

**IN THE MATTER OF THE CLAIM
OF GAYNER BOSWORTH,
CLAIMANT,
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF RICHARD NELSON
T/A NELSON CONTRACTING, LLC,
RESPONDENT**

*** BEFORE DANIEL ANDREWS,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No.: DLR-HIC-02-17-25182
* MHIC No.: 17 (05) 393
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PROPOSED DECISION

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STATEMENT OF THE CASE

On February 6, 2017, Gayner Bosworth (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of actual losses allegedly suffered as a result of a home improvement contract with Richard Nelson, trading as Nelson Contracting, LLC (Respondent).

I held a hearing on November 8, 2017, at the Office of Administrative Hearings (OAH), 11101 Gilroy Road, Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. § 8-407(e) (2015). The Claimant represented herself. Eric London, Assistant Attorney General, Department of Labor,

Licensing, and Regulation (Department), represented the Fund. The Respondent represented himself.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2017); Code of Maryland Regulations (COMAR) 09.01.03; COMAR 28.02.01.

ISSUES

1. Did the Claimant sustain an actual loss as a result of the Respondent's acts or omissions while performing a home improvement contract to repair or replace a roof?
2. Did the Claimant sustain an actual loss as a result of the Respondent's acts or omissions while performing a home improvement contract to repair brick steps?
3. If so, what is the compensable amount of actual loss from the Fund?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the Claimant:

- Claimant 1 Series of text messages between the Claimant and the Respondent from September 30, 2015 through June 19, 2016
- Claimant 2 Claimant's Complaint Form, September 23, 2016
- Claimant 3 Email from Kim Rosenthal, MHIC, to the Claimant, regarding the Respondent's response to the complaint, October 25, 2016¹
- Claimant 4 Email from the Claimant to Ms. Rosenthal, replying to the Respondent's response, October 27, 2016;² Personal checks paid to the Respondent, including check number 2849, dated August 15, 2012, in the amount of \$4,100.00, and check number 1176, dated August 31, 2013, in the amount of \$1,200.00

¹ This email indicated the Respondent's response was attached; however, the exhibit offered into evidence did not contain the attached response.

² This email indicated the Claimant's reply was attached; however, the exhibit offered into evidence did not contain the attached reply.

- Claimant 5 Emails between Ms. Rosenthal and the Claimant, October 28 and 27, 2016
- Claimant 6 Email from David Finneran, MHIC, to the Claimant, regarding a second response from the Respondent, with the attached response, December 8, 2016
- Claimant 7 Claimant's Home Improvement Claim Form, February 6, 2017, with several attached documents, including:
- Phil DiBello Roofing Inc., Certificate of Warranty
 - Phil DiBello Family Roofing Estimate, December 15, 2016
 - Several photographs of the Claimant's roof
 - Email from Fresh Coat Painters to the Claimant, November 28, 2016, with attached cover letter
 - MHIC License for Paint the Town, Inc., undated
 - Proposal to paint two bathrooms, undated
 - Mark Huber, Masonry and Remolding, Job Estimate for Brick Steps, undated
- Claimant 8 Several photographs of water damage in the Claimant's home and the brick steps to her home

The Respondent did not offer any documents into evidence.

I admitted the following exhibits on behalf of the Fund:

- Fund 1 Notice of Hearing, September 26, 2017
- Fund 2 Hearing Order, August 8, 2017
- Fund 3 Respondent's licensing history, November 1, 2017
- Fund 4 Claimant's Home Improvement Claim Form, February 6, 2017
- Fund 5 Letter from the MHIC to the Respondent, March 6, 2017

Testimony

The Claimant testified in her own behalf.

The Respondent testified in his own behalf.

The Fund did not offer any witness testimony.

PROPOSED FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. The Respondent has been licensed by the MHIC as a home improvement contractor since July 2011. His current license is not due to expire until July 2019. The Respondent's business operates under MHIC license number 05-129289.
2. The Claimant and the Respondent have known each other from church since 2011.
3. In the past, the Respondent has done several home improvement jobs for the Claimant.
4. In August 2012, due to water leaking into the Claimant's home, her roof required roof repair or replacement. She entered into a contract with the Respondent to perform the work on her roof.
5. The cause of the water leaking into the Claimant's home was a low point in the roof. The low point in her roof was an area of roofing timber which was water damaged and rotten.
6. On August 15, 2012, after completing the roof work and other work, including, installing a new back door and door jamb, repairing a crack on the back entry stairs, and repairing a clogged drain in a basement sink, the Claimant paid the Respondent \$4,100.00 by personal check.
7. In August 2012, the Claimant's front brick steps to her home needed the cement mortar to be repaired or replaced because the cement mortar between the bricks was deteriorating and failing.
8. The Claimant entered into an oral contract with the Respondent to perform the work on the brick steps. The cost of the contract was \$1,200.00.
9. On August 31, 2012, after the Respondent removed the old mortar and installed new mortar, the Claimant paid the Respondent \$1,200.00 by personal check.

10. In November 2014, the Claimant desired painting of her master bedroom, a back bedroom, and hall. In each bedroom, she also desired the replacement of a ceiling fan. The Claimant entered into an oral contract with the Respondent to perform this work at the cost of \$1,300.00.

11. In April 2015, the Claimant noticed water damage on the ceiling in the back bedroom. After inspecting the roof, the Respondent determined the water damage was coming from the same location as in 2012.

12. Between September 2015 and June 2016, the Claimant and the Respondent engaged in a series of text messages regarding the roof repair; however, not until January 20, 2016, did the Claimant specifically request in a text message for the Respondent to come to her home because water continued to come through the roof and with snow coming it was going to be a big problem if nothing was fixed. The Respondent texted a response stating, "OK Thanks."

13. In February, March, and April 2016, the Claimant sent several text messages to the Respondent stating that water was leaking from the roof and that the ceiling in "Alexandra's room" was going to come down soon and to please patch the roof soon.³

14. In September 2016, as shown by photographs taken by the Claimant, the cement mortar between several bricks in the Claimant's front steps to her home were cracking and failing.

15. On September 23, 2016, the Claimant submitted her complaint to the MHIC.

16. On November 28, 2016, the Claimant obtained an estimate from Paint the Town, Inc. (MHIC License numbers 119949 and 132696) to paint a bedroom, including repairing the bedroom ceiling and bathroom. The estimated price was \$752.98.

³ Based on the testimony presented, "Alexandra's" bedroom is the "back" bedroom mentioned earlier in these Findings of Fact.

17. On December 15, 2016, the Claimant entered into a written contract with Phil DiBello Family Roofing (DiBello), MHIC License number 7485, to replace her roof.

18. The contract required DiBello to tear off all layers of the roof down to the wood deck; install one ply of base sheet with insulation board and Canth strips where necessary; install a new rubber roof system; seal all flashing and roof protrusions; remove all job-related trash; and magnetically sweep for all work area nails. The total cost of the estimate was \$7,000.00.

19. The Claimant obtained an estimate from Mark Huber, Masonry and Remodeling (Huber), MHIC license number 109088, to repair the Claimant's brick steps. The estimate provided that Huber would grind failing joints in the mortar of the steps; repoint steps with matching mortar; and clean and seal the steps. The cost of this repair was \$720.00.

20. The Claimant's actual loss is \$720.00

DISCUSSION

In this case, the Claimant has the burden of proving the validity of her claim by a preponderance of the evidence. Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3). "[A] preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces . . . a belief that it is more likely true than not true." *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002) (quoting *Maryland Pattern Jury Instructions* 1:7 (3d ed. 2000)).

An owner may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor." Md. Code Ann., Bus. Reg. § 8-405(a) (2015);⁴ *see also* COMAR 09.08.03.03B(2) ("actual losses . . . incurred as a result of misconduct by a

⁴ Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 Replacement Volume of the Maryland Annotated Code.

licensed contractor”). Actual loss “means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.”

Md. Code Ann., Bus. Reg. § 8-401. For the following reasons, I find that the Claimant has proven eligibility for compensation.

The Parties' Positions

The Claimant testified that in August 2012 she entered into a written contract with the Respondent to replace her roof. The Claimant did not offer the contract into evidence because she could not locate the contract; however, she testified that the contract was for a new roof. She explained that the cost of new roof was \$3,800.00. The Claimant paid the Respondent for the roof work as well as other work to be performed on August 15, 2012, by a personal check, in the amount of \$4,100.00. To explain the amount of total payment that she attributed to the roof work, the Claimant testified that she determined the cost of the roof work by going to a Home Depot store and priced the cost of a new door and plumbing, which was the other work performed by the Respondent, and subtracted those amounts from the total amount paid to the Respondent.

On cross-examination, the Claimant was adamant that she and the Respondent entered into a contract to install a new roof, that there was no discussion about a roof repair, and was confident that the Respondent was to install a new roof because all the details were in a one-page contract, which was about a new roof. Counsel for the Fund asked the Claimant about the rubber roof installed by DiBello, as opposed to a tar roof, and what kind of roof the Respondent agreed to install. The Claimant admitted that she did not know much about the roof or what kind of roof the Respondent agreed to install, whether it was a rubber roof or a tar roof. She added, however, that whatever type of roof it was, it was in the contract.

The Claimant testified that in August 2012 she had a verbal contact with the Respondent to repair the brick steps leading to her front door. She testified that the verbal contract cost was \$1,200.00, which she paid the Respondent on August 31, 2012. After the steps were repaired, she noticed that the second step out of three steps had a hump, which the Respondent fixed the next day. Afterward, the Claimant testified that the brick steps were fine.

The Claimant testified that in November 2014 she had another verbal contract with the Respondent to paint two bedrooms, a hall, and replace two ceiling fans in the bedrooms. She explained that the contact cost for this work was \$1,300.00. The Claimant, however, did not present any evidence to support the existence of an oral contract, including payment for any work performed.

The Claimant testified that in April 2015 she noticed the roof leaking because she observed water damage on the ceiling of the back bedroom. She explained that she contacted the Respondent regarding the leak. Further, she testified that the Respondent came to her home and they both went up onto the roof. The Claimant testified that the Respondent pointed to an area, showed her what needed to be done, and agreed to fix the issue. However, the Respondent never returned to the Claimant's home to perform the work. Also in April 2015, the Claimant indicated that she also showed the Respondent issues she was having with the cement mortar in the brick steps. The Respondent also agreed to fix the steps but never came back to perform this work.

From September 30, 2015 through June 2016, the Claimant sent several text messages to the Respondent regarding the work to repair the roof and steps. She testified that she told the Respondent by a text message in June 2016 that she would wait until the end of summer to have the roof repaired; however, when the roof was not fixed, the Claimant filed her complaint with the MHIC.

The Claimant contends that her actual loss for the work performed by the Respondent is demonstrated by the need to have DiBello install a new roof at a cost of \$7,000.00, the \$720.00 estimate of repair by Huber to repair the brick steps, the \$752.98 estimate by Paint the Town, and the several photographs she attached to Claimant's Exhibit 7.

Claimant's Exhibit 7 included photographs of the Claimant's roof, which were taken by DiBello before and after the roof was replaced. In one of those photographs, there is an area of the roof showing exposed wood boards with a square-shaped wood piece cut out. This is the area of the roof which is over the Claimant's back bedroom. The wood in this area of the roof had become water-damaged and rotten and was the cause of the water seeping into the ceiling area of the back bedroom. Also attached to Claimant's Exhibit 7 are three photos of the ceiling in the back bedroom, which were taken in January and September 2016. These photos show the drywall falling from the ceiling, including in the area near the ceiling fan, and large cracks radiating from the part of the ceiling which had already fallen. The Claimant also presented two photographs of her front brick steps, which were taken in September 2016. These photographs show cement mortar between several bricks to be cracking and failing.

The Respondent testified he started his business to help people who could not afford the regular contractor rates. He explained that he has done work for the Claimant before and all contracts were oral, except one which was because of an insurance issue and required a contract.

As to the roof, the Respondent testified that he had an oral contract with the Claimant to repair, but not replace, the roof. He testified that the photographs of the roof do not show a front portion of the roof which has shingle tiles. He added that part of his contract with the Claimant was to replace those shingle tiles. The Respondent also explained that the Claimant originally called him because she had observed water stain damage in the back bedroom and bathroom. After he went up onto the roof, which originally was a tar roof, he determined that the area of the

roof, which in the Claimant's photographs is the picture with the square hole cut into the roof, was a low point, and he could feel that the wood under the tar was soft. He explained that water was coming into the house from this area. He told the Claimant that she needed to replace the roof and quoted her a price of \$6,500.00. The Respondent testified that the Claimant could not afford the replacement price, so the agreement was to repair the roof, which included sealing the roof joints on the flat portion of the roof and installing new shingle tiles on the front portion of the roof. The Respondent explained that the Claimant paid him by check in the amount of \$4,100.00. He explained that the total payment included the cost for other work performed including installing a new back door and door jamb, repairing a crack on the back entry stairs, and repairing a clogged drain in a basement sink. He estimated that the cost of the roof repair was \$2,500.00. The Respondent further explained that because the low point in the roof was causing water to collect, the Claimant was going to continue to have issues with water until that area was built up. To help reduce that potential, the Respondent explained that he came back to the Claimant's home on two occasions to build up that low point with roof cement. He added that he did not charge the Claimant for that work and eventually determined that he could not keep performing work for free when the Claimant actually needed a new roof.

The Respondent testified that the Claimant's photographs of the steps look like the condition of the steps in August 2012 when he repaired the steps. He explained that in 2012, because the cement mortar was failing between the bricks, he removed the old mortar and installed new cement mortar. Except for the issue with a slight hump in the step, which the Respondent explained he fixed right away, he stated that the Claimant was happy with the work performed. The Respondent explained that the condition of the steps three or four years later is due to wear and tear, including using salt on the steps during the winter. However, on cross

examination, the Respondent agreed that after only three or four years the cement mortar should not be failing as it is in the Claimant's photograph.

Analysis

The Claimant has the burden to establish that she suffered an actual loss because the Respondent performed an unworkmanlike, inadequate, or incomplete home improvement. Md. Code Ann., Bus. Reg. § 8-401. In this case, as it pertains to the Claimant's roof and front brick steps, the disputed issue is whether the Respondent performed a home improvement contract that was unworkmanlike or inadequate.

The Claimant contends that in August 2012 she had a written contract with the Respondent, which required the Respondent to install a new roof on her home. She also contends that in April 2015, after water was again leaking from the roof into her home and which caused water stains in the back bedroom area, she had to have another contractor install another new roof. Based on these circumstances, the Claimant argues that she established that the Respondent completed the roofing work in an unworkmanlike or inadequate manner.

The Respondent disagrees with the Claimant. He contends that he had a contract with the Claimant, but that it was a verbal contract and it was only to repair the roof. He contends that he did this by installing new roofing tiles on the front portion of her roof and sealing the joints on the flat portion of the roof. He also contends that the Claimant required a new roof, but that she could only afford to repair the roof, which is what he did.

As it pertains to the roofing contract, the Claimant did not offer the alleged written contract into evidence. She also failed to establish by testimony the specific requirements of any contract she had with the Respondent, written or oral, which the Respondent was to perform or whether the Respondent was to install a new roof or repair the existing roof. The Claimant also failed to produce any photographs of the work performed by the Respondent. Although the

Dibello photographs purport to show a before and after perspective, the photographs do not show the condition of Claimant's roof with any pre-existing roofing material installed. Instead, the photographs show to condition of the exposed underlying roof timber and related water damage, after any pre-existing material was removed.

To determine whether the work the Respondent performed on the roof was unworkmanlike or inadequate requires, at the very least, some credible evidence which establishes the specific work that the Respondent was required to perform. Without such evidence, I have no opportunity to consider whether the work he actually performed was unworkmanlike or inadequate. Without some evidence as to what work the parties contracted for the Respondent to perform, I have no ability to understand the baseline of work required by any contract between the Claimant and Respondent. Additionally, even if I had some evidence of the work he was required to perform, the Claimant has presented insufficient evidence to demonstrate that the work the Respondent performed was unworkmanlike or inadequate.

The Respondent admits he had a contract with the Respondent and he concedes that he did perform work on the Claimant's roof. He also testified that he suggested to the Claimant that she needed to install a new roof but the Claimant could only afford to repair the roof, which he did by sealing the joints on the roof. The fact that the Respondent's roof began to leak water into her home approximately three years after the work was performed does not, by that fact alone, establish that the work performed by the Respondent was unworkmanlike or inadequate. Because this particular issue is not readily observable or self-evident, it generally requires evidence presented by an expert witness or another licensed roofing contractor who, after inspecting the work performed by the Respondent, could offer competent evidence that the work performed was unworkmanlike or inadequate. However, such competent evidence is missing from this record. After considering the evidence presented, I am not persuaded that the Claimant

has established that the Respondent performed an unworkmanlike or inadequate home improvement contract to repair or replace the Claimant's roof. Md. Code Ann., Bus. Reg. § 8-401. Therefore, her claim against the Fund for an actual loss as it pertains to the roofing work must be denied.

Because I find that the Claimant's claim against the Fund as it pertains the roofing work has failed, any related claim she asserted for the repair of the water-damaged ceiling in the back bedroom, including the painting of the bedroom and a bathroom, by Paint the Town, must also be denied. I note, however, that even if the Claimant had established that she sustained an actual loss as it pertains to the roofing work, the damage to the back bedroom's ceiling resulting from water damage is considered consequential damages and would not be compensable by the Fund under COMAR 09.08.03.03B(1) (the MHIC may not award from the Fund any amount for consequential damages; the Fund may only compensate claims for actual losses incurred as a result of misconduct by a licensed contractor).

The Claimant's claim against the Fund also involves an August 2012 oral contract between the Claimant and Respondent to repair her front brick steps. Again, the Claimant did not provide any specific testimony regarding the work to be performed by the Respondent. However, the Respondent testified that in August 2012 the cement mortar between the bricks was failing and needed to be removed and new cement mortar installed between each brick. Both the Claimant and Respondent testified that the Respondent performed the brick work as required and did a fine job. However, by 2015, the cement mortar was cracking and failing. In fact, the Respondent testified that the Claimant's pictures taken in 2016 looks like the condition of the cement mortar in 2012. He also explained that the cement mortar should not be failing as it did after only three or four years; however, he also explained that using salt on the steps during the winter can cause cement to crack if not removed promptly.

Unlike the roofing issue, I am persuaded that the 2016 photographs of the Claimant's front brick steps show the cement mortar installed by the Respondent in 2012 was completely failing and had deteriorated. These photographs are self-evident and demonstrate that the work performed by the Respondent was unworkmanlike or inadequate. The Respondent's explanation that salting the steps in the winter can cause the cement to fail is not persuasive. While the Respondent's testimony may be truthful, I find it fails to explain why the cement mortar failed in less than four years when cement mortar, if properly installed, is commonly understood to be much more durable and long-lasting. For these reasons, I am persuaded that the Claimant demonstrated she sustained an actual loss because the Respondent performed an unworkmanlike or inadequate home improvement contract to repair the Claimant's front brick steps. Md. Code Ann., Bus. Reg. § 8-401.

Having found eligibility for compensation from the Fund as it pertains to the brick work performed by the Respondent, I must determine the amount of the Claimant's actual loss which is compensable from the Fund. The MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work. COMAR 09.08.03.03B(3). In this case, the Respondent performed the brick work required by the contract and was paid \$1,200.00. The Claimant sought another contractor, Huber, to perform the work required to repair the brick steps at an estimated cost of \$720.00. Under these circumstances, the following formula appropriately measures the Claimant's actual loss:

If the contractor did work according to the contract and the claimant has solicited or is soliciting another contractor to complete the contract, the claimant's actual loss shall be the amounts the claimant has paid to or on behalf of the contractor under the original contract, added to any reasonable amounts the claimant has paid or will be required to pay another contractor to repair poor work done by the original contractor under the original contract and complete the original contract, less the original contract price. If the Commission determines that the original

contract price is too unrealistically low or high to provide a proper basis for measuring actual loss, the Commission may adjust its measurement accordingly.

COMAR 09.08.03.03B(3)(c).

Based on the above formula, the Claimant's actual loss is \$720.00 and is calculated as follows:

Amount paid under original contract	\$1,200.00
Plus Amount to repair the work	+ 720.00
	<u>1,920.00</u>
Minus Original contract price	<u>-1,200.00</u>
Actual loss	\$720.00

PROPOSED CONCLUSIONS OF LAW

As it pertains to the home improvement contract to repair or replace the Claimant's roof, the Claimant has not met her burden of proof to demonstrate that she sustained an actual loss as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03A(3).

As it pertains to the home improvement contract to repair the Claimant's front brick steps, the Claimant has demonstrated by a preponderance of the evidence that she sustained an actual loss as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(c).

I further conclude that the Claimant's actual loss of \$720.00 is compensable by the Fund. Md. Code Ann., Bus. Reg. § 8-405; COMAR 09.08.03.03B(3)(c).

RECOMMENDED ORDER

I **RECOMMEND** that the Maryland Home Improvement Commission:

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$720.00; and

ORDER that the Respondent is ineligible for a Maryland Home Improvement Commission license until the Respondent reimburses the Guaranty Fund for all monies disbursed

under this Order, plus annual interest of ten percent (10%) as set by the Maryland Home Improvement Commission;⁵ and

ORDER that the records and publications of the Maryland Home Improvement Commission reflect this decision.

Signature on File

January 30, 2017
Date Decision Issued

Daniel Andrews *TKAC*
Administrative Law Judge

DA/da
#171555

⁵ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 9th day of March, 2018, Panel B of the Maryland Home Improvement Commission approves the Recommended Order of the Administrative Law Judge and unless any parties files with the Commission within twenty (20) days of this date written exceptions and/or a request to present arguments, then this Proposed Order will become final at the end of the twenty (20) day period. By law the parties then have an additional thirty (30) day period during which they may file an appeal to Circuit Court.

Joseph Tunney

***Joseph Tunney
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION