

**IN THE MATTER OF THE CLAIM
OF CHARLES BOUTIN,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF MICHAEL
HUDECHECK,
T/A PRO-G CONTRACTORS LLC,
RESPONDENT**

*** BEFORE SUSAN H. ANDERSON,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
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* OAH No.: DLR-HIC-02-19-16819
* MHIC No.: 19(90)222

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PROPOSED DECISION

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STATEMENT OF THE CASE

On February 26, 2019, Charles Boutin (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$4,480.00 in actual losses allegedly suffered as a result of a home improvement contract with Michael Hudecheck, t/a Pro-G Contractors LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015). On May 22, 2019, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on November 1, 2019 at the OAH offices in Hunt Valley, Maryland. Bus. Reg. § 8-407(e). Michelle Wilson, Assistant Attorney General, Department of Labor (Department),¹ represented the Fund. The Claimant represented himself. The Respondent represented himself.²

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. 2019); Code of Maryland Regulations (COMAR) 09.01.03; COMAR 28.02.01.

ISSUES

1. Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?
2. If so, what is the amount of the compensable loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on the Claimant's behalf:

- Clmt. Ex. 1 - MHIC Complaint Form, undated
- Clmt. Ex. 2 - Estimate from Lednor Corporation to cut off and replace Gutter Helmut, February 14, 2019
- Clmt. Ex. 3 - Photographs taken by Chad Edick, Lednor Corporation, June 25, 2018
 - #4³ Photograph showing rut in center of roof where Gutter Helmut meets shingles
 - #5 Photograph showing Gutter Helmut installed under first line of shingles
 - #6 Photograph showing shingle jutting out over Gutter Helmut

¹ On July 1, 2019, the Maryland Department of Labor, Licensing, and Regulation became the Department of Labor.

² The Respondent appeared without a Power of Attorney authorizing him to act on behalf of the company. I held the record open until November 8, 2019 to allow him to provide a valid Power of Attorney. He provided the Power of Attorney on November 5, 2019.

³ The Claimant had pre-marked his exhibits. He originally marked the photographs as Clmt. #4 through 8; I consolidated them into Clmt. Ex. 3, but retained their original numbering for identification purposes.

- #7 Photograph showing shingle jutting too far forward over Gutter Helmet and lack of end cap
- #8 Photograph showing shingle jutting too far forward over Gutter Helmet

I admitted the following exhibits on the Respondent's behalf:

- Resp. Ex. 1 - Emails between the Respondent and Cynthia Boutin, April 13, 2016 through November 16, 2016; emails from Claimant to Respondent, August 2, 2018 and August 15, 2018
- Resp. Ex. 2 - Signed Contract Proposal (Contract), October 26, 2016
- Resp. Ex. 3 - Ten photographs taken by the Respondent on November 14, 2016 showing the roof before work began and then at various stages throughout the replacement⁴

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. 1 - Hearing Order, May 22, 2019
- Fund Ex. 2 - Notice of Hearing dated June 21, 2019
- Fund Ex. 3 - Notice of Hearing dated July 23, 2019
- Fund Ex. 4 - Claimant's Home Improvement Claim Form, February 26, 2019; MHIC letter to Respondent, March 11, 2019
- Fund Ex. 5 - Licensing History for Respondent

Testimony

The Claimant testified and presented the testimony of Chad Edick, who I accepted as an expert in the installation and maintenance of the Gutter Helmet gutter system.

The Respondent testified in his own behalf.

The Fund presented no testimony.

⁴ I granted the Respondent's request to provide photographs of the roof during the replacement process after the hearing due to technical difficulties during the hearing, which made it impossible to print them out. On November 4, 2019, the Respondent emailed them to the OAH documents mailbox and to Ms. Wilson, who in turn forwarded them to the Claimant the same day. The Fund offered no objection to the photographs themselves, only to the content included in the body of the email. The Claimant did not offer any objection to the exhibit. I sustained the Fund's objection and admitted only the photographs as Respondent Exhibit No. 3.

PROPOSED FINDINGS OF FACT

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

1. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor under MHIC license number 100384.

2. In April 2016, the Claimant's wife, Cynthia Boutin, contacted the Respondent to come look at some problems she and the Claimant were having with the roof of their home at 627 Northgate Road, Aberdeen, MD 21001.

3. The Respondent inspected the roof and determined it should be replaced. On or about April 13, 2016, the Respondent sent Mrs. Boutin a "Pro-G Contractors Residential Roofing Estimator" (Estimator), dated April 11, 2016. The Estimator listed various options for installation of a new roof, ranging from \$8,740.71 to \$14,264.01 depending on the manufacturer and the materials used.

4. In the "Notes" section on the first page of the Estimator, the Respondent listed various recommendations, including installing ridge vents and blocking gable vents, and replacing chimney flashings (sic) with new counters installed by grind and tuck method. He also noted, "Helmet style gutter guards on all gutters will have to be removed and reinstalled."

5. On the second page, the Estimator listed Extras/Options of: \$45.00 per sheet OSB sheathing (sic) replacement (1/2", walkable); \$60.00 per sheet Plywood sheathing (sic) replacement (3/8" or 1/2", walkable); and \$480.00 Remove and reinstall existing gutter helmet guards.

6. At some point between 2002 and prior to 2016, the Claimant had purchased the Gutter Helmet system for his gutters. The Gutter Helmet system came with a warranty for materials and for service for the duration of time the purchaser lived in the home, plus twenty

years for the next buyer of the home. The warranty expressly stated that any warranties would be voided if an unauthorized third party installed or reinstalled the Gutter Helmet gutters.

7. On Wednesday, April 20, 2016, the Respondent completed a minor repair to the Claimant's roof, as the Claimant had opted to wait several months to proceed with a whole roof replacement and was still getting other estimates.

8. In October 2016, the Claimant and his wife decided to go forward with the roof replacement using the Respondent as their contractor.

9. On October 26, 2016, the Claimant and his wife signed the Contract prepared by the Respondent and based on the April 2016 estimate. The scope of the work included roof replacement, chimney caps, and flashings. There was no mention at all of gutters in the Contract. The total Contract price was \$11,882.03; the Claimant paid the Respondent a \$4,000.00 deposit before work began.

10. The Contract contained a provision stating that the Claimant agreed to hold the Respondent harmless for any collateral damage that might result from the work on the roof.

11. On November 14, 2016, the Respondent completed the majority of work under the Contract. He returned on November 16, 2016 to pour the chimney caps.

12. On November 16, 2016, the Claimant paid the balance of the Contract price.

13. In early 2018, the Claimant noted that the gutters on his home appeared to be full and that water was coming off the sides of the home.

14. On June 25, 2018, Chad Edick from Gutter Helmet inspected the Claimant's gutters and determined the Gutter Helmet gutters had been improperly reinstalled by the roofing team who replaced the roof in November 2016. In his email report to the Claimant, he noted that the Gutter Helmet system is designed to be installed in a very specific way and that whoever had

replaced the roof did not reinstall the cover panels using the correct installation method. Mr. Edick advised the Claimant that the work of the roofers had voided the Gutter Helmet's lifetime warranty and quoted a cost of \$4,480.00 to replace the system.

15. The Claimant never advised the Respondent that his gutters had been installed as part of a proprietary system.

DISCUSSION

In this case, the Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Md. Code Ann., Bus. Reg. §8-407(e)(1) (2015); 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)⁵; *see also* COMAR 09.08.03.03B(2) (“actual losses . . . incurred as a result of misconduct by a licensed contractor”). “[A]ctual loss’ means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.” Bus. Reg. § 8-401. For the following reasons, I find that the Claimant has not proven eligibility for compensation.

⁵ Unless otherwise noted, all references to the Business Regulation Article herein cite the 2015 Replacement Volume of the Maryland Annotated Code.

There is no dispute that the roof itself was installed properly in a workmanlike fashion. In fact, the Claimant testified that "the roof job itself is perfect." The only dispute is the damage to the Gutter Helmet system and the responsibility for the damage.

Damage to the gutter covers

The evidence has convincingly established that the Claimant's gutter covers were damaged during the course of the roof replacement. Mr. Edick, who has several years of experience with Gutter Helmet, provided expert testimony describing the problems he found with the gutters when he performed the inspection in June 2018. Mr. Edick attributed these problems to the roofers bending the covers off the gutters, bending them back into place, and to the fact that the roofers nailed the helmets under the first layer of shingles. Mr. Edick explained that the Gutter Helmet system is designed so that the gutter cover panel is placed over the first row of shingles and then tucked about two inches under the second row of shingles. This creates a downward slope so that water is fed onto the gutter helmet cover. The outer edge of the Gutter Helmet cover is placed over the gutter itself so that its outer curved edge feeds the water into the gutter. At the same time, the helmet covers the top of the gutter so that debris cannot easily find its way into the gutters.

Mr. Edick explained that if the Gutter Helmet cover panels are attached under the first layer of shingles, rather than over them, as happened in this case, the cover panels flatten out and the patented downward slope that helps feed the water into the Gutter Helmet gutters is lost. It is not possible to fix this problem once this happens because the cover panels are now embedded under both the first and second layers of shingles. In order to remove the cover panels, the two layers of shingles would have to come off, destroying that part of the roof. The only solution would be to cut off the cover panels at the shingle line, leaving the embedded parts where they

are and then install new cover panels over the first shingle and about two inches under the second line of shingles, as they were designed to be installed. Mr. Edick provided a cost of \$4,480.00 to correct the damage to the Claimant's Gutter Helmet system.

Responsibility for the damage to the Gutter Helmet system

The Claimant lays the responsibility for the damage to the Gutter Helmet system squarely at the feet of the Respondent. He testified that he believed the removal and reinstallation of the gutter guards was part of the Contract. He further asserted that he specifically discussed the matter with the Respondent prior to the roof replacement and asked, "Do you remove gutter guard covers as a part of your arrangement?" and the Respondent assured him, "Oh, we've done it several times. We have no problem with that." According to the Claimant, because the Respondent had contracted to remove and reinstall the Gutter Helmet gutter system, it was part of the scope of work and the Respondent's failure to reinstall them properly constitutes an unworkmanlike home improvement for which the Respondent should be liable.

I do not find the Claimant's testimony and arguments persuasive. While the initial estimate did mention removal and reinstallation of the gutters, doing so was clearly not included in the scope of work for the roof replacement, as it was listed as part of the "Extras/Options" section on the second page. It is true that in an email on April 21, 2016, the Respondent did advise the Claimant's wife that he would be "happy to include the removal and reinstallation of the gutter guards" in the scope of work in the estimate, apparently at no additional cost.⁶ However, a copy of the executed Contract (Resp. Ex. 2) contains no mention of gutter work in the scope of work to be performed. Moreover, despite the Claimant's insistence that he believed there were emails and phone calls with the Respondent about including the removal and

⁶ This seems to be in response to a question from the Claimant's wife about reducing the cost of the total roof replacement because in the same email the Respondent also indicated he could not drop the replacement cost of the roof itself. In addition, the Claimant's wife references obtaining other estimates for the roofing job in other emails.

reinstallation of the gutters, he produced no emails to support this contention; in fact, he produced no email correspondence with the Respondent at all. On the other hand, the Respondent provided copies of emails spanning April 2016 through August 2018 between the Claimant's wife, the Claimant, and him. The only specific mention of the gutters is in the April 21, 2016 email. It is notable that there is no mention of the gutters in any of the emails from November 2016. Moreover, the Respondent denied ever orally advising the Claimant that he would remove and reinstall the gutter cover system.

Next, the Respondent provided credible testimony explaining that he and his crew "worked around" the gutters and the gutter covers because the Claimant had not opted to include the removal and reinstallation of the gutters and gutter covers in the Contract. He described how his team moved the gutters and covers out of the way, installed the new roof, and then put the gutters and covers back. Both the testimony of Mr. Edick and the photographs the Respondent supplied support the Respondent's description of how the work was done. It is clear from the evidence and the Respondent's testimony that he did not consider a full removal and reinstallation to be part of the Contract.

The Respondent also explained that the Claimant never advised him that the gutters were part of a proprietary system. The Respondent was adamant that had the Claimant advised him the gutters were part of a proprietary system, he would never have touched them because he is not Gutter Helmet certified and he is well aware that any work on a proprietary system by an unauthorized third party would void any warranty. The Claimant admitted that he never specifically advised the Respondent that the gutter system on his house was the proprietary Gutter Helmet system. It was the Claimant's responsibility, as holder of the Gutter Helmet warranties, to advise the Respondent of the nature of his gutter system and to protect the

warranties. The fact that the warranties were voided is ultimately the responsibility of the Claimant.

For all of these reasons, I decline to find that the removal and reinstallation of the gutters and gutter covers was part of the Contract. The evidence overwhelmingly establishes that the only “home improvement” the Respondent contracted to do was replace the roof of the Claimant’s home and that this does not include work on the gutters. Therefore, I cannot find that the Claimant suffered an “actual loss” as the result of an act or omission by the Respondent arising from an unworkmanlike, inadequate, or incomplete home improvement.

Moreover, a claimant is prohibited from recovering consequential damages from the Fund. Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1). As the work on the gutters was not part of the scope of work contemplated by the Contract, any damage to the gutter system is considered consequential. In addition, the Contract itself provides that the Claimant agrees to hold the Respondent harmless in the event collateral damages occur. For all of these reasons, I find the Claimant is not eligible for compensation from the Fund.

PROPOSED CONCLUSIONS OF LAW

Based on the Proposed Findings of Fact and Discussion, I conclude as a matter of law that the Claimant did not sustain an actual monetary loss compensable by the Fund as a result of the Respondent’s acts or omissions, and the Claimant is not entitled to an award from the Maryland Home Improvement Commission Guaranty Fund because any damages he suffered were consequential damages which are not recoverable. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405(d), § 8-405(e)(3) (2015); COMAR 09.08.03.03B(1).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund deny the Claimant's claim; and

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

December 6, 2019
Date Decision Issued

CONFIDENTIAL

Susan H. Anderson
Administrative Law Judge

SHA/da
182880

PROPOSED ORDER

WHEREFORE, this 28th day of January, 2020, 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

Chairman

Panel B

***MARYLAND HOME IMPROVEMENT
COMMISSION***

