IN THE MATTER OF THE CLAIM	*	**BEFORE ANN C. KEHINDE,**
OF WALTER BROWN,	*	**AN ADMINISTRATIVE LAW JUDGE**
CLAIMANT	*	**OF THE MARYLAND OFFICE**
AGAINST THE MARYLAND HOME	*	**OF ADMINISTRATIVE HEARINGS**
IMPROVEMENT GUARANTY FUND	*	
FOR THE ALLEGED ACTS OR	*	
OMISSIONS OF JAMES SCRUGGS,	*	**OAH No.: LABOR-HIC-02-19-40330**
t/a SCRUGGS & SONS,	*	**MHIC No.: 19 (90) 320**
RESPONDENT	*	

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[1]REVISED PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
PROPOSED FINDINGS OF FACT
DISCUSSION
PROPOSED CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On November 23, 2018, Walter Brown (Claimant) filed a claim (Claim), with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund). The Claim requested reimbursement of $4,850.00 in actual losses allegedly suffered as a result of a home improvement contract with James Scruggs, trading as Scruggs & Sons (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015). On December 9, 2019, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

[1] COMAR 28.02.01.27C provides that a final decision may be revised at any time on the judge's own initiative due to a clerical mistake. The Decision issued on February 2, 2021 erroneously added a letter from the Maryland Home Improvement Commission to Respondent, dated June 5, 2019. This Revised Decision is issued to correct that clerical mistake.

On September 2, 2020, the OAH sent the parties a Notice of Hearing (Notice), scheduling this matter for November 20, 2020 at the OAH, 11101 Gilroy Road, Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. § 8-407(e).[2] On November 6, 2020, I sent a letter to the parties to advise them that due to the continuing health risks of the COVID-19 Pandemic, I was converting the hearing from an in-person hearing to a remote hearing via the Google Meet platform.

On November 20, 2020, I conducted the hearing by Google Meet. The Claimant appeared along with his wife, Marilyn Brown, and represented himself. Nicholas Sokolow, Assistant Attorney General, Department of Labor (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. 2020); 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:

Cl #1 Contract between Claimant and Respondent, undated but start date June 28, 2017

Cl #2 Drawing of new concrete parking pad with dimensions, undated

[2] The hearing was originally scheduled for May 6, 2020, and August 4, 2020, but postponed each time due to the COVID-19 pandemic.

Cl #3	Checks from the Claimant to the Respondent, dated June 2017, June 30, 2017, and July 5, 2017 with endorsements
Cl #4	Letter from Claimant to Respondent, undated; Letter from Claimant to Respondent, dated July 16, 2018; return receipts from the United States Postal Service (USPS)
Cl #5	For identification only; not admitted[3]
Cl #6	For identification only; not admitted[4]
Cl #7	Email from Mike Shipley, MDR Contracting, to the Claimant, dated November 19, 2018
Cl #8	Proposal, Louis Sebastian Contractor, dated February26, 2019; check to Louis Sebastian Contractor, dated February 26, 2019
Cl #9	Narrative timeline prepared by Claimant
Cl #10	Letter from Respondent to MHIC, dated October 4, 2018
Cl #11	Response to Respondent's letter from Claimant, undated
Cl #12	For identification only; not admitted[5]
Cl #13	Baltimore County Code: Typical Wall Section for Excavated Basement, dated January 27, 2011
Cl #14	"The Recommended Gravel Base for a Concrete Driveway," *SFGate Home Guides*
Cl #15	Timeline and problems prepared by Claimant; copies of photographs
Cl #16	Copy of photograph

I admitted the following exhibits on behalf of the Fund:

GF #1	Notice of Rescheduled Hearing, dated September 2, 2020

[3] The Claimant offered a Proposed Order issued by the MHIC, dated September 27, 2019. As this hearing is not based on the MHIC's review and Proposed Order, it is irrelevant and was not admitted.
[4] The Claimant offered a print-out from the website *Justia* of the Business Regulation Article of the Maryland Annotated Code. As citations to the law do not need to be offered as exhibits, the document was placed in the file but not admitted as evidence.
[5] The Claimant offered a letter from The Baltimore Community Mediation Center, dated October 16, 2018. Mediations, as a form of settlement discussions, are not admissible in a hearing on the same issue(s). The parties stipulated that: The Claimant tried to engage in mediation with the Respondent as suggested by the MHIC, but mediation was unable to be scheduled due to no fault of the Claimant.

[illegible]

GF #2 Hearing Order, dated December 2, 2019

GF #3 Home Improvement Claim Form, dated November 23, 2018

GF #4 Respondent's Licensing History

I admitted the following exhibit on behalf of the Respondent:

Resp. #1 Copies of photographs

Testimony

The Claimant testified as an expert in concrete slabs. The Fund did not present any witnesses. The Respondent testified.

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 with MHIC; license #01-108729.

2. On June 26 or 27, 2017, the Claimant contracted with the Respondent to demolish an area of concrete behind the Claimant's house, which was approximately sixteen by thirty feet.

3. The parties contracted for a new concrete parking pad, ten feet by thirty feet and approximately five inches thick with reinforced wire mesh.

4. The parties agreed to a total contract price of $3,350.00, which the Claimant paid in full.

5. On June 28, 2017, the Respondent started work on the Claimant's property. After demolishing the existing concrete, the Claimant realized the Respondent was using two-inch by four-inch pieces of wood to make the forms that would hold the concrete when it was poured. The Respondent also put down a thin layer of gravel. The Claimant asked the Respondent by

telephone and in person how he was going to pour a five-inch slab when he was using two-by-fours for the form. The Respondent blamed his worker and told the Claimant not to worry.

6. That evening the Claimant placed pink strings across the two-by-fours to show that there would be no way to pour a five-inch concrete slab into the forms.

7. In order for a concrete parking pad to support the weight of a vehicle, it needs to be at least five inches thick.

8. The next day, the Claimant showed the Respondent that there was no way that the Respondent could pour a five-inch slab because the Respondent did not dig deep enough, the gravel took up some of the space and the two-by-fours were not sufficient to allow for a five-inch slab. The Respondent started digging up some of the gravel but stopped when the cement truck arrived.

9. Cement vibrators are used to get air and water pockets or bubbles out of the concrete. The Respondent did not use a cement vibrator; instead, after the Respondent's workers took the concrete from the truck to the area where the parking pad would be, they dumped the concrete and dragged a board over it to make it level.

10. If air or water bubbles are left in the concrete it will crack.

11. The Respondent did not feel well the day the concrete was poured. He did not supervise his workers but left them to work while he sat in a truck away from the job site.

12. The Respondent installed four-inch deep expansion joints between the sections of concrete. The Respondent trimmed down the expansion joints to match the height of the concrete.

13. The concrete parking pad installed by the Respondent varied in depth from three inches, to three and one-quarter inches, to three and one-half inches.

14. On January 10 and again on January 12, 2018, the Claimant informed the Respondent that the concrete slabs cracked.

15. In June or July 2018, the Respondent told the Claimant he would grind out the part of the concrete where the crack was and repair it. He refused to replace the concrete pad and install a five-inch deep one as contracted.

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);[6] 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); *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." Md. Code Ann., Bus. Reg. § 8-401.

The Claimant provided convincing evidence that the Respondent's work was unworkmanlike and inadequate. The Claimant told the Respondent that he wanted a five-inch thick concrete parking pad and it is specified in the contract as five-inches thick. The Claimant

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

wanted to be able to park his vehicle closer to his house so that his wife, who has mobility limitations, would not have to traverse as much ground before entering their house. The Claimant checked with contractors and the Baltimore County Building Code office to find out how deep the concrete must be in order to support the vehicles parked on it. The Claimant credibly testified that he was told the concrete should be five to six inches thick at a minimum to support vehicles.

The Claimant worked for over forty-six years at Bethlehem Steel as a construction electrician. The Claimant explained that all Bethlehem Steel construction workers had to learn the basics of the other trades because they had to understand each other's work in order to work together. He testified that as a construction electrician he had to mark out and lay the trenches for electrical and air conditioning systems so those areas could be excavated and then the conduits could be constructed prior to concrete being poured. He further explained that it was important to get the measurements right and ensure that the forms did not get disturbed so that when the concrete became solid there was the proper amount of room for what electrical systems needed to be installed. The Claimant testified that he watched many concrete pours when he worked at Bethlehem Steel and that he knew it was important to "work the concrete properly" to avoid air or water pockets or bubbles. Air or water bubbles cause cracking in the concrete as it dries. Workers used concrete vibrators to compress the concrete and get the air and water bubbles out of the concrete. In addition to the knowledge the Claimant had from working at Bethlehem Steel, the Claimant testified he also helped his father-in-law install a very large concrete pad in his backyard and helped his uncle on three or four other concrete jobs.

The Respondent initially testified that the contract specified an "approximately" five-inch thick driveway so what he did was sufficient. After he was questioned on cross-examination, the Respondent admitted that the concrete slab he put in was not five-inches thick, that he did not know the actual thickness for certain, and that three inches to three and one-half inches is too far

off from five inches to be considered "approximately" five-inches. The Respondent also agreed that the recommended minimum thickness for a parking pad is five inches. The Respondent testified that he did not intentionally want to "do the [Claimant] wrong." He explained that on the day of the concrete pour he was in very bad shape because he was suffering from heat stroke. He also testified that he underbid the cost of the job because the Claimant's daughter was his neighbor. The Respondent testified that he offered to fix or replace the area of the concrete that cracked but felt it was not fair to expect him to have to replace the entire concrete slab.

Whether or not the Respondent intended to install less than the five-inch concrete parking slab the Claimant contracted and paid for, the Claimant is left with a concrete pad that varies in depth from three inches to three and one-half inches. It does not meet the terms of the contract or the recommendation of the Baltimore County Building Code for a minimum depth of five inches. In addition, the Claimant testified that he saw air bubbles in the concrete as the worker was dragging a piece of wood across the concrete and he told his wife that he believed the concrete would later fail because it was not worked properly. That winter, a crack formed in the concrete that runs the entire width of the parking pad. The Respondent's assertion that he charged the Claimant less than the job was worth is unavailing because the Claimant cannot use the concrete pad for its intended purpose and therefore the worth of the parking pad to the Claimant and his wife is zero dollars.

Having found eligibility for compensation I must determine the amount of the Claimant's actual loss and the amount, if any, that the Claimant is entitled to recover. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney fees, court costs, or interest. Md. Code Ann., Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1). MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work.

However, none of the following three regulatory formulas precisely applies to what happened in this case:

> (a) If the contractor abandoned the contract without doing any work, the claimant's actual loss shall be the amount which the claimant paid to the contractor under the contract.
>
> (b) If the contractor did work according to the contract and the claimant is not soliciting another contractor to complete the contract, the claimant's actual loss shall be the amount which the claimant paid to the original contractor less the value of any materials or services provided by the contractor.
>
> (c) 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)(a)-(c).

The first method (a) does not apply because the Respondent did not abandon the contract without doing any work and the second method (b) does not apply because the Claimant has solicited estimates from other contractors to replace the concrete parking pad. In his claim, the Claimant requested $4,850.00 which appears to represent the amount in the estimate prepared by Mike Shipley of MDR Contracting. (Cl #7). However, that estimate contains at least one item that was not in the contract with the Respondent: remove one block deep paver with gravel on both sides of driveway and reinstall. The Claimant did not provide any information as to the cost of this additional item. Therefore, the third method (c) cannot be used because the MDR Estimate has an additional item that is outside the scope of the original contract.

Even if one of the three methods applied to this case, the Claimant cannot recover an amount greater than what he paid to the Respondent. The Business Regulation Article caps a claimant's recovery at $20,000.00 for acts or omissions of one contractor and provides that a

claimant may not recover more than the amount paid to the contractor against whom the claim is filed. Md. Code Ann., Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a). In this case, the Claimant paid the Contractor $3,350.00, and I agree with the Fund that the Claimant's recovery is limited to the amount he paid ($3,350.00). Md. Code Ann., Bus. Reg. § 8-405(e)(5); COMAR 09.08.03.03B(4).

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant proved that he sustained an actual and compensable loss as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015). I further conclude that the Claimant is entitled to recover $3,350.00 from the Fund.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant $3,350.00; 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;[7] and

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

February 11, 2021
Date Decision Issued

Ann C. Kehinde
Administrative Law Judge

ACK/cj
#190258

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

PROPOSED ORDER

WHEREFORE, this 2nd day of June, 2021, 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