IN THE MATTER OF THE CLAIM	*	**BEFORE KATHLEEN A. CHAPMAN,**
OF JASON TOWNSEND,	*	**AN ADMINISTRATIVE LAW JUDGE**
CLAIMANT,	*	**OF THE MARYLAND OFFICE**
AGAINST THE MARYLAND HOME	*	**OF ADMINISTRATIVE HEARINGS**
IMPROVEMENT GUARANTY FUND	*	**OAH NO.: DLR-HIC-02-13-25928**
FOR THE ALLEGED ACTS OR	*	**MHIC NO.: 13 (90) 413**
OMISSIONS OF DANIEL STEEN, Jr.	*	
T/A CHESAPEAKE HOME	*	
REMODELING AND DESIGN,	*	
RESPONDENT	*	

* * * * * * * * * * * * *

RECOMMENDED DECISION

STATEMENT OF THE CASE

On February 20, 2013, Jason Townsend (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of $9,750.00 for actual losses allegedly suffered as a result of a home improvement contract with Daniel Steen, Jr., t/a Chesapeake Home Remodeling and Design (Respondent).

I held a hearing on February 20, 2014 at the Office of Administrative Hearings (OAH), located in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010 & Supp.

2013). Hope Sachs, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Claimant represented himself. The Respondent failed to appear after due notice to his address of record.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2013), Code of Maryland Regulations (COMAR) 09.01.03; 09.08.02; and 28.02.01.

ISSUE

Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?

SUMMARY OF THE EVIDENCE

Exhibits

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

CL Ex. 1 – Complaint Form, signed October 8, 2012, with the following documents contained in a spiral binder:

- Title page (p. 1)
- Table of contents (p. 2)
- Complaint summary (p. 3)
- Seven color pictures of trowel marks, foot prints, and imperfections within the concrete (pp. 4 – 7)
- Two color pictures of double stamping within the concrete (p. 8)
- Eleven color pictures of scattered rocks throughout the concrete (pp. 9 – 15)
- Twenty-seven color pictures of foot prints in the concrete (pp. 16 – 26)
- Three color pictures of seam lines within featured circular detail (pp. 27 – 28)
- Seven color pictures of sealer issues (pp. 29 – 33)
- Four color pictures of issues concerning expansion joints (pp. 24 – 36)
- Two color pictures regarding color issues (pp. 37 – 38)
- Four color pictures regarding more color issues (pp. 39 – 41)
- Eleven color pictures of unprofessional finish – sides of patio (pp. 42 – 48)

- Four color pictures of issues concerning lack of interlocking design (pp. 49 – 50)
- Three color pictures of miscellaneous views of unprofessional installation (pp. 51 – 52)
- E-mail correspondence between the Claimant and Respondent, September 8, 2013 to October 6, 2013 (pp. 53 – 69)
- Marroccos Stamped Concrete report and quote (pp. 70 – 71)
- Proof of payment (pp. 72 – 74)
- Original Contract and Addendums (pp. 75 – 88)

CL Ex. 2 – Three color pictures of the patio (taken recently)

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

GF Ex. 1 – Notice of Undeliverable Mail (certified), December 4, 2013

GF Ex. 2 – Notice of Hearing, January 9, 2014, with signed green card with the Respondent acknowledging receipt of mailing, January 23, 2014

GF Ex. 3 – Licensing history, January 9, 2014

GF Ex. 4 – Letter from John Borz, Chairman, MHIC, to the Respondent, February 25, 2014, with copy of the Home Improvement Claim Form, received on February 20, 2013

No documents were admitted on behalf of the Respondent.

Testimony

The Claimant testified on his own behalf. No one appeared to testify on behalf of the Respondent. The Fund did not present any testimony.

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 #99336.

2. On May 5, 2012, the Claimant and the Respondent entered into a contract to build an Azek deck (deck) to the rear of the Claimant's home on the second floor level. This aspect of the work is not in dispute nor is it included in the Claimant's Fund claim.

3. On May 24, 2012, the Claimant and the Respondent entered into an Addendum Contract to install a 540 square foot stamped concrete patio (patio), in a "London Cobblestone" design, in the color scheme Sun Buff, to the rear of the Claimant's home on the ground level. The price of the Addendum Contract was $8,100.00, with a $2,700.00 down payment due upon signing and $5,400.00 due upon completion. The patio is the subject matter of the Fund claim.

4. On May 25, 2012, the Claimant paid the $2,700.00 down payment via a debit card purchase.

5. On June 6, 2012, the Claimant submitted an Architectural Change Request Form, along with the contract information, to the Perry Hall Homeowners Association seeking approval for the deck as well as the patio.

6. On June 15, 2012, the Perry Hall Homeowners Association approved both the deck and patio designs.

7. On September 6, 2012, the Claimant and the Respondent entered into a second Addendum Contract to add another 110 square feet to the patio, for a total of 650 square feet. The price for the second Addendum Contract was $1,650.00.

8. The total value of the Contract for the patio, not including the deck, was $9,750.00.

9. The Respondent finished both the deck and patio on September 8, 2012.

10. On September 12, 2012, the Claimant paid the Respondent the remaining due under the contract in the amount of $7,050.00 by check number 317.

11. While the Claimant was initially pleased with the finished product (*see* CL Ex. 1, September 8, 2012 e-mail, p. 54), a week later he noticed that the patio did not look uniform in color.

12. In a September 16, 2012 e-mail to the Respondent, the Claimant wrote that he believed one-half of the patio was 2-3 shades darker than the other half. He also conveyed to the Respondent that there were visible foot prints throughout the patio. In support of his claims, the Claimant attached three color photographs to the e-mail. Finally, the Claimant asked the Respondent how the issues could be rectified. (CL Ex. 1, pp. 55 – 56.)

13. On September 17, 2012, Matthew Tabaka, Marketing Administrator Manager for the Respondent, responded to the Claimant in an e-mail explaining that the colors would eventually fade over time. (CL Ex. 1, p. 57.)

14. The Claimant immediately replied on the same day in an e-mail to Mr. Tabaka, with a copy to the Respondent, challenging Mr. Tabaka's claim that the colors would fade and wrote "one side is khaki color, while the other side is a light tan color. The color between the two halves are not even close, so we need to get this fixed." (CL Ex. 1, p. 58.)

15. Tom Benson, the Respondent's contractor, came out to the Claimant's home to view the patio. In addition, the Claimant sought opinions from five different contractors regarding the quality of the workmanship.

16. On September 21, 2012, the Claimant sent the Respondent an e-mail outlining nine major flaws he felt needed to be corrected based on observations made by the contractors and Tom Benson. The flaws included:

- Foot prints within the contrast colors all over the patio;
- Foot prints in the cement itself;
- Two distinctly different cement colors throughout the patio;
- Visible rocks found on the surface of the patio;
- No expansion joints on the posts or along the back wall of the house;
- Trowel marks in several spots;
- Visible stamp seams either too deep or too shallow;

- Stamp not squared up to the grout lines; and
- Cement missing near the stairs.

(CL Ex. 1, p. 59.)

17. On September 21, 2012, Mr. Tabaka sent the Respondent an e-mail, with a copy to the Claimant, asking the Respondent to contact the Claimant about his concerns. (CL Ex. 1, p. 60.)

18. On September 21, 2012, the Respondent visited the Claimant's home to view the patio. On September 24, 2012, he sent the Claimant an e-mail and told him that after inspecting the patio, "[t]he only thing I saw wrong was 2 different shades and foot print [sic] in release... [and it] can be fixed." (CL Ex. 1, p. 62.)

19. The Claimant agreed to allow the Respondent an opportunity to correct the problems with the patio and, on a date unknown between September 24, 2012 and October 1, 2012, one of the Respondent's workers attempted to smooth out trowel marks as well as other imperfections in the concrete, but it made the concrete look worse with smudge marks.

20. On October 2, 2012, the Claimant attached a draft complaint to an e-mail he wrote to the Respondent demanding a resolution to the workmanship issues. The Claimant gave the Respondent five business days to review the complaint and respond with a resolution to avoid any action being taken against the Respondent.

21. On October 5, 2012, the Respondent responded in an e-mail stating that he would call the Claimant later in the day, but no call came and this was the last communication from the Respondent regarding the patio.

22. On October 5, 2012, the Claimant obtained an estimate from Marroccos Stamped Concrete (Marroccos), MHIC #47709.

23. After an inspection of the patio, Marroccos determined that it was necessary to excavate the work performed by the Respondent because (a) the expansion joints were not installed in the proper location, (b) there were not enough control joints, (c) the pattern was not consistent or interlocked, (d) there were two different color combinations throughout the patio, (e) there was no back-fill around the patio; (f) there were foot prints and other markings in the texture; and (g) the sealer was not consistent across the patio.

24. Marroccos quoted the Claimant $10,000.00 to excavate the work performed by the Respondent and replace it with a like, kind and quality patio per the original specifications contained in the Respondent's contract.[1]

25. Taking into account the extra 33 square feet of patio in the Marroccos' proposal, the Claimant's actual loss is $9,505.00 ($10,000.00 - $495.00 = $9,505.00). (*See* FN 1.)

DISCUSSION

I. Respondent's Failure to Appear

Section 8-312(a) of the Business Regulation Article provides that the Commission shall give the person against whom the action is contemplated an opportunity for a hearing. Md. Code Ann., Bus Reg. § 8-312(a) (Supp. 2013). The statutory provisions governing disciplinary proceedings against MHIC licensees state that notice shall be sent by certified mail "at least 10 days before the hearing by certified mail to the business address of the licensee on record with the Commission." *Id.* § 8-312(d). The procedures for notice applicable to disciplinary proceedings also apply to claims against the Fund. *Id.* at § 8-407(a) (2010).

[1] The original contract provided for 650 square feet; the Marroccos proposal, however, is for 683 square feet – a difference of 33 square feet. Using the Respondent's price per square foot, the cost for adding an additional 33 square feet is $495.00 ($1,650.00 divided by 110 square feet = $15.00/per sq. ft.; 33 x $15.00 = $495.00) (*see* Findings of Fact No. 7).

On November 7, 2013, the OAH sent a Notice of Hearing (Notice) by certified and first class mail to the Respondent's last address of record which was returned as unclaimed. After learning that the Respondent's trade address had changed, on January 9, 2014, the OAH sent a second Notice to the Respondent at the new address. The Notice advised the Respondent of the time, place and date of the hearing. According to the Fund, the Respondent signed the green card acknowledging receipt of the certified mailing and the green card is contained in the record at GF Exhibit 2.

On February 10, 2014, the Respondent requested a postponement of the hearing on the basis that he will be out of town on a pre-arranged business trip on the date of the scheduled hearing. On the same date, Pamela L. Johnson, Postponement Clerk, OAH, reviewed the postponement request, but denied it. The OAH mailed a letter to the Respondent on February 10, 2014 explaining that documentation was needed to support the conflict and to grant the postponement request. COMAR 28.02.01.16B. The Respondent failed to submit any documentation in advance of the hearing, which took place on February 20, 2014.

Under section 8-312 of the Business Regulation article, "[i]f, after due notice, the person against whom the action is contemplated does not appear . . . the Commission may hear and determine the matter." Md. Code Ann., Bus Reg., § 8-312(h). Based upon the record before me, I am satisfied that the OAH properly notified the Respondent of the date, time and location of the scheduled hearing, as well as the issues to be presented. Accordingly, when the Respondent was still not present after fifteen minutes of the scheduled hearing start time, I directed that the hearing proceed in the Respondent's absence. Md. Code Ann., Bus Reg., § 8-312(h); COMAR 09.01.02.07E.

II. Analysis

A. Was the Respondent licensed at the time of the contract?

A review of the licensure information for the Respondent (GF Ex. 3) makes it clear that the Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant.

B. Did the Claimant sustain an actual loss?

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) (Supp. 2013). *See also* COMAR 09.08.03.03B(2). Actual loss "means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement."[2] Md. Code Ann., Bus. Reg. § 8-401 (2010). For the following reasons, I find that the Claimant has proven eligibility for compensation.

The Claimant testified that he was initially satisfied with the patio; in fact, he sent the Respondent an e-mail exuding his pleasure over the "redonculous work."[3] (CL Ex. 1, p. 54.) However, after the sealer and dark contrast color had time to dry, he noticed that the patio no longer looked uniform in color. The Claimant indicated that the patio appeared to be pewter gray in some areas and tan mixed with pewter gray in other areas. The Claimant also pointed out

[2] "Workmanlike" is defined as "characterized by the skill and efficiency typical of a good workman." *Merriam-Webster's Collegiate Dictionary* 1443 (11th ed. 2006) (*Merriam Webster's*); *see also Webster's II New Riverside University Dictionary* 1328 (1994) ("Typical of or befitting a skilled workman or craftsman.")

[3] The Claimant misspelled the word redonkulous. Though his use of the word does not fit the definition contained in the Urban Dictionary, my impression is that he intended it to be positive expression, such as "crazy or over the top." *See generally*, http://www.urbandictionary.com/define.php?term=redonkulous.

that neither color (pewter gray or tan) was the color he contracted for which was Sun Buff. At that point, according to the Claimant, he immediately alerted the Respondent in an e-mail, dated September 16, 2012, and attached 3 color photographs to corroborate his concerns. The Claimant testified that while he received a reply from one of the Respondent's representatives, he was not pleased with the response – in essence, that the discoloration would fade over time. The Claimant stated, however, that the colors never faded over time and he presented 3 color photographs he took recently of the patio to support this point. (CL Ex. 2.)

In addition, the Claimant testified that after the patio had time to cure, which took approximately one week, he noticed more issues with the quality of the work, both structurally and cosmetically. At this point, he had Tom Benson, a contractor for the Respondent, and five other contractors come out to his home to view the patio. According to the Claimant, each of these contractors confirmed that the work performed by the Respondent was unworkmanlike. Here, the Claimant presented 78 color photographs showing the flaws, including: double stamping within the concrete; scattered rocks embedded in the stamped concrete; numerous shoe prints (twenty-seven in all) in the stamped concrete; seam lines producing large ridges; discoloration of the patio (as discussed above); expansion joints missing; and dangerous edges due to no back fill around the perimeter of the patio.

The Claimant testified that he complained about these issues to the Respondent in an e-mail on September 21, 2012. According to the Claimant, the Respondent came out to his home and looked at the patio, however, the Respondent told him that the patio looked good and since it was a manmade product "there were going to be mistakes." Nevertheless, the Respondent agreed to have one of his contractors correct any imperfections by "grinding out" the problem areas. Much to the Claimant's chagrin, the attempted repair worsened the condition of the patio

and the Claimant presented a color photograph which showed that the desired textured finish was also being ground out at the same time.

After the attempt to correct the cosmetic issues in the patio failed, the Claimant testified and presented several e-mails showing that he tried to contact the Respondent for approximately two more weeks seeking a resolution, but to no avail. The Claimant testified further that it was at this point he knew the Respondent could no longer be counted on to correct the problems with the patio.

Finally, the Claimant testified that there is no way to salvage the patio due to the multitude of issues previously discussed. The Claimant presented a proposal from Marroccos providing the reasons why the patio needs to be excavated as opposed to being repaired. (CL Ex. 1, pp. 70 – 71; *see also* Finding of Fact No. 23.) The cost for removal and replacement of the patio, per the Marroccos estimate, is $10,000.00.

Based on this record, I am persuaded by the Claimant's presentation that the Respondent's work was unworkmanlike and is unsalvageable.

C. Was there a good faith effort to resolve the contract dispute?

Section 8-405(d) of the Business Regulation Article provides that "[t]he Commission may deny a claim if the Commission finds that the claimant unreasonably rejected good faith efforts by the contractor to resolve the claim." Md. Code Ann., Bus. Reg. § 8-405(d) (Supp. 2013). I do not find that the Claimant did so in this case. Here, the Claimant candidly testified that while he told the Respondent to stop all efforts to grind out certain imperfections in the patio, the photographic evidence supports the Claimant's contention that the Respondent's efforts made the patio look worse. In light of that, I find it reasonable and appropriate for the Claimant to tell the Respondent to stop any further repairs.

D. Is the Claimant entitled to reimbursement from the Fund?

Having found eligibility for compensation, I now turn to the amount of the award, if any. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. COMAR 09.08.03.03B(1). MHIC's regulations offer three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). One of those formulas, as follows, offers an appropriate measurement in this case:

> 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).

In support of his Fund claim, the Claimant presented the proposal prepared by Marroccos to remove and replace the patio installed by the Respondent. The cost of the Marroccos proposal was $10,000.00. While the Claimant testified that the Marroccos proposal was "same for same," I disagree. The Respondent's contract allowed for 650 square feet of patio, whereas the Marroccos proposal allowed for 683 square feet of patio. As the regulation provides, the Claimant may only recoup reasonable amounts to repair poor work done by the original contractor under the original contract terms. As such, I found it appropriate to deduct the difference in cost for the additional 33 square feet. (*See* Findings of Fact No. 25; FN 1.)

Consequently, I calculate the Claimant's actual loss as follows:

$ 9,750.00	Amount the Claimant paid the Respondent
9,505.00	Amount required to excavate and replace the patio
$ 19,255.00	
- 9,750.00	Contract price
$ 9,505.00	The Claimant's actual loss

CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual/compensable loss of $9,505.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2010).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant $9,505.00; 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 at least ten percent as set by the Maryland Home Improvement Commission. Md. Code Ann., Bus. Reg. § 8-411(a) (2010); and

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

Signature on File

March 4, 2014
Date Decision Issued

Kathleen A. Chapman
Administrative Law Judge

KAC/da
147825v1

IN THE MATTER OF THE CLAIM	*	**BEFORE KATHLEEN A. CHAPMAN,**
OF JASON TOWNSEND,	*	**AN ADMINISTRATIVE LAW JUDGE**
CLAIMANT,	*	**OF THE MARYLAND OFFICE**
AGAINST THE MARYLAND HOME	*	**OF ADMINISTRATIVE HEARINGS**
IMPROVEMENT GUARANTY FUND	*	**OAH NO.: DLR-HIC-02-13-25928**
FOR THE ALLEGED ACTS OR	*	**MHIC NO.: 13 (90) 413**
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T/A CHESAPEAKE HOME	*	
REMODELING AND DESIGN,	*	
RESPONDENT	*	

* * * * * * * * * * * * *

FILE EXHIBIT LIST

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

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CL Ex. 2 – Three color pictures of the patio (taken recently)

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

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GF Ex. 4 – Letter from John Borz, Chairman, MHIC, to the Respondent, February 25, 2014, with copy of the Home Improvement Claim Form, received on February 20, 2013

No documents were admitted on behalf of the Respondent.

STATE OF MARYLAND
DLLR
DEPARTMENT OF LABOR, LICENSING AND REGULATION

DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING
MARYLAND HOME IMPROVEMENT COMMISSION
500 N. Calvert Street, Room 306
Baltimore, MD 21202-3651

PROPOSED ORDER

WHEREFORE, this 25th of March 2014, Panel B of the Maryland Home Improvement Commission approves the Recommended Decision 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.

Jeffrey Ross
Jeffrey Ross
Panel B

MARYLAND HOME IMPROVEMENT COMMISSION

PHONE: 410-230-6309 • FAX: 410-962-8482 • TTY USERS, CALL VIA THE MARYLAND RELAY SERVICE
INTERNET: WWW.DLLR.STATE.MD.US • E-MAIL: MHIC@DLLR.STATE.MD.US

The Maryland Home Improvement Commission	*	**BEFORE THE MARYLAND HOME IMPROVEMENT COMMISSION**
	*	
v. Daniel Steen, Jr. t/a Chesapeake Home Remodeling & Design, LLC (Contractor)	*	**MHIC No.: 13 (90) 413**
and the Claim of Jason R. Townsend (Claimant)	*	

****

FINAL ORDER

WHEREFORE, this September 3, 2014, Panel B of the Maryland Home Improvement Commission ORDERS that:

1. **The Findings of Fact set forth in the Proposed Order dated March 25, 2014 are AFFIRMED.**

2. **The Conclusions of Law set forth in the Proposed Order dated March 25, 2014 are AFFIRMED.**

3. **The Proposed Order dated March 25, 2014 is AFFIRMED.**

4. **This Final Order shall become effective thirty (30) days from this date. During the thirty (30) day period, any party may file an appeal of this decision to Circuit Court.**

Joseph Tunney
Joseph Tunney, Chairperson
PANEL B

MARYLAND HOME IMPROVEMENT COMMISSION