

IN THE MATTER OF THE CLAIM	* BEFORE NANCY E. PAIGE,
OF GAIL LIEB,	* 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 CRAIG	*
WASHINGTON, T/A HOME DEPOT	* OAH No.: DLR-HIC-02-18-21670
USA, INC., #2511,	* MHIC No.: 17 (90) 751 ¹
RESPONDENT	*

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On March 16, 2017, Gail Leib (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$26,057.95 in actual losses allegedly suffered as a result of a home improvement contract with Craig Washington, T/A Home Depot USA, Inc., #2511 (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015). On July 9, 2018, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

¹ This number appears on the transmittal of the case to the Office of Administrative Hearings from the Home Improvement Commission and on other Home Improvement Commission documents. The Home Improvement Claim Form, however, carries the number 17(75)757.

I held a hearing on November 28, 2018 at the OAH in Hunt Valley, Maryland. Bus. Reg. § 8-407(e). Hope Sachs, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. Victory E. Cretella, Esquire, represented the Claimant, who was present. Kevin Cornish, Esquire, represented the Respondent, who was present.

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. 2018); 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, unless noted:

- Cl. #1. Home Depot Special Services Customer Invoice
- Cl. #2. January 23, 2017 Purged Customer Order Report
- Cl. #3. Custom Building Products Residential Lifetime Warranty
- Cl. #4. Business cards superimposed upon Home Depot promotional material
- Cl. #5. July 9, 2015 to April 26, 2016 emails
- Cl. #6. [Not admitted. October 18, 2016 letter from Home Depot to Claimant]
- Cl. #7. September 8, 2016 to September 28, 2016 emails
- Cl. #8. October 19, 2016 to December 12, 2016 emails

- Cl. #9. Photographs
- Cl. #10. Photographs
- Cl. #11. February 11, 2017 to May 14, 2017 emails
- Cl. #12. February 2, 2017 to April 13, 2017 emails
- Cl. #13. [Not admitted. Rectangular Tile Installation – Arizona Tile, printed March 12, 2017]
- Cl. #14. [Not admitted. March 9, 2017 Potomac Tile & Cart, Inc. Installer Worksheet]
- Cl. #15. Photographs
- Cl. #16. Tile
- Cl. #17. May 25, 2018 Ceramic Tile Inspection Report
- Cl. #18. Association of Tile, Terrazzo, Marble Contractors & Affiliates, Inc., Technical Committee chart
- Cl. #19. Daltile's Step-by-Step Instructions for installing Large Format Tile
- Cl. #20. Flexbond Premium Crack Prevention Thin-Set Mortar
- Cl. #21. American National Standard specifications for the Installation of Ceramic Tile, 1999
- Cl. #22. November 20, 2018 Schaffert Construction, Inc., Estimate
- Cl. #23. Daltile promotion piece for Saddle Brook Glazed porcelain with Reveal Imaging
- Cl. #24. Hand drawn illustration

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

- Resp. #1. The Home Depot – 043 Installation Customer Approval, multiple dates

I admitted the following exhibits on behalf of the Fund:

- Fund #1. September 26, 2018 Notice of Hearing
- Fund #2. November 27, 2018 Licensing History
- Fund #3. March 29, 2017 letter from MHIC to Respondent

Testimony

The Claimant testified and presented the testimony of Jeffrey Horn, accepted as an expert in tile floor installation and inspection, and Lawrence Schaffert, accepted as an expert in estimating the cost of removing and replacing ceramic floor tile.

The Respondent presented the testimony of Chao Barbosa, labor manager, accepted as an expert in flooring installation.

The Fund did not call any witnesses.

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 01-854-36.
2. On or about April 30, 2014, the Claimant and the Respondent entered into a contract to install large format (6"x 24") simulated wood grain tile flooring on the entire first floor of the Claimant's home (Contract).
3. The agreed-upon Contract price was \$14,920.79, which the Claimant has paid in full.
4. In May 2014, the Respondent installed tile in the foyer, living room, dining room, kitchen, hallway and a back room (Phase One). The Claimant complained about chipped tiles and the difference in height of adjacent tiles (known as lippage). The Respondent's regional manager responded to the complaints and ninety tiles were replaced.
5. Between August and September 2014, several additional tiles "popped" up.
6. Tile installation in the three bedrooms on the first floor (Phase Two) was delayed until January 2015 at the Claimant's request. Because of her dissatisfaction with the first portion of the work, the Respondent used a different installer for the bedrooms.

7. The manufacturer's recommendation is for 3/16 inch grout joints. Grout joints between tiles laid by Respondent in Phase One vary from 0 inches to ¼ inch. In some places, grout is cracked or missing entirely. There are no two rows with even 3/16 inch grout joints between them.

8. The manufacturer's standard for lippage is 1/16 inch. Allowable warpage of large format tile is .05 inch. Therefore, according to manufacturer's specifications, the maximum difference in height between adjacent tiles should not exceed 1/16 inch plus .05 inch.

9. Approximately twenty-five percent of the tiles installed by the Respondent in Phase One exceed the lippage and warpage allowances specified by the manufacturer.

10. About one third of the tile floor in Phase One sounds hollow, which indicates that the tiles do not properly adhere to the subfloor.

11. The manufacturer recommends that 90 percent of each tile should be bonded to the subfloor by mortar; the industry standard is 80 percent. One tile removed from the floor in Phase One had mortar on about 20 percent of the bottom surface.

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).² “[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)).

² As noted above, “COMAR” refers to the Code of Maryland Regulations.

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)³; *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 proven eligibility for compensation.

The Claimant testified to her dissatisfaction with Phase One of the job, and her difficulties in getting Home Depot to remedy her complaints. She agreed that about 90 percent of the chipped tiles she had identified had been replaced, but said that after that remedial work was done, tiles “popped up.” She testified that the installer did not use spacers, which resulted in uneven grout lines, and that chips appeared after grouting. She claimed that the installer did not use proper tools in the installation and when she complained about lippage she was told that it would not be visible when the job was done. She said work was stopped before the bedrooms were done because she was having a party for her son’s graduation, and that it took several months for the second phase to be scheduled. She agreed to have Home Depot finish the job only after they promised to use a different installer. She testified that a different dye lot was used in the bedrooms because the tile that was purchased for that part of the job had been used up in remedying the defects in Phase One. She also claimed that too much water was used in grouting the bedroom tile, which left white spots. She agreed that she had signed a customer approval form after remedial work was done, but said she probably did not read the form, and did not intend to release Home Depot or the Respondent.

³ Unless otherwise noted, all references to the Business Regulation Article herein cite the 2015 Replacement Volume of the Maryland Annotated Code.

Jeffrey Horn, qualified as an expert in tile floor installation and inspection, testified that he inspected the Claimant's floor in May 2018 and found that walking on the floor produced a hollow sound over about one third of the living room floor. He picked up one tile and found that only about 20 percent of the tile adhered to the subfloor; 80 percent of the tile was devoid of mortar. This is the reverse of the industry standard that at least 80 percent of each tile should be bonded to the subfloor by mortar. He concluded that the hollow sound produced by walking on the floor was the result of lack of adherence to the subfloor, which would ultimately result in loose and lifting tile. He also noted a number of areas where the heights of the tile were uneven, and the lippage exceeded industry standards. Additionally, grout lines were uneven, and grout was cracked and missing in some places. Mr. Horn opined that these deficiencies were consistent with the report of the Claimant that the installer did not use spacers to assure consistent spaces between tiles and did use proper tools and procedures in laying the tile, as recommended by industry standards.

Mr. Horn also noted that the tile was not laid in the pattern recommended by the manufacturer. The manufacturer recommended that large format tiles be staggered at less than one third of the length of the tile, to reduce the appearance of warpage. Because the tiles in the Claimant's home were staggered at approximately half the length of the tile, the appearance of warpage and lippage was more pronounced.

Mr. Horn documented his findings in a written report (Cl. #17). The report identified problems in Phase One, but not in Phase Two. The wide distribution of errors in installation made it impractical to replace sections of tile. Mr. Horn also assumed that the tile used in the job was no longer available and therefore recommended removal and replacement of the entire floor.

Lawrence Shaffert, an expert in estimating the cost of removing and replacing tile, concluded that the cost of replacing the entire job performed by the Respondent was \$21,643.00.

He relied on the conclusions of the expert, Mr. Horn, that the worst areas were in the middle of the living room floor. He said it was not possible to remedy the uneven spacing from the middle of the floor. He assumed, based upon the testimony of others, that the tile used on the Claimant's job was no longer available, and that the problems identified by the inspector pervaded both Phase One and Phase Two of the job. At the request of the attorney for the Fund, Mr. Shaffert calculated replacement cost without including the bedrooms. This resulted in a total replacement cost for Phase One of the job of \$10,276.00.

Craig Washington, the service licensing manager of Home Depot, testified that the original tile used in the Claimant's job was available, and that the manufacturer would provide as much of that tile as necessary for any replacement in the Claimant's home. He agreed that the dye lot would be different, but that the difference would be imperceptible because wood grain patterns vary. His testimony was not disputed.

Chao Barbosa, Labor Manager for Home Depot, testified for the Respondent as an expert in flooring installation. He responded, with the District Manager, to the Claimant's complaints with respect to Phase One of the job, which he said were limited to chips in the tile. It was his conclusion that this represented a quality installation and he denied the complaints. Home Depot determined that markings on 4 percent of tiles were within the manufacturer's tolerance. Because the Claimant continued to complain, however, a second service manager authorized replacement of two tiles. The Claimant wanted all chipped tiles removed. Mr. Barbosa testified that he advised the Claimant that replacing that number of tiles could damage the substrate and could cause lippage. Since the Claimant insisted, nonetheless, approximately a third of the floor, about ninety tiles, were replaced. The Claimant then signed a customer approval form. She continued to complain, however, and four to six more tiles were replaced, against his

recommendation. He said he was not surprised by the Claimant's current complaints about uneven tiles, because this was what he had warned would result from replacing individual tiles.

I did not find Mr. Barbosa's testimony persuasive. There was no writing indicating that the remedial work was done against his recommendation, or that the Claimant was informed that the remedial work was likely to cause problems. I find it unlikely that Home Depot would have undertaken or authorized work that it was advised was improper and likely to cause future problems. I found Mr. Horn's opinions to be well-reasoned, detailed, supported by his observations and documented in his report. I also found Mr. Shaffert to be a credible and persuasive witness. When asked by the Fund attorney if he could estimate the cost of replacement, eliminating the bedrooms, he performed the calculations on the stand.

The evidence reflects substandard, unworkmanlike installation of tile in Phase One. Uneven grout joints are unsightly and, as explained by Mr. Horn, are easily avoided by use of an appropriate spacer. Lippage was measured and documented by Mr. Horn. Lack of adherence of tiles in Phase One was attributed to improper workmanship and was evidenced by hollow sounding areas in large portions of Phase One. I accept Mr. Horn's opinion that the defects in Phase One can only be remedied by removal and replacement of the tiles in that portion of the job.

On cross-examination, Mr. Horn agreed he did not note deficiencies in Phase Two and the pictures in the report were only of Phase One. Mr. Schaffert testified that the only problem he observed in the bedrooms was cracked or missing grout, which could be remedied by re-grouting the floors. No estimate of the cost of doing so was offered. The primary reason for recommending replacement of the bedroom floors was the assumption, subsequently proved incorrect by Mr. Washington, that the original tile was no longer available. The fact that new tile would be from a different dye lot was discounted by Mr. Washington, based upon the wood grain

design, and there was no evidence that the difference would be so great as to result in an unaesthetic appearance if only Phase One were replaced. In fact, the Claimant acknowledged that the bedroom tiles were a different dye lot and this fact was not part of her initial complaint.

I also conclude that the failure of the Respondent to follow the instructions of the manufacturer with respect to the pattern is not grounds for replacement of the tile. This is an aesthetic issue about which the Claimant made no complaint during the installation. Moreover, it is not clear from the picture offered by the Claimant in evidence that the one third length offset, as opposed to one half length, recommended by the manufacturer is, in fact, adhered to.

In summary, I conclude that the Respondent performed an unworkmanlike home improvement, but that replacement of Phase Two is not warranted.

The Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimant. The Respondent performed unworkmanlike, inadequate or incomplete home improvements. I thus find that the Claimant is eligible for compensation from the Fund.

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. 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.

In this case, the Respondent performed work under the contract, and the Claimant intends to retain other contractors to complete or remedy that work. Accordingly, 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).

Amount paid to the Respondent	\$14,920.79
Amount to replace Phase One	<u>+\$10,576.00</u>
	\$25,496.79
Original Contract price	<u>-\$14,920.79</u>
	\$10,576.00

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. Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a). The Claimant's actual loss is less than the amount paid to the Respondent and less than \$20,000.00. Therefore, the Claimant is entitled recover her actual loss of \$10,576.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$10,576.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(c). I further conclude that the Claimant is entitled to recover that amount from the Fund. Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$10,576.00; 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;⁴ and

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

Signature on File

February 11, 2019
Date Decision Issued

Nancy E. Paige
Administrative Law Judge

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177064

⁴ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 25th day of March, 2019, 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.

Michael Shilling

***Michael Shilling
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION