IN THE MATTER OF THE CLAIM	*	**BEFORE KRYSTIN J. RICHARDSON,**
OF DELANO SHELLEY,	*	**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 THOMAS McCABE,	*	
T/A McCABE HOME	*	**OAH No.: DLR-HIC-02-19-08665**
IMPROVEMENTS,	*	**MHIC No.: 18 (90) 1021**
RESPONDENT	*	

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PROPOSED DECISION

STATEMENT OF THE CASE

On June 28, 2018, the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) received a claim (Claim) from Delano Shelley (Claimant) seeking reimbursement from the Fund for $23,980.00 in actual losses allegedly suffered as a result of a home improvement contract with Thomas McCabe, trading as McCabe Home Improvements (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015).[1] On March 21, 2019, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

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

I held a hearing on August 22, 2019 at the OAH. Bus. Reg. § 8-407(e). Andrew Brouwer, Assistant Attorney General, Department of Labor (Department),[2] represented the Fund. The Claimant represented himself. 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. 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 - Various documents
1A – Receipt, dated March 3, 2018
1B – Receipt, dated June 2, 2019
1C – Home Improvement Claim Form, dated June 25, 2018
1D – Complaint Form, dated March 20, 2018
1E – Contract Agreement, dated November 18, 2017
1F – Proposal from Rudy's Home Improvements, LLC, dated August 19, 2018

Clmt. Ex. 2 - Six page document containing various receipts, dated November 26, 2017 through February 11, 2018[3]

Clmt. Ex. 3 - Five page document containing various checks from the Claimant to the Respondent, dated November 18, 2017 through February 16, 2018
- Copy of Check (No. 4971) from the Claimant to the Respondent in the amount of $1,800.00
- Copy of Check (No. 4979) from the Claimant to the Respondent in the amount of $4,000.00

[2] On July 1, 2019, the Maryland Department of Labor, Licensing, and Regulation became the Department of Labor.
[3] I am unable to make out some of the dates from the receipts.

- Copy of Check (No. 4981) from the Claimant to the Respondent in the amount of $2,000.00
- Copy of Check (No. 4982) from the Claimant to the Respondent in the amount of $2,000.00
- Copy of Check (No. 4983) from the Claimant to the Respondent in the amount of 1,500.00
- Copy of Check (No. 4986) from the Claimant to the Respondent in the amount of $1,500.00
- Copy of Check (No. 4992) from the Claimant to the Respondent in the amount of $600.00
- Copy of Check (No. 4995) from the Claimant to the Respondent in the amount of $400.00
- Copy of Check (No. 4998) from the Claimant to the Respondent in the amount of $900.00
- Copy of Check (No. 4999) from the Claimant to the Respondent in the amount of $800.00
- Copy of Check (No. 5001) from the Claimant to the Respondent in the amount of $800.00
- Copy of Check (No. 5005) from the Claimant to the Respondent in the amount of $700.00
- Copy of Check (No. 5006) from the Claimant to the Respondent in the amount of $630.00
- Copy of Check (No. 5008) from the Claimant to the Respondent in the amount of $540.00
- Copy of Check (No. 5010) from the Claimant to the Respondent in the amount of $775.00
- Copy of Check (No. 5011) from the Claimant to the Respondent in the amount of $275.00
- Copy of Check (No. 5012) from the Claimant to the Respondent in the amount of $395.00
- Copy of Check (No. 5016) from the Claimant to the Respondent in the amount of $465.00
- Copy of Check (No. 5017) from the Claimant to the Respondent in the amount of $3,300.00
- Copy of Check (No. 5020) from the Claimant to the Respondent in the amount of $2,200.00

Clmt. Ex. 4 - Eight page document containing various photographs of exterior of home and front porch, undated[4]

Clmt. Ex. 5 - Respondent's Response to the Complaint, with notations made by the Claimant, received on April 16, 2018

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[4] The Claimant testified that the photographs contained on pages one through seven of Clmt. Ex. 4 were taken in August 2018; the upper photograph and mid photograph contained on page eight of Clmt. Ex. 4 were taken on September 24, 2018; and the lower photograph contained on page eight of Clmt. Ex. 4 was taken before November 2017.

The Respondent did not offer any exhibits.

I admitted the following exhibits on behalf of the Fund:

Fund Ex. 1 - Hearing Order, dated March 15, 2019

Fund Ex. 2 - Notice of Hearing, dated July 18, 2019

Fund Ex. 3 - Notice of Hearing, dated June 11, 2019

Fund Ex. 4 - Notice of Hearing, dated April 23, 2019

Fund Ex. 5 - Letter from Joseph Tunney to the Respondent, dated July 13, 2018, with attached Claim

Fund Ex. 6 - Respondent's MHIC Licensure Information, dated August 21, 2019

Testimony

The Claimant testified and presented the testimony of Joshua Wisneski.

The Respondent testified.

The Fund did not present the testimony of 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 48016.

2. At all relevant times, the Claimant owned and resided in a residence located in Baltimore County, Maryland.

3. On November 18, 2017, the Claimant and the Respondent entered into a contract (Contract) for the construction of a front porch at the Claimant's residence. The home improvement work included installation of decking, overhang roofing, plastic railing, lighting, gutters, and a sidewalk, among other things.

4. The original agreed-upon Contract price was $15,800.00. The Contract did not provide a payment schedule, but noted a down payment in the amount of $1,800.00, which was paid by the Claimant on November 18, 2017. (*See* Clmt. Ex. 3, Check No. 4971.)

5. Work began on November 18, 2017. The Contract did not state a date on which the work was to end.

6. During the course of the home improvement work, changes[5] were made to the Contract, but were not documented in writing.

7. Between November 18, 2017 and February 16, 2018, the Claimant paid the Respondent $25,580.00 by a series of check payments. (*See* Clmt. Ex. 3.)

8. The Respondent last worked at the Claimant's home on February 22, 2018.

9. As of February 22, 2018, the following Contract items were left incomplete by the Respondent: installation of plastic railing and covering of fascia board (item 2), application of deck sealant (item 4), installation of two lights and running water from the deck (item 6), installation of soffit on the ceiling (item 7), installation of back gutter and covering of fascia board (item 8), and installation of sidewalk (item 10). (Clmt. Ex. 1E.)

10. On March 10, 2018, one of the Respondent's workers came to the Claimant's home and inquired about working in the evenings or on the weekends. The Claimant told the worker that he did not have any more money to pay to the Respondent and not to return.

11. On March 20, 2018, the Claimant filed a complaint against the Respondent with the Department.

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[5] One of the changes included upgrades to the decking material, but there was no testimony about the type of decking material that the Contract originally called for or the type of upgraded decking material used. Another modification involved the Claimant changing his mind about having a window "boxed out" on the side of his home as the Contract provided. (*See* Clmt. Ex. 1E, Item 9.) No adjustment was made to the Contract price for this modification.

12. On August 19, 2018, the Claimant accepted a proposal from Joshua Wisneski[6] of Rudy's Home Improvements, LLC to repair and complete his front porch. The contract price was $13,200.00.

13. Foundational issues with the decking, along with the cupping and warping of the deck boards, prevented Mr. Wisneski from beginning where the Respondent left off with the home improvement work. Ultimately, Mr. Wisneski had to remove the deck installed by the Respondent and rebuild it for support. Mr. Wisneski was able to salvage the roofing installed by the Respondent, but had to re-support the ceiling rafters. Mr. Wisneski completed the home improvement work at the Claimant's home on September 15, 2018.

14. The Claimant paid Tim Deese, a licensed contractor, $500.00 for the lighting installation. The Claimant also paid Glen Petty, one of Mr. Wisneski's employees, $600.00 for staining and sealing the deck. (*See* Clmt. Exs. 1A and 1B.)

15. The Claimant has not taken any other legal action to recover monies.

16. The Claimant is not related to the Respondent, is not an employee or business associate of the Respondent, and is not related to an employee or business associate of the Respondent.

17. The Contract between the Claimant and the Respondent does not contain an arbitration provision.

DISCUSSION

Legal Framework

The Maryland General Assembly created the Fund to provide an available pool of money from which homeowners could seek relief for losses sustained at the hands of incompetent or unscrupulous home improvement contractors. Md. Code Ann., Bus. Reg. §§ 8-401 to 8-411. A

[6] Mr. Wisneski is a licensed home improvement contractor under MHIC license number 134944.

homeowner is authorized to "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). The statutes governing the Fund define "actual loss" as "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.

At a hearing on the claim, 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); 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)).

Certain claimants are excluded from recovering from the Fund altogether. In this regard, a claimant must prove that: (a) the claimant resides in the home as to which the claim is made, or he owns no more than three dwelling places; (b) the claimant is not an employee, officer or partner of the contractor; or the spouse or other immediate relative of the contractor or the contractor's employees, officers or partners; (c) the work at issue did not involve new home construction; (d) the claimant did not unreasonably reject the contractor's good faith effort to resolve the claim; (e) the claimant complied with any contractual arbitration clause before seeking compensation from the Fund; (f) there is no pending claim for the same loss in any court of competent jurisdiction and the claimant did not recover for the actual loss from any source; and (g) the claimant filed the claim with the MHIC within three years of the date the claimant knew, or with reasonable diligence should have known, of the loss or damage. Md. Code Ann.,

Bus. Reg. §§ 8-405(c), (d), (f), and (g), 8-408(b)(1); Md. Code Ann., Bus. Reg. § 8-101(g)(3)(i) (Supp. 2019).

For the reasons explained below, I find that the Claimant has proven eligibility for compensation from the fund.

Statutory Eligibility

The evidence in this case establishes there are no impediments barring the Claimant from recovering from the Fund. The home improvement work was to be performed on the Claimant's residence in Maryland. The Claimant is not a relative, employee, officer, or partner of the Respondent; the Claimant is not related to any of the Respondent's employees, officers, or partners. As discussed more fully below, the Claimant did not unreasonably reject any efforts by the Respondent to resolve the claim. The Contract between the Claimant and the Respondent did not contain an arbitration provision. The Claimant timely filed his Claim with the MHIC on June 28, 2018. Finally, the Claimant has not taken any other legal action to recover monies.

The Respondent Performed Home Improvement Work that was Inadequate or Incomplete

It is undisputed that the vast majority of the home improvement work under the Contract was left incomplete by the Respondent. The incomplete work included the following: failure to install the plastic railing and covering of fascia board; failure to apply the deck sealant; failure to install two lights and running water from the deck; failure to install the soffit on the ceiling; failure to install the back gutter and covering of fascia board; and failure to install the sidewalk. (Clmt. Ex. 1E, Items 2, 4, 6, 7, 8, and 10.) As a result, the Claimant hired Mr. Wisneski to complete the home improvement work. Mr. Wisneski has been employed in the construction industry for fifteen years and has built approximately one hundred porches. He testified that he was unable to begin work from where the Respondent left off working because of various issues with the decking and roofing. Although the Claimant did not offer Mr. Wisneski as an expert in

the field of construction, it was evident he was very familiar with the scope and nature of the work performed by the Respondent at the Claimant's residence. I found Mr. Wisneski to be a credible witness and I gave substantial weight to his testimony.

A. Use of Nails to Secure Deck Boards

Mr. Wisneski pointed out that the Respondent used nails instead of screws, which the original Contract required, to secure the deck boards. Mr. Wisneski explained that the nails failed to properly tie down the deck boards. He noted that some of the boards already began to pop up, creating a tripping hazard. Additionally, Mr. Wisneski testified that many of the deck boards began to cup and warp (twist or curve), which is a natural occurrence as the lumber used for the decking dries. Due to the cupping and warping of the lumber, Mr. Wisneski explained that the Respondent's use of nails was simply inadequate to securely tie down the deck boards. Mr. Wisneski maintained that screws should have been used instead because they would have firmly held down the deck boards notwithstanding the cupping or warping.

I note that I reviewed the photographs offered into evidence by the Claimant. Only three of the photographs contained within the packet depict portions of the decking installed by the Respondent. (Clmt. Ex. 4, pp. 1 and 3.) One of the photographs clearly depicts nails in the deck boards. However, it is otherwise difficult to determine the presence of cupping or warping in the deck boards or note where the deck boards began to pop up from the photographs alone. Nevertheless, the Respondent acknowledged his use of nails in the decking was a cost saving measure, and he otherwise failed to refute the negative condition of the deck boards (i.e., cupping, warping or popping up). Accordingly, I am persuaded by Mr. Wisneski's testimony that the use of nails was inadequate home improvement work such that remedial measures were necessary.

B. Foundational Issues with the Decking

Mr. Wisneski further explained that a proper foundation for the front porch was lacking. In particular, Mr. Wisneski testified that when he removed some of the deck boards, he observed stringer boards, which run beneath the deck boards for support. Mr. Wisneski explained that the stringer boards were not properly affixed to a double band board, which would have enabled the decking to properly bear weight. In support of his contention, Mr. Wisneski drew my attention to one photograph (Clmt. Ex. 4, p. 6) and explained that the stringer boards depicted in the photograph were only attached to a single band board, which cannot adequately handle weight.

Additionally, Mr. Wisneski argued that the footers installed by the Respondent underneath the deck were unworkmanlike and inadequate. In this regard, Mr. Wisneski explained that the proper procedure for installing footers is to dig a hole, pour in concrete as the base, place metal brackets on the bottom, screw in the wooden post, and then add dirt. However, upon reviewing the Respondent's work, Mr. Wisneski testified that there was no concrete base inside of the footer and that the wooden posts were merely sitting on top of dirt, held together only by the vinyl sleeve enclosing it. (*See* Clmt. Ex. 4, p. 5, top photograph.) As a result, Mr. Wisneski testified that the posts were poorly installed and could "weeble and wobble." Because a proper foundation is central to the porch, Mr. Wisneski testified that he had to rebuild the deck and its undercarriage. Moreover, Mr. Wisneski noted that the original Contract called for decking dimensions of 8 feet x 34 feet; however, the deck ultimately installed by the Respondent was 6 feet x 34 feet instead. Thus, when Mr. Wisneski rebuilt the deck, he did so in accordance with the original agreed-upon dimensions. (Clmt. Ex. 1E, Item 1.)

The Respondent rejected Mr. Wisneski's claims that the stringer boards needed to be affixed to a double band board or that he improperly installed footers, citing to the fact that his work passed inspection by Baltimore County. As it pertains to the decking dimensions, the

Respondent acknowledged that the original Contract provided for an 8 feet x 34 feet deck, but he claimed that when he went to Baltimore County to obtain a permit, the County informed him that the deck had to be 6 feet x 34 feet.

I am not persuaded by the Respondent's claims that simply because he passed inspection by Baltimore County that the home improvement work performed by him was adequate. Mr. Wisneski explained that multiple inspections can occur during the course of home improvement work. He testified that it is possible for work to be approved in the early stage of the inspection process and not be approved during the final stage of the inspection process. Therefore, in the absence of testimony from Baltimore County regarding the nature and extent of their inspection of the Respondent's work, I decline to infer that just because the Respondent passed inspection, his home improvement work was adequate or workmanlike. Moreover, I am persuaded by Mr. Wisneski's testimony that the footers undergirding the deck were improperly installed, thereby calling into question the stability of the posts inserted in them. I also find the stringer boards running underneath the decking were not properly constructed to bear weight, thereby constituting inadequate home improvement work. As the footers and stringer boards are central to the foundation of the deck, I find the remedial measures performed by Mr. Wisneski were justified.

C. The Ceiling Rafters

Mr. Wisneski testified that he was able to salvage the ceiling rafters, sheathing, and shingles, despite the inadequate work performed by the Respondent. According to Mr. Wisneski, the ceiling rafters installed by the Respondent were inadequate because the rafters were affixed to the residence without being attached to any sort of ledger board for support. Instead, the Respondent secured the rafters to an aluminum piece of metal affixed to the residence. (*See* Clmt. Ex. 4, pp. 1 – 4.) Mr. Wisneski explained that the construction of the

ceiling rafters in this fashion was insufficient to support any ceiling weight. As a result, Mr. Wisneski corrected the construction and secured the ceiling rafters to a ledger board that he affixed to the residence for reinforcement. (*See* Clmt. Ex. 4, p. 7.)

The Respondent failed to refute the claim that his construction of the ceiling rafters lacked support to carry weight. Therefore, I find the Respondent's work in attaching the ceiling rafters to a piece of metal instead of a ledger board is inadequate home improvement work. Accordingly, remedial measures were warranted.

The Claimant Did Not Reject Any Efforts by the Respondent to Resolve the Claim

According to the Claimant, the Respondent never returned to complete the home improvement work after February 22, 2018. The Claimant testified that one of the Respondent's workers came to his home on March 10, 2018 and inquired about working in the evenings or on the weekends. However, at this point, four months had already elapsed into the Contract, the Contract was not near completion, and the Claimant had already paid the Respondent $25,580.00, an overage of nearly $10,000.00 of the original agreed-upon Contract price. The Claimant testified that he told the Respondent's worker that he did not have any more money and not to return.

The Respondent, on the other hand, argued that he made efforts to contact the Claimant on three different occasions to complete the work, although he failed to specify the dates of the contact, or explain how he contacted the Claimant (i.e., by telephone, in-person, or by some other means), or provide any additional details pertaining to the contact. The Respondent also testified that he sent one of his workers to the Claimant to inform the Claimant that he would return. The Respondent maintains that he did not ask the Claimant for any additional money, claiming he only wanted to complete the job and the Claimant prevented him from doing so.

Notwithstanding the opposing views of the Claimant and the Respondent on this issue, there was notably a breakdown in communication between the parties over the duration of the home improvement work, which was only exacerbated by the Claimant's belief that he was being overcharged and taken advantage of by the Respondent, who had been his friend for over thirty years. To that end, I find the Claimant's reluctance to engage the Respondent further regarding completion or remediation of the home improvement work to be reasonable under the circumstances, and I do not find that the Claimant rejected the Respondent's alleged efforts to resolve the claim.

The Amount of the Claimant's Loss

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 some work under the contract, and the Claimant retained another contractor 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).

Using this formula, the Claimant's actual loss would be calculated as follows:

Total amount paid to the Respondent:	$25,580.00
Plus amount paid to Josh Wisneski	$13,200.00
Plus amount paid to Tim Deese	$ 500.00
Plus amount paid to Glen Petty	$ 600.00
Total paid for project:	$39,880.00
Minus original Contract price	$25,580.00
Actual loss:	$14,300.00

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). In this case, 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 to recover his actual loss of $14,300.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of $14,300.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405; COMAR 09.08.03.03B(3)(C). I further conclude that the Claimant is entitled to recover that amount from the Fund.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant $14,300.00; 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.

November 19, 2019
Date Decision Issued

[redacted]
Krystin J. Richardson
Administrative Law Judge

KJR/dlm
#182894

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

PROPOSED ORDER

WHEREFORE, this 18th day of December, 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.

Joseph Tunney

Joseph Tunney
Panel B
Chairman
MARYLAND HOME IMPROVEMENT COMMISSION