

IN THE MATTER OF THE CLAIM
OF REBECCA LEWIS,
CLAIMANT,
AGAINST THE MARYLAND
HOME IMPROVEMENT
COMMISSION GUARANTY FUND
FOR THE ACTS OR OMISSIONS
OF MINNIE BAILEY,
T/A FIVE STAR CONCRETE
CONSTRUCTION, INC.,
RESPONDENT

* BEFORE LATONYA B. DARGAN,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
*
*
*
*
*
* OAH No.: DLR-HIC-02-19-07000
* MHIC No.: 18 (75) 31

* * * * *

PROPOSED DECISION

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

STATEMENT OF THE CASE

On May 2, 2018, Rebecca Lewis (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$20,800.00 in actual monetary losses allegedly suffered as a result of the acts or omissions of Minnie Bailey (Respondent), t/a Five Star Concrete Construction, Inc., the alleged responsible home improvement contractor. Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015).¹ On March

¹ Unless otherwise noted, all references to the Business Regulation Article of the Maryland Annotated Code are to the version published in the 2015 Replacement Volume and the 2018 Supplement.

6, 2019, the MHIC ordered the Claimant should have a hearing to establish eligibility for an award from the Fund, and forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On April 8, 2019, I conducted a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. § 8-407(e). The Claimant represented herself and was accompanied by her husband, Ian Lewis. Hope Sachs, Assistant Attorney General, Department of Labor, Licensing, and Regulation (DLLR), represented the Fund. No one appeared on behalf of the Respondent.

I noted on the record the following information: A Notice of Hearing (Notice) was issued by the OAH to the parties at their addresses of record on March 7, 2019; the Notice advised the parties the matter was scheduled for hearing on Monday, April 8, 2019 at 9:30 a.m. at the OAH; and the Notice further advised the parties that failure to appear for the hearing could result in dismissal of the case, or an adverse decision against the party failing to appear.

The Claimant's and Respondent's copies of the Notice were sent to them via regular first-class mail and certified mail-return receipt requested.² Neither of the copies of the Notice sent to the Respondent were returned to the OAH as undeliverable by the United States Postal Services. None of the parties requested a postponement of the hearing. Accordingly, I deemed the Respondent to have failed to appear under Code of Maryland Regulations (COMAR) 28.02.01.23A, and I proceeded with the hearing in the Respondent's absence.

The contested case provisions of the Administrative Procedure Act, the DLLR's hearing regulations, and the Rules of Procedure of the OAH govern procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2018); COMAR 09.01.03 and 28.02.01.

² Ian Lewis signed the certified mail return receipt for the Claimant's copy of the Notice on March 11, 2019 and the OAH received the return receipt on March 20, 2019.

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 for the Claimant:

- Cl. Ex. 1: Photograph of framing, taken September 2016
- Cl. Ex. 2: Photograph of one side of rear steps, taken September 2016
- Cl. Ex. 3: Photograph of other side of rear steps, taken September 2016
- Cl. Ex. 4: Photograph of concrete drops on driveway, taken September 2016
- Cl. Ex. 5: Photograph of patio staining, taken September 12, 2016
- Cl. Ex. 6: Photograph of concrete drops on patio, taken September 12, 2016
- Cl. Ex. 7: Photograph of cracks in patio, taken May 2017
- Cl. Ex. 8: Photograph of discarded railroad ties and debris, taken May 10, 2017
- Cl. Ex. 9: Email from Minnie Bailey to Claudia Lewis, August 29, 2016, with attached contract
- Cl. Ex. 10: Photograph of framing, taken May 10, 2017
- Cl. Ex. 11: Photograph of framing, taken May 10, 2017
- Cl. Ex. 12: Copies of cancelled checks, August 24, 2016; August 29, 2016; September 8, 2016; October 13, 2016; and December 10, 2016
- Cl. Ex. 13: Service Contract, Armor Prep Coatings, LLC, June 11, 2017, with attached cancelled check
- Cl. Ex. 14: Proposal, Stampcrete of Maryland, Inc., March 30, 2018

I admitted the following exhibits for the Fund:

- Fund Ex. 1: Notice of Hearing, issued March 7, 2019
- Fund Ex. 2: Respondent's Licensure Information
- Fund Ex. 3: MHIC's Letter to the Respondent, May 2, 2019

No exhibits were offered for the Respondent.

Testimony

The Claimant testified and did not present other witnesses. The Fund did not present witnesses.

FINDINGS OF FACT

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

1. At all relevant times, the Respondent was a home improvement contractor licensed by the MHIC.
2. On or around August 25, 2016, the Claimant entered into a contract (Contract) with the Respondent for the Respondent to perform the following work at the Claimant's residence (Residence) in New Windsor, Maryland, specifically, on the front yard and the back patio:
 - Remove railroad ties³ and haul them away
 - Form and pour approximately twenty new concrete steps and a sidewalk from the front porch to the driveway per custom design
 - Remove existing patio pavers and stack on side of the house
 - Prep and pour new concrete patio, approximately 35' x 20'
 - Form and pour approximately twelve new concrete steps and a sidewalk from the patio to the driveway
 - All concrete to be stamped and dyed with Italian Slate stamp pattern, with light tan and medium brown color, and with a dark brown border included.
3. The Respondent provided a completion estimate for the job of approximately two weeks, weather permitting, with the work to commence during the first week of September 2016.
4. The total Contract price was \$20,000.00, with a third of the cost due as a deposit, a third due at the commencement of the project, and the balance due on the day of completion.
5. The Claimant made the following payments⁴ to the Respondent under the Contract: \$6,800.00 on August 24, 2016; \$6,000.00 on August 29, 2016; \$1,500.00 on September 8, 2016; \$800.00 on October 13, 2016; and \$2,000.00 on December 10, 2016.
6. The Claimant paid the Respondent a total of \$17,100.00 under the Contract, with approximately \$12,800.00, or two-thirds of the price, paid by August 29, 2016.

³ A railroad tie is a rectangular support, generally made of wood, for the rails in railroad tracks. They are generally laid perpendicular to the rails. They transfer loads to the track ballast and subgrade, hold the rails upright, and keep them spaced to the correct gauge. "Railroad Tie," WIKIPEDIA.ORG, https://en.wikipedia.org/wiki/Railroad_tie (last accessed June 26, 2019).

⁴ Four checks totaling \$15,100.00 were written by Claudia Silvia, the Claimant's mother-in-law. One check totaling \$2,000.00 was written by the Claimant.

7. On or around August 29, 2016, Dwayne Bailey, the Respondent's husband, began work at the Residence. Mr. Bailey removed the railroad ties and left them in the side yard rather than hauling them away.

8. On or around August 30, 2019, Mr. Bailey poured the concrete for the patio and its sidewalk, but did so in a manner where there were visible sections of clumped rather than smooth concrete throughout the patio and sidewalk surfaces. When the Claimant's husband asked Mr. Bailey to smooth out and clean up the patio and sidewalk surfaces, Mr. Bailey indicated he would do so, but asked for an additional \$2,000.00. The Claimant was not willing to pay an additional \$2,000.00, as the Contract called for the final third of the its price to be paid only upon completion of the job.

9. Mr. Bailey never cleaned up the patio and sidewalk surfaces as requested by the Claimant.

10. Over the course of the next three months, Mr. Bailey continued to ask the Claimant for the additional \$2,000.00, even though the final payment was not due until the work was completed.

11. Mr. Bailey erected the forms for the front steps and the front sidewalk on or around October 11, 2016. The concrete for the front steps and the front sidewalk was never poured.

12. The discarded railroad ties remained in the Claimant's yard until approximately December 10, 2016; when Mr. Bailey came to remove them only on the condition the Claimant pay him the additional \$2,000.00.

13. The Claimant did not hear from the Respondent, nor did the Respondent perform any work at the Residence, between December 10, 2016 and February 21, 2017. On February 21, 2017, the Respondent, through Mr. Bailey, contacted the Claimant to arrange a time for the pouring of the concrete for the front steps and the sidewalk. The Claimant advised Mr. Bailey

they would have to wait for her mother-in-law, who was financing the majority of the project, to return from a vacation out of the country sometime in mid-March 2017. The Claimant and Mr. Bailey then agreed on the date of April 24, 2017 for the Respondent to complete the job.

14. The Respondent did not come to the Residence on April 24, 2017 to perform any work. When the Claimant attempted to reach Mr. Bailey via telephone, his voicemail inbox was full and she was unable to leave a message. At approximately 5:00 p.m. on April 24, 2017, Mr. Bailey called the Claimant to advise he would not be able to work at the Residence and they would have to re-schedule. They agreed on a new date of May 10, 2017.

15. On May 9, 2017, the Claimant contacted Mr. Bailey and inquired about what time she could expect him at the Residence on May 10, 2017. Mr. Bailey advised the Claimant he needed an additional \$4,000.00 to \$5,000.00 to pick up supplies for the "staining" of the patio, steps, and sidewalk. When the Claimant advised she would not pay any more money until the job was completed to her satisfaction, Mr. Bailey advised her he "would call her if he could make it," and hung up on her. (Testimony, Claimant.)

16. The Claimant's attempts to call Mr. Bailey back on May 9, 2017 were unsuccessful as he would not answer his phone. She sent a text message in which she advised Mr. Bailey it was not acceptable to state he would call her back only if he could make it. She indicated they needed to select another date on which the job could be completed. Mr. Bailey did not respond to the text message. The Claimants had no further contact with the Respondent or any of its representatives after May 9, 2017.

17. As of May 9, 2017, the concrete for the front steps and front sidewalk was not poured, the patio and its sidewalk had areas of visibly clumped concrete on their surfaces, and cracks had developed in sections of the patio and its sidewalk.

18. On June 11, 2017, the Claimant entered into a contract with Armor Prep Coatings, LLC (Armor), an MHIC-licensed contractor to perform the following work within the scope of the Claimant's original contract with the Respondent:

- Finish framing and prepping front steps and landing to be poured
- Pour new steps, tan in color, with a seamless stamped design similar to the rear patio
- Seal finished steps and landings with non-slip additive

19. The total price of the Armor contract was \$3,700.00, of which the Claimant paid \$1,900.00 upon signing the contract on June 11, 2017, with the balance due upon completion of the work.⁵

20. The Claimant obtained an estimate from another MHIC-licensed contractor, Stampcrete of Maryland, Inc. (Stampcrete). The estimate was for Stampcrete to remove the existing patio and adjacent sidewalk installed by the Respondent, and to install a patio and adjacent sidewalk which met the specifications of the Contract, including proper staining, uniform color, and uniform surface. Stampcrete's estimate to complete the work was \$13,750.00.

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); 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)).

⁵ The Claimant testified the Armor contract was completed and paid for by the end of June 2017.

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.” Bus. Reg. § 8-401. For the following reasons, I find the Claimant has proven eligibility for compensation.

It is undisputed that the Respondent was a licensed home improvement contractor at the time it entered into the Contract with the Claimant on August 25, 2016 and at all times during which Mr. Bailey, as the Respondent’s representative, performed work at the Residence. *See* Fund Ex. 2, p. 2. The evidence presented overwhelmingly demonstrates much of the work was not completed by the Respondent as contemplated under the Contract, and of the work that was completed, namely the patio, it was substandard in quality. The Respondent simply never poured the concrete for the front steps and the front sidewalk, and left the framing materials at the Residence for months. The surface of the patio and its adjacent sidewalk contained clumps of dried concrete, and it was not stained in a uniform manner as contemplated by the Contract. By May 2017, cracks had developed in the patio surface. *See* Cl. Exs. 1, 4, 5-7, and 10-11.

The Claimant testified credibly and persuasively about the difficulty she had in dealing with the Respondent, including extended periods with no contact with Mr. Bailey and no work being performed at the Residence. Additionally, the Claimant was frustrated by Mr. Bailey’s insistence on being paid additional money before the job was completed, despite the parties’ agreement under the Contract that the balance of payment would be made when the job was completed. The Claimant was patient with the Respondent despite her frustration, and clearly gave the Respondent, via Mr. Bailey, multiple opportunities to complete what should have been

a straight-forward, roughly two-week project. After the Respondent essentially abandoned the project on or around May 9, 2017, the Claimant had to hire another contractor, Armor, to complete some of the work specified in the Contract (the front steps and sidewalk). Cl. Ex. 13. The Claimant also obtained an estimate from another contractor, Stampcrete, to repair the substandard work done by the Respondent on the patio and adjacent sidewalk. Cl. Ex. 14.

Based on the evidence, I find the Claimant has demonstrated the Respondent performed an inadequate, incomplete, and unworkmanlike home improvement and she is, therefore, eligible for an award from the Fund. Having found the Claimant eligible for an award from the Fund, I must determine the amount of the Claimant's actual loss and the amount, if any, 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). The MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work. COMAR 09.08.03.03B(3).

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).

Applying the formula set out above leads to the following results:

Amount paid to the Respondent	\$17,100.00 ⁶
+ Amount paid to correct or complete the work	<u>\$17,450.00⁷</u>
	\$34,550.00
- Amount of original contract	<u>\$20,000.00⁸</u>
Amount of actual loss	\$14,550.00

The Business Regulation Article caps a claimant's recovery at \$20,000.00 for the 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 of \$14,550.00 is less than the statutory maximum and less than the actual amount paid by the Claimant to the Respondent. The Claimant is therefore entitled to an award from the Fund in the amount of \$14,550.00.

PROPOSED CONCLUSIONS OF LAW

Based on the Findings of Fact and Discussion, I conclude as a matter of law the Claimant has sustained an actual and compensable loss of \$14,550.00 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 the Claimant is entitled to recover an award in the amount of \$14,550.00 from the Fund. Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a).

⁶ See Cl. Ex. 12

⁷ See Cl. Exs. 13-14

⁸ See Cl. Ex. 9

RECOMMENDED ORDER


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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$14,550.00; 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;⁹ and

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

July 1, 2019
Date Decision Issued



Latonya B. Dargan
Administrative Law Judge

LBD/cmj
#180709

⁹ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 31st day of July, 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