IN THE MATTER OF THE CLAIM	*	BEFORE KIMBERLY FARRELL,
OF RICHARD & LESLIE MELZER,	*	AN ADMINISTRATIVE LAW JUDGE
CLAIMANTS,	*	OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	*	OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	*	
FOR THE ALLEGED ACTS OR	*	
OMISSIONS OF CHARLES EVERS,	*	
JR., T/A EVERS HOME	*	OAH No.: DLR-HIC-02-19-16989
IMPROVEMENTS,	*	MHIC No.: 18 (90) 363
RESPONDENT	*	

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

PROPOSED DECISION

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

STATEMENT OF THE CASE

On February 12, 2018, Richard and Leslie Melzer (Claimants) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of $27,400.00 in actual losses allegedly suffered as a result of a home improvement contract with Charles Evers, Jr., trading as Evers Home Improvements[1] (Respondent). Md. Code Ann., Bus.

[1] The company is referred to in various ways in different documents in evidence, such as C. Evers Home Improvement Inc., Evers Home Improvements, C. Evers, etc. The variations on the business name do not impact this proposed decision.

Reg. §§ 8-401 through 8-411 (2015).[2] On May 30, 2019, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on August 16, 2018, at OAH's offices at 11101 Gilroy Road in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. § 8-407(e). Andrew Brouwer, Assistant Attorney General, Department of Labor (Department),[3] represented the Fund. Michael J. Moran, Esquire, represented the Claimants, who were present at the hearing. 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 Claimants 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 Claimants' behalf[4]:

Exhibit No. 1	Resume of Claimants' expert witness, C. Stephen Klitsch[5]
Exhibit No. 2	Contract between the Claimants and the Respondent, April 27, 2016
Exhibit No. 3	Document entitled, "Changes/Adds/Credits," undated
Exhibit No. 4	Contractor's Invoice, June 22, 2016
Exhibit No. 5	Warranty/Contractor's Invoice, July 5, 2016
Exhibit No. 6	Documents regarding draws and payments, various dates

[2] References to the Business Regulation Article are to the 2015 volume and the 2019 Supplement.
[3] On July 1, 2019, the Maryland Department of Labor, Licensing and Regulation became the Department of Labor.
[4] The Claimants' exhibits had face sheets and were pre-marked as Exhibit No. 1 through Exhibit No. 12. Claimants' Exhibit No. 13 was offered and admitted at the hearing, but does not have a face sheet. Claimants' Exhibit No. 14 was submitted after the hearing. It had been discussed as a potential exhibit during the hearing. Neither the Respondent nor the Fund objected after I sent correspondence about this exhibit and I have admitted it as well.
[5] Mr. Klitsch's full name is Charles Stephen Klitsch, but he goes by Steve Klitsch.

Exhibit No. 7	Home Inspection Report authored by Steve Klitsch, Home Improvement Consultant, October 28, 2016
Exhibit No. 8	List of work alleged to be "unfinished, sub-standard, or incomplete," December 10, 2016
Exhibit No. 9	Construction Costs Summary, January 15, 2018
Exhibit No. 10	Code Compliance Analysis, July 26, 2019
Exhibit No. 11	Home Inspection Report, May 16, 2017[6]
Exhibit No. 12	Home Inspection Report, April 25, 2017
Exhibit No. 13	Actual Loss Calculation, undated[7]
Exhibit No. 14	Itemized costs for tasks listed in Exhibit No. 8, August 16, 2019

I admitted two of the three exhibits offered by the Respondent:

RESP No. 1	Letter, "To Whom it May Concern," on letterhead of RE/MAX First Choice, August 16, 2019[8]
RESP No. 2	Not admitted[9]
RESP No. 3	A version of the contract (unsigned)

I admitted the following exhibits on behalf of the Fund:

FUND No. 1	Hearing Order, May 24, 2019
FUND No. 2	Notice of Hearing, June 21, 2019
FUND No. 3	Letter from the MHIC to the Respondent, February 22, 2018, with attached Home Improvement Claim Form, February 12, 2018
FUND No. 4	MHIC Licensing records for the Respondent (license #01-83053 and his business (license #05-121473)

Testimony

The Claimants presented the testimony of Charles S. Klitsch, whom I accepted as an expert in home improvement, the adequacy and workmanlike nature of home improvement, and costs and estimation of home improvement repair. The Claimants, though both present, did not testify.

The Respondent testified on his own behalf.

The Fund did not call any witnesses.

---

[6] Claimants' Exhibits Nos. 11 and 12 were admitted subject to the caveat that they were not admitted for nor should I accept as factual any expert opinions expressed by the authors in the reports.
[7] In Claimants' Exhibit No. 13, under Roman numeral II, the date of the supplemental report should read July 29, 2019, rather than July 29, 2018.
[8] This exhibit was admitted subject to striking the portion that indicated that the author was a co-owner of the business named on the letterhead and striking the last paragraph.
[9] The exhibits that were not admitted are marked for identification and in the file.

Stipulations

The parties stipulated that item number 1 on the Code Compliance Analysis in evidence as Claimants' Exhibit No. 10 was part of the scope of work included in the original contract.

The parties further stipulated that the Claimants were not the spouse or other immediate relative of the contractor; employees, officers, or partners of the contractor; or immediate relatives of any employee, officer, or partner of the contractor. They stipulated that at the time they made the claim, the Claimants did not own more than three residences or dwelling places. They stipulated that there were no State or federal actions pending regarding this case; and that the Claimants had not received any insurance monies as the result of a claim arising out of these facts.

I accepted all of these stipulations.

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 01-83053 (for the Respondent as an individual) and 05-121473 (for his business).

2. On April 27, 2016, the Claimants and the Respondent entered into a contract for home improvement work at 7554 Battle Grove Circle, Baltimore, Maryland 21222.[10]

3. The Claimants intended to sell the property and they wanted to strategically make home improvements designed to keep their expenses relatively low while maximizing the price they could get for the property. They made the Respondent aware of their goals. The Respondent walked the entire property with the Claimants and they discussed what work would best fit these goals. The Claimants were either not willing or not able to invest enough money to make all the

[10] The MHIC claim form filed by the Claimants lists July 5, 2016, as the date of the original contract, but the contract document bears a date of April 27, 2016, and Claimants' Exhibit No. 6 documents payment of $9,500.00 on or about April 28, 2016, so I have determined the contract date to be in April rather than July.

repairs noted in the walk-through of the property. Additionally, after work began, problems that were not evident at the time of the initial walk-through became apparent. The Claimants were either not willing or not able to invest enough money to repair all the additional items identified during the course of the home improvement project, although the scope of work was expanded to include some of these issues.

4. Based on his interaction with the Claimants, the Respondent prepared multiple proposals. The Respondent considered one to be high-end; it included more work and higher-end finishes. There were one or two other proposals. The Claimants chose what the Respondent considered to be a mid-range proposal - a three-page document which was eventually signed by both Claimants and the Respondent and came to be the contract.

5. The contract was vague in places, making it difficult to determine the precise scope of work contemplated by the parties. It lacked the type of specifics and details generally appropriate for a home improvement contract, such as the names of specific products that were to be used or allowances to be given. There were no products, model numbers, or manufacturers designated for any of the appliances the Respondent was to provide.

6. The contract called for work as follows[11]:

Exterior

- Replace rotten, peeling paint around garage doors and windows with new trim and bright white exterior paint and caulk – $390 labor and material
- Clean up entire yard (rake, trim, cut, edge), drop fresh stone in [illegible] area and take down fence at water's edge. Remove all things impeding view of water, put fresh mulch in all flower beds – $315
- Reinforce small area of decking used to walk over gulley – no charge
- Put matching railings on steps walking into house and stain/seal entire deck – $1,195

[11] Some of the work items contained options which affected the price. The contract language in this Proposed Finding of Fact is substantially the same as it appears in the contract, but I have made a few stylistic changes. For example, I have added commas in numbers over $999 and I have changed some phrasing for clarity.

- Patch siding and silicone, remove glass block in kitchen and frame up, fill in – $650 labor and material

- Replace rear door with better style and paint/seal, new brushed nickel hardware – $795 labor and material

Interior

- "Demo/clean up-remove carpet wall, we discussed, remove [wainscoting], old lights etc., remove rear wall and bedroom wall – $1,300"[12]

- Frame – minor framing as discussed with master bedroom with wall in closet, remove glass block in kitchen and frame in – $1,175

- Bathroom 1st floor – complete gut and install new basic standard tub, 24" vanity and toilet. Use 12"x12" ceramic tile in standard pattern on floor and tub surround, install some matching 6'x8" [sic] tiles with 2 recessed soap boxes approx. 12'x12" [sic] with recess 4" – 5", install new toiletries with Nu-Tone vent - $3,895 labor – owner to supply tile

- Flooring

  - Option 1 – we will install new sub-floor throughout and level the best we can and install laminate (wood floor look) throughout entire first floor – $2,900 labor and material + *1,705*[13]
  - Option 2 – install standard carpet throughout – $1,195 labor and material

- Kitchen

  - Option 1 – Gut kitchen in basement and move up to first floor in rear back room. This will require having to level and raise the [illegible, probably the word is "ceiling"], remove window except one large window over sink and use entire rear as wrap around – $7,700 labor and material + *6,210*[14]
  - Option 2 – Leave kitchen in basement but fill in glass block and have cabinets top/bottom added to existing – $1,490

- Counters

  - Option 1 – Upgrade to granite grade C with under mount sink with new faucet – $1,600 + *850*[15]
  - Option 2 – Formica with sink and faucet install – $750

- Change out floor in kitchen to ceramic tile 18"x18" in standard pattern for new look – $950 labor, owner to supply tile

---

[12] This bullet point is quoted exactly as it appears in the contract.
[13] The italicized material is handwritten in what is otherwise a typed document.
[14] The italicized material is handwritten in what is otherwise a typed document.
[15] The italicized material is handwritten in what is otherwise a typed document.

- Backsplash – this will make kitchen look very good but is option[16]

- Basement – if we move kitchen, I recommend putting new carpet (grade D Berber) and fresh paint – $1,100[17]

- Powder Room – ¼' [sic] drywall over walls and ceiling, standard tile in standard pattern for ceramic tile 12"x12", change out toilet and vanity – $1,200 labor and material

- Drywall – we will hang approx. 38 sheets throughout to include hang, finish, sand and prime ready for paint – $2,500 (if additional sheets required, price will increase)

- Paint – prime out entire house, paint all ceilings, trim and walls (neutral color, same throughout) – $2,850 labor and material

- *Plumbing – As discussed, we have to repair or **bring to code** in utility room, set new toilets, 2 vanities, shower diverter, new faucets, garbage disposal – $850*[18]

- Electric – will have electrician inspect all existing electric, hang new lights as needed, rough in new kitchen if you choose that option, install new GFI's where needed in kitchen/bathrooms – $1,375 – lights not included

- Misc. – install brushed nickel interior door knobs, 2 exterior matching knobs (keyed same), and metal shelving in closet, set toiletries in bathroom and powder room – $575

- Trim – install standard 2 ¼" base throughout, install 6 panel interior doors (4) where they are not matching, bi-fold door on closet openings x3, caulk ready for paint – $1,600

7. After the list of work and options, the contract reads, "Total – $26,150 includes cheapest options in areas that have options to choose from." It then has handwritten:

1) 1,700 upstairs sub floor all laminate

2) 6,200 move kitchen upstairs

3) 850 granite

[16] No price is listed for labor or material for this line item.
[17] On the contract, there is a handwritten line drawn from this item with a question mark and the word "Stairs."
[18] Emphasis added. This particular provision is discussed below.

followed by a total of $34,900.00. This indicated that the Claimants had chosen the more expensive options for these items and that with these options the total contract price was $34,900.00.[19]

8. The contract included the following notification:

> *All proposals are estimates and prices may change if additional or unexpected issues arise. Upon agreeing to this proposal, a signature will be required with half of the total amount down to begin the project. The remaining balance to be paid within 24 hours of completion of the job, unless other arrangements are made and signed off on by the Client and C. Evers Home Improvements. Any and all adds requested by Client, not listed on this proposal, must be paid in full in order to begin the work on those items. This proposal is valid for 30 days from receipt of email from C. Evers Home Improvements. We accept payment in the form of cash/check/[Visa]/MC. If paying with Visa/MC, there will be a 3% surcharge in addition to your total. We thank you for your consideration.*

Claimants' Exhibit No. 2.

9. There were many changes after the original contract. Some or all of them were loosely tracked on pre-printed Contractor's Invoice forms that were hand-labeled as "changes/adds/credits," "invoice/warranty," or not labeled. These contained a variety of things – statements of items that had been completed, explanations of why changes were made, either in the scope of the work or the monetary charges, account balances at unspecified times, requests or suggestions for splitting unexpected expenses and labor costs, summaries of findings of master tradesmen who inspected the property, and other notes. Most of these are not signed by either party and most notations do not include any date.

10. The cost of the kitchen appliances purchased by the Respondent and installed in the property was $1,602.72.

[19] The $1,700.00 and $6,200.00 were slightly rounded down from the numbers appearing for the options in the scope of work listing.

11. When the Respondent delivered a new refrigerator, the Claimants were dissatisfied with it because it was too small and the Respondent returned it to the store and delivered a new one to the property.

12. The reasonable cost of the products and fixtures purchased by the Respondent and installed in the property other than kitchen appliances was $11,000.00.[20]

13. A reasonable estimate of the labor costs to complete the original contract at the time it was signed in 2016 is $19,958.54.

14. The total job costs, including the kitchen appliances, the products and fixtures, and labor costs add up to $32,561.26. National industry standards for these types of home improvement contracts add 20% to the total job costs to account for overhead and profit. Thus, the amount that would be added to this contract to account for those items would be $6,512.25. Adding these two numbers together yields the selling price of the job, $39,073.51, which is the figure a reasonable contractor and a reasonable home owner could be expected to agree upon for the scope of work contemplated by the original contract.

16. The Claimants paid the Respondent $45,500.00 in total.[21] The last payment was made July 11, 2016. The total payment included money for work that was not contemplated by the original contract.

17. The Claimants hired a well-qualified home improvement consultant to evaluate the work done on the property. He inspected the property sometime on or before October 28, 2016, and he produced reports dated October 28, 2016 and December 10, 2016, identifying fifteen unworkmanlike, inadequate and incomplete conditions existing when the Claimants made their

[20] This includes charges for two dumpsters.
[21] Some of the evidence suggests the total was $45,400.00, but I find by a preponderance of the evidence that it was $45,500.00.

last payment to the Respondent. Those items are as follows[22] (the numbers following each item are the reasonable costs for labor and materials to repair, correct, or complete the deficiencies):

1. Not within the scope of work contemplated by the original contract.[23]
2. The bathroom tile surround in the tub area should have been caulked, and either bullnose tile or metal edging should have been installed to give a properly finished look. Also, the sink top backsplash should have been caulked to the wall. $551.03
3. Touch-up painting was needed in several areas due to there being wall paint on the ceiling or ceiling paint on the wall. Additionally, touch-up painting was needed around several electric cover plates. $470.00
4. Of the four windows in the living room, three included picture frame molding and one had drywall returns. Picture frame molding should have been installed around the window with drywall returns. $391.19
5. For the middle bedroom window, the drywall return at the top of the window was not level and sloped to the right. The drywall should have been placed in a level positon and the paint around it should have been touched up. $703.15
6. The railing at the stairs was supposed to be stained but was instead painted. That railing needed to be stripped of paint, properly prepared for staining, stained, and varnished. $584.30
7. The glass block window in the basement needed to be remove[illegible] filled in with solid material and insulation. The exterior sho[illegible] made weather tight, with the interior area finished with drywall and pa[illegible] blend. $2,312.57
8. A missing cover plate from a light switch on a column in lower level needed to be installed. $45.32
9. The kitchen backsplash should have been caulked to the wall. $126.84
10. There was some missing shoe molding in the basement bathroom that should have been installed. $135.24
11. Recessed light trims in the basement ceiling needed to be painted to blend as closely as possible with the ceiling and the light fixtures. $145.56
12. In several instances, molding details were inconsistent with related molding finishes. These should have been replaced to create a unified look. Also baseboard returns needed to be installed at a bedroom door jamb. $975.86
13. Some places painted white on the exterior of the home had an uneven look to them (some areas looked lighter than others) and there should have been an

---

[22] The Claimants submitted Claimants' Exhibit No. 8 at the hearing. It listed fifteen alleged deficiencies, numbered as 1-15. After the hearing, the Claimants submitted Claimants' Exhibit No. 14. It contained the material from Exhibit 8, as well as an additional page that listed the costs associated with each of the numbered items 1-15. I find that not all of the items were within the scope of the original contract, but for ease of discussion and cross-referencing among the documents, I am leaving the items as originally numbered, rather than shortening the list and changing the ordinal numbers assigned to them in the Claimants' exhibits.

[23] Item one alleged that the front deck entry had a split or broken rail which needed to be replaced and painted to blend in. The cost to repair this would be $446.95. The Claimants' expert testified that this item was not within the scope of the original contract, but he believed that it was an eyesore that detracted substantially from the curb appeal of the property. He believed that it could have been and should have been addressed given the Claimants' goals. The Respondent advised that he saw it and brought it to the attention of the Claimants, but that they decided to address other items instead.

additional application of white exterior paint to exterior surfaces. There was also some caulking that needed to be completed. $842.91

14. The rear deck was low enough that it did not require a railing, so the railing and the posts supporting it were removed. When the rear deck railing posts were cut, they were not cut flush with the deck, leaving trip hazards and cut posts sticking up. These posts needed to be cut flush with the existing deck planks and should have been stained to blend in with the deck. $125.00.
15. In a certain area of the yard, the contract called for the Respondent to "drop fresh stone." He used aggregate marble chips which was not an appropriate product for this particular area of the yard due to it being a low-lying area that flows into a nearby river. The Respondent should have installed large river rock instead of the marble chips. The marble chips should have been removed and large river rock should have been installed. $739.65

18. The total for repairing, replacing, or completing items 2 – 14 above is $8,109.52.[24]

19. In 2017, the Claimants had their home improvement consultant return to the property to conduct an additional inspection because they had come to believe, based on home inspection reports, that there were additional instances of incomplete, inadequate, or unworkmanlike home improvements performed by the Respondent in 2016.

20. In 2019, the home improvement consultant produced a Code Compliance Analysis, which he based on his 2017 inspection and one of the home inspection reports produced in 2017. This listed seven areas the consultant identified as failing to meet relevant building code requirements at the time the Claimants made their last payment to the Respondent (again, the dollar amount following each is the reasonable amount to repair or complete the item):

1. The front entrance stair risers were too high. $495.90
2. The hot and cold plumbing fixtures in the powder room and the laundry were reversed. They were reversed prior to the Respondent's work and continued to be reversed at the time of the Claimants made their last payment to him. $549.48
3. There were problems with the sump pump, allegedly including the way discharge was set up, the lack of an accessible full check valve, and a lid that was not sealed. These items were not within the scope of the original contract.

[24] The Claimants' total for the repairs is $8,556.47. The total in this Proposed Finding of Fact is lower because I excluded $446.95 for item number one on the list – the split or broken front deck rail that was not part of the scope of work included in the original contract.

4. Electrical service conductors cleared the roof by less than three feet, creating a potential safety hazard. This item is not within the scope of the original contract.
5. There were numerous issues in and around the electrical panel, including rust and corrosion, wiring issues, frayed sheathing, and loose wires. This item is not within the scope of the original contract.
6. Four "three-prong" plugs were improperly wired.[25]
7. Certain exterior outlets were not functional and certain outlets in a garage were not GFCI protected. These items are not within the scope of the original contract.

21. The original contract did not have a draw schedule or payment plan, other than to require that 50% of the total proposal be paid before work would begin. The Claimants paid the Respondent when he requested that they do so. They did not withhold money or report any deficiencies when making the final payment, nor did they contact the Respondent to complain about any of the alleged deficiencies in his work.

22. The Claimants sold the property.[26]

23. The Claimants did not solicit any contractors to repair or complete the work contemplated under the original contract.

DISCUSSION

In this case, the Claimants have 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).[27] "[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)).

[25] This item is further discussed below.
[26] The date the property was sold is not a part of the evidence or record in this case.
[27] As noted above, "COMAR" refers to the Code of Maryland Regulations.

Owners may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor." Md. Code Ann., Bus. Reg. § 8-405(a); *see also* COMAR 09.08.03.03B(2) ("actual losses . . . incurred as a result of misconduct by a licensed contractor"). "'[A]ctual loss' means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." Md. Code Ann. Bus. Reg. § 8-401. The Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimants and he performed unworkmanlike, inadequate or incomplete home improvements. This case is complicated by several factors, but, ultimately, I find that the Claimants have not proven the value of the services provided by the Respondent and accordingly I am unable to determine the amount of any appropriate award.

The Claimants' expert was well qualified. Mr. Klitsch has been in the home improvement industry for forty years and he has been licensed by the MHIC since 1979. He is the owner and founder of a home improvement company. Ninety-five percent of the company's business involves residential remodeling and approximately 5% of the business involves remediating inadequate, incomplete, or unworkmanlike home improvement left behind by other contractors. Mr. Klitsch is knowledgeable in all phases of residential remodeling, including estimating. He prepares estimates when his company is bidding on home improvement projects. He also teaches and lectures on home improvement issues across the country and he has authored articles for respected journals in the home improvement field. He has held and currently holds leadership positions in well-regarded professional associations. I accepted him as an expert in the adequacy of home improvement repair, the workmanlike character of home improvement work, and costs and estimation of home improvement repair.

Before I get to the heart of his testimony, I note that his reports and his testimony identified several areas where the contract failed to meet statutory requirements – among other

things, it failed to have a start date or a projected completion date for the project; it failed to contain certain consumer protection notifications; and it required a down-payment in excess of that allowed under Maryland law. None of those issues are before me. The MHIC did not bring regulatory charges and there is no evidence that any of these failings prejudiced the Claimants in any way. These issues do not go to the questions of whether the Respondent was a licensed home improvement contractor, whether his work was inadequate, unworkmanlike, or incomplete, or how to calculate the Claimants' actual losses. Accordingly, I will not further address any of these matters.

The expert also testified repeatedly that he thought the Claimants overpaid for the contract, saying, for example, that they "did not get the right value for what they invested"; that the Claimants were disappointed with the home improvement performed by the Respondent; and that in light of the Claimants' goals, the original contract should have addressed different substantive items, such as the split or broken railing at the front of the home. These concerns are also not before me, and, even if true, they do not represent compensable losses as those are defined for Fund cases. I will not address these assertions.

With respect to the original contract, Mr. Klitsch testified persuasively that it was vague by industry standards. Even with his expertise and having visited the property, it was difficult for him to discern what scope of work the original contract intended. It was poorly drafted, poorly organized, and lacking details and specifics. With minor exceptions, it did not name the products to be used in completing the work. For the appliances, it did not specify brand names, model numbers, or allowances. Sometimes descriptions of areas where work was to be done were so cursory that it is impossible to determine from the contract where that particular aspect of the project stopped or started inside the dwelling.

This was exacerbated by the materials contained in Claimants' Exhibit Nos. 3, 4, and 5. This running series of undated notes, observations, reports, account information, changes to the scope of work and other miscellany, does little to clarify the original contract or illuminate what changes are referenced or agreed upon after the original contract. The Claimants, the parties with the burden of proof in this matter addressed a very small number of entries in the documents contained in Claimants' Exhibit Nos. 3, 4, and 5. The Respondent, the party who drafted the documents, also testified in very cursory fashion about the content of those documents.

As a consequence, in my analysis of what does or does not fall within the scope of work called for by the contract, I consider the original three-page document in evidence as Claimants' Exhibit No. 2 to be the entire contract under consideration. Further, I consider the original agreed upon contract price of $34,900 to be the number I should use in making calculations, rather than the total amount paid to the Respondent, which was $45,500. This is so because the $45,500 total payment included additional work agreed to by the Claimants but not reflected in the original contract's scope.

Mr. Klitsch testified that the value of the appliances installed in the Claimants' home was $1,602.72, a figure the Respondent did not dispute. Mr. Klitsch determined this by looking at the appliances installed in the home and then finding the prices for the exact same appliances at H. H. Gregg, because that is where the Respondent purchased the appliances. The Claimants have complaints about the overall quality level of the appliances provided by the Respondent, but the contract does not specify any particular manufacturer, model or features that the appliances are required to have. The appliances that were used were not lacking in functionality, they just were very basic. Further, the evidence shows that when the Claimants saw the first refrigerator delivered to the property, they were dissatisfied about its size and complained to the Respondent. He removed the refrigerator from the property and brought a larger one to replace it. The

Claimants could have also refused other appliances that were not to their satisfaction. I accept $1,602.72 as the amount the Respondent paid for appliances installed at the Claimants' home.

The Claimant's expert also determined that aside from the appliances, the reasonable cost of the products and fixtures installed in the Claimants' property by the Respondent was $11,000.00. In his Construction Costs Summary, in evidence as Claimants' Exhibit No. 9, Mr. Klitsch lists the products and fixtures he considered and their costs based on the prices charged at Home Depot around the time of the installation. These included items like kitchen cabinets, flooring, ceiling fans, and many other items. It also included service charges for two dumpsters. Mr. Klitsch was painstaking in all his testimony – about the appliances, about these additional products and fixtures, and about the labor costs I address below – offering details about what reference materials he used, his methodology, and that he was looking at costs and labor for remodeling as opposed to new construction. The Respondent did not dispute any of the figures used by Mr. Klitsch in calculating the costs of the products and fixtures. I accept $11,000.00 as accurate.

Mr. Klitsch also addressed labor costs. In his Construction Costs Summary, in evidence as Claimants' Exhibit No. 9, Mr. Klitsch details the labor costs associated with the work laid out in the contract, as best he could determine the contract's boundaries. Again, in the exhibit and in his testimony, he meticulously explained the resources and methods he used to make the calculations. He arrived at a figure of $19,958.54. His testimony was persuasive and logical and was not challenged by the Respondent. I find that the reasonable labor costs associated with the scope of work in the original contract is $19,958.54.

In his report and in his testimony Mr. Klitsch referenced conversations described to him by the Claimants. First, while acknowledging that there were language barriers complicating communication in these conversations, the Claimants advised Mr. Klitsch that they spoke with workers on their property who identified themselves as day laborers and who advised that they

were being paid $100.00 per day. I do not accept this as reliable evidence. While it is true that hearsay is admissible in administrative proceedings, I find insufficient indicia of reliability surrounding this information to credit it.[28] I am concerned about the degree of the language barrier, about which I know nothing, as well as the circumstances of the discussions. Further, the Respondent directly testified that the workers on the Claimants' job were not day workers.

The Claimants also told Mr. Klitsch that the Respondent told them that he was paying the electrician and the plumber $300.00 per day for their services, a rate that would be very much below expected market rates. Based on these alleged conversations, Mr. Klitsch prepared a revised estimate of labor costs, determining that the labor costs would be reduced from $19,958.54 to $7,000.00. I do not accept $7,000.00 as an accurate labor estimate for the work contemplated by the original contract first, because I do not accept the evidence it is premised on as reliable, and second, and more importantly, it does not matter what the labor costs actually were. Even if the Respondent was paying various workers less than might be expected, that is not an actual loss to the Claimants. The Claimants are entitled to an award against the Fund, if at all, based on unworkmanlike, inadequate, or incomplete home improvement. Who performed the work or how much they were paid is simply not part of the equation.

In his first set of reports, Mr. Klitsch identified fifteen items that represented unworkmanlike, inadequate, or incomplete home improvement. As noted in the Proposed Findings of Fact, the first item on the list was not part of the contract's scope of work and it would not be appropriate to consider any award based on that item. The other fourteen items are fairly contemplated by the original contract and were, in fact, inadequate, unworkmanlike or

---

[28] "Hearsay is admissible in an administrative proceeding. Indeed, if hearsay is found to be credible and probative, it may be the sole basis for a decision of an administrative body." *Redding v. Bd. of County Comm'rs*, 263 Md. 94, 110–11 (1971), *cert. denied*, 406 U.S. 923 (1972). "Even though hearsay is admissible, there are limits on its use. The hearsay must be competent and have probative force." *Kade v. Charles H. Hickey School*, 80 Md. App. 721, 725 (1989); *see also* Md. Code Ann., State Gov't, § 10–208(b) and (c); COMAR 28.02.01.21B and C.

incomplete. The Respondent did not seriously dispute any of the items in this list. The labor and material costs for correcting those fourteen items is $8,109.52.

Much more problematic is the Code Compliance Analysis prepared by Mr. Klitsch more than three years after the project was completed. In the introductory paragraph, Mr. Klitsch advises that the report is intended to identify "deficiencies in and around this property" that represent lack of compliance with relevant building code requirements, particularly with reference to the International Residential Code for One and Two Family Dwellings 2012, commonly known as the IRC. The introduction went on to say:

> The purpose of this analysis is to identify the tasks to bring the house to code compliancy based on a written notation made by [the Respondent] where they used the phrase *"bring to code"* on page 2 of their original contract with a hand written date of April 27, 2016.

Claimants' Exhibit No. 10, pg. 1 (emphasis added).

The Claimants' position, endorsed by Mr. Klitsch in his written compliance analysis as well as his testimony, is that in using the phrase "bring to code" in the contract, the Respondent was affirmatively taking responsibility to bring the entire property into code compliance. This assertion is breathtaking in scope, and strongly refuted by the Respondent. I find the Respondent's position to be more persuasive on this point.

Critically, the contract references "code" only one time. In context, it reads as follows: "Plumbing-As discussed, we have to repair or *bring to code* in utility room, set new toilets, 2 vanities, shower diverter, new faucets, garbage disposal $850." Claimants' Exhibit No. 2, pg.2, (emphasis added). To suggest, as the Claimants do, that this should be interpreted as the Respondent undertaking to bring all aspects of the property into code compliance is an overly broad and unsupportable reading of the contract language.

To be sure, if the Respondent agrees to perform a certain task in the home improvement contract, it must be workmanlike, adequate, and complete. Further, an implied condition of the

contract is that work performed under it must conform to applicable building codes. *Denice v. Spotswood I. Quinby, Inc.*, 248 Md. 428, 433 (1968) (addressing new construction rather than remodeling, but standing for the principle that compliance with building codes is an implied condition of contracts involving residences). Item 1 on the code compliance list complains that the riser height on the front entrance stairs was too high based on IRC requirements. The Respondent stipulated that those stairs were within the scope of the original contract. Accordingly, he was obligated to, but did not, conform the stairs to IRC specifications. The reasonable cost of remediating this condition is $495.90.

Item 2 on the code compliance list reads:

> The hot/cold at the powder room and laundry are reversed. This references the hot and cold supply pipes to these locations are in the opposite or reversed locations. It is a plumbing industry standard that the hot inbound water pipe is on the left side of the drain and the cold inbound water pipe is on the right side of the drain.

Claimants' Exhibit No. 10 (some internal punctuation omitted). Mr. Klitsch testified that this is a safety issue as well as an IRC violation. People expect the hot water to be on the left side. Faucets that are reversed and as a consequence produce hot water when an individual is expecting cold can result in burns. Based on the language quoted above, the Respondent specifically mentioned bringing the faucets and the laundry to code, which he failed to do. The hot and cold were reversed before he undertook home improvement work on the property and they remained reversed when he finished home improvement work on the property. The reasonable cost of correcting this is $549.48.

Item 3 on the code compliance list reads:

> Sump pumps cannot be discharged into the public waste water system. They are required to be discharged to daylight or into a storm water management system. According to the IRC, P3303.1.4 Piping. Discharge piping shall include an accessible full check valve. Furthermore, the sump lid is [not] sealed. In an undated document on page 3, titled Changes/Adds/Credits apparently written by

C. Evers, the contractor, states; Sump Pump and Pit in the powder room is pumped to is illegal.

Claimants' Exhibit No. 10 (some internal punctuation omitted). Nothing in the original contract references a sump pump or exterior drainage. The Claimants conceded that the code violations complained about under this bullet point pre-existed any work by the Respondent and Mr. Klitsch testified that he did not know if the Respondent had done any work on the sump pump or drainage system. On the evidence presented, it is not reasonable to hold the Respondent accountable for the $739.00 it would take to bring the sump pump into compliance with the IRC.[29]

The next two items listed in the compliance analysis read:

4. Electrical Service conductors clearance (outside) from the roof is lower than 3 feet, and needs correcting for safety. The inbound conductor service (electric cable for the utility provider) should be greater than 3 feet above and surfaces such as roofing, overhangs, and other such combustible materials.

5. The problem(s) discovered in the [electric] panel such as [ ] rust, corrosion [ ], Bunched wiring, frayed sheathing, loose breakers... In an undated document on page 4, titled Changes/Adds/Credits apparently written by C. Evers, the contractor . . . states: Master Electrician inspected entire property including the 3 wires (owner) wanted inspected they will be (de-phased). According to the IRC, E3902.12 Arc-fault circuit-interrupter protection. All branch circuits that supply 120-volt, single-phase, 15- and 20-ampere outlets... shall be protected by a combination type arc-fault circuit interrupter installed to provide protection of the branch circuit. This author notes that if a master electrician did inspect the entire property, why were the deficiencies in the electric panel not brought to the attention of the General Contractor, C. Evers?

Claimants' Exhibit No. 10 (some internal punctuation omitted). These are electrical system issues existing on the property prior to the Respondent's arrival. These are not situations created by anything the Respondent did.

Nowhere was disagreement between the Claimants and the Respondent more pronounced than the whole topic of electrical work. The contract states: "Electric-Will have electrician

[29] Mr. Klitsch testified that if items 2 and 3 on the code compliance items were bundled together for correction, it would be appropriate to reduce the costs to correct by 20%, as an industry standard accounting for trip charges and some service fees.

inspect all existing electric, hang new lights as needed, rough in new kitchen if you choose that option, install new GFI's where needed in kitchen/bathrooms. $1[,]375-Lights not included." Claimants' Exhibit No. 2.

The Claimants resolutely insist that this contract language meant that the Respondent was agreeing not only to have a master electrician inspect the entire property, but also that the Respondent was obligating himself to correct and bring to code *any and all* problems revealed by the inspection, all for $1,375. The Claimants used various forms of the phrase "taking ownership" to express their contention that in specifying that a master electrician would inspect the property, and in mentioning in an unrelated contract provision regarding plumbing that certain things had to be "brought to code," the Respondent was thereby binding himself to correct and bring to code any electrical issue inside or outside of the home.

The Respondent emphatically disagreed with this. His position is supported by a preponderance of the evidence. Despite the expert's impressive credentials, I do not credit his testimony that the contract language should be read as including the correction and bringing to code of any electrical problems that might be uncovered during the course of an inspection. Accordingly, I find that the work alleged to be code deficient in items 4 and 5 of the Code Complaint Analysis was not within the original contract's scope of work and no Fund award should be made to the Claimants to correct these code deficiencies.

Mr. Klitsch queries in Item 5 (and in other items later in the code analysis), why, if a master electrician actually inspected the entire property, these problems were not brought to the attention of the Respondent. The Respondent directly answered this question, offering unchallenged testimony that the master electrician had brought these things to his attention and that he, in turn, had brought them to the Claimants' attention, but that the Claimants did not have the budget to address everything that could have been or should have been done. He decried the

notion that in having a master electrician inspect the property he (the Respondent) somehow became duty-bound to perform home improvement in areas that the Claimants knew were problematic, but elected not to address due to financial concerns.

Item 6 in the Code Compliant Analysis noted:

> At least four "three-prong" plugs are improperly wired (reversed wire). . . Outlets, junction boxes and switches missing covers are a safety hazard... This author notes that if a master electrician did inspect the entire property, as indicated by C. Evers, why were the plugs with reverse polarity not corrected and missing cover plates not installed?

Claimants' Exhibit No. 10. Mr. Klitsch indicated that in preparing the code compliance materials, he was guided by his own visit and by a May 16, 2017 Property Inspection Report (Claimants' Exhibit No. 11). The language of item 6 in the code compliance report is taken directly from the Property Inspection Report. I take "three-prong plugs" to be a reference to the GFI's required by the contract; however; nowhere in the Code Compliant Analysis, the Property Inspection Report, or the testimony at the hearing was there any indication where the problem three-prong plugs were located in or on the property. The contract covered "GFI's where needed in the kitchen/bathrooms." Only if the problem GFIs were in kitchen or the bathrooms would this problem be properly attributed to the Respondent. The Claimants have not adequately proven this allegation.

As for the problems with outlets, junction boxes, and switches with missing covers, only one of the pictures in the Property Inspection Report depicting this problem is labeled as to its location. That picture shows that the problem was located in the garage. The contract does not include any home improvement in the garage. I find that the Claimants have not proved that the problem outlets, junction boxes, and switches were those required by the contract, and therefore no Fund award should be made for them.

The final item on the Claimant's code compliance analysis reads in pertinent part:

> Exterior GFCI is not covered and is not functional... Garage outlets should be GFCI protected. According to the IRC, E3905.10 Damp or wet locations. In damp or wet locations, boxes, conduit bodies and fittings shall be placed or equipped so as to prevent moisture from entering or accumulating within the box, conduit body or fitting. This author notes that if a master electrician did inspect the entire property, as indicated by C. Evers, why were the GFCI problems not corrected?

Claimants' Exhibit No. 10 (some internal punctuation omitted). No exterior GFCIs and no GFCIs within the garage are part of the home improvement contract under consideration. No Fund award should be made to correct these code deficiencies.[30]

In his testimony, the Respondent mentioned several times in several ways that the Claimants never reported their dissatisfaction to him. He testified that they paid him when he asked for money, including the final installment paying off the full balance. He further testified that when they complained about the refrigerator, he provided a substitute to address their concerns. Although they were clearly dissatisfied almost immediately with the home improvement work done by the Respondent based on how quickly they engaged the services of Mr. Klitsch, there is not a shred of evidence in the record that the Respondent had any notice of the Claimants concerns until they filed with the MHIC.[31]

The law regarding Fund claims provides that "[t]he [MHIC] may deny a claim if the [MHIC] finds that the claimant unreasonably rejected good faith efforts by the contractor to resolve the claim." Md. Code Ann., Bus. Reg. § 8-405(d). By failing to notify the Respondent

---

[30] Although I do not recommend any Fund award for the code compliance violations numbered 4 – 7, I note that the reasonable costs associated with correcting the deficiencies would have been $1,061.27, $2,775.78, $448.08, and $425.77 respectively, subject to a 20% reduction if any two or more had been bundled, due to standard industry practices regarding trip fees and service charges.

[31] Despite the Respondent raising the issue of lack of notice of the alleged deficiencies, the Claimants did not adduce any evidence to counter this testimony, nor did they address it in closing argument. After all parties had had a full and fair opportunity to make closing arguments and any rebuttal argument, I asked about whether the Claimants had unreasonably precluded the Respondent from making good faith efforts to resolve the claim. At that time, the Claimants attempted to make a proffer intended to show efforts to communicate with the Respondent about the matter. I declined to accept the proffer at that point.

about their complaints, the Claimants deprived the Respondent of the opportunity to inspect the work, either as a prelude to correcting the deficiencies or in service of mounting a defense to a claim at hearing.

I note that the Claimants' expert testified that the deficiencies that existed when the Claimants made their last payment to the Claimant in July 2016, were "correctable." In fact, Mr. Klitsch opined in his October 28, 2016 report:

> Overall, most of the finishes of the home, both interior and exterior, are within the tolerances of workmanlike performances and current trade practices . . . However, as noted above, there are unfinished items and inconsistencies with some finishes and some application of products. The client is asking that all finishes that are acceptable and satisfactory within the project scope are consistent throughout the entire project.

(Claimants' Exhibit No. 7, Summary.) There is no evidence to suggest that the overall project was so poorly performed that the Claimants should be excused from allowing the Respondent the opportunity to make good faith efforts to correct the defects. As a practical matter, he could almost certainly make corrections for considerably less than the claim amount sought in this case. There are other very real adverse consequences to a contractor defending a claim in a Fund case. The MHIC considers a contractor ineligible for a home improvement license until the contractor reimburses the Fund for all monies disbursed to a claimant, plus interest. *See* Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii); COMAR 09.08.01.20. Awards from the Fund may create a blot on a contractor's record and may impact future business.

These significant consequences warrant giving the Respondent a good faith opportunity to make repairs. The evidence shows that the Respondent acted in good faith while he was performing the Claimant's home improvement. For example, when the Claimants expressed dissatisfaction with the refrigerator the Respondent chose and installed for them, because it was not big enough, he returned it, and purchased a new one that he picked up and delivered. The record suggests that the Respondent would have worked with the Claimants to satisfy them.

Nevertheless, after carefully considering the specific statutes at issue, I have concluded that the Claimants' failure to give the Respondent notice and an opportunity to cure the defects would not bar the Claimants from recovering under a Fund claim. The statutes governing Fund claims contain many specific requirements that Claimants must meet. Most of the requirements were covered by stipulations in this case. The Claimants must not be the spouse or other immediate relative of the contractor. They must not be employees, officers, or partners of the contractor. They cannot be immediate relatives of any employee, officer, or partner of the contractor. The statutes limit the number of properties or dwelling places potential claimants may own. There are considerations dependent on whether there are State or federal actions pending regarding the case, and strictures about insurance monies paid as a result of claims arising out of the same facts.

The legislature and the MHIC have carefully contemplated any number of factors that could bar recovery from the Fund. A claimant who unreasonably rejects good faith efforts by the contractor to resolve a claim is barred from recovering from the Fund. Nowhere does the statute or the regulations require a claimant to notify a contractor of any dissatisfaction with home improvement work, and nowhere does the law bar a claimant from recovery due to having failed to notify a contractor. In this case, if the Claimants' plan had worked out as they hoped, the property would have sold quickly after the home improvements were completed and notifying the Respondent would have been moot, as the Claimants would not have been in a position to have him address any of the incomplete, unworkmanlike, or inadequate home repairs at issue.

Having found that the Respondent was a licensed contractor and that he performed unworkmanlike, inadequate, and incomplete home improvement, 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 Claimants did not seek to have other contractors 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 is not soliciting another contractor to complete the contract, the claimant's actual loss shall be the amount which the claimant paid to the original contractor less the value of any materials or services provided by the contractor." COMAR 09.08.03.03B(3)(b).

The amount paid to the contractor for the original contract was $34,900.00. The cost of the materials provided by the Respondent is $12,602.72 ($11,000.00 for material expenses and job costs plus $1,602.72 for the appliances). This brings us to $22,297.28. From that I must deduct the value of the services provided by the contractor. This is where the problem arises for the Claimants. They did not provide the value of the services provided by the contractor. They have left me unable to calculate an appropriate award.

The Claimants calculations of actual loss vary from mine in several respects. They start with the basic premise that materials and job costs, plus appliances, plus labor estimates of $19,958.54 total $32,561.26. Based on an industry standard of a 20% markup for overhead and profit, a reasonable homeowner and a reasonable contractor could be expected to agree on the original contract at a price point of around $39,073.51. Mr. Klitsch asserted that the Claimants overpaid for a variety of reasons, but an important one was that he considered them to have paid $45,500.00 for the contract. For the reasons explained above, I find that the figure to be used as the price paid for the contract is $34,900.00. The numbers actually suggest that rather than overpaying, the Claimants got a good bargain based on the original contract, at least on paper.

In calculating actual loss, the Claimants offered three alternatives. Claimants' Exhibit No. 13. Their first calculation assumed $32,561.26 for materials and labor. It noted that to fix the fifteen items listed in Mr. Klitsch's December 10, 2016 report it would cost $8,556.47. The Claimants' method of accounting for this was to subtract the repair value of $8,556.47 from the original labor estimate, reducing the labor estimate to $11,402.07. With this reduced labor estimate, the total for materials, appliances, and labor was $24,004.79. Giving credit for 20% overhead and profit brought the contract selling price to $28,805.74. The Claimants suggested that their actual loss then equaled the difference between the price they paid (which they consider to be $45,500.00) and the contract selling price of $28,805.74, or in other words, $16,694.26.

The second actual loss calculation submitted by the Claimants used the same methodology but rather than addressing the costs to repair the 15 items from the December 2016 report, it addressed costs to bring the seven areas of code-deficient conditions on the property alleged to be the fault of the Respondent into code compliance. Using $6,495.30 as the cost to correct the deficiencies, the equation yielded $14,220.85 as the amount the Claimant believed should be considered their actual loss.

The third actual loss calculation submitted by the Claimants used the same methodology, but combined the costs to correct both sets of deficiencies, a total of $15,051.77. Running these numbers through the equation yielded $24,488.62 as the amount the Claimants believed represented their actual loss, although they understood that Fund awards are capped at $20,000.00.

The problem with all of these calculations is that they attempt to define the value of the services provided by the Respondent in terms of what it would cost to complete the scope of work as originally envisioned in the contract. The value of the services provided by the contractor is independent of what it would have cost the Claimants to complete the contract if that is how they decided to proceed. The value of the services provided by the Respondent is a number unto itself.

It could be much higher (yielding a low or even no award), much lower (meriting a higher amount from the Fund), or basically in line with the numbers in the Claimants' calculations (adjusted as they would be for the items I found not to be contained in the original contract), but I have no way of assigning a proper value based on the evidence before me. Mr. Klitsch was surely qualified to opine as to the value of the services that the Respondent actually provided, but he did not, nor did the Claimants provide that number in any other evidence.

For this reason, I am unable to calculate an appropriate award from the Fund and I recommend that no award be made.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimants have failed to prove that they sustained an actual and compensable loss, or the amount of any such loss 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)(b).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund deny the Claimants' claim; and

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

November 14, 2019
Date Decision Issued

Kimberly Farrell
Administrative Law Judge

KAF/cmg
Document #182016

PROPOSED ORDER

WHEREFORE, this 20th 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

IN THE MATTER OF THE CLAIM OF RICHARD & LESLIE MELZER	*	**MARYLAND HOME IMPROVEMENT COMMISSION**
	*	
AGAINST THE MARYLAND HOME IMPROVEMENT GUARANTY FUND FOR THE ACTS OR OMISSIONS OF CHARLES EVERS, JR. t/a EVERS HOME IMPROVEMENTS	*	**MHIC CASE NO. 18(90)363** **OAH CASE NO. DLR-HIC-02-19-16989**
	*	

* * * * * * *

FINAL ORDER

This matter was heard before an Administrative Law Judge ("ALJ") of the Office of Administrative Hearings ("OAH") on August 16, 2019. Following the evidentiary hearing, the ALJ issued a Proposed Decision on November 14, 2019, concluding that the homeowners Richard and Leslie Melzer ("Claimants") failed to prove that they sustained an actual loss that is compensable by the Guaranty Fund. *OAH Proposed Decision* p. 28. In a Proposed Order dated December 20, 2019, the Maryland Home Improvement Commission ("MHIC") affirmed the Proposed Decision of the ALJ to deny the claim. The Claimants subsequently filed exceptions of the MHIC Proposed Order.

On February 6, 2020, a hearing on the exceptions was held before a three-member panel ("Panel") of the MHIC. The Claimants were represented by Michael Moran, Esq. Despite receiving proper notice of the hearing, evidenced by a signed certified mail receipt, the contractor, Charles Evers, Jr. t/a Evers Home Improvements ("Contractor"), was not present for the exceptions hearing. Hope Sachs, Assistant Attorney General, appeared at the exceptions hearing to present evidence on behalf of the MHIC. The following two preliminary exhibits were offered by AAG Sachs and admitted into evidence at the exceptions hearing: 1) OAH Proposed Decision, MHIC Proposed Order, and Cover letter with Certified Mail Receipts, and 2) Hearing Notice for February 6, 2020 Exceptions Hearing with Certified Mail Receipts. Neither the Contractor nor the Claimants produced a copy of the transcript of the hearing before the ALJ, and therefore the

Panel's review was limited to the ALJ's proposed decision, the exhibits introduced into evidence at the OAH hearing, and the preliminary exhibits offered by AAG Sachs at the exceptions hearing. COMAR 09.01.03.09(G) - (I).

In their written exceptions, the Claimants challenge the ALJ's conclusion that their actual loss cannot be calculated from the evidence presented at the OAH hearing. The Commission agrees with and affirms the ALJ's findings of fact but differs from the ALJ on how those facts are applied to the calculation of actual loss. The Commission has promulgated by regulation three formulas for calculating actual loss. COMAR 09.08.03.03B(3)(a)-(c). Because the Claimants are not seeking another contractor to correct or complete the work, the ALJ appropriately used the second formula that reads as follows:

> If the contractor did work according to the contract and the claimant is not soliciting another contractor to complete the contract, the claimant's actual loss shall be the amount which the claimant paid to the original contractor less the value of any materials or services provided by the contractor.

COMAR 09.08.03.03B(3)(b). The first figure used in this calculation is the "amount which the claimant paid to the original contractor." The ALJ found based on the preponderance of the evidence that the Claimants paid the Contractor a total of $45,500.00. *OAH Proposed Decision* p. 9; *Claimants' Exhibit* 6. Based on the plain language of the regulation, the Commission finds that this sum is the appropriate figure to use in the calculation, and not the price of the original contract used by the ALJ. *OAH Proposed Decision* p. 15.

Per the formula, the $45,500.00 is then reduced by the "value of any materials or services provided by the contractor." COMAR 09.08.03.03B(3)(b). Although the ALJ found that the Claimants proved the value of the materials, she concludes that the Claimants failed to prove the value of the services provided by the Contractor. *OAH Proposed*

Decision p. 26-28. The ALJ noted that the problem with the Claimants' calculation of actual loss is that they "attempt to define the value of the services provided by the [Contractor] in terms of what it would cost to complete the scope of the work as originally envisioned in the contract." *OAH Proposed Decision* p. 27. The ALJ ultimately recommended a denial of the claim because, based on the evidence before her, she could not ascertain the value of the services provided by the Contractor and therefore was unable to calculate an appropriate award. *OAH Proposed Decision* p. 28. The Commission, however, finds that the cost to correct and complete the work of the Contractor can be used to ascertain the value of the materials and services provided by the Contractor, thereby allowing for the calculation of an award from the Guaranty Fund.

The Claimants provided through their expert two lists of items that were allegedly left by the Contractor in an unworkmanlike, inadequate or incomplete state. *Claimants' Exhibits* 8, 10, and 14. The ALJ reviewed the two lists in her decision and identified those items for which the Contractor was responsible. *OAH Proposed Decision* p. 17-23. The Claimants' expert also provided estimates for the cost to correct and complete these items. *Claimants' Exhibits* 8, 10, and 14. The Commission agrees with the ALJ's analysis as to which items were the responsibility of the Contractor, and finds that the total cost to correct and complete these items, based on the estimates provided by the Claimants' expert, is $9,154.90.[1] *OAH Proposed Decision* p. 17-23; *Claimants' Exhibits* 8, 10, and 14. When this cost to correct and complete the work, $9,154.90, is subtracted from the amount the Claimants paid the Contractor and agreed to pay for the job, $45,500.00, the resulting figure is the value of the work that was provided to the Claimants by the Contractor, $36,345.10. In accordance with the regulatory formula used by the ALJ, this value

[1] $8,109.52 (Items 2-15 in Claimants' Exhibits 8, 14) + $1,045.38 (Items 1-2 in Claimants' Exhibit 10) = $9,154.90

provided, $36,345.10, can then be deducted from the amount paid to the Contractor, $45,500.00, to reach the amount of actual loss of $9,154.90, which in effect is the same amount as the cost to correct or complete the work. The result adheres to the statutory definition of "actual loss" which is "the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." Md. Code Ann., Business Regulation Article, § 8-401. In this case, the Claimants have proven that amount to be $9,154.90.

Having considered the parties' arguments, the evidence in the record and the OAH Proposed Decision, it is this **8th** day of **May 2020 ORDERED:**

A. That the Findings of Fact of the Administrative Law Judge are **AFFIRMED**;

B. That the Conclusions of Law of the Administrative Law Judge are **AMENDED**;

C. That the Proposed Decision and Order of the Administrative Law Judge is **AMENDED;**

D. That the Maryland Home Improvement Guaranty Fund award the Claimants **$9,154.90**;

E. That the Contractor is ineligible for a Maryland Home Improvement Commission license until the Contractor reimburses the Guaranty Fund for all monies disbursed under this Order, plus annual interest of ten percent (10%) as set by the Commission; AND

F. That the records and publications of the Commission reflect this decision.

G. Any party has thirty (30) days from the date of this Final Order to appeal this decision to Circuit Court.

Joseph Tunney

Chairperson –Panel
Maryland Home Improvement Commission