

IN THE MATTER OF THE CLAIM	* BEFORE ROBERT B. LEVIN,
OF JEFFREY D. STAMLER,	* 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 RICK HIGH,	*
T/A TOWN & COUNTRY CHIMNEY	*
SERVICE, INC.	* OAH No.: LABOR-HIC-02-19-24705
RESPONDENT	* MHIC No.: 18 (90) 804

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On June 1, 2018, Jeffrey D. Stamler (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$7,849.00 in actual losses allegedly suffered as a result of a home improvement contract with Rick High (Respondent), trading as Town & Country Chimney Service, Inc. (Town & Country). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015). On July 26, 2019, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on January 28, 2020 at the OAH in Hunt Valley, Maryland. Bus. Reg. § 8-407(e). Hope Sachs, Assistant Attorney General, Department of Labor (Department),¹ 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 - Photograph of tile roof, January-April 2017
- Clmt. Ex. 2 - Mark & Buttons C/S Inc. Proposal, April 28, 2014
- Clmt. Ex. 3 - Town & Country Proposal, January 26, 2017, with attached Town & Country Proposal, January 30, 2017
- Clmt. Ex. 4 - Packet of Checking Account Transaction Details, with attached check nos. 1208 (January 26, 2017), 1211 (January 30, 2017), 1214 (February 2, 2017)
- Clmt. Ex 5 - Photograph with handwritten legend: "View of liner from firebox with cut edges of damper in foreground," January 12, 2018

¹ On July 1, 2019, the Maryland Department of Labor, Licensing, and Regulation became the Department of Labor.

Clmt. Ex. 6 - Package of screenshots of mobile phone outgoing calls, November 27, 2017 (3); November 30, 2017; December 14, 2017; December 15, 2017; December 18, 2017; December 21, 2017 (2)

Clmt. Ex. 7 - Text of the Claimant's electronic message to Town & Country website

Clmt. Ex. 8 - Letter from the Claimant to the Respondent, January 2, 2018, with attached UPS receipt, January 2, 2018

Clmt. Ex. 9 - Complaint Form, January 19, 2018

Clmt. Ex. 10 - Home Improvement Claim Form, June 1, 2018

Clmt. Ex. 11 - Mark & Buttons C/S Inc. Proposal, January 30, 2018

Clmt. Ex. 12 - Ace of Diamonds Chimney email to the Claimant, May 17, 2018, with attached Proposal, May 17, 2018

Clmt. Ex. 13 - Cleansweepcrew.com Inspection Report, November 2, 2018

Clmt. Ex. 14 - Letter from the Claimant to the MHIC Investigator Carl Suber, September 7, 2018

Clmt. Ex. 15 - NOT ADMITTED

I admitted the following exhibits on behalf of the Fund:

Fund Ex. 1 - Memorandum from OAH Docket Specialist to Legal Services, December 27, 2019

Fund Ex. 2 - MHIC licensing information for the Respondent

Fund Ex. 3 - Letter from the MHIC to the Respondent, November 27, 2018

Testimony

The Claimant testified. The Respondent did not testify, but cross-examined the Claimant and presented an opening statement and closing argument.² The Fund did not call 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 24688.
2. The Respondent operates a chimney service business trading as Town & Country.
3. The Claimant's home has a brick chimney with three flues. One flue (fireplace flue) serves a wood-burning fireplace in the living room. A second flue (furnace flue) serves the basement furnace and water heater. A third flue (kitchen flue) served an area in the kitchen.³

² At the outset of the hearing, the Respondent requested a postponement on two grounds: (a) he wished to have his lawyer represent him at the hearing, and (b) he claimed prejudice because he would be seeing the Claimant's exhibits for the first time at the hearing. At the beginning of the hearing, before requesting the postponement, the Respondent had executed a notarized power of attorney on behalf of Town & Country, the chimney service company of which he is the president, and the stock of which he and his wife own. Under this power of attorney Town & Country authorized the Respondent to represent it at the hearing. The Respondent had ample time to engage an attorney to represent himself and/or his corporation after receiving the OAH's November 22, 2019 Notice of Hearing, which was accompanied by an information sheet advising the parties that in certain case types (which would include this case) a corporate party may be represented by a non-attorney, but in that situation the proposed non-attorney corporate employee/designee must provide a power of attorney authorizing their representation of the corporation at the hearing. The Respondent executed such a power of attorney on behalf of his corporation. Under these circumstances, I found that the Respondent and Town & Country had waived their respective right to counsel.

The Respondent's argument related to alleged prejudice because he would be seeing the Claimant's exhibits for the first time at the hearing is addressed in COMAR 09.01.03.04. 04. This regulation provides that "[t]here is no prehearing discovery" (such as requests for the production of documents) in contested cases, as here, which an administrative unit of the Department (here, the MHIC) has delegated to the OAH for hearing. I noted that the Claimant and the Fund would also be seeing the Respondent's exhibits, if any, for the first time at the hearing. Counsel for the Fund stated, in opposing the postponement request (as the Claimant also did), that the Respondent would have previously received at least some of the Claimant's exhibits, to the extent they were attached to the Claimant's Claim Form and/or the MHIC's Hearing Order, though the Respondent denied he received any exhibits. I delayed the commencement of the hearing and gave the Respondent approximately 30 minutes to review each of the Claimant's proposed exhibits before the evidentiary phase of the hearing began.

Because the grounds for the Respondent's request for postponement did not constitute good cause, and did not meet the criteria for an emergency postponement under COMAR 28.02.01.16D, I denied the request. At that point, the Respondent stated that he was going to walk out of the hearing, because he felt unprepared, and that the proceeding was "racked and stacked" against him. (Hrg. at 11:00:00; 11:02:53). After a colloquy with me, the Respondent elected to stay and participate in the hearing.

³ The kitchen flue is not at issue in this case and will not be mentioned further.

4. The fireplace is located in the interior in the house. The front of the fireplace faces the living room. The back of the fireplace faces the kitchen, with cabinets attached.

5. The fireplace contains a Heatilator system, that involves pipes that go from below the fireplace and into the flue in a C-shape, and circulate air in the room.

6. The chimney needed masonry restoration for the long term, but the Claimant had not experienced any problems with its function.

7. In early 2017, the Claimant contacted a roofer because the house needed a roof replacement. The roofer recommended that any chimney work the Claimant wanted to have done should be completed before the roofer installed new roof tiles, because the tiles are delicate, and chimney work on the roof could damage the new tiles.

8. Previously, in 2014, the Claimant had obtained a chimney repair proposal from Mark & Buttons C/S, Inc. (M&B), a chimney service company. M&B provided a proposal on April 28, 2014, that addressed the masonry restoration of the chimney. M&B proposed the following work for a total price of \$3,953.56 (\$853.56 for materials and \$3,100.00 for labor):

The necessary scaffolding will be set up on the chimney structure and roof area protected with plywood. The flue servicing the furnace and hot water heater will be lined with a 316 Hi-flex stainless steel lining system for the safe operation of the appliances. After the proper curing time of the masonry work on the chimney, the chimney structure will be treated with a 40% breathable weather worker waterproofing product to eliminate water penetration and stop freeze-thaw cycles. Upon completion of all restoration work, the scaffolding will be removed, and the work area will be clean and free from debris.

(Clmt. Ex. 2).

9. The Claimant did not contract with M&B in 2014.

10. In early 2017, following the roofer's suggestion, the Claimant called M&B, but they were unavailable, and the roofer could not wait for them. The roofer then recommended Town & Country and another contractor. The other contractor was also unavailable at that time.

11. The Claimant contacted Town & Country, which was available on the roofer's schedule.

12. Town & Country provided two proposals to the Claimant, the first on January 26, 2017, and the second on January 30, 2017. The Claimant signed and accepted both proposals.

13. Town & Country's January 26, 2017 proposal, accepted by the Claimant that day, delineated the following work and materials to be provided the Claimant, for a price of \$4,110.00:

1. Reline the gas hot water 4" and gas furnace 4" with 6" stainless steel lining system.
2. Change smoke pipe to 4" & 4" to 6" connection.
3. Seal lining system top and bottom.
4. Move capping stone as needed.
5. May have to cut stone and re-set it.
6. Cut and shape wire animal protector on top of flue system.

(Clmt. Ex. 3, p. 1).

14. Town & Country's January 30, 2017 proposal, accepted by the Claimant that day, described the following work and materials to be provided the Claimant for a price of \$3,739.00:

Fireplace liner:

1. Set up ladder to gutters, 2 ridge hooks, drop cloths, and vacuum.
2. Temporarily remove capping stone from top of chimney. Remove damper blade in firebox.
3. Breakout fireplace terra cotta clay flue tiles.
4. Insert 12" stainless steel lining system.
5. Pour in lightweight masonry insulation around new lining system.
6. At top of chimney, set a 6" piece of tile extension for masonry aesthetics [sic].
7. Put damper back in place.
8. Put capping stone back in place.
9. Clean up job related debris.

(*Id.*, p. 3).

15. The Claimant paid Town & Country \$7,849.00, representing the total amount due for both proposals.

16. The Respondent completed the work under both proposals on February 2, 2017.

17. The Respondent's job team sawed through the Heatilator pipes on both sides, which was not called for under either proposal. They installed packing material in the cut pipes. The job leader thought the pipes could be re-soldered, but instead they were discarded. A flimsy, drywall-type material was placed where the Heatilator pipes were cut. The Heatilator system was left open in the back of the firebox. The team cut through the existing damper, which was also not called for under either proposal, but they replaced the damper.

18. The Claimant lit his first fire after the Respondent's work on Thanksgiving Day, November 23, 2017, during a family gathering. The living room filled with smoke. The smoke came from the fireplace and did not go up the fireplace flue with an open damper. The smoke penetrated the kitchen cabinets behind the fireplace. The cabinets smelled of soot and smoke. The Claimant took a video on his phone of the smoke.

19. The escaping smoke on Thanksgiving resulted from Town & Country's sawing through the Heatilator pipes, and from the placement of the chimney liner, which was too low and crushed slightly, with the opening too far inside the other elements. These conditions prevented smoke from exiting the firebox properly.

20. The Claimant called the Respondent on November 27, 2017, and scheduled an appointment for November 30, 2017, at the Claimant's house. On November 30, 2017, the Respondent canceled the appointment with no explanation and rescheduled it for December 6, 2017.

21. Representatives of Town & Country appeared on December 6, 2017, and said the firebox was working properly, and that their plan was to reinforce the packing material in the cut Heatilator pipes in order to keep smoke from the kitchen. The team was to return on December 14, 2017 to reinforce the packing.

22. The team did not show up on December 14, 2017. This was the second failure to keep an appointment without explanation.

23. The Claimant called the Respondent on December 15, 2017, and made another appointment for December 21, 2019. On December 21, 2017, for the third time, the Respondent or his team failed to appear. The Claimant called the Respondent that day. The Respondent did not answer.

24. On December 22, 2017, the Claimant sent a written message to the Respondent through Town & Country's website, mentioning the missed appointments and that he had been unable to use the fireplace since the original work was done, and requested a call back or an email to schedule a follow-up.

25. Receiving no response to the website message, the Claimant next wrote to the Respondent on January 2, 2018, requesting that he return, finish the work, and plan to restore safe and proper function to his chimney by January 19, 2018 and, if that were not done, he would file a complaint with the MHIC and pursue correction through their process.

26. On January 19, 2018, the Claimant filed a Complaint Form with the MHIC. He referred in the form only to the January 30, 2017 proposal (for which the contract amount was \$3,739.00), and complained that the Heatilator pipes were cut, and the chimney liner was not installed properly, resulting in the escape of smoke on November 23, 2017, and that the Respondent failed to keep appointments to discuss a solution to the problem.

27. On June 1, 2018, the Claimant filed with the MHIC a Home Improvement Claim Form, with attachments. He stated that although in his Complaint Form he had stated that the amount of his contract with the Respondent was \$3,739.00 (the amount of the January 30, 2017 proposal), he had subsequently discovered from estimates received from other contractors that in addition to the *fireplace and fireplace flue* work under the \$3,739.00 January 30, 2017 proposal

needing correction, the work performed on the *furnace flue* under the \$4,110.00 January 26, 2017 proposal also needed correction, to prevent condensation and damage to his furnace and water heater. The Claimant estimated the value of the work done by the Respondent as zero, and claimed \$7,849.00 (the total of the contract prices for both accepted contract proposals) from the Fund.

28. The Claimant obtained three proposals to correct the Respondent's work. None of the proposals have yet been accepted.

29. The first proposal was provided by M&B on January 30, 2018. M&B felt that no degree of packing or insulation in the firebox would prevent smoke leakage, so M&B suggested putting a Bellfires self-contained fireplace inside the existing firebox. The Bellfires fireplace would have its own liner to restore functionality. The roof replacement had been completed when M&B submitted its proposal, and M&B was comfortable doing the work. M&B's January 30, 2018 proposal called for the following work, at a price of \$14,219.68 (materials cost of \$5,854.68 and labor charges of \$8,365.00):

The necessary scaffolding and equipment will be set up to access the chimney structure. The existing stone slab on the top portion of the chimney will be removed, along with the stainless liner and any mix that is poured in around the lining system. Because the original tubes for the Heatilator unit have been cut out and removed from the unit, the unit cannot be used, and the entire steel box and chamber will have to be removed from the existing masonry. After the lining system and existing box is removed from the system, a BSV28 Bellfires refractory fireplace, complete with stainless steel lining system and all components, will be installed in the existing masonry chimney. The lining system will be further supported from above with a stainless steel top plate and collar. The lining system and unit will be fully insulated with Cergol insulated wrap. The existing stone slab will be re-installed on top of the chimney structure, the scaffolding and equipment will be removed, and the work area will be clean and free from debris.

(Clmt. Ex. 11).

30. The second proposal was provided on May 17, 2018, by another chimney company, Ace of Diamonds Chimney. Ace of Diamonds emailed the Claimant with two alternative quotes for the repair of pipes connecting the water heater to the furnace flue. Ace of Diamonds proposed “to replace the interior vent piping with single wall vent connector from the wall to the appliances gas furnace/water heater. Parts/labor \$799.50” and alternatively proposed “to replace the vent pipe using b-vent (double wall vent pipe) from the wall over to the appliance they [sic-then] short run of single wall pipe parts/labor \$1043.30.” (Clmt. Ex. 12).

31. The pipes connecting the water heater to the furnace flue that Ace of Diamonds proposed be replaced were not the cause of fireplace smoke escaping from the fireplace. Ace of Diamonds proposed replacing these pipes in the furnace flue to remedy a problem of condensation on the pipes. Ace of Diamonds was not comfortable with attempting to fix the chimney because the roof had been replaced at the time Ace of Diamonds submitted its proposal.

32. The third proposal the Claimant received was from Cleansweepcrew.com (Cleansweep). On November 2, 2018, Cleansweep gave the Claimant an inspection report and work estimate for a total proposed repair cost of \$8,975.00. Its inspection report addressed several issues with both the furnace flue and the fireplace flue, on a Pass/Fail basis. The following items were listed as a Fail: (a) Cleansweep listed as a Fail the “stove/pipe clearance” in the furnace flue area, and proposed as a correction to “Reconfigure furnace/water heater venting-grade/clearances”; (b) Cleansweep listed as a Fail in the fireplace flue the “Ash Pit Door” and proposed to “Replace cleanout door-set and adjust”; (c) Cleansweep listed as a Fail in the fireplace flue the “Damper” and proposed to “Reset at termination”; (d) Cleansweep listed as a Fail in the fireplace flue the “Flue Liner” and proposed to “Reinstall liner w/ correct base termination, install bottom seal/transition, restore smoke chamber w/ SmokeTite spray refractory system-backfill and finish, insulate flue cavity w/ Thermix poured vermiculite, reconfigure top

termination”; (e) Cleansweep listed as a Fail in the fireplace flue the “Refractory Panel: Rear” and proposed to “Repair modified heatilator-finish both manifolds [openings] w/ steel and mortar”; (f) Cleansweep listed as a Fail the “Smoke Chamber” in the fireplace flue and proposed as a correction “See repair above”; and (g) Cleansweep listed on its “Exterior Inspection” the “Damper” as a Fail and proposed as a correction “See repair above.” (Clmt. Ex. 13).

33. The Claimant advised MHIC investigator Carl Suber on September 7, 2018, that he had attempted to mediate this dispute with the Respondent through the Baltimore County Conflict Resolution Center. A mediation was scheduled three times: July 12, August 8, and August 30, 2018. The Respondent canceled each time, with little or no notice. The Claimant advised the investigator that he wished to pursue his Guaranty Fund claim.

34. The last time the Claimant spoke with the Respondent was in July 2018, when the Respondent called him and offered to return to the house and fix the problem, but the Claimant declined the offer because of his lack of trust in the Respondent due to his repeated failures to appear at appointments and mediations.

35. The Claimant has not been able to use his fireplace for three years.

DISCUSSION

A. Legal Framework

In this case, the Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Md. Code Ann., Bus. Reg. §8-407(e)(1) (2015); Md. Code Ann., State Gov’t §10-217 (2014); COMAR 09.08.03.03A(3). “[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)).

An owner may recover compensation from the Fund “for an actual loss that results from an act or omission by a licensed contractor.” Md. Code Ann., Bus. Reg. § 8-405(a) (2015)⁴; *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. For the following reasons, I find that the Claimant has proven eligibility for compensation.

B. Analysis

The Respondent was a licensed home improvement contractor at the time he entered into the contracts with the Claimant as embodied in the Respondent’s January 26, 2017, and January 30, 2017 proposals that the Claimant accepted and for which he paid the contract price. The Respondent performed unworkmanlike and inadequate home improvements on both the fireplace flue as well the furnace flue in the Claimant’s chimney. While the evidence is particularly strong that the fireplace flue work was unworkmanlike and inadequate, the weight of the credible evidence shows that the furnace flue work was also unworkmanlike and inadequate. The deficiencies in the work performed on each flue will be discussed in turn.

1. Fireplace Flue

The evidence was uncontradicted that the Respondent’s team sawed through the Heatilator pipes on both sides, an action not called for under the January 30, 2017 contract. In addition, the Claimant testified that the Respondent’s team installed the fireplace flue liner too low, and it was slightly crushed. I conclude that these conditions caused smoke to escape the

⁴ Unless otherwise noted, all references to the Business Regulation Article herein cite the 2015 Replacement Volume of the Maryland Annotated Code.

fireplace flue on Thanksgiving Day 2017, when the Claimant made a fire for the first time after the Respondent's team completed their work.

The Claimant's contemporaneous video from his mobile phone that he played during the hearing corroborated his testimony regarding the escape of smoke. Moreover, the proposals for repair and correction that M&B and Cleansweep separately provided the Claimant in 2018 describe significant problems with the condition of the fireplace flue, and substantiate his contention that the Respondent's work on the fireplace flue was unworkmanlike, and resulted in the Thanksgiving Day 2017 escape of smoke.

The Respondent's team returned to the Claimant's home on December 6, 2017 and proposed to correct the problem by reinforcing packing material in the cut Heatilator pipes, which they suggested to keep smoke from escaping. They never did so, and the Respondent failed to respond to the Claimant's calls and written communications, broke several appointments, and failed to appear at three scheduled mediation sessions.

When it was the Respondent's turn at the hearing to testify or offer any other evidence, he declined, stating: "I have no evidence." (Hrg. at 1:15:12). In his closing statement the Respondent said, "I got to admit fault here." (*Id.* at 1:20:26). He also stated in his closing that the Claimant's unwillingness to have him return to his home for additional work was "reasonable." (*Id.* at 1:20:31).

During the Respondent's closing statement, he began to mention facts not in evidence.⁵ At that point, even though the Respondent had explicitly declined to testify, I offered to reopen the evidentiary phase of the hearing so he could support his argument by presenting evidence in

⁵ Specifically in his closing statement, the Respondent argued that it was not necessary to remedy the fireplace flue by installing a Bellfires fireplace system in the firebox, as M&B proposed, and stated that the answer to the Claimant's problem was to coat the smoke chamber with SmokeTite, a high temperature refractory material that could be sprayed into the smoke chamber.

the form of testimony subject to cross-examination, but he declined, stating: "I'm finished, I have no testimony, no statements, nothing to say." (*Id.* at 1:22:26).

The Claimant's testimony was credible, corroborated by the M&B and Cleansweep estimates, confirmed by the Respondent's admission of fault, and not rebutted. The record compels the conclusion that the Respondent's work on the fireplace flue was unworkmanlike and inadequate.

2. *Furnace Flue*

The evidence concerning the furnace flue was much less extensive as the fireplace flue evidence, and the Respondent did not admit fault in regard to his work on the furnace flue. Nevertheless, substantial evidence showed that the Respondent's work on the furnace flue was also unworkmanlike and inadequate. Ace of Diamonds, a chimney service company, emailed the Claimant with alternative quotes for the repair of pipes connecting the furnace and water heater to the chimney's furnace flue. Ace of Diamonds proposed (a) "to replace the interior vent piping with single wall vent connector from the wall to the appliances gas furnace/water heater. Parts/labor \$799.50" or alternatively (b) "to replace the vent pipe using b-vent (double wall vent pipe) from the wall over to the appliance they [sic-then] short run of single wall pipe parts/labor \$1043.30." (Clmt. Ex. 12).

Cleansweep stated in its inspection report that the "Stove Pipe Clearance" in the furnace flue was a "Fail," and proposed to "Reconfigure furnace/water heater venting grade/clearances." (Clmt. Ex. 13). While the Respondent argued in his closing statement that the only flue needing correction, or for which he was at fault, was the fireplace flue, not the furnace flue, he provided no testimony subject to cross-examination, and no documentary or other evidence to rebut the Ace of Diamonds and Cleansweep proposals which each identified specific deficiencies in the Respondent's furnace flue work.

Both Ace of Diamonds and M&B identified furnace flue problems warranting correction. The Respondent did not refute their inspection reports with any evidence, as distinguished from unsworn argument. He declined the opportunity I afforded him during his closing argument to re-open the evidentiary portion of the hearing to permit him so he could testify in support of his argument that the furnace flue did not need correction.⁶ While the Claimant, a physician and not a chimney professional, testified that the only furnace flue problem of which he was aware was condensation on the pipes, I draw the reasonable inference that the deficiencies that Ace of Diamonds and Cleansweep identified are not *de minimis*. If the problems with the furnace flue they described were insignificant, both of these chimney service companies would not have recommended that the problems they observed should be corrected. Therefore, I must conclude based on the uncontradicted evidence that the Respondent's work on the furnace flue was unworkmanlike and inadequate.

I thus find that the Claimant is eligible for compensation from the Fund because the Respondent's work with respect to both the fireplace flue as well as the furnace flue was unworkmanlike and inadequate.

3. Amount of Actual 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. Md. Code Ann., 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.

⁶ Even if I were to consider the Respondent's closing argument as evidence, I would find it outweighed by the Claimant's evidence and my proposed decision would not change.

The regulations governing the calculation of actual loss are precise and formulaic.

COMAR 09.08.03.03B. An award may not be based on a vague estimate from a homeowner.

Nor may the Fund compensate a homeowner for any amount paid to an unlicensed contractor.

The potential formulas are:

- (a) If the contractor abandoned the contract without doing any work, the claimant's actual loss shall be the amount which the claimant paid to the contractor under the contract.
- (b) 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.
- (c) 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)(a)-(c).

Here, the Respondent did not abandon the contract without doing any work, so COMAR 09.08.03.03B(3)(a) does not apply. The formula in COMAR 09.08.03.03B(3)(b) applies only where the claimant is not soliciting another contractor to complete the contract. The Claimant solicited and obtained proposals from M&B, Ace of Diamonds⁷ and Cleansweep, so the COMAR 09.08.03.03B(3)(b) formula is also inapplicable. COMAR 09.08.03.03B(3)(c) requires the Claimant to prove (1) that a licensed contractor has been solicited to complete the work; and (2) the amount which the Claimant paid or plans to pay, the new contractor. The Claimant

⁷ Ace of Diamonds was unwilling to work on the chimney because the roof renovation involved delicate roof tiles.

submitted this evidence.⁸ Therefore, COMAR 09.08.03.03B(3)(c) provides the correct formula to apply in this case.

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. Md. Code Ann., Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a). I find that as between Cleansweep's and M&B's respective repair and correction proposals, the lower of the two estimates—Cleansweep's estimate of \$8,975.00—is the proper value to use in the COMAR 09.08.03.03B(3)(c) formula as the amount of the Claimant's actual loss, because I cannot conclude that M&B's recommendation of a Bellfires fireplace in its \$14,219.68 estimate is superior to Cleansweep's \$8,975.00 proposal. In this case, the Claimant's actual loss of \$8,975.00 (the amount of Cleansweep's estimate) exceeds \$7,849.00, the amount that the Claimant paid to the Respondent. Therefore, the Claimant's recovery is limited to \$7,849.00, the amount paid to the Respondent.⁹ Md. Code Ann., Bus. Reg. § 8-405(e)(5); COMAR 09.08.03.03B(4). In its closing statement, the Fund argued that the Claimant had proved his case, and recommended an award of \$7,849.00. For the reasons stated above, I agree.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$7,849.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(c). I further conclude that the Claimant is entitled to recover that amount from the Fund. *Id.*

⁸ No contention was made that any of the three chimney service companies whose proposals were admitted in evidence were unlicensed.

⁹ Under the COMAR 09.08.03.03B(3)(c) formula, the amount of the award would be the same (\$7,849.00), even if the higher M&B estimate were used.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$7,849.00; 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;¹⁰ and

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

March 30, 2020
Date Decision Issued

CONFIDENTIAL

Robert B. Levin
Administrative Law Judge

RBL/da
185237

¹⁰ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 20th day of May, 2020, 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.

Wm Bruce

Quackenbush

Wm. Bruce Quackenbush

Panel B

***MARYLAND HOME IMPROVEMENT
COMMISSION***