IN THE MATTER OF THE CLAIM	*	**BEFORE WILLIAM SOMERVILLE,**
OF CHERYL JOHNSON,	*	**AN ADMINISTRATIVE LAW JUDGE**
CLAIMANT	*	**OF THE MARYLAND OFFICE**
AGAINST THE MARYLAND HOME	*	**OF ADMINISTRATIVE HEARINGS**
IMPROVEMENT GUARANTY FUND	*	
FOR THE ACTS OR OMISSIONS	*	
ALLEGED AGAINST LES DAVIS T/A	*	
BAY STATE DESIGN, LLC,	*	**OAH No.: LABOR-HIC-02-19-37626**
RESPONDENT	*	**MHIC No.: 19 (90) 1142**

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PROPOSED DECISION

STATEMENT OF THE CASE

On June 18, 2019, Cheryl Johnson, (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of $13,034.73 in "actual loss" alleged to have been suffered as a result of a home improvement contract with Les Davis, trading as Bay State Design, LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015). On November 15, 2019, the MHIC referred the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a video-conference hearing[1] on November 4, 2020. Bus. Reg. § 8-407(e). Andrew J. Brouwer, Assistant Attorney General, Department of Labor (Department),[2] represented the Fund. The Claimant represented herself. The Respondent was represented Justin M. Hoyt, Esq.

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. 2020); 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 actual loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits offered by the Claimant:

Clmt. Ex. 1 - Photocopy of a photograph

Clmt. Ex. 1a - Photocopy of a photograph

Clmt. Ex. 2 - Photocopy of a photograph

Clmt. Ex. 3 - Photocopy of a photograph

Clmt. Ex. 4 - Photocopy of a photograph

Clmt. Ex. 5 - Letter, 12-5-2018[3]

Clmt. Ex. 6 - Invoice, 11-8-2018

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[1] COVID-19 restrictions required the video conference hearing.
[2] On July 1, 2019, the Maryland Department of Labor, Licensing, and Regulation became the Department of Labor.
[3] The letter was admitted only for the primary facts (observations) contained therein. No conclusory facts or professional opinions contained in the letter are in evidence. *See State v. Jones*, 103 Md. App 548, 583 (1995) (distinguishing between primary facts and conclusory or dispositional facts) *rev'd on other grounds*, 343 Md. 448 (1996).

Clmt. Ex. 7 - Invoice, 6-13-19

Clmt. Ex. 8 - Contract document, 6-10-2016

I admitted the following exhibits offered by the Respondent:

Resp. Ex. 1 - sketch

Resp. Ex. 2 - Post-it™ note

Resp. Ex. 3 - Thank you note

I admitted the following exhibits offered by the Fund:

Fund Ex. 1 - Hearing Order

Fund Ex. 2 - Notice of Hearing

Fund Ex. 3 - Letter, 7-9-2019

Fund Ex. 4 - Licensing History document

Testimony

The Claimant testified and offered the testimony of Christa Johnson in her case. The Respondent testified in his case and was qualified to offer opinions in "construction and home improvements." The Fund did not offer a witness.

PROPOSED FINDINGS OF FACT

Having considered demeanor evidence, testimony, and other evidence, 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, holding the license for, and trading as, Bay State Design, LLC (Respondent's corporation).

2. Sometime between June 10, 2016 and June 23, 2016 the Respondent's corporation and the Claimant entered into a contract by which the Claimant would pay $35,000.00 and the Respondent's corporation would remodel a bathroom, among other things, at

[illegible]

the Claimant's residence. The Respondent's corporation was to remodel a master bedroom, a master bathroom, install or remodel a second bathroom, remodel an office room, install new flooring in a hallway, and repair some drywall blemishes. The Respondent's corporation was also to install vanities, and tops and install closet doors and paint. Allowances were provided for flooring, tiles, and fixtures. Some plumbing and electrical work was also included. The Claimant paid $12,000.00 as a deposit.

3. Work was started in early August 2016 and ended several months later.

4. The Claimant's residence, built in the 1970's, was a modular-built house placed over a crawl-space foundation. The structure had manifested some rotten subfloor in recent years because of a toilet leak. There was some termite damage to some joists. The crawl-space was wet and there were some structural issues with the house that the Respondent suggested would need attention, such as replacement of a sill plate. At the beginning of the project, the Respondent addressed the wet crawl space with fans and by opening up foundation vents.

5. With regard to the shower in the master bathroom, the Respondent's corporation replaced some joists and subflooring under the bathroom and constructed the shower pan out of cement, cement board, and tile. A rubber liner was used.

6. During the course of work on the project, the Claimant noticed an electrical wire that was spliced, and not connected through a junction box, within the wall. She brought that condition to the attention of the Respondent. That condition did not meet industry standards. (Clmt Ex. 7)

7. Although the contract price was $35,000.00, during the course of work on the project, the Claimant paid the Respondent's corporation $30,114.00 and paid on behalf of the Respondent's corporation $5,046.00 for certain supplies.[4]

[4] This discrepancy was not explained.

8. During the summer of 2018, another company, Nuttle Builders, Inc., came to the Claimant's residence to offer an estimate on another project. While in the crawl space under the house, an employee from that company discovered mold on an area of damp sub-floor under the shower pan. On further inspection, the employee noticed some spaces or voids at grout joints in the shower. With permission, the employee began to "deconstruct" the shower area and found some wood rot. Eventually, Nuttle Builders, Inc., was awarded a contract to rebuild the shower.

9. On November 8, 2018, Nuttle Builders, Inc., issued to the Claimant an invoice showing what it charged for rebuilding the shower and remodeling the bathroom. The invoice showed a labor charge of $10,419.50, overhead and profit charge of $1,562.92, materials charge of $679.88, and a materials overhead charge of $142.77, for a total project cost of $12,805.07. In the materials invoice, the company included an unnecessary shower drain, the purchase of many re-usable tools, and some duplicate supplies such as painter's tape, cement screws, and premium adhesive. (Clmt. Ex. 6.)

10. Some of the work done by Nuttle Builders, Inc., and reflected in the invoice dated November 8, 2018, such as remedying loose tile in another room, were unrelated to rebuilding the shower. (Clmt. Ex. 6.)

11. On December 5, 2018, someone at Nuttle Builders, Inc., drafted a letter for the Claimant explaining what an employee of Nuttle Builders, Inc., observed and offering some professional opinions about possible causes.

12. Sometime before June 13, 2019, the Claimant used an endoscopic camera to look inside the wall where she had seen the spliced wire. No junction box had been installed.

13. On June 13, 2019, the Claimant hired an electrician to install a junction box in a wall near a bathroom vanity where she had discovered that there was some spliced wire without a junction box. The Claimant paid $229.66 for that service.

14. On or about June 18, 2019, the Claimant filed a claim against the Fund for $13,034.73.

DISCUSSION

Burdens

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). Demeanor evidence played an important role in this matter. *Bragunier Masonry Contractors, Inc. v. Maryland Comm'r of Labor and Indus.*, 111 Md. App. 698, 717, n.7 (1996); *N.L.R.B. v. Dinion Coil Co.*, 201 F.2d 484, 487 (2d Cir. 1952).

Applicable Law

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); *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.

Analysis

The Respondent was a licensed home improvement contractor at the time he or his corporation entered into the contract with the Claimant. (Finding of Fact 1.) Md. Code Ann., Bus. Reg. § 8-405(a).

The Claimant alleges that the work that was performed on the shower in the master bathroom and some wiring was "unworkmanlike." "Unworkmanlike" means not in a workmanlike manner. *See Webster's New Universal Dictionary* 1984-88 (2d ed. 1983). The

Court of Appeals has defined "workmanlike manner" as that term applies to building and construction contracts. In *Gaybis v. Palm*, 201 Md. 78, 85 (1952) the Court held, "The obligation to perform with skill and care is implied by law and need not be stated in any contract." That rule was reaffirmed in *Worthington Constr. Co. v Moore*, 266 Md. 19, 22 (1972). In *K & G Constr. Co. v. Harris*, 223 Md. 305, 314 (1960), the Court compared the express standard "workmanlike manner" with the implied standard of performance discussed in the *Gaybis* case. The *Harris* Court cited the *Gaybis* case for authority that the "workmanlike-manner" wording was equivalent to the "skill-and-care" wording in the *Gaybis* case.

In the instant case, the Claimant has shown by a preponderance of the evidence that, for some reason, the rubber-lined shower pan had failed by the time that an employee from Nuttle Builders, Inc., offered to "deconstruct" the shower and rebuild it for about $12,000.00. That failure is not dispositive of the issue.

There was no persuasive opinion evidence to show that the Respondent's corporation failed to abide by industry standards in constructing the shower or the shower pan. The pan failure does not speak for itself in that regard. On the other hand, the Respondent offered persuasive opinion evidence that the shower was built according to industry standards. He also offered plausible explanations, under the facts and circumstances of this case, about why, even when built to industry standards, the shower pan might have failed for unrelated reasons, such as a nearby supply line leak, structural shifting, and other structural problems that were not addressed as suggested. On the basis of the evidence before me, I cannot determine that the Respondent's corporation failed to meet a workmanlike standard when it constructed the shower in the instant case. With regard to the shower, the Claimant has not met her burdens. Md. Code Ann., Bus. Reg. § 8-401.

The Fund argues that, as an alternative, it is possible that the shower and shower pan were "inadequate." "Inadequate" as used in the statutory scheme, *compare* Md. Ann. Code Bus. Reg. §§ 8-311(a)(10) and 8-401, means that the home improvement work was done with all of the steps, phases, or processes required by industry standards but that the result does not equal what is required by the contract or is not suitable to the case or occasion. *See, Black's Law Dictionary*: 61 (4th ed. 1957). The term is used in the statute to describe a method to prove a lack of compliance to industry standards in work. Md. Ann. Code Bus. Reg. §§ 8-311(a)(10) and 8-401. In the instant case, there was no evidence that the shower did not work as a suitable shower when completed, or that it was not the type of shower called for in the contract. On the basis of the evidence before me, I am not persuaded that the design or construction of the shower was "inadequate" as that term is used in the statutory scheme.

The Claimant also alleges that the electrical work in which the Respondent's corporation spliced some wire within a wall was work that did not meet residential electrical industry standards. She has proven that the electrical work done by the Respondent's corporation in that instance was unworkmanlike, and otherwise did not meet industry standards. (Findings of Fact 6 and 13.) Credible evidence was offered showing that such a splice violated electrical codes and standards.

Calculations

Having found eligibility for compensation for the subpar electrical work , I must determine the amount of the Claimant's actual loss and the amount, if any, that the Claimant is entitled to recover from the Fund. 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. COMAR 09.08.03.03B(3).

In this case, the Respondent's corporation performed some unworkmanlike electrical work under the contract and the Claimant hired a remedial electrical contractor to complete or remedy that work. (Findings of Fact 6 and 13.) Accordingly, the following formula appropriately measures the Claimant's actual loss:

> If the contractor did work according to the contract and the claimant has solicited or is soliciting another contractor to complete the contract, the claimant's actual loss shall be the amounts the claimant has paid to or on behalf of the contractor under the original contract, added to any reasonable amounts the claimant has paid or will be required to pay another contractor to repair poor work done by the original contractor under the original contract and complete the original contract, less the original contract price.

COMAR 09.08.03.03B(3)(c).

With the Findings of Fact in mind, the "actual loss" calculation is as follows:

$35,160.00	Amount paid to the contractor under the original agreement, including payments for materials
+$229.66	Amount paid to the remedial contractor
-$35,160.00	Price of the original agreement plus voluntary adjustments
$229.66	Actual loss

The Business Regulation Article caps a claimant's recovery at $20,000.00 for acts or omissions of one contractor, and it 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). In this case, the Claimant's actual loss is less than the amount paid to the Respondent, and less than $20,000.00. The Claimant has shown that she is entitled to an award of compensable actual loss in the amount of $229.66.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has shown by a preponderance of the evidence a compensable actual loss. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant $229.66, and

ORDER that the Respondent be, and is hereby, 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;[5] and further

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

January 29, 2021
Date Proposed Decision Issued

William J.D. Somerville III
Administrative Law Judge

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

PROPOSED ORDER

WHEREFORE, this 2nd day of June, 2021, 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
Chairman
Panel B
MARYLAND HOME IMPROVEMENT COMMISSION