IN THE MATTER OF THE CLAIM	*	**BEFORE HARRIET C. HELFAND,**
OF KIMBERLY ALLEN,	*	**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 JOHN DONATELLI,	*	
T/A, HONOR SERVICES, LLC,	*	**OAH No.: LABOR-HIC-02-20-03238**
RESPONDENT	*	**MHIC No.: 19 (75) 1257**

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PROPOSED DECISION

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ISSUES
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PROPOSED FINDINGS OF FACT
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PROPOSED CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On June 6, 2019, Kimberly Allen (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund), under the jurisdiction of the Department of Labor (Department),[1] for reimbursement of $16,848.71 in actual losses allegedly suffered as a result of a home improvement contract with John Donatelli, trading as Honor Services, LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015).[2] On

[1] On July 1, 2019, the Maryland Department of Labor, Licensing, and Regulation became the Department of Labor.
[2] Unless otherwise noted, all references to the Business Regulation Article herein cite the 2015 Replacement Volume of the Maryland Annotated Code.

January 15, 2020, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on October 21, 2020, at the Office of Administrative Hearings in Hunt Valley, Maryland. *Id.* § 8-407(e). Andrew Brouwer, Assistant Attorney General, Department, represented the Fund. The Claimant represented herself.

After waiting twenty minutes for the Respondent or the Respondent's representative to appear, I proceeded with the hearing. Applicable law permits me to proceed with a hearing in a party's absence if that party fails to attend after receiving proper notice. Code of Maryland Regulations (COMAR) 28.02.01.23A. On September 1, 2020, notice of the hearing was mailed to the Respondent at the address of record by regular and certified mail and was not returned as undeliverable. COMAR 09.08.03.03A(2). The Respondent did not notify the OAH of any change of address. COMAR 28.02.01.03E. I determined the Respondent received proper notice.

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); COMAR 09.01.03; and 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. A1 – Honor Services, LLC Service Agreement, dated November 26, 2018
A2 – Check for $5,000.00 from Michael G. Harrington to Honor Services dated November 26, 2018
A3 – Check for $13,000.00 from Michael G. Harrington to Honor Services dated November 30, 2018
A4 – Check for $2,000.00 from Honor Services, LLC to Michael Harrington dated February 7, 2019

Clmt. Ex. B1 – Bathroom Increases contract supplement

Clmt. Ex. C1 – Harford County Government Inspection Worksheet dated March 20, 2019
C2 – Permit Receipt dated February 8, 2019
C3 – Harford County Government plumbing permit dated March 26, 2019
C4 – Superior Automatic Sprinkler Corp. Service Work Order dated December 8, 2018
C5 – Harford Electrical Testing Co., Inc., Interim Report of Test dated April 19, 2019
C6 – Harford County Permit No. BR-001946-2019 issued February 8, 2019

Clmt. Ex. D1 – EMC Home Improvements Estimate, labeled Estimate No. 1 for entire basement re-do, in the amount of $17,480.00, dated March 27, 2019
D2 – Feather & Nail Design & Remodeling Estimate, labeled Estimate No. 2 for entire basement re-do, in the amount of $17,475.00, dated March 21, 2019
D3 – Check for $8,607.50 from Michael G. Harrington to Feather & Nail Design & Remodeling dated April 30, 2019
D4 – Check for $3,547.50 from Michael G. Harrington to Feather & Nail Design & Remodeling dated April 1, 2019
D5 – Email from Home Depot dated April 6, 2019

Clmt. Ex. E1 – Email from Kimberly Allen dated October 18, 2020 forwarding emails from David Castrillon to K. Allen
E2 – Photos of shower tile work taken by Claimant on February 5, 2019
E3 – Photos of shower tile work taken by Claimant on February 5, 2019
E4 – Photos of shower and floor taken by Claimant on February 5, 2019
E5 – Photo depicting waterproofing behind tile walls taken by Claimant on February 5, 2019
E6 – Photo depicting wallboard to hold marble tiles taken by Claimant on February 5, 2019
E7 – Photos (2) of shower tile work taken by Claimant on February 5, 2019
E8 – Photos (3) of shower tile work taken by Claimant on February 5, 2019
E9 – Photos (2) of shower tile work taken by Claimant on February 5, 2019

E10 – Photos (2) of shower tile work taken by Claimant on February 5, 2019
E11 – Photos (2) of shower tile work taken by Claimant on February 5, 2019
E12 – Photos (2) of shower tile work taken by Claimant on February 5, 2019
E13 – Photos (2) of shower tile work and floor damage taken by Claimant on February 5, 2019

Clmt. Ex. F1 – Photo of installation of laminate flooring over existing floors, taken by Claimant on February 6, 2019
F2 – Photos (2) of laminate flooring taken by Claimant on February 6, 2019
F3 – Photo of tile spacers taken by Claimant on February 6, 2019
F4 – Photos (2) of workmanship in flooring installation taken by Claimant on February 6, 2019

Clmt. Ex. G1 – Photos (2) of base molding installation taken by Claimant on February 6, 2019
G2 – Photo of base molding installation taken by Claimant on February 6, 2019
G3 – Photo of missing base molding taken by Claimant on February 6, 2019
G4 – Photo of base molding and drywall installation taken by Claimant on February 6, 2019
G5 – Photos (2) of drywall and trim installation and drywall at light switch, taken by Claimant on February 6, 2019
G6 – Photos (2) of trim installation dated February 6, 2019
G7 – Photos (2) of installation of base molding taken by Claimant on February 6, 2019

Clmt. Ex. H1 – Photos (3) of drywall and switch plates and outlet covers
H2 – Photos (3) of drywall and outlet covers, defective base molding installation, and flooring
H3 – Photos (2) of drywall repairs at sprinkler head and outlet cover
H4 – Photos (3) of drywall
H5 – Photos (2) of drywall at corners of walls and ceilings in bedroom
H6 – Photos (2) of ceiling drywall for light and sprinkler head in den
H7 – Photos (3) of drywall
H8 – Photos (2) of ceiling drywall in den and bedroom
H9 – Photos (3) of ceiling drywall in den
H10 – Photo of holes in ceiling for light and sprinkler head in bedroom ceiling

Clmt. Ex. I1 – Photos (3) of rolling barn door for closet
I2 – Photos (2) of bedroom door
I3 – Photos (3) of hall door

I admitted the following exhibits on the Fund's behalf:

Fund Ex. 1 - Hearing Order dated January 15, 2020

Fund Ex. 2 - Notices of Hearing (3) dated September 1, 2020; April 27, 2020 and February 27, 2020

Fund Ex. 3 - Letter to Respondent with Home Improvement Claim Form from Maryland Home Improvement Commission

Fund Ex. 4 - Print out of Respondent's licensing data from Department of Licensing and Regulation

Testimony

The Claimant testified and did not present other witnesses.

The Fund did not present 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 5537948.

2. At all times relevant, the Claimant was the owner of a home on Cullen Way, Forest Hill, Maryland (Home). Michael G. Harrington was also a resident of the Home.[3]

3. On November 26, 2018, the Claimant and the Respondent entered into a contract (Contract) to perform home improvements to the Home. The improvements described in the Contract were to transform an unfinished basement into a living space, including framing and complete construction of a hallway, bedroom, a full bathroom, a family room, a utility room with sink, and storage spaces. The work included flooring, walls, ceilings, trim, doors and hardware, and extension of HVAC service to the bathroom and bedroom. The Contract also included electrical installation of all lighting, switches, receptacles, sub-panel, circuits, fault breakers, smoke and CO2 detectors, as well as permits and inspection for all of the electrical service.

4. The original agreed-upon Contract price was $15,185.00. This amount was supplemented by $2,157.00 for tile, for a total of $17,360.00.

[3] Mr. Harrington was the Claimant's fiancée. The Claim was filed only by the Claimant.

5. Work under the Contract was to begin November 27, 2018. The approximate completion date was January 4, 2019.

6. On November 26, 2018, Mr. Harrington paid the Respondent $5,000.00 pursuant to the Contract, on behalf of the Claimant.

7. On November 30, 2018, Mr. Harrington paid the Respondent an additional $13,000.00 on behalf of the Claimant.

8. On December 1, 2018, the Claimant first raised concerns orally with the Respondent about the quality of his work under the Contract.

9. On December 13, 2018, the Claimant raised concerns in text messages to the Respondent about the quality of his work under the Contract.

10. The Respondent's installation of drywall and flooring contained numerous deficiencies.

11. The drywall for the shower was inadequate to support the Carrara marble tiles chosen by the Claimant. The tiles were improperly cut and fixed onto the wall, causing breakage. There was inadequate or no waterproofing behind the tiles. The shower was unusable.

12. Vinyl plank flooring was improperly installed and showed gaps and spaces between planks and the molding.

13. The moldings at the base of the walls and around the doors were incorrectly installed and left unfinished.

14. None of the drywall was level or plumb, and was unevenly matched to the ceiling. There were lumps and flaws in the drywall throughout. Nail heads remained unpatched and unfilled.

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

15. The Respondent did not correct the deficiencies identified to him by the Claimant, but asked her to identify the flaws and represented that they would be corrected at "punch out" upon conclusion of the work.

16. The Respondent last worked at the residence on February 6, 2019, leaving the work incomplete.

17. On February 7, 2019, the Respondent left a check in the amount of $2,000.00 at the residence, payable to Mr. Harrington, for "refund on shower tile + base."

18. After leaving the check on February 7, 2019, the Respondent had no further contact with the Claimant and did not return to the Home to complete the Contract.

19. After the Respondent abandoned the project, the Claimant discovered that necessary construction permits had not been obtained by the Respondent.

20. On February 8, 2019, the Claimant and Mr. Harrington obtained a building permit to complete the project, Permit Number: BR-001946-2019.

21. On March 26, 2019, a permit was issued by Harford County Government to RC2G Plumbing for plumbing work incident to a finished basement at the residence.

22. On March 30, 2019, the residence was inspected by Harford County Inspector Dave Cross, who advised the Claimant to contact the plumber and electrician to pull permits, which Claimant learned had also not been done before the project was abandoned by the Respondent. The Inspector also determined that several items needed to be remedied before they would pass inspection.

23. The Claimant spent a total of $1,820.00 to secure the necessary permits, make necessary corrections, and facilitate inspections not obtained by the Respondent.

24. On March 21, 2019, upon request by the Claimant, Feather & Nail Design & Remodeling (Feather & Nail) generated an estimate in the amount of $17,475.00 for demolition, removal and replacement of components improperly installed due to substandard workmanship by Respondent, including framing, drywall, flooring, trim, shower and bathroom components.

25. On April 6, 2019, the Claimant expended $467.42 to purchase ceramic wall tile to replace marble shower tile improperly installed by Respondent. The marble tile had to be demolished.

DISCUSSION

The Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Bus. Reg. § 8-407(e)(1); Md. Code Ann., State Gov't § 10-217 (2014); COMAR 09.08.03.03A(3). To prove a claim by a preponderance of the evidence means to show that it is "more likely so than not so" when all the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002).

An owner may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor . . . ." Bus. Reg. § 8-405(a); *see also* COMAR 09.08.03.03B(2) ("The Fund may only compensate claimants for actual losses . . . incurred as a result of misconduct by a licensed contractor."). "'[A]ctual loss' means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." Bus. Reg. § 8-401. For the following reasons, I find that the Claimant has proven eligibility for compensation.

The Respondent performed unworkmanlike, inadequate, or incomplete home improvements. Though permits were required, the Respondent did not obtain any. The Claimant was directed by Harford County to obtain a building permit, as well as have remedial work

performed before arranging inspections and procuring permits that were not obtained by the Respondent or his subcontractors for the plumbing and electrical work.

The Claimant informed the Respondent of her concerns, orally within four days of the commencement of work, and thereafter in writing. The Respondent did not respond to her concerns, or attempt to correct or revise inadequately performed work. The deficiencies of the Respondent's work were visibly apparent as to every aspect of the Respondent's work, demonstrated in the numerous photos produced by the Claimant at the hearing.

In the bathroom to be constructed by the Respondent, for instance, the shower was to be lined primarily with Carrera marble tiles, which required adequate wall support, adequate waterproofing, adequate adhesion techniques, adequate sloping for drains, and adequate means to create precise and uniform cutting of the marble tiles. Instead, the tiles were cut imprecisely using a scoring technique rather than a wet tile saw, the wall board was too thin to support the marble tiles, they were adhered with inadequate adhesive, the basin was not sloped to permit drainage, and there was inadequate or no waterproofing behind the tiles. As a result of these defects, the marble tiles were uneven and poorly adhered and repeatedly fell from the shower walls, resulting in broken marble tiles and a failure of the entire shower system.

Even to an untrained eye, the Respondent's work product was unworkmanlike and inadequate. The Respondent also left work incomplete. The moldings were particularly unsightly, cut one to two inches short of the door frames. Molding around the base of walls and around doors was left unfinished. Drywall was left without correction for flaws, lumps, and nail head covers.

To repair these deficiencies, Feather & Nail proposed demolishing all previous work, followed by framing, waterproofing, drywall replacement, tile installation and reinstallation of flooring in the bathroom.

Defects in the installation of drywall were apparent throughout the project, based on the Claimant's photos, including unfinished joints and seams, improper cuts for switch plates, outlet covers, light fixtures and sprinkler heads, and defects in the patching, filling and finishing of drywall around fixtures, above the level of base trim and on the ceilings. To remedy these defects, drywall had to be demolished and replaced in the bathroom, and it was extensively filled and refinished elsewhere.

Vinyl plank flooring was improperly installed with gaps and spaces between planks. In some places planks were cut too short so that small pieces were used to fill gaps at a wall or molding. To address these deficiencies, all existing flooring had to be removed, gaps corrected, and flooring reinstalled. Trim had to be removed and replaced throughout the entire basement.

It has been necessary for the Claimant to engage a contractor to restore, replace, repair and complete the deficient installations performed by the Respondent and she has incurred actual losses as a result. The Claimant's direct economic loss is a direct result of the unworkmanlike, inadequate, or incomplete home improvement rendered by the Respondent.

I find that the Claimant is eligible for compensation from the Fund. Having found eligibility for compensation, I must determine the amount of the Claimant's actual loss and the amount, if any, that the Claimant is entitled to recover. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney fees, court costs, or interest. Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1). MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work.

In this case, the Respondent performed some work under the Contract, and the Claimant has retained other contractors to complete or remedy that work. Accordingly, the following formula appropriately measures the Claimant's actual loss:

> If the contractor did work according to the contract and the claimant has solicited or is soliciting another contractor to complete the contract, the claimant's actual loss shall be the amounts the claimant has paid to or on behalf of the contractor under the original contract, added to any reasonable amounts the claimant has paid or will be required to pay another contractor to repair poor work done by the original contractor under the original contract and complete the original contract, less the original contract price. If the Commission determines that the original contract price is too unrealistically low or high to provide a proper basis for measuring actual loss, the Commission may adjust its measurement accordingly.

COMAR 09.08.03.03B(3)(c).

Mr. Harrington, on the Claimant's behalf, initially paid $18,000.00 to the Respondent. Thereafter, $2,000.00 was refunded by the Respondent at the time of abandonment, reducing the amount directly paid to the Respondent to $16,000.00. Added to this is the $1,820.00 paid by the Claimant for remedial work, inspections, and permits for which the Respondent was responsible, for a total of $17,820.00.[4]

The Claimant has paid or will be required to pay $17,475.00 to Feather & Nail to repair work done poorly by the Respondent under the original Contract and complete the original Contract. In addition, the Claimant paid $467.42 to purchase tiles for the bathroom to replace the marble tiles that were demolished, for a total of $17,942.42.

[4] COMAR 09.08.01.08 provides, "In the performance of any Home Improvement Contract, it shall be the non-delegable duty and obligation of the prime contractor to secure, or see to the securing of, every permit, license, or special exception necessary to the proper completion of the contract according to applicable state or local building laws.

The original Contract price was $15,185.00, which was supplemented by agreement of the Claimant and Respondent to include an additional sum of at $2,157.00, for a total of $17,360.00.

Using the regulatory formula, the calculation is as follows:

	$17,820.00	Amount paid under original Contract to the Respondent or on his behalf
+	$17,942.42	Amount reasonably needed to repair & complete
=	$35,762.42	Total
-	$17,360.00	Amount of the original Contract
=	$18,402.42	Actual Loss

The Business Regulation Article caps a claimant's recovery at $20,000.00 for acts or omissions of one contractor and provides that a claimant may not recover more than the amount paid to the contractor against whom the claim is filed. Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a). In this case, the Claimant's actual loss of $18,402.42 exceeds $17,820.00, the amount paid to the Respondent or on his behalf. Therefore, the Claimant's recovery is limited to $17,820.00, the amount paid to the Respondent or on the Respondent's behalf. Bus. Reg. § 8-405(e)(5); COMAR 09.08.03.03B(4).

The Fund argued that any amount awarded to the Claimant should be restricted to the amount specified on the Claim Form and that any additions to the Claim alleged during the hearing not be included in an award. The Claimant's original claim amount was $16,848.71. The Fund cited COMAR 09.08.03.02C, which provides:

> C. Amending of Claims. Once a verified claim has been filed with the Commission, the claimant may not amend the claim unless the claimant can establish to the satisfaction of the Commission that either the:

> (1) Claimant did not know or could not have reasonably ascertained the facts on which the proposed amendment is based at the time the claim was filed or;
> (2) Claimant's proposed amendment would not prejudice the contractor whose conduct gave rise to the claim.

The Fund asserted that since the Respondent failed to appear at the hearing, he lacked sufficient notice that the claim was going to be amended to an amount greater than that originally claimed. The Fund suggested this lack of knowledge would necessarily prejudice the Respondent. I note, however, that the regulation permits an amendment where the Claimant did not know or could not have reasonably ascertained the facts on which the amendment was based when the claim was filed. The Contract clearly obligated the Respondent to acquire the necessary permits for the job. It was only afterward that the Claimant discovered he had not performed this essential duty and was forced to bear the cost on her own. Amending the claim for this amount recognizes the Claimant's discovery that this expenditure constituted an amount paid to or on behalf of the Respondent, in the fulfillment of that duty as part of the Contract.

Even if I were to find prejudice to the Respondent, the regulation does not require that it be a mandatory bar to an amended claim. The regulation specifically states either (1) <u>or</u> (2) be the determining factors in permitting an amended claim. I find that COMAR 09.08.03.02C(1) is sufficient to support the amendment. Moreover, while I understand and appreciate the Fund's argument, I also note there is no evidence that the Respondent was unaware of the hearing. He received proper notice and could have attended to support his position and dispute the claim. That he could benefit from his failure to appear, despite notice, is more prejudicial to the Claimant, whose amendment was legitimate. The Respondent was a signatory to the Contract, and likely drafted it. The Contract clearly included permitting and the Respondent is also presumed to know the regulation that requires obtaining necessary permits be considered part of

a contractor's duty. Clearly, the cost of obtaining permits to complete the Contract was completely foreseeable to the Respondent. Contrary to the Fund's argument, I am not convinced that had the Respondent known the Claim could be amended to include the cost of permitting borne by the Claimant he may have changed his mind and appeared at the hearing. I find that the amendment to the Claim is legitimate and should be considered in the determination of actual loss.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual loss, with a compensable loss of $17,820.00 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 $17,820.00 from the Fund. COMAR 09.08.03.03B(4), D(2)(a); COMAR 09.08.03.02C.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant $17,820.00 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;[5] and

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

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

January 12, 2021
Date Decision Issued

Harriet C. Helfand
Administrative Law Judge

HCH/jf
#189693

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PROPOSED ORDER

WHEREFORE, this 17th day of March, 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