STEPHAN S. HANLEY,	*	**BEFORE STEVEN V. ADLER,**
CLAIMANT	*	**ADMINISTRATIVE LAW JUDGE**
v.	*	**OF THE MARYLAND OFFICE**
THE HOME IMPROVEMENT	*	**OF ADMINISTRATIVE HEARINGS**
COMMISSION GUARANTY FUND	*	
FOR THE ALLEGED ACTS OR	*	
OMISSIONS OF BRANDON H.	*	**OAH No.: LABOR-HIC-02-20-02719**
JOHNSON, t/a CONSIDER IT DONE	*	**MHIC No.: 19 (05) 925**
CONSTRUCTION COMPANY, LLC	*	
RESPONDENT	*	

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

PROPOSED DECISION

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STATEMENT OF THE CASE

On April 18, 2019, Stephan S. Hanley (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC or Commission) Guaranty Fund (Fund) for reimbursement of actual losses allegedly suffered as a result of a home improvement contract with Brandon H. Johnson, trading as Consider It Done Construction Company, LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015).[1] On December 11,

[1] All later citations to the Business Regulations Article of the Annotated Code of Maryland are to the 2015 Replacement Volume to the Code.

2019, the Commission issued a Proposed Order in favor of the Claimant granting an award of $4,250.00 from the Fund. On or about December 29, 2019, the Respondent filed exceptions to the Proposed Order requesting a hearing on the merits of the Claim. On January 8, 2020, the Chairperson of the Commission determined a hearing was warranted on the Claim, vacating the Proposed Order, and on January 13, 2020, transmitted the matter to the Office of Administrative Hearings (OAH) for an evidentiary hearing.

I held a hearing on the merits of the Claim on August 21, 2020 at the OAH in Hunt Valley, Maryland.[2] Md. Code Ann., Bus. Reg. § 8-407(e). The Claimant represented himself. The Respondent represented himself. Justin Dunbar, Assistant Attorney General, counsel to the Department of Labor (Department), represented the Fund.

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, if any, of the Claimant's compensable loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits in evidence offered by the Claimant:

CL Ex. 1 – Baltimore City Housing Department, Construction and Building Inspection Permit, dated October 28, 2018

[2] The case was originally scheduled to be heard on May 14, 2020, and postponed due the closure of State offices to the public occasioned by the COVID-19 pandemic.

CL Ex. 2 – Photographs of property, undated

I admitted the following exhibits in evidence offered by the Respondent:

Resp. Ex. 1 – Project Summary Scope of Design Services, undated, sent to the Claimant on July 21, 2016, with attachments

Resp. Ex. 2 – Email correspondence from the Respondent to the Commission (Response to the Claim), dated December 29, 2019, with attachments

Resp. Ex. 3 – Timeline of Events (Additional Response to the Claim), undated, with attachments

I admitted the following exhibits in evidence offered by the Fund:

GF Ex. 1 – Notice of Hearing, dated May 4, 2020

GF Ex. 2 – Department Identification Registration for the Respondent, dated August 19, 2020

GF Ex. 3 – Proposed Order, Claim No. 19 (05) 925, dated December 11, 2019

GF Ex. 4 – Letter from the Commission to Claimant, dated January 8, 2020

GF Ex. 5 – Hearing Order, Claim No. 19 (05) 925, dated January 8, 2020

There were no other exhibits offered in evidence.

SUMMARY OF THE EVIDENCE

Testimony

The Claimant testified on his own behalf. The Respondent testified on his own behalf. The Fund presented no witness testimony.

PROPOSED FINDINGS OF FACT

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

1. At all times relevant to the proceeding, the Respondent was a licensed home improvement contractor under MHIC registration number 95789.

2. The Claimant is not related to the Respondent or any of his employees, by blood or marriage.

3. The Claimant owns and resides in the subject property and owns no other real property in the State.

4. On January 19, 2016, the Claimant and the Respondent entered into a contract for the Respondent to complete a total renovation to the Claimant's property in Baltimore, Maryland.

5. On June 13, 2017, the Claimant and the Respondent entered into a separate contract for the Respondent to complete a partial demolition of the basement rear crawl space; underpinning of rear; and partial framing of the first floor of the Claimant's property in Baltimore, Maryland (June contract).

6. The agreed-upon contract price for the June contract was $5,500.00 for all labor and materials.

7. On June 15, 2017, the Claimant paid the Respondent in full for the work under the June contract.

8. Work began under the June contract on June 20, 2017.

9. The last day work was performed under the June contract was June 28, 2017.

10. As of June 28, 2017, the last day work was performed under the June contract, work remained incomplete.

11. After June 28, 2017, the Claimant and the Respondent had numerous discussions about the timeframes for the Respondent's completion of the work under the June contract. During these discussions, the Respondent acknowledged he did not have sufficient funds available to complete the work agreed to in the contract and requested an extension of time.

12. After waiting approximately four months, the Claimant subsequently contracted with Walt Hammond and Greg Gomez, an MHIC licensed contractor, in October 2017, to

complete the June contract as well as perform additional work not contemplated in the June contract.

13. The Claimant paid Messrs. Hammond and Gomez $10,000.00 to complete the home improvement work contracted for with the Respondent and to perform additional work outside the scope of work of the June contract.

14. In discussions with the Claimant, the Respondent valued the work he performed under the June contract at $3,250.00 and on March 5, 2018, requested a repayment plan from the Claimant to refund the balance owing to the Claimant over time.

15. As of the date of the hearing, the Respondent has not remitted any monies to the Claimant.

DISCUSSION

I

Governing Law, Controlling Regulations, and Burden of Proof

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); COMAR 09.08.03.03B(2). Actual 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 purposes of recovery from the Fund, the act or omission of a licensed contractor includes the act or omission of a subcontractor, salesperson, or employee of the licensed contractor, whether or not an express agency relationship exists." Md. Code Ann., Bus. Reg. § 8-405(b).

At a hearing on a claim for reimbursement from the Fund, the Claimant has the burden of proof. Md. Code Ann., Bus. Reg. § 8–407(e)(1); COMAR 09.08.03.03(A)(3). The standard of proof is by a preponderance of the evidence. Md. Code Ann., State Gov't § 10-217 (2014). To

prove something by a "preponderance of the evidence" means "to prove that something is more likely so than not so," when all of the evidence is considered. *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)); *see also Mathis v. Hargrove*, 166 Md. App. 286, 310 n.5 (2005).

For the following reasons, I am persuaded that the Claimant has proven eligibility for an award from the Fund.

II

Positions of the Parties

The Claimant testified that on June 13, 2017, he entered into a contract with the Respondent for the partial demolition, underpinning, and framing of the basement of his home. The Claimant contends he timely remitted all the monies agreed to under the contract to the Respondent; that the monies covered labor and materials but not any project maintenance fees, which were never discussed or made a part of the June contract; the Respondent was unable to complete the contract work and left the work unfinished on June 28, 2017; failing to return to the property and complete the project. As a result, the Claimant contends he was obliged to seek the services of another licensed contractor to complete the work agreed to under the contract with the Respondent as well to perform additional work. Due to the Respondent's failure to complete the home improvement, the Claimant avers he suffered an actual monetary loss and seeks just compensation from the Fund to redress this loss.

The Respondent maintains he performed all the work agreed to in the June contract, which he contends included underpinning, framing, and pre-construction project management fees. After completing the work, a balance of $382.11 was remaining to the Claimant.

The Fund opposed the Claim, contending that while there was no legal impediment to recovery, the Claimant had failed to meet his burden of proof to establish the amount of his

actual loss because he was unable to parse out from the $10,000.00 paid to Messrs. Hammond and Gomez, the precise amount which represented the cost to complete the Respondent's work.

III

Analysis of the Merits of the Claim

The resolution of this case turns on which party's account of events I find more credible. Both the Claimant and the Respondent are party witnesses, which furnishes each with a motivation to color their respective testimony in a light most favorable to them. Accordingly, I weigh the evidence of record with particular care and caution. *Hoffa v. United States*, 385 U.S. 293, 418 n.14 (1966).

There was no expert testimony offered in this case. "It is well settled that expert testimony is required when the subject of the inference is so particularly related to some science or profession that it is beyond the ken of the average layman." *Wood v. Toyota Motor Corp.*, 134 Md. App. 512, 518 (2000) (internal citations and quotation omitted). The nature of the incomplete work in this case does not require expert testimony to persuasively establish; it turns on a question of fact that is not beyond the ken of a layperson—was the June contract work fully performed or not—an inquiry that turns on which party's account I find more credible. *See Suburban Hospital Ass'n v. Hadary*, 22 Md. App. 186, 194 (1974);[3] *see also Para v. 1691 Ltd. P'ship*, 211 Md. App. 335, 380 (2013) (expert testimony is not necessary in an agency hearing before a presumably expert hearing office.).

[3] In *Suburban Hospital Association*, a hospital stored sterile and nonsterile needles in the same cabinet and a physician used a nonsterile needle in performing a liver biopsy, requiring a patient to undergo a painful series of gamma globulin injections. The Court determined expert testimony was not essential for the jury to determine that storage of the needle was inconsistent with hospital's obligation to use due care. The Court held that where, as analogous here, an issue of performance is not related to technical matters peculiarly within the knowledge of practitioners in the field, but to circumstances where common knowledge and the experience of reasonable persons can evaluate the conduct of professionals, expert testimony is not essential for the factfinder. *Id.* at 194-95.

The Claimant's testimony was delivered clearly, consistently, and sincerely; without any signs of doubt, evasion, falsity, deception or contradiction; and was supported by documentation, including pictures taken contemporaneously with the performance of the work at issue and email and text message correspondence with the Respondent detailing the Claimant's concerns about the Respondent's lack of progress. CL Ex. 2; Resp. Exs. 2-3; *see B.H. v. Anne Arundel Cty. Dep't of Soc. Servs.*, 209 Md. App. 206, 224-25 (2012). I find the Claimant's testimony and his account of events credible and I give it great weight. *See Dickey v. State*, 404 Md. 187, 202-03 (2008) (factors to be weighed by a fact-finder in assessing credibility); *Maryland Bd. of Physicians v. Elliott*, 170 Md. App. 369 (2006) (a finder-of-fact is authorized to determine the credibility of a witness's testimonial evidence based on the witness's demeanor); *Montgomery Cty. Dep't of Health & Human Servs. v. P.F*, 137 Md. App. 243, 268 (2001) (the credibility to be given a witness and the weight to be given his testimony is the exclusive province of the finder-of-fact).

The Respondent's testimony is inconsistent with, and contravened by, his own documentary submission. For this reason, I find the Respondent's testimony less credible and give it less weight than the Claimant's, where their accounts diverge. At the hearing, the Respondent averred that he completed the entire scope of work contemplated in the June contract and the only monies outstanding to the Claimant were $382.11. In his exhibits, in defense of the Claim, the Respondent sets forth a text message exchange with the Claimant on March 5, 2018, where in response to a request for "cash back from [the Claimant] for advance of 5.5.k" he quotes himself as "requesting a payment plan" and expressly stating that "we're willing to give back what we can this week and set up a payment plan towards the balance." Resp. Ex. 3.

Should the Respondent have completed the scope of work as he alleges the only "cash back" coming to the Claimant would be a sum less than $400.00. While multiple inferences can

be drawn from the Respondent seeking a repayment plan from the Claimant, it strains even the most elastic concept of credulity to conclude the Respondent would request a repayment plan for a sum of this nature; it is more likely so than not so that the sum in question was appreciably larger, which, in turn, suggests the Respondent did not complete the scope of work in the June contract, as this would be the sole reason the Respondent would return monies to the Claimant. *Smith v. State*, 415 Md. 174, 183 (2010) (quotation marks, citations and internal ellipsis omitted). ("[T]he finder of fact has the ability to choose among differing inferences that might possibly be made from a factual situation. That is the fact-finder's role . . ."); *Cerrato-Molina v. State*, 223 Md. App. 329, 337 (2015) ("Choosing between competing inferences is classic grist for the [fact-finder's] mill.").

Furthermore, in text message exchanges with the Claimant on April 21 and 22 of that same year, discussing the possibility of work on a new project, the Respondent wrote "[e]specially if we can barter the balance due." Resp. Ex. 3. This further supports the Claimant's account that the Respondent acknowledged to him that he did not complete the work and earn the $5,500.00 advance payment under the June contract.

Additional support for the Claimant's account is found in text messages exchanged between the Claimant and the Respondent on August 10, 2017, when in response to the Claimant's inquiry on progress on the June contract the Respondent replied "[w]e need some funds bruh . . . we were trying to move with the small amounts but its difficult to get help once you put out most of the funding for materials. That's the hold up . . ." *Id.* (ellipses in original).

For these reasons, I am persuaded, more likely than not, the home improvement at issue was incomplete, as that term is used in the law and regulations. *Steinberg v. Arnold*, 42 Md. App. 711, 712 (1979) ("as fact finder, [the judge] has the usual jury prerogatives of whether to

believe or disbelieve witnesses, how much weight to give testimony and ultimately whether to be persuaded or not to be persuaded").

Based upon the credible evidence of record, I find the Respondent, a licensed contractor, entered into a written agreement with the Claimant to perform a home improvement to the Claimant's property, accepted payment totaling $5,500.00, which represents the total contract price, and performed work that was incomplete. Further, I find there is no dispute that the Claimant is the owner of the subject property and that there are no procedural impediments barring his from recovery from the Fund. Md. Code Ann., Bus. Reg. § 8-405(f), (g); COMAR 09.08.01.13.

I conclude, therefore, that the home improvement at issue here is incomplete within the meaning of the statute, the Claim is not barred by any relevant statuary or regulatory provisions, and the Claimant is eligible for compensation from the Fund. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405.

V

Award of Compensation from the Fund

Having found eligibility for compensation, I now turn to the amount of the award, if any, to which the Claimant is entitled. The Claimant may not be compensated for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. Md. Code Ann., Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1). The Claim sets forth an alleged actual loss of $4,250.00, which represents the payment the Claimant made to the Respondent under the contract totaling the full contract price of $5,500.00 minus $1,250.00, the monetary value of the Respondent's work as assessed by Messrs. Hammond and Gomez, the contractors who completed the work under the June contract and performed additional work totaling $10,000.00. GF Ex. 3.

The MHIC's regulatory scheme offers three formulas for measurement of a claimant's actual loss, unless a unique measurement is necessary. COMAR 09.08.03.03B(3)(a)-(c).

It is undisputed that the Respondent performed some work under the contract. I am persuaded the credible evidence of record establishes that the Claimant solicited Messrs. Hammond and Gomez, the latter of whom is a licensed contractor, to complete the original contract after the Respondent left the work incomplete. None of the prescribed formulas properly measures the Claimant's loss here, however, because the remedial work that was subsequently performed included a larger scope than that which was set forth in the June contract. Accordingly, the following formula, which most closely fits the facts, fails to appropriately measure 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).

Therefore, I must fashion a unique measure. COMAR 09.08.03.03B(3). The Claimant credibly testified that in discussions with the Respondent in October 2017, the Respondent valued the work he performed under the June contract at $3,250.00 and agreed to refund the Claimant the remaining balance of $2,250.00 ($5,500.00 - $3,250.00 = $2,250.00). While I find credible the Claimant's testimony that the subsequent contractor valued the Respondent's work at $1,250.00, the subsequent contractor was not called as a witness and did not offer any basis on the record before me for how he arrived at that calculation for me to independently weigh. The Respondent's exhibits reflect that three carpenters and a helper in his employ spent a total of

eighteen hours on site working under the June contract between June 20 and June 28, 2017, performing skilled and unskilled labor. Resp. Ex. 3. $3,250.00 divided by eighteen yields an hourly rate of $180.55. Using the specialized knowledge, I have gained from presiding over home improvement commission and new home builder guarantee fund cases, I find this a reasonable cost to partially perform the work at issue. Md. Code Ann., State Gov't § 10-213(i) (2014) ("The [OAH] may use its experience, technical competence, and specialized knowledge in the evaluation of evidence."). I have also considered that as between the parties, the Respondent is the best positioned to value his own work and, for these reasons, accept the Respondent's valuation (as credibly testified to by the Claimant) over Messrs. Hammond and Gomez's valuation (as credibly testified to by the Claimant). Applying this unique measure to the facts of the case at bar, I subtract $3,250.00 (the value of the Respondent's work) from $5,500.00 (the amount paid to the Respondent under the June contract), which yields the sum of $2,250.00 (the Claimant's actual loss).

The law and controlling regulations cap a claimant's recovery at $20,000.00 for the acts or omissions of one contractor, and expressly provide 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 of $2,250.00 is less than the statutory maximum of $20,000.00 and the amount paid to the Respondent. Therefore, the Claimant is entitled to an award from the Fund in the sum of $2,250.00. Md. Code Ann, Bus. Reg. § 8-405(e)(1); COMAR 09.08.03.03D(2)(a).

PROPOSED CONCLUSIONS OF LAW

I conclude, as a matter of law, that the Claimant sustained an actual loss of $2,250.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405, § 8–407(e)(1) (2015); COMAR 09.08.03.03(A)(3). I further conclude, as a matter of law, that the Claimant is entitled to an award of $2,250.00 from the Fund. *Id.*; COMAR 09.08.03.03B(3), (4), D(2)(a).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant $2,250.00;

ORDER that the Respondent is deemed to be ineligible for a Maryland Home Improvement Commission license until the Respondent reimburses the Maryland Home Improvement Guaranty Fund for all monies disbursed under this Order, plus annual interest of at least ten percent, as set by the Maryland Home Improvement Commission[4]; and

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

November 12, 2020
Date Decision Issued

Steven V. Adler
Administrative Law Judge

SVA/da
#188921

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

PROPOSED ORDER

WHEREFORE, this 4th day of February, 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