IN THE MATTER OF THE CLAIM	*	**BEFORE NANCY E. PAIGE,**
OF WESLEY MILLER,	*	**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 JASON ZABEC,	*	
T/A INNOVATIVE ELEMENTS, INC.,	*	**OAH No.: LABOR-HIC-02-20-24914**
RESPONDENT	*	**MHIC No.: 20 (75) 263**

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PROPOSED DECISION

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STATEMENT OF THE CASE

On December 13, 2019, Wesley Miller (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 $18,810.00 in actual losses allegedly suffered as a result of a home improvement contract with Jason Zabec, trading as Innovative Elements, Inc. (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through

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

[illegible]

8-411 (2015).[2] On November 2, 2020, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on January 5, 2021, via video conferencing on the WebEx platform. Bus. Reg. § 8-407(c)(2)(i); Code of Maryland Regulations (COMAR) 09.08.03.03A(1); 28.02.01.20B. Nicholas Sokolow, Assistant Attorney General, represented the Fund. Kelly S. Kylis, Esquire, represented the Claimant, who was present.

After waiting more than fifteen 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. COMAR 28.02.01.23A. On December 4, 2020, notice of the hearing was mailed to the Respondent at the address of record by regular and certified mail, COMAR 09.08.03.03A(2), and was not returned as unclaimed/undeliverable. The Respondent did not notify the OAH of any change of address. COMAR 28.02.01.03E. On December 20, 2020, however, at the request of Mr. Sokolow, an additional notice was mailed to the Respondent at the address reflected in the records of the Department of Motor Vehicles. That notice was not returned. I determined that the Respondent received proper notice, and I proceeded to hear the captioned matter.

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.

[2] Unless otherwise noted, all references hereinafter to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.

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:

Cl. #1. October 27, 2017 Home Improvement Agreement between Claimant and Respondent
Cl. #2. December 13, 2017 Amendment to Home Improvement Agreement
Cl. #3. January 15, 2018 Service/Repair agreement between Claimant and Respondent
Cl. #4. A-R Undated photographs
Cl. #5. Undated proposal from Ridgevale Renovation & Construction LLC
Cl. #6. Undated receipts from Respondent
Cl. #7. October 24 – November 23, 2017; November 26-December 22, 2017; December 26, 2017- January 23, 2018 Chase Sapphire Account Summaries
Cl. #8. A-F Undated photographs

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

GF. #1. December 17, 2020 Notice of Remote Hearing
GF. #2. October 28, 2020 Hearing Order
GF. #3. December 9, 2020 Home Improvement Claim Form
GF. #4. December 16, 2020 letter from MHIC To Whom It May Concern (Respondent's licensing history)
GF. #5. December 29, 2020 Affidavit of Charles Corbin

Testimony

The Claimant testified and presented the testimony of John Musok, accepted as an expert in residential home improvement.

PROPOSED FINDINGS OF FACT

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

1. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor under MHIC license number 01-98060.

2. On October 27, 2017, the Claimant and the Respondent entered into a contract to smooth and paint the walls and ceilings in Claimant's home and install wood flooring on the first floor of the home (Contract). The Contract stated that work would begin on within three to four weeks of the Contract date and would be completed in two to three days.

3. The original agreed-upon Contract price was $9,998.00.

4. The Claimant paid the Respondent a deposit of $3,329.00 at the time of Contract.

5. On December 13, 2017, the parties entered into an Amendment to the Contract. Instead of sanding the walls and ceilings, the Respondent agreed to install drywall over the existing surfaces, add crown molding, and paint. In addition, the entries between the living room and dining room and between the dining room and the kitchen were to be widened and the floors at the entries were to be "finished." The Contract price was increased to $12,000.00, with an additional deposit of $667.00 charged on the increase.

6. The Claimant paid the Respondent a total of $11,863.00. The Respondent reduced the bill to cover the cost to replace a lighting fixture that its employees dropped in the course of construction.

7. The Respondent failed to properly attach drywall to the existing ceiling. The new ceiling is sagging in several places; the seams are not properly finished; and the paint is rough and uneven.

8. The seams in the drywall installed over walls are not properly finished and nail holes are not properly spackled and smoothed. The wrong type of paint was used on the walls; the colors do not match the Claimant's selections; the walls were not properly prepared for painting, the wrong type of paint was used and the paint is uneven, both in color and texture.

9. The Respondent used an inappropriate narrow molding between the ceilings and the walls, instead of the crown molding provided for in the Contract.

10. The Respondent installed a piece of engineered wood instead of a properly shaped threshold in the newly widened entrances to the dining room. The "threshold" is not securely attached to the flooring and presents a tripping hazard.

11. The flooring installed to patch the spaces created when the entrances were widened was not installed in a workmanlike manner. The flooring patch is not properly "toothed in" to the existing flooring and is lifting and the pattern does not comport with the existing flooring. In addition, a heating register that was covered by the new flooring was not properly capped, thus allowing leakage of air, dust, and moisture.

12. In the course of repairing the ceiling, the Respondent put a hole in the existing ceiling which allowed insulation to fall out. The Respondent did not replace the insulation before covering the ceiling with drywall. The insulation will have to be replaced in the course of repairing the ceiling.

13. The Claimant secured a judgment against the Respondent in District Court but cannot collect because the Respondent declared bankruptcy.

DISCUSSION

In this case, 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 was a licensed home improvement contractor at the time he entered into and performed work on the Contract with the Claimant. The Respondent performed unworkmanlike, inadequate, or incomplete home improvements.

The Claimant testified that he hired the Respondent to remove the pattern from the walls and ceilings in his home and to repaint, and to smooth and repair scratches in the hardwood floors. After he signed the Contract, a foreman employed by the Respondent came to review the project and informed the Claimant that it would be impossible to complete the project within the terms of the Contract. The foreman suggested that drywall be installed to cover the existing surfaces, rather than attempting to smooth off the pattern, and that crown molding be installed at the juncture of the walls and ceilings. The Claimant agreed to the changes and the parties also agreed to add enlarging the entrances to the dining room, with the attendant repairs to the floor.

The Contract price was increased from $9,998.00 to $12,000.00 and the Claimant paid an additional deposit of $667.00.

Work proceeded, off and on, beginning before Christmas 2017. The Claimant complained about the appearance of the work, but Respondent's employees assured him it would look better when completed and dried. After the work was ostensibly completed, the Claimant attended several "walk-throughs" with the Respondent's foreman, and although the foreman acknowledged the problems, no corrective work was done.

The Claimant paid the Respondent a total of $11,863.00, which was the full Contract price, less $137.00 for a fixture damaged by the Respondent. He filed suit against the Respondent in District Court and secured a judgment, including attorneys fees, but is unable to collect on the judgment because the Claimant has declared bankruptcy.

The Claimant retained John Musok to review the Respondent's work and advise on what would be necessary to correct it. Mr. Musok has been a home improvement contractor for about twenty years and operates Ridgevale Residential Construction & Renovation, LLC. He offered his opinion as an expert in home improvement that the work done in Claimant's home was substandard in several respects.

Mr. Musok testified that each sheet of drywall weighs about seventy-five pounds. Drywall used to cover the ceiling was attached to the existing ceiling with screws. It should have been attached to the framing. It is sagging and Mr. Musok said it will eventually fall. This cannot be fixed; the drywall must be removed and replaced. In addition, in the process of installing drywall on the ceiling, the Respondent's workmen stepped through the existing ceiling and insulation fell through the hole. The insulation must be replaced as part of the ceiling repair. The Respondent also installed "bed" molding, not crown molding, as promised.

Mr. Musok found that no preparatory work was done on the walls or ceilings before painting. Seams should have been taped and finished before painting, and semi-gloss paint was used directly over drywall, which resulted in an uneven paint job. According to Mr. Musok, it would require more work to prime and prepare the drywall than to replace it and start anew.

With respect to the widened entrances to the dining room, when portions of the walls were removed, gaps in the flooring needed to be filled. Mr. Musok testified that the ends should have been staggered to match the pattern of the remainder of the floor and the patched flooring was not "toothed in" to the existing flooring. As a result, the patches are lifting and need to be replaced. The pieces of engineered wood used as thresholds are not properly contoured and not properly attached. The "threshold" at the entry to the kitchen wobbles and presents a tripping hazard. The "thresholds" need to be replaced. A register vent in a newly enlarged entrance was covered with "floating" flooring which is not meant to be attached to the substrate and is not proper to cover a hole. The vent must be properly capped to prevent the escape of dust and moisture, which can cause the formation of mold.

Mr. Musok testified that more work is required to repair the work done by the Respondent than was required to complete the original Contract work. The damage done by the Respondent must be fixed, and the poorly installed drywall, flooring and molding must be removed before the Contract work can be replaced. He provided an itemized proposal, totaling $18,810.00, which he further explained in detail. I found his testimony reasonable and persuasive.

Based upon Mr. Musok's opinion and the Claimant's testimony, I find that the Claimant is eligible for compensation from the Fund. I must, therefore, 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 work under the Contract, and the Claimant intends to retain another contractor 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). The Claimant's loss is calculated as follows:

Amount paid to the Respondent:	$11,863.00
Amount to repair the Respondent's work	$18,810.00
	$30,673.00
Original Contract price	$12,000.00
Actual loss	$18,673.00

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 is more than the amount paid to the Respondent and less than $20,000.00. Therefore, the Claimant is entitled to recover the $11,863.00 he paid to the Respondent.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of $18,673.00 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 $11,863.00 from the Fund. Bus. Reg. § 8-405(e)(5); COMAR 09.08.03.03B(4).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant $11,863.00; 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;[3] and

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

February 12, 2021
Decision Issued

CONFIDENTIAL
Date

Nancy E. Paige
Administrative Law Judge

NEP/emh
#189859

[3] *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