

<p>IN THE MATTER OF THE CLAIM</p> <p>OF ROBERT HERTEL,</p> <p>CLAIMANT</p> <p>AGAINST THE MARYLAND HOME</p> <p>IMPROVEMENT GUARANTY FUND</p> <p>FOR THE ALLEGED ACTS OR</p> <p>OMISSIONS OF JAZMIN DICOLA,</p> <p>T/A MOSAIC HOME</p> <p>ENHANCEMENTS LLC,</p> <p>RESPONDENT</p>	<p>* BEFORE BRIAN PATRICK WEEKS,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>*</p> <p>*</p> <p>*</p> <p>* OAH No.: LABOR-HIC-02-23-04944</p> <p>* MHIC No.: 22 (75) 1037</p> <p>*</p>
--	---

\* \* \* \* \*

**PROPOSED DECISION**

STATEMENT OF THE CASE  
ISSUES  
SUMMARY OF THE EVIDENCE  
PROPOSED FINDINGS OF FACT  
DISCUSSION  
PROPOSED CONCLUSIONS OF LAW  
RECOMMENDED ORDER

**STATEMENT OF THE CASE**

On August 4, 2022, Robert Hertel (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)<sup>1</sup> Guaranty Fund (Fund) for reimbursement of \$18,685.90 for actual losses allegedly suffered as a result of a home improvement contract with Jazmin Dicola, trading as Mosaic Home Enhancements LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2022).<sup>2</sup> On February 3, 2023, the MHIC issued a

---

<sup>1</sup> The MHIC is under the jurisdiction of the Department of Labor.

<sup>2</sup> Unless otherwise noted, all references to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.

Hearing Order on the Claim. On February 14, 2023, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On May 4, 2023, I held a hearing by video. Bus. Reg. §§ 8-407(a), 8-312; Code of Maryland Regulations (COMAR) 28.02.01.20B(1)(b). Ernie Dominguez, Assistant Attorney General, Department of Labor (Department), represented the Fund. The Claimant was self-represented. The Respondent failed to appear.

After waiting 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 March 9, 2023, the OAH provided a Notice of Hearing (Notice) to the Respondent by United States mail. COMAR 28.02.01.05C(1). The Notice stated that a video hearing was scheduled for May 4, 2023, at 9:30 a.m. COMAR 09.08.03.03A(2). The Notice further advised the Respondent that failure to attend the hearing might result in "a decision against you."

The United States Postal Service did not return the Notice to the OAH. The Respondent did not notify the OAH of any change of mailing address. COMAR 28.02.01.03E. The Respondent made no request for postponement prior to the date of the hearing. COMAR 28.02.01.16. I determined that the Respondent received proper notice, and I proceeded to hear the captioned matter. COMAR 28.02.01.05A, C.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the OAH govern procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021); 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 offered by the Claimant:

- Cl. Ex. 1 - Photo of backer board, undated
- Cl. Ex. 2 - Photo of plywood, undated
- Cl. Ex. 3 - Photo with measurement, undated
- Cl. Ex. 4 - Photo with plywood measurement, undated
- Cl. Ex. 5 - Photo of floor, undated
- Cl. Ex. 6 - Photo with tile measurement, undated
- Cl. Ex. 7 - Photo of floor, undated
- Cl. Ex. 8 - Photo of floor, undated
- Cl. Ex. 9 - Photo of floor, undated
- Cl. Ex. 10 - Photo of floor, undated
- Cl. Ex. 11 - Photo of floor, undated
- Cl. Ex. 12 - Photo of floor and door jamb, undated
- Cl. Ex. 13 - Photo of floor and door jamb, undated
- Cl. Ex. 14 - Photo of tile and grout, undated
- Cl. Ex. 15 - Photo of tile and grout, undated
- Cl. Ex. 16 - Photo of tile and grout, undated
- Cl. Ex. 17 - Photo of tile and grout, undated
- Cl. Ex. 18 - Photo of tile and grout, undated
- Cl. Ex. 19 - Flooring Inspection Report from Buildtek, Inc., November 19, 2021
- Cl. Ex. 20 - Floors Etc. Invoice, April 29, 2022

Cl. Ex. 21 - Email to the Claimant, April 24, 2023

Cl. Ex. 22 - Buildtek, Inc. Invoice, April 13, 2023

I admitted the following exhibits offered by the Fund:

Fund Ex. 1 - Notice of Hearing, March 9, 2023  
Hearing Order, February 3, 2023

Fund Ex. 2 - Claim Form, August 4, 2022

Fund Ex. 3 - Licensing history for Respondent, printed April 28, 2023

The Respondent failed to appear and did not offer any exhibits.

### Testimony

The Claimant testified and presented the testimony of Michael Jordan, certified flooring inspector.

The Fund did not present any testimony.

The Respondent failed to appear and did not present any testimony.

### **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 112672.
2. On an unspecified date, the Claimant and the Respondent entered into a contract to demolish the existing floor and install tile in the kitchen, laundry room, and mud room at the Claimant's residence (Contract).
3. The original agreed-upon Contract price was \$15,950.00.
4. On an unspecified date, the Claimant paid the Respondent \$15,950.00.
5. The Respondent completed the work in October 2019. The Respondent removed a layer of plywood from the floor underlay between the previously existing tile and the subfloor, and installed backer board in place of the plywood. The backer board was not as thick as the

plywood, and as a result there were voids between the tile and the underlay. The floor was not level. The grout never cured properly and as a result grout residue has been coming off the floor.

6. Voids lead to floor deflection and a hollow sound, both of which were present after the Respondent completed the work on the Claimant's floors. Floor deflection leads to cracked tiles and grout, and potential structural issues underneath the floor.

7. On an unspecified date, the Respondent returned to the Claimant's residence after the Claimant complained about the grout not curing. The Respondent tried to fill in additional grout, but it did not cure.

8. On April 29, 2022, Floors Etc. provided an estimate of \$18,685.00 to completely redo the work that the Respondent had performed under the Contract.

9. On April 13, 2023, the Claimant paid Mr. Jordan \$600.00 for a floor inspection.

10. On April 24, 2023, the Claimant received an estimate of \$6,400.00 to remove and replace the subfloor in the kitchen, laundry room, and mudroom.

### **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); State Gov't § 10-217; 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 Cnty. 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) (Supp. 2022); *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 conclude that the Claimant has proven eligibility for compensation.

The Respondent was a licensed home improvement contractor at the time the Respondent entered into the Contract with the Claimant. By statute, certain claimants are excluded from recovering from the Fund altogether. Bus. Reg §§ 8-405, 8-408 (2015 & Supp. 2022). In this case, there are no such statutory impediments to the Claimant’s recovery.<sup>3</sup>

The Claimant argued that the Respondent’s work was deficient because the floor was not level, the grout never cured, and the Respondent erred when installing the subfloor leading to deflection. I conclude based on the uncontroverted and credible testimony of Mr. Jordan and the Claimant that the Respondent performed unworkmanlike, inadequate, or incomplete home improvements. I thus find that the Claimant is eligible for compensation from the Fund.

The Claimant explained that the scope of the Contract was to demolish the existing floor and install a new tile floor in the kitchen, laundry room, and mud room at the Claimant’s residence. The Claimant testified that when the Respondent took up the plywood during demolition, there was damage that the Respondent patched but did not replace. The Respondent told the Claimant that he would install the backer board to compensate for the damage to the plywood. After the work had been completed, the Claimant noticed that the grout had not cured, and talked with the Respondent who returned to try to fill in additional grout, but this also did not cure. The Claimant explained that the overall appearance of the floor is unacceptable because it is not level and he does not trust the subfloor.

---

<sup>3</sup> Mr. Dominguez argued that the Claim was legally sufficient, but that the Claimant had not given the Respondent a chance to correct the inappropriate installation, and thus the Fund could not recommend an award. However, there is nothing in the statute that requires a claimant to give a respondent the opportunity to correct the work before filing with the Fund. Instead, the Commission may deny a claim if it finds that the claimant unreasonably rejected good faith efforts by the contractor to resolve the claim. Bus. Reg § 8-405(d). There is no evidence that the Claimant rejected good faith efforts by the Respondent to resolve the Claim.

Mr. Jordan, who has worked for over twenty years in the flooring industry and is certified as a flooring inspector, testified regarding his inspection in November 2021. He testified that he measured the backer board and determined that it was thinner than the plywood that had been removed by the Respondent. Mr. Jordan identified and explained the photographs that were admitted as Claimant Exhibits 1-18. In the photos, one can clearly see the difference in thickness between the plywood and backer board. One can also see clearly that the floor is not level in certain places and that the grout continues to come out in places.

Mr. Jordan concluded that the underlayment was inadequate, causing floor deflection, as evidenced by the hollow sound when the floor is walked upon. He explained that floor deflection leads to cracked tiles and grout, as well as increasing the potential for other issues if the floor cannot support the load placed on it, including potential structural problems with the subfloor. He testified that based on his measurements he determined that there is “a lot of floor deflection.” (Jordan testimony). Finally, Mr. Jordan testified that the only thing that could have caused the issues with the Claimant’s floor was the Respondent’s inappropriate installation of the floor. I accept Mr. Jordan's experienced opinion on the reason for the problems with the floor and find the Respondent's work under the Contract was unworkmanlike.

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) (Supp. 2022); 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.

The Respondent performed some work under the Contract, and the Claimant intends to retain 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).

The Claimant obtained an estimate of \$18,685.00 from Floors Etc. to completely redo the work that the Respondent had performed under the Contract. (Cl. Ex. 20). The Claimant also argued that he incurred the cost of the floor inspection by Mr. Jordan, which cost \$600.00. However, this cost is not recoverable. Bus. Reg. § 8-405(e)(3) (Supp. 2022); COMAR 09.08.03.03B(1). Further, the Claimant obtained an estimate of \$6,400.00 to replace the subfloor but has not proven that it needs to be replaced and acknowledged this at the hearing. Accordingly, the measure of the Claimant's loss is: \$15,950.00 (amount paid) + \$18,685.00 (cost of repair) = \$34,635.00 – \$15,950.00 = \$18,685.00.

Effective July 1, 2022, a claimant's recovery is capped at \$30,000.00 for acts or omissions of one contractor, and a claimant may not recover more than the amount paid to the contractor against whom the claim is filed.<sup>4</sup> Bus. Reg. § 8-405(e)(1), (5) (Supp. 2022); COMAR 09.08.03.03B(4). In this case, the Claimant's actual loss of \$18,685.00 exceeds the amount paid

---

<sup>4</sup> On or after July 1, 2022, the increased cap is applicable to any claim regardless of when the home improvement contract was executed, the claim was filed, or the hearing was held. See *Landsman v. MHIC*, 154 Md. App. 241, 255 (2002) (explaining that the right to compensation from the Fund is a "creature of statute," these rights are subject to change at the "whim of the legislature," and "[a]mendments to such rights are not bound by the usual presumption against retrospective application").



to the Respondent. Therefore, the Claimant's recovery is limited to \$15,950.00, the amount paid to the Respondent.

**PROPOSED CONCLUSIONS OF LAW**

I conclude that the Claimant has sustained an actual and compensable loss of \$18,685.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2022); COMAR 09.08.03.03B(3)(c). I further conclude that the Claimant is entitled to recover \$15,950.00 from the Fund. Bus. Reg. § 8-405(e)(5) (Supp. 2022); 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 \$15,950.00; 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;<sup>5</sup> and

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

July 20, 2023  
Date Decision Issued

*Brian Patrick Weeks*

\_\_\_\_\_  
Brian Patrick Weeks  
Administrative Law Judge

BPW/dlm  
#205822

<sup>5</sup> See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

**PROPOSED ORDER**

***WHEREFORE, this 23<sup>rd</sup> day of August, 2023, 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.***

***Michael Newton***

***Michael Newton***

***Panel B***

***MARYLAND HOME IMPROVEMENT  
COMMISSION***