

IN THE MATTER OF THE CLAIM	* BEFORE BRIAN ZLOTNICK,
OF JACK DUNN,	* 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 STEPHEN GERARD	*
MADDEN, T/A BAYSIDE HOME	* OAH No.: LABOR-HIC-02-24-02016
IMPROVEMENTS, LLC	* MHIC No.: 22 (75) 1251
RESPONDENT	*

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On September 12, 2023, Jack Dunn (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)¹ Guaranty Fund (Fund) for reimbursement of \$19,700.00 for actual losses allegedly suffered as a result of a home improvement contract with Stephen Gerard Madden, trading as Bayside Home Improvements, LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to 411 (2015 & Supp. 2023).² On December 29, 2023, the

¹ The MHIC is under the jurisdiction of the Department of Labor.

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

MHIC issued a Hearing Order on the Claim. On December 29, 2023, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On April 12, 2024, I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. Kris M. King, Assistant Attorney General, Department, represented the Fund. The Claimant represented himself. The Respondent did not 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 January 30, 2024, the OAH provided a Notice of Remote Hearing (Notice) to the Respondent by certified mail and first-class mail. Bus. Reg §§ 8-312(d), 8-407(a); COMAR 28.02.01.05C(1). The Notice stated that a hearing was scheduled for April 12, 2024, at the OAH, 11101 Gilroy Road, Hunt Valley, Maryland. 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. I determined that the Respondent received proper notice, and I proceeded to hear the captioned matter. COMAR 28.02.01.05.

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 & Supp. 2023)³; COMAR 09.01.03; COMAR 28.02.01.

³ Unless otherwise noted, all references to the State Government Article are to the 2021 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, unless otherwise noted, offered by the Claimant:

- Cl. Ex. 1 Contract, May 10, 2021
- Cl. Ex. 2 Checks paid to the Respondent from the Claimant, May 10, 2021, July 1, 2021, August 12, 2021, and August 20, 2021, totaling \$18,750.00
- Cl. Ex. 3 Text messages between the Claimant and the Respondent, September 28, 2021 through November 16, 2021, with attached photographs
- Cl. Ex. 4 Emails between the Claimant and the Respondent, November 16, 2021 through March 13, 2022
- Cl. Ex. 5 Estimate from Cox Kitchens & Baths, Inc., August 23, 2022
- Cl. Ex. 6 Estimate from VKB Kitchen & Bath, April 6, 2024
- Cl. Ex. 7 International Residential Code (IRC) section R-702.4.2 – Backer Boards, 2015 – NOT ADMITTED INTO EVIDENCE
- Cl. Ex. 8 Home Inspection Report from Certified Property Inspection, March 3, 2022⁴
- Cl. Ex. 9 A collection of photographs of the shower, numbered one through sixteen, taken by the Claimant in March 2022 (photographs one through fifteen) and April 2024 (photograph 16)

I admitted the following exhibits offered by the Fund:

- GF Ex. 1 Notice of Hearing, January 30, 2024, with attached certified mail receipts
- GF Ex. 2 Hearing Order, December 29, 2023

⁴ The Fund did not object to the photographs and observations noted in this exhibit but did object to any opinions offered in this exhibit regarding construction. I sustained the Fund's objection, therefore, any opinions pertaining to construction made in this exhibit will not be considered.

- GF Ex. 3 MHIC Licensing Information for the Respondent, based on March 19, 2024 inquiry
- GF Ex. 4 Affidavit of David Finneran, April 11, 2024
- GF Ex. 5 Home Improvement Claim Form, September 12, 2023
- GF Ex. 6 Letter from the MHIC to the Respondent, September 15, 2023

The Respondent did not offer any exhibits.

Testimony

The Claimant testified.

The Fund did not present testimony.

The Respondent did not present 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.
2. On May 10, 2021, the Claimant and the Respondent entered into a contract (Contract) to remodel an existing second floor primary bathroom shower. The Contract specified the following terms:
 - Remove glass shower doors and faucet diverters. Demolish one inch marble floor to ceiling shower walls and remove PVC angle shower base and haul all items to dump
 - Install new PVC angled shower base and set trap
 - Reset wall studs as needed
 - Install new faucet and diverter with proper back set
 - Install new greenboard drywall on two back walls, tape and spackle
 - Install new twelve by twelve marble tile inside the shower as surround from floor to ceiling – grout and seal grout
 - Install faucet trim and caulk trim, shower corners and at base
 - Install three piece glass shower door, two stationary and one door
 - Touch up paint as needed.
3. The original agreed-upon Contract price was \$18,750.00.

4. The Respondent began work on or about late May 2021 and completed the Contract in October 2021.

5. The Claimant paid the Respondent a total of \$18,750.00.

6. The Claimant texted the Respondent on September 28, 2021 several pictures of the shower area where caulking, grout, and trim work needed repairs. The Respondent returned to the Claimant's home on October 27, 2021 to make requested repairs. The Respondent never returned to the Claimant's home to make any further repairs after October 27, 2021.

7. On November 10, 2021, the Claimant texted the Respondent that the caulking and grout work in the shower look sloppy with several areas where gaps in the grout exist. On November 12, 2021, the Claimant texted the Respondent photographs showing incomplete work in the shower area including gaps between the shower wall tile and the bathroom walls, unsealed shower fixtures with gaps in the tile work and black caulking used on the shower walls which failed to match the white caulking utilized for the shower floor. The Respondent responded by text that he would come to the Claimant's home on November 16, 2021 to make the requested repairs.

8. On November 16, 2021, the Respondent emailed the Claimant that since the shower doors were installed their contractual obligation to the Claimant has been fulfilled.

9. On March 3, 2022, the Claimant emailed the Respondent seeking repairs to the deficiencies in the construction of the shower. On March 5, 2022, the Respondent replied that it had more than lived up to their end of the Contract.

10. Photographs of the shower taken by the Claimant in March 2022 show the following:

- Sloppy and uneven caulk and grout work
- Gaps between the shower floor and walls which were not properly sealed
- Baseboard trim work was sloppily performed leaving chunks of baseboard protruding from the bathroom floor

- Grout residue left on portions of shower tile
- Shower fixture was not properly sealed into shower wall leaving an exposed gap between the fixture and shower wall
- A one half inch gap in the shower door when closed which allows water to escape shower area
- Gap between shower tile and bathroom wall left unfinished and unpainted

11. A home inspection report was completed by Certified Property Inspection (CPI) on March 3, 2022. CPI took numerous photographs of the shower completed by the Respondent which noted the following observations based on those photographs:

- Missing grout at wall termination
- Exposed joint tape
- Open wall due to missing grout
- Sharp uneven floor tile work resulting in an improper slope
- Shower drain was not secured
- Uneven floor tile with no drain slope resulting in pooling water
- Missing sealant at ceiling joints
- Uneven wall tiles

12. On April 6, 2024, the Claimant contacted a new contractor, VKB Kitchen & Bath (VKB), to correct and complete the Respondent's work. VKB agreed to redo all work completed by the Respondent and to complete the same scope of work agreed to in the Contract. The cost to retain VKB to correct the Respondent's work is \$13,482.04.

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 (2021); 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. 2023); *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.⁵

It is undisputed that the Respondent was a licensed home improvement contractor at the time the Respondent entered into the Contract with the Claimant. (GF Ex. 3.) Based on the evidence presented, I am persuaded that the Respondent performed unworkmanlike and inadequate home improvements. The Claimant testified without refutation regarding problematic work completed by the Respondent, including uneven and jagged tile work resulting in sharp edges, improperly installed shower drain, non-sloped shower tile floor resulting in pooling of water, a gap in the shower door when closed causing leaking of water during operation, improperly applied caulking and grout, missing sealant at ceiling joints, shower fixture improperly sealed leaving a gap in shower wall, gap between shower tile and bathroom wall left unfinished, gaps between shower floor and shower wall were not properly sealed, and sloppy baseboard trim work (corroborated by photographs – Cl. Exs. 8 and 9). This evidence establishes that the work was both unworkmanlike (because it was poorly done) and inadequate (because it was structurally deficient).

Notably, the Claimant was consistent in his accounts regarding his efforts to continue working with the Respondent, despite his non-responsiveness at times. The Claimant expressed his concerns regarding the Respondent’s work shortly after work was completed. The Claimant

⁵ By statute, certain claimants are excluded from recovering from the Fund altogether. The Fund cross-examined the Claimant regarding these exclusions, and based on the Claimant’s credible, uncontradicted testimony, I conclude that there are no such statutory impediments to the Claimant’s recovery. The claim was timely filed, there is no pending court claim for the same loss, and the Claimant did not recover the alleged losses from any other source. Bus. Reg §§ 8-405(g), 8-408(b)(1) (2015 & Supp. 2023). The Claimant resides in the home that is the subject of the claim or does not own more than three dwellings. *Id.* § 8-405(f)(2) (Supp. 2023). The parties did not enter into a valid agreement to submit their disputes to arbitration. *Id.* §§ 8-405(c), 8-408(b)(3) (2015 & Supp. 2023). The Claimant is not a relative, employee, officer, or partner of the Respondent, and is not related to any employee, officer, or partner of the Respondent. *Id.* § 8-405(f)(1) (Supp. 2023).

asked the Respondent to make numerous repairs and the Respondent last made any repairs to his work in October 2021. After the Respondent last worked on the Contract, the Claimant continued to communicate his displeasure with the Respondent's work through numerous texts and emails, but the Respondent ultimately notified the Claimant that he had fulfilled his contractual duties which essentially indicated that he had no intention of making any further repairs after he last worked on the project in October 2021. The Claimant's efforts to have the Respondent correct his work are documented in their text and email exchanges. (Cl. Exs. 3 and 4). I therefore find that the Claimant did not unreasonably reject good faith efforts by the Respondent to resolve the claim. Bus. Reg § 8-405(d) (Supp. 2023).

The Claimant argued that the Respondent's use of greenboard drywall for the shower back walls was against industry code and that those boards need to be removed and replaced with industry accepted drywall boards. However, the Claimant was not accepted as an expert in home remodeling and did not provide any expert witness testimony to corroborate his contention that the Respondent's use of greenboard drywall material was contrary to industry code. Therefore, I found that the VKB estimate, which did not include the removal of greenboard drywall and replacement with industry accepted drywall, to be within the scope of the Contract.

I thus find that the Claimant is eligible for compensation from the Fund.⁶ Accordingly, 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. 2023); COMAR 09.08.03.03B(1). The MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work.

⁶ It was the Fund's position that the Claimant established that the Respondent's work was inadequate and incomplete, and that the Claimant is eligible for an award.

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).⁷

The Claimant provided documentation of \$18,750.00 paid to the Respondent. (Cl. Ex. 2). This figure is added to the cost to remediate and complete the Respondent's work (\$13,482.04), resulting in \$32,232.04. (Cl. Ex. 6). From this total, the amount of the original contract, or \$18,750.00, is subtracted, which results in an actual loss of \$13,482.04.

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.⁸ Bus. Reg. § 8-405(e)(1), (5) (Supp. 2023); COMAR 09.08.03.03B(4). In this case, the Claimant's actual loss is less than the amount paid to the Respondent and less than \$30,000.00. Therefore, the Claimant is entitled to recover his actual loss of \$13,482.04.

⁷ This is the formula the Fund recommended applying in this case.

⁸ 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").

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$13,482.04 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2023); COMAR 09.08.03.03B(3)(c). I further conclude that the Claimant is entitled to recover that amount from the Fund. Md. Code Ann., Bus. Reg. § 8-405(e)(1), (5) (Supp. 2023); 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 \$13,482.04; 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;⁹ and

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

July 2, 2024
Date Decision Issued



Brian Zlotnick
Administrative Law Judge

BMZ/at
#212697

⁹ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 10th day of October, 2024, 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.

W. Bruce

Quackenbush

W. Bruce Quackenbush

Chairman

Panel B

**MARYLAND HOME IMPROVEMENT
COMMISSION**