

IN THE MATTER OF THE CLAIM	BEFORE MARY PEZZOLLA,
OF RYAN WYNNE,	* 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 LEE WESTON,	*
T/A WESTON HOUSE	* OAH No.: LABOR-HIC-02-23-27200
WOODWORKS,	* MHIC No.: 22 (75) 510
RESPONDENT	*

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On April 20, 2023, Ryan Wynne (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)¹ Guaranty Fund (Fund) for reimbursement of \$6,293.60 for actual losses allegedly suffered as a result of a home improvement contract with Lee Weston, trading as Weston House Woodworks (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2023).² On October 13, 2023, the MHIC issued a Hearing

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.

Order on the Claim. On that same date, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On December 14, 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). Nicholas Sokolow, Assistant Attorney General, Department of Labor (Department), represented the Fund. The Claimant was self-represented. The Respondent was self-represented.

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); 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:

- Clmt. Ex. 1 - Email from Bill Lynn, Apache Wood Products, to the Claimant, July 19, 2022
- Clmt. Ex. 2 - Estimate from the Respondent, May 15, 2021
- Clmt. Ex. 3 - Contract between the Claimant and the Respondent, March 3, 2020, signed October 6, 2020
- Clmt. Ex. 4 - 41 photographs taken by the Claimant, April 2023
- Clmt. Ex. 5 - Estimate from Bay Country Floors, April 4, 2022
- Clmt. Ex. 6 - Invoice from Apache Wood Products, December 11, 2020
- Clmt. Ex. 7 - Vinyl Plank Quote from Lowe's, March 25, 2022

Exhibit 1 - Quote from The Home Depot, May 20, 2021

I admitted the following exhibit offered by the Respondent:

Resp. Ex. 1 - Email exchange between David Weston and the Claimant, May 24-25, 2021;
Email from David Weston to the Claimant, May 27, 2021

I admitted the following exhibits offered by the Fund:

Fund Ex. 1 - Notice of Remote Hearing, November 7, 2023

Fund Ex. 2 - Hearing Order, October 13, 2023

Fund Ex. 3 - Letter from the MHIC to the Respondent, April 26, 2023, with attached Home Improvement Claim Form, April 2, 2023

Fund Ex. 4 - MHIC licensing records for the Respondent, November 20, 2023

Testimony

The Claimant testified and did not present other witnesses.

The Respondent testified and presented the testimony of David Weston.

The Fund did not present any 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 01-38734.
2. On October 6, 2020, the Claimant and the Respondent entered into a contract to remodel the first floor of the Claimant's home (Contract).
3. The original agreed-upon Contract price was \$45,450.00.
4. The Contract included a section entitled "Flooring" which stated, "Remove existing flooring and install customer provided flooring. \$3/sqft. Labor and material pricing is

not included in estimate. Total square footage 1,300.” (Clmt. Ex. 3). This equals a total cost of \$3,900.00 for the labor to install the flooring.³

5. The Contract did not contain any provisions requiring the Respondent to replace the subflooring or to level the existing subflooring. The Claimant was aware of unevenness in the first floor flooring, and specifically purchased vinyl flooring that he believed would work well on an uneven floor.

6. The Claimant purchased fifty-eight boxes of vinyl flooring from Apache Wood Products at the price of \$59.84 per box. (Clmt. 6). The flooring portion of the contract used forty boxes of the flooring, for a total cost of \$2,393.60.⁴

7. The Respondent was also aware of the unevenness in the first floor flooring; he and the Claimant had more than one conversation regarding the flooring, at least one occurring when the Claimant informed the Respondent that the flooring he purchased supposedly worked well on uneven surfaces.

8. At a date unspecified in the record, the parties made at least one change to the Contract, changing the total contract price to \$43,260.00. This change order did not affect the flooring provision of the Contract.

9. The Respondent began work on the project in December 2020. David Weston was the Claimant’s main point of contact and performed the work under the Contract.

10. A portion of the existing floor had vinyl flooring that was difficult to remove. The parties agreed to leave the existing vinyl flooring in place and install the new flooring over it, with the understanding that the existing flooring would not interfere with the new flooring.

³ $3.00 \times 1,300 = \$3,900.00$.

⁴ $\$59.84 \times 40 = \$2,393.60$.

flooring, including that the flooring would pop apart or unsnap when stepped on. In an attempt to remedy the issues, the Respondent removed sections of the flooring and reinstalled them, using compound patching and screws in some areas.

12. The Respondent completed work on the project in early February 2021 and the Claimant paid the Respondent in full.

13. In March 2021, the Claimant began noticing that the flooring had begun to crease, crack, and pull apart, especially in higher traffic areas, such as the area between the foyer and the kitchen.

14. The Respondent determined that uneven subflooring caused the issue with the flooring.

15. The Respondent did not install the flooring per the manufacturer's specification that low spots in the subflooring greater than 3/16" were to be filled with a leveling compound prior to installation.

16. In May 2021, the Respondent offered to attempt to rectify the flooring issues in one of three ways:

- 1) At no cost, remove the existing flooring, spot fix some of the more uneven areas, and then reinstall the existing flooring or a different, thicker flooring designed to be applied over uneven surfaces to be purchased by the Claimant;
- 2) At an additional cost of \$9,988.00, remove the existing flooring, level the subflooring for the entire first floor, and then install flooring to be purchased by the Claimant; or
- 3) At no cost, remove the existing flooring, permit the Claimant time to hire someone else to level the subflooring, and then reinstall either the existing flooring or another flooring to be purchased by the Claimant.

17. The Claimant obtained a quote from Lowes, which notes the labor cost of installing new flooring to be \$3,753.71. (Clmt. Ex. 7).

18. The Claimant obtained a quote from The Home Depot, which notes the labor cost of installing new flooring to be \$3,067.24. (Clmt. Ex. 8).

19. The Claimant obtained a quote from Bay Country Floors, which notes a cost of \$1,000.00 to grind and level the subfloor and a labor cost of \$3,298.81 to install an underlayment and new laminate flooring. (Clmt. Ex. 5).

20. The Claimant is not seeking the cost of leveling the subflooring.

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.

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. In this case, 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(c), 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).

The Claimant testified that he knew that parts of the first floor were not level and that he informed the Respondent about this issue. He explained that he expected the Respondent to know how to properly lay flooring, and that the Respondent assured him that he could install whatever flooring the Claimant chose. The Claimant further explained that if the subflooring needed to be leveled prior to installation, he believed that the Respondent would have had a conversation with him about that. However, the Respondent never told him that his flooring choice could not be installed without significant leveling of the subflooring, nor did the Respondent indicate that the flooring could not be appropriately installed over the existing subflooring without additional leveling work. The Claimant argued that not leveling low spots in the subflooring greater than 3/16" per the manufacturer's specifications was unworkmanlike. I agree.

The Respondent did not contest that the subflooring was not leveled prior to the flooring installation and that the subflooring was uneven to a degree outside of the manufacturer's specifications. In fact, in an email to the Claimant, Mr. David Weston offered to "level the subfloor per manufacturer specification" for an additional charge. (Resp. Ex. 1). In that same email the Respondent told the Claimant that "We do not have X-ray vision and can not tell the shape a subfloor is in during an estimate, even with the original flooring up, the subfloor did not *visibly* seem inadequate [sic] for a floor designed for unevenness." (Resp. Ex. 1) (emphasis

added). However, there is no indication that other than giving the subfloor a visual once over, the Respondent made any attempt to make sure that there were not any low spots in the subfloor greater than 3/16" or that he properly filled in any such low spots. Also, while the Respondent may not have known that the subflooring was uneven prior to beginning the work, the parties had subsequent conversations about the unevenness of the floor, including when the Claimant told the Respondent that the flooring he purchased was supposed to work well over uneven floors.

Even after the Claimant reported issues with the flooring in January 2021, and the Respondent attempted to correct the problems with compound patching and screws, there is no indication that this attempt to correct the issue complied with the manufacturer's specifications or were an appropriate substitute. In fact, per the Claimant's testimony, the issues with the flooring continued and worsened, with the flooring creasing, cracking, and pulling apart, when frequently walked on. It is hard to imagine a properly installed floor that cannot be walked on.

The Claimant submitted forty-one photographs that show the current state of the flooring. The photographs clearly depict large dips in portions of the flooring, as well as cracks and creases. They also show where parts of the flooring have chipped away and peeling and separating boards. The Claimant testified that the damage to the flooring is directly related to the unworkmanlike installation because the floor is uneven. The Respondent countered that the photographs do not depict the condition of the flooring when he installed it and asserted that the damage is instead due to how long it has been installed without the subflooring being fixed.

Essentially, the Respondent argued that the damage to the flooring is, at most, a consequential damage due to the Claimant's failure to fix the underlying unevenness of the subflooring. The Fund may not compensate a claimant for consequential damages. Bus. Reg. § 8-405(e)(3) (Supp. 2023); COMAR 09.08.03.03B(1). Though neither the statute nor the regulation defines the term consequential, it commonly refers to something "indirect."

Black's Law Dictionary 489 (11th Ed. 2019). This is in line with the *Black's Law Dictionary* definition which provides that consequential damages are “[l]osses that do not flow directly and immediately from an injurious act but that result indirectly from the act.” *Black's Law Dictionary* 489 (11th. Ed. 2019). In this case, however, the damage to the flooring is not a consequential damage, but rather directly related to the unworkmanlike installation of the flooring.

Floors, in general, are designed and meant to be walked on. It is not unreasonable that the Claimant expected to have a generally level floor on which he and others could walk. The Respondent does not contest that the floor was uneven after he installed the vinyl flooring provided by the Claimant. The Respondent maintained, however, that leveling the existing subfloor was not part of the Contract and that the Claimant was aware that the floor was uneven when the project began. In support, the Respondent pointed out that the portion of the Contract regarding the floor only required him to install the flooring provided by the Claimant over the existing subfloor; there was nothing in the Contract about leveling the existing subfloor. Although the Respondent had some concerns that the flooring purchased by the Claimant was not a quality product, he still installed the flooring over the existing flooring, without doing so according to the manufacturer's specifications. In this case, the Respondent had an obligation to make sure that the pre-installation conditions were appropriate, and, if they were not, to inform the Claimant. He failed to do so.

The evidence shows, therefore, that the damage to the flooring is directly and immediately related to its installation as it is uncontested that the Respondent did not install the flooring according to the manufacturer's specifications. Moreover, the Claimant's photographs show that ordinary usage of the improperly installed flooring has resulted in damage to the point where the flooring cannot be uninstalled and reused.

Also, at issue in this matter is whether the Claimant unreasonably rejected good faith efforts by the Respondent to resolve the claim. Bus. Reg § 8-405(d) (Supp. 2023). I find that he did not.

The Claimant first gave the Respondent an opportunity to correct the issues with the flooring in January 2021 while the project was still ongoing, but the Respondent's attempted correction did not fix the issues. It was not until May 2021, when the flooring problems had exacerbated to the point where the flooring was creasing and breaking, that the Respondent mentioned to the Claimant that there was a larger underlying issue that would need to be corrected.

In the May 2021 emails, the Respondent offered options regarding what he was willing to do in relation to the flooring. (See Finding of Fact # 16). The Claimant was not satisfied with these options. I find it was reasonable that, by this point, the Claimant did not trust the Respondent with flooring issues. The Respondent did not install the original flooring to the manufacturer's specifications. Further, the Respondent's first attempt to correct or repair was unsuccessful. The Claimant did not have confidence that any subsequently purchased flooring would be properly installed by this contractor. I do not find that the Claimant unreasonably rejected good faith efforts by the Respondent to resolve the claim. I additionally note that the Respondent's offer to level the subflooring and then reinstall the flooring was for a cost of \$9,988.00. An estimate from Bay Country Floors in April 2022 shows a cost of \$1,000.00 to grind and level the subfloor and a labor cost of \$3,298.81 to install an underlayment and new laminate flooring. (Clmt. Ex. 5). Moreover, estimates from The Home Depot and Lowes are in line with the Bay Country Floors estimate. An estimate that is more than double the costs of other estimates does not appear to have been made in good faith.

Because the Respondent performed an unworkmanlike home improvement by improperly installing the vinyl flooring at the Claimant's home. I further find that the Claimant did not unreasonably reject good faith efforts by the Respondent to resolve the matter. I thus 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) (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.

However, none of the following three regulatory formulas is appropriate in this case:

(a) If the contractor abandoned the contract without doing any work, the claimant's actual loss shall be the amount which the claimant paid to the contractor under the contract.

(b) If the contractor did work according to the contract and the claimant is not soliciting another contractor to complete the contract, the claimant's actual loss shall be the amount which the claimant paid to the original contractor less the value of any materials or services provided by the contractor.

(c) 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)(a)-(c). Accordingly, I shall apply a unique formula to measure the Claimant's actual loss.⁵

⁵ See COMAR 09.08.03.03B(3) ("[u]nless it is determined that a particular claim requires a unique measurement. . .").

The Claimant is seeking \$2,393.06, the cost of the vinyl flooring used in the original project, and \$3,900.00, the amount noted in the Contract for the labor to install that flooring, for a total of \$6,293.60. As discussed above, the flooring was improperly installed, causing the flooring to curl and crease and ultimately break when walked on. The improper and unworkmanlike installation ruined the flooring. It is unsalvageable; it cannot be removed and reused. The Claimant explained that he is seeking the cost of the original flooring only and not the cost of the flooring from either The Home Depot or the Lowes estimates. As he noted, he is unable to obtain the same flooring the Respondent installed and the flooring from the other quotes are different, more expensive types of flooring. Accordingly, he is only seeking the cost of the original flooring the Respondent used. I find this to be reasonable.

The Fund argued that the Claimant was entitled to the \$2,393.60 for the flooring he purchased. However, inexplicably, the Fund then asserted that the Claimant was entitled to \$3,032.24 in reimbursement for labor costs to install the flooring. This figure comes from the Home Depot estimate; the Fund offered no explanation as to why it chose this estimate, rather than the ones from Lowes, Bay Country Floors, or the actual amount the Claimant paid the Respondent for his labor to install the flooring. The Claimant is only seeking the cost of the original flooring improperly installed by the Respondent; I therefore find it appropriate to use the actual cost of the labor to install that flooring, as provided in the Contract between the parties. As such, I find the Claimant's actual loss to be the cost of the original flooring (\$2,393.60) plus the cost of the labor paid to the Respondent to install the original flooring (\$3,900.00) for a total loss of \$6,293.60.

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.⁶ 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 total amount paid to the Respondent and less than \$30,000.00. Therefore, the Claimant is entitled to recover his actual loss of \$6,293.60.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$6,293.60 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). I further conclude that the Claimant is entitled to recover \$6,293.60 from the Fund.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$6,293.60; 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;⁷ and

⁶ 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").

⁷ 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.

February 20, 2024
Date Decision Issued

MP/dlm
#209196

Mary Pezulla

Mary Pezulla
Administrative Law Judge

PROPOSED ORDER

WHEREFORE, this 31st day of May, 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.

J Jean White

I Jean White

Panel B

***MARYLAND HOME IMPROVEMENT
COMMISSION***