

IN THE MATTER OF THE CLAIM	* BEFORE H. DAVID LEIBENSPERGER,
OF NANCY PRINCE,	* 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 JOHN HALL, II,	*
T/A KIRKWOOD PAINTING AND	* OAH No.: LABOR-HIC-02-23-11378
HANDYMAN SERVICES, LLC	* MHIC No.: 23 (75) 891
RESPONDENT	

\* \* \* \* \*

**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 February 3, 2023, Nancy Prince (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)<sup>1</sup> Guaranty Fund (Fund) for reimbursement of \$250.00<sup>2</sup> for actual losses allegedly suffered as a result of a home improvement contract with John Hall, II, trading as Kirkwood Painting and Handyman Services, LLC (Respondent). Md.

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

<sup>2</sup> Different versions of the Claim form were admitted into evidence also showing a claim in the amount of \$349.16. The version introduced by the Fund showed a claim amount of \$250.00. (Fund, Ex. 3.)



Code Ann., Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2022).<sup>3</sup> On April 10, 2023, the MHIC issued a Hearing Order on the Claim and forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On June 16, 2023, I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. MacKenzie Read, Assistant Attorney General, 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); 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 of the compensable loss?

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

I admitted the following exhibits offered by the Claimant:

- Clmt. Ex. 1 - Contract between the Claimant and the Respondent, October 19, 2022; Deposit Check, November 22, 2022
- Clmt. Ex. 2 - Letter from the Respondent to the Claimant, December 15, 2022
- Clmt. Ex. 3 - Letter from the Claimant to the Respondent, undated, with attached Text Message, January 5, 2023
- Clmt. Ex. 4 - Letter from the Claimant to the Respondent, January 6, 2023
- Clmt. Ex. 5 - Letter from the MHIC to the Respondent, January 25, 2023

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<sup>3</sup> Unless otherwise noted, all references to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.



- Clmt. Ex. 6 - Photographs of the Claimant's Home and the Respondent's Work, November 22, 2022 (except the first "before" photograph, which is undated)
- Clmt. Ex. 7 - Text Messages between the Claimant and the Respondent, November 16-17, 2022
- Clmt. Ex. 8 - Photographs Taken by the Respondent of the Claimant's Dining Room and the Respondent's Work, undated
- Clmt. Ex. 9 - Letter from the MHIC to the Claimant, January 30, 2023
- Clmt. Ex. 10 - The Claimant's MHIC Claim Form, February 1, 2023
- Clmt. Ex. 11 - Invoice from Starboard Construction, LLC (Starboard) to the Claimant, December 23, 2022, with Photograph of Starboard's Finished Work, undated
- Clmt. Ex. 12 - Letter from the MHIC to the Respondent with Proposed Order, March 2, 2023
- Clmt. Ex. 13 - Letter from the Respondent to the MHIC, February 8, 2023
- Clmt. Ex. 14 - Subpoena Duces Tecum, May 18, 2023, with responsive documents: Invoice from Starboard to the Claimant, December 23, 2022; Check from the Claimant to Starboard, December 26, 2022; Excerpt of Truist Bank Statement, January 6, 2023

I admitted the following exhibits offered by the Respondent:

- Resp. Ex. 1 - Photograph of the Claimant's Dining Room and the Respondent's Work, undated
- Resp. Ex. 2 - Photograph of the Claimant's Dining Room and the Respondent's Work, undated
- Resp. Ex. 3 - Photograph of the Claimant's Dining Room and the Respondent's Work, undated
- Resp. Ex. 4 - Photograph of the Claimant's Dining Room and the Respondent's Work, undated
- Resp. Ex. 5 - Photograph of the Claimant's Dining Room and the Respondent's Work, undated
- Resp. Ex. 6 - Photograph of the Claimant's Dining Room and the Respondent's Work, undated
- Resp. Ex. 7 - Photograph of the Claimant's Dining Room and the Respondent's Work, undated

I admitted the following exhibits offered by the Fund:

- Fund Ex. 1 - Notice of Remote Hearing, May 5, 2023; Hearing Order, April 10, 2023
- Fund Ex. 2 - MHIC Licensing History for the Respondent, May 16, 2023



Fund Ex. 3 - Letter from the MHIC to the Respondent, February 14, 2023; MHIC Claim Form, received February 3, 2023

Testimony

The Claimant testified and presented the testimony of Richard Lee Stem, Starboard.

The Respondent testified on his own behalf.

The Fund did not present any witness 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 01-140216.
2. On October 19, 2022, the Claimant and the Respondent entered into a contract to remove wallpaper beneath the chair rail in her dining room and paint from the chair rail to the baseboard (Contract).
3. The original agreed-upon Contract price was \$875.00, which included the cost of paint to be purchased by the Respondent.
4. The Contract stated that the project duration would be one to two days.
5. On October 19, 2022, the Respondent asked the Claimant if her dining room furniture could be removed from the room while he worked. She said that would not be possible, but that everything could be pushed to the middle of the room, which was done prior to the Respondent's work.
6. On or about October 19, 2022, the Claimant paid the Respondent a \$250.00 deposit. The Claimant made no further payments to the Respondent.
7. On November 15, 2022, the Respondent began work on the Claimant's home.
8. The Respondent worked on the Claimant's home November 15, 16, 21, and 22, 2022. The Respondent worked approximately a total of twenty-six hours on the project.





9. On November 15, 2022, the Respondent worked on removing the wallpaper below the chair rail in the dining room, using a steamer. The Claimant used towels to clean up water on her floors left behind by the steamer.

10. Removing wallpaper was the most “time consuming and labor intensive” part of the work. (Testimony, Stem.) The value of that work alone is \$500.00.

11. On November 16, 2022, the Claimant asked the Respondent to bring drop cloths to protect her floors.

12. During his four days of work, the Respondent stripped the wallpaper, spackled and sanded the walls, applied a coat of primer, and applied one coat of the Claimant’s selected green color paint for the wall.

13. At this stage of the Respondent’s unfinished work, there were white areas showing through the single coat of green paint. There remained several indentations and imperfections in the surface of the wall. There were several small uneven areas where wallpaper or wallpaper glue was not fully removed, or spackle had not adequately covered indentations. There were also paint drips and brush strokes that did not blend evenly with the roller work.

14. On November 22, 2022, when the Claimant complained to the Respondent about the state of the work at that time, the Respondent acknowledged the imperfections that the Claimant was concerned about. The Respondent also told the Claimant he would address her areas of concern.

15. On or before November 23, 2022, the Respondent told the Claimant, in response to the Claimant’s complaints about his work, that additional coats of paint would fill in some imperfections, and that he could spackle over the imperfections, smooth them out, and repaint. The Respondent had previously successfully employed this method in his work on another home.



16. On November 23, 2022, when the Respondent arrived at the Claimant's home to begin work, the Claimant and her husband fired the Respondent from the job.

17. On November 23, 2022, the Respondent told the Claimant that, "brush strokes can take time to level out and fully harden," and the Claimant told the Respondent that, "we will wait 2 or 3 weeks to see if the brush strokes level out and the paint fully hardens and cures, and if we want you to come back in two or three weeks, we will call you and have you come back."

(Testimony, Claimant.)

18. In early December 2022, the Respondent sent the Claimant a text message, following up on whether he should return to the job. The Claimant received, but did not acknowledge or respond to that text message.

19. On a date not contained in the record, the Claimant contracted with Starboard to complete the painting work in her dining room, which is memorialized in a December 23, 2022 invoice from Starboard to the Claimant (Starboard Contract).

20. At the time of the Starboard Contract, Starboard was already working for the Claimant on a separate project, remodeling an upstairs bathroom.

21. Starboard began work under the Starboard Contract on December 9, 2022.

22. On December 9, 2022, Starboard spent six hours covering the Claimant's furniture, windows and doors with plastic, covering her floor with disposable drop cloth, scraping and cleaning the walls, lightly sanding the walls, skim-coating the walls with two coats of spackle, and then cleaning up and removing temporary dust protections.

23. On December 12, 2022, Starboard spent five hours covering the windows and doorway with plastic, covering the floor with drop cloths, sanding the skim-coated walls, cleaning the edges of the trim molding, and then cleaning up and removing the dust protections.



24. From December 13 to 15, 2022, Starboard's subcontractor, Nusbaum & Ott, laid and removed drop cloths as needed, painted the walls with primer/sealer, painted the walls and trim molding with the finished paint color, and cleaned up following completion of the work. The actual hours of work on those days are not contained in the record.

25. Starboard charged the Claimant \$52.00 per hour for eleven hours of labor, \$24.15 for a bucket of joint compound spackle, and \$33.00 for three disposable drop cloths, for a total of \$629.15 for Starboard's labor and materials. Starboard charged the Claimant \$345.00 for Nusbaum & Ott's labor and materials. The total price of the Starboard Contract was \$974.15.

## DISCUSSION

### *Legal Framework*

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. 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 find that the Claimant has not proven eligibility for compensation.



***The Claimant Unreasonably Rejected the Respondent's Good Faith Offer to Cure***

The Claimant unreasonably rejected good faith efforts by the Respondent to resolve the claim. *Id.* § 8-405(d) (Supp. 2022). On November 23, 2022 and before, the Respondent acknowledged the problems with his work that concerned the Claimant and offered to remedy them by spackling over the imperfections, smoothing them out, and repainting. The Respondent credibly testified that this could be accomplished. The method he suggested is essentially what Starboard did to complete the job, and the Respondent also testified he had successfully done this before.

The Claimant admitted in her direct testimony that the Respondent had in fact offered to do these things, though she later denied it on cross-examination and stated that he had only offered her “unconventional” methods of repair, about which she never elaborated. (Claimant, Testimony.) Although the Claimant was unhappy with the Respondent’s work, she did not offer a concrete reason for why she rejected his offer to repair. Her rejection of his good faith effort to resolve the Claim was particularly unreasonable given that the Claimant had only paid a \$250.00 deposit and could have continued to retain the balance of the Contract price until the work was completed to her satisfaction. The Claimant would have borne very little risk in allowing the Respondent to attempt the repairs he promised.

The Claimant did not present sufficient evidence to show that the Respondent was not capable of fixing his work, or that the Claimant reasonably made such a conclusion. Although the Claimant testified that she had complained to the Respondent about his work throughout the project, she did not specify when she had complained about particular items. Therefore, I am unable to reasonably infer that despite her complaints, the Respondent had failed to, or was incapable of making the necessary repairs. The Claimant did testify that after the Respondent’s first day of work she had to clean up water on the floors from the steamer. However, there was





no evidence that her floors or anything else was damaged, and there was no evidence regarding the amount of water left behind. The Respondent also denied this allegation. In short, there was insufficient evidence for the Claimant to establish the reasonableness of her decision to decline the Respondent's offer.

Moreover, I find that the Respondent's offer was made in good faith. He told the Claimant more than once that he was willing to make repairs to his work. Even after he was fired from the job, he followed up in early December 2022 to see if the Claimant would allow him to return to the job.

***There is Insufficient Evidence That the Respondent's Work Was Inadequate or Unworkmanlike, in Light of the Actual Terms of the Contract***

With regard to whether the Respondent performed unworkmanlike, inadequate, or incomplete home improvements, I find that the Claimant has not sustained her burden. I found the testimony of Mr. Stem from Starboard to be reliable and unbiased. He testified to his many years working in the industry, and he was knowledgeable about the subject matter. He testified that he did not believe the Respondent's work had been done professionally. He admitted that imperfections in the Respondent's work were "small and minor in nature," but "there was a load of them." (Stem, Testimony.) He also admitted that the Respondent's work was in an unfinished state. Clearly, Mr. Stem would have performed the work differently and, in fact, what he ultimately contracted for with the Claimant was different from what the Respondent contracted for with the Claimant. As discussed below, this is relevant to whether the Respondent's work was unworkmanlike or inadequate. Given that the Respondent's work was unfinished, and different from the work under the Starboard Contract, I cannot conclude he performed and unworkmanlike or inadequate home improvement.

The Contract makes no mention of sanding or spackling. A reasonable amount of spackling and sanding to create a smooth paintable surface could arguably be inferable under the



circumstances where wallpaper is being removed, but the Contract does not specify it. The Starboard Contract, however, specified two spackle skim coats to be sanded before painting. And importantly, the Claimant paid a premium for that work. Mr. Stem testified that he would have estimated the job in question to cost \$500.00 for wallpaper removal alone, an additional \$500.00 for spackling and sanding, and approximately \$400.00 for the painting. The Claimant in fact paid Starboard \$629.15 for just the spackling, sanding, and associated materials. The Respondent's Contract, by comparison, was only \$245.85 more than that. And the Respondent's Contract, unlike the Starboard Contract, included wallpaper removal, the most "time consuming and labor intensive" part of the work. (Stem, Testimony.)

Under these circumstances – where the work under the Contract did not explicitly include the degree of spackling and sanding that was included in the Starboard Contract, where the Claimant had not paid the Respondent to perform a job that included two full skim coats of sanded spackle, and where the Respondent's work was unfinished at the time the Claimant terminated the Contract – I cannot conclude that the work performed up to that point by the Respondent was unworkmanlike or inadequate.

The Claimant was also unhappy with the amount of time it was taking the Respondent to complete the work (twenty-six hours by the time she terminated him). The Contract provided the Respondent's work would be completed in one or two days. However, the duration of the Respondent's work was not unworkmanlike, or inadequate given that Starboard took approximately five days to complete the Starboard Contract, which did not include wallpaper removal (the most "time consuming and labor intensive" part of the work (Stem, Testimony)). Moreover, Starboard expended three days of work only on painting. The Respondent should have done a better job at estimating the duration of the job, but the actual time he took in performing the work was reasonable by Starboard's own standards.



I thus find that the Claimant is not eligible for compensation from the Fund. However, even if the Claimant were eligible for compensation from the Fund, she has not sustained an actual loss.

***The Claimant Did Not Sustain an Actual Loss under COMAR 09.08.03.03B(3)(c) Because the Amount She Paid Starboard to Complete the Original Contract, was less than the Original Contract Price***

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). The MHIC's regulations provide that where the Respondent performed some work under the Contract, and the Claimant retained another contractor to complete or remedy that work, the Claimant's actual loss is measured according to the following formula:

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 above formula specifically provides that the amounts paid by a claimant to a subsequent contractor can only be considered to the extent they are to repair or complete work *under the original contract*, i.e., within the scope of the original contract. As mentioned above, Starboard performed work outside the scope of the original Contract.

The Claimant and Starboard specifically contracted for Starboard to cover furniture, windows, and doors with plastic. Those items of work are not contained in the original Contract. That the Claimant and Respondent did not agree the Respondent would cover the furniture,



windows and doors is further evidenced by two conversations between the parties. The Respondent originally asked the Claimant to remove her furniture from the room, and instead she said she would push it to the center of the room. Then, after the Respondent's first day of work, the Claimant asked him to bring drop cloths the following day to better cover the floors. It is evident that neither party contemplated covering all the furniture, windows, and doors as part of the Contract.

The Claimant also specifically contracted for Starboard to apply two sanded skim coats of spackle to the entire paintable wall surface. That work is not contained in the original Contract. As discussed in more detail above, it is clear that the Claimant paid Starboard a premium for this additional work.

The total cost of the dust covering, two skim coats, and sanding (including materials) performed by Starboard, plus the cost of Starboard scraping and lightly sanding the walls before applying the skim coats, was \$629.15 under the Starboard Contract. The scraping and light sanding is work that would be within the scope of the original Contract as part of the removal of the wallpaper and preparation of the walls for paint (and, in fact, the Respondent performed this work under the original Contract). Therefore, the cost of the additional Starboard work that was outside the scope of the original Contract would be less than the \$629.15, because that amount included some work within the scope of the original Contract – the scraping and light sanding.

In his testimony, Mr. Stem estimated the cost of applying the spackle skim coats and sanding them to be \$500.00 which, based on Mr. Stem's experience and credibility as a witness, I believe is a reliable estimate. Therefore, a reasonable estimate of the cost of the additional work under the Starboard Contract that was outside the scope of the original Contract, is \$500.00. That amount should consequently be subtracted from the \$974.15 total Starboard





Contract price, resulting in an adjusted Starboard Contract price of \$474.15 – that is the amount the Claimant paid to Starboard to repair and complete the work under the original Contract.

As discussed above, the Claimant specifically contracted with Starboard to perform additional work and paid it a premium to perform that work. The Starboard Contract specifically set forth that additional work, which was not set forth in the original Contract. To further illustrate the difference in the agreed-upon work in each contract, the Respondent's total Contract price was \$875.00, and included the wallpaper removal. The total Starboard Contract price was \$974.15, and did not include the wallpaper removal, the value of which was estimated by Mr. Stem to be \$500.00. If the cost of the wallpaper removal had been part of the Starboard Contract, it would have cost the Claimant \$1,474.15 – nearly \$600.00 more than the Respondent charged. The record is clear in this case that the Claimant bought and paid for additional work from Starboard that was not part of her agreement with the Respondent.

Applying the formula in COMAR 09.08.03.03B(3)(c) above, the Claimant paid the Respondent only a \$250.00 deposit. The reasonable amount paid to Starboard to repair and complete the work under the original Contract was \$474.15. Added together, these amounts only total \$724.15, which is less than the amount of the original Contract. The Claimant therefore sustained no actual loss.

***Even if the Scope of the Two Contracts Was the Same, I Would Apply a Unique Formula, and the Claimant Did Not Sustain an Actual Loss under COMAR 09.08.03.03B(3) Because She Paid the Respondent Less than the Value of the Work He Performed***

Even if the scope of the original Contract and the Starboard Contract were the same, I would find that the formula contained in COMAR 09.08.03.03B(3)(c) is not appropriate for this matter and requires a unique measurement. COMAR 09.08.03.03B(3). The Claimant paid the Respondent only \$250.00. However, it was undisputed in this matter that she received at least \$500.00 in the value of his work – the removal of the wallpaper. Mr. Stem testified, without



contradiction from any other witness, that the value of that work was \$500.00. There was no testimony that the removal of the wallpaper had been done wholly inadequately or needed to be redone. However, there was credible testimony that the Respondent had failed to remove some small areas of wallpaper, and so the actual value may have been negligibly less than \$500.00. Regardless, it is clear that the Claimant received significantly more value from the Respondent's work – in the form of the wallpaper removal – than she paid for. And I therefore conclude she sustained no actual loss.

#### **PROPOSED CONCLUSIONS OF LAW**

I conclude that the Claimant unreasonably rejected good faith efforts by the Respondent to resolve the claim. Md. Code Ann., Bus. Reg. § 8-405(d) (Supp. 2022). I further conclude that the Claimant has not sustained an actual and compensable loss 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).



**RECOMMENDED ORDER**

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

**ORDER** that the Maryland Home Improvement Guaranty Fund deny the Claimant's claim; and

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

September 6, 2023  
Date Decision Issued

*David Leibensperger*

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H. David Leibensperger  
Administrative Law Judge

HDL/ckc  
#207052



PROPOSED ORDER

*WHEREFORE, this 25<sup>th</sup> day of October, 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.*

*Joseph Tunney*

*Joseph Tunney  
Chairman  
Panel B  
MARYLAND HOME IMPROVEMENT  
COMMISSION*

