IN THE MATTER OF THE CLAIM	*	**BEFORE JENNIFER L. GRESOCK,**
OF AMY M. BLACHERE,	*	**AN ADMINISTRATIVE LAW JUDGE**
CLAIMANT,	*	**OF THE MARYLAND OFFICE**
AGAINST THE MARYLAND HOME	*	**OF ADMINISTRATIVE HEARINGS**
IMPROVEMENT GUARANTY FUND	*	**OAH NO.: DLR-HIC-02-12-27648**
FOR THE ALLEGED ACTS OR	*	**MHIC NO.: 12 (90) 141**
OMISSIONS OF STUART A.	*	
MAXWELL,	*	
T/A DECO-SYSTEMS OF	*	
MARYLAND,		
INC.		
RESPONDENT		

* * * * * * * * * * * * *

RECOMMENDED DECISION

STATEMENT OF THE CASE

On November 9, 2011, Amy M. Blachere (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of $5,500.00 for actual losses allegedly suffered as a result of a home improvement contract with Stuart A. Maxwell, T/A Deco-Systems of Maryland, Inc. (Respondent).

I held a hearing on May 23, 2013, at the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010 & Supp. 2012). Kris King, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Claimant represented herself, and Mr. Maxwell represented the Respondent pursuant to a Special Power of Attorney.[1]

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department of Labor, Licensing and Regulation, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2012); Code of Maryland Regulations (COMAR) 09.01.03; 09.08.02; and 28.02.01.

ISSUE

Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following as a Joint Exhibit:

Jt. Ex. 1- Floor Refinishing contract, dated February 18, 2011

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

Cl. Ex.1 - Photographs of Sample Work from website, dated July 25, 2011

Cl. Ex. 2 - Color Chart, undated

Cl. Ex. 3 - Emails between the Respondent and the Claimant, dated between April 13, 2011 and June 6, 2011

[1] I held the record open for five business days to allow the Respondent to submit the Special Power of Attorney designating Mr. Maxwell as the Non-Attorney Representative. It was timely submitted.

Cl. Ex. 4 - Letter from the Claimant to the Respondent, dated April 28, 2011

Cl. Ex. 5 - Three Payments by Check, from the Claimant to the Respondent, dated March 21, 2011; April 1, 2011; and April 6, 2011

Cl. Ex. 6 - Quotation from Daniel C. Mahlmann, dated July 15, 2011

Cl. Ex. 7 - Detailed Events Regarding Case # DLR-HIC-02-12-27648 (Summary)

Cl. Ex. 8 - Timeline for Case # DLR-HIC-02-12-27648

Cl. Ex. 9 - Video Footage of basement floor, on compact disk

Cl. Ex. 10 - Chip from finished basement floor

Cl. Ex. 11 - Email from the Claimant to the Respondent, dated October 18, 2011

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

Fund Ex. 1 - Notice of Hearing, dated February 7, 2013

Fund Ex. 2 - Hearing Order, dated June 22, 2012

Fund Ex. 3 - MHIC computer print-out of Respondent's Licensing Information, dated May 22, 2013

Fund Ex. 4 - Home Improvement Claim Form, dated November 9, 2011

Fund Ex. 5 - Letter from the MHIC to the Respondent, dated November 15, 2011

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

Resp. Ex. 1 - Photocopy of Photographs of the Finished Floor, undated

Resp. Ex. 2 - Photocopy of Photograph of the Finished Floor, undated

Resp. Ex. 3 - Response to the Complaint, dated September 2, 2011

Testimony

The Claimant testified on her own behalf. The Respondent testified on his own behalf and presented the testimony of Elvia Maxwell, his wife and partner in his business, as well as Armando Flores, laborer.

The Fund did not present testimony.

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 16285.
2. In late 2011, the Claimant and her husband sought to renovate the basement area of their only residence, located at 18644 Tanterra Way, Brookville, Maryland 20833.
3. As the first stage of the renovation, the Claimant and her husband contracted with the Respondent to have the basement concrete floor refinished to provide a durable surface for a recreation room.
4. On March 21, 2011, the Claimant and the Respondent entered into a contract to remove 460 square feet of vinyl tile and glue from the basement floor and then stain, seal, and wax the existing concrete.
5. After viewing pictures on the Respondent's web site as well as brochures provided by the Respondent showing various floor finishes, the Claimant chose a caramel stain for the floor.
6. The agreed-upon contract price for the removal of the tile and glue was $1,489.20. Without any upgrades, the cost of staining, sealing, and waxing was $2,184.00.
7. Also on March 21, 2011, the Claimant paid the Respondent $1,102.00.
8. Because the parties did not know the condition of the concrete under the vinyl tile, the contract set out two different upgrades from which the Claimant could choose after the removal of the tile: applying a thin micro-topping before staining the floor to even out the floor's color and texture, then sealing and waxing it for $3,120.00; or having a self-leveling floor completed, which would involve cleaning the floor, applying a bonding

agent, applying color, applying a leveling material which the color would bleed through in creating a marble effect, then sealing and waxing for $1,897.00.

9. The contract did not specify a start date, but the Respondent began work around March 24, 2011.

10. Once the vinyl tiles were removed, the parties discovered that there was a large concrete patch in the middle of the floor, cracks, and several dozen drilled holes which would need to be patched.

11. The Respondent explained to the Claimant that the patches on the floor would take the stain differently and would remain prominent after the staining process. He recommended that the Claimant upgrade to one of the two available options set out in the contract.

12. The Claimant elected the micro-topping option on March 25, 2011.

13. On March 31, 2011, the Respondent began removing the glue from the concrete floor.

14. Removal of the glue from the original concrete involved acid-washing the floor with muriatic acid and then rinsing it with baking soda and a large amount of water. The process left a half-inch of water and chemical stripper on the floor at the end of the day on March 31, 2011.

15. On April 1, 2011, the Claimant paid the Respondent $5,323.42.

16. Also on or around April 1, 2011, the Respondent applied a micro-topping to the entire floor.

17. During the Respondent's staining of the floor, the Claimant told Ms. Maxwell, the Respondent's wife and business partner, that she wanted the color to be darker, so Mr. Flores, the laborer, added additional stain.

18. The Claimant and her family spent the night outside of the home on the night of April 5, 2011, as recommended by the Respondent, because of the fumes generated by the sealer.

19. The first attempt to finish the floor concluded on April 6, 2011.

20. The first attempt to finish the floor left large dark brown patches throughout the room, some of which contained rough areas that appeared unsealed. In addition, there were smaller white patches within the large brown patches.

21. When the Claimant returned to the home on April 6, 2011, and expressed concern about the dark brown patches, Ms. Maxwell assured her that the waxing process would improve the appearance of the floor.

22. The Respondent asked the Claimant to make a payment of $367.78 on April 6, 2011, which she did.

23. On April 7, 2011, the Claimant contacted the Respondent about the floor, and he returned that day to look at it. After the Respondent examined the floor, he told her it would need to be re-stained.

24. Between April 9 and April 13, 2011, the Respondent ground off the micro-topping from the areas where there were brown patches, which was about 30% of the basement floor.

25. The Respondent then applied new micro-topping to these areas.

26. On April 13, 2011, the Claimant told the Respondent by email that the floor was still not dry and that she wanted him to assess the dryness of the floor before staining.

27. Between April 13 and April 18, 2011, the Respondent stained and sealed the sections of the floor where new micro-topping had been applied.

28. The Claimant and her family vacated the home overnight during the second attempt at staining and sealing.

29. The areas refinished as part of the second attempt were a distinctly different color from the areas refinished on the first attempt. In addition, the defects observed after the first attempt, including darker patches, porous areas of rough concrete, and white patches, were still present.

30. The Claimant objected to the uneven color of the flooring.

31. The Respondent contacted the manufacturer of the stain to inquire about the color difference. After consulting with the manufacturer, the Respondent informed the Claimant that his employee had either sealed the floor prematurely or the floor was too moist, and that the sealer had forced the stain into the concrete. The Respondent offered to return to strip the sealer and reapply the stain a second time.

32. On April 20, 2011, the Respondent's employees went to the Claimant's home, but the Claimant did not allow them to strip the sealer and reapply the stain.

33. On April 30, 2011, the Claimant contacted the Respondent by email and explained that she wanted him to correct the color difference, the discolored patches in the areas of the floor completed during the first attempt, the rough areas that appeared not to be sealed, and the white patches.

34. Later on April 30, 2011, the Respondent replied to the Claimant's email by stating that he would repair the floor at the Claimant's convenience.

35. The Respondent consulted with the manufacturer of the micro-topping for recommendations on how to resolve the color differences in the floor.

36. The Respondent made a third attempt to refinish the floor between May 24, 2011, and June 6, 2011. The Respondent removed the sealer and dye from the entire floor with acetone, ground the floor down to the original concrete, applied micro-topping, and then re-stained and resealed.

37. Around May 28, 2011, the work was delayed because the floor was wet.

38. After the third attempt, the color tones in the floor were inconsistent, there were uneven patches of sealer, and small bumps were visible throughout. The Respondent buffed out the bumps with a machine, leaving divots where the bumps were.

39. The Claimant covered the basement floor with boards to protect it while the rest of the basement was renovated.

40. In the months after the third attempt, the divots deepened and the dye and sealer were removed, leaving bare concrete floor. In addition, the dye and sealer began to detach from the floor in patches, exposing bare concrete, and bubbles formed and burst, causing dye and sealer to flake off.

DISCUSSION

An owner may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor...." Md. Code Ann., Bus. Reg. § 8-405(a) (Supp.2012). *See also* COMAR 09.08.03.03B(2). Actual loss "means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." Md. Code Ann., Bus. Reg. § 8-401 (2010).

This case involves the refinishing of the basement floor in the Claimant's home. The Claimant argued that despite repeated attempts by the Respondent, the finished floor was vastly different from what she believed she had contracted for. The first attempt to complete the floor resulted in dark, large dark brown patches throughout the room, some of which contained rough areas that appeared unsealed. In addition, there were smaller white patches within the large brown patches. According to the Claimant, when the Respondent returned to assess the floor at the Claimant's request, he agreed to re-do the section of the floor that was discolored. This second attempt, argued the Claimant, resulted in a section of floor that was an entirely different

color from the first attempt. Further, darker patches, porous areas of rough concrete, and white patches, were still present. The Respondent made a third attempt to refinish the floor, which involved removing the micro-topping from the entire floor, applying new micro-topping, and re-staining and sealing. After the third attempt, there were bubbles in the refinished surface, which burst in the following weeks, causing areas where the dye and sealer were absent. In addition, other patches came off, leaving bare concrete, and the floor color was still uneven.

The Respondent argued that the Claimant did not heed his advice in the refinishing process and interfered with the work as it was being done. He contended that the problems with the first attempt were due to the Claimant's insistence that the Respondent add more stain to make the color darker, that the Claimant chose the micro-topping despite the Respondent's recommendation that a self-leveling floor be done instead, that the Claimant did not heed his warnings about moisture in the basement floor, and that the Claimant and her family did not vacate the home during the third attempt, which allowed dust from the rafters to be loosened by activity on the floor above, and that the dust settled in the sealer. The Respondent was adamant that he has many years of experience in these types of jobs and has never encountered problems like the ones at issue here. Finally, the Respondent argued that he made every attempt to satisfy the Claimant and believed her to be satisfied with the third attempt until he received a copy of her complaint to the MHIC.

The Fund's position was that the Claimant demonstrated that the Respondent's work was inadequate in that it was clearly far inferior to the photographs of work on the Respondent's web site and in materials provided to the Claimant. For that reason, the Fund contended that the Claimant is entitled to compensation based on COMAR 09.08.03.03B(3)(c).

For the following reasons, I find that the Claimant has proven eligibility for compensation.

First, the Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant; there was no dispute on this point.

Second, the Respondent performed inadequate home improvement. While the Respondent was adamant that the first attempt was adequate and that he only agreed to re-do a small section as a courtesy to the Claimant, the photographs submitted by the Claimant establish otherwise. (Cl. Ex. 7.) In the photographs of the first attempt, there are clearly dark brown patches, some quite small and some very large, on the floor. In addition, the photos show rough patches of concrete that appear unsealed, as well as white blotches. The Claimant's finished floor included far more color variation than the brochure the Respondent provided to the Claimant (Cl. Ex. 2) (which the Claimant used to choose the caramel stain) and the photographs on the Respondent's web site.

While the Respondent attempted to fix the uneven coloring and other problems with the floor by removing and reapplying the micro-topping in a section of it (referred to here as "the second attempt"), the result is clearly inadequate; again, photographs submitted by the Claimant show that the section completed in the second attempt is a different color from the section completed on the first attempt. Finally, the third attempt is equally inadequate. The Claimant testified that while at first the third attempt seemed to be the best of the three, within weeks defects became apparent, including: sections of the dye and sealer coming off, divots that had no dye or sealer, and bubbles that continued to form and eventually burst, leaving bare concrete beneath.

None of the Respondent's arguments persuades me that the work he did was adequate. The Claimant testified credibly that contrary to the Respondent's assertion, the Respondent made no recommendation about which upgrade was more appropriate. Also, the notes that accompany the contract prepared by the Respondent indicate that the micro-topping "provides a new, blank

canvas, for the application of stains." (Jt. Ex. 1.) The self-leveling overlay is described in those notes as creating a "marble affect [sic]". Nowhere do the notes indicate that the self-leveling option is recommended in some cases. In fact, the micro-topping description suggests that that option creates a "blank canvas" for color, which suggests that it is a good option for achieving an even color.

That the Claimant also sought additional stain to create a darker color is also not a factor in the color problems with the finished floor. Ms. Maxwell testified about the conversation in which the Claimant requested more stain; she explained that there were no disagreements or issues with regard to the Claimant's request. This admission that there was not an objection or warning by Respondent or any of his agents at that time that to dissuade Claimant from requesting a darker stain undercuts the Respondent's argument that it was the Claimant who caused the problem by demanding a darker stain.

The Respondent also suggested that the problems with the floor were caused by the Claimant's failure to vacate the home during the sealing process. Because she and her family were in the home, and the children were playing in the kitchen, their movements caused dust to come down from the rafters and settle on the floor, according to the Respondent. The Claimant credibly testified, however, that she was never told to vacate the home because of dust; rather, she was advised that the sealer had a strong odor and that the family should leave the home during its application (a recommendation that also appears in the notes attached to the contract). In fact, the Claimant did vacate the home while the sealer was applied during the first two attempts. She did not vacate the third time. There is no evidence, however, that the problems with the third attempt to finish the floor, which included dark patches, bubbling, and separation of the dye and sealer from the concrete, were caused by dust from the ceiling above.

Finally, the Respondent contended that there were moisture problems with the floor and that the Claimant insisted on addressing those problems by using fans to dry the basement out, which was an inadequate solution. According to the Respondent, he first noticed the moisture problems after removing the glue from the original tile; the concrete, he said, took an unusually long time to dry. For that reason, the Respondent testified that he suggested to the Claimant that she have a moisture test done. The Claimant credibly testified, however, that the Respondent made no such suggestion. Emails exchanged between the Claimant and the Respondent indicate that the Claimant was aware of wetness on the concrete floor (see Cl. Ex. 3, where she indicates that she left the bathroom ceiling fan running and would leave the basement door open), but there is no indication that she insisted that the Respondent proceed while the floor was still wet, or that she refused any recommended measures that might have addressed the moisture problem.

The Respondent consulted with the manufacturer of the stain and was told that the color difference that resulted from the second attempt to finish the floor may have been because Mr. Flores did not wait long enough before applying the sealer. The Claimant gave the Respondent an opportunity to rectify the problem by making a third attempt at finishing the floor. It is clear from the documents submitted at the hearing that the Respondent took the Claimant's complaints seriously and attempted to finish the floor to her satisfaction. He sought advice from the manufacturer of both the stain and the micro-topping, and he returned repeatedly to the home to view the finished floor and to attempt to fix it. While he argued that he was not given an opportunity to view the third attempt to finish the floor after the Claimant filed her complaint with the MHIC and that he would repair the job if given such an opportunity, the Claimant already allowed the Respondent to attempt to fix the floor twice after the initial job was done. I find that the Respondent has been given more than sufficient opportunities to rectify the problem.

Based on the evidence before me, I find that all three attempts to finish the floor reflect inadequate home improvement work. While the Respondent's marketing materials do indicate that some variations in floor color are expected and normal, the color variations in the Claimant's floor were much starker than in the marketing materials. In addition, the third application of stain and sealer did not properly adhere to the floor, as sections of it are coming up and bubbles continue to form and burst, leaving bare concrete exposed. The Respondent was simply unable to complete the home improvement work that he contracted to do in an adequate manner. Accordingly, the Claimant is eligible for compensation.

I now turn to the amount of the award, if any. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. COMAR 09.08.03.03B(1). MHIC's regulations offer three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). In this case, the Claimant solicited another contractor to complete the contract and was given an estimate of $5,550.00. (Cl. Ex. 6.) Accordingly, the following formula offers an appropriate measurement in this case:

> 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). This formula is applied as follows:

Amount paid under original contract:		$6,793.20
Estimate from new contractor:	+	$5,550.00
	=	$12,343.20

Original contract price:	-	$6,793.00
Actual loss:	=	$5,550.00

Hence, the Claimant is entitled to reimbursement in the amount of $5,500.00 from the Fund.

CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of $5,500.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2010).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant $5,550.00; 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 at least ten percent as set by the Maryland Home Improvement Commission. Md. Code Ann., Bus. Reg. § 8-411(a) (2010); and

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

Signature on File

August 22, 2013
Date Decision Mailed

Jennifer L. Gresock
Administrative Law Judge

JLG/emh
#144284

IN THE MATTER OF THE CLAIM	*	**BEFORE JENNIFER L. GRESOCK,**
OF AMY M. BLACHERE	*	**AN ADMINISTRATIVE LAW JUDGE**
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AGAINST THE MARYLAND HOME	*	**OF ADMINISTRATIVE HEARINGS**
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MAXWELL,	*	
DECO-SYSTEMS OF MARYLAND,	*	
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RESPONDENT		

* * * * * * * * * * * * *

FILE EXHIBIT LIST

I admitted the following as a Joint Exhibit:

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

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