

IN THE MATTER OF THE CLAIM	*	BEFORE MARINA LOLLEY SABETT,
OF HENRY KAHWATY,	*	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 FRED BERGER	*	
T/A FRED BERGER DESIGN &	*	OAH No.: DLR-HIC-02-15-37553
BUILD,	*	MHIC No.: 15 (90) 1174
RESPONDENT	*	

* * * * *

PROPOSED DECISION

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

STATEMENT OF THE CASE

On May 21, 2015, Henry Kahwaty (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$7,900.00 (for Project 6) and \$685.00 (for Projects 1 and 7) in alleged actual losses suffered as a result of a home improvement contract with Fred Berger t/a Fred Berger Design & Build (Respondent).

I held a hearing on May 6, 2016, at the Office of Administrative Hearings (OAH), in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015).¹ The Claimant represented himself. Jessica Berman Kaufman, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Respondent did not appear. After waiting approximately twenty minutes for the Respondent or someone to represent him, I proceeded with the hearing. Code of Maryland Regulations (COMAR) 28.02.01.23A.²

The contested case provisions of the Administrative Procedure Act, the MHIC procedural regulations, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014), Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02.01B, and 28.02.01.

ISSUES

1. Did the Claimant sustain an actual loss compensable by the Fund as a result of any acts or omissions of the Respondent?
2. If so, what is the amount of that loss?

SUMMARY OF THE EVIDENCE

Exhibits

I have attached a complete Exhibit List as an Appendix.

Testimony

The Claimant testified on his own behalf.

¹ Unless otherwise noted, all citations of the Business Regulation Article hereinafter refer to the 2015 Replacement Volume.

² Notice of the hearing was mailed to the Respondent at the address of record by certified mail on March 30, 2016, COMAR 09.08.03:03A(2), which was signed for by "Danielle Hall" with the green card returned to OAH on April 6, 2016. The address to which the notice was sent is also the Respondent's address of record with the Maryland State Motor Vehicle Administration. Fund Ex. 4.

No one testified on behalf of the Respondent.

The Fund presented no 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 01-80824.
2. On September 18, 2012, the Claimant and the Respondent entered into a contract (Contract) regarding various projects to be performed at the Claimant's residence: work on the basement stairs (project 1); install bedroom flooring (project 2); identify hallway water spots (project 3); repair master bedroom ceiling and crown molding (project 4); repair main floor water damage (project 5); replace windows (project 6); replace master bedroom shoe molding (project 7); and repair sunroom wall and doors (project 8). Claimant's Exhibit 1.
3. Each project was priced separately and required a deposit and provided for the balance upon completion.
4. The original agreed-upon contract price for all of the projects was \$19,279.00.
5. By check dated, September 18, 2012, the Claimant paid the Respondent a total deposit of \$13,399.00, so that the Respondent could begin the projects. Claimant Ex. 2.
6. This amount included a deposit of \$1,490.00 for the work on the stairs for project 1 and \$7,900.00 for the window replacements contemplated in project 6. *Id.*
7. This amount also included an extra \$139.00 that reflected the entire cost of replacing the master bedroom shoe molding in project 7 under the Contract.
8. By check dated December 27, 2012, the Claimant paid an additional draw under the Contract in the amount of \$2,970.00. Claimant's Exhibit 3.

9. This December 27, 2012 draw included a payment of \$800.00 for completion of project 1, the basement stairs.

10. Although the Respondent completed projects 1 through 5, he did not complete project 6, replacement of the windows, and never returned the \$7,900.00 deposit.

11. Indeed, the Claimant made repeated requests that the Respondent complete the project 6 window replacement or return the deposit from December 2012 through May 2013. Although the Respondent responded to the Claimant's email requests as late as March 2013 that the windows were still not in but would be done, the Respondent did not respond to the Claimant's April and May 2013 emails requesting completion of project 6 or a refund of the deposit. Claimant's Exhibits 5 and 8-11.

12. Similarly, the Claimant paid \$139.00 to repair the shoe molding in the master bedroom pursuant to project 7, but the Respondent did not perform this repair or return the money paid for that project. Claimant's Exhibit 19.

13. While the Respondent did complete the project 1 work on the basement stairs, the flooring on the landing of the stairs was the wrong color and never corrected by the Respondent. Claimant's Exhibits 8 and 17.

14. The cost of removing and replacing the wood flooring in the landing area was \$21.97 per square foot. This number was based on the amount that the Respondent had charged the Claimant previously for installation of the exact same flooring in the Claimant's hallway, under a contract dated September 24, 2009. Claimant's Exhibit 28.

15. The Claimant could not offer any precise measurements for the landing area other than an educated guess of fifteen square feet.

16. The Claimant's actual loss is \$7,900.00 (for the deposit paid for project 6, which was never begun) plus \$139.00 (for the amount paid for project 7, which was never begun) for a total of \$8,039.00.

DISCUSSION

In this case, the Claimant has the burden of proving the validity of his claim by a preponderance of the evidence. Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3).³ “[A] preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces . . . a belief that it is more likely true than not true.” *Coleman v. Anne Arundel Cty. Police Dep't.*, 369 Md. 108, 125, n. 16 (2002) (quoting Maryland Pattern Jury Instructions 1:7 (3rd. ed. 2000)).

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). *See also* COMAR 09.08.03.03B(2) (“actual losses . . . incurred as a result of misconduct by a licensed contractor”). 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. 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 he entered into the contract with the Claimant.

The Respondent did unworkmanlike, inadequate or incomplete home improvements.

I thus find that the Claimant is eligible for compensation from the Fund.

³ As noted above, “COMAR” refers to the Code of Maryland Regulations.

Having found eligibility for compensation, I now turn to the amount of the award, if any, to which the Claimant is entitled. 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 provide three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). The following formula offers an appropriate measurement to determine the amount of actual loss in this case.

"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." COMAR 09.08.03.03B(3)(a).

In the instant case, the Claimant presented evidence through the Contract and cancelled checks that he paid the Respondent a deposit in the amount of \$13,399.00, which included a \$7,900.00 deposit for the replacement of windows in the Claimant's home, referred to in the Contract as project 6. The Claimant testified credibly and presented email documentation through May 2013 that despite the Claimant's repeated requests that the Respondent schedule and complete project 6 or return the \$7,900.00 deposit, the Respondent failed to do so.

Similarly, the Claimant credibly testified that although he paid \$ 139.00 for the entire cost of the shoe molding repair (project 7) as part of the initial deposit, that project was never completed and the \$139.00 never returned. Indeed, the Claimant provided a picture of the shoe molding in its incomplete state and the evidence was uncontroverted that project 7 was never completed by the Respondent.

Finally, the Claimant ultimately requested that he be compensated for the cost of replacing the flooring on the stair landing, in the amount of \$330.00.⁴ He offered a photograph of the stair landing to depict the different color wood used by the Respondent on the landing and also presented a December 18, 2012 email from Respondent acknowledging the issue.

Accordingly, these documents coupled with the Claimant's credible testimony established that he was entitled to compensation for the Respondent's improper installation of the wood floor on the stair landing. The formula he used for calculating this amount was based on the \$21.97 per square foot that he had been charged by the Respondent previously in a September 24, 2009 contract for installation of the identical wood flooring in the Claimant's hallway. The Claimant then estimated the landing to be approximately fifteen square feet, and did so without any measurements presented at the hearing to support this, and multiplied the \$21.97 per square foot by fifteen square feet to arrive at \$329.55, then rounded up to \$330.00. While I admire the Claimant's ingenuity in arriving at this figure, without a more specific measurement for the landing, I cannot calculate an actual loss based on a "best guess," even under the regulation that allows me to calculate unique measurements of actual loss. COMAR 09.08.03.03B(3).

Pursuant to the Business Regulation Article, the maximum recovery from the Fund is limited to the lesser of \$20,000.00 or the amount paid by or on behalf of the Claimant to the Respondent. Bus. Reg. § 8-405 (e)(1), (5). In this case, the contractor abandoned the contract without doing any work on projects 6 and 7. Accordingly, the Claimant is entitled to reimbursement from the Fund in the amount of \$8,039.00, which is the amount actually paid to

⁴ In his May 21, 2015 HIC Claim, the Claimant requested that he be compensated in the amount of \$685.00 for the combined cost of the shoe molding under project 7 and the cost of fixing the stairs under project 1, which includes the cost of changing the incorrect wood flooring on the landing laid by the Respondent. At the hearing, however, he requested \$139.00 for the amount he already paid for project 7, which would leave a claim of \$ 546.00 to repair the stairs under project 1. He only calculated, however, the cost of replacing the landing flooring.

the Respondent for work never completed for projects 6 and 7 under the Contract. Bus. Reg. § 8-405(a), (e)(5); COMAR 09.08.03.03B(3)(a).

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$8,039.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(a).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$8,039.00; 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 (10%) as set by the Maryland Home Improvement Commission;⁵ and

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

Signature on File

July 28, 2016
Date Decision Issued

Marina Lolley Sabett
Administrative Law Judge

MLS/kc
162322

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

PROPOSED ORDER

WHEREFORE, this 23rd day of August, 2016, Panel B of the Maryland Home Improvement Commission approves the Recommended Order of the Administrative Law Judge and unless any parties files with the Commission within twenty (20) days of this date written exceptions and/or a request to present arguments, then this Proposed Order will become final at the end of the twenty (20) day period. By law the parties then have an additional thirty (30) day period during which they may file an appeal to Circuit Court.

Michael Shilling

***Michael Shilling
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION