

IN THE MATTER OF THE CLAIM * BEFORE JENNIFER L. GRESOCK,
 OF TODD A. MACMULLAN, * 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 GARY COOPER, *
 T/A COOPER RESTORATION AND * OAH No.: DLR-HIC-02-17-02465
 REMODELING, LLC, * MHIC No.: 16 (05) 339
 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 April 1, 2016, Todd A. MacMullan (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$4,274.58 in alleged actual losses suffered as a result of a home improvement contract with Gary Cooper, trading as Cooper Restoration and Remodeling, LLC (Respondent).

I held a hearing on August 2, 2017, at the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). Scott MacMullan, Esquire, represented the Claimant, who was present. Eric B. London, Assistant

Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. After waiting fifteen minutes for the Respondent or the Respondent's representative to appear, I proceeded with the hearing. Code of Maryland Regulations (COMAR) 28.02.01.23A.¹

The contested case provisions of the Administrative Procedure Act, the Department's hearing 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 & Supp. 2017); 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 that loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on the Claimant's behalf, except where noted:

- Cl. Ex. 1 - Construction Contract, dated April 23, 2013
- Cl. Ex. 2 - NOT ADMITTED
- Cl. Ex. 3 - Photographs A through C
- Cl. Ex. 4 - Email chain, dated August 4, 2015
- Cl. Ex. 5 - Estimate, William D Wooden Enterprises, dated August 13, 2015
- Cl. Ex. 6 - Check to the Respondent, \$1,500.00, dated March 14, 2015
- Cl. Ex. 7 - Checks to the Respondent: \$1,761.00, dated July 10, 2013; \$619.37, dated July 17, 2013; \$869.38, dated July 23, 2013

¹ Notice of the hearing was mailed to the Respondent at the address of record by regular and certified mail on June 7, 2017, COMAR 09.08.03.03A(2), and not returned as unclaimed/undeliverable. 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. I determined that the Respondent had received proper notice, and proceeded to hear the captioned matter.

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. 1 - Notice of Hearing, dated June 7, 2017, with three attached signed receipt cards, dated June 17, 24, and 26, 2017
- Fund Ex. 2 - Hearing Order, dated January 3, 2017
- Fund Ex. 3 - Licensing History Letter, dated May 25, 2017
- Fund Ex. 4 - Home Improvement Claim Form, dated March 30, 2016
- Fund Ex. 5 - Letter from the MHIC to the Respondent, dated April 11, 2016
- Fund Ex. 6 - Order, dated September 18, 2015
- Fund Ex. 7 - Respondent's Answers to Complaint, undated; Certificate of Liability Insurance, dated August 17, 2015; Building Permit, issued June 3, 2014; Contractor Certification, expiration date of November 20, 2016

The Respondent was not present to offer any exhibits.

Testimony

The Claimant testified on his own behalf. No other witnesses testified.

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 01-105701.
2. On April 23, 2013, the Claimant and the Respondent entered into a contract to remove the existing deck on the Claimant's home and replace it with a new deck. The contract stated that work would begin on or about June 3, 2013 and would be completed by June 18, 2013.
3. The original agreed-upon contract price was \$5,580.00.
4. Also on April 23, 2013, the Claimant and the Respondent entered into a separate contract to remodel two bathrooms in the home. The amount of that contract was approximately

\$10,000.00. Work began in June 2013 and the bathrooms were completed by the end of November 2013.

5. Because the Claimant's wife was pregnant, with the baby due in mid-August 2013, the Claimant asked the Respondent to delay work on the deck until after the baby was born.

6. In the months following the birth of the Claimant's baby on August 21, 2013, the Claimant attempted to reschedule work on the deck but was unable to work out a date with the Respondent.

7. On March 14, 2015, the Claimant paid the Respondent \$1,500.00 for work on the deck.

8. The Respondent started work on the deck in June or July 2015.

9. The Respondent removed the existing deck and began constructing a new deck.

10. The new deck was not level and was not secured by in-ground footers. The Respondent also failed to install railings.

11. The Respondent stopped work on the unfinished deck in early August 2015. Despite the Claimant's repeated requests by telephone and email that the Respondent complete the work, he failed to complete the deck.

12. In the fall of 2015, the Claimant hired another contractor to correct and complete the deck construction.

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).² “[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* (3d 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) (2015);³ *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.” Bus. Reg. § 8-401. For the following reasons, I find that the Claimant has proven eligibility for compensation; however, I decline to make an award for the reasons explained below.

First, I find the Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant. That the Respondent was licensed is not in dispute.

Second, I find that the Respondent performed unworkmanlike, inadequate or incomplete home improvements. The Claimant credibly testified that the deck constructed by the Respondent was not level. Furthermore, there is no dispute that the Respondent failed to install railings which were part of the deck design. Though the Respondent provided (to the MHIC) a written response to a complaint filed by the Claimant that referenced a delay in work due to difficulty matching the railings to the deck color (Fund Ex. 6), the Claimant testified that this should not have delayed the work, as the railings only needed to be a shade of brown.

Furthermore, the Claimant provided emails from his wife to the Respondent in which she

² As noted above, “COMAR” refers to the Code of Maryland Regulations.

³ Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 Replacement Volume.

repeatedly asked him to return and complete the deck, which the Respondent failed to do. (Cl. Ex. 4.) I therefore conclude that the Respondent's work was both unworkmanlike and incomplete.

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

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). Because the Respondent did some of the contractual work, but the Claimant hired another contractor to correct and complete the work, the following formula offers the appropriate measurement to determine the amount of actual loss 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).

The difficulty in this case, as noted by the Fund at the hearing, is that the Claimant failed to provide the information required to calculate the actual loss. The Claimant candidly admitted that he was unsure of the amount he had paid to the Respondent. He testified that he believed he made an initial payment of \$3,000.00 in April 2013, and then paid another \$1,500.00 in March 2015, for a total of \$4,500.00. However, he was able to document only the \$1,500.00 payment in March 2015. While he provided other checks, these were marked to indicate that they were payments for the Respondent's work on the two bathrooms, pursuant to a separate contract that is

not at issue in this case. The Claimant explained that these other checks likely represented funds he paid to the Respondent for both the bathrooms and for the deck, but he acknowledged he was unable to recall exactly what the funds were intended for. I am not persuaded that these additional checks reflect any payments made to the Respondent for work on the deck.

The Claimant argued that even if I do not find the evidence supports payments of \$4,500.00 to the Respondent, I should find that the Claimant paid the Respondent at least \$1,500.00, and then apply the formula using that figure. However, in addition to his uncertainty regarding payments actually made to the Respondent, the Claimant did not provide one of the essential elements of the formula: "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." The Claimant provided an estimate from William D Wooden Enterprises in the amount of \$6,854.86 which reflects correction and completion of the deck, but acknowledged that he hired a different contractor to complete the work. He could not recall what he paid to that contractor (who did complete the work), and he had no documentation of the contract or of any payments made to that contractor.

Without that information, any calculation of the actual loss is speculative, rather than factual. A speculative assessment is contrary to the clear mathematical formula of COMAR 09.08.03.03B(3)(c). Accordingly, while the Claimant has suffered an actual loss, I decline to find that it is a compensable loss and, therefore, make no award to the Claimant.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual loss as a result of the Respondent's acts and omissions, but the loss cannot be compensated. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(c).

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.

Signature on File

October 19, 2017
Date Decision Issued

~~Jennifer L. Gresock~~
Administrative Law Judge

JLG/dlm
#170342

PROPOSED ORDER

WHEREFORE, this 14th day of December, 2017, 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.

Andrew Snyder

***Andrew Snyder
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION