

IN THE MATTER OF THE CLAIM	* BEFORE M. TERESA GARLAND,
OF ALFRED AND CINDY	* AN ADMINISTRATIVE LAW JUDGE
DONALDSON,	* OF THE MARYLAND OFFICE
CLAIMANTS	* OF ADMINISTRATIVE HEARINGS
AGAINST THE MARYLAND HOME	*
IMPROVEMENT GUARANTY FUND	*
FOR THE ALLEGED ACTS OR	*
OMISSIONS OF MELANIE	* OAH No.: DLR-HIC-02-16-30509
MATTISON, T/A HOUSEPROS, LLC,	* MHIC No.: 16 (05) 583
RESPONDENT	*

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On August 17, 2016, Alfred and Cindy Donaldson (Claimants) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$57,643.00 in alleged actual losses suffered as a result of a home improvement contract with Melanie Mattison trading as HousePros, LLC (Respondent).

I held a hearing on March 20, 2017 at the Tawes State Office Building in Annapolis, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). Dennis Weisberg, Esquire, represented the Claimants. Kris King, Assistant Attorney General, Department of Labor,

Licensing and Regulation (Department), represented the Fund. Ian Mattison, by Special Power of Attorney, represented the Respondent.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the Office of Administrative Hearings (OAH) govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2016); Code of Maryland Regulations (COMAR) 09.01.03; COMAR 28.02.01.

ISSUES

1. Did the Claimants 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 have attached a complete Exhibit List as an Appendix.

Testimony

Mr. Donaldson testified on the Claimant's behalf and presented the testimony of: Charles Schindler, Building Inspector for Anne Arundel County, and Brian Weese, Weese Remodeling, LLC, who was accepted as an expert in Home Improvement Estimating Price and Cost.

Mr. Mattison testified on the Respondent's behalf.

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 numbers 96028 and 93621.

2. On January 13, 2015, the Claimants and the Respondent entered into a contract to build a new family room addition and kitchen-garage breezeway extension to the Claimants' existing home (Contract). Work on the Contract was to begin sixty days from the date of the contract. (Jt. Ex. 1.)

3. The original agreed-upon Contract price was \$125,500.00. (Jt. Ex.1.)

4. The Claimants paid the follow amounts to the Respondents: (Jt. Ex. 1.)

- a. \$3,500.00 on January 13, 2015
- b. \$38,500.00 on June 17, 2015
- c. \$20,000.00 on September 29, 2015
- d. \$30,000.00 on October 14, 2015
- e. \$10,000.00 on October 19, 2015

5. In total, the Claimants paid the Respondent \$102, 000.00.

6. Throughout the Respondent's work on the Claimants' property, Claimant Alfred Donaldson maintained a detailed log¹ of the Respondent's work.² (Cl. Ex. 5.)

7. The Respondent began work on the Contract on August 20, 2015. (Cl. Ex. 5.)

8. On August 25 and 27, 2015, the Respondent dug the footing for the extension of a porch foundation. The foundation was required to be a minimum of sixteen inches in width. The foundation as dug by the Respondent was twelve inches in width.

9. On August 27, 2015, Charles Schindler, Housing Inspector with the Anne Arundel County Department of Inspection, Licensing and Permits, conducted an inspection and failed the footing inspection because it did not meet the required sixteen inches in width. The Respondent rectified the deficiency and the footing passed inspection on August 28, 2015.

¹ The Claimant's log is a twenty-six page, single-spaced, excruciatingly detailed document organized in columns and rows. It is a dense document written in the third-person, narrative form and replete with emotionally-charged language and extraneous information.

² All references to the Respondent hereinafter refer to Ian Mattison, the individual who performed the work and who represented the Respondent at the hearing.

10. On September 21, 2015, Charles Schindler conducted an inspection of the foundation and found numerous deficiencies.

11. The Claimants and the Respondent had significant personality conflicts throughout the course of their relationship. (Test. Cl. and Resp.)

12. As of October 8, 2015, the Claimants had paid the Respondent \$62,000.00. On that date, the Respondent demanded another \$40,000.00, which the Claimants declined to pay at that time because much of the work associated with each previous draw had yet to be completed.

13. On October 9, 10, and 13, 2015, the Respondent again demanded another \$40,000.00, which the Claimants declined to pay due to the Respondent's incomplete work.

14. On October 9, 2015, the Claimants gave the Respondent a written document which summarized the work that remained incomplete, specifically framing, and notified the Respondent that no further funds would be paid until October 12, 2015. (Resp. Ex. 5.)

15. On October 14, 2015, the Respondent again demanded another \$40,000.00. The Respondent had made some progress between October 9 and 14, 2015 and the Claimants paid the Respondent \$30,000.00. The additional \$10,000.00 payment was contingent on the Respondent engaging a plumber and an electrician to complete the work. (Cl. Ex. 5.)

16. On October 14, 2015, the Claimants gave the Respondent a written document which detailed the work the Respondent must complete before release of an additional \$10,000.00 payment. Specifically, complete electrical, plumbing and HVAC rough-ins, and install ceiling, wall and floor insulation.

17. On October 19, 2015, the Claimants released \$10,000.00 to the Respondent. The Respondent had begun the electrical rough-in, although he is not a licensed electrician. The

plumbing rough-in and pipe insulation was completed by a licensed plumber and it passed inspection on October 21, 2015.³

18. Between October 20, 2015 and October 22, 2015, the Respondent did little work on the Claimants' project. On October 23, 2017, the Respondent did not come to the job-site.

19. On October 26, 2015, a plumbing inspection revealed that the Respondent had not installed the septic drain pipe which should run from the kitchen extension through the garage. The Claimants also discovered that the family room addition measured 20 feet by 19 feet, six inches and not 20 feet by 20 feet as specified. (Cl. Ex. 5.)

20. On October 26, 2015, the Respondent emailed the Claimants a Contract Change Order (Change Order) which included some work or materials that were not in the Contract, work required by Anne Arundel County inspectors in order to pass inspections, and work or materials that were already in the Contract. The Change Order totaled \$8,733.00, which brought the total Contract costs to \$134,233.00. The email to which the Change Order was attached also noted that the Respondent would not move forward without the signed Change Order. (Resp. Ex. 3; Cl. Ex. 6.)

21. On October 29, 2015, the Claimants terminated the Respondent. (Cl. Ex. 7.)

22. The Contract contained a provision requiring the Claimants and the Respondent to submit to mediation and/or arbitration as the means of dispute resolution. (Jt. Ex. 1.) The Respondent refused to submit to any form of alternative dispute resolution.

23. The Claimants hired a structural engineer to assess the structural integrity of the Respondent's incomplete work. The engineer concluded that the work performed by the

³ Pipe insulation was not an item on the Claimant's October 14, 2015 "to-do" list. See Finding of Fact #16.

Respondent exemplified poor workmanship and found structural deficiencies which required corrective measures in the following areas:

- Garage roof trusses
- Breezeway east partition wall
- Breezeway north load-bearing wall
- Breezeway west load-bearing wall
(Cl. Ex. 1.)

24. The Claimants hired Weese Remodeling, Inc., MHIC # 92789, to complete the work begun by the Respondent. All of the work was the same scope of work required by the Contract. The work included the following:

- Damp-proof crawlspace
- Install floor decking
- Install interior walls
- Install door and window headers
- Install ceiling joists
- Complete exterior siding on fireplace bump-out
- Install insulation
- Install exterior and interior doors
- Complete all electrical work
- Complete all plumbing work
- Install cabinetry
- Install vanity tops
- Finish hardware
- Install interior trim
- Paint all interior ceilings and walls, and interior/exterior trim and doors
- Install bathroom tile and hardwood flooring in addition and kitchen
- Patch and trowel garage slab
- Grade and seed outside perimeter after construction completed
(Cl. Ex. 3.)

25. The Claimant's paid Mr. Weese \$78,293.00 to complete the work specified in the Contract with the Respondent. (Cl. Ex. 3.)

26. The value of the work the Respondent performed is \$33,410.00. (Cl. Ex. 2.)

27. The Claimants' actual loss is \$54,793.00.

DISCUSSION

In this case, the Claimants have the burden of proving the validity of their claim by a preponderance of the evidence. Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3).⁴ “[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);⁵ *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 Claimants have proven eligibility for compensation.

From the very outset of the hearing in this matter, it was quite apparent that Mr. Donaldson,⁶ and the Respondent were of opposite and incompatible personalities. The Claimant, as evidenced by his daily log, was intent on being involved in every minute detail of the Respondent's work. The Respondent, on the other hand, just wanted to be left alone. And while this glaringly evident personality conflict strained the relationship between the two, it was the

⁴ As noted above, “COMAR” refers to the Code of Maryland Regulations.

⁵ Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 Replacement Volume.

⁶ Hereinafter, any reference to Claimant (singular) is to Mr. Donaldson.

Respondent's poor work quality and his ultimatum to the Claimants in his final email which caused the demise of the Contract.

The Claimants' Position

Charles Schindler, a building inspector for the Anne Arundel County Department of Inspection, Licensing and Permits, testified that the Respondent's work had a higher than average number of inspection failures. The Respondent's work failed inspections because: he performed electrical work when he was not a licensed electrician; some work scheduled for inspection had yet to begin; and the Respondent would not take direction from the inspectors when they told him the existing garage needed a support beam and additional engineering work. The framing in the addition never passed the framing inspection because all of the trades had not finished their work as required to pass inspection. Mr. Schindler testified that he never passed any of the Respondent's work above the footers. The most glaring deficiencies Mr. Schindler noted were: the back garage beam was too small and the trusses needed to be repaired; there were structural issues with the level of the floors; the support for the fireplace in the addition was inadequate; and the breezeway and garage required additional engineering, which the Respondent had resisted.

Brian Weese, owner of Weese Remodeling, LLC, was accepted as an expert in home improvement, and cost and price estimation. He began in the construction business in 1994, began estimating home improvement jobs and new construction in 1996 and began his own home improvement company in 2006. He has estimated the costs of 300-400 jobs and in his business he is responsible for estimating, accounting and project management for twenty to thirty jobs per year, of which eight to ten of those jobs involve the construction of an addition to an existing home. Mr. Weese has been MHIC-licensed since 2006.

On behalf of the Claimants, Mr. Weese performed a price and cost analysis of the work the Respondent performed pursuant to the Contract. This analysis included comparing the terms of the Contract to the actual work the Respondent completed and estimating the value of that work. Mr. Weese concluded that the value of the work performed by the Respondent was \$33,410.00, which included 12% company overhead and 18% company profit. The Claimants had paid the Respondent \$102,000.00. The only work Mr. Weese deemed complete pursuant to the Contract was the foundation and the roofing. Mr. Weese also analyzed and projected the cost to complete the work pursuant to the terms of the original Contract. Some of the Respondent's work had been partially completed (i.e., demolition, footings, rough carpentry), but much of the work had never begun (i.e., electric, HVAC, drywall, decks, floor coverings, painting). (Cl. Ex. 2.) The cost to complete the terms of the Contract was \$78,293.00. (Cl. Ex.3.)

Finally, on November 16, 2015, Mr. Weese and Michael A. Ajomale, P.E., the engineer who drew the original plans for the Claimants' project, met at the site. After surveying the work performed by the Respondent, Mr. Ajomale verbally concluded that the Respondent had not followed the engineering specifications provided in his plans. After Mr. Weese finished his work on the Claimants' project, Mr. Ajomale approved Mr. Weese's work and certified it to the Anne Arundel County Department of Inspections, Licensing and Permits, which gave final inspection approval to Mr. Weese's work.

The Claimant testified that he met with the Respondent once or twice in December 2014 and signed the Contract in January 2015, at which time he gave the Respondent a \$3,500.00 retainer. He gave the Respondent a first draw of \$38,500.00 on June 17, 2015, but the Respondent did not appear at the job site until August 20, 2015. The Claimant testified that he maintained a daily journal of the Respondent's comings and goings, the work performed by the Respondent (or his subcontractors), what time workers showed up, what time they left, dates

inspectors came to the site and a detailed description of any conversations he had with anyone involved in the project. The Claimant expressed that he felt regret immediately after contracting with the Respondent when he read numerous uncomplimentary reviews of the Respondent's work and when, nine days after the Respondent began work on his project, he received a call from an "investigator" who was investigating the work the Respondent performed for someone else.

The Claimant said that he was dismayed by the delay between the Contract date and the date the Respondent actually began work some eight months and \$40,000.00 later. There were numerous discussions between the Claimant and the Respondent regarding the Respondent's lack of progress. The Respondent had also failed to pay a number of subcontractors, including the engineer who drew the plans for the project. The Claimant made a list of deficiencies in the Respondent's work, which Mr. Weese described as accurate. The deficiencies included: the garage ceiling trusses lacked structural integrity; the fireplace box-structure failed inspection; the addition's exterior entry door was improperly installed; the kitchen floor joists were not level; the stepdown access platform into the garage to the kitchen was not level; the entry door between the garage and the kitchen was installed backwards; there was no subfloor in the addition which should have been installed before the wall studs; the rough-in electrical work performed by the Respondent had to be removed because Respondent is not a licensed electrician; the floor plan drawings and Respondent's construction were not consistent with each other; and the wall studs and ceiling joists were improperly installed, causing "waves" in the walls and ceiling, some of which could not be corrected. (Cl. Ex. 4.)

The "straw that broke the camel's back" was the Respondent's unwavering insistence that the Claimants pay a \$40,000.00 draw when they had seen little progress and, when they did pay

the \$40,000.00, the Respondent emailed them a Change Order which demanded an additional \$8,733.00. The Change Order was attached to an October 26, 2015 email, written by the

Respondent, which expressed the Respondent's expectation that the Claimant refrain from yelling at and belittling him, and trying to manage the project. The email requested payment of the Change Order, with the last line stating, "Unfortunately, until these items are resolved, we cannot put ourselves at risk of working." (Resp. Ex. 3.) On October 29, 2015, the Claimants terminated the Contract with the Respondent.⁷ (Cl. Ex. 7.)

The Respondent's Position

The Respondent testified and denied that his work was poor or that it was not substantially complete. He complained that the Claimant was interfering with his work and that he was "held hostage" over a \$40,000.00 check. The Contract called for a sixteen-week completion timeframe and he was only halfway through that time when he was terminated. He had finished the foundation, siding and demolition. The Respondent denied that his electrical work was unworkmanlike and claimed it was approved by a licensed electrician.⁸ The footing, framing and additional breezeway footer had all been inspected and passed. Further, the Respondent insisted that he followed the engineering plans tying the existing garage into the addition, but the engineer subsequently changed the plans. He claimed to have "cleared" his construction with both the engineer and well as the Claimant. The Respondent denied that he left any of the subcontractors unpaid, but also said that when he was not paid by the Claimants, he in turn did not pay his subcontractors. He further stated that he did not terminate his relationship with the Claimants; they sent him a termination letter. He insisted that it was the Claimants who

⁷ The Contract had a mediation/arbitration clause which the Claimant attempted to enforce, but the Respondent failed to cooperate.

⁸ According to the Claimant, the electrician named by the Respondent said he had never met the Respondent.

breached the terms of the Contract by paying bills late and in "chunks." Further, the Claimants did not submit this dispute to mediation/arbitration as required by the Contract.

During his testimony, the Respondent was shown photographs of the work site and denied that the photos were a fair and accurate representation of the work site as he had left it. He was critical of Mr. Weese's estimate of the cost to complete the terms of the contract and claimed that he could have completed the contract with the proceeds of the remaining draw together with the funds set out in the Change Order for a total of about \$32,000.00. He called Mr. Weese's estimate of \$78,000.00 to finish the Claimants' project "criminal." During his testimony, the Respondent said that he was always willing to return to the Claimants' property to complete the Contract. The Respondent expressed his dismay that he was not permitted to complete the work on the Claimants' house and exclaimed to the Claimant, "You railroaded me, buddy. You put me down and ran me over."

Analysis

The facts before me demonstrate that the Respondent performed unworkmanlike, inadequate and incomplete home improvements on the Claimants' home. The Claimants paid the Respondent a total of \$102,000.00, yet only a small percentage of the work was completed by the end of October 2015, nearly nine weeks after the Respondent began work. The Respondent performed electrical work when he was not a licensed electrician and, despite his testimony to the contrary, no electrician either supervised or approved his work. All electrical work performed by the Respondent had to be ripped out and reinstalled. The uncontroverted testimony of Mr. Weese convinces me that the Respondent left a substantial amount of work partially or wholly unfinished, and work that he did complete required remediation because of poor workmanship. I accept Mr. Weese's expert opinion that the value of the Respondent's work was \$33,410.00, when he accepted payments totaling \$102,000.00.

The Respondent had conflicts with the Claimant and others, including inspector Charles Schindler. Advice Mr. Schindler gave the Respondent went largely ignored. The Respondent had conflicts with the Claimant, as evidenced by his eye-rolling, finger-drumming, hand-flailing and audible expressions of exasperation during the hearing. The evidence before me is that the Respondent was the party to terminate the contractual relationship when he submitted the Change Order to the Claimants with an email assuring the Claimants that he would not return to finish the work unless the \$8,733.00 Change Order was "approved" and paid. The Claimant, understandably, felt the project was being held hostage by the Respondent over \$8,733.00 that he did not believe he should pay. Consequently, I conclude that the Respondent had no justification to invoke the arbitration clause contained in the Contract as a defense to the Claimants' claim.⁹

Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimants. The Respondent performed unworkmanlike, inadequate or incomplete home improvements. I thus find that the Claimants are 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 Claimants are 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

⁹ Furthermore, per COMAR 09.08.01.25, a binding arbitration clause contained in a home improvement contract must contain certain elements to be enforceable. It has to list the name of the person or organization that will conduct the arbitration, whether any mandatory fees will be charged to the parties for participation in the arbitration and include the fee schedule and a disclosure that, under Business Regulation Article Section 8-405(c), a claim against the Home Improvement Guarantee Fund by an owner shall be stayed until the completion of any mandatory arbitration proceeding. Additionally, COMAR 09.08.01.25 specifies that both "parties shall affix their initials and date immediately adjacent to any mandatory arbitration clause in a home improvement contract, at the time of execution of the contract." The Contract dispute resolution clause met none of the COMAR09.08.01.25 requirements.

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 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).

I have calculated the Claimants' loss as follows:

Amount paid to the Respondent:	\$102,000.00
Cost to complete the Contract:	+ <u>\$ 78,293.00</u>
	= \$180,293.00
Original contract price:	- <u>\$125,500.00</u>
Claimants' loss:	= \$54,793.00

Pursuant to the applicable law, 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 Claimants to the Respondents.

Md. Code Ann., Bus. Reg. § 8-405(e)(1), (5) (2015).

The actual loss computed above is \$ 54,793.00, which exceeds \$20,000.00 by \$34,793.00. Accordingly, the Claimants are entitled to reimbursement from the Fund of only a portion of their actual loss, or \$20,000.00. *Id.* § 8-405(e)(1).

PROPOSED CONCLUSION OF LAW

I conclude that the Claimants have sustained an actual and compensable loss of \$20,000.00 as a result of the Respondents' acts and omissions. 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 award the Claimants \$20,000.00; 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 ten percent (10%) as set by the Maryland Home Improvement Commission;¹⁰ and

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

Signature on File

May 31, 2017
Date Decision Issued

M. Teresa Garland
Administrative Law Judge

MTG/sw
168269

¹⁰ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 10th day of July, 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.

Joseph Tunney

***Joseph Tunney
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION