

I held a hearing on November 2, 2016 at the Office of Administrative Hearing (OAH), located in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). The Claimant represented himself. Eric London, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Respondent represented himself.

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 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:

- Clmt. Ex. 1 - Claimant's contract with the Respondent, October 17, 2014
- Clmt. Ex. 2 - Invoice and receipt for \$1,086.00 down payment, October 17, 2014
- Clmt. Ex. 3 - Six photographs
- Clmt. Ex. 4 - Community Concrete Restoration, Inc. Proposal April 27, 2016
- Clmt. Ex. 5 - Community Concrete Restoration, Inc. invoice, July 13, 2016
- Clmt. Ex. 6 - Photograph of wall prior to Respondent's renovations
- Clmt. Ex. 7 - Photograph of basement area after Respondent's renovations

I admitted the following exhibits on behalf of the Fund:

Fund Ex. 1 - Notice of Hearing, September 1, 2016

Fund Ex. 2 - Hearing Order, June 17, 2016

Fund Ex. 3 - Licensing History of Respondent, October 25, 2016

Fund Ex. 4 - Home Improvement Claim Form, May 20, 2016

The Respondent offered no exhibits.

Testimony

The Claimant testified on his own behalf. The Respondent testified on his own behalf.

The Fund did not call 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 number 94311.
2. On or about October 17, 2014, the Claimant and the Respondent entered into a contract for the installation of a sump pump and installation of drain tile and concrete to waterproof Claimant's basement.
3. The original agreed-upon contract price was \$3,260.00, with a deposit of \$1,086.00.
4. The installation of the sump pump accounted for \$1,667.00 of the contract price.
5. The Claimant paid the Respondent the full contract price.
6. The Respondent completed the work, including the concrete work, in July 2015.
7. The Claimant used a small window air conditioner, dehumidifier and a fan in the basement while the concrete was drying.

8. Six to eight weeks after the Respondent completed the contract, the Claimant noticed that the concrete poured by the Respondent was not hardening; the concrete was soft with a dusty layer. The Claimant also noticed cracks in the rear wall.

9. The Respondent did not mix the concrete to the manufacturer's specifications; he added too much water to the concrete and the strength of the concrete was compromised resulting in the concrete not setting.

10. In December 2015, the Respondent inspected the concrete and took a concrete dust sample from the floor.

11. In April 2016, the Claimant retained Community Concrete Restoration to examine the Respondent's work and provide an estimate to correct the problem.

12. Community Concrete recommended removal and replacement of the concrete and the installation of a drain board at a cost of \$2,556.99.

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).¹ "[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).

¹ As noted above, "COMAR" refers to the Code of Maryland Regulations.

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);² *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.

The Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant. In October 2014, the Claimant hired the Respondent to install a basement waterproofing system and sump pump at a total contract price of \$3,260.00. The work was completed in July 2015.³ The Claimant testified that approximately six to eight weeks after the work was completed, he noticed that the concrete installed on the floor was not hardening and had a layer of dust on top. The Claimant contacted the Respondent regarding the issues and the Respondent came to the Claimant’s home on December 2, 2015 to look at the work.

According to the Claimant, the Respondent stated that he had never seen anything like the condition of the concrete and he blamed the Claimant’s use of the air conditioner and dehumidifier for the concrete’s soft and dusty condition. The Claimant testified that the Respondent took a dust sample of the floor and that he never heard from the Respondent again.

According to the Claimant, the Respondent did not offer to do any additional or remedial work, but told the Claimant that the Claimant could personally put tile over the area or a coat of epoxy paint.

² Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 Replacement Volume.

³ The Claimant and the Respondent disagreed as to the reason that the contract took so long to complete. This was not an issue relevant to the Claim and is therefore not addressed in this decision.

In April 2016, the Claimant contacted Community Concrete Restoration to provide an estimate to repair the cracked walls and concrete area of the floor. Community Concrete attributed the soft concrete to the Respondent's failure to mix the concrete to the manufacturer's specifications. According to the Community Concrete's report, the Respondent had used too much water when mixing the concrete, which compromised the strength of the concrete. Community Concrete recommended removing and replacing the concrete installed by the Respondent.

The Respondent testified in response to the Claimant's case. The Respondent attributed the reason for the concrete not hardening properly was because the Claimant used fans and an air conditioning unit in the basement and did not let the concrete dry naturally. According to the Respondent, he took a sample of the concrete/dust to others in the industry and they confirmed that the problem with the concrete was caused by the water being sucked out of the concrete too quickly. The Respondent further testified that at the time the contract was entered into he did a walk-through in the basement with the Claimant. During the walk-through, he explained what was going to be done and what to expect after the work was completed. He testified that at the time the contract was entered into, he provided the Claimant with a pamphlet of what to expect, which included information that the concrete should be left to dry naturally. The Respondent adamantly denied that he refused to offer any remedial work to address the concrete issues. He stated that he told the Claimant that he could block sand a small areas of the concrete to remove the film and put another layer on. If it appeared that this corrected the problem, he would use the same technique over the entire area. On the other hand, if that technique was unsuccessful, he would replace all of the concrete. According to the Respondent, the Claimant would not accept

any solution other than to have all of the work torn out and replaced, and he was never provided with the opportunity to see if the block sanding would work.

The Respondent also disputed the reasonableness of Community Concrete's estimate. The Respondent testified that the sump pump and its installation accounted for \$1,667.00 of the \$3,260.00 of contract price. He estimated that a more reasonable price to remove and replace the concrete would be approximately \$1,200.00.

After considering the documentary evidence and the testimony of the Claimant and Respondent, I have concluded that the Claimant is entitled to reimbursement from the Fund for the following reasons. First, it is undisputed that the concrete installed as part of the Respondent's waterproofing system did not properly set. The Respondent attributed the problem to the Claimant using fans, a dehumidifier and an air conditioner to assist in the drying process after being instructed to let the concrete dry naturally. The Respondent's assertion that the Claimant was instructed not to use any appliances to assist in the drying process was not supported by any corroborating evidence. Although the Respondent testified that the Claimant was provided with a pamphlet that explained the process, the Respondent did not produce the pamphlet at the hearing. Additionally, I give significant weight to the fact that the Respondent's initial response to the condition of the concrete was that he had never seen anything like that before. I believe that it if was just a matter of the concrete drying too quickly that would be readily recognized by the Respondent. Additionally, I gave weight to the to the fact that the concrete was so soft that as pointed out in the Community Concrete report, it could easily be penetrated and gouged with a finger. This leads me to believe that there was a significant problem with the mixture of the concrete as assessed by Community Concrete. I therefore have given more weight to Community Concrete's assessment that the poor condition of the concrete

was due to the Respondent's failure to properly mix the concrete in accordance with the manufacturer's specifications than to the Respondent's assessment that it was due to the Claimant's assistance in the drying process.

I further find that there is insufficient evidence for me to conclude that the Claimant unreasonably rejected the Respondent's offers to cure the issue with the concrete. The Claimant adamantly denied that the Respondent made any offers to fix the problem and the Respondent was equally adamant in his assertions that he provided possible solutions, but was denied the opportunity to try and remedy his work. Neither party struck me as more credible than the other. Because the Respondent bears the burden of establishing that he made a good faith effort to address the problem with the concrete, without any witnesses or documents to corroborate his assertions, he has not persuaded me on this issue.

I conclude that the Claimant has established that the concrete installed as part of the Respondent's waterproofing system was done in an unworkmanlike manner entitling the Claimant to reimbursement 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). The following formula is generally used if the contractor did work according to the contract and the claimant has solicited or is soliciting another contractor to complete the contract. Using this formula 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. MHIC's regulations offer the implementation of a unique measurement if none of the offered formulas is appropriate: COMAR 09.08.03.03B(3)(c).

This case requires some adjustment to the formula applied when the Claimant solicits another contract to repair and/or replace the original contract. The Respondent's contract price was \$3,260.00, which included the installation of a sump pump. The cost of the sump pump was \$1,068.00 and installation of the pump in the pit was \$599.00 for a total of \$1,667.00. The Claimant agrees that the sump pump is in good working order and not part of his claim. The remaining \$1,593.00 was for the installation of the trench system, including the concrete work. The Claimant obtained a proposal from Community Concrete to tear out and replace the concrete, plus supply and install 48-inch fabric backed drain board at a total cost of \$2,658.82. The installation of the drain board was not part of the original work included in the Respondent's contract. Community Concrete's proposal did not separate the concrete work from the installation of the drain board. According to the Claimant, it accounted for \$100.00 of the contract price. The Respondent contended that \$100.00 was too low of an estimate for drain board installation and testified that a reasonable cost of removing and replacing concrete would be \$1,200.00; the remaining portion of Community Concrete's estimate would be attributable to the additional work. Thus, the Claimant is entitled to \$1,200.00 reimbursement from the Fund. (\$3,260.00 (original contract price) + \$1,200.00 (cost to repair and replace) - \$3,260.00 (original contract price) = \$1,200.00.) The Claimant is entitled to reimbursement from the Fund in this amount.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss \$1,200.00 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.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$1,200.00; 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;⁴ and

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

Signature on File

December 29, 2016
Date Decision Issued

GAK/sw
165680

Geraldine A. Klauber
Administrative Law Judge

⁴ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 15th day of February, 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.

Sachchida Gupta

***Sachchida Gupta
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION

MEMORANDUM

TO : [Illegible]

FROM : [Illegible]

SUBJECT : [Illegible]

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