

IN THE MATTER OF THE CLAIM	*	BEFORE MARY SHOCK,
OF MATTHEW HOFFMAN,	*	AN ADMINISTRATIVE LAW JUDGE
CLAIMANT	*	OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	*	OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	*	
FOR THE ALLEGED ACTS OR	*	OAH No.: DLR-HIC-02-19-04027
OMISSIONS OF GILBERT STROUP,	*	MHIC No.: 18 (90) 787
T/A STROUP FLOORING AMERICA,	*	
RESPONDENT	*	

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On October 18, 2018, Michael Hoffman (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$4,276.97 in actual losses allegedly suffered as a result of a home improvement contract with Gilbert Stroup, trading as Stroup Flooring America (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015).¹ On February 4, 2019, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

¹ Unless otherwise noted, all references to the Business Regulation Article herein cite the 2015 Replacement Volume of the Maryland Annotated Code.

On June 5, 2019, I held a hearing at the Washington County Office Building, 35 West Washington Street, Hagerstown, Maryland. Bus. Reg. § 8-407(e). The Claimant represented himself. The Respondent represented himself. Eric London, Assistant Attorney General, Department of Labor (Department), represented the Fund.

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. 2018); Code of Maryland Regulations (COMAR) 09.01.03; COMAR 28.02.01.

ISSUES

1. Did the Claimant timely file a claim for reimbursement from the Fund?
2. If so, did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?
3. If so, what is the amount of the compensable loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits for the Claimant:

- CL 1 Floor Inspection Service, LLC, Report, April 25, 2017
- CL 2 James M. Thies, Certified Flooring Inspector, Inspection Report Form, September 30, 2017
- CL 3 Photographs of the Claimant's kitchen floor, dated January 1, 2017 to December 4, 2017
- CL 4 R & W Dorsey, Inc., Proposal, July 17, 2018

The Respondent did not offer any exhibits.

I admitted the following exhibits for the Fund:

- FUND 1 Notice of Hearing, March 19, 2019
- FUND 2 Hearing Order, February 4, 2019
- FUND 3 Respondent's MHIC licensing information, May 10, 2019
- FUND 4 Claim Form, signed July 18, 2018, received, October 18, 2018
- FUND 5 Letter from Fund to Respondent, November 19, 2018
- FUND 6 Respondent's Invoice, September 23, 2013

Testimony

The Claimant testified on his own behalf. The Respondent testified on his own 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, license number 01-22370.
2. In 2013, the Claimant's icemaker in his residence leaked and caused damage to his kitchen floor.
3. On September 23, 2013, the Respondent installed an unfinished red oak floor in the Claimant's kitchen for \$5,565.01.
4. The Claimant's homeowner's insurance carrier paid for the floor and installation.
5. In late 2014 or early 2015, the Claimant noticed a gap between the boards had developed in the floor in front of the kitchen sink.
6. In July 2016, the Claimant notified the Respondent of the gap.
7. On September 27, 2016, the Respondent inspected the floor and determined the gap was normal. The gap measures approximately $\frac{1}{16}$ of an inch wide.
8. On October 18, 2018, the Claimant filed a claim with the Fund against the Respondent.

DISCUSSION

The Claimant has the burden of proving the validity of the claim by a preponderance of the evidence. Bus. Reg. § 8-407(e)(1); Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(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 (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. Bus. Reg. § 8-405(a); *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. Bus. Reg. § 8-401.

There is a limitation period on claims. A claimant must bring a claim against the Fund within three years after the claimant discovered or, by use of ordinary diligence, should have discovered the loss or damage. Bus. Reg. § 8-405(e). I find that the Claimant failed to timely file a claim against the Fund.

The Claimant testified he first noticed the gap in late 2014 or early 2015. Later in his testimony, he stated he noticed the problem in February or March 2016. A flooring inspector examined the floor on April 25, 2017. The Claimant told the inspector the gap had developed over the past two years. (CL 1.) The Claimant submitted photographs of his measurements of the gap, which he took over a year, from January 1, 2017 to December 4, 2017. (CL 3.) The gap does not appear to be expanding and contracting. The photographs support the Claimant's position, discussed below, that the gap was not caused by variance in humidity throughout the year. The absence of expansion and contraction, however, also indicates the Claimant should have discovered the gap shortly after installation in September 2013. Given the Claimant's first statements that he noticed the gap in late 2014 or early 2015, and because the photographs show no changes in the size of the gap, I did not find credible the Claimant's testimony that he noticed the problem in February or March 2016.

Accepting the Claimant first statements of having observed the gap by late 2014 or early 2015, I find it more likely than not that the Claimant discovered the loss or damage at that time.

The Claimant signed the Fund claim form on July 18, 2018. The Fund received the claim on October 18, 2018, the effective date of filing. (FUND 4.) Even considering a discovery date in early 2015 and the claim signature date of July 18, 2018, the Claimant's claim is untimely. July 2018 is not early in 2018. Consequently, the Claimant's July 18, 2018 claim is more than three years from the Claimant's early 2015 discovery of the loss or damage.

Even if I accept that the Claimant's claim as timely, the Claimant failed to show the Respondent performed an unworkmanlike, inadequate, or incomplete home improvement. The Claimant entered two inspection reports into the record. (CL 1 and 2.) The first inspection was performed by Kevin Donlea, Floor Inspection Service, LLC, on April 25, 2017. Mr. Donlea concluded that there were no installation or hardwood defects. He noted the gap measured $\frac{1}{16}$ of an inch. He stated minor gaps occur from time to time in hardwood flooring. (CL 1.)

The second inspection was performed by James M. Thies, F.C.I.T.S., Certified Flooring Inspector, on September 30, 2017. The inspector found the board was tight at the end of the adjoining boards and gapped, which is consistent with a crooked board. He writes there were only a "few face nails" in the pull-up row at the toe kick of the cabinet that would have been used to hold the flooring tight while the adhesive dried. The "few face nails" does not meet the standard of ten to twelve inches for face nailing. As a result, the board gapped. The inspector also wrote that a consistent interior climate environment is key to optimum wood flooring performance. He concluded there were both installation and environmental issues with the floor. "The nailing schedule and lack of testing at installation are in error. The lack in controlling the interior environment is in error." (CL 2.)

The Claimant offered photographs of the floor taken over a year to show that the gap does not expand and contract in response to humidity. (CL 3.) He seeks to rule out the interior environment as the cause of the gap.

The Respondent testified that $\frac{1}{16}$ of an inch gap is a cosmetic, not a material defect. He stated if the board was bowed, it would have been noticed at the time on installation. The Respondent explained that over time, gaps can occur in a floor. Wood is a natural product that expands and contracts and can develop gaps as a result.

Mr. Thies did not testify at the hearing. His report and the Claimant's photographs fail to prove the Respondent's work was unworkmanlike or inadequate. First, Mr. Thies's report is imprecise. While the inspector cited the NWFA Wood Flooring Installation Guidelines and Methods, the description of "a few face nails" does not adequately pinpoint how the Respondent's work failed to meet that standard. Although I infer there were fewer nails than needed, I do not know exactly what "a few face nails" means. The inspector attached photographs of the floor, some showing nails, but I do not know what those photographs mean. Without further explanation, the report fails to prove the Respondent's work was unworkmanlike or inadequate.

More importantly, Mr. Thies did not adequately address causation. Although he ties the crooked board to installation, he did not discuss whether the passage of time and the location of the gap near the kitchen sink could have contributed to the alleged defect. The inspector knew the floor was installed in 2013 and he inspected the work in 2017, four years later. The gap is in the kitchen floor in front of the sink where there is generally more water and moisture than in other areas of the room. The Claimant testified that water spills on the floor in that area. The inspector did not address whether, as a result of the location of the gap, the gap could have developed due to dampness in the area and not due to installation.

Finally, while the Claimant's photographs tend to show the gap does not expand and contract throughout the year, the evidence fails to prove the gap is a defect and/or was caused by unworkmanlike or inadequate installation. Mr. Donlea measured the gap at $\frac{1}{16}$ of an inch. I am unable to read what the photographs measure. Thus, the evidence establishes the gap measures

approximately $\frac{1}{16}$ of an inch. The Respondent testified such a gap is a cosmetic defect. While the Respondent has an interest in these proceedings, I found his testimony reliable based on his experience and demeanor. He testified in a straightforward, calm manner. The Claimant did not present any evidence to counter the Respondent's position that the gap is not a material defect or his testimony that if the board was bowed, it would have been discovered at the time of installation. As a result, the Claimant failed to prove the Respondent performed an unworkmanlike or inadequate home improvement.

Finally, even had the Claimant filed a timely claim and presented sufficient evidence to prove the Respondent performed an unworkmanlike or inadequate home improvement, he failed to prove the amount of his actual loss. Here, the Respondent performed work according to the contract. The Claimant presented a proposal from R & W Dorsey, Inc., for the company to remove and install an area of the kitchen floor and to screen and coat the living room, dining room, hallway, and kitchen with urethane finish. The cost of the work is \$2,145.76. (CL 4).

The measure of actual loss in this case is calculated as follows:

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 proposal the Claimant submitted does not separately list the cost to remove and replace the kitchen floor and the cost to screen and coat the other rooms in the house. In order to calculate actual loss, I need to know the exact amount attributable to replacing the kitchen floor.

Without that number, I am unable to apply the required formula and so determine the Claimant's actual loss.

PROPOSED CONCLUSIONS OF LAW

I conclude the Claimant failed to timely file a claim for reimbursement from the Fund. Md. Code Ann., Bus. Reg. § 8-405(e).

I further conclude the Claimant failed to prove he sustained an actual compensable loss as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. § 8-405; 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

August 9, 2019
Date Decision Issued

Mary Shock
Administrative Law Judge

MKS/cmj
#180434

PROPOSED ORDER

WHEREFORE, this 30th day of October, 2019, 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