IN THE MATTER OF THE CLAIM	*	**BEFORE PATRICK E. MAHER,**
OF KARYN SENKER,	*	**ADMINISTRATIVE LAW JUDGE,**
CLAIMANT	*	**THE MARYLAND OFFICE**
AGAINST THE MARYLAND HOME	*	**OF ADMINISTRATIVE HEARINGS**
IMPROVEMENT GUARANTY FUND	*	
FOR THE ALLEGED ACTS OR	*	
OMISSIONS OF DAVID A.	*	
MARROCCO,	*	**OAH No.: LABOR-HIC-02-21-24218**
T/A MARROCCO'S STAMPED	*	**MHIC No.: 20 (90) 182**
CONCRETE, INC.,	*	
RESPONDENT	*	

* * * * * * * * * * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On December 28, 2020, Karyn Senker (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund), under the jurisdiction of the Department of Labor (Department), for reimbursement of $4,225.19 in actual losses allegedly suffered as a result of a home improvement contract with David Marrocco, trading as Marrocco's Stamped Concrete, Inc. (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411

(2015).[1] On October 15, 2021, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on January 19, 2021, at the OAH in Hunt Valley, Maryland. *Id.* §§ 8-407(a), 8-312. John Hart, Assistant Attorney General, Department, represented the Fund and appeared via the Webex videoconferencing platform. Daniel Donlick, Esquire, represented the Claimant, who were both present at the OAH. The Respondent did not appear for the hearing. After waiting twenty minutes for the Respondent or his representative to appear, I proceeded with the hearing. Applicable law permits me to proceed with a hearing in a party's absence if that party fails to attend after receiving proper notice. Code of Maryland Regulations (COMAR) 28.02.01.23A.

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 (2021); COMAR 09.01.03; and 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 the compensable loss?

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

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits into evidence for the Claimant:

Clmt. Ex. 1. Proposal between the Claimant and the Respondent, May 28, 2019.

Clmt. Ex. 2A. Photograph of the dive rock.[2]

Clmt. Ex. 2B. Photograph of the dive rock.

Clmt. Ex. 3A. Photograph of pavers.

Clmt. Ex. 3B. Photograph of pavers.

Clmt. Ex. 4. Photograph of pooling water.

Clmt. Ex. 5 Photograph of miscellaneous construction debris in the Claimant's yard.

Clmt. Ex. 6 Photograph of the construction site with pavers.

Clmt. Ex. 7. Invoice from Paradigm Contracting, LLC., July 22, 2019.

Clmt. Ex. 8. Photograph of pavers

Clmt. Ex. 9. Photograph of pavers.

Clmt. Ex. 10 Invoices from B. Kelly Enterprises, Inc., August 22, 2019, October 1, 2019, and November 1, 2019; copies of eight checks paid to B. Kelly Enterprises, Inc.

Clmt. Ex. 11. Home Improvement Claim Form, December 21, 2020.

I admitted the following exhibits into evidence for the Fund:

Fund Ex. 1. Notice of Hearing, October 25, 2021.

Fund Ex. 2. Hearing Order, September 29, 2021.

Fund Ex. 3. Letter from the MHIC to the Respondent, January 20, 2021; Home Improvement Claim Form, December 21, 2021.

Fund Ex. 4. The Respondent's licensing history with the MHIC, January 18, 2022.

[2] The dive rock is also referred to as a dive stone and a jump rock in testimony and exhibits.

Testimony

The Claimant testified and did not present other witnesses.

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 number 01-47709. The Respondent's license expires on May 25, 2022.

2. The Respondent operated under the trade name Marrocco's Stamped Concrete, Inc.

3. On May 28, 2019, the Claimant and the Respondent entered into a contract for the Respondent to install pavers, deck drainage pipes, and a dive rock for the Claimant's swimming pool at the Claimant's home in Forest Hill, Maryland (Contract).

4. The Contract price, including a subsequent change order, was for $26,061.00.[3]

5. The Claimant paid the Respondent $26,061.00 under the Contract and the subsequent change order.

6. The Respondent completed the work in July 2019.

7. The Respondent did not properly install the pavers around the pool resulting in gaps between the pavers and an uneven surface.

[3] The original contract was for $25,511.00. A change order in the amount of $500.00 was subsequently added to purchase additional fill dirt for the project.

8. The Respondent did not properly install the dive rock in the pool area, resulting in an unsafe condition and therefore making the dive rock unusable for its intended purpose.

9. The Respondent left trash, concrete pieces, and debris in the construction area that was supposed to have been incorporated into the dirt that was used in the backfill around the pool area.

10. The Respondent did not properly install the drainage pipes in the pool area, causing an accumulation of water on the Claimant's property after rain events.

11. The Claimant paid the Respondent $850.00 for the purchase and installation of the dive rock.

12. The Claimant paid Paradigm Contractors, LLC. $400.00 to remove the dive rock from the pool area to the adjacent garden area.

13. The Claimant entered into an agreement with B. Kelly Enterprises, Inc., to perform landscaping work in the pool area and to repair the unworkmanlike and incomplete work by the Respondent.

14. On or about July 23, 2019, B. Kelly Enterprises, Inc., submitted to Claimant invoice #1568 in the amount of $6,617.35, of which $695.19 was attributable to repair of the unworkmanlike and incomplete work by the Respondent.

15. On or about October 1, 2019, B. Kelly Enterprises, Inc. submitted to Claimant invoice # 1603 in the amount of $1,529.18, to repair the unworkmanlike and incomplete work of the Respondent.

16. The total amount paid by the Claimant to B. Kelly Enterprises, Inc., to repair the unworkmanlike and incomplete work by the Respondent was $2,224.37.

DISCUSSION

The Respondent's Failure to Appear

Section 8-312 of the Business Regulation Article, entitled "Hearings," states, in pertinent part, as follows:

> (a) Except as otherwise provided in § 10-226 of the State Government Article, before the Commission takes any final action under § 8-311 of this subtitle, or if requested under § 8-620(c) of this title, it shall give the person against whom the action is contemplated an opportunity for a hearing before the Commission or, as provided under § 8-313 of this subtitle, a hearing board.
>
> (b) The Commission shall give notice and hold the hearing in accordance with Title 10, Subtitle 2 of the State Government Article.
>
> . . . .
>
> (d) The hearing notice to be given to the person shall be sent at least 10 days before the hearing by certified mail to the business address of the licensee on record with the Commission.
>
> . . . .
>
> (h) If, after due notice, the person against whom the action is contemplated does not appear, nevertheless the Commission may hear and determine the matter.

Bus. Reg. § 8-312.

Although the above statute applies to disciplinary proceedings against licensees, the MHIC uses the same procedures for hearings involving claims against the Fund, such as this case. *Id.* § 8-407(a). These procedures ensure, as much as possible, that a contractor against whom a claim is filed is made aware of the date, time, and place of the hearing.

On October 26, 2021, the OAH mailed a Notice of Hearing by both first-class mail and by certified mail to the Respondent's home and trade address in Severn, Maryland.[4] The Return Receipt, PS Form 3811 (Return Receipt) that accompanied the certified mailing was returned to the OAH on November 1, 2021. The Return Receipt indicated that delivery of the Notice of

[4] The Respondent's home and business address listed with the Commission are identical.

Hearing was acknowledged by a signature in the signature block on October 28, 2021.[5] In addition, the Notice of Hearing that was sent by first class mail was not returned to the OAH.

I find that the OAH provided "due notice" to the Respondent under Business Regulation section 8-312(h), and I held the hearing in the Respondent's absence.

The Merits of the Claim

The Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. *Id.* § 8-407(e)(1); Md. Code Ann., State Gov't § 10-217 (2021); COMAR 09.08.03.03A(3). To prove a claim by a preponderance of the evidence means to show that it is "more likely so than not so" when all the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002).

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) ("The Fund may only compensate claimants for actual losses . . . incurred as a result of misconduct by a licensed contractor."). "'[A]ctual 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. (GF Ex. 4). The parties executed the contract on May 28, 2019. The Respondent did work on the Contract and completed the installation of the pavers around the pool area, installed drainage pipes for the purpose of allowing water to flow away from the pool, and installed a dive rock by the pool in July 2019. The Claimant paid the full Contract price in several installments.

[5] The signature was illegible and the section block to print the name of the recipient was left blank.

I find the Respondent performed inadequate and unworkmanlike home improvements with respect to the installation of the pavers and the drainage system and the placement of the dive rock. The Claimant was able to articulate the issues that arose from the Respondent's work in an organized manner and supported the claims with photographs. She identified each issue and presented invoices and proof of receipt of payment for the described remedial repairs that were necessary as a result of the Respondent's shoddy work. The invoices provided detail in varying degrees to support the Claimant's explanation of the defects found in the Respondent's work. The Claimant requested reimbursement in the amount of $4,421.61 from the Fund.

It was the Fund's position that the Claimant has proven her eligibility for an award from the Fund. However, the Fund disagreed with the appropriateness of some of the claims for reimbursement submitted by the Claimant. The Fund recommended reimbursement in the amount of $2,624.37.

For the reasons stated below, I find that the Claimant has met her burden to prove eligibility for an award from the Fund, but not in the amount claimed. For the sake of clarity, I will address the disputed claims in the order presented at the hearing.

The Dive Rock

In lieu of a diving board, the Claimant purchased a large slab of stone, a dive rock, which would serve as a platform to jump or dive into the deep end of the pool. According to the Contract, the cost to purchase and install the dive rock was $850.00. (Clmt. Ex. 1). The Respondent did not install the dive rock at the edge of the pool as required, but instead placed it beyond the coping.[6] The dive rock was placed over one foot from the edge of the pool, making it unsafe to jump or dive from the rock into the pool. (Clmt. Exs. 2A & 2B). This rendered the

[6] Coping is the foot long wide stone border that surrounds the pool.

dive rock unusable for its intended purpose. I find that the Respondent improperly installed the dive rock.

The Claimant testified that once she determined that the dive rock was improperly installed, she decided not to attempt to properly re-install the dive rock in the pool area and instead had it moved to the adjacent garden area.

The Claimant sought compensation from the Fund in the amount of $1,250.00, for the faulty installation and subsequent removal of the dive rock. The claim included $850.00 which represented the contract price for the purchase and installation of the dive rock, (Cl Ex. 1), and $400.00 paid to Paradigm Contracting, LLC., to remove the dive rock from the pool area and place it in the adjacent garden area. (Clmt. Ex. 7).

The Fund countered that although it agreed that the dive rock was improperly installed, the Fund should not be responsible for reimbursement of the purchase price of the dive rock as it remained on the property in the garden area of the pool. The Fund suggested that the appropriate reimbursement should be the $400.00 cost paid to Paradigm Contracting LLC., to move the dive rock from the pool area to the adjacent garden area.

I find that the Fund should not be responsible for the cost of the dive rock when the Claimant decided to forego the proper installation of the dive rock and instead placed the dive rock in the garden area. In theory, the Claimant may eventually decide to have the dive rock properly installed at the edge of the pool. It would not be appropriate for the Fund to be responsible for the cost of the dive rock while it remains on the Claimant's property. Although I recognize the dive rock is not currently on the property for its intended use, the reason is that the Claimant decided to abandon the project.

I do find however, that the Claimant is entitled to reimbursement for the faulty installation of the dive rock. Unfortunately, the purchase and installation of the dive rock were

not separated out in the contract. (Clmt. Ex 1). Paradigm Contracting, LLC., submitted an invoice in the amount of $400.00 to remove the dive rock. Therefore, I apply the cost to remove the rock as the determining factor in calculating the cost of the installation. Accordingly, with respect to the $850.00 cost for the purchase and installation of the dive rock, I would recommend that $450.00 be assessed to the purchase price of the dive rock, and $400.00 be assessed to the installation.

I conclude that it is appropriate to recommend that the Fund reimburse the Claimant a total amount of $800.00 for the faulty installation and subsequent removal of the dive rock.

Fill Dirt

The Claimant sought reimbursement from the Fund of the $550.00 additional expense that was added to the original contract for fill dirt to be used to grade the pool area. The Claimant believed that the cost of the fill dirt should have been part of the original contract.

The Fund countered that the Claimant agreed to and subsequently paid for the change to the original contract price. The Fund further argued that an agreed upon change order that is subsequently disputed is not a matter contemplated for reimbursement by the Guaranty Fund and that it was a matter to be resolved at the time the additional cost was incurred.

I agree with the Fund that a change order that is agreed upon and paid for, even if it was reluctantly done or subsequently disputed, is not a matter contemplated by the statute. The Fund may only compensate claimants for actual losses, which is defined as the costs of restoration, replacement, or completion that arise from an unworkmanlike, inadequate or incomplete home improvement. *See* Bus. Reg. §§ 8-401, 405(a). I do not find the change to the contract because more fill dirt was needed than was originally expected is an actual loss as defined in the statute. Accordingly, I have not included the $550.00 cost for the fill dirt in my calculation of the recommended award by the Fund.

Invoice #1568

The Claimant submitted invoice #1568 from B. Kelly Enterprises, Inc., in the amount of $6,717.35. (Clmt. Ex. 10). The Claimant averred that $1,092.43 of the invoice was attributable to repair of the shoddy work completed by the Respondent.

The Fund countered that there are three separate line-item costs in the invoice in the amounts of $50.00, $67.24, and $280.00, respectively, for a total of $397.24, that are essentially identical to charges in subsequent invoices submitted by B. Kelly Enterprises, Inc. to the Claimant. The Fund opined that either the Claimant had been double charged or that the invoices were cumulative in nature as the work progressed. Regardless, the Fund argued that it should not be responsible for reimbursement of identical charges. Accordingly, the Fund would recommend that the amount to reimburse the Claimant for costs incurred from the faulty work of the Respondent in invoice #1568 would be $695.19, broken down as follows:

$1,092.43	Claimant's assertion
- $ 397.24	Less the duplicative charges
$ 695.19	Recommended reimbursement by the Fund

The Claimant conceded that the $280.00 charge in line sixteen of invoice #1568 appeared identical to line four of invoice #1603. The Claimant sought to distinguish the other two charges from the ones found on the other invoice without much success.

I conclude that the charges submitted in the amount of $50.00 in line eleven and $67.14 in line thirteen of invoice #1568 are substantially similar to the work described in line three of invoice #1603, and the Claimant has not met her burden to show this is a separate and recoverable cost. Notwithstanding whether the Claimant paid the invoice, duplicate costs should not be counted twice for the purposes of reimbursement to the Claimant. As will be shown below, the costs associated with invoice #1603 are recommended to be awarded in full, so the charges for work done in invoice #1568 that I find to be duplicative will not be included in the

calculation of any potential award from the Fund. I will recommend $695.19 as an award by the Fund for costs incurred in invoice #1568.

Invoice #1603

The Claimant submitted invoice #1603 from B. Kelly Enterprises, Inc., in the amount of $1,529.18. (Clmt. Ex. 10). The Claimant averred that the entire invoice amount was attributable to repair the shoddy work completed by the Respondent.

The Fund agreed that the costs associated with this invoice are related to the repair of the faulty work by the Respondent and should be considered in the calculation for a recommended award from the Fund.

Invoice #1612

The Claimant submitted invoice #1612 from B. Kelly Enterprises, Inc., in the amount of $1,446.01. (Clmt. Ex. 10). The Claimant initially averred that the $1,426.13 of the invoice amount was attributable to repair of the inadequate work completed by the Respondent. In response to questions during the hearing, the Claimant acknowledged that much of the work in the invoice was for landscaping work that was not associated with the faulty work done by the Respondent. The Claimant credibly testified that she was not sure about whether to submit this invoice for reimbursement as there was arguably some work in the invoice that was attributable to the faulty or incomplete work of the Respondent, but it was not separated out from the unrelated landscaping work. She further stated the Fund's investigator suggested that she add the invoice and that counsel for the Fund would review the matter.

Counsel for the Claimant subsequently argued that it would be appropriate to apportion one half of the invoice to the repair of the incomplete or inadequate work of the Respondent. I decline to do so. It is the Claimant's burden to prove actual losses sustained from the unworkmanlike or inadequate work of the Respondent and it is impossible to distinguish or

separate the costs for unrelated landscaping work that is included in this invoice with any repair work attributable to the Respondent's shoddy work. The Claimant to her credit did not seek to add this invoice amount in her calculations for reimbursement as she was apparently unsure of whether it was a viable claim. I address the invoice for the sake of completeness as it was included in Claimant's Exhibit 10 and counsel argued for reimbursement in closing argument.

Accordingly, based on the evidence presented, I find that the Claimant is eligible for compensation from the Fund. Having found eligibility for compensation, I must determine the amount of the Claimant's actual loss and the amount, if any, that the Claimant is entitled to recover. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney fees, court costs, or interest; none of which the Claimant is seeking in this case. Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1).

I recommend the following award by the Fund

Invoice # 1568	$ 695.19
Invoice #1603	+ $1,529.18
Install/Remove Dive Rock	+ $ 800.00
Total Award	$3,024.37

The MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work.

The Respondent performed work under the contract, and the Claimant retained another contractor to repair that work. Accordingly, the following formula appropriately measures the Claimant's actual loss:

> 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 calculation is as follows:

> $26,061.00 paid to the Respondent; plus
> +3,024.37 proposal to complete the contract; equals
> $29,085.37 less
> -26,061.00 the original contract price; equals
> $3,024.37 actual loss.

The Business Regulation Article caps a claimant's recovery at $20,000.00 for acts or omissions of one contractor and provides that a claimant may not recover more than the amount paid to the contractor against whom the claim is filed. Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a). The Claimant's actual loss is less than the amount paid to the Respondent and less than $20,000.00. Therefore, the Claimant is entitled to recover her actual loss of $3,024.37.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of $3,024.37 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(c). I further conclude that the Claimant is entitled to recover that amount from the Fund.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant $3,024.37; and

ORDER that the Respondent be 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;[7] and

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

Patrick Maher

April 8, 2022
Date Decision Issued

Patrick E. Maher
Administrative Law Judge

PEM/emh
#197626

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

PROPOSED ORDER

WHEREFORE, this 13th day of June, 2022, 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.

Lauren Lake

Lauren Lake
Panel B
MARYLAND HOME IMPROVEMENT COMMISSION