IN THE MATTER OF THE CLAIM	*	**BEFORE NICOLAS ORECHWA,**
OF PATRICIA ELLINGWOOD,	*	**ADMINISTRATIVE LAW JUDGE**
CLAIMANT	*	**THE MARYLAND OFFICE**
AGAINST THE MARYLAND HOME	*	**OF ADMINISTRATIVE HEARINGS**
IMPROVEMENT GUARANTY FUND	*	
FOR THE ALLEGED ACTS OR	*	
OMISSIONS OF JOHN KRAUSE,	*	
T/A JOHN KRAUSE	*	**OAH No.: LABOR-HIC-02-22-01057**
CONSTRUCTION INC,	*	**MHIC No.: 21 (75) 1111**
RESPONDENT	*	

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

PROPOSED DECISION

STATEMENT OF THE CASE

On August 18, 2021, Patricia Ellingwood (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund), under the jurisdiction of the Department of Labor (Department), for reimbursement of $4,168.00 for actual losses allegedly suffered as a result of a home improvement contract with John Krause, trading as John Krause Construction Inc. (Respondent). Md. Code Ann., Bus. Reg.

§§ 8-401 to -411 (2015).[1] On December 28, 2021, the MHIC issued a Hearing Order on the Claim. On January 4, 2022, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On March 22, 2022, I held a hearing via the Webex online platform. Bus. Reg. §§ 8-407(a), 8-312; Code of Maryland Regulations (COMAR) 28.02.01.20B(1)(b). Justin Dunbar, Assistant Attorney General, Department, represented the Fund. The Claimant represented herself. 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 OAH govern procedure. 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?

SUMMARY OF THE EVIDENCE

Exhibits[2]

I admitted the following exhibits offered by the Claimant:

Clmt. Ex. 1a - Photographs numbered 1 through 10;

Clmt. Ex. 1b - Documents consisting of:

- OAH Hearing Notice, January 26, 2022, no page number;
- The Claimant's timeline of events, undated, pp. 1-2;
- Emails, pp. 3-14;
- MHIC Order, June 23, 2021, pg. 15;

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

[2] At the hearing, the Fund advised it did not receive copies of either the Claimant's or the Respondent's exhibits. I gave the Claimant and the Respondent five days to provide the Fund their exhibits. I then gave the Fund five days thereafter to submit any objections to the admissibility of the Claimant's and Respondent's exhibits. The Fund lodged no objections.

- Letter from the Respondent to the MHIC, July 2, 2021, pg. 16;
- Contract between the Claimant and the Respondent, January 22, 2021, pp. 17-19;
- The Respondent's MHIC Licensing Permit, undated, pg. 20;
- Certificate of Liability Insurance, date illegible, pg. 21;
- Estimate from the Respondent, October 12, 2020, pg. 22;
- Estimate from Gary Myers, undated, pg. 23;
- Home Improvement Claim Form, undated, pg. 24;
- MHIC Complaint Form, June 3, 2021, pp. 25-26;
- Unsigned Contract from the Respondent, January 22, 2021, pp. 27-28;
- Receipt for the Claimant's payment to the Respondent of $2,331.00, January 25, 2021, pg. 29;
- PNC Bank Online Confirmation of the Claimant's payment to the Respondent of $2,333.00, March 30, 2021, pg. 30.

Clmt. Ex. 1c - Photographs numbered 1 through 4.

I admitted the following exhibit offered by the Respondent:

Resp. Ex. 1 - Fifty-six pages of documents consisting of the following:

- Cover letter, March 8, 2022, pg. 1;
- OAH Hearing Notice, January 26, 2022, pg. 2;
- MHIC Hearing Order, December 28, 2021, pp. 3-5;
- OAH Hearing Information Sheet, undated, pp. 6-8;
- MHIC Order to Respond, June 23, 2021, pg. 9;
- Complaint Form, June 16, 2021, pp. 10-11;
- The Claimant's Order of Events, undated, pp. 12-13;
- Unsigned Contract, January 22, 2021, pp. 14-15;
- Receipt, January 25, 2021, pg. 16;
- Emails, various dates, pp. 17-34;
- The Respondent's MHIC Licensing Information, January 22, 2021, pp. 35-37;
- The Respondent's letter to the MHIC, July 2, 2021, pp. 38-39;
- Signed Contract between the parties, January 22, 2021, pp. 40-45;
- Certificate of Insurance, undated, pp. 46-47;
- The Respondent's MHIC License Certificate, undated, pp. 48-49;
- Letter from the MHIC to the Respondent, August 31, 2021, pp. 50-51;
- Claim Form with date stamped page, August 18, 2021, pp. 52-55;
- Letter from the Respondent to the MHIC, September 14, 2021, pg. 56.

I admitted the following exhibits offered by the Fund:

Fund Ex. 1 - OAH Hearing Notice, January 26, 2022;

Fund Ex. 2 - Hearing Order, December 28, 2021;

Fund Ex. 3 - Claim Form, August 18, 2021;

Fund Ex. 4 - Letter from the MHIC to the Respondent, August 31, 2021;

Fund Ex. 5 - The Respondent's MHIC Licensing History, undated.

Testimony

The Claimant testified and presented the testimony of Gary Myers (Myers).

The Respondent testified and did not present other witnesses.

The Fund presented no testimony.

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 01-5545471.

2. On January 22, 2021, the Claimant and the Respondent entered into a contract (Contract) to remove and install concrete near the Claimant's pool to allow water to drain away from the Claimant's home's foundation, install a french drain near the Claimant's home's foundation and replace an existing strip drain.

3. The original agreed-upon Contract price was $6,995.00.

4. The Claimant paid the Respondent the following amounts on the following dates:

- $2,331.00 on January 25, 2021;
- $2,333.00 on March 29, 2021.

5. The Respondent commenced work on March 23, 2021 and completed work on April 11, 2021.

6. The Respondent did not adequately level the concrete he poured and it does not allow water to drain properly. The Respondent improperly installed a drain near the Claimant's deck. The Respondent did not properly finish the poured concrete.

7. The Claimant contacted the Respondent several times and requested he inspect the work. The Respondent never appeared at the Claimant's residence to inspect the work.

8. It will cost the Claimant $6,500.00 to fix the Respondent's work.

DISCUSSION

The Positions of the Parties

The Claimant has a pool in her backyard. When she noticed the concrete slab between her house and the pool beginning to sink, she contacted the Respondent to fix the issue. The Respondent dispatched an associate named Troy who told the Claimant remedying the problem would require digging up 165 square feet of concrete, installing a french drain, installing a new four-inch strip drain and repouring the concrete. The Claimant signed a Contract for the work and paid the Respondent a deposit of $2,331.00. The Respondent[3] began work on March 23, 2021. On March 29, 2021, the Claimant made a second payment of $2,333.00. On April 11, 2021, the Respondent advised the Claimant of the job's completion.

On April 12, 2022, the Claimant called the Respondent's office manager Shirley to express "concerns" about the Respondent's work. In particular, the Claimant noticed the Respondent failed to smoothly finish the concrete and failed to lay the concrete at the proper level to allow water to run into the drains. Shirley promised to have Troy call the Claimant. When Troy did not call the Claimant, the Claimant followed up with Shirley three times. After still receiving no response, on May 4, 2021, the Claimant called Shirley, terminated the Respondent and advised she would make no further payments. The Claimant memorialized that conversation with a written termination letter. Although the Claimant subsequently corresponded with the Respondent several times, the Respondent never inspected the work.

[3] The Respondent John Krause did not actually perform the work, his employees did. However, for the sake of simplicity I will use Respondent when referring to his workers collectively.

The Claimant then contacted Myers for a second opinion. Myers has a degree in architecture from the University of Maryland and has been a contractor[4] for about fifty years. Myers personally inspected the Respondent's work and took pictures (Clmt. 1c). Myers characterized the Respondent's craftsmanship as "just a conglomeration of bad work." The concrete around a drain requires a quarter inch per foot fall. The concrete the Respondent laid had only a sixteenth inch per foot fall. The Respondent failed to install an expansion joint at the house and water cannot drain because the Respondent installed the deck drain higher than the concrete. As a result, water will then enter under the concrete and erode the Claimant's retaining wall. In addition, the Respondent "broom finished" the concrete making it so rough it is "just terrible" and hurts a person's bare feet. Myers opined[5] the Respondent should have trowel finished the concrete. A contractor cannot raise the concrete so it properly drains water and no caulking prevents water from seeping into the ground. Myers concluded the only way to remedy the Claimant's situation is to "tear it up and do it again." Myers provided the Claimant with a verbal estimate of $6,500.00 to redo the Respondent's work. However, Myers has not yet commenced the work.

The Respondent provided little defense to the Claimant's case. He testified he never visited the job site and being overbooked with other customers prevented him from meeting with the Claimant. A few months prior to the hearing, Troy suffered a fatal heart attack outside an MVA[6] branch office and was thus unavailable to testify. The Respondent agreed the two puddles of water in the concrete and the failure to caulk the joint failed to meet "industry standards." However, he disputed the quarter inch per foot standard Myers cited for the slope of the concrete. The Respondent testified he knew of no code provisions obligating that degree of

[4] Myers has an MHIC license. (Clmt. Ex. 1b pg. 23.)
[5] The Claimant never moved to qualify Myers as an expert. However, neither the Respondent nor the Fund objected to his opinion testimony. I shall address the weight I afford his opinions below.
[6] The Maryland Motor Vehicle Administration.

slope. He further explained his workers most likely did not install an expansion joint up to the house due to the presence of a drain nearby. With regard to the broom finish, the Respondent testified he saw nothing "too rough" in the pictures and denied the broom finish would hurt a person's feet.

The Respondent felt the Claimant overreacted by cancelling the contract. Had she given him more time, he believes he could have fixed the errors his workers made. However, he conceded culpability for "not the greatest customer service" since the Claimant needed to contact his office repeatedly to set up a meeting (which never happened). The Respondent attributed this shortcoming to a rush of work due to the pandemic. The Respondent believed the Claimant exhibited patience. However, if she had shown more patience he could have "made things right for her."

Analysis

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 (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 bulk of the case hinged upon the testimony of Myers and the Respondent. I found Myers's testimony more persuasive than the Respondent's testimony. Unlike the Respondent, Myers actually visited the job site and personally inspected the Respondent's work. While one could argue Myers's bias due to his oral contract with the Claimant, I found his conclusions sound. Through his testimony, Myers exhibited a strong command of his craft. He explained the pictures in evidence in detail and how the pictures supported his conclusions. He provided technically proficient explanations for his conclusions. The pictures themselves support Myers's testimony. For example, one picture shows a level placed on the concrete. The reading on the level confirms the concrete has barely, if any, slope. (Clmt. Ex. 1a, Picture 3.)

The Respondent candidly agreed with some conclusions Myers reached (e.g. the Respondent did not properly level the concrete causing water to pool). However, he failed to provide support for the conclusions with which he disagreed. For example, while he stated he disagreed with Myers's conclusion that the finish on the concrete would hurt a person's feet, he had no basis upon which to reach that conclusion since he never visited the site.

Balancing the Claimant's evidence versus the Respondent's I find the Claimant met her burden that the Respondent completed its work under the Contract in an unworkmanlike manner. Thus, I find 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. Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1). MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work.

The Respondent performed some work under the Contract, and the Claimant intends to retain Myers, an MHIC licensed contractor, to complete or remedy 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 Claimant paid the Respondent $4,664.00[7] under the Contract. The Claimant will need to pay Myers $6,500.00 to repair the Respondent's work. That total, $11,164.00, minus the original contract price of $6,995.00, renders the Claimant's actual loss $4,169.00.[8]

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). In this case, 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 $4,169.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of $4,169.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg.

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[7] $2,331.00 + $2,333.00 = $4,664.00

[8] While the Claim form states an actual loss of $4,168.00, I find the one dollar increase the actual calculation yields *de minimis*.

§§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(c). I further conclude that the Claimant is entitled to recover $4,169.00 from the Fund. *Id.*

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant **$4,169.00**; 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;[9] and

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

June 10, 2022
Date Decision Issued

Nicolas Orechwa

Nicolas Orechwa
Administrative Law Judge

NO/at
#198780

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

PROPOSED ORDER

WHEREFORE, this 2nd day of August, 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.

Joseph Tunney

Joseph Tunney
Chairman
Panel B
MARYLAND HOME IMPROVEMENT COMMISSION