

<p>IN THE MATTER OF THE CLAIM</p> <p>OF PAUL AND JESSICA TURNER,</p> <p>CLAIMANTS</p> <p>AGAINST THE MARYLAND HOME</p> <p>IMPROVEMENT GUARANTY FUND</p> <p>FOR THE ALLEGED ACTS OR</p> <p>OMISSIONS OF LEE DIAZ,</p> <p>T/A LEE D HOME REPAIRS, LLC,</p> <p>RESPONDENT</p>	<p>* BEFORE DEBORAH S. RICHARDSON,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>*</p> <p>*</p> <p>*</p> <p>* OAH No.: LABOR-HIC-02-21-25360</p> <p>* MHIC No.: 21 (75) 946</p>
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PROPOSED DECISION

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STATEMENT OF THE CASE

On July 2, 2021, Paul and Jessica Turner (Claimants) 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 \$6,423.00¹ for actual losses allegedly suffered as a result of a home improvement contract with Lee Diaz, trading as Lee D Home Repairs, LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015).² On October 22, 2021, the MHIC issued a Hearing Order on the Claim.

¹ The Claimants filled out the Claim form incorrectly. At the hearing, they made clear they were actually seeking \$1,423.90 from the Fund.

² Unless otherwise noted, all references hereinafter to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.

On November 2, 2021, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On February 28, 2022, I held a hearing at the OAH in Rockville, Maryland. Bus. Reg. §§ 8-407(a), 8-312. The Claimants represented themselves. Olesya Sidorkina, Esquire, represented the Respondent. Hope Sachs, Assistant Attorney General, 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. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021); 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 the compensable loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits offered by the Claimants:

- Clmt. Ex. 1 - Photo of bathroom, undated
- Clmt. Ex.2 - Photo of floor, undated
- Clmt. Ex. 3 - Photos of floor, undated
- Clmt. Ex. 4 - Photo of floor, undated
- Clmt. Ex. 5 - Text message to the Claimant, undated
- Clmt. Ex. 6 - Notice of Violation, April 15, 2021
- Clmt. Ex. 7 - Estimate from The Grime Boss, March 5, 2021

Unless otherwise noted, I admitted the following exhibits offered by the Respondent:

Resp. Ex. A - Interior Project 2, April 28, 2018

Resp. Ex. B - Not admitted

Resp. Ex. C - Not admitted

Resp. Ex. D - Text messages between the Claimants and the Respondent, undated

Resp. Ex. E - Photos of floor, undated

Resp. Ex. F - Email from Lee Glass, Office of Consumer Protection to the Respondent, January 22, 2021; email from Mr. Glass to the Claimants, April 1, 2021

Resp. Ex. G - Not admitted

Resp. Ex. H - Home Depot receipt, January 7, 2021

I admitted the following exhibits offered by the Fund:

Fund Ex. 1 - Notice of Hearing, November 9, 2021; Hearing Order, October 22, 2021

Fund Ex. 2 - Licensing information printout, January 26, 2022

Fund Ex. 3 - Letter from the MHIC to the Respondent, July 9, 2021; Home Improvement Claim Form, July 2, 2021

Testimony

Mr. Turner testified on behalf of the Claimants.

The Respondent testified in his own behalf.

The Fund did not present any 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 by the MHIC.
2. The Claimants own a home in Montgomery County, Maryland (Property).

3. Sometime in 2017 or 2018, the Claimants asked the Respondent for an estimate to make many repairs and renovations throughout their recently purchased Property, including repairs to the bathroom and kitchen.

4. The estimate was much more than the Claimants were prepared to spend at that time, so they asked the Respondent to break the estimate up into separate projects that the Claimants intended to have completed in turn. The Respondent's estimate changed several times because the Claimants made several revisions to the requested scope of work.

5. In June 2018, the Claimants hired the Respondent to make repairs to the bathroom and the kitchen at the Property.

6. The parties never had a signed contract or scope of work.

7. From June 28 to June 29, 2018, the Respondent performed work on the bathroom at the Property.

8. On a date uncertain, the Claimants paid the Respondent \$2,613.36 for the bathroom work.

9. On July 2, 2018, the Claimants informed the Respondent they were unhappy with the work that he had done in the bathroom. The grout color had changed within days of the Respondent's work, and the tiles and seams in the shampoo nook were uneven. The Respondent said that he would remedy the problem when he started work on the kitchen. The Respondent said he would repair the tiles and change the grout.

10. The Claimants were unhappy with the appearance of their existing kitchen floor at the Property. The tiles were not level and were cracked. The Claimants asked the Respondent to remove the existing kitchen floor and create a new level kitchen floor.

11. On July 13, 2018, the Respondent began work on the kitchen floor.

12. On a date uncertain, the Claimants paid the Respondent \$2,416.29 for the kitchen floor.
13. A few months later, the Claimants noticed that the new tiles in the kitchen started to shift and the grout was coming up.
14. On January 24, 2019, the Claimants informed the Respondent there were problems with their new kitchen floor.
15. On January 25, 2019, the Respondent came to the Property to remedy the problems with the kitchen floor. At the same time, the Respondent changed the grout in the bathroom to get the yellow color out. The Respondent did not address the tile problem in the bathroom.
16. The Claimants continued to be dissatisfied with the kitchen floor, as it was off-centered and tiles were loose and they informed the Respondent of these problems.
17. On August 25, 2020, the Respondent came to the Property to repair grout and tiles in the kitchen.
18. The Claimants continued to experience cracking tiles in the kitchen and informed the Respondent.
19. In November or December of 2020, the Respondent came to the Property to repair the kitchen floor. He removed the entire subfloor, rebuilt a new plywood subfloor, and installed self-levelling concrete and vinyl flooring.
20. The Claimants were dissatisfied with this new kitchen floor. They were particularly dissatisfied with the trim work and the transitions between the kitchen and the adjoining rooms.

21. On April 15, 2021, the Montgomery County Office of Consumer Protection issued the Respondent a Notice of Violation for failing to provide a consumer with a proper contract which conform to the requirements under law regarding home improvement work.

22. On a date uncertain, the Claimants paid someone \$773.90 to install a new kitchen floor.

23. The Claimants do not owe the Respondent any money.

DISCUSSION

The Claimants have 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 Claimants have not proven eligibility for compensation.

Certain claimants are excluded from recovering from the Fund altogether. In this regard, a claimant may only recover from the Fund when: (1) the claimant resides in the home as to which the claim is made, or owns no more than three dwelling places; (2) the claimant is not an employee, officer or partner of the contractor; or the spouse or other immediate relative of the contractor or the contractor's employees, officers or partners; (3) the work at issue did not

involve new home construction; (4) the claimant did not unreasonably reject the contractor's good faith effort to resolve the claim; (5) the claimant complied with any contractual arbitration clause before seeking compensation from the Fund; (6) there is no pending claim for the same loss in any court of competent jurisdiction and the claimant did not recover for the actual loss from any source; and (7) the claimant filed the claim with the MHIC within three years of the date the claimant knew, or with reasonable diligence should have known, of the loss or damage. Md. Code Ann., Bus. Reg. § 8-405(c), (d), (f), (g); Md. Code Ann., Bus. Reg. § 8-408(b)(1); Md. Code Ann., Bus. Reg. § 8-101(g)(3)(i) (Supp. 2021).

There is no argument to the contrary, and the evidence establishes that the Claimants reside in the home as to which the Claim is being made; that they have never been an employee, officer or partner of the Respondent and are not related to any of the Respondent's employees, officers or partners; that the home improvement was not new home construction; that the Claimants did not fail to participate in arbitration; that the Claimants have not taken any other legal action to recover monies for any actual loss in connection with the Respondent's work; and the Claimants timely filed their claim within three years of the date they became aware of the problems with the home improvement work. Finally, at all times relevant to this matter, the Respondent was a licensed home improvement contractor under the MHIC.

The issue in this case, then, is whether the Respondent performed unworkmanlike, inadequate, or incomplete home improvements. The Fund recommended no award based on the evidence in this case, and I agree. The allegation is that the work performed by the Respondent in the Claimants' bathroom and kitchen was unworkmanlike and inadequate. The Claimants seek \$1,423.90 -- \$650.00 to remedy what they allege is unworkmanlike bathroom work and \$773.90 to remedy what they allege was unworkmanlike kitchen floor work.

It is impossible for me to understand the scope of work that the parties agreed to with respect to either the bathroom or the kitchen. Mr. Turner pointed to some documents at his table while talking about estimates provided by the Respondent and the scope of work, but offered none of those documents into evidence. The Respondent had admitted into evidence Respondent's Exhibit A, which is an estimate dated April 28, 2018 for the bathroom and kitchen work. He argued this exhibit represented the agreed upon scope of work. I have no confidence that the parties agreed to the scope of work detailed in Respondent's Exhibit A because the bathroom portion of the estimate totaled \$3,711.79. Mr. Turner testified that he paid the Respondent \$2,613.36 for the bathroom and the Respondent testified he had been fully paid and was not owed money by the Claimants. Moreover, Respondent's Exhibit A has a portion for the "kitchen floor" for \$2,579.00. Mr. Turner testified that he paid the Respondent \$2,416.29, again, below the amount of the estimate. Therefore, it is highly unlikely that the April 28, 2018 estimate in Respondent's Exhibit A represents the actual scope of work agreed to by the parties.

It is troubling that the Claimants did not provide me with a reliable document or testimony to establish the scope of work, because their main complaint with respect to the floor was the trim work. Claimants' Exhibit 3 was a series of pictures showing the non-existent trim work on the kitchen floor. The Respondent testified trim work was not part of the scope of work, and the Claimants entirely failed to prove by a preponderance of the evidence that it was. The Claimants also complained about the transition between the new kitchen floor and the adjoining room. After the Respondent built an entire new subfloor and installed vinyl flooring, the transition piece that had been in place between the two rooms had deteriorated and broken. Moreover, the Respondent explained it would no longer fit between the two rooms because of the height of the new floor, which was different from the previous floor. He installed a transition but it was a different color than the existing floor in the adjoining room, and was narrower than

the original transition piece, revealing scratches and defects on the floor in the adjoining room. The Claimants told the Respondent they were very unhappy with the transition. The Respondent testified that he offered to sand the transition piece and stain it to better match their existing floor, but the Claimants would not allow the Respondent to complete that work.

Mr. Turner also testified that the Claimants were unhappy because their floor "was like a trampoline." Even after the Respondent built a new subfloor, at his own expense, and installed new vinyl flooring, the floor was bouncy. Mr. Turner testified that the inspector from the Montgomery County consumer protection division agreed with them. However, the Claimants did not bring him to testify nor did they bring any other witness or documentation to corroborate this claim. The Montgomery County investigator issued a citation to the Respondent only with respect to his failure to provide the Claimants with a signed contract, not with respect to the workmanship he provided. I also have no idea whether the cause of the trampoline effect in the kitchen was due to the Respondent's poor workmanship, or something that was outside of the agreed upon scope of work, because again, I was never presented with comprehensive and reliable documentation or testimony about the scope of work. Therefore, I cannot conclude the Respondent provided inadequate or unworkmanlike home improvement with respect to the kitchen.

Mr. Turner relied on Claimants' Exhibit 1 to establish that there was unworkmanlike tile work done in the bathroom. Mr. Turner referred to the work he had the Respondent do at his property as "repairs." He testified the Respondent did those repairs on the bathroom on June 28 to June 29, 2019. The Claimants informed the Respondent they were dissatisfied with those repairs. At some point in time, the date undetermined, the Respondent attempted to remedy the work he had done with which the Claimants were dissatisfied. The parties also referred to this work as a "repair." Mr. Turner relied on Claimants' Exhibit 1 to establish that the work done by

the Respondent was unworkmanlike. I agree with the Claimants, it is clear from Claimants' Exhibit 1 that the tile work was unworkmanlike. The margins are unsightly, there is cracked tile, and the grout color does not match the surrounding grout. The problem is that Mr. Turner testified Claimants' Exhibit 1 was taken after the Respondent's repair work. I have no idea whether Claimants' Exhibit 1 was taken after the initial repair, done on June 28 to June 29, 2018, or was taken after the Respondent returned to remediate this work on January 25, 2019. In other words, the Claimants did not establish by a preponderance of the evidence that Claimants' Exhibit 1 was the Respondent's final work product.

Even assuming Claimants' Exhibit 1 was the Respondent's final work product, and was unworkmanlike, the Claimants failed to establish damages in a coherent way. Mr. Turner testified that the only remediation work the Respondent did in the bathroom was with respect to the grout, and that he did not address the tile problem. The Claimants have asked for \$650.00 to fix the problems in the bathroom. This amount represents an estimate provided by The Grime Boss, found in Claimants' Exhibit 7. However, the work detailed in Claimants' Exhibit 7 is for grout and caulking. There is no mention of tiles. It is unclear to me whether the proposed \$650.00 would ameliorate the problem identified in Claimants' Exhibit 1. And there is no other way for me to determine what amount of compensation would be proper in this case.

For all of these reasons, I find that the Claimants are not eligible for compensation from the Fund.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimants have not sustained an actual and compensable loss of \$1,423.90 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03A(3).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund deny the Claimants' claim; and

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

May 31, 2022
Date Decision Issued

Deborah S. Richardson

Deborah S. Richardson
Administrative Law Judge

DSR/at
#198401

PROPOSED ORDER

WHEREFORE, this 20th day of July, 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.

J Jean White

I Jean White

Panel B

**MARYLAND HOME IMPROVEMENT
COMMISSION**