

IN THE MATTER OF THE CLAIM	* BEFORE WILLIAM SOMERVILLE,
OF SCOTT C. MAGNESS,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	*
FOR THE ALLEGED ACTS OR	*
OMISSIONS OF CONOR McGANN,	*
T/A McGANN RENOVATIONS, LLC,	* OAH No.: LABOR-HIC-02-23-23315
RESPONDENT	* MHIC No.: 22 (75) 195

* * * * *

PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
PROPOSED FINDINGS OF FACT
DISCUSSION
PROPOSED CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On March 13, 2023, Scott C. Magness (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)¹ Guaranty Fund (Fund) for reimbursement of \$11,071.88 for actual losses he alleges he suffered as a result of a home improvement contract associated with Conor McGann, trading as McGann Renovations, LLC, (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2023).² On August 31, 2023, the MHIC

¹ The MHIC is under the jurisdiction of the Department of Labor (Department).

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

issued a Hearing Order on the Claim. On September 1, 2023, the MHIC referred the matter to the Office of Administrative Hearings (OAH) for a hearing.

On October 6, 2023, I held a hearing at the OAH in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-407(a), 8-312. Nicholas Sokolow, Assistant Attorney General, Department, represented the Fund. The Claimant was self-represented. The Respondent failed to appear.

After waiting fifteen minutes for the Respondent or the Respondent's representative to appear, I proceeded with the hearing. Applicable agency regulations contemplate proceeding 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. After reviewing the case file and determining that the Respondent had been properly notified, I proceeded to hear the matter. COMAR 28.02.01.05A, C.

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 & Supp. 2023); 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 the compensable loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits offered by the Claimant:

- Clmt. Ex. 1 - Contract document, 8/24/2019
- Clmt. Ex. 2 - Email thread, various dates
- Clmt. Ex. 3 - Photographs, undated
- Clmt. Ex. 4 - Proposal, 5/15/2021
- Clmt. Ex. 5 - Proposal, 7/27/2021
- Clmt. Ex. 6 - Proposal, 9/9/2021
- Clmt, Ex. 7 - Packet of photographs, undated
- Clmt Ex. 8 -10 – (not offered or not admitted)
- Clmt. Ex. 11 - Proposal, 9/28/2021, with attachments
- Clmt. Ex. 12 - Packet of checks, various dates
- Clmt. Ex. 13 - Proposal, 9/28/2021 (duplicate)

The Respondent offered no exhibits.

The Fund offered no exhibits.

Testimony

The Claimant testified and did not present other witnesses. No one else testified.

The parties who were present offered some stipulations of fact that are reflected in the Findings of Fact below.

PROPOSED FINDINGS OF FACT

Having considered demeanor evidence, testimony, and other evidence, 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 salesman for his company, McGann Renovations LLC, (Company), and the Company was licensed by the MHIC, as well, under corporate license number 135984. (Clmt. Ex. 1 and stipulation.)

2. On or about August 24, 2019, the Claimant and the Company entered into a home improvement contract by which the Claimant was to pay \$9,000.00 and the Company would remodel a bathroom in the Claimant's residence. The Company was to demolish the existing second-floor bathroom and install a new subfloor, a custom shower pan and shower, new valves, new floor and wall tile, mosaic tile in the shower pan, install base molding, paint walls, install a new vanity and mirror, install new towel racks, reinstall an existing light fixture, reinstall an existing toilet, and install a new exhaust fan.

3. Work on the project was started at the end of August 2019 and the project was finished sometime in September 2019.

4. On August 28, 2019, the Claimant paid "McGann Renovations" \$3,000.00 by check.

5. On September 2, 2019, the Claimant paid "Timothy McGann" \$3,000.00 by check.

6. On September 18, 2019, the Claimant paid "McGann Renovations" \$1,500.00 by check.

7. At some point during the performance of the contract, before September 29, 2019, the parties amended the contract such that the Claimant would pay an additional \$200.00 for extra work or an upgrade of material.
8. On September 29, 2019, the Claimant paid "McGann Renovations" \$1,700.00 by check.
9. On or about February 1, 2020, the Claimant noticed water stains and a crack in the ceiling below the renovated bathroom. The shower was leaking. He also noticed a problem with tile grout. He communicated those problems to the Respondent and received no response. (Clmt. Ex. 2.)
10. About a year later, on March 11, 2021, drywall on the ceiling, below the bathroom, fell. (Clmt. Ex. 3.)
11. On or before April 15, 2021, the Claimant requested proposals from several contractors to remedy the leaking shower. At that time, the Claimant noticed these additional defects: the tile grout contained voids, there was uneven tile, tiles were not flush with each other, grout was used as caulk in seams in the shower niche, there were extremely wide grout joints, and water appeared to leak around the shower drain area. (Clmt. Ex 7.)
12. On September 28, 2021, the Claimant entered into a contract with a remedial contractor, MakHome Remodeling LLC. The Claimant was to pay \$11,446.88 and the contractor was to demolish and reinstall the shower, again, with a tile shower pan, and a frameless shower door.
13. By November 12, 2021, the Claimant had paid the remedial contractor the full amount of the remedial contract.
14. Thereafter, the Claimant filed a claim against the Fund for \$11,071.88.

DISCUSSION

The Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Md. Code Ann., Bus. Reg. § 8-407(e)(1); Md. Code Ann., State Gov't § 10-217; 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 Cnty. 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.” Md. Code Ann., Bus. Reg. § 8-405(a) (Supp. 2023); *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.” Md. Code Ann., Bus. Reg. § 8-401. For the following reasons, I conclude that the Claimant has proven eligibility for compensation.

Both the Respondent and the Company were entities who held MHIC licenses at the time that the Company entered into the Contract with the Claimant. (Finding of Fact 1.) Both entities share licensing responsibility. Md. Code Ann., Bus. Reg. § 8-405(b) (act or omission of a licensed contractor includes the act or omission of a subcontractor, salesperson, etc.).

By statute, certain claimants are excluded from recovering from the Fund altogether. *See* Md. Code Ann., Bus. Reg §§ 8-405, 8-408(b) (2015 & Supp. 2023). In this case, there are no such statutory impediments to the Claimant’s recovery. No one argued or offered evidence to show that a statutory impediment existed.

The Respondents collectively performed unworkmanlike, inadequate, or incomplete home improvements. Md. Code Ann., Bus. Reg. § 8-405(a). (Findings of Fact 9, 10, and 11.)

The Claimant has met his burdens to show inadequate and unworkmanlike performance by the Respondent.

The Claimant observed conditions that reflected unworkmanlike performance. “Unworkmanlike,” as used in the statutory scheme, means not in a workmanlike manner. *See Webster's New Universal Dictionary* 1984-88 (2d ed. 1983). Maryland's highest court has defined “workmanlike manner” as that term applies to building and construction contracts. In *Gaybis v. Palm*, 201 Md. 78, 85 (1952) the Court held, “The obligation to perform with skill and care is implied by law and need not be stated in any contract.” That rule was reaffirmed in a later case. *Worthington Constr. Co. v Moore*, 266 Md. 19, 22 (1972). In another case, *K & G Constr. Co. v. Harris*, 223 Md. 305, 314 (1960), the Court compared the express standard “workmanlike manner” with the implied standard of performance discussed in the *Gaybis* case. The *Harris* Court cited the *Gaybis* case for authority that the “workmanlike-manner” wording was equivalent to the “skill-and-care” wording in the *Gaybis* case.

In the instant case, the Claimant observed the tile grout that contained voids, there was uneven tile, tiles were not flush with each other, grout was used as caulk in seams in the shower niche, there were extremely wide grout joints, and water appeared to leak around the shower drain area. (Finding of Fact 11.) These conditions demonstrate the lack of skill and care necessary under the industry's statutory standards.

The shower drain, or the pan itself, leaked. (Findings of Fact 9 and 10.) “Inadequate” as used in the Business Regulation Article, Md. Ann. Code, Bus. Reg. §§ 8-311(a)(10) and 8-401, means that the home improvement work might have been done with all of the steps, phases, or processes required by industry standards but the result does not equal what is required by the contract, or is not suitable to the case or occasion. *See Black's Law Dictionary* 61 (4th ed. 1957). The term is used in the statute to describe a method to prove a lack of compliance to industry

standards in work, or lack of competence to produce that which the contract reflects. Clearly, a shower pan that leaks does not equal what was required by the home improvement contract and was not suitable for the case or occasion.

Calculations

Having found eligibility for compensation, I will 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) (Supp. 2023); 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 has retained other contractors 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).

With the Findings of Fact in mind, the "actual loss" calculation is as follows:

\$9,200.00	Amount paid to the contractor under the original agreement with an amendment
+\$11,071.88	Amount that the Claimant is claiming represents the remedial contractor's price to remedy items in the original agreement that have been shown to be unworkmanlike or inadequate

- \$9,200.00	Price of the original agreement with an amendment
\$11,071.88	Actual loss

Effective July 1, 2022, a claimant's recovery is capped at \$30,000.00 for acts or omissions of one contractor, and a claimant may not recover more than the amount paid to the contractor against whom the claim is filed.³ Bus. Reg. § 8-405(e)(1), (5) (Supp. 2023); COMAR 09.08.03.03B(4). In this case, the Claimant's actual loss of \$11,071.88 exceeds the amount of \$9,200.00 paid to the Company. Therefore, the Claimant's recovery is limited to \$9,200.00, the amount paid to the Respondent.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$9,200.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2023); COMAR 09.08.03.03B(3). I further conclude that the Claimant is entitled to recover that amount from the Fund. 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 award the Claimant \$9,200.00; and

ORDER that the Respondents are ineligible for a Maryland Home Improvement Commission license until the Respondents reimburses the Guaranty Fund for all monies

³ On or after July 1, 2022, the increased cap is applicable to any claim regardless of when the home improvement contract was executed, the claim was filed, or the hearing was held. *See Landsman v. MHIC*, 154 Md. App. 241, 255 (2002) (explaining that the right to compensation from the Fund is a "creature of statute," these rights are subject to change at the "whim of the legislature," and "[a]mendments to such rights are not bound by the usual presumption against retrospective application").

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.

December 14, 2023
Date Decision Issued

William J.D. Somerville III

William J.D. Somerville III
Administrative Law Judge

WS/emh
#208516

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

PROPOSED ORDER

WHEREFORE, this 9th day of January, 2024, 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.

Heather Connellee

Heather Connellee

Panel B

***MARYLAND HOME IMPROVEMENT
COMMISSION***