

IN THE MATTER OF THE CLAIM	* BEFORE PATRICK E. MAHER,
OF DOV N. FLEISCHMAN,	* 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 TIMOTHY FARO,	*
JR., T/A BIRDLAND BUILDERS, LLC,	* OAH No.: LABOR-HIC-02-22-19351
RESPONDENT	* MHIC No.: . 22(75)632

* * * * *

PROPOSED DECISION

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

STATEMENT OF THE CASE

On May 26, 2022, Dov F. Fleischman (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 \$61,478.64 for actual losses allegedly suffered as a result of a home improvement contract with Timothy Faro, Jr., trading as Birdland Builders, LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to - 411 (2015 & Supp. 2022).¹

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

On July 28, 2022, the MHIC issued a Hearing Order on the Claim. On August 9, 2022, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On January 10-11, 2023, I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. John Hart, Assistant Attorney General, Department, represented the Fund. The Claimant was self-represented. The Respondent was self-represented.

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 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 have attached a complete Exhibit List as an Appendix.

Testimony

The Claimant testified and did not present other witnesses.

The Respondent 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 109840.
2. On December 17, 2019, the Claimant and the Respondent entered into a contract to build a two-car garage with a master suite living space above it and additional remodeling work on the Claimant's existing house (First Contract or First Addition).
3. The original agreed-upon Contract price was \$88,600.00.
4. On July 14, 2020, the parties entered into a second contract to remove the roof over the center section of the existing house above the kitchen and build an addition over the top of the first floor to be a master bedroom and two walk-in closets. (Second Contract or Second Addition), (First and Second Additions collectively will be referred to as the "Project").
5. The agreed upon price for the Second Contract was \$42,330.00.
6. The total contract amount for the Project was \$130,930.00.
7. The Project was delayed due to the Respondent's inability to obtain the construction permits required for the Second Addition, as county offices were closed for a period of time during the Covid-19 pandemic.
8. The Respondent worked on the Project from December 2019 through March 2021.
9. The roof vents were not properly secured to the roof and a piece of plywood was damaged.
10. The gutters attached to the roof were not properly installed which caused water to pool in the gutter rather than flow to the drainpipe.

11. The installation of the siding on the house was faulty due to the failure of the Respondent to properly frame the inside of the attic on the right side of the house prior to attaching the siding, causing the siding to separate from the house.

12. The Respondent's employees, in order to supply air conditioning to the Second Addition, altered the previously installed HVAC² unit that was sized to work only in the First Addition. The Respondent's employees installed additional air ducts and two eight-inch lines which were improperly sealed from the HVAC unit to the Second Addition.

13. The piping for the gas lines were not installed from the gas meter to inside the house to an eight outlet manifold as described in the First Contract.

14. The Respondent failed to hook up the washer and dryer after building the laundry room and installing the washer and dryer.

15. The Respondent did not properly install a wall on the side of the house after removing the chimney.

16. The Respondent's workers damaged the ceiling of the dining room and the kitchen while building the Second Addition.

17. The Respondent did not complete the painting that was contracted for in the Project. There were instances where painting that was completed was poorly done. Areas needed touch-up work and some rooms required patch-up work and other areas a second coat of paint.

18. The Respondent discontinued work on the Project in March 2021, and did not fully complete the Project.

² HVAC is an abbreviation for heating, ventilation, air conditioning.

19. The Claimant paid the Respondent a total amount of \$114,800.00 for work done on the Project.

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); 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." Bus. Reg. § 8-405(a) (Supp. 2022); *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.

By statute, certain claimants are excluded from recovering from the Fund altogether. In this case, there are no such statutory impediments to the Claimant's recovery. The claim was timely filed, there is no pending court claim for the same loss, and the Claimant did not recover the alleged losses from any other source. Bus. Reg §§ 8-405(g), 8-408(b)(1) (2015 & Supp. 2022). The Claimant resides in the home that is the subject of the claim or does not own more than three dwellings. *Id.* § 8-405(f)(2) (Supp. 2022). The parties did not enter into a valid agreement to submit their disputes to arbitration. *Id.* §§ 8-405(c), 8-408(b)(3) (2015 & Supp. 2022).

The Claimant is not a relative, employee, officer, or partner of the Respondent, and is not related to any employee, officer, or partner of the Respondent. *Id.* § 8-405(f)(1) (Supp. 2022).

Position of the Parties

The Complainant presented a myriad of complaints about the home improvement in just about every phase of the Project. The Complainant presented testimony and many photographs in support of his claims.

The Respondent disagreed with many of the Claimant's allegations and asserted that many of the photographs were outdated and did not reflect the nature of the Project when the Respondent stopped work. He acknowledged that he did not complete the project but asserted that the Claimant was difficult to work with, harassed his employees and subcontractors, and attempted to have them do work outside the scope of the Contracts.

The Fund agreed that the Respondent had performed unworkmanlike, inadequate, or incomplete home improvements, but suggested an award that was less than the claim asserted by the Claimant.

I do find that the Respondent performed unworkmanlike, inadequate, or incomplete home improvements in some of the areas of the Project. I will address the issues raised by the Claimant as presented by the Claimant at the hearing.

Roof

The Claimant provided photographs that showed the Respondent failed to properly secure the ridge vents when he attached them to the roof. The Claimant also submitted photographs of standing water in the gutters indicating that they were not properly sloped towards the drainpipe when installed. The Claimant submitted invoices from licensed contractors in the amount of \$352.00 and \$1,200.00 to repair the gutter installation and ridge vent installation respectively, for

a total of \$1,552.00. The Claimant also submitted an estimate from another MHIC licensed roofing company to replace the roof for a sum of \$9,900.00 due to their concerns with the quality of the roof installation and that the roof would have to be removed to investigate the nature of any necessary repairs.

The Respondent argued that the roof was properly installed and there was nothing to suggest that the roof needed to be replaced. He argued that the representative of the roofing company is a salesman and trying to sell a new roof job.

Photographs of the roof showed the ridge vents were not properly secured and that one of the plywood roof sheathing pieces was damaged. In addition, the gutter was incorrectly installed which led to standing water in the gutter after a rain. However, there was no competent evidence presented that would lead me to conclude that replacement of the roof is warranted. The \$9,900.00 estimate based on the suggestion that the entire roof needs to be taken off to determine if it was constructed properly is not a reliable estimate. It is the Claimant's burden of proof to show an actual loss, and he has not done so with respect to this estimate. The most reliable evidence of an actual loss relating to the roof is the invoices submitted for \$352.00 to fix the gutter and \$1,200.00 to secure the ridge vents and plywood repair to address problems identified on the roof.

Siding

The Claimant testified the Respondent failed to properly install the siding on the right side of the house and sections of the siding had peeled off as a result. The Claimant stated that the Respondent attempted to fix the siding three times, but it kept separating from the side of the house.

The Respondent testified that all his employees are CertainTeed³ certified to install siding. The first section of the siding job was completed by a subcontractor who was not available for the second phase of the project, so the Respondent and his employees completed that part of the siding job themselves. The Respondent did not offer a sound explanation for the siding issues.

The photographs entered into evidence showed the siding peeling off the side of the house. The installation was unworkmanlike, as it should not repeatedly peel off. The evidence showed the Respondent failed to properly frame the section of the house where the siding peeled off. As a result, the siding was unable to be properly attached to the house. The Claimant provided estimates for the repair of the siding. The Claimant submitted proposals in the amount of \$3,600.00 and \$770.00 for the sections of siding that needed repair, which are reasonable estimates to repair the unworkmanlike installation of the siding.

HVAC

The Claimant testified that the HVAC unit does not properly cool the Second Addition to the house. Smith & Company HVAC, LLC (Smith & Co.) installed the HVAC unit in the First Addition. The Claimant asserted that the Respondent improperly altered the HVAC unit that was installed by Smith & Co. to deliver air conditioning to the Second Addition. The support for this claim was a series of emails from Smith & Co. to the Claimant where the representative asserted that the duct system Smith & Co. installed was manipulated by the Respondent or a third party. Smith & Co. further noted that the lack of air conditioning was due to the improper installation of ducts and adding two eight-inch lines that were not properly sealed, causing a loss

³ A North American manufacturer of building materials, including siding.

of air conditioning to the system. Smith & Co. additionally noted that the unit they installed was sized for only the First Addition, and not designed to cool the Second Addition.

The Respondent denied any improprieties and asserted that he did not need permission to work on the HVAC unit.

In response to questions from Mr. Hart, the Respondent was unable to provide a State of Maryland required certification to perform HVAC work required by Section 9A-301 of the Business Regulation Article of the Maryland Code Annotated. The Respondent provided a plumbing licensing number, but otherwise asserted that Baltimore County does not require contractors to pull a permit, and therefore he was not prohibited from performing HVAC work.

I find that the Respondent contracted with Smith & Co. to install the HVAC unit in the First Addition. Smith & Co. completed the installation of the HVAC unit on March 9, 2020. The HVAC unit was sized for the dimensions in the First Addition. At the time of the installation of the HVAC unit, construction on the Second Addition had not been started and it was not part of the contract between Smith & Co. and the Respondent.

After work began on the Second Addition, the Respondent's employees altered the previously installed HVAC unit to install air conditioning to the Second Addition. The unit was not sized to cool both the First and Second Additions.

The Respondent failed to determine if the HVAC unit previously installed for the First Addition was sufficiently sized for the Second Addition. Instead, the Respondent and his employees altered the HVAC unit and simply ran additional ducts and vents to the Second Addition.

The Respondent should have engaged Smith & Co. or another licensed HVAC contractor to determine whether the HVAC unit installed by Smith & Company for the First Addition was a sufficient size to also cool the Second Addition. Obviously, this should have been done prior to altering the unit and adding ducts to deliver air conditioning to the Second Addition.

The workers were not licensed as required by statute to perform the HVAC work and ultimately the unit did not have sufficient capacity for the Second Addition. According to Smith & Co., the Respondent's work on the HVAC unit also voided their warranty as the Respondent and/or his workers altered the unit and were not authorized technicians.

The estimate for a new HVAC system in the amount of \$7,322.00 is a fair estimate to install a new air conditioning unit that would be sized to work effectively in both the First Addition and the Second Addition. It is fair and reasonable to accept the estimate for a new HVAC unit based on the issues set forth above.

Gas Line Work and Washer/Dryer Hookup

The Claimant testified that the First Contract called for the installation of piping for gas lines from the meter into a gas manifold in the house and then into the First Addition. The Claimant argued that the Respondent did not complete this work. The Respondent testified that some of the work in the estimate was not within the scope of the contract but did not offer any further clarification. I find that the Claimant has met his burden of proof that the Respondent failed to install the gas lines into a manifold as set forth in the First Contract. The \$3,900.00 estimate the Claimant provided is reasonable to complete the gas line work.

The Respondent also did not hook up the washer and dryer after the utility room was built and the washer and dryer were installed in the room. Although the Respondent advised the Claimant by email that he would "set up" the washer and dryer, the Respondent claimed the

hook up was not included in the Contract. I find that explanation is without merit. It is common sense to expect that a contractor who builds a utility room for a washer and dryer, and then “sets up” the appliances, would be expected to hook them up as part of the Contract.

The additional invoice to include the cost to hook up the washer and dryer in the amount of \$325.00 is reasonable and should be an expected cost when building a washer and dryer utility room.

Bathroom Shower and Garage Ceiling

The Claimant asserted a claim for water damage to the ceiling of the garage built pursuant to the First Contract due to the improper installation of the shower in the master suite above the garage. The Respondent denied that claim and argued that the water damage could have come from several different areas of the house not related to the work completed on the First Contract.

I do not find that the Claimant has met his burden of proof to show causation from the cause of leak onto the ceiling and whether it came from the shower that was installed by the Respondent. Even assuming the leak came from the shower, a representative from the Wedi bath installation company reviewed pictures and could not definitively say whether the leak was a warranty issue or the result of a faulty installation of the shower. Accordingly, I do not find the Claimant is eligible for an award from the Fund for damages to the ceiling or the replacement of the shower.

Back Deck

The Claimant describes cracks in lumber that was used in the installation of the deck and alleges it is a problem. The Respondent replied and stated that all lumber has cracks, it does not affect the deck, and that the deck was not part of the Project. The Claimant presented no expert

testimony to prove that the cracks in the lumber were either problematic or the result of an unworkmanlike or inadequate home improvement. Therefore, the testimony on this issue is in equipoise. As the Claimant has the burden of proof, I find that he has failed to meet his burden and is not eligible for an award from the Fund for any cracks in the wood on the back deck.

Screen Door

The Claimant asserted that the sliding glass door did not come with a screen and should be included in the award from the Fund. The Respondent replied that the cost of a screen door is an extra charge that was not included in the purchase price of the sliding door. The Claimant did not prove that the screen door was included in the First Contract. I do not recommend an award from the Fund for the screen door.

Window Shutters

The Claimant asserted that the Respondent failed to provide window shutters. The Respondent replied that they were not included in the First or Second Contract and would be an additional cost. The Claimant presented no evidence to show that window shutters were included in the First or Second Contract. Therefore, I find that the Claimant did not meet his burden of proof and I do not recommend an award from the Fund for the window shutters.

Bowed Wall

The First Contract called for the removal of the existing chimney and installation of sheathing⁴ as needed to get the wall ready for the installation of siding. The Claimant testified that the wall where the chimney was removed is now bowed. The Respondent stated that all walls bow to some extent, and it is not a flaw.

⁴ Sheathing is the protective covering or casing used on flooring, walls, and roof assemblies.

The Claimant presented photographs of a level held against the wall that clearly showed the wall was bowed to a significant degree. The Claimant has demonstrated that the bowed wall was caused by the framing/sheathing of the wall area where the fireplace removal took place, and that the construction of the wall was done in an unworkmanlike manner. The estimate by Strong Wall Construction Co. in the amount of \$3,458.35 to fix the bowed wall is reasonable.

Fence

The Claimant testified that the new fence gate was improperly attached to the existing fence and does not work as the gate latch no longer aligns with the fence latch. The Claimant stated the Respondent advised him that it was okay to attach the new gate to the existing fence. The Respondent disputed the statement and testified that the Claimant wanted to save money and directed that the new fence gate be attached to the old fence. He further stated that the fence gate worked fine when it was installed. I find that this was a situation where new construction was attached to old construction and that it worked initially, which shows it was installed correctly. I do not find the Claimant has met his burden of proof and do not find sufficient evidence of unworkmanlike or inadequate construction in the attachment of the new gate to the existing fence.

Laundry Room

The Claimant testified that the dimensions of the laundry room built by the Respondent did not fit the washer and dryer to be installed as there was insufficient space to hook up the washer and dryer and to also close the doors to the laundry room. The Respondent answered that he was provided the washer and dryer in a box and used those dimensions to design the laundry room.

I find that the contractor who is drawing the plans should know there is additional space needed for hook-ups of the washer and dryer. The Claimant provided the measurements of the boxes of the washer and dryer, and the Respondent should have designed the closet to fit the washer and dryer and the necessary hook-ups. However, the Claimant failed to provide any estimate to fix the unworkmanlike construction as he stated that it would require moving a wall. The recovery from the Fund not only requires a finding of unworkmanlike or inadequate construction, but also proof that the Claimant suffered an actual loss. *Brzowski v. Maryland Home Imp. Comm'n*, 114 Md. App. 615, 628 (1997). Accordingly, I do not recommend an award from the Fund for the unworkmanlike and inadequate construction of the laundry room.

Carpet

The Claimant testified that the carpet the Respondent installed is inferior and is already starting to show signs of wear. The Respondent advised that the carpet was selected by the Complainant and that the cost of the carpet grade was set in the First and Second Contracts.

I find that although the Claimant testified that he believed he was getting stain resistant carpeting, it is not spelled out in the First or Second Contract. The Claimant presented an estimate for the replacement of the carpet from Strong Wall Construction for \$10,000.00, but that is not what the Claimant bargained for in the Contract. To suggest that carpet that was purchased for \$1,600.00 should be of the same quality as a \$10,000.00 carpet is unreasonable. The Claimant did not prove that the installed carpet was inadequate. Instead, the evidence showed he received the inexpensive carpet that was provided for in the Project. I do not recommend an award from the Fund for the replacement of the carpet.

Kitchen and Dining Room

The Claimant testified that the Second Contract included the removal of the wall that was between the kitchen and the dining room. The Claimant testified that the area where the wall that was removed meets the other wall was never patched or painted. He further testified that the parties discussed fixing a tripping hazard on the floor and that was not done. The Respondent objected to the photographs submitted by the Claimant in the kitchen, asserting that they were pictures taken during the project, and were not indicative of how the job was left. The Respondent denied leaving the kitchen in the state of disrepair asserted by the Claimant. He further noted that the Claimant is trying to recover money for items that are not within the scope of the Second Contract.

The Claimant acknowledged that the removal of the wall was the first phase of a future remodeling job involving the dining room and the kitchen that was not within the scope of the Project with the Respondent. Although the Claimant has asserted incomplete work arising from the removal of the wall, there is nothing in the Second Contract specifying any other work to be done other than to "remove wall between kitchen and dining room." I find the Claimant has not met his burden of proof to show inadequate or incomplete work related to the removal of the wall separating the kitchen and the dining room.

While working on the Second Addition above the kitchen and dining room, the Respondent's employees damaged the ceiling in the kitchen and dining room. On two occasions, a worker put his foot through the ceiling and on one occasion fell entirely through the ceiling. The Respondent acknowledged that he had not repaired the ceiling prior to leaving the Project.

I find that an award is allowed to reimburse the Claimant for the repair of substandard work by the Respondent's employees. The Fund did not object to this claim as a consequence of poor performance. I find that the detailed estimates for repairing the dining room and kitchen ceiling provided in the Strong Wall Construction proposal (Clmt. Ex. 1), and identified by line item, are fair and reasonable. The estimate for the dining room ceiling repair was \$1,193.20 (line items 8, 9, 10), and the estimate for the kitchen ceiling repair was \$1,348.31 (line items 20, 21) for the kitchen ceiling repair. These estimates are a fair and reasonable estimate for the repair of the damage to the dining room and kitchen ceiling.

Painting

The First and Second Contracts included painting of the additions, two bedrooms and the family room where the fireplace used to be. The Claimant presented photographs of walls where touch-up painting was needed, the painting of walls was incomplete or poorly finished. In addition, the Claimant testified that patch and touch-up work was not completed, and second coats of paint were not applied in some of the rooms.

The estimate provided by Strong Wall Construction for painting included work that was unrelated to the two contracts between the Claimant and the Respondent.

The Respondent questioned how long his company would be held responsible for touch-up work at a house that is occupied and has pets.

I find that a review of many of the photographs submitted does support the Claimant's assertion that the painting job was unworkmanlike and incomplete. This coupled with the Respondent's acknowledgement that there were areas of the Project that were not completed and that it was "quite embarrassing when you look at the pictures," is sufficient evidence to prove unworkmanlike and incomplete painting work by the Respondent.

I find that the detailed estimates for painting provided in the Strong Arm Construction proposal (Clmt. Ex. 1), and identified by line item, are fair and reasonable: First Addition-new family room, touch up paint throughout, \$351.95 (line item 53); bathroom and sub room, \$968.81 (line items 65, 66, 67) ; master bedroom & closet, \$443.40 (line items 75, 76, 77); stairs and landing, \$2,471.76 (line items 81, 82, 83, 85, 86); old family room, \$2,068.18 (line items 40, 41), for a total of \$6,304.10.

Items Not in Dispute

The Respondent agreed that the following items were his responsibility pursuant to the Contracts, and that he did not complete them:

\$380.00 to provide a garage wall heater, a line item from the First Contract; \$500.00 to install the railing that was provided for in the First Contract; \$1,400.00 to paint the garage floor with epoxy garage floor paint that was in the First Contract.

Thus, I find the reasonable amount the Claimant has paid or will be required to pay another contractor to repair the unworkmanlike or incomplete work done by the Respondent under the First and Second Contracts to be the following:

\$352.00 - Roof
\$1,200.00 - Roof
\$3,600.00 - Siding
\$770.00 - Siding
\$7,322.00 - HVAC
\$3,900.00 - Gas Line Work
\$325.00 - Washer & Dryer Hook Up
\$3,458.35 - Bowed Wall
\$1,193.20 - Dining Room Ceiling
\$1,348.31 - Kitchen Ceiling
\$6,304.10 - painting
\$380.00 - garage wall heater
\$500.00 - railing
\$1,400.00 - garage floor
\$32,052.96

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. Bus. Reg. § 8-405(e)(3) (Supp. 2022); 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. COMAR 09.08.03.03B(3)

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).

I will apply the formula to the findings that I have made. The amount paid by the Claimant to the Respondent was \$114,800.00. Added to that amount is the reasonable cost to repair the poor work by the Respondent, which I have determined to be \$32,052.96. The sum equals \$146,852.96. Subtract from this amount the total contract price of \$139,130.00, and the actual loss is calculated to be \$7,722.96.

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.⁵ Bus. Reg. § 8-405(e)(1), (5) (Supp. 2022); COMAR 09.08.03.03B(4). In this case, the Claimant's actual loss is less than the amount paid to the Respondent and less than \$30,000.00. Therefore, the Claimant is entitled to recover his actual loss of \$7,722.96.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$7,722.96 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2022); COMAR 09.08.03.03B(3)(c). I further conclude that the Claimant is entitled to recover that amount 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 \$7,722.96; 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;⁶ and

⁵ 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").

⁶ *See* Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

ORDER that the records and publications of the Maryland Home Improvement

Commission reflect this decision.

April 11, 2023
Date Decision Issued

Patrick E. Maher

Patrick E. Maher
Administrative Law Judge

PEM/sh
#204350

PROPOSED ORDER

WHEREFORE, this 24th day of May, 2023, 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***

IN THE MATTER OF THE CLAIM OF * **MARYLAND HOME**
DOV FLEISCHMAN * **IMPROVEMENT COMMISSION**
AGAINST THE MARYLAND HOME *
IMPROVEMENT GUARANTY FUND * **MHIC CASE NO. 22(75)632**
FOR THE ACTS OR OMISSIONS OF * **OAH CASE NO. LABOR-HIC-**
TIMOTHY FARO JR. AND * **02-22-19351**
BIRDLAND BUILDERS, LLC *

* * * * *

FINAL ORDER

This matter was originally heard before an Administrative Law Judge (“ALJ”) of the Office of Administrative Hearings (“OAH”) on January 10-11, 2023. Following the evidentiary hearing, the ALJ issued a Proposed Decision on April 11, 2023, concluding that the homeowner, Dov Fleishman (“Claimant”) suffered an actual loss as a result of the acts or omissions of Timothy Faro Jr. and Birdland Builders, LLC (collectively, “Contractor”). *ALJ Proposed Decision* p. 19. In a Proposed Order dated May 24, 2023, the Maryland Home Improvement Commission (“MHIC” or “Commission”) affirmed the Proposed Decision of the ALJ to grant an award of \$7,722.96 from the Home Improvement Guaranty Fund. The Claimant subsequently filed exceptions to the MHIC Proposed Order.

On July 6, 2023, a three-member panel (“Panel”) of the MHIC held a remote hearing on the exceptions filed in this matter. The Claimant and Contractor participated without counsel. Assistant Attorney General Jessica Kaufman appeared at the exceptions hearing on behalf of the Guaranty Fund. The Commission entered the following preliminary exhibits as part of the record of the exceptions hearing without objection: 1) hearing notice; 2) transmittal letter, ALJ Proposed Decision, and MHIC Proposed Order; and 3) Claimant’s exceptions. Neither the Claimant nor the Contractor produced a copy of the transcript of the hearing before the ALJ. Therefore, the Panel’s review of the record was limited to the preliminary exhibits for the exceptions hearing, the OAH Proposed Decision, and the exhibits offered as evidence at the OAH hearing. COMAR

09.01.03.09(G) - (I).

The claim in this proceeding relates to a contract between the parties for the construction of a garage addition and remodeling work at the Claimant's home. The ALJ found that the Contractor's performance under the contract was unworkmanlike and incomplete and that the Claimant was entitled to a Guaranty Fund Award, but disallowed portions of the Claimant's claim.

ALJ Proposed Decision pp. 5-19.

On exception, the Claimant argued that the ALJ erred in denying an award relating to several components of the contracted work.

First, the Claimant argued that the ALJ erred in considering the discounted price of the estimate for correcting deficiencies with the HVAC system because the estimate was years old and the discount is no longer available. The Commission finds no error. The Claimant has not proven that the discount is no longer available and has not provided a current estimate of the cost to correct the HVAC system.

The Claimant also argued that the ALJ erred in failing to include a heat and air conditioning register in the calculation of actual loss because it related to the HVAC system installation, which the ALJ deemed to have been unworkmanlike. The Commission finds no error. There is no evidence that the removal and replacement of the register was necessitated by the unworkmanlike installation of the HVAC system.

The Claimant also argued that the ALJ erred in failing to include repairs to the bathroom ceiling caused by condensation stemming from the deficient HVAC installation. The Commission finds no error. Damage to the ceiling resulting from the HVAC system installation constitutes consequential damages that are not compensable by the Fund under Md. Code Ann., Bus. Reg. § 8-405(e)(3).

Although not raised by the parties, the Commission finds that the ALJ erred in including the cost of repairing damage to the kitchen and dining room ceilings caused by the Contractor's employees stepping or falling through the ceiling while working on the addition. As the parties did not contract for the installation of the kitchen and dining room ceiling, such damages were consequential and therefore not compensable. Accordingly, the Commission finds that the Claimant's award must be reduced by the costs attributable to repairing the dining room ceiling, \$1,193.20, and kitchen ceiling, \$1,348.31.

The Claimant also argued that the ALJ erred in failing to include the cost of repairing door latches and a gable and performing caulking because such work related to the repair of the Contractor's unworkmanlike installation of siding. The Commission finds no error. The Claimant did not identify, and the Commission is not aware of evidence demonstrating that such repairs related to the deficient siding installation.

The Claimant also argued that the ALJ erred in failing to find that the Contractor's installation of the bathroom tile was unworkmanlike because the Contractor used two different colors of tile and there were cracked tiles. Although the Claimant asserted that he raised the issue of the tiling at the OAH hearing, the ALJ does not reference the issue, and the Claimant did not provide a transcript of the OAH hearing to the Commission. In addition, regarding the color of the tile, the only photographs in the record are black and white, so there is no evidence before the Commission demonstrating that the tiles were different colors. Regarding purported cracks in the tile, the photographs do not demonstrate to the Commission that the tiles were cracked or otherwise installed in an unworkmanlike manner. Accordingly, the Commission finds no error.

The Claimant also argued that the ALJ erred in failing to include a "cleanout cover" in the calculation of actual loss. The Commission finds no error, as the Claimant did not identify, and

the Commission is not aware of any evidence demonstrating that the cleanout cover relates to deficient performance by the Contractor.

The Claimant also argued that the ALJ erred in failing to include the installation of a pocket door in the calculation of actual loss. The Commission finds no error. The ALJ did not address the pocket door in the Proposed Decision, so, without the transcript, the Commission is unable to determine whether the Claimant raised the issue during the evidentiary hearing. In addition, the Claimant did not identify, and the Commission is unaware of evidence that a pocket door was included in the parties' contract.

The Claimant also argued that the ALJ erred in failing to include the cost of protecting the floor from damage during repainting of the kitchen and dining room ceilings in the calculation of actual loss. The Commission finds no error. The costs the Claimant argued should be included related to the painting of the foyer, not the kitchen or dining room, and the parties' contract did not involve improvements in the foyer.

The Claimant also argued that the ALJ erred in failing to include the cost of installing recessed lights in the pool room in the calculation of actual loss. The Commission finds no error. The ALJ did not address the recessed lighting in the Proposed Decision, so, without the transcript, the Commission is unable to determine whether the Claimant raised the issue during the evidentiary hearing. In addition, the Claimant did not identify, and the Commission is unaware of evidence that recessed lighting or any other work in the pool room was included in the parties' contract.

Finally, the Claimant argued that the ALJ erred in failing to include the cost of moving furniture and protecting the floors in the "main level," kitchen, foyer, "purple room," guest room, and "subroom" in the calculation of actual loss. The Commission finds no error. The ALJ did not

address these issues in the Proposed Decision and the Claimant did not provide a transcript of the evidentiary hearing, so the Commission is unable to determine whether these issues were raised during the evidentiary hearing. In addition, there is no evidence that the parties' contract included painting in these areas of the Claimant's home or that the floor protection and furniture moving were necessary to correct or complete the Contractor's deficient work.

Having considered the parties' arguments, the evidence contained in the record, and the ALJ's Recommended Decision, it is this 16th day of August 2023, **ORDERED:**

- A. That the Findings of Fact of the Administrative Law Judge are **AMENDED**;
- B. That the Conclusions of Law of the Administrative Law Judge are **AMENDED**;
- C. That the Proposed Decision and Recommended Order of the Administrative Law Judge is **AMENDED**;
- D. That the Claimant is awarded \$5,181.45 from the Maryland Home Improvement Guaranty Fund;
- E. That the Contractor shall remain ineligible for a Maryland Home Improvement Commission license until the Contractor reimburses the Guaranty Fund for all monies disbursed under this Order plus annual interest of at least ten percent (10%) as set by the Commission, *Md Code Ann.*, Bus. Reg. §§ 8-410(a)(1)(iii), 8-411(a);
- F. That the records and publications of the Maryland Home Improvement Commission shall reflect this decision; and
- G. Any party has thirty (30) days from the date of this Final Order to appeal this decision to Circuit Court.

Michael Newton
**Chairperson –Panel
Maryland Home Improvement
Commission**