

IN THE MATTER OF THE CLAIM * **BEFORE RACHAEL BARNETT,**
OF DONALD & MARIANNE¹ ENGEL, * **AN ADMINISTRATIVE LAW JUDGE**
CLAIMANTS * **OF THE MARYLAND OFFICE**
AGAINST THE MARYLAND HOME * **OF ADMINISTRATIVE HEARINGS**
IMPROVEMENT GUARANTY FUND *
FOR THE ALLEGED ACTS OR *
OMISSIONS OF FRANK DAVIS, *
T/A A&F CONSTRUCTION * **OAH No.: LABOR-HIC-02-24-01574**
SERVICES, * **MHIC No.: 23 (75) 1368**
RESPONDENT *

* * * * *

PROPOSED DECISION

STATEMENT OF THE CASE
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STATEMENT OF THE CASE

On August 29, 2023, Donald & Marianne Engel (Claimants) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)² Guaranty Fund (Fund) for reimbursement of \$6,880.00 for actual losses allegedly suffered as a result of a home improvement contract with Frank Davis, trading as A&F Construction Services (Respondent).

¹ At the outset of the hearing, Mr. Engel explained that he only listed his name on the claim form because there was only one space for a name on the form; however, he motioned to add his wife's name to the claim, and I granted the request.

² The MHIC is under the jurisdiction of the Department of Labor (Department).

Md. Code Ann., Bus. Reg. §§ 8-401 to 8-411 (2015 & Supp. 2023).³ On January 16, 2024, the MHIC issued a Hearing Order on the Claim. On January 17, 2024, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On April 30, 2024, I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. Chris King, Assistant Attorney General, Department, represented the Fund. The Claimants were self-represented.

After waiting fifteen minutes for the Respondent or the Respondent's representative to appear, I proceeded with the hearing. Applicable law permits me to proceed with a hearing in a party's absence if that party fails to attend after receiving proper notice. Code of Maryland Regulations (COMAR) 28.02.01.23A. On February 1, 2024, the OAH provided a Notice of Hearing (Notice) to the Respondent by certified mail and first-class mail. Bus. Reg §§ 8-312(d), 8-407(a); COMAR 28.02.01.05C(1). The Notice stated that a hearing was scheduled for April 30, 2024, at OAH, in Hunt Valley, Maryland. COMAR 09.08.03.03A(2). The Notice further advised the Respondent that failure to attend the hearing might result in "a decision against you."

The United States Postal Service did not return the Notice to the OAH. The Respondent did not notify the OAH of any change of mailing address. COMAR 28.02.01.03E. I determined that the Respondent received proper notice, and I proceeded to hear the captioned matter. COMAR 28.02.01.05; 28.02.01.23A.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the OAH govern procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021 & Supp. 2023); COMAR 09.01.03; COMAR 28.02.01.

³ Unless otherwise noted, all references to the Business Regulation Article are to the 2015 Volume of the Maryland Annotated Code.

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 - Email exchange between the Claimants and the Respondent, various dates in 2023
- Clmt. Ex. 2 - Proposal, April 5, 2023
- Clmt. Ex. 3 - Email from the Claimants to the Respondent, April 24, 2023
- Clmt. Ex. 4 - Email exchange between the Claimants and the Respondent, April 26 – 28, 2023
- Clmt. Ex. 5 - Explanation for MHIC Engel Complaint Against A&F Contracting, undated
- Clmt. Ex. 6 - Estimate, August 17, 2023
- Clmt. Ex. 7 - Printout of Checking Account Transactions, April 30, 2024
- Clmt. Ex. 8a-8j - Photographs, various dates in April – May 2023

The Respondent did not offer any documents into evidence.

I admitted the following exhibits offered by the Fund:

- Fund Ex. 1 - Notice of Hearing, February 1, 2024
- Fund Ex. 2 - Hearing Order, January 16, 2024
- Fund Ex. 3 - Department of Labor I.D. Registration, April 23, 2024
- Fund Ex. 4 - Home Improvement Claim Form, August 29, 2024
- Fund Ex. 5 - Letter from the Fund to the Respondent, August 29, 2023

Testimony

The Claimants both testified and did not present other witnesses.

The Respondent did not testify.

The Fund did not offer the testimony of 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 5967132.

2. On April 12, 2023, the Claimants and the Respondent entered into a contract (Contract) to perform the following work:

Front of the home

- Fix mortar joints on front brick step area and left and right of the doorway
- Seal with silicone the bottom of the bricks and the seal with mortar the next day

Back patio

- Re-mortar the back stone patio surface and seal it the following day

Fence/ Back door

- Repair the back fence in the two areas of disrepair
- Install longer screws at backdoor threshold

Deck

- Repair and replace decking
- Install side boards
- Resecure the deck in four areas needing repair
- Replace the step
- Fill, skim and paint to look as new as possible

3. The original agreed-upon Contract price was \$6,880.00.

4. On April 18, 2024, the Claimants paid the Respondent \$2,294.00.

5. The Respondent used a sandy-colored substance on the walkway. It coated over the front brick walkway and steps. The coating covered both the mortar and bricks, rather than just the joint area. The new mortar did not match the worn and blackened mortar that was already in place.

6. On the back patio, the Respondent did not remove and replace the mortar. Rather, he applied a fine stone layer over the joints that also coated the patio stones. Within nine days, this stone layer was crumbling. As of the date of the hearing, it was washed away, except for a sandy residue.

7. On April 20, 2023, the Claimants made two separate payments of \$2,294.00 to the Respondent, for a total of \$4,588.00 that day.

8. In sum, the Claimants paid the Respondent \$6,880.00, the total contract price.

9. On April 24, 2024, the Claimants emailed the Respondent and provided a list of complaints about the workmanship.

10. On April 26 and 28, 2023, the Respondent sent the Claimants emails regarding the work performed.

11. In his April 26, 2023 email, the Respondent offered to refund the Claimants for the fence (back deck area) work and to send a new work crew to their home to fix the loose step and any areas that were missing paint.

12. On April 28, 2023, the Respondent sent an email to the Claimants and reiterated his offer, "I will offer to send a different crew to fix the missed paint and the loose step." (Cl. Ex. 4). The Respondent signed the email with "LMK," an abbreviation for "let me know" and included his name and title. *Id.* In the email, the Respondent also agreed to refund the Complainants for the fence work, acknowledging that it was not as tight as it should be.

13. The Claimants did not accept the offer to fix the paint job and step or be reimbursed for the fence work.

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); 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 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. 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." Bus. Reg. § 8-401. For the following reasons, I find that the Claimants have proven eligibility for compensation.

The Respondent was a licensed home improvement contractor at the time the Respondent entered into the Contract with the Claimants. By statute, certain claimants are excluded from recovering from the Fund altogether. In this case, there are no such statutory impediments to the Claimants' recovery. The claim was timely filed, there is no pending court claim for the same loss, and the Claimants did not recover the alleged losses from any other source. Bus. Reg §§ 8-405(g), 8-408(b)(1) (2015 & Supp. 2023). The Claimants reside in the home that is the subject of the claim or do not own more than three dwellings. *Id.* § 8-405(f)(2) (Supp. 2023). 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. 2023). The Claimants are 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. 2023).

The Claimants rejected good faith efforts by the Respondent to resolve the claim, at least in part. *Id.* § 8-405(d) (Supp. 2023). In the Respondent's April 26, 2024 email, he offered to send a work crew to the Claimants' home to fix the paint and the loose step. The Respondent reiterated his offer in his April 28, 2023 email to the Claimants. Mr. Engel testified that he did not follow up on these offers to make repairs because he did not want the Respondent to return to his home to perform work. That was the Claimants' choice to make, but it was indeed a rejection of a good faith effort to repair two of the workmanship issues the Claimants raised in their claim. The Respondent did not offer to make any additional repairs and thus the remainder of the workmanship claims are assessed herein. The Respondent performed unworkmanlike and incomplete home improvements.

Back Patio

The Contract called for the following work, "Re-mortar back stone on patio surface, seal the next day." (Cl. Ex. 2). I interpret "re-mortar" as akin to "redo" the mortar on the back stone patio. The pictures in Claimants' Exhibit 5 of the before and after images of the back stone patio reveal that the Respondent filled in some gaps but did not redo all the mortar, per the Contract. Additionally, the mortar job was sloppy, with a fine, light grey coating left atop the patio stones. Furthermore, Mr. Engel testified that the mortar the Respondent used crumbled soon after he applied it and had turned to dust within a year of its application. The Claimants listed this item in their April 24, 2023 email to the Respondent. The Respondent did not offer to fix the work or reimburse the Claimants for it, nor did he offer an explanation for the crumbling mortar. Mortar should not crack and crumble so quickly. The fact that the Respondent's mortar did is indicative of a significant workmanship issue. Additionally, the work was incomplete, because the

Respondent did not redo the mortar, per the Contract; he just filled in certain areas. The only way imaginable to remedy mortar in a partially installed and crumbled state is to replace it. Green Future Construction proposed to do the following work, “[r]emove and reinstall full color natural flagstone backyard. Patio measures 13x15 with 4x5’6” landing in front of garage door. We will need to bring additional pieces to fill new joints closer. Approximately 205 square feet.” (Cl. Ex. 6). This proposed work is consistent with the work proposed in the original Contract, because both contractors proposed to redo the mortar. Green Future Construction provided additional details as to how the work should be done, but there were no additional work items outside the scope of the original Contract. Green Future Construction estimated \$12,800.00 for this work. Mr. Engel testified that he and the other Claimant obtained other estimates for this work, and they were all much higher than the Contract price. Since the Respondent was not present to offer any contradictory evidence, I accept this estimate as an appropriate estimation of the cost of redoing the patio mortar.

Fence

The Contract called for the following work, “Shore up right side back fence in [two] areas. Install longer screws at backdoor threshold to tighten and stiffen up.” (Cl. Ex. 2). Mr. Engel testified that the fence divided their patio from the neighbor’s patio. The photographs of the fence included within Claimants’ Exhibit 5 show the fence leaning to the right (toward the Claimants’ patio). The purpose of the contracted work was to straighten and tighten the fence so it would not lean anymore. In his April 26, 2023 email, the Respondent offered to refund the Claimants for that portion of the work, stating “...the only thing I was not thrilled about was the fence. You heard what needed to be done from the neighbors’ side, to tighten up. I mentioned that on our last day. I will refund you for that. I agree that it’s not firm and tight.” (Cl. Ex. 4). He also stated, “The crack at the top of the fence wasn’t done by us. We would have no reason

to touch that part of the support. It's the bottom and left side we worked [on] and touched..."

Id. He denied that his work crew caused that damage. The Respondent offered no evidence to prove otherwise. Unfortunately, the original Contract was not itemized, and the Respondent did not provide a suggested dollar amount for the refund of the fence work he offered. The Claimants offered into evidence an estimate for work by Green Future Construction, which they acknowledged went beyond the scope of the original Contract. Green Future Construction proposed to replace the fence (which it called a "railing"). This business did not provide an alternative estimate for simply straightening it, as was called for in the Contract. Since the Claimants did not provide any estimate to fix the fence as described in the original Contract, there can be no award for this item.

Masonry

The original Contract called for the following work on the masonry in the front of the home (by the door and the front step/path areas), "Fix mortar joints on front brick at step area and left and right of door. Silicone seal bottom of brick. Seal mortar the next day." (Cl. Ex. 2). There were two areas in the front of the home where the Respondent repaired the mortar - the front archway (surrounding the front door) and on the steps and front walkway. In the front archway, the Claimants described the repaired condition in their April 24, 2023 email as "The archway was barely repaired. A large majority of the archway joint is still cracked." (Cl. Ex. 3). Indeed, the photographs of this area (post-repair) show areas that are still cracked, alongside repaired areas. The Respondent did not offer any remedy for this condition in his April 26, 2023 emailed response to the Claimants. Green Future Construction estimated \$2,500.00 to "grind and regROUT the front wall caps and arched way including the top portion close to the keyway in front façade doorway." (Cl. Ex. 6). This proposal went beyond the scope of the original contract, which was just called for the Respondent to "fix" the mortar joints, not redo them

completely. Since the work went beyond the scope of the Contract and there is no estimate in evidence consistent with the original Contract, there will be no award for this portion of the work.

Mr. Engel testified that the mortar on the front step and walkway had become blackened and cracked in some areas over the years. Mr. Engel testified that the homeowner's association expected the Claimants to fix this issue with a result that would be consistent in color. The Contract did not call for color matching to the blackened mortar, nor did it call for the full replacement of the mortar. This second option would have ensured that the mortar was fixed and a consistent color. That, however, would have been a different job and perhaps at a different price than the work the parties contracted for. The contract called for the Respondent to "fix," not redo, all the mortar. The result was not aesthetically pleasing because it left different colored mortar in place and there was a stone residue on the red bricks. Leaving a visible stone residue on the bricks was unworkmanlike; however, the failure to color match was not because mortar typically is not black, and the Contract did not call for it to be in this instance. Green Future Construction provided an estimate of \$4,750.00 to "grind open all the front brick joints to prep for new tuckpointing of entire front walkway and stoop close to door." This work went beyond the scope of the original Contract and there is no alternative estimate that is within the scope of the Contract, so there will be no award for this work item.

I thus find that the Claimants are eligible for compensation from the Fund. Having found eligibility for compensation I must determine the amount of the Claimants' actual loss and the amount, if any, that the Claimants are 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 Claimants intend to retain other contractors to complete or remedy that work. Accordingly, the following formula appropriately measures the Claimants' 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 Claimants paid \$6,880.00 for the entire job to the Respondent. The Contract was not itemized; however, the work on the back stone patio was a significant work item on the Contract, so I will estimate it to constitute a third of the value of the Contract, or \$2,293.33. This amount will be added to the estimate from Green Future Construction of \$12,800.00 for a total of \$15,093.33. The original price of \$2,293.33 will then be subtracted for a result of \$15,322.66.

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.⁴ Bus. Reg. § 8-405(e)(1), (5) (Supp. 2023); COMAR 09.08.03.03B(4). In this case, the Claimants' actual loss of \$15,322.66 exceeds the amount paid

⁴ 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").

to the Respondent. Therefore, the Claimants' recovery is limited to the amount paid to the Respondent, \$2,293.33.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimants have sustained an actual and compensable loss of \$2,293.33 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)(c). I further conclude that the Claimants are entitled to recover that amount from the Fund. Bus. Reg. § 8-405(e)(1), (5) (Supp. 2023); COMAR 09.08.03.03B(4).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimants \$2,293.33; 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;⁵ and

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

July 19, 2024
Date Decision Issued

Rachael Barnett

Rachael Barnett
Administrative Law Judge

RAB/emh
#212294

⁵ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 10th day of December, 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.

Robert Altieri

Robert Altieri

***Panel B
MARYLAND HOME IMPROVEMENT
COMMISSION***