

IN THE MATTER OF THE CLAIM	* BEFORE DOUGLAS E. KOTEEN,
OF MORRIS A. SIMMS & L.	* AN ADMINISTRATIVE LAW JUDGE
ELIZABETH WILSON,	* OF THE MARYLAND OFFICE
CLAIMANTS,	* OF ADMINISTRATIVE HEARINGS
AGAINST THE MARYLAND HOME	*
IMPROVEMENT GUARANTY FUND	*
FOR THE ALLEGED ACTS OR	*
OMISSIONS OF KENNETH	*
WALDMAN, T/A FLOOR GEM	*
SERVICES, INC.,	* OAH No. DLR-HIC-02-15-30445
RESPONDENT	* MHIC No. 14 (90) 1317

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On May 13, 2014, Morris A. Simms & L. Elizabeth Wilson (Claimants) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$3,552.39 in alleged actual losses suffered as a result of a home improvement contract with Kenneth Waldman, trading as Floor Gem Services, Inc. (Respondent).

I held a hearing on February 18, 2016 at the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). The Claimant Morris Simms was present and represented himself. The Claimant L. Elizabeth Wilson was not

present due to illness. The Respondent was present and represented himself. Kris King, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014), Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02, and 28.02.01.

ISSUES

1. Did the Claimant sustain an actual loss compensable by the Fund as a result of any acts or omissions committed by the Respondent?
2. If so, what is the amount of that loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on the Claimants' behalf:

- CL Ex. 1. Letter from Claimant Wilson, undated; which includes Letter from Plumber Robert Ehrhardt, undated;
- CL Ex. 2. Check from Claimants to Ambient Bamboo Floors, No. 2330, dated January 31, 2013; and Checks from Claimants to Floorgem, No. 2331, dated February 12, 2013; No. 2341, dated March 18, 2013; and No. 2366, dated June 27, 2013; and
- CL Ex. 3-7. Five Photographs of basement floor, dated November 12, 2015.

I admitted the following exhibits on the Respondent's behalf:

- Resp. Ex. 1. Invoice from Respondent to Claimants, dated January 28, 2013;
- Resp. Ex. 2. Invoice from Respondent to Claimants, dated March 15, 2013;
- Resp. Ex. 3. Emails from Claimant Wilson to Respondent, dated March 18, 2013; from Davon Fowlkes to Respondent and Respondent to Davon Fowlkes, dated July 8, 2014; and Job Statement from Leandro Carvalho, undated.

I admitted the following exhibits on behalf of the Fund:

- GF Ex. 1. Notice of Hearing, dated December 1, 2015, for February 18, 2016 hearing;
- GF Ex. 2. MHIC Hearing Order, dated September 4, 2015;

- GF Ex. 3. MHIC I.D. Registration and Professional License History, dated February 16, 2016;
- GF Ex. 4. Home Improvement Claim Form from Claimants, dated August 13, 2015; and
- GF Ex. 5. Letter from the MHIC to the Respondent, dated August 20, 2015.

Testimony

The Claimant Morris A. Simms (Claimant Simms) testified on behalf of the Claimants. The Respondent testified on his own behalf and presented testimony from Leandro Carvalho, a subcontractor from American Floor Solutions; and Davon L. Fowlkes, President, DMF Stone Restoration. The Fund presented testimony from the Respondent.

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 Registration No. 83658. The Respondent has been continuously licensed with the MHIC since July 10, 2002. His current license is scheduled to expire on July 10, 2016. (GF Ex. 3).
2. On or about January 28, 2013, the Claimants entered into a contract with the Respondent for him to perform renovation work in the basement of their residence. The Respondent contracted to install 306 square feet of bamboo flooring in the Claimants' basement, 100 lineal feet of white shoe molding, and 96 lineal feet of primed white baseboards. The Claimants were required to prepay for all materials, and provide one-third of the labor cost with the balance due upon completion. The total labor cost for this work was \$1,295.86. (Resp. Ex. 1).
3. The Respondent installed the bamboo flooring in the Claimants' basement and completed this work on or about February 8, 2013. The Claimants were satisfied with the Respondent's workmanship for the installation of the bamboo flooring. Leandro Carvalho (Carvalho), a subcontractor with American Floor Solutions, worked with the Respondent on the flooring work.

4. On or about March 15, 2013, the Claimants entered into another contract with the Respondent, which called for the Respondent to remove and dispose of 163 square feet of laminate and vinyl flooring, and install 163 square feet of 3/4" by 2-1/4" of unfinished select wood flooring on the main floor of the Claimants' residence. The contract also called for the Respondent to remove and reinstall a toilet, repair 34 boards in the kitchen and family room, and sand, stain, and finish 443 square feet of wood floors. This included one coat of stain to match the stairs and three coats of satin oil polyurethane. The contract also included the installation of 60 lineal feet of primed white shoe molding in the kitchen, hallway, and powder room. (Resp. Ex. 2).

5. The Claimants were required to prepay for all materials, and provide a one-third deposit on the labor with the balance due upon completion of the work. The total cost for this additional contract was \$3,300.00. The itemized cost for the removal and reinstallation of the toilet was \$75.00. (Resp. Ex. 2).

6. The Claimants accepted the Respondent's contracts for the main level hardwood flooring work and the basement bamboo flooring work over the Internet.

7. Beginning on or about March 18, 2013, the Respondent worked for several days installing the hardwood flooring on the main level of the Claimants' residence. Carvalho also worked with the Respondent on this job.

8. The Respondent instructed the Claimants to write a check directly to Ambient Bamboo Floors (Ambient) for the bamboo flooring materials. On January 31, 2013, the Claimants paid \$1,556.59 to Ambient for the bamboo floor materials. (CL Ex. 2). The Claimants also paid the Respondent \$1,295.80 on February 12, 2013 for the labor associated with the bamboo flooring work. (CL Ex. 2). The Claimants paid a total of \$2,852.39 for labor and materials associated with the bamboo flooring work.

9. On March 18, 2013, the Claimants paid the Respondent \$3,300.00 for the hardwood flooring work on the main level. (CL Ex. 2). The Claimant did not challenge the Respondent's workmanship regarding installation of the wood flooring and shoe molding on the main level, with one exception.

10. In the course of installing the wood flooring on the main level, the Respondent removed and reinstalled the toilet in the powder room on the main level. The toilet was not reinstalled correctly. It was loose and unstable, was improperly raised above the floor, and was not properly secured to the floor or sealed with caulk upon re-installation. In addition, the tank of the toilet was cracked. (CL Ex. 1).

11. When Claimant Simms used the toilet for the first time after the Respondent removed and reinstalled the toilet, Claimant Simms observed that the toilet was unstable and wobbled. Claimant Simms did not observe any leaks at that time, but the Claimants subsequently discovered that the toilet was leaking after the Respondent completed installation of the hardwood floor on the main level.

12. The leaking toilet caused flooding on the main level in the powder room, on the walls below the powder room, and in the basement. Water from the leaking toilet damaged the newly-installed bamboo flooring in the basement.

13. The Claimants did not experience any problems with the toilet leaking before the Respondent removed and reinstalled the toilet in March 2013.

14. The Claimants did not notify the Respondent concerning the leaking toilet for several weeks after they discovered it. In the meantime, the Claimants contacted a plumber, Robert Ehrhardt (Ehrhardt) to inspect the toilet. Ehrhardt discovered that the toilet was installed improperly, was cracked, and was leaking. As a result, Ehrhardt replaced the damaged

toilet with a new one in April 2013. The Claimants did not experience any further leaks with the toilet after the plumber performed the repair work in April 2013.

15. The Respondent did not have an opportunity to examine the toilet while it was leaking water.

16. The Claimants requested that the Respondent return to examine the hardwood floor in the powder room and the bamboo floor in the basement due to the water damage.

17. Ehrhardt removed the new toilet so the Respondent could replace a section of the hardwood floor near the toilet where it was damaged by water. After the Respondent completed this repair, Ehrhardt reinstalled the new toilet. Carvalho also worked on the repair of the hardwood floor.

18. The Respondent also examined the Claimants' basement and determined that the newly-installed bamboo floor was not salvageable due to the water damage.

19. The Respondent offered to remove the damaged bamboo floor and reinstall new bamboo flooring in the basement at no cost to the Claimants for both labor and materials .

20. The Claimants rejected the Respondent's offer to install a new bamboo floor in the basement at no charge. Instead, they requested that the Respondent provide waterproof polished concrete flooring at no additional charge. The Respondent told the Claimants that he could not do this work for free, but would charge an additional \$700.00 to provide the polished concrete flooring. The Claimants agreed to the additional charge and the Respondent agreed to remove the damaged bamboo flooring and provide the Claimants with a polished concrete floor in their basement. The parties did not prepare or execute a written contract regarding the polished concrete flooring work.

21. The Respondent told the Claimants that he could not assure that the floor would have a uniform appearance after the polished concrete was applied due to pre-existing areas

of patched concrete and “ghosting” from the outline of the tiles that had previously covered the basement floor. (CL Ex. 3-7).

22. The Respondent, with the assistance of Carvalho, removed the damaged bamboo flooring from the basement.

23. The Respondent hired a subcontractor, Davon Fowlkes, from DMF Stone Restoration, to perform the polished concrete flooring work. This work was completed on or about June 20, 2013. The Claimants paid the Respondent \$700.00 on June 27, 2013 after the polished concrete flooring work was complete. (CL Ex. 2).

24. After the concrete flooring work was complete, the Claimants were dissatisfied with the imperfections that remained visible on the concrete floor. These imperfections included pre-existing concrete patchwork and ghosting from the tiles that had previously covered the basement floor. The imperfections could not be removed with the application of a polished concrete surface.

25. The Claimants contacted the Respondent in June 2013 to request that he fill some holes in the concrete floor created by carpet tack strips. The Respondent contacted Fowlkes regarding the Claimants’ concerns about the holes. Fowlkes returned and filled the holes with epoxy.

26. The only way the visible imperfections in the concrete could be removed would be to install a thin concrete layer for an additional charge, or perhaps with a coat of stain. The parties never contracted for the Respondent to cover the concrete imperfections with a concrete layer or with stain.

27. The Claimants requested that the Respondent refund their money or correct the problem with no additional charge. The Respondent did not refund any money to the Claimants and did not make any further repairs.

28. The Claimants did not have any further work done to the basement floor and have no plans at this time to hire another contractor to make repairs to the basement floor. The Claimants did not obtain a written estimate from any other flooring company to make any repairs to the concrete floor .

29. On August 13, 2015, the Claimants filed a claim with the MHIC, requesting reimbursement in the amount of \$3,552.39 from the Fund. (GF Ex. 4).

DISCUSSION

Legal Background

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) (2015). *See also* COMAR 09.08.03.03B(2) (“actual losses . . . incurred as a result of misconduct by a licensed contractor”). Actual loss “means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.” Bus. Reg. § 8-401 (2015).

Section 8-405 of the Business Regulation Article of the Maryland Annotated Code provides:

- (d) The Commission may deny a claim if the Commission finds that the Claimant unreasonably rejected good faith efforts by the contractor to resolve the claim.

Md. Code Ann., Bus. Reg. § 8-405(d) (2015). Section 8-405(e)(3) of the Business

Regulation Article also provides that the Commission may not award from the Fund an amount for, among other things, consequential damages.

Section 8-501 of the Business Regulation Article provides that each home improvement contract shall be in writing and legible, be signed by the parties, include the license number of the contractor, the approximate dates for the performance of the home improvement, the description of the home improvement to be performed and the materials to be used, and any other matters on which the parties lawfully agree, among other items. This section also provides,

however, that a home improvement contract that does not comply with the contractual provisions is not invalid merely because of noncompliance. Md. Code Ann., Bus. Reg. § 8-501 (2015).

Analysis

The evidence establishes that the Respondent was a licensed home improvement contractor at the time that he contracted with the Claimants to perform flooring work in their home. There are no *prima facie* statutory impediments barring the Claimant from recovering compensation from the Fund (being related to the Respondent, recovering damages from the Respondent in a court proceeding, or owning more than three residential properties). Md. Code Ann., Bus. Reg. §§ 8-405(f)(1), (2) (2015).

The Respondent submitted into evidence an invoice for the installation of 306 square feet of bamboo flooring, as well as molding and baseboards, in the basement of the Claimants' home, that was dated January 28, 2013. (Resp. Ex. 1). Although this invoice was not signed by the parties, Claimant Simms testified that the parties entered into a contract online for the performance of this work. The invoice set forth in detail the scope of the work to be performed and provided that the contract was for labor only. The invoice provided that the Claimants were responsible for purchasing the materials for the bamboo flooring. The invoice also provided that the cost of labor for the installation of the bamboo flooring, molding, and baseboards was \$1,295.86. (Resp. Ex. 1). The Claimants paid the Respondent \$1,295.80 on February 12, 2013 for the labor portion of this work. (CL Ex. 2).¹ The Claimants made an additional payment of \$1,556.89 directly to Ambient Bamboo Floors on January 31, 2013 for the cost of the bamboo flooring materials. (CL Ex. 2).

Although there was no signed contract in the record that called for the installation of the bamboo floor, I will accept the invoice as evidence of the parties' contractual agreement because

¹ The parties did not explain this minor discrepancy in the amount the Claimant paid, but I find this discrepancy to be *de minimis*.

it accurately sets forth the scope of work, Claimant Simms stated that the parties entered into a contract for this work, and the Respondent did not dispute this testimony. In fact, it was the Respondent who submitted the invoice into evidence at the hearing, further acknowledging the existence and scope of the parties' contractual agreement. (Resp. Ex. 1).

The evidence established that the Respondent installed bamboo flooring in the Claimants' basement in accordance with the terms of their contract in February 2013. Claimant Simms testified that he was satisfied with the Respondent's work regarding installation of the bamboo floor. There was no evidence presented that this work was performed in an unworkmanlike, inadequate, or incomplete manner.

The parties entered into another contract on or about March 15, 2013 calling for the Respondent to install hardwood flooring on the main floor of the Claimants' residence, to remove and reinstall a toilet in the powder room on the main level of the home, and perform other related work. (Resp. Ex. 2). The Respondent submitted an invoice regarding this work that was again not signed by the parties. Claimant Simms testified that he also entered into a contract online with the Respondent for the performance of this work. This invoice also set forth in some detail the scope of the work to be performed. For the same reasons addressed above with regard to the January 28, 2013 bamboo flooring work, I will accept the March 15, 2013 invoice as evidence of the parties' contractual agreement regarding installation of the hardwood flooring, the removal and reinstallation of the toilet, and other related work.

The Claimants did not challenge the adequacy of the Respondent's work with regard to the installation of the hardwood flooring on the main level, with one exception. The Claimants contend that the Respondent's work in removing and reinstalling the toilet in the main level powder room was unworkmanlike and inadequate. Furthermore, the Claimants contend that the Respondent's poor work caused the toilet to leak, the hardwood in the powder room around the

toilet to be damaged and require repair, and the bamboo flooring in the basement to be damaged, become unsalvageable, and require replacement.

The Claimants established by a preponderance of the evidence that the Respondent performed the removal and reinstallation of the toilet in an unworkmanlike and inadequate manner. Claimant Simms testified that the first time he used the toilet after the Respondent reinstalled it, it was unstable and wobbled. The Claimants subsequently discovered that the toilet was leaking and had caused damage to the floor around the toilet in the powder room, the walls below the powder room, and the basement floor. After discovering the leaking toilet, the Claimants promptly contacted a licensed plumber, Robert Ehrhardt, to repair the toilet.

At the hearing, Claimant Simms submitted a typewritten statement from Claimant Wilson, which set forth her summary of the alleged problems with the Respondent's performance of the home improvement under the contracts. Included within Claimant Wilson's statement was the restatement of a letter from plumber Ehrhardt that described what he observed when he came to the Claimants' residence to repair the toilet. (CL Ex. 1). Counsel for the Fund, Kris King, argued that Claimant Wilson's statement should not be admitted into evidence because it contained the opinions of Claimant Wilson and the opinions of Ehrhardt, who was not present to testify, and had not been qualified as an expert in plumbing work. I admitted the statement into evidence and found that it offered probative evidence because it included descriptions by Ehrhardt regarding what he observed when he came to the Claimants' home to repair the toilet, and the information provided in Ehrhardt's letter was essentially unrefuted. I also admitted into evidence Claimant Wilson's statement because her portion of the written statement provided the descriptions and characterizations of a lay individual who was one of the Claimants in this matter, and it also provided some probative evidence. The weight to be

afforded to Claimant's Exhibit 1 was still a proper determination that I could make as the trier of fact.

Based on my assessment of Ehrhardt's detailed, reliable, and essentially unrefuted description, I conclude that the Respondent and/or his subcontractors failed to properly reinstall the toilet after they removed it to enable the Respondent to complete the hardwood flooring in the main level powder room. Ehrhardt explained that the toilet was not properly secured to the floor and was not sealed with caulk. The toilet was leaking from the tank into the basin. He also found that the toilet was improperly unsecured from the floor and improperly raised to the height of the new floor, and was not anchored properly, which changed the degree of flow and caused the toilet to wobble. Ehrhardt also discovered a large crack in the tank, which was causing the leak. As a result of this damage, Ehrhardt determined that the toilet needed to be replaced. (CL Ex. 1). Ehrhardt installed a new toilet.

Claimant Simms testified that he had no problems with the toilet and that the toilet was not leaking before the Respondent removed and reinstalled it in March 2013. He also testified that he had no further problems with the toilet leaking after the plumber installed a new toilet in April 2013.

The original contract for the installation of the hardwood flooring on the main level included the itemized cost of \$75.00 for removal and reinstallation of the toilet. (Resp. Ex. 2). The Claimants did not submit any evidence of the cost they incurred for the repair work performed by the plumber Ehrhardt on the toilet. In her written statement, Claimant Wilson stated that the Claimants were also seeking to recoup the \$75.00 charge for the unworkmanlike reinstallation of the toilet. She also explained in her statement that the Claimants contacted the plumber because they did not want the Respondent or his workers to perform any further work on the toilet, based on the evidence of their poor work in this regard. (CL Ex. 1). This

determination was reasonable because the Claimants had already discovered, when they tried to use the toilet after the Respondent had reinstalled it, that it was unstable and wobbly.

The Respondent and his subcontractor, Leandro Carvalho, claimed that the Respondent was not responsible for the problems with the toilet. Carvalho stated that the toilet was working fine after he removed and reinstalled it. The Respondent and Carvalho also claimed they never saw the toilet until the plumber had replaced it. However, I find the testimony of Claimant Simms that he never had any problems with the toilet until the Respondent removed and reinstalled it, and the detailed written description of the licensed plumber regarding the problems he observed with the toilet when he came to repair it, to be more logical and persuasive than the testimony of the Respondent and Carvalho. Accordingly, I conclude that a preponderance of the evidence presented in this record establishes that the Respondent performed the toilet reinstallation work in an unworkmanlike and inadequate manner, which damaged the toilet, caused it to leak, and caused water damage in the Claimants' residence. I also conclude that the Claimants' decision to bypass the Respondent and call a licensed plumber directly to perform the repairs to the toilet was reasonable under the circumstances.

The Claimants subsequently discovered that the leaking toilet had damaged the hardwood floor around the toilet and the bamboo flooring in the basement. The Claimants did not present any evidence of the cost to repair the damaged hardwood on the main level. Presumably, but not clear from the record, the Respondent repaired or replaced hardwood flooring around the toilet at no additional cost. When the Respondent examined the bamboo floor in the basement, he discovered that the bamboo flooring was so badly damaged that it was unsalvageable.

Under section 8-405(e)(3) of the Business Regulation Article, a claimant is not entitled to any award from the Fund for an amount for consequential damages that arise from home improvement work. When the toilet leaked as a result of the Respondent's poor work in

reinstalling the toilet, any damages that were caused by the leaking toilet are considered consequential damages, which are not recoverable from the Fund. Therefore, any charges that arose from damages caused by the leaking toilet, including repairs to the hardwood floor on the main level, and repairs and changes to the basement floor, can be considered in the nature of consequential damages which are expressly barred from recovery from the Fund under section 8-405(e)(3) of the Business Regulation Article. Accordingly, under one legal theory of this case, the inquiry can end here and the Claimants would not be entitled to any award from the Fund because all subsequent charges, including any repairs or changes made to the basement floor, are in the nature of consequential damages which cannot be awarded from the Fund. Under this theory, the Claimants are entitled to no recovery from the Fund for any further work performed in the basement, which work all arose due to the Respondent's poor work on the toilet and the subsequent severe leakage and water damage.

However, under an alternate theory of this case, the parties entered into a new contract in which the Respondent agreed to provide the Claimants with a polished concrete floor in the basement at a cost of \$700.00. Under this theory, I shall analyze the facts to determine whether the Claimants are entitled to an award from the Fund based on an unworkmanlike, inadequate or incomplete home improvement arising from the polished concrete work performed in the Claimants' basement.

Initially, when the Respondent determined that the bamboo flooring in the basement was unsalvageable, the Respondent offered to remove and reinstall the bamboo flooring at no charge to the Claimants for either labor or materials. The Claimants rejected this offer. Counsel for the Fund argued that this decision by the Claimants was an unreasonable rejection of a good faith effort by the Respondent to resolve the claim and, therefore, that the Claimants should be barred from any award from the Fund. Had the story ended there, I would have agreed with the Fund's

position. The Respondent offered to make the Claimants whole by removing the damaged bamboo floor and reinstalling a new bamboo floor in the basement at no charge to the Claimants. This offer was especially generous because the original contract calling for installation of the bamboo flooring in the basement was a labor only contract. Under this contract, the Claimants were responsible for purchasing the bamboo flooring materials from a flooring supplier. The Claimants did purchase the bamboo flooring materials directly from Ambient Bamboo Floors. (CL Ex. 2). The Claimants paid the Respondent only for the labor costs that arose from the installation of the bamboo flooring, the molding, and the baseboards. (CL Ex. 2; Resp. Ex. 1). The Claimants' decision to reject the Respondents' offer to make them whole and restore the bamboo floor to its original new undamaged condition, consistent with the January 28, 2013 contract, was unreasonable.

However, the story does not end there. The parties continued to negotiate and reached a new agreement for the Respondent to install a polished concrete floor in the basement at a cost of \$700.00 to replace the bamboo floor. Therefore, under these additional circumstances, I do not find that the Claimants' rejection of the Respondent's reasonable offer establishes a separate basis to deny the Claimant's request for an award from the Fund.

The Claimants apparently desired to obtain a waterproof floor in their basement. As a result, they requested that the Respondent provide a polished concrete floor at no additional cost. The Respondent explained that he could not provide this floor for no charge, but would agree to provide a polished concrete floor at a cost of \$700.00. The parties did not enter into a written contract for the performance of this work.² Therefore, there are no additional terms in writing to describe the scope of the work. Under section 8-501(b) of the Business Regulation Article, a

² Although Claimant Simms claimed that he signed a contract online for this polished concrete flooring work, neither party produced a written contract or invoice for this work at the hearing. The Respondent acknowledged that the parties did not have a written contract for the polishing work. Accordingly, I conclude that the parties did not prepare or enter into a written contract for the polished concrete work.

home improvement contract shall be in writing. However, section 8-501(a) provides that a home improvement contract that does not comply with this section, which includes the requirement for a written contract, is not considered to be invalid merely due to this noncompliance. Md. Code Ann., Bus. Reg. § 8-501(a), (b) (2015).

Therefore, I find that the evidence establishes that the parties reached an oral agreement for the Respondent to remove the damaged bamboo flooring and install a polished concrete floor in the Claimants' basement at a cost of \$700.00. This work was performed in June 2013 and the Claimants paid the Respondent \$700.00 on June 27, 2013 in accordance with their oral agreement. (CL Ex. 2).

Claimant Simms stated that he was dissatisfied with the polished concrete flooring work. He argued that he expected to receive a beautiful polished concrete floor similar to the photographs on the Respondent's website. He contends that he was not satisfied with the polished concrete floor that the Respondent installed because the pre-existing flaws and unsmooth areas in the concrete floor were visible, and the floor did not have a uniform color. The testimony of Claimant Simms was inconsistent with regard to the results that he expected to receive from the polished concrete flooring work. Claimant Simms claimed that the Respondent told him he would have a beautiful concrete floor without flaws. However, he subsequently acknowledged that it was his perception that the flaws would not be visible after the polished concrete flooring was applied. He also admitted that the Respondent never told him that the polished concrete floor would resemble the pictures on his website.³

Claimant Simms stated that after the Respondent completed the polished concrete work, Simms told him that he was dissatisfied with the work. Claimant Simms stated that the

³ The Claimants also alleged that the Respondent misled them about whether there were traces of asbestos on their concrete basement floor. The evidence failed to establish that the Respondent intentionally misled the Claimants, the evidence failed to establish definitively the precise nature of the black substance that was present on the basement floor, and the Claimants failed to prove that this issue materially affected the issues determined in this proceeding.

Respondent then told him that to address his concerns with the floor would require the application of a concrete overlay, which would require an additional charge beyond the \$700.00 that was already incurred. Claimant Simms did not want to pay any additional charges and asked the Respondent to refund his money or correct the problem for no additional charge. The parties did not reach an agreement for the performance of any further work, and the Respondent did not refund the Claimants' money. Claimant Simms acknowledged that he is not seeking another contractor to perform any further work at this time on the polished concrete floor.

The Respondent stated that he did not tell the Claimants that the polished concrete floor would look like the photographs on his website. The Respondent also stated that he told the Claimants before the work was performed that he could not assure a uniform appearance in the polished concrete floor due to the pre-existing ghosting and patches. The Respondent explained that the "scars" and imperfections in the concrete could not polish out. He explained further that the only way to remove the scars in the concrete would be to apply a thin layer of concrete overlay to the existing concrete floor. He indicated that there was no agreement with the Claimants for him to provide an extra layer of concrete for an additional charge. The Respondent stated that he told the Claimants numerous times that the right thing to do was to replace the damaged bamboo floor with a new bamboo floor and that he offered to do that free of charge. He stated that the Claimants rejected this offer because they wanted a waterproof floor. He indicated that this was why he agreed to provide the polished concrete floor.

Davon Fowlkes, a subcontractor with DMF Stone Restoration, performed the polished concrete work on the Claimants' concrete basement floor. He explained that he applied a polish, but not a stain, to the existing concrete floor. He explained that the polished concrete process could not make the Claimants' concrete basement floor look like a new floor, could not remove the imperfections, and could not leave the floor with a uniform appearance. Fowlkes stated that

he told Claimant Wilson that he could not remove the remaining imperfections from the concrete floor. He stated that the Claimants requested that the Respondent return and touch up the holes in the concrete floor that were caused by carpet strips. Fowlkes stated that he did return and apply epoxy to fill the holes.

The burden of proof is on the Claimants to prove that the Respondent performed the polished concrete work in an unworkmanlike, inadequate, or incomplete manner. The Claimants did not present a written contract regarding the polished concrete work, so they failed to offer a written document describing the scope of work. I conclude by a preponderance of the evidence in this record that the parties reached a verbal agreement for the Respondent to provide a waterproof polish over the existing concrete floor at a cost of \$700.00. This is exactly what the Respondent provided. The Claimants did not prove that the Respondent agreed to apply a thin layer of concrete or stain to cover up the imperfections on the existing concrete floor. In fact, Claimant Simms admitted that a concrete overlay was not discussed until *after* the polished concrete flooring work was completed. When the Respondent told Simms that a concrete overlay would cost more money, Simms stated that he did not want to pay the Respondent any more money. This demonstrates that the parties never reached an agreement, before or after the polishing work was performed, for the Respondent to cover the flaws in the concrete floor with a concrete overlay.

Claimant Simms also admitted that the Respondent never told him that the polished concrete would resemble the photographs on the Respondent's website. The evidence demonstrates that this was based only on Simms' perception, but not on any promise the Respondent made. The Claimants have failed to prove that the Respondent contracted to remove the flaws and imperfections from the concrete floor through application of the waterproof polish to the concrete floor. The Claimants contracted to receive a waterproof polish coating over top

of the existing concrete floor in the Claimants' basement. That is what the Respondent provided. The Claimants have failed to prove based on the evidence in this record that the Respondent performed the polished concrete flooring work in an unworkmanlike, inadequate or incomplete manner. Therefore, the Claimants' claim for an award from the Fund based on the Respondent's performance of the polished concrete flooring work is denied.

Calculation of Actual Loss

For the reasons addressed above, I have concluded that the Claimants have proven that the Respondent performed home improvement work in an unworkmanlike or inadequate manner only with regard to the poor work in removing and reinstalling the toilet in the powder room on the main level of the Claimants' home.

Therefore, the Claimants are entitled to an award from the Fund for an actual loss that arose from the Respondent's unworkmanlike home improvement work in reinstalling the toilet. An actual loss is defined as "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 (2015). The Claimants are entitled to reimbursement for the actual loss that arose from repairing or replacing the toilet. As discussed above, any other costs that arose from the damage caused by the leaking toilet are not recoverable from the Fund because they are barred as consequential damages. Md. Code Ann., Bus. Reg. § 8-405(e)(3) (2015).

Having found eligibility for compensation, I will now address the amount of the award, if any, to which the Claimant is entitled. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. COMAR 09.08.03.03B(1). The MHIC regulations provide three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). The following formula offers a traditional measurement to determine the amount of the actual loss in this case.

(c) 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).

In this case, the Claimants solicited a plumber, Robert Ehrhardt, to repair the poor work done by the Respondent's subcontractor when reinstalling the toilet. When the plumber observed the Respondent's poor work in reinstalling the toilet, and discovered that the toilet was cracked and leaking, he determined that it was necessary to install a new toilet. However, the Claimants provided no evidence during the hearing of any costs associated with the plumber's work. Therefore, I am unable to calculate the Claimants' actual loss under the traditional formula set forth above in COMAR 09.08.03.03B(3)(c).

The regulations governing the calculation of awards from the Fund also permit me to determine that a particular claim requires a unique measurement. COMAR 09.08.03.03B(3). I find that the Claimant suffered an actual loss as a result of the unworkmanlike home improvement work performed by the Respondent in reinstalling the toilet. However, because the Claimants have failed to establish the plumber's cost in replacing and installing a new toilet, I conclude that a unique measurement is appropriate to determine the Claimants' actual loss arising from the Respondent's poor work in reinstalling the toilet.

The March 15, 2013 contract between the Respondent and Claimants sets forth the itemized cost for removing and reinstalling the toilet at \$75.00. (Resp. Ex. 2). I conclude that the Claimants received no value from this work. Therefore, I conclude that the Claimants' actual

loss resulting from the Respondent's unworkmanlike toilet work is \$75.00. For the reasons addressed above, I conclude that the Claimants have failed to establish that the Respondent performed any other work in an unworkmanlike, inadequate, or incomplete manner.

In accordance with the formula set forth in the regulations, as modified by the unique measurement explained above, I conclude that the Claimants' actual loss as a result of the acts or omissions of the Respondent in performing unworkmanlike and inadequate home improvement work under the contracts addressed above is \$75.00. Md. Code Ann., Bus. Reg. § 8-405 (2015).

PROPOSED CONCLUSION OF LAW

I conclude that the Claimants have sustained an actual and compensable loss of \$75.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guarantee Fund award the Claimants \$75.00; and

ORDER that the Respondent is ineligible for a Maryland Home Improvement Commission license until the Respondent reimburses the Guaranty Fund for all monies disbursed under this Order, plus annual interest of at least ten percent as set by the Maryland Home Improvement Commission. Md. Code Ann., Bus Reg. § 8-401(a) (2015); COMAR 09.08.01.20; and

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

May 18, 2016
Date Decision Issued

DEK/da
162433

Signature on File

Douglas E. Koteen
Administrative Law Judge

PROPOSED ORDER

WHEREFORE, this 29th day of June, 2016, 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