

<p>IN THE MATTER OF THE CLAIM</p> <p>OF LOUIS F. NATALE,</p> <p>CLAIMANT</p> <p>AGAINST THE MARYLAND HOME</p> <p>IMPROVEMENT GUARANTY FUND</p> <p>FOR THE ALLEGED ACTS OR</p> <p>OMISSIONS OF MAGOMED VELIEV,</p> <p>T/A EMN CONSTRUCTION, LLC,</p> <p>RESPONDENT</p>	<p>* BEFORE LOUIS N. HURWITZ,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>*</p> <p>*</p> <p>*</p> <p>* OAH No.: DLR-HIC-02-14-38291</p> <p>* MHIC No.: 14 (75) 795</p>
--	---

* * * * *

PROPOSED DECISION

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

STATEMENT OF THE CASE

On September 9, 2014, Louis F. Natale (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$3,195.00 in alleged actual losses suffered as a result of a home improvement contract with Magomed Veliev, t/a EMN Construction, LLC (Respondent). In a letter to the MHIC, dated September 15, 2014, the Claimant amended his claim to \$1,500.00.

I held a hearing on March 31, 2015 at the Office of Administrative Hearings (OAH) in Kensington, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). Hope Sachs,

Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Claimant represented himself. The Respondent was also present and represented himself.

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 the Respondent's acts or omissions?
2. If so, what is the amount of that loss?

SUMMARY OF THE EVIDENCE

Exhibits

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

- GF Ex. 1 - Notice of Hearing, dated February 4, 2014, and Hearing Order, dated October 24, 2014
- GF Ex. 2 - Licensing History of Respondent, March 17, 2015
- GF Ex. 3 - Letters (two) from Joseph Tunney, Chairman, MHIC, to the Respondent, dated September 9, 2014 and September 18, 2014, with attached Home Improvement Claim Form, received by the MHIC on September 9, 2014; and letter from the Claimant to the MHIC, dated September 15, 2014

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

- Cl. Ex. 1 - Information sheet/checklist from the MHIC; Complaint Form, undated; flier from the Respondent titled "Renovation and Remodeling Services," undated; contract with Respondent, signed by the Respondent on August 21, 2013 (Contract); copies of carbonized check receipts, dated August 20, 2013 (\$450.00), September 7, 2013 (\$600.00), and September 7, 2013 (\$450.00)

- Cl. Ex. 2 - Chronology of events from August 20, 2013 to February 4, 2015
- Cl. Ex. 3 - MHIC Order to the Respondent, dated February 4, 2014
- Cl. Ex. 4 - Letter from the MHIC to the Claimant, dated February 25, 2014
- Cl. Ex. 5 - Letter from the MHIC to the Claimant, dated April 28, 2014
- Cl. Ex. 6 - Information sheet/checklist from the MHIC; Complaint Form, dated August 5, 2014; proof of mailing, including United States Postal Service (USPS) receipt, dated August 8, 2014, and certified mail receipt, dated August 8, 2014; MHIC Claim Form, dated August 6, 2014; the Respondent's Money Mailer ad/coupon; and Estimate from Herrera Construction, dated July 15, 2014
- Cl. Ex. 7 - Email from Kim Rosenthal, DLLR, to the Respondent, dated August 21, 2014
- Cl. Ex. 8 - MHIC Order to the Respondent (complaint # 177 2015), dated August 22, 2014
- Cl. Ex. 9 - Copy of an envelope addressed to the Claimant from the Respondent; letter from the Respondent to the MHIC, dated September 2, 2014; MHIC Order to the Respondent, dated February 4, 2014; letter from the MHIC to the Claimant, dated April 28, 2013;¹ Complaint Form, received by the MHIC on January 30, 2014; letter from the Respondent to the MHIC, dated February 17, 2014; Contract with Respondent, signed by the Respondent on August 21, 2013; copies of checks issued to the Respondent on August 20, 2013 (\$450.00) and September 7, 2013 (two), one for \$450.00 and one for \$600.00; Certificate of Insurance, dated April 15, 2014
- Cl. Ex. 10 - Emails between the Claimant and Kim Rosenthal, MHIC, dated September 8, 2014, and an email from Kim Rosenthal to the Respondent, dated August 21, 2014
- Cl. Ex. 11 - Letter from the MHIC to the Claimant, dated October 24, 2014, with attached Notice to Guaranty Fund Claimants and Guaranty Fund Workshop information, both undated
- Cl. Exs. 12-17 - Photographs

The Respondent did not submit any exhibits for inclusion into evidence.

¹ The date appears to be a typographical error. From the context of the events and documents in this case, the correct date of the letter is April 28, 2014.

Testimony

The Claimant testified and presented the testimony of Elizabeth Natale, his wife.

The Respondent testified on his own behalf.

The Fund presented no 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 numbers 01-97512 and 05-126129.

2. On or about August 20, 2013, the Claimant entered into a Contract with the Respondent (Contract) for the following home improvement work² at his residence located at 3695 Childress Terrace, Burtonsville, Maryland:

- a. [fill] concrete under landing area;
- b. fix handrail and apply paint;
- c. rise two steps;
- d. cut concrete and [fill] concrete;
- e. fix [rotted] door bottom and [install] 2 [door] pumps;
- f. contractor will provide all materials and perform labor.

3. The price of the above project was \$1,250.00 (Cl. Ex. 1).

4. The parties agreed to modify the above Contract to include a \$250.00 charge for the Respondent to provide an additional stair handrail,³ making the total contract price \$1,500.00.

² The description of the work to be performed is taken verbatim from the Contract.

³ The Contract refers to this as a second contract, but I am considering it as part of the same Contract between the parties.

5. The Contract did not mention start or completion dates.
6. On August 20, 2013, the Claimant paid the Respondent a deposit of \$450.00.
7. On September 7, 2013, the Respondent finished working on the project. The Claimant asked the Respondent why the concrete surface looked “rough,” and the Respondent replied by stating that a rough surface helps prevent people from slipping on the surface when it is wet.
8. The Claimant registered no other objections to the project on September 7, 2013 and paid the Respondent the balance of the amount due, \$1,050.00, which he separated into two checks.
9. As part of the project, the Respondent applied concrete on the property’s steps and landing area. The concrete applied to the steps was to raise the height of the steps. The concrete on the landing was to patch concrete that was pockmarked in various places. Rather than tearing out the existing concrete at a cost of about \$3,500.00, the Claimant elected the option of having the Respondent patch the concrete at considerably less expense.
10. The Respondent did not inform the Claimant that applying salt and/or chemical agents to the concrete surface patched by the Respondent could negatively impact the integrity of the concrete/mortar mix used to patch the landing area.
11. On and after September 7, 2013, the Claimant began noticing problems with the following work performed by the Respondent:
 - a. the two concrete steps which were raised in height were not level;
 - b. the concrete surface of the landing area was rough, instead of being smooth;
 - c. the concrete the Respondent filled in the area near the sidewalk adjoining the Claimant’s home was cracked; and

- d. the Respondent only installed one door pump, instead of the two provided for in the Contract.

12. The Claimant telephoned the Respondent to register his complaints with the workmanship of the project. The Respondent assured the Claimant that he would fix the items, but he did not do so.

13. The Claimant left four to five telephone messages for the Respondent in the fall of 2013, but they were not returned.

14. With the onset of winter and the presence of snow and ice, the Claimant shoveled snow from the landing and applied rock salt and/or chemical agents to the landing in order to combat the elements.

15. By January 2014, the concrete on the landing was peeling considerably, leaving pockmarks and an uneven surface over most of the landing (Cl. Ex. 13).

16. On January 30, 2014, the Claimant filed a complaint with the MHIC, claiming the bottom step is not level, the cement is chipping off the landing, the wrought iron railing is uneven and not painted properly, and the pump on the screen door is inoperable and fell off.

17. In an Order dated February 4, 2014, the MHIC advised the Respondent of the Claimant's complaint and requested a response by February 20, 2014.

18. In a letter dated February 17, 2014, the Respondent responded to the MHIC regarding the Claimant's MHIC complaint.

19. On July 15, 2014, the Claimant obtained an estimate from Herrera Construction in the amount of \$3,195.00 to remove and replace the existing concrete stoop. The scope of the estimate differs from the concrete work contemplated by the Contract between the parties in that it calls for replacing and installing new concrete instead of patching existing concrete.

20. In an Order, dated August 22, 2014, the MHIC again requested a response from the Respondent to the complaint filed by the Claimant.

21. In a letter dated September 2, 2014, the Respondent responded again to the allegations made by the Claimant.

22. On September 9, 2014, the Claimant filed a Fund claim in the amount of \$3,195.00. In a letter dated September 15, 2014, the Claimant revised the amount of his claim to \$1,500.00.

23. The focus of the Claimant's Fund claim became the workmanship problems with the concrete landing surface and one door pump.

24. The Respondent never returned to the Claimant's home and did not perform any further work on the project.

DISCUSSION

An owner may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor." Md. Code Ann., Bus. Reg. § 8-405(a) 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." Md. Code Ann., Bus. Reg. § 8-401 (2015). For the following reasons, I find that the Claimant has proven eligibility for compensation.

The Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimant. Although the language of the Contract was not entirely clear, the parties provided information at the hearing explaining the scope of the Contract. The Contract provided for "filling concrete under the landing area," which I understand to mean patching the

concrete on the landing with a cement mortar mix; fixing and painting the handrail; “rise two steps,” which means raising the height of the two concrete steps; “cut and put concrete,” which means installing concrete near the concrete sidewalk; fixing a rotted door bottom (cutting and replacing wood in the door jamb area), and installing two door pumps. An addition to the Contract provided for the installation of an additional stair handrail. The Contract noted that the Respondent will provide all materials and labor. The total price for all of the work listed above is \$1,500.00.

When the Claimant filed a complaint with the MHIC on January 30, 2014, he raised the following issues: (1) the bottom step is not level; (2) cement is chipping off the porch; (3) the railing is crooked and was not painted properly; and (4) the pump on the screen door does not work and “came off.” The Claimant filed a Fund claim form in August 2014. The Claimant requested \$3,195.00 in his Fund claim, but later amended his claim to \$1,500.00, representing the amount he paid the Respondent. At the hearing, the Claimant noted that the issue here is “the concrete and the one (door) pump” that was not installed.

The Claimant testified that he noticed that the concrete on the landing looked rough and not smooth the day the work was performed and shared the observation with the Respondent, who responded by stating that a rough finish is good, because it will prevent falls. The Claimant further explained that he noticed other problems with the workmanship on the project and made an error when he paid the Respondent in full when the latter finished his work on the job. Over the course of the next several months, the Claimant noted, the surface of the concrete landing continued to pit and crater more significantly, as represented in the photograph identified as Cl. Ex. 13. The Claimant acknowledged that with the onset of the snow and ice that winter brought, he applied rock salt and/or a chemical treatment to the concrete landing.

The Claimant remarked that when he registered complaints with the Respondent shortly after the work was completed, the Respondent agreed to return to the property and remedy those problems. He never returned. The Claimant recalled that after the Respondent had failed to return to fix the problems with his work, he attempted to reach the Respondent on four to five occasions, leaving him messages. Those messages went unreturned.

The Respondent responded to the Claimant's allegations by explaining that the project was a small one in which the Claimant opted for a patchwork approach to filling pockmarks in the concrete landing instead of removing the concrete and installing new concrete. The job also called for raising the height of the two steps, installing a railing, installing some concrete adjacent to the sidewalk, and fixing a door frame. The Respondent noted that he informed the Claimant that a new concrete porch cost \$3,500.00, but the Claimant opted for the less expensive option of patching the existing concrete porch at a cost of \$1,250.00. The railing was added at a cost of \$250.00.

The Respondent denied receiving messages from the Claimant that he did not return. The Respondent denied that he received any messages from the Claimant or even spoke with him by telephone after the work was completed. The Respondent also testified that he instructed the Claimant not to apply any salt or chemicals to the concrete landing. (The Claimant denied ever being given such an instruction.) The Respondent further noted that he brushed the concrete landing at the end of the job, leaving a smooth surface. Lastly, the Respondent wonders why the Claimant would wait until several months after the job's completion to start complaining about the quality of the work performed.

The lack of an expert to render an opinion about the workmanship of a project is not necessarily a shortcoming that is fatal to a claimant's case. Although the Claimant did not

present the report or live testimony from an expert in the area of concrete or general home improvement, he did provide photographs to support his claim. The Claimant testified that the patched concrete surface was rough, even at the work's completion. The Respondent did not dispute that claim. In fact, he reinforced it when he remarked that the roughness was a good thing, because it would prevent slips and falls on the concrete landing. The photograph (Cl. Ex. 13) clearly shows that the concrete surface patching applied by the Respondent had mostly peeled off by February 2014. An expert is not needed to render an opinion that more than five months after a concrete surface has been patched, a workmanlike performance would not result in a cratered and pockmarked concrete surface such as the one depicted in the photograph.

In assessing the evidence, I must make credibility determinations on three matters -- whether the Respondent left the concrete landing with a smooth surface when the job was performed, whether he informed the Claimant not to apply salt or chemical substances to the patched surface, and whether the Claimant left several messages for the Respondent that went unanswered.

As I consider the truthfulness of the parties, I must note that the hearing was a contentious one, characterized by the Respondent's refusal to heed my admonitions about his improper questioning of witnesses, arguing with the Claimant, and repeatedly referring to the Claimant as "Louie." As my pleas about the decorum of the hearing went unheeded, the Respondent suggested that perhaps there exists a "language problem." Observing that the Respondent regularly deals with the public in several facets of his home improvement business, I am convinced that the Respondent's stubborn failure to follow instructions at the hearing to be more of a "listening problem."

Nevertheless, rather than finding that the Respondent's behavior at the hearing makes his testimony unworthy of belief, I note that there are other reasons why I find the Claimant's

testimony to be more credible than the Respondent's on several points. First, the Claimant contacted the Respondent by telephone shortly after the work was performed and complained about the surface being rough. The Respondent does not deny telling the Claimant at some point that a rough surface is good, because it will help prevent falls. Next, I find the Respondent's statement that he warned the Claimant about applying salt or chemicals to the patched concrete surface to be less credible than the Claimant's denial that he was given such a warning. The Claimant, to his credit, did not attempt to conceal that he applied salt or a chemical agent to the concrete porch during the winter. I also find the Respondent's denials that the Claimant ever spoke to him after the day the job was finished or that the Claimant left four to five unanswered messages for the Respondent after the job was completed to be unworthy of belief. I find the Claimant's forthright demeanor and matter-of-fact testimony to be more believable than the Respondent's positions on the points addressed above. The Respondent's behavior at the hearing did not enter into my credibility determination.

The Claimant's claim is focused on the installation of patched concrete to the landing surface, which within months was pitted, flaking, and pockmarked over a large portion of the landing, and the failure to install a second door pump. The Respondent's defense on the concrete surfacing issue is that he performed the concrete patching in a workmanlike manner because he cautioned the Claimant about the application of salt and/or chemical agents to the landing, which is the cause of the flaking concrete. I disagree.

I find that the Respondent provided no such warnings to the Claimant about the dangers of applying salt or chemical agents to the concrete landing. Such a warning that affects the quality of the product is an essential part of performing this job in a workmanlike fashion.

Without such a warning, holding the Claimant responsible for the deterioration of the product is misplaced.

The Claimant also noted that the Respondent was supposed to install two door pumps but only installed one. This point is unrefuted. I cannot comment further on the installation and painting of the railing, because I cannot tell from the photographs whether it was painted properly. With respect to the painting of the door jamb, it is unclear from the Contract whether painting of that area was included in the Contract. The issue regarding the level of the steps is not clearly visible from the photograph and is not supported by any expert testimony. The Claimant stated at the hearing that the focus of his claim remains the issues regarding the concrete and the failure to install one of the door pumps.⁴

On July 15, 2014, the Claimant obtained an estimate from Herrera Construction in the amount of \$3,195.00 to remove and replace the existing concrete stoop; however, the scope of the estimate exceeds the concrete work contemplated by the Contract between the parties. There is also no other estimate in the record relating to the cost of installing a second door pump. No evidence has been presented regarding the value of any materials or services provided by the Respondent. Since no workmanship problems have been established with respect to the railing and the Contract specifically attributed \$250.00 to that portion of the contract, I will assign a value of \$250.00 to the installation of the railing.

I find that the Respondent's work was "unworkmanlike, inadequate, or incomplete." Md. Code Ann., Bus. Reg. § 8-401. I therefore conclude that the Claimant is entitled to recover

⁴ Although the Claimant's complaint included a reference to the railing not being straight and not being painted properly, there is insufficient evidence to support a finding of unworkmanlike performance regarding the railing, even if it was a part of the Fund claim.

compensation from the Fund for an actual loss resulting from acts or omissions by the Respondent. Md. Code Ann., Bus. Reg. §8-405(a).

The next issue is to determine the amount of the Claimant's actual loss. Since the estimate obtained by the Claimant goes well beyond the scope of the Contract at issue, the formula, found at COMAR 09.08.03.03B(3)(c), that addresses the situation where a claimant has solicited or is soliciting another contractor to complete the contract, does not apply here. The more appropriate formula for calculating a Fund award provides in pertinent part as follows:

If the contractor did work according to the contract and the claimant is not soliciting another contractor to complete the contract, the claimant's actual loss shall be the amount which the claimant paid to the original contractor less the value of any materials or services provided by the contractor.

COMAR 09.08.03.03B(3)(b).

Using the above formula, the Claimant's actual loss is \$1,250.00, calculated as follows:

\$ 1,500.00	Amount the Claimant paid the Respondent
<u>\$ - 250.00</u>	Less the value of material or services provided by the Respondent
\$ 1,250.00	The Claimant's actual loss

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$1,250.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401 and 8-405 (2015).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$1,250.00; 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 (10%) as set by the Maryland Home Improvement Commission. Md. Code Ann., Bus. Reg. § 8-411(a) (2010); and

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

Signature on File

June 18, 2015
Date Decision Issued

(

Louis N. Hurwitz
Administrative Law Judge 

LNH/dlm
156467

PROPOSED ORDER

WHEREFORE, this 22nd day of July, 2015, 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.

Michael Shilling

*Michael Shilling
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION