



I held a hearing on November 2, 2016 at the Tayes State Office Building, Annapolis, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). The Claimants appeared without representation. The Respondent appeared without representation. 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 Department's hearing regulations, and the Rules of Procedure of the Office of Administrative Hearings govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2016); Code of Maryland Regulations (COMAR) 09.01.03; COMAR 28.02.01.

### 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 that loss?

### SUMMARY OF THE EVIDENCE

#### Exhibits

I admitted the following exhibits on behalf the Claimants:

- Cl. Ex. 1 - Contract, dated October 3, 2014
- Cl. Ex. 2 - Letter from Claimants to Respondents, dated March 27, 2015
- Cl. Ex. 3a-r - Photographs
- Cl. Ex. 4 - Proposal from Cardigan Tile and Plumbing, Inc., dated April 30, 2015
- Cl. Ex. 5 - Proposal from Heidler, Inc., dated April 14, 2015
- Cl. Ex. 13 - Email exchange between the Claimant and Beth Dunn, September 16, 2014 and March 5, 2015

I admitted the following exhibits on behalf of the Respondent:

- Resp. Ex. 1 - Chronology prepared by American Glass Co., Inc., undated
- Resp. Ex. 2 - Invoice, All Phases Floors, dated February 19, 2015
- Resp. Ex. 3a-o - Photographs

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. 1 - Notice of Hearing, dated
- Fund Ex. 2 - Hearing Order, June 17, 2016
- Fund Ex. 3 - Respondents' Licensing History, November 21, 2016
- Fund Ex. 4 - Claim Form, received at MHIC July 21, 2015
- Fund Ex. 5 - Letter from MHIC to Respondent, August 7, 2016

Testimony

Anish Shah testified on behalf of the Claimants.

Hal Marker, President of Hal C. Marker Company, and Robert Ciccarelli, subcontractor, testified on behalf of the Respondents.

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 4712473. The Respondent operated under the trade name of Hal C. Marker Company, MHIC license number 122097.
2. In September 2014, the Claimants decided to have the bathroom in their master bedroom remodeled.
3. On October 3, 2014, the Claimants and the Respondent entered into a contract (Contract) to remodel the bathroom.
4. The Contract provided that the Respondent would, among other things, replace the existing shower and tub, repair water damage, install a new ceramic tile floor, install new tile shower walls with a marble threshold, install a frameless glass shower door with 3/8 inch clear, tempered glass, install a new light fixture, and paint the bathroom.

5. Under the Contract, the Claimants were to supply all materials and fixtures with the following exceptions: the Respondent was to supply backer board, thin-set, a shower pan, and a drain head.

6. The total Contract price was \$5,366.00.<sup>2</sup>

7. The Claimants paid the Respondent \$4,066.00 under the Contract.

8. The Contract provided that the work would begin on October 9, 2014.

9. Work began on October 9, 2014.

10. The Respondent informed the Claimants that the entire project would take about three weeks.

11. Work on the project progressed slowly. Work on the project occurred only one or two days per week. On some days, the Respondent's workers did not appear as scheduled.

12. The last time work was performed under the Contract was in late February or early March 2015.

13. Throughout the course of the construction, the Claimants frequently informed the Respondent of various problems with the ongoing work.

14. The Respondent corrected some, but not all, of the problems identified by the Claimants.

15. At the time the Respondent ceased work on the project, the following problems existed: tiles stained with paint and grout; grout uneven and containing gaps and holes; faucets installed incorrectly; hole in closet door; main door cut too short, leaving a large gap with floor; drywall damaged by falling light fixture; tiles scratched, chipped, and cut to improper size; door frame partially unpainted; carpets stained; no caulk around vanity, baseboard, and tile; and excess putty around sink drains.

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<sup>2</sup> The parties stipulated to Findings of Fact 6 and 7.

16. On March 27, 2015, the Claimants sent the Respondent a letter listing the problems noted in Finding of Fact 15, above, and requesting that the Respondent correct the problems.
17. The Respondent did not respond to the letter of March 27, 2015.
18. Around the beginning of April 2015, the Respondent told the Claimants that the Respondent considered the job to be complete.
19. On April 14, 2015, the Claimants received a proposal from Heidler, Inc. (Heidler), a home improvement contractor, to perform remodeling work in the master bathroom, including the correction of alleged defects in the Respondent's work.
20. The Heidler proposal called for the contractor to supply fixtures and materials.
21. The quoted price for the Heidler proposal was \$12,850.00.
22. On April 30, 2015, the Claimants received a proposal from Cardigan Tile and Plumbing, Inc. (Cardigan), a home improvement contractor, to perform remodeling work in the master bathroom, including the correction of alleged defects in the Respondent's work.
23. The scope of work in the Cardigan proposal was broader than that in the Contract.
24. The Cardigan proposal called for the contractor to supply fixtures and materials.
25. The Cardigan proposal called for the use of so-called high end fixtures and materials.
26. The quoted price for the Cardigan proposal was \$20,600.00.
27. As of the date of the hearing in this matter, the Claimants have not entered into any agreements with any contractor to repair or correct work performed under the contract by the Respondents.

## DISCUSSION

In this case, the Claimants have the burden of proving the validity of their claim by a preponderance of the evidence. Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3). "[A] preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces . . . a belief that it is more likely true than not true." *Coleman v. Anne Arundel Cty. Police Dep't.*, 369 Md. 108, 125 n. 16 (2002), quoting Maryland Pattern Jury Instructions 1:7 (3rd ed. 2000).

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);<sup>3</sup> 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. For the following reasons, I find that the Claimants have not proven eligibility for compensation.

### Issues Regarding Problems With the Respondent's Performance

In this case, the evidence is clear that in many respects the Respondent's work was unworkmanlike, inadequate, or incomplete. Although none of the problems with the Respondent's work are catastrophic, the work is clearly deficient in many ways. This conclusion is based on Mr. Shah's credible testimony as well as the corroborating evidence of the photographs the Claimants submitted. Cl. Ex. 3. I find Mr. Shah credible based on his demeanor, and the clarity and consistency of his testimony, including on cross-examination. Both his testimony and the photographs reveal that a multitude of problems, including poorly cut

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<sup>3</sup> Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 Replacement Volume.

and ill-fitted tiles, excessive or poorly installed grout, and a gap of several inches under the door. These defects are apparent to a layperson and, in my view, need not be established by expert testimony.<sup>4</sup>

Although Hal Marker and Robert Ciccarelli denied any defects in the work and testified that they “bent over backwards” to accommodate the Claimants’ concerns I find that that the Claimant’s testimony and the photographs in Claimants Ex. 3 are strong evidence that the Respondent left the job with the problems noted by the Claimants still in existence. In addition, the Respondent’s failure to respond to the Claimant’s letter of March 27, 2015, or to make an effort to correct the defects noted, suggests a lack of good faith and leads me to question the credibility of the testimony presented by the Respondent. I therefore conclude that the Claimants have established by a preponderance of the evidence that the Respondent’s performance under the contract was unworkmanlike, inadequate, or incomplete.

#### Issues Regarding Proof of Actual Loss

I now turn to the amount of the award, if any, to which the Claimants are 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). MHIC’s regulations provide three formulas for measurement of a claimant’s actual loss. COMAR 09.08.03.03B(3). The following formula offers an appropriate measurement to determine the amount of actual loss in this case:

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

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<sup>4</sup> Both the Cardigan proposal, Cl. Ex. 4, and the Heidler proposal, Cl. Ex. 5, contain statements critical of the Respondent’s work. As the authors of those documents did not testify (and thus were not accepted as experts), I give no weight to these statements.

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).

As a practical matter, there are two components to any claim against the Fund. A claimant must show, first, that a licensee has performed an unworkmanlike, inadequate, or incomplete home improvement. But a claimant's burden is not satisfied merely by such a showing. A claimant must also establish an actual monetary loss and the *amount* of such loss. This second prong is inescapable from the language of the statute which provides that the term "actual loss" "means the *costs* of restoration, repair, replacement, or completion . . ." *Id.* Emphasis added. For the reasons that follow, I conclude that the Claimants have failed to establish by a preponderance of the evidence the amount, if any, of their actual loss.

The parties stipulated that the total Contract price was \$5,366.00 and that the Claimants paid the Respondent \$4,066.00. As discussed above, I have found that the Respondent's performance was inadequate, incomplete, or unworkmanlike. The remaining question, then, is what is the cost to repair the Respondent's poor work? The Claimant's offered in evidence proposals from two contractors concerning remodeling of the bathroom. In neither case, however, does the proposal provide a useful basis for determining the Claimants' actual loss.

Cardigan supplied a proposal on April 15, 2015. Cl. Ex. 4. The Cardigan proposal quotes a contract price of \$20,600.00. The fact that this price is almost four times greater than the price of the original Contract is attributable to several factors. First, the scope of the work in the Cardigan proposal is significantly beyond that in the Contract. For example, the Cardigan proposal calls for removal of the existing subfloor and its replacement with a "proper" subfloor. *Id.* In addition, the Cardigan proposal specifies that the contractor will supply all materials and



fixtures, whereas under the original Contract, the Claimants were responsible for supplying fixtures and nearly all materials, including tile. *Id.* Finally, Mr. Shah testified that the Cardigan proposal called for the use of “high end” materials and fixtures, further adding to the price. The Cardigan proposal is not presented in such detail as would make it possible to determine what the cost of simply repairing the problems with the Respondent’s work would be. In other words, the expansion of the scope of the work, the shift of responsibility for purchases of materials and fixtures from homeowner to contractor, and the use of high-end items all make it impossible to compare the Cardigan proposal to the Contract in a meaningful way. On the record before me, there is no plausible analysis by which to make an “apples to apples” comparison between the two documents. Without relying on raw speculation, which I decline to do, the Cardigan proposal provides no evidence of the Claimants’ actual loss.

The situation regarding the Heidler proposal is much the same. Cl. Ex. 5. Heidler provided an estimate of \$12,850.00. Although substantially lower than the Cardigan estimate, it is still over twice that of the original Contract price. As with the Cardigan proposal, the Heidler proposal requires the contractor to supply materials and fixtures, including vanities, vanity tops, mirrors, light fixtures, paint, and tile. Although contemplating more “medium-grade” materials than the Cardigan proposal, it is no more possible to compare the Heidler proposal with the Contract than it is to compare it with the Cardigan proposal. As with the Cardigan proposal, the Heidler proposal is not broken down in sufficient detail to allow one to determine what costs would be attributable to simply repairing the Respondent’s missteps and which costs result from

the fundamental differences between the two documents. I therefore conclude that the Heidler proposal does not provide evidence of the amount of the Claimants' actual loss.<sup>5</sup>

In sum, although I have found that the Respondent's performance was inadequate, incomplete, or unworkmanlike, I also find that the Claimants have not established the cost to repair such defects as exist in the Respondent's work and, therefore, have not established the amount of their actual loss. As a result, they have failed to meet their burden to establish what, if any, amount they should be awarded from the Fund and their claim must be denied.

### **PROPOSED CONCLUSION OF LAW**

I conclude that the Claimant has failed to establish by a preponderance of the evidence an actual and compensable loss as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(a).

### **RECOMMENDED ORDER**

I **RECOMMEND** that the Maryland Home Improvement Commission **ORDER** that the Maryland Home Improvement Guaranty Fund deny the Claimant's claim; and

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

**Signature on File**

February 21, 2017  
Date Decision Issued

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David Hofstetter  
Administrative Law Judge

DH/emh  
#166823

<sup>5</sup> Mr. Shah testified that he and his wife also received proposals from other contractors which were in the "seven thousand dollar range," i.e., closer to the original Contract price. The Claimants did not have those proposals with them at the hearing, however, and he provided no details about them. I therefore conclude that the purported additional proposals are not probative of the amount of the Claimants' actual loss.

**PROPOSED ORDER**

***WHEREFORE, this 10<sup>th</sup> day of April, 2017, 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.***

***Bruce Quackenbush***

***Bruce Quackenbush  
Panel B***

**MARYLAND HOME IMPROVEMENT COMMISSION**

CONFIDENTIAL

1. The purpose of this document is to provide a comprehensive overview of the project's objectives and scope.

2. The project is designed to address the current challenges faced by the organization in the market.

3. The primary goal is to increase operational efficiency and reduce costs across all departments.

4. This document outlines the key milestones and deliverables for the project's duration.

5. It is essential that all team members adhere to the guidelines and timelines set forth in this document.

6. Regular communication and reporting are required to ensure the project remains on track.

7. The project team will be responsible for monitoring progress and addressing any issues that arise.

8. The success of this project will be measured by the achievement of the defined goals and objectives.

9. This document is classified as confidential and should be handled accordingly.

10. For more information, please contact the project manager at the end of this document.