IN THE MATTER OF THE CLAIM	*	**BEFORE SUSAN H. ANDERSON,**
OF CAROLYN DOWNS,	*	**AN ADMINISTRATIVE LAW JUDGE**
CLAIMANT	*	**OF THE MARYLAND OFFICE**
AGAINST THE MARYLAND HOME	*	**OF ADMINISTRATIVE HEARINGS**
IMPROVEMENT GUARANTY FUND	*	
FOR THE ALLEGED ACTS OR	*	
OMISSIONS OF JASON APTER,	*	
T/A DECK HELMET, INC.	*	**OAH No.: DLR-HIC-02-19-16931**
RESPONDENT	*	**MHIC No.: 18(05)703**

* * * * * * * * * * * * *

PROPOSED DECISION

STATEMENT OF THE CASE

On December 12, 2018, Carolyn Downs (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of $2,003.00 in actual losses allegedly suffered as a result of a home improvement contract with Jason Apter, trading as Deck Helmet, Inc. (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015). On May 24, 2019, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on August 21, 2019 at the County Office Building in Largo, Maryland. Bus. Reg. § 8-407(e). Shara Hendler, Assistant Attorney General, Department of Labor (Department),[1] represented the Fund. The Claimant represented herself. After waiting fifteen minutes for the Respondent or the Respondent's representative to appear, I proceeded with the hearing. Code of Maryland Regulations (COMAR) 28.02.01.23A.[2]

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, 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 & Supp. 2018); COMAR 09.01.03; COMAR 28.02.01.

ISSUES

1. Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?

2. If so, what is the amount of the compensable loss?

SUMMARY OF THE EVIDENCE

Exhibits

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

Clmt. Ex. 1 - Contract between Claimant and Respondent, June 1, 2017, with attached photos of deck as it appeared on that date

Clmt. Ex. 2 - Checks showing two payments of $1,415.00 each to Respondent, June 1, 2017 and July 15, 2017

[1] On July 1, 2019, the Maryland Department of Labor, Licensing, and Regulation became the Department of Labor.
[2] Notice of the hearing was mailed to the Respondent at the address of record by regular and certified mail on both June 21, 2019 and July 23, 2019, COMAR 09.08.03.03A(2), and not returned as unclaimed or undeliverable. Applicable law permits me to proceed with a hearing in a party's absence if that party fails to attend after receiving proper notice. COMAR 28.02.01.23A. I determined that the Respondent had received proper notice and proceeded to hear the captioned matter.

Clmt. Ex. 3 - Photographs taken by Claimant in September 2017:

A. Deck post showing cracks and splits in the wood
B. Stairs removed and not replaced
C. End board not attached to base of deck
D. Deck board cracked and not sanded
E. Upright deck board cracked and split from top to bottom
F. Upright deck post showing cracks and splits in the wood
G. Stair post showing cracks and splits in the wood
H. Split upright deck post not repaired
I. Deck board not attached to base of deck
J. Deck board around the perimeter showing splits and cracks
K. Upright deck boards supporting deck railing showing splits and cracks
L. Upright deck board supporting deck railing showing splits and cracks
M. Deck boards partially primed but not yet sanded
N. Deck boards intended to be top deck railing left loose on deck floor
O. Wood debris left at work site by Respondent
P. Broken stair from second set of deck stairs not replaced

Clmt. Ex. 4 - Contract between Claimant and Zowd Homes & Restoration, Inc., July 17, 2018

Clmt. Ex. 5 - Emails between Claimant and Jason Apter spanning August 14, 2017 and September 25, 2017

I admitted the following exhibits on behalf of the Fund:

Fund Ex. 1 - Hearing Order, May 24, 2019

Fund Ex. 2 - Notices of Hearing, July 23, 2019 and June 21, 2019

Fund Ex. 3 - Claimant's Home Improvement Claim Form, December 21, 2018; MHIC letter to Respondent, January 8, 2019

Fund Ex. 4 - Licensing History for Respondent

Testimony

The Claimant testified on her own behalf.

The Fund presented no testimony.

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 5305657.

2. On June 1, 2017, the Claimant and the Respondent entered into a contract to repair the Claimant's deck, including replacing seven boards; sanding all of the wood on the deck; applying filler to fill in cracked and splitting areas in the wood; applying a Deck Helmet "Eco Friendly solution" as a protectant; replacing one set of stairs to the deck; replacing one of the steps on the second set of deck stairs; and painting the entire deck (Contract). The Contract stated that work would begin immediately and be completed within ninety days, weather permitting.

3. The original agreed-upon Contract price was $4,250.00.

4. On June 1, 2017, the Claimant paid the Respondent $1,415.00 and on July 15, 2017, the Claimant paid the Respondent an additional $1,415.00.

5. On June 14, 2017, the Respondent delivered materials for the project to the Claimant's home.

6. On June 20, 2017, the Respondent power washed and cleaned the Claimant's deck. Pursuant to the terms of the Contract, when the Respondent cleaned the deck, he applied "Deck Helmets (sic) Eco Friendly solution" to make the cracks on the deck contract. Per the Contract, the solution would then have to cure for a maximum of thirty days before the Respondent could apply the Deck Helmet coating.

7. Between June 20, 2017 and August 3, 2017, the Respondent performed no other work on the project. On August 3, 2017, the Respondent's employee, Jorge, came out and replaced the seven boards as called for under the Contract, removed the one set of deck stairs that was to be replaced, and started applying a paint primer. Jorge performed the work and left for the day while the Claimant was still at work.

8. When the Claimant returned from work that evening, she was concerned when she saw that no sanding or filling in of cracks and splits had been done, particularly because Jorge had started applying primer.

9. When Jorge returned on August 4, 2017, the Claimant asked him about other areas of the deck that she believed needed work or replacement and the lattice work. Jorge indicated he believed an additional one or two boards needed replacing and advised he did not know anything about the latticework. Jorge called the Respondent's office for clarification, but advised the Claimant he needed to return to the office for further instruction.

10. On August 14, 2017, the Respondent's sales person, Jacob Givens, came to the home to discuss the situation with the Claimant. He advised her that additional boards did not need replacing, that the entire deck would be sanded and smoothed with cracks and splits filled in, and that it only appeared the way it did because the job had not been completed. He reassured the Claimant she would be happy with the final product.

11. That evening, the Respondent emailed the Claimant to confirm the original seven deck boards were all that needed replacement and that the color would be two-tone walnut with white rails.

12. On August 28, 2017, the Claimant emailed the Respondent, outlining her concerns that no work had been done since Jorge left the job site on August 4, 2017, leaving her deck unusable. The Claimant advised that if the Respondent did not complete the job in an acceptable manner by the end of the ninety days specified in the Contract, she would be requesting a full refund of all monies paid to date.

13. On August 29, 2017, the Respondent replied indicating he would contact her the following day to resolve the issue. He reiterated that the Deck Helmet coating is designed to fill the cracks and resurface the deck.

14. On September 1, 2017, the Claimant emailed the Respondent requesting a full refund because the job had not been completed as promised and the little work that had been done had left her deck both unusable and unsafe.

15. The Respondent replied later that day that a full refund was not possible and stated, "If you would simply let is (sic) complete are (sic) job then the work would be done."

16. The Claimant responded in an email on the evening of September 1, 2017 pointing out that she had never prevented anyone from completing the job and, in fact, no one from his company had ever gone to the home to complete the job.

17. On September 5, 2017, the Respondent alleged in an email that the Claimant had sent "the team" away, allegedly telling Jorge that the Respondent "needed to replace the entire deck." The Claimant responded that the Respondent's information was incorrect, she had never sent anyone away, it was past the ninety day time frame in which the work was to be completed, and she wanted a full refund.

18. The Claimant heard nothing further from the Respondent after this email. On September 25, 2017, the Claimant again emailed the Respondent requesting a refund. The Respondent emailed back stating only that he would be forwarding the matter to his attorney the following day so the Claimant needed to resolve the issue before 9:00 a.m. the next day.

19. There was no further communication between the parties.

20. In the summer of 2018, the Claimant solicited two quotes to repair her deck and complete the work originally contemplated by her Contract with the Respondent. She chose to use Zowd Homes & Restoration, Inc. (ZHR) and paid $2,900.00 for the work. The $2,900.00 included $100.00 for ZHR to haul away the wood debris the Respondent had left behind the year prior.

21. The Claimant is not related to the Respondent, is not an employee or business associate of the Respondent, and is not related to an employee or business associate of the Respondent.

22. The Claimant owns and resides in the home where the deck repair was to take place; she does not own any other homes in Maryland.

23. The Claimant has no other actions pending against the Respondent and has received no compensation of any kind.

DISCUSSION

In this case, the Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Md. Code Ann., Bus. Reg. §8-407(e)(1) (2015); 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 (3d 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)[3]; *see also* COMAR 09.08.03.03B(2) ("actual losses . . . incurred as a result of misconduct by a licensed contractor"). "'[A]ctual loss' means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." Bus. Reg. § 8-401. For the following reasons, I find that the Claimant has proven eligibility for compensation.

The Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimant. The Claimant presented credible, unrefuted testimony and evidence showing that the Respondent failed to complete the work under the Contract and the partial work he did perform was performed in an unworkmanlike fashion. The photographs she took in September 2017 after the Respondent had ceased working on the project clearly demonstrate the flaws in the wood, such as cracks and splits. It is notable that this is after the Respondent applied a cleaning solution coating that he represented would cause the cracks to contract.

The Claimant's concerns about the condition and appearance of her deck after the cleaning solution had been applied and allowed to cure were reasonable. The Contract clearly states the cleaning solution will cause "the cracks on your deck to contract..." The September

[3] Unless otherwise noted, all references to the Business Regulation Article herein cite the 2015 Replacement Volume of the Maryland Annotated Code.

2017 photographs clearly show obvious cracks and splits. The Claimant's concerns were then exacerbated when Jorge started to prime the deck for painting without first sanding and smoothing the wood. These concerns intensified after Jorge advised her he believed additional boards needed to be replaced. The Claimant had been skeptical when the Respondent's sales person told her prior to entering into the Contract that only seven boards needed to be replaced; she felt strongly that other sections of the deck also needed replacing and Jorge seemed to confirm this during the conversation on August 4, 2017. The Claimant had relied on the representations of the Respondent's sales person that the deck boards would be smooth and filled in, the deck would look like new, and she would be happy with it. The sales person specifically advised that the cracks in the boards would be filled in.

While a representative from the Respondent's company assured the Claimant the entire deck would be sanded and smoothed prior to painting, this never occurred. No one from the Respondent's company came to perform any work after Jorge left the job site on August 4, 2017. The Claimant's evidence documents the many attempts she made to maintain contact with the Respondent to try to resolve the matter. While the Respondent accused the Claimant of failing to allow the Respondent to complete the job, there is no evidence to support this. Jorge left the project after a half day on August 4, 2017 because he told the Claimant there was "confusion" in the office about the project and he needed to go to the office to get further instructions. The Claimant testified credibly that she never told the Respondent or anyone else not to continue the work, nor did she demand the entire deck be replaced.

A review of the emails between the Claimant and the Respondent bolster this testimony and show that it was the Respondent who failed to take steps to complete the project. On August 29, 2017, the Respondent emailed advising the Claimant that the Deck Helmet coating is designed to fill in the cracks and resurface the deck and offering to speak to the Claimant to resolve the matter. However, by September 1, 2017, no such contact had occurred. That afternoon, the Respondent wrote that if the Claimant would "simply let is (sic) complete are (sic) job then the work would be done." There is absolutely no evidence the Claimant ever told the Respondent not to complete the job or turned away anyone who came to complete the job. It would have been a simple matter for the Respondent to send workers to apply the Deck Helmet coating and demonstrate to the Claimant that the coating would, in fact, fill the cracks in the boards and resurface the deck. He failed to do so. The Respondent had ample opportunity to complete the job between August 14, 2017, when his sales person met with the Claimant after work had begun, and August 28, 2017, when the Claimant emailed the Respondent that she expected the job to be completed by the end of the ninety day time frame specified in the Contract. Even after this, the Respondent failed to act, prompting the Claimant on September 5, 2017 to ask for a refund of monies paid because the job had not been completed within ninety days. This should have been a straight-forward project, as it appears from the Contract the bulk of the time needed for the project was the time for the cleaning solution to cure after application, and the solution should have fully cured by late July 2017 given its application on June 20, 2017.

The Claimant emailed repeatedly asking for a refund until September 25, 2017 when the Respondent advised he would forward the matter to his attorney. There was no further communication between the parties after this date. I find the Respondent essentially abandoned the project on or around September 25, 2017, leaving the Claimant with an unfinished project, an

unusable and unsafe deck, and debris in her yard. This forced the Claimant to hire another contractor, ZHR, to repair the deck and complete the work originally contemplated by her Contract with the Respondent. The Respondent's failure to fulfill his obligations under the Contract deprived the Claimant of the use of her deck for approximately one year.

Based on the evidence, I find the Claimant has demonstrated the Respondent performed an inadequate, incomplete, and unworkmanlike home improvement and she is, therefore, eligible for an award from the Fund.

Having found eligibility for compensation I must determine the amount of the Claimant's actual loss and the amount, if any, that the Claimant is entitled to recover. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney fees, court costs, or interest. Bus. Reg. § 8-405(e)(3); 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.

In this case, the Respondent performed some work under the contract, and the Claimant retained other contractors to complete or remedy that work. Accordingly, the following formula appropriately measures the Claimant's actual loss:

> If the contractor did work according to the contract and the claimant has solicited or is soliciting another contractor to complete the contract, the claimant's actual loss shall be the amounts the claimant has paid to or on behalf of the contractor under the original contract, added to any reasonable amounts the claimant has paid or will be required to pay another contractor to repair poor work done by the original contractor under the original contract and complete the original contract, less the original contract price. If the Commission determines that the original contract price is too unrealistically low or high to provide a proper basis for measuring actual loss, the Commission may adjust its measurement accordingly.

COMAR 09.08.03.03B(3)(c).

Application of the formula results in a finding that the Claimant suffered an actual loss of $1,480.00. The Claimant paid $2,830.00 to Deck Helmet and $2,900.00 to ZHR to correct and complete the work of the original Contract. The original Contract price was $4,250.00. Therefore, the Claimant's actual loss is $1,480.00 ($2,830.00 + $2,900.00 = $5,730.00; $5,730.00 - $4,250.00 = $1,480.00).

The Business Regulation Article caps a claimant's recovery at $20,000.00 for acts or omissions of one contractor, and provides that a claimant may not recover more than the amount paid to the contractor against whom the claim is filed. Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a). In this case, the Claimant's actual loss is less than the amount paid to the Respondent and less than $20,000.00. Therefore, the Claimant is entitled recover her actual loss of $1,480.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of $1,480.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(c). I further conclude that the Claimant is entitled to recover that amount from the Fund.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant $1,480.00; 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 ten percent (10%) as set by the Maryland Home Improvement Commission;[4] and

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

October 24, 2019
Date Decision Issued

[redacted]
Susan H. Anderson
Administrative Law Judge

SHA/sw
181680

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

PROPOSED ORDER

WHEREFORE, this 20th day of December, 2019, Panel B of the Maryland Home Improvement Commission approves the Recommended Order of the Administrative Law Judge and unless any parties files with the Commission within twenty (20) days of this date written exceptions and/or a request to present arguments, then this Proposed Order will become final at the end of the twenty (20) day period. By law the parties then have an additional thirty (30) day period during which they may file an appeal to Circuit Court.

Joseph Tunney

Joseph Tunney
Panel B
Chairman
MARYLAND HOME IMPROVEMENT COMMISSION