

IN THE MATTER OF THE CLAIM
OF EMELIA STIVERSON,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF JONATHAN
JACOBSEN, T/A CREATIVE
SOLUTIONS HOME
IMPROVEMENT,
RESPONDENT

* BEFORE DOUGLAS E. KOTEEN,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No. DLR-HIC-02-19-12896
* MHIC No. 19 (75) 34
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PROPOSED DECISION

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DISCUSSION
PROPOSED CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On December 17, 2018, Emelia Stiverson (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) seeking reimbursement of \$7,325.08 in actual losses allegedly suffered as a result of a home improvement contract with Jonathan Jacobsen, trading as Creative Solutions Home Improvement, LLC (Respondent). Md.

Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015).¹ On April 25, 2019, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on July 9, 2019 at the Tawes State Office Building in Annapolis, Maryland. Md. Code Ann., Bus. Reg. § 8-407(e) (2015). Nicholas Sokolow, Assistant Attorney General, Department of Labor (Department),² represented the Fund. The Claimant represented herself. The Respondent represented himself.

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. 2019); Code of Maryland Regulations (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:

- CL Ex. 1. Two photographs, dated 2016;
- CL Ex. 2. Email chain from Claimant to Pablo Tickel, dated March 1 and 2, 2018; June 23, 26, and 27, 2018; with attached four photographs, undated;
- CL Ex. 3. South River Flooring Estimate, amended October 30, 2018; with attached South River Flooring Estimate, dated September 14, 2018; Atlas Marble & Tile, Inc. Invoice, dated September 1, 2018; Compass Stone & Tile Invoice, dated September 15, 2018; and All Glass & Mirror, Inc., dated November 12, 2018;
- CL Ex. 4. Master Bathroom & Hallway Bathroom Repair List (plumbing: master bathroom), undated, with attached three photographs; and 24 Code of Federal Regulations (C.F.R.) § 3280.606;

¹ Unless otherwise noted, all references to the Business Regulation Article herein cite the 2015 Replacement Volume of the Maryland Annotated Code.

² On July 1, 2019, the Maryland Department of Labor, Licensing, and Regulation became the Department of Labor.

- CL Ex. 5. Master Bathroom & Hallway Bathroom Repair List (tile: master bathroom), undated, with attached Backer Board Selection Guide, undated; and two photographs, undated;
- CL Ex. 6. Master Bathroom & Hallway Bathroom Repair List (flooring), undated, with attached photograph, undated;
- CL Ex. 7. Creative Solution Home Improvement Contract for Stiverson Masterbath, dated March 7, 2017;
- CL Ex. 8. Master Bathroom & Hallway Bathroom Repair List (shower curb), undated; with attached Wikipedia Drywall, dated July 4, 2019; Backer Board Selection Guide, undated; 2015 International Building Code for Showers and Water Closets, dated October 2015; and two photographs, undated;
- CL Ex. 9. Creative Solution Home Improvement Contract for Stiverson Backsplash/Bath Floor, dated March 21, 2017;
- CL Ex. 10. Master Bathroom & Hallway Bathroom Repair List (tile and toilet flange: hallway bathroom), undated, with attached two photographs, undated; and The Council of North America, Inc. Tile document, dated 2019;
- CL Ex. 11. Check No. 311, dated March 8, 2017; Check No. 312, dated March 19, 2017; Check No. 314, dated March 23, 2017; and Check No. 319, dated April 19, 2017;
- CL Ex. 12. Three photographs, undated; and
- CL Ex. 13. Heidler, Inc. Service Order, dated May 11, 2017.

The Respondent did not submit any documents into evidence.

I admitted the following exhibits on behalf of the Fund:

- GF Ex. 1. Notice of Hearing for July 9, 2019 hearing, dated May 3, 2019;
- GF Ex. 2. MHIC Hearing Order, dated April 23, 2019;
- GF Ex. 3. Letter from David Finneran, Executive Director, MHIC, re: Licensing History, dated June 19, 2019;
- GF Ex. 4. Letter from Joseph Tunney, Chairman, MHIC, to Respondent, dated February 25, 2019; and
- GF Ex. 5. Home Improvement Claim Form, filed December 17, 2018.

Testimony

The Claimant testified on her own behalf. The Respondent testified on his own behalf.

The Fund did not present testimony from 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 numbers 01-106746 and 05-191342. The

Respondent was licensed by the MHIC on October 6, 2014 and remains licensed through October 6, 2020. (GF Ex. 3).

2. On March 7, 2017, the Claimant and the Respondent entered into a contract to fully renovate the Claimant's master bathroom, including removing existing fixtures and flooring, and installing new tile flooring, and a new vanity, sinks, faucets, certain plumbing, a new shower and bathtub, and a new toilet. The total cost of the master bathroom renovation was \$18,801.75. (CL Ex. 7). After the Respondent made a change of \$249.75 to the master bathroom cost, the total cost of the master bathroom renovation was \$19,051.50. (GF Ex. 5).

3. On March 21, 2017, the Claimant and Respondent entered into a separate contract to install backsplash tile in the kitchen and install new tile flooring in the upstairs hallway bathroom (or guest bathroom). The total cost of the kitchen work was \$1,635.50. The total cost of the upstairs bathroom work was \$1,447.91. The total cost of the March 21, 2017 contract, including tax, was \$3,161.07. (CL Ex. 9).

4. The Respondent completed the home improvement work in the Claimant's home on or about April 29, 2017. (GF Ex. 5).

5. The Claimant made the following payments to the Respondent:

March 8, 2017	\$6,267.25;
March 19, 2017	\$6,267.25;
March 23, 2017	\$3,161.07 (including \$1,635.50 for kitchen work); and
April 19, 2017	\$6,517.00 (including additional charge of \$249.75 for master bathroom work).

The Claimant paid the Respondent a total of \$22,212.57 for the home improvement work the Respondent performed at her residence. (CL Ex. 11):

6. The Claimant was satisfied with the work the Respondent performed in the kitchen. The Claimant paid the Respondent a total of \$20,499.41 for the work he performed in the master bathroom and guest bathroom.

7. On March 1, 2018, Paul Tickel (Tickel), co-owner of the Respondent, emailed the Claimant to inquire about the work. On March 2, 2018, the Claimant responded by email and advised that the floor tile outside the shower was loose and might require resetting or re-caulking. (CL Ex. 2). Tickel did not respond.

8. On June 23, 2019, the Claimant contacted Tickel again by email and advised that additional tiles had come loose on the tile floor in the master bathroom, there were cracks in the tile under the glass shower door, and holes in the grout in the shower, which could cause water leakage. She further advised that she had obtained an estimate of \$2,600.00 to repair the tile, which did not include the purchase of new tile or removing and reinstalling the shower door. The Claimant also notified Tickel regarding cracks in the grout in the guest bathroom floor and tile that was not lying flat. The Claimant advised that she intended to have the repair work done by a different contractor since the Respondent did not respond in a timely manner. (CL Ex. 2).

9. On June 26, 2018, Tickel requested by email that the Claimant hold off on having any repairs performed until he had an opportunity to inspect the bathrooms. On June 27, 2018, the Claimant emailed Tickel with attached photographs of the defects, and advised that it would cost at least \$475.00 to remove and reinstall the shower glass to repair cracks in the tile beneath the shower glass door. (CL Ex. 2). She pointed out that, in addition to loose tiles, some tiles were coming up. The Respondent did not return to inspect the work or make repairs.

10. An MHIC investigator came to the Claimant's home, inspected the work, and met with the Claimant, her father, Tickel, and Jonathan Jacobsen, the Respondent's MHIC license holder, in August 2018. The Respondent agreed to replace a few tiles, but denied that the floors required complete replacement. The Claimant did not want the Respondent to do any further work because she was dissatisfied with the Respondent's work. No plumbing issues were raised during this meeting.

11. The Claimant contacted South River Flooring (South River) in or about June 2018 to inspect the Respondent's work for the purpose of making future repairs to the work. Stephen Rice (Rice), Sales Manager with South River, inspected the Claimant's master and guest bathrooms and consulted with other South River employees. With input from South River laborers and certified plumbers, Rice concluded in writing that the Respondent installed the plumbing incorrectly in the master bathroom. He asserted that the toilet drain sloped in the wrong direction, the sanitary "T" flowed in the wrong direction, the tub drain was not connected, an illegal running trap was installed on the drain line, a tail piece on the sink was improperly cross-threaded, and the toilet flange was installed incorrectly below the finished floor. (CL Ex. 4).

12. Rice also made other findings in writing with regard to the master bathroom work. With regard to the master bathroom, the Respondent:

- a. improperly installed the tile floor over plywood causing tile and grout to break;
- b. failed to use sufficient glue, causing tile to loosen and not lie flat;
- c. failed to properly patch holes in the subfloor, jeopardizing the structural integrity of the tile floor and requiring removal and replacement of the subfloor; and
- d. improperly installed the shower curb in the master bathroom, causing tile to crack and potentially lift and cause water damage. (CL Exs. 5, 6, 8).

13. The Respondent improperly installed the shower curb so that it was not level and sloped toward the tile floor instead of the shower, allowing water to run toward the tile floor. (CL Ex. 8).

14. With regard to the guest bathroom, Rice concluded that the Respondent improperly installed the tile floor over existing rolled vinyl, which would cause the tile and grout to break. Rice also concluded that toilet flange in the guest bathroom was cracked in half, but he could not determine how this occurred. (CL Ex. 10). One tile in the guest bathroom was raised up in the corner and had a minor crack in the grout.

15. The Claimant obtained an estimate from South River on September 14, 2018 in the amount of \$1,850.00 to demolish the existing tile floor in the guest bathroom and reinstall tile

flooring, repair and reinstall the toilet, remove and reinstall the vanity, and install new vanity and toilet flange components. The guest bathroom contract also called for installation of a marble sill at a cost of \$100.00. This was an upgrade beyond the scope of the guest bathroom contract with the Respondent. South River was an MHIC-licensed contractor.

16. South River performed the repairs in the Claimant's guest bathroom in October 2018 and the Claimant paid South River in full for this work. (CL Ex. 3).

17. The Claimant obtained an amended estimate from South River on or about October 30, 2018 to remove and replace the tile flooring and remove and replace the shower curb in the master bathroom. The estimate also included the removal and reinstallation of the vanity, tub, and shower incidental to tile flooring work. The estimate also included plumbing repairs to be performed by a certified plumber. The total cost of the estimate was \$4,100.00. The cost of the plumbing repairs was \$1,850.00. The master bathroom contract also called for installation of a marble sill at a cost of \$100.00. This was an upgrade beyond the scope of the master bathroom contract with the Respondent.

18. South River performed the repairs in the master bathroom in or about October 2018 and the Claimant paid South River in full for this work. (CL Ex. 3).

19. The Claimant paid \$637.72 to Atlas Marble & Tile, Inc. (Atlas), a marble and tile supplier, on September 1, 2018 for 18 x 18 inch tile for the tile floor in the master bathroom. She also paid \$237.36 to Compass Stone & Tile Studio (Compass) on September 15, 2018 for 12 x 24 inch tile for the tile floor in in the guest bathroom. (CL Ex. 3). The Respondent had originally installed 18 x 18 inch tile in both bathrooms.

20. The Claimant also obtained an estimate from All Glass & Mirror, Inc. (All Glass) in the amount of \$500.00 on November 12, 2018 to remove and reinstall shower glass door

related to repairs to the shower curb. (CL Ex. 3). The Claimant had this work done and paid the invoice in full.

21. The Claimant paid \$704.84 to Heidler, Inc., a plumbing contractor, on May 11, 2017 to unclog a sewer line by using a snake and camera. (CL Ex. 13).

22. The Claimant filed a claim with the Fund on December 17, 2018. The Claimant seeks reimbursement from the Fund in the amount of \$7,325.08 to repair the Respondent's home improvement work. (GF Ex. 5).

23. The Claimant suffered an actual loss of \$3,287.72 for repairs to the tile flooring and shower curb in the master bathroom.

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); *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 the Claimant has proven eligibility for partial compensation for unworkmanlike or inadequate home improvement work in the master bathroom.

The Respondent was a licensed home improvement contractor when he executed the contract with the Claimant. He was licensed by the MHIC from October 6, 2014 under license numbers 01-106746 and 05-131942. The Claimant contracted with the Respondent on March 7, 2017 to perform a complete renovation of the master bathroom, including new tile flooring, a new shower, new bathtub, new toilet, and a new vanity with sink and faucets. The contract price for this work was \$18,801.75, plus a change order of \$249.75, for a total cost of \$19,051.50. The Claimant also contracted with the Respondent to install a new tile floor in the guest bathroom at a cost of \$1,447.91.³

The Claimant alleges that the Respondent performed the tile flooring work in both bathrooms in an unworkmanlike and inadequate manner. She also alleges poor workmanship on the shower curb in the master bathroom because it was cracked and sloped incorrectly toward the bathroom floor. The Claimant further alleges that the Respondent performed plumbing work in the master bathroom in an unworkmanlike and inadequate manner. Accordingly, the Claimant alleges that she had to pay \$7,325.08 to have other contractors repair this work.

For the reasons addressed below, I conclude that the Respondent performed unworkmanlike, inadequate or incomplete home improvements on the tile flooring and shower curb in the master bathroom. I further conclude, however, that the Claimant failed to prove on this record that the Respondent performed plumbing work in the master bathroom in an inadequate, unworkmanlike, or incomplete manner. Furthermore, I conclude that the Claimant failed to prove on this record that the Respondent suffered an actual loss regarding tile work in the guest bathroom based on unworkmanlike inadequate, or incomplete work.

³ The Respondent also contracted with the Respondent to install a new tile back splash in the kitchen at a cost of \$1,635.50. (CL Ex. 9). The Claimant did not raise any issues regarding the Respondent's work in the kitchen so the kitchen work is not addressed further in this decision.

Master Bathroom

The Claimant testified that a number of tiles were loose, some tiles were raised up and did not lie flat, and grout was broken between tiles in many areas throughout the tile flooring in the master bathroom. She believed these problems arose because the Respondent installed tile in the master bathroom over plywood rather than concrete board, failed to use enough glue to secure the tile to the subfloor, and failed to properly patch holes in the subfloor which compromised the structural integrity of the subflooring. The Claimant also testified regarding cracks in the tile under the glass shower door in the master bathroom and the improper slope of the shower curb away from the shower. The Claimant explained that she discovered these problems within approximately one year of the Respondent performing this work in the master bathroom. She submitted emails into evidence that she sent to the Respondent's co-owner, Paul Tickel, showing that she brought these problems to the Respondent's attention in a timely manner. (CL Ex. 2). The documents show that the Claimant sent emails to Tickel regarding these issues on March 2, 2018; June 23, 2018; and June 27, 2018. She also attached photographs to her June 27, 2018 email identifying some of the problem areas. (CL Ex. 2). She submitted additional photographs at the hearing, further identifying some of the problems. (CL Exs. 5, 6, 8).

The photographs the Claimant submitted showed a significant crack in the shower curb, broken and sinking grout between tiles, and raised tiles where they did not lie flat. (CL Ex. 2). The Claimant explained that many tiles had become loose due to these issues. The Claimant submitted additional photographs showing a lack of sufficient glue securing the tiles to the subfloor, unpatched holes in the subfloor, and the improper slope of the shower curb away from the shower. (CL Exs. 5, 6, 8). The Claimant explained that she believed the entire tile floor in the master bathroom needed replacement because many of the installation problems affected the entire tile floor and subflooring and she was concerned that piecemeal repairs would only place a

“bandage” on a larger problem. She pointed out that her contract required the Respondent to inspect the subfloor and replace damaged areas. (CL Ex. 7).

The Claimant explained that she obtained additional information regarding these issues after she contracted with South River to make repairs in her master bathroom. She submitted a summary of the problems written by Stephen Rice (Rice), Sales Manager for South River. (CL Exs. 4, 5, 6, 8, 10).⁴ Although Rice is identified as the Sales Manager for South River, the Claimant stated that Rice told her he compiled this summary based on information he obtained from several South River employees, including laborers and certified plumbers, who performed the work. Although Rice did not testify at the hearing and was not subject to cross-examination, I found the written summary to be reliable with regard to the installation of flooring tiles in the master bathroom in the context of all of the evidence because it was detailed, was consistent with the Claimant’s testimony and the photographs she submitted, as well as the South River invoice, and other documents she submitted from the Tile Council of North America for 2019. (CL Exs. 3, 5, 8).

I found the Claimant’s testimony to be detailed and logical and supported by the photographs she submitted. The Claimant testified that a number of tiles had become loose. The photographs supported the Claimant’s testimony that there was poor workmanship in the installation of the tile flooring in the master bathroom. They showed grout that was broken and sinking between a number of tiles and that some tiles were raised and did not lie flat. (CL Ex. 2). Additional photographs showed that the glue used to secure the tiles was not spread adequately throughout the subfloor surface and several holes were left unpatched on the subfloor. (CL Exs. 5, 6). This did not comply with the terms of the contract that required the Respondent to inspect the subfloor and replace damaged areas. (CL Ex. 7). Documents from the Tile Council of North

⁴ The Claimant submitted multiple copies of this summary with different attachments, because each exhibit addressed different aspects of the work performance problems. (CL Exs. 4, 5, 6, 8, 10).

America for 2019 indicated that plywood was generally not recommended as backing materials for direct bonding of ceramic tile and was consistent with Rice's written summary. (CL Ex. 5). Regardless of whether the plywood subflooring was the direct cause of the tile problems, the Claimant's testimony and supporting photographs supported her claim that the Respondent's installation of the tile flooring in the master bathroom had failed just one year after the work was performed, which was unworkmanlike and inadequate.

Jonathan Jacobsen, co-owner of the Respondent, and the MHIC license-holder, testified at the hearing. He denied that the tile flooring in the master bathroom was installed improperly. He claimed that it was permissible to install tile over plywood and that this did not cause any damage to the tiles or grout. He also claimed that plywood could be used outside of a wet area and claimed that the bathroom floor was not a wet area. He dismissed the Tile Council documents, which stated that plywood was not recommended as backing material for direct bonding of ceramic tile, because he was not familiar with that publication. Jacobsen acknowledged the presence of some loose and raised tiles and broken grout, but claimed that any damage to the tiles and grout did not result from his work. He claimed instead that this damage was caused when the Claimant hired a plumber to investigate a problem with the toilet not flushing and used a snake to try to unclog the toilet. He stated that the Claimant told him that when the plumber was using the snake it shook the entire upstairs of the house. He speculated that this incident damaged the tiles.

I find this explanation to be highly speculative and unconvincing. This incident allegedly occurred less than two weeks after the Respondent completed the work in April 2017. (CL Ex. 13). Jacobsen acknowledged that he returned to the Claimant's home one or two weeks later to

repair a water problem.⁵ Neither the Claimant nor the Respondent identified any problems with loose or damaged tile or broken grout at that time. It was not until approximately one year after the work was completed that the Claimant discovered a problem with loose and damaged tile and grout, she notified the Respondent of this problem at that time, and her emails reflect that the problem began to worsen over time. The Claimant did not recall the incident and denied that it played any part in the tile issues. I consider the Respondent's shaken house defense to be highly speculative, illogical, and unpersuasive. I conclude that the Claimant has established by a preponderance of the evidence that the loose and damaged tile and grout in the master bathroom was caused by the Respondent's poor workmanship in the installation of the tile and subflooring. The tile floor should not have begun to fail less than one year after installation if the work was performed correctly. Moreover, the Claimant has established by a preponderance of all of the evidence that the only practical way to correct the problems with installation of the tile and the integrity of the subflooring was to replace the entire tile floor in the master bathroom. This was consistent with recommendations from a licensed home improvement contractor and the evidence established that replacement of only a few tiles would not adequately correct the underlying issues.

The Claimant has also established that the shower curb was installed in an unworkmanlike and inadequate manner. The Claimant's testimony and photographs demonstrate that the shower curb developed a substantial crack just one year after installation. (CL Ex. 2). Moreover, another photograph demonstrated that the shower curb was sloping toward the tiled bathroom floor, rather than toward the shower, which would cause water from the shower to run onto the bathroom floor. The Claimant also claimed, based on Rice's summary, that the Respondent had used drywall as a tile backer board on the shower curb. Rice claimed in his summary that drywall cannot sustain the weight of tile and might lead to water damage in the

⁵ The Claimant testified that she received an insurance award regarding certain water damage in her home and does not seek reimbursement from the Fund for those issues.

framing of the shower. (CL Ex. 8). The Claimant submitted documentation from the Tile Council of North America for 2019 that confirmed that drywall, or gypsum board, may not be used as backing for direct application of tile in wet areas. (CL Ex. 8).

Jacobsen denied that he used drywall in constructing the shower curb or elsewhere in the master bathroom. He also disputed the Claimant's contention that a photograph showed water damage in the wood used to construct the shower curb. (CL Ex. 8). However, regardless of whether drywall was used in constructing the shower curb, Jacobsen did not dispute the clear evidence of a significant crack in the shower curb just one year after installation, and he offered no explanation to justify the shower curb sloping in the wrong direction. (CL Ex. 8). For these reasons, I conclude that the shower curb was installed in an inadequate and unworkmanlike manner and also required repair.

Plumbing

The Claimant also seeks reimbursement for several problems that South River purportedly discovered with the plumbing in the master bathroom. The Claimant testified that the plumbing issues were not discovered until South River removed and replaced the tile flooring in the bathroom in October 2018. Rice summarized a list of items that he considered to be poor workmanship in the plumbing work and indicated that his summary was based on information provided by a certified South River plumber. The Claimant admitted that she was unable to explain several of the plumbing issues and was only relying on Rice's summary. She was also unable to establish on this record that the plumbing issues identified by Rice resulted from work performed by the Respondent. Furthermore, the Claimant acknowledged that she never brought any of these problems to the Respondent's attention, so the Respondent was not afforded the opportunity to correct any of the plumbing issues she raised.

Jacobsen acknowledged that he was not a licensed plumber but explained that he was permitted to perform minor plumbing work to connect certain bathroom fixtures to the home's existing plumbing network. He denied that several of the listed items in the summary were legitimate problems, he claimed that the photographs submitted by the Claimant regarding the plumbing issues were inconclusive without further explanation from a plumbing expert, and he denied that he had performed the type of plumbing work identified in Rice's summary. (CL Ex. 4). He claimed that if items identified by Rice in the written summary were actual plumbing issues, they involved the preexisting plumbing network in the home and were unrelated to the limited plumbing work the Respondent performed. The contract that described the work performed by the Respondent in the master bathroom made reference to plumbing items, but it was vague with regard to the actual plumbing work that the Respondent performed. (CL Ex. 7).

Without testimony from a plumbing expert to explain in detail the plumbing issues raised, and to distinguish between preexisting plumbing issues and those performed during the bathroom renovation, I conclude that the Claimant has failed to prove on this record that the Respondent performed plumbing work in the master bathroom in an inadequate or unworkmanlike manner.

Guest Bathroom

The Claimant also contends that the Respondent installed the tile flooring in the guest bathroom in an inadequate or unworkmanlike manner. She claimed, consistent with Rice's summary, that the tile in the guest bathroom was improperly installed over existing rolled vinyl which caused damage to the tiles and grout. (CL Ex. 10). The Claimant submitted two photographs showing that the tile was installed over top of a vinyl floor. (CL Ex. 10). However, she submitted only one photograph that purported to show damage to the grout on the tile floor in the guest bathroom. (CL Ex. 2). This photograph showed a barely perceptible crack in the grout adjacent to one tile. The Claimant did not testify or submit photographs to show that there

was a pervasive issue throughout the tile floor in the guest bathroom. She referred to a middle tile that was raised, had some broken grout, and creaked when it was walked on. No other photographic evidence was presented identifying these purported issues.

Jacobsen testified that it was proper to install tile over top of vinyl flooring so long as the floor on which it was placed was a solid floor. The Tile Council of North America document that the Claimant submitted to support her contention about the vinyl flooring indicated that tile could be installed over sheet vinyl so long as certain precautions were taken. (CL Ex. 10). The Claimant argued that the Respondent failed to show that he followed all of the requirements in the Tile Council document. However, it was the Claimant's burden to prove that the Respondent performed the guest bathroom tile floor installation in an inadequate or unworkmanlike manner and contrary to industry standards. She failed to prove that based on the evidence in this record.

Jacobsen acknowledged there was one tile on the guest bathroom floor where the corner of the tile was a little higher than the other tiles. Even if there was one damaged tile in the guest bathroom, the Claimant has failed to prove on this record that a problem existed throughout the guest bathroom floor requiring replacement of the entire tile floor in that bathroom. Furthermore, even if it would be appropriate to replace one tile, the Claimant has failed to present sufficient evidence on this record to establish the cost of such replacement.⁶ For the foregoing reasons, I conclude that the Claimant has failed to prove that the Respondent installed the tile floor in the guest bathroom in an unworkmanlike or inadequate manner and has failed to prove she suffered an actual loss regarding work performed on the tile floor in the guest bathroom.

The Claimant also relied on Rice's summary to claim that she was entitled to the cost to replace the toilet flange in the guest bathroom that purportedly was cracked in half. (CL Ex. 10).

⁶ The Respondent also claimed that the Claimant replaced the tile in the guest bathroom with a different size tile from the original contract and subsequently had tile installed under a new vanity. The Claimant pointed out that the different tile was less expensive than the original tile. In any event, these issues do not bear on whether the tile flooring is an actual loss compensable by the Fund.

The Claimant submitted no pictures to identify this issue. Moreover, she failed to present sufficient evidence to identify when this issue occurred or to establish that the Respondent had prior knowledge or was responsible for the cracked toilet flange. Rice even acknowledged in his summary that he could not identify the cause of this issue or when it occurred. (CL Ex. 10). For these reasons, I conclude that the Claimant has failed to prove that the Respondent performed work in an inadequate or unworkmanlike manner with regard to the toilet flange.

Cost to Repair

Having concluded that the Respondent was responsible for performing work on the master bathroom tile floor and shower curb in an unworkmanlike manner, I must now determine the cost to perform the repairs. The Claimant submitted an invoice from South River in the amount of \$4,100.00 for repairs to the master bathroom. (CL Ex. 3). The Claimant testified that South River was licensed by the MHIC and this testimony was not refuted. The Claimant testified that she paid the full amount of this cost to repair and the invoice stated on its face that it was "paid in full." (CL Ex. 3). As discussed above, I have found that the cost to install a new tile floor and the cost to repair the shower curb are actual losses that warrant reimbursement from the Fund. However, I also found that the Claimant is not entitled to reimbursement for the cost of the plumbing work. Therefore, I must deduct the full cost of the plumbing work from the South River invoice. The total cost of the plumbing work performed in the master bathroom by a certified plumber as set forth on the South River invoice is \$1,850.00. (CL Ex. 3). The Claimant acknowledged in her testimony that the installation of a marble sill in the master bathroom was an upgrade and not within the scope of the original contract with the Respondent. Therefore, the \$100.00 cost for this item must also be deducted from the South River invoice.

Therefore, I shall deduct a total of \$1,950.00 from the South River invoice for repair work that is not reimbursable. Accordingly, the Claimant is entitled to reimbursement for an actual loss in the amount of \$2,150.00 to repair the tile floor and shower curb in the master bathroom, as reflected in the South River invoice. (CL Ex. 3). The Claimant is also entitled to reimbursement of \$637.72 for the cost she paid to Atlas for the 18 x 18 inch tile to install on the master bathroom floor. (CL Ex. 3). As Atlas is only a marble and tile supplier and does not perform home improvement work, it need not be licensed by the MHIC for the Claimant to be eligible for reimbursement from the Fund.

The Claimant also submitted an invoice from All Glass & Mirror, Inc. for \$500.00 for the cost to remove and reinstall the shower glass during the repair of the shower curb. (CL Ex. 3). As All Glass performs home improvement work, it would require MHIC licensure for Fund reimbursement to be authorized. However, no issue was raised and no evidence was presented to indicate that All Glass was not properly licensed. Therefore, I shall determine that the Claimant is also entitled to reimbursement for an actual loss for the \$500.00 cost to remove and reinstall the shower glass when repairing the shower curb.

Accordingly, I conclude that the total reimbursable cost to repair the tile work and shower curb in the master bathroom is \$3,287.72 (\$2,150.00 + \$637.72 + \$500.00).

Having found eligibility for compensation, I must determine the amount of the Claimant's actual loss and the amount she is entitled to recover. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney fees, court costs, or interest. Md. Code. Ann., 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 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).

In this case, the Claimant paid the Respondent \$20,499.41 to perform the master bathroom and guest bathroom work under the contract. For the reasons addressed above, I conclude that the Claimant paid other contractors and the tile supplier \$3,287.72 to repair the tile floor and shower curb in the master bathroom that the Claimant has proved were performed in an unworkmanlike or inadequate manner. The calculation to determine the amount of the Claimant's actual loss is as follows:

\$20,499.41	Amount Paid to Respondent
<u>\$ 3,287.72</u>	Cost to Repair Work
\$23,787.13	
<u>-\$20,499.41</u>	Original Contract Amount
\$ 3,287.72	Actual Loss

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 far less than the amount paid to the Respondent and less than \$20,000.00. Therefore, the Claimant is entitled recover her

actual loss in the amount of \$3,287.72 to repair the unworkmanlike or inadequate home improvement work performed by the Respondent on the tile floor and shower curb in the master bathroom of the Claimant's residence. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405; COMAR 09.08.03.03B(3)(c).

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$3,287.72 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015). I further conclude that the Claimant is entitled to recover \$3,287.72 from the Fund. COMAR 09.08.03.03B(3)(c).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$3,287.72; 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;⁷ and

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

October 4, 2019
Date Decision Issued

DEK/da
182289

CONFIDENTIAL

Douglas E. Koteen
Administrative Law Judge

⁷ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 20th day of November, 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.

Robert Altieri

***Robert Altieri
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION

IN THE MATTER OF THE CLAIM OF EMELIA STIVERSON AGAINST THE MARYLAND HOME IMPROVEMENT GUARANTY FUND FOR THE ACTS OR OMISSIONS OF JONATHAN JACOBSEN T/A CREATIVE SOLUTIONS HOME IMPROVEMENT	* MARYLAND HOME * IMPROVEMENT COMMISSION * * MHIC CASE NO. 19(75)34 * OAH CASE NO. LABOR-HIC- * 02-19-12896 *
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FINAL ORDER

This matter was originally heard before an Administrative Law Judge (“ALJ”) of the Office of Administrative Hearings (“OAH”) on July 9, 2019. Following the evidentiary hearing, the ALJ issued a Proposed Decision on October 4, 2019, concluding that the homeowner, Emelia Stiverson (“Claimant”) suffered an actual loss of \$3,287.72 as a result of the acts or omissions of Jonathan Jacobsen t/a Creative Solutions Home Improvement (“Contractor”). *ALJ Proposed Decision* pp. 19-20. In a Proposed Order dated November 20, 2020, the Maryland Home Improvement Commission (“MHIC” or “Commission”) affirmed the Proposed Decision of the ALJ to grant an award from the Home Improvement Guaranty Fund. The Contractor subsequently filed exceptions to the MHIC Proposed Order.

On October 15, 2020, a three-member panel (“Panel”) of the MHIC held a remote hearing on the exceptions filed in this matter. The Claimant and Contractor participated without counsel. Assistant Attorney General Hope Sachs appeared at the exceptions hearing on behalf of the Guaranty Fund. The Commission entered the following preliminary exhibits as part of the record of the exceptions hearing without objection: 1) July 21, 2020 hearing notice; 2) November 20, 2019 transmittal letter, ALJ Proposed Decision, and MHIC Proposed Order; 3) Contractor’s exceptions; 4) October 5, 2020 virtual hearing notice. Neither the Claimant nor the Contractor produced a copy of the transcript of the hearing before the ALJ. Therefore, the Panel’s review of the record was limited to the preliminary exhibits for the exceptions hearing, the OAH Proposed

Decision, and the exhibits admitted into evidence at the OAH hearing. COMAR 09.01.03.09(G)

- (I).

The claim in this proceeding relates to two contracts between the parties, one for the renovation of at the Claimant's master bathroom and one for the installation of a backsplash in the kitchen and new tile flooring in a hall bathroom. The ALJ found that the Contractor's performance under the contract was unworkmanlike and inadequate with respect to the tile flooring and shower curb in the Claimant's master bathroom. *ALJ Proposed Decision* pp. 11-14.

On exception, the Contractor argued that the ALJ (1) erred in finding that its work was unworkmanlike and inadequate because the Claimant presented only hearsay evidence of the shortcomings of his work, (2) erred in granting an award because the Claimant did not give him the opportunity to correct his defective work, and (3) erred in finding that the problems with the tile floor in the master bathroom was caused by his unworkmanlike and inadequate work rather than when a plumber snaked a drain in the claimant's home.

The Commission finds no error with the ALJ's finding that the Contractor's installation of the tile floor and shower curb in the master bathroom were inadequate and unworkmanlike. The Claimant did present a written statement from the Sales Manager of South River Flooring describing the problems with the Contractor's work, which constituted hearsay because the Sales Manager did not testify at the hearing before the ALJ. However, hearsay evidence is permissible in administrative proceedings. In addition, the record includes other evidence supporting the finding that the Contractor's work was unworkmanlike and inadequate, including photographs of holes in the subfloor (OAH Hearing Claimant's Exhibit 6), inadequate thinset applied to the subfloor (OAH Hearing Claimant's Exhibit 3), the shower curb sloping away from the shower and the shower curb constructed with drywall (Claimant's Exhibit 8), and cracks in the grout between

the tiles on the floor and shower curb and lifted tiles in the master bathroom (OAH Hearing Claimant's Exhibit 2). In addition to the photographs, the Claimant testified regarding her observations of the problems, and the fact that the Claimant experienced the problems with the master bathroom tile floor and shower curb within a year of the installation (OAH Hearing Claimant's Exhibit 2) also supports the conclusion that they were installed improperly.

The Commission also disagrees with the Contractor's assertion that the Claimant should not have received an award because he was not afforded the opportunity to correct his work. Under *Md. Code Ann.*, Bus. Reg. § 8-405(d), the Commission may deny a Guaranty Fund claim if "the claimant unreasonably rejected good faith efforts by the contractor to resolve the claim." In this case, there is no evidence that the Claimant rejected the Contractor's good faith efforts to correct his work. Rather, the record indicates that the Contractor ignored the claimant when she first reported the problems she was having in her master bathroom (OAH Hearing Claimant's Exhibit 2) and then, when meeting with the Claimant and an MHIC investigator at the Claimant's home, offered to replace some tiles, but not repair the subfloor, replace the entire tile floor, or properly install the shower curb. (*ALJ's Proposed Decision* p. 10.) Therefore, the Commission finds that the Claimant did not unreasonably reject good faith efforts by the Contractor to resolve her claim.

The Commission also agrees with the ALJ's finding that the problems with the Claimant's master bathroom floor and shower curb were caused by the Contractor's unworkmanlike and inadequate work rather than the snaking of the Claimant's drain. As discussed above, the record includes extensive evidence that the Contractor's performance was unworkmanlike and inadequate, and the only evidence that the snaking of the drain caused the damage was the testimony of the Contractor, who did not observe the snaking. As the ALJ noted, the snaking occurred shortly after the Contractor performed the home improvements and nearly one year before the Claimant

discovered the problems with the master bathroom floor and shower curb. The Commission finds that the snaking of the drain is unlikely to have caused the damage to the floor and shower curb and that the Contractor's failure properly to prepare the subfloor, his use of drywall in the shower curb, and the improper slope of the shower curb that he installed were more likely than not the cause of the problems.

Having considered the parties' arguments, the evidence contained in the record, and the ALJ's Recommended Decision, it is this 21st day of October 2020, **ORDERED:**

- A. That the Findings of Fact of the Administrative Law Judge are **AFFIRMED**;
- B. That the Conclusions of Law of the Administrative Law Judge are **AFFIRMED**;
- C. That the Proposed Decision and Recommended Order of the Administrative Law Judge is **AFFIRMED**;
- D. That the Claimant is awarded \$3,287.72 from the Maryland Home Improvement Guaranty Fund;
- E. That the records and publications of the Maryland Home Improvement Commission shall reflect this decision; and
- F. Any party has thirty (30) days from the date of this Final Order to appeal this decision to Circuit Court.

Michael Shilling
Chairperson –Panel
Maryland Home Improvement
Commission