

IN THE MATTER OF THE CLAIM	*	BEFORE JENNIFER A. NAPPIER,
OF WAYNE LAWSON,	*	AN ADMINISTRATIVE LAW JUDGE
CLAIMANT	*	OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	*	OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	*	OAH No.: LABOR-HIC-02-23-06642
FOR THE ALLEGED ACTS OR	*	
OMISSIONS OF PAUL HERBERT,	*	MHIC No.: 22 (75) 1339
T/A HERBERT CONSTRUCTION,	*	
LLC,	*	
RESPONDENT	*	

* * * * *

PROPOSED DECISION

STATEMENT OF THE CASE
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RECOMMENDED ORDER

STATEMENT OF THE CASE

On December 15, 2022, Wayne Lawson (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)¹ Guaranty Fund (Fund) for reimbursement of \$42,613.00 for actual losses allegedly suffered as a result of a home improvement contract with Paul Herbert trading as Herbert Construction, LLC (Respondent).² On March 1, 2023, the MHIC issued a Hearing Order on the Claim. On March 9, 2023, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

¹ The MHIC is under the jurisdiction of the Department of Labor (Department).
² Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2022). All references to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.

On May 9, 2023, I held a hearing at the OAH in Hunt Valley, Maryland.³ Jonathan Phillips, Assistant Attorney General, Department, represented the Fund. The Claimant represented himself. Rebecca Schisler-Adams, Esquire, represented the Respondent's estate.⁴

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the OAH govern procedure.⁵

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 offered by the Claimant⁶:

- CL Ex. A Contract, January 31, 2022; Estimate, January 30, 2022
- CL Ex. B Email from the Claimant's wife to the Respondent, April 28, 2022
- CL Ex. C Emails between the Claimant, the Claimant's wife, and the Respondent, May 5 to May 11, 2022
- CL Ex. D Emails between the Claimant, the Claimant's wife, and the Respondent, May 16 to May 18, 2022, with attachment
- CL Ex. E Email from Nathan Cederoth to the Claimant and the Claimant's wife, with attachment, May 17, 2022
- CL Ex. F Emails between the Claimant and the Respondent, May 20, 2022
- CL Ex. G Emails between the Claimant and the Respondent, May 24, 2022 and June 1, 2022
- CL Ex. H Complaint Form, with attachments, June 2, 2022

³ Bus. Reg. §§ 8-407(a), 8-312.

⁴ The Respondent is deceased. Ms. Schisler-Adams appeared as the representative of the Respondent's estate.

⁵ Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021); Code of Maryland Regulations (COMAR) 09.01.03; COMAR 28.02.01.

⁶ The Claimant submitted his exhibits in a folder that included Claimant Exhibits O, P, and Q, which were not offered into evidence.

- CL Ex. I Email from the MHIC to the Respondent, June 3, 2022
- CL Ex. J Email from the Respondent's family and employees to the Claimant, June 6, 2022
- CL Ex. K Diaz Construction Invoice, July 10, 2022; Seth's Plumbing Service Proposal, June 27, 2022; Plus Electric Corporation Estimate, July 6, 2022
- CL Ex. L Email from the Claimant to the Respondent's attorney, with attachments, August 9, 2022
- CL Ex. M Prince George's County Department of Permitting, Inspections and Enforcement (DPIE) inspection sticker, October 21, 2022; WSSC Water Final Inspection Plumbing/Gasfitting sticker, October 4, 2022
- CL Ex. N Emails between the Claimant, Pro Se Manager 8, and the Respondent's attorney, December 2 to December 11, 2022

I admitted the following exhibits offered by the Fund:

- MHIC GF Ex. 1 Notice of Hearing, March 21, 2023; emails between Jonathan P. Phillips, Department Assistant Attorney General and Kelly A. Burgy, Esquire
- MHIC GF Ex. 2 Hearing Order, March 1, 2023
- MHIC GF Ex. 3 Claim Form, December 15, 2022
- MHIC GF Ex. 4 The Respondent's Department I.D. Registration and Occupational/Professional License History, May 2, 2023

The Respondent did not offer any exhibits.

Testimony

The Claimant testified and presented the testimony of Andre Diaz of Diaz Construction and Olga Naidenko, the Claimant's wife.

Neither the Respondent nor the Fund presented any witness 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, individually, was a licensed home improvement contractor under MHIC contractor/salesperson license number 01-105848 and MHIC corporate number 05-130507.
2. The Claimant is not an officer or employee of the Respondent, related to the Respondent, or related to an officer or employee of the Respondent.
3. The Claimant has no other pending claims related to this matter and has not otherwise recovered for any losses connected to the Claim.
4. At all relevant times, the Claimant and his wife were the owners of a home located on Perry Street in Brentwood, Maryland (Home).
5. The Claimant and his wife jointly own their primary residence in Ellicott City, Maryland.
6. Prior to contracting with the Respondent, the Claimant retained an architect, Nathan Cederroth of Operant Studio, to draft building plans to convert the Home's detached garage into an accessory apartment.
7. Mr. Cederroth drafted the building plans, which were approved by DPIE on a date not contained in the record.
8. The Claimant provided the Respondent with the approved building plans before entering into a contract with the Respondent.
9. On January 31, 2022, the Claimant and the Respondent entered into a contract to convert the Home's detached garage into an accessory apartment according to the plans supplied by the Claimant (Contract). In addition to supplying the project plans, the Claimant was to

supply all building permits and pay all associated fees and remove all items, other than trash, from the garage prior to commencing the work.

10. The Contract provided that the Respondent would complete the following, in accordance with the approved plans drafted by the Claimant's architect,⁷ and provided the associated cost for each item:

- Demolition – Remove garage door, right side entry door, window, everything on walls and ceiling, and all existing drywall down to framing and block walls. Remove all electrical wires, boxes, panels, and sub panels. Supply two dumpsters in driveway near garage. Put down plywood to protect the driveway. (\$3,600.00.)
- Waterproofing – Seal all inside exterior cinder block walls with one coat of Drylock. (\$1,450.00).
- Install thirty-six-inch entry steel door with one-quarter-inch glass (not transparent) at top with no transom above, right in-swing. (\$550.00 allowance.)
- Supply and install Provia Spectrum storm door, Vallis Red, right out-swing, top screen, full view. (\$600.00 allowance.)
- Supply and install windows white vinyl, prairie styles grids, low-E, argon gas, full screen. (No price listed.)
- Install one double forty-eighty-inch by ninety-six-inch double hung door with transom above. (\$2,000.00 allowance.)
- Labor and material to set windows, door, and wrap framing with six-inch rubber tape and install windows and door and reseal. (\$1,650.00.)
- Masonry & concrete – Supply and install all material, labor, and tools to pour missing concrete front left corner where new plumbing was installed by others; and fill in with cinder block, existing kitchen window and entry door on right side. (\$4,250.00.)
- Floor application – Supply and install six-mil poly vapor barrier over the concrete floor and four to six inches up the walls; construction of a subfloor using two by four joists with one-half-inch plywood, two-inch nailed to the existing concrete floor; installation of R10 foam insulation between the joist. After the inspection, installation of three-quarter-inch plywood surface. (\$4,925.00.)
- Framing – Two by four walls around all exterior walls (for insulation and electrical box purposes) and interior walls, and pressure treated lumber to be used for sill plate and when touching concrete. The steel beam was to be left open. Niche to be forty inch by sixteen inch kitchen wall of shower; frame in front wall with two by six where garage door is being demoed, frame new window and door. Install seventh-sixteenth-inch OSB plywood with Tyvek. Lightly scrape and sand existing steel beam and two coats of clear to keep industrial look. (\$4,450.00.)
- Install siding – Front only. (\$5,250.00.)
- Windows – Supply and install five four-by-four foot wrapped in white smooth aluminum. (\$500.00.)

⁷ The Contract include/ \$2,950.00 in credits to the Claimant. The record is unclear as to the nature of the credits.

- Exterior Painting – Prime and paint patched block on sides and back as needed. (\$1,325.00.)
- Roofing – (Price not yet determined.)
- Gutters – (Optional, \$1,200.00.)
- HVAC – Supply and install vent to cinder block wall for hood fan/microwave (\$350.00); install bath fan and vent to roof vent (\$350.00).
- Plumbing – The Respondent was to provide the permit and pay the fees; cap existing gas⁸ and remove all gas lines in the garage; groundwork; rough in; and trim out. The Claimant was to supply all fixtures, tankless water heater, faucets, toilet, appliances, etc. (\$8,450.00+.)
- Electric – The Respondent was to supply the permit and pay the fees. Supply and install 100 amp sub panel for the HVAC system; install two fans; install a bathroom fan; supply and install two recessed lights in the bathroom; perform mini split installation; install two recessed lights in the utility area; install four circuits, for the dryer, range, water heater, and washer; install a microwave, fridge, dishwasher, garbage disposal, and hood fan in the kitchen; install a light by the front door and existing flood lights outside; install six switches, thirteen plugs, three GFI outlets, and smoke/carbon monoxide detectors. (\$9,350.00+.)
- Install insulation per the building plans, including R13 insulation for the exterior walls, R38 insulation for the ceiling, and R24 insulation behind all of the water lines in the exterior walls. (\$3,450.00.)
- All materials, tools, and labor needed to draft stop and firestop. (\$425.00.)
- Supply and install drywall. (\$3,900.00.)
- Supply and install all interiors doors (to be six-panel); extend the windows with plywood from the window to the drywall; standard two and one-quarter-inch casing around the windows and doors; one access for around the electric panel; and one access panel to the attic. (\$4,200.00+.)
- Installation of industrial sink supplied by the Claimant and butcher block top (\$600.00 allowance). (1,450.00.)
- Installation of appliances supplied by Claimant. (\$750.00.)
- All interior painting. (\$2,750.00.)
- Floor – Install three-quarter-inch T&G x two and one-quarter-inch prefinished flooring. (\$4,800.00 allowance.)
- Tile work. (\$5,550.00+.)
- Accessories – Installation of front right closet supplied by the Respondent and installation of fixed wire shelving (\$350.00); 1 bathroom knob (\$75.00), four dummy knobs and stops for the closets (\$100.00); glass shower doors (\$500.00); a dishwasher (\$85.00+); a towel bar, loop, toilet paper holder, and mirror/medicine cabinet (to be determined).
- Final cleaning – Remove all debris; and clean all floors and windows. (\$550.00.)

11. The Contract explained that the allowances were amounts specified and included in the cost estimate for details that had yet-to-be determined when the Contract was signed. The

⁸ It is unclear what is meant by “cap existing gas.” Claimant Exhibit A.

allowances covered the base cost of the item and did not include the cost of labor, installation, overhead, profit, and/or other expenses related to the allowance item. The Contract further stated that the Contract amount would increase or decrease depending upon the Claimant's final selections.

12. The original agreed-upon Contract price was \$80,960.00 and provided the following payment schedule:

- \$30,000.00 initial deposit;
- \$20,000.00 due on the day demolition begins;
- \$15,000.00 due on the day drywall is stocked;
- \$10,000.00 due on the day painting begins;
- \$4,000.00 due upon substantial completion; and
- \$1,960.00 due upon completion.

13. In February and April 2022, the Respondent sent the Claimant invoices for additional costs incurred, which the Claimant accepted. The February invoice was in the amount of \$7,875.00 and the April invoice was in the amount of \$3,875.00.

14. The final agreed-upon Contract price was \$92,710.00.⁹

15. The Contract contains an arbitration clause, but arbitration is not mandatory because the arbitration clause does not: (1) specifically name the person or organization responsible for conducting arbitration; (2) include a fee schedule for the mandatory fees associated with arbitration; and (3) include a disclosure that a claim against the Fund shall be stayed until completion of any mandatory arbitration proceeding.

16. The Contract stated that work would begin on or about February 2022 and would be completed no later than 120 business days thereafter, subject to delays caused by acts of God, inclement weather, theft, vandalism, or other unforeseen events beyond the control of the Respondent.

⁹ \$80,960.00 + \$7,875.00

17. The Claimant paid the Respondent a total of \$76,750.00, as follows:
 - \$30,000.00 on February 1, 2022;
 - \$20,000.00 on February 10, 2022;
 - \$7,875.00 on February 17, 2022;
 - \$15,000.00 on April 6, 2022; and
 - \$3,875.00 on April 28, 2022.
18. The Respondent began demolition work on or about February 10, 2022.
19. The pre-existing garage floor was a concrete slab. According to the building plans and the Contract, the Respondent was to install a six-mil polyethylene vapor barrier over the concrete slab floor before installing the subfloor.
20. In late February 2022, the Respondent deviated from the building plans when installing the subfloor. The Respondent failed to install the poly vapor barrier plastic sheeting over the concrete slab. Instead, the Respondent placed wood blocking directly on top of the concrete slab and nailed it down. The Respondent then nailed the deck framing into the blocking and then installed plywood sheeting on top of the frame.
21. By late April 2022, the Respondent had completed a substantial portion of the work under the Contract, including the framing, rough-ins and most, if not all of the exterior work. The following work remained to be completed: flooring, drilling holes for exhaust, finishing the bathroom and kitchen, tilework, and installation of accessories and a storm door.
22. After the Respondent performed concrete work in front of the garage, water began to run into the garage and under the concrete slab when it rained.
23. On April 28, 2022, the Claimant's wife was at the work site when a subcontractor came to the property to install blown-in insulation. When a portion of the subfloor plywood was removed so that insulation could be blown in under the subfloor, the Claimant's wife noticed that there was no vapor barrier over the concrete and there was visible mold on the surface of the

concrete. As a result, the Claimant's wife asked that the subcontractor halt the insulation work so that the mold could be properly addressed.

24. Upon seeing the mold, the Claimant's wife took photographs of the section of the subfloor where the plywood had been removed, revealing that there was no vapor barrier over the concrete and showing visible mold spores. That day, she emailed the photographs to the Respondent with the subject line "Need to have a call right away, mold under plywood."¹⁰

25. The mold was the result of water seeping through the concrete where the Respondent penetrated the concrete when nailing the wood blocking into the concrete floor without first applying the vapor barrier.

26. It is unknown whether there is a vapor barrier beneath the concrete slab.

27. On a date not contained in the record, the Claimant and Respondent had a telephone conversation, during which the Respondent suggested that the mold be remediated by fogging the garage.

28. On May 5, 2022, the Respondent emailed the Claimant and suggested that the mold be removed with Concrobium mold control and hydrogen peroxide-based agents, which he stated would kill the mold but leave ugly mold stains behind. He also suggested that the concrete slab be treated with a fungicidal protective coating.

29. On May 6, 2022, the Respondent emailed the Claimant and offered to pay fifty percent of the costs for mold remediation. The Claimant responded that he did not believe that he was responsible for the mold developing and informed the Respondent that he would be willing to pay \$4,000.00 towards mold remediation, provided the Respondent provide a letter from an engineer confirming that the Respondent's proposed plan would prevent mold growth on the concrete slab in the future.

¹⁰ Claimant Exhibit B.

30. An MHIC license is required to perform mold remediation in Maryland. No additional certifications or licensure is required.

31. Due to the health and safety issues associated with mold growth, the Claimant informed the Respondent that he wanted to consult with a professional mold remediation company to make sure that the appropriate steps were taken to remediate the mold. On or about May 7, 2022, the Respondent scheduled appointments with some professional mold remediation companies in order to obtain information on standard industry practices to address mold and moisture.

32. On May 7, 2022, the Claimant's wife emailed the Respondent to inform him of the appointments with the mold remediation companies and to reiterate that there should be no further work on the project until there was a mutually-agreed-upon plan for preventing moisture penetration and future mold growth.

33. On May 7, 2022, the Claimant spoke with the Respondent about his plan for addressing the mold growth. The Respondent stated that he would remove the existing plywood and insulation and treat the mold before using closed cell foam insulation. The Respondent said that the cell foam was also a moisture and air barrier, and he stated that that he would have an engineer provide a letter regarding the proposed plan.

34. On May 8, 2022, the Claimant's wife emailed the Respondent and informed him that she and the Claimant wished to speak to the engineer in person regarding his recommendations.

35. On May 9, 2022, a technician from Indoor Green Solutions visited the Claimant's home to inspect the area. The technician noted visible mold on subfloor surface areas, visible water damage on various surfaces, demolition and removal of all affected subfloor, and fogging process/remediation treating all surfaces under the subfloor area.

36. On May 9, 2022, the Claimant informed the Respondent that it would be insufficient just to kill the mold without taking further steps because there was still no vapor barrier to prevent further mold growth.

37. The Claimant and the Respondent continued to exchange numerous emails during May 2022 but were unable to reach an agreement as to mold remediation and measures to prevent future mold growth. The Claimant informed the Respondent that although the Respondent was legally allowed to perform mold remediation, he would not allow the Respondent to do so because the Claimant needed to make sure that someone who was experienced addressed the issue so that he could ensure the safety of the property.

38. The Respondent conducted ten “mold treatments” during the five years prior to May 2022.¹¹

39. On a date not contained in the record, the Respondent removed all of his equipment from the Claimant’s property, as well as some of the items the Claimant personally purchased for the renovation project and took them to the Respondent’s office.

40. On May 16, 2022, the Claimant emailed the Respondent to inform him that Indoor Green Solutions would start the mold treatment the next day and that he would notify the Respondent when he could enter the property after the treatment was completed.

41. On May 16, 2022, the Respondent’s office manager responded to the Claimant’s email and stated “Thank you for forwarding the information on to us and we will be looking for the mail upon completion.”¹²

¹¹ Claimant Exhibit G.

¹² Claimant Exhibit D.

42. On May 17, 2022, Indoor Green Solutions performed mold remediation and protections services, including the following:

- Containment of the area to be remediated;
- Removal/disposal of all affected and/or hazardous materials;
- Removal/disposal of surrounding surfaces to eliminate the possibility of further contamination;
- Buffering, scrubbing, and remediation of all mold-covered areas;
- Remediation and spraying of all studs;
- Remediation of all surfaces affected mold, as well as the surrounding surfaces, and the application of a mold prevention treatment using EPA-approved solutions to provide sanitation, anti-bacteria, dust repulsion, mildew elimination, mold control, anti-rusting, deodorizing, and odor control;
- The use of blowers and dehumidifiers for up to seventy-two hours to facilitate the drying process;
- The use of air scrubbers, an air negative pressure machine, and/or humidifier;
- Project manager supervision on site; and
- Fogging of the entire garage, including all surfaces; and wiping and cleaning all of the affected area after the fogging was complete.

43. The Claimant paid Indoor Green Solutions \$3,405.30.

44. Indoor Green Solutions is a licensed contractor and certified in mold remediation.

45. By May 20, 2022, the Respondent had not provided the Claimant with a letter from an independent professional engineer regarding the proposed plan for preventing future mold growth, which differed from the approved building plans. That day, the Claimant emailed the Respondent to state that Indoor Green Solutions had completed the mold remediation but the Claimant had not received the engineer's letter addressing the Respondent's plan to remediate the moisture issue in the garage. The Claimant expressed his concern that the delay in receiving the engineer's letter was exacerbating the damage to the infrastructure of the garage and requested that the letter be provided no later than 9:00 a.m. on May 23, 2022.

46. On the evening of May 20, 2022, the Respondent emailed the Claimant a proposed plan to address the water penetrating the concrete slab. The Claimant did not accept the proposal because the plan did not include a certification from a professional engineer. On

May 24, 2022, the Claimant emailed the Respondent and asked that the Respondent provide a plan certified by an independent professional engineer by the close of business on May 30, 2022.

47. The Respondent never provided the Claimant with a letter from an independent professional engineer, outlining and assessing the Respondent's plan for addressing the moisture issues to prevent future mold growth.

48. On June 2, 2022, the Claimant filed a complaint with the MHIC, due to the Respondent's failure to follow the approved building plans, failure to remediate the mold, and failure to remediate the conditions that created the mold.

49. The Respondent passed away unexpectedly on June 3, 2022.

50. On June 6, 2022, the Claimant received an email from the Respondent's family and employees, informing him of the Respondent's passing.¹³

51. On June 27, 2022, Seth's Plumbing Service completed the remaining plumbing work, including installation of the water heater, toilet, shower, and kitchen sink.

52. The Appellant paid Seth's Plumbing Service \$1,500.00 for completion of the plumbing work.

53. Seth's Plumbing is a licensed plumber.

54. On July 6, 2022, C&R Insulation installed two-inch thick R14 closed cell foam in the floor of the garage.

55. The Claimant paid C&R \$2,920.00 for the foam installation.

56. C&R Insulation is a licensed contractor.

57. On or about July 10, 2022, the Claimant paid Diaz Construction a total of

¹³ The email was signed "Herbert Family and Herbert Construction Team." Claimant Exhibit J.

\$15,988.00 to perform the following work:

- Remove the existing subfloor wood frame to access the concrete and apply the vapor barrier, per the approved building plans. (\$865.00.)
- Clean all dirt and oils from the concrete slab before applying drylock extreme waterproof paint and sealing all visible holes and cracks with concrete sealant. Apply two coats of drywall extreme to the entire exposed concrete surface and installing a six mil vapor barrier over the concrete slab, sealing all seams as necessary. (\$2,987.00.)
- Install new subfloor wood frame over the vapor barrier. Install new three-quarter-inch subfloor. (\$3,895.00.)
- Prepare and install flooring provided by the Claimant.
- Complete the bathroom, including tilework and finishes. (\$2,487.00.)
- Drill two three-inch holes for exhaust. (\$350.00.)
- Complete the kitchen. (\$940.00.)
- Install a storm door provided by the Claimant. (\$185.00.)

58. Diaz Construction is a licensed contractor.

59. On December 11, 2022, counsel for the Respondent's estate withdrew from the arbitration proceeding.

60. As of the date of the hearing, the Respondent's estate had refused to participate in arbitration. The Claimant does not intend to pursue arbitration any further.

61. The Claimant has no other pending claims related to this matter and has not otherwise recovered for any losses connected to the Claim.

DISCUSSION

LEGAL FRAMEWORK

In this case, the Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence.¹⁴ To prove a claim by a preponderance of the evidence means to show that it is "more likely so than not so" when all the evidence is considered.¹⁵

¹⁴ Bus. Reg. § 8-407(e)(1); Md. Code Ann., State Gov't § 10-217; COMAR 09.08.03.03A(3).

¹⁵ *Coleman v. Anne Arundel Cnty. Police Dep't*, 369 Md. 108, 125 n.16 (2002).

An owner may recover compensation from the Fund “for an actual loss that results from an act or omission by a licensed contractor”¹⁶ “[A]ctual loss’ means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.”¹⁷ The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney fees, court costs, or interest.¹⁸

By statute, certain claimants are excluded from recovering from the Fund altogether. There are no such statutory impediments to the Claimant’s recovery. The Claim was timely filed, there is no pending court claim for the same loss, and the Claimant did not recover the alleged losses from any other source.¹⁹ The Claimant does not own more than three residences.²⁰ The Claimant is not a relative, employee, officer, or partner of the Respondent and is not related to any employee, officer, or partner of the Respondent.²¹ The Contract did not contain a mandatory arbitration clause and the Claimant is no longer pursuing arbitration.^{22,23}

Additionally, I find that the Claimant did not unreasonably reject good faith efforts by the Respondent to resolve the claim.²⁴ Given the health and safety issues present by the mold, the Claimant was reasonable to require that the mold be remediated by a contractor certified in mold remediation rather than the Respondent, who had only performed ten mold treatments in the past

¹⁶ Bus. Reg. § 8-405(a) (Supp. 2022); *see also* COMAR 09.08.03.03B(2) (“The Fund may only compensate claimants for actual losses . . . incurred as a result of misconduct by a licensed contractor.”).

¹⁷ Bus. Reg. § 8-401.

¹⁸ Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1).

¹⁹ Bus. Reg. §§ 8-405(g), 8-408(b)(1) (2015 & Supp. 2022).

²⁰ *Id.* § 8-405(f)(2) (Supp. 2022).

²¹ *Id.* § 8-405(f)(1) (Supp. 2022).

²² COMAR 09.08.01.25A provides:

A. A mandatory arbitration clause in a home improvement contract shall include the following information:

- (1) The name of the person or organization that will conduct the arbitration;
- (2) Whether any mandatory fees will be charged to the parties for participation in the arbitration and include the fee schedule;
- (3) Whether the arbitrator’s findings are binding; and
- (4) A disclosure that, under Business Regulation Article, §8-405(c), Annotated Code of Maryland, a claim against the Home Improvement Guaranty Fund by an owner shall be stayed until completion of any mandatory arbitration proceeding.

²³ Claimant Exhibit A.

²⁴ *Id.* § 8-405(d) (Supp. 2022).

five years and who gave the Claimant no indication that he or his employees had any training in mold remediation. Further, given that the subfloor was exposed, which allowed mold spores to enter the air in the garage, the Claimant was also reasonable in requesting that the mold remediation go beyond cleaning the affected surfaces and that fogging be performed.²⁵

Additionally, there is no evidence that the Respondent ever offered the Claimant a solidified plan, approved by an engineer and/or DPIE, to address the moisture issues and prevent further mold growth in the future. Also, given that the condition which created the mold was still present after the mold remediation, and after giving the Respondent over a month to appropriately address the issues, I find that the Claimant was reasonable in securing other contractors in June and July 2022 to complete the project.

For the following reasons, I find that the Claimant has proven eligibility for compensation.

THE MERITS OF THIS CASE

The facts of this case are generally undisputed. The Respondent was a licensed home improvement contractor at the time the Respondent entered into the Contract with the Claimant. The credible evidence in the record establishes that the Respondent performed unworkmanlike, inadequate, and/or incomplete home improvements.

The evidence in the record establishes that both the building plans and the Contract, which provided that the Respondent would perform the work according to building plans supplied by the Claimant, provided that a vapor barrier was to be installed over the concrete slab before installing a subfloor.²⁶ However, when the Respondent installed the subfloor in late

²⁵ The Claimant also testified that at one point, the Respondent verbally suggested that fogging the garage was necessary to remediate the mold, but the Respondent later insisted that cleaning and killing the mold was sufficient. The Claimant's testimony is supported by a copy of an email where he states that the Respondent had suggested fogging and the Respondent does not dispute this in his response. Claimant Exhibit G.

²⁶ Claimant Exhibit A; see Claimant Exhibit E.

February 2022, he failed to install the vapor barrier.²⁷ When installing the subfloor, the Respondent penetrated the concrete with the nails used to affix the wood blocking to the concrete slab.²⁸ Once the subfloor was completed, the concrete slab was almost entirely enclosed beneath the subfloor for about two months. When a section of the subfloor plywood was removed on April 28, 2022, there was mold visible on the concrete slab where there previously had been none.²⁹ Andre Diaz of Diaz construction testified that the mold was the result of moisture that had accumulated under the concrete slab when rain ran into the garage and under the concrete slab. Mr. Diaz further testified that a vapor barrier beneath the concrete would probably have helped to prevent moisture escaping from under the concrete slab after the Respondent penetrated it. There is no evidence as to whether a vapor barrier is or is not present under the concrete slab.

The first issue in dispute is whether the mold was the result of the Contractor's actions. The Claimant testified that the architect included a vapor barrier in the building plans because the architect was concerned about water intrusion and the vapor barrier was a preventative measure. The Claimant's testimony is corroborated by a letter from the architect that indicates the plans provided for moisture protection.³⁰ The accumulation of moisture in an enclosed space can lead to mold growth; indeed, no argument was made to the contrary. I find that it is more likely than not that penetrating the concrete with nails where no vapor barrier was in place allowed moisture to escape from beneath the concrete, leading to mold growth in the enclosed area over the next two months. Although I do not doubt that a vapor barrier beneath the concrete would have helped to mitigate or avoid the issue of moisture escaping from beneath the concrete, I also find that it is more likely than not that a six mil poly vapor barrier properly applied and

²⁷ See Claimant Exhibit B.

²⁸ See *id.*

²⁹ See *id.*

³⁰ Claimant Exhibit E.

sealed over the concrete slab prior to the installation of the subfloor would have prevented or mitigated moisture from escaping beneath the concrete after the concrete was penetrated with nails and enclosed under the subfloor plywood. I further find that a sealed barrier would have prevented mold spores from entering the air. Because the Respondent failed to adhere to the building plans and the Contract, resulted in mold developing on the concrete slab, I conclude that the Respondent performed an unworkmanlike or inadequate home improvement. I thus find that the Claimant is eligible for compensation 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 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).

It is undisputed that the Claimant paid \$76,750.00 to the Respondent under the Contract. The Claimant submitted evidence indicating that he paid an additional \$25,913.30 to various licensed contractors to complete the conversion of the detached garage into an accessory apartment, including: \$3,405.30 to Indoor Green Solutions for mold remediation; \$15,988.00 to Diaz Construction to complete the renovation; \$1,500.00 to Seth's Plumbing Service to complete the plumbing; \$2,920.00 to C&R Insulation for the installation of R14 closed cell foam in the

floor of the apartment; and \$2,100.00 to Plus Electrical to run a one and one-quarter inch conduit from the electrical meter to the apartment. However, having compared the Contract to the invoices from each of these contractors, I find that some of the work performed by the outside contractors did not fall within the scope of the Contract.

Having found that the development of mold was due to the Respondent's failure to install the six-mil vapor barrier per the Contract and approved building plans, I find that the mold remediation was necessary to repair the inadequate work performed by the Respondent. Further, the work performed by Seth's Plumbing Service was within the scope of the Contract. However, the Contract did not provide for the installation of a conduit from the electrical meter to the apartment and therefore the Claimant may not recover the \$2,100.00 paid to Plus Electrical.

With regard to the work performed by Diaz Construction, the Fund raised two issues as to whether the work performed was within the scope of the Contract. First, there is a \$757.00 line item under the heading of "Additional" which lists the installation of additional shelving, hardware, and accessories provided by the Claimant and cleanup upon completion.³¹ I find that these items are within the scope of the Contract, which provided that the Respondent would install shelving, hardware, and accessories to be supplied by the Respondent. I find it reasonable to include this cost in the calculation of the Claimant's actual loss and note that the cost would have been greater had Diaz Construction supplied these items.

³¹ The "Additional" heading appears alone at the bottom of the first page of the Diaz Construction invoice, with the \$757.00 cost. The next page contains the description of what is included in the "Additional" category. When discussing this potential discrepancy between the Diaz Construction Invoice and the Contract, counsel for the Fund described the line item as a "random category described as additional." It appears that counsel may have overlooked that the description continued to the next page, as it is not immediately obvious. Claimant Exhibit K.

Second, the Fund argued that Diaz Construction performed remedial concrete work outside of the scope of the Contract. The Claimant paid Diaz Construction \$2,987.00 for work described as:

clean existing concrete surface of all dirt and oils for application of drylock extreme waterproof paint, seal all visible holes and cracks with concrete sealant. Apply two coats Drywall Extreme to entire exposed concrete surface, allow recommended dry time for each phase and install new 6mil plastic over concrete surface sealing all seams as necessary.³²

Although the Contract, provides for the installation of a six-mil vapor barrier, it only provides for drylock to be painted on the walls and not the concrete slab. The Contract also does not call for the use of Drywall Extreme to seal the concrete. Although this work may have helped to address the presence of moisture underneath the concrete slab, it was not provided for in the Contract. Unfortunately, the cost for the installation of the vapor barrier is combined with the cost for installing the subfloor in the Contract and the Claimant has not presented any evidence as to the cost of the vapor barrier and its installation alone. Therefore, I am unable to determine the appropriate amount to attribute to the installation of a vapor barrier when calculating the Claimant's actual loss. As such, I must deduct the entire amount of \$2,987.00 from the \$15,988.00 payment by the Claimant to Diaz Construction, resulting in an amount of \$13,001.00 that was paid for the completion of work under the Contract.

With regard to the insulation, the Contract provided for the installation of insulation with a R-value of R10. However, R14 insulation was installed by C&R. The evidence in the record does not allow me to determine the difference in cost between R10 and R14 insulation.³³ The Contract combines the cost of the R10 insulation with the cost of and installation of the vapor barrier, installation of the insulation, and the construction of the subfloor, at the total cost of

³² Claimant Exhibit K.

³³ The Fund suggested that I could determine the approximate cost of the R10 insulation by subtracting 71% of the price of the R14 insulation. Although I presume this suggestion is based on specialized knowledge counsel for the Fund possesses, there is no evidence in the record to support this calculation.

\$4,450.00; and the C&R insulation invoice combines the cost of the R14 insulation with the cost of its installation. Thus, it is impossible for me to determinate the cost of the R10 insulation alone and/or the cost for installation the insulation. As such, I cannot include the cost for insulation in the calculation of actual loss because the Claimant has failed to prove by a preponderance of the evidence what that amount would be if R10 insulation had been installed.

Having determined the amounts paid by the Claimant for completion or repair of work under the Contract, I find that the Claimant's actual loss is as follows:

\$76,750.00	paid to the Respondent under the Contract
\$ 3,405.30	paid to Indoor Green Solutions for mold remediation
\$13,001.00	paid to Diaz Construction to complete the work per the Contract
<u>+\$ 1,500.00</u>	paid to Seth's Plumbing Service to complete the work per the Contract
\$94,656.30	
<u>- \$92,710.00</u>	total Contract price
\$ 1,946.30	proposed actual loss

Effective July 1, 2022, a claimant's recovery is capped at \$30,000.00 for acts or omissions of one contractor, and a claimant may not recover more than the amount paid to the contractor against whom the claim is filed.^{34,35} In this case, the Claimant's actual loss is less than the amount paid to the Respondent and less than \$30,000.00. Therefore, the Claimant is entitled to recover their actual loss of \$1,946.30.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$1,946.30 as a result of the Respondent's acts or omissions.³⁶ I further conclude that the Claimant is entitled to recover that amount from the Fund.³⁷

³⁴ Bus. Reg. § 8-405(e)(1), (5) (Supp. 2022); COMAR 09.08.03.03B(4).

³⁵ On or after July 1, 2022, the increased cap is applicable to any claim regardless of when the home improvement contract was executed, the claim was filed, or the hearing was held. *See Landsman v. MHIC*, 154 Md. App. 241, 255 (2002) (explaining that the right to compensation from the Fund is a "creature of statute," these rights are subject to change at the "whim of the legislature," and "[a]mendments to such rights are not bound by the usual presumption against retrospective application").

³⁶ Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2022); COMAR 09.08.03.03B(3)(c).

³⁷ Md. Code Ann., Bus. Reg. § 8-405(e); COMAR 09.08.03.03B(3)(c).

RECOMMENDED ORDER

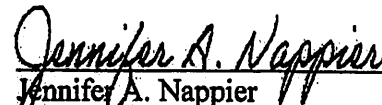
I **RECOMMEND** that the Maryland Home Improvement Commission:

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$1,946.30; 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,³⁸ and

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

August 7, 2023
Date Decision Issued



Jennifer A. Nappier
Administrative Law Judge

JAN/at
#206579

³⁸ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 3rd day of October, 2023, 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

Chairman

Panel B

***MARYLAND HOME IMPROVEMENT
COMMISSION***