

IN THE MATTER OF THE CLAIM	* BEFORE RICHARD O'CONNOR,
OF CHERYL MCINTYRE,	* ADMINISTRATIVE LAW JUDGE,
CLAIMANT	* THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	*
FOR THE ALLEGED ACTS OR	*
OMISSIONS OF JOSE POCASANGRE	*
MARTINEZ,	*
T/A SP2ALL LLC,	* OAH No.: LABOR-HIC-02-23-06665
RESPONDENT	* MHIC No.: 22 (75) 825

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On October 31, 2022, Cheryl McIntyre (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC)¹ Guaranty Fund (Fund) for reimbursement of \$33,925.35 for actual losses allegedly suffered as a result of a home improvement contract with Jose Pocasangre Martinez, trading as Sp2all LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411

¹ The MHIC is under the jurisdiction of the Department of Labor (Department).

(2015 & Supp. 2023).² On February 3, 2023, the MHIC issued a Hearing Order on the claim. On February 14, 2023, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On July 25, 2023, I held a hearing at the OAH in Rockville, Maryland. Bus. Reg. §§ 8-407(a), 8-312. Freddie Dominguez, Assistant Attorney General, represented the Fund. Rebekah D. Lusk, Esquire, represented the Claimant, who was present. The Respondent participated without representation.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the OAH govern procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021 & Supp. 2023); 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 into evidence the following exhibits offered by the Claimant:

- Clt. Ex. 1. Nine photographs of the master bathroom, taken May 30, 2023.
- Clt. Ex. 2. Four photographs of the hall bathroom; taken May 30, 2023.
- Clt. Ex. 3. Three photographs of wiring and vents in the attic, taken May 30, 2023.
- Clt. Ex. 4. Five photographs of the basement stairs, taken May 30, 2023.

² Unless otherwise noted, all references to the Business Regulation Article are to the 2015 Volume of the Maryland Annotated Code.

- Clt. Ex. 5. Construction Contractor Agreement and Proposal, October 28, 2021.
- Clt. Ex. 6. Basement Proposal, undated.
- Clt. Ex. 7. Records of payments to the Respondent, October 27, 2021, to November 21, 2021.
- Clt. Ex. 8. Text messages between the Claimant and the Respondent, November 17, 2021, to December 1, 2021.
- Clt. Ex. 9. Amendments to the bathroom contract and the Claimant's response, undated.
- Clt. Ex. 10. Email from the Claimant to the Respondent, "Walkthrough After Remodeling," January 4, 2022.
- Clt. Ex. 11. Text messages between the Claimant and the Respondent, December 7, 2021, to December 11, 2021.
- Clt. Ex. 12. Emails between the Claimant and the Respondent, December 13, 2021.
- Clt. Ex. 13. Text message from the Claimant to the Respondent, December 13, 2021.
- Clt. Ex. 14. Three photographs of the master bathroom, taken May 2023.
- Clt. Ex. 15. Three photographs of the master bathroom, taken May 2023.
- Clt. Ex. 16. One photograph of the master bathroom, taken May 2023.
- Clt. Ex. 17. Six photographs of the master bathroom, taken May 2023.
- Clt. Ex. 18. Four photographs of the master bathroom, taken May 2023.
- Clt. Ex. 19. Invoice, report, and photographs from Delta Electric, April 19, 2022.
- Clt. Ex. 20. Three photographs of the hall bathroom during remodeling, taken in 2021.
- Clt. Ex. 21. One photograph of the hall bathroom, taken May 2023.
- Clt. Ex. 22. One photograph of the hall bathroom, taken in 2021.
- Clt. Ex. 23. Three photographs of the hall bathroom, taken in 2021.
- Clt. Ex. 24. Two photographs of the basement walls, taken in 2023.
- Clt. Ex. 25. Five photographs of the basement stairs, taken in 2023.

- Clt. Ex. 26. Estimate from Wellman General Contracting and Home Improvements, LLC, May 19, 2022.
- Clt. Ex. 27. Proposal from Optimum Construction, Inc., July 21, 2022.
- Clt. Ex. 28. Estimate from Hammerhead Contracting, July 19, 2023.
- Clt. Ex. 29. Diagram of the master bathroom, July 21, 2023.
- Clt. Ex. 30. List of items that the Claimant paid for, undated (two copies).

The Respondent did not offer any exhibits.

I admitted into evidence the following exhibits offered by the Fund:

- GF Ex. 1. Letter from the MHIC to the Respondent with the Home Improvement Claim Form attached, November 18, 2022.
- GF Ex. 2. Hearing Order, February 3, 2023.
- GF Ex. 3. Notice of Hearing, June 8, 2023.
- GF Ex. 4. The Respondent's licensing history with the MHIC.

Testimony

The Claimant testified and presented testimony from Jeffrey Wilson, whom I accepted as an expert in home improvement and remodeling.

The Respondent testified and did not present other witnesses.

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 numbers 01-140894 (personal) and 05-145113 (corporate).

2. On October 28, 2021, the Claimant and the Respondent entered into a contract to completely remodel two bathrooms in the Claimant's home, the master bathroom and the hall bathroom.
3. The agreed-upon contract price was \$14,500.00.
4. At some point during or shortly after the Respondent's work on the bathroom contract, the Claimant and the Respondent entered into a contract to renovate the basement stairs and paint the basement walls.
5. The agreed-upon contract price was \$2,350.00.
6. The Claimant paid the Respondent a total of \$14,350.00 for both contracts.
7. The Claimant purchased light fixtures, vanity cabinets, faucets and valve kits, mirrors, toilet paper holders, and doorknobs for the bathrooms, as well as the materials for the basement stairs.
8. The Respondent furnished labor and other necessary materials.
9. The Respondent started work immediately and substantially completed both projects by late November.
10. The Respondent did not obtain any county permits for the work.
11. Permits were required at least for the plumbing and electrical work in the bathrooms.
12. The Respondent built a new pan for the master bathroom shower that was bigger than the old pan. As a result, the edge of the shower pan was too close to the toilet, a building code violation that would not have passed inspection if the Respondent had pulled permits.
13. The Respondent improperly wired the exhaust fan and recessed lighting in the master bathroom.

14. The transition threshold between the master bathroom and bedroom has a one-inch difference in height, which is a tripping hazard and a code violation.
15. The area around the threshold was not properly finished and has disintegrated.
16. About an inch of the master bathroom door was cut off to accommodate the high threshold. If the problem were fixed, there would be a large gap under the door.
17. The Respondent used a three-inch vent pipe for the exhaust fan instead of the required four-inch pipe.
18. Many areas in the master bathroom are caulked in an unsightly and messy manner, including around the toilet, in corners, along the shower pan, and at the threshold.
19. Grout in the master bathroom was improperly installed and has cracked in several areas.
20. The outline of an old vanity mirror that the Respondent had removed was still visible after the Respondent painted the walls.
21. One of the Claimant's primary concerns upon signing the contract was the hall bathroom floor creaking and squeaking when the tub was used. She conveyed this concern to the Respondent.
22. The Respondent replaced some of the subfloor in the hall bathroom, but not under the tub.
23. After the Respondent finished the work, the new fiberglass bathtub in the hall bathroom creaked and flexed when in use.
24. The bathtub faucet and showerhead were loose.
25. The transition threshold between the bathroom and hallway has a one-inch difference in height, which is a tripping hazard and a code violation.

26. The Respondent improperly wired the exhaust fan in the hall bathroom.
27. The Respondent used a three-inch vent pipe for the exhaust fan instead of the required four-inch pipe in the hall bathroom.
28. The Respondent left an area under the hall bathroom vanity unfinished, with the cement board exposed.
29. The covering of the toilet water-supply hose's entry into the wall did not fit properly, leaving the hole and unsightly caulking visible.
30. Grout in the hall bathroom was improperly installed and has cracked in several areas.
31. One floor tile in the hall bathroom is a different color from all the other tiles.
32. The Respondent removed the existing carpet from the basement stairs and installed wood veneers on the treads and risers.
33. The Respondent installed a hardwood landing without giving the wood time to acclimate to the home.
34. The basement stairs installed by the Respondent squeak and creak when used.
35. The landing in the middle of the stairs is pulling away from the wall and the floorboards are separating.
36. In the master bathroom, there is no practical way to salvage the Respondent's work because, to meet code, the larger shower will have to be removed, along with the tile, and replaced with a shower the same size as the original.
37. In the hall bathroom, there is no practical way to salvage the Respondent's work because the new bathtub must be removed to repair or replace the subfloor, joists, or whatever is causing the tub to flex and creak. This will also necessitate removal of the other flooring and tile.

38. On the stairs, the veneers and hardwood the Respondent installed must be removed, the entire area scraped and cleaned, the subflooring screwed down to eliminate squeaks, and new custom pre-finished hardwood installed.

39. The Claimant has obtained estimates to repair, replace, and complete the Respondent's inadequate work from three MHIC-licensed contractors.

40. Wellman General Contracting and Home Improvements, LLC (Wellman) proposes to remodel the master bathroom for \$18,626.41, remodel the hall bathroom for \$16,646.94, and rebuild the basement stairs for \$7,318.44, a total of \$42,591.79.

41. Wellman's price for the stairs is for demolition of the existing stairs and labor and material for new stairs. It does not include painting the walls.

42. Optimum Construction, Inc. (Optimum) proposes to remodel the master bathroom for \$21,000.00, remodel the hall bathroom for \$18,000.00, and rebuild the basement stairs for \$3,000.00, a total of \$42,000.00.

43. Optimum's price for the stairs is for labor only – the Claimant would furnish the materials. The price includes painting.

44. Hammerhead Contracting (Hammerhead), which is Mr. Wilson's company, proposes to remodel the master bathroom for \$13,990.21, remodel the hall bathroom for \$11,834.21, and rebuild the basement stairs for \$3,539.75, a total of \$29,364.17. A discount for performing all three projects at the same time would reduce the total to \$27,895.98, and the proposal includes a "call it even" final price of \$27,800.00.

45. Hammerhead's price for the stairs is primarily for labor – the Claimant would furnish most of the materials. The price includes painting.

46. The Claimant repeatedly pointed out the deficiencies in the work to the Respondent by text message, email, and in person.

47. The Respondent expressed willingness to correct the inadequate work, but ultimately did nothing to address the Claimant's concerns.

DISCUSSION

The Claimant has the burden of proving the validity of her claim by a preponderance of the evidence. Bus. Reg. § 8-407(e)(1); Md. Code Ann., State Gov't § 10-217 (2021); COMAR 09.08.03.03A(3). 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. *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." Bus. Reg. § 8-405(a) (Supp. 2023); *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."). "[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. 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) (Supp. 2023); COMAR 09.08.03.03B(1). 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. There are no 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. Bus. Reg §§ 8-405(g), 8-408(b)(1) (2015 & Supp. 2023). The Claimant resides in the home that is the subject of the claim. *Id.* § 8-405(f)(2) (Supp. 2023). The parties did not agree to submit their disputes to arbitration. *Id.* §§ 8-405(c), 8-408(b)(3) (2015 & Supp. 2023). 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. *Id.* § 8-405(f)(1) (Supp. 2023).

The Respondent performed unworkmanlike and inadequate home improvements. Mr. Wilson, an MHIC-licensed contractor with twenty years of experience in home improvement and remodeling, testified credibly and convincingly about the many defects he found in the Respondent's work. The photographs that Mr. Wilson and the Claimant took at various times corroborate that testimony and leave no doubt that the work was poorly performed in several areas.

In the master bathroom, the major problem was that the new, larger shower encroached upon the space needed for the toilet. The Respondent testified that he and the Claimant agreed not to obtain any permits for the Respondent's work, but Mr. Wilson testified that remodeling a bathroom requires a permit from the county. An agreement by the parties to a contract does not abrogate this requirement. A permit would have led to an inspection to approve the work, which would have revealed the inadequate spacing and caused the county to reject the Respondent's work.

The same is true for the tripping hazard at the threshold. Mr. Wilson stated that there was a one-inch height difference between the bathroom and bedroom floors, and the building code requires a difference of one-half-inch or less. Additionally, the Respondent had cut an inch off the bottom of the door to clear the threshold, meaning that when the problem is fixed a large gap

will remain, necessitating replacement of the door. The photographs also show the area around the threshold filled with disintegrated debris from the Respondent's poor installation.

The Claimant hired Delta Electric to inspect the Respondent's electrical work in the bathrooms in April 2022. The electrician found that both exhaust fans and the light above the master bathroom shower were improperly wired. He did a temporary fix of each installation but reported that all three needed to be rewired.

The Respondent installed exhaust fans in each bathroom that had four-inch exit openings. The Respondent connected three-inch pipes to vent the exhaust through the roof, thereby impairing the fans' efficiency.

Many other deficiencies were of a cosmetic nature. Both bathrooms contained messy globs of caulk in various locations, used to cover up gaps in trim, flooring, and plumbing fixtures that were too large. Grout in both bathrooms cracked because of improper installation. In the hall bathroom, the bathtub faucet and the shower head were installed loosely and, according to Mr. Wilson, can easily be moved from side to side and in and out. The Respondent did not adequately prepare the walls before painting, leaving the outline of the old vanity mirror visible on the master bathroom wall. One floor tile in the hall bathroom is a different color from all the others.

One of the Claimant's major reasons for renovating the hall bathroom was that the floor around and under the bathtub would creak and groan whenever the tub was used. She discussed this with the Respondent at the time she signed the contract. At the conclusion of the work, the Claimant immediately noticed that the new tub creaked and flexed when anyone used it. The Respondent had replaced some of the subfloor in the bathroom, but not in the area under the tub.

The Respondent testified that the contract did not call for replacement of the subfloor in the hall bathroom. He said he used foam under the bathtub to support it and thought that perhaps the problem was related to failing floor joists. When the Claimant told the Respondent about the problem, he offered to cut a hole in the living room ceiling underneath the tub to inspect the area but told the Claimant that any further repairs (i.e., subflooring or joists) would incur additional costs. The Claimant rejected this proposal because she did not want a hole in her ceiling.

The scope of work for the hall bathroom included “install new standard fiberglass or metal bathtub” and “install off [sic] new Durock³ on walls for shower and flooring.” Clt. Ex. 5. The Respondent did not install any Durock in the flooring. Competent installation of the tub would not have allowed the creaking and flexing that have been present since the Respondent completed the work. The only available remedy is to remove the bathtub, including the tile and flooring, and install a proper support for a new tub. This means that, essentially, the hall bathroom must once again be demolished and rebuilt.

The same is true for the master bathroom. The shower pan that the Respondent built must be demolished and removed, meaning that the tile on the walls and floor cannot be salvaged. The entire bathroom will have to be redone with a shower pan of the proper size and a rebuilt threshold.⁴

On the basement stairs, the Respondent installed new wood veneers and a hardwood landing. He did not properly screw down the treads, leading to squeaks and creaks on every step. The hardwood used for the landing was not given sufficient time to acclimate to the house before

³ Durock is a brand of cement board.

⁴ Mr. Wilson testified that the vanity is too large for the bathroom because it partially blocks an air exchange vent, which is a code violation. I do not fault the Respondent for this because the Claimant bought the vanity – the Respondent merely installed the material he was given. I cannot determine from the evidence whether there is a way to re-use the vanity, but the Claimant is responsible for any expense incurred for a new vanity. Whatever the solution may be has no effect on the need to completely rebuild the bathroom.

installation, causing it to shrink and separate after the landing was rebuilt. To provide an attractive appearance and keep the stairs from squeaking when used, all the Respondent's work on the stairs must be removed and replaced with proper materials that have been correctly installed with screws and adhesives. The Respondent also failed to properly prepare the walls before painting. This portion of his work must also be redone.

The Claimant has received estimates to remedy the Respondent's faulty work from three licensed home improvement contractors. The Wellman and Optimum proposals are from 2022 and are both around \$42,000.00. Hammerhead's proposal of \$27,800.00 is from July 2023 and is about \$14,000.00 less than the other two estimates. Having heard and considered Mr. Wilson's testimony about his experience and the scope of the necessary work, I find that Hammerhead's proposal is a reasonable basis to use in calculating the Claimant's recovery from the Fund.

I find that the Claimant is eligible for compensation from the Fund because the Respondent's inadequate and unworkmanlike home improvements must all be removed and replaced. Having found eligibility for compensation, I shall determine the amount of the Claimant's actual loss and the amount, if any, that the Claimant is entitled to recover. The MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work.

The Respondent performed work under the contract, and the Claimant intends to retain another contractor to complete and 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). The calculations of the Claimant's actual loss under the above formula are as follows:

\$14,350.00 paid to the Respondent; plus
+27,800.00 required to repair the Respondent's poor work; equals
\$42,150.00 minus the original contract price;⁵
-16,850.00 equals
\$25,300.00 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.⁶ Bus. Reg. § 8-405(e)(5) (Supp. 2023); COMAR 09.08.03.03B(4). In this case, the Claimant's actual loss of \$25,300.00 exceeds the amount paid to the Respondent. Therefore, the Claimant's recovery is limited to \$14,350.00, the amount paid to the Respondent.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained a compensable loss of \$14,350.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2023); COMAR 09.08.03.03B(3)(c). I further conclude that the Claimant is entitled to recover that amount from the Fund. Bus. Reg. § 8-405(e)(5) (Supp. 2023); COMAR 09.08.03.03B(4).

⁵ I.e., the two contracts for the bathrooms and the stairs.

⁶ On or after July 1, 2022, the \$30,000.00 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").

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$14,350.00; 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;⁷ and

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

October 13, 2023
Date Decision Issued

Richard O'Connor

Richard O'Connor
Administrative Law Judge

ROC/ds
#207685

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

PROPOSED ORDER

WHEREFORE, this 9th day of November, 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***