

**IN THE MATTER OF THE CLAIM
OF MILTON WHITTINGTON,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF JASON ZABEC,
T/A INNOVATIVE ELEMENTS
RESPONDENT**

*** BEFORE MARY SHOCK,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
*
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* OAH No.: DLR-HIC-02-19-16987
* MHIC No.: 18 (75) 785

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PROPOSED DECISION

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STATEMENT OF THE CASE

On September 17, 2018, Milton Whittington (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$14,576.64 in actual losses allegedly suffered as a result of a home improvement contract with Jason Zabec, trading as Innovative Elements (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015). On May 9, 2019 the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On September 25, 2019, I held a hearing at the Prince George's County Office Building, 1400 McCormick Drive, Largo, Maryland. Bus. Reg. § 8-407(e). The Claimant represented

himself. Shara Hendler, Assistant Attorney General, Department of Labor (Department),¹ represented the Fund. The Respondent failed to appear. Code of Maryland Regulations (COMAR) 28.02.01.23A.²

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the OAH's Rules of Procedure govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2019); 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 1 Notes and Home Improvement Agreement, March 6, 2017, and checks from the Claimant to the Respondent, March 6, 2017 and May 22, 2017
- CL 2 Letter from the Claimant to the Respondent, November 27, 2017
- CL 3 Letter from William R. Dowling, Director of Operations, Mr. Handyman, to the Claimant, June 12, 2018, with Estimate, June 12, 2018
- CL 4 Seven photographs of the Claimant's floor
- CL 5 Complaint Form, signed January 8, 2018

I admitted the following exhibits on behalf of the Fund:

- GF 1 Hearing Order, May 24, 2019
- GF 2 Notice of Hearing, July 29, 2019
- GF 3 Home Improvement Claim Form, received September 17, 2018

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

² Notice of the hearing was mailed to the Respondent at his address of record with the Department and with the Maryland Motor Vehicle Administration. The notice was sent by regular and certified mail. COMAR 09.08.03.03A(2). The United States Postal Service (USPS) did not return the regular mail as undeliverable. The USPS returned the certified mail as unclaimed. Applicable law permits me to proceed with a hearing in a party's absence if that party fails to attend after receiving proper notice. COMAR 28.02.01.23A. I determined that the Respondent had received proper notice and proceeded to hear the case.

GF 4 Respondent's licensing history, August 22, 2019
GF 5 Affidavit of Thomas Marr, IV, August 27, 2019

Testimony

The Claimant testified.

PROPOSED FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor under MHIC license number 4885308.
2. On March 6, 2017, the Claimant and the Respondent entered into a contract for the Respondent to install a new tile floor in the Claimant's kitchen, hall, and coat closet. The Claimant supplied the tiles and materials for installation. The Respondent provided the labor.
3. The contract price was \$4,525.00. The Respondent reduced the contract price to \$3,151.00, if the Claimant paid for the work within thirty days. The Respondent added \$100.00 to the price to install shoe molding which increased the contract price to \$3,251.00.
4. The Claimant paid the Respondent \$1,073.00 on March 6, 2017.
5. The contract provided that estimated start date for the work was April 1, 2017.
6. The Respondent began work on May 20, 2017 and completed work on May 22, 2017.
7. On May 22, 2017, the Claimant paid the Respondent the balance due under the contract of \$2,178.00, for a total payment of \$3,251.00.
8. Toward the end of June and the beginning of July 2017, the grout between the tiles became brittle and tiles began to loosen.
9. On July 13, 2017, the Claimant telephoned the Respondent's office to discuss the issue; he left a voicemail message. No one returned his call.

10. On September 19, 2017, after repeated calls, the Claimant spoke with the Respondent's representative. The representative stated someone would call the Claimant back; no one called back.

11. On October 12, 2017, the Claimant spoke with another representative of the company, who stated someone would call him about repairs. No one called the Claimant back.

12. On November 25, 2017, the Claimant sent the Respondent a letter stating the grout had become brittle and tiles had become loose. He asked the Respondent to contact him about repairs. The Respondent did not contact the Claimant.

13. The Respondent had installed the new tile floor over the old tile floor. The grout became brittle and fell out. The tiles became loose and cracked. The entire floor must be removed and replaced.

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); Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3).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); *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

³ As noted above, "COMAR" refers to the Code of Maryland Regulations.

an unworkmanlike, inadequate, or incomplete home improvement.” Bus. Reg. § 8-401. For the following reasons, I find that the Claimant has proven eligibility for compensation.

The Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant. The Respondent performed unworkmanlike and inadequate home improvement. He installed a tile floor over an old tile floor. The grout became brittle and fell out within weeks of installation. The tiles came loose and cracked.

The Respondent presented a letter from William R. Dowling, Director of Operations, Mr. Handyman, to support his contention that the Respondent performed an unworkmanlike and inadequate home improvement. (CL 3.) The Fund objected to the letter because it includes an expert opinion and Mr. Dowling was not present at the hearing to establish his expertise, state his opinion, and be subject to cross-examination. Even without expert testimony, it is reasonable to infer that a tile floor that becomes loose and cracks within weeks of installation is defective. The Claimant’s testimony concerning the condition of the floor and the photographs he presented depicting the loose and missing grout and cracked tiles, are sufficient to establish it is more likely than not that the Respondent performed an unworkmanlike and inadequate home improvement and that the Claimant must replace the floor. (CL 4.) I 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 the Claimant is entitled to recover. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney fees, court costs, or interest. Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1). Nor may an award exceed the amount the claimant paid the contractor. COMAR 09.08.03.03B(4). Unless the MHIC determines that a particular claim requires a unique measurement, the regulations provide three formulas to calculate a claimant’s actual loss, depending on the status of the contract work. First, if the

contractor abandoned the contract without doing any work, the actual loss is the amount the claimant paid the contractor. Second, if the contractor did work and the claimant is not soliciting another contractor to complete the work, the loss is the amount the claimant paid less the value of any materials or services provided by the contractor. Third, if the claimant is soliciting another contractor to complete the work, the actual loss is the amount the claimant paid to the contractor added to the amount the claimant will pay another contractor, less the contract price. COMAR 09.08.03.03B(3). The Claimant's situation does not fit into any of these categories.

Although the Respondent performed the work under the contract and the Claimant intends to retain Mr. Handyman to replace the floor, the Mr. Handyman estimate is inadequate to show the cost to replace the floor. The estimate states the work will include: removing cabinets and appliances; removing the floor; installing a sub floor; supplying and installing the tiles; reinstalling the base cabinets; and supplying and installing a counter top. The contract price totals \$14,576.64. (CL 3.) While the estimate breaks down the labor and material costs, it does not break down the costs for each item of work. The Claimant did not contract with the Respondent to remove the base cabinets, install a new subfloor, or to supply and install a new counter top. I cannot determine from the estimate what the Claimant is required to pay for Mr. Handyman to replace the Respondent's work.

The regulations provide for a unique measure of actual loss. COMAR 09.08.03.03B. Although the second measure of actual loss does not quite fit because the Claimant intends to replace the floor, I use that measure as a guide to formulate a unique measure of the Claimant's actual loss. The Claimant has not yet had any work done to replace the floor. Assuming he is not soliciting another contractor to complete the work, the actual loss is the amount the Claimant paid the Respondent less the value of any materials or services provided by the contractor. Because the Claimant provided the materials and the entire floor must be replaced, there is no

value to the materials or services provided by the Respondent. The Claimant's actual loss is the amount he paid the Respondent, \$3,251.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$3,251.00 as a result of the Respondent's acts or omissions and is entitled to recover that amount from the Fund. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405, COMAR 09.08.03.03B(3).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$3,251.00; 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 as set by the Maryland Home Improvement Commission;⁴ and

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

November 6, 2019
Date Decision Issued


Mary Shock
Administrative Law Judge

MKS/cmg
#182637

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

PROPOSED ORDER

WHEREFORE, this 18th day of December, 2019, Panel B of the Maryland Home Improvement Commission approves the Recommended Order of the Administrative Law Judge and unless any parties files with the Commission within twenty (20) days of this date written exceptions and/or a request to present arguments, then this Proposed Order will become final at the end of the twenty (20) day period. By law the parties then have an additional thirty (30) day period during which they may file an appeal to Circuit Court.

Joseph Tunney

Joseph Tunney

Panel B

Chairman

MARYLAND HOME IMPROVEMENT COMMISSION

SECRET

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