IN THE MATTER OF THE CLAIM	*	**BEFORE RICHARD O'CONNOR,**
OF MATTHEW BREMAN,	*	**ADMINISTRATIVE LAW JUDGE,**
CLAIMANT	*	**THE MARYLAND OFFICE**
AGAINST THE MARYLAND HOME	*	**OF ADMINISTRATIVE HEARINGS**
IMPROVEMENT GUARANTY FUND	*	
FOR THE ALLEGED ACTS OR	*	
OMISSIONS OF WILLIAM COLE,	*	
T/A COLE CONSTRUCTION LLC,	*	**OAH No.: LABOR-HIC-02-22-00997**
RESPONDENT	*	**MHIC No.: 21 (75) 629**

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PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
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STATEMENT OF THE CASE

On March 26, 2021, Matthew Breman (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund), under the jurisdiction of the Department of Labor (Department), for reimbursement of $19,527.87 for actual losses allegedly suffered as a result of a home improvement contract with William Cole, trading as Cole Construction LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015).[1] On

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

Resp. Ex. 6. Washington Suburban Sanitary Commission (WSSC) Long Form Permit Report, July 26, 2019; WSSC Final Inspection, January 9, 2020.

Resp. Ex. 7. Montgomery County Department of Permitting Services search results for permits for the Claimant's property, undated.

Resp. Ex. 8. MHIC licensing information for Marck Remodeling, LLC, undated.

Resp. Ex. 9. Forty-three photographs (some annotated) of the Claimant's property.

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

Fund Ex. 1. Notice of Hearing, January 27, 2022.

Fund Ex. 2. Hearing Order, December 28, 2021.

Fund. Ex. 3. Letter from the MHIC to the Respondent with Claim Form attached, March 31, 2021.

Fund Ex. 4. The Respondent's licensing history with the MHIC, March 28, 2022.

Testimony

The Claimant testified and presented the testimony of William O'Brien, accepted as an expert in shower reconstruction; and Gene Watson, accepted as an expert in home improvement and reconstruction, including shower rebuilds.

The Respondent testified as an expert in shower installation.

The Fund presented no testimony.

PROPOSED FINDINGS OF FACT

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

1. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor under MHIC license number 01-114723.

2. On February 23, 2019, the Claimant and the Respondent entered into a contract to construct an addition to the Claimant's house, including a master bathroom and a second bathroom, and perform extensive renovations.

3. The contract was cost-plus; that is, the Claimant agreed to reimburse the Respondent for labor and material costs, plus ten percent for overhead and twelve percent for profit.

4. The Claimant paid the Respondent $318,606.63 under the contract.

5. The Respondent started work on the project immediately and finished the job in January 2020. The Respondent used a subcontractor, Marck Remodeling, LLC, to build the showers in the master bathroom and the second bathroom.

6. Shortly thereafter, the Respondent added grout to the master bathroom shower floor to make it smoother.

7. The master bathroom shower included a bench seat.

8. The bathrooms passed WSSC inspection in January 2020.

9. The Claimant noticed water leaking through the sunroom ceiling directly under the master bathroom shower in November 2020.

10. The leak was coming from the shower in the master bathroom.

11. The construction of the master bathroom shower was defective in several ways: there was no membrane over the bench to prevent water from leaking through, the shower pan was not installed on a pre-slope and did not drain properly, some tile was not installed correctly, and the grout work was very poorly done.

12. In August 2020, the Respondent refunded $1,185.00 to the Claimant as recompense for poor workmanship on the master bathroom shower floor.

13. At the Claimant's request, the Respondent returned to the job site on November 4, 2020 to address the leak. The Respondent opened the sunroom ceiling and saw water leakage

from cracked or missing caulk in the shower. The Respondent recaulked and regrouted and let the water run for about twenty minutes without seeing a leak.

14. The master bathroom shower continued to leak after the Respondent's visit.

15. The Claimant made no further attempts to have the Respondent correct faulty work.

16. In December 2020, the Claimant hired Binghamton Land Design to completely rebuild the master bathroom shower at a cost of $8,037.50.

17. The Claimant also purchased new tile from Wayfair for $1,116.65 and a new glass shower door from Dulles Glass & Mirror for $1,615.50.

18. Binghamton Land Design engaged O'Brien Construction as a subcontractor to rebuild the shower. William O'Brien of O'Brien Construction was the supervisor or project manager on the job.

19. Binghamton Land Design reconstructed the master bathroom shower, and the Claimant has had no problems with leakage since the rebuild.

20. In December 2020, the Claimant noticed water damage and leaking on the dining room ceiling, directly under the second bathroom shower.

21. The Claimant filed an insurance claim for water damage, and his homeowner's insurance carrier hired Capezio Contractors, Inc., to repair the damage and rebuild the shower in the second bathroom.

22. Gene Watson was the project manager for Capezio Contractors, Inc., which rebuilt the shower in March 2022.

23. The shower pan of the second bathroom was not built or installed correctly, causing it to leak.

24. Upon demolition, the framing and subfloor of the shower showed evidence of water leakage over time. The water descended onto the dining room ceiling and down the chandelier.

25. In late January 2022, a pipe in the second bathroom froze.

26. Capezio Contractors, Inc., rebuilt the shower at a cost of $5,788.12. They also repaired the water damage in the dining room for $1,065.62.

27. The Claimant paid Capezio Contractors, Inc., the insurance policy deductible of $2,000.00; his homeowner's insurance carrier paid the remainder of the costs.

DISCUSSION

The Claimant has the burden of proving the validity of the 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 Cty. 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); *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); 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. The Claimant did not unreasonably reject good faith efforts by the Respondent to resolve the claim. Bus. Reg. § 8-405(d). In August 2020, the Respondent refunded $1,185.00 to the Claimant as an acknowledgement of the poor workmanship of the master bathroom shower floor. The parties had discussions of a further settlement, but ultimately the Respondent provided no additional refund. The Respondent returned to the home in November 2020 to address the master bathroom leaking, but his efforts were unavailing, as the shower continued to leak. Shortly thereafter, the Claimant discovered that the second bathroom shower was also leaking, providing further evidence of the Respondent's incompetence.[3] At that point it was reasonable for the Claimant to find another contractor to address the problem and have no further contact with the Respondent.

The evidence establishes that the Respondent performed unworkmanlike and inadequate home improvements. At the risk of committing the logical fallacy of "after this, therefore because of this," both the showers that the Respondent installed starting leaking within a few months after the completion of the contract. Mr. O'Brien and Mr. Watson were present for the demolitions of the master bathroom and the second bathroom, respectively, and both saw evidence that the shower pans had been leaking for some time before the leaks showed up on the ceilings below. No possible alternate source of the leakage (such as pipes) was presented as evidence or even hinted at. The evidence shows beyond any doubt that the new showers were the sources of the leaks.

The Claimant's expert witnesses testified credibly about the poor workmanship they observed in the showers. Mr. O'Brien testified that he has held an MHIC license for twenty to

[3] More correctly, the incompetence is that of the subcontractor, Marck Remodeling, LLC, but "the act or omission of a licensed contractor includes the act or omission of a subcontractor." Bus. Reg. § 8-405(b).

thirty years and has installed over 100 showers. He noted that the Respondent did not place a rubber membrane under the cement board on the bench in the shower, allowing water to penetrate that structure and leak beneath the shower pan. The pan itself never dried out, which is evidence that it was installed improperly. Essentially, the concrete of the shower pan absorbed water and, when saturated, released that water into the structures beneath the shower. Additionally, the tile work was faulty, and the grout looked as if it had been "done by a three-year-old." Mr. O'Brien stated that he had "never seen the like." In his opinion, the Respondent's installation of the master bathroom shower did not meet industry standards.

As to the second bathroom, Mr. Watson testified that he has had about fifteen years of experience in home improvement, including shower rebuilds. He holds no MHIC license personally, but Capezio Contractors, Inc., is licensed. Much of his experience has been in reconstructions resulting from insurance claims, including five showers in the previous two months.

Mr. Watson stated that the second bathroom had "no proper shower pan" and that the existing pan appeared to be hand-sculpted concrete. It was obvious to him that the shower pan was causing the leak into the dining room below. His company installed a new shower pan with proper slope and drainage and provided a five-year warranty on workmanship.

The Respondent attacked the Claimant's evidence on several fronts. First, he attempted to blame the Claimant for the leaks, testifying that a homeowner must "touch up" grout every six months for it to maintain integrity. The Respondent presented photographs of discolored grout (Resp. Ex. 9), which he blamed on lack of maintenance and/or use of improper cleaning products. Another photograph showed grout missing from around a tile, which the Respondent characterized as "eaten away."

This last photograph is actually evidence of poor workmanship. Grout is a concrete-like product that, absent extraordinary circumstances, does not get "eaten away" within a few months. The fact that it was missing in November 2020 shows that it was not applied properly. Additionally, discolored grout may be unpleasant to look at, but in the photographs it was not disintegrating and there is no evidence that it could be the source of any leaks. The Respondent offered no support, such as product bulletins or industry standards, to support his allegation that grout must be touched up (whatever that means) every six months. Grout is found in almost every bathroom and usually receives no maintenance for years. I do not find this statement by the Respondent credible, nor do I find that the Claimant bears any responsibility for the leaks in the bathrooms.

Next, the Respondent argued that the installations of the showers must have been done properly because they passed WSSC inspections. The inspection certificate states: "This installation meets the requirements of the Plumbing and Gasfitting Regulations of the Washington Suburban Sanitary District." Resp. Ex. 6. The Respondent did not provide any information about those regulations, and it is entirely possible that the bathroom installations could meet the regulations but still leak within a few months. I find that the fact that the bathrooms passed WSSC inspections does not absolve the Respondent of responsibility for the leaks.

Finally, the Respondent testified that rebuilding both showers was unnecessary and absurd, and that the costs to do so were unreasonable. He said that had he been informed of ongoing problems, he would have returned and solved them with caulk, grout, and re-installation of the rubber membrane.

The Respondent had already made one unsuccessful attempt to stop the leak in the master bathroom, in November 2020. At that time, the Respondent essentially denied that the leak was coming from the shower pan, which it certainly was. Both Mr. O'Brien and Mr. Watson, testifying as experts, stated that the workmanship of each bathroom was so poor that the entire installations needed to be demolished and rebuilt. The evidence supports these conclusions, given the many defects that they observed. Also, Mr. O'Brien and Mr. Watson stated their opinions that the cost of each rebuild was fair and reasonable and in line with industry standards.

In summary, the Respondent's arguments are unavailing. The evidence establishes that the leaks in the Claimant's home came from the shower pans of the master bathroom and the second bathroom. The Respondent installed both those showers incorrectly, using inadequate methods and poor workmanship. 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 original claim, signed on March 25, 2021, requested reimbursement of $19,527.87, based upon the costs of rebuilding the master bathroom shower and the second bathroom shower by Binghamton Land Design and Capezio Contractors, Inc., respectively. At the hearing, the Claimant reduced the claim slightly, to $19,115.15, without really explaining the difference.

Be that as it may, intervening events have reduced the amount of the recovery for which the Claimant is eligible. The second bathroom was redone in March 2022, after the claim was filed, at approximately the cost stated in the claim. However, the Claimant testified, and Mr. Watson's testimony concurred, that the Claimant paid only the $2,000.00 deductible required by his homeowner's insurance policy; USAA paid the rest of the cost of the rebuild. There is,

therefore, no need to discuss whether certain of those costs were beyond the scope of the contract with the Respondent, since the Claimant's exposure and out-of-pocket expense were limited to $2,000.00. He can recover no more than that amount from the Fund for the second bathroom.

The Respondent refunded $1,185.00 to the Claimant, so that sum must be subtracted from the amount paid to the contractor.

The claim for the master bathroom includes $1,615.50 for a new shower door. The record includes evidence that this was necessary because the master bathroom walls, as originally installed, were bowed, preventing the original door from fitting properly; thus, a replacement was necessary.

Mr. O'Brien testified that he could not re-use the original shower door after the bench had been removed to eliminate a source of the leak. He did not mention the wall being bowed or out of plumb, but, based on the witness's expertise, I accept his conclusion that the rebuild had to include a new shower door. The Claimant is entitled to recover this expense from the Fund.

The 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 work under the contract, and the Claimant has 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).

The calculations are as follows:

$317,421.63 paid to the Respondent; plus
8,037.50 paid to Binghamton Land Design for the master bathroom; plus
1,116.65 paid to Wayfair for tile for the master bathroom; plus
1,615.50 paid to Dulles Glass & Mirror for a shower door; plus
+2,000.00 insurance deductible paid for the second bathroom; equals
$330,191.28 minus the contract price;
-318,606.63 equals
$11,584.65 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 less than the amount paid to the Respondent and less than $20,000.00. Therefore, the Claimant is entitled to recover his actual loss of $11,584.65.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of $11,584.65 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(c). I further conclude that the Claimant is entitled to recover that amount from the Fund.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant $11,584.65; and

ORDER that the Respondent is ineligible for a Maryland Home Improvement Commission license until the Respondent reimburses the Guaranty Fund for all monies disbursed

under this Order, plus annual interest of ten percent (10%) as set by the Maryland Home Improvement Commission;[4] and

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

Richard O'Connor

June 27, 2022
Date Decision Issued

Richard O'Connor
Administrative Law Judge

ROC/dlm
#199114

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

PROPOSED ORDER

WHEREFORE, this 19th day of August, 2022, 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