IN THE MATTER OF THE CLAIM	*	**BEFORE MARY R. CRAIG,**
OF KIMBERLEY B. YOUNG,	*	**AN ADMINISTRATIVE LAW JUDGE**
CLAIMANT	*	**OF THE MARYLAND OFFICE**
AGAINST THE MARYLAND HOME	*	**OF ADMINISTRATIVE HEARINGS**
IMPROVEMENT GUARANTY FUND	*	
FOR THE ALLEGED ACTS OR	*	
OMISSIONS OF MICHAEL BIRNER,	*	
T/A HUNT'S END REMODELING	*	**OAH No.: LABOR-HIC-02-21-07330**
LLC,	*	**MHIC No.: 20 (90) 848**[1]
RESPONDENT	*	

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PROPOSED DECISION

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STATEMENT OF THE CASE

On April 11, 2020, Kimberly Young (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund), under the jurisdiction of the Department of Labor (Department), for reimbursement of $23,950.00 in actual losses allegedly suffered as a result of a home improvement contract with Michael Birner, t/a Hunt's End

[1] This is the MHIC case number on the Hearing Order issued by the MHIC and the MHIC's transmittal to the Office of Administrative Hearings (OAH). The number handwritten on the Claim is 20 (75) 848.

Remodeling LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015).[2] On March 23, 2021, the MHIC forwarded the matter to the OAH for a hearing.

I held a hearing on May 11, 2021 on the Webex videoconferencing platform. Bus. Reg. §§ 8-407(a), 8-312; Code of Maryland Regulations (COMAR) 28.02.01.20B. Hope Sachs, Assistant Attorney General, Department, represented the Fund. The Claimant represented herself. The Respondent represented himself.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2020); COMAR 09.01.03; and 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:

Clmt. Ex. 1 Not offered

Clmt. Ex. 2 Contract between Claimant and Respondent, February 2017[3]

Clmt. Ex. 3 FCITS Inspection Report, undated

Clmt. Ex. 4 Carpet Arts Invoice, September 1, 2018; Report of August 31, 2018 inspection with eight photographs of flooring

[2] Unless otherwise noted, all references hereinafter to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.
[3] The Contract is not dated. The Claimant testified without contradiction that it was executed in February 2017.

Clmt. Ex. 5 Letter from Joseph Tunney, MHIC Chairman, to Respondent, April 22, 2020
Letter from Respondent to Mr. Tunney, April 30, 2020
Letter from Respondent to David R. Finneran, Executive Director, MHIC, February 18, 2020 with Respondent's estimates to replace hardwood floors and refinish sections of floors, undated

Clmt. Ex. 6 Respondent's itemized list of materials for performance of the Contract, undated

Clmt. Ex. 7 Claimant's checks paid to Respondent, February 15, 2017 to May 18, 2017

Clmt. Ex. 8 Letter to Claimant from Maryland Insurance Administration (MIA), October 22, 2019
COMAR 31.02.01
Letter to MIA from Gretchen A. Tome, Erie Insurance, October 29, 2018
Letter from Christine Foard, Erie Insurance, to Claimant, October 12, 2018
MIA blank form of Customer Questionnaire, undated

Clmt. Ex. 9 Emails from Claimant to OAH attaching exhibits

Clmt. Ex. 10 Residential Construction Performance Guidelines for Professional Builders & Remodelers, undated

Clmt. Ex. 11 Photographs of floors, undated

The Respondent offered no exhibits for admission into evidence.

I admitted the following exhibits on the Fund's behalf:

Fund Ex. 1 Notice of Remote Hearing, April 12, 2021
Hearing Order, March 11, 2021

Fund Ex. 2 MHIC Licensing History for Respondent, printed April 26, 2021

Fund Ex. 3 Letter from Chairman Joseph Tunney, April 22, 2021
Claim received by MHIC April 14, 2020 (with attached proposal from Ferraro Custom Builders, April 10, 2020)

Testimony

The Claimant testified and presented testimony from her husband Jacob A. Young.

The Respondent testified and presented the testimony of Philip J. Luman, Project Manager, Hunt's End Remodeling LLC.

The Fund did not present testimony from any witness.

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 104625.

2. On February 15, 2018, the Claimant and her husband Jacob Young (collectively Owners) and the Respondent entered into a contract (Contract) to extensively remodel the first floor of their home (House), including removal of existing flooring throughout the first floor (excluding the two front bedrooms) and replacement with hardwood flooring.

3. The Contract required the Respondent to remove the existing flooring and install new 2¼" red oak unfinished hardwood flooring in the foyer, living room, hall, mudroom, powder room, kitchen and dining room. The hardwood was to be sanded, stained in the Owners' choice of color, and finished with two coats of polyurethane. The Contract called for a $2,055.00 optional upgrade to 5" wide unfinished red oak flooring.

4. The Contract required work to begin as soon as practical and be substantially complete within seventy working days.

5. The original agreed-upon Contract price was $146,300.00, plus $2,055.00 for the flooring upgrade, for a total Contract price of $148,355.00, before any change orders and upgrades.

6. The Owners paid the Respondent a total of $156,173.60 as follows:

2/15/17	$10,450.00 (due at signing of Contract)
2/23/17	$10,450.00 (due at wall and flooring removal)
3/3/17	$20,900.00 (due at framing, electrical and plumbing rough-in)
3/14/17	$10,450.00 (windows)
3/27/17	$3,000.00 (mason work)
3/27/17	$10,450.00 (drywall)
4/2/17	$28,273.60 (windows, floors, extras)
4/13/17	$20,900.00 (flooring, trim doors)

4/24/17	$10,450.00 (countertops)
5/9/17	$10,450.00[4]
5/18/17	$20,400.00.

7. The Respondent bought the hardwood flooring on March 1, 2017.

8. The Respondent removed the existing flooring in the areas specified in the Contract and installed new red oak hardwood flooring. The flooring was installed in early March 2017. The Respondent sanded the floors and finished staining and sealing them one month later.

9. The Respondent completed work in May 2017.

10. After the work was completed, beginning in June 2017, the Owners noticed that the hardwood flooring was cupping, meaning the edges of the planks were raised and the centers were lower, creating an uneven and unsightly floor.

11. The Owners contacted the Respondent about the problem on July 16, 2017.

12. The Respondent came to the House and inspected the floors on July 28, 2017. He told the Owners that cupping was temporary and recommended they wait for the floors to settle and flatten.

13. On August 8, 2017, the Claimant emailed the Respondent, complaining that the floors were still uneven.

14. On August 11, 2017, the Respondent again inspected the floors, which were still cupping throughout.

15. On August 11, 2017, the Respondent contacted the vendor of the flooring, which in turn retained FCITS, a company providing inspection and evaluation of allegedly defective flooring on behalf of the manufacturer.

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[4] The May 9 and 18, 2017 checks do not contain any reference to the purpose for the payments, and I am unable to determine the steps of the Contract payment schedule to which these payments correspond. *See* Contract (Clmt. Ex. 2, page 7) & checks (Clmt. Ex. 7).

16. A representative from FCITS inspected the hardwood flooring at the House and completed a report, which the Claimant received on September 11, 2017.[5]

17. On the recommendation of FCITS, the Owners ran a dehumidifier in the House continuously for thirty days.

18. On September 28, 2017, the Claimant again emailed the Respondent, asking him what he planned to do about the floors, which were still cupping.

19. The Respondent re-inspected the floors in November 2017, and told the Owners he wanted to wait a year from the date of installation to see if the floors would cease cupping.

20. On February 9, 2018, the Claimant asked the Respondent if the repair or replacement of the flooring was covered by the one year warranty under the Contract.

21. In May 2018, the Respondent repaired at no cost to the Claimant a portion of the floor near the oven which was cupping badly.

22. On August 12, 2018, the Claimant told the Respondent the floors were still cupping.

23. In response, the Respondent told the Claimant the problem with the floors was related to humidity.

24. The Owners were still dissatisfied with the cupping of the floors.

25. On August 31, 2018, Mark Brown, an inspector with Carpet Arts, inspected the floors and submitted a report.[6] The inspector selected eight boards at random in the kitchen, foyer, dining room, and family room. He used a taper gauge and a square to check for cupping. All of the boards showed cupping of varying degrees from .010" to .030".

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[5] Clmt. Ex. 3.
[6] Clmt. Ex. 4.

26. Flooring installers need to carefully monitor the moisture content of the wood flooring systems that they work with to prevent issues like cupping.

27. Wood will absorb or let off moisture until it reaches equilibrium with the ambient humidity of the environment. The moisture content at which the wood stops absorbing or letting off moisture is called the equilibrium moisture content of the wood.

28. The Respondent installed the flooring before the new floor boards reached equilibrium moisture content with the humidity of the House, resulting in many of the floor boards swelling after installation. The boards did not have room to expand once they absorbed ambient moisture, so the edges of the floor boards were forced to rise up, resulting in uneven flooring.

29. There is no barrier, such as familial or business relationship, that would prevent the Claimants from being reimbursed by the Fund.[7]

30. The Claimant sustained an actual loss of $23,950.00.[8]

DISCUSSION

In this case, 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 (2014); 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

[7] *See* Bus. Reg. § 8-405(f)(1).
[8] *See* Estimate of Farraro Custom Builders, attached to Claim. Fund Ex. 3.

result of misconduct by a licensed contractor."). "'[A]ctual loss' means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." Bus. Reg. § 8-401. For the following reasons, I find that the Claimant has proven eligibility for compensation.

The Respondent performed unworkmanlike home improvements in the installation of hardwood flooring. It is undisputed that the new hardwood flooring installed by the Respondent was uneven. It is a matter within the competence of an ordinary person that new hardwood flooring should be level and smooth throughout. The edge of the planks should not rise higher than the middle of the planks. This is precisely what happened to the flooring the Respondent installed. The cupping was explained credibly by the Owners in their testimony and supported by photographs. It was also documented in the inspector's report which also contained photographs. The Respondent did not deny the cupping problem.

The dispute involves the cause of the cupping. The Claimant maintains that the flooring cupped because the Respondent did not allow the raw wood to reach equilibrium with the ambient humidity of the environment in the House before installation. Thus, when the flooring was finished and sealed, the planks swelled and, having no room to expand, were forced upwards on the edges. Despite the passage of time, the cupping remains.

The Owners are not experts in the installation of hardwood flooring; neither do they have any expertise in the properties of hardwood. However, the Owners amply supported their reasons for believing the cupping was caused by the Claimant's failure to allow the raw wood to reach equilibrium before the flooring was installed.

According to a report admitted as Claimant's exhibit 4, Mark Brown inspected the flooring on August 31, 2018. Mr. Brown was not present to testify, so he was not qualified as an

expert witness. I do not have any information about his qualifications. However, his report was admitted into evidence without objection from the Respondent. His report appears to be unbiased and demonstrates knowledge of the properties of hardwood flooring. I accept the report as reliable evidence of the cause of the cupping.

Mr. Brown inspected the floor, observed the cupping, and took measurements. He measured the temperature and humidity in the basement, took pin meter readings of the subfloor, and measured the temperature and humidity of the main floor of the House. Mr. Brown cited the National Wood Flooring Association standards for causes of flooring problems. Relying on that source, he wrote that the potential sources of any cupping are:

> A moisture differential within individual pieces of flooring, usually excessive moisture on the underside of the flooring. More subtle cupping can be caused by lack of proper acclimation, (this is generally permanent cupping). Flooring also may cup when a wood floor experiences conditions that cause rapid drying on the surface. This condition occurs with gaps as the flooring shrinks.
> Clmt. Ex. 4, p. 3.

Mr. Brown reached the conclusion that improper acclimation caused cupping in this instances partly through eliminating other potential causes. The measurements taken indicate that there was no excessive moisture on the underside of the flooring, so that cause was eliminated. Span measurements of the flooring indicated that the flooring was at the manufacturer's width of five inches when it was installed. However, uninstalled floor boards that were left at the job site in the same moisture as the installed flooring were measured as *more than five inches wide* at the time of the 2018 inspection.

Mr. Brown concluded:

> BOARDS THAT ACCLIMATE TO A HIGHER MOISTURE CONTENT AFTER INSTALLATION AND DO NOT HAVE ADEQUATE FIELD SPACING WILL CUP. The evidence indicates that the flooring was not properly acclimated.
> Clmt. Ex. 4, p. 4.

I accept this conclusion as the most likely explanation of the cause for the cupping.

The Respondent testified that the cupping could have been caused by moist air leaking into the House through the attic door. I reject this suggestion because the evidence shows that the Respondent replaced the original attic door during the construction project.

The Respondent also testified that the cupping could have been solved by re-sanding the floors. However, the Claimants rejected that suggestion because it was not recommended by the inspector.

Mr. Luman, the project manager for the Respondent, testified that the flooring was delivered to the House on a date between March 3rd and 6th. The flooring was spread around after delivery to enable acclimation. The floor was installed on an unspecified date after it was in the House with the air conditioning and/or heat running for several days. According to Mr. Luman, the floors should have had adequate time to acclimate. Mr. Luman suggested that a deficiency in the floor joists contributed to the cupping. On cross-examination, however, Mr. Luman acknowledged that the Owners paid extra to the Respondent to have those floor joists replaced. Therefore, I reject the suggestion that a problem with the floor joists caused the cupping.

I thus find that the Claimant is eligible for compensation from the Fund. The Claimant proved that the installation of the flooring was unworkmanlike. The totality of the reliable evidence shows that the wood flooring was not allowed to sufficiently acclimate before it was installed. When the wood absorbed moisture from the air inside the House it swelled. There was insufficient room for expansion, so the planks rose at the edges, resulting in uneven and unsightly floors.

The Respondent argued that the Claimant should be required to wait longer to see if the cupping subsides. I reject that notion for two reasons. First, the floors were installed more than a year before Mr. Brown's inspection; he found cupping. If the floors were going to right themselves I would expect it to have happened by then. Second, the inspection report indicates that, if cupping is the result of poor acclimation, it is likely to become permanent.

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 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). MHIC's regulations provide formulas to measure a claimant's actual loss, depending on the status of the contract work.

In this case, the Respondent performed some work under the Contract, and the Claimant intends to retain other contractors to complete or remedy that work. The Claimant obtained an estimate from Ferraro Custom Builders to remove and replace the flooring. The estimated cost totals $23,950.00. 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).

Applying that formula to reach the proper award is as follows:

Amount paid to the Respondent	$156,173.60
Plus amount to be paid to Ferraro to complete the Contract	$23,950.00
	$180,123.60
Less original Contract price	$156,173.60
Actual loss	$23,950.00

The law 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 of $23,950.00 exceeds $20,000.00. Therefore, the Claimant's recovery is limited to $20,000.00. Bus. Reg. § 8-405(e)(1); COMAR 09.08.03.03D(2)(a).

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual loss of $23,950.00 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 $20,000.00 from the Fund. Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant $20,000.00; 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;[9] and

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

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

July 16, 2021
Date Decision Issued

Mary R. Craig
Administrative Law Judge

MRC/cj
#192616

PROPOSED ORDER

WHEREFORE, this 13th day of October, 2021, 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