STATE OF MARYLAND
DLLR
DEPARTMENT OF LABOR, LICENSING AND REGULATION

DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING
MARYLAND HOME IMPROVEMENT COMMISSION
500 N. Calvert Street, Room 306
Baltimore, MD 21202-3651

IN THE MATTER OF THE CLAIM OF DAVID STEVENS AGAINST THE MARYLAND HOME IMPROVEMENT GUARANTY FUND FOR ALLEGED VIOLATIONS OF DANIEL STEEN, JR., t/a CHESAPEAKE HOME REMODELING & DESIGN, LLC	* * * *	**MARYLAND HOME IMPROVEMENT COMMISSION** **MHIC CASE NO. 14 (05) 1203**

* * * * *

FINAL ORDER

WHEREFORE, this 19TH day of January, 2017 , Panel B of the Maryland Home Improvement Commission ORDERS that:

1) The Findings of Fact of the Administrative Law Judge are Affirmed.

2) The Conclusions of Law of the Administrative Law Judge are Amended as follows:

A) The Administrative Law Judge found that the Respondent performed an inadequate and incomplete home improvement with respect to the painting of the rails, band boards and stair stringers. The record contains evidence that the cost to a contractor to hire a subcontractor to complete the painting work would be $400.00. The Commission concludes that the fair and reasonable "retail" cost to the Claimant to hire a contractor to complete the painting work would be $800.00.

B) Pursuant to the formula set forth in COMAR 09.08.03.03B(3)(c), the correct calculation of the Claimant's actual loss is as follows:

• Amount paid to Respondent (Finding of Fact 8)	$12,376.00
• Reasonable cost to complete Respondent's Work	$ 800.00
• Total	$13,176.00
• Less original contract price (Finding of Fact 7)	- $12,376.00
• Actual Loss	$ 800.00

3) The Recommended Order of the Administrative Law Judge is Amended as follows:

A) The Claimant is Awarded $ 800.00 from the Home Improvement Guaranty Fund.

B) Pursuant to Bus. Reg. Art. §8-411(a), any home improvement licenses held by the Respondent shall be Suspended at such time as any money is paid from the Home Improvement Guaranty Fund under this Order, and the Respondent shall be ineligible for any home improvement license until such time as the Home Improvement Guaranty Fund has been reimbursed. The Respondent shall be liable for 10% annual interest on any unreimbursed balance owed to the Guaranty Fund.

4) This Final Order shall become effective thirty (30) days from this date. During the thirty (30) day period, any party may file an appeal of this decision to Circuit Court.

Joseph Tunney
Chair - Panel B

MARYLAND HOME IMPROVEMENT COMMISSION

IN THE MATTER OF THE CLAIM	*	BEFORE UNA M. PEREZ,
OF DAVID STEVENS,	*	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 DANIEL STEEN, JR.,	*	
t/a CHESAPEAKE HOME	*	OAH No.: DLR-HIC-02-15-28584
REMODELING & DESIGN, LLC	*	MHIC No.: 14 (05) 1203
RESPONDENT	*	

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PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
PROPOSED CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On December 8, 2014, David Stevens (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of $8,594.00 in alleged actual losses suffered as a result of a home improvement contract with Daniel Steen, Jr., trading as Chesapeake Home Remodeling & Design, LLC (Respondent).

I held a hearing on January 5, 2016, at the Office of Administrative Hearings (OAH)-Kensington, 10400 Connecticut Avenue, Suite 208, Kensington, Maryland. Md. Code Ann.,

Bus. Reg. §§ 8-312(a), 8-407(e) (2015).[1] The Claimant represented himself. The Respondent represented himself.[2] Hope Sachs, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR or Department), represented the Fund.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, 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); Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02, and 28.02.01.

ISSUES

1. Did the Claimant sustain an actual loss compensable by the Fund as a result of any acts or omissions committed by the Respondent?

2. If so, what is the amount of that loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on the Claimant's behalf:[3]

Clmt. Ex. 1 Contract with Addend [a], March 22, 2013 and July 9, 2013

Clmt. Ex. 2 Submission to Home Owners' Association, May 1, 2013

Clmt. Ex. 3 Building Permits/Inspections, July 5, 2013 and January 8, 2015

Clmt. Ex. 4 Attachment 1, E-mail Communications between the Claimant and the Respondent, August 15, 2013 – October 3, 2013

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[1] Unless otherwise noted, all citations to the Business Regulation Article refer to the 2015 Replacement Volume.

[2] The Claim identifies the contractor as Chesapeake Home Remodeling & Design, LLC. At the hearing, the Respondent stated that the limited liability company, of which he was a principal, was no longer in existence. As of March 15, 2016, the website of the State Department of Assessments and Taxation (SDAT) showed that on October 3, 2014, this LLC, Dept. ID # W12621256, was forfeited for failure to file a property tax return for 2013. *See generally* Md. Code Ann., State Gov't § 9-1607.1 (2014).

[3] For ease of reference, I have page-numbered the Claimant's exhibits in the lower right-hand corner, exclusive of the cover pages.

Clmt. Ex. 5 Attachment 2, Powerpoint Summary of Complaint, from March 22, 2013 through October 10, 2014, including photographs

Clmt. Ex. 6 Attachment 3, Summary of Text Messages between the Claimant and "Andy," subcontractor for the Respondent, December 6, 2014 through April 13, 2015

Clmt. Ex. 7 Attachment 4, Repair Estimate from Cedarbrook Outdoor Design/Build, October 10, 2014

The Respondent did not offer any exhibits.

I admitted the following exhibits on behalf of the Fund:

Fund Ex. 1 Notice of Hearing, October 9, 2015, with Hearing Order, August 18, 2015

Fund Ex. 2 Licensing History for the Respondent, printed January 4, 2016

Fund Ex. 3 Letter from the MHIC to the Respondent, December 8, 2014, attaching Claim, received December 8, 2014

Testimony

The Claimant testified on his own behalf. The Respondent testified on his own behalf. The Fund did not present any witnesses.

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 registration number 01-99336.[4]

2. On or about March 22, 2013, the Claimant and the Respondent entered into a contract (Contract) to build a wooden deck onto the Claimant's residence on Castle Oak Road, in Clarksburg, Maryland. Clmt. Ex. 1. The Contract stated that work would begin on May 6, 2013 and would be completed by May 11, 2013. *Id.*

3. The Claimant's home is located in a community, Clarksburg Village.

[4] The Respondent's MHIC license is currently suspended. *See* Fund Ex. 2. The MHIC registration number for the now-forfeited LLC was 05-126955. *Id.*

4. The sales presentation that resulted in the Contract included a photograph of part of a wooden deck, showing a segment of the deck railing and posts. *See* Clmt. Ex. 1, at 6. The posts shown in the picture had caps on them. *Id.*; *see also* Clmt. Ex. 5, at 12.

5. On April 11, 2013, the Claimant applied to the Clarksburg Village Community Association (Homeowners' Association) for permission to build the deck. On May 7, 2013, the Homeowners' Association approved the request, specifying that the deck railings, band boards and stringers "must be 'Clarksburg Village' white in color." Clmt. Ex. 2, at 9.

6. Addendum 02 to the Contract, dated July 9, 2013, provided that the deck rails, band boards and stair stringers were to be painted "Clarksburg Village white" by the Respondent "on or before August 02, 2013 weather permitting." Clmt. Ex. 1, at 9.

7. The original agreed-upon contract price was $12,376.00. Clmt. Ex. 1, at 1. There were no change orders.

8. The Claimant paid the Respondent the full contract price through a Visa credit card.[5]

9. As installed, the deck did not have the elaborate rail system depicted in the photograph that accompanied the Contract. *See* Clmt. Ex. 5, at 11, 12, and 13.

10. There were only 14 steps, not 16 steps as called for in the Contract. *See* Clmt. Ex. 1, at 3, 4 and 5.

11. The Montgomery County Department of Permitting Services (DPS) approved the footers on July 5, 2013. The DPS approved the framing on August 5, 2014, but disapproved a final inspection on August 5, 2014 and again on December 15, 2014. Clmt. Ex. 3, at 8.

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[5] The Claimant testified that he incurred an additional amount in finance charges by using this method of payment.

12. The DPS disapprovals on August 5 and December 15, 2014 were related to the need for post-to-beam braces, stringer support, and a hand rail. Clmt. Ex. 3, at 7-8; Clmt. Ex. 5, at 2. The Respondent made, or caused to be made, the changes needed for the project to pass the final inspection. *See* Clmt. Ex. 6, at 1-2.

13. The Respondent requested the July 2013 DPS inspection, but the Claimant requested all subsequent inspections. The DPS approved the final inspection on January 8, 2015. Clmt. Ex. 3, at 8.

14. As of early August 2013, neither the Respondent nor anyone acting on his behalf had painted the deck rails and other features that were required by Contract Addendum 02 to be painted "Clarksburg White." These items are still unpainted.

15. Beginning on August 15, 2013, the Claimant began to correspond by e-mail with the Respondent and/or Timothy Casey (Casey), the Respondent's agent, servant or employee, regarding the painting of the rails and other items with "Clarksburg White" paint. Clmt. Ex. 4. The painter was identified as "Dave" or "Steve." *Id.* at 1, 2, 3, 8, 9, 12. Steve's motor vehicle was unreliable and he could not get to the Claimant's home. *Id.* at 8, 9, 12, and 13.

16. As of October 3, 2013, the Respondent had not provided anyone to paint the deck rails, band boards, and stair stringers on the Claimant's deck. Casey estimated the cost of this "small" paint job to the Respondent as $375.00 or $400.00. Clmt. Ex. 4, at 5, 13, and 14.

17. On October 10, 2014, Cedarbrook Outdoor Design/Build (Cedarbrook) prepared an estimate of the cost to remove the deck railing and install new railing, and to make other repairs or modifications to the deck and steps. Clmt. Ex. 7, at 1. Among the items included were to "install secondary hand rail on top of the cap board going down the steps"; "add proper joist hangers and mechanical fasteners to joists and stair stringers"; and "install diagonal rack braces

from all posts to beams." *Id.* The estimate also proposed to replace the two support posts under the landing with 6"x 6" posts. *Id.*

18. The total cost in the Cedarbrook estimate was $8,594.00, but it was not broken down by item. Clmt. Ex. 7, at 1. The estimate did not include painting, but stated: "All staining or painting would be a separate project to be completed at a later date." *Id.* Finally, the estimate provided an option—to replace the deck railing with white PVC (vinyl) railing; to totally rebuild the stairs; and to trim the deck and steps with white PVC trim boards, at an additional cost of $2,016.00. *Id.*

19. Since October 2013, there has been separation at some of the joints in the deck rail, the stair rail, and elsewhere. *See* Clmt. Ex. 5, at 5-10. The Claimant attributes this separation to the lack of paint. *Id.*

DISCUSSION

In this case, the Claimant has the burden of proving the validity of his claim by a preponderance of the evidence. Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(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 (3rd. 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"). Actual loss "means the costs of restoration, repair, replacement, or completion that

arise from an unworkmanlike, inadequate, or incomplete home improvement." Md. Code Ann., Bus. Reg. § 8-401.

Unworkmanlike, Inadequate or Incomplete Home Improvement

Although his license is currently suspended, the Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant.

The Claimant met his burden to show that the Respondent performed an incomplete home improvement. The Respondent admitted that neither he, nor any subcontractor engaged by him, ever painted the deck railings, band boards, or stair stringers with "Clarksburg White" paint, as required by the Homeowners' Association approval document and the July 9, 2013 Addendum 02 to the Contract. The photographs in Clmt. Ex. 5[6] show clearly that these items are still bare wood.

The Claimant attributes several instances of separation at certain joints to the fact that these items are unpainted, approximately 2 ½ years after construction. The Respondent, on the other hand, asserts that the separation is because these items (and indeed the whole project) are real wood, not vinyl or composite, and that some separation would have occurred over time even if these items had been painted.

The Claimant did not present any expert testimony to show that the lack of paint is the cause of the separation, but I need not resolve this issue in order to find that with respect to the painting of the specific items required by the Contract, the home improvement is incomplete and inadequate.

The Claimant raised several other issues about the deck and the railings. First, he contended that he did not get the post and railing arrangement that was depicted in the picture

[6] The Claimant testified that he took the photographs in October 2015.

attached to the Contract. The Claimant did not deal directly with the Respondent, but with a person named "Noel." The Respondent testified that this was Noel Hazelwood, a sales representative. The Respondent further testified that he did not know where Noel got the photograph.

The Claimant said repeatedly that he believed that he was going to get the rail system depicted in the photograph. Under all the circumstances, I do not find this belief reasonable. First, the photograph is not mentioned or incorporated by reference in the Contract. Moreover, it is clear from a comparison of that photograph to the photographs of the Claimant's deck that the two rail systems are quite different. The rails in the picture have posts at much shorter intervals, and the posts have caps on them. The rails on the Claimant's deck have posts much further apart, without caps.

As argued by the Respondent, if the Claimant really believed he was getting the fancier rail system, the Claimant should have brought this up at the time, and most likely would not have paid the contract price in full. The Claimant testified that he thought the caps would be installed when the painting was done; but his contemporaneous e-mails only refer briefly to his wish that the "top cap of the railing" not be painted, but remain natural wood. *See* Clmt. Ex. 4, at 1 and 3. The bulk of these e-mails refer to the *painting*.

The Claimant also asserted that the Respondent erred in using 4" x 4" posts, and that the County required 6" x 6" posts for decks over six feet in height. The Claimant suggested that the DPS inspector did not note this problem. *See* Clmt. Ex. 7, at 2. The Respondent testified that the 4" x 4" posts were for the stair landing, and that he believed the support posts under the deck were in fact 6" x 6" posts. The Contract, the plans, and the specifications all make clear that the deck support posts were to be 6" x 6" and that the landing support posts were to be 4" x 4". *See*

Clmt. Ex. 1. In addition, the Cedarbrook estimate says, "We will replace 2 support posts *under landing* with new 6x6 support posts." Clmt. Ex. 7, at 1 (emphasis added).

The Claimant also testified that the Respondent installed only 14 steps, when the Contract and the specifications clearly call for 16 steps. The Respondent did not dispute this.

It is important to note that the Claimant's complaints concerning the support posts, the number of steps, and other items described in Clmt. Ex. 5, were not brought to the Respondent's attention in the 2013-14 time frame. There is no dispute that the Respondent did send one of his subcontractors, "Andy," to make the changes necessary for the project to pass a final DPS inspection in January 2015. The Respondent testified that the only remaining problem he was aware of before the hearing was the failure to paint, for which he took responsibility. He also took responsibility for the failure to schedule a final inspection—that is why he sent someone to perform the necessary work.

Actual Loss

Having found that the Respondent performed an inadequate and incomplete home improvement as regards the painting of the rails, band boards and stair stringers, I now turn to the amount of the award, if any, to which the Claimant is entitled. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. COMAR 09.08.03.03B(1). MHIC's regulations provide three formulas for measurement of a claimant's actual loss, unless a unique measurement is necessary. COMAR 09.08.03.03B(3). The following formula ordinarily offers an appropriate measurement to determine the amount of 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).[7]

In this case, the Claimant has unfortunately not provided evidence from which I can determine the correct amount of an actual loss. The "lump sum" estimate by Cedarbrook contains no estimate of the cost of painting, and indeed *excludes* painting as a separate project. Furthermore, that estimate was prepared before the project passed the final inspection, and includes several tasks that the Respondent's subcontractor, "Andy," undisputedly performed. *See* Findings of Fact 12 and 17.

The only evidence as to the cost of painting was the $375.00 or $400.00 that Timothy Casey, whom the Claimant identified as the Respondent's partner, estimated it would cost the Respondent. This price was what the Respondent would pay a subcontractor, not what a consumer would pay; it is reasonable to believe that the "retail" price of the paint job would be higher, but I cannot determine by what factor.

The Cedarbrook estimate did provide the option of replacing the wood deck railings and some other items with vinyl, at a cost of $2,016.00. *See* Clmt. Ex. 7. The Claimant was very clear that he wanted *wood* railings; there is no evidence in the record as to whether the Homeowners' Association would approve vinyl railings if the Claimant chose that option now.

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[7] In his Claim, the Claimant indicated the value of the work done by the contractor as $7,000.00. Fund Ex. 3. However, there is no independent evidence of the value of the deck and stairs as constructed by the Respondent. *See* COMAR 09.08.03.03B(b). At the hearing, the Claimant suggested that an award of "a percentage of the claim" would be fair, but any percentage I suggested would be based on speculation, not the evidence.

Although COMAR 09.08.03.03B(3) permits the application of a unique formula, the Fund, while expressing sympathy for the Claimant here, did not suggest such a formula, and I do not have the expertise to create one.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has met his burden to show that the Respondent performed an incomplete and inadequate home improvement. I further conclude, however, that the Claimant has not met his burden to prove the amount of any actual loss sustained as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund deny the Claimant's claim; and

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

Signature on File

March 28, 2016
Date Decision Issued

Una M. Perez
Administrative Law Judge

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PROPOSED ORDER

WHEREFORE, this 16th day of May, 2016, 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

MARYLAND HOME IMPROVEMENT COMMISSION