

IN THE MATTER OF THE CLAIM	*	BEFORE LORRAINE E. FRASER,
OF NICHOLAS HOLSTON,	*	AN ADMINISTRATIVE LAW JUDGE
CLAIMANT	*	OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	*	OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	*	OAH No.: DLR-HIC-02-16-20062
FOR THE ALLEGED ACTS OR	*	MHIC No.: 15 (90) 130
OMISSIONS OF MINNIE BAILEY,	*	
T/A FIVE STAR CONCRETE	*	
CONSTRUCTION, INC.,	*	
RESPONDENT	*	

* * * * *

PROPOSED DECISION

STATEMENT OF THE CASE
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DISCUSSION
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STATEMENT OF THE CASE

On March 25, 2016, Nicholas Holston (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$19,132.00 in alleged actual losses suffered as a result of a home improvement contract with Minnie Bailey, trading as Five Star Concrete, Inc. (Respondent).

I held a hearing on December 1, 2016, at the Tawes State Office Building. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). The Claimant represented himself. Hope Sachs, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department),

represented the Fund. The Respondent failed to appear. After waiting fifteen minutes for the Respondent or someone to represent her, I proceeded with the hearing. Code of Maryland Regulations (COMAR) 28.02.01.23A.¹

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the Office of Administrative Hearings (OAH) govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2016); 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 that loss?

SUMMARY OF THE EVIDENCE

Exhibits

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

- Claimant 1 Photographs (28) taken by the Claimant's wife, 7/1/15
- Claimant 2 Contract between the Claimant and the Respondent²
- Claimant 3 Cancelled checks from the Claimant paid to the Respondent; \$4,000.00 3/21/13, \$5,000.00 3/27/13, \$2,000.00 3/28/13, and \$1,100.00 3/29/17
- Claimant 4 Memorandum of Agreement, Anne Arundel Conflict Resolution Center, 9/18/14
- Claimant 5 Photographs (38) taken by the Claimant's wife, 9/17/14
- Claimant 6 The Claimant's notes of conversations he had with Dwayne Bailey in 2015

¹ Notice of the hearing was mailed to the Respondent at the address of record by regular and certified mail on August 8, 2016. COMAR 09.08.03.03A(2). The regular mail was not returned as undeliverable. The certified mail was returned as unclaimed.

² The contract is dated 7/7/14; however, the Claimant's wife testified that they entered into the contract in March 2013.

- Claimant 7 Report of Frank J. Kaiss, III, Frank J. Kaiss & Associates, 10/20/15, Estimate Sheet, 7 photographs
- Claimant 8 Letter from the Respondent to MHIC, 4/9/16
- Claimant 9 Proposal from Quality Pools, Inc., 11/15/16; Estimate from Artistic Stamped Concrete of Maryland, LLC; Proposal from Marrocco's Stamped Concrete, Inc., 1/4/16
- Claimant 10 Photographs (10) taken by the Claimant's wife, 12/1/16
- Claimant 11 Text messages between the Claimant and the Respondent, June and July 2014

The Respondent did not offer any exhibits into evidence.

I admitted the following exhibits on behalf of the Fund:

- Fund 1 Memorandum re: unclaimed certified mail, 9/1/16; Notice of Hearing mailed to the Respondent, 8/8/16; Hearing Order, 6/22/16
- Fund 2 The Respondent's licensing history, 11/28/16
- Fund 3 Letter to the Respondent from MHIC, 4/1/16; Claim Form, 3/25/16, with attached two page letter from the Claimant and his wife

Testimony

The Claimant testified in his own behalf and presented the testimony of his wife, Dawn.

The Respondent did not present any testimony.

The Fund did not present any 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*103519.
2. Sometime in March 2013, the Claimant and the Respondent entered into a contract to prepare and pour a new stamped and dyed concrete pool deck, install "1 step near

shed”³ approximately 1400 sq. ft. (sidewalk), and install a pool drain. Payment was due upon completion of the work.

3. The original agreed-upon contract price was \$12,000.00.

4. Beginning on March 21, 2013 and ending two to three days later, Dwayne Bailey, the Respondent’s employee, performed the work under the contract.

5. Between March 21-29, 2013, the Claimant paid the Respondent \$12,100.00.⁴

6. When the Claimant and his wife opened the pool in 2014, they noticed the stamped concrete was peeling and discolored.

7. The Claimant and his wife notified the Respondent of the problems with the pool deck. At first, Mr. Bailey said he would come to the Claimant’s property but then he did not respond. Later, Mr. Bailey said he would repair the pool deck if the Claimant paid him an additional \$400.00, which the Claimant refused to do because the work was supposed to be under warranty.

8. On September 18, 2014, the Claimant and the Respondent participated in mediation and reached an agreement. The Respondent would repair the pool deck and sidewalk to “mutually acceptable standards of workmanship,”⁵ the work would have a new two-year warranty, and the Claimant would have the deck and sidewalk sealed annually at his own expense at the cost of \$200.00.

9. In July and August 2015, the Claimant and the Respondent discussed repairing the pool deck; however, they did not reach an agreement. The Respondent wanted to resurface the concrete and install a new overlay. The Claimant wanted the concrete replaced.

³ Claimant 2.

⁴ It is unclear why the Claimant paid the Respondent \$100.00 more than the contract price.

⁵ Claimant 4.

10. On October 10, 2015, Frank J. Kaiss, Frank J. Kaiss & Associates, inspected the Claimant's pool deck. He observed that the surface color was fading and irregular and that the entire pool deck concrete surface was spalling (chipping). He did not observe any problems with the sidewalk. He recommended that the pool deck be removed and replaced. He noted that an overlay would have durability problems. He estimated it would cost \$15,863.00 to remove and replace the pool deck.

11. Over time, the peeling and discoloration of the pool deck has increased, and the concrete has chipped and has hairline cracks.

12. In order to correct the Respondent's unworkmanlike work, the pool deck concrete should be removed and replaced.

13. The Claimant's actual loss is \$15,700.00.

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).⁶ “[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) (2015);⁷ *see also* COMAR 09.08.03.03B(2) (“actual losses . . . incurred as a result of misconduct by a

⁶ As noted above, “COMAR” refers to the Code of Maryland Regulations.

⁷ Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 Replacement Volume.

licensed contractor”): Actual 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 was a licensed home improvement contractor at the time she entered into the contract with the Claimant. The Claimant dealt with Dwayne Bailey, who appears to be a male relative of the Respondent’s. The Respondent performed unworkmanlike, inadequate or incomplete home improvements at the Claimant’s home. Specifically, the Respondent installed stamped concrete on the Claimant’s pool deck in 2013. When the Claimant and his wife opened their pool in 2014, the stamped concrete was discolored, peeling, and chipping; conditions that have continued to worsen over time. The Claimant attempted to have the Respondent correct the problem by removing and replacing the concrete. The Respondent refused to remove and replace the concrete and wanted to install an overlay of concrete instead. The Claimant attempted to resolve the dispute with the Respondent and allow her to correct her work but she refused to remove and replace the concrete.

Frank J. Kaiss, Frank J. Kaiss & Associates,⁸ inspected the Claimant’s pool deck on October 10, 2015 and observed that the surface color was fading and irregular and that the entire pool deck concrete surface was spalling. He recommended that the pool deck be removed and replaced because an overlay would have durability problems. He estimated it would cost \$15,863.00 to remove and replace the pool deck.

The Claimant submitted two estimates for removing and replacing the concrete pool deck. One estimate, from Artistic Stamped Concrete of Maryland, LLC, was for \$19,032.00. The other estimate, from Marrocco’s Stamped Concrete, Inc., was for \$15,600.00.

⁸ Counsel for the Fund noted that the MHIC has used Mr. Kaiss as an expert in other cases.

Thus, I find that the Claimant is eligible for compensation from the Fund.

Having found eligibility for compensation, 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. COMAR 09.08.03.03B(3). The following formula offers an appropriate measurement to determine the amount of actual loss in this case.

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 Claimant's actual loss is calculated as follows:

Amount paid to the Respondent	\$12,100.00
Cost to repair	+15,600.00
	<u>\$27,700.00</u>
Original contract price	-12,000.00
Actual loss	\$15,700.00

Pursuant to the applicable law, the maximum recovery from the Fund is limited to the lesser of \$20,000.00 or the amount paid by or on behalf of the Claimant to the Respondent. Md. Code Ann., Bus. Reg. § 8-405(e)(1), (5).

The Claimant paid \$12,100.00 to the Respondent, which is less than his actual loss of \$15,700.00 computed using the formula in COMAR 09.08.03.03B(3)(c) described above.

Accordingly, the Claimant is limited to reimbursement of \$12,100.00. Md. Code Ann., Bus Reg. § 8-405(a).

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$12,100.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(c).

RECOMMENDED ORDER

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


ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$12,100.00; 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

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

Signature on File

February 21, 2017
Date Decision Issued


Lorraine E. Fraser
Administrative Law Judge

LEF/sm
#166790

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

PROPOSED ORDER

WHEREFORE, this 10th day of April, 2017, 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.

Bruce Quackenbush

***Bruce Quackenbush
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION

**The Maryland Home
 Improvement Commission**

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**BEFORE THE
 MARYLAND HOME IMPROVEMENT
 COMMISSION**

**v. Minnie Bailey
 t/a Five Star Concrete
 (Contractor)
 and the Claim of
 Nicholas Holston
 (Claimant)**

MHIC No.: 15 (90) 130

FINAL ORDER

WHEREFORE, this 6th day of July 2017, Panel B of the Maryland Home

Improvement Commission ORDERS that:

- 1. The Findings of Fact set forth in the Proposed Order dated April 10, 2017 are AFFIRMED.**
- 2. The Conclusions of Law set forth in the Proposed Order dated April 10, 2017 are AFFIRMED.**
- 3. The Proposed Order dated April 10, 2017 is AFFIRMED.**
- 4. This Final Order shall become effective thirty (30) days from this date.**
- 5. During the thirty (30) day period, any party may file an appeal of this decision to Circuit Court.**

Joseph Tunney
 Joseph Tunney, Chairperson
 PANEL B

MARYLAND HOME IMPROVEMENT COMMISSION