

**IN THE MATTER OF THE CLAIM
OF SUSAN GRODSKY,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF ISAAC BROWN,
T/A 3D RESIDENTIAL, LLC,
RESPONDENT**

*** BEFORE STEVEN V. ADLER,
* ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
*
* OAH No.: DLR-HIC-02-18-33628
* MHIC No.: 18 (90) 916
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PROPOSED DECISION

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

STATEMENT OF THE CASE

On April 12, 2018, Susan Grodsky (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC or Commission) Guaranty Fund (Fund) for reimbursement of \$6,150.00 in actual losses allegedly suffered as a result of a home improvement contract with Isaac Brown, trading as 3D Residential, LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015).¹ On October 18, 2018, the Chairperson of the Commission determined a hearing was warranted on the Claim and on October 25, 2018, the

¹ All later citations to the Business Regulations Article of the Annotated Code of Maryland are to 2015 Replacement Volume to the Code.

Commission transmitted the matter to the Office of Administrative Hearings (OAH) for an evidentiary hearing.

I held a hearing on the merits of the Claim on March 20, 2019, at the OAH in Kensington, Maryland. Md. Code Ann., Bus. Reg. § 8-407(e). The Claimant represented herself. The Respondent represented himself. Shara Hendler, Assistant Attorney General, counsel to the Department of Labor, Licensing, and Regulation (Department), represented the Fund.

Without objection from the parties, I held the record open after the close of proceedings, until March 29, 2019, to allow Ms. Hendler to review the Commission's decisions and provide to me any relevant orders of the Commission addressing the question of what constitutes an unreasonable rejection of a good faith effort by a contractor to resolve a claim. Md. Code Ann., Bus. Reg. § 8-405(d).

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. 2018); Code of Maryland Regulations (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, if any, of the Claimant's compensable loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits in evidence on the Claimant's behalf, except as otherwise provided:

- CL Ex. 1 - USB Drive containing videos of studs and shower wall membrane in guest and master bathrooms
- CL Ex. 2 - Home Improvement Claim Form, dated April 9, 2018, with attachments:
- Photocopy of check, dated May 2, 2016
 - Photocopy of MHIC Complaint Form, undated
- CL Ex. 3 - Addenda 1-15 and Appendices A-H (96 pages)
- CL Ex. 4 - Further Evidence (35 pages)
- CL Ex. 5 - Order of Dismissal, *Isaac Brown v. Md. Home Improvement Comm'n*, Case No. 442322-V, Circuit Court for Montgomery County, with attachments (Not Admitted)

The Respondent offered no exhibits in evidence.

I admitted the following exhibits on behalf of the Fund:

- GF Ex. 1 - Hearing Order, dated October 18, 2018 (2 pages)
- GF Ex. 2 - Notice of Hearing, dated January 3, 2019 (2 pages)
- GF Ex. 3 -
- MHIC Home Improvement Claim Form
 - Letter to Respondent from J. Tunney, MHIC, dated April 17, 2018
- GF Ex. 4 -
- Department I.D. Registration, dated March 19, 2019
 - Department Professional License History, dated March 19, 2019
 - Letter to Whom It May Concern from D. Finneran, MHIC, dated February 19, 2019

There were no other exhibits offered or admitted.

Testimony

The Claimant testified on her own behalf in her case-in-chief and in rebuttal. The Respondent testified on his own behalf in his case-in-chief. The Fund presented no witness testimony.

PROPOSED FINDINGS OF FACT

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

1. At all times relevant to the proceeding, the Respondent was a licensed home improvement contractor under MHIC registration number 93415.
2. On January 15, 2016, the Claimant and the Respondent entered into a contract (Contract) to remodel the master and guest bathrooms at the Claimant's home in Rockville, Maryland (subject property).
3. The agreed-upon Contract price was \$11,750.00.
4. The Claimant paid the Respondent a total of \$7,400.00, as follows:

Date	Amount
1/15/2016	\$3,900.00
2/26/2016	\$3,000.00
	\$500.00
Total	\$7,400.00

5. Work under the Contract began on February 1, 2016.
6. The work performed by the Respondent included demolition of the existing master and guest bathrooms and installation of a bathtub, two shower diverters, and bathroom floors. The Respondent also performed preparation work for later plumbing.

7. The last day work was performed under the Contract was February 26, 2016.

8. Work ceased on February 26, 2016, at the Claimant's behest, because she was concerned with the quality of the Respondent's work and wished to solicit additional opinions from other contractors.

DISCUSSION

I

Governing Law, Controlling Regulations, and Burden of Proof

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); COMAR 09.08.03.03B(2). 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 (2015). "For purposes of recovery from the Fund, the act or omission of a licensed contractor includes the act or omission of a subcontractor, salesperson, or employee of the licensed contractor, whether or not an express agency relationship exists." Md. Code Ann., Bus. Reg. § 8-405(b) (2015).

At a hearing on a claim for reimbursement from the Fund, the Claimant has the burden of proof. Md. Code Ann., Bus. Reg. § 8-407(e)(1) (2015); COMAR 09.08.03.03(A)(3). The standard of proof is by a preponderance of the evidence. Md. Code Ann., State Gov't § 10-217 (2014). To prove something by a "preponderance of the evidence" means "to prove that something is more likely so than not so," when all of the evidence is considered. *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)); see also *Mathis v. Hargrove*, 166 Md. App. 286, 310 n.5 (2005).

For the following reasons, I find that the Claimant has not proven eligibility for reimbursement from the Fund.

II

Positions of the Parties

The Claimant testified that she entered into a Contract with the Respondent to remodel her master and guest bathrooms at the subject property on January 15, 2016, and pursuant to the terms of the agreement provided payments totaling \$7,500.00 to the Respondent before becoming dissatisfied with his work and seeking the opinions of other construction professionals.

The Claimant explained that work began on the project on February 1 and ceased at her direction on February 26, 2016. After consulting with three contractors and a home inspector, all of whom informed her the Respondent's work was inadequate or unworkmanlike, the Claimant concluded the Respondent's work was inadequate and unworkmanlike and offered the Respondent the option to remediate the unsatisfactory work under the supervision and direction of a contractor of the Claimant's choosing or to refund the monies she had paid him. The Respondent declined both options and the Claimant then filed her Claim with the Commission.

Explaining that the instructions on the Claim form created confusion, the Claimant sought leave to amend her Claim at the hearing, and seek recovery of \$9,547.50 from the Fund, the correct measure of her actual loss.

The Respondent maintained that he performed the work in question satisfactorily and tried to meet or exceed all of the Claimant's expectations in the work he performed under the Contract at the subject property. The Respondent stated that he felt the Claimant was disingenuous by failing to alert him to her concerns, seeking out additional opinions on the quality of his work without discussing this with him, and furnishing him with an inaccurate

explanation for the three-month delay in the project while the additional opinions were being obtained. He, nevertheless, averred he remained willing to work with the Claimant to cure any perceived deficiencies and told her he would "be glad to remediate," but would not agree to working under the direction and control of another contractor, the Claimant's stipulation, or to a cash settlement. The Respondent explained he then encouraged the Claimant to seek redress from the Fund, should she continue to feel aggrieved with his performance, in order to be made whole, since he was unable to resolve the matter to her satisfaction, despite his good-faith efforts so to do.

The Fund recommended against a finding in favor of the Claimant and an award from the Fund. The Fund contended that while there is no procedural bar to recovery, the Claimant failed to prove an actual loss due to the unworkmanlike or inadequate work of the Respondent. The Fund was not persuaded by the Claimant's evidence, which it assessed as resting exclusively on the opinions of four contractors, none of whom offered testimony at the hearing to support their respective opinions or were subject to cross-examination. The Fund maintained that expert testimony is necessary in the case at bar to establish the Respondent's work was unworkmanlike and none was supplied; the absence of which is fatal to the Claimant's case.

The Fund expressed grave concern with permitting the amending of the Claim, citing the Department's regulations that govern amendment and the constitutional principles of due process and notice. COMAR 09.08.03.02C. The Fund concluded that it was unreasonable of the Claimant to require the Respondent to submit to the direct supervision of another contractor for the performance of any remedial work and offered that the Claimant's action in requiring this supervision may have been an unreasonable rejection of a good faith effort to resolve the Claim.

III

Analysis of the Merits of the Claim

The Claimant's testimony was delivered clearly, consistently, and sincerely; without any signs of doubt, evasion, falsity, deception or contradiction; and was supported by documentation, including pictures and videos depicting the work at issue. CL Exs. 1-4; see *B.H. v. Anne Arundel Cty. Dep't of Soc. Servs.*, 209 Md. App. 206, 224-25 (2012). I find the Claimant's testimony and her account of events credible. I have no doubt that the Claimant had genuine concerns about the quality of the Respondent's work and was informed by three contractors and a home inspector that she subsequently consulted with that the work performed by the Respondent was poor. This does not mean, however, that the Claimant has offered persuasive evidence establishing her case. I explain.

The Claimant's evidence supports a finding that she sincerely believed the work performed by the Respondent was poor. This does not, however, make it so. The sincerity of the Claimant's belief is not at issue, the facts undergirding that belief very much are. The Claimant's conclusion that the Respondent's workmanship was poor was largely, if not wholly, informed by the opinions of the several contractors who reviewed the work after February 26, 2016. None of these persons, however, were called to testify at the hearing. Their respective accounts are hearsay.

"Hearsay is an out of court statement offered to prove the truth of the matter asserted."

Md. Rule 5-801(c). Although hearsay is generally inadmissible in judicial proceedings, it may properly be admitted in administrative proceedings and given controlling weight, should it be reliable. *Motor Vehicle Admin. v. McDorman*, 364 Md. 253, 262 (2001); see *Consolidated Edison Co. of NY v. NLRB*, 305 U.S. 197, 230 (1938); *Maryland Dep't of Human Resources v.*

Bo Peep Day Nursery, 317 Md. 573, 595 (1989); *Para v. 1691 Ltd. Partnership*, 211 Md. App. 335, 381 (2013); *Travers v. Baltimore Police Dep't*, 115 Md. App. 395, 413 (1997) (for a discussion of what constitutes reliable hearsay). Considering the hearsay evidence before me, in the form of unsworn documents and the Claimant's testimony relaying the opinions of the contractors, I am not persuaded they are sufficiently reliable to be accorded evidentiary weight.

Moreover, their observations and ultimate opinions were not subject to cross-examination or other testing to identify the strength of their opinions, the facts and observations upon which they were formed, and any possible motivation or bias that could color their respective accounts. See *Pantazes v. State*, 376 Md. 661, 680 (2003); *Marshall v. State*, 346 Md. 186, 192 (1997); *Smallwood v. State*, 320 Md. 300, 306 (1990) (One of the most effective means of attacking the credibility of a witness is cross-examination. Through cross-examination, a party is able to impeach the credibility of a witness and to establish a witness's possible biases, prejudices, motives to testify falsely, or ulterior motives pertaining to the outcome of the trial.).

This inability to test the soundness of the opinions offered through the Claimant's exhibits and the inability to ascertain the precise nature of the education and experience in the field of those offering the opinions appreciably impacts the weight I can give these opinions. *Marshall v. Sellers*, 188 Md. 508, 518 (1947) (internal citations omitted) (“[t]he opinion of an expert witness, the grounds upon which it has been formed, and the weight to be accorded to it are all matters for the consideration of the [trier of fact]”); *Steinberg v. Arnold*, 42 Md. App. 711, 712 (1979) (“as fact finder, [the judge] has the usual jury prerogatives of whether to believe or disbelieve witnesses, how much weight to give testimony and ultimately whether to be persuaded or not to be persuaded”).

As the Claimant's position that the Respondent's work was unworkmanlike is chiefly founded upon the opinions of the persons she consulted with, without that underlying support, the Claimant's ultimate opinion becomes unmoored from its factual underpinnings and loses the probative force necessary to sustain her case.

This analysis notwithstanding, it is undisputed, on the record before me, that on February 26, 2016, the last day work was performed at the subject property, the Respondent was very much in the midst of the project, did not consider the Contract-work complete, and had no intention or desire to cease work under the Contract. It is equally undisputed that work ceased on February 26, 2016, because the Claimant directed that result.

A three-month period elapsed, where no work was performed, at the Claimant's behest, while the Claimant gave the Respondent to understand that she was waiting for delivery of a vanity light and was making certain alternate arrangements for tile installation. The Respondent freely acknowledged that had his work to that date—February 26, 2016—been his complete performance under the Contract, the Claimant would "have a case."

The Respondent explained, however, that he had no intention of ceasing work at that time, thus making any assessment of his incomplete work—by the Claimant, another contractor, or any other person—premature. For each instance of unworkmanlike or inadequate work the Claimant cited, the Respondent offered a plausible and credible explanation of the steps he would have taken in the normal course, had he been permitted, to address the at-that-time only partially complete work, before moving on to the next phase of the project. *See Dickey v. State*, 404 Md. 187, 202-03 (2008) (factors to be weighed by a fact-finder in assessing credibility); *Maryland Bd. of Physicians v. Elliott*, 170 Md. App. 369 (2006) (a finder-of-fact is authorized to

determine the credibility of a witness's testimonial evidence based on the witness's demeanor); *Montgomery Cty. Dep't of Health & Human Servs. v. P.F.*, 137 Md. App. 243, 268 (2001) (the credibility to be given a witness and the weight to be given his testimony is the exclusive province of the finder-of-fact).

For example, the Claimant averred that the Respondent's installation of a shower wall protective membrane, durock,² and bracing for a shower grab bar was inadequate, insufficient, and unworkmanlike. The Respondent agreed that had he installed tile directly on the durock as it was on February 26, 2016, his work would have been just those things—inadequate, insufficient, and unworkmanlike. The Respondent explained, however, that he would never have installed tile directly on the durock, but would first have added mesh tape, secured the corners with steel, plastered and waterproofed the durock, and then would have installed the tile, securing the grab bar with anchors. He was never able to complete these additional tasks, because the Claimant terminated her business relationship with the Respondent before he was able so to do. This explanation was delivered credibly and was not refuted, on the record before me.

In another instance, the Claimant averred that the Respondent had used an insufficient number of studs as required by county building code, not placing them sixteen inches apart, in her bathroom wall. The Respondent explained the "sixteen inch rule" applies only to outside walls not reinforced with concrete, such as the Claimant's bathroom, and the number of studs installed was sufficient. The Claimant did not refute the Respondent's credibly delivered testimony and alternative explanation of sufficient stud installation.

² Durock, as explained by the Respondent, is a waterproof board that attaches to studs in the wall prior to the application of tile.

The opinions provided by the construction professionals the Claimant consulted do not address the question of whether the Respondent's work, if completed in the fashion he credibly testified he would have performed the work, would be an inadequate or unworkmanlike home improvement nor could the Claimant offer any testimony establishing facts that would support its reasonable inference. Both the Claimant and the Respondent agree the partial work performed at the subject property was inadequate and that the work never progressed to its completion because the Claimant did not permit it. This, in turn, prevents anyone, including the Claimant and the tribunal, from assessing the quality of the completed project. The only credible and competent evidence before me is what occurred during the twenty-five days of work, for which there is no compelling evidence, only the Claimant's sincere belief, lacking persuasive support on the record before me, that the Respondent's home improvement was unworkmanlike.

After carefully weighing the evidence, I remain unpersuaded—in a state of honest doubt—that the Claimant suffered an actual loss due to an incomplete, inadequate, or unworkmanlike home improvement performed by the Respondent at the subject property, between February 1 and February 26, 2016. *Starke v. Starke*, 134 Md. App. 663, 680 (2000) (emphasis omitted) (“Actually to be persuaded of something requires a requisite degree of certainty on the part of the fact finder (the use of a particular burden of persuasion) based on legally adequate evidentiary support (the satisfaction of a particular burden of production by the proponent) Mere non-persuasion, on the other hand, requires nothing but a state of honest doubt.”).

For these reasons, I do not need to reach the question of whether the Claim is barred by an unreasonable rejection of a good faith effort to resolve the Claim and whether amendment of the Claim is proper, and I do not reach the question of an appropriate award from the Fund, having not found the Claimant eligible for compensation from the Fund.

PROPOSED CONCLUSION OF LAW

I conclude, as a matter of law, that the Claimant has not proven she sustained an actual and compensable loss as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405, 407(e)(1) (2015); COMAR 09.08.03.03(A)(3), B(2).

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

June 20, 2019
Date Decision Issued


Steven V. Adler
Administrative Law Judge

SVA/sw
180097

MARYLAND HOME IMPROVEMENT COMMISSION

W. Bruce Quackenbush
Panel B

W. Bruce Quackenbush

WHEREFORE, this 24th day of July, 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.

PROPOSED ORDER