

IN THE MATTER OF THE CLAIM	* BEFORE EILEEN C. SWEENEY,
OF GREGORY A. CROSS,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT,	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	* OAH NO.: DLR-HIC-02-12-27712
FOR THE ALLEGED ACTS OR	* MHIC NO.: 10(90)1287
OMISSIONS OF MICHAEL BALL T/A	*
POTOMAC HOME IMPROVEMENT	*
COMPANY,	*
RESPONDENT	*

* * * * *

RECOMMENDED DECISION

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STATEMENT OF THE CASE

On November 15, 2010, Gregory A. Cross (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$19,572.37 for actual losses allegedly suffered as a result of a home improvement contract with Michael Ball t/a Potomac Home Improvement Company (Respondent).¹

I held a hearing on March 26, 2013 at Wheaton Park Office Complex, 11510 Georgia Avenue, Suite 190, Wheaton, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010 &

¹ I will refer to the Respondent and his workers, collectively, as the Respondent.

Supp. 2012). The Claimant represented himself. James R. Dever, Esquire, represented the Respondent. Kris King, Assistant Attorney General, Department of Labor, Licensing and Regulation (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 Office of Administrative Hearings (OAH) govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2012), Code of Maryland Regulations (COMAR) 09.01.03; 09.08.02; and 28.02.01.

ISSUE

Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on the Claimant's behalf:²

- CL Ex. 1 May 24, 2009 Proposal (Contract);³ itemized list of payments
- CL Ex. 2 April 14, 2010 Complaint Form
- CL Ex. 3 Attachment to April 14, 2010 Complaint Form
- CL Ex. 4 Photographs
- CL Ex. 4A Joint compound sample
- CL Ex. 5 July 10, 2010 U.S. Inspect, LLC (U.S. Inspect) report

² I did not admit CL Ex. 7 into evidence. In addition, the Claimant did not submit into evidence an exhibit pre-marked by him as CL Ex. 8.

³ The copy of the Contract submitted into evidence by the Claimant was unsigned; however, the Respondent stipulated that it was a copy of the actual Contract entered into by the parties.

CL Ex. 6 October 22, 2010 estimates from High Point Contracting, LLC (High Point)

CL Ex. 9 Cancelled checks from the Claimant to:

- the Respondent (May 24, 2009: \$5,000.00; June 8, 2009: \$848.48; June 11, 2009: \$5,000.00; September 12, 2009: \$1,750.00)
- Atlantic [Bath & Brass] (Atlantic): (June 1, 2009: \$1,157.44; June 6, 2009: \$5,944.63; September 25, 2009: \$258.64)
- Lowe's (June 1, 2009: \$133.56)
- Bath & Kitchen Showroom (June 1, 2009: \$1,047.07)
- Annapolis Lighting (June 3, 2009: \$339.00)

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

Fund Ex. 1 October 3, 2012 Notice of Hearing; receipts for certified mailings to the Claimant and the Respondent

Fund Ex. 2 January 8, 2013 letter from the OAH to the Claimant and the Respondent; receipts for certified mailings to the Claimant and the Respondent

Fund Ex. 3 June 25, 2012 Hearing Order

Fund Ex. 4 March 25, 2013 licensing information

Fund Ex. 5 November 9, 2010 Home Improvement Claim Form

Fund Ex. 6 December 7, 2010 letter from the MHIC to the Respondent

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

Resp. Ex. 1 April 2, 2010 email from the Claimant to the Respondent

Resp. Ex. 2 April 19, 2010 email from the Respondent to the Claimant

Resp. Ex. 3 July 2, 2010 letter from the Respondent to the MHIC

Testimony

The Claimant testified on his own behalf. He did not present the testimony of any other witnesses.

The Respondent, who was accepted as an expert witness in home repair and estimating, testified on his own behalf and presented the testimony of the following witnesses:

- William Hancock, retired builder, who was accepted as an expert witness in the construction and renovation of residential bathrooms
- Sarah Carpenter⁴

The Fund did not present the testimony of 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 license number # 4378269.
2. On May 24, 2009, the Claimant and the Respondent entered into a contract for the Respondent to remodel the first and second floor bathrooms in the Claimant's home, including the following:

1st Floor Bathroom

1. Remove existing bathroom fixtures and tiles
2. Remove existing tub faucet and install new shower faucets
3. Replace all flooring [with] ½" Duroc cement boards
4. Build 5' ceramic tile shower stall [with] build-in bench
5. Repair any damages and leaks behind walls
6. Paint walls [with] primer and 2 coats of semi gloss latex paint
7. Install new ceramic tile floors
8. Install new bead board wainscot; paint [with] 2 coats of semi gloss latex paint
9. Install new ADA⁵ toilet
10. Install new 30" vanity/sink [with] new faucets and cabinet next to vanity
11. Install new strip lighting, GFI⁶ outlets, and bathroom vent

2nd Floor Bathroom

1. Remove existing bathroom fixtures and tiles
2. Replace all flooring [with] ½" Duroc cement boards
3. Install new 2' X 2' operable skylight and ceiling fan
4. Reglaze bath tub
5. Replace drywall around tub [with] ½" Duroc cement boards
6. Install ceramic tiles around tub
7. Install new bead board wainscot

⁴ Ms. Carpenter testified briefly until I sustained an objection to her testimony based on relevancy.

⁵ Neither party explained this acronym. I assume it refers to the Americans with Disabilities Act.

⁶ Ground Fault Interrupter.

8. Paint all walls and ceiling [with] primer and 2 coats of semi-gloss latex paint
9. Install new ADA toilet
10. Pedestal sink [with] faucet
11. Install new strip lighting, GFI outlets, and bathroom vent

(CL. Ex. 1.)

3. The Contract also provided for a “[b]athroom allowance” of \$1,850.00 for the following items: “36” vanity sink, pedestal sink, 2 ADA toilets, 2 sink faucets, 2 shower/tub diverters, and 2 strip lights.” (CL Ex. 1.) In addition, the Contract provided for a “[t]ile allowance: \$2.50/sf.”⁷ (CL Ex. 1.)
4. The agreed upon Contract price was \$13,800.00.
5. The Contract stated that work would begin in twelve to fifteen days. The Contract did not state when work would be completed.
6. The Respondent began work sometime in June 2009 and completed it sometime in September 2009.
7. The Claimant purchased the following items listed below, including items that were supposed to be paid for by the Respondent as part of the bathroom allowance, and the Respondent made an adjustment in the final bill:
 - fixtures for the sinks, showers and tub
 - wall and floor tiles
 - light fixtures
 - cabinets
 - countertop
 - sinks
 - toilets

8. The Claimant made the following payments to the Respondent, which the parties agreed constituted payment of the Contract in full:

⁷ The Claimant explained that “allowance” meant that the Respondent would provide the listed items at the stated cost, which was included in the Contract price. If the Claimant wanted more expensive items than those the Respondent was going to provide, the Claimant would pay the difference.

May 24, 2009	\$5,000.00
June 8, 2009	848.48 (cost of second floor tile minus allowance of \$139.50)
June 11, 2009	5,000.00
	1,194.18 (cost of first floor tile minus allowance of \$247.50) ⁸
September 12, 2009	<u>+1,750.00</u>
	\$13,792.66
	<u>- 1,850.00</u> (amount equal to bathroom allowance)
	\$ 11,942.66

9. The Respondent performed the following inadequate and unworkmanlike home improvements:

- (1) two gouges in the surface of the second floor bathtub;
- (2) dripping and streaked paint on the first floor bathroom walls;
- (3) loose water faucets in the first floor bathroom;
- (4) darkened and too-widely applied grout between the floor tiles in the first floor bathroom.⁹

10. On April 14, 2010, the Claimant filed a Complaint Form with the MHIC against the Respondent. On November 15, 2010, he filed a Claim Form for reimbursement from the Fund in the amount of \$19,572.37.

11. The Claimant reasonably rejected efforts by the Respondent to resolve the claims.

12. The Claimant's actual loss is \$500.00.

DISCUSSION

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) (Supp.2012). *See also* 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 (2010).

⁸ The Claimant did not provide a cancelled check for this item; however, the Respondent presented no evidence to dispute the Claimant's testimony that he paid it to him.

⁹ As discussed below, the Respondent also installed the wrong type of skylight, but gave the Claimant a credit for that error, and he repaired a leaking showerhead.

In this case, the Claimant contended that he was entitled to recover from the Fund based on an unworkmanlike and inadequate home improvement performed by the Respondent on the Claimant's bathrooms.

The Respondent did not dispute that he was a licensed home improvement contractor at the time he entered into the Contract with the Claimant. Nor did he dispute that he failed to properly paint bathroom walls. He otherwise disputed the Claimant's contentions. In addition, he asserted that the Claimant's claim is barred because he unreasonably rejected good faith efforts by the Respondent to resolve the claim.

For the reasons set forth below, I find that the Claimant has proven eligibility for compensation.

Motion to Dismiss

At the close of the Claimant's case, the Respondent made a Motion to Dismiss based on the Claimant's alleged failure to state the amount of his claim.¹⁰ I orally denied the motion based on COMAR 09.01.03.05B, which provides that "[a] motion to dismiss or any other dispositive motion may not be granted by the [Administrative Law Judge] without the concurrence of all parties."

Alleged Defective Conditions¹¹

Evidence

Skylight

The Respondent did not dispute that instead of installing an operable (able to be opened) skylight as called for by the Contract, he installed a static skylight that could not be opened.

¹⁰ The motion would have been more properly labeled as a Motion for Judgment. See COMAR 28.02.01.12C and E.

¹¹ In his Complaint Form filed with the MHIC, the Claimant also referred to alleged improper caulking around the HVAC vent, on the back of the sink, and around the door; however, he presented no testimony in that regard and no evidence of the cost to repair. I note also that the Claimant submitted no photographs of that alleged condition and that an inspection report from U.S. Inspect submitted into evidence by him does not refer to it.

Ceiling Fans

The Claimant testified that the Respondent installed extremely loud fans in the bathrooms, instead of “whisper quiet” fans, as agreed to.

The Respondent testified that installation of ceiling fans was not part of the original Contract. Nonetheless, he would have made an adjustment in the Contract price if the Claimant had mentioned this before final payment was made.

Drywall

The Claimant contended that some of the drywall installed by the Respondent on the walls and ceilings in both bathrooms developed cracks at the seams. According to the Claimant, this resulted from the Respondent’s improper use of paper tape and a drywall compound, on the seams, which did not hold.

The Claimant submitted into evidence a July 10, 2010 inspection report from U.S. Inpect relating to an inspection performed by Eric L. Carpenter. An attachment to the report indicates that Mr. Carpenter is a licensed home inspector and has thirty-five years of experience in the construction industry. Mr. Carpenter reported that improper installation of drywall was apparent in both bathrooms -- seams were breaking through the walls.

The Respondent, who was accepted as an expert witness in home repair and estimating, testified that he has been in the home improvement industry as a residential contractor since 1993 and performs thirty to forty bathroom remodels a year. He is on the jobs daily, is very “hands-on,” and has attended seminars sponsored by tile distributors. In addition, he acts as the main estimator for his company.

The Respondent testified that he always installs Duroc with construction adhesive and screws, and special perforated drywall tape on the seam. To prepare the seams in the drywall, he tapes and blocks all the seams with thinset, in accordance with the manufacturer’s directions. He

stated that it is not possible, using the type of hand trowel he used, to leave “blanks” in the drywall, unless you do it on purpose.

The Respondent also presented the testimony of William Hancock, a retired (five years) builder, who was accepted as an expert witness in the construction and renovation of residential bathrooms. Mr. Hancock, who presented as extremely knowledgeable and experienced, was present during the entire hearing. He testified that he was employed in the residential building industry for over forty years, has a B.A. in Industrial Design, is a past president of the Montgomery County Building Association, and is familiar with residential construction, including tiling. In addition to testifying generally that it was his opinion, based on the photographs and testimony, that there was no poor workmanship in this case, Mr. Hancock testified that the Respondent’s application of the Duroc and thinset met industry standards.

Soap Dishes

The Claimant testified that the Respondent failed to install soap dishes in the shower walls.

The Respondent did not address this alleged failure as part of his case.

Wall Tiles

According to Claimant, sometime in either October or December 2009,¹² a wide, approximately three-foot-long crack appeared in the wall tiles above the bathtub in the second floor bathroom, extending across three of the 14” tiles. In addition, fine cracks had developed in ten of the second floor bathroom tiles and in nine of the first floor bathroom tiles. The Claimant claimed that this was a result of improperly installed Duroc substraat behind the broken tiles. Specifically, the Claimant argued that the Respondent did not seal the seams and joints in the

¹² The Claimant testified as to the former date, but his Complaint Form indicates the latter date.

backing to make them one large piece as instructed by manufacturer guidelines for stability purposes.

Mr. Carpenter reported that on July 10, 2010, he observed some missing and cracked tiles “indicating the likelihood of damage or improper installation to the cement backer board.” (CL Ex. 5.) He stated that approximately nine of the first floor tiles were cracked at all of the backer seams and that the second floor backer board had seams at improper locations, indicating that the board was improperly installed vertically instead of horizontally. In addition, the Claimant testified that Mr. Carpenter told him that the Respondent should have allowed a gap at the bottom or top of the bathroom wall tiles to allow them to expand and that his failure to do so resulted in the tiles breaking because they had no place to move. Although not discussed in detail in his report, under one photograph of the tile, Mr. Carpenter stated that the tile was “[s]et and grouted from ceiling to tub (no room for expansion).” (CL Ex. 5.)

The Respondent testified that he has never seen wall tiles crack like this before and that it was his opinion that the cracks are due to either a substandard tile material or substandard structural construction by others. The Respondent further testified that, as he told the Claimant, a tile vendor had advised him that there may have been changes in the production process after the tile company was sold.

Specifically as to the cracks in the wall tiles in the first floor bathroom, the Respondent testified that they could not have resulted from the condition of the drywall because the cracks do not follow the drywall line. According to the Respondent, this could only have occurred if there was structural damage behind the wall tiles, causing movement. (He testified that he saw such structural damage when he repaired the leak in the shower head). Therefore, even if the drywall was repaired or replaced, there is no guaranty that the problem will not return if the structural problem is not taken care of.

Mr. Hancock testified that he rarely saw cracks in tile applied over Duroc. In his opinion, vertical cracks in the middle of tile are indicative of defective tile and horizontal cracks are indicative of a structural problem, *i.e.*, the wall behind the tile moves and cracks the tile. He testified, "I think it is an old wall."

Bathtub

The Claimant testified that when the Respondent removed the broken wall tiles, he made several gouges in the newly resurfaced bathtub.

The Respondent did not address this particular alleged condition at the hearing.

Paint

According to the Claimant, paint drips are visible on the bathroom walls and some areas looked like they had been painted with a folded paper towel. In addition, part of the ceiling appeared to have only one coat of paint.

Mr. Carpenter reported that unacceptable workmanship was apparent: the paint ran at most of the walls.

The Respondent did not dispute that the painting performed by him had streaks.

Wall Light Fixture/Electrical Box

The Claimant testified that the wall light fixture in the first floor bathroom was not recessed into the wall as it was supposed to be and was not centered. Furthermore, when the Claimant centered it himself, he discovered that the Respondent had not installed an electrical box in the wall behind the light fixture and that wires were just sticking out through a hole in the wall. According to the Claimant, this condition "did not meet code."

The Respondent testified that all bathroom fixtures have to be vapor-proof and have their own box. Thus, a second box in the wall is not required.

Floor Tiles/Subfloor

According to the Claimant, instead of properly replacing some subflooring around the toilets in both bathrooms during the demolition phase, the Respondent installed “lattice work” for support, on which he laid the backing for the floor tile. In addition, a piece of electrical wire runs between the 2’ X 4’ boards into which the Respondent screwed 1’ X 3’ boards and one of the 1’ X 3’ boards hangs in midair. According to the Claimant, the floor creaks when you step on it and the floor in front of the toilet rocks, making the grout between the tiles crumble.

Mr. Carpenter reported that some of the ceramic floor tiles are loose and that the first floor bath tiles “pop” when walked on “indicating that they are loose from the backer.” (CL Ex. 5.) In addition, when tapped lightly with a blunt instrument, some of the tiles had a sound indicative of no longer being bonded to the subfloor. According to Mr. Carpenter, “[u]nbonded tiles are likely to move, result in grout breakage and eventually crack and come up.” (CL EX. 5.) Furthermore, according to Mr. Carpenter, the first floor ceramic floor tiles lacked grout between approximately six tiles and the subfloor was improperly supported with spaced fillers, OSB,¹³ and cement backer board.

The Respondent testified that he cut out the original subflooring around the first floor toilet and replaced it with 1’ X 6’ beams and that the plywood he installed to which the Claimant referred was merely a cleat, not a structure. The Respondent testified that he walked on the floor before tile was laid and felt no weakness and that he would never leave a floor unstable. Any weakness would have been in the material used to build the house.

The Respondent disagreed with Mr. Carpenter that tapping lightly on the floor tiles with a blunt instrument will produce a sound indicative of the tile not being bonded to the subfloor.

¹³ Oriented strand board.

According to the Respondent, because this was a porcelain tile, the only way to determine if it is not bonded is to pull it up.

Mr. Hancock testified that, after listening to the Respondent's testimony about how he installed the subflooring in the Claimant's bathroom, it was his expert opinion that it was properly installed. He further testified that it would be "unusual" to discover air pockets behind tile by knocking on the tiles.

Grout

The Claimant testified that the grout between the floor tiles in the first floor bathroom started to crumble in two places within a week of completion. After he was advised of that condition, the Respondent removed some of the grout and replaced it; however, within a few weeks, it was crumbling again. Furthermore, when the Respondent reapplied the grout, he used a darker tint and grouted a wider area, making the reapplied grout stand out from the rest, and the new grout started to crumble as well. The Claimant attributed the crumbling grout to the movement in the floor caused by the alleged failure to properly install a subfloor.¹⁴

The Respondent testified that grout can shrink or discolor and he would have been willing to regrout at no charge. It was his opinion, however, that the grout cracked as a result of weakness in the floor joists underneath it.

Water Faucet Handles/ Showerhead/ Pipes

The Claimant testified that both of the water faucet handles in the first floor bathroom are loose and that one of the handles moves at least 3/4" side to side. He further testified that the Respondent attempted to fix this by putting caulk behind the decorative ring; however, it did not hold and the handles are still loose.

¹⁴ The Claimant presented no evidence that the Respondent failed to clean grout off of tiles, as the Claimant alleged in his Complaint Form filed with the MHIC.

The Claimant also reported that the first time he used the showerhead in the first floor bathroom, water ran down the inside of the wall into the basement. The Claimant attributed this to the Respondent's alleged failure to anchor the valves or the plastic pipes he installed.

Mr. Carpenter reported that the shower faucet in the first floor bathroom was loose because the CPVC¹⁵ pipes were not properly blocked and secured behind the walls, "causing water damage to unprotected areas as finished areas are allowed to move." (CL Ex. 5.) He further reported that the water supply piping was not supported properly and that blocking was missing in the walls behind the shower fittings. According to his report, improper support can lead to loose fittings and potential leaks.

The Respondent did not dispute that both of the water faucet handles in the first floor bathroom are loose. He testified that it sounded like the bracket holding the pipe had come loose.

Sink

The Claimant testified that the first floor sink emitted a strong sewer gas smell every time the water was turned on. The Claimant attributed the odor to the installation of a "larger than normal" drain pipe by the Respondent. (CL Ex. 3.) On cross-examination, the Claimant testified that he fixed this problem by installing a smaller drain pipe.

Mr. Carpenter reported that sink drain overflow in the first floor bathroom allowed foul air to circulate back into the bowl. He could not find the source for this "gas," however, and recommended further investigation.

The Respondent testified that he never smelled an odor coming from the first floor sink and denied that the drain pipe he installed was too large or the cause of any odor. According to

¹⁵ Chlorinated polyvinyl chloride.

the Respondent, an odor would not have been able to get around the P-shaped section of the drain pipe (P-trap).

Analysis

For the following reasons, I find that the Respondent performed an unworkmanlike and inadequate home improvement as to certain items and not as to others.

Skylight

The Claimant presented no evidence to dispute the Respondent's testimony that he gave the Claimant a credit for the installation of the wrong type of skylight. Thus, I find that the Claimant may not again recover for this error.

Ceiling Fans

The Contract calls for the installation of a ceiling fan in the second floor bathroom, but does not specify the type of fan to be installed. The Contract did not refer to the installation of a ceiling fan in the first floor bathroom. The Claimant complained that the fans were too loud, yet Mr. Carpenter did not even mention them in his report. Thus, I find that the Claimant failed to prove by a preponderance of the evidence that the Respondent performed an unworkmanlike or inadequate home improvement by failing to install "whisper quiet" fans in the bathrooms. I note also that on cross-examination, the Claimant admitted that the Respondent replaced the fans with quieter ones.

Drywall

Photographs taken by the Claimant and Mr. Carpenter clearly show an unsightly crack in the drywall on the wall in the first floor bathroom and a photograph taken by Mr. Carpenter showed cracked drywall at the seams in the first floor bathroom. The Claimant failed to prove by a preponderance of the evidence, however, that the crack was caused by the Respondent.

I recognize that the Respondent's testimony was necessarily self-serving. Nonetheless, his testimony as to how to properly apply the Duroc made sense and was supported by Mr. Hancock's expert testimony. Although I placed some weight on Mr. Carpenter's report since he was a licensed home inspector, I placed far greater weight on Mr. Hancock's testimony. He was present at the hearing and I was able to observe his demeanor and judge his credibility. Furthermore, for the reasons, discussed above, I found Mr. Hancock to be a credible knowledgeable expert witness with many years of experience. On the other hand, Mr. Carpenter's report did not explain the basis for his opinion that the drywall was improperly installed and he did not elaborate on what the installation should have entailed. Furthermore, the Claimant did not submit into evidence a copy of the manufacturer's installation guide, which he contended required the use of fiber tape and cement to install the Duroc substrait. Thus, I find that the Claimant may not recover from the Fund for this alleged condition.

Soap Dishes

The Contract did not specifically include the installation of soap dishes and the Claimant presented no testimony that industry standards require that soap dishes be installed in bathtubs or showers. Thus, I find that the Claimant may not recover from the Fund for this item.

Wall Tiles

Photographs of tile on the shower walls in both bathrooms show cracks. I find, however, that the Claimant failed to prove by a preponderance of the evidence that the cracks in the wall tiles resulted from the Respondent's poor workmanship. He presented no expert testimony to support his allegation that the cracks were the result of improperly installed Duroc substrate behind the broken tiles and failed to submit into evidence the alleged manufacturer's recommendations with regard to sealing the seams and joints in the backing.

I found Mr. Carpenter's report as to the alleged cause(s) of the cracks to be somewhat vague. Indeed, as discussed above, he expressed several alternate theories as to the alleged cause.

Again, for the reasons, discussed above, I place greater weight on Mr. Hancock's expert opinion that the cracks were probably due to defective tiles or structural problems with the home.

In addition, I note that the Respondent failed to prove that it was necessary to replace undamaged tiles, as well as damaged tiles, due to mismatch in color. I note also that although the photographs of the Duroc substrate in the second floor bathroom appeared to show a gap between the pieces, I was unable to tell if there was a clear sealant or clear tape over that gap. Thus, the Claimant may not recover from the Fund for this item.

Bathtub

The Claimant believed that the Respondent made several gouges in the newly resurfaced bathtub when he removed some tiles. Regardless of the cause, a preponderance of the evidence shows that the Respondent did not provide an adequate or workmanlike product to the Claimant. Although the Claimant presented no expert testimony that the two gouges represented an unworkmanlike and inadequate home improvement, photographs of the newly resurfaced bathtub show two gouges and I find that the average layperson can reach that conclusion.

Paint

Neither the photographs nor Mr. Carpenter's report corroborated the Claimant's contention that the ceiling was improperly painted but paint drips and smears were visible in the photographs of the walls taken by the Claimant and the Respondent did not dispute that condition. Thus, I find that a preponderance of the evidence established that the Respondent performed an unworkmanlike and inadequate home improvement with regard to painting the walls.

Wall Light Fixture/Electrical Box

I find that the Claimant failed to prove by a preponderance of the evidence that the Respondent improperly installed the wall light fixture in the first floor bathroom. The Contract does not specify that the Respondent would install a recessed wall light fixture; rather, it refers to the installation of “strip lighting.” (CL Ex. 1.) In addition, the Claimant presented no expert testimony that an electrical box should have been installed behind the wall light fixture or that the fixture did not meet code.

Floor Tiles/Subfloor

The Claimant submitted photographs, which he contended showed 1' X 3' pine wood support, as well as electrical wiring between a 2' X 4' board and the original flooring. The Claimant presented no expert testimony, however, to establish that the Respondent improperly installed the subflooring or that the creaking and rocking or the cracked tiles around the toilet on the first floor resulted from the Respondent's inadequate or unworkmanlike home improvement. Although Mr. Carpenter's report indicates that he believed that to be the case, for reasons discussed above, I placed more weight on Mr. Hancock's live testimony that the installation of the subfloor met applicable standards.

Grout

Photographs of the grout between the floor tiles in the first floor bathroom taken by the Claimant and Mr. Carpenter show crumbling grout; however, as discussed above, the Claimant failed to prove that the Respondent installed a faulty subfloor.

Nonetheless, the Respondent presented no evidence to dispute the Claimant's testimony that the grout reapplied by the Respondent was darker and covered a wider area, making the grout stand out from the rest. Accordingly, I find that the Claimant proved by a preponderance

of the evidence the Respondent performed an unworkmanlike and inadequate home improvement with regard to the grout.

Water Faucet Handles/ Shower Head/ Pipes

The Contract clearly calls for the installation of new tub, sink and shower faucets in the first floor bathroom. Because on cross-examination, the Claimant acknowledged that the Respondent fixed the water dripping from the showerhead, I find that he failed to prove a defect with regard to the showerhead. The Respondent did not dispute that the water faucet handles in the first floor bathroom are loose, however, and conceded that it sounded like the bracket holding the pipe had come loose. Thus, I find that the Claimant proved by a preponderance of the evidence an unworkmanlike and inadequate home improvement as to the water faucet handles.

Sink

I do not doubt that a foul odor, detected by the Claimant and Mr. Carpenter, was coming from the sink drain on the first floor. Nonetheless, Mr. Carpenter could not determine the reason for the phenomenon. Thus, I find that the Claimant failed to prove that it resulted from the Respondent's alleged improper installation of a wrong-sized pipe.

Good Faith Efforts To Resolve Claim

Evidence

The Respondent testified that after he was advised of the cracked tiles, he and the Claimant agreed in March 2010 that the Respondent would replace them, with the Respondent paying for the labor and the Claimant paying for the new tiles. He started work to repair the damaged tiles, but the Claimant stopped the work in April and demanded that undamaged tiles be replaced as well. The Respondent testified that it was not necessary to replace the undamaged tiles because matching tiles were available. He testified that he was anxious to finish the work, but the Claimant would not let him because of the Easter holiday and because the Claimant

wanted to get an inspector's opinion. He was still negotiating with the Claimant about making repairs to the items about which the Claimant was complaining, when the Claimant filed a complaint with the MHIC on or about April 13, 2010.

The Respondent testified that he would have made all the necessary repairs because his work was under warranty for one year,¹⁶ although he acknowledged that he would not have paid for the replacement tile, as agreed to by the Claimant in March.

In support of his testimony, the Respondent submitted into evidence an April 2, 2010 email from the Claimant to the Respondent in which the Claimant indicated that he would rather not have the Respondent come that weekend because it was Easter and because he was hoping to have an inspector look at the problems. In addition, the Respondent sent an email to the Claimant on April 19, 2010, asking the Claimant to let him know when he could do the work.

The Claimant disputed the Respondent's contention that he unreasonably rejected the Respondent's good faith attempts to resolve the claim. The Claimant testified that after he called the Respondent in January 2010 about the cracks in the tiles, the Respondent came to his home to look at them. According to the Claimant, the Respondent stated that he would redo the bathrooms if the Claimant paid for all the necessary new "stuff," including the tile. He quoted the Respondent as saying, "you pay for the parts, I'll pay for the labor."

The Claimant testified that this was not acceptable to him because he wanted all of the "shoddy work" to be repaired or replaced, including replacement of all the tile to ensure that the colors match. He emphasized that he already paid for the tile once and that he should not have to pay for any materials or work necessary to repair the Respondent's "shoddy" home improvement.

¹⁶ It is not my role in this proceeding involving a claim against the Fund to determine whether the Respondent had a contractual obligation to repair some or all the items pursuant to the one-year warranty.

In his complaint filed with the MHIC, the Claimant stated only that the Respondent told him that he would install new tile if the Claimant bought it. In addition, the Respondent offered to repair the drywall and repaint.

Analysis

Section 8-405(d) of the Business Regulation Article provides that “[the MHIC] may deny a claim if the [MHIC] finds that the claimant unreasonably rejected good faith efforts by the contractor to resolve the claim.”

Regardless of which version of the negotiations between the Claimant and the Respondent is accurate, I find that the Claimant’s reluctance to allow the Respondent to make repairs was not unreasonable in light of the Claimant’s observations of multiple problems with the bathrooms, which he believed were the Respondent’s fault. That reluctance was subsequently reinforced by the findings in Mr. Carpenter’s report. I can understand why, based on the information he had at the time, the Claimant may have refused to allow the Respondent to return.

Award

Having found eligibility for compensation, I now turn to the amount of the award, if any.

The Claimant presented no evidence as to the cost to repair the bathtub and to regrout. Furthermore, I did not place any weight on Mr. Carpenter’s estimate to repaint and to repair the faucets because insufficient evidence was presented as to his expertise in estimating. For the same reason, and because it did not itemize the cost to repair each item, I did not place weight on an estimate from High Point submitted by the Claimant.

The Respondent testified that the cost for the Respondent to repaint would equal \$50.00 (\$100.00 if someone else did the work). The cost for the Respondent to repair the loose faucets would equal \$100.00 to \$200.00 (\$200.00 to \$400.00 if someone else did the work). He also

testified that he would not charge to regrout. Based on the evidence, however, I find it is unlikely the Claimant would allow the Respondent to make the repairs. Thus, my award will be based on the costs of repair if someone other than Respondent performed the work.

The MHIC's regulations offer three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3).¹⁷ Subsection (c) provides in pertinent part as follows:

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.

I have performed the following calculations in accordance with that formula:

Amount Claimant paid to Respondent under original contract	\$ 11,942.66
Plus reasonable amounts Claimant will be required to pay another Contractor to repair poor work	+500.00
	12,442.66
Less original contract price	<u>-11,942.66</u> ¹⁸
Actual loss	\$ 500.00

Thus, the Claimant is entitled to an award from the Fund in the amount of \$500.00.

CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual compensable loss as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2010).

¹⁷ 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). The governing statute provides that the "Commission may not award ... more than \$20,000.00 to one claimant for acts or omissions of one contractor[.]" The Commission's regulations provide that it may not award more than \$15,000.00 in such circumstances. *Compare* Md. Ann. Code, Bus. Reg. § 8-405(e)(1) and COMAR 09.08.03.03D(2)(a). The difference between these two enactments constitutes a conflict, as a result of which I am bound to follow the statute. *Thanner Enterprises v. Baltimore Co.*, 414 Md. 265, 276 (2010).

¹⁸ Although the Contract signed by the parties reflected a Contract price in the amount of \$13,800.00, the evidence shows that the parties subsequently agreed to this amount after consideration of credits and allowances.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$500.00; 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 at least ten percent as set by the Maryland Home Improvement Commission. Md. Code Ann., Bus. Reg. § 8-411(a) (2010); and

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

Signature on File

May 13, 2013
Date Decision Mailed

Eileen C. Sweeney
Administrative Law Judge



ECS/emh
#142445

IN THE MATTER OF THE CLAIM * BEFORE EILEEN C. SWEENEY,
OF GREGORY A. CROSS, * AN ADMINISTRATIVE LAW JUDGE
CLAIMANT, * OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME * OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND * OAH NO.: DLR-HIC-02-12-27712
FOR THE ALLEGED ACTS OR * MHIC NO.: 10(90)1287
OMISSIONS OF MICHAEL BALL * T/A * * * * *
POTOMAC HOME IMPROVEMENT * COMPANY, * * * * *
RESPONDENT

* * * * *

FILE EXHIBIT LIST

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

- CL Ex. 1 May 24, 2009 Proposal (Contract); itemized list of payments
- CL Ex. 2 April 14, 2010 Complaint Form
- CL Ex. 3 Attachment to April 14, 2010 Complaint Form
- CL Ex. 4 Photographs
- CL Ex. 4A Joint compound sample
- CL Ex. 5 July 10, 2010 U.S. Inspect, LLC (U.S. Inspect) report
- CL Ex. 6 October 22, 2010 estimates from High Point Contracting, LLC (High Point)
- CL Ex. 9 Cancelled checks from the Claimant to:
 - the Respondent (May 24, 2009: \$5,000.00; June 8, 2009: \$848.48; June 11, 2009: \$5,000.00; September 12, 2009: \$1,750.00
 - Atlantic [Bath & Brass] (Atlantic): (June 1, 2009: \$1,157.44; June 6, 2009: \$5,944.63; September 25, 2009: \$258.64)
 - Lowe's (June 1, 2009: \$133.56)

- Bath & Kitchen Showroom (June 1, 2009: \$1,047.07)
- Annapolis Lighting (June 3, 2009: \$339.00)

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

- Fund Ex. 1 October 3, 2012 Notice of Hearing; receipts for certified mailings to the Claimant and the Respondent
- Fund Ex. 2 January 8, 2013 letter from the OAH to the Claimant and the Respondent; receipts for certified mailings to the Claimant and the Respondent
- Fund Ex. 3 June 25, 2012 Hearing Order
- Fund Ex. 4 March 25, 2013 licensing information
- Fund Ex. 5 November 9, 2010 Home Improvement Claim Form
- Fund Ex. 6 December 7, 2010 letter from the MHIC to the Respondent

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

- Resp. Ex. 1 April 2, 2010 email from the Claimant to the Respondent
- Resp. Ex. 2 April 19, 2010 email from the Respondent to the Claimant
- Resp. Ex. 3 July 2, 2010 letter from the Respondent to the MHIC