IN THE MATTER OF THE CLAIM	*	BEFORE STEVEN V. ADLER,
OF PENNY L. KAFKA,	*	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 CLIFFORD S.	*	
CARTWRIGHT, III,	*	OAH No.: DLR-HIC-02-16-37553
T/A BASEMENT UNLIMITED, INC.,	*	MHIC No.: 16 (75) 65
RESPONDENT	*	

* * * * * * * * * * * * *

PROPOSED DECISION

STATEMENT OF THE CASE

On August 2, 2016, Penny L. Kafka (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of $7,685.00 in alleged actual losses suffered as a result of a home improvement contract with Clifford S. Cartwright, III, trading as Basement Unlimited, Inc. (Respondent). On November 23, 2016, the MHIC issued a Hearing Order, and on November 29, 2016, transmitted the case to the Office of Administrative Hearings (OAH) for a hearing on the merits.

Accordingly, I held an evidentiary hearing on May 24 and June 12, 2017 at the OAH in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407(e) (2015); Code of Maryland Regulations (COMAR) 09.01.03.05A. The Claimant was present and represented herself. The Respondent was also present and represented himself. Andrew Brouwer, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund.

The contested case provisions of the Administrative Procedure Act (APA), 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 and Supp. 2016); 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 offered by the Claimant:

CL Ex. 1 - Agreement Contract between Basement Unlimited, Inc. and Penny Kafka, dated May 31, 2015 (4 pages)

CL Ex. 2 - Copy of Claimant's personal check (front and back) #258 with payment to Basement Unlimited, Inc. or Clifford Cartwright, III in the amount of $3,862.00, dated June 2, 2015 (1 page)

CL Ex. 3 - Photographs of holes in Claimant's basement floor, dated June 13, 2015 and May 19, 2017 (6 pages)

CL Ex. 4 - Facsimile from Claimant to Respondent, dated June 5, 2015 (2 pages)

CL Ex. 5 - Copy of Claimant's personal check (front and back) #260 with payment to Basement Unlimited, Inc. or Clifford Cartwright, III in the amount of $3,233.00, dated June 4, 2015 (1 page)

CL Ex. 6 - Text messages between Claimant and her son, dated June 15, 2015 (1 page)

CL Ex. 7 - Work proposal from Ducote Construction Company, dated October 3, 2015 (1 page)

I admitted the following exhibits offered by the Fund:

GF Ex. 1 - MHIC Hearing Order, dated November 23, 2016 (2 pages)

GF Ex. 2 - OAH Notice of Hearing, dated March 3, 2017 (2 pages)

GF Ex. 3 - MHIC Home Improvement Claim Form dated August 2, 2016 (2 pages)

GF Ex. 4 - Department's I.D. Registration and Professional License History for the Respondent, dated February 21, 2017 (4 pages)

GF Ex. 5 - Letter from Office of the Attorney General to the Respondent, dated March 22, 2017 (2 pages)

GF Ex. 6 - Department's I.D. Registration and Professional License History for Ducote Construction Company, dated February 21, 2017 (2 pages)

GF Ex. 7 - Department's I.D. Registration and Professional License History for Affordable Basement Waterproofing, dated April 18, 2017 (2 pages)

There were no other exhibits offered or admitted.

Testimony

The Claimant testified on her own behalf and presented the testimony of her son, Shimon Kafka. The Respondent, accepted as an expert in basement waterproofing upon stipulation of the parties, testified on his own behalf. The Fund did not present any witness testimony.

PROPOSED FINDINGS OF FACTS

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 92011.

2. At all times relevant to the proceeding, the Respondent held himself out as the principal of Basements Unlimited, Inc.

3. Although unknown to the Claimant at the time of contract, Basement Unlimited, Inc. forfeited its corporate charter in 2012, and the Respondent operated thereinafter as a sole proprietorship.

4. On May 31, 2015, the Claimant and the Respondent entered into a contract for the Respondent to install a high-impact drain core with flow channels and a pressure relief system under the basement floor of the Claimant's home.

5. The original agreed-upon contract price was $11,862.00.

6. On June 2, 2015, the Claimant paid the Respondent $3,862.00 by check as advance payment.

7. On June 3, 2015, the Respondent's employees started work at approximately 9:15 a.m. and all work ceased at approximately 11:00 a.m.

8. After drilling eight holes of approximately four inches in diameter and six inches in depth in the basement floor, the Respondent asserted that his employee's discovered voids under the floor and continuing doing the work under the contract, which required creating a channel along the walls in the floor, could cause the floor to collapse.

9. The Respondent told the Claimant that he could not perform the agreed upon work until this problem was cured.

10. The Respondent proposed to perform the work necessary to address the voids for the additional sum of $9,700.00.

11. On June 4, 2015, the Claimant and the Respondent entered into an oral agreement by which the Respondent would fill the voids with gravel and dirt and replace the entire floor for $9,700.00, and the Claimant made a payment of $3,233.00 by check as advance payment.

12. On June 5, 2015, the Claimant sent a fax to the Respondent, indicating she wished to obtain additional opinions before moving forward with replacing the basement floor and asking for the return of her $3,233.00 payment.

13. The Respondent did not return any of the Claimant's monies.

14. On or about June 15, 2015, in conversation with Mr. Kafka, the Respondent averred that he was a structural engineer and similarly did so with the Claimant on or about June 7, 2015. The Respondent is not a structural engineer or a licensed or professional engineer of any kind.

15. Mr. Kafka also asked the Respondent to return the Claimant's monies minus any expenses incurred to date.

16. The Respondent stated to Mr. Kafka that he had expended all of the Claimant's monies on supplies and labor. Mr. Kafka asked the Respondent for copies of his receipts, bills, and invoices that account for the monies purportedly expended. The Respondent failed to produce any documentation to support his contention.

17. On a date not established in the record, the Claimant contacted four construction firms for additional opinions on the need to replace the basement floor. After reviewing the basement, each firm determined there was no need for the additional work that the Respondent advised the Claimant was necessary.

18. On June 15, 2015, one of the Respondent's employees sent a text message to the Claimant, on behalf of the Respondent, offering to do the additional work at no additional cost, an offer the Claimant declined.

19. On October 3, 2015, the Claimant contracted with Ducote Construction Company (Ducote) to fill the holes in the basement floor for $740.00.

20. Approximately twenty small holes, drilled in the basement floor for termite prevention treatment, existed at the time of the contract.

21. The Claimant estimated the cost to repair the existing twenty small holes was $150.00.

22. The Claimant is not related to the Respondent or any of his employees, by blood or marriage.

23. The Claimant owns and resides in the subject property and it is her sole residence.

DISCUSSION

I

Preliminary Matters

As a preliminary matter, the Respondent raised a number of arguments concerning the propriety of the proceeding itself—whether it is barred by a contractual arbitration clause and whether a reasonable opportunity to prepare for the hearing was afforded to the Respondent. I ruled on each argument on the record, finding neither to be meritorious, and briefly set forth a recitation of the arguments and my rulings here. Turning to the first of his contentions, the Respondent argued that that an evidentiary hearing in this matter was improper because there is a binding arbitration agreement in the contract that was not adhered to by the Claimant.

In order to be enforceable, an arbitration clause in a home improvement contract must contain the name of the person or organization that will conduct the arbitration, whether any mandatory fees will be charged to the parties for participation in the arbitration and include the fee schedule, whether the arbitrator's findings are binding, and a disclosure that, under section 8-405(c) of the Business Regulation Article, a claim against the Fund by an owner shall be

stayed until completion of any mandatory arbitration proceeding. COMAR 09.08.01.25A. In addition, the parties shall affix their initials and date immediately adjacent to any mandatory arbitration clause in a home improvement contract, at the time of execution of the contract. COMAR 09.08.01.25B.

The arbitration clause contained in the contract states, in whole, as follows:

> Any disputes, controversies, or claims between Owner and Contractor, including but not limited to all statutory claims and all claims that arise from or related to this Contract or the Work to be performed by Contractor, shall be resolved by binding arbitration administered by the American Arbitration Association. The Owner and Contractor hereby waive their rights to a jury trial and to any other court proceedings. Nothing contained herein shall prohibit any party from entering an arbitration award as a judgment in ourt [sic] with jurisdiction and engaging in process to enforce any such judgment.

Cl Ex. 1.

Applying the plain language of the contractual provision at issue to the plain language of the controlling regulations, I conclude that the arbitration clause fails to fully comply with the provisions of COMAR 09.08.01.25A. While the arbitration clause does contain the name of the organization that will conduct the arbitration and addresses the binding nature of the arbitrator's findings, it does not include a fee schedule, or include a disclosure that a claim against the Fund shall be stayed until completion of any mandatory arbitration proceeding. COMAR 09.08.01.25A. I also note there is no evidence that the parties initialed and dated the portion of the Contract containing the arbitration clause. COMAR 09.08.01.25B. Failure to comply with any one of the provisions of the controlling regulations is sufficient to render an arbitration clause unenforceable. COMAR 09.08.01.25A and B. Since the arbitration clause contained in

the contract is unenforceable, the Claimant is not required to comply with the clause and it was appropriate for the MHIC to forward this Claim to the OAH for a merits hearing.[1] Md. Code Ann., Bus. Reg. § 8-405(c) (2015).

The Respondent requested a postponement of the proceeding arguing that he was not prepared to move forward because he believed the scheduling of the hearing was in error due to the arbitration clause in the contract. The Fund and the Claimant opposed the request.

A request for postponement of a proceeding is governed by the Rules of Procedure of the OAH.

> A. Except as provided in §D of this regulation, a request for postponement shall be made in writing and filed not less than 5 days before the scheduled hearing.
>
> B. Documentation of the reasons for the postponement shall be required from the party making the request.
>
> C. A request for postponement shall be granted only if the party requesting the postponement establishes good cause for the postponement.
>
> D. Emergency Request for Postponement.
>
> > (1) For purposes of this section, "emergency" means a sudden, unforeseen occurrence requiring immediate attention which arises within 5 days of the hearing.
>
> . . .

COMAR 28.02.01.16

The Respondent's request for postponement was made for the first time at the start of the proceeding. This implicates the workings of COMAR 28.02.01.16D(1), which permits a postponement only upon a showing of an emergency basis for the request. The Respondent's request is not an emergency as that term is used in the controlling regulation, but a consequence

[1] I also considered and gave weight to the arguments set forth by the Fund and provided by letter from the MHIC's counsel to the Respondent on March 22, 2017, that since Basement Unlimited, Inc.'s charter has been forfeited, the corporation no longer exists to invoke arbitration and that due to the Respondent's personal bankruptcy, arbitration may not be invoked because "an arbitrator would be stayed from adjudicating a claim filed by [the Claimant] against you." GF Ex. 5.

of, as the Fund persuasively argued, the Respondent's litigation strategy. I concluded this does not meet the requirements of the regulation, and denied the postponement request.[2]

II

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). *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 (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 burden 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); *see also Mathis v. Hargrove*, 166 Md. App. 286, 310 n.5 (2005).

[2] In reaching this decision, I considered that on November 23, 2016, the MHIC issued a hearing order setting forth that a merits hearing had been granted on the Claim and providing notice to the Respondent of the procedures for the hearing with citations to procedural and substantive law and regulations that govern the proceeding and this missive was not returned by the United States Postal Service (USPS) as undeliverable or for any other reason. I also considered that on March 3, 2017, the OAH issued notices of hearing to the Respondent by certified and first-class mail setting forth the issue to be decided and advising the parties of the consequences for failing to appear. While the notice sent by certified mail was retuned as being unclaimed, the notice sent by first-class mail was not returned by the USPS. The content of the MHIC's and OAH's notices makes plain that an evidentiary hearing would take place and did not suggest that there was any legal impediment to convening an administrative hearing. The Respondent did not suggest he did not receive these notices, addressed to his confirmed address of record, but argued that he did not receive a March 22, 2017 letter from the MHIC squarely addressing the arbitration agreement and the Fund's position that it was unenforceable. The Respondent later posited that he may have received the March 22, 2017 letter, but inadvertently forward it to his attorney without reviewing it. Considering these facts, I found notice was constitutionally sufficient and the hearing would proceed. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Griffin v. Bierman*, 403 Md. 186 (2008).

For the following reasons, I find that the Claimant has proven eligibility for reimbursement from the Fund.

III

Argument and Testimony

A. Of the Claimant and her Witness

The Claimant testified that the Respondent's employees spent less than two hours working at her home on one day, June 3, 2015, succeeding only in drilling eight holes[3] in the basement floor, and then ceased all work leaving behind buckets with debris from the concrete floor and gravel from the holes. The Claimant stated that, during the evening of June 3, 2015, she was paid a visit by an employee of the Respondent who explained that voids in the basement floor made it fragile, unstable, required replacement of the floor, and must be done before the previously agreed upon work could commence. The Respondent offered to complete the basement floor replacement project for an additional $9,700.00. The Claimant agreed and tendered a check in the sum of $3,233.00 as first payment. The Claimant stated that, on June 5, 2015, she faxed a document to the Respondent explaining that she wished to seek additional opinions on the need for the replacing the basement floor and requesting return of the $3,233.00 payment and all keys to her home. The Claimant stated that, on June 7, 2015, the Respondent came to her home to discuss his continued assertion of the need to replace her basement floor. At the conclusion of the June 7, 2015 meeting, the Claimant continued to demand the return of her monies and the Respondent continued to want to perform the basement replacement.

The Claimant testified that on June 8, 2015, the Respondent returned the keys and advised the Claimant that he already spent $5,000.00 towards materials and his employees'

[3] The Claimant testified that previous to the Respondent's work, twenty holes of half an inch in size were drilled in the basement floor by a pest-control company to insert a termite prevention substance.

salaries, and that he considered the second check as payment towards the entire contract. The Claimant testified that she contacted four different construction firms for additional opinions, including a firm of structural engineers, each of whom examined the basement and determined that it was not necessary to replace the basement floor as the Respondent asserted. The Claimant stated that on June 15, 2015, the Respondent offered to do the additional work at no additional cost; however, the Claimant declined this offer because she no longer had faith in the integrity of the Respondent or the accuracy of his opinions and continued to demand the return of the monies she provided to the Respondent. Finally, the Claimant further testified that she contracted with another company in October 2015 to have all the holes in the basement floor cemented, work for which she paid $740.00.

The Claimant's witness, her son, Mr. Kafka, testified that on or about June 15, 2015, he called the Respondent and informed him that the Claimant wants to terminate the contract, and he further asked for receipts of expenses, which the Claimant never received. The witness testified, and the Respondent confirmed during his testimony, that the Respondent said that the Claimant was liable for all money paid because the materials purchased could not be reused, and that the second check was considered payment towards the entire work.

B. Of the Respondent

The Respondent testified at length regarding his twenty years of experience in basement waterproofing and the absolute propriety of his dealings with the Claimant. The Respondent did not disagree with the Claimant's presentation of events, but took marked exception to the conclusion reached by the four firms she obtained additional opinions from that the basement floor replacement was unnecessary and posited that those firms lacked the technical knowledge to offer an assessment. The Respondent explained that he offered to do the additional work he had valued at $9,700.00, which he stated could actually cost "tens of thousands of dollars," for

no cost beyond the $3,233.00 the Claimant already paid towards that work because he treats his customers as he would his family, and that he wants to have the work done correctly, so his ultimate goal is to do the right job in the right way, even if it is to his own financial detriment.

C. Position of the Fund

The Fund did not take an ultimate position on the merits of the Claim. The Fund suggested that the significance of putative voids and the necessity of replacing the basement floor in the Claimant's home is a technical issue that may require expert testimony to resolve, which was not provided by the Claimant. Addressing the statutory requirement that the Claimant not reasonably refuse a good faith offer from the Respondent to resolve the Claim, the Fund took no ultimate position, indicating that it "could go either way."

IV

Analysis

I will address first that which is not disputed. There is no dispute that the Respondent held a valid home improvement contractor's license when he entered into the home improvement contract at issue with the Claimant. Further, there is no dispute that the Claimant is an owner of the subject property and that there are no procedural impediments barring her from recovering from the Fund. Md. Code Ann., Bus. Reg. § 8-405(f) (2015).

Specifically, the parties agreed that the Claimant entered into a contract with the Respondent for improvements to the Claimant's home on May 31, 2015. The parties agreed that the home improvement involved the installation of a sub-floor drainage system around the walls of the Claimant's basement, and of a sub-floor pressure relief system. The parties further agreed that work on the project began on June 3, 2015 around 9:00 a.m. and it was suspended around 11:00 a.m. the same day; that the original agreed-upon contract price was $11,862.00 of which

the Claimant paid by check $3,862.00; that the Respondent asked for $9,862.00 for the agreed upon additional work of which the Claimant paid by check $3,233.00.

What is disputed is the necessity of the additional work and the reasonableness of the Claimant's declination of the Respondent's offer to complete the work at no additional cost beyond what the Claimant had incurred and agreed to for the original work plus the $3,233.00 paid on June 4, 2015.

If the Claimant's theory of her case was predicated upon an inadequate or unworkmanlike home improvement, depending on the unique facts of the case, I may find persuasive the Fund's position regarding the need for expert testimony[4] to establish her Claim. Considering the facts of the case at bar and the theories under which the Claimant seeks to recover from the Fund, I not persuaded the Fund is correct.[5] The Claimant and Respondent contracted for the installation of a drainage system under the basement floor of the Claimant's home. A written contract was signed by both parties. The work consisted of drilling around the perimeter of the basement floor along the walls, and the installation of drain pipes below the

[4] I have considered the Fund's position, but I am also mindful of the direction of the APA that I may use my "experience, technical competence, and specialized knowledge in the evaluation of evidence." Md. Code Ann., State Gov't § 10-213(i) (2014).

[5] Unlike a criminal or civil proceeding governed by the strictures of the formal Rules of Evidence, in an administrative hearing, the controlling law and regulations expressly provide that I may, without exception, "admit probative evidence that reasonable and prudent individuals commonly accept in the conduct of their affairs, and give probative effect to that evidence." Md. Code Ann., State Gov't § 10-213(b) (2014); COMAR 28.02.01.21B; *see Fairchild Hiller Corp. v. Supervisor of Assesments*, 267 Md. 519, 523-24 (1973) and *Ginn v. Farley*, 43 Md. App. 229, 236 (1979) (administrative tribunals are not bound by the technical common-law rules of evidence). *See also Matoumba v. State*, 390 Md. 544, 554 (2006) (the court did not abuse its discretion in declining to apply the strictures of the formal Rules of Evidence regarding admissibility of opinion testimony in a proceeding where its application was discretionary). Under these relaxed standards, there is no requirement that a party present expert testimony. "The General Assembly . . . recognized that the formal rules of evidence possess far greater utility in jury trials than an agency hearing before a presumably expert hearing office." *Para v. 1691 Ltd. P'ship*, 211 Md. App. 335, 380 (2013). "[T]hese hearings, should be understandable to the layman claimant, should not necessarily be stiff and comfortable only for the trained attorney, and should be liberal and not strict in tone and operation." *Id.* at 381 (internal citations and quotations omitted). Under these relaxed standards, hearsay evidence is both admissible at OAH hearings and may be the sole basis for an administrative law judge's decision. Md. Code Ann., State Gov't § 10-213(c) (2014) ("Evidence may not be excluded solely on the basis that is hearsay."); COMAR 28.02.01.21C (same); *Hammen v. Baltimore Cty. Police Dep't*, 373 Md. 440, 453 (2013) ("rules relating to the admissibility of evidence are more relaxed in administrative proceedings").

floor. Previous work, similar to the one under this contract but by another contractor, was done on two sides of the basement. The Respondent dispatched his crew to start the work. After drilling eight holes in the basement floor, the Respondent's employees ceased all work purporting to discover voids in the sub-floor creating whole house structural instability. The Respondent presented the Claimant with a plan to cure the structural instability, consisting of additional work not contemplated in the original contract that the Claimant agreed to orally. The following day the Claimant terminated the agreement for any additional work and advised the Respondent that she wanted a second opinion about the issue and asked the Respondent to return the key to her house and her monies. The four contractors that the Claimant contacted for a second opinion each independently concluded that the additional work that the Respondent proposed was not necessary in order to do the work agreed to under the original contract.

The parties agree that neither the work under the original contract nor the additional work to replace the basement floor was completed. There is no question, therefore, that the home improvement at issue here is incomplete. This finding alone is not dispositive of the instant matter, however. The applicable statute provides that "[t]he [MHIC] may deny a claim if the [MHIC] finds that the claimant unreasonably rejected good faith efforts by the contractor to resolve the claim." Md. Code Ann., Bus. Reg. § 8-405(d) (2015). Therefore, I must determine whether, under the facts of this case, the Respondent made a good faith effort to resolve the Claim and whether the Claimant acted unreasonably to reject that offer.

The Claimant maintains that the home improvement at issue was not completed because she declined the Respondent's offer to perform additional work she was advised by multiple persons was unnecessary and based on the Respondent's position that the additional work was a condition precedent, the work agreed to under the original contract could not be performed, and because she received nothing of value for her monies, that she be made whole by the Fund. The

Respondent contends that he discovered a significant structural flaw in the Claimant's basement and agreed to cure that flaw for a certain sum of money, and later, due to his abiding belief in customer service agreed to perform that work at no additional cost and even as the hearing commenced stood ready to perform the work.

Considering the plain language of the governing statutory provision, I conclude the Claimant does not need to establish as fact on the record before me that the four additional opinions she obtained were correct and the Respondent's opinion was incorrect. She merely has to prove that she acted reasonably to rely upon them—the test is reasonableness not rightness.

The term reasonable is not defined in the statute. Therefore, I look to the dictionary for its ordinary meaning. *Montgomery Cty. v. Deibler*, 423 Md. 54, 67 (2011) ("a dictionary definition provides a useful starting point for determining what the statutory terms mean. Although dictionary definitions do not provide dispositive resolutions of the meaning of statutory terms, it is proper to consult a dictionary or dictionaries for a term's ordinary and popular meaning") (internal citations, quotations, and brackets omitted). Reasonable is defined as "[f]air, proper, or moderate under the circumstances; sensible . . . ." *Black's Law Dictionary* 1456 (10th ed. 2014). Applying the ordinary meaning of the term reasonable to the facts of the case at bar, I conclude the Claimant acted reasonably to rely on four separate contractors' opinions that it was unnecessary to replace the Claimant's basement floor and reasonably declined any curative efforts from the Respondent whose acumen and integrity were reasonably impugned in the Claimant's estimation from the facts as she reasonably understood them to be. I have also considered that the Respondent, during the first day of hearing, in direct examination, stated multiple times that after the Respondent had received the opinions from the other contractors, "I

don't blame [the Claimant] for throwing her hand up in the air." I find that testimony to be an acknowledgement and admission of the reasonableness of the Claimant's decision.[6]

Notwithstanding the reasonableness of the Claimant's refusal to permit any curative work, I find the Respondent's offer to perform curative work was not made in good faith. The record contains many examples of the Respondent's untrustworthiness and deception. For example, the Respondent's testimony was riddled with inconsistencies that are profoundly self-serving and indicative of bad faith. The Respondent represented himself to the Claimant and Mr. Kafka to be an engineer and made a like reference in the hearing, but then later acknowledged, in examination by the Fund, that he holds an undergraduate degree in chemical engineering, and is not a licensed or professional engineer. In addition, the Respondent contracted with the Claimant on behalf of, and purportedly as the principal of, a business entity that had not existed for three years at the time of contract.

In the first day of proceedings, discussing the necessity of the basement floor replacement, the Respondent averred "I cannot install this drain without losing the entire floor. It cannot be done." I infer from this and like statements that the Respondent was asserting that the additional work was essential and a condition precedent to the installation of a drainage system, as contemplated in the original contract. In the second day of proceedings, however, the Respondent's changed his position and stated unequivocally that he could have performed all of the work contemplated in the original contract without performing any of the additional work.

When seeking to account for the Claimant's monies he expended, the Respondent explained that he had to pay retainer fees to engineering firms for soil testing and to study the voids because he could not wait for the permitting office, salaries for his employees of $635.00 a

[6] The Respondent later, in cross-examination, changed his position and testified that he thought it was unreasonable for the Claimant to reject his offer.

day each for four persons to remain on standby for a week and for a partial day of work, and the rest of the amount for materials and for a plumber's evaluation of the site on how to suspend the heater and the air conditioning unit before beginning the additional work and in so doing "I lost many thousands of dollars." The Respondent offered of his own accord that "if you allow me, I'll bring in the bank statements and canceled checks made out to my employees and to the engineering firm for the project and Affordable Heating and Air Conditioning."

I explained that the Respondent may submit any relevant documents in evidence and discussed with the parties leaving the record open after the close of proceedings for a reasonable period to afford the Respondent that opportunity if we completed proceedings in one day.

At the Respondent's request, the proceeding was continued to a second day, affording the Respondent nineteen days to gather these documents. When the proceeding was reconvened, the Respondent stated that he was unable to acquire any documentation of his expenses related to the Claimant's home improvement, because he was stymied by the recalcitrance of his financial institution, Wells Fargo Bank, N.A., who advised him it would take between two and four weeks to obtain certified copies[7] of the documents. Later in the second day of proceedings, the Respondent changed his position and argued that he should not have to produce documentation of his expenses and "whether I spent fifty cents or $500.00 is totally irrelevant."

The Respondent maintained that he "run[s] a really, really tight ship" but also stated that it was "impossible to calculate total expenses for the project." The Respondent stated that "if [he] made fifteen cents on the dollar" on the Claimant's project that would be a good outcome and that his sole objective was to fix the Claimant's basement and yet stated "I do not work for free and neither do my employees."

[7] The Respondent did not explain what a "certified" bank statement is nor did I direct him to produce only "certified" documents for admission in evidence.

The extent and material nature of these irreconcible and contradictory statements and my observations of the Respondent's demeanor, which was suggestive of evasion and falsity, cause me to conclude that the Respondent was not a credible witness and I do not find persuasive his malleable opinion that the additional work was necessary and therefore any offers to perform this work at no additional cost were not made in good faith. *See Maryland Bd. of Physicians v. Elliott*, 170 Md. App. 369 (2006) (a finder-of-fact is authorized to determine the credibility on of a witness's testimonial evidence based on the witness's demeanor).

I have also considered the literal impossibility of the Respondent's timeline of events. The Respondent claims that between June 3, 2015, when he began work, and June 5, 2015, when the Claimant directed him by fax to return her monies as she wished to obtain additional opinions on the necessity of the work, that he expended $5,000.00[8] on materials, labor, and outside consulting. This account of events defies belief and strains even the most elastic concept of probability far past its breaking point.

For all these reasons, I find that the Respondent's offer to complete the additional work for free and, then, commence and complete the work agreed to in the original contract, similarly could not be trusted.

Alternatively, I have also considered that the written contract expressly provides, and the Respondent agrees, that the Claimant had a right of recession that extended until June 7, 2015, and the Claimant exercised that right by sending a fax to the Respondent on June 5, 2015, directing him to return her monies. Although the written contract was subsequently modified by an oral agreement for additional work, I do not find this meaningfully affects the outcome or

[8] If the Respondent expended $5,000.00 of the Claimant's monies, then $2,095.00 remained. The Respondent did not explain why he did not return these remaining monies to the Claimant after her repeated demands so to do.

analysis.[9] *See Hovnanian Land Inv. Group, LLC v. Annapolis Towne Ctr. at Parole, LLC*, 421 Md. 94, 114 (2011) (holding that a written contract can be modified by a subsequent oral agreement with the mutual consent of the parties).

I conclude, therefore, that the home improvement at issue here was incomplete within the meaning of the statute and section 8-405(d) of the Business Regulations Article does not bar the Claimant's Claim.

V

Award of 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 Claimant may not be compensated for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. COMAR 09.08.03.03B(1).

The Claim sets forth an alleged actual loss of $7,095.00 which represents the two payments ($3,862.00 + $3,233.00) made to the Respondent on June 2 and 4, 2017, plus $740.00 that the Claimant spent to have the holes in her basement filled in, less $150.00 that she subtracted from $740.00, for the existing holes drilled by the pest-control company.

The MHIC's regulatory scheme offers three formulas for measurement of a claimant's actual loss, unless a unique measurement is necessary. COMAR 09.08.03.03B(3)(a)-(c). As explained more fully below, none of those prescribed formulas are precisely appropriate in this case, and thus I shall apply a formula unique to the facts of this matter, as described below. COMAR 09.08.03.03B(3).

[9] The Fund suggested there may have been two contracts—one written and one oral. Whether ultimately there are two contracts or one modified contract, the Respondent stated at the hearing that there was a three day rescission period for all the agreements at issue here.

The Respondent performed no work of any value or any work that was agreed to under the contract nor could he document any of his purported expenditures. The Claimant did not solicit another contractor to complete the original contract, but did contract with Ducote to repair the several holes made by the Respondent's employees. The Claimant candidly acknowledged the presence of existing holes of a minute nature that were also filled in at the time the larger holes made by the Respondent. The Respondent deducted $150.00 from the total cost she incurred of $740.00 to account for the existing holes.

I am mindful that the Claimant is not a professional hole repairer and may not have the firmest of bases for arriving at this figure, however, as discussed in footnote four, I may use my "experience, technical competence, and specialized knowledge in the evaluation of evidence" and doing so here culled from my experience presiding over Fund claims, new home builder guarantee fund cases, and other construction-related matters, conclude that $150.00 represents a reasonable sum to repair the existing holes in the basement floor due to their *de minimis* size and nature. Md. Code Ann., State Gov't § 10-213(i) (2014).

However, the controlling regulation provides that "[t]he [MHIC] may not award from the Fund an amount in excess of the amount paid by or on behalf of the claimant to the contractor against whom the claim is filed." COMAR 09.08.03.03B(4). Therefore, I cannot recommend the Fund pay an award that reflects the $590.00 adjusted cost of repairing the Respondent's incomplete work. Instead, in accordance with the MHIC's regulations, I recommend the Fund pay to the Claimant all the monies she paid to the Respondent because she received no services of value, or that were agreed to in the contract, and did not reasonably refuse an offer made by the Respondent in good faith to resolve the Claim, in the sum of $7,095.00.

PROPOSED CONCLUSION OF LAW

I conclude, as matter of law, that the Claimant has sustained an actual and compensable loss in the sum of $7,095.00, as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401 and 8-405 (2015).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant $7,095.00; and

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

Signature on File

September 11, 2017
Date Proposed Decision Issued

Steven V. Adler
Administrative Law Judge

SVA/da
#169191

PROPOSED ORDER

WHEREFORE, this 25th day of October 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.

Andrew Snyder

Andrew Snyder
Panel B

MARYLAND HOME IMPROVEMENT COMMISSION