

**IN THE MATTER OF THE CLAIM
OF NOAH SAPOSNIK**

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**MARYLAND HOME IMPROVEMENT
COMMISSION**

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**AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ACTS OR OMISSIONS OF
CHRISTOPHER STECK t/a
COVENANT DESIGN CONTRACTING,
LLC**

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**MHIC CASE NO. 19(75)198
OAH CASE NO. LABOR-HIC-02-19-
27583**

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FINAL ORDER

This matter was originally heard before an Administrative Law Judge (“ALJ”) of the Office of Administrative Hearings (“OAH”) on March 3, 2020. Following the evidentiary hearing, the ALJ issued a Proposed Decision on April 13, 2020, concluding that the homeowner, Noah Saposnik (“Claimant”) failed to prove that the amount of the actual loss he suffered as a result of the acts or omissions of Christopher Steck t/a Covenant Design Contracting, LLC (“Contractor”). *ALJ Proposed Decision* p. 10-12. In a Proposed Order dated May 20, 2020, the Maryland Home Improvement Commission (“MHIC” or “Commission”) affirmed the Proposed Decision of the ALJ to deny an award from the Home Improvement Guaranty Fund. The Claimant subsequently filed exceptions to the MHIC Proposed Order.

On September 3, 2020, a three-member panel (“Panel”) of the MHIC held a remote hearing on the exceptions filed in this matter. The Claimant and Contractor participated without counsel. Assistant Attorney General Shara Hendler appeared at the exceptions hearing on behalf of the Guaranty Fund. The Commission made the following preliminary exhibits part of the record of the exceptions hearing without objection: 1) June 1, 2020 hearing notice; 2) May 20, 2020 transmittal letter, ALJ Proposed Decision, and MHIC Proposed Order; 3) Claimant’s exceptions; 4) August 21, 2020 virtual hearing notice. Neither the Claimant nor the Contractor produced a copy of the transcript of the hearing before the ALJ. Therefore, the Panel’s review of the record

was limited to the preliminary exhibits at the exceptions hearing, the OAH Proposed Decision, and the exhibits admitted into evidence at the OAH hearing. COMAR 09.01.03.09(G) - (I).

The claim in this proceeding relates to a two-part contract between the parties for the remodeling of two bathrooms at the Claimant's home. The ALJ found that the Contractor's performance under the contract was unworkmanlike, *ALJ's Proposed Decision* p. 8, but denied an award to the Claimant because the Claimant failed to prove the amount of the actual loss he suffered. *ALJ's Proposed Decision* pp. 10-12.

On exception, the Claimant argued that the ALJ erred by declining to rely on the Contractor's proposals as proof of the value of the materials and services the Contractor provided under the contract.

The Commission finds no error with the ALJ's conclusion that the Claimant failed to prove the value of materials and services the Contractor provided under the contract. The Contractor's proposals, which became the contract between the parties, lumped the majority of the services together with a price of \$4,200.00 for each bathroom and provided allowances for materials rather than actual costs. OAH Hearing Claimant's Exhibit 1 pp. 4-6. The Commission agrees that the Contractor's proposals were insufficient to prove the value of the materials and labor that the Contractor provided, and the Commission sees no other evidence of the value elsewhere in the record.

Because the Contractor completed some work under the contract and the Claimant elected to correct the Contractor's unworkmanlike work and complete the bathroom remodels himself, *ALJ's Proposed Decision* pp. 5-6, the ALJ properly applied Code of Maryland Regulations 09.08.03.03(B)(3)(b) to measure the Claimant's actual loss. That section provides,

If the contractor did work according to the contract and the claimant is not soliciting another contractor to complete the contract, the claimant's actual loss shall be the

amount which the claimant paid to the original contractor less the value of any materials or services provided by the contractor.

Absent proof of the value of the materials and services the Contractor provided to Claimant, the ALJ correctly concluded that the Claimant failed to prove his actual loss and correctly declined to make an award to the Claimant.

Having considered the parties' arguments, the evidence contained in the record, and the ALJ's Recommended Decision, it is this 11th day of September 2020, **ORDERED:**

- A. That the Findings of Fact of the Administrative Law Judge are **AFFIRMED;**
- B. That the Conclusions of Law of the Administrative Law Judge are **AFFIRMED;**
- C. That the Proposed Decision and Recommended Order of the Administrative Law Judge is **AFFIRMED;**
- D. That the records and publications of the Maryland Home Improvement Commission shall reflect this decision; and
- E. Any party has thirty (30) days from the date of this Final Order to appeal this decision to Circuit Court.

Joseph Tunney
Chairperson –Panel
Maryland Home Improvement
Commission

**IN THE MATTER OF THE CLAIM
OF NOAH S. SAPOSNIK,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ACTS OR OMISSIONS
ALLEGED AGAINST CHRISTOPHER
W. STECK T/A COVENANT DESIGN
CONTRACTING, LLC,
RESPONDENT**

*** BEFORE WILLIAM SOMERVILLE,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
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* OAH No.: LABOR-HIC-02-19-27583
* MHIC No.: 19 (75) 198**

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PROPOSED DECISION

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

STATEMENT OF THE CASE

On December 20, 2018, Noah S. Saposnik, (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$4,704.00 in “actual loss” alleged to have been suffered as a result of a home improvement contract with Christopher W. Steck, trading as Covenant Design Contracting, LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015). On August 9, 2019, the MHIC referred the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on January 31, 2020, at the Administrative Law Building in Hunt Valley, Maryland. Bus. Reg. § 8-407(e). Robert McCray, Assistant Attorney General, Department of Labor (Department),¹ represented the Fund. The Claimant represented himself. The Respondent represented himself.

As a preliminary matter, the Claimant made a motion to remand the case to the MHIC for automatic payment under the statutory scheme. The Claimant offered as a motion exhibit a copy of a complaint for judgment on affidavit on a contract, *see* Md. Rule 3-306, and a resulting judgment against the Respondent, individually, in the District Court of Maryland. Having found that the Claimant did not satisfy the elements of proof set forth in the applicable statute, Md. Code Ann., Bus. Reg. § 8-409(a)(2), I denied the motion.

The Claimant also made a motion to postpone. For lack of good cause, I denied the motion.

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. 2019); 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 of the compensable actual loss?

¹ On July 1, 2019, the Maryland Department of Labor, Licensing, and Regulation became the Department of Labor.

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibit offered by the Claimant:

Clmt. Ex. 1 - Written narrative with attachments, tabbed 1 through 43

The Respondent offered no exhibits.

I admitted the following exhibit offered by the Fund:

Fund Ex. 1 - Packet containing a Hearing Order, Notice, Claim form, and licensing history document

Testimony

The Claimant offered testimony of Louise Saposnik and Jack Reilly who was qualified to offer opinions in residential home inspections. Christopher Steck testified in his case. The Fund did not offer a witness.

PROPOSED FINDINGS OF FACT

Having considered demeanor evidence, testimony, and other evidence, 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, holding the license for, and trading as, Covenant Design Contracting, LLC (Respondent's corporation).
2. On April 15, 2018, the Claimant and the Respondent's corporation entered into a home improvement contract. The two-part contract was to remodel two bathrooms in the Claimant's residence. The Claimant was to pay \$6,025.00 for the first-floor bathroom and \$4,900.00 for the second-floor bathroom for a total of \$10,925.00. More specifically, in the first floor bathroom the Respondent's corporation was to tear out an existing tub surround and install a shower base, shower walls and base tile, re-tile the floor, install a new vanity, vanity top, and faucet, install a new light fixture, medicine cabinet, toilet, two wall niches, and an exhaust fan,

remove a heater, and install a grab bar, towel racks, and a toilet paper holder. The Respondent's corporation was also to paint the walls and door. In the second floor bathroom, the corporation was to remove an existing shower and wainscoting, install a new tub, move some plumbing for a toilet, install a toilet, install a light fixture, install a tub diverter and a new exhaust fan, install a towel bar and toilet paper holder, install the old medicine cabinet from the first floor, and paint the walls and door. In the contract documents, allowances were noted for fixtures. There was no time for completion reduced to writing. There were no drawings, specifications, or floor plans included. There was no provision for hauling away debris.

3. On April 15, 2018, the Claimant issued a check to the Respondent's corporation for \$2,500.00.

4. From April 15, 2018 until May 31, 2018, the Claimant made many verbal changes to the agreement and the Respondent did not have unencumbered access to the residence.

5. On May 31, 2018, the Claimant issued to the Respondent a check for \$1,000.00. At that time, in an addendum to the contract documents, the parties reduced to writing a completion date. The Respondent was to have both bathrooms "functional" or "operational" by June 18, 2018. A discount of 15% of the project price would arise if the Respondent did not have both bathrooms fully completed "like said on contract" by June 18, 2018. (Clmt. Ex. 1, tab 6.)

6. On June 18, 2018, the Respondent's corporation had not substantially started the project.

7. On June 19, 2018, the Claimant paid the Respondent's corporation \$3,000.00 by credit card. The Respondent's corporation had still not started the project.

8. On or about June 21, 2018, the Respondent's corporation began "tearing out" or demolition of the first-floor bathroom. The Claimant and his family were not living in the

residence at that time. Other contractors were doing extensive work on other projects in the residence.² Friends or tenants, however, were living in the basement.

9. Work on the project progressed slowly. In the first-floor bathroom, the Respondent's corporation did some demolition, replaced a vanity, installed wall tile, installed shower floor tile, and painted a bit. The shower floor tile was installed in a manner that would not allow water to drain completely from the shower. In the second-floor bathroom, the Respondent's corporation did some demolition and allowed a plumber to cut a floor joist such that it significantly weakened the joist. The plumber also installed some rough-in plumbing. Shut off valves were installed backwards. Some of the work on the project had value.

10. On or about July 1, 2018, the Claimant e-mailed to the Respondent a list of unfinished items or items that he believed to be unsatisfactory. The Respondent immediately responded that he would finish the project and remedy the items.

11. As of July 13, 2018, the two bathrooms were not finished. There was one working toilet. On that day, the Claimant told the Respondent, or an employee of the Respondent's corporation, to stop work and not to return.

12. During July 2018, the Claimant had several other contractors look at the bathroom projects.

13. Sometime during July 2018, the Claimant filed a complaint with the MHIC.

14. On July 25, 2018, the Claimant hired a junk hauler to remove certain debris from the front porch of the residence.

15. On July 31, 2018, Piernon Building and Remodeling, Inc., gave the Claimant an estimate to remodel both bathrooms for \$15,900.00.

² The Claimant and his family had planned to live elsewhere for several months while the extensive renovations were being performed on the house.

16. On August 21, 2018, "Honest Abe Kitchen and Bath" gave the Claimant an estimate to remodel the second-floor bathroom for \$18,357.00 and the first-floor bathroom for \$8,642.00.

17. During September, October, and November 2018, the Claimant and some friends worked on the project and completed it.

18. Sometime in September or October 2018, the Claimant hired a licensed home inspector. The home inspector would perform his services in three visits to the residence. In the first visit, he assessed the work of the unfinished project. In the second visit, he told the Claimant what was needed to fix or restore the project and he was to determine if the remedial contractor was competent. During the second visit, the home inspector met a person who held himself out as a remedial contractor. The home inspector assumed that the person was licensed by the MHIC and never saw a remedial contractor's estimate. In the third visit, around November 18, 2018, the home inspector was to verify that the remedial work was being done correctly, much like as if it were a draw inspection. During that visit, the Claimant told the home inspector that the remedial contractor person who he had met at the second visit was the person responsible for the remedial work.

19. On December 1, 2018, the home inspector issued a half-page, to-whom-it-may-concern letter regarding the project. In that short letter, the home inspector noted in a conclusory statement that upon first inspecting the project, there was some "unprofessional" and "incomplete" tile work on a bathroom floor. He accurately noted that a floor joist was cut. He accurately noted that the shower floor in the first-floor bathroom was not sloped in a manner that would allow water to flow down the drain. He had not seen any of the contract documents.

20. On January 24, 2019, the Claimant filed a claim against the Fund for \$4,704.00.

DISCUSSION

In this case, the Claimant has the burden of proving the validity of the claim by a preponderance of the evidence. Md. Code Ann., Bus. Reg. §8-407(e)(1) (2015); Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3). With regard to weighing the evidence, a trier of fact can accept some, all, or none of the evidence offered. *Sifrit v. State*, 383 Md. 116, 135 (2004); *Edsall v. Huffaker*, 159 Md. App. 337, 341-43 (2004). Demeanor evidence played an important role in this matter. *Bragunier Masonry Contractors, Inc. v. Maryland Comm'r of Labor and Indus.*, 111 Md. App. 698, 717, n.7 (1996); *N.L.R.B. v. Dinion Coil Co.*, 201 F.2d 484, 487 (2d Cir. 1952).

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”). “[A]ctual 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.

The Respondent was a licensed home improvement contractor at the time he or his corporation entered into the contract with the Claimant. (Finding of Fact 1.) Md. Code Ann., Bus. Reg. § 8-405(a).

The Claimant alleges that much of the work that was performed was “unworkmanlike.” “Unworkmanlike” means not in a workmanlike manner. *See Webster’s New Universal Dictionary* 1984-88 (2d ed. 1983). The Court of Appeals has defined “workmanlike manner” as that term applies to building and construction contracts. In *Gaybis v. Palm*, 201 Md. 78, 85 (1952) the Court held, “The obligation to perform with skill and care is implied by law and need not be stated in any contract.” That rule was reaffirmed in *Worthington Constr. Co. v Moore*,

266 Md. 19, 22 (1972). In *K & G Constr. Co. v. Harris*, 223 Md. 305, 314 (1960), the Court compared the express standard “workmanlike manner” with the implied standard of performance discussed in the *Gaybis* case. The *Harris* Court cited the *Gaybis* case for authority that the “workmanlike-manner” wording was equivalent to the “skill-and-care” wording in the *Gaybis* case.

In the instant case, the Claimant has shown by a preponderance of the evidence that at least some of the home improvement work for which the Respondent was responsible was not done with the requisite skill and care required by home improvement industry standards. Two examples of unworkmanlike performance are the floor of the shower in the first-floor bathroom which was not installed to allow all the water to drain, and the floor joist in the second-floor bathroom that was cut.³ (Finding of Fact 9.)

The work done by the Respondent was not shown to be “incomplete” as that term is used in the statutory scheme. The statutory scheme is intended to govern and regulate performance of home improvement contractors so that their performance meets or exceeds the home improvement industry’s standards. See *Brzowski v. MHIC*, 114 Md. App. 615, 639, *cert. denied* 346 Md. 238 (1997) (“actual loss” is the “cost of correcting a contractor’s deficient workmanship”). Administrative complaints against the Fund are not contract actions but are more similar to professional negligence actions. Md. Ann. Code Bus. Reg. § 8-311(a)(10) (unworkmanlike, inadequate, or incomplete performance shows lack of competency in the home improvement industry); See *Brzowski v. MHIC*, 114 Md. App. 615, 633 – 634 (Court recognized that in cases involving contractors and owners, trial courts and arbitrators often determine

³ The shower floor and the cut joist also qualify as “inadequate” under the statutory scheme. “Inadequate” as used in Md. Ann. Code Bus. Reg. §§ 8-311(a)(10) and 8-401 means that the home improvement work was done with all of the steps, phases or processes required by industry standards but the result does not equal what is required by the contract or is not suitable to the case or occasion. See, *Black’s Law Dictionary*: 61 (4th ed. 1957). The term is used in the statute to describe a method to prove a lack of compliance to industry standards in work.

contract disputes, tort disputes, and mechanic lien disputes that are not determinations of the statutory concept “actual loss”). “Incomplete” as used in Md. Ann. Code Bus. Reg. §§ 8-311(a)(10) and 8-401 means that the home improvement work was done, to an extent, but that a step, phase, or process required by industry standards was omitted.⁴ See *Black's Law Dictionary*: 357 (4th ed. 1957). The term, like the other two, is used in the statutes to describe a method to prove a lack of compliance to industry standards in work. “Incomplete” does not simply mean “unfinished” or “abandoned” because a project can be unfinished or abandoned by a home improvement contractor who has shown by the work done until that point in the project that he is fully competent in the industry.⁵ See also Md. Ann. Code Bus. Reg. § 8-605(1)(a) separate code section prohibiting a contractor from abandoning or failing to perform work pursuant to a contract unless the contractor had justification for doing so.)

In the instant case, it has not been shown that the Respondent performed work that was “incomplete” with regard to industry standards. Nor has it been shown that the contract was “abandoned.” Because the Claimant believed that the Respondent and his corporation had breached the time provision of the evolving contract, the Respondent and his corporation were told to leave the project site.⁶

The Fund argues that the unworkmanlike items were unworkmanlike only because they were not finished, and that they were not finished because the Claimant dismissed the Respondent's corporation from the project. I disagree. The shower floor was set in “mud” and simply had not yet been grouted. To bring it up to industry standards, the shower floor would

⁴ A simple example would be work of a roofing contractor who affixes shingles directly to plywood decking without first installing underlayment.

⁵ After January 21, 2004, the MHIC determined that “actual loss” could also be shown by demonstrating that a contractor failed to fully perform a contract because of insolvency. See DLR-HIC-02-04-14807, *Workman, et al.*, (issued Dec. 22, 2004) (citing final order from DLR-HIC-02-2002-00094, *Huddleston*). There was no such suggestion in the instant case.

⁶ The time provision in the addendum to the contract made time “of the essence” of the contract with regard to having the bathrooms merely “functional” or “operational.” The provision also required a 15% discount if the bathrooms were not entirely finished “like said on contract” by a certain date. (Claimant Ex. 1, tab 6.)

have had to have been demolished and rebuilt. In addition, the cut floor joist would have had to have been replaced or reinforced somehow in a manner that met industry standards.

The Fund also argues that the Claimant rejected good faith efforts by the Respondent to remedy or resolve disputes. Md. Code Ann., Bus. Reg. § 8-405(d). I disagree. The Claimant appears to have been making reasonable good faith efforts to resolve disputes during the course of the contract. (Findings of Fact 5, 7, and 10.) I conclude that by the time that the Claimant told the Respondent and his corporation to stop work, the Claimant had reasonably lost confidence in the broken promises made by the Respondent and his corporation.

Having found eligibility for compensation, I must determine the amount of the Claimant's actual loss and the amount, if any, that the Claimant is entitled to recover from the Fund. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney fees, court costs, or interest. Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1). MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work. COMAR 09.08.03.03B(3).

In this case, the Respondent's corporation performed some work under the contract but the Claimant did not retain a remedial contractor to complete or remedy that work. (Finding of Fact 17.) Neither is this a case of a home improvement contractor abandoning the project without doing any work. Accordingly, the following formula appropriately measures the Claimant's actual loss:

b) If the contractor did work according to the contract and the claimant is not soliciting another contractor to complete the contract, the claimant's actual loss shall be the amount which the claimant paid to the original contractor less the value of any materials or services provided by the contractor.

COMAR 09.08.03.03B(3)(b).

Some of the work done by the Respondent was valuable. (Finding of Fact 9.) The tear out or demolition, for instance, was work that had value. No credible evidence was adduced,

however, to show the value of the materials or services provided by the Respondent's corporation⁷ in this case.

With the Findings of Fact in mind, the "actual loss" calculation is as follows:

\$6,500.00	Amount paid to the contractor under the original agreements
-\$ (unknown)	Value of any materials or services provided by the contractor
<u>\$(unknown)</u>	Actual loss

The Claimant has not shown by a preponderance of the evidence the value of any materials or services provided by the Respondent's corporation, thus rendering any calculation of an "actual loss" impossible in this particular case. He has not shown that which is necessary to determine an actual loss. The Claimant has the burdens in this matter. COMAR 09.08.03.03A(3). I cannot speculate on values. On the basis of this evidentiary record, I would only be able to speculate on the value of the work done by the Respondent.⁸ *Compare Roebuck v. Stuart*, 76 Md. App. 298, 314 (1988) (damages must be proven with reasonable certainty). On the basis of this evidentiary record, an actual loss would be based on mere speculation. The Claimant has not met his burdens.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has not shown by a preponderance of the evidence a compensable actual loss. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B.

⁷ The remedial proposals of contractors not hired by the Claimant show that some of the work was valuable.

⁸ For instance, if the value of the Respondent's competent tear out work in both bathrooms, or other competent work, had been shown to be worth \$400.00, or \$500.00, then I could make the appropriate calculations. There was no such credible evidence offered.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund dismiss this matter for failure of proof; and

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

April 13, 2020
Date Proposed Decision Issued

CONFIDENTIAL

William J.D. Somerville III
Administrative Law Judge *WOS*

WS/da
185382

PROPOSED ORDER

WHEREFORE, this 20th day of May, 2020, 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.

Wm Bruce

Quackenbush

Wm. Bruce Quackenbush

Panel B

**MARYLAND HOME IMPROVEMENT
COMMISSION**

