IN THE MATTER OF THE CLAIM	*	BEFORE STEPHEN W. THIBODEAU,
OF BARRY STEELMAN,	*	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 MICHAEL BYERS,	*	
T/A MB MASONRY CONCRETE INC.,	*	OAH No.: LABOR-HIC-02-22-19349
RESPONDENT	*	MHIC No.: 22 (75) 636

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PROPOSED DECISION

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STATEMENT OF THE CASE

On May 13, 2022, Barry Steelman (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund), under the jurisdiction of the Department of Labor (Department), for reimbursement of $8,170.00 for actual losses allegedly suffered as a result of a home improvement contract with Michael Byers, trading as MB Masonry Concrete, Inc. (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2022).[1]

[1] Unless otherwise noted, all references hereinafter to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.

On July 28, 2022, the MHIC issued a Hearing Order on the Claim. On August 9, 2022, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On November 28, 2022, I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. Catherine Villareale, Assistant Attorney General, Department, represented the Fund. The Claimant was self-represented. The Respondent was self-represented.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the OAH govern procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021); 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 loss?

SUMMARY OF THE EVIDENCE

Exhibits

A list of the exhibits offered into evidence is attached to this Proposed Decision as an Appendix.

Testimony

The Claimant testified and presented the testimony of William Carnes, P.E.[2], of Hillis-Carnes Engineering Associates, who I accepted as an expert in masonry, concrete installation

[2] Professional Engineer.

and finishing, and general civil engineering; and Janak A. Patel, P.E., who I accepted as an expert in preparation and design of concrete slabs, and general structural engineering.

The Respondent testified and did not present other witnesses.

The Fund did not present any witnesses.

PROPOSED FINDINGS OF FACT

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

1. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor under MHIC license number 01-91446.

2. On October 27, 2020, the Claimant and the Respondent entered into a contract to replace the Claimant's garage concrete slab at 11 Brickford Lane, Baltimore, Maryland (Contract).

3. Specifically, the Contract called for the Respondent to demolish the existing garage concrete slab and install a new five inch thick concrete slab, and three garage steps, with Fibermesh reinforcement and two coats of surface protector, with a steel trowel finish.

4. The original agreed-upon Contract price was $8,150.00.

5. The Contract included a limited warranty, which provided that the Respondent's liability was "limited to the replacement or correction of ... defective material and/or installation."

6. The Claimant paid the Respondent the following amounts on the Contract, for a total of $8,150.00:

- $2,716.00 on October 27, 2020;
- $2,717.00 on October 29, 2020;
- $2,492.00 on November 3, 2020; and
- $225.00 on November 4, 2020.

7. The Respondent began work on the Contract on October 27, 2020. Over the course of four days, the Respondent demolished the existing concrete garage slab and poured a new concrete slab.

8. Once the Respondent poured the new slab and left the Claimant's home, there were several problems with the new slab. They included: discolorations in the slab, dark stains left on the slab, portions of the slab that were not level, footprints left by the Respondent's work crew in the slab, bug holes, and the lack of a smooth trowel finish, which was intended to leave the slab with a smooth surface.

9. Moreover, while the Contract did not explicitly call for their installation, the Respondent did not use control joints (a planned seam through portions of the slab to allow for expansion of the concrete to prevent cracking) or isolation joints (a planned seam along walls where the concrete abuts the walls or other objects to prevent cracking).

10. On January 8, 2021, the Claimant sent a letter to the Respondent demanding the defective slab be fixed.

11. On January 14, 2021, the Claimant asked Detailz Construction Corporation (Detailz) to inspect the slab and provide an estimate for repairing the defective slab. Detailz recommended a full replacement of the slab and estimated the cost to replace the slab at $7,427.00.

12. On January 26, 2021, William Carnes, a professional engineer hired by the Claimant, inspected the slab. During his inspection, several hairline cracks had started to form in the slab. Moreover, Mr. Carnes measured the thickness of the slab at four different quadrants. The slab itself did not have uniform five-inch thickness, but varied from 3.9 inches to 9.4 inches throughout the slab.

13. The next day, January 27, 2021, the Respondent met with the Claimant at his home. The Respondent offered to solve the cracks in the slab by applying a fill material and epoxy coat over the whole slab. However, the Respondent rejected the Claimant's suggestion to replace the slab, based on the Detailz assessment.

14. On February 8, 2021, the Respondent followed up on his offer to fix the cracks with fill and epoxy in a letter to the Claimant. In that letter, the Respondent offered to extend the Contract's warranty an additional twelve months including patching "all hair line cracks that may occur during this extended period." The letter did not mention full replacement of the slab.

15. The Claimant never responded to the Respondent's offer.

16. By the spring of 2021, more and wider cracks began to form in the slab, and uneven, unlevel areas of the slab began to pool water.

17. To date, the Claimant has not replaced the slab.

DISCUSSION

The Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Bus. Reg. § 8-407(e)(1); State Gov't § 10-217; COMAR 09.08.03.03A(3). To prove a claim by a preponderance of the evidence means to show that it is "more likely so than not so" when all the evidence is considered. *Coleman v. Anne Arundel Cnty. Police Dep't*, 369 Md. 108, 125 n.16 (2002). The Respondent bears the burden to show the Claimant unreasonably rejected a good faith offer to cure any issues related to his alleged poor workmanship by a preponderance of the evidence. Bus. Reg. § 8-405(d); COMAR 28.02.01.21K(1), (2)(b)/.

An owner may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor." Bus. Reg. § 8-405(a) (Supp. 2022); *see also* COMAR 09.08.03.03B(2) ("The Fund may only compensate claimants for 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." Bus. Reg. § 8-401. For the following reasons, I find that the Claimant has proven eligibility for compensation.

Unworkmanlike, Inadequate, or Incomplete Home Improvement

The Claimant introduced a great deal of evidence at the hearing, in the form of testimony and exhibits, to demonstrate that the Respondent's work under the Contract was unworkmanlike, inadequate, or incomplete. This included the testimony of two expert witnesses, Mr. Carnes and Mr. Patel, who each made multiple site visits to his home to inspect the concrete slab, perform tests, and offer opinions as to the slab's condition and whether the Respondent performed his work under the Contract in an unworkmanlike, inadequate, or incomplete manner.

Ultimately, however, the question of whether the Claimant met his burden as to this issue was met based upon the fact that the slab installed by the Respondent was not uniformly five inches thick, as required by the Contract. Mr. Carnes confirmed this in early January 2021, a few months after the slab was installed. Predictably, the lack of uniform thickness and evenness could lead to areas where water could pool in the garage, which is what started to occur months later. The lack of uniform thickness was also noted in the Detailz estimate from January 14, 2021. The fact that the Respondent did not install a five-inch thick slab as required by the Contract renders his work both inadequate and incomplete.

In addition, both of the Claimant's experts testified extensively to the lack of control and isolation joints in the slab, which help to prevent the slab from cracking. Notably, by the time of the January 27, 2021 site visit by the Respondent, the slab was already showing hairline cracks. The lack of joints in the slab does also render the Respondent's work unworkmanlike and

inadequate, as both experts testified the use of expansion and isolation joints is an industry standard that was not employed by the Respondent.

Unreasonable Rejection of a Good Faith Offer

While the Respondent asserted that he believed the slab to be the correct thickness, other than this assertion, he provided no objective evidence to demonstrate that the slab was installed with the proper thickness. Instead, the Respondent's defense was that he believed he had the absolute right to cure any defects with the project as the original contractor, and the Claimant denied him that right.

Indeed, the Fund may deny a claim if a claimant "unreasonably rejected good faith offers to resolve the claim." Bus. Reg. §8-405(d). Here, the Respondent argues that he made a good faith offer to the Claimant to resolve the claim by extending the warranty on his work and offering a solution to the cracking by installing fill and epoxy to the cracks in the slab. Moreover, the Claimant never responded to the offer.

Here, it is important to discuss the context of the Respondent's offer. It occurred at the January 27, 2021 meeting between the Respondent and the Claimant at the Claimant's home. This is after the Claimant had received both the Detailz estimate and Mr. Carnes' report. Both the estimate and report called for the full replacement of the slab due to poor workmanship. The Claimant informed the Respondent that he wanted to have the slab replaced, but was rejected in favor of a counteroffer to install the fill and epoxy.

As noted by the Respondent – and confirmed by the Claimant at the hearing – the Claimant is a retired construction litigation attorney. To that end, the Respondent testified several times that the meeting on January 27, 2021 at the Claimant's home made the Respondent feel as though he was being called into "court" for hearing. Indeed, the Claimant's own

contemporaneous notes from that meeting appear to show that the Claimant treated the meeting more like a deposition than an effort to resolve the claim, asking the Respondent several technical questions about his workmanship. As a result, the Respondent understandably testified as to his discomfort with the conversation and that he ignored a lot of the conversation he had with the Claimant.

In the end, however, the Claimant's rejection of the Respondent's proposed solution was not unreasonable. Indeed, the Respondent's offer was made in good faith, but would not have fully addressed the problems. The Claimant had information both from another licensed contractor and a professional engineer that the only way to resolve the defects in the slab, in particular the lack of uniform thickness, was to remove and reinstall the slab. The Respondent rejected that solution. While the Respondent testified that he wanted to try fill and epoxy solution first and then see what would be needed at a later time, he never conveyed a willingness to replace the slab. The Respondent's proposed resolution was based on his own training and experience in the industry, which is extensive. However, in this instance, based on the two other expert opinions, it would not have cured the issues with the Claimant's installed slab.

Indeed, the Respondent's offer to extend the warranty on the Contract an additional twelve months may have ultimately led to the replacement of the slab, but it was never directly communicated as such to the Claimant. As a result, due to the unfortunate miscommunication and distrust between the parties, the Claimant reasonably rejected his offer. Based on this analysis, the Respondent did not meet his burden to demonstrate that the Claimant unreasonably rejected a good faith offer to resolve the claim.

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

Actual Loss and Proposed Award

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. 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) (Supp. 2022); 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.

The Respondent performed some work under the Contract, and the Claimant intends to retain other contractors to complete or remedy that work. Accordingly, the following formula appropriately measures the Claimant's actual loss:

> If the contractor did work according to the contract and the claimant has solicited or is soliciting another contractor to complete the contract, the claimant's actual loss shall be the amounts the claimant has paid to or on behalf of the contractor under the original contract, added to any reasonable amounts the claimant has paid or will be required to pay another contractor to repair poor work done by the original contractor under the original contract and complete the original contract, less the original contract price. If the Commission determines that the original contract price is too unrealistically low or high to provide a proper basis for measuring actual loss, the Commission may adjust its measurement accordingly.

COMAR 09.08.03.03B(3)(c).

At the hearing, the Claimant introduced three separate estimates from Detailz of various dates and amounts. Notably, all the estimates had the exact same scope of work for removal and replacement of his defective concrete slab. However, the estimates varied as follows:

- January 14, 2021 estimate: $7,427.00
- September 23, 2021 estimate: $8,170.00
- September 20, 2022 estimate: $9,100.00

No explanation was provided as to why the Detailz estimate increased approximately twenty-two percent over the course of a year and a half. Nor was there any explanation of why the Detailz estimate increased over time despite being the exact same scope of work. Testimony was provided by Mr. Patel, in his expert opinion that the September 2022 estimate was reasonable for the scope of work cited.

However, as the Claimant filed his claim with the Fund in May 2022, the most recent estimate at the time he filed his claim is the appropriate estimate to use. In this case, it is the September 23, 2021 estimate of $8,170.00, which is also the estimate in the middle range of the three estimates provided.

As applied to the formula outlined in COMAR, the Claimant's actual loss is therefore $8,170.00 ($8,150.00 paid to the Respondent plus $8,170.00 minus the original Contract price of $8,150.00 equals $8,170.00).

Effective July 1, 2022, a claimant's recovery is capped at $30,000.00 for acts or omissions of one contractor, and a claimant may not recover more than the amount paid to the contractor against whom the claim is filed.[3] Bus. Reg. § 8-405(e)(1), (5) (Supp. 2022); COMAR 09.08.03.03B(4). In this case, the Claimant's actual loss of $8,170.00 exceeds the amount paid to the Respondent. Therefore, the Claimant's recovery is limited to $8,150.00, the amount paid to the Respondent.[4]

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[3] On or after July 1, 2022, the increased cap is applicable to any claim regardless of when the home improvement contract was executed, the claim was filed, or the hearing was held. *See Landsman v. MHIC*, 154 Md. App. 241, 255 (2002) (explaining that the right to compensation from the Fund is a "creature of statute," these rights are subject to change at the "whim of the legislature," and "[a]mendments to such rights are not bound by the usual presumption against retrospective application").

[4] The result would be the same if the higher estimate from Detailz of $9,100.00 was used in calculating the Claimant's actual loss.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of $8,170.00.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2022); COMAR 09.08.03.03B(3)(c). I further conclude that the Claimant is entitled to recover $8,150.00 from the Fund. Bus. Reg. § 8-405(e)(1), (5) (Supp. 2022); COMAR 09.08.03.03B(4).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant $8,150.00; and

ORDER that the Respondent is ineligible for a Maryland Home Improvement Commission license until the Respondent reimburses the Guaranty Fund for all monies disbursed under this Order, plus annual interest of ten percent (10%) as set by the Maryland Home Improvement Commission;[5] and

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

Stephen W. Thibodeau

February 24, 2023
Date Decision Issued

Stephen W. Thibodeau
Administrative Law Judge

SWT/ds
#203550

[5] *See* Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 24th day of April, 2023, 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.

Robert Altieri

Robert Altieri
Panel B
MARYLAND HOME IMPROVEMENT COMMISSION