

<b>IN THE MATTER OF THE CLAIM</b>	<b>* BEFORE KRYSTIN J. RICHARDSON,</b>
<b>OF HAROLD COOSENBERRY AND</b>	<b>* AN ADMINISTRATIVE LAW JUDGE</b>
<b>SHIRLEY COOSENBERRY,<sup>1</sup></b>	<b>* OF THE MARYLAND OFFICE</b>
<b>CLAIMANTS</b>	<b>* OF ADMINISTRATIVE HEARINGS</b>
<b>AGAINST THE MARYLAND HOME</b>	<b>*</b>
<b>IMPROVEMENT GUARANTY FUND</b>	<b>*</b>
<b>FOR THE ALLEGED ACTS OR</b>	<b>*</b>
<b>OMISSIONS OF PAUL SMITH,</b>	<b>* OAH No.: DLR-HIC-02-18-33437</b>
<b>T/A THE SMITH GROUP</b>	<b>* MHIC No.: 18 (75) 201</b>
<b>CONSTRUCTION, LLC,</b>	<b>*</b>
<b>RESPONDENT</b>	<b>*</b>

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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 November 15, 2017, the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) received the Claimants' claim (Claim) seeking reimbursement from the Fund for \$15,675.00 in actual losses allegedly suffered as a result of a home improvement contract with Paul Smith, trading as The Smith Group Construction, LLC (Respondent). Md.

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<sup>1</sup> This claim was originally filed in the name of Harold Coosenberry only. At the hearing, I granted Mr. Coosenberry's request to amend the claim to include his wife, Shirley Coosenberry, who is a party to the contract and an owner of the residence at issue, as a claimant. Code of Maryland Regulations 09.08.03.02C(2). Mr. Coosenberry and Mrs. Coosenberry will hereinafter be referred to in the collective as "Claimants."

Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015).<sup>2</sup> On October 25, 2018, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on April 11, 2019 at the OAH in Hunt Valley, Maryland. Bus. Reg. § 8-407(e). Kris King, Assistant Attorney General, Department of Labor, Licensing, and Regulation (Department), represented the Fund. The Claimants represented themselves. The Respondent represented himself.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2018); Code of Maryland Regulations (COMAR) 09.01.03; COMAR 28.02.01.

### ISSUES

1. Did the Claimants 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

I admitted the following exhibits on the Claimants' behalf<sup>3</sup>:

- Cl. Ex. 1      Photographs 1A through 1K, undated  
                  1A – Photograph of cement inside hole near front porch  
                  1B – Photograph of black plastic trash bag next to front porch  
                  1C – Photograph (Close-up) of black plastic trash bag next to front porch  
                  1D – Photograph of basement bathroom showing water damage  
                  1E – Photograph of basement bathroom showing water damage  
                  1F – Photograph of basement bathroom corner showing water damage

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<sup>2</sup> Unless otherwise indicated, all citations to the Business Regulation article of the Annotated Code of Maryland are to the 2015 Replacement Volume.

<sup>3</sup> The Claimants sought to offer into evidence what was identified as Cl. Exs. 17 through 19. Cl. Ex. 17 was a waterproofing estimate from Basement Systems USA, Inc. Cl. Ex. 18 was a waterproofing estimate from Handyman On Call, LLC. Cl. Ex. 19 was a waterproofing estimate from American Construction Services. These exhibits were not admitted into evidence because they exceeded the scope of the contract. Copies of these exhibits have been retained in the file.

- 1G<sup>4</sup> – Photograph of basement bathroom corner showing water damage
- 1H – Photograph of buckled wall and damage to baseboard in basement bathroom
- 1I – Photograph (Close-up) of buckled wall and damage to baseboard in basement bathroom
- IJ – Photograph of baseboard and flooring behind toilet showing water damage
- IK – Photograph of baseboard and flooring near toilet showing water damage

Cl. Ex. 2 Complaint Form filed with the Department, with attached narrative, dated August 7, 2017

Cl. Ex. 3 Response from the Respondent to the MHIC Complaint, with attachments:

- Cover Letter from the Respondent to the Department, undated;
- Response Letter from the Respondent to the Department, undated;
- Complaint Form filed with the Department, with attached narrative, dated August 7, 2017;
- One photograph of basement, undated, labeled: Condition of basement before work stated [sic];
- Four photographs of basement bathroom, undated, labeled: Bathroom before; Bathroom when work was completed;
- One photograph of basement bathroom, undated, labeled: Bathroom vanity light and mirror drywall all new;
- Two photographs of basement, undated, labeled: Basement shown edge of fireplace and condition of wall; New Paneling to replace rotted wood paneling;
- Certificate of Liability Insurance, dated August 28, 2017; and
- Copy of two permits pertaining to electrical wiring and plumbing, dated April 15, 2016 and April 21, 2016 respectively

Cl. Ex. 4 Photographs 4A and 4B, undated  
 4A – Photograph of debris removed from basement  
 4B – Photograph of containers that were removed from basement prior to start of work

Cl. Ex. 5 Calendars for the following months: March 2016, April 2016, May 2016, June 2016, and July 2016

Cl. Ex. 6 Photographs 6A through 6B, undated  
 6A – Photograph of meter closet in basement showing cap on pipe  
 6B – Photograph of meter closet in basement showing missing cap on pipe  
 6C – Photograph of meter closet in basement showing new cap on pipe

Cl. Ex. 7 Photographs 7A through 7C, undated  
 7A – Photograph of the basement fireplace before construction  
 7B – Photograph of stripped wall to the right of the basement fireplace during construction  
 7C – Photograph of area near basement fireplace during construction

<sup>4</sup> Cl. Ex. 1G is a duplicate of Cl. Ex. 1F.

- Cl. Ex. 8      Photographs 8A through 8F, undated  
                   8A – Photograph (Close-up) of original utility tub and faucet  
                   8B – Photograph of original utility tub  
                   8C – Photograph of replacement utility tub  
                   8D – Photograph (Close-up) of replacement utility tub  
                   8E – Photograph (Close-up) of replacement utility tub faucet  
                   8F – Photograph of replacement utility tub faucet
- Cl. Ex. 9      Photographs 9A through 9B, undated  
                   9A – Photograph of circuit breaker in laundry area  
                   9B – Photograph of circuit breaker in laundry area
- Cl. Ex. 10     Change Order, with attached copy of check (No. 234) from the Claimants to the Respondent in the amount of \$1,154.97, dated April 7, 2016 (Laundry utility tub)
- Cl. Ex. 11     Change Order, dated April 14, 2016, with attached copy of duplicate check (No. 240) from the Claimants to the Respondent in the amount of \$950.00 (Front entrance roof repair and exterior work)
- Cl. Ex. 12     Change Order, with attached copy of duplicate check (No. 241) from the Claimants to the Respondent in the amount of \$2,020.00, dated April 20, 2016 (Removal of rotted paneling and trim, purchase of new wood paneling, termite treatment by certified pest control, and installation of paneling and baseboards)
- Cl. Ex. 13     Copy of duplicate check (No. 243) from the Claimants to the Respondent in the amount of \$400.00, dated May 12, 2016 (Window repairs)
- Cl. Ex. 14     Change Order, with attached copy of check (No. 246) from the Claimants to the Respondent in the amount of \$1,380.00, dated June 1, 2016 (Exterior painting, screen and lock installation on back fence, additional moulding in laundry room, apply polyurethane to additional paneling and special coating on front flagstone)
- Cl. Ex. 15     Change Order, with attached copy of check (No. 247) from the Claimants to the Respondent in the amount of \$500.00, dated June 8, 2016 (Installation of new faucets in master bedroom, repair garage soffit and paint, remove and replace shower head, and installation of new trap)
- Cl. Ex. 16     Change Order, with attached copy of duplicate check (No. 256) from the Claimants to the Respondent in the amount of \$485.20, dated July 1, 2016 (Cover for stairway, labor to cut and install fiber glass panels, labor to stain, install and apply polyurethane to moulding, costs of materials)

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

- Resp Ex. 1     Four photographs of basement bathroom, undated, labeled: Bathroom before; Bathroom when work was completed

I admitted the following exhibit on behalf of the Fund:

Fund Ex. 1 Respondent's MHIC Licensure Information, dated August 14, 2017

I admitted the following as Joint exhibits:

Joint Ex. 1 Notice of Hearing, with attached Certified Mail Receipts and Notice of File Copy, dated February 14, 2019

Joint Ex. 2 Hearing Order, dated October 19, 2018

Joint Ex. 3 Home Improvement Claim Form, received November 15, 2017

Joint Ex. 4 Contract Agreement, dated March 18, 2016

Joint Ex. 5 Series of payments by check from the Claimants to the Respondent:  
Copy of Duplicate Check No. 232 in the amount of \$6,000.00, dated March 18, 2016  
Copy of Duplicate Check No. 233 in the amount of \$4,000.00, dated April 1, 2016  
Copy of Duplicate Check No. 237 in the amount of \$4,000.00, dated April 8, 2016  
Copy of Duplicate Check No. 239 in the amount of \$4,000.00, dated April 15, 2016  
Copy of Duplicate Check No. 242 in the amount of \$4,000.00, dated April 22, 2016  
Copy of Duplicate Check No. 248 in the amount of \$2,000.00, dated June 8, 2016  
Copy of Duplicate Check No. 255 in the amount of \$2,000.00, dated July 1, 2016  
Copy of Duplicate Check No. 258 in the amount of \$500.00, dated July 8, 2016

### Testimony

The Claimants testified.

The Respondent testified.

The Fund did not present the testimony of 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 99095.

2. At all relevant times, the Claimants owned and resided in a residence located in Baltimore, Maryland.

3. On March 18, 2016, the Claimants and the Respondent entered into a contract (Contract) to perform home improvement at the Claimants' residence. The home improvement

included, among other things, renovation of a basement bathroom, plumbing work, electrical work, installation of new fixtures and tiling, installation of security doors, and exterior repair work.

4. The only waterproofing provision contained in the Contract stated, “[a]ll bare walls that were scraped of flaking paint will be recoated with ‘Dry Lock’<sup>5</sup> paint coating in laundry room and bathroom before new framing and sheetrock is applied in bathroom.” (See Jt. Ex. 4.)

5. The Contract stated work would begin on March 28, 2016 and would be completed by May 7, 2016.

6. The original agreed-upon Contract price was \$ 26,500.00. A payment schedule provided a deposit of \$6,000.00 was due upon acceptance of the Contract. Thereafter, payments in the amount of \$4,000.00 were due on April 1, 2016, April 8, 2016, April 15, 2016, and April 22, 2016. Upon completion of the Contract, a payment of \$4,500.00 was due.

7. Between March 18, 2016 and July 8, 2016, the Claimants paid the Respondent \$26,500.00 by a series of check payments. (See Jt. Ex. 5.)

8. On April 7, 2016, the Claimants and the Respondent entered into a change order regarding the removal and replacement of a utility tub in the laundry room for \$1,154.97. The Claimants paid the Respondent by check for this amount on April 7, 2016. (See Cl. Ex. 10.)

9. On April 14, 2016, the Claimants and the Respondent entered into a change order regarding various exterior repairs totaling \$950.00. The Claimants paid the Respondent by check for this amount on April 15, 2016. (See Cl. Ex. 11.)

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<sup>5</sup> The Respondent explained that Dry Lock paint is a sealant; when applied to a surface, it prevents moisture from penetrating through the surface.

10. On April 20, 2016, the Claimants and the Respondent entered into a change order regarding termite treatment totaling \$2,020.00. The Claimants paid the Respondent by check for this amount on April 20, 2016. (See Cl. Ex. 12.)

11. On May 12, 2016, the Claimants paid the Respondent \$400.00 by check for window repairs.<sup>6</sup> (See Cl. Ex. 13.)

12. On June 1, 2016, the Claimants and the Respondent entered into a change order regarding exterior repairs, installation of moulding in the laundry room, and application of polyurethane to paneling and special coating on front flagstone totaling \$1,380.00. The Claimants paid the Respondent by check for this amount on June 1, 2016. (See Cl. Ex. 14.)

13. On June 8, 2016, the Claimants and the Respondent entered into a change order regarding installation of new faucets in the master bathroom, repairing and painting garage soffit, removing and replacing shower head, and installation of new trap totaling \$500.00. The Claimants paid the Respondent by check for this amount on June 8, 2016. (See Cl. Ex. 15.)

14. On July 1, 2016, the Claimants and the Respondent entered into a change order regarding fiber glass panels for the stairway cover, cutting and installing paneling, and staining and installing moulding totaling \$485.20. The Claimants paid the Respondent by check for this amount on July 1, 2016. (See Cl. Ex. 16.)

15. In addition to the original Contract price of \$26,500.00, the Claimants paid the Respondent an additional amount of \$6,890.17 to cover the costs of the subsequent change orders, for a total Contract price of \$33,390.17.

16. Sometime after the completion of the work, it rained and water intruded into the basement bathroom area causing damage to the wall, flooring, and baseboards. Additionally, the

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<sup>6</sup> Mrs. Coosenberry testified that she could not find the change order regarding the window repairs.

front security door began to separate from the foundation of the house and the Claimants experienced difficulty with locking the rear security door.

17. In May 2017, the Claimants contacted the Respondent and only informed him about the issues with the security doors. Subsequently, the Respondent returned to the Claimants' residence and made corrective repairs to both security doors. While the Respondent was at the residence, the Claimants informed him of the water seepage issue in the basement bathroom. The Respondent examined the area in the basement bathroom and agreed to make repairs.

18. Repairs to remediate the water seepage issue were never made to the Claimants' basement bathroom.

19. On August 7, 2017, the Claimants filed a complaint with the Department.

20. The Claimants have not taken any other legal action to recover monies.

21. The Claimants are not related to the Respondent, are not employees or business associates of the Respondent, and are not related to an employee or business associate of the Respondent.

22. The Contract between the Claimants and the Respondent does not contain an arbitration provision.

23. The Claimants, who are both retired government workers, do not possess any expertise in the area of home improvement work.

## **DISCUSSION**

### **Legal Framework**

The Maryland General Assembly created the Fund to provide an available pool of money from which homeowners could seek relief for losses sustained at the hands of incompetent or unscrupulous home improvement contractors. Md. Code Ann., Bus. Reg. §§ 8-401 to 8-411. A



homeowner is authorized to “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); *see also* COMAR 09.08.03.03B(2). The statutes governing the Fund define “actual loss” as “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.

At a hearing on the claim, 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). “[A] preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces . . . a belief that it is more likely true than not true.” *Coleman v. Anne Arundel Cty. Police Dep’t*, 369 Md. 108, 125 n.16 (2002) (quoting *Maryland Pattern Jury Instructions* 1:7 (3d ed. 2000)).

Certain claimants are excluded from recovering from the Fund altogether. In this regard, a claimant must prove that: (a) the claimant resides in the home as to which the claim is made, or he owns no more than three dwelling places; (b) the claimant is not an employee, officer or partner of the contractor; or the spouse or other immediate relative of the contractor or the contractor’s employees, officers or partners; (c) the work at issue did not involve new home construction; (d) the claimant did not unreasonably reject the contractor’s good faith effort to resolve the claim; (e) the claimant complied with any contractual arbitration clause before seeking compensation from the Fund; (f) there is no pending claim for the same loss in any court of competent jurisdiction and the claimant did not recover for the actual loss from any source; and (g) the claimant filed the claim with the MHIC within three years of the date the claimant knew, or with reasonable diligence should have known, of the loss or damage. Md. Code Ann.,

Bus. Reg. §§ 8-405(c), (d), (f), and (g), 8-408(b)(1); Md. Code Ann., Bus. Reg. § 8-101(g)(3)(i) (Supp. 2018).

For the reasons explained below, I find that the Claimants have proven, in part, eligibility for compensation from the Fund.

**Statutory Eligibility**

The evidence in this case establishes there are no impediments barring the Claimants from recovering from the Fund. The home improvement work was to be performed on the Claimants' residence in Maryland. The Claimants are not relatives, employees, officers, or partners of the Respondent; the Claimants are not related to any of the Respondent's employees, officers, or partners. The Claimants did not reject any efforts by the Respondent to resolve the claim. The Contract between the Claimants and the Respondent did not contain an arbitration provision. The Claimants timely filed their Claim with the MHIC on November 15, 2017. Finally, the Claimants have not taken any other legal action to recover monies.

**The Respondent Performed Home Improvement Work that was in Some Respects Unworkmanlike,**

**Inadequate or Incomplete**

**A. Installation of Front and Rear Security Doors**

The Claimants alleged the installation of the front and rear security doors was unworkmanlike because the front security door began to separate from the foundation of the house, and both doors did not lock properly. After notifying the Respondent of these issues in May 2017, the Respondent made corrective repairs to both doors. Notwithstanding the repairs, Mrs. Coosenberry testified that she still believed the Respondent's work was unworkmanlike because in order to properly lock both doors, the Claimants now had to force the doors shut. She otherwise acknowledged that the front security door had been repaired back to the foundation of the house. Mrs. Coosenberry admitted she had no photographs to offer into evidence depicting

the condition of the doors. She also testified that a repair estimate was not obtained for either door. Furthermore, the Claimants offered no competent evidence expressly linking the issue of having to force the doors shut with the Respondent improperly installing the doors. As no competent evidence was presented on this issue, I find the Claimants failed to prove that the installation of the security doors was inadequate, unworkmanlike or incomplete home improvement. Moreover, even if I had found the installation of the doors to be unworkmanlike, there was no evidence that the Claimants suffered a compensable loss in the form of repair or replacement costs.

**B. Rear Porch Sensor Light**

The Claimants asserted the Respondent performed unworkmanlike home improvement in regards to the installation of a sensor light on the rear porch. The Claimants acknowledged the sensor light worked after its initial installment in April 2016 and stopped working within six months of this hearing, which would have been sometime in October 2018. The Claimants could offer no explanation as to why the sensor light stopped working. Given the passage of time between the Respondent's installation of the sensor light and its malfunction well over two years later, I find the Claimants failed to prove the installation of the sensor light was inadequate, unworkmanlike or incomplete home improvement.

**C. Plastic Barrier**

Pursuant to the Contract, the Respondent was to put up a “. . . plastic barrier over [the] basement door leading to [the] kitchen to prevent dust and debris from going upstairs. . . .” (*See* Jt. Ex. 4.) The undisputed testimony revealed the Respondent failed to perform this task. As a result, Mrs. Coosenberry credibly testified the house got dusty and she was left with the chore of cleaning. Nevertheless, the Claimants failed to prove what, if any, value was attributed to the Respondent's failure to hang this plastic barrier and the subsequent cleaning done by Mrs.

Coosenberry. Thus, I find the Claimants failed to prove an actual loss as a result of the Respondent's omission.

**D. Purchase of Toilet Paper Holder and Towel Rack**

The Claimants testified that the Respondent failed to provide the toilet paper holder and towel rack pursuant to the Contract. As a result, the Claimants purchased and installed both items. Mrs. Coosenberry testified that the costs of both items totaled \$40.00. While the Claimants provided no receipt(s) to corroborate this expense, I did find Mrs. Coosenberry's testimony to be credible. Accordingly, I find the Respondent's omission to supply these items in accordance with the Contract resulted in an actual loss to the Claimants in the amount of \$40.00.

**E. Failure to Remove Old Meter**

The Claimants argued the Respondent failed to remove an old meter or fuse box as provided in the Contract. The undisputed testimony revealed that BG&E<sup>7</sup> subsequently removed the old meter box at a later date from the Claimants' residence. I note that no testimony was offered to prove an actual loss associated with the Respondent's failure to remove the old meter box and BG&E's subsequent removal of it. Therefore, I find the Claimants failed to establish a compensable loss.

**F. Flex Supply Line**

The Claimants contend the Respondent's installation of a toilet shut off valve with flex supply line in the basement bathroom was unworkmanlike insofar as water damage is near the area of the flex supply line. In support of their claim, the Claimants offered one photograph depicting the flex supply line behind the toilet and apparent water damage to the flooring. (See Cl. Ex. 1K.) On cross-examination, Mrs. Coosenberry was candid in acknowledging that she did not know where the water leak was actually coming from and that the flex supply line may not

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<sup>7</sup> BG&E is an abbreviation for Baltimore Gas and Electric Co.

be the source of the water intrusion. As the Claimants failed to offer any evidence in the form of expert testimony purporting to show any correlation between the flex supply line and the source of the water intrusion, I cannot find the Respondent's installation of the flex supply line was unworkmanlike.

**G. Faucet on Utility Tub (Change Order)**

The Claimants asserted the Respondent's installation of the faucet onto the utility tub in the laundry room was unworkmanlike because the faucet was not mounted with screws. As a result, the Claimants contend the faucet is "wobbly" and looks "unprofessional." The Claimants offered photographs of the faucet to demonstrate how it is attached to the utility tub. (See Cl. Exs. 8D through 8F.) The photographs clearly show the faucet is not mounted by screws to the piece of wood that separates the faucet from the utility tub. While the faucet otherwise appears to be securely fastened to two separate overhead pipes, I do find merit in the Claimants' argument that the faucet's lack of mounting by screws to the piece of the wood constitutes inadequate or unworkmanlike home improvement. Nevertheless, the Claimants offered no evidence of repair costs to remediate this issue. Accordingly, the Claimants failed to prove an actual loss associated with the mounting of the utility tub's faucet.

**H. Overpricing for Termite Treatment (Change Order)**

The Claimants alleged the Respondent overcharged them regarding the termite treatment that was performed pursuant to the change order that was entered into on April 20, 2016. At the hearing, Mrs. Coosenberry acknowledged she was not contending that the work associated with the termite treatment was inadequate, unworkmanlike, or incomplete. In light of the foregoing, I will not consider this claim any further.

**I. Cover for Stairway and Installation of Moulding (Change Order)**

Pursuant to the change order entered into on July 1, 2016, the Respondent was to provide a cover of fiber glass panels for the stairway. The Respondent was also to stain, install and apply polyurethane to the moulding. The undisputed testimony was that the Respondent did not complete this task. The cost of this change order totaled \$485.20, which the Claimants paid in full on July 1, 2016. (*See* Cl. Ex. 16.) The Respondent refunded the Claimants \$360.00 for the labor, but he did not reimburse the Claimants for the costs of the materials, which totaled \$125.20. Mrs. Coosenberry testified that the Respondent did not provide the Claimants with these materials. Accordingly, I find the Claimants have demonstrated an actual loss in the amount of \$125.20, the amount the Claimants were not reimbursed, with respect to the incomplete work performed by the Respondent pursuant to the change order.

**J. Waterproofing**

The Claimants argued the waterproofing work performed by the Respondent was inadequate and unworkmanlike because water intruded the basement bathroom after it rained causing damage.<sup>8</sup> In support of their contention, the Claimants offered photographs depicting the extent of the water damage to the wall, baseboards and flooring of the basement bathroom. (*See* Cl. Exs. 1D through 1K.)

The Respondent testified that he applied a sealant called Dry Lock, which he used many times before, to the bathroom walls to prevent moisture from coming through the walls. He explained he initially scraped the pre-existing paint from the bathroom walls and observed cracks in the mortar. Thereafter, he applied the Dry Lock sealant and it filled the cracks in between the mortar. The Respondent further acknowledged that he did not observe any areas that could have led to water infiltration after the sealant was applied.

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<sup>8</sup> The Claimants did not advise when they initially noticed the water damage in the basement bathroom.

The undisputed testimony revealed the Respondent was first made aware of the water seepage issue in May 2017, when he responded to the Claimants' residence to make corrective repairs to the security doors. The Respondent examined the water damage in the basement bathroom area and agreed to make repairs. The Respondent never returned to make the repairs between May 2017 and August 7, 2017 when the Claimants filed their complaint with the Department. The Respondent adamantly argued that he made efforts to contact the Claimants on three separate occasions between May 2017 through August 2017 to make an appointment to remediate the water seepage issue and no one answered or returned his calls. The Claimants argued that the Respondent never contacted them until after they filed the complaint in August 2017. Nevertheless, the Claimants acknowledged receiving these phone calls from the Respondent and not returning them. There was notably a breakdown in communication between the parties over the duration of the home improvement work, which was only exacerbated by the Claimants' beliefs that they were being overcharged and taken advantage of by the Respondent, among their many other frustrations. To that end, I find the Claimants' reluctance to engage the Respondent further regarding remediation of the water seepage issue to be reasonable under the circumstances, and I do not find that the Claimants rejected the Respondent's efforts to resolve the claim.

Nevertheless, the evidence failed to show that the Respondent's application of the Dry Lock paint was inadequate or unworkmanlike home improvement work. The Claimants simply failed to offer any competent evidence showing the water seepage in the basement bathroom amounted to unworkmanlike or inadequate home improvement by the Respondent. There was no evidence presented tending to show any correlation between the source of the water intrusion in the basement bathroom and the Respondent's use of the Dry Lock sealant, including whether or not the sealant was properly applied or worked as expected. I am unable to reach such

conclusions from the photographs before me. As a result, I cannot find the Respondent's work was inadequate or unworkmanlike.

Moreover, even if I had found the Respondent's application of the sealant was inadequate or unworkmanlike, the Claimants failed to prove an actual loss. The Contract between the Claimants and the Respondent only provided, "[a]ll bare walls that were scraped of flaking paint will be recoated with 'Dry Lock' paint coating in laundry room and bathroom before new framing and sheetrock is applied in bathroom." (See Jt. Ex. 4.) At the hearing, the Claimants attempted to offer into evidence three separate waterproofing estimates. However, as the estimates far exceeded the scope of the Contract between the parties, they were not admitted into evidence.<sup>9</sup> Accordingly, I further find the Claimants failed to prove any reasonable repair or restoration costs to remediate the water seepage issue in the basement bathroom.

#### *The Amount of the Claimants' Actual Loss*

Having found eligibility for compensation, I must determine the amount of the Claimants' actual loss and the amount, if any, that the Claimants are 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); 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.

In this case, the Respondent performed some work under the Contract and the Claimants are not seeking other contractors to complete or remedy that work. Accordingly, the following formula appropriately measures the Claimants' actual loss: "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

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<sup>9</sup> The estimates called for installation of sump pump systems, a French Drain, or a Hydro Static Pressure Relief System.



the value of any materials or services provided by the contractor.” COMAR 09.08.03.03B(3)(b). As noted above, the Claimants failed to establish the reasonable amounts required to repair the vast majority of their claims. However, the Claimants have established they paid \$40.00 for the purchase of a towel rack and toilet paper holder. Additionally, the Claimants established they paid the Respondent \$485.20 for work that was never completed. Of this amount, the Respondent reimbursed the Claimants only \$360.00. Therefore, the Claimants are entitled to the balance of \$125.20. Accordingly, the Claimants have established a total actual loss of \$165.20 (or \$40.00 + \$125.20).

The Business Regulation Article caps a claimant’s recovery at \$20,000.00 for acts or omissions of one contractor, and provides that a claimant may not recover more than the amount paid to the contractor against whom the claim is filed. Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a). In this case, the Claimants’ actual loss is less than the amount paid to the Respondent and less than \$20,000.00. Therefore, the Claimants are entitled to recover their actual loss of \$165.20.

#### **PROPOSED CONCLUSIONS OF LAW**

I conclude that the Claimants have sustained an actual and compensable loss of \$165.20 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(b). I further conclude that the Claimants are entitled to recover that amount from the Fund.

#### **RECOMMENDED ORDER**

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

**ORDER** that the Maryland Home Improvement Guaranty Fund award the Claimants \$165.20; 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;<sup>10</sup> and

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

July 2, 2019  
Date Decision Issued

KJR/dlm  
#180415

**CONFIDENTIAL**

Krystin J. Richardson  
Administrative Law Judge

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<sup>10</sup> See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

<b>IN THE MATTER OF THE CLAIM OF</b>	<b>*</b>	<b>MARYLAND HOME</b>
<b>HAROLD AND SHIRLEY</b>	<b>*</b>	<b>IMPROVEMENT COMMISSION</b>
<b>COOSENBERRY</b>	<b>*</b>	
<b>AGAINST THE MARYLAND HOME</b>	<b>*</b>	
<b>IMPROVEMENT GUARANTY FUND</b>	<b>*</b>	<b>MHIC CASE NO. 18(75)201</b>
<b>FOR THE ACTS OR OMISSIONS OF</b>	<b>*</b>	<b>OAH CASE NO. LABOR-HIC-</b>
<b>PAUL SMITH T/A</b>	<b>*</b>	<b>02-18-33437</b>
<b>THE SMITH GROUP</b>	<b>*</b>	
<b>CONSTRUCTION, LLC</b>	<b>*</b>	

\* \* \* \* \*

**FINAL ORDER**

This matter was originally heard before an Administrative Law Judge (“ALJ”) of the Office of Administrative Hearings (“OAH”) on April 11, 2019. Following the evidentiary hearing, the ALJ issued a Proposed Decision on July 2, 2019, concluding that the homeowners, Harold and Shirley Coosenberry (“Claimants”) sustained an actual and compensable loss of \$165.20 as a result of the acts or omissions of Paul Smith t/a The Smith Group Construction, LLC (“Contractor”). *ALJ Proposed Decision* p. 17. In a Proposed Order dated July 31, 2019, the Maryland Home Improvement Commission (“MHIC” or “Commission”) affirmed the Proposed Decision of the ALJ to grant an award from the Home Improvement Guaranty Fund. The Claimants subsequently filed exceptions to the MHIC Proposed Order.

On February 20, 2020, a three-member panel (“Panel”) of the MHIC held a hearing on the exceptions filed in this matter. The Claimants participated in the February 20 hearing and were represented by James Scott, Esq., but the Contractor was not present. The Commission issued a Final Order amending the ALJ’s Proposed Decision, and the Contractor filed a petition for judicial review asserting that he did not receive notice of the exceptions hearing. The Commission confirmed that the Contractor did not receive notice of the February 20 hearing and asked that the Circuit Court for Baltimore City remand the case to allow it to conduct an exceptions hearing in which the Contractor could participate. The Circuit Court granted the Commission’s request, and

the Commission conducted a second exceptions hearing on November 5, 2020.

At the November 5 hearing, the Claimants attended and were again represented by Mr. Scott, and the Contractor participated without counsel. Assistant Attorney General Hope Sachs appeared at the exceptions hearing on behalf of the Guaranty Fund. The Commission entered the following preliminary exhibits as part of the record of the exceptions hearing without objection: 1) September 14, 2020 hearing notice; 2) July 31, 2019 transmittal letter, ALJ Proposed Decision, and MHIC Proposed Order; 3) Claimant's exceptions; 4) October 26, 2014 virtual hearing notice. The Contractor produced a copy of the transcript of the hearing before the ALJ. Therefore, the Panel's review of the record included the preliminary exhibits for the exceptions hearing, the OAH Proposed Decision, the transcript of the OAH hearing, 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 contract between the parties for repairs to the Claimants' home, including the waterproofing and renovation of the Claimants' basement.

On exception, the Claimant argued that the ALJ erred in finding that they failed to prove that the Contractor's performance of the waterproofing of their basement was inadequate or unworkmanlike and denying them an award based on the waterproofing work. Mr. Smith argued that he tried to return and correct the leak in the basement bathroom but that the Claimants would not allow him to return to their home.

The Commission disagrees with the ALJ's findings of fact and conclusions of law regarding the Contractor's waterproofing work. The record includes evidence of a significant water intrusion problem in the Claimants' basement before they hired the Contractor, including photographs of the bathroom with extensive water damage (OAH Hearing Respondent's Exhibit 4), testimony by the Claimants that their primary objective was the waterproofing of the basement

bathroom (OAH Hearing Transcript at 116), and testimony by the Claimants that they repeatedly informed the Contractor that their primary objective was the waterproofing of the basement bathroom (OAH Hearing Transcript at 26).

The Contractor implicitly acknowledged that the Claimants conveyed to him the need for waterproofing and expressly admitted that he determined the appropriate method of waterproofing to be the use of Drylok waterproofing paint, testifying that he did not include in his proposal the installation of a French drain to address the water intrusion problem because, when he “originally came to look at the job, there was no major water on the floor.” (OAH Hearing Transcript at 290-91.)

The record includes photographs of the Claimants’ bathroom after the Contractor completed the Drylok application and the bathroom renovation showing water damage to the wall and baseboard, which demonstrates to the Commission that the Drylok failed to stop the water intrusion in the Claimant’s basement. (OAH Hearing Claimants’ Exhibits 1D-1K.) Therefore, the Commission finds that the Contractor’s performance was inadequate. Because the Contractor’s performance of the waterproofing was inadequate, the Commission will admit into evidence the estimates for the waterproofing of their basement and the repair of the water damage in the bathroom that the Claimants submitted at the ALJ hearing, as the estimates are relevant to the cost to correct the Contractor’s inadequate work. (OAH Hearing Claimant’s Exhibits 17-19.) Although the Claimant’s waterproofing estimates proposed different methods than the Drylok sealant proposed and applied by the Contractor, the Commission finds that the Contractor recommended the use of Drylok and that the Claimants relied upon the Contractor’s recommendation to their detriment and suffered continued water intrusion and water damage to their newly renovated bathroom.

Of the three waterproofing estimates the Claimants submitted to show the cost to correct the Contractor's inadequate waterproofing work, the Commission finds that the \$5,029.94 estimate of Basement Systems USA, Inc., which was the lowest estimate and included the repair of the water damage to the Claimant's remodeled bathroom, provides the best evidence of the cost to correct the Contractor's deficient performance. Therefore, the Commission finds that the Claimants proved an actual loss of \$5,029.94 relating to the Contractor's acts or omissions relating to the waterproofing component of their contract and will increase the Claimants' total award to \$5,195.14.

The Commission does not find that the Claimants unreasonably rejected good faith efforts by the contractor to resolve the claim. Rather, the Commission finds that the Claimants acted reasonably when they did not allow the Contractor to return given the Contractor's demonstrated lack of competence with waterproofing.

Having considered the parties' arguments, the evidence in the record and the OAH Proposed Decision, it is this 2<sup>nd</sup> day of December 2020 **ORDERED:**

- A. That the Findings of Fact of the Administrative Law Judge are **AMENDED;**
- B. That the Conclusions of Law of the Administrative Law Judge are **AMENDED;**
- C. That the Proposed Decision and Recommended Order of the Administrative Law Judge is **AMENDED;**
- D. That the Maryland Home Improvement Guaranty Fund shall award the Claimants \$5,195.14;
- E. That the Contractor is ineligible for a Maryland Home Improvement Commission license until the Contractor reimburses the Guaranty Fund for all monies disbursed under this Order, plus annual interest of ten percent as set by the Commission;

- F. That the records and publications of the Maryland Home Improvement Commission shall reflect this decision; and
- G. Any party has thirty (30) days from the date of this Final Order to appeal this decision to Circuit Court.

**Bruce Quackenbush**  
**Chairperson –Panel**  
**Maryland Home Improvement**  
**Commission**

**PROPOSED ORDER**

***WHEREFORE, this 31<sup>st</sup> day of July, 2019, Panel B of the Maryland Home Improvement Commission approves the Recommended Order of the Administrative Law Judge and unless any parties files with the Commission within twenty (20) days of this date written exceptions and/or a request to present arguments, then this Proposed Order will become final at the end of the twenty (20) day period. By law the parties then have an additional thirty (30) day period during which they may file an appeal to Circuit Court.***

***Michael Shilling***

***Michael Shilling  
Panel B***

**MARYLAND HOME IMPROVEMENT COMMISSION**