

IN THE MATTER OF THE CLAIM
OF ANIKA KEARNEY,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF MARK SIMS,
T/A POWERKLEEN
CONSTRUCTION SERVICES,
RESPONDENT

* BEFORE MARY PEZZULLA,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
*
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* OAH No.: DLR-HIC-02-18-30888
* MHIC No.: 17 (75) 1301
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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 February 13, 2018, Anika Kearney (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$123,500.00 in actual losses allegedly suffered as a result of a home improvement contract with Mark Sims, trading as Powerkleen Construction Services (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015). On October 1, 2018, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on February 27, 2019 at the OAH in Hunt Valley, Maryland. Bus. Reg. § 8-407(e). Nicholas Sokolow, Esquire, Assistant Attorney General, Department of Labor, Licensing, and Regulation (Department), represented the Fund. The Claimant represented herself. Jordan Selzer, Esquire, represented the Respondent, who was present. 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 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

Unless noted, I admitted the following exhibits on the Claimant's behalf:

- Clmt. Ex. 1 - Contract between Claimant and Respondent, March 9, 2017
- Clmt. Ex. 2 - Contract between Claimant and Respondent, March 10, 2017
- Clmt. Ex. 3 - Emails between Claimant and Respondent regarding Claimant's request for Respondent to stop work on the project; June 4, 13, and 14, 2017 (3 pages)
- Clmt. Ex. 4 - Z & S Home Inspections LLC, Property Inspection Report of 4519 Powell Avenue, Baltimore, Maryland 21206 (67 pages)
- Clmt. Ex. 5 - Not admitted
- Clmt. Ex. 6 - Photographs A-B and D-BB, taken in June 2017, Photograph C not admitted.
- Clmt. Ex. 7 - Not admitted
- Clmt. Ex. 8 - Check stub for \$25,500.00 cashier's check to Respondent, March 10, 2017;
Check stub for \$20,000.00 cashier's check to Respondent, May 1, 2017;

Personal check for \$3,100.00 from Claimant to Respondent, April 25, 2017;
Personal check for \$3,000.00 from Claimant to Respondent, May 24, 2017

Clmt. Ex. 9 - Contract between Claimant and Soper Investment Group, LLC (Soper), October 20, 2017

Clmt. Ex. 10 - Estimate from Soper regarding deck/basement areaway, January 19, 2018

Clmt. Ex. 11 - Change Order Form from Soper regarding rear dormer, January 19, 2018

Clmt. Ex. 12 - Addendum to Home Improvement Claim Form, March 27, 2018

Unless noted, I admitted the following exhibits on the Respondent's behalf:

Resp. Ex. 1 - Not admitted

Resp. Ex. 2 - Photographs A-E, taken June 3, 2017

I admitted the following exhibits on behalf of the Fund:

Fund Ex. 1 - Notice of hearing, January 16, 2019

Fund Ex. 2 - Hearing order, September 24, 2018

Fund Ex. 3 - Licensing record, February 26, 2019

Fund Ex. 4 - Letter to Mark Sims regarding Complaint # 1301-2017, April 11, 2018 with Home Improvement Claim Form attached, March 27, 2018

Testimony

The Claimant testified.

The Respondent testified and presented the testimony of Michael Daniel.

The Fund did not offer any testimony.

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 107415.

2. On March 9, 2017, the Claimant and the Respondent entered into a contract (Contract) to construct a 15x31 foot addition onto the Claimant's home, located at 4519 Powell

Avenue, Baltimore, Maryland 21206. This addition would include a master bedroom suite with bathroom, a kitchen, and a 15x13 foot outdoor deck, as well as an update to the HVAC system to accommodate the addition. The Contract also included the following work to be completed in the basement: adding a shower and recessed toilet in the bathroom, widening the stairs and installing new stairs, adding cabinets to the laundry room, constructing a 10x12 foot room, installing drywall and waterproofing, and demolishing a closet.

3. Under the Contract, work would commence on March 13, 2017 and would be completed by June 17, 2017.

4. On March 10, 2017, after additional discussions, the parties signed a second contract (Amended Contract) regarding the work to be done on the property. The Amended Contract removed a provision for the installation of 750 square feet of vinyl flooring and added provisions to install insulation in the attic, stabilize the driveway gate, and remove the existing hot water heater and install a 50-gallon hot water heater. The Amended Contract also changed the completion date to June 2, 2017.

5. Both the Contract and Amended Contract contain a provision that the Respondent, through subcontractors, would provide "required plumbing, HVAC, and electrical, and building permits." (Clmt. Exs. 1 & 2).

6. The original agreed-upon Contract price was \$72,000.00. The agreed-upon price for the Amended Contract was \$70,500.00.

7. On March 10, 2017, the Claimant paid the Respondent \$25,500.00. The Claimant paid additional amounts to the Respondent of \$3,100.00 on April 25, 2017, \$20,000.00 on May 1, 2017, and \$3,000.00 on May 24, 2017 for a total amount paid of \$51,600.00.

8. Work on the Amended Contract began in March, 2017, but progressed slowly due to a rainy spring and disagreements between the parties.

9. The Claimant had concerns regarding the quality and workmanship of the work being completed on the property, specifically with regard to the drywall in the basement, the subflooring not being level between the house and the addition, and the electrical work throughout the addition and basement.

10. The Claimant voiced these concerns to the Respondent, as well as concerns that the work was not progressing quickly enough to be completed by June:

11. The Amended Contract was not completed by June 2, 2017.

12. As of June 2, 2017, the existing deck had not been demolished and no work had begun on the new deck. The existing master bedroom had holes in the drywall. The subflooring between the addition and existing structure was uneven with a large dip or gap between the two structures. The hardwood flooring for the addition was not installed. The roof over the addition was incomplete and still covered in plastic. Roofing felt had been placed on the roof, but the roofing had not been completed. The roof did not have any joist hangers or metal clips attaching it to the addition. No insulation had been installed in the attic. The kitchen was not completed: neither the island nor the cabinets were installed and the walls were not insulated. The support beam between the kitchen and dining room areas was not installed in the ceiling. The bathroom that was part of the addition was framed, but not complete and had no fixtures installed. Drywall was installed in the basement, but had already begun to mold due to the drywall being installed directly against the concrete walls. The drywall in the basement was not seamless, but had gaps in between the sheets of drywall. Demolition had not been completed to turn the basement bathroom into a powder room. The laundry room in the basement did not have cabinets, counter tops, or a sink. Work on the HVAC system had been started, but the compressor and supply registers had not been installed. The basement steps had not been widened. Debris was strewn throughout the yard and also left inside of the property. The yard had at least two trenches dug

in it that had filled with standing water. Exposed electrical wires hung throughout the incomplete addition and the basement.

13. On June 4, 2017, the Claimant sent the Respondent an email, requesting that he stop work on the property until she could have a full inspection completed to make sure the work finished so far was structurally sound.

14. The Respondent stopped work on the property on June 4th and never returned to complete the Amended Contract.

15. Prior to stopping work on June 4th, the Respondent had done some demolition work at the property, installed framing for the addition, and installed some portion of drywall in the basement. No portion of the Amended Contract was fully completed.

16. On June 16, 2017, the Claimant had the property inspected by Z & S Home Inspections LLC, who then issued a report. The report accurately noted many deficiencies in the property, including poor construction of the new roof over the addition, loose or damaged siding, exposed wood, and gaps in the flashing. The report also detailed that the attic structure for the addition had gaps in the framing connections, no metal framing connectors, and had nothing securing the bottom of the sheathing at the roofline.

17. The parties attempted to resolve their issues regarding the completion of the Amended Contract through mediation with the Home Improvement Commission, but were not able to reach an agreement.

18. On October 20, 2017, the Claimant entered into a contract with Soper, a licensed home improvement contractor under MHIC license number 110988, for \$122,500.00 to redo and complete the work under the Amended Contract.

19. The contract with Soper contained additional work to be completed on the property that was not included in the Amended Contract with the Respondent. Specifically, the

Soper contract included the installation of thirty new recessed light fixtures, ten new windows, and crown and base molding.

20. On January 19, 2018, the Claimant signed a Change Order Form with Soper for an additional \$3,800.00 worth of work to be completed.

21. On January 19, 2018, the Claimant obtained from Soper an estimate of \$19,900.00 in order to reconstruct the existing basement stairwell and to expand the existing deck to a 16x20 foot deck.

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).¹ “[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)).

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)²; 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.” Bus. Reg. § 8-401. For the following reasons, I find that the Claimant has proven eligibility for compensation.

¹ As noted above, “COMAR” refers to the Code of Maryland Regulations.

² Unless otherwise noted, all references to the Business Regulation Article herein cite the 2015 Replacement Volume of the Maryland Annotated Code.

The Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimant. The Respondent performed unworkmanlike, inadequate or incomplete home improvements. The Respondent started work on the Amended Contract as expected in March, 2017. He should have completed the work by June 2nd of that year. The Claimant testified that the relationship between the parties was contentious from the beginning and that the parties "bumped heads" a lot.

As the project progressed, the Claimant began to have concerns regarding the quality and workmanship of the construction being done. Specifically, in May the Claimant was concerned that the subflooring in the addition was not level with the flooring in the house and there was a gap between them. Claimant testified that when she addressed this problem with the Respondent, he told her that it "didn't matter" and it "won't be perfect." The Respondent testified that he didn't remember telling the Claimant this. The Claimant also had concerns regarding unworkmanlike renovations regarding the drywall in the basement. The Claimant noted that the walls in the basement were not seamless and had an indentation between the drywall sections and that the drywall was not on framing, but placed directly on the concrete walls. When she asked the Respondent to address these issues, he made it clear that he would not change them. The Respondent, in his testimony, stated that he installed the drywall in the basement per the Claimant's request to save as much space as possible. The Claimant also had concerns regarding the electrical work being done in the addition and basement. The Claimant understood the provision in the Amended Contract that "Powerklean Construction Services, through its subcontractors, will be providing required plumbing, HVAC, and electrical, and building permits" (Clmt. Ex. 1) required the Respondent to make sure that the electrical wiring was up to code and that the existing wiring could support the new addition. When the Claimant tried to address these issues with the Respondent, she did not receive a response.

The Claimant characterized the Respondent's interaction with her as "hostile" and stated that whenever she brought up something that she believed to be an issue, such as the uneven floor between the addition and the rest of the home, the drywall being placed directly on the concrete in the basement, or the need to upgrade the electrical wiring in the home so it could support the addition, the Respondent would "storm and fuss and cuss" at her. The Claimant also testified that she spoke to the Respondent regarding her concern that the addition would not be completed by June 2nd, specifically due to the fact that the Respondent did not work on the property on a daily or even a consistent basis.

The Respondent, in his testimony, agreed to a contentious relationship between the parties. Although he stated that he did not remember ever cursing at the Claimant, he admitted that he could get "excited." In fact, during his testimony at this hearing, the Respondent became loud and agitated while answering questions. The Respondent explained that he believed the Claimant was adding work onto the contract and making changes, which he found bothersome.

The Respondent denied the allegation that he was not consistently working on the project, but acknowledged that there was a delay in the completion of the work for multiple reasons. First, the Respondent stated that delays were due to a rainy spring, which may have caused a loss of seven to ten days. He could not recall, however, if he ever told the Claimant that the project was running behind due to the weather. Second, he testified that some delay may have come from the Claimant wanting to save space in the basement, so he re-did the drywall and placed it directly against the concrete in order to save three inches of space. The Respondent, however, could not testify with certainty that this caused any kind of a delay, only that it could have. Finally, the Respondent testified that he underestimated the amount of time to complete the project. This was his first construction of an addition and he believed that he should have added another month to the time estimate.

Communication between the parties continued to break down and the Claimant continued to have serious doubts about the quality and workmanship of the Respondent's construction. The Claimant testified that her concerns persisted because the Respondent refused to address them. On June 4, 2017, the Claimant contacted the Respondent and requested that he stop work on the project until she could have an inspection of the completed work. The Claimant followed this contact with an email to the Respondent stating, "I am requesting that no further work is done at 4519 Powell Ave [sic] until a full inspection is completed to determine whether the addition and all other work done thus far is deemed structural [sic] sound and up to code" (Clmt. Ex. 3). Despite the Claimant's conditional time frame of the work stoppage, "until a full inspection is completed," the Respondent reported that he read the email to mean that the Claimant was firing him from the project. One of the few points in the Respondent's testimony on which he did not prevaricate was that after he received the June 4th email he did not return to the property to complete any additional work. Despite the Claimant complaining to him about the flooring not being level, the basement walls having gaps or seams, the drywall being placed against the concrete, the electrical wiring not being up to code and able to support the new addition, electrical wires dangling throughout the project and the delay in the completion of the project, the Respondent expressed surprise at the June 4th email, stating he believed he was fired "out of the blue" and without any explanation. The facts of this case, the evidence, and the testimony show this to be untrue.

I find that the Claimant did not fire the Respondent or terminate the Amended Contract. After months of slow progress, for which she was given no explanation, and work that she perceived as unworkmanlike and structurally unsound, the Claimant informed the Respondent that she wanted an inspection before any additional work was performed and paused the project to have an inspection completed. The Claimant believed that aspects of the project were not

being appropriately completed and when she broached these problems with the Respondent, he dismissed her complaints outright. At the hearing, the Respondent went back and forth regarding his recollection of events and answers given to the Claimant. Per his testimony, he completed 60-62% of the work on the contract, but maybe it was actually 55%; he lost seven to ten days due to rain, but he was not sure if that is more than a normal amount; the Claimant did not complain about the quality of the work, except she might have "said something" about the floors not being level, the walls in the basement not being seamless, and the electrical wires hanging down.

After halting the work, the Claimant hired Z & S Home Inspections LLC to perform a property inspection, which was completed on June 16, 2017. Z & S Home Inspections LLC issued a 67 page report (Clmt. Ex. 4), detailing the safety hazards and deficiencies at the property. Regarding some of the insufficiencies present at the property, it is difficult to determine from the report which deficiencies may have preexisted the Respondent's work, which were caused by the Respondent's unworkmanlike renovation, or which were a result of the Respondent leaving the project on June 4, 2017 in an unfinished state. Some deficiencies, though, are easier to discern. The report specifically identifies poor construction of the new roof over the addition, including loose or damaged siding, exposed wood, and gaps in the flashing. (Clmt. Ex. 4, p. 25). The report also notes that the attic structure for the addition has gaps in the framing connections, has no metal framing connectors, and has nothing securing the bottom of sheathing at the roofline. (Clmt. Ex. 4, p. 31).

At some point after Z & S Home Inspections LLC completed its inspection and report, the parties participated in mediation through the MHIC. The parties were unable to reach a resolution through mediation and the Claimant continued to pursue her claim. During this time, the property sat empty with the project uncompleted. On October 20, 2017, the Claimant

contracted with Soper to complete the addition and work on her home. The contract with Soper was for \$122,500.00 (Clmt. Ex. 9) with a change order for an additional \$3,800.00 (Clmt. Ex. 11).

The Respondent argued that since the Soper contract with the change order was in excess of \$55,000.00 more than his contract with the Claimant, it must go vastly beyond the scope of their contract. The Soper contract does contain work outside the scope of the Amended Contract between the parties. The most obvious additions are the installation of windows and the increase of the size of the deck to 16x30. The cost of the windows was \$170.00 per window for ten windows, or \$1,700.00. The provision regarding the deck, however, is not in the Soper contract itself. The terms were set forth in an estimate given by Soper on January 19, 2019 for \$19,900.00 for work to be completed in the basement and constructing the deck. (Clmt. Ex. 10). No testimony was presented regarding the difference in value between a 15x30 foot deck and a 16x20 foot deck. The Soper contract included installation of recessed light fixtures, installation of new windows, installation of crown molding, and installation of base molding, which are not included in the Amended Contract. Despite these additions, the Soper contract's main provisions were to perform work that the Claimant had hired the Respondent to perform. Specifically, the work entailed completing the addition, continuing the demolition of the interior and completing the interior framing and framing in the basement, installing drywall to all exposed wall and ceiling framing in the first floor and basement, installing kitchen cabinets, installing tiling in the master bath and basement powder room, furnishing and installing flooring to the home, repairing drywall in the attic, removing existing duct work, fabricating and installing a new HVAC distribution system to include supply and return, removing existing wiring in the new addition, rewiring the house to code, roughing-in drain, vent and water distribution systems to the new master bath, powder room, kitchen and laundry, installing plumbing fixtures, installing new

siding on the addition, and installing roofing on the new addition. (Clmt. Ex. 9). It is clear from the scope of the Soper contract that all work completed by the Respondent had to be redone.

The Respondent argued that the project was substantially completed and required less than a month's worth of work to complete. Per this argument, the Amended Contract would have been completed if he had not been fired. I have already found that the Claimant did not fire the Respondent. She asked him to stop work until she had an inspection completed. She hired a company to perform the inspection. After the report was prepared, the Respondent never attempted to return to complete the work. The Respondent's witness, Michael Daniel, testified that he installed an indoor HVAC unit, but was not able to run the two supplies to the addition. He testified that the work he performed should have taken two or two and a half days, but it took three weeks due to rain. This is greater than the seven to ten day delay that the Respondent estimated due to rain. By the time work stopped on June 4th, Mr. Daniel still had to put in the condenser and two supply registers.

The Respondent introduced photographs (Resp. Ex. 3 A-E) to show that work had almost been completed. However, the Claimant had numerous photographs (Clmt. Ex. 6 A-B and D-BB) showing each room and its condition as of June 4, 2017. The Claimant's photographs directly refute the argument that the project was 55-62% completed, which is what the Respondent testified. No single item in the Amended Contract had been completed. The addition had some framing work, but the Respondent acknowledged that all framing work had not been completed. The addition had no walls, no insulation, no final flooring, no cabinets, no island, and no bathroom. Electrical wiring was left dangling throughout the house. Plastic still covered the unfinished roof. If the Amended Contract had been substantially completed in an adequate and workmanlike manner, the Soper contract would not have necessitated redoing the

work that had been started by the Respondent. The Respondent's argument is not credible. The Respondent performed unworkmanlike and incomplete home improvements.

The Respondent never returned to the property to complete the work and no testimony was provided by either party that he ever attempted to do so. The Respondent testified that after he received the June 4th letter he stopped work and never returned. When specifically asked by his attorney if he ever explained to the Claimant that the project was running behind or if given more time it could be completed, the Respondent answered, "No. I just stopped." It is possible that the Respondent may have been able to correct or complete some of the home improvements, such as upgrading the electrical wiring, making sure no electrical wires were dangling, finishing the roof of the addition and properly attaching it to the existing structure, but he never returned to do so. Additionally, I find that after she received the property inspection report from Z & M Home Inspections LLC, the Claimant lost faith in the ability of the Respondent to complete the home improvements. This report confirmed that the work performed by the Respondent was incomplete and what was completed was unworkmanlike, specifically in regards to the construction of the new roof over the addition and the attachment of the attic structure having gaps and no metal connectors.

The parties had a contentious relationship from the beginning of the project, which continued to deteriorate based on the Respondent's belligerent attitude towards the Claimant and his refusal to address her concerns regarding the work being performed, all of which culminated with the Claimant having to retain an outside company to complete an inspection and prepare a report to show that the Respondent had not been performing the home improvements in a workmanlike manner, and ultimately having to hire a new contractor to complete the project. The Claimant did attempt to resolve the issues regarding the completion of the Amended Contract in mediation with the Respondent through the MHIC, but the parties did not reach a

resolution. The Claimant testified that the Respondent "wasn't interested" in completing the work. The Respondent did not refute this testimony.

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. In this case, there is no testimony or evidence that the Respondent made any effort to resolve the Claim. The only testimony before me on this issue is the Claimant's who testified that the Respondent was not interested in completing the work. I find that the Respondent's home improvements were both unworkmanlike and incomplete under the terms of the Amended Contract, and I thus find that the Claimant is eligible for compensation from the Fund.

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); COMAR 09.08.03.03B(1). The MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work.

(a) If the contractor abandoned the contract without doing any work, the claimant's actual loss shall be the amount which the claimant paid to the contractor under the contract.

(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.

(c) 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)(a)-(c).

I conclude that none of the three regulatory formulas is appropriate in this case. Based upon the testimony of the parties, the Respondent completed some work on the property before the Claimant paused the work on the property to have an inspection completed. While no single provision of the contract was completed, the Respondent performed some demolition. He also framed at least part of the addition as shown in Respondent's Exhibit 3 A-E. There was conflicting testimony as to how much work under the Amended Contract was completed. As discussed above, I do not credit the testimony of the Respondent that 55-62% of the Amended Contract had been completed. The Claimant also had a difficult time testifying to the percentage of the work done and giving this percentage a value. On her Home Improvement Claim Form (Fund Ex. 4), the Claimant initially valued the amount of work completed at \$7,050.00, which is ten percent of the Amended Contract amount. However, in her Addendum to Home Improvement Claim Form (Clmt. Ex. 12), Claimant wrote, "The amount or % of work completed is difficult to quantify as none of the work was completed. The new contractor had to remove, tear down and repair all the poor, inadequate and incomplete workmanship performed by Powerkleen Construction." This statement in the Addendum is corroborated by the Claimant's credible testimony and the photographs of the state of the home as of June, 2017.

The Claimant hired another contractor to complete the work. The contract with Soper, in addition to the work that should have been completed under the Amended Contract, contained additional work to be completed that was beyond the scope of the Amended Contract. The Claimant presented insufficient testimony and evidence in order for me to value the work outside the scope of the Amended Contract. What I find most compelling and instructive is the fact that the work started or completed by the Respondent had to be redone by Soper. Because of this, I find the work completed by the Respondent to have no value. The Claimant gained nothing from her contract with the Respondent, as she had to pay another company to do the work as if the Respondent had abandoned the contract before beginning.

Accordingly, I shall apply a unique formula to measure the Claimant's actual loss. I find the Claimant's actual loss to be the amount the Claimant paid to Respondent. The Claimant paid the Respondent \$51,600.00.

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 Claimant's actual loss of \$51,600.00 exceeds \$20,000.00. Therefore, the Claimant's recovery is limited to \$20,000.00. Bus. Reg. § 8-405(e)(1); COMAR 09.08.03.03D(2)(a).

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$20,000.00 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)(c). I further conclude that the Claimant is entitled to recover \$20,000.00 from the Fund. Bus. Reg. § 8-405(e)(1); COMAR 09.08.03.03D(2)(a).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$20,000.00; 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;³ and

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

March 29, 2019
Date Decision Issued

CONFIDENTIAL

Mary Pezzulla
Administrative Law Judge

MP/da
178578

³ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 3rd day of May, 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

CIRCUIT COURT FOR BALTIMORE CITY

Marilyn Bentley
Clerk of the Circuit Court
Courthouse East

111 North Calvert Street - Room 462
Baltimore, MD 21202-

410-333-3722 TTY for Deaf: (410)-333-4389

May 21, 2020

Case Number: 24-C-19-005696 / AA /

In the Matter of the Petition of Mark Anthony Si

John D Hart Esq
Staff Attorney
500 N Calvert Street
Suite 406
Baltimore, MD 21202

FOLD HERE

PETITION OF MARK ANTHONY
SIMS d/b/a Powerkleen Construction
Services

* IN THE
* CIRCUIT COURT
* FOR
* BALTIMORE CITY

FOR JUDICIAL REVIEW OF THE
DECISION OF THE MARYLAND
HOME IMPROVEMENT
COMMISSION

IN THE CASE OF

CLAIM OF ANIKA KEARNEY
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND.

*
*
* CASE NO. 24-C-19-005696
*
*

MHIC No. 17(75)1301
OAH No. DLR-HIC-02-18-30888

* * * * *

ORDER

This judicial review proceeding arises out of a decision of the Maryland Home Improvement Commission ("MHIC"). By Final Order dated October 17, 2019, the MHIC affirmed a decision of an Administrative Law Judge ("ALJ") finding that Claimant Anika Kearney sustained actual and compensable loss of \$20,000 due to the actions and omissions of Petitioner Mark Anthony Sims. All parties appeared for oral argument before the Court electronically in accordance with Md. Rule 2-802(a) on May 5, 2020. At oral argument, MHIC moved to dismiss the action due to the Mr. Sim's failure to file a memorandum in accordance with Md. Rule 7-207(a).

Preliminarily, the Court may dismiss an action for judicial review if a petitioner fails to file a memorandum within the time prescribed by Md. Rule 7-207 if the Court finds that the failure to file caused prejudice to the moving party. Md. Rule 7-207(d). The Clerk mailed notice to the parties at their address of record on

January 31, 2020, informing the parties that the agency record had been received. (Docket Entry No. 6.) Mr. Sims had 30 days from January 31, 2020, to file his memorandum. Md. Rule 7-207(a). It is undisputed that Mr. Sims failed to file a Md. Rule 7-207 memorandum.

Considering the totality of the circumstances, the Court finds that MHIC was prejudiced by the failure to file a memorandum because it was unaware of what arguments Mr. Sims would raise on judicial review and was not fully prepared to address them. *See Swatek v. Bd. of Elections of Howard County*, 203 Md. App. 272, 283-84 (2012) (dismissal for failure to file 7-207 memorandum appropriate because Board was prejudiced by not knowing what arguments the voters would raise on review). For these reasons, the Court finds that dismissal is the appropriate sanction.

Even if the Court had reached the merits of the petition for judicial review, the decision of the MHIC must be affirmed. Judicial review of an administrative agency decision is narrow. *Maryland-Nat. Capital Park and Planning Com'n v. Greater Baden-Aquasco Citizens Ass'n*, 412 Md. 73, 83 (2009). It is limited to determining whether there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and whether the agency's decision is based on an erroneous conclusion of law. *Colburn v. Dept. of Pub. Safety & Corr. Svcs.*, 403 Md. 115, 127-28. (2008).

In this case, Mr. Sims argued that the MHIC erred in failing to give any value to the work that Mr. Sims had done for Ms. Kearney. However, the record reveals that the conclusions were based on photographs of the work and a subsequent

contractor's assessment that the work completed by Mr. Sims would need to be redone. Mr. Sims is unable to point to anything in the record to support his assertions of the value of his work. Mr. Sims was given ample opportunity to present his evidence to the ALJ and to the MHIC on exceptions. He failed to introduce anything to support his assertion.

Finally, Mr. Sims argued that he did not abandon the job. The MHIC concluded that he did abandon the job because the stoppage of work requested by Ms. Kearney was only until an inspection could be completed. This conclusion was based on the ALJ's assessment of the credibility of the witnesses at the evidentiary hearing. It is well-established that this Court should not substitute its judgment for the credibility determinations made by the agency. *Wisniewski v. Department of Labor, Licensing and Regulation*, 117 Md. App. 506, 520 (1997) (credibility determinations and inferences to be drawn therefrom are the exclusive province of agency). For these reasons, even if the Court were to reach the merits of the petition for judicial review, the decision of the MHIC must be affirmed.

Accordingly, it is this 7th day of May 2020, hereby

ORDERED that the petition for judicial review filed by Mark Anthony Sims is **DISMISSED** for failure to file a Md. Rule 7-207 memorandum; and it is further

ORDERED that decision of the MHIC is **AFFIRMED**; and it is further

ORDERED that costs are to be paid by the Petitioner.

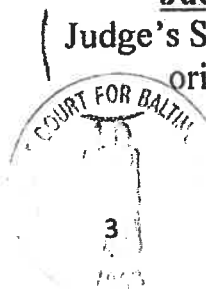
Judge John Nugent

Judge's Signature appears on the original document

TRUE COPY
TEST

Marilyn Bentley

M. BENTLEY, CLERK



**IN THE MATTER OF THE CLAIM
OF ANIKA KEARNEY**

**MARYLAND HOME IMPROVEMENT
COMMISSION**

**AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ACTS OR OMISSIONS
OF MARK SIMS t/a
POWERKLEEN CONSTRUCTION
SERVICES**

**MHIC CASE NO. 17(75)1301
OAH CASE NO. DLR-HIC-02-18-30888**

FINAL ORDER

This matter was heard before an Administrative Law Judge (“ALJ”) of the Office of Administrative Hearings (“OAH”) on February 27, 2019. Following the evidentiary hearing, the ALJ issued a Proposed Decision on March 29, 2019, concluding that the homeowner Anika Kearney (“Claimant”) sustained an actual and compensable loss of \$20,000.00 as a result of the acts and omissions of Powerkleen Construction Services (“Contractor”). *OAH Proposed Decision* p. 18. In a Proposed Order dated May 3, 2019, the Maryland Home Improvement Commission (“MHIC”) affirmed the Proposed Decision of the ALJ to award the Claimant \$20,000.00 from the MHIC Guaranty Fund. The Contractor subsequently filed exceptions of the MHIC Proposed Order.

On July 11, 2019, a hearing on the exceptions was held before a three-member panel (“Panel”) of the MHIC. Both the Claimant and the Contractor were present without counsel. Hope Sachs, Assistant Attorney General, appeared at the exceptions hearing to present evidence on behalf of the MHIC. The following two preliminary exhibits were offered by AAG Sachs and admitted into evidence at the exceptions hearing: 1) May 3, 2019 Cover Letter, OAH Proposed Decision and MHIC Proposed Order, and 2) May 21, 2019 Notice of Exceptions Hearing to be held July 11, 2019 and Contractor’s Written Exceptions. Neither the Contractor nor the Claimant produced a copy of the transcript of the hearing before the ALJ, and therefore the Panel’s review

was limited to the ALJ's proposed decision, the exhibits introduced into evidence at the OAH hearing, and the preliminary exhibits offered by AAG Sachs at the exceptions hearing. COMAR 09.01.03.09(G) - (I)

In his written exceptions, the Contractor argues that he did not abandon the job but instead was told to stop work on the property, and claims that the ALJ erred in assigning no value to the work he did prior to leaving the job. The ALJ addressed the Contractor's failure to finish the job in her decision, and specifically found that "the Claimant did not fire the Respondent or terminate the Amended Contract." *OAH Proposed Decision* p. 10. The ALJ further found that the stoppage of work requested by the Claimant was only "until a full inspection is completed," and despite this conditional time frame the Contractor later failed to return, or even attempt to return and complete the job. *OAH Proposed Decision* p. 10, 14. The ALJ's findings are based on the June 4, 2017 email from the Claimant to the Contractor requesting that work be stopped until an inspection is completed and the Contractor's own testimony that after the June 4th email he stopped work and never returned. *OAH Hearing Claimant's Exhibit 3; OAH Proposed Decision* p. 14. The ALJ also noted that the Claimant testified that the Contractor "wasn't interested" in completing the work, and that at the hearing the Contractor did not refute this testimony. *OAH Proposed Decision* p. 15.

As for the valuation of the work done by the Contractor, the ALJ notes that although the Contractor testified that he completed 55 to 62% of the job, she did not find this testimony to be credible, and instead found that "[n]o single item in the Amended Contract had been completed." *OAH Proposed Decision* p. 13, 16. The ALJ based her decision on the Claimant's testimony, which she found to be credible, and the numerous photographs showing the current state of the home. *OAH Proposed Decision* p. 13, 16. The ALJ was tasked with observing the demeanor of the witnesses as they testify, judge their credibility, and ultimately make findings of fact based on

this testimony. The ALJ clearly found the Claimant's version of events to be more credible. *OAH Proposed Decision* p. 10, 14. The Commission will not overturn the credibility determinations of the ALJ in this case.

To assess the value of the Contractor's work, the ALJ also looked at the scope of the contract between the Claimant and Soper, the subsequent contractor hired to complete the job. *OAH Proposed Decision* p. 12-13. The ALJ found based on this contract that "the work started or completed by the Respondent had to be redone by Soper," and therefore she found that the Contractor's work had no value. *OAH Proposed Decision* p. 17. To counter the ALJ's finding, the Contractor in his exceptions alleges that he incurred certain costs, such as the purchase of architectural plans and other building materials, which he claims should be considered in calculating the value of his work. The Contractor, however, does not point to anything in the record generated before the ALJ that support such costs. The opportunity to present testimony and offer evidence was at the hearing before the ALJ. COMAR 09.01.03.09(K).

The Commission agrees with the ALJ's analysis and finds no error in her decision. The ALJ's decision is thorough, supported by the evidence in the record and correct as a matter of law. Having considered the parties' arguments, the evidence in the record and the OAH Proposed Decision, it is this 17th day of October 2019 **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**; AND
- C. That the Proposed Decision and Order of the Administrative Law Judge is **AFFIRMED**;
- D. 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**