

<p>IN THE MATTER OF THE CLAIM</p> <p>OF TIMOTHY PAWLOWITZ,</p> <p>CLAIMANT</p> <p>AGAINST THE MARYLAND HOME</p> <p>IMPROVEMENT GUARANTY FUND</p> <p>FOR THE ALLEGED ACTS OR</p> <p>OMISSIONS OF DANIEL SHIFFLETT,</p> <p>T/A JD SHIFFLETT CONSTRUCTION,</p> <p>RESPONDENT</p>	<p>* BEFORE JOY L. PHILLIPS,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>*</p> <p>*</p> <p>*</p> <p>* OAH No.: LABOR-HIC-02-19-39716</p> <p>* MHIC No.: 19 (05) 1381</p>
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PROPOSED DECISION

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

STATEMENT OF THE CASE

On July 5, 2019, Daniel Pawlowitz (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 \$21,000.00 in actual losses allegedly suffered as a result of a home improvement contract with Daniel Shifflett, trading as JD Shifflett Construction (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015).¹ On

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

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November 18, 2019, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on October 30, 2020 over a videoconferencing platform. Bus. Reg. § 8-407(e). John Hart, Assistant Attorney General, Department, represented the Fund. The Claimant represented himself. The Respondent failed to appear for the hearing.

After waiting fifteen minutes for the Respondent or the Respondent's representative to appear, I proceeded with the hearing. Applicable law permits me to proceed with a hearing in a party's absence if that party fails to attend after receiving proper notice. Code of Maryland Regulations (COMAR) 28.02.01.23A. On September 30, 2020, notice of the hearing was mailed to the Respondent at the address of record by regular and certified mail. COMAR 09.08.03.03A(2).² The certified mailing was returned as unclaimed, but the regular mailing was not returned as undeliverable. The Respondent did not notify the OAH of any change of address. COMAR 28.02.01.03E. The Fund verified the Respondent's current mailing record and used it prior to the hearing to send exhibits to the Respondent. I determined that the Respondent received proper notice, and I proceeded to hear the captioned matter.

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. 2020); COMAR 09.01.03; and COMAR 28.02.01.

² This hearing notice was for the third scheduled hearing in this matter. The first hearing date was on April 23, 2020. That hearing date was postponed after COVID-19 restrictions were imposed. The second hearing date was on September 30, 2020. The notice of remote hearing was mailed on August 27, 2020. On September 30, 2020, the Respondent contacted the OAH Clerk's Office after the hearing was underway to report he was having trouble logging on. The Administrative Law Judge assigned to the case on that day attempted to call the Respondent at the telephone numbers provided to the Clerk's Office without reaching the Respondent. In the interest of fairness, that Administrative Law Judge postponed the hearing and asked that it be rescheduled and assigned to a different Administrative Law Judge.

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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

I admitted the following exhibits on the Claimant's behalf:

- Clmt. Ex. 1 - Invoice/Contract, May 20, 2018
- Clmt. Ex. 2 - Cancelled check and banking information, May 23, 2018
- Clmt. Ex. 3 - Cancelled check and banking information, May 29, 2018
- Clmt. Ex. 4 - Residential Building Permit, December 6, 2018
- Clmt. Ex. 5 - Photograph
- Clmt. Ex. 6 - Request from Claimant to Calvert County Division of Inspections and Permits to close out permit, April 21, 2020
- Clmt. Ex. 7 - Copies of texts exchanged between Claimant and Respondent, May 11, 2018 to April 19, 2019

I admitted the following exhibits on the Fund's behalf:

- Fund Ex. 1 - Notice of Remote Hearing, August 27, 2020
- Fund Ex. 2 - Hearing Order, November 18, 2019
- Fund Ex. 3 - Letter from MHIC to Respondent, August 1, 2020; Home Improvement Claim Form, July 5, 2019
- Fund Ex. 4 - Licensing information print-out, printed September 23, 2020
- Fund Ex. 5 - Notice of Remote Hearing, September 30, 2020
- Fund Ex. 6 - State Department of Assessments and Taxation: Real Property Search, printed October 30, 2020

No exhibits were submitted by the Respondent.

Testimony

The Claimant testified and did not present other witnesses. The Fund presented no witness testimony. The Respondent did not appear and thus, presented no 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 01-111968. That license expired December 15, 2020.
2. The Respondent ran his company, JD Shifflett Construction, with two brothers, Josh and Matt. The Claimant primarily interacted with Josh but did talk with the Respondent during the construction process.
3. On May 20, 2018, the Claimant and the Respondent entered into a contract to install a new deck on the rear of the Claimant's home, with a door leading to the deck (Contract).
4. The original agreed-upon Contract price was \$31,000.00.
5. The Claimant paid the Respondent \$11,000.00 on May 23, 2018, and \$10,000.00 on May 29, 2018.
6. On an unknown date before June 11, 2018, the Respondent dug the holes for the deck footers. This was the last work performed by the Respondent on the Contract.
7. The Respondent delivered no building materials to the Claimant's home.
8. Between June 2018 and April 2019, in response to repeated texts from the Claimant, the Respondent made promises to complete the Contract, but failed to do so. The Claimant asked to have his money returned, but the Respondent always promised to complete the

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Contract, providing new completion dates that were not met. He offered a series of excuses to the Claimant for why he was not performing the work.

9. On December 6, 2018, the Respondent finally obtained the permit for the deck, after receiving repeated inquiries from the Claimant regarding whether the permit had been secured.

10. The Respondent made more promises to complete the Contract in January, February, March, and April 2019.

11. After April 13, 2019, the Claimant's texts and calls to the Respondent's cell phone number were blocked.

12. Sometime in April 2019, after he was no longer able to contact the Respondent, the Claimant filled in the footer holes left in his backyard.

13. On April 21, 2020, the Claimant made a written request that the permit be closed, enabling him to hire MD Custom Construction to build a smaller, simpler deck. Because the deck was smaller than the one to be built pursuant to the Contract, the Claimant could not use the footer holes the Respondent dug in 2018.

14. The Claimant is not related to the Respondent, owns no other properties in Maryland, and has no other civil action or claim pending against the Respondent.

DISCUSSION

In this case, the Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Bus. Reg. § 8-407(e)(1); Md. Code Ann., State Gov't § 10-217 (2014); 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 Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002).

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); *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.

The Claimant presented credible testimony and supporting exhibits to show that he entered into a Contract in May 2018 with the Respondent to build a deck and a door leading to the deck. The Claimant paid the Respondent \$21,000.00 toward the Contract price. Yet the only work the Respondent did was to dig footer holes. Those holes remained in the Claimant’s yard for another year, until the Claimant filled them. A year after that, the Claimant hired another contractor to build a smaller deck.

The Respondent provided no materials for the job, never sent a crew to the job site after the footer holes were dug, and never completed the Contract. Instead, he gave the Claimant a series of excuses and broken promises, culminating in the Claimant’s telephone and text messages being blocked by the Respondent.

The evidence presented demonstrates that the Respondent failed to complete a home improvement contract. Bus. Reg. § 8-401. Because the Claimant has met his burden of proving the Respondent performed an incomplete home improvement, he has established an actual loss and 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). MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work. Those formulas are found in COMAR 09.08.03.03B, as follows:

(3) Unless it determines that a particular claim requires a unique measurement, the Commission shall measure actual loss as follows:

(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.

Because the Respondent did some, albeit minimal, work on the Contract before abandoning the job, COMAR 09.08.03.03B(3)(a) would not be the appropriate formula, as that section requires proof that the contractor abandoned the job without doing any work at all.

The next formula applies when the homeowner is not using another contractor to complete the contract, but the proof in this case is that the Claimant did hire another company to build a deck. COMAR 09.08.03.03B(3)(b). Thus, this section is not appropriate to the facts of this case.

The Claimant has retained another contractor to build the deck, but the deck that was built was smaller and simpler than what was called for under the Contract. Thus, COMAR

09.08.03.03B(3)(c) would also not be the appropriate formula, as it requires proof that the new contractor completed the original contract.

As none of the three regulatory formulas is appropriate in this case, I shall apply a unique measurement to measure the Claimant's actual loss. The Fund noted that this is the appropriate approach.

The Claimant paid the Respondent \$21,000.00 and in return, unusable footer holes were dug. The Claimant received no value for his payment to the Respondent. I thus conclude the Claimant has shown an actual loss in the full amount he paid the Respondent.

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 \$21,000.00 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 \$21,000.00 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). I further conclude that the Claimant is entitled to recover \$20,000.00 from the Fund. Md. Code Ann., Bus. Reg. § 8-405(e)(1); COMAR 09.08.03.03D(2)(a).

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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.

CONFIDENTIAL

January 12, 2021
Date Decision Issued

Joy L. Phillips
Administrative Law Judge

JLP/kdp
#189833

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

SECRET

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PROPOSED ORDER

WHEREFORE, this 17th day of March, 2021, 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.

Joseph Tunney

Joseph Tunney

Chairman

Panel B

***MARYLAND HOME IMPROVEMENT
COMMISSION***

SECRET

1. The purpose of this document is to provide information regarding the activities of the [redacted] in the [redacted] area. This information is being provided to you for your information only and should not be disseminated to other personnel.

2. The [redacted] has been identified as a [redacted] and is currently operating in the [redacted] area. It is believed that the [redacted] is engaged in [redacted] activities and is a potential threat to the [redacted] area.

3. It is recommended that you remain alert for any signs of [redacted] activity in the [redacted] area. If you observe any suspicious activity, you should report it to the [redacted] immediately.

4. This information is classified as [redacted] and is to be handled accordingly. It is to be destroyed when it is no longer needed.

SECRET