IN THE MATTER OF THE CLAIM	*	**BEFORE RACHAEL BARNETT,**
OF NIKKI JORDAN,	*	**AN ADMINISTRATIVE LAW JUDGE**
CLAIMANT	*	**OF THE MARYLAND OFFICE**
AGAINST THE MARYLAND HOME	*	**OF ADMINISTRATIVE HEARINGS**
IMPROVEMENT GUARANTY FUND	*	
FOR THE ALLEGED ACTS OR	*	
OMISSIONS OF PETER BORMAN,	*	
T/A AMERICAN CONSTRUCTION	*	**OAH No.: LABOR-HIC-02-21-00863**
SERVICES,	*	**MHIC No.: 19 (90) 1513**
RESPONDENT	*	

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PROPOSED DECISION

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STATEMENT OF THE CASE

On August 20, 2019, Nikki Jordan (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund), under the jurisdiction of the Department of Labor (Department),[1] for reimbursement of $14,895.00 in actual losses allegedly suffered as a result of a home improvement contract with Peter Borman, trading as American Construction Services (Respondent). Md. Code Ann., Bus. Reg.

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

§§ 8-401 through 8-411 (2015).[2] On December 29, 2020, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on March 5, 2021 using the Webex videoconferencing platform. Md. Code Ann., Bus. Reg. §§ 8-407(a), 8-312. Shara Hendler, Assistant Attorney General, Department, represented the Fund. The Claimant represented herself. Edward Miller, 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. 2020); Code of Maryland Regulations (COMAR) 09.01.03; and 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

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

Clmt. Ex. 1 - MHIC Complaint, March 5, 2019, with the following attachments:

- Architectural drawings, December 28, 2018
- Text messages between the Claimant and the Respondent, various dates
- Contract, November 11, 2018
- Anchor Waterproofing, LLC bill, April 15, 2019
- Bank records, various dates

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

- Permits, various dates
- Text messages between the Claimant and Powerhouse, various dates
- Powerhouse Home Improvement estimate and contract, April 23 and 26, 2019
- Basement photographs, undated
- Timeline of events, various dates

Clmt. Ex. 2 - Response to Complaint, July 19, 2019

Clmt. Ex. 3 - Email from the Department to the Claimant, August 5, 2019

Clmt. Ex. 4 - Written Statement from the Claimant, undated

Clmt. Ex. 5 - Estimate from Otinga, LLC, August 15, 2019

Clmt. Ex. 6 - Email Exchange Between the Claimant and the Department, August 20 – 22, 2019

Clmt. Ex. 7 - Expenses Accounting from Claimant, various dates, with the following attachments:

- Bank of America Form 1098, 2019
- Credit Card statements: Discover, October – November 2019, Chase, June 1, 2019 – December 31, 2019, Bank of America September 2019

Clmt. Ex. 8 - Otinga, LLC Invoice, August 22, 2019

Clmt. Ex. 9 - Saffer Electric Invoice, July 15, 2019

Clmt. Ex. 10 - Text Messages Between the Claimant and the Respondent, various dates

Clmt. Ex. 11 - Text Messages Between the Claimant and Powerhouse Home Improvement, various dates

The Respondent did not offer any documents for admission into evidence.

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

Fund Ex. 1 - Hearing Order, December 21, 2020

Fund Ex. 2 - Notice of Hearing, March 5, 2021

Fund Ex. 3 - Home Improvement Claim Form, August 16, 2019

Fund Ex. 4 - Department of Labor, Licensing & Regulation I.D. Registration, February 26, 2021

Testimony

The Claimant testified and did not present other witnesses.

The Respondent did not testify or present any witnesses.

The Fund did not present any witnesses.

PROPOSED FINDINGS OF FACT

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

1. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor under MHIC license number 24615.

2. In 2004, the Respondent and her husband purchased a home ("the home") in Baltimore, Maryland. It is their only home.

3. The home included an unfinished basement with exposed beams and wiring, as well as a small bathroom.

4. On November 11, 2018, the Claimant and the Respondent entered into a contract to convert the unfinished basement into a finished basement, including installing a new bathroom, new walls with insulation and electrical applications, a new ceiling, relocating the washer and dryer, installing flooring, shelving, recessed lighting, and built-in storage (Contract).

5. Although the Contract included the installation of a new bathroom, plumbing work was excluded from the Contract.

6. The original agreed-upon Contract price was $26,768.00.

7. The Respondent estimated the work would take four to six weeks.

8. On November 11, 2018, the Claimant paid the Respondent $8,922.66.

9. On December 20, 2018, the Respondent arrived at the home with a work crew. The Claimant paid the Respondent $8,923.00, and the Respondent's employees began work.

10. Between December 20, 2018 and January 1, 2019, the Respondent's employees worked in the basement. The work included framing and jack hammering.

11. In mid-March 2019, the Respondent's employees returned and demolished the basement bathroom and disabled the washer and dryer.

12. On April 1, 2019, the Claimant sent the Respondent a text to ask when work would occur that week. The Respondent replied in part, "We're at a little pause." (Clmt. Ex. 10).

13. On April 4, 2019, the Claimant sent the Respondent a text, which stated in part, "When will you be coming back?" (Clmt. Ex. 10).

14. On April 10, 2019, Joel Bowden, Powerhouse Improvement (Powerhouse), came the home to provide a plumbing quote, as well as a quote to subcontract the project, at the suggestion of the Respondent. The Claimant agreed to have Powerhouse serve as the plumber for the basement conversion.

15. On April 16, 2019, the Claimant paid Powerhouse $2,650.00.

16. On April 17, 2019, Powerhouse began performing plumbing work in the basement.

17. On April 19, 2019, Mr. Bowden called the Claimant and informed her that the basement needed additional plumbing work and he would need additional funds to proceed.

18. Also on April 19, 2019, the Claimant sent the Respondent a text asking for a breakdown of the expenditure of their funds paid. The Respondent did not provide a breakdown.

19. On April 24, 2019, the Claimant paid Powerhouse $3,520.34.

20. On April 26, 2019, the Claimant met with Mr. Bowden and the Respondent at the home. The Respondent requested additional funds. The Claimant inquired as to what happened to the funds they had already provided to the Respondent. The Respondent became upset and departed the home.

21. In late April or early May 2019, Mr. Bowden re-established the washer and dryer connection and performed some underground plumbing, but then did not return to the home and did not return the Claimant's text messages or calls beginning in May 2019.

22. After not hearing from Mr. Bowden, the Claimant directed the Respondent not to turn over any funds to Mr. Bowden, as subcontractor.

23. On May 6, 2019, the Claimant requested a timeframe from the Respondent for completing the basement project. The Respondent did not provide a timeframe.

24. On May 14, 2019, the Claimant again inquired when the Respondent would perform more work in the basement. The Respondent did not perform more work.

25. On May 25, 2019, the Claimant requested that the Respondent return $15,000.00.

26. On May 31, 2019, the Claimant paid Powerhouse an additional $2,000.00.

27. The value of the work performed by the Respondent was $2,950.00, as documented in an assessment by Otinga, LLC (Otinga). Prior to stopping work, the Respondent had installed some metal framing, installed a cubby for the washer and dryer and demolished the bathroom.

28. Since March 2019, the Respondent has not performed any additional work, nor has he returned any funds to the Claimant.

29. The Claimant hired Otinga to finish the work specified under the Contract. The cost of that work was $12,920.40.

30. Otinga performed the work between July 2019 and November 2019.

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); 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 . . . ." Md. Code Ann., 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." Md. Code Ann., Bus. Reg. § 8-401. For the following reasons, I find that the Claimant has proven eligibility for compensation.

The Claimant argued that after paying the Respondent $17,845.66, he performed very little of the work called for under the Contract. Despite the Claimant's many attempts to get the Respondent to return his workers to the job, the Respondent never did so. The Respondent also did not provide a breakdown of how the Claimant's funds were used nor return any of the Respondent's funds when requested. While plumbing work occurred in the basement, the Claimant paid Powerhouse separately for that work, and even Powerhouse stopped communicating with the Claimant in May 2019. The Claimant came to realize that the Respondent was not going to complete the job and was aware that the Respondent had

considered Powerhouse as a subcontractor (other than plumbing), so the Claimant directed the Respondent not to provide any funds to Powerhouse.

After the Respondent failed to perform any work between March 2019 and July 2019, the Claimant then secured a new contractor, Otinga, to complete the basement conversion. Otinga estimated that the work performed by the Respondent was worth $2,950.00. The Claimant argued she was entitled to $15,000.00, slightly more than what she requested in her claim.

The Respondent opted not to present a defense. Rather, the Respondent agreed that he owed Claimant $15,000.00 for not completing the Contract; however, the Respondent stated he was not able to pay that amount because he currently lacks the necessary funds to do so. Since the parties agree that the Respondent performed an incomplete home improvement, 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. Md. Code Ann., 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 Claimant has retained other contractors to complete or remedy that work. Accordingly, the following formula appropriately measures the Claimant's actual loss:

> If the contractor did work according to the contract and the claimant has solicited or is soliciting another contractor to complete the contract, the claimant's actual loss shall be the amounts the claimant has paid to or on behalf of the contractor under the original contract, added to any reasonable amounts the claimant has paid or will be required to pay another contractor to repair poor work done by the original contractor under the original contract and complete the original contract, less the original contract price. If the Commission determines

> that the original contract price is too unrealistically low or high to provide a proper basis for measuring actual loss, the Commission may adjust its measurement accordingly.

COMAR 09.08.03.03B(3)(c). The Claimant paid the Respondent $17,845.66 and then hired Otinga at a cost of $12,920.40 to complete the work called for under the Contract. These sums are added together for a total of $30,766.06 and then reduced by the original contract price with the Respondent, $26,768.00, for a net result of $3,998.06. This is the amount of the Claimant's recovery.

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. Md. Code Ann., Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a). In this case, the Claimant's actual loss is less than the amount paid to the Respondent and less than $20,000.00. Therefore, the Claimant is entitled to recover her actual loss of $3,998.06.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of $3,998.06 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 that amount from the Fund. Md. Code Ann., Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant $3,998.06; 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.

Rachael Barnett

May 26, 2021
Date Decision Issued

Rachael Barnett
Administrative Law Judge

RAB/at
#192256

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

PROPOSED ORDER

WHEREFORE, this 9th day of July, 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