

<p>IN THE MATTER OF THE CLAIM</p> <p>OF VERNETTA MONTAGUE,</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 RAMIRO ESPINO,</p> <p>T/A R&M LANDSCAPING &</p> <p>CONSTRUCTION, LLC,</p> <p>RESPONDENT</p>	<p>* BEFORE STEPHEN W. THIBODEAU,</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>*</p> <p>* OAH No.: LABOR-HIC-02-19-24042</p> <p>* MHIC No.: 19 (90) 16</p>
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PROPOSED DECISION

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STATEMENT OF THE CASE

On October 17, 2018, Vernetta Montague (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$5,500.00 in actual losses allegedly suffered as a result of a home improvement contract with Ramiro Espino, trading as R&M Landscaping and Construction LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015). On July 15, 2019 the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on November 5, 2019, at the Prince George's County Office Building, 1400 McCormick Drive, Suite 336, Largo, Maryland. Bus. Reg. § 8-407(e). Shara Hendler, Assistant Attorney General, Department of Labor (Department),¹ represented the Fund. The Claimant represented herself. 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. 2019); 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

I admitted the following exhibits on the Claimant's behalf unless otherwise noted:

- Clmt. Ex. 1 - Envelope addressed to the Claimant from the Respondent, with handwritten notes by the Respondent, October 17, 2018; Respondent's answer to the MHIC Complaint No. 16-2019, July 23, 2018; Proposal and Invoice prepared by the Respondent, September 25, 2017
- Clmt. Ex. 2 - Copies of checks from the Claimant to the Respondent for the following amounts:
- \$5,000.00, dated September 25, 2017
 - \$2,000.00, dated September 29, 2017
 - \$1,500.00, dated December 4, 2017
- Clmt. Ex. 3 - Estimate prepared by Beltway Builders, Inc. for the Respondent, October 5, 2018
- Clmt. Ex. 4 - MHIC Home Improvement Claim Form (not admitted)
- Clmt. Ex. 5 - MHIC Complaint Form completed by the Respondent, July 2, 2018

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

Clmt. Ex. 6 - Copies of text messages between the Claimant and the Respondent from August 25, 2017 through May 22, 2018

Clmt. Ex. 7 - Series of photos taken by the Claimant, sub-numbered as follows:

- 7a: Claimant's back gate, November 1, 2019
- 7b: Claimant's top fence post facing street, November 1, 2019
- 7c: Claimant's back gate, November 1, 2019
- 7d: Steps to Claimant's back deck, November 1, 2019
- 7e: Nails from street side of Claimant's fence, November 1, 2019
- 7f: Nails from street side of Claimant's fence, November 1, 2019
- 7g: Nails from yard side of Claimant's fence, November 1, 2019
- 7h: Top of Claimant's back gate, November 1, 2019
- 7i: Top of Claimant's back gate and fence, November 1, 2019
- 7j: Bottom of Claimant's fence showing nails, November 1, 2019
- 7k: Top of Claimant's fence post showing nails, November 1, 2019
- 7l: Claimant's fence post, cracked, November 1, 2019
- 7m: Claimant's back deck floor, June 7, 2018
- 7n: Claimant's back deck floor, June 7, 2018
- 7o: Claimant's front deck floor, June 7, 2018

I admitted the following exhibits on behalf of the Fund:

- GF Ex. 1 - Hearing Order, July 9, 2019
- GF Ex. 2 - Notice of Hearing, October 24, 2019
- GF Ex. 3 - Home Improvement Claim Form, October 17, 2018
- GF Ex. 4 - MHIC License Registration and History for the Respondent, printed September 30, 2019

The Respondent did not submit any exhibits.

Testimony

The Claimant testified. The Respondent testified. The Fund did not present 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 5372102.

2. On or about September 25, 2017, the Claimant and the Respondent entered into a verbal contract to replace the floor on Claimant's front and back decks, as well as the fence surrounding the Claimant's property (Contract).

3. The original agreed-upon Contract price was \$8,500.00.

4. The Contract price included the following amounts for the work: \$6,000.00 for replacing the wood on the floor of the front and back decks; \$1,000.00 for replacement of the fence; and \$1,500.00 for the staining of the decks.

5. The Claimant paid the Respondent in three installments on the following dates: \$5,000.00 on September 25, 2017; \$2,000.00 on September 29, 2017; \$1,500.00 on December 4, 2017.

6. Following the completion of the work on the Contract in December 2017, the Claimant noticed in March 2018 that her fence was leaning and requested the Respondent to come to her home to fix the fence.

7. On approximately April 5, 2018, the Respondent returned to the Claimant's property to fix the lean in the fence. However, on April 7, 2018, the Claimant noticed that she could no longer open her back gate connected to the fence due to the lean in the fence.

8. In both April and May 2018, the Claimant reached out to the Respondent via text message to have him return to the property to fix the gate and the fence. The Respondent never answered those text messages or otherwise returned to the Claimant's home to repair the fence.

9. At several points throughout the fence, there are significant gaps between the boards where nails are exposed. In addition, many of the fence boards are cracked.

10. The Respondent used pressure treated wood to construct the fence, described as pine boards, a soft wood. The Respondent's work crew used a nail gun to nail the fence boards together. However, the Respondent's crew did not nail the boards together properly.

11. In June 2018, the Claimant noticed several of the boards on her back deck floor cracking and buckling.

12. On October 5, 2018, the Claimant solicited an estimate from Beltway Builders, Inc. (Beltway) to fix her back deck and fence gate. The Beltway estimate includes work for the back deck joists and undercarriage needed to be "beefed up" in order support a new deck floor. The estimate also provides for a removal and replacement of the fence gate. The total estimate for both projects is \$8,300.00.

13. The Contract between Claimant and Respondent did not provide for any work on the undercarriage of either the front or the back deck. The Contract merely provided for replacement of the floor boards of the deck that sit on top of the undercarriage in order to save money on pulling building permits for a full deck replacement.

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).² "[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);³ 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

² As noted above, "COMAR" refers to the Code of Maryland Regulations.

³ Unless otherwise noted, all references to the Business Regulation Article herein cite the 2015 Replacement Volume of the Maryland Annotated Code.

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.

There is no dispute the Respondent was a licensed home improvement contractor at the
time he entered into the Contract with the Claimant. There is a question as to whether the
Respondent performed unworkmanlike, inadequate or incomplete home improvements. The
Claimant maintains the Respondent did so because both her fence and back deck⁴ have
significant problems. In particular, there are significant gaps in her fence and a faulty gate that
will not open even after the Respondent returned to the Claimant’s property to fix the fence.
Moreover, the Claimant’s back deck floorboards show signs of cracking and buckling.

The Respondent maintains the issues related to Claimant’s fence are due to the materials
used, specifically the pressure treated wood that will show cracks over time due to weather.
However, the Respondent admitted that installation of nails on the Claimant’s fence was not
done properly as his work crew used a nail gun on the fence and did not ensure there were no
gaps in the fence. As to the back deck, the Respondent indicated the Contract only called for a
replacement of the floorboards on top of the deck’s undercarriage. Therefore, according to the
Respondent, he could not be held responsible for the warping and cracking of boards if the
undercarriage needed to be beefed up, per the Beltway estimate, in order to prevent warping and
cracking.

Indeed, I cannot find that the Respondent’s work on the back deck, and the resulting
warping and cracking of the wood, is due to an unworkmanlike, inadequate or incomplete home
improvement. The Respondent performed the work as agreed to with the Claimant, and a
subsequently discovered structural issue that caused the warping and cracking floorboards is not

⁴ During the hearing and in her MHIC Guaranty Fund Claim form, the Claimant notes there are no problems with
the work the Respondent did to her front deck.

the Respondent's fault. As the Contract only provided for replacement of the floorboards on the front and back deck, any subsequent issue discovered with respect to the undercarriage cannot be the result of any alleged faulty work on the part of the Respondent.

The fence is another matter. On this record, the Claimant did not dispute the Respondent's claim that the pressure treated wood used in the construction of the fence will crack over time due to weathering. However, the Respondent did admit that the nails on the fence were not installed properly. Moreover, while the Respondent did return to the Claimant's property a few months after installation of the fence to fix a lean in the fence, it is unclear from the Respondent's testimony what work was done to remedy the problem. After the Respondent did the work to remedy the fence lean, the Claimant's gate attached to the fence would not open properly, and the Respondent never returned to fix the problem after the Claimant requested him to do so.

The Respondent testified the lean in the fence was due to high winds the area experienced during that time (over sixty miles-per-hour) but left unanswered is the question of whether the fence lean could have been cured from the beginning if the Respondent had properly installed the fence nails. Also left unanswered is why, after the Respondent's work to remedy the fence lean, the fence gate no longer opens properly, and the gaps in the fence due to poor installation of the fence nails still remain. Based on the preponderance of the evidence and the Respondent's admission of improper nail installation, I must find the fence gaps and the improper working gate are due not to the wood used in the construction of the fence, but are a result of the Respondent's unworkmanlike and inadequate 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. 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:

(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).

However, none of the three regulatory formulas is appropriate in this case. While COMAR 09.08.03.03B(3)(c) seems appropriate in this instance due to the Claimant's solicitation of a bid from Beltway, the Beltway estimate gives an \$8,300.00 overall estimate for repairing the Claimant's back deck, as well as replacing the Claimant's fence gate. The Beltway estimate, however, does not itemize these repairs. Given that I cannot find that the Respondent performed work resulting in actual loss to the Claimant with respect to her back deck, I also cannot parse Beltway's estimate for the purposes of applying the formula described in COMAR 09.08.03.03B(3)(c). The formula described in COMAR 09.08.03.03B(3)(a) is inappropriate because the Respondent did not abandon the work, and the formula described in COMAR 09.08.03.03B(3)(b) is inappropriate both because the Claimant has solicited a bid from another contractor and because there is no itemization of the value of the materials and services provided by the Respondent pursuant to the Contract.

Accordingly, I shall apply a unique formula to measure the Claimant's actual loss. The Claimant made a claim for \$5,500.00 to the Fund for the alleged poor workmanship related to Respondent's work on the back deck, the fence, and the staining for the front and back deck. She testified at the hearing that the itemization of the claim was as follows, pursuant to the verbal contract she had with the Respondent: \$3,000.00 for work on the back deck; \$1,000.00 for the fence; and \$1,500.00 for the staining of the front and back deck. At the hearing, the Claimant amended her claim to subtract the \$1,500.00 for the staining of the decks, indicating she could not allege anything wrong with the Respondent's work related to the staining of the decks. That leaves a total claim to the Fund of \$4,000.00.

Simply stated, it is undisputed in this case that the portion of the Contract for the replacement of the Claimant's fence was \$1,000.00. As the Respondent's work on the fence was wholly inadequate, leaving a leaning fence with significant gaps and a non-working gate, I find the Claimant received no value from the \$1,000.00 she paid for the work on the fence and deem the Claimant's actual loss under the contract to be \$1,000.00. I cannot find any more than this amount, in particular in relation to the \$3,000.00 claimed for the Respondent's work on the back deck, because I did not find that work to be unworkmanlike, inadequate or incomplete.

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 is less than the amount paid to the Respondent and less than \$20,000.00. Therefore, the Claimant is entitled recover her actual loss of \$1,000.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$1,000.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015). I further conclude that the Claimant is entitled to recover \$1,000.00 from the Fund.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$1,000.00; 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;⁵ and

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

January 24, 2020
Date Decision Issued

SWT/dlm
#184003

CONFIDENTIAL

Stephen W. Thibodeau
Administrative Law Judge

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

PROPOSED ORDER

WHEREFORE, this 3rd day of March, 2020, 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**

