IN THE MATTER OF THE CLAIM	*	**BEFORE JOY L. PHILLIPS,**
OF MARGARET BONACORDA,	*	**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 LESTER CALDERON,	*	
T/A NATURAL LANDSCAPING OR	*	**OAH No.: LABOR-HIC-02-19-29002**
NATURAL CONSTRUCTION, INC.,	*	**MHIC No.: 19 (90) 164**
RESPONDENT	*	

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PROPOSED DECISION

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STATEMENT OF THE CASE

On March 22, 2019, Margaret Bonacorda (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 $3,400.00 in actual losses allegedly suffered as a result of a home improvement contract with Lester Calderon, trading as Natural Landscaping or Natural Construction, Inc. (Respondent). Md. Code Ann.,

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

Bus. Reg. §§ 8-401 through 8-411 (2015).[2] On August 30, 2019, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

Hearings that were scheduled by the OAH to take place on April 23, 2020 and July 30, 2020 were postponed. I held a hearing on December 1, 2020 via a video conferencing platform. Bus. Reg. § 8-407(e). Justin S. Dunbar, Assistant Attorney General, Department, represented the Fund. The Claimant represented herself. The Respondent represented himself.

The contested case provisions of the Administrative Procedure Act (APA), 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 - Contract, August 9, 2017
Clmt. Ex. 2 - Text chains between Claimant, Respondent, and MHIC, September – October 2018, February 2019, and May 2019
Clmt. Ex. 3 - Estimate from Denchfield Landscape & Nursery, with photographs, September 25-26, 2019, and email cover sheet, emailed December 1, 2020 to OAH
Clmt. Ex. 4 - Photographs and email cover sheet, emailed December 1, 2020 to OAH

The Respondent submitted no documents to be admitted into evidence.

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

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

Fund Ex. 1 - Notice of Remote Hearing, September 4, 2020
Fund Ex. 2 - Hearing Order, August 27, 2019
Fund Ex. 3 - Letter from MHIC to Respondent, April 1, 2019, with Claim, March 19, 2019
Fund Ex. 4 - Respondent's Licensing History, printed November 25, 2020

Testimony

The Claimant testified and did not present other witnesses.

The Respondent testified and did not present other witnesses.

The Fund presented no 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 105545.

2. On August 9, 2017, the Claimant and the Respondent entered into a contract (Contract) to replace an outside stairwell retaining wall at the Claimant's home, which was built in the 1950s. As part of the job, the Respondent was to install a french drain behind the wall. The Respondent included in the Contract that he would have to remove some boards on the adjacent deck to create access space to dig out the old wall and build the new one.

3. The original agreed-upon Contract price was $6,500.00.

4. The Claimant paid the Respondent in full.

5. The Respondent did replace the outside stairwell retaining wall. He did not remove any decking boards when he built the wall.

6. The work was done in August 2017.

7. By May 2018, mud was washing into the stairwell from an open drainpipe built into the wall. Mud, gravel, and debris filled up the stairwell base. The mud entered the

Claimant's basement under the outside door. Gravel from under the wall began to wash out from under the wall.

8. The Claimant continues to use sandbags and duct tape to try to prevent water and mud incursion into her basement.

9. The Respondent agreed in May 2018 and again in September 2018 to go to the Claimant's home and assess and repair the damage. The Respondent never repaired the damage or addressed the problems reported to him.

10. Denchfield Landscape & Nursery will remove the deck boards to access the work area and replace those boards as needed, excavate the area of collapsed dirt, install a Mira drain board, install gravel backfill, and power wash and unclog the stairwell drain from the previous dirt wash out for $3,510.00.

11. The Claimant has no legal impediment to being awarded compensation for an actual loss.

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's home has an outside stairwell leading to her basement. There is a wooden deck near the stairwell with a door leading to the first floor of the home. A retaining wall holds back the ground from the stairwell. As the home was built in the 1950s, the wall was in need of repair by 2017, when the Claimant hired the Respondent to replace the wall.

As part of the work, the Respondent contracted to remove part of the deck in order to access the old wall. He would then remove the wall, install a french drain, install a pipe that would allow water to drip out into the stairwell and go down through a drain in the bottom of the stairwell, and replace any decking boards required to make the deck whole. It should go without saying that once the work was done, muddy water would not enter the Claimant's basement due to improper drainage and gravel would not wash away from under or behind the retaining wall.

The Respondent never met the Claimant prior to the hearing. He said the employee who entered into the Contract with the Claimant and who interacted with the Claimant has since been fired. The Respondent believes the problem the Claimant is experiencing is caused not by the work he performed, but by the sand under the deck which is washing away in conjunction with a sinkhole that opened naturally. He argued that his work was up to industry standards, but that nature is subverting his work. The Respondent testified that he did install a french drain. He said the gravel he installed will keep washing away because of the sinkhole. He conceded that he did not remove any deck boards when replacing the wall. He said the deck was so old he would have had to replace the entire deck, although the Claimant disputed this, testifying the

deck was built in 2000 and thus, was only seventeen years old at the time the Respondent replaced the retaining wall.

The Respondent said that when he was doing the work, he tried to regrade the ground to get water to move away from the house; but to prevent incursion of water into the house, the entire lawn would need to be elevated. He said he hand-dug the jobsite because there was not room to use machines. He did not explain how he dug under the deck which, he said, sits only about 8" above the ground, or why the Contract provided for removing deck boards, but he did not remove them in doing the work.

The Claimant's photographs show the incursion of water and mud into the stairwell and into the basement of her home. It is impossible to see from the photographs whether a french drain was installed under or behind the new wall, but the estimate obtained by the Claimant includes the installation of a "Mira drain board against foundation wall and filter fabric." (Clmt. Ex. 3). The contractor who provided that estimate, Eric Denchfield, also indicated he would have to remove deck boards to access the work area, just as the Respondent said he would have to do, but did not.[3] The estimate from Mr. Denchfield does not mention a sinkhole, but the photographs that accompanied his estimate show a large hole opening up under the deck.

No expert testified to explain the reason for the mud wash-out or the reason for the failure of the drain to do its job. I do not have the benefit of knowing if there is, in fact, a sinkhole or whether the Respondent's work on the Claimant's wall is what caused the sand and mud to wash out. I do not have testimony or other evidence from an expert on that subject. What I do have, however, is the Respondent's concession that he did not perform the work according to the Contract because he did not pull back the decking boards to give himself room to work. Without

[3] Although there was no evidence that Mr. Denchfield is a licensed home improvement contractor, the Fund stipulated that he is.

doing that, I cannot see how he would have been able to install the french drain or ensure that the ground behind the wall was stable enough to withstand storms. If the french drain was installed as the Respondent testified, there should not be so much water and mud pouring into the stairwell, regardless of whether there is sinkhole.

I must also consider the Respondent's failure to return to the Claimant's home to inspect her allegations of mud and gravel incursion into her home and repair his work, after he told the Claimant on two occasions that he would. I cannot give his denials of responsibility any weight when there is no evidence he even returned to her home to at least assess the problem.

For these reasons, I find the Respondent performed unworkmanlike and inadequate home improvements. 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.

The Respondent performed work under the Contract, and the Claimant intends to retain 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 has proven an actual loss under this formula, as follows:

Amount paid by Claimant to Respondent	$6,500.00
Amount to repair Respondent's work	$3,510.00
Subtotal:	$10,010.00
Less Contract price	- $6,500.00
Actual Loss	$3,510.00

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 is less than the amount paid to the Respondent and less than $20,000.00.

However, in the Claim, the Claimant indicated her actual loss was $3,400.00, not the $3,510.00 that appears in Mr. Denchfield's estimate. The Claimant did not explain this discrepancy, but she did express confusion over the Claim form in an email she wrote to the MHIC on October 24, 2018. (Clmt. Ex. 2). The MHIC responded via email on October 25, 2018 that although the math portion of the Claim was not important, it was "MOST important" that she fill out lines 1 (date of original contract), 3 (amount of original contract), 6 (amount paid to contractor), and 11 correctly. Line 11 is the reimbursement amount she was seeking, based on a "corrective repair estimate." (*Id.*). The Claimant wrote that the estimate amount was $3,400.00 and that was her claim amount. (Fund Ex. 3).

[illegible]

I find that the Claimant's reimbursement is limited to $3,400.00, the amount she requested in the Claim, because it is the only amount of which the Respondent was notified and she never amended the Claim. The APA provides that "[a]n agency shall give reasonable notice of the agency's action." Md. Code Ann., State Gov't § 10-207 (2014). The Court of Appeals has often reiterated that "'[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Barrie-Peter Pan Sch., Inc. v. Cudmore*, 261 Md. 408, 420-21 (1971) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950)). Accordingly, pursuant to principles of due process and basic fairness to the Respondent, the Claimant should not be awarded more than she requested in the original Claim.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of $3,510.00 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 $3,400.00 from the Fund.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant $3,400.00; 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;[4] and

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

CONFIDENTIAL

January 28, 2021
Date Decision Issued

Joy L. Phillips
Administrative Law Judge

JLP/kdp
#190172

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

PROPOSED ORDER

WHEREFORE, this 31st 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