IN THE MATTER OF THE CLAIM	*	**BEFORE WILLIAM F. BURNHAM,**
OF MANUEL CABRAL,	*	**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 JASON ZABEC,	*	
T/A INNOVATIVE ELEMENTS, INC.,	*	**OAH No.: LABOR-HIC-02-21-02358**
RESPONDENT	*	**MHIC No.: 19 (05) 801**

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PROPOSED DECISION

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STATEMENT OF THE CASE

On November 18, 2019, Manuel Cabral (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 $16,216.36.[1] in actual losses allegedly suffered as a result of a home improvement contract with Jason Zabec, trading as Innovative Elements, Inc. (Respondent).[2] Md. Code Ann., Bus. Reg.

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[1] Although the Claimant's claim form indicates a loss of $16,216.36, exhibits offered by the Claimant show a different amount paid to finish the contractor's work.
[2] Although the Claimant's claim references Val Seifert, Jason Zabec traded as Innovative Elements, Inc.

§§ 8-401 through 8-411 (2015).[3] On January 27, 2021, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On April 5, 2021, I conducted a remote hearing via the Webex video conferencing platform. Code of Maryland Regulations (COMAR) 28.02.01.20B(1)(b); Md. Code Ann., Bus. Reg. § 8-407(e). Andrew Brouwer, Assistant Attorney General, Department, represented the Fund. The Claimant represented himself. Neither the Respondent nor anyone authorized to represent the Respondent attended the hearing, and, as described more fully below, I proceeded with the hearing in his absence. COMAR 28.02.01.23A.

I waited over fifteen minutes for the Respondent or the Respondent's representative to appear. Applicable law permits me to proceed with a hearing in a party's absence if that party fails to attend after receiving proper notice. *Id.* On February 25, 2021, the OAH provided a Notice of Hearing (Notice) to the Respondent by United States mail to the Respondent's address on record with the MHIC. COMAR 09.08.03.03A(2); COMAR 28.02.01.05C(1). The Notice stated that a hearing was scheduled for April 5, 2021, at 9:30 a.m., via videoconference. The Notice further advised the Respondent that failure to attend the hearing might result in "a decision against you."

The United States Postal Service did not return the Notice to the OAH. The Respondent did not notify the OAH of any change of mailing address.[4] COMAR 28.02.01.03E. The Respondent made no request for postponement prior to the date of the hearing. COMAR 28.02.01.16. I determined that the Respondent received proper notice, and I proceeded to hear the captioned matter. COMAR 28.02.01.05A, C.

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

[4] The MHIC became aware of an alternate address and provided it to the OAH on April 1, 2021. That same day, another notice was sent to the alternate address and was not returned to the OAH for any reason.

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; 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 Description of Complaint, undated[5]

Clmt. Ex. 2 Photographs of the Claimant's property, May 1, 2018

Clmt. Ex. 3 Certified letter from the Claimant to the Respondent, April 27, 2018

Clmt. Ex. 4 Certified letter from the Claimant to the Respondent, May 14, 2018

Clmt. Ex. 5 Home Improvement Claim Form, October 29, 2019

Clmt. Ex. 6 Invoice 1155 from Hammer Time Home Improvement, LLC (Hammer Time), due September 9, 2018

Clmt. Ex. 7 Chart of Amount Paid for Completion of Work and attached photocopies of checks to Hammer Time, various dates[6]

Clmt. Ex. 8 Hammer Time Invoice, August 8, 2018

The Respondent did not offer any exhibits into evidence.

[5] The Claimant forwarded exhibits to the OAH and the Fund after the hearing and I renumbered them for clarity. Although the Claimant stated on the record that Exhibit 1 was two pages, only one page was submitted.
[6] I did not admit checks to other contractors.

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

MHIC Ex. 1 Hearing Order, January 20, 2021

MHIC Ex. 2 Notice of remote hearing, February 25, 2021

MHIC Ex. 3 Letter to the Respondent from Joseph Tunney, November 22, 2019, with attached Claim, dated October 29, 2019

MHIC Ex. 4 Respondent's MHIC Licensure Information, March 30, 2021

MHIC Ex. 5 Affidavit of Thomas Marr, IV, April 2, 2021

MHIC Ex. 6 Business Express Entity Search, Innovative Elements, Inc., April 5, 2021; Corporate Charter Approval Sheet, Innovative Elements, Inc., March 2, 2020; Articles of Revival, Innovative Elements, Inc., March 2, 2020.

Testimony

The Claimant testified and presented the testimony of Diane Cabral, his wife.

The Respondent did not present the testimony of any witnesses.

The Fund did not present the testimony of 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 4885308.

2. At all relevant times, the Claimant owned and resided in a home located in Baltimore, Maryland.

3. On November 8, 2017, the Claimant and the Respondent entered into a contract (Contract) for the remodel of the entire second floor of the Claimant's two-story colonial residence (Property), including three bedrooms, one bathroom, a connecting hallway, a large walk-in closet, and some stairs. Danny Collins, Senior Customer Manager, signed the Contract on behalf of the Respondent.

4. The Claimant communicated with the Respondent and his workers principally through texting and telephone calls. Val Seifert and Felipe Alonso were the Claimant's primary contacts.

5. The Contract required the Respondent, among other things, to demolish the existing areas down to the studs and add insulation. The Respondent was to remove plaster and replace it with drywall including joint compound and painting. The Respondent was also to redo the electric and plumbing.

6. In the bathroom, the Respondent was to add a bathtub, a vanity, two medicine cabinets, a toilet, a double sink, a linen closet, and a tiled floor.

7. The original agreed-upon price of the Contract was $44,970.00. (*See* Clmt. Ex. 1)

8. Work began on January 23, 2018, and the Respondent did not return to the Property after March 27, 2018.

9. On November 8, 2017, the Claimant paid the Respondent a $14,000.00 deposit and paid an additional $17,000.00 on March 13, 2018. (*See* Clmt. Ex. 1)

10. On April 5, 2018, the Claimant received a text from Mr. Alonso indicating that work was halted because no dumpster was ordered to remove materials and that the Respondent stopped paying his balances at Home Depot, so no materials could be picked up.

11. Following Mr. Alonso's text, the Claimant tried to reach Mr. Siefert by text and phone but was unsuccessful.

12. On April 13, 2018, Mr. Siefert texted the Claimant that the Respondent would meet him at his home on April 17, 2018, to discuss the project. The Respondent did not come.

13. On April 17, 2018, another contractor came to the property to measure for doors and trim. When the Claimant asked Mr. Siefert why the Respondent failed to come and why the

new contractor was there, Mr. Siefert told the Claimant that the new contractor could get the work completed faster.

14. When April 20, 2018 came, and no more work was completed, the Claimant contacted Mr. Siefert for an update. On April 23, 2018, Mr. Siefert texted the Claimant that workers were scheduled to come the next day.

15. On April 24, 2018, the Claimant texted Mr. Siefert because no workers had arrived, and it was 10:30 a.m. Afterwards, the contractor who measured the doors and trim called the Claimant and indicated his crew would arrive sometime in the afternoon. The Claimant explained no one would be home and the contractor told the Claimant he would call later in the day, but the contractor never called.

16. Between April 24 and April 27, 2018, the Claimant texted Mr. Siefert to inquire about work on the project.

17. On April 27, 2018, the Claimant sent a certified letter to the Respondent summarizing work that was completed and incomplete and demanding the Respondent complete the Contract and respond to the letter within one week.

18. On May 14, 2018, the Claimant sent another certified letter to the Respondent terminating the Contract and demanding the Respondent return $17,000.00.

19. On August 10, 2018, the Claimant entered into a contract with Hammer Time to complete the Contract, and to do additional work not contemplated by the Contract (Hammer Time Contract). The agreed-upon price of the Hammer Time Contract was $24,557.00.

20. The Claimant paid Hammer Time $16,371.33 to complete the Contract.

21. The Claimant paid Hammer Time additional money to repair and replace flooring that was not part of the Contract.

22. On April 17, 2019, the Claimant filed a claim against the Respondent with the MHIC.

DISCUSSION

Legal Framework

The Maryland General Assembly created the Fund to provide an available pool of money from which homeowners could seek relief for losses sustained at the hands of incompetent or unscrupulous home improvement contractors. *See* Md. Code Ann., Bus. Reg. §§ 8-401 to 8-411. A homeowner is authorized to "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 statutes governing the Fund define "actual loss" as "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.

At a hearing on the claim, 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). "[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)).

For the reasons explained below, I find that the Claimant has proven eligibility for compensation from the Fund.

Statutory Eligibility

The evidence in this case establishes there are no impediments barring the Claimant from recovering from the Fund. The home improvement work was performed on the Claimant's

residence in Maryland. The Claimant is not a relative, employee, officer, or partner of the Respondent; the Claimant is not related to any of the Respondent's employees, officers, or partners. The Claimant did not reject any efforts by the Respondent to resolve the claim, as the Respondent ultimately abandoned the project and made no such efforts. The Contract between the Claimant and the Respondent does not contain an arbitration provision. The Claimant timely filed his Claim with the MHIC on November 18, 2019. Finally, the Claimant has not taken any other legal action to recover monies. Md. Code Ann., Bus. Reg. §§ 8-101(g)(3)(i), 8-405(c), (d), (f), and (g), 8-408(b)(1).

The Respondent Performed Incomplete Home Improvement

The Respondent performed incomplete home improvement. The record demonstrates that the Respondent stopped work on the Contract in March 2018 and ceased all communication with the Claimant in April 2018. The photographs taken of the Property and the project on May 1, 2018 document numerous incomplete items, and construction materials strewn about the Property. *See* Clmt. Ex. 2. Accordingly, I find the Respondent abandoned the Contract and the Claimant hired another contractor to complete the Contract.

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

The Amount of the Claimant's Actual Loss

As discussed above, the Respondent abandoned the Contract after performing some work and the Claimant hired another contractor to complete the project. 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). Additionally, the Commission may not award from the Fund an amount in excess of the amount paid by or on behalf of the claimant to the contractor against whom the claim is filed." COMAR 09.08.03.03B(3)(c) and (4).

The Claimant paid the Respondent $31,000.00 pursuant to the Contract. (*See* Clmt. Exs. 1 and 7.). The Claimant paid Hammer Time $16,371.33 to complete the Contract. In addition, Mrs. Cabral testified that the Claimant paid "about $8,000.00" in order to repair floors the Respondent damaged. That sum, according to Mrs. Cabral, included the replacement of undamaged floors that the Claimant wanted to replace in order to match the damaged floors. The Claimant's exhibits contain checks that corroborate the testimony. Check numbers 1856 and 1868 are for $1,000.00 and $8,040.97, respectively. Clmt. Ex. 7. There is also check number 1842 for $16,371.33 and Mrs. Cabral testified that amount was paid to Hammer Time for completion of the Contract. Although her testimony was somewhat confusing regarding amounts paid to Hammer Time, I find Mrs. Cabral's testimony credible given the corroborating exhibits I received after the hearing. The amounts paid to Hammer Time for floor repair and

replacement are consequential damages and the Fund may not reimburse the Claimant for those amounts. *See* Md. Code Ann., Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1).

Here, the Claimant paid the Respondent $31,000.00, which is then added to the amount the Claimant paid another contractor to complete the work, $16,371.33, resulting in $47,371.33. The original contract price of $44,970.00 is then subtracted from this total, resulting in an actual loss of $2,401.33.

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 $20,000.00. Therefore, the Claimant is entitled to recover his actual loss of $2,401.33.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of $2,401.33 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2020); COMAR 09.08.03.03B(3)(a). I further conclude that the Claimant is entitled to recover that amount from the Fund.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant $2,401.33; 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;[7] and

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

June 11, 2021
Date Decision Issued

William F. Burnham
William F. Burnham
Administrative Law Judge

WFB/at
#192602

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

PROPOSED ORDER

WHEREFORE, this 15th day of September, 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.

Michael Shilling

Michael Shilling
Panel B
MARYLAND HOME IMPROVEMENT COMMISSION