

IN THE MATTER OF THE CLAIM

*

BEFORE JOHN T. HENDERSON, JR.

OF ANITA SMITH,

*

ADMINISTRATIVE LAW JUDGE

CLAIMANT

*

THE MARYLAND OFFICE

AGAINST THE MARYLAND HOME

*

OF ADMINISTRATIVE HEARINGS

IMPROVEMENT GUARANTY FUND

*

FOR THE ALLEGED ACTS OR

*

OMISSIONS OF

*

BRYAN JONES, T/A

*

BOJ & SONS CONSTRUCTION,

*

OAH No.: LABOR-HIC-02-23-01537

LLC,

*

MHIC No.: 21(75)1114

RESPONDENT

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PROPOSED DECISION

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STATEMENT OF THE CASE

On March 24, 2022, Anita Smith (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) under the jurisdiction of the Department of Labor (Department), for the reimbursement of \$20,000.00 for actual losses allegedly suffered because of a home improvement contract with Bryan Jones, t/a BOJ & Son's Construction, LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015 &

Supp. 2022).¹ On January 17, 2023, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On February 2, 2023, the OAH mailed a notice of the hearing to the Respondent by certified and regular mail to his address of record on file with the MHIC. Md. Code Ann., Bus. Reg. § 8-312(d) (2015).² The notice advised the Respondent of the time, place, and date of the hearing. On March 8, 2023, the United States Postal Service (USPS) returned the Notice sent by certified mail as being unclaimed and unable to forward. The Notice sent by regular mail was not returned to the OAH by the USPS as being undeliverable. I determined there was adequate notice of the hearing provided to the Respondent.³

On March 23, 2023, I held a hearing at the OAH in Rockville, Maryland. Bus. Reg. §§ 8-407(a), 8-312; Code of Maryland Regulations (COMAR); COMAR 28.02.01.20A. The Claimant appeared and was represented by Timothy Moorehead, Esquire. The Respondent did not appear. Catherine Villareale, Assistant Attorney General for the Department, represented the Fund. After waiting fifteen minutes for the Respondent to appear, I proceeded in the Respondent's absence, having found he failed to appear after receiving proper notice.

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 (2021); COMAR 09.01.03; and COMAR 28.02.01.

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

² "The hearing notice to be given to the person shall be sent at least 10 days before the hearing by certified mail to the business address of the licensee on record with the Commission." Md. Code Ann., Bus. Reg. § 8-312(d) (2015).

³ According to *Bock v. Insurance Commissioner*, 84 Md. App. 724, 733-34 (1990), which addresses the "mailbox rule" in this State, there is a presumption of receipt of a properly mailed letter.

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 into evidence exhibits offered by the Claimant, as follows:

- Cl. Ex. 1: Contract between the Claimant and the Respondent, February 1, 2020 (pp. 1-2).
- Cl. Ex. 2: Check number 3071 from the Claimant to the Respondent in the sum of \$10,000.00, February 5, 2020; check number 3073, from the Claimant to the Respondent, in the sum of \$5,000.00, February 27, 2020; check number 3074, from the Claimant to the Respondent, in the sum of \$4,000.00, February 26, 2020 (pp. 3-5)
- Cl. Ex. 3: Twelve photographs of home improvement work, taken by the Claimant's daughter in October 2020 (pp. 6-17)
- Cl. Ex. 4: Claimant's Supplemental Documentation for Remodel Project to include Photographs taken by Claimant's daughter in October 2020, text messages and Claimants narrative (pp. 22-35)
- Cl. Ex. 5: Claimant's narrative, September 25, 2020; text messages between Claimant and Respondent, September 28, 2020 through October 9, 2020; estimate/proposal for new roof from Beltway Services, Inc., October 19, 2020 (pp. 36-39; p. 86)
- Cl. Ex. 6: Proposal from Casey's Concepts & Designs, LLC, (Casey's) March 11, 2022 (pp. 87-89)
- Cl. Ex. 7: Invoice from Ecker's Plumbing, LLC, (Ecker's) September 27, 2021 (p. 93)
- Cl. Ex. 8: Proposal from Green Clean Restoration, for Microbial Treatment, undated (pp. 94-96)
- Cl. Ex. 9: Claimant's payment history for floors, March 19, 2021 through August 31, 2022; invoice from Yes Energy Management, February 18, 2021
- Cl. Ex. 10: Claimant's narrative, February 17, 2021 (p. 63-64); text messages between the Claimant and the Respondent, March 26, 2021 through April 18, 2021 (pp. 65-74)
- Cl. Ex. 11: Photographs of home improvement work, taken by Claimant's daughter in October, 2020 (pp. 75 - 85)
- Cl. Ex. 12: Invoice from All Tubs Solutions, February 9, 2023 (pp. 90 - 91)

I admitted into evidence exhibits offered by the Fund as follows:

- GF Ex. 1: Letter from the HIC to the Respondent, April 4, 2022; Claimant's Home Improvement Claim Form, received by the HIC, March 24, 2022
- GF Ex. 2: Hearing Order, January 6, 2023
- GF Ex. 3: OAH Notice of Hearing, February 15, 2023
- GF Ex. 4: Department of Labor licensing history for Respondent, March 14, 2023 (6 pp.)
- GF Ex. 5: Affidavit of Charles Corbin, March 15, 2023; Respondent's driving Record from the Maryland Motor Vehicle Administration, January 23, 2023
- GF Ex. 6: Letter from the Respondent, not addressed, July 27, 2021

Testimony

The Claimant testified on her behalf, and she also presented the testimony of Deshawn Keyser (the Claimant's son-in-law). 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 general contractor's license number 01-18128 and 05-137602, trading as BOJ & Sons, LLC.
2. The Claimant is not related to the Respondent.
3. The Claimant's property subject to this matter is located in Baltimore, Maryland on Darmouth Avenue (the Property). It is her primary residence.
4. The Claimant has not filed other claims against the Respondent outside of these proceedings.
5. The Agreement between the Claimant and the Respondent did not provide for an arbitration proceeding.
6. In January 2020, the Claimant and the Respondent's representative, Adam Sharretts, met at the Property, where a walk through was conducted. Mr. Sharretts took notes on

what the Claimant wanted in terms of remodeling. Subsequently, the Respondent emailed a contract to the Claimant.

7. On February 1, 2020, the Claimant and the Respondent entered into a contract (Contract) to construct and remodel a second floor bathroom (for \$8,500.00) and remodel the basement at the property (for \$23,000.00). (Cl. Ex. 1.)

8. The total contract price was \$31,500.00. A \$10,000.00 deposit was due on February 5, 2020. A second \$10,000.00 draw was due at a scheduled inspection. A third \$5,000.00 draw was due at a second scheduled inspection. The balance of \$5,000.000 was due at the completion of the project.

9. On February 5, 2020, the Claimant paid the Respondent the \$10,000.00 deposit so work could begin on the project.

10. The Respondent estimated to the Claimant that the project would take eight weeks to six months to complete.

11. On February 22, 2020, and before the project began, the Respondent requested additional money from the Claimant to help the Respondent's business. In exchange, the Respondent promised to reduce the total contract price to \$24,000.00.

12. On February 26, 2020, the Claimant paid the Respondent \$4,000.00. On February 27, 2020, the Claimant paid the Respondent \$5,000.00. Both payments were paid to reduce the original contract price, in consideration of the Respondent's request of February 22, 2020.

13. On or about March 22, 2020, the Claimant telephoned the Respondent to determine when the home improvement project would begin.

14. The Respondent informed the Claimant that he planned to begin the project in April 2020. The Respondent did not begin the project in April 2020.

15. On July 22, 2020, after many delays and excuses provided by the Respondent related to the COVID-19 pandemic, the Claimant notified the Respondent by text that she no longer wanted him to proceed with the remodel project and she requested a full refund.

16. Despite the Claimant's notification to the Respondent to cease work on the project, she changed her mind and allowed the Respondent to continue with the project.

17. Due to the nature of the work to be performed, the Claimant moved from the Property along with her pregnant daughter and son-in law. She signed a six-month lease in August to provide accommodations for her family while the Respondent performed work on the project. The Claimant moved from the home the second week of September 2020.

18. In August and September 2020, the Respondent sent the Claimant several text messages concerning the project but did not perform any work.

19. After an eight-month delay, the Respondent did begin work on the project in October 2020 when he started demolition of the second floor bathroom and work on the basement.

20. When the Respondent began work in October 2020, his workers broke a water valve while demolishing the second-floor bathroom. This resulted in flooding and water damage from the second floor to the basement flooring.

21. The Respondent used a bucket in the basement to collect the draining water from the second floor and did not turn off the main water shut off valve.

22. The Claimant telephoned the county government to have the water turned off from the outside.

23. The Claimant's basement flooring was damaged as a result of the flooding. The Respondent did not satisfactorily replace or repair the water damaged flooring in the basement.

24. On February 17, 2021, the Claimant, the Respondent and Mr. Keyser, conducted a walk-through of the home improvement project as determined completed by the Respondent.

25. On March 26, 2021, the Claimant notified the Respondent by text to advise that she was delayed in responding to him after the February 17, 2021 walk through, due to her daughter giving birth six weeks prematurely. She advised the Respondent that she had a list of issues that needed to be corrected, some of which are identified in summary, as follows:

- The valence in the living and dining room area was not constructed properly
- Workers painted over vent covers and electrical outlet covers
- Workers removed the door stop for front door and did not replace it.
- An electrical outlet in the kitchen was not working despite being included in earlier repair issues.
- The electrical work in the basement was not completed. Electrical wires were exposed and not secured to either the ceiling or joists.
- The second-floor bathroom window was poorly constructed.
- The second-floor bathroom shower had inadequate water pressure. The water was flowing from the bath spigot and the showerhead simultaneously.
- The bathroom sink was draining very slow.
- The basement bathroom door came off the hinges because the screws were too short.
- The outside front water spout was not working.
- The second-floor bathtub faucet was installed crooked and not completely caulked
- The sanding and painting of the second floor bathroom floor boards behind the toilet were performed poorly.

26. In March 2021, the Claimant paid Boulevard Flooring Company a total of \$3,544.00, through the *Cash App* internet payment portal. (Payments of \$1,257.00, \$1,087.00 and \$1,200.00 were made to repair and replace the basement flooring damaged with the broken water pipe.) (Cl. Ex. 9.)

27. In April 2021, at the Claimant's request, the Respondent sent workers back to the property to make repairs for two days and did not thereafter return to the property.

28. The Claimant moved back into the Property in April 2021.

29. On September 27, 2021, the Claimant paid Ecker's \$855.00 to repair the damaged pipes that leaked water into the basement from the second-floor bathroom.

30. The Claimant paid a total of \$4,994.00 to repair the Respondent's work.⁴

31. On March 11, 2022, the Claimant received a proposal from Casey's who proposed to demolish the unworkmanlike work of the Respondent and reconstruct the intended basement home improvement.

32. The cost of Casey's proposal is \$21,850.00.

33. The Claimant did not authorize Casey's to begin the home improvement as she did not have the money for the project.

DISCUSSION

The Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Bus. Reg. § 8-407(e)(1); State Gov't § 10-217; 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 Cnty. 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) (Supp. 2022); *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.

By statute, certain claimants are excluded from recovering from the Fund altogether. In this case, there are no such statutory impediments to the Claimant's recovery. The claim was

⁴ The Claimant received a proposal from Green Clean Restoration in the sum of \$595.00 for mold remediation, which was not a service consistent with the Contract with the Respondent. (See. Cl. Ex. 8.) There was no evidence that the Claimant paid for the mold remediation service.

timely filed, there is no pending court claim for the same loss, and the Claimant did not recover the alleged losses from any other source. Bus. Reg §§ 8-405(g), 8-408(b)(1) (2015 & Supp. 2022). The Claimant resides in the home that is the subject of the claim and does not own more than three dwellings. *Id.* § 8-405(f)(2) (Supp. 2022). There was no arbitration agreement between the Claimant and the Respondent. *Id.* §§ 8-405(c), 8-408(b)(3) (2015 & Supp. 2022). The Claimant is not a relative, employee, officer, or partner of the Respondent, and is not related to any employee, officer, or partner of the Respondent. *Id.* § 8-405(f)(1) (Supp. 2022).

The Claimant did not unreasonably reject good faith efforts by the Respondent to resolve the claim. *Id.* § 8-405(d) (Supp. 2022). Rather, the Claimant requested the Respondent return to the project to make repairs, which the Respondent did for two days but then never returned. There is no competent evidence that the Respondent satisfactorily corrected or repaired its work.

The Respondent performed an unworkmanlike, inadequate, or incomplete home improvement. I thus find that the Claimant is eligible for compensation from the Fund.

According to the Claimant's testimony and admitted exhibits, the original Contract totaled \$31,000.00. On February 5, 2020, the Claimant paid the Respondent \$10,000.00 as the deposit for the Contract. On February 26 and 27, 2020, the Claimant paid the Respondent a total of \$9,000.00, to receive a reduced contract price of \$24,000.00. The Claimant paid the Respondent a total of \$19,000.00 as of February 27, 2020.

In September 2020, the Claimant leased, for six months, a residential property so she and her family could reside away from the Property and not interfere with the progress of the home improvement. The Respondent did not begin the home improvement project until October 2020, eight months from the date of the Contract.

Prior to the Claimant and her family moving temporarily from the Property, she lost confidence in the Respondent's ability to begin and complete the home improvement project.

On July 22, 2020, the Claimant notified the Respondent by text that she no longer required his services. She also requested a refund of the \$19,000.00 she paid the Respondent. Subsequently, the Claimant changed her mind and allowed the Respondent to continue with the project.

The evidence shows that the Respondent spent an unreasonable amount of time texting with the Claimant during August 2020 and September 2020 providing excuses why he had not begun work on the home improvement project. He blamed the COVID-19 pandemic, supply chain issues, and a governor's proclamation as his reasons he could not timely begin the project.

Finally, the Respondent began work on the home improvement in October 2020, however certain calamities occurred such as the workers broke a water valve while demolishing the second-floor bathroom, the overall workmanship resulted in poor construction, and electrical wires were exposed. After a walkthrough was conducted on February 17, 2021, the Claimant expressed to the Respondent on March 26, 2021, her dissatisfaction with the work performed. Her delay in communicating her dissatisfaction with the Respondent was due to her daughter giving birth prematurely, which required her attention.

The Claimant sent text messages to the Respondent detailing her concerns about the construction. In April 2021, the Respondent sent workers to the Property to make repairs over a two-day period. The Claimant and her family also moved back into the Property. Despite the Respondent's efforts to correct his workmanship, the Claimant had to pay a total of \$4,994.00 to other contractors to make additional repairs.

The Fund argues that the Claimant has met her burden of proof that she is entitled to an award from the Fund. According to the Fund, the Claimant proved that she suffered an actual monetary loss as a result of unworkmanlike, inadequate, or incomplete home improvement work performed by the Respondent. The Fund is convinced that due to the Respondent failing to

complete the agreed upon work, the evidence admitted tends to show by a preponderance that the Respondent's work was unworkmanlike, incomplete or inadequate.

I agree with the Fund. The evidence, by a preponderance, shows that the Respondent's work was unworkmanlike, inadequate and incomplete. The Respondent failed to satisfactorily correct and repair its poor work during the two days his workers were at the Property in April 2021.

The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. COMAR 09.08.03.03B(1). The MHIC's regulations offer three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3) sets forth the various formulas for determining an "actual loss." The appropriate formula is the following:

(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.

Using the formula in COMAR 09.08.03.03B(3)(c), the following calculations apply:

\$19,000.00	Payment made to the Respondent by the Claimants as deposit for the home improvement pursuant to the Amended Contract of February 1, 2020
\$ 3,544.00	The amount paid to Boulevard Flooring Company to repair, correct and complete the home improvement
\$ 855.00	The amount paid to Ecker's to repair, correct and complete the home improvement
<u>\$21,850.00</u>	The amount to be paid to Casey's to repair, correct and complete the home improvement
Total \$45,249.00	

Less \$24,000.00 The Original and Amended February 1, 2020 Contract
Price with the Respondent

\$21,249.00 Actual Loss

Effective July 1, 2022, a claimant's recovery is capped at \$30,000.00 for acts or omissions of one contractor, and a claimant may not recover more than the amount paid to the contractor against whom the claim is filed.⁵ Bus. Reg. § 8-405(e)(1), (5) (Supp. 2022); COMAR 09.08.03.03B(4). In this case, the Claimant's actual loss is more than the amount paid to the Respondent, but less than the statutory cap of \$30,000.00. Therefore, the Claimant's recovery is limited to the amount she paid to the Respondent, which was \$19,000.00.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained, and is entitled to recover from the Fund, an actual and compensable loss of \$19,000.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2022) COMAR 09.08.03.03B(3)(c).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$19,000.00; 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;⁶ and

⁵ On or after July 1, 2022, the increased cap is applicable to any claim regardless of when the home improvement contract was executed, the claim was filed, or the hearing was held. See *Landsman v. MHIC*, 154 Md. App. 241, 255 (2002) (explaining that the right to compensation from the Fund is a "creature of statute," these rights are subject to change at the "whim of the legislature," and "[a]mendments to such rights are not bound by the usual presumption against retrospective application").

⁶ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

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

June 20, 2023
Date Decision Issued

JTH/emh
#205780

John T. Henderson, Jr.
John T. Henderson, Jr.
Administrative Law Judge

PROPOSED ORDER

WHEREFORE, this 3rd day of August, 2023, 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***