IN THE MATTER OF THE CLAIM	*	**BEFORE ANN C. KEHINDE,**
OF ANDRE ISSAYANS,	*	**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 GLADIMIR FLORES	*	
AMAYA, T/A FLORES	*	**OAH No.: LABOR-HIC-02-21-20196**
LANDSCAPING & CONSTRUCTION,	*	**MHIC No.: 21 (75) 208**
LLC,	*	
RESPONDENT	*	

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PROPOSED DECISION

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STATEMENT OF THE CASE

On November 17, 2020, Andre Issayans (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 $1,085.10 in actual losses allegedly suffered as a result of a home improvement contract with Gladimir Flores Amaya, trading as Flores Landscaping & Construction, LLC (Respondent). Md. Code Ann.,

Bus. Reg. §§ 8-401 through 8-411 (2015).[1] On April 13, 2021, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on November 16, 2021, by the Webex videoconferencing platform (Webex). Bus. Reg. §§ 8-407(a), 8-312; Code of Maryland Regulations (COMAR) 28.02.01.20B. The Claimant represented himself. Nicholas Sokolow, Assistant Attorney General, Department, represented the Fund. The Respondent failed to appear for the hearing.

After waiting over twenty minutes for the Respondent or the Respondent's representative to appear, I proceeded with the hearing. Applicable law permits me to proceed with a hearing in a party's absence if that party fails to attend after receiving proper notice. COMAR 28.02.01.23A. On September 8, 2021, the OAH provided a Notice of Hearing (Notice) to the Respondent by standard and certified United States mail to the Respondent's address on record with the OAH. COMAR 09.08.03.03A(2); COMAR 28.02.01.05C(1). The Notice stated that a hearing was scheduled for November 16, 2021, at 10:00 a.m., at the OAH – Rockville, 40 West Gude Drive, Suite 235 Rockville, MD 20850. 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 certified or standard mail Notice to the OAH. The Respondent did not notify the OAH of any change of mailing address. COMAR 28.02.01.03E. The Respondent made no request for postponement prior to the date of the hearing. COMAR 28.02.01.16.

On November 9, 2021, I sent a letter to the parties advising them that I was converting the hearing on November 16, 2021, from an in-person hearing to a remote hearing using Webex. COMAR 28.02.01.20B. In the correspondence, I provided the name and contact information for

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

my administrative assistant. Finally, the correspondence was sent by first class mail as well as by electronic mail to the Respondent, and the regular mail was not returned by the United States Postal Service and the electronic mail was not returned as undeliverable. The Respondent did not contact my administrative assistant to advise that he was experiencing any difficulty entering the remote hearing. I determined that the Respondent received proper notice, and I proceeded to hear the captioned matter. COMAR 28.02.01.05A, C.

During the hearing, the parties requested that I leave the record open to submit additional exhibits and further closing arguments in writing. As stated during the hearing, I closed the record on December 7, 2021.

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; 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 Fund's behalf:

Fund Ex. 1 - Notice of Hearing, dated September 8, 2021

Fund Ex. 2 - MHIC Hearing Order, dated August 2, 2021

Fund Ex. 3 - Letter to the Respondent, dated December 15, 2020; MHIC Claim Form, dated November 12, 2020

Fund Ex. 4 - Licensing Record for the Respondent, printed January 8, 2021

Fund Ex. 5 - Affidavit of Charles Corbin, dated November 10, 2021

Fund Ex. 6 - Letter from Administrative Law Judge Ann C. Kehinde converting hearing to remote hearing, dated November 9, 2021

Fund Ex. 7 - Certification of David Finneran, Executive Director, MHIC, attesting to no licensing history or license for MEVM Construction, LLC[2]

I admitted the following exhibits on behalf of the Claimant:

Cl. Ex. 1 - Photograph of brick sidewalk

Cl. Ex. 2 - Photograph of brick sidewalk

Cl. Ex. 3 - Photograph of brick sidewalk meeting steps after repairs

Cl. Ex. 4 - Photograph (from cellphone) of materials and tools left by Respondent

Cl. Ex. 5 - Photograph of brick walk (edging) by Respondent

Cl. Ex. 6 - Photograph of brick walk meeting steps before repairs

Cl. Ex. 7 - Photograph of brick walk meeting steps before repairs (wider angle)

Cl. Ex. 8 - Photograph of shrubbery

Cl. Ex. 9 - Photograph (from cellphone) of drainage ditch and pipe

Cl. Ex. 10 - Photograph (from cellphone) of dirt and construction covered by tarp

Cl. Ex. 11 - Photograph (from cellphone) of brick walk by Respondent

Cl. Ex. 12 - Photograph (from cellphone) of Respondent's worker sorting bricks

Cl. Ex. 13 - Photograph (from cellphone) of edging of brick during repairs

Cl. Ex. 14 - Photograph (from cellphone) of edging of brick after repairs

Cl. Ex. 15 - Photograph (from cellphone) of brick after repairs

Cl. Ex. 16 - Email chain between the Respondent and the Claimant, July 17, 2020 to July 22, 2020; check #3100 paid by the Claimant to the Respondent, August 10, 2020, in the amount of $3,600.00; Invoice, MEVM Construction, LLC, November 5, 2020[3]

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[2] This exhibit was submitted by the MHIC on November 29, 2021, pursuant to my instructions during the hearing regarding leaving the record open until December 7, 2021.

[3] This exhibit was submitted by the Claimant on November 22, 2021, pursuant to my instructions during the hearing regarding leaving the record open until December 7, 2021. The Claimant also filed a written closing argument on

The Respondent did not appear to offer exhibits.

Testimony

The Claimant testified and did not present any other witnesses. The Fund did not present the testimony of any witnesses. The Respondent did not appear for the hearing.

PROPOSED FINDINGS OF FACT

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

1. The Respondent was an MHIC licensed home improvement contractor at the time of his contract with the Claimant.

2. In July 2020, the Claimant wanted improvements made to the outside of his house/property located in North Potomac, Maryland. After receiving estimates and talking with several contractors, he proposed having the Respondent start the first of three projects which involved demolishing an existing cement sidewalk and constructing a brick sidewalk from his paved driveway to the front steps of his house (also constructed of brick).

3. The Claimant and the Respondent went to look at a neighbor's brick sidewalk and the Claimant explained that he would like his brick sidewalk to look like and be designed like the neighbor's. The Respondent told the Claimant that he could install the brick sidewalk according to the Claimant's requested design. The Respondent and the Claimant also agreed that the Claimant would purchase ten lights and the Respondent would install five lights on each side of the brick sidewalk. The Respondent also agreed to mulch beds next to the sidewalk and the Claimant would take care of planting plants in the bed.

December 3, 2021; the MHIC noted that it would not be filing any written closing argument other than what was in the letter accompanying its exhibit #7.

4. The Respondent sent the Claimant a proposal to construct the brick sidewalk for $5,900.00. The Respondent also proposed to build a new retaining wall for two plant beds at a cost of $3,900.00. Those two projects totaled $9,800.00.[4]

5. The Claimant asked the Respondent if he would complete the two projects for $8,800.00. The Respondent agreed. The final cost of the brick sidewalk (with the $500.00 discount) was $5,400.00.

6. On August 10, 2020, the Claimant paid the Respondent $3,600.00, as a deposit on the brick sidewalk project.

7. After the Respondent's workers demolished the concrete and started laying the bricks over the new concrete, the Claimant could see that the pattern was not correct. The bricks were skewed. The Claimant asked the Respondent's workers to stop, and he contacted the Respondent.

8. The Respondent agreed to come look at the job. When he arrived, the Claimant showed the Respondent the work that was done and pointed out the problems with the way the workers were installing the bricks. The Respondent became upset and said that he always installed brick sidewalks in this manner and that the problem was with the Claimant's house and front steps.

9. The Claimant told the Respondent that the work was unsatisfactory and he wanted it corrected to look according to the agreed upon pattern. The Respondent told the Claimant that if he paid him $1,200.00 more, he would have the workers remove the bricks and start again. The Claimant told the Respondent that he did not agree to pay anything more to correct the job. The Respondent told the Claimant he did not want to work for the Claimant any further and left.

[4] The third proposal was for a deck at a cost of $7,350.00.

The Respondent left a pile of debris at the Claimant's house that he covered with a tarp. The Respondent came back another day and took his tools but never removed the pile of debris.

10. The Claimant emailed the Respondent and asked him to come back and correct the job. The Respondent did not respond.

11. In November 2020, the Claimant hired MEVM Construction, LLC (MEVM) to demolish what the Respondent installed and construct a brick sidewalk with a pattern similar to his neighbor's brick sidewalk. MEVM was unable to use the bricks installed by the Respondent because he had to use a jackhammer to remove the bricks which had been cemented to the concrete slab underneath. In the process of removing the bricks, most of them were destroyed or damaged to the point that they were unable to be reused.

12. The Claimant paid MEVM $2,385.10 to build the sidewalk. The Claimant removed the construction debris left by the Respondent. The Claimant bought and installed the lighting next to the sidewalk and took care of the planting beds.

13. The Respondent also installed a drain in the back of the Claimant's house that was part of the next project. However, instead of draining the water away from the house, it drained the water towards the Respondent's house.

14. MEVM was not, and is not, a licensed home improvement contractor in Maryland.

15. There is no barrier, such as familial or business relationship, that would prevent the Claimant from being reimbursed by the Fund.[5]

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

[5] *See* Bus. Reg. § 8-405(f)(1).

§ 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.

Certain claimants are excluded from recovering from the Fund altogether. In this regard, a claimant must prove that: (1) the claimant resides in the home as to which the claim is made, or owns no more than three dwelling places; (2) the claimant is not an employee, officer or partner of the contractor, or the spouse or other immediate relative of the contractor or the contractor's employees, officers or partners; (3) the work at issue did not involve new home construction; (4) the claimant did not unreasonably reject the contractor's good faith effort to resolve the claim; (5) the claimant complied with any contractual arbitration clause before seeking compensation from the Fund; (6) there is no pending claim for the same loss in any court of competent jurisdiction and the claimant did not recover for the actual loss from any source; and (7) the claimant filed the claim with the MHIC within three years of the date the claimant knew, or with reasonable diligence should have known, of the loss or damage. Md. Code Ann., Bus. Reg. §§ 8-405(c), (d), (f), and (g), 8-408(b)(1); Bus. Reg. § 8-101(g)(3)(i) (Supp. 2021).

The evidence in this case establishes there are no impediments barring the Claimant from recovering from the Fund. The home improvement work was to be performed on a residential property in Maryland in which the Claimant resides and did not involve new construction. 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. The oral contract between the Claimant and the Respondent does not contain an arbitration provision. Further, the Claimant has not taken any other legal action to recover financially for the same loss and the Claimant did not recover for the actual loss from any source. Finally, the Claimant timely filed the Claim with the MHIC on November 17, 2020. Bus. Reg. §§ 8-405(c), (d), (f), and (g), 8-408(b)(1); Bus. Reg. § 8-101(g)(3)(i) (2015 & Supp. 2021).

Nevertheless, the Fund asserts that an award should not be granted to the Claimant in this case because MEVM was not licensed by the MHIC. The MHIC argued:

> [A]lthough [the Claimant] has proved that the Contractor, [Respondent's] performance was unworkmanlike, he has failed to prove the cost to correct or complete the Contractor's work. While he has submitted a paid invoice from MEVM in an effort to prove the amount he paid to correct the work performed by [the Respondent], that invoice cannot be relied upon, because as noted above MEVM was not licensed at the time that it performed work at [the Claimant's] home.

(November 29, 2021 letter from Mr. Sokolow, AAG, accompanying GF Ex. 7).[6]

The Fund did not question the authenticity of the MEVM invoice or argue that it covered items that were outside the scope of the oral contract between the Claimant and the Respondent. I found the Claimant's testimony very credible. The Claimant testified that the Respondent removed bushes for him and was not going to charge him for this work but, the Claimant

[6] Although the Fund stipulated that the work was performed in an unworkmanlike manner, I also specifically conclude that the Respondent's work was unworkmanlike. The pictures clearly showed that the Respondent or his workers did not plan out the pattern of the brick before beginning to lay the bricks. As a result, the edges of the sidewalk did not have an ascetically pleasing border and the bricks were not even where the sidewalk met the existing brick steps. The difference between the photographs showing the work performed by the Respondent and the work performed by MEVM was clearly depicted in the pictures. Although the work performed by the Respondent may have been structurally sound, the agreement was that he would construct a brick sidewalk using a pattern of laying the bricks similar to what his neighbor's brick sidewalk looked like. The Respondent agreed to do this but did not follow the pattern and attempted to blame it on the Respondent's house and steps being "crooked."

testified, he believed that the Respondent should be compensated for removing the bushes and he figured in $200.00 for that work. As the Respondent did not appear for the hearing, I would have had no way of knowing that the Respondent removed the bushes for the Claimant if the Claimant had not volunteered this information. The Claimant's candor lends credibility to his testimony that the invoice from MEVM did not go beyond the work contemplated by the agreement between the Claimant and the Respondent; indeed, the Claimant performed some of the work himself (installing the lights and mulching the beds) but he did not expect to be reimbursed for that.

Although the Fund made the assertion that the MEVM invoice cannot be relied upon because MEVM was not licensed at the time it performed work at the Claimant's home, the Fund offered no authority—caselaw, statute, regulation, or written policy[7]—to support its position that an invoice from an unlicensed contractor cannot form the basis of proving the amount the Claimant had to pay to correct the Respondent's work.

The Maryland home improvement law mandates a licensing system requiring contractors to be licensed for the protection of the public. *Brzowski v. Md. Home Imp. Comm'n*, 114 Md. App. 615, 628 (1997) ("The Maryland Home Improvement Law is a regulatory statute enacted for the protection of the public."). Performing a home improvement in this State without being properly licensed by the MHIC is a criminal misdemeanor. Md. Code Ann., Bus. Reg. § 8-601. Accordingly, the courts, as a matter of public policy, will not enforce the rights of unlicensed

[7] To the extent that the Fund was arguing that it was against public policy to recognize the invoice of an unlicensed contractor, I recognize that "[i]n a contested case, the [OAH] is bound by any agency regulation, declaratory ruling, prior adjudication, or other settled, preexisting policy, to the same extent as the agency is or would have been bound if it were hearing the case." Md. Code Ann., State Gov't § 10-214 (2021). However, the Fund submitted no policy statement or evidence of such policy statement, and therefore, I am not bound by the Fund's unsupported assertion that the subsequent contractor must be licensed in order for the claimant to be reimbursed for his expenses in correcting the work of the licensed contractor. *Id.*; *see also Brzowski*, 114 Md. App. at 634 ("Administrative practice . . . is entitled to no weight when it is inconsistent with the statutory scheme.") (citations omitted).

contractors. More than a hundred years ago, in *Goldsmith v. Manufacturers Liability Insurance Company of New Jersey*, 132 Md. 283, 286 (1918), the Court of Appeals of Maryland held:

> [A] contract entered into by an unlicensed person, engaged in a trade, business, or profession required to be licensed, and made in the course of such trade, business, or profession, cannot be enforced by such person, if it appears that the *license* required by the statute *is*, in whole or in part, *for the protection of the public*, and to prevent improper persons from engaging in such trade, business, or profession.

(Emphasis added); *see Balt. St. Builders v. Stewart*, 186 Md. App. 684, 706 (2009) (unlicensed contractor cannot enforce a home improvement contract with a homeowner because such enforcement is against public policy); *Fosler v. Panoramic Design, Ltd.*, 376 Md. 118, 134 (2003) (homeowner can repudiate a contract made with a consultant if the consultant is performing a home improvement without a license).

The focus of these cases is limiting the legal rights of the unlicensed contractor and not the homeowner for whom the licensing system exists to protect. As the Claimant argued in his written closing, the Fund's position would frustrate the very purpose of the statutory and regulatory scheme—to create an accessible forum to compensate those harmed by the acts and omissions of licensed contractors. Any award made to the Claimant by the Fund must be reimbursed by the Respondent, should he ever wish to be relicensed. The only person who benefits by denying the Claimant an award that he is otherwise entitled to receive is the Respondent himself, who would be insulated from the financial consequences of his bad acts; this is inconsistent with the purpose of the statute and is in itself contrary to public policy because it nullifies the deterrent effects of the MHIC's regulatory scheme and does not require any accountability from the Respondent for his actions.

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). The 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 paid MEVM to 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).

Amount Claimant paid to Respondent:	$3,600.00
Amount Claimant paid to MEVM:	$2,385.10
Total	$5,985.10
Less original contract price	$5,400.00
Actual loss	$. 585.10

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 to recover his actual loss of $585.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss 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 $585.00 from the Fund.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant $585.00; 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;[8] and

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

Ann C. Kehinde

March 7, 2022
Date Decision Issued

Ann C. Kehinde
Administrative Law Judge

ACK/kkc
#196918

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

PROPOSED ORDER

WHEREFORE, this 23rd day of May, 2022, 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.

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Heather Connellee
Panel B
MARYLAND HOME IMPROVEMENT COMMISSION