

IN THE MATTER OF THE CLAIM	* BEFORE JENNIFER L. GRESOCK,
OF ANTHONY DEARING,	* 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 MARIO ARRIAGA,	*
T/A MAJESTIC HARDSCAPES	* OAH No.: LABOR-HIC-02-23-31806
CONTRACTING, LLC,	* MHIC No.: 23 (75) 1069
RESPONDENT	

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On July 18, 2023, Anthony Dearing (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)¹ Guaranty Fund (Fund) for reimbursement of \$485,930.76 for actual losses allegedly suffered as a result of a home improvement contract with Mario Arriaga, trading as Majestic Hardscapes Contracting, LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2023).² On November 30, 2023, the MHIC issued a

¹ The MHIC is under the jurisdiction of the Department of Labor.
² Unless otherwise noted, all references to the Business Regulation Article are to the 2015 Volume of the Maryland Annotated Code.

Hearing Order on the Claim. On November 30, 2023, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On February 20, 2024, I held a hearing by video. Bus. Reg. §§ 8-407(a), 8-312; Code of Maryland Regulations (COMAR) 28.02.01.20B(1)(b). MacKenzie Read, Assistant Attorney General, Department of Labor (Department), represented the Fund. The Claimant was self-represented. The Respondent did not appear. After waiting fifteen 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 December 20, 2023, the OAH provided a Notice of Remote Hearing (Notice) to the Respondent by certified mail and first-class mail. Bus. Reg §§ 8-312(d), 8-407(a); COMAR 28.02.01.05C(1). The Notice stated that a hearing was scheduled for February 20, 2024, at 9:30 a.m. via Webex. COMAR 09.08.03.03A(2). 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. COMAR 28.02.01.03E. I determined that the Respondent received proper notice, and I proceeded to hear the captioned matter. COMAR 28.02.01.05.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the OAH govern procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021 & Supp. 2023); 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 offered by the Claimant:

- Cl. Ex. 1 Complaint Form, received by the Department on March 1, 2023
- Cl. Ex. 2 Contract (in the form of an Invoice), dated November 18, 2022³
- Cl. Ex. 3 Photograph, Legal Notice: Stop Work, dated November 29, 2022
- Cl. Ex. 4 Photograph (beams outside home), undated
- Cl. Ex. 5 Photograph (beams outside home from another angle), undated
- Cl. Ex. 6 Photograph (exposed wiring), undated
- Cl. Ex. 7 Photograph (debris), undated
- Cl. Ex. 8 Photograph (side porch), undated
- Cl. Ex. 9 Photograph (unfinished patio), undated
- Cl. Ex. 10 Photograph (in-ground seating area), undated
- Cl. Ex. 11 Photograph (pavilion wall), undated
- Cl. Ex. 12 Photograph (patio landscaping), undated
- Cl. Ex. 13 Photograph (unsupported beams), undated
- Cl. Ex. 14 Photograph (pavilion roof and outdoor kitchen appliances), undated
- Cl. Ex. 15 Photograph (pavilion roof and outdoor kitchen appliances from another angle), undated
- Cl. Ex. 16 Photograph (side porch and crawl space), undated
- Cl. Ex. 17 Photograph (stone wall), undated
- Cl. Ex. 18 Photograph (stone wall and beam), undated
- Cl. Ex. 19 Photograph (outdoor stairs with missing railing), undated

³ The Claimant testified that the date that appears on the invoice is not the date the Contract was executed.

- Cl. Ex. 20 Text exchanges, various dates
- Cl. Ex. 21 Letter to the Respondent from the MHIC, dated March 13, 2023
- Cl. Ex. 22 Photograph (flooded in-ground seating area), undated
- Cl. Ex. 23 Photograph (flooded in-ground seating area from another angle), undated
- Cl. Ex. 24 Photograph (flooded in-ground seating area from a third angle), undated
- Cl. Ex. 25 Proof of Payment (checks posted July 22, 2022; April 4, 2022; January 11, 2023; October 20, 2022; October 27, 2022; October 14, 2022; November 18, 2022; November 3, 2022; October 6, 2022; and September 26, 2022)
- Cl. Ex. 26 Photograph (sinking pavers and eroding grading), undated
- Cl. Ex. 27 Photograph (sinking pavers and eroding grading from another angle), undated
- Cl. Ex. 28 Estimate from LiveWell Outdoors, dated June 16, 2023
- Cl. Ex. 29 Invoice, LiveWell Outdoors, dated June 27, 2023
- Cl. Ex. 30 Findings from Elencon Elhadj Engineering Consultants at the request of LiveWell Outdoors, dated July 13, 2023

I admitted the following exhibits offered by the Fund:

- GF Ex. 1 Notice of Remote Hearing, dated December 20, 2023
- GF Ex. 2 Hearing Order, dated November 30, 2023
- GF Ex. 3 MHIC Licensing Information for the Respondent, based on January 23, 2024 inquiry
- GF Ex. 4 Letter from the MHIC to the Respondent, dated July 21, 2023, with attached Home Improvement Claim Form received by the Department on July 18, 2023

The Respondent was not present to offer exhibits.

Testimony

The Claimant testified and presented the testimony of his wife, Crystal Dearing.

The Fund did not present 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.
2. On March 23, 2022, the Claimant and the Respondent entered into a contract to complete a luxury patio with in-ground seating and a detached outdoor kitchen/pavilion with a stone wall (Contract). The Respondent was also to install a roof and steps for the side porch. The project had been started by another contractor, but the Claimant was not satisfied and hired the Respondent to complete it.
3. The previous contractor had initiated but not completed obtaining permits for the project; the Respondent agreed to obtain the required permits.
4. The original agreed-upon Contract price was \$164,127.27.
5. The Respondent began work on or about August 22, 2022.
6. In November 2022, the Respondent had to stop work because of a problem with his work identified during an inspection, as well as the need for a new permit.
7. In December 2022, the Respondent was unresponsive to efforts by the Claimant and his wife to contact him about the status of the pending permit applications.
8. In January 2023, the Respondent told the Claimant and his wife that he had applied for three permits. However, the Claimant later learned that he had not provided the permitting office with all required documentation.
9. The Respondent was not responsive to the Claimant's questions about the permits and did not resume work.
10. The Claimant paid the Respondent a total of \$148,527.27.

11. The Respondent's last day on the job site was May 20, 2023, when he stopped by only to retrieve his tools.

12. Pavers installed by the Respondent were not installed over a sufficiently supportive and graded foundation, which has allowed the patio to sink into the ground. Additionally, the in-ground seating area does not have proper drainage and fills up with ten to fifteen inches of water when it rains.

13. The Respondent did not complete the project. Specifically, he did not install the side porch steps or finish the side porch roof; columns were not installed; beams were insufficiently supported; electrical wiring was improperly done, incomplete, and left exposed; piles of debris were left on the property; a section of the patio was not complete, gas and water lines were not completed prior to installation of bricks and pavers (which means completion will require removal of bricks and pavers), and a stair railing was not installed.

14. The Claimant contacted a new contractor, Livewell Outdoors (LiveWell), to correct and complete the Respondent's work. Upon examining the job site, LiveWell was concerned that significant work by the Respondent had been done improperly and was unsafe. In particular, LiveWell cited concerns about the condition of the side porch roof, which could collapse and damage the home.

15. In July 2023, an inspection by an engineering consultant retained by LiveWell documented significant structural deficiencies in the outdoor kitchen/pavilion. Specifically, the rafters were not properly connected to the ridge beam, the posts were not properly connected to the beams, and the stone wall was not constructed on proper footing.

16. LiveWell agreed to redo all work completed by the Respondent and to complete the same scope of work agreed to in the Contract. The cost to retain LiveWell to demolish the Respondent's work and then complete the job is \$495,130.76.

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 (2021); 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. 2023); *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.⁴

It is undisputed that the Respondent was a licensed home improvement contractor at the time the Respondent entered into the Contract with the Claimant. (GF Ex. 3.) Based on the evidence presented, I am persuaded that the Respondent performed unworkmanlike, inadequate, and incomplete home improvements. The Claimant testified without refutation regarding problematic work completed by the Respondent, including an in-ground seating area that fills with water in the rain and does not drain properly (corroborated by photographs – Cl. Exs. 10,

⁴ By statute, certain claimants are excluded from recovering from the Fund altogether. The Fund cross-examined the Claimant regarding these exclusions, and based on the Claimant's credible, uncontradicted testimony, I conclude that there are no such statutory impediments to the Claimant's recovery. The claim was 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. 2023). The Claimant resides in the home that is the subject of the claim or does not own more than three dwellings. *Id.* § 8-405(f)(2) (Supp. 2023). The parties did not enter into a valid agreement to submit their disputes to arbitration. *Id.* §§ 8-405(c), 8-408(b)(3) (2015 & Supp. 2023). Neither the Claimant nor his spouse is a relative, employee, officer, or partner of the Respondent, and neither is related to any employee, officer, or partner of the Respondent. *Id.* § 8-405(f)(1) (Supp. 2023).

22, 23, 24) and structural deficiencies in the pavilion roof and stone wall (corroborated by an engineering consultant's report – Cl. Ex. 30). This evidence establishes that the work was both unworkmanlike (because it was poorly done) and inadequate (because it was structurally deficient).

Additionally, the Claimant testified and presented compelling corroborating evidence of incomplete work, including insufficiently supported beams intended to be completed as columns (Cl. Exs. 4, 5, 13); side porch steps that were not installed and an unsupported side porch roof (Cl. Ex. 8); electrical wiring left exposed (Cl. Ex. 6); sections of the patio that were never done (Cl. Ex. 9); and piles of debris left on the property (Cl. Ex. 7). The Claimant further stated that gas and water lines were not run, though pavers were installed and now must be removed to run those lines (Cl. Ex. 11). Notably, the Claimant and his wife, Ms. Dearing, were consistent in their accounts regarding their efforts to continue working with the Respondent, despite his non-responsiveness at times and their concerns about his handling of the permit applications. These efforts are documented in part in their text exchanges. (Cl. Ex. 20.)

I thus find that the Claimant is eligible for compensation from the Fund.⁵ Accordingly, 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) (Supp. 2023); 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.

⁵ It was the Fund's position that the Claimant established that the Respondent's work was inadequate and incomplete, and that the Claimant is eligible for an award.

The Respondent performed some work under the Contract, and the Claimant has retained 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).⁶

The Claimant provided documentation of \$148,527.27 paid to the Respondent.⁷ (Cl. Ex. 25.) This figure is added to the cost to remediate and complete the Respondent's work (\$495,130.76), resulting in \$643,658.03. (Cl. Ex. 28.) From this total, the amount of the original contract, or \$164,127.27, is subtracted, which results in an actual loss of \$479,530.76.

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.⁸ Bus. Reg. § 8-405(e)(1), (5) (Supp. 2023); COMAR 09.08.03.03B(4). In this case, the Claimant's actual loss of \$479,530.76 exceeds \$30,000.00.⁹ Therefore, the Claimant's recovery is limited to \$30,000.00.

⁶ This is the formula the Fund recommended applying in this case.

⁷ The Claimant testified that he paid the Respondent a total of \$154,927.27. However, I have used the payment amount consistent with the Claimant's documentation; using the higher figure would make no difference to the amount of the award, due to the \$30,000.00 cap discussed below.

⁸ 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").

⁹ It also exceeds the amount paid to the Respondent, but as the cap is the lower threshold, the latter is determinative here.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$479,530.76 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2023); COMAR 09.08.03.03B(3)(c). I further conclude that the Claimant is entitled to recover \$30,000.00 from the Fund. Bus. Reg. § 8-405(e)(1), (5) (Supp. 2023); COMAR 09.08.03.03B(4).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$30,000.00; 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;¹⁰ and

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

May 13, 2024
Date Decision Issued



Jennifer L. Gresock
Administrative Law Judge

JLG/dlm
#211621

¹⁰ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 20th day of August, 2024, 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***