

<p>IN THE MATTER OF THE CLAIM</p> <p>OF JO A. VIA,</p> <p>CLAIMANT</p> <p>AGAINST THE MARYLAND HOME</p> <p>IMPROVEMENT GUARANTY FUND</p> <p>FOR THE ALLEGED ACTS OR</p> <p>OMISSIONS OF PAUL JOHNSON,</p> <p>T/A COMMSERV LLC,</p> <p>RESPONDENT</p>	<p>* BEFORE ROBERT B. LEVIN,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>*</p> <p>*</p> <p>*</p> <p>* OAH No.: LABOR-HIC-02-23-06641</p> <p>* MHIC No.: 23 (75) 204</p>
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PROPOSED DECISION

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STATEMENT OF THE CASE

On November 21, 2022, Jo A. Via (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)¹ Guaranty Fund (Fund) for reimbursement of \$9,332.50 for actual losses allegedly suffered as a result of a home improvement contract with Paul Johnson, trading as Commserv LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2022).² On March 1, 2023, the MHIC issued a Hearing Order on

¹ The MHIC is under the jurisdiction of the Department of Labor (Department).

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

the Claim. On March 9, 2023, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On May 9, 2023, I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. Jessica B. Kaufman Assistant Attorney General, Department, represented the Fund. Myles Friedman, Esquire, represented the Claimant, who was present.

After waiting more than 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. Code of Maryland Regulations (COMAR) 28.02.01.23A. On March 21, 2023, the OAH provided a Notice of Hearing (Notice) to the Respondent by United States mail to the Respondent's address on record with the OAH. COMAR 28.02.01.05C(1). The Notice stated that a hearing was scheduled for May 9, 2023, at 9:30 a.m., at the OAH, 11101 Gilroy Road, Hunt Valley, Maryland. 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. 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.

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); 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:

- Clmt. Ex. 1 - Notice of Hearing, March 21, 2023, with attached correspondence from the MHIC to the Claimant, March 1, 2023
- Clmt. Ex. 2 - Respondent's invoice #325 to the Complainant in the amount of \$19,800.00, signed by the Respondent and the Claimant on August 3, 2022
- Clmt. Ex. 3 - Claimant's handwritten "Notice of Cancellation" to the Respondent, August 5, 2022, with attached photocopy of Claimant's check #1504, payable to the Respondent, in the amount of \$6,600.00
- Clmt. Ex. 4 - Photograph, undated, with attached handwritten note, undated
- Clmt. Ex. 5 - Correspondence from Synchrony Bank to the Claimant, August 7, 2022
- Clmt. Ex. 6 - United States Postal Service receipt, with attached certified mail receipt, both dated August 9, 2022, and photocopy of the Respondent's business card, undated
- Clmt. Ex. 7 - The Complainant's complaint to Better Business Bureau (BBB) Greater Baltimore Complaint Dept., August 5, 2022, with the following attachments: BBB correspondence to the Complainant, undated; BBB Correspondence addressed to "Mr. Banks"³ undated; and Claimant's BBB complaint, August 8, 2022

³ This letter identifies the Claimant as the Consumer and the Respondent as the Business in connection with the Claimant's BBB complaint. The record is unclear as to the identity of "Mr. Banks" or whether that reference was a typographical error.

Clmt. Ex. 8 - Correspondence from Myles Friedman, Esquire, to the Respondent,
August 29, 2022

Clmt. Ex. 9 - Correspondence from the Claimant to the MHIC, undated

Clmt. Ex. 10 - Correspondence from the Claimant to the MHIC, undated

Clmt. Ex. 11 - The Claimant's MHIC Complaint Form, August 15, 2022

Clmt. Ex. 12 - The Claimant's MHIC Claim Form, undated⁴

Clmt. Ex. 13A - Photograph of the doorway into the Claimant's kitchen, taken before the
Respondent's work, undated

Clmt. Ex. 13B - Photograph of the doorway into the Claimant's kitchen, taken before the
Respondent's work, undated

Clmt. Ex. 14 - Photograph of the doorway into the Claimant's kitchen, taken after the
Respondent's work, undated

Clmt. Ex. 15 - Photograph of a portion of the interior of the Claimant's home, undated

Clmt. Ex. 16 - Photocopies of the following checks written on the Claimant's account with First
National Bank: no. 1505 payable to Handyman on Call, LLC (Handyman on Call)
for \$1,005.00, and no. 1506 payable to Handyman on Call for \$480.00⁵

Clmt. Ex. 16A - Handyman on Call LLC invoice in the amount of \$1,485.00,
November 19, 2022

Clmt. Ex. 16B through 16E - Photographs of work completed by Handyman on Call, undated

⁴ Clmt. Ex. 12 is undated, but the copy of the Claim Form admitted as Fund Ex. 4 shows the MHIC received it on November 21, 2022.

⁵ This exhibit consists of one page showing four checks: two starred checks to Handyman On Call as stated in the text and two checks to other payees; the latter are irrelevant to this matter and for privacy purposes the other two payees are not identified here.

I admitted the following exhibits offered by the Fund:

Fund Ex. 1 - Notice of Hearing, March 21, 2023

Fund Ex. 2 - MHIC Transmittal Form to the OAH with attached Hearing Order, March 1, 2023

Fund Ex. 3 - MHIC licensing information for the Respondent, printed April 20, 2023

Fund Ex. 4 - Correspondence from the MHIC to the Respondent, December 20, 2022, with attached Claim Form, November 21, 2022

The Respondent, who did not appear, did not submit any exhibits.

Testimony

The Claimant testified and did not present other witnesses. The Fund did not present any witnesses. The Respondent did not appear and 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 license number 01-110209.
2. The Respondent's corporate license for Commserv LLC, his business entity, is 05-133155.
3. The Respondent was licensed by the MHIC at all times relevant to this matter, although his license is currently suspended.
4. In or about August 2022, the Claimant ordered a new refrigerator from Lowe's. Before the refrigerator could be delivered, the Claimant needed to widen the interior doorway between her residence's dining room and kitchen so the refrigerator could be installed in the kitchen.
5. The Claimant placed an online advertisement on the "Nextdoor" app seeking a contractor to widen the doorway.

6. On Wednesday, August 3, 2022, the Respondent answered the advertisement and came to the Claimant's home. The Claimant said she needed the doorway widened quickly because the refrigerator was coming on Sunday, August 7, 2022. The Respondent said he could do the widening job in one day.

7. On August 3, 2022, the Respondent further told the Claimant that if she agreed to have him do a complete kitchen remodeling, he would widen the doorway for free. He estimated the doorway alone would otherwise cost her \$1,200.00. The Claimant agreed to the Respondent's proposal of a total kitchen remodeling.

8. On August 3, 2022, the Claimant and the Respondent each signed (on the Respondent's cellphone) a contract (Contract). The Contract, printed as the Respondent's invoice no. 325, provided that for a total price of \$19,800.00, the Respondent would do the following work to widen the doorway:

- Remove and retain existing trim at doorway between kitchen and dining room
- Widen doorway to 36 inches at left side
- Furnish and install trim
- Supply and apply two coats of paint to same
- Haul debris caused by the Respondent's work

9. The Contract further provided that the Respondent would perform the following work under the heading "Kitchen Remodel Straight Wall":

- Tear out and haul existing kitchen and remove vinyl tile flooring
- Furnish and install the following:
- New drywall to walls and ceiling
- Plumbing to code to hook up sink, hook up ice maker
- Electric to code

- New straight wall and base cabinets York White
- New granite counter top (Santa Cecelia White) [sic]
- New ceramic or porcelain flooring (customer to choose from the Respondent's selection, allowance is 250 square feet)
- Up to five recessed ceiling fixtures
- Supply and apply two coats of good quality paint to the walls and ceilings, customer to choose

10. The Contract provides the following Notice of Right to Cancel:

Customer acknowledges that he/she/they have five (5) business days from the date of signing this agreement OR seven (7) business days if the buyer is at least 65 years old (this does not include Sundays or Federal and/or Banking holidays....I, ABOVE MENTIONED CUSTOMER and/or (SPOUSE OF ABOVE MENTIONED CUSTOMER) have been provided oral notice that I have the right to cancel this transaction, without any penalty or obligation, within 5 business days from the date of the transaction specified on the "Notice of Cancellation", or, if I am at least 65 years old, within 7 business days from the date of the transaction specified on the "Notice of Cancellation."

(Clmt. Ex. 2, pp.1-2).

11. On August 3, 2022, the Claimant paid the Respondent \$6,600.00 by check as a deposit of one third of the total \$19,800.00 Contract price. The remaining balance was \$13,200.00.
12. The Claimant was more than sixty-five years of age on August 3, 2022.
13. The Claimant arranged for Lowe's to deliver the new refrigerator on Sunday, August 7, 2022.
14. On or shortly after August 3, 2022, the Respondent called the Claimant and asked for her Social Security number, which she gave him. Later he called her again and stated that he had caused the \$13,200.00 balance due under the Contract to be financed through a loan to her which he arranged with Synchrony Bank.

15. On the morning of Friday, August 5, 2022, the Respondent and a helper arrived at the Claimant's house to perform the widening of the door frame, which the Respondent had said would be completed in one day.
16. The Respondent said they would put plastic up to keep plaster and debris from spreading into the house.
17. On August 5, 2022, the Respondent left the Claimant's house twice and left his helper to do the job.
18. The Respondent and his helper failed to put plastic or anything else down to prevent the spread of debris.
19. The first time the Respondent left the Claimant's house on August 5, the Respondent returned at 11:44 a.m. Then, he and his helper went to lunch and did not return until 2:20 p.m.
20. The Respondent and his helper left the Claimant's house at 3:20 p.m.
21. The Respondent had said they would work from 9:00 a.m. to 5:00 p.m., but they did not, and the job was incomplete.
22. The Claimant, who uses a walker to go from room to room, could not get into her dining room because of the mess the Respondent and his helper had made.
23. The Claimant decided to cancel the kitchen remodeling Contract. She went to her bank (First National Bank) while the Respondent and his helper were still at lunch to stop payment on her deposit check. The bank told her the check was deposited in the Respondent's Commserv LLC account on August 4, 2022.
24. The Claimant cancelled the financing arrangement with Synchrony Bank on August 5, 2022. Synchrony Bank confirmed the cancellation in an August 7, 2022 letter.

25. When the Respondent and his helper returned from lunch at 2:20 p.m. on August 5, they swept her house “a little” (Clmt. Ex. 10) and put debris in her kitchen trash can, leaving it for her to dispose of. The helper used a snow shovel to try and remove the debris.
26. The helper broke a knob on the Claimant’s gas stove.
27. Although the Contract required the Respondent to “retain” the trim around the doorway, the Respondent removed the trim and molding around the kitchen door frame and took it away in his truck. (Clmt. Ex. 2, p. 1).
28. The Respondent and his helper made a mess in the Claimant’s sunroom and basement. When the helper tore down the plaster and debris, he allowed it to enter the basement.
29. The Claimant told the Respondent on August 3, 2022, that she had arranged for the refrigerator to be delivered on Sunday, August 7, 2022. Because the doorway job was incomplete, she changed the delivery date to Tuesday, August 9, 2022.
30. On August 8, 2022, the Claimant prepared a “Notice of Cancellation” of the Contract. (Clmt. Ex. 3).
31. On Monday, August 8, 2022, the Respondent called and asked the Claimant if the refrigerator had arrived. The Claimant told the Respondent that she changed the delivery date.
32. The Respondent came to the Claimant’s home on Monday, August 8, 2022. She told him she wanted to cancel the complete kitchen renovation and wanted her \$6,600.00 back. She tried to hand the Notice of Cancellation to him. He refused to accept it, threw it on her parking pad, and said, “you can’t cancel and you won’t get your money back.” (Claimant testimony; Cl. Ex. 9).

33. August 8, 2022 was the third business day after the August 3, 2022 date of execution of the Contract.

34. The Claimant mailed the Notice of Cancellation to the Respondent by certified mail on August 8, 2022. (Clmt. Ex. 6, certified mail receipt).

35. The Claimant hired Handyman On Call, LLC to complete the doorway widening for \$1,485.00. Handyman On Call satisfactorily completed the job in one day.

36. The Respondent refused to agree to the cancellation of the contract and has not return the Claimant's \$6,600.00.

37. The Claimant attempted to resolve this matter through a BBB complaint but the Respondent never responded or refunded any money.

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.

The Respondent was a licensed home improvement contractor at the time the Respondent entered into the Contract with the Claimant.

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 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 or does not own more than three dwellings. *Id.* § 8-405(f)(2) (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 parties did not consummate a *valid* agreement to submit their disputes to arbitration. *Id.* §§ 8-405(c), 8-408(b)(3) (2015 & Supp. 2022). While the Contract contains an arbitration provision (*see* Compl. Ex. 2, p. 3), the Claimant's timely cancellation of the Contract pursuant to its express cancellation provision (*see id.* p. 2) rendered the arbitration provision of no force and effect. And even if the arbitration provision had not been rescinded, I find as a fact that the Respondent waived the right to arbitrate by not merely *delaying* to demand or initiate arbitration following his notice of both this Claim as well as the May 9, 2023 hearing, but by *never* seeking to enforce the Contract's arbitration provision. *See Stauffer Const. Co. v. Board of Educ. of Montgomery County*, 54 Md. App. 658, 665 ("[B]y failing to make a timely demand, the party had waived his contractual right to resolve the dispute through arbitration.").

The Claimant did not unreasonably reject good faith efforts by the Respondent to resolve the claim. *Id.* § 8-405(d) (Supp. 2022). When she sought the assistance of the BBB to resolve the dispute, the Respondent failed to respond. The Claimant made good faith efforts to resolve the dispute. The Respondent made no efforts toward resolution.

The Respondent performed unworkmanlike, inadequate, and incomplete home improvements. The Claimant's undisputed testimony, documentary, and photographic evidence established that the Respondent's work was unworkmanlike, inadequate, and incomplete. He did not complete the job, left debris in her home, removed the Claimant's trim, and failed to return it.

The Fund agreed that the evidence showed the Respondent left the doorway in shambles. The Fund noted that when the Complainant cancelled the Contract, as was her contractual and statutory right, he threw her cancellation notice on the ground and refused to return any portion of the \$6,600.00 deposit.

In recommending an award of \$6,600.00 (the amount the Claimant paid the Respondent), the Fund reasoned in its closing argument that the Contract provided for a complete kitchen remodel for \$19,800.00, and that the doorway job was "thrown in" as a gratuitous extra. The Respondent performed inadequate, unworkmanlike, and incomplete work on the doorway. Importantly, he also abandoned the kitchen remodeling project, doing no work on it; he then refused to return the Claimant's \$6,600.00 deposit. Accordingly, the Fund's position was that the Claimant's actual loss was the \$6,600.00 deposit she paid the Respondent for the kitchen remodeling Contract, because he did no work yet kept her money. I agree and 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) (Supp. 2022); 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.

I agree with the Fund that the Respondent abandoned the kitchen remodeling Contract without doing any work. Accordingly, the following formula appropriately measures the Claimant's actual loss: "If the contractor abandoned the contract without doing any work, the claimant's actual loss shall be the amount which the claimant paid to the contractor under the contract." COMAR 09.08.03.03B(3)(a). As the Fund noted in closing argument, the \$1,485.00 the Claimant paid Handyman On Call was her cost for completion of the doorway which the Respondent had promised to perform for free. The Fund's position, with which I agree, was that the Handyman payment did not relate to the remodeling contract for which the Respondent refused to refund the Claimant's deposit despite doing no kitchen remodeling work. Accordingly, the amount paid to Handyman is not included in the recommended award. The Claimant's actual loss is the \$6,600.00 she paid the Respondent under the kitchen remodeling Contract.

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.⁶ Bus. Reg. § 8-405(e)(1), (5) (Supp. 2022); COMAR 09.08.03.03B(4). In this case, the Claimant's actual loss is equal to the amount paid to the Respondent and less than \$30,000.00. Therefore, the Claimant is entitled to recover her actual loss of \$6,600.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$6,600.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg.

⁶ 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").

§§ 8-401, 8-405 (2015 & Supp. 2022) ; COMAR 09.08.03.03B(3)(a). I further conclude that the Claimant is entitled to recover \$6,600.00 from the Fund.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$6,600.00; 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;⁷ and

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

July 25, 2023
Date Decision Issued

Robert B. Levin

Robert B. Levin
Administrative Law Judge

RBL/at
#206415

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

PROPOSED ORDER

WHEREFORE, this 14th day of September, 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.

Chandler Louden

Chandler Louden

Panel B

***MARYLAND HOME IMPROVEMENT
COMMISSION***