

IN THE MATTER OF THE CLAIM	* BEFORE BRIAN PATRICK WEEKS,
OF ANDRE IRVING,	* 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 FRANK WINTER,	*
T/A MW ENTERPRISES LLC,	* OAH No.: LABOR-HIC-02-23-14541
RESPONDENT	* MHIC No.: 23 (75) 27

\* \* \* \* \*

**PROPOSED DECISION**

STATEMENT OF THE CASE  
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RECOMMENDED ORDER

**STATEMENT OF THE CASE**

On September 28, 2022, Andre Irving (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)<sup>1</sup> Guaranty Fund (Fund) for reimbursement of \$26,500.00 for actual losses allegedly suffered as a result of a home improvement contract with Frank Winter, trading as MW Enterprises LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2023).<sup>2</sup> On May 10, 2023, the MHIC issued a Hearing Order on

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

the Claim. On May 22, 2023, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On August 25, 2023, I held a hearing by video. Bus. Reg. §§ 8-407(a), 8-312; Code of Maryland Regulations (COMAR) 28.02.01.20B(1)(b). Jonathan Phillips, Assistant Attorney General, Department, represented the Fund. The Claimant was self-represented. The Respondent was self-represented.

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, unless otherwise noted:

Clmt. Ex. 1 - Estimate, August 23, 2019

Clmt. Ex. 2 - Receipt, September 20, 2019

Clmt. Ex. 3 - Text messages, various dates

Clmt. Ex. 4 - Photos, printed September 1, 2020

Clmt. Ex. 5 - Letter from KJD Architects, LLC to the Claimant, October 15, 2020

Clmt. Ex. 6 - Photos, undated

Clmt. Ex. 7 - Facebook posts from the Respondent, various dates

Clmt. Ex. 8 - Printout from the Respondent's website, printed March 16, 2022

Clmt. Ex. 9 - Policastri Law Firm, LLC Invoices, various dates

Clmt. Ex. 10 - Letter from KJD Architects, LLC to the Claimant, March 12, 2022

Clmt. Ex. 11 - *Offered but not admitted*

Clmt. Ex. 12 - *Not admitted*<sup>3</sup>

Clmt. Ex. 13 - Emails from Deck Boss, various dates

I admitted the following exhibits offered by the Respondent:

Resp. Exs. 1-6 - Photos, undated

I admitted the following exhibits offered by the Fund:

Fund Ex. 1 - Notice of Hearing, June 30, 2023

Fund Ex. 2 - Hearing Order, May 10, 2023

Fund Ex. 3 - Claim Form, signed September 28, 2022

Fund Ex. 4 - Licensing history, accessed August 2, 2023

### Testimony

The Claimant testified and did not present other witnesses.

The Respondent testified and did not present other 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 103867.

2. On August 23, 2019, the Claimant and the Respondent entered into a contract to build a new deck including a roof structure to cover part of the deck (Contract).

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<sup>3</sup> I kept the record open so that the Claimant could submit a video that was to be Clmt. Ex. 12, but he did not submit it by the date when the record closed.

3. The original agreed-upon Contract price was \$30,000.00.

4. The Claimant paid the Respondent a total of \$26,500.00.

5. Between August 23, 2019, and June 11, 2020, the Respondent communicated by text message with the Claimant, and made multiple excuses as to why the work had not been completed.

6. As of September 1, 2020, the Respondent had laid out the decking material on the deck and installed steps from the rear of the deck to the deck. The Respondent had not begun to construct the enclosed portion of the deck. The Respondent did not install a railing on the side of the deck where a wall was to be built for the enclosed portion, and there was a drop-off at this location.

7. The Respondent did not perform any additional work after September 1, 2020.

8. On September 21, 2020, the Claimant received an estimate from Deck Soldier for a total of \$39,000.00 to rebuild the existing deck with the same size and configuration.

9. On October 15, 2020, Kevin J. Driscoll of KJD Architects, LLC performed a site inspection of the deck. In his report, he noted the following issues:

- The beam to post connections were not connected using the right materials;
- The double beam closest to the basement stair was not supported at the end of the span and the beam members were not spiked together which had caused them to warp and separate;
- The connections between the railing posts and deck structure were not connected using the right materials;
- The composite decking was not installed using concealed fasteners as required by the installation instructions;

- The deck framing of the trapezoid bump on the rear of the deck was not in compliance with the framing standards for the county because the overhang was too large; and
- The stair stringers were not supported properly for the load they were supporting.

10. The Claimant's deck is in the same state as when the Respondent discontinued work on the Contract.

### 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. 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 conclude that the Claimant has proven eligibility for compensation.

The Respondent performed unworkmanlike, inadequate, or incomplete home improvements. The Respondent agreed to rebuild the Claimant's deck and accepted \$26,500.00 but failed to complete the work. By September 2020, nearly a year after the Contract was signed, the Respondent had only laid out the decking material on the deck and installed steps

from the rear of the deck to the deck. The Respondent had not begun to construct the enclosed portion of the deck, a major part of the Contract. The Respondent did not install a railing on the side of the deck where a wall was to be built for the enclosed portion, and there was a drop-off at this location, making it unsafe. Further, the Claimant hired KJD Architects, LLC to evaluate the state of the deck as of September 2020, and the company found various problems with the deck that required it to be completely rebuilt. Based on the above facts, which were not refuted by the Respondent, the Claimant has proven eligibility 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. 2023); 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.

The Respondent performed some work under the Contract, and the Claimant intends to retain 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). The amount paid to the Respondent was \$26,500.00. The amount required to repair the poor work done by the Respondent is \$39,000.00. Adding those two

together equals \$65,500, and subtracting \$30,000.00 from this amount equals \$35,500.00, which constitutes the Claimant's 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.<sup>4</sup> Bus. Reg. § 8-405(e)(1), (5) (Supp. 2023); COMAR 09.08.03.03B(4). In this case, the Claimant's actual loss is more than the amount paid to the Respondent and greater than \$30,000.00. Therefore, the Claimant is entitled to recover the amount paid to the Respondent - \$26,500.00. Although the Claimant offered invoices for attorney's fees and for the retention of KJD Architects, LLC,<sup>5</sup> those costs are not compensable by the Fund. Bus. Reg. § 8-405(e)(3) (Supp. 2023); COMAR 09.08.03.03B(1).

#### **PROPOSED CONCLUSIONS OF LAW**

I conclude that the Claimant has sustained an actual and compensable loss of \$26,500.00 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 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 \$26,500.00; and

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<sup>4</sup> 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").

<sup>5</sup> Attorney's fees are expressly mentioned as not recoverable, and the fees paid to KJD Architects, LLC do not flow directly from the Respondent's actions, and thus are consequential damages.

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,<sup>6</sup> and

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

October 19, 2023  
Date Decision Issued

*Brian Patrick Weeks*  
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Brian Patrick Weeks  
Administrative Law Judge

BPW/emh  
#207651

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



**PROPOSED ORDER**

***WHEREFORE, this 22<sup>nd</sup> day of December, 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.***

***J Jean White***

***I Jean White***

***Panel B***

***MARYLAND HOME IMPROVEMENT  
COMMISSION***