

<p>IN THE MATTER OF THE CLAIM</p> <p>OF ALEJANDRO BARRIOS,</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 CARLOS GUZMAN,</p> <p>T/A C & F CONSTRUCTION, LLC,</p> <p>RESPONDENT</p>	<p>* BEFORE PATRICK E. MAHER,</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-02-23-04915</p> <p>* MHIC No.: 23 (75) 34</p>
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PROPOSED DECISION

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STATEMENT OF THE CASE

On October 13, 2022, Alejandro Barrios (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 \$10,781.54 in actual losses allegedly suffered as a result of a home improvement contract with Carlos Guzman, trading as C & F Construction, LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015

& Supp. 2022).¹ On February 14, 2023, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on May 5, 2023, via the Webex videoconferencing platform. Bus. Reg. §§ 8-407(a), 8-312. Jonathan Phillips, Assistant Attorney General, Department, represented the Fund. The Claimant represented himself. The Respondent represented himself.

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); Code of Maryland Regulations (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 Claimant exhibits:

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| Cl. Ex. 1 | Sixteen photographs, labeled: 1A & 1B; 2A & 2B; 3A, 3B, & 3C; 4A & 4B; 5A & 5B; 6A, 6B, 6C, 6D, & 6E, undated |
| Cl. Ex. 2 | List of Payments made for the deck and patio |
| Cl. Ex. 3 | Estimate for stamped concrete patio, H & J General Services Inc., September 19, 2022 |
| Cl. Ex. 4 | Contract Work Order, Deck & Patio, Respondent |
| Cl. Ex. 5 | Email from Hugo Hernandez to Claimant, May 5, 2023 |

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

I admitted the following Fund exhibits:

- Fund Ex. 1 Notice of Remote Hearing, March 10, 2023
- Fund Ex. 2 Hearing Order, February 3, 2023
- Fund Ex. 3 Home Improvement Claim Form, October 7, 2022
- Fund Ex. 4 Printout of licensing information for Respondent

The Respondent did not offer any exhibits into evidence.

Testimony

The Claimant testified and did not present other witnesses. The Respondent testified and did not present other witnesses. 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 license number 01-116436 and trading as C & F Construction, LLC, under MHIC license number 05-136517.
2. The Claimant and the Respondent entered into a contract on or about January 16, 2022, for the Respondent to build an enclosed deck and concrete patio in the back of the Claimant's house.
3. The original agreed-upon Contract price was \$19,900.00. The contract called for an initial down payment of \$4,975.00, and three successive payments of \$4,975.00 after certain milestones were met.
4. The Claimant made the initial down payment in the amount of \$4,975.00 on January 16, 2022.
5. The start of the construction project was delayed until April 2022.

6. The Claimant made the following payments to the Respondent and other entities associated with the project after the initial down payment: April 11, 2022 - \$11,385.37; May 11, 2022 - \$321.17; June 13, 2022 - \$1,500.00; June 13, 2022 - \$750.00; June 13, 2022 - \$950.00; October 2, 2022 - \$70.00. The total amount paid was \$19,951.54.

7. The concrete slab of the patio was not sufficiently leveled so that it would drain to the back yard. The result was that puddles of water would form on the patio after it rained.

8. There were areas where the water would run off the concrete patio and cause erosion under a section of the patio.

9. The Claimant brought concerns about the workmanship and appearance of the patio to the Respondent's attention.

10. The Respondent attempted repairs to the concrete patio, including cutting a groove into the concrete slab.

11. The Claimant was not satisfied that the deficient work had been corrected.

12. The Respondent offered to re-level the patio and place stones under the area where there was erosion under the concrete patio.

13. The Claimant did not give the Respondent the opportunity to return to the property and conduct further repairs of the concrete patio.

14. Before and during the hearing, the Respondent offered to repair the concrete patio.

15. The Claimant was not interested in discussing any further repair work with the Respondent, indicating that he wanted to hire a different contractor and demolish and replace the concrete patio built by the Respondent.

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

§ 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); *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. “The [MHIC] may deny a claim if the [MHIC] finds that the claimant unreasonably rejected good faith efforts by the contractor to resolve the claim.” Bus. Reg. § 8-405(d). For the following reasons, I find that the Claimant has not proven eligibility for compensation from the Fund.

In support of his claim, the Claimant presented pictures of the concrete patio after the job had been completed and subsequent repairs were made by the Respondent that purported to show the unworkmanlike nature of the installation and repair work of the concrete patio. The Claimant testified that his father-in-law is a civil engineer who pointed out the deficiencies of the concrete work. The Claimant took pictures and made notes based on his father-in-law’s observations, and he included the notes in the exhibits to explain the problems with the construction of the concrete patio. (Cl. Ex. 1). The notes cited numerous problems with the concrete work, including issues with the joints, failure to vibrate the concrete at the time of pouring, incorrect leveling of the upper surface, and failure to place an expansion joint between the concrete slab and the house.

The Claimant submitted an estimate to replace the concrete patio from Hugo Hernandez, manager for H & J General Services, Inc., in the amount of \$10,800.00. The estimate did not offer any explanation about why the concrete patio needed to be replaced or how the Claimant

presented the job proposal to the contractor. During the hearing, Mr. Phillips determined that the company and the contractor were not licensed with the MHIC. The Claimant responded by stating that this estimate was a "guideline," and he would hire a licensed contractor to perform the job. Later in the afternoon of the hearing, the Claimant forwarded to the OAH an email from Mr. Hernandez to the Claimant advising him that the work would be done under a company known as Duran Landscape and provided a MHIC License number. I agreed to the Claimant's request that the email be introduced as an exhibit. (Cl. Ex 5).

The Respondent did not dispute that he initially performed an unworkmanlike home improvement with respect to the installation of the concrete patio. He admitted as much when he made subsequent repairs to the concrete patio and continued to offer to repair the defects in the concrete patio. He acknowledged that while he is familiar with concrete work, "no one is perfect." The Respondent disputed the assertion that the concrete patio required a joint fitting in the concrete slab and advised he discussed the matter with an engineer. As part of the repair, the Respondent made a longitudinal cut in the concrete plate. He advised that he could re-level the concrete and place stones where there is erosion under the concrete slab. The Respondent testified that he continued to offer to make repairs to the concrete patio.

The Fund posited that the Respondent performed the work in an unworkmanlike manner. The Respondent testified that it would cost \$2,500.00 to repair the concrete patio and \$8,500.00 to replace the concrete patio. The Fund also questioned the evidentiary value of the \$10,800.00 estimate provided by Mr. Hernandez and H & J General Services Inc. He suggested that any award should be based on the estimate provided by the Respondent. The Fund deferred to me as to whether the concrete patio was in need of repair or replacement. In other words, he could not determine from the evidence presented whether the concrete patio could be repaired or had to be replaced. It did not comment on the Respondent's efforts to repair the concrete patio.

While the Claimant's photographs and notes attached to them are potentially instructive to the assertion that the patio needed to be replaced, the Claimant did not present his father-in-law as a witness at the hearing to support the claim. The witness could have been questioned about his expertise and provided additional explanation of his comments and the basis for his opinions, including whether a repair of the concrete patio was a feasible option as opposed to demolition and replacement. Further, the Respondent disagreed with some of the assertions in the written statements and indicated that he also spoke with an engineer prior to installing the concrete patio. As I am unable to judge the credibility of the individual who made the observations that were alleged to be recorded by the Claimant, I do not find the written comments on the pictures to be persuasive as to whether the concrete patio needs to be replaced.

I find the email from Mr. Hernandez to the Claimant to contradict the Claimant's earlier assertion that the estimate was only a guideline and it suggests to me that the Claimant contacted Mr. Hernandez during the hearing after he became aware the contractor did not have a MHIC license. Mr. Hernandez then obtained by some means a contractor who could provide an MHIC license number to bolster the estimate. The Fund suggested that the situation had the hallmarks of a borrowed MHIC license number. Had I found the Claimant eligible for an award, I would give little evidentiary weight to the estimate provided.

The pictures offered by the Claimant clearly show areas of the concrete patio construction where repairs should be made. I was able to observe the puddles that formed on the concrete floor and there was erosion under a section of the concrete slab. What is not clear to me is whether the concrete patio needs to be replaced based on the pictures and testimony presented. As the Claimant has the burden of proof, I do not find that he has presented sufficient evidence to demonstrate the concrete patio is not able to be repaired and needs to be replaced.

As previously noted, the Respondent made attempts to repair the concrete work and continued to offer to make the necessary repairs. The question is whether the Claimant's rejection of the subsequent repair attempts was unreasonable. Based on the record before me, I find the rejection was unreasonable and the Respondent's offer to repair the concrete patio was done in good faith. Bus. Reg. § 8-405(d). The Claimant was not satisfied, and insisted not only on a new concrete patio, but having another contractor do the work. Although the Claimant is certainly entitled to that option, he is not eligible for compensation from the Fund under those circumstances.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has not 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(2).

RECOMMENDED ORDER

I RECOMMEND that the Maryland Home Improvement Commission:

ORDER that the Maryland Home Improvement Guaranty Fund deny the Claimant's claim; and

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

July 26, 2023
Date Decision Issued

Patrick E. Maher

Patrick E. Maher
Administrative Law Judge

PEM/ds
#206454

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*