

IN THE MATTER OF THE CLAIM	* BEFORE LEIGH WALDER,
OF ROSA CALDERON, <sup>1</sup>	* 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 OSCAR MERCADO,	*
T/A MERCADOS, LLC,	* OAH No.: LABOR-HIC-02-23-07321
RESPONDENT	* MHIC No.: 23 (75) 347

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**PROPOSED DECISION**

STATEMENT OF THE CASE  
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PROPOSED FINDINGS OF FACT  
DISCUSSION  
PROPOSED CONCLUSIONS OF LAW  
RECOMMENDED ORDER

**STATEMENT OF THE CASE**

On December 7, 2022, Rosa Calderon (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)<sup>2</sup> Guaranty Fund (Fund) for reimbursement of \$5,500.00 for actual losses allegedly suffered as a result of a home improvement contract with Oscar Mercado, trading as Mercados, LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2023).<sup>3</sup> On March 1, 2023, the MHIC issued a Hearing Order on the

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<sup>1</sup> The Claimant's last name is incorrectly spelled as Caldron in the case record documents up until May 16, 2023, when the error was corrected.

<sup>2</sup> The MHIC is under the jurisdiction of the Department of Labor (Department).

<sup>3</sup> Unless otherwise noted, all references to the Business Regulation Article are to the 2015 Volume of the Maryland Annotated Code.

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

A remote video hearing utilizing the Webex video conferencing platform was initially scheduled to be conducted on June 2, 2023, at 9:30 a.m. *See* Code of Maryland Regulations (COMAR) 28.02.01.20B(1)(b). On May 8, 2023, the OAH received the Claimant's request to convert the remote proceeding to an in-person proceeding. *See* COMAR 28.02.01.20B(2). On May 16, 2023, after finding good cause, I granted the Claimant's unopposed request, and the hearing was scheduled to take place at the OAH's satellite office in Rockville, Maryland on the already scheduled date and time. Prior to the hearing, the OAH Rockville office sustained building damage and had to be closed. Therefore, the June 2, 2023 hearing was converted to a telephone prehearing conference to discuss rescheduling this matter. *See* COMAR 28.02.01.17. At the prehearing conference, all parties agreed to reschedule the hearing for July 6, 2023. On June 28, 2023, the parties were notified that the hearing would have to be rescheduled, again, due to continued renovations at the OAH Rockville office. All parties indicated their availability to reschedule the case for September 1, 2023, at 10:00 a.m. Accordingly, on July 5, 2023, the OAH mailed all parties a Notice of Hearing (Notice) informing them of the rescheduled hearing date and time.

On September 1, 2023, I held a hearing at the OAH in Rockville, Maryland. Bus. Reg. §§ 8-407(a), 8-312. Catherine Villareale, Assistant Attorney General, Department, represented the Fund. The Claimant represented herself. The Respondent did not appear for 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. The Notice was mailed to the Respondent's address of record. COMAR 09.08.03.03A(2); COMAR 28.02.01.05C(1). The Respondent signed a Return Receipt indicating that he received the Notice. The Notice clearly

sets out the hearing date, time, and location. The Notice advised the Respondent that failure to attend the hearing might result in “a decision against you.” The Respondent made no request for postponement prior to the date of the hearing. COMAR 28.02.01.16. After waiting fifteen minutes for the Respondent or the Respondent’s representative to appear, and after determining that the Respondent received proper notice, I proceeded with the hearing. 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 & 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 exhibit offered by the Claimant:

Clmt. Ex. 1 – Binder of documents, including:

- Letter to the MHIC, dated September 17, 2022
- Text message thread, dated July 3-6, 2022
- Complaint, dated September 10, 2022
- 1A – Checks, dated March 26 and April 11, 2022
- 1B – Check, dated May 11, 2022
- 2A-H – Photographs, undated
- K4 – Handwritten note, dated August 16, 2022
- 3A – Invoice, dated September 28, 2021
- Claim, dated December 3, 2022
- Letter from the Claimant to the OAH, dated April 27, 2023
- Custom Remodeling Agreement, dated July 20, 2022
- Six photographs, undated

The Respondent was not present at the hearing and, therefore, did not offer any exhibits into evidence.

I admitted the following exhibits offered by the Fund:

GF Ex. 1 – Letter from the MHIC to the Respondent, dated January 5, 2023; Claim, received December 7, 2022

GF Ex. 2 – Hearing Order, dated March 1, 2023

GF Ex. 3 – Notice, dated July 5, 2023

GF Ex. 4 – Certification of Custodian of Records or Other Qualified Individual, dated May 22, 2023

### Testimony

The Claimant testified on her own behalf.

The Respondent was not present to testify or offer any witnesses.

The Fund did not offer any witness testimony.

### **PROPOSED FINDINGS OF FACT**

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

1. Effective November 18, 2021, the Respondent became a licensed home improvement contractor under MHIC license numbers 01-145773 (individual) and 05-146969 (corporate).
2. The Claimant sought a contractor to install new downspouts on her home. When the Claimant met the Respondent, he tried to talk her into letting him perform work in addition to installing new downspouts. The Claimant wanted the Respondent to focus on installing the downspouts but finally relented to his requests to perform additional work.
3. On September 28, 2021, the Claimant and the Respondent entered into a contract where the Respondent agreed to perform the following work:
  1. replace the face wood molding by the driveway and by the neighbor's side of the house

2. sanding the siding (primer/paint white semi-gloss)
3. paint the wood under gutters
4. paint the house soffit (white paint semi-gloss)
5. add new downspout at 4 corners with 4" extension
6. add new PVC edge bottom the siding
7. add new drainpipe 10ft on the corner for new downspout (driveway side)

(Clmt. Ex. 1).

4. The agreed upon contract price was \$4,240.00.
5. In total, the Claimant paid the Respondent \$4,240.00 in three different installments.
6. On or about March 26, 2022, the Respondent began construction. He worked sporadically.
7. On May 11, 2022, the Claimant gave the Respondent his last installment payment.
8. The Respondent did not replace the wood molding by the driveway; instead, he just painted it.
9. The Respondent sanded the siding.
10. The Respondent painted the wood under the gutters.
11. The Respondent did not paint the house.
12. The Respondent installed four downspouts, but with a three-inch extension (not a four-inch extension).
13. The Respondent did not add a new PVC edge to the bottom of the siding.
14. The Respondent added a new drainpipe, but it faced towards the Respondent's house.
15. On or about July 3, 2022, the Claimant asked the Respondent to return to her home because rain was overflowing from the gutters, and water was collecting around the base of her home due to direction of the downspouts he installed, all of which caused flooding in the Claimant's home.

16. The Respondent did not return to the Claimant's home to fix the downspouts.

17. On July 20, 2022, the Claimant contracted with Thompson Creek Window Company (Thompson Creek) to install new downspouts for \$5,500.00.

18. Thompson Creek informed the Claimant that it would have to completely uninstall all downspout work the Respondent installed and reinstall new downspouts.

19. Starting on or about August 29, 2022, Thompson Creek installed the new downspouts.

## DISCUSSION

### Applicable Law

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 find that the Claimant has [not] proven eligibility for compensation.

### Eligibility for Compensation

The Claimant argued that she suffered an actual loss incurred as a result of the Respondent's acts or omissions, entitling her to compensation from the Fund. Specifically, the

Claimant argued that the Respondent performed an unworkmanlike home improvement for which she had to retain another contractor to correctly install the downspouts she wanted on her home. The Fund agreed that the Claimant suffered an actual loss, entitling the Claimant to compensation. For the reasons that follow, I agree with the Claimant and the Fund.

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. 2023). The Claimant resides in the home that is the subject of the claim and 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). 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. 2023).

The Fund recognized that the Respondent was not a licensed home improvement contractor when the contract was signed; however, he was licensed by the time he performed work under the contract. As such, the Fund took the position that the Respondent's licensing status at the time the contract was formed should not impact the Claimant's ability to recover compensation from the Fund. For the reasons that follow, I agree. Section 8-405(a) of the Business Regulation Article sets out ". . . an owner may recover compensation from the Fund for an actual loss that results from an act or omission by a licensed contractor . . ." Similarly, COMAR 09.08.03.03B(2) sets out: "The Fund may only compensate claimants for actual losses they incurred as a result of misconduct by a licensed contractor." It is apparent in reading these provisions that the temporal importance of a contractor's licensing status, as it relates to this type of proceeding, needs to focus on when the act or omission/misconduct occurred that caused an

actual loss. In this case, the Claimant's actual loss occurred at the time the Respondent improperly installed downspouts on her property. The Respondent improperly installed the downspouts between March 26, 2022, and May 11, 2022. During this focal period, the Respondent was licensed.

The Claimant demonstrated that the Respondent performed an unworkmanlike and inadequate home improvement. The Claimant focused her presentation on the work the Respondent performed on the downspouts. The Claimant credibly testified that the Respondent improperly installed four downspouts that were incorrectly sized and caused her gutters to overflow with rainwater, and that the drainpipe he installed was angled towards her home, which caused flooding. The Claimant provided photographs to document the work the Respondent performed, and explained how the materials the Respondent used were too small to serve their appropriate purpose, hence causing water accumulation. As a result, the Claimant had to hire another contractor, Thompson Creek, which informed her that it would have to completely uninstall all downspout work the Respondent installed and reinstall new downspouts. The Claimant's testimony was uncontroverted. The fact that the Respondent's work was improperly installed and even caused damage to the Claimant's home evidences that the Respondent performed an unworkmanlike and inadequate home improvement; thus, the Claimant is eligible for compensation from the Fund. *See* Bus. Reg. § 8-405(a) (Supp. 2023); *see also* COMAR 09.08.03.03B(2). 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.

Award

The Claimant argued that she is entitled to recover \$9,640.00 from the Fund, due to an actual loss that resulted from an act or omission by the Respondent. The Fund recommended



that the Claimant recover \$4,240.00. For the reasons set out below, I agree with the Fund's recommendation.

The Claimant's request to be compensated \$9,740.00 is based on adding the \$4,240.00 she paid the Respondent, to the \$5,500.00 she paid Thompson Creek. This type of award is not allowed under section 8-405(e)(5) of the Business Regulations Article, which prohibits awarding "an amount in excess of the amount paid by or on behalf of the claimant to the contractor against whom the claim is filed." Here, the Claimant paid the Respondent \$4,240.00; therefore, the maximum amount that she can recover from the Fund is \$4,240.00. The Claimant also requested that she be reimbursed an undisclosed amount of money for damage she sustained to her home due to flooding. For two reasons, this request is not reimbursable. First, the amount the Claimant seeks is undisclosed. Second, the Fund may not compensate the Claimant for consequential or punitive damages. Bus. Reg. § 8-405(e)(3) (Supp. 2023); COMAR 09.08.03.03B(1)(a). Reimbursement for flood damage would be consequential damages. *See id.*

The Fund recommended that the Claimant be reimbursed according to the formula set forth in COMAR 09.08.03.03B(3)(c), which sets out:

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.

Applying this formula, the Claimant paid the Respondent \$4,240.00 under the contract. The main service the Claimant wanted the Respondent to provide was to install new downspouts. As discussed above, the Respondent installed the downspouts in an unworkmanlike and inadequate manner, requiring the job to be completely redone by Thompson Creek. The Claimant hired

Thompson Creek to provide the same type of service, and the Claimant had to pay Thompson Creek \$5,500.00 for its work. Adding \$4,240.00 to \$5,500.00 equals \$9,740.00. Then subtracting the Respondent's contract price (\$4,240.00) from \$9,740.00 equals \$5,500.00. Per this formula, the Claimant's actual loss is \$5,500.00. However, as set out above, the Claimant is unable to recover "an amount in excess of the amount paid by or on behalf of the claimant to the contractor against whom the claim is filed." Bus. Reg. § 8-405(e)(5) (Supp. 2023). Therefore, the Claimant's recovery is limited to \$4,240.00.

### **PROPOSED CONCLUSIONS OF LAW**

I conclude that the Claimant has sustained an actual loss of \$5,500.00 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 \$4,240.00 from the Fund. Md. Code Ann., Bus. Reg. 8-405(a), (e)(5) (Supp. 2023).

### **RECOMMENDED ORDER**

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

**ORDER** that the Maryland Home Improvement Guaranty Fund award the Claimant \$4,240.00; 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;<sup>4</sup> and

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<sup>4</sup> See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

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

November 29, 2023  
Date Decision Issued

*Leigh Walder*  

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Leigh Walder  
Administrative Law Judge

LW/ja  
#208669

**PROPOSED ORDER**

***WHEREFORE, this 26<sup>th</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.***

***Robert Altieri***

***Robert Altieri***

***Panel B***

***MARYLAND HOME IMPROVEMENT  
COMMISSION***