

IN THE MATTER OF THE CLAIM	* BEFORE DANIEL ANDREWS,
OF SEAN DEGABRIEL,	* 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 DAVID BENFER, T/A	*
TIMELESS CONSTRUCTION	* OAH No.: LABOR-HIC-02-23-27201
RESPONDENT	* MHIC No.: 23 (75) 350

\* \* \* \* \*

**PROPOSED DECISION**

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

**STATEMENT OF THE CASE**

On April 4, 2023, Sean Degabriel (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)<sup>1</sup> Guaranty Fund (Fund) for reimbursement of \$42,744.15 for actual losses allegedly suffered as a result of a home improvement contract with David Benfer, t/a Timeless Construction (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to 411 (2015 & Supp. 2023).<sup>2</sup> On October 13, 2023, the MHIC issued a Hearing Order on the Claim and transmitted the matter to the Office of Administrative Hearings (OAH) for a hearing.

<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 Volume of the Maryland Annotated Code.

1. The first part of the document is a letter from the President of the United States to the Secretary of the Navy, dated 18th March 1899. The letter is addressed to the Secretary of the Navy, Department of the Navy, Washington, D.C. The letter is signed by the President of the United States, William McKinley.

On March 15, 2024, I held a hearing by video.<sup>3</sup> 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:

- Clmt. Ex. A - Claimant's Summary of Events, supported with photographs, undated
- Clmt. Ex. B - Frederick County Building Permit 377917, expires December 6, 2022, Frederick County, Permit Application, Permit Number 377917, November 22, 2021, with drawings and structural engineering plans
- Clmt. Ex. C - Text communications between Claimant and Respondent, December 13, 2021 through June 24, 2022
- Clmt. Ex. D - Home Improvement Claim Form, received date April 4, 2023
- Clmt. Ex. E - Proposal from Respondent to Claimant and Respondent for Outdoor Living Space, February 25, 2021, second Proposal by Respondent to Claimant, March 15, 2021, with attached design of project

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<sup>3</sup> A hearing scheduled for January 5, 2024 was postponed

Clmt. Ex. F - Payments by Claimant to Respondent or others, March 15, 2021 through June 14, 2022, including:

- Check to Respondent - March 15, 2021, \$15,637.00
- Check to Respondent - December 9, 2021, \$11,009.00
- Check to Respondent - February 11, 2022, \$16,668.00
- Check to Respondent - March 11, 2022, \$16,668.00
- Check to Respondent - March 22, 2022, \$8,000.00
- Check to Respondent - June 11, 2022, \$8,000.00
- Check to William Mosely - November 4, 2021, \$1,500.00
- Credit Card payment to Huffer Trucking, November 5, 2021, \$1,257.00
- Check to William Mosely - March 2, 2022, \$1,500.00
- Credit Card payment to Huffer Trucking - March 2, 2022, \$3,552.00
- Invoice, MC Lawn Care, LLC, June 2, 2022, with credit card payment, June 14, 2022, \$4,095.00.

Clmt. Ex. G - Claimant's cost estimate of work performed by Respondent (identified only)

Clmt. Ex. H - Packet of documents regarding cost to complete or repair the Contract, including:

- Proposal by As You Like it Landscapes (As You Like It), August 9, 2022
- Acme Stove Invoice, July 29, 2022
- SERC Electric, Inc., Estimate, August 8, 2022
- Calco Fencing Company, LLC, Proposal, March 6, 2023
- Check to As You Like It, August 12, 2022, \$11,000.00
- Check to As You Like It, September 26, 2022, \$11,000.00
- Check to As You Like It, November 4, 2022, \$10,742.70.00
- Credit Card Payment to Acme Stove, August 15, 2022, \$3,106.70
- Check to SERC Electric, September 29, 2022, \$1,100.00 (with noted payment of cash payment of \$1,050.00)

Clmt. Ex. I - Frederick County Building Permit 422923 (building), application date August 31, 2022, and 425659 (electrical), application date September 14, 2022

The Respondent did not offer any exhibits into evidence.

I admitted the following exhibits offered by the Fund:

Fund Ex. 1 - Notice of Remote Hearing, rescheduled to March 15, 2024, issued date January 12, 2024

Fund Ex. 2 - Hearing Order, issued date October 13, 2023

Fund Ex. 3 - Home Improvement Claim Form, received date April 4, 2023

Fund Ex. 4 - MHIC Licensing History for the Respondent, print date December 30, 2023

### Testimony

The Claimant testified and presented the testimony of Hyunok Robyn Degabriel, who is the Claimant's wife.

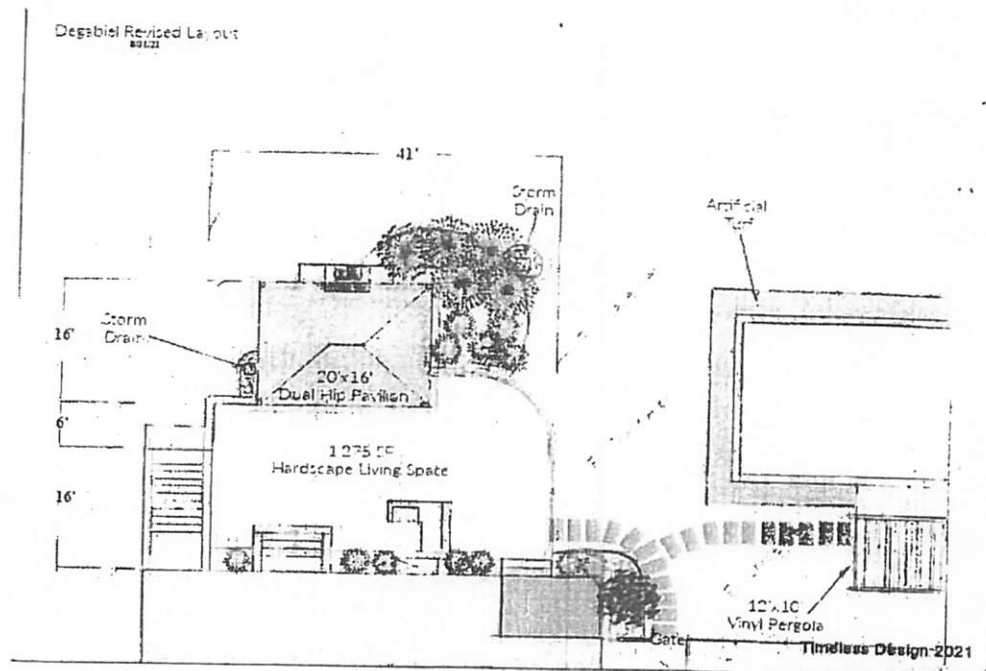
The Respondent on his own behalf.

The Fund did not present any witness 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 under MHIC license number 01-95285.
2. On March 15, 2021, the Respondent entered into a home improvement contract to Claimant to install an outdoor living space, with several components (the Contract). The Respondent created a design for the outdoor living space, which was incorporated into the Contract. The design of the outdoor living space is below:<sup>4</sup>



<sup>4</sup> The Artificial Turf was to be installed around a swimming pool. The swimming pool was installed by another contractor, referred to Sylvan Pools or Anthony Sylvan.

3. The scope of work and cost for each component of the outdoor living space included:

Hardscape Living Space

- 1,275 Square Feet (SF) of hardscape living space, includes Geo-Textile, compressed aggregate bases, polymer grout - \$28,000.00
- 49 Liner Feet (LF) agricultural mini-Creta Retaining Wall, 36 Square Feet (SF) - \$1,620.00
- 30 SF stair design (main steps), with 14-inch tread - \$1,350.00
- 8 LF Arabin (or similar) Aluminum rail - \$800.00
- 13.75 SF porch stair design (matching tread) - \$577.00
- 77 LF snap edge - \$539.00
- 2 excavation dumpsters - \$1,050.00
- **Total - \$33,936.00**

Open Gable Pavilion (Free-Standing Cabana)

- 22'x14' (320 SF coverage, with approximate 396 SF Roof Structure), includes vinyl trim (soffit), rain gutter, open rafter, match shingles to hose plus dual hip engineering - \$16,236.00
- Open gable decorative ridge support 8 LF (vinyl cladding) - \$240.00
- 72 LF Glulam headers (Engineered for Spans) Vinyl Clad with Crown Molding - \$5,040.00
- 4 oversized reinforced (8" vinyl sleeved posts) - \$1,400.00
- **Total - \$22,916.00**

Custom Framed Stone (Wood Burning Fireplace)

- 204 SF Steel Stud Cabinet (Durok Face), dimension 6' wide by 12' elevation - \$3,260.00
- 164 SF El Dorado Stone Veneer (match fireplace) - \$4,920.00.00
- 42" Villawood (stainless) outdoor wood burn fireplace insert with plumbing, includes central vent plumbing and SL series vent cap (cupula) - \$3,250.00
- 28 SF Stone Cap (limestone or thermal blue) for mantal/hearth/cupula - \$1,200.00
- **Total - \$12,630.00'**

Wood Storage Cabinets

- Two 30"x30"x30" Stud/Durdock Cabinets - \$562.00
- Stone Veneer - \$960.00
- Stone Cap (2 at 32"x34" thermal caps bonded) 15 SF - \$550.00
- **Total - \$2,072.00**

Bar Kitchen Island

- 10' 6" El Dorado Kitchen (60"x30"x60" cabinets) - \$2,362.00
- 72 SF El Dorado Stone Veneer (match fireplace) - \$2,304.00
- 6.5 LF Bar Cantilever (Partition) - \$610.00

- 8.25 SF Backsplash Tile (homeowner to provide tile) - \$185.00
- Installation of 4x components (grill and door set) - \$600.00
- 34 SF Travertine or Turkish marble countertop - \$1,080.00
- Umbrella Mount - \$140.00
- **Total - \$7,280.00**

#### Electrical and Utilities

- Three GFCI<sup>5</sup> outlets (bar/kitchen/pavilion) - \$450.00
- Two Vista Pro Under-Cap LED fixtures - \$300.00
- L/P<sup>6</sup> trench/plumbing and tie in - \$2,700.00
- Ceiling fan installation - \$350.00
- **Total - \$3,800.00**

#### Permits

- Mo/Co Electrical - \$500.00
- L/P Gas - \$500.00
- Build Permit - \$475.00

#### Other work –

- 70 LF drain (2 basins) to emitter - \$1,100.00
- Planting plan to be completed independently of the scope of work

4. The Contract's cost for the outdoor living space \$84,700.00.
5. The Contract included other work to be performed in the swimming pool area.

The scope of work and costs for each component included:

- 12'x10' classic vinyl shade pergola - \$2,850.00
- 120 SF matching hard landscape (Techo Mista) - \$2,640.00
- 20 LF (20 SF) Mini Creta Retaining Wall (will review after final pool grade) - \$900.00<sup>7</sup>
- 400 SF - 36" Band of Easy-Turf Ultimate Natural Artificial Turf - surrounding the pool, includes aggregate base, 20 Grit sand for strand taught-hess and steel spikes - \$4,115.00
- Pool feathering and grade fill between pool deck and patio space including area grading - \$4,150.00
- includes 40 yards of screened topsoil, seed and straw
- **Total - \$16,120.00**

<sup>5</sup> GFCI means Ground Fault Circuit Interrupter.

<sup>6</sup> L/P refers to Liquified Petroleum Gas.

<sup>7</sup> The retaining wall location in the swimming pool area is not shown on the above design. It was to be installed to the right of the pool area, in a location where the pool equipment was installed.

6. The Contract's total cost, including the scope of work for the outdoor living space and the swimming pool area was \$100,820.00.

7. With normal weather conditions, the build time to complete the Contract was estimated to be eight to ten weeks with county inspections. The Respondent was to begin work in late June or July 2021.

8. The Contract required the Claimant to make payments to the Respondent under the following schedule:

- At project agreement, a deposit - \$15,637.00
- Second payment upon excavation and roof frame - \$11,009.00
- Third payment upon completion of excavation and first Techo deliver - \$16,668.00
- Forth payment upon completion of roof shingle - \$16,668.00
- Fifth payment upon completion of hardscape floors - \$16,668.00
- Sixth payment upon completion of fireplace and rough-in electrical inspection - \$16,668.00
- Final payment upon completion of project, site clean up and yard repair - \$7,500.00

9. In September 2021, the Respondent began to perform the work required by the Contract.

10. There Claimant performed the Contract intermittently during the winter months.

11. On March 2, 2022, the Claimant had Huffner Trucking deliver eight truckloads of topsoil for the pool area.<sup>8</sup> On the same day, William Mosely graded the topsoil.<sup>9</sup> On this date, the Claimant paid Huffner Trucking \$3,552.00 and Mr. Mosely \$1,500.00.

12. By March 2, 2022, the Claimant requested the Respondent to explain if work to install pavers for the patio and pavilion could be done. The Claimant also wanted an update as to when the pergola, a retaining wall, and the astroturf around the pool would be installed.

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<sup>8</sup> Huffner Trucking was a company that delivered the topsoil for the Claimant's contract.

<sup>9</sup> William Mosely was a contractor providing grading services.



13. On May 21, 2022, the Claimant sent a text to the Respondent complaining about a lack of communication and inquiring if the Respondent was "walking away" from the Contract. The Claimant asked if another contractor should be located to complete the project and indicated that the Claimant was "OK" doing so. The Claimant indicated that the Respondent had been paid for all work and materials and that the Claimant would take possession of materials on site, including assuring disposal.

14. On May 24, 2022, the Claimant sent a text message to the Respondent requesting a plan to install the fireplace, steps to the porch, the drainage, and other work. The Claimant wanted the Respondent's plan in writing for the remainder of the work, and when the whole project would be completed.

15. On May 25, 2022, the Respondent had workers at the Claimant's home to work on the project, but the Claimant told them to leave. At 8:04 a.m., the Claimant sent a text message to the Respondent to tell him that the workers were sent away and that the Claimant did not want the Respondent to work on the backyard until the Respondent gave the Claimant a detailed plan and the date the work will be completed. At 8:30 a.m., in another text message sent to the Respondent, the Claimant wanted a plan for the whole project, outdoor kitchen, pavilion, drainage, fireplace, seed, and straw.

16. On May 25, 2022, at 8:35 a.m., in a text message, the Respondent responded that the workers were to work on the draining, getting the kitchen done, and cleaning up. The Respondent also explained that he was getting dirt and drainage seed and straw all done and requested that the Claimant let the workers start working. At 8:54 a.m., in another text message, the Respondent told the Claimant that he would complete the project by July 1 or will take "1k off per day."

17. On May 25, 2022, at 9:42 a.m., the Respondent sent a text to the Claimant to ask if he or his wife were home because he was at their home setting the location for the kitchen and wanted their input, or otherwise he would set the kitchen as planned. There was no response from the Claimant. The Claimant installed the Bar Kitchen Island.
18. On May 26, 2022, the Respondent sent a text message to the Claimant to report that the floor to hardscape living space was done and requested a "half" payment.
19. On June 2, 2022, MC Lawn Care installed twelve tons of topsoil around the pool and low areas, raked the area, applying grass seed and straw at a cost of \$4,095.00, which the Claimant paid directly to MC Lawn Care.
20. On June 11, 2022, the Claimant paid the Respondent by personal check, as half payment for the outdoor stone patio floor \$8,000.00.
21. After June 11, 2022, the Respondent did not return to the Claimant's residence and did not complete the project, the Respondent also stopped communicating with the Claimant.
22. Under the Contract, the Claimant paid to the Respondent at total of \$75,982.00, as follows:
- Personal check to Respondent, a deposit, \$15,637.00, March 15, 2021;
  - Personal check to Respondent, a second payment, \$11,009.00, December 9, 2021;
  - Personal check to Respondent, a third payment, \$16,668.00, February 11, 2022;
  - Personal check to Respondent, a fourth payment, \$16,668.00, March 11, 2022;
  - Personal check to Respondent, a fifth payment, \$8,000.00, March 22, 2022; and
  - Personal check to Respondent, a half payment for floor, \$8,000.00, June 11, 2021.
23. The Claimant also paid other contractors - William Mosley, Huffner Trucking, and MC Lawn Care - for topsoil and grading totaling \$11,904.00.00. The payments included:
- Personal check to William Mosely, \$1,500.00, November 4, 2021;
  - Credit card to Huffner Trucking, \$1,257.00, November 5, 2021;
  - Personal check to William Mosley, for grading, \$1,500.00, March 2, 2022;
  - Credit card to Huffner Trucking, \$3,552.00, March 2, 2022; and
  - Credit card to MC Lawn Care, \$4,095.00, June 14, 2022.

24. On August 9, 2022, the Claimant entered into a home improvement contract with As You Like It, with a scope of work and cost which included:

Fireplace and Wood Storage

- Install a fireplace and wood storage cabinet on existing concrete slab, with stone on site, with more to stone to be purchased complete, modify Pergola as needed, and appropriate wiring and electrical; and
- The fireplace was to be 13 feet tall by 7 feet wide, and a minimum of 30 inches deep.
- **Cost \$26,571.00**

Deck Step and Treads

- Remove Deck step treads, two deck boards at sliding door to remove deck post, and install two new deck boards to match existing color;
- Remove and replace white deck fascia board on front of deck;
- Remove and replace white step facial boards and install white on sides of steps; and
- Install new deck treads to match existing deck color,
- **Cost \$1,805.00**

Grading and drainage

- Install 12"x12" drain box off left side of patio and drain pipe to left side of driveway;
- Add soil at basement steps to allow water flow to drain box;
- Grade left side of patio to allow water flow away from patio; and
- Grade around patio, seed, straw all areas.
- **Cost \$3,866.70**

25. The total contact cost with As You Like It was \$32,242.70.

26. On August 8, 2022, the Claimant hired SERC Electric, Inc., to perform electrical work including new circuit fan and outlet from main electrical panel, with 80 foot PVC pipe, three GFCI outlets, ceiling fan, and two outside outlets for the outdoor grill at a cost of \$2,150.00.

27. On March 6, 2023, the Claimant obtained an estimate from Calco Fencing Company, LLC, to install a functional outdoor kitchen at a cost of \$18,178.75. The scope of work included:

- Installing Kitchen Island Cabinet Bases, two 60" and one 30,"
- Install 72 SF of El Dorado Stone Veneer;

- Install 7 LF of bar top stone;
- Install 9 SF of Backsplash tile;
- Install grill, grill cabinet doors, and three drawer cabinets; and
- Install 5 SF of Travertine Countertop

28. The Claimant has not repaired or replaced the outdoor kitchen installed by the Respondent.

## 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 (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.

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 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). 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).

#### *Incomplete Home Improvement*

On March 15, 2021, the Claimant and the Respondent entered into the Contract to install an outdoor living space at the Claimant's residential home. The Contract cost was \$100,820.00. The Contract required the Respondent to install an outdoor living space (stone patio), a pavilion, a stone fireplace with wood storage, a bar kitchen island, certain electrical utilities, and two drains. A swimming pool was installed by another contractor, Anthony Sylvan or Sylvan Pools, and in the area of the swimming pool, the Contract required the Respondent to install a pergola, hard landscaping, a retaining wall, astroturf around the pool, and install and grade for drainage forty yards of topsoil with seed and straw. Because of issues with the astroturf, the Claimant agreed to substitute stone pavers around the pool.

Depending on weather conditions, the Respondent was to begin performing the Contract in June or July 2021 and complete the Contract within eight to ten weeks or sometime in September 2021. The Claimant, however, did not start performing the Contract until September 2021. Text messages between Claimant and Respondent reflect that this delay was caused by weather conditions or issues with materials and delivery delays related to the COVID pandemic.

During the winter months of November 2021 through March 2022, the Claimant directly paid subcontractors used by the Respondent, William Mosely and Huffner Trucking, to haul and grade topsoil for the project.

By May 2022, the Respondent installed the outdoor living space, the pavilion, the two drains, the pergola, hard landscaping, retaining wall, and stone pavers around the pool. The Respondent also installed and graded forty yards of topsoil for drainage.

From the perspective of the Respondent's home and facing the backyard, the Claimant installed and graded the forty yards of topsoil required by the Contract on the right side of the outdoor living space, between the outdoor living space and the pool area. In this area, the Respondent also installed a drain to facilitate water drainage. From the same perspective of facing the backyard, the second drain was installed to the left side of the outdoor living space. This area was used by trucks and workers to bring in materials and equipment. The area also required topsoil and grading by the Respondent, which the Respondent planned doing as the project neared completion. The drain that was installed by the Respondent was subject to being reinstalled in another location at a later time.

By late May 2022, the relationship between the Respondent and the Claimant had broken down. The Respondent was communicating with the Claimant by text messages sent to the Claimant's wife. In a series of text messages, the Claimant was asking the Respondent if he was going to complete the project or if the Claimant should seek other contractors to complete the project. At the time, to complete the Contract required installing the stone fireplace and wood storage. To install the fireplace required the Respondent to purchase a wood burning fireplace insert. The Respondent also had to install the bar kitchen island, and electrical utilities. During the project, the Respondent installed a porch stair design with tread to match an existing deck and which connected the house to the outdoor living space. The Respondent had to correct some of this work by installing matching treads and to place white vinyl on the sides of the steps. The Respondent also had to install topsoil and grade the area on the left side of the outdoor living area.

On May 25, 2022, the working relationship between the Claimant and the Respondent became irreparable. The Claimant would not allow the Respondent's workers onto the Property until the Respondent provided a clear plan of when he would complete the project. The

Respondent responded that the workers were there to work on the drain, install the kitchen, and that he was on the way to finish the stone patio floor; then he planned on cleaning up and installing seed and straw. Eventually, this exchange led to the Claimant's wife suggesting that if the project was not completed by July 1, 2022, they would deduct \$1,000.00 day. The Respondent testified that he just wanted to complete the stone floor, install the kitchen, and collect a payment, so he agreed to this condition. However, because of the relationship issues, the Respondent also anticipated that he would not complete the Contract. Between May 25, 2022 and June 11, 2022, the Respondent completed the stone patio floor and installed the bar kitchen island. He explained that the kitchen island was installed as shown in the project design, which was incorporated into the Contract. On June 11, 2022, after the Claimant made a payment of \$8,000.00, the Respondent stopped communicating with the Claimant and left the Contract incomplete.

As of June 11, 2022, the Claimant contends that he paid the Claimant and other subcontractors for the Claimant a total of \$87,886.00. This amount included payments the Claimant made to Respondent from March 15, 2021 through June 11, 2022, which totaled \$75,982.00. The Claimant also included payments made directly to William Mosely and Huffner Trucking to haul topsoil and grading for the project. The Claimant paid these other contractors a total of \$7,809.00. Because another contractor, MC Lawncare, installed more topsoil and graded around the pool area, including seed and straw, the Claimant included a cost of \$4,095.00, which he directly to the other contractor. In total, for hauling topsoil and grading services, the Claimant paid these other contracts, \$11,904.00, which he added to the total amount paid to the Respondent toward the Contract price.

To complete the Contract, the Claimant contracted with another licensed home improvement contractor, As You Like It, to install the stone fireplace and wood cabinet storage at

a cost of \$26,571.00. The Claimant purchased a wood burning fireplace insert from Acme Stove at a cost of \$3,106.70. The Claimant also paid As You Like It to repair and complete the porch steps at a cost of \$1,805.00. The Claimant hired an electrical contractor, SERC Electric, Inc, to install electrical utilities at a cost of \$2,150.00. The Claimant contends that the Respondent improperly or in an unworkmanlike manner installed the kitchen island. To repair or replace the Respondent's work, the Claimant obtained an estimate from Calico Fence Company to reinstall the kitchen Island at a cost of \$18,178.75 but has yet to have that work performed due to costs. To complete the Contract, the Respondent argues that he had paid or will have to pay other contractors a total of \$51,810.75.

During the hearing, the Respondent agreed that he left the Contract incomplete. The evidence also demonstrated that the Contract was left incomplete requiring the Claimant to hire other contractors to repair the Respondent's work or to complete the Contract and resulted in an actual loss for the Claimant. As a result, I am persuaded that the Claimant established his eligibility for reimbursement from the Fund. The issue now becomes the amount of the actual loss.

#### *Actual Loss*

Having found eligibility for compensation from the Fund, I must determine the amount of the Claimant's actual loss, 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 work under the Contract, and the Claimant 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).

As the formula indicates, I must determine what amounts the Claimant had paid the Respondent or on behalf of the Respondent under the original contract.<sup>10</sup> The Respondent and the Fund argued that the Claimant paid \$75,982.00 to the Respondent. The Claimant contends that he paid the Respondent and the other contractors \$87,886.00. The Claimant's argument includes the \$11,904.00 paid directly to the other contractor for topsoil and grading services. This work was beyond the terms of the original contract which only contemplated forty yards of topsoil and grading. For this reason, I agree that the total amount paid the Respondent under the Contract was \$75,982.00.

Next, I must determine the 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 to complete the original contract. The Respondent disagreed with the estimate by As You Like It to install the stone fireplace and wood storage cabinets in the amount of \$26,571.00. The Respondent argued that the Contract to install the fireplace and wood storage

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<sup>10</sup> The Claimant presented evidence, including a spreadsheet, of the amounts paid to the Respondent for work performed and estimates for the value of the work performed. The Claimant presented no credible evidence to support the estimated values. The Claimant agreed that these values were his own estimates. I gave those estimated values no evidentiary weight.

cabinet totaled \$14,702.00 and was for a fireplace that was 6 feet by 12 feet. He also explained that the As You Like It contract increased the size of the fireplace to seven feet by thirteen feet, which may account for the larger estimate. The Claimant did not provide any evidence to demonstrate that the Respondent's cost to install the fireplace and wood storage cabinets was unreasonably low. Reimbursement from the Fund is based on a reasonable cost to complete and when faced with two different costs, the lower cost of \$14,702.00 is the most reasonable amount to complete the fireplace and wood storage cabinet, which included the cost purchase the fireplace insert.

The Respondent agreed that the Claimant had to hire an electrician to install the electrical outlets as required by the Contract. However, the Respondent disagreed with the estimate of \$2,150.00 by SERC Electric, Inc, which included installing three GFCI outlets and two other outdoor outlets. Although, the Contract did not have a separate line item for outlets, which required installation of three GFCI outlets, the Respondent estimated that to install three outlets would have cost about \$450.00 each or a total of \$1,300.00. As discussed earlier, without any evidence that the Respondent's estimate is unreasonably low, I find that the most reasonable estimate is \$1,300.00 to complete this portion of the Contract.

The Respondent also agreed that the Claimant had to pay another contractor to repair and complete the stair design. The Respondent disagreed with the estimate of \$1,805.00 by As You Like It, which included replacing and color matching two decking boards and replacing white step facial boards and white on the sides of the steps. The Respondent contends that the Contract had the cost to install brand new matching stair treads at a cost of \$577.00. I find the Respondent's proposal of \$577.00 did not fully consider the repair work, including materials and labor, as proposed by As You Like It, which included other components beyond simply replacing

two decking boards. I find the estimate of \$1,805.00 from As You Like It to be a reasonable cost to repair or complete the stair design by the Respondent.

The Respondent agreed that Claimant needs to hire another contractor to install topsoil and grade that topsoil on the left side of the outdoor living space. The Respondent, however, argued that he installed the drain in the area as required by the Contract and is not responsible for any other cost if the Claimant wanted to move the drain to a different location. The evidence, including photographs, presented by the Claimant demonstrated that the Respondent installed the drain. While the Respondent was performing the Contract, there were plans to move the drain to another location, however, that never occurred because the Respondent left the Contract incomplete. There is no evidence the Respondent would have charged the Claimant an extra cost for moving the drain. The Respondent estimated that the cost to install topsoil and grading, with seed and straw, in this area was approximately \$570.00.

For the left side of the outdoor living space, the Respondent obtained an estimate from As You Like It to install a drain, add topsoil and grading, with seed and a straw at a cost of \$3,866.70. The estimate from As You Like It also includes other work to improve drainage in this area. The Claimant presented no evidence to explain why the extra drainage work was required or why the drain installed by the Respondent was inadequate or unworkmanlike. I have no question that the Claimant wanted to maximize the drainage in this area as he wanted to do on the right side of the outdoor living space. I am persuaded by the Respondent's position that he installed the drain as required by the Contract and is not responsible for any extra work the Claimant wanted done in this area. The Respondent agreed that Claimant was entitled to at least the reasonable cost of \$570.00 to install the topsoil and grading in this area including seed and straw. I also find this cost reasonable.

The last major dispute between the Respondent and the Claimant is with the outdoor kitchen. The Claimant argued that the Respondent inadequately or in an unworkmanlike manner installed the stone veneer to the island kitchen because he could easily see kitchen components through large gaps of the stone veneer. The Claimant also complains that a section of a natural stone countertop has started to deteriorate. The Claimant asserts that the Respondent installed the kitchen island too close to the house. The kitchen island is L shaped and a part of the island is placed immediately adjacent to the Claimant's home. The Claimant obtained an estimate from Calco Fencing Company, LLC, to install a functional outdoor kitchen at a cost of \$18,178.75. The Claimant has not performed any work to repair or reinstall the kitchen island because of costs.

The Respondent argued that based on the shape of the stone veneer there were natural large gaps and, before he left the job, he would have piped filling into the gaps, which would have finished the stonework. As to the countertop, the Respondent argued that the Claimant wanted natural stone, which the Respondent installed without any warranty because natural stone tends to deteriorate. However, the Respondent explained that he would have been able to replace that stone piece at a cost of \$35.00. The Respondent also contends that the kitchen island was completely installed and located exactly as it was planned on the design. He contends that he should not be held responsible if the Claimant wants a brand-new outdoor kitchen. The Respondent contends that the estimate by Calco was unreasonable because the Respondent installed all new components, which are interchangeable and could easily be moved without having to destroy and replace those components. The Respondent also explained that he installed the entire kitchen island at a cost of \$7,280.00. For these reasons, the Respondent contends that an estimate which doubles the original cost to install is unreasonable.

The kitchen island was the last component of the Contract that the Respondent installed. By this time, the Respondent was ready to leave the Contract after obtaining a payment from the Claimant. The kitchen island's placement and whether it was adequate or workmanlike is a matter of dispute between the parties, which I must resolve. The Respondent clearly believes that he installed the kitchen as agreed upon by the design plan. The Respondent also admitted that he adjusted the placement because of site conditions. The Respondent also explained that he unsuccessfully attempted to have the Claimant confirm the location before he began installation. The Claimant explained that he and his wife both work and may not have been immediately available to discuss the island placement. Regardless, the Claimant believes that the kitchen is too close to the house. The evidence as to whether the placement of kitchen island, which includes elements for cooking, presents a danger to the home is circumstantial, but I will resolve this issue in the Claimant's favor.

The Claimant will have another contractor move the kitchen to another location. I agree with the Respondent that moving the kitchen may include preserving the kitchen components. As before, the cost to install a brand-new kitchen island was \$7,280.00. There is no evidence to demonstrate that this cost was unreasonably low. There is also no evidence to demonstrate why the cost to remove and replace the kitchen would be double the original cost, assuming that kitchen components can be reused. I find that the reasonable cost to replace the kitchen island is \$7,280.00.

Based on my analysis, the reasonable costs to repair the Respondents work or to complete the Contract, totals \$25,657.00 (\$14,702.00 + \$1,300.00 + \$1,805.00 + \$570.00 + \$7,280.00). Having determined this amount, the calculation of the Claimant's actual loss is as follows: the amounts paid to contractor under the original contract (\$75,982.00) added to any reasonable amounts the Claimant has paid or will be required to pay another contractor to repair or complete

the original contract (\$25,657.00), less the original contract price (\$100,820.00) equals an actual loss in the amount of \$819.00.

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>11</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 less than the amount paid to the Respondent and less than \$30,000.00. Therefore, the Claimant is entitled to recover their actual loss of \$819.00.

### **PROPOSED CONCLUSIONS OF LAW**

I conclude that the Claimant has sustained an actual and compensable loss of \$819.00 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. COMAR 09.08.03.03B(3)(c).

### **RECOMMENDED ORDER**

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

**ORDER** that the Maryland Home Improvement Guaranty Fund award the Claimant \$819.00; 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>12</sup> and

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<sup>11</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>12</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.

June 13, 2024  
Date Decision Issued

*Daniel Andrews*  
Daniel Andrews  
Administrative Law Judge

DA/ja  
#211742

**PROPOSED ORDER**

***WHEREFORE, this 20<sup>th</sup> day of September, 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.***

**Chandler Louden**

**Chandler Louden**

**Panel B**

**MARYLAND HOME IMPROVEMENT  
COMMISSION**