

IN THE MATTER OF THE CLAIM	* BEFORE MARY PEZZULLA,
OF DINA PATTERSON,	* 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 KIMBERLY KAGEN,	*
T/A PHOENIX REMODELING	* OAH No.: LABOR-HIC-02-23-24584
GROUP LLC,	* MHIC No.: 23 (75) 437
RESPONDENT	*

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**PROPOSED DECISION**

STATEMENT OF THE CASE  
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RECOMMENDED ORDER

**STATEMENT OF THE CASE**

On February 3, 2023, Dina Patterson (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)<sup>1</sup> Guaranty Fund (Fund) for reimbursement of \$18,496.70 for actual losses allegedly suffered as a result of a home improvement contract with Kimberly Kagen, trading as Phoenix Remodeling Group LLC (Respondent). Md. Code Ann.,

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<sup>1</sup> The MHIC is under the jurisdiction of the Department of Labor (Department).

Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2023).<sup>2</sup> On September 15, 2023, the MHIC issued a Hearing Order on the Claim. On September 15, 2023,<sup>3</sup> the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On October 31, 2023, I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. Nicholas Sokolow, Assistant Attorney General, Department, represented the Fund. The Claimant was self-represented. The Respondent failed to appear for the hearing.

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 September 26, 2023, the OAH provided a Notice of Hearing (Notice) to the Respondent by United States Postal Service (USPS) certified mail, as well as by USPS regular mail, to two addresses on record with the OAH for the Respondent. COMAR 28.02.01.05C(1). The Notice was also sent via USPS regular mail to the Respondent's attorney, Richard Hackerman, whose information had been provided by the MHIC on its transmittal of the matter to the OAH. The Notice stated that a hearing was scheduled for October 31, 2023, at 9:30 a.m., at the OAH in 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 Notices sent via certified mail were both returned to the OAH, one with the notation of "Return to Sender Attempted – Not Known Unable to Forward" and the other with the notation of "Moved Left No Address Unable to Forward Return to Sender." The USPS did not

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

<sup>3</sup> The Transmittal form from the MHIC is date-stamped as having been received by the OAH on September 14, 2023. I find this to be a typographical error, and that the matter was transmitted on September 15, 2023.

return either Notice sent by regular mail to the OAH as undeliverable or for any other reason, nor did it return the notice sent to Mr. Hackerman. 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 & 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. 1 - Contract between the Claimant and the Respondent, March 8, 2022
- Clmt. Ex. 2 - Two photographs of water damage inside the Claimant's home, taken by the Claimant in February 2022
- Clmt. Ex. 3 - ReBuild, Inc. Roof Assessment Report, July 16, 2021

The Respondent did not appear and did not offer any exhibits.

I admitted the following exhibits offered by the Fund:

- Fund Ex. 1 - Notice of Hearing, September 26, 2023

- Fund Ex. 2 - Hearing Order, September 15, 2023
- Fund Ex. 3 - Letter from the MHIC to the Respondent, February 14, 2023 with attached Home Improvement Claim Form, received by the MHIC on February 3, 2023
- Fund Ex. 4 - Certification of Custodian of Records, July 25, 2023
- Fund Ex. 5 - Affidavit of David Finneran, October 19, 2023
- Fund Ex. 7<sup>4</sup> - Check No. 17634009 from Nationwide Insurance in the amount of \$12,602.40, February 15, 2022

Testimony

The Claimant testified and presented the testimony of her husband, Greg Patterson.

The Respondent did not appear and did not offer any testimony.

The Fund did not present any 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 numbers 01-116244 and 05-135908.
2. In approximately July 2021, the roof of the Claimant's home sustained damage and needed to be replaced. The Claimant filed a claim with her homeowner's insurance for the cost of a new roof.
3. On March 8, 2022, the Claimant and the Respondent entered into a contract to replace the roof on her home (Contract).
4. The original agreed-upon Contract price was \$18,496.70.
5. The Claimant received a check from her insurance company in the amount of \$12,602.40, which she signed over to the Respondent as her deposit on the Contract.

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<sup>4</sup> The Fund did not offer an exhibit 6.

6. The remaining balance on the Contract was \$5,894.30, which was to be paid to the Respondent upon completion of the Contract. The Claimant's insurance company was to pay this money to the Claimant upon proof of completion, and then the Claimant was to sign the check over to the Respondent.

7. The Respondent was to begin working on the roof in May 2022.

8. After taking the initial deposit of \$12,602.40, the Respondent performed no work on the property.

9. The Claimant and her husband attempted to contact the Respondent multiple times to find out the status of their roofing project, but received no information about when the Respondent would begin work.

10. The Claimant was not able to obtain the remaining \$5,894.30 from her insurance company to use to hire another roofer because the insurance company would not release that money without proof of completion.

### **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 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).

The Claimant did not unreasonably reject good faith efforts by the Respondent to resolve the claim. *Id.* § 8-405(d) (Supp. 2023). The Claimant and her husband made multiple attempts to contact the Respondent in order for the Respondent to fulfill the terms of the Contract. The Respondent, however, abandoned the Contract without performing any work. It is abundantly clear that the Respondent took the Claimant’s \$12,602.40 and then performed no work, making this an incomplete home improvement. I credit both the Claimant and Mr. Patterson’s testimony that they made multiple attempts to contact the Respondent and, had the Respondent responded, they would have happily allowed the Respondent to perform the work the Respondent agreed to perform under the Contract. Mr. Patterson testified that he had faith in the Respondent and now, despite still needing a new roof, has no trust in contractors. The Claimant also expressed frustration that not only had the Respondent absconded with the \$12,602.40, but her insurance

company will not pay the remaining \$5,894.30 without proof of completion, which has not happened. Based on the record before me, I 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. 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 abandoned the 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).

The Claimant is seeking an award of the Contract price of \$18,496.70. She explained that while she paid the Respondent \$12,602.40, her insurance company was to pay her the remaining \$5,894.30 if the work was completed within two years. The Claimant expressed frustration that she will not be able to obtain this \$5,894.30 since the two-year timeframe is almost over. She further testified that her roof is still in need of repair, but costs have risen since she entered into the Contract with the Respondent. She argued that she should be reimbursed the full \$18,496.70 in order to be made whole.

The Claimant's frustration with the position the Respondent placed her in by taking her deposit and then abandoning the Contract was palpable and absolutely understandable. Through no fault of her own, the Claimant finds herself in a situation where her home still requires

roofing work, but she no longer has the money to complete the repairs. However, the statute and regulations are clear that Claimant's actual loss cannot be greater than the amount that she paid under the Contract. Bus. Reg. § 8-405(e)(1), (5) (Supp. 2023); COMAR 09.08.03.03B(3)(a). I find the Claimant's actual loss to be \$12,602.40, which is the amount she paid to the Respondent.

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>5</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 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 \$12,602.40.

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

I conclude that the Claimant has sustained an actual and compensable loss of \$12,602.40 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)(a). 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 \$12,602.40; and

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<sup>5</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").



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.

December 28, 2023  
Date Decision Issued

  
Mary Pezzulla  
Administrative Law Judge

MP/kkc  
# 208277

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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 13<sup>th</sup> day of February, 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.***

***Joseph Tunney***

***Joseph Tunney***

***Chairman***

***Panel B***

***MARYLAND HOME IMPROVEMENT  
COMMISSION***