

<p>IN THE MATTER OF THE CLAIM OF EMMANUEL HARRIS, CLAIMANT AGAINST THE MARYLAND HOME IMPROVEMENT GUARANTY FUND FOR THE ALLEGED ACTS OR OMISSIONS OF KIMBERLY KAGEN, T/A PHOENIX REMODELING GROUP, LLC, RESPONDENT</p>	<p>* BEFORE LORRAINE E. FRASER, * AN ADMINISTRATIVE LAW JUDGE * OF THE MARYLAND OFFICE * OF ADMINISTRATIVE HEARINGS * * * * OAH No.: LABOR-HIC-02-23-25543 * MHIC No.: 23 (75) 776 *</p>
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STATEMENT OF THE CASE

On April 21, 2023, Emmanuel Harris (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)¹ Guaranty Fund (Fund) for reimbursement of \$16,813.00 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., Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2023).²

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

On September 28, 2023, the MHIC issued a Hearing Order on the Claim. On September 29, 2023, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On January 31, 2024, I held a hearing by videoconference. Bus. Reg. §§ 8-407(a), 8-312; Code of Maryland Regulations (COMAR) 28.02.01.20B(1). Catherine Villareale, Assistant Attorney General, Department, represented the Fund. Jason Penn, Esquire, represented the Claimant, who was present. The Respondent did not appear.

After waiting fifteen minutes for the Respondent or a representative for the Respondent 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. COMAR 28.02.01.23A. On December 4, 2023, the OAH provided a Notice of Hearing (Notice) to the Respondent by certified mail and first-class mail. Bus. Reg §§ 8-312(d), 8-407(a); COMAR 28.02.01.05C(1). The Notice stated that a hearing was scheduled for January 31, 2024, at 9:30 a.m., via Webex, and included instructions how to log into the videoconference. 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 Notice sent to the Respondent's home address via first-class mail was not returned as undeliverable. The Notice sent to the Respondent's home address via certified mail was returned with the notation "Refused." The Respondent did not notify the OAH of any change of mailing address. COMAR 28.02.01.03E. I determined that the Respondent received proper notice, and I proceeded to hear the captioned matter. COMAR 28.02.01.05.

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 Estimate from Shaq's Restoration Services, 11/7/23
- Clmt. Ex. 2A Photographs (8) of the exterior of the Claimant's home
- Clmt. Ex. 2B Photographs (10) of the interior of the Claimant's home
- Clmt. Ex. 3 Contract between the Claimant and the Respondent, pages 1 and 3, 10/9/20
- Clmt. Ex. 4 Warranty from the Respondent, 2/19/21
- Clmt. Ex. 5 Email to the Respondent from the Claimant, 11/12/22
- Clmt. Ex. 6 The Claimant's monthly payment to Foundation Finance Company, 1/25/24
- Clmt. Ex. 7 The Claimant's loan balance with Foundation Finance Company, 2/21/24
- Clmt. Ex. 8 Contract between the Claimant and the Respondent, page 2, 10/9/20

I admitted the following exhibits offered by the Fund:

- Fund Ex. 1 Letter to the Respondent from the MHIC, 4/21/23; Home Improvement Claim Form, received 4/21/23
- Fund Ex. 2 Hearing Order, 9/28/23

Fund Ex. 3 Notice of Remote Hearing, 12/4/23

Fund Ex. 4 The Respondent's MHIC licensing history, 1/22/24

The Respondent did not offer any exhibits.

Testimony

The Claimant testified and presented the following witness: Sheku Bangura, owner of Shaq's Restoration Services.

The Respondent did not present any 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 116244.
2. On October 9, 2020, the Claimant and the Respondent entered into a contract to replace the siding, soffit, fascia, rake, corner posts, gutters, downspouts, and covers on the home owned by the Claimant (Contract).
3. The original agreed-upon Contract price was \$16,813.00.
4. The Claimant financed the contract through Foundation Finance Company, who paid the Respondent \$16,813.00. The Claimant is currently repaying his loan and has made all his payments to date.
5. The Respondent completed the work under the contract by the end of October 2020.
6. Sometime in October or November 2022, the Claimant noticed problems with the work performed by the Respondent, specifically problems with the siding, soffit, and gutters, and resulting water damage inside the home.

7. On November 12, 2022, the Claimant emailed the Respondent regarding the problems with the work. The Claimant also made several phone calls to the Respondent. The Respondent did not respond to the Claimant.

8. Siding installed by the Respondent is falling off the home, portions of the soffit are hanging open, the j-channels that connect the siding are improperly installed and/or missing, and the fascia is not caulked around the nails to prevent leaks.

9. As a result of the missing and damaged siding, soffit, and fascia, water is leaking into the Claimant's home and causing stains on the drywall and damage to the insulation.

10. On November 7, 2023, Shaq's Restoration Services estimated the cost to repair the soffit, siding, fascia, and water damage to the Claimant's home was \$8,419.15.

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 (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.

The Respondent was a licensed home improvement contractor at the time the Respondent entered into the Contract with the Claimant. The Respondent replaced the siding, soffit, and fascia on the Claimant's home in October 2020. In October or November 2022, the Claimant noticed problems with the Respondent's work. Specifically, siding is falling off the home, portions of the soffit are hanging open, the j-channels that connect the siding are improperly installed and/or missing, and the fascia is not caulked around the nails to prevent leaks. As a result, water has entered the home, leaving stains on the drywall and damaging the insulation. The Claimant attempted to contact the Respondent when he noticed the problems with the work; however, the Respondent never responded to the Claimant. Therefore, I find the Respondent performed unworkmanlike, inadequate, or incomplete home improvements.

The Claimant does not have any statutory impediments barring him from recovering from the Fund. *See* Bus. Reg. §§ 8-405(c), (f), (g), and 8-408(b) (2015 & Supp. 2023).

The Claimant did not unreasonably reject good faith efforts by the Respondent to resolve the Claim. *Id.* § 8-405(d) (Supp. 2023). To date, the Respondent has not made any attempt to resolve the Claim.

Thus, 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 performed work under the Contract, and the Claimant intends to retain other contractors to 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).

Amount paid to Respondent	\$16,813.00
Cost to repair	<u>+8,419.15</u>
	\$25,232.15
Minus the original contract price	<u>-16,813.00</u>
Actual loss	\$8,419.15

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.³ 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 his actual loss of \$8,419.15.

³ 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").

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$8,419.15 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 \$8,419.15 from the Fund. Md. Code Ann., Bus. Reg. § 8-405(e)(1), (5) (Supp. 2023); COMAR 09.08.03.03B(4).

RECOMMENDED ORDER

I RECOMMEND that the Maryland Home Improvement Commission:

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$8,419.15; 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;⁴ and

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

April 23, 2024
Date Decision Issued

LEF/sh
#211406

Lorraine E. Fraser

Lorraine E. Fraser
Administrative Law Judge

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

PROPOSED ORDER

WHEREFORE, this 15nd day of July, 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***