

IN THE MATTER OF THE CLAIM	* BEFORE JOHN D. HART,
OF JAMES MCLEAN,	* 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 EDGAR BERNAL	*
GUZMAN,	* OAH No.: LABOR-HIC-02-23-27197
T/A E & Y HOME IMPROVEMENT,	* MHIC No.: 23 (75) 902
LLC,	*
RESPONDENT	*
* * * * *	* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On April 3, 2023, James McLean (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)¹ Guaranty Fund (Fund) for reimbursement of \$11,350.00 for actual losses allegedly suffered as a result of a home improvement contract with Edgar Bernal Guzman, trading as E&Y Home Improvement, LLC (Respondent). Md. Code Ann.,

¹ The MHIC is under the jurisdiction of the Department of Labor (Department).

Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2023).² On October 13, 2023, the MHIC issued a Hearing Order on the Claim. On the same day, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On March 8, 2024, I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. Eric London, Assistant Attorney General, Department, represented the Fund. The Claimant was self-represented and appeared with his daughter Denice Michelle McLean Crump.³ The Respondent did not appear.

After waiting 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 December 27, 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 March 8, 2024, at 9:30 a.m., at OAH's Hunt Valley location. 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 mailed via certified mail was returned to the OAH with the notation "return to sender unclaimed unable to forward."⁴ The Notice sent via first-class mail was not returned. The Respondent did not notify the OAH of any change of mailing address. COMAR 28.02.01.03E. I

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

³ After the conclusion of the hearing and while we were off the record, Ms. Crump stated that she had previously been an investigator with the Office of Financial Regulation (OFR) within the Department of Labor. At the outset of the hearing, I placed on the record my prior work history as an Assistant Attorney General (AAG) with the Office of the Attorney General (OAG) representing the Department of Labor, including at times the OFR. I have no recollection of ever meeting or working with Ms. Crump prior to her appearance at this hearing. Moreover, according to the dates provided by Ms. Crump, she left the OFR prior to my starting with the OAG representing the Department of Labor. Ms. Crump's prior employment has no bearing on my decision in this matter.

⁴ GF Ex. 6.

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:

- Cl. Ex. 1 - Home improvement contract between the Claimant and Respondent, dated August 12, 2022.
- Cl. Ex. 2 - Four checks paid from Claimant to Respondent, two dated September 14, 2022, two dated September 30, 2022.
- Cl. Ex. 3 - Mobile text and WhatsApp messages between Claimant's daughter and Respondent, dated September 13, 2022, through December 30, 2022, including additional undated messages sent after December 30, 2022.

I admitted the following exhibits offered by the Fund:

- GF Ex. 1 - Copy of notice of OAH hearing, issued December 27, 2023.
- GF Ex. 2 - MHIC Hearing Order, dated October 13, 2023.
- GF Ex. 3 - Certification of MHIC licensing records for Respondent, dated February 20, 2024.
- GF Ex. 4 - Home Improvement Claim Form, filed April 3, 2023.
- GF Ex. 5 - Letter from MHIC to Respondent notifying him of the filing of claim, dated April 26, 2023.

GF Ex. 6 Returned notice of OAH hearing sent to Respondent via certified mail, postmarked December 28, 2023.

The Respondent did not appear or present any exhibits.

Testimony

The Claimant testified and presented the testimony of his daughter.

The Respondent did not appear.

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. The company E&Y Home Improvement, LLC held a MHIC corporate license under the number 05-138380. Mr. Guzman held the individual contractor's license for the company under MHIC license number 01-119634.⁵
2. On August 12, 2022, the Claimant and the Respondent entered into two contracts for work on two different properties.⁶
3. The first contract was for the installation of a deck, lights and a window at the Claimant's primary residence located at 1200 Harwall Road, Gwynn Oak, MD 21207 (1200 Harwall Rd. contract).⁷ Although this is where the Claimant resides, the property is owned by his daughter.
4. The second contract was for the installation of new siding, windows, gutters and soffit at a residential rental property owned by the Claimant and located at 4302 Maine Avenue, Gwynn Oak, MD 21207 (4302 Maine Ave. contract).⁸

⁵ GF Ex. 3.

⁶ Cl. Ex. 1.

⁷ The Claimant stated that the 1200 Harwall Road contract is not the subject of the Claimant's claim and no copy was provided at the hearing.

⁸ Cl. Ex. 1.

5. The original agreed-upon price for the 4302 Maine Ave. contract was \$41,106.00.⁹

6. On September 15, 2022, the Claimant and his daughter met with the Respondent and provided a check in the amount of \$12,000.00 as a deposit for the 1200 Harwall Rd. contract, and a \$5,000.00 check as a deposit for the 4302 Maine Ave. contract.¹⁰

7. By October 24, 2022, the Respondent completed the work at 1200 Harwall Rd.¹¹

8. On November 28, 2022, the Claimant's daughter texted the Respondent a breakdown of the money paid thus far and what was still owed to the Respondent to start the work on 4302 Maine Ave.¹²

9. On November 28, 2022, the Respondent agreed via text with the daughter's accounting of what had been paid and what was left to be paid.¹³

10. On November 28, 2022, the parties agreed that as of that date a total of \$17,000.00 had been paid by the Claimant to the Respondent. The parties agreed that of that \$17,000.00 a total of \$13,100.00 was applied to the completed project at 1200 Harwall Rd. as follows: 1) \$12,450.00 for the deck, 2) \$200.00 for a window, and 3) \$450.00 for lights on the deck.¹⁴

11. The deposit paid for the 1200 Harwall Rd. contract was \$1,100.00 less than the total due on that contract.

12. Instead of having the Claimant pay an additional \$1,100.00 to complete the 1200 Harwall Rd. contract, the parties agreed that this amount would be deducted from the \$5,000.00 deposit already paid for 4302 Maine Ave. contract, thus leaving \$3,900.00 from the \$5,000.00 deposit for 4302 Maine Ave.

⁹ *Id.*

¹⁰ Cl. Ex. 2, 3.

¹¹ Cl. Ex. 3.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

13. On November 28, 2022, the parties agreed that the Respondent owed the Claimant a credit¹⁵ of \$3,900.00 that would be applied towards the payment of the 4302 Maine Ave. contract¹⁶

14. On November 28, 2022, the parties also agreed that the Claimant would pay the Respondent an additional \$7,450.00 to start work on 4302 Maine Ave.¹⁷

15. On December 5, 2022, the Claimant and his daughter met with the Respondent and provided him with two checks in the amount of \$4,000.00 and \$3,450.00.¹⁸

16. In total, the Claimant paid the Respondent \$11,350.00 (\$3,900.00 credit + \$4,000.00 + \$3,450.00) for the 4302 Maine Ave. contract.¹⁹

17. On December 23, 2022, the Claimant's daughter contacted the Respondent about wind damage to a fence on the deck Respondent installed at 1200 Harwall Rd.²⁰

18. Between December 23, 2022, and December 30, 2022, the Claimant's daughter and the Respondent communicated via text message about having the Respondent send someone to address the damage to the fence on the deck. The Respondent was out of the country during this time.²¹

19. On December 30, 2022, the Respondent sent workers to the house to collect the pieces that had fallen off the fence and order new longer pieces.²²

¹⁵ While the parties use the term credit, the amount is essentially the remaining balance of the deposit paid by the Claimant for the 4302 Maine Ave. contract.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Cl. Ex. 2, 3.

¹⁹ Cl. Ex. 1.

²⁰ Cl. Ex. 3.

²¹ *Id.*

²² *Id.*

20. After December 30, 2022, on a date unspecified in the record, the Claimant's daughter asked the Respondent about the status of the replacement of the fence. The Respondent responded that his workers would be there the following Saturday.²³

21. On the morning of the Saturday the repair work was to begin, the Claimant's daughter asked the Respondent when he would start work that day. The Respondent replied the same morning, that his workers would pick up the materials and conduct the repair on Monday, but then stated that if his workers had time they would arrive later that day. By Saturday afternoon, after asking again whether the Respondent was arriving that day, the Claimant's daughter texted the Respondent asking for a refund of \$5,000.00 for the deck work at 1200 Harwell Rd. and the \$11,350.00 for the work at 4302 Maine Ave.²⁴

22. After her request for a refund, the Claimant's daughter attempted to call the Respondent over fifty times over the course of two days but did not receive any further response from the Respondent.²⁵

23. The Respondent did not begin any work on 4302 Maine Ave.

24. The Respondent has not refunded the Claimant, nor his daughter, any of the money paid.

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).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

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). Although the property where the work was to be done is not the Claimant’s primary residence, he 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.²⁶ *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 Respondent entered into a contract with the Claimant to perform siding, window, gutter and soffit replacement on the residence located at 4302 Maine Ave. As of December 5, 2022, he has been paid the amount needed to start the work, which was \$11,350.00. However, the Respondent has failed to perform any work on the property. I thus find that the Claimant is eligible for compensation from the Fund for the incomplete home improvement.

²⁶ The 4302 Maine Ave. contract does contain an arbitration clause, however, the clause itself states “the parties must initial and date this clause for it to be in effect.” No initials or dates are entered in the spaces provided after the clause and therefore according to its own wording the clause has no effect.

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 established that he was owed a \$3,900.00 credit after the completion of the 1200 Harwall Rd. contract, and that the parties agreed that this credit would be applied towards the cost of the 4302 Maine Ave. contract. The Claimant also established that he paid an additional \$7,450.00 to the Respondent to start the 4302 Maine Ave. contract, bringing the total amount he paid to the Respondent for work under this contract to \$11,350.00. Because the Respondent did no work under the 4302 Maine Ave. contract and did not return any of the money paid, the Claimant has established an actual loss of \$11,350.00.

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.²⁷ 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

²⁷ 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").

Respondent and less than \$30,000.00. Therefore, the Claimant is entitled to recover their actual loss of \$11,350.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$11,350.00 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)(a). I further conclude that the Claimant is entitled to recover that amount from the Fund. 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 \$11,350.00; 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;²⁸ and

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

June 5, 2024
Date Decision Issued



John D. Hart
Administrative Law Judge

JDH/ckc
#212236

²⁸ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 20th day of August, 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.

Michael Shilling

Michael Shilling

Panel B

***MARYLAND HOME IMPROVEMENT
COMMISSION***