

IN THE MATTER OF THE CLAIM OF	*	BEFORE LATONYA B. DARGAN,
DANIEL AND LYN RUTKOSKI,	*	AN ADMINISTRATIVE LAW JUDGE
CLAIMANTS	*	OF THE MARYLAND OFFICE
AGAINST THE MARYLAND	*	OF ADMINISTRATIVE HEARINGS
HOME IMPROVEMENT GUARANTY	*	
FUND FOR THE ACTS OR	*	
OMISSIONS OF TIMOTHY POWELL,	*	
t/a POWELL CONTRACTING	*	
COMPANY, INC.,	*	OAH No.: DLR-HIC-02-19-18788
RESPONDENT	*	MHIC No.: 18 (05) 1317

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On December 18, 2018, Daniel and Lyn Rutkoski (Claimants) filed a claim for reimbursement with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund). The claim was for actual monetary losses in the amount \$3,500.00, allegedly suffered due to the acts or omissions of Timothy Powell (Respondent), t/a Powell Contracting Company, Inc., under a home improvement contract for a project at the Claimants' residence. Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015).¹ On June 5, 2019, the MHIC ordered that the

¹ Unless otherwise specified, all references to the Business Regulation Article are to the version contained in the 2015 volume and 2019 supplement.

Claimants should have a hearing to establish their eligibility for an award from the Fund. On June 7, 2019, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On September 4, 2019, I conducted a hearing at the OAH in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. § 8-407(e). The Claimants were present and represented themselves. Shara Hendler, Assistant Attorney General, Department of Labor (Department),² represented the Fund. Neither the Respondent nor anyone authorized to represent the Respondent appeared. After waiting fifteen minutes, during which time the Respondent still failed to appear, I proceeded with the hearing in the Respondent's absence.³ Code of Maryland Regulations (COMAR) 28.02.01.23A.⁴

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 (2014 & Supp. 2019); COMAR 09.01.03 and 28.02.01.

ISSUES

1. Did the Claimants sustain an actual monetary loss compensable by the Fund as a result of the Respondent's acts or omissions; and, if so
2. What is the amount of the loss?

² On July 1, 2019, the Maryland Department of Labor, Licensing & Regulation became the Department of Labor.

³ The OAH issued a Notice of Hearing to the parties at their addresses of record. The Claimants' and Respondent's copies of the notice were sent via first class mail and certified mail-return receipt requested. The certified mail copy of the notice sent to the Respondent was returned to the OAH by the United States Postal Service as undeliverable because it was unclaimed. The first class mail copy of the notice sent to the Respondent was not returned to the OAH by the postal service.

⁴ 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. I determined that the Respondent received proper notice.

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits⁵ for the Claimants:

- CL Ex. A: Contract, January 27, 2018, with attachments
- CL Ex. B: Cecil County MD Building Permit, issued March 9, 2018, with attachments
- CL Ex. C.: Double E Construction LTD Proposal, May 1, 2018, with attachments

I admitted the following exhibits for the Fund:

- Fund Ex. 1: The MHIC's Hearing Order, issued June 5, 2019
- Fund Ex. 2: The OAH's Notice of Hearing, issued June 24, 2019
- Fund Ex. 3: Home Improvement Claim Form, December 10, 2018, received at the MHIC on December 18, 2018
- Fund Ex. 4: The Respondent's MHIC Licensing History, printed August 6, 2019

The Respondent did not submit exhibits.

Testimony

Daniel Rutkoski testified for the Claimants. The Fund did not present witnesses.

PROPOSED FINDINGS OF FACT

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

1. At all relevant times, the Respondent was a home improvement contractor licensed by the MHIC.
2. On January 27, 2018, the Claimants entered into a contract (Contract) with the Respondent for the Respondent to construct an 18' x 14' addition to their residence in North East, Maryland (Property). Under the Contract, the Respondent was responsible for securing all required permits and working with the utility company to properly mark the location of gas and power lines.

⁵ CL Exhibits D and E were offered, but I sustained the objections to their admission. I retained them to preserve the record, but I have not considered them in rendering this Proposed Decision.

3. Within the new addition, the Respondent was also to construct a new bedroom and bathroom, to include the installation of a new closet, and the installation of new bathroom fixtures and tiles.

4. The total Contract price was \$28,530.00, to be paid in installments as follows: \$3,500.00 due upon the signing of the Contract; \$5,000.00 due on the first day of work; \$4,500.00 due when the addition's roof was completed; \$5,000.00 due at the time of the rough-in inspection; \$4,000.00 due when the interior walls were primed; \$3,800.00 due when trades were completed; and the balance of \$2,730.00 due on final inspection and approval.

5. Under the Contract, once work commenced it would take approximately six weeks to complete.

6. Lyn Rutkoski paid the \$3,500.00 deposit to the Respondent via check on January 27, 2018. The Respondent presented the check to the Claimants' bank for payment on January 30, 2018.

7. The Respondent never performed any work at the Property under the Contract.

8. On or around March 12, 2018, Daniel Rutkoski sent a text message to the Respondent asking the Respondent to call him so they could discuss the project.

9. On March 15, 2018, the Respondent replied to Mr. Rutkoski's text and advised that while he had secured the necessary permits, he was "busy trying to finish things up by April," (CL Ex. A, p. 4.) and he would be available to talk on Sunday.⁶ Mr. Rutkoski advised the Respondent he would call the Respondent on Sunday.

10. The Claimants left two voicemail messages for the Respondent on Sunday, March 18, 2018, neither of which received a response from the Respondent. On March 20, 2018, Mr.

⁶ March 18, 2018 was the Sunday immediately subsequent to Thursday, March 15, 2018.

Rutkoski texted the Respondent to advise he had left voicemail messages on March 18, 2018 with no response and that as of March 20, 2018, the Respondent's voicemail inbox was full.

11. After March 15, 2018, the Respondent did not reply to any of the text or voicemail messages left for him by the Claimants during the remainder of March 2018.

12. On April 12, 2018, Mr. Rutkoski texted the Respondent and, citing the Respondent's non-responsiveness to multiple telephone calls, text messages, and emails, advised the Respondent that the Claimants were cancelling the Contract and asked the Respondent to refund the \$3,500.00 deposit.

13. On April 13, 2018, the Respondent replied to Mr. Rutkoski via text message and advised, "I'll take out my expenses and send you a check." (*Id.*)

14. The Respondent never refunded the deposit to the Claimants.

DISCUSSION

In this case, the Claimants have the burden of proving the validity of the Claim by a preponderance of the evidence. Md. Code Ann., Bus. Reg. §8-407(e)(1); Md. Code Ann., State Gov't §10-217.(2014); COMAR.09.08.03.03A(3). "[A] preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces . . . a belief that it is more likely true than not true." *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002) (quoting *Maryland Pattern Jury Instructions* 1:7 (3d ed. 2000)). Under this standard, if the supporting and opposing evidence is evenly balanced on an issue, the finding on that issue must be against the party who bears the burden of proof. *Id.*

An owner may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor." Md. Code Ann., Bus. Reg. § 8-405(a); *see also* COMAR 09.08.03.03B(2) ("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.” Md. Code Ann., Bus. Reg. § 8-401. After considering the evidence, I find the Claimants are eligible for an award from the Fund.

The evidence demonstrates the Respondent abandoned the project. He did so without providing the Claimants any explanation, despite the fact that the Claimants paid the required deposit due upon the signing of the Contract. Claimant Daniel Rutkoski reached out to the Respondent multiple times in an effort to obtain a status update, and he was clearly receptive to an explanation for a brief delay. When the Respondent initially advised that he was trying to finish other jobs and clear his work calendar so he would be available to work on the project starting in April 2018, Mr. Rutkoski was satisfied with that response. It was not until several more weeks passed, well into April 2018, with no further updates from the Respondent that the Claimants decided to terminate the Contract and request a refund of the deposit. Despite promising to provide a refund after deducting any expenses,⁷ the Respondent failed to do so. The Respondent’s abandonment of the project and his failure to refund the deposit is conduct that caused the Claimants to sustain an actual monetary loss. The Claimants are eligible for an award from the Fund.

Having found eligibility for compensation, I must determine the amount of the Claimants’ actual loss and the amount, if any, that the Claimants are 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); COMAR 09.08.03.03B(1).

⁷ The Claimant produced evidence demonstrating the Respondent paid \$285.00 in fees for two permits issued by the Cecil County Government. See CL Ex. B. I draw the reasonable inference that the permit fees are the “expenses” the Respondent would have deducted from the deposit had he ever bothered to actually provide the Claimants with a refund. However, I find the permits do not have any value to the Claimants and as such, the cost of the permits should not be deducted from their claim.

MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract. Here, the Respondent abandoned the Contract without doing any work.

The following formula appropriately measures the Claimants' 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 Claimants presented evidence demonstrating that upon signing the Contract, they paid the Respondent the \$3,500.00 deposit via a check written by Lyn Rutkoski. The Respondent cashed the check on January 30, 2018. (CL Ex. A, p. 3.) Then, the Respondent abandoned the job.

The Business Regulation Article caps a claimant's recovery at \$20,000.00 for the acts or omissions of one contractor, and provides that a claimant may not recover more than the amount paid to the contractor against whom the claim is filed. Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a). In this case, the Claimants' actual loss is less than \$20,000.00. They are entitled to an award from the Fund in the amount of \$3,500.00.

PROPOSED CONCLUSION OF LAW

Based on the Proposed Findings of Fact and Discussion, I conclude as a matter of law the Claimants have sustained an actual and compensable loss of \$3,500.00 as a result of the Respondent's acts or omissions and they are entitled to an award from the Maryland Home Improvement Commission's Guaranty Fund in the amount of \$3,500.00. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(a).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimants \$3,500.00; 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;⁸ and

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

Signature on File

November 22, 2019
Date Decision Issued

LBD/cmg
#183157



Latonya B. Dargan
Administrative Law Judge

Jgar

A. S. W.

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

PROPOSED ORDER

WHEREFORE, this 2nd day of January, 2020, 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***

RECEIVED
FEB 18 2020