

IN THE MATTER OF
THE CLAIM OF
CHARLES WALPOLE &
ELIZABETH A. KING,
CLAIMANTS
AGAINST THE MARYLAND
HOME IMPROVEMENT
COMMISSION GUARANTY FUND
FOR THE ACTS OR OMISSIONS OF
CHARLES EVERS,
t/a EVERS HOME IMPROVEMENTS,
RESPONDENT

* BEFORE LATONYA B. DARGAN,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS

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* OAH No.: LABOR-HIC-02-19-28978
* MHIC No.: 18 (75) 958

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PROPOSED DECISION

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STATEMENT OF THE CASE

On February 11, 2019, Charles Walpole III, on behalf of himself and Elizabeth A. King (Claimants) filed a claim for reimbursement (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for actual monetary losses suffered as a result of the acts or omissions of Charles Evers, Jr. (Respondent), t/a Evers Home Improvement, a licensed

home improvement contractor. Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015).¹ By Order dated August 27, 2019, the MHIC directed that the Claimants have a hearing to establish eligibility for an award from the Fund. On August 30, 2019, the MHIC transmitted the matter to the Office of Administrative Hearings (OAH).

On August 6, 2020,² I conducted a remote hearing via video-conference on the Google Meet platform under Code of Maryland Regulations (COMAR) 28.02.01.20B. Mary E. Gephardt, Esquire, represented the Claimants, who were present. Nicholas Sokolow, Assistant Attorney General, Department of Labor, 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 COMAR 28.02.01.23A.⁴

The contested case provisions of the Administrative Procedure Act, the Department of Labor'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. 2020); COMAR 09.01.03 and 28.02.01.

¹ Unless otherwise noted, all references hereinafter to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.

² The matter was originally scheduled for hearing on February 25, 2020 but it was postponed at that time to allow the Claimants to amend the Claim, which required the approval of the MHIC.

³ The OAH issued a Notice of Remote Hearing and Instructions to the parties at their addresses of record on July 13, 2020. 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. Additionally, by letter issued on July 13, 2020 via first class mail, I personally notified the parties that the matter would proceed via video-conference on August 6, 2020 at 9:30 a.m. The Respondent's copy of my letter was not returned to the OAH as undeliverable 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.

ISSUES

1. Did the Claimants 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 for the Claimants:⁵

- CL Ex. 2: Facsimile cover letter, May 12, 2020, and Amended Claim Form, May 5, 2020
- CL Ex. 3: Contract Proposal, Change Orders, Permit Requirements, various dates
- CL Ex. 4: Photocopies of Checks written by the Claimants, various dates
- CL Ex. 5: Proposals, Correspondence, Estimates from Other Contractors, various dates
- CL Ex. 6: Inspection Report, prepared by Pat Cosentini, February 27, 2020
- CL Ex. 8: Photographs, taken in and around September and October 2017
- CL Ex. 9: Text Message communications between Claimants and Respondents, various dates
- CL Ex. 10, p. 26 and p. 27: Checks Payable to J.W. Associates, various dates

I admitted the following exhibits for the Fund:

- Fund Ex. 1: Notice of Remote Hearing, issued July 13, 2020
- Fund Ex. 2: MHIC Hearing Order, issued August 27, 2019
- Fund Ex. 3: The Respondent's Licensure Information, certified on January 15, 2020
- Fund Ex. 4: The MHIC's Letter to the Respondent, February 13, 2020, with attached original Claim Form

The Respondent did not offer exhibits.

Testimony

The Claimants testified and presented the following witnesses: Pete Cosentini, Pillar to Post Home Inspections; Lester King, the father of Claimant King.

No one testified for the Respondent and the Fund did not present witnesses.

⁵ Where there is a gap in exhibit number sequence, it is because an exhibit was not offered.

PROPOSED FINDINGS OF FACT

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

1. At all relevant times, the Respondent was licensed as a home improvement contractor by the MHIC.
2. On or around July 26, 2017, the Claimants entered into a contract (Contract) with the Respondent for him to perform home improvement work at their residence in Middle River, Maryland (the Property). Specifically, the Respondent was responsible for digging out and pouring the concrete of the foundation of an addition to the Property. Under the Contract, the Respondent was also expected to build the frame of the addition, including the construction of the interior walls and the installation of all windows. The addition was to be the same width as the existing Property structure. The addition would include a third bedroom and an area the Claimants intended to use as an updated kitchen.
3. The total price of the Contract, including the amounts for amendments/change orders, was \$21,455.00.
4. Under the terms of the Contract, the work was to take approximately ten to fourteen days to complete.
5. The Respondent was also responsible for obtaining any necessary permits related to new construction that were required by the county.
6. Between July 26, 2017 and October 2, 2017, the Claimants paid the Respondent \$25,338.21 in connection with work performed under the Contract.
7. The Respondent commenced work at the Property on or around August 7, 2017.
8. It took approximately one month for the foundation to be dug out and the concrete for it to be poured.

9. The Respondent dug out the foundation and footers for a section of the addition, but he did not properly grade the ground to allow for adequate drainage, nor did he install drain tiles or other piping to the existing sump pump system to ensure the foundation under the addition would adequately drain/not store groundwater when it rained.

10. The Respondent erected the frame for a portion of the addition, but he did not erect all of the framing. For the portion of the addition that was framed out, the Respondent never constructed the interior walls.

11. In October 2017, the Respondent's subcontractors advised the Claimants that they were having difficulty getting the Respondent to pay them. As a result, during October 2017, the Claimants paid the Respondent's subcontractors directly for any work they performed at the Property.

12. Shortly after work commenced on the project, the Claimants had difficulty getting the Respondent to provide them with information about the project, including explanations when there were lapses in work being performed, the status of certain materials, including the concrete for the foundation and footers, and the construction of the interior walls. Claimant King sent numerous text messages to the Respondent between September 2017 and December 2017 seeking clarity about when the work would be concluded and what steps the Respondent was taking to address the lack of progress in the framing out of the kitchen and the new bedroom, which was to be a nursery for the Claimants' newborn. The Respondent's replies were often evasive or constituted excuses for why certain things were not done as called for under the Contract.

13. The frame out of the addition was completed by the subcontractors sometime at the end of October 2017.

14. On or around December 12, 2017, a county inspector visited the Property to assess the foundation work. The inspector advised Claimant King that the footers for the addition were not installed to code, primarily because they were not constructed in a manner which allowed for proper drainage if there was water infiltration into the basement. The inspector advised Claimant King that due diligence could possibly require the footers to be torn out and completely re-constructed.

15. Sometime in mid-December 2017, Claimant King advised the Respondent she was not comfortable having him continue working on the project.

16. In May 2018, the Claimants began soliciting other contractors to correct and complete the work started by the Respondent, including the construction of the interior walls and the pouring of new concrete footings.

17. Between May 2018 and February 2019, the Claimants paid other contractors a total of \$8,419.25 to repair or replace work performed by the Respondent.

18. The Claimants also obtained an estimate for the installation of a French drain to mitigate water infiltration in the basement of the addition. The total estimate for the installation of the French drain is \$8,480.00.

DISCUSSION

In this case, the Claimants have the burden of proving the validity of the Claim by a preponderance of the evidence. Bus. Reg. § 8-407(e)(1); Md. Code Ann., State Gov't § 10-217 (2014); 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 Cty. 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); *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.

There is no dispute that at all relevant times, the Respondent was a licensed home improvement contractor. The Claimants do not have any relationship with the Respondent that operates as a legal impediment to them receiving an award from the Fund. Bus. Reg. § 8-405(f)(1). The remaining question, then, is whether the Claimants are entitled to such an award. Based on the evidence, I find that they are.

The Respondent was hired to essentially lay the foundation for and construct the frame of an addition to the Property. The Claimants expanded their family and needed extra room to accommodate their newborn, including a room specifically set aside for the baby. Under the Contract, the Respondent was responsible for creating the shell of the addition; the Claimants were responsible for the interior, which could have included hiring the Respondent to do additional work if they were satisfied with the construction of the frame of the addition. The evidence clearly demonstrates that (i) the Respondent did not complete the tasks associated with framing out the addition and (ii) his construction of the foundation and footers was inadequate and unworkmanlike. The Respondent did not complete the dry wall work for the third bedroom and he did not construct the frame for the area that would serve as the new kitchen. *See* CL. Ex. 8. The Claimants produced photographs which illustrated the state of the work performed by the Respondent, including the lack of interior walls in the bedroom portion of the addition and footers which clearly did not properly drain when water infiltrated them. *Id.*

In addition to doing inadequate work in what he did complete, the Respondent became increasingly difficult to reach and showed an increasing unwillingness to be accountable to the

Claimants about when materials would arrive or work on a given portion of the project would be completed. The Claimants submitted a collection of text messages, mostly between the Respondent and Claimant King, for the period of September 2017 through December 2017.⁶ The messages are frustrating to read even as a neutral third party; the Respondent consistently deflects in response to direct questions from Claimant King, or provides various excuses that often amount to *someone else's* failure to do something rather than the Respondent's oversights. In some instances, the Respondent resorts to attempts at emotional manipulation by appealing to his sense of "friendship" for the Claimants. The Respondent repeatedly advises Claimant King that he will do something by a given date or time, only for her to have to reach out once the designated time came and went and whatever task the Respondent promised he would complete was not performed. *See* CL. Ex. 9. The text messages paint a clear picture of the Respondent as someone dodging his professional responsibilities to the Claimants, even after being specifically and explicitly told that the Claimants believe him to be dodging his professional responsibilities. For all intents and purposes, the Respondent abandoned the project once the foundation was completed at the end of October 2017.

Having found eligibility for compensation I must now 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). MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work.

⁶ There are a few assorted messages from 2018, but it is clear they were exchanged after the Respondent was no longer working on the project/at the Property.

In this case, the Respondent performed some work under the Contract, and the Claimants retained other contractors to complete or remedy that work. Accordingly, the following formula appropriately measures the Claimants' 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).

Using the above formula, I calculate the Claimants' actual monetary loss as follows:

Amount paid to the Respondent	\$ 24,989.11 ⁷
+ Amount paid to correct or complete the work	<u>\$ 16,899.25⁸</u>
	\$ 41,888.36
- Amount of original contract	<u>\$ 21,455.00</u>
Amount of actual loss	\$ 20,433.36

The Business Regulation Article caps a claimant's recovery at \$20,000.00 for 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, both the amount the Claimants paid to the Respondent and the amount of the Claimants' actual loss exceed the statutory cap. Therefore, the Claimants' recovery is limited to \$20,000.00. Bus. Reg. § 8-405(e)(1); COMAR 09.08.03.03D(2)(a).

⁷ CL Ex. 2

⁸ CL Exs. 2, 5

PROPOSED CONCLUSIONS OF LAW

Based on the Proposed Findings of Fact and Discussion, I conclude as a matter of law that the Claimants have sustained an actual and compensable loss of \$20,433.36 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(c). I further conclude that the Claimants are entitled to recover \$20,000.00 from the Fund. Bus. Reg. § 8-405(e)(1); COMAR 09.08.03.03D(2)(a).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimants \$20,000.00; 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;⁹ and

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

November 4, 2020
Date Decision Mailed

CONFIDENTIAL

Latonya B. Dargan
Administrative Law Judge

LBD/emh
#188752

⁹ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 7th day of December, 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.

Joseph Tunney

Joseph Tunney

Chairman

Panel B

***MARYLAND HOME IMPROVEMENT
COMMISSION***