IN THE MATTER OF THE CLAIM	*	**BEFORE RACHAEL BARNETT,**
OF JENNA CUNNINGHAM,	*	**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 KARL JOHNSON,	*	
T/A BUILDING CONTRACTORS OF	*	**OAH No.: LABOR-HIC-02-20-24223**
MARYLAND, INC.,	*	**MHIC No.: 19(75)1353**
RESPONDENT	*	

* * * * * * * * * * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On August 6, 2019, Jenna Cunningham (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund), under the jurisdiction of the Department of Labor (Department),[1] for reimbursement of $71,794.92 in actual losses allegedly suffered as a result of a home improvement contract with Karl Johnson, trading as Building Contractors of Maryland, Inc. (Respondent). Md. Code Ann., Bus. Reg.

[1] On July 1, 2019, the Maryland Department of Labor, Licensing, and Regulation became the Department of Labor.

§§ 8-401 through 8-411 (2015).[2] On November 2, 2019, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on December 14, 2020 on the Google Meet platform. Bus. Reg. §§ 8-407(a), 8-312; Code of Maryland Regulations (COMAR) 28.02.01.20B. Nicholas Sokolow, Assistant Attorney General, Department, represented the Fund. The Claimant represented herself. Bradley Stover, Esquire, represented the Respondent, who was present. On December 15, 2020, the Respondent filed a post-hearing memorandum.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2020); Code of Maryland Regulations (COMAR) 09.01.03; and 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 on the Claimant's behalf:

Clmt. Ex. 1 - Contract between the Claimant and the Respondent, December 19, 2018

Clmt. Ex. 2 - Caliber Home Loans – Contractor's Waiver of Lien, December 21, 2018

Clmt. Ex. 3 - Check from Caliber Home Loans to the Claimant and Building Contractors of Maryland, Inc. January 8, 2019

Clmt. Ex. 4 - Email from the Respondent to the Claimant, March 28, 2019

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

Clmt. Ex. 5 - Photographs of the Claimant's home after a home fire and partial demolition, taken in March – April 2019

Clmt. Ex. 6 - A&I Environmental Services (A&I) proposal for asbestos abatement, April 11, 2019

Clmt. Ex. 7 - Home Designs by JDD (JDD), invoice, May 1, 2019

Clmt. Ex. 8 - JDD, invoice, May 1, 2019

Clmt. Ex. 9 - JDD, invoice, July 3, 2019

Clmt. Ex. 10 - JDD, invoice July 3, 2019

I admitted the following exhibits on the Respondent's behalf:

Resp. Ex. 1 - Articles of Incorporation of Building Contractors of Maryland, Inc., April 4, 1978

Resp. Ex. 2 - Contractor/Salesman License (corporate) issued by the Department to Building Contractors of Maryland, Inc., May 12, 2020

Resp. Ex. 3 - Contractor/Salesman License issued by the Department to Karl Johnson on behalf of Building Contractors of Maryland, Inc., May 12, 2020

I admitted the following exhibits on the Fund's behalf:

Fund Ex. 1 - Notice of Hearing, November 10, 2020

Fund Ex. 2 - Hearing Order, October 28, 2020

Fund Ex. 3 - Home Improvement Claim Form, August 6, 2019

Fund Ex. 4 - Home Improvement Commission database printouts, various dates

Testimony

The Claimant testified and did not present other witnesses.

The Respondent testified and did not present other witnesses.

The Fund did not offer 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 number 5173498.

2. In June 2011, the Claimant purchased a single-family home in Parkville.

3. On April 13, 2018, the Claimant's home was destroyed by fire. Travelers Insurance Company (Travelers), the insurance provider for the home, deemed it a total loss and approved an insurance payout of $239,316.41.

4. The Claimant did not know of any contractors who could rebuild the home, so she sought recommendations from Travelers. Travelers recommended three companies, one of which was Building Contractors of Maryland, Inc.

5. The Respondent was a part-owner of Building Contractors of Maryland, Inc. and is listed on the corporate license as the responsible licensee for the business.

6. The Claimant contacted the Respondent and they discussed the project.

7. On December 19, 2018, the Claimant and the Respondent met in person and entered into a contract (Contract) to rebuild her home. The Contract called for the following payment schedule:

- $71,794.92 due at signing,
- $71,794.92 due when framing begins,
- $71,794.92 due once painting begins, and
- $23,931.65 due upon completion of the project.

8. On December 19, 2018, the Respondent and the Claimant both signed the contract.

9. The Contract stated that work would begin within approximately two to six weeks and would be substantially complete within eight to ten months of when work began.

10. The original agreed-upon Contract price was $239,316.41, exactly the amount Travelers approved for the loss of the home.

11. Travelers named the Respondent as the contractor for the insurance claim.

12. The Claimant held a mortgage on the home. Therefore, payments for the rebuilding of the home had to be processed through her mortgage company, Caliber Home Loans (Caliber).

13. On January 18, 2019, the Respondent deposited a check from Caliber in the amount of $71,794.92.

14. Between mid-January and mid-March 2019, the Respondent did a minor amount of subflooring work on the home, did planning work and secured permits. Also during this time frame, the Respondent was scheduled to meet with the Claimant but notified the Claimant that he had car trouble and could not keep the appointment.

15. The Respondent did not reschedule his appointment with the Claimant.

16. Around March 28, 2019, the Claimant received an email from the Respondent, stating that on March 28, 2019 Building Contractors of Maryland, Inc. ceased doing business.

17. Neither the Respondent, nor Building Contractors of Maryland, Inc., refunded any of the funds received to the Claimant.

18. After much effort, the Claimant had the Respondent removed from her insurance claim as the contractor.

19. Once removed, the Claimant had $167,521.49 left in insurance proceeds to rebuild her home.

20. The Claimant hired A&I to perform asbestos remediation work. She paid $21,620.75 for this work.

21. The Claimant hired JDD to rebuild her home, and they completed the project in December 2019. In sum, the Claimant paid JDD $203,100.00. She made the following payments:

- May 2019 - $53,050.00
- May 2019 - $49,000.00
- July 2019 - $47,500.00
- July 2019 - $53,550.00

22. In total, the Claimant paid $224,720.75 to A&I and JDD to rebuild her home, which meant that she spent $57,199.26 out of pocket to have her home rebuilt.

DISCUSSION

In this case, the Claimant has 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.

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 he entered into the Contract with the Claimant. The Respondent argued at the hearing and in his post-hearing memorandum that the Claimant entered into the Contract with Building Contractors of Maryland, Inc., not with the Respondent individually. Therefore, the Claimant should have pursued her claim against the corporate license for Building Contractors of Maryland, Inc. for any loss she incurred as a result of the non-performance of the Contract. The Respondent cited the following law which sets forth the process of MHIC claims and drew emphasis as follows:

> Bus. Reg § 8-407
>
> (b) On receipt of a claim, the Commission shall
> (1) send a copy of the claim ***to the contractor alleged to be responsible for the actual loss...***
>
> COMAR 09.08.03.03(A)(1)
>
> (1) Parties.
> (a) The claimant who brought the claim, and ***the contractor alleged to be responsible for the monetary loss of the claimant***, shall be parties in all claim hearings.

The Respondent asserted that Building Contractors of Maryland, Inc. was the responsible contractor and should have been a party in the claim, not the Respondent.

The Fund disagreed with the Respondent's argument and drew attention to the statutory explanation of who is subject to recovery for a claim filed with the Fund, the statutory definition of "contractor," and the regulatory requirement that a corporation must employ a contractor who carries joint liability with the corporation. Section 8-405 of the Business Regulations Article states in pertinent part (emphasis added):

> (a) Subject to this subtitle, an owner may recover compensation from the Fund for an ***actual loss that results from an act or omission by a licensed contractor*** or a violation of § 8-607(4) of this title as found by the Commission or a court of competent jurisdiction.

(b) For purposes of recovery from the Fund, the act or omission of a licensed contractor includes the act or omission of a subcontractor, salesperson, or employee of the licensed contractor, whether or not an express agency relationship exists.

Section 8-101 (c) states, '"Contractor" means a ***person***, other than an employee of an owner, who performs or offers or agrees to perform a home improvement for an owner.'

COMAR 09.08.01.04 states, in pertinent part:

A. A corporation or partnership may not act as a home improvement contractor unless it obtains a corporate or partnership home improvement contractor's license.
B. In order to obtain and maintain a corporate or partnership home improvement license, the corporation or partnership shall employ ***one individual licensed contractor who shall be in responsible charge*** of the corporation's or partnership's home improvement work.
C. The corporation or partnership and the individual in responsible charge of the corporation's or partnership's home improvement work shall be jointly and severally responsible for

. . . .

(3) Repayment to the Home Improvement Commission Guaranty Fund pursuant to Business Regulation Article, § 8-410, Annotated Code of Maryland, for any payments made to claimants from the Fund on account of violations by the corporation or partnership or the individual in responsible charge.

Clearly, a contractor must be a person in charge of home improvement work for the corporation. In this matter, the Respondent was a contractor in responsible charge of Building Contractors of Maryland's home improvement work. On the corporate license for Building Contractors of Maryland, Inc., the Respondent's name is listed as the "Responsible Licensee." (GF Ex. 4). Therefore, the Respondent is jointly and severally responsible for any potential repayment to the Fund that may be appropriate in this matter.

The Respondent performed unworkmanlike, inadequate, or incomplete home improvements. The Respondent deposited the payment from the Claimant's insurance company to rebuild her family's home in Parkville, did minimal subfloor work, and then ceased work and did not return any of her funds.

The Respondent testified that in addition to doing a minor amount of subfloor work, he also did planning work and secured permits for the project prior to stopping work. Planning did not result in any measurable value to the Claimant. The Respondent admitted the subflooring work was minimal and did not assign a value to this work. He also did not assign a value to any planning work. For these reasons, I find that the Claimant did not derive any value from the Respondent's work and therefore his performance is the equivalent of doing no work at all.

The Respondent further argued that asbestos remediation was not included in the Contract. The Claimant testified that it was included in that all demolition was included in the contract; the Respondent was planning to have a subcontractor do remediation work. Clearly, the Respondent and Claimant offered divergent testimony on this matter. The best evidence is the Contract itself, Complainant Exhibit 1. This exhibit is the main page of the contract, and lists the address of the job, the dollar amount, some terms and includes signatures of the parties. The Contract states, "Work to be done – as outlined on attached specification sheets, **pages 14 – 64** which are attached and made part of this Contract." *Id.* (Emphasis in original). The Claimant did not offer the specification sheets into evidence. While it makes sense to have the demolition included in the Contract, without seeing the actual specification sheets, it is impossible to determine whether the Respondent's obligation to perform demolition included asbestos remediation. For this reason, I will not consider the Claimant's payment for asbestos remediation as part of any award.

The Fund argued that the Claimant made a sizable deposit for work the Respondent never performed. The Claimant received no value for any minimal amount of work performed by the Respondent, so it is proper to assign it no value. The Fund asserted it is proper to consider this as a matter where the Respondent accepted funds and abandoned the job. I agree. The Claimant testified that she had plans to meet with the Respondent about the job, but he canceled and then

she subsequently received a letter stating that Building Contractors of Maryland, Inc. had ceased operation. She further testified that she tried calling and sending emails to the Respondent but she received no response from him. As a result, she hired a new contractor to rebuild her home and paid $203,000.00 to rebuild her home when she only had $167,521.49 remaining in insurance proceeds. Clearly, she suffered a financial loss. I thus 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); 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.

In this case, the Respondent abandoned the Contract without doing any measurable 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."[3] COMAR 09.08.03.03B(3)(a). Through her insurance proceeds, the Claimant paid the Respondent $71,794.92. However, she cannot recover the full amount from the Fund.

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, the Claimant's actual loss of $71,794.92 exceeds

[3] For this reason, the issue of payment for asbestos remediation is not relevant to the award.

$20,000.00. Therefore, the Claimant's recovery is limited to $20,000.00. Bus. Reg. § 8-405(e)(1); COMAR 09.08.03.03D(2)(a).

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of $20,000.00 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)(a). I further conclude that the Claimant is entitled to recover that amount from the Fund. Md. Code Ann., Bus. Reg. §§ 8-101, 8-405; COMAR 09.08.01.04.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant $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;[4] and

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

Rachael Barnett

March 8, 2021
Date Decision Issued

Rachael Barnett
Administrative Law Judge

RAB/at
#190710

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

PROPOSED ORDER

WHEREFORE, this 12th day of July, 2021, 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

IN THE MATTER OF THE CLAIM OF JENNA CUNNINGHAM AGAINST THE MARYLAND HOME IMPROVEMENT GUARANTY FUND FOR THE ACTS OR OMISSIONS OF KARL JOHNSON T/A BUILDING CONTRACTORS OF MD, INC.	* * * * * * *	**MARYLAND HOME IMPROVEMENT COMMISSION** **MHIC CASE NO. 19(75)1353** **OAH CASE NO. LABOR-HIC-02-20-24223**

* * * * * * *

FINAL ORDER

This matter was originally heard before an Administrative Law Judge ("ALJ") of the Office of Administrative Hearings ("OAH") on December 14, 2020. Following the evidentiary hearing, the ALJ issued a Proposed Decision on March 8, 2021, awarding Jenna Cunningham ("Claimant") $20,000.00 from the Home Improvement Guaranty Fund for her actual loss resulting from the acts or omissions of Karl Johnson t/a Building Contractors of MD, Inc. ("Contractor"). *ALJ Proposed Decision* p. 11. In a Proposed Order dated June 9, 2021, the Maryland Home Improvement Commission ("MHIC" or "Commission") affirmed the Proposed Decision of the ALJ to grant an award from the Fund. The Contractor subsequently filed exceptions to the MHIC Proposed Order.

On November 18, 2021, a three-member panel ("Panel") of the MHIC held a remote hearing on the exceptions filed in this matter. The Claimant participated without counsel. Bradley Stover, Esq., represented the Contractor. Assistant Attorney General Hope Sachs appeared at the exceptions hearing on behalf of the Guaranty Fund. The Commission entered the following preliminary exhibits as part of the record of the exceptions hearing without objection: 1) hearing notice; 2) transmittal letter, ALJ Proposed Decision, and MHIC Proposed Order; and 3) Contractor's exceptions. Neither the Claimant nor the Contractor produced a copy of the transcript of the hearing before the ALJ. Therefore, the Panel's review of the record was limited to the preliminary exhibits for the exceptions hearing, the OAH Proposed Decision, and the exhibits offered as evidence at the OAH hearing. COMAR 09.01.03.09(G) - (I).

The claim in this proceeding relates to a contract between the parties for the repair of fire damage to the Claimant's home. The ALJ found that the Contractor abandoned the contract without completing the project. *ALJ's Proposed Decision* p. 9-10.

On exception, the Contractor argued that the ALJ erred in finding 1) that Karl Johnson, in his individual capacity, was a proper party to this proceeding, 2) that Building Contractors of Maryland, Inc. ("BCM"), was a party to the proceeding, 3) that BCM and Mr. Johnson were jointly and severally liable for the Claimant's claim, and 4) that BCM and Mr. Johnson were not justified in failing to perform the contract because BCM filed a bankruptcy petition. (Exceptions Hearing Exhibit 3.) The Commission finds no error with the ALJ's findings of fact or conclusions of law.

Under COMAR 09.08.01.04, to obtain a corporate home improvement license, a corporation "must employ one individual licensed contractor who shall be in responsible charge of the corporation's . . . home improvement work," and the corporation and the responsible individual are jointly and severally responsible for repaying the Guaranty Fund for payments made to claimants "on account of violations by the corporation . . . or the individual in responsible charge." COMAR 09.08.03.03(a) provides that "[t]he claimant who brought the claim, and the contractor alleged to be responsible for the monetary loss of the claimant, *shall be parties* in all claim hearings." (Emphasis added.)

In this case, the Claimant entered into a contract with BCM (OAH Hearing Claimant's Exhibit 1) and filed a claim against BCM and Karl Johnson (OAH Hearing Guaranty Fund Exhibit 3). At all times pertinent to this proceeding, BCM held a corporate Maryland home improvement contractor license, Mr. Johnson held an individual Maryland home improvement contractor license, Mr. Johnson was the responsible individual licensee for BCM, and Mr. Johnson's trade name on his individual license was BCM. (OAH Hearing Guaranty Fund Exhibit 4.) Therefore,

the Commission holds that Karl Johnson and BCM are proper parties in this proceeding, and each is jointly and severally liable for Claimant's actual loss.

The Commission finds that the Contractor did not have just cause to abandon the contracted work. First, a contractor's filing of a petition for bankruptcy does not constitute just cause to abandon a home improvement contract for purposes of a Guaranty Fund claim. Second, even assuming that a contractor petitioning for bankruptcy could justify abandoning a home improvement contract, the record demonstrates that BCM abandoned the contract when it "anticipated" filing a bankruptcy petition (OAH Hearing Guaranty Fund Exhibit 4) and contains no evidence of when BCM filed its bankruptcy petition.

However, in light of BCM's filing of a bankruptcy petition, the Commission finds that the ALJ's recommended order that BCM be ineligible for a home improvement contractor's license until the Guaranty Fund is reimbursed for monies disbursed to the Claimant must be amended. The Commission may only suspend Mr. Johnson's individual license if he fails to reimburse the Guaranty Fund for the Claimant's award. In the event that Mr. Johnson's individual license is suspended for failure to reimburse the Guaranty Fund, BCM may maintain its corporate license if it employs another licensed individual contractor.

Having considered the parties' arguments, the evidence contained in the record, and the ALJ's Recommended Decision, it is this 8th day of December 2021, **ORDERED:**

A. That the Findings of Fact of the Administrative Law Judge are **AFFIRMED**;

B. That the Conclusions of Law of the Administrative Law Judge are **AFFIRMED**;

C. That the Proposed Decision and Recommended Order of the Administrative Law Judge is **AMENDED;**

D. That the Claimant is awarded $20,000.00 from the Maryland Home Improvement Guaranty

Fund;

E. That Karl Johnson shall remain ineligible for a Maryland Home Improvement Commission license until the Contractor reimburses the Guaranty Fund for all monies disbursed under this Order plus annual interest of at least ten percent (10%) as set by the Commission, *Md Code Ann.*, Bus. Reg. §§ 8-410(a)(1)(iii), 8-411(a);

F. That the records and publications of the Maryland Home Improvement Commission shall reflect this decision; and

G. Any party has thirty (30) days from the date of this Final Order to appeal this decision to Circuit Court.

Robert Altieri
Chairperson –Panel
Maryland Home Improvement Commission