IN THE MATTER OF THE CLAIM	*	**BEFORE MARC NACHMAN,**
OF JEREMY AND GINA	*	**AN ADMINISTRATIVE LAW JUDGE**
McDONNELL	*	**OF THE MARYLAND OFFICE**
CLAIMANTS	*	**OF ADMINISTRATIVE HEARINGS**
AGAINST THE MARYLAND HOME	*	
IMPROVEMENT GUARANTY FUND	*	
FOR THE ALLEGED ACTS OR	*	
OMISSIONS OF DOUGLAS E.	*	**OAH No.: LABOR-HIC-02-19-39051**
LeFEVER,	*	**MHIC No.: 19 (75) 944**
T/A D & L SIDING AND	*	
CONSTRUCTION, LLC	*	
RESPONDENT	*	

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PROPOSED DECISION

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STATEMENT OF THE CASE

On January 27, 2019, Jeremy McDonnell (Claimant)[1] filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund), under the jurisdiction

[1] At the hearing, Mr. McDonnell asked to amend his claim to add his wife, Gina McDonnell, as a Claimant. As there was no prejudice to the Respondent, and the Fund did not object, the claim was amended to add Gina McDonnell as a second Claimant. Hereafter, I will refer to the parties as "Claimants" unless the context requires a different designation.

[illegible]

of the Department of Labor (Department),[2] for reimbursement of $16,530.00 in actual losses allegedly suffered as a result of a home improvement contract with Douglas E. LeFever, t/a D & L Siding and Construction, LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015).[3] On December 9, 2019, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on September 11, 2020 at the OAH, 11101 Gilroy Road, Hunt Valley, Maryland. Bus. Reg. § 8-407(e). Claimant Gina McDonnell represented herself as well as the interests of her husband, Jeremy, the initial Claimant.[4] Andrew J. Brouwer, Assistant Attorney General, Department, represented the Fund.

After waiting more than twenty 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 August 17, 2020, notice of the hearing was mailed to the Respondent by regular and certified mail at the Respondent's address of record and to two alternative addresses provided to the OAH by the Fund as a result of its investigation. COMAR 09.08.03.03A(2).

The hearing notice sent to the Respondent at his address of record with the MHIC - 2207 Merrick Way, Abington, Maryland 21009 (GF Ex. 4) - was not returned to the OAH by the U.S.Postal Service (USPS), indicating its delivery. The hearing notice sent to the Respondent at

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[2] On July 1, 2019, the Maryland Department of Labor, Licensing, and Regulation became the Department of Labor.
[3] Unless otherwise noted, all references hereinafter to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.
[4] Generally, non-attorney claimants can represent themselves in Fund cases, but non-attorney claimants cannot represent other claimants. Md. Code Ann., State Gov't §9-1607.1 (2014 & Supp. 2020). However, Ms. McDonnell presented her and her husband's joint claim, submitted into evidence their joint exhibits, and their positions in this matter are one and the same. Ms. McDonnell represented herself, and although she was not authorized by law to represent her husband at the hearing, their interests in the claim are identical and indistinguishable.

his company's address of record on file with the Maryland State Department of Assessments and Taxation (SDAT) - 409 Selby Court, Baltimore, Maryland 21212 (GF. Ex. 7) – was delivered by the USPS; the return receipt was signed on August 19, 2020 indicating its receipt. The hearing notice sent to the Respondent at the address of real property he owns – 7601 Park Drive, Baltimore, Maryland 21234 (GF Ex. 8) - was returned by the USPS with the notation "Not at this address." The record of several court cases in which the Respondent was a party contained these addresses as well. (GF Ex. 9).

The Respondent did not notify the OAH or the MHIC of any change of address. COMAR 28.02.01.03E; COMAR 09.08.01.11. I determined that the Respondent had received proper notice, and I conducted the hearing as scheduled.

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); COMAR 09.01.03; and COMAR 28.02.01.

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 on the Claimants' behalf:

Cl. Ex. 1 A through W – photographs
Cl. Ex. 2 A through Q – text messages

Cl. Ex. 3 Contracts:

A. Top of front page of the initial contract (Contract) dated June 15, 2017
B. Bottom of front page of Contract
C. Top of reverse side of Contract
D. Bottom of reverse side Contract
E. Top of addendum to contract (Addendum) dated November 11, 2017
F. Bottom of Addendum

Cl. Ex. 4 Precision Remodeling, Inc., (Precision) estimate, dated April 29, 2019
Cl. Ex. 5 Narrative
Cl. Ex. 6 MHIC Complaint form, dated January 18, 2019
Cl. Ex. 7 Record of Claimants' payments to the Respondent[5]

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

GF. Ex. 1 MHIC Hearing Order, dated December 2, 2019
GF. Ex. 2 OAH Notices of Hearing, various dates
GF. Ex. 3 MHIC letter to Respondent, dated July 9, 2019
GF. Ex. 4 Respondent's MHIC licensing history
GF. Ex. 5 SDAT business entity search, undated
GF. Ex. 6 Baltimore County property search, undated
GF. Ex. 7 SDAT business entity search, undated
GF. Ex. 8 Baltimore County property search, undated
GF. Ex. 9 Maryland Judiciary case search results, undated
GF. Ex. 10 MVA Driving Record Information

Because the Respondent failed to appear at the hearing, he did not submit any documents into evidence.

Testimony

Claimant Gina McDonnell testified and did not present the testimony of any other witnesses.

Nether the Fund nor the Respondent presented the testimony of any witnesses.

[5] The Claimants asked for additional time to provide these documents, to which the Fund did not object. The documents were sent to the OAH by the Claimants the afternoon of the hearing. They were admitted into evidence as discussed at the hearing.

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 74609.

2. On June 15, 2017, the Claimants and the Respondent entered into a Contract to build a sun room (Addition) over the garage of the Claimants' house (CL Ex. 3 A through D). .

3. The Contract called for the following work to be completed:[6]

1) Obtain all necessary drawings, permits and inspections
2) Build a sunroom addition on existing roof approx. 16 x 19
3) Install sleepers on floor to level and install ¾ plywood. No flooring included in this contract
4) Sunroom will be A frame roof to conform to existing roof line with overhang to match
5) On outer wall we will install 6 double hung thermal pane vinyl windows approx 30 x 57 evenly spaced
6) On side wall away from driveway we will install (1) entry door 36 x80 and same sized windows evenly spaced (3)
7) On side by driveway we will install entry door (36 x 80) and (3) evenly spaced windows same size as others
8) We will cut entry way between main house and sunroom
9) We will install all electric to code to include outlets, switches and up to 8 6" recessed lights
10) We will install customer supplied wood on common wall
11) Other walls and ceiling will be drywalled, taped, blocked and finished
12) Install baseboard, window and door trim
13) On driveway side install pressure treated walkway approx. 6 x16' with rails

4. The agreed-upon Contract price was $56,060.00.

5. The Claimants and the Respondent amended the Contract with an Addendum dated November 11, 2017 (CL. Ex. 3E) which added the following additional work:

1) Remove porch soffit and fascia. Rebuild structure to level and install new [ ] labor only	$ 1,800.00
2) Purchase and install 2 new windows - $450.00 each	$ 900.00
3) Replace porch posts and cover with Azek - $100.00 each	$ 800.00

[6] This information is taken verbatim from the Contract (Cl. Ex. 3A and B)

4) Paint door and drywall	$ 120.00
5) Install customer supplied door (cap with aluminum and paint)	$ 460.00
6) Add 4 smoke detectors (cost)	$ 1,308.15

6. The agreed-upon price for the Addendum was $5,388.15.

7. The total price of the Contract and Addendum was $61,448.15

8. The Claimants paid the Respondent $61,448.15 as agreed under the Contract and Addendum.

9. The Respondent did not adequately perform the work he agreed to perform. By February 2018, the Addition, built over the garage, leaked and the stucco walls began to crack.

10. The Claimants called the Respondent and sent him text messages, but Respondent did not return to the property until August 2018.

11. By that time, water was leaking from the Addition into the basement and through the garage light fixtures, and mold and algae began to grow in the garage.

12. On August 31, 2018, the Claimants' garage beneath the Addition flooded. The Addition was the cause and source of the water incursion into the garage below.

13. The Respondent still did not respond to the Claimants' request to correct his home improvement work.

14. The Respondent contacted the Claimants on September 3, 2018, when he came to the property, claiming to have fixed the leak. The Respondent removed the drywall from the garage, but never replaced it or sealed the leak. The leak continued.

15. The Claimants again contacted the Respondent who responded to them about the leaks in October 2018. The Respondent advised the Claimants that he was injured, but that he was still planning to fix the leak. He never returned to the property or provided any further response to the Claimants.

16. The Claimants sought an estimate from Precision, an MHIC licensed contractor, who estimated it would cost $16,530.00 to correct the Respondent's unworkmanlike, inadequate, or incomplete home improvements.

17. Precision's estimate with within the scope of the work performed by the Respondent.

18. The Respondent performed unworkmanlike, inadequate, or incomplete home improvements and failed to cure the defects timely brought to his attention, even though he was given a chance to do so.

19. The actual loss to the Claimants is $16,530.00.

DISCUSSION

In this case, the Claimants have the burden of proving the validity of their 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 Claimants have proven eligibility for compensation.

The Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimants. The scope of the work was specified in the Contract between the Claimants and the Respondent (CL Ex. 3A through D), and detailed in Finding of Fact (FF) 3. The original Contract price was $56,060.00. The parties entered into an Addendum (Cl. Ex. 3E) for additional work detailed in FF 5. The price for the Addendum was $5,388.15, resulting in a total cost for the work to be performed of $61,448.15. The Claimants paid the Respondent the total cost of the Contract and Addendum (Cl. Ex. 7 and FF 8).

Claimant Gina McDonell testified clearly and in an organized manner. She described in detail the leaks coming from the Addition into the garage over which it was built. She described the mold that appeared on the water-soaked garage walls and the deterioration of the stucco which was inundated by the water. She also testified how she attempted to contact the Respondent by text messages (Cl. Ex. 2 , and that he time and again failed to respond and return to the property. When the Respondent finally did return to the property on or about September 23, 2018, he removed some of the moldy drywall, but failed to make any necessary repair, and the leak continued. Further contact by the Claimants elicited further promises from the Respondent, who never again appeared at the property. I find that the Claimants gave the Respondent a reasonable opportunity to cure the defects, but he failed to do so.

Additions built onto houses should not leak into their supporting structures. The Respondent performed unworkmanlike, inadequate, or incomplete home improvements. I thus find that the Claimants are eligible for compensation 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). The Claimants are not seeking disallowed damages.

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 performed work under the Contract, but did so poorly, and the Claimants retained Precision to estimate the work that was necessary to correct the Respondent's unworkmanlike, inadequate, or incomplete home improvements. 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). Therefore, the Claimants' actual loss can be calculated as follows:

$56,060.00	Amount paid by Claimants to the Respondent under the Contract, plus
$5,388.15	Amount paid by Claimants to the Respondent under the Addendum
$61,448.15	Total Amount paid by Claimants to the Respondent, plus
$16,530.00	Fair market cost to make corrections and complete Respondent's work
$77,978.15	Subtotal, less
($61,448.15)	Original contract price, equals
$16,530.00	Amount of the Claimants' actual loss

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 Claimants' actual loss is less than the amount paid to

the Respondent and less than $20,000.00. Therefore, the Claimants are entitled to recover their actual loss of $16,530.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimants have sustained an actual and compensable loss of $16,530.00 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)(c). I further conclude that the Claimants are entitled to recover that amount from the Fund.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimants $16,530.00; 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;[7] and

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

November 25, 2020
Date Decision Issued

Marc Nachman
Administrative Law Judge

MN/kdp
#189095

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

PROPOSED ORDER

WHEREFORE, this 8th day of March, 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.

I Jean White

I Jean White
Panel B
MARYLAND HOME IMPROVEMENT COMMISSION