

<p>IN THE MATTER OF THE CLAIM</p> <p>OF RODNEY L. SMITH,</p> <p>CLAIMANT</p> <p>AGAINST THE MARYLAND HOME</p> <p>IMPROVEMENT GUARANTY FUND</p> <p>FOR THE ALLEGED ACTS OR</p> <p>OMISSIONS OF OSCAR PADILLA,</p> <p>T/A SOLID BRICK CONTRACTING,</p> <p>LLC,</p> <p>RESPONDENT</p>	<p>* BEFORE MICHAEL R. OSBORN,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>* OAH No.: LABOR-HIC-02-23-01511</p> <p>* MHIC No.: 20 (75) 383</p>
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PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
PROPOSED FINDINGS OF FACT
DISCUSSION
PROPOSED CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On June 7, 2021, Rodney L. Smith (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)¹ Guaranty Fund (Fund) for reimbursement of \$14,086.00 for actual losses allegedly suffered because of a home improvement contract with Oscar Padilla, trading as Solid Brick Contracting, LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2022).²

¹ The MHIC is under the jurisdiction of the Department of Labor (Department).
² Unless otherwise noted, all references to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.

On January 6, 2023, the MHIC issued a Hearing Order on the Claim. On January 17, 2023, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing. On February 1, 2023, the OAH issued a Notice of Remote Hearing for March 13, 2023, at 9:30 a.m.

On March 13, 2023, I held a hearing by video. Bus. Reg. §§ 8-407(a), 8-312; Code of Maryland Regulations (COMAR) 28.02.01.20B(1)(b). Catherine P. Villereale, Assistant Attorney General, Department, represented the Fund. The Claimant was self-represented and was assisted by his wife, Alicia Smith. The Respondent was self-represented.

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); COMAR 09.01.03; COMAR 28.02.01.

ISSUES

1. Did the Claimant sustain an actual loss compensable by the Fund because 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:

- Clmt. Ex. 1 - Settlement effort emails, 10/13/2022 through 11/30/2022
- Clmt. Ex. 2 - Notice of Hearing, 7/11/2022
- Clmt. Ex. 3 - Claim with attached narrative, 5/31/2021
- Clmt. Ex. 4a - MHIC Complaint form, 9/2/2019
- Clmt. Ex. 4b- Claim with attached narrative, 10/26/2020

- Clmt. Ex. 5 - Contract, 4/20/2019
- Clmt. Ex. 6 - Respondent's licensing status, 9/5/2019
- Clmt. Ex. 7a- Payment, 5/22/2029
- Clmt. Ex. 7b- Picture of cardboard box with shipping label, undated
- Clmt. Ex. 8a- Estimate, Garcia Patios and Landscaping, Inc., 2/16/2023
- Clmt. Ex. 8b- Estimate, Garcia Patios and Landscaping, Inc., 4/27/2021
- Clmt. Ex. 8c- Allmaster Home Services proposals, 4/24/2021 and 7/13/2022
- Clmt. Ex. 8d- Stevens Contracting & Restorations, Inc., proposal, 5/31/2021
- Clmt. Ex. 9a- Screenshot of text message, Claimant to Respondent, 7/1/2022
- Clmt. Ex. 9b- Screenshots of text messages between Claimant and Respondent, May 2019 through August 2019
- Clmt. Ex. 9c- Copies of text messages with photographs, and screenshots of text messages between Alicia Smith and Respondent, October 2019 through October 2020
- Clmt. Ex. 9d- Screenshots of text messages between Alicia Smith and Respondent, August 2019
- Clmt. Ex. 10- Emails between Alicia Smith and Respondent, May 2019 through August 2019
- Clmt. Ex. 11a- Photocopies of photographs, October 2019
- Clmt. Ex. 11b- Photocopies of photographs, May 2019 through October 2019

The Respondent did not offer any exhibits for admission as evidence.

I admitted the following exhibits offered by the Fund:

- Fund Ex. 1 - Hearing Order, 1/6/2023
- Fund Ex. 2 - Claim, 5/31/2021
- Fund Ex. 3 - Notice of Hearing, 2/1/2023
- Fund. Ex. 4 - Respondent's MHIC Licensing History, 3/10/2023

Testimony

The Claimant testified and presented the testimony of Mrs. Smith.

The Respondent testified and did not present other witnesses.

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 under MHIC registration number 01-114634.

2. The Claimant owns and resides in a home in Bowie, Maryland.

3. On April 20, 2019, the Claimant and the Respondent entered into a contract to install a paver border path along the Claimant's driveway, and to build a retaining wall (Contract). The Contract included that the Respondent would provide all materials, labor, and equipment to complete the Contract. The scope of work under the Contract included:

- Excavation of 200 linear feet for new paver borders, with excavation 12 inches deep and 24 inches wide;
- Pouring 8 inches of concrete at the base of the excavation;
- Installation of pavers 12 inches wide, on both sides of the driveway;
- Installation of a wall next to the paver borders; and
- Installation of an asphalt driveway section.

4. The Contract stated that work would begin on or before May 6, 2019, and would take four days to complete.

5. Under the Contract, \$5,000.00 was due on execution of the Contract, \$6,000.00 was due when work began, with a final payment of \$7,450.00 when work was completed.

6. The Contract included a provision that if the Claimant wanted lights in the paver border, the Respondent would install seventeen lights at a cost of \$150.00 per light. The lights to be installed were shaped like the pavers, with a light source below the surface and a white-colored horizontal lens exposed to view. The lights were to be installed as a substitute for pavers at selected spacings along the paver border, with the lighted lens flush with the horizontal surface of adjacent pavers. The Claimant agreed for the Respondent to install the lights.

7. The cost breakdown of the Contract was as follows:

- Installation of brick border \$14,000.00³
- Installation of 17 lights \$ 2,550.00
- Installation of asphalt driveway \$ 1,900.00
\$18,450.00

8. On April 24, 2019, the Claimant paid the Respondent \$5,000.00. On May 22, 2019, the Claimant paid the Respondent \$6,000.00 and work began under the Contract.

9. The Respondent performed work under the Contract, including installation of the lighting.

10. Shortly after the pavers and the lights were installed, the Claimant's home received a heavy rain. The rain caused several of the lights to fail. Large pools of water stood on the driveway and paver path where the driveway and paver path met.

11. From May 2019 through October 2019, Mrs. Smith and the Respondent, or the Claimant and the Respondent, exchanged multiple text messages as the Claimant and his wife sought to convince the Respondent to repair the inoperable lights and to alleviate water pooling

³ There was no cost breakdown for the retaining wall.

on the driveway and pavers when it rained. The Respondent repeatedly promised to return to make repairs.

12. The Respondent often told the Claimant and Mrs. Smith that lights were backordered, or that pavers were being delivered, or that the pavers delivered were the wrong size, or that he would be returning to the Claimant's home soon, or that he was "hoping" to come by the Claimant's home on some future unspecified day or weekend.

13. The paver border was installed with retainers along the outer edge where the pavers met the Claimant's lawn. The retainers were supposed to be unseen but were exposed to view in several places along the paver border. Several of the lights had wiring exposed on the surface. Several of the pavers along the paver borders were not properly aligned and did not form straight rows. Sand or other fill between pavers washed away.

14. On July 20, 2019, the Claimant paid the Respondent \$6,799.00.⁴

15. The Claimant and the Respondent continued to exchange text messages over a course of months into 2020. The COVID 19 pandemic arrived and added to the reasons why the Respondent was unable to return to the Claimant's home to repair unworkmanlike work and to repair or replace inoperative lights. The Claimant granted the Respondent's request to delay returning to the Claimant's home for an unspecified time as a precaution against the possible risk to the health of the Respondent's employees posed by the pandemic.

16. On July 10, 2020, Mr. Smith contacted the Respondent to inquire when the Respondent would return to make the necessary repairs to the Respondent's work, to which the Respondent replied that it would be "this week."

⁴ There was no evidence presented as to why this payment was less than the full amount due under the Contract or why the Claimant paid the Respondent. By July 2020, the Claimant was already dissatisfied with the Respondent's work.

17. On an unknown date the Respondent sent workers to the Claimant's home to investigate the failed lights. The workers did not repair the lights, but they stripped the set screws that affixed the upward-facing lens on several of the light fixtures.

18. On or around July 2020, the Claimant purchased ten replacement lights for the inoperative lights along the paver border at a cost of \$750.00. Exact replacements lights for the lights installed by the Respondent were no longer available, and the Claimant bought lights of similar shape with clear, versus white, lenses. The Respondent did not install them, citing as the reason that he did not want to expose his workers to July temperatures.

19. The Respondent did not perform any more work under the Contract even though the Claimant continued to try to convince the Respondent to return and to perform the work under the Contract properly.

20. On April 27, 2021, Garcia Patios and Landscaping, Inc., provided an estimate to the Claimant in the amount of \$10,725.00 to repair the work done by the Respondent. The cost breakdown of the Garcia Patios and Landscaping, Inc., estimate was: \$8,800.00 to remove and replace the paver borders; \$800.00 to repair the lighting using the existing fixtures and the new fixtures the Claimant had on hand, even though they did not match the existing fixtures; and \$1,125.00 to install a flower bed.

21. On April 24, 2021, Allmaster Home Services provided an estimate in the amount of \$13,336.00 to repair the Respondent's work. The Allmaster Home Services estimate included that it would remove the existing paver borders and lighting and it would prepare the area where pavers were removed with compressed crushed stone, that it would install concrete edging as necessary, that it would install pavers, and that it would use polymeric sand in the spaces between pavers.

22. On May 31, 2021, Stevens Contracting and Restorations, Inc., provided an estimate to the Claimant in the amount of \$12,993.00 to repair the work performed by the Respondent. The estimate included that Stevens Contracting and Restorations, Inc., would demolish the existing paver borders, excavate the base of the borders, remove the existing lighting and provide it to the Claimant to keep, install crushed stone at the base of the excavations for proper drainage, install a new paver border, and install new lighting, including a transformer. The Stevens Contracting and Restorations, Inc., estimate also included removing and replacing a five and a half foot by five- and half-foot square of asphalt driveway where it was low and retained water, including excavation and installation of a proper gravel base to support the new asphalt.

23. On July 13, 2022, Allmaster Home Services provided a second estimate to the Claimant in the amount of \$15,208.00 to repair the Respondent's work. The second Allmaster Home Services estimate included that it would remove the existing paver borders and lighting and prepare the area where pavers were removed with compressed crushed stone, that it would install concrete edging as necessary, that it would install pavers, and that it would use polymeric sand in the spaces between pavers. The second Allmaster Home Services estimate included that it would remove seventeen existing landscape lights and would replace them with thirty new lights.

24. On February 16, 2023, Garcia Patios and Landscaping, Inc., provided a second estimate to the Claimant in the amount of \$14,500.00 to install all new lights, to demolish and reinstall the paver borders installed by the Respondent, and to demolish the concrete layer below the pavers and replace it with crushed stone to provide proper drainage. The cost breakdown of the Garcia Patios and Landscaping, Inc., estimate was \$3,600.00 for the lights and \$10,900.00 for the paver borders.

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; 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).

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. 2022); *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. 2022). The Claimant resides in the home that is the subject of the claim and does not own more than three dwellings. *Id.* § 8-405(f)(2) (Supp. 2022). The parties did not enter into a valid agreement to submit their disputes to arbitration. *Id.* §§ 8-405(c), 8-408(b)(3) (2015 & Supp. 2022). 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. 2022).

The Claimant did not unreasonably reject good faith efforts by the Respondent to resolve the claim. *Id.* § 8-405(d) (Supp. 2022). The Respondent repeatedly made promises to return to the Claimant's home to address the Claimant's concerns and he did not honor any of those promises. The Respondent offered several excuses about supply mis-deliveries or similar reasons why repair was delayed, all of which were convenient because the Claimant had no way to challenge or verify the Respondent's excuses. The Claimant was patient when the COVID 19 pandemic struck, but the Respondent took advantage of the Claimant's patience. When the Claimant bought new lights to replace failed lights in July 2020, the Respondent declined to install them because he did not want to expose his workers to the summer heat. Apparently, the Respondent's employees at Solid Brick Contracting, LLC, will only report for work in suitably comfortable weather.

The Respondent performed unworkmanlike home improvements. The lights he installed failed the first time the Claimant experienced a heavy rain, water pooled where the pavers met the driveway, pavers were improperly aligned, fill between pavers washed away, paver borders were exposed to view, and wiring for the lighting was visible on the Claimant's lawn.

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) (Supp. 2022); COMAR 09.08.03.03B(1). The Claimant does not seek any compensation from the Fund for these reasons.

This matter was delayed in reaching the hearing stage for over a year as the parties tried to arrive at a mutually acceptable resolution with the help of an Assistant Attorney General of the Department.

The delay caused by this resolution effort caused estimates obtained by the Claimant to support resolution to become stale. The Claimant had to obtain more current estimates prior to the hearing.

On April 27, 2021, Garcia Patios and Landscaping, Inc., provided an estimate to the Claimant in the amount of \$10,725.00 to repair the work done by the Respondent. The cost breakdown of the Garcia Patios and Landscaping, Inc., estimate was \$8,800.00 to remove and replace the paver borders, \$800.00 to repair the lighting using the existing fixtures and the new fixtures the Claimant had on hand, even though they did not match the existing fixtures, and \$1,125.00 to install a flower bed.

On February 16, 2023, Garcia Patios and Landscaping, Inc., provided a second estimate to the Claimant in the amount of \$14,500.00 to install all new lights, to demolish and reinstall the paver borders installed by the Respondent, and to demolish the concrete layer below the pavers and replace it with crushed stone to provide proper drainage. The cost breakdown of the Garcia Patios and Landscaping, Inc., estimate was \$3,600.00 for the lights and \$10,900.00 for the paver borders.

Of all the estimates for repair the Claimant obtained, the February 16, 2023, estimate of Garcia Patios and Landscaping, Inc, most closely matches the scope of work of the Contract. This estimate also represents the expected cost increases of a project that was originally done in 2019.

The Claimant paid \$750.00 for new lights that were similar to those installed by the Respondent, but not the same. The February 16, 2023, estimate of Garcia Patios and Landscaping, Inc., does not include using these replacements, and there is no reason the Claimant should settle for mismatched replacement lights.

However, there is no basis for compensating the Claimant for lights that were never used and which will not be used to repair the Respondent's work. MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work.

The Respondent performed some work under the Contract, although all of it must be removed to correct the unworkmanlike character of the work. The Claimant intends to retain other contractors to complete or remedy that work. Accordingly, the following formula appropriately measures the Claimant's 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).

Under this formula:

Amount paid to the Respondent	\$17,799.00 (\$5,000.00 + \$6,000.00 + \$6,799.00)
Plus	
Amount to repair	<u>\$14,500.00</u> \$32,299.00
Minus	
Original Contract price	<u>(\$18,450.00)</u>
Award	\$13,849.00

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.⁵ Bus. Reg. § 8-405(e)(1), (5) (Supp. 2022); COMAR 09.08.03.03B(4). In this case, the Claimant's actual loss is less than the amount paid to the Respondent and less than \$30,000.00. Therefore, the Claimant is entitled to recover his actual loss of \$13,849.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$13,849.00 because of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2022); COMAR 09.08.03.03B(3)(c). I further conclude that the Claimant is entitled to recover \$13,849.00 from the Fund. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405(a) (2015 and Supp. 2022); COMAR 09.08.03.03B(2), (3).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$13,849.00; 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;⁶ and

⁵ 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").

⁶ *See* Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

ORDER that the records and publications of the Maryland Home Improvement

Commission reflect this decision.

June 5, 2023
Date Decision Issued

Michael R. Osborn

Michael R. Osborn
Administrative Law Judge

MRO/sh
#205132

PROPOSED ORDER

WHEREFORE, this 18th day of July, 2023, 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.

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Panel B

***MARYLAND HOME IMPROVEMENT
COMMISSION***