

**IN THE MATTER OF THE CLAIM OF \* MARYLAND HOME  
FRANK BABUSCI \* IMPROVEMENT COMMISSION  
AGAINST THE MARYLAND HOME \*  
IMPROVEMENT GUARANTY FUND \* MHIC CASE NO. 21(75)52  
FOR THE ACTS OR OMISSIONS OF \* OAH CASE NO. LABOR-HIC-  
DENNIS MCCLOSKEY AND KADE \* 02-22-15291  
CONSTRUCTION, INC**

\* \* \* \* \*

**PROPOSED ORDER**

This matter was originally heard before an Administrative Law Judge (“ALJ”) of the Office of Administrative Hearings (“OAH”) on October 20, 2022. Following the evidentiary hearing, the ALJ issued a Proposed Decision on December 20, 2022, concluding that the homeowner, Frank Babusci (“Claimant”) suffered a compensable actual loss as a result of the acts or omissions of Dennis McCloskey and Kade Construction, Inc. (collectively, “Contractor”) and recommended that the Claimant receive an award from the Home Improvement Guaranty Fund. In accordance with COMAR 09.01.03.08, a Panel of the MHIC reviewed the ALJ’s Proposed Decision, which is incorporated herein and amended as set forth below.

The Commission finds that the ALJ erred by granting an award to the Claimant. Md. Code Ann., Bus. Reg. § 8-405 provides that a homeowner may recover compensation from the Home Improvement Guaranty Fund “for an actual loss that results from an act or omission by a licensed contractor.” COMAR 09.08.03.02 authorizes the Commission to “dismiss a claim as legally insufficient if the contractor was unlicensed when the contract was entered into but licensed during the performance of the contract unless: (i) The claimant establishes by a preponderance of the evidence that the claimant did not know that the contractor was unlicensed at the time the contract was entered into; and (ii) A substantial portion of the contractor's alleged misconduct occurred after the contractor became licensed.” In this case, the parties entered into the contract giving rise to the Claimant’s claim on November 3, 2018. At that time, the Contractor did not hold a home

improvement contractor license. The Contractor performed the contracted home improvement, the removal and replacement of the Claimant's roof, in December 2018. The Contractor's installation of the roof was unworkmanlike, incomplete, and inadequate, because he glued the new roof to the Claimant's siding instead of installing flashing as required by the Contract and as necessary to prevent the roof from leaking. At that time, the Contractor remained unlicensed. The Contractor became licensed on February 24, 2019. The only work the Contractor performed for the Claimant after he became licensed was the repair of interior water damage caused by the leaky roof he installed. Such repairs were not within the scope of the parties' contract, and the sole purpose of the repairs was to ameliorate the consequential damages that the Contractor's unworkmanlike performance caused the Claimant to suffer. Accordingly, the Commission finds that no portion of the Contractor's misconduct occurred after he became licensed, and holds that the Claimant is not eligible for an award from the Guaranty Fund.

Having considered the evidence contained in the record and the ALJ's Proposed Decision, it is this 14<sup>th</sup> day of February 2023, **ORDERED:**

- A. That the Findings of Fact of the Administrative Law Judge are **AMENDED**;
- B. That the Conclusions of Law of the Administrative Law Judge are **AMENDED**;
- C. That the Proposed Decision and Recommended Order of the Administrative Law Judge is **AMENDED**;
- D. That the Claimant's Claim is **DENIED**;
- E. That the records and publications of the Maryland Home Improvement Commission shall reflect this decision; and

F. Unless, within twenty days of the date of this Proposed Order, any party files with the Commission written exceptions or a request to present argument, then this Proposed Order will become final. By law, the parties then have an additional thirty days to file a petition for judicial review in Circuit Court.

***Michael Newton***  
**Commissioner –Panel B**  
**Maryland Home Improvement**  
**Commission**

<p><b>IN THE MATTER OF THE CLAIM</b></p> <p><b>OF FRANK BABUSCI,</b></p> <p><b>CLAIMANT</b></p> <p><b>AGAINST THE MARYLAND HOME</b></p> <p><b>IMPROVEMENT GUARANTY FUND</b></p> <p><b>FOR THE ALLEGED ACTS OR</b></p> <p><b>OMISSIONS OF DENNIS</b></p> <p><b>MCCLOSKEY,</b></p> <p><b>T/A KADE CONSTRUCTION, INC.,</b></p> <p><b>RESPONDENT</b></p>	<p><b>* BEFORE BRIAN PATRICK WEEKS,</b></p> <p><b>* AN ADMINISTRATIVE LAW JUDGE</b></p> <p><b>* OF THE MARYLAND OFFICE</b></p> <p><b>* OF ADMINISTRATIVE HEARINGS</b></p> <p><b>*</b></p> <p><b>*</b></p> <p><b>*</b></p> <p><b>* OAH No.: LABOR-HIC-02-22-15291</b></p> <p><b>* MHIC No.: 21 (75) 52</b></p> <p><b>*</b></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 March 1, 2021, Frank Babusci (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund), under the jurisdiction of the Department of Labor (Department), for reimbursement of \$9,200.00 for actual losses allegedly suffered as a result of a home improvement contract with Dennis McCloskey, trading as Kade Construction, Inc. (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015 & Supp.

2022).<sup>1</sup> On June 24, 2022, the MHIC issued a Hearing Order on the Claim. On June 28, 2022, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On October 20, 2022, I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. Jonathan Phillips, Assistant Attorney General, Department, represented the Fund. The Claimant and the Respondent were both 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); Code of Maryland Regulations (COMAR) 09.01.03; 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 offered by the Claimant:

- Cl. Ex. 1 - Written statement, undated
- Cl. Ex. 2 - Response to Respondent's MHIC response, undated
- Cl. Ex. 3 - Email from the Claimant to the Respondent, October 27, 2018
- Cl. Ex. 4 - Emails between the Claimant and the Respondent with attached estimate, October 28, 2018
- Cl. Ex. 5 - Emails between the Claimant and the Respondent, various dates
- Cl. Ex. 6 - Email from the Respondent to the Claimant, October 28, 2018

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

- Cl. Ex. 7 - Email from the Claimant to the Respondent, October 28, 2018
- Cl. Ex. 8 - Email from the Respondent to the Claimant, October 28, 2018
- Cl. Ex. 9 - Emails between the Claimant and the Respondent, various dates
- Cl. Ex. 10 - Email from the Respondent to the Claimant with attached estimate, October 29, 2018
- Cl. Ex. 11 - Emails between the Claimant and the Respondent, October 29, 2018
- Cl. Ex. 12 - Emails between the Claimant and the Respondent, October 29, 2018
- Cl. Ex. 13 - Letter from the Claimant to the Respondent with attached executed contract, November 3, 2018
- Cl. Ex. 14 - Letter from the Claimant to Perry & Margaret Pillas with attached checks, undated
- Cl. Ex. 15 - Emails between the Claimant and the Respondent, various dates
- Cl. Ex. 16 - Email from the Respondent to the Claimant, November 14, 2018
- Cl. Ex. 17 - Emails between the Claimant and the Respondent with attached invoice, various dates
- Cl. Ex. 18 - Emails between the Claimant and the Respondent, various dates
- Cl. Ex. 19 - Emails from the Claimant to the Respondent, various dates
- Cl. Ex. 20 - Email from the Respondent to the Claimant, December 10, 2018
- Cl. Ex. 21 - Emails between the Claimant and the Respondent, various dates
- Cl. Ex. 22 - Emails between the Claimant and the Respondent, December 11, 2018
- Cl. Ex. 23 - Emails between the Claimant and the Respondent, December 11, 2018
- Cl. Ex. 24 - Email from the Claimant to the Respondent, March 8, 2020
- Cl. Ex. 25 - Emails between the Claimant and the Respondent, March 8, 2020
- Cl. Ex. 26 - Emails between the Claimant and the Respondent, March 8, 2020
- Cl. Ex. 27 - Emails from the Claimant to the Respondent, March 8, 2020

- Cl. Ex. 28 - MHIC complaint form, signed July 13, 2020
- Cl. Ex. 29 - Emails from the MHIC to the Claimant and the Respondent, July 20, 2020
- Cl. Ex. 30 - MHIC Order and email to the Respondent, July 20, 2020
- Cl. Ex. 31 - Email from Chesapeake Roofing to the Claimant with attached estimate, July 22, 2020
- Cl. Ex. 32 - Emails between the Claimant and Chesapeake Roofing, July 22, 2020
- Cl. Ex. 33 - Email from the Claimant to the MHIC with attached photographs, July 23, 2020
- Cl. Ex. 34 - Emails between the Claimant and Chesapeake Roofing, July 23, 2020
- Cl. Ex. 35 - Email from the Claimant to the Respondent, July 26, 2020
- Cl. Ex. 36 - Email from the Respondent to the MHIC, August 16, 2020
- Cl. Ex. 37 - Emails between the Claimant and the MHIC, September 4, 2020
- Cl. Ex. 38 - Emails between the Claimant and the MHIC, various dates
- Cl. Ex. 39 - Email from Chesapeake Roofing to the Claimant with attached invoice, October 23, 2020
- Cl. Ex. 40 - Emails between Chesapeake Roofing and the Claimant with attachment, various dates
- Cl. Ex. 41 - M Salazar Construction Inc. invoice, November 18, 2020
- Cl. Ex. 42 - Babusci & Son Construction Company contract with attachments, December 2, 2020
- Cl. Ex. 43 - MHIC claim form, March 1, 2021
- Cl. Ex. 44 - Letter from the MHIC to the Claimant, March 11, 2022
- Cl. Ex. 45 - Emails from the Claimant to the MHIC, various dates
- Cl. Ex. 46 - Letter from the Claimant to the MHIC, March 17, 2022
- Cl. Ex. 47 - Email from the MHIC to the Claimant, March 17, 2022
- Cl. Ex. 48 - Letter from the MHIC to the Claimant with attached order, June 24, 2022

- Cl. Ex. 49 - Notice of Hearing, July 11, 2022
- Cl. Ex. 50 - Account history, contracts, check copies, receipts, various dates
- Cl. Ex. 51 - Revised claim amount, undated
- Cl. Ex. 52 - Table of contents, undated

Neither the Respondent nor the Fund offered any documents.

Testimony

The Claimant testified and did not present other witnesses.

The Respondent testified and did not present other witnesses.

The Fund did not present any testimony.

**PROPOSED FINDINGS OF FACT**

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

1. Between June 21, 2018, and February 24, 2019, the Respondent was not licensed by the MHIC. At all times other times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor under MHIC license number 92272.
2. On November 3, 2018, the Claimant and the Respondent entered a contract to remove an existing flat roof and install a new rubber roof at a home owned by the Claimant in Ocean City. The Contract included flashing/counter flash, and new drip edge (Contract).
3. The original agreed-upon Contract price was \$3,900.00.
4. On November 3, 2018, the Claimant paid the Respondent \$1,170.00.
5. On an unspecified date(s), the Claimant paid the Respondent a total of \$2,730.00.
6. On December 11, 2018, the Claimant paid the Respondent an additional \$600.00 to remove and replace plywood under the roof exterior.



7. In or around December 2018, The Respondent started the work required by the Contract but when he started pulling the vinyl siding up, he glued the rubber roofing material directly onto the siding instead of installing counter flashing and “closed it up as best he could.” (R. testimony). He did not discuss this alteration to the Contract with the Claimant.

8. In or around July 2019, the Claimant noticed a leak in his bedroom near the closet.

9. In September 2019, the Respondent met with the Claimant regarding the leak, and said he would fix the roof.

10. In March 2020, the Claimant and the Respondent exchanged emails. The Respondent said he would make the requested repairs once the “asbestos has been removed.” (Cl. Ex. 25).

11. On July 22, 2020, the Claimant received an estimate from Chesapeake Roofing for a total of \$4,375.00. The estimate included tearing off the existing roof and completely redoing the work of the Respondent.

12. On October 23, 2020, Chesapeake Roofing completed the roof repairs specified in the July 22, 2020 contract. The Claimant paid Chesapeake Roofing a total of \$4,875.00.

13. On an unspecified date after December 2, 2020, the Claimant, through his MHIC-licensed corporate entity, Babusci & Son Construction Company, performed work to remediate the water damage to the interior of the Claimant’s residence.

### **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.

The Respondent was not a licensed home improvement contractor at the time the Respondent entered into the Contract with the Claimant. Between June 21, 2018, and February 24, 2019, the Respondent was not licensed by the MHIC. However, at all times other times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor under MHIC license number 92272. The Claimant first noticed a leak in July 2019, after the Respondent had become licensed again. In September 2019, the Respondent met with the Claimant regarding the leak, and said he would fix it. Discussions about fixing the leak continued, but the leak was never fixed by the Respondent. Therefore, because at least some of the acts or omissions giving rise to the claim took place after the Respondent had become licensed again, I conclude that the claim is not barred by the fact that the Respondent was not licensed when he entered the Contract with the Claimant. Bus. Reg. § 8-405(a) (Supp. 2022); *see also* COMAR 09.08.03.03B(2).

The Respondent performed unworkmanlike, inadequate, or incomplete home improvements. The Contract called for the Respondent to install a new flat roof. He did not

complete the job, and the resulting work was unworkmanlike and inadequate. The Respondent testified that he replaced the existing roof and began to put the new roofing material down, but when he started pulling the vinyl siding up, he thought it might contain asbestos. As a result, he said that he "closed it up the best he could" but admitted that he should not have tied the new roofing material directly to the existing siding. Instead, he stated that he should have installed counter flashing and secured the roofing material to the flashing. Furthermore, the Contract required the Respondent to install flashing.

The Respondent told the Claimant that the work was done, but, in or around July 2019, a mere seven months after installation of a new roof, the Claimant noticed significant water damage inside his home. The photographs clearly show the damage. (Cl. Ex. 33.) The Claimant testified that, although there had been leaks prior to the Respondent beginning the work, there had never been any leaks in the area near his bedroom closet where this new leak appeared in July 2019. Accordingly, the Claimant has proven that the Respondent's failure to properly install the new flat roof caused an actual loss.

In defense of his admittedly inadequate job, the Respondent blamed the potential for asbestos as the reason he did not remove the siding and install flashing. There is no evidence that the Respondent communicated to the Claimant, prior to notifying the Claimant that he had completed the work in December 2019, that he had not removed the siding or installed flashing. If the Respondent had communicated with the Claimant, the parties could have attempted to reach a resolution. I do not find that the possible presence of asbestos gave the Respondent *carte blanche* to do an inadequate installation job, especially where he did not tell the Claimant that he was adjusting the Contract because of the possible presence of asbestos.

For the above reasons, I conclude 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). 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, and the Claimant has retained 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).

The total amount paid to the Respondent by the Claimant was \$4,500.00. The Claimant paid \$4,875.00 to Chesapeake Roofing to repair the roof. The Claimant, who is licensed by the MHIC, completed work to repair the interior of the residence. However, I will not add any of the estimates provided by the Claimant for this work because: (1) they were not included in the original claim, COMAR 09.08.03.02C; and (2) there was no testimony describing the scope of work and explaining the correlation between the Respondent's conduct, the actual loss, and

scope of work completed by the Claimant's company.<sup>2</sup> Accordingly, the actual loss is \$9,375.00 (\$4,500.00 + \$4,875.00) - \$4,500.00 = \$4,875.00.

A claimant may not recover more than the amount paid to the contractor against whom the claim is filed. Bus. Reg. § 8-405(e)(5) (Supp. 2022); COMAR 09.08.03.03B(4). In this case, the Claimant's actual loss of \$4,875.00 exceeds the amount paid to the Respondent. Therefore, the Claimant's recovery is limited to \$4,500.00, the amount paid to the Respondent.

### **PROPOSED CONCLUSIONS OF LAW**

I conclude that the Claimant has sustained an actual and compensable loss of \$4,875.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401 (2015), 8-405 (Supp. 2022); COMAR 09.08.03.03B(3)(c). I further conclude that the Claimant is entitled to recover \$4,500.00 from the Fund. Md. Code Ann., Bus. Reg. § 8-405(e)(5) (Supp. 2022); COMAR 09.08.03.03B(4).

### **RECOMMENDED ORDER**

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

**ORDER** that the Maryland Home Improvement Guaranty Fund award the Claimant \$4,500.00; 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;<sup>3</sup> and

<sup>2</sup> The Fund did not object in principle to the concept of a Fund Claimant essentially paying himself from the Fund.

<sup>3</sup> 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.

December 20, 2022  
Date Decision Issued

*Brian Patrick Weeks*  

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Brian Patrick Weeks  
Administrative Law Judge

BPW/dlm  
#202407