IN THE MATTER OF THE CLAIM	*	**BEFORE LEIGH WALDER,**
OF DOUGLAS WOODWARD,[1]	*	**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 JACKIE McFEE, JR.,	*	
T/A McFEE MASONRY COMPANY,	*	
INC.,	*	**OAH No.: LABOR-HIC-02-22-06864**
RESPONDENT	*	**MHIC No.: 21 (75) 728**

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

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 3, 2021, Douglas Woodward (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 $10,980.00 for actual losses allegedly suffered as a result of a home improvement contract with Jackie McFee, Jr., trading McFee Masonry Company, Inc. (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015).[2] On

[1] The OAH case file incorrectly lists the spelling of the Claimant's last name as Woodard. The correct spelling of the Claimant's last name is Woodward.
[2] All references hereinafter to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.

March 16, 2022, the MHIC issued a Hearing Order on the Claim. On March 21, 2022, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On May 31, 2022, I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. Justin Dunbar, Assistant Attorney General, Department, represented the Fund. The Claimant represented himself. The Respondent did not appear for the hearing.

After waiting fifteen 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 April 6, 2022, the OAH provided a Notice of Hearing (Notice) to the Respondent by United States mail. COMAR 09.08.03.03A(2); COMAR 28.02.01.05C(1). The Notice stated that a hearing was scheduled for May 31, 2022, at 9:30 a.m., at the OAH in Hunt Valley, Maryland. The Notice further advised the Respondent that failure to attend the hearing might result in "a decision against you." On May 27, 2022, the Notice was returned to the OAH with the notation: "RETURN TO SENDER TEMPORARILY AWAY UNABLE TO FORWARD." The Respondent did not notify the OAH of any change of mailing address. COMAR 28.02.01.03E. The Respondent made no request for postponement prior to the date of the hearing. COMAR 28.02.01.16. I determined that the Respondent received proper notice, and I proceeded to hear the captioned matter. COMAR 28.02.01.05A, C.

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; 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 have attached a complete Exhibit List as an Appendix.

Testimony

The Claimant testified on his own behalf.

The Respondent was not present to testify or offer any witnesses.

The Fund did not offer any witness 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 120161.

2. On April 16, 2020, the Claimant and the Respondent entered into a contract where the Respondent agreed to remove components of the Claimant's old deck and install new decking materials.

3. The new decking material was to consist of 8 x 3.125" kiln dried after treatment pressure treated pine (KDAT PTP) tongue and groove porch flooring.

4. The KDAT PTP was to be finished with Behar Premium Solid Cape Cod Gray staining.

5. The Respondent also agreed to replace the treads on three deck stairs.

6. The total price for the contracted work was $10,980.00.

7. On April 21, 2020, the Claimant paid the Respondent a $3,620.00 down payment.

8. Sometime after April 21, 2020, the Respondent's workers installed the decking materials but the wood that the workers used was partially wet at the time of installation.

9. On May 8, 2020, the Claimant paid the Respondent the remaining $7,360.00 owed under the contract.

10. On or about May 12, 2020, the Claimant noticed that the decking boards began to separate. The separation was approximately one centimeter in some areas.

11. On May 18, 2020, the Claimant called Bill Miner, an individual who worked for the Respondent, and explained that the decking boards were beginning to separate. Mr. Miner came out to inspect the state of the deck and agreed that the Respondent would have to redo the work.

12. On June 10, 2020, the Respondent's workers returned to redo the contracted work. The workers removed the decking boards, flipped them over, and reinstalled them. The workers damaged some of the wooden boards during this process, and the workers used wood putty to fill any holes and the gaps in the decking materials. The construction also created damage to some of the existing porch posts, joists, and band boards.

13. On June 11, 2020, the Claimant contacted the Respondent to report that the reinstalled flooring continued to have gapping and reported an uneven floor texture because the Respondent's workers only partially sanded some of the wood. Mr. Miner came to the Claimant's property and inspected the work. Mr. Miner agreed that the Respondent would have to redo the project again, but this time using new materials.

14. On December 10 and 11, 2020, after a delay in getting the new decking materials, the Respondent's workers returned to redo the contracted work. The workers demolished half of the porch floorboards and attempted to install the new decking floorboards. During the

installation, the workers noticed that there was an issue with the quality of the lumber that the Respondent had ordered and informed the Claimant that they could not properly install the floorboards using the materials that were available that day. The Respondent's workers left the job, leaving nearly half of the porch open to the joists, unsupported railings, along with two large piles of damaged lumber sitting in the driveway.

15. On January 4, 2021, the Respondent's son assured the Claimant that the job would be completed correctly.

16. On January 26, 2021, the Respondent's son told the Claimant that the Respondent's workers would install the deck on February 1, 2021.

17. On February 1, 2021, nobody from the Respondent's company appeared to install the deck.

18. On February 2, 2021, the Claimant emailed the Respondent's son asking for a status update. The Respondent's son never responded.

19. On February 8, 2021, the Claimant sent a letter to the Respondent stating that he was terminating the contract and would like to engage in arbitration to recover the funds that he paid the Respondent.

20. On March 8, 2021, the Respondent's workers returned to the Claimant's home to install the decking materials. The floorboards that the workers used were not KDAT PTP and had not been properly primed or sealed on all sides, the workers damaged the decking posts, the corner of the porch had not been properly nailed in, the staining was uneven, no work was done to the steps, and the flooring was uneven.

21. The Respondent was unresponsive to the Claimant's attempts to engage in arbitration.

22. At the time of the hearing, the boards on the Claimant's deck cup and buckle due to moisture entering, uneven grading allows water to pool in various areas of the deck, and the boards have visible water stains.

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); Md. Code Ann., State Gov't § 10-217 (2021); 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).

The evidence in this case establishes there are no legal impediments barring the Claimant from filing a claim under section 8-405 of the Business Occupations Article. The Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant. The home improvement work was to be performed on the Claimant's residence in Maryland. The Claimant is not a relative, employee, officer, or partner of the Respondent; and the Claimant is not related to any of the Respondent's employees, officers, or partners. The Claimant did not reject any efforts by the Respondent to resolve the Claim. The Claimant timely filed the Claim with the MHIC on June 3, 2021. Finally, the Claimant has not taken any other legal action to recover monies from the Respondent.

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 Claimant very methodically demonstrated that the Respondent performed an unworkmanlike, inadequate, and incomplete home improvement. Under the contract, the Respondent agreed to remove components of the Claimant's old deck and install new decking materials. These decking materials were to consist of 8 x 3.125" KDAT PTP tongue and groove porch flooring. The Respondent made four attempts to properly install the decking materials, which each attempt resulting in an unworkmanlike, inadequate, or incomplete home improvement..

The evidence establishes that on the Respondent's first attempt to install the decking materials, on or about April 21, 2020, the Respondent's workers used decking materials that were partially wet at the time of installation. As a result, the decking boards began to separate, with the separation being approximately one centimeter in some areas. (Clmt. Ex. 10). The Claimant credibility testified that even the Respondent's worker, Mr. Miner, agreed that the work was unworkmanlike and inadequate and agreed that the Respondent would have to return to redo the work.

On the Respondent's second attempt, on June 10, 2020, the Respondent's workers removed the previously installed decking boards, flipped them over, and reinstalled them. Many boards were damaged during this process, which required the Respondent's workers to use putty to fill any holes and gaps in the decking materials. (Clmt. Ex. 11). During construction, the Respondent's workers caused damage to some of the existing porch posts, joists, and band boards. (*Id.*). This reinstalled flooring continued to have gapping and the flooring had an uneven texture because the Respondent's workers only partially sanded some of the wood. (Clmt. Ex. 12). Again, the Claimant testified that the Respondent's worker, Mr. Miner, agreed that the work

was unworkmanlike and inadequate and agreed that the Respondent would have to return to redo the work, but this time using new materials.

On the Respondent's third attempt, on December 10 and 11, 2020, the Respondent's workers returned to the Claimant's home and demolished half of the porch floorboards and attempted to install the new decking floorboards. During the installation, the workers noticed that Respondent ordered low quality materials and informed the Claimant that they could not properly install the floorboards using the materials that were available that day. The Respondent's workers left the job, leaving nearly half of the porch open to the joists, unsupported railings, along with two large piles of damaged lumber sitting in the driveway. (Clmt. Exs. 13-15). This work was unworkmanlike, inadequate, and incomplete as the Respondent's workers left the job without installing the new decking floorboards, as contracted. The Claimant's photographs depict the state of the job site after the Respondent's workers left and the photos demonstrate that the flooring that remained is completely unfinished, much of the flooring had been removed by the Respondent's workers, leaving holes in the Claimant's porch. (*Id.*).

On the Respondent's final attempt, on March 8, 2021, the Respondent's workers returned to the Claimant's home to install the decking materials. This last attempt resulted in an unworkmanlike, inadequate, and incomplete home improvement. The floorboards that the Respondent's workers used were not KDAT PTP and had not been properly primed or sealed on all sides, the workers damaged the decking posts, the corner of the porch had not been properly nailed in, the staining was uneven, no work was done to the steps, and the flooring was uneven. (Clmt. Exs. 19-31). The Respondent was unresponsive to the Claimant's attempts to have his company remedy the work for a fifth time. Due to the Respondent's unworkmanlike, inadequate, and incomplete work, at the time of the hearing, the boards on the Claimant's deck

cup and buckle due to moisture entering, the uneven grading allows water to pool in various areas of the deck, and the boards have visible water stains. (Clmt. Exs. 38-41). The photographs that the Claimant submitted into evidence support the Claimant's assertions that water pools on uneven spots on the deck, that the water has stained the deck, and that the deck boards are no longer aligned as they are cupping and buckling. (*Id.*).

After considering the Claimant's uncontested and credible testimony, and after reviewing the Claimant's corroborating exhibits, I agree with both the Claimant and the Fund that the Respondent performed an unworkmanlike, inadequate, and incomplete home improvement. *See* Bus. Reg. § 8-401. Thus, the Claimant is eligible for compensation from the Fund. *See Id.* § 8-405(a); *see also* COMAR 09.08.03.03B(2). 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.

Here, the Respondent performed some work under the Contract, and the Claimant has not currently retained another contractor 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 is not soliciting another contractor to complete the contract, the claimant's actual loss shall be the amount which the claimant paid to the original contractor less the value of any materials or services provided by the contractor." COMAR 09.08.03.03B(3)(b).

The Fund agreed with the Claimant in that the Respondent provided the Claimant with $0.00 in value of any materials or services contributed towards the deck. The Fund and Claimant

base this $0.00 value on the fact that the Respondent's inadequate workmanship left the deck in a completely dilapidated state which would require another contractor to redo the Respondent's shoddy work using new materials. I agree with the Fund and Claimant. As such, utilizing the formula provided in COMAR 09.08.03.03B(3)(b), the Claimant's actual loss is calculated as the amount paid to the Respondent ($10,980.00) less the value of any materials or services provided by the Respondent ($0.00). For this reason, the Claimant is entitled to recover $10,980.00 as the amount of his actual loss. *Id.*; Bus. Reg. § 8-405(a).

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.[3] In this case, the Claimant's actual loss is less than $30,000.00. Therefore, the Claimant is entitled to recover his actual loss of $10,980.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of $10,980.00 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)(b). I further conclude that the Claimant is entitled to recover $10,980.00 from the Fund. Md. Code Ann., Bus. Reg. § 8-405(a) (2015).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant $10,980.00; and

[3] H.D. 917, 2022 Leg., 444th Sess. (Md. 2022) (to be codified in section 8-405(e)(1) of the Business Regulation Article). *See also* Bus. Reg. § 8-405(e)(5); COMAR 09.08.03.03B(4), D(2)(a). The increased cap is applicable to any claim on or after July 1, 2022, 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").

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.

Leigh Walder

August 22, 2022
Date Decision Issued

Leigh Walder
Administrative Law Judge

LW/at
#200308

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

PROPOSED ORDER

WHEREFORE, this 7th day of October, 2022, 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

IN THE MATTER OF THE CLAIM OF	*	**MARYLAND HOME**
DOUGLAS WOODWARD	*	**IMPROVEMENT COMMISSION**
AGAINST THE MARYLAND HOME	*	
IMPROVEMENT GUARANTY FUND	*	**MHIC CASE NO. 21(75)728**
FOR THE ACTS OR OMISSIONS OF	*	**OAH CASE NO. LABOR-HIC-**
JACKIE McFee Jr. AND McFEE	*	**02-22-06864**
MASONRY COMPANY, INC.	*	

* * * * * * * *

FINAL ORDER

This matter was originally heard before an Administrative Law Judge ("ALJ") of the Office of Administrative Hearings ("OAH") on May 31, 2022. Following the evidentiary hearing, the ALJ issued a Proposed Decision on August 22, 2022, concluding that the homeowner, Douglas Woodward ("Claimant") suffered an actual loss as a result of the acts or omissions of Jackie McFee Jr. and McFee Masonry Company, Inc. (collectively, "Contractor"). *ALJ Proposed Decision* p.10. In a Proposed Order dated October 7, 2022, the Maryland Home Improvement Commission ("MHIC" or "Commission") affirmed the Proposed Decision of the ALJ to grant an award of $10,980.00 from the Home Improvement Guaranty Fund. The Contractor subsequently filed exceptions to the MHIC Proposed Order.

On March 2, 2023, a three-member panel ("Panel") of the MHIC held a remote hearing on the exceptions filed in this matter. William Blackford, Esq., represented the Contractor. The Claimant participated without counsel. 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. The Contractor provided the Commission with a copy of the transcript of the hearing before the ALJ. Therefore, the Panel's review of the record included the preliminary exhibits for the exceptions hearing, the OAH Proposed Decision, and the exhibits offered as

evidence at the OAH hearing, and the OAH hearing transcript. COMAR 09.01.03.09(G) - (I).

The claim in this proceeding relates to a contract between the parties for the restoration of a deck at the Claimant's home. The ALJ found that the Contractor's performance under the contract was unworkmanlike, inadequate, and incomplete. *ALJ's Proposed Decision* p. 9. The Contractor did not attend the OAH hearing, but the ALJ found that OAH had provided the Contractor with proper notice and proceeded with the hearing.

On exception, the Contractor argued that he is entitled to a new hearing because OAH did not provide him with proper notice of the evidentiary hearing because OAH erroneously addressed the hearing notice to 13803 Coco Avenue, Hudson, *MD* 34667, instead of his correct address, 13803 Coco Avenue, Hudson, *FL* 34667. The envelope for the hearing notice sent to the Contractor via Certified Mail indicates that delivery was attempted in the Contractor's Florida zip code. In addition, the Nixie label on the Certified Mail envelope returned to OAH stated that it was returned because the addressee was temporarily away, not because the address was incorrect. Finally, the hearing notice sent to the Contractor via regular mail was not returned to OAH. Accordingly, the Commission finds that OAH provided the Contractor with proper notice and holds that he is not entitled to a new hearing.

The Contractor also argued that the ALJ erred in finding that the Claimant suffered an actual loss because the deck floor installed by the Contractor had value, and because the Claimant did not present proof of the cost to repair the floor. The Commission finds no error. The ALJ found that the Contractor installed the wrong deck floor materials and that the flooring was uneven (findings that the Contractor did not challenge on exception) and deemed the labor and materials the Contractor provided to have no value. Therefore, the ALJ correctly applied the formula set forth in COMAR 09.08.03.03B(3)(b) to calculate the Claimant's actual loss and subtracted the

value of the materials and labor provided by the Contractor ($0.00) from the amount the Claimant paid to the Contractor ($10,980.00). Under this formula, the Claimant need not prove the cost to correct or complete the Contractor's performance.

The Contractor also argued that the ALJ erred in deeming him responsible for the Claimant's actual loss because he moved to Florida and stopped working in Maryland, his son contracted with the Claimant and used his home improvement contractor license without his permission, and he did not receive any compensation from the Claimant. The Commission finds no error, as there is no evidence in the record to support the Contractor's position.[1] By failing to relinquish his license and allowing his son to use his license, the Contractor assumed responsibility for his son's conduct. *See* COMAR 09.08.01.04.C(3).

Having considered the parties' arguments, the evidence contained in the record, and the ALJ's Recommended Decision, it is this 31st day of March 2023, **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 **AFFIRMED;**

D. That the Claimant is awarded $10,980.00 from the Maryland Home Improvement Guaranty Fund;

[1] Although not part of the evidentiary record, the Contractor asserted in his exceptions that he moved to Florida and ceased working in Maryland in 2020, and allowed his son to use his license, but eventually stopped working with his son. The Commission notes that a contractor that allows another person to operate under their license is liable for actual losses resulting from the person's conduct. If the Contractor was retired and did not want his son to use his license, he should have relinquished his license. In addition, and again not part of the record, the Contractor asserted that the Commission's original notice of claim was sent to his son. However, the Commission sent the notice of claim on June 15, 2021, to the Contractor's address of record with the Commission on that date, 1003 Belvedere Place, Orchard Beach, MD 21226, which the Contractor provided to the Commission on February 12, 2021. Had the Contractor provided his new address to the Commission when he moved to Florida, then the Commission would have sent notice of the claim to the Contractor in Florida.

E. That the Contractor 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.

Chairperson –Panel
Maryland Home Improvement Commission