IN THE MATTER OF THE CLAIM	*	BEFORE DEBORAH S. RICHARDSON,
OF JACEN DRUMMOND,	*	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 JAMES J.	*	
CLARK, III,	*	OAH No.: LABOR-HIC-02-22-28228
S & L CONTRACTING	*	MHIC No.: 21 (75) 891
SERVICES, INC.,	*	
RESPONDENT	*	

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

PROPOSED DECISION

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STATEMENT OF THE CASE

On June 7, 2021, Jacen Drummon (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)[1] Guaranty Fund (Fund) for reimbursement of $8,567.00 for actual losses allegedly suffered as a result of a home improvement contract with James Joseph Clark, III, trading as S & L Contracting Services, Inc. (Respondent). Md. Code

[1] The MHIC is under the jurisdiction of the Department of Labor (Department).

Ann., Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2022).[2] On September 29, 2021, the MHIC issued a Hearing Order on the Claim. On October 15, 2021, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on January 20, 2022, at which neither the Claimant nor the Respondent appeared. I issued a proposed decision on April 13, 2022 concluding that the Claimant had failed to prove that he had suffered a compensable loss as a result of the acts or omissions of the Respondent. On June 21, 2022, the MHIC issued a decision affirming my proposed decision to deny an award. The Claimant filed exceptions to the MHIC decision and the MHIC held an exceptions hearing, at which time the Claimant proved he never received notice of the hearing before me. In an order dated September 16, 2022, the MHIC vacated my prior decision and remanded this matter for an evidentiary hearing on the merits.

On January 12, 2023, I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. Mr. Drummond represented himself. John Hart, Assistant Attorney General, Department, represented the Fund.

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 December 8, 2022, the OAH provided a Notice of Hearing (Notice) to the Respondent by United States mail to the Respondent's address on record with the OAH. COMAR 28.02.01.05C(1). The Notice stated that a hearing was scheduled for January 12, 2023, at 9:30 a.m., at the OAH in Hunt Valley, Maryland. COMAR

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

09.08.03.03A(2). The Notice further advised the Respondent that failure to attend the hearing might result in "a decision against you."

The United States Postal Service did not return the Notice to the OAH. 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 above-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; 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:

Clmt. Ex. 1 - HIC Complaint Form, April 6, 2021

Clmt. Ex. 2 - Proposal from the Respondent, September 17, 2020

Clmt. Ex. 3 - Checks, September 25, 2020, December 23, 2020, January 23, 2021

Clmt. Ex. 4 - Photographs, undated

Clmt. Ex. 5 - Text messages, September 18, 2020 to March 16, 2021

Clmt. Ex. 6 - Emails between the Claimant and the Respondent, various dates

Clmt. Ex. 7 - Proposal from D.T.S. Home Services, Inc., March 16, 2021

Clmt. Ex. 8 - Invoices, various dates

Clmt. Ex. 9 - Invoices, various dates

The Respondent did not appear and did not offer any exhibits for admission into evidence.

I admitted the following exhibits offered by the Fund:

GF Ex. 1 - Notice of Hearing, December 8, 2022

GF Ex. 2 - Hearing Order, September 29, 2021

GF Ex. 3 - Letter from the MHIC to the Respondent, June 15, 2021; Home Improvement Claim Form, June 7, 2021

GF Ex. 4 - Licensing information, printed January 11, 2023

GF Ex. 5 - Real Property Data Search, undated

GF Ex. 6 - Remand Order, September 16, 2022

GF Ex. 7 - Letters from MHIC To Whom It May Concern, January 20, 2022

Testimony

The Claimant testified in his own behalf.

The Respondent did not appear and therefore did not present any testimony.

The Fund did not present 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.

2. The Claimant owns a single-family home in Randallstown, Maryland (the Property).

3. On September 25, 2020, the Claimant and the Respondent entered into a contract for the Respondent to construct a custom 485-square-foot deck on the back of the Claimant's

Property (Contract). The Contract included demolishing an existing deck, building a new deck which included stairs, Trex material, lighting, and a curved perimeter of the deck. The Contract included all labor and materials.

4. The original agreed-upon Contract price was $32,000.00.

5. The parties agreed the Contract would be paid in three installments – one third as an initial deposit, one third mid-way through construction, and one third upon completion of the job.

6. The Respondent told the Claimant the Contract would be completed in three to four weeks.

7. On September 25, 2020, the Claimant paid the Respondent an initial deposit of $10,666.66.

8. The parties agreed the Respondent would begin construction the week of November 23, 2020. The Respondent began construction on December 8, 2020.

9. When the Respondent demolished the existing deck on the Property, he damaged siding on the house. He acknowledged this error and agreed to fix it.

10. On December 23, 2020, the Claimant paid the Respondent the second draw in the amount of $10,666.66.

11. On January 23, 2021, the Respondent informed the Claimant they had worked as far as they could but had to stop while they awaited the curved aluminum railing and curved deckboard, which were special order pieces. The Respondent asked the Claimant for a $4,000.00 payment from the final balance due.

12. On January 23, 2021, the Claimant paid the Respondent $4,000.00.

13. On January 23, 2021, the Respondent worked on the Property for the last time.

14. On January 29, 2021, the Respondent informed the Claimant via text that the special order would arrive in four to five weeks.

15. On February 10, 2021, the Respondent informed the Claimant that the special order would arrive in three weeks.

16. From February 10, 2021 through February 22, 2021, the Respondent did not respond to fourteen attempts at communication from the Claimant by telephone call, email, and text. The Claimant was trying to determine where the Respondent had placed the special order because he had done substantial research into the curved boards and railing.

17. On February 23, 2021, the Respondent informed the Claimant he would re-start work in two weeks.

18. On March 8, 2021, the Claimant attempted to reach the Respondent five times by call, text, and email inquiring when he would be returning to work. The Respondent finally replied that the company where he had placed the special order had snapped the railing while attempting to bend it and that he had ordered more railing from a different company.

19. The Claimant responded that he had done quite a bit of research into the curved boards and that the Respondent should have ordered directly from the Trex manufacturer instead of a local supplier, based on Trex's recommendation. The Respondent insisted that he had already reordered the curved railings and wanted to have it done his way.

20. On March 11, 2021, the Claimant sent the Respondent an email expressing his concerns with the Respondent ignoring his attempts at communication and taking it upon himself to deviate from the original plans, which included ordering the curved railings directly from the manufacturer. The Claimant said that if he did not hear back from the Respondent he would assume he had abandoned the job.

21. The Respondent replied by saying he would call the Claimant that day but the Respondent never called or otherwise replied to the Claimant.

22. On March 16, 2021, the Claimant signed a contract with D.T.S. Home Services, Inc. (D.T.S.) for $8,200.00 to complete the labor from the original Contract and to repair the damaged siding on the Property.

23. D.T.S. included a license number on its contract, but that license number was not valid. D.T.S. is not a licensed home improvement contractor in Maryland.

24. The Claimant paid D.T.S. $8,200.00.

25. The Appellant spent $6,730.00 to purchase materials for D.T.S. to complete the Contract. The Respondent was responsible for purchasing these materials under the Contract.

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 a licensed home improvement contractor at the time the Respondent entered into the Contract with the Claimant. 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. *Id.* § 8-405(f)(2) (Supp. 2022). There is no evidence that the parties entered 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). Moreover, the Claimant did not unreasonably reject good faith efforts by the Respondent to resolve the claim. *Id.* § 8-405(d) (Supp. 2022).

The Respondent performed an incomplete home improvement as the evidence established that he abandoned the job. The Respondent last worked on the Contract at the Property on January 21, 2021. That day, the Respondent explained that the project was at a standstill awaiting the special order for the curved boards and railings. Also that same day, the Respondent requested $4,000.00 that was not yet due. The Claimant testified that there was one young man who had been working on the Contract for the Respondent. He had done a substantial amount of the work on his own. The Claimant wanted to make sure this young man was paid, so he agreed to the early $4,000.00 payment.

The Claimant attempted to speak to the Respondent many times in the following weeks, specifically because the Claimant was concerned about where the Respondent had ordered the curved boards from. The Claimant wanted them ordered directly from the manufacturer and the Respondent had ordered them from a local company. Ultimately, the Respondent informed the

Claimant the local company had broken the boards while bending them and that he had to re-order. The Claimant reiterated that he wanted them ordered from the manufacturer. After several more weeks, when the re-ordered product failed to materialize, the Claimant again attempted to contact the Respondent. After repeated unreturned calls, texts and emails, on March 11, 2021, the Claimant informed the Respondent that if he did not hear back from him he would assume he had abandoned the job. The Respondent replied that he would call the Claimant, but never did so. The Claimant was reasonable in assuming the Respondent had abandoned the job on March 11, 2021, after weeks of no contact and an unfinished project that had begun on December 8, 2020 and was supposed to take three to four weeks to complete. Thus, I 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 Claimant argued that he is entitled to $10,730.00, which represents the $4,000.00 advance he made on January 23, 2021 as well as $6,730.00 he paid for materials that should have been paid for by the Respondent under the Contract and the $500.00 he paid to repair the siding that was damaged by the Respondent. The Claimant argued that he recognizes that he would have been required to pay around $6,000.00 more to the Respondent for the Respondent to complete the job. Therefore, the Claimant did not take the $8,200.00 that he paid to D.T.S. into account when calculating damages.

While I appreciate that the Claimant put a lot of thought into calculating what he believes he is owed, 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). Therefore, the Claimant's claim for compensation for the siding damaged by the Respondent is not compensable. Moreover, the 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 some of the work under the Contract and the Claimant used other contractors to complete the job. The Fund argued, and I agree, that 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 Fund further argued that in utilizing this formula, it would be inappropriate to include funds paid to D.T.S., an unlicensed contractor. Legislative policy is designed to encourage contractors to be licensed and to discourage homeowners from using unlicensed contractors. The legislative policy is reflected in a number of ways: A homeowner may recover compensation from the Fund only for an actual loss resulting from an act or omission by a *licensed* contractor. Bus. Reg. §§ 8-401, 8-405(a). If the Respondent had not been licensed by the MHIC, the Claimant would have been barred from asserting its claim against the Fund. Moreover, if the Respondent had been unlicensed when he performed the work, he would have committed a misdemeanor crime and been subject to a fine of $1,000.00 or imprisonment not exceeding six months, or both, for a first offense. *Id.* § 8-601. Additionally, Maryland appellate decisions offer some guidance on the treatment of unlicensed home improvement contractors. Because the Maryland home improvement law was enacted for the protection of the public and mandates a licensing system to encourage contractors to be licensed and to discourage home owners from using unlicensed home improvement contractors, the courts, as a matter of public

policy, will not enforce contracts made by or with unlicensed contractors. Long ago, in *Goldsmith v. Mfrs.' Liability Ins. Co. of N.J.*, 132 Md. 283 (1918), the Supreme Court of Maryland held:

> [A] contract entered into by an unlicensed person, engaged in a trade, business, or profession required to be licensed, and made in the course of such trade, business, or profession, cannot be enforced by such person, if it appears that the license required by the statute is, in whole or in part, for the protection of the public, and to prevent improper persons from engaging in such trade, business, or profession.

Id. at 286; *see also Balt. St. Builders v. Stewart*, 186 Md. App. 684, 706 (2009) (unlicensed contractor cannot enforce a home improvement contract with a homeowner); *Fosler v. Panoramic Design, Ltd.*, 376 Md. 118, 134 (2003) (homeowner can repudiate a contract made with a consultant if the consultant is performing a home improvement without a license). The purpose of the Fund is to compensate a homeowner for an actual loss resulting from an act or omission of a licensed home improvement contractor. Bus. Reg. § 8-405(a); COMAR 09.08.03.03B(2). The licensing of a contractor is an essential element, since as a matter of public policy, home improvement contracts executed by unlicensed individuals or entities are considered unlawful. MHIC dismisses claims filed against the Fund regarding acts or omissions of unlicensed contractors as legally insufficient.

When an award is granted, the Fund is entitled to reimbursement from the original contractor in the amount paid to a claimant, plus interest. Bus. Reg. § 8-410(a)(1)(iii). MHIC is also permitted to suspend a contractor's license until the Fund is reimbursed. *Id.* § 8-411(a). If the Fund were to grant reimbursement for the work performed by unlicensed contractors, it would be rewarding a claimant who was a party to an illegal contract with an unlicensed contractor at the expense of a licensed contractor who, although deficient, observed the licensing requirements of the State. It would be improper for the Fund to act against public policy and

condone a contract undertaken by a claimant with a party that the Fund considers in violation of the law.

The Claimant argued that the Fund is funded by taxpayers and should be available to compensate him for his loss. However, the Fund is not funded by taxpayers, it is funded by licensed contractors. Md. Code Ann., Bus. Reg. § 8-404. I am also sympathetic to the Claimant, who testified he assumed that D.T.S. was licensed as there was a license number on its contract. However, a call to the MHIC would have revealed to the Claimant that D.T.S. was in fact unlicensed. Therefore, for all of these reasons, I will not include the amounts paid to D.T.S. in the calculation of an award.

The Claimant paid the Respondent a total of $25,333.32. I must add to that $6,730.00, the amount the Claimant paid for materials to have the work completed, which then equals $32,063.32. After subtracting the original contract amount of $32,000.00, there remains $63.32.

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] 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 $63.32.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of $63.32 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015

[3] 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").

& Supp. 2022); COMAR 09.08.03.03B(3)(c). I further conclude that the Claimant is entitled to recover that amount from the Fund. Bus. Reg. § 8-405(e)(1), (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 $63.32; 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.

Deborah S. Richardson

April 7, 2023
Date Decision Issued

Deborah S. Richardson
Administrative Law Judge

DSR/ja
#204058

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

PROPOSED ORDER

WHEREFORE, this 24th day of May, 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.

Joseph Tunney

Joseph Tunney
Chairman
Panel B
MARYLAND HOME IMPROVEMENT COMMISSION