IN THE MATTER OF THE CLAIM	*	**BEFORE EDWARD J. KELLEY,**
OF CHARLES COVINGTON,	*	**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 WILLIAM E.	*	
CONNOLLY,	*	
T/A WILLIAM CONNOLLY & SON,	*	**OAH No.: LABOR-HIC-02-22-24812**
RESPONDENT	*	**MHIC No.: 22 (75) 249**

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PROPOSED DECISION

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STATEMENT OF THE CASE

On November 6, 2021, Charles Covington (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 $5,068.82 for actual losses allegedly suffered because of a home improvement contract with William Connolly, trading as William Connolly & Son (Respondent). Md. Code Ann., Bus. Reg.

§§ 8-401 to -411 (2015 & Supp. 2022).[1] On September 16, 2022, the MHIC issued a Hearing Order on the Claim. On September 23, 2022, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On January 18, 2023, 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 was present and self-represented. The Respondent did not appear.

After waiting over 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 October 28, 2022, the OAH provided a Notice of Hearing (Notice) to the Respondent by United States mail and certified mail to the Respondent's address on record with the OAH and the MHIC. COMAR 28.02.01.05C(1). The Notice stated that a hearing was scheduled for January 18, 2023, at 9:30 a.m., at the OAH in Hunt Valley, Maryland. COMAR 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 notice sent first-class mail was returned by the United States Postal Service with the notation "Return to Sender, Attempted – Not Known, Unable to Forward." The Notice sent certified mail was returned to the OAH with the notation "Return to Sender, Refused, Unable to Forward." The Respondent did not notify the OAH or the MHIC of any change of mailing address. *See* 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.

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

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: Claimant's narrative, undated

Clmt. Ex. 2: Contract between the Claimant and the Respondent, March 22, 2021

Clmt. Ex. 3: Check from the Claimant to the Respondent, March 22, 2021

Clmt. Ex. 4: Check from the Claimant to the Respondent, May 14, 2021

Clmt. Ex. 5: Scope of Unfinished Painting Project, undated

Clmt. Ex. 6: Contract between the Claimant and W. McKenzie Painting Services (McKenzie), September 29, 2021

Clmt. Ex. 7: Check from the Claimant to McKenzie, October 5, 2021

Clmt. Ex. 8: Check from the Claimant to McKenzie, October 14, 2021

Clmt. Ex. 9: Check from the Claimant to McKenzie, October 22, 2021

Clmt. Ex. 10: Contract between the Claimant and McKenzie, September 29, 2021

Clmt. Ex. 11: Check from the Claimant to McKenzie, October 18, 2021

Clmt. Ex. 12: Check from the Claimant to McKenzie, October 22, 2021

Clmt. Ex. 13: Pictures of project, undated

Clmt. Ex. 14: Letter from the Claimant to the Respondent, November 22, 2021

I admitted the following exhibits offered by the Fund:

Fund Ex. 1: Notice of Hearing, October 28, 2022

Fund Ex. 2: Hearing Order, September 16, 2022

Fund Ex. 3: MHIC Claim Form and Letter from Joseph Tunney, Chairman, MHIC, November 23, 2021

Fund Ex. 4: The Respondent's licensing history, January 11, 2023

The Respondent did not attend the hearing or present exhibits for admission into evidence.

Testimony

The Claimant testified and did not present other witnesses.

The Respondent did not appear at the hearing or present any 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 license number 01-4082.

2. On March 22, 2022, the Claimant and the Respondent entered a contract to paint the exterior of the Claimant's residence (Contract). The project included glazing and painting several twelve-pane window frames.

3. The original agreed-upon Contract price was $6,000.00.

4. The Claimant and the Respondent agreed that the work would begin in May 2021 and would be completed in two weeks.

5. The Contract stated that $2,000.00 was due at signing and $4,000.00 was due upon completion of the project.

6. On March 22, 2022, the Claimant paid the Respondent $2,000.00.

7. The Respondent began work on May 4, 2021, with the Respondent's son as the only painter assigned to the project.

8. The Respondent's son worked diligently on the project for approximately two weeks but completed only one-third of the project.

9. On May 14, 2021, the Respondent requested that the Claimant pay $2,000.00, and the Claimant did so.

10. On May 18, 2021, the Respondent's son died in a car accident.

11. Following the death of his son, the Respondent came to the residence with Michael Grimm (Grimm), an unlicensed contractor, to inspect the project.

12. The Respondent refused to the complete the project unless the Claimant paid Grimm $2,000.00. The Claimant rejected this demand, and the Respondent did no further work on the project.

13. In September 2021, the Claimant contracted with McKenzie, a licensed contractor, to complete the project to the Contract's specifications.

14. McKenzie had to redo some of the painting because it was chipping, and it also had to repair windows the Respondent had broken.

15. McKenzie completed the project in October 2021, and the Claimant paid McKenzie $7,023.82.

LEGAL FRAMEWORK

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).

Certain claimants are excluded from recovering from the Fund altogether. Specifically, a claimant may not recover an award from the Fund unless the evidence shows that: (a) the claimant resides in the home as to which the claim is made, or owns no more than three dwelling places; (b) the claimant is not an employee, officer, or partner of the contractor; or the spouse or other immediate relative of the contractor or the contractor's employees, officers or partners; (c) the work at issue did not involve new home construction; (d) the claimant did not unreasonably reject the contractor's good faith effort to resolve the claim; (e) the claimant complied with any contractual arbitration clause before seeking compensation from the Fund; (f) there is no pending claim for the same loss in any court of competent jurisdiction and the claimant did not recover for the actual loss from any source; and (g) the claimant filed the claim with the MHIC within three years of the date the claimant knew, or with reasonable diligence should have known, of the loss or damage. Bus. Reg. §§ 8-405(c), (d), (f), and (g), 8-408(b)(1); Bus. Reg. § 8-101(g)(3)(i) (Supp. 2022).

If not excluded on these grounds, a claimant 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.

ANALYSIS

Based on the evidence presented at the hearing, I find that the Claimant was not subject to any of the statutory exclusions for recovery from the Fund. Additionally, the undisputed evidence demonstrated that the Respondent performed an incomplete and unworkmanlike home improvement by failing to timely and competently complete the project as required by the Contract. The Claimant testified thoroughly and credibly about all facets of the project, and his unrefuted testimony was corroborated by exhibits, which included pictures demonstrating the status of the Respondent's incomplete and deficient work. The Respondent was hired to paint the exterior of the Claimant's home for $6,000.00. The project was supposed to be completed within two weeks; however, after two weeks only one-third of the project was completed. The substantial delay occurred because the Respondent's son was the only person working on the project and he could not complete the project by himself in the timeframe allotted. On May 14, 2021, although not required to do so under the Contract, the Claimant paid the Respondent an additional $2,000.00 upon request because at that time, it appeared that the project was progressing toward completion even though it was substantially delayed.

Tragically, the Respondent's son was killed in a car accident on May 18, 2021, and work on the project halted as a result. The Respondent then refused to complete the project unless the Claimant paid Grimm, an unlicensed contractor, $2,000.00. The Claimant rejected this unreasonable demand given that he already advanced the Respondent $2,000.00 before it was due under the Contract. After the Respondent refused to honor the Contract terms, the Claimant

was hired McKenzie to complete the project to the Contract's specifications for $7,023.82. McKenzie had to redo some of the painting because it was chipping, and it also had to repair windows the Respondent had broken.

Both the Claimant and the Fund argued that the evidence demonstrated the Respondent performed an incomplete home improvement, and I find these arguments persuasive. The Respondent's son's death, while tragic, did not relieve the Respondent of fulfilling the terms of the Contract. At the time of the Respondent's son's death, only one-third of the project was completed, and the Claimant owed no money to the Respondent until the Respondent fully completed the project. The Respondent refused to fulfill his obligations under the Contract, and he left the project incomplete; additionally, some of the work was deficient and needed to be repaired and redone. 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). 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 retained McKenzie to repair and complete 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).

In this case, the Claimant paid the Respondent $4,000.00 under the Contract and then paid McKenzie $7,023.82 to repair poor work and complete the project, which totals $11,023.82. When the $6,000.00 Contract price is subtracted from this figure, the resulting actual loss is $5,023.82.

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.[2] Bus. Reg. § 8-405(e)(1), (5) (Supp. 2022); COMAR 09.08.03.03B(4). In this case, the Claimant's actual loss of $5,023.82 exceeds the amount paid to the Respondent. Therefore, the Claimant's recovery is limited to $4,000.00, the amount paid to the Respondent.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual loss of $5,023.82 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 $4,000.00 from the Fund. Md. Code Ann., Bus. Reg. § 8-405(e)(1), (5) (2015 & Supp. 2022); COMAR 09.08.03.03B(4).

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[2] 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").

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant $4,000.00; 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;[3] and

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

February 24, 2023
Date Decision Issued

Edward J. Kelley
Administrative Law Judge

EJK/ds
#202983

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

PROPOSED ORDER

WHEREFORE, this 24th day of April, 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.

Robert Altieri

Robert Altieri
Panel B
MARYLAND HOME IMPROVEMENT COMMISSION