IN THE MATTER OF THE CLAIM	*	BEFORE LEIGH WALDER,
OF BLONDELL TAYLOR,	*	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 WAGNER REYNOSO	*	
PEREZ,	*	
T/A AGUILAR REMODELING, LLC,	*	OAH No.: LABOR-HIC-02-22-24807
RESPONDENT	*	MHIC No.: 22 (75) 59

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

PROPOSED DECISION

STATEMENT OF THE CASE

On May 23, 2022, Blondell Taylor (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)[1] Guaranty Fund (Fund) for reimbursement of $2,842.31 for actual losses allegedly suffered as a result of a home improvement contract with Wagner Reynoso Perez, trading as Aguilar Remodeling, LLC (Respondent). Md. Code Ann.,

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

Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2022).[2] 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 30, 2023, I held a hearing on the Webex videoconferencing platform. Bus. Reg. §§ 8-407(a), 8-312; Code of Maryland Regulations (COMAR) 28.02.01.20B(1)(a). Andrew Brouwer, Assistant Attorney General, Department, represented the Fund. The Claimant represented herself. Jude Wikramanyake, Esquire, represented the Respondent.

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 – Photograph, undated

Clmt. Ex. 2 – Photographs, undated

Clmt. Ex. 3 – Text messages between the Claimant and the Respondent's worker, various dates

Clmt. Ex. 4 – Letter from Friedman, Framme & Thrush, P.A. to the Respondent, dated January 27, 2021

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

Clmt. Ex. 5 – Letter from the Respondent to the Claimant, dated February 4, 2021; Letter from the Claimant to the Respondent, dated February 15, 2021

Clmt. Ex. 6 – Invoice, dated October 19, 2020

Clmt. Ex. 7 – Beltway Builders, Inc. Estimate, dated June 4, 2021

Clmt. Ex. 8 – Complaint Form, received by the MHIC on July 15, 2021

Clmt. Ex. 9 – Letter from the MHIC to the Respondent, dated July 5, 2022; Proposed Order, dated July 5, 2022; Letter from the MHIC to the Claimant, dated September 1, 2021.

Clmt. Ex. 10 – Photocopy of business cards, undated

I admitted the following exhibit offered by the Respondent:

Resp. Ex. 1 – Bank Statement, spanning October 1 through 31, 2020

I admitted the following exhibits offered by the Fund:

GF Ex. 1 – Notice of Remote Hearing, dated October 25, 2022; Memorandum from the OAH to the Department, dated November 22, 2022, including returned Notice of Remote Hearing

GF Ex. 2 – Transmittal, undated; Hearing Order, dated September 16, 2022

GF Ex. 3 – Licensing History, printed December 21, 2022

GF Ex. 4 – Letter from the MHIC to the Respondent, dated May 23, 2022; Claim, received by the MHIC on May 23, 2022

Testimony

The Claimant testified and presented the testimony of her husband, Shawn Alexis.

The Respondent testified on his own behalf.

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 numbers 01-120413 (individual) and 05-138611 (corporate).

2. Around October 2020, the Claimant and her husband began shopping around to find a contractor willing to install an outdoor patio onto their home.

3. The Claimant met with Eduardo Aguilar Macho who informed the Claimant that he was willing to install the patio. Mr. Aguilar Macho gave the Claimant a business card that contained a company name: "Aguilar Remodeling, LLC"; listed two names: "Wagner & Eduardo"; listed an MHIC licensing number: "LIC # 138611"; and contained both the Respondent's and Mr. Aguilar Macho's cellular telephone numbers. (Clmt. Ex. 10).

4. On a date uncertain, the Respondent gave the Claimant an identical business card.

5. On October 19, 2020, the Claimant and Mr. Aguilar Macho entered into a contract where the Respondent's business agreed to install a 20 x 21 brick patio (including retention wall for sitting and five columns), and the Claimant agreed to pay $11,750.00 to the Respondent's company for the labor and materials.

6. Between October 19 and October 29, 2020, the Claimant used Zelle to wire $7,588.69 to the Respondent. This money was deposited into a checking account designated for the Respondent's business.

7. On a date unknown, the Claimant paid Mr. Aguilar Macho $3,000.00 in cash towards the contract.

8. The Respondent hired a third party to excavate the Claimant's property where the patio would be built. The Respondent was present when the third party performed this work.

9. The Respondent was not pleased with the third party's excavation, so he performed additional excavation work himself.

10. The total cost the Respondent had to expend to excavate the property was $1,400.00.

11. During excavation, the Claimant's lawn was damaged, and the Bobcat® that was used to excavate scratched the Claimant's driveway.

12. After excavating the property, the Respondent placed gravel and sand into the hole where the patio was to be built. The Respondent paid $250.00 for the gravel and $180.00 for the sand.

13. The Respondent left a large amount of building materials on top of the Claimant's driveway; these building materials included $3,721.38 of materials that the Respondent purchased from a garden center and $2,345.62 of materials that the Respondent purchased from Allan Myers.

14. The Respondent rented a U-Haul truck to transport the materials to the Claimant's property. The U-Haul rental cost the Respondent $213.59.

15. Neither the Respondent nor Mr. Aguilar Macho returned to the Claimant's property after October 29, 2020.

16. Throughout November 2020, December 2020, and the beginning of January 2021, the Claimant would text Mr. Aguilar Macho seeking an update about when work would resume. Mr. Aguilar Macho would respond, via text, that he and the Respondent were sick with COVID-19 and could not return.

17. On January 27, 2021, the Claimant's attorney sent a letter to the Respondent seeking a refund of $2,361.62.

18. On February 4, 2021, the Respondent sent a response letter to the Claimant's attorney. The response letter contained a letterhead containing the same logo as seen on the business cards, along with the names "Wagner Reynoso & Eduardo Aguilar," along with both the Respondent's and Mr. Aguilar Macho's cellular telephone numbers.

19. On June 4, 2021, the Claimant received an estimate from Beltway Builders, Inc. (Beltway) to reseal her entire driveway. Beltway quoted the Claimant $1,300.00 if it was paid during the week of June 4, $1,400.00 if it was paid after the week of June 4, and $1,500.00 if it was paid one month after June 4.

20. The Claimant's husband completed constructing the patio by using the materials the Respondent purchased for the project.

21. Mr. Aguilar Macho was either an employee or an authorized representative of the Respondent's company.

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 (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 Cnty. Police Dep't*, 369 Md. 108, 125 n.16 (2002). The Respondent asserted an affirmative defense that the Claimant contracted with Mr. Aguilar Macho, who was neither the Respondent's employee nor the Respondent's authorized representative. Therefore, the Respondent argued that he is improperly named as the Respondent in this matter. The Respondent bears the burden to show

that he is the wrong named respondent in this matter by a preponderance of the evidence. COMAR 28.02.01.21K(1), (2)(b).

Is the Respondent the properly named Respondent in this matter?

The Respondent's affirmative defense is a threshold issue in this matter. Therefore, I will address this defense first. For the reasons that follow, I find that the Respondent failed to meet his burden to demonstrate that he is improperly named as the respondent in this matter.

The Respondent testified that the Claimant contracted with Mr. Aguilar Macho, who was neither the Respondent's employee nor the Respondent's authorized representative. The Respondent claimed that he was a subcontractor hired by Mr. Aguilar Macho to only perform excavation services. The evidence in this record does not support the Respondent's testimony. The Claimant submitted into evidence two identical business cards; one she testified she received from the Respondent and the other she testified that she received from Mr. Aguilar Macho. (*See* Clmt. Ex. 10). These business cards contain a company name: "Aguilar Remodeling, LLC"; list two names: "Wagner & Eduardo"; list an MHIC licensing number: "LIC # 138611"; and contain both the Respondent's and Mr. Aguilar Macho's respective cellular telephone numbers. (*Id.*). Since both the Respondent and Mr. Aguilar Macho gave the Claimant the identical business card, containing both of their contact information, logic reasons that Mr. Aguilar Macho was either the Respondent's employee or the Respondent's authorized representative when the Claimant entered into a contract with the Respondent's company.

Furthermore, the name of the Respondent's company contains a part of Mr. Aguilar Macho's last name. The Claimant's testimony that he decided to use the word "Aguilar" in the company name to pay respect to his father-in-law (whose last name is supposedly Aguilar) was unconvincing. Finally, and perhaps most persuasively, when the Claimant's attorney sent the

Respondent a letter, the Respondent sent a letter in response which contained letterhead with the same logo as seen on the business cards, along with the names "Wagner Reynoso & Eduardo Aguilar," along with both the Respondent's and Mr. Aguilar Macho's cellular telephone numbers. Therefore, I find, by a preponderance of the evidence standard, that Mr. Aguilar Macho was either an employee or an authorized representative of the Respondent's company. For these reasons, I find the Respondent's affirmative defense unpersuasive as the evidence contradicts the Respondent's testimony that the Claimant did not enter into a contract with his company.

Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?

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.

The evidence in this case establishes there are no legal impediments barring the Claimant from filing a claim under sections 8-405 and 8-408 of the Business Occupations Article. The Respondent was a licensed home improvement contractor at the time of the contract. 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 May 23, 2022. Finally, the Claimant has not taken any other legal action to recover monies from the Respondent.

The Claimant took the position that she suffered an actual loss incurred as a result of the Respondent's acts or omissions, entitling her to compensation from the Fund. Specifically, the Claimant argued that the Respondent abandoned the contract after performing excavation work, leaving a hole with gravel and sand where the patio was supposed to be built. The Claimant also seeks recovery for the damage to her driveway caused by the Bobcat® that the Respondent used to excavate the property. The Respondent took the position that the Claimant did not meet her burden to demonstrate that she sustained an actual loss. The Respondent argued that the Claimant did not pay the full amount owed under the contract and, therefore, there is no proof that she did not receive the services and materials that she paid for. The Respondent also argued that the damage to the Claimant's driveway is a consequential damage that is not recoverable from the Fund. The Fund took a noncommittal position, arguing that the damage to the Claimant's driveway might be a consequential damage (but, also, might not be) and if it is determined to be a non-consequential damage then the Claimant might be entitled to recovery of $338.69 as an actual loss.[3]

I find that the Respondent did not fully construct the Claimant's patio, as he was contractually obligated to do. The Respondent does not contest that he stopped working on the Claimant's patio after excavation and the Claimant provided photographs to demonstrate that the Respondent never constructed a patio. (*See* Clmt. Ex. 1). Therefore, the Respondent performed an incomplete home improvement.

[3] The Fund got to this figure by adding the cost to repair the driveway ($1,500.00) to the amount that the Claimant paid the Respondent's company ($10,588.69), and subtracting this total sum ($12,088.69) from the cost of the original contract ($11,750.00).

In a situation where a home improvement contractor performed some work under the contract, and a claimant is not seeking other contractors to complete or remedy that work, the following formula appropriately measures a 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).

In total, the Claimant paid the Respondent's company $10,588.69, which consisted of wire payments of $7,588.69 made through Zelle, and a $3,000.00 cash payment.[4] The Respondent provided a breakdown of the costs of the materials and services that were provided to the Claimant, which consisted of: $3,721.38 of materials purchased from a garden center; $2,345.62 of materials purchased from Allan Myers; $1,400.00 for property excavation; $250.00 for gravel; $180.00 for sand; and $213.59 to rent a U-Haul truck to transport all materials to the Claimant's property. Therefore, the value of materials or services provided by the Respondent was $8,110.59.[5] Using the formula provided in COMAR 09.08.03.03B(3)(b), the Claimant's total loss is calculated by subtracting the value of any materials or services provided by the Respondent ($8,110.59) from the amount paid to the Respondent ($10,588.69). Therefore, the Claimant's actual loss amounts to $2,478.10. Despite the Respondent's argument, I do not find that the Claimant needed to present expert testimony to substantiate her claim. The Respondent does not contest that he failed to fully construct the Claimant's patio and the figures I have used

[4] Although the Respondent testified that he only received $7,588.69 in payments made through Zelle, he did not dispute that the Claimant may have paid Mr. Aguilar Macho a $3,000.00 cash payment.
[5] This amount is almost in line with the sums the Claimant placed on the Claim form, where she estimated that the Respondent provided $7,196.38 in materials and $1,000.00 in labor. (*See* GF Ex 4).

to determine the value of the materials and services that the Respondent provided come directly from the Respondent who was responsible for providing those materials and services.

I agree with the Respondent that the damage caused to the Claimant's driveway is a consequential damage that is not recoverable from the Fund. 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 acknowledged that the Respondent was not obligated to perform any home improvement on her driveway under the contract. While unfortunate, the damage to the Claimant's driveway was a consequence of the Respondent's poor workmanship but is not a damage that includes the cost of restoration, repair, replacement, or completion that arise from the Respondent's work that would be compensable by the Fund.

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.[6] 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 her actual loss of $2,478.10.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of $2,478.10 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405

[6] 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").

(2015 & Supp. 2022); COMAR 09.08.03.03B(3)(b). I further conclude that the Claimant is entitled to recover $2,478.10 from the Fund. Md. Code Ann., Bus. Reg. 8-405(a), (e)(1) (Supp. 2022).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant $2,478.10; 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;[7] and

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

May 1, 2023
Date Decision Issued

Leigh Walder
Leigh Walder
Administrative Law Judge

LW/cj
#204826

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

PROPOSED ORDER

WHEREFORE, this 26th day of June, 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.

Lauren Lake

Lauren Lake
Panel B
MARYLAND HOME IMPROVEMENT COMMISSION