

IN THE MATTER OF THE CLAIM	* BEFORE EDWARD J. KELLEY,
OF ROBERT TOBASH,	* 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 BRIAN FURLETTI,	*
T/A CLASSIC CHIMNEY SWEEP &	* OAH No.: LABOR-HIC-02-23-13845
SERVICE COMPANY,	* MHIC No.: 23 (75) 1003
RESPONDENT	*

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On March 1, 2023, Robert Tobash (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)¹ Guaranty Fund (Fund) for reimbursement of \$1,795.00 for actual losses allegedly suffered as a result of a home improvement contract with Brian Furletti, trading as Classic Chimney Sweep & Service (Respondent). Md. Code Ann., Bus.

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

Reg. §§ 8-401 to -411 (2015 & Supp. 2023).² On May 10, 2023, the MHIC issued a Hearing Order on the Claim. On May 22, 2023, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On August 15, 2023, I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. Hope Sachs, Assistant Attorney General, Department, represented the Fund. The Claimant represented himself. The Respondent represented himself.

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 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: Contract between the Claimant and the Respondent, June 27, 2022
- Clmt. Ex. 2: Photograph, undated
- Clmt. Ex. 3: Proposal, with attached Residential Energy Credits form, undated
- Clmt. Ex. 4: Regency Pro Series Inserts User Guide, undated
- Clmt. Ex. 5: Email from Kenny Borys to the Claimant, February 1, 2023; Inglenook Fireplace & Hearth invoice, January 18, 2023

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

- Clmt. Ex. 6: Photographs, undated
- Clmt. Ex. 7: Not admitted
- Clmt. Ex. 8: Letter from the Department to the Respondent, with attached Proposed Order, April 6, 2023
- Clmt. Ex. 9: Correspondence between the Claimant and his tax preparer; July 9-10, 2023
- Clmt. Ex. 10: Fireplace/burning stove permitting documentation, undated
- Clmt. Ex. 11: MHIC Complaint Form, February 2, 2023
- Clmt. Ex. 12: Cover page of Regency Fireplace Products' Owner's Manual with blank warranty information, June 8, 2021
- Clmt. Ex. 13: Classic Chimney Sweep & Service Company business status report, undated

I admitted the following exhibits offered by the Respondent:

- Resp. Ex. 1: Correspondence from Tony Schumacher, Regency Fireplace Products, February 7, 2022
- Resp. Ex. 2: MHIC Complaint documentation, February 14, 2023

I admitted the following exhibits offered by the Fund:

- GF Ex. 1: Notice of Hearing, June 12, 2023; Hearing Order, May 10, 2023
- GF Ex. 2: Licensing History, July 17, 2023
- GF Ex. 3: Letter from the MHIC to the Respondent, dated March 14, 2023; Home Improvement Claim Form, March 1, 2023; email from Kenny Borys to the Claimant, February 1, 2023; Inglenook Fireplace & Hearth invoice, January 18, 2023 (2 copies)

Testimony

The Claimant testified and did not present other witnesses.

The Respondent testified, and he presented the testimony of Jessica Longley, the Respondent's office manager.

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.
2. On June 27, 2022, the Claimant and the Respondent entered into a contract for the installation of a Regency Ci2700 pro wood burning fireplace insert (Insert) at the Claimant's residence (Contract).
3. The original agreed-upon Contract price was \$5,700.00, which was to be paid in three equal installments.
4. The Claimant paid the Respondent \$1,900.00 on June 27, 2022, when the Contract was executed.
5. On July 1, 2022, the Respondent, accompanied by Ms. Longley and another coworker, Travis, came to the residence and began installation of the Insert.
6. On July 1, 2022, the Claimant paid the Respondent the second \$1,900.00 installment.
7. The Insert is large, and its size presented problems during installation. As a result, the Respondent did not complete installation on July 1, 2022.
8. On July 6, 2022, the Respondent, accompanied by a different coworker, Chris, returned to the residence to complete installation of the Insert.
9. The Respondent deemed installation complete on July 6, 2022, and the Claimant paid the Respondent the final \$1,900.00 installment.
10. Despite making the final payment, the Claimant, who observed the installation, was concerned that the Insert was not installed properly.

11. The Respondent did not ignite the Insert at the time of installation because it was Summer and the weather was warm. The parties agreed that the Respondent would return to the Claimant's residence in November 2022 to confirm the Insert worked properly during colder weather.
12. On November 15, 2022, two of the Respondent's employees returned to the Claimant's residence to make sure the Insert worked properly.
13. If functioning properly, the Insert should ignite and reach temperatures exceeding five hundred degrees within approximately thirty minutes.
14. The Insert is designed to maintain temperatures exceeding five hundred degrees for ten to fourteen hours.
15. The Insert's initial ignition took substantially longer than thirty minutes, but eventually it ignited.
16. In January 2023, the Claimant contacted the Respondent to state that the Insert was not functioning properly.
17. On January 16, 2023, Ms. Longley and a Regency representative went to the Claimant's residence to inspect the Insert.
18. Upon inspection, it was determined that the liner of the Insert was damaged and the Respondent failed to install rubber feet under the blower. The Regency representative stated that these issues needed to be repaired for the Insert to function properly.
19. The liner was damaged when the Respondent installed the Insert.
20. The Respondent offered to make the identified repairs.
21. The Claimant refused to have the Respondent do the repairs based on his belief that the Respondent was not qualified to do the repairs.

22. The Claimant hired Inglenook Fireplace & Hearth (Inglenook), a licensed contractor, who completed the repairs for \$1,795.00.

23. The Insert functions properly following the repairs.

DISCUSSION

LEGAL FRAMEWORK

“The Fund was established to provide an additional remedy for homeowners who suffered actual loss due to unsatisfactory work performed by a home improvement contractor.” *Brzowski v. Maryland Home Imp. Comm’n*, 114 Md. App. 615, 628 (1997); Bus. Reg. § 8-405(a) (Supp. 2023); *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.”). Certain claimants are excluded from recovering from the Fund altogether. Specifically, an award from the Fund may occur only if the evidence shows: (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) (Supp. 2023); Bus. Reg. § 8-101(g)(3)(i) (Supp. 2023).

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) (Supp. 2023); *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, and as discussed further below, I find that the Claimant was not subject to any of the statutory exclusions for recovery from the Fund. Additionally, the evidence demonstrates that the Respondent performed an inadequate, unworkmanlike, and incomplete home improvement by failing to properly install the Insert. The Claimant testified credibly about all facets of the project, and his testimony was corroborated by exhibits, which included pictures demonstrating the status of the Respondent’s incomplete and deficient work.

The Claimant fulfilled his contractual obligation by paying the Respondent \$5,700.00. The Respondent, however, did not fulfill his obligation to perform an adequate, workmanlike, and complete home improvement. The evidence demonstrates that during installation of the Insert, the Respondent forced the Insert into the Claimant’s fireplace box, which damaged the liner. The Respondent also failed to install the Insert’s rubber feet under the blower. Both of these deficiencies were observed in January 2023 by the Regency representative who stated the Insert needed to be repaired so that it would function to manufacturer specifications. This evidence is consistent with the Claimant’s testimony that the Insert was not functioning properly

and confirms that the Respondent performed an inadequate, unworkmanlike, and incomplete home improvement.

It is undisputed that the Respondent offered to make the repairs identified by the Regency representative and that the Claimant rejected this offer. Under the circumstances of this case, the Claimant's rejection of the Respondent's offer to repair the Insert does not bar recovery from the Fund because the Claimant's action was reasonable. The Insert is intended to burn at extremely high temperatures for an extended period of time. Accordingly, an incorrectly installed Insert presents a serious safety hazard to the residence and the occupants of the residence. In this case, the Claimant rightfully lacked confidence in the Respondent's workmanship, and it was reasonable for the Claimant to employ a different licensed contractor to repair the Insert in order to insure it operated safely. Because the Claimant did not *unreasonably* reject a good faith offer by the Respondent to repair the Insert, I find that the Claimant is eligible for compensation from the Fund. Bus. Reg. §§ 8-405(d) (Supp. 2023).

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. 2023); COMAR 09.08.03.03B(1). 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 work under the Contract, and the Claimant retained a different licensed contractor to remedy 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).

The Claimant paid the Respondent \$5,700.00 under the Contract and then paid Inglenook \$1,795.00 to repair and complete the project to the Contract's specifications. These figures added together total \$7,495.00. When the \$5,700.00 Contract price is subtracted from \$7,495.00, the actual loss calculation is \$1,795.00.

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. 2023); COMAR 09.08.03.03B(4). In this case, the Claimant's actual loss of \$1,795.00 is less than the amount paid to the Respondent and less than \$30,000.00. Therefore, the Claimant is entitled to recover \$1,795.00 from the Fund.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2023).

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").

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$1,795.00; 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;⁴ and

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

October 12, 2023
Date Decision Issued

Edward J. Kelley

Edward J. Kelley
Administrative Law Judge

EJK/ja
#207378

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

PROPOSED ORDER

WHEREFORE, this 9th day of November, 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***