

<p>IN THE MATTER OF THE CLAIM</p> <p>OF MICHAEL BREACH,</p> <p>CLAIMANT</p> <p>AGAINST THE MARYLAND HOME</p> <p>IMPROVEMENT GUARANTY FUND</p> <p>FOR THE ALLEGED ACTS OR</p> <p>OMISSIONS OF FRANCISCO JAVIER</p> <p>RAMIREZ FLORES AND FRANKS</p> <p>DRYWALL AND PAINTING, LLC,</p> <p>RESPONDENT</p>	<p>* BEFORE MICHELLE W. COLE,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>*</p> <p>*</p> <p>*</p> <p>* OAH No.: LABOR-HIC-02-23-11588</p> <p>* MHIC No.: 23 (75) 150</p> <p>*</p>
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PROPOSED DECISION

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STATEMENT OF THE CASE

On October 31, 2022, Michael Breach (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)¹ Guaranty Fund (Fund) for reimbursement of \$20,855.93 for actual losses allegedly suffered as a result of a home improvement contract with Francisco Javier Ramirez Flores and Franks Drywall and Painting, LLC (Respondents). Md. Code Ann., Bus. Reg. §§ 8-401 to 411 (2015 & Supp. 2023).² On April 10, 2023, the MHIC

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

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

issued a Hearing Order on the Claim. On April 20, 2023, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On July 17, 2023, I held a remote hearing by video. Md. Code Ann., Bus. Reg. §§ 8-407(a), 8-312; Code of Maryland Regulations (COMAR) 28.02.01.20B(1)(b). Jonathan P. Phillips, Assistant Attorney General, Department, represented the Fund. The Claimant represented himself. Matthew Dyer, Esquire, represented the Respondent, who was present.

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 as the result of an inadequate, unworkmanlike, or incomplete home improvement by the Respondent?
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:

- Cl. Ex. 1 Home Improvement Claim Form, October 26, 2023
- Cl. Ex. 2 Contract, November 29, 2021
- Cl. Ex. 3 Nationwide Insurance Check, November 19, 2021
- Cl. Ex. 4 Nationwide General Insurance Company Estimate and Summary, November 19, 2021

I admitted the following exhibits offered by the Respondent:

- Resp. Ex. 1 Text messages, December 25, 2019
- Resp. Ex. 2 Letter to "To Whom It May Concern" from Steve Fraatz, Senior Relationship Banker, Truist, April 4, 2022

Resp. Ex. 3 Trade Name Application, January 8, 2019; Trade Name Cancellation Application, November 17, 2021; Trade Name Approval Sheet, February 16, 2022; Email from the Respondent to K. Rosenthal, Department, March 16, 2022

I admitted the following exhibits offered by the Fund:

- Fund Ex. 1 Notice of Remote Hearing, May 19, 2023
- Fund Ex. 2 Hearing Order, April 10, 2023
- Fund Ex. 3 Home Improvement Claim Form, October 31, 2023
- Fund Ex. 4 HIC Licensing Inquiry, June 26, 2023

Testimony

The Claimant testified on his own behalf.

The Respondent testified on his own behalf.

The Fund did not present 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 the MHIC.
2. The Respondent entered into an agreement with Manny Gomez Garcia and Martin Blake whereby Mr. Garcia and Mr. Blake would solicit and perform home improvement work under the Respondent's license and share payment with him.
3. On January 8, 2019, the Respondent filed a Trade Name Application for AllState Exteriors.³ He permitted Mr. Garcia and Mr. Blake to solicit and perform home improvement work using his MHIC license under this trade name.

³ The spelling of the trade name is inconsistent throughout the case documents, and is referred to as AllState Exteriors and All State Exteriors.

4. On December 25, 2019, the Respondent sent a text message to Mr. Garcia as follows:

Hey many I am getting complaints on my MHIC of people I don't know whats going on? We spoke last time and I clearly told you that you can't use my license why you keep using my license without my permission I think you gone too far and you need to respond to all this customers.

(Resp. Ex. 1). Mr. Garcia responded and agreed to "take care of everything." (*Id.*).

5. On January 19, 2021, the Respondent opened a business banking account for Franks Drywall & Painting d/b/a All State Exteriors, naming Manuel Gomez Garcia as an owner of the account. A debit card was issued to Mr. Garcia for this account.

6. On March 4, 2021, the Respondent closed the business banking account that listed Mr. Garcia as an owner. He informed the bank that Mr. Garcia should have been designated only as a signatory on the account, was not an owner, and was using business funds for his own personal gain.

7. On an unknown date in November 2021, Mr. Garcia solicited the Claimant and encouraged him to submit an insurance claim for roof repairs, which Mr. Garcia reported were necessary and could be completed by his company. He further instructed the Claimant on how to submit the claim and assisted the Claimant with filing the claim with his insurer, Nationwide General Insurance Company (Nationwide).

8. On November 17, 2021, the Respondent submitted a Trade Name Cancellation Application for AllState Exteriors to the Maryland Department of Assessments and Taxation. He did not pay for expedited service of the cancellation.

9. On November 19, 2021, Nationwide issued a check to the Claimant in the amount of \$20,855.93, with a summary of the repairs under the claim and a breakdown of costs.

10. On November 29, 2021, the Claimant entered into a contract (Contract) to replace the roof on the Claimant's property with Frank's Drywall & Painting, LLC d/b/a AllState

Exteriors, under the Respondent's MHIC license number. Mr. Garcia signed the Contract on behalf of the Respondent.

11. Under the Contract, the Respondent agreed to perform roof repairs as set forth in the insurance claim summary provided by Nationwide.

12. On December 14, 2021, based on Mr. Garcia's instruction, the Claimant endorsed the Nationwide check to Build Pro Exteriors.

13. No work was ever performed under the Contract.

14. On February 16, 2022, the Respondent's Trade Name Cancellation Application was approved.

15. On March 16, 2022, in response to a MHIC complaint, the Respondent informed the MHIC that he had "open[ed] a case with the police because Manual Gomez (Manny) and Blake Martin are not allow[ed] to use my license." (Resp. Ex. 3).

DISCUSSION

The Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Md. Code Ann., Bus. Reg. § 8-407(e)(1); Md. Code Ann., 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." Md. Code Ann., 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.” Md. Code Ann., Bus. Reg. § 8-401. For the following reasons, I find that the Claimant has proven eligibility for compensation.

Actual Loss – Prima Facie Impediments

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. Md. Code Ann., Bus. Reg §§ 8-405(g), 8-408(b)(1) (2015 & Supp. 2023). The Claimant resides in the home that is the subject of the claim and does not own more than three dwellings. *Id.* § 8-405(f)(2) (Supp. 2023). The parties did not enter into a valid agreement to submit their disputes to arbitration. *Id.* §§ 8-405(c), 8-408(b)(3) (2015 & Supp. 2023). 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. 2023). Finally, the Claimant did not unreasonably reject good faith efforts by the Respondent to resolve the claim. *Id.* § 8-405(d) (Supp. 2023).

Actual Loss - Unworkmanlike, Inadequate, or Incomplete Home Improvement by the Respondent

There is no dispute that the Claimant entered into a Contract to perform work at the Claimant’s home with Frank’s Drywall & Painting, LLC d/b/a AllState Exteriors under the Respondent’s MHIC license, or that after the Claimant paid the entire amount of the Contract price, no work was performed under the Contract. The issue before me is whether the Claimant has established an actual loss based on the Respondent’s acts or omissions, which allows the Claimant to recover an award from the Fund. Based on the evidence, I am persuaded that the Claimant sustained an actual loss as the result of the Respondent’s acts and omissions.

Parties' Arguments

The Claimant argued that at all times, he believed the Respondent was responsible for completing home improvement work under the Contract, which was never performed. He agreed that he never met with the Respondent and that all interactions were with Mr. Garcia, who he believed was the Respondent's employee. He stated that he relied on Mr. Garcia's representations that the Respondent would replace his roof for the amount paid by Nationwide under his insurance claim when he signed the Contract and endorsed the Nationwide check.

The Respondent claimed that he bears no responsibility for Mr. Garcia's actions, which were executed without his knowledge or permission. He presented evidence showing that he asked Mr. Garcia to stop using his MHIC license, closed the bank account which the Respondent shared with Mr. Garcia, cancelled the trade name AllState Exteriors, and filed a police report.

The Fund recommended that the Claimant receive an award in the amount of the Contract price. It argued that the Respondent is the contractor whose name and MHIC license number were used to solicit home improvement work based on an agreement between the Respondent and Mr. Garcia by which the Respondent would receive a financial benefit for any work performed by Mr. Garcia using the Respondent's MHIC license. The Fund noted that the Respondent was aware that Mr. Garcia was contracting with homeowners and performing work under their agreement.

Analysis

I am persuaded that the Claimant sustained an actual loss based on the Respondent's acts and omissions in this case. The evidence shows that the Respondent entered into an agreement with Mr. Garcia by which Mr. Garcia would solicit and perform home improvement work under the Respondent's MHIC license and the Respondent would receive a portion of the payments under these contracts. While it appears that the Respondent, on December 25, 2019, sent a text

message to Mr. Garcia requesting that he not use his MHIC license, the record suggests that the business arrangement between the Respondent and Mr. Garcia continued. On January 19, 2021, the Respondent opened a business account for Franks Drywall & Painting d/b/a AllState Exteriors and gave Mr. Garcia access to this account.⁴ This account was not closed until March 4, 2021. Further, the Respondent did not take any action to cancel the trade name associated with his agreement with Mr. Garcia until November 17, 2021, and did not contact the MHIC to inform it that the Respondent's license was being used to defraud homeowners until March 16, 2022, in response to a MHIC claim.

Based on this evidence, I find it more likely than not that, at the time the Claimant entered into the Contract, made payment, and received no benefit, the Respondent had an agreement with Mr. Garcia which permitted Mr. Garcia to use the Respondent's MHIC license to solicit and perform home improvement work. It is clear that the Respondent was aware that Mr. Garcia was using his MHIC license to solicit additional home improvement work and failed to monitor this activity. Moreover, when he became aware that Mr. Garcia was defrauding clients while using his MHIC license with his permission, he did not contact the MHIC or take any affirmative action to prevent the Claimant's loss. Accordingly, I find that the Claimant is eligible for an award from the Fund as a result of the Respondent's acts or omissions.

Compensation

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. Md. Code Ann., Bus. Reg. § 8-405(e)(3) (Supp. 2023); COMAR

⁴ In March 2021, the Respondent reported to the bank that Mr. Garcia should only have been designated as a signatory on the account, instead of an owner. When the Respondent became aware that Mr. Garcia was using the funds in this account for personal gain, the Respondent reported the misuse and closed the account.

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 abandoned the Contract without doing any work. Accordingly, the following formula appropriately measures the Claimant's actual loss: "If the contractor abandoned the contract without doing any work, the claimant's actual loss shall be the amount which the claimant paid to the contractor under the contract." COMAR 09.08.03.03B(3)(a). Under the Contract, the Claimant paid \$20,855.93, and he is entitled to an award from the Fund in that amount.

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.⁵ Md. Code Ann., Bus. Reg. § 8-405(e)(1), (5) (Supp. 2023); COMAR 09.08.03.03B(4). In this case, the Claimant's actual loss is the amount paid to the Respondent and less than \$30,000.00. Therefore, the Claimant is entitled to recover the actual loss of \$20,855.93.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$20,855.93 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2023); COMAR 09.08.03.03B(3)(a). I further conclude that the Claimant is entitled to recover that amount from the Fund. Md. Code Ann., Bus. Reg. § 8-405(e)(1), (5) (Supp. 2023); COMAR 09.08.03.03B(4).

⁵ 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 \$20,855.93; 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;⁶ and

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

October 13, 2023
Date Decision Issued

Michelle W. Cole

Michelle W. Cole
Administrative Law Judge

MWC/ds
#207814

⁶ 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***