

IN THE MATTER OF THE CLAIM	* BEFORE MICHAEL R. OSBORN,
OF RENEE TYSON	* 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	*
AMILCAR BENITEZ,	* OAH No.: LABOR-HIC-02-23-06653
T/A SHALOM HOME SOLUTIONS,	* MHIC No.: 23 (75) 229
LLC	*
RESPONDENT	*

* * * * *

PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
PROPOSED FINDINGS OF FACT
DISCUSSION
PROPOSED CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On December 7, 2022, Renee Tyson (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)¹ Guaranty Fund (Fund) for reimbursement of \$8,226.00 for actual losses allegedly suffered as a result of a home improvement contract with Amilcar Benitez, trading as Shalom Home Solutions, LLC (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. 2022).² On March 1, 2023, the MHIC issued a Hearing Order on the Claim. On March 9, 2023, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On May 2, 2023, I held a hearing on the Webex videoconference platform. Bus. Reg. §§ 8-407(a), 8-312; Code of Maryland Regulations (COMAR) 28.02.01.20B. Jessica B. Kaufman, Assistant Attorney General, Department, represented the Fund. The Claimant was self-represented.

After waiting twenty 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. COMAR 28.02.01.23A. On March 21, 2023, 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 May 2, 2023, 9:30 a.m., on the Webex videoconference platform. The Notice also provided a telephone number the Respondent could call to participate in the hearing. 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 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 captioned matter. COMAR 28.02.01.05A, C.

² Unless otherwise noted, all references 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 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

Except for Exhibit 9, I admitted the following exhibits offered by the Claimant:

- Clmt. Ex. 1 - Contract, 9/27/2021
- Clmt. Ex. 2 - Navy Federal Credit Union credit card payments to the Respondent, 9/29/2021 and 10/6/2021
- Clmt. Ex. 3 - Photographs, undated
- Clmt. Ex. 4 - Claimant text message to the Respondent, 9/27/2021
- Clmt. Ex. 5 - Respondent text messages to the Claimant, 10/14/2021, 10/25/2021, and 11/19/2021, and Claimant text messages to the Respondent, 11/21/2021, 12/2/2021, 1/16/2022, and 1/17/2022
- Clmt. Ex. 6 - Respondent emails to the Claimant, the Claimant's emails to the Respondent, 11/10/2021, 11/15/2021, 12/2/2021, 12/8/2021, 1/18/2022, 3/18/2022, and 4/20/2022
- Clmt. Ex. 7 - Dynasty Community Services, LLC, Estimate, 11/8/2022, MHIC letter to the Respondent, 9/22/2022
- Clmt. Ex. 8 - Claim, 11/14/2022
- Clmt. Ex. 9 - Credit card charges, 7/2021, objection by the Fund sustained³

³The exhibit will be retained for the record for purposes of judicial review pursuant to COMAR 28.02.01.22C.

The Respondent failed to appear and did not offer any exhibits for admission as evidence.

I admitted the following exhibits offered by the Fund:

Fund Ex. 1 - Notice of Hearing, 3/21/2023

Fund Ex. 2 - MHIC cover letter to the OAH, undated, with Hearing Order, 3/1/2023

Fund Ex. 3 - Respondent's MHIC licensing history, undated

Fund Ex. 4 - MHIC letter to the Respondent, 1/5/2023

Testimony

The Claimant testified and did not present other witnesses. The Respondent failed to appear. 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 118449.
2. The Claimant is the owner and occupier of residential real estate in Mitchellville, Maryland. There are no statutory impediments to her Claim.
3. On September 27, 2021, the Claimant and the Respondent entered a contract to improve the deck on the Claimant's home (Contract).
4. The original agreed-upon Contract price was \$13,342.00.
5. The scope of the work under the Contract included:
 - Removal of the existing handrails, deck boards, and the existing 2 x 12 stair base bins⁴

⁴ The term "stair base bin" was not defined in the Contract.

- Installation of deck frame reinforcement, a new 2 x 12 base, flashing to prevent water damage, deck boards on the floor and stairs, handrails around the deck and stairs, a metal ceiling under the existing deck, and grout on patio pavers. The Contract also included repairing the fascia around the deck.

6. The Contract provided that the new deck boards would be the same or better quality than the existing deck boards. The Contract provided that the materials would include handrails, solar lights, fasteners, and nails. Although not specified in the Contract, the work under the Contract was expected to take four to six weeks to complete.

7. On September 27, 2021, the Claimant sent an email to the Respondent in which she requested the Contract be updated to include the new materials the Respondent would use, and the existing materials the Respondent would re-use, to perform the Contract. She also requested the Respondent include details she and the Respondent discussed relating to edging, picture frame, frame adjustment, and remediation and repair of drywall to an interior space under the deck that had experienced water intrusion. The Respondent's email did not result in any change to the Contract, but it recited the Claimant's and the Respondent's oral agreement to modify the Contract without change to the Contract's price. These changes related to water damage to the casings, frame, drywall, and insulation surrounding a sliding glass egress door that provided access to a lower-level paver patio under the deck, and water damage to a window also under the deck. As part of the oral modification to the Contract, the Respondent agreed to do what was necessary to prevent any further water intrusion below the deck.

8. The draw schedule under the Contract included 33% at the time of signing the Contract, and 33% when work started, with the balance due at completion.

9. The Claimant paid the Respondent \$4,447.52 on September 29, 2021.

10. On or about October 1, 2021, the Respondent began work on the Contract by sending some workers to the Claimant's home. The work included demolition of the existing deck boards, deck rails and balusters, stair treads, and stairway handrails and balusters. This demolition work left only an exposed deck frame and open, sawtooth stringers. The Claimant's entire back yard was now a debris field.

11. On October 7, 2021, the Claimant paid the Respondent \$4,447.52.

12. Following demolition, the Respondent reinforced the deck frame and posts. He told the Claimant he was waiting on deck boards to be available to continue work on the deck.

13. On October 14, 2021, the Respondent contacted the Claimant to tell her that his interior worker had a family emergency, and that he was working on finding someone to perform the interior repairs to the Claimant's home.

14. On October 25, 2021, the Respondent informed the Claimant that new deck boards would arrive that day. New deck boards were not delivered to the Claimant's home at any time.

15. On November 19, 2021, a worker arrived at the Claimant's home, who told the Claimant that her deck boards had not been delivered.

16. On November 21, 2021, a worker used a spray product on the water-damaged, moldy framework of the sliding patio door, after which he replaced the damaged drywall.

17. On December 2, 2021, the Respondent told the Claimant that Contract completion would take four to six weeks, depending on material availability.

18. On January 16, 2022, the Claimant contacted the Respondent to request he return to her home to finish the Contract. She informed the Respondent that she had water intruding into her home as it had before. She requested the Respondent call her.

19. Between October 2021 and March 2022, the Claimant repeatedly called the Respondent. Each time, the Respondent failed to answer, his voice mail box was full, and the Claimant was unable to leave a message.

20. Between October 2021 and March 2022, the Claimant emailed the Respondent or sent him text messages relating to the Contract. The Respondent seldom responded, and when he did respond, the response was apologies, requests for forgiveness, thanks for understanding, or excuses relating to material delays, cell phone damage, personal difficulties, family travel plans, worker illness, or scheduling conflicts with other projects. The Respondent occasionally made unkept promises to return to complete the Contract.

21. On March 18, 2022, the Claimant emailed the Respondent to express her dissatisfaction with the work under the Contract, the continuing water intrusion, and the failure of the Respondent to respond to text messages or emails. The Claimant requested the Respondent provide a telephone number at which he would answer when she called, and requested a specific date when the Respondent would return to complete the Contract. The Claimant told the Respondent that if he was not going to return to finish the Contract that she wanted her money refunded.

22. The Respondent did not respond to the Claimant's March 18, 2022, email.

23. On November 8, 2022, the Claimant obtained an estimate from Dynasty Community Services, LLC, an MHIC licensed home improvement contractor, to perform the work the Respondent agreed to perform under the Contract, except for the interior repairs. The estimate was in the amount of \$12,500.00.

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.⁵

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 or does not own more than three dwellings. *Id.* § 8-405(f)(2) (Supp. 2022). The parties did not enter into a valid

⁵ According to the Fund's counsel, the Respondent's MHIC license has been suspended since the Contract was entered and work was performed. The reason for the suspension was that another claimant filed a successful claim against the Fund relating to the Respondent's work, and the Respondent has not reimbursed the Fund for the paid claim.

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).

The Claimant did not unreasonably reject good faith efforts by the Respondent to resolve the claim. *Id.* § 8-405(d) (Supp. 2022). She tried repeatedly over a course of months to convince the Respondent to return to her home to complete the Contract and was met with every form of unverifiable excuse the Respondent could imagine.

The Respondent performed incomplete home improvements. He stripped the deck to the frame and the decks stairs to the stringers and covered the Claimant's back yard with demolition debris. The work the Respondent did in the interior of the home was ineffectual because he did nothing to arrest the water intrusion that caused the interior damage, and the intrusion continued.

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). No claim is made for consequential or punitive damages.

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 intends to retain other contractors to complete or remedy that work. The work to be performed by Dynasty Community Services, LLC, a home improvement contractor licensed by the MHIC, is nearly

identical to the work to be performed by the Respondent. 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).

Amount paid to the Respondent:	\$ 8,895.04
Plus, amount to repair or complete:	<u>\$12,500.00</u>
	\$21,395.04
Minus, original contract price	<u>\$13,342.56</u>
Actual loss	\$ 8,052.48

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 \$8,052.48.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$8,052.48 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)(c). I further conclude that the Claimant is entitled to recover \$8,052.48 from the Fund.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$8,052.48; 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.

June 29, 2023
Date Decision Issued

Michael R. Osborn
Michael R. Osborn
Administrative Law Judge

MRO/ac
#205962

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

PROPOSED ORDER

WHEREFORE, this 28th day of July, 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***