

IN THE MATTER OF THE CLAIM	* BEFORE MICHAEL R. OSBORN,
OF CAROLYN DE VAUGHN,	* 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 DIOMEDES	*
MENDEZ ,	*
T/A MENDEZ PAINTING SERVICES ,	*
LLC,	* OAH No.: DLR-HIC-02-19-08673
RESPONDENT	* MHIC No.: 18 (90) 1061

\* \* \* \* \*

**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 July 13, 2018, Carolyn DeVaughn (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$2,450.00 in actual losses allegedly suffered as a result of a home improvement contract with Diomedes Mendez, trading as Mendez Painting Services, LLC (Respondent). Md. Code Ann.,

Bus. Reg. §§ 8-401 through 8-411 (2015). On March 15, 2019, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on June 24, 2019 at Conference Room 306 in the County Office Building, 1400 McCormick Drive, Largo, MD 20774. Bus. Reg. § 8-407(e). Shara Hendler, Assistant Attorney General, Maryland Department of Labor (Department or MDL), represented the Fund. The Claimant represented herself. After waiting fifteen minutes for the Respondent or the Respondent's representative to appear, I proceeded with the hearing. Code of Maryland Regulations (COMAR) 28.02.01.23A.<sup>1</sup>

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2018); 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 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 on the Claimant's behalf:

Clmt. Ex. 1 – Contract between Claimant and Respondent, dated July 18, 2017

Clmt. Ex. 2a to 2j – Pictures of the house to be worked on, undated

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<sup>1</sup> Notice of the hearing was mailed to the Respondent at the address of record by regular and certified mail on April 25, 2019, COMAR 09.08.03.03A(2), and was returned as unclaimed/undeliverable on June 26, 2019. 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. I determined that the Respondent had received proper notice, and proceeded to hear the captioned matter.

Clmt. Ex. 3 – Proposal from Cornell Design-Build, LLC, dated May 8, 2018

I admitted the following exhibits on behalf of the Fund:

Fund Ex. 1 – Hearing Order from DLLR, dated March 15, 2019

Fund Ex. 2 – Notice of Hearing from OAH, dated April 25, 2019

Fund Ex. 3 – Home Improvement Claim Form, dated July 3, 2018

Fund Ex. 4 – MDL I.D. Registration, dated June 17, 2019

I admitted no exhibits for the Respondent.

### Testimony

The Claimant testified.

The Respondent did not appear.

The Fund did not present any 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 registration number 01 113632.
2. The Claimant's home is a bungalow in Oxon Hill, Maryland, with vinyl siding over brick on most of the exterior surfaces, and metal siding over an "A" shaped structure on the rear side of the home. The Claimant determined she wanted to remove the vinyl siding in favor of a painted brick surface on the exterior walls, and sought a contractor to do the work. In her search for a contractor she found the Respondent.

3. On July 18, 2017, the Claimant and the Respondent entered into a contract (the contract) to:

- Remove the siding from the front, sides, and back of the Claimant's home;
- Remove the metal frames of sixteen windows, and install new metal frames, and remove and replace the metal frame of an exterior door;
- Remove all downspouts and gutters and replace them with new downspouts and gutters;
- Prime and paint the part of the back wall of the house not covered by siding;
- Prepare all exterior surfaces of the home previously covered by siding for painting, and prime and paint those surfaces; and
- Replace the metal trim on both sides of the home's first-floor addition.

4. The agreed-upon contract price was \$6,800.0, with 35% due when the contract was signed, 35% due when work began, and 30% due when work under the contract was complete. Work under the contract was to begin within two weeks of entering the contract, with expected completion in twenty-eight days, but not longer than forty days, after work began. The contract also included a one-week extension for completion in the event of a weather delay.

5. On July 26, 2017, the parties amended the contract to include: resurfacing of some exterior walls; repair of some foundation cracks; repair an exterior wall crack near an overhang, and paint the metal siding on an "A" shaped structure on the back of the home. The amendments changed the total contract price to \$9,850.00.

6. On or about July 26, 2017 the Claimant paid the Respondent \$3,150.00.

7. On or about July 30, 2017, the Respondent sent a crew to begin work under the contract.
8. The crew removed some of the gutters then put them back. The crew forcibly removed all of the vinyl siding from the Claimant's home, and forcibly removed anything mounted on the surface of the vinyl siding. In the process of removing the siding, the crew: separated the roof structure of the bay window on the front of the home from the front exterior wall; separated the brick foundation of the front steps from the front wall of the home, leaving a large gap between the wall and the foundation of the steps, rendering the steps unsafe and unusable; separated the metal handrails from the brick foundation wall of the front steps; broke several bricks on the home's front wall and steps; removed the electrical supply box mounted on the exterior of the wall of the home, leaving it on the ground with loose wires exposed; removed the television and internet cable box from the exterior wall of the home, leaving it dangling by a cable wire; removed and destroyed the home's exterior lights; removed an exterior outlet box, leaving it on the ground with wires exposed; and, loosened the electrical supply company's meter box, leaving it askew and leaving several bricks on which it was mounted broken or on the ground. The crew also removed some of the metal siding from the "A" frame part of the back wall of the home, which was supposed to be painted but not removed.
9. The Claimant called the Respondent, who reassured her that the damage done during removal of the vinyl siding would be repaired.
10. After the crew left, the next time it rained the rainwater entered the Claimant's home where the crew separated the roof structure over the bay window from the home.

11. Approximately two weeks after a crew removed the home's vinyl siding the Respondent sent a crew to work on the home. The crew removed the metal surrounding two windows. The crew installed two lengths of new gutter, but no downspouts. The crew also began repair work on some foundation cracks, and performed some work on exterior surfaces to prepare them for paint. The crew also painted one of the Claimant's home's exterior walls without doing any preparation work, leaving a brick wall with paint over chips and other loose debris. The appearance of the painted surface was unacceptable.

12. While the crew was present, members of the crew searched the Claimant's shed in the back yard without her permission. The crew found some roofing paper and some vinyl siding in the shed. The Claimant saw some of the siding on her lawn, and saw the crew using some of the vinyl siding to replace the metal siding improperly removed from the "A" structure on the home's back wall. The crew had used roofing paper from her shed as underlayment for the vinyl siding. The Claimant, irate at the behavior of the crew and the unrepaired damage to her home, contacted the Respondent. She demanded the Respondent complete repairs to the siding of the "A" structure on the back wall of the house, and demanded that he do no work other than that on the contract.

13. The Respondent bought siding and completed repair of the siding on the "A" structure on the back of the home.

14. The repair of the home's foundation cracks was acceptable to the Claimant. Because the foundation repair work was acceptable she did not request any refund of the money she had paid the Respondent to this point, \$3,150.00. The repaired cracks, however, re-emerged after six months.

15. The Respondent did not repair the front steps, the broken bricks, the broken handrail, the electrical junction box, outlet or electrical meter, the cable/internet box, or the exterior light fixtures.
16. The Claimant paid an electrician \$250.00 to repair all of the damage to fixtures and boxes, and hired a contractor to repair drywall damaged by water intrusion.<sup>2</sup>
17. The Claimant paid a contractor \$4,800 to complete preparation and painting of the home's brick exterior walls.<sup>3</sup>
18. The Claimant paid a contractor \$900.00 to complete the work on the gutters and downspouts.<sup>4</sup>
19. The Claimant paid a contractor \$900.00 to complete removal of the metal surrounding fourteen of sixteen windows, and the metal surrounding the exterior doors.<sup>5</sup>
20. On May 8, 2018, Cornell Design-Build, LLC issued a proposal to the Claimant for work on the home. The scope of work included repair and painting of the "A" structure on the back wall of the home, and replacing the metal trim on all sixteen of the home's windows. The proposed cost of the work was \$5,400.00.
21. The price paid to repair or complete the Respondent's work was \$6,850.00 (\$250.00 for electrical repairs, \$4,800.00 for exterior preparation and paint, \$900.00 for gutters and downspouts, \$900.00 for removal of metal trim around windows and doors). The proposed cost to complete the work of the Respondent on the back wall of the home is \$5,400.00. The total cost of work completed or to be done is \$12,250.00.

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<sup>2</sup> The Claimant did not have a contract or receipts for this work, but recalled she paid \$250.00.

<sup>3</sup> The Claimant did not have a contract or receipts for this work, but recalled she paid \$4,800.00.

<sup>4</sup> The Claimant did not have a contract or receipts for this work, but recalled she paid \$900.00.

<sup>5</sup> The Claimant did not have a contract or receipts for this work, but recalled she paid \$900.00.

22. The Claimant paid \$3,150.00 to the Respondent. The cost to repair and complete the Respondent's work is 12,250.00. The total of the money paid to the Respondent plus the cost of the work done or to be done is \$15,400. The contract price is \$9,850.00. The difference between the total money paid to the Respondent plus cost of repairs done or to be done (\$15,400.00 minus the contract price (\$9,850.00) is \$5,500.00).

23. On her claim form submitted to the MHIC, the Claimant requested she be reimbursed \$2,450.00 in actual losses. She did not revise her claim or at the hearing request she be allowed to revise her claim.

### DISCUSSION

In this case, 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) (2015); Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3). “[A] preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces . . . a belief that it is more likely true than not true.” *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002) (quoting *Maryland Pattern Jury Instructions* 1:7 (3d ed. 2000)).

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) (2015)<sup>6</sup>; *see also* COMAR 09.08.03.03B(2) (“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.”

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<sup>6</sup> Unless otherwise noted, all references to the Business Regulation Article herein cite the 2015 Replacement Volume of the Maryland Annotated Code.



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 he entered into the Contract with the Claimant.

The Respondent performed unworkmanlike, inadequate or incomplete home improvements. His crew demolished the exterior of the Claimant's home well beyond the demolition required by the contract. The Respondent's crew's methods resulted in damage to bricks, steps, handrails, roof structures, electrical boxes, the electrical meter, the cable/internet box and exterior lighting fixtures. The Respondent removed siding from the "A" structure on the back wall of the Claimant's home when it was not supposed to be removed. The Respondent did not remove metal trim surrounding fourteen of sixteen windows. The Respondent hung only two lengths of gutter. The Respondent painted one exterior wall without any surface preparation resulting in an appearance described by the Claimant "awful."

The Respondent was unresponsive to the Claimant's request that the Respondent repair the damage done. The Respondent's crew let themselves into the Claimant's storage shed and helped themselves to roofing paper and siding without her permission. The Claimant was reasonable when she demanded the Respondent not return. The work was performed with a method that caused extensive and unnecessary damage to her home, and the Respondent's crew entered her shed without permission and used her property without permission to perform repairs to siding that should not have been removed in the first place.

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); COMAR 09.08.03.03B(1). Thus, although the Claimant paid a contractor to repair interior drywall due to water intrusion, this cost cannot be recovered. I consider the money paid to an electrician to be recoverable because, had the Respondent performed the siding removal properly, electrical and cable/internet fixtures would have been removed before the siding was removed and re-attachment of the electrical and cable/internet fixtures would, as a result, have been required.

MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work. The correct formula is found at COMAR 09.08.03.03B(3)(c). This regulation provides:

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.

Using this formula, the Claimant's actual loss is calculated to be \$5,500.00. However, under COMAR 09.08.03.02:

C. Amending of Claims. Once a verified claim has been filed with the Commission, the claimant may not amend the claim unless the claimant can establish to the satisfaction of the Commission that either the:

- (1) Claimant did not know and could not have reasonably ascertained the facts on which the proposed amendment is based at the time the claim was filed; or
- (2) Claimant's proposed amendment would not prejudice the contractor whose conduct gave rise to the claim.

I find the Claimant was in possession of facts from which she could have reasonably determined the amount of her claim. I also find that more than doubling the claim from

\$2,450.00 to \$5,500.00 prejudices the Respondent. Amending the claim to more than double it may alter his decision not to attend the hearing. In any event, the Claimant did not request she be allowed to amend her claim. Thus, her claim is capped at \$2,450.00.

The Business Regulation Article caps a claimant's recovery at \$20,000.00 for acts or omissions of one contractor, and provides that a claimant may not recover more than the amount paid to the contractor against whom the claim is filed. Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a). In this case, the Claimant's actual loss is less than the amount paid to the Respondent and less than \$20,000.00. Therefore, the Claimant is entitled recover an actual loss of \$2,450.00.

#### **PROPOSED CONCLUSIONS OF LAW**

I conclude that the Claimant has sustained an actual and compensable loss \$2,450.00 as a result of the Respondent's acts or omissions, and that the Claimant is entitled to recover that amount from the Fund. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(c).

I further conclude that the Claimant's award is limited to the amount stated in the Claim filed with the MHIC. COMAR 09.08.03.02C.

#### **RECOMMENDED ORDER**

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

**ORDER** that the Maryland Home Improvement Guaranty Fund award the Claimant \$2,450.00; 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;<sup>7</sup> and

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

**Signature on File**

September 20, 2019  
Date Decision Issued

\_\_\_\_\_  
Michael R. Osborn  
Administrative Law Judge

MRO/kdp  
# 180901

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

**PROPOSED ORDER**

***WHEREFORE, this 26<sup>th</sup> day of November, 2019, 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.***

***Lawrence Helminiak***

***Lawrence Helminiak***

***Panel B***

***MARYLAND HOME IMPROVEMENT  
COMMISSION***

