

**KARLENE HILL,**

**CLAIMANT**

**v.**

**THE HOME IMPROVEMENT**

**COMMISSION GUARANTY FUND**

**FOR THE ALLEGED ACTS OR**

**OMISSIONS OF JOHN O'SICK, t/a**

**JEMCO PROPERTIES,**

**RESPONDENT**

**\* BEFORE STEVEN V. ADLER,**

**\* ADMINISTRATIVE LAW JUDGE**

**\* OF THE MARYLAND OFFICE**

**\* OF ADMINISTRATIVE HEARINGS**

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**\* OAH No.: LABOR-HIC-02-21-02362**

**\* MHIC No.: 19 (90) 890**

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**STATEMENT OF THE CASE**

On August 27, 2019, Karlene Hill (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC or Commission) Guaranty Fund (Fund) for reimbursement of actual losses allegedly suffered as a result of a home improvement contract

with John O'Sick, trading as JEMCO Properties (Respondent).<sup>1</sup> Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015).<sup>2</sup>

On January 20, 2021, the Chairperson of the Commission determined a hearing was warranted on the Claim and on January 27, 2021, the Commission transmitted the matter to the Office of Administrative Hearings (OAH) for an evidentiary hearing, delegating its authority to the OAH to issue a proposed decision.

I held a hearing on the merits of the Claim on March 26, 2021, remotely, via the Webex videoconferencing platform. Md. Code Ann., Bus. Reg. § 8-407(e); Code of Maryland Regulations (COMAR) 28.02.01.20B(1)(b). The Claimant represented herself. The Respondent represented himself. Shara Hendler, Assistant Attorney General, counsel to the Department of Labor (Department), represented the Fund.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the OAH Rules of Procedure govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2020); COMAR 09.01.03; COMAR 28.02.01.

### ISSUES

- 1) Did the Claimant receive a final award in arbitration in her favor?
- 2) If so, is the Claimant entitled to an award from the Fund in the amount of the final award of arbitration?

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<sup>1</sup> The Claim identifies the Respondent's trade name as JEMCO Properties as does the Commission's licensing records. The Commission's Hearing Order identifies the Respondent's trade name as All State Home Improvement Company, Inc. The Respondent identifies the relevant business entity as JOS Equity Management Company in a special power of attorney he executed designating himself as the non-attorney representative of the entity in his appearance before the OAH. I use the term Respondent expansively in this Proposed Decision to refer to the licensee himself, all relevant business entities, and any subcontractors or employees of the licensed contractor, except where otherwise provided. Md. Code Ann., Bus. Reg. § 8-405(a), (b) (2015).

<sup>2</sup> All later citations to the Business Regulation Article of the Annotated Code of Maryland are to the 2015 Replacement Volume.

## SUMMARY OF THE EVIDENCE

### Exhibits<sup>3</sup>

I admitted the following exhibits in evidence offered by the Claimant:

- CL Ex. 1 - Narrative of Events, undated
- CL Ex. 2 - Carbon Copies of Checks, dated May 12, July 4, and July 17, 2018
- CL Ex. 3 to 5 - Photographs of the Respondent's work at the subject property, undated
- CL Ex. 6 - Estimate to Complete the Respondent's work, undated with attachments
- CL Ex. 7 - Photographs of the subject property, undated
- CL Ex. 8 - Invoice, dated May 10, 2020
- CL Ex. 9 - Arbitration Award, dated November 14, 2018, with attachments
- CL Ex. 10 - Carbon Copies of Checks paid to other contractors, dated October 26, November 16, and December 11, 2018
- CL Ex. 11 - Letter from the Claimant to the OAH, dated June 21, 2021

I admitted the following exhibits in evidence offered by the Respondent:

- Resp. Ex. 1 - Scope of Work/Accounting, undated
- Resp. Ex. 2 - Invoice, dated May 10, 2018
- Resp. Ex. 3 - Profit and Loss Statement, undated
- Resp. Ex. 4 - Special Power of Attorney, dated March 31, 2021
- Resp. Ex. 5 - Letter from the Respondent addressed To All Parties Concerned, dated June 23, 2021

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<sup>3</sup> I held the record open after the close of proceedings until March 31, 2021 to allow the Respondent to submit a special power of attorney designating him the attorney-in-fact for purposes of representing the involved business entities before the OAH. This document was admitted in evidence as Respondent's Exhibit 4. At the hearing, upon objection of the Respondent and the Fund, I did not admit in evidence Claimant's Exhibit 9. After reviewing relevant caselaw and statutory provisions, I reopened the record on June 18, 2021 and sent correspondence to the parties informing them I had reconsidered my evidentiary ruling and would hold the record open until 11:59 p.m. on June 23, 2021 to allow the parties to file any written response to my reconsideration of the admissibility of Claimant's Exhibit 9. In my correspondence, admitted in evidence as OAH Exhibit 1, I set forth with specificity the caselaw and statutes I determined relevant to my analysis and invited the parties to respond. On June 21, 2021, the Claimant filed a response admitted in evidence as Claimant's Exhibit 11. On June 23, 2021, the Respondent filed a response admitted in evidence as Respondent's Exhibit 5. The Fund declined to file a response and I closed the record on June 24, 2021.

I admitted the following exhibits in evidence offered by the Fund:

- GF Ex. 1 - Hearing Order, Claim No. 19 (90) 890, dated January 20, 2021
- GF Ex. 2 - Notice of Remote Hearing, dated January 9, 2021
- GF Ex. 3 - Home Improvement Claim Form, dated August 27, 2019, with attached Letter to the Respondent, dated September 23, 2019
- GF Ex. 4 - Department Identification Registration for the Respondent, dated March 2, 2021

I admitted the following exhibit in evidence on my own motion:

- OAH Ex. 1 - Email Correspondence to the Parties, dated June 18, 2021

There were no other exhibits offered in evidence.

### Testimony

The Claimant testified on her own behalf. The Respondent testified on his behalf. The Fund did not present any witness testimony.

### PROPOSED FINDINGS OF FACT<sup>4</sup>

I find the following facts, by a preponderance of the evidence:

1. At all times relevant to the proceeding, the Respondent was a licensed home improvement contractor under MHIC registration number 113831.
2. The Claimant is not related to the Respondent or any of his employees, by blood or marriage.
3. The Claimant owns and resides in the subject property and during the relevant times owned no other properties in the State.
4. On May 10, 2018, the Claimant and the Respondent entered into a contract for the Respondent to remove an existing deck and a build a new deck and screened-in porch on the Claimant's property in Silver Spring, Maryland.

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<sup>4</sup> Claimant's Exhibit 9 provides the evidentiary basis for the quoted language in factual findings 12 through 15.

5. The Claimant paid the Respondent \$15,600.00 for work under the contract.
6. Work under the contract was performed by the Respondent's employee, Felipe Alonso. The Respondent's business address was a post office box and the Claimant was unsuccessful in reaching the Respondent in-person or by telephone after two initial calls.
7. A dispute arose between the parties about the quality of the Respondent's work and the matter was submitted to arbitration.
8. On October 12, 2018, the Claimant executed an arbitration agreement and on October 16, 2018, the Respondent, either directly or through an employee, did the same. Both parties agreed to the rules and procedures of arbitration.
9. Ashlei Vargas, Esquire, a neutral and independent arbitrator, was appointed pursuant to the parties' arbitration agreement to arbitrate their dispute.
10. On November 6, 2018, an arbitration hearing was held, remotely via videoconference, pursuant to the Federal Arbitration Act, in which the Claimant and Mr. Alonso, on behalf of JEMCO Properties, participated.
11. After reviewing the parties' arguments and the evidence presented, on November 14, 2018, the arbitrator issued a final award in favor of the Claimant.
12. In the final award, the arbitrator concluded that the photographs presented "showed poor workmanship on the part of the Respondent."
13. The arbitrator concluded that the Claimant "may recover the reasonable cost of correcting the defects" and the purpose of an award is to place the Claimant "in as good a position as . . . she would have occupied [has the Respondent performed the contract work in a workmanlike manner.]"
14. The arbitrator concluded that the "Claimant may collect \$7,850 from [the] Respondent in order to correct the defects in her deck."

15. On December 13, 2018, a letter was issued providing that the arbitration award was final, the attached copy of the award was a certified copy and was made pursuant to the parties “fully executed” arbitration agreement and the arbitration rules “to which both parties agreed.”

16. After issuance of the final award, the Claimant sent a letter by certified mail to the Respondent, at his business address of record with the Commission, requesting he promptly remit payment to satisfy the award.

17. The final award of arbitration was not corrected, modified, or set aside by a court of competent jurisdiction and as of the date of the hearing, remains unsatisfied.

## **DISCUSSION**

### ***I***

#### ***Governing Law, Controlling Regulations, and Burden of Proof***

“In 1962, the General Assembly enacted the Maryland Home Improvement Law . . . . This law . . . is a regulatory scheme designed for the protection of the public. *Landsman v. Md. Home Imp. Comm’n*, 154 Md. App. 241, 248 (2003) (citations and footnote omitted).

Nearly twenty years later, in 1981, the General Assembly enacted legislation establishing the Fund. “The Fund was created to provide a remedy for homeowners who suffer an “actual loss that results from . . . an act or omission by a licensed contractor.” *Id.* at 249.

The Commission may order payment of a claim against the Fund only if [as relevant here]:

...

(2) the claimant provides the Commission with a certified copy of a final judgment of a court of competent jurisdiction or a *final award in arbitration*, with all rights of appeal exhausted, in which the court or arbitrator:

(i) expressly has found on the merits that the claimant is entitled to recover under § 8-405(a) of this subtitle; and

(ii) has found the value of the actual loss.

Md. Code Ann., Bus. Reg. § 8-409(a)(2) (emphasis added).

“To the extent that a final judgment or *final award in arbitration* is decided in favor of the claimant, the Commission *shall* approve the claim against the Fund.” *Id.* § 8-408(b)(3)(i) (emphasis added).

At a hearing on a claim for reimbursement from the Fund, the Claimant has the burden of proof. Md. Code Ann., Bus. Reg. § 8-407(e)(1); COMAR 09.08.03.03(A)(3). The standard of proof is by a preponderance of the evidence. Md. Code Ann., State Gov’t § 10-217 (2014). To prove something by a “preponderance of the evidence” means “to prove that something is more likely so than not so,” when all of the evidence is considered. *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)); *see also Mathis v. Hargrove*, 166 Md. App. 286, 310 n.5 (2005).

For the following reasons, I am persuaded that the Claimant has proven her entitlement to an award from the Fund.

### *III*

#### *Positions of the Parties*

The Claimant testified that on May 10, 2018, she entered into a contract with the Respondent to build a new deck and screened-in porch on her property and paid the Respondent \$15,600.00 of a total contract price of approximately \$21,000.00. After disputes about the quality of the work arose, the matter was submitted to arbitration, where she and Mr. Alonso fully participated in an arbitration hearing held by videoconference before a neutral arbitrator, and the arbitrator granted a final award of \$7,850.00 in her favor, which remains unsatisfied.

The Respondent contends that the arbitration proceeding took place in haste, without proper notice or his direct involvement, and at most should have resulted in an award of no more than \$2,350.00. The Respondent further contends the arbitration agreement is invalid, and the arbitration was not conducted in good faith or with proper care and diligence and should be set aside.

The Fund contends that the arbitration award is neither binding nor even relevant to my inquiry and the case, instead, turns on my analysis of the Claim on the merits. The Fund agreed with the Claimant's position on the merits that the Respondent performed an unworkmanlike home improvement, observed that there was no legal impediment to recovery, and recommended an award to the Claimant for her actual loss as calculated by the tribunal using the appropriate regulatory formula.

### *IV*

#### *Analysis*

The questions presented in this case are not a matter of first impression. The arbitration provisions of section 8-409 of the Business Regulation Article have been construed by the Court



of Special Appeals in the analogous case of *Brzowski v. Maryland Home Improvement Commission*, 114 Md. App. 615, *cert. denied*, 346 Md. 238 (1997).<sup>5</sup>

In *Brzowski*, the court held:

we construe section 8-409(a)(2)(i) as requiring that a judicial decision or arbitration award state in substance that, based on the merits, the claimant has suffered actual loss due to fault on the part of a licensed contractor. The Senate Economic and Environmental Affairs Committee envisioned that actual loss means “the amounts paid or payable for the cost of ‘making good.’” Senate Economic and Environmental Affairs Committee, Bill Analysis for Senate Bill 507 at 3 (1985). The arbitrator’s 10 May letter stated that the award he rendered reflected his determination of the cost to correct the deficiencies in the work performed. The cost of correcting a contractor’s deficient workmanship is embraced within “the costs of restoration, repair, replacement, or completion.” Md. Code Ann., Bus. Reg. § 8-401 (“‘Actual loss’ defined”). We conclude that, considering the remedial purpose of the Home Improvement Act, the award, when combined with the arbitrator’s 10 May letter, satisfied the requirements for when the Commission may authorize payment from the Fund.

114 Md. App. at 639.

Much like the arbitration award granted against Mr. Brzowski, the award granted here against the Respondent expressly sets forth that it is premised on the arbitrator’s finding of “poor workmanship,” noting documentary evidence of “uneven cuts and poor finishing.” CL Ex. 9. The arbitrator states that the rationale of the award “is to put the Claimant ‘in as good a position as . . . she would have occupied’ if the Respondent had not breached the contract” and that the award of \$7,850.00 is made “in order to correct the defects in [the Claimant’s] deck.” *Id.* (citations omitted).

The arbitration award here is factually analogous to the arbitration award found by the court in *Brzowski* to meet the statutory requirements of section 8-409 of the Business Regulation Article.

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<sup>5</sup> “A claimant has essentially three avenues from which he can obtain relief from the Fund. He can file a claim directly with the Commission or proceed initially in court or in an arbitration proceeding.” *Brzowski*, 114 Md. App. at 630-31. Like *Brzowski*, this case concerns the third avenue.

The Respondent takes exception to the venue, format, and substance of the arbitration hearing—the use of a videoconference platform, that the evidence presented was, in his estimation, incomplete, and that he did not participate in the arbitration directly—and whether he received proper notice. The Respondent offered no credible evidence that contravened the Claimant’s evidence and the arbitrator’s findings that the arbitration hearing was conducted pursuant to an executed arbitration agreement between the parties; that Mr. Alonso participated in the arbitration on behalf of the Respondent; that JEMCO Properties was named as the respondent; and that the arbitrator’s award was based on specific findings of defects to the Respondent’s work. Test. Claimant; CL Ex. 9, 11; Resp. Ex. 5. There is no dispute that the Claimant furnished a certified copy of the award in evidence before me and the award is final. *Id.*

The Respondent offered no evidence that he timely filed a petition with an appropriate court to modify or correct the award or to vacate it. Md. Code Ann., Cts. & Jud. Proc. §§ 3-223, 3-224 (2020); *see Bd. of Ed. of Charles Cty. v. Educ. Ass’n of Charles Cty.*, 286 Md. 358, 366–67 (1979) (Statutory time constraints to seek to vacate an arbitration award are mandatory.); *Schaper & Assocs. v. Soleimanzadeh*, 87 Md. App. 555, 560 (1991) (Deficient notice must be raised in a timely petition to vacate an arbitration award.).

The Respondent’s concerns are inapposite to this forum. *Id.* The propriety of the arbitrator’s factual findings, her decision, and the award are not before me; in order to be addressed they needed to have been raised in the arbitration proceeding itself or in a timely filed petition before a court of competent jurisdiction to modify, correct or vacate the award, not before the Commission, acting through this tribunal, more than two years after the issuance of the arbitration award and after all timeframes have run. *Id.*

I am persuaded the final award of arbitration meets the requirements of section 8-409 of the Business Regulation Article as interpreted by the court in *Brzowski*. 114 Md. App. at 639. There are no legal impediments to recovery and the amount of the arbitration award is not in excess of the amount paid by the Claimant to the Respondent. Accordingly, I am persuaded there is no statutory or regulatory bar to recovery. Md. Code Ann., Bus. Reg. § 8-405(e)-(g); COMAR 09.08.01.13.

The plain language of section 8-408(b)(3)(i) of the Business Regulation Article—if “a final award in arbitration is decided in favor of the claimant, the Commission *shall* approve the claim against the Fund”—is mandatory and not permissive in its nature (emphasis added). See *Livesay v. Baltimore Cty.*, 384 Md. 1, 16 (2004) (observing that “[m]ay” is generally interpreted as permissive, in contrast with ‘shall,’ which is interpreted as mandatory”). Therefore, I am persuaded this tribunal, acting with the delegated authority of the Commission, must approve the Claim and grant an award of \$7,850.00 to the Claimant. Md. Code Ann., Bus. Reg. §§ 8-405(a), (e)(1), 8-408(b)(3)(i), 8-409(a)(2); see *Berkshire Life Ins. Co. v. Md. Ins. Admin.*, 142 Md. App. 628, 645 (2002) (“When [the agency] delegates the hearing responsibility to an [administrative law judge] ALJ, the ALJ becomes an extension of [the agency].”).

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

I conclude, as a matter of law, that the Claimant received a final award of arbitration in her favor finding she sustained an actual loss of \$7,850.00 as a result of the Respondent’s acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-405(a), (e)(1), 8-407(e)(1) (2015); *Brzowski v. Md. Home Imp. Comm’n*, 114 Md. App. 615, *cert. denied*, 346 Md. 238 (1997).

I further conclude, as a matter of law, that the Claimant is entitled to an award of \$7,850.00 from the Fund. Md. Code Ann., Bus. Reg. §§ 8-408(b)(3)(i), 8-409(a)(2) (2015); *Brzowski v. Md. Home Imp. Comm’n*, 114 Md. App. 615, *cert. denied*, 346 Md. 238 (1997).

**RECOMMENDED ORDER**

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

**ORDER** that the Maryland Home Improvement Guaranty Fund award the Claimant \$7,850.00;

**ORDER** that the Respondent is deemed to be ineligible for a Maryland Home Improvement Commission license until the Respondent reimburses the Maryland Home Improvement Guaranty Fund for all monies disbursed under this Order, plus annual interest of at least ten percent, as set by the Maryland Home Improvement Commission<sup>6</sup>; and

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

June 29, 2021  
Date Decision Issued

Steven V. Adler  
Steven V. Adler  
Administrative Law Judge

SVA/at  
#192935

<sup>6</sup> Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

*WHEREFORE, this 6<sup>th</sup> day of September, 2021, 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.*

*Wm Bruce*

*Quackenbush*

*Wm Bruce Quackenbush*

*Panel B*

**MARYLAND HOME IMPROVEMENT  
COMMISSION**