IN THE MATTER OF THE CLAIM	*	BEFORE JENNIFER L. GRESOCK,
OF TONY MIMS,	*	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 JUSTIN ROY,	*	
T/A BLUESTAR HOME	*	OAH No.: LABOR-HIC-02-21-01288
INNOVATION, LLC,	*	MHIC No.: 20 (75) 980
RESPONDENT	*	

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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 April 17, 2020, Tony Mims (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund), under the jurisdiction of the Department of Labor (Department), for reimbursement of $61,667.00 in actual losses allegedly suffered as a result of a home improvement contract with Justin Roy, trading as Bluestar Home Innovation, LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015).[1] On

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

January 13, 2021, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on March 11, 2021, via the Google Meet platform. Bus. Reg. §§ 8-407(a), 8-312. Shara Hendler, Assistant Attorney General, Department, represented the Fund. The Claimant represented himself.

After waiting fifteen 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. Code of Maryland Regulations (COMAR) 28.02.01.23A. On February 19, 2021, 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 09.08.03.03A(2); COMAR 28.02.01.05C(1). The Notice stated that a hearing was scheduled for March 11, 2021, at 9:30 a.m., via the Webex videoconferencing platform. The Notice further advised the Respondent that failure to attend the hearing might result in "a decision against you."

The Notice was returned to the OAH with the notation "forward time expired." The Respondent did not notify the OAH of any change of mailing address. COMAR 28.02.01.03E. On February 17, 2021, I issued a letter granting Ms. Hendler's request to convert the March 11, 2021 hearing, which had been scheduled as an in-person hearing, to a remote hearing.[2] This letter was emailed to the parties, including Mr. Roy, at the email address on record. The email did not result in a notice of electronic delivery failure. The Respondent made no request for postponement prior to the date of the hearing. COMAR 28.02.01.16. I determined that the

[2] My letter stated that the March 11, 2021 hearing would be held via Google Meet. The OAH Clerk's Office then erroneously issued the notice scheduling the hearing via Webex. Because of this error, I established a Google Meet meeting room and sent an invitation to the Respondent fifteen minutes prior to the scheduled hearing time. I then kept the Webex room open for him to join while I simultaneously monitored the Google Meet meeting room. The Respondent did not join either remote proceeding. At 9:45 a.m., I ended the Webex meeting.

Respondent received proper notice, and I proceeded to hear the captioned matter. COMAR 28.02.01.05A, C.

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. 2020); COMAR 09.01.03; and 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. A Complaint Form, dated February 15, 2020

Clmt. Ex. B Contract, date illegible

Clmt. Ex. C Funds Transfer Request Authorization for $21,667.00, dated December 23, 2019

Clmt. Ex. D Letter from Joseph G. Mayer to the Respondent, dated December 23, 2019, with attached check from the Respondent to Mr. Mayer ($500.00), dated January 18, 2020

Clmt. Ex. E Photographs of the work site, dated February 12, 2020

Clmt. Ex. F Text messages between the Claimant and the Respondent, December 2019/January 2020

Clmt. Ex. G Text messages between the Claimant and Michael Coleman (employed by the Respondent), dated December 5, 2019 through February 4, 2020

Clmt. Ex. H Text messages between the Claimant and Alexandra Alker (employed by the Respondent), some dated December 2019, others undated

Clmt. Ex. I Text messages between the Claimant and Joseph Mayer, dated December 21, 2019 through January 31, 2020, some undated

Clmt. Ex. J Emails between Debra Mims and the Respondent, dated January 29, 2020 through February 12, 2020

I admitted the following exhibits on the Fund's behalf:

Fund Ex. 1 Hearing Order, dated January 7, 2021

Fund Ex. 2 Notice of Remote Hearing, dated February 19, 2021

Fund Ex. 3 Home Improvement Claim Form, dated April 17, 2020

Fund Ex. 4 Licensing information for the Respondent, printed February 26, 2021

The Respondent was not present to offer any exhibits for admission into evidence.

Testimony

The Claimant testified and presented the testimony of Joseph Mayer and the Claimant's wife, Debra Mims.

The Fund did not present any testimony, and the Respondent was not present to do so.

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 MHIC licensed home improvement contractor.

2. On December 21, 2019, the Claimant and the Respondent entered into a contract to build a 40 foot by 60 foot garage (Contract). At that time, the Claimant was not provided with a copy of the Contract that included the Respondent's signature.

3. The original agreed-upon Contract price was $65,000.00.

4. The Contract included blueprints that were to be provided by Joseph Mayer of J. Mayer Architects, LLC. The fee for the blueprints, as stated in the Contract, was $4,000.00.

5. On December 23, 2019, the Claimant paid the Respondent a deposit of $21,667.00.

6. On January 3, 2020, after inquiries from the Claimant, the Respondent told the Claimant that the garage size would need to be reduced based on the opinion of Mr. Mayer. However, the Respondent had not consulted with Mr. Mayer, and Mr. Mayer had provided no such opinion.

7. The Claimant and the Respondent exchanged messages in early January 2020, with the Respondent representing that the blueprints were finished. However, no blueprints had been completed or even requested from Mr. Mayer at that time.

8. On January 22, 2020, the Respondent paid Mr. Mayer $500.00 for the blueprints.

9. By the end of January 2020, the Respondent had not started work on the garage.

10. On January 29, 2020, the Claimant contacted the Respondent and asked that the Contract be cancelled and the deposit be returned.

11. Over the next two weeks, the Claimant and his wife exchanged messages with the Respondent in an effort to cancel the Contract and have the money they had paid refunded. At times the Respondent stated that he wished to perform part of the Contract; at other times he agreed to refund some or all of the funds.

12. At some point, the Respondent stopped responding to the Claimant and his wife.

13. At no time did the Respondent perform any work on the Contract or purchase any materials, other than the $500.00 paid to Mr. Mayer.

14. At no time did the Respondent refund any funds to the Claimant.

15. Mr. Mayer completed the blueprints, for which the Claimant paid him in full. The additional cost of the blueprints, after subtraction of the $500.00 the Respondent had paid Mr. Mayer, was $2,730.00.

16. The Claimant hired another contractor, who built the 40 foot by 60 foot garage at a cost of $105,000.00.

DISCUSSION

In this case, the Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Bus. Reg. § 8-407(e)(1); Md. Code Ann., State Gov't § 10-217 (2014); 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 Cty. 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); *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.

There is no dispute that the Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimant. (Fund Ex. 4.)

The Claimant testified that he first reached out to the Respondent near the end of November 2019, when he sought to have a garage built on his property, shortly after he had a new home constructed. He explained that he met with the Respondent and Michael Coleman, an employee of the Respondent's, to discuss the project in early December 2019. Throughout the month of December, the Claimant exchanged messages with Mr. Coleman and Alex Alker, another employee, regarding the work and the contract. In late December, the Claimant also met with the architect, Mr. Mayer, at the Claimant's home, to discuss the job. The Claimant further

testified that in early January 2020, the Respondent was sometimes unresponsive to text messages, and that when the Respondent did respond, he falsely told the Claimant the garage would have to be downsized based on feedback from Mr. Mayer.

During this time, the Claimant also sought a copy of the fully executed Contract, as he had only the one he had signed and sent to the Respondent. At one point, Ms. Alker sent it by text message, but the Claimant asked that she resend it via email instead. However, the Claimant was never provided with the fully executed Contract.

The Claimant also stated that by mid-January 2020, he learned by speaking directly with Mr. Mayer that the Respondent had misrepresented that the blueprints were completed, when in fact Mr. Mayer had just received the $500.00 retainer and was about to begin work. The Claimant continued to exchange text messages with Mr. Coleman about the job, but by late January 2020, he felt that Mr. Coleman and the Respondent were not on the same page and that the Respondent was avoiding performing the job. By the end of January 2020, Mr. Coleman expressed to the Claimant that he did not believe the Respondent would complete the job. The Claimant and his wife then messaged the Respondent in an effort to have their deposit refunded, but the Respondent was erratic in his responses, initially agreeing to do so and then insisting he had a right to keep the deposit. Eventually, the Respondent stopped communicating with the Claimant. The Claimant then worked with Mr. Mayer to obtain completed blueprints and hired another contractor to construct the garage. The Claimant presented the testimony of Mr. Mayer, who corroborated the Claimant's statements regarding the Respondent's inconsistent behavior and false statements, noting in particular that he had never told the Respondent that the garage needed to be downsized.

The Fund did not present evidence but argued the Claimant has established an actual loss due to the Respondent's actions, which constitute either abandonment of the Contract without

doing any work or incomplete performance, and that the Claimant is therefore entitled to an award from the Fund.

Based on the evidence before me, I am persuaded that the Respondent performed incomplete home improvements. The Claimant's account is credible, uncontradicted, and corroborated by the documents he submitted into evidence. It is clear that the Respondent agreed to construct the garage for the contract price of $65,000.00, but then did no work other than to pay Mr. Mayer $500.00 towards the blueprints, which the Contract indicated would cost $4,000.00 in full. I am further persuaded that at no time did the Claimant reject any good faith efforts by the Respondent to complete the work, as the Respondent never made any attempt to do so.

While the Fund contended that the Respondent's actions could amount to either abandonment of the Contract without doing any work or incomplete work, I conclude that the Respondent's payment of the $500.00 to Mr. Mayer constitutes some (minimal) performance of the Contract, and that incomplete performance is a more accurate reflection of the facts. This distinction is significant only insofar as the formulas for calculating actual loss are different for abandonment than for incomplete work; however, due to the $20,000.00 cap on any award from the Fund, the application of either formula results in the same award amount.

Having found that the Claimant is eligible 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.[3] 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

[3] I note that there was no evidence of any statutory bar to an award, as made clear by testimony on cross examination elicited by the Fund that addressed this issue. Md. Code Ann., Bus. Reg. § 8-405(f).

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.

In this case, I have found that the Respondent performed some work under the Contract, and the Claimant then retained another contractor to complete. 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).

Here, the Claimant paid the Respondent $21,667.00, which is then added to the amount the Claimant paid another contractor to complete the work ($105,000.00), resulting in $126,667.00. The original contract price of $65,000.00 is then subtracted from this total, resulting in an actual loss of $61,667.00.

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 of $61,667.00 exceeds $20,000.00. Therefore, the Claimant's recovery is limited to $20,000.00. Bus. Reg. § 8-405(e)(1); COMAR 09.08.03.03D(2)(a).[4]

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[4] Had I instead concluded that the Respondent abandoned the Contract, the Claimant's actual loss would have been the amount the Claimant paid to the Respondent, or $21,667.00. COMAR 09.08.03.03B(3)(a). The Claimant would still have been subject to the $20,000.00 cap, resulting in the same award amount as for incomplete performance: $20,000.00. COMAR 09.08.03.03D(2)(a).

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of $61,667.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(c). I further conclude that the Claimant is entitled to recover $20,000.00 from the Fund. Bus. Reg. § 8-405(e)(1); COMAR 09.08.03.03D(2)(a).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant $20,000.00; 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;[5] and

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

Jennifer L. Gresock

May 26, 2021
Date Decision Issued

Jennifer L. Gresock
Administrative Law Judge

JLG/dlm
#191923

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

PROPOSED ORDER

WHEREFORE, this 9th day of July, 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.

Joseph Tunney

Joseph Tunney
Chairman
Panel B
MARYLAND HOME IMPROVEMENT COMMISSION