

<p>IN THE MATTER OF THE CLAIM</p> <p>OF JOHN DOLD,</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 KIMBERLY KAGEN,</p> <p>T/A PHOENIX REMODELING</p> <p>GROUP, LLC,</p> <p>RESPONDENT</p>	<p>* BEFORE JOY L. PHILLIPS,</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-02-23-06668</p> <p>* MHIC No.: 22 (75) 1048</p> <p>*</p>
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PROPOSED DECISION

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STATEMENT OF THE CASE

On June 16, 2022, John Dold (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)¹ Guaranty Fund (Fund) for reimbursement of \$16,607.75 for actual losses allegedly suffered as a result of a home improvement contract with Kimberly Kagen, trading as Phoenix Remodeling Group, LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to 411 (2015 & Supp. 2022).² On February 3, 2023, the MHIC issued a Hearing Order

¹ The MHIC is under the jurisdiction of the Department of Labor.
² Unless otherwise noted, all references to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.

on the Claim. On February 14, 2023, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On May 25, 2023, I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. Jonathan P. Phillips,³ Assistant Attorney General, Department of Labor (Department), represented the Fund. The Claimant, who was in the hospital at the time of the hearing, was represented by his son, James “Jim” Dold, who holds the Claimant’s Power of Attorney.⁴ The Respondent did not appear for the hearing.

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 April 7, 2023, the OAH provided a Notice of Hearing (Notice 1) to the Respondent by United States mail to the Respondent’s address on record with the OAH in Baltimore, Maryland. Notice 1 stated that a hearing was scheduled for May 25, 2023, at 9:30 a.m., at the OAH, 11101 Gilroy Road, Hunt Valley, Maryland. COMAR 09.08.03.03A(2). Notice 1 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 Notice 1 to the OAH. On May 16, 2023, the Respondent’s attorney, Richard Hackerman, Esquire, who had received a copy of Notice 1, struck his appearance on behalf of the Respondent. The Department provided the OAH with the Respondent’s address on file with the Maryland Motor Vehicle Administration, in Owings Mills, Maryland and, on May 16, 2023, the OAH sent the Respondent a new Notice of Hearing (Notice 2) to the Owings Mills address. Notice 2 was sent by the United States Postal Service and was

³ Jonathan P. Phillips and I are not related and had never met prior to this hearing.

⁴ Clmt. Ex. 1.

not returned. 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.

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 to 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

I admitted the following exhibits offered by the Claimant:

Clmt. Ex. 1 Limited Power of Attorney, signed October 6, 2021

Clmt. Ex. 2 Packet containing the following:

- Contract, signed July 8, 2021, and check (pp. 1-3)
- Email from Jim Dold to Rocky, an employee of Respondent, November 16, 2021 (p. 4)
- Text thread between Jim Dold and Rocky, December 13 - 17, 2021 (pp. 5-11)
- Email from Jim Dold to MHIC, May 5, 2022 (p. 12)
- Email from Jim Dold to Respondent, May 18, 2022 (p. 13)
- Email from Jim Dold to Respondent, June 1, 2022 (p. 14)
- Email from Jim Dold to Respondent, May 13, 2022 (p. 15)
- Receipt of filing of criminal charges, undated (p. 16)
- Communication history with Better Business Bureau, April 12-13, 2022 (pp. 17-18)

Clmt. Ex. 3 Six photographs

The Respondent submitted no exhibits.

I admitted the following exhibits offered by the Fund:

- Fund Ex. 1 Letter from MHIC to Respondent, June 28, 2022, with Claim Form attached
- Fund Ex. 2 Hearing Order, February 3, 2023
- Fund Ex. 3 Notice of Hearing, May 16, 2023
- Fund Ex. 4 Licensing History, May 10, 2023

Testimony

James Dold, the Claimant's son/representative, testified.

The Respondent presented no witnesses.

The Fund presented the testimony of Sharon Dold, the Claimant's wife.

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 116244.
2. On July 8, 2021, the Claimant and the Respondent contracted to replace the roof, gutters, and downspouts on the Claimant's home (Contract).
3. The original agreed-upon Contract price was \$17,818.60.
4. The Contract stated that work would begin eight to ten weeks after the deposit was received and would take one to three days to complete.
5. On July 8, 2021, the Claimant paid the Respondent \$16,607.75 by endorsing a check from the Claimant's insurance company for that amount.
6. The Respondent has never fulfilled the Contract. The Claimant's roof, gutters, and downspouts still need to be replaced.
7. In November 2021, the Claimant notified the Respondent that water was leaking from the roof into one of the ceilings in the home. In response, someone from the Respondent's

business came to the home to do minor, temporary repairs to certain shingles to prevent further water infiltration into the ceiling. This was not work done pursuant to the Contract.

8. The Claimant and his son have communicated with the Respondent via texts, emails, and telephone calls. The Respondent and the Respondent's employees made numerous promises to fulfill the Contract. The Respondent gave the Claimant many new estimated completion dates for the Contract. Eventually the Respondent blocked the Claimant's number on her telephone.

9. In February 2022, a sales representative from the Respondent called the Claimant to solicit business, asking whether the Claimant would be interested in a quote from the Respondent to replace his roof. When the Claimant said he already had an unfulfilled Contract with the Respondent to do just that, the sales representative hung up.

10. In April 2022, after the Claimant filed a complaint with the Better Business Bureau (BBB), which then contacted the Respondent for a response, the Respondent told the BBB it would complete the work by the "end of May 2022 at the latest." (Clmt. Ex. 1, p. 18).

11. The Respondent never returned to the home or performed any work under the Contract.

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. 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.⁵

The credible evidence shows that the Claimant and the Respondent contracted to replace the Claimant’s roof, gutters, and downspouts, but the Respondent performed no work under the Contract. After the Claimant notified the Respondent of leaking ceilings in November 2021, later than when the Contract should have been completed, an employee of the Respondent went to the Claimant’s home and did some minor repairs to some of the shingles to try to prevent further water infiltration. I do not consider this to be work done under the Contract, as the Contract called for a complete replacement of the roof. The Respondent performed incomplete home improvements by abandoning the Contract. I thus find that the Claimant is eligible for compensation from the Fund.

The Claimant’s son testified that a sales representative working for the Respondent called his home in February 2022, after the Contract should have been completed, and asked if he

⁵ 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 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).

would like a quote for a new roof. Upon being told he was already under contract with the Respondent for a new roof and that it was months overdue, the sales representative hung up. I found this testimony believable, but shocking. The Claimant's son also testified the Respondent has declared bankruptcy and the Claimant is listed as a creditor.

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). The Claimant has not requested any consequential or punitive damages. The 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).

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 equal to the amount paid to the Respondent and less than \$30,000.00. Therefore, the Claimant is entitled to recover his actual loss of \$16,607.75.

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").

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$16,607.75 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2022); 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. 2022); COMAR 09.08.03.03B(4).

RECOMMENDED ORDER

I RECOMMEND that the Maryland Home Improvement Commission:

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$16,607.75; 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 2, 2023
Date Decision Issued

JLP/dlm -
#205350



Joy L. Phillips
Administrative Law Judge

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

PROPOSED ORDER

WHEREFORE, this 18th 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.

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Panel B

***MARYLAND HOME IMPROVEMENT
COMMISSION***