

IN THE MATTER OF THE CLAIM	* BEFORE WILLIAM F. BURNHAM,
OF ROBIN MORTON,	* 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 JAMES CLARK, III,	*
T/A S & L CONTRACTING	* OAH No.: LABOR-HIC-02-22-29086
SERVICES, INC.,	* MHIC No.: 22 (75) 196
RESPONDENT	*

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On December 7, 2021, Robin Morton (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 \$22,851.20 in actual losses allegedly suffered as a result of a home improvement contract with James Clark, III, trading as S & L Contracting Services, Inc. (Respondent). Md. Code Ann., Bus. Reg.

§§ 8-401 through 8-411 (2015).¹ On November 21, 2022, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On February 14, 2023, I conducted a hearing at the Office of Administrative Hearings in Hunt Valley, Maryland. Code of Maryland Regulations (COMAR) 28.02.01.20; Md. Code Ann., Bus. Reg. § 8-407. Nicholas Sokolow, Assistant Attorney General, Department, represented the Fund. The Claimant was self-represented. Neither the Respondent nor anyone authorized to represent the Respondent attended the hearing, and I proceeded with the hearing in his absence. COMAR 28.02.01.23A.²

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 (2021 & Supp. 2022); 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?

¹ Unless otherwise noted, all references hereinafter to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code and 2022 Supplement.

² Notice was sent to the Respondent at his address of record which the MHIC confirmed with the Motor Vehicle Administration. No notice was returned to the OAH as undeliverable for any reason.

SUMMARY OF THE EVIDENCE

Exhibits

On the Claimant's behalf,³ I admitted an exhibit binder as Claimant Exhibit 1 (CL Ex. 1), with the following:⁴

- Timeline, various dates
- Claim Calculation Support, various dates
- Home Improvement Claim Form, November 29, 2021
- Support Facts, various dates
- Claim Form Calculation Support, various dates
- Communication from the MHIC to the Claimant, November 3, 2021
- Communication from the Claimant to the MHIC, September 8, 2021
- MHIC Complaint Form, revised June 2020
- Contract, November 4, 2020
- Contract, April 11, 2021
- Photocopy of check, November 6, 2020
- Photocopy of check, April 28, 2021
- Photocopy of check, May 6, 2021
- Photocopy of check, May 21, 2021
- Contract, September 1, 2021
- Photographs of gutters, undated
- Photocopy of check, September 19, 2021
- Decks Direct Order 100359305, August 8, 2021
- Decks Direct Packing Slip, August 9, 2021
- Home Depot receipt, August 28, 2021
- Photographs, undated
- Text Messages between the Claimant and the Respondent, various dates
- Emails between the Claimant and the Respondent, various dates
- Custom Design and Build, LLC Contract, approximate start date November 22, 2021

The Respondent did not offer any exhibits into evidence.

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

MHIC Ex. 1 Notice of Hearing, December 13, 2022

MHIC Ex. 2 Hearing Order, November 21, 2022

MHIC Ex. 3 MHIC Claim Form, received December 7, 2021

³ Although the contracts and payments related to the Respondent all reference both the Claimant and her husband, the Claimant submitted the Claim to the MHIC.

⁴ The binder was submitted with colored tabs to which the Claimant referred. I maintained the colored tabs with the exhibit and numbered them for ease of reference.

MHIC Ex. 4 Respondent's MHIC Licensure Information, January 12, 2023

MHIC Ex. 5 Affidavit of David Finneran, January 13, 2023

Testimony

The Claimant testified and presented the testimony of Stephen Morton, her husband.

The Respondent did not present the testimony of any witnesses.

The Fund did not present the testimony of 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/salesperson under MHIC license number 01-74002.
2. At all relevant times, the Claimant owned and resided in a home located in Bel Air, Maryland (Property).
3. On November 5, 2020, the Claimant and the Respondent entered into a contract (Contract) for the remodel of the basement and screening of a deck on the Property. The total cost of the Contract was \$32,300.00 and the Claimant paid the Respondent \$11,000.00 as a down payment. The check was cashed on November 6, 2021.
4. The Contract provided that the screened deck cost \$19,000.00.
5. On April 11, 2021, the Claimant entered into an addendum to the Contract (Addendum) to change the roof of the screened deck to a gabled roof. The Addendum added \$4,500.00 to the Contract for the screened deck.
6. On April 28, 2021, the Respondent began the home improvement and the Claimant paid the Respondent \$13,400.00; the check was cashed the same day.
7. On May 6, 2021, the Respondent informed the Claimant he needed \$6,700.00 to continue the Contract/Addendum.

8. On or before May 20, 2021, the Claimant and the Respondent entered into an oral contract to add a ceiling to the underside of the screened porch (Oral Contract) (Contract/Addendum/Oral Contract collectively Project). The Oral Contract was for \$3,000.00.
9. The total cost for the Project was \$39,800.00, of which the screened deck comprised \$26,500.00.
10. On May 21, 2021, the Claimant paid the Respondent \$3,000.00 for completion of the Oral Contract.
11. The Claimant paid the Respondent a total of \$34,100.00 for the Project.
12. The Claimant communicated with the Respondent principally through texting and emails.
13. On or about June 27, 2021, the Claimant texted the Respondent and informed him that the gutters he installed were overflowing.
14. After weeks of not coming or finishing the Project, the Claimant asked the Respondent to complete the deck before a surprise birthday party.
15. On or about July 25, 2021, the Respondent texted that he would clean up and “finish the deck and basement.” CL Ex. 1, T5.26.
16. On July 28, 2021, the Respondent texted that he would return the following day. The Respondent never contacted the Claimant again after July 28, 2021.
17. The Respondent completed no work on the basement.
18. The Respondent did not complete the Project.
19. The Claimant paid American Home Contractors, Inc. (American) \$864.00 to repair the gutters.⁵ CL Ex. 1, T3.
20. The Claimant paid Decks Direct \$904.11 for vinyl post wraps. *Id.*

⁵ The Claimant actually paid American \$1,364.00 in total, but \$500.00 was for other work.

21. The Claimant paid Home Depot \$349.09 for Azek fascia board. *Id.*
22. The Claimant paid Custom Design and Build, LLC (Custom) \$26,434.00 to complete the basement portion of the Contract. CL Ex. 1, T7.

DISCUSSION

Legal Framework

The Maryland General Assembly created the Fund to provide an available pool of money from which homeowners could seek relief for losses sustained at the hands of incompetent or unscrupulous home improvement contractors. Md. Code Ann., Bus. Reg. §§ 8-401 to 8-411. A homeowner is authorized to “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); *see also* COMAR 09.08.03.03B(2). The statutes governing the Fund define “actual loss” as “the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.” Md. Code Ann., Bus. Reg. § 8-401.

At a hearing on the claim, 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); Md. Code Ann., State Gov’t § 10-217 (2021); 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)).

For the reasons explained below, I find that the Claimant has proven eligibility for compensation from the Fund.

Statutory Eligibility

The evidence in this case establishes there are no impediments to the Claimant's recovery from the Fund. The home improvement work was performed on the Claimant's residence in Maryland. The Claimant is not a relative, employee, officer, or partner of the Respondent; the Claimant is not related to any of the Respondent's employees, officers, or partners. The Claimant did not reject any efforts by the Respondent to resolve the claim, as the Respondent ultimately abandoned the project and made no such efforts. The Contract between the Claimant and the Respondent does not contain an arbitration provision. The Claimant timely filed her Claim with the MHIC on December 7, 2021. Finally, the Claimant has not taken any other legal action to recover monies. Md. Code Ann., Bus. Reg. §§ 8-101(g)(3)(i), 8-405(c), (d), (f), and (g), 8-408(b)(1).

The Respondent Performed Incomplete Home Improvement

The Respondent performed incomplete home improvement. The record demonstrates that the Respondent stopped work on the project around June 2021 and ceased all communication with the Claimant in July 2021. The photographs taken of the Property and the Project document the leaking gutters, unfinished fascia boards and post wraps that the Claimant and her family had to either fix themselves or pay other contractors to remedy; the photos also depict construction materials strewn about the Property. See CL Ex. 1, T5. The Claimant texted and emailed the Respondent numerous times in attempts to get him to complete the Project in a workmanlike manner, or at all. See CL Ex. 1, T6. Accordingly, I find the Respondent abandoned the Project and the Claimant hired other contractors to complete the Project.

The Amount of the Claimant's Actual Loss

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. Md. Code Ann., Bus. Reg. § 8-405(e)(3); COMAR 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.

As discussed above, the Respondent abandoned the Contract after performing some work and the Claimant hired other contractors to complete the Project. 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). Additionally, "the Commission may not award from the Fund an amount in excess of the amount paid by or on behalf of the claimant to the contractor against whom the claim is filed." COMAR 09.08.03.03B(3)(c) and (4).

The Claimant paid the Respondent \$34,100.00 pursuant to the Project. *See* CL Ex. 1, T2. The Claimant paid Custom \$26,434.00 to complete the basement renovation. CL Ex. 1, T7. The Claimant additionally paid American \$864.00 to repair the gutters; Decks Direct \$904.11 for vinyl post wraps; and Home Depot \$349.09 for Azek fascia board. CL Ex. 1, T3. The total the Claimant paid to complete the Respondent's abandoned and unworkmanlike home improvement totaled \$28,551.20. CL Ex. 1, T3 and T7.

Therefore, to calculate the actual loss:

Amount paid to the Respondent	\$ 34,100.00
+ Amount paid to correct or complete the work	<u>\$ 28,551.20</u>
	\$ 62,651.20.00
- Amount of original contract	<u>\$ 39,800.00</u>
Amount of actual loss	\$ 22,851.20

The Business Regulation Article caps a claimant's recovery at \$30,000.00 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. Md. Code Ann., 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 \$30,000.00 and less than the amount paid to the Respondent. Therefore, the Claimant is entitled to recover her actual loss of \$22,851.20.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$22,851.20 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.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$22,851.20; 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;⁶ and

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

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

April 28, 2023
Date Decision Issued

William F. Burnham

William F. Burnham
Administrative Law Judge

WFB/at
#204661

PROPOSED ORDER

WHEREFORE, this 26th day of June, 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.

Lauren Lake

Lauren Lake

Panel B

**MARYLAND HOME IMPROVEMENT
COMMISSION**