

<p><b>IN THE MATTER OF THE CLAIM</b></p> <p><b>OF HERSCHEL SMITH</b></p> <p><b>CLAIMANT</b></p> <p><b>AGAINST THE MARYLAND HOME</b></p> <p><b>IMPROVEMENT GUARANTY FUND</b></p> <p><b>FOR THE ALLEGED ACTS OR</b></p> <p><b>OMISSIONS OF</b></p> <p><b>BRYAN JONES t/a BOJ &amp; SON'S</b></p> <p><b>CONSTRUCTION, LLC</b></p> <p><b>RESPONDENT</b></p>	<p>* <b>BEFORE DENISE O. SHAFFER,</b></p> <p>* <b>AN ADMINISTRATIVE LAW JUDGE</b></p> <p>* <b>OF THE MARYLAND OFFICE</b></p> <p>* <b>OF ADMINISTRATIVE HEARINGS</b></p> <p>*</p> <p>*</p> <p>*</p> <p>* <b>OAH No.: LABOR-HIC-02-22-13893</b></p> <p>* <b>MHIC No.: 22(75)499</b></p> <p>*</p>
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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 March 28, 2022, Herschel Smith (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) under the jurisdiction of the Department of Labor (DOL) for reimbursement of \$9,000.00 in alleged actual losses suffered as a result of a home improvement contract with Bryan Jones t/a BOJ & Son's Construction, LLC

(Respondent).<sup>1</sup> On June 13, 2022, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On September 19, 2022, I held a hearing at the OAH in Hunt Valley, Maryland.<sup>2</sup> Andrew Brouwer, DOL Assistant Attorney General, represented the Fund. Catherine A. Potthast, Esq., represented the Claimant. The Respondent failed to 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.<sup>3</sup> On June 22, 2022, the OAH mailed, by first-class and certified mail, a Notice of Hearing (Notice) to the Respondent at his address of record with the MHIC on West Lanvale Street in Baltimore, MD.<sup>4</sup> The Notice stated that a hearing was scheduled for 9:30 a.m. at the OAH in Hunt Valley, Maryland. The Notice further advised the Respondent that failure to attend the hearing might result in "a decision against you."

The United States Postal Service (USPS) returned as unclaimed the certified mail Notice. The first-class mail Notice was not returned by the USPS. The Respondent did not notify the OAH of any change of mailing address.<sup>5</sup> The Respondent made no request for postponement prior to the date of the hearing.<sup>6</sup> I determined that the Respondent received proper notice and held the hearing.

The contested case provisions of the Administrative Procedure Act, the DOL's hearing regulations, and the Rules of Procedure of the OAH govern procedure in this case.<sup>7</sup>

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<sup>1</sup> Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015). Unless otherwise noted, all references to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.

<sup>2</sup> Bus. Reg. §§ 8-407(a), 8-312.

<sup>3</sup> COMAR 28.02.01.23A.

<sup>4</sup> COMAR 09.08.03.03A(2); COMAR 28.02.01.05C(1).

<sup>5</sup> COMAR 28.02.01.03E.

<sup>6</sup> COMAR 28.02.01.16.

<sup>7</sup> Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021); 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 that loss?

**SUMMARY OF THE EVIDENCE**

**Exhibits**

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

- Cl. #1 Contract with BOJ & Son's Construction. LLC, June 13, 2021
- Cl. #2 Cancelled check # 1351, in the amount of \$5,000.00, June 13, 2021
- Cl. #3 Cancelled check # 1353 in the amount of \$4,000.00, June 21, 2021
- Cl. #4 Contract with Di Fatta Mason Contractor, November 9, 2021
- Cl. #5 Receipt for Payment to Di Fatta Mason Contractor, undated
- Cl #6 Eleven photographs of site before repair by Di Fatta Mason Contractor
- Cl. #7 Photograph of driveway after repair by Di Fatta Mason Contractor
- Cl. # 8 MHIC Complaint, March 28, 2022

I admitted the following exhibits on behalf of the Fund:

- Fund #1 DOL Hearing Order, June 8, 2022
- Fund #2 Copy of the OAH Notice, June 22, 2022
- Fund #3 Letter from the MHIC to the Respondent, dated April 5, 2022 and copy of the Claim, received by the MHIC, March 18, 2022
- Fund #4 The Respondent's licensing history with the MHIC

The Respondent did not appear for the hearing and therefore, he did not submit any exhibits for admission into the record.

Testimony

The Claimant testified. No one appeared to testify on behalf of the Respondent. The Fund presented no 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 under MHIC license number 5750642.
2. On June 13, 2021, the Claimant entered the Contract with the Respondent for the Respondent to demolish, grade, prepare and install a new 70 feet by 6 feet concrete pad and to repair an adjacent retaining wall. The Contract price included “demo, bulk trash removal, labor and all supplies and building materials.” (Cl. #1)
3. The Respondent advised the Claimant that the work outlined in the Contract would take two weeks from start to finish.
4. The agreed-upon price for the work specified in the Contract was \$10,000.00.
5. On June 13, 2021, the Claimant paid the Respondent a deposit of \$5,000.00.
6. The Respondent began work on area designated for the concrete pad installation. He removed dirt from the area and installed some chicken wire across the dirt.
7. The Respondent told the Claimant that he needed an additional payment of \$4,000.00 to pour the concrete. On June 21, 2021, the Claimant paid the Respondent and additional \$4,000.00.

8. The Respondent did not return to finish the work. Despite repeated attempts by the Claimant to reach him, the Respondent did not call back or propose any solution.

9. The Claimant hired another contractor, Di Fatta Masonry Contractor, to complete the work. The cost to install the pad was \$11,500.00. The new contractor needed to remove the useless chicken wire placed by the Respondent and dig the dirt to an eight inch depth.

10. There was no value from the work performance by the Respondent. In fact, it had to be undone to properly install the concrete pad.

11. The Respondent did not refund any money to the Claimant.

#### **DISCUSSION**

The Claimant has the burden of proving the validity of his claim by a preponderance of the evidence.<sup>8</sup> “[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.”<sup>9</sup>

An owner may recover compensation from the Fund “for an actual loss that results from an act or omission by a licensed contractor.”<sup>10</sup> Actual loss “means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.”<sup>11</sup> For the following reasons, I find that the Claimant has proven eligibility for compensation.

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<sup>8</sup> Bus. Reg. § 8-407(e)(1); Md. Code Ann., State Gov’t § 10-217 (2021); COMAR 09.08.03.03A(3); COMAR 28.02.01.21K(1).

<sup>9</sup> *Coleman v. Anne Arundel Cty. Police Dep’t*, 369 Md. 108, 125 n.16 (2002).

<sup>10</sup> Md. Code Ann., 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.”).

<sup>11</sup> Md. Code Ann., Bus. Reg. § 8-401.

Based on the unrefuted evidence, the Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimant. The Claimant paid the Respondent \$9,000.00 of the \$10,000.00 contract price to install a concrete pad and repair an adjacent retaining wall.

According to the Claimant, the Respondent initially started working on digging out the area. He only dug to a depth of 3 inches; however, and then put down chicken wire instead of rebar. The Respondent then asked for another payment of \$4,000.00 before he could pour the concrete. The Claimant gave the Respondent \$4,000.00 and never saw him again. The Claimant tried to reach the Respondent with no success.

The Claimant testified that he "gave up" after a few months of trying to reach the Respondent and contracted with another company to complete the work. He ultimately paid that contractor \$11,500.00 to undo the Respondent's work and complete the project.

I conclude that although the Respondent began work under the Contract, he failed to complete that work. I further conclude that the Claimant has provided evidence, that it cost him \$11,500.00 to complete the work. Accordingly, the Claimant has experienced an actual loss.

MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work.

In this case, the Respondent performed work under the Contract, and the Claimant has retained another contractor to complete or remedy that work. Accordingly, the following regulatory formula measures the Claimants' 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.<sup>12</sup>

The calculation is as follows:

\$9,000.00	paid to the Respondent under the Contract
<u>+\$11,500.00</u>	paid to repair or complete the home improvements
\$20,500.00	
<u>- \$10,000.00</u>	(original Contract price)
\$10,500.00	

Effective July 1, 2022, a claimant's recovery is capped at \$30,000.00 for acts or omissions of one contractor.<sup>13</sup> However, pursuant to COMAR 09.08.03.0B(4), "[t]he 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." In this case, the Claimant paid the Respondent \$9,000.00 under the Contract; accordingly, his actual loss compensable by the MHIC Fund is limited to that amount. Therefore, the Claimant is entitled to recover \$9,000.00 of his actual loss.

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

I conclude that the Claimant sustained an actual and compensable loss of \$9,000.00. as a result of the Respondent's acts or omissions.<sup>14</sup> I further conclude that the Claimant is entitled to recover that amount from the Fund.

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<sup>12</sup> COMAR 09.08.03.03B(3)(c).

<sup>13</sup> H.D. 917, 2022 Leg., 444th Sess. (Md. 2022) (to be codified in section 8-405(e)(1) of the Business Regulation Article). See also Bus. Reg. § 8-405(e)(5); COMAR 09.08.03.03B(4), D(2)(a). The increased cap is applicable to any claim on or after July 1, 2022, 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").

<sup>14</sup> Md. Code Ann., Bus. Reg. §§ 8-401, 8-405; COMAR 09.08.03.03B(3)(c).

**RECOMMENDED ORDER**

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

**ORDER** that the Maryland Home Improvement Commission Guaranty Fund award the Claimants \$9,000.00; and

I **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>15</sup> and

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

October 24, 2022  
Date Decision Issued

*Denise O. Shaffer*  
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Denise O. Shaffer  
Administrative Law Judge

DOS/at  
#201450

<sup>15</sup> See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii); COMAR 09.08.01.20.



**PROPOSED ORDER**

***WHEREFORE, this 7<sup>th</sup> day of December, 2022, 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***