IN THE MATTER OF THE CLAIM	*	**BEFORE TRACEE N. HACKETT,**
OF MICHAEL AND CHARLENE	*	**AN ADMINISTRATIVE LAW JUDGE**
WEITZMAN,	*	**OF THE MARYLAND OFFICE**
CLAIMANTS[1]	*	**OF ADMINISTRATIVE HEARINGS**
AGAINST THE MARYLAND HOME	*	
IMPROVEMENT GUARANTY FUND	*	
FOR THE ALLEGED ACTS OR	*	
OMISSIONS OF DANIEL OSTROW,	*	**OAH No.: LABOR-HIC-02-22-10983**
T/A PUDDLES COMPANY,	*	**MHIC No.: 22 (75) 669**
RESPONDENT	*	

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PROPOSED DECISION

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STATEMENT OF THE CASE

On March 9, 2022,[2] Michael and Charlene Weitzman (Claimants) 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 $20,937.50 for

[1] At the beginning of the hearing, the Claimants' Counsel indicated that Dr. Weitzman was unavailable but Charlene Weitzman, his wife, was present and available. Further, Mrs. Weitzman was a joint owner of the property and had direct communication with the Respondent regarding the home improvement which is the subject of the Claim; therefore, Counsel requested that Mrs. Weitzman be added as a party. The Fund did not object. Although Dr. Weitzman filed the Claim, I will refer to Dr. and Mrs. Weitzman as the Claimants throughout the decision.
[2] The Claim was dated for March 3, 2022, but was not received by the MHIC until March 9, 2022.

actual losses allegedly suffered as a result of a home improvement contract with Daniel Ostrow, trading as Puddles Company (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015).[3] On May 6, 2022, the MHIC issued a Hearing Order on the Claim and forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On August 26, 2022, I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. Andrew Brouwer, Assistant Attorney General, Department, represented the Fund. William Chase, Esquire, represented the Claimants, who were present.

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 June 10, 2022, the OAH provided a Notice of Hearing (Notice) to the Respondent by United States first-class mail and by certified mail, return receipt requested 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 August 26, 2022 at 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 Notices were returned to the OAH with the notations: not deliverable as addressed (first-class mail) and as unclaimed (certified mail). The Respondent did not notify the OAH of any change of mailing address. COMAR 28.02.01.03E. 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.

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

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 through 10-226 (2021); COMAR 09.01.03; and COMAR 28.02.01.

ISSUES

1. Did the Claimants 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 Claimants:

Clmt. Ex. A - Estimate from Puddles Company to the Claimants, dated April 28, 2021

Clmt. Ex. B - Check No. 5234 from the Claimants to the Respondent, dated May 1, 2021

Clmt. Ex. C - Email from the Respondent to the Claimants regarding Invoice No. 1159, dated September 15, 2021

Clmt. Ex. D - Darling & Daughters, TEM Trucking, Inc., Pool Water Invoice #5298, dated November 23, 2021

Clmt. Ex. E - Email from the Respondent to the Claimants, dated November 5, 2021

Clmt. Ex. F - Email from the Claimants to the Respondent, dated November 5, 2021

Clmt. Ex. G - Letter to the Claimants from Galloway Pool Service, dated December 16, 2021

Clmt. Ex. H - Galloway Pool Service Addendum, dated April 13, 2022

Clmt. Ex. I - Wells Fargo Printout of Check No. #5352 from the Claimants to Galloway Pool Service, dated May 17, 2022

Clmt. Ex. J - Wells Fargo Printout of Check No. #5367 from the Claimants to Galloway Pools, dated July 6, 2022

Clmt. Ex. K - Wells Fargo Printout of Check No. #5352 from the Claimants to Galloway Pool Service, dated July 21, 2022

Clmt. Ex. L - Acceptance of Proposal between the Claimants and Galloway Pool Service, dated March 3, 2022

Clmt. Ex. M - Proposal between the Claimants and Galloway Pool Service, dated March 3, 2022

I admitted the following exhibits offered by the Fund:

Fund Ex. 1 - Notice of Hearing, dated June 10, 2022

Fund Ex. 2 - Hearing Order, dated May 6, 2022

Fund Ex. 3 - Letter from MHIC to the Respondent, dated March 16, 2022; and Claim, dated March 3, 2022

Fund Ex. 4 - Maryland Department of Labor, I.D. Registration, MHIC Inquiry, dated August 22, 2022

Fund Ex. 5 - Affidavit from Charles Corbin, MHIC Investigator, dated August 23, 2022

Fund Ex. 6 - Estimate 1142 from the Respondent to the Claimants, dated April 28, 2021

Testimony

The Claimants[4] testified and did not present other witnesses.

The Fund did not present 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 under MHIC license number 01-121024 and 05-140498.

2. On April 28, 2021, the Claimants and the Respondent entered into a contract to renovate an existing outdoor pool (Contract).

[4] Only Mrs. Weitzman testified, but I have referred to Dr. and Mrs. Weitzman as the Claimants throughout this decision.

3. The original agreed-upon Contract price was $30,312.50. The parties then agreed that the Respondent would provide a $1,200.00 discount, and the Contract price was changed to $29,112.50.

4. The Contract did not specify when the work would begin, but the Respondent began work in August 2021 and completed approximately two weeks of work.

5. The Claimants paid the Respondent a total of $28,000.00 which consisted of a check payment of $17,000.00 on May 1, 2021; and a credit card payment of $11,000.00 on September 15, 2021.

6. On or around November 5, 2021, the Respondent informed the Claimants via email that he had been previously unable to obtain the plaster, but would hire a plaster crew to complete the installation. The Respondent further explained that he had delayed the project because he had underestimated the costs of materials, and offered to reimburse them for $5,900.00 upon contract termination.

7. On or around November 5, 2021, the Claimants responded to the Respondent's email and requested that the Respondent finish the work.

8. The Respondent did not order the plaster, did not complete the pool renovation, and did not reimburse the Claimants for the $5,900.00.

9. On November 23, 2021, the Claimants attempted to winterize their pool and purchased 4,000 gallons of water to fill the pool from Darling & Daughters, TEM, Trucking, Inc. for $980.00.

10. On or around November 25, 2021, all of the water had drained from the pool.

11. On November 29, 2021, Galloway Pool Service winterized the pool.

12. On December 16, 2021, at the request of the Claimants, Galloway Pool Service inspected the work completed by the Respondent. The work completed by the Respondent was unworkmanlike in the following respects:

a. the coping was not leveled, and was not cut correctly which caused uneven joints;

b. the tile was not leveled and was unevenly installed around the perimeter;

c. the pool surface was not prepared properly for resurfacing;

d. the caulk joints had mortar in it; and

e. the pool was not retaining water.

13. On March 3, 2022, the Claimants contracted with Galloway Pool Service for a total of $22,050.00, which consisted of repair/replacement of work previously completed by the Respondent. Specifically, the work including the following: resurface the pool; remove and replace safety grip brick coping; add trim tile dots on steps/swimouts; remove existing waterline tile and install new tile; remove bond beam to determine damage; replumb filter; repair cracks; winterize poor lines; pressure test line; install new drain; and refill and balance the pool.

14. On April 13, 2022, the Claimants amended their Contract with Galloway Pool Service to include upgrades to the tile and pool surface in the amount of $9,175.00, which were outside of the scope of the original work completed by the Respondent.

15. The Claimants paid a total of $31,206.08 to Galloway Pool Services, which include a check payment of $11,000.00 on May 17, 2022; a check payment of $7,200.00 on July 6, 2022; and a check payment of $13,006.08 on July 21, 2022.

DISCUSSION

The Claimants have 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 (2021);

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 Claimants has proven eligibility for compensation. The Claimants requested recovery from the Fund in the amount of $20,937.50, the costs incurred to repair and replace the incomplete and unworkmanlike work performed on their pool by the Respondent. The Fund concurred that the Claimants should recover from the Fund based upon the evidence and argued that the calculation under COMAR 09.08.03.03B(3)(c) should be utilized to determine the amount of the actual loss.

The Claimants did not unreasonably reject good faith efforts by the Respondent to resolve the claim. *Id.* § 8-405(d). When the Respondent made the reimbursement offer in November 2021, almost six months had transpired from the Contract date and the Claimants had already paid $28,000.00 of the $29,112.50 Contract Price. At that point, the Respondent had only completed two weeks of work. It was not unreasonable for the Claimants to reject this offer and request completion of the work, which they had already paid for at that time.

The Respondent performed unworkmanlike, inadequate, or incomplete home improvements. The Claimants testified credibly that the coating installed by the Respondent was

uneven, the decoration around the outside of the pool was poor and did not fit; and the bond coating installed created a ledge around the pool, instead of being flush. Additionally, the Claimants testified that the Respondent drained the pool when he began work and in order to winterize the pool, the Claimants took it upon themselves to fill the pool with water in November 2021. However, the 4,000 gallons of water drained in two days. The Claimants last heard from the Respondent in November/December 2021, and the Respondent never returned to complete the project. I found the Claimants' testimony credible based upon her demeanor, the level of details in her testimony, and her candor when she had to correct herself.

I thus find that the Claimants are eligible for compensation from the Fund. Having found eligibility for compensation I must determine the amount of the Claimants' actual loss and the amount, if any, that the Claimants are 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); 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.

The Respondent performed some work under the Contract, and the Claimants have retained other contractors to complete or remedy that work. Accordingly, the following formula appropriately 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.

COMAR 09.08.03.03B(3)(c).

In this case, the Claimants paid the Respondent a total of $28,000.00 out of the $29,112.50 adjusted contract price. Additionally, the Claimants have paid $31,206.08 to Galloway Pool Services; however, this cost includes the upgrades to the tile and pool surface which are beyond the scope of work needed to repair the poor work completed by the Respondent. Therefore, the Claimants are limited to the amount of their original contract with Galloway Pool Service of $22,050.00. Additionally, the $980.00 charged by Darling & Daughters for winterization to fill the pool was also outside of the scope of work in the Contract. Therefore, the actual cost is $29,937.50.[5]

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] In this case, the Claimants' actual loss of $29,937.30 exceeds the amount paid to the Respondent. Therefore, the Claimants' recovery is limited to $28,000.00, the amount paid to the Respondent. COMAR 09.08.03.03(B)(4). ("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.").

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimants has sustained an actual and compensable loss of $29, 937.50 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-

[5] This calculation is as follows: $28,000.00 (amount paid to Respondent) + $22,050.00 (amount paid to other contractors to repair poor work) = $55,050.00 - $29,112.50 (adjusted contract price) = $29,937.50 (actual loss).
[6] 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").

405 (2015); COMAR 09.08.03.03B(3)(c). I further conclude that the Claimants is entitled to recover $28,000.00 the Fund. COMAR 09.08.03.03(B)(4).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimants $28,000.00; 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;[7] and

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

Tracee N. Hackett

October 13, 2022
Date Decision Issued

Tracee N. Hackett
Administrative Law Judge

TNH/ja
#200588

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

PROPOSED ORDER

WHEREFORE, this 7th 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