

IN THE MATTER OF THE CLAIM	* BEFORE EDWARD J. KELLEY,
OF SARA GLACKEN,	* 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 DANIEL OSTROW,	*
T/A PUDDLES COMPANY,	* OAH No.: LABOR-HIC-02-23-25553
RESPONDENT	* MHIC No.: 22 (75) 906

\* \* \* \* \*

**PROPOSED DECISION**

STATEMENT OF THE CASE  
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SUMMARY OF THE EVIDENCE  
PROPOSED FINDINGS OF FACT  
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PROPOSED CONCLUSIONS OF LAW  
RECOMMENDED ORDER

**STATEMENT OF THE CASE**

On February 21, 2023, Sara Glacken (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)<sup>1</sup> Guaranty Fund (Fund) for reimbursement of \$35,795.00 for 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 & Supp. 2023).<sup>2</sup> On September 28, 2023, the MHIC issued a Hearing Order on the

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

Claim. On September 29, 2023, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On November 21, 2023, I held a remote hearing on the Webex videoconferencing platform (Webex). Bus. Reg. §§ 8-407(a), 8-312; Code of Maryland Regulations (COMAR) 28.02.01.20B(1). Catherine Villareale, Assistant Attorney General, Department, represented the Fund. The Claimant represented herself. The Respondent did not appear.

After waiting over 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. COMAR 28.02.01.23A. On October 26, 2023, the OAH provided a Notice of Hearing (Notice) to the Respondent by United States mail and certified mail. COMAR 28.02.01.05C(1). The Notice stated that a hearing was scheduled for November 21, 2023, at 9:30 a.m., via Webex. COMAR 09.08.03.03A(2). The Notice 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 the Notice to the OAH. 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.

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 & Supp. 2023); 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. A - Contract, June 25, 2021
- Clmt. Ex. B - Copy of \$20,000.00 check paid to the Respondent, June 25, 2021
- Clmt. Ex. C - Proof of \$16,000.00 payment to the Respondent, August 5, 2021
- Clmt. Ex. D - Permit documentation, November 18, 2021
- Clmt. Ex. E - Proof of Arbitration, September 28, 2022
- Clmt. Ex. F - Narrative, undated
- Clmt. Ex. G - Communications between the Complainant and the Respondent, various dates

The Respondent did not offer any exhibits for admission.

I admitted the following exhibits offered by the Fund:

- Fund Ex. 1 - MHIC Claim Form and Letter from Joseph Tunney, Chairman, MHIC, February 27, 2023
- Fund Ex. 2 - Hearing Order, September 28, 2023
- Fund Ex. 3 - Notice of Remote Hearing, October 26, 2023
- Fund Ex. 4 - Licensing History, printed November 16, 2023

### Testimony

The Claimant testified and did not present other witnesses.

The Respondent did not appear.

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.
2. On June 25, 2021, the Claimant and the Respondent entered into a contract where the Respondent agreed to construct an in-ground concrete pool at the Claimant's residence (Contract).
3. The original agreed-upon Contract price was \$100,000.00.
4. On June 25, 2021, the Claimant paid the Respondent \$20,000.00 pursuant to the terms of the Contract.
5. The Contract did not have a start date or an end date, but the parties agreed that construction would begin in October of 2021 and construction would be completed in the Spring of 2022.
6. In August of 2021, the Respondent contacted the Claimant, announced his intent to begin excavation, and requested payment of the next installment.
7. On August 5, 2021, the Claimant paid the Respondent \$16,000.00.
8. The Respondent did not begin excavation after receiving the second payment, nor did he do any other work at the residence.
9. In August 2021, the Respondent applied to the county for a permit, but did not pay the permit fee.
10. In September of 2021, the Claimant contacted the Respondent to confirm a construction schedule, but the Respondent was not responsive.

11. Concerned by the Respondent's inaction and lack of communication, the Claimant contacted the county in October of 2021 to determine the status of the permit. The county informed the Claimant that the permit was on hold because the \$205.00 permit fee had not been paid.

12. In November of 2021, the Respondent requested to delay the start date until the Spring of 2022 because of other ongoing projects and a labor shortage. The Respondent told the Claimant that he would still complete the pool in the Spring of 2022 as promised.

13. At this time, the Claimant demanded that the Respondent promptly pay the \$205.00 permit fee out of the \$36,000.00 she had paid him, which the Respondent did.

14. The Respondent did no other work on the Contract.

15. In February of 2022, another pool company contacted the Claimant to state that it was reaching out to the Respondent's customers to complete his outstanding projects.

16. On February 17, 2022, the Claimant sent the Respondent an email demanding a refund of the \$36,000.00 paid to the Respondent.

17. In March of 2022, the Respondent declared bankruptcy.

18. The Respondent did not respond to any other communications from the Claimant attempting to resolve the dispute pursuant to the Contract.

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

20. The Claimant did not seek another licensed contractor to complete the Contract because she could not afford to do so.

21. The Claimant entered into a different contract with a different contractor to construct a different pool at her residence.

22. The county allowed the Claimant to use the permit obtained by the Respondent for the pool that was constructed at her residence.

## DISCUSSION

### LEGAL FRAMEWORK

“The Fund was established to provide an additional remedy for homeowners who suffered actual loss due to unsatisfactory work performed by a home improvement contractor.” *Brzowski v. Maryland Home Imp. Comm’n*, 114 Md. App. 615, 628 (1997); Bus. Reg. § 8-405(a) (Supp. 2023); *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.”). By statute, certain claimants are excluded from recovering from the Fund altogether. Specifically, an award from the Fund may occur only if the evidence shows: (a) the claimant resides in the home as to which the claim is made, or owns no more than three dwelling places; (b) the claimant is not an employee, officer, or partner of the contractor; or the spouse or other immediate relative of the contractor or the contractor’s employees, officers or partners; (c) the work at issue did not involve new home construction; (d) the claimant did not unreasonably reject the contractor’s good faith effort to resolve the claim; (e) the claimant complied with any contractual arbitration clause before seeking compensation from the Fund; (f) there is no pending claim for the same loss in any court of competent jurisdiction and the claimant did not recover for the actual loss from any source; and (g) the claimant filed the claim with the MHIC within three years of the date the claimant knew, or with reasonable diligence should have known, of the loss or damage. Bus. Reg. §§ 8-405(c), (d), (f), and (g), 8-408(b)(1) (Supp. 2023); Bus. Reg. § 8-101(g)(3)(i) (Supp. 2023).

If not excluded on these grounds, a claimant 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. 2023); *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.

#### **ANALYSIS**

The Fund’s counsel did not assert that any statutory exclusions applied to this case, and I find that the Claimant was not subject to any of the statutory exclusions for recovery from the Fund. Additionally, the evidence demonstrates that the Respondent performed an inadequate, unworkmanlike, and incomplete home improvement.

The Claimant testified thoroughly and credibly about all facets of the project, and this testimony was corroborated by exhibits, which explained a timeline of the relevant events and her communications with the Respondent. The Claimant fulfilled her contractual obligation by paying the Respondent over one-third of the Contract price, and she was more than patient as the project was delayed without adequate explanation. The Respondent led the Claimant to believe he could complete the Contract by installing a fully functioning pool by the Spring of 2022 when he clearly did not have the ability or the intention of doing so. The Claimant paid the Respondent \$36,000.00, and the Respondent did not perform any construction work. The only task the Respondent completed was obtaining the permit from Washington County, which cost \$205.00, and the Claimant needed to remind him to do that. Ultimately, after months of inaction and unresponsiveness, the Respondent declared bankruptcy and discontinued all communications with the Claimant. The Respondent ignored the Claimant’s attempts to resolve the dispute.

The Respondent did not attend the hearing to dispute any of the allegations against him. Based on the evidence presented, both the Claimant and the Fund's counsel argued that the Claimant proved eligibility for compensation from the Fund. I find that the Claimant is eligible for compensation from the Fund because the evidence demonstrates conclusively that the Respondent did not fulfill his obligation to perform an adequate, workmanlike, and complete home improvement.

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. 2023); 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 Fund's counsel asserted that because the Respondent obtained the permit, which the Claimant was able to use, and the Claimant did not seek another contractor to complete the Contract, the following formula appropriately measures the Claimant's actual loss: "If the contractor did work according to the contract and the claimant is not soliciting another contractor to complete the contract, the claimant's actual loss shall be the amount which claimant paid to the contractor less the value of any materials or services provided by the contractor." COMAR 09.08.03.03B(3)(b).

The Claimant testified that she did not seek another contractor to complete the Contract because after giving the Respondent \$36,000.00, she could not afford to do so. The Claimant stated that the pool she eventually had constructed at her residence resulted from a different contract for a completely different pool with a new licensed contractor. The new contractor was allowed to use the permit the Respondent obtained from the county to construct the pool, but



otherwise started anew. I fully credit the Claimant's testimony. Given these circumstances, I agree that the Fund's suggested formula applies to this case. Pursuant to this formula, the Claimant's actual loss is the \$36,000.00 she paid to the Respondent less the \$205.00 permit fee, which equals \$35,795.00.

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.<sup>3</sup> Bus. Reg. § 8-405(e)(1), (5) (Supp. 2023); COMAR 09.08.03.03B(4). In this case, the Claimant's actual loss of \$35,795.00 is less than the amount paid to the Respondent but it exceeds \$30,000.00. Therefore, the Claimant's recovery is limited to \$30,000.00.

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

I conclude that the Claimant has sustained an actual loss of \$35,795.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2023); COMAR 09.08.03.03B(3)(a). I further conclude that the Claimant is entitled to recover \$30,000.00 from the Fund.

#### **RECOMMENDED ORDER**

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

**ORDER** that the Maryland Home Improvement Guaranty Fund award the Claimant \$30,000; and


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<sup>3</sup> 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").

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>4</sup> and

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

January 5, 2024  
Date Decision Issued

  
Edward J. Kelley  
Administrative Law Judge

EJK/ac  
#208588

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<sup>4</sup> See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

**PROPOSED ORDER**

***WHEREFORE, this 23<sup>rd</sup> day of February, 2024, 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***