

<p>IN THE MATTER OF THE CLAIM</p> <p>OF MICHAEL ZARRO,</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 LIZBETH MACIAS,</p> <p>T/A CLS SERVICES, LLC,</p> <p>RESPONDENT</p>	<p>* BEFORE JENNIFER L. GRESOCK,</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-02-23-06643</p> <p>* MHIC No.: 23 (75) 109</p>
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PROPOSED DECISION

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STATEMENT OF THE CASE

On December 6, 2022, Michael Zarro (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)¹ Guaranty Fund (Fund) for reimbursement of \$2,850.00 for actual losses allegedly suffered as a result of a home improvement contract with Lizbeth Macias, trading as CLS Services, LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2023).² On March 1, 2023, the MHIC issued a Hearing Order

¹ The MHIC is under the jurisdiction of the Department of Labor (Department).

² Unless otherwise noted, all references to the Business Regulation Article are to the 2015 Volume of the Maryland Annotated Code.

on the Claim. On March 9, 2023, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On August 17, 2023, I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. Catherine Villareale, Assistant Attorney General, Department, represented the Fund. The Claimant was represented by Kaitlin R. Zarro, Esq. The Respondent did not appear, nor did anyone appear on her behalf.

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 14, 2023, the OAH provided a Notice of Hearing (Notice) to the Respondent by United States mail, both certified and first-class, to two different addresses. COMAR 28.02.01.05C(1).³ The Notice stated that a hearing was scheduled for August 17, 2023, at 9:30 a.m. at the OAH in Hunt Valley, Maryland. 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 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

³ Notice was sent to the Respondent at 1211 Glenback Avenue, Pikesville, MD 21208 by first-class mail and certified mail, as well as to 8450 Church Road, Pasadena, MD 21222 by first-class mail and certified mail. All Notices were returned as undeliverable except the Notice sent by first-class mail to the Glenback Avenue address. The Glenback Avenue address was provided to the OAH by the Fund on May 8, 2023, along with an affidavit from David R. Finneran, Executive Director of the MHIC, stating that he had obtained that address from the MVA and that it was the current address on record with the MVA. (Fund Ex. 5.) Additionally, on May 9, 2023, an OAH clerk spoke with the Respondent by telephone about a postponement request and returned notices for an earlier hearing date, May 10, 2023. That hearing date was ultimately postponed and, based on information from the clerk, I arranged for a Spanish interpreter for the August 17, 2023 hearing date. I dismissed the interpreter when the Respondent failed to appear.

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

Exhibits⁴

I admitted the following exhibits offered by the Claimant:

- Clmt. Ex. 1 Contract, dated May 27, 2022
- Clmt. Ex. 2 Payment by check to the Respondent, dated May 27, 2022 (\$2,850.00)
- Clmt. Ex. 3 Emails between the Claimant and the Respondent, dated May 27, 2022, through July 25, 2022
- Clmt. Ex. 4 Test message correspondence between the Claimant and Mr. Zelaya, dated June 4, 2022, through July 5, 2022
- Clmt. Ex. 5 Contract with First Impressions Construction Services, LLC, dated January 10, 2023

I admitted the following exhibits offered by the Fund:

- Fund Ex. 1 Letter from the MHIC to the Respondent, dated December 20, 2022, with attached Home Improvement Claim Form, dated November 18, 2022
- Fund Ex. 2 Hearing Order, dated March 1, 2023

⁴ The Respondent was not present and thus did not offer any exhibits for admission into evidence.

Fund Ex. 3 Notice of Hearing, dated June 14, 2023

Fund Ex. 4 MHIC license information for the Respondent, dated May 3, 2023

Fund Ex. 5 Affidavit of David R. Finneran, Executive Director, MHIC, dated May 8, 2023

Testimony

The Claimant 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.

2. Daniel Zelaya was the Respondent's employee. He worked as a salesperson and was the only individual employed by the Respondent with whom the Claimant had any in-person contact. The Claimant did not meet the Respondent in person at any time.

3. On May 27, 2022, the Claimant and Mr. Zelaya, on behalf of the Respondent, entered into a contract (Contract) for the construction of built-in bookshelves with two art lights in the Claimant's home office and to install crown molding and new recessed lighting in the same room. The Contract specified that any damage was to be patched and painted.

4. The original agreed-upon Contract price was \$5,700.00, to be paid in two payments – one as a deposit, and the other upon completion of the job.

5. The Claimant made an initial deposit of \$2,850.00 at the time the Contract was executed.

6. Though not explicitly specified in the Contract, Mr. Zelaya and the Claimant agreed that the work would begin on June 13, 2022.

7. Mr. Zelaya did not appear at the Claimant's home to perform the work on June 13, 2022, and he was not responsive to the Claimant's calls or texts that day.

8. On June 14, 2022, Mr. Zelaya responded to the Claimant by text, stating that he was ill. The Claimant and Mr. Zelaya agreed that the work would instead begin on June 20, 2022.

9. Mr. Zelaya did not appear at the Claimant's home to perform the work on June 20, 2022, and he was not responsive to the Claimant's calls or texts until June 25, 2022. On that date, Mr. Zelaya apologized and told the Claimant a "work situation" had arisen.

10. Mr. Zelaya and the Claimant agreed that the work would begin on June 27, 2022.

11. On June 27, 2022, Mr. Zelaya dropped off wood for the shelving as well as two base cabinets at the Claimant's home. However, he did not perform any of the work at that time and did not respond to any of the Claimant's subsequent calls or texts that week.

12. The purchase price for each of the two cabinets was about \$300.00. The cost of the wood was approximately \$40.00.

13. On July 1, July 6, and July 25, 2022, the Claimant emailed the Respondent to inquire about the status of the project. He received no response to any of these emails.

14. The Claimant received no further communications from either Mr. Zelaya or the Respondent.

15. On January 10, 2023, the Claimant entered into a contract with First Impressions Construction Services, LLC. (First Impressions), a licensed contractor. The scope of the contract with First Impressions was identical to that of the Contract; the contract price was \$7,000.00.

16. First Impressions completed the project, and the Claimant paid the contractor \$7,000.00. First Impressions did not use any of the materials that had already been purchased and delivered 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. 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. There is no dispute that the Respondent was a licensed home improvement contractor at the time Mr. Zelaya entered into the Contract (on the Respondent’s behalf) with the Claimant.⁵ For the following reasons, I find that the Claimant has proven eligibility for compensation.⁶

⁵ Fund Ex. 4 reflects the undisputed license information.

⁶ By statute, certain claimants are excluded from recovering from the Fund altogether. In this case, the evidence, including the Claimant’s testimony on cross examination, established that there are no such statutory impediments to the Claimant’s recovery. 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. 2023). 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. 2023). 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. 2023). 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. 2023). Additionally, the Claimant did not unreasonably reject good faith efforts by the Respondent to resolve the claim, as the record makes clear that no such efforts took place. *Id.* § 8-405(d) (Supp. 2023).

The Claimant credibly testified that the Contract for the construction of the bookcases, crown molding, and light installation was executed on May 27, 2022, and that he paid half of the total Contract amount, or \$2,850,00, at that time. However, Mr. Zelaya repeatedly failed to show up at the Claimant's home, or to call or text regarding his absence, on the agreed-upon dates for the work to begin. Despite the Claimant's efforts to call, text, and email both Mr. Zelaya and the Respondent, he heard nothing from Mr. Zelaya after June 27, 2022, and nothing from the Respondent after the initial May 27, 2022 email confirming receipt of the signed Contract and deposit. Neither the Respondent nor its employee, Mr. Zelaya, performed any work specified in the Contract.

The Claimant had excellent recall of the sequence of events, including his communications with Mr. Zelaya. His recollection of details is corroborated by the documents he provided, including the Contract, payment, emails sent to the Respondent, and texts exchanged with Mr. Zelaya. (Clmt. Exs. 1, 2, 3, and 4.) Accordingly, I am persuaded that the Respondent performed incomplete home improvements; in fact, the Respondent abandoned the job after performing no work other than purchasing and delivering two base cabinets and some plywood. I thus find that the Claimant is eligible for compensation from the Fund.

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.

Based on the evidence, the Respondent clearly abandoned the Contract after purchasing and delivering minimal materials. The Fund recommends the following as the most appropriate formula: "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 the claimant paid to the original contractor less the value of any materials or services provided by the contractor." COMAR 09.08.03.03B(3)(b). This formula is not a perfect fit, as the Claimant did in fact hire another contractor (First Impressions) to perform the work. An alternate formula, COMAR 09.08.03.03B(3)(c), accounts for partially completed work that is ultimately completed or remedied by another contractor. However, it is crafted to separate the overlapping work performed by multiple contractors, which also is not a perfect fit in the instant case, as the Respondent performed no labor or services at all, and the materials delivered could not be used by the contractor later hired to perform the work. In other words, there is no overlapping work to be separated.

I therefore conclude that while COMAR 09.08.03.03B(3)(b) is not a perfect fit, it is the most appropriate formula.⁷ The Fund contended that application of this formula results in the following calculation: \$2,850.00 (the amount the Claimant paid to the Respondent) less the cost of the base cabinets (\$600.00), resulting in an actual loss of \$2,250.00. (The Fund did not recommend any deduction for the cost of the plywood, noting that its value was "de minimis.") The Claimant did not dispute that the total purchase price for each of the two cabinets was \$300.00; indeed, this figure is based on his own testimony that he contacted multiple home improvement retail stores to obtain this information.⁸ However, he maintained that the cost of

⁷ That COMAR 09.08.03.03B(3) provides for the application of a "unique measurement" when a particular claim so requires allows for appropriate deviation when the formulas delineated in COMAR 09.08.03.03B(3)(a)-(c) are not an exact fit.

⁸ The Contract does not itemize the cost or estimated cost of materials.

the cabinets should not be deducted, as they have no value to him and in fact have taken up space in his garage for fourteen months. The Claimant testified that his efforts to return the cabinets were fruitless, as they had been discontinued and the retailers would not accept a return. Further, First Impressions was not able to use the cabinets when it completed the work.

I note that COMAR 09.08.03.03B(3)(b) refers to the “value” of any materials, rather than the cost. I agree with the Claimant that the cabinets Mr. Zelaya delivered but did not install, and that could not be used in the project as completed by First Impressions, are effectively of no value to him. The Claimant was diligent in his efforts to recoup the cost himself but credibly testified that was unable to do so. Accordingly, I decline to consider the cabinets to be materials of value that should offset the actual loss. I therefore find that the Claimant’s actual loss is the full amount paid to the Respondent, or \$2,850.00.

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.⁹ 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 \$2,850.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$2,850.00 as a result of the Respondent’s acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405

⁹ 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”).

(2015 & Supp. 2023); COMAR 09.08.03.03B(3)(b). I further conclude that the Claimant is entitled to recover that amount from the Fund. Bus. Reg. § 8-405(e)(1), (5) (Supp. 2023); 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 \$2,850.00; 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;¹⁰ and

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

November 8, 2023
Date Decision Issued



Jennifer L. Gresock
Administrative Law Judge

JLG/ds
#208278

¹⁰ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 26th day of December, 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.

Robert Altieri

Robert Altieri

Panel B

***MARYLAND HOME IMPROVEMENT
COMMISSION***