

IN THE MATTER OF THE CLAIM	* BEFORE LEIGH WALDER,
OF GUY & MARIA BULLEY,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANTS	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	*
FOR THE ALLEGED ACTS OR	*
OMISSIONS OF KIMBERLY KAGEN,	*
T/A PHOENIX REMODELING	*
GROUP, LLC,	* OAH No.: LABOR-HIC-02-23-14563
RESPONDENT	* MHIC No.: 23 (75) 113

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On December 28, 2022, Guy and Maria Bulley (Claimants) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)¹ Guaranty Fund (Fund) for reimbursement of \$28,000.00 for actual losses allegedly suffered as a result of a home improvement contract with Kimberly Kagen, trading as Phoenix Remodeling Group, LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to 411 (2015 & Supp. 2023).²

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 May 10, 2023, the MHIC issued a Hearing Order on the Claim. On May 22, 2023, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On September 7, 2023, I held a hearing at the OAH in Hunt Valley, Maryland.³ Bus. Reg. §§ 8-407(a), 8-312. Eric London, Assistant Attorney General, Department, represented the Fund. Ian Valkenet, Esquire, represented the Claimants.⁴ As set out below, the Respondent failed to appear to the hearing.

On July 12, 2023, the OAH mailed a Notice of Hearing (Notice) to the Respondent by United States mail. The Notice was sent to two different addresses for the Respondent: one address in Baltimore; and another address in Owings Mills. The Notice stated that a hearing was scheduled for September 7, 2023, at 9:30 a.m., at the OAH in Hunt Valley, Maryland. Code of Maryland Regulations (COMAR) 09.08.03.03A(2). The Notice advised the Respondent that failure to attend the hearing might result in “a decision against you.” The Notices that were sent to the Respondent’s addresses were returned to the OAH as undeliverable; however, there is also indication that one Notice sent by certified mail was received at the Respondent’s Baltimore address by Yvette Racks.⁵ At the outset of the hearing, Mr. London proffered he and Mr. Valkenet became aware that the Respondent was represented by an attorney, Richard Hackerman, Esquire. Mr. London and Mr. Valkenet explained they had been in touch with Mr. Hackerman who advised: (1) that he was aware of the scheduled hearing; (2) that the Respondent was aware of the scheduled hearing; and (3) that neither Mr. Hackerman nor the Respondent would appear for the scheduled hearing.⁶

³ I kept the record open until September 14, 2023, to afford the Claimants an opportunity to dismiss a pending lawsuit against the Respondent and to send proof of the dismissal, which would be admitted into evidence – without objection from the Fund – as Claimants Exhibit 5. The Claimants complied and submitted Claimants Exhibit 5 on September 13, 2023.

⁴ Guy Bulley was present at the hearing. Maria Bulley did not attend the hearing.

⁵ Ms. Racks’ relationship to the Respondent is unknown.

⁶ Mr. Valkenet also explained that he engaged in settlement discussions with the Respondent in anticipation of the hearing.

I waited until 9:45 a.m. to see if either the Respondent or Mr. Hackerman would appear. Neither did. 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. I determined that the Respondent received proper notice and proceeded in the Respondent's absence. 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 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:

CL Ex. 1 – Contract, signed September 28, 2019

CL Ex. 2 – Check, dated September 28, 2019

CL Ex. 3 – Contract, undated

CL Ex. 4 – Check, dated April 28, 2021

CL Ex. 5 – Stipulation of Dismissal, dated September 11, 2023

No documents were submitted on behalf of the Respondent.

I admitted the following exhibits offered by the Fund:

GF Ex. 1 – Notice, dated July 12, 2023

GF Ex. 2 – Hearing Order, dated May 10, 2023

GF Ex. 3 – Certification of Custodian of Records or Other Qualified Individual, dated August 9, 2023

GF Ex. 4 – Claim, received December 28, 2022

GF Ex. 5 – Letter from the MHIC to the Claimants, dated May 10, 2023

Testimony

Mr. Bulley testified on behalf of the Claimants.

The Respondent was not present to testify or offer any witnesses.

The Fund called Mr. Bulley as a witness.

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 numbers 01-116244 (individual) and 05-135908 (corporate).

2. On September 28, 2019, the Claimants and the Respondent entered into a contract where the Respondent agreed to perform the following work, in exchange for \$34,569.00:

- Remove existing windows from the existing house
- Remove siding from around the windows
- Install Jeld Wen brand windows with grids. Wood interior and dark green exterior to match existing as closely as possible
- Install flashing tape around the windows to properly seal
- Install spray foam insulation around the windows to give a tight seal
- Install PVC trim instead of metal capping around the exterior of the windows
- All windows are to be replacement style windows . . .
- Caulk as needed

(CL Ex. 1).

3. On September 28, 2019, the Claimants paid the Respondent \$5,000.00 as a down payment.
4. Between September 28, 2019 and approximately April 28, 2021, the Respondent performed no work on the Claimants' home due to the holidays, other work obligations, and COVID-19 concerns.
5. On or about April 28, 2021, after COVID-19 concerns dwindled, the Claimants and the Respondent entered into a new contract where the Respondent agreed to perform the work previously contracted for on September 28, 2019, as well as perform additional work to install a new roof, doors, and front porch.
6. The total balance the Claimants agreed to pay the Respondent to perform the work under the new contract was \$86,424.00.
7. On April 28, 2021, the Claimants paid the Respondent \$23,000.00 as a down payment.
8. After receiving the \$23,000.00 down payment, the Respondent performed no work on the Claimants' home.
9. The Claimants made multiple attempts to contact the Respondent to perform the work under the contract, the Respondent initially made excuses and finally stopped all communication by December 2021.
10. The Claimants filed a lawsuit against the Respondent in the Circuit Court for Baltimore County.
11. On September 11, 2023, the Claimants dismissed their lawsuit against the Respondent, with prejudice.

DISCUSSION

Applicable Law

The Claimants have 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. For the following reasons, I find that the Claimants have proven eligibility for compensation.

Eligibility for Compensation

The evidence in this case establishes there are no legal impediments barring the Claimants from filing a claim under section 8-405 of the Business Occupations Article. The Respondent was a licensed home improvement contractor at the time of the contract. The home improvement work was to be performed on the Claimants' residence in Maryland. The Claimants were not relatives, employees, officers, or partners of the Respondent; and the Claimants were not related to any of the Respondent's employees, officers, or partners. The Claimants did not reject any efforts by the Respondent to resolve the Claim.

Section 8-405(g) of the Business Regulations Article sets out: "A claim shall be brought against the Fund within [three] years after the claimant discovered or, by use of ordinary diligence, should have discovered the loss or damage." The Fund took the position that the Claimants timely filed their claim. Although the first contract was signed on September 28, 2019, the Respondent failed to perform and, therefore, added the same scope of work in the second contract that was signed on or before April 28, 2021. Therefore, the Claimants had three years to file a claim after they "discovered or, by use of ordinary diligence, should have discovered the loss or damage" that derived from the contract entered on or about April 28, 2021. *Id.* I agree with the Fund's analysis; as such, the claim filed on December 28, 2022, was timely. Further, although the Claimants filed a lawsuit against the Respondent in the Circuit Court for Baltimore County, the Claimants dismissed the lawsuit, with prejudice, on September 11, 2023. (CL Ex. 5).⁷

The Claimants argued, and the Fund agreed, that they suffered an actual loss incurred as a result of the Respondent's acts or omissions, entitling them to compensation from the Fund. Specifically, the Claimants argued that, despite being paid a down payment, the Respondent failed to perform any work on their windows, roof, doors, or porch, as contracted. The Claimants produced two contracts. The first contract required the Respondent to perform work on their windows. (CL Ex. 1). The second contract incorporated the work from the first contract and added additional work on the Claimants' roof, doors, and porch. (CL Ex. 3). Despite being paid a total of \$28,000.00 in down payments, the Respondent performed no work under the contracts.

⁷ The Fund was unaware of the pending suit until the day of the hearing. Per section 8-408(b)(2) of the Business Regulations Article, the MHIC would have stayed the instant matter had it been aware of the pending suit.

The Claimants' assertion that the Respondent performed no work is uncontroverted and, based on Mr. Bulley's testimony, credible. Therefore, the Claimants established that they suffered an actual loss due to an incomplete home improvement. 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.

Award

The Claimants seek \$28,000.00 from the Fund. The Fund agreed the Claimants are entitled to this amount. 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.

Here, the Respondent abandoned the contract without doing any work. Accordingly, the following formula appropriately measures the Claimants' actual loss: "If the contractor abandoned the contract without doing any work, the claimant's actual loss shall be the amount which the claimant paid to the contractor under the contract." COMAR 09.08.03.03B(3)(a). The Claimants submitted proof that they paid the Respondent a total of \$28,000.00 under the contract. (CL Exs. 2 & 4). Therefore, the Claimants' actual loss is \$28,000.00.

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.⁸

⁸ 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").

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimants sustained an actual and compensable loss of \$28,000.00 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)(1). I further conclude that the Claimants are entitled to recover \$28,000.00 from the Fund. Md. Code Ann., Bus. Reg. § 8-405(a) (Supp. 2023); COMAR 09.08.03.03B(3)(1).

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;⁹ and

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

December 4, 2023
Date Decision Issued

LW/sh
#208739



Leigh Walder
Administrative Law Judge

⁹ 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***