

IN THE MATTER OF THE CLAIM
OF HOLLY BANKS,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF ETHAN GADSON,
T/A EF GADSON BUILD
& DESIGN LLC,
RESPONDENT

* BEFORE EMILY DANEKER,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No.: LABOR-HIC-02-23-11518
* MHIC No.: 23 (75) 370
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PROPOSED DECISION

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STATEMENT OF THE CASE

On January 9, 2023, the Maryland Home Improvement Commission (MHIC)¹ received a claim submitted by Holly Banks (Claimant) seeking to recover \$27,350.00 from the Maryland Home Improvement Guaranty Fund (Fund) for actual losses allegedly sustained as a result of the acts or omissions of contractor Ethan Gadson, trading as EF Gadson Build & Design LLC

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

(Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2023).² On April 20, 2023, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On August 7, 2023, I held a hearing using the Webex videoconferencing platform.³ Bus. Reg. §§ 8-407(a), 8-312; Code of Maryland Regulations (COMAR) 28.02.01.20B(1). Jonathan P. Phillips, Assistant Attorney General, Department, represented the Fund. The Claimant was self-represented. The Respondent did not appear for the hearing.

The applicable procedural law is set out in the contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the OAH. 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?

² Unless otherwise noted, all references to the Business Regulation Article are to the 2015 Volume of the Maryland Annotated Code, as complemented by the 2023 Supplement thereto.

³ The hearing was originally scheduled for July 12, 2023. In advance of that hearing, the Fund submitted its proposed exhibits to the OAH and the other parties; no other party submitted exhibits in advance of the hearing, despite the directive on the hearing notice to do so. Both the Claimant and Respondent were present for the July 12, 2023 hearing, but neither were prepared with their exhibits. Accordingly, the matter was postponed and a mutually agreeable date was selected for the continuation of the hearing: August 7, 2023.

SUMMARY OF THE EVIDENCE

Testimony

The Claimant testified in support of their case. There were no other witnesses.

Exhibits

The Claimant offered the following exhibits, which I admitted into evidence:

- Clmt. Ex. 1 - Contract between Claimant and Respondent, February 27, 2022
- Clmt. Ex. 2 - Email chain between Claimant and Respondent, March 29, 2022 to August 26, 2022
- Clmt. Ex. 3 - Deposited checks, February 27, March 8, March 21, May 6, and March 22, 2022
- Clmt. Ex. 4 - Receipt from Punchout Specialist Team (aka P.O.S.T. Construction, LLC), July 27, 2023
- Clmt. Ex. 5 - Proposal for Work, from P.O.S.T. Construction, LLC, December 5, 2022
- Clmt. Ex. 6 - Text messages between Claimant and Respondent, April 17 to August 4, 2022

The Fund offered the following exhibits, which I admitted into evidence:

- Fund Ex. 1A - Notice of Remote Hearing, May 19, 2023
- Fund Ex. 1B - Notice of Remote Hearing, July 13, 2023
- Fund Ex. 2 - MHIC Hearing Order, April 10, 2023
- Fund Ex. 3 - MHIC Claim Form, January 9, 2023
- Fund Ex. 4 - Respondent's MHIC licensing information, printed June 26, 2023

The Respondent did not attend the hearing and, thus, did not offer any exhibits.

PROPOSED FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. At the time of the work at issue, the Claimant owned and resided in a home located on Lavender Dream Lane, in Brandywine, Maryland (the Residence).⁴ The Claimant owns only one other property, which is located in Hyattsville, Maryland.

2. From April 22, 2022 onward, the Respondent was a licensed home improvement contractor under MHIC individual license number 145423 and corporate license 148945. Prior to that, the Respondent was not licensed by the MHIC.

3. On February 27, 2022, the Claimant and the Respondent entered into a contract (Contract) for work at the Residence, consisting of: painting interior walls and ceilings, installing vinyl flooring, painting and reinstalling kitchen cabinets, installing a granite countertop, installing carpeting, and installing a doorframe, a sliding door, a handrail, and electrical receptacles.⁵

4. The agreed-upon Contract price was \$33,388.00.

5. The Contract provided that work would begin on March 7, 2022, and would be completed by April 5, 2022.

6. The Claimant made payments under the Contract as follows:

Date	Amount
February 27, 2022 (check)	\$10,184.00
March 2, 2022 (cash, for dumpster)	\$500.00
March 8, 2022 (check)	\$10,184.00
March 21, 2022 (check)	\$5,010.00

⁴ At the time of the hearing, the Claimant still owned the Residence, but was no longer living there.

⁵ While the work at issue was ongoing, the Claimant and Respondent entered into a separate contract for work on the Claimant's bathrooms. That work was fully performed and is not at issue here. The Claimant also paid the Respondent \$200.00 for a light fixture and installation; that was not part of the Contract and is not at issue here.

March 21, 2022 (cash, for sliding door)	\$3,000.00
March 22, 2022 (check)	\$5,010.00
April 7, 2022 (cash, for dumpster)	\$500.00
Total	\$34,388.00 ⁶

7. By March 12, 2022, the Respondent had painted the interior walls and ceilings at the Residence.

8. By or about April 7, 2022, the Respondent had removed a dumpster of debris from the site.

9. By April 8, 2022, the Respondent had installed the vinyl flooring in the Residence.

10. By April 15, 2022, the Respondent had painted the kitchen cabinets at the Residence.

11. The Claimant was satisfied with the work that was performed by the Respondent.

12. On April 22, 2022, the Claimant sent a text message to the Respondent enquiring when the Respondent would return to complete the remaining work. The Respondent replied that he would “be there Tuesday morning” and he would arrange for another dumpster at the site. (Clmt. Ex. 6.)

13. On May 2, 2022, the Respondent represented to the Claimant that he was working on obtaining a dumpster for the site. When the Claimant enquired if the Respondent would be at the site the following day, the Respondent stated that he would be. (*Id.*)

14. On May 9, 2022, the Claimant advised the Respondent that he was “good to go back” to the Residence and the Respondent stated “Ok. Thanks.” (*Id.*)

⁶ The cost of trash removal resulted in an additional \$1,000.00 being added to the contract price.

15. On June 10, 2022, the Claimant enquired if the Respondent was coming to do work that day and the Respondent stated that he was “in Florida working” but would “be there tomorrow.” (*Id.*)

16. The Respondent did not perform any work at the Residence after April 15, 2022, and he did not return to the Residence thereafter.

17. The Respondent did not reinstall the kitchen cabinets, did not remove all construction debris from the site, did not install the carpeting, did not install the electrical receptacles, did not reframe the door, and did not provide the sliding door.

18. Over the period of December 2022 to July 2023, the Claimant retained P.O.S.T. to complete the Contract work. P.O.S.T. was licensed with the MHIC throughout 2022 and 2023.

19. The Claimant paid P.O.S.T. \$27,600.00 to complete the Contract work.

20. The Claimant is not related to the Respondent or to the Respondent’s officers, employees, or partners. The Claimant is not employed by or affiliated with the Respondent.

21. The Claimant filed this claim with the MHIC on or about January 9, 2023, and has not filed any other claims or actions relating to the Respondent’s work.

DISCUSSION

I. Notice to the Respondent

The statutory provisions governing disciplinary proceedings against MHIC licensees state that notice of the proceeding shall be sent by certified mail to “the business address of the licensee on record with the Commission.” Bus. Reg. § 8-312(d). These same notice procedures apply to proceedings involving claims against the Fund. Bus. Reg. § 8-407(a). The purpose of the notice requirement is to provide a measure of due process.

On May 19, 2023, the OAH sent a Notice of Remote Hearing (Notice) to the Respondent his address of record with the MHIC, by both certified and first class mail. The Notice advised that the hearing was scheduled for 9:30 a.m. on July 12, 2023 and would be held using the Webex videoconferencing platform. The Respondent appeared for the hearing. As neither the Respondent nor the Claimant had provided their exhibits in advance of the hearing, as the Notice had instructed them to do, the hearing was postponed. Before concluding the July 12, 2023 proceeding, and while the Respondent, Claimant, and counsel for the Fund were all present, a mutually agreeable date and time were selected for the continuation of the hearing: August 7, 2023 at 9:30 a.m.

The following day, July 13, 2023, the OAH also mailed a new Notice to the Respondent, by certified and first class mail, to his address of record. The Notice stated that the hearing would be held at 9:30 a.m. on August 7, 2023, by Webex, as had been agreed to by the parties. The Notice provided instructions for joining the hearing by videoconference or by using a call-in telephone number. The return receipt for the certified mailing to the Respondent was received by the OAH on July 25, 2023, signifying the Notice was delivered. I concluded that the Respondent was provided proper notice of the hearing. Bus. Reg. §§ 8-312(d), 8-407(a); State Gov't § 10-209 (2021); COMAR 28.02.01.05C; *see also Board of Nursing v. Sesay*, 224 Md. App. 432 (2015).

The Respondent did not appear for the hearing, as scheduled. There was no indication or report that the Respondent was experiencing any technical difficulties. After waiting fifteen minutes for the Respondent to appear, either personally or through a representative, I proceeded with the hearing in his absence. COMAR 28.02.01.23A.

II. The Merits

Applicable Law

The Maryland General Assembly created the Fund to provide an available pool of money from which homeowners could seek relief for losses sustained at the hands of incompetent or unscrupulous home improvement contractors. Bus. Reg. §§ 8-401 to 8-411. A homeowner is authorized to “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 “licensed contractor” means “a person who is licensed by the MHIC to act as a contractor. Bus. Reg. § 8-101(j). The governing statute defines “actual loss” as “the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.” Bus. Reg. § 8-401. The Commission may deny a claim if the claimant unreasonably rejected good faith efforts by the contractor to resolve the claim. *Id.* § 8-405(d).

The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney fees, court costs, or interest. *Id.* § 8-405(e)(3); COMAR 09.08.03.03B(1). In addition, a claimant may not recover from the Fund more than was paid to the original contractor. Bus. Reg. § 8-405(e)(5); COMAR 09.08.03.03B(4). Further, effective July 1, 2022, a claimant’s recovery is capped at \$30,000.00 for the acts or omissions of one contractor.⁷

⁷ 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”).

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).

Analysis

On February 27, 2022, the Claimant and the Respondent entered into a Contract for home improvement work at the Claimant's residence. (Test. Claimant; Clmt. Ex. 1.) The Claimant's testimony, supported with copies of canceled checks (where applicable), substantiates that the Claimant paid the Respondent \$34,388.00, the full Contract price. (Clmt. Ex. 3.) The Claimant's testimony was detailed and consistent and established that the Contract work was incomplete. This is also supported by text messages in which the Respondent implicitly acknowledges that work remains to be done. (Clmt. Ex. 6, at 2, 5.) The subsequent invoice from P.O.S.T. for the performance of the same scope of work likewise supports the conclusion that the Respondent did not complete the Contract work. (Clmt. Exs. 4 & 5.) Thus, the Respondent performed an incomplete home improvement.

As noted above, however, the legislature limited recovery from the Fund to claims resulting from an act or omission by a licensed contractor." Bus. Reg. § 8-405(a); *see also* COMAR 09.08.03.03B(2). The uncontradicted evidence is that the Respondent was not a licensed contractor at the time he entered into the Contract with the Claimant. The Respondent was not a licensed contractor at the time he received any of the payments under the Contract. He was not a licensed contractor at the time he performed any of the work under the Contract. Nonetheless, after the Respondent obtained his MHIC license on April 22, 2022, the Respondent

continued to misrepresent to the Claimant that he would complete the Contract work. Thus, while licensed by the MHIC, the Respondent continued to engage in the type of unscrupulous conduct that the statute is intended to protect against. The abandonment was ongoing into the period during which the Respondent was licensed. Accordingly, I find the claim arises from an act or omission by a licensed contractor. This is in accord with the position taken by the Fund during the hearing.

There are no impediments to the Claimant's recovery based on her own status. The Claimant timely filed the claim with the MHIC less than three years after entering into the Contract with the Respondent; the Claimant is not related to or affiliated with the Respondent, nor are the Claimant's immediate family members; the Residence was the Claimant's primary residence at the time, and the Claimant does not own more than three residences; the Claimant did not reject any good faith efforts by the Respondent; the Claimant has not filed any other claims against the Respondent. Bus. Reg. §§ 8-405(d), (f), & (g), 8-408(b).

Having found the Claimant eligible for compensation, the remaining question is the amount of any actual loss the Claimant is entitled to recover from the Fund. The MHIC, by regulation, has established a formula for measuring actual loss when a contractor fails to complete the work and the claimant hires a replacement contractor. That formula is:

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. . . .

COMAR 09.08.03.03B(3)(c).

As noted above, the amount paid under the Contract was \$34,388.00. The cost to complete the work was \$27,600.00, which is the amount the Claimant paid to P.O.S.T. to perform the remaining Contract work. (Clmt. Exs. 4 & 5.) Applying the above formula results in an actual loss to the Claimant of \$27,600, calculated as follows:

\$34,388.00	amount paid by the Claimant to the Respondent
+ \$27,600.00	amount required to complete the contract & repair the Respondent's work
\$61,988.00	total paid by the Claimant
- \$34,388.00	original contract price
\$27,600.00	actual loss per formula

See COMAR 09.08.03.03B(3)(c). The Claimant's actual loss is less than the \$30,000 per claim statutory cap on recovery from the Fund and does not exceed the amount she paid to the Respondent. Thus, the Claimant is eligible to recover her full actual loss of \$27,600.00 from the Fund. Bus. Reg. § 8-405(a), (e)(1), (5).

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$27,600.00 as a result of the Respondent's acts or omissions and is entitled to recover that amount from the Fund. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2023); COMAR 09.08.03.03B(3)(c).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$27,600.00; 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,⁸ and

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

November 6, 2023
Date Decision Issued

Emily Daneker

Emily Daneker
Administrative Law Judge

ED/ds
#208183

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

PROPOSED ORDER

WHEREFORE, this 22nd 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.

J Jean White

I Jean White

Panel B

***MARYLAND HOME IMPROVEMENT
COMMISSION***