

IN THE MATTER OF THE CLAIM OF * MARYLAND HOME
JANICE McKINNON * IMPROVEMENT COMMISSION
AGAINST THE MARYLAND HOME *
IMPROVEMENT GUARANTY FUND * MHIC CASE NO. 23(75)771
FOR THE ACTS OR OMISSIONS OF * OAH CASE NO. LABOR-HIC-
WAYNE MANGER AND MANGER * 02-23-11434
ENTERPRISES, INC. T/A JOHN K. *
EARECKSON & CO. *

* * * * *

FINAL ORDER

This matter was originally heard before an Administrative Law Judge (“ALJ”) of the Office of Administrative Hearings (“OAH”) on July 18, 2023. Following the evidentiary hearing, the ALJ issued a Proposed Decision on September 14, 2023, concluding that the homeowner, Janice McKinnon (“Claimant”) failed to prove that she suffered an actual loss as a result of the acts or omissions of Wayne Manger and Manger Enterprises t/a John K. Eareckson & Co. (collectively, “Contractor”). *ALJ Proposed Decision* p. 8. In a Proposed Order dated October 25, 2023, the Maryland Home Improvement Commission (“MHIC” or “Commission”) affirmed the Proposed Decision of the ALJ to deny an award from the Home Improvement Guaranty Fund. The Claimant subsequently filed exceptions to the MHIC Proposed Order.

On January 4, 2024, a three-member panel (“Panel”) of the MHIC held a remote hearing on the exceptions filed in this matter. The Claimant and Contractor participated without counsel. Assistant Attorney General Catherine Villareale appeared at the exceptions hearing on behalf of the Guaranty Fund. The Commission entered the following preliminary exhibits as part of the record of the exceptions hearing without objection: 1) hearing notice; 2) transmittal letter, ALJ Proposed Decision, and MHIC Proposed Order; and 3) Claimant’s exceptions. Neither the Claimant nor the Contractor produced a copy of the transcript of the hearing before the ALJ. Therefore, the Panel’s review of the record was limited to the preliminary exhibits for the exceptions hearing, the ALJ Proposed Decision, and the exhibits offered as evidence at the OAH

hearing. COMAR 09.01.03.09(G) - (I).

The claim in this proceeding relates to a contract between the parties for the power washing of and application of polymeric sand to a patio at the Claimant's home. The ALJ found that the Contractor's performance under the contract was unworkmanlike because he installed the sand shortly before a predicted rainstorm that washed away the sand, and then made deficient efforts to correct the issue. *ALJ's Proposed Decision* p. 6. However, the ALJ found that the Claimant was ineligible for an award from the Guaranty Fund because she failed to prove the amount of her actual loss because she did not present evidence of the cost to correct the Contractor's deficient work and did not present evidence of the value of the labor and materials provided by the Contractor.

On exception, the Claimant argued that the ALJ erred in finding that she failed to prove the value of the labor and materials provided by the Contractor because she proved that the Contractor's performance had no value. The Claimant argued that she proved the Contractor's performance was valueless because an estimate indicated that her patio would have to be power washed again before the polymeric sand was repaired as a result of the accumulation of sand and dirt since the Contractor performed the work. The Commission finds no error. First, the Claimant did not identify, and the Commission is not aware of, an estimate or other source of evidence in the record that indicates that the patio would have to be power washed again. Second, the Commission notes that power washing must be performed periodically to maintain an outdoor patio in a clean condition, so, even if the Claimant proved that her patio required another power washing, that would not constitute proof that the Contractor's performance had no value.

Having considered the parties' arguments, the evidence contained in the record, and the ALJ's Recommended Decision, it is this 17th day of January 2024, **ORDERED:**

- A. That the Findings of Fact of the Administrative Law Judge are **AFFIRMED**;
- B. That the Conclusions of Law of the Administrative Law Judge are **AFFIRMED**;
- C. That the Proposed Decision and Recommended Order of the Administrative Law Judge is **AFFIRMED**;
- D. That the Claimant's claim is **DENIED**;
- E. That the records and publications of the Maryland Home Improvement Commission shall reflect this decision; and
- F.. Any party has thirty (30) days from the date of this Final Order to appeal this decision to Circuit Court.

Michael Newton

**Chairperson –Panel
Maryland Home Improvement
Commission**

<p>IN THE MATTER OF THE CLAIM</p> <p>OF JANICE McKINNON,</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 WAYNE MANGER,</p> <p>T/A MANGER ENTERPRISES, INC.</p> <p>AND JOHN K. EARECKSON & CO.</p> <p>RESPONDENT</p>	<p>* BEFORE BRIAN ZLOTNICK</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-02-23-11434</p> <p>* MHIC No.: 23 (75) 771</p> <p>*</p>
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PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
PROPOSED FINDINGS OF FACT
DISCUSSION
PROPOSED CONCLUSION OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On March 15, 2023, Janice McKinnon (Claimant) 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 \$580.00 for actual losses allegedly suffered as a result of a home improvement contract with Wayne Manger, trading as Manger Enterprises, Inc. and John K. Eareckson & Co. (Respondent). Md. Code Ann.,

Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2022).¹ On April 10, 2023, the MHIC issued a Hearing Order on the Claim. On April 20, 2023, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On July 18, 2023, I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. Nicholas Sokolow, Assistant Attorney General, Department, represented the Fund. The Claimant represented herself. Wayne Manger, Owner of Manger Enterprises, Inc. and John K. Eareckson & Co. represented the Respondent.

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 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:

- Cl. Ex. 1 - Home Improvement Contract (Contract) between the Claimant and the Respondent, August 5, 2022, with attached emails from the Respondent to the Claimant, August 5 and 6, 2022
- Cl. Ex. 2 - Emails between the Claimant and the Respondent, June 28, 29, 2022, August 15, 2022, and September 1, 2022. Text messages between the Claimant and the Respondent, August 24, 25, 26, and 27, 2022
- Cl. Ex. 3 - Letter from the Claimant to the Respondent, September 12, 2022

¹ Unless otherwise noted, all references hereinafter to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.

- Cl. Ex. 4 - Photographs of Claimant's patio, taken by the Claimant on October 10, 2022
- Cl. Ex. 5 - Emails between the Claimant and the Respondent, June 28, 2022, and July 28, 2022
- Cl. Ex. 6 - Complaint Form, December 1, 2022, with attached typed statement from the Claimant
- Cl. Ex. 7 - Copy of cancelled check paid from the Claimant to the Respondent, August 5, 2022, with attached August 2022 bank statement

I admitted the following exhibit offered by the Respondent:

- Resp. Ex. 1 - Respondent's typed statement, July 18, 2023

I admitted the following exhibits offered by the Fund:

- Fund Ex. 1 - Notice of Hearing, May 19, 2023
- Fund Ex. 2 - Hearing Order, April 10, 2023
- Fund Ex. 3 - Letter from Joseph Tunney, MHIC Executive Director, to the Respondent, March 24, 2023, with attached Home Improvement Claim Form, dated March 7, 2023, and received by the MHIC, March 15, 2023
- Fund Ex. 4 - Certified copy of the MHIC licensing record for the Respondent, June 27, 2023

Testimony

The Claimant testified and did not present other witnesses. Wayne Manger testified on behalf of the Respondent and did not present any additional 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 01-78910.²
2. In 2022, the Claimant decided to re-sand his patio pavers with polymeric sand to prevent dirt and weeds from surfacing between the pavers.
3. On August 5, 2022, the Claimant and the Respondent entered into a contract to re-sand the Claimant's patio paver gaps.³
4. The original agreed-upon Contract price was \$580.00.
5. The Claimant provided the Respondent with polymeric sand to be used in the performance of the Contract. Polymeric sand requires a one to three day period of dry weather to cure after application.
6. The Respondent began work on August 5, 2022, and finished that same day. Neither the Respondent nor the Claimant checked the weather forecast on August 5, 2022, before work began.
7. The Claimant paid the Respondent \$580.00 on August 5, 2022.
8. On the evening of August 5, 2022, after the Respondent completed his work, a heavy rainstorm occurred which left several inches of standing water on the pavement pavers.
9. On or about August 14, 2022, the Claimant inspected the patio pavers and discovered loose sand in between the pavers with some pavers lacking any sand. On August 15, 2022, the Claimant emailed the Respondent that the sand never set due to the August 5, 2022 rainstorm.

² Fund Ex. 4, a certified summary of the MHIC's licensing records for the Respondent, lists his Contractor's license number(s) as "01-78910 & 05-120748."

³ Although the Contract stated that it was to powerwash a deck, the Respondent agreed during cross examination that the Contract also included re-sanding the patio pavers.

10. On August 27, 2022, the Respondent sent a crew to the Claimant's home to correct the issues with the patio. The Respondent's crew applied more polymeric sand to the paver gaps without power washing the patio before the application of the polymeric sand.

11. On August 27, 2022, the Claimant texted the Respondent and expressed displeasure with the Respondent's attempt to cure the patio because the Respondent's crew did not remove the old polymeric sand before applying new sand and they also failed to use a compactor when applying the new sand.

12. On September 1, 2022, the Claimant swept the patio and observed numerous areas of soft sand between the pavers and some areas with no sand. The Claimant emailed the Respondent on September 1, 2022, regarding the status of the pavement. After September 1, 2022, the Respondent did not contact the Claimant.

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); 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 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. 2022); *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.

The Respondent conceded that the standing water on the pavers within hours of completion of his work certainly caused the polymeric sand to wash away and prevented it from curing. This resulted in the sand between the pavers remaining loose and soggy with some pavers lacking any sand due to being washed away by the August 5th rainstorm. I find that the Respondent's failure to be aware of the impending rainstorm that occurred hours after completion of their work was clearly unworkmanlike and inadequate as the polymeric sand was applied without allowing sufficient time to cure. Additionally, the Respondent's attempted repair of the sanding job was performed without removing the existing loose sand and without a compactor resulting in the majority of the patio pavers still experiencing loose and uncured sand between those pavers. I thus find that the Claimant is eligible for compensation from the Fund. Nevertheless, although I find that the Respondent performed an unworkmanlike and inadequate home improvement, I must accept the Fund's argument that the Claimant did not prove the amount of her actual loss. The Claimant offered no evidence of the cost of replacing the sanding work performed by the Respondent. Nor did the Claimant offer any evidence of the cost of repairing the work performed by the Respondent.

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. 2022); COMAR 09.08.03.03B(1). The MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work.

"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). This formula does not apply: the Respondent did not abandon the contract without doing any work.

The Respondent performed work under the Contract, and according to her testimony the Claimant is not seeking other contractors to complete or remedy that work. Accordingly, 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 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).

Here, the Claimant showed that she paid the Contract price of \$580.00. However, she did not offer any evidence to prove the value of the materials and services provided by the Respondent. She did not prove the Respondent's work was completely valueless. The evidence shows that the polymeric sand applied by the Respondent on August 5th and August 27th failed to properly cure and remained loose in many areas of the patio pavers. Despite this, with no evidence of the value of the Respondent's labor and no proof that they are valueless, the Claimant failed to prove the amount of her actual loss under the COMAR 09.08.03.03B(3)(b) formula.

The Claimant also offered no evidence that she either has retained or intends to retain other contractors to remedy the Respondent's deficient work. She testified that one company told her the entire patio would have to be replaced at a cost of \$9,200.00. However, replacing the patio is beyond the scope of the Contract and the Claimant did not offer that estimate into evidence. Accordingly, she failed to prove an actual loss under the third formula:

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).

Therefore, none of the above three regulatory formulas are appropriate in this case. No unique formula was suggested at the hearing that might be appropriate and I do not discern one that might apply to the circumstances of this case.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has not sustained an actual and compensable loss as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2022).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund deny the Claimant's claim; and **ORDER** that the records and publications of the Maryland Home Improvement Commission reflect this decision.

September 14, 2023
Date Decision Issued

Brian Zlotnick

Brian Zlotnick
Administrative Law Judge

BMZ/emh
#207310

PROPOSED ORDER

WHEREFORE, this 25th day of October, 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.

Joseph Tunney

Joseph Tunney

Chairman

Panel B

*MARYLAND HOME IMPROVEMENT
COMMISSION*