

<p>IN THE MATTER OF THE CLAIM</p> <p>OF CAROL MOWBRAY-BROOKS,</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 TIMOTHY POWELL,</p> <p>T/A POWELL CONTRACTING</p> <p>COMPANY, INC.,</p> <p>RESPONDENT</p>	<p>* BEFORE KRISTIN E. BLUMER,</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-02-23-05142</p> <p>* MHIC No.: 23 (75) 96</p>
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PROPOSED DECISION

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STATEMENT OF THE CASE

On November 10, 2022, Carol Mowbray-Brooks (Claimant) filed a claim (Claim)¹ with the Maryland Home Improvement Commission (MHIC)² Guaranty Fund (Fund) for reimbursement of \$4,500.00 for actual losses allegedly suffered as a result of a home improvement contract with Timothy Powell, trading as Powell Contracting Company, Inc.,

¹ The Claimant dated the Claim form November 5, 2022. The Maryland Home Improvement Commission received the Claim form on November 10, 2022.
² The MHIC is under the jurisdiction of the Department of Labor.

(Respondent).³ On February 3, 2023, the MHIC issued a Hearing Order on the Claim. On February 14, 2023, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On April 21, 2023, I conducted a hearing at the OAH in Hunt Valley, Maryland. Eric London, Assistant Attorney General, represented the Fund. The Claimant was self-represented. The Respondent did not appear.

After waiting for more than 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.⁴ On March 2, 2023, the OAH provided a Notice of Hearing (Notice) to the Respondent by United States mail and certified mail to the Respondent's address on record with the OAH.⁵ The Notice stated that a hearing was scheduled for April 21, 2023, at 9:30 a.m., at the OAH in Hunt Valley, Maryland.⁶ 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, sent by regular mail or certified mail, to the OAH, nor was the certified mail card returned to the OAH. The Respondent did not notify the OAH of any change of mailing address, email address, and/or telephone number.⁷ The Respondent made no request for postponement prior to the date of the hearing.⁸

³ Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2022). Unless otherwise noted, all references to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.

⁴ Code of Maryland Regulations (COMAR) 28.02.01.23A.

⁵ COMAR 28.02.01.05C(1).

⁶ COMAR 09.08.03.03A(2).

⁷ COMAR 28.02.01.03E.

⁸ COMAR 28.02.01.16.

I determined that the Respondent received proper notice, and I proceeded to hear the captioned matter.⁹

The contested case provisions of the Administrative Procedure Act, the Department of Labor's hearing regulations, and the Rules of Procedure of the OAH govern procedure.¹⁰

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. 1: Contract, March 22, 2022
- Clmt. Ex. 2: Change Order, March 22, 2022
- Clmt. Ex. 3: Copy of cancelled check, front and back, March 18, 2022
- Clmt. Ex. 4: Copy of cancelled check, front and back, March 22, 2022
- Clmt. Ex. 5: Various correspondences between the Claimant and the Respondent, including:
 - Text messages, May 4 and 6, 2022
 - Email to the Respondent from the Claimant's husband, May 8, 2022
 - Text messages, undated
 - Text messages, May 9 and 16, 2022
 - Telephone call log, May 9, 2022
 - Letter from the Claimant to the Respondent, May 26, 2020
 - Emails between the Claimant and the Respondent, May 28, 2022, June 3, 2022, June 18, 2022, June 20, 2022, July 8, 2022
 - Telephone call logs, July 8, 2022, July 27, 2022, March 27, 2023

⁹ COMAR 28.02.01.05A, C.

¹⁰ Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021); COMAR 09.01.03; COMAR 28.02.01.

- Clmt. Ex. 6: Various documents, including:
- Summary of claim, contracts and payments, and communications, undated
 - Letter from Matthew Gawel, Chief Building Inspector, Baltimore County, Maryland, undated
 - Color photograph, undated

I admitted the following exhibits offered by the Fund:

- Fund Ex. 1: Notice of Hearing, March 2, 2023
- Fund Ex. 2: MHIC Hearing Order, February 3, 2023
- Fund Ex. 3: MHIC Licensing Information for the Respondent, March 23, 2023
- Fund Ex. 4: Claimant's Home Improvement Claim Form, November 5, 2022
- Fund Ex. 5: Letter to Respondent from MHIC, December 28, 2022

The Respondent did not offer any exhibits.

Testimony

The Claimant testified and did not present other witnesses.

The Respondent did not appear, and, therefore, presented no 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 01-89017.
2. At all relevant times, the Respondent's corporate entity was a licensed home improvement contractor under MHIC license number 05-6304.
3. At all relevant times, the Claimant owned and resided in a home located in Phoenix, Maryland (the Residence). The Claimant does not own any other residential properties in Maryland.

4. On March 22, 2022, the Claimant and the Respondent entered into a contract for the Respondent to install a roof over the Claimant's patio at the Residence, including digging footers; pouring concrete for footers; installation of posts, beams, and headers; installation of trusses; installation of sheathing; installation of shingles; blocking ends over beams to prevent birds nesting; and installation of a ceiling (Contract).¹¹

5. The Contract price was \$8,815.00, with \$2,000.00 due upon signing the Contract, \$2,000.00 for the trusses, \$2,000.00 at the start of the work, and \$2,815.00 due upon completion.

6. The Contract specified that the work would start on or about April 28, 2022 and would take approximately two weeks to complete.

7. The Claimant paid the Respondent \$2,000.00 by personal check dated March 18, 2022 as a deposit for the Contract.

8. On March 22, 2022, the Claimant and the Respondent agreed to a change order for the Contract that added the installation of vinyl sleeves over posts, the installation of soffit fascia and gutter, and trimming beams with white vinyl inside, underneath, and outside to under the soffit to the scope of the work (Change Order).¹²

9. The Change Order price was \$4,000.00, with \$500.00 due at the time of signing the Change Order, \$2,000.00 due upon installation of the sleeves, and \$1,500.00 due upon completion.

10. The Change Order did not specify any changes to the timing of the start or completion of the work.

¹¹ The Contract is dated March 18, 2022. The Claimant signed it on March 20, 2022. The Respondent signed it on March 22, 2022.

¹² The Change Order is dated March 15, 2022. There was no testimony explaining why the Change Order is dated before the Contract. The Claimant signed the Change Order on March 20, 2022. The Respondent signed it on March 22, 2022.

11. The Claimant paid the Respondent \$2,500.00 by personal check dated March 22, 2022 for the \$2,000.00 required to purchase the trusses as specified in the Contract and the \$500.00 deposit for the Change Order.

12. The Respondent never reported to the Residence to begin the work.

13. Between May 4, 2022 and May 26, 2022, the Claimant contacted the Respondent by text messages, telephone calls, and email, requesting that he start the work and asking for an estimated start date.

14. The Claimant left voicemails for the Respondent if the voicemail was not full.

15. On May 9, 2022, the Respondent replied to the Claimant by text message and attributed the delay in starting the work to rainy weather but did not identify a new start date.

16. Between May 4, 2022 and May 26, 2022, the Respondent did not reply to any other messages from the Claimant, did not provide a new start date, and did not appear at the Residence to begin the work.

17. The Respondent never obtained a permit for the work to be done under the Contract and Change Order.

18. In a letter dated May 26, 2020,¹³ the Claimant sent a letter to the Respondent by certified mail and email, requesting that the Respondent refund the payments totaling \$4,500.00.

19. On June 3, 2022, the Respondent emailed the Claimant, stating that he would send her the money within a week.

20. On June 18, 2022, the Claimant emailed the Respondent, stating that she had not received a refund from him.

¹³ The letter is dated May 26, 2020, but in testimony, the Claimant made it clear that she drafted and sent the letter on May 26, 2022.

21. That same day, the Respondent replied to the Claimant's email, stating that he would put the check in the mail that day and apologizing for the delay.

22. The Respondent never refunded the Claimant's deposit.

DISCUSSION

The Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence.¹⁴ 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.¹⁵ An owner may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor."¹⁶ "[A]ctual loss' means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement."¹⁷

By statute, certain claimants are excluded from recovering from the Fund altogether. In this case, 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.¹⁸ The Claimant resides in the home that is the subject of the claim.¹⁹ The parties did not enter into a valid agreement to submit their disputes to arbitration.²⁰ 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.²¹

¹⁴ Bus. Reg. § 8-407(e)(1); State Gov't § 10-217; COMAR 09.08.03.03A(3).

¹⁵ *Coleman v. Anne Arundel Cnty. Police Dep't*, 369 Md. 108, 125 n.16 (2002).

¹⁶ 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.").

¹⁷ *Id.* § 8-401.

¹⁸ *Id.* §§ 8-405(g), 8-408(b)(1) (2015 & Supp. 2022).

¹⁹ *Id.* § 8-405(f)(2) (Supp. 2022).

²⁰ *Id.* §§ 8-405(c), 8-408(b)(3) (2015 & Supp. 2022).

²¹ *Id.* § 8-405(f)(1) (Supp. 2022).

For the following reasons, I find that the Claimant has proven eligibility for compensation.

It is undisputed that the Claimant paid the Respondent a total of \$4,500.00 for work to be performed at the Residence, with an approximate start date of April 28, 2022.²² It is further undisputed that the Respondent failed to start the work, failed to obtain the required building permit, and failed to respond to the Claimant's repeated requests to identify a start date or start the work.²³ It is further undisputed that the Respondent ultimately agreed to refund the Claimant's deposits totaling \$4,500.00 in two emails that he sent to the Claimant in June 2022, but never did so.²⁴

I find that the Respondent performed unworkmanlike, inadequate, or incomplete home improvements by the failure to start or complete the work under the Contract. The record before me unequivocally establishes that the Claimant paid a deposit of \$4,500.00 for work that was never done. 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.²⁵ MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work.

²² Clmt. Exs. 1-4.

²³ Clmt. Exs. 5-6.

²⁴ Clmt. Ex. 5.

²⁵ Bus. Reg. § 8-405(e)(3) (Supp. 2022); COMAR 09.08.03.03B(1).

The Respondent abandoned the Contract without doing any work. Accordingly, the following formula appropriately measures the Claimant's 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."²⁶

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.²⁷ In this case, the Claimant's actual loss is equal to the amount paid to the Respondent and that amount is less than \$30,000.00. Therefore, the Claimant is entitled to recover her actual loss of \$4,500.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$4,500.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2022); COMAR 09.08.03.03B(3)(a). I further conclude that the Claimant is entitled to recover that amount from the Fund. Md. Code Ann., Bus. Reg. § 8-405(a) (Supp. 2022); COMAR 09.08.03.03B(3)(a).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$4,500.00; and

²⁶ COMAR 09.08.03.03B(3)(a).

²⁷ Bus. Reg. § 8-405(e)(1), (5) (Supp. 2022); COMAR 09.08.03.03B(4). 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;²⁸ and

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

June 15, 2023
Date Decision Issued

KEB/sh
#205597

Kristin E. Blumer

Kristin E. Blumer
Administrative Law Judge

²⁸ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 3rd day of August, 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.

Michael Shilling

Michael Shilling

Panel B

***MARYLAND HOME IMPROVEMENT
COMMISSION***