IN THE MATTER OF THE CLAIM	*	**BEFORE EDWARD J. KELLEY,**
OF NICHOLAUS NOCAR,	*	**AN ADMINISTRATIVE LAW JUDGE**
CLAIMANT,	*	**OF THE MARYLAND OFFICE**
AGAINST THE MARYLAND HOME	*	**OF ADMINISTRATIVE HEARINGS**
IMPROVEMENT GUARANTY FUND	*	
FOR THE ALLEGED ACTS OR	*	
OMISSIONS OF JEROD WILKS, T/A	*	
PRECISION POOLS, LLC,	*	**OAH No.: LABOR-HIC-02-20-24910**
RESPONDENT	*	**MHIC No.: 20 (75) 704**

* * * * * * * * * * * * *

PROPOSED DECISION

STATEMENT OF THE CASE

On January 27, 2020, Nicholaus Nocar (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund), under the jurisdiction of the Department of Labor (Department),[1] for reimbursement of $9,000.00 in actual losses allegedly suffered as a result of a home improvement contract with Jerod Wilks, trading as Precision Pools, LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015).[2]

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[1] On July 1, 2019, the Maryland Department of Labor, Licensing, and Regulation became the Department of Labor.
[2] Unless otherwise noted, all references to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.

On November 2, 2020, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on January 8, 2021, at the OAH office in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. Justin Dunbar, Assistant Attorney General, Department, represented the Fund. The Claimant represented himself.

After waiting over fifteen minutes for the Respondent or the Respondent's representative to appear, I proceeded with the hearing. Code of Maryland Regulations (COMAR) 28.02.01.23A. On December 4, 2020, notice of the hearing was mailed to the Respondent at the address of record by regular and certified mail. COMAR 09.08.03.03A(2). The Respondent did not notify the OAH of any change of address. COMAR 28.02.01.03E. The Fund verified that the hearing notice was sent to the Respondent's mailing address of record, which is required by law to be updated. COMAR 09.08.01.11. There was no request for a postponement. COMAR 28.02.01.16. I determined that the Respondent had received proper notice, and I proceeded to hear the matter.[3]

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2020); 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?

[3] After the hearing, I learned that the notices of hearing sent to the Respondent by the OAH by regular and certified mail were returned as undeliverable. Because the notices were sent to the Respondent's address of record, which is required to be updated, COMAR 09.08.01.11, COMAR 28.02.01.03E, I maintain my determination that the notice requirements were satisfied, and it was proper to proceed with the hearing in the Respondent's absence.

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on the Claimant's behalf:

Clmt. Ex. 1 - Contract between the Claimant and the Respondent, dated May 11, 2018

Clmt. Ex. 2 - Summary of Payments and Checks paid to the Respondent by the Claimant, various dates; Contract between the Claimant and Aqua Wonders, LLC, dated October 31, 2019, and payment receipt, dated November 14, 2019; Invoice from MCS Ferrara Land Services, LLC to the Claimant, dated January 28, 2020, and screenshots confirming payments made; Pictures of Completed Fence and Pool Cover, undated

I admitted the following exhibits on the Fund's behalf:

Fund Ex. 1 - Notice of Hearing, dated December 4, 2020

Fund Ex. 2 - Home Improvement Claim Form, dated January 18, 2020

Fund Ex. 3 - Letter from the MHIC to Respondent, dated January 27, 2020

Fund Ex. 4 - Hearing Order, dated October 28, 2020

Fund Ex. 5 - Respondent's MHIC licensing history, dated January 5, 2021

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 under MHIC license number 01-95239.

2. At all times relevant to the subject of this hearing, the Claimant resided at 2820 Orchard Lakes Drive, Baldwin, Maryland 21013 (Claimant's residence).

3. On May 11, 2018, the Claimant and the Respondent executed a contract for installation of a swimming pool at the Claimant's residence (Contract).

4. The Contract's scope of work included excavation of the site, installation of the concrete shell, installation of the interior finish to the pool, installation of decking and fencing compliant with local code, installation of a pool cover and pump, an initial start-up indoctrination and balancing of chemicals, and a one-time closing of the pool.

5. The Contract stated that work would begin on or about July 20, 2018 and be substantially completed by May 15, 2019.

6. The agreed-upon Contract price was $56,150.00 and the Contract set forth a payment schedule based on specific milestones.

7. On May 15, 2018, the Claimant paid the Respondent an initial $2,000.00 to cover all permits necessary to construct the pool.

8. On June 15, 2018, the Claimant paid the Respondent $16,000.00 after he acquired financing for the project.

9. On September 27, 2018, the Claimant paid the Respondent $15,000.00 when the Respondent began excavating the site. The Respondent completed excavation pursuant to the Contract.

10. On December 1, 2018, the Claimant paid the Respondent $15,000.00 after the Respondent began installation of the pool's concrete shell. The Respondent installed the concrete shell pursuant to the Contract.

11. Following installation of the concrete shell in December 2018, the Respondent still needed to complete the concrete pool deck, install the interior lining of the pool, and

[illegible]

construct the fence. Because this work was not completed, the Claimant withheld the final Contract payment of $8,150.00.

12. The Respondent did not work on the project for eight months, and the project was not substantially completed by the May 15, 2019 deadline set forth in the Contract.

13. In August 2019, the Respondent hired a subcontractor to finish the pool decking and the interior of the pool. On August 21, 2019, at the Respondent's request, the Claimant directly paid the Respondent's subcontractor $9,410.00 for the services rendered, which resulted in the Claimant paying $1,260.00 more than the $56,150.00 Contract price.

14. On August 21, 2019, the Respondent provided a refund of $1,250.00 to the Claimant.

15. The Respondent did not construct the fence.

16. The Respondent did not install a pool cover or provide a one-time winterizing/closing of the pool.

17. The Respondent did not work on the project after August 21, 2019, and he did not respond to the Claimant's communications through October 2019.

18. In October 2019, the Claimant texted the Respondent that he was going to obtain other contractors to complete the scope of work in the Contract, and the Respondent did not respond to this communication.

19. On November 14, 2019, the Claimant paid Aqua Wonders, LLC, $4,050.00 to install a pool cover and close the pool for the season.

20. On January 28, 2020, the Claimant paid MCS Ferrara Land Services, LLC, $4,600.00 to install a fence compliant with local code.

21. The amount the Claimant paid other contractors to complete the scope of work in the Contract was $8,660.00.

DISCUSSION

Legal Framework

In this case, 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 (2014); 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 Cty. 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); *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.

Positions of the Parties

The Claimant argued that the Respondent performed an inadequate and incomplete home improvement by failing to install a pool cover, close the pool, and construct a fence compliant with local code requirements, as required by the Contract. The Fund agreed. For the following reasons, I find that the Claimant has proven eligibility for compensation from the Fund.

The Respondent Performed an Inadequate and Incomplete Home Improvement

The undisputed evidence shows that the Respondent performed an inadequate and incomplete home improvement by failing to finish the project as required by the Contract. The

Claimant testified credibly and cogently about all facets of the project, and his testimony was fortified by the documents I admitted into evidence on his behalf. In addition to construction of the pool itself, the Contract required the Respondent to install a pool cover, close the pool one time, and construct a fence that met local code requirements. The Claimant fulfilled his obligation by paying the Respondent the full contract price pursuant to the payment schedule set forth in the Contract. The Respondent did not fulfill his obligation to complete the project for that price.

The Claimant asked the Respondent to complete the project, but the Respondent ignored these requests. The Respondent's disregard and inaction forced the Claimant to hire other licensed contractors to install the pool cover, close the pool for the season, and install fencing that met local code requirements. The Claimant needed to take these actions promptly to protect the newly constructed pool from damage and to comply with local safety regulations.

The Claimant's unrefuted testimony and exhibits prove the Respondent failed to complete the Contract after receiving the full Contract price. Despite being given an opportunity to do so, the Respondent made no effort to remedy the deficiency. Based on these facts, I conclude that the Respondent performed an inadequate and incomplete home improvement. I thus find that the Claimant is eligible for compensation from the Fund.

Calculation of Compensation

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); 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.

In this case, the Respondent performed some work under the Contract, and the Claimant has retained 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 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).

Here, the Claimant paid the Respondent $56,150.00 of the original Contract price. The Claimant then obtained reasonable estimates to remedy and complete the project for $8,660.00. Thus, the Claimant's actual loss is the $56,150.00 added to the $8,660.00, minus the original contract price, $56,150.00, which equals $8,660.00. The Business Regulation Article caps a claimant's recovery at $20,000.00 for acts or omissions of one contractor and provides that a claimant may not recover more than the amount paid to the contractor against whom the claim is filed. Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a). In this case, the Claimant's actual loss is less than the amount paid to the Respondent and less than $20,000.00. Therefore, the Claimant is entitled to recover his actual loss of $8,660.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of $8,660.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405

(2015); COMAR 09.08.03.03B(3)(c). I further conclude that the Claimant is entitled to recover $8,660.00 from the Fund. Md. Code Ann., Bus. Reg. § 8-405(e)(5) (2015); 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 $8,660.00; 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;[4] and

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

March 22, 2021
Date Decision Issued

Edward J. Kelley
Administrative Law Judge

EJK/dlm
#190811

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

PROPOSED ORDER

WHEREFORE, this 9th day of June, 2021, 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.

Lauren Lake

Lauren Lake
Panel B
MARYLAND HOME IMPROVEMENT COMMISSION