

<p>IN THE MATTER OF THE CLAIM</p> <p>OF ELIHU EL,</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 STEVEN YOUNKER,</p> <p>T/A MD WATERPROOFING &</p> <p>RADON REDUCTION, INC.,</p> <p>RESPONDENT</p>	<p>* BEFORE JOY L. PHILLIPS,</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-02-22-29170</p> <p>* MHIC No.: 20 (75) 1297</p> <p>*</p>
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PROPOSED DECISION

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STATEMENT OF THE CASE

On January 19, 2022, Elihu El (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 \$7,879.00 for actual losses allegedly suffered as a result of a home improvement contract with Steven Younker, trading as MD Waterproofing & Radon Reduction, Inc. (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401

to -411 (2015 & Supp. 2022).¹ On October 4, 2022, the Claimant amended his Claim to \$8,704.00. On November 21, 2022, the MHIC issued a Hearing Order on the Claim. On November 28, 2022, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On February 21, 2023, I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. Jessica Kaufman, Assistant Attorney General, Department, represented the Fund. The Claimant was self-represented. The Respondent was self-represented.

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); Code of Maryland Regulations (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?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits offered by the Claimant:

- Clmt. Ex. 1 - Contract Addendum, May 6, 2020
- Clmt. Ex. 2 - Email from Claimant to Steve Maney, May 12, 2020
- Clmt. Ex. 3 - Photographs, taken February 20, 2023
- Clmt. Ex. 4 - Estimate from Pete Westera's Basement Systems, March 31, 2020

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

I admitted the following prenumbered exhibits offered by the Respondent:

- Resp. Ex. 1 - Mediation Agreement, October 27, 2020²
- Resp. Ex. 2 - (Not submitted)
- Resp. Ex. 3 - Contract, April 29, 2020
- Resp. Ex. 4 - Back of Contract, undated
- Resp. Ex. 5 - Certificate of Completion, undated
- Resp. Ex. 6 - (Not admitted but retained in the file)
- Resp. Ex. 7 - Waterproofing Work Order, April 30, 2020

I admitted the following exhibits offered by the Fund:

- Fund Ex. 1 - Notice of Hearing, December 14, 2022
- Fund Ex. 2 - Transmittal and Hearing Order, November 21, 2022
- Fund Ex. 3 - License Information, printed February 8, 2023
- Fund Ex. 4 - Letter from Fund to Respondent, March 3, 2022, with Claimant's Claim form
- Fund Ex. 5 - Letter from MHIC to Claimant, November 2, 2022, with attached letter from Claimant to MHIC, October 4, 2022, and proposals from BDry North, October 15, 2020 and All Aspects Waterproofing, October 15, 2020

Testimony

The Claimant testified and did not present other witnesses.

The Respondent testified and did not present other witnesses.

The Fund did not present any witness testimony.

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 99693.
2. On April 29, 2020, the Claimant and the Respondent entered into a contract to install a perimeter waterproofing system in the basement of the Claimant's home on Maple Avenue in Baltimore, Maryland. (Contract). The work involved tunneling a trench around the perimeter of the basement floor to prevent water incursion in the basement.

² Admitted solely for the purpose of showing the Respondent's good faith in resolving the dispute.

3. The original agreed-upon Contract price was \$6,900.00.
4. In the basement was a bathroom which contained a bathtub. A work order dated April 30, 2020, specifies that the Respondent would either tunnel under the tub or tunnel on a “stop/start” basis.
5. On May 6, 2020, the parties amended the Contract to include removal of all drywall, studs, and insulation on exterior walls, except behind the bath tub, for an additional \$982.00, bringing the total Contract price to \$7,882.00.
6. There were two old, obsolete sump pumps in the basement that were not compatible with the new waterproofing system. Therefore, the Respondent removed the sump pumps and replaced them with one sump pump that was sufficiently powerful to handle the basement’s space.
7. On unknown dates, the Claimant paid the Respondent in full.
8. The work took approximately two and one-half days. The Respondent completed the work as contracted and the Claimant signed a Certificate of Completion.
9. Once the Respondent’s crew was tunneling out the basement floor in the bathroom area, they realized they could not tunnel completely under the tub due to pipes in the floor and walls. Thus, they used the “stop/start” method, whereby they tunneled as far as they could under the tub from both ends, approximately one foot under each side. Because of how the tunnel was dug, any water seeping into the basement under the tub would flow into the perimeter channel and out to the sump pump.
10. Since the Respondent completed his work, the Claimant has experienced no water intrusion in his basement.

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); 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. 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. For the following reasons, I find that the Claimant has not proven eligibility for compensation.

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. Bus. Reg §§ 8-405(g), 8-408(b)(1) (2015 & Supp. 2022). The Claimant resides in the home that is the subject of the claim and does not own more than three dwellings. *Id.* § 8-405(f)(2) (Supp. 2022). The parties did not enter into a valid agreement to submit their disputes to arbitration. *Id.* §§ 8-405(c), 8-408(b)(3) (2015 & Supp. 2022). 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. *Id.* § 8-405(f)(1) (Supp. 2022).

The Claimant testified that he was unhappy with certain aspects of the Respondent's work. He learned there were two old sump pumps when the Respondent was excavating the basement floor, but only one new sump pump was installed. The Claimant thinks two would be better than one and seeks reimbursement for the second sump pump. The Claimant was dissatisfied that the Respondent's crew used the "stop/start" method of tunneling under the tub, believing that the system should be a closed loop around the perimeter of the basement. Because the loop stops under the tub, the Claimant believes the job was not finished. He argued that the fact there has been no water incursion since the Respondent completed his work only shows that the waterproofing system has not been tested, not that that the system works. He was disgruntled that the crew seemed not to be employed by the Respondent. He did not like the attitude of Mr. Maney, the Respondent's salesperson. He argued that the Respondent committed fraud when his crew determined they could not tunnel under the entire tub once they excavated the area and found pipes that presented obstacles.

The Respondent testified that he was contracted to install a sub-floor pressure relief waterproofing system and that is what was installed. His crew opened a trench to the footers, filled it with wash gravel, installed 4" perforated PVC piping, and installed a Mira Drain, which connects the wall to the footer drain. They installed one powerful sump pump which is efficient and can handle that size basement. The Contract specifically excluded opening up the wall behind the tub, he said, and the Scope of Work detailed that the tunnel under the tub might have to be "stop/start." The Respondent offered to remove the tub to give the crew access to the area under the floor, but the Claimant refused, asking instead for a \$3,000.00 refund. The Respondent testified that even without removing the tub, he gave the Claimant a lifetime warranty for water

intrusion 2' feet up the wall and 2' into the floor on the entire basement, including the tub area of the basement.

The Claimant presented no expert testimony regarding the inadequacy of the "stop/start" method or of the one efficient sump pump installed to replace two obsolete ones. He submitted estimates to redo the work, but no testimony regarding why redoing the entire waterproofing system was necessary, particularly given that there has been no water intrusion in his basement since the Respondent's system was installed. The Respondent noted in his testimony that there had been several heavy rainstorms since May 2020, yet there has been no water intrusion. This shows that the system works.

The Respondent looked at the three estimates offered by the Claimant to redo the work and testified that the Pete Westera's estimate is for a different scope of work from the Contract; it includes a "Clean Space Vapor Area." The BDry estimate uses a battery back-up unit and includes annual maintenance plans. It is a premanufactured system, not a custom system such as the one installed by the Respondent. The estimate from All Aspects includes more linear feet, and uses a similar system as the Respondent's, but also does not replace the tub.

The Fund argued that the Claimant cannot prevent the Respondent from removing the tub while also complaining that the Respondent could not tunnel completely under the tub to create a loop. It noted that the waterproofing system obviously works as there has been no water intrusion in almost three years. The Fund said this appears to be more of a dispute over the cost of the Contract, not actual loss. The Claimant received what he paid for. He presented no expert testimony to explain why the entire system needs to be replaced. The Fund noted that the

Respondent made good faith efforts to resolve the Claim. Thus, the Fund argued the Claim should be denied.

Despite the evidence that the waterproofing system installed by the Respondent appears to be working successfully, the Respondent attempted to satisfy the Claimant by offering to remove the tub and create a continuous loop of the system, as the Claimant wanted, but the Claimant rejected this offer. The Respondent also offered to pay for the standard cost of a sump pump, \$474.00, but the Claimant rejected that offer. In addition, the Respondent gave the Claimant a lifetime warranty on the work, including the area under the tub. These efforts show his good faith attempts to resolve the claim and I conclude the Claimant unreasonably rejected those attempts. Bus. Reg. § 8-405(d) (Supp. 2022).

For all of the reasons discussed above, I conclude the Claimant failed to prove that the Respondent performed unworkmanlike, inadequate, or incomplete home improvements. In addition, the Claimant unreasonably rejected the Respondent's good faith attempts to resolve the claim. I therefore find that the Claimant is not eligible for compensation from the Fund.

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.

April 12, 2023
Date Decision Issued

JLP/dlm
#203680

Joy L. Phillips

Joy L. Phillips
Administrative Law Judge

PROPOSED ORDER

WHEREFORE, this 24th day of May, 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**