IN THE MATTER OF THE CLAIM	*	**BEFORE MARC NACHMAN,**
OF EDWIN MOLINA,	*	**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 STEVE HESSLER,	*	
T/A ROCK CREEK DECKS &	*	**OAH No.: LABOR-HIC-02-21-01364**
ADDITIONS, LLC,	*	**MHIC No.: 20 (75) 220**
RESPONDENT	*	

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PROPOSED DECISION

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

STATEMENT OF THE CASE

On January 17, 2020, Edwin Molina (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 $1,600.00 in actual losses allegedly suffered as a result of a home improvement contract with Steve Hessler, T/A Rock Creek Decks & Additions, 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 hereinafter to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.

On January 13, 2021, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on March 22, 2021 over the Webex video platform. Bus. Reg. §§ 8-407(a), 8-312; Code of Maryland Regulations (COMAR) 28.02.01.20B. Justin Dunbar, Assistant Attorney General, Department, represented the Fund. The Claimant represented himself. The Respondent was not present.

After waiting more than twenty 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. COMAR 28.02.01.23A.

On February 4, 2021, the OAH provided a Notice of Hearing (Notice) to the Respondent by United States mail. COMAR 09.08.03.03A(2); COMAR 28.02.01.05C(1). The Notice stated that a hearing was scheduled for March 22, 2021, at 9:30 a.m., over the Webex video platform (Meeting Number 129 667 2295). The Notice further advised the Respondent that failure to attend the hearing might result in "a decision against you." The Notice was also mailed to Richard J. Hackerman, Esquire, who entered an appearance on behalf of the Respondent. By letter dated March 12, 2021, Mr. Hackerman filed a Notice of Withdrawal of Appearance, striking his appearance on behalf of the Respondent.

The United States Postal Service did not return the Notice to the OAH. The Respondent did not notify the OAH of any change of mailing address. COMAR 28.02.01.03E. The Respondent made no request for postponement prior to the date of the hearing. COMAR 28.02.01.16. Prior to the hearing, Mr. Dumbar attempted to correspond with the Respondent and his then counsel, but received no response. Mr. Hackerman, who had previously represented the Respondent, was aware of the hearing, having initially noted his appearance and then filing his

withdrawal. Therefore, I determined that the Respondent received proper notice, and I proceeded to hear the captioned matter. COMAR 28.02.01.05A, C.

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?

SUMMARY OF THE EVIDENCE

Exhibits

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

Cl. Ex. 1	Contract/Proposal between Claimant and Respondent, dated September 7, 2018 (Contract)
Cl. Ex. 2	Deck Armor LLC Estimate
Cl. Ex. 3	Photograph
Cl. Ex. 4	Photograph
Cl. Ex. 5	Photograph
Cl. Ex. 6	Photograph
Cl. Ex. 7	Photograph
Cl. Ex. 8	Photographs (15)[3]
Cl. Ex. 9	Checks (3)
Cl. Ex. 10	Deck Armor email

[3] The record was left open for ten days for the Claimant to submit documents that were sent to the MHIC, but had not been sent to the OAH prior to the hearing. The Claimant sent these photographs to the MHIC as part of his claim; the record was kept open for the Fund's attorney to submit them into the record, which he did. The Claimant was also permitted to submit the payment records (Cl. #. 9) and text from Armor Deck (Cl. Ex. 10) into evidence. Accordingly, no objections having been made, all the post-hearing submissions have been admitted into evidence.

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

Fund Ex. 1. Notice of Remote Hearing, dated February 3, 2021
Fund Ex. 2. MHIC Hearing, dated January 7, 2021
Fund Ex. 3. MHIC Claim Form, received January 17, 2020
Fund Ex. 4. Letter from MHIC to the Respondent, dated January 24, 2020, with MHIC Claim Form attached.
Fund Ex. 5. MHIC licensing information for Respondent

The Respondent did not appear at the hearing and submitted no exhibits for admission into evidence.

Testimony

The Claimant testified and did not present other witnesses. Neither the Fund nor the Respondent presented 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 5305670.

2. On September 7, 2018, the Claimant and the Respondent entered into a contract to build a deck on the rear of the Claimant's house in the City of Rockville, Montgomery County, Maryland. (Contract).

3. The original agreed-upon Contract price was $11,754.00, to which was added $500.00 for permits from the City of Rockville, less a discount of $500.00. The Contract price therefore remained $11,754.00.

4. The Contract called for the Claimant to pay for the construction in four installments: $2,400,00 when the Contract was signed; $3,500.00 when the materials arrived and the footers were excavated; $4,700.00 when the frame and roof was installed, and $1,154.00 when the construction was completed.

5. The Respondent started construction of the deck in September 2018, but he failed to file for the necessary permits. When construction was almost completed, a City of Rockville building inspector ordered the construction to be torn down and rebuilt, subject to subsequent inspections. Additionally, the deck was longer than was allowed by the City of Rockville and had to be rebuilt to code.

6. The Respondent tore down the deck he had constructed, and rebuilt it according to the Rockville City Code. The Respondent reused the wood that had initially been used to construct the deck that was not built to code.

7. Construction was ostensibly completed in November 2018,

8. Due to the Respondent's failure to obtain the necessary permits from the City of Rockville, the Respondent verbally agreed to reduce the Contract price by $1,100.00. The cost of construction under the Contract was therefore $10,654.00.

9. The Claimant paid the Respondent the first three installments required under the Contract, for a total of $10,600.00. He did not pay the final installment of $1,154.00.

10. Over the winter of 2018 and 2019, the Claimant noticed defects in the deck construction.

11. When building the deck, the Respondent failed to properly screw the deck boards onto the floor joists. Some boards were only attached with one screw to the joists instead of two, causing the boards to warp and cup. As a result, the warped and cupped boards looked poorly constructed and posed tripping hazards. In addition some deck boards were not screwed down at all, posing fall hazards.

12. In April 2019, the Claimant contacted the Respondent to repair the defects.

13. The Respondent sent workers to the property to repair the cupped boards and install screws in the boards.

14. After the Respondent attempted to correct the defects, the Claimant continued to complain about the poor workmanship, to which the Respondent responded that the work was completed and he was not returning to the property.

15. After the Respondent's attempt to repair the deck, many of the deck boards were still cupped and warped, and the deck remained in an unworkmanlike and unfinished condition.

16. After the Respondent failed to complete his work, the Claimant obtained an estimate from Deck Armor, LLC, to correct the construction. Many of the deck boards could not be reused and had to be replaced. Additionally, new screws had to be installed. Both repairs required materials and labor. The amount of Deck Armor's estimate was $1,600.00.

17. The work has not yet been completed.

18. Taking into account the initial Contract price of $11,754.00, the Respondent's $1,100.00 discount, the payments of $10,600.00 made to the Respondent and the $1,600.00 cost to complete and repair the Respondent's work, the Claimant's actual loss is $1,546.00.

DISCUSSION

Applicable law

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

The Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimant. The Claimant is neither a relative of the Respondent nor an officer, partner or employee of his company. The Claimant owns the subject property, which is his home, and does not own any other real property in Maryland. No suits have been filed against the Respondent or his company by the Claimant, nor has the Claimant filed any insurance or other claims to compensate him for the Respondent's defective work. Having met those qualifications, the Claim is therefore a compensable claim against the Fund, subject to its proof.

The Contract

On or about September 7, 2018, the Claimant and the Respondent entered into a Contract to perform home improvement work at the Claimant's house. Cl. Ex. 1. The initial proposal was to build a deck in the back of the house. The scope of the work was listed as follows:

- Build a new screen room and deck.
- Deck size will be 16 ft x 22 ft.
- Decking will be #1 pressure treated wood.
- 16 ft long rail on one side of deck
- 16 ft long bench on one side of deck.
- 1 long step on left side of deck directly to the ground.
- Build a 4 ft x 4 ft landing with approx. 5 steps to ground.
- Rails will be # 1 Pressure treated wood

The price of the work was $11,754.00, to which the Respondent added $500.00 for permits and inspection costs, for a total of $12,254.00.. The price was then reduced by $500.00 for a "Company website discount." The total amount due was therefore $11,754.00, payable on the following draw schedule:

Draw 1: Contract signing	$2,400.00
Draw 2: 1st material package on site and footers excavated	3,500.00
Draw 3: Decking boards installed and frame of roof installed	4,700.00
Draw 4: Upon Completion	1,154.00

The Respondent verbally agreed to a price reduction of $1,100.00 (discussed below).

The Claimant testified that the final Contract price was $10,654.00, for which the following payments were made:

Check No.	Date	Amount
182	9/7/2018	$ 2,400.00
187	9/25/2018	$ 3,500.00
429	11/20/2018	$ 4,700.00
	Total:	$ 10,600.00

Cl. Ex. 9.

The Respondent's work

The Respondent's work was defective. First, although the Respondent promised to apply for construction permits from the City of Rockville, where the property was located, he failed to do so. After the Respondent completed approximately ninety percent of the construction, a City inspector stopped the work and required the Respondent to tear down the deck and rebuild it with the required permits and inspections.[4] As a result of this error, the Respondent orally agreed to reduce his contract charge by $1,100.00, reducing the Contract price to $10,654.00.

Secondly, the deck boards were improperly installed, causing warping and cupping. The Claimant testified that the Respondent reused the decking boards that he had to remove due to the lack of inspection. The deck was eventually completed in November 2018. During the winter months, the Claimant testified that he did not use the deck. However in the Spring of 2019, the Claimant began to notice defects in the decking. Specifically, some boards were

[4] The Claimant testified that the Respondent originally built the deck longer than was permitted under the Rockville town ordinances, which is another reason it had to be removed and rebuilt.

warping and cupping and some screws were missing from the planks – some boards only had one screw holding them down to the joists.

In April 2019, the Claimant complained to the Respondent, who promised to correct the defects in the deck. Although the Respondent promised three times to come to the Claimant's house to repair the deck, he initially did not return to complete the work. After the Claimant filed a complaint with the MHIC, the Respondent returned to the property and replaced a few of the more cupped boards. However, the Respondent failed to complete the repairs, leaving some of the boards that he removed piled up, and he failed to install second screws where they were needed. Despite his failure to complete the repairs, the Respondent sent the Claimant a text message, stating "just finished, looks good," with a picture of a worker installing a screw in one of the deck boards. There was no further communication between the Claimant and the Respondent, the work having ended on October 5, 2019.

Photographs, taken by the Claimant and submitted into evidence,[5] show that the Respondent did not perform a workmanlike home improvement and did not correct the defects brought to his attention; the Claimant also sent these photographs to the Respondent. CL Ex. 3 shows deck boards with only one screw put in, where two screws should have been used. Cl. Exs. 4 and 5 show that the boards were not sitting flat, posing a tripping hazard. Cl. Ex. 6 shows the same defect, with cupping evident. Cl. Ex. 7 shows a loose, unattached board that the Claimant's three year old son was able to lift up and remove, as there were no screws holding it down. The photographs submitted into evidence in the Claimant's post-hearing submission also support the Claimant's testimony regarding the condition of the deck after the Respondent said he completed his work, but before any repairs to that work were begun. Cl. Ex. 8.

[5] The Claimant testified that he took the photographs himself, and that they are a fair and accurate representation of the condition of the deck after the Respondent completed his work.

Repairs to the Claimant's unworkmanlike, inadequate, or incomplete construction,

When the Respondent failed to repair the deck boards, the Claimant retained Deck Armor, LLC, to correct the work that the Respondent failed to properly complete. Cl. Ex. 2. The Deck Armor estimator told the Claimant that two screws were needed in each board at the joists, so that the boards would not cup or warp. He said, however that, installing screws in the cupped boards would not flatten the boards, and the boards could not just be flipped over, as the boards had already been warped and would not sit flat. New boards were needed. The scope of the Deck Armor contract is as follows:

> 1. Remove all the floor boards.
> 2. Using same boards install them in order to create an even gaps/space between new pattern[s].
> 3. Use new boards for the divider in the middle (extend it all of the way to the house).
> 4. Create new "even" pattern.

The Deck Armor estimate was $1,600.00 including labor and materials. However, Deck Armor did not perform the work, and the deck remains in the condition that the Respondent left it. The Claimant testified that the Deck Armor estimate expired and the cost had increased, so the lower estimate was no longer valid.[6]

Based on the foregoing, I therefore find that the Respondent performed unworkmanlike, inadequate, or incomplete home improvements.

Actual Damages

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

[6] The Claimant also submitted additional estimates from Posada Roofing and Exterior and Deck and Restoration, but there was no testimony about these estimates. Nor have they been marked as exhibits or admitted into evidence due to the lack of testimony supporting their admission into evidence. Although the Claimant testified that the Deck Armor estimate had increased due to COVID costs and the increase in lumber costs, evidence of the new construction estimates and construction costs were not admitted into evidence and are therefore not considered to be part of the Claim, although it is up to the Fund to determine whether to accept these estimates.

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 intends to retain 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). Therefore, the actual loss is calculated as follows:

$10,600.00	Amount paid by the Claimant to the Respondent under the Contract, plus
$0.00	Amount paid by the Claimant to the Respondent under any addendum
$10,600.00	Total Amount paid by the Claimant to the Respondent, plus
$1,600.00	Fair market cost to make corrections and complete Respondent's work
$12,200.00	Subtotal, less
$10,654.00	Original contract price (including the price of any addendum) equals
$1,546.00	Amount of the Actual Loss to the Claimant.[7]

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

[7] The discrepancy of $54.00 is accounted for by the Claimant paying the Respondent $54.00 less than the Contract price (i.e., payments of $2,400.00, $3,500.00 and $4,700, totaling $10,600.00, is $54.00 less the amended Contract price of $10,654.00, which is the result of the total adjusted Contract price of $11,574, less the verbal discount of $1,100.00).

the Respondent and less than $20,000.00. Therefore, the Claimant is entitled to recover his actual loss of $1,546.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of $1,546.00 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 that amount from the Fund.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant $1,546.00; 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.

June 14, 2021
Date Decision Issued

Marc Nachman
Administrative Law Judge

MN/emh
#192635

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

PROPOSED ORDER

WHEREFORE, this 7th day of July, 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.

Joseph Tunney

Joseph Tunney
Chairman
Panel B
MARYLAND HOME IMPROVEMENT COMMISSION