IN THE MATTER OF THE CLAIM	*	BEFORE RACHAEL BARNETT,
OF KRISTIN KERNS-D'AMORE,	*	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 DAVID	*	
ZOLLINHOFER,	*	OAH No.: LABOR-HIC-02-22-28110
T/A PAX CONTRACTING,	*	MHIC No.: 22(75)890
RESPONDENT		

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

PROPOSED DECISION

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STATEMENT OF THE CASE

On August 17, 2022, Kristin Kerns-D'Amore (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 $13,881.63 for actual losses allegedly suffered as a result of a home improvement contract with David Zollinhofer, trading as Pax Contracting (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -

411 (2015 & Supp. 2022).[1] On October 26, 2022, the MHIC issued a Hearing Order on the Claim. On November 7, 2022, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On February 6, 2023, I held a hearing by video. Bus. Reg. §§ 8-407(a), 8-312; Code of Maryland Regulations (COMAR) 28.02.01.20B(1)(b). Andrew Brouwer, Assistant Attorney General, Department, represented the Fund. The Claimant was self-represented.

After waiting 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. COMAR 28.02.01.23A. On December 8, 2022, the OAH provided a Notice of Hearing (Notice) to the Respondent by United States mail to the Respondent's address on record with the OAH. COMAR 28.02.01.05C(1). The Notice stated that a hearing was scheduled for February 6, 2023, at 9:30 a.m. on Webex, an on-line meeting platform. COMAR 09.08.03.03A(2). The Notice further advised the Respondent that failure to attend the hearing might result in "a decision against you."

The Notice sent was returned to the OAH with the notation "Not Deliverable as Addressed." The Office of the Attorney General subsequently provided the OAH with an updated address for the Respondent and, on January 24, 2022, the OAH provided a copy of the Notice to the Respondent's updated address by United States mail and certified mail. COMAR 28.02.01.05C(1). The new copy of the Notice provided the identical scheduling information as the first. The new Notice was sent by United States mail and was not returned to the OAH; however, the notice sent via certified mail was returned as undeliverable. The Respondent did not notify the OAH of any change of mailing address. COMAR 28.02.01.03E. The Respondent

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

made no request for postponement prior to the date of the hearing. COMAR 28.02.01.16. 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. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021); 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, undated; Residential Building Permit, July 10, 2020; Inspection Requirements, July 10, 2020; Architectural Drawings, undated

Clmt. Ex. 2 - Checks from the Claimant to the Respondent, various dates in 2020-2021; Checks from the Claimant to Stockton Home Improvement, various dates in 2022

Clmt. Ex. 3 - Photographs of the Porch in various stages of construction, January 2021 – August 2022

Clmt. Ex. 4 - Email correspondence between the Claimant and the Respondent, various dates

Clmt. Ex. 5 - Email from the Respondent to the Claimant, July 9, 2021

Clmt. Ex. 6 - Better Business Bureau record of complaint, printed January 7, 2023

Clmt. Ex. 7 - Email from Respondent to the Claimant, October 27, 2021

Clmt. Ex. 8 - Email exchange between the Respondent and the Claimant, November 18 – 19, 2021

Clmt. Ex. 9 - Email exchange between the Respondent, the Claimant, Ralo Enterprise, various dates

Clmt. Ex. 10 - Respondent's response to the Claimant's MHIC complaint, May 5, 2022

Clmt. Ex. 11 - Email from the Claimant to several parties regarding an estimate from Stockton Home Improvement, May 12, 2022

Clmt. Ex. 12 - Estimate from Stockton Home Improvement, May 18, 2022, with attached sales orders and payment receipt from Stoett Industries, Inc., various dates, with attached email exchange between the Claimant and Stockton Home Improvement, May 10, 2022

Clmt. Ex. 13 - Home Improvement Claim Form, February 2, 2022

The Respondent did not offer any exhibits.

I admitted the following exhibits offered by the Fund:

Fund Ex. 1 - Hearing Order, October 26, 2022

Fund Ex. 2 - Notice of Remote Hearing, December 8, 2022

Fund Ex. 3 - Letter from the MHIC to the Respondent, August 30, 2022, with attached Home Improvement Claim Form, August 17, 2022

Fund Ex. 4 - License Registration with MHIC, November 23, 2022

Fund Ex. 5 - Affidavit of David Finneran, January 24, 2023

Fund Ex. 6 - Notice of Remote Hearing, January 24, 2023

Testimony

The Claimant testified and did not present other witnesses.

The Respondent did not testify or present any witnesses.

The Fund did not offer 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 5611999.

2. The Claimant and her spouse own a home located in Calvert County; it is their only residential property. There is a pool located in the backyard.

3. On December 21, 2020, the Claimant and the Respondent entered into a contract to construct a screened-in patio on the rear of the Claimant's home. (Contract).

4. The Contract specified the Respondent would install the following:

- Framing
- Tie in electrical to run for fan and infrared heat or canned heat lighting and switches
- Retractable screen across the front section opening to the pool
- Manual retractable screen on the left side of the patio
- Wrap and finish all exposed framing in white PVC
- Roofing materials to match the existing roof
- New screens throughout
- Gutters and downspouts

5. The Contract specified that $8,550.00 was due at the time of signing and that the second payment (approximately $6,285.00) would be due after framing was completed and the Respondent purchased some additional materials. The third and fourth payments would be made near the completion of the project, respectively $3,000.00 and $4,000.00.

6. The original agreed-upon Contract price was $21,835.00.

7. On December 21, 2020, the Claimant paid the Respondent $8,550.00, which coincided with acceptance of the Contract.

8. On January 14, 2021, the Respondent began construction.

9. The Claimant and Respondent subsequently entered into an addendum to install heaters for $1,200.00

10. During the course of the project, the Respondent requested the Claimant make the following payments, which the Claimant made:

- $6,285.00 on January 9, 2021, and
- $5,700.00 on January 20, 2021.

11. The Respondent worked on the project intermittently, with progress slowing to a near standstill by November 2021.

12. During the course of the construction, the Respondent left the patio roof in a partial state of construction with no shingles on it. This allowed water intrusion to occur in the attic and the ceiling to become damp. Following the water intrusion, carpenter bees infiltrated the damp space, causing damage to the ceiling.

13. On April 15, 2021, the Claimant provided directions to the Respondent via email regarding where electrical switches would be placed.

14. In May 2021, the Respondent installed the electrical wiring. The Respondent installed a 120-volt receptable on a 240-volt circuit and failed to install the heaters. Respondent subcontracted with an electrician to have the electrical work performed.

15. The Claimant raised concerns with the Respondent regarding the electrical work over the course of several emails.

16. In July 2021, the Respondent installed siding.

17. In October 2021, the Respondent installed the ceiling.

18. On October 27, 2021, the Respondent sent the Claimant an email that set out the details of what the Respondent would do to finish the project. The Respondent also stated, "I'd like to apologize for the absolute miscommunication, as well as mismanagement of this project as I assume accountability for lack of greater oversight." (Claimant Ex. 7).

19. In November 2021, the Respondent installed a ceiling fan and lights.

20. On November 30, 2021, the Respondent agreed that the issues the Claimant raised about the electrical work would be remediated and the heaters would be installed.

21. On December 3, 2021, the Claimant raised the following outstanding issues with the Respondent over email:

- Ceiling rod needed to be installed for the fan,
- Lighting and fan switches needed to be corrected,
- Heaters needed to be installed and heater timer switches needed to be enclosed,

- Replace non-heater ceiling outlets and the low GFCI outlet on the wall,
- Fix gutter slope, install gutter guards,
- Build and install walk-on cover for window well,
- Sand, caulk, and seal ceiling,
- Install retractable screens,
- Install Stationary screen,
- Install screen door, and
- Paint vinyl white.

22. On December 9, 2021, the Respondent provided a schedule for addressing these remaining issues.

23. On December 24, 2021, after additional emails from the Claimant, the Respondent agreed the electrical work would be done "the EXACT WAY we want it done" and that the screen company would provide an update soon on remaining issues, and projected that the work would all be complete in January 2022. (Claimant Ex. 4)

24. The remaining issues, including electrical issues were not corrected, so on December 28, 2021, the Claimant provided the name of a different electrician to the Respondent. The electrician performed work; however, the Respondent failed to pay the electrician, so the Claimant paid the electrician directly.

25. The Claimant also notified the Respondent that one screen the Respondent installed was damaged.

26. Other tasks remained incomplete.

27. On May 12, 2022, the Claimant sent the Respondent an email with an attached quote for completion of the project by Stockton Home Improvement ("Stockton") and requested the Respondent reply by May 16, 2022. The Respondent did not respond by May 16, 2022.

28. On May 18, 2022, the Claimant entered a contract with Stockton to remediate damage to the project and to complete the project. The Contract included the following work:

- Install two retractable screens and two fixed-panel screens,
- Install a door and glass above the door,

- Install vinyl rail on side with fixed screen,
- Caulk posts and siding under roof, install trim against the ceiling, and remove and rehang heaters,
- Paint all PVC boards and siding under roof,
- Cut access from existing attic to attic on porch,
- Rescreen damaged screen on sliding glass door, and
- Plug holes from carpenter bees.

29. The Claimant paid Stockton a total of $16,331.63 to complete the project.

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 proven eligibility for compensation.

The Respondent was a licensed home improvement contractor at the time the Respondent entered into the Contract with the Claimant.

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 did not unreasonably reject good faith efforts by the Respondent to resolve the claim. *Id.* § 8-405(d) (Supp. 2022). Rather, the Claimant followed up with the Respondent extensively over email for nearly a year after the project began in an effort to have the Respondent complete the project. The Claimant's efforts elicited some work and many empty promises. The Respondent took ownership for the project's shortcomings, admitting in an email that he had provided inadequate oversight of the project. However, honesty did not pave the way to action. Ultimately, in December 2021, the Respondent had failed to install screens, glass, vinyl rails, caulk posts, install trim, paint PVC boards, provide for attic access, repair holes caused by carpenter bees and rescreen the damaged screen. The purpose of the original project was to have a screened-in porch, but without screens it was functionally incomplete. It was reasonable for the Claimant to conclude that the Respondent would not complete the project because work had ceased, and the Respondent had not made a recent effort to return to the property to complete the project. After a year of efforts to get the Respondent to complete the project according to the Contract, it was reasonable for the Claimant to conclude the Respondent would not be doing so. By leaving the project in an incomplete state, the Respondent performed an incomplete home improvement.

In May 2022, the Claimant elicited a contract from Stockton to complete the project at a cost of $16,331.63. The new contract included the following tasks left undone by the Respondent:

- Install two retractable screens and two fixed-panel screens,
- Install a door and glass above the door,
- Install vinyl rail on side with fixed screen,
- Caulk posts and siding under roof, install trim against the ceiling, and remove and rehang heaters,
- Paint all PVC boards and siding under roof,
- Cut access from existing attic to attic on porch,
- Rescreen damaged screen on sliding glass door, and
- Plug holes from carpenter bees.

Stockton is an MHIC-licensed contractor. Stockton performed the aforementioned work, completing the Contract as originally contemplated with the Respondent. 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. Bus. Reg. § 8-405(e)(3) (Supp. 2022); COMAR 09.08.03.03B(1). The damages caused by the carpenter bees are consequential damages and therefore, the Claimant is not eligible for compensation for the cost to remediate these damages. MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work.

The Respondent performed some work under the Contract, and the Claimant has retained another contractor to complete or remedy that work. Largely, Stockton completed the work; however, Stockton also remediated the damage caused by carpenter bees and the damaged screen that occurred during the Respondent's work. Stockton's contract does not specify the cost of the labor to repair the holes caused by the carpenter bees but notes that wood from the remaining project was used. There was no testimony about the cost to remediate the damage caused by the carpenter bees. It would be hard to imagine the labor cost would exceed $1,000.00, so I will use

this figure. 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). The Claimant and Respondent entered into a contract for $21,835.00 and added an addendum of $1,200.00, bringing the contractual total to $23,035.00. Since the Respondent did not complete the Contract, the Claimant only paid $20,535.00 and this is the starting point of the calculation. To this amount, one adds the amount paid to Stockton to complete the project, $16,331.63 (minus $1,000.00 for the carpenter bee repairs) for a total of $35,366.63. From this amount, one subtracts the contractual amount of $23,035.00 for a result of $12,331.63.

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.[2] Bus. Reg. § 8-405(e)(1), (5) (Supp. 2022); COMAR 09.08.03.03B(4). In this case, the Claimant's actual loss is less than the amount paid to the Respondent and less than $30,000.00. Therefore, the Claimant is entitled to recover her actual loss of $12,831.63.

[2] 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").

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of $12,831.63 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)(c). I further conclude that the Claimant is entitled to recover that amount from the Fund. Bus. Reg. § 8-405(e)(1), (5) (Supp. 2022); 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 $12,831.63 amount; 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;[3] and

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

Rachael Barnett

March 9, 2023
Date Decision Issued

Rachael Barnett
Administrative Law Judge

RAB/ja
#203874

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

PROPOSED ORDER

WHEREFORE, this 27th day of April, 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.

Chandler Louden

Chandler Louden
Panel B
MARYLAND HOME IMPROVEMENT COMMISSION