

IN THE MATTER OF THE CLAIM	* BEFORE EDWARD J. KELLEY,
OF TAMERA BRUNSON,	* 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 BRIAN FREEMAN,	*
T/A ELITE PROFESSIONAL	* OAH No.: LABOR-HIC-02-23-27204
BUILDERS, INC.,	* MHIC No.: 23 (75) 205
RESPONDENT	*

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On April 14, 2023, Tamera Brunson (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)¹ Guaranty Fund (Fund) for reimbursement of \$13,399.00 for actual losses allegedly suffered as a result of a home improvement contract with Brian Freeman, trading as Elite Professional Builders, Inc. (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2023).² On October 13, 2023, the MHIC issued a Hearing

¹ The MHIC is under the jurisdiction of the Department of Labor.
² Unless otherwise noted, all references to the Business Regulation Article are to the 2015 Volume of the Maryland Annotated Code.

Order on the Claim. On October 13, 2023, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On December 7, 2023, I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. Mackenzie Read, Assistant Attorney General, Department of Labor (Department), represented the Fund. The Claimant represented herself. The Respondent represented himself.

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 & Supp. 2023); 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 between the Claimant and the Respondent, October 9, 2021
- Clmt. Ex. 2 - Letter from the Claimant's counsel to the Respondent, August 12, 2022
- Clmt. Ex. 3 - Communications between the Claimant and the Respondent, August 17-23, 2022
- Clmt. Ex. 4 - Contract between the Claimant and Abbey Fence and Deck Co., Inc., February 5, 2023
- Clmt. Ex. 5 - Letter from the MHIC to the Respondent, September 2, 2022

The Respondent did not offer any exhibits for admission.

I admitted the following exhibits offered by the Fund:

Fund Ex. 1 - Notice of Remote Hearing, November 3, 2023

Fund Ex. 2 - Hearing Order, October 13, 2023

Fund Ex. 3 - Licensing History, printed November 29, 2023

Fund Ex. 4 - MHIC Claim Form and letter from Joseph Tunney, Chairman, MHIC,
May 8, 2023

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 witnesses.

PROPOSED FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. In September of 2021, the Claimant determined that she wanted to build a deck at her residence.
2. After hearing the Respondent's advertisement on the radio, stating that he was a licensed contractor in Maryland, the Claimant contacted him and requested an estimate.
3. On October 9, 2021, the Claimant and the Respondent entered into a contract where the Respondent agreed to construct a 12' x 20' raised deck at the Claimant's residence (Contract).
4. The original agreed-upon Contract price was \$11,500.00.
5. On October 9, 2021, the Claimant paid the Respondent \$8,100.00 pursuant to the terms of the Contract.
6. At the time the Contract was executed, the Respondent's home improvement contractor's license had expired.

7. The Contract did not have a start date or an end date, but the parties agreed that construction would begin when materials were available and weather conditions allowed. The parties also agreed that the deck would be completed in the spring of 2022.

8. The Respondent did not work on the project between October 2021 and January 2022.

9. On January 15, 2022, the Claimant contacted the Respondent regarding the construction schedule, and he stated that the ground was too hard to begin construction. He promised that the project would be completed by April 20, 2022.

10. On February 14, 2022, the Respondent reactivated his home improvement contractor's license.

11. The Respondent did not work on the project between January 2022 and May 2022.

12. On May 3, 2022, the Respondent obtained a permit for the project from the county for \$87.24. On or about this same date, the Respondent told the Claimant that the project would be completed by June 24, 2022.

13. The Respondent did not work on the project between May 3, 2022, and July 7, 2022.

14. On July 7, 2022, the Respondent came to the residence and installed footers and a ledger board. At the time the Respondent completed this work, his contractor's license was active.

15. Between June 24, 2022, and August 12, 2022, the Respondent did not work on the project.

16. On August 12, 2022, the Claimant demanded that the project be completed by August 31, 2022.

17. The Respondent did not complete the project as requested. He agreed to refund the Claimant's money but never did so.

18. The Claimant hired a licensed contractor, Abbey Fence and Deck Co., Inc. (Abbey Fence and Deck) to complete the project for \$16,799.00.

19. Abbey Fence and Deck had to obtain a new permit to complete the project.

20. Abbey Fence and Deck completed the deck in July 2023. Abbey Fence and Deck had to remove and replace the footers and ledger installed by the Respondent because they were installed incorrectly and did not pass inspection.

DISCUSSION

LEGAL FRAMEWORK

“The Fund was established to provide an additional remedy for homeowners who suffered actual loss due to unsatisfactory work performed by a home improvement contractor.” *Brzowski v. Maryland Home Imp. Comm’n*, 114 Md. App. 615, 628 (1997); Bus. Reg. § 8-405(a) (Supp. 2023); *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.”). By statute, certain claimants are excluded from recovering from the Fund altogether. Specifically, an award from the Fund may occur only if the evidence shows: (a) the claimant resides in the home as to which the claim is made, or owns no more than three dwelling places; (b) the claimant is not an employee, officer, or partner of the contractor; or the spouse or other immediate relative of the contractor or the contractor’s employees, officers or partners; (c) the work at issue did not involve new home construction; (d) the claimant did not unreasonably reject the contractor’s good faith effort to resolve the claim; (e) the claimant complied with any contractual arbitration clause before seeking compensation from the Fund; (f) there is no pending claim for the same loss in any court of competent jurisdiction and the claimant did not recover for the actual loss

from any source; and (g) the claimant filed the claim with the MHIC within three years of the date the claimant knew, or with reasonable diligence should have known, of the loss or damage. Bus. Reg. §§ 8-405(c), (d), (f), and (g), 8-408(b)(1) (Supp. 2023); Bus. Reg. § 8-101(g)(3)(i) (Supp. 2023).

A home improvement claim is subject to dismissal as legally insufficient if the contractor was unlicensed when the contract was entered into but licensed during the performance of the contract unless:

- (i) The claimant establishes by a preponderance of the evidence that the claimant did not know that the contractor was unlicensed at the time the contract was entered into; and
- (ii) A substantial portion of the contractor's alleged misconduct occurred after the contractor became licensed.

COMAR 09.08.03.02D(3)(d).

If not excluded on any of these grounds, a claimant 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. 2023); *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.

ANALYSIS

Although the Respondent was not a licensed contractor at the time the Contract was signed, the evidence demonstrated that the Claimant did not know that the Respondent was unlicensed on that date. The Claimant testified credibly that she believed the Respondent was licensed with the MHIC when the Contract was signed. This testimony was not refuted. Indeed, the Respondent agreed that he represented himself to the Claimant as a licensed contractor when the Contract was executed. The evidence also showed that a substantial portion of the

Respondent's alleged misconduct occurred after he reactivated his contractor's license. Thus, as the Fund's counsel acknowledged at the hearing, the Claimant's Claim is not subject to dismissal under COMAR 09.08.03.02D(3)(d).

The Fund's counsel did not assert that any other statutory exclusions applied to this case, and I find that the Claimant was not subject to any of the statutory exclusions for recovery from the Fund. Additionally, the evidence demonstrates that the Respondent performed an inadequate, unworkmanlike, and incomplete home improvement.

The Claimant testified thoroughly and credibly about all facets of the project. Her testimony was corroborated by exhibits, which explained the timeline of the relevant events and the Claimant's communications with the Respondent. The Claimant fulfilled her contractual obligation by paying the Respondent \$8,100.00, and she was more than patient as the project was delayed without adequate explanation. The Respondent led the Claimant to believe he could complete the Contract by installing the deck by the spring of 2022, but he failed to do so. The Respondent did some work on the project in July 2022, but by his own admission, this work was defective and needed to be replaced. The Respondent obtained a permit to construct the deck, but that permit could not be used to construct the deck. Ultimately, after months of inaction and unresponsiveness, the Claimant gave up on the Respondent and found another licensed contractor to construct the deck.

Significantly, the Respondent appeared at the hearing and candidly acknowledged his deficiencies. He agreed that the Claimant deserved a refund of the money she paid, but he stated he did not have the money to pay her.

In this case, the Claimant, the Fund, and the Respondent agreed that the evidence demonstrated the Respondent performed an incomplete home improvement, and I find these arguments persuasive. 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. 2023); 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.

The Respondent performed some work under the Contract, and the Claimant retained Abbey Fence and Deck to repair and complete 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).

In this case, the Claimant paid the Respondent \$8,100.00 under the Contract. She then paid Abbey Fence and Deck \$16,799.00 to replace the Respondent's deficient work and complete the project. Added together, these amounts total \$24,899.00. When the \$11,500.00 Contract price is subtracted from this figure, the resulting actual loss is \$13,399.00.

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.³ Bus. Reg. § 8-405(e)(1), (5) (Supp. 2023); COMAR 09.08.03.03B(4). In this case, the Claimant's actual loss of \$13,399.00 exceeds the amount paid to the Respondent. Therefore, the Claimant's recovery is limited to \$8,100.00, the amount paid to the Respondent.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual loss of \$13,399.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2023) COMAR 09.08.03.03B(3)(c). I further conclude that the Claimant is entitled to recover \$8,100.00 from the Fund.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$8,100.00; 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.



January 10, 2024
Date Decision Issued

Edward J. Kelley
Administrative Law Judge

EJK/dlm; #209209

³ 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").

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

PROPOSED ORDER

WHEREFORE, this 13th day of February, 2024, 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***