

<p>IN THE MATTER OF THE CLAIM</p> <p>OF TERESA SYLVINA,</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 JAMES MCMILLAN,</p> <p>T/A JAMES MCMILLAN,</p> <p>RESPONDENT</p>	<p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p>	<p>BEFORE SUN E. CHOI,</p> <p>AN ADMINISTRATIVE LAW JUDGE</p> <p>OF THE MARYLAND OFFICE</p> <p>OF ADMINISTRATIVE HEARINGS</p> <p>OAH No.: LABOR-HIC-02-23-06660</p> <p>MHIC No.: 23 (75) 273</p>
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STATEMENT OF THE CASE

On December 9, 2022, Teresa Sylvina (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)¹ Guaranty Fund (Fund) for reimbursement of \$36,000.00 for actual losses allegedly suffered as a result of a home improvement contract with James McMillan, trading as James McMillan (Respondent).² On March 1, 2023, the MHIC issued a Hearing Order on the Claim. On March 9, 2023, the MHIC transmitted the matter to the Office of Administrative Hearings (OAH) to conduct a hearing.

¹ The MHIC is under the jurisdiction of the Department of Labor (Department).
² Md. Code Ann., Bus. Reg. §§ 8-401 to 8-411 (2015 & Supp. 2022). Unless otherwise noted, all references to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.

On July 12, 2023, I held an in-person hearing at the OAH in Rockville, Maryland.³ The Claimant represented herself. Hillary Baker, Assistant Attorney General, Department, represented the Fund. The Respondent failed to appear for 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.⁴ On June 2, 2023, the OAH mailed the Respondent a Notice of Remote Hearing (Notice) by certified and first-class mail to the Respondent's address of record with the Department and the OAH.⁵ The Notice stated that a hearing was scheduled for July 12, 2023, at 10:00 a.m., at the OAH, in Rockville, Maryland.⁶ The Notice further advised the Respondent that failure to attend the hearing might result in "a decision against you."

The United States Postal Service returned the copy of the Notice that was sent by certified mail as well as first-class regular mail with the notation, "RETURN TO SENDER NOT DELIVERABLE AS ADDRESSED UNABLE TO FORWARD." The address was the address of record that the Respondent provided to the Fund.⁷ The Respondent did not notify the OAH of any change of mailing address either before or after the hearing.⁸ The Respondent made no request for postponement of the hearing.⁹ I determined that the Respondent was given proper

³ Bus. Reg. §§ 8-407(a), 8-312.

⁴ Code of Maryland Regulations (COMAR) 28.02.01.23A.

⁵ COMAR 28.02.01.05C(1).

⁶ COMAR 09.08.03.03A(2).

⁷ On March 27, 2023, the Notice was sent to the Respondent's address at 10101 Twin Rivers Road, Columbia, Maryland 21044, for a scheduled hearing on May 22, 2023. This Notice was returned with notations that the correct address was 10100 Twin Rivers Road, Suite #415, Columbia, Maryland 21044. On May 3, 20223, a second Notice was sent to the Respondent's most up to date address at 10100 Twin Rivers Road, Suite #415, Columbia, Maryland 21044, for the scheduled hearing on May 22, 2023. On that date, the Respondent failed to appear. Due to a burst pipe in the building, the hearing was postponed. On June 2, 2023, a Notice was sent to the Respondent's address at 10100 Twin Rivers Road, #415, Columbia, Maryland 21044, for a scheduled hearing on July 12, 2023, at 10:00 a.m., at the OAH in Rockville, Maryland. There are no other addresses on record for the Respondent.

⁸ COMAR 28.02.01.03E.

⁹ COMAR 28.02.01.16.

notice, and after waiting fifteen minutes for the Respondent or the Respondent's representative to appear, I proceeded with the hearing.¹⁰

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the OAH govern procedure.¹¹

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 exhibit as CL Ex. 1, consisting of 127 pages, which was offered by the Claimant:

- Claimant's Cover Letter to the OAH, May 22, 2023 (p. 1)
- Table of Contents, May 22, 2023 (p. 2)
- Four screenshots of video on the Respondent's website, May 22, 2023 (pp. 3-4)
- Respondent's Draft Proposal, undated (p. 5)
- Claimant's Letter to the Respondent, via certified mail, August 17, 2022 (pp. 6-10)
- Respondent's Agreement Addendum, August 18, 2022 (p. 11)
- Emails between the Claimant and the Respondent, August 19, 2022 (pp. 12-15)
- Claimant's Email to the Respondent, August 25, 2023 (p. 16)
- Claimant's Payment to the Respondent, check number 1433, for \$7,500.00, August 8, 2022 (p. 17)

¹⁰ COMAR 28.02.01.05A, C.

¹¹ Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021); COMAR 09.01.03; COMAR 28.02.01.

- Claimant's Payment to the Respondent, check number 1434, for \$9,500.00, August 12, 2022 (p. 18)
- Claimant's Letter to the MHIC Investigator, C. Corbin, February 10, 2023 (p. 19)
- Fortress Foundation Solutions, Project Summary, February 8, 2023 (pp. 20-32)
- JES Foundation Repair, Proposal, January 16, 2023 (pp. 33-50)
- The Durable Slate Company, Proposal, November 8, 2022 (pp. 51-55a)
- Receipts for FedEx Office postage and shipping, August 31, 2022 (pp. 55b-56)
- Complaint Form, August 31, 2022 (pp. 57-58)
- Claimant's Summary of Complaint, undated (pp. 59)
- Respondent's Draft Proposal, undated (p. 60)
- Claimant's Payment to the Respondent, check number 1434, for \$9,500.00, August 12, 2022 (p. 61)
- Claimant's Payment to the Respondent, check number 1433, for \$7,500.00, August 8, 2022 (p. 62)
- Photograph of package and receipt, August 19, 2022 (p. 63)
- Claimant's Letter to the Respondent, via certified mail, August 17, 2022 (pp. 64-67)
- Respondent's Agreement Addendum, August 18, 2022 (p. 68)
- Emails between the Claimant and the Respondent, August 19, 2022 (pp. 69-72)
- Respondent's Letter to the Claimant, via certified mail, August 22, 2022 (pp. 73-74)
- Claimant's Email to the Respondent, August 25, 2022 (p. 75)
- Three photographs of materials at Home Depot, August 16, 2022 (p. 76)
- Sixteen photographs of exterior of the Claimant's home, various dates in August 2022 (pp. 77-80)
- Claimant's Summary of subsequent contractor's work and eleven photographs, August 22, 2022 (p. 81-86a)
- FedEx Office Receipt, delivery date December 9, 2022 (p. 86b)

- Claimant's handwritten note, November 27, 2022 (p. 86c)
- Home Improvement Claim Form, February 28, 2023 (p. 87-89)
- Claimant's Summary of Complaint, undated (p. 90)
- United States Post Office Package and Receipt, August 19, 2022 (p. 91)
- Claimant's Letter to the Respondent, via certified mail, August 17, 2022 (p. 92-94)
- Claimant's Payment to the Respondent, check number 1434, for \$9,500.00, August 12, 2022 (p. 95)
- Claimant's Payment to the Respondent, check number 1433, for \$7,500.00, August 8, 2022 (p. 96)
- MHIC Letter to the Claimant, October 11, 2022 (p. 97)
- MHIC Letter to the Respondent, January 5, 2023 (p. 98)
- Respondent's Documents to the MHIC, October 14, 2022 (pp. 99-103)
- Respondent's Summary in response to the Claimant's Complaint to the MHIC, October 3, 2022 (pp. 104-117b)
- Photographs of Materials from Home Depot, August 16, 2022 (pp. 118-127)

I admitted the following exhibits offered by the Fund:

- GF Ex. 1 Notices of Hearing, March 27, 2023, May 3, 2023, and June 2, 2023
- GF Ex. 2 Hearing Order, March 1, 2023
- GF Ex. 3 MHIC Letter to the Respondent, January 5, 2023, with attachment, Home Improvement Claim Form
- GF Ex. 4 Department I.D. Registration, Occupational/Professional License History, and Change Code Screen printouts, September 6, 2022

Testimony

The Claimant testified on her own behalf. The Respondent failed to appear and did not testify. 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 538199.

2. At all relevant times, the Claimant was the owner of a home located on Tremont Avenue in Cheverly, Maryland (home), which is her personal residence. The Appellant does not own any other dwellings.

3. The Claimant is not an officer or employee of the Respondent, related to the Respondent, or related to an officer or employee of the Respondent.

4. The Claimant has no other pending claims related to this matter and has not otherwise recovered for any losses connected to the Claim.

5. The Claimant needed to repair a water leak in her garage. The Claimant's home was built next to a hill; a stone wall next to her garage was damaged and falling apart. The slope of the area caused water from an alley to funnel to the Claimant's garage. The drainage near that area needed to be repaired or replaced to cause the flow of water to be directed away from the home and redirected toward the wall.

6. In August 2022, the Claimant received a telephone call from the Respondent, when she sought potential contractors on Angie's List.¹² The Respondent referred the Claimant to his website and a YouTube video about the Hydro-Loc System, which would repair the leak and was backed by a full money back guarantee.

7. The Claimant was impressed with the Respondent's YouTube video and the Hydro-Loc System and decided to hire the Respondent for the necessary home improvements.

¹² This is now known as Angi.

8. On or about August 6, 2022, the Respondent provided the Claimant with a draft proposal. (CL Ex. 1, p. 5). The proposal included the following work to be completed (project):

- Dig a trench along the basement wall (saving the plants first)
- Clean and inspect the wall for repairs and repair with mortar
- Install the three layer Hydro-Loc System
- Install a leach and pipe system at base
- Install a window well at window with drain connected to the drain system
- Compact soil to level
- Clean and refinish the siding upper and gutters
- Replace the missing slates and flash the chimney
- Install new boots

9. The proposal also included a payment schedule.

10. The Claimant did not sign the proposal because it lacked details. However, she and the Respondent did enter into a verbal agreement that essentially included the same terms of the proposal on or about August 8, 2022 (Contract).

11. The total agreed upon Contract price was \$33,000.00.

12. The Contract did not indicate when work was to begin. However, the Respondent was supposed to complete the work by August 18, 2022, because the Claimant had scheduled other contractors to perform work on other parts of the home, such as her driveway.

13. The Respondent requested payment from the Claimant to purchase materials and supplies to get the work started.

14. The Claimant paid the Respondent \$17,000.00. The first payment was made on August 8, 2022, for \$7,500.00. (CL Ex. 1, p. 17). The second payment was made on September

12, 2022, for \$9,500.00. (CL Ex. 1, p. 18). The Respondent acknowledged receiving \$17,000.00 from the Claimant.

15. On the first day of work, two workers came to the Claimant's home with two shovels; they dug a hole (trench) and removed three to four bushes, which all eventually died. The workers subsequently came back and continued with more digging, which left an open trench.¹³ Thereafter, the workers did not return to the Claimant's home.

16. A week after the payment of \$17,000.00, the Respondent proposed an addendum, dated August 18, 2022.¹⁴ The Respondent identified three parts to the project: (1) basement wall waterproofing, window well install, and repair the mortar above the I-beam inside the garage; (2) paint the refinished aluminum siding on the home; and (3) repair roof slates and chimney flashing. The total price was \$36,000.00, an increase of \$3,000.00 from the original agreed upon Contract price. The Claimant did not accept the addendum because the addendum did not mention the Hydro-Loc System.

17. Despite being paid \$17,000.00, the Respondent did not purchase the materials and supplies needed for the project. Additionally, he did not provide to the Claimant an invoice regarding any materials and supplies purchased.

18. August 19, 2022, was the last date any work was performed by the Respondent.

19. Thereafter, communications broke down between the Claimant and the Respondent, and the Claimant could not reach the Respondent. The Claimant tried to contact the Respondent by telephone, text messages, emails, and a certified letter.

20. The Claimant requested that the Respondent return the funds paid to him. His response was, "You'll never see that again." (Claimant's Testimony).

¹³ See CL Ex. 1, pp. 76-86.

¹⁴ See CL Ex. 1, p. 11.

21. The Claimant provided estimates from other contractors that reflect the work the Respondent had to complete. The estimates were not for extra or different work. (CL Ex. 1, p. 19). The other subcontractors use a completely different system than the Respondent's Hydro-Loc System. As such, the new contractors would have to start all over and cannot improve on the Respondent's initial work.

DISCUSSION

Legal Framework

In this case, the Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence.¹⁵ 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.¹⁶

An owner may recover compensation from the Fund for an actual loss that results from an act or omission by a licensed contractor.¹⁷ "[A]ctual loss means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement."¹⁸ The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney fees, court costs, or interest.¹⁹

By statute, certain claimants are excluded from recovering from the Fund altogether. 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.²⁰ The Claimant resides in the home that is the subject of the

¹⁵ Bus. Reg. § 8-407(e)(1); Md. Code Ann., State Gov't § 10-217; COMAR 09.08.03.03A(3).

¹⁶ *Coleman v. Anne Arundel Cnty. Police Dep't*, 369 Md. 108, 125 n.16 (2002).

¹⁷ 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.").

¹⁸ Bus. Reg. § 8-401.

¹⁹ Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1).

²⁰ Bus. Reg §§ 8-405(g), 8-408(b)(1) (2015 & Supp. 2022).

claim.²¹ The parties did not enter into a valid agreement to submit their disputes to arbitration.²² 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.²³ Additionally, the Claimant did not unreasonably reject good faith efforts by the Respondent to resolve the claim.²⁴ Rather, the Claimant made efforts to have the Respondent resolve the dispute, which the Respondent ignored. For the following reasons, I find that the Claimant has proven eligibility for compensation.

Analysis

The facts of this case are undisputed. The Respondent was a licensed home improvement contractor at the time the Respondent entered into the Contract with the Claimant. The Claimant is not barred by statute from recovering from the Fund. The credible evidence in the record establishes that the Respondent performed unworkmanlike, inadequate, and/or incomplete home improvements with regard to the Contract with the Claimant.

The Claimant testified that the Respondent's workers dug a deep trench. After making payments totaling \$17,000.00, the Respondent became non-responsive and eventually abandoned the project. The Claimant explained that the Respondent told her that she was micro-managing the project, watching his workers too closely, taking pictures, and was making it too difficult for him. The Claimant explained that she is a doctor and is used to documenting everything, which is what she did in this case. After August 19, 2022, the Claimant was unable to get the Respondent to communicate with her. In addition, there was no work performed on the roof or siding, and no waterproofing.

²¹ *Id.* § 8-405(f)(2) (Supp. 2022).

²² *Id.* §§ 8-405(c), 8-408(b)(3) (2015 & Supp. 2022).

²³ *Id.* § 8-405(f)(1) (Supp. 2022).

²⁴ *Id.* § 8-405(d) (Supp. 2022).

The Claimant provided ample evidence that she made good faith efforts to communicate with the Respondent to resolve the dispute. The Claimant made phone calls, sent text messages and emails, as well as sending a certified letter. The Respondent essentially ignored her efforts to resolve the case. Because the Respondent failed to appear for the hearing to provide evidence to the contrary, there is no dispute concerning Claimant's testimony.

It is also undisputed that the Claimant paid the Respondent a total of \$17,000.00 pursuant to the Contract. *See Findings of Fact (FOF) No. 14.* When the Claimant asked for the return of the payments made, the Respondent told her that she would not see the money again. He did not offer her an explanation as to why he would not return the money. The Claimant surmised that he did not like her micro-managing the project but was not sure since he never provided an explanation. The Claimant explained that she was not able to hire a subsequent contractor because she never got her money back from the Respondent, and the new contractors do not use the Hydro-Loc System so they cannot improve on the work (a deep trench) that the Respondent left. The new contractors would have to start from scratch.

Based on all of the evidence before me, I find that the Claimant is eligible for compensation from the Fund. The Fund agrees. 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 MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work. The first formula is applicable when a contractor abandons the contract without performing any work.²⁵ The second formula applies when "the contractor did work according to the contract, and the claimant is not soliciting another

²⁵ COMAR 09.08.03.03B(3)(a).

contractor to complete the contract.”²⁶ Under this circumstance, “the claimant’s actual loss shall be the amount which the claimant paid to the original contractor less the value of any materials or services provided by the contractor.”²⁷ The third formula is applicable when a contractor did work but the claimant solicited another contractor to complete the contract.²⁸

Of the three different calculations that can be used, the first calculation is most applicable in this case, although an argument can be made that the Respondent did some of the work by digging a trench. In this case, I did not consider digging a trench as work performed as no identifiable value was provided, and it did not appear to have been completed in advancement of any identifiable term of the Contract. In addition, the Respondent did not purchase any materials, despite receiving payment in the amount of \$17,000.00. Finally, the Claimant has been unable to secure a new contractor to complete the work abandoned by the Respondent because the new contractors do not use the Hydro-Loc System and must start from scratch. Accordingly, the following formula appropriately measures the Claimant’s actual loss:

If the contractor abandoned the contract without doing any work, the claimant’s actual loss shall be the amount which the claimant paid to the contractor under the contract.²⁹

The Claimant paid the Respondent \$17,000.00, none of which was refunded. 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.^{30, 31} In this case, the Claimant’s actual loss is the amount she paid to the

²⁶ COMAR 09.08.03.03B(3)(b).

²⁷ *Id.*

²⁸ COMAR 09.08.03.03B(3)(c).

²⁹ COMAR 09.08.03.03B(3)(a).

³⁰ Bus. Reg. § 8-405(e)(1), (5) (Supp. 2022); COMAR 09.08.03.03B(4).

³¹ 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”).

Respondent, which is less than \$30,000.00. Therefore, the Claimant is entitled to recover her actual loss of \$17,000.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$17,000.00 as a result of the Respondent's acts or omissions.³² 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 \$17,000.00; 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;³³ and

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

September 19, 2023
Date Decision Issued

Sun E. Choi

Sun E. Choi
Administrative Law Judge

SEC/kkc
#206241

³² Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2022); COMAR 09.08.03.03B(3)(c).

³³ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 25th day of October, 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***