

<p>IN THE MATTER OF THE CLAIM</p> <p>OF HEATHER WARD,</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 DANIEL OSTROW,</p> <p>t/a PUDDLES COMPANY,</p> <p>RESPONDENT</p>	<p>* BEFORE DANIEL ANDREWS,</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-02-23-29494</p> <p>* MHIC No.: 22 (75) 1041</p>
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PROPOSED DECISION

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STATEMENT OF THE CASE

On April 19, 2023, Heather Ward (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)¹ Guaranty Fund (Fund) for reimbursement of \$29,786.12 for an actual loss allegedly suffered as a result of a home improvement contract with Daniel Ostrow trading as Puddles Company (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2023).² On November 15, 2023, the MHIC issued a Hearing Order on the

¹ The MHIC is under the jurisdiction of the Department of Labor (Department).

² Unless otherwise noted, all references to the Business Regulation Article are to the 2015 Volume of the Maryland Annotated Code.

Claim. On November 15, 2023, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On December 19, 2023, the OAH issued a Notice of Remote Hearing (Notice), which informed the parties that a hearing was scheduled for February 12, 2024 at 9:30 a.m., via Webex. On February 12, 2024, I held a hearing as scheduled. Bus. Reg. §§ 8-407(a), 8-312; Code of Maryland Regulations (COMAR) 28.02.01.20. Jessica Kaufman, Assistant Attorney General, Department, represented the Fund. The Claimant was self-represented. The Respondent failed to appear for the scheduled hearing.

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. COMAR28.02.01.23A.

The Notice further advised the Respondent that failure to attend the hearing might result in "a decision against you." The Notice was mailed to the Respondent using the address of record with the MHIC. A copy of the Notice was mailed to the Respondent's address of record by both certified mail and by regular first-class mail. On January 8, 2024, the United States Postal Service returned both Notices to the OAH as "not deliverable unable to forward." The Respondent did not notify the OAH of any change of mailing address. COMAR 28.02.01.03E. Under these circumstances, I determined that the Respondent received proper notice, and proceeded to hear the captioned matter. COMAR 28.02.01.05.

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); 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 actual loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits³ offered by the Claimant:

- Clmt. Ex. 1 - Contract with Respondent, April 26, 2021
- Clmt. Ex. 2 - Claimant's personal check, April 26, 2021, Quick Books Payment Confirmation, August 3, 2021, Estimate by Atlantic Pools, Inc, March 26, 2022 (first page only)
- Clmt. Ex. 3 - Text messages between Claimant and Respondent, June 7, 2021 through January 11, 2022
- Clmt. Ex. 4 - Request for Arbitration, undated
- Clmt. Ex. 5 - Summary of Events, April 26, 2021 through March 26, 2022
- Clmt. Ex. 6 - Contract with Atlantic Pools, Inc., March 26, 2022

I admitted the following exhibits offered by the Fund:

- Fund Ex. 1 - Notice of Remote Hearing on February 12, 2024, issued December 19, 2023
- Fund Ex. 2 - MHIC Transmittal, with attached Hearing Order, November 15, 2023, and Home Improvement Claim Form, April 19, 2023
- Fund Ex. 3 - MHIC licensing record for the Respondent, January 23, 2024
- Fund Ex. 4 - MHIC letter to Respondent, April 21, 2023, with attached Home Improvement Complaint Form, April 19, 2023

Testimony

The Claimant testified and presented the testimony of her husband, Michael Ward.

³ The Claimant's exhibits were pre-marked by letter designation A through F. For consistency in this Decision, using a number, I re-designated the exhibits 1 through 6.

The Respondent did not appear and did not present witnesses.

The Fund did not present 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 01-121024.

2. On April 21, 2021, the Respondent provided an estimate to remodel the Claimant's existing swimming pool.

3. On April 26, 2021, the Claimant accepted the Respondent's estimate (the Contract). The total contract price was \$40,956.50. The Claimant entered into the Contract with the Respondent to have the pool remodeling completed by July 3, 2021.

4. The Contract required the Respondent to remove and install pool coping and tile, a main pool drain with returns and skimmers (plumbing), pool plaster as needed, a concrete pool deck with deck jets, and pool lighting. The Contract also required the Respondent to install perimeter fencing, and to install a water pump, a heat pump, and a mesh pool cover.

5. The Contract provided that the total cost of materials was \$13,031.25.

6. The Contract also required a deposit of \$5,585.00 plus the cost of materials, which totaled \$18,616.25.

7. On April 26, 2021, the Claimant paid the Respondent \$18,616.25.

8. On May 3, 2021, the Respondent began to perform the Contract.

9. Between May 3, 2021 and August 3, 2021, the Respondent performed some work but his work was very sporadic. Through text messages during this time period, the Claimant inquired about the Respondent's work progress to complete the Contract. In response, the

Respondent indicated delays were caused by supply chain issues due to the COVID-19 pandemic.

10. On August 3, 2021, the Claimant paid the Respondent \$11,169.87. As of this date the total paid by the Claimant to the Respondent was \$29,786.12.

11. Between August 3, 2021 and January 11, 2022, the Respondent performed some work but his work was very sporadic. Again, through text messages, the Claimant inquired about the Respondent's progress to complete the Contract and the Respondent continued to attribute delays were caused by supply chain issues due to the COVID-19 pandemic.

12. On January 11, 2022, the Claimant sent a text message to the Respondent requesting an update about completing the Contract. The Respondent did not respond to this text message. After this date, despite approximately ten phone calls or text messages, there was no more communication by the Respondent and the Contract was left incomplete.

13. As of January 11, 2022, the work performed by the Respondent included removing and installing pool coping and some plumbing work including the installation of a pool drain, skimmer lines, and water return lines.

14. On March 26, 2022, the Claimant contracted with Atlantic Pools, Inc., (Atlantic) to repair any work performed by the Respondent and to complete the pool remodeling under the same terms as originally contracted to by the Respondent.

15. Because the pool coping was inadequately or improperly installed, Atlantic had to replace the pool coping. After pressure testing the Respondent's plumbing work, Atlantic was able to complete the pool remodeling using the Respondent's plumbing work.

16. The Claimant paid Atlantic Pool Company \$39,258.50.

DISCUSSION

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. 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.

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 (2021); 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). 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. 2023). The Claimant resides in the home that is the subject of the claim or does not own more than three dwellings. *Id.* § 8-405(f)(2) (Supp. 2023). The parties did not enter into a valid agreement to submit their disputes to arbitration.⁴ *Id.* §§ 8-

⁴ The Claimant offered into evidence a request to arbitrate to which the Respondent did not respond. The Claimant explained that someone advised her to send the request; however, the Contract did not contain any requirement to participate in arbitration.

405(c), 8-408(b)(3) (2015 & Supp. 2023). 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. 2023).

The uncontested evidence demonstrated that on April 26, 2021, the Claimant entered into the Contract with the Respondent to remodel an existing swimming pool. The total cost of the Contract was \$40,956.50 and the Claimant paid the Respondent \$18,616.25 as a deposit. The Respondent performed some work by removing and installing pool coping. The Respondent also performed some plumbing work including installing a pool drain, return lines, and skimmers. But for the most part, the Respondent's progress was sporadic and delayed beyond the expected finish date of July 3, 2021. Despite the delays, the Claimant made a second payment for material on August 3, 2021, in the amount of \$11,169.87, bringing the total paid to the Respondent to \$29,786.12.

Between June 2021 and January 11, 2022, the Claimant sent the Respondent several text messages to seek an explanation about the delays. The Respondent generally attributed any delays to supply chain issues caused by the COVID-19 pandemic. After January 11, 2022, the Respondent stopped communicating with the Claimant and left the Contract incomplete. As a result, the Claimant contracted with Atlantic to complete the pool remodeling under the same terms as originally contracted by the Respondent. The cost to complete the pool remodeling was \$39,258.50, which the Claimant paid to Atlantic.

The Claimant's evidence is undisputed by the Respondent and the Fund and easily demonstrated that the Claimant sustained an actual loss that resulted from the Respondent's failure to complete a home improvement contract. 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). No claims for such compensation are made.

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 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).

Amount paid to Respondent:	\$ 29,786.12
Plus, reasonable amount to complete the Contract	<u>\$ 39,258.80</u>
	\$ 69,044.62
Minus, original contract price	<u>\$ 40,956.00</u>
Actual loss	\$ 28,088.12

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.⁵ Bus. Reg. § 8-405(e)(1), (5) (Supp. 2023); 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 their actual loss of \$28,088.12.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$28,088.12 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 \$28,088.12 from the Fund. Md. Code Ann., Bus. Reg. § 8-405(e)(1), (5) (Supp. 2023); 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 \$28,088.12; 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;⁶ and

⁵ 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").

⁶ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

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

May 2, 2024
Date Decision Issued

Daniel Andrews

Daniel Andrews
Administrative Law Judge

DA/ja
#210562

PROPOSED ORDER

WHEREFORE, this 15nd day of July, 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***