

IN THE MATTER OF THE CLAIM	* BEFORE EDWARD J. KELLEY,
OF KELLY BERGER,	* 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 SARATH	*
PUTHUSSERY, T/A BALTIMORE	* OAH No.: LABOR-HIC-02-23-29520
DESIGN & REMODELING,	* MHIC No.: 23 (75) 531
RESPONDENT	*

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On May 30, 2023, Kelly Berger (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)¹ Guaranty Fund (Fund) for reimbursement of \$16,910.00 for actual losses allegedly suffered as a result of a home improvement contract with Sarath Puthussery, trading as Baltimore Design & Remodeling (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2023).² On November 15, 2023, the MHIC issued a

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.

Hearing Order on the Claim and forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On February 14, 2024, 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 did not appear.

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. Code of Maryland Regulations (COMAR) 28.02.01.23A. On December 19, 2023, the OAH provided a Notice of Hearing (Notice) to the Respondent by certified mail and first-class mail. Bus. Reg §§ 8-312(d), 8-407(a); COMAR 28.02.01.05C(1). The Notice stated that a hearing was scheduled for February 14, 2023, at 9:30 a.m., at the OAH in Hunt Valley, Maryland. 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 United States Postal Service did not return the Notice sent to the Respondent by regular mail. The Notice sent certified mail was signed as received. The Respondent did not notify the OAH of any change of mailing address. COMAR 28.02.01.03E. I determined that the Respondent received proper notice, and I 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 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, April 2, 2021
- Clmt. Ex. 2 - Payment paperwork, April 6, 2021
- Clmt. Ex. 3 - Email correspondence between the Claimant and the Respondent, May 3-22, 2022
- Clmt. Ex. 4 - Payment paperwork, June 3, 2022
- Clmt. Ex. 5 - Email correspondence between the Claimant and the Respondent, July 16-August 2, 2022
- Clmt. Ex. 6 - Email correspondence between the Claimant and the Respondent, July 10-15, 2022
- Clmt. Ex. 7 - Payment paperwork, June 3, 2022
- Clmt. Ex. 8 - Pictures of water damage, July 16, 2022
- Clmt. Ex. 9 - Pictures of kitchen floor, August 2022
- Clmt. Ex. 10 - Email correspondence between the Claimant and the Respondent, August 21-September 11, 2022
- Clmt. Ex. 11 - Proposal from Najera Services, LLC (Najera), May 15, 2023
- Clmt. Ex. 12 - Pictures of project as left by the Respondent, August 2022
- Clmt. Ex. 13 - Email correspondence between the Claimant and Najera, April 4-May 21, 2023

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, December 19, 2023

Fund Ex. 2 - Hearing Order, November 15, 2023

Fund Ex. 3 - Licensing History, printed January 23, 2024

Fund Ex. 4 - MHIC Claim Form and Letter from Joseph Tunney, Chairman, MHIC,
May 31, 2023

Testimony

The Claimant testified and did not present other witnesses.

The Respondent did not appear.

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 01-119037.
2. On April 2, 2021, the Claimant and the Respondent entered into a contract for a total kitchen renovation at the Claimant's residence (Contract). The Contract included demolition, the removal of a load-bearing wall, and the installation of a concrete slab, heated flooring, a countertop and backsplash, new plumbing, new lighting and wiring, new cabinets, a new back door, a new sink, and new appliances.
3. The original agreed-upon Contract price was \$35,168.00.
4. On April 6, 2021, the Claimant paid the Respondent \$10,550.40.
5. The parties agreed that the work would begin in June or July of 2021.
6. The project did not begin as scheduled because Baltimore City would not issue a building permit. Baltimore City expressed concern over the removal of the load-bearing wall and wanted additional information before issuing a permit.

7. Because Baltimore City would not issue a building permit, no work occurred on the project between April 2021 and May 2022.

8. In May 2022, the Claimant requested to terminate the Contract for a full refund of \$10,550.40 based on the Respondent's nonperformance. The Respondent refused to terminate the Contract or refund any of the Claimant's money.

9. On May 11, 2022, the Respondent met with the Claimant at the residence to discuss the project. The Claimant and the Respondent decided to continue the kitchen renovation without removing the load-bearing wall. Based on this amendment to the Contract, the Contract price was reduced by \$7,500.00 to \$27,668.00.

10. On June 13, 2022, the Respondent began demolition. On or about this same date, the Claimant paid the Respondent \$8,558.80.

11. Between June 13 and July 5, 2022, the Respondent completed demolition and installed all of the following: the concrete slab, the heated flooring, the countertop and backsplash, the new plumbing, the new lighting and wiring, the new cabinets, the new sink, the new back door, and the new appliances.

12. The Respondent did not use a licensed plumber to install the new plumbing.

13. On June 23 and July 5, 2022, the Claimant notified the Respondent that he installed the wrong cabinets. The Respondent acknowledged his mistake and agreed to reduce the Contract price by \$2,600.00 because of this error, resulting in a new Contract price of \$25,068.00.

14. On July 10, 2022, the Claimant emailed the Respondent that several issues needed to be addressed before the Contract was completed, such as finishing tiling of the backsplash, installing sliding shelves, and repairing damaged cabinetry. The Claimant also asked the Respondent to fix the sink and the dishwasher because they were not draining properly.

15. Between July 12-14, 2022, Respondent sent two workers to evaluate the drainage issue, but none of the other items were addressed. The drainage issue was not resolved.

16. On July 14, 2022, the Claimant paid the Respondent \$4,000.00.

17. On July 16, 2022, the Claimant discovered that every time she used the sink or the dishwasher water flooded into her basement. This occurred because of damage to a pipe caused by the Respondent during construction.

18. The Claimant immediately contacted the Respondent regarding the water problem, and the Respondent stated he would send a plumber to fix it, but no one came for three days.

19. Due to the delay, the Claimant told the Respondent she was going to hire her own plumber to assess and fix the problem. The Respondent told the Claimant that if she hired her own plumber it would void the warranty for the entire project. The Claimant decided not to hire her own plumber as a result.

20. The Respondent's plumber came to the residence on July 19, 2022, but he left without diagnosing or fixing the problem.

21. Between July 19-25, 2022, the Respondent took no action to correct the plumbing issue, and the Claimant could not use the sink or the dishwasher.

22. On August 2, 2022, the Respondent sent two workers who were not plumbers to evaluate the plumbing problem. The workers cut through the new kitchen flooring to examine the plumbing. They also disconnected the dishwasher. The workers left the property without fixing the plumbing problem. The workers left the hole in the floor and did not reconnect the dishwasher.

23. The Respondent did no further work on the residence after August 2, 2022. The Respondent told the Claimant that the plumbing problem preexisted the project and was not his responsibility to fix.

24. The Claimant hired a licensed plumber who fixed the plumbing problem for \$350.00.

25. At some point in August 2022, the Respondent contacted the Claimant to let her know that his workers broke a wire that would require replacing the heated flooring. On September 5, 2022, the Respondent stated he would send out an electrician to address this issue, but he never did so and all communications between the Claimant and the Respondent stopped.

26. In May 2023, the Claimant contacted Najera, a licensed contractor, to complete the project to the Contract's specifications and correct the Respondent's deficient work. Najera stated that to meet the Contract specifications, it needed to update the electrical circuit, replace the heated floor thermostat, repair the flooring, repair plumbing under the sink, repair loose electrical outlets, reconnect the dishwasher, install sliding shelves, repair cabinetry, repair countertop grout, and repair and paint drywall.

27. Najera stated it could complete the Contract for \$16,910.00.

28. To date, the Claimant has not hired Najera to compete the Contract.

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).

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.

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).

ANALYSIS

The Fund's counsel asserted that no statutory exclusions prevented the Claimant from reimbursement by the Fund, and I find that the Claimant was not subject to any of the statutory exclusions for recovery from the Fund. Additionally, I find the evidence demonstrates that the Respondent performed an unworkmanlike, inadequate, and incomplete home improvement.

The Claimant testified credibly about all facets of the project, and her unrefuted testimony was corroborated by exhibits, which included pictures demonstrating the status of the Respondent's unworkmanlike, inadequate, and incomplete work. The Claimant fulfilled her contractual obligation by paying the Respondent \$23,109.20 under the Contract, and she was more than patient as the project was delayed well beyond a reasonable completion date and then left unfinished and in disrepair.

The Respondent did not fulfill his obligation to perform an adequate, workmanlike, and complete home improvement; indeed, the Respondent clearly took advantage of the Claimant's patience and goodwill and never delivered on his part of the Contract despite accepting \$23,109.20. After the parties agreed to move forward with the project without removing the load-bearing wall, the project was supposed to be completed no later than July 2022, but that did not occur. By September 2022, the project still was not completed, and the Respondent stopped communicating with the Claimant notwithstanding that serious issues still needed to be addressed.

The Respondent failed to complete the project and his work was deficient, which caused the Claimant substantial inconvenience and much distress. The Respondent's unworkmanlike plumbing led to flooding in the Claimant's residence. The Respondent's unworkmanlike wiring caused the heated flooring not to function properly. The Respondent's unworkmanlike performance presented serious safety hazards and left the kitchen unusable for a significant

period of time. The Claimant timely and reasonably presented these concerns to the Respondent, and the Respondent unreasonably refused to remedy his errors and complete the project.

Ultimately, the Claimant paid a licensed plumber \$350.00 to repair some of the Respondent's deficient plumbing work, which was causing flooding in her basement. The kitchen renovation, however, still remains incomplete and in disrepair. Najero, a licensed contractor, has evaluated the condition of the project as the Respondent left it and indicated that to complete the Contract to specification, it needs to update the electrical circuit, replace the heated floor thermostat, repair the flooring, repair plumbing under the sink, repair loose electrical outlets, reconnect the dishwasher, install sliding shelves, repair cabinetry, repair countertop grout, and repair and paint drywall. Najera states that the cost to remedy the Respondent's errors and complete the project to the Contract's specifications is \$16,910.00. The Respondent, who did not appear at the hearing despite receiving proper notice, has not challenged the Claimant's evidence or Najera's estimate.

The Claimant argued that the Respondent performed an incomplete, inadequate, and unworkmanlike home improvement. The Fund agreed with the Claimant and recommended an award. Based on the evidence presented, I agree that the Claimant has met her burden to show that she is eligible for compensation from the Fund because the Respondent performed an incomplete, inadequate, and unworkmanlike home improvement.

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 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 has obtained a quote from a licensed contractor for the cost to remedy and complete that work. Accordingly, as the Fund proffered at the hearing, 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 paid the Respondent \$23,109.20 under the Contract. I agree with the Fund's counsel that the cost to remedy and complete the Contract is \$17,260.00 (\$16,910.00 + \$350.00). When added together, these figures total \$40,369.20. When the \$25,068.00 Contract price is subtracted from \$40,369.20, the Claimant's actual loss equals \$15,301.20, which is the amount of reimbursement recommended by the Fund's counsel.

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. 2022); COMAR 09.08.03.03B(4). In this case, the Claimant's actual loss of \$15,301.20 is less than the amount paid to the Respondent and less than \$30,000.00. Therefore, the Claimant is entitled to recover \$15,301.20 from the Fund.

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").

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$15,301.20 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 \$15,301.20 from the Fund.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$15,301.20; 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.

April 8, 2024
Date Decision Issued



Edward J. Kelley
Administrative Law Judge

EJK/dlm
#210281

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

PROPOSED ORDER

WHEREFORE, this 11th day of June, 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***