

IN THE MATTER OF THE CLAIM
OF JENNIFER COUNTS,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF JOSE FRIAS,
FRIAS CONSTRUCTION, LLC,
RESPONDENT

* BEFORE JENNIFER L. GRESOCK,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
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* OAH No.: LABOR-HIC-02-21-03998
* MHIC No.: 19 (90) 1503

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PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
PROPOSED FINDINGS OF FACT
DISCUSSION
PROPOSED CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On December 23, 2019, Jennifer Counts (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 \$5,300.00 in actual losses allegedly suffered as a result of a home improvement contract with Jose Frias, trading as Frias Construction, LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411

(2015).¹ On January 27, 2021, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a remote hearing on April 23, 2021, via the Webex videoconferencing platform. Bus. Reg. §§ 8-407(a), 8-312; COMAR 28.02.01.20B(1)(b). Hope Sachs, Assistant Attorney General, Department, represented the Fund. The Claimant represented herself.

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 March 4, 2021, 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 09.08.03.03A(2); COMAR 28.02.01.05C(1). The Notice stated that a hearing was scheduled for April 23, 2021, at 9:30 a.m., via Webex, for which it listed a website and how to access Frequently Asked Questions regarding the Webex platform. 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 to the OAH. The Respondent did not notify the OAH of any change of mailing address. COMAR 28.02.01.03E. The Respondent 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 in this case. Md.

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

MHIC Ex. 2 Respondent's Licensing Information as of March 29, 2021

MHIC Ex. 3 Letter from the MHIC to the Respondent, dated January 6, 2020

MHIC Ex. 4 Home Improvement Claim Form, dated December 23, 2019

The Respondent was not present to offer any exhibits.

Testimony

The Claimant testified and did not present other witnesses.

The Respondent was not present to offer testimony.

The Fund did not present 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.
2. On an unspecified date in December 2017, the Claimant and the Respondent entered into an oral contract for the Respondent to pour concrete decking around the Claimant's newly installed pool (Contract).
3. The original agreed-upon Contract price was \$7,802.00.
4. The Respondent completed the work between December 8, 2017, and December 19, 2017.
5. The Claimant paid the Respondent a total of \$7,802.00, with two checks posted on December 11, 2017 (for \$1,640.00 and \$3,216.00) and one check posted on December 19, 2017 (for \$2,946.00).
6. In early 2019, the Claimant noticed that the concrete was chipping in several spots.

7. In March 2019, the Claimant repeatedly called the Respondent and left him voicemail messages. She also texted him. The Respondent did not respond.

8. The Claimant contacted Elite Swimming Pools, from whom she had purchased her pool, and who had recommended the Respondent to her for concrete installation. The owner of Elite Swimming Pools also attempted to contact the Respondent on the Claimant's behalf, but the Respondent did not respond to him.

9. On an unspecified date, the Claimant requested a proposal for repair or replacement of the concrete decking from Golden Ring Construction. Golden Ring proposed tearing out and replacing the sections of concrete where the flaking was occurring. The proposed cost of the work was \$5,300.00.

DISCUSSION

In this case, the Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Bus. Reg. § 8-407(e)(1); Md. Code Ann., State Gov't § 10-217 (2014); 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 Cty. 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); *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.

There is no dispute that the Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimant. (MHIC Ex. 2.)

I am also persuaded that the Respondent performed unworkmanlike and inadequate home improvements. The Claimant credibly testified that in approximately four spots on the concrete decking poured by the Respondent, the concrete is flaking, and that she first observed the flaking about a year after the Respondent completed the work. She also provided photographs that clearly show the pockmarked concrete, as well as the location of those spots around the pool. (Clmt. Ex. 11.) The Claimant's testimony, which was clear and detailed, was persuasive, supported by the photographs, and uncontradicted by any other evidence. It was the Fund's position that the Claimant has proven her eligibility for an award from the Fund.

Accordingly, based on the evidence presented, I find that the Claimant is eligible for compensation from the Fund. I must therefore 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); 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 work under the Contract, and the Claimant intends to retain another contractor to 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).

Under this formula, the Claimant's actual loss is \$5,300.00, based on the following calculation: the amount paid to the Respondent under the original contract (\$7,802.00) plus the amount the Claimant will be required to pay to repair the Respondent's poor work (\$5,300.00), or \$13,102.00, minus the price of the original contract (\$7,802.00). \$13,102.00 minus \$7,802.00 results in \$5,300.00.

The Business Regulation Article caps a claimant's recovery at \$20,000.00 for acts or omissions of one contractor and provides that a claimant may not recover more than the amount paid to the contractor against whom the claim is filed. Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a). In this case, the Claimant's actual loss is less than \$20,000.00. Therefore, the Claimant is entitled to recover her actual loss of \$5,300.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$5,300.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); 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); COMAR 09.08.03.03B(4), D(2)(a).

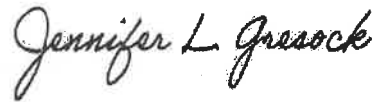
RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$5,300.00; 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;² and

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



July 13, 2021
Date Decision Issued

Jennifer L. Gresock
Administrative Law Judge

JLG/cj
#192220

² See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 23rd day of September, 2021, 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.

Robert Altieri

Robert Altieri

Panel B

***MARYLAND HOME IMPROVEMENT
COMMISSION***