IN THE MATTER OF THE CLAIM OF BETTY LEE AGAINST THE MARYLAND HOME IMPROVEMENT GUARANTY FUND FOR THE ACTS OR OMISSIONS OF ERROLL G. MCDONALD AND HAVENPORT, LLC	* * * * * * *	**MARYLAND HOME IMPROVEMENT COMMISSION** **MHIC CASE NO. 20(75)1198** **OAH CASE NO. LABOR-HIC-02-21-15258**

* * * * * * * *

PROPOSED ORDER

This matter was originally heard before an Administrative Law Judge ("ALJ") of the Office of Administrative Hearings ("OAH") on August 24, 2021. Following the evidentiary hearing, the ALJ issued a Proposed Decision on November 22, 2021, concluding that the homeowner, Betty Lee ("Claimant") did not suffer an actual loss as a result of the acts or omissions of Erroll G. McDonald and Havenport, LLC ("Contractor"). In accordance with COMAR 09.01.03.08, a Panel of the MHIC reviewed the ALJ's Proposed Decision, which is incorporated herein and amended as set forth below.

The Commission finds that the ALJ erred by considering $7,500.00 that the Claimant paid to JM Kelly for the installation of a driveway to calculate the Claimant's actual loss because JM Kelly did not hold a Maryland home improvement contractor license.

The installation of a driveway for a residence constitutes a home improvement under Md. Code Ann., Bus. Reg. § 8-101(g) for which a home improvement contractor license is required under Md. Code Ann., Bus. Reg. § 8-301(a). Maryland has a strong public policy against the sale and performance of home improvements without a license. The General Assembly has made the sale or performance of home improvements a criminal offense. Md. Code Ann., Bus. Reg. § 8-301(a). Maryland courts, in recognition of the public policy against the sale and performance of unlicensed home improvements, refuse to enforce home improvement contracts made by unlicensed contractors. *See, e.g., Baltimore St. Builders v. Stewart,* 186 Md. App. 684, 695, 706

(2009).

The Home Improvement Guaranty Fund was established to compensate homeowners who suffer an actual loss as a result of the acts or omissions of a licensed contractor. Md. Code Ann., Bus. Reg. § 8-301(a). The Guaranty Fund is funded by license fees and assessments paid by licensed home improvement contractors. Md. Code Ann., Bus. Reg. § 8-404(a). "Actual loss" is defined as the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement. To the extent that the restoration, repair, replacement, or completion of a home improvement contract involves home improvement work requiring a license, for a homeowner to receive an award from the Guaranty Fund, that work must be performed by a licensed home improvement contractor. *See Five Oceans, Inc., v. Michael Baker et al*, MHIC Case No. 15(05)949 (2018), *Vanetta v. Jovetic et al*, MHIC Case No. 15(05)756 (2017). Otherwise, the Commission would be condoning criminal conduct, using public monies collected from licensed contractors to compensate unlicensed contractors, and incentivizing homeowners to hire unlicensed contractors.

In addition, the Commission holds that ALJ erred in relying on the invoice of JM Kelly, an unlicensed contractor operating illegally, to calculate the Claimant's actual loss, because such an invoice does not constitute credible evidence of the cost to correct or complete deficient home improvement work.

The Commission notes that the itinerant workers that the Claimant hired to complete the removal of debris and construction materials required under the contract between the parties do not appear to be licensed home improvement contractors. However, the service they provided does not constitute a home improvement under Md. Code Ann., Bus. Reg. § 8-101(g), and, therefore, does not require a home improvement license under Md. Code Ann., Bus. Reg. § 8-

301(a). Accordingly, the Commission holds that the ALJ properly considered the amount the Claimant paid to them to calculate the Claimant's actual loss. *See Fouts v. Burgwald et al*, MHIC Case No. 14(05)1298 (2016).

The Commission also holds that the ALJ erred by failing to consider the $359.68 that the Claimant paid the contractor in excess of the contracted price as required by COMAR 09.08.03.03B(3)(c).

Accordingly, the Commission calculates the Claimant's actual loss in accordance with COMAR 09.08.03.03B(3)(c) as follows:

$223,155.00	Amount paid to the contractor
+727.00	Cost to correct the contractor's work
- 222,795.32	Original contract price, including change orders
$1,086.68	Actual loss

Having considered the evidence contained in the record and the ALJ's Proposed Decision, it is this 18th day of March 2022, **ORDERED:**

A. That the Findings of Fact of the Administrative Law Judge are **AMENDED**;

B. That the Conclusions of Law of the Administrative Law Judge are **AMENDED**;

C. That the Proposed Decision and Recommended Order of the Administrative Law Judge is **AMENDED;**

D. That the Claimant is awarded **$1,086.68** from the Home Improvement Guaranty Fund;

E. That Erroll G. McDonald and Havenport, LLC, shall remain ineligible for a Maryland Home Improvement Commission license until the Contractor reimburses the Guaranty Fund for all monies disbursed under this Order plus annual interest of at least ten percent (10%) as set by the Commission, *Md Code Ann.*, Bus. Reg. §§ 8-410(a)(1)(iii), 8-411(a);

F. That the records and publications of the Maryland Home Improvement Commission shall reflect this decision; and

G. Unless, within twenty days of the date of this Proposed Order, any party files with the Commission written exceptions or a request to present argument, then this Proposed Order will become final. By law, the parties then have an additional thirty days to file a petition for judicial review in Circuit Court.

Joseph Tunney
Chairperson –Panel B
Maryland Home Improvement Commission

BETTY LEE,	*	**BEFORE STEVEN V. ADLER,**
CLAIMANT	*	**ADMINISTRATIVE LAW JUDGE**
v.	*	**THE MARYLAND OFFICE**
THE HOME IMPROVEMENT	*	**OF ADMINISTRATIVE HEARINGS**
COMMISSION GUARANTY FUND	*	
FOR THE ALLEGED ACTS OR	*	**OAH No.: LABOR-HIC-02-21-15258**
OMISSIONS OF ERROLL G.	*	**MHIC No.: 20 (75) 1198**
McDONALD, t/a HAVENPORT, LLC,	*	
RESPONDENT	*	

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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 June 5, 2020, Betty Lee (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC or Commission) Guaranty Fund (Fund) for reimbursement of actual losses allegedly suffered as a result of a home improvement contract with Erroll G. McDonald, trading as Havenport, LLC, (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015).[1] On June 9, 2021, the Commission determined that a hearing was warranted on the Claim and transmitted the matter to the Office of Administrative Hearings

[1] All later citations to the Business Regulations Article of the Annotated Code of Maryland are to the 2015 Replacement Volume to the Code.

(OAH) for an evidentiary hearing, delegating its authority to the OAH to issue a proposed decision.

I held a hearing on the merits of the Claim on August 24, 2021, at the OAH in Rockville, Maryland. Md. Code Ann., Bus. Reg. § 8-407(e); Code of Maryland Regulations (COMAR) 28.02.01.07. The Claimant represented herself. The Respondent failed to appear after proper notice was provided.[2] Eric London, Assistant Attorney General, counsel to the Department of Labor (Department), represented the Fund.

The contested case provisions of the Administrative Procedure Act (APA), the Department's hearing regulations, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021); COMAR 09.01.03; COMAR 28.02.01.

ISSUES

1) Did the Claimant sustain an actual loss compensable by the Fund due to the Respondent's acts or omissions?

2) If so, what is the amount, if any, of the Claimant's compensable loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits in evidence offered by the Claimant:

CL Ex. 1 – Safehome Trust Inspection Report, dated May 11, 2020.

CL Ex. 2 – General Contracting Agreement between the Claimant and the Respondent, dated January 19, 2019, with attached Driveway Slab & Mono-Lithic Slab Plan

CL Ex. 3 – Email correspondences regarding inspection services, from the Claimant to the Respondent, Robert L. Purkey, Jr., and Marcus Silvestro, dated September 16 – 17, 2019

[2] *See* findings and rulings made on the record regarding the OAH's issuance of proper notice in this matter and the Respondent's failure to appear, incorporated by reference herein. COMAR 28.02.01.05A, C; COMAR 28.02.01.23A.

CL Ex. 4 – Email correspondences regarding the completion of the project from the Claimant to the Respondent and Marcus Silvestro, dated March 5, 2020, through April 1, 2020

CL Ex. 5 – Havenport, LLC Invoice, dated October 2, 2019

CL Ex. 6 – Estimate from Ascension Home Contractors, LLC, dated March 20, 2020

CL Ex. 7 – Email correspondence regarding the date and time of final inspection, from the Claimant to Robert L. Purkey, Jr., dated March 17, 2020

CL Ex. 8 – Checks (#132, #135, #139, #140, #141, #142, #143, #145, #146, #147) from the Claimant to the Respondent, various dates, with attached carbon copies of check register for Citi Priority Account, dated January 1 – 31, 2019 and March 1 – 31, 2019

CL Ex. 9 – Estimate from JM Kelly Paving, dated March 7, 2020

CL Ex. 10 – Claimant's Bank Records, Department of Commerce, Federal Credit Union, Acct. x4500, dated July 1 – 31, 2021

I admitted the following exhibits in evidence offered by the Fund:

GF Ex. 1 – Notice of Hearing, dated July 14, 2021

GF Ex. 2 – Hearing Order, dated June 9, 2021

GF Ex. 3 – Department Identification Registration for the Respondent, dated July 29, 2021

GF Ex. 4 – Home Improvement Claim Form, dated June 5, 2020

GF Ex. 5 – Department Notice to Respondent, Advising of Complaint filed by the Claimant, dated June 9, 2021

GF Ex. 6 – Respondent's Response to Complaint, undated

There were no other exhibits offered in evidence.

Testimony

The Claimant testified on her own behalf and presented the testimony of Edgar Ivan Moreno[3], of Safehome Trust Inspections, and Marcus F. Silvestro, the Claimant's husband and

[3] Accepted as an expert witness in the field of home inspection upon stipulation of the parties. Mr. Moreno is a licensed home inspector with 20 years' experience in the field and is a professor of the College of Southern Maryland.

co-owner of the property. The Respondent failed to appear and, accordingly, no testimony was offered on his behalf. The Fund presented no witness testimony.

PROPOSED FINDINGS OF FACT

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

1. At all times relevant to the proceeding, the Respondent was a licensed home improvement contractor under MHIC license number 01-103851 & 05-132365.

2. The Claimant is not related to the Respondent or any of his employees, by blood or marriage.

3. The Claimant does not hold a position in the Respondent's company.

4. The Claimant owns and resides in the subject property, located at 600 Mercer Road, Rockville, Maryland (Home), and owns no other real property in the State.

5. The Claimant has not filed any court action concerning the Home and the matters at issue in this case, nor has she filed an insurance claim regarding the same.

6. On January 19, 2019, the Claimant and the Respondent entered into a General Contracting Agreement (Contract) for the Respondent to add a 12' x 26' finished two story addition and a finished second story addition on the back half of the existing single-family Home (Project). (CL Ex. 2, p. 1).

7. The Contract included the completion of a Mono-Lithic Slab Driveway (Driveway).

8. The original amount of the Contract was $209,512.00 for all labor and materials; changes to the original Contract added $13,283.32 to the original Contract price; the final amount of the Contract totaled $222,795.32.

9. Work under the Contract began in February 2019.

10. In March 2020, the Respondent stopped working on the Project. At the time, work under the Project remained, including the Driveway, and the Project was not complete.

11. The Claimant paid the Respondent a total of $223,155.00, as follows:

Date of Check	Check Number	Amount	Memo/Notes
January 2, 2019	132	$6,400.00	Design Drawings
January 2, 2019	134	$475.00	Illegible
January 9, 2019	135	$8,280.00	Final Design D
June 10, 2019	139	$15,000.00	(Illegible) Framing
June 10, 2019	140	$15,000.00	Electrical
June 18, 2019	141	$15,000.00	HVAC
July 5, 2019	142	$30,000.00	Interior Framing and Plumbing
August 12, 2019	143	$15,000.00	9. Shechock (illegible)
September 23, 2019	145	$15,000.00	Interior Painting
November 7, 2019	146	$15,000.00	Interior Carpet
November 25, 2019	147	$13,000.00	Extra work (illegible)
Date of Electronic Transfers			
January 22, 2019	N/A	$45,000.00	N/A
March 29, 2019	N/A	$30,000.00	N/A

12. After the Claimant's unsuccessful efforts to contact the Respondent to complete the Project, the Claimant entered into a subsequent contract with JM Kelly, who completed the driveway portion of the Project in May 2020.

13. On June 3, 2020, the Claimant employed the services of two itinerant workers to clean up debris and construction material left by the Respondent.

DISCUSSION

I

Governing Law, Controlling Regulations, and Burden of Proof

An owner may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor." Md. Code Ann., Bus. Reg. § 8-405(a); COMAR 09.08.03.03B(2). Actual loss "means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." Md. Code Ann., Bus. Reg. § 8-401. "For purposes of recovery from the Fund, the act or omission of a

licensed contractor includes the act or omission of a subcontractor, salesperson, or employee of the licensed contractor, whether or not an express agency relationship exists." Md. Code Ann., Bus. Reg. § 8-405(b).

At a hearing on a claim for reimbursement from the Fund, the Claimant has the burden of proof. Md. Code Ann., Bus. Reg. § 8–407(e)(1); COMAR 09.08.03.03(A)(3). The standard of proof is by a preponderance of the evidence. Md. Code Ann., State Gov't § 10-217 (2021). To prove something by a "preponderance of the evidence" means "to prove that something is more likely so than not so," when all of the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002) (quoting *Maryland Pattern Jury Instructions* 1:7 (3d ed. 2000)); *see also Mathis v. Hargrove*, 166 Md. App. 286, 310 n.5 (2005).

For the following reasons, I am persuaded that the Claimant has proven eligibility for an award from the Fund.

II

Positions of the Parties

The Claimant seeks an award from the Fund for the money she paid to complete the Project that she contends the Respondent left incomplete in March 2020. Specifically, the Claimant seeks reimbursement for monies she paid to have the Driveway installed, remove debris and construction materials, and fill the excavation hole next to the property foundation which was left by the Respondent after the installation of the main sewer line.

After the Respondent left the Project incomplete, the Claimant contends he never responded to the Claimant's attempts to reach him to complete the Project. The Claimant then entered into a subsequent contract with another contractor, who represented that he was licensed by the Commission, or would be before he started work, to install the concrete driveway that was included in the original Contract. The Claimant also hired two itinerant workers to clean up

debris and construction materials left by the Respondent, the removal of which was contemplated in the Contract with the Respondent.

The Fund's strenuously contends that the Claimant is not entitled to an award for two reasons. First, the Fund asserts that, as a matter of public policy, it does not provide recompense to a homeowner who contracts with an unlicensed person to perform work regardless of whether that work was to cure the deficiencies of a licensed contractor or whether the unlicensed person held themselves out to the public as being licensed. As such, the Fund maintains that the Claimant is not entitled to reimbursement for payments made to JM Kelly, who has not been licensed since 2011, or to the workers who cleared up the debris and construction materials left by the Respondent, who are also unlicensed.

Second, the Fund asserts that the Driveway was not a part of the Contract, and therefore not a proper part of the Claim. However, the Fund contends that the Claimant is entitled to $355.88, the sum it calculated as the difference between her overpayment to the Respondent and the actual price of the Contract.

III

Analysis of the Merits of the Claim

Driveway

The Fund disputes that the Driveway was included in the Contract. The evidence, however, clearly demonstrates that it was included. First, in the Contract, under "Section Five: Start of Work, #32," the Respondent agreed to, "[r]emove and discard existing carport, concrete slab, soils as required to install proposed addition pier footing and *Mono-Lithic* concrete slabs per drawings." In addition, the Contract states, "[p]rovide and install 3000 PSI concreate for slab with anchor bolts per drawings." (CL Ex. 2, p. 2).

Mr. Silvestro, the Claimant's husband who co-owns the Home, testified that the Driveway was a part of the design and one of the primary reasons that the Claimant hired the Respondent for the Project. The Driveway was included in the Contract, Mr. Silvestro explained, because the carport was removed, and the Rockville City Code required a paved area or parking spaces for two vehicles in a driveway. Mr. Silvestro further explained that Michael Diggs, the architect who designed the Project, including the Driveway, was the Respondent's partner and suffered a stroke at the start of the Project, rendering him unable to continue his employment. The Respondent took over the entirety of the Project as a result. Mr. Silvestro testified that Mr. Diggs included the Driveway in the Contract work at no additional cost for the Claimant at the time of Contract execution and the Respondent affirmed this commitment. There is no persuasive evidence to refute Mr. Silvestro's testimony that the Driveway was a part of the work agreed to under the Contract.

The Respondent's own written response to the Complaint, offered in evidence by the Fund, supports the assertion that the Driveway was to be installed under the Contract. The document is replete with references to the Driveway and never once suggests that work was outside the scope of the Contract or otherwise excluded. (GF Ex. 6). Where the Respondent's account differs from the Claimant's is solely related to the cost of the Driveway. The Respondent writes that he informed the Claimant that the prices he received to complete the Driveway ranged from $9,000.00 to about $13,000.00. As such, he wanted to "find a company that offered a better price-point." (GF Ex. 6, p. 6). The Respondent never denies he was to perform this work under the terms of the Contract and expressly states that he was able to secure the services of a concrete company for "$6,000" and "[w]hen he went to the site the homeowner had another company doing the work." (*Id.*).

In the final costing breakdown, dated January 9, 2019, the Respondent indicates a budget amount of $9,800.00 for materials and labor for a "Mono-Lithic Slab" and also notes a budgeted cost of $0.00 for materials and labor for a "Driveway." (*Id.*, p. 21). In addition, the Respondent wrote in his response to the Complaint, elaborating on his earlier statements, "I did not quit my pursuit to find a company that could complete the driveway at a reasonable price. Unfortunately, the homeowners beat me to it and I was never informed. I was made aware my guys went to prep the site and the work has been completed." (*Id.*, p. 12).

Consistent with the Respondent's final costing breakdown, the Claimant also testified that the Driveway was already included in the budget and that is why the cost listed was $0.00. The most reasonable inference to draw from this evidence is that whatever it cost the Respondent to construct the Driveway, it was not going to be charged to the Claimant beyond what was paid under the Contract, but it was going to be built.

Despite the Respondent's contention that he did not quit his pursuit to find a company to complete the Driveway, it is inconsistent with the Claimant and Mr. Silvestro's testimony that after the final inspection of the Home in March 2020, the Respondent's foreman announced that they had finished the Project and left the Home. I credit the Claimant and Mr. Silvestro's account over the Respondent's where they differ, based on my assessment of their demeanor, which revealed no signs of deceit or falsity, and their consistent testimony upon spirited cross-examination by the Fund. *See B.H. v. Anne Arundel Cty. Dep't of Soc. Servs.*, 209 Md. App. 206, 224-25 (2012).

When it became clear to the Claimant that the Respondent abandoned the Project and was not going to complete the Driveway, the Claimant had to hire a new contractor to finish its construction. The Claimant hired JM Kelly, who constructed the Driveway in May 2020. The

Claimant paid JM Kelly $7,500.00 for materials and labor for the installation of a new 780 square foot concrete driveway. (CL Ex. 9).

Excavation Hole and Severe Slope Toward the Home Caused by the Sewer Line

The Claimant offered the fact and opinion testimony of Mr. Moreno, of Safehome Trust Inspections, who inspected the Home on May 11, 2020. Mr. Moreno testified that he was hired to inspect the Home concerning the Claimant's concerns with the structure and drainage system. Specifically, he inspected the Home for problems with the interior due to the piping and severe slope of the land toward the Home after the installation of the main sewer pipe, opining that it would adversely affect the structure of the Home and permit water penetration.

Mr. Moreno prepared a written report, with numerous photographs, detailing the problems with the Respondent's work. (CL Ex. 1). Mr. Moreno explained that when the Respondent installed the main sewer line, he left a severe slope toward the Home and a hole that needed to be filled, since the hole had been collecting water for many days at the time of the inspection.

Mr. Silvestro testified that the Respondent hired a plumber to upgrade the existing plumbing. When the work was done, a six-inch deep, four by four excavation hole was left, in which water was pooling next to the Home's foundation. The Respondent promised to address it and fill the hole with dirt but never did.[4]

Clean-Out Pipe

Mr. Moreno testified regarding the Respondent's work on the clean-out, or drainage, pipe. Mr. Moreno explained that a properly installed exterior clean-out pipe prevents saturation of the soil around the foundation exterior, which could otherwise cause basement or crawlspace

[4] While the Claimant testified that there was water penetration in the basement of the Home as a result of the Respondent's work under the Contract, she did not seek an award for any deficiencies related to these matters.

water intrusion, foundation damage, or other issues. As soil settles over time, regrading may be needed next to the foundation exterior to maintain good runoff. (*Id.*, p. 13). Mr. Moreno opined that the exterior clean-out pipe was set too low by the Respondent and should have been installed with the top accessible approximately one foot from the ground. At the hearing, Mr. Moreno was not aware of any current problems arising from the clean-out pipe deficiencies, but opined that if the slope were not filled in next three to six months, the Claimant would have damage to the foundation; he noted that the mulch and pebbles in the slope already retained water. Mr. Morena recommended that the clean-out pipe be dug out, replaced, and reinstalled so that the top part of the pipe is accessible.

The Claimant testified that JM Kelly placed dirt into the excavation hole. However, after the Driveway was complete, the ground sunk, and buried the clean-out pipe under soil and grass. The clean-out pipe became completely buried underground and will eventually have to be dug out and replaced. (*Id.*, p. 11).

The Debris

Under the Contract, "Section Four: Mobilization and Demolition, #27," the Respondent agreed to, "[p]rovide as many 30yd dumpsters as required and labor to remove from site any and all project related debris to maintain a clean job site." (CL Ex. 2, p. 2). Thus, the Contract specifically required the Respondent to remove the debris. When the Respondent's foreman announced they were finished and then failed to return to the Project, the Respondent left debris inside the Home, out in the yard, and on the steps, making it unsafe to walk around the Home. (CL Ex. 1). The Claimant was forced to hire help to remove the remaining debris. The Claimant paid $727.00 for that work on June 3, 2020. (CL Ex. 10). The work consisted of removing the debris, which resulted in nine bags of garbage, adding additional dirt to the trough area, and cleaning the site.

For these reasons, I am persuaded, more likely than not, the home improvement at issue was unworkmanlike, inadequate, and incomplete, as those terms are used in the law and regulations. *Steinberg v. Arnold*, 42 Md. App. 711, 712 (1979) ("[A]s fact finder, [the judge] has the usual jury prerogatives of whether to believe or disbelieve witnesses, how much weight to give testimony and ultimately whether to be persuaded or not to be persuaded").

A Fund award is appropriate. I now turn to the issue of whether the Claim is barred by the Claimant's choice of persons to complete the Project.

Unlicensed Contractors[5]

The Fund asserts that an award is not permissible in this case because JM Kelly and the itinerant workers who performed the remedial work were not contractors licensed by the MHIC. Specifically, the Fund's position is that including the amount paid to an unlicensed contractor in determining actual loss rewards a claimant who became a party to an illegal contract with an unlicensed contractor at the expense of a licensed contractor who, although deficient, observed the law and licensing requirements of the State. Thus, it would be improper for the Fund to act against public policy and condone a contract undertaken by a claimant with a party that the Fund considers in violation of the law.

The Fund offered no authority—caselaw, statute, regulation, or written policy—to support its position that it is prohibited from granting an award for monies paid to unlicensed contractors to cure the failings of licensed contractors.

The Maryland home improvement law mandates a licensing system requiring contractors to be licensed for the protection of the public. *Brzowski v. Md. Home Imp. Comm'n*, 114 Md. App. 615, 628 (1997) ("The Maryland Home Improvement Law is a regulatory statute enacted

[5] Although the Fund takes exception to the use of this term and contends there is no such thing as an "unlicensed contractor," I use the term merely for ease of reading and simplicity and intend no lack of respect to the Fund and its position on the matter.

for the protection of the public."). Performing a home improvement in this State without being properly licensed by the MHIC is a criminal misdemeanor. Md. Code Ann., Bus. Reg. § 8-601. Accordingly, the courts, as a matter of public policy, will not enforce the rights of unlicensed contractors. More than a hundred years ago, in *Goldsmith v. Manufacturers Liability Insurance Company of New Jersey*, 132 Md. 283, 286 (1918), the Court of Appeals of Maryland held:

> [A] contract entered into by an unlicensed person, engaged in a trade, business, or profession required to be licensed, and made in the course of such trade, business, or profession, cannot be enforced by such person, if it appears that the *license* required by the statute *is*, in whole or in part, *for the protection of the public*, and to prevent improper persons from engaging in such trade, business, or profession.

(Emphasis added); *see Balt. St. Builders v. Stewart*, 186 Md. App. 684, 706 (2009) (unlicensed contractor cannot enforce a home improvement contract with a homeowner because such enforcement is against public policy); *Fosler v. Panoramic Design, Ltd.*, 376 Md. 118, 134 (2003) (homeowner can repudiate a contract made with a consultant if the consultant is performing a home improvement without a license).

The focus of these cases is limiting the legal rights of the unlicensed contractor and not the homeowner for whom the licensing system exists to protect. Nevertheless, I respect the Fund's position and give its concerns weight. However, I am not persuaded these public policy concerns can be interpreted as the Fund contends in this case because such an interpretation would work to frustrate the very purpose of the statutory and regulatory scheme—to create an accessible forum of redress for those harmed by the acts and omissions of licensed contractors.

The Respondent acted at all times within the authority of his MHIC license. It is the indicia of reliability that his license conveyed that allowed him to do business with the Claimant in the first instance. Any award made to the Claimant by the Fund must be reimbursed by the Respondent, should he ever wish to be relicensed. The only person who benefits by denying the Claimant an award that she is otherwise entitled to receive is the Respondent himself, who would

be insulated from the pecuniary effects of his bad acts; this works to the contrary purpose of the statute and is in itself contrary to public policy because it nullifies the deterrent effects of the MHIC's regulatory scheme and renders the Respondent's actions wholly without consequence.

To do any other would be to reward the malefactor and harm the victim and the public at large. Members of the public rely on the State's licensing system. Their trust is betrayed by failing to fairly recompense a claimant or allowing a culpable respondent to continue perform home improvements without accounting for their bad acts, an outcome offensive to the statute and the Fund's very purpose.

I do not countenance the use of unlicensed contractors for home improvement work. The Claimant, however, presented as a sincere person navigating the complicated waters of home improvement contracting to the best of her ability. She simply wanted an honest and competent contractor to construct her concrete driveway. She inquired among neighbors and sought a referral. At the hearing, the Claimant was adamant about only hiring licensed contractors and was reassured, based on her due diligence, that JM Kelly would be the right contractor to install the concrete driveway. The Claimant contacted all three references, who reassured her that JM Kelly was an excellent contractor. Additionally, JM Kelly showed her an expired license card, covering the expiration date with his hand, and represented that he had applied to renew online and there were delays in the process but that he would have an active license before he began work. The Fund was able to verify at the hearing that JM Kelly had not been licensed since 2011, an online application for renewal was not possible, and no renewal application was pending for JM Kelly. The Complainant would not have known this status based on the information JM Kelly provided her.

Nonetheless, based on my assessment of her testimonial demeanor, which showed no signs of falsity or deceit, I find the Claimant to be a credible witness who believed that JM Kelly

was a licensed contractor when she contracted with him to complete the concrete driveway. *Md. Bd. of Physicians v. Elliott*, 170 Md. App. 369 (2006) (a finder-of-fact is authorized to determine the credibility of a witness's testimonial evidence based on the witness's demeanor). I also find that there was no intent on the Claimant's part to facilitate illegal behavior. The Claimant freely acknowledged that the itinerant workers were not licensed, as they were students seeking to make extra money during the summer. She also received their referral from her neighbors. The Claimant's candor speaks to her credibility.

These factual and policy considerations notwithstanding, "[i]n a contested case, the [OAH] is bound by any agency regulation, declaratory ruling, prior adjudication, or other settled, preexisting policy, to the same extent as the agency is or would have been bound if it were hearing the case." Md. Code Ann., State Gov't § 10-214 (2021). The Fund submitted no policy statement or evidence of such policy statement at the hearing. Therefore, I am not bound by the Fund's claimed policy position in making a proposed decision in this case and decline to adopt it. *Id.*; *see also Brzowski*, 114 Md. App. at 634 ("Administrative practice . . . is entitled to no weight when it is inconsistent with the statutory scheme.") (citations omitted).

Based upon the credible evidence of record, I find the Respondent, a licensed contractor, entered into a written agreement with the Claimant to perform a home improvement to the Claimant's property, accepted payment totaling $223,155.00, which is an amount greater than the total contract price, and performed work that was incomplete. Further, I find there is no dispute that the Claimant is the owner of the subject property and that there are no procedural impediments barring her from recovery from the Fund. Md. Code Ann., Bus. Reg. § 8-405(f), (g); COMAR 09.08.01.13.

I conclude, therefore, that the home improvement at issue here is incomplete within the meaning of the statute, the Claim is not barred by any relevant statuary or regulatory provisions,

and the Claimant is eligible for compensation from the Fund. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405.

IV

Award of Compensation from the Fund

Having found eligibility for compensation[6], I now turn to the question of whether the Claimant has proven the amount of the "actual loss" she sustained. Md. Code Ann., Bus. Reg. § 8-401 ("actual loss means the costs of restoration, repair, replacement, or completion . . . ."); *see also* Commission's Hearing Order, June 9, 2021 ("The Claimant must establish . . . the specific amount of loss . . . ."). The MHIC's regulations provide three formulas to measure a claimant's "actual loss," unless a unique measure is necessary. COMAR 09.08.03.03B(3).

The controlling regulation provides, as follows:

> (a) 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.
>
> (b) If the contractor did work according to the contract and the claimant is not soliciting another contractor to complete the contract, 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.
>
> (c) 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).

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[6] The Claimant may not be compensated for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. Md. Code Ann., Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1). None of these are at issue here.

For the Driveway, paragraph (a) is the only applicable measure since the Respondent did not perform any of the agreed upon work. At the time the Respondent left the Project, no Driveway work had taken place. The Claimant paid JM Kelly $7,500.00 for the installation of the Driveway. (CL. Ex. 9). Had the Respondent completed the Project, the Claimant would have had a Driveway at no additional cost to her beyond the monies paid under the Contract. Due to the Respondent's abandonment of the Project, it cost the Claimant $7,500.00 to have the Driveway installed. Thus, the Claimant's actual loss on the Driveway is $7,500.00.

Paragraph (a) also applies the Claimant's actual loss incurred for the cleanup of the debris and construction material. The Claimant paid $727.00 to the workers to perform this task. Again, the Respondent was required under the Contract to clear up the debris and construction materials, as set forth in the Contract. When the Respondent abandoned the Project, he never came back to clean up the debris. As such, the Claimant was forced to hire help to clear the debris and construction material left behind by the Respondent. Thus, the Claimant's actual loss for clearing the debris is $727.00.

The law and controlling regulations cap a claimant's recovery at $20,000.00 for the acts or omissions of one contractor, and expressly provide that a claimant may not recover more than the amount paid to the contractor against whom the claim is filed. Md. Code Ann, Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a). In this case, the Claimant's actual loss of $8,227.00 ($7,500.00 for the Driveway + $727.00 for the debris clearance = $8,227.00) is less than the statutory maximum of $20,000.00 and the amount paid to the Respondent under the Contract. Therefore, the Claimant is entitled to an award from the Fund in the sum of $8,227.00. Md. Code Ann, Bus. Reg. § 8-405(e)(1); COMAR 09.08.03.03D(2)(a).

PROPOSED CONCLUSIONS OF LAW

I conclude, as a matter of law, that the Claimant sustained an actual loss of $8,227.00 due to the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405, 8–407(e)(1) (2015); COMAR 09.08.03.03(A)(3), B(3)(a).

I further conclude, as a matter of law, that the Claimant is entitled to recover that amount from the Fund. *Id.*

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant $8,227.00;

ORDER that the Respondent is deemed to be ineligible for a Maryland Home Improvement Commission license until the Respondent reimburses the Maryland Home Improvement Guaranty Fund for all monies disbursed under this Order, plus annual interest of at least ten percent, as set by the Maryland Home Improvement Commission[7]; and

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

November 22, 2021
Date Decision Issued

Steven V. Adler
Steven V. Adler
Administrative Law Judge

SVA/at
#193987

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

IN THE MATTER OF THE CLAIM OF BETTY LEE AGAINST THE MARYLAND HOME IMPROVEMENT GUARANTY FUND FOR THE ACTS OR OMISSIONS OF ERROLL G. MCDONALD AND HAVENPORT, LLC	* * * * * * *	**MARYLAND HOME IMPROVEMENT COMMISSION** **MHIC CASE NO. 20(75)1198** **OAH CASE NO. LABOR-HIC-02-21-15258**

* * * * * * *

FINAL ORDER

This matter was originally heard before an Administrative Law Judge ("ALJ") of the Office of Administrative Hearings ("OAH") on August 24, 2021. Following the evidentiary hearing, the ALJ issued a Proposed Decision on November 22, 2021, concluding that the homeowner, Betty Lee ("Claimant") suffered a compensable actual loss of $8,227.00 as a result of the acts or omissions of Erroll G. McDonald and Havenport, LLC (collectively, "Contractor"). *ALJ Proposed Decision* p. 18. In a Proposed Order dated March 9, 2022, the Maryland Home Improvement Commission ("MHIC" or "Commission") amended the Proposed Decision of the ALJ by reducing the Claimant's actual and compensable loss to $1,086.68. The Claimant subsequently filed exceptions to the MHIC Proposed Order.

On June 2, 2022, a three-member panel ("Panel") of the MHIC held a remote hearing on the exceptions filed in this matter. The Claimant and Contractor participated without counsel. Assistant Attorney General Eric London appeared at the exceptions hearing on behalf of the Guaranty Fund. The Commission entered the following preliminary exhibits as part of the record of the exceptions hearing without objection: 1) hearing notice; 2) transmittal letter, ALJ Proposed Decision, and MHIC Proposed Order; and 3) Claimant's exceptions. Neither the Claimant nor the Contractor produced a copy of the transcript of the hearing before the ALJ. Therefore, the Panel's review of the record was limited to the preliminary exhibits for the exceptions hearing, the OAH Proposed Decision, and the exhibits offered as evidence at the OAH hearing. COMAR

09.01.03.09(G) - (I).

The claim in this proceeding relates to a contract between the parties for the construction of an addition and new driveway at the Claimant's home. The ALJ found that the Contractor's performance under the contract was unworkmanlike because of several defects in the Contractor's performance and incomplete because the Contractor failed to install a driveway, fill in a sewer excavation, and remove debris from the project. *ALJ's Proposed Decision* p. 11.

Upon review of the ALJ's Proposed Decision, the Commission held that the ALJ erred in recommending an award to the Claimant based on the cost the Claimant incurred to install the driveway because the Claimant hired a contractor who did not hold a home improvement contractor's license to perform that task, and proposed reducing the Claimant's by the amount the Claimant paid to the unlicensed contractor to install the driveway.

On exception, the Claimant argued that the Commission erred in reducing her award because she did not know that the contractor that she hired to install her driveway, JM Kelly Paving, did not have a home improvement contractor's license, and because the Contractor's own estimate of the cost of installing the driveway constitutes sufficient evidence of the amount of her actual loss.

The Commission shall affirm its Proposed Order. The Commission agrees with the Claimant that the Contractor's own estimate of the cost to install the driveway may be probative as to that cost. However, the Commission remains unable to make an award from the Guaranty Fund to compensate a homeowner for expenditures on unlicensed home improvement work.

Having considered the parties' arguments, the evidence contained in the record, and the ALJ's Recommended Decision, it is this 15th day of June 2022, **ORDERED:**

A. That the Proposed Order of the Commission dated March 18, 2022, which is incorporated

herein by reference, is **AFFIRMED**;

B. That the Claimant is awarded $1,086.68 from the Maryland Home Improvement Guaranty Fund;

E. That the Contractor shall remain ineligible for a Maryland Home Improvement Commission license until the Contractor reimburses the Guaranty Fund for all monies disbursed under this Order plus annual interest of at least ten percent (10%) as set by the Commission, *Md Code Ann.*, Bus. Reg. §§ 8-410(a)(1)(iii), 8-411(a);

F. That the records and publications of the Maryland Home Improvement Commission shall reflect this decision; and

G. Any party has thirty (30) days from the date of this Final Order to appeal this decision to Circuit Court.

Lauren Lake
Chairperson –Panel
Maryland Home Improvement
Commission