

IN THE MATTER OF THE CLAIM	* BEFORE BRIAN ZLOTNICK,
OF AVA WILLIAMS,	* 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 JOHN TENEYCK,	*
T/A JWT ENTERPRISES,	*
RESPONDENT	* OAH No.: LABOR-HIC-02-23-23299
	* MHIC No.: 22 (75) 1403
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PROPOSED DECISION

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STATEMENT OF THE CASE

On March 22, 2023, Ava Williams (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)¹ Guaranty Fund (Fund) for reimbursement of \$3,200.00 for actual losses allegedly suffered as a result of a home improvement contract with John Teneyck, trading as JWT Enterprises (Respondent or JWT). Md. Code Ann., Bus. Reg. §§

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

8-401-411 (2015 & Supp. 2023).² On August 31, 2023, the MHIC issued a Hearing Order on the Claim. On September 1, 2023, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On October 12, 2023, eight days prior to the scheduled remote hearing, the Respondent filed a request to postpone the hearing (Request). On October 18, 2023, I directed the OAH Postponement Officer to notify the parties that the Request was denied. Maryland Code of Regulations (COMAR) 28.02.01.20B(1). On October 20, 2023, I held a remote video hearing through the Webex platform. Bus. Reg. §§ 8-407(a), 8-312 and COMAR 28.02.01.20B(1). Hope Sachs, Assistant Attorney General, Department, represented the Fund. The Claimant was self-represented. The Respondent represented himself.

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?

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

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits offered by the Claimant:

- Cl. Ex. 1 - Concrete deck and patio and retaining wall contract (Contract), March 28, 2022
- Cl. Ex. 2 - Concrete deposit check from the Claimant to the Respondent for \$3,200.00, March 28, 2022
- Cl. Ex. 3 - Texts between the Claimant and James Christiansen³, April 12 and 13, 2022
- Cl. Ex. 4 - Texts between the Claimant and Mr. Christiansen, April 27, 2022 and May 11, 12, and 20, 2022
- Cl. Ex. 5 - Receipt from York Building Products; April 2, 2022
- Cl. Ex. 6 - Email from Tammy Kitzmiller⁴ to Carl Smith⁵, July 19, 2022
- Cl. Ex. 7 - Emails from Angi⁶ to the Complainant, May 17, 2022 and June 9, 2022
- Cl. Ex. 8 - Photograph of concrete work being performed by Jose Villalobos, a contractor not associated with the Respondent, May 16, 2022
- Cl. Ex. 9 - Photograph of stone being delivered, May 17, 2022
- Cl. Ex. 10 - Photograph of retaining wall work being performed by Elmer Perchurio, a contractor not associated with the Respondent, May 25, 2022
- Cl. Ex. 11 - Photograph of retaining wall work being performed by Mr. Perchurio, May 25, 2022
- Cl. Ex. 12 - Photographs of concrete work being performed by Mr. Villalobos, May 26, 27, and 28, 2022

I admitted the following exhibits offered by the Fund:

- Fund Ex. 1 - Notice of Hearing, September 14, 2023, with attached Hearing Order, August 31, 2023
- Fund Ex. 2 - Respondent's MHIC licensing history, October 3, 2023

³ Mr. Christiansen was a sub-contractor hired by the Respondent to perform the work for the Contract.

⁴ Ms. Kitzmiller is the Credit Manager for York Building Products.

⁵ Mr. Smith is the Manager at York Building Products.

⁶ Angi, formerly Angi's List, is a service referral and rating company.

Fund Ex. 3 - Claim Form, March 22, 2023, with attached letter from the MHIC to the Respondent, March 27, 2023

I admitted the following exhibits offered by the Respondent:

Resp. Ex 1 - Contract, March 28, 2022

Resp. Ex. 2 - Receipt from York Building Products, April 1, 2022

Resp. Ex. 3 - Letter from the Respondent to David R. Finneran, Executive Director, MHIC, July 11, 2022

Resp. Ex. 4 - Letter from the Respondent to Joseph Tunney, MHIC, March 31, 2023

Resp. Ex. 5 - Yelp review of Respondent by the Claimant, May 17, 2022

Testimony

The Claimant testified on her own behalf.

The Respondent testified and presented the testimony of James M. Christiansen, subcontractor for the Respondent.

The Fund did not present any testimony.

PROPOSED FINDINGS OF FACT

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

1. The Respondent was a licensed home improvement contractor under MHIC license number 5941061 at all times relevant to the subject of this hearing.
2. On March 28, 2022, the Claimant and the Respondent entered into a Contract to construct a retaining wall and a concrete patio in the Claimant's backyard surrounding an in-ground pool that was under construction.
3. The Contract specified the following:
 - Install retaining to parallel fence line and follow shape of the pool at both ends. This wall will support the concrete pool deck on that side
 - Backfill along wall to proper grade
 - Prep and form for concrete pool deck and patio
 - Install #3 rebar mat 24 inches on center doweled into foundation and retaining wall

- Place and finish 3500 psi concrete. This will be finished to a light broom finish. Concrete will be placed to proper slopes for drainage away from house and pool
- Remove forms and clean up construction debris
- Total cost for material and labor - \$9,400.00
- Draw Schedule:
 - #1 \$3,200.00 upon acceptance of proposal
 - #2 \$3,200.00 upon completion of prep and site is ready for concrete
 - #3 \$1,500.00 upon completion of concrete
 - #4 \$1,500.00 upon cleanup and completion of project

4. On March 28, 2022, the Claimant paid the Respondent \$3,200.00.

5. The Respondent's subcontractor, Jim Christensen, advised the Claimant at the time the Contract was signed that work would begin in two to three weeks when the stone materials are delivered.

6. On April 12, 2022, the Claimant texted Mr. Christensen and inquired about the start date for the Contract. Mr. Christensen replied that they have two weeks of work to complete the projects that they have started.

7. On May 11, 2022, the Claimant texted Mr. Christensen that she has missed all of her other slots for projects that follow the concrete work by the Respondent. The Claimant asked for her money to be returned. Mr. Christensen replied that they had planned on starting the Contract work at the end of the week. The Claimant responded that same day she would have to go with someone else for the job and that she wanted her deposit payment returned.

8. On May 16, 2022, Jose Villalobos, a contractor hired by the Claimant, began work on the concrete patio that the Respondent was hired to perform. Mr. Villalobos is not affiliated with the Respondent. The Claimant paid Mr. Villalobos to construct the concrete patio around her pool.

9. On May 20, 2022, the Claimant texted Mr. Christensen asking when her deposit payment would be returned. Mr. Christensen did not reply.

10. On May 25, 2022, Elmer Perchurio, a contractor hired by the Claimant, began work on the retaining wall that the Respondent was hired to perform. Mr. Perchurio is not affiliated with the Respondent.

11. On July 19, 2022, Tammy Kitzmiller, Credit Manager, York Building Products, indicated in an email that an April 1, 2022 receipt from York Building Products that listed the Claimant's address as the shipping address for a special order of 350 unites Coronado Tumbled Red Sandstone paid in full through a bankcard ending in 2696 was a fraudulent receipt. Ms. Kitzmiller indicated that York Building Products does not manufacture Coronado Tumbled Red Sandstone and that a report run through their credit card processor indicated that no transactions were processed between January 1, 2022 and May 31, 2022 with a bankcard ending in 2696.

12. The Respondent has not returned any money to the Claimant.

13. The Respondent never performed any work on the Contract and last communicated with the Claimant through Mr. Christensen's May 11, 2022 reply text.

DISCUSSION

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; 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).

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.

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 on March 22, 2023, 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. *Id.* §§ 8-405(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). 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. The Respondent was issued his license on September 8, 2020, and it was due to expire on September 5, 2022. The parties entered into the Contract on March 28, 2022.

The Claimant testified that she wanted to build a retaining wall and concrete patio around an in-ground pool in her backyard. She indicated that she needed the Contract completed in order to allow her pool contractor to finish building her pool. Mr. Christiansen indicated that work on the Contract would begin in two to three weeks after the stone was delivered for the patio.

The parties entered into the Contract on March 28, 2022. The Contract required a \$3,200.00 payment from the Claimant upon her acceptance of the Contract. On March 28, 2022,

the Claimant paid the Respondent \$3,200.00 via check. (CL Ex. 2). The Respondent acknowledged receipt of the \$3,200.00 payment, as he stated that those funds were used to purchase stone for the Contract. The Claimant texted Mr. Christiansen on April 12, 2022, inquiring about the start date for the Contract and Mr. Christiansen replied that they were backed up by two weeks by other projects that they were completing. On May 11, 2022, the Claimant again texted Mr. Christiansen informing him that she had missed her opportunity to have other projects started that were waiting for completion of the concrete patio. The Claimant on that day asked Mr. Christiansen for a return of her \$3,200.00 payment, and Mr. Christiansen replied that they had planned on starting work on the Contract at the end of that week. The Claimant responded that same day that she is going to hire another contractor to perform the Contract and that she wanted her \$3,200.00 deposit returned. On May 16, 2022, another contractor began working on the concrete patio and on May 25, 2022, a different contractor began working on the retaining wall. The Claimant texted Mr. Christiansen on May 20, 2022, asking for her a return of her deposit, but Mr. Christiansen did not reply to that text.

The Respondent argued that he ordered the stone needed for the Contract from York Building Products (York) on April 1, 2022, and that he used the Claimant's \$3,200.00 deposit payment for that order. The Respondent argued that the stone was specially ordered, and therefore, was non-refundable as indicated on the April 1, 2022 receipt from York (Resp. Ex. 2). The Respondent further asserted that the stone was ordered from Eldorado Stone Manufacturing (Eldorado), but he indicated that the stone was purchased from York. There was no explanation regarding the connection between Eldorado and York. The Respondent also argued that Eldorado called the Claimant on April 25, 2022, to deliver the stone but that the Claimant refused delivery. The Claimant testified that she never had any conversations with the

Respondent or Mr. Christiansen about the stone being a special order or her denial of any deliveries of the stone.

In evaluating whether the stone ordered for the Contract by the Respondent was a special order that was non-refundable, I found the Respondent to be less than credible. The Respondent relied on an April 1, 2022 receipt from York that showed that he paid \$3,200.00 for Coronado Tumbled Red Sandstone which was paid with a bankcard ending in 2696. However, Ms. Kitzmiller, a Credit Manager with York, ran an audit of all transactions processed between January 1, 2022 and May 31, 2022, and none indicated a purchase made with a bankcard ending in 2696. Ms. Kitzmiller also noted that York does not manufacture Coronado Tumbled Red Sandstone. Therefore, I find that there is no credible evidence that the Claimant's \$3,200.00 payment was used for a non-refundable purchase of stone by the Respondent. Further, the Contract makes no mention of any non-refundable aspect of the required draw payments. I find that the Respondent took the Claimant's deposit without performing any work on the Contract.

The Respondent also asserted during the hearing that the stone that was ordered for the Claimant was returned to the Eldorado warehouse after the Claimant declined delivery of that stone. The Respondent stated that when they attempted to track down the stone, Eldorado indicated that it was impossible to find that stone order. The Respondent also stated that he attempted to get a refund from Eldorado, but they declined because the stone was specially ordered. The Respondent's assertion regarding the stone makes no sense. It is implausible that Eldorado is now unable to track down the stone order after it was returned to their warehouse. Further, the Respondent relied on the April 1st York receipt to demonstrate that the stone purchase was non-refundable, but York has no record of that purchase and does not even manufacture the stone listed on the April 1st receipt. I find that the York receipt produced by the Respondent is inaccurate, if not fraudulent. Therefore, I conclude that the Respondent took the

Claimant's \$3,200.00 deposit without ordering any stone for the project or performing any work on the Contract. I further find that the Claimant had a legitimate purpose in moving the project forward by hiring new contractors after waiting more than six weeks for the Respondent to perform any work, as other projects that she was attempting to complete were reliant on the completion of the Contract by the Respondent. Based on the evidence before me, I find that the Respondent has abandoned the 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). MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work.

The Respondent abandoned the Contract without doing any work. Accordingly, the following formula appropriately measures the Claimant's actual loss: "If the contractor abandoned the contract without doing any work, the claimant's actual loss shall be the amount which the claimant paid to the contractor under the contract." COMAR 09.08.03.03B(3)(a). In this case, the Claimant paid the Respondent \$3,200.00. After receipt of the payment, no work was ever started. The Fund agreed and recommended an award of \$3,200.00 to the Claimant.

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.⁷ Bus. Reg. § 8-405(e)(1), (5) (Supp. 2023); COMAR

⁷ 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

09.08.03.03B(4). In this case, the Claimant's actual loss is equal to the amount paid to the Respondent and less than \$30,000.00. Therefore, the Claimant is entitled to recover his actual loss of \$3,200.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$3,200.00 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)(2). I further conclude that the Claimant is entitled to recover \$3,200.00 from the Fund.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$3,200.00; 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,⁸ and

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

January 11, 2024
Date Decision Issued

Brian Zlotnick

Brian Zlotnick
Administrative Law Judge

BMZ/emh
#209426

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").

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

PROPOSED ORDER

WHEREFORE, this 23rd day of February, 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***