

<p>IN THE MATTER OF THE CLAIM</p> <p>OF JAY MABE,</p> <p>CLAIMANT</p> <p>AGAINST THE MARYLAND HOME</p> <p>IMPROVEMENT GUARANTY FUND</p> <p>FOR THE ALLEGED ACTS OR</p> <p>OMISSIONS OF BRIAN TOMLIN,</p> <p>T/A TOMLIN HOMES LLC,</p> <p>RESPONDENT</p>	<p>* BEFORE MARY PEZZULLA,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>*</p> <p>*</p> <p>*</p> <p>* OAH No.: LABOR-HIC-02-24-11214</p> <p>* MHIC No.: 22 (75) 807</p>
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PROPOSED DECISION

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STATEMENT OF THE CASE

On October 2, 2023, Jay Mabe (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)¹ Guaranty Fund (Fund) for reimbursement of \$14,650.00 for actual losses allegedly suffered as a result of a home improvement contract with Brian Tomlin, trading as Tomlin Homes LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2024).²

¹ The MHIC is under the jurisdiction of the Department of Labor (Department).
² All references to the Business Regulation Article are to the 2024 Volume of the Maryland Annotated Code.

On April 15, 2024, the MHIC issued a Hearing Order on the Claim. On that same date, April 15, 2024, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On November 19, 2024,³ I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. Hope Sachs, Assistant Attorney General, Department, represented the Fund. Meighan G. Burton, Esquire, represented the Claimant, who was present. The Respondent failed to appear for the scheduled hearing.

After waiting fifteen minutes for the Respondent or the Respondent's representative to appear, I proceeded with the hearing. Applicable law permits me to proceed with a hearing in a party's absence if that party fails to attend after receiving proper notice. Code of Maryland Regulations (COMAR) 28.02.01.23A. On August 26, 2024, 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 November 19, 2024, 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 to the OAH.⁴ 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.

³ A hearing in this matter was initially scheduled for September 6, 2024, but was postponed due to the documented unavailability of the Claimant's counsel.

⁴ Neither the certified or first-class mail sent to the Respondent's address of record were returned to the OAH for any reason; however, the OAH, however, did not receive the Domestic Return Receipt, or "green card" noting delivery of the certified mail.

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. 2024); 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 Agreement between the Claimant and the Respondent, October 7, 2020
- Clmt. Ex. 2 - Check #318 from the Claimant to the Respondent in the amount of \$3,000.00, October 12, 2020; Check #270 from the Claimant to the Respondent in the amount of \$2,000.00, April 30, 2021; Check #271 from the Claimant to the Respondent in the amount of \$3,509.05, June 19, 2021
- Clmt. Ex. 3 - Invoice from Outdoor Specialties for \$6,140.95, October 12, 2020
- Clmt. Ex. 4 - Check #319 from the Claimant to Outdoor Specialties for \$3,100.00, October 16, 2020
- Clmt. Ex. 5 - Photograph completed deck, taken by Claimant in 2022
- Clmt. Ex. 6 - Photograph of partially completed deck, taken by Claimant in late April 2021
- Clmt. Ex. 7 - 4 photographs of boards and railing on the completed deck, taken by Claimant in June 2021
- Clmt. Ex. 8 - 4 photographs of fasteners on the completed deck, taken by Claimant in June or July 2021
- Clmt. Ex. 9 - 3 photographs of boards on the completed deck, taken by Claimant in June or July 2021

Clmt. Ex. 10 - Email from the Claimant to the Respondent, June 28, 2021

Clmt. Ex. 11 - MHIC Complaint Form, December 31, 2021

Clmt. Ex. 12 - Letter from the Respondent to the MHIC, undated

Clmt. Ex. 13 - Deck Repair/Replacement Proposal from Legacy Home Remodeling, July 26, 2024

Clmt. Ex. 14 - Arbitration Opinion and Award, August 14, 2023

Clmt. Ex. 15 - Inspection Report performed by Highlight Construction, January 6, 2023

I admitted the following exhibits offered by the Fund:

Fund Ex. 1 - Notice of Hearing, August 26, 2024; MHIC Hearing Order, April 15, 2024

Fund Ex. 2 - Letter from the MHIC to the Respondent, October 12, 2023; Home Improvement Claim Form, dated September 28, 2023, received by the MHIC October 2, 2023

The Respondent did not appear and did not offer any exhibits.

Testimony

The Claimant testified and presented the testimony of Vincent Trombetta, accepted as an expert in home improvement construction.

The Respondent did not appear and did not offer any testimony.

The Fund did not present any 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 with the MHIC.⁵

⁵ The Respondent's MHIC license number was not provided by either the Claimant or the Fund at the hearing; however, the Fund proffered that the Respondent was licensed by the MHIC.

2. On or about October 7, 2020, the Claimant and the Respondent entered into a contract to remove the existing deck boards on the Claimant's deck and to replace them with Trex⁶ boards in pebble grey to be installed with hidden fasteners. (Contract).

3. The original agreed-upon Contract price was \$13,000.00.

4. During work on the project, the parties amended the Contract to include replacing the existing stairs for an additional \$1,650.00.

5. The Claimant paid the Respondent the total amended Contract amount of \$14,650.00 (\$13,000.00 + \$1,650.00).

6. Work began on the project in April 2021 and was completed in June 2021.

7. Upon completion of the work, the Claimant noticed that some boards were loose and not fastened correctly.

8. In June 2021, the Claimant communicated with the Respondent regarding the loose boards and that he believed the fasteners were not installed properly.

9. The Respondent returned to the property and rather than utilizing the hidden fasteners, he used a nail gun to secure some of the boards.

10. Throughout June 2021, the Claimant documented multiple fasteners that were not imbedded properly, deck boards that were not secured at all or were improperly secured, and screws that were not recessed with the boards.

11. On June 28, 2021, the Claimant emailed the Respondent asking for a refund of the \$14,650.00 paid for the project and listing the outstanding issues regarding the deck installation, including: that the hidden fasteners were not installed properly, leaving deck boards loose; fasteners were not installed where a deck board and joist intersect; nails were used to secure

⁶ Trex is a brand of composite, wood alternative boards.

some boards, instead of the fasteners; incorrect boards were used on the steps; boards had splits in them due to how they were screwed down; and some boards dipped when stepped on. The Respondent did not respond to the email.

12. The Contract contained a clause requiring the parties to go to arbitration to resolve any disputes regarding the Contract. Although the Respondent agreed to attend the arbitration, he did not appear for the arbitration.

13. In January 2023, the Claimant hired Highlight Construction to perform an inspection of the deck. The report created by Vincent Trombetta, the owner of Highlight Construction found that the flashing between the deck and the side of the home was not installed properly or to code; throughout the deck, the fasteners were not installed properly, meaning nothing was actually holding down the deck boards; inconsistent measurements were used causing the deck's overhang to be uneven; boards were uneven and not flush; boards were lifted and warped; and the incorrect material was used for the steps. (Clmt. Ex. 15)

14. On July 26, 2024, the Claimant obtained an estimate from Legacy Home Remodeling (Legacy). (Clmt. Ex. 13). Per the Legacy estimate, the cost to remove the damaged composite decking and supply and install new Trex decking is \$25,850.00.

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 (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).

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.

By statute, certain claimants are excluded from recovering from the Fund altogether. In this case, there are no such statutory impediments to the Claimant’s recovery. The claim was timely filed, there is no pending court claim for the same loss, and the Claimant did not recover the alleged losses from any other source. Bus. Reg §§ 8-405(g), 8-408(b)(1). 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). The Contract contained a clause regarding submitting any disputes to arbitration, however, the Respondent failed to attend the arbitration once it was scheduled. *Id.* §§ 8-405(c), 8-408(b)(3). 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).

There is no evidence before me that the Claimant unreasonably rejected any good faith efforts by the Respondent to resolve the claim. *Id.* § 8-405(d). Upon discovering that there were issues with the boards being properly secured using the agreed upon fasteners, the Claimant permitted the Respondent to return to attempt to fix the issues. The Claimant testified credibly that rather than correcting the issues and using the fasteners, the Respondent used nails on some of the boards, which did not fix the issue. The Claimant then emailed the Respondent seeking a refund, but the Respondent did not respond.

The Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimant. The Claimant presented uncontroverted testimony and evidence showing that the Respondent performed an unworkmanlike home improvement on his home. The Respondent was to remove the boards of the existing deck and replace them with Trex composite boards for \$13,000.00. During the course of removing the existing boards, the parties agreed to include replacing the deck stairs for an additional \$1,650.00. The new stairs were also to be comprised of Trex boards. The Claimant paid the Respondent the full Contract amount of \$14,650.00.

Once the work was completed in June 2021, the Claimant noticed that boards appeared to be loose and not properly fastened. He testified that he looked under the deck to see how the boards were fastened and could plainly see that the fasteners were either missing in places or were improperly installed so that they were not actually connecting the boards to anything. The Respondent returned to the property one time, but rather than correctly installing or using the agreed upon fasteners, he used nails on various boards around the deck.

The Claimant presented the testimony of Vincent Trombetta, who was offered and accepted as an expert in home improvement construction. Mr. Trombetta is the owner of Highlight Construction and performed an inspection of the Claimant's deck in January 2023. Mr. Trombetta's testimony was clear that the Respondent performed an unworkmanlike installation of the deck boards. He explained that the flashing between the deck and the side of the house was improperly installed to direct water away from the house and that it is a code requirement to use rim board flashing, which the Respondent did not use. He described the Respondent's work as "sloppy" and that it looked like a "rush job." He testified that the hidden fasteners were not properly installed and that nothing was actually securing the deck boards or

properly holding them in place. In some places the hidden fasteners were improperly screwed into the boards, causing the boards to crack. He also explained that since the deck boards were not properly fastened, they lifted up in places and have become warped. Mr. Trombetta opined that the boards were a safety hazard, that they had to be removed, and that they could not be reused since they were cracked and warped.

Based on the evidence and testimony presented, I find that the Respondent performed unworkmanlike home improvement on the Claimant's property. It is clear from the Claimant's testimony, the photographs submitted into evidence, and the testimony of the Claimant's expert, Mr. Trombetta, that the deck boards were not installed properly. The photographs show, even to the untrained eye, that boards are warped, cracked, and uneven, and that in some places nails were used instead of hidden fasteners, and in other places, fasteners are not actually holding boards together. (See Clmt. Ex. 9, showing nails and a fastener between boards but without a screw holding it in place). Mr. Trombetta's expert testimony highlighted numerous issues with the installation of the deck boards. He explained that the installation had "no structural strength" and that unsecured boards pose a hazard to walk on. His testimony was clear that the boards installed by the Respondent could not be reused because they had been compromised due to the poor installation and that all new boards would need to be purchased and installed. Mr. Trombetta provided a rough estimate that the labor and materials to redo the Respondent's unworkmanlike work would be at least \$15,000.00, but he clarified that he had not actually priced the materials, so it could be substantially more. Based on the uncontroverted testimony and evidence presented by the Claimant, I 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); 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 performed some work under the Contract, and the Claimant intends to retain other contractors to complete or remedy that work. Accordingly, the following formula appropriately measures the Claimant's actual loss:

If the contractor did work according to the contract and the claimant has solicited or is soliciting another contractor to complete the contract, the claimant's actual loss shall be the amounts the claimant has paid to or on behalf of the contractor under the original contract, added to any reasonable amounts the claimant has paid or will be required to pay another contractor to repair poor work done by the original contractor under the original contract and complete the original contract, less the original contract price. If the Commission determines that the original contract price is too unrealistically low or high to provide a proper basis for measuring actual loss, the Commission may adjust its measurement accordingly.

COMAR 09.08.03.03B(3)(c).

Using the formula noted above, the Claimant's loss is calculated as follows:

Amount the Claimant paid to the Respondent	\$ 14,650.00
Amount the Claimant will pay to repair the work	<u>+ \$ 25,850.00⁷</u>
	\$ 40,500.00
Minus Contract price	<u>-\$ 14,650.00</u>
Actual loss	\$ 25,850.00

⁷ The Fund argued that for purposes of calculating an award, it did not matter if I used the estimate of \$25,850.00 from Legacy, or Mr. Trombetta's estimate of \$15,000.00, as both estimates were more than was paid by the Claimant to the Respondent. Bus. Reg. § 8-405(e)(1), (5) (Supp. 2024). As Mr. Trombetta's testimony was that his estimate of \$15,000.00 was not based on any recent pricing, I find the estimate of \$25,850.00 from Legacy more accurate and reliable.

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.⁸ Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4). In this case, the Claimant's actual loss of \$25,850.00 exceeds the amount paid to the Respondent. Therefore, the Claimant's recovery is limited to \$14,650.00, the amount paid to the Respondent.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$25,850.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405; COMAR 09.08.03.03B(3)(c). I further conclude that the Claimant is entitled to recover \$14,650.00 from the Fund. Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$14,650.00; 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;⁹ and


⁸ 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").

⁹ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2024); COMAR 09.08.01.20.

ORDER that the records and publications of the Maryland Home Improvement

Commission reflect this decision.

December 19, 2024
Date Decision Issued



Mary Pezulla
Administrative Law Judge

MP/sh
#215153

PROPOSED ORDER

WHEREFORE, this 7th day of May, 2025, 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.

Wm. Bruce

Quackenbush

Wm. Bruce Quackenbush

Chairman

Panel B

*MARYLAND HOME IMPROVEMENT
COMMISSION*