IN THE MATTER OF THE CLAIM	*	**BEFORE ANN C. KEHINDE,**
OF DONNA BENNETT,	*	**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 GARY BOUTHNER,	*	**OAH No.: LABOR-HIC-02-19-34192**
t/a UNIQUE REMODELING,	*	**MHIC No.: 18 (75) 979**
RESPONDENT	*	

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PROPOSED DECISION

STATEMENT OF THE CASE

On May 22, 2019, Donna Bennett (Claimant) filed a claim (Claim), with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund).[1] The Claim requested reimbursement of $7,200.00 in actual losses allegedly suffered as a result of a home improvement contract with Gary James Bouthner, trading as Unique Remodeling (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015). On October 21, 2019, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

[1] The Claimant initially, or in an amended claim, also requested reimbursement for a generator installed by the Claimant; however, the MHIC informed the Claimant that a generator would not be a home improvement and advised her as to how to file her claim with the appropriate agency. The generator will not be discussed further in this Proposed Decision.

On June 18, 2020, the OAH sent the parties a Notice of Hearing (Notice), scheduling this matter for September 3, 2020 at the OAH, 11101 Gilroy Road, Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. § 8-407(e).[2] The Notice advised the parties that failing to appear for the hearing might result in a dismissal of the case or a decision against the party who failed to appear. The notices were sent by certified mail and by first-class mail. The return receipt for the certified letter to the Claimant was signed and returned to the OAH but a return receipt for the certified letter to the Respondent was not signed and returned to the OAH. The notices sent by first-class mail were not returned by the United States Postal Service (USPS).

On August 31, 2020, I sent a letter to the parties to both their physical and email addresses. The letters were not returned by the USPS. The purpose of my letter was to advise the parties that I was converting the hearing from an in-person hearing to a remote hearing to be conducted by Google Meet. In the letter, I requested that the parties contact my assistant to advise receipt of the letter and to confirm their email addresses.

On September 3, 2020, I sent the Google Meet links by email to the parties. The Claimant appeared and represented herself. Justin S. Dunbar, Assistant Attorney General, Department of Labor (Department), represented the Fund. Gary Bouthner, Respondent, failed to appear and the hearing proceeded in his absence.[3] The Claimant did not have access to a scanner

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[2] The hearing was originally scheduled for March 19, 2020, and June 5, 2020, but postponed each time due to the COVID-19 pandemic.

[3] As noted, the Notice was mailed to the Respondent at the address of record by regular and certified mail on June 18, 2020. Code of Maryland Regulations (COMAR) 09.08.03.03A(2). Although the receipt for the copy of the Notice sent by certified mail was not returned to the OAH, the Notice was not returned to the OAH. Further, the letter I sent on August 31, 2020 was the same email address used by the Respondent in an earlier request for a postponement. The email did not "bounce back" as incapable of being delivered. Applicable law permits me to proceed with a hearing in a party's absence if that party fails to attend after receiving proper notice. COMAR 28.02.01.23A. Further, a contractor must notify the MHIC within ten days of any change in address. COMAR 09.08.01.11. As the OAH sent the notice to the Respondent's address of record, which the Respondent has the responsibility to update, I determined that the Respondent had received proper notice, and proceeded to hear the captioned matter. Md. Code Ann., Bus. Reg. § 8-309.

and the record was left open until September 10, 2020, for her to submit her two exhibits. The Claimant timely submitted her two exhibits and the record closed on September 10, 2020.

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. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2020); Code of Maryland Regulations (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 on the Claimant's behalf:

Cl #1 Contract between Claimant and Respondent, dated August 30, 2016

Cl #2 Home Improvement Retail Installment Contract between Claimant and BGE Home Products and Services, LLC, dated May 20, 2019

I admitted the following exhibits on behalf of the Fund:

GF #1 Notice of Rescheduled Hearing, dated June 18, 2020

GF #2 Hearing Order, dated October 17, 2019

GF #3 Letter from MHIC to Respondent, dated June 5, 2019

GF #4 Respondent's Licensing History

The Respondent did not appear.

Testimony

The Claimant testified. The Fund did not present any witnesses. The Respondent did not appear to present witnesses.

PROPOSED FINDINGS OF FACT

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

1. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor with MHIC.

2. On or about August 30, 2016, the Claimant contracted with the Respondent to replace sixteen double-hung windows and one picture window in her house in Essex, Maryland (property).

3. The Claimant paid the Respondent $2,000.00 cash when she signed the contract. The total contract price was $7,200.00.

4. The Respondent installed the windows over a four to five-day period and the Claimant paid the contract in full by cash on September 3, 2016.

5. As the weather became cooler, the Claimant tried to close the windows and discovered that they would not stay closed. The Claimant contacted the Respondent and told him the windows would not close and stay closed. The Respondent agreed to come back to the Claimant's house and fix the windows. The Claimant took off from work and waited at home for the Respondent to come but he did not come and did not contact her.

6. On May 20, 2019, a contractor with BGE Home Products & Services, LLC, visited the Claimant's house and examined her windows. The windows installed by the Respondent were not measured properly and would therefore not close and stay closed properly.

7. On May 20, 2019, the Claimant entered into a home improvement retail installment contract with BGE Home Products & Services, LLC, to replace the sixteen double-hung and one picture window installed by the Respondent at the Claimant's property. The total cost of the contract was $9,465.00.

8. As of July 10, 2020, the Claimant paid the contract with BGE Home Products & Services, LLC, for the replacement windows in full.

DISCUSSION

In this case, the Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Md. Code Ann., Bus. Reg. § 8-407(e)(1) (2015);[4] Md. Code Ann., State Gov't § 10-217 (2014); COMAR 09.08.03.03A(3). "[A] preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces . . . a belief that it is more likely true than not true." *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)).

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); *see also* COMAR 09.08.03.03B(2) ("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." Md. Code Ann., Bus. Reg. § 8-401.

The Claimant provided overwhelming and uncontroverted evidence that the Respondent's work was unworkmanlike, inadequate and incomplete. Windows that do not close completely and stay closed are an unworkmanlike home improvement because they do not serve their intended purpose of keeping the natural elements out of the house and they are a way for intruders to easily enter one's home.

[4] Unless otherwise noted, all references to the Business Regulation Article herein cite the 2015 Replacement Volume of the Maryland Annotated Code.

[illegible]

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. Md. Code Ann., 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.

In this case, the Respondent performed work under the contract, and the Claimant has paid another contractor to remedy the Respondent's unworkmanlike, inadequate, and incomplete 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).

Applying the formula in this case results in the following calculation:

Amount Claimant paid to Respondent:	$7,200.00
Amount Claimant paid to another contractor to repair:	$9,465.00
Less the contract price:	$7,200.00
Claimant's actual loss:	$9,465.00

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. 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 $9,465.00

exceeds the amount she paid the Respondent ($7,200.00). Therefore, the Claimant's recovery is limited to $7,200.00. Md. Code Ann., Bus. Reg. § 8-405(e)(5); COMAR 09.08.03.03B(4).

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant proved that she sustained an actual and compensable loss as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015). I further conclude that the Claimant is entitled to recover $7,200.00 from the Fund.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant $7,200.00; 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;[5] and

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

November 25, 2020
Date Decision Issued

Ann C. Kehinde
Administrative Law Judge

ACK/dlm
#189107

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

PROPOSED ORDER

WHEREFORE, this 8th day of March, 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.

I Jean White

I Jean White
Panel B
MARYLAND HOME IMPROVEMENT COMMISSION

IN THE MATTER OF THE CLAIM OF	*	**MARYLAND HOME**
DONNA BENNETT	*	**IMPROVEMENT COMMISSION**
AGAINST THE MARYLAND HOME	*	
IMPROVEMENT GUARANTY FUND	*	**MHIC CASE NO. 18(75)979**
FOR THE ACTS OR OMISSIONS OF	*	**OAH CASE NO. LABOR-HIC-**
GARY BOUTHNER T/A	*	**02-19-34192**
UNIQUE REMODELING	*	

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FINAL ORDER

This matter was originally heard before an Administrative Law Judge ("ALJ") of the Office of Administrative Hearings ("OAH") on September 3, 2020. Following the evidentiary hearing, the ALJ issued a Proposed Decision on November 25, 2020 concluding that the homeowner, Donna Bennett ("Claimant") suffered an actual loss they suffered as a result of the acts or omissions of Gary Bouthner t/a Unique Remodeling ("Contractor"). *ALJ Proposed Decision* pp. 6-7. In a Proposed Order dated March 8, 2021, the Maryland Home Improvement Commission ("MHIC" or "Commission") affirmed the Proposed Decision of the ALJ to grant an award from the Home Improvement Guaranty Fund. The Claimant subsequently filed exceptions to the MHIC Proposed Order.

On May 6, 2021, 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 Hope Sachs 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) Contractor'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 admitted 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 installation of replacement windows at the Claimant's home. The ALJ found that the Contractor's performance under the contract was unworkmanlike. *ALJ's Proposed Decision* p. 5.

On exception, the Contractor stated that he did not attend the OAH hearing because of a medical issue and requested that he be allowed to present evidence at another hearing.

The Commission finds that the Contractor received proper notice of the hearing and that there is no evidence that the Contractor requested a postponement of the September 3, 2020 OAH hearing. Therefore, the Commission holds that the Contractor is not entitled to a new hearing.

Having considered the parties' arguments, the evidence contained in the record, and the ALJ's Recommended Decision, it is this 14th day of May 2020, **ORDERED:**

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

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

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

D. That the Claimant is awarded $7,200.00 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.

Joseph Tunney
Chairperson –Panel
Maryland Home Improvement Commission