

IN THE MATTER OF THE CLAIM	* BEFORE ERIN H. CANCELLER,
OF JASON DANIELS,	* 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 SCOTT FORD,	*
T/A DESIGN INNOVATIONS LLC,	* OAH No.: LABOR-HIC-02-23-24578
RESPONDENT	* MHIC No.: 22 (75) 1010

* * * * *

PROPOSED DECISION

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RECOMMENDED ORDER

STATEMENT OF THE CASE

On June 30, 2023, Jason Daniels (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)¹ Guaranty Fund (Fund) for reimbursement of \$133,252.55 for actual losses allegedly suffered as a result of a home improvement contract with Scott Ford (Individual Respondent), trading as Design Innovations LLC (Business Respondent).²

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

² As explained below, the Individual Respondent and Business Respondent may have divergent interests in this matter. Throughout the decision, these terms will be used to refer only to the individual or the business, respectively. Collectively, the Individual Respondent and Business Respondent will be referred to as "the Respondents".

Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2023).³ On September 15, 2023, the MHIC issued a Hearing Order on the Claim. On September 14, 2023,⁴ the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

This matter was originally set for a hearing on November 2, 2023. Jonathan Phillips, Assistant Attorney General, Department, represented the Fund. Rebekah Lusk, Esquire, represented the Claimant,⁵ who was present. The Individual Respondent did not attend the hearing. Ray Ford, Esquire, represented the Business Respondent, and Cherry Maradiaga appeared as the authorized representative of that entity. Mr. Ford stated unequivocally that he did not represent the Individual Respondent. Further, there was an argument that notice to the Business Respondent was insufficient as the Notice was only addressed to the Individual Respondent, who was no longer with the business entity. In order to ensure that the Business Respondent had notice and sufficient time to prepare for the hearing, the parties agreed to postpone the matter to November 29, 2023.

On November 29, 2023, I held a hearing by video. Bus. Reg. §§ 8-407(a), 8-312; Code of Maryland Regulations (COMAR) 28.02.01.20B(1)(b). All of the same individuals that attended the November 2, 2023 hearing also attended the November 29, 2023 hearing.

After waiting fifteen minutes for the Individual Respondent or the Individual 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. COMAR 28.02.01.23A. On November 3, 2023, the OAH provided a Notice of Hearing

³ Unless otherwise noted, all references to the Business Regulation Article are to the 2015 Volume of the Maryland Annotated Code.

⁴ It is unclear how the transmittal could forward the hearing order before the date of the hearing order. No explanation has been provided for this inconsistency.

⁵ According to the Hearing Order, Jason Daniels is listed as the Claimant. However, during the hearing, Rikki Daniels, who is Jason Daniels' wife and a co-owner of the home, also appeared and identified herself as a claimant. Throughout this decision, Mr. Daniels will be referred to as the Claimant, and Mrs. Daniels will be referred to as Co-Homeowner.

(Notice) to the Individual 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 29, 2023, at 9:30 a.m., via the Webex videoconferencing platform. COMAR 09.08.03.03A(2). The Notice further advised the Individual Respondent that failure to attend the hearing might result in "a decision against you."

The United States Postal Service did not return the Notice to the OAH. The Individual Respondent did not notify the OAH of any change of mailing address. COMAR 28.02.01.03E. I determined that the Individual Respondent received proper notice, and I proceeded to hear the captioned matter. COMAR 28.02.01.05.

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 Respondents' acts or omissions?
2. If so, what is the amount of the compensable loss?

SUMMARY OF THE EVIDENCE

Exhibits⁶

I admitted the following exhibits offered by the Claimant:

Clmt. Ex. 1 - Outdoor Solutions, A Barrick Company, (Outdoor Solutions) Estimate, created October 31, 2023

Clmt. Ex. 2 - Landscape Plan 1 by Joshua Hewitson, revised June 22, 2022.

⁶ Prior to the hearing, the parties submitted premarked exhibits. For any premarked exhibit that was not admitted into evidence, that exhibit was not considered in this decision, but a copy will be maintained with the file. COMAR 28.02.01.22C.

- Clmt. Ex. 3 - *Curriculum Vitae* for Jeffrey B. Fertich, P.E.,⁷ October 30, 2023
- Clmt. Ex. 4 - Report from Structural Engineering Resources, LLC, June 9, 2022
- Clmt. Ex. 5 - Review of Retaining Wall System by John P. Stoppi, Jr., P.E., January 10, 2022⁸
- Clmt. Ex. 6 - Drawing of Wall #1,⁹ by John P. Stoppi, Jr., P.E., January 10, 2022¹⁰
- Clmt. Ex. 7- Drawing of Wall #2, by John P. Stoppi, Jr., P.E., January 10, 2022¹¹
- Clmt. Ex. 8 - Drawing of Wall #3, by John P. Stoppi, Jr., P.E., January 18, 2022¹²
- Clmt. Ex. 9 - Business Respondent, Estimate 1315, June 30, 2021
- Clmt. Ex. 10 - Payments to Business Respondent between July 2021 and November 2021
- Clmt. Ex. 11 - Business Respondent, Invoice 1320, July 31, 2021
- Clmt. Ex. 12 - Payment to Business Respondent, Check # 533, September 15, 2021
- Clmt. Ex. 13 - Business Respondent, Invoice 1425, September 14, 2021
- Clmt. Ex. 14 - Business Respondent, Invoice 1447, including change order, September 27, 2021
- Clmt. Ex. 15 - Payment to Business Respondent, Check # 535, September 29, 2021
- Clmt. Ex. 16 - Not offered or admitted.
- Clmt. Ex. 17 - Payment to Business Respondent, Check #541, November 15, 2021
- Clmt. Ex. 18 - Business Respondent, Invoice 1520, November 15, 2021
- Clmt. Ex. 19 - Letter from Frederick County Government, Division of Planning and Permitting (Permit Office), November 11, 2021
- Clmt. Ex. 20 - Text messages, sent between November 24, 2021 and November 30, 2021
- Clmt. Ex. 21 - Emails between Permit Office and Claimant, December 8 and 10, 2021
- Clmt. Ex. 22 - Email from Co-Homeowner to Business Respondent, December 5, 2021

⁷ Professional Engineer.

⁸ These plans are marked as "Approved" by Ken Compbell on January 13, 2022.

⁹ During the hearing, most witnesses referred to the walls by the numbers on the drawings in Exhibits 6-8. Therefore, throughout this decision, when wall numbers are referenced, they are referencing these drawings, unless otherwise noted.

¹⁰ This drawing is marked as "Approved" by Ken Compbell on January 13, 2022.

¹¹ This drawing is marked as "Approved" by Ken Compbell on January 13, 2022.

¹² This drawing is marked as "Approved" by Ken Compbell on January 13, 2022.

- Clmt. Ex. 23 - Emails between Business Respondent and Co-Homeowner, December 8 and 12, 2021¹³
- Clmt. Ex. 24 - Master Services Agreement, and Statement of Work, unsigned, undated
- Clmt. Ex. 25 - Emails between Business Respondent and Co-Homeowner, various dates between December 8 and December 14, 2021
- Clmt. Ex. 26 - Emails between Business Respondent and Co-Homeowner, various dates between December 8 and December 14, 2021
- Clmt. Ex. 27 - Emails between Business Respondent and Co-Homeowner, December 8 and 12, 2021
- Clmt. Ex. 28 - Emails between Business Respondent and Rebekah Lusk (Claimant's Counsel), January 20 and 21, 2022
- Clmt. Ex. 29 - Emails between Claimant's Counsel and Business Respondent, dates between January 21, 2022 and January 26, 2022¹⁴
- Clmt. Ex. 30 - Emails between Claimant's Counsel and Business Respondent, dates between January 24 and January 28, 2022
- Clmt. Ex. 31 - Emails between Business Respondent and Claimant's Counsel, dates between January 28, 2022 and January 31, 2022
- Clmt. Ex. 32 - Emails between Business Respondent and Claimant's Counsel, dates between January 31, 2022 and February 4, 2022
- Clmt. Ex. 33 - Emails between Business Respondent and Claimant's Counsel, February 4, and February 7, 2022
- Clmt. Ex. 34 - Emails between Business Respondent and Claimant's Counsel, dates between February 7, and February 16, 2022
- Clmt. Ex. 35 - Email between Claimant and Permit Office,¹⁵ January 28, 2022
- Clmt. Ex. 36 - Email between Permit Office and Claimant's Counsel, various dates between February 11, 2022 and March 28, 2022
- Clmt. Ex. 37 - Photographs, taken January 13, 2022 and March 10, 2022

¹³ Throughout the Claimant's exhibits several emails appear repeatedly as part of a subsequent email chain. Therefore, some of the emails in the various email chains will be duplicated in other exhibits.

¹⁴ Starting at this exhibit, the email chains show the full emails for the most recent emails in the chain, but at times cut off parts of the last email of the chain. For example, for this exhibit, the January 21, 2022 email is incomplete. For the next exhibit, the January 24, 2022 email is incomplete.

¹⁵ The email chain includes emails between the Business Respondent and the Permit Office on January 27, and 28, 2022, that was then forwarded to the Claimant.

Clmt. Ex. 38 - Design drawings by ECS Mid-Atlantic LLC, October 21, 2021

Clmt. Ex. 41¹⁶ - Email from Business Respondent to Claimant and Co-owner, April 15, 2021, attaching Business Respondent Estimate 1162, April 15, 2021

Clmt. Ex. 42 - Emails between Business Respondent and Co-owner, March 7 and 8, 2021

I admitted the following exhibits offered by the Business Respondent:

Resp. Ex. 1 - Business Respondent Estimate 1162, April 15, 2021

Resp. Ex. 2 - Not offered or admitted.

Resp. Ex. 3 - Not offered or admitted.

Resp. Ex. 4 - Not offered or admitted.

Resp. Ex. 5 - Not offered or admitted.

Resp. Ex. 6 - Not offered or admitted.

Resp. Ex. 7 - Not offered or admitted.

Resp. Ex. 8 - Photographs (a through k), undated

Resp. Ex. 9 - Not offered or admitted.

Resp. Ex. 10 - MHIC License for Business Respondent (unsigned), expiration date August 11, 2024

Resp. Ex. 11 - Not offered or admitted.

Resp. Ex. 12 - Not offered or admitted.

Resp. Ex. 13 - Not offered or admitted.

Resp. Ex. 14 - Not offered or admitted.

Resp. Ex. 15 - Email between Business Respondent and Co-owner, May 14, 2021¹⁷

I admitted the following exhibits offered by the Fund:

Fund Ex. 1 - Notice of Remote Hearing, November 3, 2023

Fund Ex. 2 - Hearing Order, September 15, 2023

¹⁶ There were no exhibits marked as Claimant Exhibits 39 or 40.

¹⁷ The top of Respondent's Exhibit 15 was an email chain between the Business Respondent and its counsel. That portion is redacted and the only part to consider is the bottom email between the parties.

Fund Ex. 3 - Home Improvement Claim Form, dated June 20, 2023¹⁸

Fund Ex. 4 - License History for Individual Respondent, trading as Business Respondent, printed November 22, 2023

Testimony

The Claimant testified and presented the following witnesses: Joshua Hewitson, Outdoor Solutions, and Jeffrey Fertich, P.E., accepted as an expert in structural engineering.

The Business Respondent presented the following witnesses: Cherry Maradiaga, authorized representative of Business Respondent, and the Co-Homeowner.

The Individual Respondent did not appear, testify, or present any witnesses.

The Fund did not present any 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 Individual Respondent was a licensed home improvement contractor under MHIC license number 01-103154, and the Business Respondent was licensed under MHIC license number 05-142968. The Individual Respondent's License showed that he was trading as the Business Respondent. Fund Ex. 4.
2. On June 30, 2021, the Business Respondent prepared an estimate for the Claimant, which included constructing retaining walls to replace existing retaining walls, completing new steps on one of the walls, grading the driveway, and paving the driveway. This estimate was accepted by the Claimant on an unknown date (Contract). Clmt. Ex. 9.
3. The original agreed-upon Contract price was \$40,950.00. Clmt. Ex. 9.
4. The Contract did not have any reference to a Master Services Agreement.
5. The Contract did not require the parties to participate in arbitration.

¹⁸ There is a blank for date received on the top of this document. No date was listed in this blank.

6. The Contract did not address whether permits were needed, or who would obtain the permits.

7. On September 24, 2021, the parties amended the Contract to extend the length of one of the walls, for an additional \$7,875.00 (Change Order).¹⁹ Clmt. Ex. 14.

8. The Claimant paid the Business Respondent the following amounts:

July 13, 2021	\$13,600.00
September 14, 2021	\$13,650.05
September 28, 2021	\$7,785.00
November 7, 2021	\$452.50
November 15, 2021	\$6,337.50
November 18, 2021	\$652.00
November 19, 2021	\$752.50
November 19, 2021	\$950.00
Total	\$44,179.55

Clmt. Exs. 10, 12, 15 and 17.

9. The Business Respondent's work on the Claimant's property began in September 2021.

10. On or about November 11, 2021, the Claimant received a letter from the Permit Office notifying him that the retaining walls were constructed without the required permits being obtained. Clmt. Ex. 19.

11. On December 5, 2021, the Co-Homeowner told the Business Respondent to cease all work on the property. Clmt. Ex. 22.

¹⁹ Based on the way the Contract is written, it is slightly unclear as to the number of the Wall being extended.

12. As of December 10, 2021, no permit applications had been filed for the construction of any of the retaining walls on the Claimant's property. Clmt. Ex. 21.

13. On December 12, 2021, the Business Respondent forwarded a draft contract for the Claimant and the Co-Homeowner to review. The draft contract included a Master Services Agreement, a blank Project Change Order Request, and a Statement of Work. Clmt. Ex. 24.

14. In the Master Services Agreement, one of the provisions states: "...the Parties may elect to arbitrate the matter." Clmt. Ex. 24., Master Services Agreement, p. 7.

15. At the time of the hearing, a portion of the longest wall (Wall #1) is failing, as it is leaning outward. Clmt. Ex. 4.

16. There are no engineering drawings of any of the walls constructed by the Business Respondent that show the placement and depth of the geogrid.²⁰

17. There are no progress photographs that confirm the placement and depth of the geogrid for any of the walls constructed by the Business Respondent.

18. The Claimant obtained an estimate from Outdoor Solutions to rebuild the three retaining walls constructed by the Respondents, to install steps, and to install a lower wall with a raised bed. The total costs for this estimate was \$76,590.00. Clmt. Ex. 1.

19. The portion of the estimate from Outdoor Solutions to add a lower wall with a raised bed was not work included in the original Contract. The cost for this portion of the work is \$2,240.00. Clmt. Ex. 1.

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).

²⁰ Geogrid is basically a layer of grid material that goes between the blocks of the retaining wall and goes for a certain depth perpendicular to the wall to help hold the wall into place. Geogrid can be different brands.

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. For the following reasons, I find that the Claimant has proven eligibility for compensation.

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) (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 Claimant is not a relative, employee, officer, or partner of the Respondents, and is not related to any employee, officer, or partner of the Respondents. *Id.* § 8-405(f)(1) (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 Business Respondent contended that the Master Services Agreement was a part of the Contract and that the Master Services Agreement required that the parties proceed with arbitration. However, even if the Master Services Agreement was part of the Contract (which is addressed below), the Master Services Agreement allowed the parties to participate in arbitration but did not require the parties to proceed with that

form of conflict resolution. Specifically, the Master Services Agreement states: "...the Parties may elect to arbitrate the matter." Clmt. Ex. 24., Master Services Agreement, p. 7. Therefore, I do not find that there was any agreement between the parties that required them to submit their disputes to arbitration.

Further, the Claimant and the Co-Homeowner both contend that they never agreed to the terms of the Master Services Agreement. They both testified that the Business Respondent never sent the Master Services Agreement to them until December 2021, and that they did not agree to it. Further, they provided Estimate 1315, dated June 30, 2021. Clmt. Ex. 9. This estimate has no reference to the Master Services Agreement. The Business Respondent provided Estimate 1162, dated April 15, 2021. Resp. Ex. 1. This estimate contains this single sentence statement: "Please refer to attached master service agreement for complete terms of service." Resp. Ex. 1. The Business Respondent contends that this was sent to the Claimant and was accepted on May 14, 2021. I did not find the Business Respondent's witness on this point, Cherry Maradiaga, to be credible.

First, the Business Respondent could present no proof that this particular estimate was sent, nor that this document was sent with a copy of the Master Services Agreement. It did not present an email attaching this estimate sent on or about the same date, or a business record that logged when this estimate was sent. Second, the Claimant and Co-Homeowner adamantly deny that they received a copy of the Master Service Agreement prior to December 2021. Third, the sentence regarding the master service agreement is not contained in Estimate 1315, June 30, 2021, which the Claimant contends was accepted as the Contract. It is not credible that the Business Respondent would contain a reference to the Master Services Agreement in a prior Estimate, and then remove it from a subsequent estimate. Finally, on Estimate 1162, the first two pages are crisp clear copies, while the third page, which purports to be the signature of

acceptance, is blurry. It is unclear if the signature was in relation to Estimate 1162; or some other document. For all of these reasons, I do not find it credible that the Claimant or the Co-Homeowner agreed to the Master Services Agreement at any point.

Claimant's Testimony

The Claimant testified that his cousin initially referred him to the Business Respondent. The Claimant and the Co-Homeowner only had contact with Ryan Weinstein from the Business Respondent throughout this project. The Claimant has never talked to, met, or communicated with the Individual Respondent to his knowledge. Whenever the Claimant communicated with Business Respondent, it was with Mr. Weinstein unless specifically noted.

The Claimant's initial request to the Business Respondent was to fix a retaining wall that was starting to fall apart (Wall #2). Wall #2 contained stairs leading up to the front door, which were steep. However, while still in discussions with the Business Respondent, Wall #1 appeared to also be failing. Therefore, Wall #1 was also included in the estimate of June 2021. Clmt. Ex. 9. Other work that was not disputed was also included in the estimate. The Claimant agreed to accept the estimate and therefore, the Contract was accepted.

The Claimant testified that he asked the Business Respondent if permits were required, and the Business Respondent answered that permits were not necessary since they were fixing what was already there. The Claimant testified that he and his wife do not have backgrounds in construction and therefore, they took these assertions to be true. The Claimant testified that he had continually asked for design drawings and drawings to show what the final walls should look like. However, he never received any drawings from the Business Respondent.

In late September 2021, the Claimant and the Business Respondent agreed to the Change Order, which extended a wall and increased the price by \$7,875.00. The Claimant paid for the Change Order by check at or around the time of the Change Order. Clmt. Exs. 14 and 15.

While the Business Respondent performed work at the property, the Claimant testified that he never saw the Business Respondent excavate ground to install a geogrid. At some point during construction, the Claimant received a visit from the Permit Office. An anonymous complaint had been filed with the Permit Office and it was responding to the complaint. The Permit Office employee informed the Claimant that there were no permits pulled for the work being performed, which was a violation of the building code. The Claimant, his cousin, and the Business Respondent exchanged text messages regarding permits in late November 2021. Clmt. Ex. 20. In the text messages, the Business Respondent stated "It's in process. We owe them detailed drawings of all 3 walls and they will issue and close out the permit. No inspection required but you will get a certification of completion for your records I can assure you." Clmt. Ex. 20.

On December 5, 2021, the co-owner sent a cease-and-desist letter to the Business Respondent as no permits had been pulled, the drawings had not been provided, the design of the driveway did not meet the county code, and refunds were owed for certain items. Clmt Ex. 22. As of December 10, 2021, no permit applications had been filed for any of the retaining walls on the Claimant's property. Clmt. Ex. 21.

After that time, the Business Respondent sent a copy of a Master Services Agreement and a new Statement of Work to the Co-Homeowner. Clmt. Ex. 24. According to the Claimant, the statement of work nearly doubled the costs from the Contract. However, the Claimant denies that any change order should have increased the price by that amount. When the Claimant and Co-Homeowner received the new documents, the Claimant testified that they immediately rejected it as none of the changes had been discussed previously.

In January 2022, a permit application was filed with drawings by Mr. Stoppi.²¹ Ex. 6-8. However, the Claimant testified that he was unaware of Mr. Stoppi ever coming to his house, and the Business Respondent had not told him that any permit application had been filed.

The Claimant started to talk to various contractors about repairing the walls. However, none of the contractors were willing to repair a wall and provide a warranty because they were not sure what had been previously done and the work was still in progress. Eventually, the Claimant had Mr. Hewitson prepare an estimate to work on all of the walls. Clmt. Ex. 1. However, the Claimant cannot afford to pay for a new wall out of pocket at this time.

The Claimant denied receiving any refund or receiving any offer from Business Respondent to repair the failed portion of Wall #1.

Testimony of Jeffrey Fertich

Jeffrey Fertich, accepted as an expert in structural engineering, testified as to his inspections of the property. He visited the Claimant's residence at least four different times. Clmt. Ex. 4. At the first visit, Mr. Fertich observed the failure of a portion of Wall #1. The remaining inspections were to determine if the wall was moving and to try to determine how the wall was constructed. To determine whether there was a problem, Mr. Fertich used a level to see if any of the walls were tipping forward or back and to document the amount of lean over the height. During the inspections, Mr. Fertich attempted to determine what layers contain geogrid. According to Mr. Fertich, generally the geogrid should go as far back as 70% of the height of the wall. Clmt. Ex. 4. The soil on top of the geogrid holds the geogrid, and the grid holds the blocks. Therefore, to know if a wall is constructed properly, it is important to know how far back the geogrid goes.

²¹ It is unclear whether Mr. Stoppi was an employee of the Business Respondent. However, it was undisputed that these drawings were filed by or on behalf of the Business Respondent.

At the Claimant's house, it is unclear how the walls were built as there were no engineering drawings showing how far the geogrid went out, or where exactly the geogrid was placed between the blocks. Further, one of the walls is failing because it is tipping out. Wall #1, which Mr. Fertich described as the longest of the retaining walls, is tipping out to the downhill side. Clmt. Ex. 4. Mr. Fertich explained that retaining walls will sometimes lean toward an embankment when built so that if there were any movement it would move only to upright. However, Wall #1 leans outward, which he defines as a clear failure. Mr. Fertich prepared a report regarding his review of the Claimant's property. Clmt. Ex. 4. While preparing that report he looked at the drawings by Mr. Stoppi, and he explained that the drawings showed cross sections, but these were generic cross sections. Clmt. Exs. 5-8. Mr. Fertich explained that the cross sections do not show information about the geogrid such as type, length, and strength. Further, the drawings say that Keystone Standard III blocks were used, but the blocks were actually Keystone Compac III. Every model of block has differences, and those differences can affect the design. Mr. Fertich explained that when he draws engineering drawings, he must include the type and brand of both the block and the geogrid. He uses a computer program to then determine how far back the geogrid needs to go and how often or how many layers of geogrid is required. Mr. Fertich further explained that the computer program will also consider the type of soil, because that can also have an impact on the design. However, for the Claimant's house, Mr. Fertich is unable to determine what kind of materials were used behind the wall and the drawings provided do not provide any explanation of how far back into the soil the geogrid was supposed to go, nor how far it actually went. At this point, Mr. Fertich cannot state whether any other part of the retaining walls will fail. The Wall #1 failure will continue to lean further out until it eventually falls apart, unless the section is unassembled and reassembled properly. Mr. Fertich testified that in his expert opinion, the failure is proof that the geogrid did not go far

enough back in that section of Wall #1, and Mr. Fertich would expect that there are similar situations at all points along Wall #1. Part of Wall #1 is curved which provides additional rigidity that would compensate for the lack of any geogrid in the curve. For the remaining parts of Wall #1 and the other walls, the Claimants would need to excavate areas to determine where the layers of geogrid are and how far back those layers go. Then an engineer could determine if they were designed properly or would need to be entirely replaced.

Mr. Fertich opined that the normal process for installing retaining walls would be to start with engineering drawings that include information about the height of the wall, and type of soil, geogrid and blocks. Then use software from the suppliers of the materials to create a model of the entire wall, including determining where the geogrid should be placed (both in terms of how many layers of geogrid is needed and how far back the geogrid should be installed). The design should include what fill should be used. During the installation, there should be an initial excavation, and then a layer of gravel is put in and compacted. Mr. Fertich testified that counties sometimes check the soil before taking any other steps, but that counties do not usually come out to look at every layer of geogrid installation. Instead, the county may come out to look at some layers, or the county will look at photographs taken by the builder to show that the wall was built according to the engineering plan. Once the wall is over four feet high, the distance from the face of the wall to the end of the geogrid is more important and should be more specific. Since there are no engineering drawings, and no photographs of the installation of any layers of the geogrid, Mr. Fertich cannot confirm that the walls as built are structurally sound. He also cannot state with certainty that the walls as built will fail, except for the portion that already failed.

Mr. Fertich conceded that a failure could potentially be fixed by repairing a portion of the wall. However, when one block begins to be pushed, then it pulls the next block and because they are all connected, it starts a chain reaction. Therefore, to repair a wall, the Claimant would

need to completely remove the failed portion. This would require disassembling the block wall until you get to a section that is not failing and going beyond that spot to repair.

Mr. Fertich also conceded that by excavating sections around the three walls, Mr. Fertich could better understand if the failure is only at one spot or pervasive on all three walls. If the excavation showed proper placement of the geogrid, then he could make certain that other parts of Wall #1, as well as Walls #2 and #3, would not fail. However, to his knowledge, no excavation has been performed to determine the structural soundness of the three walls or if geogrid was used, or was properly or improperly placed.

Testimony of Joshua Hewitson

Joshua Hewitson is employed by Outdoor Solutions, which performs various hardscape work including installing and repairing retaining walls. He went out to the Claimant's property and walked over the walls. The steps on one of the retaining walls were half-finished. One of the larger retaining walls was leaning outward. After reviewing the walls as they were, Mr. Hewitson prepared an estimate for replacing the walls. The estimate was broken into multiple sections: Permitting \$500.00, Rebuilding Wall #1 \$31,450.00, Rebuilding Wall # 2²² \$18,010.00, Rebuilding Wall #3 \$13,710.00, Steps \$10,680.00, and Lower Wall/Raised Bed \$2,240.00. The total for the estimate was \$76,590.00. These quotes included the costs of taking down the existing wall and assume that some of the materials can be reused. The portion for the lower wall and raised garden bed was not included in the original Contract and would be extra work. Mr. Hewitson prepared a sketch for the walls, but this is not a replacement for engineering drawings. Clmt. Ex. 2.

²² On the estimate prepared by Hewitson, Walls 2 and 3 are the opposite of what the plans show (Clmt. Exs. 6-8) and what Mr. Fertich called walls 2 and 3 in his report (Clmt. Ex. 4). Wall 2 in the Hewitson estimate is the wall closest to the house with stairs to the front of the house. Wall 3 in the Hewitson estimate is the wall by the parking area.

Mr. Hewitson testified that typically you would be unable to pull permits for walls that you did not build. This is because the Permit Office wants to see the footer and the excavation behind the wall. He testified that typically that area is not visible after the wall has been built. He did concede that if he was able to show the footers are the right height and the geogrid is in the right place, then it may be possible, but he has never pulled a permit for a wall that was already built. Mr. Hewitson testified that he cannot tell the exact construction of the existing wall. He is making assumptions as he never saw engineering drawings.

Testimony of Cherry Maradiaga

At the time of the hearing, Cherry Maradiaga held a MHIC license that was associated with the Business Respondent. Her license was issued in August 2022. She did not hold any MHIC license when the Contract was negotiated or any of the work under the Contract was performed. However, she has been employed by the Business Respondent since July 19, 2021.

As of July 19, 2021, the Individual Respondent was not working with the Business Respondent. The resident agent of the Business Respondent changed from the Individual Respondent to Ms. Gabby Maradiaga (the witness' sister) on June 29, 2021. Ms. Maradiaga believes that is when the Individual Respondent left the Business Respondent. The Business Respondent did not update its MHIC license from June 29, 2021 until Ms. Maradiaga received her license in August 2022. Ms. Maradiaga never met the Individual Respondent. Ms. Maradiaga denies that Mr. Weinstein was an owner of the Business Respondent at the time the Contract was signed. At some point, Ms. Maradiaga became an investor of the Business Respondent along with other investors. However, she did not provide information about who else was an investor, or how many investors there were.

Ms. Maradiaga provided a copy of Estimate 1162, dated April 15, 2021, which stated "Please refer to attached master service agreement for complete terms of service." Resp. Ex. 1.

She said this estimate was sent in March 2021. Ms. Maradiaga testified that the Master Services Agreement would have been sent with that estimate. However, she did not have any specific proof that it was sent, such as a contact log, or an email stating it was attached. Ms. Maradiaga testified that the Co-Homeowner agreed to Estimate 1162, when she signed it on May 14, 2021. Resp. Ex. 1.

Ms. Maradiaga testified that in February or March 2023 she had a phone call with Mr. Fertich and Ryan Weinstein to discuss whether Mr. Fertich would be willing to work with the Business Respondent to complete the repairs and then have Mr. Fertich sign off on the repairs once they were completed. The testimony was that the wall would be dismantled to whatever point was necessary to bring the wall back to vertical and that the repairs would be at the cost of the Business Respondent. This was the first time the parties had this conversation. According to Ms. Maradiaga, Mr. Fertich was supposed to reach out to the Claimant and give them that option to accept. Ms. Maradiaga did not testify that the Business Respondent made this offer directly to the Claimant, Claimant's Counsel, or the Co-Homeowner.

Ms. Maradiaga did not know if progress photographs from this jobsite were taken. She does not personally know Mr. Stoppi, nor whether he had visited the jobsite at any point.

Testimony of the Co-Homeowner

The Co-Homeowner denies signing Estimate 1162. Resp. Ex. 1. She testified that she had received multiple versions of Estimate 1162 on March 7, 2021 and April 14, 2021. However, she denied that had received the version of Estimate 1162, dated April 15, 2021. Resp. Ex. 1. She denied that she electronically signed any document for the Business Respondent. She denied receiving a copy of the Master Service Agreement prior to December 2021.

Analysis

The Respondents, collectively, performed unworkmanlike, inadequate, or incomplete home improvements. There was no dispute that at all times relevant to this Contract, the Individual Respondent's License was tied to the Business Respondent's license. There is no indication that the Individual Respondent notified the MHIC that he was no longer associated with the Business Respondent, or that the Business Respondent should no longer be tied to his license. Further, the Individual Respondent did not attend the hearing or present any evidence to dispute that his license was tied to the Business Respondent. Therefore, I find that the Individual Respondent is bound by what the Business Respondent did in this matter.

It is undisputed the Business Respondent entered into the Contract with the Claimant and the Co-Homeowner. It is further undisputed that the Business Respondent did not obtain any permits prior to starting the work. The Business Respondent did not complete Wall #2; however, it is undisputed that the Claimant ordered the Business Respondent to cease and desist all work when it was determined that there were no permits obtained.

The Business Respondent presented no evidence that any of the walls were properly constructed. It did not call any witness to testify regarding the design and build of the walls. The Business Respondent did not provide any design drawings that would explain how, or even if, the geogrid was installed or the exact specifications of the walls. The Business Respondent did not provide any progress photographs to show specifically what work was performed.

On the other hand, the Claimant presented the testimony of an expert, who explained that Wall #1 is unequivocally failing. Mr. Fertich also explained that as the blocks are connected, when one section fails, the failing section pulls on the other parts of the wall and the failure can spread. Further, Mr. Fertich explained that to properly install the geogrid, it is usually installed to 70% of the height of the wall, not including the thickness of the wall. Clmt. Ex. 4. The

Claimant testified credibly, without challenge, that excavation never went underneath the current driveway, which would be required to install the geogrid to 70% of the height of the wall. Mr. Fertich testified that based on the limited information available (without excavating around the retaining walls) he cannot certify whether the retaining walls are built in accordance with the manufacturer's recommendations nor whether they are structurally sound. The Claimant also presented the testimony of Mr. Hewitson, who contends that the Permit Office would want more information regarding the footer and the excavation behind the wall before it would approve the work already performed. With this area not being visible after the wall is built, Mr. Hewitson testified that he cannot tell the exact construction of the existing wall (without excavating portions of the wall).

I find that the Business Respondent's work on the Claimant's property unworkmanlike due to the fact that it performed work without any permits. At this point, the Claimant needs to either show that the walls were built correctly to comply with the Permit Office, or he needs to have new permits issued and the work re-done. At least one of the retaining walls installed by the Business Respondent is already failing. The Claimant spoke to multiple contractors to see if any of them would obtain permits and finish the unfinished work. However, none was willing to work on the walls when they could not determine what the Business Respondent had performed. The Business Respondent created this problem by not obtaining the permits at the beginning of the project, which is in violation of building codes, and not documenting its design, or work. For all of these reasons, I find that the Business Respondent's work at the Claimant's home was unworkmanlike.

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). No such claims are made here.

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).

The Claimant paid the Business Respondent a total of \$44,179.55 over the course of the Contract. Clmt. Exs. 10, 12, 15 and 17. Because all of the work from the Respondent was unpermitted work that cannot be certified by another contractor, I find it reasonable for the Claimant to have all three of the walls removed and rebuilt. The Claimant received an estimate from Outdoor Solutions to correct the Business Respondent's work by removing the unpermitted walls and rebuilding them for \$76,590.00. Clmt. Ex. 1. This estimate included a lower wall and raised garden bed, which was not part of the Contract. The costs for that additional work were \$2,240.00, which must be removed from the estimate when considering what is the reasonable amount the Claimant will be required to pay another contractor to repair the poor work done by the original contractor. No party presented any evidence that the estimate from Outdoor

Solutions was unreasonable. Therefore, the costs to correct are actually \$74,350.00.²³ The original contract price with the change order was \$48,825.00.²⁴ Clmt. Exs. 9 and 14.

Amount Paid on Contract	\$44,179.55
Plus Amount to Repair Respondents' Work	\$74,350.00
Minus Original Contract Price	\$48,825.00
Actual damages	\$69,704.55

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.²⁵ Bus. Reg. § 8-405(e)(1), (5) (Supp. 2023); COMAR 09.08.03.03B(4). In this case, the Claimant's actual loss of \$69,704.55 exceeds both \$30,000.00 and the amount paid to the Respondents. Therefore, the Claimant's recovery is limited to \$30,000.00, which is less than the amount paid to the Respondents.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$69,704.55 as a result of the Respondents' acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2023); COMAR 09.08.03.03B(3)(c). I further conclude that the Claimant is entitled to recover \$30,000.00 from the Fund. Md. Code Ann., Bus. Reg. § 8-405(e)(1), (5) (Supp. 2023); COMAR 09.08.03.03B(4).

²³ \$76,590.00 (total estimate) – \$2,240.00 (work outside of the scope of the Contract) = \$74,350.00.

²⁴ \$40,950.00 (original Contract price) + \$7,875.00 (Change Order price) = \$48,825.00 (total contract price)

²⁵ 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").

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$30,000.00; and

ORDER that the Respondents are ineligible for a Maryland Home Improvement Commission license until the Respondents reimburse 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;²⁶ and

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

February 12, 2024
Date Decision Issued

EHC/at
#209831

Erin H. Cancienne

Erin H. Cancienne
Administrative Law Judge

²⁶ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 16th day of April, 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***