IN THE MATTER OF THE CLAIM	*	**BEFORE GERALDINE A. KLAUBER,**
OF MELISSA FOCA,	*	**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 DARRELL	*	
GOTTSCHALK, T/A GOTTPOWER	*	**OAH No.: LABOR-HIC-02-21-02349**
RESTORATION SERVICES, INC.,	*	**MHIC No.: 18 (75) 142**
RESPONDENT	*	

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PROPOSED DECISION

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STATEMENT OF THE CASE

On March 29, 2019, Melissa Foca (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund), under the jurisdiction of the Department of Labor (Department),[1] for reimbursement of $7,861.96 in actual losses allegedly suffered as a result of a home improvement contract with Darrell Gottschalk, trading as Gottpower Restoration Services, Inc. (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401

[1] On July 1, 2019, the Maryland Department of Labor, Licensing, and Regulation became the Department of Labor.

through 8-411 (2015).[2] On January 27, 2021, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on March 31, 2021 via the Webex videoconferencing platform. Bus. Reg. §§ 8-407(a), 8-312; Code of Maryland Regulations (COMAR) 28.02.01.20B. Justin Dunbar, Assistant Attorney General, represented the Fund. The Claimant represented herself.[3] 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 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; and 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:

Clmt. Ex. 1 - Contract, March 19, 2017

Clmt. Ex. 2 - Letter from William R. Bryant, Assistant Director of Anne Arundel County Department of Inspections and Permits, March 14, 2018

Clmt. Ex. 3 - Report from Vannoy and Associates, September 5, 2017

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

[3] Melissa Foca signed and submitted the Claim to the MHIC on behalf of herself and her husband Joseph Foca. Both were present at the hearing and, without objection from the parties, Joseph Foca presented the Claimant's case.

Clmt. Ex. 4 - The Travelers' Home and Marine Insurance Company (Travelers) scope of work for replacement of wall, October 16, 2017; Copy of check from Travelers payable to Joseph Foca in the amount of $30,957.01, October 17, 2017

I admitted the following exhibits on the Respondent's behalf:

Resp. Ex. 1 - Contract, signed by Respondent on March 29, 2017

Resp. Ex. 2 - General Release, July 20, 2017

Resp. Ex. 3 - Complaint Form, July 20, 2017

Resp. Ex. 4 - Building permit and attached plans, April 12, 2017

Resp. Ex. 5 - Letter from Travelers to the Claimant, March 13, 2018

Resp. Ex. 6 - Rental Works Invoice, June 12, 2017; John Deere Invoice, June 9, 2017

Resp. Ex. 7 - Scope of work/estimate, March 7, 2017

I admitted the following exhibits on the Fund's behalf:

Fund Ex. 1 - Notice of Remote Hearing, February 10, 2021

Fund Ex. 2 - Hearing Order, January 20, 2021

Fund Ex. 3 - Home Improvement Claim Form, March 29, 2019

Fund Ex. 4 - Letter from MHIC to the Respondent, April 3, 2019

Fund Ex. 5 - MHIC licensing history for the Respondent, March 23, 2021

Testimony

Joseph Foca testified on behalf of the Claimant.

The Respondent testified and did not present other 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 Respondent was a licensed home improvement contractor under MHIC license number 131067.

2. On March 19, 2017, the Claimant and the Respondent entered into a contract to repair a bowing/cracked foundation wall in the Claimant's residence (Contract).

3. The original agreed-upon Contract price was $7,861.00.

4. The Claimant paid the Respondent the total Contract price.

5. After obtaining the necessary permit, the Respondent began work on May 12, 2017.

6. On June 9, 2017, the Respondent completed the work.

7. On June 12, 2017, the Anne Arundel County Department of Permits and Inspections (Department of Permits) inspected the work done by the Respondent. The work did not pass inspection due to grading issues.

8. On August 1, 2017, the Respondent returned to the Claimant's property to grade the yard. After the Respondent left the job, the Claimant noticed a new crack in the foundation wall. The Claimant called the Respondent regarding the crack and instructed him not to return to the property.

9. On August 2, 2017, the work performed by the Respondent failed the final inspection due to new crack in the basement wall. The crack may have been caused by impact or the backfill pressure on the wall.

10. In August 2017, the Claimant contacted her insurance company, Travelers, regarding the damaged foundation wall. Travelers retained Vannoy and Associates (Vannoy), an engineering firm, to inspect the wall.

11. On September 5, 2017, Vannoy inspected the Claimant's wall. At the time of the inspection the wall was out of plumb; rebar was visible through the cracks and was not spaced in accordance with the plans submitted and approved by the Department of Permits; the rebar did not extend to the solid top course of the block; there was no evidence of grout at the location of the vertical rebar and a water leak existed at the rear left corner of the foundation wall.

12. Thomasville Homes (Thomasville) was retained by the Claimant to replace the entire foundation wall.

13. Travelers paid the Claimant a total of $42,080.06 toward the claim for the damaged wall. Travelers made the final payment on the claim on March 13, 2018. The Claimant paid the insurance proceeds to Thomasville.

14. On July 20, 2018, the Claimant executed a General Release whereby for the receipt of $5,285.00 the Claimant released the Respondent from any and all causes of action arising out of the damage to the wall sustained on August 1, 2017.

DISCUSSION

In this case, the Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Bus. Reg. § 8-407(e)(1); Md. Code Ann., State Gov't § 10-217 (2014); 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 Cty. 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.

The Claimant established that the Respondent's repair of the Claimant's structural wall was unworkmanlike and inadequate. On August 1, 2017, after the Respondent had completed the grading, the Claimant noticed a new extensive crack in the structural wall. Vannoy, the engineering firm retained by Travelers, inspected the wall and determined that the work done by the Respondent was unworkmanlike and prepared a report that listed the issues with the Respondent's work. (See Finding of Fact 11). Additionally, the work performed by the Respondent was not approved by the Anne Arundel County Department of Permits. The failure of the Respondent's work to pass inspection, coupled with the report of Vannoy, is sufficient to establish that the Respondent's work was unworkmanlike. The Claimant's refusal to allow the Respondent to return to the property to perform any additional or remedial work was reasonable given the extent of the Respondent's poor workmanship and consequential damages he had caused.[4]

The Claimant is seeking $8,861.00 in reimbursement from the Fund, which represents the amount paid to the Respondent plus the $1,000.00 insurance deductible paid to Thomasville.

Having found that the Claimant established an actual loss, I must now turn to calculating the Claimant's actual loss. The MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work and provide as follows:

> (3) Unless it determines that a particular claim requires a unique measurement, the Commission shall measure actual loss as follows:
>
> (a) If the contractor abandoned the contract without doing any work, the claimant's actual loss shall be the amount which the claimant paid to the contractor under the contract.

[4] Joseph Foca testified that the Respondent damaged the sump pump, breaker box, HVAC unit and mower. The Claimant received reimbursement for the damages through insurance proceeds from the Respondent's carrier.

(b) If the contractor did work according to the contract and the claimant is not soliciting another contractor to complete the contract, the claimant's actual loss shall be the amount which the claimant paid to the original contractor less the value of any materials or services provided by the contractor.

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

COMAR 09.08.03.03B(3). In determining the amount of the Claimant's actual loss, I also consider that 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).

In this case, the Respondent performed work under the Contract, and the Claimant retained Thomasville, a contractor, to remedy that work. If the measure of the Claimant's actual loss included only the amounts paid to the Respondent and to Thomasville to repair the wall, calculating the Claimant's actual loss would be accomplished using the formula provided at COMAR 09.08.03.03B(3)(c). This would result in an actual loss comprised of the amount the Claimant spent above and beyond the Contract price to repair of the wall. In this instance, however, there are several factors that dictate the use of a unique measurement to determine the Claimant's actual loss. The first factor under consideration is the scope of the original contract, which called for repair, not replacement of the structural wall. Although Vannoy determined that it was feasible to strengthen the existing foundation wall, due to the extent and severity of the damage, the cost, and long-term durability, it recommended replacement of the rear foundation wall. In accordance with the recommendation, Thomasville removed and replaced the foundation wall.

The second factor to consider is the Claimant's receipt of insurance money from an insurance claim filed with Travelers. The Claimant received $42,080.06, from Travelers, which included the replacement of the wall and work above the foundation wall. In addition to the insurance funds, the Claimant received $5,258.00 from the Respondent as consideration for a release of the Respondent's liability. Although the release executed by the Claimant does not preclude the Claimant from filing a claim against the Fund, the money from the release is essentially the same as if the Claimant had received an award from a civil proceeding and therefore, I find that Claimant's actual loss is offset by the insurance proceeds received from Travelers as well as the money received from the Respondent.[5]

To determine the actual loss, I calculated the amount it would have cost Thomasville to perform the work called for in the original contract. As pointed out by the Fund, Travelers' calculation of the scope of work relied upon by Thomasville to replace the wall reflects a basement wall measurement of 649 square feet (Clmt. Ex. 4), which is comparable to the Respondent's measurement in his scope of work. (Resp. Ex. 7). The Travelers' scope of work breaks down the cost value of the basement wall as $3,875.08. I have used this figure to determine the cost to Thomasville to repair the basement wall. My calculation of the actual loss is as follows:

	$7,861.00	paid to the Respondent
+	$3,875.08.	paid to complete the Respondent's work
	$11,742.08	total amount expended by Claimant
-	$7,861.00	amount paid to Respondent
=	$3,875.08	
-	$2,875.08.	insurance proceeds attributable to rear wall ($3,875.08 - $1,000.00)
=	$1,000.00	

[5] The Fund recommended an award to the Claimant for her actual loss but did not take into account either the insurance or the Release proceeds.

The Claimant received $ 5,258.00 from the Respondent as consideration for releasing the Respondent from liability. As I previously noted, because the amount paid pursuant to the Release is directly related to the work in question, I find that this sum mitigated the Claimant's actual loss. Subtracting the $5,258.00 from the actual loss of $1,000.00 leaves the Claimant with a negative balance and, therefore, I find she is not entitled to any reimbursement from the Fund.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has not 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); COMAR 09.08.03.03B(3).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund deny the Claimant's claim; and

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

May 4, 2021
Date Decision Issued

Geraldine A. Klauber
Administrative Law Judge

GAK/at
#191672

IN THE MATTER OF THE CLAIM OF MELISSA FOCA AGAINST THE MARYLAND HOME IMPROVEMENT GUARANTY FUND FOR THE ACTS OR OMISSIONS OF DARRELL GOTTSCHALK T/A GOTTPOWER RESTORATION SERVICES, INC.	* * * * * *	**MARYLAND HOME IMPROVEMENT COMMISSION** **MHIC CASE NO. 18(75)142** **OAH CASE NO. LABOR-HIC-02-21-02349**

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PROPOSED ORDER

This matter was originally heard before an Administrative Law Judge ("ALJ") of the Office of Administrative Hearings ("OAH") on March 31, 2021, via Webex videoconference. Following the evidentiary hearing, the ALJ issued a Proposed Decision on April 8, 2021, concluding that the homeowner, Melissa Foca ("Claimant") did not suffer an actual loss as a result of the acts or omissions of Darrell Gottschalk t/a Gottpower Restoration Services, Inc. ("Contractor"). (ALJ Proposed Decision p. 9.) A Panel of the MHIC reviewed the ALJ's Proposed Decision in accordance with COMAR 09.01.03.08, which is incorporated herein and amended as set forth below.

The Commission finds that the ALJ erred in calculating the Claimant's actual loss because the ALJ incorrectly deemed $5,258.00 paid by the Contractor's insurer to the Claimant to have mitigated the Claimant's actual loss.

The Claimant received $5,258.00 from the Contractor's insurer in exchange for the release of her claims against the Contractor and the Contractor's insurer for property damage or personal injury arising from "the accident on or about August 01, 2017." (OAH Hearing Respondent's Exhibit 2.) August 1, 2017, is when the Contractor caused a "new extensive crack" in a wall of the Claimant's home when performing regrading work. (ALJ Proposed Decision p. 6.) This proceeding involves a statutory claim for compensation for "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. Therefore, the release executed by the Claimant and the payment the Claimant received in exchange for the release of a claim for consequential damages caused by the Contractor are irrelevant to the calculation of the Claimant's actual loss. Accordingly, the Commission calculates the Claimant's actual loss as follows:

$7,861.00	Amount paid to the contractor
+3,875.08	Cost to correct the contractor's work
- 7,861.00	Original contract price
$3,875.08	Actual loss

Having considered the evidence contained in the record and the ALJ's Proposed Decision, it is this 10th day of June 2021, **ORDERED:**

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

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

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

D. That the Claimant is awarded **$3,875.08** from the Home Improvement Guaranty Fund;

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

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

G. Unless, within twenty days of the date of this Proposed Order, any party files with the

Commission written exceptions or a request to present argument, then this Proposed Order will become final. By law, the parties then have an additional thirty days to file a petition for judicial review in Circuit Court.

Michael Newton
Chairperson –Panel B
Maryland Home Improvement Commission

PROPOSED ORDER

WHEREFORE, this 10th day of June, 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.

Lauren Lake

Lauren Lake
Panel B
MARYLAND HOME IMPROVEMENT COMMISSION