

**IN THE MATTER OF THE CLAIM
OF SHADI MOKHTARI,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF JOSE ARGUETA
REYES,
T/A JAY HOME SPECIALIST AND
MAINTENANCE, INC.,
RESPONDENT**

*** BEFORE JOHN T. HENDERSON, JR.,
* ADMINISTRATIVE LAW JUDGE
* THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
*
*
*
*
* OAH No.: DLR-HIC-02-19-13814
* MHIC No.: 18 (05) 895**

* * * * *

PROPOSED DECISION

**STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
PROPOSED FINDINGS OF FACT
DISCUSSION
PROPOSED CONCLUSIONS OF LAW
RECOMMENDED ORDER**

STATEMENT OF THE CASE

On August 21, 2018, Shadi Mokhtari (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$45,000.00 in actual losses allegedly suffered as a result of a home improvement contract with Jose Argueta Reyes, trading as Jay Home Specialist and Maintenance, Inc. (Respondent). Md.

Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015).¹ On April 25, 2019, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on July 22, 2019 at the OAH office in Rockville, Maryland. Md. Code Ann., Bus. Reg. § 8-407(e). Andrew Brouwer, Assistant Attorney General, Department of Labor (Department),² represented the Fund. The Claimant represented herself. After waiting twenty minutes for the Respondent or the Respondent's representative to appear, I proceeded with the hearing. Code of Maryland Regulations (COMAR) 28.02.01.23A.³

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. 2019); 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?

¹ All references to the Business Regulation Article are to the 2015 volume.

² On July 1, 2019, the Maryland Department of Labor, Licensing, and Regulation became the Department of Labor.

³ Notice of the hearing was mailed to the Respondent at the address of record by regular and certified mail on May 8, 2019, COMAR 09.08.03.03A(2), and not returned as unclaimed/undeliverable. The certified mailing was received by the Respondent on May 13, 2019. Franchesa Perez signed for the certified mailing of the notice. 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. I determined that the Respondent received proper notice, and proceeded to hear the captioned matter.

SUMMARY OF THE EVIDENCE

Exhibits

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

- CL Ex. 1 Payments made by Claimant to Respondent, December 23, 2016 to October 31, 2017 and Claimant's Contractual Payment Obligations from January 4, 2017 to October 12, 2017, undated
- CL Ex. 2 Payments made by Claimant to Third Parties as Payment to Respondent prior to December 29, 2017, undated
- CL Ex. 3 Sworn statement of Juan Carlos Macal, subcontractor, dated July 20, 2019
- CL Ex. 4 Chronology of Permits and Inspections, February 1, 2017 to June 28, 2019, undated
- CL Ex. 5 Chart of work contractor obligated to complete but did not complete, undated
- CL Ex. 6 Home Depot Special Services Invoice, undated
- CL Ex. 7 Home Depot Special Services Invoice, undated
- CL Ex. 8 Proposal for Painting from Homm, dated January 19, 2018
- CL Ex. 9 Consent to E-delivery of documents and updates (14 pages), undated
- CL Ex. 10 Interior and exterior photos of house, December, 2017 to July 10, 2018
- CL Ex. 11 Transaction details for payments from December 27, 2016 to October 31, 2017
- CL Ex. 12 Contract and Scope of work between Claimant and Respondent for home improvement, dated January 4, 2017
- CL Ex. 13 Plans for rear addition, January 17, 2017
- CL Ex. 14 Complaint Form of Conflict Resolution Form of Montgomery County, dated May 3, 2017
- CL Ex. 15 Addendum to Contract and Revised Project Schedule, dated May 9, 2017
- CL Ex. 16 Invoice from Rentals Unlimited, dated September 6, 2017
- CL Ex. 17 Home Depot Invoice, dated October 1, 2017
- CL Ex. 18 Email from Respondent to Claimant with attached invoice, dated October 13, 2017
- CL Ex. 19 Text messages between Respondent and Claimant, October 24 to December 17, 2017
- CL Ex. 20 SunTrust credit card statements, dated October 23, 2017 to February 23, 2018
- CL Ex. 21 Email from Claimant to Respondent about Range Hood, dated October 29, 2017
- CL Ex. 22 Quote from Macal Electrical Service, dated November 30, 2017
- CL Ex. 23 Citi Visa Card Statement dated December 20, 2017
- CL Ex. 24 Home Depot Invoice, dated November 2, 2017
- CL Ex. 25 Metropolitan Fire Protection Invoice, undated
- CL Ex. 26 Tempered glass related photos/email from Claimant to Robert Purkey, dated December 14, 2017
- CL Ex. 27 Invoices from ABC Supply Company, dated December 14, 2017
- CL Ex. 28 Email from Claimant to Robert Purkey about stairway headroom, dated December 18, 2017

- CL Ex. 29 Copies of Sun Trust checks from Claimant to Respondent, dated December 18, 2017 to July 27, 2018
- CL Ex. 30 Estimates from Cameron Home Insulation and ER Roofing Company, December 20, 2017 and February 4, 2018
- CL Ex. 31 Proposal from DeVere Insulation Company to Claimant, dated December 26, 2017
- CL Ex. 32 Completed DeVere Insulation Company Proposal, dated December 26, 2017
- CL Ex. 33 Payment by TeleCheck for several invoices, dated January 2, 2018
- CL Ex. 34 Invoice from Next Day Dumpsters to Complainant, dated January 6, 2018
- CL Ex. 35 Contract with Central Roofing and Siding, dated January 8, 2018
- CL Ex. 36 Copies of two checks from Sun Trust, dated January 9 and 12, 2018
- CL Ex. 37 Chase Slate Statement, dated November 15, 2017
- CL Ex. 38 Home Depot invoice, dated January 21, 2018
- CL Ex. 39 Home Depot invoice, dated January 21, 2018
- CL Ex. 40 Home Depot invoice, dated January 21, 2018
- CL Ex. 41 Sherwin Williams invoice, dated January 25, 2018
- CL Ex. 42 Three checks from Claimant to Edwin Aragon, dated January 27, 2017, February 2, 2018 and February 3, 2018
- CL Ex. 43 Several Home Depot receipts, dated January 26, 2018 to February 1, 2018
- CL Ex. 44 Floor and Décor email receipt, dated February 9, 2018
- CL Ex. 45 Dolle Stairs receipt, dated March 1, 2018
- CL Ex. 46 College Hunks receipt, dated April 28, 2018
- CL Ex. 47 Home Depot Order Confirmation, dated May 24, 2018
- CL Ex. 48 Ferguson receipt, dated July 25, 2018
- CL Ex. 49 Report from Fox Home Inspections, dated August 8, 2018
- CL Ex. 50 Estimate from Nelson Tree Removal, dated January 9, 2019
- CL Ex. 51 Contract with Green Future Construction, dated June 19, 2019
- CL Ex. 52 Home Depot Order # WA65650468, dated June 3, 2019
- CL Ex. 53 Invoice from Pest Now, dated June 4, 2018
- CL Ex. 54 Ad from Elégant Floor Service, dated July 3, 2019
- CL Ex. 55 Estimate from American Windows and Siding of VA, Inc., dated July 9, 2019
- CL Ex. 56 Offer from Mendez Painting Services, LLC, dated July 20, 2018
- CL Ex. 57 Shipping Confirmation for Home Depot Order, dated June 6, 2019
- CL Ex. 58 Offer from Murphy Family Services, dated July 21, 2018
- CL Ex. 59 List of Inadequate Work done by Contractor, Potential Code Violations/Unethical Conduct by Contractor, undated
- CL Ex. 60 Email exchange between Claimant and Jay Home Specialist, Inc., dated November 7, 2017

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. 1 Hearing Order from MDL, dated April 25, 2019
- Fund Ex. 2 Notice of Hearing from OAH, dated June 20, 2019
- Fund Ex. 3 Notice of Hearing from OAH, dated May 8, 2019

Fund Ex. 4 Letter from MHIC to Claimant, dated August 29, 2018

Fund Ex. 5 Licensing History for Claimant, dated June 19, 2019

Fund Ex. 6 ID Registration MDL, dated July 15, 2019

The Respondent offered no exhibits into evidence.

Testimony

The Claimant testified on her behalf. No one testified on behalf of the Respondent. The Fund did not 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 under MHIC license number 5167340.

2. The Claimant is not related to the Respondent.

3. The Claimant's property subject to this matter is located in Rockville, Maryland (the Property).

4. The Property is the Claimant's primary residence.

5. The Claimant has not filed any other claims against the Respondent outside of these proceedings and the Conflict Resolution Center of Montgomery County (CRCMC) where mediation was conducted on May 3, 2017. (CL Ex. 14.)

6. On December 23, 2016, the Claimant and the Respondent met at the Property to discuss the Respondent performing a renovation and home improvement. The Claimant paid a \$2,000.00 deposit to the Respondent on that date.

7. On January 4, 2017, the Claimant and the Respondent entered into a contract (Contract) to construct an addition and do a major renovation of the Property. (CL Ex. 12.) The

Contract stated that work would begin on January 4, 2017 and would be completed by the end of April 2017.

8. The original agreed-upon Contract price was \$134,000.00 plus addenda as follows:

1.	January 4, 2017 Addendum	\$ 2,500.00
2.	February 2017 Oral Addendum	1,700.00
3.	February 2017 Oral Addendum	500.00
4.	June 15, 2017 Oral Addendum	18,000.00
5.	October 12, 2017 Oral Addendum	<u>15,000.00</u>
	Total	\$ 37,700.00

(CL Ex. 1, pg. 2.)

9. The Claimant agreed to pay the Respondent a total of \$171,700.00 for the home improvements. (CL Ex. 1, pg. 2.)

10. The Claimant paid the Respondent \$145,500.00 for the agreed upon home improvements. The last payment was made on October 31, 2017. (CL Ex. 1.)

11. The Claimant and her family moved back into the home the end of February 2017. The Respondent had not completed the renovations and addition at that time.

12. The Respondent ceased work on the Property and abandoned the job on December 15, 2017 after attending on that day the City of Rockville close-in inspection of the Property and after demanding from the Claimant additional money beyond the \$145,500.00 already paid, to complete the home improvement.

13. On January 9, 2018, by email, the Claimant terminated the Respondent's services as general contractor for abandoning the home improvement. There was no agreement to pay additional money above the \$145,500.00 already paid to complete the home improvement. The Respondent did not make any good faith efforts to resolve the dispute or complete the Contract.

14. The Claimant purchased supplies for the home improvement and paid third party vendors a total of \$13,439.63 to complete all work under the Contract after the Respondent abandoned the Property. (CL Ex. 2.)

15. The Respondent did not complete the following work:

- Insulation
- Siding and gutters
- Drywall
- Paint of newly dry walled areas
- Baseboards in addition
- Installation of doors in addition
- Interior window trim in addition
- Sand and stain hardwood flooring in living and dining room existing part of house
- All required electrical work
- Installation of sinks, toilet, bathtub, gas stove and washer/dryer
- Replace all windows in existing part of house
- Install addition windows
- Debris removal and landscaping
- Exterior paint of brick walls of existing structure
- Finish addition stairs (skirt board, treads and risers)
- Railing for both stairways and balcony
- Install range hood exhaust duct and install range hood
- Install recessed lights in existing living and dining room
- Cut down mulberry and cherry trees next to addition

16. On or about December 26, 2017, the Claimant paid De Vere Insulation Company (Devere), \$4,278.54 to complete a portion of the home improvement which included the sprinkler system and finishing the basement.

17. On or about February 7, 2018, the Claimant paid ER Roofing Company (ER) to install siding and gutters on the Property and to complete a portion of the home improvement for \$6,400.00.

DISCUSSION

In 1985, the Maryland General Assembly enacted legislation that first established the Fund. By this means, the legislature sought to create a readily available reserve of money from which homeowners could seek relief for actual losses sustained because of an unworkmanlike,

inadequate, or incomplete home improvement performed by a licensed home improvement contractor. Md. Code Ann., Bus. Reg. §§ 8-401 to 8-411. Under this statutory scheme, licensed contractors are assessed fees, which subsidize the Fund. Homeowners who sustain losses by the actions of licensed contractors may seek reimbursement for their “actual losses” from this pool of money, subject to a maximum of the lesser of \$20,000.00 or the amount paid by or on behalf of the claimant to the contractor. Md. Code Ann., Bus. Reg. § 8-405(e)(1) and (5). A homeowner is authorized to recover from the Fund when he or she sustains an actual loss that results from an act or omission by a licensed contractor. Md. Code Ann., Bus. Reg. § 8-405(a). When the Fund reimburses a homeowner as a result of an actual loss caused by a licensed contractor, the responsible contractor is obligated to reimburse the Fund. Md. Code Ann., Bus. Reg. § 8-410. The MHIC may suspend the license of any such contractor until he or she reimburses the Fund in full with annual interest as set by law. Md. Code Ann., Bus. Reg. § 8-411(a).

Recovery against the Fund is based on “actual loss,” as defined by statute and regulation. “[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. “By employing the word ‘means,’ as opposed to ‘includes,’ the legislature intended to limit the scope of ‘actual loss’ to the items listed in section 8-401.” *Brzowski v. Md. Home Improvement Comm’n*, 114 Md. App. 615, 629 (1997). The Fund may only compensate claimants for actual losses incurred as a result of misconduct by a licensed contractor. COMAR 09.08.03.03B(2). At a hearing on a claim, the Claimant has the burden of proving the validity of the claim by a preponderance of the evidence. 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).

There is no dispute that the Respondent held a valid contractor's license in 2017 when he and his company entered into the Contract with the Claimant. Md. Code Ann., Bus. Reg. § 8-405(a). There is no dispute that the Claimant is the owner of the subject property and that there is no procedural impediment barring her from recovering from the Fund. Md. Code Ann., Bus. Reg. § 8-405(a), (f). The next issue is whether the Respondent performed an unworkmanlike, inadequate, or incomplete home improvement, and if so, whether the Respondent made good faith efforts to resolve the claim. A claim may be denied if the Claimant unreasonably rejected good faith efforts by the Respondent to resolve the claim. Md. Code Ann., Bus. Reg. § 8-405(d). For the following reasons, I find that the Claimant has not proven eligibility for compensation.

The Claimant testified that she and her husband own the Property where she sought a home improvement and entered into Contract with the Respondent on January 4, 2017. The Contract price was \$134,000.00. There were agreed upon addenda to the Contract, including one that was agreed to after the May 3, 2017 mediation session. The addenda increased the agreed upon price to \$171,700.00.

The Claimant further testified that she paid the Respondent \$145,500.00 and that she paid third party vendors and sub-contractors a total of \$13,439.63. According to the Claimant, the Respondent abandoned the project after participating in a city construction inspection on December 15, 2017. According to the Claimant, the Respondent requested more money to complete the project, although he had been paid \$145,500.00 for the home improvement that was not complete. The Claimant refused to pay any additional money to the Respondent after

December 15, 2017. As a result, the Respondent did not return to the Property to complete the home improvement.

The Claimant's evidence supports the contract price, the money she paid the Respondent; and the efforts she made to have the Respondent complete the home improvement. Her photographs admitted into evidence clearly show the Respondent left an incomplete or inadequate home improvement. (CL Ex. 10.) The photographs show unworkmanlike installation of HVAC tubing through the roof of the home, failure to caulk or seal windows, improper installation of rear wood sill under siding, failure to install exterior lighting and failure to remove old electrical service wire to name a few examples. The Respondent's failures in construction show that the home improvement conducted for the Claimant was unworkmanlike.

After December 15, 2017, the Claimant secured new contractors to repair and complete the home improvements as specified in the Contract. ER installed new siding and gutters. DeVere constructed the sprinkler system and finished the basement.

The Fund agreed that the Respondent abandoned the home improvement and that the Respondent performed in an inadequate and incomplete manner. The Fund argued that the credible evidence shows that the Claimant proved a loss from the acts or omissions of the Respondent and recommended an award to the Claimant from the Fund.

I agree that the Respondent abandoned the home improvement after December 15, 2017 and the Claimant provided evidence suggesting an actual loss. However, in utilizing the relevant formula to determine actual loss, I must conclude the Claimant is not entitled to an award from the Fund.

The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. COMAR 09.08.03.03B(1). MHIC's regulations offer three formulas for measurement of a claimant's actual loss. COMAR

09.08.03.03B(3) sets forth the various formulas for determining an "actual loss." According to the Fund, and I agree, the appropriate formula is the following:

- (3) Unless it determines that a particular claim requires a unique measurement, the Commission shall measure actual loss as follows:

...

(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.

Using the formula in COMAR 09.08.03.03B(3)(c), the following calculations apply:

\$145,500.00	Payments made to the Respondent by the Claimant under the January 4, 2017 Contract and addenda
\$ 13,439.63	The amount paid to vendors and subcontractors
\$ 6,400.00	The amount paid to ER
\$ 4,278.54	The amount paid to Devere
Total	\$169,618.17
Less	<u>\$171,700.00</u> The original January 4, 2017 contract price and agreed upon addenda increasing the total contract price
	(-\$2,081.83) No Actual Loss

Although the Fund recommended awarding the Claimant a sum in my discretion for a perceived actual loss, I cannot agree. The calculations pursuant to the evidence applied to the relevant regulation show that the Claimant has not sustained an actual loss due to the inadequate or incomplete home improvement conducted by the Respondent. In other words, the Claimant's total outlay, to the Respondent and the other contractors, was less than the original Contract price. Thus, the Claimant has failed to meet her burden of proof and is not eligible for compensation from the Fund.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has not sustained an actual and compensable loss as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015) COMAR 09.08.03.03B(3)(c).

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.

October 18, 2019
Date Decision Issued

JTH/emh
#181579

CONFIDENTIAL
CONFIDENTIAL

John T. Henderson, Jr.
Administrative Law Judge

PROPOSED ORDER

WHEREFORE, this 18th day of November, 2019, 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.

J Jean White

***I Jean White
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION

**IN THE MATTER OF THE CLAIM
OF SHADI MOKHTARI**

**MARYLAND HOME IMPROVEMENT
COMMISSION**

**AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ACTS OR OMISSIONS
OF JOSE ARGUETA REYES t/a
JAY HOME SPECIALIST AND
MAINTENANCE, INC.**

**MHIC CASE NO. 18(05)895
OAH CASE NO. DLR-HIC-02-19-13814**

* * * * *

FINAL ORDER

This matter was heard before an Administrative Law Judge (“ALJ”) of the Office of Administrative Hearings (“OAH”) on July 22, 2019. Following the evidentiary hearing, the ALJ issued a Proposed Decision on October 18, 2019, concluding that the homeowner Shadi Mokhtari (“Claimant”) failed to prove that she sustained an actual loss that is compensable by the Maryland Home Improvement Guaranty Fund (“Guaranty Fund”). *OAH Proposed Decision* p. 12. In a proposed order, the Maryland Home Improvement Commission (“MHIC”) affirmed the Proposed Decision of the ALJ to deny the claim. The Claimant subsequently filed exceptions of the MHIC Proposed Order.

On January 16, 2020, a hearing on the exceptions was held before a three-member panel (“Panel”) of the MHIC. The Claimant was present without counsel. Despite being sent proper notice of the hearing, the contractor, Jose Argueta Reyes t/a Jay Home Specialist and Maintenance, Inc. (“Contractor”), failed to appear. Nicholas Sokolow, Assistant Attorney General, appeared at the exceptions hearing to present evidence on behalf of the MHIC. The following two preliminary exhibits were offered by AAG Sokolow and admitted into evidence at the exceptions hearing: 1) November 18, 2019 Cover Letter and MHIC Proposed Order with certified mail delivery receipts, and 2) November 22, 2019 Notice of Exceptions Hearing set for December 19, 2019 with certified

mail delivery receipts, and the Claimant's Written Exceptions. Although the exceptions hearing was originally set for December 19, 2019, the Claimant requested a postponement to allow for more time to obtain the transcript of the OAH hearing below. The Commission's records further show that on or about December 9, 2019, notice was sent to the parties via regular and certified mail stating that the exceptions hearing had been postponed to January 16, 2020. The Commission received the transcript of the OAH hearing on January 6, 2020.

The Claimant argues on exceptions that the ALJ erred by not including in his calculation of actual loss all the costs to correct and complete the job of the Contractor. After reviewing the transcript and the exhibits submitted into evidence at the OAH hearing, the Commission agrees that the ALJ erred in his calculations and finds that the appropriate award in this case is \$20,000.00.

At finding of fact number 14, the ALJ found that "[t]he Claimant purchased supplies for the home improvement and paid third party vendors a total of \$13,439.63 *to complete all work under the Contract* after the Respondent abandoned the Property." *OAH Proposed Decision* p. 7 (*emphasis added*). It is clear from Claimant's Exhibit 2, however, that the total of \$13,439.63 is only the amount the Claimant paid on behalf of the Contractor to subcontractors and material vendors up until December 29, 2017, shortly before the Claimant notified the Contractor that she was terminating his services for abandoning the project. This total is not the full amount paid to complete all work under the original contract. In Claimant's Exhibit 5, the Claimant provided another spreadsheet showing additional costs she incurred, and will have to incur, to complete the contract after the Contractor abandoned the job. At finding of fact 15, the ALJ lists the items that were not completed by the Contractor. *OAH Proposed Decision* p. 7. This list mirrors the incomplete items set forth in the spreadsheet at Claimant's Exhibit 5. The ALJ, however, only includes the costs of two of the items from Claimant's Exhibit 5 in his calculation of actual loss. *OAH Proposed Decision* pp. 7, 11.

Some of the costs listed in the Claimant's Exhibit 5 are prospective costs based on estimates obtained by the Claimant showing what it would reasonably cost the Claimant to complete that part of the work. The regulatory formula allows for the use of estimates in calculating actual loss by including in the formula the figure of "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." Code of Maryland Regulations ("COMAR") 09.08.03.03B(3)(c)(*emphasis added*). Therefore, the calculation of actual loss in this case should take into consideration both the items the Claimant has already paid others to complete, and the reasonable costs she would incur to complete the remaining unfinished items.

The ALJ selected the correct regulatory formula to be used in this case, which reads as follows:

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 formula can be expressed as the following equation:

$$\text{Amount paid to or on behalf of the contractor} + \text{Cost to correct and complete the work} \\ - \text{Original contract price} = \text{Actual Loss}$$

In this case the amount paid to or on behalf of the contractor is the sum of the \$145,500.00 the Claimant paid directly to the Contractor and the \$13,439.63 the Claimant paid to vendors and subcontractors on behalf of the Contractor, equaling \$158,939.63. *OAH Hearing Claimant's Exhibits 1, 2, 11, 16, 17, 20, 23, 24, 29, 37.* The cost to correct and complete the work is found in

Claimant's Exhibit 5, which lists the incomplete work that was left after the Contractor abandoned the job. After a review of the items on the list, and the underlying documents in evidence that support the costs listed, the Commission finds that it cannot use the total of \$61,875.62 the Claimant asserts she will incur to complete the job. *OAH Hearing Claimant's Exhibits 5-9, 12, 22, 27, 29, 31-36, 38-48, 51-58.* The Claimant testified that the subsequent contractors used to complete the drywall and painting were not licensed contractors. *OAH Hearing Transcript pp. 96-103.* Because individuals are required to be licensed with the Commission to provide home improvement services in Maryland, and the performance of home improvement work without a license is a criminal offense, the Commission traditionally does not award Claimants for that part of their claim that goes towards the payment of unlicensed contractors. Md. Code Ann., Bus. Reg. §§8-301; 8-601(c). The Commission, however, typically does not exclude the material costs incurred by the claimant who hires the unlicensed contractor. The labor costs of \$6,822.00 and \$8,700.00 for the two unlicensed contractors who provided drywall and painting services are itemized in Claimant's Exhibit 5 and therefore can be removed from the total cost to complete. Claimant's Exhibit 5 also includes \$439.00 for hiring a pest control company to address a rodent infestation the Claimant alleges was the result of the Contractor's inaction in sealing windows. *OAH Hearing Claimant's Exhibit 53.* Pursuant to Annotated Code of Maryland, Business Regulation Article, §8-405(e)(3), the Commission cannot award from the Guaranty Fund an amount for consequential damages, and therefore the cost to control an infestation resulting from the Contractor's work cannot be included in the calculation of actual loss. As a result, the Commission finds that based on the evidence in the record the reasonable cost to complete the work is \$45,914.62. *OAH Hearing Claimant's Exhibits 5-9, 12, 22, 27, 29, 31-36, 38-48, 51-58.* Lastly, the original contract price is the price of the contract plus the agreed upon addenda increasing the total contract price to \$171,700.00. *OAH Hearing Claimant's Exhibits 1, 12, 14,*

15. The Commission's calculation of actual loss reads as follows:

	\$158,939.63	Amount paid to or on behalf of the contractor
+	<u>\$45,914.62</u>	<u>Cost to correct and complete the work</u>
	\$204,854.25	
-	<u>\$171,700.00</u>	<u>Original contract price</u>
	33,154.25	Actual Loss

Pursuant to Business Regulation Article §8-405(e)(1), individual awards from the Guaranty Fund are capped at \$20,000.00 and therefore the compensable award in this case is \$20,000.00.

Having considered the parties' arguments, the evidence in the record and the OAH Proposed Decision, it is this 15th day of April 2020 **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 Order of the Administrative Law Judge is **AMENDED**;
- D. That the Maryland Home Improvement Guaranty Fund award the Claimant **\$20,000.00**;
- E. That the Contractor is 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 ten percent (10%) as set by the Commission; AND
- F. That the records and publications of the Commission reflect this decision.
- G. Any party has thirty (30) days from the date of this Final Order to appeal this decision to Circuit Court.

Bruce Quackenbush

**Chairperson –Panel
Maryland Home Improvement
Commission**