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| IN THE MATTER OF THE CLAIM | * BEFORE MICHAEL R. OSBORN, |
| OF BERNADETTE JONES, | * 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 ALEX JAMES | * |
| ALEXANDER, | * OAH No.: LABOR-HIC-02-23-28434 |
| T/A GURU CONSTRUCTION, | * MHIC No.: 23 (75) 316 |
| RESPONDENT | * |

* * * * *

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 April 25, 2023, Bernadette Jones (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)¹ Guaranty Fund (Fund) for reimbursement of \$35,378.34 for actual losses allegedly suffered as a result of a home improvement contract with Alex James Alexander, trading as Guru Construction (Respondent). Md. Code Ann., Bus., Reg. §§ 8-401 to -411 (2015 & Supp. 2023).²

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

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

On October 30, 2023, the MHIC issued a Hearing Order on the Claim. On October 31, 2023, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On April 16, 2024, I held a hearing on the Webex videoconference platform. Bus. Reg. §§ 8-407(a), 8-312; Code of Maryland Regulations (COMAR) 28.02.01.20B(1)(b). Jonathan P. Phillips, Assistant Attorney General, Department, represented the Fund. The Claimant was self-represented.

After waiting fifteen minutes for the Respondent or the Respondent's representative to appear, I proceeded with the hearing.³ 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 February 29, 2024, the OAH provided a Notice of Remote Hearing (Notice) to the Respondent by certified mail and first-class mail. Bus. Reg §§ 8-312(d), 8-407(a); COMAR 28.02.01.05C(1). The Notice stated that a hearing was scheduled for April 16, 2024, at 9:30 a.m., on the Webex platform. COMAR 09.08.03.03A(2). The Notice included instructions on how to attend the hearing on a computer or by telephone. The Notice further advised the Respondent that failure to attend the hearing might result in "a decision against you."

The United States Postal Service returned the certified mail as undeliverable. The United States Postal Service did not return the Notice sent by regular mail to the OAH. The Respondent did not notify the OAH of any change of mailing address. COMAR 28.02.01.03E.

³ I initially convened this hearing on February 8, 2024. After approximately 90 minutes on the record, the Respondent contacted Assistant Attorney General Phillips to ask how the Respondent could join the hearing. I called the Respondent via Webex, and he joined the hearing. The Respondent explained that he was at the hospital with his father who had suffered a cardiac emergency. The Respondent said he wanted to attend the hearing and had exhibits he wanted to offer as evidence. After all parties, including the Respondent, said they were available on April 16, 2024, for a hearing, I postponed the matter and rescheduled it for that date. I confirmed the Respondent's email address. I directed the Respondent to submit documentation to the OAH relating to his father's hospitalization within two weeks. On February 8, 2024, my Administrative Aide emailed the Respondent with instructions on how to submit the medical documentation and how to submit exhibits. The Respondent did not submit any medical documentation relating to his father's hospitalization and did not submit any exhibits.

I confirmed with Mr. Phillips that the address to which the OAH sent the Notice was the same address as the MHIC had on file. I also reviewed my notes of February 8, 2024, which reflected the Respondent stated he was available for a hearing on April 16, 2024. I determined that the 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 Respondent's acts or omissions?
2. If so, what is the amount of the compensable loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits offered by the Claimant:

- Clmt. Ex. 1 - Complaint to MHIC, 9/13/2022
- Clmt. Ex. 2 - Attachment to Complaint to MHIC, 9/13/2022
- Clmt. Ex. 3 - Contract, 3/9/2021
- Clmt. Ex. 4 - Check from The Travelers Insurance Company to Claimant, 3/9/2021
- Clmt. Ex. 5- Photograph, undated
- Clmt. Ex. 6 - Estimate from The Travelers Insurance Company, 3/9/2021
- Clmt. Ex. 7 - Photograph of front of Claimant's home, undated
- Clmt. Ex. 8 - Photograph of side of Claimant's home, undated

- Clmt. Ex. 9 - Photograph of rear of Claimant's home, undated
- Clmt. Ex. 10 - Photograph of rear of Claimant's home, undated
- Clmt. Ex. 11 - Photograph of rear of Claimant's home, undated
- Clmt. Ex. 12 - Liberty Estimates, one for \$12,482.15, another for \$26,159.13, both dated 4/3/2023⁴

The Respondent did not attend the hearing and did not offer any exhibits.

I admitted the following exhibits offered by the Fund:

- Fund Ex. 1 - Notice of Remote Hearing on February 8, 2024, 12/5/2023
- Fund Ex. 2 - Hearing Order, 10/30/2023
- Fund Ex. 3 - Claim, 4/25/2023
- Fund Ex. 4 - Respondent's licensing history, printed 1/24/2024

Testimony

The Claimant testified and presented the testimony of Edward L. Trowell, Jr., her son.

The Respondent did not attend the hearing.

The Fund did not present the testimony of 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 01 119994.
2. Prior to March 9, 2021, the Claimant's home was damaged by wind.

⁴The Claimant described Claimant's Exhibit 12 on the record on April 16, 2024, and displayed the exhibit on the screen. Mr. Phillips confirmed that Liberty is a home improvement contractor licensed by the MHIC. The Claimant submitted Claimant's Exhibit 12 to the OAH on April 18, 2024.

3. On March 9, 2021, Adey O. Okupe, a claims adjuster for the Claimant's homeowner's insurance policy, The Travelers Insurance Company (Travelers), visited the Claimant's home. Mr. Okupe met with the Respondent and with the Claimant's daughter via Zoom to review the damage to the Claimant's home and to discuss necessary repairs.

4. On March 9, 2021, Mr. Okupe prepared an estimate of the cost to repair the Claimant's home. The estimate included roof removal and replacement, siding replacement, drywall repair of a bedroom ceiling damaged by water intrusion, repainting the bedroom ceiling and walls, repair and replacement of gutters and downspouts, and repair and replacement of a front porch awning.

5. The Travelers estimate included that the total cost of the work required to repair the Claimant's home was \$11,431.15, with a depreciation deduction of \$1,631.47, for a total cash value of the repairs of \$9,799.68. The Claimant's homeowner's policy with Travelers included a \$500.00 deductible, resulting in a net insurance claim of \$9,299.68.

6. Mr. Okupe advised the Claimant that after the repair work was done, the Claimant would be eligible to recover the depreciation of \$1,631.47, and that to recover the \$1,631.47, the Claimant must submit photographs of the completed repairs, a certificate of completion, and a final invoice from whatever contractor the Claimant hired to perform the repair work.

7. The Travelers estimate included line-item costs for all work to be performed. The estimate included:

- Removal and replacement of the existing roof, including flashing, drip edges, vents, roofing felt, and shingles, \$3,679.21;
- Bedroom ceiling materials, labor, furniture removal, paint ceiling and walls, and clean up, \$901.13;
- Repair and replacement of damaged aluminum siding, \$3,615.91;

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- Priming and painting to match the existing siding, \$396.75;
- Repair and replacement of gutters, \$225.10;
- Repair and replacement of downspouts, \$157.77;
- Repair and replacement of a front door awning with aluminum or steel, \$316.49;
- Drywall labor, \$141.16;
- Cleaning labor, \$72.46; and
- Dump truck services, \$293.90.

8. On March 9, 2021, Travelers issued a check for \$9,601.52 to the Claimant.

9. On March 9, 2021, the Claimant and the Respondent entered into a contract to remove and replace the Claimant's roof, including removal of the existing shingles, and installation of felt paper, drip edges, ridge vents, and lifetime architectural shingles (Contract). The Contract provided that the Respondent would include up to three sheets of plywood roof sheathing, and that any plywood sheathing that was in addition to the three sheets would be at the Claimant's expense, at \$60.00 per sheet. The Contract also included that the Respondent would perform all work described in the Travelers estimate.

10. The original agreed-upon Contract price was \$11,732.99, with \$9,601.52 due as a deposit, and \$2,131.47 due on completion.

11. Under the Contract, work was to begin within two to seven days from receipt of the deposit, with completion one to three days from the start of the work.

12. On or about March 9, 2021, the Claimant paid the Respondent \$9,601.52 by endorsing the Travelers check made payable to the Claimant to the Respondent.

13. On March 16, 201, the Claimant paid the Respondent \$500.00.

14. The total amount the Claimant paid the Respondent was \$10,101.52.

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15. After the Claimant and the Respondent entered the Contract, they made an oral modification to the Contract in which the Respondent agreed that instead of repairing the front door awning he would instead remove the existing front door screen door and install a new screen door. This oral modification to the contract did not alter the Contract price.

16. On March 17, 2021, the Respondent performed all work on the roof under the Contract. The roof work was unworkmanlike because the Respondent did not remove roof sheathing where necessary, and when the new roof was complete, it had visible sags and undulations where new roof sheathing should have been installed.

17. On April 16, 2021, the Respondent performed all work on the siding, and the gutter and downspout, under the Contract.

18. The siding work was unworkmanlike because the Respondent removed the existing siding and wall sheathing and affixed new siding to the home over house wrap, only, and did not install new sheathing.

19. The Respondent rehung the original gutters and downspouts. This was unworkmanlike because the Contract required the Respondent to install new gutters and new downspouts.

20. The Respondent performed no interior work.

21. The Respondent did not remove the existing front screen door or install a new screen door, nor did he repair and replace the front door awning.

22. After April 16, 2021, the Claimant and her son tried through several phone calls and text messages to contact the Respondent to inquire when the Respondent would return to finish the work under the Contract, and to express dissatisfaction with the work the Respondent performed. The Respondent did not return any text messages or telephone calls and never returned to the Claimant's home to do any work.

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23. On April 3, 2023, the Claimant obtained an estimate from Liberty (first Liberty estimate) to install a new roof, including shingles, roofing felt, flashing, drip edges, ice shields, pipe collars, ridge vents, and ridge caps. The first Liberty estimate also included new white gutters with hidden hangers, and new white downspouts.

24. The total cost of the first Liberty estimate was \$12,482.15. It included additional costs, where necessary, of removal of additional layers of roof at \$30.00 per square foot, plank replacement (if the roof used plank roof decking under the felt and shingles) at \$15.00 per foot of plank, plywood roof sheathing (if the roof used 4 ft by 8 ft sheathing under the felt and shingles) at \$110.00 per 4 ft by 8 ft sheet, B Deck 22 gauge at \$17.00 per foot (if the roof used Type B roof decking), and rafter replacement at \$15.00 per foot.

25. On April 3, 2023, the Claimant obtained a second Liberty estimate (second Liberty estimate) to replace all of the siding on her home with CertainTeed brand 4-inch woodgrain look vinyl siding, to install 3/8" insulation under the siding, and to install house wrap under the siding. The second Liberty estimate also included replacement of an exterior window on the back of the Claimant's home. The total cost of the second Liberty estimate was \$26,159.13. The second Liberty estimate included plywood, if necessary, at \$110.00 per sheet, and plank boards, if necessary, at \$15.00 per foot.

DISCUSSION

The Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Bus. Reg. § 8-407(e)(1); State Gov't § 10-217 (2021); COMAR 09.08.03.03A(3). To prove a claim by a preponderance of the evidence means to show that it is "more likely so than not so" when all the evidence is considered. *Coleman v. Anne Arundel Cnty. Police Dep't*, 369 Md. 108, 125 n.16 (2002).

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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.

The Respondent was a licensed home improvement contractor at the time the Respondent entered into the Contract with the Claimant.

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 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 Claimant is not a relative, employee, officer, or partner of the Respondent, and is not related to any employee, officer, or partner of the Respondent. *Id.* § 8-405(f)(1) (Supp. 2023).

The Claimant did not unreasonably reject good faith efforts by the Respondent to resolve the claim. *Id.* § 8-405(d) (Supp. 2023). The Respondent never returned any text messages or telephone calls the Claimant or her son made to inquire when work under the Contract would be completed.

The Respondent performed unworkmanlike, inadequate, or incomplete home improvements.

The Respondent removed the roof of the Claimant's home and replaced it per the Contract. The Claimant pointed to Claimant's Exhibit 11 as evidence that the new roof has noticeable sags and undulations, from which she concludes the Respondent should have replaced roof sheathing under the new roof. Thus, she argued, the roof replacement was unworkmanlike. The Fund agreed with the Claimant, as do I. The Contract provided that the Respondent would replace plywood roof sheathing where needed, and the Respondent did not do so. No expert testimony is necessary to reach this conclusion.

Mr. Trowell testified that he is an electrical contractor and knowledgeable about most construction trade practices. Mr. Trowell testified that he went into the Claimant's home's attic after the Respondent replaced the damaged siding. In the attic where no siding was repaired, he saw black or brown wall sheathing, with no light coming through. Where the Respondent repaired siding, Mr. Trowell saw the reverse side of house wrap, over which new siding was affixed to the home, and light coming through. He saw no exterior wall sheathing from inside the attic where the Respondent performed siding work. This, the Claimant argued, was unworkmanlike. The Fund agreed, as do I. Affixing siding over house wrap, only, was unworkmanlike, a conclusion I reach without the need for expert testimony.

The Claimant testified that the Respondent reattached the home's existing gutters and downspouts. This was unworkmanlike because the Contract required the Respondent to install new gutters and downspouts.

The Respondent performed no work inside the home. He was required to repair the bedroom ceiling where it was damaged by water intrusion and to paint the bedroom ceiling and walls. The Respondent's work was incomplete. Mr. Trowell testified that the Respondent was also supposed to refinish the bedroom floor where the ceiling was damaged.

He was unable to point to any provision of the Travelers estimate or the Contract that called for the bedroom floor to be refinished but stated that it was his understanding the Respondent was supposed to do so. I find no support in the documents submitted as evidence by the Claimant to support this understanding.

After considering the evidence I find that the Claimant is eligible for compensation from the Fund.

Having found eligibility for compensation I must determine the amount of the Claimant's actual loss and the amount, if any, that the Claimant is entitled to recover. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney fees, court costs, or interest. Bus. Reg. § 8-405(e)(3) (Supp. 2023); COMAR 09.08.03.03B(1). No such claims are made here.

The MHIC has established a formula for measuring actual loss when the claimant is seeking a new contractor to complete or remedy the contract work. That formula requires evidence of the "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." COMAR 09.08.03.03B(3)(c); *see also* Bus. Reg. § 8-401. All work the Respondent performed was either unworkmanlike or incomplete.

The first Liberty estimate is for removing the roof and replacing it, and for installing new gutters and downspouts. This estimate can be used to calculate the Claimant's actual loss. The second Liberty estimate is for replacing all the siding on the Claimant's house with new vinyl siding, insulation, and house wrap, and for installing a new window. The Travelers estimate was only to repair the home's aluminum siding where it was damaged, not to remove and replace all the siding on the home with a completely different product. And, the Travelers estimate did not include any new windows.

The Claimant did not submit any estimate to complete the interior work never performed by the Respondent, nor did the Claimant submit any estimate of the cost to repair or replace the front door awning.

There being no other evidence, I view the Travelers estimate as the best measure of what it will cost the Claimant to repair or replace the front door awning, to repair the bedroom ceiling and to paint the bedroom ceiling and walls, and to repair the damaged siding. The second Liberty estimate is an inappropriate measure of the cost to repair the siding as it addresses replacement of all the siding on the Claimant's home and to install a new window. The first Liberty estimate is the best estimate of what it will cost the Claimant to replace the roof, the gutters, and the downspouts.

MHIC regulations provide three methods for calculating actual loss when a claim is made against the Fund. COMAR 09.08.03.03B(3)(a)-(c). However, none of the three regulatory formulas is appropriate in this case. COMAR 09.08.03.03B(3)(a)-(c).⁵

⁵ COMAR 09.08.03.03B(3) provides:

- (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.
- (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.

Accordingly, I shall apply a unique formula to measure the Claimant's actual loss, that is, the reasonable amounts the Claimant will be required to pay another contractor to repair poor work done by the Respondent under the original contract.

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| Amount paid to the Respondent: | \$10,101.52 |
| Value of the Respondent's work: | \$ 0.00 |
| Plus | |
| Cost to repair or complete the work: | |
| First Liberty estimate, roof, | |
| Gutters, downspouts: | \$12,482.15 |
| | |
| Travelers estimate, siding: | \$ 3,615.91 |
| Travelers estimate, awning: | \$ 316.49 |
| Travelers estimate, bedroom | |
| ceiling and walls | \$ 901.13 |
| Travelers estimate, drywall | |
| labor | <u>\$ 141.16</u> |
| | |
| Total to repair or complete: | \$17,456.84 <u>\$17,456.84</u> |
| | \$27,558.36 |
| Minus original contract price: | <u>\$11,732.99</u> |
| <u>Loss:</u> | <u>\$15,825.37</u> |

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.⁶ Bus. Reg. § 8-405(e)(1), (5) (Supp. 2023); COMAR 09.08.03.03B(4). The Claimant's actual loss is greater than the amount paid to the Respondent, \$10,101.52, and is less than \$30,000.00. Therefore, the Claimant is entitled to recover \$10,101.52.

⁶ 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").

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$10,101.52 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2023); COMAR 09.08.03.03B(4). I further conclude that the Claimant is entitled to recover \$10,101.52 from the Fund.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$10,101.52; and

ORDER that the Respondent is ineligible for a Maryland Home Improvement Commission license until the Respondent reimburses the Guaranty Fund for all monies disbursed under this Order, plus annual interest of ten percent (10%) as set by the Maryland Home Improvement Commission;⁷ and

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

June 12, 2024
Date Decision Issued

MRO/sh
#212311

Michael R. Osborn

Michael R. Osborn
Administrative Law Judge

⁷ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 20th day of September, 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.

Chandler Louden

Chandler Louden

Panel B

***MARYLAND HOME IMPROVEMENT
COMMISSION***