

IN THE MATTER OF THE CLAIM	* BEFORE DANIA AYOUBI,
OF PAULA CHREKY,	* 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 KIMBERLY KAGEN,	*
T/A PHOENIX REMODELING	*
GROUP LLC,	* OAH No.: LABOR-HIC-02-23-14567
RESPONDENT	* MHIC No.: 23 (75) 4

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**PROPOSED DECISION**

STATEMENT OF THE CASE  
ISSUES  
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RECOMMENDED ORDER

**STATEMENT OF THE CASE**

On September 20, 2022, Paula Chreky (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)<sup>1</sup> Guaranty Fund (Fund) for reimbursement of \$15,694.00 for actual losses allegedly suffered as a result of a home improvement contract with Kimberly Kagen, trading as Phoenix Remodeling Group LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2022). On May 10, 2023, the MHIC issued a

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<sup>1</sup> The MHIC is under the jurisdiction of the Department of Labor (Department).

Hearing Order on the Claim. On May 22, 2023, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On July 11, 2023, the OAH provided a Notice of Hearing (Notice) to the Respondent by United States first class and certified mail to the Respondent's address of record<sup>2</sup> with the OAH as well as an alternate address.<sup>3</sup> Code of Maryland Regulations (COMAR) 28.02.01.05C(1). The Notice stated that a hearing was scheduled for August 10, 2023, at 10:00 a.m., at the OAH in Rockville, Maryland. COMAR 09.08.03.03A(2). The Notice further advised the Respondent that failure to attend the hearing might result in "a decision against you."

The United States Postal Service (USPS) returned to the OAH the Notice sent by first class mail to the Respondent's address of record and the Notice sent by certified mail to the Respondent's alternate address with the notations "not deliverable as addressed unable to forward."<sup>4</sup> The Respondent did not notify the OAH of any change of mailing address or request a postponement prior to the hearing. COMAR 28.02.01.03E; COMAR 28.02.01.16.

On August 10, 2023, I held a hearing at the OAH in Rockville, Maryland, as scheduled. Bus. Reg. §§ 8-407(a), 8-312. Nicholas Sokolow, Assistant Attorney General, Department, represented the Fund. The Claimant was self-represented. After waiting fifteen minutes, neither the Respondent nor a representative of the Respondent appeared for the hearing.<sup>5</sup>

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<sup>2</sup> In Baltimore, Maryland.

<sup>3</sup> In Owings Mills, Maryland. The Fund's Exhibit 5 establishes that the Respondent's alternate address matches the address on file for the Respondent with the Maryland Motor Vehicle Administration.

<sup>4</sup> On July 28, 2023, the USPS also returned to the OAH the Notice sent by certified mail to the Respondent's address of record. However, on July 18, 2023, the OAH received a certified mail return receipt, signed for by Yvette Racks, for the Notice sent by certified mail to the Respondent's address of record.

<sup>5</sup> On July 18, 2023, Richard Hackerman, Esquire, struck his appearance as the attorney of record for the Respondent.

I determined that the Respondent received proper notice and accordingly proceeded to hear the captioned matter.<sup>6</sup> COMAR 28.02.01.05A, C.<sup>7</sup>

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 Form, signed June 27, 2022
- Clmt. Ex. 2-1 - Proposal from the Respondent for balcony roof, December 13, 2021
- Clmt. Ex. 2-2 - Proposal from the Respondent for rear roof, December 13, 2021
- Clmt. Ex. 2-3 - Page two of contract for balcony roof, signed December 13, 2021
- Clmt. Ex. 2-4 - Pages one and two of contract for rear roof, signed by the Claimant January 17, 2022
- Clmt. Ex. 2-5 - Email correspondence between the Respondent and the Claimant, January 14 and 17, 2022; June 13, 2022

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<sup>6</sup> 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.

<sup>7</sup> During her testimony, the Claimant indicated that she believed the Respondent had filed for bankruptcy. The Fund was unaware of any such filing by the Respondent. In *In re Michael Goodman*, No. 86-B-1700 (Bankr. D. Md., Aug. 28, 1987), the United States Bankruptcy Court for the District of Maryland held that the automatic bankruptcy stay is not applicable to proceedings by homeowners to recover claims against the MHIC Fund. See 11 U.S.C.A. § 362(a) (2015). Though an unpublished decision, I am persuaded by the court's rationale. Therefore, assuming that the Respondent has indeed filed for bankruptcy, I determine that such a filing does not require or warrant a stay of this proceeding against the Fund.

- Clmt. Ex. 3 - Text message correspondence between the Respondent and the Claimant, December 6, 15, and 17, 2021; January 13 and 14, 2022; June 3 and 9, 2022
- Clmt. Ex. 4-1 - Photograph depicting first view of roofing to be repaired, undated
- Clmt. Ex. 4-2 - Photograph depicting second view of roofing to be repaired, undated
- Clmt. Ex. 4-3 - Photograph depicting third view of roofing to be repaired, undated
- Clmt. Ex. 4-4 - Photograph depicting fourth view of roofing to be repaired, undated
- Clmt. Ex. 4-5 - Photograph depicting fifth view of roofing to be repaired, undated
- Clmt. Ex. 5 - Letter from GAF Warranty Claims Department to the Claimant, June 15, 2022
- Clmt. Ex. 6<sup>8</sup> - Home Improvement Claim Form, received September 20, 2022, with the following attachment:
- Claimant's Navy Federal Credit Union Visa statement, December 27, 2021

I admitted the following exhibits offered by the Fund:

- Fund Ex. 1 - Notice of Hearing, July 11, 2023
- Fund Ex. 2 - Hearing Order, May 10, 2023
- Fund Ex. 3 - Letter from Joseph Tunney, MHIC, to the Respondent, September 28, 2022, with the following attachment:
- Home Improvement Claim Form, received September 20, 2022
- Fund Ex. 4 - The Respondent's Licensing History, July 25, 2023
- Fund Ex. 5 - Affidavit of David Finneran, July 26, 2023

The Respondent did not attend the hearing and therefore offered no exhibits.

### Testimony

The Claimant testified and did not present other witnesses.

The Fund presented no testimony.

The Respondent did not attend the hearing and therefore presented no testimony.

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<sup>8</sup> I held the record open allow the Claimant an opportunity to supplement the record with proof of payment to the Respondent, which she provided on August 11, 2023. That same day, I directed my administrative aide to email the parties and to require the Fund to lodge any objection to the Claimant's Exhibit 6 by August 21, 2021. No response from the Fund was received.

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 01-116244.
2. On December 13, 2021, the Claimant and the Respondent entered into a contract for the Respondent to remove an existing balcony roof and install a flat GAF rubber roof at a balcony of the Claimant's home (First Contract). The First Contract included labor and materials. The original agreed-upon price was \$6,106.00.
3. On December 15, 2021, the Claimant paid the Respondent \$2,035.00 as a deposit on the First Contract.
4. On January 17, 2022, the Claimant and the Respondent entered into a contract for the Respondent to remove an existing rear roof and install a flat GAF rubber roof at the rear of the Claimant's home (Second Contract). The Second Contract required that shingles be installed and that the roof be pitched to allow for the management of rainwater. The Second Contract included labor and materials. The original agreed-upon price was \$9,988.00.
5. On January 18, 2022, the Claimant paid the Respondent \$3,329.00 as a deposit on the Second Contract.
6. On February 19, 2022, the Respondent's subcontractor began the work under the First Contract and the Second Contract (collectively, Contracts). Thereafter, the Respondent's subcontractor removed the project materials from the Claimant's home and did not return to install the shingles.
7. On February 21, 2022, the Claimant paid the Respondent \$10,729.00 as the balance owed on the Contracts. In total, the Claimant paid the Respondent \$16,093.00.

8. On May 3, 2022, the Respondent's license was suspended on an emergency basis due to a failure to perform home improvement contracts.<sup>9</sup>

9. As of June 2022, the balcony roof installed under the First Contract leaks, causing water to seep through the ceiling, into the drywall and onto the wood flooring of the room below.

10. The rear roof installed under the Second Contract collects standing water and was never shingled as required.

11. In June 2022, the Claimant initiated a warranty claim with GAF, the rubber roofing manufacturer. The Claimant submitted required materials. As of the date of the hearing, the Claimant had not heard back from GAF regarding her warranty claim.

## **DISCUSSION**

### ***Applicable Law***

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.

### ***Burden of Proof***

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; 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

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<sup>9</sup> The Contracts and work performed by the Respondent that are the subject of this Claim all occurred before the emergency suspension of the Respondent's license.

not so<sup>33</sup> when all the evidence is considered. *Coleman v. Anne Arundel Cnty. Police Dep't*, 369 Md. 108, 125 n.16 (2002).

### ***Parties' Positions***

The Claimant argued that the Respondent performed an unworkmanlike, inadequate, or incomplete home improvement by failing to properly install the balcony and rear roofs and failing to pitch and shingle the rear roof as required under the Second Contract. The Claimant explained that she could not yet afford to hire another contractor and should be refunded the payments made to the Respondent to remedy the faulty work.

The Fund argued that the Claimant met her burden to demonstrate that she sustained an actual loss as a result of an act or omission by the Respondent. Specifically, the Fund argued that in exchange for her payments, the Claimant received two faulty roofs for which she should be reimbursed the amounts paid to the Respondent.

### ***Analysis***

For the reasons that follow, I conclude that the Claimant met her burden to demonstrate that the Respondent performed unworkmanlike, inadequate, or incomplete home improvements and that she is therefore eligible for compensation from the Fund. Further, I recommend an award in the amount of the Claimant's actual loss as explained below.

#### ***No Statutory Bars to Recovery***

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 Respondent's Installation of the Balcony and Rear Roofs Was Unworkmanlike, Inadequate, or Incomplete***

The evidence demonstrates that the Claimant contracted for the Respondent to replace two roofs at the Claimant's home. The Claimant recognized that prior to any work by the Respondent, the roofs leaked. However, after the Respondent's work, the condition was exacerbated rather than eliminated. Now the balcony roof leaks so much that the ceiling in the room below is damaged and allows water inside, causing the drywall to become saturated and the flooring wet. Additionally, after the Respondent's work, the rear roof collects standing water that the Claimant explained she regularly sweeps when it rains to avoid pooling water and leaks. Based on this evidence of leaking water at the balcony roof and pooling water at the rear roof, I conclude that the Claimant met her burden to demonstrate that the Respondent performed unworkmanlike, inadequate, or incomplete home improvements when installing the balcony and rear roofs at the Claimant's home.

The Claimant entered into the First Contract and Second Contract with the Respondents in December 2021 and January 2022, respectively. The work was performed on February 19, 2022, and shortly thereafter, the Claimant paid the Respondent in full. Less than four months later, in June 2022, the Claimant reached out to the Respondent to report the leak and related concerns. By that time, the Respondent's license had been suspended on an emergency basis due to a failure to perform home improvement contracts and despite the Claimant's attempts, the Respondent did not address her concerns or return to repair the faulty



work. Therefore, the Claimant cannot be said to have unreasonably rejected good faith efforts by the Respondent to resolve the claim, as the Respondent made no such efforts. *Id.* § 8-405(d) (Supp. 2023).

For these reasons, I conclude that the Claimant is eligible for compensation from the Fund.

*Amount of Actual Loss*

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). Depending on the status of the contract work, the MHIC's regulations provide the following three formulas to measure a claimant's actual loss:

(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.

COMAR 09.08.03.03B(3)(a)-(c).

Here, the Respondent did not abandon the Contracts without doing any work; therefore, the first formula does not apply. Though she intends to secure another contractor to repair the Respondent's poor work and to complete the Contracts, the Claimant explained that she cannot presently afford to do so and would revisit the repairs with another contractor if she received an award from the MHIC. Further, the Claimant offered no evidence of any reasonable amounts that she will be required to pay to another contractor to repair the Respondent's poor work. Therefore, I am unable to perform a calculation for an award under the third formula. Accordingly, at this time, the most appropriate calculation to measure the Claimant's actual loss is pursuant to the second formula.

The Claimant paid the Respondent a total of \$16,093.00 for labor and materials to replace two roofs at her home. The Respondent testified that the Respondent's subcontractor failed to complete the work by not installing the shingles as required and after just one day of work, took the project materials with him. For the payments to the Respondent, the Claimant received one leaky roof, one roof that collects standing water, and was not provided the project materials included in the Contracts. While work was done, it was performed so poorly that it has no value. Therefore, the value of any materials or services provided by the Respondent is \$0.00. Accordingly, the record supports an award to the Claimant for the full price of the Contracts in the amount of \$16,093.00.

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.<sup>10</sup> Bus. Reg. § 8-405(e)(1), (5) (Supp. 2023);

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<sup>10</sup> 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").

COMAR 09.08.03.03B(4). In this case, the Claimant's actual loss is equal to the amount paid to the Respondent and less than \$30,000.00. Therefore, the Claimant is entitled to recover her actual loss of \$16,093.00.

**PROPOSED CONCLUSIONS OF LAW**

I conclude that the Claimant has sustained an actual and compensable loss of \$16,093.00 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(2). I further conclude that the Claimant is entitled to recover \$16,093.00 from the Fund. Bus. Reg. § 8-405; COMAR 09.08.03.03B(3).

**RECOMMENDED ORDER**

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

**ORDER** that the Maryland Home Improvement Guaranty Fund award the Claimant \$16,093.00; and

**ORDER** that the Respondent is ineligible for a Maryland Home Improvement Commission license until the Respondent reimburses the Guaranty Fund for all monies disbursed under this Order, plus annual interest of ten percent (10%) as set by the Maryland Home Improvement Commission;<sup>11</sup> and

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

November 7, 2023  
Date Decision Issued

*Dania Ayoubi*  
\_\_\_\_\_  
Dania Ayoubi  
Administrative Law Judge

DLA/ckc  
#206773

<sup>11</sup> See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

**PROPOSED ORDER**

***WHEREFORE, this 22<sup>nd</sup> day of December, 2023, 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***