

**IN THE MATTER OF THE CLAIM
OF MARLENE STATHER,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF VERNON
SUMMERS, JR., T/A ATLANTIC
CONTRACTING, LLC,
RESPONDENT**

*** BEFORE TRACEY JOHNS DELP,
* AN ADMINISRTATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
*
*
*
* OAH No.: LABOR-HIC-02-19-23179
* MHIC No.: 18 (90) 1221

* * * * *

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 July 31, 2018, Marlene Stather (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$11,800.00 in actual losses allegedly suffered as a result of a home improvement contract with Vernon Summers, Jr., trading as Atlantic Contracting, LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015 & Supp. 2019).¹ On July 8, 2019, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

¹ Unless otherwise noted, all references to the Business Regulation Article herein cite the 2015 Replacement Volume of the Maryland Annotated Code.

I held a hearing on October 16, 2019 at the OAH in Hunt Valley, Maryland. Bus. Reg. § 8-407(e). Shara Hendler, Assistant Attorney General, Department of Labor (Department),² represented the Fund. The Claimant represented herself. Bradford Carney, Esquire, represented the Respondent, who was present.

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)³; 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 on the Claimant's behalf:

Clmt. Ex. 1 - Contract, October 26, 2017

Clmt. Ex. 2 - Letter from Wicomico County, Maryland, Department of Planning, Zoning and Community Development, Permits and Inspections Division, to Claimant, July 31, 2017

Clmt. Exs. 3a - k -Photographs of garage taken by Respondent, undated

Clmt. Ex. 4 - Letter from Respondent to MHIC, June 11, 2018

Clmt. Ex. 5 - Contract/Proposal, Brian Beaver, MHIC No. 80056, May 11, 2018

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

³ Unless otherwise noted, all references to the State Government Article herein cite the 2014 Replacement Volume of the Maryland Annotated Code.

Clmt. Ex. 6 - Check Numbers 1017, 1045, 1037, and 1024 from Thomas and Marlene Stather payable to Brian Beaver, totaling \$12,650.00⁴

Clmt. Ex. 7 - The following licensing and permit information:

- Wicomico County, Maryland, Department of Planning, Zoning and Community Development, Permits and Inspections Division, Staff Report - Administrative Variance, February 28, 2019
- Wicomico County, Maryland, Building Inspector, Building Permit, March 7, 2019
- Wicomico County, Maryland, Department of Planning, Zoning and Community Development, Permits and Inspections Division, Floodplain Permit, March 7, 2019
- Wicomico County, Maryland, Department of Planning, Zoning and Community Development, Building Division, Building Permit, March 11, 2019
- Salisbury - Wicomico County, Maryland, Department of Planning, Zoning and Community Development, Disclaimer - Non-Tidal Wetlands, March 11, 2019
- Salisbury - Wicomico County, Maryland, Department of Planning, Zoning and Community Development, Habitat Protection and Water Quality Statement for Minor Development, Chesapeake Bay Critical Area, March 11, 2019
- Salisbury - Wicomico County, Maryland, Department of Planning, Zoning and Community Development, Chesapeake Bay Critical Area Certificate of Compliance for Building Permit, March 11, 2019
- Disclaimer, Non-Tidal Wetlands in Wicomico County, March 11, 2019
- Permits and Inspections Payment Receipt, March 7, 2019
- Wicomico County, Office of the Building Inspector, diagram of garage, October 17, 2016

Clmt. Ex. 8 - Photograph of garage flood vent interior, undated

Clmt. Ex. 9 - Photograph of garage 2x4's (interior view) and cut lumber, undated

Clmt. Ex. 10 - Photograph of garage staircase and electrical outlet, undated

Clmt. Ex. 11 - Photograph of garage staircase, undated

Clmt. Ex. 12 - Photograph of garage staircase and concrete floor, undated

Clmt. Ex. 13 - Photograph of garage 2x4's (exterior view), undated

Clmt. Ex. 14 - Photograph of garage 2x4's (interior view), undated

⁴ The Claimant seeks only \$11,800.00 in reimbursement from the MHIC Fund. The Claimant paid Mr. Beaver \$850.00 for roof work which is not related to the Contract.

Clmt. Ex. 15 - Photograph of garage flood vent exterior, undated

Clmt. Ex. 16 - Wicomico County, Maryland, Board of Electrical Examiners, Electrical Permit, June 20, 2018

The Respondent did not offer any documents for admission into evidence.

I admitted the following exhibits on behalf of the Fund:

Fund Ex. 1 - Hearing order, July 1, 2019

Fund Ex. 2 - Notice of October 16, 2019 Hearing, issued August 20, 2019

Fund Ex. 3 - Home Improvement Claim Form, received July 31, 2018; Letter from MHIC to Respondent, August 21, 2018

Fund Ex. 4 - Respondent's MHIC Licensure Information, printed August 27, 2019

Stipulation

The parties stipulated that the Claimant paid the Respondent in full, the contract price of \$13,300.00.

Testimony

The Claimant testified and presented the testimony of Brian Beaver.

The Respondent testified.

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 numbers 01- 90759 (Contractor/Salesman) and 05-123509 (Atlantic Contracting, LLC). (Fund Ex. 4.)

2. The Claimant is not related to the Respondent or any of his employees, by blood or marriage.

3. The Claimant resides in South Carolina⁵ and is the owner of one home (subject property) in Maryland located in Tyaskin, Wicomico County.

4. The subject property is located in an AE Flood Zone. Flood zones are geographic areas that FEMA⁶ has defined according to varying levels of flood risk. The AE Flood Zone is a high risk area.⁷

5. The Claimant's ex-husband built a detached garage on the subject property many years ago. The garage was constructed without the required permits and did not adhere to building and floodplain management codes.

6. Among other violations, the original garage floor plates were constructed using untreated lumber and the entire garage electrical circuit was in code violation.

7. On or about July 31, 2017, the Claimant received a letter from the Wicomico County, Maryland, Department of Planning, Zoning and Community Development, Permits and Inspections Division. The letter ordered her to abate the garage building and floodplain management code violations.⁸

8. Through the recommendation of a realtor, Tom Ruch, the Claimant contacted the Respondent for assistance in bringing the garage to code compliance. The Claimant sent the Respondent a copy of the July 31, 2017 Wicomico County letter so that the Respondent understood the scope of the job.

⁵ The Claimant previously resided in Florida.

⁶ Federal Emergency Management Agency

⁷ <https://snmapmod.snco.us/fmm/document/fema-flood-zone-definitions.pdf>

⁸ The letter also ordered the Claimant to abate violations related to a shed on the property, secure a surveyor-prepared site plan, obtain a variance, and ensure that a resubdivision plat was recorded to correct building setback violations. These additional requirements are not relevant to this matter.

9. On or about October 25, 2017, the Claimant signed a contract (Contract) with the Respondent. The Contract price was \$13,300.00. The Contract scope of work was as follows:

- Tear off T-1-11⁹ on building 10' high to replace wood studs with salt treated lumber
- Remove all studs and replace with salt treated lumber
- Install new metal on building 10' high
- Move all electric above 5' high
- Remove and replace overhead door and personal door
- Remove all materials from job site

10. The Claimant has no experience in the construction industry, and no experience with building and floodplain management code provisions. The Claimant relied on the Respondent's expertise in these areas.

11. The Claimant believed the Contract satisfied all building and floodplain management code violations that could be remedied by a contractor.

12. The Respondent received \$13,300.00, payment in full, from the Claimant pursuant to the Contract.

13. The Respondent removed the T-1-11 siding and installed new metal siding panels on the garage, but did not install flood openings.

14. The Respondent installed salt treated lumber wood studs, but did not tear down and remove the existing, untreated wood which was not code-compliant. Non-flood resistant materials remained five feet from grade.

15. The Respondent relocated some electric, but did not adhere to code requirements.

16. The Respondent removed and replaced overhead and personal doors. The Claimant does not complain about this aspect of the Respondent's work.

17. The Respondent removed all materials and debris from the job. The Claimant does not complain about this aspect of the Respondent's work.

⁹ T-1-11 is a type of siding.

18. Approximately one month after Contract completion, Bill Mister, Chief Building Inspector, Wicomico County, Maryland inspected the garage and advised the Claimant that the garage was not code-compliant.

19. The Claimant telephoned and left messages for the Respondent regarding Inspector Mister's report. The Respondent did not return her calls and texts until he was on notice that the Claimant had filed a Claim with the MHIC Fund.

20. The Respondent's contact with the Claimant after receiving notice of her Claim was not made in good faith to resolve the dispute, because the Respondent ignored her earlier calls and messages.

21. On or about May 11, 2018, the Claimant contracted with Brian Beaver, Contractor, MHIC No. 80056, to bring the garage into compliance with all building and floodplain management codes. The Claimant paid Mr. Beaver \$11,800.00, and Mr. Beaver performed the following work:

- Removal of untreated wood
- Replacing of untreated floor plate
- Electrical work
- Floor vent installation

22. Mr. Beaver conferred with the Wicomico County, Maryland, Department of Planning, Zoning and Community Development, Permits and Inspections Division to ensure his work met all required building and floodplain management code provisions.

23. Wicomico County does not issue permits needlessly.

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); State Gov't §10-217; 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)).

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) (“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 Claimant was residing out-of-state when she received notice from Wicomico County that her garage on the subject property was not code-compliant. On July 31, 2017, the Claimant was ordered to abate the condition. The Claimant testified that she intended to sell the subject property and a realtor, John Ruch, told her that the Respondent had performed work for Long and Foster clients. With this recommendation, the Claimant contacted the Respondent and provided him with a copy of the July 31, 2017, Wicomico County Permits and Inspections Division letter. In his testimony, the Respondent acknowledged receiving a copy of this letter from the Claimant prior to drafting the Contract. The Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimant.

The Claimant complains that the sole reason for her contracting with the Respondent was to bring the detached garage up to code. With no construction or permitting experience, she relied on the Respondent’s expertise in these areas. Based upon her communication with the Respondent and the information she provided to the Respondent, the Claimant believed the Contract the Respondent prepared addressed the required upgrades and alterations necessary to satisfy all building and floodplain management codes, but it did not. The Claimant testified that

the Respondent told her in February 2018 when the job was complete that Bill Mister, Chief Building Inspector, had been on-site and advised that everything was up to code. Thereafter, she awaited some form of paperwork from the county which verified code compliance. After waiting several weeks and receiving nothing in the mail, the Claimant contacted Inspector Mister. The Claimant testified that Inspector Mister told her no permits had been issued for garage work on the subject property, he had never met the Respondent, and he had never been to the subject property as work was being performed by the Respondent. Thereafter, Inspector Mister visited the subject property and advised the Claimant that the garage still lacked flood vents, electrical remained in violation, and the presence of non-treated wood violated relevant code provisions.

The Claimant testified that she immediately attempted to communicate with the Respondent concerning Inspector Mister's findings. After the Respondent did not respond to her calls and text messages, the Claimant contracted the Brian Beaver, MHIC No. 80056, to perform the necessary work. The Claimant explained that she did not hear from the Respondent until she had filed her Claim with the MHIC Fund. By that time, Mr. Beaver was already working on the project and she informed the Respondent not to enter upon the subject property.

I found the Claimant very credible. She was slightly nervous and possessed a sincere manner of testimony, trying to be as thorough as possible. The Claimant was prepared with many documents, and when she was uncertain about particular questions, the Claimant reviewed her documentation for accuracy in her responses. The Claimant's testimony was consistent, and was supported by her evidence and by the testimony of Brian Beaver.

Brian Beaver testified that he has worked as a licensed contractor since 2001. He did not know the Claimant or the Respondent before this case. Mr. Ruch knew that Mr. Beaver also performed work for Long and Foster clients, and when the Respondent did not return their calls,

he recommended that the Claimant call Mr. Beaver to discuss the garage problems. Mr. Beaver testified that the Claimant called him from South Carolina, and he agreed to perform the work. Mr. Beaver named several individuals from the Wicomico County Permits and Inspections Division (Marilyn Williams, Bill Mister, Bill Livingston, and Jeff Turner), and explained that he met and spoke with all of them at different times because he visited the office on numerous occasions to be certain he performed all tasks necessary to bring the garage into building and floodplain management code compliance. His contract identifies the scope of work as follows: "obtain and comply with all Wicomico County Permits and Inspections, FEMA regulations." (Clmt. Ex. 5.) And Mr. Beaver testified regarding each aspect of this contract work.

Mr. Beaver explained that the Respondent had left untreated lumber below the floodplain. Mr. Beaver testified that he had to remove the exterior aluminum siding panels for access. He removed untreated lumber, including the floor plates, which required the entire garage to be lifted off the ground using a jack. He also replaced the staircase with treated lumber. Mr. Beaver testified that it appeared the Respondent raised garage electrical outlets to an approximate height of 46 to 60 inches; however, code provisions required all electric outlets and electric switches to be 72 inches (12 inches above the minimum 60 inch floodplain). Mr. Beaver testified that he subcontracted with McIntyre Electric because the entire garage circuit was in violation of applicable code provisions. Wicomico County issued an electrical permit and inspected the completed work. (Clmt. Ex. 16.) Finally, Mr. Beaver installed three flood vents in the garage. The cost of the Claimant's contract with Mr. Beaver was \$11,800.00, which was paid in full.

Mr. Beaver submitted a project diagram to the Office of the Building Inspector, which was reviewed and approved for code compliance. (Clmt. Ex. 7.) The reviewer's notes also state that field inspections were necessary "to verify code compliance since building already built." (Clmt. Ex. 7.) Mr. Beaver also secured a Floodplain Permit, Building Permit, Electrical Permit, and a Chesapeake Bay Critical Area Certificate of Compliance for Minor Development. (Clmt. Exs. 7 and 16.) The Respondent obtained no such permits, certificates, or diagram approvals when he performed Contract work on the subject property.

Mr. Beaver was highly credible and I find that Wicomico County would not require approval of plans, and issue permits and certificates unless they were required. He has been an experienced contractor for almost two decades and his manner of testimony reflected his experience in this regard. He was extremely thorough in his testimony. During cross-examination, counsel for the Respondent remarked, "You're an honest man." Mr. Beaver stated that for the work the Respondent performed, the Respondent's Contract price was fair and his work was workmanlike; however, the problem is that the Respondent's work failed to satisfy code requirements.

The Respondent was not as credible as Mr. Beaver. The Respondent was quite argumentative during the Fund's cross-examination. On more than one occasion, he answered counsel's question with a question. The Respondent testified that he has been in the construction industry all his life, and in 2002 he moved to Ocean City and formed Atlantic Contracting, LLC. He stated that he has built in floodplains and is aware of the specific requirements. The Respondent claimed that he met with Jeff Turner in-person in the Wicomico County Permits and Inspections Division and was told that no permits were necessary, and that he never told the Claimant that Inspector Mister visited the subject property. The Respondent testified that he brought the Contract with him to the Wicomico County Permits and Inspections Division office,

and then stated that he did not. The Respondent stated that he did not “do floodgates,” then said he just finished a contract in which he installed floodgates. I found his demeanor arrogant and his testimony confusing.

In his letter of response to the MHIC, the Respondent wrote that after he received the Claim, he contacted the Wicomico County Permit and Inspections Division and was informed that FEMA’s requirements were different than what he was previously told. (Clmt. Ex. 4.) The Respondent argues that the Claimant’s Claim should be dismissed because he performed the Contract. He removed the T-1-11 and installed new metal siding panels on the building, removed and replaced the overhead and personal doors, moved all electric above five feet high,¹⁰ and removed all materials from the job. However, the new metal siding panels on the building lacked flood openings which the July 31, 2017 Wicomico County letter clearly states were necessary. Although the Respondent did not “remove all studs and replace with salt treat[ed] lumber as specked” (Clmt. Ex. 1), he argues that he increased the strength of the garage by “sistering,” or abutting, treated lumber to the existing untreated studs. The Respondent testified that Jeff Turner of the Wicomico County Permits and Inspections Division told him this method of installation would satisfy code requirements. The Respondent argues that he made the garage stronger than it was, and performed the Contract; however, I find these arguments unsatisfactory.

COMAR 09.08.01.08 provides as follows:

In the performance of any Home Improvement Contract it shall be the non-delegable duty and obligation of the prime contractor to secure, or see to the securing of, every permit, license, or special exception necessary to the proper completion of the contract according to applicable state or local building laws.

¹⁰ Mr. Beaver testified all electric was not moved above five feet high; however, this fact is not relevant because relevant code provisions required “all electrical and mechanical equipment servicing the building to be located 2 feet above the Base Flood Elevation identified on the flood map, except any electrical panel boxes, which are to be located 3 feet above the Base Flood Elevation.” (Clmt. Ex. 7.) The Base Flood Elevation is seven feet. (Clmt. Ex. 7.)

The July 31, 2017 letter from Wicomico County, which the Respondent acknowledged receiving before he drafted the Contract, clearly states that the Claimant must reconstruct “that part of the garage which lies below the Base Flood Elevation... with flood resistant materials and [install] flood openings in according to Section 149-34 of the Wicomico County Code, as well as [perform] all other actions necessary to bring the building into compliance with Wicomico County Building and Flood Plain regulations.” (Clmt. Ex. 2.) The letter also requires the Claimant to obtain the necessary permits for the garage, and noted that field inspections may determine additional non-compliant items. Clearly, the Claimant wanted these violations abated and she wanted the garage code-compliant. It is irrelevant that the Respondent increased the structural integrity of the garage by “sistering” lumber. The Respondent was supposed to reconstruct “that part of the garage which lies below the Base Flood Elevation... with flood resistant materials” and he did not do so. (Clmt. Ex. 2.) I do not accept that anyone with the Wicomico County Permits and Inspections Division told the Respondent that “sistering” untreated and treated lumber would comply with floodplain management regulations. Furthermore, even if someone had provided this erroneous information, the Respondent testified that he is familiar with floodplain regulations. He should have known better, and he is responsible for ensuring his work complies with the law. As the contractor, the Respondent’s decision to leave non-treated lumber below the Base Flood Elevation violated COMAR 09.08.01.08, and his work was inadequate. Bus. Reg. § 8-401. Further, the Respondent’s decision to install metal siding panels on the walls without required flood openings violated COMAR 09.08.01.08, and his work was inadequate. Bus. Reg. § 8-401.

Although the Respondent acknowledged that he left untreated 2x4 studs in the garage, he maintained that the original garage floor plates were constructed using treated lumber, because he saw a “tag” on one of the pieces of wood. I find Mr. Beaver far more credible in this regard.

Mr. Beaver testified that the original floor plates were untreated, and he needed to raise the garage with a jack in order to replace them. Thus, by failing to address the inadequacy of the floor plate lumber, the Respondent violated COMAR 09.08.01.08, and his work was inadequate. Bus. Reg. § 8-401.

The Respondent's electrical work under the Contract was also inadequate. The Contract states that all electric was to be moved above five feet in height; however, moving the electric above five feet in height did not resolve code violations. As Mr. Beaver testified, and the Wicomico County Department of Planning and Zoning's Administrative Variance (Clmt. Ex. 7) reflects, electrical equipment was required to be located two feet above the Base Flood Elevation, and electrical panel boxes were to be located three feet above the Base Flood Elevation. Furthermore, while investigating the electrical violations, Mr. Beaver discovered that the entire garage circuit was in violation, and his contract remedied the condition. Thus, I find the Respondent's electrical scope of work violated COMAR 09.08.01.08, and his work was inadequate. Bus. Reg. § 8-401.

Having found that the Respondent performed inadequate home improvements, the Claimant is eligible for compensation from the Fund and I must now 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); COMAR 09.08.03.03B(1). MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work.

In this case, the Respondent performed work under the Contract, and the Claimant retained Brian Beaver, MHIC No. 80056, to remedy that work. The Fund recommended applying COMAR 09.08.03.03B(3)(c), and I concur. Accordingly, the following formula appropriately measures the Claimant's actual loss:

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

COMAR 09.08.03.03B(3)(c).

The calculations when applying this formula are as follows:

Amount paid to Respondent:	\$13,300.00
Amount paid to other contractor to repair inadequate work done by Respondent	+ \$11,800.00
	= \$25,100.00
Original Contract price	- \$13,300.00
Claimant's Actual Loss under the Contract	= \$11,800.00

The Business Regulation Article caps a claimant's recovery at \$20,000.00 for acts or omissions of one contractor, and provides that a claimant may not recover more than the amount paid to the contractor against whom the claim is filed. Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a). In this case, the Claimant's actual loss is less than the amount paid to the Respondent and less than \$20,000.00. Therefore, the Claimant is entitled to recover her actual loss of \$11,800.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss \$11,800.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015). I further conclude that the Claimant is entitled to recover \$11,800.00 from the Fund. 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 award the Claimant \$11,800.00; 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,¹¹ and

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

November 6, 2019
Date Decision Issued

CONFIDENTIAL

Tracey Johns Delp
Administrative Law Judge

TJD/sw
#182627

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

PROPOSED ORDER

WHEREFORE, this 18th day of December, 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.

Joseph Tunney

Joseph Tunney

Panel B

Chairman

MARYLAND HOME IMPROVEMENT COMMISSION

the record included the preliminary exhibits for the exceptions hearing, the OAH Proposed Decision, the exhibits admitted into evidence at the OAH hearing, and the transcript of the OAH hearing. COMAR 09.01.03.09(G) - (I).

The claim in this proceeding relates to a contract between the parties for improvements to a garage on the Claimant's property. The ALJ found that the Contractor's performance under the contract was inadequate. *ALJ's Proposed Decision* pp. 13-14.

On exception, the Contractor argued that the ALJ's decision was arbitrary and capricious and that the ALJ erred by imposing obligations on the Contractor that were not set forth in the contract between the parties and by failing to give the Contractor credit for the work he performed or the materials he provided under the contract.

The Commission finds that the ALJ's proposed decision is supported by substantial evidence in the record and therefore is not arbitrary and capricious. In support of his argument that the ALJ's proposed decision is arbitrary and capricious, the Contractor identifies evidence that supports his position on the facts of the case but ignores contrary evidence supporting the ALJ's findings and ignores the ALJ's determination that his testimony was not credible.

For example, the Contractor argues that the ALJ, in finding that permits were required for the work he performed, ignored his "clear and definitive statement" that he "discussed the matter with [Wicomico County] Chief [Building] Inspector Bill Mister . . . and secured his blessing to proceed without a permit." (Exceptions Hearing MHIC Exhibit 3 at p. 2.) In fact, the Contractor testified that he never met with Inspector Mister. (OAH Hearing Transcript p. 201.) The ALJ also did not ignore the Contractor's testimony regarding the need for permits and cited the Contractor's testimony that he had met with permitting official Jeff Turner and that Mr. Turner had advised him that no permits were required. *ALJ Proposed Decision* p. 11. The AJL stated that she did not find

the Contractor's testimony to be credible because of his argumentative demeanor and his self-contradictory testimony. *AJJ Proposed Decision* pp. 11-12. The ALJ noted that the Claimant testified that, after the Contractor completed his work, the Contractor told her that Inspector Mister had visited the property and advised him that the project was up to code and that, when the Claimant sought confirmation from the permitting office that her garage was up to code, Inspector Mister told her that he had never been to her property while the Contractor was working on the garage and that he had never met the Contractor. *ALJ Proposed Decision* pp. 8-19. The ALJ also noted that the Claimant testified that Inspector Mister inspected the Contractor's completed work and discovered several code violations. *ALJ Proposed Decision* p. 8. The ALJ stated that she found the testimony of the Claimant to be very credible based on her demeanor and her use of documents to answer questions when she was uncertain of the answer. The ALJ also noted that the Claimant's testimony was corroborated by the testimony of the contractor she hired to complete the improvements to her garage and bring it up to code, Brian Beaver, who testified about his communications with the permitting office to ensure that he brought the garage up to code. *ALJ Proposed Decision* pp. 10-11.

The Contractor also appears to argue that the ALJ's finding that he failed to return the Claimant's calls and texts following Inspector Mister's determination that his work was not code compliant was erroneous, citing his testimony that he had one call with the Claimant and she barred him from entering her property. (Exceptions Hearing MHIC Exhibit 3 p. 8.) However, as noted above, the ALJ did not find the Contractor's testimony to be credible, and the Claimant, who the ALJ found to be credible, testified that she and her real estate agent sent the Contractor multiple text messages and made several calls to the Contractor after Inspector Mister advised her that the Contractor did not bring her garage up to code. (OAH Hearing Transcript p. 28.) The Commission

agrees with the ALJ's finding on this issue.

The Commission disagrees with the Contractor's assertion that the ALJ erred by imposing obligations on the Contractor that were not set forth in his contract with the Claimant. The Claimant hired the Contractor for the purpose of bringing her garage up to code after receiving a letter from the Wicomico County permitting office advising her, in pertinent part, that she had to abate the code violations relating to the garage by performing the following improvements:

1) Reconstructing the part of the garage which lies below the Base Flood Elevation . . . with flood resistant materials and installing flood openings in accordance with . . . the Wicomico County Code, as well as performing all other actions necessary to bring the building into compliance with Wicomico County Building and Flood Plain regulations. Based on our aerial maps, the estimated area of the garage which needs to be rebuilt with flood resistant materials appears to be the bottom five (5) feet of the garage. A surveyor-prepared site plan with elevations will be required to determine the exact area for reconstruction.

* * *

4) Performing all actions required to bring the shed into compliance, including, but not limited to ensuring that all areas below the Base Flood Elevation are constructed with flood resistant materials and installing flood openings as per Section 149-34 of the Wicomico County Code.

5) Obtaining the necessary permits for both the garage and shed.

(OAH Hearing Claimant's Exhibit 2)

The Claimant hired the Contractor for the purpose of bringing her garage up to code (OAH Transcript p. 20-21). The Claimant emailed a copy of the letter to the Contractor (OAH Transcript p. 200) and the Contractor drafted the contract (OAH Transcript p. 237). The Contractor did not advise the Claimant that the contract did not include the work and permits necessary to bring the garage up to code.

This proceeding involves a claim against the Home Improvement Guaranty fund and is not a breach of contract action. Section 8-405 of the Business Regulation Article of the *Maryland Code* allows a homeowner to recover an "actual loss" resulting from an act or omission by a

licensed contractor. Section 8-401 of the Business Regulation article defines “actual loss” as “the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.” COMAR 09.08.01.08 imposes upon home improvement contractors a non-delegable duty to “secure, or see to the securing of, every permit, license, or special exception necessary to the proper completion of the contract according to applicable state or local building laws. Section 8-611 of the Business Regulation Article of the *Maryland Code* prohibits home improvement contractors from violating State or local building laws. Therefore, the Contractor was responsible for obtaining the necessary permits and performing the home improvements in accordance with applicable building codes, and his failure to do so rendered his work inadequate as the ALJ correctly found. If the Contractor did not intend to obtain the necessary permits or comply with applicable building codes, he should not have contracted to perform the work. Because the Contractor agreed to perform the work, the responsibility for obtaining the permits and performing the work necessary to comply with applicable building codes is imputed to the Contractor. Therefore, the Commission holds that the ALJ properly imposed upon the Contractor obligations stemming from code requirements that the Contractor did not expressly set forth in the contract he prepared for the Claimant, including the removal and reconstruction of the untreated wood stairs with treated wood, removal and replacement of the untreated studs and baseplates, installing flood vents in the siding, and raising the electrical sufficiently above the base flood elevation.

The Commission disagrees with the Contractor’s assertion that the ALJ erred by failing to give him credit for replacing the siding and doors on the Claimant’s garage. The ALJ applied the formula set forth in COMAR 09.08.03.03(B)(3), which provides that

[i]f 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.

Under this formula, the extent the labor and materials provided by the Contractor reduced the costs the Claimant incurred to correct the Contractor's work, the Contractor received credit for the labor and materials provided. Regarding the metal siding installed by the Contractor, under the Claimant's contract with Mr. Beaver to correct the Contractor's work, Mr. Beaver removed and reinstalled the metal siding provided by the Contractor instead of purchasing new siding, which reduced the cost to correct the inadequate work. Mr. Beaver had to remove the siding installed by the Contractor because he had to remove the untreated studs to which the siding was attached that the Contractor was supposed to have removed and replaced with treated studs. Therefore, there was no value to the Contractor's labor installing the metal siding. Regarding the replacement of the doors, the Claimant's contract with Mr. Beaver did include any labor or materials relating to the doors, which reduced the Claimant's cost to correct the Contractor's work and therefore reduced her actual loss and her award.

However, the Commission disagrees with the ALJ's calculation of the Claimant's actual loss. Although the Contractor should not have contracted with the Claimant if he did not intend to perform the work necessary to bring the Claimant's garage up to code, the contract clearly did not include the cost of the relocation of the electrical panel in the garage or the replacement of the electrical service line from the Claimant's main panel to the garage that were necessary to achieve code compliance and had to be performed by a licensed electrician. Therefore, the Commission finds that the original contract price was too unrealistically low to provide a proper basis for

measuring the Claimant's actual loss. Mr. Beaver testified that he paid an electrician \$4,000.00 for the electrical work included in his contract with the Claimant. (Transcript p. 162.) Accordingly, the Commission finds that, for purposes of calculating the Claimant's actual loss, the \$4,000.00 cost of the electrician's services should be added to the original contract price, resulting in the following calculation:

\$13,300.00	Amount paid to or on behalf of the contractor
+ \$11,800.00	<u>Cost to correct and complete the work</u>
\$25,100.00	
- \$17,300.00	<u>Imputed original contract price</u>
\$7,800.00	Actual Loss

Having considered the parties' arguments, the evidence contained in the record, and the ALJ's Recommended Decision, it is this 21st day of October 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 Recommended Order of the Administrative Law Judge is **AMENDED;**
- D. That the Claimant is awarded \$7,800.00 from the Maryland Home Improvement Guaranty Fund;
- E. That the Contractor 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);
- E. That the records and publications of the Maryland Home Improvement Commission shall

reflect this decision; and

- F. Any party has thirty (30) days from the date of this Final Order to appeal this decision to Circuit Court.

Joseph Tunney
Chairperson – Panel
Maryland Home Improvement
Commission