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| **IN THE MATTER OF THE CLAIM** | * | **BEFORE WILLIAM F. BURNHAM,** |
| **OF CORINDA MANUEL,** | * | **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 JAMES MASIMORE,** | * | |
| **JR., T/A MASIMORE** | * | **OAH No.: LABOR-HIC-02-19-40275** |
| **CONTRACTORS, INC.,** | * | **MHIC No.: 19 (75) 182** |
| **RESPONDENT** | * | |

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## PROPOSED DECISION



## STATEMENT OF THE CASE

On March 11, 2019, Corinda Manuel (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of $21,872.00 in actual losses allegedly suffered as a result of a home improvement contract with James Masimore, Jr., trading as Masimore Contractors, Inc. (Respondent). Md. Code Ann., Bus.

Reg. §§ 8-401 through 8-411 (2015 & Supp. 2020).[1] On December 9, 2019, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on August 27, 2020 from the OAH in Hunt Valley, Maryland via the Google Meet audio/video platform. Md. Code Ann., Bus. Reg. § 8-407; Code of Maryland Regulations (COMAR) 28.02.01.20B. The parties participated from their respective locations. Shara Hendler, Assistant Attorney General, Department of Labor (Department),[2] represented the Fund. Andrew Vance, Esquire, represented the Claimant. The Respondent represented himself.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2020); 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

Unless otherwise noted, I admitted the following exhibits on the Claimant's behalf:

Cl. Ex. 1 – Contract between the Respondent and the Claimant, January 23, 2016; Invoice, July 11, 2016.

Cl. Ex. 2 – Claimant's check registers, various dates between May 2011 and May 2016

Cl. Ex. 3 – Photocopy of check number 112, April 4, 2017

[1] Unless otherwise noted, all references to the Business Regulation Article herein cite the 2015 Replacement Volume and 2020 Supplement of the Maryland Annotated Code.
[2] On July 1, 2019, the Maryland Department of Labor, Licensing, and Regulation (DLLR) became the Department of Labor.

Cl. Ex. 4 – Photocopy of check number 113, June 7, 2017

Cl. Ex. 5 – Check register, various dates between November 9, 2016 and May 2, 2019

Cl. Ex. 6 – Inspection Report, East Coast Inspections, LLC, October 5, 2018

Cl. Ex. 7 – Contract between Dun-Rite Contractors and the Claimant, February 22, 2019

Cl. Ex. 8 – Photographs, taken in 2017

Cl. Ex. 9 – Photographs, taken in 2017-18

Cl. Ex. 10 – Photographs, taken in 2018

Cl. Ex. 11 – Photographs, taken in 2017-18

Cl. Ex. 12 – Photographs, taken in 2016-17

Cl. Ex. 13 – Photographs, taken in 2019

Cl. Ex. 14 – Photographs, taken in 2019

Cl. Ex. 15 – Photographs, taken in 2016-17

Cl. Ex. 16 – Photographs, taken in 2016-17

Cl. Ex. 17 – Not admitted

Cl. Ex. 18 – Not admitted

Unless otherwise noted, I admitted the following exhibits on the Respondent's behalf:

Resp. Ex. 1 – Not admitted

Resp. Ex. 2 – Photographs, taken in 2019

Resp. Ex. 3 – Letter from the Respondent to the DLLR, August 25, 2018

I admitted the following exhibits on behalf of the Fund:

Fund Ex. 1 – Hearing Order, December 2, 2019

Fund Ex. 2 – Notice of Remote Hearing, June 30, 2020

Fund Ex. 3 – Home Improvement Claim Form, received on December 18, 2018; email between the Claimant and DLLR, March 14, 2019, amended Home Improvement Claim Form, March 11, 2019; Letter from DLLR to the Respondent, October 18, 2018

Fund Ex. 4 – Licensing history, printed on March 5, 2020.

Testimony

The Claimant testified and presented the testimony of:

Scott Wallace, Owner, Dun-Rite Contractors
Cliff Zimmerman, Owner, East Coast Inspections, LLP

The Respondent testified and presented the testimony of:

Jim McElroy, Owner, J & S Contracting, LLC
Robin Seipp, Head Carpenter
Cory Masimore, Contractor

The Fund did not present any witnesses.

## PROPOSED FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor under the MHIC license number 20933.

2. The Claimant owns the home located on Roller Road in Manchester, Maryland and does not own any other real property.

3. On January 23, 2016, the Claimant and the Respondent entered into a contract (Contract) for the three following home improvement projects at the following prices per project:

a) "Rear Porch Railings" $1,300.00;

b) "Front Porch, Retaining Wall and Side Walk" (Front Porch) $9,000.00; and

c) "Kitchen Work" $14,000.00.

4. The Front Porch project contained the following description in the Contract:

a) Demo and discard old porch slab and sidewalks, etc.
b) Excavate for new retaining wall blocks and install new red block types with caps. Supply drain tile, stone and backfill.
c) Frame and pour standard new concrete walk with steps 3' wide.
d) Extend new front porch pad top to approx. 5' out from house.
e) Add railing back on porch with post.

Cl. Ex. 1.

5. The total Contract price was $24,300.00. The Contract provided that the Claimant would pay $4,300.00 as a down payment, and "$20,000.00 in draws later."

6. The Respondent completed the Rear Porch Railings and Kitchen Work projects. The Claimant was satisfied with the completed work in both sections of the Contract.

7. The Respondent began the Front Porch project.

8. The Respondent used OSB wood to construct potions of the forms built in advance of pouring the new front porch concrete slab. Respondent's subcontractor, J & S Contracting, LLC, (J & S)[3] poured the new front porch concrete slab.

9. The Respondent did not remove the forms after the new front porch concrete slab was poured.

10. The Claimant paid the Respondent $19,840.00 in the following payments:

- January 28, 2016 = $4,300.00
- February 26, 2016 = $3,000.00
- March 30, 2016 = $3,000.00
- July 13, 2016 = $2,540.00
- April 4, 2017 = $3,000.00
- June 7, 2017 = $4,000.00.

[3] Because Mr. McElroy is the owner/operator of J & S, I may use his name and company interchangeably.

11. The Claimant paid $7,000.00 toward the completion of the Front Porch project.

12. The Claimant was not pleased with the Front Porch project, specifically the steps and wall that she felt made backing a car from her garage challenging. The Front Porch retaining walls and sidewalk was revised several times, but the Claimant was not satisfied.

13. In January 2018, Mr. McElroy told the Respondent he did not want to use the Respondent's forms to pour the concrete steps for the Front Porch project, and the Respondent gave Mr. McElroy permission to reconstruct the forms at the Claimant's expense.

14. J & S rebuilt the forms for the steps.

15. On January 31, 2018, the Claimant paid $3,231.30 to J & S and issued two checks in the following amounts: $1,131.30 and $2,100.00.

16. In or about February 2018, the Respondent abandoned the Front Porch project.

17. The Claimant hired East Coast Inspections, LLP (East Coast) to inspect the Front Porch work performed by the Respondent.

18. On October 5, 2018, East Coast conducted the inspection and issued a report.

19. On February 22, 2019, the Claimant contracted with Dun-Rite Contractors (Dun-Rite) for the following services:[4]

- demo front porch & block
- dig & pour new footers for porch
- install new block foundation for porch and parge[5]
- pour new porch concrete slab
- remove existing stack block wall at front porch and reset after new porch is complete
- form and pour new concrete steps at porch
- form and pour new walk from driveway to new porch
- remove existing porch soffit and install new vinyl

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[4] The following was offered in the Dunn-Rite contract for $3,000.00 and $1,000.00, respectively:
OPTIONAL ITEMS:
- install approximately 780 SF of asphalt for parking pad (NOT IN CONTRACT PRICE)
- final grade and seed (NOT IN CONTRACT PRICE)

[5] This term was not defined during the hearing.

- install new white vinyl porch railing
- install new white vinyl railing at steps to porch and driveway
- install 1 pole light at driveway steps
- tint for front porch only – color to be selected from options available

Cl. Ex. 7.

20. The total cost of the Dun-Rite contract was $23,875.00 with an additional $225.00 for the tint for the front porch; $250.00 for the pole light; and $950.00 for the vinyl soffit. The tint, pole light and soffit were not related to the Respondent's contract.

21. The Claimant paid Dun-Rite $27,450.00 in the following amounts:

- February 27, 2019 = two payments of $7,025.00
- April 23, 2019 = $7,025.00
- May 2, 2019 = $6,375.00.

22. Dun-Rite hired J & S to complete some of the work in its contract with the Claimant. J & S used materials purchased by the Respondent to complete the Dun-Rite contract.

23. Neither the Respondent nor Dun-Rite obtained any permits for their work.

24. The Claimant sustained an actual monetary loss in the amount of $10,231.30.

## DISCUSSION

**Legal Framework**

An owner may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor." Md. Code Ann., 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." *Id.* § 8-401. The Commission may not award "an amount in excess of the amount paid by or on behalf of the claimant to the contractor against whom the claim is filed." *Id.* § 8-404(e)(5).

**Statutory Eligibility**

Certain claimants are excluded from recovering from the Fund altogether. In this regard, a claimant must prove that: (a) the claimant resides in the home as to which the claim is made, or owns no more than three dwelling places; (b) the claimant is not an employee, officer or partner of the contractor; or the spouse or other immediate relative of the contractor or the contractor's employees, officers or partners; (c) the work at issue did not involve new home construction; (d) the claimant did not unreasonably reject the contractor's good faith effort to resolve the claim; (e) the claimant complied with any contractual arbitration clause before seeking compensation from the Fund; (f) there is no pending claim for the same loss in any court of competent jurisdiction and the claimant did not recover for the actual loss from any source; and (g) the claimant filed the claim with the MHIC within three years of the date the claimant knew, or with reasonable diligence should have known, of the loss or damage. Md. Code Ann., Bus. Reg. §§ 8-101(g)(3)(i); 8-405(c), (d), (f), and (g); 8-408(b)(1).

**Burden of Proof**

In this case, the Claimant seeks reimbursement from the Fund and bears the burden of proof. Md. Code Ann., Bus. Reg. § 8-407(e). Pursuant to COMAR 28.02.01.21K, the party asserting "[a]n affirmative defense bears the burden of proof regarding the defense" by a preponderance of the evidence. To prove an assertion or a claim by a preponderance of the evidence means to show that it is "more likely so than not so" when all the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002). "In other words, 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 in your mind [ ] a belief that it is more likely true than not true." *Coleman*, 369 Md. at 125 n.16. Under this

standard, if the supporting and opposing evidence is evenly balanced on an issue, the finding on that issue must be against the party who bears the burden of proof. *Id.* With regard to the burden of persuasion and the weight of evidence, a trier of fact can properly accept all, some, or none of the evidence offered. *See Sifrit v. State*, 383 Md. 116, 135 (2004).

Based on the record before me, I find that the Claimant has met her burden for recovery under the Fund.

**The Merits**

*Undisputed facts*

The Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimant. The Rear Porch Railings and Kitchen Work was performed in a workmanlike manner. There is no dispute between the parties that the Respondent abandoned the job and, therefore, left an incomplete home improvement project. *See* Md. Code Ann., Bus. Reg. § 8-401. There was no contention that the Claimant unreasonably rejected the Respondent's good faith efforts to resolve the claim. *See Id.* § 8-405(d). The Claimant is neither married to nor a relative of the respondent, or any immediate relative of an employee, officer, or partner of the Respondent. *See Id.* § 8-405(f). The Claimant resides at 4909 Roller Road in Manchester, Maryland and does not own more than three residences or dwelling places. *Id.* The Claimant paid $7,000.00 to the Respondent for the Front Porch project.

*Unworkmanlike, Inadequate or Incomplete Home Improvement*

The Contract with the Claimant was for three separate projects; 1) Rear Porch Railings, 2) Front Porch and 3) Kitchen Work. The scope of work for the Front Porch to be performed under the Contract consisted of rebuilding the concrete front porch and railing and adding a sidewalk and steps down to the driveway. The Contract included demolition, excavation,

concrete framing, installation of a block wall, drain tile, stone and backfill. The core issue here is that the Respondent abandoned and failed to finish the Front Porch project, and the Claimant hired another contractor to complete the original contract.

Although the parties agree that the Respondent failed to finish the Front Porch as prescribed by the Contract, the parties disagree about whether the completed portions of the Front Porch were done in a workmanlike manner. According to the Claimant, the East Coast inspection outlined significant unworkmanlike concrete forms because they were constructed with improper materials. Additionally, East Coast found the concrete porch slab was poured and not properly supported by the block wall the Respondent constructed under it. As a result, the Claimant contends all of the Respondent's Front Porch work was unworkmanlike and had to be entirely redone. The Respondent, on the other hand, presented testimony that his way of constructing the Front Porch was simply one way of properly doing it and there were no plans drawn of the project. He indicated that he tried several times to rebuild to satisfy the Claimant but could not, and, the materials he bought and paid for were eventually used in reconstructing the block wall.

I considered the demeanor of witnesses when they testified. I concluded that both witnesses for the Claimant and the Respondent were supportive of some of both positions. *Maryland Bd. of Physicians v. Elliott*, 170 Md. App. 369, 387-89 (2006) (A finder-of-fact is authorized to determine the credibility of a witness's testimonial evidence based on the witness's demeanor.). Jim McElroy testified first. He said he had thirty years of experience as a contractor. Mr. McElroy served as the concrete subcontractor for both the Respondent and Dun-Rite. He testified that as subcontractor to the Respondent, he arrived at an agreed time and poured the first porch slab with "no complications." Some days or a week later, he returned

when he was informed that the forms were ready to pour the steps. According to Mr. McElroy, he was not happy with the Respondent's forms because they left gaps and the Respondent was "fine" with Mr. McElroy's changes. He testified that Respondent's forms were not "not incorrect" it was just a "preference" of his to have a smooth pour with no gaps. He testified he stayed out of the conversations between the Claimant and the Respondent and the Claimant took some time to understand that she would have to pay J & S more money to "fix" the forms. Mr. McElroy never poured the concrete steps until after he was hired by Dun-Rite.

In relation to Dun-Rite's revision of the Respondent's work, Mr. McElroy testified that it was a different way to do the project, but not the only way. According to Mr. McElroy, Dun-Rite's cost "pretty close to the same" as the Respondent's cost except the demolition J & S had to perform and the design changes. He explained that the approaches of both the Respondent and Dun-Rite would support the concrete porch. There was "nothing wrong" with the first porch he poured. In regard to the forms that the Respondent left on the slab after J & S poured the first front porch, Mr. McElroy testified that the forms could have been removed, but the Respondent was not "allowed back."

Mr. McElroy testified that at the time he was hired by Dun-Rite in 2019, he recognized the Claimant's address as a place where he had already worked. The second porch was a different design than that of the Respondent's Contract. He tore down the porch he poured for the Respondent and the block wall and dug a footer and foundation. He repoured the porch and used all the Respondent's blocks on site together with an extra pallet of blocks he purchased to rebuild the wall.

Robin Seipp was the head carpenter for the Respondent's Contract projects and testified that the Claimant was well satisfied with two of the three projects. The Front Porch was another

issue altogether because the Claimant, despite design changes, could not be satisfied. He testified that the walkway was the main concern and the Respondent did not know "which direction to go" to satisfy the Claimant. Corey Masimore testified that the Respondent removed things three or four times in an attempt to satisfy the Claimant's vision for the Front Porch.

Cliff Zimmerman's view was that the entire Front Porch project failed to meet workmanlike standards. He testified that "OSB"[6] wood was used to construct the front porch concrete forms and that using that material constituted poor workmanship because OSB would deteriorate and rot when exposed to moisture and invite the "easy access" of insects like termites and carpenter ants to the house. According to Mr. Zimmerman, OSB wood should not be used for concrete construction unless it is removed afterwards. OSB is appropriate when used for roofs, siding and sheathing and "should not be buried."

Scott Wallace testified that although he was on site for only some of the demolition, it "looked" to him like the wood went the entire length of the porch and, therefore, it could not be removed because it was under the entire slab and would leave "holes" and "gaps." Further, the porch had to be completely removed because the slab was overhanging the block support wall, was not supported at all, and would be further unsupported when the board rotted away. Mr. Wallace testified that Dun-Rite could have fixed the first porch without demolition, but it would have been "labor intensive" and "expensive" to remove the OSB wood. Although he did not know whether the OSB board went entirely underneath the slab, it was in "some." He testified the OSB lumber is not supposed to used outside and would rot in sixty years. Additionally, the front porch slab should have been supported by a poured footer and he disagreed that the block

[6] OSB was not further defined.

wall could be used as the front porch slab support. Therefore, according to Mr. Wallace, Dun-Rite was compelled to start the project anew from the foundation up.

Mr. Wallace hired J & S and, when J & S finished, there was no wood left under the slab, and the bearing wall for the front porch slab was not dry stacked block but poured concrete footers. He contended the only portion under the porch the Respondent constructed that was improper was the overhang. *See* Cl. Ex. 10 (right-hand photo). Mr. Wallace testified Dun-Rite replaced the step frames and arranged them in a semi-circle such that it could be poured in a continuous pour. Dun-Rite removed the vinyl porch soffit at the front entrance and added a rail across the porch and down the steps.

The Claimant verified that she asked that the steps and wall be reconfigured so she would not potentially hit the wall she felt was in her way when she backed her car from the garage. She testified that the Respondent stopped coming to her home in August 2017. Additionally, she paid the Respondent $7,000.00 in April and June of 2017 toward completing the Front Porch after he completed the other two projects in the Contract. She said the Respondent asked her to pay J & S to reconstruct the forms for the steps. She testified she paid the Respondent "everything he asked me for when he asked me."

*Analysis*

The Claimant and the Respondent could not agree on the design of the Front Porch project and it was torn down and rebuilt several times. Mr. McElroy testified that either the Respondent's or Dunn-Rite's design was proper for the front porch project including the retaining walls and step designs. He also testified that the wood the Respondent used to create the forms could be removed from the front porch slab and Mr. Wallace agreed. I give less weight to Mr. Zimmerman's testimony that the forms for the Front Porch slab could not be

removed, because two MHIC licensed contactors testified it was possible to remove them. The issue was cost, time, and effort. Furthermore, Mr. Zimmerman focused on the wood as a conduit for insects. Mr. Wallace agreed with the contention, but not convincingly. When questioned whether termites can be an issue due to the wood the Respondent used, he said, "there can be," and smiled. I was not convinced, presuming the wood was left as depicted in the exhibits, insect infestation was a certainty. Additionally, the slab was allegedly ok for sixty years according to Mr. Wallace.

Mr. Wallace was more convincing that the front porch slab was improper because of the way it was supported, but Mr. McElroy testified in opposition to him. There was opposing testimony from two licensed MHIC contractors. Mr. McElroy testified that either of the designs was proper and the front porch slab he poured was properly supported. Mr. Wallace testified that there were flaws because the slab was improperly supported and contained an overhang. The evidence, therefore, was in equipoise on this point and must be construed against the party with the burden of proof. I give less weight to Mr. Zimmerman's testimony that the Respondent's design was improper because he is not a licensed MHIC contractor and his design of the front porch also includes an overhang of the slab from the retaining wall. *See* Cl. Ex. 6.

The Respondent failed to complete the Contract and abandoned the home improvement project. He completed two of the three projects. The Claimant paid him $19,840.00 and then paid J & S $3,231.30 at the Respondent's request. Therefore, the Claimant paid a total of $23,071.30 to the Respondent for the Contract. She testified, uncontested, that $7.000.00 of the payments to the Respondent was specifically for the Front Porch and there was an additional $3,231.30 paid to J & S for rebuilding concrete forms related to the Front Porch project.

The Claimant contracted with Dunn-Rite for $23,875.00 including an additional $225.00 for the tint for front porch ($24,100.00). It was uncontested at the hearing that $250.00 of the contract was for the pole light, and $950.00 was for the vinyl soffit. Additionally, it was uncontested that the tint, pole light and soffit were not related to the Contract (i.e. $1,425.00). However, based on the evidence, the Claimant paid Dunn-Rite a total of $27,450.00. The discrepancy was not explained during the hearing. In fact, the Claimant was generally confused as to what she paid to whom for what. She was confident she paid what was asked of her and provided checks and check registers to show the amounts.

The testimony from the contractors was that the front porch slab forms could have been removed. Mr. Wallace testified removing the front porch slab would have been labor intensive and expensive but did not place a value on what it would have cost to "fix" the Respondent's work. Instead, he decided to totally dismantle the project and start from the foundation up and a $9,000.00 job became a $26,025.00 job ($27,450 paid to Dunn-Rite minus the $1,425.00 allegedly unrelated to the Respondent's Contract). Mr. McElroy testified that the jobs were similar in cost, except for the demolition. There was no evidence presented as to the cost of demolition, but I cannot fathom that it cost $17,025.00 and there was countervailing evidence of the cost to finish the Respondent's work. Equally absent from the evidence was any breakdown of the costs associated with Dunn-Rite's contract beyond the $1,425.00 carved out for the tint, pole light and soffit. It was uncontested that Dunn-Rite used the blocks that the Respondent purchased to complete their design, but Mr. Wallace did not provide evidence as to how that affected his contract with the Claimant. Neither the Respondent nor Dun-Rite obtained any permits for their work, so neither of their projects was subject to an inspection that might support each contractor's claim that their design was proper.

The Respondent abandoned the Contract and failed to complete the Front Porch after completing some of the work. The evidence supports that the first slab was workmanlike. The amount of time and expense to remove the forms from the first porch slab was not provided and Dunn-Rite demolished it. Whatever work was necessary to complete the Front Porch project was not addressed by either party outside of complete demolition and rebuilding. The Claimant is due compensation from the fund, but not for the entire demolition and rebuilding. The claim filed by the Claimant does not support what amount she should be paid because its calculations are not supported by the evidence. The revised complaint the Claimant submitted to the Fund provided the following:

| | | | |
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| 1. | Date of original contract | 1. | January 23, 2016 |
| 2. | Date work done by [Respondent] | 2. | Started March 2017 |
| 3. | Amount of Original Contract | 3. $ | 24,300 (9,000.00 front porch) |
| 4. | Amount of any changes to original contract | 4. $ | N/A |
| 5. | Total amounts of lines 3 and 4 | 5. $ | 24,300 ($9,000.00 for front) |
| 6. | Amount paid to or on behalf of contractor | 6. $ | 7,000.00 – for front |
| 7. | Estimated value of work done by the [Respondent] (PROVIDE PROOF) | 7. $ | N/A |
| 8. | Subtract line 7 from line 6 and enter here | 8. $ | 7,000.00 |
| 9. | Amount paid or payable to restore, repair, replace or complete work done by the [Respondent], which is poor or unworkmanlike or otherwise inadequate or incomplete (PROVIDE PROOF) | 9. $ | 23,875.00 |

[illegible]

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|---|---|---|---|
| 10. | Amount of claim. Add amounts on line 6 and 9 and subtract the amount of line 5 | 10. $ | 21,875.00 |
| 11. | Enter claim amount from either line 8 or 10 | 11. $ | 21,875.00 |

Therefore, a unique calculation must be performed using the figures in evidence.

*Amount of Actual Loss*

Having found eligibility for compensation because the Respondent abandoned the project, I must determine the amount of the Claimant's actual loss and the amount 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. Md. Code Ann., Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1). The MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work unless a unique calculation is necessary.

In this case, the Respondent performed some of the work required per the Contract, and the Claimant retained another contractor to complete that work and the new contractor demolished the entire Front Porch project and started over. In accordance with the special circumstances outlined in the findings above, I conclude this claim requires a unique measurement.[7] COMAR 09.08.03.03B(3). 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

[7] I considered the calculations provided by fund and disregard them because the calculations presume the demolition of the entire project was necessary and they used the entire cost of the Contract ($24,300.00) when it was uncontested that two thirds of the Contract projects were performed in a workmanlike manner to the satisfaction of the Claimant.

> 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).

Based on this formula, the Claimant's actual loss is $10,231.30.

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| Amount paid under the Contract..... | $10,231.30[8] |
| Plus amount paid to Dunn-Rite..... | $26,025.00 |
| Subtotal..... | $36,256.30 |
| Minus original Contract price..... | $ 9,000.00 |
| Total..... | $27,256.30 |

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. Md. Code Ann., Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a). In this case, the Claimant's alleged actual loss of $27,256.30 exceeds $20,000.00. In addition, that number is inflated because the evidence is that the projects should have cost about the same (i.e. $9,000.00). The amounts the Respondent should be credited for the first slab that J & S poured, and the blocks that were reused in the Dunn-Rite contract were not valued, nor was the value of what was necessarily reconstructed after the Respondent abandoned the project. Further, the Fund may not award "an amount in excess of the amount paid by or on behalf of the claimant to the contractor against whom the claim is filed." Md. Code Ann., Bus. Reg. § 8-404(e)(5); COMAR 09.08.03.03B(4). I calculate that the costs associated with removing the forms, using the blocks and repouring the steps offset

[8] This figure represents the $7,000.00 paid to the Respondent in April and June 2017 and the $3,231.30 paid to J & S in January 2018.

any demolition and rebuilding of forms bringing the total cost of finishing the abandoned job to the same cost paid for its initial completion.

Therefore, in this case, the Claimant's recovery is limited to $10,231.30. Md. Code Ann., Bus. Reg. § 8-405(e); COMAR 09.08.03.03.

## PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss $10,231.30 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & 2020 Supp.); COMAR 09.08.03.03B(3). I further conclude that the Claimant is entitled to recover $10,231.30 from the Fund.

## RECOMMENDED ORDER

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

**ORDER** that the Maryland Home Improvement Guaranty Fund award the Claimant $10,231.30; 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;[9] and

[9] *See* Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii); COMAR 09.08.01.20.

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



November 25, 2020
Date Decision Issued

William F. Burnham
Administrative Law Judge

WFB/kdp
# 189184

## *PROPOSED ORDER*

***WHEREFORE, this 8th day of March, 2021, Panel B of the Maryland Home Improvement Commission approves the Recommended Order of the Administrative Law Judge and unless any parties files with the Commission within twenty (20) days of this date written exceptions and/or a request to present arguments, then this Proposed Order will become final at the end of the twenty (20) day period. By law the parties then have an additional thirty (30) day period during which they may file an appeal to Circuit Court.***

*I Jean White*

***I Jean White***
***Panel B***
***MARYLAND HOME IMPROVEMENT COMMISSION***

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| **IN THE MATTER OF THE CLAIM OF CORINDA MANUEL AGAINST THE MARYLAND HOME IMPROVEMENT GUARANTY FUND FOR THE ACTS OR OMISSIONS OF JAMES MASIMORE T/A MASIMORE CONTRACTORS, INC.** | * * * * * * * | **MARYLAND HOME IMPROVEMENT COMMISSION**<br><br>**MHIC CASE NO. 19(75)182**<br>**OAH CASE NO. LABOR-HIC-02-19-40275** |

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**FINAL ORDER**

This matter was originally heard before an Administrative Law Judge ("ALJ") of the Office of Administrative Hearings ("OAH") on November 25, 2020. Following the evidentiary hearing, the ALJ issued a Proposed Decision on December 9, 2019, finding that Corinda Manuel ("Claimant") suffered an actual loss resulting from the acts or omissions of James Masimore t/a Masimore Contractors, Inc. ("Contractor") and granting the Claimant an award of $10,231.30 from the Home Improvement Guaranty Fund. (Proposed Decision p. 8.) In a Proposed Order dated March 8, 2021, the Maryland Home Improvement Commission ("MHIC" or "Commission") affirmed the Proposed Decision of the ALJ. The Claimant subsequently filed exceptions to the MHIC Proposed Order.

On April 15, 2021, a three-member panel ("Panel") of the MHIC held a remote hearing on the exceptions filed in this matter. Andrew Vance, Esq., represented the Claimant. James Masimore participated without counsel. Assistant Attorney General Justin Dunbar appeared at the exceptions hearing on behalf of the Guaranty Fund. The Commission entered the following preliminary exhibits as part of the record of the exceptions hearing without objection: 1) hearing notice; 2) transmittal letter, ALJ Proposed Decision, and MHIC Proposed Order; 3) Claimant's exceptions. Neither party produced a copy of the transcript of the hearing before the ALJ. Therefore, the Panel's review of the record was limited to the preliminary exhibits for the exceptions hearing, the OAH Proposed Decision, and the exhibits offered as evidence at the OAH

hearing. COMAR 09.01.03.09(G) - (I).

The claim in this proceeding relates to a contract between the parties to 1) install rear porch railings on the Claimant's home for $1,300.00, 2) demolish and replace the Claimant's front porch and walkway and construct a retaining wall for $9,000.00 (hereinafter "front porch project") and 3) remodel the Claimant's kitchen for $14,000.00, which the ALJ deemed by be three separate projects. The parties agreed, and the ALJ found, that the Contractor satisfactorily completed the rear porch railing and kitchen remodeling projects and that the Contractor failed to complete the front porch project.

There was conflicting evidence as to whether the Contractor's work with respect to the front porch project was workmanlike and whether and the extent to which demolition was necessary to correct and complete the project. The ALJ found that the Contractor's installation of the slab for the front porch was workmanlike but that the forms for the slab had to be removed, which the Contractor did not do before abandoning the project. Therefore, the ALJ found that the Claimant was not entitled to compensation for the entire demolition and rebuilding of the front porch. (Proposed Decision p. 16.)

The ALJ determined that the facts justified the use of a unique formula to calculate the Claimant's actual loss because the Claimant's contract with a subsequent contractor, Dun-Rite, to complete the front porch project included the complete demolition of the front porch slab and because the contract between the parties involved three distinct projects, two of which the Contractor completed satisfactorily. Therefore, the ALJ, rather than using the entire original contract price of $24,300.00 to calculate the Claimant's actual loss, used only the $9,000.00 price for the front porch project. In his calculation, the ALJ deemed the Claimant to have paid $10,231.30 under the contract, which included $7,000.00 paid directly to the Contractor for the

front porch project and $3,231.30 that the Claimant paid to the Contractor's concrete subcontractor, J&S, to redo the concrete forms that the Contractor built for the front steps. The ALJ found that the Dun-Rite's contract was for the same scope of work as the original contract except that it included $1,200.00 for a pole light and vinyl soffit that were not part of the original contract and reduced the $23,875.00 price to $22,625.00. The ALJ found that the amount paid to Dun-Rite was excessive because the Dun-Rite contract price included the unnecessary demolition and reconstruction of the front porch slab and did not account for stacked block materials that the Contractor purchased and Dun-Rite reused. The ALJ ultimately found that the Claimant suffered an actual loss of $10,231.00, reasoning both that that figure represented the reasonable cost to complete the front porch project and that the actual loss was capped at $10,231.00 under *Md Code Ann.*, Bus. Reg. § 8-405(e)(1) because that is the amount the Claimant paid under the original contract.

On exception, the Claimant argued that the ALJ erred in finding that the defective construction of the front porch slab could be remedied without demolishing the slab and erred by dividing the three projects that were the subject of the parties' contract for purposes of calculating her actual loss.

The Commission agrees that the ALJ erred in finding that the defective construction of the front porch slab could be remedied without demolishing the slab. The Claimant presented photographs of the concrete slab constructed by the Contractor with the wood form, including an OSB sheet used for the bottom of the form, left underneath the slab. (Claimant's OAH Hearing Exhibit 6.) The Commission finds the Claimant's Home Inspector's statement that the wood form could not be removed from underneath the slab (Claimant's OAH Hearing Exhibit 6) to be persuasive and therefore finds that the demolition of the slab was necessary to remedy the

Contractor's defective work.

The Commission also agrees with the Claimant that the ALJ erred in calculating her actual loss, but does not agree with the Claimant's suggested calculation. As the Claimant notes in her exceptions, to calculate a claimant's actual loss when a contractor has performed work under a contract and the claimant has hired another contractor to correct and complete the work, COMAR 09.08.03.03B(3)(c) calls for the consideration of the original *contract* price, not the price of the specific defective component of the contract work, and the amount a homeowner has paid to or on behalf of the contractor under the original *contract*, not the amount paid to or on behalf of the contractor under the original contract for a specific defective component of the contract work. The Commission holds that the ALJ erred by applying a unique measurement to calculate the Claimant's actual loss rather than applying the formula set forth in COMAR 09.08.03.03B(3)(c). Although the contract between the parties included separate prices for three specific projects, it was a single contract. *Md Code Ann.*, Bus. Reg. § 8-405(e)(5) protects contractors from excessive liability by capping Guaranty Fund awards at $20,000.00 or the amount paid by a claimant under their contract. Expanding the protection of the Contractor in this proceeding by further limiting the award to the amount paid by the Claimant for one component of the contract is not warranted.

The Commission also finds that the ALJ erred in relying on the Dun-Rite contract to determine the cost to correct or complete the Contractor's deficient work. The scope of work and materials under the contract between the parties differed from those under the Dun-Rite contract in significant respects. J&S, the concrete subcontractor that poured the concrete for both the Contractor and Dun-Rite testified that the porch installed by Dun-Rite was a different design than the porch installed by the Contractor. (Proposed Decision p. 11.) The Contractor's porch was supported by stacked block walls, whereas Dun-Rite dug footers and poured a concrete foundation

to support its porch. (Proposed Decision pp. 12-13; OAH Hearing Claimant's Exhibits 11-14.) Scott Wallace, the owner of Dun-Rite, testified that he used the blocks that the Contractor had used for the front porch project plus another pallet of blocks that he purchased. (Proposed Decision p. 11.) He also testified that he replaced the step frames built when the Contractor was working on the project and arranged them in a semicircle pattern. The photographs in the record do not demonstrate that the Dun-Rite steps were similar in design to the Contractor's steps. Although the concrete subcontractor testified that the cost of pouring the concrete for the Contractor was approximately the same as the cost of pouring the concrete for Dun-Rite, the Dun-Rite contract price for the front porch project was more than twice the price of the front porch project in the contract between the parties. In addition, the Dun-Rite contract did not include the demolition and removal of the existing steps, as the Contractor had already performed that work. Finally, the Dun-Rite contract included the installation of new railings on the steps to the porch and driveway that were not included in the original contract. (OAH Hearing Claimant's Exhibits 1 and 7.) Accordingly, the Commission finds that the Claimant has failed to prove that the front porch project under the Dun-Rite is for the same scope of work as the front porch project in the contract between the parties and, therefore, that the ALJ's reliance on the Dun-Rite contract price as the Claimant's cost to correct and complete the Contractor's work was erroneous.

Given the lack of other evidence of the cost to correct and complete the Contractor's work, the Commission finds that the original contract price, plus the cost of having the concrete subcontractor rebuild the form for the steps under the original contract, represents the cost to correct or complete the work. The Commission agrees with the ALJ's finding that the Contractor failed to complete the front porch project. In addition, contrary to the ALJ's finding, the Commission finds that the Contractor's construction of the front porch was unworkmanlike

because the front porch slab was poured on top of wood forms that could not reasonably be removed (OAH Hearing Claimant's Exhibits 6, 10, 11, and 12.) Therefore, the work that the Contractor did complete with respect to the front porch slab and support had little value to the Claimant, rather, it had to be demolished to correct and complete the project, which added some cost to the correction and completion of the project, although there was no evidence of that cost. Conversely, the Contractor provided stacked block materials that were reused by Dun-Rite and the Contractor had already demolished the existing walkway, but there also is no evidence of the value of the demolition work or materials.

The Commission finds that the Claimants actual loss is $7,771.00, calculated as follows:

| | |
|---|---|
| $19,840 | Amt. paid to Contractor under original contract |
| + $3,231 | Amt. paid on behalf of Contractor to J&S under change to original contract |
| + $12,231 | Cost to correct and complete contract work |
| $35,302 | |
| - $27,531[1] | Original contract price including change order |
| $7,771 | Actual Loss |

Having considered the parties' arguments, the evidence contained in the record, and the ALJ's Recommended Decision, it is this 19th day of July 2021, **ORDERED:**

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

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

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

[1] The Commission notes that the Claimant erroneously included the $3,231.00 in the amount the Claimant paid to or on behalf of the Contractor but failed to include it in the original contract price in her proposed calculation of actual loss. (Exceptions Hearing MHIC Exhibit 3 p. 6.)

D. That the Claimant is awarded $7,721.00 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);

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

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**