IN THE MATTER OF THE CLAIM	*	**BEFORE STEPHEN W. THIBODEAU,**
OF TENISHA THOMPSON,	*	**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 DWIGHT HIGGS,	*	
T/A 3DS CONSTRUCTION LLC,	*	**OAH No.: LABOR-HIC-02-21-27305**
RESPONDENT	*	**MHIC No.: 21 (75) 718**

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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 June 24, 2021, Tenisha Thompson (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund), under the jurisdiction of the Department of Labor (Department), for reimbursement of $14,737.00 for actual losses allegedly suffered as a result of a home improvement contract with Dwight Higgs, trading as 3DS Construction LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015).[1] On

[1] Unless otherwise noted, all references hereinafter to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.

November 17, 2021, the MHIC issued a Hearing Order on the Claim. On November 18, 2021, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On January 24, 2022, I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. Hillary A. Baker, Assistant Attorney General, Department, represented the Fund. The Claimant represented herself. 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. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021); Code of Maryland Regulations (COMAR) 09.01.03; and 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 - Estimate prepared G4S Compliance & Investigations, Inc., prepared June 25, 2021

Clmt. Ex. 2 - Contract between the Claimant and the Respondent, December 28, 2020

Clmt. Ex. 3 - Photo of check from M.T. Key Turnover Service, LLC, for $5,100.00, with accompanying stub, made payable to the Respondent, December 28, 2020

Clmt. Ex. 4 - Text messages from Michael Reese to the Claimant, December 28, 2020

Clmt. Ex 5 - Photo of check stubs showing payment to the Respondent for $2,800.00 and $200.00, January 5, 2021

Clmt. Ex. 6 - Email from the Respondent to the Claimant, January 18, 2022

Clmt. Ex. 7 - Email from the Claimant to the Respondent, January 31, 2021

Clmt. Ex. 8 - Email from the Claimant to the Respondent, January 29, 2021

Clmt. Ex. 9 - Receipt for television issued to the Claimant, November 26, 2020

Clmt. Ex. 10 - Receipt from BBT Dumpster Rental, April 6, 2021

Clmt. Ex. 11 - Email from Brock Murray of AROCON Roofing and Construction LLC, May 7, 2021, with attached home improvement contract dated May 6, 2021

Clmt. Ex. 12 - Maryland Insurance Administration Property and Casualty Complaint Form filed by the Claimant, September 13, 2021

Clmt. Ex. 13 - Check for $5,100.00 from Joseph Vincent Roman, the Claimant's husband, to Michael Reese, December 29, 2020

Clmt. Ex. 14 - Receipt from Essex Furniture, LLC, January 22, 2021

Clmt. Ex. 15 - Letter from Global Indemnity Group to the Respondent, May 10, 2021

Clmt. Ex 16 - Photos taken by Joseph Vincent Roman on January 5, 2021, subnumbered as follows:

- 16a: Photo of exterior of the Claimant's home showing debris from the Claimant's roof;
- 16b: Photo of debris from the Claimant's roof covering the HVAC unit for the home

Clmt. Ex. 17 - Photos taken the Claimant of various views of the Claimant's home, taken January 2022, subnumbered as follows:

- 17a: Photo of corner of shingles covering the gutter;
- 17b: Photo of side of home;
- 17c: Photo of rear gutters of home;
- 17d: Photo of rear of home downspout;
- 17e: Photo of front of home downspout;
- 17f: Photo of front of home downspout;
- 17g: Photo of side of home fascia boards on roof;
- 17h: Photo of rear of home downspout;
- 17i: Photo of displaced bricks near roof of home;
- 17j: Photo of displaced bricks near roof of home;
- 17k: Photo of displaced bricks near roof of home;
- 17l: Photo of debris on roof of home;
- 17m: Photo home rear awning;
- 17n: Photo of hole in home rear awning.

Clmt. Ex. 18a-18k - Eleven photos of the ceiling of the third level of the Claimant's home, taken by the Claimant, April 5, 2021, showing various views of mold on the plywood and joists in the ceiling

Clmt. Ex. 19a-19b - Two photos of buckets of water in a bedroom of the Claimant's home, taken by the Claimant, January 15 and 16, 2021

Clmt. Ex. 20 - Photo of damaged property placed in dumpster outside home, taken by the Claimant, April 6, 2021

Clmt. Ex. 21 - Two photos of spoiled food and damaged refrigerator in Claimant's home, taken by the Claimant, January 16, 2021, subnumbered as follows:

- 21a: Photo of spoiled food;
- 21b: Photo of damaged refrigerator

Clmt. Ex. 22 - Photos of second level bedroom of the Claimant's home, taken by the Claimant, subnumbered as follows:

- 22a: Photo of corner of bedroom showing exposed floor and ductwork, December 2020
- 22b: Photo of corner of bedroom showing exposed ceiling, December 2021;
- 22c: Photo of corner of bedroom, December 2021;
- 22d: Photo of corner of bedroom showing water damage, December 2021;
- 22e: Photo of corner of bedroom, December 2021;
- 22f: Photo of exposed ceiling in bedroom, December 2021;
- 22g: Photo of ductwork and plastic covered ceiling in bedroom, December 2021;
- 22h: Photo of floor of bedroom, December 2021

Clmt. Ex. 23 - Photo of hole in hallway ceiling of the Claimant's home, taken by the Claimant, January 7, 2021

Clmt. Ex. 24 - Photo of water damage near roof access door in the Claimant's home, taken by the Claimant, December 20, 2021

Clmt. Ex. 25 - Photos of third level kitchen of the Claimant's home, taken by the Claimant, subnumbered as follows:

- 25a: Photo of kitchen, December 2020;
- 25b: Photo of ceiling collapse in kitchen, January 5, 2021;
- 25c: Photo of exposed ceiling in kitchen, January 5, 2021;
- 25d: Photo of debris in kitchen, January 5, 2021;
- 25e: Photo of cleanup of kitchen, April 2021;
- 25f: Photo of cleanup of kitchen, April 2021;
- 25g: Photo of water valve in kitchen, April 2021

Clmt. Ex. 26 - Photos of third level master bedroom of the Claimant's house, taken by Claimant April 2021, subnumbered as follows:

- 26a: Photo of damaged drywall under window;
- 26b: Photo of exposed ceiling;
- 26c: Photo of exposed ceiling;
- 26d: Photo of exposed ceiling and debris from ceiling on bed;
- 26e: Photo of debris from ceiling on bed;
- 26f: Closeup photo of debris from ceiling on bed;
- 26g: Photo of exposed ceiling and debris from ceiling on bed;
- 26h: Photo of damaged drywall underneath window;
- 26i: Photo of exposed ceiling;
- 26j: Photo of floor;
- 26k: Photo of floor and wall;
- 26l: Photo of floor and wall;
- 26m: Photo of floor

Clmt. Ex. 27 - Photo of scratched floor in hallway of third floor of the Claimant's house, taken by Claimant, December 2021

Clmt. Ex. 28 - Five photos of debris inside ceiling of the third floor of Claimant's house, taken by Claimant, April 2021

I admitted the following exhibits offered by the Respondent, except as otherwise noted:

Resp. Ex. 1 - Eight photos of work performed on the Claimant's roof, taken by Leroy Forbes, Jr., January 5, 2021

Resp. Ex. 2 - Photo of work performed on the Claimant's roof, taken by Leroy Forbes, Jr., January 5, 2021

Resp. Ex. 3 - (Offered but not admitted)

Resp. Ex. 4 - Receipt for payment from the Respondent to Joseph Roman for $150.00, January 6, 2021

I admitted the following exhibits offered by the Fund:

GF Ex. 1 - Notice of Hearing, December 3, 2021

GF Ex. 2 - Hearing Order, November 17, 2021

GF Ex. 3 - MHIC Licensing History for the Respondent, printed December 13, 2021

GF Ex. 4 - Letter from the MHIC to the Respondent, July 8, 2021, with attached Home Improvement Claim Form from the Claimant, received by the MHIC June 14, 2021

Testimony

The Claimant testified and presented the testimony of:

1. Joseph Roman, the Claimant's husband; and

2. The Respondent.

The Respondent testified and presented the testimony of Leroy Forbes, Jr., who assisted the Respondent on the Claimant's home improvement project.

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 MHIC license number 118661.

2. On December 28, 2020, the Claimant and the Respondent entered into a contract for a full roof replacement at the Claimant's home (Property) at 3037 E. Federal Street, Baltimore, Maryland (Contract). Specifically, the Contract called for the Respondent to remove the existing main roof of the Claimant's home; inspect the integrity of the wood on the roof deck; flash all necessary areas protruding from the roof top to create a watertight seal; clean up area and run magnet to pick up all loose nails; install a flat roof by torching down a new modified rubber roofing system over the entire flat roof; install new 3-tab shingle roof with a felt waterproof barrier; and replace all gutters and downspouts at the Property.

3. The original agreed-upon Contract price was $5,700.00. On January 5, 2021, the Claimant and the Respondent orally agreed to additional $3,000.00 of work, bringing the total contract price to $8,700.00.

4. The Contract stated that work would be completed within three to four weeks of initial payment on the Contract. The Contract required the Respondent to obtain all necessary permits to complete the work.

5. The first payment on the Contract, for $5,100.00, was made on December 28, 2020. The payment was made to the Respondent via a check from M.T. Key Turnover Service, LLC, (M.T. Key) an entity owned by Michael Reese.[2] M.T. Key made two additional payments to the Respondent on January 5, 2021, for $2,800.00 and $200.00.

6. On December 29, 2020, the Claimant's husband, Joseph Roman, paid Michael Reese $5,700.00 towards payment on the Contract advanced by M.T. Key.

7. Work on the Contract began January 4, 2021.

8. During the work, the Respondent's workers did not take proper safety precautions in the removal of the existing roof, including not being properly harnessed while hanging off the roof, and not using proper tools for the removal of the shingles. Additionally, the Respondent's workers were carelessly discarding debris from the roof onto the street and onto the rear awning and front porch of the Property. The workers also covered the Property's HVAC unit with debris.

9. During the demolition phase, three different workers, including the Respondent, fell through the roof and into the interior third level of the Property, causing large holes in the ceiling of the third level of the Property.

10. On January 5, 2021, workers again fell through various parts of the roof causing damage to the ceiling, and workers shattered a bedroom window. The Respondent's worker cleaned the debris on the interior of the home, which was caused by damage to the ceiling.

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[2] Other than identifying Mr. Reese by name and noting that he was an intermediary with whom the Claimant financed the project, no other information was provided regarding Mr. Reese's role with respect to the Contract.

11. On January 5, 2021, the Respondent installed new plywood on the flat roof and torched down the rubber on the roof.

12. On January 12 and 13, 2021, the Respondent's subcontractor installed shingles on the roof. However, the work was incomplete because shingles were not installed on the front porch roof.

13. On January 13, 2021, the Respondent began work on replacing the gutters and downspouts through a subcontractor. However, only one gutter and downspout were replaced.

14. On January 14 and 15, 2021, the roof began to leak, permitted a water leak into the interior third level of the Property, and caused water damage to the Property and the Claimant's personal property.

15. On January 16, 2021, two of the Respondent's workers returned to the Property to make remedial repairs to the roof to stop the leaks. However, on January 19, 2021, it rained again, and the leaks to the interior of the Property continued.

16. On January 20, 2021, and again on January 28, 2021, the Respondent returned to the Property to properly seal the roof and stop the leaks. However, on January 28, 2021, as the Respondent attempted to fix the roof, he damaged the property further by ripping the fascia boards off the side of the home.

17. On January 28, 2021, the Claimant instructed the Respondent to stop work on the project because it had not been timely completed as required by the Contract and because of the multiple issues regarding the Respondent's installation of the new roof.

18. On January 29, 2021, the Respondent contacted the Claimant one last time to request to return to the Property in order to complete the work. At that time, the Claimant refused to allow the Respondent to return due to the poor progress on the Contract.

19. The Respondent never obtained the necessary permits for the project.

DISCUSSION

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

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) ("The Fund may only compensate claimants for actual losses . . . incurred as a result of misconduct by a licensed contractor."). "'[A]ctual loss' means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." Bus. Reg. § 8-401. For the following reasons, I find that the Claimant has proven eligibility for compensation.

There is no dispute that the Respondent was a licensed home improvement contractor at the time he entered in the Contract with the Claimant. The Respondent does dispute that he performed unworkmanlike, inadequate, or incomplete home improvements. The Claimant provided extensive evidence that the Respondent performed unworkmanlike, inadequate, and incomplete home improvements from the beginning of the work on the Contract. Specifically, the removal of the Claimant's existing roof was done in an unworkmanlike manner, with debris being cast off from the roof and burying the Claimant's HVAC unit. Several of the Respondent's workers fell through the roof and into the interior of the Claimant's home. The Respondent did not pull permits for the project despite language in the Contract showing it was his responsibility to do so. After the

roofing plywood was installed and the rubber layer was torched down, the roof experienced numerous leaks on the third level of the home. The roof leaks continued after the shingles of the roof were only partially installed. Further, the gutters and downspouts were only partially installed. Finally, during the Respondent's last attempt to correct and repair the work performed by his workers, the Respondent continued to damage the Claimant's home when he ripped fascia boards off the roof that were left unrepaired. As a result of the Respondent's multiple attempts to correct the faulty work on the project that resulted in further damage to the Claimant's property, the Claimant instructed the Respondent to stop work on the project.

At the hearing, the Respondent essentially provided two explanations for why the project was not completed in a professional manner. Neither explanation is persuasive. First, the Respondent said many of the subcontractors he hired were responsible for the poor workmanship and he was not directly responsible. However, it is undisputed that the Respondent is responsible for the conduct of his subcontractors because he signed the Contract with the Claimant ensuring the work would be professionally done. *See* Bus. Reg. § 8-405(b) ("For purposes of recovery from the Fund, the act or omission of a licensed contractor includes the act or omission of a subcontractor, salesperson, or employee of the licensed contractor, whether or not an express agency relationship exists.")

In the alternative, and to demonstrate that at least some of the work performed by the Respondent's crew was professionally done, the Respondent called Mr. Forbes as a witness to testify to the work he witnessed being performed by the Respondent's workers, following the removal of the old roof and during at the beginning of the new roof install. However, it was unclear what role Mr. Forbes had with respect to the project. He denied being the Respondent's employee and denied being a subcontractor. Yet, Mr. Forbes stated his role was to "supervise" the

workers and check on everything when the Respondent was not present. Notably, Mr. Forbes is not a licensed home improvement contractor himself. Nor does Mr. Forbes have any apparent experience in home improvement work generally, or roofing specifically. Mr. Forbes' current stated profession is as a "writer." As a result, I gave no weight to Mr. Forbes' opinion as what he observed as to the quality of the work performed by the Respondent's workers.

The second reason the Respondent gave as to why the project was never completed in a workmanlike manner was the Claimant's refusal to allow him to continue work after January 29, 2021. Indeed, the Respondent noted that the roof would continue to leak and asked for an opportunity to correct his previous poor workmanship. The Claimant refused to allow the Respondent to continue the work. Potentially, this could be a bar to compensation to the fund, as the Commission may deny a claim if a claimant "unreasonably rejected good faith efforts" by the Respondent to resolve the claim. Bus. Reg. § 8-405(d). However, under the circumstances of this case, I do not find the Claimant's rejection of the offer by the Respondent to be unreasonable because of the Respondent's continued incompetence and unworkmanlike performance throughout his work on the Claimant's roof. The Claimant allowed the Respondent to attempt repairs to the roof three times. On the third attempt, on January 28, 2021, the Respondent tried to fix the Claimant's roof but again damaged the home by ripping the fascia boards off the roof. At that point, and given the numerous work issues caused by the Respondent and his workers, it was not unreasonable for the Claimant to say that he had enough and he properly refused the Respondent's offer. To that end, I find that the Respondent performed unworkmanlike, inadequate, and incomplete home improvements in relation to the Contract with the Claimant, and the Claimant is eligible for compensation from the Fund.

Having found eligibility for compensation I must determine the amount of the Claimant's actual loss and the amount, if any, that the Claimant is entitled to recover. As a preliminary matter, 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). "Consequential damages" are "losses that do not flow directly and immediately from an injurious act but that result indirectly from the act." Damages definition, *Black's Law Dictionary,* (11th ed. 2019), *available at* Westlaw. Here, the Claimant provided extensive evidence with regard to loss of personal property, including clothing, a television set, bedding, furniture, and a dumpster rental to facilitate clean-up of damage related to the water damage to the property after the roof began to leak. Some receipts were provided for the cost of replacement items; some were not. And there is no dispute that those damages were an indirect result of the Respondent's poor workmanship on the Contract. Regardless, none of what was claimed in this regard is compensable by the Fund, as all of those damages are consequential damages for which the Fund may not compensate the Claimant.

MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work. In this instance, the Respondent performed some work under the Contract, and the Claimant intends to retain other contractors to complete or remedy that work. 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).

First, as to the amount the Claimant paid the Respondent, all the payments to the Respondent were made by Michael Reese, d/b/a M.T. Key Turnover Service, LLC. The Claimant provided copies of checks and check stubs from M.T. Key to the Respondent totaling $8,100.00. There is no dispute that the $8,100.00 M.T. Key paid to the Respondent on the Contract was on behalf of the Claimant, as the Claimant was financing the project through M.T. Key. *See* Bus. Reg. § 8-405(e)(5). Therefore, the total amount the Claimant paid on the Contract was $8,100.00.

The Claimant received an estimate of $14,737.50 from AROCON Roofing and Construction LLC (AROCON) to remedy the Respondent's poor workmanship and install a new roof. AROCON is a licensed home improvement contractor and no one disputed the reasonability of AROCON's estimate. As such, applying the second part of the formula, I find that the amount to remedy the Respondent's poor work was $14,737.50.

Finally, both the Claimant and the Respondent agree that total agreed upon price for the Contract was $8,700.00. Therefore, applying the formula, the Claimant's actual loss is $14,137.50 ($8,100.00.00 paid to the Respondent plus $14,737.50 required to remedy the work minus the original Contract price of $8,700.00 equals $14,137.50).

The Business Regulation Article limits 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 of $14,147.50 exceeds the amount paid to the Respondent. Therefore, the Claimant's recovery is limited to $8,100.00, the amount paid to the Respondent. Bus. Reg. § 8-405(e)(5); COMAR 09.08.03.03B(4).

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of $ 8,100.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(c). I further conclude that the Claimant is entitled to recover $8,100.00 from the Fund. Bus. Reg. § 8-405(e)(5); COMAR 09.08.03.03B(4).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant $8,100.00; 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;[3] and

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

Stephen W. Thibodeau

April 26, 2022
Date Decision Issued

Stephen W. Thibodeau
Administrative Law Judge

SWT/dlm
#197448

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

PROPOSED ORDER

WHEREFORE, this 13th day of June, 2022, 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.

Lauren Lake

Lauren Lake
Panel B
MARYLAND HOME IMPROVEMENT COMMISSION