CLAIM OF MICHAEL V. RUTH,	*	BEFORE MICHAEL D. CARLIS,
CLAIMANT	*	AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND HOME	*	OF THE MARYLAND OFFICE
IMPROVEMENT GUARANTY FUND,	*	OF ADMINISTRATIVE HEARINGS
REGARDING THE ALLEGED ACTS AND	*	
OMISSIONS OF JOHN SOMMERFELD, III,	*	
T/A BOARDWALK CONSTRUCTION	*	
COMPANY,	*	OAH No.: DLR-HIC-02-15-11626
RESPONDENT	*	COMPLAINT No.: 13 (05) 1257

* * * * * * * * * * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On March 24, 2014, Michael V. Ruth (Claimant) filed a claim for reimbursement with the Maryland Home Improvement Commission (Commission) Guaranty Fund (Fund). He alleged that John Sommerfeld, III, t/a Boardwalk Construction Company (Respondent), performed unworkmanlike, inadequate, or incomplete home improvement[1] that resulted in an actual loss of $17,170.00. On April 2, 2015, the Commission forwarded a Hearing Order related to this matter to the Office of Administrative Hearings (OAH) for a hearing.

[1] A "home improvement" is "the addition to or alteration, conversion, improvement, modernization, remodeling, repair, or replacement of a building or part of a building that is used or designed to be used as a residence[.]" Md. Code Ann., Bus. Reg. § 8-101(g)(1)(i) (2015).

On June 11, 2015, I convened a hearing in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. § 8-407 (2015).[2] The Claimant represented himself. Evangelos D. Sidou, Esquire, represented the Respondent. Eric B. London, Assistant Attorney General, and the Office of the Attorney General, represented the Fund.

The contested case provisions of the Administrative Procedure Act, the Commission's Hearing Regulations, and the OAH's Rules of Procedure govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014); COMAR 09.01.03 and 09.08.03; and COMAR 28.02.01.

ISSUES

The issues are:

A. Whether the claim for actual loss is time barred;

B. If the claim is not time barred, whether the Claimant incurred an actual loss as the result of the Respondent's unworkmanlike, inadequate, or incomplete performance of a home improvement contract;[3] and, if so,

C. What is the compensable amount of the Claimant's actual loss?

SUMMARY OF THE EVIDENCE

Exhibits

The following exhibits were admitted for the Claimant:

Claimant 1: Proposal from the Respondent, dated October 21, 2010;

Claimant 2: Complaint Form, signed by the Claimant on September 2, 2012;

Claimant 3: Proposal from J.E.T. Seal (J.E.T.), dated August 26, 2014;

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[2] All subsequent citations and references to the Business Regulation Article of the Annotated Code of Maryland are only to sections.

[3] A "home improvement contract" is "an oral or written agreement between a contractor and owner for the contractor to perform a home improvement." Section 8-101(h). An "'[o]wner' includes a homeowner, tenant, or other person who buys, contracts for, orders, or is entitled to a home improvement." Section 8-101(k).

Claimant 4: Letter to the Claimant from the Commission, dated December 18, 2013;

Claimant 5: Letter to the Claimant from the Commission, dated July 18, 2014; and

Claimant 6: Email to the Claimant from the Commission, dated May 20, 2013.

The Respondent did not offer any exhibits.

The following exhibits were admitted for the Fund:

Fund 1: Notice of Hearing, dated April 23, 2015;

Fund 2: Hearing Order, dated April 2, 2015;

Fund 3: Licensing information about the Respondent;

Fund 4: Home Improvement Claim Form, dated as received on March 24, 2014; and

Fund 5: Letter to the Respondent from the Commission, dated March 24, 2014.

Testimony

The Claimant testified for himself.

Neither the Fund nor the Respondent offered any testimony.

PROPOSED FINDINGS OF FACT

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

1. The Claimant owns and resides in a home in Kingsville, Maryland.

2. The Respondent was a licensed home improvement contractor during all times that are relevant to this matter.

3. On October 21, 2010, the Claimant and Respondent entered into a home improvement contract. The Respondent agreed to provide labor only for the construction of a 30′ by 50′ two-bay garage with a loft. The Respondent was to frame the garage and install the roof, insulation, drywall, and siding.

4. The Claimant agreed to pay the Respondent $20,000.00 in four equal installments of $5,000.00. The Claimant paid the Respondent a total of $17,000.00.

5. The Respondent worked on the home improvement through December 10, 2010. On that day, he stopped working and never returned to perform additional work.

6. When the Respondent stopped work on the home improvement on December 10, 2010, the Claimant was pleased with his work and expected the Respondent to return to complete the home improvement.

7. When the Respondent stopped work on December 10, 2010, the roof was not completely installed, and the Respondent had not begun to install the insulation and drywall.

8. In addition to leaving the home improvement incomplete, some of the Respondent's construction was inadequate or done in an unworkmanlike manner. Water had damaged part of the construction due to the Respondent's poor installation of the roof, and the siding and soffit were damaged due to poor workmanship.

9. On August 26, 2014, J.E.T., a contractor licensed by the Commission, inspected the home improvement and estimated that it would cost $21,448.36 to complete and repair the garage.

DISCUSSION

On October 21, 2010, the Claimant and Respondent executed a home improvement contract. Claimant 1. The Respondent agreed to provide labor for the framing, siding, insulation, and drywall for the construction of a 30′ x 50′ two bay, loft area garage. The Claimant agreed to pay $20,000.00 for the home improvement in quarterly $5,000.00 payments: (i) at start-up, (ii) after completion of the wood frame, (iii) after completion of the roof and siding, and (iv) at the completion of the home improvement.

Is the claim time barred under section 8-405(g)?

Following the Claimant's testimony, the Respondent requested dismissal of the claim based on the statute of limitations. The Fund brought COMAR 09.01.03.05B to my attention: "A motion to dismiss or any other dispositive motion may not be granted

by the ALJ without the concurrence of all parties." Nonetheless, the Fund argued in support of dismissal. The Claimant did not concur. I deferred ruling on the motion until issuing this decision. The Respondent elected not to present evidence in support of a defense against the claim.

Under section 8-405(g), "[a] claim shall be brought against the Fund within 3 years after the claimant discovered or, by use of ordinary diligence, should have discovered the loss or damage." Despite the Claimant's contrary arguments that I discuss below, based on the claim form, the claim was brought against the Fund on March 24, 2014. When the Claimant discovered or should have discovered the loss is the issue.

The Claimant testified that when work started, "everything was going well but slowly."[4] Then, "shortly before Christmas," testified the Claimant, the Respondent asked for payment of the last installment, although the home improvement was not finished. According to the Claimant, the Respondent had not yet installed insulation, sheet rock, aluminum siding, or finished the shingles on the "back side [of the roof]." Nonetheless, the Claimant testified that he paid the Respondent $2,000.00 of the final installment because the Claimant "[was] doing a good job." The Claimant testified that was in December 2010.[5]

According to the Claimant's testimony, after this partial payment in December 2010, the Respondent said he would return to continue work on the home improvement after the Claimant had an electrician complete the electrical work inside the garage.[6] The Claimant testified that the electrical work was finished after "the holidays."

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[4] The record does not establish when the work started.
[5] The record dos not support finding a more specific date.
[6] The home improvement contract expressly describes the Respondent as a "sub-contractor." Further, the home improvement contract makes clear that the Respondent was not being hired to do "landscaping, plumbing, HVAC, Elec[trical], deck work, [or] concrete." Claimant 1.

The Claimant also testified that after the electrical work was done, he telephoned the Respondent two times without contact or receiving a return call. "Several weeks later," testified the Claimant, the Respondent answered another telephone call from the Claimant and explained he was busy with another job but would return to continue work on the Claimant's garage "in a couple of weeks." After "another three to four weeks," the Claimant testified that he contacted the Respondent, who said, 'I'm out of business. If you want me to finish come up with more money.' According to the Claimant, he refused to pay more, the Respondent said he would not return and 'there's nothing you can do about it.' The Claimant testified that he had no further contact with the Respondent after that.

The Respondent's Argument

The Respondent argued that he last worked on the home improvement sometime before December 25, 2010, and that the claim was filed on March 24, 2014. Therefore, argued the Respondent, the claim is time barred because it was filed more than three years after he stopped work on the home improvement.

The Claimant's Argument

The Claimant argued that there was a prior hearing on this matter, based on a claim he filed on September 2, 2012. He further argued that, that hearing "didn't complete" because "some error" occurred related to the Respondent's license number. The Claimant relied on Claimant 4 and 5 to support this argument.

The Claimant also argued that he filed a complaint with the Commission on September 2, 2012, and argued the complaint verifies that the Commission had "notice on my complaint."

In addition, the Claimant argued that he did everything "as timely as possible," including contacting the Respondent to give him the opportunity to complete the garage, and "he kept leading me on."

Finally, the Claimant argued "I submitted my claim on time on the date that I dated it, and I sent it directly to [the Commission]." He conceded he "may have made a mistake" when he wrote on the Claim Form that the Respondent stopped work in 2011.

The Fund's Argument

The Fund argued that the Claimant's filing of a complaint does not stop the running of the statute of limitations. The Fund pointed out that the complaint form notifies a complainant that "[t]o initiate a Guaranty Fund claim, you must complete and submit a separate claim form[.]" The Fund also notes that the Commission sent a Claim Form to the Claimant on December 18, 2013, that notifies a claimant that the Commission may "dismiss any claim as legally inefficient if . . . [t]**he claim is filed after three (3) years from the date the claimant discovered or should have discovered the loss or damage."** (emphasis in the original).

The Fund also emphasized that the Claimant's testimony contradicted what he reported on the complaint and claim forms in regard to when the Respondent last worked on the home improvement. Both forms list December **2011** as the last day the Respondent worked. However, at the hearing, the Claimant corrected that by testifying the last day worked was in December **2010**. The Fund argued that the claim is time barred because it was filed with the Commission on March 24, 2014, more than three years after the Respondent stopped work on the home improvement. The Fund relied on *Lumsden v. Design Tech Builders, Inc.*, 358 Md. 435 (2000), to support its argument.

Analysis

The record contains contradictory evidence regarding when the Respondent last did any work on the home improvement. The only relevant exhibits show that date to be December 10, 2011. On December 29, 2013, the Claimant certified the content of the Claim Form "is true and correct to the best of my knowledge, information and belief." The Claimant alleged in the Claim

Form that December 10, 2011, was the "[d]ate work done by contractor." Fund 4. On September 2, 2013, The Claimant "affirmed under penalty of perjury that the information contained in this complaint is true and correct to the best of my knowledge." The Claimant alleged in the complaint the "last date work performed" was December 10, 2011.

However, at the hearing, the Claimant testified under oath that the Respondent last worked on the home improvement in December 2010. He also testified that the December 2011 date on the Claim Form and complaint "was a mistake" and should be 2010. Accordingly, I find that the Respondent stopped work on the home improvement on December 10, 2010.

March 24, 2014, is the date on which the Claimant brought the claim against the Fund. The Claimant's testimony that the Commission had a problem with its email system during the time he submitted the claim -- suggesting the claim arrived at the Commission earlier than March 24, 2014 -- is vague and not corroborated. The Claim Form is the best evidence in regard to when the claim was filed. That date is March 24, 2014.

The remaining issue is when "the claimant discovered or, by use of ordinary diligence, should have discovered the loss or damage." Section 8-405(g). The loss in this case is the cost to complete and repair an incomplete and unworkmanlike home improvement. The Respondent and Fund argued that loss occurred on December 10, 2010. The Fund cited to *Lumsden* to support its position. For the following reasons, I find the facts in *Lumsden* are too different from those in this case to support the Respondent's and Fund's arguments. Furthermore, I find that no reasonable person in the Claimant's position on December 10, 2010, would have known or, by use of ordinary diligence, should have discovered the loss or damage.

The issue in *Lumsden* was when the statute of limitations began to run under language very similar to that found in section 8-405(g). In *Lumsden*, new homeowners sued their home-builder for breach of warranty based on surface damage to their driveways. The homeowners

first discovered the damage in March 1994, after a company they hired had removed snow and ice from their driveways. To clear the driveways on January 20, 1994, the company used a de-icing chemical to facilitate the snow and ice removal. However, it was not until March 1994 that the homeowners first noticed peeling and scaling on the driveway surfaces.

In March 1994, when the homeowners first discovered the damage, there was some indication that the snow removal company's de-icing chemicals had caused the peeling and scaling; however, by August 1994, they homeowners had learned that problems with the concrete used to pour the driveways might have been the culprit. On April 8, 1996, the homeowners filed suit against the homebuilder.

The trial court dismissed the homeowners' claims for breach of warranties based on the statute of limitations. Both the circuit court and Court of Appeals affirmed the dismissal. The issued before the Court of Appeals was whether the statute of limitations began to run in March 1994 when the homeowners discovered their damaged driveways or in August 1994 when the homeowners discovered the damage was likely caused by improperly poured cement.

The relevant statute in *Lumsden* stated: "Any action arising under this subtitle shall be commenced within two years after the defect was discovered or should have been discovered."[7] *Lumsden*, 358 Md. at 441. The Court held "that the running of the statute of limitations in the case *sub judice* commenced in March of 1994 when the [homeowners] first discovered that their respective driveways had been damaged and not in August of 1994 when they discovered the purported cause of the damage." *Lumsden*, 358 Md. at 440.

The *Lumsden* Court explained that Maryland adopted the "discovery rule" in 1991 as the general rule for determining the triggering of the statute of limitations: "[W]e now hold the discovery rule to be applicable generally in all actions and the cause of action accrues when the

[7] The statute referred to was section 10-204(d) of the Real Property Article that applies to civil actions based on violations of implied or express warranties.

claimant in fact knew or reasonably should have known of the wrong." *Id.* at 444 (quoting *Poffenberger v. Risser*, 290 Md. 631, 636 (1981)). The Court explained its rationale: "[It is] inherently unfair to deprive a diligent plaintiff the opportunity to bring the suit when he did not, and could not, know he had been injured due to the negligence of another." *Id.* (quoting *Pennwalt Corp. v. Nasios*, 314 Md. 433, 440 (1988)).

Thus, as in *Lumsden,* the Court held that the homeowners became aware of their loss in March 1994 when they first discovered their damaged driveways. Although they did not know the identity of the likely wrongdoer at that time, the awareness of the loss triggered the running of the statute of limitations and put them on inquiry notice that time was running to identify the wrongdoer. The *Lumsden* Court explained: "A claimant reasonably should know of a wrong if the claimant has 'knowledge of circumstances which ought to have put a person of ordinary prudence on inquiry [thus, charging the individual] with notice of all facts which such an investigation would in all probability have disclosed if it had been properly pursued.'" *Lumsden*, 358 Md. at 445 (quoting *Poffenberger*, 290 Md. at 637).

I disagree with the Fund that *Lumsden* supports a finding that the Respondent's work stoppage on December 10, 2010, triggered the running of the statute of limitations. The Claimant's knowledge that the home improvement was not finished on December 10, 2010, did not reasonably placed him on inquiry notice to begin an "investigation" into whether the Respondent would return to complete the garage. As discussed below, the Claimant expected the Respondent to return. In contrast, in *Lumsden*, the homeowners knew their driveways were damaged in March 1994 because they saw peeling and scaling. In this case, the Claimant did not know, nor, as further discussed below, should he have known, that the Respondent had abandoned the home improvement in December 2010.

First, the Respondent and Fund have the burden to prove that the Claimant had discovered or, by use of ordinary diligence, should have discovered he suffered a loss or damage in December 2010. *See Lumsden*, 358 Md. at 446.

Second, the evidence in the record before me only proves that the Respondent last worked on the home improvement on December 10, 2010.

Third, the home improvement contract does not specify a date on which the parties agreed that the Respondent would either begin or complete the home improvement.

Fourth, the Claimant testified that "everything was going well," and the Respondent "was doing a good job" on December 10, 2010.

Fifth, the Claimant paid the Respondent $2,000.00 on or after December 10, 2010. This final payment under the contract was not due until the home improvement was complete. I infer from this early last payment that the Claimant believed the Respondent would return to complete the home improvement.

Finally, the Claimant hired the Respondent as a subcontractor to frame the garage and do related work. The contract expressly stated that the contractor was not to do electrical work, among other things.[8] The Claimant's unrefuted testimony was that the Respondent said he would return to complete the home improvement after the Claimant had arranged for an electrician to do the electrical work. This made sense because, at that point, the largest part of the unfinished work was for the installation of the insulation and sheet rock.

Based on all the reasons discussed above, I am not persuaded that December 10, 2010, triggered the running of the statute of limitations. Unlike the homeowners in *Lumsden*, on December 10, 2010, the Claimant could not see any loss or damage related to the home improvement. Although the home improvement was not finished, the Claimant believed the

[8] The Claimant hired the Respondent as a "subcontractor for framing purpose only" and "to provide labor for insulation & loft drywall & roofing." Claimant 1.

Respondent would return to complete the garage after an electrician did the electrical work. In *Lunsden*, March 1994 triggered the running of the statute of limitations because the homeowners saw "peeling and scaling" on the driveway surfaces on that date. On December 10, 2010, the Claimant saw no damage or loss, and he had no reason to think the Respondent had abandoned the home improvement contract. As reviewed above, when the Respondent left work on December 10, 2010, the Claimant was pleased with the work he had done and expected the Respondent's return after a different subcontractor completed the interior electrical work.

In addition, based on the record before me, I am not persuaded that this claim is barred by the statute of limitations because I cannot reasonably find when the statute of limitations in this case began to run. To determine whether the statute of limitation operates in this case to bar the claim, the moving parties must prove two material facts; (i) when the claim was filed and (ii) when the running of limitations was triggered. As discussed above, the claim was filed on March 24, 2014. Therefore, to determine whether the statute of limitations bars this claim, the record must support finding that the running of the limitations period was triggered before March 24, 2011. As discussed below, the relevant evidence is too vague to allow for a reasonable determination of the triggering date.

The Claimant testified that he had an electrician complete the electrical work on the home improvement. He did not testify when the electrician began or completed the work. The Claimant also testified that after the electrical work was "put in," he called the Respondent two times but did not receive a return phone call. The Claimant did not testify when he made the first telephone call. The Claimant then testified that "several weeks later" the Respondent answered a telephone call and said he was busy with another job, but would return to the Claimant's home in a "couple of weeks." The Claimant did not testify when that conversation took place. Finally, the Claimant testified that three to four weeks later was when he last spoke to the Respondent.

According to the Claimant, the Respondent said he was out of business and would not return to complete the home improvement. The Claimant did not testify when that conversation took place. Because the Claimant's testimony is too vague to establish a specific time line of the events after December 10, 2010, I cannot reasonably find when the running of the statute of limitations was triggered. Therefore, I recommend that the Commission deny the Respondent's and Fund's motion to dismiss this claim as time barred under section 8-405(g).[9]

Did the Claimant suffer an actual loss?

"Actual loss" is "the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." Section 8-401. For the reasons discussed below, I find that the Respondent left the home improvement incomplete and performed certain parts of the home improvement in an unworkmanlike or inadequate manner.

Neither the Fund nor the Respondent refuted the Claimant's testimony. The Claimant testified that the Respondent agreed to construct a 30′ by 50′ garage with a loft area "to be finished with" insulation and sheet rock. The home improvement contract corroborates that testimony in that the proposal describes the following home improvement: "Construct out of wood framing, 30′ by 50′, 2 bay, loft area garage" and "provide labor for insulation & loft, drywall & roofing."[10]

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[9] None of the exhibits provides any greater specificity in regard to when the running of the statute of limitations was triggered. Claimant #2 contains a narrative of the events leading to the filing of the complaint. The narrative does not mention anything about an electrician; instead, the Claimant wrote that the Respondent said he would return to complete the loft and install the insulation "when the weather got warmer." The Claimant went on to write that he first talked to the Respondent after December 10, 2010, "[w]hen the weather got warmer." The Respondent said he was busy with another job and would return to complete the garage in "a few weeks." According to the narrative, when the Claimant did not return, he talked to the Respondent about three months later. It was then that the Respondent said he would not return. Other than the vague reference to "when the weather got warmer," the Claimant did not identify when, after December 10, 2010, the Respondent said he was too busy to return to complete the garage.

[10] Some punctuation omitted or added for clarity.

The Claimant also testified that after the Respondent's last day of work on December 10, 2010, the Respondent "had the back side of the garage to shingle" and had not installed the insulation and sheet rock. Accordingly, I find that the Respondent left the home improvement incomplete because he had only partially completed the roof and had not begun the installation of the insulation or sheet rock.

Additionally, the Claimant testified that the garage was "lacking . . . the aluminum on the sides[.]" Claimant 1 partially corroborates that testimony. The home improvement contract contains a schedule for the Claimant's payments to the Respondent. The third payment for $5,000.00 is for "roofing/siding." Accordingly, I find that the Respondent agreed to install siding on the garage.

The Claimant testified that he arranged for a contractor to provide an estimate of the cost to complete the garage. He also testified that he obtained an estimate from J.E.T.

Claimant 3 is J.E.T.'s proposal. It is signed and dated on August 26, 2014, and contains J.E.T.'s home improvement license number.[11] The proposal is for: "Labor to be provided to finish and correct poor workmanship of the . . . garage at the above address." It lists the following work to be done:

- Framing, insulating, sheet rocking loft area
- Insulating garage
- Finishing roofing[.]

Claimant 3.

The proposal also provides the following description of "poor workmanship":

- [R]epairing water damaged section [of roof]
- Remove and replace water damaged soffit area blown out and damaged siding (removing and replacing 10 rows in front and 7 rows in back)
- Remove and replace entry door frames that were not wrapped properly with Tyvek

[11] Phillip Scott signed the proposal for J.E.T.

- Repair cracked roof ties
- Fix flopping shingles on front side and re-shingle rear side. Shingles crooked and falling off.

Claimant 3. The proposal includes the following note:

> After careful and close inspection it is very evident that many crucial areas were poorly constructed and/or skipped in constructing this structure and it is our strong recommendation to correct these areas as soon as possible to reduce any further water damage and or new damage causing more extensive repairs. Structurally I would suggest reinforcing those cracked roof ties before winter and any significant weight is on the roof line.

Claimant 3.

I find that the Claimant was credible when he testified about what part of the home improvement was incomplete when the Respondent stopped working on the garage and in regard to Mr. Scott's inspection of the garage and submission of the proposal. Furthermore, I find the proposal sufficiently reliable to give the contents of the proposal some probative weight because it is generally consistent with the Claimant's testimony, and it contains J.E.T.'s letterhead and license number. Therefore, based on the evidence discussed above, I am persuaded that the Respondent did not complete the home improvement. Also, some of his work was unworkmanlike because he left areas of the wood framing exposed to water, some roof ties had cracks in them, and he inadequately installed roof shingles and siding. These deficiencies in work are easily observable and do not require the trained eye of an expert in construction to determine their inadequacy or unworkmanlike installation. However, I cannot find that the Respondent improperly wrapped the two entry doors with Tyvek because such a finding requires expert opinion testimony. The record does not contain any evidence related to Mr. Scott's education, training, or experience from which his relevant expertise can properly be established. He did not explain in the proposal, and the Claimant did not present any other evidence, how one correctly wraps a door and how the Respondent incorrectly wrapped the

subject doors. Accordingly, I do not find that the Respondent inadequately wrapped the front doors.

What is the amount of the Claimant's compensable actual loss

Under Section 8-405(a), the Commission may compensate an "owner . . . for an actual loss that results from an act or omission by a licensed contractor[.]" *See also* COMAR 09.08.03.03B(2) (compensation is "only . . . for actual losses . . . incurred as a result of misconduct by a licensed contractor.").

"Actual loss" is "the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." Section 8-401. However, "[t]he Commission may not award from the Fund: (1) more than $20,000 to one claimant for acts and omissions of one contractor . . . or (5) an amount in excess of the amount paid by or on behalf of the claimant to the contractor against whom the claim is filed." Section 8-405(e)(1) & (5).

COMAR 09.08.03.03B regulates the measurement of actual loss:

> (1) The Commission may not award from the Fund any amount for:
> (a) Consequential or punitive damages;
> (b) Personal injury;
> (c) Attorney's fees;
> (d) Court costs; or
> (e) Interest.
> . . .
>
> (3) Unless it determines that a particular claim requires a unique measurement, the Commission shall measure actual loss as follows:
> (a) If the contractor abandoned the contract without doing any work, the claimant's actual loss shall be the amount which the claimant paid to the contractor under the contract.
> (b) If the contractor did work according to the contract and the claimant is not soliciting another contractor to complete the contract, the claimant's actual loss shall be the amount which the claimant paid to the original contractor less the value of any materials or services provided by the contractor.
> (c) If the contractor did work according to the contract and the claimant has solicited or is soliciting another contractor to complete the contract, the claimant's actual loss shall be the amounts the claimant has paid to or on behalf

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

In this case, the Claimant has solicited J.E.T. to complete the home improvement contract; therefore, COMAR 09.08.03.03B(3)(c) guides the calculation of the amount of the Claimant's actual loss.

Under Regulation .03B(c), the first fact that is necessary to determine the Claimant's actual loss is how much the Claimant paid to the Respondent under the original contract. As discussed above, the original contact price as $20,000.00. The original contract also called for the Claimant to pay the contract price in four equal installments of $5,000.00. According to the Claimant's unrefuted testimony, he made three full payments and partial payment of $2,000.00 on the last installment. As mentioned above, I found the Claimant to be a credible witness in regard to his testimony about payments. Accordingly, I find the Claimant paid $17,000.00 to the Respondent under the original home improvement contract.

The next fact that is necessary to determine the measurement of the Claimant's actual loss is the amount the Claimant will be required to pay another contractor to repair poor work done by the Respondent or to complete the original home improvement contract. J.E.T. proposed to complete and repair the home improvement for $21,448.36. This price includes the removal, rewrapping, and re-installation of the doors that I did not find were either poorly wrapped or installed, as discussed above. The effect of this exclusion on the measurement of the Claimant's actual loss will be discussed below.

J.E.T.'s total price for its proposal to repair and complete the home improvement ($21,448.36) includes costs for labor ($18,500.00) and materials ($2,948.36). The cost for

materials is for materials that cannot be reused because J.E.T. found them damaged and "not reusable . . . due to [the Respondent's] poor workmanship." As mentioned above, the Claimant's original contract with the Respondent was for labor only. Therefore, J.E.T.'s inclusion of the cost of materials is outside the scope of the original labor-only home improvement contract and is for consequential damages. "Consequential damages" are "losses that do not flow directly and immediately from an injurious act but that result indirectly from the act." *Black's Law Dictionary* 472 (2014). Under COMAR 09.08.03.03B (1)(a), consequential damages are excluded from actual loss. Accordingly, the cost of $2,948.36 for non-reusable material must be excluded from J.E.T's cost to complete and repair the original contract.

In addition, the cost to the Claimant for the work contained in J.E.T's proposal includes removing two doors, rewrapping them with Tyvek, and re-installing them. Because I have determined that the Claimant failed to prove poor workmanship related to the doors, the cost to fix them cannot be included any measurement of actual loss. Unfortunately for the Claimant, because J.E.T.'s proposal contains only global estimates of the contract price ($21,448.36 or $18,500.00), I cannot determine the Claimant's actual loss. Without proof of the cost to correct the allegedly inadequately wrapped doors, I cannot subtract that cost from J.E.T.'s global estimate to arrive at a reasonable cost to the Claimant to repair the Respondent's poor work. Any assignment of such a cost would be speculative. The cost to the Claimant to repair the Respondent's poor work is a necessary element of actual loss, and without it, I find that the Claimant has failed to prove actual loss.[12]

Based on the factual findings discussed above, the Claimant's actual loss is undeterminable. The following calculation shows this result:

[12] The final element under COMAR 09.08.03.03B(1)(c) is the original contract price. As mentioned above, the original contract price was $20,000.00.

Amount the Claimant paid to the Respondent:	$17,000.00
Plus Reasonable Amount to be paid to J.E.T.:	+ undeterminable
Equals:	undeterminable
Minus the amount of the original contract:	− $20,000.00
Actual loss:	underterminable

PROPOSED CONCLUSION OF LAW

I propose that the Commission adopts the following conclusions:

A. The statute of limitations did not bar the Claimant from filing this claim. *See* Md. Code Ann., Bus. Reg. § 8-405(g) (2015).

B. The Claimant has not sustained an actual and compensable loss [of $ amount] as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015).

RECOMMENDED ORDER

I **RECOMMEND** that the Maryland Home Improvement Commission adopt the following **ORDER**:

A. The Claimant's claim against the Maryland Home Improvement Guarantee Fund is denied.

B. The records and publications of the Maryland Home Improvement Commission reflect this decision.

Signature on File

September 3, 2015
Date Decision Issued

Michael D. Carlis
Administrative Law Judge

MDC/da
#157813

STATE OF MARYLAND
DLLR
DEPARTMENT OF LABOR, LICENSING AND REGULATION

DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING
MARYLAND HOME IMPROVEMENT COMMISSION
500 N. Calvert Street, Room 306
Baltimore, MD 21202-3651

The Maryland Home Improvement Commission	*	**BEFORE THE MARYLAND HOME IMPROVEMENT COMMISSION**
v. John Sommerfeld, III t/a Boardwalk Construction Company (Contractor) and the Claim of Michael Ruth (Claimant)	*	**MHIC No.: 13 (05) 1257**

****

FINAL ORDER

WHEREFORE, this 11th day of February 2016 , Panel B of the Maryland Home Improvement Commission ORDERS that:

1. **The Findings of Fact set forth in the Proposed Order dated October 27, 2015 are AFFIRMED.**
2. **The Conclusions of Law set forth in the Proposed Order dated October 27, 2015 are AFFIRMED.**
3. **The Proposed Order dated October 27, 2015 is AFFIRMED.**
4. **This Final Order shall become effective thirty (30) days from this date.**
5. **During the thirty (30) day period, any party may file an appeal of this decision to Circuit Court.**

Joseph Tunney
Joseph Tunney, Chairperson
PANEL B

MARYLAND HOME IMPROVEMENT COMMISSION