IN THE MATTER OF THE CLAIM	*	**BEFORE EILEEN C. SWEENEY,**
OF XIAO SHI,	*	**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 JAMMIE	*	
TAVENNER, T/A TIDAL DECK AND	*	**OAH No.: LABOR-HIC-02-19-23279**
DESIGN LLC,	*	**MHIC No.: 19 (05) 661**
RESPONDENT		

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

PROPOSED DECISION

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STATEMENT OF THE CASE

On or about January 18, 2019, Xiao Shi (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of $21,000.00 in actual losses allegedly suffered as a result of a home improvement contract with Jammie Tavenner, trading as Tidal Deck and Design LLC (Respondent).[1] Md. Code Ann., Bus.

[1] The Hearing Order transmitted to the Office of Administrative Hearings (OAH) refers to a receipt date of January 24, 2018; however, the Home Improvement Claim Form is marked as received on January 18, 2019. In addition, the Hearing Order incorrectly refers to "Jamie" Tavenner.

Reg. §§ 8-401 through 8-411 (2015). On July 8, 2019, the MHIC forwarded the matter to the OAH for a hearing.

I held a hearing on October 22, 2019 at the OAH in Hunt Valley, Maryland. Bus. Reg. § 8-407(e). Andrew J. Brouwer, Assistant Attorney General, Department of Labor (Department),[2] represented the Fund. The Claimant represented himself. After waiting twenty minutes for the Respondent or the Respondent's representative to appear, I proceeded with the hearing. Code of Maryland Regulations (COMAR) 28.02.01.23A.[3]

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2019); 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?

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

[3] Notice of the hearing was mailed to the Respondent at the address of record by regular and certified mail on August 20, 2019, COMAR 09.08.03.03A(2), and was not returned as unclaimed/undeliverable. Applicable law permits me to proceed with a hearing in a party's absence if that party fails to attend after receiving proper notice. COMAR 28.02.01.23A. I determined that the Respondent had received proper notice, and proceeded to hear the captioned matter. On December 4, 2019, the certified mailing sent to the Respondent at the address of record was returned by the U.S. Postal Service as undeliverable.

[illegible]

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on the Claimant's behalf:

Clmt. Ex. 1	Photographs
Clmt. Ex. 2	July 31, 2018 contract between the Claimant and the Respondent (Contract)
Clmt. Ex. 3	Undated document entitled, "Explanation"
Clmt. Ex. 4	October 15, 2018 email exchange between the Claimant and Ray Tavenner
Clmt. Ex. 5	Howard County Department of Inspections, Licenses and Permits record, printed on September 20, 2019
Clmt. Ex. 6	January 15, 2019 estimate from Leon Pro Services

The Respondent did not appear at the hearing to submit any exhibits.

I admitted the following exhibits on behalf of the Fund:

Fund Ex. 1	July 1, 2019 Hearing Order
Fund Ex. 2	August 20, 2019 Notice of Hearing
Fund Ex. 3	January 24, 2019 letter from the MHIC to the Respondent, with attached January 18, 2019 Home Improvement Claim Form
Fund Ex. 4	September 17, 2019 licensing information

Testimony

The Claimant testified and did not present the testimony of any other witnesses.

The Respondent did not appear at the hearing to testify or present the testimony of any other witnesses.

The Fund did not present the testimony of any witnesses.

PROPOSED FINDINGS OF FACT

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

1. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor under MHIC individual license number 01107733 and business license number 05133725.

2. On July 31, 2018, the Claimant and the Respondent entered into a Contract for the Respondent to construct a 20' x 20' Eze-breeze room[4] at the Claimant's residence (Property). The parties amended the Contract on September 22, 2018 because of a flooring design change.

3. The Contract included the following work:

> All deck framing to be pressure treated pine . . . 6 x 6 deck supports, 2 x 10 beam, 2 x 8 joists and 4 x 4 roof supports[5] and 4 x 4 rail supports. Roof framing to be KD nominal lumber. Sheathing on roof to be OSB.
>
> Flooring will be Trex Transcend Spice Rum. Flooring installed with hidden fastener system. Treads and 1 ½" picture frame to match flooring. Screen installed under flooring.
>
> 10 Eze-breeze windows and 1 - 36" Cabana door in white. Windows and doors to have screens.
>
> Windows to be installed between 6 x 6 roof supports and held off floor 1 ½", trimmed in white vinyl inside and out
>
> Gable end of roof to have shingle return detail approximately 18" up and 12" overhang, detail framed with wood and covered with OSB plywood. Siding matching house as close as possible installed above detail to finish gable. Shingles on roof and gable detail to match existing house as close as possible. Gutters on both sides of porch, downspout placement to be determined by homeowner.
>
> White vinyl lattice to be installed around perimeter of project.
>
> Ceiling in room to be white soffit solid, Ply Gem T4. Room to have 2 skylites . . . Velux 14 ½" x 46 ½" fixed curb mount with flashing kit.
>
> Rails to be Wolfe white vinyl with white balusters.

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[4] Eze-Breeze is a porch and deck enclosure system. The Claimant described this as "an enclosed deck."
[5] "6 x 6" was crossed out and "4 x 4" written in.

White vinyl trim on 3 sides of deck, sides of stairs and riser boards. Also between windows inside and out, to cover beams above windows and as fascia and gable trim details.

2 ceiling fan outlets on ridge beam (exact placement by homeowner), 2 power outlets (placement by homeowner) power to be run from existing junction box in eve on house.

Form metal wrap with sheet metal around exhaust vent. Approximately 14" tall.

(Clmt. Ex. 2.)

4. The Contract did not describe when work would begin or be completed.

5. The original agreed-upon Contract price was $29,500.00. As a result of the September 22, 2018 amendment, an additional cost of $1,000.00 was added to the Contract price (total: $30,500.00).

6. The Claimant made the following payments to the Respondent:

July 31, 2018	$5,900.00
August 7, 2018	5,900.00
September 22, 2018	5,900.00
September 22, 2018	1,000.00
September 27, 2018	5,900.00
	Total: $24,600.00

7. The Respondent began work sometime in September 2018, and came to the Property only only four or five times in total.

8. The Respondent last performed work at the Property on or about September 23, 2018.

9. Sometime before October 15, 2018, the Claimant observed that the roof supports installed by the Respondent were bending and he contacted the Respondent to express concerns about the strength of the roof supports. Ray Tavenner,[6] the individual who had been performing

[6] As discussed below, the Claimant did not know Mr. Tavenner's title or position.

work on the Property, advised the Claimant that the Respondent would return to the Claimant's job once the Respondent got paid on another job.

10. On October 15, 2018, when the Claimant emailed Mr. Tavenner to ask when the Respondent would be back to the Claimant's project, Mr. Tavenner emailed the Claimant that the Respondent could not complete the project because the Respondent no longer had the funds to do so. Another customer had written a large check that bounced and, as a result, money paid by the Claimant which was deposited in the Respondent's bank account was applied to checks the Respondent had written to pay for materials and workers on the other project. Mr. Tavenner advised the Claimant that the Respondent was "working for another company to make fast money to get [the Claimant's] project complete." (Clmt. Ex. 4.) Mr. Tavenner further stated, "As we get paid from contractor we will be doing work on your project . . . hopefully in a week or so." (*Id.*)

11. The Respondent never returned to the Property to complete the work contracted for.

12. The home improvement for which the parties contracted was unworkmanlike and inadequate as follows:

- the roof did not have enough support
- the outside chimney (bump out) was not removed from the closed porch environment
- the deck was directly attached to the chimney area
- proper deck support joints were not installed, there was not enough beam to support the deck and there were no brackets or other fasteners
- there were no supports under the deck connecting it to the ground

- some electrical material was exposed to the outside at a rafter
- the Respondent did not submit necessary engineering drawings.

13. On or about November 2, 2018, the work performed by the Respondent failed an inspection performed by the Howard County Department of Inspections, Licenses and Permits.

14. The following work has been or needs to be performed to repair or complete the work contracted for by the Respondent, at a cost of $27,000.00:

> Remove fire place bump out and install fireplace insert inside the house [and] finish the wall with similar siding
>
> Install 2 sky lights (40 x 46)
>
> Redo [r]oof frame to COD[7]
>
> Redo roof [p]osts (use 6" x 6" [p]ost)
>
> Install [f]lashings on roof
>
> Pass all inspection
>
> Install ezbreeze [w]indows and ezbreeze door
>
> Install shingles, gutters
>
> [B]ead board on interior ceiling . . .
>
> Install fans
>
> Install 3 exterior light and camera (camera provided by the user)
>
> Exterior and interior design should be same as the attached in the contract.

(Clmt. Ex. 6.)

15. Claimant sustained an actual loss of $21,100.00 as a result of the Respondent's acts or omissions.[8]

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[7] The Claimant did not explain this acronym. I assume it is an abbreviation for "code".
[8] As discussed below, the Claimant may recover only $20,000.00 from the Fund.

DISCUSSION

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) (2015)[9]; *see also* COMAR 09.08.03.03B(2) ("actual losses . . . incurred as a result of misconduct by a licensed contractor"). "'[A]ctual loss' means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." Bus. Reg. § 8-401.

In this case, the Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Bus. Reg. § 8-407(e)(1) (2015); State Gov't § 10-217 (2014); COMAR 09.08.03.03A(3). "[A] preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces . . . a belief that it is more likely true than not true." *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002) (quoting *Maryland Pattern Jury Instructions* 1:7 (3d ed. 2000)).

For the following reasons, I find that the Claimant has proven eligibility for compensation.

Based on the MHIC licensing records submitted into evidence, I find that the Respondent was a licensed home improvement contractor at the time the Respondent entered into the Contract with the Claimant.

I note that the licensed individual was Jammie Tavenner; the licensed business was Tidal Deck and Design LLC. The Claimant testified that, except for one instance when he believes Jammie Tavenner may have signed for a payment, he dealt with Ray Tavenner. The Claimant was unsure of the relationship between Mr. Tavenner and Ms. Tavenner and of Mr. Tavenner's

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

position with the Respondent business. Nonetheless, the Respondent did not appear at the hearing to dispute that Mr. Tavenner was acting on the Respondent's behalf or to dispute that the Claimant entered into a Contract with the Respondent.

The Claimant submitted into evidence emails from him to the Respondent, with attached photographs showing a finished Eze-breeze room like the one the Claimant wanted added to his home. According to the Claimant, that is the room for which he contracted. The Respondent performed work on the Property on four or five occasions in September 2018 but did not return after September 23, 2018. In addition, the work the Respondent did complete was unworkmanlike and inadequate.

The Claimant testified that sometime before October 15, 2018, he contacted Mr. Tavenner to express concerns about the strength of the roof supports; the Claimant had observed that the supports were bending. Mr. Tavenner stated the Respondent would return to the Claimant's job once the Respondent got paid on another job.

The Claimant submitted into evidence an October 15, 2018 email to Mr. Tavenner asking when he "would . . . be back to [the Claimant's] project," and Mr. Tavenner's response indicating that the Respondent did not have the funds at that time to complete the job because it had to use the Claimant's payments on another project. Mr. Tavenner promised to return to the Claimant's job as soon as the Respondent had the money to do so – "hopefully in a week or so." (Clmt. Ex. 4.) Again, the Respondent never returned to complete the work on the Claimant's home.

The Claimant testified that much of the work performed by the Respondent did not pass an inspection performed on November 2, 2018, by the Howard County Department of Inspections, Licenses and Permits. The inspector found that the roof did not have enough support and the outside chimney (bump out) had to be removed from the closed porch

environment. This presented an additional issue since the deck was directly attached to the chimney area. The inspection also showed that the Respondent did not properly install the deck support joints – there was not enough beam to support the deck and there were no brackets or other fasteners. In addition, the Respondent did not install supports under the deck connecting it to the ground, some electrical material was exposed to the outside at a rafter, and the trim at the top and bottom of the enclosure was not strong enough. Finally, the Respondent did not submit necessary engineering drawings.

The Claimant testified that he hired Leon Pro Services to repair or complete the work contracted for by the Respondent, at a cost of $27,000.00. This included removing the fireplace bump out, installing a fireplace insert inside the house, and finishing the wall with similar siding. According to the Claimant, the wall where the bump out had been is now flush. Leon Pro Services also installed a vertical beam for support of the roof in the former bump out area. In order to do that, it had to remove the back part of the deck and pour a concrete footer. Leon Pro Services was able to re-use some of the TREK deck but had to remove approximately one-third (a portion by the chimney area) and had to cut the frame to fit the supports. It also had to replace 4' x 4' beams above the deck with 6' x 6' supports and fasteners.

The Claimant further testified that Leon Pro Services had to re-frame the room and install multiple brackets and screws to the roof and deck. It also installed stronger white trim at the top and bottom of the enclosure, and obtained necessary engineering drawings.

Leon Pro Services finished the project by installing two sky lights, flashing on the roof, Eze-breeze windows and an Eze-breeze door, shingles, gutters, bead board on the interior ceiling, fans, three exterior lights, and a camera.

Based on the Claimant's testimony, the Howard County inspection report, the email exchange with the Respondent, and my review of the Contract with the Respondent and the

contract with Leon Pro Services, I find that the Respondent performed unworkmanlike, inadequate or incomplete home improvements.

Having found eligibility for compensation, I must determine the amount of the Claimant's actual loss and the amount, if any, that the Claimant is entitled to recover. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney fees, court costs, or interest. Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1). MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work.

In this case, the Respondent performed some work under the Contract, and the Claimant retained another contractor 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).

Thus, I calculate the Claimant's actual loss as follows:

Amounts the Claimant has paid to or on behalf of the contractor under the original contract	$24,600.00
Plus 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	+ 27,000.00
	$51,600.00
Minus the original contract price	- 30,500.00
Total:	$21,100.00

The Business Regulation Article caps a claimant's recovery at $20,000.00 for acts or omissions of one contractor, and provides that a claimant may not recover more than the amount paid to the contractor against whom the claim is filed. Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a). In this case, the Claimant's actual loss of $21,100.00 exceeds $20,000.00. Therefore, the Claimant's recovery is limited to $20,000.00. Bus. Reg. § 8-405(e)(1); COMAR 09.08.03.03D(2)(a).

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of $20,000.00 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 that amount from the Fund. Bus. Reg. § 8-405(e)(1); COMAR 09.08.03.03D(2)(a).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant $20,000.00; 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;[10] and

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

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

December 26, 2019
Date Decision Issued

Eileen C. Sweeney
Administrative Law Judge

ECS/emh
#182981

PROPOSED ORDER

WHEREFORE, this 9th day of July, 2020, Panel B of the Maryland Home Improvement Commission approves the Recommended Order of the Administrative Law Judge and unless any parties files with the Commission within twenty (20) days of this date written exceptions and/or a request to present arguments, then this Proposed Order will become final at the end of the twenty (20) day period. By law the parties then have an additional thirty (30) day period during which they may file an appeal to Circuit Court.

Joseph Tunney

Joseph Tunney
Chairman
Panel B
MARYLAND HOME IMPROVEMENT COMMISSION