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| IN THE MATTER OF THE CLAIM | * BEFORE JOCELYN L. WILLIAMS, |
| OF CHERYL COVINGTON, | * 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 ANA GUEVARA, | * |
| T/A BRANCO LLC, | * OAH No.: LABOR-HIC-02-23-25544 |
| RESPONDENT | * MHIC No.: 21 (75) 957 |

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On April 18, 2023, Cheryl Covington (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)¹ Guaranty Fund (Fund) for reimbursement of \$296,700.00 for actual losses allegedly suffered as a result of a home improvement contract with Ana Guevara, trading as Branco, LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2023).² On September 28, 2023, the MHIC issued a Hearing

¹ The MHIC is under the jurisdiction of the Department of Labor (Department).
² Unless otherwise noted, all references to the Business Regulation Article are to the 2015 Volume of the Maryland Annotated Code.

Order on the Claim. On September 29, 2023, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On November 27, 2023, I held a hearing via the Webex videoconferencing platform (Webex). Bus. Reg. §§ 8-407(a), 8-312; Code of Maryland Regulations (COMAR) 28.02.01.20B(1)(b). Jonathan P. Phillips, Assistant Attorney General, Department, represented the Fund. The Claimant was self-represented. The Respondent was not present or represented.

A review of the file noted undeliverable mail to the Respondent's attorney of record, John P. Kudel, Esquire and an additional address for the Respondent to which notice of the hearing had not been mailed. I found good cause to postpone the matter for the Fund to investigate the addresses with respect to Mr. Kudel and the Respondent. On November 28, 2023, the Fund filed a memorandum with the OAH detailing the results of its investigation. On November 28, 2023, Mr. Kudel filed a letter with the OAH indicating that he was not representing the Respondent in this matter.

On January 29, 2024, I held a hearing via the Webex. Mr. Phillips represented the Fund. The Claimant was self-represented. The Respondent was not present or represented. After waiting fifteen minutes for the Respondent or the Respondent's representative to appear, I proceeded with the hearing. 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. On December 1, 2023, the OAH provided a Notice of Hearing (Notice) to the Respondent by United States Postal Service (USPS) to the Respondent's address on record with the OAH. COMAR 28.02.01.05C(1). The Notice stated that a hearing was scheduled for January 29, 2024, at 9:30 a.m., via Webex and listed the pertinent information to access Webex. COMAR 09.08.03.03A(2). The Notice further advised the Respondent that failure to attend the hearing might result in "a decision against you."

The USPS did not return the Notice to the OAH. The Respondent did not notify the OAH of any change of mailing address. COMAR 28.02.01.03E. The Respondent made no request for postponement prior to the date of the hearing. COMAR 28.02.01.16. I determined that the Respondent received proper notice, and I proceeded to hear the captioned matter. COMAR 28.02.01.05A, C.

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 & Supp. 2023); Code of Maryland Regulations (COMAR) 09.01.03; COMAR 28.02.01.

ISSUES

1. Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?
2. If so, what is the amount of the compensable loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits offered by the Claimant:

- Clmt. Ex. 1 MHIC document list for Complaint, undated
- Clmt. Ex. 2 MHIC Complaint, filed April 28, 2021
- Clmt. Ex. 3 General Service Agreement between the Claimant and the Respondent for \$132,150.00, March 11, 2019
- Clmt. Ex. 4 Invoice #64 from the Respondent, dated January 22, 2019; Invoice #66 from the Respondent, dated March 4, 2020; Invoice #143 from the Respondent, dated July 31, 2020
- Clmt. Ex. 5 Handwritten contract between the Claimant and the Respondent for \$25,000.00, dated October 2, 2020; handwritten contract between the Claimant and the Respondent for \$15,000.00, dated October 5, 2020; handwritten contract between the Claimant and the Respondent for \$12,000.00, dated October 10, 2020

- Clmt. Ex. 6 Not Offered, Not Admitted
- Clmt. Ex. 7 Checks from the Claimant made payable to the Respondent: check #4994 for \$10,000.00, dated March 11, 2019; check #4998 for \$34,050.00, dated March 22, 2019; check #5000 for \$16,000.00, dated April 9, 2019; check #5030 for \$7,000.00, dated March 4, 2020; cash receipt #1002 to the Claimant from Samuel Nasat for \$6,000.00, dated August 4, 2020; cash receipt #1001 to the Claimant from Mr. Nasat for \$6,000.00, dated August 1, 2020; Checks from the Claimant made payable to Mr. Nasat: check #5056 for \$1,000.00, dated August 8, 2020; check #5057 for \$4,000.00, dated August 8, 2020; check #4750 for \$5,000.00, dated September 10, 2020; check #4751 for \$5,000.00, dated September 10, 2020; check #4752 for \$10,000.00, dated September 10, 2020; check #4754 for \$4,500.00, dated September 10, 2020; check #4755 for \$4,500.00, dated September 10, 2020; check #4756 for \$6,000.00, dated September 10, 2020; check #4757 for \$1,000.00, dated September 12, 2020; check #4767 for \$9,000.00, dated October 2, 2020; check #4768 for \$9,000.00, dated October 2, 2020; check #4769 for \$7,000.00, dated October 2, 2020; check #5062 for \$1,483.71, dated October 6, 2020; check #5071 for \$3,000.00, dated November 5, 2020; check #5072 for \$3,000.00, dated November 5, 2020; check #5073 for \$2,000.00, dated November 5, 2020; check #5074 for \$2,000.00, dated November 5, 2020; Check #5078 from the Claimant made payable to Amando Lopez for \$4,500.00, dated November 7, 2020; Checks from the Claimant made payable to Mr. Nasat: check #5079 for \$3,000.00, dated November 10, 2020; check #5080 for \$3,000.00, dated November 10, 2020; check #5081 for \$3,000.00, dated November 10, 2020; check #5082 for \$3,500.00, dated November 10, 2020; check #5084 for \$2,500.00, dated November 13, 2020; check #5085 for \$4,700.00, dated November 14, 2020; check #5063 for \$430.60, dated October 6, 2020
- Clmt. Ex. 8 Thirty-three color photographs taken by the Claimant of the incomplete project, undated
- Clmt. Ex. 9 Summary of Respondent's work that needs to be replaced and estimate from Brown Custom Contracting, LLC (Brown) for \$29,800.00, undated
- Clmt. Ex. 10 Proposal and Contract from Brown to complete the project for \$307,800.00, dated November 3, 2021
- Clmt. Ex. 11 Letter from the Office of the Attorney General (OAG) Consumer Protection Division (CPD) to the Claimant with attached complaint summary, dated July 13, 2021; Letter from the OAG CPD to the Respondent with attached complaint summary, dated August 31, 2021; Letter from the OAG CPD to the Claimant, with attached email from Mr. Kudel, dated September 17, 2021; Letter from the OAG CPD to Mr. Kudel with attached letter of complaint from the Claimant, dated October 1, 2021; Letter from the OAG CPD to the Claimant with attached email from Mr. Kudel, dated October 22, 2021; Letter from the OAG

CPD to Mr. Kudel with attached letter from the Claimant, dated December 7, 2021; Letter from the OAG CPD to the Claimant, dated December 30, 2021

- Clmt. Ex. 12 MHIC Claim Form, undated
- Clmt. Ex. 13 Text message exchange between the Claimant and Mr. Nasat, dated August 21, 2020 – January 21, 2021; handwritten notes from the Claimant summarizing phone conversations with Mr. Nasat, dated April 30, 2021, May 3, 2021, May 15, 2021, July 13, 2021; handwritten notes from consultation phone call with Collins Legal Group, dated April 12, 2021; text message exchange between Darrell Gibson, Sr. and Mr. Nasat, various dates.
- Clmt. Ex. 14 Not Offered, Not Admitted
- Clmt. Ex. 15 Consumer reviews of the Respondent, dated May 1, 2019, September 24, 2019 and October 29, 2020
- Clmt. Ex. 16 Proposal from J & L First Home Improvement, Inc. for \$13,000.00, dated July 31, 2022
- Clmt. Ex. 17 Checks from the Claimant made payable to Brown: check #5148 for \$100,000.00, dated November 5, 2021; check #5187 for \$50,000.00, dated March 4, 2022; check # 5189 for \$5,000.00, dated April 8, 2022; check #5191 for \$3,600.00, dated April 13, 2022;³ check #5192 for \$50,000.00, dated April 15, 2022; check #5194 for \$4,500.00, dated April 15, 2022; check#5197 for \$1,750.00, dated May 4, 2022; check# 5201 for \$10,450.00, dated May 12, 2022; check#5205 for \$5,385.00, dated June 10, 2022; check#5206 for \$2,400.00, dated June 17, 2022; check# 5208 for \$25,000.00, dated June 17, 2022; check# 5212 for \$2,000.00, dated July 14, 2022; check#5214 for \$600.00, dated July 14, 2022; check# 5215 for \$2,800.00, dated July 14, 2022; check# 5216 for \$25,000.00, dated July 14, 2022; check #5220 for \$30,000.00 dated August 11, 2022; check#5227 for \$20,000.00 dated September 14, 2022; check# 5232 for \$7,800.00 dated October 5, 2022

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

I admitted the following exhibits offered by the Fund:

- Fund Ex. 1 Notice of Hearing, issued December 1, 2023
- Fund Ex. 2 Hearing Order, dated September 28, 2023
- Fund Ex. 3 MHIC Claim Form, filed April 18, 2023
- Fund Ex. 4 Licensing History for the Respondent, dated November 21, 2023

³ This check did not include the entire date; however, the check was deposited on April 13, 2022.

Testimony

The Claimant testified and presented the testimony of Eddie Brown.

The Respondent did not present any testimony or offer any witnesses.

The Fund did not present any testimony or offer 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 01-114147.
2. The Claimant's property subject to this matter is located in Upper Marlboro, Maryland and is the Claimant's residence (the Property).
3. The entirety of the Claimant's business with the Respondent was facilitated through Samuel Nasat, who held himself out as the owner of the company and the husband of the Respondent.
4. On March 11, 2019, the Claimant and the Respondent entered into a contract to build and extend a new two-level addition in the rear of the existing home, to include a sunroom, bathroom, remodeling of the kitchen, extension of the master bedroom and two separate additional rooms at the Property. (Contract). (Clmt. Ex. 3).
5. The original agreed-upon Contract price was \$132,150.00. (*Id.*).
6. The Claimant paid a deposit of \$10,000.00 at the time the Contract was signed. (*Id.*).
7. There were multiple delays in the Respondent starting the project.
8. Prior to the start of the project, the Claimant was required to submit architectural drawings to her Homeowner's Association (HOA) for approval.

9. Once the HOA approved the project, the Respondent told the Claimant that it was too cold to begin the project and advised to wait until the spring, during which time the building permit expired causing an additional delay.

10. The Respondent began work on the project in July 2020.

11. The Claimant made the following additional payments to the Respondent towards the project costs:

- check #4998 for \$34,050.00, dated March 22, 2019;
- check #5000 for \$16,000.00, dated April 9, 2019; and
- check #5030 for \$7,000.00, dated March 4, 2020.

(Clmt. Ex. 7).

12. The Claimant made the following payments directly to Mr. Nasat towards the project costs:

- cash receipt #1002 for \$6,000.00, dated August 4, 2020;
- cash receipt #1001 for \$6,000.00, dated August 1, 2020;
- check #5056 for \$1,000.00, dated August 8, 2020;
- check #5057 for \$4,000.00, dated August 8, 2020;
- check #4750 for \$5,000.00, dated September 10, 2020;
- check #4751 for \$5,000.00, dated September 10, 2020;
- check #4752 for \$10,000.00, dated September 10, 2020;
- check #4754 for \$4,500.00, dated September 10, 2020;
- check #4755 for \$4,500.00, dated September 10, 2020;
- check #4756 for \$6,000.00, dated September 10, 2020;
- check #4757 for \$1,000.00, dated September 12, 2020;
- check #4767 for \$9,000.00, dated October 2, 2020;
- check #4768 for \$9,000.00, dated October 2, 2020;
- check #4769 for \$7,000.00, dated October 2, 2020;
- check #5062 for \$1,483.71, dated October 6, 2020;
- check #5071 for \$3,000.00, dated November 5, 2020;
- check #5072 for \$3,000.00, dated November 5, 2020;
- check #5073 for \$2,000.00, dated November 5, 2020;
- check #5074 for \$2,000.00, dated November 5, 2020;
- check #5079 for \$3,000.00, dated November 10, 2020;
- check #5080 for \$3,000.00, dated November 10, 2020;
- check #5081 for \$3,000.00, dated November 10, 2020;
- check #5082 for \$3,500.00, dated November 10, 2020;

- check #5084 for \$2,500.00, dated November 13, 2020;
- check #5085 for \$4,700.00, dated November 14, 2020;
- check #5063 for \$430.60, dated October 6, 2020.

(*Id.*)

13. The Claimant paid the Respondent \$67,050.00 and Mr. Nasat \$109,614.31, for a total of \$176,664.31.⁴

14. Several of the Claimant's payments were advances on payment for work that had not yet been performed. She received handwritten promissory notes from Mr. Nasat in exchange for the advances. (Clmt. Ex. 5). These advances totaled \$52,000.00.

15. Mr. Nasat would routinely bring workers to the Claimant's property for one to two days, then they would fail to show up for several days or weeks and he would subsequently return requesting additional payments and/or advances from the Claimant.

16. Between August 21, 2020 and January 21, 2021, the Claimant exchanged numerous text messages with Mr. Nasat and made several phone calls in an attempt to get him to complete the project. (Clmt. Ex. 13).

17. On April 28, 2021, the Claimant filed a Complaint with the MHIC.

18. In November 2021, Mr. Nasat ceased performing all work under the Contract and abandoned the project, at which time there was a pile of debris and a port-o-potty left in the backyard, there was exposed plywood at the back of the house, no windows or door on the addition, there was exposed wiring, and exposed roof beams and there were open areas which allowed the intrusion of water, insects and birds into the property. (Clmt. Ex. 8).

19. On a date unknown from the record, the Claimant obtained a summary and estimate of \$29,800.00 from Brown just to replace and remediate work performed by the

⁴ It is unclear from the record and testimony why the Claimant paid the Respondent approximately \$40,000.00 more than the original Contract amount.

Respondent. (Clmt. Ex. 9). The Claimant requested a second proposal from Brown that would include replacing and remediating the work performed by the Respondent and completing the work that was within the scope of work to be performed in the original contract with the Respondent.

20. On November 3, 2021, the Claimant entered into a contract with Brown (Remediation Contract) for \$307,800 to repair, replace and complete the work performed by the Respondent. (Clmt. Ex. 10).

21. The project was completed by Brown.

22. On April 18, 2023, the Claimant filed a Claim with the MHIC.

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); State Gov't § 10-217; 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 Cnty. 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) (Supp. 2023); *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.

By statute, certain claimants are excluded from recovering from the Fund altogether. In this case, there are no such statutory impediments to the Claimant's recovery. The claim was

timely filed, there is no pending court claim for the same loss, and the Claimant did not recover the alleged losses from any other source. Bus. Reg §§ 8-405(g), 8-408(b)(1) (2015 & Supp. 2023). The Claimant resides in the home that is the subject of the claim or does not own more than three dwellings. *Id.* § 8-405(f)(2) (Supp. 2023). The parties did not enter into a valid agreement to submit their disputes to arbitration. *Id.* §§ 8-405(c), 8-408(b)(3) (2015 & Supp. 2023). The Claimant is not a relative, employee, officer, or partner of the Respondent, and is not related to any employee, officer, or partner of the Respondent. *Id.* § 8-405(f)(1) (Supp. 2023).

The Claimant did not unreasonably reject good faith efforts by the Respondent to resolve the claim. *Id.* § 8-405(d) (Supp. 2023). The Respondent performed unworkmanlike, inadequate, and incomplete home improvements. The Claimant was justified in refusing to pay or advance the Respondent any additional money, as she actually paid more than the original Contract price and the work was nowhere near complete. The Respondent performed all the demolition and the framing for the addition to the property, but abandoned the project, leaving exposed plywood framing, exposed wiring, and exposed ceiling beams.

The Claimant provided overwhelming and uncontroverted evidence that the Respondent's work was unworkmanlike, inadequate, and incomplete. The Claimant established, by a preponderance of the evidence, the Contract price, the money paid to the Respondent, and provided evidence of the cost to obtain repair, replace the unworkmanlike and inadequate portions of the work performed by the Respondent, as well as the cost to complete the work that the Respondent failed to perform under the Contract.

The Fund agreed that the Respondent performed in an inadequate, incomplete and unworkmanlike manner. The Fund argued that the Claimant's credible evidence shows that she sustained a loss from the acts or omissions of the Respondent, and it therefore recommended an

award to the Claimant from the Fund. I find that 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. 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) (Supp. 2023); 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.

The Respondent performed some work under the Contract, and the Claimant retained other contractors to remedy and complete 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).

Applying the formula in this case results in the following calculation:

| | |
|--------------------------------------------------|---------------------|
| Amount Claimant paid to Respondent and Mr. Nasat | \$176,664.31 |
| Amount paid to Brown | \$307,800.00 |
| Amount paid to all Contractors | <u>\$484,464.31</u> |
| <u>Less the Contract price:</u> | <u>\$132,150.00</u> |
| Actual Loss | \$352,314.31 |

Effective July 1, 2022, a claimant's recovery is capped at \$30,000.00 for acts or omissions of one contractor, and a claimant may not recover more than the amount paid to the contractor against whom the claim is filed.⁵ Bus. Reg. § 8-405(e)(1), (5) (Supp. 2022); COMAR 09.08.03.03B(4). In this case, the Claimant's actual loss is far greater than the amount paid to the Respondent and more than \$30,000.00. Therefore, the Claimant is entitled to recover \$30,000.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2023); COMAR 09.08.03.03B(3)(c). I further conclude that the Claimant is entitled to recover \$30,000.00 from the Fund. Md. Code Ann., 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 \$30,000.00; 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;⁶ and

⁵ On or after July 1, 2022, the increased cap is applicable to any claim regardless of when the home improvement contract was executed, the claim was filed, or the hearing was held. *See Landsman v. MHIC*, 154 Md. App. 241, 255 (2002) (explaining that the right to compensation from the Fund is a "creature of statute," these rights are subject to change at the "whim of the legislature," and "[a]mendments to such rights are not bound by the usual presumption against retrospective application").

⁶ *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.

April 10, 2024
Date Decision Issued

JLW/at
#209841

Jocelyn L. Williams

Jocelyn L. Williams
Administrative Law Judge

PROPOSED ORDER

WHEREFORE, this 18th day of June, 2024, 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***