

<p><b>IN THE MATTER OF THE CLAIM</b></p> <p><b>OF MITRA DERAKHSHAN,</b></p> <p><b>CLAIMANT</b></p> <p><b>AGAINST THE MARYLAND HOME</b></p> <p><b>IMPROVEMENT GUARANTY FUND</b></p> <p><b>FOR THE ALLEGED ACTS OR</b></p> <p><b>OMISSIONS OF BRADLEY MAUST,</b></p> <p><b>T/A INTEGRITY CONCRETE, LLC.,</b></p> <p><b>RESPONDENT</b></p>	<p>* <b>BEFORE ERIN H. CINCIENNE,</b></p> <p>* <b>AN ADMINISTRATIVE LAW JUDGE</b></p> <p>* <b>OF THE MARYLAND OFFICE</b></p> <p>* <b>OF ADMINISTRATIVE HEARINGS</b></p> <p>*</p> <p>*</p> <p>*</p> <p>* <b>OAH No.: LABOR-HIC-02-21-02717</b></p> <p>* <b>MHIC No.: 20 (75) 22</b></p>
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**1AMENDED 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 October 9, 2019, Mitra Derkhshan (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund), under the jurisdiction of the Department of Labor (Department),<sup>2</sup> for reimbursement of \$76,850.00 in actual losses allegedly suffered as a result of a home improvement contract with Bradley Maust, trading as Mossy Horn Construction<sup>3</sup> (Respondent). Md. Code Ann., Bus. Reg.

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<sup>1</sup> The Proposed Decision issued on July 2, 2021 contained an incorrect spelling of the Licensee's last name. This has since been corrected.  
<sup>2</sup> On July 1, 2019, the Maryland Department of Labor, Licensing, and Regulation became the Department of Labor.  
<sup>3</sup> When the case was transmitted from the Department, the Licensee's company was listed as Integrity Concrete LLC. Both Mossy Horn and Integrity Concrete LLC. are under the same License number for Bradley Maust.

§§ 8-401 through 8-411 (2015).<sup>4</sup> On January 2, 2021, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a remote hearing on April 16, 2021 via the Webex videoconferencing platform from the OAH office in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. Justin Dunbar, Assistant Attorney General, Department, represented the Fund. The Claimant represented herself. Justin Gregory, Esquire, represented the Respondent, who was present.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2020); 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 on the Claimant's behalf<sup>5</sup>:

- Clmt. Ex. 1 - Construction Contract REV 8, signed March 15, and 16, 2019<sup>6</sup>
- Clmt. Ex. 2 - Statement of Claimant, undated
- Clmt. Ex. 3 - Statement of Claimant, undated

<sup>4</sup> Unless otherwise noted, all references hereinafter to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.

<sup>5</sup> Prior to the hearing, the Claimant emailed two different packets of pre-marked exhibits to the parties and the OAH. One set of exhibits were marked with numbers (Exhibits 1-9), and the other set of the exhibits were pre-marked with letters (Exhibits A-Q). In order to avoid confusion during the remote hearing, the exhibits were identified as they were premarked and will be referenced with the same number or letter in this decision.

<sup>6</sup> The parties to the contract signed it in March 2019; however, the date on the footer in the contract is February 9, 2019.

- Clmt. Ex. 4 - Text message from Respondent, June 24, 2019
- Clmt. Ex. 5 - Text message from Mahnaz "Mary" Derakhshan, June 4, 2019
- Clmt. Ex. 6 - Text message from Mahnaz "Mary" Derakhshan, June 4, 2019
- Clmt. Ex. 7 - Email from Respondent, December 14, 2018
- Clmt. Ex. 8 - Contract Price Sequence, undated
- Clmt. Ex. 9 - Invoice # 196 from Mossy Horn Construction to the Claimant, May 20, 2019
- Clmt. Ex. A - Letter from the Claimant to Mr. Joseph Tunney, Chairperson, March 23, 2021, with attachments
- Clmt. Ex. B - Invoices from Mossy Horn Construction, December 22, 2018, January 21, 2019, February 15, 2019, and April 8, 2019,
- Clmt. Ex. C - Email from Respondent to Claimant, December 14, 2018; Photographs January 20, 2019 and June 23, 2019, AA Waterproofing and Foundation Repair Structural Systems Agreement, June 9, 2019; Text message from the Claimant, June 4, 2019; Photographs from June 23, 2019; Text message from Respondent, June 24, 2019
- Clmt. Ex. D - Rush Services summary of payments,<sup>7</sup> undated; Letter from John Rush, Rush Services, May 18, 2021; Rush Services Statement, March 15, 2021
- Clmt. Ex. E - Pete Brosnihan summary of payments, undated; Brosnihan Builders, Inc. Estimate, December 13, 2019; Brosnihan Builders, Inc. Statements, November 22, 2019, January 22, 2020, February 7, 2020, April 21, 2020, April 14, 2020, and October 30, 2020
- Clmt. Ex. F - Darrin Kemp<sup>8</sup> summary of payment; Contractor's Invoice from Darrin Kemp, March 26, 2020; Invoice, March 27, 2020; Invoice from Rent Ad to Darrin Kemp, March 25, 2020
- Clmt. Ex. G - Darrin Kemp summary of payment, undated; Contractor's Invoices, both dated June 29, 2019
- Clmt. Ex. H - G & W Lumber and Larry Friend summary of payment, undated; handwritten calculation for Larry Friend, undated; G & W Lumber, Inc. receipts, April 27, 2020, May 28, 2020, June 4, 2020, June 10, 2020, June 15, 2020, July 17, 2020, and December 10, 2020

<sup>7</sup> Exhibits D-O all start with a handwritten summary of payments. These handwritten summaries were prepared by the Claimant to show what was purportedly paid by the Claimant to each individual contractor.

<sup>8</sup> Throughout the exhibits, Mr. Kemp's first name alternates between Darren and Darrin. No explanation was provided for the difference and it is unclear which is the correct spelling. In this decision, Darrin Kemp or Mr. Kemp will be used throughout.

- Clmt. Ex. I - Walter Jepson summary of payments, undated; Statements, October 8, 2019; Contractors Invoice, September 14, 2019; Job invoices, December 7, 2019, December 13, 2019, undated, and November 3, 2019; hand written notes, undated, Contractors invoice, July 4, 2019; Mars Lumber Inc. Invoice, October 11, 2019; Maust Finishing invoice, November 19, 2019
- Clmt. Ex. J - NobleMan Tile, LLC., summary of payments, undated; NobleMan Tile, LLC. invoice, September 13, 2019; NobleMan Tile, LLC. estimate, July 3, 2019; NobleMan Tile, LLC. Invoice, May 25, 2021
- Clmt. Ex. K - Glass Services summary of payments, undated; Glass Services invoice, January 28, 2020
- Clmt. Ex. L - Correction Notice from Garrett County Office of Building Permits and Inspections, undated; Temper Glass summary of payments, undated; Unique Décor invoice, undated; Glass Service invoice, June 10, 2020
- Clmt. Ex. M - Guttertech Enterprises summary of payments, undated, Guttertech Enterprises receipt, May 15, 2020; Guttertech Enterprises invoice, August 4, 2020
- Clmt. Ex. N - Paint by Chad summary of payments, undated; Everything Drywall, LLC. Invoice, July 6, 2020; Everything Drywall, LLC invoice, August 2, 2019; Everything Drywall, LLC. invoice, October 11, 2019; Maust Finishing invoice, April 29, 2020
- Clmt. Ex. O - Waste and Recycle summary of payments, undated; Garrett County Solid Waste and Recycle Invoice, June 1, 2020; Garrett County Solid Waste and Recycle invoice, June 2, 2020
- Clmt. Ex. P - List of Expenses and dates paid, 2019 and 2020
- Clmt. Ex. Q - Rush Services Invoice, September 19, 2019, September 20, 2019, October 3, 2019, and March 14, 2021

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

- Resp. Ex. 1 - Invoice #197 from Mossy Horn Construction to the Claimant, May 20, 2019<sup>9</sup>
- Resp. Ex. 2 - Invoice # 196 from Mossy Horn Construction to the Claimant, May 20, 2019
- Resp. Ex. 3 - Photographs dated May 8, and 9, 2019

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<sup>9</sup> This exhibit includes two invoices with the same number and date. However, one shows a refund of \$4,000.000 and the other does not show any refund.

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

Fund Ex. 1 - Notice of Hearing, March 4, 2021

Fund Ex. 2 - Hearing Order from the Department, January 21, 2021

Fund Ex. 3 - Home Improvement Claim Form, received October 9, 2019

Fund Ex. 4 - Letter from the Department to Bradley Maust, October 21, 2019

Fund Ex. 5 - Licensing History of Bradley Maust as of March 30, 2021

Testimony

The Claimant testified and presented the testimony of Mahnaz "Mary" Derakhshan, her mother.

The Respondent testified and did not present other witnesses.

The Fund did not present any testimony.

**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 registration number 88222.

2. At all times relevant, the Claimant owned a residence located on Deep Creek Drive in Garrett County, Maryland (Residence).

3. The Claimant has never lived at the Residence.

4. In addition to the Residence, the Claimant owns one other home, and one piece of property without any buildings.

5. While the Claimant owns the Residence, Mahnaz "Mary" Derakhshan (Ms. Mary) had more direct involvement and discussions with the Respondent.

6. The Claimant and the Respondent started to negotiate a contract in the Fall of 2018 to renovate the Residence. During the negotiation, various contract prices and items included in the price were discussed and changed.<sup>10</sup>

7. On March 16, 2019, the Claimant and the Respondent entered into a contract to demolish most of the existing Residence (except for the sunroom and the basement walls), and rebuild a new home on the same foundation (Contract). The Contract stated that work would begin in December 2018 and would be completed by May 15, 2019.

8. The agreed-upon Contract price was \$246,530.00.

9. The Claimant paid the Respondent a total of \$176,880.00 as follows:

December 22, 2018	\$24,500.00
January 26, 2019	\$63,480.00
February 25, 2019	\$43,000.00
May 3, 2019	\$45,900.00

10. The Respondent started work under the Contract in December 2018 as stated in the Contract.

11. Both the Claimant and the Respondent were aware of water infiltration in the basement prior to entering into the Contract.

12. The Respondent and the Appellant discussed various options to prevent water infiltration, the costs of those options, and the risks of the various options.

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<sup>10</sup> The Claimant provided a "Contract Price Sequence" (Clmt. Ex. 8), which contained the various prices during the negotiation. This document indicates that the original contract price was \$283,100.00 and that there were various change orders which altered the price both down and up over time. Neither the Claimant nor the Respondent provided any document that shows what was included with the original contract price, nor change orders or revisions that adjusted that price. The Claimant did provide a copy of the final contract, which is Claimant's Ex. 1.

13. After discussing options, the Respondent informed the Claimant on December 14, 2018 that he would not dig outside to try to stop the leak by the chimney, but would “only address the problem from in side (sic).” Clmt. Ex. 7.

14. The Respondent applied a hydraulic cement near the chimney as an attempt to stop the water infiltration, but did not guarantee the work due to an uncertainty of the water source.

15. On June 24, 2019, the Respondent informed the Claimant that he would not complete the Contract because the Claimant insisted the Respondent address the water infiltration, which he contended was not included in the Contract. After this date the Respondent did not perform any other work under the Contract.

16. The following items on the Contract were not completed as of June 24, 2019:<sup>11</sup>

3(b) Vapor barrier to be 6 mil plastic on the ground and up behind the foam insulation on the walls;

10(b) Install new flooring [in sun room area]

10(d) Repaint walls [in sun room area]

15 Remove (2) exterior walls and partial 3<sup>rd</sup> wall on the lower level to create an exposed patio.

18 Patch concrete and level areas that are out of level (existing concrete floor stays as is)

25 Drywall walls and ceiling and paint

26 Install tile around tub/shower and shower doors

27 Install hardwood or tile on all floors

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<sup>11</sup> Section numbers refer to the section numbers in the Contract, Clmt. Ex. 1. Descriptions are exact quotes from the Contract. To the extent abbreviations are included, or there are errors in the original, those abbreviations and errors are included in this finding.

28 interior doors to be 3 panel pine doors white paint (without grain and knots to match door Mary had at the house)

29 Install painted/stained standard size casing and base trim

30 "Square up" side deck and replace shingles/siding on shed

31 Clean up and remove all construction debris

17. During the Contract, the Respondent had installed a window in the basement, which did not comply with the local building code requirement to be tempered.

18. On an unknown date, a Garrett County inspector issued a correction notice regarding the lack of tempered windows in the basement. Clmt. Ex. L.

19. The Claimant hired multiple subcontractors to either complete the items on the Contract or to repair work performed by the Respondent.<sup>12</sup>

20. The Claimant paid \$90.00 to have construction debris removed from the residence by Garrett County Solid Waste and Recycle. That work was within the scope of the contract with the Respondent.

21. The Claimant hired Unique Décor to put a film over one window in the basement and replace another window in the basement to comply with the local building code. The Claimant paid \$1,233.53 for this work. Clmt. Ex. L. That work was within the scope of the Contract with the Respondent and was performed due to the work of the Respondent not meeting the local building code.

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<sup>12</sup> Claimant provided a packet of invoices from each contractor. See Clmt. Exs. D-Q. The Contractors for each invoice are included in the Exhibit List.



## DISCUSSION

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); Md. Code Ann., State Gov't § 10-217 (2014); 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.

The Claimant initially purchased the Residence in question with the intent to demolish the majority of the home and rebuild. The Respondent and the Claimant initially began discussing this project in October or November of 2018; however, the Contract was not fully revised and executed until March 2019. Clmt. Ex. 1. The March 2019 agreement is eight pages long, and lists both items that are included in the Contract and items that are specifically excluded from the Contract. Clmt. Ex. 1. Even though the Contract was signed in March 2019, the work began on the residence in December 2018.

While the Claimant owns the property, Ms. Mary had more direct involvement and discussions between the Respondent and the Claimant. Ms. Mary testified extensively about the Contract, the work performed by the Respondent, the work performed by other contractors, and the various alleged deficiencies and expenses.

First, I will address the three types of deficiencies alleged by the Claimant: water infiltration and damage, unworkmanlike and inadequate work, and incomplete work.

Water infiltration and water damage

Prior to the beginning of construction, both the Respondent and the Claimant were aware of a problem with water infiltration at the home. However, in the final version of the contract, there was no line item to address water infiltration in either the included or excluded items.

Clmt. Ex. 1.

Despite this omission from the Contract, the parties had discussed the water issue throughout the negotiation. Specifically, in a December 14, 2018 email, the Respondent gave a final offer to complete the renovation, and indicated that if it was not suitable, then he would “withdraw my proposal and will not be able to complete the project for you.” Clmt. Ex. 7. The Respondent stated, in pertinent part “I will not be digging outside to try and stop the leak by the chimney – will only address the problem from inside (sic).” Clmt. Ex. 7. The Claimant provided a Contract Price Sequence during the hearing. Clmt. Ex. 8. Over the course of the price sequence, the change orders generally lowered the total contract price.<sup>13</sup> The Contract Price Sequence indicates that there was a subtraction for “Addressing chimney leak from outside.” Clmt. Ex. 8.

According to the Claimant’s testimony, the Respondent had not told her about the various outside options and that she was relying on him, as her general contractor, to fix the water infiltration issue. The Claimant submitted text messages from June 4, 2019. In the first message, her mother, Ms. Mary, stated “I didn’t think you can solve the water/moisture problem but asked you for some companies (sic) name that they do this kind of work although to start the

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<sup>13</sup> While there were a few revisions that increased the price, over the entire price sequence, the price decreased from \$283,100.00 to \$246,530.00.

project you and Tim seem that you were [on] top of this Problem (sic) Timothy didn't get back to me yet with his idea Thanks anyway." Clmt. Ex. 5. In the second message, Ms. Mary stated "You are my contractor and I asked you a few times to please bring whoever needs to be to diagnose this problem but you taught (sic) you can Solve (sic) it now it's become issue of demand I do not understand. What ever (sic) is your wish I will go along. Thx." Clmt. Ex. 6. The Claimant's testimony versus her exhibits are not consistent. In her testimony, the Claimant was adamant that she relied on the Respondent to fix the water infiltration issue and that there was no discussion of options other than interior repairs. However, the Claimant's exhibits show that either she or her mother asked for a referral to another contractor to address the water issue, that the price was reduced to reflect the removal of "addressing chimney leak from outside," that the Respondent specifically informed the Claimant that he would not be digging outside to try and stop the leak by the chimney, and that Ms. Mary did not think the Respondent could solve the water/moisture problem. See Clmt. Exs. 5, 6, 7, and 8.

The Respondent testified that when he walked through the house, there was a clear water infiltration issue next to the chimney and staining on the floor in the basement in another area, but it was not wet at that time. The Respondent testified that he obtained estimates to address the water infiltration issue from the outside, but the Claimant did not want to pursue those options due to the costs. Further, the Respondent testified that he recommended tearing down the entire foundation of the home, putting in a French drain or fixing the problems, and then building a new house. The Respondent testified that this option was more costly, and the Claimant did not want to pursue that option. The Respondent testified that after discussing the more expensive options, the Respondent tried to come up with a way to address the water infiltration from the inside. He smeared hydraulic cement near the chimney in an attempt to stop the water. However, the Respondent testified that he informed the Claimant that he could not guarantee this

work because he was unsure if the water was surface water or ground water. According to the Respondent, the Claimant was given all of the options, the prices for all of the options, the risks for the options, and that the Claimant chose what they wanted. The exhibits presented by the Claimant appear to support the Respondent's position. See Clmt. Exs. 5, 6, 7, and 8.

The Claimant did not present any evidence that the option performed by the Respondent was unworkmanlike or inadequate. While the hydraulic cement did not stop the water infiltration problem, the Respondent had fully advised the Claimant of his concerns, provided other alternatives to address the problem, and informed the Claimant that he could not guarantee the work as it was unclear if it would resolve the problem. Based on all of those things, I do not find that any of the water related damages claimed in this case are due to the unworkmanlike or inadequate work of the Respondent.

#### Alleged Unworkmanlike or Inadequate Work

The Claimant raised multiple issues with the work performed by the Respondent.

Specifically, the following issues were listed in a written statement:

1. The window above the basement stairs and the two windows next to the front door were not tempered to code.
2. Stairs to the basement was not up to code.
3. Head on the top of stairs in the basement not up to code.
4. Foundation was not reinforced and was just cement coding.
5. No access to the attic.
6. Crooked framing in which the drywalls had to be re-done after, as well as vanities not fitting, and we had to re-frame walls.
7. Sewage backed up in the house as he disconnected the grinder pump and was not reconnected.
8. Did not do the French drain to stop the water and yes he did dig out the side to bring the down spot to the year.

Clmt. Ex. 3.

The Claimant did not provide any expert testimony during the hearing. She did not call any of the subcontractors that she hired to finish the work on the residence to testify. While Ms. Mary testified as to the need to redo certain work, such as the stairs,

headers, framing of the walls, foundation, no access to the attic, there was no testimony as to what was the industry standard for any of the issues, except for the tempered windows, or as to what specific codes were allegedly not followed. Similarly, there were no photographs to support her testimony and show the alleged unworkmanlike or inadequate work. Other than the subjective opinions of the Claimant and Ms. Mary, there was no evidence that the work of the Respondent on the stairs, foundation, access to the attic, and framing was unworkmanlike or inadequate. The Respondent testified that he performed his work in a workmanlike and adequate manner. I find that the Claimant has not proven that she is entitled to any actual loss related to those items, except for the tempered windows in the basement.

The Claimant provided a correction notice from a Garrett County inspector regarding the lack of tempered windows in the basement. Therefore, this document is evidence that the Respondent did not comply with the Contract as he installed a window that did not meet the local building code. See Clmt. Ex. 1. A further discussion of the tempered windows is below.

#### Alleged Incomplete Work

During the hearing, the Claimant testified that the Respondent did not complete the following items in the Contract: 3(b), 3(c), 3(d), 9, 10(a), 10(b), 10(c), 10(d), 10(f), 15 (all sections), 18, 25, 26, 27, 28, 29, 30, and 31. Clmt. Ex. 1. The Claimant provided photographs of water damage at the home, but did not provide any photographs to show the state of the renovation at the time that the Respondent left the project. Similarly, the Claimant did not provide any witness testimony to specifically describe what was left to do for each line item at the time the Respondent left the project, other than to say the work was unfinished.

The Respondent testified regarding the allegedly incomplete items on the Contract. The Respondent testified that item 3(b) under the contract was not completed because workers still needed to access the crawl space. The Respondent testified that item 3(c) (framing walls on top of block around crawl space and access panel into crawl space) and item 3(d) (add a "raised closet" area along edge of basement/crawl space) were completed. The Respondent testified that item 9 (Soffit and Fascia to be aluminum with downspouts on eaves) was completed on the part he rebuilt and that downspouts were only required on the rebuilt portion, not the sunroom. The Respondent testified that item 10(a) (sunroom floor raised to match the kitchen area) was completed, but that items 10(b) and 10(d) were not completed yet. The Respondent could not recall whether item 10(f) (ceiling drywall to be repaired or install owner supplied wood on ceiling to cover drywall) was completed. The Respondent admitted that he did not complete item 15, and that the leveling was not complete for item 18. The respondent testified that under item 25, drywall was hung, sanded, finished, and primed. The paint was purchased and located in the house. However, the paint had not yet been applied to the walls. The Respondent had given the Claimant a \$4,000.00 refund due to the paint not being applied to the walls. Resp. Ex. 1. The Respondent admitted that he did not complete items 26 and 27. The Respondent testified that he bought the interior trim and doors and they were painted prior to leaving the jobsite, but that they were not installed yet, item 28. The Respondent admitted that trim had not yet been installed. The Respondent had not squared up the side deck at the time he left the jobsite (item 30). The Respondent testified that he had cleaned up the debris prior to leaving (item 31) and pressure washed the driveway prior to removing his requirement. As the Respondent admitted that at least some of the home improvements under the Contract were incomplete, I find that the Claimant is eligible for compensation as to those items.

As to the other items that the Claimant alleges are incomplete, I find that the Respondent's testimony on these issues was credible. During his testimony, the Respondent admitted that several items were incomplete, and further on other issues in the case, the Respondent's testimony was corroborated by documentary evidence. The Claimant and Ms. Mary's testimony was less precise, more hyperbolic, and was not always corroborated by the documentary evidence. As I find the Respondent's testimony credible, and the Claimant did not provide anything other than self-serving testimony to support her claims, I find that the Claimant has not provided sufficient evidence to meet the burden of proof as to those items and therefore, is not eligible for recovery for those items (3(c), 3(d), 9, and 10(a)). Clmt. Ex. 1.

I thus find that the Claimant is eligible for compensation from the Fund for the incomplete items as well as the unworkmanlike window installment in the basement. 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).

Below I will address each set of invoices provided by the Claimant and whether those invoices should be considered reasonable amounts the Claimant paid to other contractors to either repair poor work or complete the original contract.

#### Tempered Glass in Basement

The Claimant presented evidence that the Respondent did not perform the installation of certain basement windows in accordance with the local building code. Clmt Ex. L. The Contract required that the work of the Respondent be performed "per local building codes." Clmt. Ex. 1. Garrett County issued a correction notice regarding the requirement for tempered glass in certain basement windows. The Respondent had installed the long window over the

basement stairs. The Claimant provided evidence that another contractor covered the long window with a film to make it tempered, after she had received the correction notice. In addition, two other windows had tempered glass installed. Clmt. Ex. L. The total costs of this repair were \$1,233.53. Clmt. Ex. L. As I found that the installation of the windows was not in accordance with local county code, this amount was a reasonable cost to repair the poor work.

#### Guttertech Enterprises

Item 9 of the Contract requires “Soffit and Fascia to be aluminum with downspouts on eaves.” Clmt. Ex. 1. The Claimant contends that this item requires gutters be installed on the entire structure. The Claimant provided invoices from Guttertech Enterprises for this work to be completed. Clmt. Ex. M. The Respondent contends that the gutters were to be installed on the addition only, and not on the remainder of the structure. As it is the Claimant’s burden of proof to show that gutters were included on the entire structure, and I find that the evidence is vague as to whether or not gutters were to be installed on the entire structure, I do not find that the Claimant has proven this element of her damages.

#### Shower Doors

Item 26 of the Contract requires the Respondent to install tile around the tub/showers and shower doors. Clmt. Ex. 1, p. 7. However, the Claimant was required to provide the materials for the tub/showers, faucets, and toilets. Clmt. Ex. 1, p. 8. The Claimant contends that the Respondent was responsible for providing the shower doors for the showers. The Claimant provided invoices from Glass Services regarding the amount paid for shower doors. Clmt. Ex. K. The Respondent contends that the Claimant was responsible for providing the shower doors as that is part of the “tub/showers” that the Claimant was providing. I find that the Claimant’s argument is not persuasive as the Claimant was responsible for providing the materials for the shower, and the Respondent could only for install the materials provided by the Claimant. As



the Claimant was responsible for providing the material, she cannot recover for the costs of the shower door.

#### NobleMan Tile Work

The Contract called for the Claimant to provide “All flooring (Hardwood and Tile).” Clmt. Ex. 1. The Claimant paid NobleMan tile for tile work, including both labor and materials. Clmt. Ex. J. The materials included “Schluter Waterproofing and Drain Kits for both showers, Sand, Cement, Screws, Lumbar, Matalathe, ¼” Durock for three bath floors,” as well as items for tub walls and showers. The Claimant provided three invoices regarding the work of NobleMan, but the invoices were not itemized to explain the cost for each of the materials versus the cost for the labor. The Contract did not include any flooring material as those were to be provided by the Claimant. As the invoices from NobleMan appear to include flooring materials, which were outside of the Contract, the Claimant has failed to meet her burden of proof that she is entitled to recover these invoices in their entirety. Further, the Claimant did not provide any explanation, through testimony or documents, as to the specific line item amounts for the materials listed or the labor incurred. Therefore, the Claimant has failed to meet her burden of proof as to her actual loss as to these invoices and cannot recover any of them.

#### Everything Drywall Invoices/Paint by Chad

The Claimant presented evidence that she paid \$17,637.00 to Everything Drywall. Clmt. Ex. N. The largest charge on the invoice “Painting and Miscellaneous Labor” from January 1, 2020 to July 6, 2020 is \$22,344.00.<sup>14</sup> This charge has no description as to what was painted, whether the paint was interior paint or exterior paint, and whether the paint was for doors, casings, or trim.

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<sup>14</sup> The same invoice then shows two discounts of \$4,000 and \$3,132.09. The invoice does not provide any further explanation. The discounts were not explained or discussed in the testimony.

In addition, the invoices contain at least one item that was not included in the Contract, installation of bathroom mirrors. Finally, the invoices list charges for “demo drywall and replace... cut out access in wall and closet ceiling... skim around shower.” It is unclear what drywall was demolished or replaced and the reasoning for this demolition and replacement. The Claimant testified that some of the walls installed by the Respondent were not properly squared/straight. While the Claimant provided her subjective opinions regarding the walls, the Claimant provided no photographs to support her testimony, and no testimony from any other contractor as to whether the installation was unworkmanlike or inadequate, and/or whether there is any allowable variance from perfectly squared walls. Similarly, as explained earlier, any damage caused by water infiltration was not the result of unworkmanlike or inadequate work by the Respondent. Therefore, any removal of drywall for that purpose may not be included in the actual damages incurred by the Claimant.

No contract was provided to explain exactly what Everything Drywall was hired to do, nor was there sufficient testimony to explain the invoices. Based on the imprecise nature of the invoices, and the inclusion of some items which are not eligible for reimbursement, I find that the Claimant has not proven these invoices were actual damages from the Respondent’s unworkmanlike, inadequate or incomplete work under the Contract.

#### Trash and Recycling

The Contract calls for the Respondent to clean up and remove all construction debris. Clmt. Ex. 1, p. 7. The Respondent testified that before he left the jobsite he had cleaned up the debris that was present. However, the Contract was left incomplete and the Claimant had to hire other subcontractors to complete the job. The Claimant paid for Garrett County Solid Waste and Recycle to remove trash and recycling waste. There was no testimony to refute that the amount the Claimant paid for removal of the waste was excessive or unnecessary. Further, the

Respondent was required to provide removal of construction debris under the Contract.

Therefore, I find the Claimant had actual damages for the trash and recycling removal of \$90.00.

Clmt. Ex. O.

G & W Lumber, Inc. and Larry Friend

The Claimant included invoices for both G & W Lumber and Larry Friend as a single exhibit. Clmt. Ex. H. The Claimant wrote on the summary of costs page for Exhibit H that this work was for the deck and patio. However, the Claimant did not provide any contract with Larry Friend to explain the exact scope of work to compare to the scope of work under the Contract. For example, the Contract states specifically that the "Proposal Does Not Include: ... Building new decks." Clmt. Ex. 1, p. 7-8. However, the Contract included " 'Square up' side deck..." Clmt. Ex. 1, p. 7. The Contract does not reference a patio.

In addition, the invoices from G & W Lumber, Inc. contain not only lumber for a deck, but other materials that were not fully explained. Most of the invoices contain abbreviations for what was purchased and there was no testimony provided to explain exactly what was purchased on each invoice, or where/how each item was used. As the Claimant has the burden of proof as to her actual loss, I find the Claimant has not met the burden of proof that these invoices were actual loss from the Respondent's failure to complete the Contract.

Rush Services, Inc.

Rush Services Inc. was hired to complete the plumbing, electrical and HVAC work. Clmt. Ex. D. The Claimant contends that in total, Rush Services, Inc. charged \$20,444.85. Clmt. Ex. D. The Claimant provided invoices for only some of the charges. Clmt. Ex. Q. The invoices provided are as follows: \$8,553.31, \$1,375.95, \$281.61, and \$4,239.88 for a total of \$14,450.75. Clmt. Ex. Q. Ms. Mary testified extensively upon examination by the Fund as to what work under the Contract was incomplete, but did not list any of the electrical, plumbing, or

HVAC work as incomplete. Clmt. Ex. 1; 5-7. Similarly, the Respondent did not testify that any of the electrical, plumbing or HVAC was incomplete. Therefore, the Claimant has not proven that she is eligible for reimbursement for any of the Rush Services invoices.

Brosnihan Builders, Inc.

The Claimant submitted an estimate from Brosnihan Builders, Inc. Clmt. Ex. E. This estimate included "Leveling up the floor." The Contract stated that the Respondent was responsible to "Patch concrete and level areas that are out of level (existing concrete floor stays as is)." Clmt. Ex. 1, p. 4. In the Respondent's email of December 14, 2018, he stated "I will not pour a new floor in the basement even if we find that the old floor is thin. (I had money in to cover that worse case scenario) I will use leveling patches to level the floor as much as possible." Clmt. Ex. 7. The Respondent testified that he had not yet leveled the basement floor.

Ms. Mary testified that the leveling of the floor by Brosnihan Builder's Inc. was not the basement floor, but the main floor in the sunroom, which the Respondent had raised to match the kitchen area. The testimony was ambiguous as to whether this leveling was necessary due to an alleged unworkmanlike or inadequate job raising the floor, or whether this was necessary due to the Respondent leaving the job early. The Contract specifically provided for the Respondent to raise the floor in the sunroom to match the kitchen area and then install new flooring. The Contract does not specifically reference leveling in the sun room area. Clmt. Ex. 1, p. 3. The leveling of the sunroom floor was not addressed in the Contract, and there was insufficient evidence to indicate that it was required due to unworkmanlike, inadequate or incomplete work of the Respondent.

In addition, the Brosnihan Builder's Inc. estimate includes hardwood flooring for the stairs, unfinished wood for flooring, and floor stain and finish. Clmt. Ex. E. However, the Contract specifically stated that the owner was to provide "All flooring (Hardwood and Tile)."

Clmt. Ex. 1, p. 8. The Claimant contends that “[a]ll flooring” did not specifically refer to the stairs. However, the Contract does not provide for that exclusion. The Contract states clearly, “[a]ll flooring”. Clmt. Ex. 1, p. 8. Therefore, I find that any claim for materials for the flooring (wood, stain, finish) are not actual losses caused by the Respondent not completing the Contract.

Since the invoices contain multiple excluded items, and the Claimant has the burden of proof as to her actual damages, I find that the Claimant has not met her burden on these invoices.

#### Walter Jepson

The Claimant presented \$5,469.61 in invoices from Walter Jepson. Clmt. Ex. I. Some of these charges were for milling black walnut into the hardwood floor. Clmt. Ex. I. As stated previously, the Claimant was responsible for “All flooring.” Clmt. Ex. 1, p. 8. Therefore, any charges for milling or finishing of wood for the hardwood floor are not included in the Contract.

Further, the packet of items from Walter Jepson include statements, invoices, and proposals. The Claimant did not provide explanations for each of these documents to explain if a statement corresponds with a specific invoice, and a specific proposal, or if each document is a separate charge that is added up to get to a total. While the Claimant provided a calculation on the first page to state the total is \$5,469.61, after reviewing the documents I do not find corresponding charges for each of those amounts nor can I determine how the total was reached.

As some of the charges were outside of the Contract, and the evidence is unclear as to what was billed and what was paid by the Claimant, as well as exactly what was included in each of the unknown charges, I do not find that the Claimant has met her burden of proof that these charges were actual damages caused by the Respondent’s unworkmanlike, inadequate or incomplete work under the Contract.

### Darrin Kemp invoices

The Claimant introduced invoices from Darrin Kemp into evidence. Clmt. Exs. F and G. One invoice was for the “corner patio” and the other was for the “drain pipe. The Contract includes squaring up a side deck, but specifically excludes building a new deck. Clmt. Ex. 1. The testimony was unclear whether the corner patio was a deck, and if so, whether it was the side deck or the new deck (as those terms are used in the Contract). The Contract does not use the term “corner patio.” Without knowing more about what work was done and whether that work was specifically included in the contract, I do not find that the Claimant has met her burden of proof that she is entitled to any recovery for the invoice for the corner patio. Clmt. Ex. F.

The invoice for the drain pipe is for work that was clearly excluded from the contract. Specifically, there is no inclusion in the contract for water remediation work to be performed outside of the house. See Clmt. Ex. 1. In addition, the Respondent’s email from December 14, 2018, which was offered into evidence by the Claimant, clearly indicates that the Respondent would only address the water issue from the inside. The work performed by Darrin Kemp include water remediation from the outside of the home, and was not part of the Contract. Therefore, the Claimant is not entitled to recover any alleged amount for that work.

### Calculation

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 has retained 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).

I find that the Claimant paid the Respondent a total of \$176,880.00. The Claimant also paid \$1,233.53 for tempered glass, and \$90.00 for trash and recycling removal to repair or complete Respondent's work under the Contract. The agreed-upon Contract price was \$246,530.00. Therefore, the calculation is:

Amount paid to Respondent	\$176,880.00
Amount paid to repair or complete Respondent's work	+ \$1,323.53
Total Contract Price	- <u>\$246,530.00</u>
Actual Damages	(\$68,326.47)

As the amounts paid to the Respondent with the amount paid to repair or complete Respondent's work are less than the total contract price, the Claimant is not entitled to any recovery in this matter.

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).

**PROPOSED CONCLUSIONS OF LAW**

I conclude that the Claimant has not 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); COMAR 09.08.03.03B(3)(c).

**RECOMMENDED ORDER**

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

**ORDER** that the Maryland Home Improvement Guaranty Fund deny the Claimant's claim; and

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

July 26, 2021  
Date Decision Issued

*Erin H. Cancienne*  
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Erin H. Cancienne  
Administrative Law Judge

EHC/at  
#193422



PROPOSED ORDER

*WHEREFORE, this 15<sup>th</sup> day of September, 2021, Panel B of the Maryland Home Improvement Commission approves the Recommended Order of the Administrative Law Judge and unless any parties files with the Commission within twenty (20) days of this date written exceptions and/or a request to present arguments, then this Proposed Order will become final at the end of the twenty (20) day period. By law the parties then have an additional thirty (30) day period during which they may file an appeal to Circuit Court.*

*Michael Shilling*

*Michael Shilling*

*Panel B*

*MARYLAND HOME IMPROVEMENT  
COMMISSION*