

<p>IN THE MATTER OF THE CLAIM</p> <p>OF MARAT GOYKHMAN,</p> <p>CLAIMANT</p> <p>AGAINST THE MARYLAND HOME</p> <p>IMPROVEMENT GUARANTY FUND</p> <p>FOR THE ALLEGED ACTS OR</p> <p>OMISSIONS OF ALBERT</p> <p>ANDRAWOS, T/A HOME TECH, LLC,</p> <p>RESPONDENT</p>	<p>* BEFORE TRACEE N. HACKETT,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>*</p> <p>*</p> <p>*</p> <p>* OAH No.: LABOR-HIC-02-21-23817</p> <p>* MHIC No.: 21 (75) 771</p>
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PROPOSED DECISION

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STATEMENT OF THE CASE

On May 3, 2021, Marat Goykhman (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund), under the jurisdiction of the Department of Labor (Department), for reimbursement of \$4,950.00 for actual losses allegedly suffered as a result of a home improvement contract with Albert Andrawos trading as Home Tech, LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015).¹ On September

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

29, 2021, the MHIC issued a Hearing Order on the Claim. On October 15, 2021, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On January 13, 2022, I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. Hope Sachs, Assistant Attorney General, represented the Fund. The Claimant represented himself. Charles Smith, Esquire, represented the Respondent, who was present.²

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the OAH govern procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021); Code of Maryland Regulations (COMAR) 09.01.03; and COMAR 28.02.01.

ISSUES

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

SUMMARY OF THE EVIDENCE

Exhibits

I have attached a complete Exhibit List as an Appendix.

Testimony

The Claimant testified and did not present other witnesses.³

The Respondent testified and presented the testimony of Thomas Hallwig, Operations Manager.

² Katrina Andrawos appeared on behalf of the Respondent as the owner and office administrator.

³ I swore in the Claimant and his wife as witnesses; however, the Claimant chose to not call his wife as a witness in his case-in-chief. The Claimant then attempted to call his wife while the Respondent was testifying on basis that the testimony regarding the number of times that the Claimant called per day were not true, which was denied. The Claimant was provided an opportunity to provide rebuttal testimony and still choose not to call his wife.

The Fund did not present any witnesses.

PROPOSED FINDINGS OF FACT

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

1. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor with the MHIC under License #128827.⁴

2. On or around May 22, 2014, the Claimant suffered a recoverable loss for the roof of his residence as a result of storm damage, which he reported to his insurance company, Safeco Insurance Company of America (Safeco Insurance).

3. On September 2, 2014, the Claimant and the Respondent entered into a contract to “complete work via adjuster summary plus any additional supplementals provided by the insurance carrier” (Contract). More specifically, the Contract required the Respondent to repair and replace the asphalt shingled roof, two gutters, and two window screens, and to remove debris, according to the insurance scope of work.

4. The scope of work in the Contract did not include any work on the portico flat roof.⁵

5. On or around September 25, 2014, Safeco Insurance completed an adjustment estimate in the amount of \$11,481.34 (\$6,198.09 actual cash value less a \$500.00 deductible and less \$5,783.25 recoverable depreciation).⁶

⁴ The Fund proffered that it reviewed the file prior to the hearing, and the Respondent was a licensed contractor by the MHIC at the time that the parties entered into the Contract, which is the relevant time period for the Court to have jurisdiction. I accepted this proffer on the record. The proffer is supported by the Contract which provides the Respondent’s MHIC Number (Clmt. Ex. 9 and Resp. Ex. A).

⁵ The September 25, 2014 insurance adjustment (Clmt. Ex. 9 and Resp. Ex. B) has a sketch of a roof which looks like it may have included the portico roof; however, there was no testimony or additional evidence from the Claimant that this sketch included the flat portico roof or any further description of the home, other than the pictures submitted into evidence.

⁶ This appears to be a supplemental estimate based upon a notation of “***Supplement***” and “-Supplement – Adjusted waste factor from 10% to 13% to accommodate waste for valleys” on page 3 (Clmt. Ex. 9 and Resp. Ex. B). The parties did not provide the original estimate as evidence.

6. The original agreed-upon Contract price was \$10,827.50, however, the final contract price paid was \$11,481.34. There were no amendments to the Contract.

7. The Contract stated that work would begin on September 12, 2014 and would be completed within one week.

8. On October 10, 2014, the Claimant and the Respondent signed the Certificate of Completion authorizing payment to the Respondent by the Claimant's insurance company.

9. As of December 12, 2014, the Claimant's Statement of Loss reflected that the Claimant received a total of \$5,698.09 in payments from Safeco Insurance (\$5,345.68 on August 25, 2014 and \$352.41 on October 2, 2014) leaving an outstanding balance of \$5,783.25 (the amount of recoverable depreciation).

10. On December 30, 2014, the Respondent paid the Claimant in full for the contract price of \$11,481.34 less a \$500.00 deductible.⁷

11. In September 2020, the Claimant noticed a water leak on one side of the portico flat roof,⁸ which poured down the right column and as a result, the Claimant made a warranty claim with the Respondent.⁹

12. The portico roof is located above the front door of the home. Two white columns (one on each side of the front door) support the rectangular structure of the portico roof, and the rectangular roof is surrounded on top by white wooden rails with open slats on all four sides with white wooden posts at each of the four corners. The portico roof sits below a second-story window of the home, but there is no entry/exit from the home onto the roof. In other words, the

⁷ According to the Certificate of Completion, Safeco Insurance would have been responsible for paying the Respondent directly; however, the Claimant's evidence, i.e., the paid invoice reflected that the invoice was sent to the Claimant and is stamped "PAID." Based upon this evidence, I infer that the Claimant paid the Respondent with the money he received from the insurance company. The September 2, 2014 invoice is stamped paid in full, with a zero-balance due, and was addressed to the Claimant. The Respondent provided no evidence to refute this fact.

⁸ Throughout the hearing, witnesses referred to the portico flat roof as also the flat roof or the portico roof. This roof is distinguishable from the shingled roof which covers the entire home. I will use all three terms interchangeably throughout this decision.

⁹ The Claimant did not know the exact date that he made the warranty claim with the Respondent.

portico roof looks like a small balcony supported by two columns above the front door, but there is no way for a person to stand on it other than to climb up onto it from the outside.

13. At some point between September 15, 2020 and December 1, 2020, the Respondent removed the posts, railings, and the torch-down flat roof;¹⁰ replaced rotted plywood on the right side of the roof; installed an EPDM¹¹ membrane; and installed a new railing.

14. On November 23, 2020, Ashley Thomas, Officer Manager for the Respondent,¹² informed the Claimant via email that “[o]n 9/24/2014, the file shows that [the Respondent] installed a torched front porch over top of the existing flat roof.”

15. Also, in the November 23, 2020 email, Ms. Thomas informed the Claimant that an estimate for exterior work “where the column is sinking” would be provided.

16. On December 2, 2020, the Respondent completed a water test which confirmed that water was not leaking from the new rubber on the flat roof, which the Respondent installed.

17. On January 13, 2021, the Respondent informed the Claimant via email that the Respondent would not fix the portico roof and railings because the work was not authorized under the warranty.

18. On January 24, 2021, the Claimant replied to the Respondent’s January 13, 2021 email, and provided a copy of an estimate for the remediation.¹³

¹⁰ A flat roof product applied by a torch, where the torch heats up the rubber to adhere to the substrate below.

¹¹ The parties did not provide the acronym for this product, but that information is not dispositive to my decision.

¹² Ms. Thomas no longer works for the Respondent but was so employed by the Respondent at the time the warranty work was authorized in 2020. With the scope of Ms. Thomas’ position, she answered phone calls, was responsible for scheduling and sending workers out for inspections and appointments. The Respondent testified that sending workers out for a warranty claim was within the scope of Ms. Thomas’ work.

¹³ The Claimant did not provide a copy of this email or the attached invoice as evidence. I assume it is not the same as the one from Mast Construction, LLC, since that invoice is dated February 9, 2021, and the Claimant’s testimony was that the invoice was sent to the Respondent on January 24, 2021. The Claimant mentioned in his written statement and his testimony that the estimate from Clarksville Construction Services was not included (Clmt. Ex. 1). The Claimant also testified that he obtained a third estimate but did not provide the name of that company or a copy of that estimate.

19. On February 9, 2021, Mast Construction, LLC, provided the Claimant an estimate for \$4,950.00 to repair and replace the portico flat roof.

20. As of the date of the hearing, the Respondent had no documentation in its file to support Ms. Thomas' statement that work was completed on the portico roof in 2014.

DISCUSSION

Legal Framework

The Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Bus. Reg. § 8-407(e)(1); Md. Code Ann., State Gov't § 10-217 (2021); COMAR 09.08.03.03A(3). To prove a claim by a preponderance of the evidence means to show that it is "more likely so than not so" when all the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002). The Respondent bears the burden to establish by a preponderance of the evidence her affirmative defense that the Claimant should not be awarded any amount from the Fund because the Respondent claims that the express warranty expired before the Claimant notified the Respondent of the water damage to the portico roof. COMAR 28.02.01.21K(1), (2)(a) and 2(b).

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 not proven actual loss and therefore, cannot be awarded compensation from the Fund.

Positions of the Parties

The Claimant argued that the Respondent completed roof work in 2014 as part of an insurance claim; however, around September 2020, the Claimant noticed that water was leaking on one side and down the right column of the portico roof. When the Claimant requested the Respondent to fix this issue under the warranty, the Claimant argued that the Respondent performed work (warranty work) between September 2020 and January 2021, which made the issue worse. The Claimant argued that the railings were not properly measured, and the portico roof which was previously level was crooked after the Respondent's warranty work. The Claimant argued that a water test should have been completed before the Respondent began the warranty work, but instead, the Respondent's workers walked on rotted wood on the portico roof, which caused more sagging and more damage.

According to the Claimant, when he brought these issues to the attention of the Respondent, the Respondent refused to fix the issues because the Respondent realized that the September 2020 portico roof work was not covered under the original warranty. The Claimant argued that whether the warranty work was covered is irrelevant because Ms. Ashley Thomas, former officer manager, authorized the warranty work, and the Respondent's workers did complete the warranty work on the Claimant's home. The Claimant also argued that his offer to purchase materials was refused by the Respondent. The Claimant requested that I find in his favor and award \$4,950.00.

The Respondent argued that the Claimant failed to meet his burden of proof, and that the only act that the Respondent committed was mistakenly honoring an expired warranty. Furthermore, the Respondent argued that the Claimant did not prove that the Respondent committed an act or omission that led to the damage and that there was no "egregious harm." Lastly, the Respondent argued that there is a genuine dispute regarding whether the portico roof

was replaced in 2014 as part of the original contract between the parties. The Respondent argued that the portico roof was not a part of the original contract and that essentially, they replaced this portico roof for free. The Respondent requested that the claim be dismissed for these reasons.

The Fund argued that there was no statutory prohibition against recovery and that the Claimant timely filed his claim within the statute of limitations time period which begins from the date of the discovery, not the date of the original work in 2014. The Fund argued that regardless of the Respondent's mistake to perform work under the expired warranty, the Respondent still performed work on the Claimant's home and therefore is subject to the MHIC laws. The Fund argued that without expert testimony to show the Respondent's work was unworkmanlike, there is not enough evidence to support recovery from the Fund and the claim should be denied.

Analysis

Expiration of the Warranty and Agency

The parties spent a lot of time testifying about whether or not the warranty¹⁴ had expired and therefore, whether or not the warranty work was properly authorized. I find that whether or not the Respondent's one-year express warranty expired before the Claimant notified the Respondent of the issues with the portico roof and whether the portico roof was initially covered within the express warranty are legally irrelevant. As pointed out by the Fund, even if the expressly warranty *had* expired, the instant claim is *not* based on the Respondent's express warranty. Rather, the claim arises statutorily, under section 8-405(a) of the Business Regulation Article, which provides that a homeowner may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor...." Further, section 8-

¹⁴ The contract is misleading in that it reflected a 30-year manufacturer's warranty for the roof system and a "Lifetime Labor Warranty on all Workmanship"; however, the "General Terms and Conditions of the Agreement" which were incorporated into the contract, limited the labor warranty to a period of one year.

401 of the Business Regulation Article, defines "actual loss" as "the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." Regardless of the expiration or scope of the express warranty, the Respondent performed work on the Claimants home thereafter.

The express warranty's one-year duration is also irrelevant because, under section 8-405(g) of the Business Regulation Article, a claim must be brought against the Fund within three years after a claimant discovered, or should have discovered, the loss or damage. Here, the Claimant discovered the damage in September 2020, and timely filed his claim on May 3, 2021, within three years of the Claimant's discovery of the loss or damage. Notwithstanding the existence of an express warranty, section 8-103 of the Business Regulation Article provides that the provisions of the Home Improvement Law "may not be waived."

Additionally, I do not need to analyze the law of agency, i.e., whether Ms. Thomas had the legal authority to authorize the warranty work on behalf of the Respondent, for my determination in this case. This is not a breach of contract or breach of warranty claim, where such arguments may be applicable. I also find this point irrelevant, as noted by the Fund, because regardless of *who* authorized it, the home improvement work was completed by the Respondent and as noted above, the quality, completeness, and adequacy of the work performed by the Respondent is subject to the MHIC laws, which cannot be waived.

For the reasons stated above, I find that the Respondent has not met its burden for this affirmative defense.

Unworkmanlike, incompleteness or inadequacy

For the following reasons, I find that the Claimant has proven that there was inadequate work completed by the Respondent. The Claimant's photographs show sagging of the portico roof and the unevenness of the supporting white wooden columns. Specifically, the Claimant

presented a picture that his wife took on September 15, 2020 where there was no sagging. In this picture, the two white columns are even. At the very top of each column there is a white square piece between the top of the column and the bottom of the portico roof. The Claimant circled the right column (when exiting the door) with a red and blue circle on the picture. The Claimant also presented a picture taken by his wife on September 23, 2020, which depicts the removed railings and posts. The square piece above the right column that is circled in red on the picture is visibly smaller than the square piece above the left column. Lastly, the picture taken on November 24, 2020, shows that the entire right side of the square piece of the right column has been covered by the bottom portion of the portico roof as compared to the square piece above the left column which is completely visible. When comparing the September 15, 2020 picture to the November 24, 2020 picture, I can visibly see that the roof has sagged in such a way that it has almost entirely covered the right side of the square piece above the right column.

The Claimant testified that his claim was due to leaking water, and that he noticed sagging to the portico roof after the Respondent's workers performed the warranty work and had walked on the rotted wood. He testified that the workers did not measure the railings; the railings are crooked on each side and are eight inches taller and wider than the original. These observations do not require expert testimony, as the average person can observe a roof sagging. Additionally, the average person can use a ruler or tape measure to determine the size of new railings versus old railings. I would also note that the Respondent solicited testimony from the Claimant during cross-examination that the Claimant is a handyman. Although the Claimant was adamant during his testimony, kept interrupting others as they were speaking, and provided narrative responses that were beyond the scope of the questions asked, his testimony is supported by his photographic evidence. Therefore, I find the Claimant's testimony credible and reliable.

The Respondent and the Fund argued that the Claimant has not proven that the damage was caused by an act or omission by the Respondent. The Respondent provided unsolicited testimony during cross-examination that the rotted wood deteriorated over time from lack of maintenance and water intrusion from the window leaking. The Respondent persistently denied authorizing the work, was defensive during her testimony, kept speaking over the Claimant as he attempted to ask her questions, and provided narrative responses that were beyond the scope of the questions asked. The Respondent also incorrectly testified that there were no supplements issued by the insurance company, contrary to her own evidence (Resp. Ex. B). As the Respondent was not offered as an expert witness, and this testimony was not responsive to the question posed to her during cross-examination, I do not find the Respondent's testimony about the cause of the sagging to be persuasive.

The Respondent also presented the testimony of Mr. Thomas Hallwig, Operations Manager, who has fifteen years of roofing experience and has worked for the Respondent for the last two years. Mr. Hallwig testified that he initially inspected the property and observed an aged, smooth-based, torched-down modified flat roof, which indicated to him that the roof had not been replaced by the Respondent. He also testified that the roof had wooden columns in the fencing, and if such columns are not maintained, kept-up and painted, water can intrude through the posts. According to Mr. Hallwig, while employed with the Respondent, he has not observed or inspected any torched-down roofs. He clarified that the Respondent does not use torched-down roof products because they are an older style product, at a higher risk of a fire hazard, and generally used nowadays for commercial roofing. Mr. Hallwig testified that he also reviewed the original contract (which incorporates the insurance adjustment), and there was no coverage for the portico roof.

Mr. Hallwig also testified that on December 2, 2020, he conducted the water test¹⁵ on the new rubber installed by the Respondent to find out the root cause of the “issues.” As a result, Mr. Hallwig determined that there was no leaking from the new rubber installed by the Respondent in 2020. When he tested the second-story window, within a minute of spraying the window, a lot of water leaked from the window. Mr. Hallwig testified that rot can develop over two to three years or five to six years depending on how long it takes the water to intrude.

He testified that completing a water test prior to conducting any repairs is not necessarily customary, but it “would have definitely nipped things in the bud.” Mr. Hallwig testified that he was not directed by the Respondent to complete the water test first, and that generally water tests are only completed on the Respondent’s own work, because it can cause more damage to the home from water intrusion.

Mr. Hallwig indicated that as standard protocol, a picture is taken of the property prior to work include address of the home and he had a picture on his phone of where the roof appeared to already be sagging.¹⁶ Mr. Hallwig indicated that sagging was a part of the complaint from the Claimant and in order to document the issue before climbing on the flat roof, he took the picture on September 9, 2020. When asked to clarify during cross-examination, Mr. Hallwig indicated that he could see the slope and that the portico roof is not built 100% flat so that the roof can drain. Mr. Hallwig admitted that the corner is lower now than before, but it is due to rot in the wood framing, not keeping up with maintenance, and water penetration of the railing right above it. Mr. Hallwig did not deny that the sagging may have gotten worse. Although the Respondent did not offer Mr. Hallwig as an expert, he opined that the sagging in the portico roof was due to

¹⁵ A water test is a slow process begun at the low slope of the roof working up to the flashing against the home to recreate dripping rain, in order to show that no water can leak through the new roofing system.

¹⁶ The Respondent did not offer this picture as evidence because it was not printed and was solely on Mr. Hallwig’s cell phone. I permitted the Respondent the opportunity to ask Mr. Hallwig questions so that the picture could be described on the record, and the description provided was vague. The Claimant’s questions on cross-examination provided more details regarding Mr. Hallwig’s description of the picture.

wear and tear and negligent maintenance that caused intrusion from water leakage coming from the window, which penetrated the posts.

The Respondent and the Fund argued that the Claimant did not meet his burden because he did not present expert testimony to prove the unworkmanlike, inadequate, or incomplete work. However, there is no requirement in the MHIC regulations that supports this position. To the contrary, there is no requirement that a party at an OAH proceeding present live testimony to establish his or her case.¹⁷

Although I agree with the Respondent and the Fund that there is insufficient evidence to establish incomplete or unworkmanlike work, the Claimant's testimony and his photographs establish that the Respondent performed inadequate¹⁸ home improvements for the warranty work. The Claimant testified that he made the original claim due to a water leak, which was confirmed by Mr. Hallwig's testimony. According to Mr. Hallwig's testimony, the Respondent knew enough to take a picture of the portico roof before beginning the work and was aware of the sagging; however, they never addressed the cause of the water leakage until after the work was completed. Mr. Hallwig had no choice but to acknowledge that water testing beforehand would have "nipped things in the bud." It is illogical that a customer complains about water leakage and without determining if the water leakage was caused by the contractor's own work, that a contractor would replace plywood, railings, and install new roofing products without ensuring that the leak was addressed so it would not damage the newly installed products. Even though Mr. Hallwig disagreed with the Claimant about the cause of the sagging, he also acknowledged that it was worse. I accept Mr. Hallwig's testimony that rotting can occur over

¹⁷ "Indeed, hearsay statements are admissible in an administrative proceeding and if found to be credible and probative, may form the sole basis for the agency's decision." *Redding v. Bd. of Cty. Com'rs for Prince George's Cty.*, 263 Md. 94, 110-11, (1971), citing *Kade v. Charles H. Hickey Sch.*, 80 Md. App. 721, 725 (1989).

¹⁸ Inadequate is defined as "not enough or good enough." *Merriam-Webster's Online Dictionary*, retrieved March 25, 2022.

time, anywhere from three to six years, so over the roughly two and half months between the Claimant's first and third pictures, there is no way that the rotting process somehow accelerated. Instead, the Respondent did not sufficiently address the water leakage complaint, did not determine its cause, and in trying to replace the portico roof, made the sagging worse. In other words, but for the Respondent working on the portico roof (which they had no reason or obligation to do), the level of sagging would not have occurred.

Recovery from the Fund

I now 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.

However, none of the following three regulatory formulas is appropriate in this case:

(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.

COMAR 09.08.03.03B(3)(a)-(c).

There was no abandonment, and the Claimant has solicited other contractors, so the first and second formulas are not applicable.

Under the third formula, it states: “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.” COMAR 09.08.03.03B(3)(c) (emphasis added). The Claimant has established that he paid the Respondent \$11,481.34 under the original contract for the shingled roof. Additionally, the Claimant has established that the cost to repair the unworkmanlike warranty work would be \$4,950.00.

However, the Claimant has failed to prove that he paid any amount to the Respondent for the portico roof. Although the Claimant testified that the Respondent worked on the portico roof in 2014, his testimony is refuted by the Respondent’s evidence. The Respondent presented evidence from Safeco Insurance that the flat roof was not included in the claim (Resp. Ex. D). Additionally, the testimony from Mr. Hallwig was based upon his review of the Contract, inspection of the property, the age, wear/tear, and the fact that the Respondent does not install torched-down roofs, indicated that the Respondent did not install the flat roof in 2014. Therefore, this formula is not appropriate.

In such circumstances, use of a unique formula is applied to measure the Claimant’s actual loss; however, I find that a unique formula is also not appropriate. Although not dispositive on the issue of the adequacy of the warranty work, the original scope of the contract and payment thereunder is relevant to this part of the analysis. The Claimant is ineligible for recovery from the Fund because the flat portico roof was not a part of the original scope of work in the September 2, 2014 contract. As such, the Claimant did not pay any monetary funds directly to the Respondent in 2014 or in 2020. 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) (emphasis added).

In this case, the Claimant's actual loss is \$0.00, as there was no amount paid directly to the Respondent (contractor) for the portico roof. The Respondent testified that all warranty work on the portico roof in 2020 was provided to the Claimant at no cost. Additionally, the Claimant's own evidence confirmed that as of November 23, 2020, the Respondent had spent \$200.00 for railing materials and \$630.00 for the portico roof costs with no costs to the Claimant (Clmt. Ex. 2). The Claimant had no out-of-pocket expenses for this warranty work.

Although I am sympathetic to the level of damage the Claimant and his wife sustained to their portico roof, the type of claim they have made is not the type for which they are entitled to recovery from the Fund. This is not to say that the actions of the Respondent were appropriate, but just that the Claimant has not met his burden in this forum. "The Fund was established to provide an additional remedy for homeowners who suffered **actual loss due to** unsatisfactory work performed by a home improvement contractor." *Brzowski v. Maryland Home Imp. Comm'n*, 114 Md. App. 615, 628 (1997) (emphasis added). The payment of claims from the Fund is limited to "only those claims that establish that a homeowner has suffered '**actual loss**' **due to** the act or omission of a licensed contractor." *Id.* (emphasis added). The Commission is presumed to be "aware of the Fund's limited purpose, to compensate for actual loss," and to act within the scope of its authority when making such an award. *Id.* at 631. Allowing any claimant to recover from the Fund, without regard to that claimant's own financial loss, has the potential

to result in a windfall¹⁹ to a claimant to the detriment of the party who, in fact, incurred the actual loss.

The Claimant may be rightfully upset that the Respondent's warranty work was inadequate. However, I am required to follow the regulations when calculating an actual loss and the Respondent's warranty work, although defective, was completed for free. The Claimant did not present sufficient evidence to demonstrate he incurred an actual loss and, therefore, has failed to prove that he is entitled to recovery from the Fund.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has not sustained an actual and compensable loss of \$4,950.00 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(2), (3), (4).

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.

March 31, 2022
Date Decision Issued

Tracee N. Hackett

Tracee N. Hackett
Administrative Law Judge

TNH/ja
#196431

¹⁹ Windfall is "an unanticipated benefit, usu. in the form of a profit and not caused by the recipient." *Black's Law Dictionary* (11th ed. 2019).

PROPOSED ORDER

WHEREFORE, this 13th day of June, 2022, Panel B of the Maryland Home Improvement Commission approves the Recommended Order of the Administrative Law Judge and unless any parties files with the Commission within twenty (20) days of this date written exceptions and/or a request to present arguments, then this Proposed Order will become final at the end of the twenty (20) day period. By law the parties then have an additional thirty (30) day period during which they may file an appeal to Circuit Court.

Lauren Lake

Lauren Lake

Panel B

**MARYLAND HOME IMPROVEMENT
COMMISSION**