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| <p><b>IN THE MATTER OF THE CLAIM</b></p> <p><b>OF DERRON DART,</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</b></p> <p><b>KEVIN PIECEWICZ, T/A</b></p> <p><b>KAB CONSTRUCTION, LLC</b></p> <p><b>RESPONDENT</b></p> | <p><b>* BEFORE JOHN T. HENDERSON, JR.,</b></p> <p><b>* ADMINISTRATIVE LAW JUDGE</b></p> <p><b>* THE MARYLAND OFFICE</b></p> <p><b>* OF ADMINISTRATIVE HEARINGS</b></p> <p><b>*</b></p> <p><b>*</b></p> <p><b>*</b></p> <p><b>*</b></p> <p><b>* OAH No.: DLR-HIC-02-17-18407</b></p> <p><b>* MHIC No.: 16 (75) 594</b></p> |
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**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 July 15, 2017, Derron Dart (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for the reimbursement of \$52,357.13 of actual losses allegedly suffered because of a home improvement contract with Kevin Piecewicz, t/a KAB Construction, LLC (Respondent).

On July 3, 2017, the Office of Administrative Hearings (OAH) mailed notice of the hearing to the Respondent by certified and regular mail to his address of record on file with the

MHIC. Md. Code Ann., Bus. Reg. § 8-312(d) (2015).<sup>1</sup> The notice advised the Respondent of the time, place, and date of the hearing. On July 20, 2017, the United States Postal Service returned the receipt evidencing the notice was delivered to the Respondent's address of record.

I held the hearing on September 12, 2017, at the OAH, 10400 Connecticut Avenue, Suite 208, Kensington, Maryland 20895. Bus. Reg. §§ 8-312(a), 8-407(a) and (e) (2015). Steve Jackson, Esquire, appeared for the Claimant who was present. The Respondent did not appear and waived his appearance at the hearing by letter dated September 11, 2017 and received by the Clerk of the OAH on September 12, 2017. Eric B. London, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR), represented the Fund.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the DLLR, 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. 2017); Code of Maryland Regulations (COMAR) 09.01.03; COMAR 09.08.02; COMAR 28.02.01.

### ISSUES

1. Did the Claimant submit a claim to the Fund within three years after the Claimant discovered or, by use of ordinary diligence, should have discovered the loss or damage?
2. If so, did the Claimant sustain an actual loss compensable by the Fund because of the Respondent's acts or omissions?
3. If the Claimant sustained an actual loss, how much is the Claimant entitled to receive from the Fund?

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<sup>1</sup> "The hearing notice to be given to the person shall be sent at least 10 days before the hearing by certified mail to the business address of the licensee on record with the Commission." Md. Code Ann., Bus. Reg. § 8-312(d) (2015).

## SUMMARY OF THE EVIDENCE

### Exhibits

I admitted exhibits offered by the Claimant as follows:

- Cl. Ex. 1 Respondent's Contract for Services, December 3, 2010, with Attachment A, scope of work; fax log, April 22, 2011; Contract Addendum/Revision, April 22, 2011; Attachment A, scope of work, April 22, 2011
- Cl. Ex. 2 Claimant's summary of construction defects, corrections and costs associated with each correction, undated
- Cl. Ex. 3 Seventeen photographs of the subject home improvement construction
- Cl. Ex. 4 Letter from the Claimant's attorney to the Respondent, April 11, 2013
- Cl. Ex. 5 Thirteen photographs of the subject home improvement construction
- Cl. Ex. 6 Invoice no. 1043 from City Renovations & Remodeling, LLC, (City) January 27, 2013; the Claimant's Bank of America statement, February 14, 2013; invoice no. 1058 from City, 2013; the Claimant's check no. 1147, February 10, 2013, payable to City for \$1,611.20; a duplicate Bank of America statement, February 14, 2013
- Cl. Ex. 7 Invoice no. 3911 from APAC Engineering, Inc., (APAC) January 26, 2013; check no. 1145, January 25, 2013, payable to APAC, for \$300.00; invoice no. 3966 from APAC, February 9, 2013; check no. 1149, February 24, 2013, payable to APAC for \$150.00; invoice no. 1018, from City, January 21, 2013; check no. 1144, January 21, 2013, payable to City for \$550.00; invoice no. 1043, from City, January 27, 2013; a duplicate Bank of America statement, February 14, 2013
- Cl. Ex. 8 Invoice no. 1118 from City, April 26, 2013; email from Claimant to City sending payment of \$1,684.34; statement from AAA Financial Services, (AAA), May 3, 2013; invoice no. 261640, from Parrish Services, April 17, 2013; Claimant's Bank of America checking account statement, May 13, 2013
- Cl. Ex. 9 Invoice no. 830 from American Mold & Restoration, (American) January 1, 2014; Statements from US Bank, February 8, 2014, March 8, 2014, May 8, 2014 and September 8, 2014; invoice no. 1924 from Landmark Property Services, Inc., (Landmark), March 11, 2016; duplicate statements from American Express, March 28, 2016; duplicate invoice nos. 1924 from Landmark, March 11, 2016
- Cl. Ex. 10 Statement from American Express, December 28, 2016; statement from CITI, December 12, 2016; statement from AAA, February 5, 2017; statement from American Express, March 28, 2017; statement from Capital One, April 15, 2017

- Cl. Ex. 11 Estimate from City, April 9, 2013; estimate from City, March 29, 2013
- Cl. Ex. 12 Copy of website from DLLR Guaranty Fund FAQ's-HIC
- Cl. Ex. 13 Estimate from Landmark, September 12, 2017

I admitted exhibits offered by the Fund as follows:

- GF Ex. 1 Notice of Hearing from the OAH, July 3, 2017
- GF Ex. 2 MHIC Hearing Order, June 9, 2017
- GF Ex. 3 The Respondent's DLLR license history as of September 8, 2017
- GF Ex. 4 MHIC Home Improvement Claim Form, July 7, 2016 and received July 15, 2016
- GF Ex. 5 Letter from MHIC to the Respondent, August 2, 2016
- GF Ex. 6 The Claimant's HIC Complaint Form, October 12, 2015, received by HIC on October 23, 2015; letter from the Claimant to HIC, October 12, 2015
- GF Ex. 7 The Claimant's checks as follows:
- Check no. 1053, April 22, 2010, payable to KAB Construction for \$10,000.00
  - Check no. 1054, May 6, 2011, payable to KAB Construction for \$30,000.00
  - Check no. 1059, August 8, 2011, payable to KAB Construction for \$12,500.00
  - Check no. 1064, October 3, 2011, payable to KAB Construction for \$20,000.00
  - Check no. 1075, December 2, 2011, payable to KAB Construction for \$12,500.00
  - Check no. 1076, December 2, 2011, payable to KAB Construction for \$7,060.00
  - Check no. 1079, January 4, 2012, payable to KAB Construction for \$10,000.00
  - Check no. 1086, February 8, 2012, payable to Kevin Plecewicz, for \$5,000.00
  - Check no. 1091, March 20, 2012, payable to KAB Construction for \$5,000.00
  - Check no. 1094, March 31, 2012, payable to KAB Construction for \$7,135.20
  - Check no. 1090, March 16, 2012, payable to KAB Construction for \$2,500.00

- Check no. 1092, March 24, 2012, payable to KAB Construction for \$7,101.00
- Six SunTrust deposit slips for account no. 4086, dated December 2, 2011 for \$19,560.00, April 2, 2012 for \$7,135.20, January 4, 2012 for \$10,000.00, March 1, 2012 for \$3,518.34, March 16, 2012 for \$2,500.00 and March 21, 2012 for \$5,000.00

### Testimony

The Claimant testified on his behalf. Todd Stevens (Stevens), Contractor, was qualified as an expert in the field of home improvement and testified on behalf of the Claimant. The Fund did not present any witness 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 contractor's license number 4373507.
2. The Claimant is not related to the Respondent.
3. The Claimant's property subject to this matter is located at 5510 Greentree Road, Bethesda, Maryland 20817 (the Property).<sup>2</sup>
4. The Property is the Claimant's primary residence.
5. The Claimant filed a civil suit with the Circuit Court for Montgomery County, Maryland (Circuit Court) which the Circuit Court dismissed for want of prosecution, without prejudice.<sup>3</sup>

<sup>2</sup> The Respondent owns the property with his wife, Mariella While, who is not a party to this claim.

<sup>3</sup> On September 30, 2013, the Claimant filed a civil tort lawsuit against the Respondent in the Circuit Court, bearing case number 382473V. On March 7, 2014, the Respondent filed a Suggestion of Bankruptcy with the Circuit Court, which stayed the lawsuit. On May 7, 2014, the Respondent filed a second Suggestion of Bankruptcy with the Circuit Court, which again stayed the lawsuit pending resolution of the Respondent's bankruptcy. On June 13, 2016, the Circuit Court dismissed without prejudice the lawsuit against the Respondent for lack of prosecution. For purposes of this decision, I take official notice of the procedural posture of the lawsuit against the Respondent.

6. In October 2010, the Claimant met with the Respondent to discuss home improvements to the Property.

7. On December 3, 2010, the Claimant (along with his wife) and the Respondent entered into an agreement (the Contract) whereby the Respondent agreed to do a complete demolition, remodel and improvement of the Property.

8. The original contract price was \$101,714.00.

9. The start date was scheduled for December 7, 2010.

10. The Contract provided for the scope of work listed in Attachment A (Cl. Ex. 1).

In summary, the scope of work was as follows:

- Finishing work involving the kitchen, bathrooms, electrical fixtures and decorative structure (pitched roof with decorative columns)
- Demolition and hauling
- Foundation (excavate and build new)
- Framing
- Kitchen
- Bathrooms on the first floor and second floor
- Flooring (install, refinish, replace and add carpet)
- Painting
- Make interior repairs
- Make exterior repairs
- Plumbing install and move supply lines performed by a licensed plumber
- Electric install performed by a licensed electrician
- HVAC performed by a licensed HVAC technician
- Finish (broom clean)

11. The payment terms pursuant to the Contract were the following:

|   |                    |
|---|--------------------|
| Upon signing Contract                       | \$25,700.00        |
| First Draw/Permit and Demolition Complete   | \$17,160.00        |
| Second Draw/Concrete Complete               | \$17,160.00        |
| Third Draw/Complete Framing, etc.           | \$20,880.00        |
| Fourth Draw/Rough-In Completed              | \$11,056.00        |
| Fifth Draw/Complete Deck, Drywall, etc.     | \$ 8,182.00        |
| Final Draw/Complete/Use & Occupancy Granted | <u>\$ 1,576.00</u> |
| Total                                       | \$101,714.00       |

12. The completion date was estimated to be the end of six calendar months from the scheduled start date of December 7, 2010.

13. On April 22, 2011, the Claimant and Respondent revised the payment terms of the

Contract as follows:

|   |                    |
|---|--------------------|
| Upon signing Contract                       | \$ 25,700.00       |
| First Draw, with signed updated Contract    | \$ 10,000.00       |
| Second Draw/Concrete Complete               | \$ 30,000.00       |
| Third Draw/Complete Framing, etc.           | \$ 25,000.00       |
| Fourth Draw/Rough-In Completed              | \$ 20,000.00       |
| Fifth Draw/Complete Deck, Drywall, etc.     | \$ 20,000.00       |
| Final Draw/Complete/Use & Occupancy Granted | <u>\$ 3,933.00</u> |
| New Contract Total                          | \$134,633.00       |

14. The payment revisions were due to the Respondent agreeing to build a new second floor and roof to the Property.

15. The estimated date of completion pursuant to the revised Contract was April 2012.

16. The Claimant paid the Respondent for the home improvement as follows:

| <u>Check No.</u> | <u>Payable to</u> | <u>Date</u>      | <u>Amount</u>      |
|------------------|-------------------|------------------|--------------------|
| 1053             | KAB Construction  | April 22, 2010   | \$ 10,000.00       |
| 1054             | KAB Construction  | May 6, 2011      | \$ 30,000.00       |
| 1059             | KAB Construction  | August 8, 2011   | \$ 12,500.00       |
| 1064             | KAB Construction  | October 3, 2011  | \$ 20,000.00       |
| 1075             | KAB Construction  | December 2, 2011 | \$ 12,500.00       |
| 1076             | KAB Construction  | December 2, 2011 | \$ 7,060.00        |
| 1079             | KAB Construction  | January 4, 2012  | \$ 10,000.00       |
| 1086             | Kevin Piecewicz   | February 8, 2012 | \$ 5,000.00        |
| 1090             | KAB Construction  | March 16, 2012   | \$ 2,500.00        |
| 1091             | KAB Construction  | March 20, 2012   | \$ 5,000.00        |
| 1092             | KAB Construction  | March 24, 2012   | \$ 7,101.00        |
| 1094             | KAB Construction  | March 31, 2012   | <u>\$ 7,135.00</u> |
|                  | Total             |                  | \$128,796.00       |

17. The Respondent did not complete the home improvement by April 2012.

18. In August 2012, the Respondent ceased construction on the Property and did not return despite repeated demands by the Claimant.

19. Between August 2012 and October 2012, the Claimant discovered the following defects with the Respondent's construction:

|    | <u>Issue (Defect) Title</u>  | <u>Issue (Defect) Description<sup>4</sup></u>                                      |
|----|------------------------------|--|
| 2. | Structural Beam:             | Unworkmanlike installation of structural beam detached from floor joists           |
| 4. | Kitchen/Dining Room Ceiling: | Not level and pitched to nearly four inches from one end of the room to the other. |

(Cl. Ex. 2)

20. On March 29, 2013, the Claimant retained City to conduct an independent analysis of the Respondent's construction. (Cl. Ex. 11.)

21. On April 9, 2013, City provided its report and reported to the Claimant construction defects caused by the Respondent, as follows:

- Exposed flashing where roof shingles are not in alignment,
- Edge of shingles not cut straight
- No flashing around chimney on main roof
- No cap
- Multiple holes in shingles; more than twenty holes on each side of the roof
- Windows at least two inches smaller than the rough opening
- Kitchen ceiling not level; the ceiling rises up to two inches over ten feet
- Bathroom vents into the master bedroom and the bedroom lacked a vent hose leading the air outside the home
- Shoe molding does not match the floor
- Tank-less water heater draws too much current for a single phase electrical source
- Main support footer and beam constructed improperly, and
- Gutter system contains insufficient drainage to accommodate the runoff from the roof.

22. City estimated the cost to replace and repair the construction to be \$76,739.58.

23. On October 30, 2013, the Claimant retained Landmark to conduct an independent analysis on the Respondent's construction. (Cl. Ex. 13.)

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<sup>4</sup> Finding of Fact number 19 is numbered the same as Claimant's exhibit 2.

24. On November 22, 2013, Landmark reported to the Claimant construction defects

caused by the Respondent, as follows:

- Main support footer and beam that was detached from floor joist
- Dislodged pantry cabinet in the kitchen
- Disconnected outside electrical what? line? conduit?
- Damaged roof materials and flashing
- Windows that were incorrectly sized for the existing framing
- Angled ceiling in the kitchen
- Missing venting hoses
- Installation of electric tank-less water heater that drew too much power
- Insufficient Drainage of installed gutter system
- Unfinished HVAC exhaust and intake components
- Non-sealed door leading from the master bedroom to the outside
- Rippled siding
- Bathroom Venting: Inadequately installed venting in the master bathroom and second floor bathroom
- Electrical Wiring: The safety box was bypassed and an additional 120-volt live line was hanging next to disconnect box; broken 24 volt wires
  
- Windows: Each window on both the first and second floors was at least two inches smaller than the rough opening
  
- Electrical Water Heater: Exceeded the capacity of the single phase electrical source that caused circuit to break.; used device outside warranty.

(Cl. Ex.13)

25. Landmark estimated the cost to replace and repair the construction to be \$80,735.77.

26. The only new construction defects provided by Landmark to the Claimant on November 22, 2013, that are not time barred by the statute of limitations are the following:

|        |             |
|--------|-------------|
| Doors  | \$ 368.78   |
| HVAC   | \$ 327.05   |
| Siding | \$13,580.69 |

(Cl. Ex. 13)

|             |                    |
|-------------|--------------------|
| Venting     | \$ 1,262.60        |
|             | \$ 1,611.20        |
| Electrical  | \$ 545.00          |
|             | <u>\$ 1,684.34</u> |
| (Cl. Ex. 2) |                    |
| Total       | \$19,379.66        |

(Cl. Ex.13)

27. The estimated cost to repair or replace the Landmark discoveries not time barred by the statute of limitations is \$19,379.66.

### DISCUSSION

In 1985, the Maryland General Assembly enacted legislation that first established the Fund. By this means, the legislature sought to create a readily available reserve of money from which homeowners could seek relief for actual losses sustained because of an unworkmanlike, inadequate, or incomplete home improvement performed by a licensed home improvement contractor. Md. Code Ann., Bus. Reg. §§ 8-401 to 8-411 (2015).<sup>5</sup> Under this statutory scheme, licensed contractors are assessed fees which subsidize the Fund. Homeowners who sustain losses by the actions of licensed contractors may seek reimbursement for their “actual losses” from this pool of money, subject to a maximum of the lesser of \$20,000.00 or the amount paid by, or on behalf of, the claimant to the contractor. Md. Code Ann., Bus. Reg. § 8-405(e)(1) and (5). A homeowner is authorized to recover from the Fund when he or she sustains an actual loss that results from an act or omission by a licensed contractor. Md. Code Ann., Bus. Reg. § 8-405(a). When the Fund reimburses a homeowner as a result of an actual loss caused by a licensed contractor, the responsible contractor is obligated to reimburse the Fund. Md. Code Ann., Bus. Reg. § 8-410. The MHIC may suspend the license of any such contractor until he or she reimburses the Fund in full with annual interest as set by law. Md. Code Ann., Bus. Reg. § 8-411(a).

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<sup>5</sup> Unless otherwise indicated, all references are to the 2015 version.

A claimant may not concurrently submit a claim to recover from the Fund and bring an action in a court of competent jurisdiction against a contractor based on the same facts alleged in the claim. If the claimant brings an action in a court of competent jurisdiction based on the same facts alleged in a pending claim, the Commission shall stay its proceedings on the claim until there is a final judgment and all rights to appeal are exhausted. 8-408(b)(1)(2). In this case, the Claimant's action against the Respondent filed in Circuit Court was dismissed on June 13, 2016, before the July 15, 2017 claim filed against the Fund.

Recovery against the Fund is based on "actual loss," as defined by statute and regulation. "[A]ctual loss' means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." Md. Code Ann., Bus. Reg. § 8-401. "By employing the word 'means,' as opposed to 'includes,' the legislature intended to limit the scope of 'actual loss' to the items listed in section 8-401." *Brzowski v. Md. Home Improvement Comm'n*, 114 Md. App. 615, 629 (1997). The Fund may only compensate claimants for actual losses incurred as a result of misconduct by a licensed contractor. COMAR 09.08.03.03B(2). At a hearing on a claim, the Claimant has the burden of proving the validity of the claim by a preponderance of the evidence. Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3). "[A] preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces . . . a belief that it is more likely true than not true." *Coleman v. Anne Arundel Cty. Police Dep't.*, 369 Md. 108, 125, n. 16 (2002), quoting *Maryland Pattern Jury Instructions* 1:7 (3d ed. 2000).

There is no dispute that the Respondent held a valid contractor's license in 2014 when his company entered into the Contract with the Claimant. Md. Code Ann., Bus. Reg. § 8-405(a). There is no dispute that the Claimant is the owner of the subject property. In addition, there is no

procedural impediment barring him from recovering from the Fund for new construction defects discovered by Landmark and reported to him on November 22, 2013. Md. Code Ann., Bus. Reg. § 8-405(a), (f).

The dispute is whether the Claimant's claims totaling \$52,357.13, were submitted within the time required by the applicable statute of limitations. A claim shall be brought against the Fund within three years after the claimant discovered or, by use of ordinary diligence, should have discovered the loss or damage. Md. Code Ann., Bus. Reg. § 8-505(g). Under the discovery rule, a statute of limitations begins to run when a claimant gains knowledge sufficient to put him or her on inquiry notice; from that date forward, a claimant will be charged with knowledge of facts that would have been disclosed by a reasonably diligent investigation. *Lumsden et al. v. Design Tech Builders, Inc.*, 749 A. 2d 786, 358 Md. 435 (2000).

In this case, some of the construction defects the Claimant identified as being unworkmanlike or incomplete were not timely claimed against the Fund. The Claimant argued that there is ample evidence to support his claim filed on July 15, 2017 for all of the construction issues as those issues represent a continuing line of new discovery. The analogy used was that of a blooming onion, meaning that every time the onion was peeled, a new problem was uncovered. The Claimant argues that there should be no statute of limitations imposed against the claim that penalizes the Claimant who was victimized by the Respondent. Enforcing a statute of limitations, the Claimant argues, would be patently unfair.

The Fund argued that the credible evidence shows that the Claimant has shown the Respondent performed an unworkmanlike, inadequate and incomplete home improvement, but, a claim against the Fund had to be filed no later than the end of three years after discovery of the loss or damage, which was no later than October 2015 or April 9, 2016. The Fund further argued that there is no tolling of the statute of limitations.

I conclude that the construction defects discovered by the Claimant between August 2012 and October 2012 are time barred from filing a claim against the Fund. The construction defects discovered by City and reported to the Claimant on April 9, 2013 are time barred from filing a claim against the Fund.

The testimony of Stevens was not sufficient to overcome the procedural defects with the Claimant presenting timely claims. Stevens, through his company Landmark, was retained to provide an independent analysis of the Respondent's construction. The Claimant first hired Stevens' subsidiary company, American, to provide remediation of mold work on the Property. The majority of the construction defects Landmark discovered pursuant to its analysis and disclosed within its report dated November 23, 2013 were already known, or should have been known to the Claimant upon the Claimant's inspection of the Property during the period of August 2012 through October 2012 and upon receiving the April 9, 2013 report of City.

I conclude that the construction defects resulting in a timely filed claim with the Fund for an inadequate home improvement are identified in finding of fact number twenty-six herein, and amount to \$19,379.66.

The next issue is whether the Respondent performed an unworkmanlike, inadequate, or incomplete home improvement due to misconduct concerning the timely claimed construction defects, and if so, whether the Respondent made good faith efforts to resolve the claim. A claim may be denied if the Claimant unreasonably rejected good faith efforts by the Respondent to resolve the claim. Md. Code Ann., Bus. Reg. § 8-405(d). For the following reasons, I find that the Claimant has proven eligibility for compensation for the timely claimed construction defects and has not unreasonably rejected good faith efforts by the Respondent to resolve the claim.

The Respondent performed an incomplete and unworkmanlike home improvement for which it was contracted. Thus, the misconduct in this case lies in the Respondent not performing

the agreed upon work pursuant to the April 22, 2011 revised Contract. The unworkmanlike and incomplete work is identified within finding of fact number twenty-six herein. The Claimant sustained an actual monetary loss for those timely claimed construction defects. He is eligible for compensation from the Fund. I now turn to the amount of the award, if any.

The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. COMAR 09.08.03.03B(1). MHIC's regulations offer three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3) sets forth the various formulas for determining an "actual loss." The appropriate formula is the following:

- (3) Unless it determines that a particular claim requires a unique measurement, the Commission shall measure actual loss as follows:
  - ...
  - (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.

Using the formula in COMAR 09.08.03.03B(3)(c), the following calculations apply:

|                       |   |
|-----------------------|---|
| \$128,796.00          | Payment made to the Respondent by Claimant under the Contract                                 |
| + <u>\$ 19,379.66</u> | The amount paid to or required to pay to Landmark for the timely claimed construction defects |
| Total                 | \$148,175.66  |
| Less                  | <u>\$134,633.00</u> The original revised contract price                                       |
|                       | \$ 13,542.66    To be considered as actual loss   |

The fund may not pay a Claimant an amount in excess of the amount paid by or on behalf of a claimant to the contractor against whom the claim is filed. Md. Code Ann., Bus. Reg. § 8-405(e)(1) and (5). The Claimant has an “actual loss” of \$13,542.66.

### **PROPOSED CONCLUSIONS OF LAW**

I conclude that the Claimant did submit a claim to the Fund within three years after the claimant discovered or, by use of ordinary diligence, should have discovered the loss or damage of construction defects identified within finding of fact number twenty-six of this order. Md. Code Ann., Bus. Reg. § 8-505(g) (2015); *Lumsden et al. v. Design Tech Builders, Inc.*, 749 A. 2d 786, 358 Md. 435 (2000).

I further conclude that the Claimant has sustained an actual loss of \$13,542.66 as a result of the Respondent’s acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405(e)(1) and (5) (2015); COMAR 09.08.03.03B(3)(b).

### **RECOMMENDED ORDER**

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

**ORDER** that the Claimant sustained an actual loss; and

**ORDER** that the Maryland Home Improvement Guaranty Fund award the Claimant \$13,542.66; and

**ORDER** that the Respondent is ineligible for a Maryland Home Improvement Commission license until he reimburses the Guaranty Fund for all monies disbursed under this Order plus annual interest of at least ten percent as set by the Maryland Home Improvement Commission;<sup>6</sup> and

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<sup>6</sup> 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.

**Signature on File**

December 5, 2017  
Date Decision Issued

John T. Henderson, Jr. *JTH*  
Administrative Law Judge

JTH/emh  
#171141

**PROPOSED ORDER**

***WHEREFORE, this 5<sup>th</sup> day of February, 2018, 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.***

***Andrew Snyder***

***Andrew Snyder***

***Panel B***

***MARYLAND HOME IMPROVEMENT COMMISSION***