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| **IN THE MATTER OF THE CLAIM** | * | **BEFORE JENNIFER M. CARTER JONES,** |
| **OF LLOYD STIRMER,** | * | **AN ADMINISTRATIVE LAW JUDGE** |
| **CLAIMANT** | * | **OF THE MARYLAND OFFICE** |
| **AGAINST THE MARYLAND HOME** | * | **OF ADMINISTRATIVE HEARINGS** |
| **IMPROVEMENT GUARANTY FUND** | * | |
| **FOR THE ALLEGED ACTS OR** | * | |
| **OMISSIONS OF** | * | |
| **NATALIA MARIN,** | * | **OAH No.: LABOR-HIC-02-22-01028** |
| **T/A BENT PALM DESIGN/BUILD** | * | **MHIC No.: 21(75)932** |
| **LLC,** | * | |
| **RESPONDENT** | * | |

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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 or about August 12, 2021, Lloyd Stirmer (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) under the jurisdiction of the Department of Labor (DOL) for reimbursement of $19,345.00 in alleged actual losses suffered as a result of a home improvement contract with Natalia Marin, t/a Bent

Palm Design/Build LLC (Respondent).[1] On January 4, 2022, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.[2]

I held a hearing on April 1, 2022, at the OAH in Hunt Valley, Maryland.[3] Justin Dunbar, DOL Assistant Attorney General, represented the Fund. The Claimant represented himself. Thomas Griest, Respondent Principal, represented the Respondent

The contested case provisions of the Administrative Procedure Act, the DOL's hearing regulations, and the Rules of Procedure of the OAH govern procedure in this case.[4]

## 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 that loss?

## SUMMARY OF THE EVIDENCE

Exhibits

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

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| CL #1 | Copy of a promotional pamphlet for Zip Up Ceiling and Underdeck and the following photographs:<br>a. Trex RainEscape waterproofing system atop the Claimant's deck framing<br>b. Underside of deck framing |
| CL #2 | Contract between the Claimant and the Respondent, with annotations, December 30, 2019 |
| CL #3 | Printout from Trex waterproofing website titled Trex RainEscape vs. the Competition, undated |

[1] Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015). Unless otherwise noted, all references hereinafter to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.
[2] Bus. Reg. §§ 8-407(a), 8-312.
[3] Bus. Reg. § 8-407(e). The Respondent participated in the hearing by telephone. COMAR 28.02.01.20B.
[4] Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021); COMAR 09.01.03; and COMAR 28.02.01.

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| CL #4 | Emails between Andy, Respondent's Project Manager, and the Claimant's wife, Stacey for dates including December 8, 2019 through December 28, 2020 |
| CL #5 | Emails between the Claimant and Mike Horvat, Trex RainEscape Operations Manager, January 7, 2021 |
| CL #6 | Emails between the Claimant and Mr. Horvat, January 7, 2021 |
| CL #7 | Emails between the Claimant and Mr. Horvat for dates including January 18, 2021 and February 9, 2021 |
| CL #8 | Emails between the Claimant and Mr. Griest, January 28, 2021 |
| CL #9 | Email from Mr. Horvat to the Claimant, March 29, 2022 |
| CL #10 | Emails between the Claimant and Mr. Griest, March 16, 2021 |
| CL #11a - i | Photographs of the underside of the Claimant's deck showing leaks and nail holes, taken between April and December 2020 |
| CL #12 | Contract with WDL Carpentry, Inc. (WDL Carpentry), July 30, 2021 |

I admitted the following exhibits on behalf of the Fund:

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| Fund #1 | Copy of OAH Notice of Hearing, January 28, 2022 |
| Fund #2 | Letter from the DOL to the Respondent, December 28, 2021 |
| Fund #3 | Claimant's MHIC Claim Form, August 12, 2021 |
| Fund #4 | Letter from the DOL to the Respondent, August 24, 2021 |
| Fund #5 | Respondent's Licensing History, printed on March 31, 2022 |

The Respondent did not submit any exhibits for admission into the record.

Testimony

The Claimant testified.

Thomas Griest testified on behalf of the Respondent.

The Fund presented no witnesses.

## PROPOSED FINDINGS OF FACT

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

1. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor under MHIC license number 104766.

2. The Claimant and his wife have a special needs son who enjoys the water.

3. The Claimant and his wife installed a hot tub beneath their deck where their son could enjoy being in the water.

4. The Claimant and his wife wished to waterproof the deck so that when it rained, no water would leak through the deck and the Claimant's son could enjoy the hot tub while it is raining.

5. Initially, the Claimant intended to use a product called Zip Up. The Claimant called the Zip Up manufacturer and a Zip Up representative referred the Claimant to Berhens Lumber (Berhens).

6. The Claimant contacted Berhens who, in turn, referred the Claimant to Andy Fulmer (Andy), Project Manager for the Respondent. Andy advised the Claimant that Trex RainEscape waterproofing was a better product than Zip Up.

7. Zip Up waterproofing material is installed under the deck and does not require the deck floor to be removed. Trex RainEscape is installed between the deck frame and the deck floor.

8. On December 30, 2019, the Claimant entered into a contract with the Respondent (Contract) to waterproof his deck using Trex RainEscape. Specifically, the scope of work included the following:

- Demolition of existing deck flooring and railings
- Installation of Trex RainEscape
- Installation of new Trex deck floorboards atop the RainEscape

9. The Contract specified that the Respondent would also install gutters, lights, and down spouts.

10. The Contract stated that the "[p]roduct may have small leaks due to excessive rain downfalls. Leaks tend to happen at or close by gutters [sic] system and will not [sic] ceiling area."[5]

11. The Claimant paid the Respondent $36,651.00 for the deck work. Of this amount, the Claimant paid $9,642.00 for the Trex RainEscape waterproofing system.

12. The Contract included a two-year warranty.

13. The Trex RainEscape website states that the waterproofing systems, "provide 100% protection of the deck substructure from moisture penetration."[6]

14. The Respondent's work crew began removing the existing deck boards and installing the Trex RainEscape in late February or early March 2020.

15. The Respondent's work crew removed the existing deck floorboards, installed the Trex RainEscape on top of the existing deck frame, and installed new deck floorboards on top of the Trex RainEscape.

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[5] CL #2.
[6] CL #3.

16. Some of the deck floor boards the Respondent's crew installed were not level. As a result, the Respondent removed the existing floorboards, and replaced them, ensuring the deck floor was level.

17. The Respondent completed the installation of the Trex RainEscape and the new deck boards and related items before April 2020.

18. In or about April 2020, the Claimant noticed that in several areas, water was leaking into the space below the deck. The Claimant's wife sent a text message to Andy to advise him of the leaks.

19. In or about June 2020, through Andy, the Respondent inspected the Claimant's deck, removed some of the deck floor boards, and made repairs.

20. After Andy made repairs to the deck, on July 2, 2020, the Claimant's wife advised Andy by text message that some of the deck floor boards had begun popping up.

21. Andy advised the Claimant's wife that he would come to their house early the following week and, perhaps, have a Trex RainEscape representative accompany him to inspect the deck and the Trex RainEscape.

22. Andy visited the Claimant's house on or about August 6, 2020.

23. After Andy's visit, the Claimant's deck was still leaking. On November 11, 2020, the Claimant's wife advised Andy of these leaks.

24. Before November 30, 2020, the Claimant and his wife discovered two additional leaks. On November 30, 2020, the Claimant's wife sent Andy a text message advising him of the two new leaks.

25. In her November 30, 2020 text the Claimant's wife asked Andy to bring a Trex RainEscape representative to diagnose any problems that may have been causing the leaking.

26. In at least one location, the Respondent's crew penetrated the Trex RainEscape with a nail. The nail was visible on the underside of the deck and there was a leak in this area.

27. In at least one location, the Trex RainEscape was penetrated so that sunlight shone through.

28. There were multiple areas of collected moisture and leakage under the deck.

29. Some of the leaks dropped water directly onto the hot tub.

30. After November 30, 2020, Mr. Griest became the Respondent's point of contact with the Claimant and his wife.

31. On December 14, 2020, the Claimant sent Mr. Griest an email to address the leaking deck and Trex RainEscape. Mr. Griest responded to this email and advised the Claimant that he wanted to arrange for a Trex RainEscape representative to inspect the deck and the Trex RainEscape materials. Mr. Griest also stated the following:

> An underdeck ceiling drainage system will not hold up to a massive downfall of rain. These are second systems and if your house gutters are [not] keeping up with the drainage during a heavy downpour, neither will rainescape [sic] or any other system out there. If Trex can identify an issue that is causing the leaks other then [sic] mother nature, we will be fixing it.[7]

32. On December 28, 2020, the Claimant's wife again contacted Andy via text and inquired when he would repair the leaks.

33. By the end of the 2020 calendar year, the Claimant researched and found the phone number for the Trex RainEscape headquarters in Colorado. The Claimant called the headquarters and spoke with Mike Horvat, Trex RainEscape Operations Manager, and advised him of the leaks resulting from the deck or the Trex RainEscape.

34. On January 7, 2021, the Claimant sent Mr. Horvat an email with additional information about how the Respondent installed the Trex RainEscape and deck. The Claimant

[7] CL #5.

attached to the email photos of the areas where the deck was leaking on the underside of the deck.

35. On January 18, 2021, Mr. Horvat contacted Mr. Griest by email and copied the Claimant on the email. In this email, Mr. Horvat advised Mr. Griest that he was willing to work with Mr. Griest to discover the source of the leaks the Claimant was experiencing on the underside of his deck.

36. In the January 18, 2021 email, Mr. Horvat advised Mr. Griest that Trex RainEscape representatives had not been traveling much "for obvious reasons."[8] Instead, Mr. Horvat suggested that he or a Trex RainEscape representative could be available to "Facetime"[9] when Mr. Griest was on site at the Claimant's property to inspect the deck.

37. On January 28, 2021, the Claimant sent an email to Mr. Griest, again stating his dissatisfaction with the leaking deck. The Claimant advised the Respondent that he would prefer a refund of $9,642.000, the cost of the Trex RainEscape.

38. On the same date, Mr. Griest responded to the Claimant's email and advised the Claimant that the Respondent was attempting to schedule an on-site visit with a Trex RainEscape representative. Specifically, the Respondent stated that, "[i]deally, we want and need a Trex rep to meet with us at your project so we can agree on what needs to be done in their opinion."[10]

39. The Claimant responded to Mr. Griest's email by reminding him that Mr. Horvath stated that Trex RainEscape representatives are not traveling but a representative could consult with Mr. Griest via Facetime to diagnose the problem.

40. On February 9, 2021, Mr. Horvat sent an email to the Respondent and copied the Claimant. In the email, Mr. Horvat asked whether there was any further information about the

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[8] The COVID-19 pandemic began in March 2020.
[9] Facetime is a video communications platform.
[10] CL #8.

source of the Claimant's deck leaks. Mr. Horvat advised the Respondent to let him know "if there is something that I can do to assist from a distance."[11]

41. On March 16, 2021, the Claimant sent an email to the Respondent and complained that the Respondent had not worked to resolve the leaking deck. The Claimant again requested a refund of the $9,642.00 he paid for the Trex RainEscape.

42. On the same day, the Respondent replied to the Claimant's email and advised that the Respondent "MUST have a Trex RainEscape rep meet [them] at [the Claimant's] project and advise us on exactly what they want done to resolve this issue."[12]

43. The Claimant demanded that the Respondent refund of his money in response to the Respondent's email.

44. The Respondent did not return to the property between March 16, 2021 and March 29, 2022 and did not arrange for an on-site or Facetime consultation with any representative from the Trex RainEscape headquarters.

45. On March 29, 2022, the Claimant spoke with Mr. Horvat by telephone.

46. On that same date, Mr. Horvat sent the Claimant an email stating the following:

> Our system, if installed properly, will create a 100% waterproof area under your decking, protecting your joists, beams, etc., from water.
>
> As we had spoken about in the past, it is not necessary for one of our representatives to be at your house in person to identify the cause and solution for your leaking RainEscape system. Regardless of Covid, installation issues like this and most of the calls of this nature are resolved over the phone or through face time with a great degree of success.[13]

47. The Claimant obtained an estimate from WDL Carpentry to resolve the Claimant's leaking deck.

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[11] CL #7.
[12] CL #10.
[13] CL #9.

48. To resolve the leaking deck, the deck boards, Trex RainEscape, and railings must be removed, a rain system must be installed, and the deck boards and railings must be reinstalled.

49. WDL Carpentry estimated that the cost to resolve the Claimant's leaking deck would be $19,345.00

## DISCUSSION

The Claimant has the burden of proving the validity of his claim by a preponderance of the evidence.[14] "[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."[15]

An owner may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor."[16] Actual loss "means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement."[17] For the following reasons, I find that the Claimant has proven eligibility for compensation.

Based on the unrefuted evidence, the Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimants. Per the Contract, the Claimants agreed to pay the Respondent $36,651.00 to remove the deck boards and railings of the Claimant's existing deck, install the Trex RainEscape waterproofing system, and install new deck boards and railings, lighting and gutters. The Claimants paid the Respondent a total of $36,651.00 to complete the project and asserted that the Respondent failed to properly install the Trex RainEscape, causing the waterproofing system to fail and leak under the deck.

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[14] Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3); COMAR 2.02.01.21K(1).
[15] *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002).
[16] Md. Code Ann., Bus. Reg. § 8-405(a); *see also* COMAR 09.08.03.03B(2) ("actual losses . . . incurred as a result of misconduct by a licensed contractor").
[17] Md. Code Ann., Bus. Reg. § 8-401.

The Claimant testified that he and his wife have a son with special needs who loves the water. The Claimant and his wife have a hot tub their son enjoys, which is situated under the deck; therefore, they decided to waterproof their deck so that their son could enjoy time in the family hot tub even when it rained. The Claimant further testified that once the Respondent's work crew installed some of the deck boards, he and his wife discovered that a section of those new deck boards were not level. Accordingly, Andy or another Respondent representative removed the boards and replaced them so they were level. After that, the Claimant and his wife began to notice leaks in the Trex RainEscape and contacted Andy to resolve the issue. Andy attempted to make repairs, but the leaks persisted, with new leaks forming over time. According to the Claimant, and as shown in the photographs he produced at the hearing, some of the leaks were directly above the hot tub. As the entire purpose for waterproofing the deck was to allow his son to enjoy the hot tub in inclement weather, the Claimant argued that the Respondent's work was useless.

The Claimant further testified that Mr. Griest insisted that to determine the source of the leaks, he needed to meet on site with a Trex RainEscape representative at the Claimant's property. However, according to Trex RainEscape Operations Manager Mike Horvat, due to Covid-19, no Trex RainEscape representatives were available to travel to the Claimant's property; rather, he or another Trex RainEscape representative could meet with Mr. Griest via FaceTime to diagnose the cause of the leaks together. The Respondent, however, never made any effort to diagnose the problems after November 2020 and refused to meet with a Trex RainEscape representative by FaceTime.

The Claimant presented photographs of the leaks under the deck after the Respondent installed the Trex RainEscape. In one of those photographs, the Trex RainEscape appears to be punctured with a nail or a screw. In another photograph, a clear hole is visible in the Trex

RainEscape. The Claimant also presented multiple text messages between the Claimant's wife and Andy regarding the steps Andy took to correct the originally installed crooked deck floorboards and to fix the leaks. Furthermore, the Claimant submitted emails between himself and Mr. Griest in which the Claimant requested, on multiple occasions, to consult with Mr. Horvat to determine why the deck and Trex RainEscape was leaking.

The Respondent did not dispute that the Trex RainEscape leaked after it was installed, but Mr. Griest testified that the Respondent diligently tried to address the leaks on several occasions. According to Mr. Griest, due to the Covid-19 pandemic that impacted the United States in early 2020, the Respondent only had one crew available to work on the Respondent's project, which accounted for some of the delays in diagnosing and finding a remedy for the leaks in the deck and Trex RainEscape. Mr. Griest further testified that he believed it was imperative that he be able to meet with a Trex RainEscape representative in person to accurately diagnose what was causing the leaks. According to Mr. Griest, he would still like to meet in person with Trex RainEscape personnel and to ensure the leaks are fixed.

It is undisputed that the Claimants have experienced leaks under their deck since the Respondent installed the Trex RainEscape and topped it with new deck floorboards. It is also undisputed that a section of the deck floor boards the Respondent's crew initially installed on top of the Trex RainEscape was not level, requiring the Respondent to remove those boards and replace them so they were flush and straight. It was after this repair that the Claimant began to notice water leaking into the underside of the deck. Although Andy attempted to repair the leaks, additional leaks occurred which remained as of the date of the hearing.

A preponderance of the evidence merits the conclusion that the leaks occurred because the Respondent improperly installed the Trex RainEscape. The photographs the Claimant submitted clearly show at least one area where the Trex RainEscape was penetrated by a nail or

screw and another area where daylight is visible through the Trex RainEscape. According to the Trex RainEscape website, the product "provide[s] 100% protection of the deck substructure from moisture penetration,"[18] a claim echoed by Mr. Horvat in his March 29, 2022 email.[19] Furthermore, the Contract ensures that although small leaks may occur during periods of excessive rain, those leaks "tend to happen at or close by gutters [sic] system and will not [sic] ceiling area." The leaks are clearly not limited to the gutter system; rather, they are throughout the underside of the deck, including right above the hot tub – the primary area the Claimant wished to keep dry.

Although Mr. Griest testified that he believed that it was necessary to inspect the deck in person with a Trex RainEscape representative to diagnose the problem, he offered no cogent reason why he did not accept Mr. Horvat's offer to conduct an inspection, via video, something Mr. Horvat represented the company did often, with generally productive results. This is especially so in light of the fact that the Covid-19 pandemic prevented many people from traveling and interacting in-person with others.

Mr. Griest also offered no explanation about why the Respondent took no action between March 16, 2021 and March 29, 2022 to address the Claimant's leaking deck.

For the reasons stated above I find that the Respondent did not install the Trex RainEscape in a workmanlike manner, resulting in an actual loss to the Claimant. The Claimant presented an estimate from WDL Carpentry,[20] stating that it would cost $19,345.00 to remove the existing deck floorboards, rails, and framing, remove and replace the damaged areas of the Trex RainEscape where damaged, and replace the deck floor boards, rails and framing. Accordingly, the Claimant is eligible for compensation from the Fund.

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[18] CL #3.
[19] CL #9.
[20] CL. #12.

**Calculation of Actual Loss**

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.[21]

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 work under the Contract, and the Claimant has retained or will retain another contractor to complete or remedy that work. Accordingly, the following regulatory formula 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.[22]

The calculation is as follows:

$36,651.00 paid to the Respondent under the Contract
+$19,345.00 payable to repair the deck
$55,996.00
- $36,651.00 (original Contract price)
$19,345.00 actual loss.

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

[21] Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1).
[22] COMAR 09.08.03.03B(3)(c).

paid to the contractor against whom the claim is filed.[23] As the Claimant's actual loss of $19,345.00 does not exceed the amount paid to the Respondent or the statutory cap on a claimant's recovery, the Claimant shall recover that amount.[24]

## PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of $19,345.00 as a result of the Respondent's acts or omissions.[25] I further conclude that the Claimant is entitled to recover that amount from the Fund.

## RECOMMENDED ORDER

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

**ORDER** that the Maryland Home Improvement Commission Guaranty Fund award the Claimant $19,345.00; and

I **ORDER** that the Respondent is ineligible for a Maryland Home Improvement Commission license until the Respondent reimburses the Guaranty Fund for all monies disbursed under this Order, plus annual interest of ten percent (10%) as set by the Maryland Home Improvement Commission;[26] and

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

June 27, 2022
Date Decision Issued

Jennifer M. Carter Jones
Administrative Law Judge

JCJ/at
# 199159

[23] Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03D(2)(a).
[24] Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(3)(c).
[25] Md. Code Ann., Bus. Reg. §§ 8-401, 8-405; COMAR 09.08.03.03B(3)(c).
[26] *See* Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii); COMAR 09.08.01.20.

## *PROPOSED ORDER*

***WHEREFORE, this 19th day of August, 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.***

*Joseph Tunney*

***Joseph Tunney***
***Chairman***
***Panel B***
***MARYLAND HOME IMPROVEMENT COMMISSION***