

<p>IN THE MATTER OF THE CLAIM</p> <p>OF MARK OLSZYK,</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 FRANK WINTER,</p> <p>JR., T/A MW ENTERPRISES, LLC,</p> <p>RESPONDENT</p>	<p>* BEFORE MARC NACHMAN,</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-02-22-24496</p> <p>* MHIC No.: 22(75)294</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 May 10, 2022, Mark Olszyk (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 \$12,750.00 for actual losses allegedly suffered as a result of a home improvement contract with Frank Winter, T/A MW Enterprises, LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2022).¹

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

STATEMENT OF THE CASE

1. NAME OF THE CASE
- ISSUE

2. SUMMARY OF THE EVIDENCE
ADMITTED FINDINGS OF FACT
DECISION
RECOMMENDATIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On May 2, 1984, the Clerk (Lawrence) filed with the Court
for review the Complaint of MICO Company, Inc. (MICO) against
the respondents, the Administrator of the State of Michigan
and the State of Michigan. The respondents are the State of
Michigan, MCO and the Bureau of the State of Michigan.

It is respectfully requested that the Respondent advise the
Court of any further developments in this matter.

On August 30, 2022, the MHIC issued a Hearing Order on the Claim. On September 8, 2022, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On January 11, 2023, I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. Jessica Berman Kaufman, Assistant Attorney General, Department, represented the Fund. The Claimant represented himself. The Respondent also represented himself.

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; COMAR 28.02.01.

ISSUES

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

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits offered by the Claimant:

- Cl. Ex. 1 Letter from the Respondent to the MHIC and the Claimant, undated
- Cl. Ex. 2 List of relevant dates and events, undated
- Cl. Ex. 3 Receipt from EZ Fix, LLC, dated January 3, 2022
- Cl. Ex. 4 Photographs (undated):
 - a. Deck railings installed by the Respondent
 - b. Mitered joints in the railings installed by the Respondent
 - c. Detachment of the existing deck to the house
 - d. Additional, new deck installed by subsequent contractor
 - e. Photograph of support system of the existing deck
 - f. Railings installed by the Respondent

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- Cl. Ex. 5 Payment records:
 - a. Claimant's Visa statement showing Claimant's \$1,500.00 payment to the Respondent
 - b. Claimant's check 4201 to the Respondent for \$17,000.00, dated March 27, 2021
 - c. Claimant's check 4152 to the Respondent for \$17,400.00, dated May 26, 2021
- Cl. Ex. 6 Record of the Respondent's \$5,000.00 payment to the Claimant, dated July 2, 2021
- Cl. Ex. 7 Respondent's note acknowledging refund amount, dated July 2, 2021
- Cl. Ex. 8 "Secured Promissory Note" for \$15,000.00, dated July 9, 2021
- Cl. Ex. 9 Record of the Respondent's \$5,000.00 payment to the Claimant, dated July 16, 2021
- Cl. Ex. 10 Respondent's check to Claimant for \$5,000.00, dated August 17, 2021
- Cl. Ex. 11 Respondent's acknowledgement of debt to the Claimant, dated July 16, 2021
- Cl. Ex. 12 Record of "Stop Payment" check for \$5,000.00, dated August 8, 2021
- Cl. Ex. 13 Contract between the Claimant and Respondent ("Contract"), dated March 27, 2021
- Cl. Ex. 14 Estimate from EZ Fix, LLC, dated November 22, 2021
- Cl. Ex. 15 Emails between the parties, various dates

The Respondent did not offer any exhibits to be admitted into evidence.

I admitted the following exhibits offered by the Fund:

- GF. Ex. 1 OAH Notice of Hearing, dated October 20, 2022
- GF. Ex. 2 MHIC Transmittal to the OAH, with Hearing Order dated August 30, 2022
- GF. Ex. 3 Respondent's licensing information, December 13, 2022
- GF. Ex. 4 MHIC letter to the Respondent, dated August 30 23, 2022, to which was attached the MHIC Claim form, received January 12, 2022

Testimony

The Claimant testified and did not present other witnesses.

The Respondent testified and did not present other witnesses.

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 under MHIC license number 01-0103867.
2. The Claimant wanted the Respondent to renovate an existing deck by removing and replacing boards and railings and building an entirely new deck on another part of the Claimant's house.

1. The Respondent is a limited liability company organized under the laws of the State of California. Its principal office is located at 1234 Main Street, San Francisco, California 94102. The Respondent is a subsidiary of ABC Corporation, a public company listed on the New York Stock Exchange.

2. The Respondent is a subsidiary of ABC Corporation, a public company listed on the New York Stock Exchange. The Respondent is a limited liability company organized under the laws of the State of California. Its principal office is located at 1234 Main Street, San Francisco, California 94102.

3. The Respondent is a limited liability company organized under the laws of the State of California. Its principal office is located at 1234 Main Street, San Francisco, California 94102. The Respondent is a subsidiary of ABC Corporation, a public company listed on the New York Stock Exchange.

4. The Respondent is a limited liability company organized under the laws of the State of California. Its principal office is located at 1234 Main Street, San Francisco, California 94102. The Respondent is a subsidiary of ABC Corporation, a public company listed on the New York Stock Exchange.

3. When the parties first met on February 17, 2021, the Claimant paid the Respondent \$1,500.00 to produce a three-dimensional sketch of the new deck. The Claimant paid the Respondent by credit card.

4. On March 27, 2021, the Claimant and the Respondent entered into a Contract to perform the intended home improvement work.

5. The original agreed-upon Contract price was \$53,400.00: \$15,000 was for the deck renovation and the balance, \$38,400.00, was to construct the new deck.

6. Among the salient terms of the Contract was the imposition of a penalty on the Respondent if he did not start or finish the construction work on time as specified in the Contract. The Respondent would also be paid a bonus if the work was completed earlier than required under the Contract.

7. The Contract stated that work would begin six to eight weeks after the Contract was signed and would be completed three weeks thereafter.

8. The deck renovation started late on May 27, 2021.

9. The construction of the new deck was never started.

10. The Claimant made two payments to the Respondent under the Contract:

<u>Payment dates</u>	<u>Amounts</u>
March 27, 2021	\$ 17,000.00
May 26, 2021	<u>\$ 17,400.00</u>
Total:	\$ 34,400.00

11. On June 7, 2021, the Respondent asked the Claimant for another \$17,000.00 draw under the Contract. Because the draw was not yet due, the Claimant declined to make that payment, which would have gone towards the construction of the new deck.

7/1 - The first of the two payments of \$100,000 was made on 7/1/2011. The second payment of \$100,000 was made on 7/1/2012. The total amount of the two payments is \$200,000.

On 7/1/2011, the first payment of \$100,000 was made. The second payment of \$100,000 was made on 7/1/2012. The total amount of the two payments is \$200,000.

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12. The Respondent removed the existing deck planks and replaced them with the "fibron Z" decking material identified in the Contract.
13. The decking board removal and replacement was done in a satisfactory manner, however when the Respondent installed the railings, the top of the railings were too wide and mitered joints connecting the railings around the deck did not meet and fit poorly.
14. Additionally, the trim boards around the deck were not installed using the hidden fasteners and color match screws required under the Contract.
15. The Respondent agreed to correct the problems with the railings and fasteners, but never did so.
16. On June 8, 2021, the parties agreed to terminate the balance of the Contract. The Respondent would not construct the new deck.
17. At the time that the Contract was terminate, \$20,900.00 was due to be refunded to the Claimant.
18. Among the terms of that termination were the following: the Respondent would complete the work to correct the railings and fasteners; the Claimant would settle for the return of \$20,000.00; the refund could be paid over time.
19. The Respondent never completed the work to correct the railings and fasteners.
20. On July 2, 2021, the Respondent paid the Claimant an initial installment on the refund of \$5,000.00
21. On July 9, 2021, the Respondent signed a note acknowledging the balance of \$15,000.00.

1. The first part of the document is a letter from the Secretary of the Department of the Interior to the Secretary of the Department of the Army, dated August 1, 1950. The letter discusses the proposed construction of a dam on the Colorado River and the need for a study to determine the feasibility of the project. The Secretary of the Interior requests that the Secretary of the Army conduct a study of the project and report back to him by October 1, 1950.

2. The second part of the document is a letter from the Secretary of the Department of the Army to the Secretary of the Department of the Interior, dated August 1, 1950. The letter acknowledges the Secretary of the Interior's request and states that the Secretary of the Army will conduct a study of the project and report back to him by October 1, 1950.

3. The third part of the document is a letter from the Secretary of the Department of the Interior to the Secretary of the Department of the Army, dated August 1, 1950. The letter discusses the proposed construction of a dam on the Colorado River and the need for a study to determine the feasibility of the project. The Secretary of the Interior requests that the Secretary of the Army conduct a study of the project and report back to him by October 1, 1950.

4. The fourth part of the document is a letter from the Secretary of the Department of the Army to the Secretary of the Department of the Interior, dated August 1, 1950. The letter acknowledges the Secretary of the Interior's request and states that the Secretary of the Army will conduct a study of the project and report back to him by October 1, 1950.

5. The fifth part of the document is a letter from the Secretary of the Department of the Interior to the Secretary of the Department of the Army, dated August 1, 1950. The letter discusses the proposed construction of a dam on the Colorado River and the need for a study to determine the feasibility of the project. The Secretary of the Interior requests that the Secretary of the Army conduct a study of the project and report back to him by October 1, 1950.

6. The sixth part of the document is a letter from the Secretary of the Department of the Army to the Secretary of the Department of the Interior, dated August 1, 1950. The letter acknowledges the Secretary of the Interior's request and states that the Secretary of the Army will conduct a study of the project and report back to him by October 1, 1950.

7. The seventh part of the document is a letter from the Secretary of the Department of the Interior to the Secretary of the Department of the Army, dated August 1, 1950. The letter discusses the proposed construction of a dam on the Colorado River and the need for a study to determine the feasibility of the project. The Secretary of the Interior requests that the Secretary of the Army conduct a study of the project and report back to him by October 1, 1950.

8. The eighth part of the document is a letter from the Secretary of the Department of the Army to the Secretary of the Department of the Interior, dated August 1, 1950. The letter acknowledges the Secretary of the Interior's request and states that the Secretary of the Army will conduct a study of the project and report back to him by October 1, 1950.

9. The ninth part of the document is a letter from the Secretary of the Department of the Interior to the Secretary of the Department of the Army, dated August 1, 1950. The letter discusses the proposed construction of a dam on the Colorado River and the need for a study to determine the feasibility of the project. The Secretary of the Interior requests that the Secretary of the Army conduct a study of the project and report back to him by October 1, 1950.

10. The tenth part of the document is a letter from the Secretary of the Department of the Army to the Secretary of the Department of the Interior, dated August 1, 1950. The letter acknowledges the Secretary of the Interior's request and states that the Secretary of the Army will conduct a study of the project and report back to him by October 1, 1950.

22. On July 16, 2021, the Respondent paid the Claimant an additional \$5,000.00 installment. The balance was now \$10,000.00.

23. On July 23, 2021, the Respondent told the Claimant that he did not have the funds to pay the next \$5,000.00 installment that was due.

24. On July 30, 2021, the Respondent gave the Claimant two postdated checks for \$5,000.00 each. One check cleared the bank, but the Respondent stopped payment on the second.

25. The remaining balance was \$5,000.00.

26. Because the Respondent did not correct the work on the railings and the fasteners, the Claimant retained another contractor to complete the work, at a cost of \$5,150.00.

27. The second contractor observed structural problems with the deck's attachment to the house and added additional supports under the deck.

28. The additional structural work identified by the second contractor was outside the scope of the Contract.

DISCUSSION

Applicable law

The Claimant has the burden of proving the validity of the claim by a preponderance of the evidence. Bus. Reg. § 8-407I(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 Cnty. Police Dep't*, 369 Md. 108, 125 n.16 (2002).

DISCUSSION

The Commission has the honor of providing the following information in response to the request of the Honorable State Representative [Name] regarding the [Topic]. The information is provided for your information and is not intended to constitute an official position of the Commission. The Commission is currently reviewing the [Topic] and will provide a final report to the Commission in the near future.

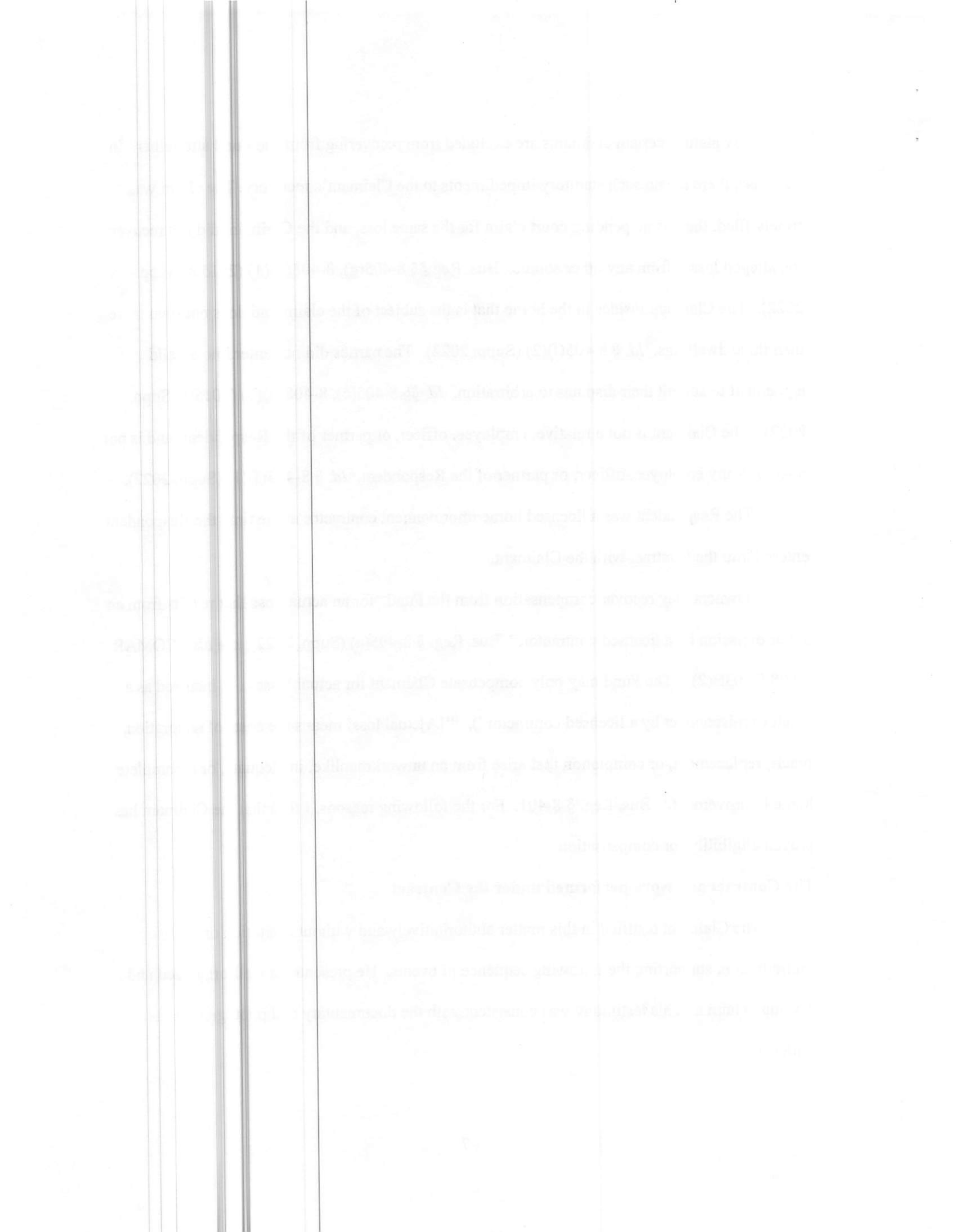
By statute, certain claimants are excluded from recovering from the Fund altogether. In this case, there are no such statutory impediments to the Claimant's recovery. The claim was timely filed, there is no pending court claim for the same loss, and the Claimant did not recover the alleged losses from any other source. Bus. Reg §§ 8-405(g), 8-408(b)(1) (2015 & Supp. 2022). The Claimant resides in the home that is the subject of the claim and does not own more than three dwellings. *Id.* § 8-405(f)(2) (Supp. 2022). The parties did not enter into a valid agreement to submit their disputes to arbitration. *Id.* §§ 8-405(c), 8-408(b)(3) (2015 & Supp. 2022). The Claimant is not a relative, employee, officer, or partner of the Respondent, and is not related to any employee, officer, or partner of the Respondent. *Id.* § 8-405(f)(1) (Supp. 2022).

The Respondent was a licensed home improvement contractor at the time the Respondent entered into the Contract with the Claimant.

Owners may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor." Bus. Reg. § 8-405(a) (Supp. 2022); *see also* COMAR 09.08.03.03B(2) ("The Fund may only compensate Claimant for actual losses . . . incurred as a result of misconduct by a licensed contractor"). "[A]ctual loss' means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." Bus. Reg. § 8-401. For the following reasons, I find that the Claimant has proven eligibility for compensation.

The Contract and work performed under the Contract

The Claimant testified in this matter authoritatively and without hesitation or contradiction, supporting the following sequence of events. He presented a well-organized and thorough claim and his testimony was consistent with the documentary and photographic evidence.



The Claimant testified that on February 17, 2021, the parties met to discuss the renovation of the Claimant's existing deck and the construction of a new one. In order for the Respondent to produce a three dimensional sketch of the new deck construction,² the Claimant paid the Respondent \$1,500.00 by credit card. Cl. Ex. 5a. After a little more than a month, the drawing was completed, and the parties signed a contract on March 27, 2021 \$53,400.00 to: 1) renovate the existing deck for \$15,000.00; and 2) build a new deck for \$38,400.00. Cl. Ex. 14. The first payment under the Contract was \$17,000.00, which was paid by check number 4201. CL. Ex. 5b.

The scope of the Contract for the deck renovation is the following:

Remove the existing decking and railings and haul away. Inspect the frame of the deck and adjust as needed to bring the deck to be in plane. Install new fiberon Z decking. The decking will be installed using hidden fasteners and color match screws. Install new pvc white trim on the risors (sic) of the steps and around the perimeter of the deck. The overall square footage of the deck is approx. (32' x 16') includes a (4x4) landing and (11) rise.

Cl. Ex. 13. The balance of the Contract addressed the new construction which was not started.

Under the Contract, if the work did not progress timely the Respondent was subject to penalties but would also have an incentive to finish the construction earlier than anticipated

The overall project will take approx. (4-6) weeks to complete. The project will start in approx. (4) weeks. Exact start date will be mutually agreed upon at time of first payment. All timelines DEPEND ON WEATHER CONDITIONS. If [the Respondent] is unable to start by the estimated time, [t]here will be a \$1000.00 credit towards the overall cost of the project. If project is not completed within 8 weeks- a \$1000 credit will be applied to the total cost- and \$500 for each week the project is not completed thereafter. If project is completed early—customer will pay \$500 for each full week the project in completed in advance of the agreed 6 week timeline.

Cl. Ex. 13.

² I assume that these drawings were for the deck to be constructed, as a deck renovation would not require producing a three-dimensional drawing.

The first... (faint, illegible text)

The second... (faint, illegible text)

The third... (faint, illegible text)

The fourth... (faint, illegible text)

The first milestone triggering an installment payment was the commencement of the contract within four weeks of the signing, or by April 26, 2021. In fact, the first work that was done under the Contract was the arrival of a dumpster on May 26, 2021, followed by five days of demolition. Under the Contract, the second installment of \$17,400.00 was paid by check 4152. Cl. Ex. 5c. The Claimant requested copies of the drawings to show to the homeowners' association and asked for the permits. The permits were not applied for more than two months after the Contract was signed.

On June 7, 2021, the Respondent requested a third \$17,000 draw, which, according to the progress of the work, was not yet due under the terms of the Contract. The Claimant declined to make this payment.

Among the work performed by the Respondent on the deck renovation, the bar railings on top of the railing and the handrails on the stairs were too wide according to the applicable building code. Cl. Ex. # 4A. The Respondent claimed that he believed that the widened rails were better than those specified in the Contract, but relented, acknowledging that they were not the right fit for that feature.³ Mitered joints on the railings did not meet and fit poorly. Cl. Ex. 4B. When the parties met to discuss that work on June 8, 2021, the Respondent acknowledged the error and agreed to redo that work. He never did.

Termination of the Contract and payments made to the Claimant.

Due to the Claimant's concerns about the workmanship on the renovation of the existing deck, the parties agreed to cancel the second part of the contract for another deck to be constructed and to refund the amount attributable to the new deck's construction.

³ The building code was not submitted into evidence; but the Respondent acknowledged that the railings needed to be replaced.

The accounting for that refund was as follows:

Payments to the Respondent for the construction	\$ 35,900.00 ⁴
Payment due for existing deck renovation	<u>\$(15,000.00)</u>
Amount to be refunded for the canceled second deck construction	\$ 20,900.00

In exchange for the Respondent's promise to complete the renovation, the Claimant discounted the refund to \$20,000.00.⁵ On July 2, 2021, the Respondent gave him a check for \$5,000.00 in partial payment, signing an "IOU" for the balance because the Respondent did not have the funds necessary to refund the entire balance due. Cl. Ex. 7.

On July 9, 2021, when the Respondent was scheduled to pay the next installment of the refund, he advised the Claimant that he did not have the funds to do so. The Claimant prepared and accepted a promissory note for \$15,000.00 secured by the Respondent's vehicle.⁶ Cl. Ex. 8. A week later, on July 16, 2021, the Respondent gave the Claimant another \$5,000.00 check; after that payment, the Respondent still owed the Claimant \$10,000.00. Cl. Ex. 9.

The following week, on July 23, 2021, the Respondent told the Claimant that he did not have the funds to make his payments. He asked for another week, and on July 30, 2021, the Respondent gave the Claimant two post-dated checks for \$5,000.00. One check cleared, but the Respondent stopped payment on the other check. Cl. Exs. 10, 11 and 12. The remaining balance of the \$20,000.00 refund is \$5,000.00.

⁴ Payments were calculated to include the cost of the three-dimensional drawing paid before before the contract was signed:

Three-dimensional drawing	\$ 1,500.00
First Installment	\$ 17,000.00
Second Installment	\$ 17,400.00
Total	<u>\$ 35,900.00</u>

⁵ The parties agreed to the reduction, Both parties had their reasons to accept the termination and the balance due. Accordingly, I am calculating the actual damages with the agreed amount (\$20,000.00) rather than the mathematically derived amount (\$20,900.00).

⁶ No lien was recorded on the vehicle.

On July 2, 1953, the Respondent was advised by the Commission that it had received a check for \$21,000.00 from the Respondent. The Respondent advised that this check was for the amount of \$21,000.00 which he had previously deposited in the name of the Respondent's wife, Mrs. [Name Redacted]. The Respondent stated that he had not received any other checks from the Commission at that time. The Commission advised that it had received a check for \$21,000.00 from the Respondent's wife on July 2, 1953. The Respondent advised that he had not received any other checks from the Commission at that time. The Commission advised that it had received a check for \$21,000.00 from the Respondent's wife on July 2, 1953. The Respondent advised that he had not received any other checks from the Commission at that time.

10	2,325.00
20	2,325.00
30	2,325.00
40	2,325.00
50	2,325.00
60	2,325.00
70	2,325.00
80	2,325.00
90	2,325.00
100	2,325.00

The Commission advised that it had received a check for \$21,000.00 from the Respondent's wife on July 2, 1953. The Respondent advised that he had not received any other checks from the Commission at that time. The Commission advised that it had received a check for \$21,000.00 from the Respondent's wife on July 2, 1953. The Respondent advised that he had not received any other checks from the Commission at that time.

Completion and correction of the Respondent's work on the existing deck

Although the Respondent acknowledged that the railings were not to the Contract's specifications and needed to be replaced, he did not complete that work. Because the Respondent did not complete the work he promised to complete, the Claimant retained another MHIC licensed contractor, EZ Fix, LLC, to complete the deck renovation work. CL. Ex. 3. The second contractor removed and replaced the railings and removed and replaced the visible fasteners with covered fasteners that were color coordinated with the boards. Cl. Ex. 14. The second contractor billed and was paid \$5,150.00 for that work. The Respondent complained that EZ Fix did not salvage the stairs leading to the deck which had to be replaced because the railing kept the balustrades in place, and he claimed that he could have returned the unit to the fabricator for a credit. However, by failing to complete the work as promised, he waived any objection to how it was done, particularly with regard to the choice to scrap or salvage the improperly done work. The EZ Fix work also includes the replacement of the covered, color matching fasteners on the side of the decking. I find that the work identified in the EZ Fix estimate and bill was within the scope of the Contract and there is no challenge that it was not a reasonable price for the work.

The EZ Fix estimate, however, covers additional work to reinforce the deck to the house and support its structure. CL Ex. 4C. I do not find that this work was within the scope of the Contract and is not subject to an award by the Fund. The photographs showed the deck separating from the house. Cl. Ex. 4c. The photographs also showed the additional support added by EZ Fix. Cl. Ex. 4e. The Claimant maintains that a competent contractor observing the detachment of the deck from the house would have realized that the deck needed the extra support that EZ Fix installed. But the Respondent testified that he did not

observe any such defect, and if he did, it would have prompted a change order with an extra cost to the Contract. The Claimant countered that the scope of the Contract included this inspection: "Inspect the frame of the deck and adjust as needed..." Cl. Ex. 13. But that reading leaves out the balance of the sentence: "...to bring the deck to be in plane." The modifying clause limits the work to the proper installation of the decking material. The Respondent explained that some of the preexisting joists supporting the deck might have needed to be planed or filled so that the decking planks laid evenly; age and wear might have caused the joists to rise or fall at intervals, and the cited clause obligated him to check the joists for this issue before installing the new decking materials. I agree with the Respondent's explanation; even if I were to have agreed with the Claimant that the Respondent was obligated to inspect the deck supports, the additional work, if indicated, would have required a change order, and most likely, an increase in the Contract price. I therefore do not find the balance of the EZ Fix estimate to be an element of the actual damages, addressed below.

No unreasonable rejection of efforts to cure

The Claimant did not unreasonably reject good faith efforts by the Respondent to resolve the claim. *Id.* § 8-405(d) (Supp. 2022). With regard to the deck renovation, the Respondent did not complete his obligation to reconstruct the railings, although he promised to do so. He never took that opportunity, and the Claimant did not impede him from doing so,

The new deck work will be discussed below, as neither party intended that the Respondent would perform any of this work.

Costs to correct the Respondent's unworkmanlike and inadequate home improvements

According to the uncontroverted testimony of the Claimant, and from my review of his documentary evidence and photographs of the work performed by the Respondent, it is apparent that the Respondent performed unworkmanlike, inadequate, or incomplete home improvements as it concerns the railings. The Claimant had no complaints about the newly installed decking, but did object to the composition (i.e., width) and installation (i.e., mitered joints) of the railing. Furthermore, the Respondent did not use the color coordinated fasteners. The deck renovations with regard to the railings required the removal of most vertical railings and replacement of the stair railings, for the reasons discussed above. The fasteners also needed to be removed and replaced with those called for in the Contract.

Terminating the work covered by the balance of the Contract

With regard to the new deck installation, the parties agreed to terminate that part of the contract, placing the parties in the same position they would have been in had the contract not been signed. This would mean that the Respondent was not obligated to perform the work, but it also means that he was obligated to return the payments he received for the work he was no longer obligated to perform. The Respondent acknowledged his obligation to give this refund in several ways but did not complete his payment obligation.

Calculating the 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

The first part of the report deals with the general principles of the law of contract. It discusses the formation of a contract, the requirements for a valid contract, and the consequences of breach of contract. The second part of the report deals with the law of tort. It discusses the elements of a tort, the defenses to a tort, and the remedies available for a tort. The third part of the report deals with the law of property. It discusses the acquisition of property, the transfer of property, and the protection of property. The fourth part of the report deals with the law of succession. It discusses the wills, the intestacy, and the administration of an estate. The fifth part of the report deals with the law of trusts. It discusses the creation of a trust, the duties of a trustee, and the beneficiaries of a trust. The sixth part of the report deals with the law of insurance. It discusses the principles of insurance, the types of insurance, and the claims process. The seventh part of the report deals with the law of banking. It discusses the relationship between a bank and its customers, the duties of a bank, and the protection of a customer's funds. The eighth part of the report deals with the law of consumer protection. It discusses the rights of consumers, the duties of traders, and the remedies available for a consumer. The ninth part of the report deals with the law of employment. It discusses the rights of employees, the duties of employers, and the remedies available for an employee. The tenth part of the report deals with the law of intellectual property. It discusses the rights of creators, the types of intellectual property, and the remedies available for an intellectual property owner. The eleventh part of the report deals with the law of international trade. It discusses the principles of international trade, the types of international trade, and the remedies available for an international trader. The twelfth part of the report deals with the law of international law. It discusses the principles of international law, the types of international law, and the remedies available for an international lawbreaker.

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compensate a claimant for consequential or punitive damages, personal injury, attorney fees, court costs, or interest. Bus. Reg. § 8-405(e)(3) (Supp. 2022); COMAR 09.08.03.03B(1).⁷

MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contracted work. The two parts of the Contract (renovation of the existing deck and construction of an additional, new deck) must be evaluated under separate formulae.

With regard to the deck renovations, the Respondent performed some work under the Contract that was satisfactory to the Claimant, and the Claimant is not seeking other contractors to complete or remedy that work. However, regarding the railings and fasteners, I found that the work was unworkmanlike, inadequate or incomplete. Therefore, the Respondent performed some work under the Contract, and the Claimant retained EZ Fix, LLC, to complete or remedy the work that needed to be corrected. Accordingly, the following formula appropriately measures this portion of the Claimant's actual loss:

If the contractor did work according to the contract and the claimant has solicited or is soliciting another contractor to complete the contract, the claimant's actual loss shall be the amounts the claimant has paid to or on behalf of the contractor under the original contract, added to any reasonable amounts the claimant has paid or will be required to pay another contractor to repair poor work done by the original contractor under the original contract and complete the original contract, less the original contract price. If the Commission determines that the original contract price is too unrealistically low or high to provide a proper basis for measuring actual loss, the Commission may adjust its measurement accordingly.

COMAR 09.08.03.03B(3)(c). The calculation is as follows:

\$15,000.00	Total Amount paid by the Claimant(s) to the Respondent, plus
<u>\$5,150.00</u>	Fair market cost to make corrections and complete Respondent's work
\$20,150.00	Subtotal, less
<u>\$15,000.00</u>	Original contract price (including the price of any addendum) equals
\$5,150.00	Amount of the Actual Loss to the Claimant

⁷ Under the terms of the Contract, the work was to be completed within eight weeks of its start date (which would have been July 28, 2021), for which the Respondent incurred a \$1,000.00 penalty. Penalties are not recoverable from the Fund.

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With regard to the balance of the contract, the parties agreed to mutually terminate that part of the Contract, and the Respondent was obligated to return the deposited payment. The Claimant reduced the balance from \$20,900.00 to \$20,000.00. The Respondent repaid \$15,000.00, but the balance of \$5,000.00 remains unpaid. The Respondent also charged the Claimant for the computer drawings for the project that he never started – this should also be an element of the actual loss.⁸ Although COMAR 09.08.03.03B(3)(a) addresses actual losses “[i]f the contractor abandoned the contract without doing any work,” even though there was technically no “abandonment” because the parties mutually agreed to end that part of the Contract, the actual loss should still be “the amount which the claimant paid to the contractor under the contract” that never went forward. The outstanding balance after the parties’ agreement to rescind the balance of the contract is \$5,000.00:

Agreed upon refund due to rescission: ⁹		\$20,000.00
Less payments:		
July 2, 2021	Initial Payment	(\$5,000.00)
July 16, 2021	Second Payment	(\$5,000.00)
August 16, 2021	Final payment	<u>(\$5,000.00)</u>
Balance due:		\$5,000.00

Accordingly, I propose that the actual cost awardable by the fund should be as follows:

Renovation repair costs	\$ 5,150.00
Contract termination refund	<u>\$ 5,000.00</u>
Total:	\$ 10,150.00

⁸ Had there been any evidence that the drawings were used by the subsequent contractor to build the new deck, the \$1,500.00 paid by the Claimant to commission the drawings might not be an element of the damages. But because the Claimant included this cost among his losses, and the Respondent did not provide evidence or argument to challenge that inclusion, I consider the \$1,500.00 paid to the Respondent to be no value to the Claimant. The cost of the drawings is an element of the “actual damages” caused by the Respondent’s failure to complete the contract. Bus. Reg. § 8-401. This amount was recognized in the amount to be refunded to the Claimant. See fn. 4.

⁹ The parties agreed to waive the additional \$900.00 that many have been due under the Contract. Because this discount was agreed upon by the parties (for whatever reasons they did so), I use the agreed upon amount of \$20,000.00 as the starting point for this calculation. See fn. 5, above.

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PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$10,150.00 as a result of the Respondent's acts or omissions. Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2022); COMAR 09.08.03.03B(3)(c). I further conclude that the Claimant is entitled to recover that amount from the Fund. Bus. Reg. § 8-405(e)(1), (5) (Supp. 2022); COMAR 09.08.03.03B(4).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$10,150.00; and

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

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

March 30, 2023
Date Decision Issued

Marc Nachman

Marc Nachman
Administrative Law Judge

MN/sh
#204228

¹⁰ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

REGISTRATION OF EVIDENCE

At the time of the seizure of the evidence, the following items were found in the possession of the defendant:

- 1. A 1967 Ford Mustang coupe, serial number 6E01A010000, engine number 6E01A010000, VIN 6E01A010000.
- 2. A 1967 Ford Mustang coupe, serial number 6E01A010000, engine number 6E01A010000, VIN 6E01A010000.
- 3. A 1967 Ford Mustang coupe, serial number 6E01A010000, engine number 6E01A010000, VIN 6E01A010000.

STATE OF CALIFORNIA

THE PEOPLE of the State of California, County of Santa Clara, do hereby certify that the following items were found in the possession of the defendant:

- 1. A 1967 Ford Mustang coupe, serial number 6E01A010000, engine number 6E01A010000, VIN 6E01A010000.
- 2. A 1967 Ford Mustang coupe, serial number 6E01A010000, engine number 6E01A010000, VIN 6E01A010000.
- 3. A 1967 Ford Mustang coupe, serial number 6E01A010000, engine number 6E01A010000, VIN 6E01A010000.

Witness my hand and the seal of the County of Santa Clara, California, this _____ day of _____, 1967.

County Clerk
Santa Clara County, California

PROPOSED ORDER

WHEREFORE, this 24th day of May, 2023, 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***

PROPOSED ORDER

WHEREAS, the Commission has received a petition for review of the order of the Board of Directors of the [Company Name], dated [Date], and the Commission has determined that the order is not in the public interest and should be reversed and annulled;

It is ordered

that the order of the Board of Directors of the [Company Name], dated [Date], is hereby reversed and annulled.