

<p>IN THE MATTER OF THE CLAIM  OF MARLENE J. DOUGLAS,  CLAIMANT  AGAINST THE MARYLAND HOME  IMPROVEMENT GUARANTY FUND  FOR THE ALLEGED ACTS OR  OMISSIONS OF FRANKLIN  BESSETTE,  T/A THE ROOFING EXPERTS, LLC.  RESPONDENT</p>	<p>* BEFORE MICHAEL R. OSBORN,  * AN ADMINISTRATIVE LAW JUDGE  * OF THE MARYLAND OFFICE  * OF ADMINISTRATIVE HEARINGS  *  *  *  * OAH No.: LABOR-HIC-02-22-13909  * MHIC No.: 22 (75) 628  *</p>
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**PROPOSED DECISION**

STATEMENT OF THE CASE  
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SUMMARY OF THE EVIDENCE  
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PROPOSED CONCLUSIONS OF LAW  
RECOMMENDED ORDER

**STATEMENT OF THE CASE**

On March 16, 2021, Marlene J. Douglas (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 \$9,030.00 for actual losses allegedly suffered as a result of a home improvement contract with Franklin Bessette, trading as The Roofing Experts, LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411

(2015 & Supp. 2022).<sup>1</sup> On June 8, 2022, the MHIC issued a Hearing Order on the Claim. On June 13, 2022, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On October 11, 2022, I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312; Code of Maryland Regulations (COMAR) 28.02.01.20A. Andrew Brouwer, Assistant Attorney General, Department, represented the Fund. The Claimant was self-represented.

After waiting twenty minutes for the Respondent or the Respondent's representative to appear, I proceeded with the hearing. Applicable law permits me to proceed with a hearing in a party's absence if that party fails to attend after receiving proper notice. COMAR 28.02.01.23A. On September 12, 2022, the OAH provided a Notice of Hearing (Notice) to the Respondent by United States mail to the Respondent's address on record with the OAH. The Notice stated that a hearing was scheduled for October 11, 2022, at 10:00 a.m., at the OAH in Salisbury, Maryland. COMAR 09.08.03.03A(2). The Notice further advised the Respondent that failure to attend the hearing might result in "a decision against you."

The United States Postal Service did not return the Notice to the OAH.<sup>2</sup> The Respondent did not notify the OAH of any change of mailing address. COMAR 28.02.01.03E. The Respondent made no request for postponement prior to the date of the hearing. COMAR 28.02.01.16. I determined that the Respondent received proper notice, and I proceeded to hear the captioned matter. COMAR 28.02.01.05A, C.

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

<sup>2</sup> On June 29, 2022, the OAH mailed a Notice of Hearing to the Respondent at an address in Annapolis, Maryland, which was returned as undeliverable. The Department of Labor provided an alternate address for the Respondent, also in Annapolis, and on September 12, 2022, the OAH mailed a Notice of Hearing to the Respondent at the alternate address. The September 12, 2022, Notice of Hearing was not returned as undeliverable.

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); 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:

- Clmt. Ex. 1 - Photograph, 6/29/2022
- Clmt. Ex. 2 - Photograph, 6/29/2022
- Clmt. Ex. 3 - Photograph, 6/29/2022
- Clmt. Ex. 4 - Contract, 12/1/2020 (impression copy).
- Clmt. Ex. 5 - Contract, 12/1/2020
- Clmt. Ex. 6 - Claimant letter "To whom it may concern," undated
- Clmt. Ex. 7 - Receipts from Respondent, 6/28/2021 and 12/2/2020
- Clmt. Ex. 8 - Marquita Duckworth statement, undated
- Clmt. Ex. 9 - National Remodelers Specialists, Inc. contract, 3/11/2022
- Clmt. Ex. 10 - MHIC Claim Form, 3/13/2021
- Clmt. Ex. 11 - MHIC Complaint Form, undated
- Clmt. Ex. 12 - Home improvement loan monthly statement, 9/15/2022

The Respondent did not appear and did not offer any exhibits.

I admitted the following exhibits offered by the Fund:

- Fund Ex. 1 - Hearing Order, 6/2/2022
- Fund Ex. 2 - Notice of Hearing, 9/12/2022
- Fund Ex. 3 - Notice of Hearing, 6/29/2022
- Fund Ex. 4 - NHIC letter to Respondent, 3/31/2022
- Fund Ex. 5 - Respondent's licensing history, 9/19/2022
- Fund Ex. 6 - David Finneran affidavit, 9/8/2022

## Testimony

The Claimant testified and did not present other witnesses. The Fund did not present any witnesses. The Respondent did not appear for the hearing.

### PROPOSED FINDINGS OF FACT

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

1. The Respondent was not a licensed contractor at any time relevant to the subject of this hearing. The Respondent was licensed on April 11, 2019, and his MHIC license expired April 20, 2020.
2. The Claimant owns and resides in a residential property in Cambridge, Maryland. She does not own any other residential property, is not related to the Respondent, and has no business relationship with the Respondent other than entering into a contract for home improvement work. The Claimant has no other claims pending against the Respondent. There is no arbitration clause in the contract the Claimant entered into with the Respondent.
3. In late 2020 the Claimant searched for a contractor to replace the roof on her home. She obtained two estimates that ranged from approximately \$17,000.00 to approximately \$23,000.00.
4. In December 2020, the Claimant met with a salesman for the Respondent.<sup>3</sup> The Respondent's salesman provided the Claimant with an estimate for a new roof. The Respondent's salesman's estimate for the work to be done was several thousand dollars less than the estimates the Claimant obtained from two other companies. The Respondent's salesman explained that the Respondent was running a special.

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<sup>3</sup> The Claimant testified that she has never met nor ever spoken to the Respondent, and that a representative for the Respondent told her that all work done by the Respondent and The Roofing Experts, LLC was done by subcontractors.

5. On December 1, 2020, the Claimant and the Respondent, through a representative sales agent, entered into a contract to replace the roof of the Claimant's home in Cambridge, Maryland. The Contract included installation of fourteen squares of General Aniline & Film (GAF) brand, Timberline model shingles, in "shakewood" color. The contract included installation of a GAF roofing system, plus warranty (Contract).

6. The Contract also included a felt barrier, a drip edge, chimney flashing, pipe collars, and "seal ridge." In addition, the Contract provided that in the event the roof required replacement of rotted wood the Respondent would replace it with four feet by eight feet sheets of oriented strand board at a cost of \$90.00 per sheet.

7. The Contract included a pre-printed line that provided: "Installation will begin within 45-60 days." The "45-60" part of this line was crossed through on the Contract. The Contract also provided "Projected completion date is approximately 2-3 weeks" but the Contract does not specify the date from which "2-3 weeks" would be calculated.

8. The Contract did not identify any part of the contract attributable to labor or materials or otherwise specify what part of the \$9,030.00 was for what part of the Contract.

9. Under the terms of the Contract the Claimant was to pay the Respondent \$9,030.00, with \$3,010.00 due within 72 hours of signing the Contract and \$6,020.00 due "COD." The Contract had a footnote which explained that COD means "payable to installer at the time of installation."

10. On December 2, 2020, the Claimant paid the Respondent \$3,010.00.

11. On or about April 7, 2021, a delivery vehicle arrived at the Claimant's home and deposited a large stack of shingles, approximately forty to fifty bundles wrapped in plastic, along

with two rolls of felt and two boxes of roofing supplies on the Claimant's lawn, adjacent to the Claimant's front sidewalk, near her front porch.<sup>4</sup>

12. In April 2021, someone who worked for the Respondent visited the Claimant's home and went up onto her roof. The person who went on the roof explained that several sheets of oriented strand board would be necessary to repair the roof, and there would be an additional unspecified cost.

13. On April 29, 2021, the Claimant paid the Respondent \$6,020.00.

14. No one ever delivered any oriented strand board to the Claimant's home.

15. Beginning in May 2021, the Claimant made several efforts to reach the Respondent or someone who represented the Respondent to ask when her roof would be replaced. On or about late May 2021, a work crew arrived. Once on site, the work crew chief contacted "Rick," a site supervisor, who arrived at the Claimant's home sometime later. The Claimant overheard the work crew chief explain to Rick that the Claimant's roof required several sheets of plywood to do the job correctly. The Claimant overheard Rick tell the crew chief to install the new shingles over the existing roof plywood, and the work crew chief refused. The work crew left the Claimant's home without doing any work. Rick left without talking to the Claimant.

16. The Claimant made repeated efforts over several months to reach the Respondent or someone who represented the Respondent to inquire when her new roof would be installed. No one responded to her efforts.

17. On March 22, 2022, the Claimant entered a contract with National Remodelers Specialists, LLC, to remove and replace the roof of her home. The National Remodelers

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<sup>4</sup> The Claimant and her daughter moved all of the roofing supplies delivered in April 2021 from the front of the Claimant's home to the rear of her home, by hand, one bundle of shingles at a time, because they were an eyesore and because the Claimant's lawn was being destroyed.

Specialists, LLC, contract included that it would furnish and install a new GAF Timberline lifetime roofing system, would install new gutters and downspouts, would install new wood sheathing, and would paint, for a total cost of \$23,338.00. The National Remodelers Specialists, LLC contract did not break down how much of the cost of the contract was for labor, and how much of the contract was for materials.

18. After entry of the contract with National Remodelers Specialists, LLC, National Remodelers Specialists, LLC removed the Claimant's roof in its entirety down to the rafters, replaced all of the roof sheathing, installed new shingles, and installed new gutters and downspouts on the Claimant's home where needed, leaving some of her gutters and downspouts intact.

19. National Remodelers Specialists, LLC used the roofing supplies deposited on the Claimant's lawn in April 2021, but the supplies were not enough for the entire job and National Remodelers Specialists, LLC had to buy unspecified additional roofing supplies to complete the work.

20. The Claimant paid National Remodelers Specialists, LLC \$23,388.00 for the work it performed.

### DISCUSSION

The Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Bus. Reg. § 8-407(e)(1); State Gov't § 10-217; 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).

An owner may recover compensation from the Fund “for an actual loss that results from an act or omission by a licensed contractor.” Bus. Reg. § 8-405(a) (Supp. 2022); *see also* COMAR 09.08.03.03B(2) (“The Fund may only compensate claimants for actual losses . . . incurred as a result of misconduct by a licensed contractor.”). “[A]ctual loss’ means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.” Bus. Reg. § 8-401. Here, the Respondent was not a licensed home improvement contractor at the time the Respondent entered into the Contract with the Claimant. This bars her claim.

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 or 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 Claimant did not unreasonably reject good faith efforts by the Respondent to resolve the claim. *Id.* § 8-405(d) (Supp. 2022).

The Respondent performed incomplete home improvements. He delivered materials to the Claimant’s home four months after the Contract was entered. He sent a representative to the Claimant’s home in May 2021, which resulted in the Claimant paying an additional \$6,020.00 to the Respondent. But the Respondent did not deliver any roofing materials or supplies to the Claimant’s home and did no work after the Claimant paid him an additional \$6,020.00.



If I were to conclude the Claimant's claim was not barred because the Respondent was not a licensed contractor when the Contract was entered, I must find a basis for eligibility. To do so, I must determine the amount of the Claimant's actual loss and the amount, if any, that the Claimant is entitled to recover. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney fees, court costs, or interest. Bus. Reg. § 8-405(e)(3) (Supp. 2022); COMAR 09.08.03.03B(1). MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work.

COMAR 09.08.03.03B(3) provides:

- (3) Unless it determines that a particular claim requires a unique measurement, the Commission shall measure actual loss as follows:
- (a) If the contractor abandoned the contract without doing any work, the claimant's actual loss shall be the amount which the claimant paid to the contractor under the contract.
  - (b) If the contractor did work according to the contract and the claimant is not soliciting another contractor to complete the contract, the claimant's actual loss shall be the amount which the claimant paid to the original contractor less the value of any materials or services provided by the contractor.
  - (c) If the contractor did work according to the contract and the claimant has solicited or is soliciting another contractor to complete the contract, the claimant's actual loss shall be the amounts the claimant has paid to or on behalf of the contractor under the original contract, added to any reasonable amounts the claimant has paid or will be required to pay another contractor to repair poor work done by the original contractor under the original contract and complete the original contract, less the original contract price. If the Commission determines that the original contract price is too unrealistically low or high to provide a proper basis for measuring actual loss, the Commission may adjust its measurement accordingly.

Here, of the three formulas, COMAR 09.08.03.03B(3)(c) most closely applies. The Respondent performed some work under the Contract – he delivered some materials to the Claimant's home – and the Claimant hired National Remodelers Specialists, LLC to complete

the work. But COMAR 09.08.03.03B(3)(c) does not apply in a way that makes calculation of an award possible.

The Claimant paid the Respondent \$9,030.00 and received a stack of roofing supplies of unknown value, which National Remodelers Specialists, LLC used to complete the work the Respondent agreed to perform. National Remodelers Specialists, LLC had to purchase unknown additional supplies, including enough sheathing to completely cover the Claimant's roof, plus some shingles and some roofing felt. National Remodelers Specialists, LLC agreed to install new gutters and downspouts, which the Respondent did not agree to do. National Remodelers Specialists, LLC replaced some, but not all, of the gutters and downspouts.

There are many variables and unknowns here, such as:

- What was the value of the materials the Respondent delivered to the Claimant in April 2021?
- How much of the Contract was for materials and how much was for labor?
- How many sheets of sheathing would the Respondent have used, at \$90.00 per sheet, if the Respondent did the work?
- Of the \$23,388.00 contract with National Remodelers Specialists, LLC, how much was for all new roof sheathing?
- How many bundles of shingles and how many rolls of roofing felt were required to complete the roof after National Remodelers Specialists, LLC used the shingles and roofing felt the Respondent delivered months earlier?
- Did National Remodelers Specialists, LLC take into consideration that it would be able to use the supplies the Respondent delivered to the Claimant's home in April 2021 when it submitted an estimate to the Claimant to complete the work?

I am left to guess the answers to these fundamental questions, and without answers I cannot calculate an award, even if the Claimant was eligible.

None of the three regulatory formulas is appropriate in this case and there is no unique formula which can be used given the evidence missing here. If the Contract included in its terms how much of it was for materials and how much was for labor, a calculation of the value of materials the Respondent delivered may be possible and calculation of an award may be possible, if the Claimant's claim was not barred because the Respondent was not licensed when the Contract was entered. But this is the evidence.

Amount paid to the Respondent:	\$ 9,030.00
Amount paid to National Remodelers Specialists, LLC:	\$23,388.00
Value of materials delivered by the Respondent in April 2021?	unknown
How many sheets of roof sheathing would the Respondent have used if he did the work?	unknown
How much of the Contract was labor and how much was materials?	unknown
Did National Remodelers Specialists, LLC take into consideration that it would be able to use the supplies the Respondent delivered to the Claimant's home in April 2021 when it submitted an estimate to the Claimant to complete the work?	unknown

Because the Respondent was not a licensed home improvement contractor at the time the Claimant and the Respondent entered the Contract I find that the Claimant is not eligible for compensation from the Fund.

**PROPOSED CONCLUSIONS OF LAW**

I conclude that the Claimant has not sustained an actual and compensable loss as a result of the Respondent's acts or omissions and is not entitled to recover any amount from the Fund. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2022); COMAR 09.08.03.03B(2) and (3).

**RECOMMENDED ORDER**

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

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

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

December 14, 2022  
Date Decision Issued

*Michael R. Osborn*  

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Michael R. Osborn  
Administrative Law Judge

MRO/sh  
#202406

PROPOSED ORDER

*WHEREFORE, this 25<sup>th</sup> day of January, 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.*

*Michael Newton*

*Michael Newton*

*Panel B*

**MARYLAND HOME IMPROVEMENT  
COMMISSION**