IN THE MATTER OF THE CLAIM	*	BEFORE SUSAN A. SINROD,
OF SYLVIA SAUNDERS,	*	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 DAVID GEORGE	*	
FINAN, T/A WHEATON DOOR &	*	OAH No.: LABOR-HIC-02-19-36779
WINDOW, also known as DECK	*	MHIC No.: 19 (90) 932
WIZARD	*	
RESPONDENT	*	

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PROPOSED DECISION

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STATEMENT OF THE CASE

On May 7, 2019, Sylvia Saunders (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund), under the jurisdiction of the Department of Labor (Department),[1] for reimbursement of $6,000.00 in actual losses allegedly suffered as a result of a home improvement contract with David Finan, t/a Wheaton Door & Window, also known as Deck Wizard (Respondent).

[1] On July 1, 2019, the Maryland Department of Labor, Licensing, and Regulation became the Department of Labor.

Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015).[2] On November 15, 2019, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I conducted a remote hearing through the Webex videoconferencing platform on November 12, 2020. Bus. Reg. § 8-407(e). Hope Sachs, Assistant Attorney General, Department, represented the Fund. The Claimant represented herself. The Respondent failed to appear at the hearing.

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. Code of Maryland Regulations (COMAR) 28.02.01.23A. On October 5, 2020, notice of the hearing was mailed to the Respondent at its address of record with the Department by regular and certified mail. The United States Postal Service did not return either notice as undeliverable. COMAR 09.08.03.03A(2).[3] The Respondent did not notify the OAH of any change of address. COMAR 28.02.01.03E. I determined that the Respondent received proper notice, and I proceeded to hear the captioned matter.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, 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. 2020); COMAR 09.01.03; and COMAR 28.02.01.

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

[3] This matter was previously scheduled for May 29, 2020 but was rescheduled due to the COVID 19 pandemic. The United States Postal Service returned the certified mail copy of that notice, sent to the same address, to the OAH as unclaimed. The OAH did not receive the certified mail green card back from the notice for this rescheduled hearing that was mailed to the Respondent by certified mail.

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

The Claimant submitted the following exhibits, which were admitted into evidence:

Cl. Ex. #1- Photographs of Claimant's deck, taken August 11, 2018, August 13, 2018, August 19, 2018, August 30, 2018, September 21, 2018, January 1, 2019, May 12, 2020 and July 5, 2020

Cl. Ex. #2- Email from Kurt's Pressure Wash to the Claimant, dated May 4, 2019

Cl. Ex. #3- Letter from the Claimant to the MHIC, dated May 6, 2019

Cl. Ex. #4- Estimate from Long Fence, dated April 16, 2019

Cl. Ex. #5- Montgomery County Deck Maintenance Inspection Checklist, dated June 27, 2019

Cl. Ex. #6- Letter from the MHIC to the Claimant, dated April 15, 2019

Cl. Ex. #7- Letter from the MHIC to the Claimant, dated February 25, 2019

Cl. Ex. #8- Email from the MHIC to the Claimant, dated January 25, 2019

Cl. Ex. #9- Letter from the MHIC to the Respondent, dated January 28, 2019

Cl. Ex. #10- Home Improvement Claim Form, undated

Cl. Ex. #11- Consumer Loan Application, Service Finance Co., LLC., dated July 24, 2018; Change in Contract Form, dated July 31, 2018; Notice of Right of Rescission, dated July 25, 2018; Terms & Conditions, undated; Deck Wizard Warranty, undated; Contract with Deck Wizard, dated July 24, 2018; Signature/Name Affidavit, dated July 25, 2018; Addendum to Retail Installment Contract, dated September 4, 2018

Cl. Ex. #12- Letter from the Claimant to the Respondent, dated August 21, 2018

Cl. Ex. #13- Complaint Form, dated January 15, 2019

Cl. Ex. #14- Letter from the Claimant to Hope Sachs, Assistant Attorney General, dated October 13, 2020

Cl. Ex. #15- Letter from Service Finance Company to the Claimant, dated April 1, 2020

The Respondent did not appear and therefore, did not submit any exhibits for admission into evidence.

The Fund submitted the following exhibits, which were admitted into evidence:

Fund Ex. #1- Notice of Remote Hearing, dated October 4, 2020

Fund Ex. #2- Hearing Order, dated November 12, 2019

Fund Ex. #3- Letter from the MHIC to the Respondent, dated May 16, 2019, with Home Improvement Claim Form, received May 10, 2019, attached

Fund Ex. #4- Home Improvement Commission Licensing History, dated January 9, 2020

Testimony

The Claimant testified and did not present the testimony of any other witnesses.

The Respondent did not appear and therefore, did not present the testimony of any witnesses.

The Fund presented did not present the testimony of 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 home improvement contractor licensed by the MHIC.

2. The Respondent specializes in deck restoration, repair and replacement.

3. On July 25, 2018, the Claimant and the Respondent entered into a contract whereby the Claimant purchased the Respondent's Silver Package for the restoration and upgrade of her deck (Contract). The total contract price was $4,650.00. The Contract included a one-year warranty for labor and construction and a fifteen-year warranty of the sealer applied to

newly installed boards. Information included with the Contract indicated that, weather permitting, the work under the Contract would be completed in one to three days.

4. Pursuant to the Contract, the Respondent was to remove and replace old deck boards and rails and apply the Respondent's patented coating.

5. The wood boards the Respondent used to replace the old deck boards were defective with gouges and cuts and splintered in places. The Respondent replaced the railings and the step boards descending from the deck, leaving the first step unstable because it was not resting on anything; a brace had to be installed to stabilize the step. The Respondent glued the railings instead of using bolts. At the joints, where one segment of the railing meets another, the joints did not match up properly and were uneven. Wood boards were cut at different lengths. Also, in multiple locations where the railing met the house, the wood was uneven and not flush against the house.

6. The Respondent's sales manager came to look at the deck after the Claimant complained about the initial work. The sales manager agreed that some of the work was unsatisfactory and agreed to replace faulty deck boards. The sales manager arranged to send someone out to do so on August 20, 2018.

7. On August 20, 2018, the installer appeared with nine replacement boards even though approximately twenty boards needed replacement. The Respondent had not given the installer any guidance as to which boards were to be replaced. The Claimant did not allow the Respondent's installer to do the work.

8. On August 30, 2018, a different worker from the Respondent came out to fix some of the defects. This worker replaced the defective top boards and repaired the steps to make them stable and safe. However, defective boards and poor workmanship, including

incorrect fitting of the deck rails against the house and incorrect fitting of railing joints against each other remained.

9. While working on August 30, 2018, the worker spilled paint on the heat pump. When the paint could not be removed, the worker painted the heat pump a different color to remediate the paint spillage.

10. Currently, when it rains, water puddles on the deck and does not run off. Also, the color of the wood has faded since installation.

11. On June 27, 2019, a Montgomery County inspector performed an inspection upon the Claimant's deck and found that the deck lacked sufficient bolts to secure ledger boards and guardrails, the railing height on the stairs was not high enough, and the deck needed a graspable handrail.

12. The Claimant paid $3,600.00 to the Respondent for work under the Contract.

DISCUSSION

In this case, the Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Bus. Reg. § 8-407(e)(1); Md. Code Ann., State Gov't § 10-217 (2014); COMAR 09.08.03.03A(3). To prove a claim by a preponderance of the evidence means to show that it is "more likely so than not so" when all the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002).

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

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

From the Claimant's testimony and the pictures she presented into evidence, the Claimant established that the Respondent's work under the Contract was inadequate. The wood the Respondent used to replace boards on the deck appears to be defective with covered up nail holes and it is splintered in places. Cl. Ex. #1. Some of the wood used for the top rails on the deck and on the stair rails is damaged. In one spot, a wood board is damaged such that it is cut much wider at one point and then narrows. The two stair rails are different; one is flush against a top rail, but the other stair rail was installed underneath the top rail, leaving an overhang. The wood on the outer edge of the deck was uneven and appears to be filled and painted to cover up the inadequacies. The decking is pulling away from the house rather than flush against it. Where the joints of the railings meet, the wood is cut unevenly and the joints are not flush with each other. The work appears overall to be shoddy and sloppy. The Respondent did not appear for the hearing to refute the Claimant's contentions.

The Claimant obtained some estimates to repair the Respondent's inadequate work. However, none of the estimates that she presented into evidence were for work that was within the scope of the Contract. The Kurt's Pressure Wash estimate is for $6,000.00 to replace the deck. Cl. Ex. #2. The Contract was not for replacement of the deck. The estimate from Long Fence was for $7,875.00, also to completely replace the deck. Cl. Ex. #4. Both of these estimates go far beyond the scope of work the Respondent was required to perform under the Contract, and therefore cannot be considered.

However, the Claimant paid $3,600.00 to the Respondent for inadequate work and this constitutes an actual loss. Based on my analysis herein, I conclude that the Claimant is eligible for compensation from the Fund.

Therefore, I must determine the amount that the Claimant is entitled to recover from the Fund. The Fund may not compensate a claimant for consequential or punitive damages, personal

injury, attorney fees, court costs, or interest. Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1). MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work.

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

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

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

The Respondent did some work under the Contract but there is no evidence in the record to indicate the value of that work. The Claimant has solicited other contractors to complete the work but the estimates for that work fall far outside the scope of the Contract. It cannot be said that the Respondent abandoned the project; however, the work the Respondent performed was inadequate and unworkmanlike. Accordingly, I shall apply a unique formula to measure the Claimant's actual loss. Section 8-405(e)(5) of the Business Regulation Article of the Maryland Code provides that a claimant cannot recover more from the Fund than the claimant paid to the contractor. As set forth above, the Claimant's estimates cannot be utilized to determine the amount she is entitled to recover. However, she paid $3,600.00 to the Respondent and did not receive the value that she paid for that work.

The Fund agreed that the Claimant was entitled to this amount. Thus, I conclude, that the Claimant is entitled to recover the $3,600.00 that she paid to the Respondent.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of $3,600.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3). 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 Guaranty Fund award the Claimant $3,600.00; 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;[4] and

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

January 25, 2021
Date Decision Issued

Susan A. Sinrod
Administrative Law Judge

SAS/at
#189997

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

PROPOSED ORDER

WHEREFORE, this 7th day of June, 2021, 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