

<p>IN THE MATTER OF THE CLAIM</p> <p>OF SYMON M. MANYARA,</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 GARY SWEITZER,</p> <p>T/A GARY SWEITZER, INC.,</p> <p>RESPONDENT</p>	<p>* BEFORE MICHAEL R. OSBORN,</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-02-23-07315</p> <p>* MHIC No.: 22 (75) 1354</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 October 12, 2022, Symon M. Manyara (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)<sup>1</sup> Guaranty Fund (Fund) for reimbursement of \$26,831.00 for actual losses allegedly suffered as a result of a home improvement contract with Gary Sweitzer, trading as Gary Sweitzer, Inc., conducting business under the corporate

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<sup>1</sup> The MHIC is under the jurisdiction of the Department of Labor (Department).

name of Excellent Contracting (Respondent).<sup>2</sup> Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2022).<sup>3</sup> On March 1, 2023, the MHIC issued a Hearing Order on the Claim. On March 9, 2023, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On June 6, 2023, I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. Hope Sachs, Assistant Attorney General, Department, represented the Fund. The Claimant was self-represented. The Respondent was self-represented.

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:

- Clmt. Ex. 1 - Contract, November 16, 2019
- Clmt. Ex. 2 - Claimant's narrative submitted to the MHIC, October 17, 2022
- Clmt. Ex. 3 - Home Improvement Claim Form, October 12, 2022

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<sup>2</sup> The November 19, 2019, home improvement contract between the Claimant and the Respondent reflects that the Respondent was trading as Excellent Contracting, with MHIC No. 48726. On the MHIC Home Improvement Claim Form the Claimant identified the Respondent as the contractor against whom claim was being made, and that the Respondent was trading as Excellent Contracting. MHIC Exhibit 2 reflects that the Respondent's MHIC number is 48726, and that his trade name is Gary Sweitzer, Inc., with a corporate business name of Excellent Contracting. All references to the Respondent are to Gary Sweitzer, Gary Sweitzer, Inc., and Excellent Contracting.

<sup>3</sup> Unless otherwise noted, all references to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.

- Clmt. Ex. 3a - Inspection slips, Howard County Department of Inspections, Licenses & Permits, various dates in October, November, and December 2020, June 2021, and April 2022<sup>4</sup>
- Clmt. Ex. 4 - Receipts and checks, various dates November 2019 through March 2022
- Clmt. Ex. 5 - Photographs, June 1, 2022
- Clmt. Ex. 6 - Estimate from Pro Deck, Inc., undated, estimate from Exis General Contracting, July 25, 2022, and Estimate from Shamrock Service, Co., Inc., August 10, 2022
- Clmt. Ex. 7 - Emails between the Claimant and the Respondent, October 25, 2019, through August 1, 2022
- Clmt. Ex. 8 - Photograph of interior of project, with narrative comments, undated

I admitted the following exhibits offered by the Respondent:

- Resp. Ex. 1 - Howard County Department of Inspections, Licenses & Permits printout reflecting permit for work under the Contract is completed, printed June 5, 2023
- Resp. Ex. 2 - Hand drawing of interior, exterior, and heating, ventilation, and air conditioning (HVAC) layout, undated
- Resp. Ex. 3 - Printout of Lowe's web page displaying a heating and cooling window unit, undated
- Resp. Ex. 4 - MHIC Complaint Form, with handwritten notation, June 7, 2022
- Resp. Ex. 5 - Emails between the Claimant and the Respondent, October 22, 2021, through May 31, 2022
- Resp. Ex. 6 - Proposal from Respondent to Claimant for work to be done in the Claimant's kitchen, February 17, 2022

I admitted the following exhibits offered by the Fund:

- Fund Ex. 1 - Notice of Hearing, April 10, 2023
- Fund Ex. 2 - Respondent's MHIC licensing history, printed May 25, 2023
- Fund Ex. 3 - MHIC letter to Respondent, November 15, 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 testimony.

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<sup>4</sup> During the hearing I marked this exhibit as Exhibit 3 when I had already marked an exhibit as Exhibit 3. I re-marked this exhibit as Exhibit 3a in the course of drafting this proposed decision.

## 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 01-48726.
2. On November 16, 2019, the Claimant and the Respondent entered into a contract to convert the Claimant's deck, which was 10 feet by 12 feet in size, to an enclosed interior space 12 feet by 12 feet in size when finished (Contract or Addition).
3. The original agreed-upon Contract price was \$24,800.00.
4. The scope of work under the Contract included:
  - Demolish existing deck rails
  - Frame the walls with 2 x 4s, 16 inches on center, install secondary beams close to the existing house as needed with treated lumber, pour footers and bolt together, replace the front beam to fit new size, add additional joists
  - Construct roof with certified scissor trusses, cover with half-inch plywood
  - Install 20-year 3-tab shingles with tar paper, install ice and water shield with drip edge, install flashing
  - Install low E glass windows and insulated door with locksets, windows to be wrapped in water seal frame covering
  - Exterior to be white PVC board, one half inch thick, caulked and sealed, wrap posts in PVC as well
  - Install one half inch drywall on walls and ceilings with glue and screws, spackle, sand, and finish as needed
  - Install door, baseboard trim with closest match as possible to existing house

- Prime and paint walls, doors, and trim. Prime and two coats of paint, walls to be flat with trim semi-gloss. \$450.00 to be added if ceiling a different color
  - Install through the wall heat pump unit for heating and cooling, install unit and connect electrical
  - Electrical to consist of outlets and four recessed LED lights in ceiling, wire and trim out as needed. Install outlet for heat pump
  - Floor, walls, and ceiling to be insulated to code standards
  - Floor of room to be tiled with customer supplied tile. Place in thin set and grout as needed
  - Demolish and remove opening between house and room. Repair walls as needed. Replace trim. Rework steps to original deck to accommodate the new room size. Repair steps to patio
  - Homeowner to be available to let inspectors in. We can also meet for a small fee
  - Haul away job-related debris. Room to be broom swept at completion
  - Excellent Contracting to pull needed Howard County permits
5. The Contract also included: "Items supplied are quality mid-grade fixtures.

Upgrades available. All materials included unless otherwise noted. All work and materials warranted for 1 year. Unless otherwise noted by product manufactures for longer period."

6. The Contract provided for a down payment of \$8,200.00, \$4,000.00 at permit application, \$7,000.00 after framing, \$2,000.00 after electrical rough in, with remainder due at completion. Although not included in the terms of the Contract the work was to take approximately one month to complete.

7. On November 16, 2019, the Claimant paid the Respondent \$8,000.00.

8. The deck to be converted to interior living space was on the back of the Claimant's home, on the second level. A staircase led from the deck to the back yard. A paver patio was directly below the deck, accessible from the home via a sliding door.

9. On March 13, 2020, the Claimant paid the Respondent \$4,000.00.

10. On a date not clear from the record the Respondent began work on the Addition. The Respondent demolished the existing deck rail.

11. When the framing and flooring for the Addition was completed, the first step from the Addition to the outside staircase had a 12-inch drop. This drop was unacceptable.

12. On April 23, 2020, the Appellant agreed to pay the Respondent \$2,500.00 for labor to alter the exterior staircase with materials the Claimant would provide.

13. On April 23, 2020, the Claimant paid the Respondent \$7,000.00.

14. On April 27, 2020, the Claimant paid the Respondent \$1,500.00.

15. On July 9, 2020, the Claimant paid John S. Wilson Lumber \$1,334.00 for treated lumber for posts for the new staircase.

16. On July 25, 2020, the Claimant obtained an estimate for Anderson Series 400 windows and a door that would be needed for the Addition in the amount of \$7,811.39.

17. Before August 4, 2020, the Claimant emailed the Respondent to express the Claimant's dissatisfaction with the Respondent's use of windows and a door that did not match the Anderson Series 400 windows in the rest of the Claimant's house, and that he had obtained an estimate for Anderson Series 300 windows. On August 4, 2020, the Respondent replied by email that the Anderson windows were not specified in the Contract, and that the Respondent had already paid \$4,000.00 for windows and doors. The Respondent explained that the door already installed would have to be removed and would be valueless. The Respondent told the

Claimant that if the Claimant wanted Anderson Series 400 windows, the cost would be an additional \$3,800.00, if the Claimant wanted to pay the difference. On August 5, 2020, the Claimant refused, citing that the Respondent had removed an Anderson Series 400 bay window as part of the work under the Contract and should have assumed the Respondent wanted matching windows in the Addition. The Claimant renewed his demand for Anderson Series 400 windows and a door and demanded that the Addition be completed by August 31, 2020.

18. On August 19, 2020, the Respondent emailed the Claimant to inform the Claimant that the trim, door, and steps were completed, and that \$1,100.00 remained from the trim and staircase quote. The Respondent told the Claimant that a new door and PVC replacement was \$850.00, and an upgrade to Anderson Series 400 windows was \$3,110.00. The Respondent requested payment of \$5,060.00.

19. On August 19, 2020, the Claimant responded to the Respondent's request for \$5,060.00, requesting clarification of the Respondent's August 19, 2020, email, and questioning how the Respondent arrived at this figure given previous conversations that would have resulted in a lower figure.

20. On August 24, 2020, the Claimant paid the Respondent \$1,000.00 with a notation on the check "trim/steps," paid the Respondent \$788.00 with a notation on the check "door," and paid the Respondent \$3,110.00, with a notation on the check "windows and door – Anderson."

21. The \$1,000.00 was payment as part of an agreement on April 23, 2020, in which the Respondent agreed to provide labor to rebuild the exterior staircase for \$2,500.00. \$788.00 was for reimbursement to the Respondent for the door and trim the Respondent installed but had to later remove. \$3,110.00 was for Anderson 400 series windows and door upgrades.

22. On October 29, 2020, the Claimant paid the Respondent \$2,000.00.

23. On December 29, 2020, the Claimant paid the Respondent \$1,000.00, and on the same date, paid the Respondent \$450.00.

24. The Claimant and the Respondent exchanged several emails over a course of months. The dominant theme was the Claimant's requests that the Respondent complete work on the Addition, and remarks by the Claimant about the several times the Respondent's work had to be improved to pass Howard County inspections. On March 13, 2021, the Claimant noted that the Addition needed:

- A transition strip at the entry to the Addition from the home
- A ceiling fan
- A wall switch for the exterior light
- An exterior light by the exit door
- Better fasteners for exterior boards, which were separating from the house
- Painting of the exterior of the Addition to match the house
- A staircase
- Window screens and completion of window installation

25. The Claimant requested the items listed in the March 13, 2021, email be completed by March 21, 2021.

26. The Claimant paid for a ceiling fan, which the Respondent installed. A ceiling fan was not part of the original Contract. The Contract made no reference to installation of an exterior light and switch.

27. The Respondent did not respond to the Claimant's March 13, 2021, email.

28. By March 21, 2021, the new staircase had failed several Howard County



inspections, two for inadequate footings, which delayed continued work until proper footings were installed. The staircase was not complete.

29. On May 14, 2021, the Claimant emailed the Respondent to tell him that the Claimant considered the Contract abandoned by the Respondent. Despite this email the Respondent continued to work on the Contract.

30. On June 14, 2021, the new staircase footings passed a Howard County inspection, and work on the staircase continued.

31. On July 27, 2021, the Claimant paid the Respondent \$950.00 to alter the step at the Addition's exit door to pass a Howard County inspection.

32. On July 31, 2021, the Claimant paid Home Depot \$206.43 for thirteen composite-material post sleeves for use on the exterior steps.

33. On August 11, 2021, the Claimant paid Home Depot \$15.88 for one composite-material post sleeve for use on the exterior steps.

34. On October 7, 2021, the Claimant paid John S. Wilson Lumber Company \$3,477.91 for 30 white composite-material boards in lengths of 8 and 12 feet, and eight white composite-material 4 foot by 8-foot panels for use on the exterior stairs and use on the underside of the Addition.

35. On October 9, 2021, the Claimant paid Home Depot \$403.91 for PVC boards and finish nails for use on the stairs from the Addition to the back lawn and patio.

36. Following the Claimant's purchase of materials workers built an entirely new exterior stairway leading to the Addition, with three landings, the top landing approximately 4 feet by 4 feet, directly outside the exit door of the Addition. This new stairway replaced the

previous stairway, which was a single main set of steps leading to a single landing, with a short second set of steps perpendicular to the main stairway, which led to the exit door of the Addition.

37. On October 9, 2021, at the Respondent's suggestion, the Claimant entered into a contract with one of the Respondent's workers, Mr. Martinez, to complete the new exterior staircase. The Claimant hired Mr. Martinez to cover the underside of the steps with PVC boards, to cover the posts supporting the steps with PVC board, to complete covering the underside of the Addition with PVC boards, and to complete covering the posts supporting the Addition with PVC boards. The cost of the contract with Mr. Martinez was \$1,290.00. Of this cost, \$850.00 was for labor.

38. On October 10, 2021, the Claimant paid Mr. Martinez \$790.00 by check, and \$500.00 in cash. The \$500.00 was for labor, and of the \$790.00 check, \$350.00 was for labor, the remainder for materials.

39. On October 21, 2021, the Claimant paid Mr. Martinez \$1,400.00 by check,

40. On November 4, 2021, the Claimant paid John S. Wilson Lumber Company \$577.00 for material for use on the handrails of the exterior steps.

41. Mr. Martinez performed the work on the stairs, primarily using the materials purchased by the Claimant. On an unknown date after Mr. Martinez completed the work, the exterior stairs passed a Howard County inspection. However, the Claimant was not fully satisfied with the appearance of the stairs after they were completed.

42. The Respondent never installed a heating and air conditioning unit in the Addition.

43. On or about April 23, 2022, following a successful final inspection, the Howard County Department of Inspections, Licenses & Permits entered a “completed” notation for the permit issued for construction of the Addition. Before the inspection could be completed, Mr. Martinez had to remove staircase boards already installed to provide a clear view of the structural elements of the staircase for inspection. The Claimant paid Mr. Martinez \$450.00 for this work.

44. On May 27, 2022, the Claimant emailed the Respondent with a last appeal to finish the Addition. The Claimant stated that the final work was: “caulk and paint touch ups of the boards that were removed for inspection,” and “install the wall heat pump unit for heating and cooling.”

45. The Claimant’s reference to the boards removed for inspection was for touching up the boards Mr. Martinez had to remove and reinstall so an inspector could get a better view of the structural elements of the new staircase.

46. On an unknown date in 2022, the Claimant obtained an estimate from Deck Pro., Inc. to remove and replace the trim on two beams and four posts under the Addition, to remove and replace all of the trim on the sides, bottom, and posts on the stairs and landings of the exterior stairs, to remove and replace all of the stair treads with Fiberon composite decking with hidden screws, and to remove all debris. The total cost of the work in the Deck Pro, Inc, estimate was \$13,904.00.

47. On an unknown date in 2022, the Claimant obtained an estimate, also from Deck Pro., Inc., to install a wall-mounted Mitsubishi brand air conditioning unit and to install all necessary electrical service to components both inside and outside the Claimant’s home. The total cost for installation of the air conditioning unit was \$12,020.00.

48. On July 25, 2022, the Claimant obtained an estimate from Exis General Contracting to remove the existing stair treads and replace them, with screw head covers, to supply and install PVC boards to cover the existing staircase and the underside of the Addition, to install PVC trim caps on all staircase posts, and to paint the exterior of the Addition in the Claimant's chosen color. The total cost of the work under the Exis General Contracting estimate was \$11,280.00.

49. On August 10, 2022, the Claimant obtained an estimate from Shamrock Service Co., Inc. to install a new Mitsubishi brand ductless split-system heating and air conditioning unit, to install all electrical supply and controllers including a circuit breaker, and to install a PVC electrical-line concealment cover. The total cost of the Shamrock Service Co., Inc., estimate was \$6,528.00.

50. A Hisense brand heating and air conditioning unit, a window-mounted air conditioner with a heater, which is plugged into a standard 120-volt electrical outlet, costs \$489.00 at Lowe's. The Respondent did not install such a unit in the Claimant's home nor offer to do so.

51. The Contract price was \$24,800.00. Modifications to the Contract included \$2,500.00 for labor to build the new staircase, \$950.00 to modify the exterior steps to the Addition door, and \$3,110.00 for upgraded windows. The total cost of the Contract with modifications was \$31,360.00.

### **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. For the following reasons, I find that the Claimant has proven eligibility for compensation, but not in the amount he claims.

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). In March 2021, in an email, the Claimant requested the Respondent complete several items. The Respondent did not respond. In May 2021, the Claimant followed with an email in which he told the Respondent that he, the Claimant, considered the Respondent had abandoned the Contract. But after this May 2021 email, the

Respondent continued to work on the Addition. There was no point at which the Claimant rejected efforts by the Respondent to complete the Contract.

### *The Exterior Staircase*

The most significant disagreement between the parties was the exterior staircase. The original staircase was a single long set of steps from the lawn to a landing. When using this staircase, a person would climb the long set of stairs and arrive at the landing, turn left, and climb two or three stairs to the deck. Shortly after construction of the Addition began the Claimant, or perhaps the Respondent, realized that when exiting the Addition to the existing landing using the existing stairs, the first stair tread as a person exited the Addition would be a 12-inch drop, and that the staircase would require modification.

The Contract says the Respondent will “Rework steps to original deck to accommodate the new room size. Repair steps to patio.” The Claimant and the Respondent had different views as to the meaning of this provision and presented emails and testimony relating to the reconstruction of the staircase. The scope of work relating to the staircase was never reduced to writing, making the determination of who agreed to do what, and when, and who would pay for it, challenging. The new staircase design consisted of a series of three landings with stairs leading to each landing, the uppermost landing being outside the Addition door. This staircase was a significant change from the existing staircase, with significantly more engineering, and using significantly more materials, than the existing staircase.

Disputes between the Claimant and the Respondent about delays and the Claimant’s list of items for correction arose. The Claimant also wanted the staircase finished. The Respondent recommended the Claimant hire Mr. Martinez, one of the Respondent’s crew members, to perform the labor on the new staircase. Mr. Martinez was unwilling to undertake this work

without direct payment from the Claimant, and the Claimant was unwilling to hire Mr. Martinez to build the new staircase without a written agreement describing what Mr. Martinez would do. The Claimant viewed this sequence of events as the Respondent undertaking his responsibilities under the Contract to build the entire new staircase. The Respondent viewed this agreement as a contract between the Claimant and Mr. Martinez, separate from any agreement he had with the Claimant.

I conclude from the very-conflicting and often very-confusing evidence that the Respondent agreed to revise a landing, only, immediately adjacent to the exit door of the Addition, for \$950.00. The Claimant paid the Respondent for this work. I also conclude the Respondent agreed to perform the labor, only, to reconstruct the entire staircase, for \$2,500.00. I conclude the Claimant agreed to buy all the materials to reconstruct the staircase. I also conclude the contract between the Claimant and Mr. Martinez was separate and apart from any agreement the Claimant had with the Respondent relating to the new staircase, and the amount the Claimant paid Mr. Martinez in labor to finish the new staircase was less than he agreed to pay the Respondent for labor.

The Claimant paid the Respondent \$950.00 for the Respondent's role in revising the staircase. He also paid the Respondent \$1,000.00 toward the \$2,500.00 the Respondent agreed to as the labor cost for building the new staircase. Mr. Martinez agreed to complete the staircase for a total labor cost of \$850.00. Thus, although the Claimant agreed to pay \$2,500.00 for labor on the new staircase, he paid only \$1,850.00, consisting of \$1,000.00 to the Respondent and \$850.00 to Mr. Martinez. Thus, the Claimant has failed to prove he incurred an actual loss relating to the labor aspect construction of the new staircase.

The new staircase passed inspection by Howard County. The Claimant presented no evidence that the new staircase was unworkmanlike, inadequate, or incomplete. The Claimant was not pleased with the appearance of the new staircase and obtained an estimate from Deck Pro., Inc., in the amount of \$13,904.00 to remove and replace all of the PVC and composite-material surfaces, and to remove and replace all the composite-material stair treads and replace them with a different brand and color of composite-material treads. The Claimant obtained an estimate from Exis General Contracting in the amount of \$11,280.00 to perform essentially the same work. The Claimant argued that the Fund should pay either of these estimates as part of his claim.

I disagree. The Fund should not award any recovery relating to the new staircase. It was completed on the terms agreed upon between the Claimant and the Respondent, at a labor cost below the agreed-upon labor cost, and passed a Howard County inspection when complete. The Claimant presented evidence that he was not personally pleased with the appearance of the new staircase, but presented no evidence that the new staircase was unworkmanlike, inadequate, or incomplete.

#### *The Windows and Door*

The Contract provided that the Respondent would “install low E glass windows and insulated door with locksets, windows to be wrapped in water seal frame covering.” The Contract also provided “items supplied are quality mid-grade fixtures. Upgrades available. All materials included unless otherwise noted.” The Contract did not specify “Anderson Series 400 windows.”



A dispute arose after the Respondent installed the exit door from the Addition to the exterior staircase regarding the quality of the windows and door selected by the Respondent. The Claimant asserted that the Respondent should have observed that the rest of the Claimant's home, including the bay window over the deck the Respondent removed, were Anderson Series 400 windows, and that the Respondent should have used the same brand and style in the Addition. When the Claimant complained to the Respondent, the Respondent agreed to use the Anderson Series 400 product, but only for an additional charge of \$3,800.00. On August 24, 2020, the Claimant paid the Respondent \$850.00 for a door and trim the Respondent paid for and installed but later had to remove when a dispute arose over the Respondent's choice of windows and door. \$3,110.00 was for purchase and installation of upgraded windows and a door. However, the Claimant now seeks the additional charge for the upgraded windows and door from the Fund because, in the Claimant's view, he should not have been required to agree to an additional charge.

The Claimant and the Respondent resolved their dispute over the cost of the new windows and door during the course of work on the Contract after the Claimant disagreed with the Respondent's product choice. The Claimant presented no evidence of an actual loss as a result of incomplete, inadequate, or unworkmanlike work on the windows or door of the Addition. There is no basis for a recommendation that the Fund pay any aspect of the Claimant's claim relating to the windows and door.

#### *The Heating and Air Conditioning Unit*

Under the Contract, the Respondent is to "install through the wall heat pump unit for heating and cooling, install unit and connect electrical." The Respondent testified that this term means a window unit, and that "connect electrical" means plugging it in to a standard wall outlet.

He presented evidence that a Hisense brand window unit that both cools and heats up to 350 square feet is available at Lowe's for \$489.00. The Claimant countered with assertions that the Respondent never mentioned that a "through the wall heat pump unit" meant a window-mounted air conditioner, and that he would never have agreed to a window unit.

The Claimant testified that he does not have any window-mounted air conditioners anywhere else in his home and that any suggestion that he would agree to a window air conditioner as part of the Contract is absurd. I agree with the Claimant that no reasonable person would conclude that "through the wall heat pump" means a window-mounted air conditioner, especially in the context of the nature, size, and quality of fixtures and finishes of the Addition.

The Claimant obtained two estimates to install a Mitsubishi-brand mini-split heat pump, both of which included installation of the unit itself and all electrical work. On an unknown date, Deck Pro, Inc., in addition to its estimate of \$13,904.00 to rebuild or substantially modify the staircase, estimated that the air conditioning and heating unit would cost \$8,900.00, and the electrical service to the unit would cost \$3,120.00, for a total cost of \$12,020.00. On August 10, 2022, Shamrock Service Co., Inc., estimated that the cost to install a Mitsubishi ductless-split-system heat pump, wall control, all ducting, all electrical, all refrigerant and drain lines, and a PVC wall concealment system would be \$6,528.00.

In addition to being thousands less than the Deck Pro, Inc., estimate, the Shamrock Service Co. Inc. estimate is far more detailed than the Deck Pro, Inc., estimate. From its estimate, it is also clear that Shamrock Service Co, Inc.'s principal business is HVAC. For these reasons I find the Shamrock Service Co., Inc. estimate to be more reliable than the Deck Pro, Inc. estimate of the cost of installation of a through-the-wall heating and air conditioning system.

The Respondent's performance of the Contract as it related to installation of a through-the-wall heat pump unit for heating and cooling, installing and connecting the unit, and connecting the electrical was incomplete.

I thus find that the Claimant is eligible for compensation from the Fund.

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. Bus. Reg. § 8-405(e)(3) (Supp. 2022); COMAR 09.08.03.03B(1). No claims are made for these costs.

The MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work.

The Respondent performed some work under the Contract, and the Claimant intends to retain other contractors to complete or remedy that work. Accordingly, the following formula appropriately 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.

COMAR 09.08.03.03B(3)(c).

Amounts paid by Respondent to Claimant:

11/10/2019	\$ 8,000.00
3/13/2020	\$ 4,000.00
4/23/2020	\$ 7,000.00
4/27/2020	\$ 1,500.00
8/24/2020	\$ 1,000.00 <sup>5</sup>
8/24/2020	\$ 3,110.00
10/29/2020	\$ 2,000.00
12/29/2020	\$ 1,000.00
12/29/2020	\$ 450.00
12/27/2021	<u>\$ 950.00</u>
	\$29,010.00

Amount to complete the original Contract:

When, TBD \$ 6,528.00

Amount paid by Claimant to Respondent plus amount to complete the Contract:

	\$29,010.00
plus	<u>\$ 6,528.00</u>
	\$35,538.00

Amount of Contract with modifications:

\$31,360.00 (See Finding of Fact 51)

Amount Claimant paid to Respondent, plus cost to complete, minus amount of Contract  
with modifications:

	\$35,538.00
minus	<u>\$31,360.00</u>
Award	\$ 4,178.00

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<sup>5</sup> On August 24, 2020, the Claimant paid the Respondent \$788.00 to reimburse the Respondent for the cost of a door and trim the Respondent installed and later removed. Thus, this \$788.00 payment does not factor into the actual loss or Fund award calculation.

Effective July 1, 2022, a claimant's recovery is capped at \$30,000.00 for acts or omissions of one contractor, and a claimant may not recover more than the amount paid to the contractor against whom the claim is filed.<sup>6</sup> Bus. Reg. § 8-405(c)(1), (5) (Supp. 2022); COMAR 09.08.03.03B(4). In this case, the Claimant's actual loss is less than the amount paid to the Respondent. Therefore, the Claimant is entitled to recover his actual loss of \$4,178.00.

### **PROPOSED CONCLUSIONS OF LAW**

I conclude that the Claimant has sustained an actual and compensable loss of \$4,178.00 as a result of the Respondent's acts or omissions. Md. Code Ann., 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.

### **RECOMMENDED ORDER**

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

**ORDER** that the Maryland Home Improvement Guaranty Fund award the Claimant \$4,178.00; 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;<sup>7</sup> and

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<sup>6</sup> On or after July 1, 2022, the increased cap is applicable to any claim regardless of when the home improvement contract was executed, the claim was filed, or the hearing was held. *See Landsman v. MHIC*, 154 Md. App. 241, 255 (2002) (explaining that the right to compensation from the Fund is a "creature of statute," these rights are subject to change at the "whim of the legislature," and "[a]mendments to such rights are not bound by the usual presumption against retrospective application").

<sup>7</sup> *See* Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

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

August 1, 2023  
Date Decision Issued

*Michael R. Osborn*  
\_\_\_\_\_  
Michael R. Osborn  
Administrative Law Judge

MRO/sh  
#206478

**PROPOSED ORDER**

***WHEREFORE, this 3<sup>rd</sup> day of October, 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***