

IN THE MATTER OF THE CLAIM	*	BEFORE DENISE O. SHAFFER,
OF DANIEL SARUBIN,	*	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 GARRY	*	
LAVENSTEIN,	*	OAH No.: LABOR-HIC-02-23-05111
T/A ALL AMERICAN WINDOWS &	*	MHIC No.: 23 (75) 112
SIDING, INC.,	*	
RESPONDENT	*	

* * * * *

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 November 9, 2022, Daniel Sarubin (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)¹ Guaranty Fund (Fund) for reimbursement of \$11,000.00 for actual losses allegedly suffered as a result of a home improvement contract with Garry Lavenstein, trading as All American Windows & Siding, Inc. (Respondent). Md.

¹ The MHIC is under the jurisdiction of the Department of Labor (Department).

Code Ann., Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2023).² On February 3, 2023, the MHIC issued a Hearing Order on the Claim. On February 14, 2023, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On February 2, 2024, I held a hearing at the OAH in Hunt Valley, Maryland.³ Bus. Reg. §§ 8-407(a), 8-312. Ernie Domingo, Assistant Attorney General, Department, represented the Fund. Harrison Stone, Esq. represented the Claimant. George Oswinkle, Esq., represented the Respondent, who Mr. Oswinkle reported was deceased.

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 & Supp. 2023); 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 exhibit offered by the Claimant:

Clmt. Ex. 1 Contract dated July 10, 2021

I admitted the following exhibit offered by the Respondent:

Resp. Ex. 1 Respondent's handwritten summary of the events, undated

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

³ Four previous hearing dates were postponed.

I admitted the following exhibits offered by the Fund:

- Fund Ex. 1 Rescheduled Notice of Hearing, issued December 5, 2023
- Fund Ex. 2 Hearing Order, February 3, 2023
- Fund Ex. 3 Home Improvement Claim Form, received November 9, 2022
- Fund Ex. 4 Licensing Record for the Respondent, printed January 29, 2024

Testimony

The Claimant testified and did not present other witnesses. The Respondent did not present any testimony or offer any witnesses. The Fund did not present any testimony or offer 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 6026472.
2. The Claimant's property is located in Owings Mills, Maryland and is the Claimant's residence (the Property).
3. The Claimant is a dentist, and the Respondent was his patient. When the Respondent needed dental work that he could not afford, he suggested that he could perform home improvements at the Claimant's home in exchange for the dental work.
4. On July 10, 2021, the Claimant and the Respondent entered into a contract for the following improvements:
 1. Supply and install two vinyl picture windows and close up existing windows in front of house;
 2. Supply and install board and batten vinyl siding over existing siding;
 3. Supply and install stone around door entrance;
 4. Supply and install vinyl soffits on house;
 5. Cover carport posts

6. Supply and install two storm doors;
7. Supply and install new wood, replacing rotten wood as necessary;
8. Repair damaged ceiling on inside of front wall;

5. The original agreed-upon Contract price was \$63,500.00. The Claimant and the Respondent agreed to reduce the contract price by \$12,500.00 in exchange for the dental work the Respondent needed. The Respondent wrote: "This discount of \$12,500.00 is for dental work on Garry Lavenstein." (Cl. Ex. 1)

6. The Claimant paid the Respondent \$25,000.00 as a deposit and the Respondent agreed to order supplies for the project with the money.

7. The Claimant began to treat the Respondent's dental issues and did so as needed for nine months. During that time, the Respondent advised the Claimant that there were delays in delivering the necessary supplies.

8. In April of 2022, the Respondent admitted that he never ordered supplies for the Claimant's project and that he used the money for other jobs. He also told the Claimant that he could not afford to pay him back all at once. He offered to return the \$25,000.00 in monthly installments of \$2,000.00 per month.

9. The Respondent reimbursed the Claimant \$2,000.00 in April and \$2,000.00 in June. No other payments were made.

10. Between April and June, the Respondent offered to send another contractor to install the windows, item one on the contract. The Respondent and the Claimant agreed that the value of that work was \$10,000.00. The work was performed, and there were no issues with the quality of the work.

11. No other work under the Contract was completed.

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. 2023); *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. The Claim was for \$11,000.00 representing \$25,000.00 - \$10,000.00 (value of windows) - \$4,000.00 (reimbursement from Respondent). However, during argument, counsel for the Claimant argued that the claim could include reimbursement for the dental work.⁴ Counsel for Respondent argued that the Contract was not sufficiently detailed to establish the amount of loss. The Fund argued that the dental work amount was not recoverable under the appropriate formula, but that the Claimant had presented sufficient evidence to establish an actual loss of \$11,000.00. For the following reasons, I find that the Claimant has proven eligibility for compensation in the amount of \$11,000.00.

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.

⁴ Counsel did not amend the claim.

2023). 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. 2023). 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. 2023). 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. 2023). Additionally, the Claimant did not unreasonably reject good faith efforts by the Respondent to resolve the claim. *Id.* § 8-405(d) (Supp. 2023)

The Respondent performed an incomplete home improvement. The Respondent failed to perform any portion of the Contract other than item one, installing the windows. The Claimant established through his credible testimony the money paid to the Respondent (\$25,000.00), the amount the Claimant reimbursed the Respondent (\$4,000.00), and the agreement between the Claimant and the Respondent that the value of item one was \$10,000.00. While the Claimant did not produce canceled checks or other documentation of payments made, each of these assertions was corroborated by the Respondent's handwritten statement provided to his attorney before his death. Moreover, the Respondent acknowledged in that writing that he owed the Claimant \$11,000.00. In addition, I reject Respondent's arguments that the itemization in the Contract is not sufficiently detailed to establish the value of the work performed under item one. While the Contract the Respondent drafted was not itemized, the Respondent noted in his statement: "I did two large windows which involved closing up some other windows, removing electric inside his front exterior walls for \$10,000.00." (Resp. Ex. 1)

On the issue of the dental reimbursement, I find that the Claimant has not met his burden. First, the claim did not include a request for this amount, and neither the Respondent nor the Fund were on notice before the hearing of this additional claim. Second, while the Contract clearly offsets \$12,500.00 for dental work, there is no corroboration for the Claimant's assertion

that approximately \$8,800.00 of dental work was performed. He acknowledged that it was an estimate. Moreover the Respondent's statement expresses dissatisfaction with the dental work and cannot be read to corroborate the Claimant's estimate of the work performed.

I find that the Claimant is eligible for compensation from the Fund based on the incomplete home improvement. 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. 2023); 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.

The Respondent performed some work under the Contract, and the Claimant has not yet retained or solicited other contractors to complete 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 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.

COMAR 09.08.03.03B(3)(b).

Applying the formula in this case results in the following calculation:

Amount Claimant paid to Respondent:	\$25,000.00
Less	
Reimbursement by Respondent	\$4,000.00
Less	
Value of the material and the services for item one	<u>\$10,000.00</u>
Equals	\$11,000.00

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.⁵ Bus. Reg. § 8-405(e)(1), (5) (Supp. 2023); COMAR 09.08.03.03B(4). In this case, the Claimant's actual loss is less than the amount paid to the Respondent and less than \$30,000.00. Therefore, the Claimant is entitled to recover his actual loss of \$11,000.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$11,000.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2023); COMAR 09.08.03.03B(3)(b). I further conclude that the Claimant is entitled to recover that \$11,000.00 from the Fund. Md. Code Ann., Bus. Reg. § 8-405(e)(1); COMAR 09.08.03.03D(2)(a).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$11,000.00; and

ORDER that the Respondent is ineligible for a Maryland Home Improvement Commission license⁶ 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;⁷ and

⁵ 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).

⁶The Respondent is now deceased and was the sole proprietor of All American Siding & Windows, Inc. I include this recommendation because the licensing information provided by the Fund showed an active license as of January 24, 2024.

⁷ *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.

February 22, 2024
Date Decision Issued

Denise O. Shaffer

Denise O. Shaffer
Administrative Law Judge

DOS/ja
#210279

PROPOSED ORDER

WHEREFORE, this 20th day of May, 2024, 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.

J Jean White

I Jean White

Panel B

***MARYLAND HOME IMPROVEMENT
COMMISSION***