

<p><b>IN THE MATTER OF THE CLAIM</b></p> <p><b>OF MARTIN FITCHETT,</b></p> <p><b>CLAIMANT</b></p> <p><b>AGAINST THE MARYLAND HOME</b></p> <p><b>IMPROVEMENT GUARANTY FUND</b></p> <p><b>FOR THE ALLEGED ACTS OR</b></p> <p><b>OMISSIONS OF JOHN DAVIS,</b></p> <p><b>T/A DAVIS DESIGN AND</b></p> <p><b>CONSTRUCTION,</b></p> <p><b>RESPONDENT</b></p>	<p>* <b>BEFORE H. DAVID LEIBENSPERGER,</b></p> <p>* <b>AN ADMINISTRATIVE LAW JUDGE</b></p> <p>* <b>OF THE MARYLAND OFFICE</b></p> <p>* <b>OF ADMINISTRATIVE HEARINGS</b></p> <p>*</p> <p>*</p> <p>*</p> <p>* <b>OAH No.: LABOR-HIC-02-22-00901</b></p> <p>* <b>MHIC No.: 21 (75) 846</b></p> <p>*</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 August 12, 2021, Martin Fitchett (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 \$7,572.80 for actual losses allegedly suffered as a result of a home improvement contract with John Davis, trading as Davis Design and Construction (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015).<sup>1</sup> On

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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.

December 6, 2021, the MHIC issued a Hearing Order on the Claim. On December 16, 2021, Office of Administrative Hearings (OAH) received the matter from the MHIC for a hearing.

On March 11, 2022, I held a remote hearing using the Webex videoconferencing platform, from the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312; Code of Maryland Regulations (COMAR) 28.02.01.20B(1)(b). John D. Hart, Assistant Attorney General, Department, represented the Fund. The Claimant represented himself. The Respondent 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); COMAR 09.01.03; and 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. Did the Claimant unreasonably reject good faith efforts by the Respondent to resolve the Claim?
3. Is the Claimant eligible for reimbursement from the Fund for any compensable loss?

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

I admitted the following exhibits offered by the Claimant:

- Clmt. Ex. 1 - Construction Contract between the Claimant and the Respondent, undated
- Clmt. Ex. 2 - Copy of Check from the Claimant to the Respondent, June 6, 2019
- Clmt. Ex. 3 - Emails between the Claimant and the Respondent, June 3, 2021 through September 16, 2021

Clmt. Ex. 5<sup>2</sup> - Packet of Photographs including the following number labels: 1, 2, 4, 10, 11-15, 17, 19, 22-23, 25-26, 28-29, and 35-40,<sup>3</sup> January 2022 (photograph 39 taken March 10, 2022)

Clmt. Ex. 6 - The Claimant's SECU Bank Statement, May 16, 2019 to June 15, 2019

Clmt. Ex. 7 - Transaction History for the Claimant's Square Account, June 27, 2019 to July 26, 2019

I admitted the following exhibits offered by the Respondent:

Resp. Ex. 1 - Photograph of Walkway Construction, approximately July 10, 2019

Resp. Ex. 4<sup>4</sup> - Photograph of Porch Trim Seam, undated

Resp. Ex. 5 - Photograph of Completed Work to the Claimant's Home, undated

I admitted the following exhibits offered by the Fund:

Fund Ex. 1 - Notice of Remote Hearing, January 21, 2022

Fund Ex. 2 - MHIC Hearing Order, December 6, 2021

Fund Ex. 3 - Correspondence from the MHIC to the Respondent, August 24, 2021, with the Claimant's Home Improvement Claim Form attached, August 8, 2021

Fund Ex. 4 - MHIC Licensing History for the Respondent, 2022 (date partially obscured)

Fund Ex. 4 - Photograph of the Claimant's Windows,<sup>5</sup> January 2022

Fund Ex. 6 - Straight Edge Construction Proposal, August 4, 2021

Fund Ex. 7 - Straight Edge Construction Proposal, August 5, 2021

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<sup>2</sup> Clmt. Ex. 4 was marked for identification, but not offered or admitted into evidence. A copy of this Exhibit was retained by me with the record.

<sup>3</sup> Photographs marked 3, 5-6, 8-9, 16, 18, 20-21, 24, 27, and 30-34, were not made part of Clmt. Ex. 5 and were not offered or admitted into evidence. Copies of these photographs were retained by me with the record. A photograph of a caliper reading from the Claimant was not marked for identification or offered or admitted into evidence. A copy of this photograph was also retained by me with the record.

<sup>4</sup> The Respondent also marked for identification Exhibits 2, 3, and 6, which were not offered or admitted into evidence. Copies of these exhibits were retained by me with the record.

<sup>5</sup> This photograph was originally marked by the Claimant with a "7" written on the photograph.

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 101697.

2. In June or July of 2019, the Claimant and the Respondent entered into a contract to, among other things, cover the Claimant's existing stone walkway with a walkway built of composite decking boards, cover the Claimant's existing porch with a porch built of composite decking boards, and wrap the Claimant's front windows and front door in white PVC with the style to be determined later (Contract). (Clmt. Ex. 1.) The Claimant later chose the square stock style of PVC.

3. The Contract did not include wrapping the top of the windows with PVC. The Respondent told the Claimant that the tops of the windows would not be wrapped, and the Claimant understood this. The Contract also did not include replacing the metal trim between the windows and the soffit. The Respondent explained to the Claimant this could not be done without an extra cost, and the Claimant declined this additional work.

4. The original agreed-upon total Contract price was \$7,450.00. The Contract did not include itemized pricing for each of the different parts of the job.

5. The Claimant made the following payments to the Respondent:

June 6, 2019:           \$2,500.00

July 9, 2019:           \$2,500.00

July 16, 2019:	\$1,000.00
<u>July 25, 2019:</u>	<u>\$1,572.80</u>
Total:	\$7,572.80 <sup>6</sup>

6. The Respondent wrapped three sides of the Claimant's windows in white PVC – the left and right side of each window, and the bottom of each window. The Respondent did not wrap the top of the Claimant's windows in PVC. The Respondent did not replace the metal trim between the windows and the soffit. The Respondent left visible gaps, approximate 1/4 to 1/2 inch, between the PVC window wrapping and the metal trim at the top of the windows.

7. The Respondent used spare pieces of PVC to wrap the windows, i.e., each side of the window was not wrapped with one whole piece of PVC, but rather more than one piece of PVC was used to wrap the length of some windows. The seams between the spare pieces of PVC were sealed with caulk.

8. One piece of PVC was installed with a barcode exposed on the outside of the finished work.

9. The Respondent anchored the newly built walkway to the ground. Several blocks from the Claimant's existing walkway were removed, and pressure-treated anchor posts were installed in the ground.

10. The Respondent completed work on the Contract on July 28, 2019.

11. In August of 2019, the Claimant power-washed the exterior of his house, holding the power-washer horizontally and perpendicular to the exterior of his house. During the power-washing, water entered the Claimant's home and caused water damage to the walls in his workout room directly behind windows in that room. The Claimant had not experienced any

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<sup>6</sup> Initially the Contract called for only the windows under the Claimant's porch to be wrapped in PVC. It was later agreed that the Respondent would wrap all of the windows on the front of the Claimant's house, resulting in a total payment greater than the original agreed Contract price.

damage to his home when power-washing prior to the work done by the Respondent. No water damage was caused to the Claimant's home from natural rain. The water entered the Claimant's home from gaps left by the Respondent between the PVC and metal trim at the tops of the Claimant's windows.

12. In late July and early August 2019, the Claimant asked the Respondent to correct the exposed bar code and fix a few other issues with the job, including a loose screw in the decking and the interior water damage. The Claimant did not specify to the Respondent any other items in need of repair. It was the Claimant's intent that he would point out his complaints when the Respondent returned to his home.

13. The Respondent offered to fix the Claimant's walkway with additional screws, and to fix the damage to the interior of the Claimant's home; however, the Claimant told the Respondent that he did not want the Respondent to come back to fix anything at his house.

14. On a date or dates undisclosed by the record between the completion of the work on July 28, 2019 and August 12, 2021,<sup>7</sup> gaps between various pieces of spare PVC in the window wrapping, approximately 3/8 inch, developed.

15. On a date or dates undisclosed by the record between the completion of the work on July 28, 2019 and August 12, 2021,<sup>8</sup> three composite decking boards warped and separated at one end from the side, or skirting, of the walkway structure; one decking board warped and separated from the top of the walkway structure; and one composite decking board warped and separated at one end of the porch structure.

16. On August 8, 2021, the Claimant contracted with Straight Edge Construction (SEC), an MHIC licensed contractor, to install a new walkway (SEC Walkway Contract). The

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<sup>7</sup> This is the date of the Claimant's MHIC complaint.

<sup>8</sup> This is the date of the Claimant's MHIC complaint.

SEC estimate called for the walkway to be rebuilt to the same height as the Claimant's porch, and for the inclusion of a ramp onto the walkway. The SEC Walkway Contract price was \$7,986.00.

17. On August 8, 2021, the Claimant contracted with SEC to remove the PVC window wrapping installed by the Respondent on six windows, install pressure treated lumber trims and wrap the windows in white aluminum, and to also repair and replace "PVC trims throughout fascia and repair soffits as necessary/requested by the homeowner" (SEC Window Contract). (Fund Ex. 7.) The SEC Window Contract provides, "Customer to add additional windows around the perimeter of house as necessary/requested." (Fund Ex. 7.) SEC will use pressure treated lumber to replace rotted wood under the Claimant's soffit. The SEC Window Contract does not include a total contract price, but rather only provides that \$960.00 would be due at the "pre-production meeting," and that, "[l]abor costs over the 1 day minimum will be invoiced upon completion of the project." (Fund Ex. 7.)

### 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); 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 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. For the following reasons, I find that the Claimant has not proven eligibility for compensation.

The Claimant alleges three areas of inadequate, incomplete, or unworkmanlike home improvements – the windows, the walkway, and the porch. First, with regard to the windows, the Claimant alleged the Respondent’s work was incomplete, inasmuch as the Respondent did not wrap the tops of the windows in PVC. There was diverging testimony between the Claimant and the Respondent with regard to whether they contracted for the tops of the windows to be wrapped in PVC. The Contract itself is not specific in this regard, but calls for the windows to be wrapped. The Claimant alleged that the Respondent should have wrapped the windows fully, not on three sides, but on all four sides. The Claimant testified that wrapping the top of the window was not specifically discussed, but it was his understanding from the Contract that all four sides would be wrapped, and that they never discussed the issue of wrapping the tops of the windows. The Respondent testified that he specially told the Claimant that the tops of the windows would not be wrapped, and that the Claimant understood this. Although the Contract specifies, “wrap windows...in PVC” (Clmt. Ex. 1), I find the Respondent’s testimony regarding the scope of work to be more credible, given the surrounding circumstances. Upon completion of the work, it would have been immediately obvious to the Claimant that the tops of the windows had not been wrapped in PVC. Despite making specific earlier complaints to the Respondent about other items, such as the exposed barcode, the Claimant never complained about the tops of the windows until he filed his complaint with the MHIC.

The Claimant also alleged the Respondent’s work was incomplete because he should have replaced the metal trim between the soffit and the windows. The Contract is silent on this issue. The Respondent testified that he told the Claimant he would not be replacing this trim without an extra cost, and that the Claimant had declined the work at an extra cost. Again, given



the surrounding circumstances, I find the Respondent's testimony to be credible. The Contract does not mention the trim between the soffit and the windows. And again, the Claimant made no early complaint to the Respondent about this issue, despite that it would have been obvious immediately after the Respondent completed his work, and despite that the Claimant made other more specific complaints.

Regarding the windows, the Claim also alleged that using spare PVC to wrap the windows was inadequate and unworkmanlike because of the unsightly gaps that became exposed. He also alleged that the cutouts in the metal trim above the windows, where it intersected with the PVC window wrapping, had unsightly gaps that were too large, and allowed water to enter his home when he power-washed. Both the Claimant and the Respondent agreed that spare pieces of PVC were used to wrap the windows. The Claimant and the Respondent also agreed that a single piece of PVC can expand or contract by 3/16 inch and that therefore the gap between two pieces of PVC could be up to 3/8 inch. The parties also agreed that caulk, which the Respondent used to seal the gaps between the PVC wrapping at installation, is subject to wear and tear.

The Claimant testified that SEC told him all the PVC would have to be replaced because of the Respondent's use of spare pieces. This is corroborated by the SEC Windows Contract, which calls for the total removal of the PVC installed by the Respondent.

The Respondent testified that the gaps in the metal trim between the windows and the soffit had been left by the prior installer, and that he installed the PVC all the way up through the gap, so there would be no way for natural water to enter the structure at that location. The Respondent also testified that there is no building code for wrapping windows that prevents him from using spare pieces of PVC. The Respondent admitted that he never asked the Claimant to approve the use of spare pieces of PVC, and that when the Claimant asked the Respondent about

the use of spare pieces, the Respondent told him it would be more expensive to use whole pieces of PVC to wrap each side of the window. The Respondent further testified that he took the heat of the day at installation into account when installing the PVC to try to prevent gapping as much as possible. Lastly, the Respondent testified that because caulk is subject to wear and tear damage, it requires maintenance, i.e., re-caulking.

The Respondent's installation of the PVC wrapping using spare pieces was inadequate and unworkmanlike. The Respondent installed the PVC with tight seams, but he knew the PVC would contract causing gaps up to 3/8 inch. The Respondent also knew the caulking would be subject to wear and tear and require re-caulking. Thus, the Respondent installed the PVC wrapping in a manner he knew would break the seals around the windows when the PVC eventually contracted, creating gaps and rendering the windows not waterproof. Moreover, the Respondent installed the PVC wrapping in a manner he knew would create unsightly gapping around the windows. The purpose of window treatments such as those at issue here is not merely protection of the interior of the home from the elements, but also the improvement of the appearance of the home. By comparison the installation of a new floor that developed large gapping between the boards due to the installer's choice of materials would not be a workmanlike job even if the floor still provided an adequate walking surface. The gaps created by the Respondent's use of spare PVC created an unsightly condition that is unworkmanlike. Installing the PVC wrap with an exposed barcode was also unworkmanlike due to the unsightliness of such installation.

For similar reasons, the large gaps left by the Respondent between the PVC and the metal trim at the top of the windows was inadequate and unworkmanlike. Power-washing the exterior of a home is a normal activity that should not cause interior water damage to the home if it is properly sealed. Indeed, the Claimant had previously power-washed his home, prior to the work

performed by the Respondent, without incident. The damage to the interior of the Claimant's home occurred in the area immediately surrounding the windows right after he power-washed. I therefore find by a preponderance of the evidence that this interior damage was caused by the Respondent's inadequate sealing of the PVC wrapping and the area where the PVC met the metal trim at the top of the windows. Moreover, the gaps left by the Respondent between the PVC wrapping he installed and the previously installed metal trim created an unsightly condition that is unworkmanlike.

With regard to the walkway and porch, the Respondent did not perform unworkmanlike, inadequate, or incomplete home improvements. The Respondent's pictures of the construction clearly demonstrate that the walkway is anchored to the ground, and the Claimant submitted no documentary evidence to corroborate his testimony that the walkway was not properly anchored. The Respondent used pressure-treated lumber for the anchoring, and the Claimant did not submit any evidence that the Respondent's work violated any building or industry standard. Nor did the Claimant submit any evidence to show that the walkway had shifted its position.

There is no credible evidence that the few boards that became loose on the walkway and porch were the result of an inadequate or unworkmanlike home improvement, as opposed to normal wear and tear. The Respondent credibly testified that the few boards that had separated from the walkway and porch could have been easily repaired by merely re-fastening those boards. The pictures of the walkway that the Claimant submitted into evidence show a small separation between these few boards and the rest of the structures, making it apparent that the boards could be re-fastened with minimal effort. The Respondent credibly testified that the boards could be re-fastened with a few screws.

Although the Claimant established that the installation of the PVC wrap was done in an unworkmanlike manner, I find that his rejection of the Respondent's offers to repair was

unreasonable. "The [MHIC] may deny a claim if the [MHIC] finds that the claimant unreasonably rejected good faith efforts by the contractor to resolve the claim." Md. Code Ann., Bus. Reg. § 8-405(d). The Respondent bears the burden to establish by a preponderance of the evidence the defense that this Claim should be denied on the basis that the Claimant unreasonably rejected the Respondent's good faith efforts to resolve the Claim. COMAR 28.02.01.21K(2)(b).

Here, when the loose walkway and porch boards, the exposed barcode, and the interior damage to the Claimant's home were brought to the Respondent's attention, there is no dispute that he offered to repair these items. Indeed, the Respondent even offered to make repairs to the interior of the Claimant's home that were caused by the water that entered the home through the window structure. There is also no dispute that the Claimant then rejected the Respondent's offers, telling the Respondent he did not want the Respondent to perform additional inadequate repairs on his home. The record reflects that the Respondent's work on the Claimant's home was not so egregiously bad as to justify the Claimant's refusal to allow the Respondent to repair the work. Nor did the Respondent engage in any concerning behavior that would justify the Claimant being wary of his offers to make repairs. The Claimant did not dispute that the Respondent's offers were made in good faith. Therefore, the Claimant's rejection of the Respondent's offers to repair was unreasonable and for that reason, his claim will be denied.

Even if the Claimant had not unreasonably rejected the Respondent's offers to repair, he has not sustained his burden to prove the reasonable cost to correct or complete the work. In a case such as this, where the Respondent performed the work under the Contract and the Claimant has retained another contractor to complete or remedy that work, the Claimant's actual loss must be based on, "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....*” COMAR 09.08.03.03B(3)(c) (emphasis added). As discussed above, I find the installation of the PVC wrapping of the windows to have been inadequate and unworkmanlike. However, the Claimant’s contract with SEC to repair the windows calls for the use of pressure treated lumber, and aluminum, rather than PVC wrap – this work is therefore more than a “repair...under the original contract.” *Id.* There is no evidence regarding the price difference between the aluminum wrap versus the PVC wrap, and the SEC Window Contract does not disclose any price difference. Moreover, the SEC Window Contract is incomplete as to the scope of the work, and the total price for the repair. It provides the scope of work will be adjusted, “as necessary/requested by the homeowner,” and that “[c]ustomer to add additional windows around the perimeter of house as necessary/requested.” (Fund Ex. 7.) Relatedly, it merely specifies that the Claimant would be responsible for a minimum charge of \$960.00, and that a detailed invoice would be provided upon completion of the project. Thus there is no way to determine what “reasonable amounts” the Claimant would be required to pay to repair the work done by the Respondent. *Id.*

Based on the foregoing, 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. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015).

I conclude that the Claimant unreasonably rejected good faith efforts by the Respondent to resolve the Claim. Md. Code Ann., Bus. Reg. § 8-405(d) (2015).

I conclude that the Claimant is not eligible for reimbursement from the Fund. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015).

**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.

June 1, 2022  
Date Decision Issued

*David Leibensperger*  
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H. David Leibensperger  
Administrative Law Judge

HDL/at  
#198437

PROPOSED ORDER

*WHEREFORE, this 2<sup>nd</sup> day of August, 2022, 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**