

IN THE MATTER OF THE CLAIM	* BEFORE RACHAEL BARNETT,
OF TAMARA FISCHER,	* 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 GABRIEL	*
HERNANDEZ,	* OAH No.: LABOR-HIC-02-23-01526
T/A ELITE SIDING GUTTERS AND	* MHIC No.: 23 (75) 182
ROOFING,	*
RESPONDENT	*
* * * * *	* * * * *

PROPOSED DECISION

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PROPOSED CONCLUSIONS OF LAW
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STATEMENT OF THE CASE

On September 12, 2022, Tamara Fischer (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)¹ Guaranty Fund (Fund) for reimbursement of \$2,200.00 for actual losses allegedly suffered as a result of a home improvement contract with Gabriel Hernandez, trading as Elite Siding Gutters Roofing, LLC (Respondent). Md. Code Ann.,

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

Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2022):² On January 6, 2023, the MHIC issued a Hearing Order on the Claim. On January 17, 2023, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On March 20, 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 and participated with the assistance of a Spanish interpreter. 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 - Invoice, July 16, 2021
- Clmt. Ex. 2 - Image of exterior of the home, January 31, 2023
- Clmt. Ex. 3 - Image of exterior of the home, January 31, 2023
- Clmt. Ex. 4 - Image of exterior of the home, January 31, 2023
- Clmt. Ex. 5 - Image of exterior of the home, January 31, 2023

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

Clmt. Ex. 6 - Close-up image of exterior of the home, January 31, 2023

Clmt. Ex. 7 - Image of the exterior of the home, January 31, 2023

I admitted the following exhibits offered by the Respondent:

Resp. Ex. 1 - Letter from the MHIC to the Claimant, October 18, 2022

Resp. Ex. 2 - Complaint Form, August 24, 2022

I admitted the following exhibits offered by the Fund:

Fund Ex. 1 - Notice of Hearing, February 15, 2023, with attached Hearing Order, January 6, 2023

Fund Ex. 2 - Licensee's Contractor/Salesman license status with the MHIC, February 27, 2023

Fund Ex. 3 - Letter from the Department to the Respondent, September 22, 2022, with attached Home Improvement Claim Form, September 9, 2022

Testimony

The Claimant testified and did not present other witnesses.

The Respondent testified and did not present other witnesses.

The Fund did not offer 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 licensed home improvement contractor under MHIC license number 6019250.
2. The Claimant owns an end-of-group townhome located in Maryland that has siding on the exterior, except for the front, which is brick. This is the Claimant's only residence.
3. On or about July 16, 2021, the Claimant and the Respondent entered into a contract to perform the following work:
 - Remove the existing siding from the rear of the Claimant's home,
 - Install new Tyvek house wrap,

- Install new siding to match the existing siding,
- Install new metal wrap to rear windows,
- Install new metal wrap to rear doors, and
- Secure any loose siding on the gable. (Contract).

4. The original agreed-upon Contract price was \$2,200.00, which the Claimant paid in full after the work was completed.

5. Of the \$2,200.00, the Contract allotted \$400.00 for installing new metal wrap around the rear windows and doors and \$1,800.00 for wrapping the back of the home with Tyvek and installing siding.

6. The Respondent performed the work within a week or two of the Contract.

7. The Respondent's employees applied caulk in a bumpy and untidy manner where caulk was needed. It was not neat or smooth.

8. After the job was completed, the siding began to pull away from the home where the pieces of siding met.

9. The Respondent did not install metal wrap around the windows, because the underlying window frame was plastic (not wood), and metal wrap should not be installed over plastic.

10. Water infiltrated into the Claimant's basement.

11. On July 18, 2002, the Claimant contacted the Respondent about her concerns, in particular water entering her basement. Her email stated in pertinent part, "EVERYTIME it rains heavy I am getting water coming into my basement (below the door) that [the Respondent] installed any 'metal' and/or flashing." (Cl. Ex. 10).

12. The Respondent returned to the property in July 2002 to remedy the loose siding and try to determine how water was entering the basement. The Respondent used caulk to try to

close up gaps in the siding; however, the siding still was not tight at the junction spots, as siding normally appears on a home. Caulk was left bumpy in several areas.

13. The Claimant was dissatisfied with the repairs and requested a refund, which the Respondent refused to provide.

14. On February 2, 2023, Polk Contracting (Polk), a MHIC-licensed contractor, inspected the rear siding of the Claimant's home and concluded, "Siding in rear needs to be removed due to improper installation." (Cl. Ex. 3). Polk proposed to replace the rear siding and trim at a cost of \$5,324.00.

15. As of the date of the hearing, the Claimant had not had the siding replaced.

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.

By statute, certain claimants are excluded from recovering from the Fund altogether. In this case, there are no such statutory impediments to the Claimant's recovery. The claim was

timely filed, there is no pending court claim for the same loss, and the Claimant did not recover the alleged losses from any other source. Bus. Reg §§ 8-405(g), 8-408(b)(1) (2015 & Supp. 2022). The Claimant resides in the home that is the subject of the claim or does not own more than three dwellings. *Id.* § 8-405(f)(2) (Supp. 2022). The parties did not enter into a valid agreement to submit their disputes to arbitration. *Id.* §§ 8-405(c), 8-408(b)(3) (2015 & Supp. 2022). The Claimant is not a relative, employee, officer, or partner of the Respondent, and is not related to any employee, officer, or partner of the Respondent. *Id.* § 8-405(f)(1) (Supp. 2022).

The Claimant did not unreasonably reject good faith efforts by the Respondent to resolve the claim. *Id.* § 8-405(d) (Supp. 2022). The Claimant contacted the Respondent after noticing that water infiltrated her basement during heavy rainstorms ever since the Respondent replaced her rear siding. The Claimant also informed the Respondent that the siding was pulling away from her home and the caulking was unsightly. The Claimant also complained that the Respondent did not cover her window frames with metal trim, per the Contract.

The Respondent performed unworkmanlike, inadequate, or incomplete home improvements. The Respondent admitted that he did not install metal trim around the windows but explained it was not possible to do so because the underlying material was plastic, rather than wood. While it may have not been possible for the Respondent to perform the work after inspecting the home more carefully, the Respondent did not refund the Claimant for this portion of the Contract. I find the Respondent's failure to install metal trim (or to refund the Claimant) amounted to an incomplete home improvement.

The Claimant also argued that the siding was not properly installed because there were areas where it was cut too short around the windows on the lower level of her home, allowing for water to infiltrate her basement during heavy rain. The Claimant also argued that the metal wrap work around her door and windows was done sloppily, as well as the caulk job. The Claimant's

exhibits do not include a photograph of the back door she describes, so it is not possible to determine whether the wrap was done sloppily, as she claims. Without more information, it is also hard to determine whether the siding was cut too short around the windows. Claimant's Exhibits 4 through 12 are photographs of the siding and window trim work done by the Respondent. Exhibit 11 clearly shows gaps in the place where the pieces of siding join. The images of the window wrap do not appear untidy; however, I have already determined that portion of the job was incomplete. Claimant's Exhibit 8 shows several images of obviously crooked and lumpy caulk. The Claimant also offered into evidence a written statement by Polk, which stated the siding was not properly installed on the rear of the home and proposed to replace all of it, as well as to redo the trim.

The Respondent argued that the siding was laid properly and was not pulling away from the house. In the pictures that show large areas of siding (including Claimant's Exhibits 4 and 5); it is difficult to determine whether the siding is pulling away from the home. This determination would likely require the testimony of an expert witness. However, in the close-up pictures showing the places where the siding joins (such as Claimant's Exhibit 11), there are significant gaps that are unsightly and inconsistent with how siding normally looks. Polk proposed to replace all of the siding because it was not installed correctly. I place more weight on Polk's assessment than the Respondent's because the photographic evidence supports Polk's conclusion that the siding was not properly installed, at least in the areas where the siding joins. 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).

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). The Claimant paid the Respondent \$2,200.00 for the siding and trim. The Respondent's invoice did not separate out the cost for the window trim and door trim, so I will consider the entire \$400.00 allotted for trim to ensure the award adequately accounts for the incomplete portion of the Contract. Next, I will allot the remaining \$1,800.00 for the siding, which was not installed correctly. To this amount, I will add the cost of redoing the siding and trim, which Polk indicated would cost \$3,979.51. Then, I will subtract the original Contract price of \$2,200.00 for a figure of \$3,979.51.

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.³ Bus. Reg. § 8-405(e)(1), (5) (Supp. 2022); COMAR 09.08.03.03B(4). In this case, the Claimant's actual loss of \$3,979.51 exceeds the amount paid

³ 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").

to the Respondent. Therefore, the Claimant's recovery is limited to \$2,200.00, the amount paid to the Respondent.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$2,200.00 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. Md. Code Ann., Bus. Reg. § 8-405(a) (Supp. 2022).

RECOMMENDED ORDER

I RECOMMEND that the Maryland Home Improvement Commission:

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$2,200.00; 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.

June 20, 2023
Date Decision Issued

Rachael Barnett

Rachael Barnett
Administrative Law Judge

RAB/at
#205507

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

IN THE MATTER OF THE CLAIM OF * MARYLAND HOME
TAMARA FISCHER * IMPROVEMENT COMMISSION
AGAINST THE MARYLAND HOME *
IMPROVEMENT GUARANTY FUND * MHIC CASE NO. 23(75)182
FOR THE ACTS OR OMISSIONS OF * OAH CASE NO. LABOR-HIC-
GABRIEL HERNANDEZ AND ELITE * 02-23-01526
SIDING GUTTERS AND ROOFING, *
LLC *

* * * * *

FINAL ORDER

This matter was originally heard before an Administrative Law Judge (“ALJ”) of the Office of Administrative Hearings (“OAH”) on March 20, 2023. Following the evidentiary hearing, the ALJ issued a Proposed Decision on June 20, 2023, concluding that the homeowner, Tamara Fischer (“Claimant”) suffered an actual loss as a result of the acts or omissions of Gabriel Hernandez and Elite Siding Gutters and Roofing, LLC (collectively, “Contractor”). *ALJ Proposed Decision* p. 9. In a Proposed Order dated July 28, 2023, the Maryland Home Improvement Commission (“MHIC” or “Commission”) affirmed the Proposed Decision of the ALJ to grant an award of \$2,200.00 from the Home Improvement Guaranty Fund. The Contractor subsequently filed exceptions to the MHIC Proposed Order.

On October 19, 2023, a three-member panel (“Panel”) of the MHIC held a remote hearing on the exceptions filed in this matter. The Claimant and Contractor participated without counsel. Assistant Attorney General Hope Sachs appeared at the exceptions hearing on behalf of the Guaranty Fund. The Commission entered the following preliminary exhibits as part of the record of the exceptions hearing without objection: 1) hearing notice; 2) transmittal letter, ALJ Proposed Decision, and MHIC Proposed Order; and 3) Contractor’s exceptions. Neither the Claimant nor the Contractor produced a copy of the transcript of the hearing before the ALJ. Therefore, the Panel’s review of the record was limited to the preliminary exhibits for the exceptions hearing, the OAH Proposed Decision, and the exhibits offered as evidence at the OAH hearing. COMAR

09.01.03.09(G) - (I).

The claim in this proceeding relates to a contract between the parties for siding installation and repairs and the installation of metal wrap to windows and doors at the Claimant's home. The ALJ found that the Contractor's performance under the contract was unworkmanlike, inadequate, and incomplete because the Contractor failed to install metal wrap as required by the contract, and there were gaps where pieces of siding joined and lumpy caulking. *ALJ's Proposed Decision* pp. 5-7.

On exception, the Contractor argued that the ALJ erred in finding that the siding installation and repairs that he performed were unworkmanlike and inadequate. The Contractor did not identify evidence in the record in support of his position. The Commission finds no error.

The record includes photographs of gaps in the siding and poor caulking (OAH Hearing Claimant's Exhibit 8) and an estimate from a licensed home improvement contractor stating that the siding installed by the Contractor must be removed because of improper installation (OAH Hearing Claimant's Exhibit 13) that support the ALJ's finding and demonstrate to the Commission that the Contractor's performance was unworkmanlike and inadequate.

Having considered the parties' arguments, the evidence contained in the record, and the ALJ's Recommended Decision, it is this 15th day of December 2023, **ORDERED:**

- A. That the Findings of Fact of the Administrative Law Judge are **AFFIRMED**;
- B. That the Conclusions of Law of the Administrative Law Judge are **AFFIRMED**;
- C. That the Proposed Decision and Recommended Order of the Administrative Law Judge is **AFFIRMED**;
- D. That the Claimant is awarded \$2,200.00 from the Maryland Home Improvement Guaranty Fund;

- E. That the Contractor shall remain ineligible for a Maryland Home Improvement Commission license until the Contractor reimburses the Guaranty Fund for all monies disbursed under this Order plus annual interest of at least ten percent (10%) as set by the Commission, *Md Code Ann.*, Bus. Reg. §§ 8-410(a)(1)(iii), 8-411(a);
- F. That the records and publications of the Maryland Home Improvement Commission shall reflect this decision; and
- G. Any party has thirty (30) days from the date of this Final Order to appeal this decision to Circuit Court.

Robert Altieri
Chairperson –Panel
Maryland Home Improvement
Commission

PROPOSED ORDER

WHEREFORE, this 28th day of July, 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.

Robert Altieri

***Robert Altieri
Panel B
MARYLAND HOME IMPROVEMENT
COMMISSION***