

<p>IN THE MATTER OF THE CLAIM</p> <p>OF ANN COLLINS AND</p> <p>BRITTANY FLINT,</p> <p>CLAIMANTS¹</p> <p>AGAINST THE MARYLAND HOME</p> <p>IMPROVEMENT GUARANTY FUND</p> <p>FOR THE ALLEGED ACTS OR</p> <p>OMISSIONS OF GARRY</p> <p>LAVENSTEIN, T/A ALL AMERICAN</p> <p>WINDOWS & SIDING, INC.,</p> <p>RESPONDENT</p>	<p>* BEFORE KRISTIN E. BLUMER,</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>*</p> <p>*</p> <p>* OAH No.: LABOR-HIC-02-22-01015</p> <p>* MHIC No.: 22 (75) 14</p>
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PROPOSED DECISION

STATEMENT OF THE CASE
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RECOMMENDED ORDER

STATEMENT OF THE CASE

On September 28, 2021,² the Claimants 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 \$34,800.00 for actual losses allegedly

¹ Ms. Collins filed the claim form. The transmittal to the Office of Administrative Hearings (OAH) misidentified “Barbara Flint” as the second claimant in the case. Ms. Flint’s first name is Brittany, not Barbara. Ms. Flint is Ms. Collins’ granddaughter.

² The Claimants dated the claim form September 28, 2021. The Maryland Home Improvement Commission (MHIC) received the claim form on October 8, 2021.

suffered as a result of a home improvement contract with Garry Lavenstein, trading as All American Windows and Siding, Inc. (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to 8-411 (2015).³ On December 28, 2021, the MHIC issued a Hearing Order on the Claim. On December 28, 2021, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On June 24, 2022, I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312.⁴ John Hart, Assistant Attorney General, represented the Fund. The Claimants represented themselves, with Ms. Flint taking the primary role. George Oswinkle, Esquire, represented the Respondent, who was present.

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. 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: Letter to Ms. Collins from Borden Chase, Chase Improvement, undated

³ Unless otherwise noted, all references hereinafter to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code, and shall be abbreviated "Bus. Reg."

⁴ On March 8, 2022, an OAH postponement officer granted a request by the Respondent's counsel to postpone the first hearing in this matter, which had been scheduled for March 16, 2022, as counsel had recently been retained and needed more time to prepare for the hearing. Code of Maryland Regulations (COMAR) 28.02.01.16C. I postponed two subsequent hearing dates, April 19, 2022 and May 5, 2022, for good cause at the request of the Respondent's counsel, based on the Respondent's documented hospitalization in April 2022 and documented continuing poor health in May 2022. COMAR 28.02.01.16C, D, E.

- Clmt. Ex. 2: Color photograph, undated
- Clmt. Ex. 3: Color photograph, undated
- Clmt. Ex. 4: Color photograph, undated
- Clmt. Ex. 5: Color photograph, undated
- Clmt. Ex. 6: Color photograph, undated
- Clmt. Ex. 7: - Color photograph, undated
- Clmt. Ex. 8: Handwritten notes, September 2020 to March 14, 2021
- Clmt. Ex. 9: Handwritten notes, March 20 to May 28, 2021
- Clmt. Ex. 10: Color photograph, undated
- Clmt. Ex. 11: Three copies of cancelled checks written to Respondent, various dates
- Clmt. Ex. 12: Estimate, Chase Improvement, June 15, 2021
- Clmt. Ex. 13: Handwritten notes, undated

I admitted the following exhibits offered by the Respondent:

- Resp. Ex. A(1)-(4): Hand-drawn construction drawings, undated
- Resp. Ex. B: Color photographs, undated
- Resp. Ex. C: Color photographs, undated
- Resp. Ex. D: Draw schedule, undated
- Resp. Ex. E: Color photographs, undated
- Resp. Ex. F: Review of addition, Fleming's Diversified Services, June 22, 2022, with color photographs attached
- Resp. Ex. G: Letter to Whom It May Concern from Steve Speargas, June 23, 2022

I admitted the following exhibits offered by the Fund:

- Fund Ex. 1: Notice of Remote Hearing, May 3, 2022
- Fund Ex. 2: MHIC Hearing Order, December 28, 2021

Fund Ex. 3: Letter to Respondent from MHIC, October 13, 2021, with the following attachment: Claimant's Home Improvement Claim Form, September 28, 2021

Fund Ex. 4: MHIC Licensing Information for Respondent, printed March 15, 2022

Fund Ex. 5: Contract, September 25, 2020

Fund Ex. 6: Baltimore Housing, Printout of Respondent's license search webpage, undated

Testimony

Both of the Claimants testified; they did not present any other witnesses.

The Respondent testified and presented the testimony of Stanley Sirody, licensed salesperson for the Respondent.

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 01-22277.

2. At all relevant times, the Respondent's corporate entity was a licensed home improvement contractor under MHIC license number 05-24550.

3. The Respondent holds a contractor's license and a sales license through MHIC, meaning that that he can sell home improvement as well as perform work as a home improvement contractor.

4. At all relevant times, the Claimants owned and resided in a home located in Baltimore, Maryland (the Residence). The Claimants do not own any other residential properties in Maryland.

5. The Claimants and the Respondent entered into a home improvement contract (Contract) for a new kitchen and bath addition to the Residence, to replace an existing addition, on September 25, 2020.

6. The Contract set forth the following work to be performed: (1) tear down existing rear first floor kitchen and bath addition and remove from property; (2) build a new addition of the same size, which was twelve feet by twelve feet, with specifications to be approved; (3) furnish and install new kitchen and bath with specifications and plans to be approved; and (4) remove debris from property. The Contract also provided that the Respondent would install the customer's appliances.

7. The total cost of the Contract was \$48,500.00 and the down payment due at the time the Contract was signed was \$16,000.00. The Contract stated that the balance of payment totaling \$32,500.00 would be arranged by a draw schedule, which was not further identified in, nor attached to, the Contract.

8. The Claimants paid the Respondent \$16,000.00 by a personal check, dated September 25, 2020, as a down payment. (Clmt. Ex. 11).

9. The Contract did not specify a start date or completion date.

10. On January 4, 2021, the Respondent began the demolition work at the Residence pursuant to the Contract. The Respondent completed the demolition work no later than January 6, 2021. (Clmt. Ex. 8).

11. The Claimants paid the Respondent \$16,000.00 by a personal check, dated January 7, 2021. (Clmt. Ex. 11).

12. On January 21, 2021, the Respondent began construction of the new addition. (Clmt. Ex. 8).

13. As of January 25 and 26, 2021, the Respondent finished the framing of the new addition and began installing the roof. (Clmt. Ex. 8).

14. The Claimants paid the Respondent \$8,000.00 by a personal check, dated January 29, 2021. (Clmt. Ex. 11).

15. On March 3 and 4, 2021, the Respondent installed siding on the outside of the new addition. (Clmt. Ex. 8).

16. On March 20 and 26, 2021, the Respondent performed additional work on the roof. (Clmt. Ex. 9).

17. On April 13, 2021, the Respondent installed three windows. (Clmt. Ex. 9).

18. On May 12 or 13, 2021, the Respondent conducted a site visit at the Residence to determine where plumbing would be installed. (Clmt. Ex. 9).

19. On May 28, 2021, the Respondent and a plumber conducted another site visit at the Residence regarding the plumbing work to be done. The plumber wrote down for the Respondent what other work needed to be completed before the plumbing work could begin. (Clmt. Ex. 9).

20. On a date unspecified in the record, but sometime after May 28, 2021, the Respondent and the Claimants met to discuss what needed to be done to complete the work pursuant to the Contract. (Testimony; Clmt. Ex. 9).

21. The Claimants sought a second opinion from another licensed contractor, Borden Chase with Chase Improvement, who coincidentally came to see the Residence on the same day the Respondent was there with the plumber. (Testimony; Clmt. Ex. 1).

22. The Respondent performed the work without the required permit.

23. At the meeting, the Claimants expressed concerns to the Respondent about the failure to obtain a permit and the delays in completing the work. The Respondent asked for more time to obtain the permit and complete additional work. The Claimants agreed to the request.

24. In August or September 2021, when the work was still unfinished, the Claimants advised the Respondent to stop work.

DISCUSSION

Legal Framework

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.

By statute, certain claimants are excluded from recovering from the Fund altogether. In this case, there are no such statutory impediments to the Claimants' 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). The Claimants⁵ reside in the home that is the subject of the claim and do not own more than three dwellings. *Id.* § 8-405(f)(2). The Claimants are not relatives, employees, officers, or partners of the Respondent, and are not related to any employee, officer, or partner of the Respondent. *Id.* § 8-405(f)(1).

⁵ Ms. Collins is the owner of the Residence.

For the following reasons, I find that the Respondent performed unworkmanlike, inadequate, or incomplete home improvements. I further find that the Claimants have proven eligibility for compensation.

The Positions of the Parties

The Claimants asserted that the Respondent performed unworkmanlike and inadequate home improvement, because the Respondent performed the work without obtaining a permit, and therefore, the work was not subject to inspections to ensure that it was being performed properly. The Claimants argued that they were justified in terminating the Respondent's work before the job was finished due to the problems that they identified and the delays they had experienced. The Claimants introduced evidence that the costs to repair, replace, and/or complete the work contracted for with the Respondent totaled \$43,300.00.

The Respondent conceded that it conducted the work prior to obtaining a permit, but argued that it was justified in doing so, because the previously existing structure was hazardous. The Respondent further argued that the permitting office for Baltimore City was closed to the public and that the online system to apply for and secure the permit was problematic. The Respondent blamed the delays in completing the job on staffing issues and supply chain issues caused by the COVID-19 pandemic. The Respondent asserted that it would have obtained the permit and finished the work under the Contract in a satisfactory way if the Claimants had not terminated the job.

The Fund argued that the Claimants met their burden in showing that the Respondent's work was unworkmanlike and in proving the costs to repair or complete the work.

Analysis

Ms. Flint testified that the preexisting addition to the Residence, where the kitchen and first floor bathroom were located, was deteriorating. Under the Contract, the Respondent was

responsible for tearing down the existing addition and rebuilding it in the existing footprint, without enlargement. (Fund Ex. 5). After the parties signed the Contract on September 25, 2020, a dumpster was delivered to the Residence at the end of October, but no further work commenced until the Respondent started demolishing the existing addition on January 4, 2021. (Clmt. Ex. 8). Ms. Flint testified that she understood the reason for the delay was due to supply chain issues and an inability to pull the permit for the work.

After the demolition was completed in January 2021, the Respondent installed the footing and foundation, framed the new addition, and installed the roof. *Id.* The Respondent installed the siding in March 2021 and the windows in April 2021. (Clmt. Exs. 8, 9). In this same time frame, the Respondent also installed some insulation inside the new addition, before the plumbing and electrical work was completed, but the insulation installation was incomplete. (Clmt. Ex. 4). Ms. Flint testified that the space below the new addition was full of debris. (Clmt. Exs. 3, 5, 6, 7). There was also an exposed pipe underneath the structure after the new addition was framed. (Clmt. Exs. 6, 7). The interior of the new addition remained unfinished.

Ms. Collins testified that she was unhappy that so much debris remained at the Residence after the demolition was completed, which made it difficult to walk in the yard. (Clmt. Exs. 6, 8). She noted that the dumpster was filled with debris but had not been emptied, so that trash started blowing out of it and all over the yard. (Clmt. Ex. 8). She stated that she and her grandson cleaned up a lot of debris. *Id.* She also testified that one of the rain gutters that the Respondent installed on the addition's roof in March 2021 was the wrong size and it leaked. (Clmt. Ex. 9). She stated that she pointed out the leaking gutter to the Respondent, but it was never fixed.

Ms. Collins further testified that the Respondent's crew members never consistently came to work on the project. After the initial work began in January 2021, no work was performed in February 2021. Crew members showed up to work sporadically during March and April but

never worked an entire week at a time. She noted that she was frustrated with the lack of progress and made handwritten notes about what was done and when, as well as the gaps in time where no work was done. (Clmt. Exs. 8, 9, 13). The Claimants also called into question whether the Respondent's crew members were appropriately qualified to perform the work. Both Claimants recalled a pair of workers, one male and one female, who came to work at the Residence for one day only. (Clmt. Ex. 13). Although the Claimants could not remember the exact day the workers came, they consistently testified that the male worker appeared to be training the female worker, but the female worker appeared to be under the influence of some substance. They took numerous breaks and left shortly after 2:00 p.m. without finishing their work and never returned. *Id.*

In May 2021, the Respondent and the plumber visited the Residence to discuss the plumbing work to be done. *Id.* The plumber explained that the Respondent needed to complete other work before he could begin with the plumbing tasks and he told the Respondent what needed to be done. (Clmt. Ex. 9). The Claimants did not understand why a partial subfloor and insulation were installed before the plumbing and electrical work were completed.

Ms. Collins stated that she did not have a schedule regarding the payments to be made for the work under the Contract. She testified that she paid the initial down payment of \$16,000.00 by check at the time the parties signed the Contract. (Clmt. Ex. 11). After the initial payment, Stanley Sirody, the Respondent's salesperson with whom she had been working, came to her twice and asked her for additional payments. She paid the Respondent another \$16,000.00 by check on January 7, 2021 and \$8,000.00 by check on January 29, 2021, for a total of \$40,000.00. *Id.*

The Claimants were concerned about the delays and frustrated that the work was taking so long to be completed. The Residence was without a kitchen and the addition was still in an

unfinished state at the time of the hearing in this matter. Ms. Collins testified that she cooks on the outside grill or on an electric skillet and washes her dishes in the upstairs bathtub or in the backyard. Due to the delays and their frustration, Ms. Flint suggested to her grandmother that they consult with another contractor and Ms. Collins agreed. They asked Borden Chase⁶ of Chase Improvement to evaluate the Respondent's work and provide them with an estimate to replace or complete the job. (Clmt. Exs. 1, 12).

Mr. Chase coincidentally came to the Residence on a day when the Respondent was there, sometime after May 28, 2021. (Clmt. Exs. 9, 13). Ms. Collins testified that, although there was no meeting scheduled, when Mr. Chase arrived, the Claimants, Mr. Chase, the Respondent and Mr. Sirody reviewed the Respondent's work on the project. Mr. Chase opined that the work should be torn down and redone. Mr. Chase sent the Claimants a letter that provided a written evaluation of the work. (Clmt. Ex. 1). On June 15, 2021, Mr. Chase generated a written estimate for Ms. Collins regarding the cost to complete the work specified in the Contract. (Clmt. Ex. 12).

The Claimants voiced frustration with the Respondent in their testimony. The Claimants' frustration about the delays and the poor quality of the work was not addressed by the Respondent to their satisfaction prior to the termination of the Contract. The Claimants further testified that as the Respondent did not come to the job site, no one seemed to be monitoring the sporadic work that was being performed. Ms. Flint testified that her grandmother paid the Respondent \$40,000.00, but she believed that the work was not worth that amount. When she expressed her concerns and dissatisfaction to the Respondent, he did not answer her questions and then told her she had no right to the information. After the meeting with Mr. Chase, the Respondent asked for more time to obtain the permit and complete the job; the Claimants agreed to give the Respondent more time.

⁶ Mr. Chase is licensed by the MHIC.

After the Claimants agreed to give the Respondent more time, the Respondent sent the male and female workers who took frequent breaks and then left for the day without finishing their tasks. At that point, Ms. Flint testified, she had no faith that the Respondent would properly complete the job. She contacted the Respondent and asked him for a refund and to turn over whatever supplies he had purchased for the job. The Respondent refused and the Claimants told him not to return to the Residence.

Stanley Sirody, a salesperson for the Respondent, testified that he spoke with Ms. Collins about the work she wanted done and drafted the Contract. He noted that the old addition that was to be torn down was in bad shape and presented a hazard. (Resp. Exs. B, C). He stated that Ms. Collins knew that it was unsafe, which is why she wanted it torn down. He completed the drawings of the plans for the work. (Resp. Exs. A1-A4). He also drafted a draw schedule for the work, indicating that after the Claimants paid the \$16,000.00 deposit, \$16,000.00 would be due at the start of the work; \$8,000.00 would be due when the new addition was under roof; and the last \$8,500.00 would be due upon completion. (Resp. Ex. D).⁷

Mr. Sirody testified that one of his employment duties is pulling permits for jobs, including the permit for the job in this case. Mr. Sirody testified that he went to the Baltimore City permitting office but that it was closed to the public due to the COVID-19 pandemic. He further testified that he made phone calls in an attempt to figure out how to get the permit but never received a return call. Ultimately, he determined that he could apply for the permit online, but he needed an access code in order to complete the permit application. Mr. Sirody testified it took him some time to determine the access code, but he conceded that he never applied for, or received, a permit for any of the work done at the Residence pursuant to the Contract.

⁷ The draw schedule was undated and unsigned. There was no evidence in the document itself that the Claimants had seen it prior to the hearing and no one elicited any testimony from the Claimants about it.

Furthermore, Mr. Sirody did not testify with any specificity regarding the dates he allegedly went to the permitting office, made the telephone calls or attempted to apply online for a permit.

Mr. Sirody testified that the reason the Respondent proceeded with the work, despite not having a permit, was because of the dangers presented by the state of the old addition. He then stated that the work slowed due to bad weather, difficulty in finding workers, and supply chain issues. He acknowledged that because no permit had been obtained, no independent inspections were conducted by the permitting authority. He testified that the footers for the foundation were installed at the right depth and stated that the crew measured it; he saw the holes but did not see them pour the concrete. Mr. Sirody acknowledged that a sewer line was above grade with a crack in it and stated that the Respondent knew that it needed to be fixed, but that the plumber could not do it without a permit and the plumber could not get a permit for the plumbing work until Mr. Sirody obtained the permit for the entire job. Mr. Sirody acknowledged that the roof rafters were not properly installed but stated that they could go back and fix that problem later. He also explained that the temporary subfloor was installed to keep out the weather and any vermin, but that it could be removed later when the plumbing work needed to be done.

The Respondent also testified that his crew proceeded to do the work without a permit due to the dangerous conditions presented by the old addition. He stated that he discussed the lack of a permit with Ms. Collins and that she wished to proceed with the work anyway. He acknowledged that Ms. Collins complained about the delays and the mess, but denied that she complained about the quality of the work. In his testimony, he was dismissive of the concerns that Ms. Flint raised with him, both in recounting previous conversations with her and on cross-examination.

The Respondent acknowledged that there were delays in the work, but he characterized the work as properly done. He denied that the rain gutter was a problem and said that the

installation of the gutters was not part of the Contract. He further conceded that there were problems with the windows and stated that the headers for the windows had not yet been installed; he noted that the job was not finished and that he was not allowed to finish it. He disputed Mr. Chase's findings that the frame was attached to rotted wood. The Respondent testified that he had another contractor evaluate the work and generate a report. (Resp. Ex. F).

I find that the Claimants have met their burden to show that the Respondent's work was unworkmanlike and inadequate. Both of the contractors who evaluated the Respondent's work at the request of each party found flaws in the work. Mr. Chase, at the request of the Claimants, opined that it would be best to tear down the Respondent's work and start over; he did not recommend finishing the Respondent's work. (Clmt. Ex. 1). He noted the following problems: (1) no permit was pulled; (2) since no permit was pulled, the footers were possibly not up to code; (3) the foundation was built on wood measuring two by six, when the minimum code requirement calls for two by eight; (4) the sewer line⁸ should be replaced due to a crack; (5) the roof rafters were not properly installed; (6) the frame of the addition was attached to rotten wood; (7) the support around the windows was not proper; (8) the walls were insulated before electrical and plumbing was completed; and (9) sheathing was exposed to the elements. See *id.*

The Respondent's contractor, John Fleming,⁹ Fleming's Diversified Services, opined that the framing of the addition was problematic for several reasons. (Resp. Ex. F). He noted that all four window openings had framing issues, specifically: "non continuous one piece headers, no jack studs, lack of proper amount of cripple studs or a combination of these three issues." *Id.* He noted that exterior sheathing was missing from the back right window. *Id.* He explained that the ledger boards attached to the house at both top and bottom use nails only with one or two "ledger

⁸ Mr. Chase further noted that "sewage would be exposed element." (Clmt. Ex. 1). This statement was not explained or addressed by any party.

⁹ Mr. Fleming is licensed by the MHIC.

lock screws” instead of bolting, which is preferred when building an addition against an existing exterior wall of an old house. *Id.* He further noted that there is “no way of knowing if the ledger board is attached to a structurally sound surface without removing the existing exterior wall covering to expose the underlying studs.” *Id.*

Mr. Fleming also addressed problems with the foundation of the addition installed by the Respondent. He indicated that the posts used to support the addition have been “back filled leaving no visible evidence of proper footers.” *Id.* He performed “explorative digging” of eight to ten inches below ground level, which did not expose any concrete footers; therefore, the presence of proper footers is inconclusive. *Id.* He stated that additional digging would be needed “to prove or disprove the existence of proper footers.” *Id.* Two posts were not plumb, and the posts are four inches by six inches, instead of the conventional six inches by six inches; the posts are, however, pressure treated. *Id.* Mr. Fleming opined that the wood used for the floor joists measure two inches by eight inches, not two inches by six inches as indicated by Mr. Chase.¹⁰ *Id.*

With respect to the roof rafters, he indicated that they did not have “bird’s mouth” cut¹¹ into the rafter tails, which “changes the direction of force away from the top plates of the supporting walls.” *Id.* He noted that a proposed solution of “simply adding metal clips can be problematic.” *Id.* He recommended consulting with an engineer to “ensure that any metal clips used are rated for the additional loading from the elimination of the birds mouth [sic], in addition to dealing with any standard regional conditions such as wind uplift.” *Id.*

¹⁰ The Respondent introduced a letter from his employee, Steve Speargas, dated June 23, 2022, the day before the hearing. (Resp. Ex. G). In the letter, Mr. Speargas first explained that he was unable to attend the hearing due to the recent death of his wife. See *id.* Mr. Speargas then stated that the Respondent was waiting for electrical and plumbing to come in to finish the interior of the addition and that they installed insulation temporarily to keep the house warmer. See *id.* He disputed Mr. Chase’s assertion that the wood used for the floor joists measured two by six and stated that they measured two by eight. See *id.* I give this evidence no weight, as Mr. Speargas’ version of events is slightly different than that of the Respondent and Mr. Sirody; furthermore, Mr. Speargas, an employee of the Respondent, was not subject to cross examination.

¹¹ This type of cut was not explained or addressed by any party.

Mr. Fleming stated that the plumbing and electrical work had not been started and noted that the insulation installed on the exterior walls and roof rafters would need to be removed for electric and plumbing work, as well as inspections. *Id.* He opined that the gutters were pitched in the wrong direction and recommended that a review of the roof flashing should be completed. *Id.* He noted that no permit was obtained. *Id.* Mr. Fleming disagreed with Mr. Chase's recommendation that the addition should be torn down, but noted that the issues that he identified "are major concerns" and that "there will be a fair amount of reframing needed." *Id.*

I find from the evidence and testimony presented that the Respondent's work was unworkmanlike and inadequate. The Respondent chose to proceed with the work, despite not having obtained the proper permit, which would have necessarily included the appropriate inspections of the work. The explanations offered by the Respondent and Mr. Sirody as to why they proceeded with the work, despite not having a permit, were nonsensical, because if the preexisting addition was so dangerous, the Respondent should have expedited the project instead of waiting over three months after signing the Contract before demolishing the "dangerous" addition. Moreover, once the old addition was demolished, the danger was eliminated; yet the Respondent moved forward on the job without the permit. The difficulties that Mr. Sirody experienced in obtaining the permit were understandably frustrating, but the barriers he encountered do not justify the Respondent's decision to proceed with the work before obtaining a permit; the Respondent was required to obtain the relevant permit for the work in the Contract.

See COMAR 09.08.01.08.¹²

Both Mr. Chase and Mr. Fleming agree that there are possible problems with the footings, the roof rafters are faulty, the framing surrounding the windows is improper, the

¹² This provision requires that in "the performance of any Home Improvement Contract it shall be the non-delegable duty and obligation of the prime contractor to secure, or see to the securing of, every permit, license, or special exception necessary to the proper completion of the contract according to applicable state or local building laws." COMAR 09.08.01.08.

insulation was installed before the plumbing and electrical work was done, and there was no permit. They reasonably disagree on whether the structure should be torn down, but they do agree that a significant amount of additional work is needed to rectify the problems with the Respondent's work. For these reasons, I find that the Claimants have met their burden as to proving that the work was unworkmanlike and inadequate.

Further, I find that the Claimants did not unreasonably reject good faith efforts by the Respondent to resolve the claim. *Id.* § 8-405(d). Nearly one year after signing the Contract, during which time the Respondent's crew performed work poorly, intermittently, and without a permit, the Claimants terminated the Respondent because they reasonably concluded that he had failed to demonstrate that the work would be done promptly and correctly.

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

The Respondent performed some work under the Contract, and the Claimants intend to retain other contractors to complete or remedy that work. Accordingly, the following formula appropriately measures the Claimants' 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 Claimants paid the Respondent \$40,000.00. There was no dispute over the amount paid and the Claimants presented evidence of the cancelled checks. (Clmt. Ex. 11). The full contract price was \$48,500.00. (Fund Ex. 5). The Claimants submitted an estimate from Chase Improvement to document the cost to tear down and replace the addition, in the amount of \$43,300.00. (Clmt. Ex. 12). Using these numbers and the regulatory formula quoted above, the Claimants' actual loss is:

Amount Paid to the Respondent:	\$40,000.00
<u>Cost to repair faulty work:</u>	<u>+ \$43,300.00</u>
Total paid and to be paid by Claimants:	\$83,300.00
<u>Less contract price:</u>	<u>- \$48,500.00</u>
Actual loss:	\$34,800.00

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.¹³ In this case, the Claimants' actual loss of \$34,800.00 exceeds \$30,000.00. Therefore, the Claimants' recovery is limited to \$30,000.00. Due to the issues with the Respondent's work and considering that it was never subject to independent inspection, it is reasonable to conclude that the entire addition installed by the Respondent would need to be removed and replaced, as indicated by the estimate from Chase Improvement. Essentially, the contract work would be back at square one: the removal and replacement of an existing addition. In these circumstances, the application of the regulatory

¹³ H.D. 917, 2022 Leg., 444th Sess. (Md. 2022) (to be codified in section 8-405(e)(1) of the Business Regulation Article). See also Bus. Reg. § 8-405(e)(5); COMAR 09.08.03.03B(4), D(2)(a). The increased cap is applicable to any claim on or after July 1, 2022, 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").

formula, which puts the Claimants nearly back to square one financially as well, is particularly reasonable.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimants have sustained an actual loss of \$34,800.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(c). I further conclude that the Claimants are entitled to recover \$30,000.00 from the Fund. Md. Code Ann., Bus. Reg. § 8-405(e)(5) (2015); COMAR 09.08.03.03B(3)(c).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimants \$30,000.00; 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;¹⁴ and

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

September 13, 2022
Date Decision Issued

Kristin E. Blumer

Kristin E. Blumer
Administrative Law Judge

KEB/dlm
#200622

¹⁴ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 21st day of October, 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***

IN THE MATTER OF THE CLAIM OF * MARYLAND HOME
ANN COLLINS AND * IMPROVEMENT COMMISSION
BRITTANY FLINT * *
AGAINST THE MARYLAND HOME * *
IMPROVEMENT GUARANTY FUND * MHIC CASE NO. 22(75)14
FOR THE ACTS OR OMISSIONS OF * OAH CASE NO. LABOR-HIC-
GARRY LAVENSTEIN AND ALL * 02-22-01015
AMERICAN WINDOWS & SIDING, * *
INC. *

* * * * *

FINAL ORDER

This matter was originally heard before an Administrative Law Judge (“ALJ”) of the Office of Administrative Hearings (“OAH”) on June 24, 2022. Following the evidentiary hearing, the ALJ issued a Proposed Decision on September 13, 2022, concluding that the homeowners, Ann Collins and Brittany Flint (“Claimants”) suffered an actual loss as a result of the acts or omissions of Garry Lavenstein and All American Windows & Siding, Inc. (collectively, “Contractor”). *ALJ Proposed Decision* pp.17-19. In a Proposed Order dated October 21, 2022, the Maryland Home Improvement Commission (“MHIC” or “Commission”) affirmed the Proposed Decision of the ALJ to grant an award of \$30,000.00 from the Home Improvement Guaranty Fund. The Contractor subsequently filed exceptions to the MHIC Proposed Order.

On March 2, 2023, a three-member panel (“Panel”) of the MHIC held a remote hearing on the exceptions filed in this matter. Ann Collins participated on behalf of the Claimants without counsel. The Contractor participated without counsel with the assistance of Stanley Sirody because the Contractor was in poor health. 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 the demolition of an old addition and construction of a new addition at the Claimants' home. The ALJ found that the Contractor's performance under the contract was unworkmanlike and inadequate. *ALJ's Proposed Decision* p. 17.

On exception, the Contractor argued that the ALJ erred in finding that the structure it built had to be torn down instead of repaired. The Contractor cited a letter from home inspector John Fleming stating that the deficiencies in the Contractor's performance "can be remedied without a complete teardown."¹ The letter from Mr. Fleming described extensive structural defects with the addition built by the Contractor and additional potential structural defects that he was unable to observe, including the adequacy of footers and the method of attachment of the addition to the Claimants' house. In addition, because of inclement weather, Mr. Fleming was unable to conduct a thorough inspection of the roof, siding, and flashing. Therefore, the Commission finds that the ALJ properly relied on the letter of contractor Borden Chase, which also noted significant deficiencies in the addition built by the Contractor, described the Contractor (with whom he met at the Claimants' home) as being unfamiliar with the applicable building code and unaware of who had been performing work on his behalf, and noted the absence of necessary building permits for the project.

The Contractor also argued that the ALJ erred in finding that the parties' contract did not

¹ The Contractor also cited an estimate that it obtained after the OAH hearing, but that estimate is not part of the record before the Commission, and the Contractor did not submit or serve on the Claimants a timely request for leave to present new evidence or explain to the Commission why it could not have obtained the estimate before the OAH hearing.

include a completion date. The Commission finds no error. Because the contract did not include a start date, the provision for completion within 120 days is meaningless. In addition, this fact is not material to the disposition of the Claimants' claim.

Although not raised by either party, the Commission finds that, in addition to being unworkmanlike and inadequate, the Contractor's performance was also incomplete, the Contractor having failed to perform a significant portion of the contracted work, including plumbing and electrical work, cabinets, appliances, fixtures, or flooring.

Having considered the parties' arguments, the evidence contained in the record, and the ALJ's Recommended Decision, it is this 29th day of March 2023, **ORDERED:**

- A. That the Findings of Fact of the Administrative Law Judge are **AMENDED**;
- B. That the Conclusions of Law of the Administrative Law Judge are **AMENDED**;
- C. That the Proposed Decision and Recommended Order of the Administrative Law Judge is **AMENDED**;
- D. That the Claimant is awarded \$30,000.00 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.

JOSEPH TUNNEY
Chairperson –Panel
Maryland Home Improvement
Commission