

IN THE MATTER OF THE CLAIM
OF GREGORY GRAHAM,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF JOHN DENNIS,
T/A MASTER SEAL, INC.
RESPONDENT

* BEFORE JENNIFER A. NAPPIER,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No.: DLR-HIC-02-18-09887
* MHIC No.: 17 (90) 1282
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PROPOSED DECISION

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STATEMENT OF THE CASE

On August 3, 2017, Gregory Graham (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$5,260.00 in actual losses allegedly suffered as a result of a home improvement contract with John Dennis, trading as Master Seal, Inc. (Respondent).

I held a hearing on June 20, 2018, at the Office of Administrative Hearing (OAH) in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. § 8-407(e) (2015). The Claimant represented himself. Kris M. King, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. 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 Office of Administrative Hearings (OAH) govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2017); 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 that loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on the Claimant's behalf:

- CL Ex. 1 Contract, June 1, 2016
- CL Ex. 2 Photos of labels, undated
- CL Ex. 3 Color photos of the exterior of Claimant's home
- CL Ex. 4 Color photos of window and trim
- CL Ex. 5 Completion Certificate, September 27, 2016; Sales slip, September 27, 2016
- CL Ex. 6 Installation and Service Contracts with Advantage Homes Exteriors, July 12, 2017 and August 1, 2017
- CL Ex. 7 Installation and Service Contracts with Advantage Homes Exteriors, July 24, 2017 and August 1, 2017

I admitted the following exhibits on behalf of the Fund:

- GF Ex. 1 Notice of Hearing, April 3, 2018; Certified mail return receipt for mailing to the Appellant, undated; Certified mail return receipt for mailing to the Respondent, delivered April 5, 2018
- GF Ex. 2 Hearing Order, March 23, 2018

- GF Ex. 3 Department of Labor, Licensing and Regulation (DLLR) I.D. Registration for Respondent, June 19, 2018; DLLR Occupational/Professional License History for Respondent, June 19, 2018
- GF Ex. 4 Home Improvement Claim form, August 3, 2017; Installation and Service Contracts with Advantage Homes Exteriors, July 12, 2017 and August 1, 2017
- GF Ex. 5 Letter from MHIC Chairman to the Respondent, August 24, 2017
- GF Ex. 6 DLLR I.D. Registration for Advantage Home Exteriors, Inc., June 19, 2018; DLLR Occupational/Professional License History for Advantage Home Exteriors, June 19, 2018

The Respondent did not offer any exhibits for admission into evidence.

Testimony

The Claimant testified and presented the testimony of the Respondent, Gabriel Daniel Hopkins (Dan), Lawrence Hand, Sr. (Larry, Sr.), and Kortez Graham (Claimant's wife).

The Respondent testified on his own behalf.

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 49775.
2. On June 1, 2016, the Claimant and the Respondent entered into a contract to have eight white double hung windows and half screens installed as follows: three in the living room, three in the front bedroom and two in the back bedroom. The wood around the exterior of the windows was to be covered with beige aluminum. The contract also provided that the Respondent would haul away the debris. The contract was written and signed by Bill, one of the Respondent's sales representatives.

3. The windows have a lifetime manufacturer's warranty. For the first two years following installation of the windows, the Respondent is responsible for providing service under the warranty at no charge.

4. While drafting the contract, Bill told the Claimant and his wife that he was just the sales representative and that they should discuss the details of what they wanted when the installer came out to measure the windows.

5. The original agreed-upon contract price was \$4,160.00.

6. On June 1, 2016, the Claimant paid the Respondent \$1,460.00.

7. On June 7, 2016, one of the Respondent's installer's, Dan, visited the Claimant's home and measured each of the windows that was to be replaced under the contract. While discussing the details of the contract, Dan agreed that the aluminum capping for the new windows would be consistent with the pre-existing aluminum capping, per the request of the Claimant and his wife.

8. On June 13, 2016, the Respondent ordered the eight windows, based on Dan's measurements. The windows were delivered to the Respondent on July 5, 2016.

9. The installation of the windows was originally scheduled to begin sometime between July 5, 2016 and August 9, 2016. On the original date of installation, the Respondent sent a different installer, Larry, Sr., to install the windows. That day, Larry, Sr. discovered that the two windows for the back bedroom had been incorrectly measured and were too tall. No windows were installed on that date.

10. On August 9, 2016, the Respondent reordered the two mismeasured windows, based on the new measurements taken by Larry, Sr. The new windows were delivered to the Respondent on August 29, 2016.

11. On September 26, 2016, Larry, Sr. installed five windows in the Claimant's home. At that time, he found that the remaining two screens were damaged and needed to be reordered.

12. Prior to continuation of the job on September 27, 2016, the Claimant's wife noticed that the capping on the side window in the front bedroom and the side window in the rear bedroom was not consistent in size with the pre-existing capping.

13. On September 27, 2016, Larry, Sr. installed the remaining three windows. By that date, six of the eight screens were installed. Although the job was not yet complete, on September 27, 2016, the Claimant paid the balance owed on the contract (\$2,700.00) and Larry Sr. had the Claimant sign a "Completion Certificate." The certificate noted that the Respondent needed to order new screens.

14. Prior to signing the completion certificate on September 27, 2016, the Claimant told Larry, Sr. that he and his wife were dissatisfied with the capping on two of the windows because it was not consistent in size with the pre-existing capping. Larry, Sr. told the Claimant that he would straighten things out and do something to compensate for the capping not being the same. The capping was not referenced on the completion certificate because this was an agreement between the Claimant and Larry, Sr.

15. On October 14, 2016, the Claimant called the Respondent to request a service call because a window in the rear bedroom was crooked and would not lock.

16. On October 28, 2016, Larry, Sr. and his assistant, Larry, Jr. visited the Claimant's home for a service call. At that time, they reinstalled a window in the rear bedroom, which corrected the issue with the lock, but left a ½ inch gap around the window. They also installed the final two screens on that date.

17. Before Larry, Sr. and Larry, Jr. left on October 28, 2016, the Claimant's wife complained that there was caulking missing from at least one of the windows. Larry, Sr. and Larry, Jr. told the Claimant's wife that they would come back next year to do the caulking because it was too cold to do at that time.

18. The Claimant's wife called the Respondent several times between February 2017 and May 2017 to request a service call. On May 9, 2017, the Respondent finally scheduled a service call with Larry, Sr. for May 15, 2017.

19. Larry, Sr. did not show up for the May 15, 2017 service call.

20. On May 18, 2017, Larry, Jr. performed a service call at the Claimant's home. On that date, Larry, Jr. applied new caulking to one of the windows and re-caulked some of the other windows. The caulking on five of the windows was sloppy and unprofessional in appearance.

21. On May 25, 2017, the Claimant called and spoke to Larry, Sr.'s supervisor about his concerns with the work on the home. However they did not reach a resolution.

22. On May 30, 2017, the Claimant's wife called the Respondent to find out why Larry, Sr. had not come out to correct the capping or returned the Claimant's phone calls. She spoke to office staff, Carol, who said that she would have Larry, Sr. come back to the Claimant's home to look at the capping on the other windows and if she could not get Larry to come out, she would send Dan. Carol also said that she would have the owner, John Dennis call the Claimant.

23. Later on May 30, 2017, the Claimant spoke to John Dennis, but they were unable to come to a resolution.

24. The Respondent has not performed a service call or otherwise visited the Claimant's home since May 18, 2017.

25. Since the Respondent last serviced the Claimant's windows on May 18, 2017, the Claimant has had problems locking one of the windows in the rear bedroom, and some of the trim has cracked.

26. As of the date of the hearing, there was still ½ inch gap around one of the windows in the rear bedroom, the capping was too wide on two windows on the side of the house, and the caulking was not applied in a neat and professional manner.

27. Advantage Home Exteriors (Advantage) is a home improvement contractor licensed in Maryland.

DISCUSSION

In this case, the Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Md. Code Ann., Bus. Reg. §8-407(e)(1) (2015); Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3).¹ “[A] preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces . . . a belief that it is more likely true than not true.” *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002) (quoting *Maryland Pattern Jury Instructions* 1:7 (3d ed. 2000)).

A claimant may recover compensation from the Fund “for an actual loss that results from an act or omission by a licensed contractor.” Md. Code Ann., Bus. Reg. § 8-405(a) (2015);² *see also* COMAR 09.08.03.03B(2) (“actual losses . . . incurred as a result of misconduct by a licensed contractor”). Actual loss “means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.”

¹ As noted above, “COMAR” refers to the Code of Maryland Regulations.

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

Md. Code Ann., Bus. Reg. § 8-401. For the following reasons, I find that the Claimant has proven eligibility for compensation.

The Claimant and the Respondent entered into a contract on June 1, 2016 to install eight windows with screens in the Claimant's home: three in the living room, three in the front bedroom, and two in the rear bedroom. The Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant. According to the written contract, the exterior wood around each window was to be capped with beige aluminum. CL Ex. 1. In addition, the Claimant asserts that the Respondent's installer, Dan, agreed that the capping would be consistent in size with the pre-existing capping on the windows. The Claimant testified that the sales representative who wrote the contract told him that he should tell the installer what he wanted when the installer came out to measure the windows. The Respondent also testified that customers may speak to the installer regarding how they would like the job to be performed. Therefore, based upon the testimony of the parties, I find that installing capping consistent in size with the pre-existing capping was a condition of the June 1, 2016 contract.

By October 28, 2016 the Respondent installed the eight windows and screens in the Claimant's home, and in doing so, performed unworkmanlike, inadequate or incomplete home improvements. When the installer left the home on that date, at least one window had no caulking, one of the windows in the rear bedroom was left with a ½ inch gap, and the capping was inconsistent on three windows. On May 18, 2017, the Respondent performed additional work to fix the caulking. As of the date of the hearing, there were still multiple issues with the home improvements performed by the Respondent, including: (1) the ½ inch gap around the rear bedroom window, (2) the unprofessionally applied caulking, and (3) the inconsistent width of the capping on two windows.

It is undisputed that there is a ½ inch gap around one of the rear bedroom windows and that some of the caulking was not applied in a professional manner. *See* CL Ex. 3, pp. 6. It is also undisputed that the capping on two of the windows is inconsistent in width with the pre-existing capping. However, the Respondent suggests that either the capping was not originally uniform, or that there was a pre-existing issue with the j-channel³ around the windows which caused the capping to be wider around certain windows. On the other hand, the Claimant asserts that the issue with the capping is the result of incorrectly measured windows that are too small.

The Claimant's wife was adamant in her testimony that prior to the Respondent's installation of the windows, the capping on the old windows was consistent. She further testified that when the installer came to the home to take the initial measurements, she stressed to him that she wanted the capping on all of the windows to be uniform and the installer agreed that the capping on the new windows would be consistent in size with the pre-existing capping.

The Respondent admitted that he has never visited the Claimant's home and is only speculating as to the reasons for the inconsistency in the capping. There is no evidence to contradict the Claimant's wife's firsthand testimony as to the previous uniformity of the capping. There is also no statement in the contract, or any other evidence, to indicate that the Respondent's installer ever identified that the j-channeling might cause an issue with installing the capping for the new windows to be consistent with the pre-existing capping. Based on the other problems with windows being mismeasured throughout the course of this job, I find that it is more likely than not that the problems with the size of the capping are the result of the two windows in question having been mismeasured.

Based on the Respondent's inadequate and/or unworkmanlike home improvements, I find the Claimant is eligible for compensation from the Fund. The Claimant intends to have the

³ J-channel is a type of siding trim.

Respondent's inadequate and/or unworkmanlike work repaired by Advantage, which is a home improvement contractor licensed in Maryland.

Having found eligibility for compensation I must now 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. Md. Code Ann., 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).

In this case, 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 submitted as evidence four estimates he obtained from Advantage. CL Ex. 6 and 7. Two of those estimates are for the work necessary for Advantage to completely redo the job, from beginning to end. CL Ex. 7. The Claimant asked that I consider awarding him the amount necessary to have Advantage redo all of the work because based on his past experience with the Respondent, he anticipates that he may have difficulties having the Respondent perform service under the lifetime warranty. However, under Maryland law a claimant is only able to

recover his or her *actual loss* and may not recover for anticipated future damages. Md. Code Ann., Bus. Reg. § 8-405(e); COMAR 09.08.03.03B(2).

In examining the remaining two estimates, the July 12, 2017 estimate is for the scope of work which would most closely address the inadequacies. CL Ex. 6. That estimate is for the following:

1. Install one window in front bedroom 34 ½ x 48 w/aluminum wrap
2. Recap two front facing windows in front bedroom
3. Install one window in rear bedroom 31 x 43 w/aluminum wrap
4. Recap side window rear bedroom
5. Wrap windows & caulk in Norandex canyon tan

CL Ex. 6. Advantage has proposed to complete the aforementioned work for \$1,470.00.

However, according to the Claimant's wife, there is only a problem with the capping on two windows—the side window in the front bedroom and the side window in the rear bedroom. In fact, she specifically testified that she was satisfied with the capping on all four windows on the front of the home (the two front facing windows in the front bedroom and the two front facing windows in the living room). Thus, the Claimant only shall be compensated for recapping two windows, instead of three.

The July 12, 2017 estimate does not provide a breakdown of the cost for each item of work listed. However, the August 1, 2017 estimate submitted by the Claimant does provide a breakdown of the cost for each item listed and states the cost of capping four windows is \$430.00.

Based upon the information contained in the July 12 and August 1, 2017 estimates, I find that the cost to repair the Respondent's inadequate and/or unworkmanlike home improvements is as follows:

Estimated cost for work under the 7/12/17 estimate:	\$1,470.00
<u>Minus the cost of capping one window⁴</u>	<u>\$ 107.50</u>
Cost to repair/complete the project	\$1,362.50

The correct calculation of the award is determined by COMAR 09.08.03.03B(3)(c), set forth above. According to that regulation, the calculation is as follows:

Amount paid to the Respondent:	\$4,160.00
<u>Plus cost to repair/complete the project:</u>	<u>\$1,362.50</u>
	\$5,522.50
<u>Minus the original contract price:</u>	<u>\$4,160.00</u>
Actual Loss:	\$1,362.50

The Business Regulation Article caps a claimant's recovery at \$20,000.00 for acts or omissions of one contractor, and provides that a claimant may not recover more than the amount paid to the contractor against whom the claim is filed. Md. Code Ann., Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a). In this case, the Claimant's actual loss is less than the amount paid to the Respondent and less than \$20,000.00. Therefore, the Claimant is entitled to recover his actual loss of \$1,362.50

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$1,362.50 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 Claimant is entitled to recover that amount from the Fund. COMAR 09.08.03.03D.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$1,362.50; and

⁴ I divided the cost for capping four windows (\$430.00) by four, to calculate the cost of capping one window.

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;⁵ and

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

Signature on File

September 18, 2018
Date Decision Issued

Jennifer A. Wappier
Administrative Law Judge

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⁵ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 20th day of November, 2018, 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.

Jeffrey Ross

**Jeffrey Ross
Panel B**

MARYLAND HOME IMPROVEMENT COMMISSION