



On November 23, 2016, I conducted a hearing the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). The Claimant represented himself. Brian Layman, Esquire, represented the Respondent, who was present. Hope Sachs, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR), represented the Fund.

The contested case provisions of the Administrative Procedure Act, the DLLR's hearing regulations, and the Rules of Procedure of the OAH govern this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2016); Code of Maryland Regulations (COMAR) 09.03.01 and 28.02.01.

### ISSUES

1. Did the Claimant sustain an actual monetary loss, compensable by the Fund, as a result of the Respondent's acts or omissions as a home improvement contractor; and, if so,
2. What is the amount of that loss?

### SUMMARY OF THE EVIDENCE

#### Exhibits

I admitted the following exhibits for the Claimant:

- Cl. 1: The Claimant's March 29, 2016 letter to Thomas Marr
- Cl. 2: March 28, 2016 Home Improvement Claim Form
- Cl. 3: Undated estimate, Sunscape Deck Builders, LLC
- Cl. 4: December 3, 2015 Complaint Form
- Cl. 5: Photocopies of cancelled checks
- Cl. 6: June 5, 2015 Contract

Cl. 7: September 5, 2015 Change Order

Cl. 8: Photographs

I admitted the following exhibits for the Respondent:

Resp. 1: Undated photograph

Resp. 2: August 2, 2015 Inspection Report

I admitted the following exhibits for the Fund:

Fund 1: Notice of Hearing, issued July 27, 2016

Fund 2: The Respondent's licensing history

Fund 3: MHIC's April 11, 2016 letter to the Respondent, with attachments

### Testimony

The Claimant testified. The Respondent testified. The Fund did not present any witnesses.

### FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. At all relevant times, the Respondent was a home improvement contractor licensed by MHIC.
2. On June 5, 2015, the Claimant entered into a contract with the Respondent for the Respondent to perform home improvement work at the Claimant's residence at 9715 Deep Smoke, Columbia, Maryland.
3. Under the contract, the Respondent was to do the following:
  - Remove existing deck boards and rails
  - Remove existing gazebo
  - Remove existing deck steps and step stringers
  - Install new deck boards, new rails and new step stringers

- Install new patio pavers in lower deck area
- Construct small knee wall in corner of lower deck area
- Install lights on steps
- Install cap lighting
- Construct new planter boxes

4. The total contract price was \$35,500.00. The contract price was to be paid in the following installments:

Deposit due at contract signing:	\$11,833.00
Amount due upon removal of the deck:	\$11,833.00
Amount due upon installation of pavers:	\$6,000.00
Amount due upon completion of the job:	\$5,834.00

5. Under the contract, the work was to commence upon the delivery of the new deck boards and would take approximately two to two-and-a-half weeks to complete.
6. The Claimant paid the \$11,833.00 deposit on June 5, 2015.
7. The Respondent commenced work on the project sometime in late June 2015.
8. The Respondent removed the existing deck boards and rails by June 26, 2015. Upon doing so, the Respondent discovered that some of the underlying joists (or support beams for the deck boards) were damaged and would likely need to be replaced before the new deck boards could be installed.
9. On July 6, 2015, the Claimant paid the Respondent \$5,000.00, which was only a partial payment for what was due upon the removal of the existing deck boards and rails.
10. The original contract did not call for the Respondent to replace any of the existing joists, but the Respondent recognized that as a result of ordinary wear and tear, it was

likely some joists would need to be replaced after the old deck boards were removed.

The Respondent replaced some of the joists sometime in July 2015.<sup>1</sup>

11. The Respondent removed the existing gazebo.
12. The Respondent did not remove the steps and step stringers at the commencement of the project because the steps were needed to access other parts of the deck while the work was being performed.
13. The Claimant was concerned about the quality of the Respondent's work related to the replacement of some of the joists and, as a result, arranged for an inspection by a Howard County building inspector. The inspection took place on August 2, 2015. The Respondent was not notified the inspection was scheduled nor was the Respondent or a representative for the Respondent present during the inspection.
14. Bill Blotzer, who conducted the inspection, noted the following deficiencies:
  - Need clean notches with solid bearing for joists resting on beam
  - Need joist hangers on ledger board
  - Stairs need additional supports at top and additional stringers if widened
  - Need additional beam at window cantilever
  - Need additional joist at French door
  - Existing gazebo beam to be re-framed
  - Need additional leg bolts in existing ledger board
  - Need additional support at base of stairs
  - Need to properly support new section of lower deck at bottom of stairs
  - Need to extend beam alongside of stairs out further to support the end joists

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<sup>1</sup> Neither party explained to me how many joists required replacement or how many joists the Respondent replaced.

15. The Claimant presented the inspection results to the Respondent sometime between August 2, 2015 and September 5, 2015.
16. As the Respondent believed the deficiencies noted in the inspection report went beyond the scope of the original contract, particularly the items related to the window cantilever, the gazebo reframing and the complete re-framing<sup>2</sup> of the deck, he submitted a change order to the Claimant in the amount of \$6,800.00 for the cost of abating the deficiencies. The Respondent submitted the change order on September 5, 2015.
17. As a result of the August 2, 2015 inspection report and the Respondent's submission of the \$6,800.00 change order on September 5, 2015, the Claimant terminated the contract.
18. The Claimant obtained an estimate from Sunscape Deck Builders, LLC (Sunscape) to complete the deck and stair replacement. Sunscape estimated the cost of completely replacing the deck, including the joists, and the stairs to be \$45,955.00.

## DISCUSSION

### *Legal Framework*

In this case, the Claimant has the burden of proving the validity of his claim by a preponderance of the evidence. Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3). "[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)).

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<sup>2</sup> The Respondent explained that "re-framing" the deck would include removing both the deck boards and all the underlying support beams and replacing both.

An owner 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);<sup>3</sup> *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.” Bus. Reg. § 8-401. For the following reasons, I find that the Claimant has not proven eligibility for compensation.

### *Arguments of the Parties*

The Claimant argued the Respondent failed to perform adequate work on the replacement of his deck as called for under the contract entered into between the parties. Specifically, the Claimant asserted that he had a verbal agreement with Kyle Jamison, the Respondent’s project manager, for the Respondent to perform a complete re-framing of the deck, including the replacement of all the joists, once it was clear that the joists were more damaged than either the Claimant or the Respondent anticipated at the start of the project. The Claimant was further concerned that the Respondent failed to obtain the necessary permits to perform work on the deck, even though the Claimant asked at the commencement of the project if permits were required. As support for his position the Respondent’s work was inadequate and unworkmanlike, the Claimant pointed to the August 2, 2015 inspection report, in which Inspector Blotzer noted nine areas of deficiency and declined to pass the project as meeting building code standards. The Claimant testified he felt it “unfair” of the Respondent to submit the \$6,800.00 change order to repair the deficiencies because, from the Claimant’s perspective, the deficiencies were the Respondent’s fault. He terminated the contract because he felt he could no longer trust the Respondent or his company.

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<sup>3</sup> Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 Replacement Volume.

For his part, the Respondent disputed that the scope of the contract included the complete “re-framing” of the deck, which would require the removal and replacement of not only the deck boards and rails, but many of the underlying support beams (i.e., joists). The Respondent indicated the Claimant kept changing his mind about what he wanted, for example, switching from the installation of pavers for the lower deck to deck boards. The Respondent denied that the complete replacement of the joists was either explicitly part of the original contract, or an implied part of the original contract. According to the Respondent, Mr. Jamison did not have authority to make such representations to the Claimant. The Respondent acknowledged that due to ordinary wear and tear, it was likely some of the joists would need replacing once the deck boards were removed, but the actual damage to the joists was far more extensive than the Respondent anticipated. As a result, any work that involved the complete replacement of all the joists should have been the subject of a change order, as the replacement of all the joists was never contemplated in the original contract.

Additionally, the Respondent was troubled by the Claimant’s decision to schedule an inspection at the property (1) when the job was not completed and (2) without advising the Respondent or providing the Respondent with an opportunity to be present during the inspection to provide the inspector with any necessary context. For example, the original steps and step stringers were still in place at the time of the inspection because the Respondent needed to access the steps to perform the other work on the deck. Thus, the removal and replacement of the steps and stringers was one of the last things on the project the Respondent planned to do. The inspector did not have that information and treated the condition of the steps and stringers as a deficiency. Finally, the Respondent argued the September 5, 2015 change order was necessary because (1) some of the deficiencies noted in the inspection report were outside the scope of the



original contract, and (2) the Claimant had not made the full second installment payment that was due upon the removal of the deck boards.

### *Analysis*

The facts of this case underscore the importance of reducing the parties' intentions under a contract to writing at all phases of negotiation related to a project. The Fund is correct that the resolution of this case turns on which version of events is more credible – the Claimant's assertion the complete re-framing of the deck was part of the original contract and the Respondent did a poor job fulfilling the contractual terms, or the Respondent's assertion he was only responsible for replacing the deck boards and the so-called deficiencies were because the Respondent was in the middle of working on the project when it was inspected. Taking the totality of circumstances and the complete record into consideration, I find the Respondent's version of events to be more credible that (1) the complete re-framing of the deck was not contemplated by the original contract or verbally agreed to by the Respondent, and (2) the Respondent's work has not been shown to be inadequate or unworkmanlike.

The Respondent conceded that with a project such as this one, where an overlying surface – such as deck boards or roof shingles – is removed, there is always the possibility that some of the supporting framework might be damaged, due to ordinary wear and tear, or even the removal of the surface. The Respondent further acknowledged that any such latent defects would likely need to be corrected before the new surface is applied or installed in order to ensure the overall integrity of the structure. The parties agree that the damage to the underlying joists was far more extensive than either party anticipated. As the damage was far more extensive than anticipated, it is reasonable to expect the cost of correction to also be *greater than anticipated* or already budgeted for under the original contract. I find it more likely than not that where the damage was much greater than anticipated, and thus the cost of correction was likely to be much greater than

planned, a prudent contractor would initiate a change order specifying the increased cost and scope of the work.

I am not persuaded by the Claimant's assertion that Mr. Jamison, acting as the Respondent's representative, entered into a verbal agreement to undertake a greater abatement than anticipated and did so without first consulting with the Respondent. It was not a mere handful of joists in need of replacing; it was, apparently, a substantial number of them.<sup>4</sup> I find it difficult to believe the Respondent would commit to performing significant additional work without ensuring, in writing, that both the scope and the additional cost of the work were understood and agreed to by the Claimant. Furthermore, the Claimant did not produce Mr. Jamison as a witness to testify about the alleged verbal agreement to completely re-frame the deck, nor did the Claimant produce any documentary evidence to support the assertion that he and Mr. Jamison had such an agreement, such as an invoice for additional, new joists.

Even if, for the sake of argument, I assume the Claimant and Mr. Jamison had reached a verbal agreement for the Respondent to replace not only the deck boards, but all the underlying joists, I do not find the Claimant has demonstrated that the Respondent's work was inadequate or unworkmanlike. The parties agree the damage to the underlying joists was extensive. The Claimant produced no satisfactory evidence to demonstrate that the problems related to the joists which were seen by the inspector on August 2, 2015 were the result of the Respondent's handiwork. Several of the joists were already damaged or otherwise unusable when the deck boards were removed. I have no way of knowing if the deficiencies observed by Inspector Blotzer were a result of the already-unsuitable condition of the joists, or, alternatively, because of acts or omissions of the Respondent in replacing some of the joists or in removing the original deck boards. The Claimant did not produce the testimony of an expert who could, to a reasonable

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<sup>4</sup> As noted earlier, neither party advised me how many joists needed to be replaced.

degree of professional certainty, say the condition of the joists was related to the Respondent's work. The Sunscape estimate is not helpful in this regard because (1) it involves a scope of work well beyond that of the original contract, and (2) no one was present from Sunscape to testify that the "poor condition of the joists" (Cl. Ex. 3.) was due to the Respondent's work performance. In the absence of a showing by the Claimant that it is more likely than not that the deficiencies observed, related to the joists, in the August 2, 2015 inspection were due to inadequacies in the Respondent's work, I cannot recommend an award to the Claimant from the Fund.

Additionally, I do not find the Claimant has demonstrated that the work was incomplete because of the Respondent's refusal or failure to complete the work. The Respondent was willing to abate the deficiencies cited in the inspection report, if the Claimant had been willing to both accept the change order and pay the balance of the second installment, which was due after the Respondent removed the deck boards. The Claimant terminated the contract and thus did not give the Respondent the opportunity to complete the project.

I am further not persuaded an award to the Claimant from the Fund is appropriate because of the deficiencies observed, related to the steps and step stringers, on August 2, 2015. The Respondent explained the steps were left for last in terms of demolition and replacement because they were needed for access to the rest of the project. The steps were not completed on August 2, 2015; their removal and replacement had not even been started by the Respondent. To the extent the inspector observed problems with the steps, the problems were of a pre-existing nature and not a result of the Respondent's inadequate or unworkmanlike performance.

**PROPOSED CONCLUSION OF LAW**

I conclude that the Claimant has not sustained an actual and compensable loss as a result of the Respondent's acts and omissions. 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.

**Signature on File**

February 17, 2017  
Date Decision Issued

Latonya B. Dargan  
Administrative Law Judge

LBD/sw  
#166773

**PROPOSED ORDER**

***WHEREFORE, this 10<sup>th</sup> day of April, 2017, 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.***

***Bruce Quackenbush***

***Bruce Quackenbush  
Panel B***

**MARYLAND HOME IMPROVEMENT COMMISSION**

