

**IN THE MATTER OF THE CLAIM
OF PATRICIA A. HODGES ,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF JOHN WEBER,
T/A DECK WIZARD,
RESPONDENT**

*** BEFORE MICHAEL R. OSBORN,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE OF
* ADMINISTRATIVE HEARINGS
*
* OAH No.: DLR-HIC-02-18-33625
* MHIC No.: 18(90)570¹

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REVISED PROPOSED DECISION

**STATEMENT OF THE CASE
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STATEMENT OF THE CASE

On February 7, 2018, Patricia A. Hodges, (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$14,200.00 in actual losses allegedly suffered as a result of a home improvement contract with John Weber, trading as Deck Wizard (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through

¹ COMAR 28.02.01.27C provides that a final decision may be revised at any time on the judge's own initiative due to a clerical mistake. The Proposed Decision issued on April 17, 2019 referenced an incorrect MHIC No. in the caption. This Revised Proposed Decision is issued to correct that clerical mistake.

8-411 (2015).² On October 25, 2018, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on March 5, 2019, at the St. Mary's County Public Library in Leonardtown, Maryland. Md. Code Ann., Bus. Reg. § 8-407(e). Shara Hendler, Assistant Attorney General, Department of Labor, Licensing, and Regulation (Department), represented the Fund. The Claimant represented herself. David Finan, President of Deck Wizard, appeared on behalf of Respondent Deck Wizard (hereafter, Deck Wizard).³ Mr. Weber did not appear after receiving notice of the hearing, and I proceeded in his absence. Code of Maryland Regulations (COMAR) 28.02.01.23A.⁴

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2018); COMAR 09.01.03; COMAR 28.02.01.

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

³ Mr. Finan said he now has ownership interest in Deck Wizard, and Respondent John Weber no longer has any ownership interest in the company. He said Mr. Weber is not an employee of Deck Wizard, and he did not know where Mr. Weber could be found. I allowed Mr. Finan to remain at the hearing and to represent Deck Wizard under Code of Maryland Regulations 09.08.01.04C, which provides for joint and several liability in this matter, as follows:

C. The corporation or partnership and the individual in responsible charge of the corporation's or partnership's home improvement work shall be jointly and severally responsible for:

(3) Repayment to the Home Improvement Commission Guaranty Fund pursuant to Business Regulation Article, §8-410, Annotated Code of Maryland, for any payments made to claimants from the Fund on account of violations by the corporation or partnership or the individual in responsible charge.

In addition, Mr. Finan, although not an attorney, is authorized to represent Deck Wizard under section 8-312 of the Business Regulation Article of the Maryland Annotated Code.

⁴ Notice of the hearing was mailed to Mr. Weber and was received by him on January 10, 2019. Mr. Weber was trading as Deck Wizard at the time Deck Wizard entered a contract with the Claimant and when the work under the contract was performed. Thus, Mr. Weber is a party to this hearing. Applicable law permits me to proceed with a hearing in a party's absence if that party fails to attend after receiving proper notice. COMAR 28.02.01.23A. I determined that Mr. Weber received proper notice, and proceeded to hear the captioned matter.

ISSUES

1. Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondents' 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 as evidence by the Claimant:

- Clmt. Ex. 1 - Deck Wizard web page printout, September 23, 2016
- Clmt. Ex. 2 - Contract, May 16, 2016
- Clmt. Ex. 3 - Four photographs taken September 7, 2016, twenty-four photographs taken September 18, 2016, and thirteen photographs taken September 10, 2017
- Clmt. Ex. 4 - Wm. Gibson Construction, LLC Proposal, January 30, 2018
- Clmt. Ex. 5 - Narrative of events, undated
- Clmt. Ex. 6 - Check dated May 16, 2016 in the amount of \$2,767.00, and check dated June 9, 2016 in the amount of \$5,533.00

Respondent Deck Wizard did not offer any exhibits for admission as evidence.

I admitted the following exhibits offered as evidence by the Fund:

- Fund Ex. 1 - Hearing Order, October 18, 2018
- Fund Ex. 2 - Notice of Hearing with attached certified mail receipts, January 8, 2019
- Fund Ex. 3 - Claim form, February 2, 2018
- Fund Ex. 4 - Respondents' licensing history, February 1, 2019

Testimony

The Claimant testified and presented the testimony of her husband, Robert Hodges.

Respondent Deck Wizard did not present any testimony.

Respondent Weber did not appear.

The Fund did not present any testimony.

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, Respondent Weber was a licensed home improvement contractor under MHIC license number 96780-01. Deck Wizard was licensed under MHIC number 132859-05.**
- 2. At all relevant times the Claimant and her husband lived at 21996 Deep Creek Lane, Avenue, Maryland 20609 (the home).**
- 3. The home has a two-level deck, with a total area of approximately 930 square feet.**
- 4. On May 16, 2016, the Claimant's husband entered a contract with Deck Wizard, through salesman Joe Chandler, to apply a "Red Barn" colored finish coating to the home's deck (contract). The contract also included the rail color would be white. The scope of work under the contract included:
 - Countersink nails on deck surface only**
 - Fill cracks on deck surface only**
 - Replace warped or rotted boards as indicated in writing on addendum**
 - Sand deck boards to prep for coating**
 - Apply sealer in color indicated****
- 5. The agreed-upon contract price was \$8,300.00, with 33% due at signing, and 67% due on completion. Work under the contract was to be performed as weather allowed.**
- 6. On May 16, 2016, the Claimant paid \$2,767.00 to Deck Wizard.**

7. After the contract was entered, Deck Wizard workers removed defective deck boards identified and marked by salesman Chandler and replaced them. Workers sanded the entire deck, and filled cracks and nail dents with a putty product from a tub. Workers sanded where the putty was used.

8. Following replacement of the deck boards and sanding the deck's surface, Deck Wizard workers applied a Red Barn finishing product to the deck and painted the rails and spindles white.

9. On June 9, 2016, following application of the deck finishing product and paint, and following inspection by the Claimant and her husband, the Claimant paid Deck Wizard \$5,533.00, which was full payment under the contract. At that time the Claimant and her husband were satisfied with the work performed.

10. On or about September 2018, the Claimant and her husband noticed some imperfections on the deck's surface. They noticed two places where the deck board was not as smooth as they had anticipated, noticed a place where the surfaces of adjacent deck boards was not precisely on the same plane, with one deck board slightly higher or thicker than the adjacent board, and noticed one approximately one-inch long by one-eighth-inch wide place where the Red Barn product had separated or peeled from the deck board. The Claimant and her husband also noticed the white color on the rail and spindles had peeled slightly in a few places, and noticed places where the rail and spindles were not sanded as smooth as they thought appropriate.

11. On September 6, 2016, the Claimant called Deck Wizard to complain, and talked to a representative. In the weeks that followed the Claimant made at least five more calls to Deck Wizard to follow up, but received no response. On September 29, 2016, Deck Wizard

called the Claimant with a message that Deck Wizard would send a representative to the home at a future unspecified date.

12. On September 23, 2016, the Claimant visited Deck Wizard's website, which featured claims of a one-year labor warranty, and a ten-year limited materials warranty. The website also included claims the company's unique deck finishing product would save homeowners thousands of dollars in replacement costs and would result in a maintenance-free deck for many years. The contract, however, included a one-year limited warranty of labor and materials, and excluded normal wear and tear from the warranty.

13. On October 18, 2016, and again on November 15, 2016, Deck Wizard sent a representative to the home. The first home visit included comments by the Deck Wizard representative that the deck was old, that the Claimant and her husband should consider replacing it, and that he would talk to his boss to see if Deck Wizard would credit the deck coating cost to the price of a new deck. The second visit included comments by the representative that Deck Wizard would like to return the following spring to re-do the deck coating job.

14. On or around the time of the home visits, the Claimant made calls to Deck Wizard referencing the inconsistent conversations with representative who made the site visits. On some calls, the Claimant spoke to Sharon, a Deck Wizard employee who it seemed to the Claimant had been assigned responsibility for dealing with the matter. Although the Claimant left numerous messages for Sharon in 2016, she received no response.

15. Based upon the comments from the Deck Wizard representative on November 15, 2016, that Deck Wizard wanted to wait for spring 2017, the Claimant discontinued calling Deck Wizard.

16. On June 10, 2017, the Claimant called Deck Wizard and left a message for Sharon that amounted to "what happened to the wait for spring plan?" On June 12, 2017, Sharon returned the call and informed the Claimant she had to talk to Joe, an inspector.

17. On August 28, 2017, having heard nothing, the Claimant called Sharon, who told her Joe had a new territory and a Deck Wizard would have to send a new inspector.

18. On September 15, 2017, and again on October 12, 2017, the Claimant called Deck Wizard, each time leaving a message for Sharon, neither of which was returned.

19. On September 10, 2017, the Claimant took additional photos of the deck, each of which showed small places where deck finish product had chipped to reveal deck board.

DISCUSSION

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); 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)).

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); see also COMAR 09.08.03.03B(2) ("actual losses . . . incurred as a result of misconduct by a licensed contractor"). "[A]ctual loss' means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement."

Bus. Reg. § 8-401. For the following reasons, I find that the Claimant has not proven eligibility for compensation.

Respondent Weber was a licensed home improvement contractor doing business as Deck Wizard in May and June 2016.

The Claimant derives most of her expectations about the quality of the work and the resilience of the Deck Wizard finish coating from Deck Wizard's website. The Claimant and her husband expected a deck that was like new, and a deck that would look like new for many years. They were happy when the work was done but within three months the deck finish product failed their expectations.

The contract includes "Important Conditions and Reminders" which include that a deck on which a Deck Wizard product has been applied should never be power washed, and that large dogs and heavy furniture may cause scratches. The contract also includes "Terms and Conditions" which include that the product warranty does not include normal fading and wear, especially in areas exposed to heavy foot traffic, or contact with sharp objects. These warnings demonstrate the finish product is not impervious.⁵

The Claimant offered only photographs which depicted small imperfections on the surface of the deck and on hand rails and spindles. She did not offer any testimony from a qualified witness to offer an opinion whether the imperfections discovered three months after the work was performed amounted to unworkmanlike, inadequate, or incomplete home improvement, or to testify that the product applied to the deck did, or did not, perform as

⁵ The contract includes a provision that if, after one year, the customer is dissatisfied with the product or its application, Deck Wizard will furnish a sufficient amount of product in the color selected by the customer for the customer to apply to the deck surface. This provision includes that Deck Wizard will not supply the labor to either prepare the deck surface or apply the product. No evidence was presented by the Claimant that she or her husband made any demand on Deck Wizard to comply with this provision.

expected. I am unable to reach such conclusions from the photographs and other evidence before me. Thus, the Claimant has failed to prove her claim.

The Claimant was treated shabbily by Deck Wizard, whose representatives gave her a run around. However, this run around and the obvious frustration it caused the Claimant do not prove the Respondent performed unworkmanlike, inadequate or incomplete home improvements. I find, therefore, that the Claimant is not eligible for compensation from the Fund.⁵

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has not sustained an actual and compensable loss as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015).

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.

April 17, 2019
Date Decision Issued



Michael R. Osborn
Administrative Law Judge

MRO/kp
179299

⁵ On January 30, 2018, the Claimant obtained an estimate from Wm. Gibson Construction, LLC to demolish 928 square feet of existing deck, to install 928 square feet of treated 2x6 deck boards, to cover 6x6 posts with vinyl sleeves, and to replace the existing deck rails with vinyl deck rails, for a total cost of \$14, 200.00. This estimate is the actual loss reflected in the Claim. Although I do not reach the issue of whether the Claimant has demonstrated actual damages, an estimate to demolish and replace the existing deck is not an appropriate measure of damages. The Claimant did not submit any evidence regarding what it would cost to have the deck prepared and recoated with a deck finish product, as she and her husband hired Deck Wizard to do.