

IN THE MATTER OF THE CLAIM
OF KERRY MCKEON
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF DARREN
KAUFMAN,
T/A PRIMO BUILDERS, INC.

* BEFORE STUART G. BRESLOW,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
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* OAH No.: LABOR-HIC-02-19-23277
* MHIC No.:19(90)416

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PROPOSED DECISION

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STATEMENT OF THE CASE

On February 20, 2019, Kerry McKeon (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$11,300.00 in actual losses allegedly suffered as a result of a home improvement contract with Darren Kaufman, trading as Primo Builders, Inc. (Respondent). Md. Code Ann., Bus. Reg. §§ 8-

401 through 8-411 (2015). On June 27, 2019, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on December 5, 2019 at the OAH-Rockville. Bus. Reg. § 8-407(e). Shara Hendler, Assistant Attorney General, Department of Labor (Department),¹ represented the Fund. The Claimant represented himself. 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 OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2019); Code of Maryland Regulations (COMAR) 09.01.03; COMAR 28.02.01.

ISSUES

1. Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?
2. If so, what is the amount of the compensable loss?

SUMMARY OF THE EVIDENCE

Exhibits

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

- Clmt. Ex. 1 - Timeline of Key Events Regarding Installation of Deck by Respondent, dated December 5, 2019
- Clmt. Ex. 2 Agreement between Claimant and Respondent, dated April 16, 2018, with copies of four checks in the total amount of \$37,900.00
- Clmt. Ex. 3 Email from Respondent to Claimant, dated June 28, 2018
- Clmt. Ex. 4 Three Inspection Disapproval certificates, dated August 3, 2018, June 22, 2018 and September 27, 2018
- Clmt. Ex. 5 Text messages between Claimant and Respondent, dated July 12, 2018 through October 11, 2018

¹ On July 1, 2019, the Maryland Department of Labor, Licensing, and Regulation became the Department of Labor.

- Clmt. Ex. 6 Deck Repair Quote from Probuilt Construction, Inc., dated January 21, 2019
- Clmt. Ex. 7 Photographs, A-F, taken on June 18, 2018 and July 21, 2018

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

- Resp. Ex. 1 - Photographs A-F, undated
- Resp. Ex. 2 - Estimate from Barrons,² materials only, dated March 27, 2018
- Resp. Ex. 3 Drawing of Deck, undated
- Resp. Ex. 4 Estimated cost for the ceiling replacement under the deck by Bobby (subcontractor to the Respondent) in a text, dated June 28, 2018
- Resp. Ex. 5 List of the names of Montgomery County Inspectors on the Project
- Resp. Ex. 6 Photographs A-C of potential repair to address the water issue on the Project, undated

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. 1 - Hearing Order, dated June 27, 2019
- Fund Ex. 2 Notice of Hearing, dated September 3, 2019
- Fund Ex. 3 Home Improvement Claim Form, received February 20, 2019
- Fund Ex. 4 Licensing History of Respondent, dated October 1, 2019

Testimony

The Claimant testified and presented no other witnesses.

The Respondent testified and presented no other 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 87942.

² It is unclear from the document whether Barrons is a corporate entity, partnership, or a sole proprietorship.

2. On April 16, 2018, the Claimant and the Respondent entered into a contract (Contract) to build a deck and install the dry deck Trex Rain Escape system. (Project). The work was to be substantially completed by June 8, 2018.

3. The original agreed-upon Contract price for the Project was \$37,900.00.

4. Work progressed on the Project. The Trex Rain Escape system was to be installed to keep the area under the deck dry. According to the Contract, the system was to be installed under the entire deck.

5. The Respondent was responsible for obtaining Montgomery County Building permits for the Project, except for permits for any electrical work.

6. On June 22, 2018, the Montgomery County inspector visited the work site and determined that the posts on the deck were more than five feet apart, thereby not in compliance with the applicable building code. As a result of correcting the code violation, the Respondent damaged the rubber of the Trex Rain Escape system and patched it by taping the damaged section. As a result of the damage and repair to the Trex Rain Escape system, the Respondent agreed to extend the warranty on the Trex Rain Escape system from one to four years, covering labor only.

7. The Respondent did not install the Trex Rain Escape system under the entire deck. There is a sixteen foot by three foot section of the deck near the stairs that did not have the Trex Rain Escape system installed. Although required to install the system under the entire deck, the Respondent elected not to do it because of the unusual shape of the deck and difficulty to install it. The Claimant was never asked to approve a change in the scope of the Project to eliminate the Trex Rain Escape system for this area of the deck.

8. On June 28, 2018, the Respondent notified the Claimant that all inspections had passed; however, this statement was untrue. On August 3, 2018 the inspector found that the risers on the stairs were not in compliance with code and therefore, did not pass inspection. On September 27, 2018, another inspector found that the risers still exceeded the maximum height and there was a failure to comply with the minimum tread depth requirement of ten inches. The inspector did not pass the inspection of the stairs. To date, there is still no final inspection approval for the items found deficient by the inspectors who reviewed the Project.

9. The Claimant made the final payment under the Contract on July 18, 2018. With this payment, the Claimant paid the Respondent the full amount under the Contract, \$37,900.00.

10. On July 21, 2018, following a heavy rain, the Claimant observed leaks under the deck and notified the Respondent that he needed to return to the jobsite and fix the leakage problem.

11. To try and remediate the leakage problem, the Respondent cut slits in the ceiling below the deck. This did not correct the leakage problem.

12. The Claimant contacted a representative of Trex Rain Escape system to discuss the issue and obtain advice. The Trex Rain Escape system could have been installed under the entire deck, regardless of the irregular shape.

13. The Respondent agreed to further investigate the leakage issue and the step issue but decided not to do any further work on the Project following the filing of the Claim by the Claimant.

14. The Claimant received an estimate from another contractor, Probuilt Construction, Inc., to remediate the steps and the leaks coming through the ceiling under the

deck. The estimated cost to address both issues was \$11,300.00. This estimate does not include any repair of the existing Trex Rain Escape system.

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).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) (2015)⁴; *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 proven eligibility for compensation.

The Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimant.

The Respondent performed unworkmanlike, inadequate or incomplete home improvements. There is no dispute that the Respondent failed to install the Trex Rain Escape system under the entire deck. He was required to do so, but decided, without consulting the

³ As noted above, “COMAR” refers to the Code of Maryland Regulations.

⁴ Unless otherwise noted, all references to the Business Regulation Article herein cite the 2015 Replacement Volume of the Maryland Annotated Code.

Claimant, that he would not install the system under a section of the deck that was irregularly shaped. The Respondent did not believe that leaving this area unprotected would pose a problem.

Unfortunately, immediately after all the payments were made under the terms of the Contract, the Claimant noticed leaking under the ceiling below the deck. The Claimant notified the Respondent and the Respondent came to the Project site and installed slits in the ceiling of the deck in an effort to fix the leakage problem. It did not fix the problem and slits in the ceiling was not what the Claimant envisioned when he contracted with the Respondent to complete the Project.

The other issue involves the stairs. The stairs failed inspection several times and continue to be out of compliance with the applicable building code. The Respondent claims that several inspectors had differing opinions concerning the stairs and that is the primary reason for the failure to obtain final approval for the stairs. The Respondent acknowledges that the stairs need to pass inspection and it will be necessary to remediate the steps so that it can pass inspection.

As a result of the leakage issue involving the ceiling of the deck and the lack of building code compliance involving the stairs, the parties agree that work needs to be done to correct these two issues. I find that due to the leakage issue and the stair issue, the work performed by the Respondent was unworkmanlike, inadequate, and incomplete.

I thus find that the Claimant is eligible for compensation from the Fund.

Having found eligibility for compensation, I must determine the amount of the Claimant's actual loss and the amount, if any, that the Claimant is entitled to recover. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney

fees, court costs, or interest. Bus. Reg. § 8-405(e)(3); 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.

In this case, the Respondent performed work under the Contract, and the Claimant has retained 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).

While the Respondent acknowledges that there is work to be done on the Project to address both the stair issue and the leakage issue, there is substantial disagreement on what the cost should be to fix these problems. Both the Claimant and the Respondent provided estimates. The Claimant's estimate, which he received from Probuilt Construction, Inc., is \$11,200.00. This figure could increase if Probuilt finds that the existing Trex Rain Escape system was damaged. Furthermore, if the leak cannot be located in a defined area, there would be additional cost to remove more decking and ceiling. The estimate also includes repair to the stairs but does not include a new ceiling to replace the existing ceiling which now has slits as a result of the Respondent's failed attempt to fix the leak.

The Respondent's estimates are vastly different from the estimate provided by the Claimant, although he did provide a quotation to replace the ceiling in the amount of \$2,300.00. Replacement of the ceiling was not part of Probuilt's estimate.

The Respondent provided an estimate of \$520.00 to install the missing section of the Trex Rain Escape system that he did not install. He estimated that the steps could be remediated for approximately \$800.00, which includes labor and materials. The Probuilt estimate to replace the steps, rather than repair them is \$3,700.00.

First, the ceiling has to be removed and replaced. There are slits in the ceiling that were never envisioned to be part of the installation by either the Claimant or the Respondent. The Probuilt estimate does not include the replacement of the ceiling, merely reinstallation of the ceiling after it is removed to determine where the leak is originating from and any necessary repairs are made. The Respondent obtained an estimate from the roofing subcontractor that he uses (Bobby) for the replacement and reinstallation of the ceiling. The estimate for this work is \$2,350.00. Inasmuch as the ceiling was damaged by the Respondent by installing slits, I find that this amount for the work is not unreasonable and should be included as part of the Claimant's compensation for his actual loss.

In addition to the ceiling cost, the Respondent is responsible for failing to install the Trex Rain Escape system under the entire deck. Probuilt proposed that the cost to install the system over the area that did not have the system would cost \$2,400.00. The Respondent provided an estimate for materials from Barrons, a supplier of Trex products, of \$520.00. The Respondent did not provide a cost for labor which would be in addition to the estimate for materials. I find Probuilt's estimate of \$2,400.00 to install the Trex Rain Escape system over the area that was not included to be reasonable given that there was no labor component in Barron's quotation and the

Respondent's acknowledgement that this irregular shaped area of the deck presents a difficult installation.

Probuilt's estimate includes removal of the existing decking and ceiling of a thirteen by sixteen foot section to determine where the leak is originating from at a cost of \$2,300.00. First, there was no testimony from a representative of Probuilt that removal of that much section of the deck and ceiling was necessary, especially if it is the absence of the Trex Rain Escape system in a particular area of the deck that is anticipated to be the cause of the leak. The Claimant did not provide a representative of Probuilt to explain why so much of the deck had to be removed when only a much smaller section did not have the system in place. As the Claimant has the burden of proof, I do not find that the Claimant has proven the cost for this item and, therefore, it should not be included as part of the Claimant's actual loss.

The remaining issue involves the deck steps. The Respondent testified that most of the materials to correct the steps can be reused. Probuilt proposed to demolish the old steps and completely rebuild new steps. The Respondent testified that new materials to repair the steps and make them in compliance with applicable codes would cost approximately \$200.00 with an additional \$600.00 in labor costs. The Montgomery County inspectors only mentioned certain areas of the steps that need to be adjusted to meet applicable code. This suggests that some existing stair components can be reused, such as framing, hardware, rails and trim. Again, there was no one from Probuilt present to explain why the entire staircase needed to be torn down and replaced. The Respondent credibly testified that the stairs could be fixed at a minimal cost of \$800.00. I found the Respondent's testimony concerning this issue to be forthright and straightforward. He recognized, during the hearing, that he has responsibility for certain items related to his work on the Project and was willing to accept that responsibility. Additionally, he

has experience building deck structures such as the work done on the Project and knows the various costs for materials and labor to construct a deck of this type. His testimony was given under oath and was subject to cross-examination. By contrast, the proposal from Probuilt was not offered through a representative of Probuilt who could have been challenged by the Respondent on the accuracy and necessity of certain elements of the estimate. Therefore, regarding the steps, I find that the Claimant has not sustained his burden of proof as to the actual loss he has sustained due to the unworkmanlike steps. I find the Respondent's estimate of \$800.00 to be more reflective of the cost to repair the steps so that they meet Montgomery County building code.

Finally, adding the cost of replacing the ceiling (\$2,350.00) to the cost for installing the Trex Rain Escape system over the area that did not have the system (\$2,400.00), yields a compensable loss of \$4,750.00 to correct these deficiencies. To correct the work on the steps to meet applicable Montgomery County code would cost an additional \$800.00 for a total actual loss of \$5,550.00.

Applying the formula found in COMAR 09.08.03.03B(3)(c), the cost to correct the deficiencies is added to the total amount paid (\$37,900.00) under the Contract. The total result of that calculation is \$43,450.00. From that figure, the Contract price is subtracted (\$37,900.00) resulting in a total compensable loss of \$5,550.00.

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. 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 recover his actual loss of \$5,550.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss \$5,550.00 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 Claimant is entitled to recover that amount from the Fund.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$5,550.00 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;⁵ and

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

Signature on File



February 20, 2020
Date Decision Issued

SGB/cj
#183983

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

PROPOSED ORDER

WHEREFORE, this 29th day of April, 2020, Panel B of the Maryland Home Improvement Commission approves the Recommended Order of the Administrative Law Judge and unless any parties files with the Commission within twenty (20) days of this date written exceptions and/or a request to present arguments, then this Proposed Order will become final at the end of the twenty (20) day period. By law the parties then have an additional thirty (30) day period during which they may file an appeal to Circuit Court.

Robert Altieri

Robert Altieri

Panel B

***MARYLAND HOME IMPROVEMENT
COMMISSION***