

IN THE MATTER OF THE CLAIM	* BEFORE RACHAEL BARNETT,
OF KEITH MONTGOMERY,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	*
FOR THE ALLEGED ACTS OR	*
OMISSIONS OF RANDALL SMITH,	*
T/A MARYLAND DECK AND SHED,	* OAH No.: DLR-HIC-02-17-21610
RESPONDENT	* MHIC No.: 16(90)1295

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On April 19, 2017, Keith Montgomery (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$11,930.00 in actual losses allegedly suffered as a result of a home improvement contract with Randall Smith, trading as Maryland Deck and Shed, LLC (Respondent).

I held a hearing on October 11, 2017 at the Office of Administrative Hearings (OAH), in Kensington, Maryland. Md. Code Ann., Bus. Reg. § 8-407(e) (2015). The Claimant represented himself. Eric London, Assistant Attorney General, Department of Labor, Licensing, and Regulation (Department), represented the Fund. After waiting fifteen minutes for the

Respondent or the Respondent's representative to appear, I proceeded with the hearing. Code of Maryland Regulations (COMAR) 28.02.01.23A.¹

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. 2017); 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:

- Clmt. Ex. 1 - Contract, signed July 7, 2014
- Clmt. Ex. 2 - Checks from the Claimant to the Respondent, various dates
- Clmt. Ex. 3 - Photograph – aerial view of collapsed deck roof, taken January 26, 2016
- Clmt. Ex. 4 - Photograph – underside of the collapsed deck roof, taken January 26, 2016
- Clmt. Ex. 5 - Photograph – longitudinal view of collapsed deck roof, taken January 26, 2016
- Clmt. Ex. 6 - Engineering report issued by Vannoy & Associates, dated March 17, 2016
- Clmt. Ex. 7 - Building permit, issued August 1, 2014

No one was present to offer any exhibits on the Respondent's behalf.

¹ Notice of the hearing was mailed to the Respondent at the address of record, as well as alternative addresses obtained by DLLR, by regular and certified mail on July 18, 2017, August 29, 2017, and September 6, 2017, and the certified mailings were all returned as unclaimed or undeliverable following each notice. COMAR 09.08.03.03A(2). 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 the Respondent had received proper notice, and proceeded to hear the captioned matter.

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. 1 - Notice of hearing mailed on July 18, 2017 to the listed addresses, providing the date of hearing, October 11, 2017
- Fund Ex. 2 - Notice of hearing mailed on August 29, 2017 to the listed addresses, providing the date of hearing, October 11, 2017
- Fund Ex. 3 - Letter from DLLR, dated September 6, 2017
- Fund Ex. 4 - Hearing Order, issued July 3, 2017
- Fund Ex. 5 - Home improvement claim form, dated April 17, 2017
- Fund Ex. 6 - Letter from DLLR, dated April 27, 2017

Testimony

The Claimant testified in his own behalf and presented the testimony of Thomas Krauth, who I accepted as an expert in structural engineering, inclusive of roof decks.

The Respondent was not present to present testimony.

The Fund did not present 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, the Respondent was a licensed home improvement contractor under MHIC license number 16(90)1295.
2. On July 7, 2014, the Claimant and the Respondent entered into a contract for the following home improvement work:
 - remove the existing roof over the rear porch
 - install six vinyl posts with vinyl beams
 - install an A-frame roof with an open gable
 - replace the skirting around the deck and add a set of stairs

- install a fan on the underside of the roof, and
 - construct an eight by ten foot shed near the fence.
3. The contract included a two-year warranty.
 4. The contract stated that work would begin within two weeks of permit approval but did not provide a date by which the work would be completed.
 5. The Respondent began work on July 7, 2014 and completed the work sometime in August 2014.
 6. The original agreed-upon contract price was \$15,160.00, including an Angie's List discount of \$500.00.
 7. The Claimant also paid the \$450.00 in permit fees, of which the Respondent used \$79.80 to secure a permit for the construction of the shed, leaving \$370.20 in permit fees paid for the construction of the covered deck.
 8. The cost of the covered deck was \$10,930.00. The cost of installing vinyl posts (or columns) was \$480.00. The shed cost \$4,250.00.
 9. On July 10, 2014, the Claimant paid the Respondent \$5,053.00.
 10. On August 7, 2014, the Claimant paid the Respondent \$5,054.00.
 11. On August 20, 2014, the Claimant paid the Respondent \$5,503.00.
 12. On the evening of January 25, 2016, the deck roof collapsed under the pressure of accumulated snow. The deck roof was still under a two-year warranty.
 13. On January 25, 2016, the Claimant photographed the damage and contacted the Respondent. The Respondent's representative, Jim Sarazan, directed the Claimant to contact his homeowner's insurance company (Traveler's) to determine whether the damage was covered.
 14. On January 26, 2016, the Respondent removed some of the debris.

15. In late March 2016, following an investigation by Thomas Krauth, engineer at Vannoy & Associates, Traveler's denied the claim due to poor workmanship.

16. The Claimant contacted the Respondent and requested a date for rebuilding the covered deck.

17. In June 2016, the Respondent submitted to the Claimant a contract to rebuild the deck with an addendum releasing the company of all other claims. The contract did not include a warranty or a start date.

18. The Claimant did not accept the June 2016 contract but rather drafted his own contract and submitted it to the Respondent.

19. The Claimant continued to contact the Respondent about redoing the work under the warranty.

20. The Respondent has not performed any reconstruction work.

21. The Claimant's last contact with the Respondent was in January 2017.

22. The Claimant's actual loss is \$11,415.08.

DISCUSSION

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).² “[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)).

² As noted above, “COMAR” refers to the Code of Maryland Regulations.

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);³ *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 proven eligibility for compensation.

The Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant. The contract included a two-year warranty which stated:

The Contractor warrants to the Owner that the work performed in connection with the Contract will be of good quality and workmanship, free from patent and latent defects, and will conform to all federal, state and local laws and regulations. The Contractor shall warrant the work performed under the Contract for a period of two (2) years⁴ from the date of the Contract.

The Claimant’s claim arose approximately seventeen months after the Respondent completed construction of the covered deck and shed when a January snow blanketed Montgomery County, where the Claimant’s home is located. The weight of the snow caused the covered roof that Respondent had built to collapse on January 25, 2016. The Claimant was inside the home at the time and heard what he described as a crunching sound. The next morning, he photographed the damage and called the Respondent. To the company’s credit, the Respondent came to the scene to clear as much of the debris as the Claimant’s insurance company authorized. However, the Claimant’s efforts to have the Respondent replace the roof and beam structure proved more difficult. The shed was not damaged during the collapse and is therefore not part of this claim.

³ Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 Replacement Volume of the Maryland Annotated Code.

⁴ Emphasis in original.

The Claimant argued that the Respondent failed to replace the faulty deck roofing and supporting columns after the structure collapsed under the weight of snow. Mr. Krauth testified that Travelers contacted his engineering firm, Vannoy & Associates, to assess the damage at the Claimant's property. Mr. Krauth was assigned to the investigation, and he began by conducting a site visit. He documented the conditions, took measurements of and photographed the structure, and documented its deficiencies. Mr. Krauth also reviewed the contract and design sketches. Mr. Krauth testified that he produced a written report about the cause of the collapse and that he still agrees with his conclusions therein.

In the report, Mr. Krauth concluded that the collapse of the deck roof was the result of "improper design and construction of the roof and its subsequent inability to resist loads imparted by snow accumulation on the roof surface." Mr. Krauth ruled out age and wear as a contributing factor to the collapse, because the roof was constructed less than two years before the collapse. Furthermore, the quantity of snowfall (approximately twenty-four inches) did not exceed code mandated minimum design loads. Therefore, he concluded, the roof would not have collapsed if it had been properly designed and constructed.

Mr. Krauth emphasized several design flaws in his report and testimony. First, the main cause of the collapse was the inadequate tying of opposing roof rafters.⁵ Proper tying is required to resist the outward thrust⁶ that occurs in a stick-built roof frame when there is a load on the roof. Second, collar ties were used to tie the rafters, when rafter ties should have been used.⁷ Third, given the construction, at least twelve 16d nails⁸ would have been required at each tie to rafter connection; however, only four nails were used. Fourth, the rafter ties were raised, which resulted in a reduction of rafter capacity. Given the raised rafters, the rafters should have been

⁵ Rafters are connected by boards that run parallel to the ground, often referred to as ties.

⁶ Thrust is a technical term that describes the inward pressure of rafters.

⁷ Rafter ties connect rafters at a higher point (closer to the peak) than do collar ties.

⁸ 16d is a type of nail.

larger. Mr. Krauth concluded in his report that the roof experienced a "thrust-induced failure" due to improper design and construction of the roof. (Claimant Ex 6).

Following the Claimant's receipt of Mr. Krauth's report and denial of his claim by Traveler's, the Claimant contacted the Respondent to schedule the reconstruction of the roof deck. The Claimant testified that he asked the Respondent for a date when the structure would be rebuilt and a contract; however, when he received the contract it did not include a start date but did have an addendum releasing the Respondent from all other claims. The Claimant e-mailed the Respondent a different version of the contract, but the Respondent did not accept it. The Claimant also stated that he spoke with Jim Sarazan on June 11, 2016 but that was his last return call, despite additional efforts to reach him. The Claimant further stated that he continued e-mailing and calling the Respondent between June 2016 and January 2017 but the Respondent stopped returning his calls and never scheduled a date for rebuilding the structure.

The Fund agreed with Mr. Krauth's conclusion that the roof deck should not have collapsed under the load of snow and asserted that the construction was unworkmanlike and inadequate. Additionally, the Fund argued that the Claimant made a good faith effort to have the roof deck rebuilt. The Respondent was not present to argue in his defense.

The Respondent performed unworkmanlike, inadequate or incomplete home improvements. The roof deck collapsed under the weight of a snow that was within the range of code-mandated design loads. Furthermore, the work was under warranty and yet, the Respondent failed to rebuild a year after the structure collapsed. The Respondent's submission of a contract to the Claimant that included a release of all future claims did not constitute an adequate effort to remedy the inadequate home improvements. Had the Claimant accepted and the roof collapsed again, that would have left the Claimant with no recourse. It is not reasonable

to expect that the Claimant would agree to these additional terms in order to secure performance under the terms of an already existing warranty.

I thus find that the Claimant is eligible for compensation from the Fund. Having found eligibility for compensation I now turn to the amount of the award, if any, to which the Claimant is entitled. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. COMAR 09.08.03.03B(1). MHIC's regulations provide three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). The following formula offers an appropriate measurement to determine the amount of actual loss in this case.

"If the contractor did work according to the contract and the claimant is not soliciting another contractor to complete the contract, the claimant's actual loss shall be the amount which the claimant paid to the original contractor less the value of any materials or services provided by the contractor." COMAR 09.08.03.03B(3)(b). The Claimant paid the Respondent in full for the roof deck and shed to be constructed. He received an Angie's List discount of \$500.00 on the entire project, which represents a 3.2% discount per project item. The discount must be spread over the roof, deck, and shed costs in order to get an accurate cost for the roof deck construction. The roof deck, including the decorative columns cost \$11,410.00, which is reduced by 3.2% for a cost savings of \$365.12 ($\$11,410.00 - \$365.12 = \$11,044.88$). The Claimant paid this amount, plus a permit fee of \$370.20 for a grand total of \$11,415.08. The roof deck collapsed, resulting in the Claimant receiving no value for the work performed. Hence, the resulting recovery calculation is: $\$11,415.08 - 0 = \$11,415.08$.

Pursuant to the applicable law, the maximum recovery from the Fund is limited to the lesser of \$20,000.00 or the amount paid by or on behalf of the Claimant to the Respondent. Md.

Code Ann., Bus. Reg. § 8-405(e)(1), (5) (2015). As a result, the Claimant is entitled to an award of \$11,494.88.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$ 11,415.08 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405; COMAR 09.08.03.03B(3)(b).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$11,415.08 amount; 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;⁹ and

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

Signature on File

November 30, 2017
Date Proposed Decision Issued

Rachael Barnett
Administrative Law Judge

RAB/da
170789

⁹ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 2nd day of February, 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.

Andrew Snyder

***Andrew Snyder
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION