

IN THE MATTER OF THE CLAIM	* BEFORE JOY L. PHILLIPS,
OF MATTHEW A. HOPKINS,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	* OAH No.: DLR-HIC-02-17-02466
FOR THE ALLEGED ACTS OR	* MHIC No.: 16 (90) 478
OMISSIONS OF STEVEN HESSLER,	*
T/A ROCK CREEK DECKS AND	*
ADDITIONS, LLC,	*
RESPONDENT	*

\* \* \* \* \*

**PROPOSED DECISION**

STATEMENT OF THE CASE  
ISSUES  
SUMMARY OF THE EVIDENCE  
PROPOSED FINDINGS OF FACT  
DISCUSSION  
PROPOSED CONCLUSION OF LAW  
RECOMMENDED ORDER

**STATEMENT OF THE CASE**

On March 12, 2016, Matthew and Kristen Hopkins (Claimants)<sup>1</sup> filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$3,783.00 in alleged actual losses suffered as a result of a home improvement contract with Steven Hessler, trading as Rock Creek Decks and Additions, LLC (Respondent).

I held a hearing on May 11, 2017 at the Tawes State Office Building, Annapolis, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). The Claimant represented

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<sup>1</sup> Mr. Hopkins filed the actual claim; therefore, when using the singular Claimant, I am referring to him. However, because his wife, Kristen Hopkins, signed the contract and interacted frequently with the Respondent, I am including her as a Claimant when referring to the plural Claimants.

himself. Andrew Brouwer, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. Richard J. Hackerman, Esquire, represented the Respondent, who was present.

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 govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2016); Code of Maryland Regulations (COMAR) 09.01.03; COMAR 28.02.01.

### ISSUES

1. Did the Claimants 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

Unless otherwise indicated, I admitted the following exhibits on behalf of the Claimants:

- Clmt. Ex. 1 - Proposal from the Respondent, June 17, 2015, updated August 3, 2015
- Clmt. Ex. 2 - Cancelled check, August 3, 2015
- Clmt. Ex. 3 - Email exchange between the Claimants and the Respondent, August 31, 2015
- Clmt. Ex. 4 - Cancelled check, September 21, 2015
- Clmt. Ex. 5 - Photograph, undated
- Clmt. Ex. 6 - Photographs, October 6, 2015
- Clmt. Ex. 7 - Photograph, undated
- Clmt. Ex. 8 - (Not admitted)
- Clmt. Ex. 9 - Photograph, undated
- Clmt. Ex. 10 - Photograph, undated
- Clmt. Ex. 11 - Quality Control Checklist and other documents
- Clmt. Ex. 12 - Photograph, undated
- Clmt. Ex. 13 - Photographs, undated
- Clmt. Ex. 14 - Fence & Deck Connection Estimate, December 14, 2015

I admitted the following exhibits on behalf of the Respondent:

- Resp. Ex. 1 - Receipts from Lumber & Building Supply Co., September 19 – 29, 2015
- Resp. Ex. 2 - MicroPro Certificate of Treatment, September 30, 2015

Resp. Ex. 3 - Photographs A – J, undated

Resp. Ex. 4 - Job Expense Form, August 3 – October 3, 2015

I admitted the following exhibits on behalf of the Fund:

GF Ex. 1 - Hearing Order, January 3, 2017

GF Ex. 2 - Notice of Hearing, March 2, 2017

GF Ex. 3 - Home Improvement Claim Form, March 12, 2016

GF Ex. 4 - Registration information, printed April 14, 2017

### Testimony

The Claimant testified in his own behalf.

The Respondent testified in his own behalf and presented the testimony of Jeffrey A. Schwartz, President, Ritchie Lumber Company.

The Fund presented no 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 4985857 (registration 109065).
2. On June 17, 2015, the Claimants received a proposal from the Respondent to build a 20x20 wood-framed deck on the Claimants' house, attached to a fence. The deck would be low to the ground, with three steps going to the ground, and would have no railing. The decking, but not the frame, would be made of composite materials.
3. The original agreed-upon project price was \$7,700.00.
4. Mr. Hammond and the Claimants amended the plan on August 3, 2015 to provide for a railing, a small retaining wall, demolition of two concrete slabs, and a discount from Mr. Hammond. The revised project cost was \$9,300.00. Ms. Hopkins signed the proposal on behalf of the Claimants, accepting the proposal as the contract. The start date for the revised contract was August 29, 2015 and the end date was August 31, 2015.

5. On August 3, 2015, the Claimants paid the Respondent \$3,100.00 as a down payment.

6. The deck was not completed by August 31, 2015. On that day, the Claimant spoke with the Respondent, who told him that Mr. Hammond was no longer working for his company. The Respondent was leaving for vacation and he would oversee the project upon his return. The Claimants agreed, with the proviso that the Respondent pay a \$50.00 per day penalty for each day after September 30, 2015 that the deck was not completed.

7. On September 21, 2015, the Respondent's crew began working on the deck and the Claimants paid the Respondent \$3,100.00.

8. On an unknown date, the Claimants and the Respondent decided not to remove concrete slabs under the deck, but use flashing and gravel instead. This reduced the contract price by \$100.00, to \$9,200.00.

9. On September 23, 2015, a county inspector approved the footers the Respondent built for the Claimant's deck.<sup>2</sup>

10. The Respondent purchased contact boards, also called ground boards, and non-contact boards, also called above ground boards, for the project. Contact boards are treated to sit on the ground.

11. About twenty 2x6 boards at the job site were non-contact boards, meaning they were not treated to sit on the ground. The vendor had misunderstood where those 2x6 boards would be installed and had sent the wrong boards to the job site. On September 24, 2015, the Respondent's crew replaced those 2x6 non-contact boards with contact boards.

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<sup>2</sup> The Claimant testified that on September 29, 2015, the inspector arrived at the site and required that additional footers be installed, but according to Clmt. Ex. 9, the footers passed inspection on the 23<sup>rd</sup>. There is no evidence regarding additional footers.

12. The Claimant saw tags from the non-contact boards and believed the Respondent was using all non-contact boards to frame the deck. Two tags marked above ground were attached to a 2x8 board in the frame. The remaining tags were in a garbage bag.

13. On September 30, 2015, a county inspector did not pass the framing of the deck.<sup>3</sup>

14. On that same day, the Respondent's crew was working at the job site when the Claimant and the Respondent were on the telephone having a heated conversation about whether the boards were the wrong type. The Respondent brought his vendor, Jeffrey Schwartz, into the call to try to persuade the Claimant the boards were treated for ground contact. The Respondent also obtained a certification from the manufacturer of the boards proving the boards were treated for ground contact.

15. During the telephone conversation, the Claimant called the Respondent a liar several times, and a scam artist. The Respondent finally told him if he called him a liar once more, he would pull his crew and not finish the project. The Claimant told him he did not want the crew there any longer. The Respondent told his crew to move the materials to the side of the house, off of the driveway, but the Claimant, believing the crew was taking the materials with them, threatened to call the police. Once the Claimant threatened to call the police, the Respondent pulled his crew from the job site and did not return.

16. The project could have been completed in two more days, as the crew needed only to make a notch in one board to make the deck level, lay the decking boards and stair treads, add the railing, and complete the retaining wall. The cost to complete the contract was \$2,050.00.

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<sup>3</sup> The handwritten notes on the inspection sticker are either illegible or, if legible, are unclear in meaning, although the following phrases are clear: "nail notches," "receipt for ground contact," and "prove ground contact." Clmt. Ex. 5.

17. The Respondent called the Claimant a few days later to offer to finish the job, but did not get an answer or voicemail.

18. On December 14, 2015, the Claimants obtained an estimate from Fence & Deck Connection to completely remove the deck, the footers, and the concrete underneath the deck, excavate some of the dirt under the deck, and replace the entire deck in a slightly different design, for a contract amount of \$13,988.28. The Claimant received a credit of \$2,417.00 for some of the materials left by the Respondent on the job site. The work was completed and the contract was paid in full<sup>4</sup> on February 12, 2016.

### DISCUSSION

In this case, the Claimants have the burden of proving the validity of their 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)).

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>5</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.

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<sup>4</sup> Clmt. Ex. 14 shows the contract was paid in full in the amount of \$13,889.00, even though the contract price was \$13,988.28. The Claimant could not explain this discrepancy.

<sup>5</sup> Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 Replacement Volume.

Section 8-405 of the Business Regulation Article of the Maryland Code Annotated

provides:

(d) Denial of claim. -- The Commission may deny a claim if the Commission finds that the Claimant unreasonably rejected good faith efforts by the contractor to resolve the claim.

For the following reasons, I find that the Claimants have not proven eligibility for compensation.

The Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant. His employee, Matthew Hammond, proposed to build a deck on the Claimants' home by August 31, 2015, but the employee left the Respondent's business before the deck could be built. The Respondent agreed to oversee the job personally once he returned from vacation, after September 12, 2015.

The Claimants contend the Respondent's crew erroneously used above ground boards in building the frame of the deck, resulting in the deck not passing inspection. When the deck was not completed by September 30, 2015, the Claimants sought estimates from other builders. A few months later, they had another contractor demolish the existing frame, remove the footers, and completely replace the deck in a slightly different design. The Claimants argued that the Respondent walked off the job because he was facing the \$50.00 per day penalty.

The Claimant saw some labels in a garbage bag or attached to the ends of one board in the deck frame indicating the wood was for above ground use. After that, he believed all of the boards the crew was using were wrong. In fact, some of the boards sent to the job site were the wrong type and, on September 24, 2015, they were replaced with ground contact boards. The evidence was unclear as to whether any wrong type boards were actually left in the frame of the deck or, if so, were replaced, with the Claimant testifying he saw a 2x8 board with the above ground label in the deck frame and the Respondent disputing that testimony. The persuasive

evidence, however, showed that the vendor switched twenty 2x6 non-contact boards he had erroneously sent to the job because he did not realize how they would be used for contact boards. Consequently, the boards used in the deck framing were ground contact boards. The Respondent introduced not only a certificate from the company proving the boards were for ground contact application (Resp. Ex. 2), but he called the vendor, Jeffrey Schwartz, to testify that the boards were the correct type. Mr. Schwartz himself wrote the receipts for the lumber. Resp. Ex. 1.

To show the deck was not built in a workmanlike manner, the Claimants submitted proof that the deck framing did not pass inspection. (Clmt. Ex. 5.) The notes left with the inspection sticker were difficult to read, although I was able to read a few phrases. The Respondent believed he complied with the note regarding "receipt for contact" "proof for contact" by providing the Claimants with the certification proving the boards were for ground contact. There was no follow up county inspection which could have confirmed whether with that information, the inspector would have passed the deck.

In his photographs, the Claimant pointed out one board carrying the above ground label. (Clmt. Ex. 12.) He said it was a 2x8 board. In other photographs, labels could not be seen. (Clmt. Exs. 6 and 13.) He contended the other labels were moved by the crew and thrown into a garbage bag. However, because some above ground boards were used in parts of the frame that did not touch the ground and, as explained by the Respondent, the crew removed the labels and threw them into the garbage bag as part of their daily clean up, the fact that they were in the bag does not prove that incorrect boards were used.

The Respondent has been in the construction business for many years. He runs a large business throughout the State of Maryland. He is not new to this industry, but is an experienced contractor. He explained how little profit he stood to make from this job because most of the cost goes into labor and materials. He was not concerned about the \$50.00 per day penalty if the

job extended beyond September 30, 2015, because, he explained, rain days are built into any contract and they would have extended his time for finishing the deck. Furthermore, even if the penalty had been assessed, it was so small he was not concerned about it, he said. I found his testimony to be credible, detailed, and persuasive.

According to the Respondent, his crew complained to him regularly that the Claimant was interfering with their work by criticizing or questioning them. They told the Respondent they wanted to walk off the job. The Respondent asked the Claimant to let them do their job and they would build a quality deck that would pass inspection, but the Claimant constantly intervened, he said.

Things came to a head on September 30, 2015, when the deck was not yet completed. Someone on the crew gave the Claimant a packet of documents that included a quality checklist and, according to the Claimant, asked him to sign all of the sheets. (Clmt. Ex. 11.) The Respondent disputed that his crew would have asked the Claimant to sign the documents, because the documents were part of a standard packet and not all of the sheets, such as a blank change order, would even have applied to the Claimants. The Claimant and the Respondent engaged in an increasingly heated telephone conversation over the issue of whether the correct boards were used in the deck frame and the Respondent brought Mr. Schwartz into a three-way call to confirm the correct boards had been used. Once the Claimant refused to stop calling the Respondent a liar, the Respondent told him he would pull his crew if he called him a liar one more time. The Claimant said he did not want the crew there. At this point, the Respondent decided to pull out from the job.

The Respondent testified that at that point, the work to be completed was quick and easy compared to the rest of the job. He said it could have been done in, at most, two days, at a cost of \$2,050.00. He said he called the Claimants two or three days after the September 30, 2015

telephone call because he heard from his subcontractors the Claimants had called to ask them to finish the job. The Respondent was going to offer to finish the job and not be paid until the deck passed inspection. He got no answer to his call or voicemail that would have allowed him to leave a message. The Claimant did not rebut the Respondent's testimony about having called the subcontractors to ask them to complete the deck.

Regarding the kind of boards the Respondent used for the job, Jeffery Schwartz, President of the supply store where the Respondent bought the wood, corroborated his testimony that the correct boards were used. Mr. Schwartz recalled having to switch out twenty 2x6 boards because he had earlier misunderstood that they were going to have contact with the ground. He said he was specifically asked to get ground contact boards for this job. He also testified to the three-way telephone call on September 30, 2015 with the Claimant and the Respondent, where the discussion became heated. He did not recall what was said.

I conclude the Respondent's crew used the correct boards to frame the deck, leaving at most one or two non-contact boards in the frame. Given the size of the deck and the number of boards used in the frame, this is not a significant oversight that would justify a complete replacement of the deck, including the footers, which is what the Claimants ultimately chose to have done. Nor would such an oversight, if true, constitute unworkmanlike work by the Respondent.

Furthermore, the Respondent testified credibly that the Claimant was overly involved in the construction process, to the point that the crew complained about the Claimant interfering with the work. Along with Mr. Schwartz's corroboration of the heated telephone call, this also leads me to believe the Respondent's version of the telephone call on September 30, 2015, in which the Claimant called him a liar several times, would not back off from that insult, and threatened to call the police because he saw the Respondent's crew moving the materials still

lying on the driveway. I believe the Respondent when he said he decided it was no longer worth it to him to finish the job and did not want the police to be called. I also believe he tried to call the Claimants a few days later, to no avail.

In sum, I do not find the Claimants proved by a preponderance of the evidence that the Respondent engaged in unworkmanlike work in building the deck or that he walked away from the job. Accordingly, they are not entitled to compensation from the Fund.

Even if I were to find the Respondent's work on the Claimants' deck unworkmanlike, the Claimants would still not be entitled to an award, for the following reasons.

MHIC's regulations provide three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). Where a claimant has solicited 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).

In this case, the replacement contract was significantly greater than the original contract price, and there was no estimate to simply complete the job. Instead, Fence & Deck Connection proposed a complete replacement of the deck, using a different design, removal of the concrete slabs, a more expensive railing, and entirely new footers. There was no evidence showing why replacement was necessary or reasonable in this case and I do not find the cost of the replacement contract to be reasonable.

Instead, had I found the job was done in an unworkmanlike manner, I would have accepted the Respondent's testimony regarding the cost to complete the contract, which he

estimated to be \$2,050.00. Except for an inexpensive railing the Respondent said he would provide at no charge, the materials had already been purchased, so the cost was primarily for labor. The cost included installing the railing (\$250.00), installing the retaining wall (\$600.00), and laying the decking boards and treads (\$1,200.00). Using the measurement set forth in COMAR 09.08.03.03B(3)(c), the actual loss would be measured as follows:

Amount paid under original contract	\$6,200.00
Plus cost to complete contract	<u>\$2,050.00</u>
	\$8,250.00
Minus contract price	<u>\$9,200.00</u>
Equals	(\$950.00)

Thus, the Claimants' actual loss would be a negative amount and they would not be entitled to compensation.

Additionally, the Respondent made a good faith effort to complete the contract by offering to finish the deck in the telephone call on September 30, 2015, but the Claimant told him he did not want the crew at the job site any longer and threatened to call the police if the crew attempted to remove materials from the site. Only at this point did the Respondent pull his crew, despite having produced satisfactory evidence that the boards used for the deck frame were contact boards, which is what the Claimant demanded. Then the Respondent tried to call the Claimants a few days later to offer to complete the deck, with an intention of waiting for final payment until the deck passed inspection. The fact that the Claimants called the Respondent's subcontractors to ask them to finish the deck shows they would have been satisfied with the deck framing built by the Respondent. Thus, I find the Claimants' refusal to work with the Respondent to be unreasonable. Accordingly, under section 8-405(d) of the Business Regulation Article of the Maryland Code Annotated, I would also recommend the claim be denied.

**PROPOSED CONCLUSION OF LAW**

I conclude that the Claimants have 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); COMAR 09.08.03.03A(3).

**RECOMMENDED ORDER**

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

**ORDER** that the Maryland Home Improvement Guaranty Fund deny the Claimants' claim; and

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

**Signature on File**

July 21, 2017  
Date Decision Issued

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Joy L. Phillips  
Administrative Law Judge

JLP/dlm  
#169056

**PROPOSED ORDER**

***WHEREFORE, this 21<sup>st</sup> day of August, 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.***

***Joseph Tunney***

***Joseph Tunney  
Panel B***

**MARYLAND HOME IMPROVEMENT COMMISSION**