

<p>IN THE MATTER OF THE CLAIM</p> <p>OF ALLISON JONES,</p> <p>CLAIMANT</p> <p>AGAINST THE MARYLAND HOME</p> <p>IMPROVEMENT GUARANTY FUND</p> <p>FOR THE ALLEGED ACTS OR</p> <p>OMISSIONS OF JAMES AMEND, JR.,</p> <p>T/A THE DECK AND FENCE</p> <p>COMPANY, LLC.,</p> <p>RESPONDENT</p>	<p>* BEFORE ALECIA FRISBY TROUT,</p> <p>* AN ADMINISTRATIVE LAW JUDGE,</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>*</p> <p>*</p> <p>*</p> <p>* OAH No.: LABOR-HIC-02-22-09843</p> <p>* MHIC No.: 22 (75) 371</p> <p>*</p>
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PROPOSED DECISION

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STATEMENT OF THE CASE

On March 31, 2022, Allison Jones (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund), under the jurisdiction of the Department of Labor (Department), for reimbursement of \$3,450.00 in actual losses allegedly suffered as a result of a home improvement contract with James Amend Jr., T/A The Deck and Fence Company, LLC. (Respondent). Md. Code Ann., Bus. Reg.

§§ 8-401 through 8-411 (2015).¹ On April 22, 2022, the MHIC issued a Hearing Order on the claim. On April 28, 2022, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On July 14, 2022, I conducted a remote hearing utilizing the Webex videoconferencing platform. *Id.* §§ 8-407(a), 8-312. Hope Sachs, Assistant Attorney General, Department, represented the Fund. The Claimant and her husband, James Jones, represented themselves. 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 (2021); Code of Maryland Regulations (COMAR) 09.01.03; and 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

Except where noted, I admitted the following exhibits into evidence for the Claimant:

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| Clmt. Ex. 1. | Complaint Form, September 20, 2021 |
| Clmt. Ex. 2. | Additional language the Claimant submitted with her Complaint, undated |
| Clmt. Ex. 3. | Photograph, deck beams, July 2021 |
| Clmt. Ex. 4. | Email chain between the Claimant and Respondent, September 25, 2020 – July 21, 2021 |

¹ Unless otherwise noted, all references to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.

- Clmt. Ex. 5. Prince George's County Inspection Division, Correction Order, August 3, 2021
- Clmt. Ex. 6. Email chain between the Respondent and the Claimant, July 21, 2021 – August 9, 2021
- Clmt. Ex. 7. Email from the Claimant to the Respondent, August 3, 2021
- Clmt. Ex. 8. Email from the Respondent to the Claimant, August 27, 2021, with Service/Repair Order attached, August 27, 2021
- Clmt. Ex. 9. Wells Fargo Home Projects Credit Card Application, May 26, 2020
- Clmt. Ex. 10. Contract Work Order: Deck & Patio, May 26, 2020
- Clmt. Ex. 11. Beltway Builders Inc., Estimate, March 10, 2022

I admitted the following exhibits into evidence for the Respondent.

- Resp. Ex. 1. Southern Pine Inspection Bureau, letter Re: Seasoning Checks in Timbers, June 18, 2015
- Resp. Ex. 2. Contract Work Order: Deck & Patio, May 26, 2020, with highlighted provision regarding pressure treated pine
- Resp. Ex. 3. Three photographs of the completed rear deck, undated
- Resp. Ex. 4. Prince George's County inspection record for permit number 23964-2020-01, September 9, 2020 – September 17, 2020

I admitted the following exhibits into evidence for the Fund:

- Fund Ex. 1. Notice of Hearing, May 10, 2022 and Hearing Order, April 22, 2022
- Fund Ex. 2. Maryland Department of Labor, Registration information for the Respondent, printed June 27, 2022
- Fund Ex. 3. Letter from MHIC to Respondent, April 7, 2022, Home Improvement Claim Form, March 31, 2022

Testimony

The Claimant testified and presented the testimony of her husband, James Jones.

The Respondent testified and presented the testimony of Stewart Braun, Managing Member, The Deck and Fence Company.

The Fund did not present any 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 01-86997.
2. The Respondent is a Managing Member of The Deck and Fence Company, LLC.
3. On May 26, 2020, the Claimant and the Respondent entered into a Contract for the construction of a deck on the rear of their home (Contract). Specifically, the Contract included the following language:

Install approximately 292 sq.ft. deck. Tear out and haul approximately 0 sq.ft. of deck/steps. The height of the deck is approximately 9 ft.

Conventional Framing: The deck will be built with a self-supporting framing structure. 6"x6" support posts with concrete footers attached to 2"x10" double beams, connected to 2"x8" joists, spaced 12 inches on center. All framing to be pressure treated pine #2 grade or better. The [Respondent] reserves the right to upgrade the size of beams and joists.

4. The Contract included a page titled "Contract Disclaimers and Buyer Acknowledgements." On that page, the Claimant initialed next to ten statements. One of those statements was:

Pressure Treated Pine: Pressure treated pine carries a limited lifetime warranty from the manufacturer, which only covers rot, fungal decay and termite damage. The warranty will not cover natural characteristics of pressure treated pine to cup, check, shrink, bow, twist, split or scratch. Additionally, it is common for pressure treated pine to have knots, wane and grading stamps. The [Respondent] is not be (sic) liable for replacement or service of lumber exhibiting these characteristics of pressure treated pine. These natural characteristics of pressure treated lumber can be especially prevalent during the lumber's initial acclimation period after installation. The Buyer understands that pressure treated pine requires regular annual maintenance, for aesthetics, durability and longevity (sic).

5. The Contract also included an attachment titled, "Standard Contract Terms, Conditions and Notices." That page contains the following language:

Warranty Exclusions: ... The [Respondent]'s workmanship warranty does not include labor for replacement of defective materials.

Material Warranties: The [Respondent] does not provide any guarantee or warranty on any material used. All materials used are warranted by the manufacturer of the material. In the event a customer has a material claim, [the Respondent] will provide to the buyer, upon request, the manufacturer's contact information.

6. The Contract price was \$12,000.00. The Contract required a \$600.00 down payment.

7. The Contract stated that construction shall begin approximately six to ten weeks from receipt of the scaled location drawing; and would be completed in approximately one week.

8. The Respondent completed the work as described by the Contract between September 11, 2020 and September 17, 2020.

9. On September 17, 2020, Prince George's County Department of Permitting, Inspections and Enforcement inspected the deck, closed the related permit and entered the inspection result of: "Final w/o U&O."²

10. The Claimant paid the Contract price in full.

11. In July 2021, the Claimant noticed that there were loose bolts in the deck, causing the railing to be loose, and the boards to squeak. After inspecting the deck, the Claimant also noticed that one of the support beams had a large, vertical crack. The Claimant emailed the Respondent about her concerns on July 18, 2021.

² Final without Use and Occupancy

12. On August 2, 2021, the Inspections Division of the Prince George's County Department of Permitting, Inspections and Enforcement issued a Correction Order that stated:

The discrepancies listed below require correction in order to pass inspection:

- (1) Loose bolts on railing, beams
- (2) Split support beam at landing

13. On August 3, 2022, the Respondent came to the Claimant's home and tightened the loose bolts. The majority of the bolts within the deck needed to be tightened.

14. On August 3, 2022, the Respondent provided the Claimant with the name and website information for the lumber company that supplied the beams for the Claimant's deck, Madison Lumber. The Claimant contacted Madison Lumber and the company responded that they did not find the beam to be covered by their warranty. The Claimant provided this information to the Respondent.

15. On August 27, 2021, the Respondent provided the Claimant with a service order to remove the beam and replace it with a new beam at a cost of \$500.00 to the Claimant. The Claimant declined the Respondent's service order offer.

16. On a date after August 27, 2021, but not specified in the record, the Claimant installed a concrete patio underneath the deck. The concrete from the patio surrounds the base of the beams.

17. On March 10, 2022, the Claimant got an estimate from Beltway Builders, Inc., to complete work on the deck. The estimate totaled \$3,450.00³ and included the following work:

Replace 3 deck posts that are cracked
2 posts surrounded by cement on three sides and open to small rock in area
1 post in grass
[Approximately] 9 [feet] high
6x6
Pressure treated wood

DISCUSSION

The Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. *Id.* § 8-407(e)(1); Md. Code Ann., State Gov't § 10-217 (2021); COMAR 09.08.03.03A(3). To prove a claim by a preponderance of the evidence means to show that it is “more likely so than not so” when all the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002).

An owner may recover compensation from the Fund “for an actual loss that results from an act or omission by a licensed contractor.” Bus. Reg. § 8-405(a); *see also* COMAR 09.08.03.03B(2) (“The Fund may only compensate claimants for 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.

The Position of the Parties

The Claimant filed a claim with the Fund for \$3,450.00. The claim reflected the estimate provided by Beltway Builders, Inc. to replace three beams. The Claimant and her husband detailed a difficult experience working with the Respondent to install their deck. They explained

³ The estimate included a 10% military discount bringing the total quoted to the Appellant for the work detailed to \$3,105.00.

that there were gaps in communication, materials delivered unexpectedly, postponed timelines and confusion. Ten months after the deck was completed, Mr. Jones testified that his mother-in-law leaned on one of the railings, and almost fell off the deck due to the railing being loose. After that, the Claimant and her husband inspected the entire deck and discovered that most of the bolts were loose, and one support beam contained a large, vertical crack. The Respondent did not offer assistance when the Claimant first contacted them. After the Respondent received a Correction Order from the Inspections Division of the Prince George's County Department of Permitting, Inspections and Enforcement, the Respondent provided a work crew to tighten the bolts on the deck. The crew came out and tightened the majority of the bolts at no cost to the Claimant.

The Claimant and her husband testified that they expected the Respondent to replace the beam that had cracked less than a year after the deck was installed. The Claimant provided a Correction Order issued by Prince George's County Department of Permitting, Inspections and Enforcement Inspections Division on August 3, 2021 stating that, in order to pass inspection, the "split support beam at landing" required correction. The Claimant provided photographs of the beam showing the vertical crack and testified that the Respondent should not have installed a beam in this condition, and should replace it at no cost.

The Respondent testified that he has been a licensed home improvement contractor and building decks for fifteen years. He explained that what happened to the Claimant's post, is a characteristic common to pressure treated pine, and why the Respondent's standard contracts includes language specific to pressure treated pine. The Respondent pointed to the provisions in the Contract, initialed by the Claimant, providing a limited lifetime warranty from the manufacturer that only covers rot, fungal decay and termite damage. The contract provision also explains that

pressure treated pine commonly has knots, wane, grading stamps and tends to cup, check, shrink, bow, twist, split or scratch.

The Respondent further explained that the term “check” as it applies to pressure treated pine refers to the type of crack seen in the Claimant’s posts. He explained that as the lumber acclimates to its environment, the wet chemical in the lumber will be drawn to the surface because the exterior cells of the lumber dry faster than the interior cells. As the chemical evaporates at the surface, cracks may occur. In the industry, these cracks are called “checks,” while a “split” refers to a crack that penetrates the entire piece of wood. He stated that checks do not pose a structural concern, but do sometimes cause a cosmetic concern with customers. Because checks form as the result of pressure-treated pine acclimating to its environment, the checks often appear shortly after installation. In response to these characteristics of pressure-treated pine, the Contract included language that neither the manufacturer’s warranty nor the Respondent would cover changes to the beam caused by checks, or replacement of lumber exhibiting checks. The provision also states that, “[t]hese natural characteristics of pressure treated lumber can be especially prevalent during the lumber’s initial acclimation period after installation.”

Despite the language in the contract, and the Respondent’s belief that the checks in the Claimant’s beam were not structurally significant, the Respondent did offer to replace three beams for \$500.00. The Respondent testified that the charge would cover the cost of the materials, but not the labor cost that was required to replace the beams. The Claimant declined the offer. The Respondent testified that because the Claimant has now installed a concrete patio underneath the deck, and surrounding the beams, the cost would greatly increase, as evidenced by the Beltway Builders, Inc., estimate. The Respondent testified that in the current condition, with the patio, the Respondent could not do the work required to replace the posts.

Finally, the Respondent testified that at the time the work on the deck was completed, in September 2020, the deck passed inspection and the open permit with Prince George's County was approved and closed. The Respondent explained that his office contacted Prince George's County and learned there was no current open or pending permit with Prince George's County, and therefore no need to "pass inspection" as alluded to on the Correction Order.

The Fund's position was that the Claimant did not meet her burden of proof by a preponderance of the evidence. The Fund did point out that despite the language in the Contract, if the Respondent had installed a defective material, the Respondent would be liable for its replacement. Here, however, the Fund argued that the Claimant did not establish that the beam was in a defective condition when it was used by the Respondent in September 2020. The Fund also argued that the Claimant did not establish that the current condition of the beam causes a structural concern, or raised a question of unworkmanlike performance. The Fund concluded that the current condition of the beam was an aesthetic, and not structural problem, and therefore did not recommend an award.

Analysis

In support of her claim for actual losses from the cracked support beam under her deck that was installed in September 2020, the Claimant submitted photographs, an estimate from Beltway Builders, Inc., and a Correction Order from Prince George's County. No representative from Beltway Builders, Inc., or Prince George's County Inspection Division appeared to testify at the hearing. It was not possible for the Respondent or the Fund to question the basis for Beltway Builders, Inc., estimate, or their position on whether the beams required replacement. Likewise, it was not possible for the Respondent or the Fund to question the County about its basis for completing the Correction Order, or whether there was a pending or open permit regarding the deck. Additionally, the Claimant did not present expert testimony to prove that the cracked

support beam was the result of the unworkmanlike, inadequate, or incomplete home improvement by the Respondent.

Although evidence in administrative hearings is not to be excluded solely because it is hearsay,⁴ it is inappropriate to consider what is essentially an expert opinion without the opportunity for the opposing party to question both the qualifications of the individual who gave the opinion and the basis for the opinion. This is especially relevant where the qualifications of the individuals, their knowledge, skill, experience, training, or education in the field of pressure treated pine and decking, is unknown.⁵

The Respondent credibly testified that the Respondent and Prince George's County inspected the deck at the conclusion of the project in September 2020, and there were no defects noted. Prince George's County approved the deck and closed the permit. The Respondent further testified that the checking found in the Claimant's post is characteristic of pressure-treated pine and does not pose a structural problem to the deck. The Respondent's testimony was corroborated by the fact that language explaining these characteristics of pressure-treated pine are included in their standard contract, and specifically excluded from any warranty. Despite that, the Respondent offered to replace the post at a cost of \$500.00 to the Claimant. The cost would have essentially split the cost of the post and labor between the Respondent and the Claimant. The Claimant declined the offer. Since that time, the Claimant has installed a concrete patio beneath the deck greatly changing the work that would be required to remove the old beam, and install a new beam.

⁴ COMAR 28.02.01.21(C).

⁵ COMAR 28.02.01.21(D).

I do not find the Claimant's evidence, including the documents presented as exhibits, outweigh the credibility of the Respondent's testimony and his exhibits. Therefore, she has not met her burden of proof, and I will deny the claim.

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 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 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.

October 11, 2022
Date Decision Issued

Alecia Frisby Trout

Alecia Frisby Trout
Administrative Law Judge

AFT/at
#201243

PROPOSED ORDER

WHEREFORE, this 4th day of November, 2022, 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.

Lauren Lake

Lauren Lake

Panel B

*MARYLAND HOME IMPROVEMENT
COMMISSION*