IN THE MATTER OF THE CLAIM	*	**BEFORE KIMBERLY FARRELL,**
OF JOHN ESCE,	*	**AN ADMINISTRATIVE LAW JUDGE**
CLAIMANT	*	**OF THE MARYLAND OFFICE**
AGAINST THE MARYLAND HOME IMPROVEMENT GUARANTY FUND FOR THE ALLEGED ACTS OR OMISSIONS OF LUKE ROUECHE, T/A STRUCTURED DESIGN AND BUILD, INC., d/b/a/ DECKS DEL SOL,	*	**OF ADMINISTRATIVE HEARINGS**
	*	
	*	
	*	**OAH No.: LABOR-HIC-02-19-24125**
RESPONDENT	*	**MHIC No.: 18 (75) 755**

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PROPOSED DECISION

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STATEMENT OF THE CASE

On September 27, 2018, John Esce (Claimant) filed a 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 Luke Roueche, trading as Structured Design and Build, Inc., d/b/a Decks Del Sol (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015). On July 26, 2019, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on December 3, 2019, at the Office of Administrative Hearings, 11101 Gilroy Road in Hunt Valley, Maryland. Bus. Reg. § 8-407(e). Shara Hendler, Assistant

Attorney General, Department of Labor (Department),[1] represented the Fund. The Claimant represented himself. Earl Jose Acquaviva, Jr., Esquire, represented the Respondent.

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 except as noted:[2]

CLMT #1	Printouts of eight photographs
CLMT #2	Email containing estimate for home improvement project, September 28, 2016[3]
CLMT #3	Printout of brochure on CertainTeed (CT) UnderShield Water Diversion System, undated[4]
CLMT #4	Contract between the Claimant and the Respondent, signed October 8, 2016
CLMT #5	Installation instructions for UnderShield Water Diversion System, undated[5]
CLMT #6	Printout of four photographs
CLMT #7	Printouts of 10 photographs with narration pages
CLMT #8	Not admitted
CLMT #9	Email between Claimant and Respondent, December 4, 2016 at 11:20 a.m., and Respondent and CT representative with Claimant copied, December 4, 2016 at 7:38 p.m.
CLMT #10	Printouts of forty-two photographs with narrative pages
CLMT #11	Email between the Claimant, the Respondent, and a CT representative, various dates beginning December 1, 2016, and ending December 12, 2017
CLMT #12	Letter from CT to the Claimant, October 6, 2017

[1] On July 1, 2019, the Maryland Department of Labor, Licensing, and Regulation became the Department of Labor.
[2] The Claimant had pre-marked his exhibits. No exhibits 13 or 14 were offered or admitted, which is why the numbering jumps from 12 to 15.
[3] This proposal was for a different, lesser scope of work than the parties eventually agreed upon.
[4] The brochure is undated but has a copyright date of August 2016.
[5] The brochure is undated but has a copyright date of May 2017.

CLMT #13	No exhibit with this number (see footnote 2)
CLMT #14	No exhibit with this number (see footnote 2)
CLMT #15	Email exchange between the Claimant and CT representative, May 10, 2018
CLMT #16	Estimate from Long Fence, June 25, 2018

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

RESP #1	Respondent's response to MHIC inquiry, January 20, 2018, with attachments
RESP #2	Letter from Respondent to the MHIC, October 2, 2018

I admitted the following exhibits on behalf of the Fund:

FUND #1	Hearing Order, July 19, 2019
FUND #2	Notice of Hearing, September 3, 2019
FUND #3	Home Improvement Claim Form, signed August 12, 2018, received by MHIC September 27, 2018, with attached letter from the MHIC to the Respondent, September 27, 2018
FUND #4	MHIC licensing information for Respondent, printed November 25, 2019

Testimony

The Claimant and the Respondent testified.

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 80842, for the Respondent as an individual, and 122045, for his business.

2. The Claimant owns a home in Aberdeen, Maryland.

3. A decade or more before the events in this case, the Respondent built a deck for the Claimant and the Claimant was happy with the Respondent's work.

4. A contractor other than the Respondent constructed a system under the deck which served as a ceiling of sorts so that the space under the deck could be used as an outdoor living space or for storage. The system used soffit material in an unconventional manner to catch water (such as rain or snow melt) that would otherwise fall and drain through the deck and to divert it in a controlled manner to keep the space under the deck dry.

5. The system worked well for a while, but after about seven years it collapsed.

6. The Claimant contacted the Respondent about replacing the collapsed system. Initially, the Claimant intended to use insurance money to install a new system and he planned to have only part of the area under the deck addressed in the scope of work.

7. The Respondent sent a proposal for this project. It included the following language: "No warranty against leaks (we should discuss, these systems are best done at time of deck install there are some limitations)."[6] At the time of this proposal, the Respondent was uncertain what brand of product he would use.

8. Subsequently, the Claimant decided to have the entire underside of the deck included in the scope of work. On October 8, 2016, the Claimant and the Respondent entered into a contract for home improvement. It called for the Respondent to "remove and haul away existing soffit/drain system under deck" and replace it "with CertainTeed Underdeck Shield." A new gutter was included as part of the scope of work. The gutter was part of the overall project but was not a CT product. Although not mentioned in the contract, the Respondent also tore down and hauled away a small shed as part of the job.

9. The Respondent knew that the Claimant wanted the area under the deck to stay dry and the Respondent selected CT as the product to be used for the project. The Respondent discussed with the Claimant that there might be some water intrusion under the deck at the house wall.

10. Around the time the contract was signed on October 8, 2016, the Respondent provided to the Claimant a brochure about CT UnderShield Water Diversion System. The pictures in the brochure show underdeck areas with CT products installed and what appears to be upholstered and wicker furniture and tables with knickknacks. The brochure makes frequent

[6] CLMT #2.

mention of providing a dry space, such as "a...vinyl shield and ceiling system...turns an unsightly deck underside into a dry, beautiful ceiling, creating limitless options for new exterior living spaces." Further phrases include "dry by design," "channels that discreetly collect and drain precipitation away from under your deck, leaving the space dry and comfortable," and "[c]reate a dry patio space under the deck and extend usable living space."[7]

11. In extremely small print the brochure also provided some additional information:

> The UnderShield product is designed as a water diversion system under normal weather conditions; however, it is not a waterproof roof system. Proper cleaning and flushing of debris by the property owner is important to allow the rain water to flow unobstructed to the exit point and to not create excess weight buildup ... During periods of extreme rainfall or wind-driven rain, the system can temporarily experience minor drips. Occasional droplets of the underside also could result from normal condensation. Having a qualified professional install and follow the installation instructions carefully is necessary for best performance.[8]

12. The original agreed-upon Contract price was $10,000.00.

13. Work commenced on or about November 7, 2016 and was completed on November 11, 2016. The Respondent was on-site when most of the work was done.

14. When the job was complete, the Claimant finished paying the contract price in full.

15. During installation, the pitch of the CT panels is set by clips that are attached to the deck. If the deck is not level, which can be caused by settlement or other factors, it affects the pitch and the flow of water. During installation, the Respondent made sporadic checks to see if the deck was level.

16. At the end of November 2016, there was appreciable rain for the first time since installation. The CT system leaked in numerous places in two different ways. It leaked down through or between the panels that had been installed to channel the water. It also leaked at the

[7] Claimant #3, pg. 3.2.
[8] Claimant #3, pg. 3.2.

ends of the panels. The water was supposed to be channeled towards the gutters and then drip off the ends of the panels into gutters. Instead of the water rolling or dripping off the ends of the panels, it was curving around the ends of the panels and running back along their underside – the portion that was supposed to remain dry and be the visible "ceiling" in the underdeck area – and then dripping. These drips were sometimes to the ground and sometimes ran along the outside of the gutters and then dripped from there. There were also places where the water transferred from the panels to the outside of the gutter because the gutters touched the panels

17. The Claimant notified the Respondent of the problem on or about November 30, 2016.

18. The next day the Respondent went to the Claimant's house. The Respondent used the Claimant's garden hose to run water on the deck to test the system. The system did not leak.

19. The Claimant has controls on his garden hose to monitor and control the amount of water used. The amount of water sprayed on the deck by the Respondent was modest.

20. On December 6, 2016, it rained again and the system again leaked. After that, the system leaked any time there was even moderate rain. The leaking and dripping would last two to three days each time. It repeatedly soaked and eventually stained furniture cushions the Claimant had under the deck.

21. On or before December 1, 2016, the Respondent contacted CT to lay the groundwork for a claim. The Respondent wrote an email summarizing the conversation on December 1, 2016. He indicated in the email that he and the Claimant's spouse would keep a watchful eye when it rained to see what developed.

22. The Respondent did not follow up with CT until May 25, 2017, after the Claimant again complained about the amount of water dripping under the deck.

23. The Respondent and a CT representative arranged to meet at the Claimant's home on June 8, 2017, to "review" the Claimant's "concern."[9] After the meeting, per CT's request, the Claimant sent pictures on June 11, 2017, showing the leaks in pictures taken in December 2016 and May 2017. In accompanying email correspondence, the Claimant noted that although it would seem from the pictures that the leaking was being caused by overflow in the gutters, that was not the case; there was leaking over the outside of the gutters even though the rain was not hard and the gutters were not full of water. Many of the leaks occurred where the CT and gutter made contact with each other.

24. The Claimant did not hear anything from CT or the Respondent by June 29, 2017, so he sent an email to the Respondent to check on the status of his complaint. The Respondent promptly answered that he followed up with CT by leaving a voicemail message and sending an email.

25. The Claimant did not hear anything further by July 22, 2017, so he sent another email to the Respondent. The Claimant received an email two days later from the CT representative advising that he had spoken to the Respondent and that CT had "delays that were beyond [their] control" and would hope to give some answer by the following week.

26. The Claimant did not hear anything and sent an email to the Respondent and the CT representative on August 16, 2017. By this time, the leaks were worsening. The Respondent sent an email to the Claimant that day advising that the CT representative would call the Claimant on August 17, 2017.

27. The Claimant did not hear anything further from the Respondent or from CT. On September 27, 2017, the Claimant sent an email expressing his frustration that CT and the

[9] CLMT #11, pg. 11.7, email of May 26, 2017 at 7:47 a.m.

Respondent were "just blowing [him] off after stretching out a response and action for a year."[10] He reiterated that the problem was obvious days after installation and that he was not getting anywhere in having the problem solved.

28. The Respondent sent an email in response stating that his last involvement was a discussion with the CT representative on August 16, 2017, and that the CT representative was supposed to call the Claimant on August 17, 2017.

29. By letter dated October 6, 2017, CT notified the Claimant that its product:

> ...is designed as a water diversion system under normal weather conditions; however, it is not a waterproof roof system. Proper cleaning and flushing of debris by the property owner is important to allow the rain water to flow unobstructed to the exit point and to not create excess weight buildup on the surface of UnderShield. The system can temporarily experience minor drips. Occasional droplets on the underside also could result from normal condensation. Flashing, pitch, and proper clip placement play important roles in the effective performance of the water diversion system.
>
> As indicated above, water leakage is not a concern/condition that is covered under our material warranty. Due to the warranty and the nature of the concern, we cannot accept any responsibility for the water penetration problems on the above property, as the problem is not the result of any manufacturing defects in the material.
>
> . . .
>
> [W]e do not make a determination or speculation [sic] as to the cause of the water leakage. Any questions about this condition should be directed to the installer, builder, or the local building code body.[11]

30. Upon receiving the letter, the Claimant emailed the Respondent expressing his dissatisfaction. When the Respondent was not responsive to the first email, the Claimant, on November 26, 2017, sent a longer, more pointed email threatening legal action and bad reviews on social media sites if he did not get satisfaction from the Respondent.

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[10] CLMT #11, pg 11.4, email of September 27, 2017 at 8:19 pm.
[11] CLMT #12.

31. The email exchange continued, with escalating anger from the Claimant, until, on December 12, 2017, the Respondent advised via email that he had fulfilled his obligation to the Claimant.

32. The Claimant landscaped the area around the underdeck area after the CT UnderShield Water Diversion System was installed. He also made other improvements to the underdeck area. These did not adversely affect the performance of the CT and gutter.

33. At some point, the Claimant tried adding a bead of stick-on insulation[12] to try to stop some of the leaking along the gutter. It neither adversely impacted the performance of the CT UnderShield Water Diversion System and gutters nor stopped the leaking.

34. At some point, the Claimant enclosed a portion of the underdeck area. He, in effect, installed a gutter under the one that was installed by the Respondent to catch the water that was running down the outside of the gutters installed as part of the project. The Claimant used a large plastic tub to collect the water from his secondary gutter. From a moderate storm, the Claimant would catch two to three gallons of water that would otherwise have leaked down into what was just one small portion of the space that was supposed to be dry.

35. The Claimant called ten contractors to try to obtain estimates to repair or replace the CT UnderShield Water Diversion System., and three never responded. Three companies declined to come to the property as they were not interested in the project. Four came to the property and declined to bid on the project. CT tried to intervene and find a contractor willing to assist the Claimant in rectifying the underdeck problem, but that was not fruitful.

36. Eventually the Claimant was able to obtain one estimate. Long Fence proposed to install approximately 528 square feet of Zip-it Underdecking System for $10,500.00. It would charge an additional $800.00 to remove and haul away the CT system.

[12] This was a product the Claimant tried to use to redirect or stop water leakage around the gutter.

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).[13] "[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)[14]; *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, and the Respondent performed unworkmanlike or inadequate home improvements.

There are essentially four possibilities in this case. The first is that the unconventional soffit system that worked was a fluke and there is really no reasonable means to confidently make the area under the deck a dry space with existing systems or materials. If this is the case, the Respondent should have told the Claimants plainly that this was the case and not agreed to a

[13] As noted above, "COMAR" refers to the Code of Maryland Regulations.
[14] Unless otherwise noted, all references to the Business Regulation Article herein cite the 2015 Replacement Volume of the Maryland Annotated Code.

contract that would provide protection clearly short of what was expected at a cost of $10,000.00. To do otherwise would be to provide inadequate home improvement.

The second possibility is that the space could reasonably be made dry, but the Respondent chose poorly in recommending CT as the system to use. Long Fence recommended a different product, Zip-it, to achieve the desired level of dryness. I have no evidence before me to evaluate what product should have been selected, but there is no question that it was the Respondent who chose the CT system from among those available. If the Respondent chose a system incapable of providing the expected performance when others were available that would have kept the underdeck space dry, that is inadequate home improvement.

Another possibility is that the CT was suitable as a system to keep the area under the deck dry, but it was not installed properly. The Claimant believes that this is likely, and he produced evidence supporting this theory. Specifically, he testified that the CT system was installed first, followed by the gutters. The manufacturer's installation instructions note that if one is finishing an end with a gutter system "it is easier to install [the gutter] before installing panels. Be sure the panels will clear the gutter and any hardware used to install it."[15] The Claimant believes that in installing the gutter at the end, the Respondent and the person helping him pushed the ends of the panels farthest from the house up slightly. The Claimant was present and watching as this was done. The panels should have been on a slope from a high side at the house to a lowest point where it was supposed to drip into the gutters. The Claimant noted that this small error would account for most of the problems he observed. It could have been the cause of the leaking several feet in from the outer edges of the panels, as the water would not have the benefit of gravity to help it fall into the gutters and would instead have pooled. It would also have explained why the water did not fall off the CT panels into the gutters. In some places

[15] CLMT #5, pg. 5.4.

it rolled over the edge and ran down what was supposed to be the dry side and in other places, where the gutters touched the panel edges, it ran down the outside of the gutters.

The Respondent noted that he did not install flashing as recommended by the manufacturer because he would have had to remove the deck boards to do so. He mentioned that the CT system was only as good as the deck it was attached to, a reference to a need for the deck to be level, but he made only sporadic checks to make sure the deck was level and at some points seemed to argue that it probably was not. In addressing the Claimant's suggestion that the gutters were pushed too firmly up in installation, the Respondent testified that he did not think the gutter was "overwhelmingly" pressed against the panels, but that he wanted a tight fit to keep wildlife, especially birds, out.

The Respondent noted that he promptly visited the Claimant's property as soon as he was notified that there was a problem, and that is true, but his efforts overall were paltry in the face of the problems experienced by his customer as a consequence of a project he (the Respondent) installed. The Respondent sprayed a modest amount of water over the deck and did not create a leak. At that point he immediately started laying the groundwork for a warranty claim against CT. Despite the continuing and worsening nature of the water leakage under the Claimant's deck, the Respondent did not revisit the property for six months, when he came accompanied by a CT representative.

The Respondent asked somewhat rhetorically at the hearing what more he could have done because if he could not create a leak, he could not fix it. First, he could have used more water to try to create a leak that he could observe. An even more obvious answer is that he could have gone when it was raining and observed firsthand exactly the nature of the problem. The Respondent had never seen the capillary action drips, because he never went out when it was dripping. There is no doubt the leaking occurred because the Claimant has many pictures taken

over a broad span of time. In testimony and argument, the Respondent downplayed the volume of the leaks, largely characterizing them as "a few drips." The Claimant's testimony and numerous exhibits belie this characterization. This was a problematic amount of leakage in an area that was supposed to be usable as an outdoor living space.

The Claimant offered pictures showing, using levels and rulers, that there were problems with the pitch of the CT panels. The Respondent argued that the Claimant was not an expert and his testimony and theories about this project should be dismissed. While it is true that the Claimant was never qualified as an expert in home improvement, cross-examination by the Respondent as well as testimony by the Claimant made it clear that he had extensive experience doing substantial home improvement projects on his property. He also did a lot of research to understand how the CT system was supposed to be installed and how performance was related to installation. Due to his practical experience, and since he undertook to investigate this matter thoroughly in an attempt to abate it, I give substantial weight to his testimony. I also note that although the Respondent has many years of experience and a good record with the MHIC, he did not seek qualification as an expert in the hearing before me. Were I to refuse to consider certain parts of the Claimant's testimony because he is not an expert, I would have to apply that same rule to the Respondent and decline to consider much of his testimony. Declining to consider significant portions of the testimony of both the Claimant and the Respondent would not be helpful in evaluating all the evidence.

I noted earlier in the discussion that there were essentially four possibilities. Three have been discussed: the project should not have been undertaken because of a low likelihood of success, the project should have been undertaken using a different product, and the product was appropriate for this application, but there were installation issues. In any of these scenarios, the Respondent performed inadequate or unworkmanlike home improvement.

The fourth possibility is that there was some defect in the CT materials that caused the leaking. The Respondent was quick to initiate a warranty claim with the manufacturer, doing so just a day or two after he was notified there was a problem; however, nowhere in the record does the Respondent suggest any specific defect or failure of the materials. Nowhere in the documentary evidence, which includes emails between the Claimant and the Respondent and emails between the Respondent and the CT representative, does the Respondent point to any perceived shortcoming in the CT system or its hardware. The Claimant testified that the Respondent never expressed to him any opinion that the product was defective in any specific way. At the hearing, when asked in cross-examination how he would explain the leaking, the Respondent stated that after he could not make it leak with the hose, he thought it might be a product problem, but there is no evidence he made any effort to find out. CT investigated and determined that there was no defect in the materials. For all these reasons I find it unlikely that a product defect caused the leaking at the Claimant's home.

I find by a preponderance of the evidence that the Respondent performed inadequate and/or unworkmanlike home improvement and as a result, the Claimant suffered an actual loss. The initial situation was exacerbated by how little the Respondent did for the Claimant to try to rectify the matter. He went to the house one time, made a half-hearted effort to create a leak, filed a warranty claim, and then waited until May, when the Claimant contacted him again before doing anything more. He then came back out with a CT representative, followed by months of doing nothing but emailing or calling CT when the Claimant made contact.

I find that the Claimant is eligible for compensation from the Fund, so I must determine the amount of the Claimant's actual loss and the amount, if any, that the Claimant is entitled to recover from the Fund. 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). The Claimant in this matter is not seeking compensation for any of these prohibited categories. 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 intends to retain another contractor to 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).

The Claimant paid $10,000.00 to the Respondent. The estimate from Long Fence is for $11,300.00: $10,500.00 to install a new underdecking system and $800.00 to remove and haul away the CT system. Applying the formula, the Claimant's actual loss is $11,300.00.

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 of $11,300.00 exceeds the amount paid to the Respondent. Therefore, the Claimant's recovery is limited to $10,000.00, the amount paid to the Respondent. Bus. Reg. § 8-405(e)(5); COMAR 09.08.03.03B(4).[16]

[16] As noted above, the Respondent tore down and hauled away a shed for the Claimant in addition to the work specified in the home improvement contract. Because it is not mentioned in the contract and based on the Respondent's testimony that he just threw that in because he was doing other work for the Claimant, I have not assigned a dollar value to that task, and accordingly I am crediting the full $10,000.00 the Claimant paid to the Respondent as applying to the tear out and hauling of the soffit system and installation of the CT.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual loss of $11,300.00, but a compensable loss of $10,000.00 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) and (4). I further conclude that the Claimant is entitled to recover $10,000.00 from the Fund. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(c) and (4).

RECOMMENDED ORDER

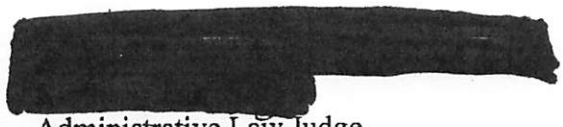
I **RECOMMEND** that the Maryland Home Improvement Commission:

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant $10,000.00; 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;[17] and

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

January 29, 2020
Date Decision Issued


Administrative Law Judge

KF/cmg
Document # 184181

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

IN THE MATTER OF THE CLAIM OF JOHN ESCE	*	**MARYLAND HOME IMPROVEMENT COMMISSION**
	*	
AGAINST THE MARYLAND HOME IMPROVEMENT GUARANTY FUND FOR THE ACTS OR OMMISSIONS LUKE ROUECHE t/a STRUCTURED DESIGN AND BUILD d/b/a DECKS DEL SOL	* * *	**MHIC CASE NO. 18(75)755 OAH CASE NO. LABOR-HIC-02-19-24125**

* * * * * * *

FINAL ORDER

This matter was originally heard before an Administrative Law Judge ("ALJ") of the Office of Administrative Hearings ("OAH") on December 3, 2019. Following the evidentiary hearing, the ALJ issued a Proposed Decision on January 29, 2020, concluding that the homeowner, John Esce ("Claimant") proved that he sustained an actual loss as a result of the acts or omissions of Luke Roueche t/a Structured Design and Build d/b/a Decks del Sol ("Contractor"). *ALJ Proposed Decision* p. 16. In a Proposed Order dated January 22, 2020, the Maryland Home Improvement Commission ("MHIC" or "Commission") affirmed the Proposed Decision of the ALJ to grant an award from the Home Improvement Guaranty Fund. The Contractor subsequently filed exceptions to the MHIC Proposed Order.

On August 6, 2020, a three-member panel ("Panel") of the MHIC held a remote hearing on the exceptions filed in this matter. Both the Claimant and the Contractor participated without counsel. Assistant Attorney General Hope Sachs appeared at the exceptions hearing to present evidence on behalf of the Guaranty Fund. The following preliminary exhibits were offered by AAG Sachs and admitted into evidence at the exceptions hearing: 1) April 6, 2020 transmittal letter; 2) OAH Proposed Decision; 3) MHIC Proposed Order; 4) Contractor's exceptions; 5) April 29, 2020 hearing notice; 6) Claimant's remote hearing consent; and 7) Contractor's remote hearing consent. The Contractor offered five exhibits, the following three of which the Commission

admitted because they were presented during the OAH hearing: 1) UnderShield promotional materials; 2) September 28, 2016 email; and 5) photograph of Claimant's deck. Neither the Claimant nor the Contractor produced a copy of the transcript of the hearing before the ALJ. The Contractor sought to introduce new evidence but he failed to demonstrate that the documents he wanted in evidence were not, and could not have been, discovered before the OAH hearing. Therefore, the Panel's review of the record was limited to the preliminary exhibits offered by AAG Sachs at the exceptions hearing, the OAH Proposed Decision and the exhibits admitted into evidence at the OAH hearing. COMAR 09.01.03.09(G) - (I).

The claim in this proceeding relates to the Contractor's installation of a replacement underdecking system on the Claimant's deck following the collapse of an underdecking system installed by another contractor. The ALJ found that the Contractor improperly installed the underdecking system causing it to leak when it rains.

On exception, the Contractor argued that the evidence does not support the ALJ's factual findings as to the potential reasons why the underdecking leaks. The Commission disagrees.

The Contractor argued that the ALJ erred in relying on the guidance of CertainTeed, the underdecking paneling manufacturer, that it is easier to install a gutter to catch the water from the panels before installing the panels (which the Contractor did not do), *ALJ Proposed Decision* p. 11, to find that his performance was inadequate because CertainTeed's guidance was merely a recommendation. However, the record includes additional evidence that the installation of the gutter after the underdecking panels caused the leaking, including the Claimant's testimony that the Contractor pushed the ends of the panels up when he installed the gutter, thereby preventing water from flowing away from the house and into the gutters, that water rolled over the edge of the paneling and behind the gutters, and that water ran down the outside of the gutters where the

panels touched the gutter. *ALJ Proposed Decision* p. 11-12.

The Contractor also argued that the ALJ's finding of fact number 11, that the CertainTeed underdecking product brochure's warning that extreme rainfall or wind-driven rain may cause the product to "temporarily experience minor drips" was in extremely small print was erroneous. In support of this argument, the Contractor presented the Commission with copies of two pages excerpted from the OAH hearing record, the first of which was a printout from the CertainTeed UnderShield Water Diversion System internet product page from January 21, 2018, and the second of which was a page from the UnderShield product brochure the Contractor gave to the Claimant around the time the parties executed their contract in October 2016. Exceptions Hearing Respondent's Exhibit 1. The Commission agrees with the ALJ's finding that the warning in the product brochure is extremely small, as the text of the warning is approximately half the size of the text immediately above it. The fact that the UnderShield internet product page included a similar warning on January 21, 2018, does not contradict the ALJ's finding. In addition, the size of the warning about temporary minor drips during extreme weather and even whether the Claimant saw the warning before deciding to contract with the Contractor are irrelevant, as the ALJ found that, starting on December 6, 2016, the underdecking leaked "any time there was even moderate rain" and that the "leaking and dripping would last two to three days each time." *ALJ Proposed Decision* p. 6.

The Contractor also argued that the ALJ's finding of fact number 33, finding that the Claimant added a bead of stick-on insulation to prevent leaking along the gutter at the end of the underdecking, mandated a conclusion that the Claimant caused the underdecking to leak. The Commission disagrees. The ALJ found that the Claimant applied the insulation "to try to stop some of the leaking along the gutter," which indicates that the leaking was occurring before the

Claimant applied the insulation and therefore the insulation did not cause the leaking.

The Contractor also argued that the ALJ erred in relying on a single estimate, OAH Hearing Claimant's Exhibit 16, for the installation of a different underdecking product to calculate the Claimant's actual loss. The Commission sees no error. There is no requirement that a claimant present more than one estimate to prove the cost to correct a defective home improvement, and the Commission does not see any reason that the Claimant's estimate was unreasonable or unreliable. To the contrary, the estimate to remove and replace the underdecking system installed by the Contractor was issued 20 months after the original contract and was only13 percent higher than the original contract price.

The Contractor also argued that the ALJ erred by qualifying the Claimant as an expert witness but declining to qualify him as an expert witness because he has extensive experience in the home improvement industry and the Claimant is a scientist with only minor experience working on his own home. However, the ALJ did not qualify the Claimant as an expert, rather, she expressly stated that she did not qualify the Claimant as an expert but found his testimony to be credible because of his research on underdecking and experience with home improvement projects. In addition, the ALJ stated that the Contractor did not seek qualification as an expert, *ALJ Proposed Decision* p. 13, and the Contractor did not provide the Commission with a transcript of the hearing before the ALJ, so there is no evidence before the Commission demonstrating that he did seek qualification as an expert.

Having considered the parties' arguments, the evidence contained in the record, and the ALJ's Recommended Decision, it is this 13th day of August 2020, **ORDERED:**

A. That the Findings of Fact of the Administrative Law Judge are **AFFIRMED**;

B. That the Conclusions of Law of the Administrative Law Judge are **AFFIRMED**;

C. That the Proposed Decision and Recommended Order of the Administrative Law Judge is **AFFIRMED;**

D. That the Maryland Home Improvement Guaranty Fund award the Claimant **$10,000.00;**

E. That the Contractor is ineligible for a Maryland Home Improvement Commission license until the Contractor reimburses the Guaranty Fund for all monies disbursed under this Order, plus annual interest of ten percent; and

F. That the records and publications of the Maryland Home Improvement Commission shall reflect this decision; and

F. Any party has thirty (30) days from the date of this Final Order to appeal this decision to Circuit Court.

Joseph Tunney
Chairperson –Panel
Maryland Home Improvement Commission

STATE OF MARYLAND
DEPARTMENT OF LABOR

REFUND REQUEST FORM

AGENCY: **OCCUPATIONAL & PROFESSIONAL LICENSING** PCA CODE: **64152**
AGENCY CODE: **340601** FUND: PROGRAM CODE: COMPLAINT **#: 18 (75) 755**

PAYEE:

John Esce
1704 Church Point Court
Aberdeen, MD 21001

LICENSE # **01-80842**

SSN **105-44-1584**

REFUND AMOUNT: **$10,000.00**

SOURCE CODE: **7101**

REASON FOR REFUND: **GUARANTY FUND PAYOUT**

APPROVED BY:

DATE: **August 26, 2020**

TITLE:

David Finneran
Executive Director

Maryland
DEPARTMENT OF LABOR

Division of Occupational And Professional Licensing
Maryland Home Improvement Commission
500 N. Calvert Street Room 306
Baltimore, MD 21202-3651

August 26, 2020

Luke Roueche
Decks del Sol t/a
Structured Design & Build Inc
4515 Hydes Road
Hydes, MD 21082

RE: Case No. 18 (75) 755

Dear Luke Roueche:

As you were previously notified, the Maryland Home Improvement Commission has issued a Home Improvement Guaranty Fund award in the amount of **$10,000.00 to *John Esce,*** the **claimant** in the above referenced case. **The order in this case has become final, and all periods of appeal have expired. Therefore, your license from the Commission has been placed under suspension.**

If this Guaranty Fund award amount is reimbursed to the Commission within thirty (30) days, no further collection activity will be initiated. If you pay within the next thirty (30) days, please submit your check, with your MHIC license number noted on it, in the enclosed envelope. If this Guaranty Fund award is not reimbursed within the thirty (30) day period, your account will be transferred to the State Central Collection Unit. You may be assessed 10% annual simple interest on any unpaid Guaranty Fund debt. In addition, the State Central Collection Unit may assess a 17% collection fee, and you may be liable for attorney fees or court costs related to collection of your debt. The State Central Collection Unit also has authority to intercept any Maryland state income tax refund due to you, in order to apply it to a Guaranty Fund debt.

You are advised that, until all debts related to this Guaranty Fund award are paid, any licenses issued to you by this Commission are **Suspended**, and it is illegal for you enter into any additional home improvement contracts in the State of Maryland. You are also advised that, in addition to payment of the Guaranty Fund debt, the law requires that you take and pass the licensing examination before you are eligible for reinstatement of a license.

Sincerely,

Tenaea Thomas

Tenaea Thomas
Panel Secretary
Maryland Home Improvement Commission

Maryland
DEPARTMENT OF LABOR

Division of Occupational And Professional Licensing
Maryland Home Improvement Commission
500 N. Calvert Street Room 306
Baltimore, MD 21202-3651

August 26, 2020

John Esce
1704 Church Point Court
Aberdeen, MD 21001

RE: Complaint/Claim: 18 (75) 755

Dear John Esce:

This is to inform you that the Proposed Order has become final. The Maryland Home Improvement Commission has directed payment for ***$10,000.00*** from the Home Improvement Guaranty Fund.

Please allow six (6) to eight (8) weeks from the date of this letter to receive the award from the State Treasury. If you have any questions concerning this matter, please feel free to contact this office at 410-230-6178.

Very truly yours,

Tenaea Thomas

Tenaea Thomas
Panel Secretary
Maryland Home Improvement Commission