

IN THE MATTER OF THE CLAIM
OF PETER VONDERHEIDE,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF TIMOTHY
CHAMPION,
T/A PROFESSIONAL
IMPROVEMENTS, LLC,
RESPONDENT

* BEFORE WILLIS GUNTHER BAKER,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
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* OAH No.: DLR-HIC-02-18-20834
* MHIC No.: 17 (75) 523
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PROPOSED DECISION

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STATEMENT OF THE CASE

On July 25, 2017, Peter Vonderheide (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$20,250.00 in actual losses allegedly suffered as a result of a home improvement contract with Timothy Champion, trading as Professional Improvements, LLC (Respondent). Md. Code Ann.,

Bus. Reg. §§ 8-401 through 8-411 (2015). On July 2, 2018 the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on November 9, 2018 at the Tawes State Office Building, Department of Natural Resources, 580 Taylor Avenue, Annapolis, Maryland. Bus. Reg. § 8-407(e). Nicholas Sokolow, Assistant Attorney General, Department of Labor, Licensing, and Regulation (DLLR), represented the Fund. The Claimant represented himself. Christopher Drummond, Esquire, represented the Respondent, who was present.

The contested case provisions of the Administrative Procedure Act, the DLLR'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. 2018); 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 joint exhibit on behalf of the Claimant and the Respondent:

Jt. Ex. 1 – Complete Contract, including options and change orders, various dates

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

Clmt. Ex. 1 - September 16, 2015 Contract, pgs. 1-10 (incomplete)

Clmt. Ex. 2 - Undated addendum signed by the parties

Clmt. Ex. 3 – October 26, 2018 DLLR Order to the Respondent requesting response to complaint

- Clmt. Ex. 4 - November 3, 2016 letter from Anne Arundel County to the Respondent re: code violations
- Clmt. Ex. 5 - November 28, 2016 letter from the Respondent's attorney to the Claimant
- Clmt. Ex. 6 - February 16, 2017 letter from the Respondent to Anne Arundel County
- Clmt. Ex. 7 - April 18, 2017 Final Notice from Anne Arundel County to the Respondent
- Clmt. Ex. 8 - August 3, 2017 letter from DLLR to the Respondent advising of claim and requesting response
- Clmt. Ex. 9 - Location drawing for Claimant's property
- Clmt. Ex. 10 - Photo of Claimant's floor joists
- Clmt. Ex. 11 - Claimant's drawing of the floor of the Addition
- Clmt. Ex. 12 - International Residential Code excerpts
- Clmt. Ex. 13 - Six photographs of the Claimant's property taken at various times
- Clmt. Ex. 14 - February 18, 2016 Contract amendment
- Clmt. Ex. 15 - Sixteen photographs of the Claimant's property taken at various times
- Clmt. Ex. 16 - June 29, 2017 Estimate form Annapolis Remodeling Company
- Clmt. Ex. 17 - September 8, 2016 Servpro invoice
- Clmt. Ex. 18 - Floor plans of the Claimant's Addition

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

- Resp. Ex. 1 - December 7, 2016 letter from the Respondent to Anne Arundel County
- Resp. Ex. 2 - June 17, 2016 Building Inspection ticket
- Resp. Ex. 3 - June 13, 2016 photograph of rear and side of Addition
- Resp. Ex. 4 - June 13, 2016 photograph rear of Addition
- Resp. Ex. 5 - June 13, 2016 photograph side of Addition
- Resp. Ex. 6 - June 13, 2016 eight photographs of exterior of Claimant's Addition

Resp. Ex. 7 – August 26, 2016 six photographs of exterior of Claimant's Addition
I admitted the following exhibits on the Fund's behalf:

Fund Ex. 1 - OAH Hearing Notice

Fund Ex. 2 - June 28, 2018 DLLR Hearing Order

Fund Ex. 3 - Respondent's Licensing history

Fund Ex. 4 - August 3, 2017 letter from DLLR to the Respondent attaching the Claim Form

Testimony

The Claimant testified and presented the testimony of Michael William, Chief Building Inspector, Anne Arundel County Department of Inspections and Permits, accepted as an expert in the Anne Arundel County Building Code.

The Respondent testified on his own behalf and presented no other witness.

The Fund presented no 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 licensed as a home improvement contractor by MHIC.

2. On September 16, 2015, the Claimant and the Respondent entered into a contract (Contract) to build an extension and make other interior modifications of the Claimant's existing home (Addition).

3. The Respondent submitted plans to the Anne Arundel County Department of Inspections and Permits (Anne Arundel Department) reflecting the work agreed upon in the Contract and the Respondent was granted a building permit.

4. The original agreed-upon Contract price was \$77,776.00. There is no dispute that the all monies due under the contract and change orders were paid in full.

5. The Contract indicated an approximate start date of October 5, 2015 and a completion date of December 18, 2015, subject to potential delays beyond the Respondent's control. Work actually began in February 2016 and the Addition was essentially completed by May 2016.

6. The Contract stated that "All work done under this contract shall be done in good and workmanlike manner and in accordance with applicable building codes and plans." (Jt. Ex. 1, p. 4).

7. The Contract terms included "...rough backfill for positive drainage. Final grading, seeding and/or sodding by others." (Jt. Ex. 1, Exhibit A, item 26).

8. The Respondent installed 2 x 8 joists in the living room extension, instead of the 2 x10 joists that were in the approved drawings. The Respondent did not install the lateral bracing called for in the approved drawings that was required to lock joists together to prevent movement. These items have not been corrected.

9. The Respondent's drawings of the Addition, approved by the Anne Arundel Department, showed the appropriate grade for compliance with the building code, therefore proper grading was part of the building permit.

10. The Claimant's home is situated on a hill and the Addition was to the back of the house. The natural topography caused flow around the house to the back where the Addition was built.

11. In June of 2016, the Claimant experienced some flooding around the Addition.

12. On or about June 13, 2016, the Respondent returned to the Claimant's property to add additional dirt to attempt to add positive drainage away from the Addition.

13. Anne Arundel Department Inspector Ralph Sutherland issued a Building Inspection Permit on June 17, 2016 indicating that the Addition project had passed inspection.

14. In July of 2016, the Claimant found mold in his new closet and went into the crawl space of the Addition where he discovered a few inches of standing water.

15. Between June 17 and August 26, 2016, the Claimant made some changes to the exterior of the property including the addition of a ground level deck and alterations to the window wells and down spouts.

16. On or about August 26, 2016, the Respondent returned to the Claimant's property to review the grading issue, but made no changes.

17. On or around September 8, 2016, Servpro of Annapolis came to the Claimant's property and did restoration work to repair the water damage to the Claimant's closet and crawl space at a cost of \$2,220.01. Claimant did not have the insulation replaced at that time, which reduced the original estimate of \$3,510.83 by \$1,290.82.

18. In late summer or early fall of 2016, the Claimant contacted the Anne Arundel Department to express his concerns about the work done by the Respondent at his home.

19. In November of 2016, Chief Building Inspector Michael Williams, Anne Arundel Department, came to inspect the Claimant's property. He found several violations of the building code and issued a Notice of the violations to the Respondent on November 3, 2016, because it was the Respondent who applied for the building permit and was ultimately responsible for the permit violations.

21. The Notice included the following building code violations:
 1. Section R-106.4 – Amended construction documents - for failure to provide new construction documents when changes were made to the approved construction documents;
 2. Section R-404.1.6 – Height above finished grade - for failing to properly extend the concrete and masonry walls above the finished grade adjacent to the foundation at the a minimum of four inches;
 3. Section R-502.7 – Lateral restraint supports - for failing to properly support joists; and
 4. Section R-401.3 – Drainage - for failing to grade to drain surface water away from foundation walls at a minimum six inch grade within the first ten feet.
22. A Stop Work Order was issued and the Respondent was ordered to correct the violations and notify the Anne Arundel Department.
23. On November 30, 2016, the Respondent remedied the first violation under Section R-106.4 by filing new drawings with the Anne Arundel Department.
24. On April 18, 2017, Mr. Williams issued a Final Notice to the Respondent indicating that three other violations remained, advising that the Stop Work Order would continue and that the Respondent needed to submit the required permit applications and pursue correction. The building code violations of Sections R-401.3, R-404.1.6, and R-502.7 remain and have not been remedied as of the date of the hearing.
25. The Claimant received an estimate from Annapolis Remodeling Company, LLC on June 29, 2017 to “install blocking in between crawlspace floor joists to prevent joists from

further racking” at a cost of \$950.00 and to “install new R30 batt insulation in crawl space floor joist and cover the floor with 6 mil vapor barrier” at a cost of \$3,920.00.

26. Annapolis Remodeling Company, LLC also provided an estimate to excavate and landscape the claimant’s property to address the drainage and grading issues at a cost of \$13,160.00.

DISCUSSION

The Claimant subpoenaed three witnesses from the Anne Arundel Department, but only Michael Williams appeared at the hearing. I requested that the Claimant proffer what he expected these witnesses to provide in their testimony, had they appeared. The Claimant proffered that William Bryant, Assistant Director of the Anne Arundel Department, would have testified that the code violations outlined by Mr. Williams’ inspection were valid. Since Mr. Williams was present to testify to his own report, I determined that Mr. Bryant’s testimony, as proffered, would be duplicative and less reliable than the testimony of Mr. Williams who actually did the inspection and that the Claimant was not prejudiced by his absence. The Claimant proffered that Ralph Sutherland, Inspector for the Anne Arundel Department, “would have testified to whatever would have covered his butt.” Since it appears by his own proffer, the Claimant would not have anticipated that Mr. Sutherland would have offered helpful or even truthful testimony, I do not find that his absence prejudiced the Claimant in any way. In addition, these witnesses were served by first class mail, not certified mail or personal delivery.¹

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). “[A] preponderance of the evidence

¹ The Claimant did not request a postponement nor seek to enforce the subpoenas to compel these witnesses presence. However, pursuant to COMAR 28.02.01.14, these subpoenas cannot be enforced pursuant to State Government Article § 9-1605(d)(2) because there is no evidence of personal service.

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)²; *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 for some of the items in his Claim and not for others.

The Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimant. The Respondent performed some unworkmanlike, inadequate or incomplete home improvements, but the Claimant failed to prove all of the damages claimed.

Floor Joists and Bracing

There is no question that the Respondent did not construct the Addition according to the approved plans when he used smaller size floor joists without lateral bracing. The Respondent conceded this at the hearing. The Claimant’s expert witness, Michael Williams, testified that the Respondent had not used the 2 x 10 joists identified in the approved drawings, but instead used 2 x 8 joists without lateral bracing, creating instability and violating the building permit and the building code. The Respondent argued that he “needed to get creative” when it became difficult for him to give the Claimant the level living space required and that he had to change things up

² Unless otherwise noted, all references to the Business Regulation Article herein cite the 2015 Replacement Volume of the Maryland Annotated Code.

from the approved drawings, without getting the changes approved by the Claimant or the Anne Arundel Department. The Respondent agreed he made unapproved unilateral changes to the plans and neglected to put in the joist bracing.

The Respondent submitted changed drawings to the Anne Arundel Department after being cited for the code violations in November 2016, but the work required to remedy the joist and bracing concerns has never occurred. The Respondent claimed in a letter to the Anne Arundel Department in February of 2017 that he was ready and willing to add joist blocking but was awaiting the permit and the release of the stop work order from the Anne Arundel Department.

The Claimant testified that he has never even seen the new drawings that were submitted to the Anne Arundel Department, nor has he approved them, and that he does not want to allow the Respondent on his property to make repairs since the matter has become quite contentious. Under these circumstances, I conclude that the Claimant did not unreasonably reject the Respondent's offer to remedy the joist blocking. I find that the Respondent used the incorrect size floor joists and failed to provide lateral bracing, in violation of the approved drawings and the building code, thereby making the construction of the joists and bracing incomplete, inadequate and unworkmanlike.

Grading and Drainage

The Claimant also claimed that the Respondent failed to properly grade away from the Addition to allow for proper drainage. He noted that the contract specifically stated that the work would be performed "in good and workmanlike manner and in accordance with applicable building codes and plans." (Jt. Ex. 1, p. 4.) The Claimant testified that he had problems with water pooling outside the Addition almost immediately after work was completed in May 2016,

and he contacted the Respondent who came out and did some re-grading on or about June 13, 2016. In July 2016, the Claimant discovered mold in his new bedroom closet and upon further inspection, found standing water in the crawl space of the Addition. The Claimant testified that water around the Addition foundation had been an ongoing problem and he tried to fix it by adding a ground level deck and making changes to the window wells and down spouts. In September 2016, the Claimant had Servpro perform some water cleanup and restoration at a cost of \$2,220.01, but did not have it replace the insulation that had been ruined because he did not want to do that until he was sure the water issue was resolved.

Michael Williams inspected the property in November 2016 and noted grading issues at that time, citing the Respondent with code violations relating to grading and drainage, indicating that they were not done to building code, nor in compliance with the approved drawings.

The Respondent countered that the contract terms included "rough backfill for positive drainage," but specifically excluded final grading, seeding, or sodding. He testified that the Claimant insisted that the Addition be level with the existing house and that the grade of the property made that difficult. The Respondent testified that he left the Claimant's property at proper grade in May 2016 and when he came back out on June 13, 2016 to re-grade, he left the property at a 4-5 inch grade, which he stated was within the 4 inch code requirement of R-404.1.6. (See Clmt. Ex.12.) However, the Respondent also contended that he had no responsibility to properly grade the Addition because only rough grading was within the contract terms. He stated that the Anne Arundel Department passed his work on final inspection and he came out after that due to the Claimant's complaints to try to rectify the situation.

There is no question that the topography of the Claimant's property created challenges with the construction of the Addition. However, the Respondent submitted drawings that

showed compliance with the code requirements for grading, and he cannot relieve himself of the duty to comply by putting in different contract terms contradicting the requirement to build to code. The Respondent admitted he did not follow the drawings and sometimes needed to be “creative.” At the time of final inspection in July 2016, the Anne Arundel Department passed the Respondent’s work. In November of 2016, the Anne Arundel Department provided notice of building codes violations, two of which related to grading and drainage. While the Respondent conceded two other violations in that he did not provide new drawings³ and that the floor joists and supports were not to code, he denied the grading and drainage violations. I do not find his protestations in that regard to be credible. His willingness to compromise the underlying structure within the Addition regarding the joists and supports calls into question his insistence that he would properly grade the property outside.

The Respondent returned in June 2016 to “re-grade” the property due to the flooding and pooling that occurred. The Respondent denied he had not properly graded and indicated he did the “re-grading” “out of the goodness of his heart” and at his own expense. It is clear that the grading and drainage were not to code in November of 2016.

However, due to other circumstances, it is not entirely clear that the Respondent was wholly responsible for the grading and drainage issues observed in November 2016. Between July and November of 2016, the Claimant took matters into his own hands and made some adjustments to try to deal with the flooding issue. He added a ground level deck. He tinkered with the window wells. He created a “rock garden” and extended the down spouts. In addition, there was testimony from Mr. Williams that the topography of the Claimant’s lot contributed to water movement back toward the Addition and that the code requirement for drainage was a

³ This has been rectified to the Anne Arundel Department’s satisfaction.

minimum standard that could have been ineffective over time based on the hilly landscape of the Claimant's property.

There is no question that grading around the Addition was altered prior to the November 2016 inspection. There is simply no way to know at this juncture whether the grading was at code on June 17, 2016, when the Respondent turned the property over to the Claimant upon completion of the project, or whether it became out of code after that time because of actions by the Claimant, the Respondent, or natural forces. Therefore, there is no basis to find eligibility from the Fund regarding the grading and drainage issues cited in November 2016.

Compensation by the Fund

Having found eligibility for compensation regarding the floor joists and bracing, I must determine the amount of the Claimant's actual loss and the amount, if any, that the Claimant is entitled to recover. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney fees, court costs, or interest. Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1).

MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work: abandoned contract under COMAR 09.08.03.03B(3)(a); incomplete work, but not completed by another contractor under COMAR 09.08.03.03B(3)(b); and work performed under the contract and other contractors have or will complete under COMAR 09.08.03.03B(3)(c).

In this case, the Respondent essentially performed the work under the contract, and the Claimant intends to retain other contractors to complete or remedy that work. Accordingly, the following formula appropriately measures the Claimant's actual loss:

If the contractor did work according to the contract and the claimant has solicited or is soliciting another contractor to complete the contract, the claimant's

actual loss shall be the amounts the claimant has paid to or on behalf of the contractor under the original contract, added to any reasonable amounts the claimant has paid or will be required to pay another contractor to repair poor work done by the original contractor under the original contract and complete the original contract, less the original contract price. If the Commission determines that the original contract price is too unrealistically low or high to provide a proper basis for measuring actual loss, the Commission may adjust its measurement accordingly.

COMAR 09.08.03.03B(3)(c).

The parties agree that the Contract was paid in full, and the original contract price was \$77,776.00.⁴ The Claimant provided an estimate from Annapolis Remodeling Company (Clmt. Ex. 16) that included installing “blocking in between crawlspace floor joists to prevent joists from further racking” at a cost of \$950.00 and “new R30 batt insulation in crawl space floor joist and cover the floor with 6 mil vapor barrier” at a cost of \$3,920.00. The Respondent testified at the hearing that he “made a mistake” in not providing lateral bracing to the joists and also admitted to using the smaller joists, contrary to the approved drawings. The Claimant sought the estimate from Annapolis Remodeling Company to correct the inadequate and unworkmanlike condition left by the Respondent relative to the joists and bracing. Therefore, I find that the Claimant can recover \$4,870.00 for the blocking of the floor joists, insulation, and vapor barrier necessary to address and rectify the incomplete, inadequate and unworkmanlike joist and bracing issues caused by the Respondent.

As I have not found that the Claimant demonstrated any further loss pertaining to the grading issues, the remainder of the Annapolis Remodeling Company Estimate (Clmt. Ex. 16) and the Servpro Invoice (Clmt. Ex. 16) are not recoverable.

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

⁴ This amount may not be the final contract price as there may have been change orders, but full payment of the final contract is not in dispute.

paid to the contractor against whom the claim is filed. Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a). In this case, the Claimant's actual loss is less than the amount paid to the Respondent and less than \$20,000.00. There are no statutory impediments to the Claim. Md. Code Ann., Bus. Reg. §§ 8-405(c), (d), (f), and (g), 8-408(b)(1). Therefore, the Claimant is entitled to recover his actual loss of \$4,870.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$ 4,870.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(c). I further conclude that the Claimant is entitled to recover \$4,870.00 from the Fund. COMAR 09.08.03.03B(3).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$4,870.00; and

ORDER that the Respondent is ineligible for a Maryland Home Improvement Commission license until the Respondent reimburses the Guaranty Fund for all monies disbursed under this Order, plus annual interest of ten percent (10%) as set by the Maryland Home Improvement Commission;⁵ and

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

ORDER that the records and publications of the Maryland Home Improvement

Commission reflect this decision.

Signature on File

January 23, 2018
Date Decision Issued

Willis Gunther Baker
Administrative Law Judge

WGB/cj
#177129

PROPOSED ORDER

WHEREFORE, this 25th day of March, 2019, 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.

Michael Shilling

***Michael Shilling
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION