BEFORE THE
REGISTRAR OF CONTRACTORS
CONTRACTORS STATE LICENSE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: **BILLY SNOW** **DBA SNOW CONSTRUCTION** **3268 Hillock Drive** **Los Angeles, CA 90068** **Contractor's License Number 1016716, B** Respondent.	CASE No. N2019-296 OAH No. 2021040177 DECISION AND ORDER

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Registrar of Contractors as his Decision in the above-entitled matter. The failure to comply with any of the terms and conditions as set forth in the provisions of probation will be deemed a violation of probation.

IT IS FURTHER ORDERED that **SNOW CONSTRUCTION**, License Number **1016716**, on the effective date of this Decision shall have on file a Disciplinary Bond or post a cash deposit in the amount of $30,000.00, for a period of not less than two years pursuant to Section 7071.8 of the Business and Professions Code. Any suspension for failing to post a disciplinary bond or a cash deposit, or any suspension for any other reason, shall not relieve the Respondent from complying with the terms and conditions of probation. Furthermore, suspension of the license during the period of probation, for any reason under this chapter, will cause the probationary period to be automatically extended in time equal to the length of time that the license is not in a clear and active status.

IT IS FURTHER ORDERED that respondent shall pay the investigative costs in the amount of **$ 8,000.00**. Monthly payments are to be made in the amount of **$ 470.59**, until completed. Payments are to be made at the end of each month, commencing the first full month after the effective date of this decision.

IT IS THE responsibility of the respondents, named in this Decision, to read and follow the terms and conditions of probation found in the Proposed Decision. The deadlines for meeting the terms and conditions are based upon the EFFECTIVE DATE of the Decision. No notices or reminders will be sent, as to the compliance of the terms and conditions. Proof of payments of restitution and payments for the Cost of Investigation and Enforcement if ordered, are to be sent to CSLB, Sacramento Case Management, Post Office Box 26888, Sacramento, CA 95826.

This Decision shall become effective on February 4, 2022.

IT IS SO ORDERED January 4, 2022.

David Fogt
Registrar of Contractors

BEFORE THE
REGISTRAR OF CONTRACTORS
CONTRACTORS STATE LICENSE BOARD
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STATE OF CALIFORNIA

In the Matter of the Accusation Against:

BILLY SNOW, dba SNOW CONSTRUCTION,

Contractor's License No. 1016716, B

Agency Case No. N2019-296

OAH No. 2021040177

PROPOSED DECISION

Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on September 28, 29, and 30, 2021, by video and telephone conference.

Matthew H. Beasley, Deputy Attorney General, represented Complainant. Negin Yamini represented Snow Construction and Billy Snow.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on September 30, 2021.

Amendment of the Accusation

At the outset of the hearing, Complainant moved to amend the Accusation, which motion was granted. Thus, the Accusation was amended as follows:

At paragraph 30 (page 15 of the document, page AGO 19 of exhibit 1)[1], a fourth bullet point was added, to allege a fourth progress payment of $18,525.95 on January 8, 2019.

At paragraph 36, page 20, at line 4, the allegation that P.F. paid Respondent $55,028.79 was changed to allege that Respondent was paid $73,554.74. Line 6 was amended to allege a financial loss of $394,757.28.

Re-Opening of the Record

On October 29, 2021, the ALJ issued an order re-opening the record, to obtain briefing regarding the calculation of any restitution that might be ordered, because Complainant's claim was based on estimates made by Complainant's expert witness. The homeowner, however, had testified to completing the project. The ALJ requested briefs regarding whether the homeowner's actual costs should be used if restitution was calculated, and further, whether the record should be re-opened to receive

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[1] Complainant's exhibits have page numbers that are "Bates stamped," separate from the document's internal page numbers. The added page numbers contain the legend "AGO" and a zero before the actual page number. Hereafter, citations to Complainant's exhibits will use the added page number, but dispense with the AGO prefix and the zero.

evidence on such actual costs. The parties were given until November 12, 2021, to submit briefs.

Complainant, by a filing dated November 10, 2021, took the position that the ALJ should not assess any restitution, essentially leaving the issue to the ongoing Superior Court litigation between the parties. Thereafter, Respondent's counsel, submitted a statement that concurred with Complainant's position. Complainant's submission will be identified as exhibit 36, and Respondent's will be identified as exhibit P. In reliance on those exhibits, no restitution will be awarded in this matter, even if a cause for discipline is sustained that would justify such an award.

The record was again closed, and the matter submitted for decision, on November 12, 2021.

FACTUAL FINDINGS

The Parties and Jurisdiction

1. Complainant Wood Robinson filed and maintained the Accusation in this matter in his official capacity as a Supervising Special Investigator I of the Contractors State License Board (Board), Department of Consumer Affairs.

2. On July 29, 2016, the Registrar of Contractors (Registrar) issued Contractor's License Number 1016716 to Respondent Billy Snow, doing business as Snow Construction. The license is a Type B, general contracting license, and it was in effect during all the times relevant to this matter. It is due to expire in July 2022, unless renewed.

3. After receiving the Accusation, Respondent submitted a Notice of Defense, contesting the claims and thereby demanding a hearing. This proceeding ensued, all jurisdictional requirements having been met.

The P.F. Remodeling Project

4. The transaction underlying this matter involved the extensive remodeling of a home owned by P.F., sometimes hereafter Homeowner, in Santa Monica, California. Essentially, P.F. wanted to add a second floor to her home. P.F. was a widow with two growing children, and she needed more space. The house, described by Homeowner as a small beach cottage, was estimated to be well over 80 years old; testimony indicated that it still had some tube and bobbin wiring, a hallmark of houses built before World War II. It was a single story house, fairly narrow and long, as was the lot it was built on. The original house was approximately 880 square feet in size; according to Respondent's expert, the lot covered 3,225 square feet. A driveway ran down one side of the house to a detached garage.

5. During her testimony, Homeowner related how she had wanted to put a second floor on the house but was initially stymied when architects she consulted told her that the structure would not support a second floor. Some months later, her neighbors began a remodeling project to add a second floor. Homeowner spoke to the designers and engineers who were working with her neighbor on that project. They looked at P.F.'s home and told her they could design a floating second floor for her. Homeowner she engaged their services. The engineering firm was Alfred Design Inc.

6. The engineers drew plans, which were submitted to the City of Santa Monica's Building and Safety Department (City), and those plans were approved in September 2019.

The Initial Plans

7. The plans called for adding space to the back of the ground floor and building a second floor which contained a loft at the back end of the new construction. As a result, the new work, as contemplated, has the aspect of a third floor at the back of the house. The upstairs addition was not quite centered on the existing structure, as seen from the drawings depicting the front and back of the contemplated structure. In this regard, the addition was essentially cantilevered over one side of the existing house. Some sheets of the plans are dated by the designers on June 8, 2018, and some of the sheets are dated August 6, 2018. The plans were stamped by the City on September 19, 2018.

8. The original plans contained a demolition plan. The demolition plan was minimal. It called for removing part a small part of the rear wall of the house, and a concrete pad at the back of the house. The demolition plan indicates the garage was to be demolished. The demolition plan did not show that the exterior walls were to be demolished, nor did they detail what was to be demolished in the interior portion of the house. The demolition plan does not clearly show removal of the roof. Just how the second-floor addition was to be constructed without removing all of the then-existing roof is not disclosed from the plans. However, when the balance of the plans are viewed, they show that the floor of the second floor was flat throughout the structure, at or about the height of the original ceiling; it does not appear that the addiction could be constructed without removing all of the existing roof structure.

9. The plans showed that the upstairs addition would be supported by a number of posts, including metal posts, and not solely supported by the walls of the existing house. Some of the new posts were to be placed in the interior of the house, running from the front to the back, near the centerline of the house as viewed from front to back. Three of those posts were to be set on three foot by three foot concrete footings, one of which was tied to a concrete pier that extended toward the side of the house. Two smaller footings, two feet nine inches by two feet nine inches or two feet six inches square, were to be built along the centerline toward the back of the house, one tied into a pier.[2] Two other piers were designed into the original foundation plan, not tied to a square footing, as seen on exhibit 27 at page 147. Three other footings, smaller than the others, were to be placed on the centerline, toward the back of the house. Construction of these footings, denominated as tie-downs on the plans and referred to as pads by Respondent in some texts or emails, would plainly necessitate opening the floor structure to excavate for the footings and piers, and to pour the concrete for them. The initial foundation plan showed that six new footings, two feet by two feet by one foot, were to be placed along and under the wall on the northside of the house, including in the outside wall that defined, in part, the existing kitchen. Where posts were to be placed on the perimeter of the existing house, it was plain that walls would have to be opened to set the piers, and to build footings for the posts. As it turned out, there were other problems with the plans.

10. The initial foundation plan contained a note that the "existing continuous footing" was to underpinned by "slot-cut method." (Ex. 27, p. 147.) According to

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[2] The plan details can be difficult to read in digital form, which is the form of the exhibits. Therefore, some of the measurements may not be exact.

Complainant's expert, Daniel Francisco, that work would call for cutting out a section of the foundation, forming and pouring new concrete. When that new work cured, another section would be renewed, tied to the recently poured sections. As Respondent's expert, Philip Crane, pointed out in his report, such a continuous footing did not exist, a fact that Francisco acknowledged during his testimony.

11. The plans were changed on at least two occasions, after Respondent found existing conditions that were not as depicted on the original plans. These problems included the discovery that there was rot in existing support structures such as posts and joists, and that the continuous footing depicted in the plans did not exist. Respondent submitted photographic evidence that the existing foundation was substandard; for example, there were places where posts were not supported by any sort of concrete footing, but instead were placed directly on dirt. There were other problems with the plans as well, including the fact that they did not depict the actual state of the walls, which were built with 2 x 3 studs, instead of 2 x 4 studs.

The Contract

12. The contract between P.F. and Respondent is denominated a home improvement contract and shows a contract date of September 20, 2018. There are a number components to the contract that are relevant to this matter. One is that Respondent was not to furnish or include any finish materials unless specifically noted; the contract called for Respondent to provide labor and rough materials. Hence fixtures and appliances were to be supplied by Homeowner. (A separate page of the contract lists the items to be supplied by Homeowner, ranging from 15 doors to finish flooring to sinks, toilets, tubs and tile.) Respondent's expert, Crane, described the contract as requiring Respondent to build a "warm shell." (Ex. O, p. 8.)

13. The parties agreed that Homeowner would pay Respondent for cost of labor, cost of material, cost of subcontract work and services, and cost of equipment, plus a fee of 15 percent of the total cost. The aforementioned costs were to be as defined by the agreement. A minimum cost was estimated, and it was agreed that the maximum cost to Homeowner under the contract was to be $450,000 plus any change orders approved by Homeowner; if the contract went over the ceiling, that was out of Respondent's pocket. If the ultimate cost was less than $450,000 that would be a savings to the Homeowner. These provisos ultimately put tension into the relationship between Homeowner and Respondent.

14. The base price was spelled out in a table titled "Financial Planning," which was essentially an estimate of what the work would cost. It contained numbers for items such as temporary fencing, a concrete pump, reinforcing steel (rebar), drywall, installation of flooring and doors, plumbing and HVAC. The estimate of such costs was $336,100. Respondent's overhead and profit—the 15 percent referenced above—was calculated as $50,416. The total estimate was for $386,515.

15. A further provision entitled "miscellaneous" impacted the contract price. There it stated that any unforeseen conditions that couldn't be determined at the time of the estimate, such as plumbing, electrical, structural, mold and lumber damage that required repair or replacement would be at additional cost "but any and all costs that exceed $450,00 including but not limited to labor and material will be the responsibility of the contractor. NB: the Homeowner shall not pay any fees, monies or costs exceeding $450,00 and customer will be informed before any corrections occur." (Ex. 7, p. 64.) However, the provision goes on to state that "some undisclosed conditions often exist, and require immediate action. Such conditions will be corrected by Snow Construction and billed as extra to this agreement. Must get approval by

homeowner before corrections are made, any unforeseen conditions caused by contractor subcontractors shall be the responsibilities of the contractor." (*Id.*) Further, it is provided that "decisions made by Snow Construction shall herein be deemed correct by default." (*Id.*)

16. The contract provides that the plans shall become part of the agreement. It also provides that Respondent could stop work if payment were not made when due. One of the Homeowner's responsibilities under the contract was to point out and warranty the property lines to Respondent, and shall hold him harmless for any dispute or error in the property lines or setback locations.

17. The contract did not provide a notice regarding the Board. As to a start date, the contract provided the "Approximate Start Date: ASAP." (Ex. 7, p. 61.)

The Construction

18. Timelines for construction are not easily established. Respondent started work on or about September 28, 2018. On October 12, 2018, the City stopped work due to an easement issue. (Ex. L, p. 6.) Respondent and Homeowner asked the City to lift the stop order, and apparently it did so, but the record does not disclose when that occurred. Communications to the City about this stop order are dated October 15. 2018.

19. Respondent soon perceived problems with the then-existing foundation. At some point in October, a City inspector ordered that the crawl space under the house be dug out so that there was 18 inches of clearance between the earth and the floor structure.

20. Respondent undertook demolition of the property. Essentially, he gutted the original house, demolishing the bathrooms and the kitchen, and other features of the interior.

21. Homeowner has taken the position that she did not want to demolish the interior of the house, that Respondent knew that, and that she did not know about it until it was done. That position cannot be credited. For example, on October 11, 2018, Respondent sent Homeowner an email pointing out he had raised issues about the extent of demolition on prior occasions, and that on further exploration the two bathrooms and the kitchen would "pretty much be gone." (Ex. L, p. 2.) And, a review of original foundation plan, as described above, should have alerted Homeowner to the extent that the original interior would be affected; one of the new posts and large footings was to be placed under the corner of the bathtub in the front bathroom.

22. On October 31, 2018, Respondent sent an email to Homeowner about his meeting with the structural engineer the previous day. Respondent addressed her request to move the wall of the front bathroom back one foot, an issue she previously raised after learning the bathroom would be demolished. Respondent informed P.E. that new 2 x 4 framing was going to have to be "sistered" to the existing substandard studs, and he told her that this would necessitate moving the interior walls in because to move the exterior wall surfaces out risked encroachment issues in the future. Respondent also told Homeowner of the need to anchor down the entire property with new bolts. Respondent made reference to a prior conversation where he told Homeowner that they could not tie new electrical into the old, nor tie into old plumbing. He closed the letter with the note that he could not save existing items such as the flooring, fireplace, and bathtub if they were going to build the remodel.

23. On October 31, 2018, the engineer sent a revised plan sheet S-1, the foundation and second floor framing plan, to Todd Gasser, who Respondent testified was a foundation person, though he also described him as a foreman. The email was copied to Homeowner. The revised plan ultimately called for more pads and other structural support.

24. Respondent removed all of the exterior siding from the walls of the existing structure, and all the drywall. Photos indicate that some of the original studs were left behind. The floor structure was removed so that the workers could obtain access to the area below the house, to dig out the crawl space and to dig out the earth for the new footings and piers, and to pour the concrete for them. Respondent also demolished rotting support members and joists, and such components that were not properly constructed.

25. By mid-November 2018, the relationship between Homeowner and Respondent was deteriorating, much of the problem had to do with Respondent's billing. One dispute, which might be labelled a spat, pertained to a charge for a special drill bit that Respondent's crew would need to drill down into concrete footings to bolt the sill plates and thereby the structure, down. In essence, Respondent maintained it was a specialized device, unlike a saw blade and an unanticipated expense, as it was not anticipated that such steps would be needed. Homeowner asserted it was a tool, and that contractors should pay for their own tools.

26. In late November, Respondent made clear he wanted to leave the job, because of issues with payment, and because of the time consumed with dealing with Respondent. He later wanted her to hire a construction manager who could communicate with her, and to act as a go between.

27. Notwithstanding Respondent's request that P.E. find another contractor to take over the job, the relationship continued into the early part of 2019. On January 9, 2019, the engineers issued another revision of the foundation plan, and the engineers drew revised details, such as a detail pertaining to a steel beam to column retrofit. (Ex. 28, p. 161.)

28. During the holidays, work had slowed, and there was some delay due to rain. In early January, the parties were again at odds over payment. On January 7, 2019, numerous text messages were exchanged, and at one point Homeowner accused Respondent of destroying her first floor. Respondent took the position that she needed to pay him on a pending invoice, or he would stop work. Respondent also raised the idea of a project manager or other person to act as a go between, because he could not communicate to Homeowner about construction.

29. On January 7, 2019, Respondent sent an email to Homeowner entitled "please find another contractor." (Ex. 16, p. 83.) He stated that because of P.E.'s (alleged) behaviors, texts, and emails, that were taking up much of his day, he couldn't continue to work with her, and he said "please find another contractor to finish your project." (*Ibid.*) He went on to complain about not getting paid, and that fights over his bills was causing uncertainty for him and his workers. P.E. responded that she would forward the email to her lawyer and the Board. At that point in time, Respondent had been paid $55,028.79, less than 20 percent of the floor contract price.

30. On January 8, 2019, Respondent emailed Homeowner and reiterated his problems with her, demanding she obtain a project manager or other middleman. He sent another email that day, which described work due to unforeseen issues, and tying it to a then-pending invoice. He listed the following items: demolish floor to get to rotten girders and floor joists; new footings to support second floor where no

foundation existed and to underpin spots as suggested; add new five-eighth inch bolts to the sill plate; add new 2 x 4 framing per the engineer; and to dig out the crawl space per the City's directive.

31. Homeowner made a payment of $18,525.95, on January 8, 2019; this was the last payment to Respondent. Some work was performed thereafter. According to an invoice dated February 4, 2019, work was performed during the week of January 7, but not the week of January 14, due to rain.

32. In early February 2019, Respondent tendered to Homeowner a written change order, pertaining to the unforeseen issues that had arisen, such as the need to dig out the crawlspace, the 2 x 3 framing, and the problems with the existing foundation. He estimated that the cost of dealing with these problems was $70,000. In that document Respondent asserted that while the contract term requiring written change orders had not been followed in the past, Homeowner had been apprised of the issues.

33. At the same time as the change order was provided to Homeowner, Respondent tendered a document entitled "violation of contract." (Ex. 30, p. 180.) In the document Respondent asserted that he had had to stop work on January 8 and February 7, 2019, because bills had not been timely paid. He took the position that if she did not come current, he would deem the contract to be void. He urged Homeowner to pay his Invoices 4 and 5. However, there is no invoice number 5 in the record, and the Invoice 4, found in exhibit 20, is dated February 8, 2019. (See ex. 20, p. 93 for invoice 4.) However, it should be noted that Respondent emailed Homeowner Invoice 4 on January 28, 2018, as an attachment to the email. (Ex. L, p. 21.) This contradictory set of facts in not readily explained, though it may be that the invoice dated February 8, 2019, was a revised version of the invoice.

34. Homeowner would not sign the change order document. Work came to a halt. On February 11, 2019, Respondent sent an email to Homeowner, asserting that she had failed to get current on the billing, and that she had cancelled a meeting scheduled on Saturday February 9, 2019. He pointed out she had not signed the change order and the "violation" letter. Respondent told her he had no choice but to put a lien on her property because he could not go $20,000 from his own pocket.

35. On Sunday, February 17, 2019, Respondent sent an email to Homeowner, pointing out that she had not signed the change order and violation letter. He demanded a check for the money he claimed to have put into the project, and stated he had updated the last invoice to show the latest bill for the portable toilet on site. He claimed that the locks had been changed, and he could not retrieve his equipment, or have the fence and toilet taken away by the owners of those items.

The Stop Work Order

36. Homeowner found another contractor to take on the project. However, after one or two days of work, the contractor had to halt his activities because the City found that the demolition had exceeded the scope of the plans, due to "excessive demo of exterior & interior walls, roof, ceiling." (Ex. 23. p. 109.) The inspector required the submission of new demolition plans, and their approval before more work could take place.

37. Thereafter, the City determined that the demolition of the original house, and especially the exterior wall cladding, was so significant that the project was no longer a remodel, but instead would be treated as new construction. This meant that the owner would now have to comply with various legal mandates, such as energy

efficiency requirements. Further, a "grandfathered" setback was lost to the homeowner.

The Expert Witnesses

38. Daniel Francisco testified on behalf of Complainant. He described himself as third generation contractor with some 25 years of experience. He examined the property in July 2019, before Homeowner was able to complete the project.

39. Francisco opined that Respondent departed from the plans, especially as to the demolition of the house. He explained the slot cut method for upgrading the existing perimeter foundation. He gave opinions on what it would cost to complete the project, and he found fault with some of the work that Respondent performed. In this regard he pointed to the use of shims between pressure treated sill plate and rim joists, some uneven floor joists, hollow structural section (HSS) posts incorrectly placed, and a rim joist improperly notched along an HSS post.

40. During his testimony, Francisco acknowledged that there was not a continuous footing as the plans contemplated. He agreed that the walls would have to be demolished, either on the interior side or exterior side, in order to sister up the new 2 x 4 studs. Francisco agreed that the floors would have to be opened up in order to construct the addition. At bottom, he believed that extensive demolition and alteration of the then-existing structure would be required to complete the project as planned. Francisco opined that the work he saw in July 2019, that Respondent had performed, was of value commensurate with what the Homeowner paid Respondent, i.e., approximately $74,000.

41. Philip Crane, a licensed general and engineering contractor, testified as Respondent's expert. He had, prior to the hearing, prepared a written report in

response to the report Francisco provided to the Board prior to the proceeding. He has been licensed since 1991, and his company has built millions of square feet of wood framed structures including custom homes, hotels, and multi-family dwellings.

42. In his report, Crane opined that there were gross errors and omissions in the construction documents provided by Homeowner—the plans—and he opined that Respondent was justified in seeking payment for the unanticipated problems. The defects in the plans were described, and some have been previously touched on. However, Crane pointed out that the plans showed the new waste plumbing that would come from the second floor to be run through the walls, which was a problem because the pipes would be too large for the existing 2 x 3 wall cavities. He described how floor joists were atop an unblocked, unsecured cripple wall, not on a continuous footing as depicted in the plans. He noted one of the plan details showed clearance in the crawl space that did not exist.

43. Crane testified that the remodel project could not be built if the original demolition plan were followed. He pointed out that the "slot cut" method of reinforcing the existing foundation would have taken weeks, as each new section of concrete would have to cure for seven days. He opined that Homeowner received $75,000 value from the work performed by Respondent.

Other Matters

44. As noted previously, Homeowner finished the project as an owner-builder. It is not known what she paid to finish the job, nor is it disclosed whether further plan changes were made in order to complete the project.

45. Homeowner's credibility suffered from her contentions, to both the Board's investigator and in the hearing, to the effect she didn't know about the plan

changes made by the engineers, and her contention she did not understand the extent of the changes to the original house. As noted previously, Respondent apprised her of these issues by late October. A review of the original plans would have put her on notice that the interior of the house was going to be forever changed. The revised plans made that even more clear, and she was aware of the plan changes. (At one point she complained to Respondent that he should not have called the engineers out to review the situation because that was costing her money.) Homeowner's credibility suffered from some of her behavior in the hearing, interrupting testimony to argue with the witness, and at one point holding up a sign that read "liar" during Crane's testimony.

46. Both experts were credible in their testimony, in terms of demeanor and because of their expertise.

47. Respondent was credible in his demeanor. However, he was unable to detail some of the financial issues; for example, he could not say whether he had sent invoice 5 to Homeowner, and he otherwise could not give a good explanation of some of the issues pertaining to billing. He did not provide solid evidence of what Homeowner owes him. This does not mean all of his testimony is discredited, but he was not the perfect witness.

48. The engineers who might have added useful information about the project and communications among the parties, did not testify. However, it appears that Crane is correct when he opined that their plans were defective in depicting conditions that simply did not exist. Those problems were substantial and were bound to affect the viability of the project in a significant way. It is inferred that the plans did not apprise Homeowner of the obvious issues that would result if a contractor had to

open up the floors of the home to build concrete footings down the middle of the house, and to put such underpinnings under the wall where her kitchen resided.

Costs

49. The Board has incurred costs of investigation and enforcement totaling $14,542.61.

LEGAL CONCLUSIONS

Jurisdiction

1. Jurisdiction to proceed in this matter was established pursuant to Business and Professions Code section 7090, based on Factual Finding 1 through 3.[3]

Rules of General Applicability

STANDARD OF PROOF

2. Complainant has the burden of proving grounds to discipline Respondent's license by clear and convincing evidence. (Code § 7090, fth. par.) Complainant was therefore obligated to adduce evidence that was clear, explicit, and unequivocal—so clear as to leave no substantial doubt and sufficiently strong as to command the unhesitating assent of every reasonable mind. (*In Re Marriage of Weaver* (1990) 224 Cal.App.3d 478.)

[3] Further statutory references are to the Business and Professions Code.

ASSESSING CREDIBILITY

3. (A) The trier of fact may "accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted." (*Stevens v. Parke, Davis & Co.* (1973) 9 Cal.3d 51, 67.) The trier of fact may also "reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material." (*Id.* at p. 67–68, quoting from *Nevarov v. Caldwell* (1958) 161 Cal.App.2d 762, 767.) The testimony of "one credible witness may constitute substantial evidence," including a single expert witness. (*Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040, 1052.)

(B) The rejection of testimony does not create evidence contrary to that which is deemed untrustworthy. Disbelief does not create affirmative evidence to the contrary of that which is discarded. "The fact that a jury may disbelieve the testimony of a witness who testifies to the negative of an issue does not of itself furnish any evidence in support of the affirmative of that issue, and does not warrant a finding in the affirmative thereof unless there is other evidence in the case to support such affirmative." (*Hutchinson v. Contractors' State License Bd. of Cal.* (1956) 143 Cal.App.2d 628, 632–633, quoting *Marovich v. Central Cal. Traction Co.* (1923) 191 Cal. 295, 304.)

(C) Discrepancies in a witness's testimony, or between that witness's testimony and that of others does not necessarily mean that the testimony should be discredited. (*Wilson v. State Personnel Bd.* (1976) 58 Cal.App.3d 865, 879.)

(D) "On the cold record a witness may be clear, concise, direct, unimpeached, uncontradicted—but on a face to face evaluation, so exude insincerity as to render his credibility factor nil. Another witness may fumble, bumble, be unsure,

uncertain, contradict himself, and on the basis of a written transcript be hardly worthy of belief. But one who sees, hears and observes him may be convinced of his honesty, his integrity, his reliability." (*Wilson v. State Personnel Bd.* (1976) 58 Cal.App.3d 865, 877–878, quoting *Meiner v. Ford Motor Co.* (1971) 17 Cal.App.3d 127, 140.)

(E) An expert's credibility may be evaluated by looking to his or her qualifications. (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 786.) It may also be evaluated by examining the reasons and factual data upon which the expert's opinions are based. (*Griffith v. Los Angeles County* (1968) 267 Cal.App.2d 837, 847.)

(F) The trier of fact may reject the testimony of a witness, including an expert witness even if it is uncontradicted. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890.) The expert's opinion is no better than the facts on which it is based and, "where the facts underlying the expert's opinion are proved to be false or nonexistent, not only is the expert's opinion destroyed but the falsity permeates his entire testimony; it tends to prove his untruthfulness as a witness." (*Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 923–924.)

(G) Even when the witness qualifies as an expert, he or she does not possess a carte blanche to express any opinion within the area of expertise. For example, an expert's opinion based on assumptions of fact without evidentiary support, or on speculative or conjectural factors, has no evidentiary value and may be excluded from evidence. Similarly, when an expert's opinion is purely conclusory because unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion, that opinion has no evidentiary value because an expert opinion is worth no more than the reasons upon which it rests. (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1116.) The bare

conclusion of an expert without supporting facts is not entitled to evidentiary weight. (*Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493.)

(H) The presiding officer in an administrative proceeding may evaluate evidence based on his or her experience or training. (Gov. Code, § 11425.50, subd. (c).)

Dispositive Legal Conclusions

4. (A) It was not established, as alleged, that Respondent abandoned the project without legal excuse, in violation of section 7107. At the time that he stopped working on the project, Homeowner had refused to sign a change order that addressed necessary work. It is plain that Respondent had been required to address serious structural problems in the house as it existed before construction began, which issues, if not addressed, could not have allowed a properly constructed house to be completed. Respondent was entitled to payment for such necessary work, which work was not disclosed to him by the plans.

(B) The general rule is that an owner who supplies plans to a contractor impliedly warrants that they are correct and suitable for the performance of work, and that a satisfactory result will be achieved if the plans are followed. If the plans are deficient, the contractor is entitled to recover the extra costs incurred as a result. (Miller & Star, Cal. Real Estate (4th ed. 2016), § 31:63.) Here Homeowner supplied defective plans, and Respondent was obligated to incur costs to respond to the situation as it existed, and not as misrepresented by the plans. Homeowner was not justified in refusing to acknowledge the facts of the situation by refusing to sign the change order. That cost could not be thrust onto Respondent by her refusal, and Respondent had a legal excuse to not go forward in the circumstances.

5. It was established that Respondent violated section 7109, subdivision (a), in that he deviated from accepted trade standards for good and workmanlike construction in a material respect by failing to construct floor framing in accordance with those standards, as set forth in Factual Finding 39.

6. It was established that Respondent violated section 7109, subdivision (b), by performing demolition work that exceeded that provided by the plans, and by demolishing the "grandfathered" non-conforming setback.

7. It was established that Respondent violated section 7110 by performing demolition work in excess of that allowed by the building permit.

8. It was not established that Respondent violated section 7113 by failing to complete the project for the price stated in the contract. This work was necessary if the project was to be completed. At most, this amount would have driven the final price to approximately $456,000, or $6,000 over the contract maximum. Under the most favorable reading of the contract from the Homeowner's point of view, Respondent would have been required to absorb that amount of some $6,000.

9. It was established that Respondent violated section 7159, subdivision (d), by performing extra work without first obtaining a change order. The failure to obtain a written change order before doing extra work typically does not bar recovery of compensation for that work. (Miller & Starr, Cal. Real Estate (4th ed. 2016), § 31:66. However, that rule of contract law does not obviate the regulatory requirement to obtain a written change order in connection with home improvement contracts.

10. Respondent violated section 7159, subdivision (d), in that the contract failed to contain an approximate start date; "ASAP" is not a date to be found on a

calendar. Respondent's contract violated section 7159, subdivision (e), by failing to provide a notice about the Board.

11. (A) The Board is entitled to recover its costs of investigation and prosecution pursuant to section125.3, based on Legal Conclusions 5, 6, 7, 9 and 10. The reasonable costs are $14,542.61, based on Factual Finding 50, and absent other considerations.

(B) Into the analysis must come the case of *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45 (*Zuckerman*), which pertained to a cost regulation with language similar section 125.3. In that case the Supreme Court held that an agency must exercise its discretion to reduce or eliminate cost awards in a manner which will ensure that the costs statute does not deter licensees with potentially meritorious claims or defenses from exercising their right to a hearing. The court stated: "Thus, the Board must not assess the full costs of investigation and prosecution when to do so will unfairly penalize a chiropractor who has committed some misconduct, but who has used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed." (29 Cal.4th at 45.)

(C) Under *Zuckerman*, the agency must also consider the licensee's subjective good faith belief in the merits of his or her position and whether the licensee has raised a colorable challenge to the proposed discipline. The Court further required that the agency must determine that the licensee will be financially able to make later payments. It concluded by stating that an agency "may not assess the full costs of investigation and prosecution when it has conducted a disproportionately large investigation to prove that a [licensee] engaged in relatively innocuous misconduct." (*Ibid.*, footnote omitted.)

(D) In this case Respondent prevailed on some of the claims. It is thus reasonable to reduce the costs to $8,000.

12. The purpose of proceedings of this type are to protect the public, and not to punish an errant licensee. (E.g., *Camacho v. Youde* (1979) 95 Cal.App.3d 161, 164.)

13. The Board has developed disciplinary guidelines that indicate that the minimum discipline for some of the more serious matters established herein, such as failure to comply with trade standards or departure from plans and specifications, is revocation stayed, and two years' probation. The disciplinary guidelines look to a number of factors to consider in imposing discipline, including nature and severity of the acts, actual or potential harm to the public, whether work was performed that was hazardous, prior disciplinary record, and rehabilitation evidence.

14. Here Respondent has no disciplinary record. The severity of the acts is moderate, in that Respondent was dealing with a difficult situation, where he had relied upon deficient plans, and where his failure to respond to the actual problems with the structure could have endangered occupants; the foundation was simply not adequate to the proposed construction.

15. In these circumstances, the minimum discipline is warranted, as it does not appear that Respondent poses an especial threat to the public welfare. A two-year probation is warranted, and he should be allowed to pay costs in installments.

ORDER

The Contractor's license issued to Billy Snow, sole owner of Snow Construction, license number 1016716, is hereby revoked. However, the order of revocation is stayed, for a period of two years, on the following terms and conditions:

1. **Obey All Laws**: Respondent shall comply with all federal, state and local laws governing the activities of a licensed contractor in California.

2. **Interviews With Regional Deputy**: Respondent and any of Respondent's personnel of record shall appear in person for interviews with the Regional Deputy or designee upon request and reasonable notice.

3. **Completion of Probation**: Upon successful completion of probation, the contractor's license will be fully restored.

4. **Violation of Probation**: If Respondent violates probation in any respect, the Registrar, after giving notice and opportunity to be heard, may revoke probation and impose the disciplinary order that was stayed.

5. **Provision of Documents**: Respondent shall submit copies of documents directly related to his construction operations to the Registrar upon demand during the probation period.

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6. **Costs**: Respondent shall pay costs of $8,000 to the Board. He may pay the costs of installments by a payment plan approved by the Board. The costs shall be paid in full 90 days before the termination of probation. Failure to pay costs may be deemed a violation of probation.

DATE: 12/13/2021

Joseph Montoya
JOSEPH D. MONTOYA
Administrative Law Judge
Office of Administrative Hearings