

IN THE MATTER OF THE CLAIM OF	* BEFORE DAVID HOFSTETTER
LAWRENCE J. BRAUN	* AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND HOME	* OF THE MARYLAND OFFICE
IMPROVEMENT GUARANTY FUND	* OF ADMINISTRATIVE HEARINGS
FOR THE ALLEGED ACTS OR	* OAH NO.: DLR-HIC-02-10-24781
OMISSIONS OF DANIEL CURREY, T/A	* MHIC NO.: 08 (90) 2430
CURREY CONCRETE &	*
LANDSCAPING	*
* * * * *	* * * * *

RECOMMENDED DECISION

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

STATEMENT OF THE CASE

On October 6, 2008, Lawrence J. Braun (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of actual losses allegedly suffered as a result of a home improvement contract with Daniel Currey, trading as Currey Concrete & Landscaping (Respondent).

I held a hearing on November 9, 2010, at the Wheaton Office of Administrative Hearings (OAH), Westfield North, Suite 205, 2730 University Boulevard West, Wheaton, Maryland 20902. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010). Kris King, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Claimant was present and represented himself. The Respondent was present and represented himself.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, and the OAH's Rules of Procedure govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2010); Code of Maryland Regulations (COMAR) 09.01.03.01 – .10, 09.08.02.01, 09.08.01.02, and 28.02.01.01 – 28.02.01.27.

ISSUES

Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions, and, if so, in what amount?

SUMMARY OF THE EVIDENCE

Exhibits

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

CL Ex. 1 – Contract, dated June 1, 2008

CL Ex. 2a-1 – Twelve photographs

CL Ex. 3 – Inspection Report, George Pilat Home Inspection Co., dated July 9, 2009

CL Ex. 4 – Estimate from Premier Home Improvement, dated September 22, 2008

CL Ex. 5 – Letter from Claimant to MHIC, undated

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

GF Ex. 1 – Notice of Hearing, dated September 13, 2010, with certified mail documents

GF Ex. 2 – Hearing Order, dated July 9, 2009

GF Ex. 3 – MHIC Licensing History, dated November 8, 2010

GF Ex. 4 – Home Improvement Claim Form, dated October 3, 2008

GF Ex. 5 – Letter from MHIC to the Respondent, dated October 31, 2008

The Respondent offered no exhibits for admission into evidence.

Testimony

The Claimant testified on his own behalf .

The Respondent testified on his own behalf.

The Fund called the Claimant as a witness.

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 home improvement contractor licensed by the MHIC.
2. On June 1, 2008, the Claimant and the Respondent entered into a contract (Contract) to construct a rear patio and a side concrete pad at the Claimant's home at 8305 Overmont Road, Parkville, Maryland.
3. The agreed-upon Contract price was \$6,400.00.
4. The Claimant paid the Respondent a total of \$4,300.00 under the Contract.
5. The Respondent began work on the project on June 3, 2008 and finished work on June 11, 2008.
6. The patio at the rear of the house and the side concrete pad were constructed in such a way that they slope toward the house rather than away from the house.
7. On July 19, 2009, the rear patio was inspected by the George Pilat Home Inspection Company (Pilat).
8. The cost to replace and correct the work performed by the Respondent is \$9,800.00.

DISCUSSION

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) (Supp. 2010).

See also COMAR 09.08.03.03B(2). The loss must “arise from an unworkmanlike, inadequate, or incomplete home improvement.” Md. Code Ann., Bus. Reg. § 8-401 (2010). The Claimant bears the burden to prove each of the above elements by a preponderance of the evidence. Md. Code Ann., Bus. Reg. § 8-407(e) (2010); COMAR 09.01.02.16C; COMAR 09.08.03.03A(3). For the following reasons, I find that the Claimant has met his burden, establishing his entitlement to an award from the Fund.

In this case, there is a factual dispute as to whether there is an improper slope or grade in the patio and concrete pad constructed by the Respondent. The Respondent testified that the work was done properly and that water does not flow towards the house. (He acknowledged that there is one low spot on the rear patio where water may “puddle” but believes that this is inconsequential.) The Respondent testified that he and his workers checked their work before and after construction, including by use of a level, and that these checks showed that the concrete sloped properly away from the house.

The Claimant testified that he used a level to check the concrete in approximately fifteen different places and that all, or almost all, of the results showed a slope toward the house. He also testified that rain water does in fact flow toward the house. The Claimant introduced a brief report from a licensed home inspection company (Pilat), which states in part: “Patio has improper pitch[.] Water rolls toward house . . . Checked with level and water tested.” Claimant Ex. 3.¹

I conclude that the Claimant’s evidence on this issue is persuasive. He testified credibly that he used a level to check the slope of the concrete at multiple locations and that a pronounced slope toward the house was apparent. This conclusion is also corroborated by the report from

¹ I do not consider it relevant that the inspection was performed over a year after the construction, as there is no reason to think that the grade of the concrete changed during that period.

Pilat. Moreover, I must note that the Claimant only found a reason to perform such tests and hire an inspector because he witnessed water flowing toward the house. I found the Respondent's testimony on this issue to be vague and halting, and I consider it to be self-serving.

As to the question of what, if any, damage has been caused by the Respondent's poor workmanship, the Claimant's evidence was weak. He admitted that he had a problem with water in his basement before the construction but testified that the problem is now "worse." He did not specify the extent of the problem or what, if any, steps he has taken to remediate the problem. Nevertheless, there can be little doubt that a patio that slopes toward a house indicates an unworkmanlike performance. Such a sloping may result in flooding at some point even if such an eventuality has not yet occurred. In addition, improperly sloping concrete may well lower the re-sale value of the home. I conclude that such a defect is, virtually by definition, unworkmanlike.

As a result of the Respondent's unworkmanlike performance, the Claimant is potentially eligible for an award from the fund. I now turn to the amount of the award, if any. MHIC's regulations offer three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). One of those formulas, as follows, offers an appropriate measurement in this case:

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.

COMAR 09.08.03.03B(3)(e).

The Claimant presented evidence (which was not refuted) from a licensed home improvement contractor that the cost to remove and re-construct the contract work would be \$9,800.00. Using the formula set forth in COMAR 09.08.03.03B(3)(c), I calculate the Claimant's actual loss as follows:

Amount Paid to the Respondent	\$4,300.00
Amount required to correct work	<u>+\$9,800.00</u>
	\$14,100.00
Amount of original contract	<u>-\$6,400.00</u>
Amount of Loss	\$7,700.00

Although the Claimant's actual loss is \$7,700.00, I conclude, for the reasons set forth below, that he is not entitled to that entire amount. Sections 8-401 and 8-405(e) of the Fund statute govern the award of compensation from the Fund. Prior to 2010, section 8-405(e) applied the following limits to a claimant's recovery: (1) a claimant could not recover attorney's fees, consequential damages, court costs, interest, personal injury damages or punitive damages; (2) a claimant was limited to the amount of his actual loss; and (3) the maximum recovery was capped at \$20,000.00 for the acts of a single contractor. Md. Code Ann., Bus. Reg. §§ 8-405(a) and (e)(1) and (3) (2010).

In 2010, Maryland's General Assembly amended section 8-405(e), adding an additional limit to a claimant's recovery. Under the amended statute, a claimant may not recover "an amount in excess of the amount paid by or on behalf of the claimant to the contractor against whom the claim is made." Md. Code Ann., Bus. Reg. § 8-405(e)(5) (Supp. 2010). The amendment took effect October 1, 2010. Following passage of the amendment, the MHIC did not alter the regulations as to the different measures of damages available to claimants.

The amendment raises the issue of whether it applies to claims pending at the time the amendment took effect (that is, retroactively). The MHIC contends that the amendment applies to all claims pending at the time the amendment took effect. This would include the claim here at

issue. I agree with the MHIC. In *Landsman v. Maryland Home Improvement Comm'n*, 154 Md. App. 241 (2003), the Court of Special Appeals determined that an amendment expanding the remedies available under the Fund applied retroactively. In so holding, the Court noted that the guaranty fund statute was remedial and that, absent an expressed legislative intent to the contrary, remedial statutes are to be applied retroactively, unless that application would interfere with someone's substantive or vested rights under the statute. *Id.*, 154 Md. App. at 254-55. The Court also noted that the General Assembly did not express any intent to apply the amendment prospectively only. Finally, the Court held that the underlying statute did not create any substantive or vested rights. A claimant was not automatically entitled to compensation, but was so entitled only after proving the underlying claim. Thus, a claimant's right to compensation was contingent, not substantive or vested. Similarly, the Court concluded that a respondent was not entitled to any particular limit on a claimant's compensation or other form of remedy in the event a respondent's work was found deficient. As stated by the Court, "it cannot be gainsaid that 'there can be no vested right to do wrong.'" *Id.*, at 255 (quoting *Randall v. Krieger*, 90 U.S. 137 (1874)). For this and other reasons, a respondent had no substantive or vested rights under the statute. *Id.*, at 255-61. Consequently, and because the legislature did not express an intent to the contrary, the amendment at issue in *Landsman* was to be applied retroactively. *Id.*, at 261.

While *Landsman* addressed an amendment *expanding* the available remedies under the Fund, the same reasoning applies regarding the 2010 amendment *limiting* the available remedies. An analogous point was addressed in *McComas v. Criminal Injuries Board*, 88 Md. App. 143 (1991). There, applying the same analysis later used in *Landsman*, the Court of Special Appeals held that an amendment capping the compensation available to crime victims from the criminal injuries fund was to be applied retroactively. *Id.*, at 149-151. The *Landsman* Court referred

approvingly to the *McComas* decision, and stated that the analysis should be the same whether a statute or amendment expands or restricts remedies. *Landsman, supra*, 154 Md. App. at 254-55.

For the above reasons, I conclude that the 2010 amendment to section 8-405(e) applies to this case. As a result, the extent of the Claimant's recovery is limited to the amount he actually paid the Respondent, that is, \$4,300.00.

CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$4,300.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-405(a) and (e)(5) (Supp. 2010); COMAR 09.08.03.03B(3)(c).

RECOMMENDED ORDER


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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$4,300.00; and

ORDER that the Respondent be 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 at least ten percent as set by the Maryland Home Improvement Commission. Md. Code Ann., Bus. Reg. § 8-411(a) (2010); and

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

February 4, 2011
Date Decision Issued



David Hofstetter
Administrative Law Judge

DH/rs
119665

IN THE MATTER OF THE CLAIM OF	* BEFORE DAVID HOFSTETTER
LAURENCE J. BRAUN	* AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND HOME	* OF THE MARYLAND OFFICE
IMPROVEMENT GUARANTY FUND	* OF ADMINISTRATIVE HEARINGS
FOR THE ALLEGED ACTS OR	* OAH NO.: DLR-HIC-02-10-24781
OMISSIONS OF DANIEL CURREY, T/A	* MHIC NO.: 08 (90) 2430
CURREY CONCRETE &	*
LANDSCAPING	*
* * * * *	* * * * *

FILE EXHIBIT LIST

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

- CL Ex. 1 - Contract, dated June 1, 2008
- CL Ex. 2a-1 - Twelve photographs
- CL Ex. 3 - Inspection Report, George Pilat Home Inspection Co., dated July 9, 2009
- CL Ex. 4 - Estimate from Premier Home Improvement, dated September 22, 2008
- CL Ex. 5 - Letter from Claimant to MHIC, undated

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

- GF Ex. 1 - Notice of Hearing, dated September 13, 2010, with certified mail documents
- GF Ex. 2 - Hearing Order, dated July 9, 2009
- GF Ex. 3 - MHIC Licensing History, dated November 8, 2010
- GF Ex. 4 - Home Improvement Claim Form, dated October 3, 2008
- GF Ex. 5 - Letter from MHIC to the Respondent, dated October 31, 2008

The Respondent offered no exhibits for admission into evidence.

PROPOSED ORDER

WHEREFORE, this 21st day of March 2011, 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.

Andrew Snyder

***Andrew Snyder
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION