

<p>IN THE MATTER OF THE CLAIM</p> <p>OF TIMOTHY KERNAN,</p> <p>CLAIMANT</p> <p>AGAINST THE MARYLAND HOME</p> <p>IMPROVEMENT GUARANTY FUND</p> <p>FOR THE ALLEGED ACTS OR</p> <p>OMISSIONS OF RONALD STEWART,</p> <p>T/A STEWART LAWN &</p> <p>LANDSCAPE,</p> <p>RESPONDENT</p>	<p>* BEFORE MARY R. CRAIG,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>*</p> <p>*</p> <p>*</p> <p>* OAH No.: DLR-HIC-02-15-30494</p> <p>* MHIC No.: 15 (90) 463</p> <p>*</p>
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PROPOSED DECISION

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

STATEMENT OF THE CASE

On July 8, 2015, Timothy Kernan (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$7,402.00 in alleged actual losses suffered as a result of a home improvement contract with Ronald Stewart t/a Stewart Lawn & Landscape (Respondent).

I held a hearing on December 4, 2015 in Annapolis, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015).¹ The Claimant represented himself. Matthew Hayes Osborne, Esquire, represented the Respondent, who was present. Kris King, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, and the Rules of Procedure of the Office of Administrative Hearings (OAH) govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014), Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02, and 28.02.01.

ISSUES

1. Did the Claimant sustain an actual loss compensable by the Fund as a result of any acts or omissions committed by the Respondent?
2. If so, what is the amount of that loss?

SUMMARY OF THE EVIDENCE

Exhibits

I have attached a complete Exhibit List as an Appendix.

Testimony

The Claimant testified and presented the testimony of his wife, Amy Kernan.

The Respondent testified on his own behalf.

The Fund did not present any witnesses.

¹ Unless otherwise noted, all citations of the Business Regulation Article hereinafter refer to the 2015 Replacement Volume.

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 85450.
2. The Respondent owns and operates a very successful landscaping business in the State of Maryland.
3. The Respondent has no prior claim history with the MHIC.
4. The Claimant and his wife, Amy Kernan, own and reside at a single family ranch style home with lower level garage located at 1591 Colony Road, Pasadena, Maryland 21122 (House).
5. The House is situated on a lot with a slope running from high to low from left to right in the view of the property from the street facing toward the House. On the right side of the lot is a driveway connecting the lower level, attached garage to the front street.
6. The driveway slopes down and away from the street to allow it to connect to the basement level of the House.
7. The front yard's sandy soil was eroding at the point where the driveway abuts the front yard before the Claimant hired the Respondent. The higher ground at the edge of the driveway adjacent to the front yard was washing away and running into the driveway during rainy conditions.
8. The front door of the House led outside to a wooden deck with a concrete path leading away from the House.

9. The Claimant met with the Respondent prior to entering into a contract with him, explaining that the soil erosion near the driveway was the primary focus of concern for the Kernans, and showing the Respondent the area of soil erosion.

10. The Respondent recommended that the Kernans hire his company to construct a stacked stone wall approximately 2' high and 16' long in the area of the erosion with boulder stone steps approximately 5-7" thick, 2' wide and 2' long leading from the front yard down to the driveway through a break in the wall, install plantings along the top of the wall to absorb moisture and reduce run-off, and install river cobble and accent boulders along the other side of the driveway where the Kernans' property abuts their neighbors' property. The Respondent proposed to reseed the front lawn and place mulch around the plantings. The Respondent also recommended that the Kernans remove the front deck and concrete sidewalk, replacing the walk with pavers leading to the steps down to the driveway through a break in the proposed stack stone wall to allow ingress from the driveway to the paver walkway and the front door.

11. The Respondent prepared drawings showing the proposed work with an estimated cost of the project, and presented them to the Kernans. Cl. Ex. 1.

12. The Kernans discussed with the Respondent whether to use the stack stone wall rather than a solid wall, as proposed by other contractors. The Respondent told the Kernans that the stack stone wall would allow water to pass through the stone wall and onto the driveway without damaging the wall.

13. The Respondent recommended that the Claimant install sod in the front yard since the existing sandy soil was covered with crabgrass. The Claimant rejected the Respondent's recommendation regarding the sod because the Claimant had a \$15,000.00 budget for the project and sod would have exceeded that budget.

14. The Kernans accepted the Respondent's proposal, except for sodding the front yard, and Mrs. Kernan signed a contract attached to the proposal on behalf of the Claimant on October 7, 2012 (Contract).

15. The Respondent's staff began work on October 31, 2012 and completed it about November 29, 2012.

16. The Respondent's employees excavated the area for the boulder stone steps, and then placed the boulders onto the ground without installing smaller stones for a foundation or filter paper to prevent soil erosion under the steps.

17. After the first rain, mulch and dirt washed into the driveway, exposing the roots of some of the new plantings. The Kernans called and reported this to the Respondent's staff.

18. About one week later, the Respondent's crew came to the property and placed river cobble, *i.e.*, rocks, in the area next to the stairs to control drainage.

19. After the next rain, soil eroded from the front yard into the driveway. The Kernans called and reported this to the Respondent's staff.

20. The Respondent's crew came back to the Property and installed more river cobble.

21. The erosion continued, and the Respondent sent crews to the property to install river cobble several more times.

22. When the erosion continued, the Respondent sent his foreman Brad to the property. Brad observed the erosion. The Respondent's employees installed a drain near the top of the stairs leading down through the wall and filled the empty area below and behind the boulder stairs with rocks.

23. The Kernans made multiple telephone calls to the Respondent's office over the next eighteen months, reporting continued erosion. The Respondent sent his employees to the property about ten times to inspect and attempt to address the erosion.

24. On or about March 31, 2104, the Respondent emailed the Claimant, refusing to take any further action to address the continuing erosion.

25. At the time when the Respondent refused to further repair the erosion, there were extremely large void areas under the boulder steps that lead through the stack stone wall. Every time it rained, a large amount of sand and soil washed out from under the boulder stone steps and ran into the driveway.

26. The Kernans contacted several other landscaping companies to obtain proposals for fixing the erosion problem.

27. East Coast Landscape Design, MHIC #42490, inspected the erosion at the property and completed a proposal to remedy the problem. Cl. Ex. 5. East Coast proposed to do the following work for \$3,675.00:

- Take up existing plant material near boulder steps and set it aside
- Take up boulder steps
- Compact soil
- Add fabric to area to be beneath boulder steps
- Add an additional boulder step to create a berm to direct water away from steps and plantings
- Adjust existing catch basin, if necessary, or remove
- Dig out 12-24" behind stacked stone wall and place drainage stone wrapped with filter fabric

- Install a 4" flexible drainage pipe along the wall and connect it to the existing pipe at the corner of the house
- Replant existing plant materials along with 15 flats of periwinkle to prevent erosion and stabilize soil

28. The Claimant has not had the repairs performed.

29. As the work was progressing and at the time of the erosion problem after the Respondent completed his work, Mrs. Kernan took many photographs accurately depicting the condition of the property.

30. The erosion that occurred after the Respondent completed his work seriously undermined the foundation of the boulder rocks. As depicted by the photographs, a large amount of the soil under the boulder rocks washed away, leaking out from in between the lower steps and running onto the driveway. The boulder rocks are now resting on the edges of the soil remaining at the ends of the rocks, but the soil across the entire undersides of the rocks is gone.

31. The original agreed-upon contract price was \$15,330.00. The Claimant also verbally agreed to pay an extra \$150.00 for additional large rocks along the property line.

32. The Claimant paid the Respondent a total of \$15,480.00 as follows: \$5,110.00 on October 8, 2012; \$5,100.00 on November 8, 2012; and \$5,270.00 on November 12, 2012. Cl. Ex. 2A-C.

33. The Claimant's actual loss is \$3,675.00.

DISCUSSION

In this case, the Claimant has the burden of proving the validity of his claim by a preponderance of the evidence. Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3). "[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 (3rd. 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.” Bus. Reg. § 8-405(a). *See also* COMAR 09.08.03.03B(2) (“actual losses . . . incurred as a result of misconduct by a licensed contractor”). Actual 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 inadequate home improvement work.

The Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimant.

The Respondent completed a portion of the project satisfactorily but he performed some inadequate home improvement work at the Claimant’s property. Before entering into the Contract, the Claimant and the Respondent discussed the Claimant’s primary concern that soil erosion ran off the Claimant’s front yard and onto his driveway. The Respondent, who is very experienced in the landscape design and installation business met with the Kernans, inspected the property, and created detailed drawings and a proposal for them. The parties agreed that the Respondent’s company would remove an existing front deck, install steps up to the front door with a small side patio, and install pavers and plantings throughout the front yard.

The Respondent’s workers performed this work properly. The Claimant has no complaint about that portion of the project.

In addition, the Respondent recommended that the Claimant allow his staff to construct a stack stone wall along a portion of the edge of the lawn where it meets the driveway. The Respondent proposed that he construct steps with large boulders through a break in the stone wall so that the paver path to the front door could be accessed from the driveway, and vice versa.

I am convinced that the Claimant communicated his concern about erosion to the Respondent before entering into the Contract. The Claimant testified that they discussed the other proposals he received for a block and mortar solid wall in that area. He further testified that the Respondent told him that a solid wall was more expensive and not necessary to solve the erosion problem. The Respondent told the Claimant that he could use some of the \$15,000.00 budget to create a more esthetically pleasing entrance and front yard as well as to control the soil and sand running off the front yard and onto the driveway.

In addition, as the Claimant testified and as the Respondent's proposal shows, the Respondent recommended that he install plantings in a garden bed along the top of the stacked wall so that the roots of the plants would soak up some of the moisture from the lawn and reduce the amount of water running off the lawn and onto the driveway. This corroborates the Claimant's testimony and supports his position that erosion was the primary focus of the project.

The Respondent's testimony was evasive at times, as he said could not recall some of his conversations with the Claimant. However, the Respondent conceded that the Claimant wanted a plan to control the erosion from the lawn onto the driveway. The Claimant relied on the Respondent's expertise in the landscape business and agreed to the proposed plan.

Once the project was completed, whenever it rained, the Kernans observed copious amounts of soil and sand running out of the steps. *See* Cl. Ex. 9, Photos 24-27 (showing piles of soil the Claimant swept up after it eroded in the area of the steps). They placed many calls to the

Respondent's office alerting him of this problem. To his credit, the Respondent sent his employees on multiple occasions to the property to observe the condition. Repairs were undertaken at the Respondent's expense to alleviate the problem: a drain was installed and rocks were added.

However, it is clear that the problem persisted. The Kernans took many photographs of the erosion and the loss of soil under the boulder steps. Cl. Ex. 9. Photos 5 and 9 show sand and soil coming out from beneath the bottom boulder step. Photo 6 shows sand leaking out from in between and on the side of the boulders. Photo 7 shows a large gap between two of the steps and indicates that soil or sand has moved from beneath the step.

The result of this erosion around the boulder steps was the creation of a cavern below the steps. The Claimant put a camera into the area below the top step and the photograph taken under the steps shows a startling loss of support for the steps. Cl. Ex. 9, photos 17-23. There is a huge void under the steps where soil or stones should have been for support of the steps. The Respondent testified that the boulders are so heavy that it requires three men to lift and move one of them. This left the large boulders perched on the remaining soil at either end of the rocks with no support underneath, making the Claimant concerned that someone might be injured while walking on the steps.

The Claimant is not an expert landscaper and he did not provide testimony or an affidavit from an expert. However, it does not require special education, training, experience or knowledge to know that steps placed into a slope should be supported by something. The steps as shown in the photographs are basically perched on the soil on either end of the large boulders. If that soil continues to erode, the boulders will shift or collapse. The Claimant did not tamper with

the steps after they were installed. I conclude that the Respondent performed inadequate landscaping work in the installation of the boulder steps.

The Respondent testified that he never guaranteed the area would be free from all erosion after the work was performed. I have concluded that the Respondent designed and executed a landscape plan to improve the appearance of the property and control erosion from the front lawn onto the driveway below. The Claimant did not contend that the Respondent guaranteed there would be no water on the driveway after the project was completed. That is not his complaint. However, I am convinced that the Respondent convinced the Claimant that the stacked stone wall, plantings and boulder steps would adequately stabilized the area and prevent the soil from the front lawn from being depleted through leakage onto the driveway. Whether from a defect in the plan or improper installation, the boulder step area was inadequate.

The Claimant suggested that the soil washed out from under the boulder steps because no filter paper was placed down before the boulders were installed. Indeed the photographs show that there were no filter papers behind the boulders. The Respondent testified that there was filter paper behind the boulders. I reject his testimony for two reasons. First, as stated, the photographs of the area under the boulders show dirt and no filter paper. There is no way, given the size of the boulders, that the Claimant could have removed the filter paper before he took the pictures. Furthermore, the Claimant had several contractors provide estimates of the cost to repair the area, but none of them moved the boulders from where the Respondent's crew placed them. Thus, I conclude that no filter paper was used.

I am unsure whether it was a violation of the standard of care in the landscape business to fail to place filter paper in this setting. It is also not clear whether the boulder steps themselves were adequate for the slope and the distance. However, the Claimant did not tamper with the

steps, and the steps should not have been undermined as they were immediately after the Respondent installed them. I conclude that the Claimant proved that the Respondent performed inadequate work in the area of the steps.

The Claimant's driveway was not paved when the work was done. The Respondent suggested that the steps might have been damaged when the Claimant had the driveway paved after the Respondent's crew finished their work. The Respondent testified that it is necessary to excavate in order to place a foundation for an asphalt driveway. If the supporting area of stones at the edge of the bottom step was dislodged, the Respondent suggested, the entire set of steps could shift, allowing water to seep into the cracks.

The stacked stone wall and the bottom step meet the asphalt. There is no visible gap at the area below the bottom step. Cl. Ex. 9, photo 6. The Respondent did not seal steps along the bottom edge, so it is unlikely that water seeped behind the bottom step, causing the higher steps to lose support. The photographs in evidence show water and soil coming from in between the steps and a large gap between the top step and the lawn, suggesting the soil below the steps was eroded from water running off the lawn rather than from under the last step at the seam of the asphalt. It is more likely than not that the erosion started behind the top step and moved downward. The boulders do not appear to have shifted forward, as would be expected if they lost support from below at the edge of the asphalt.

The Respondent testified that the Claimant's lawn was in poor shape, consisting solely of crabgrass which has poor roots. He argued that the Claimant chose not to sod the lawn as the Respondent recommended, so the Claimant was responsible for the erosion around the boulder steps. The Claimant admitted that he decided not to sod the lawn because he had a limited amount of funds to spend on this project. The Claimant argued that he did not initially plan to

have the front deck removed, new steps placed off the front porch, or the plantings and mulch installed in his front yard. He agreed to that portion of the project because it improved the appearance of the house.

The condition of the Claimant's lawn does not excuse the Respondent's inadequate work. If, as the Respondent argued, the Claimant's rejection of sod for the front lawn doomed the boulder steps to failure, the Respondent, as a very experienced landscape contractor, should have refused to proceed with the project unless the Claimant agreed to the sod. The evidence is undisputed that it was the Respondent who suggested that the Claimant include improvements to the front porch and walkway in the project. As the Respondent's designs on his proposal show and as the Claimant testified, the Respondent's suggestions in that regard did produce a very pleasant appearance for the front of the house. However, it is not reasonable to suggest that the Claimant would have proceeded with the cosmetic work and incurred the expense of the stack stone wall and boulder steps if he had been warned by the Respondent that failing to sod the lawn would undermine the steps. I conclude that the lawn, while admittedly in poor condition, did not excuse the Respondent from adequately performing the landscape work.

The Respondent impressed me as a very experienced landscape contractor. He owns and operates a large, successful business. I do not think the Respondent approached this project with anything other than good intentions. Once the very large boulders were in place and the problems arose, the Respondent sent crews out to the property many times in an effort to address the problem. For whatever reason, the Respondent got frustrated with the Claimant's complaints, which admittedly were many, and stopped trying to address the Claimant's concerns. This left the Claimant with a home improvement project which was inadequate as to the steps. Despite the

other good work done at the House, the Respondent is ultimately responsible for the inadequate portion of the work.

For all these reasons, I conclude that the Claimant is eligible for compensation from the Fund. Having found eligibility for compensation I now turn to the amount of the award, if any, to which the Claimant is entitled. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. COMAR 09.08.03.03B(1). MHIC's regulations provide three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). The following formula offers an appropriate measurement to determine the amount of actual loss 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. 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 obtained an estimate from East Coast Landscape Design, a licensed home improvement contractor, to repair and correct the problem with the boulder steps. The estimate of the work to be performed and the \$3,675.00 charge appear reasonable. The estimate does not include any work beyond that necessary to repair the problem area around the boulder steps. The Claimant has not had the work done.

Applying this formula, I calculate the Claimant's actual loss as follows:

Amount paid to Respondent under the Contract	\$15,480.00
Amount the Claimant will pay East Coast	+3,675.00
Original Contract price (with verbal amendment)	<u>-15,480.00</u>
Claimant's actual loss	\$3,675.00

I propose that the Fund award the Claimant \$3,675.00, representing his actual loss as a result of the Respondent's inadequate work.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$3,675.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$3,675.00; 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 at least ten percent (10%) as set by the Maryland Home Improvement Commission;² and

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

February 23, 2016
Date Decision Issued

Signature on File

Mary R. Craig
Administrative Law Judge

(Free)

MRC/cj
#159715

² See Md. Code Ann., Bus. Reg. § 8-410(a) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 13th day of April, 2016, 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.

Jeffrey Ross

Jeffrey Ross

Panel B

MARYLAND HOME IMPROVEMENT COMMISSION