

IN THE MATTER OF THE CLAIM OF	*	BEFORE JEROME WOODS, II,
DENNISE MOCK,	*	AN ADMINISTRATIVE LAW JUDGE
CLAIMANT	*	OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	*	OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	*	OAH Case No.: DLR-HIC-02-10-24849
FOR THE ALLEGED ACTS OR	*	MHIC Case No.: 08 (90) 2328
OMMISSIONS OF AMBER	*	
LAUTERBACH,	*	
1/a AMBERBROOKE	*	
CONTRACTING,	*	
INC.		

* * * * *

RECOMMENDED DECISION

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

STATEMENT OF THE CASE

On January 5, 2009, Dennise Mock (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$29,395.00 for actual losses allegedly suffered as a result of a home improvement contract with Amber Lauterbach (Respondent), t/a Amberbrooke Contracting, Inc. On October 9, 2009, the MHIC ordered a hearing to allow the Claimant to prove her claim.

On October 12, 2010, the Office of Administrative Hearings (OAH) mailed notice of the hearing to the Respondent by certified and regular mail to 8543 Neptune Drive, Pasadena, Maryland 21122, her last business address of record on file with the MHIC. Md. Code Ann., Bus. Reg. § 8-312(d) (2010). The notice advised the Respondent of the time, place, and date of the hearing. The U.S. Postal Service returned a receipt for the certified mail to the OAH indicating that it had been unclaimed. The U.S. Postal Service did not return the regular mail to the OAH.

"If, after due notice, the person against whom the action is contemplated does not appear, nevertheless the Commission may hear and determine the matter." Md. Code Ann., Bus. Reg. § 8-312(h) (2010). Since notice had been provided to the Respondent, I directed the hearing to proceed in the Respondent's absence.

I held a hearing on January 28, 2011 at the OAH (Wheaton) 2730 University Boulevard, West, Wheaton, Maryland 20902. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010). Eric London, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR or Department), represented the Fund. The Claimant represented herself. The Respondent failed to appear after due notice to her addresses of record.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department of Labor, Licensing and Regulation, and the OAH Rules of Procedure govern the 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, COMAR 09.08.02.01; COMAR 28.02.01.

ISSUE

Did the Claimant sustain an actual loss compensable by the Fund as a result of the

Respondent's acts or omissions?

SUMMARY OF THE EVIDENCE

Exhibits

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

- Claimant Ex. 1 March 29, 2008 contract between the Claimant and Respondent
- Claimant Ex. 2 Work Schedule
- Claimant Ex. 3 March 29, 2008 copy of Check 293 from Claimant to the Respondent
- Claimant Ex. 4 April 18, 2008 copy of Check 303 from Claimant to the Respondent
- Claimant Ex. 5 Claimant telephone log May 16, 2008 through November 4, 2008
- Claimant Ex. 6 November 10, 2008 Invoice from Dream Maker Bath and Kitchen
- Claimant Ex. 7 Supplemental Observation and Information
- Claimant Ex. 8 Color photographs of sink, tub, bathroom

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. 1: October 12, 2010 Notice of Hearing
- Fund Ex. 2: October 9, 2010 Hearing Order, with attached Notice of Hearing and returned Envelope
- Fund Ex. 3 The Respondent's Maryland Department of Assessments and Taxation Real Property Data Search
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- Fund Ex. 7 MHIC January 12, 2009 letter to the Respondent
- Fund Ex. 8 June 3, 2008 Complaint Form from the Claimant

No exhibits were submitted on behalf of the Respondent.

Testimony

The Claimant testified on her own behalf and did not present any other witnesses. The Fund presented argument. No one testified on behalf of the Respondent.

FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. At all times relevant to this matter, the Respondent was a licensed home improvement contractor under MHIC license number 05-125441.
2. On March 29, 2008, the Claimant entered into a contract with the Respondent to remodel the Claimant's master bathroom at her residence.
3. The Respondent was supposed to demolish the old bathroom and install a new shower, tub, heat lamps, baseboard heaters, electrical wiring, counter tops, toilet, vanity, floor and shower tiles, and cabinets
4. The contract price was \$10,500.00. The Claimant paid the Respondent \$3,500.00 at the time she signed the contract on March 29, 2008. The Claimant made an additional payment in the amount of \$2,300.00 on April 18, 2008, for a total payment to the Respondent under the contract of \$5,800.00.
5. Work started on April 7, 2008 in accordance with the contract. The work was supposed to be completed by April 16, 2008. It was never completed.
6. The Respondent installed tile on the floor and shower wall. The tile had dirt in the grout and was installed unevenly. The grout had cracking.
7. The wood door frame installed by the Respondent was too short for the space.

8. The soap dishes installed by the Respondent were installed incorrectly and the Respondent removed them to position them correctly. When the Respondent repositioned the soap dishes, they broke. Additionally, the Respondent used excessive caulk when installing the soap dishes.
9. The Respondent did not install the shower enclosure even though the shower technician took the required measurements.
10. The Respondent did not install the baseboard heaters.
11. The Respondent was supposed to install a bathtub, shower, and sink fixtures. The Respondent over-enlarged the hole on the tub for the spout and the fixtures could not be installed.
12. The shower pan installed by the Respondent did not have a support under the base.
13. The tub installed by the Respondent did not have a support subfloor base.
14. The drywall installed by the Respondent had glue and visible tape seams showing.
15. The Respondent installed the toilet at an improper angle.
16. Electrical wiring installed by the Respondent did not have adequate voltage to sustain the electrical fixtures.
17. The Respondent did not request the permits to perform the plumbing and electrical work as required by the contract.
18. Between May 4, 2008 and June 15, 2008, the Claimant contacted the Respondent at least seventeen times and requested the Respondent correct the errors and omissions regarding her work.
19. The Respondent did not respond to the Claimant's request.

20. On November 10, 2008, the Claimant entered into a contract with Dream Maker Bath and Kitchen, a licensed MHIC contractor, to replace all of the plumbing, fixtures, and electrical work installed by the Respondent. The total contract price was \$23,595.00.
21. The new contractor performed the same work that the Respondent had originally agreed to perform, and had to replace all of the Respondent's work.

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 her burden, establishing her entitlement to an award from the Fund.

First, the Respondent was a licensed home improvement contractor at the time she entered into the contract with the Claimant. Second, the Claimant paid the Respondent \$5,800.00 under a home improvement contract. Third, the uncontroverted evidence presented by the Claimant demonstrates that the Respondent performed an inadequate home improvement.

The Claimant testified to the numerous deficiencies in the Respondent's work, including but not limited to, dirty, cracked grout, improperly installed fixtures, uneven tile, faulty electrical installation and non installation of heaters.

I conclude that the Claimant's evidence on this issue is persuasive. She presented documentary evidence that the Respondent's work was well below industry standards as detailed

by her own observations, color photographs, and the licensed contractor Dream Maker Bath and Kitchen in their invoice. The invoice details with specificity what the Respondent did wrong and what Dream Maker Bath and Kitchen had to do in order to correct the Respondent's work.

When the Claimant advised the Respondent of her omissions and errors, she refused to correct the work. The Respondent's position in this regard was unreasonable. When anyone is hired to perform a task under a contract, the contractor is expected to conform the work to the contract specifications and industry norms. The Respondent failed to conform to the contract in this case when she installed uneven tile, dirty, cracked grout, incorrect voltage (for electrical wiring), improper base settings, and improper fixture holes. It was inappropriate for her to decline to correct the errors and omissions. As a result of the Respondent's continued refusal to perform in accordance with the contract, the Claimant had to secure the services of a second contractor to do the work.

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)(c).

The Claimant presented unrefuted evidence from a licensed home improvement

contractor that the cost to remove and re-construct the contract work would be \$23,395.00.

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	\$5,800.00
Amount Paid to Correct and Complete Work	<u>+\$23,595.00</u>
	\$29,395.00
Amount of Original Contract	<u>-\$10,500.00</u>
Amount of Actual Loss	18,895.00

Although the Claimant's actual loss is \$18,895.00, I conclude, for the reasons set forth below, that she 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. As Mr. London acknowledged during the hearing, 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 filed." 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 *McComus v. Criminal Injuries Compensation 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 she actually paid the Respondent, that is, \$5,800.00.

CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$5,800.00 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 \$5,800.00; 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.

April 20, 2011
Date Decision Mailed

JW/zhs
#122179


Jerome Woods, II
Administrative Law Judge

IN THE MATTER OF THE CLAIM OF * BEFORE JEROME WOODS, II,
DENNISE MOCK, * AN ADMINISTRATIVE LAW JUDGE
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FILE EXHIBIT LIST

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PROPOSED ORDER

WHEREFORE, this 2nd day of June 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.

J. Jean White

*I. Jean White
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION