Maryland Home Improvement Commission
500 N. Calvert Street, Room 306
Baltimore, MD 21202-3651
Stanley J. Botts, Commissioner

IN THE MATTER OF THE CLAIM ETHAN S. BURGER AND NEVA W. GRANT AGAINST THE MARYLAND HOME IMPROVEMENT GUARANTY FUND FOR ALLEGED VIOLATIONS OF JAMES MARTINS t/a AMERICAN LANDSCAPING INC.	* * *	MARYLAND HOME IMPROVEMENT COMMISSION MHIC CASE NO. 09 (90) 1337

* * * * *

FINAL ORDER

WHEREFORE, this 2ND day of August, 2011, Panel B of the Maryland Home Improvement Commission ORDERS that:

1) The Findings of Fact of the Administrative Law Judge are Amended as follows:

A) Finding of Fact No. 8 is Reversed.

2) The Conclusions of Law of the Administrative Law Judge are Amended as follows:

A) Pursuant to Business Regulation Article, §8-405(e)(5), Annotated Code of Maryland, which was enacted by the Maryland Legislature, effective October 1, 2010, the Commission may not award to a Guaranty Fund claimant an amount greater than the amount paid by or on behalf of the claimant to the original contractor against whom the claim is filed. Said amendment to the statute applies to any pending Guaranty Fund claim, for which the adjudication of the Commission is not yet final as of October 1, 2010.

B) The Administrative Law Judge found that the Claimants paid a total of $2,107.00 to the Respondent. Therefore, pursuant to Business Regulation Article, §8-405(e)(5), Annotated Code of Maryland, the maximum amount which may be awarded to the Claimants in this matter is $2,107.00.

C) Based on review of the record in this matter, the Commission concludes that the Claimants have failed to meet their burden of proof. Business Regulation Article, §8-407(e)(1), Annotated Code of Maryland, provides that, at a hearing, the claimant has the burden to prove an actual loss as a result of unworkmanlike, inadequate, or incomplete home improvement work by the respondent contractor. In this case, there was a dispute whether the Respondent performed in an unworkmanlike manner. The burden was on the Claimants to prove that the Respondent's workmanship failed to meet acceptable trade standards. As acknowledged by the Administrative Law Judge, there is no expert evidence in the record in support of the Claimants' allegation of unworkmanlike performance by the Respondent. After review of the entire record in this matter, the Commission concludes that the evidence presented in support of the Claimants' claim is legally insufficient to prove that the Respondent performed an unworkmanlike home improvement.

3) The Recommended Order of the Administrative Law Judge is Amended as follows:

A) Pursuant to Business Regulation Article, §8-407(e)(1), Annotated Code of Maryland, the Guaranty Fund claim of the Claimants is DENIED.

4) This Final Order shall become effective thirty (30) days from this date. During the thirty (30) day period, any party may file an appeal of this decision to Circuit Court.

I. Jean White
Chair - Panel B
MARYLAND HOME IMPROVEMENT COMMISSION

CLAIM OF ETHAN S. BURGER AND	*	**BEFORE MARLEEN B. MILLER,**
NEVA W. GRANT AGAINST THE	*	**AN ADMINISTRATIVE LAW JUDGE**
MARYLAND HOME IMPROVEMENT	*	**OF THE MARYLAND OFFICE**
GUARANTY FUND, REGARDING THE	*	**OF ADMINISTRATIVE HEARINGS**
ALLEGED ACTS AND OMISSIONS OF	*	
JAMES MARTINS T/A AMERICAN	*	**OAH NO.: DLR-HIC-02-10-13023**
LANDSCAPING, INC.,	*	**MHIC NO.: 09 (90) 1337**
THE LICENSEE		

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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 or about July 13, 2009, Ethan S. Burger (the Claimant) filed a claim (the Claim) with the Maryland Home Improvement Commission (the MHIC or the Commission) Guaranty Fund (the Fund), for reimbursement of the actual losses he and his wife allegedly suffered as a result of the acts and omissions of James Martins, t/a American Landscaping, Inc. (the Licensee). After investigation, the Commission issued an April 8, 2010 Hearing Order and forwarded the case to the Office of Administrative Hearings (OAH) on April 15, 2010.

On May 19, 2010, I conducted a hearing on the Claim at OAH's Administrative Law Building in Hunt Valley, Maryland, pursuant to the Maryland Annotated Code's Business

Regulation Article[1] § 8-407(a) (incorporating the hearing provisions of Business Regulation Article § 8-312).[2] Because the Claim was originally filed only by Mr. Burger, and he and his wife (Neva W. Grant) jointly own the subject property (the Property), Mr. Burger requested and I granted his request to include Ms. Grant as an additional Claimant.[3] The Claimants represented themselves, Assistant Attorney General Eric B. London appeared on the Fund's behalf, and Amir D. Gibbs, Esquire, represented the Respondent.

The contested case provisions of the Administrative Procedure Act, Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009); the Commission's Hearing Regulations, COMAR 09.01.03, 09.08.02.01, and 09.08.03; and OAH's Rules of Procedure, COMAR 28.02.01, govern procedure in this case.

ISSUES

Did the Claimants sustain an actual loss as a result of the Licensee's acts or omissions and, if so, what amount are the Claimants entitled to recover from the Fund?

SUMMARY OF THE EVIDENCE

Exhibits

The Claimants submitted the following documents, which I admitted into evidence as the exhibits numbered below:

1. Proposal, dated March 19, 2008

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[1] Throughout this Recommended Decision, the 2010 Replacement Volume to the Maryland Annotated Code's Business Regulation Article will be referred to as the Business Regulation Article.
[2] On May 17, 2010, the Licensee requested a postponement of this hearing, which the OAH denied as untimely filed.
[3] COMAR 09.08.03.02C prohibits a party from amending a claim unless the claimant can satisfactorily establish that either the "(1) Claimant did not know and could not have reasonably ascertained the facts on which the proposed amendment is based at the time the claim was filed; or (2) Claimant's proposed amendment would not prejudice the contractor whose conduct gave rise to the claim." Certainly, amending the Claim to include both Property owners as joint claimants will not in any way prejudice the Licensee.

2. The Claimants' checks payable to the Licensee[4]

3. Series of emails between the Claimants and the Licensee

4. Eleven photographs

5. Contract, invoices, and communications between the Claimants and Fine Earth Landscape, Inc.

6. Broken off pieces of mortar/concrete

7. Nine photographs

8. December 30, 2008 letter to the Claimants from Fine Earth Landscape, Inc.

9. January 29, 2009 letter from the Licensee to the Claimants

The Licensee submitted the following documents, which I admitted into evidence as the exhibits numbered below:

1. Four photographs

2. Contract, signed May 13, 2008

3. February 27, 2009 MHIC Complaint by Mr. Burger against the Licensee

4. Six photographs

5. Photograph

6. Photograph

7. March 11, 2008 Customer Contact Information

The Fund submitted the following documents, which I admitted into evidence as the exhibits numbered below:

1. April 16, 2010 Notice of Hearing

2. April 8, 2010 Hearing Order

3. The Licensee's certified licensing history

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[4] These checks do not add up to the total amount the Claimants paid to the Licensee, but the Licensee does not dispute the amounts paid.

4. July 13, 2009 Claim

5. July 30, 2009 letter from the Commission to the Licensee

Testimony

The Claimants each testified and also presented the testimony of Pamela Schaeffer, who was qualified as a real estate agent.

The Licensee testified on his own behalf and presented the testimony of the following additional witnesses:

- Karen Martins, the Licensee's General Manager
- Paul Smith, the Licensee's Foreman
- William F. Beatty, the Licensee's Estimator

FINDINGS OF FACT

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

1. At all relevant times, the Licensee was a licensed home improvement contractor, License # 01-4783, who operated a business trading as American Landscaping, Inc.

2. In or around March of 2008, the Claimants decided to replace their front walkway, stoop and steps.

3. After meeting with a number of contractors and reviewing several bids, on May 13, 2008, the Claimants entered into a contract (the Contract) with the Licensee, to perform the following work (the Work):

    - Patch cracks in concrete;
    - Furnish and install approximately fifty square feet of irregularly shaped flagstone;

- Set flagstone in mortar; and
- Clean-up and haul away all debris.

4. Before the Work began, the Claimants showed the Licensee's representatives their rear patio as an example of what they wanted on their front walkway and steps.

5. After the Work began, the Claimants expressed to the Licensee's representatives their concern that the walkway and steps might not be safe for traversing by their elderly parents.

6. By June 12, 2008, the Claimants had paid the Licensee the full Contract price for the Work, $1,791.00, plus an additional $316.00 for flagstones better matching the house, without waiving their concerns regarding problems they expected the Licensee to fix.

7. Not until after the Work was completed and the mortar began to crack and flake away did the Licensee advise the Claimants of the necessity of sealant to properly maintain the Work, which the Licensee would only install at an additional charge of approximately $400.00.

8. The Work performed by the Licensee was unworkmanlike in, among others, the following ways:

- The Work did not conform with the flagstone on the Claimants' rear steps/patio;
- The overhang and step treads were inconsistent in depth and thickness, making them unsafe;
- The flagstone installed was irregular on the top, preventing water from running off properly and making them difficult to traverse safely;
- The flagstones were set too far apart;
- Mortar was sloppily installed so that it covered the edges of the flagstone;

- Approximately a five-foot by six-foot area of landscaping was unnecessarily destroyed;
- No sealant was placed over any of the Work;
- The mortar was not uniform in color;
- The mortar became lumpy, flaky and discolored; and
- Dirt was seeping into the walkway.

9. Between approximately August and September 2008, the Licensee sent its representatives back to the Property on about three occasions to make repairs, which resolved some but not all of the deficiencies in the Work.

10. On or about September 16, 2008, Mr. Burger tripped on broken mortar on his way to get the newspaper.

11. On December 16, 2008, the Claimants made a complaint about the Licensee's Work to the Montgomery County Office of Consumer Protection.

12. On or about December 31, 2008, the Claimants obtained an estimate from Fine Earth Landscape, Inc. (Fine Earth) for repair and replacement of the Licensee's Work, which included the following:

- Removal and replacement of front walkway and steps; and
- Replacement of landscaping damaged by the Licensee's workmen.

13. On February 27, 2009, Mr. Burger filed with the Commission a Complaint against the Licensee.

14. On July 13, 2009, Mr. Burger filed his Claim with the Commission.

15. On July 30, 2009, the Commission notified the Licensee of the Claim.

16. The Claimants paid Fine Earth a total of $7,473.00 for its repair and replacement of the Work and additional sums for replacement of landscaping damaged by the Licensee's workmen.

DISCUSSION

Pursuant to Business Regulation Article §§ 8-405(a) and 8-407(e)(1), to recover compensation from the Fund, the Claimants must prove, by a preponderance of the evidence, that they incurred an actual loss, which resulted from a licensed contractor's acts or omission. Business Regulation Article § 8-401 defines an "actual loss" as "the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." For the reasons set forth below, I conclude that the Claimants have met this burden, by proving that the Licensee failed to perform a workmanlike job and that the Claimants incurred an actual loss, entitling them to an award of $7,473.00.

The Claimants testified regarding and presented clear photographic evidence demonstrating the problems with the Licensee's Work. As a result, I find that an expert is unnecessary for me to find that deficiencies existed, as listed in my factual findings and as described in the letter written to the Claimants by the replacement contractor, Fine Earth. The Claimants further established the terms of and payments made on the original Contract with the Licensee and on the contract with Fine Earth to repair/replace the Work.

The Licensee seeks to place the blame for any problems on the Claimants because they asked for irregular flagstone and did not ask or pay for sealing the Work. Yet the testimony of both the Claimants and the Licensee's witnesses convince me that the Licensee has misplaced the blame in this case.

I believed the Claimants when they testified that, by using the term "irregularly shaped flagstone," they were referring only to irregularly shaped sides, assuming that the tops would be safely flat, as was the case with their rear patio. They testified that they showed their rear patio to the Licensee's agent, William F. Beatty, with whom they negotiated the Contract and asked him to give them similar stonework in the front of their residence. Mr. Beatty testified that he remembered being shown the rear patio at that time, but that he could not remember what was said about it. Consequently, the Claimants' testimony is unrefuted in that regard. While the Licensee's witnesses testified to the difference between what the Claimants asked for, irregular flagstones, and what they apparently wanted, random flagstones, not one witness testified when and if any of the Licensee's representatives fully explained that difference to the Claimants before Work commenced. In contrast, Fine Earth explained the difference to the Claimants and, therefore provided the Claimants with what they required. Contrary to the Licensee's contention, simply because Ms. Grant testified on that point that she had "learned her lesson," does not mean that it is her fault that she chose the wrong flagstone in the first place.

Another example of misplaced blame involves the Claimants' alleged failure to ask that the Work be sealed or cured to maintain its integrity. Not one of the Licensee's witnesses testified that the option of sealant was raised before the completed mortar and stone began to seep, flake and discolor. Mr. Beatty specifically testified that he had no recollection of anyone mentioning the option of sealant before the Work commenced. Yet, the Licensee (who admittedly had virtually nothing to do with the Contract or the Work until after problems arose) complains that the Claimants should have purchased sealant, but they were allegedly unwilling to pay for it.

By working as a licensed home improvement contractor, who advertises himself and his staff as experts in stone and masonry work, the Licensee is under an obligation to assure that customers lacking that degree of expertise know what they will be getting when they enter into a contract with his company. The fact that the Claimants did not question how safe the steps and walkway would be until around two weeks after the Work commenced, does not excuse the License and his staff from failing to explain to them any safety concerns raised by irregular flagstone. The Licensee and Mr. Beatty testified that weather conditions may cause flaking and discoloration of unsealed mortar. If sealant or curing were necessary to maintain the integrity of the Work, the Claimants needed to be made aware of that fact before the Work began.

Finally, if the Claimants' rear patio contained random rather than irregular flagstone and that random flagstone patio was shown to Mr. Beatty as an example of what the Claimants wanted, it was incumbent upon him to explain the difference to them between what he was shown and what the Licensee would be providing in the front of their Property. While the increased price of changing the Contract to meet the Claimants' actual needs might have resulted in a higher price and the Licensee's possible loss of its bid for the Contract, such a risk should not have deterred the Licensee from providing the Claimants the benefit of his expertise.

Consequently, I conclude that the Claimants have met their burden of proof and are entitled to an award from the Fund under the following formula set forth in COMAR 09.08.03.03B(3)(c):

> B. Measure of Awards from Guaranty Fund.
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> . . . .
>
> (3) Unless it determines that a particular claim requires a unique measurement, the Commission shall measure actual loss as follows:
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> . . . .
>
> (c) 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.

Using the above formula, I calculate the Claimants' actual loss as follows:

$ 2,107.00	Amount the Claimants paid the Licensee
+ 7,473.00	Amount required to repair/replace the Licensee's Work
$ 9,580.00	Total amounts paid by the Claimants
− 2,107.00	Contract price
$ 7,473.00	The Claimants' actual loss

Reimbursement of the Claimants for the Licensee's destruction of their landscaping would constitute an award of compensatory damages, which cannot properly be obtained from the Fund. *See* COMAR 09.08.03.03B(1)(a).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude that the Claimants have met their burden of proving that they incurred an actual loss as a result of the Licensee's unworkmanlike performance of the Work. Business Regulation Article §§ 8-405(a) and 8-407(e)(1). The total amount of that loss is $7,473.00, which the Claimants should be awarded from the Fund. COMAR 09.08.03.03B(3)(c).

RECOMMENDED ORDER

Upon due consideration, I **RECOMMEND** as follows:

1. The MHIC **ORDER** that the Claimants, Ethan S. Burger and Neva W. Grant, be awarded $7,473.00 from the MHIC Fund, for the actual losses they sustained as a result of the Licensee's unworkmanlike home improvement work;

2. The Licensee, James Martins t/a American Landscaping, Inc., be ineligible for an MHIC license, under Business Regulation Article § 8-411(a), until the Fund is reimbursed for the full amount of the award paid pursuant to its Order, plus annual interest of at least ten percent (10%); and

3. The records and publications of the MHIC reflect this decision.

August 9, 2010
Date

Marleen B. Miller
Administrative Law Judge

MBM/kkc
#115886

CLAIM OF ETHAN S. BURGER AND	*	**BEFORE MARLEEN B. MILLER,**
NEVA W. GRANT AGAINST THE	*	**AN ADMINISTRATIVE LAW JUDGE**
MARYLAND HOME IMPROVEMENT	*	**OF THE MARYLAND OFFICE**
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FILE EXHIBIT LIST

The Claimant's Exhibits

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PROPOSED ORDER

WHEREFORE, this 5th day of October 2010, 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.

Marilyn Jumalon

Marilyn Jumalon
Panel B

MARYLAND HOME IMPROVEMENT COMMISSION