

IN THE MATTER OF THE CLAIM * BEFORE A. J. NOVOTNY, JR,
OF MICHAEL FIORE * 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-02-10-24950
OMISSIONS OF EUGENE MARTIN, * MHIC NO.: 09 (05) 621
JR., trading as MARTIN HOME *
IMPROVEMENT SERVICES *

* * * * *

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 March 3, 2009, Michael Fiore (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$15,389.89 for actual losses allegedly suffered as a result of a home improvement contract with Eugene Martin, Jr., trading as Martin Home Improvement Services (Respondent).

I held a hearing on February 2, 2011, at the Frederick County Department of Social Services, 100 All Saints Street, Frederick, Maryland 21701. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010). Hope Sacks, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Claimant was represented by David

Weaver, Esquire, Holtzinger & Weaver, P.A., 100 North Court Street, Frederick, Maryland 21701. The Respondent appeared and represented himself.¹

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 govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2010), Code of Maryland Regulations (COMAR) 09.01.03.01–09.01.03.10; 09.08.02.01-09.08.01.02; and 28.02.01.01-28.02.01.27.

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:

- Cl. Ex. # 1 Contract, dated May 13, 2008
- Cl. Ex. # 2 Letter from Claimant to Respondent, dated September 28, 2008
- Cl. Ex. # 3 Letter from Claimant to Respondent, dated October 7, 2008
- Cl. Ex. # 4 Photograph of bedroom wall damage
- Cl. Ex. # 5 Photograph of bathroom alcove, poor centering
- Cl. Ex. # 6 Photograph of bowed bathroom ceiling
- Cl. Ex. # 7 Photograph of shower bench, wrong sized
- Cl. Ex. # 8 Photograph of main support beam, cut for faucet

¹ Although the notices of hearing sent by regular and registered mail were returned to the Office of Administrative Hearings, the Respondent appeared timely.

- Cl. Ex. # 9 Photograph of bathroom uncapped drain pipe
- Cl. Ex. # 10 Photograph of bathroom exhaust fan, un-connected
- Cl. Ex. # 11 Photograph of bathroom ceiling light, wrong fixture
- Cl. Ex. # 12 Photocopy of check issued May 13, 2008
- Cl. Ex. # 13 Photocopy of signature page and receipt, dated May 13, 2008
- Cl. Ex. # 14 Photocopy of check issued July 20, 2008
- Cl. Ex. # 15 Proposal of Riccobene Contracting (Riccobene), dated October 6, 2008
- Cl. Ex. # 16 Change Order with Riccobene, dated October 3, 2008
- Cl. Ex. # 17 Plumbing Change Order with Riccobene, dated October 14, 2008
- Cl. Ex. # 18 Electrical Change Order with Riccobene, dated October 20, 2008
- Cl. Ex. # 19 Material purchase receipts, dated October 13 & November 5, 2008
- Cl. Ex. # 20 Receipt to Riccobene, dated October 22, 2008
- Cl. Ex. # 21 Receipt to Riccobene, dated January 17, 2009
- Cl. Ex. # 22 Receipt to Riccobene, dated October 6, 2008
- Cl. Ex. # 23 MHIC claim calculation spread-sheet
- Cl. Ex. # 24 Email from Claimant to Respondent, dated September 12, 2008
- Cl. Ex. # 25 Photograph of bathroom plumbing, attached to existing lines
- Cl. Ex. # 26 Photograph of main support beam, cut for faucet (closer view of # 8)
- Cl. Ex. # 27 Photograph of main entrance, missing molding and reversed handle

I admitted the following exhibits on behalf of the Respondent:

- Re. Ex. # 1 Drawing of beam and floor plan
- Re. Ex. # 2 Exterior photograph of the house, with notations
- Re. Ex. # 3 Photocopy of section 2308.9.10 of 2006 International Building Code

- Re. Ex. # 4 Email from Claimant to Respondent, dated August 17, 2008
- Re. Ex. # 5 Email from Claimant to Respondent, dated August 25, 2008
- Re. Ex. # 6 Email from Respondent to Claimant, dated September 10, 2008
- Re. Ex. # 7 Email from Respondent to Claimant, dated September 16, 2008

I admitted the following exhibits on behalf of the MHIC Fund:

- GF Ex. #1: Notices of Hearing, dated November 12, 2010
- GF Ex. #2: Affidavit of Michael Miller, MHIC Investigator, dated December 8, 2010
- GF Ex. #3: Licensing history for the Respondent
- GF Ex. #4: MHIC letter to the Respondent, dated April 14, 2009

Testimony

The Claimant testified on his own behalf and presented the testimony of James Follemeyer, Vice President of Riccobene.

The Fund did not present the testimony of any additional witnesses.

The Respondent testified on his own behalf.

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 3729893.
2. On May 13, 2008, the Claimant and the Respondent entered into a contract (the contract) to remodel the Claimant's home, located at 4085 Lomar Drive, Mount Airy, Maryland 21771 (the property).
3. The scope of the work included a complete remodeling of the master bathroom and front door replacement. The Respondent was to demolish and completely replace the bathroom

installing new tile, sinks, toilet, fixtures, cabinets, plumbing, electrical outlets, switches and lighting, relocate the fan, install moisture resistant drywall, grout, seal, prime and paint and build a custom shower, which included a bench and recessed soap niche.

Additionally, the Respondent was to totally remove and replace the front door assembly, install hardware, trim, seal and paint. The scope of the contract was extensive.

4. The contract stated that work would begin on or before May 21, 2008 for the front door and June 2, 2008 for the bathroom.
5. The contract estimated that the work would be completed by May 22, 2008 for the front door and June 23, 2008 for the bathroom.
6. The original agreed upon contract price was \$16,050.00, allocated as \$3,850.00 for the front door and \$12,200.00 for the bathroom.
7. On May 13, 2008, the Claimant paid the Respondent a deposit of \$5,350.00.
8. Work on the bathroom was delayed approximately two weeks because of delays in the material delivery. The actual dates that construction began were not disclosed.
9. The Claimant was repeatedly leaving messages for the Respondent about when the work would be completed, and when he responded, the Respondent would indicate that it would be by the end of the week, or by Friday.
10. The Respondent removed the old front door and installed the replacement, but did not paint it or install the inside molding and trim. The door latch (not a knob, but a latch) was installed backwards.
11. The Claimant and Respondent agreed to a change in the original contract. The storm door specified in the contract was deleted, at a credit of \$484.00.

12. On July 20, 2009, the Claimant paid the Respondent \$4,866.00 as the second draw payment under the contract.
13. Total payments from the Claimant to the Respondent were \$10,216.00.
14. The Respondent removed the old bathroom but his replacement work was terrible. The tile was not centered in and behind the shower bench, the shower bench was not made the correct size, the plumbing was attached to and routed off the old plumbing rather than rerouting new plumbing, and the main bearing wall support column was cut more than halfway to allow faucet installation, but no re-support of that column was installed. There was damage to the adjoining bedroom walls because tape was used to hang dust covers, then the tape was pulled off peeling away part of the drywall. The adhesive applied to the floor tile did not harden, and the tiles were loose. The new cabinets were scratched.
15. The integrity of the bathroom wall structure was seriously compromised by the Respondent's cutting the deep notches in the main support column and failure to install additional buttresses or supports around that column.
16. Based upon the extensive delay in completion and the visibly poor quality of the Respondent's work, on September 28, 2008, the Claimant notified the Respondent that he was terminating the contract.
17. The Respondent's home improvement work on the property was unworkmanlike, inadequate and incomplete.
18. The Claimant had given the Respondent a reasonable opportunity to complete the job and to presumably correct the unworkmanlike, inadequate and incomplete home improvements, but he failed to do so within a reasonable time.

19. The Respondent's unworkmanlike, inadequate, or incomplete home improvement on the property required extensive amount of additional work to correct and complete.
20. On October 6, 2008, the Claimant contracted with Riccobene to repair the work done by the Respondent and complete the original contract. The initial contract price with Riccobene was \$14,345.55 for removal of the various installations made by the Respondent and replacement according to the original contract and specifications with the Respondent. The proposal provided for supplemental proposals should additional defects or work be required when the tile, cabinets and other installations made by the Respondent were removed.
21. The Claimant ultimately paid Riccobene a total of \$21,696.00 to remove what the Respondent had done and to complete the project to the original contract specifications.
22. The Respondent filed his MHIC Fund claim on March 3, 2009.

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) (2010). *See also* COMAR 09.08.03.03B(2). Actual loss "means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." Md. Code Ann., Bus. Reg. § 8-401 (2010). For the following reasons, I find that the Claimant has proven eligibility for compensation.

The Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant. The Claimant was not related to the Respondent nor was a part of his business; *i.e.*, the Claimant was not an owner, partner or employee of the Respondent's company. The Respondent performed home improvements on the Claimant's property, his only

home in the state of Maryland, in which he intended to reside. The work included removal and replacement of the front door unit (the entire pre-hung door, frame and window assembly, not just the door itself) as well as demolition of and total re-fabrication of the master bathroom.

Next, the Respondent performed unworkmanlike, inadequate or incomplete home improvement. The Respondent started the work, but it went very wrong. The Claimant testified about the Respondent's unworkmanlike, inadequate and incomplete work clearly, convincingly and without contradiction. Other evidence, especially the photographs and the string of emails supported his testimony.

Despite having these complaints brought to his attention, the Respondent failed to move the job along or to correct the defects. At the hearing, the Respondent had a myriad of unconvincing excuses when he was not being evasive: there were delays in getting the materials, "about a month;" he could not get his crew to the site; the plumbing and electric were original; the Claimant was out of town a lot and this caused delays (the Respondent had been given house keys and access) and that he was thrown off before he could finish. The two most disingenuous excuses were that the Claimant "wanted it done right, not fast" and that he cut the column according to code, not more than 25 percent. In fact, the evidence, and all of the inferences drawn from that evidence, showed me that the Claimant wanted it done not only right, but at least done. The project was supposed to be done in mid-May for the door and late June for the bathroom. It was in late September that the Claimant had had enough of the Respondent's procrastination and damage. As to the column, even assuming that section 2308.9.10 of 2006 International Building Code applied, the photographs show clearing that the Respondent did not cut 25 percent of the column - he left 25 percent! The evidence also shows that the Respondent

would not even respond timely to communications from the Claimant. The work was not finished timely and not performed properly.

The Claimant contacted Riccobene complete the scope of the contract and correct the Respondent's poor and unworkmanlike manner. "Workmanlike" means "characterized by the skill and efficiency typical of a good workman" and "competent and skillful but not outstanding or original." *Merriam-Webster's Collegiate Dictionary* 1443 (11th ed. 2006). In the context of this case, "unworkmanlike" means unskillful or incompetent home improvement. Applying that standard to the work that the Respondent performed on the property, by cutting the support column, and not re-supporting the wall, the Respondent compromised the structural integrity of the entire structure, falling far below the standards of "workmanlike" construction. Likewise, not centering tile, cutting benches short and creating a morass of pipes and wires by tapping into existing pipes and wires rather than removing the old and routing in new falls far below the standards of "workmanlike" construction.

The scope of the work envisioned by the Riccobene proposal work was undisputedly within the scope of the Respondent's initial contract with the Claimant. Riccobene was required to repair the damage caused by the Respondent and then to complete the renovation. The Claimant is eligible for compensation for the Respondent's unworkmanlike, inadequate and incomplete home improvement on his property.

Having found eligibility for compensation, I now turn to the amount of the award, if any. 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 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. 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).

Applying the formula set out above, I find that the Claimant sustained an actual loss as follows:

Amount Paid to the Respondent	\$10,216.00
Amount Paid to Correct and Complete Work	<u>+\$21,696.00²</u>
	\$31,912.00
Amount of Original Contract	<u>-\$15,566.00³</u>
Amount of Actual Loss	\$16,346.00

However, the Claimant's award is limited to the amount that he paid the original contractor (Respondent). In 2010, Maryland's General Assembly amended section 8-405(c), adding an additional limit to a claimant's recovery. A claimant could 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.

² The Claimant wished to include two receipts (CE. Ex. #19) that he paid for merchandise purchased from Home Depot totaling \$1,566.00. I have not included these because I did not find them sufficiently authenticated as being items necessary to the completion of the project over and above the Riccobene proposal.

³ I deducted the storm door credit of \$484.00 from the original contract price of \$16,050.00.

The amendment raises the issue as to 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.* 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, the 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 outcome 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. Interpreting the amendment to section 8-405(e) so that it is nothing more than a *cap on the amount of actual loss, rather than a re-definition of "actual loss,"* comports with the statutory language. Applying this interpretation gives meaning to every word of the statute. No word or section is extraneous, and the interpretation is consistent with the remedial purpose to compensate claimants for their actual losses, subject to a maximum.

For all these reasons, where the cost of repair exceeds the full contract price, a claimant is entitled to recover the full cost of repair, up to a maximum of the amount paid to the contractor for the entire contract. Accordingly, I find that the Claimant is entitled to actual damages in the amount of \$10,216.00.

CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual loss of \$10,216.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2010).

RECOMMENDED ORDER

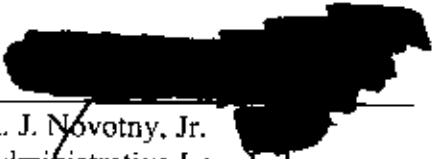
I **PROPOSE** that the Maryland Home Improvement Commission:

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$10,216.00; 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 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 28, 2011
Date Decision mailed


A. J. Novotny, Jr.
Administrative Law Judge

122379

PROPOSED ORDER

WHEREFORE, this 5th day of July 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.

Rossana Marsh

*Rossana Marsh
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION