

**The Maryland Home
Improvement Commission**

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**BEFORE THE
MARYLAND HOME IMPROVEMENT
COMMISSION**

**v. Randy Gossman
t/a R T M Concrete Construction, LLC
(Contractor)
and the Claim of
Carolyn A. Cox
(Claimant)**

MHIC No.: 12 (90) 280

FINAL ORDER

**WHEREFORE, this October 6, 2014, Panel B of the Maryland Home Improvement
Commission ORDERS that:**

- 1. The Findings of Fact set forth in the Proposed Order dated June 24, 2014 are
AFFIRMED.**
- 2. The Conclusions of Law set forth in the Proposed Order dated June 24, 2014 are
AFFIRMED.**
- 3. The Proposed Order dated June 24, 2014 is AFFIRMED.**
- 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.**

Joseph Tunney
**Joseph Tunney, Chairperson
PANEL B**

MARYLAND HOME IMPROVEMENT COMMISSION

IN THE MATTER OF THE CLAIM
OF CAROLYN A. COX
CLAIMANT,
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF RANDY GOSSMAN,
T/A RTM CONCRETE
CONSTRUCTION LLC,
RESPONDENT

* BEFORE A. J. NOVOTNY, JR.,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH NO.: DLR-HIC-02-13-40162
* MHIC NO.: 12(90)-80- 280
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RECOMMENDED DECISION

STATEMENT OF THE CASE
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CONCLUSIONS OF LAW
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STATEMENT OF THE CASE

On December 29, 2011, Carolyn Cox (Claimant) filed a claim for reimbursement from the Home Improvement Commission (MHIC) Guaranty Fund (Fund) for the acts or omissions of Randy Gossman t/a RTM Concrete Construction LLC (Respondent). The Fund determined that the Claimant was entitled to a hearing and forwarded the case to the Office of Administrative Hearings (OAH), where the matter was assigned case number DLR-HIC-02-12-40224 and scheduled for hearing. Administrative Law Judge (ALJ) Power convened a hearing

on June 14, 2013 at the Harford County Public Library in Bel Air, Maryland. Md. Code Ann., Bus. Reg. §§ 8-405 through 8-407 (2010 & Supp. 2012). Neither the Claimant nor the Respondent appeared for the hearing. The Fund was represented by Kris King, Assistant Attorney General. On June 29, 2013, ALJ Power issued a Recommended Decision proposing that the MHIC deny the claim.

Thereafter, the Claimant filed written exceptions with the MHIC addressing the proposed dismissal of her claim. After consideration, the MHIC determined that the Claimant had established good cause for her failure to appear at the June 14, 2013 hearing. On September 5, 2013, the MHIC issued a Remand Order, remanding the matter to the OAH for scheduling a *de novo* hearing of the merits of the claim.¹ The OAH assigned the matter the current case number.

On October 23, 2013, the OAH sent Notice of the Hearing (Notice) to the parties scheduling a hearing based upon the Remand. The Notices were sent via both regular mail and by certified mail, return receipt requested. On October 24, 2013, Fred Gossman signed the delivery receipt green card acknowledging receipt of the certified mailing for the Respondent. *See* Fund exhibit #1. On October 25, 2013, the Claimant signed the delivery receipt green card acknowledging receipt of the certified mailing. The regular mail Notices were not returned by postal authorities as undelivered.

Based upon the record before me, I am satisfied that the OAH properly notified the Respondent of the date, time and location of the scheduled hearing, as well as the issues to be

¹ Although the previous hearing was conducted by another ALJ, because MHIC ordered the instant case to be conducted *de novo*, it could be heard on remand by any ALJ.

presented.² Accordingly, when the Respondent failed to appear, I convened the hearing in the Respondent's absence. Md. Code Ann., Bus Reg., § 8-312(h); Code of Maryland Regulations (COMAR) 09.01.02.07E.

I held a hearing as scheduled on February 21, 2014, at the Harford County Public Library in Bel Air, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010 & Supp. 2013). The Fund was again represented by Kris King, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department). The Claimant represented herself. The Respondent failed to appear.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2013), COMAR 09.01.03; 09.08.02; and 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:

Cl. #1 Contract between Claimant and Respondent, dated August 16, 2011

² Section 8-312(a) of the Business Regulation Article provides that the Commission shall give the person against whom the action is contemplated an opportunity for a hearing. Md. Code Ann., Bus Reg. § 8-312(a) (Supp. 2013). The statutory provisions governing disciplinary proceedings against MHIC licensees state that notice shall be sent by certified mail "at least 10 days before the hearing by certified mail to the business address of the licensee on record with the Commission." *Id.* § 8-312(d). The procedures for notice applicable to disciplinary proceedings also apply to claims against the Fund. *Id.* at § 8-407(a) (2010). Under section 8-312 of the Business Regulation article, "[i]f, after due notice, the person against whom the action is contemplated does not appear . . . the Commission may hear and determine the matter." Md. Code Ann., Bus Reg., § 8-312(h).

- Cl. #2 Copies of cancelled checks # 761 and 1009, dated August 21 and August 30, 2011, respectively
- Cl. #3 Three photographs taken September 3, 2011, and explanation narrative
- Cl. #4 Five photographs taken September 3, 2011, and explanation narrative
- Cl. #5 Two photographs taken September 3, 2011
- Cl. #6 Four photographs taken September 3, 2011, and explanation narrative
- Cl. #7 Six photographs taken September 3, 2011, and explanation narrative
- Cl. #8 Six photographs taken September 3, 2011, and explanation narrative
- Cl. #9 Two photographs taken September 3, 2011, and explanation narrative
- Cl. #10 Three photographs taken September 3, 2011, and explanation narrative
- Cl. #11 Three photographs taken September 3, 2011, and explanation narrative
- Cl. #12 Series of emails between the Claimant and Respondent from August 16, 2011 through September 6, 2011
- Cl. #13 Claimant's Original letter of complaint to the MHIC, dated September 10, 2011
- Cl. #14 Original claim form, signed September 6, 2011
- Cl. #15 Proposal of TMS Commercial Builders, Inc. (TMS), dated December 5, 2011
- Cl. #16 Letter of Linda Finding (tenant), undated
- Cl. #17 Letter of David Cox to the MHIC, dated September 10, 2011

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

- Fund #1 Respondent's mail delivery receipt, signed October 24, 2013
- Fund #2 Remand Order, signed September 5, 2013
- Fund #3 Original Hearing Order, dated October 5, 2012
- Fund #4 Respondent's licensing information, printed February 14, 2014
- Fund #5 Original Claim Form, dated December 29, 2011

Fund #6 Commission's claim letter to the Respondent, dated January 17, 2012

The Respondent did not offer any exhibits for admission into evidence.

Testimony

The Claimant testified on her own behalf and called David Cox as a witness. Mr. Cox was admitted as an expert in concrete and masonry.

The Respondent presented no witnesses.

The Fund presented no witnesses.

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 #91771. The Respondent's license was due to expire on April 13, 2014.³ (Fund #2).
2. On August 16, 2011, the Claimant and Respondent entered into a contract (Contract) wherein the Respondent was to perform home improvement work at the Claimant's house at 618-620 Fountain Street, Havre de Grace, Maryland.⁴ According to the Contract, the Respondent would "re-pour concrete porch....removal of existing loose concrete...use bonding agent to adhere new concrete to old ...concrete to be 3500 PSI and average approx. 3 inches." (Cl. #1).
3. The Contract price was \$4,500.00. There would be one third deposit, one third upon framework installation and final payment due on the day of the pour. (Cl. #1).

³ Since the hearing was prior to the expiration date, I do not know if the license was subsequently renewed.

⁴ The house is a duplex. The Claimant lives on one side and has a tenant in the other side. The porch is in common, but divided by a wooden railing. The Contract did not include work on the railings.

4. The Claimant paid the Respondent \$1,500.00 on August 21, 2011 and \$1,500.00 on August 30, 2011. (Cl. #2).
5. The concrete was poured into the framing on September 2, 2011. The framing was removed on September 3, 2011.
6. Immediately upon removal of the framing, it was apparent that the concrete was not smooth. The concrete was not uniformly three inches thick. There were pieces of concrete pulled away from the riser⁵ between the porch and first step when the framing was removed. Because concrete was added to the porch floor, the height from the last step to the porch was increased but the step-up between the new porch surface and the front door threshold was significantly reduced. The porch sloped toward the house in some areas and was formed into a trough under some parts of the railings. There were cracks in the concrete and areas of gaps and poor attachment (bonding) to the existing concrete. (Cl. #3 - 11).
7. Trip hazards were created because of the difference in riser height from the last step to the porch and because the concrete porch flooring was wavy, rough, and not of uniform thickness. (Test. Cox and Claimant; Cl. #16).
8. When the framing was removed, the Respondent requested the final payment (\$1,500.00). (Test. Claimant).
9. Based upon the unsatisfactory appearance and condition of the porch, the Claimant refused to make the final payment until the Respondent corrected the conditions. The Claimant and Respondent engaged in a series of email discussions about the Respondent's work. (Cl. #12).

⁵ The riser is the vertical board connecting two steps or a step and a porch or platform.

10. Ultimately, the Respondent refused to return and correct the conditions noted in the porch. (Test. Claimant; Cl. #12).
11. On December 5, 2011, the Claimant received a proposal from TMS to: remove the railings concreted in by the Respondent; jack hammer the concrete off the porch, set forms and wire; pour 3500 PSI concrete, and remove railings and replace with new railings. (Cl. #15).
12. The TMS proposal noted a cost of \$5,600.00 for concrete replacement and \$1,870.00 for railing replacement for a total of \$7,470.00. (Cl. #15).

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. 2013). *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). “At a hearing on a claim, the claimant has the burden of proof.” Md. Code Ann., Bus. Reg. § 8-407(e)(1) (2010).

The positions of the parties are as follows. The Claimant argues that the Respondent performed unworkmanlike, inadequate, or incomplete home improvement work in the performance of the August 16, 2011 contract for resurfacing of the porch. Although he was not present, according to the email chain between the Claimant and Respondent, the Respondent felt that the work was done according to the contract. (Cl. #12). The Fund did not dispute the claim, but argued that there was a limitation to the award available to the Claimant and that some areas of complaint involved consequential damages. For the following reasons, I find that the Claimant has proven eligibility for compensation from the Fund.

There is no dispute that the Respondent was a licensed home improvement contractor at the time that he entered into the August 16, 2011 contract and performed the work. Additionally, no legal bar exists that would generally prevent the Claimant from receiving compensation from the Fund (such as being related to the Respondent or owning too many houses).

Mr. Cox, an expert in concrete and masonry, testified that he considered the work done by the Respondent unworkmanlike and inadequate. He opined that the concrete was too thin in places and it had an unworkmanlike, wavy, rough finish. He noted that the porch now sloped too steeply in some places and the wrong way in other places. Mr. Cox noted that the new porch floor, constructed by the Respondent, made the riser on the last step higher than on the other steps, creating a trip hazard. In summary, Mr. Cox was clear and concise in what he characterized as the overall "bad" job done by the Respondent.

The photographs, taken within days of the framing removal, clearly support Mr. Cox's observations and opinions, as well as the claim. (Cl. #3 through #11). It does not take an expert to see missing areas of concrete, wavy rough surfaces that would be expected to be flat and smooth, significant slopes creating partially submerged railings, gaps and poor bonding between the new and old concrete, cracks, and varying concrete height measurements. Areas of puddles, rather than drainage were obvious. Based upon the photographs, it is clear that the project left by the Respondent was unworkmanlike and inadequate. It was also incomplete since concrete pieces pulled away by the framing were not replaced. I conclude that the Claimant has established a valid claim against the Fund. Having found eligibility for compensation, I now turn to the amount of the award, if any.

The Fund may not compensate a claimant for consequential⁶ or punitive damages, personal injury, attorney's fees, court costs, or interest. COMAR 09.08.03.03B(1). Although the Claimant complained that the Respondent damaged the grass and shrubbery, as well as left concrete splatter on the walls of the house, the front door and others areas, these damages would be consequential damages. Nonetheless, she did not specify any dollar amount claimed for these conditions. As such, I am considering only the part of the TMS proposal that relates to the actual porch floor replacement, as indicative of the costs of restoration, repair, replacement, or completion arising from the Respondent's unworkmanlike, inadequate, or incomplete home improvement.

The TMS proposal provides a cost of \$5,600.00 for concrete removal and replacement. Concrete removal must be included in the consideration of repairs or restoration because to merely add more concrete and build-up the existing concrete would exacerbate many of the currently defective conditions. Things such as the inconsistent riser height, threshold height and submersion of the railings into troughs formed in the porch floor would be made worse.

Since the Contract with the Respondent did not include any replacement or repairs to the railings, the \$1,870.00 for railing replacement noted in the TMS proposal is beyond the scope of the original Contract. Therefore, it does not come into the calculations of an award from the Fund. Thus, I conclude that the costs of restoration, repair, replacement, or completion arising

⁶ "Consequential damages," which may arise out of the performance of a home improvement contract, are not reimbursable from the Fund. Md. Code Ann., Bus. Reg. § 8-405(e)(3) (Supp. 2013); COMAR 09.08.03.03B(1)(a). Although neither the statute nor the regulations governing the Fund define "consequential damages," the law provides that an award from the Fund is allowable only to reimburse a homeowner for the cost of "restoration, repair, replacement, or completion" of a substandard or unfinished home improvement job. Md. Code Ann., Bus. Reg. § 8-401. Consequential damages have been often characterized as being the product of special circumstances or an indirect result of some wrong. Consequential damages have been defined as "[s]uch damage, loss or injury as does not flow directly and immediately from the act of the party, but only from some of the consequences or results of such act." *Trimed, Inc. v. Sherwood Medical Co.*, 977 F.2d 885, 893 n.7 (4th Cir, 1992) (citing *Black's Law Dictionary* (6th ed. 1990), at 390). See also, *Black's Law Dictionary* (9th ed. 2009), at 445.

from the Respondent's unworkmanlike, inadequate, or incomplete home improvement, are reflected in the TMS proposal of \$5,600.00.

MHIC's regulations offer three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). One of these formulas takes into account the Claimant's solicitation of another contractor to complete the contract and offers an appropriate measure 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).

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

Amount paid to the Respondent:	\$3,000.00
<i>Plus</i> amount estimated to complete/repair:	<u>\$5,600.00</u>
Total:	\$8,600.00
<i>Minus</i> Contract price	<u>\$4,500.00</u>
Actual Loss:	\$4,100.00

Pursuant to the Business Regulation Article, the maximum recovery from the Fund is limited to the lesser of \$20,000.00 or the amount paid by or on behalf of the Claimant to the Respondent. Md. Code Ann., Bus. Reg. §8-405 (e)(1), (5) (Supp. 2013). The Claimant paid the Respondent a total of \$3,000.00. Thus, under the above limitation, although her actual losses are calculated to be \$4,100.00, the Claimant's maximum recovery from the Fund is limited to \$3,000.00. Md. Code Ann., Bus. Reg. §8-405 (e)(1), (5) (Supp. 2013).

CONCLUSIONS OF LAW

I conclude that the Claimant has sustained a compensable actual loss of \$3,000.00 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 \$3,000.00; and

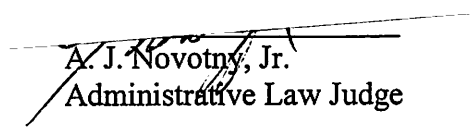
ORDER that the Respondent is ineligible for a Maryland Home Improvement Commission license until the Respondent reimburses the Guaranty Fund for all monies disbursed under this Order plus annual interest of at least ten percent as set by the Maryland Home Improvement Commission. Md. Code Ann., Bus. Reg. § 8-411(a) (2010); and

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

Signature on File

May 12, 2014
Date Order Issued

149089


A. J. Novotny, Jr.
Administrative Law Judge

PROPOSED ORDER

WHEREFORE, this 24th of June 2014, Panel B of the Maryland Home Improvement Commission approves the Recommended Decision 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.

Michael Shilling

Michael Shilling
Panel B

MARYLAND HOME IMPROVEMENT COMMISSION