IN THE MATTER OF THE CLAIM OF	* BEFORE HENRY R. ABRAMS,
JOAQUIN BALLESTERO	* 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-02-09-43026
OMISSIONS OF OSCAR TREJO, T/A	* MHIC NO.: 07 (90) 2413
O & T CONTRACTORS	

* * * * * * * * * * * * *

RECOMMENDED DECISION

STATEMENT OF THE CASE
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RECOMMENDED ORDER

STATEMENT OF THE CASE

On April 9, 2008, Joaquin Ballestero (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of $6,600.00 in actual losses allegedly suffered as a result of a home improvement contract with Oscar Trejo (Respondent).

A hearing was scheduled for July 28, 2010. At the outset of that hearing, I was advised that the Respondent needed an interpreter. With the agreement of all parties, the July 28 hearing was continued so that an in-person interpreter could be engaged. I held a hearing on September 23, 2010, at the Wheaton Office of Administrative Hearings (OAH), Westfield North, Suite 205, 2730 University Boulevard West, Wheaton, Maryland 20902. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010). Matthew A. Lawrence, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. Maria Mena, Esquire, and

Stephen Jacobs, Esquire, represented the Claimant, who was present. Josselin Saint-Preux, Esquire, represented the Respondent, who was also present. Jorge Salazar served as interpreter for the Respondent.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, and the OAH's Rules of Procedure 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 – .10, 09.08.02.01, 09.08.01.02, and 28.02.01.01 – 28.02.01.27.

ISSUES

Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions, and, if so, in what amount?

SUMMARY OF THE EVIDENCE

Exhibits

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

CL Ex. 1 Report from F. J. Kaiss, Sr. assessing the work on the driveway, dated August 30, 2008[1]

CL Ex. 2 – Copies of June 24, 2006 and June 30, 2006 checks payable to the Respondent, together with undated register of payments[2]

CL Ex. 3 – Photos of concrete driveway; undated

CL Ex. 4 Small plastic bag of concrete dust from the driveway; undated

CL Ex. 5A Proposed agreement between the Claimant and Tri-State Homes, dated October 31, 2007;

CL Ex. 5B – Unsigned concrete driveway contract (estimate) from Solid State Home Improvement Co., Inc., dated March 11, 2008

[1] Mr. Kaiss was engaged by the MHIC to investigate the claim.

[2] The original three-page exhibit is missing from the file. At my request, Mr. Jacobs delivered a copy of the original exhibit to my office on November 9, 2010.

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

GF Ex. 1 Notice of Hearing, dated August 5, 2010

GF Ex. 2 – Transmittal from the MHIC with Hearing Order, dated October 13, 2009

GF Ex. 3 MHIC I.D. Registration, dated July12, 2010

GF Ex. 4 – Home Improvement Claim Form, dated April 4, 2008

GF Ex. 5 -- Letter to DLLR from the Respondent, dated May 29, 2007

GF Ex. 6 – Letter to DLLR from the Respondent, dated June 2, 2008

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

RESP Ex. 1 – Four photos of concrete driveway, undated

RESP Ex. 2 – Contractor's sketches (two pages), undated

RESP Ex. 3 – Receipt from W L Trucking, dated June 30, 2006

Testimony

The Claimant testified on his own behalf and presented the testimony of Antonio Romano, who I accepted without objection as an expert in matters pertaining to concrete and concrete paving, including concrete driveways.

The Respondent testified on his own behalf.

The Fund did not present any 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 3176356.

2. The Claimant was introduced to the Respondent by the Claimant's father-in-law, who had worked with the Respondent on construction projects. On or about June 24, 2006, the Claimant and Respondent entered into an oral agreement for work at the Claimant's residence.

The Respondent agreed to replace the Claimant's driveway with a concrete driveway, pour new footings, foundation and concrete for the Claimant's front outside entry, and perform miscellaneous additional work. The Claimant agreed to pay the Respondent $5,900.00 for the work. Of this amount, $3,500.00 was for the driveway.

3. The work began on or about June 24, 2006. The driveway was installed on or about June 30, 2006.

4. To complete installation of the driveway, the Respondent required two separate loads of concrete, delivered at different times on the same day. The driveway was poured in multiple layers.

5. The Claimant paid the Respondent $2,000.00 by check on June 24, 2006; $2,500.00 by check on June 30, 2006; and $1,400.00 in cash on July 14, 2006. The check issued on June 24, 2006 bore the notation "Driveway." CL Ex. 2. The second check had no notation as to its purpose.

6. The Respondent asked the Claimant not to apply any salt to the driveway for at least two years.

7. Following completion of the driveway, the Claimant noticed what he described as foaming on the driveway. The Respondent inspected the driveway and poured a new layer of concrete.

8. Beginning approximately two months after installation, the Claimant observed further problems with the driveway. The concrete was flaking and peeling and had cracks.

9. The Claimant asked the Respondent to replace the driveway, but the Respondent refused. The Respondent offered to patch the driveway in certain areas, which the Claimant refused to accept as an adequate method to fix the problems.

10. The driveway continued to deteriorate.

11. The driveway is defective due to the Respondent's unworkmanlike installation. The cause of the defects was, among other things, the Respondent's failure to pour the different layers of the driveway in a timely fashion. One layer was permitted to set, or harden, before the next layer was poured. This caused the layers not to bond properly. In addition, the expansion joints were prepared improperly.

12. The Claimant did not apply salt to the driveway. Moreover, had salt been applied, it would not have caused the defects observed. The application of salt to a concrete driveway would cause spalling, consisting of pock-like marks on the driveway's surface. No spalling was present on the Claimant's driveway.

13. At least fifty percent of the driveway is in a deteriorated condition. The correct course to deal with the defects is to replace the driveway in its entirety. A properly installed concrete driveway has a life cycle of twenty-five to thirty years. If only the deteriorated portions of the Claimant's driveway are patched, these portions will have a substantially shorter life span. The repaired portion would also have a different color than the remainder, which would not be workmanlike.

14. The cost to replace the defective driveway exceeds the full contract price.

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 his burden, proving his entitlement to an award from the Fund.

First, the Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant. Second, the Respondent performed an unworkmanlike home improvement.

The Claimant's expert and Mr. Kaiss, the person engaged by the MHIC to investigate the claim, both determined that the driveway installed by the Respondent was defective, due to the Respondent's unworkmanlike efforts. Their testimony was highly credible. Mr. Kaiss' credentials were not disclosed at the hearing. A fair inference can be drawn, however, that the MHIC would attempt to engage qualified persons to evaluate home improvements, given the MHIC's implicit duty to protect the guaranty fund from meritless claims. *See* Md. Code Ann., Bus. Reg. § 8-407(c)(2)(ii) (2010). Moreover, the MHIC's investigator had no apparent motive to falsify his findings. The Respondent did not challenge Mr. Kaiss' credentials or his motives.

The Claimant's expert, Mr. Romano, has very impressive academic and field-based credentials. He has a degree in civil engineering, with a minor in construction management. He has passed a post-graduate test necessary for licensure as a civil engineer, and was awaiting licensure at the time of the hearing. He has worked in the concrete industry much of his life. He now owns the Romano Construction Company, which he joined in 1997, when he partnered with his father. His company pours approximately 500 to 1000 concrete and asphalt driveways per year.

Mr. Romano also had no apparent motive to falsify his conclusions. There was no firm evidence that his compensation depended upon the outcome of his testimony, or that he had or would be awarded a contract by the Claimant to install a new driveway. I would have accepted Mr. Romano's conclusions even if the Claimant had not introduced Mr. Kaiss' report.

The Respondent disputed the claim that his construction of the driveway was unworkmanlike, offering two alternative explanations for the driveway's defective condition. He claimed, first, that the condition was caused by the Claimant spreading salt on the driveway sometime prior to the expiration of two years from the date of installation. However, the Respondent offered no proof that the Claimant had spread salt on the driveway. The Respondent instead relied solely on his own self-serving testimony that he assumed the Claimant had spread salt on the driveway because the Claimant did not answer when the Respondent asked if the Claimant had done so. Because the Claimant testified that he did not spread salt on the driveway and because of Mr. Kaiss' and Mr. Romano's conclusions as to the cause of the driveway's problems, including Mr. Romano's detailed and unrebutted testimony regarding the spalling effect of salt and the absence of spalling here, I reject the Respondent's claim that the defective condition was caused by salting the driveway.

The Respondent's second explanation for the defective condition was that it was the result of the type of soil underlying the driveway and the alleged insistence by the Claimant or the Claimant's father-in-law that the driveway be six inches deep to compensate for the soil condition. According to the Respondent, the driveway should have been four rather than six inches deep. The Respondent did not explain how the soil condition affected the driveway, or what difference the depth of concrete made. Given the reports of Mr. Romano and Mr. Kaiss, I again reject the Respondent's explanation.

Moreover, the Respondent testified he did not warn anyone that the depth of concrete or the soil condition would cause the driveway to fail. Even if he had, however, this would not have excused the delivery of a defective driveway to the Claimant. The Respondent agreed to undertake the contract. Having done so, the Respondent cannot disclaim responsibility for defects. This was a home improvement contract, which constitutes a contract for the sale of

consumer goods or services under Maryland's Uniform Commercial Code. Md. Ann. Code Com. Law §§ 2-316.1(1) and 9-102(a)(23) (2002 & Supp. 2010). All such contracts include an implied warranty of merchantability (a promise that the goods and services are fit for their ordinary purpose), which cannot be modified or excluded by the parties. *Id.*, §§ 2-314(2)(c) and 2-316.1(2) and (3). Thus, even if the Respondent had tried to exclude defects caused by soil conditions or the depth of the concrete, he would still be liable for such defects under Maryland law.[3]

The Respondent offered one last defense to liability. He testified that the contract for the driveway and other services was with the Claimant's father-in-law, not with the Claimant. Although not clearly articulated, the Respondent apparently was arguing that there could be no liability without the existence of a contract between him and the Claimant. This contention is rejected for several reasons.

First, nothing in the law requires the existence of a contract with a claimant. The law pertaining to claims against the fund states that "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). A later section states that an owner may make a claim if the owner "resides in the home as to which the claim is made...." *Id.*, § 8-405(f)(2)(i). The implicit purpose of the statute is to compensate those who can demonstrate they have suffered losses at their homes at the hands of licensed contractors. Losses can occur without contracts, such as the Respondent alleged here, and there is no reason that the Fund should not be required to address that loss.

[3] The Respondent's attorney asked Mr. Romano whether the defects could have been caused by poor quality concrete supplied by the manufacturer. Mr. Romano indicated that was possible, but not likely. There was no evidence to the contrary, which defeats any claim that the concrete was defective. In any event, based upon the Respondent's implied warranty of merchantability, had the concrete been defective he would still be liable to the Claimant, although the Respondent would have an independent claim against the concrete manufacturer. Md. Ann. Code Com. Law §§ 2-316.1(2) (2002)

In any event, the evidence strongly supports the Claimant's assertion that he was the contracting party. The Respondent's claim to the contrary is not believable. In the Respondent's two letters to the MHIC, in which he was responding to the MHIC's request that he address the Claimant's charges, the Respondent made no claim that he did not have a contract with the Claimant. Also, while at one point in his testimony the Respondent claimed he had no dealings with the Claimant, did not know that the Claimant lived at the subject residence, and only dealt with the Claimant's father-in-law, the Respondent subsequently admitted that he met both the Claimant and his wife at the residence, negotiated contract terms with the Claimant, and knowingly accepted payment from the Claimant. This fundamental contradiction totally undermines the Respondent's claim that he did not contract with the Claimant.

Identifying the parties to a contract is a question of fact, judged from all the surrounding circumstances. *See Wilhelm v. Hadley*, 218 Md. 152 (1958). Given that the Respondent negotiated contract terms with the Claimant, provided products and services at the Claimant's residence, and was paid exclusively by the Claimant, I am satisfied that the contract was with the Claimant.

Lastly, even if the Claimant were not the contracting party, he was clearly a third party beneficiary. When two parties enter into a contract with the intent to confer a benefit on a third person, that gives the third person standing to enforce the contract. *Shofer v. Stuart Hack Co.*, 124 Md. App. 516, 529, *cert. den.*, 354 Md. 331 (1999). Given all the contact with the Claimant and the fact that the work was performed at his house and he paid the Respondent, it is abundantly clear that the contract was intended and understood by all to confer a benefit on the Claimant, entitling him to make a claim pursuant to the contract.

Having found eligibility for compensation, I now turn to the amount of the award, if any. Sections 8-401 and 8-405(e) of the Fund statute govern the award of compensation from the

Fund. 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). The MHIC's regulations implementing sections 8-405(a) and (e) offered three alternative measures for determining the amount a claimant was to be compensated. COMAR 09.08.03.03B(3). One of those formulas permitted a claimant to recover the cost of repair (up to the statutory maximum of $20,000.00), even if that amount exceeded the contract price. COMAR 09.08.03.03B(3)(c). This is what the Claimant seeks in this case.

In 2010, Maryland's General Assembly amended section 8-405(e), 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.

The amendment raises two issues: (1) whether it applies to claims pending at the time the amendment took effect (that is, retroactively); and (2) whether the claimant can recover the full contract price, even if the defective portion of the work constituted only a part of the contract work as a whole. As to the first issue, 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, 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. The next question is whether a recovery under section 8-405 is limited to the amount

paid for the defective work, where the price paid for that work is less than the full contract price but the cost of repair exceeds the contract price.

When interpreting a statute, the fundamental purpose is to ascertain and apply the intent of the legislature. *Consolidated Construction Services, Inc. v. Simpson*, 372 Md. 434, 456 (2002). If the words of the statute are clear, they are generally to be applied in accordance with their ordinary, unambiguous meaning. No search for legislative intent beyond an understanding of the actual words used is appropriate. *In re Kaela C.*, 394 Md. 432, 468 (2006). If the wording is unclear, whether construed alone or in the context of the statute as a whole, further probing of legislative intent is required. Interpretations at odds with the apparent purpose of the statute should be avoided, and a statute should be interpreted so that no word is rendered extraneous. *Birkey Design Group, Inc. v. Egle Nursing Home, Inc.*, 113 Md. App. 261, 269 (1997); *Mayor and City Council of Baltimore v. Neighborhood Rentals, Inc.*, 170 Md. App. 671, 684 (2006).

Here, there appears to be a latent ambiguity inherent in the wording of the amendment, judged in the context of the statute as a whole. The statute as amended does not expressly address how to apply the statutory remedies where, as alleged by the Claimant here, only a portion of the contract work is defective but the cost of repair exceeds the full contract price. A question arises whether, in adopting the amendment, the General Assembly intended to limit a claimant's "actual loss" solely to the amount paid for the defective work, where that amount represents less than the contract price as a whole, even in cases where a claimant's cost of repair exceeds the entire contract price. Construing the statute as a whole and in the context of the regulations that pre-existed the amendment, it is clear that was not the intent of the General Assembly. Rather, its intent was to permit a claimant to recover the cost of repair, even if it exceeds the price paid for the defective portion of the contract work, but, in the event the cost of repair exceeds the full contract price, to cap the claimant's recovery to the full contract price paid.

First, as noted in *Landsman*, the Fund statute is remedial. *Landsman, supra*, 154 Md. App. at 253. Remedial statutes are to be interpreted broadly. *Coburn v. Coburn*, 342 Md. 244, 256 (1996).

Second, had the General Assembly intended to re-define the scope of an "actual loss," rather than simply adding a new limitation on the maximum recovery for that loss, it would have included wording effectively modifying the implementing regulations found in COMAR 09.08.03.03B(3)(a) through (c). It did not do so. Prior to the 2010 amendment, the statute separately addressed a claimant's injury (actual loss) and the remedy for that injury. Among other things, the statute limited the recovery available to a claimant to a maximum of $20,000.00, regardless how much was paid for the defective work, for the contract as a whole, or for the repair of the defective work. The amendment simply added a further limitation on the remedy, capping the remedy at a maximum of the full contract price, even if that amount is less than the actual loss sustained by the claimant.

Finally, 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, even if the defective work represents only a portion of the contract as a whole, 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. In this case, the Claimant received four estimates for the cost of repair: $7,600.00, per Mr. Kaiss (Cl. Ex. 1); $6,600.00, per Tri State Homes, a construction company (Cl. Ex. 5A); $6,300.00, per the Solid State Home Improvement Co., Inc., another contractor (Cl.

Ex. 5B); and $6,900.00, per the Claimant's expert, Mr. Romano.[4] Each exceeded the full contract price. As a result, because the Claimant's actual loss exceeds the contract price, his recovery is limited to $5,900.00, the full amount paid by the Claimant to the Respondent for all of the work done pursuant to the contract.

CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual, compensable loss of $5,900.00 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 $5,900.00; 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.

December 17, 2010
Date Decision Issued

Henry R. Abrams
Administrative Law Judge

HRA/fe
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[4] Of these four, I am ignoring in my analysis the estimate provided by Mr. Kaiss, both because it assumes the wrong contract price and because it is difficult to discern what he estimated as the cost of replacement. *See* Cl. Ex. 1.

IN THE MATTER OF THE CLAIM OF	*	BEFORE HENRY R. ABRAMS,
JOAQUIN BALLESTERO	*	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-02-09-43026
OMISSIONS OF OSCAR TREJO, T/A	*	MHIC NO.: 07 (90) 2413
O & T CONTRACTORS		

* * * * * * * * * * * * *

FILE EXHIBIT LIST

Exhibits

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

CL Ex. 1 – Report from F. J. Kaiss, Sr. (Mr. Kaiss), assessing the work on the driveway, dated August 30, 2008

CL Ex. 2 – Copies of June 24, 2006 and June 30, 2006 checks payable to the Respondent, together with undated register of payments

CL Ex. 3 – Photos of concrete driveway; undated

CL Ex. 4 – Small plastic bag of concrete dust from the driveway; undated

CL Ex. 5A – Proposed agreement between the Claimant and Tri-State Homes, dated October 31, 2007

CL Ex. 5B – Unsigned concrete driveway contract (estimate) from Solid State Home Improvement Co., Inc., dated March 11, 2008

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

GF Ex. 1 – Notice of Hearing, dated August 5, 2010

GF Ex. 2 – Transmittal from the MHIC with Hearing Order, dated October 13, 2009

GF Ex. 3 – MHIC I. D. Registration, dated July12, 2010

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GF Ex. 5 – Letter to DLLR from the Respondent, dated May 29, 2007

GF Ex. 6 – Letter to DLLR from the Respondent, dated June 2, 2008

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

RESP Ex. 1 - Four photos of concrete driveway, undated

RESP Ex. 2 – Contractor's sketches (two pages), undated

RESP Ex. 3 Receipt from W L Trucking, dated June 30, 2006

PROPOSED ORDER

WHEREFORE, this 10th day of February 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.

Marilyn Jumalon

Marilyn Jumalon
Panel B

MARYLAND HOME IMPROVEMENT COMMISSION

STATE OF MARYLAND
DLLR
DEPARTMENT OF LABOR, LICENSING AND REGULATION

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

IN THE MATTER OF THE CLAIM OF JOAQUIN BALLESTERO AGAINST THE MARYLAND HOME IMPROVEMENT GUARANTY FUND FOR ALLEGED VIOLATIONS OF OSCAR TREJO t/a O & T CONTRACTORS	*	MARYLAND HOME IMPROVEMENT COMMISSION MHIC CASE NO. 07 (90) 2413

* * * * *

FINAL ORDER

WHEREFORE, this 26TH day of April, 2011, Panel B of the Maryland Home Improvement Commission ORDERS that:

1) **The Findings of Fact of the Administrative Law Judge are Affirmed.**

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

A) COMAR 09.08.03.03B(3)(c) provides that, if the Commission determines that the original contract price is too unrealistically high or low to provide a proper basis for measuring actual loss, the Commission may adjust its measurements accordingly.

B) Based on review of the record in this matter, the Commission concludes the original contract price for the driveway work performed by the Respondent is too unrealistically low to provide a proper basis for measuring the Claimant's actual loss. The Claimant's original contract with the Respondent provided for replacement of the driveway for a cost of $3,500.00. (Finding of Fact #2). The Claimant obtained estimates from three contractors to replace the driveway: $6,300.00 - Solid State Home Improvement Co.; $6,600.00 - Tri-State Homes; $6,900.00 - Romano Construction. (ALJ Decision p. 13). The average of the three estimates is $6,600.00, which is approximately 90% more than the Respondent's original price for the driveway work. The Commission concludes that the

price disparity of approximately 90% establishes that the original price for driveway work charged by the Respondent was unrealistically low and does not provide a proper basis for measuring the Claimant's actual loss. The Commission concludes that the average of the three estimates obtained by the Claimant, $6,600.00, provides a more realistic measure of the fair market cost of the driveway work performed by the Respondent.

C) Accordingly, the measure of the Claimant's actual loss is amended as follows:

- Amount paid on original contract	$ 5,900.00
- Plus cost to repair driveway	$ 6,600.00
	$12,500.00
- Less original (adjusted) contract price (includes cost of $6,660.00, instead of $3,500.00, for driveway)	- $ 9,000.00
- Actual Loss	$ 3,500.00

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

A) The Claimant is Awarded $ 3,500.00 from the Home Improvement Guaranty Fund.

B) Pursuant to Business Regulation Article, §8-411(a), any home improvement licenses held by the Respondent shall be Suspended at such time as any money is paid from the Home Improvement Guaranty Fund under this Order, and the Respondent shall then be ineligible for any home improvement license until such time as the Home Improvement Guaranty Fund has been reimbursed. The Respondent shall also be liable for 10% annual interest on any unreimbursed balance owed to the Fund.

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
Chair - Panel B
Maryland Home Improvement Commission