

IN THE MATTER OF THE CLAIM	* BEFORE MARINA LOLLEY SABETT,
OF PHILLIP AND MELINDA PON,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANTS,	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	*
FOR THE ALLEGED ACTS OR	*
OMISSIONS OF	*
LUIS J. BALDERRAMA,	*
T/A CLASSIC DESIGN GROUP, INC.,	* OAH No.: DLR-HIC-02-13-46689
RESPONDENT	* MHIC No.: 12 (90) 1226

\* \* \* \* \*

**PROPOSED DECISION**

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

**STATEMENT OF THE CASE**

On March 1, 2013, Phillip Pon (Claimant), filed a claim (Complaint) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$16,175.00 in alleged actual losses suffered as a result of a home improvement contract with Luis J. Balderrama, trading as Classic Design Group, Inc. (Classic Design, or Respondent). The claim at issue was amended orally at the hearing to include Melinda Pon as a joint Claimant; she

is the wife of Claimant Philip Pon and co-owner of the subject property. The Pons will be referred to collectively as the Claimants.

I held a hearing on May 30, 2014, at the Frederick County Department of Social Services, 100 East All Saints Street, Frederick, Maryland. Md. Code Ann., Bus. Reg. § 8-312 (Supp. 2013) and § 8-407 (2010). Melinda Pon presented the case on behalf of the Claimants. The Respondent represented himself. Jessica Kaufmann, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund.

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 (OAH) govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2013), Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02, and 28.02.01.

### **ISSUES**

1. Did the Claimants sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?
2. If so, what is the amount of that loss?

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**<sup>1</sup>

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

- G.F. Ex. 1 - Notice of Hearing dated March 3, 2014, regarding hearing scheduled for May 30, 2014, with Hearing Order dated November 20, 2013, and Memorandum dated April 8, 2014, attaching certified mail receipt and envelope marked "Return to Sender – Unclaimed – Unable to Forward" (9 pages plus envelope)

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<sup>1</sup> All documents are photocopies unless indicated otherwise.

- G.F. Ex. 2 - Transmittal to OAH from MHIC, attaching HIC Claim Form and Hearing Order (4 pages)
- G.F. Ex. 3 - HIC printouts dated April 4, 2014, including:
- I.D. Registration
  - Professional License History
  - Business Name Change, Business Address Change, and duplicate (3 pages)
- G.F. Ex. 4 - Letter to Respondent from J. Borz, MHIC, dated March 12, 2013, attaching HIC Claim Form (2 pages)

I admitted the following exhibits on the Claimants' behalf:

- Clmt. Ex. 1 - Outdoor Carpentry & Design, Inc. (Outdoor Design) contract for carpentry and masonry work, dated November 11, 2009, with attachments (6 pages)
- Clmt. Ex. 2 - Frederick County Building Permit # 78986 (1 page)
- Clmt. Ex. 3 - Five cancelled checks from the Claimants to Outdoor Design: for \$6188.00 dated November 12, 2008<sup>2</sup>; for \$8185.00 dated December 11, 2009; for \$600 dated December 12, 2009; for \$2129.00 dated December 21, 2009; and for \$4126.00 dated March 19, 2010 (5 pages)
- Clmt. Ex. 4 - Two photos A-B (2 pages)
- Clmt. Ex. 5 - Classic Design Warranty, dated October 15, 2010 (1 page)
- Clmt. Ex. 6 - Email chain, dated October 17 through 21, 2010 (2 pages)
- Clmt. Ex. 7 - Email chain, dated October 17, 2010, through March 28, 2011 (2 pages)
- Clmt. Ex. 8 - Letters to Respondent and "Dan," Classic Design, from the Claimants, dated June 20, 2011 (2 pages)
- Clmt. Ex. 9 - Classic Design Warranty, dated October 15, 2010/Revised August 15, 2011 (1 page)
- Clmt. Ex. 10 - Email chain, dated October 17, 2010, through August 17, 2011 (2 pages)
- Clmt. Ex. 11 - Six close-up photos A-F (6 pages)
- Clmt. Ex. 12 - A. Email exchange, dated September 5-6, 2011 (2 pages)  
B. Signed copy of letter included in above email exchange (1 page)

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<sup>2</sup> The year of the year on this check looks like it was changed to 2008, but the check cleared on November 17, 2009; the correct date therefore appears to be November 12, 2009.

- Clmt. Ex. 13 - Email chain, dated September 11 through October 9, 2011 (1 page)
- Clmt. Ex. 14 - Letter to Classic Design from Respondent, dated October 18, 2011 (1 page)
- Clmt. Ex. 15 - Letter to Classic Design from Respondent, dated November 20, 2011, with the following attachments (4 pages total):
- Warranty dated October 156, 2010/Revised August 15, 2011
  - Letter dated October 18, 2011
  - Email dated November 12, 2011
- Clmt. Ex. 16 - Five close-up photos A-E (5 pages)
- Clmt. Ex. 17 - HIC Complaint, dated April 28, 2012, with attachments (32 pages)
- Clmt. Ex. 18- Letter to S. Smitson, MHIC, from Respondent, undated (2 pages)
- Clmt. Ex. 19 - Rebuttal to Classic Design's Response to Complaint, undated, with attachments (5 pages)
- Clmt. Ex. 20 - Email chain, dated August 3 through September 28, 2012 (3 pages)
- Clmt. Ex. 21 - • Email chain, dated August 3 through August 20, 2012 (3 pages)  
• Email exchange, dated August 23-24, 2012 (1 page)
- Clmt. Ex. 22 - Email dated August 27, 2012, with the following attachments (10 pages total):
- Unsigned Warranty Extension dated August 26, 2012
  - Email chain, dated August 27 through September 7, 2012
  - Unsigned Warranty Extension dated September 7, 2012, with covering email dated September 18, 2012
  - Email exchange, dated September 23 through 26, 2012
- Clmt. Ex. 23 - Description and Explanation of deck problem, with the following attachments (14 pages total):
- Letter to S. Smitson as in Ex. 18
  - Photos and schematic drawing of problems
- Clmt. Ex. 24 - Description of patio retaining wall failure, with the following attachments (29 pages total):
- Schematic drawing
  - Letter to Respondent from M. Fanning, Metro Landscape & Construction, Inc. (Metro), dated December 18, 2012
  - Material information sheets
  - Copies of screens on Classic Design website
  - Photos of paving and problems, some annotated

Clmt. Ex. 25 - Metro Proposal, dated December 18, 2012, with attachments (11 pages)

Clmt. Ex. 26 - Unsigned Superior Home Works Inc. (Superior) contract, dated January 19, 2013  
(1 page)

Clmt. Ex. 27 - HIC Home Improvement Claim Form, dated February 28, 2013, with the following attachments (40 pages total):

- Explanation and justification
- Outline of facts and circumstances of claim
- Problem statement
- Emails
- Unsigned Warranty Extension and Revised Warranty Extension
- Screens from Classic Design website
- Material from Metro
- Statement of facts and circumstances for claim with photos
- Material from Grayson Plant and Stone Landscaping Incorporated (Grayson)
- Unsigned contract with Superior
- Respondent's Rebuttal to Classic Design's Response
- Certified mailing receipts
- Material from Outdoor Design
- Survey plat
- Cancelled checks

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

Resp. Ex. 1 - Six photos (6 pages)

Resp. Ex. 2 - Letter to J. Borz, MHIC, from Respondent, undated, attaching email dated August 29, 2012 (3 pages)

Resp. Ex. 3 - Eight photos (4 pages)

### Testimony

Melinda Pon and Philip Pon testified in their own behalf, and Philip Pon was qualified and further testified as an expert in engineering construction and design.

The Respondent testified in his own behalf.

The Fund presented no witnesses.

### **PROPOSED 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 holding MHIC license number 01-83116 and MHIC corporate license number 05-128017.

2. The Respondent was first licensed effective April 25, 2002. His current license is due to expire on April 25, 2016. The Respondent's business name and address have changed during the intervening years; his previous business name was Outdoor Carpentry & Design, Inc. (Outdoor Design).

3. On November 11, 2009, the Claimants and the Respondent entered into a contract to install a raised deck and stairs with a brick paver patio in the dry space below. The contract specified that the dry space under the deck would be finished with beaded white soffit and that all hardware would be galvanized to prevent rusting. Clmt. Ex. 1.

4. The original agreed-upon contract price was \$20,628.00.

5. On December 12, 2009, the Claimants entered into a \$600.00 change order with the Respondent for a retaining wall. Clmt. Ex. 3, p. 3.

6. On the following dates, the Claimants paid the Respondent the following amounts:

November 12, 2009	\$6,188.00
December 11, 2009	8,185.00
December 12, 2009	600.00
December 21, 2009	2,129.00
March 19, 2010	<u>4,126.00</u>
TOTAL	\$21,228.00

7. The work under the Contract and change order was completed in April 2010.

8. In the weeks that followed the completion of the work in April 2010, the Claimants began to notice that there was improper water leaking into their home, water dripping

from the deck to the pavers below the deck, sand and gravel wash-out causing uneven pavers and gaps between the pavers, as well as "rusting" of the pavers themselves.

9. The Claimants brought this to the attention of the Respondent's personnel, who informed the Claimants that they would need to file a warranty claim form.

10. The Claimants completed the warranty claim form in October 2010, and the Claimants were told that they would have to wait four to six weeks for such warranty work to be performed. By November 2010, the Respondent's representatives informed the Claimants that it was too cold to perform the necessary work claimed in the warranty form.

11. On March 16, 2011, the Claimants tried to get put on the schedule for the repair of their deck and patio. After many attempts at contacting the Respondent, the Claimants were finally able to meet with Dan Brewer from the Respondent's company in July 2011 to evaluate the Claimant's concerns.

12. Accordingly, in August 2011, the Respondent determined that due to the weather experienced during construction, the material had settled. To address this issue, the Respondent removed and reinstalled the retaining wall, increased the footing in size and base, and slightly staggered the paver edge wall in the opposite direction of the man-made hill.

13. Despite the Respondent's attempts in August 2011, the patio and retaining wall were still failing and continued to deteriorate because of improper installation. Gravel and sand continued to wash out from between the pavers and the pavers buckled and were uneven. The pavers continued to have defective rust stains on them. Clmt. Ex. 24.

14. After numerous attempts to get the Respondent to repair the paver and retaining wall issues, the Respondent was unresponsive until after an HIC Complaint was filed by the Claimants in April 2012. After an August 2012 meeting among the Claimants, the Respondent's

representatives and the paver company, Eagle Bay, the Respondent agreed to remove and replace the existing wall and patio and reset in accordance with Eagle Bay specifications and standards of the Interlocking Concrete Pavement Institute (ICPI), the industry standard. Eagle Bay agreed to replace all of the pavers at no cost, which were delivered to Eagle Bay's distributor, Patuxent Nurseries, on or before August 7, 2012, awaiting pick-up and installation by the Respondent. Clmt. Ex. 27, at attachments 1.1.2.1 - 1.1.3.

15. The Respondent further agreed that demolition and repairs would begin by September 25 or September 27, 2012. The Respondent failed to show up and the demolition and repairs were never done. Clmt. Ex. 27, at attachment 1.1.2.4 – 1.1.3.

16. Grayson Plant and Stone Landscaping Incorporated (Grayson) provided to the Claimants an estimate in the amount of \$9,300.00 for the removal and proper reinstallation of the Claimants' retaining wall and patio. Clmt. Ex. 27, at attachment 2.2.

17. Metro Landscaping & Construction, Inc. (Metro) also provided to the Claimants an estimate in the amount of \$13,325.00 for the removal and proper installation of the Claimants' retaining wall and patio. Clmt. 25 and Clmt. Ex. 27, at attachment 2.1.

18. The Metro estimate gives a more detailed description of the scope of work than the Grayson estimate and further specifies a two year warranty for defects in material and craftsmanship, in contrast with Grayson's one year. Attached to the Metro estimate are copies of the certificates obtained by that contractor for paver installation. *See* Clmt. Ex. 25 and Clmt. Ex. 27, at attachments 2.1 and 2.2. Nonetheless, the substance of the two estimates is essentially the same and both contractors are certified by the ICPI. Neither estimate goes beyond the scope of work performed by the Respondent. The estimates do contemplate demolition and repair of the Respondent's work in accordance with industry standards.



19. The Respondent sealed a pathway that prevented water from coming under the door sill on the deck during a heavy rain. The dry roof system is shallow and easily overwhelmed in a heavy rain and has dripped in the space below the deck when there was a heavy rain.

20. Claimant Philip Pon graduated from University of California at Davis in 1972, with a degree in engineering. The Claimant has been employed in civil engineering for many years since that time, with a focus on managing power plant design, installation and construction, and power plant control systems.

21. The Claimants' actual loss is \$9,300.00.

### 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 losses . . . incurred as a result of misconduct by a licensed contractor”). 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 Claimants have proven eligibility for compensation.

There is no dispute that the Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimants. Moreover, I find that the Respondent performed unworkmanlike, inadequate or incomplete home improvements with regard to the paver and retaining wall installations. Specifically, despite the Respondent's attempts in August 2011 to fix the paver and retaining wall issues by removing and replacing the retaining wall and increasing the footing size and base, the pavers continued to shift and buckle, with sand and silt

washing away. Moreover, the pavers remain rust stained, even though the manufacturer, Eagle Bay, offered to replace all of the pavers at no cost and in fact delivered the pavers to its distributor, Patuxent Nurseries, pending installation by the Respondent.

The Respondent acknowledged at the hearing that the pavers were installed in an unworkmanlike or inadequate manner and are defective and need to be removed and reinstalled. Although the Respondent acknowledged that the retaining wall needed to be fixed, he did not agree that the retaining wall needed to be removed to do so; rather, he opined that if a liner was installed between the pavers and the wall to avoid the sand and silt washing away, this would be a sufficient fix. Further, the Respondent apologized for his lack of responsiveness and failure to supervise the project properly. The Respondent testified that during the time that the Claimants were having issues with the pavers, he was travelling abroad quite a bit to care for his mother who was terminally ill and passed away in 2011, and had many legal issues with which to deal after her passing. He also testified that a lack of money contributed to his failure to timely repair the Claimants' wall and pavers, and further lamented that cash flow is still a problem. The Respondent testified that the Claimants should allow him to fix the pavers and retaining wall and use the replacement pavers that the manufacturer had promised for free, although he did not confirm that the pavers delivered to a distributor over two years ago were still available.

While I appreciate and sympathize with the Respondent's difficulties, his offer to repair what should have been repaired two years ago is too little too late. The Respondent had many opportunities to fix the pavers and the wall, and his assurances now that he is ready, willing, and able to fix the problems are belied by his failure to identify whether the replacement pavers offered up by Eagle are still available and by the Respondent's admitted ongoing cash flow issues. Further, the Respondent's current proposal to fix the retaining wall without removing it

is contrary to what had been promised by the Respondent's representatives in August-September 2012, who acknowledged that the patio and the pavers needed to be removed and replaced in accordance with Eagle Bay's specifications and ICPI (industry) standards. Moreover, both the Metro and Grayson proposals, which were submitted by the Claimants to the HIC to substantiate the work needed to repair the wall and paver patio, contemplated complete demolition of the patio and wall and reinstallation in accordance with ICPI standards as the way to correct the inadequate workmanship of the Respondent.

Conversely, the Claimants did not meet their burden of proving that the Respondent inadequately designed and constructed the deck and dry roofing system. The Respondent placed some type of sealant to prevent water from flowing under the door sill on the deck and into the Claimants' home. Although the Claimants indicated that this sealant has stopped the flow of water into their home, Mr. Pon opined (as he was also qualified as an expert in engineering and design) that he was concerned about some future failure of the substance used by the Respondent to stop the water (and was unsure what specific substance was used) and the potential for water otherwise infiltrating his home. Mr. Pon could only "guess," however, as to what the proper fix would be other than complete reconstruction of the dry space system. Such concerns about future failures and guesswork as to the proper fix are not sufficient to establish the existence of an unworkmanlike, inadequate, or incomplete deck and dry space system. Moreover, simply because there are some drips that occur in the dry area under the deck during a heavy rain does not make the deck and dry space system unworkmanlike, inadequate, or incomplete. There was nothing in the contract between the parties that guaranteed a completely waterproof area below the deck and the Claimants presented no experts to say that the lack of any drips is the expected

standard in the industry for such systems. Accordingly, the Claimants should not be compensated for the \$2,850.00 they claimed with regard to the redo of the deck and dry space system.

Having found eligibility for compensation for the demolition and repair of the paver patio and retaining wall, I now turn to the amount of the award, if any, to which the Claimants are entitled. 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 Claimants to the Respondent. Md. Code Ann., Bus. Reg. §8-405 (e)(1), (5) (Supp. 2013). Moreover, 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 provide three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). The following formula offers an appropriate measurement to determine the amount of actual loss 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).

In this case, the Claimants submitted two estimates for replacement and repair of the retaining wall and paver patio. The Metro estimate, which is \$13,325.00, is essentially identical in substance to the Grayson estimate of \$9,300.00. Besides the fact that the Metro estimate is

more detailed and offers a two year warranty against defects in material and craftsmanship as opposed to Grayson's one year warranty against defects in workmanship or materials, both contractors are ICPI certified and provide that they will perform the contract in accordance with industry standards. As the Claimants submitted both estimates to the HIC as reasonable estimates of what it would take to fix the Respondent's unworkmanlike, inadequate, or incomplete home improvement with regard to the paver patio and the retaining wall, I find Grayson's \$9,300.00 estimate to be the more reasonable of the two. Indeed, the Claimants could not articulate why the HIC should pay the more expensive estimate other than the fact that the proposal was more detailed and the existence of the extended warranty, the latter of which has nothing to do with compensating the Claimants for the retaining wall and paver patio issues in the instant case.

Accordingly, the Claimants are entitled to reimbursement from the Fund in the amount of \$9,300.00, which is calculated using the formula outlined above as follows:

\$ 21,228.00	Amount paid to Respondent under the Contract (and change order)
<u>+ 9,300.00</u>	Reasonable estimate to repair poor work done
30,528.00	
<u>- 21,228.00</u>	Price of the Contract (and change order)
9,300.00	Amount of Claimants' actual loss

The Claimants were able to prove by a preponderance of the evidence that they are entitled to be reimbursed by the Fund in the amount of \$9,300.00 for the actual loss that they suffered as a result of the Respondent's unworkmanlike and inadequate attempt to build them a paver patio and retaining wall. Conversely, the Claimants are not entitled to recover for the work done by the Respondent with regard to the deck and dry roofing system for the reasons previously described above.

**PROPOSED CONCLUSION OF LAW**

I conclude that the Claimants have sustained an actual and compensable loss of \$9,300.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401 (2010), 8-405 (Supp. 2013).

**RECOMMENDED ORDER**

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

**ORDER** that the Maryland Home Improvement Guaranty Fund award the Claimants \$9,300.00; 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 (10%) 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 o Signature on File**

August 25, 2014  
Date Decision Issued

Marina Lolley Sabett  
Administrative Law Judge

MLS/lh  
# 150003

PROPOSED ORDER

*WHEREFORE, this 26th of September 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.*

*W.M. Bruce Quackenbush, Jr.*  
*William Bruce Quackenbush, Jr.*  
*Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION