

IN THE MATTER OF THE CLAIM
OF JOHN W. WILLIAMS,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF JASON KINTZEL,
SHORT CUTTERS, INC.,
RESPONDENT

* BEFORE THOMAS G. WELSHKO,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
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* OAH No.: DLR-HIC-02-13-46639
* MHIC No.: 13 (90)1200

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PROPOSED DECISION

STATEMENT OF THE CASE
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STATEMENT OF THE CASE

On September 11, 2013, John W. Williams (Claimant), filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$15,000.00 (later amended to \$13,675.00) in alleged actual losses suffered as a result of a home improvement contract he entered into with Jason Kintzel, t/a Short Cutters, Inc. (Respondent).

I held a hearing on October 24, 2014 at the Harford County Public Library in Bel Air, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2010 & Supp. 2014). The Claimant represented himself. Anthony DiPaula, Attorney-at-Law, represented the Respondent. Peter Martin, 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 (2014), Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02, and 28.02.01.

ISSUES

1. Did the Claimant 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

The Claimant offered five exhibits, the Respondent offered seven exhibits, and the Fund offered four exhibits. I admitted all exhibits offered by the parties into evidence. I have attached a complete Exhibit List as an appendix to this decision.

Testimony

The Claimant testified on his own behalf. Russell W. Allen, a builder and licensed home inspector, testified for the Respondent. I accepted Mr. Allen as an expert in general construction and concrete work. The Fund did not call any 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 under MHIC license numbers 01-92860 and 05-124593. (Fund Ex. 3.)

2. On October 25, 2012, the Claimant and the Respondent entered into a contract (Contract) to remove and replace concrete around the perimeter of an existing in-ground swimming pool and remove and re-lay existing pavers around the pool deck at the Claimant's Abingdon, Maryland home. (Test. Cl.; Cl. Ex. 2.)

3. The Contract specifically called for the Respondent to perform the following work:

- Busting out and replacing 950 sq. ft. of concrete around perimeter of pool area. Concrete to match existing surface. Tapping down base and backfilling with [crusher run 6 (CR6)] to bring up to proper grade. Steel reinforcement set in place. Concrete poured at 4,000 psi.
- Removing and relaying 340 sq. ft. of existing pavers around pool deck. Also tamping down base, backfilling with CR6 to bring up to proper grade.

(Cl. Ex. 2.)

4. The agreed-upon contract price was \$13,675.00. (Cl. Ex. 2.)

5. The Respondent completed work under the contract in December 2012. (Test. Cl.)

6. On October 25, 2012, the Claimant paid the Respondent a down payment of \$4,560.00. Upon completion of the work on December 14, 2012, the Claimant paid the Respondent the remaining balance due of \$9,115.00. (Test. Cl.; Cl. Ex. 2.)

7. Within a month after the Respondent completed the work, the concrete perimeter surrounding the pool deck began to crack and become discolored. (Test. Cl.; Cl. Exs. 1A – 1Y, 4.)

8. At the beginning of January 2013, the Claimant and his wife called the Respondent and informed him that the concrete surrounding the pool was cracking and needed to be repaired. The Respondent replied that he would return to the Claimant's property in the spring to perform those repairs. (Cl. Ex. 4.)

9. As of April 12, 2013, the Respondent had failed to return to the Claimant's property to perform the promised repairs, despite the Claimant's additional efforts to have him do so. The Respondent's failure to return prompted the Claimant's wife to send an e-mail to the Respondent, which expressed her and the Claimant's concerns. (Cl. Ex. 4.)

10. The Claimant's wife's April 12, 2013 e-mail also noted the Claimant's dissatisfaction with two additional items:

- Found blue tape cemented into the cement around the pool.
- Drainage issues by hot tub concrete pad and cement area around the pool. Water has nowhere to drain and [lies] in puddles.

(Test. Cl.; Cl. Ex. 4.)

11. On April 21, 2013, the Claimant sought an estimate from Joe Viscomi, t/a Joe Viscomi, Inc., a licensed home improvement contractor, to have the 950 sq. ft. of concrete decking surrounding the pool removed and replaced. Mr. Viscomi's estimate for that work was \$15,000.00. (Cl. Ex. 5.)

12. On May 31, 2013, in response to the Claimant's complaints about the cracking and discoloration of the concrete pool deck, the Respondent offered to repair the cracking and sent a proposed repair order to the Claimant and his wife in this regard. The Claimant rejected

that repair order; he sought removal and replacement of the entire concrete pool deck as a remedial measure. The Respondent withdrew his repair offer after receiving the Claimant's e-mail reply. (Test. Cl. Cl. Ex. 4 and Resp. Ex. 1.)

13. In June 2013, the parties came to an agreement concerning the repair of certain items that the Claimant's wife mentioned in her April 12, 2013 e-mail. On June 29, 2013, the Respondent removed the blue tape embedded in the concrete and drilled holes in the hot tub drainage pad to address the drainage issue in that area. He also repaired the gates to prevent them from rubbing. Despite doing this additional work, the Respondent did not address the cracking and discoloration problems related to the concrete pool deck. (Test. Cl.; Cl. Ex. 4 and Resp. Ex. 2.)

14. Because he and the Respondent had reached an impasse related to repairing the concrete work, on September 11, 2013, the Claimant filed a claim for reimbursement with the Fund for actual losses sustained by him resulting from the Respondent's alleged poor workmanship. (Test. Cl.; Fund Ex. 3.)

15. On October 20, 2014, the Respondent retained Russell W. Allen, a builder and consultant, to assess the reason(s) for the cracking and discoloration of the pool deck that he installed at the Claimant's residence. Mr. Allen inspected the Respondent's work at the Claimant's residence on that date. (Test. Allen.)

16. The discoloration of the pool deck resulted from the accumulation of dirt. Pressure cleaning would be an effective method to remedy this problem. The concrete cracking of the pool deck resulted from poor drainage in the area of the pool deck adjacent to the back retaining wall. The freezing and thawing of accumulating water, which infiltrated into the crushed stone base behind the wall, picked up and moved the concrete. This freeze-thaw effect

caused the concrete to expand and contract which, in turn, resulted in the cracking when the concrete rose and fell. (Test. Allen; Resp. Ex. 6.)

17. The Claimant did not sustain an actual loss. (Test. Allen; Resp. Ex. 6.)

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. 2014). *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 Claimant has not proven eligibility for compensation.

The Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant. There are no statutory impediments barring the Claimant from recovering from the Fund. He is not related to the Respondent and does not work for him. He does not have a pending insurance claim or court case against him, he owns the residence that is the subject of his claim and does not own more than three properties. Md. Code Ann., Bus. Reg. § 8-405(f)(2)(ii).

The Claimant asserts that in December 2012, the Respondent poorly installed a concrete deck surrounding the perimeter of the in-ground pool at his Abingdon, Maryland home under the terms of an October 25, 2012 contract that he entered into with him. In support of his assertion, the Claimant offered his testimony and a number of exhibits, including photographs, and an estimate from a contractor whom he hopes to hire to remove and replace the allegedly defective concrete decking installed by the Respondent.

The Claimant testified that as early as late December 2012 and early January 2013, less than a month after the Respondent installed his new concrete pool deck, he began to notice the cracking and discoloration of the concrete. He and his wife called the Respondent, who promised to repair the cracking in the spring of 2013. As of April 2013, the Respondent had not appeared, prompting the Claimant to send a series of e-mails to the Respondent. The Respondent ultimately repaired a number of punch-list items (addressing poor drainage around the hot tub and repairing a gate) in late June 2013. On May 31, 2013, he offered to repair the cracking by filling in the cracks with crack filler, but the Claimant found this remedy undesirable. He told the Respondent that he would only accept the total removal and replacement of the concrete pool deck. The Respondent rejected this remedy, and subsequently withdrew his repair offer. At this point, there was an impasse between the Claimant and the Respondent, which resulted in the Claimant's claim filing with the Fund.

The photographs that the Claimant offered in support of his claim demonstrate extensive cracking in the concrete deck. They also illustrate its discoloration, something that has only worsened over time. (Some parts of the concrete appear gray, not white.) The proposed remediation contract that the Claimant offered was from Joe Viscomi, a licensed Maryland home improvement contractor. That contract proposal is from April 2013. At that time, Mr. Viscomi estimated that it would cost \$15,000.00 to fix the cracking and discoloration problems. Mr. Viscomi blames the Respondent's poor installation techniques for all of the problems with the concrete deck. Mr. Viscomi observed that an expansion joint is missing between the old and new concrete, "therefore creating a crack across the block." Moreover, he believes that the

Respondent poured the concrete when it was too cold to do so, which caused the discoloration.¹ Consequently, Mr. Viscomi believes removal and replacement of all 950 sq. ft. of the concrete deck surrounding the pool is the only solution to remedy the problems caused by the Respondent's use of poor installation techniques. The Claimant is relying on Mr. Viscomi's estimate as the basis for proving his actual loss. That estimate, however, exceeds the original contract price of \$13,675.00, so the Claimant is seeking a refund of that amount as compensation for damages that he sustained because of the Respondent's alleged poor and inadequate workmanship. (A claimant may not recover more from the Fund than he paid to the original contractor. Md. Code Ann., Bus. Reg. § 8-405 (e)(1), (5) (Supp. 2014).)

The Respondent asserts that he properly installed the concrete pool deck. He offered the testimony of Russell W. Allen, a builder and licensed home inspector, to support that assertion. As noted, I admitted Mr. Allen as an expert in general construction and concrete work.

Mr. Allen testified that the cracking and discoloration of the concrete pool deck are not the Respondent's responsibility. Instead, he averred that poor drainage adjacent to a retaining wall where the concrete decking ends is the cause. Mr. Allen observed that no cracking exists near the front retaining wall where the drainage is adequate. By contrast, cracking is apparent near the back retaining wall, where the drainage is poor. Mr. Allen theorized that because of the freeze and thaw cycle of water that accumulates because of the poor drainage, the concrete was "raised up," which caused movement and, therefore, cracking.² Mr. Allen stated that without a

¹ The Claimant offered a temperature chart for the Aberdeen, Maryland region that verified that the weather was cold when the Respondent performed the work. (Cl. Ex. 3.)

² Mr. Allen advised that minor cracking in concrete is expected and acceptable. There was some cracking in other areas, according to the Claimant, but Mr. Allen stated that unless the crack is at least one-quarter inch wide or one-quarter inch in vertical displacement, it is not significant. He relied on "Residential Construction Performance Guidelines for Professional Builders & Remodelers" (4th ed.) published by the National Association of Home Builders (NAHB) at section 12-4-4 (Resp. Ex. 7), in providing this opinion.

problem being observable and obvious, the Respondent could assume all other installations (such as retaining walls) were installed properly to promote proper drainage, and that Respondent had no obligation to address any drainage issues. Mr. Allen also saw that there was no expansion joint between the old and new concrete, also noted by Mr. Viscomi, but he did not consider the missing expansion joint significant. Mr. Allen rejected Mr. Viscomi's theory that the Respondent caused the concrete to darken by pouring it when it was too cold to do so. He stated that experienced contractors use concrete that has antifreeze mixed in as a matter of course (at a percentage determined at the concrete plant depending on weather conditions). His review of the Respondent's receipt for the concrete confirmed that the Respondent used concrete infused with antifreeze when he poured the Claimant's concrete deck. Therefore, low temperatures should not have had any bearing on the appearance of the concrete.³ In Mr. Allen's opinion, the discoloration was simply the result of accumulated dirt (possibly from mulch run-off and pollution), which the Claimant could easily remove by pressure cleaning the deck.

The Fund did not call any witnesses; it essentially adopted Mr. Allen's testimony. Like the Respondent, it contends that if the lack of proper drainage adjacent to the back wall was not observable, then the Respondent had no responsibility to address it before pouring the concrete deck. It asks that I deny the Claimant's claim on that basis.

I find Mr. Allen's testimony persuasive in support of both the Respondent's and Fund's position. Mr. Allen is a credible expert. While Mr. Allen admitted that he testifies as a "hired gun" (that is, he has testified both for and against claimants and for and against contractors), he also emphasized that he aims to be objective in analyzing any workmanship problems.

³ Mr. Allen also testified that had the Respondent poured the concrete when the weather was too cold, a noticeable spalling or snowflake effect would have developed that is absent here.

Furthermore, the parties vetted Mr. Allen's expertise in general construction and concrete work during *voir dire* before he gave his opinion. During that *voir dire*, Mr. Allen indicated that he was seventy-nine years old and has had seventy years' experience in performing construction work, having started as a helper when he as a child. While the first nine or ten years of Mr. Allen's experience is not significant, given his youth at that time, certainly his subsequent sixty years of experience is. Mr. Allen also recounted his familiarity with the proper procedures for pouring concrete, lending further credence to his opinion.

Turning to Mr. Allen's opinion, I find his conclusions comported with his, Mr. Viscomi's and the Claimant's observations and, thus, have validity. Mr. Allen observed that the major cracking in the concrete deck was only apparent near the retaining wall and not elsewhere, which is true. This observation, therefore, buttresses his view that poor drainage and the resulting freezing and thawing of accumulating water was the culprit in causing the concrete deck to crack. Mr. Allen also found the one missing expansion joint insignificant; the Claimant offered no valid contrary evidence to show otherwise. With regard to the discoloration, Mr. Allen's conclusion that dirt accumulation caused it contradicted Mr. Viscomi's conclusion that the Respondent caused the discoloration by pouring the concrete when it was too cold. Again, I find Mr. Allen's opinion valid. The Claimant's temperature chart suggests that the temperatures in the Aberdeen-Abingdon area were seasonal for early and mid-December (highs 40s and 50s and lows in the 20s and 30s on the Fahrenheit scale). Additionally and, more important, the Respondent used concrete mixed with antifreeze to lessen the impact of the cold weather on the concrete installation.

By contrast, the Claimant presented only his own non-expert testimony, a series of photographs and the terse written opinions of Mr. Viscomi about the causes of the cracking and

discoloration, in support of his claim. (Mr. Viscomi's opinions appear as asides in the April 21, 2013 proposed contract that Mr. Viscomi provided to the Claimant.) I do not give Mr. Viscomi's written opinions as much weight as Mr. Allen's live testimony. As noted, Mr. Allen's expertise was established at the hearing; Mr. Viscomi's was not. Mr. Viscomi did not testify, so his qualifications for providing an opinion about the causes of the cracking and discoloration are unknown. With Mr. Viscomi's opinions diminished, the Claimant is left with a tacit reliance on the doctrine of *res ipsa loquitur* (the thing speaks for itself) to support his claim. Here, the Claimant cannot invoke the *res ipsa loquitur* doctrine because there is contrary credible evidence in the record that suggests the Respondent was not responsible for causing the problems at issue.

In his rebuttal closing, the Claimant countered the Respondent's arguments by suggesting that if there was an existing drainage problem that could have caused concrete to crack, the Respondent had the responsibility to discover the drainage problem, inform him of it and, if necessary, take steps to correct it before laying any new concrete. Under the circumstances presented here, the Claimant's counter argument has no merit. To rebut Mr. Allen's expert opinion that the Respondent had no responsibility to address such a problem unless it was obvious, the Claimant would have had to present contrary testimony from his own expert witness. The Claimant did not have an expert witness, so Mr. Allen's opinion remains unrebutted.⁴

⁴ Hypothetically, if the Respondent were responsible for addressing drainage issues in the Claimant's yard before beginning work on the concrete pool deck, he most likely would have raised the contract price to be compensated for doing this extra work. In calculating the Claimant's actual loss, I would have had to factor in that additional cost by adding it to the original contract price. This would be problematic because that cost is unknown. The Viscomi contract also does not include any charges for drainage remediation.

I am not addressing the validity of the amount of the Claimant's claim. This is because the Claimant has not shown any defective workmanship by the Respondent that would entitle him to reimbursement from the Fund.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has not sustained an actual and compensable loss as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401 and 8-405 (2010 & Supp. 2014).

PROPOSED ORDER

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

ORDER that the Maryland Home Improvement Guarantee Fund deny the Claimant's claim; and

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

Signature on File

January 7, 2015
Date Decision Issued

C _____ z
Thomas G. Welshko
Administrative Law Judge

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<p>IN THE MATTER OF THE CLAIM</p> <p>OF JOHN W. WILLIAMS,</p> <p>CLAIMANT</p> <p>AGAINST THE MARYLAND HOME</p> <p>IMPROVEMENT GUARANTY FUND</p> <p>FOR THE ALLEGED ACTS OR</p> <p>OMISSIONS OF JASON KINTZEL,</p> <p>SHORT CUTTERS, INC.,</p> <p>RESPONDENT</p>	<p>* BEFORE THOMAS G. WELSHKO,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>*</p> <p>*</p> <p>*</p> <p>* OAH No.: DLR-HIC-02-13-46639</p> <p>* MHIC No.: 13 (90)1200</p>
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FILE EXHIBIT LIST

Claimant's Exhibits:

1. Photographs, A – Y, from October 20, 2014
2. October 25, 2012 contract
3. Temperature chart for Aberdeen, Maryland, November and December 2012
4. E-mails, April and May 2013
5. April 21, 2013 proposed contract from Joe Viscomi

Respondent's Exhibits:

1. May 31, 2013 proposed repair order
2. June 29, 2013 repair order
3. Photographs A and B
4. *Curriculum Vitae* for Russell W. Allen
5. List of case where Russell W. Allen testified as an expert witness
6. Allen's photographs, A – Z

7. Excerpt from Residential Construction Performance Guidelines for Professional Builders & Remodelers "(4th ed.) (undated)

Fund's Exhibits:

1. May 29, 2014 original hearing notice
2. August 12, 2014 rescheduling notice
3. September 24, 2014 licensing record for the Respondent
4. September 17, 2013 claim receipt

PROPOSED ORDER

WHEREFORE, this 2nd day of March 2015, 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