IN THE MATTER OF THE CLAIM	*	**BEFORE THOMAS G. WELSHKO,**
OF RAJIV V. SONI,	*	**AN ADMINISTRATIVE LAW JUDGE**
CLAIMANT	*	**OF THE MARYLAND OFFICE**
AGAINST THE MARYLAND HOME	*	**OF ADMINISTRATIVE HEARINGS**
IMPROVEMENT GUARANTY FUND	*	
FOR THE ALLEGED ACTS OR	*	**OAH No.: DLR-HIC-02-15-07771**
OMISSIONS OF JERRY L. PRIDDY,	*	**MHIC No.: 13 (90) 905**
T/A PRIDDY CHIMNEY SWEEP,	*	
RESPONDENT	*	

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

PROPOSED DECISION

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STATEMENT OF THE CASE

On April 14, 2014, Rajiv V. Soni (Claimant), filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of $1,975.00 in alleged actual losses suffered as a result of a home improvement contract with Jerry L. Priddy, t/a Priddy Chimney Sweep (Respondent).

I held a hearing on June 18, 2015 at the Office of Administrative Hearings' (OAH) Regional Office in Kensington, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e)

(2015). The Claimant represented himself. The Respondent represented himself.[1] Jessica Kaufman, 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 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. Is the Claimant's claim barred by the limitations period found in section 8-405(g) of the Business Regulation Article?

2. If the Claimant's claim is not barred by limitations, did the Claimant sustain an actual loss compensable by the Fund as a result of any acts or omissions committed by the Respondent?

3. If so, what is the amount of that loss?

SUMMARY OF THE EVIDENCE

Exhibits

The Claimant offered fifteen exhibits. The Respondent did not offer any exhibits. The Fund offered seven exhibits. (I have attached a complete Exhibit List as an Appendix.)

[1] Some exhibits give the company name as "Priddy Clean Chimney Sweeps, Inc.," but the MHIC has licensed the Respondent as a sole proprietorship, not a corporation. In any event, Jerry L. Priddy is the sole owner of Priddy Chimney Sweep. Generally, attorneys must represent corporations in legal proceedings. *Turkey Point Property Owners' Ass'n, Inc. v. Anderson*, 106 Md. App. 710, 713 (1995). Nevertheless, as a principal of the company, even if his company were incorporated, Mr. Priddy did not have to retain an attorney to represent his company according to section 9-1607.1 of the State Government Article of the Maryland Annotated Code (2014).

Testimony

The Claimant testified on his own behalf. The Respondent testified on his own behalf and presented the testimony of Christina El-Hage, the Respondent's Director of Operations. I admitted Ms. El-Hage as an expert in chimney sweeping and chimney construction. 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 number 01-42961. (Fund Ex. 3.)

2. In early 2010, Dice Residential Improvement, Inc. (Dice), a roofing contractor licensed by the MHIC, replaced the entire roof of the Claimant's rental property located in Bethesda, Maryland (Property). The Property and the Claimant's own residence are the only residential properties that the Claimant owns. (Test. Cl.)

3. After Dice performed the roofing work at the Property, the Claimant discovered an interior leak. A Dice representative performed a water test on the roof, and told the Claimant that the chimney might be the source of the leakage. The Dice representative recommended that the Claimant have a chimney-repair specialist inspect the chimney. (Test. Cl.)

4. The Claimant knew that the Respondent performed chimney-related work, because he had seen the Respondent's work trucks traversing his neighborhood. Acting on the suggestion by Dice's representative, he called the Respondent to schedule an appointment to inspect the roof on the Property. (Test. Cl.; Cl. Ex. 1.)

5. In response to the Claimant's request, on July 14, 2010, the Respondent sent its technician, José Salazar, to inspect the chimney at the Property. (Test. El-Hage; Cl. Exs. 2 and 7.)

6. On July 14, 2010, the chimney on the Property was in the following condition:

- The chimney's bricks were spalled[2] in several locations. This spalling occurred because the bricks used in the construction of the chimney were reused "Old Baltimore bricks." Reused bricks are more porous than new bricks and, therefore, are subject to moisture absorption at a higher rate.
- There were several loose and cracked mortar pieces.
- The chimney's concrete crown was deteriorated, cracked and worn from weather.

(Test. El-Hage; Cl. Exs. 1, 2, 7 and 8.)

7. The Claimant did not tell Mr. Salazar that he was concerned about a leakage problem before Mr. Salazar inspected the chimney. (Test. El-Hage and Resp.)

8. Mr. Salazar made the following recommendations to the Claimant concerning the repair of the chimney on his rental property:

- Rebuild the chimney from eighteen courses upward.
- Re-lay a new concrete crown.
- Apply waterproofing to the entire chimney stack once reconstruction is complete.
- Install two new stainless steel rain and animal guards.

(Test. El-Hage and Cl.; Cl. Ex. 8.)

9. The Claimant decided to enter into a contract with the Respondent to rebuild the chimney based on Mr. Salazar's recommendations. (Test. Cl.)

[2] According to Ms. El-Hage, spalling refers to the popping of outer bricks caused by moisture-laden bricks holding water in warmer spring and summer weather, and then releasing that moisture in cold winter weather.

10. On July 16, 2010, the Claimant and the Respondent entered into a contract to rebuild the chimney at the Property. The contract specifically called for the Respondent to perform the following work:

- Perform masonry chimney rebuild of 18 courses with new matching bricks and mortar.
- Install two new stainless steel rain and animal guards.

(Cl. Ex. 3.)

11. The contract included a five-year warranty on brick and cement work and a ten-year warranty for waterproofing. (Cl. Ex. 3.)

12. The agreed-upon contract price was $1,975.00. (Test. Cl.; Cl. Ex. 3.)

13. The Respondent began the contracted work on July 21, 2010, and completed it on July 26, 2010. (Test. Cl.; Cl. Exs. 3 and 4.)

14. On July 21, 2010, the Claimant paid the Respondent a $700.00 deposit and, on July 26, 2010, he paid the Respondent the remaining balance of $1,275.00. The Claimant paid both amounts by check. (Cl. Ex. 4.)

15. About two months after the Respondent completed the work, a rainstorm came through the Bethesda area. During that rainstorm, the Claimant's tenant noticed interior leakage where the ceiling met the chimney brick. There was also a second leak inside the fireplace. (Test. Cl.)

16. After a second rainfall, similar leakage occurred in the interior of the Claimant's home. (Test. Cl.)

17. The second leakage occurrence prompted the Claimant to call the Respondent for the first time to make repairs to the chimney. (Test. Cl.)

18. In October 2010, the Respondent sent a worker to the Property to fix the chimney. At that time, the Respondent's worker resealed the chimney and installed a new chimney crown. (Test. Cl.; Cl. Ex. 8.)

19. The Respondent only became aware of the interior leakage problem that existed before July 2010 in October 2010, when the Claimant told the Respondent's employee about the leaks that were present before the Respondent did any work. (Test. El-Hage; Cl. Ex. 8.)

20. The leakage continued after the Respondent made repairs to the chimney in October 2010. This prompted the Claimant to call the Respondent to make additional repairs to the chimney. (Test. Cl.)

21. On February 10, 2011, the Respondent's technician, Javier, replaced the chimney crown. (Test. Cl.; Cl. Ex. 8 and Fund Ex. 7.)

22. In all, the Respondent came to the Property at least nine times to fix the leakage problem. The Respondent tried a variety of chimney repair methods to address the leakage issue, but none worked. Those methods mostly involved the application of waterproofing materials and resealing the brick. (Test. Cl. and El-Hage; Cl. Ex. 8.)

23. The Respondent performed ceiling repairs to the interior of the home where leakage occurred as well. (Cl. Ex. 8.)

24. During the time that the Respondent's technicians came to the Property to make repairs to the chimney, they advised the Claimant that problems with the metal step flashing in the chimney area might be the cause of the leakage and that replacement of that flashing might be necessary. The Claimant did not contract for step flashing repair, so the Respondent would not be performing any step flashing repairs or replacement without an additional charge. (Test. El-Hage; Cl. Ex. 8.)

25. The last time that any Respondent employees made any repairs to the chimney at the Property was in November 2012, when a technician sealed a leak in the chimney. (Cl. Ex. 9.)

26. The Claimant had no personal knowledge of leaks occurring at the Property after November 2012. (Test. Cl.)

27. On December 19, 2012, the Claimant filed a complaint about the Respondent with the Montgomery County Office of Consumer Affairs in an effort to get the Respondent to take additional steps to remedy the leakage problem without incurring an additional charge. The Montgomery County Office of Consumer Affairs notified the Respondent about the Claimant's complaint. (Test. Cl.; Cl. Ex. 7.)

28. On January 6, 2013, the Respondent sent a letter to the Montgomery County Office of Consumer Affairs in response to the Claimant's complaint. (Cl. Ex. 1.)

29. Sometime in early 2013, the Montgomery County Office of Consumer Affairs informed the Claimant that it did not have the authority to resolve his complaint against the Respondent, so it referred him to the MHIC. (Test. Cl.)

30. In the early spring of 2013,[3] the Claimant filed a complaint about the Respondent's workmanship with the MHIC, to which the Respondent filed a response on April 4, 2013. (Test. Cl.; Cl. Ex. 8.)

31. In September 2013, an employee of the Claimant's rental agent, RE/MAX Premier Selections, identified as Richard, contacted Dice to determine if Dice would make warranty repairs to the roof surrounding the chimney. Dice responded by e-mail, indicating that because the Respondent did work on the roof adjacent to the chimney, Dice's warranty was void. It offered to make repairs around the chimney, however, at a cost of $900.00. (Cl. Ex. 11.)

[3] I make this finding by inference, because none of the parties offered a copy of the Claimant's written complaint form to the MHIC as evidence. Given that the Respondent responded to the MHIC by a letter dated April 4, 2013 (Cl. Ex. 8), I surmise that the Claimant probably filed his complaint in the early spring of 2013.

32. On October 7, 2013, the Claimant entered into a $900.00 contract with Dice to perform "minor roof repair chimney only." Dice's repairs consisted of the following:

- Remove existing chimney flashing.
- Remove existing shingles around the chimney area only.
- Supply and install ice and water shield around the chimney.
- Supply and install shingles around the chimney area with aluminum step flashing.
- Color: To match existing Certain Teed XT-25 Gray Frost.
- Supply and install aluminum chimney counter flashing.

(Cl. Ex. 12.)

33. The Claimant paid Dice in full for the repairs to the shingles and flashing around the chimney of the rental property. (Cl. Ex. 12.)

34. On October 12, 2013, the Claimant entered into a $750.00 contract with Chimney.com (a.k.a. Jimneys Chimneys, Inc.) to reseal flashing around the chimney as needed and re-lay crown with flexible crown seal. (Cl. Exs. 14 and 15.)

35. On April 14, 2014, the Claimant filed a $1,975.00 claim for reimbursement with the Fund based on alleged and/or omissions committed by the Respondent in performance of the July 16, 2010 contract. (Fund Ex. 4.)

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) (2015). *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." Bus. Reg. § 8-401 (2015). The Claimant is not eligible for compensation because he filed his

claim beyond the three-year statute of limitations. Md. Code Ann., Bus. Reg. § 8-405(g) (2015). Even if the Claimant had filed his claim within the limitations period, he did not prove that the Respondent committed any act or omission that resulted in an actual loss. I have set forth the bases for my conclusions in detail below.

I. Limitations

The Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant. There are no *prima facie* statutory impediments barring the Claimant from recovering compensation from the Fund (being related to the Respondent, recovering damages from the Respondent in a court proceeding, owning more than three residential properties, etc.). Md. Code Ann., Bus. Reg. §§ 8-405(f)(1) and (2) (2015).

As touched on briefly, above, a significant obstacle stands in the way of the Claimant's recovering compensation from the Fund. Section 8-405(g) of the Business Regulation Article states, "A claim shall be brought against the Fund within 3 years after the claimant discovered or, by use of ordinary diligence, should have discovered the loss or damage." The Claimant clearly discovered the leakage in October 2010, yet did not file his claim until April 2014, more than three years later.

The Fund, however, argues that because the Respondent's contract terms included a five-year warranty on brick and cement work and a ten-year warranty on waterproofing and the Respondent undertook repairs under that warranty, the rule contained in *Antigua Condominium Ass'n v. Melba Investors Atlantic, Inc.*, 307 Md. 700 (1986), tolls the limitations period contained in section 8-405(g). I disagree.

The Fund was established under the Maryland Home Improvement Law (Act), a regulatory statute that was enacted for the protection of the public. *See, e.g., Brzowski v. Md. Home Improvement Comm'n*, 114 Md. App. 615, 628 (1997). The Act is remedial and

"facilitate[s] remedies already existing for the enforcement of rights and the redress of injuries." *Landsman v. Md. Home Improvement Comm'n*, 154 Md. App. 241, 251 – 52 (2003) (citation omitted). Remedial statutes are to be "liberally construed" in order to effect the legislature's purpose. *Brzowski*, 114 Md. App. at 633. A court may defer to an agency's construction of a statute when the agency is responsible for administering it, but the "administrative agency may not disregard the terms of the statute when that statute is clear and unambiguous." *Id.* at 634.

The MHIC administers the Fund. Section 8-405(g) is an integral part of the statute that the MHIC administers and, at first blush, appears to be a statute of limitations. Statutes of limitations provide "adequate time for a diligent plaintiff to bring suit" but also should "ensure fairness to defendants by encouraging prompt filing of claims." *Hecht v. Resolution Trust Corp.*, 333 Md. 324, 338 (1994). The Court of Appeals, citing *Booth Glass Co. v. Huntingfield Corp.*, 304 Md. 615, 623 (1985), emphasized as follows: "We have long maintained a rule of strict construction concerning the tolling of the statute of limitations. Absent legislative creation of an exception to the statute of limitations, we will not allow any 'implied and equitable exception to be engrafted upon it.'" *Hecht*, 333 Md. at 333. Equitable tolling is granted sparingly, "typically for reasons of fraudulent concealment or minority." *Anderson v. United States*, 427 Md. 99, 118 (2012).

Section 8-405(g) is the equivalent of a judicial statute of limitations, such as that for "civil actions" contained in section 5-101 of the Courts and Judicial Proceedings Article. Md. Code Ann., Cts. & Jud. Proc. § 5-101 (2013). In *Maryland Securities Comm'r v. U.S. Securities Corp.*, 122 Md. App. 574 (1998), though, the Court of Special Appeals held that section 5-107's statute of limitations did not apply to *administrative actions* for monetary fines or penalties. *Id.* at 588 – 89. The court stated that the statute applied "only to judicial proceedings as opposed to

administrative hearings." *Id.* at 589. The court explained its holding based upon the "spirit, reasoning, and holding" of its majority opinion in an earlier case and stated as follows:

> [T]he impetus of our reasoning was two-fold: (1) an administrative hearing was not a "prosecution" or "suit" within the meaning of [section 5-107 of the Courts and Judicial Proceedings Article], and (2) the underlying purpose of protecting the public from unscrupulous practices by [professionals licensed by an agency] preempted the defense of limitations.

Id. at 591. While *Maryland Securities Commissioner* did not directly stand for the proposition that a limitations period in an administrative scheme could not be interpreted as a statute of limitations—and might even be interpreted as a more expansive claim processing rule—it did assert that a specific statute of limitations in a judicial proceeding should not be imported to an administrative scheme.

Because *Maryland Securities Commissioner* asserted, but did not necessarily hold, that a judicial statute of limitations should not or could not be imported to an administrative scheme, I must still discuss whether *Booth Glass*'s restrictive rule concerning the tolling of a statute of limitations or *Antigua*'s more expansive interpretation applies or, in the alternative, whether *neither* case actually applies to Fund claims. Both *Booth Glass* and *Antigua* address specific causes of action in the civil courts and calculate the limitations timeframe based upon the statute of limitations in the Courts and Judicial Proceedings Article. The question presented in *Booth Glass* was whether the three-year statute of limitations in the Courts and Judicial Proceedings Article at section 5-101 was tolled by the "continuous course of treatment rule" in a cause of action for *negligence* against the contractor. *Booth Glass*, 304 Md. at 619. The Court of Appeals in *Booth Glass*, citing section 5-101 of the Court and Judicial Proceedings Article, stated that "an action must be filed *within three years of the date that it 'accrues.'*" *Id.* (emphasis added). The Court explained that because the suit against the contractor was based upon "the negligent installation of the glasswork and not upon negligence in the repair process," the *discovery* rule,

rather than the continuous course of treatment rule, governed when the cause of action *accrued* in the case. *Id.* at 621 – 22.

Antigua did not change the discovery rule in a negligence action against a contractor, but instead narrowly analyzed the "accrual" point in a breach of a contractual covenant to repair. In *Antigua*, the court termed a specific provision in a condominium developer's contract with the buyers as a "Repair Clause." *Antigua*, 307 Md. at 708. The Court stated that the Repair Clause was not "simply a warranty of the condition of a unit or of the common elements as of the time of closing with a [condominium] Unit Owner." *Id.* at 715. The Court held that an action for breach of the Repair Clause was within the three-year limitation period in the Courts and Judicial Proceedings Article, but that the limitation did not "accrue" at the time a defect was discovered. The Court stated that the breach of the covenant to repair did not "occur at closing or necessarily when notice is given" because there must be a period of time in which the party who made the promise to repair could "investigate the problem and prepare to perform the actual work." *Id.* at 715, 717; *see also Hilliard & Bartko Joint Venture v. Fedco Sys., Inc.*, 309 Md. 147, 163 (1987). Instead, the limitations period begins to run when the breach is discovered during this investigatory and preparatory period. *Antigua*, 307 Md. at 717. A more recent opinion in the Court of Appeals of Kansas summarized that the "statute of limitations period runs from the breach of the Repair or Replace Warranty," rather than from when the defect was discovered. *Hewitt v. Kirk's Remodeling & Custom Homes, Inc.*, 310 P.3d 436, 446 (Kan. Ct. App. 2013).

While *Antigua*'s limitation analysis applies only to the discovery period in a narrow cause of action for breach of the contracting party's contract to repair, it "divid[es] the contract clauses into two groups." *Hartford Accident & Indem. Co. v. Scarlett Harbor Assocs. Ltd. P'ship*, 109 Md. App. 217, 245 (1996). The Court of Special Appeals explained that "*Antigua* suggests that a promise by a developer in a sales contract to do an act in the future is a

contractual obligation, but a statement in the contract that assures the quality, description, or performance of the property constitutes an express warranty." *Id.* at 246. As such, a promise to repair is governed by the statute of limitations in the Courts and Judicial Proceedings Article, whereas the breach of an express warranty is governed by the special statute of limitations in the Real Property Article. *Id.* While the claim against the Fund does not concern real property, *Antigua* and *Hartford* support the distinction between an express warranty and a promise to repair.

Claims for compensation from the Fund are not pure negligence, breach of express warranty, or breach of contract to repair claims. Negligence and breach of contract to repair claims are governed by the general statute of limitations in the Courts and Judicial Proceedings Article, which addresses a broad range of civil causes of action that may be brought within three years from the date such actions accrue. Breach of express warranty claims, as discussed in *Hartford*, are governed by a special statute of limitations outside the Courts and Judicial Proceedings Article. *Antigua* narrowly analyzed the "accrual" point in a breach of a contractual covenant to repair and held that the limitation period begins to run when the breach is discovered during the investigatory and preparatory period. While there might be flexibility in the Fund's limitation period, neither *Booth* nor *Antigua* controls the limitations analysis.

Although Maryland's appellate courts have not directly addressed the nature of the filing deadlines in an administrative scheme, its opinions suggest that a filing deadline stipulated in a statute, such as section 8-405(g) of the Business Regulation Article, would generally be construed as a condition precedent to the right of action. *See, e.g.*, *Higginbotham v. Pub. Serv. Comm'n*, 412 Md. 112, 138 (2009) (Harrell, J., concurring and dissenting) ("[W]here a statute containing a limitation period creates both the right and the remedy, the limitation period constitutes a condition precedent to maintaining suit, not merely a statute of limitations subject to waiver if not

raised by the defendant as an affirmative defense."). A condition precedent operates like a jurisdictional bar and is non-waivable and non-tollable and can be raised at any time. *See, e.g.*, *Kearney v. Berger*, 416 Md. 628, 658-59 (2010) ("[A] condition precedent cannot be waived under the common law and a failure to satisfy it can be raised at any time because the action itself is fatally flawed if the condition is not satisfied." (citations omitted)). A statute of limitations, on the other hand, is subject to waiver by failure of a respondent to raise the defense in a proper manner, but it is not subject to discretionary extension. *S.B. v. Anne Arundel Cnty. Dep't of Soc. Servs.*, 195 Md. App. 287, 307-08 (2010). Equitable exceptions such as tolling and estoppel may also be available under a statute of limitations, but these exceptions are narrow. *See, e.g.*, *Elat v. Ngoubene*, 993 F. Supp. 2d 497, 537-38 (D. Md. 2014).

The Court of Appeals' opinion in *State v. Sharafeldin*, 382 Md. 129 (2004), is a key opinion on the distinction between a statute of limitations and a condition precedent. The Court of Appeals addressed whether a statutory timeframe for breach of contract claims against the State "constitute[d] a condition to the waiver of sovereign immunity and thus to the right of action itself against the State or [was], instead, merely a statute of limitations." *Id.* at 132. The statutory provision provided that "[a] claim under this subtitle is *barred unless* the claimant files suit within 1 year . . . ." *Id.* (emphasis added). The Court held that the filing deadline was not a statute of limitations but a condition to the action itself and that "the waiver of the State's immunity vanishes at the end of the one-year period." *Id.* at 148. In so holding, the Court reviewed the statute's construction for its legislative intent. The Court stated:

> [I]n attempting to divine legislative intent, we look first to the words of the statute, but if the true legislative intent cannot readily be determined from the statutory language alone, we look to other *indicia* of the intent, including the title to the bill, the structure of the statute, the inter-relationship of its various provisions, its legislative history, its general purpose, and the relative rationality and legal effect of various competing constructions.

Id. at 138 (internal quotation marks omitted and emphasis added).

The Court was concerned about construing the deadline as a "mere statute of limitations, waivable at will by State agencies or their respective attorneys," as "limitations is an affirmative defense that can be waived and that *is* waived unless raised in the defendant's answer." *Id.* at 140-41. The Court highlighted the use of the term "barred" in the applicable statute and stated that "traditional statutes of limitations . . . normally state only that an action 'shall be filed within' the allowable period." *Id.* at 140. The Court explained that when "a limitation period is stipulated in a statute *creating a cause of action* it is not to be considered as an ordinary statute of limitations, but is to be considered as a limitation upon the right as well as the remedy" and held that the time limitation in the statute was a condition to the waiver of immunity and was not subject to waiver or tolling. *Id.* at 147-48 (internal quotation marks omitted and emphasis added).

It is true that the plain language of the Fund's limitation period is more aligned with the general statute of limitations in the Court and Judicial Proceedings Article rather than the condition precedent in *Sharafeldin.* In *Sharafeldin*, the applicable limitations provision provided that "[a] claim under this subtitle is *barred unless* the claimant files suit within 1 year." *Id.* at 132 (emphasis added). The Fund's limitation provision states that "[a] *claim shall be brought against the Fund within 3 years* after the claimant discovered or, by use of ordinary diligence, should have discovered the loss or damage." Md. Code Ann., Bus. Reg. § 8-405(g) (2015) (emphasis added). Section 5-101 of the Court and Judicial Proceedings Article states that "[a] civil action at law shall be filed *within three years from the date it accrues* unless another provision of the Code provides a different period of time within which an action shall be commenced." Md. Code Ann., Cts. & Jud. Proc. § 5-101 (2013) (emphasis added). The statutory language in section 8-405(g) thus resembles that of the general statute of limitations in section 5-101. Moreover, although the limitations period is stipulated in the statute, the Act "facilitate[s] remedies already existing for the enforcement of rights and the redress of injuries" rather than creates a new cause

of action. *Landsman*, 154 Md. App. at 251-52; *see also State ex rel. Stasciewicz v. Parks*, 148 Md. 477 (1925) ("In most jurisdictions the courts have held that all the provisions of these statutes [that create a new cause of action], including that fixing the time within which the action must be brought, are essential to the maintenance of the suit."). The plain language of the statute and its legislative history indicate that the limitations period is a more flexible statute of limitations.[4] Nevertheless, the Court of Special Appeal's stance in *Brzowski* that the Act is not punitive[5] reins in the Fund's expansive interpretation that an express warranty, which here are five and ten years (for different items), tolls the limitations period. *Brzowski v. Md. Home Improvement Comm'n*, 114 Md. App. 615, 630 – 35 (1997). Based on the analysis found in *Brzowski*, I reject the Fund's attempt to apply the *Antigua* holding to this case.

Moreover, warranty issues are purely contractual and, as such, should be resolved in court. Not only the legislative history, but also the practices of the MHIC since the creation of the Fund in the mid-1980s suggest that hearings involving claims against the Fund were not

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[4] Even if section 8-405(g) were interpreted as a condition precedent, this action would still be barred for the same reasons as those relied on in the limitations analysis.

[5] In this regard, *Brzowski*, which analyzed the Act's legislative history, states the following in pertinent part:

> Section 8–409 of the Act serves as a check on the Commission's ability to use the Fund as a club to punish contractors who are on the losing end of arbitration awards or judicial decisions. To this end, the section specifies the requirements that must be met before the Commission may order payment of a claim against the Fund:
>
> **§ 8–409. Payments from Fund.**
>
> (a) *In general.*—The Commission may order payment of a claim against the Fund only if:
>
> (1) the decision or order of the Commission is final in accordance with Title 10, Subtitle 2 of the State Government Article and all rights of appeal are exhausted; or
>
> (2) the claimant provides the Commission with a certified copy of a final judgment of a court of competent jurisdiction or a final award in arbitration, with all rights of appeal exhausted, in which the court or arbitrator:
>
> (i) expressly has found on the merits that the claimant is entitled to recover under § 8-405(a) of this subtitle; . . .

Brzowski, 114 Md. App. at 630 (footnote omitted).

meant to be a substitute for the judicial process. In addition, applying the principles of *Antigua* to section 8-405(g) of the Business Regulation Article could lead to absurd results. For example, the installation by roofers of shingles warrantied for twenty-five years is commonplace today. By applying *Antigua* to section 8-405(g), a homeowner who had his roof installed in 2015 could conceivably (and legitimately) file a claim to seek compensation from the Fund for the roofer's acts and omissions as late as 2040, if the roofer endeavored to repair twenty-five year shingles during the latter part of the warranty period and failed. Section 8-405(g) exists to avoid such absurdities.

II. Merits

Even assuming, for the sake of argument, that the Claimant had timely filed his claim, he still did not prove entitlement to reimbursement from the Fund. This is because the Claimant never demonstrated any poor workmanship by the Respondent.

The Claimant testified that just before the Respondent performed work on the chimney, Dice, a roofer, had installed a new roof on the residence. A leak occurred some unspecified time after Dice completed its work. The Claimant called Dice to alert personnel there that there was a potential problem with the roof; a Dice representative came to the property and inspected the roof. Dice's representative concluded that the leakage might be coming from the chimney area. He suggested that the Claimant seek out a contractor specializing in chimney installation and repair to evaluate the condition of his chimney. That is how the Respondent became involved. The Claimant testified that he called the Respondent, because he had seen the Respondent's trucks driving through his neighborhood.

The Claimant stated that he specifically told the Respondent's technician, Mr. Salazar, that he wanted the Respondent to assess any problems with the chimney to remedy a leakage problem. According to the Respondent and his Director of Operations, Christina El-Hage, whom

I admitted as an expert in chimney sweeping and chimney construction, this is not true. According to Ms. El-Hage, the Claimant did *not* mention any leakage problem to Mr. Salazar before he entered into the contract with the Respondent. Ms. El-Hage was certain that the first time that the Claimant disclosed to a Respondent employee that he was concerned with a leakage problem was in October 2010. This was the first instance when he called the Respondent to make repairs to the chimney after the Respondent completed the contract.

I have resolved this conflict in evidence in favor of the Respondent. Both the Respondent and Ms. El-Hage testified that the first time they heard about leakage was after the Respondent had completed the contract, not before he completed it. Both the Respondent and Ms. El-Hage testified in a straightforward and sincere manner. Whether the Respondent learned about the leakage before or after he did the work is a pivotal issue in this case. If the Claimant had communicated to the Respondent that he wanted him to inspect the chimney to solve a leakage problem, then the Respondent would have had the obligation to explore alternatives beyond the mere rebuilding of a chimney to achieve that objective. (In other words, the Claimant would have been relying on the Respondent's expertise to solve a particular problem, not just to do particular work.) I find, as fact, however, that the Claimant only communicated to Mr. Salazar that he wanted him to inspect the chimney to remedy *any* potential problems with it and not specifically to remedy a leakage problem.

Ms. El-Hage further testified, in her capacity as an expert in chimney sweeping and chimney construction, that irrespective of whether there was a leakage problem, the existing chimney at the Property needed to be replaced. She noted that Mr. Salazar concluded that the chimney was deteriorating because water was infiltrating into the porous Old Baltimore Brick used in its construction, causing it to spall; Ms. El-Hage endorsed Mr. Salazar's conclusion. According to Ms. El-Hage, "spalling" occurs because the freezing and melting of the water

trapped inside the porous chimney bricks during seasonal temperature variations acts to move the outer courses of chimney bricks forward over time. This, in turn, caused those bricks to pop out. Spalling also causes the brickwork to develop hairline cracks. This incessant spalling over many seasons of alternating freezing and melting would eventually cause the chimney to crumble. Mr. Salazar recommended to the Claimant that the only way to stop the spalling was to have the chimney rebuilt. The Claimant agreed, and entered into the contract at issue with the Respondent. I accept Ms. El-Hage's unrefuted expert testimony with regard to why the chimney needed to be rebuilt.

I give further credence to Ms. El-Hage's testimony regarding the good faith efforts that the Respondent made in attempting to address the Claimant's complaints. Ms. El-Hage noted that the Respondent's technicians returned to the property nine times from 2010 through 2012 to rectify the leakage problem. On at least one occasion, the Respondent made repairs to interior water damage, a consequential item with respect to the original contract. Ms. El-Hage emphasized that during the time they were attempting to repair the chimney, the Respondent's technicians advised the Claimant that problems with the installation of the metal step flashing adjacent to the chimney, and not the chimney installation itself, might have been the culprit in causing the leakage. As Ms. El-Hage explained in her April 4, 2013 letter to the MHIC (offered as Claimant's Exhibit No. 8), flashing installation was not a part of the contract, so flashing repair would have incurred an additional charge. I cannot believe that a contractor who would make *gratis* interior damage repairs would refuse to make flashing repairs if, in fact, flashing issues were the Respondent's responsibility.

The Claimant contended that he is entitled to reimbursement from the Fund based on the Respondent's poor workmanship in rebuilding the chimney at the Property, which resulted in a continuation of the leakage problem that existed in the chimney area before the Respondent

began work. The Respondent disputed the Claimant's theory of the case, for reasons already discussed. The Fund agreed with the Respondent that the Claimant sustained no actual loss compensable by the Fund, but for different reasons.

The Fund's first argument was that the Claimant presented no evidence to show that there was any leakage in the chimney area after the last time the Respondent came to the Claimant's property in November 2012. In fact, the Claimant testified that he did not have any personal knowledge of any leakage occurring after that month. Therefore, the Claimant did not establish that the work that Dice or Chimney.com performed was necessary. The Fund's second argument was that, as Ms. El-Hage averred, there was a problem with the metal step flashing that was not part of the chimney-rebuilding contract. The problems with the metal step flashing could have occurred because of Dice's poor installation techniques.[6] The Claimant did not call his own expert witness to testify to establish which party was responsible for the flashing issues, whether flashing issues were, in fact, the cause of the leakage, or whether the Respondent's poor installation of the chimney caused the leakage. The Claimant's lay testimony is not sufficient to establish which party bore the responsibility for the leakage or even the cause of the leakage.

I agree with both of the Fund's arguments. Evidence was indeed lacking about any leaks that occurred after November 2012. The Claimant could not confirm that any occurred after that month. Additionally, what caused the leakage—the metal step flashing installation, which might

[6] One of the many disputed facts here concerns which contractor was responsible for the installation of the metal step flashing. Dice asserts that the Respondent installed the flashing, because the flashing installation by "another contractor" around the chimney area voided its warranty for the roof. (Claimant's Exhibit No. 11) Ms. El-Hage denied the Respondent's responsibility for the step flashing installation, because she insisted that flashing installation was not part of the July 16, 2010 contract. In her April 4, 2013 letter to the MHIC, Ms. El-Hage stated, "During the chimney rebuild performed, the flashing was left intact and only resealed at the brick as procedure with a qualified silicone caulk commonly used by roofing companies alike." (Claimant's Exhibit No. 8.)The Claimant had the burden to present evidence to establish whether Dice or the Respondent had responsibility for any problems with the metal step flashing, a burden that he failed to meet.

have been done by Dice, or the Respondent's alleged poor installation of the chimney—remains unknown.

Therefore, for the reasons noted, the Claimant's Guaranty Fund claim is denied.

PROPOSED CONCLUSIONS OF LAW

I conclude as a matter of law that:

1. The Claimant's claim is barred by limitations. Md. Code Ann., Bus. Reg., § 8-405(g) (2015).

2. Even if the Claimant's claim were not barred by limitations, the Claimant did not sustain an actual loss compensable by the Fund as a result of any acts or omissions committed by the Respondent, because the Claimant did not establish that the Respondent poorly installed a new chimney at his rental property. Md. Code Ann., Bus. Reg. §§ 8-401 and 8-405(a) (2015); COMAR 09.08.03.03B(2)

RECOMMENDED 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

September 9, 2015
Date Decision Issued

Thomas G. Welshko
Administrative Law Judge

TGW/dlm
#157622

IN THE MATTER OF THE CLAIM	*	**BEFORE THOMAS G. WELSHKO,**
OF RAJIV V. SONI,	*	**AN ADMINISTRATIVE LAW JUDGE**
CLAIMANT	*	**OF THE MARYLAND OFFICE**
AGAINST THE MARYLAND HOME	*	**OF ADMINISTRATIVE HEARINGS**
IMPROVEMENT GUARANTY FUND	*	
FOR THE ALLEGED ACTS OR	*	**OAH No.: DLR-HIC-02-15-07771**
OMISSIONS OF JERRY L. PRIDDY,	*	**MHIC No.: 13 (90) 905**
T/A PRIDDY CHIMNEY SWEEP,	*	
RESPONDENT	*	

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

APPENDIX - EXHIBIT LIST

Claimant's Exhibits:

1. January 6, 2013 letter from the Respondent to the Montgomery County Office of Consumer Protection, concerning the complaint filed by the Claimant with that agency

2. July 14, 2010 diagram by José Salazar outlining the work to be on the Claimant's chimney

3. July 16, 2010 contract between the Claimant and the Respondent

4. July 21, 2010 and July 26, 2010 checks paid to the Respondent by the Claimant

5. 2010 licensing record and liability insurance information pertaining to the Respondent

6. 2011 licensing record and liability insurance information pertaining to the Respondent

7. December 19, 2012 complaint filed by the Claimant with the Montgomery County Office of Consumer Protection

8. April 4, 2013 letter from Christina El-Hage, Operations Manager for the Respondent, to the MHIC

9. November 15, 2012 letter from Richard of RE/MAX to the Claimant

10. 2011 – 13 online complaints about the Respondent

11. September 30, 2013 e-mail correspondence between the Claimant, the Claimant's brother, RE/MAX and Julie Ahn regarding flashing repairs near the chimney

12. October 7, 2013 proposal and contract between the Claimant and Dice

13. June 11, 2015 licensing record from the MHIC for Dice

14. October 16, 2013 contract between the Claimant and Chimney.com

15. June 11, 2015 licensing record for Jimneys Chimneys (Chimney.com)

Respondent's Exhibits:

The Respondent did not offer any exhibits.

Fund's Exhibits

1. April 2, 2015 hearing notice

2. February 12, 2015 Hearing Order by the MHIC

3. June 5, 2015 licensing record for the Respondent

4. April 14, 2014 claim form

5. October 29 and October 30, 2014 e-mail exchanges between the Claimant and Michelle Escobar, Investigator, MHIC

6. November 19, 2010 invoice from the Respondent to the Claimant showing no charge for service

7. January 22, 2011 diagram for chimney "Re-do"

PROPOSED ORDER

WHEREFORE, this 27th day of October, 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