

IN THE MATTER OF THE CLAIM OF  
ROBERT M. HENSCHEN

v.

ROBERT L. LEHMAN,  
t/a CREATIVE DECK DESIGNS, INC.

\* MARYLAND HOME  
IMPROVEMENT COMMISSION

\* MHIC CASE NO. 11 (05) 1316

\* \* \* \* \*

**AMENDED PROPOSED ORDER**

WHEREFORE, this 25<sup>TH</sup> day of March, 2015, Panel B of the Maryland Home Improvement Commission ORDERS that:

1) The Findings of Fact of the Administrative Law Judge are Amended as follows:

A) The Claimant, Robert M. Henschen, filed two separate Guaranty Fund claims (MHIC No. 11(05)1315 and MHIC No. 11(05)1316) against the Respondent contractor, Robert L. Lehman, t/a Creative Deck Designs, Inc.

B) Guaranty Fund claim no. 11(05)1315 was based upon a contract, dated January 18, 2010, between the parties under which the Respondent contractor agreed to construct a bedroom, bathroom, kitchen and living space in the Claimant's basement. The total price of the contract was \$32,815.00.

C) Guaranty Fund claim no. 11(05)1316 was based upon a contract, dated October 10, 2009, between the parties under which the Respondent contractor agreed to perform improvements to the rear of the Claimant's house, including construction of a deck, construction of walkways and a patio, construction of a shed, installation of stone veneers on the house walls, installation of electrical lighting, improvements to the garage, and installation of french doors. The total price of the contract was \$60,950.00.

**D) A joint hearing on both claims was conducted before the Administrative Law Judge on May 9 and 14, 2014.**

**E) In Guaranty Fund claim no. 11(05)1315, the Administrative Law Judge issued a proposed decision to award the Claimant \$20,000.00. In its Final Order, dated December 9, 2014, the Commission amended the proposed decision and awarded the Claimant \$18,483.90.**

**F) In this case, Guaranty Fund claim no. 11(05)1316, the Administrative Law Judge has issued the attached proposed decision to award the Claimant \$5,780.00.**

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

**A) The Commission concludes that, as in the present case, where a claimant has two separate Guaranty Fund claims based upon two, separate and distinct home improvement contracts with the same contractor, the limitation of \$20,000.00 under Business Regulation Article, §8-405(e)(1), Annotated Code of Maryland, applies separately to each claim. Therefore, the Commission concludes that the Claimant is eligible, under Business Regulation Article, §8-405(e)(1), Annotated Code of Maryland, for an award of \$5,780.00 in this matter.**

**3) The Recommended Order of the Administrative Law Judge to award the Claimant \$5,780.00 from the Home Improvement Guaranty Fund is Affirmed.**

**4) Unless any party 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, any party then has an additional thirty (30) day period during which they may file an appeal to Circuit Court.**

**Chairperson - Panel B  
Maryland Home Improvement Commission**

IN THE MATTER OF THE CLAIM	* BEFORE KIMBERLY A. FARRELL,
OF ROBERT M. HENSCHEN,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT,	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	* OAH No.: DLR-HIC-02-14-11809
FOR THE ALLEGED ACTS OR	* MHIC No.: 11 (05) 1316
OMISSIONS OF ROBERT L.	*
LEHMAN,	*
T/A CREATIVE DECK DESIGNS,	*
INC.,	*
RESPONDENT	*

\* \* \* \* \*

**PROPOSED DECISION**

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

**STATEMENT OF THE CASE**

On December 6, 2011, Robert M. Henschen, (Claimant), filed a claim (Complaint) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$17,887.00 for alleged actual losses suffered as a result of a home

improvement contract with Robert L. Lehman, trading as Creative Deck Designs (collectively Respondent).<sup>1</sup>

The matter was referred to Office of Administrative Hearings (OAH) for hearing by a Hearing Order dated April 10, 2013. The OAH sent notices for a hearing to be held on September 26, 2013. Sometime after the hearing started, the parties agreed among themselves that the matter should be withdrawn for settlement in accordance with Code of Maryland Regulations (COMAR) 09.01.03.07.<sup>2</sup> On April 1, 2014, the MHIC transmitted this case (and the related one) back to the OAH for a hearing on the Fund claim.

I held a hearing on May 9 and 14, 2014 at the Office of Administrative Hearings (OAH), 11101 Gilroy Road, Hunt Valley, Maryland.<sup>3</sup> Md. Code Ann., Bus. Reg. § 8-312 (Supp. 2013) and § 8-407 (2010). Kris King, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Claimant represented himself. The Respondent represented himself. On May 9, 2014, the Claimant made a motion to amend his claim to include other alleged actual losses. All parties argued the motion and it was denied for reasons stated on the record.

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

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<sup>1</sup> Mr. Lehman is the Licensee. His MHIC records show that he uses the trade name Creative Deck Design, which is a sole proprietorship. His home improvement contract form refers to Creative Deck Design, Inc., and he also uses Creative Deck and Vinyl as a trade name. Although he referred to an incorporated entity and made reference to another individual being a "full partner" in the business, Mr. Lehman is registered and licensed by the MHIC as a sole proprietor.

<sup>2</sup> That provision reads:

**.07 Withdrawal of a Case.**

A. At any stage of the proceedings, upon the agreement of the parties, the case may be withdrawn from the Office of Administrative Hearings docket for settlement purposes.

B. Withdrawal of the case from the Office of Administrative Hearings docket may not be deemed a dismissal of the regulatory charges or the guaranty fund claim, and may not preclude a subsequent referral to the Office of Administrative Hearings, if settlement is not accomplished.

<sup>3</sup> This case was consolidated with DLR-HIC-02-14-11825, which involved the same parties but a different home improvement contract. These two cases were heard over a period of four days. On May 9 and 14, 2014, the hearing focused on the contract and issues relevant to this Proposed Decision. A separate Proposed Decision will be issued addressing the merits of DLR-HIC-02-14-11825, which was heard on April 25, May 7 and 9, 2014.

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

### SUMMARY OF THE EVIDENCE

#### Exhibits

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

- Clmt. Ex. 1 – Three digital graphic designs, undated
- Clmt. Ex. 2 – Specifications, undated
- Clmt. Ex. 3 – Customer Agreement from the Respondent, dated October 10, 2009
- Clmt. Ex. 4 – Additional Work Authorization / Change Order from the Respondent, dated December 16, 2009
- Clmt. Ex. 5 – Invoice from the Respondent, dated October 13, 2009
- Clmt. Ex. 6 – Visa credit card statements, spanning from October 8, 2009 through January 2, 2010
- Clmt. Ex. 7 – Fifteen color photographs labeled “A” through “P,” undated
- Clmt. Ex. 8 – J.H. Monteath Lumber Company Suggested Installation Guidelines for an Ipe Deck, undated, with the following attachments:
  - J.H. Monteath Lumber Co. Decking Comparison Chart, undated
  - Four color photographs on one page, labeled “Correctly installed Ipe deck,” undated
- Clmt. Ex. 9 – July and August 2011 emails between Andy Bredesen, Representative for Fairway, Preferred Marketing Associates, Inc., and the Claimant
- Clmt. Ex. 10 – Not admitted
- Clmt. Ex. 11 – Seven color photographs labeled “A” through “G” and “Workmanship as of [April 20, 2014],” undated
- Clmt. Ex. 12 – Pentagon Federal Credit Union – Check Image Retrieval, dated December 2, 2011, for check 642 made payable to CGC Builders, LLC in the amount of \$6,340.00, with the following attachments:
  - CGC Builders LLC Statement, dated May 1, 2014
  - CGC Builders LLC Invoice #2892, dated November 1, 2011
  - CGC Builders LLC Invoice #2893, dated November 1, 2011
  - CGC Builders LLC Invoice #2909, dated November 29, 2011
- Clmt. Ex. 13 – Certified letter from the Claimant to the Respondent, dated December 29, 2010

- Clmt. Ex. 14 – CGC Builders LLC Proposal, dated January 11, 2010  
Clmt. Ex. 15 – MG Brothers Construction Inc., dated October 18, 2011  
Clmt. Ex. 16 – One color photograph, undated

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

- Fund Ex. 1 – Notice of Hearing, dated April 3, 2014<sup>4</sup>  
Fund Ex. 2 – Hearing Order, dated April 10, 2014  
Fund Ex. 3 – Licensing history of the Respondent, dated April 24, 2014  
Fund Ex. 4 – Home Improvement Claim Form, received December 6, 2011  
Fund Ex. 5 – Letter from John Borz, Chairman, MHIC, to the Respondent, dated December 27, 2011  
Fund Ex. 6 – Letter from the Claimant to Michelle Escobar, MHIC, dated August 20, 2013, with the following attachment:
- CGC Builders, LLC Estimate, dated July 30, 2013

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

- Resp. Ex. 1 – One color photograph, undated  
Resp. Ex. 2 – One color photograph, undated  
Resp. Ex. 3 – Balance chart and credit card refund receipt, undated  
Resp. Ex. 4 – Balance chart, undated  
Resp. Ex. 5 – Bluelinx invoice, dated November 11, 2009  
Resp. Ex. 6 – Ebty.com printout, titled "EbTy Hidden Deck Fasteners for woods and composites," printed May 13, 2014  
Resp. Ex. 7 – Dek Drain information packet, undated  
Resp. Ex. 8 – Owen's Corning Cultured Stone Manufacturer's Installation Instructions, undated  
Resp. Ex. 9 – Four color photographs labeled "A" through "D," undated  
Resp. Ex. 10 – Two color photographs on one page, undated  
Resp. Ex. 11 – Four color photographs on one page, undated  
Resp. Ex. 12 – Four color photographs on one page, undated  
Resp. Ex. 13 – Four color photographs, labeled "A" through "D," undated  
Resp. Ex. 14 – One color photograph, labeled "sink hole," undated  
Resp. Ex. 15 – Two color photographs on one page, undated

### Testimony

The Claimant testified on his own behalf; the Respondent testified on his own behalf; no additional witnesses were called.

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<sup>4</sup> This exhibit is the OAH file copy of the Notice of Hearing, so it is in the OAH file rather than with the other exhibits.

## PROPOSED FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. At all times relevant to this hearing, the Respondent was a licensed home improvement contractor under MHIC license number 37346.
2. In 2009, the Claimant wanted to finish the back of his house at 8492 Tipton Drive, Laurel, Maryland, in a certain way. He worked with a company to create computer-generated drawings of the layout. The Claimant also worked up a specification sheet. He gave the drawings and the spec sheet to contractors he solicited to bid on the project, including the Respondent.
3. The Claimant was very impressed by the Respondent's representative, Bob Heckman (Heckman). The Claimant had specific conversations with Heckman about the Respondent's experience with ipe,<sup>5</sup> because an ipe deck was an important feature of the Claimant's plan and ipe is not a commonly used material. Heckman assured the Claimant repeatedly that the Respondent had lots of experience with ipe.
4. Despite his very good impression of Heckman, the Claimant was inclined to accept a bid from another contractor because it was \$2,000.00 cheaper than the Respondent's bid.
5. The Claimant advised Heckman that he was turning the Respondent's offer down. In response, Heckman said that the Respondent would match the rival's price and that the Respondent would give a lifetime warranty.
6. On October 10, 2009, the Claimant and the Respondent entered into a contract, whereby the Respondent agreed to: (1) construct an ipe deck; (2) install a dry snap drainage system under the deck; (3) create paver walkways, a patio, and masonry stone walls; (4)

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<sup>5</sup> Ipe is an extremely dense tropical hardwood.

construct a twelve by fifteen foot shed, including insulation; (5) install stone veneer on the walls of house and on the new masonry wall, including insulation on the house walls between the concrete walls and the cultured stone; (6) install electrical, including lighting and outlets; (7) install flagstone over an existing front porch; (8) make improvements to a garage; and (9) install french doors as a basement entrance.

7. The original agreed-upon contract price was \$58,750.00.

8. The contract contains a “[l]ifetime warranty on workmanship and labor for all aspects of the project.” Clmt. Ex. #3, pg. 6.

9. On December 16, 2009, the Claimant and the Respondent executed a change order, whereby, in addition to the work set out in the October 10, 2009 contract, the Respondent agreed to spread top soil and install sod in the Claimant’s yard. The change order was written as adding \$2,800.00 to the original contract price, bringing the total to \$61,550.00; however, the change order should have been written for \$2,200.00. The Respondent later returned the extra \$600.00 to the Claimant.<sup>6</sup>

10. The contract contained the following draw schedule: \$8,750.00 deposit; \$12,000.00 upon the start; \$12,000.00 upon completion of the ipe deck; \$10,000.00 when the masonry wall was built; \$10,000.00 when the pavers were complete; \$3,000.00 after installation of the stone veneer; and \$3,000.00 at the completion of the contract. The change order was not part of the original draw schedule.

11. After the signing of the contract, Frank Billingsley (Billingsley) became the project manager and the Claimant never spoke to Heckman again.

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<sup>6</sup> There was also testimony regarding a \$1,300.00 credit back to the Claimant, based on who procured the door to the shed, but that testimony appeared to conflict with other testimony regarding the total amount paid on the contract.



12. The Respondent was on site two or possibly three times a month for one-half hour or less each visit, until the very end when the parties were thoroughly dissatisfied with each other. Billingsley was rarely on site.

13. The Claimant was present when the ipe was delivered and, upon receiving it, one of the workers on site to build the deck with the ipe did not know what it was. Prior to shipping to a customer, the ends of ipe boards are coated with a sealer to reduce shrinkage, splitting, and other problems. Manufacturer's recommendations for ipe include the application of a sealant to freshly cut board ends for the same reason. The Claimant advised the Respondent's workers or subcontractors about the need to apply sealer to the boards they were cutting, but the workers told the Claimant they did not need to do that and they failed to apply sealer.

14. Some of the ipe has curved, shrunk, or otherwise changed over time.

15. The contract calls for the deck to be installed with "hidden fasteners." Some fasteners used on the deck are highly visible. The Respondent used EB-TY fasteners on the deck. The fasteners used are not stainless steel.

16. The Respondent intended the gap space between boards to be 3/32's of an inch. The gaps between the deck boards are uneven and in some places exceed 1/2 inch.

17. The railings on the project were to be Fairway brand. The Respondent or somebody under his control custom ordered the railings from Fairway. After installation, the railings began to sag and bow.

18. Proper installation of the bottom rail pieces required that "foot blocks" be centered under them, resting on the deck itself, to provide support for the railing. No foot blocks were installed on the Claimant's railings.

19. Proper installation also required that several ¼ inch weep holes be drilled in the bottom of each section of bottom railing to allow rainwater to escape. The Respondent installed the railing without any weep holes.

20. Due to the lack of foot blocks and weep holes, the railings on the deck began to sag. Some bottom rails sagged so much that they rested on the deck itself. The bottom rails also bowed out of shape. In some places, the bowing caused the aluminum balusters to develop sharp bends. In other places, the bowing was so substantial that the balusters inserted in the lower rail dropped far enough down that the top of the baluster was no longer anchored in the top railing and the balusters were simply hanging loose.

21. Billingsley told the Claimant to contact Fairway regarding the problems with the railings. A Fairway representative asked the Claimant to send pictures of the problem, which the Claimant did. The Fairway representative then offered to provide Claimant with replacement bottom railings and foot blocks at no cost. The Claimant wanted the material sent directly to him but because the order had been placed by the Respondent, Fairway would only send the replacement parts to the Respondent. The Respondent did not promptly turn over the free replacement material sent by Fairway to the Claimant. The Claimant was not at home when the Respondent eventually delivered those materials with a note stating that the materials were for the Claimant. The Respondent made no effort to install the replacement parts.

22. Some of the cultured stone applied to the walls by the Respondent has come loose and some has fallen off.

23. Some of the flagstone installed by the Respondent on the Claimant's front porch has come loose.

24. The Respondent installed pavers. Some areas of the pavers have sunk. The Respondent sent a worker or subcontractor named Milton Ramirez (Ramirez) to make repairs on

one day in January 2014, but he did not complete his intended repairs at that time. When Ramirez left in January, an area near the steps had been raised so that the pavers abutted the steps, rather than continuing under the steps as required.

25. Some edge pavers were glued into place and some of those have come loose.

26. The Respondent attached an electrical outlet box to the side of a wall, cracking several stones on the wall. Somebody on behalf of the Respondent used grey caulk on the cracks. The caulk is obvious and unsightly.

27. The Respondent installed a french door to replace an existing sliding glass door serving as an entrance into the basement of the house. There were no problems with water intrusion into the basement prior to the installation of the french door. After the french door was installed, water came in the basement in the area of the french door when it rained. The Respondent, his workers, or his subcontractors made numerous attempts to stop the leaking. They never fixed the problem.

28. The Respondent consulted with another company about how to stop the leaking.

29. That company recommended building a small roof overhang to shelter the french doors.

30. An alternative to building the roof area would have been to remove and properly reinstall the french door or, if that was not possible, to install a replacement door.

31. The Claimant did not like either of these suggestions, but chose the less expensive option, which was to build the roof overhang. Once the roof was put in place, the leaking stopped. The Claimant paid \$4,800.00 for the roof overhang.

32. There were other areas of contention between the parties.

33. The Claimant paid the Respondent the full amount due under their contract.

34. The Respondent returned between twenty and thirty times to address various problems with the work. Eventually, however, the Respondent ceased communicating with the Claimant and did not respond to numerous efforts by the Claimant to further discuss problems with the project. This included the Respondent's failure to respond to a certified letter demanding a response.

35. The Claimant obtained an estimate from CGC Builders to demolish and to replace the ipe deck, to fix the deck railings, to install a rubber membrane underneath, and to remove all debris from the site. The estimate also included installing a rubber system over the shed. The proposal came in at \$17,887.00. The work items are not priced out individually.

36. The Claimant obtained an estimate from MG Brothers Construction to remove and replace the decking boards, to replace the rubber under the decking if damaged, and to replace the railings. The estimate was broken down into labor (\$6,500.00) and replacement materials, including ipe, rails, rubber, and fasteners (\$10,890.00), for a total of \$17,390.00.

37. Both Billingsley and Ramirez still work for or are associated with the Respondent.

38. The Claimant's compensable actual loss is \$5,780.00.

### 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). I find that the Claimant has proven eligibility for compensation: the Respondent was a licensed home improvement contractor at the time he

entered into the contract with the Claimant and the Respondent performed unworkmanlike and inadequate home improvements. There also are no other impediments to the Claimant receiving reimbursement (owning too many houses, being related to the Respondent, etc.).

The Respondent referred to Billingsley as a full partner in his business, but, as explained in footnote one of this Proposed Decision, it is unclear from the evidence whether there is any incorporated entity involved. The Respondent never offered any explanation for why he called neither Billingsley nor Ramirez to testify when they were more involved with the project and remain associated with his business. Instead, I heard testimony from the Claimant, who was very involved in all aspects of this home improvement project, and I heard from the Respondent, who was on site two or possibly three times a month for one-half hour or less each visit until the very end when the parties were thoroughly disgusted with each other. Neither witness was aided by the years that have passed since the contract and the original work, but the difference in the persuasiveness of their testimony was dramatic.

The Claimant testified most of the time in a low key manner. He gave a basic bare-bones narrative about what happened, but when cross-examined, he could give additional details. The details were highly persuasive. He talked about day-to-day happenings and conversations as work progressed. His testimony seemed natural and rang true. When he realized he had made a mistake, he immediately corrected his testimony. The Respondent was left trying to comment on events he had not witnessed and conversations he had not heard. He seemed to view everything on a "big picture" level and would make broad, sweeping statements that he would then have to retreat from when asked questions about details. He answered questions too quickly, sometimes

before the question was finished, leading to inaccurate answers that caused confusion and had to be retracted.<sup>7</sup>

With respect to the deck, the Claimant meticulously planned precisely what he wanted. He was forced to scale back in some respects to stay within his budget, but a focal point of the whole project was the ipe deck. Ipe has to be imported, usually coming from South America. It is desirable as a deck material because when properly installed, it is very low maintenance and highly durable. The Claimant emphasized that he brought up the issue of experience with ipe a number of times in his discussions with Heckman, who assured him on multiple occasions that the Respondent was well versed in the use of ipe. When the ipe arrived on the site, the workers did not even know what it was. They were trying to cut the very dense hardwood with tools that were inadequate, and they were not amenable to advice from the Claimant about sealing the ends of the cut boards, a practice designed to reduce curving of the boards.

After a year had passed, the appearance of the deck had deteriorated. Gaps between the boards were variable and in some places exceeded ½ inch. The intended gap upon installation was 3/32 of an inch, or a little less than 1/8 of an inch. Some very modest amount of shrinkage is to be expected,<sup>8</sup> but some or all of the deck boards need to be replaced. The Claimant additionally complained about the “hidden fasteners” that are now visible in the gaps between the boards on the deck. He offered into evidence “Suggested Installation Guidelines for an Ipe [D]eck,” which “strongly recommends that only stainless steel fasteners be used” with ipe. Clmt. #8, pg. 2.

The Respondent did not use stainless steel fasteners, insisting that the “guide” in referring to stainless steel fasteners) was referring only to the screws used with the fasteners. The Respondent offered information he obtained from the internet from EB-TY, the

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<sup>7</sup> I repeat some of this discussion verbatim in the companion case, because the decisions are issued separately and each must be able to stand alone.

<sup>8</sup> Expected shrinkage after two years of seasoning is 1/16 to 1/8 of an inch, depending on the width of the boards.

manufacturer of the fastener that was used on the Claimant's deck. Resp. #6. The EB-TY literature states that it is suitable for use with ipe.

The Respondent argued that the Claimant had stained his deck and that might have caused some of the problems he experienced. The Claimant countered that he had not stained his deck but had used a penetrating oil finish. The ipe installation guide entered into evidence by the Claimant states that ipe has "a real potential for **ZERO MAINTENANCE.**" Clmt. #8, pg. 1 (emphasis as in original). Later in the ipe guide, it again emphasizes that ipe will weather naturally with no maintenance and that if painting staining or other coloring is desired, "it is best to consult with the manufacturer of the desired finishing system in order to determine the applicability and longevity of the finishing system upon application to *Ipe.*" Clmt. #8, pg 2 (emphasis as in original).

It is the Claimant who bears the burden of persuasion in this case. As noted by the Fund, the testimony of an expert would have assisted in evaluating his claim for damages. The Claimant is not an expert in this field. While the Respondent claimed expertise in decking, he acknowledged that he was not very familiar with ipe. Moreover, he never attempted to qualify himself as an expert for purposes of the hearing. The Respondent agreed that the deck needed work, but he insisted that the estimates for repair and replacement are unreasonably high.

The proposals offered in evidence by the Claimant are for complete demolition and rebuilding. Also, the proposals cover a rubber membrane under the deck. The membrane was not part of the Claimant's original claim. From the second estimate, it does not even appear that it is certain the membrane needs to be replaced. Although I am persuaded that the Claimant has suffered an actual loss, I find that the evidence of record does not provide sufficient information for me to find by a preponderance of the evidence that the Claimant is entitled to \$17,887.00, the figure represented by the CGC proposal, which the Claimant used in calculating his claim

amount. I am unable on the state of the evidence to determine how much the Claimant's actual losses are for this portion of the claim.

The Claimant sufficiently proved that the cost of the railing reinstallation is compensable. Fairway provided replacement parts, but the Respondent failed to provide the necessary labor for fixing his unworkmanlike or inadequate installation of the railings. The Respondent unsuccessfully tried to lay responsibility for this problem off on Fairway, but it was the Respondent who placed the custom order for the materials. The balusters selected by the Claimant were narrower than standard balusters, and the Respondent could not just put the Claimant's balusters in standard railing. To do so would have resulted in the balusters being too far apart to meet code requirements. The Respondent complained that the foot blocks were not included in the kits that Fairway sent to the Respondent but again, this was a custom order; the Respondent told Fairway which pieces to send for the job. The Respondent could not meet his contractual obligation or honor his warranty by unloading a pile of replacement pieces in the Claimant's driveway and leaving it at that. The Claimant paid CGC \$950.00 for re-installation of the rails, Clmt. #12, which he should be able to recover from the Fund.

There are problems with some of the cultured stone coming loose and falling off. There are problems with some of the flagstones on the front porch coming loose. There are problems with pavers sinking and coming unanchored. I group these together because the Respondent obtained an estimate to address these issues (and also the drilling of weep holes). CGC provided an estimate to "remove existing pavers re-level and relay pavers," as well as to perform patio and walkway repairs, repair stone veneer areas and pressure wash and re-sand joints on walks and patios. Fund #6.<sup>9</sup>

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<sup>9</sup> This estimate is attached to the request to increase the claim, which was denied, but can still serve as evidence of actual losses for those items appearing in the original claim.



As with the deck, the testimony of an expert would have been invaluable in assisting the trier of fact in sorting out this portion of the claim. Clearly, there are areas of sinking pavers that represent problems, but the Respondent maintained that this was common – that it was not unusual to have to return to job sites to address small areas of sinking. The parties sparred over whether there was a proper foundation for the pavers. The Claimant had very particular ideas about how the stone or gravel should have been compacted and how sand should have been used for leveling. The Respondent did not know how the pavers had been installed. He kept insisting that everything about the pavers was done correctly. When asked about specific aspects of the installation, he testified that he did not know the answer. When asked how he could know the job was done correctly when he did not know how it was done, the Respondent refused to give any answer but that the job had been done correctly.

On the other hand, I have no idea what industry standards or best practices might be. I have no evidence about what degree of settling or sinking, if any, should be expected. The Claimant offered evidence that depicted settling in one place of approximately 3 ½ inches, but, for other areas, I do not know how much sinking occurred. The Respondent acknowledged that some repair work was necessary but insisted that it had all been done. Then he had to amend that testimony to say that he knew Ramirez left some pavers abutting the steps rather than going under them. He asserted that he had intended to go back and fix that, but he had not returned in the weeks or months after the one day of repairs in January 2014. The parties could not agree on which areas of pavers were addressed by Ramirez when he was there. The Respondent testified that it was two areas of limited size; the Claimant indicated the total area was different. The Claimant believed Ramirez or somebody on his crew did additional damage to the Claimant's property while on site. The Respondent insisted that Ramirez reported that the Claimant was lying about that. The Claimant advises that there are areas which have sunk since the repair

work was done. Despite the fact that the Respondent was not personally on site when the repairs were done, and neither he nor anybody on his behalf has been there since, he did not hesitate in testifying that the Claimant's statements were untrue. Had an expert been called, he or she could have offered clarity about what was workmanlike or unworkmanlike, adequate or inadequate.

Given the state of the evidence, I am unable to say whether \$5,950.00 represents a reasonable estimate to repair or replace poor work by the Respondent. The Fund argued that this estimate should not be relied upon because it pre-dated the work done by the Respondent and it is unclear whether, assuming it was once a good estimate, it remains a good estimate for the work that needs to be done. Needed work might be the same or more or less than the estimate.

The contract called for the Respondent to install a french door. As soon as the door was installed, the Claimant started experiencing water intrusion into the basement. This was not a problem before the french door was installed. The Respondent made numerous attempts to fix the problem but was unable to stop the leaking. The leaking actually intersects with the second case between the parties because the leaking from the french door installed in this contract damaged laminate flooring installed under the other contract. The Claimant wanted the leaking stopped, and the Respondent could not accomplish that goal. The Claimant consulted with another company, which offered two options. One was to build out a roof overhang over the french door; the other was to remove the french door and install that door again if it could be re-used or to purchase another door if necessary. The roof overhang was the cheaper and more certain option. Although the Claimant did not want to have a roof overhang installed, he did so to stop the leaking. The fix was a success and stopped the leaking. The Claimant paid \$4,800.00 for the roof. This is a compensable loss due to inadequate or unworkmanlike home improvement by the Respondent.

In sum, I find that the Claimant's actual losses are substantial; however, due to the state of the evidence, I am unable to recommend an award in the full claim amount of \$17,887.00.

Having nevertheless found eligibility for compensation, I turn to the amount of the award to which the Claimant is entitled. The MHIC's regulations provide three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). In this case, the correct formula is as follows:

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.

COMAR 09.08.03.03B(3)(c).

The Claimant provided proof by a preponderance of the evidence that he paid \$980.00 for re-installation of railings. He also proved that he paid \$4,800.00 for the roof over the french door. This totals \$5,780.00. To be entirely candid, I am unclear, for the reasons stated above, exactly what the Claimant paid on this contract. It does not matter, however, what that exact figure is because the parties agreed that the contract price (whatever it might have been) was paid in full. So in applying the formula above, that number nets out and the actual compensable losses proven by the Claimant in this matter total \$5,780.00. To be clear, his actual losses are certainly higher than that, but I am unable to fairly recommend the award of any losses insufficiently proven by the Claimant and proof of loss includes specific proof as to the amount of the loss.

**PROPOSED CONCLUSIONS OF LAW**

I conclude that the Claimant has sustained an actual and compensable loss of \$5,780.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401 (2010), 8-405 (Supp. 2013).

**PROPOSED ORDER**

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


**ORDER** that the Maryland Home Improvement Guaranty Fund award the Claimant \$5,780.00;<sup>10</sup> and

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

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

**Signature on File**

August 8, 2014  
Date Decision Mailed

  
\_\_\_\_\_  
Kimberly A. Farrell  
Administrative Law Judge

KAF/kkc  
# 149515

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<sup>10</sup> The Business Regulation Article places certain limitations on recovery from the Fund. Relevant to this case, because there is a related case, is the following: "The Commission may not award from the Fund: (1) more than \$20,000 to one claimant for acts or omissions of one contractor[.]" Md. Code Ann., Bus. Reg. § 8-405(e)(1). I am issuing two proposed decisions and between them the total award proposed will exceed \$20,000.00; however, the Claimant's recovery is limited by the cited statute. The Claimant's actual award, of course, is determined by the Fund, and may be more or less than the proposed amounts, so this case is not mooted by the proposed decision in the other case.

IN THE MATTER OF THE CLAIM	* BEFORE KIMBERLY A. FARRELL,
OF ROBERT M. HENSCHEN,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT,	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	* OAH No.: DLR-HIC-02-14-11809
FOR THE ALLEGED ACTS OR	* MHIC No.: 11 (05) 1316
OMISSIONS OF ROBERT L.	*
LEHMAN,	*
T/A CREATIVE DECK DESIGNS,	*
INC.,	*
RESPONDENT	*

\* \* \* \* \*

**FILE EXHIBIT LIST**

Exhibits

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

- Clmt. Ex. 1 – Three digital graphic designs, undated
- Clmt. Ex. 2 – Specifications, undated
- Clmt. Ex. 3 – Customer Agreement from the Respondent, dated October 10, 2009
- Clmt. Ex. 4 – Additional Work Authorization / Change Order from the Respondent, dated December 16, 2009
- Clmt. Ex. 5 – Invoice from the Respondent, dated October 13, 2009
- Clmt. Ex. 6 – Visa credit card statements, spanning from October 8, 2009 through January 2, 2010
- Clmt. Ex. 7 – Fifteen color photographs labeled “A” through “P,” undated
- Clmt. Ex. 8 – J.H. Monteath Lumber Company Suggested Installation Guidelines for an Ipe Deck, undated, with the following attachments:
  - J.H. Monteath Lumber Co. Decking Comparison Chart, undated
  - Four color photographs on one page, labeled “Correctly installed Ipe deck,” undated
- Clmt. Ex. 9 – July and August 2011 emails between Andy Bredesen, Representative for Fairway, Preferred Marketing Associates, Inc., and the Claimant

- Clmt. Ex. 10 – Not admitted
- Clmt. Ex. 11 – Seven color photographs labeled “A” through “G” and “Workmanship as of [April 20, 2014],” undated
- Clmt. Ex. 12 – Pentagon Federal Credit Union – Check Image Retrieval, dated December 2, 2011, for check 642 made payable to CGC Builders, LLC in the amount of \$6,340.00, with the following attachments:
- CGC Builders LLC Statement, dated May 1, 2014
  - CGC Builders LLC Invoice #2892, dated November 1, 2011
  - CGC Builders LLC Invoice #2893, dated November 1, 2011
  - CGC Builders LLC Invoice #2909, dated November 29, 2011
- Clmt. Ex. 13 – Certified letter from the Claimant to the Respondent, dated December 29, 2010
- Clmt. Ex. 14 – CGC Builders LLC Proposal, dated January 11, 2010
- Clmt. Ex. 15 – MG Brothers Construction Inc., dated October 18, 2011
- Clmt. Ex. 16 – One color photograph, undated

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

- Fund Ex. 1 – Notice of Hearing, dated April 3, 2014<sup>11</sup>
- Fund Ex. 2 – Hearing Order, dated April 10, 2014
- Fund Ex. 3 – Licensing history of the Respondent, dated April 24, 2014
- Fund Ex. 4 – Home Improvement Claim Form, received December 6, 2011
- Fund Ex. 5 – Letter from John Borz, Chairman, MHIC, to the Respondent, dated December 27, 2011
- Fund Ex. 6 – Letter from the Claimant to Michelle Escobar, MHIC, dated August 20, 2013, with the following attachment:
- CGC Builders, LLC Estimate, dated July 30, 2013

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

- Resp. Ex. 1 – One color photograph, undated
- Resp. Ex. 2 – One color photograph, undated
- Resp. Ex. 3 – Balance chart and credit card refund receipt, undated
- Resp. Ex. 4 – Balance chart, undated
- Resp. Ex. 5 – Bluelinx invoice, dated November 11, 2009
- Resp. Ex. 6 – Ebty.com printout, titled “EbTy Hidden Deck Fasteners for woods and composites,” printed May 13, 2014
- Resp. Ex. 7 – Dek Drain information packet, undated
- Resp. Ex. 8 – Owen’s Corning Cultured Stone Manufacturer’s Installation Instructions, undated
- Resp. Ex. 9 – Four color photographs labeled “A” through “D,” undated
- Resp. Ex. 10 – Two color photographs on one page, undated
- Resp. Ex. 11 – Four color photographs on one page, undated
- Resp. Ex. 12 – Four color photographs on one page, undated

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<sup>11</sup> This exhibit is the OAH file copy of the Notice of Hearing, so it is in the OAH file rather than with the other exhibits.

Resp. Ex. 13 – Four color photographs, labeled “A” through “D,” undated  
Resp. Ex. 14 – One color photograph, labeled “sink hole,” undated  
Resp. Ex. 15 – Two color photographs on one page, undated