

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WILLIAM AND MARLENE GRUBB,)
)
 Petitioners,)
)
vs.) Case No. 04-3047
)
DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
CONSTRUCTION INDUSTRY)
LICENSING BOARD, and)
NORMAN LEVINSKY,)
)
 Respondents.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case on November 19, 2004, by video teleconference at sites in Fort Lauderdale and Tallahassee, Florida, before Stuart M. Lerner, a duly-designated Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioners: Marlene Grubb, pro se
 10551 Northwest 21st Court
 Sunrise, Florida 33322

For the Board: Adrienne C. Rodgers, Esquire
 Department of Business and
 Professional Regulation
 1940 North Monroe Street, Suite 42
 Tallahassee, Florida 32399-1023

For Mr. Levinsky: No Appearance

STATEMENT OF THE ISSUE

Whether Petitioners' claim for monies from the Florida Homeowners' Construction Recovery Fund is subject to adjudication pursuant to Section 120.57(1), Florida Statutes, and, if so, how much should Petitioners be awarded.

PRELIMINARY STATEMENT

On July 29, 2004, the Construction Industry Licensing Board (Board) rendered a written order awarding Petitioners \$1,025.00 from the Florida Homeowners' Construction Recovery Fund. On August 12, 2004, Petitioners filed a Request for Hearing on the Board's action, contending that they "should be awarded at least \$3,475.00." The Board referred the matter to DOAH on August 30, 2004, "for the assignment of an Administrative Law Judge to conduct a formal hearing."

As noted above, the final hearing in this case was held on November 19, 2004. Petitioners (through Petitioner Marlene Grubb) and the Board (through its attorney, Adrienne C. Rodgers, Esquire) made appearances at the hearing. Respondent Norman Levinsky, although given due notice of the hearing, did not appear, either in person or through counsel or a qualified representative.

Two witnesses testified at hearing: Petitioner Marlene Grubb (on behalf of Petitioners) and Valerie Singleton (on behalf of the Board). In addition to these two witnesses'

testimony, 12 exhibits (Petitioners' Exhibit 1, and the Board's Exhibits 1 through 11) were offered and received into evidence.

Following the conclusion of the evidentiary portion of the hearing, the undersigned established a deadline (ten days from the date of the filing of the hearing transcript with DOAH) for the filing of proposed recommended orders.

The hearing Transcript (consisting of one volume) was filed with DOAH on December 13, 2004.

The Board timely filed its Proposed Recommended Order on December 23, 2004. To date, neither Petitioners, nor Mr. Levinsky, has filed any post-hearing submittal.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following findings of fact are made:

1. On or about October 1, 1997, Petitioners entered into a contract in which they agreed to pay Respondent Norman Levinsky's company, Broward Roofing, Inc., \$3,700.00 to place a "new shingle roof" on Petitioners' residence and perform other related roofing work. The contract provided Petitioners with a ten-year "labor warranty" and a 30-year shingle warranty.

2. After the contracted work was completed and Petitioners paid Broward Roofing, Inc., the \$3,700.00 called for by the contract, the newly-installed roof started leaking.

3. Broward Roofing, Inc., refused to make the necessary repairs.

4. Petitioners paid other contractors to perform the repair work.

5. On November 17, 1998, Petitioner filed an application seeking to recover from the Florida Construction Industries Recovery Fund (which has since been renamed the Florida Homeowners' Construction Recovery Fund) \$1,025.00 that they had paid for repairs to the "new shingle roof" Broward Roofing, Inc., had recently installed, contending that they were deserving of such an award inasmuch as "[t]he roofer [Broward Roofing, Inc.] [had] refused to fix [their] new roof that was leaking and [had] totally ignored [their] 10 year warranty." Their application was filed on a Board-produced Construction Industries Recovery Fund Claim Form (Form), at the end of which was printed the following:

In addition to your complete written statement, we are requesting documentation of your contractual relationship with the contractor and evidence supporting your claim. Certified copies of the following list of documents are required to assist us in determining your eligibility for recovery.

I have attached the following: (these documents are required for proper processing of your claim. Failure to provide required documentation will delay processing and could result in your claim being denied due to incompleteness.)

___ Court certified copy of the Civil Judgment, and/or Final Order of the Construction Industry Licensing Board directing restitution be paid.

___ Copy of contract between you and the contractor.

___ Copies of applicable bonds, sureties, guarantees, warranties, letters of credit and/or policies of insurance.

___ Court certified copies of levy and execution documents.

___ Proof of all efforts/inability to collect restitution judgment.

No claims will be processed until 45 days after the date of entry of the Civil Judgment and/or Final Restitution Order.

On the completed Form that Petitioners filed, only the spaces next to "Copy of contract between you and the contractor" and "Copies of applicable bonds, sureties, guarantees, warranties, letters of credit and/or policies of insurance" were checked.

6. On May 4, 1999, the Broward County Central Examining Board of Construction Trades filed an Administrative Complaint against "Norman Levinsky d/b/a Broward Roofing, Inc.," which read as follows:

Count I

1. At all times material hereto RESPONDENT was a roofing contractor holding Broward County Certificate of Competency #95-7726-R-R.

2. On or about September 16, 1997, RESPONDENT entered into a contract to re-roof Complainant's home located at 10551 N.W. 21st Court, Sunrise, Florida.

3. RESPONDENT obtained a building permit.
4. The work was completed on March 10, 1998 and the roof began to leak on June 1, 1998.
5. RESPONDENT failed to properly supervise to ensure that the tie in with flat roof was properly completed. His failure to ensure such a proper tie in resulted in leaks.
6. Wherefore, it is charged that the RESPONDENT violated Subsection 9-14(b)(11) of the Broward County Code of Ordinances by failing to properly supervise a project commenced pursuant to a building permit.

Count II

7. Paragraphs 1 and 2 are included as if restated herein.
8. Complainant paid RESPONDENT the total contract price of \$3,700.00.
9. RESPONDENT completed the work.
10. RESPONDENT gave Complainant a 10 year labor warranty.
11. RESPONDENT failed and refused to honor his warranty.
12. Complainant had to pay additional amount of \$1,025.00 for a new contractor to repair the work of RESPONDENT.
13. Wherefore, it is charged that the RESPONDENT violated Subsection 9-14(b)(5)c of the Broward County Code of Ordinances by committing mismanagement which causes financial harm to a customer because the customer had to pay more for the contracted job than the original contract price.

Count III

14. Above paragraphs are included as if restated herein.

15. RESPONDENT failed to honor the warranty and complete the project in a workmanlike manner for a period in excess of 90 consecutive days.

16. Wherefore, it is charged that the RESPONDENT violated Subsection 9-14(b)(8) of the Broward County Code of Ordinances by abandoning a construction project in which RESPONDENT was under contract as a contractor.

It is determined that the above stated charges are grounds for disciplinary action pursuant to Chapter 9, Sections 9-14, 9-28 and 9-46, Broward County Code of Ordinances and Section 6.11, Broward County Charter. Broward County has the authority to certify and discipline local contractors pursuant to Section 489.131, Florida Statutes.

7. Following a hearing on the Administrative Complaint held May 25, 1999, the Broward County Central Examining Board of Building Construction Trades, on June 16, 1999, issued an Order, which read as follows:

A Disciplinary Proceeding was held on May 25, 1999, before the Broward County Central Examining Board of Building Construction Trades (the "Board"), in accordance with Section 9-14, Broward County Code of Ordinances (the "Code"). Service of the Administrative Complaint filed against the Respondent was made by certified mail. The Respondent being duly advised was not present at the hearing. The Board heard the sworn testimony of William Grubb and Marlene Grubb.

Upon consideration, it is ORDERED:

1. The allegations of fact as set forth in the Administrative Complaint are found to be true and adopted and incorporated herein by reference as findings of fact.

2. The conclusions of law alleged and set forth in the Administrative Complaint are approved and adopted and incorporated herein.

Upon these findings, it is therefore ORDERED:

1. That Respondent's Certificate of Competency is hereby revoked.

2. That the Respondent make restitution to the Complainants in the amount of \$3,700.00.

3. Prior to the RESPONDENT being allowed to reinstate his certificate of competency or being allowed to sit for any exam administered by a Broward County Central Examining Board, or receiving any license from a Broward County Central Examining Board, RESPONDENT must appear before the Board and prove that the restitution amount has been paid in full.

The board's order may be appealed by Petition for Writ of Certiorari to the Seventeenth Judicial Circuit within thirty (30) days of the date of rendition of the order of the board as provided by the Florida Rules of Appellate Procedure.

FURTHER, the Broward County Central Examining Board of Construction Trades makes RECOMMENDATION to the Florida Construction Industry Licensing Board to impose on the state registration, the following penalty:

1. Revoke state registration and require the RESPONDENT to make restitution to the Complainants in the amount of \$3,700.00.

In accordance with Florida Statutes, Chapter 489.131(7)(c) and (d), the disciplined contractor, the complainant, or the Department of Business and Professional Regulation may challenge the local jurisdiction enforcement body's recommended penalty for Board action to the State Construction Industry Licensing Board. A challenge shall be filed within sixty (60) days of the issuance of the recommended penalty to the State Construction Industry Licensing Board in Jacksonville, Florida. If challenged, there is a presumptive finding of probable cause and the case may proceed before the State Board without the need for a probable cause hearing.

Failure of the disciplined contractor, the complainant, or the Department of Business and Professional Regulation to challenge the local jurisdiction's recommended penalty within the time period set forth in this subsection shall constitute a waiver of the right to a hearing before the State Construction Industry Licensing Board.

A waiver of the right to a hearing before the State Board shall be deemed an admission of the violation, and the penalty recommended shall become a final order according to procedures developed by State Board rule without further State Board action.

Pursuant to Section 120.569, Florida Statutes, the Parties are hereby notified that they may appeal the Final Order of the State Board by filing one copy of a Notice of Appeal with the Clerk of the Department of Business and Professional Regulation, Northwood Centre, 1940 North Monroe Street, Tallahassee, Florida 32399-0792, and by filing the filing fee and one copy of the Notice of Appeal with the District Court of Appeal within thirty (30) days of the effective date of said Order.

8. On or sometime after September 1, 1999, Petitioners filed an affidavit prepared by Petitioner Marlene Grubb, which read as follows:

I, Marlene A. Grubb, hereby certify that I have completed a reasonable search and inquiry in accordance with the instructions provided by the Construction Industry Licensing Board and have not found property or assets to satisfy my Board Order^[1] in whole or part.

Legal Names

The Department of State revealed that the company Broward Roofing Inc. was administratively dissolved on 9/10/98. The C[IL]B verified the contractor[']s name and license number as: Norman Levinsky d/b/a Broward Roofing Inc. RC0047656.

Real Property

My search included property in the names: Norman Levinsky and Broward Roofing Inc. in Broward County, Florida. Norman Levinsky had no real property and Broward Roofing Inc. is delinquent on property taxes for over two years.

Boats and Motor Vehicles

There were no vehicles or boats in the motor vehicle data bank registered to Norman Levinsky or Broward Roofing Inc.

Aircraft

The FAA in Oklahoma City, Ms. Jeannie Vannest stated that there is no registration listed for Norman Levinsky or Broward Roofing Inc.

9. On March 25, 2004, the Board rendered a Final Order Approving Recommended Order of Disciplinary Action by Local Enforcement Body, which approved the Broward County Central

Examining Board of Building Construction Trades' June 16, 1999,
Order and read as follows:

THIS MATTER came before the Construction Industry Licensing Board (hereinafter referred to as the "Board") pursuant to Section 489.131(7), Florida Statutes, for a determination of whether to accept the proposed recommended penalty by the Broward County Central Examining Board of Building Construction Trades (a copy of which is attached and incorporated herein by reference). Neither the Petitioner, the Respondent nor the Complainant filed a challenge to the local enforcement body's recommended penalty to the Board.

Upon consideration of the local enforcement body's Administrative Complaint, the minutes from the meetings on January 21, 1999, and May 25, 1999, and the Final Order of Disciplinary Action and its proposed recommended penalty to the Board in this matter and being otherwise fully advised in the premises it is hereby ORDERED AND ADJUDGED:

1. The proposed recommended penalty is hereby approved and adopted in its entirety and incorporated herein by reference.
2. In accordance with the recommended penalty, Respondent's state registration (RC 0047656) is hereby REVOKED. Respondent shall pay restitution in the amount of \$3,700 to William and Marlene Grubb.
3. Respondent will adhere to and abide by all of the terms and conditions of the recommended penalty. Failure to abide by the terms of this Order may result in further action by the Board.
4. This Order shall be placed in and become a part of Respondent's official records.

5. A change in the Respondent's licensure status, including the suspension, revocation, voluntary relinquishment, or delinquency of license, does not relieve the Respondent of his obligation to pay any fines, costs, interest or restitution imposed in this and previous orders.

Pursuant to Section 120.68, Florida Statutes, the Parties are hereby notified that they may appeal this Final Order by filing a Notice of Appeal with the Clerk of the Department of Business and Professional Regulation, Northwood Centre, 1940 North Monroe Street, Tallahassee, Florida 32399-0792, and by filing the filing fee and one copy of the Notice of Appeal with the District Court of Appeal within thirty (30) days of the effective date of this Order.

This Order shall become effective upon filing with the Clerk of Department of Business and Professional Regulation.

This was the "Final Order of the Construction Industry Licensing Board directing restitution be paid," that, according to the Form Petitioners used to submit their claim for monies from the Florida Construction Industries Recovery Fund, was "required for proper processing of [their] claim."

10. On June 10, 2004, more than five and a half years after Petitioners had filed their claim application, the Board met to determine the merits of their claim pursuant to Section 120.57(2), Florida Statutes. Although given due notice of the Board meeting, neither Petitioners, nor Mr. Levinsky, made an appearance, either in person or through a representative, at the meeting. "[U]pon consideration of the documentation and

testimony submitted," the Board determined that Petitioners' claim for \$1,025.00 should be "approved."

11. On July 29, 2004, the Board rendered (that is, filed with the agency clerk) a written order to this effect, which read as follows:

THIS MATTER came before the Construction Industries Recovery Fund Committee and Construction Industry Licensing Board (the "Board") pursuant to sections 120.57(2) and 489.143, Florida Statutes (2003) as well as rule 61G4-21.004, Florida Administrative Code, on June 10, 2004, in Coral Gables, Florida, for consideration of a claim for restitution from the Construction Industries Recovery Fund (the "Recovery Fund"). William [a]nd Marlene Grubb ("Claimants") and Norman Levinsky ("Licensee") were duly notified of the proceedings. At the proceedings before the committee and the Board, Claimants were not present, and were not represented by counsel. Licensee was not present, and was not represented by counsel.

Upon consideration of the documentation and testimony submitted, it is ORDERED:

1. Claimants satisfied all requirements for payment from the Recovery Fund.

a. The Recovery Fund Claim was filed on November 17, 1998. The application was timely filed.

b. The contractor was paid \$3,700.00.

c. Claimants were awarded restitution from the Construction Industry Licensing Board on March 24, 2004, in the amount of \$3,700.00, pursuant to a Final Order Approving Recommended Order of Disciplinary Action by Local Enforcement Body. The Board adopted

and approved the Broward County Central Examining Board of Building Construction Trades recommendation, which found:

- i. Contractor held a current and active license at all times material to the transaction;
 - ii. The construction contract is dated September 18, 1997;
 - iii. The work was completed on March 10, 1998, and the roof began leaking June 1, 1998;
 - iv. Contractor failed to honor the warranty on the roof;
 - v. As a result, Claimants paid an additional \$1,025.00 for repair work;
 - vi. Contractor violated subsection 9-14(b)(5)c of the Broward County Ordinances by committing mismanagement, which caused financial harm to a consumer because the consumer had to pay more for the contractual job than the original contract price.
- d. The contractor engaged in activity that appears [to] violate section 489.129(1)(g)2, Florida Statutes (2003).
 - e. There is an asset search in the file that shows no assets are available from which claimant can satisfy the judgment.
2. Pursuant to section 489.143, Florida Statutes (2003), the maximum amount that the Recovery Fund can pay on a single claim is \$25,000.00. Thus, the claim for restitution from the Recovery Fund is APPROVED in the amount of \$1,025.00.
 3. In accordance with rule 61G4-21.005, Florida Administrative Code, the Secretary of the Florida Department of Business and Professional Regulation is directed to pay

the claim from the Recovery Fund after forty-five days from the date upon which the Final Order is filed with the Agency Clerk.

4. Pursuant to section 489.143(6), Florida Statutes (2003), upon payment of the claim from the Recovery Fund, Licensee's licensure to practice contracting is AUTOMATICALLY SUSPENDED without any further administrative action.

5. Pursuant to section 489.143(2), Florida Statutes (2003), upon receipt by Claimant under section 489.143(1), Florida Statutes (2003) of payment from the Recovery Fund, Claimant shall assign his or her additional right, title, and interest in the judgment or restitution order, to the extent of such payment, to the Board, and thereupon the Board shall be subrogated to the right, title, and interest of the Claimant; and any amount subsequently recovered on the award, judgment or restitution order by the Board, to the extent of the right, title, and interest of the Board therein, shall be for the purpose of reimbursing the Recovery Fund.

This Order shall become effective upon filing with the Clerk of the Department of Business and Professional Regulation.

DONE AND ORDERED this 21st day of June, 2004.

Appended to the order was the following Notice of Right of Appeal:

You are hereby notified that mediation is not available in this matter. Pursuant to Section 120.569, Florida Statutes, you may seek review of the above by filing a request for hearing with the Executive Director of the Board at 1940 North Monroe Street, Tallahassee, Florida 32399-2202 within twenty-one (21) days of the filing of this

Order. Upon request, you will receive an informal hearing pursuant to section 120.57(2), Florida Statutes. In the alternative, you may request a formal hearing pursuant to Section 120.57(1), Florida Statutes, if there are material facts in dispute; if you request a formal hearing, the petition must contain the information required by Rule 28-106.201, Florida Administrative Code, including specification of the facts which are in dispute. If you request a hearing, you have the right to be represented by an attorney or other qualified representative to take testimony.

12. On August 12, 2004, Petitioners filed a Request for Hearing, complaining that they "should be awarded at least \$3,475.00" to be adequately compensated for all of the repairs they had to make to their roof as a result of Broward Roofing, Inc.'s failure to meet its responsibilities.

13. On August 30, 2004, the Board referred the matter to DOAH "for the assignment of an Administrative Law Judge to conduct a formal hearing" pursuant to Section 120.57(1), Florida Statutes.

CONCLUSIONS OF LAW

14. Section 489.140, Florida Statutes, establishes the Florida Homeowners' Construction Recovery Fund (Fund).

15. The intent of the Legislature in maintaining the Fund is explained in Section 489.1401(2), Florida Statutes, which was added to Chapter 489, Part I, Florida Statutes, effective

July 1, 2004, by Chapter 2004-84, Laws of Florida, and provides as follows:

It is the intent of the Legislature that the sole purpose of the Florida Homeowners' Construction Recovery Fund is to compensate any aggrieved claimant who contracted for the construction or improvement of the residence located within this state and who has obtained a final judgment in any court of competent jurisdiction, was awarded restitution by the Construction Industry Licensing Board, or received an award in arbitration against a licensee on grounds of financial mismanagement or misconduct, abandoning a construction project, or making a false statement with respect to a project and arising directly out of any transaction when the judgment debtor was licensed and performed any of the activities enumerated under s. 489.129(1)(g), (j) or (k) on the homeowner's residence.

The "activities enumerated under s. 489.129(1)(g), (j) [and] (k)" (referenced in Section 489.1401(2), Florida Statutes (2004)) are as follows:

* * *

(g) Committing mismanagement or misconduct in the practice of contracting that causes financial harm to a customer. Financial mismanagement or misconduct occurs when:

1. Valid liens have been recorded against the property of a contractor's customer for supplies or services ordered by the contractor for the customer's job; the contractor has received funds from the customer to pay for the supplies or services; and the contractor has not had the liens removed from the property, by payment or by bond, within 75 days after the date of such liens;

2. The contractor has abandoned a customer's job and the percentage of completion is less than the percentage of the total contract price paid to the contractor as of the time of abandonment, unless the contractor is entitled to retain such funds under the terms of the contract or refunds the excess funds within 30 days after the date the job is abandoned; or

3. The contractor's job has been completed, and it is shown that the customer has had to pay more for the contracted job than the original contract price, as adjusted for subsequent change orders, unless such increase in cost was the result of circumstances beyond the control of the contractor, was the result of circumstances caused by the customer, or was otherwise permitted by the terms of the contract between the contractor and the customer.

* * *

(j) Abandoning a construction project in which the contractor is engaged or under contract as a contractor. A project may be presumed abandoned after 90 days if the contractor terminates the project without just cause or without proper notification to the owner, including the reason for termination, or fails to perform work without just cause for 90 consecutive days.

(k) Signing a statement with respect to a project or contract falsely indicating that the work is bonded; falsely indicating that payment has been made for all subcontracted work, labor, and materials which results in a financial loss to the owner, purchaser, or contractor; or falsely indicating that workers' compensation and public liability insurance are provided.

* * *

A contractor's failure to honor a warranty is not among these "activities enumerated under s. 489.129(1)(g), (j) [and] (k)." Rather, according to Florida Administrative Code Rule 61G4-17.001(1)(m)1, it constitutes "[m]isconduct or incompetency in the practice of contracting as set forth in Section 489.129(1)(n), F.S."

16. Chapter 2004-84, Laws of Florida, effectuated other changes to Chapter 489, Part I, Florida Statutes, in addition to adding Section 489.1401(2), Florida Statutes. The Legislature stated its purpose in making these changes (which were effective July 1, 2004) in the act's preamble, which read as follows:

WHEREAS, the Florida Construction Industries Recovery Fund was created to reimburse a person who has suffered monetary damages as a result of financial mismanagement by a contractor, and

WHEREAS, the Legislature recognizes that homeowners have been caused most monetary damages as a result of financial mismanagement or abandonment by Division I contractors, and

WHEREAS, the Legislature desires to provide homeowners with recompense for such monetary damages, and

WHEREAS, the Legislature recognizes that the current law places claimants in the position of having to reestablish damages in order to comply with the provisions of the statute, and

WHEREAS, the Legislature desires to make clear the circumstances under which an award from the fund shall be made, and

WHEREAS, the Legislature wishes to make other clarifying changes and improve the disposition of claims filed, and

WHEREAS, the Legislature recognizes that there are claims currently pending from persons who are not homeowners or who have presented claims for monetary damages caused by Division II contractors, and

WHEREAS, the Legislature desires to provide a mechanism for those claims if eligible, to be paid.

17. Section 489.141(1), Florida Statutes, as amended by Chapter 2004-84, Laws of Florida, sets forth the following eligibility requirements for recovery from the Fund:

Any claimant is eligible to seek recovery from the recovery fund after having made a claim and exhausting the limits of any available bond, cash bond, surety, guarantee, warranty, letter of credit, or policy of insurance, provided that each of the following conditions is satisfied:

(a) The claimant has received final judgment in a court of competent jurisdiction in this state or has received an award in arbitration or the Construction Industry Licensing Board has issued a final order directing the licensee to pay restitution to the claimant. The board may waive this requirement if:

1. The claimant is unable to secure a final judgment against the licensee due to the death of the licensee; or

2. The claimant has sought to have assets involving the transaction that gave rise to the claim removed from the bankruptcy proceedings so that the matter might be heard in a court of competent jurisdiction

in this state and, after due diligence, the claimant is precluded by action of the bankruptcy court from securing a final judgment against the licensee.

(b) The judgment, award, or restitution is based upon a violation of s. 489.129(1)(g), (j) or (k) or s. 713.35.

(c) The violation was committed by a licensee.

(d) The judgment, award, or restitution order specifies the actual damages suffered as a consequence of such violation.

(e) The contract was executed and the violation occurred on or after July 1, 1993, and provided that:

1. The claimant has caused to be issued a writ of execution upon such judgment, and the officer executing the writ has made a return showing that no personal or real property of the judgment debtor or licensee liable to be levied upon in satisfaction of the judgment can be found or that the amount realized on the sale of the judgment debtor's or licensee's property pursuant to such execution was insufficient to satisfy the judgment;

2. If the claimant is unable to comply with subparagraph 1. for a valid reason to be determined by the board, the claimant has made all reasonable searches and inquiries to ascertain whether the judgment debtor or licensee is possessed of real or personal property or other assets subject to being sold or applied in satisfaction of the judgment and by his or her search has discovered no property or assets or has discovered property and assets and has taken all necessary action and proceedings for the application thereof to the judgment but the amount thereby realized was insufficient to satisfy the judgment; and

3. The claimant has made a diligent attempt, as defined by board rule, to collect the restitution awarded by the board.

(f) A claim for recovery is made within 1 year after the conclusion of any civil, criminal, or administrative action or award in arbitration based on the act. This paragraph applies to any claim filed with the board after October 1, 1998.

(g) Any amounts recovered by the claimant from the judgment debtor or licensee, or from any other source, have been applied to the damages awarded by the court or the amount of restitution ordered by the board.

(h) The claimant is not a person who is precluded by this act from making a claim for recovery.

Those circumstances where a claimant is "not a person who is precluded by this act from making a claim for recovery," within the meaning of Section 489.141(1), Florida Statutes, are described in Section 489.141(2), Florida Statutes, which, as amended by Chapter 2004-84, Laws of Florida, reads as follows:

A claimant is not qualified to make a claim for recovery from the recovery fund, if:

(a) The claimant is the spouse of the judgment debtor or licensee or a personal representative of such spouse;

(b) The claimant is a licensee who acted as the contractor in the transaction which is the subject of the claim;

(c) The claim is based upon a construction contract in which the licensee was acting

with respect to the property owned or controlled by the licensee;

(d) The claim is based upon a construction contract in which the contractor did not hold a valid and current license at the time of the construction contract;

(e) The claimant was associated in a business relationship with the licensee other than the contract at issue;

(f) The claimant has suffered damages as the result of making improper payments to a contractor as defined in part I of chapter 713; or

(g) The claimant has contracted with a licensee to perform a scope of work described in s. 489.105(3)(d)-(q).

18. "Payment from the [F]und" must be made in accordance with the provisions of Section 489.143, Florida Statutes, subsections (1) and (2) of which, as amended by Chapter 2004-84, Laws of Florida, read as follows:

(1) The fund shall be disbursed as provided in s. 489.141 on a final order of the board.

(2) Any claimant who meets all of the conditions prescribed in s. 409.141 may apply to the board to cause payment to be made to a claimant from the recovery fund in an amount equal to the judgment, award, or restitution order or \$25,000, whichever is less, or an amount equal to the unsatisfied portion of such person's judgment, award, or restitution order, but only to the extent and amount of actual damages suffered by the claimant. Payment from the fund for other costs related to or pursuant to civil proceedings such as postjudgment interest, attorney's fees, court costs, medical damages, and punitive damages is prohibited.

The recovery fund is not obligated to pay any judgment, award, or restitution order, or any portion thereof, which is not expressly based on one of the grounds for recovery set forth in s. 489.141. Beginning January 1, 2005, for each contract entered after July 1, 2004, payment from the recovery fund shall be subject to a \$50,000 maximum payment.

19. The procedure the Board must follow before it may issue a final order disposing of a claim for monies from the Fund is described in Section 489.142, Florida Statutes, which, as amended by Chapter 2004-84, Laws of Florida, provides as follows:

(1) With respect to actions for recovery from the recovery fund, the board may intervene, enter an appearance, file an answer, defend the action, or take any action it deems appropriate and may take recourse through any appropriate method of review on behalf of the State of Florida. The board may delegate to the department by rule the authority to close any case when a claimant is not qualified to make a claim for recovery from the recovery fund under s. 489.141(2); when after notice the claimant has failed to provide documentation in support of the claim as required by the board; or when the licensee has reached the aggregate limit.

(2) Notwithstanding any other provision of law, the board shall cause a notice of hearing to be served 14 days in advance of the hearing on the claimant and on the licensee whose license is subject to suspension by s. 489.143. Each notice shall inform the recipient of any administrative hearing or judicial review that is available under s. 120.569, s. 120.57, or s. 120.68; shall indicate the procedure that must be

followed to obtain the hearing or judicial review; and shall state the time limits that apply. Service of the notice on the licensee shall be made in accordance with s. 455.275. Service of the notice on the claimant shall be by regular United States mail at the address provided on the claim. The service of notice in accordance with this section is complete upon expiration of 14 days after deposit in the United States mail. Proof of service of a notice shall be made by entry in the records of the department that the notice was given. The entry shall be admissible in judicial and administrative proceedings of this state and shall constitute sufficient proof that notice was given.

(3) Notwithstanding any other provision of law, board hearings on claims shall be conducted in accordance with ss. 120.569 and 120.57(2). All claim hearings shall be conducted at the board's regular meeting at the place, date, and time published. Orders of the board denying or awarding funds to a claimant constitute final orders that may be appealed in accordance with s. 120.68. Orders awarding or denying claims shall be served in the same manner as notices of hearing in this section.

20. In the instant case, Petitioners filed their claim application with the Board on November 17, 1998, requesting an award of \$1,025.00 based on Mr. Levinsky's "refus[al] to fix [their] new roof that was leaking and [his] totally ignor[ing] [their] 10 year warranty." Petitioners did not attach to their application either a "Court certified copy of [a] Civil Judgment" or a "Final Order of the Construction Industry Licensing Board directing restitution be paid," as required by

Florida Administrative Code Rule 61G4-21.003(2).² Indeed, no such judgment or order had yet been rendered. Consequently, Petitioner's application lay dormant until after the Board had rendered its March 2004 Final Order Approving Recommended Order of Disciplinary Action by Local Enforcement Body, which, among other things, directed Mr. Levinsky to "pay restitution in the amount of \$3,700.00 to [Petitioners]."

21. After due notice, the Board met on June 10, 2004, to consider Petitioners' claim application. It determined at the meeting that Petitioners should be awarded \$1,025.00 from the Fund, the amount they had requested in their application. A written order making such an award was filed with the agency clerk on July 29, 2004. The written order contained the following "Notice of Right to Appeal":

You are hereby notified that mediation is not available in this matter. Pursuant to Section 120.569, Florida Statutes, you may seek review of the above by filing a request for hearing with the Executive Director of the Board at 1940 North Monroe Street, Tallahassee, Florida 32399-2202 within twenty-one (21) days of the filing of this Order. Upon request, you will receive an informal hearing pursuant to section 120.57(2), Florida Statutes. In the alternative, you may request a formal hearing pursuant to Section 120.57(1), Florida Statutes, if there are material facts in dispute; if you request a formal hearing, the petition must contain the information required by Rule 28-106.201, Florida Administrative Code, including specification of the facts which are in

dispute. If you request a hearing, you have the right to be represented by an attorney or other qualified representative to take testimony.

By letter dated August 10, 2004, Petitioners advised the Board that they believed that their award should be "at least \$3,475.00," not \$1,025.00. The Board, in turn, by letter dated August 27, 2004, referred the matter to DOAH "for the assignment of an Administrative Law Judge to conduct a formal hearing" pursuant to Section 120.57(1), Florida Statutes.

22. The referral was made in error. The Board had already acted on Petitioners' claim pursuant to Section 120.57(2), Florida Statutes,³ and awarded them \$1,025.00 from the Fund. Pursuant to the clear and unambiguous language of Section 489.142(3), Florida Statutes, which was added to the statute effective July 1, 2004, the Board's written order making this award (which was filed with the agency clerk on July 29, 2004) constituted a "final order" subject, not to further administrative action, but to judicial review pursuant to Section 120.68, Florida Statutes. See Kalbach v. Department of Health and Rehabilitative Services, 563 So. 2d 809, 810-11 (Fla. 2d DCA 1990). Moreover, this statutory language specifies that all hearings on claims for monies from the Fund "shall" be conducted by the Board (at a regular Board meeting) in accordance with Section 120.57(2). No mention is made of

Section 120.57(1) (which, as noted in Zarifian v. Department of State, Div. of Licensing, 552 So. 2d 267 (Fla. 2d DCA 1989), "provides for a formal administrative hearing [conducted by a DOAH administrative law judge] when a disputed issue of material fact is involved"). Therefore, even if the Board had not already taken action on Petitioners' claim pursuant to Section 120.57(2), it would have been inconsistent with the requirements of Section 489.142 for the Board to have referred the matter to DOAH for the assignment of an administrative law judge to conduct a Section 120.57(1) hearing on the matter, regardless of whether there were disputed issues of material fact that needed to be resolved. See PW Ventures, Inc. v. Nichols, 533 So. 2d 281, 283 (Fla. 1988)("The express mention of one thing implies the exclusion of another."); McKendry v. State, 641 So. 2d 45, 46 (Fla. 1994)("[A] specific statute covering a particular subject area always controls over a statute covering the same and other subjects in more general terms.")⁴; Gretz v. Florida Unemployment Appeals Commission, 572 So. 2d 1384, 1386 (Fla. 1991)("Section 120.57(1)(b) is a general statute dealing with appeals from administrative proceedings. It sets a ceiling beyond which no agency may charge for preparation of a transcript. Where a more specific statute sets a fee for preparation of a transcript that is within that ceiling, the more specific statute controls."); Alsop v. Pierce, 19 So. 2d

799, 805-06 (Fla. 1944)("When the controlling law directs how a thing shall be done that is, in effect, a prohibition against its being done in any other way."); Sun Coast International Inc. v. Department of Business Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes, 596 So. 2d 1118, 1121 (Fla. 1st DCA 1992)("[A] legislative direction as to *how* a thing shall be done is, in effect, a prohibition against its being done in any other way.); and Fiat Motors of North America, Inc. v. Calvin, 356 So. 2d 908, 909 (Fla. 1st DCA 1978)("Administrative agencies are creatures of statute and have only such powers as statutes confer.").

23. That Petitioners' claim had been filed, and had become ripe for resolution on the merits, before July 1, 2004, the effective date of the addition of the statutory language now found in Section 489.142(3), Florida Statutes, did not provide the Board with a valid basis to refer the claim to DOAH for a Section 120.57(1) hearing. This is because the addition of this subsection to Section 489.142 merely changed the means and methods by which claims for monies from the Fund were to be administratively resolved. In the absence of any language in Chapter 2004-84, Laws of Florida, clearly and unambiguously providing otherwise, this mere change in procedure applied to all claims, like Petitioners', that were pending (that is, not finally resolved⁵) as of July 1, 2004. See Gupton v. Village Key

& Saw Shop, Inc., 656 So. 2d 475, 477 (Fla. 1995)("Statutes that relate only to procedure or remedy generally apply to all pending cases."); Young v. Altenhaus, 472 So. 2d 1152, 1154 (Fla. 1985)("[S]tatutes which relate only to the procedure or remedy are generally held applicable to all pending cases."); Hill v. Division of Retirement, 687 So. 2d 1376, 1377 (Fla. 1st DCA 1997)("Although the State Retirement Commission's order was entered before revisions to the Administrative Procedure Act took effect on October 1, 1996, the revised Act applies to the extent it changes only the means and methods by which an administrative determination is rendered.")(internal quotation marks omitted); Turro v. Department of Health and Rehabilitative Services, 458 So. 2d 345, 346 (Fla. 1st DCA 1984)("In part because Rule 10-5.11(23) did not become formally effective until after commencement of the hearing on the applications, Community argues that it was improper to apply the standards stated in the rule to their application. However, the rule prescribes an evidentiary standard and is thus procedural in nature. As such it became applicable and controlling on its effective date."); and Batch v. State, 405 So. 2d 302, 304 (Fla. 4th DCA 1981)("This section became effective on October 1, 1978, which was after appellant's criminal act but before his trial and sentencing. Nevertheless, the section is procedural and such statutory changes apply to pending cases.").

24. In view of the foregoing, the undersigned must return the instant matter to the Board, with the recommendation that the Board find that Petitioners are not entitled to any further administrative consideration of the merits of their claim; however, inasmuch as the "Notice of Right to Appeal" appended to the Board's final order awarding them \$1,025.00 from the Fund contained erroneous information regarding what Petitioners needed to do to seek review of the order, the Board should allow Petitioners to request that the order be vacated and re-rendered so that Petitioners will have the opportunity to timely appeal the Board's award in accordance with Section 120.68, Florida Statutes, which provides, in pertinent part, that "judicial review [of final agency action] shall be sought in the appellate district where the agency maintains its headquarters or where a party resides . . . by filing a notice of appeal or petition for review in accordance with the Florida Rules of Appellate Procedure within 30 days after the rendition of the order being appealed." See Gundlah v. Moore, 831 So. 2d 780, 781 (Fla. 2002); Ney v. Unemployment Appeals Commission, 778 So. 2d 509 (Fla. 4th DCA 2001); Department of Corrections v. Saulter, 742 So. 2d 368, 370 (Fla. 1st DCA 1999); Etienne v. Simco Recycling Corp., 721 So. 2d 399, 400 (Fla. 3d DCA 1998); National Healthcorp, L.P. v. Department of Health and Rehabilitative Services, 560 So. 2d 1184, 1185 (Fla. 1st DCA 1989); and New

Washington Heights Community Development Conference v.
Department of Community Affairs, 515 So. 2d 328, 329 (Fla. 3d
DCA 1987).

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions
of Law, it is hereby

RECOMMENDED that the Board issue an order dismissing
Petitioners' Request for Hearing challenging the Board's order,
rendered July 29, 2004, disposing of their claim for monies from
the Fund, but allowing them, if they so desire, to request that
that order be vacated and re-rendered so that they will have the
opportunity to file a timely appeal in accordance with Section
120.68, Florida Statutes.

DONE AND ENTERED this 28th day of December, 2004, in
Tallahassee, Leon County, Florida.



STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of December, 2004.

ENDNOTES

¹ The "Board Order" referred to in the affidavit was an order, not of the Board, but of the Broward County Central Examining Board of Building Construction Trades.

² Florida Administrative Code Rule 61G4-21.003(2) then provided, as it still does, as follows:

Claimant shall complete the claim form and forward with documentation attached to the board: a certified copy of the Civil Judgment or Final Order of the Construction Industry Licensing Board; a copy of any contract between the claimant and the contractor; copies of applicable bonds, sureties, guarantees, warranties, letters of credit and/or policies of insurance; certified copies of levy and execution documents, and proof of all efforts and inability to collect the judgment or restitution order.

³ The first sentence of the Board's written order disposing of Petitioners' claim read:

THIS MATTER came before the Construction Industries Recovery Fund Committee and Construction Industry Licensing Board (the "Board") pursuant to sections 120.57(2) and 489.143, Florida Statutes (2003) as well as rule 61G4-21.004, Florida Administrative Code, on June 10, 2004, in Coral Gables, Florida, for consideration of a claim for restitution from the Construction Industries Recovery Fund (the "Recovery Fund").

(emphasis supplied.)

⁴ This rule of statutory construction aside, the prefatory language of Section 489.142(3), Florida Statutes, unmistakably conveys the Legislature's intent that, "[n]otwithstanding any other provision of law" in Chapter 120, Florida Statutes, or elsewhere, all hearings on claims for monies from the Fund be conducted by the Board in accordance with Section 120.57(2),

Florida Statutes, whether or not there are disputed issues of material fact.

⁵ "Final agency action may take the form of an order whether 'affirmative, negative, injunctive, or declaratory' in tenor. A final agency order may articulate jurisdictional boundaries; require a party to cease or desist; grant, suspend, or revoke a license; impose an administrative penalty; deny an evidentiary hearing; or deny substantive relief of various kinds. A final order may or may not dismiss a petition for hearing or some other pleading. Its finality depends on whether it has brought the administrative adjudicative process to a close." Hill v. Division of Retirement, 687 So. 2d 1376, 1377 (Fla. 1st DCA 1997)(citation omitted.) "An agency has not rendered a final order until it is "filed with the agency clerk." Id.; see also Gallo v. Florida Commission on Human Relations, 867 So. 2d 1273 (Fla. 1st DCA 2004)("[T]he Court has determined that, because the order on appeal has not been filed with the agency clerk, it has not been rendered."); and Alvarez v. Florida Department of Children And Families, 863 So. 2d 1258, 1259 (Fla. 1st DCA 2004)("[T]he Court has determined that the order on appeal is not final. Although the order on appeal authorizes the Department to sanction the appellant for an intentional program violation, no formal order disqualifying the appellant from receipt of benefits has been entered. Thus, the administrative adjudicative process does not appear to have been brought to a close."). As of July 1, 2004, Petitioners' claim had not been finally resolved. Although the Board had met on June 10, 2004, and determined that Petitioners' should be awarded \$1,025.00 from the Fund, it was not until July 29, 2004, that a written order memorializing that determination was filed with the agency clerk.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.