

IN THE MATTER OF THE CLAIM	* BEFORE JOY L. PHILLIPS,
OF ELLA I. ELWAYS,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT,	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	* OAH NO.: DLR-HIC-02-12-22601
FOR THE ALLEGED ACTS OR	* MHIC NO.: 10 (90) 199
OMISSIONS OF JOHNNY NICHOLS,	*
T/A JOHNNY NICHOLS, Reg. # 45256,	*
AGGERGATE PAVING, <sup>1</sup>	*
RESPONDENT	*

\* \* \* \* \*

**RECOMMENDED DECISION**

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

**STATEMENT OF THE CASE**

On May 6, 2010, Ella I. Elways, (Claimant), filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$11,112.00 in

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<sup>1</sup> The Fund's licensing information refers to the Respondent's trade name as Aggergate Paving. (Fund Ex. 3.) I suspect it should read Aggregate Paving. The Respondent does not use that name on his Contract, however. (Fund Ex. 6.) Rather, the Contract merely uses the company name "Johnny Nichols," with a second line reading "Paving and Seal Coating." The Contract does include the Respondent's registration number of 45256. The Hearing Order refers to the Respondent's trade name as simply "Johnny Nichols" (Fund Ex. 2) and throughout the scheduling documents, the MHIC refers to the Respondent's trade name as "Johnny Nichols." In the caption of this decision, I have used the Respondent's trade name just as printed in Fund Ex. 3 as well as his name and registration number, for clarity.

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actual losses she allegedly suffered as a result of a home improvement contract with Johnny Nichols t/a Johnny Nichols, Reg. # 45256, Aggergate Paving (Respondent).

I held a hearing on November 8, 2012, at the Office of Administrative Hearings, 11101 Gilroy Road, Hunt Valley, MD, 21031. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010 & Supp. 2012). Chris King, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Claimant and Respondent represented themselves.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department of Labor, Licensing and Regulation, and the Rules of Procedure of the Office of Administrative Hearings govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2012); Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02 and 28.02.01.

### ISSUES

Did the Claimant sustain an actual loss as a result of the Respondent's acts or omissions, and if so, what amount is the Claimant entitled to recover from the Fund?

### SUMMARY OF THE EVIDENCE

#### Exhibits

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

- |      |       |   |
|------|-------|---|
| Clmt | Ex. 1 | Baltimore County Deck Construction Guidelines   |
|      | Ex. 2 | Packet of photographs, marked 2a-k  |
|      | Ex. 3 | Packet of photographs, marked 3a-o  |
|      | Ex. 4 | Packet of large photographs, marked 4a-l  |
|      | Ex. 5 | Estimate for removal and replacement of deck, by Jeffery Wall, Home Depot Home Services, dated February 23, 2011 and November 8, 2012 |
|      | Ex. 6 | Packet of receipts  |
|      | Ex. 7 | Copies of checks written to Johnny Nichols  |



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

- Fund Ex. 1 Notice of Hearing, dated August 13, 2012
- Ex. 2 Hearing Order, dated May 17, 2012
- Ex. 3 Computer generated printout of license information for the Respondent
- Ex. 4 Home Improvement Claim Form, dated May 6, 2010
- Ex. 5 Letter to Respondent from the HIC, dated May 14, 2010
- Ex. 6 Contract between Johnny Nichols, grandson of the Respondent, and the Claimant, dated March 20, 2009

The Respondent offered no documents to be admitted into evidence.

### Testimony

The Claimant testified on her own behalf and presented the testimony of William Elways, her husband, and Jonathan Nichols, the Respondent's grandson.

The Respondent testified on his own behalf and presented no additional testimony.

The Fund presented no testimony.

### FINDINGS OF FACT

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

1. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor under MHIC license number # 45256. (Fund Ex. 3.)
2. The Respondent's grandson, Jonathan Nichols (Nichols), worked for his grandfather and was learning the family business.
3. Prior to March 2009, the Respondent resealed the Claimant's driveway pursuant to a contract that is not a part of this case.
4. After finishing the driveway work, Nichols spoke with the Claimant regarding proposed work she desired to have done to her deck. Initially, the Claimant refused Nichols' solicitation to do the deck work.
5. Several days later, the Claimant and Nichols spoke again about the deck. The Claimant



had received a "spec" sheet from another contractor whom the Claimant had consulted about the job. The Claimant agreed to let Nichols have the job and gave him the spec sheet.

6. On March 20, 2009, the Claimant and Nichols entered into a contract (the Contract) for the construction on the Claimant's property of a two-level deck to replace an old deck. The upper deck was to be sized 10' x 14' and built 9'5" above the ground. Stairs were to lead to the lower deck, to be sized 8' x 18'. The Contract called for the use of treated wood. Removal of the old deck was included in the parties' agreement concerning the work but was not specified in the Contract. (Fund Ex. 6.)
7. The Contract was drawn up on the Respondent's pre-printed contract form.
8. The Respondent was not involved in any of the discussions regarding construction of the Claimant's deck. He drove past the house one time to look at the deck from his car, but he never went onto the Claimant's property.
9. Although Nichols is not a licensed salesperson and neither he nor the Respondent has experience building decks, the Respondent permitted Nichols to enter into the Contract on behalf of the Respondent.
10. The original agreed upon Contract price was \$6,500.00. (Fund Ex. 6.) The Contract price was later increased to \$6,800.00 and the Claimant paid this amount in full. (Clmt Ex. 7.)
11. Nichols, who was not an experienced deck builder, hired two experienced deck builders to build the deck. Nichols purchased the materials for the job from Home Depot, but he was not at the job site throughout the deck construction.
12. Although Nichols knew a permit was required, he failed to obtain a permit for the deck.

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13. The Claimant mentioned to Nichols several times that she wanted the deck to be built on 6" x 6" posts, but Nichols used 4" x 4" posts to support the deck.
14. The Claimant complained to Nichols about various aspects of the deck as it was being built. She did not like the large spaces that were left between steps and railings, as they created a dangerous situation for children. She believed the lag bolts were too far apart. She did not approve of nails being used instead of screws. She told Nichols that overall, she felt the deck was unstable. Nichols addressed some of her complaints, but not to the Claimant's satisfaction.
15. Within a matter of months after the deck was completed, the Claimant called Nichols to complain that the wood was splintering and cracking, that it was pulling away from joints, that it was discoloring and that it was warping.
16. Nichols inspected the deck and confirmed her complaints. He sent two sub-contractors to her home to offer to repair the deck, but the Claimant declined the offer, having lost her confidence in Nichols. He also suggested she contact Home Depot to complain about the quality of the wood.<sup>2</sup>
17. The Claimant arranged for Home Depot representatives (Reps) to inspect the deck and they noted additional problems with the construction, namely, that there was no flashing used. The Reps agreed with the Claimant that the quality of some of the wood was poor and that the rail and stair spacing was not up to code. The Reps gave the Claimant an estimate for replacing the deck and, in that estimate, agreed to a free upgrade to composite materials rather than wood. (Clmt Ex. 5.)

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<sup>2</sup> The parties agreed that the wood used for a gate separating the deck from the pool was purchased at a different store than Home Depot and there was no complaint regarding that wood.

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18. Although Nichols told the Claimant he would return in the spring to seal the deck wood, he never returned to the Claimant's home. The Claimant sealed it herself in the summer of 2012.
19. The Claimant received an estimate from Jeffrey Wall, Program Manager of the Home Depot Home Services, to remove the existing decks and replace them, using composite material. The first estimate, from February 23, 2011, was for \$11,112.00, plus \$250.00 for the construction permit. The Claimant did not accept this estimate or have the work done. The price increased on November 8, 2012, to \$12,554.00. Composite material is included in that price at no extra charge, an acknowledgement from Home Depot that the wood that was used by Nichols was of poor quality.

#### DISCUSSION

Pursuant to sections 8-405(a) and 8-407(e)(1) of the Maryland Annotated Code's Business Regulation Article, to recover compensation from the Fund, the Claimant must prove, by a preponderance of the evidence, that she incurred an actual loss, which resulted from a licensed contractor's acts or omissions. *See also* COMAR 09.08.03.03B(2). Actual loss "means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." Md. Code Ann., Bus. Reg. § 8-401 (2010). For the following reasons, I conclude that the Claimant has met this burden by proving that the Respondent failed to complete a workmanlike job and that the Claimant incurred an actual loss, entitling her to an award of \$6,800.00 from the Fund.

The Respondent was a licensed home improvement contractor at the time he allowed his grandson, Nichols, to enter into the contract with the Claimant. The parties knew Nichols had no experience building decks, but the Claimant agreed to let Nichols build the deck and the

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Respondent allowed Nichols to act on behalf of his company. The Respondent purportedly allowed Nichols to build the deck in order to teach him the family business.

Nichols, on behalf of the Respondent, performed unworkmanlike home improvement by building a deck that did not meet code standards and for which no permit was obtained. Nichols admitted during his testimony that he was not an experienced deck builder and that he did not know the relevant building code provisions for Baltimore County. He conceded that he knew a permit was required and knew that if a permit had been applied for, inspections would have been done by the county, but he stated that he did not realize the county could require a homeowner to remove a deck that did not meet the county building code. In deciding not to seek a building permit, he asserted that he simply was trying to save the Claimant money.

Nichols testified that he chose the size of the posts by looking at neighbors' decks, finding their posts to be 4" x 4". The Claimant testified that the neighbors' posts are 6" x 6" and that she asked Nichols to use 6" x 6" posts, but that he told her they were not available at Home Depot. The county code calls for 6" x 6" posts for decks over 8' 6" high. (Clmt Ex. 1). The upper deck was therefore not built within code guidelines, as it is 9'5" high. Regardless of how neighbors' decks are constructed, Nichols had an obligation to know the code provisions and to build accordingly. There was some testimony regarding Home Depot not having 6" x 6" posts available when Nichols tried to purchase them, but this is irrelevant to my decision that the posts used did not meet county building code requirements.

After the Claimant complained to Nichols about the quality of the deck, Nichols made some attempts to resolve the problems, namely, he added some rails and some stabilizing boards. These efforts were insufficient to satisfy the Claimant and also failed to bring the deck up to code. At an unknown later date, Nichols came to the home to look at the splintering, warping



wood. He was surprised at what he saw and could not offer an explanation to the Claimant, except to proffer that some of the wood must have been bad. He offered to have his assistants repair it. Two men showed up at the Claimant's door one day, unannounced, and offered to repair the deck. The Claimant turned them away, as she did not know who they were and, by that point, she had understandably lost confidence in Nichols' workmanship.

I found both the Claimant and Nichols to be credible and sincere in their testimony. Indeed, their testimony did not differ in many respects. Nichols conceded that the deck was not up to code and that it fell outside the "standard practices" language contained in the preprinted information in the Contract. He agreed that he used 4" x 4" posts, which were too small for the higher of the two decks. He disagreed about the number of boards that had warped or split, but he conceded that there were at least ten and that, as per the language in the Contract, he was responsible for the quality of the wood used. Some of the Claimant's other allegations were not specifically addressed in Nichols' testimony.

The Respondent did not deny any of the Claimant's complaints. He simply testified that he was helping Nichols, his grandson, learn the family business and that he had nothing to do with the Claimant's job. I am concerned that a licensed contractor would permit an inexperienced employee to enter into a contract for a job that is outside of the company's expertise, solely for the purpose of teaching him the family business. Apparently, Nichols was given no supervision or advice on this project and, as a result, he built a deck that did not comply with the local building code. The deck is substandard because of the wood used and the poor workmanship of Nichols' crew. As a result, the Claimant will have to remove and replace the deck.

Consequently, I conclude that the Claimant has met her burden of proof and is entitled to an award from the Fund. With respect to such awards, COMAR 09.08.03.03B(b(3)(c) provides as follows:

B. Measure of Awards from Guaranty Fund.

.....  
(3) Unless it determines that a particular claim requires a unique measurement, the Commission shall measure actual loss as follows:

.....  
(c) If the contractor did work according to the contract and the claimant has solicited or is soliciting another contractor to complete the contract, the claimant's actual loss shall be the amounts the claimant has paid to or on behalf of the contractor under the original contract, added to any reasonable amounts the claimant has paid or will be required to pay another contractor to repair poor work done by the original contractor under the original contract and complete the original contract, less the original contract price. If the Commission determines that the original contract price is too unrealistically low or high to provide a proper basis for measuring actual loss, the Commission may adjust its measurement accordingly.

Using the above formula, I conclude that the Claimant is entitled to an award of \$6,800.00 from the Fund, calculating the Claimant's actual loss as follows:

\$ 6,800.00	Amount the Claimant paid the Licensee
<u>+ 12,554.00</u>	Amount required to repair/complete the Licensee's Work
\$ 19,354.00	
<u>- 6,800.00</u>	Contract price
\$ 12,554.00	The Claimant's actual loss

Pursuant to section 8-405(e)(5) of the Maryland Annotated Code's Business Regulation Article, the amount of any award against the Fund may not exceed the amount paid by a claimant to the contractor against whom the claim is filed. Consequently, the Claimant is entitled to an award of \$6,800.00 from the Fund.



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**CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact and Discussion, I conclude that the Claimant has met her burden of proving that she incurred an actual loss as a result of the Respondent's unworkmanlike performance of home improvement work for the Claimant. Md. Code Ann., Bus. Reg. §§ 8-405(a) and 8-407(e)(1) (2010). The compensable amount of that loss is \$6,800.00, which the Claimant should be awarded from the Fund. *Id.*; COMAR 09.08.03.03B(3)(c).

**RECOMMENDED ORDER**

I **PROPOSE** that the Maryland Home Improvement Commission **ORDER** as follows:

1. The Claimant is awarded \$6,800.00 from the Maryland Home Improvement Commission Guaranty Fund;
2. The Respondent is ineligible for a Maryland Home Improvement Commission license until the Respondent reimburses the Guaranty Fund for all monies disbursed under this Order, plus annual interest of at least ten percent. Md. Code Ann., Bus. Reg. § 8-411(a) (2010); and
3. The records and publications of the Maryland Home Improvement Commission reflect this decision.

**Signature on File**

December 6, 2012  
Date Decision Mailed

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Joy L. Phillips  
Administrative Law Judge

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* * * * *	* * * * *

**FILE EXHIBIT LIST**

**Exhibits**

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

- Clmt Ex. 1 Baltimore County Deck Construction Guidelines
- Ex. 2 Packet of photographs, marked 2a-k
- Ex. 3 Packet of photographs, marked 3a-o
- Ex. 4 Packet of large photographs, marked 4a-l
- Ex. 5 Estimate for removal and replacement of deck, by Jeffery Wall, Home Depot Home Services, dated February 23, 2011 and November 8, 2012
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THE UNIVERSITY OF CHICAGO

PHYSICS DEPARTMENT

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