

IN THE MATTER OF THE CLAIM OF	*	BEFORE YOLANDA L. CURTIN,
EARL TRIPLETT,	*	AN ADMINISTRATIVE LAW JUDGE
CLAIMANT	*	OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	*	OF ADMINISTRATIVE HEARINGS
IMPROVEMENT COMMISSION	*	OAH Case No.: DLR-HIC-02-12-25926
GUARANTY FUND FOR THE	*	MHIC Case No.: 10 (90) 489
ALLEGED ACTS OR OMISSIONS	*	
OF ELMER J. GUY,	*	
t/a GUYS PAVING	*	

* * * * *

RECOMMENDED DECISION

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

STATEMENT OF THE CASE

On August 2, 2010, the Claimant filed a claim against the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$4,200.00 in actual monetary losses allegedly suffered as a result of the unworkmanlike, inadequate or incomplete home improvement performed by Elmer J. Guy, t/a Guys Paving (Respondent). Subsequently, on December 2, 2011, the Claimant filed an amended Fund claim seeking reimbursement of \$3,500.00. On April 4, 2012, the MHIC ordered a hearing to allow the Claimant to prove his claim.

On November 30, 2012, I conducted a hearing at the Bel Air Public Library in Bel Air, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407 (2010 & Supp. 2012). The Claimant represented himself. Kris King, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR), represented the Fund. The Respondent failed to appear for the hearing.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the DLLR, and the OAH Rules of Procedure govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2012), Code of Maryland Regulations (COMAR) 09.01.03.01; 09.08.02.01; and 28.02.01.01.

ISSUE

Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the Claimant:

CL #1 – Contract between Respondent and Claimant, April 2, 2009

CL #2 – Letter from Respondent to Claimant, December 8, 2009

CL #3 – Letter from MHIC to Claimant, February 25, 2010

CL #4 – Letter from Respondent to Claimant, June 18, 2010

CL #5 – Link's Paving Proposal, May 12, 2010

I admitted the following exhibit on behalf of the Respondent:¹

Resp. 1 – Letter from the Respondent addressed to “To whom it may concern,” stamped received by the OAH on November 16, 2012

I admitted the following exhibits on behalf of the Fund

Fund Ex. 1 – August 14, 2011 Notice of Hearing, with attachments

Fund Ex. 2 – Hearing Order

Fund Ex. 3 – Respondent’s licensing history with the MHIC

Fund Ex. 4 – Claimant’s Fund Claim Form, received August 2, 2010

Fund Ex. 5 – Letter from MHIC to the Respondent, August 3, 2010

Fund Ex. 6 – Email from the Claimant to the DLLR, December 2, 2011

Fund Ex. 7 – Letter from the MHIC to the Respondent, December 14, 2011

Fund Ex. 8 – Sketch of Claimant’s Property depicting the driveway

Testimony

The Claimant testified on his own behalf. The Fund did not present any witnesses.

FINDINGS OF FACT

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

1. At all times relevant to this matter, the Respondent was licensed by the MHIC as a home improvement contractor.
2. On April 2, 2009, the Claimant and Respondent entered into a contract to have the Respondent pave the driveway of the Claimant’s residence, located at 1607 Dogwood Lane Bel Air, Maryland. The area to be paved was 20 feet wide by 80 feet long.
3. The contract price was \$3,500.00.

¹ Although the Respondent did not appear for the hearing, he sent to the OAH a letter advising that he would not appear for the hearing and that he had no objection to an award from the Fund being granted to the Claimant. Thus, I admitted the letter on behalf of the Respondent.

4. The Respondent paved the Claimant's driveway and the Claimant paid the full contract price.
5. When the paving work was done, the Respondent told the Claimant to not park or drive on the driveway for four days.
6. The Claimant waited more than seven days to park or drive on the driveway.
7. Within a couple of days of using the driveway, the Claimant noticed tire marks on the driveway. He also noticed that whenever the weather was hot, indentations would occur on the surface of the driveway and tire marks would continue to appear. A few months after the paving work was completed, he noticed more and more indentations and tire marks.
8. As the Claimant increasingly noticed more indentations and tire marks on the pavement of his driveway, he contacted the Respondent and reported his observations.
9. Sometime in the summer 2009, after the Claimant complained about the condition of the driveway, the Respondent went out to the Claimant's property and inspected the driveway. The Respondent informed the Claimant that he would repair the driveway by cutting at the areas that had the indentations and then resurface those areas.
10. The Respondent did not return to perform any corrective work on the Claimant's driveway.
11. After the Respondent failed to return to correct his work, the Claimant called the Respondent repeatedly and asked him to repair the driveway.
12. On December 8, 2010, the Respondent sent a letter to the Claimant in which he informed the Claimant that he believed the problems with the driveway were because

the ground had not settled. He informed the Claimant that he would repave the entire driveway in the spring 2010 at no cost to the Claimant, and that the work would be completed no later than May 2010.

13. After the Claimant received the Respondent's letter, the Claimant contacted the MHIC to report the Respondent's inadequate work.
14. The MHIC contacted the Respondent and the Respondent agreed to correct his work by April 30, 2010.
15. The Respondent did not return to the Claimant's property to correct his work by the deadline date.
16. On or about May 12, 2010, the Claimant contacted Link Paving to see if it could repair the driveway. Link Paving provided a proposal to the Claimant to repave the driveway at a cost of \$4,200.00. The scope of the work included removing the existing asphalt and replacing it with new asphalt. Link Paving informed the Claimant that it could not just repair the areas with the indentations and tire marks because by doing so the surface of the driveway would be uneven and lack uniformity.
17. The Claimant again contacted the Respondent to inquire if he was going to correct his work. On June 18, 2010, the Respondent sent a letter to the Claimant which informed the Claimant that the Respondent would repave the driveway by July 30, 2010.
18. The Respondent never returned to the Claimant's property to correct his work.
19. The Claimant filed a claim with the Fund on August 2, 2010. Initially, the claim was for \$4,200.00; however, the Claimant amended the claim to \$3,500.00, on December 11, 2011.

20. The MHIC notified the Respondent of the Claimant's original claim amount and the amended one.
21. On August 14, 2012, the OAH sent a Notice of Hearing by certified and regular first class mail to the Respondent's last business address of record with the DLLR. The Respondent received notice of the hearing.
22. On November 16, 2012, the Respondent sent a letter to the OAH informing the OAH that he would not appear for the hearing and that he had "no objection to [the Claimant] being awarded the money he is asking for." Respondent Ex. 1.

DISCUSSION

The Respondent's Failure to Appear

Neither the Respondent nor anyone authorized to represent the Respondent appeared for the hearing. As noted above, the Respondent received notice of the hearing and elected not to appear. He also does not dispute that the Claimant is entitled to an award from the Fund. Consequently, I directed the hearing to proceed in the Respondent's absence under section 8-312(h) of the Business Regulation Article, section 10-209 of the State Government Article, and Code of Maryland Regulations (COMAR) 09.01.02.07.

Merits of the Case

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. 2012); *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).

There is no dispute that the Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant. The Claimant presented evidence to meet his burden to show that the Respondent performed an unworkmanlike and inadequate home improvement. The Fund does not dispute that the Claimant has met his burden of proof. Also, as evidence by the letter that was sent in by the Respondent to the OAH, Respondent Ex. 1, the Respondent also does not dispute that the Claimant is entitled to an award from the Fund.

The Claimant paid the Respondent to have the Respondent pave the Claimant's driveway. Although the Respondent performed the work, the work required correction. Shortly after the asphalt dried, the Claimant noticed tire marks and indentations throughout the area that the Respondent paved. Despite repeated calls to the Respondent and a willingness on behalf of the Claimant to allow the Respondent some time to repair the work, the Respondent failed to do so. The Claimant solicited a new contractor to perform the repairs; however, the work required is not simply a patch up work, the asphalt the Respondent installed must be removed and the driveway repaved, if not, the surface of the driveway would be uneven and lack uniformity.

Having found that the Claimant is eligible for compensation, I now turn to the amount of the award, if any. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. COMAR 09.08.03.03B(1). MHIC's regulations offer three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). One of those formulas, as follows, offers an appropriate measurement in this case, since the Claimant has solicited another contractor to correct the work:

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.

COMAR 09.08.03.03B(3)(c).

Applying the formula set out above, I find that the Claimant sustained an actual loss as follows:

Amount Paid to the Respondent	\$3,500.00
Amount to Correct Work	<u>+\$4,200.00</u>
	\$7,700.00
Amount of Original Contract	<u>-\$3,500.00</u>
Amount of Actual Loss	\$4,200.00

The Claimant's actual loss in this matter exceeds the amount of the original contract; however, the Claimant is entitled to only a portion of his actual loss from the Fund. Pursuant to Md. Code Ann., Bus. Reg. §8-405 (e)(1) and (5) (Supp. 2012), the maximum recovery from the Fund is limited to the lesser of \$20,000.00 or the amount paid by or on behalf of the Claimant to the Respondent. The Claimant paid \$3,500.00 to the Respondent, which is less than his actual loss computed using the formula noted in COMAR 09.08.03.03B(3)(c). Hence, the Claimant is entitled to reimbursement in the amount of \$ 3,500.00 from the Fund.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Claimant has suffered an actual and compensable loss of \$3,500.00 and is entitled to be compensated for the acts or omissions of the Respondent. Md. Code Ann., Bus. Reg. §§ 8-401 and 8-405(e)(5) (2010 & Supp. 2012); COMAR 09.08.03.03B(3)(c).

RECOMMENDED ORDER

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

ORDER that the Claimant be awarded \$3,500.00 from the Maryland Home Improvement Guaranty Fund;

ORDER that the Respondent be 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 (10%) as set by the 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

February 27, 2013
Date Decision Mailed


Yolanda L. Curtin
Administrative Law Judge

YLC/kkc
#140835

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FILE EXHIBIT LIST

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PROPOSED ORDER

WHEREFORE, this 18th day of April 2013, Panel B of the Maryland Home Improvement Commission approves the Recommended Order of the Administrative Law Judge and unless any parties files with the Commission within twenty (20) days of this date written exceptions and/or a request to present arguments, then this Proposed Order will become final at the end of the twenty (20) day period. By law the parties then have an additional thirty (30) day period during which they may file an appeal to Circuit Court.

J. Jean White

*I. Jean White
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION