

IN THE MATTER OF THE CLAIM OF
ANDREA SHIPLEY,
CLAIMANT
v.
THE MARYLAND HOME
IMPROVEMENT COMMISSION
GUARANTY FUND FOR THE
ALLEGED ACTS OR OMISSIONS OF
JOHNNY NICHOLS, t/a JOHNNY
NICHOLS,
RESPONDENT

* BEFORE NEILE S. FRIEDMAN,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH Case No.: DLR-HIC-02-12-23317
* MHIC Case No.: 11 (90) 50
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RECOMMENDED DECISION

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STATEMENT OF THE CASE

On October 12, 2010, the Claimant filed a claim for reimbursement from the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for losses allegedly incurred as a result of the inadequate, incomplete or unworkmanlike home improvement performed by Johnny Nichols, t/a Johnny Nichols (Respondent). On May 15, 2012, the MHIC ordered a hearing to allow the Claimant to prove her claim.

On November 7, 2012, I conducted a hearing at the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407 (2010 & Supp. 2012). The Claimant represented herself. The Respondent represented himself. Kris King, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR), represented the Fund.

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 for the Claimant:

Clmt. Ex. 1: Package of Photographs

Clmt. Ex. 2: Contract with Respondent

Clmt. Ex. 3: Package of Checks.

Clmt. Ex. 4: Proposal from RB Paving and Striping

The Respondent did not offer any documents into the record.

I admitted the following exhibits for the Fund:

Fund Ex. 1: May 15, 2012 Hearing Order

Fund Ex. 2: Respondent's licensing information

Fund Ex. 4: October 10, 2010 MHIC Claim Form

Fund Ex. 5: MHIC's November 4, 2010 letter to the Respondent

Testimony

The Claimant testified on her own behalf and did not present any other witnesses. The Respondent presented his son, Russell A. Nichols, as his only witness. 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 a licensed home improvement contractor with MHIC. His most recent license, No. 45256, was issued on March 21, 2012 and was to expire on November 13, 2012.
2. On or around September 12, 2008, the Claimant entered into a contract with the Respondent's company, through the Respondent's son, to patch the Claimant's existing driveway as needed, pave with two inches of hot asphalt and finally to seal the Claimant's driveway at 14826 View Way Ct., Glenelg, Maryland (the Property). The total contract price was \$6,300.00.
3. The Respondent's son and a crew performed the work at the Property on or about September 15, 2008.
4. The Claimant paid the Respondent the total amount due--\$6,300.00.
5. The crew did not apply 2" of hot asphalt consistently. In some places, only ¼" was applied. The Respondent left the paved driveway entrance to the garage 1" higher than the garage so water is not able to flow out of the garage.

6. Within days stones and chunks of asphalt started to fall out from the driveway; and then holes appeared. The driveway's condition has gotten worse over time.
7. The Claimant attempted to phone the Respondent many times but the Respondent did not return her phone calls.
8. After the Claimant filed her complaint with the MHIC, the Respondent called and said he would make the driveway look like new, but he never showed up to fix the driveway and did not return the Claimant's calls to find out why he failed to show up.
9. The Claimant has been unable to get anyone else to repair the driveway because they do not trust the integrity of the asphalt base provided by the Respondent. Contractors insist on ripping out the driveway and starting over.
10. The Claimant has obtained a proposal from RB Paving & Striping, MHIC License No. 511933, to remove the existing surface and to re-pave with a 2" compacted depth surface asphalt. The total cost of the proposal is \$6,700.00.

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. 2011); *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 Claimant contracted with the Respondent to perform work at the Property and that the cost of the home improvement contract, \$6,300.00, was paid in full to the Respondent by the Claimant. The dispute between the parties centers on the relative quality (or lack thereof) of the work performed by the Respondent. The Claimant provided evidence

demonstrating that within days of the work, stones and chunks of asphalt started to fall out from the driveway; and then holes appeared. The Claimant showed photographs corroborating her credible testimony that the driveway's deteriorating condition has gotten worse over time and that these defects are visible to the naked eye.

The Respondent conceded that the driveway's condition is unusual and in need of repair and that it will get worse over time. He also conceded that the driveway should slope down so that water leaves the garage. He further stated that, if the driveway was ¼" thick in some areas as the Claimant stated, she did not get what she paid for. He blamed much of the problem on the prior condition of the driveway, but he did not give real specifics on what was wrong with the driveway before he started construction, and he did not explain why, if the driveway was in poor shape when the Respondent contracted with the Claimant to perform the work, he never mentioned this to the Claimant or addressed the problems. In any event, any failure to address known defects in the Claimant's driveway was an omission that also resulted in an actual loss to the Claimant.

The Claimant and the Fund both argued – and I agree – that the Respondent's work was inadequate and unworkmanlike. The Claimant's driveway has deteriorated and will get worse; the Respondent agrees work needs to be done—in his estimation, having not seen the property in several years, it will cost \$3,000.00 to fix the problems. 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:

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	\$6,300 .00
Amount Paid to Correct or Complete Work	<u>+\$6,700.00</u>
	\$13,000.00
Amount of Original Contract	<u>-\$6,300.00</u>
Amount of Actual Loss	\$6,700.00

However, the Claimant is entitled to only a portion of her actual loss from the Fund.

Pursuant to Md. Code Ann., Bus. Reg. §8-405 (a) and (d) (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 \$6,300.00 to the Respondent, which is less than her actual loss computed using the formula noted in COMAR 09.08.03.03B(3)(C). Therefore, the Claimant is entitled to reimbursement in the amount of \$6,300.00 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 loss of \$6,300.00 and is entitled to be compensated for that amount as a result of the acts or omissions of the Respondent. Md. Code Ann., Bus. Reg. §§ 8-401 (2010); COMAR 09.08.03.03B(3).

RECOMMENDED ORDER

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

ORDER that the Claimant be awarded \$6,300.00 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

December 12, 2012
Date Decision Mailed

Neile S. Friedman
Administrative Law Judge

NSF/kkc
#139215

PROPOSED ORDER

WHEREFORE, this 26th day of February 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.

Marilyn Jumalon

*Marilyn Jumalon
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION