

IN THE MATTER OF THE CLAIM	* BEFORE NANCY E. PAIGE,
OF HAZEL LUCAS,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	*
FOR THE ALLEGED ACTS OR	*
OMISSIONS OF	*
JOSEPH MARINI,	*
T/A JOSEPH MARINI ASPHALT	*
PAVING,	* OAH No.: DLR-HIC-02-17-02750
RESPONDENT	* MHIC No.: 16 (90) 1114

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On August 9, 2016, Hazel Lucas (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$2,200.00 in alleged actual losses suffered as a result of a home improvement contract with Joseph Marini, T/A Marini Asphalt Paving (Respondent).

On March 7, 2017, I convened the hearing in this matter at the Leonardtown Public Library in Leonardtown, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015).¹ The Claimant appeared and represented herself. Eric B. London, Assistant Attorney General (AAG), Department of Labor, Licensing and Regulation (Department), appeared to represent the Fund. The Respondent appeared and represented himself.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the Office of Administrative Hearings (OAH) govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2016); Code of Maryland Regulations (COMAR) 09.01.03; COMAR 28.02.01.

ISSUES

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

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the Fund:

- GF Ex. 1 - February 3, 2017 Notice of Hearing
- GF Ex. 2 - January 20, 2017 Hearing Order
- GF Ex. 3 - February 13, 2017 licensing history for Respondent
- GF Ex. 4 - August 4, 2016 Home Improvement Claim Form, received August 9, 2016
- GF Ex. 5 - August 18, 2016 letter from Department to Respondent

¹ Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 volume.

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

Clmt. Ex. 1 - A-Q Photographs

Clmt. Ex. 2 - August 4, 2016 Proposal of Asphalt Specialists, Inc.

Clmt. Ex. 3 - September 10, 2015 check from Claimant to Respondent for \$2,200.00

The Respondent did not offer any exhibits.

Testimony

The Claimant testified in her own behalf.

The Respondent testified in his own behalf.

The Fund presented no witnesses.

PROPOSED FINDINGS OF FACT

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

1. At all times relevant to this hearing, the Respondent was a licensed home improvement contractor operating under MHIC registration number 01-7363.
2. On August 1, 2015, the Claimant and the Respondent entered into an oral contract to pave a parking pad adjacent to the carport of the Claimant's home (Contract).
3. The Respondent had previously paved the Claimant's driveway and carport to the Complainant's complete satisfaction.
4. The agreed-upon contract price was \$2,200.00.
5. The work was completed and the Respondent was paid on September 10, 2015.
6. Three weeks later, grass or weeds came through the new paving.
7. On or about October 5, 2015, the Claimant contacted the Respondent and advised that grass was coming through the new paving and that it appeared thin to her. The Respondent stated that he would come to look at it on October 10 or 11. He did not.

8. On October 12, 2015, the Claimant called the Respondent again. The Respondent told the Claimant to spray Round-Up on the grass/weeds. Her husband did so.

9. After the winter of 2015-16, a number of rounded lumps appeared in the paving. In late March, grass/weeds began growing out of the lumps. The growth increased throughout the spring and summer of 2016.

10. The Claimant attempted to contact the Respondent on a number of occasions, but he did not respond.

11. On August 4, 2016, the Claimant secured a proposal from Asphalt Specialist, Inc., a licensed HIC contractor, to remove and replace the pavement installed by the Respondent for \$2,670.00.

DISCUSSION

In this case, the Claimant has the burden of proving the validity of her claim by a preponderance of the evidence. Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3).² “[A] preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces . . . a belief that it is more likely true than not true.” *Coleman v. Anne Arundel Cty. Police Dep't.*, 369 Md. 108, 125 n. 16 (2002), quoting Maryland Pattern Jury Instructions 1:7 (3rd ed. 2000).

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) (2015); *see also* COMAR 09.08.03.03B(2) (“actual losses . . . incurred as a result of misconduct by a licensed contractor”). Actual loss “means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.”

² As noted above, “COMAR” refers to the Code of Maryland Regulations.

Id. at § 8-401. For the following reasons, I find that the Claimant has proven eligibility for compensation.

The Respondent was a licensed home improvement contractor at the time he entered into the Contract to perform work on the Claimant's driveway. There is no dispute that grass or weeds grew through the asphalt installed by the Respondent beginning within three weeks of completion of the work. The Respondent testified that he performed the work in accordance with applicable standards of the trade and that the plants growing through the asphalt are an invasive species that sends runners under the pavement which then find their way through the asphalt. He said he is prevented by environmental regulations from using an effective weed killer or barrier under the pavement and that it is not his fault that the weeds came through.

I take notice that many private driveways and parking pads exist throughout the area in which the Claimant's home is located (as well as elsewhere in Maryland) without weeds coming through the pavement. This includes the Claimant's adjoining driveway installed earlier by the Respondent. I also take notice that it is reasonable to expect new paving to last more than six or seven months without being cracked and pierced with weeds. While the Claimant did not produce an expert to identify exactly what the Respondent did or failed to do that resulted in destruction of a large portion of the Claimant's parking pad within six months or less, common experience leads me to reasonably infer that a properly installed asphalt surface would not be subject to such destruction in such a short period of time. I therefore find that the preponderance of the evidence supports the conclusion that the Respondent performed an unworkmanlike and inadequate home improvement in installing the parking pad. I conclude, therefore, that the Claimant is eligible for compensation from the Fund.

Having found eligibility for compensation I now turn to the amount of the award, if any, to which the Claimant is entitled. 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 provide three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). The following formula offers an appropriate measurement to determine the amount of actual loss 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).

In August 2016, the Claimant obtained a bid from another licensed paving company to remove and replace the asphalt installed by the Respondent in the amount of \$2,670.00. The proposal included \$950.00 to remove the existing asphalt and subsoil "as needed," \$620.00 to install and compact stone to a depth of four inches, and \$1,100.00 to install four inches of asphalt. Even assuming that no more than half of the excavation cost is attributable to removing and disposing of the materials installed by the Respondent, the proposal for the new work is very close to, and possibly less than, the amount charged by the Respondent. I therefore find that it is a reasonable price.

Using the above formula, the actual loss suffered by the Claimant is calculated as follows:

Amount paid by the Claimant to the Respondent:	\$2,200.00
Cost to replace the defective work:	<u>+\$2,760.00</u>
	\$4,960.00
Less original contract price	<u>-\$2,200.00</u>
	\$2,760.00

I therefore conclude that the Claimant's actual loss is \$2,760.00.

Pursuant to the applicable law, 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. Md. Code Ann., Bus. Reg. § 8-405(e)(1), (5). The Claimant paid \$2,200.00 to the Respondent, which is less than her actual loss of \$2,760.00. Accordingly, the Claimant is entitled to reimbursement of \$2,200.00. *Id.* at § 8-405(a).

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss as a result of the Respondent's acts and omissions. I further conclude that the amount of the actual and compensable loss is \$2,200.00. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405; COMAR 09.08.03.03B(3)(c).

RECOMMENDED ORDER

I RECOMMEND that the Maryland Home Improvement Commission:

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$2,200.00; and

ORDER that 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 ten percent (10%) as set by the Maryland Home Improvement Commission;³ and

³ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

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

Signature on File

April 21, 2017
Date Decision Issued

Nancy E. Paige
Administrative Law Judge

NEP/emh
#167214

PROPOSED ORDER

WHEREFORE, this 22nd day of May, 2017, 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.

Joseph Tunney

***Joseph Tunney, Chairman
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION