IN THE MATTER OF THE CLAIM	*	BEFORE WILLIS GUNTHER BAKER,
OF CINDY & KENNETH	*	AN ADMINISTRATIVE LAW JUDGE
MCCAWLEY,	*	OF THE MARYLAND OFFICE
CLAIMANTS	*	OF ADMINISTRATIVE HEARINGS
AGAINST THE MARYLAND HOME	*	
IMPROVEMENT GUARANTY FUND	*	
FOR THE ALLEGED ACTS OR	*	
OMISSIONS OF STEFANIE	*	OAH No.: LABOR-HIC-02-22-28198
PETROVITCH, T/A PETROS PAVING	*	MHIC No.: 22 (75) 1287
AND SEALCOATING,	*	
RESPONDENT	*	

* * * * * * * * * * * * *

PROPOSED DECISION

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

STATEMENT OF THE CASE

On August 23, 2022, Cindy and Kenneth McCawley (Claimants) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)[1] Guaranty Fund (Fund) for reimbursement of $ 6,255.00 for actual losses allegedly suffered as a result of a home improvement contract with Stefanie Petrovitch, trading as Petros Paving and Sealcoating

[1] The MHIC is under the jurisdiction of the Department of Labor (Department).

(Respondent).[2] Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2022).[3] On October 26, 2022, the MHIC issued a Hearing Order on the Claim. On November 7, 2022, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On February 3, 2023, I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. John Hart, Assistant Attorney General, Department, represented the Fund. The Claimant was self-represented. The Respondent was self-represented.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the OAH govern procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021); 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 the compensable loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits offered by the Claimant:

Clmt. Ex. 1 - Respondent's Estimate to remove and replace section of driveway and patio, May 25, 2021

Clmt. Ex. 2 - Contract between parties for removal and replacement of driveway and patio, May 25, 2021

Clmt. Ex. 3 - Copies of the Claimants' tendered checks, #5473, #5474, and #5475

Clmt. Ex. 4 - Photograph of the Claimant's driveway, January 18, 2023

[2] The Claimants had no interaction with Stefanie Petrovitch. They only interacted with her husband Peter Petrovitch who is an employee and was on site performing the Contract. Therefore, any reference to "Respondent" will include Peter Petrovitch.

[3] Unless otherwise noted, all references to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.

Clmt. Ex. 5A-G -Photographs of the Claimant's driveway taken January 18, 2023

Clmt. Ex. 6 - BMS Lawn & Landscape, LLC (BMS) Estimate, August 1, 2022

Clmt Ex. 7 - Respondent's Mailer advertisement, May 1, 2022

Clmt. Ex. 8 - Five close up photographs of driveway taken around March or April 2022

Clmt. Ex. 9 - Text messages between the parties, April 4-15, 2022

I admitted the following exhibits offered by the Fund:

Fund Ex. 1 - OAH Hearing Notice, December 7, 2022

Fund Ex. 2 - Hearing Order, October 26, 2022

Fund Ex. 3 - Cover Letter and Claim Form sent to the Respondent, August 31, 2022

Fund Ex. 4 - Respondent's MHIC Licensure, printed February 2, 2023

Fund Ex. 5 - BMS's MHIC Licensure, printed February 2, 2023

The Respondent did not offer any exhibits.

Testimony

The Claimants testified and did not present other witnesses.

The Respondent's husband, Peter Petrovitch, testified on behalf of the Respondent.

The Fund did not present any witnesses.

PROPOSED 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.

2. On May 24, 2021, the Claimant and the Respondent entered into a contract to excavate and replace a 18' x 15' concrete patio and a 25' x 10' section of driveway, apply a minimum of 4" of RC6 stone, mesh, and rebar, covered with 4" of 4000 PSI concrete, graded for drainage and flush with walkway and existing driveway with a one year guarantee (Contract).

3. The original agreed-upon Contract price was $11,550.00.

4. The Claimant paid the Respondent $3,500.00 on May 24, 2021, $3,500.00 on May 28, 2021, and $4,550.00 on June 2, 2021. The Respondent tendered all three checks.

5. The work on the Contract was completed in June 2021.

6. There was no issue with the patio that was constructed by the Respondent under the Contract.

7. In February 2022 the Claimants noticed that the concrete on the driveway had started crumbling and called the Respondent on February 22, 2022.

8. The Respondent indicated that he was out of town but would meet them at their home on March 3, 2022 at 11:00 a.m. The Respondent did not appear on March 3, 2022.

9. The meeting was rescheduled for March 5, 2022 at 8 a.m. The Respondent did not call and did not appear. The Claimants called the Respondent twice but did not receive a call back.

10. On March 31, 2022, the Respondent called the Claimants and scheduled a meeting at their home for April 1, 2022.

11. On April 1, 2022, the parties met at the Claimants' home and the Respondent observed the driveway and stated that the concrete was scaling.

12. The Respondent represented that he would be willing to replace or resurface part of the driveway, would provide an additional one year warranty, and would send the Claimants an email with the warranty document on April 2, 2022.

13. On April 15, 2020, the Respondent sent the Claimants an invoice with a $0 balance, but did not send a new one year warranty. The Claimants texted the Respondent to ask when the work would be done and reminded the Respondent that they needed the warranty in

writing. The Respondent replied that the work would be completed "not this week but the following." (Clmt. Ex. 9). The Claimants never heard from the Respondent again.

14. The Claimants' driveway was visibly crumbling, predominantly toward the left and right sides.

15. The Claimants received an estimate from BMS, an MHIC licensed contractor, to remove and replace the concrete driveway installed by the Respondent at a cost of $6,255.00. The repair work has not been undertaken.

16. The Claim was timely filed, there is no pending court claim for the same loss, the Claimants did not recover the loss from any other source, and the parties did not have an arbitration agreement. The Claimants reside in the home that is the subject of the Claim. The Claimants are not a relative, employee, officer, or partner of the Respondent, and are not related to any employee, officer, or partner of the Respondent. The Claimants did not unreasonably reject good faith efforts by the Respondent to resolve the claim.

DISCUSSION

The Claimants have the burden of proving the validity of the Claim by a preponderance of the evidence. Bus. Reg. § 8-407(e)(1); State Gov't § 10-217; COMAR 09.08.03.03A(3). To prove a claim by a preponderance of the evidence means to show that it is "more likely so than not so" when all the evidence is considered. *Coleman v. Anne Arundel Cnty. Police Dep't*, 369 Md. 108, 125 n.16 (2002).

An owner may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor." Bus. Reg. § 8-405(a) (Supp. 2022); *see also* COMAR 09.08.03.03B(2) ("The Fund may only compensate claimants for actual losses . . . incurred as a result of misconduct by a licensed contractor."). "'[A]ctual loss' means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or

incomplete home improvement." Bus. Reg. § 8-401. For the following reasons, I find that the Claimants have proven eligibility for compensation.

The Respondent was a licensed home improvement contractor at the time the Respondent entered into the Contract with the Claimants and is therefore a participant in the Fund. However, by statute, certain claimants are excluded from recovering from the Fund altogether. In this case, there are no such statutory impediments to the Claimant's recovery. The claim was timely filed, there is no pending court claim for the same loss, and the Claimants did not recover the alleged losses from any other source. Bus. Reg §§ 8-405(g), 8-408(b)(1) (2015 & Supp. 2022). The Claimants reside in the home that is the subject of the claim or do not own more than three dwellings. *Id.* § 8-405(f)(2) (Supp. 2022). The parties did not enter into a valid agreement to submit their disputes to arbitration. *Id.* §§ 8-405(c), 8-408(b)(3) (2015 & Supp. 2022). The Claimants are not a relative, employee, officer, or partner of the Respondent, and are not related to any employee, officer, or partner of the Respondent. *Id.* § 8-405(f)(1) (Supp. 2022). The Claimants did not unreasonably reject good faith efforts by the Respondent to resolve the claim. *Id.* § 8-405(d) (Supp. 2022). In fact, the Claimants made many efforts to allow the Respondent to make repairs, but the Respondent never came back and ceased communications with the Claimants.

The Claimants testified and provided photographs of the condition of their driveway within eight months following the completion of the Contract. There was visible deterioration throughout the driveway. The Claimants also provided recent photographs that show the deterioration has worsened. The Claimants denied using any chemicals, including ice melt or salt, and denied parking a car on the driveway before advised to do so, but stated that it just started to crumble. They testified regarding the contacts they made with the Respondent and

how he failed to show for scheduled meetings. Once the Respondent showed up and stated he would make repairs, they never saw him again.

The Respondent agreed that the top layer of the concrete was scaling and that he intended to resurface, but when he showed pictures to his subcontractor that does his resurfacing, he was told it might not work. If the resurface would not fix the issue, he testified that it would require removal and replacement. The Respondent conceded that he never contacted the Claimants to have a conversation after he decided not to resurface, never provided a new or extended warranty, and never returned to the Claimant's property. He also agreed that the BMS estimate was a fair estimate to remove and replace the concrete and was in line with his price.

The Respondent claimed that the scaling was a result of chemicals coming down the downspout and flowing down the driveway, but provided no evidence that substantiated the claim and no explanation of why both sides of the driveway showed a similar deterioration when there was no downspout on the left side of the driveway. The Respondent told the Claimants that there could have been a problem with the concrete and that he would speak to the concrete supplier, but admitted at the hearing that he never did. The concrete pour for the patio and driveway were from the same batch of concrete.

I find that the Respondent performed unworkmanlike, inadequate, or incomplete home improvements. There is no question that the driveway showed deterioration within the warranty period and began crumbling within eight months of its construction. The Respondent characterized the deterioration as normal scaling that did not indicate any flaws, but the photographs demonstrate that this was not a minor flaking of the concrete, but a crumbling surface that was bound to continue to worsen. The Respondent offered to resurface the driveway or make other repairs and offered to provide an additional one year warranty, but never returned to the Claimant's home and never responded to their attempts to contact him.

The Fund argued that the driveway should not have deteriorated so quickly, and that replacement of the concrete was a reasonable repair. The Fund provided evidence that BMS was licensed. Based on the foregoing, I find that the Claimants are eligible for compensation from the Fund.

Having found eligibility for compensation I must determine the amount of the Claimant's actual loss and the amount, if any, that the Claimant is entitled to recover. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney fees, court costs, or interest. Bus. Reg. § 8-405(e)(3) (Supp. 2022); COMAR 09.08.03.03B(1). MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work.

The Respondent performed some work under the Contract, and the Claimants intend to retain another contractor to complete or remedy that work. Accordingly, the following formula appropriately measures the Claimant's actual loss:

> 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).

The Respondent completed the driveway and the Claimants paid the full contract amount of $11,550.00.[4] By the Respondent's own acknowledgement, the driveway began deteriorating and the concrete needs to be replaced because the Respondent concluded that a resurface was not

[4] The original contract also included the patio, that is not part of the claim. The Contract did not separate the cost of the two items.

feasible. The Claimants received an estimate from BMS, a MHIC licensed contractor, to replace the concrete at a cost of $6,255.00. The Respondent testified that this was a reasonable estimate and the Fund argued that it was reasonable as well. Therefore, I find the Claimants' actual loss is $6,255.00.

Effective July 1, 2022, a claimant's recovery is capped at $30,000.00 for acts or omissions of one contractor, and a claimant may not recover more than the amount paid to the contractor against whom the claim is filed.[5] Bus. Reg. § 8-405(e)(1), (5) (Supp. 2022); COMAR 09.08.03.03B(4). In this case, the Claimant's actual loss is less than the amount paid to the Respondent and less than $30,000.00. Therefore, the Claimant is entitled to recover their actual loss of $6,255.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of $ 6,255.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2022) ; COMAR 09.08.03.03B(3)(c). I further conclude that the Claimant is entitled to recover that amount from the Fund. Bus. Reg. § 8-405(e)(1), (5) (Supp. 2022); COMAR 09.08.03.03B(4).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant $6,255.00; and

[5] On or after July 1, 2022, the increased cap is applicable to any claim regardless of when the home improvement contract was executed, the claim was filed, or the hearing was held. *See Landsman v. MHIC*, 154 Md. App. 241, 255 (2002) (explaining that the right to compensation from the Fund is a "creature of statute," these rights are subject to change at the "whim of the legislature," and "[a]mendments to such rights are not bound by the usual presumption against retrospective application").

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;[6] and

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

Willis Gunther Baker

April 21, 2023
Date Decision Issued

Willis Gunther Baker
Administrative Law Judge

WGB/emh
#204495

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

PROPOSED ORDER

WHEREFORE, this 26th day of June, 2023, 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.

Lauren Lake

Lauren Lake
Panel B
MARYLAND HOME IMPROVEMENT COMMISSION