

IN THE MATTER OF THE CLAIM OF	* BEFORE D. HARRISON PRATT,
LIAQUAT SHAFI AGAINST THE	* AN ADMINISTRATIVE LAW JUDGE
MARYLAND HOME	* OF THE MARYLAND OFFICE
IMPROVEMENT GUARANTY FUND	* OF ADMINISTRATIVE HEARINGS
FOR THE ALLEGED ACTS OR	* OAH NO.: DLR-HIC-02-10-02598
OMISSIONS OF CHRIS MCAFEE, T/A	* MHIC NO.: 08 (05) 1053
MCAFEE ASPHALT	*
	*

* * * * *

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 April 24, 2008, Liaquat Shafi (Claimant)¹ filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$2,500.00 for losses allegedly suffered as a result of a home improvement contract with Chris McAfee, T/A McAfee Asphalt (Respondent).

I held a hearing on June 4, 2010 at the Washington County Office Building, 33 West Washington Street in Hagerstown, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407(c)(2)(i) (2010). Eric London, Assistant Attorney General, Department of Labor, Licensing

¹ The Fund has titled this case in the name of Manzar and Liaquat Shafi, who are husband and wife. However, the contract with the Respondent and the claim form filed with the Fund are signed by Liaquat Shafi only.

and Regulation (Department), represented the Fund. The Claimant was present at the hearing and represented himself. Although served with a copy of the OAH Notice of Hearing, the Respondent failed to appear for the hearing.²

Procedure in this case is governed by the Administrative Procedure Act, the procedural regulations of the Department, and the Rules of Procedure of the Office of Administrative Hearings. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009), Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02.01, and 28.02.01.

ISSUE

The issues are:

1. Whether the Claimant sustained an actual loss compensable by the Fund as a result of the Respondent's acts or omissions, and if so
2. What if any award from the Fund should be made to the Claimant.

SUMMARY OF THE EVIDENCE

Exhibits

The Fund submitted the following documents that were admitted into evidence:

Fund Ex. #1 OAH Notice of Hearing with certified mail receipts attached.

Fund Ex. #2 The Fund's Hearing Order.

Fund Ex. #3 Respondent's licensing history.

Fund Ex. #4 The Claimant's Home Improvement Claim Form.

Fund Ex. #5 Letter from the Fund to the Respondent, May 7, 2008.

The Claimant submitted the following documents that were admitted into evidence:

Claimant #1 Estimate/Proposal from the Respondent, September 24, 2007.

Claimant #2a – 2f Photographs of area excavated by the Respondent.

² The OAH Notice of Hearing was mailed to the Respondent by certified mail, return receipt requested, on March 2, 2010. The return receipt was signed by the Respondent on March 16, 2010.

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|-------------------|--|
| Claimant #3a – 3g | Photographs of debris left by the Respondent. |
| Claimant #4 | Letter from the Claimant's attorney to the Respondent, October 29, 2007. |
| Claimant #5 | Letter from the Claimant's attorney to the Claimant, December 4, 2007. |
| Claimant #6 | Proposal from Robert Martz General Contractor (Martz), April 9, 2008. |
| Claimant #7 | Receipt from Martz showing payment by the Claimant, July 15, 2008. |

The Respondent did not submit any exhibits.

Testimony

The Claimant testified on his own behalf. Roger Martz, of Roger Martz General Contractor, testified on behalf of the Claimant. There were no witnesses on behalf of the Fund or the Respondent.

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 01-88444.
2. On or about September 24, 2007, the Claimant and the Respondent entered into a contract wherein the Respondent agreed to resurface the Claimant's driveway, repair or replace several roof shingles, and level out a portion of the Claimant's yard so that water would not drain into the Claimant's basement. The original agreed-upon contract price was \$4,500.00, \$500.00 of which was for the leveling of the yard. Initially, the Respondent offered to complete the contract for \$5,000.00; he agreed however, to accept \$4,500.00 if the Claimant paid in cash.
3. On September 25, 2007, the Claimant paid the Respondent the full contract price

of \$4,500.00.

4. The Respondent completed the driveway and shingle portion of the contract without incident and the Claimant is not making any allegations of improper work concerning this portion of the contract.
5. While excavating the Claimant's yard to allow water to run away from the house rather than toward the house, the Respondent damaged several drainage pipes that were under the surface of the Claimant's yard. The Claimant had informed the Respondent of the existence of these pipes. Additionally, the Respondent damaged a downspout on the Claimant's house. The soil removed during the excavation was deposited on another portion of the Claimant's property.
6. While working on property next to the Claimant, the Respondent deposited debris from that other property onto the Claimant's property. The Claimant had to have the debris removed by someone other than the Respondent.
7. The Respondent agreed with the Claimant that he would return to the Claimant's property and "fix" the damage to the drainage pipes, fill in the excavated portion of the lawn, and reseed.
8. The Respondent never returned to fix the damage or to complete the contract.
9. On April 9, 2008, the Claimant hired Martz to complete the Respondent's contract and to repair the damage he had caused. The Claimant paid Martz \$2,500.00 for his work. Martz is a licensed home improvement contractor in the state of Maryland, license #45675.

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) (2010). *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 find that the Claimant has proven that he has sustained an actual loss as the result of the acts and omissions of the Respondent.

I begin by noting that Claimant has no complaints about the work the Respondent did on the driveway or the shingles. His only complaint concerns the failure of the Respondent to complete the grading work and his damage to the drain pipes.³ The contract between the Claimant and the Respondent could certainly have been more precise. A note on the side of the contract says, "I will give you piece on side of house if get my money first or shingles." The contract also indicates that the cost for the "add on" is \$500.00. The "piece on side" and the "ad on" are the same thing and refer to the leveling of the Claimant's yard to preclude water run off into the basement.

From the Claimant's testimony and the photographs he presented, it is obvious that the drainage pipes that were beneath the surface of his lawn were damaged when the Respondent excavated the yard to make it level with the slab leading to the back of the house. The drainage pipes are not salvageable. The Claimant testified credibly that he informed the Respondent of the existence of the pipes. Furthermore, in spite of promising the Claimant that he would return and fix the damage and complete the grading, the Respondent never returned.

In April 2008, the Claimant hired Martz to complete the grading job. Martz installed new drainage pipes and completed the grading. He charged the Claimant \$2,500.00 for his work, which the Claimant paid in full. According to Martz, the cost of the new drainage pipes was

³ Although the Claimant discussed the debris left by the Respondent from his work on the neighbor's property, any cost for removing this debris would be consequential damage and not recoverable from the Fund. COMAR 09.08.03.03B(1)(A).

\$40.00. Martz also testified that the cost for the grading work as stated by the Respondent, *i.e.* \$500.00, was much too low and that such a project would actually cost at least \$1,000.00. Additionally, the contract with Martz included providing five tons of top soil to complete the grading. The contract with the Respondent makes no mention of needing any additional top soil. Finally, the contract with Martz calls for replacing rock, and although the Claimant testified that providing this rock was part of the Respondent's contract, that contract makes no mention of it. Nevertheless, pursuant to the testimony of Martz, I find that the Respondent significantly underestimated the actual cost of completing the grading work. I accept Martz's figure of \$2,500.00 for this work (less \$40.00 for new pipes, explained later) as the actual, fair and reasonable value of this work and should have been the original price for this.

The Claimant certainly sustained an actual loss as the result of the Respondent not completing the grading work. He also sustained a loss when the Respondent destroyed the drainage pipes and damaged the downspout. However, I find that the cost for the replacement of the downspout and the replacement of the drainage pipes are consequential damages and therefore not recoverable from the Fund. COMAR 09.08.03.03B(1)(a). There is no evidence that Martz charged for the repair or replacement of the downspout. He did testify that the cost of the drainage pipe was \$40.00 and therefore this amount should be deducted from any award to the Claimant.

The appropriate formula for calculating the Claimant's loss is found at COMAR 09.08.03.03B(3)(c), which provides 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.

The Claimant's actual loss is calculated thus:

Amount paid to Respondent	\$4,500.00
Amount paid to Martz,	<u>2,500.00</u>
	\$7,000.00
Less original contract price	<u>-4,500.00</u>
	\$2,500.00
Less \$40.00 for new drainage pipe	<u>40.00</u>
Claimant's actual loss	\$2,460.00

CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual loss of \$2,460.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2010).

RECOMMENDED ORDER


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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$2,460.00; and

ORDER that the Respondent is ineligible for a Maryland Home Improvement Commission license until he reimburses the Guaranty Fund for all monies disbursed under this Order plus annual interest of at least ten percent as set by the Maryland Home Improvement 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.

August 23, 2010
Date decision mailed


D. Harrison Pratt
Administrative Law Judge

IN THE MATTER OF THE CLAIM OF	* BEFORE D. HARRISON PRATT,
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OMISSIONS OF CHRIS MCAFEE, T/A	* MHIC NO.: 08 (05) 1053
MCAFEE ASPHALT	*
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FILE EXHIBIT LIST

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- Claimant 2a – 2f Photographs of area excavated by the Respondent.
- Claimant 3a – 3g Photographs of debris left by the Respondent.
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- Claimant 5 Letter from the Claimant's attorney to the Claimant, December 4, 2007.
- Claimant 6 Proposal from Robert Martz General Contractor (Martz), April 9, 2008.
- Claimant 7 Receipt from Roger Martz showing payment by the Claimant, July 15, 2008.

The Respondent did not submit any exhibits.

PROPOSED ORDER

WHEREFORE, this 5th day of October 2010, 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.

James Chiracol

James Chiracol

Panel B

MARYLAND HOME IMPROVEMENT COMMISSION