

IN THE MATTER OF THE CLAIM
OF JONAS GRIFFIN,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF HOWARD HARRISON
T/A HOWARD HARRISON PAVING,
RESPONDENT .

* BEFORE DANIEL ANDREWS,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
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* OAH No.: DLR-HIC-02-17-16524
* MHIC No.: 17 (90) 397

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PROPOSED DECISION

STATEMENT OF THE CASE
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STATEMENT OF THE CASE

On November 3, 2016, Jonas Griffin (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of alleged actual losses suffered as a result of a home improvement contract with Howard Harrison, trading as Howard Harrison Paving (Respondent).

I held a hearing on August 3, 2017, at 10:00 a.m., at the Department of Natural Resources, Tawes State Office Building, Room C-1B, 580 Taylor Avenue, Annapolis, Maryland

21401. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015).¹ The Claimant represented himself. Andrew Brouwer, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. After waiting at least fifteen minutes neither the Respondent nor anyone authorized to represent him appeared for the hearing. I proceeded with the hearing after determining that the Respondent had proper notice of the hearing but failed to attend and participate in the hearing. Md. Code Ann., Bus. Reg. § 8-312(h); Code of Maryland Regulations (COMAR) 09.08.03.03A(2).

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. 2017); 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 exhibit into evidence on behalf of the Claimant:

- CL Ex. 1 - A binder of documents which contained the following:
- Contract with Respondent, September 28, 2015 (Initial Contract)
 - Contract with Respondent, November 20, 2016 (Repair Contract)
 - Contract with Respondent, November 20, 2016² (Third Contract)
 - Letter from Claimant to Respondent, August 15, 2016

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

² This contract was a separate contract for work not contained in any prior contracts. Ultimately, the Third Contract had no impact on any claim presented by the Claimant.

- Explanation of Circumstances, undated
- Letter from Claimant to Joseph Tunney, MHIC, November 23, 2016
- Claimant's personal check to Respondent, September 28, 2016
- Claimant's personal check to Respondent, October 11, 2016
- Proposal by AC Paving, LLC, August 9, 2016
- Proposal by Dustin's Driveway's, LLC, August 9, 2016
- E. Stanley Asphalt Paving, Work Agreement, August 9, 2016
- Proposal by Digger's Paving Co., August 8, 2016
- Russell Paving Co., Inc., August 26, 2016
- Case Home Inspections, Inspection Report, July 31, 2017, with several attached photographs
- Series of text messages between Claimant and Respondent, March 15, 2016 through April 14, 2016

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. 1 MHIC Hearing Order, May 23, 2017
- Fund Ex. 2 OAH Notice of Hearing for August 3, 2017, with a mailing date of June 16, 2017
- Fund Ex. 3 MHIC letter to Respondent, November 14, 2016, with attached Home Improvement Claim filed by the Claimant on November 3, 2016
- Fund Ex. 4 MHIC licensing history for the Respondent, print date July 13, 2017
- Fund Ex. 5 MHIC licensing history for Stephanie Cooper, trading as Dustin's Driveway's LLC, print date July 14, 2017
- Fund Ex. 6 MHIC licensing history for Monica Marion Russell trading as Russell Paving Co., Inc., print date July 14, 2017
- Fund Ex. 7 MHIC licensing history for Laura Cooper trading as AC Paving, print date July 14, 2017
- Fund Ex. 8 MHIC licensing history for Carol Lynn Drury trading as Digger's Paving, print date July 14, 2017

Testimony

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

The Fund did not present any witness testimony.

There was no testimony presented on the Respondent's behalf.

PROPOSED FINDINGS OF FACTS

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

1. At all times relevant, the Respondent was a MHIC licensed home improvement contractor under registration number 01-7278. The Respondent's address of record with the MHIC is located on Linda Lane in Millersville, Maryland.³
2. On September 28, 2015, the Claimant entered into a home improvement contract with the Respondent to install an asphalt driveway at the Claimant's home (Initial Contract). The Initial Contract required the Respondent to clean and edge the driveway/parking lot area; install base milling stone; grade all existing stone/dirt to a uniform flatness to allow for water drainage flow; and install three-inches of hot smooth asphalt over the entire area then compact using a power roller to approximately two and half inches in depth.
3. The Initial Contract price was \$8,500.00. The Initial Contract required a \$2,000.00 deposit with the balance of \$6,500.00 due upon completion of contract. The Initial Contract had a one year guarantee on material and labor.
4. The Claimant paid the Respondent the \$2,000.00 deposit on September 28, 2015 by personal check number 162.
5. On or about October 11, 2015, the Respondent began and completed the Initial Contract.
6. On October 11, 2015, the Claimant paid the Respondent the remaining balance of \$6,500.00 by personal check number 164.
7. Within two weeks after the Initial Contract was performed, the Claimant noticed rain water pooling in the parking pad area just in front of the garage. In the late spring of 2016, the

³ For purposes of confidentiality, the Respondent's full address is not provided.

Claimant also observed that the area surrounding the parking lot pad was "peeling up" and the gravel was loosening from the paved surface. In the summer of 2016, the Claimant also observed that in several areas of the driveway the paved asphalt was only one and a half inch thick in contradiction to the Initial Contract requirement of at least two and one-half inch thickness. He also noticed, while facing the garage, the distance of the parking pad from the garage to the outer edge of the pad was approximately forty-eight inches shorter on the far left side than the far right side.

8. Beginning on July 19, 2016 through August 5, 2016, the Claimant called the Respondent, approximately six times, regarding the issues he observed with the work performed by the Respondent. Each time the Claimant called he left a voice mail message and, in response, the Respondent would either fail to return the phone call or he would promise to visit the Claimant's house to evaluate the issues then fail to show up as promised.

9. On August 8, 9, and 26, 2016, the Claimant obtained estimates from several MHIC licensed contractors including AC Paving, LLC; Dustin Driveways, LLC; E. Stanley Asphalt Paving; Diggers's Paving Co.; and Russell Paving Co., Inc. Each contractor offered a proposal to repair and replace the driveway installed by the Respondent. The proposals from these contractors ranged in pricing from \$7,200.00 to \$15,235.00.

10. On August 15, 2016, the Claimant mailed the Respondent a letter which explained the issues he observed with the work performed by the Respondent and included the dates the Claimant attempted to contact the Respondent to seek a resolution. Through the letter, the Claimant informed the Respondent that he had until August 30, 2016 to evaluate the issues with driveway and until September 30, 2016 to fix those issues. The Claimant further informed the

Respondent that if this plan is not met, he will seek other contractors to fix his driveway and he will contact the MHIC to file a complaint or seek a claim for reimbursement.

11. When the Respondent failed to respond to the Claimant's August 15, 2017 letter, on November 3, 2016, the Claimant filed a claim against the Fund with MHIC.

12. On November 14, 2016, the MHIC mailed to the Respondent a copy of the Claimant's MHIC claim form and requested the Respondent to provide a response to the MHIC within ten days.

13. On November 19, 2016, the Respondent contacted the Claimant by telephone and agreed to evaluate the issues with the driveway on November 20, 2016.

14. On November 20, 2016, after evaluating the issues with the driveway, the Respondent and Claimant entered into another contract to repair and replace the entire driveway, including the parking pad area (Repair Contract).⁴

15. The Repair Contract required the Respondent to remove existing asphalt in front of the garage area; grade all existing stone/dirt to a uniform flatness to allow for water drainage/flow; install three inches of CRC⁵ compacting stone on the side area of the garage; apply adhesive to bond new asphalt where needed; remove a section of asphalt in front of garage door/apron in order for the new asphalt to join even; and install three-inches of hot smooth asphalt over the entire area then compact using power roller.

16. The Claimant and Respondent agreed that the Respondent could perform the Repair Contract on November 30, 2016 or on March 1, 2017, weather permitting.

⁴ On November 20, 2016, the Claimant and Respondent also entered into a third contract which was totally separate from the Initial and Repair Contracts. This separate contract was to install a new four foot wide asphalt parking pad area. The total cost of this contract was \$800.00. However, since the Respondent did not perform this contract and the work required was not a part of the Initial Contract, the Claimant did not include this contract in his claim against the Fund.

⁵ The Claimant did not explain what the acronym CRC means.

17. The Repair Contract was entered into by the parties without any additional cost to the Claimant.

18. As a result of the Repair Contract, the Claimant informed the MHIC that the Respondent agreed to repair the issues with the Claimant's driveway. For this reason, the Claimant's claim against the Fund was temporarily suspended to permit the Respondent an opportunity to perform the repair work.

19. The Claimant agreed with the Respondent that due to weather conditions, the Repair Contract could not be performed on November 30, 2016. However, the parties agreed to perform the Repair Contract in March 2017.

20. From March 15 through April 15, 2017, the Claimant and Respondent engaged in several text messages to complete the Repair Contract. Initially, the Respondent stated that he would perform the work on April 1, 2017; however, the Respondent did not do so. Subsequently, the Claimant and Respondent exchanged several other text messages during which the Respondent stated that he could not perform the Repair Contract due to health reasons. Nevertheless, the Claimant gave the Respondent until Thursday, April 20, 2017, to perform the Repair Contract or he would continue with his claim against the Fund.

21. The Respondent did not start any work under the Repair Contract and, as a result, the Claimant re-contacted the MHIC and requested that his claim against the Fund proceed forward.

22. On June 16, 2017, the OAH mailed a Notice of Hearing (Notice) to the Respondent using his address of record with the MHIC. The Notice was mailed by certified and first class mail.

23. The Notice mailed to the Respondent informed the Respondent that a hearing was scheduled for August 3, 2017, at 10:00 a.m., and will be held at the Tawes State Office Building,

Department of Natural Resources, Room C-1A, Annapolis, Maryland. The Notice also informed the Respondent that the issue was whether the Claimant had suffered and actual monetary loss as a result of unworkmanlike, inadequate, or incomplete home improvement work by the Respondent.

24. On June 22, 2017, the OAH received a certified mail receipt indicating the Respondent received the Notice of Hearing on June 19, 2017.

25. The driveway was installed with improper drainage and improper base material support which resulted in the asphalt to peel away in several areas. In addition, the asphalt was installed to a thickness which was inconsistent with the Initial Contract requirement, which also contributed to the asphalt peeling away.

26. The Claimant's actual loss is \$8,500.00.

DISCUSSION

Respondent's Failure to Participate in the Hearing

The licensing information submitted into evidence by the Fund demonstrates that the Respondent was a licensed home improvement contractor at the time he entered into the Initial and Repair Contracts with the Claimant in September 2015 and November 2016. The Respondent's address of record with the MHIC was located on Linda Lane in Millersville, Maryland. On June 16, 2017, the OAH mailed the Notice to the Respondent's address of record which was delivered to the Respondent on June 19, 2017. The Notice informed the Respondent that the hearing would occur on August 3, 2017 and begin at 10:00 a.m. The Notice also informed that Respondent that the hearing would be held at the Tawes State Office Building, Department of Natural Resources, Room C-1A, Annapolis, Maryland. Finally, the Notice informed the Respondent that the issue was whether the Claimant had suffered an actual

monetary loss as a result of unworkmanlike, inadequate, or incomplete home improvement work by the Respondent. After convening the hearing as scheduled, the Respondent failed to appear for the hearing.

Based on the record before me, I conclude that the Respondent had an opportunity to participate in the hearing, after proper notice, but failed to appear, and I proceeded with the hearing in the Respondent's absence. Md. Code Ann., Bus. Reg. § 8-312(h); COMAR 09.08.03.03A(2).

Merits of Claim

The Claimant has the burden of proving the validity of his claim by a preponderance of the evidence. Md. Code Ann., State Gov't § 10-217 (2014); COMAR 09.08.03.03A(3). "[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).

A home 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); *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." Bus. Reg. § 8-401. For the following reasons, I find that the Claimant has proven eligibility for compensation from the Fund.

The Claimant testified about the formation of the Initial Contract with the Respondent and the performance of that contract by the Respondent. In total, the Claimant paid the

Respondent \$8,500.00 to install the driveway. The Claimant testified about the issues with the driveway including water pooling due to improper drainage. He explained how the asphalt was peeling up in several areas due to the installation of improper base materials. He also explained how he discovered the asphalt was installed to a depth which was inconsistent with the Initial Contract. The Claimant supported his testimony with photographic evidence.

In addition, the Claimant supported his claim against the Fund by introducing a report from Christopher Case, Case Home Inspections, LLC, a licensed Maryland home inspector, who, on July 31, 2017, inspected the driveway installed by the Respondent at the Claimant's home. As a part of his inspection, Mr. Case took several photographs and provided detailed comments regarding the work performed by the Respondent. Based on the inspection by Mr. Case, the following unworkmanlike issues were observed and will require repair by a licensed contractor:

- In the parking pad area just in front of the Claimant's garage door, this pad area was installed with a negative grade towards the garage, which will allow water intrusion during periods of rain or melting snow into the garage;
- In another area of the parking pad, removing a small section of asphalt to expose the base material, revealed a dirt base which was free of clay and was without a sandy mix. The dirt base failed to provide proper support to the overlaying asphalt material and required installation of ground millings by a licensed contract in order to provide the proper support; and
- In several areas of the asphalt pavement there was chipping or scaling after less than one year of use. The chipping or scaling was caused by several possible factors, including: improper compaction of base material, improper asphalt material, or poor drainage.

Based on the evidence presented, the Claimant contends that the Respondent installed the driveway in an unworkmanlike manner. The Claimant also contends that to repair the work performed by the Respondent the entire driveway will have to be removed and replaced with proper grading and materials. The Claimant supported his position to replace the entire driveway with the same photographic evidence and Inspection Report as well as with the Repair Contract.

The Claimant summed up his case for reimbursement from the Fund by stating that he a bad job was done, with bad materials, and had a Repair Contract to repair and replace the entire driveway with the Respondent which was not performed. In essence, the Claimant contends that the work performed by the Respondent has no value because the work performed will have to be removed, and then the entire area will have to be regraded with new asphalt material properly installed. Although the Claimant presented several estimates from other contractors, he was not going to use any of those contractors to replace the driveway installed by the Respondent. Additionally, the Claimant argued that the value he paid for the work performed by the Respondent represents an average cost to repair and replace the driveway and he is not seeking an award from the Fund which is greater than the amount he paid the Respondent.

After thoroughly examining the evidence presented by the Claimant, the Fund contends that the Claimant demonstrated an actual loss as a result of the unworkmanlike home improvement performed by the Respondent. As a result, the attorney for the Fund supported an award to the Claimant from the Fund in the amount of \$8,500.00.

After considering the documentary and photographic evidence presented by the Claimant, I am persuaded that the Respondent installed the Claimant's driveway in an unworkmanlike manner. The photographs taken by the Claimant revealed water pooling, asphalt depth issues, and asphalt peeling up. Additionally, other photographs demonstrated that the parking pad area in front of the garage was not square. Based on the Claimant's testimony, including a thorough examination by the Fund's attorney, and the willingness of the Respondent to replace the entire driveway by entering into the Repair Contract, I am persuaded that the original work performed by the Respondent has no value since the entire driveway requires a total replacement.

Accordingly, I find that the Claimant established an actual loss due to an unworkmanlike home improvement performed by the Respondent and is entitled to an award from the Fund.

The MHIC's regulations provide three formulas for measurement of a claimant's actual loss. 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 is not soliciting another contractor to complete the contract, the claimant's actual loss shall be the amount which the claimant paid to the original contractor less the value of any materials or services provided by the contractor.

COMAR 09.08.03.03B(3)(b).

Further, the MHIC "may not award from the Fund an amount in excess of the amount paid by or on behalf of the claimant to the contractor against whom the claim is filed." COMAR 09.08.03.03B(4).

Applying the above formula is rather straightforward. Since the Claimant paid the Respondent \$8,500.00 and the work and materials provided by the Respondent have no value since the entire driveway must be replaced, the Claimant's actual loss equals the amount the Claimant paid the Respondent, which was \$8,500.00. Accordingly, the Claimant is entitled to reimbursement from the Fund in the amount of \$8,500.00.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$8,500.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); 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 \$8,500.00; 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;⁶ and

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

Signature on File

October 19, 2017
Date Proposed Decision Issued

Daniel Andrews
Administrative Law Judge

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#170086

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

PROPOSED ORDER

WHEREFORE, this 14th day of December, 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.

Andrew Snyder

***Andrew Snyder
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION