

IN THE MATTER OF THE CLAIM	* BEFORE MICHELLE W. COLE,
OF DIANE HAYES,	* 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 JOHN CARROLL,	*
T/A JOHN CARROLL,	* OAH No.: LABOR-HIC-02-22-16411
RESPONDENT	* MHIC No.: 22 (75) 753

* * * * *

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 April 11, 2022, Diane Hayes (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund), under the jurisdiction of the Department of Labor (Department), for reimbursement of \$8,200.00 for actual losses allegedly suffered as a result of a home improvement contract with John Carroll, trading as John Carroll (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2022).¹ On July 1,

¹ Unless otherwise noted, all references hereinafter to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.

2022, the MHIC issued a Hearing Order on the Claim. On July 8, 2022, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On November 17, 2022, I held a hearing by video via the Webex videoconference platform. Md. Code Ann., Bus. Reg. §§ 8-407(a), 8-312; Code of Maryland Regulations (COMAR) 28.02.01.20B(1)(b). Nicholas Sokolow, Assistant Attorney General, Department, represented the Fund. The Claimant represented herself. Dan Willard, Esquire, represented the Respondent, who was present.

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); COMAR 09.01.03; COMAR 28.02.01.

ISSUES

Did the Claimant sustain an actual loss compensable by the Fund as a result of an unworkmanlike, inadequate or incomplete home improvement by the Respondent?

If so, what is the amount of the compensable loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits offered by the Claimant:

- Cl. Ex. 1 Photographs, undated
- Cl. Ex. 2 Contract, April 13, 2020
- Cl. Ex. 3 E & Sons Paving Proposal, April 1, 2022

I admitted the following exhibits offered by the Respondent:

- Resp. Ex. 1 Respondent's Response to Complaint, printed November 16, 2022
- Resp. Ex. 2 Text Messages between the Claimant and the Respondent, October 16, 2020
- Resp. Ex. 3 Text Messages between the Claimant and the Respondent, December 20, 2020

- Resp. Ex. 4 Text Message from the Claimant to the Respondent, March 1, 2021
- Resp. Ex. 5 Text Message from the Respondent to the Claimant, undated
- Resp. Ex. 6 Text Message from the Respondent to the Claimant, October 27²
- Resp. Ex. 7 Photograph, November 16, 2022
- Resp. Ex. 8 Photograph, November 16, 2022
- Resp. Ex. 9 Photograph, November 16, 2022

I admitted the following exhibits offered by the Fund:

- GF Ex. 1 Notice of Remote Hearing, July 27, 2022
- GF Ex. 2 Hearing Order, July 1, 2022
- GF Ex. 3 Letter from the Department to the Respondent, April 18, 2022; Home Improvement Claim Form, April 6, 2022
- GF Ex. 4 Certification of Custodian of Records, October 25, 2022

Testimony

The Claimant testified on her own behalf.

The Respondent testified on his own behalf.

The Fund did not present any witness testimony.

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 the MHIC.
2. On April 13, 2020, the Claimant and the Respondent entered into a contract (Contract) to pave the Claimant's driveway with hot asphalt and roll it to compaction.
3. The original agreed-upon Contract price was \$4,500.00.

² The year was not reflected in the screenshot of the text message.

4. The work under the Contract was started and completed on June 1, 2020.

5. The Claimant paid \$4,700.00, which included the original Contract price plus \$200.00 for additional asphalt, which the Respondent added next to the shed on the Claimant's property at the Claimant's request.

6. The Contract included a one-year guarantee against potholes and cracks, excluding damages caused by unreasonable use. The Contract further provided:

- No warranty against damage done by vegetation growths, gas, oil/chemical spills or by large vehicles in excess of design capacity.
- No guarantee against erosion, settlement or sinking.
- Complete drainage of surface water will not be guaranteed for areas having less than 2% grade.
- Guarantee becomes void if sealer is applied by others, not adjoined with J. Carroll.
- Owner is responsible for any necessary lawn grading, backfilling or resealing after installation.

(Cl. Ex. 2).

7. After the driveway was completed, heavy work trucks and the Claimant's vehicles were on the Claimant's driveway.

8. Beginning approximately two months after work was completed on the driveway, the Claimant noticed divots in the driveway surface and loose chunks of asphalt.

9. In September 2020, the Claimant complained about problems she observed with the driveway and sent photographs which she believed reflected the deficiencies to the Respondent.

10. On October 16, 2020, the Respondent offered to send employees to the Claimant's property to repair the problems reported by the Claimant. The Claimant responded:

[W]e are out of town. We would rather you come when we are back next week so we can move our cars. There are lots of divots and looks like you need to go over the whole driveway. Thank you.

(Resp. Ex. 2).

11. On December 20, 2020, the Respondent offered to send his employees to the Claimant's property to make repairs on December 21, 2020. The Claimant rejected the offer because there was snow and ice remaining on the driveway at that time.

12. In March 2021, the Respondent offered to make repairs to the driveway. The Claimant responded:

[T]here is still a lot of snow and ice on our driveway. We had 14 inches here last week and until today not a lot of sun and temperatures have been low. As much as we want you back out here, it might be best to wait until the ice and snow have melted. We really appreciate your attention to this matter.

(Resp. Ex. 4).

13. On an unknown date, the Respondent sent a text message to the Claimant as follows:

I got a look at the driveway last week sorry never got back to you quicker after looking at the areas I will come out touch the areas up get them repaired and then I will do a seal coat on the driveway free of cost that is what I am offering if that works for you guys great if not that's fine too just let me know and then will make plans to get it done thank you.

(Resp. Ex. 5).

14. On April 17, 2021, the Respondent sent two employees to the Claimant's property in order to patch holes and make certain repairs. The Claimant did not permit the Respondent's employees to do any work since she believed that the entire driveway needed to be replaced.

15. On April 27, 2021, the Respondent offered to do "touch-up" repairs and apply a seal coat to the driveway. The Claimant rejected this offer.

16. In October 2021, the Claimant sent photographs of the problems she observed with the driveway to the Respondent and asked if he would fix the driveway.

17. On October 27, 2021, the Respondent sent a text message to the Claimant reviewing his attempts to make repairs, her rejection of these attempts and her delay in renewing

her request that he make repairs. (Resp. Ex. 6).³ He told the Claimant that he no longer was willing to work on the driveway.

18. On April 11, 2022, the Claimant filed a claim with the MHIC. At that time, there were divots, pooling water, holes, and grass had grown over the edge and through the asphalt on one side of the driveway.

19. In September 2022, the Respondent offered to fix the problems areas by patching the divots, cutting away the edge where the vegetation grew through the asphalt, adding gravel and asphalt, applying heat and a seal coat and compact rolling the area. The Claimant rejected this offer, asking that the entire driveway be replaced.

DISCUSSION

The Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Md. Code Ann., Bus. Reg. § 8-407(e)(1); Md. Code Ann., 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.” Md. Code Ann., 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.” Md. Code Ann., Bus. Reg. § 8-401. For the following reasons, I find that the Claimant has not proven eligibility for compensation.

Actual Loss – Prima Facie Impediments

³ The Respondent presented only a portion of the text message that he sent to the Claimant.

By statute, certain claimants are excluded from recovering from the Fund altogether. In this regard, a claimant must prove that: (1) the claimant resides in the home as to which the claim is made, or owns no more than three dwelling places; (2) the claimant is not an employee, officer or partner of the contractor; or the spouse or other immediate relative of the contractor or the contractor's employees, officers or partners; (3) the work at issue did not involve new home construction; (4) the claimant did not unreasonably reject the contractor's good faith effort to resolve the claim; (5) the claimant complied with any contractual arbitration clause before seeking compensation from the Fund; (6) there is no pending claim for the same loss in any court of competent jurisdiction and the claimant did not recover for the actual loss from any source; and (7) the claimant filed the claim with the MHIC within three years of the date the claimant knew, or with reasonable diligence should have known, of the loss or damage. Md. Code Ann., Bus. Reg. §§ 8-101(g)(3)(i), 8-405(c), (d), (f), (g), 8-408(b)(1) (2015 & Supp. 2022).

There has been no argument to the contrary, and the evidence establishes that the Claimant owns no more than three dwelling places; that she has never been an employee, officer or partner of the Respondent and is not related to any of the Respondent's employees, officers or partners; that the home improvement was not new home construction; that the Claimant did not fail to participate in arbitration; that the Claimant has not taken any other legal action to recover monies for any actual loss in connection with the Respondent's work; and the Claimant timely filed her claim within three years of the date she became aware of the problems with the home improvement work. Finally, at all times relevant to this matter, the Respondent was a licensed home improvement contractor under the MHIC.

I am persuaded, however, that the Claimant rejected the Respondent's good faith offer to repair deficiencies in the home improvement work, and as a result, is barred from recovering

from the Fund. Md. Code Ann., Bus. Reg. § 8-405(d) (Supp. 2022). Beginning with the Claimant's first report of problems with the driveway, the Respondent offered to fix the problems reported by the Claimant. On at least two occasions, the Claimant requested that the Respondent reschedule coming to the property, which accounts for some of the delay in resolving this matter. However, at least through October 2021, the Respondent on repeated occasions offered to repair the problem areas. With the exception of the October 2021 email indicating that he no longer was willing to perform work on the driveway based on the passage of time beyond the guarantee under the Contract, delays caused by the Claimant, and her response to his offers to repair certain problems, the Respondent maintained that he would repair problem areas and roll the driveway to compaction. In September 2022, after the Claimant filed a claim with the MHIC, the Respondent renewed his offer to repair the problem areas. At all times, the Claimant has maintained that she will only accept the replacement of the entire driveway. However, she has not established that her requested remedy is reasonable or appropriate. I conclude that the Claimant unreasonably rejected the Respondent's good faith offers to resolve the Claimant's complaints.

Actual Loss - Unworkmanlike, Inadequate, or Incomplete Home Improvement by the Respondent

The Claimant presented evidence showing that she entered into the Contract with the Respondent to pave her driveway with hot asphalt and roll it to compaction. She argued that she suffered an actual loss as the result of an inadequate and unworkmanlike home improvement by the Respondent. She pointed to deficiencies in the surface of the driveway, including divots, loose asphalt, and vegetation growth through the asphalt and presented photographs in support of her claim. She reported that the Respondent failed to lay sufficient asphalt to cover the driveway, which resulted in crumbling asphalt and vegetation growth through the asphalt. She further maintained that the entire driveway needed to be removed and replaced to correct the

deficiencies, and asked that she be refunded the amount that she paid to the Respondent so that she could pay another contractor to correct the Respondent's work.

The Respondent reported that his work met the requirements under the Contract and that he was willing to make repairs to the problem areas noted by the Complainant, but that she would only accept a new driveway, which he did not believe was necessary. He explained the process for making repairs, which involved patching the problem areas, heating the patched areas, and rolling to compaction the entire area. He noted that he also offered to apply a sealant to the driveway, even though it was not part of the Claimant's Contract. He agreed that the area of vegetation overgrowth along the one side of the driveway was unusual, noting it was definitely different than the other side. He denied that the problem resulted from deficient work by him and suggested that it may have been caused by chemicals applied to the grass on that side of the driveway. In any event, he stated that he was willing to repair this area by cutting away the edge, replacing the gravel and hot asphalt, and rolling it.

Based on the evidence, I conclude that the Claimant is not eligible for compensation from the Fund based on an incomplete home improvement by the Respondent. The Respondent started and completed the home improvement on June 1, 2020. At that time, the Claimant did not report any problems with the driveway.

The Claimant is not eligible for compensation from the Fund based on an inadequate home improvement. The Claimant entered into a Contract with the Respondent to pave her driveway with hot asphalt and roll it to compaction. Once the Respondent completed work under the Contract, the Claimant was able to use her driveway as intended. At least one photograph shows a heavy work truck on the driveway and the Claimant informed the Respondent in one communication that the household vehicles were parked on the driveway. Indeed, the Claimant has not complained about the utility of the driveway.

The issue before me is whether the problems noted by the Claimant constitute an unworkmanlike home improvement. Largely, the Claimant's complaints involve the aesthetics of the driveway, which the Claimant reported were unlike other driveways in her neighborhood. Two months after the driveway was completed, the Claimant first noted problems with divots in the driveway's surface. Over time, her complaints included crumbling asphalt, holes, pooled water, and vegetation growth over and through the asphalt. The Claimant stated that the problems with the driveway were caused because the Respondent failed to use a sufficient amount of gravel and asphalt as agreed to under the Contract.

In support of her claim, the Claimant presented photographs taken by her over the two-year period following the completion of the home improvement.⁴ I do not find the photographs of the finished home improvement to establish an unworkmanlike home improvement. Although some of the Claimant's photographs show flaws, such as divots and vegetation growth over and through the asphalt, it is not clear how significant or widespread these flaws were across the entire driveway. Most of the photographs are close-up photographs and many reflect similar views of asphalt, pooled water, and vegetation. As such, I cannot discern whether there are multiple photographs of the same area or different areas. Moreover, some of these photographs were taken more than one year after the home improvement was completed. There was no expert testimony regarding accepted standards, whether the problems noted by the Claimant deviated from these standards, or how two years of weather and use of the driveway may affect the aesthetics of the driveway. Finally, many of the Claimant's complaints involve conditions which were not covered by the Contract guarantees, such as "damage done by vegetation growths," erosion, settlement or sinking, and pooling. (Cl. Ex. 2).

⁴ Claimant's exhibit 1 included thirty-eight 4X6 photographs.

The Claimant testified that she would have to pay another contractor to completely redo the entire driveway and submitted an estimate for this cost. The evidence failed to prove, however, that this requested remedy was necessary based on the Respondent's work. The Claimant did not present any witnesses or photographs to support her claim that the existing driveway had no value and needed to be replaced. As already stated, there is no argument that the driveway's utility was affected by the cosmetic deficiencies. Regarding the appropriate remedy in this case, I found the Respondent's testimony persuasive. He explained that asphalt could be patched, heated and rolled to compaction for a smooth finished driveway. He agreed that the vegetation overgrowth along one side of the driveway was unusual and explained that this problem could be corrected by cutting away the edge, adding gravel and hot asphalt, and rolling the entire driveway to compaction. At all times, the Respondent was willing to repair the driveway in this manner. For the reasons stated, I conclude that the Claimant is not entitled to the relief that she seeks.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant rejected the Respondent's good faith offer to resolve the claim, and as a result, is barred from recovering from the Fund. Md. Code Ann., Bus. Reg. § 8-405(d) (Supp. 2022).

I further conclude that the Claimant has not sustained an actual and compensable loss as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2022).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund deny the Claimant's claim; and

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

February 8, 2023
Date Decision Issued

Michelle W. Cole

Michelle W. Cole
Administrative Law Judge

MWC/ds
#203388

PROPOSED ORDER

WHEREFORE, this 24th day of March, 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.

J Jean White _____

I Jean White

Panel B

**MARYLAND HOME IMPROVEMENT
COMMISSION**