

<p>IN THE MATTER OF THE CLAIM</p> <p>OF MITCHEL SHAPIRO,</p> <p>CLAIMANT</p> <p>AGAINST THE MARYLAND HOME</p> <p>IMPROVEMENT GUARANTY FUND</p> <p>FOR THE ALLEGED ACTS OR</p> <p>OMISSIONS OF PETER DAVIS,</p> <p>T/A ACES,</p> <p>RESPONDENT</p>	<p>* BEFORE ROBERT B. LEVIN,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>*</p> <p>*</p> <p>*</p> <p>* OAH No.: DLR-HIC-02-15-30446</p> <p>* MHIC No.: 14 (90) 1174</p>
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PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
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PROPOSED FINDINGS OF FACT
DISCUSSION
PROPOSED CONCLUSION OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On September 16, 2014, Mitchel Shapiro (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of Ten Thousand Three Hundred Dollars (\$10,300) of alleged actual losses suffered as a result of a home improvement contract with Peter Davis, trading as ACES (Respondent).

I held a hearing on February 26, 2016 at the Office of Administrative Hearings, 11101 Gilroy Road, Hunt Valley, Maryland 21031. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e)

(2015).¹ The Claimant represented himself. The Respondent did not appear for the hearing. Kris M. King, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, 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), Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02, and 28.02.01.

ISSUES

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

SUMMARY OF THE EVIDENCE

Exhibits

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

Clmt. Ex. 1 - 5/19/2013 Estimate

Clmt. Ex. 2 - 7/28/2013 Southwest Credit Card Statement

Clmt. Ex. 3 - 9/28/2013 Southwest Credit Card Statement

Clmt. Ex. 4 - Undated series of photographs marked as Clmt. Ex. 4-A through 4-S

Clmt. Ex. 5 - 9/15/14 Home Improvement Claim Form, marked as received on 9/16/14

Clmt. Ex. 6 - Packet of documents consisting of:

Claimant undated email to Respondent;
Respondent 9/12/2013 email (10:26 p.m.) to Claimant;
Respondent 5/4/2014 email (7:31 a.m.) to Claimant;
Claimant 5/4/2014 email (4:03 p.m.) to Respondent;

¹ Unless otherwise noted, all citations of the Business Regulation Article hereinafter refer to the 2015 Replacement Volume.

Respondent 5/6/2014 email (10:42 a.m.) to Claimant;
Claimant 5/6/2014 email (11:03 a.m.) to Respondent;
Respondent 5/5/2014 email (7:33 a.m.) to Claimant;
Respondent 5/6/2014 email (11:30 a.m.) to Claimant;
Claimant 5/5/2014 email (7:37 a.m.) to Respondent;
Claimant 5/6/2014 email (11:49 a.m.) to Respondent;
Respondent 5/6/2014 email (11:30 a.m.) to Claimant; and
Teniseal Corporation 1/19/15 Proposal

Clmt. Ex. 7 - Packet of documents consisting of:

Respondent 3/3/2015 email (8:01 a.m.) to Claimant;
Claimant 3/3/2015 email (7:56 a.m.) to Respondent;
Respondent 3/3/2015 email (7:50 a.m.) to Claimant;
February 19, 2015 letter from David Brown to Claimant;
Claimant 2/23/2015 (6:22 p.m.) email to Respondent;
Respondent 5/6/2014 email (10:41 a.m.) to Claimant;
Claimant 5/5/2015 email (7:37 a.m.) to Respondent;
Respondent 3/3/2015 email (7:52 a.m.) to Claimant;
Claimant 2/23/2015 email (6:22 p.m.) to Respondent;
Respondent 5/6/2014 email (10:41 a.m.) to Claimant;
Respondent 5/4/2015 email (4:57 a.m.) to Claimant; and
June 10, 2015 letter from David Brown to Claimant

Clmt. Ex. 8 - 4/17/15 Confidential Mediation Conference Statement²

I admitted the following exhibits on behalf of the Fund:

Fund Ex. 1 - 12/31/ 2015 Memorandum from Sandra L. Sykes, OAH Docket Specialist, to Legal Services re: Undeliverable Mail, with the following attachments:

12-01-2015 Notice of Hearing addressed to Peter Davis T/A ACES, 7303 Hughes Ave., Baltimore, MD 21219-2013;
September 4, 2015 Hearing Order and enclosed "Important Information" sheet; and Certified Mail envelope and attached return receipt addressed to Peter Davis, with the envelope marked "Return to Sender Unclaimed Unable to Forward".

Fund Ex. 2 - Home Improvement Commission registration inquiry re: Peter Davis

Fund Ex. 3 - SDAT Real Property Search document re: Peter Davis, 7303 Hughes Ave., Baltimore, MD 21219-2013

² I have not considered the Claimant's confidential mediation statement in reaching my decision in this case. The Claimant had prepared it for the individual he thought would arbitrate the dispute but who, it turned out, would only provide mediation services.

Fund Ex. 4 - 9/15/14 Home Improvement Claim Form, marked as received on 9/16/14 (a duplicate of Clmt. Ex. 5)

The Respondent did not offer any exhibits for admission into evidence.

Testimony

The Claimant testified on his own behalf. Neither the Respondent nor the Fund offered any 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 MHIC license number 4355029.
2. On May 19, 2013, the Claimant and the Respondent entered into a contract (Contract) (Cl. Ex. 1) to repair the tennis court located on the Claimant's residential property.
3. The agreed-upon contract price was \$10,300.00.
4. In entering into the Contract, the Claimant was motivated by the desire to improve the aesthetic appearance of the tennis court, which had substantially deteriorated.
5. Large deteriorated areas had appeared in the court, allowing water to pool, and the court surface was marred by numerous cracks and eroded paint and court lines.
6. The Respondent contracted to (a) furnish and install an asphalt surface in the deteriorated, low-lying areas of the court, (b) to compact those areas to a true, firm finish conforming to existing pavement elevations, (c) to power wash excessive moss and film from the court surface, (d) to broom clean and apply acrylic leveling filler to areas on the court with standing water, (e) to clean out and repair approximately 50 linear feet of cracks, (f) to apply three coats of color coating over the entire court area, and (g) to lay out and stripe the court according to United States Tennis Association Standards.

7. The Contract provided: "Work to be performed in a professional workmanlike manner for the above noted prices." Cl. Ex. 1.
8. The Claimant reasonably expected that the Respondent's work would restore the court to an acceptable appearance that would last approximately five years.
9. The Claimant paid the Respondent \$3,399.00 on June 30, 2013 (Cl. Ex. 2), and on September 11, 2013, he paid the Respondent \$6,901.00 (Cl. Ex. 2), for a total payment of \$10,300.00 pursuant to the Contract.
10. The Respondent performed the work described in the Contract in July, 2013. The work was completed on or about July 31, 2013.
11. The Claimant used the tennis court from August through October, 2013, and observed no problems with the court's condition during those months. The court was not used during the winter of 2013-14.
12. In or about May, 2014, the Claimant noticed serious problems with the condition of the court. As documented in photographs taken by the Claimant in May, 2014 (Cl. Ex. 4-A through 4-S), as of May, 2014, numerous, lengthy cracks reappeared on the court surface, asphalt areas peeled, the court was discolored, and the court's lines either separated from the surface or disappeared.
13. In May 2014, the repairs performed by the Respondent in July 2013 had failed.
14. The work performed by the Respondent was both inadequate and unworkmanlike.
15. The Contract includes an arbitration clause that provides: "Arbitration: In the event of a dispute as a direct result of this contract, customer & contractor must agree on a neutral arbitrator." Cl. Ex. 1.
16. The Claimant made good faith efforts to arbitrate the dispute. He contacted the American Arbitration Association (AAA), obtained information about AAA arbitrators' fees, and

provided this information to the Respondent. The AAA quoted an arbitrator fee of \$800, which the Claimant proposed be divided equally between the parties. The Respondent, however, rejected AAA arbitration on the ground that his \$400 share was too expensive. The Claimant thereafter made a \$200 payment to a person proposed by the Respondent to be the arbitrator, only to learn that this person would not serve as an arbitrator, but only as a mediator. The mediator refunded the payment to Claimant. On May 4, 2014, the Respondent offered to secure another arbitrator but failed to do so. The HIC's investigator wrote to the Respondent on June 10, 2015, advising him that unless the HIC received documentation within 21 days that the Respondent agreed to submit the dispute to arbitration, the HIC would consider that the Respondent had waived the Contract's arbitration clause. The Respondent neither responded to the HIC's letter nor demonstrated a willingness to arbitrate.

17. By his conduct, the Respondent waived the Contract's arbitration provision.
18. The Claimant obtained a January 19, 2015 repair proposal from Teniseal Corporation, in the amount of \$13,068.00. The Teniseal proposal is for application of "Sportsface 1 Color System" to the Claimant's tennis court, and includes the following work and materials: clean the entire court, remove and replace three existing patches using acrylic patching materials, scrape and sand all existing lines to ensure proper adhesion of new color coats, apply acrylic tack coat to all peeled areas, repair approximately 500 linear feet of structural cracks using "a patented Armour Crack Repair System," apply new Sportsface 1 Color Coat System, and replace the court lines. Cl. Ex. 6, last item.
19. The Teniseal proposal provides that "Teniseal is not responsible for new cracks that may appear in the future". Id.

20. The Contract between the Claimant and the Respondent does not contain a similar disclaimer of responsibility for future cracks.
21. The Claimant has not entered into a contract with Teniseal, and does not know if Teniseal is licensed by the HIC.
22. The value of the Respondent's work is zero because the tennis court's appearance is the same as though the work had never been performed.
23. The Claimant's actual loss is \$10,300.
24. The Claimant has made no other claims with any government entity with regard to this matter.
25. There is no court action by or against the Claimant with regard to this matter.
26. The Claimant has not submitted any insurance claims with regard to this matter.
27. The tennis court at issue is located at the Claimant's primary residence. Neither the Claimant nor any of his relatives are affiliated with the Respondent.

DISCUSSION

A. Respondent's Failure to Appear

Section 8-312 of the Business Regulation Article provides that the MHIC shall give the person against whom the action is contemplated an opportunity for a hearing. Md. Code Ann., Bus Reg. § 8-312(a). On or about December 1, 2015, the OAH mailed to the Respondent by both certified mail, return receipt requested, and by first-class mail a Notice of Hearing, using his address of record with the MHIC. The Notice of Hearing advised the Respondent that a hearing on the Claimant's claim against the Fund was scheduled for February 25, 2016, at 9:30 a.m., and that it would be held at the OAH, 11101 Gilroy Road, Hunt Valley, Maryland 21031. The Respondent failed to accept delivery of the Notice that OAH sent by certified mail; the envelope was "return[ed] to sender unclaimed unable to forward." Fund Ex. 1. The Notice of Hearing sent

by OAH Respondent by first-class mail to his address of record with the MHIC was not returned to OAH.³ As such, it is presumed that the Respondent received adequate notice of the hearing.

On February 25, 2016, I convened the hearing in accordance with the Notice of Hearing. After waiting approximately fifteen minutes to give the Respondent an opportunity to appear for the hearing, he still failed to appear. I received no request for a postponement or other communication from or on behalf of the Respondent. As the Respondent received due notice of the hearing, I conclude that he was afforded an opportunity to participate in the hearing, but failed to appear. Accordingly, I found it appropriate to proceed with the hearing in the Respondent's absence.

B. The Merits of Claimant's Claim

In this case, 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).

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). *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

³ The Respondent's address of record with the MHIC (*see* Fund Ex. 2) is the same address as Respondent's residence address as shown on a State Department of Assessments and Taxation real property ownership record (*see* Fund Ex. 3).

unworkmanlike, inadequate, or incomplete home improvement.” Bus. Reg. § 8-401. For the following reasons, I find that the Claimant has proven eligibility for compensation.

As confirmed by Fund Ex. 2, the Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant.

The Respondent performed unworkmanlike and inadequate home improvements. The Claimant communicated to the Respondent that the Claimant desired to improve the aesthetic appearance of the tennis court by contracting for the Respondent to provide an acceptable court surface. The Respondent was to fix all cracks, repair the court’s surface including depressed areas, and then coat the entire court with three coats of color coating and stripe the court according to United States Tennis Association standards. The Claimant reasonably expected the improved surface to last for several years. However, the repairs failed almost totally in less than one year. Lengthy cracks, large discolored and uneven surface areas, among other defects and unaesthetic areas, appeared by May, 2014, as shown in the photographs taken at that time. (Cl. Ex. 4)

In a May 6, 2014 email, the Respondent told the Claimant that cracks “will always come back”. (Cl. Ex. 6, p. 3) However, I accept the Claimant’s testimony that the Respondent failed to disclose that the cracks would soon reappear. The Claimant’s testimony in this regard is corroborated by the absence of a contractual disclosure of the alleged inevitability of future cracking, or a contractual disclaimer of responsibility for future cracking or other deterioration. The only disclaimer of responsibility in the Contract with respect to the quality of the work relates to “failure/settlement of asphalt due to improper compaction, installation/backfill installed/provided by others.” There is no evidence whatsoever that any “other” contractors engaged in improper compaction, installation or backfill at the Claimant’s property.

Expert testimony is not necessary for me to find that the Respondent's work was inadequate and unworkmanlike. A reasonable lay person can readily see from the Claimant's photographs that the court appears to have simply never been repaired. I thus find 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 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). I find this measure of actual loss to fit the facts of this case. The Claimant paid \$10,300.00 to the Respondent. The value of the materials and services provided by the Respondent I find to be zero. Hence, I employ the COMAR 09.08.03.03B(3)(b) formula, and find that the Claimant's actual loss is \$10,300.00.

For several reasons, I will not employ the COMAR 09.08.03.03B(3)(c) formula.⁴ First, I note that the Claimant has not entered into an agreement with Teniseal. Second, no evidence that Teniseal is licensed by the HIC was presented. Third, insufficient details were presented at the

⁴ Under COMAR 09.08.03.03B(3)(c), "[i]f 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."

hearing with respect to the nature of Teniseal's "Acrylic Patching Material," "Acrylic Tack Coat," "Patented Armour Crack Repair System" and "Sportsface 1 Color Coat System" to enable me to determine whether the Teniseal proposal is for the repair of the Respondent's work, or if the Teniseal proposal exceeds the Respondent's promised undertakings, i.e. whether Teniseal proposed work and/or materials differ qualitatively from what is described in the Contract between the Claimant and the Respondent. In view of these uncertainties regarding the Teniseal proposal, I will not employ the COMAR 09.08.03.03B(3)(c) formula.⁵

I also conclude that the Claimant's recovery is not barred by the Contract's arbitration clause, because the Respondent waived arbitration. The waiver is manifested by the following conduct of the Respondent: he refused to participate in AAA-sponsored arbitration, proposed as an arbitrator an individual who was unwilling to serve in that capacity, and failed to respond to the HIC's June 10, 2015 letter (Cl. Ex. 7, p. 6) that set a 21-day deadline for the Respondent to demonstrate that he agreed to submit the dispute to arbitration.

Pursuant to the Business Regulation Article, 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. Bus. Reg. § 8-405 (e)(1), (5). As previously noted, the Claimant paid \$10,300.00 to the Respondent.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$10,300.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015).

⁵ The actual amount of the proposed award from the Fund would not change regardless of which formula were used, as the Claimant is limited to the total amount he paid the Respondent, up to the statutory maximum of \$20,000.

RECOMMENDED ORDER

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


ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$10,300.00 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 at least 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

March 14, 2016
Date Decision Issued


Robert B. Levin
Administrative Law Judge

RBL/emh
#161064

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

IN THE MATTER OF THE CLAIM	* BEFORE ROBERT B. LEVIN
OF MITCHEL SHAPIRO,	* 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 PETER DAVIS,	*
T/A ACES,	* OAH No.: DLR-HIC-02-15-30446
RESPONDENT	* MHIC No.: 14 (90) 1174

* * * * *

FILE EXHIBIT LIST

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

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Clmt. Ex. 8 - 4/17/15 Confidential Mediation Conference Statement

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Certified Mail envelope and attached return receipt addressed to Peter Davis, with the
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Baltimore, MD 21219-2013

Fund Ex. 4 - 9/15/14 Home Improvement Claim Form, marked as received on 9/16/14 (a
duplicate of Clmt. Ex. 5)

The Respondent did not offer any documents for admission into evidence.

PROPOSED ORDER

WHEREFORE, this 13th day of April, 2016, 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.

Jeffrey Ross

***Jeffrey Ross
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION