IN THE MATTER OF THE CLAIM OF	*	BEFORE DAVID HOFSTETTER,
DANNY SHEARER AGAINST THE	*	AN ADMINISTRATIVE LAW JUDGE
MARYLAND HOME IMPROVEMENT	*	OF THE MARYLAND OFFICE
GUARANTY FUND FOR THE	*	OF ADMINISTRATIVE HEARINGS
VIOLATIONS OF JOHN MENACHO, t/a	*	OAH NO.: DLR-HIC-02-10-31488
CHESAPEAKE DESIGN AND	*	MHIC NO.: 08 (90) 801
LANDSCAPE, INC.	*	
	*	

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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 May 29, 2008, Danny Shearer (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement for actual losses allegedly suffered as a result of home improvement work performed by John Menacho, t/a Chesapeake Design and Landscape, Inc. (Respondent).

A hearing was held on February 28, 2011, at the Office of Administrative Hearings (OAH), Hunt Valley, Maryland, before David Hofstetter, Administrative Law Judge (ALJ), on behalf of the MHIC. Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407(c)(2)(i) (2010). The Claimant represented himself. Hope Sachs, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR), represented the Fund. The Respondent represented himself.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, the procedural regulations of the DLLR, and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2010); Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02, and 09.08.03; COMAR 28.02.01.

ISSUE

Did the Claimant sustain an actual loss compensable by the Fund as a result of the acts or omissions of the Respondent?

SUMMARY OF THE EVIDENCE

Exhibits

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

CL Ex. 1 – Contract, dated April 10, 2010

CL Ex. 2a-l – Credit card statements, various dates

CL Ex. 3 – Letter from the Claimant to Robert Bennett, dated September 21, 2006; Estimates from Total Asphalt Service, undated

CL Ex. 4 – Seven photographs

CL Ex. 5 – Email from Rhine Lawn Care and Landscaping (Rhine), dated May 22, 2008; Proposal from Rhine, dated May 2, 2008

CL Ex. 6 – Proposal from Rhine, including cost of patio sealing, dated January 12, 2011

I admitted the following exhibit on Respondent's behalf:

Resp. Ex. 1 – Letter from the Respondent to the MHIC, dated April 22, 2008

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

GF Ex. 1 – Notice of Hearing, dated October 12, 2010, with certified mail documents

GF Ex. 2 – Hearing Order, dated August 24, 2010

GF Ex. 3 – Affidavit of Lynn-Michelle Escobar, dated November 8, 2010

GF Ex. 4 – Licensing History, dated February 22, 2011

GF Ex. 5 – Amended Claim Form, dated May 3, 2010

Testimony

The Claimant testified on his own behalf. The Respondent testified on his own behalf. The Fund did not present the testimony of any witnesses.

FINDINGS OF FACT

Having considered the evidence, I make the following findings of fact 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 with the MHIC.

2. At all times relevant to the subject of this hearing, the Respondent had a business partner, Robert Bennett, who acted on behalf of the Respondent.

3. At all times relevant to the subject of the hearing, the Claimant owned the property known as 6939 Westcott Place, Clarksville, Maryland (the Property).

4. On or about April 10, 2006, the Claimant contracted with the Respondent to construct a large patio with a fire pit at the rear of the Property and a small patio at the base of steps off an existing deck. The patios were to be constructed with large, decorative paving stones known as "pavers."

5. The total contract price was $19,700.00.

6. The Claimant paid the Respondent a total of $19,700.00.

7. The Respondent began work on the project in early May 2006 and completed the project in five or six days.

8. The two patios constructed by the Respondent were improperly graded. As a result, water and mud would come onto the patios after it rained.

9. In some places, the pavers became stained with a rust-like stain as a result of being covered with mud.

10. In May 2006, after realizing that the patios were improperly graded, the Claimant called Bennett to complain. Bennett said that he would send out a crew to correct the problem. After some time had passed and no crew had appeared, the Claimant called or wrote the Respondent several times, but the Respondent never corrected any defects in the work.

11. As part of the construction process, sand was placed below and between the pavers. By September 2006, sand between the pavers was washing away whenever it rained. The Claimant complained to the Respondent about this problem and the Respondent promised to correct the problem. Despite his promises, the Respondent took no actions to address the sand problem.

12. In the course of performing the contract work, the Respondent's crew accidentally gouged out a spot in the Claimant's driveway with a piece of heavy equipment. The Claimant also complained to the Respondent about the gouge and the Respondent promised to repair it.

13. Despite numerous requests, the Respondent never repaired the gouge in the Claimant's driveway.

14. On August 30, 2007, the Respondent spoke with Bennett by telephone. Bennett stated that the business was shutting down soon and that the company would neither refund any money nor address the problems with the patios.

15. As a result of the Respondent's failure to correct problems with the project, the Claimant contacted Rhine Lawn Care and Landscaping, LLC (Rhine), a company licensed by the MHIC. On May 8, 2008, Rhine submitted a proposal to correct the work improperly performed by the Respondent. The proposal included removing existing pavers and cleaning them, re-grading the sites as necessary, replacing sand, re-installing the pavers, and associated work. The total cost of the work was given as $5,853.00.

16. On January 12, 2011, Rhine also provided a proposal for applying two coats of wet-look paver sealer to the patios at a cost of $1,780.00.

17. On or about September 21, 2006, the Claimant received an estimate of $200.00 from Complete Asphalt Services (Complete Asphalt) to repair the gouge in the driveway.

18. As of the time of the hearing, the Claimant had not contracted with Rhine, Complete Asphalt, or any other contractor to correct the Respondent's work.

DISCUSSION

Section 8-405(a) of the Business Regulation article provides that an owner may recover compensation from the Guaranty Fund, "for an actual loss that results from an act or omission 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." Md. Code Ann., Bus. Reg. § 8-401 (2010). The Claimant bears the burden of proving the amount of the actual loss.

The Claimant has established that he suffered an actual loss as a result of the Respondent's unworkmanlike home improvement. The Respondent testified and presented photographs that documented the grading problems with the patios constructed by the Respondent.

In this case, the Respondent does not dispute that the patios were constructed in an unworkmanlike manner. He admits that there is a problem with the grading that must be corrected. He also acknowledges that, as a result of the improper grading, many of the pavers have become stained and discolored. Nor does he dispute that his employees gouged out part of the driveway and that the gouge should be repaired. The Respondent's main "defense" was that he was not directly involved in the work at the Respondent's home, but that the Contract was handled by his partner, Mr. Bennett. While it is true that the Claimant's dealings were with

Bennett, the licensee in this case was the Respondent, not Bennett. Indeed, the Respondent agrees that he is ultimately responsible for any unworkmanlike home improvements performed. I note that Section 8-405(b) of the Business Regulation Article provides that "for purposes of recovery from the Fund, the act or omission of a licensed contractor includes the act or omission of a subcontractor, salesperson, or employee of the licensed contractor, whether or not an express agency exists." Therefore, I conclude that the Claimant has sustained the burden of proof and established that due to the unworkmanlike, inadequate home improvement performed, he has sustained an actual loss.

The Claimant presented evidence that allows for the calculation of actual loss. The Claimant solicited and received a proposal from Rhine, a licensed MHIC contractor, to correct the work performed by the Respondent. The cost of correcting the work, including re-grading the area, removing and re-setting pavers as needed, cleaning all pavers with a compound designed to remove mineral deposits, installing a textile filter fabric and river stone to stabilize exposed soil to prevent further erosion, and sweeping new sand in all joints, is $5,853.00. The Respondent does not dispute that this work is necessary or that the price is reasonable.

Rhine also provided a separate estimate of $1,780.00 to apply "two coats of Wet-look Paver Sealer." The Respondent argued that this item was not part of the original Contract and should not be included in the calculation of the Claimant's damages. I agree. At the hearing, the Claimant agreed that the sealing was not part of the Contract and presented no evidence that the sealant was a necessary component of the repairs necessitated by the Respondent's unworkmanlike performance. On cross-examination by the Fund, the Claimant testified that the sealant was "basically an extra precaution." I therefore do not consider the cost of the sealant in determining the damages in this case.

The other remaining question concerns whether the Claimant is responsible for the cost to repair the gouge in the driveway. The Claimant presented evidence from Complete Asphalt that the cost to repair the driveway was $200.00; the Respondent did not dispute this figure. The Fund argues that any problem with the driveway, even if caused by the Respondent's employees, represent consequential damages and are therefore prohibited by COMAR 09.08.03.03B(1)(a). I disagree. Consequential damages, while not defined in the statute or regulations, are generally understood as "such damage, loss, or injury as does not flow directly and immediately from the act of the party, but only results from some of the consequences or results of the act." *Black's Law Dictionary* 390 (6th Ed. 1990). When a contractor swings a ladder around and accidentally breaks a mirror (essentially the equivalent of the circumstances here) the resulting damage is direct and immediate, not remote or indirect. Although the damages may be unintentionally caused (most damages are), it is nevertheless a direct result of the contractor's work under the contract. It is not a true consequential damage, such as, say, damage to a stove that results in the loss of a catering job or damage to a car that makes it impossible to commute to work and therefore results in the loss of a paycheck. In essence, the Fund takes the position that because the damages did not occur as part of the contracted-for work, they are consequential damages. As discussed above, this view is based on a mistaken notion of the definition of consequential damages I, therefore, conclude that the Complainant is entitled to compensation from the Fund for his losses resulting from the damage to the driveway.

The Fund agreed that the Claimant is entitled to an award from the Fund and suggests that COMAR 09.08.03.03B.3(c) governs the calculation of the award from the Fund. This provision states:

> (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 measurements accordingly.

Applying the formula set forth in COMAR 09.08.03.03B(3)(c), I have calculated the Claimant's actual loss as follows:

Amount paid on the original contract	$19,700.00
Plus cost to repair the work	+$ 6,053.00[1]
	$25,753.00
Less the original contract	-$19,700.00
Actual loss	$ 6,053.00

Accordingly, I conclude that the Claimant's actual loss is $6,053.00.

CONCLUSION OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Claimant has sustained an actual loss in the amount of $6,053.00.as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401 and 8-405(b) and (e) (2010 & Supp. 2010).

RECOMMENDED ORDER

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

ORDER that the Claimant be awarded $6,053.00 from the Maryland Home Improvement Commission Guaranty Fund; and

ORDER that the Respondent be 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 as set by the Commission, Md. Code Ann., Bus. Reg. § 8-411(a) (2010); and

[1] This figure is the total of the Rhine estimate for repairing the patios and the Complete Asphalt estimate for repairing the driveway.

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

May 24, 2011
Date Decision Mailed

[redacted]
David Hofstetter
Administrative Law Judge

DH/rbs
Doc# 120788

IN THE MATTER OF THE CLAIM OF	*	BEFORE DAVID HOFSTETTER,
DANNY SHEARER AGAINST THE	*	AN ADMINISTRATIVE LAW JUDGE
MARYLAND HOME IMPROVEMENT	*	OF THE MARYLAND OFFICE
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VIOLATIONS OF JOHN MENACHO, t/a	*	OAH NO.: DLR-HIC-02-10-31488
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LANDSCAPE, INC.	*	
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FILE EXHIBIT LIST

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STATE OF MARYLAND
DLLR
DEPARTMENT OF LABOR, LICENSING AND REGULATION

Maryland Home Improvement Commission
500 N. Calvert Street, Room 306
Baltimore, MD 21202-3651
Stanley J. Botts, Commissioner

IN THE MATTER OF THE CLAIM OF DANNY SHEARER	*	MARYLAND HOME IMPROVEMENT COMMISSION
v.		
	*	MHIC CASE NO. 08 (90) 801
JOHN MENACHO, t/a CHESAPEAKE DESIGN AND LANDSCAPE, INC.	*	

* * * * *

PROPOSED ORDER

WHEREFORE, this 5th day of July, 2011, Panel B of the Maryland Home Improvement Commission ORDERS that:

1) The Findings of Fact of the Administrative Law Judge are Affirmed.

2) The Conclusions of Law of the Administrative Law Judge are Amended as follows:

A) The Commission finds that the portion of the recommended Guaranty Fund award attributable to repair of the driveway "gouge" caused by the Respondent ($200.00) is not compensable from the Guaranty Fund.

B) The Commission finds that property damage caused by the negligence of a contractor, such as the gouge in the Claimant's driveway caused by the Respondent's equipment, constitutes a consequential damage and, pursuant to Business Regulation Article, §8-405(e)(3), may not be recovered from the Guaranty Fund. This is not a claim for the cost to repair or complete work which the contractor was obligated to perform under the contract. The Commission notes that the Legislature has established a requirement that a licensed contractor maintain general liability insurance in the amount of at least $50,000.00, which indicates the intent to establish a separate mechanism, other than the Guaranty Fund, for the pursuit of claims for property damage caused by the negligence of a contractor.

3) The Recommended Order of the Administrative Law Judge is Amended as follows:

A) The Claimant is awarded $5,853.00 from the Home Improvement Guaranty Fund.

4) Unless any party 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, any party then has an additional thirty (30) day period during which they may file an appeal to Circuit Court.

Joseph Tunney
Chairperson - Panel B
Maryland Home Improvement Commission