

CLAIM OF MARY LEE LEBARTON \* BEFORE WILLIAM C. HERZING,  
 AGAINST THE MARYLAND HOME \* ADMINISTRATIVE LAW JUDGE  
 IMPROVEMENT GUARANTY \* MARYLAND OFFICE OF  
 FUND FOR THE ALLEGED ACTS \* ADMINISTRATIVE HEARINGS  
 AND OMISSIONS OF PETE DALEY, \* OAH No. DLR-HIC-02-09-29621  
 T/A PETE DALEY \* MHIC No. 08 (90) 864  
 (RESPONDENT) \*

\* \* \* \* \*

**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 September 12, 2008, Mary Lee LeBarton, (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of losses allegedly suffered as a result of home improvement work performed by Pete Daley, T/A Pete Daley (Respondent).

William C. Herzing, Administrative Law Judge, heard the above-captioned case on July 19, 2010, on behalf of the Maryland Home Improvement Commission (MHIC). Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407(c)(2)(2010).<sup>1</sup>

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<sup>1</sup> All further references to the Business Regulation Article will be to the 2010 Replacement volume and the 2010 Supplement unless otherwise indicated.

Jessica Berman Kaufman, Assistant Attorney General, represented the Fund and the Claimant appeared on her own behalf. The Respondent failed to appear after proper notice of the hearing was sent to him by regular and certified mail at his address of record. I ruled that the hearing would proceed in the Respondent's absence. Md. Code Ann., Bus. Reg. § 8-312(h); COMAR 09.01.02.09.

Procedures in this hearing are governed by the contested case provisions of the Administrative Procedure Act, Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009) and the Rules of Procedure of the Office of Administrative Hearings, found at COMAR 28.02.01.

### **ISSUE**

The issue is whether the Claimant sustained an actual loss compensable by the Maryland Home Improvement Guaranty Fund because of the acts or omissions by the Respondent.

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

The Claimant presented eight exhibits and the Fund offered four exhibits into evidence. An Exhibit List is attached.

#### **Testimony**

The Claimant testified on her own behalf. The Fund did not offer any witness testimony.

### **FINDINGS OF FACT**

After considering all of the evidence presented, I find by a preponderance of the evidence that:

1. On August 28, 2007, the Claimant spoke to the Respondent while he was working on another job in her neighborhood and asked for an estimate for work on her driveway. The Respondent examined the driveway and identified a problem with water leaking into the garage. The Claimant also asked the Respondent to widen the driveway. The Respondent estimated the cost of the work to be \$4,000.00.

2. The Respondent started the job the following day, August 29, 2007. He removed eroded portions of the driveway abutting the garage and put a layer of asphalt on the driveway. The work was completed the same day and the Claimant paid the Respondent \$4,000.00.
3. The next time it rained, on or around September 17, 2007, water continued to flow into the Claimant's garage.
4. The Claimant called the Respondent multiple times to complain about the work but the Respondent did not make any attempt to repair the defects.
5. The Claimant filed a complaint with the MHIC on September 12, 2008. On September 16, 2008, two of the Respondent's employees applied a ridge of asphalt along the garage door area of the driveway to attempt to stop water from entering the garage. The garage still leaks despite the Respondent's repair.
6. The Claimant obtained proposals from two licensed contractors, Albert Paving, Inc., and H&H Grounds Maintenance, Inc., to repair the defective workmanship of the Respondent. The Claimant has not yet made the repairs.
7. The Respondent was licensed as a home improvement contractor at all times relevant to this proceeding.

### DISCUSSION

Sections 8-401 through 8-411 of the Business Regulation Article of the Maryland Annotated Code establish the Fund to compensate homeowners for actual losses sustained by them due to acts or omissions by licensed contractors.

Actual loss is defined as follows:

In this subtitle, "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.

The burden of proof to establish the unworkmanlike or inadequate home improvement and any actual loss suffered is on the Claimant. Md. Code Ann., Bus. Reg. § 8-407(e)(1).

The evidence established that in August 2007, the Claimant hired the Respondent to make improvements to her driveway. The Claimant testified that when the Respondent examined

her driveway to give her an estimate, he recognized that there was a problem with water leaking into the garage. The next day workers removed eroded asphalt in front of the garage door and widened part of the driveway. The next time it rained, water continued to leak into the garage. The Claimant testified that she contacted the Respondent numerous times but he did not take any action to repair his defective workmanship. It was not until after she filed a complaint with the MHIC that the Respondent attempted to make repairs. Workers put a mound of asphalt, approximately five inches wide and two inches high, across the opening at the base of the garage doors. In spite of the Respondent's efforts, the water continues to enter the garage. The Claimant's testimony, supported by graphic photographs, showed the mound of asphalt at the garage door opening and the large puddles of water in the garage.

The "cost of restoration, repair, replacement, or completion that arises from an unworkmanlike, inadequate, or incomplete home improvement" is an actual loss. Md. Code Ann., Bus. Reg. § 8-401.

COMAR 09.08.03.03B(3) establishes the methods for determining actual loss:

(3) Unless it determines that a particular claim requires a unique measurement, the Commission shall measure actual loss as follows:

(a) If the contractor abandoned the contract without doing any work, the claimant's actual loss shall be the amount which the claimant paid to the contractor under the contract.

(b) If the contractor did work under 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.

(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, 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.

(Emphasis added.)

To determine the Claimant's actual loss in accordance with the formula set forth in COMAR 09.08.03.03B(3)(c), the following calculations are applicable:

Amount paid the Respondent under original contracts	\$ 4,000.00
Cost to complete	\$ <u>2,478.00</u> <sup>2</sup>
Subtotal	\$ 6,478.00
Less original contract price	\$ <u>4,000.00</u>
Claimant's actual loss	\$ 2,478.00

The Claimant has established that she is entitled to reimbursement from the Fund in the amount of \$2,478.00 as a result of the actions of the Respondent.

#### **CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Claimant has established that she sustained an actual loss under Section 8-401 of the Business Regulation Article as a result of the Respondent's poor workmanship. Therefore, the Claimant is entitled to reimbursement from the Maryland Home Improvement Guaranty Fund pursuant to Section 8-405 of the Business Regulation Article and COMAR 09.08.03.03B(3)(c).

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<sup>2</sup> I used the estimate from Albert Paving, Inc. as the most accurate estimate of the cost to repair the Respondent's work because the estimate from H&H Grounds Maintenance, Inc., involved construction of a channel drain which was beyond the work done by the Respondent. Items in the estimate from Albert Paving were subtracted from the total cost as not part of the original work to be done by the Respondent. The cost to correct was calculated as follows:

Total	\$7,485.00
Less	\$3,240.00 for apron removal
	\$ 972.00 apron overlay
	\$ 725.00 for seal coating
	<u>\$2,478.00</u>

**RECOMMENDED ORDER**

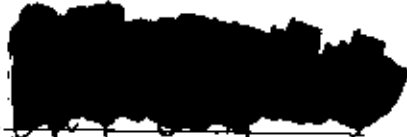
On the basis of the foregoing Findings of Fact, Discussion and Conclusions of Law, I **RECOMMEND** that the Maryland Home Improvement Commission:

**ORDER** that the Claimant be awarded \$2,478.00 from the Maryland Home Improvement Guaranty Fund for actual losses sustained as a result of the conduct of the Respondent; and further

**ORDER** that the Respondent, pursuant to Md. Code Ann., Bus Reg. § 8-411, shall 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 as set by law; and further

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

September 20, 2010  
Date Decision Issued

  
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William C. Herzing  
Administrative Law Judge

#116846

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\* \* \* \* \*

**FILE EXHIBIT LIST**

Claimant Exhibits

1. Letter, September 9, 2008 from the Claimant to the MHIC
2. Letter, September 17, 2008 from the Claimant to the MHIC
3. Copy of a check issued to Daley Paving by the Claimant
4. MHIC Complaint Form
5. Four photographs
6. Proposal from Albert Paving, Inc.
7. MHIC licensing history of Albert Paving, Inc.
8. Proposal from H&H Grounds Maintenance Inc.

Guarantee Fund Exhibits

1. Notice of Hearing sent certified mail and returned by the Post Office
2. MHIC transmittal form; Hearing Order; Home Improvement Claim Form
3. Respondent's licensing history with the MHIC
4. Letter to the Respondent, October 8, 2008, from John Borz, Chairman MHIC; Home Improvement Claim Form, received September 12, 2008

PROPOSED ORDER

*WHEREFORE, this 25th 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.*

*Andrew Snyder*

*Andrew Snyder  
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION