

IN THE MATTER OF THE CLAIM OF	* BEFORE JEROME WOODS, II,
CHRISTY MOSER,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	* OAH Case No.: DLR-HIC-02-10-31476
FOR THE ALLEGED ACTS OR	* MHIC Case No.: 0 9 (90) 1249
OMISSIONS OF CHRIS McAFEE	*
t/a McAFEE ASPHALT	*

* * * * *

RECOMMENDED DECISION

STATEMENT OF THE CASE
ISSUE
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FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On March 12, 2009, Christy Moser (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$180.00 for actual losses allegedly suffered as a result of a home improvement contract with Chris McAfee (Respondent), t/a McAfee Asphalt. After an investigation, the Commission issued an August 25, 2010, Hearing Order and forwarded the case to the Office of Administrative Hearings (OAH) on August 30, 2010.

I held a hearing on April 11, 2011, at the Washington County Office Bldg., 33 West Washington Street, 2nd Floor Conf. Room 210, Hagerstown Maryland 21740. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010). Jessica Kaufman, Assistant Attorney General, Department of Labor, Licensing and

Regulation (DLLR or Department), represented the Fund. The Claimant represented herself. Although properly notified of the hearing, the Respondent was not present.¹

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, and the OAH Rules of Procedure govern the procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2010); Code of Maryland Regulations (COMAR) 09.01.03, COMAR 09.08.02.01; COMAR 28.02.01.

ISSUE

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

SUMMARY OF THE EVIDENCE

Exhibits

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

- Claimant Ex. 1 May 25, 2006 Proposal and contract to repave driveway
- Claimant Ex. 2 June 17, 2008 letter from the Respondent to the Claimant
- Claimant Ex. 3 November 10, 2008 Complaint Form
- Claimant Ex. 4 February 24, 2009 letter from the Respondent to the Claimant
- Claimant Ex. 5 February 25, 2009 Proposal from Jeter Paving
- Claimant Ex. 6 August 11, 2009 Proposal from Jeter Paving

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. 1: January 28, 2011, certified Mail receipt
- Fund Ex. 2: August 25, 2010 Hearing Order

¹ The Respondent's license with the MHIC expired on June 25, 2010. The OAH sent Notices of Hearing to the Respondent at his addresses of record by certified and regular mail. The certified and regular mail was received. Accordingly, after reviewing the documents in the record relating to notice, I concluded that the Respondent was afforded due notice of the hearing, and although he failed to appear, I proceeded with the hearing without him. Code of Maryland Regulations 09.01.02.07 and .09.

Fund Ex. 3 March 17, 2011 Licensing History

Fund Ex. 5 March 17, 2011 Licensing History Supplement

No exhibits were submitted on behalf of the Respondent.

Testimony

The Claimant testified on her own behalf. The Fund presented argument but no witnesses.

FINDINGS OF FACT

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

1. At all times relevant to this matter, the Respondent was a licensed home improvement contractor under MHIC license number 88444.
2. On May 25, 2006, the Claimant entered into a contract with the Respondent to repave her driveway. The amount of the contract was \$2,900.00.
3. The Claimant paid the full \$2,900.00 to the Respondent as required.
4. The contract states that "seal coating follows in a two year cure period at no charge and a four year warranty sealer." (Claimant Ex. 1).
5. When the driveway was repaved in July 2006, it was done so in accordance with the contract and the Claimant was satisfied.
6. On June 17, 2008, the Respondent informed the Claimant that he would not provide the two year seal coating because of the rising price of sealer and fuel.
7. On February 24, 2009, the Respondent informed the Claimant that he would seal the driveway at sometime in May 2009, if the temperature were above sixty degrees.
8. At the time the Respondent informed the Claimant he would not seal the driveway, the driveway had never been sealed.

9. On February 25, 2009, the Claimant obtained an estimate from another licensed contractor (Jeter Paving) to seal the driveway. The estimate was \$180.00
10. The Respondent did not come in May 2009 to seal the driveway.
11. On August 11, 2009, a representative from Jeter Paving, sealed the driveway. The cost of the remedial work, i.e. sealing the driveway, was \$200.00.
12. The Claimant's actual loss is \$200.00

DISCUSSION

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) (2010). *See also* COMAR 09.08.03.03B(2). The loss must "arise from an unworkmanlike, inadequate, or incomplete home improvement." Md. Code Ann., Bus. Reg. § 8-401 (2010). The Claimant bears the burden to prove each of the above elements by a preponderance of the evidence. Md. Code Ann., Bus. Reg. § 8-407(e) (2010); COMAR 09.01.02.16C; COMAR 09.08.03.03A(3). For the following reasons, I find that the Claimant has met her burden, establishing her entitlement to an award from the Fund.

First, the Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant. Second, the Claimant paid the Respondent \$2,900.00 under a home improvement contract. Third, the Respondent performed an unworkmanlike and inadequate home improvement by refusing to seal the driveway.

After several unavailing attempts to provide an opportunity for the Respondent to correct the deficiencies, the Claimant secured an estimate in the amount of \$180.00 to seal the driveway and had the work performed by Jeter Paving for \$200.00.

As a result of the Respondent's unworkmanlike performance, the Claimant is potentially eligible for an award from the Fund. I now turn to the amount of the award, if any. MHIC's regulations offer three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). One of those formulas, as follows, offers an appropriate measurement in this case:

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.

COMAR 09.08.03.03B(3)(c).

The Claimant presented unrefuted evidence from a licensed home improvement contractor that the cost to repave the driveway and seal it, was \$2,900.00. Using the formula set forth in COMAR 09.08.03.03B(3)(c), I calculate the Claimant's actual loss as follows:

\$2,900.00	Amount paid by the Claimant to or in behalf of the Respondent
+ <u>\$200.00</u>	Reasonable cost of correction
\$3,100.00	
- <u>\$2,900</u>	Original contract price
\$200.00	Actual loss by the Claimant

The original claim against the Fund was for \$180.00. The Claimant provided documentation and testified that the cost to correct the Respondent's work was \$200.00. At the beginning of the hearing, the Claimant requested leave to amend the claim against the Fund to \$200.00.

With regard to the amendment of Guaranty Fund claims, COMAR 09.08.03.02C provides as follows:

C. Amending of Claims. Once a verified claim has been filed with the Commission, the claimant may not amend the claim unless the claimant can establish to the satisfaction of the Commission that either the:

(1) Claimant did not know and could not have reasonably ascertained the facts on which the proposed amendment is based at the time the claim was filed; or

(2) Claimant's proposed amendment would not prejudice the contractor whose conduct gave rise to the claim.

The Fund agreed that the proposed amendment to the claim was proper and would not prejudice the Respondent. I agree. The Claimant submitted a document to the Fund since filing the Claim noting that Jeter Paving increased the estimate by \$20.00 as a result of rising costs related to sealcoat. The description of expenditures was explained at the hearing and the Respondent could have heard the reason for the increase if he participated.

CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual loss of \$200.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2010).

RECOMMENDED ORDER

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


ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$200.00, and I further propose that the Maryland Home Improvement Commission,

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 as set by the Maryland Home Improvement Commission. Md. Code Ann., Bus. Reg. § 8-411(a) (2010); and

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

June 30, 2011
Date Decision Mailed

JW/kkc
#124220


Jerome Woods, Jr.
Administrative Law Judge

<p>IN THE MATTER OF THE CLAIM OF</p> <p>GREG GOBLE,</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 JOHN R. DOAR</p> <p>t/a RELIABLE PAVING</p>	<p>* BEFORE JEROME WOODS, II,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>* OAH Case No.: DLR-HIC-02-10-31465</p> <p>* MHIC Case No.: 07 (90) 454</p> <p>*</p> <p>*</p>
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FILE EXHIBIT LIST

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- Fund Ex. 5 March 17, 2011 Licensing History Supplement

No exhibits were submitted on behalf of the Respondent.

PROPOSED ORDER

WHEREFORE, this 8th day of August 2011, 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