

IN THE MATTER OF THE CLAIM	* BEFORE JENNIFER M. CARTER JONES,
OF PAUL D. NORMAN,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT,	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	* OAH NO.: DLR-HIC-02-13-08992
FOR THE ALLEGED ACTS OR	* MHIC NO.: 10 (90) 13
OMISSIONS OF EDWARD HILL,	*
T/A DIAMOND CONTRACTING	*
CORPORATION,	*

RESPONDENT

* * * * *

RECOMMENDED DECISION

STATEMENT OF THE CASE
ISSUE
SUMMARY OF THE EVIDENCE
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DISCUSSION
CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On or about December 3, 2010, Paul D. Norman (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$5,810.00 for actual losses allegedly suffered as a result of a home improvement contract with Edward Hill, t/a Diamond Contracting Corporation (Respondent).

I held a hearing on July 30, 2013 at the Office of Administrative Hearings (OAH) in Hunt Valley, MD. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010 & Supp. 2013). Hope Sachs, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR),

represented the Fund. The Claimant's wife, Kristine Dumlao-Norman, represented the Claimant.¹
Neither the Respondent nor any representative appeared for the hearing.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2013), Code of Maryland Regulations (COMAR) 09.01.03.01; 09.08.02.01; and 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:

- Cl. Ex. 1 – Contract Proposal, undated
- Cl. Ex. 2 – Photographs of the Claimant's driveway, taken in August 2008.
- Cl. Ex. 3 – Proposal from M.T. Laney Company, Inc., dated June 26, 2009; and Proposal from M.T. Laney Company, Inc., dated October 28, 2011
- CL Ex. 4 – Inspection report from John J. Heyn, JJH Consultant, dated January 12, 2011
- CL. Ex. 5 – Copies of the following checks from the Claimant to the Respondent:
 - Check # 1039, \$1,500.00, June 25, 2008
 - Check # 1041, \$2,800.00, July 1, 2008

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

- GF Ex. 1 – Copy of OAH Notice of Hearing, dated March 20, 2013 and copy of DLLR Hearing Order, dated January 25, 2013, mailed via certified mail to the Respondent, with attached green return receipt, marked by the United States Postal Service as "unclaimed."

¹ The Claimant is deceased. I allowed Ms. Dumlao-Norman to present the Claimant's case on his behalf after she submitted Letters of Administration for the Claimant's estate.

GF Ex. 2 – Affidavit of Thomas Marr, Investigator with the MHIC, dated May 3, 2013, with attached email correspondence between Mr. Marr and Ms. Sachs

GF Ex. 3 – Licensing history for the Respondent

GF Ex. 4 – Home Improvement Claim Form, dated April 17, 2013

GF Ex. 5 – Claimant’s Complaint Form with the DLLR, dated June 30, 2009, with attached summary from the Claimant

I admitted the State of Maryland Letters of Administration of a Small Estate for the Claimant, dated August 15, 2012, as Joint Ex. 1.

Testimony

Kristine Dumlao-Norman testified on behalf of the Claimant.

No other testimony was presented.

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 #3699608.
2. On or about February 14, 2009, the Claimant and the Respondent entered into a contract to extend the driveway at the front of the Claimant’s property and to create a seamless connection to the existing driveway (the Contract).
3. The Respondent charged the Claimant \$4,700.00 to complete the driveway work.
4. After the February 14, 2009 Contract, the Respondent charged the Claimant an additional \$180.00 to cut out a portion of the sidewalk to accommodate the Claimant’s driveway.
5. On June 25, 2008, the Claimant paid the Respondent \$1,500.00 via check number 1039.
6. On July 1, 2008, the Claimant paid the Respondent \$2,800.00 via check number 1041.
7. The Claimant paid the Respondent an additional \$580.00 in cash.

8. The Respondent completed the driveway work on or about July 1, 2008. Upon completion, the Respondent advised the Claimant to stay off of the driveway for approximately two weeks to let the asphalt settle.
9. The Claimant and his family stayed off of the driveway for two weeks. After two weeks, the Claimant and his family began using the driveway. The Claimant drove on the driveway and placed a hose box at the top of the driveway near the house.
10. The Claimant immediately noticed problems upon use of the driveway, including the following:
 - Tire marks and scuffs
 - Depression in the asphalt under the hose box
 - Pooling of water in depressed areas in the driveway
 - Visual seam between the pre-existing and extended portions of the driveway.
11. On or about July 17, 2008, the Claimant called the Respondent and advised him of the problems he observed with the driveway.
12. On or about July 21, 2008, the Respondent called the Claimant at work and told the Claimant that he was standing on his driveway at that moment and he did not observe any problems with the driveway.
13. The Respondent advised the Claimant that he should wait an additional three weeks without using the driveway to let the asphalt cure longer.
14. The Claimant refrained from using the driveway for three additional weeks, but the defects became worse.
15. On or about August 18, 2008, the Claimant contacted the Respondent again and left a voicemail message, but the Respondent did not return the Claimant's call.

16. Sometime after August 18, 2008, the Respondent met with the Claimant and advised him that the asphalt products he used may have been faulty and he suggested that the Claimant contact the product manufacturer.
17. On or about May 5, 2009, the Claimant sent a letter to the Respondent reiterating the problems he observed with the driveway and requesting that he repair the driveway.
18. The Respondent did not make any attempt to replace or repair the driveway.
19. The driveway continued to deteriorate over the subsequent five months. On June 26, 2009, M.T. Laney Company, Inc. gave the Claimant a proposal for \$5,810.00 to excavate and replace the driveway.
20. On October 28, 2011, M.T. Laney, Inc. gave the Claimant another proposal for \$7,322.00 to excavate and replace the driveway.
21. On or about January 12, 2011, Maryland Licensed Home Inspector John J. Heyn (Lic. # 29542) inspected the Claimant's driveway.

DISCUSSION

The Respondent's Failure to Appear

Neither the Respondent nor anyone authorized to represent the Respondent appeared for the hearing.

On March 20, 2013, the OAH mailed a Notice of Hearing (Notice) by certified and first class mail to the Respondent's address of record. The Notice advised the Respondent of the time, place and date of the hearing. The United States Postal Service (USPS) returned to the OAH the copy of the Notice sent by certified mail as unclaimed. The USPS did not return the copy of the Notice sent by first class mail. As of the date of the hearing, the Respondent had not requested a postponement of the hearing. I therefore find that service was proper and that the Respondent was on notice of the hearing. Consequently, I directed that the hearing proceed in the

Respondent's absence pursuant to section 8-312(h) of the Business Regulation Article, section 10-209 of the State Government Article, and COMAR 09.01.02.07.

Merits

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. 2013). *See also* COMAR 09.08.03.03B(2). 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). For the following reasons, I find that the Claimant has proven eligibility for compensation.

A review of the licensure information for the Respondent (GF Ex. 3) makes it clear that the Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant.

Furthermore, it is clear from the evidence that the Respondent installed the Claimant's driveway in an unworkmanlike manner. Photographs that Ms. Dumlao-Norman produced at the hearing displayed significant pooling of water in areas of the driveway, and obvious grooves and scuff marks on the surface of the driveway. Furthermore, I was able to clearly observe a line running across the width of the driveway where the existing driveway met with the extended driveway.

The Ms. Dumlao-Norman testified that she and the Claimant waited the requisite time before attempting to use the driveway after its installation, and that once the Claimant brought the driveway defects to the Respondent's attention, the Respondent simply surmised that the problems may have resulted from an inferior asphalt product provided by the manufacturer. Ms. Dumlao-Norman also testified that despite repeated attempts to have the Respondent repair the defects, he never made any attempt to do so.

Ms. Dumlao-Norman also submitted a January 12, 2011 driveway inspection report from licensed Maryland Home Inspector John J. Heyn. Mr. Heyn, who, per Ms. Sachs, completes inspections for the Commission and the Fund, reported that he observed cracks and deterioration on the surface and edges of the driveway. Mr. Heyn also reported observation of sunken areas and pooling of the driveway due to inadequate subsurface preparations. Mr. Heyn reported that the problems should be repaired by removing and replacing the defective area of the driveway, at an approximate cost of \$6,298.00.²

The Claimant intends to have another contractor repair the driveway, and submitted an October 28, 2011 proposal from M.T. Laney Company, Inc., for \$7,322.00, dated September 26, 2012.

As stated above, the Respondent failed to appear for the hearing, and therefore, offered nothing to rebut the Claimant's evidence. I find that the Claimant has submitted sufficient evidence to sustain his burden in this matter and he is entitled to compensation from the Fund.

Having found eligibility for compensation, I now turn to the amount of the award. 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 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

² Mr. Heyn did not testify in person and thus, could not be qualified as an expert. However, I find that in light of the facts that Mr. Heyn is licensed by the State of Maryland as an Inspector, and that the Commission, which regulates contractors and inspectors, employs Mr. Heyn to conduct inspections, it is reasonable to consider his inspection report to the extent that it buttresses the clear evidence submitted by the Claimant that the driveway was improperly installed.

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.

COMAR 09.08.03.03B(3)(c).

Ms. Dumlao-Norman presented evidence showing the Claimant paid the Respondent \$4,880.00.³ Therefore, the appropriate measure of compensation from the Fund is as follows:

Amount paid to Respondent:	\$4,880.00
Amount to complete the work:	+\$7,322.00
<u>Subtotal:</u>	<u>\$12,202.00</u>
Original contract price:	-\$4,880.00
Actual loss	\$7,322.00

The Claimant experienced an actual loss in the amount of \$7,322.00. However, Section 8-405(e) of the Business Regulation Article dictates that the Commission may not award from the Fund “an amount in excess of the amount paid by or on behalf of the claimant to the contractor against whom the claim is filed.” Accordingly, the Claimant is entitled to reimbursement from the fund in the amount of \$4,880.00.

CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual/compensable loss of \$4,880.00 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 \$4,880.00; and

³ My review of the Claimant's claim reveals that the Claimant initially sought reimbursement from the Fund in the amount of \$5,810.00 in error, apparently based on the June 26, 2009 proposal from M.T. Laney Co., Inc.

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.

Signature on File

October 28, 2013
Date Decision Issued

Jennifer M. Carter Jones
Administrative Law Judge

JCJ/emh
#145801

<p>IN THE MATTER OF THE CLAIM OF PAUL D. NORMAN, CLAIMANT, AGAINST THE MARYLAND HOME IMPROVEMENT GUARANTY FUND FOR THE ALLEGED ACTS OR OMISSIONS OF EDWARD HILL, T/A DIAMOND CONTRACTING CORPORATION, RESPONDENT</p>	<p>* BEFORE JENNIFER M. CARTER JONES, * AN ADMINISTRATIVE LAW JUDGE * OF THE MARYLAND OFFICE * OF ADMINISTRATIVE HEARINGS * OAH NO.: DLR-HIC-02-13-08992 * MHIC NO.: 10 (90) 13 * * *</p>
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FILE EXHIBIT LIST

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I admitted the State of Maryland Letters of Administration of a Small Estate for the Claimant, dated August 15, 2012, as Joint Ex. 1.

PROPOSED ORDER

WHEREFORE, this 26th day of November 2013, Panel B of the Maryland Home Improvement Commission approves the Recommended Decision 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.

Marilyn Jumalon
Marilyn Jumalon
Panel B

MARYLAND HOME IMPROVEMENT COMMISSION