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| **IN THE MATTER OF THE CLAIM** | * | **BEFORE HENRY R. ABRAMS,** |
| **OF STANLEY KOSMOS,** | * | **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 ROBERT WEISS,** | * | |
| **T/A PERFICUT LAWN & LANDSCAPE,** | * | **OAH No.: DLR-HIC-02-13-34297** |
| **RESPONDENT** | * | **MHIC No.: 12 (90) 214** |

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# PROPOSED DECISION

STATEMENT OF THE CASE
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DISCUSSION
PROPOSED CONCLUSION OF LAW
RECOMMENDED ORDER

## STATEMENT OF THE CASE

On April 12, 2013, Stanley Kosmos, Claimant, filed a claim (Complaint) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of $8,458.04 in actual losses suffered as a result of the alleged unworkmanlike performance of work pursuant to a home improvement contract with Robert Weiss, trading as Perficut Lawn & Landscape (Respondent).

I held a hearing on May 1, 2014, at the office of Administrative Hearings in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. § 8-312 (Supp. 2013) and § 8-407 (2010).[1] Jessica B. Kaufman, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Claimant represented himself. The Respondent represented himself.

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 (2009 & Supp. 2013), 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 the Respondent's acts or omissions?

2. If so, what is the amount of that loss?

## SUMMARY OF THE EVIDENCE

Exhibits

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

GF Ex. 1 — March 27, 2014 Notice of Hearing, together with March 20, 2014 Notice of Hearing; and February 21, 2014 memorandum and attachments from Sandra Sykes, Docket Specialist, to Legal Services;

GF Ex. 2 — Undated Transmittal from the Department to Sandra Sykes, together with August 9, 2013 MHIC Hearing Order and April 12, 2013 Home Improvement Claim Form from the Claimant

GF Ex. 3 — February 27, 2014 MHIC licensing record review re: the Respondent

[1] The OAH originally scheduled the hearing for March 24, 2014, but postponed it at the MHIC's request.

GF Ex. 4 April 17, 2013 letter from Mr. John Borz, MHIC Chairman, to the Respondent, together with the Claimant's April 12, 2013 Home Improvement Claim Form

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

Cl. Ex. 1 Undated, illustrated catalogue page with picture of Diamond Pro paving block, and with the Respondent's handwritten notes

Cl. Ex. 2 Undated excerpt, entitled "Installation," from E P Henry Corporation (EPH) booklet (p. 92 only)

Cl. Ex. 3A-C Six photographs (2 per page) taken by the Claimant of the Respondent's work

Cl. Ex. 4 Not admitted

Cl. Ex. 5 Interlocking Concrete Pavement Institute (ICPI) "Tech Spec Number 2" re: Construction of Interlocking Concrete Pavements (revised August 2011)

Cl. Ex. 6 ICPI "Tech Spec Number 6" re: Reinstatement of Interlocking Concrete Pavements (revised August 2011)

Cl. Ex. 7 Undated EPH explanation of EPH product warranty

Cl. Ex. 8 July 6, 2011 contract (Contract) between the Claimant and the Respondent

Cl. Ex. 9 January 9, 2012 Akehurst Landscape Service, Inc. Landscape Proposal and Contract

Cl. Ex. 10 January 5, 2012 Quotation from American Deck, Inc.

Cl. Ex. 11 March 29, 2013 MasterSpec, Inc. Home Inspection Service report and photographs, with the following attachments:

A. Undated set of notes from the Claimant (3 pages) and undated notes from Joseph L. Berk

B. Undated EPH excerpt entitled "Diamond Pro Installation Instructions"

C. Undated ICPI "Tech Spec Number 2" (same as Cl. Ex. 5)

Cl. Ex. 12 September 20, 2011 (4:05:19 a.m.) email from the Respondent to the Claimant; September 21, 2011 (7:51 p.m.) email from the Claimant to the Respondent; and September 21, 2011 email (8:33:24 p.m.) email from the Respondent to the Claimant

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

R. 1 ICPI Certificate of Completion certifying the Respondent as an ICPI Level I Certified Concrete Paver Installer (valid through December 31, 2011)

R. 2 March 4, 2008 letter from Brittaney R. Kamhong Thompson, National Concrete Masonry Association, to the Respondent

R. 3 The Respondent's Certificate of Attendance at the February 7, 2008 Versa-Lock Segmental Retaining Wall Seminar

R. 4 Fifteen photographs (two-sided copy)

R. 5 September 20, 2011 Final Inspection Report, signed by the Respondent on September 26, 2011

R. 6 September 28, 2011 letter from Gary Weiss to the MHIC

R. 7 Single photograph, bearing a handwritten arrow

R. 8 The Respondent's accounting for the cost of materials used in connection with the work pursuant to the Contract

R. 9 The Respondent's accounting for the cost of equipment used in connection with the work pursuant to the Contract

Testimony

The Claimant testified for himself and presented the testimony of Joseph L. Berk, who was admitted as an expert in home inspection, including with respect to the standards pertaining to and the construction of retaining walls and driveways.

The Respondent testified on his own behalf.

The Fund did not present 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, holding MHIC license number 01-96066.

2. At all relevant times, the Claimant owned and resided at the home located at 2830 Cub Hill Road, Parkville, Maryland.

3. On July 6, 2011, the Claimant and the Respondent entered into the Contract. The Contract called for the Respondent to do the following work at the Respondent's Cub Hill Road home: demolish and replace an existing retaining wall abutting the Claimant's driveway; install drainage under the retaining wall; and demolish and replace a portion of the Claimant's paver driveway.

4. The existing retaining wall consisted of decorative concrete blocks finished with a faux stone appearance on one side only. The Respondent proposed and priced the work to be done, assuming that the new retaining wall would be finished on one side only. The proposed contract price was $8,258.04, which included the cost of labor, materials and equipment.

5. When the Respondent presented the proposed contract to the Claimant, the Claimant indicated that he wanted to change the plan for the retaining wall.

6. By design, the retaining wall is slightly curved. Most of the retaining wall is concealed below ground. The top course (row), however, is above ground. Because the selected concrete block is rectangular, without alteration, the top course of the wall would show gaps between the blocks at points along the curve where edges of the blocks would not meet.

7. In addition, the Claimant wanted the retaining wall's top course of concrete to be finished on both sides.

8. To deal with these concerns, the Respondent suggested to the Claimant that the top course could be constructed of decorative blocks, each "block" actually consisting of the finished sides of two blocks. The Respondent would glue together finished block surfaces taken from two different blocks for both the inner and outer sides of each block along the top row. The inner

panels would be placed so as to avoid the appearance of gaps. (See. Cl. Ex. 3C, photograph no. 1.) The top course would then be capped with three-inch thick, flat masonry slabs finished on both sides, rather than the four-inch slabs originally specified in the proposed contract.

9. The Respondent explained to the Claimant that, because the two sides of the each top course block were glued together, the top course would lack the structural integrity possessed by the remainder of the wall in withstanding the force of certain impacts. The Claimant accepted the Respondent's modification to the top course and the change in the cap slab thickness.

10. The change to the retaining wall required an additional thirty concrete blocks and an additional two hours of labor. The final proposed contract price, including the changes to the retaining wall, was $8,586.54.[2]

11. The Claimant and Respondent signed the Contract on July 6, 2011, and the Claimant paid the Respondent $2,752.66 toward the full Contract price the same day.

12. The Respondent began work pursuant to the Contract shortly after the parties executed it.

13. The Respondent used a work crew to do the Contract work. The Respondent was not always present during construction.

14. The Respondent properly demolished the existing retaining wall.

15. The Respondent used the agreed materials to build the new retaining wall.

16. The new retaining wall consisted of several rows (or courses) of decorative concrete blocks. Pursuant to the agreement of the parties, the blocks were obtained from EPH. The Respondent recommended EPH's product and the Claimant agreed to the recommendation. Each

[2] The additional thirty blocks and two hours of labor are handwritten on the Contract. The Contract indicates each block to be installed cost $170.00. It does not state the cost of labor. The Contract price, as recited in the Contract before the changes in the design and cost of the retaining wall, was not amended on the written Contract to reflect the change in price.

row contained multiple concrete blocks and each block consisted of an outer shell finished on one side and two inner chambers, each of which was empty. Pursuant to EPH's instructions for constructing a retaining wall using its products, and per industry standard, each of the concrete block's two inner chambers was to be filled with "3/4-inch clean stone." (Cl. Ex. 2; Berk Test.) Without the stone filler, the retaining wall would lack the required stability and ultimately would fail in its purpose.

17. Because the blocks were arranged in an asymmetrical, staggered pattern from row to row, each of the blocks' dual inner chambers did not directly align with those above and below. Consequently, each course of block had to be completely filled with stone before the next course was installed.

18. With the exception of the blocks comprising the top course of the retaining wall, the Respondent filled all, or virtually all, of the inner chambers of the concrete blocks with stone. As a result, with the exception of the top course, all courses of the retaining wall were constructed in accordance with, or virtually in accordance with, manufacturer and industry standards.

19. The Respondent installed the top course using the modified blocks to which the parties agreed. The slices of block are attached to each other and to the under course by glue. The interiors should have been, but were not filled with stone. As a result, the top course of block lacks the amount of strength and stability that a stone filling would have provided. This installation is not in accordance with manufacturer or industry standard.

20. The Claimant's driveway is constructed of masonry pavers. The Respondent removed that portion of the driveway called for by the Contract and installed new pavers agreed upon by the parties. The replaced section constituted a large portion of the driveway.

21. Pursuant to the manufacturer's guidelines and industry standard, the soil in the area to be paved is to be compacted, to prevent settling. A geotextile fabric may then be added to prevent soil from pressing up against the aggregate base and creating ruts. Either the compacted soil or, if used, the fabric, is then covered with aggregate, which is also compacted to prevent settlement. A sand base is then placed on top of the aggregate. The pavers are placed in the sand and then tamped. Finally, joint sand is swept over the pavers to fill the gaps between them.

22. If done correctly, the newly installed portion of the driveway should achieve and maintain a certain slope, there should be no settlement, the pavers should be even, and they should not shift.

23. The Respondent installed the aggregate base, the geotextile fabric, and the pavers in completing the driveway.

24. The Respondent completed the Contract work approximately one week to ten days after work began.

25. As permitted by the Contract, the Respondent made certain minor changes to the work based upon site conditions, adding certain items and deleting others. These changes affected the ultimate Contract price.

26. Shortly after completing the work, the Respondent presented his invoice to the Claimant. Based upon site-related changes, the ultimate Contract price was $8,724.90. Deducting the down payment from that amount, the Claimant paid the Respondent the remainder due based upon the invoice figure.

27. On July 29, 2011, shortly after the work was completed, the Claimant left the Respondent a voicemail indicating that the Claimant could not understand how the Respondent reached the final invoice amount. The Claimant stated that he did not authorize any additions to the Contract

other than the one noted (presumably the handwritten interlineation referencing thirty blocks and two additional hours of labor associated with the modification to the top course of the retaining wall). The Claimant indicated that he planned to complain to the MHIC unless the parties resolved his price concern.

28. At an unknown date thereafter, the Claimant went out of town. The parties did not resolve the Claimant's concerns before he left.

29. The Claimant left the Respondent another voicemail on August 15, 2011. He again complained that he overpaid, and for the first time mentioned that a large amount of water flowed from his property onto the neighbor's property during a recent storm.

30. The parties spoke on September 20, 2011. During this call, the Claimant indicated that, contrary to industry standard, the Respondent failed to place a bed of sand under the pavers and failed to tamp the pavers.

31. The Respondent answered this complaint, indicating that a bed of sand was not required and that the Respondent did tamp the pavers. The Respondent indicated he would not remove the pavers and install a sand bed unless the Claimant paid for materials and labor. The Claimant did not agree to that.

32. The Claimant filed a Complaint with the MHIC sometime prior to September 28, 2011.[3] He complained about the Contract price and about the use of the double-sided, three inch capstones used on the retaining wall, which he claimed were not the capstones specified in the Contract. He also alleged that the Respondent failed to provide certain topsoil and failed to grade

[3] The parties did not offer a copy of the Complaint as an exhibit. It is not in the record. I am basing my discussion of the Complaint on the content of the Respondent's September 28, 2011 letter to the MHIC describing and addressing the Claimant's Complaint.

the soil around the retaining wall, as a result of which there was water runoff onto the neighbor's property.

33. The Respondent returned to the Claimant's property to do remedial work on September 20, 2011. Work was done on September 20 and September 26, 2011. The Claimant signed a punch list the Respondent submitted on September 26, 2011, indicating that the Respondent provided the requested topsoil; filled a void around a drain pipe; and replaced sand which had washed out at two locations. The Respondent did not grade the soil around the retaining wall, believing it was not required by the Contract and was not inadequate.[4]

34. The Claimant refused to sign that part of the punch list stating that all services required by the Contract had been completed to his satisfaction.

35. The Claimant obtained two estimates to re-do the Respondent's work. On January 5, 2012, the Claimant obtained a proposal from American Deck, Inc. to re-do the driveway for $3,600.00 or $4,700.00, depending on the scope of work. On January 9, 2012, the Claimant obtained a proposal from Akehurst Landscape Service, Inc. to re-do the retaining wall for $7,900.00 and re-do the driveway for $3,950.00.

36. In or about March 2013, the Claimant retained Mr. Berk to inspect the work done by the Respondent. The Claimant told Mr. Berk that the Respondent did not fill each of the courses of the retaining wall with stone. Mr. Berk asked the Claimant to remove several of the capstones so Mr. Berk could see whether the Respondent did fill each of the courses with stone.[5] The

[4] The Claimant did not raise the grading as an issue at the hearing.

[5] The parties did not state how many capstones there were. I estimate from my review of one of the photographs that there were between ten and fifteen capstones. (*See* R. Ex. 4, photograph number 6.)

Claimant removed at least one capstone, and Mr. Berk found that there was no stone for at least the three top courses beneath that capstone.[6]

37. The Respondent failed to install the driveway in accordance with the manufacturer's guidelines and industry standards. The Respondent failed to install the required sand bed on top of the geotextile fabric.

38. The pavers the Respondent installed appear to have settled. They have shifted, creating an uneven surface. They are also pulling away from the point where they abut the pre-existing driveway. They will continue to do so.

39. At all relevant times, the Claimant owned fewer than three dwellings. He was not an employee, officer or partner of the Respondent, nor an immediate relative of his spouse or any of his partners, officers or employees.

40. The Claimant filed his claim with the MHIC less than three years after entering into the Contract with the Respondent. The Claimant has not filed a claim for reimbursement or damages in any other forum and has not recovered for his alleged loss from any source.

41. The Claimant's actual, compensable loss is $3,950.00. [7]

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[6] Mr. Berk testified that the Claimant removed two or three capstones, but neither his report nor his photographs of the exposed block definitively so indicates. Mr. Berk's photographs, attached to his inspection report, may show only one removed capstone, and either one or two exposed blocks. Of those, there is only one photograph clearly depicting the absence of stone below the top course. (Cl. Ex. 11, March 29, 2013 Report and attached photographs three through six.) . That photograph shows a ruler inserted through the top block and going twenty-one inches into the wall. Mr. Berk testified that each block is eight inches high, so the ruler extended three courses. (Cl. Ex. 11, photograph 5.)

[7] The Claimant claimed an actual loss of $8,458.04, consisting of the original contract price of $8,258.04, plus agreed extras of $200.00. I do not know how the Claimant reached that amount for extras.

## DISCUSSION

The Claimant asserts that the Respondent failed to perform the installation of his retaining wall and driveway in a workmanlike manner.[8] The Claimant seeks a refund of what he contends was the full Contract price, $8,458.04.

An owner bears the burden to prove his claim against the Fund by a preponderance of the evidence. Md. Code Ann., Bus. Reg. § 8-407(e) (2010); COMAR § 09.08.03.03A(3); Md. Code Ann., State Gov't § 10-217 (2009). For the reasons stated below, I find that the Claimant met his burden of proof with respect to his driveway claim. He met his burden in part and failed to meet his burden in part with respect to his retaining wall claim. An owner must prove a number of elements to recover compensation from the Fund. The owner must prove "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).

In addition, an owner must prove that at all relevant times: the owner owned fewer than three dwelling places; (b) the work at issue concerned the owner's personal residence in Maryland; (c) the owner was not an employee, officer or partner of the contractor or the spouse or other immediate relative of the contractor or the contractor's employees, officers or partners; (d) the work at issue did not involve new home construction; (e) the owner did not unreasonably reject the contractor's good faith effort to resolve the claim; (f) any remedial work was done by licensed contractors; (g) the owner complied with any contractual arbitration clause before

[8] The Claimant apparently asserted in his Complaint to the MHIC that other aspects of the Respondent's work were also unworkmanlike, but he did not press those other claims at the hearing before me.

seeking compensation from the Fund; (h) there is no pending claim for the same loss in any court of competent jurisdiction and the owner did not recover for the actual loss from any source; and (i) the owner filed the claim with the MHIC within three years of the date the owner knew or with reasonable diligence should have known of the loss or damage. Md. Code Ann., Bus. Reg. §§ 8-405(c), (d), (f), and (g); 8-408(b)(1) and (2).

There is no dispute that the Respondent was a licensed home improvement contractor; and the work concerned remodeling the Claimant's primary residence. The Respondent entered into a home improvement contract with the Claimant. In addition, the Claimant owned fewer than three dwelling places; the parties were neither related nor associated in business; the Claimant did not file any other action to recover for the Respondent's acts or omissions; and the Claimant filed his claim within three years of the date of the Contract.

***The Retaining Wall***

The Claimant asserts that the Respondent failed to fill each course of the retaining wall, including the top course, with stone, in violation of EPH's guidelines and industry standards. Although not quite as clear, the Appellant also seems to contend that, without the Respondent's permission, the Respondent substituted three-inch caps for the four-inch caps initially agreed upon by the parties, and that, as constructed, the top course of the wall is structurally unsound. With the exception of the claim regarding the failure to fill the top course with stone, neither of these claims has merit.

The Respondent does not dispute that EPH and industry standards require each chamber of a concrete block used in the construction of a retaining wall to be filled with stone. The Respondent asserts that, but for the top course, his crew did fill the blocks of each course with stone, thus meeting standards.

The Claimant testified that he watched the Respondent's crew members as they built the retaining wall and observed that they were not filling the block of any course with stone. He claims that, with the Respondent present, he called EPH at an early project stage to inquire whether stone was required. The EPH representative said it was, at which point the Claimant handed the phone to the Respondent, and the EPH representative said the same thing to the Respondent. Nevertheless, the Claimant asserts, the Respondent's work crew persisted in failing to fill the blocks with stone.

For a number of reasons, I do not find the Claimant's testimony on this point credible. First, the Contract clearly included the purchase of the stone for the retaining wall, and the Claimant never asserted that it was not delivered or that he saw the Respondent or his crew members remove the stone from the site. I cannot discern any motive on the part of the Respondent to have the stones delivered to, and remain at, the site, but not install them in the block.

Second, despite the fact that the Claimant, by his own admission, was allegedly aware of the lack of stone in the chambers from the beginning of the process, he did not raise the supposed failure with the Respondent in any of the Claimant's July, August and September 2011 complaints. Further, the Claimant failed to introduce any evidence that he complained about this in the Complaint he filed with the MHIC in September 2011.

Third, one of the Respondent's photographs clearly shows the Respondent's crew member filling each of the chambers of every block of one of the courses of block. (R. Ex. 4, photograph number 8.) Although not as clear, other photographs appear to show that other

courses were filled in. (*See* R. Ex. 4, photograph numbers 5 and 8.)[9] On the other hand, and with the exception of the photograph of the top course, the Claimant did not submit any photographs of entire courses (or even large portions of particular courses) without stone as the next course was underway.

Mr. Berk begins his report by stating that the Claimant told him the Respondent failed to fill the wall blocks with stone. Mr. Berk's report then asserts, as did Mr. Berk during his testimony, that some chambers were not filled with stone, but he was unable to quantify the number of such chambers.

In undertaking his assignment, Mr. Berk requested that the Claimant remove several cap stones. However, the Claimant only removed, at most, two or three of the ten to fifteen cap stones that were present. As to the exposed blocks under the removed cap stones, Mr. Berk's photograph only shows one block in which Mr. Berk definitively established the absence of stone in a single row of inner cores for at least two courses below the top course. I reject this as proof that anything more than an insignificant number of chambers were not filled.

First, it is clear by Mr. Berk's own testimony and report that the at least some of the chambers in the observed row *below* the two courses were filled with stone. Otherwise, the ruler would have sunk further down the wall. It is also possible, for example, that over the course of the two years from the time of installation to the time of Mr. Berk's inspection the stones in the uncovered block may have shifted so as to expose an open area. Mr. Berk did not testify that the exposed chambers were completely devoid of stone. It is also quite possible that, even if this single line of chambers was not filled, the remainder, or most of the remainder, of the chambers

[9] R. Ex. 7 shows one course not yet filled with stone. However, the next course was not yet begun when the photograph was taken. Moreover, the photograph also shows that the block at the end of the course beneath the unfinished course *is* filled with stone.

were filled, as suggested by the Respondent's photographs and by the Claimant's initial lack of complaint to the Respondent and the MHIC.

Mr. Berk did not indicate that the uncovered block or blocks were fairly representative of the whole, nor did he give any indication as to how one might fairly quantify the full set of unfilled chambers solely based upon the sample or samples seen. Mr. Berk also did not testify as to how many chambers would need to be partially or wholly without stone to compromise the integrity of the wall as a whole.

Indeed, I do not understand why, given the purpose of Mr. Berk's inspection, the Claimant did not, at least, remove all of the cap stones, so some sense of representative numbers could be achieved. As Mr. Berk testified, the cap stones were only lightly glued to the top course, and the Claimant did not present any evidence that it was difficult to remove (or re-glue) the cap stones.

It is conceivable that the Respondent's crew may have missed, or incompletely filled, a few chambers in completing the wall. That, without more, however, does not establish that the Respondent's work in constructing the wall was unworkmanlike, or that the wall as a whole is unsound and needs to be replaced.

I also find that the Claimant accepted the modified design of the top course of block *and* the double-sided slabs *after* being told that the top course would lack the structural integrity of the remaining portion of the wall. The Claimant testified that the Respondent told him the top course could be made of two half pieces of block, glued together, so that each side would have a finish. In addition, the pieces could be placed asymetrically to avoid the appearance of gaps. The Claimant did not testify that he objected to the suggestion. The Respondent testified that he and

the Claimant agreed to the three inch cap slabs because they were finished on both top and bottom.

The executed Contract very clearly refers to the addition of 30 concrete blocks and two hours of labor. While the Contract does not state the purpose of the extra blocks and labor, the Claimant testified that the Respondent told him the purpose. It was to provide extra block which would be sliced and placed in a manner to avoid the appearance of gaps and appear finished on both sides. Further, the Claimant did not during his testimony expressly deny the Respondent's testimony that he explained to the Claimant that the assembled top course would not have the same structural integrity as the remainder of the wall.

I also believe that, regardless of the Respondent's discussion with the Claimant, the Claimant must have understood that the top course would lack the same amount of structural integrity as the remainder of the wall, because he knew the two sides of each block would only be held together by glue. It is obvious that the two pieces would separate more easily than the remainder of the blocks in the wall in the event of a collision.

That said, the Respondent conceded that the chambers of the top course should have been filled with stone. The failure to do so was an oversight.

The Claimant has the burden of proof in this matter. He failed to adduce sufficient evidence to demonstrate that the Respondent's construction of the wall as a whole was unworkmanlike, lacking the overall stability and strength required to serve its purpose. He failed to prove he was ignorant of, and did not approve, the design and added cost of the top course and substituted slab, or that, before he approved the design, he was unaware that course would lack the same amount of structural integrity as the remainder of the wall. For all the above reasons, I

find that the Claimant failed to meet his burden of proof with respect to his claim that the wall as a whole was unworkmanlike, or that he did not approve the three inch slab caps.

The Claimant did prove that the Respondent should have filled the top course with stone.

***The Driveway***

The Claimant satisfied his burden of proof with respect to his driveway claim. The Claimant asserted two principal deficiencies with respect to the driveway: that the Respondent did not install the required sand bed and did not properly tamp the installation at one or more stages of construction, leading to the shifting and separation of the driveway pavers.

The evidence is clear that EPH's guidelines and industry standards dictate that a sand bed is to be placed above the aggregate and tamped down. The Respondent explicitly conceded in his testimony, however, that he did not put down a sand bed.

The Respondent also conceded that the industry standards for installing entirely new paver driveways calls for the installation of a sand bed. The Respondent only reconstructed a portion of the driveway. He claimed that he could not put down a sand bed in reconstructing only a portion of the driveway, because had he done so, the two parts of the driveway would not mesh and hold. The Respondent conceded, however, that he did not know what the industry standard would be for installing a partial driveway, including whether it required the replacement of the entire driveway.

There are multiple problems with the Respondent's assertion. First, he did not state whether the untouched portion of the driveway had a sand bed or why installing a sand bed would have prevented the two portions of the driveway from meshing. I infer that further excavation would have remedied any mismatch in elevation, had such a mismatch existed.

Second, if the installation of the sand bed required replacing the entire driveway, the Respondent should have so informed the Claimant and, at the very least, explained that the Respondent did not know whether forgoing the sand bed in constructing the partial driveway met industry standards, whereas installing an entirely new driveway with the sand bed would comply. The Respondent did not claim that he explained any of this to the Claimant.

Third, EPH's instructions for paver driveways and the ICPI chapter on proper installation of an interconnecting paver driveway contravene the Respondent's claim. Both indicate that a sand bed is required, and neither differentiates between replacing an entire driveway and replacing only a portion of the driveway.[10] Moreover, Mr. Berk, himself an expert in the installation of paver driveways, testified that a sand bed is required to meet industry standards and should have been provided in this case, with respect to the installation of a partial driveway. He made no distinction between the standards applicable to the construction of a complete driveway and a partial one. Moreover, each of the two companies from whom the Claimant obtained proposals to redo the Respondent's driveway work included the installation of a sand bed, and neither indicated it would be necessary to re-do the entire driveway for that purpose. Neither indicated the failure to replace the entire driveway would in any way impair the warranties of their work.

The failure to provide the sand bed, without more, renders the Respondent's work inadequate and unworkmanlike. In addition, , I am satisfied that the Respondent's crew members failed to properly tamp the driveway at one or more stages of construction, contrary to industry standards. The Claimant insisted that the Respondent's crew members did not tamp at all at one

[10]The Respondent is certified by the ICPI as a concrete paver installer, having completed a course on the construction of interlocking concrete pavements.

or more stages. The Respondent disputed that claim.[11] I do not know whether the crew members undertook to tamp the pavers, the soil or aggregate. I am satisfied, however, that they failed to properly tamp the installation at some point in the process. I base this on Mr. Berk's expert testimony that, because of the lack of proper compacting, the new portion of the driveway is slowly pulling away from the pre-existing portion, pieces of new paving are starting to shift, and there is an inappropriate slope in the newly installed portion. Mr. Berk's testimony is supported by the photographs attached to his report. (See photographs attached to Cl. Ex. 11.)

***Calculation of Actual Loss***

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 the following measures for calculating a claimant's actual loss. COMAR 09.08.03.03B(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 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.
>
> (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

[11] The Respondent admitted during testimony that he was not always present during construction.

> 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.

The formula set forth in COMAR 09.08.03.03B(3)(a) is inapplicable because the Respondent did not abandon the Contract without doing any work. The formula set forth in COMAR 09.08.03.03B(3)(b) is inappropriate because the Claimant is soliciting another contractor to do the work.

The formula set forth in COMAR 09.08.03.03B(3)c) is *nearly* appropriate. The Respondent did the work and the Claimant is soliciting another contractor to redo the driveway. Unfortunately, the Contract does not explicitly break down the amount and cost of the labor the Respondent charged for doing the driveway. While the Contract provides line items for the labor costs, it is not clear which items of labor are to be provided for the driveway and which are to be provided for the retaining wall. In addition, while the Contract does state that two hours of labor were required to slice sand glue the top course of blocks, it does not break out the cost of the stone needed to fill the top course of the retaining wall or the cost of the labor entailed to do that.

As previously stated, the Claimant bears the burden to prove all elements of his claim. He failed to elicit from the Respondent the cost of the labor used for the driveway or the cost included in the Contract to fill the top course of the retaining wall with stone. The Respondent could have provided both figures.

Despite these failings, I believe the Claimant is entitled to some compensation, at least with respect to re-doing the driveway. Because none of the formulas specified in COMAR 09.08.03.03B(3)(a)-(c) is appropriate, I will apply a different measurement pursuant to COMAR 09.08.03.03B(3).

The Claimant received two estimates for the cost to redo the driveway. The proposal from American Deck, Inc. is from January 2012. It proposes a cost of $3,600.00 to remove and replace the existing pavers and supply a new filter cloth and sand bed. This cost appears not to include re-excavating and compacting the space and re-installing the aggregate, and does not include a warranty. With the addition of the excavation and re-installation of the aggregate, and the warranty, the cost is $4,700.[12]

The Claimant also submitted a proposal from Akehurst Landscape Service, Inc., dated January 9, 2012. That proposal provides a cost of $3,950.00 to re-do the driveway, with no caveat concerning a warranty for its work.[13]

Mr. Berk indicated that both proposals represented reasonable estimates of the cost to re-do the Respondent's driveway work. Therefore, electing to base my decision on the lower of the two reasonable estimates, I find that the Claimant sustained an actual loss of $3,950.00 with respect to the Respondent's unworkmanlike installation of the partial driveway.[14]

I further find that the Claimant is *not* entitled to any reimbursement for the cost to fill the top course of his retaining wall with stone, as he provided no evidence whatsoever as to the cost entailed in doing such work.

Pursuant to statute, 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. Md. Code

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[12] The proposal from American Deck, Inc. provides for the "add[ition] of 4" CR-6 base." (Cl. Ex. 10.) I believe CR-6 base is aggregate. This statement in the proposal suggests that the company intended to replace the existing aggregate. I do not understand why the company would believe that was necessary, and the Claimant testified that each of the proposals he received assumed re-using *all* the material already installed. For these reasons I believe American Deck, Inc.'s proposal contemplated re-using, rather than replacing, the aggregate.

[13] The proposal from Akehurst Landscape Service, Inc. provides for "remov[al] and dispos[al] of #8 gravel." (Cl. Ex. 9.) For the same reasons as those set forth in n. 12, above, I infer that the company intended to re-use, not replace, the existing aggregate.

[14] The cost may have increased in the ensuing two years since Akehurat Landscape Service, Inc. submitted its proposal. Here again, the Claimant failed to provide any evidence as to what the cost would be today, so I will limit my calculation of loss to the 2012 figure.

Ann., Bus. Reg. §8-405 (e)(1), (5) (Supp. 2013). Because $3,950.00 is less than either of these amounts, I find that the Claimant's actual compensable loss is $3,950.00.

## PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of $3,950.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401 (2010), 8-405 (Supp. 2013).

## RECOMMENDED ORDER

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

**ORDER** that the Maryland Home Improvement Guaranty Fund award the Claimant $3,950.00; 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. 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**

July 30, 2014
Date Decision Issued

Henry R. Abrams
Administrative Law Judge

HRA/kkc
# 150573

| | | |
|---|---|---|
| **IN THE MATTER OF THE CLAIM** | * | **BEFORE HENRY R. ABRAMS],** |
| **OF STANLEY KOSMOS,** | * | **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 ROBERT WEISS,** | * | |
| **T/A PERFICUT INC.,** | * | **OAH No.: DLR-HIC-02-13-34297** |
| **RESPONDENT** | * | **MHIC No.: 12 (90) 214** |

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## FILE EXHIBIT LIST

Exhibits

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

GF Ex. 1 — March 27, 2014 Notice of Hearing, together with March 20, 2014 Notice of Hearing; and February 21, 2014 memorandum and attachments from Sandra Sykes, Docket Specialist, to Legal Services;

GF Ex. 2 — Undated Transmittal from the Department to Sandra Sykes, together with August 9, 2013 MHIC Hearing Order and April 12, 2013 Home Improvement Claim Form from the Claimant

GF Ex. 3 — February 27, 2014 MHIC licensing record review re: the Respondent

GF Ex. 4 — April 17, 2013 letter from Mr. John Borz, MHIC Chairman, to the Respondent, together with the Claimant's April 12, 2013 Home Improvement Claim Form

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

Cl. Ex. 1 — Undated, illustrated catalogue page with picture of Diamond Pro paving block, and with the Respondent's handwritten notes

Cl. Ex. 2 — Undated excerpt, entitled "Installation," from E P Henry Corporation (EPH) booklet (p. 92 only)

Cl. Ex. 3A-C Six photographs (2 per page) taken by the Claimant of the Respondent's work

Cl. Ex. 4 Intentionally omitted

Cl. Ex. 5 Interlocking Concrete Pavement Institute (ICPI) "Tech Spec Number 2" re: Construction of Interlocking Concrete Pavements (revised August 2011)

Cl. Ex. 6 ICPI "Tech Spec Number 6" re: Reinstatement of Interlocking Concrete Pavements (revised August 2011)

Cl. Ex. 7 Undated EPH explanation of EPH product warranty

Cl. Ex. 8 July 6, 2011 contract (Contract) between the Claimant and the Respondent

Cl. Ex. 9 January 9, 2012 Akehurst Landscape Service, Inc. Landscape Proposal and Contract

Cl. Ex. 10 January 5, 2012 Quotation from American Deck, Inc.

Cl. Ex. 11 March 29, 2013 MasterSpec, Inc. Home Inspection Service report and photographs, with the following attachments:

C. Undated set of notes from the Claimant (3 pages) and undated notes from Joseph L. Berk

D. Undated EPH excerpt entitled "Diamond Pro Installation Instructions

C. undated ICPI "Tech Spec Number 2" (same as Cl. Ex. 5)

Cl. Ex. 12 September 20, 2011 (4:05:19 a.m.) email from the Respondent to the Claimant; September 21, 2011 (7:51 p.m.) email from the Claimant to the Respondent; and September 21, 2011 email (8:33:24 p.m.) email from the respondent to the Claimant

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

R. 1 ICPI Certificate of Completion certifying the Respondent as an ICPI Level I Certified Concrete Paver Installer (valid through December 31, 2011)

R. 2 March 4, 2008 letter from Brittaney R. Kamhong Thompson, National Concrete Masonry Association, to the Respondent

R. 3 The Respondent's Certificate of Attendance at the February 7, 2008 Versa-Lock Segmental Retaining Wall Seminar

R. 4 Fifteen photographs (two-sided copy)

R. 5 September 20, 2011 Final Inspection Report, signed by the Respondent on September 26, 2011

R. 6 September 28, 2011 letter from Gary Weiss to the MHIC

R. 7 Single photograph, bearing a handwritten arrow

R. 8 The Respondent's accounting for the cost of materials used in connection with the work pursuant to the Contract

R. 9 The Respondent's accounting for the cost of equipment used in connection with the work pursuant to the Contract