

**The Maryland Home
 Improvement Commission**

**v. George Broadway
 t/a Thurmont Paving LLC
 (Contractor)
 and the Claim of
 William Lyons
 (Claimant)**

* **BEFORE THE**
 * **MARYLAND HOME IMPROVEMENT**
 * **COMMISSION**
 *
 * **MHIC No.: 15 (90) 580**
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 *

FINAL ORDER

WHEREFORE, this 6th day of October 2016, Panel B of the Maryland Home

Improvement Commission ORDERS that:

- 1. The Findings of Fact set forth in the Proposed Order dated June 27th, 2016 are AFFIRMED.**
- 2. The Conclusions of Law set forth in the Proposed Order dated June 27, 2016 are AFFIRMED.**
- 3. The Proposed Order dated June 27, 2016 is AFFIRMED.**
- 4. This Final Order shall become effective thirty (30) days from this date.**
- 5. During the thirty (30) day period, any party may file an appeal of this decision to Circuit Court.**

Joseph Tunney
**Joseph Tunney, Chairperson
 PANEL B**

MARYLAND HOME IMPROVEMENT COMMISSION

IN THE MATTER OF THE CLAIM
OF WILLIAM J. LYONS,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF GEORGE
BROADWAY, SR., t/a THURMONT
PAVING, LLC,
RESPONDENT

* BEFORE DANIEL ANDREWS,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No.: DLR-HIC-02-15-28726
* MHIC No.: 15 (90) 580
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PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
PROPOSED FINDINGS OF FACT
DISCUSSION
PROPOSED CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On June 8, 2015, William J. Lyons (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of alleged actual losses suffered as a result of a home improvement contract with George Broadway, Sr. trading as Thurmont Paving LLC (Respondent).

On February 8, 2016, I convened a hearing at the Office of Administrative Hearings (OAH), Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015).¹ The Claimant represented himself. The Respondent represented himself. Jessica Kauffman, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR), represented the Fund.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of DLLR, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014), 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 any acts or omissions committed by the Respondent?
2. If so, what is the amount of that loss?

SUMMARY OF THE EVIDENCE

Exhibits

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

- Cl. Ex. 1 - Contract between the Claimant and Respondent, October 24, 2012
- Cl. Ex. 2 - Claimant's personal checks numbers 1780 and 1781, November 8, 2012
- Cl. Ex. 3 - Handwritten statement signed by the Claimant and Respondent, October 9, 2013; Typed statement by Claimant, October 28, 2014; Letter from Respondent to Mr. Papavasiliou, December 9, 2014, with attached photograph; and Typed letter from Claimant to Thomas Marr, June 1, 2015
- Cl. Ex. 4 - Proposal by L.W. Wolfe Enterprises, Inc., April 28, 2015; Proposal by Mt. Airy Tar and Chip Paving, undated

¹ Unless otherwise noted, all citations to the Business Regulation Article refer to the 2015 Replacement Volume.

- Cl. Ex. 5 - Website printout, "General Blacktop Paving and Asphalt Seal Coating," www.generalblacktop.com/faq.htm, printed October 11, 2014
- Cl. Ex. 6 - Pamphlet, "Your New Driveway - The How, Why, and When of Asphalt Driveway Care."
- Cl. Ex. 6A - Twelve photographs of Claimant's driveway
- Cl. Ex. 6B - Two photographs of Claimant's driveway
- Cl. Ex. 6C - One photograph of Claimant's driveway
- Cl. Ex. 7 - Five photographs of paving core samples

I admitted the following exhibits on behalf of the Respondent:

- Resp. Ex. 1 - Handwritten statement by the Claimant and acknowledged by the Respondent, October 9, 2013
- Resp. Ex. 2 - One photograph of a paving core sample

I admitted the following exhibits on behalf of the Fund:

- GF Ex. 1 - OAH Notice, February 8, 2016
- GF Ex. 2 - MHIC Transmittal to OAH, undated, with attached Hearing Order, August 18, 2015, and Home Improvement Claim Form, June 8, 2015
- GF Ex. 3 - Respondent's MHIC Licensing History, December 9, 2015
- GF Ex. 4 - MHIC letter to Respondent, June 22, 2015, with attached Home Improvement Claim Form, June 8, 2015

Testimony

The Claimant testified on his own behalf.

The Respondent testified on his own behalf.

The Fund did not present any witness testimony.

PROPOSED FINDINGS OF FACT

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

1. At all times relevant, the Respondent was a licensed by the MHIC as a home improvement contractor under individual license number 01-18441 and business license number 05-129657.
2. On October 24, 2012, the Claimant and Respondent entered into a home improvement contract to install a new driveway at the Claimant's residential home.
3. The total contract price was \$7,780.00.
4. The contract requirements included the installation of a new asphalt driveway with an approximate size of 1,600 square feet. The contract also required: remove the existing driveway; apply an approximate 4-inch base of stone, graded for water drainage; apply an approximate 2½-inch binder base asphalt; apply of an approximate 1½-inch surface asphalt; tamp asphalt edges of driveway; clean driveway, apply sealer to cracks, apply sealer to paving, and roll with vibratory roller.
5. The contract did not require the Respondent to backfill any edges of the driveway which were above grade to the adjacent ground.
6. All work under the contract was subject to a two year warranty by the Respondent.
7. On November 8, 2012, the Respondent performed all work required by the contract.
8. On November 8, 2012, through check numbers 1780 and 1781, the Claimant paid the Respondent \$3,790.00 and \$3,990.00, respectively, for a total of \$7,780.00.
9. In the early Spring or Summer of 2013, the Claimant observed cracking along the driveway edges.

10. Sometime before October 9, 2013, the Claimant complained to the Respondent about the actual square footage of driveway installed by the Respondent. The Claimant also complained that the edges of the asphalt driveway were cracking.

11. On or about October 9, 2013, in response to the Claimant's complaint about the square footage, the Respondent provided the Claimant with a refund of \$375.00. In an effort to repair the cracking, the Respondent heated and pushed the asphalt material back together. The Respondent also applied a sealer coat to the Claimant's driveway at no cost.

12. On October 9, 2013, the Claimant and Respondent signed a handwritten statement which states that the Claimant was "completely satisfied with the thickness and square footage of [his] driveway" and "also satisfied with the size of it, workmanship, and overall job." Cl. Ex. 3 (Handwritten statement by Claimant and Respondent, October 9, 2013).

13. Because of the \$375.00 refund, the total cost of the contract was reduced from \$7,780.00 to \$7,405.00.

14. Sometime in late Summer or early Fall in 2014, the Claimant again observed cracking along the sides of his driveway and notified the Respondent.

15. Initially, the Respondent informed the Claimant the cracking was occurring because of the lack of backfill along the driveway edge. The Respondent, however, offered to repeat the repair work he performed in 2013.

16. The Claimant rejected the Respondent's offer because the repair work that was performed in 2013 had failed and there was no guarantee that the repair would not fail again.

17. In late November or early December 2014, the Claimant obtained core samples from the right side of his driveway. The core sampling revealed that, for a distance of approximately twenty-four inches from the driveway edge inward toward the center of the driveway, there was no stone base installed as required by the contract.

18. In December 2015, the Claimant took several photographs of his driveway which depicted cracking along the side of his driveway. Additionally, the Claimant's driveway is not unusual in any manner; it is flat, straight, a moderate length, and mostly graded level with the adjacent ground.

19. The Claimant obtained a proposal to repair his driveway from Mt. Airy Tar and Chip Paving. The proposal provided for the removal of existing driveway, application a three-to four-inch stone base, application of a two-inch asphalt base and a two-inch asphalt surface. The cost of the proposed work was \$7,300.00.

20. The Respondent has a pamphlet which he provides to customers to inform them how to care for a new asphalt driveway. In relevant part, the pamphlet states:

The edges are the weakest part of your driveway due to the lack of side support. Avoid driving on the edges since they will crack and crumble in time. We suggest building up the sides of your driveway with topsoil to approximately one inch from the top of the driveway to allow room for sod growth and water drainage. This will support the edges and enhance the appearance after grass is grown.

Cl. Ex. 8.

DISCUSSION

The Claimant has the burden of proving the validity of his claim by a preponderance of the evidence. Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3). "[A] preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces . . . a belief that it is more

likely true than not true.” *Coleman v. Anne Arundel Cty. Police Dep’t.*, 369 Md. 108, 125, n. 16 (2002).

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). *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. For the reasons discussed in this Proposed Decision, I conclude that the Claimant established that he sustained an actual loss as a result of an unworkmanlike home improvement performed by the Respondent in the amount of \$7,300.00.

The Claimant’s and Respondent’s Positions

The Claimant argues that the contract performed by Respondent required the installation of a four-inch stone base which then would be covered with an asphalt binder base and an asphalt surface. After the Respondent installed the driveway, by the summer of 2013, the Claimant testified that the driveway developed cracks along the sides of the driveway. The Claimant explained that he notified the Appellant, who responded and repaired the cracks by heating the asphalt and pushing it back together. As a result, by October 2013, the Claimant was satisfied with the work performed by the Respondent. The Claimant, however, testified that the cracking returned again by the fall of 2014. After notifying the Respondent about the cracking, the Claimant was informed by the Respondent that the cracking was occurring because the Claimant should have backfilled the driveway edges with dirt to provide support and was given a pamphlet which explained the need to backfill. The Respondent, however, offered to repair the driveway as he did in 2013. The Claimant explained that he rejected the offer because the repair in 2013 failed after a year and he did not believe a similar repair would provide any long lasting solution to the issue.

Because the cracking issue recurred, the Claimant explained that he obtained core samples from the driveway installed by the Respondent. As a result, the Claimant asserts that the core samples reveal that the Respondent did not install the required base material along the driveway edge. Additionally, the Claimant contends that without the proper base foundation being installed the driveway edges are not properly supported and the cracking will continue to reoccur. The Claimant also asserts that, when the driveway was installed, the Respondent never informed him that it was necessary to backfill with dirt along the driveway edge to provide support for the driveway edges.

In support of his position, the Claimant submitted photographs of his driveway which depict cracking along the sides of the driveway. The Claimant also offered photographs of core samples taken from his driveway which depict a lack of a stone base at the edge of his driveway approximately two feet from edge of the driveway toward the center of his driveway.

To repair the work performed by the Respondent, the Claimant argues that the driveway must be removed so a properly installed base can be installed throughout the entire driveway. For this reason, the Claimant obtained two proposals from other licensed contractors. The proposal from Mt. Airy Tar and Chip Paving proposed to install a new driveway with essentially the same terms as required by the contract with the Respondent at a cost of \$7,300.00.

The Respondent argues that he installed the driveway as required by the contract. He explained that the depths of the stone base and asphalt layers are approximate depths. The Respondent testified that to install the driveway material he uses a machine which determines the appropriate depth of the material, which could vary several inches because of high and low points at the particular job site. The Respondent also testified that stress cracks, like the cracks in the Claimant's driveway, are typical. The Respondent explained that the Respondent was responsible to backfill his driveway edge in the areas where the asphalt and the adjacent ground

are not even. The Respondent further explained that backfilling with dirt will provide the driveway edges with additional support to prevent the cracking. The Respondent testified that he provided the Claimant with a pamphlet when they entered into the contract which informed the Respondent of the importance of backfilling his driveway edges. Finally, the Respondent argued that he does not agree that the entire driveway needs to be removed in order to fix the edges.²

Merits of Claim

There is no dispute that the contract between the Respondent and Claimant required the Respondent to install a driveway with a four inch stone base with and asphalt binder and asphalt surface at a cost of \$7,780.00. The Respondent installed the driveway on November 8, 2012 and was paid in full by the Claimant.

There is also no dispute that, by the Summer of 2013, the Respondent's driveway developed cracks along the driveway edge, which the Respondent repaired in October 2013 by heating and pushing the asphalt material together. At the time, the Respondent refunded \$375.00 to the Claimant to settle other complaints about the work performed by the Respondent.

Another fact not in dispute is that, by the Fall of 2014, the cracking along the Claimant's driveway edge returned. The Claimant's photograph's clearly show cracking along the driveway edge and the Respondent also observed the cracking himself. The Respondent offered to repair the cracks by again reheating and pushing the asphalt material together but the Claimant rejected the Respondent's offer. A claim against the Fund may be denied if the Claimant unreasonably rejects good faith efforts by the Respondent to resolve the claim. Md. Code Ann., Bus. Reg. § 8-405(d). I am not persuaded that the Claimant unreasonably rejected the Respondent's offer to repair the cracks. As the Claimant asserted, which I find persuasive, the Respondent performed

² The Respondent's actual argument was that it was not necessary to tear down the house to fix the gutters.

the same repair a year prior which failed and there was no reason to believe that doing it again will result in a more permanent solution.

The substantive issue is whether the Respondent performed an inadequate or unworkmanlike home improvement when he installed the Claimant's driveway. The Claimant obtained core samples from his driveway to investigate the possible reason for the cracks in his driveway to reoccur. By doing so, as shown in his photographs, there is clear evidence that there is no stone base layer along the driveway edge. The contract, however, required an approximate four inch stone base throughout the entire driveway. Additionally, as the Claimant testified, the approximate distance from the driveway edge inward toward the center of the driveway that did not have the stone base was twenty-four inches.

The Respondent's assertion that the stone base layer depth mentioned in the contract was only an approximation and that he relies on a machine he uses to install the material which determines the actual depth of material based upon job site circumstances is unpersuasive. To begin, the contract required a four-inch stone base be installed throughout the driveway. The lack of a stone base being installed along the driveway edge for a width of twenty four inches is a significant variation. Second, the Respondent offered no explanation about the Claimant's job site which would cause his machine to vary the installation of the stone base in such a significant manner. Lastly, the pictures offered into evidence show that the Claimant's driveway is not unusual in any manner, it appears to be flat, straight, and of moderate length. The Appellant did not offer any expert advice to explain whether the lack of a stone base along the driveway edge was unworkmanlike. For this reason, I cannot determine if the work performed by the Respondent was substandard in the industry for asphalt driveway installation. There is evidence, however, that the cracking along the driveway edge developed within a year after installation and reoccurred within another year after the Respondent made an initial repair.

Based on the recurring cracking along the driveway edge which does not contain a stone base layer as required by the contract, I find that the Respondent performed an inadequate home improvement.

The Respondent's final argument that Claimant's driveway has recurring cracks along the driveway edge because the Claimant did not backfill with dirt along the edge is also unpersuasive. Without question, the contract did not require the Respondent to backfill the driveway edge. Also, the Respondent's pamphlet indicates that a homeowner should backfill a driveway edge to provide support for the edges. Whether the Respondent gave the Claimant the pamphlet at the time of the contract or later is not important. The Claimant's pictures clearly show that the majority of the Claimant's driveway and adjacent ground are flat and level with each other and backfilling would not provide any additional support than already provided by the adjacent ground. The Claimant's pictures show a small area near the end of driveway closest to the roadway which is lower than the driveway for water drainage. This area may require backfill but the lack of it in this area does not explain the presence of cracking along other portions of the Claimant's driveway edge.

As I discussed, I am persuaded that the Respondent performed an inadequate home improvement. Accordingly, I find that Claimant established an actual loss and is eligible for compensation from the Fund. Md. Code Ann., Bus. Reg. § 8-401.

Actual Loss

Having found eligibility for compensation I now turn to the amount of the award, if any, to which the Claimant is entitled. MHIC's regulations provide three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). The formula in COMAR

09.08.03.03B(3)(c) offers an appropriate measurement to determine the amount of actual loss 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. 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.

In this case, the Claimant obtained a proposal from Mt. Airy Tar and Chip paving. The cost of the proposed work was \$7,300.00. I understand the Respondent's argument that it makes no sense to tear up the entire driveway to repair the edges. Aside from his general argument, however, he did not present any other methods contractors in his industry would use to repair cracking which reoccurs and which would not require removing the entire driveway as proposed by the Mr. Airy Tar and Chip Paving proposal. Besides the Mount Air Tar and Chip Paving proposal, the Claimant also offered into evidence a proposal from L.W. Wolfe Enterprises, Inc., a licensed home improvement contractor, which proposed to remove and replace the driveway installed by Respondent but at a higher cost. These two proposals, without any other credible evidence to refute or discredit them, establish that to repair or replace the driveway installed by the Respondent reasonably requires the removal of the entire driveway.

Using the formula described above, the Claimants' actual loss should be calculated as follows:

Amount paid to the Respondent	\$7,405.00
Repair Costs	+\$7,300.00
Total	\$14,705.00
Minus original contract price	- \$7,405.00
Actual loss	\$7,300.00

Monetary awards from the Fund are limited. 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 Ann., Bus. Reg. §8-405 (e)(1), (5); COMAR 09.08.03.03B(4). Since the actual loss is less than the amount paid to the Respondent, I find the Claimant's actual loss, to be awarded from the fund, is \$7,300.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant sustained an actual and compensable loss of \$7,300.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$7,300.00; 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 as set by the Maryland Home Improvement Commission.³ Md. Code Ann., Bus. Reg. § 8-411(a) (2015); and

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

Signature on File

May 9, 2016
Date Decision Issued

Daniel Andrews
Administrative Law Judge

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³ See Md. Code Ann., Bus. Reg. § 8-410(a) (2015); COMAR 09.08.01.20.



1. The first part of the document
 discusses the general principles
 of the proposed system.

The second part of the document
 describes the detailed design
 of the system.

The third part of the document
 discusses the implementation
 of the system.

SECTION 2: DETAILED DESIGN

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 describes the hardware
 requirements.

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 describes the software
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The third part of this section
 describes the testing
 requirements.

SECTION 3: IMPLEMENTATION

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 describes the hardware
 implementation.

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 describes the software
 implementation.

The third part of this section
 describes the testing
 implementation.

The fourth part of this section
 describes the hardware
 testing.

The fifth part of this section
 describes the software
 testing.

The sixth part of this section
 describes the testing
 results.

SECTION 4: CONCLUSION

The first part of this section
 summarizes the main
 findings.

The second part of this section
 discusses the future
 work.

The third part of this section
 discusses the
 conclusions.

PROPOSED ORDER

WHEREFORE, this 27th day of June, 2016, 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.

Joseph Tunney

***Joseph Tunney
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION