

**IN THE MATTER OF THE CLAIM
OF JOHN ROBERTS,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF
JOSEPH MARINI,
T/A JOSEPH MARINI ASPHALT
PAVING,
RESPONDENT**

*** BEFORE DANIEL ANDREWS,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
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* OAH No.: DLR-HIC-02-18-09839
* MHIC No.: 17 (90) 1101**

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PROPOSED DECISION

STATEMENT OF THE CASE
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STATEMENT OF THE CASE

On August 23, 2017, John Roberts (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$7,900.00 for an alleged actual loss suffered as a result of a home improvement contract with Joseph Marini, t/a Marini Asphalt Paving (Respondent).

On June 13, 2018, I convened a hearing at the Tawes State Office Building, Annapolis, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015).¹ Annette DeCesaris, Esquire, represented the Claimant. Shara Hendler, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Respondent represented himself.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, 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 (2014 & Supp. 2017); Code of Maryland Regulations (COMAR) 09.01.03; COMAR 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, except for GF 5, on behalf of the Fund:

- GF 1 MHIC Hearing Order, dated March 23, 2018
- GF 2 OAH Notice of Hearing, dated April 3, 2018
- GF 3 Claimant's Home Improvement Claim Form, date June 16, 2017
- GF 4 MHIC Licensing History for Respondent, print dated April 16, 2018
- GF 5 August 18, 2016 written statement from the Respondent²

¹ Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 volume.

² This exhibit was identified only for the record and was not offered into evidence.

GF 6 Letter from the Shara Hendler, Assistant Attorney General to Administrative Law Judge Andrews, dated June 14, 2018, with attachments regarding the MHIC licensing status of Pronto Paving, Inc.; an email response from the Claimant's attorney, dated June 14, 2018; and an attached Maryland Department of Transportation, Minority Business Enterprise certification for Pronto Paving, Inc., dated September 26, 2017³

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

- CL 1 Photograph of driveway with puddles of water
- CL 2 Photograph of driveway showing asphalt cracking
- CL 3 Photograph of driveway showing asphalt cracking
- CL 4 Photograph of driveway showing asphalt cracking
- CL 5 Photograph of driveway showing asphalt cracking and crumbling
- CL 6 Photograph of driveway with water pooling near a stone retaining wall
- CL 7 Photograph of driveway with water pooling near a large wooden support pole
- CL 8 Photograph of Respondent's Invoice for work performed at Claimant's address, dated April 22, 2016
- CL 9 Pronto Paving, Inc., Proposal, dated September 12, 2016, with Invoice, dated September 14, 2016
- CL 10 Photograph of driveway with portion of asphalt removed exposing the under surface
- CL 11 Photograph of driveway with new CR6 compacting stone installed
- CL 12 Letter from Respondent to MHIC, dated May 10, 2017

The Respondent did not offer any exhibits.

Testimony

The Claimant testified in his own behalf and was accepted as an expert in asphalt driveway installation.

³ During the hearing, an issue arose regarding whether Pronto Paving, Inc. was licensed as a MHIC home improvement contractor. I permitted both the Claimant and Fund to submit any information either party could locate regarding the MHIC licensing status of Pronto Paving, Inc. GF Exhibit 6 is the information I received on June 14, 2018.

The Respondent testified in his own behalf.

The Fund presented the testimony of the Claimant.

PROPOSED FINDINGS OF FACT

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

1. At all times relevant to this hearing, the Respondent was a licensed home improvement contractor operating under MHIC registration number 01-7363.
2. In April 2016, the Claimant and the Respondent entered into an oral contract to install an asphalt driveway, the size of which was approximately 6,000 square feet, for \$7,900.00.
3. On April 21, 2016, the Respondent installed the asphalt driveway.
4. On April 22, 2016, the Respondent issued an invoice for installing the asphalt at the Claimant's home, in the amount of \$8,700.00; however, the Claimant only paid the Respondent \$7,900.00.
5. By May or June 2016, the Claimant's driveway showed issues with the asphalt driveway installed by the Respondent, small areas which sagged which permitted water to pool in those areas, larger areas of water pooling due to improper grading, and asphalt cracking and crumbling.
6. After the Claimant contacted the Respondent regarding these issues, and a promise by the Respondent that he would come out to inspect the issues, the Respondent never returned to the Claimant's property.
7. On September 14, 2016, the Claimant hired another contractor to repair the work performed by the Respondent. Pronto Paving, Inc. (Pronto) proposed to remove and reinstall the asphalt installed by the Respondent. Pronto also proposed to install a compacted stone base of two to three inches, an asphalt base of two inches, and an asphalt overlay of one inch.

8. The cost of the proposal by Pronto was \$17,400.00., which the Claimant paid when the work was performed.

9. Pronto is not a MHIC licensed home improvement contractor.

10. The Respondent installed areas of the Claimant's asphalt driveway without installing a compacted stone base and instead installed the asphalt over dirt.

11. The value of the work performed by the Respondent had no value and was required to be removed in order to properly install a new asphalt driveway in a manner which would be consistent with industry standards.

12. The Claimant's actual loss is \$7,900.00.

DISCUSSION

In this case, 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), quoting Maryland Pattern Jury Instructions 1:7 (3rd ed. 2000).

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 losses . . . incurred as a result of misconduct by a licensed contractor"). Actual loss "means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." *Id.* at § 8-401. For the following reasons, I find that the Claimant has proven eligibility for compensation.

Claimant's Case

The Claimant testified that he has been a commercial landscaper since 1996 and prior to that time he was involved with residential building for twenty years. Through this experience, the Claimant explained that he was familiar with the requirements of installing asphalt driveways. Based on this experience, the Claimant was accepted as an expert in the area of asphalt driveway installation. The Claimant testified that he contacted the Respondent in April 2016 to install an asphalt driveway at his residence. The Claimant explained that the Respondent came out to the Claimant's home and discussed the scope of the job which included preparing the area with the correct grade, installing two to three inches of compact stone, and installing three inches of asphalt. The Claimant testified that there was no written agreement; however, the agreement was that the Respondent would be paid \$7,900.00 when he completed the work. The Claimant explained that the Respondent completed the work on April 21, 2016.

After the work was completed, the Claimant testified that he noticed several issues with asphalt installed by the Respondent which included cracking and sagging of the asphalt and pockets of water pooling. The Claimant testified that the cracks became worse and the asphalt began to crumble. As a result, the Claimant explained that he called the Respondent to discuss these issues. The Respondent directed the Claimant to let the driveway dry out and indicated that he would come back to the property and inspect the driveway. The Claimant also explained that in July 2016, he called the Respondent but was only able to speak with the Respondent's daughter, who indicated that she would deliver the Claimant's message to the Respondent. However, the Respondent never contacted the Claimant regarding the issues with the asphalt driveway and never came back out to the property.

In support of his testimony, the Claimant presented several photographs of his driveway, taken in May or June 2016, which show the issues with the asphalt installed by the Respondent

and complained about by the Claimant. Claimant's exhibit one depicts three small areas of the asphalt sagging with water pooling in those areas. Claimant's exhibits two through five show the asphalt to be cracking and crumbling. Claimant's exhibits six and seven show large areas of water pooling along a stone retaining wall and around a raised porch support post. The Claimant also presented the Respondent's invoice for the completed work in the amount of \$8,700.00. *See* CL 8. However, the Claimant testified that he only paid the Respondent \$7,900.00, which was the original agreed upon cost of the contract.

Based on the issues with the asphalt installed by the Respondent, the Claimant opined that the asphalt was not installed in a workmanlike manner. He explained that the cracking, crumbling, and pooling of water occur when asphalt is installed without a proper compacted stone base and an improper grade.

To repair the work performed by the Respondent, the Claimant obtained a proposal from Pronto on September 14, 2016. Pronto proposed to remove and replace all of the asphalt on the Claimant's driveway, which was approximately 5,528 square feet. Further, Pronto proposed to install a two to three inch crushed stone base, with a two inch asphalt base, and a one inch asphalt overlay. The total cost of work proposed by Pronto was \$17,400.00, which the Claimant paid when Pronto performed the work described in its proposal.

The Claimant testified that the Respondent installed portions of the asphalt driveway without installing a compacted stone base and instead installed the asphalt over dirt. The Claimant supported this testimony with a photograph which shows portions of the asphalt removed and only exposed dirt under the removed asphalt. *See* CL10. The Claimant explained that the manner by which the Respondent installed the asphalt would not be consistent with industry standards in the field of asphalt driveways.

On cross examination by the Fund, the Claimant explained that there was a new portion of the driveway where he built a new three car garage with a studio and there was an existing asphalt driveway. The Claimant also admitted that he and the Respondent had a discussion to install two inches of asphalt over the existing driveway, which would be an acceptable practice. However, the Claimant contends that all the asphalt installed by the Respondent failed and none of that work could be salvaged by Pronto. During cross-examination, the Claimant acknowledged a \$10,000.00 difference between the Respondent's invoice and the Pronto proposal but explained that difference is caused by the fact that the Respondent did not do any prep work to properly install the asphalt driveway.

Respondent's Case

The Respondent testified that the Claimant was at the job site the whole time. He explained that the Claimant did not pay him to take up the driveway or to install a compacted stone base. The Respondent testified that he was paid to install an asphalt overlay over the driveway. The Respondent asserts that the Claimant did not pay him to do all the work that Pronto performed. During the Respondent's testimony he reviewed the proposal by Pronto and questioned whether Pronto was a MHIC licensed home improvement contractor because the proposal did not contain any reference to a MHIC license number.

After reviewing the Respondent's photographic evidence, the Respondent disputed that the photographs depicted the asphalt he installed for the Claimant. The Respondent claimed that he uses an asphalt aggregate which is smooth but the aggregate in the Claimant's photographs show a different type of aggregate, which the Respondent again asserted that he does not use. As a result, the Respondent was adamant that the Claimant's photographs do not show the asphalt he installed at the Claimant's home.

In his testimony, the Respondent agreed that the Claimant's driveway was approximately 6,000 square feet. But again, the Respondent reasserted that the Claimant did not pay him to install a two to three inch compacted stone based, or a two-inch asphalt base, or a one inch asphalt overlay. However, on cross-examination, the Respondent testified that he did put two-inches of rock down but only as needed.

Fund's Case

The Fund called the Claimant as a witness to clarify whether the Claimant was present when the Respondent performed the contract and to determine if the Claimant had additional information regarding MHIC licensing of Pronto. The Claimant explained that he was at the work site in the morning but left and returned home at the end of the day to pay the Respondent. The Claimant also explained that he did not have any other information regarding Pronto's MHIC licensing status.

After the hearing concluded, I permitted the parties to offer any information it could locate regarding the MHIC licensing status of Pronto. On June 14, 2016, Ms. Hendler, on behalf of the Fund, submitted a letter which reported that after a search of the MHIC database, there was no record of Pronto being licensed by MHIC as a home improvement contractor. *See* GF 6.

Analysis

Actual Loss

This case has evidentiary issues mostly caused by the fact that the contract to install the Claimant's asphalt driveway was an oral contract and was not reduced to writing. As a result, the terms of the contract are disputed. The Claimant asserts that both he and the Respondent discussed installing a new asphalt driveway, which included grading the driveway for proper drainage, installing a two to three inch compacted stone base, and then installing three inches of asphalt. However, on cross-examination, the Claimant agreed that there were two sections of

the worksite which included an existing asphalt driveway and a new area in front of a new three car garage and studio. The Claimant also agreed on cross-examination that he and the Respondent discussed laying asphalt over the existing driveway. By contrast, the Respondent testified that he and the Claimant only discussed laying asphalt down on the proposed driveway which was approximately 6,000 square feet, which he did. The Respondent contends that he was not paid to lay down compacted stone. However, on cross-examination, the Respondent agreed that he did install two inch compacted stone in places where it was required.

Despite the challenge to determine the exact terms of the contract between the Claimant and Respondent, it is undisputed that there was a contract to install an asphalt driveway at the Claimant's home and that the driveway was approximately 6,000 square feet in size. The Respondent did not dispute that the cost of the contract was \$7,900.00. Additionally, it is undisputed that the Appellant installed the asphalt driveway at the Claimant's home.

The next issue to determine is whether the work performed by the Respondent was performed inadequately or in an unworkmanlike manner. *Id.* The Claimant testified that shortly after the Respondent installed the asphalt driveway in April 2016, he noticed the asphalt sagging in areas, water pooling in other areas, and the asphalt developed cracks and began to crumble. The Claimant supported this testimony with photographs which show small areas with the asphalt sagging which permitted water to pool in those areas, larger areas of water pooling, and asphalt which was cracking and crumbling. These photographs were taken in May or June 2016. The Claimant also asserted that all the asphalt installed by the Respondent had failed and was required to be removed.

The Respondent challenged the Claimant's photographs by asserting that the asphalt in the Claimant's photographs was not his asphalt. The Respondent's testimony was not credible on this point. First, the Respondent's statement is unsupported by other evidence to corroborate

his claim and is self-serving. Further, the photographs offered by the Claimant contain other reference points like a stone wall and the wooden pillar, which demonstrate that the photographs were of the Claimant's driveway located at his residence. By reasonable inference and because the Respondent admits he installed the asphalt at the Claimant's home, I have no doubt that the asphalt contained in the Claimant's photographs is the asphalt installed by the Respondent. The Claimant's photographs clearly demonstrate that the asphalt installed by the Respondent developed small areas which sagged and permitted water to pool in those areas. Other photographs show larger areas of water to pooling due to improper grading. Additional photographs showed the asphalt installed by the Respondent to be cracking and crumbling in several areas. Collectively, the photographs demonstrated that the asphalt installed by the Respondent was installed inadequately or in an unworkmanlike manner.

Additionally, I was persuaded by the Claimant's testimony that in order to repair the work performed by the Respondent he was required to remove all of the asphalt installed by the Respondent. The photographs offered into evidence demonstrate a broad deterioration of the asphalt installed by the Respondent along with substantial areas of water pooling due to improper grading. These photographs were sufficient to demonstrate that to repair the driveway required that the asphalt installed by the Respondent be removed in order to properly repair the work performed by the Respondent.

Because I find that there was a home improvement contract between to the Claimant and Respondent, a MHIC licensed contractor, to install an asphalt driveway at cost of \$7,900.00, which was installed inadequately or in an unworkmanlike manner and required to be removed and reinstalled properly, I also find that the Claimant established and actual loss compensable by the Fund. Having found eligibility for compensation, I now turn to the amount of the award, if any, to which the Claimant is entitled.

Award

Before addressing the merits of the amount of any actual loss compensable by the Fund, I must address whether the Claimant may rely on the proposal by Pronto to establish the amount of his actual loss. Based on the lack of any record that Pronto is licensed by the MHIC as a home improvement contractor, I find that Pronto is not a MHIC licensed contractor. The Fund contends that it is a policy of the MHIC to not provide reimbursement from the Fund to Claimants who hire unlicensed contractors to correct or complete work performed by a licensed home improvement contractor. The policy upon which the Fund relies is found on the MHIC website, under a section identified as "Guaranty Fund FAQs."⁴ In response to the question, "What costs does the Guaranty Fund cover?" the following response is provided:

The Guaranty Fund covers the "actual loss," which means the cost of restoration, repair, replacement, or completion that arises from an unworkmanlike, inadequate, incomplete, or abandoned home improvement. The Fund does not cover consequential damage or other costs that may be incurred, such as attorney's fees or court costs. *The Fund also will not reimburse a claimant for money paid to an unlicensed home improvement contractor to correct or complete work performed that is the subject of the claim.* (emphasis provided)

The MHIC policy is designed to encourage contractors to be licensed and to discourage homeowners from using unlicensed contractors. The MHIC policy is reflected in a number of ways. To begin, a homeowner may recover compensation from the Fund for an actual loss resulting from an act or omission by a *licensed* contractor. Md. Code Ann., Bus. Reg. § 8-401, 8-405(a). In other words, if the Respondent was not licensed by the MHIC the Claimant would have been barred from asserting his claim against the Fund. Likewise, if the Respondent was unlicensed when he performed the home improvement contract, he would violated section 8-601 of the Business Regulation article which makes it a misdemeanor crime to perform a home improvement contract without a license. Md. Code Ann., Bus. Reg. § 8-601 (Supp. 2017).

⁴ See <https://www.dllr.state.md.us/license/mhic/mhicfaqgf.shtml#notelig>, last visited on September 10, 2018.

Maryland appellate courts have supported the public policy of requiring home improvement contractors to be licensed by the MHIC. In *Baltimore Street Builders v. Stewart*, 186 Md. App. 684, 697 (2009), the Court of Special Appeals recognized that a person may not act as contractor in this State without a contractor's license and that an unlicensed person will not be given the assistance of the courts in enforcing contracts within the provisions of the regulatory statute because such enforcement is against public policy.

Based on the public policy that home improvement contractors be licensed by the MHIC and the Fund's policy to not provide reimbursement for any repair work performed by an unlicensed contractor, I find that the Claimant cannot rely on the proposal by Pronto, an unlicensed contractor, to establish the amount of his actual loss.

When determining the amount of an actual loss, there are several applicable regulations. 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). The Fund may only compensate claimants for actual losses they incurred as a result of misconduct by a licensed contractor. COMAR 09.08.03.03B(2). The applicable regulation provides three formulas for the measurement of an actual loss. COMAR 09.08.03.03B(3). Two of these formulas are most relevant to determine the amount of the actual loss in this case and provide:

(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 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.

COMAR 09.08.03.03B(3)(b)(c).

Finally, the MHIC 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. COMAR 09.08.03.03B(4).

Having excluded the Pronto proposal from the calculation to determine the Claimant's actual loss, the most relevant formula to use is COMAR 09.08.03.03B(3)(b). In particular, the applicable portion of this formula states that 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."

In this case, the Claimant paid the Respondent \$7,900.00 to install the asphalt. As I discussed earlier, the Respondent installed the asphalt inadequately or in an unworkmanlike manner and it was required to be completely removed. For this reason, I am persuaded that the work performed by the Respondent had no value. Based on this finding, the Claimant's actual loss is the \$7,900.00, which is the amount he paid to the Respondent.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss as a result of the Respondent's acts and omissions. I further conclude that the amount of the actual and compensable loss is \$7,900.00. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405; COMAR 09.08.03.03B(3)(b).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$7,900.00; 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 ten percent (10%) as set by the Maryland Home Improvement Commission;⁵ and

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

Signature on File

September 11, 2018
Date Decision Issued

Daniel Andrews
Administrative Law Judge

DA/da
#174395

⁵ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 20th day of November, 2018, 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.

Jeffrey Ross

***Jeffrey Ross
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION