

**IN THE MATTER OF THE CLAIM
OF PAMELA MEEKER**

**MARYLAND HOME IMPROVEMENT
COMMISSION**

**AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ACTS OR OMISSIONS
OF RACQUEL NICHOLS t/a
BOB NICHOLS PAVING**

**MHIC CASE NO. 17(90)993
OAH CASE NO. DLR-HIC-02-18-09830**

* * * * *

FINAL ORDER

This matter was heard before an Administrative Law Judge (“ALJ”) of the Office of Administrative Hearings (“OAH”) on October 30, 2018. Following the evidentiary hearing, the ALJ issued a Proposed Decision on January 28, 2019, concluding that the homeowner Pamela Meeker (“Claimant”) sustained an actual and compensable loss of \$1,533.34 as a result of the acts and omissions of Racquel Nichols t/a Bob Nichols Paving (“Contractor”). *OAH Proposed Decision* pp. 14-15. In a Proposed Order dated March 25, 2019, the Maryland Home Improvement Commission (“MHIC”) affirmed the Proposed Decision of the ALJ to award the Claimant \$1,533.34 from the MHIC Guaranty Fund. The Contractor subsequently filed exceptions of the MHIC Proposed Order.

On June 20, 2019, a hearing on the exceptions was held before a three-member panel (“Panel”) of the MHIC. The Contractor was present without counsel. Nicholas Sokolow, Assistant Attorney General, appeared at the exceptions hearing to present evidence on behalf of the MHIC. The Claimant did not appear. The following four preliminary exhibits were offered by AAG Sokolow and admitted into evidence at the exceptions hearing: 1) January 28, 2019 OAH Proposed Decision, 2) March 25, 2019 MHIC Proposed Order, 3) April 15, 2019 Notice of Exceptions Hearing to be held June 20, 2019, 4) April 12, 2019 Written Exceptions of the Contractor. Neither

the Contractor nor the Claimant produced a copy of the transcript of the hearing before the ALJ, and therefore the Panel's review was limited to the ALJ's proposed decision, the exhibits introduced into evidence at the OAH hearing, and the preliminary exhibits offered by AAG Sokolow at the exceptions hearing. COMAR 09.01.03.09(G) - (I)

In his written exceptions, the Contractor alleges that he offered video evidence at the OAH hearing that was improperly excluded by the ALJ. The Contractor, however, has failed to provide the Commission with a transcript of the hearing below and therefore has presented nothing in the record showing that he offered such an exhibit. Pursuant to COMAR 09.01.03.09(H), it is the responsibility of the party, who wishes to refer to a transcript on exceptions, to obtain said transcript at her own expense and provide it to the Commission prior to the exceptions hearing. If the transcript is not obtained, then "the parties at the hearing on exceptions may not refer to any testimony before the ALJ which was not incorporated into the ALJ's findings of fact or conclusions of law." COMAR 09.01.03.09(I). The ALJ in his decision specifically states that the "Respondent did not offer any exhibits." *OAH Proposed Decision* p. 3. The Contractor has not pointed to anything in the record before the Commission establishing that a video was offered into evidence and that the ALJ otherwise improperly denied the admission of said video into evidence.

The remainder of the Contractor's written exceptions challenges the ALJ's weighing of the evidence, and determinations of credibility. The ALJ's finding of actual loss results from two of the three asphalt patches the Claimant contracted for with the Contractor. *OAH Proposed Decision* p. 9-10, 12. Based on the Claimant's testimony and photographs, the ALJ found that two of the patches were done in an unworkmanlike and inadequate manner. *OAH Proposed Decision* p. 10. The Contractor's husband, who oversaw the work done at the Claimant's property, admitted that the patches in the photographs were poorly done. *OAH Proposed Decision* p.11. The ALJ, however, found the husband's further testimony that the photographs offered into evidence did not

depict the Claimant's driveway, or any work completed by his company, to not be credible. *OAH Proposed Decision* p. 10. The ALJ was tasked with observing the demeanor of the witnesses as they testify, judge their credibility, and ultimately make findings of fact based on this testimony. The ALJ clearly found the Claimant's version of events to be more credible, and specifically found the Contractor's contention that the photographs did not depict their work to be "illogical, unconvincing and not credible." *OAH Proposed Decision* p. 10. The Commission will not overturn the credibility determinations of the ALJ in this case.

The Panel agrees with the ALJ's analysis and finds no error in his decision. The ALJ's decision is thorough, supported by the evidence in the record and correct as a matter of law. Having considered the parties' arguments, the evidence in the record and the OAH Proposed Decision, it is this **18th** day of **September 2019 ORDERED:**

- A. That the Findings of Fact of the Administrative Law Judge are **AFFIRMED**;
- B. That the Conclusions of Law of the Administrative Law Judge are **AFFIRMED**; AND
- C. That the Proposed Decision and Order of the Administrative Law Judge is **AFFIRMED**;
- D. Any party has thirty (30) days from the date of this Final Order to appeal this decision to Circuit Court.

Joseph Tunney

**Chairperson –Panel
Maryland Home Improvement
Commission**

IN THE MATTER OF THE CLAIM
OF PAMELA MEEKER,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF RACQUEL
NICHOLS, T/A BOB NICHOLS
PAVING,
RESPONDENT

* BEFORE DOUGLAS E. KOTEEN,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No. DLR-HIC-02-18-09830
* MHIC No. 17 (90) 993
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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 20, 2017, Pamela Meeker (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$4,000.00 for an alleged actual loss suffered as a result of a home improvement contract with Racquel Nichols, t/a Bob Nichols Paving (Respondent).

~~On October 30, 2018, I convened a hearing at the Frederick County Public Library in Frederick, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015).¹ The Claimant~~

¹ Unless otherwise noted, all references to the Business Regulation Article are to the 2015 Replacement Volume.

represented herself. Eric London, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Respondent represented herself and presented a witness, Bob Nichols.

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. 2018); 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 on behalf of the Fund:

- GF Ex. 1. OAH Notice of Hearing, dated September 17, 2018 for October 30, 2018 hearing;
- GF Ex. 2. MHIC Hearing Order, dated March 23, 2018;
- GF Ex. 3. Letter from David R. Finneran, Executive Director, MHIC, re: Licensing History for Respondent, dated June 5, 2018;
- GF Ex. 4. Home Improvement Claim Form, from Claimant, received June 20, 2017;
- GF Ex. 5. Letter from Joseph Tunney, Chairman, MHIC, to Respondent, dated August 23, 2017; and
- GF Ex. 6. Hand-drawn diagram from Respondent, undated.

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

- CL Ex. 1. Driveway pavement Job Notes, from Claimant, dated October 20, 2016;
- CL Ex. 2. MHIC Complaint Form, from Claimant, dated December 12, 2016, with attached hand-written statement, dated October 17, 2016 through February 24, 2017;
- CL Ex. 3. Contract between Respondent and Claimant, dated November 4, 2016, with attached hand-written statement, dated November 4, 2016 through March 7, 2017;
- CL Ex. 4. Letter from Respondent to MHIC, dated April 5, 2017;
- CL Ex. 5. Performance Checking Statement and hand-written notes, dated October 18, 2016;
- CL Ex. 6. Work Agreement with Mt. Airy Paving, dated May 15, 2017; and
- CL Exs. 7-13. Seven Claimant Photographs, undated.

The Respondent did not offer any exhibits.

Testimony

The Claimant testified in her own behalf in her case-in-chief and on rebuttal. The Respondent presented testimony from Bob Nichols, owner, Bob Nichols Paving.

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 license number 01-101943.
2. Racquel Nichols holds the MHIC license for the company, but Bob Nichols (Nichols), owner of Bob Nichols Paving, performed the work and/or supervised the work crew.
3. On or about October 18, 2016, the Claimant and Nichols met and discussed the work to be performed on the Claimant's driveway before a written contract was signed. The Claimant explained that she wanted repairs to be made to the numerous cracks in her driveway. She also advised that she wanted three distinct areas of the driveway to be repaired where the asphalt was broken and there were pools of standing water.
4. Nichols and the Claimant walked around the driveway and inspected the problem areas. Nichols agreed to fill the major cracks with hot tar. He also agreed to remove the existing "faulted" asphalt and install new asphalt in the three identified areas. Nichols also agreed to clean the existing asphalt with a power blower and seal coat the existing driveway. The Claimant and Nichols agreed that the cost of the work to be performed was \$4,000.00.
5. Nichols returned on October 20, 2016. He requested payment in full before the work was performed so he could pay his crew. The Claimant paid Nichols \$4,000.00 in cash on October 20, 2016. (CL Exs. 2, 5).
6. Nichols and his crew began performing work on the Claimant's driveway on October 20, 2016.

7. The Claimant called Nichols on several occasions after the initial work was performed and asked the contractor to return to address problems with the work. The Claimant was dissatisfied with the quality of the work performed in filling the cracks and patching the three identified areas, the continuing presence of pools of standing water on the driveway, and her concern about whether the Respondent had applied sealant throughout the existing driveway.

8. Nichols returned to the Claimant's home on several occasions, including on October 21 and 26, 2016. Nichols made some repairs to the cracks and seal-coated the driveway multiple times. The Claimant was not satisfied with the original work or with the subsequent repairs.

9. The Respondent performed no further work on the Claimant's driveway after on or about October 26, 2016.

10. Nichols returned to the Claimant's home on November 4, 2016. On that date, the Claimant and the Respondent entered into a typed written contract to address the work the Respondent had already performed on the Claimant's driveway. The contract provided, in pertinent part, the following:

Repair 3 faulted asphalt areas:

Saw cut around perimeter of areas to be repaired. Remove faulted asphalt, refill with hot asphalt. Roll to compaction.

Clean existing asphalt surfaces with power blower.

Fill all major cracks in existing driveway with hot tar.

Seal coat existing driveway with a double coat of sealer.

Bob Nichols Paving covers all labor and materials for a period 90 day warrant[y].

(CL Ex. 3).

11. The total price set forth in the written contract was \$4,000.00. (CL Ex. 3).

12. A warranty document attached to the November 4, 2016 written contract reflects that the Respondent repaired cracks in the driveway with hot tar and seal-coated the driveway on October 26, 2016. (CL Ex. 3).

13. In performing work under the contract, the Respondent filled the major cracks in the Claimant's driveway with hot tar and cleaned the existing asphalt with a power blower. The Respondent also applied multiple coats of sealant throughout the existing driveway.

14. The Respondent performed the asphalt patch work in a sloppy and unworkmanlike manner. The Respondent failed to adequately smooth and compact the asphalt in at least two of the areas where the patch work was performed. The patched areas did not transition smoothly to the existing asphalt and the edges were not adequately sealed. The Respondent also left bumps in some of the patched areas. Existing areas of standing water remained in the patched areas of the driveway due to the inadequate installation and compaction of the asphalt. The inadequate and uneven installation of the asphalt in the patched areas also created new areas of standing water.

15. The Claimant contacted the Respondent on numerous occasions between November 2016 and March 2017 to complain about the unsatisfactory work. Nichols returned on several occasions to inspect the driveway, but performed no further work.

16. The Claimant had no further contact with the Respondent after March 7, 2017.

17. On May 15, 2017, the Claimant obtained a proposal from Mt. Airy Paving to make repairs to her driveway in three distinct areas, by removing existing asphalt and paving with 1-1/2 to 2 inches of hot surface asphalt, to be commercially rolled and compacted. The proposal stated that the area to be repaired was 5,000 square feet. The cost for the proposed work was \$6,800.00. Mt. Airy Paving is licensed with the MHIC as a home improvement contractor. (CL Ex. 6).

18. The Claimant intends to have the driveway repaired, but has not had any repairs performed by another contractor to date.

19. The Claimant took photographs of her driveway in August 2018 and submitted those photographs in evidence. (CL Ex. 7-13). The Claimant has had no other work performed on her driveway since the Respondent performed the work in 2016.

20. The Claimant filed a claim with the Fund on June 20, 2017, in which she sought reimbursement from the Fund in the amount of \$4,000.00. (GF Ex. 4).

21. The Claimant suffered an actual loss in the amount of \$1,533.34 as a result of the acts and omissions of the Respondent.

DISCUSSION

An owner may recover compensation from the Fund “for an actual loss that results from an act or omission by a licensed contractor.” Md. Code Ann., Bus. Reg. § 8-405(a); *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.

In this case, the Claimant has the burden of proving the validity of her 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). For the following reasons, I find that the Claimant has proven eligibility for compensation from the Fund.

The Claimant and the Respondent executed a contract on November 4, 2016, which called for the Respondent to make certain repairs to the Claimant’s driveway for a total cost of \$4,000.00. The contract called for the Respondent to remove “faulted” asphalt, refill the area with hot asphalt, and roll the new asphalt to compaction, in three distinct areas of the driveway. The contract also called for the Respondent to “fill all major cracks in existing driveway with hot tar.” In addition,

the contract called for the Respondent to clean the existing asphalt surface with a power blower, and to seal coat the existing driveway with a double coat of sealer. (CL Ex. 3).

The Claimant explained that the original agreement between the parties was an oral contract that was discussed on October 18, 2016 and finalized on October 20, 2016. The Claimant testified that she discussed the problems with the driveway with Bob Nichols, owner of Bob Nichols Paving, and that she and Nichols walked the driveway and inspected the problem areas. Nichols agreed that the Respondent would fill the major cracks in the driveway and install new asphalt in three separate areas of the driveway where the asphalt was broken and there were areas of standing water. She stated that she paid the Nichols in full on October 20, 2016 and the Respondent performed the work before she was ever presented with a written contract by Nichols on November 4, 2016. Both parties signed and dated the contract on November 4, 2016. (CL Ex. 3).

The Claimant stated that she believed the Respondent was going to fill the major cracks with hot asphalt. However, the type-written contract that both sides executed on November 4, 2016 clearly provides that the Respondent agreed to "Fill all major cracks in existing driveway with hot tar." (CL Ex. 3).² Nichols testified that the major cracks identified on the Claimant's driveway were too small to be filled with asphalt. He explained that it would not be possible to compact the asphalt in the cracks present on the Claimant's driveway because at about one to four inches in width the cracks were too small for such work. He stated that is why the contract provides for the cracks to be filled with hot tar. He testified that he removed debris from the cracks and filled all major cracks with liquid hot tar. He also explained that the purpose in applying hot tar to the cracks was to provide a seal from the weather.

² The contract document the Claimant submitted into evidence at the hearing included hand-written notes in several places on the document. One of those notes stated "Hot Asphalt" in handwriting adjacent to the type-written portion of the contract stating that the major cracks would be filled with "hot tar." (CL Ex. 3). It appears that the original contract was type-written and that all of the hand-written notes were placed on the document by the Claimant at a later date. The Claimant did not state and failed to prove that the written contract provided for any material other than hot tar to fill the major cracks when the parties signed it on November 4, 2016. The parties are bound by the terms of the written contract they signed.

Nichols went on to explain that after walking the Claimant's driveway, he recommended to the Claimant that the entire driveway should be repaved at a cost of \$7,500.00. He stated that the Claimant declined this recommendation because she said it was too expensive. Nichols stated that he told the Claimant the more limited repairs she was seeking would only be a "band-aid" for the problems on her driveway. Despite this explanation, the evidence establishes that the Claimant agreed to pursue only the more limited repairs set forth in the written contract. Furthermore, several of the photographs the Claimant submitted into evidence demonstrate that the cracks in her driveway were filled with hot tar. (CL Exs. 9, 11-13). Nichols also testified without dispute that he returned on several occasions and applied additional hot tar to seal the cracks in the driveway.

Consequently, with regard to filling the cracks in the driveway, I conclude, for the reasons discussed above, that the Claimant contracted with the Respondent to fill all major cracks in the driveway with only hot tar. I also conclude that the Respondent complied with the terms of the contract concerning the cracks in the Claimant's driveway and filled all of the major cracks in the existing driveway with hot tar.

The Claimant also argued that the Respondent failed to perform any work with regard to some of the cracks in her driveway. She pointed primarily to the photographs she submitted into evidence as Claimant's Exhibits 10, 12, and 13. These photographs show certain cracks, dirt, and debris that do not appear to be sealed with hot tar. Other parts of these pictures do show hot tar in the cracks. I do not find these photographs to be probative of this issue because the Claimant admitted she took these photographs in August 2018. It is more than likely that the driveway would have developed additional cracks, accumulated additional dirt and debris, and that some hot tar would have dissipated over the nearly two years between when the Respondent completed the driveway work and when the photographs were taken. Therefore, these photographs fail to present an accurate picture of the condition of the Claimant's driveway in November 2016, right after the

work was performed. I cannot conclude based on these August 2018 photographs that the Respondent failed to fill some of the major cracks with hot tar back in October or November 2016.

It is unfortunate that the Claimant was not satisfied with the results of this work, but she has failed to prove that the Respondent performed the work contracted for, in filling the major cracks in the existing driveway with hot tar, in an unworkmanlike or inadequate manner.

However, the evidence presented leads to a different result with regard to the Respondent's work in patching three distinct areas of the Claimant's driveway with new asphalt. The November 4, 2016 contract provides for the Respondent to "Repair 3 faulted asphalt areas." It goes on to state that the Respondent will "Saw cut around perimeter of areas to be repaired. Remove faulted asphalt, refill with hot asphalt. Roll to compaction." (CL Ex. 3). The Claimant's concern with regard to the three areas where new asphalt was installed to patch existing broken or "faulted" asphalt is that the asphalt was not properly compacted, it was bumpy and not flat and level, the edges of the patched areas were not smooth where they transitioned to the existing driveway, and the edges were not adequately sealed. The Claimant's primary concern with the quality of the repair work was the bumpy areas, lack of smooth transition, and because the pools of standing water present in those areas before the patch work was performed remained after the work was completed. In fact, the Claimant complained that the Respondent's poor workmanship in the patched areas had actually created additional areas of standing water.

I found the Claimant's testimony to be detailed and convincing with regard to her concerns about the quality of the work in the patched asphalt areas and her position that the pools of standing water was an issue she discussed with Nichols from the beginning when the parties walked the driveway and discussed the work to be performed. She testified that the patched areas were not rolled or flat, and the edges were not sealed. She stated that the patch work was sloppy, the transition areas were not smooth and level, and the patched areas were left with what she described as "speed bumps." She stated that before the work was performed her driveway had

three areas of standing water. She testified that after the work was completed, the driveway was left with seven areas of standing water. The Claimant identified Claimant Exhibits 7 and 8 as photographs that depicted two of the areas where the asphalt patch work was performed. (CL Exs. 7, 8). The Claimant admitted she did not submit any photographs depicting the third area where the asphalt patch work was performed.

The contract required the Respondent to "Roll to compaction." (CL Ex. 3). A reasonable interpretation of this language is that the patched areas should be flat and level and that the transition from the newly patched areas to the existing driveway should be smooth and even, and without bumps. I conclude based on the testimony presented and the documents submitted that the Respondent's work in the patched areas was performed in an unworkmanlike and inadequate manner. The photographs in Claimant Exhibits 7 and 8 confirm the problems identified by the Claimant in her testimony. They demonstrate that the asphalt patch work was not adequately installed, as the transition from the patched areas to the existing driveway was bumpy, and not level and smooth, and was not adequately sealed. The photographs also depict areas of standing water that were created or not resolved by the Respondent's poor workmanship where the patched areas failed to transition smoothly to the existing driveway.

Nichols' surprising testimony that the photographs submitted by the Claimant did not depict the Claimant's driveway and did not identify work performed by the Respondent was illogical, unconvincing, and not credible. The Claimant testified that she took the photographs herself of her driveway, that she had not had any other work performed on her driveway other than the work performed by the Respondent in 2016, and that the photographs did reflect the work performed by the Respondent. Subsequently, Nichols acknowledged that the photographs showed that some of the patched areas were higher up and were not level with the existing driveway. He claimed it was intentional because he allowed for the patched areas to settle over time. He also stated that the edges were sealed with hot tar. Nichols' claims were not persuasive because the

photographs reflected that even after nearly two years, the transitions between the patched areas and the existing driveway were uneven, bumpy, and not smooth. Moreover, no hot tar sealant could be detected at the edges of the patched areas in the photographs submitted. (CL Ex. 7, 8).

In a moment of candor, Nichols acknowledged that he would be ashamed of the work depicted in the photographs and that it would make him cry. But he continued to claim, unconvincingly, that the photographs did not depict his work. Nichols also claimed that when the Claimant complained about the work, she only referred to the cracks and not to the patched areas. I did not find this testimony persuasive because the Claimant's testimony was detailed, and supported by her documents, that she also discussed with Nichols her concerns about the areas of standing water, both before and after the work was performed, in the areas where the patch work was done.

For the foregoing reasons, I conclude that the Claimant established by a preponderance of the evidence that the Respondent performed the work concerning the patched asphalt areas in an unworkmanlike and inadequate manner. Md. Code Ann., Bus. Reg. §§ 4-401, 4-405(a) (2015).

The Claimant did not present sufficient evidence to prove any poor work performance with regard to the additional work described in the written contract. I conclude that the Respondent cleaned the existing asphalt surface with a power blower. The Claimant also contended that the Respondent did not seal coat the existing driveway with a double coat of sealer. I found the Nichols' testimony to be convincing with regard to his claim that he returned to the Claimant's residence on several occasions and seal-coated the driveway at least four times. This was also confirmed by the warranty document attached to the contract. (CL Ex. 3).

Actual Loss

The written contract signed by the parties sets forth a total amount of \$4,000.00 for all the work performed under the contract, but does not break down the costs. (CL Ex. 3). However, Nichols testified to an itemized breakdown of the contract price. He stated that the cost for

filling the cracks with hot tar was \$900.00, the cost for installing the asphalt patch work was \$2,300.00, and the cost for applying the seal coat was \$800.00. This results in a total cost consistent with the written contract of \$4,000.00. For the reasons addressed above, I find the Claimant failed to establish inadequate work or an actual loss with regard to filling the cracks or applying the seal coat. As discussed above, I do find the Claimant established the Respondent performed the asphalt patch work in an unworkmanlike and inadequate manner, particularly with regard to the uneven, unsmooth and bumpy areas of transition from the patched areas to the existing driveway. It was unsightly, potentially dangerous, and contributed to the failure to resolve and/or the creation of new areas of standing water in the patched areas of the driveway.

The Claimant presented photographs of two of the three areas where the asphalt patch work was performed. (CL Exs. 7, 8). She admitted that she did not submit a photograph depicting the third area where the patch work was done. Moreover, the Claimant did not provide any information in her testimony regarding the work performed in the third area. Therefore, I cannot conclude on this record that the Respondent's work performance in the third area was inadequate or unworkmanlike. The most logical manner for estimating the cost to repair the two areas of asphalt patch work that were performed in an unworkmanlike and inadequate manner is to calculate two-thirds of the total cost of the asphalt patch work of \$2,300.00. This calculation produces a cost to repair the two areas of asphalt patch work of \$1,533.34.

I have also considered the estimate the Claimant obtained from Mt. Airy Paving (Mt. Airy). This estimate appears to cover the cost of resurfacing the driveway with hot asphalt in the areas where the asphalt patch work was performed. The total cost of this estimate was \$6,800.00. (CL Ex. 6). However, the total area to be repaired according to the Mt. Airy estimate is listed as 5,000 square feet. Both the Claimant and Nichols agreed that 5,000 square feet was a much larger area than the size of the three patched areas in the Claimant's driveway. The size of the three patched areas was described by the Claimant and Nichols as ranging from about 2 x 3

feet, up to about 8 x 16 feet. Therefore, I must conclude, based on the large square footage, that the Mt. Airy estimate proposed to resurface the Claimant's entire driveway with asphalt, or at least to resurface a much larger area of the Claimant's driveway than the patch work performed by the Respondent. No explanation was provided for scope of the Mt. Airy estimate.

Accordingly, I conclude that the Mt. Airy estimate does not provide an accurate cost to repair the two patched areas of asphalt that I have concluded were performed in an unworkmanlike or inadequate manner. I conclude that the most accurate cost to repair the unworkmanlike and inadequate asphalt patch work performed by the Respondent in the two patched areas is \$1,533.34, in accordance with the calculations discussed above.

Award

Having concluded that the Claimant is entitled to compensation for the unworkmanlike and inadequate asphalt patch work performed by the Respondent, I now turn to the amount of the award to which the Claimant is entitled.

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). The following formula is relevant to determine the amount of the actual loss in this case and provides as follows:

(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)(c).

In this case, the Claimant paid the Respondent \$4,000.00 to perform the driveway work under the contract. For the reasons addressed above, I conclude that the Claimant will have to pay another contractor \$1,533.34 to repair the two areas of asphalt patch work that the Claimant proved were performed in an unworkmanlike or inadequate manner. The calculation to determine the amount of the Claimant's actual loss is as follows:

\$4,000.00	Amount Paid to Respondent
+ \$1,533.34	Cost to Repair Work
<u>\$5,533.34</u>	
- \$4,000.00	Original Contract Amount
<u>\$1,533.34</u>	Actual Loss

Therefore, I conclude that the Claimant's actual loss to repair the unworkmanlike or inadequate home improvement work performed by the Respondent in the two areas where the Claimant proved that the poor work was performed is \$1,533.34. Therefore, the Claimant is entitled to an award from the Fund in the amount of \$1,533.34 to compensate the Claimant for her actual loss. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405; COMAR 09.08.03.03B(3)(b).

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 \$1,533.34. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); 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 \$1,533.34.00; 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; Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20; and

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

Signature on File

January 28, 2019
Date Decision Issued

Douglas E. Koteen
Administrative Law Judge

DEK/da
1779210



The undersigned, being duly sworn, depose and say that the within and foregoing is a true and correct copy of the original of the same as the same appears from the records of the Court of Sessions of the County of ... State of ...

DEPOSED AND SWORN TO before me this ... day of ... 19...

My commission expires the ... day of ... 19...

[Signature]
 Notary Public
 State of ...

[Signature]
 Notary Public
 State of ...

WITNESSES
 My commission expires the ... day of ... 19...

PROPOSED ORDER

WHEREFORE, this 25th day of March, 2019, 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.

Michael Shilling

*Michael Shilling
Panel B*

MARYLAND HOME IMPROVEMENT COMMISSION

Maryland Home Improvement
Commission

State's Exhibit # 2