

**IN THE MATTER OF THE CLAIM  
OF HERBERT CAPPEL**

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**MARYLAND HOME IMPROVEMENT  
COMMISSION**

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**AGAINST THE MARYLAND HOME  
IMPROVEMENT GUARANTY FUND  
FOR THE ACTS OR OMISSIONS  
OF BRANDY JONES t/a  
TOWN & COUNTRY ASPHALT**

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**MHIC CASE NO. 18(90)161  
OAH CASE NO. DLR-HIC-02-19-03998**

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**FINAL ORDER**

This matter was heard before an Administrative Law Judge (“ALJ”) of the Office of Administrative Hearings (“OAH”) on May 2, 2019. Following the evidentiary hearing, the ALJ issued a Proposed Decision on July 31, 2019, concluding that the homeowner Herbert Cappel (“Claimant”) did not timely file his claim and further failed to prove that he sustained an actual compensable loss as a result of the acts of omissions of Brandy Jones t/a Town & Country Asphalt (“Contractor”). *OAH Proposed Decision* p. 7. The Maryland Home Improvement Commission (“MHIC”) subsequently affirmed the Proposed Decision of the ALJ to deny the claim. The Claimant filed exceptions to the MHIC Proposed Order.

On December 5, 2019, a hearing on the exceptions was held before a three-member panel (“Panel”) of the MHIC. The Claimant was present without counsel. The Contractor did not appear. Nicholas Sokolow, Assistant Attorney General, appeared at the exceptions hearing to present evidence on behalf of the MHIC. The following four preliminary exhibits were offered by AAG Sokolow and admitted into evidence at the exceptions hearing: 1) October 30, 2019 Cover Letter for the OAH Proposed Decision and MHIC Proposed Order, 2) OAH Proposed Decision, 3) Claimant’s Written Exceptions, and 4) November 13 2019 Notice of Exceptions Hearing set for December 5, 2019. 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).

The ALJ correctly found that the Claimant's claim was filed beyond the statute of limitations for claims against the Guaranty Fund. The statute of limitations for such claims is set forth in Maryland Annotated Code, Business Regulation Article ("BR") §8-405(g) and Code of Maryland Regulations ("COMAR") 09.08.03.02G. BR §8-405(g) provides that "[a] claim shall be brought against the Fund within 3 years after the claimant discovered or, by use of ordinary diligence, should have discovered the loss or damage." COMAR 09.08.03.02G similarly reads "[a] claim may not be brought against the Fund after 3 years from the date that the claimant discovered, or by exercise of ordinary diligence should have discovered, the loss or damage." The statute of limitations is also referenced on the MHIC Guaranty Fund claim form itself, where it states at line 1.G. that the Commission may dismiss any claim as legally insufficient if "[t]he claim is filed after three (3) years from the date the claimant discovered or should have discovered the loss or damage." *OAH Hearing Guaranty Fund Exhibit 4*.

According to the ALJ, "the Claimant's wife testified that she was not happy with the Contractor's work immediately after it was completed because the colors of the asphalt did not match." *ALJ Proposed Decision* p. 5. The ALJ also noted that the Claimant testified he noticed cracking in the driveway within six months of the Contractor's completion of the work. *ALJ Proposed Decision* p. 5. Based on this testimony, the ALJ would go on to find that "the Claimant and his wife knew of their dissatisfaction with the driveway soon after the work was completed in June 2014." *ALJ Proposed Decision* p. 5. The claim form subsequently filed by the Claimant shows that it was not received by the Commission until January 26, 2018, over three years beyond the date the Claimant discovered the loss or damage. *OAH Hearing Guaranty Fund Exhibit 4*.



Therefore the ALJ is correct that the claim is barred by the statute of limitations.

In addition, the ALJ held that the Claimant “did not prove by a preponderance of the evidence that the condition of the driveway was due to misconduct on the part of the contractor.” *ALJ Proposed Decision* p. 6. The ALJ correctly states in her decision that the Claimant has the burden of proving the validity of his claim by a preponderance of the evidence. *OAH Proposed Decision* p. 4. In order to recover from the Fund, the Claimant had to prove at the OAH hearing that he suffered an “actual loss that results from the act or omission by a licensed contractor.” BR § 8-405(a). The term “actual loss” is defined in the statute as “the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.” BR § 8-401. Therefore, the Claimant’s burden is twofold, he must first prove that the Contractor performed an unworkmanlike, inadequate or incomplete home improvement, and second he must prove the amount of his actual loss. The ALJ noted that the Contractor testified that cracks could form in a driveway for many different reasons and that “a failed foundation or tree roots are two of the most common causes.” *OAH Proposed Decision* p. 6. The ALJ ultimately found that although the Claimant provided pictures of cracks in the driveway, he did not present any evidence to show a causal relationship between the Contractor’s work and the cracking. *OAH Proposed Decision* p. 6. The contract between the Claimant and the Contractor did not provide for the excavation of and relaying of an entirely new driveway, but instead involved the cutting out of certain sections and the application of an overlay of asphalt over the existing driveway. *OAH Hearing Claimant’s Exhibit 1; OAH Proposed Decision* p. 6. The ALJ found the Claimant’s assertion, that because his original driveway lasted longer without cracks than the overlay of asphalt provided by the Contractor must be defective, to be insufficient to prove that the cracks were the result of the acts of omissions of the Contractor. *OAH Proposed Decision* p. 7.

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 **4th** day of **March 2020 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 HERBERT CAPPEL,  
CLAIMANT  
AGAINST THE MARYLAND HOME  
IMPROVEMENT GUARANTY FUND  
FOR THE ALLEGED ACTS OR  
OMISSIONS OF BRANDY JONES, t/a  
TOWN & COUNTRY ASPHALT,  
RESPONDENT

\* BEFORE ANN C. KEHINDE,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
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\* OAH No.: DLR-HIC-02-19-03998  
\* MHIC No.: 18 (90) 161  
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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 January 26, 2018, Herbert Cappel (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$24,794.73 in actual losses allegedly suffered as a result of a home improvement contract with Brandy Jones, trading as Town & Country Asphalt (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015). On February 7, 2019, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on May 2, 2019 at the OAH, 11101 Gilroy Road, Hunt Valley, Maryland. Bus. Reg. § 8-407(e). Nicholas Sokolow, Assistant Attorney General, Department of Labor (Department), represented the Fund. The Claimant represented himself. Brandy Jones, Respondent, represented herself.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, 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 & Supp. 2018); 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 the compensable loss?

### SUMMARY OF THE EVIDENCE

#### Exhibits

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

- Cl. #1. Contract, dated April 26, 2014
- Cl. #2. Check number 745, in the amount of \$3,500.00, made payable to Town & Country Asphalt, dated June 5, 2014; check number 2829, in the amount of \$400.00, made payable to Town & Country Asphalt, dated June 13, 2014
- Cl. #3. Email between the parties, dated June 11, 15, 2017
- Cl. #4. Four pictures of driveway (taken by the Claimant in the summer of 2016)
- Cl. #5. Four pictures of driveway (taken by the Claimant in the summer of 2016)
- Cl. #6. Proposal from Driveways 2day, dated January 19, 2018
- Cl. #7. Email between parties, dated July 25, 2017

- Cl. #8. Respondent's response to complaint, dated August 28, 2018
- Cl. #9. Email between parties, dated April 23, 24, 2014; Town & Country Proposal<sup>1</sup>
- Cl. #10. Dominic's Paving Proposal, undated

I admitted the following exhibits on behalf of the Fund:

- GF #1. Notice of Hearing, dated March 18, 2019
- GF #2. Respondent's Licensing History
- GF #3. Hearing Order, dated February 4, 2019
- GF #4. Letter from MHIC to Respondent, dated February 2, 2019

The Respondent did not offer any documents for admission into evidence.

#### Testimony

The Claimant testified and presented the testimony of his wife, Vivian Cappel.

The Respondent testified on her own behalf.

The Fund did not present any witnesses.

#### 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 under MHIC license number 92196.
2. On or about April 26, 2014, the Claimant and the Respondent entered into a contract to saw cut and remove certain areas of the existing driveway and then overlay the entire driveway with two inches of 9.5 mm. asphalt and power roll to compact the asphalt.

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<sup>1</sup> There was extensive testimony during the hearing about whether changes the Claimant wanted incorporated into the contract were incorporated. Specifically, the Claimant testified that he sent changes to the Respondent (second page of Cl. #9) and he believed this document was part of the contract. The Respondent testified that the only contract was the one in which the Claimant's name and April 26, 2014 (Cl. #1) appear. Cl. #1, which is dated and signed, is the only contract as it does not appear the Respondent accepted or signed the Claimant's proposal (Cl. #9) which misstates the Respondent's name as *Brandon Jones*.

3. The cost of the contract was \$3,900.00. The Claimants paid the contract price in full.

4. The work began on June 1, 2014. The driveway area was very large and asphalt had to be delivered in more than one trip. After part of the asphalt was delivered, the supplier (not the Respondent) had a breakdown of its equipment and the next batch of asphalt was not delivered for approximately three days. The Respondent finished the work on approximately June 5, 2014; immediately after the work was completed, the Claimant's wife noticed that the color of the asphalt did not match.

5. Approximately six months after the work was completed, the Claimant and his wife noticed cracks in the driveway.

6. On a date unknown, the Claimant contacted the Respondent and complained about the cracks. The Claimant and Respondent communicated to try and resolve the problem. The Respondent agreed to supply the labor and redo the driveway if the Claimant would pay for the materials; the Claimants refused.

7. The cracks became bigger and longer.

8. The Claimant filed a complaint with the MHIC on January 26, 2018.

#### DISCUSSION

In this case, the Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Md. Code Ann., Bus. Reg. §8-407(e)(1) (2015); 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 (3d 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) (2015)<sup>2</sup>; *see also* COMAR 09.08.03.03B(2) (“actual losses . . . incurred as a result of misconduct by a licensed contractor”). “[A]ctual loss’ means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.” Bus. Reg. § 8-401.

In addition, the Claimant must file a claim against the Fund within three years “after the claimant discovered or, by use of ordinary diligence, should have discovered the loss or damage.” Md. Code Ann., Bus. Reg. § 8-405(g) (2015). The Claimant testified that he noticed the cracking in the driveway within six months after the Respondent completed the work. Further, the Claimant’s wife testified that she was not happy with the work immediately after it was completed because the colors of the asphalt did not match. The Claimant testified that he was hoping to resolve the complaint with the Respondent contractor without needing to file a claim. He further argued that the Respondent was acting in bad faith so the three-year statute of limitations would expire before he had a chance to file his complaint. Although it is clear from the testimony and the documents that the parties were trying to resolve the dispute, the Claimant has not presented sufficient evidence to prove that the Respondent was acting in bad faith to prevent the Claimant from filing a claim.<sup>3</sup> As the Claimant and his wife knew of their dissatisfaction with the driveway soon after the work was completed in June 2014, the claim was not timely filed in January 2018.

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<sup>2</sup> Unless otherwise noted, all references to the Business Regulation Article herein cite the 2015 Replacement Volume of the Maryland Annotated Code.

<sup>3</sup> The Claimant repeatedly stated that he expected Scott Jones to appear because all of the work was done by Mr. Jones and he had conversations with Mr. Jones about the work and any possible remedies. However, Ms. Brandy Jones is the licensed contractor and she is listed in the public records with MHIC as the holder of the license and she is listed on the contract. Therefore, the Claimant should not have assumed that Mr. Jones would be present for the hearing without requesting a subpoena be issued to compel his attendance. Furthermore, Ms. Jones testified without contradiction that she has extensive experience working in paving, first with her father’s business, and now with her husband.

Even if the claim was timely filed, the Claimant did not prove by a preponderance of the evidence that the condition of the driveway was due to misconduct on the part of the contractor. The Respondent testified that due to the size of the driveway, there would have to be at least two seams. She further testified that due to events outside of her control, they had to use asphalt that was delivered days apart and from different lots, which resulted in different colors. The contract that was agreed to by the parties (Cl. #1) does not specify the color of the asphalt or even the size of the overall area of the driveway.

The Claimant did present pictures of the cracks in the driveway (Cl. #4, #5). In addition, he taped to the pictures a "tassel" from a nearby tree that he testified got stuck in the cracks of the driveway because they were so big. Although the cracks were obvious from the pictures, the Claimant did not present any testimony or other evidence to establish that the Respondent's poor workmanship was the cause of the cracks. In contrast, the Respondent testified that the contract that she entered into with the Claimant was not for excavation of the complete driveway. Instead, the contract specified that parts of the driveway (near the front of the garage, walkways, street and side of the house) would be removed and then an "overlay" would be installed on top of the existing driveway (composed of two inches of 9.5 mm asphalt). Further, the Respondent testified that driveways can crack for many different reasons: a failed foundation or tree roots are two of the most common causes. The Respondent testified that driveways are composed of three layers of materials but the contract she had with the Claimant did not provide for removal of the foundation but to cut out certain areas where the driveway had failed and cracked and then fill in with asphalt and resurface. Finally, the Respondent noted that the Proposals from Driveways 2day (Cl. #6) and Dominic's Paving (Cl. #10) were for excavation and removal of the entire driveway, which is reflected in the proposed prices which were twice and six times more than what the Respondent charged.

The Claimant did not present any evidence to demonstrate a causal relationship between the Respondent's work and the cracking. It is insufficient for the Claimant to merely assert that because his previous driveway lasted for a much longer time without cracks, the asphalt installed by the Respondent over the existing driveway surface must have been defective. As the Claimant has not met his burden of proving that the Respondent performed incomplete or unworkmanlike work, he is not entitled to compensation from the Fund.

**PROPOSED CONCLUSIONS OF LAW**

I conclude that the Claimant did not timely file his claim and is barred from recovering from the Fund. Md. Code Ann., Bus. Reg. § 8-405(g) (2015).

I further conclude that the Claimant has failed to prove that he sustained an actual and compensable loss as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015).

**RECOMMENDED ORDER**

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

**ORDER** that the Maryland Home Improvement Guaranty Fund deny any award to the Claimant; and

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

July 31, 2019  
Date Decision Issued

**CONFIDENTIAL**

Ann C. Kehinde  
Administrative Law Judge

ACK/cj  
#181292



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PROPOSED ORDER

*WHEREFORE, this 13<sup>th</sup> day of November, 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*

