IN THE MATTER OF THE CLAIM	*	**BEFORE EMILY DANEKER,**
OF JOY HART,	*	**AN ADMINISTRATIVE LAW JUDGE**
CLAIMANT	*	**OF THE MARYLAND OFFICE**
AGAINST THE MARYLAND HOME	*	**OF ADMINISTRATIVE HEARINGS**
IMPROVEMENT GUARANTY FUND	*	**OAH No.: LABOR-HIC-02-20-03265**
FOR THE ALLEGED ACTS OR	*	**MHIC No.: 19 (90) 1270**
OMISSIONS OF MONICA STANLEY,	*	
T/A TRIPLE A PAVING &	*	
SEALCOATING,	*	
RESPONDENT	*	

* * * * * * * * * * * * *

PROPOSED DECISION

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

STATEMENT OF THE CASE

On August 23, 2019, the Maryland Home Improvement Commission (MHIC) received a claim filed by Joy Hart (Claimant) seeking reimbursement from the Maryland Home Improvement Guaranty Fund (Fund) for $6,000.00 in actual losses allegedly sustained as a result of the acts or omissions of contractor Monica Stanley, trading as Triple A Paving & Sealcoating (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015).[1] On January 21,

[1] Unless otherwise indicated, all citations to the Business Regulation article of the Annotated Code of Maryland are to the 2015 Replacement Volume.

2020, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On June 10, 2020, I held the requested hearing by telephone.[2] Bus. Reg. § 8-407(e); *see also* Code of Maryland Regulations (COMAR) 28.02.01.20B(1)(a). Nicholas Sokolow, Assistant Attorney General, Department of Labor (Department), represented the Fund. The Claimant represented herself. The 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. 2019); 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:

Clmt. Ex. 1 - Photograph of driveway, undated

Clmt. Ex. 2 - Photograph of driveway and District Concrete truck, undated

Clmt. Ex. 3 - Photograph of driveway, with men and dogs, undated

Clmt. Ex. 5 - Photograph of driveway apron, undated

Clmt. Ex. 6 A-C - Photographs of closeup areas of concrete driveway, undated

[2] Due to the ongoing COVID-19 pandemic, in-person hearings were not then being held at the OAH.

Clmt. Ex. 7 - Letter from the MHIC to Claimant, May 9, 2019

Clmt. Ex. 8 - MHIC Complaint Form, April 3, 2019

Clmt. Ex. 9 - Claimant's canceled checks, numbers1240 (May 30, 2017), 1574 (May 30, 2017), and 1578 (June 24, 2017)

Additionally, the Claimant submitted a photograph of her driveway, with a pickup truck, showing its structure prior to the work at issue. The photograph, which was marked for identification as Claimant Exhibit 4, was not accepted into the evidentiary record, but a copy is retained with the file for purposes of any judicial review. COMAR 28.02.01.22C.

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

Resp. Ex. 1 - Letter from Respondent to Whom it May Concern, June 5, 2020

I admitted the following exhibits on behalf of the Fund:

Fund Ex. 1 - Notice of Hearing, February 10, 2020

Fund Ex. 2 - Email from the OAH to Claimant, Respondent, and Mr. Sokolow, June 8, 2020

Fund Ex. 3 - MHIC Hearing Order, January 15, 2020

Fund Ex. 4 - Home Improvement Claim Form, August 23, 2019

Fund Ex. 5 - Department ID Registration and License History, June 8, 2020

Fund Ex. 6 - Letter from the OAH to the Parties, June 3, 2020

Testimony

The Claimant testified in her own behalf.

Ms. Stanley testified on behalf of the Respondent.

No other witnesses testified at the hearing.

PROPOSED FINDINGS OF FACT

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

1. At all relevant times, the Respondent was a licensed home improvement contractor under MHIC license number 01-67243.

2. At all relevant times, the Claimant has owned and resided at a home on Frenchton Place (Residence) in Gaithersburg, Maryland; she does not own any other property.

3. The Claimant desired to replace the driveway at the Residence, as the driveway was designed with a hump at the bottom, just prior to the street, and her car often bottomed out when going over the hump.

4. On or about May 30, 2017, the Claimant entered into an oral contract with the Respondent to entirely remove and replace her driveway with a new concrete driveway.

5. The Claimant paid the Respondent at total of $6,000.00, as follows:

Check no. 1240 (May 30, 2017)	$2,000.00
Check no. 1574 (May 30, 2017)	$1,250.00
Check no. 1578 (June 24, 2017)	$2,750.00

6. In June 2017, the Respondent removed the Claimant's entire driveway. They removed the old driveway, replaced the foundation, and installed a new concrete driveway and apron (that portion that bridges the street and the drive, along the sidewalk).

7. The Claimant waited ten to twelve days before driving on the driveway.

8. In October 2017, the Claimant noticed the cement was crumbling in the area where she parks her car. A few days later she noticed more extensive crumbling. The Claimant contacted the Respondent.

9. The Respondent inspected the driveway but advised the Claimant to wait to repair it until after winter.

10. Sometime between May and July 2018, the Respondent returned to the Residence and replaced the lower half of the driveway, including the apron.

11. In September 2018, the Claimant noticed the cement on the driveway, on and in the vicinity of the apron, was crumbling and rocks and pebbles were coming up from the foundation under the cement. She contacted the Respondent about the problem.

12. In the spring of 2019, the Respondent returned and replaced the apron and the area immediately above it.

13. In October 2019, the Claimant again noticed that the cement in the apron area was crumbling and telephoned the Respondent.

14. The Respondent did not return the Claimant's call and did not return to look at her driveway.

15. Replacing the apron area would cost approximately $1,000.00.

16. The Claimant is not related to the Respondent, is not an officer or employee of the Respondent, and is not related to an officer or employee of the Respondent.

17. The Claimant has not filed any other claims related to the Respondent's work.

DISCUSSION

Applicable Law

The Maryland General Assembly created the Fund to provide an available pool of money from which homeowners could seek relief for losses sustained at the hands of incompetent or unscrupulous home improvement contractors. Md. Code Ann., Bus. Reg. §§ 8-401 to 8-411. A homeowner is authorized to "recover compensation from the Fund for an actual loss that results

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from an act or omission by a licensed contractor . . . ." *Id.* § 8-405(a); *see also* COMAR 09.08.03.03B(2). The governing statute defines "actual loss" as "the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." Bus. Reg. § 8-401.

At a hearing on a claim, the claimant has the burden of proof. Bus. Reg. § 8–407(e)(1); COMAR 09.08.03.03A(3). The claimant's burden is by a preponderance of the evidence. Md. Code Ann., State Gov't § 10-217 (2014). To prove something by a "preponderance of the evidence" means "to prove that something is more likely so than not so[,]" when all of the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002). For the reasons explained below, I find that the Claimant has proven eligibility for compensation from the Fund.

The Evidence

There was no dispute that the Respondent is a licensed home improvement contractor and the Claimant paid the Respondent $6,000.00 for replacement of the concrete driveway at the Residence with a new concrete driveway. The Respondent agreed that after its initial work, it replaced the portions of the driveway on two different occasions in order to remedy crumbling concrete in the driveway.

The Claimant noted that she was initially pleased with the Respondent's work, but testified that each time, after a few months, the concrete in the driveway began to crumble and flake. She supported her testimony with photographs depicting the problem. The Claimant photographs show that, even after two attempted repairs, the concrete continued to crumble in the apron area of the driveway. In terms of the cause of the crumbling, the Claimant testified that, in connection with the most recent incident of crumbling, the winter in her area was mild

and no road chemicals or salt had been applied. She also noted that none of her neighbors were experiencing a similar problem with their concrete driveways. The Claimant noted that she spoke to a work associate, who she explained is a contractor, and he suggested that the concrete may not have been the correct consistency, 35-40 psi. He did not see the driveway in person and his suggestion was based on the Claimant's description.

The Claimant explained that she would like to have the apron corrected and clarified in her closing argument that her claim, though originally for $6,000.00, was limited to the cost to replace the apron, which she contended was $1,100.00.[3] The Claimant has not repaired or replaced the apron since the concrete began to crumble for a third time, and she did not submit any estimate for the cost of that work. She testified, however, that her work associate had opined that it would cost about $1,100.00 to replace the driveway apron. The Claimant did not have a written estimate from that contractor, she did not identify him, she did not testify as to his experience (if any) working with concrete, and she did not indicate if he was licensed by the MHIC.

Ms. Stanley, the MHIC licensee, testified for the Respondent. Ms. Stanley explained that the Respondent had never before had a problem like this, and it had already replaced portions of the Claimant's driveway twice following its initial work; she noted that the company ultimately lost money on the job. Ms. Stanley explained that she had not heard of any other problems with the consistency of the concrete. She agreed, however, on cross-examination by the Fund, that a driveway would be reasonably expected to be free from cracking or crumbling. The Respondent did not refute the Claimant's testimony that she contacted the company a third time about crumbling concrete in the driveway. Ms. Stanley denied that the Respondent was at fault and

[3] COMAR 09.08.03.02C(2) (allowing amendment of claim where it will not prejudice the contractor).

posited that snowplows or road salt may be to blame. On cross-examination, Ms. Stanley first testified that repairing the apron area of the driveway would cost about $2,000, she then hedged her testimony and stated it might be as little as $1,000, and she then back tracked and asserted that she was not sure what the cost would be.

Analysis

The testimony of record establishes, by a preponderance of the evidence, that the Respondent performed an unworkmanlike home improvement. The Claimant's testimony and pictures established the concrete in the driveway was crumbling, and that the crumbling began within a few months of the Respondent's work. The Respondent acknowledged that this should not ordinarily occur. Although the Respondent suggested that the crumbling could have been caused by a snowplow or road salt, the Claimant was clear that the weather was mild and there was not a snow that required a plow or road salt in her area. Moreover, the Claimant testified that she observed the most recent incident of crumbling in September 2019—which would have been well in advance of when winter weather is typically experienced in Maryland.[4] The Respondent, an MHIC licensee engaged in paving and contracting, did not offer any other viable explanation for the crumbling concrete. In light of the timing of the defect, the lack of a plausible alternative cause, and the admission that the crumbling should not ordinarily occur, I find that the Claimant has established that the Respondent performed an unworkmanlike home improvement. *Cf. Peterson v. Underwood*, 258 Md. 9, 17-18 (1970) ("When the claimed negligent act and the injury are in close physical or temporal conjunction, absent a different explanation, common experience permits an inference of a cause-effect relationship.").

[4] It is common knowledge that in this area of the world, summer ends every year between September 21 and September 24.

In terms of the amount of the Claimant's actual loss, the Claimant's own information—which consisted of a verbal estimate by an unidentified contractor who had not visited the site, was insufficient on its own to establish the cost to repair or replace the Respondent's work. Nonetheless, I considered the testimony from Ms. Stanley that the work would likely cost between $1,000.00 and $2,000.00. As noted above, Ms. Stanley is the licensee for a business holding itself out as a paving company, and the Respondent had worked on the Claimant's driveway on three occasions. Although Ms. Stanley quite quickly attempted to back away from this estimate, based on her manner of testifying, her retraction seemed to be a result of her somewhat belated recognition that the testimony was against the Respondent's interests. I conclude $1,000.00 is a reasonable cost to repair or replace the concrete apron.

MHIC's regulations provide three formulas to measure an award from the Fund, depending on the status of the contract work. The Claimant explained that she wants to have the apron replaced. Accordingly, the following formula appropriately measures the Claimant's actual loss:

> 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 applying this formula, I also consider that the Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney fees, court costs, or interest. Md. Code Ann., Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1).

The Claimant's actual loss is computed as follows:

	$6,000.00	paid to the Respondent
+	$1,000.00	to repair the Respondent's work
	$7,000.00	total paid and to be paid by Claimant
-	$6,000.00	original Contract price
	$1,000.00	actual loss

The actual loss of $1,000.00 does not exceed the amount the Claimant paid to the Respondent and does not exceed the statutory cap on recovery from the Fund. Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a). There are no statutory impediments to the claim. Md. Code Ann., Bus. Reg. §§ 8-405(c), (d), (f), and (g). I thus find that the Claimant is eligible to receive compensation from the Fund in the amount of $1,000.00, which is the entire amount of her actual loss.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of $1,000.00 as a result of the Respondent's acts or omissions and is entitled to recover that amount from the Fund. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(c).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant $1,000.00; 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

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

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

August 4, 2020
Date Decision Issued

Emily Daneker
Administrative Law Judge

ED/cj
#186886

PROPOSED ORDER

WHEREFORE, this 4th day of September, 2020, 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
Chairman
Panel B
MARYLAND HOME IMPROVEMENT COMMISSION

IN THE MATTER OF THE CLAIM OF	*	**MARYLAND HOME**
JOY HART	*	**IMPROVEMENT COMMISSION**
AGAINST THE MARYLAND HOME	*	
IMPROVEMENT GUARANTY FUND	*	**MHIC CASE NO. 19(90)1270**
FOR THE ACTS OR OMISSIONS OF	*	**OAH CASE NO. LABOR-HIC-**
MONICA STANLEY T/A	*	**02-20-03265**
TRIPLE A PAVING & SEALCOATING	*	

* * * * * * *

FINAL ORDER

This matter was originally heard before an Administrative Law Judge ("ALJ") of the Office of Administrative Hearings ("OAH") on June 10, 2020. Following the evidentiary hearing, the ALJ issued a Proposed Decision on August 4, 2020, concluding that the homeowner, Joy Hart ("Claimant") suffered an actual loss of $1,000.00 as a result of the acts or omissions of Monica Stanley t/a Triple A Paving & Sealcoating ("Contractor"). *ALJ Proposed Decision* pp. 8-10. In a Proposed Order dated August 4, 2020, the Maryland Home Improvement Commission ("MHIC" or "Commission") affirmed the Proposed Decision of the ALJ to grant an award from the Home Improvement Guaranty Fund. The Claimant subsequently filed exceptions to the MHIC Proposed Order.

On November 19, 2020, a three-member panel ("Panel") of the MHIC held a remote hearing on the exceptions filed in this matter. The Claimant and Contractor participated without counsel. Assistant Attorney General Justin Dunbar appeared at the exceptions hearing on behalf of the Guaranty Fund. The Commission entered the following preliminary exhibits as part of the record of the exceptions hearing without objection: 1) September 14, 2020 hearing notice; 2) September 4, 2020 transmittal letter, ALJ Proposed Decision, and MHIC Proposed Order; 3) Contractor's exceptions; 4) November 9, 2020 virtual hearing notice. Neither the Claimant nor the Contractor produced a copy of the transcript of the hearing before the ALJ. Therefore, the Panel's review of the record was limited to the preliminary exhibits for the exceptions hearing, the

OAH Proposed Decision, and the exhibits submitted at the OAH hearing. COMAR 09.01.03.09(G) - (I).

The claim in this proceeding relates to an oral contract between the parties for the replacement of the driveway at the Claimant's home. The ALJ found that the Contractor's performance under the contract was unworkmanlike because a section of the driveway installed by the Contractor repeatedly crumbled. *ALJ's Proposed Decision* p. 8.

On exception, the Contractor said that she disagreed with the amount of the award because she was experiencing financial difficulties. AAG Dunbar argued that the ALJ erred in concluding that the Claimant proved that she suffered an actual loss in the amount of $1,000.00 because the ALJ relied on the testimony of the Contractor regarding the cost to correct the deficient work.

The Commission finds no error with the ALJ's proposed decision. The Commission finds the Contractor's testimony that the cost of repairing the Claimant's driveway would be between $1,000.00 and $2,000.00 to be reliable evidence and, based on that testimony, finds that the cost to correct the Contractor's inadequate work is $1,000.00. In addition, the Claimant's hearsay testimony that a contractor told her that repairing her driveway would cost approximately $1,100.00 corroborates the Contractor's testimony.

Having considered the parties' arguments, the evidence contained in the record, and the ALJ's Recommended Decision, it is this 2nd day of December 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**;

C. That the Proposed Decision and Recommended Order of the Administrative Law Judge is **AFFIRMED;**

D. That the Maryland Home Improvement Guaranty Fund shall award the Claimant

$1,000.00;

E. That the Contractor is ineligible for a Maryland Home Improvement Commission license until the Contractor reimburses the Guaranty Fund for all monies disbursed under this Order, plus annual interest of ten percent as set by the Commission;

F. That the records and publications of the Maryland Home Improvement Commission shall reflect this decision; and

G. Any party has thirty (30) days from the date of this Final Order to appeal this decision to Circuit Court.

Jean White
Chairperson –Panel
Maryland Home Improvement Commission

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