

IN THE MATTER OF THE CLAIM
 OF MATTHIAS HIEATZMAN,
 CLAIMANT
 AGAINST THE MARYLAND HOME
 IMPROVEMENT GUARANTY FUND
 FOR THE ALLEGED ACTS OR
 OMISSIONS OF DUANE EMERY
 BAILEY,
 T/A FIVE STAR CONSTRUCTION
 INC.,
 RESPONDENT

* BEFORE RACHAEL BARNETT,
 * AN ADMINISTRATIVE LAW JUDGE
 * OF THE MARYLAND OFFICE
 * OF ADMINISTRATIVE HEARINGS
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 * OAH No.: DLR-HIC-02-19-07003
 * MHIC No.: 19 (75) 62
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PROPOSED DECISION

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STATEMENT OF THE CASE

On February 14, 2019, Matthias Hieatzman (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$17,700.00 in actual losses allegedly suffered as a result of a home improvement contract with Duane Bailey, trading as Five Star Concrete Construction Inc. Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015). On March 6, 2019, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on April 11, 2019, at the Tawes State Office Building in Annapolis, Maryland. Md. Code Ann., Bus. Reg. § 8-407(e). Eric B. London, Assistant Attorney General, Department of Labor, Licensing, and Regulation (Department), represented the Fund. The Claimant represented himself. After waiting twenty minutes for the Respondent or the Respondent's representative to appear, I proceeded with the hearing. Code of Maryland Regulations (COMAR) 28.02.01.23A.¹

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:

- Clmt. Ex. 1 - Proposal and Warranty for Home Improvement signed by Claimant, dated August 13, 2015
- Clmt. Ex. 2 - Letter written by Claimant informing Respondent of sidewalk and driveway cracking, dated April 25, 2016

¹ Notice of the hearing was mailed to the Respondent at the address of record by regular and certified mail on March 7, 2019, COMAR 09.08.03.03A(2), and was not returned as unclaimed/undeliverable, or for any other reason. Applicable law permits me to proceed with a hearing in a party's absence if that party fails to attend after receiving proper notice. COMAR 28.02.01.23A. I determined that the Respondent had received proper notice, and proceeded to hear the captioned matter.

Clmt. Ex. 3 - Letter written by Claimant informing Respondent of increased sidewalk and driveway cracking, dated September 15, 2017

Clmt. Ex. 4 - Photographs of Claimant's home and driveway, taken April 10, 2019²

I admitted the following exhibits on behalf of the Fund:

Fund Ex. 1 - Notice of Hearing, dated March 7, 2019

Fund Ex. 2 - Hearing Order, dated March 6, 2019

Fund Ex. 3 - Letter from David Finneran providing Respondent's Licensing History, printed March 22, 2019

Fund Ex. 3a - Printout from the Department's I.D. Registration showing Respondent's work and home address, dated July 18, 2018

Fund Ex. 4 - Home Improvement Claim form showing \$17,700.00 claim amount, received February 11, 2019

Fund Ex. 5 - Receipt of Claim, dated February 25, 2019

Fund Ex. 6 - Letter written by Claimant informing Respondent of "hairline" cracks in driveway and sidewalk, dated June 20, 2017

Testimony

The Claimant testified and presented the testimony of Christina Hieatzman.

The Respondent did not present any testimony.

The Fund did not present any testimony.

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 numbers 01-103519 and 05-19409.
2. The Claimant and his wife own their home in Pasadena, Maryland.

² The Claimant brought a tablet with photographs to the hearing; however, the Claimant did not have an internet connection and, therefore, could not transmit the photographs at the time of the hearing. I held the record open for the Claimant to submit copies of the photographs presented on the tablet at the hearing.

3. On August 13, 2015, the Claimant and the Respondent entered into a contract to remove the Claimant's brick driveway and front cement porch and replace them with a new cement porch and a stamped concrete driveway (Contract).
4. The Contract stated that work would take place during the week of August 24, 2015.
5. The cement driveway was laid in stamped, meaning it was poured in large squares to create a pattern.
6. The original agreed-upon Contract price was \$17,700.00.
7. On August 13, 2015, the Claimant paid the Respondent \$ 5,900.00.
8. The Claimant paid the remaining balance after the Respondent completed the job.
9. The Claimant and his spouse spent the winter (January through March) of 2016 in Florida.
10. When the Claimant and his spouse returned from Florida, they noticed cracks in the cement sidewall of their front porch and in portions of their stamped driveway.
11. The Claimant's spouse called the Respondent and informed him about the cracks. The Respondent told the Claimant he would come over and inspect the cracking.
12. The Respondent never returned to the Claimant's home to inspect the cracks.
13. Since April 2016, the cracks have grown in length. One of them extends across three sections of the stamped concrete. The cracks are narrow and do not impede foot or automobile traffic across the driveway.³

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.,

³ The Complainant did not provide any measurements of the cracks.

State Gov't §10-217 (2014); COMAR 09.08.03.03A(3).⁴ “[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)⁵; *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.” Md. Code Ann., Bus. Reg. § 8-401. For the following reasons, I find that the Claimant has not proven eligibility for compensation.

The Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimant.

The Respondent did not perform unworkmanlike, inadequate or incomplete home improvements. The contract for the work included a warranty against “major cracking,” defined as wider than ¼ of an inch and longer than thirty percent of all driveway joints. There is no evidence that any of the cracks in the cement laid by the Respondent at the Claimant’s home exceeded ¼ of an inch. In fact, the Claimant testified the cracks are “cosmetic” and acknowledged he can still drive on the driveway. Nonetheless, a Claimant can still be successful in his claim even if a warranty is not breached. The Claimant must prove that the Respondent engaged in unworkmanlike, inadequate, or incomplete home improvement. In this case, the Respondent completed the job and there were no immediately apparent flaws. The cracks

⁴ As noted above, “COMAR” refers to the Code of Maryland Regulations.

⁵ Unless otherwise noted, all references to the Business Regulation Article herein cite the 2015 Replacement Volume of the Maryland Annotated Code.

formed in the months following the completion of the job. The Claimant presented no evidence about the cause of the cracks or how much it would cost to fix them. 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). Therefore, knowing the cause of the cracking is important in order to determine if the Respondent engaged in misconduct that caused compensable damage.

The Claimant testified that he is bothered by the hairline cracks because he paid for a new driveway and feels it should look new. He was also upset the Respondent never inspected the cracks, as promised, which is understandable. However, the Claimant did not offer any evidence from an expert or other credible source that stamped driveways should not develop hairline cracks within a few months of installation, nor did the Claimant offer any evidence to demonstrate what caused the cracking. There could be many reasons for cracking, including poor construction, the thawing of frozen ice, or earthquakes. Without an explanation, I cannot conclude the Respondent performed an unworkmanlike or inadequate job because there are narrow cracks across the driveway and sidewall of the front porch.

Furthermore, the wording of the warranty suggests that minor cracks may occur because only "major" cracks are covered under the warranty. It may indeed be normal for hairline cracks to form in concrete. Absent evidence from any sort of expert source that hairline cracks should not form in the time period in which they did at the Claimant's property, I also cannot conclude the Respondent performed an inadequate or unworkmanlike job.

I thus find that the Claimant is not eligible for compensation from the Fund.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has not 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); COMAR 09.08.03.03B(2).


RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund deny the Claimant's claim; and

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

July 10, 2019
Date Decision Issued


Rachael A. Barnett
Administrative Law Judge

RAB/da
180243

PROPOSED ORDER

WHEREFORE, this 8th day of August, 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.

J. Jean White

***I. Jean White
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION