

**IN THE MATTER OF THE CLAIM
OF IMRAN & AMARA BURNEY,
CLAIMANTS
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF DAVID HICKS,
T/A ASPHALT WORKS,
RESPONDENT**

*** BEFORE RACHAEL BARNETT,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
*
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* OAH No.: LABOR-HIC-02-19-33515
* MHIC No.: 19(05)774**

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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 February 9, 2019, Imran and Amara Burney (Claimants) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund), under the jurisdiction of the Department of Labor (Department),¹ for reimbursement of \$16,000.00 in actual losses allegedly suffered as a result of a home improvement contract with David Hicks, trading as Asphalt Works (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411

¹ On July 1, 2019, the Maryland Department of Labor, Licensing, and Regulation became the Department of Labor.

THE STATE OF TEXAS, COUNTY OF DALLAS, ss. I, the undersigned, a Notary Public in and for said County and State, do hereby certify 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 said County.

WITNESSED my hand and the seal of said County at Dallas, Texas, this _____ day of _____, 19____.

Notary Public in and for the County of Dallas, State of Texas.

My commission expires on the _____ day of _____, 19____.

Notary Public

Notary Public

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Notary Public

(2015).² On October 15, 2019, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on August 6, 2020³ at the OAH in Hunt Valley, Maryland. Bus. Reg. § 8-407(e). Andrew Brouwer, Assistant Attorney General, Department, represented the Fund. Imran Burney (the Claimant)⁴ represented himself. The Respondent represented himself. I held the record open until August 13, 2020 for the receipt of video evidence from the Respondent regarding the project at issue. I never received any video evidence.

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. 2020); Code of Maryland Regulations (COMAR) 09.01.03; and 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 - Home Improvement Claim Form, February 6, 2019

Clmt. Ex. 2 - Contract between the Claimant and the Respondent, September 3, 2018 with the following attachment:

- Copy of check to the Respondent, September 3, 2018

² Unless otherwise noted, all references hereinafter to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.

³ The original date of hearing was postponed due to hearing restrictions put in place at the outset of the global COVID-19 pandemic.

⁴ Mr. Imran Burney appeared on behalf of the Claimants. I will refer to him as "the Claimant" throughout the decision. He and Amara Burney are referred to as "the Claimants." Amara Burney appeared for the hearing but did not participate.

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Clmt. Ex. 3 - Google Maps aerial view of the Claimants' home, 2019

Clmt. Ex. 4 - Hand-drawn diagram of the Claimants' property, including driveway, August 6, 2020

Clmt. Ex. 5 - Letter from the Claimant to the Respondent, October 26, 2018, with the following attachments:

- USPS Tracking for letter, October 30, 2020
- Emailed version of letter, October 29, 2018
- Response to email, October 31, 2018

Clmt. Ex. 6 - Letter from the Respondent to the Claimant, November 8, 2018 with the following attachments:

- Contract between the Claimant and the Respondent, September 3, 2018
- List of work performed (invoice), undated
- Invoices from C.J. Miller LLC to the Respondent, for materials delivered to the Claimants' address, September 5, 2018

Clmt. Ex. 7 - Citation, Department of Labor, Licensing and Regulation, July 2, 2019

Clmt. Ex. 8 - Record of Climatological Observations, September – October 2018

Clmt. Ex. 9 - Respondent's response to the MHIC Claim, undated

Clmt. Ex. 10 - Photographs of the driveway lane from Dover Road to the Claimants' house, undated

Clmt. Ex. 11 - Photographs of stone pile left near garage, undated

Clmt. Ex. 12 - Photographs of prepared area, undated

Clmt. Ex. 13 - Photographs of new contractor preparing to pave driveway, undated

Clmt. Ex. 14 - Contract with AC Paving, April 20, 2019

I admitted the following exhibits on the Respondent's⁵ behalf:

Resp. Ex. 1 - Photographs, taken Fall 2018

Resp. Ex. 2 - Postal receipt for response to the Claim, January 2, 2019

Resp. Ex. 3a – e Photographs of worksite, undated

⁵ Since I did not receive any video evidence from the Respondent, I could not admit it into evidence.

1. The first part of the document is a list of names and titles, including 'Mr. J. H. ...', 'Mr. ...', and 'Mr. ...'. These names are arranged in a columnar format, with some names appearing in multiple rows. The text is somewhat faded and difficult to read in many places.

2. The second part of the document contains several paragraphs of text, which appear to be a report or a set of minutes. The text is organized into sections, with some headings that are also difficult to decipher. There are several lines of text that seem to be numbered or bulleted, but the specific content is illegible.

3. The third part of the document consists of a series of short, numbered items, possibly a list of tasks or a checklist. Each item is preceded by a number, and the text following the number is too faint to read.

4. The final part of the document contains a few more lines of text, which may be a conclusion or a signature block. The text is very faint and lacks clear structure.

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

Fund Ex. 1 - Hearing Order, October 8, 2019

Fund Ex. 2 - Notice of Hearing, April 2, 2020

Fund Ex. 3 - Notice of Hearing, February 7, 2020

Fund Ex. 4 - Postponement, January 22, 2020

Fund Ex. 5 - Notice of Hearing, January 7, 2020

Fund Ex. 6 - Receipt of Claim, August 13, 2019

Fund Ex. 7 - Department of Labor, Licensing & Regulation, identity registration, May 19, 2020

Testimony

The Claimant testified and did not present other witnesses.

The Respondent testified and did not present other witnesses.

The Fund did not offer 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 5524806.

2. On Monday, September 3, 2018, the Claimant and the Respondent entered a contract (Contract) for "new asphalt installation." (Clmt. Ex. 2). The size of the area for asphalt installation was noted to be approximately 24,500 square feet.

3. The Contract specified the following under a heading "New Asphalt Installation":

- Prepare installation area
- Removal of vegetation from installation area
- Application of weed kill/vegetation control
- Installation of Cr-6 stone as needed to create a four to six-inch stone base

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- Grade and compaction of stone course
- Installation of asphalt to consist of 3 ½ inches of 9.5 hot mix asphalt
- Compaction of asphalt course to complete a three-inch mat/layer.

4. At the time of the Contract, the Respondent estimated he would complete the work by the end of the week. The Contract did not list a start date.

5. The original agreed-upon Contract price was \$47,800.00.

6. On September 3, 2018, the Ms. Burney paid the Respondent \$16,000.00.

7. The area to be paved included a circular driveway, an area near a garage, and a lane that leads to Dover Road, in Reisterstown, Maryland. The lane is shared with another property.

8. Prior to the Contract, part of the area to be paved (the part shared with a neighbor) had existing pavement that needed to be removed. The remainder of the drive consisted of a stone base; that area would be cleaned up and paved over.

9. The property on which the asphalt was to be installed is co-owned by several family members who are part of an extended family and either live there permanently or spend a significant amount of time there. The house is a brick home with pillars, modeled after the white house (but finished in red brick).

10. On September 3, 2018, the Respondent immediately began preparing the driveway area for paving. He returned to the jobsite on September 4, 2018, September 5, 2018, and September 6, 2018.

11. His preparation included removal of a few small trees, excavation and removal of two tree stumps, removal of debris from the driveway area, excavation of parking areas, excavation to widen the edges of the driveway, regrading of the existing driveway, stone delivery and installation

12. On September 11, 2018, the Respondent removed his equipment from the Claimants' property.

13. The Claimant called the Respondent on the following dates to schedule completion of the work: September 12, 2018, September 24, 2018, October 1, 2018, October 8, 2018, October 10, 2018, and October 19, 2018. During some of the calls, the Respondent promised to return to the jobsite; however, he never did so. At times, the Respondent also explained that rainy weather delayed his return to the job site.

14. During the October 10, 2018 phone call, the Respondent told the Claimant he could get someone else to pave the driveway.

15. On October 26, 2018, the Claimant sent the Respondent a letter, requesting the return of his \$16,000.00 deposit and reminding the Respondent that he had not worked on the job in fifty-four days.

16. On November 8, 2018, the Respondent replied that he would not return the full \$16,000.00 but agreed to return \$8,000.00 if the Claimant signed an agreement waiving all other recourse. The parties did not enter into this agreement.

17. On April 20, 2019, the Claimant entered a contract (Second Contract) with AC Paving to do the following tasks:

- Remove entire existing asphalt
- Clean and edge driveway
- Grade all existing stone/dirt to a uniform flatness to allow for ninety-five percent drainage/flow
- Saw cut where new driveway will meet the road for a neat transition with new aprons plus a driveway

- Pave three inches of surface asphalt over entire area and then compact it using a power roller.

18. The cost of the Second Contract was \$49,200.00

DISCUSSION

In this case, the Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Bus. Reg. § 8-407(e)(1); Md. Code Ann., State Gov't § 10-217 (2014); COMAR 09.08.03.03A(3). To prove a claim by a preponderance of the evidence means to show that it is "more likely so than not so" when all the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002).

An owner may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor" Bus. Reg. § 8-405(a); *see also* COMAR 09.08.03.03B(2) ("The Fund may only compensate claimants for 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. For the following reasons, I find that the Claimant has proven eligibility for compensation.

The Respondent performed unworkmanlike, inadequate, or incomplete home improvements. The Respondent argued that he performed a significant amount of work on the Claimants' driveway and is entitled to retain \$8,000.000 of the \$16,000.00 received. The Respondent testified that after performing preliminary work to prepare for paving, the lane portion of the driveway never dried out so it could not be paved. The Respondent referenced the Contract in which it stated, "All agreements and scheduling are contingent upon strikes, accidents, weather and/or delays beyond our control." (Clmt. Ex. 2).

The Claimant argued the area to be paved was dry enough to be paved and that the Respondent simply failed to complete the job. The Claimant produced climatological data showing the days when there was and was not precipitation in September through October 2018. On many days, there was a very modest amount of precipitation, such as .03 inches on September 13 – 14, 2018, and .04 inches on September 15, 2018. There were also spans of days on which there was no precipitation, including September 19 – 21, 2018, October 1 – 3, 2018, October 6 – 19, 2018, and October 16 – 19, 2018. While there were dates when significant precipitation occurred in Reisterstown, Maryland, the aforementioned “dry days” should have been sufficient to allow for the Respondent to complete work on the job.

The Claimant made several attempts to have the Respondent return to the job and finish his work; however, despite the calls and the letter, the Respondent never returned. After waiting fifty-four days for the Respondent to return and being told to hire someone else, it was reasonable for the Claimant to assume the Respondent would not return. I find the Respondent performed an incomplete home improvement by abandoning the job after performing some work.

After the Respondent abandoned the job, the Claimant requested his payment of \$16,000.00 be returned. The Respondent made a counteroffer; however, the Claimant did not accept it and opted instead to hire a new paving company and file a claim. The new paving company, AC Paving, charged \$49,200.00 to prepare and pave the same area that the Respondent was supposed to pave under the Contract. The Claimant had the job completed by AC Paving and paid AC Paving.

I thus find that the Claimants are eligible for compensation from the Fund. Having found eligibility for compensation I must determine the amount of the Claimants’ actual loss and the amount, if any, that the Claimants are entitled to recover. The Fund may not compensate a

claimant for consequential or punitive damages, personal injury, attorney fees, court costs, or interest. Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1). The MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work.

In this case, the Respondent performed some work under the Contract, and the Claimants have retained another contractor to complete or remedy that work. Accordingly, the following formula appropriately measures the Claimants' 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). The Ms. Burney paid the Respondent \$16,000.00 under the Contract. This amount shall be added to \$49,200.00, the amount the Claimants paid to the new contractor to complete the job. The result is \$65,200.00, which is reduced by \$47,800.00 for a result of \$17,400.00.

The Business Regulation Article caps a claimant's recovery at \$20,000.00 for acts or omissions of one contractor and provides that a claimant may not recover more than the amount paid to the contractor against whom the claim is filed. Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a). In this case, the Claimants' actual loss of \$17,400.00 exceeds the amount paid to the Respondent. Therefore, the Claimants' recovery is limited to \$16,000.00, the amount paid to the Respondent. Bus. Reg. § 8-405(e)(5); COMAR 09.08.03.03B(4).

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PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimants have sustained an actual and compensable loss of \$16,000.00 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(3)(c). I further conclude that the Claimants are entitled to recover that amount from the Fund. Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimants \$16,000.00; 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;⁶ and

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

November 9, 2020
Date Order Issued

CONFIDENTIAL

Rachael Barnett
Administrative Law Judge

RAB/da
#188814

⁶ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

STATE OF TEXAS

County of _____

Know all men by these presents, that _____

of the County of _____ State of Texas, do hereby certify that _____

is the true and correct copy of the _____

NOTARIAL PUBLIC

My commission expires _____

PROPOSED ORDER

WHEREFORE, this 8th day of February, 2021, 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***

MEMORANDUM

TO : SAC, [illegible]

FROM : [illegible]

SUBJECT: [illegible]

[illegible]

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[illegible signature and date]