IN THE MATTER OF THE CLAIM	*	**BEFORE H. DAVID LEIBENSPERGER,**
OF WILLIAM LONG,	*	**AN ADMINISTRATIVE LAW JUDGE**
CLAIMANT	*	**OF THE MARYLAND OFFICE**
AGAINST THE MARYLAND HOME	*	**OF ADMINISTRATIVE HEARINGS**
IMPROVEMENT GUARANTY FUND	*	
FOR THE ALLEGED ACTS OR	*	
OMISSIONS OF GUSSIE STANLEY	*	
NICHOLS, T/A TRI STATE PAVING,	*	**OAH No.: LABOR-HIC-02-22-01125**
RESPONDENT	*	**MHIC No.: 22 (75) 161**

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PROPOSED DECISION

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STATEMENT OF THE CASE

On November 10, 2021, William Long (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund), under the jurisdiction of the Department of Labor (Department), for reimbursement of $7,000.00 for actual losses allegedly suffered as a result of a home improvement contract with Gussie Stanley

Nichols, trading as Tri State Paving (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015).[1] On January 12, 2022, the MHIC issued a Hearing Order on the Claim, and forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On April 11, 2022, I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. John Hart, Assistant Attorney General, Department, represented the Fund. The Claimant represented himself. The Respondent represented himself.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the OAH govern procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021); 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. Did the Claimant unreasonably reject good faith efforts by the Respondent to resolve the Claim?
3. If the Claimant sustained an actual compensable loss, what is the amount of the compensable loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits offered by the Claimant:

Clmt. Ex. 1 – Contract between the Claimant and the Respondent, August 5, 2020

Clmt. Ex. 2 – Check from the Claimant to the Respondent, August 5, 2020

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

Clmt. Ex. 3 – Check from the Claimant to the Respondent, August 11, 2020

Clmt. Ex. 4 – Email from the Claimant to the Respondent, April 12, 2021, with attached Photographs of Driveway Damage, April 12, 2021

Clmt. Ex. 5 – Email from the Claimant to the Respondent, July 24, 2021; Photographs of Driveway Repairs, July 23-24, 2021

Clmt. Ex. 6 – Email from the Claimant to the Respondent, July 24, 2021, with attached Photograph of Driveway Repair, July 24, 2021

Clmt. Ex. 7 – Email from the Respondent to the Claimant, July 25, 2021, with attached Photographs of Driveway Repairs, July 23, 2021

Clmt. Ex. 8 – The Claimant's Handwritten Complaint Form to the MHIC, July 29, 2021

Clmt. Ex. 9 – Contract between the Claimant and H.M.S. Paving, Inc., October 26, 2021; Check from the Claimant to H.M.S. Paving, Inc., October 26, 2021; Photographs of Driveway Repairs, October 26, 2021 and April 10, 2022

Clmt. Ex. 10 – Emails between the Claimant and the Respondent, February 8, 2021 and February 26, 2021

I admitted the following exhibits offered by the Respondent:

Resp. Ex. 1 – Photograph of Driveway Damage, February 8, 2021; Photographs of Driveway Repairs with Respondent's Handwritten Notations, July 23, 2021.

Resp. Ex. 2 – Photograph of Driveway Repair with Handwritten Notations, July 23, 2021

Resp. Ex. 3 - Photograph of Driveway Damage, February 8, 2021; Photographs of Driveway Repair with Respondent's Handwritten Notations, July 23, 2021.

Resp. Ex. 4 – Photographs of Driveway During and After Sealant Application, with the Respondent's Handwritten Notations, July 23, 2021

I admitted the following exhibits offered by the Fund:

Fund Ex. 1 - Notice of Hearing, January 31, 2022

Fund Ex. 2 - MHIC Hearing Order, January 12, 2022

Fund Ex. 3 - Correspondence from the MHIC to the Respondent, November 22, 2021, with the Claimant's Home Improvement Claim Form attached, November 8, 2021

Fund Ex. 4 - MHIC Licensing History for the Respondent, April 7, 2022

Testimony

The Claimant testified and presented the testimony of his wife, Wendy Smith Long.

The Respondent testified and did not present other witnesses.

The Fund did not present the testimony of 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 97157

2. On August 5, 2020, the Claimant and the Respondent entered into a contract to repave the Claimant's driveway (Contract) at his home in Fallston, Maryland. In particular, the Contract called for the removal of the existing asphalt driveway before applying asphalt with a motorized paver and vibratory rolling it to compaction. The Contract also called for the installation of two French drains. The Contract also included a twelve-month warranty on newly installed asphalt.

3. The total original agreed-upon Contract price was $8,050.00; the itemized cost of the French drains was $800.00.

4. On August 5, 2020, the Claimant paid the Respondent $2,800.00, and on August 11, 2020, the Claimant paid the Respondent the remainder of the Contract price, $5,250.00, for a total of $8,050.00.

5. The Respondent installed the Claimant's new driveway on or about August 11, 2020.

6. Over the winter months in late 2020 and early 2021, the driveway installed by the Respondent developed holes and cracks.

7. On February 8, 2021, the Claimant contacted the Respondent to inform them that the driveway had developed holes and cracks, and he asked when the Respondent could inspect the driveway.

8. On February 26, 2021, Richard Jifter, Project Coordinator for the Respondent, responded that the Respondent was not operating for the winter season, and would re-open in May. He asked the Claimant to contact the Respondent in mid-April to discuss the issue.

9. On April 12, 2021, the Claimant contacted the Respondent about the holes in his driveway, as well as loose gravel separating from the asphalt in front of his garage door. The Claimant attached photographs of these problems to his email.

10. In June of 2021, the Respondent returned to the Claimant's home to assess the problems with the driveway. By this time, the Claimant's driveway had developed holes in three locations, approximately four to eight inches in diameter, and the asphalt installed adjacent to the Claimant's garage door was thin and loose, and not compacted – loose gravel was separating from the asphalt.

11. At approximately the time of this meeting, the Respondent told the Claimant that he would cut out sections of the driveway around the holes, replace the asphalt, and then seal the driveway (at no additional charge) so the driveway would not have a patchwork appearance and would "maintain even color and uniformity." (Clmt. Ex. 7.)

12. On July 23, 2021, the Respondent returned to the Claimant's home to perform repairs on the driveway. The Respondent's crew dug out the areas around the holes, before installing new asphalt. The area in front of the garage doors was not dug out; new asphalt was installed directly on top of the old asphalt.

13. Later that day, the Respondent's crew returned to the Claimant's home and applied a sealant to the driveway.

14. During the repair work, the Claimant complained to the Respondent Nichols that the repairs around the holes were not large enough, and that the patches should extend beyond the perimeter of the damaged area and that the Respondent had not dug out enough of the prior driveway around the holes. The Respondent then dug out a larger area around the holes before installing the new asphalt and patched a larger area around the holes. An argument eventually erupted between the Claimant and the Respondent Nichols about the quality of the repair work being performed. The Respondent responded that he had performed the repairs as best he could. He also indicated that he could put a bead of hot tar around the patches to help the edges of the patches better adhere to the existing driveway, and the Claimant declined because it would make the patches more visible.

15. The repairs done by the Respondent resulted in the Claimant's driveway having a patchwork appearance, with the large patches being visibly distinct from the previously installed driveway. The patches were also raised higher than the rest of the driveway, approximately one half inch to one inch above the rest of the driveway. The area in front of the Claimant's garage continued to have loose gravel.

16. On July 24, 2021, the Claimant wrote to Mr. Jifter by email about his dissatisfaction with the repair work, noting that the area in front of his garage door still had the loose gravel appearance that existed before the repair work, that the patches were raised, and that the driveway had an unacceptable patchwork appearance. The Claimant requested a refund of his money or a complete replacement of his driveway. The Claimant also requested not to be contacted by the Respondent Nichols, due to the argument that had occurred.

17. On July 25, 2021, Respondent Nichols wrote back to the Claimant by email stating that he had performed the repairs correctly and as the Claimant requested, and that he would not re-pave the Claimant's driveway or provide the Claimant a refund.

18. On October 26, 2021, the Claimant contracted with H.M.S. Paving, Inc. (HMS), an MHIC licensed contractor, to remove the existing asphalt in front of the Claimant's garage, and then re-pave the Claimant's driveway with two and a half inches of machine-laid asphalt (HMS Contract).

19. The total HMS Contract price was $7,000.00, which the Claimant paid to HMS on October 26, 2021.

20. HMS performed the work under the HMS Contract on October 26, 2021.

21. On an unspecified date, the Respondent offered the Claimant $2,000.00 to settle the Claim, which the Claimant rejected.[2]

DISCUSSION

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 (2021); 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

[2] The Fund objected that this offer and rejection occurred during a mediation but noted that one of the elements of this case is whether the Claimant unreasonably rejected a good faith offer from the Respondent. Neither the Claimant nor the Respondent objected to this evidence, neither remembered signing a mediation agreement, and no copy of a mediation agreement with a confidentiality clause was offered into evidence. I therefore overruled the objection from the Fund and accepted testimony regarding this offer and rejection.

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.

"The [MHIC] may deny a claim if the [MHIC] finds that the claimant unreasonably rejected good faith efforts by the contractor to resolve the claim." Md. Code Ann., Bus. Reg. § 8-405(d). The Respondent bears the burden to establish by a preponderance of the evidence the defense that this Claim should be denied on the basis that the Claimant unreasonably rejected the Respondent's good faith efforts to resolve the Claim. COMAR 28.02.01.21K(2)(b).

For the following reasons, I find that the Respondent's home improvement to, and attempted repairs of, the driveway were unworkmanlike, the Claimant did not unreasonably reject the Respondent's effort to resolve the Claim, and the Claimant is therefore eligible for compensation from the Fund.

By statute, certain claimants are excluded from recovering from the Fund altogether. In this case, there are no such statutory impediments to the Claimant's recovery. The claim was timely filed, there is no pending court claim for the same loss, and the Claimant did not recover the alleged losses from any other source. Bus. Reg §§ 8-405(g), 8-408(b)(1). The Claimant resides in the home that is the subject of the claim and does not own more than three dwellings. *Id.* § 8-405(f)(2). The Claimant is not a relative, employee, officer, or partner of the Respondent, and is not related to any employee, officer, or partner of the Respondent. *Id.* § 8-405(f)(1).

The Contract contains a purported arbitration provision. Such a provision can be a bar to a Claimant's recovery from the Fund. *Id.* §§ 8-405(c), 8-408(b)(3). However, no party raised the arbitration provision as any part of their claim or defense. No party alleged that the

arbitration provision was or was not valid, that the arbitration provision had or had not been complied with prior to the hearing, that arbitration had or had not occurred, or that any award had or had not been made in arbitration. In short, the purported arbitration provision was not even mentioned during the hearing. Given that the arbitration issue was never raised before me, I find that issue to have been waived. *Bd. of Physician Quality Assur. v. Levitsky*, 353 Md. 188, 206-07 (1999) (physician waived right to appeal irregularities in peer review procedure that resulted in revocation of his license to practice medicine, where physician failed to raise issue before the administrative law judge); *Maryland Reception, Diagnostic & Classification Ctr. v. Watson*, 144 Md. App. 684, 693 (2002) ("having failed to raise the mitigation issue in the course of the administrative proceedings [before the administrative law judge], Watson has waived his claim that mitigating circumstances had not been considered."); *McClanahan v. Washington Cnty. Dep't of Soc. Servs.*, 218 Md. App. 258, 269-70, 286 (2014), *rev'd on other grounds*, 445 Md. 691 (2015) (arguments regarding immunity and experts' improper credibility assessments that were not raised before the administrative law judge were waived) (*citing Delmarva Power & Light Co. v. Pub. Serv. Comm'n of Md.*, 370 Md. 1, 32, *aff'd on other grounds*, 371 Md. 356 (2002) ("We do not allow issues to be raised for the first time in actions for judicial review of administrative agency orders entered in contested cases because to do so would allow the court to resolve matters ab initio that have been committed to the jurisdiction and expertise of the agency.")); *Motor Vehicle Admin. v. Gonce*, 446 Md. 100, 126 (2016) ("The constitutional issues that Gonce raises are not before us for several reasons. Significantly, the issues were neither raised before nor decided by the [administrative law judge]") (citing *Brodie v. Motor Vehicle Admin.*, 367 Md. 1, 3-4 (2001) ("[I]n an action for judicial review of an adjudicatory decision by an administrative agency, a reviewing court ordinarily 'may not pass upon issues presented to it

for the first time on judicial review and that are not encompassed in the final decision of the administrative agency.'")). Moreover, there is an insufficient factual record to make any determination as to whether the arbitration clause, even if considered, would bar the Claim in this matter.

The Respondent performed unworkmanlike and inadequate home improvements. Less than six months after the Respondent's installation of the driveway, it developed three holes approximately four to eight inches in diameter, and the asphalt installed adjacent to the Claimant's garage door was thin and loose, and not compacted, causing loose gravel to separate from the driveway. The Claimant testified he had not damaged the driveway, and he and his wife testified to their normal use of the driveway over the time period in question. The occurrence of the damage to the driveway so quickly after installation, without evidence of any cause other than normal use, is indicative that the work was performed in an inadequate and unworkmanlike manner. A newly installed driveway, meant to handle the weight of vehicles, which crumbles after a few months of ordinary use, was installed inadequately. Although the Respondent speculated that the damage to the Claimant's driveway could have been caused by the use of chemicals, the Claimant's wife credibly testified that due to her Parkinson's disease, she and her husband avoid the use of household chemicals, and the Claimant testified he did not apply any chemical or de-icer to his driveway. Even if the Claimant had used any of those products, a driveway that sustains such damage from ordinary product use over such a short period of time, has been installed inadequately.

The Respondent also speculated that the damage could have been done by a snowplow. The Claimant admitted to plowing his driveway once in 2021, but there was no evidence that the plowing was what caused the damage to the Claimant's driveway. The Respondent also

speculated that the damage could have been caused by water or erosion, but the Claimant denied having a water problem on the driveway. Perhaps most importantly, the Respondent admitted that the cause of the holes in the driveway was unknown. The Respondent's mere speculation as to multiple potential causes for the damage to the driveway does not overcome the preponderance of the evidence establishing that the damage was caused by mere normal use of the driveway. Normal use should not have been sufficient to cause such damage to the driveway in such a short period of time. Therefore, the driveway was installed in an inadequate unworkmanlike manner.

The Respondent's repairs to the Claimant's driveway in July 2021 were also performed in an inadequate unworkmanlike manner. Before the Respondent performed the repairs to the Claimant's driveway in July 2021, the Claimant made it clear that he did not want to see visible patches in his driveway, and the Respondent assured the Claimant that the repairs would not leave a visible patchwork. Both the Claimant and the Respondent testified to this, and the Respondent indicated that it was his intention to perform the repairs so they were not visible. However, the Respondent's repairs left a clearly visible patchwork of asphalt on the Claimant's driveway, and the Respondent did not fully correct the issue with the loose gravel separating from the asphalt near the Claimant's garage. Even in response to the Claimant's emailed complaint, after the repairs were performed, the Respondent stated: "I explained you [sic] that we cannot replace your entire driveway for 3 small areas that need repair, offered a free oil base sealant to the entire driveway after it was patched to maintain even color and uniformity generally a $800 charge we offered as a Curtsey [sic] to try and please you both." (Clmt. Ex. 7.)

A driveway is part of the landscaping of a yard, and the aesthetic appearance of the driveway is part of a workmanlike driveway installation or repair. That is true particularly

where, as here, both parties were explicitly aware of the Claimant's desire that his driveway have a uniform appearance. The purpose of a driveway is not merely a surface for cars to park, but also the improvement of the appearance of the home, sometimes referred to as curb appeal, and that was certainly true here. By comparison, the installation of a new floor inside a home that developed gaps in the floorboards due to the installer's poor installation would not be a workmanlike job even if the floor still provided an adequate walking surface. The driveway patchwork appearance created by the Respondent's repairs created an unsightly condition that is unworkmanlike.

The Claimant also argued that the Respondent's driveway repairs were unworkmanlike because they were raised above the rest of the driveway one half inch to one inch above the rest of the driveway surface. I agree with the Claimant, inasmuch as this contributed to the patchwork appearance of the driveway. The Fund argued that the patches being raised was not unworkmanlike because the Respondent testified at one point that the patches needed to be raised in order to allow them to settle and avoid later indentations in the driveway. However, the Respondent's testimony in this regard was not credible. The Respondent testified that he performed the initial patches of the holes in the driveway himself, which were not raised, but when the Claimant complained that the patches were not adequate, the Respondent warned the patch would be raised higher if the Respondent re-patched it. The Respondent's testimony undercuts his proposition that the patches were required to be raised for a structural purpose. Moreover, the patch installed in front of the Claimant's garage door did not involve any digging before the Respondent laid new asphalt, again undercutting the Respondent's assertion that the asphalt would have to be raised to prevent later indentations.

The Claimant did not unreasonably reject good faith efforts by the Respondent to resolve the claim. *Id.* § 8-405(d). The Fund argued that a reasonable cost to correct the Respondent's work would only include re-doing the patches, not a complete repaving of the driveway. However, the Respondent's efforts to patch the driveway in a manner that would "maintain even color and uniformity" had failed. (Clmt. Ex. 7.) Therefore, it was not unreasonable for the Claimant to conclude, as he did, that the entire driveway would have to be repaved in order to cure the patchwork problem created by the Respondent. The Respondent offered the Claimant $2,000.00 to settle the Claim, which was less than one third of what the Respondent had charged the Claimant to install a new driveway. The Claimant was not unreasonable in his conclusion that this was too low of an offer that did not adequately compensate him for the cost to replace the driveway. I thus find that the Claimant is eligible for compensation from the Fund.

Having found eligibility for compensation I must determine the amount of the Claimant's actual loss and the amount, if any, that the Claimant is 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). MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work.

The Respondent performed some work under the Contract, and the Claimant retained another contractor to remedy that work. 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).

Here, the Claimant paid the Respondent $7,250.00 to install the driveway under the original Contract, which is added to $7,000.000, the Claimant paid HMS to repair the poor work done by the Respondent, and then the original Contract price of $7,250.00 is subtracted, which equals $7,000.00. I find that the $7,000.00 charged by HMS to repave the Claimant's driveway is reasonable, inasmuch as it is very close to the amount of the original Contract price charged by the Respondent for nearly the same work.[3] The Respondent never argued that HMS had overcharged for the work it performed.

Effective July 1, 2022, a claimant's recovery is capped at $30,000.00 for acts or omissions of one contractor, and a claimant may not recover more than the amount paid to the contractor against whom the claim is filed.[4] In this case, the Claimant's actual loss is less than the amount paid to the Respondent and less than $30,000.00. Therefore, the Claimant is entitled to recover his actual loss of $7,000.00.

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[3] Under the original Contract, the Respondent removed the Claimant's entire previous driveway before installing the new asphalt driveway. The HMS Contract called for the removal of a twelve-foot by thirty-foot area of asphalt prior to installing new asphalt over the entire driveway. The photographs of the repairs done by HMS and of the Claimant's overall driveway, indicate HMS removed approximately one-sixth of the Claimant's driveway before repaving.

[4] H.D. 917, 2022 Leg., 444th Sess. (Md. 2022) (to be codified in section 8-405(e)(1) of the Business Regulation Article). *See also* Bus. Reg. § 8-405(e)(5); COMAR 09.08.03.03B(4), D(2)(a). The increased cap is applicable to any claim on or after July 1, 2022, regardless of when the home improvement contract was executed, the claim was filed, or the hearing was held. *See Landsman v. MHIC*, 154 Md. App. 241, 255 (2002) (explaining that the right to compensation from the Fund is a "creature of statute," these rights are subject to change at the "whim of the legislature," and "[a]mendments to such rights are not bound by the usual presumption against retrospective application").

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of $7,000.00 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 Claimant is entitled to recover $7,000.00 from the Fund. 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 $7,000.00; 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

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

July 1, 2022
Date Decision Issued

H. David Leibensperger
H. David Leibensperger
Administrative Law Judge

HDL/ja
#199213

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

PROPOSED ORDER

WHEREFORE, this 19th day of August, 2022, 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