

IN THE MATTER OF THE CLAIM	* BEFORE SUSAN A. SINROD,
OF BARRY NAFT	* AN ADMINISTRATIVE LAW JUDGE
AND	* OF THE MARYLAND OFFICE
ROCHELLE NAFT	* OF ADMINISTRATIVE HEARINGS
CLAIMANTS,	* OAH NO.: DLR-HIC-02-10-37909
AGAINST THE MARYLAND HOME	* MHIC NO.: <sup>90</sup> (90) 612
IMPROVEMENT GUARANTY FUND	* <sub>09</sub>
FOR THE ALLEGED ACTS OR	*
OMISSIONS OF PETE DALEY,	*
D/B/A DALEY PAVING	*
RESPONDENT	*

\* \* \* \* \*

**RECOMMENDED DECISION**

STATEMENT OF THE CASE  
ISSUE  
SUMMARY OF THE EVIDENCE  
FINDINGS OF FACT  
DISCUSSION  
CONCLUSIONS OF LAW  
RECOMMENDED ORDER

**STATEMENT OF THE CASE**

On May 18, 2009, Barry and Rochelle Naft (Claimants) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$3,985.00 for actual losses allegedly suffered as a result of a home improvement contract with Pete Daley, d/b/a Daley Paving (Respondent).

I conducted a hearing on March 17, 2011 at the Office of Administrative Hearings- Wheaton, 2730 University Boulevard West, Wheaton, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010). Eric B. London, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Claimants represented themselves. The Respondent failed to appear for the hearing despite due notice to his last address of record.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, and the Rules of Procedure of the Office of Administrative Hearings govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2010), Code of Maryland Regulations (COMAR) 09.01.03.01, 09.08.02.01, and 28.02.01.01.

### **ISSUE**

Did the Claimants sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

The Claimants submitted the following exhibits, which were admitted into evidence:

- Cl. Ex. #1- Contract between the Claimants and the Respondent, dated August 20, 2007
- Cl. Ex. #2- Copy of check to the Respondent, dated August 28, 2007
- Cl. Ex. #3- Estimate of Albert Paving, dated April 9, 2009
- Cl. Ex. #4- Letter from the Claimants to the Respondent, dated April 8, 2009
- Cl. Ex. #5(a)-(d)- Photographs of the Respondent's work
- Cl. Ex. #6- Estimate of Capital Paving, dated May 27, 2010

Cl. Ex. #7- Estimate of Town & Country Asphalt, dated May 26, 2010

The Fund submitted the following exhibits, which were admitted into evidence:

Fund Ex. #1- Notice of Hearing, dated November 10, 2010

Fund Ex. #2- Notice of Hearing, dated November 10, 2010, with Hearing Order Attached, returned by the United States Postal Service with the notation "Attempted not known"

Fund Ex. #3- Affidavit of Hubert Lowery, dated December 1, 2010

Fund Ex. #4- Certified mailing return receipt card, showing delivery of Notice of Hearing on December 4, 2010

Fund Ex. #5- Notice of Hearing, dated December 2, 2010

Fund Ex. #6- Hearing Order, dated October 6, 2009

Fund Ex. #7- Licensing History of the Respondent, dated February 10, 2011

Fund Ex. #8- Home Improvement Claim Form, dated May 8, 2009

Fund Ex. #9- Letter from the MHIC to the Respondent, dated June 9, 2009

Fund Ex. #10- Respondent's Contract form, dated January 8, 2008

### Testimony

The Claimants each testified on their own behalf, and Mr. Naft testified on behalf of the Fund. The Fund did not present any additional witnesses.

### **FINDINGS OF FACT**

After considering the evidence presented, 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 01-84191.

2. On August 20, 2007, the Claimants and the Respondent entered into a contract whereby the Respondent agreed to cut away bad areas of the Claimants' driveway and check the base, re-pave the entire driveway, add a curb, expand the apron and apply sealant.
3. The original agreed-upon contract price was \$9,800.00.
4. On August 28, 2007, the Claimant paid \$9,800.00 to the Respondent.
5. Pursuant to the terms of the contract, the Respondent cut away the bad areas of the driveway, re-paved the driveway, expanded the apron and added the curb. He told the Claimants that he would return in the spring to seal the driveway, because the hot asphalt needed time to age.<sup>1</sup>
6. Over the winter of 2007-2008, the Claimants' driveway began to show signs of disrepair and deterioration. Unsightly cracks and seams emerged, the surface became uneven and grass began to grow through seams in the driveway.
7. The Claimants made many attempts to contact the Respondent to ask him to return and fix the problems with the driveway, and to seal the driveway as he agreed to do. The Respondent returned the Claimants' calls once or twice, but then never called back after that. On April 8, 2009, the Claimants sent a certified letter to the Respondent demanding that he return to the job and complete and repair the work. The Claimant never returned to complete the contract and repair the problems.
8. The Claimants obtained three estimates from other contractors for the repair and completion of the Respondent's work. The estimate from Albert Paving was for \$3,985.00, from Town & Country Asphalt was for \$3,500.00, and the estimate from Capital Paving was \$6,783.39. However, only the work as described in the Albert

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<sup>1</sup> It is unclear from the evidence in the record the exact date that the Respondent performed this work.

Paving estimate and through the Claimants' conversations with Albert Paving, would return the Claimants' driveway to the condition that it should have been in had the Respondent completed the work.

9. Neither Town & Country Asphalt nor Capital Paving would say that they could repair the seam and make the driveway look the way it should have looked had the Respondent properly completed the required work under the contract.

### DISCUSSION

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) (2010). *See also* COMAR 09.08.03.03B(2). Actual 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 (2010). For the following reasons, I find that the Claimants have proven eligibility for compensation.

Mr. Naft testified that in April 2009, he contacted Albert Paving to obtain an estimate for the repair and completion of the driveway. Albert Paving gave the Claimants an estimate of \$3,985.00 to repair the problems that the Respondent caused and to seal the driveway. At the request of the MHIC, the Claimants also obtained two additional estimates, one from Capital Paving (Capital) and one from Town & Country Asphalt (Town & Country). Both Capital and Town and Country told the Claimants that the Respondent's workmanship was poor, and the driveway would be difficult to repair. According to Mr. Naft, both Town & Country and Capital were reluctant to say that they could fix the problems, and Town & Country was unwilling to even take on the task of fixing the seam. Town & Country told Mr. Naft that the driveway was never going to look good. Since the asphalt had hardened, it would be impossible to fully repair

the driveway. Mr. Naft testified that at least in the estimate by Albert Paving, and through his conversations with them, it appeared that Albert Paving could make the unsightly seam look better.

Mrs. Naft testified as to the significant effort the Claimants made to contact the Respondent in an effort to get him to return to fix the problems and complete the job. The Fund agreed that the Respondent's work was inadequate, and that he did not complete the job as required under the contract. The Fund also agreed that the Albert Paving estimate is the most appropriate estimate for the repairs, because that estimate was the one most likely to put the Claimants in the position that they should have been in had the Respondent performed the job in a workmanlike manner and completed the project.

I reviewed photographs that the Claimant submitted, and the unsightly seams and intrusion of grasses on the unsealed driveway are apparent. Cl. Ex. #5(a)-(d). I conclude that the Claimants established that they incurred actual loss as a result of the acts and omissions of the Respondent.

The Fund agreed that the Claimants are entitled to an award from the Fund and suggested that COMAR 09.08.03.03B(3)(c) governs the calculation of the award from the Fund. This provision states:

(c) 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 measurements accordingly.

Applying the formula set forth in COMAR 09.08.03.03B(3)(c), I have calculated the Claimants' actual loss as follows:

Amount paid on the original contract	\$ 9,800.00
Plus cost to repair the work	<u>+\$ 3,985.00</u>
	\$13,785.00
Less the original contract	<u>-\$ 9,800.00</u>
Actual loss	\$ 3,985.00

Accordingly, I conclude that the Claimants' actual loss is \$3,985.00.

### **CONCLUSIONS OF LAW**

I conclude that the Claimants have sustained an actual loss of \$3,985.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2010).

### **RECOMMENDED ORDER**


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

**ORDER** that the Maryland Home Improvement Guaranty Fund award the Claimants \$3,985.00; 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 at least ten percent as set by the Maryland Home Improvement Commission. Md. Code Ann., Bus. Reg. § 8-411(a) (2010); and

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

June 2, 2011  
Date Decision Mailed

  
Susan A. Sinrod  
Administrative Law Judge

SAS/rbs  
# 123176

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**FILE EXHIBIT LIST**

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PROPOSED ORDER

*WHEREFORE, this 8th day of August 2011, 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*