IN THE MATTER OF THE CLAIM	*	**BEFORE JENNIFER M. CARTER JONES,**
OF KENNETH CIALKOWSKI	*	**AN ADMINISTRATIVE LAW JUDGE**
AGAINST THE MARYLAND HOME	*	**OF THE MARYLAND OFFICE**
IMPROVEMENT GUARANTY FUND	*	**OF ADMINISTRATIVE HEARINGS**
FOR THE ALLEGED ACTS OR	*	**OAH NO.: DLR-HIC-02-10-31487**
OMISSIONS OF GEORGE BRANTON,	*	**MHIC NO.: 09 (90) 291**
T/A GEORGE BRANTON ASPHALT	*	
PAVING	*	

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

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 April 17, 2009, Kenneth Cialkowski (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of $3,500.00 for actual losses allegedly suffered as a result of a home improvement contract with George Branton, t/a George Branton Asphalt Paving (Respondent).

I held a hearing on March 30, 2011 at the Carroll County Health Department, 290 S. Center Street, Westminster, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010). Eric B. London, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR or Department), represented the Fund. The Claimant and the Respondent represented themselves.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the DLLR, 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) 09.01.03.01–09.01.03.10; 09.08.02.01-09.08.01.02; and 28.02.01.01-28.02.01.27.

ISSUE

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

SUMMARY OF THE EVIDENCE

Exhibits

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

GF #1 – Notice of hearing, dated November 12, 2010

GF #2 – Notice of hearing date change, dated December 15, 2010

GF #3 – Letter/Respondent's licensing history, from the DLLR addressed to "To Whom It May Concern," dated January 19, 2011

GF #4 – DLLR Hearing Order, dated August 25, 2010

GF #5 – Home Improvement Claim Form

GF #6 – Letter from the DLLR to the Respondent, dated April 27, 2009

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

CL #1 – Contract, dated September 28, 2007

CL #2 – Printout from the DeLalio SFA website Frequently Asked Questions page, printed on March 30, 2011

CL #3 – Complaint from the Claimant's wife, Angie Cialkowski, printed from the George Branton Asphalt Paving website on June 25, 2008

CL #4 – Printout from DoItYourself.com website Tips for Paving an Asphalt Driveway page, printed on July 14, 2008

CL #5 – Proposal from M.T. Laney Company, Inc., dated July 28, 2008

CL #6 – Inspection report from TAK Ventures, Inc, doing business as (dba) National Property Inspections, with an inspection date of August 6, 2008

CL #7 – Eleven Photographs of the Claimant's driveway

CL #8 – Letter from the DLLR to the Claimant, dated April 1, 2009

Testimony

The Claimant testified in support of his claim. The Respondent testified on his own behalf. No testimony was presented on behalf the Fund.

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 86711.

2. On September 28, 2007, the Claimant and the Respondent entered into a contract to complete the following:

   - Regrade the Claimant's driveway and compact base
   - Install asphalt driveway with top mix asphalt, approximately 1,445 square feet up to 2 inches thick
   - Roll, and compact surface smooth

3. The original agreed upon contract price was $3,500.00.

4. The contract included the following legible information:

OUR GUARANTEE	BE CAREFUL
1. All driveways treated with a vegetation killer. No guarantee that vegetation will not occur. 2. We guarantee satisfaction on completion. 3. Any bad broken areas patched free of charge for one year. Areas patched only. Driveways will not be torn out or resurfaced.	1. Do not put sharp objects like ladders, chairs, etc., on pavement. 2. Do not let oil or gas drip on driveway. 3. Never operate power steering while car is parked. 4. Guarantee void if job does not remain within contract.

4. Driveways guaranteed for automobile traffic only. No trucks. 5. We guarantee 90% water run-off.	

5. The Respondent completed the Claimant's driveway within one day, September 28, 2007.

6. The Claimant paid the Respondent a total of $3,500.00 after the Respondent's workers had completed the driveway.

7. The Respondent's workers applied weed killer and dug out grass and vegetation in the existing gravel driveway.

8. In or about the winter of 2007-2008, the Claimant's wife complained to the Respondent about weed growth in or near the driveway. The Respondent returned to the Claimant's property and addressed the weed growth problem.

9. On July 28, 2008, M.T. Laney Company, Inc. offered the Claimant a proposal for asphalt paving work on his driveway. The Proposal included the following services:

- Excavate & remove existing driveway
- Re-grade sub-base
- Mill/jackhammer tie-ins as needed
- Compact stone base with 4-6 ton roller
- Mark edges of driveway for neatness
- Pave with 3 ¼ inches of surface asphalt mix, compacted to 2 ½
- Compact asphalt with 4-6 ton roller
- Tamp edges of driveway for stability
- Clean up/Tape off job site

10. On August 6, 2008, TAK Ventures, Inc., dba National Property Inspections conducted an inspection of the Claimant's driveway and provided the Claimant with an Inspection Report.

11. On April 17, 2009, the Claimant filed a claim against the Respondent with the MHIC Fund seeking compensation for the Respondent's unworkmanlike and inadequate completion of the Claimant's driveway.

12. The Respondent returned to the Claimant's home in September or October 2009 and resurfaced approximately half of the driveway.

13. Upon completion of the driveway, the Respondent spoke with the Claimant who acknowledged that the work the Respondent completed on the driveway was acceptable.

14. The Claimant did not contact the Respondent again after the Respondent resurfaced a portion of his driveway in September/October 2009.

15. By letter, dated August 25, 2010, the MHIC Fund notified the Respondent that it had referred the Claimant's claim against the Respondent to the OAH for a hearing.

16. After August 25, 2010, the Respondent contacted the Claimant by telephone and asked him to withdraw his claim with the MHIC Fund. The Claimant declined to withdraw his claim with the Fund.

17. The Claimant also denied the Respondent an opportunity to address any problems the Claimant had with the driveway.

18. The Claimant did not sustain an actual loss.

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) (Supp. 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 Claimant has not proven eligibility for compensation.

There is no question that the Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant.

The Claimant asserts that the Respondent performed unworkmanlike and inadequate home improvement on his driveway. Particularly, the Claimant argues that the Respondent failed to destroy vegetation using weed killer before installing the driveway; that he failed to use an adequate compact base for the driveway; and that he failed to use an appropriate method to grade the driveway. In support of his position, he offered a printout of the Frequently Asked Questions page from a website for DeLalio SFA (Cl. #2), a printout of "Tips for Paving an Asphalt Driveway" from DoItYourself.com (Cl. #4); an August 6, 2008 inspection report from TAK Ventures, Inc., and a proposal from M.T. Laney Company, Inc. for excavation of the Claimant's existing driveway and reinstallation of the driveway. (Cl. #5).

The Respondent contends that he properly installed the Claimant's driveway and that any problems with the driveway resulted from the Claimant's improper use of vehicles on the surface. The Respondent also argues that despite the fact that his contract clearly states that he does not resurface driveways once he has installed them, he resurfaced half of the Claimant's driveway in September or October 2009, to satisfy him. Finally, the Respondent asserts that the Claimant never gave him an opportunity to address any lingering concern the Claimant had about his driveway after he resurfaced it in September or October 2009.

For the reasons that follow, I find that the Claimant has failed to sustain his burden.

According to the Claimant, shortly after the Respondent installed his driveway in September 2007, he began to notice areas where the asphalt had begun to deteriorate. Particularly, he observed weeds growing through the asphalt and disintegration and crumbling of portions of the driveway. After he noticed these problems, explained the Claimant, he complained to the Respondent. After the Respondent did not address the issues the Claimant had with his driveway, in August 2008, the Claimant contracted with TAK Ventures, Inc. (TAK), to conduct an inspection of the driveway. TAK observed the following about the Claimant's

driveway:

> The surface materials of the driveway were easily scraped up in several areas with minimal scuffing. The surface appeared loosely packed and had an open, loose appearance. A metal pry bar was pushed down through the asphalt with little force in several areas. Three holes were dug down through the asphalt with varying thicknesses of 1 to 1.5 inches. The asphalt could be pulled up by hand in some areas. A check along the edge showed a thickness of 1.5 to 2 inches and could easily be lifted. Grass was growing through the asphalt in several areas. There appeared to be minimal gravel base materials under the asphalt.
>
> It would appear that there is insufficient base materials under the asphalt for support, covered with an insufficient thickness of asphalt. The asphalt is consistent with surface materials typically used as a final top coat on a driveway. There was no base layer of asphalt which would have a courser stone. The Asphalt itself is poorly packed and was possibly laid down at an improper temperature. The grass growth would indicate improper preparation before the asphalt was laid and an overall insufficient thickness of asphalt materials.
>
> Although asphalt sealing would help prolong the driveway surface materials, it will not alter the construction methods. The asphalt will continue to deteriorate, giving way to wear and weight. The driveway shows unexpected deterioration for the age and will continue to do so.

(Cl. # 6).

The Claimant also obtained a proposal from M.T. Laney Company, Inc., which estimated that it would cost approximately $4,380.00 to excavate the driveway the Respondent installed for the Claimant and properly install a new one.

The Claimant testified that he filed a claim with the MHIC Fund in or about April 2009, after which the Respondent returned to his home and repaved the top portion of his driveway, where the Claimant had observed most of the problems. The Claimant also testified that once the Respondent finished repaving the driveway, although he told the Respondent that he thought the driveway was fine, he was actually dissatisfied with the area where the top repaved portion of the driveway transitioned into the bottom original driveway. He did not, however, convey this dissatisfaction to the Respondent. Nevertheless, he pursued his claim with the MHIC Fund because he did not believe that the Respondent would return to make any further repairs because

it was nearing the winter, and he felt it would be unlikely for the Respondent to work when it was cold. The Claimant explained that he was very disappointed because he wanted the driveway installed so that his kids would have a place to skateboard and roller skate, which, due to the deteriorating condition of his driveway, they are unable to do.

Although the Claimant's dissatisfaction with his driveway is clear, he presented insufficient evidence to support the conclusion that the Respondent's installation of the driveway was unworkmanlike or inadequate. The Claimant offered his *belief* that the Respondent had used an insufficient base for the driveway and improperly graded the driveway on the basis that internet sites dictate that the proper way to install an asphalt driveway is to start with a base of at least two inches. A closer look at the materials from these sites, however, calls into question the validity of their instructions. Particularly, information the Claimant printed from the DeLalio SFA Frequently Asked Questions page provides the following: "Assuming the existing sub-grade is suitable, the driveway will be rough graded for proper pitch and elevations and the RCA blend will be installed as a base. (Generally 2-3 inches of RCA blend is required to bring the surface within final grade.)" (Cl. #2). Somewhat at odds with the instructions of the DeLalio SFA site, however, is the internet page the Claimant printed from the DoItYourself.com site entitled "Tips for Paving an Asphalt Driveway," which provides "It is important to lay down a good gravel base in order to have a well functioning driveway. A gravel base between 2 and 8 inches thick is sufficient for most jobs." (Cl. #4).

Although both websites instruct that a proper base is necessary to construct a sufficient driveway, both offer different ways to create that base. One instructs that the use of a 2-3 inch RCA blend is proper. The other instructs that a 2-8 inch gravel base is sufficient. The Respondent testified that he installed a perfectly acceptable base and that, although there are other methods for installing driveways, there was nothing wrong with the way that he installed

the Claimant's driveway.

I place significantly more weight on the Respondent's testimony than I do on the instructions of internet sites, first, because information printed from the internet is inherently untrustworthy without sufficient evidence to corroborate its content. In this case, not only did the Claimant fail to submit corroborative evidence, but the content of the very information on the websites on which he relies varies, further calling into question its veracity or reliability.

I also place very little weight on the inspection TAK conducted of the Claimant's driveway. The Claimant offered the inspection report purportedly conducted by Jerry McCarty of TAK Ventures, but offered no evidence that Mr. McCarty (or, for that matter, TAK Ventures) was qualified to offer opinions about the construction and installation of the driveway. Indeed, the inspection report contained no information about whether TAK or Mr. McCarty are licensed with the MHIC. Moreover, the inspection was performed on August 6, 2008, *before* the Respondent had repaved approximately half of the Claimant's driveway and, therefore, it does not provide an accurate description of the current state of the driveway.

The Claimant did offer photographs he took in March 2011 of the driveway in support of his contention that the driveway is crumbling along the sides and in a number of other patches throughout the driveway, and that grass and weeds continue to grow through the asphalt. The Respondent testified that the crumbling of the asphalt depicted in the photographs is consistent with vehicles parking or turning on the edge of the driveway, or turning the wheel of a stationary vehicle while parked on the driveway. The Respondent pointed out that his contract specifically warns customers not to operate power steering while a car is parked on the driveway or to place sharp objects on the pavement.

Ultimately, I am unable to determine what caused the crumbling spots of the Claimant's driveway. Although it is plausible that the crumbling resulted from the use of improper driveway

materials or unworkmanlike installation of the driveway, it is equally plausible that the crumbling occurred as a result of the improper use of vehicles on the driveway as the Respondent asserts. Because the burden lies with the Claimant, I must resolve any question regarding the cause of the driveway deterioration against the Claimant.

Furthermore, according to section 8-405(d) of the Business Regulation Article, the Claimant cannot prevail on his claim if he unreasonably rejected good faith efforts by the contractor to resolve the claim. The Claimant admitted that after the Respondent repaved a large portion of his driveway in September or October 2009, he did not contact him to advise him of any problems he was experiencing with the driveway. The Claimant explained that he believed the Respondent would not have made any further repairs because the weather was getting cold and he figured that the Respondent would not have completed any work while it was cold. He also asserted that he lost faith in the Respondent when he did not complete the driveway to his satisfaction so, when the Respondent contacted him after receiving notice from the MHIC Fund that the Claimant was pursuing his claim against him, he denied the Respondent an opportunity to discuss/address any lingering problems he had with the driveway. I find the Claimant's decision to deny the Claimant an opportunity to address the claim to have been unreasonable.

The Respondent displayed a concern that the Claimant had filed a claim against him with the MHIC Fund and reacted to the Claimant's complaints by repaving a portion of his driveway to avoid litigation. This was true despite the fact that the contract specifically stated that the Respondent would not tear out or resurface the driveway. The Claimant told the Respondent that he was satisfied with the newly-repaved driveway. Although the Claimant may have been truly dissatisfied with the newly-repaved driveway, I find no reason to impute that knowledge to the Respondent. Moreover, I have already determined that, despite his dissatisfaction, there is insufficient proof that the driveway installation was unworkmanlike or inadequate.

Accordingly, I find that the Claimant has failed to sustain his burden and he is not entitled to reimbursement from the Fund.

CONCLUSIONS OF LAW

I conclude that the Claimant has not sustained an actual loss 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 not award the Claimant reimbursement; and

ORDER that the records and publications of the Maryland Home Improvement Commission reflect the Department's final decision.

June 2, 2011
Date Decision Issued

[redacted]
nifer M. Carter Jones
Administrative Law Judge

JCJ/ab
123404

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.

Marilyn Jumalon

Marilyn Jumalon
Panel B

MARYLAND HOME IMPROVEMENT COMMISSION