IN THE MATTER OF THE CLAIM	*	**BEFORE JENNIFER M. CARTER JONES,**
OF PAUL J. BONACCORSI,	*	**AN ADMINISTRATIVE LAW JUDGE**
CLAIMANT,	*	**OF THE MARYLAND OFFICE**
AGAINST THE MARYLAND HOME	*	**OF ADMINISTRATIVE HEARINGS**
IMPROVEMENT GUARANTY FUND	*	**OAH NO.: DLR-HIC-02-14-38001**
FOR THE ALLEGED ACTS OR	*	**MHIC NO.: 13 (75) 1396**
OMISSIONS OF JOHNNY NICHOLS,	*	
T/A AGGREGATE PAVING,	*	
RESPONDENT	*	

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PROPOSED DECISION

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STATEMENT OF THE CASE

On or about June 26, 2014, Paul J. Bonaccorsi (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of $1,500.00 for actual losses allegedly suffered as a result of a home improvement contract with Johnny Nichols, t/a Aggregate Paving (Respondent).

I held a hearing on May 6, 2015 at the Office of Administrative Hearings in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). The Claimant represented himself. The Respondent failed to appear. Jessica Kaufman, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund.

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 (OAH) govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014), Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02, and 28.02.01.

ISSUES

1. Did the Claimant sustain an actual loss compensable by the Fund as a result of any acts or omissions committed by the Respondent?

2. If so, what is the amount of that loss?

SUMMARY OF THE EVIDENCE

Exhibits

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

Cl. Ex. 1 – Contract, dated October 17, 2012

Cl. Ex. 2 – Copies of checks from the Claimant to the Respondent

Cl. Ex. 3 – Handwritten letter, signed by the Respondent, dated November 23, 2012

CL. Ex. 4 – Inspection report from John J. Heyn, JJH Consultant, dated June 18, 2014[1]

CL. Ex. 5 – Letter from John J. Heyn to the Claimant, dated February 24, 2015

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

GF Ex. 1 – Copy of OAH Notice of Hearing, stamped "Rescheduled," dated March 26, 2015; Copy of the OAH Notice of Hearing dated March 26, 2015 sent to the Respondent by first class mail, stamped "Rescheduled," returned to the OAH by the United States Postal Service (USPS) as "attempted not known. Unable to forward"; Copy of OAH Notice of Hearing, dated February 2, 2015; OAH Notice of Hearing, dated January 8, 2015; OAH Notice of Hearing sent to the Respondent by certified mail, dated January 8, 2015, returned to the OAH by the USPS as "insufficient address. Unable to forward."

[1] Upon request by Ms. Kaufman, who said that the Fund is aware of Mr. Heyn and his expertise, his Report was admitted as produced by an expert in home improvement and driveway resurfacing.

GF Ex. 2 – Home Improvement Claim Form, dated received on June 26, 2014, and DLLR Hearing Order, dated September 16, 2014

GF Ex. 3 – Licensing history for the Respondent

GF Ex. 4 – Letter from the DLLR MHIC to the Respondent, dated July 1, 2014, and attached claim form.

Testimony

The Claimant testified on his own behalf.

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 #45256.
2. On or about October 17, 2012, the Claimant and the Respondent entered into a contract to replace the driveway at the front of the Claimant's property by installing two layers of asphalt atop the existing driveway.
3. The Respondent did not offer to install a retaining wall along the driveway.
4. The Respondent completed the driveway installation on October 18, 2012.
5. The Claimant paid the Respondent $5,000.00 to complete the driveway work, which was the contract price.
6. The Respondent installed the asphalt so that the elevation of the driveway was the same at the top and bottom.
7. The Respondent guaranteed the work on the driveway for two years.
8. After the Respondent completed the driveway installation, water began to leak into the Claimant's garage from the driveway.
9. After the Claimant complained to the Respondent about water leaking into the garage, the Respondent agreed to return to the Claimant's property on May 21, 2013, to address the

problem. The Respondent could not return and address the problem until May 21, 2013 because the asphalt he required would not be available until that time.

10. The Respondent did not return to the Claimant's property on May 21, 2013 as he told the Claimant he would.

11. On May 28, 2013, the Claimant sent a certified letter to the Respondent, in which he again identified the problem with the driveway.

12. On or about November 29, 2013, the Complainant filed a Complaint against the Respondent with the DLLR.

13. On June 18, 2014, John J. Heyn, a home improvement inspector, inspected the Claimant's driveway.

14. Mr. Heyn charged the Claimant $150.00 to inspect the driveway.

15. The Respondent's installation of the driveway was unworkmanlike for the following reasons:

- Water on the driveway runs toward the house and garage instead of draining in the opposite direction;
- Approximately 500 square feet of the driveway must be sloped to allow water to drain away from the garage.

16. The cost to slope the driveway away from the garage to allow for proper drainage would be approximately $1,500.00.

17. The cost for a three-foot by fifteen-foot retaining wall would be $2,500.00.

DISCUSSION

The Respondent's Failure to Appear

Neither the Respondent nor anyone authorized to represent the Respondent appeared for the hearing.

On January 8, 2015, the OAH mailed a Notice of Hearing (Notice) by certified and first class mail to the Respondent's address of record. The Notice advised the Respondent of the time, place and date of the hearing. The United States Postal Service (USPS) returned to the OAH both the first class and certified copies of the Notice sent by certified mail as undeliverable as addressed. By letter, dated February 2, 2015, the Fund notified the OAH that Respondent was deceased and requested that the OAH send notice of the hearing to the Respondent's estate. On February 2, 2015, the OAH mailed a Notice to the Respondent's estate via first class and certified mail. The notice sent via certified mail was delivered to the Respondent's estate; the USPS returned to the OAH the certified receipt, signed by an individual with the last name "Nichols."[2] On March 26, 2015, the OAH sent a Notice to the Respondent's estate, again via first class and certified mail, rescheduling the hearing to May 6, 2015. Both the first class and the certified Notices were returned by the USPS to the OAH, as attempted but undeliverable.

It is clear that the OAH made reasonable attempts to notify the Respondent's estate of the hearing scheduled for May 6, 2015. As of the date of the hearing, no one representing the Respondent or the Respondent's estate had requested a postponement of the hearing. I therefore find that service was proper and that the Respondent was on notice of the hearing. Consequently, I directed that the hearing proceed in the Respondent's absence pursuant to section 8-312(h) of the Business Regulation Article, section 10-209 of the State Government Article, and COMAR 09.01.02.07.

Merits

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). *See also* COMAR 09.08.03.03B(2) ("actual losses . . . incurred as a result of misconduct by a

[2] The first name was difficult to read.

licensed contractor"). Actual loss "means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." Bus. Reg. § 8-401 (2015). The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. COMAR 09.08.03.03B(1). For the following reasons, I find that the Claimant has proven eligibility for compensation.

A review of the Respondent's licensure information (GF Ex. 4) makes it clear that the Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant.

Furthermore, it is clear from the evidence that the Respondent installed the Claimant's driveway in an unworkmanlike manner. The Claimant testified that when he entered into the contract with the Respondent, he made it clear that he wanted to avoid having water leak into the garage; however, when it rained shortly after the Respondent installed the driveway, water did, indeed, leak into the garage. The Claimant further testified that he immediately contacted the Respondent in an attempt to have him remedy the problem and, initially, the Respondent agreed to return to the property on May 21, 2013, when he would have access to more asphalt. On May 21, 2013, however, the Respondent did not return to the property or respond to the Claimant's verbal and written requests for him to do so.

The Claimant hired Home Improvement Inspector John Heyn to inspect the driveway and provide an estimate of the cost to repair the driveway. Mr. Heyn, who is a Maryland licensed inspector, observed water running into the garage when he tested the slope of the driveway with a hose. Mr. Heyn determined that to remedy the problem of water leaking into the garage, 500 feet of the driveway must be sloped away from the garage to allow for proper water drainage. Mr. Heyn estimated that the cost for this work would be $1,500.00. Mr. Heyn also reported that a

"small retainer wall may be needed in place of the slope, [sic]" and estimated that it would cost approximately $2,500.00 to install such a wall. (Cl. Ex. 4; Cl. Ex. 5.)

The Claimant testified that the Respondent's improper installation of the driveway has left it in an inconvenient and sometimes dangerous state. In the winter, pools of water that have formed on the driveway near the garage freeze, making it hazardous. The Claimant expressed a great desire to have the driveway fixed.

Ultimately, the preponderance of the evidence merits the conclusion that the Respondent's installation of the Claimant's driveway was completed in an unworkmanlike fashion. According to the Claimant and Mr. Heyn, the driveway was improperly sloped, which resulted in water running into the Claimant's garage. As I have stated, no one from the Respondent's estate appeared to contest the Claimant's claim. The Claimant, however, submitted a letter from the Respondent, dated November 23, 2012, in which he acknowledged a "water problem" and stated that he would return on May 21, 2013 to "fix and solve [the] problem." (Cl. Ex. 3.) As the Respondent never made the repairs and as the Claimant has submitted sufficient evidence that he will incur the additional expense of $1,500.00 to fix the driveway, I find that the Claimant has sustained his burden of proving that he suffered an actual loss as a result of the Respondent's unworkmanlike installation of the driveway.

At the end of his testimony, the Claimant asserted that he also sought reimbursement for the $2,500.00 Mr. Heyn estimated it would cost to install a retaining wall and for the $150.00 he paid Mr. Heyn for his inspection.

I find that the Claimant is not entitled to the $2,500.00 Mr. Heyn estimated it would cost to install a retaining wall. In his report, Mr. Heyn stated only that "a small retainer wall may be needed in place of the slope." A clear reading of that statement yields two interpretations: 1) Mr. Heyn's opinion about the need for the installation of the retaining wall was speculative, as he

stated only that the wall *may* be necessary; or, 2) the retaining wall represents an optional remedy as an alternative to resloping the driveway, as indicated by Mr. Heyn's statement that the wall might be necessary "in place of the slope." Whether it is the first or the second of these interpretations – or even an alternative interpretation - Mr. Heyn's statement is not definite enough to sustain the Claimant's burden of proving that installing the retaining wall is necessary to remedy the water problem.

Furthermore, the Claimant did not contract with the Respondent to build a retaining wall. As I have stated, Mr. Heyn's statement regarding the potential need for a retaining wall is not definite enough to conclude that the Respondent should have built a retaining wall. Furthermore, if the Respondent had agreed to build a retaining wall, it is reasonable to conclude that he would have increased the cost for the driveway installation to reflect the additional work.

The Claimant is not entitled to consequential damages. COMAR 09.08.03.03B(1). Accordingly, he may not be reimbursed from the Fund for the cost of Mr. Heyn's estimate.

Having found eligibility for compensation, I now turn to the amount of the award. MHIC's regulations offer three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). One of those formulas, as follows, offers an appropriate measurement in this case:

> 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 Claimant presented evidence showing that he paid the Respondent $5,000.00. Therefore, the appropriate measure of compensation from the Fund is as follows:

Amount paid to Respondent:	$5,000.00
Amount to complete the work:	+$1,500.00
Subtotal:	$6,500.00
Original contract price:	-$5,000.00
Actual loss	**$1,500.00**

The Claimant experienced an actual loss in the amount of $1,500.00. Accordingly, the Claimant is entitled to reimbursement from the fund in that amount.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual/compensable loss of $1,500.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2015).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant $1,500.00; 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) (2015); and

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

Signature on File

July 20, 2015
Date Decision Issued

Jennifer M. Carter Jones
Administrative Law Judge

JCJ/emh
#157181

PROPOSED ORDER

WHEREFORE, this 14th day of August, 2015, 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.

Andrew Snyder

Andrew Snyder
Panel B

MARYLAND HOME IMPROVEMENT COMMISSION