IN THE MATTER OF THE CLAIM	*	**BEFORE MARINA LOLLEY SABETT,**
OF JAMES HARBELL, SR.,	*	**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	*	
CURTIS COVER,	*	
T/A CJ's PAVING AND	*	
EXCAVATING, LLC,	*	**OAH No.: DLR-HIC-02-16-21534**
RESPONDENT	*	**MHIC No.: 16 (90) 631**

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PROPOSED DECISION

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STATEMENT OF THE CASE

On March 29, 2016, James Harbell, Sr. (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of $2,300.00 in alleged actual losses suffered as a result of a home improvement contract with Curtis Cover, trading as CJ's Paving and Excavating, LLC (Respondent).

At ten o'clock a.m. on November 23, 2016, I convened the hearing in this matter at the Washington County Office Building in Hagerstown, Maryland. Md. Code Ann., Bus. Reg. §§ 8-

312(a), 8-407(e) (2015).[1] The Claimant appeared to represent himself. Kris M. King, Assistant Attorney General (AAG), Department of Labor, Licensing and Regulation (Department), appeared to represent the Fund. No one appeared on behalf of the Respondent. Mr. King then moved that the hearing proceed in the Respondent's absence, a motion I granted for the following reasons.

On August 31, 2016, the Office of Administrative Hearings (OAH) sent a Notice of Hearing (Notice) by first class and certified mail to the Respondent at the address provided to OAH by the HIC.[2] The Notice advised the Respondent of the date, time, and place of the hearing scheduled for November 23, 2016. Bus. Reg. § 8-312(b), (d); Md. Code Ann., State Gov't § 10-208(a)-(b) (2014).[3] The U.S. Postal Service returned the certified mailing to the OAH with the notation "Return to Sender – Unclaimed, Unable to Forward," GF Ex. 2, but the first class mailing was not returned. On the date of the hearing Mr. King stated on the record, and offered documentation to show, that he reminded the Respondent of the date, time, and location of the scheduled hearing by email on November 16, 2016. GF Ex. 1. By return email, the Respondent indicated that he would be unable to attend the hearing and, therefore, requested a postponement. Mr. King replied that he was not authorized to grant any postponement, but included an appropriate telephone number at the Office of Administrative Hearings (OAH) for the Respondent's use if he wished to request one. *Id.* On November 23, 2016, I confirmed with the OAH clerk's office that as of that date it had received no request for postponement.

Parties are entitled to receive "reasonable written notice" of a hearing. State Gov't § 10-208(a). I conclude that the Respondent received timely, adequate, and therefore reasonable written notice of the hearing in this case. *Id.* §§ 10-208, 10-209; Bus. Reg. § 8-312(b), (d); *see*

[1] Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 volume.
[2] Transmittal form in the OAH file.
[3] Unless otherwise noted, all references to the State Government Article hereinafter cite the 2014 volume.

also Golden Sands Club Condominium, Inc. v. Waller, 313 Md. 484, 503-04 (1988). Furthermore, "[i]f, after due notice, the person against whom the action is contemplated does not appear, nevertheless the [HIC] may hear and determine the matter." Bus. Reg. § 8-312(h); *see also* COMAR 28.02.01.23A ("If, after receiving proper notice a party fails to attend or participate in a . . . hearing . . . , the judge may proceed in that party's absence . . . ."). I thus directed that the hearing proceed in the Respondent's absence.

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. 2016); COMAR 09.01.03; 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 that loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the Fund:

GF Ex. 1 - Email correspondence between K. M. King, AAG, DLR, and Respondent, November 16, 2016 (1 page)

GF Ex. 2 - Memo to Legal Services from S. L. Sykes, OAH, September 27, 2016, with unclaimed attachments (6 pages plus envelope)

GF Ex. 3 - DLR-HIC Registration and Professional License History printouts for Respondent, November 21, 2016 (2 pages)

GF Ex. 4 - Home Improvement Claim Form, marked as received March 29, 2016 (1 page)

GF Ex. 5 - Letter to Respondent from H. Lowery, HIC, dated April 11, 2016 (1 page)

GF Ex. 6 - DLR-HIC Registration and Professional License History printouts for Kevin L. Jeter, November 16, 2016 (2 pages)

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

Clmt. Ex. 1 - Respondent's Estimate dated April 16, 2014, accepted April 21, 2014, and marked "paid in full" (1 page)

Clmt. Ex. 2 - Jeter Paving Proposal/Sales Order dated March 16, 2016 (1 page)

Clmt. Ex. 3 - Six (6) color photographs of driveway, marked 3A-3F

The Respondent did not attend the hearing and offered no exhibits into evidence.

Testimony

The Claimant testified in his own behalf and presented the testimony of Michael A. Carbaugh, who was accepted as an expert in paving and sealing.

The Fund presented no witnesses.

PROPOSED FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. At all times relevant to this hearing, the Respondent was a licensed home improvement contractor operating under MHIC registration number 106683. GF Ex. 3.

2. On April 21, 2014, the Claimant and the Respondent entered into a contract for repairs to the driveway of the Claimant's home (Contract). Clmt. Ex. 1.

3. The Contract required that crack filling "where needed and driveway meet," and that the existing blacktop be "sawcut where needed, dig radius along sides and stone, [and] overlay driveway." *Id.*

4. The agreed-upon contract price was $3,000.00 in cash. *Id.*

5. On April 21, 2014, the Claimant paid James Davies, the Respondent's fellow principal in CJ's Paving and Excavating, $1,000.00 in cash. *Id.*

6. On or about May 9, 2014, the Respondent recoated the Claimant's driveway and the Claimant paid Mr. Davies the contract balance of $2,000.00 in cash.[4] *Id.*

7. On or about September 2014 the Respondent returned, with no prior notice, to seal coat the Claimant's driveway.

8. The Respondent's work was deficient in the amount of asphalt used and in the structural weakness, roughness, and unevenness of the finished surface.

9. Another licensed paving contractor has proposed to correct the deficiencies in the Respondent's work for $2,300.00. Clmt. Ex. 2; GF Ex. 6.

10. The Claimant's actual loss is $2,300.00.

DISCUSSION

In this case, the Claimant has the burden of proving the validity of his claim by a preponderance of the evidence. Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3).[5] "[A] preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces . . . a belief that it is more likely true than not true." *Coleman v. Anne Arundel Cty. Police Dep't.*, 369 Md. 108, 125 n. 16 (2002), quoting Maryland Pattern Jury Instructions 1:7 (3rd ed. 2000).

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);[6] *see also* COMAR 09.08.03.03B(2) ("actual losses . . . incurred as a result of misconduct by a

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[4] The Claimant testified that this payment was made on the day that the bulk of the Respondent's work was done. The notation on the contract stating that it was "paid in Full" is undated, but the Complaint indicates that the date in question was May 9, 2014. For the purposes of this decision I need not decide *when* the balance of the money was paid, merely that it *was* paid.

[5] As noted above, "COMAR" refers to the Code of Maryland Regulations.

[6] Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 Replacement Volume.

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. For the following reasons, I find that the Claimant has proven eligibility for compensation.

The Respondent was a licensed home improvement contractor at the time he entered into the Contract to perform work on the Claimant's driveway. The Contract called for the Respondent to fill cracks at the lower end of the Claimant's approximately fifty-foot-long driveway ("where road and driveway meet"), cut out a portion of the driveway ("saw cut where needed"), build up the sides of the existing driveway ("dig radius along sides—stone"), resurface the entire driveway ("overlay driveway"), and seal it with "Pave Shield (asphalt emulsion)." Cl. Ex. 1.

The Claimant was present when the work was done. He testified that the Respondent did not cut out any existing asphalt where they had agreed it was necessary in order to permit new asphalt to be laid without interfering with operation of the garage. Instead, the entire existing driveway was paved over. The resulting surface was uneven, with one side higher than the other, Clmt. Ex. 3A, and remained unsealed until the Respondent returned to complete that part of the job several months later. Cracking became visible along the edges of the driveway right after the Respondent's work was completed, and continues to be a problem.[7] Clmt. Ex. 3D-3F.

The Claimant testified that he telephoned the Respondent to express his dissatisfaction with the unevenness and cracking either on May 9, 2014—the day the Respondent's work was done—or the following day, and at that time the Respondent promised to return and "make it right." Except for the seal coat he applied several months later, however, the Respondent

[7] In order to maintain the driveway in a usable condition and prevent it from breaking up further since then, the Claimant had Mr. Carbaugh apply additional sealers and fillers three times, for a total cost of approximately $750.00.

performed no further work on the Claimant's driveway and returned none of the money that the Claimant had paid. The Complainant indicated that he and his wife made repeated telephone calls to Mr. Davies to tell him that they were not satisfied with the work and ask that it be corrected, but ceased calling him when his telephone number was disconnected around July 2014.

In March 2016, the Claimant obtained a bid from another paving company to correct the unevenness and cracks. Jeter Paving Company proposed to perform the following work for a quoted price of $2,300.00:

> Remove top area of driveway and replace with plenty of thickness and [sic] still be level with the garage slab. Asphalt to be 1 ½" – 2" placed in one (1) layer of surface 9.5 mix. Edge to be tamped by hand, tack oil to be placed for bonding agent.

Clmt. Ex. 2 (emphasis in original). The Claimant testified that he would like to be reimbursed by the Fund for the full $3,000.00 he paid to the Respondent, but acknowledged that he may only be entitled to reimbursement of the amount required to have the Respondent's work corrected.

Michael A. Carbaugh, a neighbor of the Claimant, is the owner of Line-A-Lot Striping and Seal Coating in Hagerstown, Maryland. He has worked in the asphalt business for twenty-seven years, and was accepted as an expert in paving and sealing. Mr. Carbaugh seal coated and patched the Claimant's driveway several times since the Respondent overlaid it in 2014, which temporarily filled in some but not all of the cracks resulting from the Respondent's work; however, such work did not correct the driveway's unevenness. Mr. Carbaugh testified that the main goal of his patch work was to keep the driveway from breaking up until it could be overlaid again properly.[8]

[8] Mr. Carbaugh testified that it was he who mentioned the start-up paving company headed by Mr. Davies and the Respondent to the Claimant. He also contacted those two gentlemen to tell them that a neighbor needed work on his driveway and would recommend them to others if they did a good job.

According to Mr. Carbaugh, sealing asphalt is essentially preventive maintenance: it cannot repair a cracking substrate, and when such cracking occurs, the surface must be overlaid. He further testified that, unless a "skim coat" is specified, when asphalt paving contractors offer to install an overlay they are assumed to be selling a layer of asphalt that is two inches thick following compaction. That is the industry standard, because thinner layers cannot maintain their structure and will break. When asked to read the Respondent's contract, Mr. Carbaugh noted that it did not specify any finished depth and, therefore, within the industry, it would be understood to indicate a standard two-inch overlay. His examination of the Respondent's overlay, however, revealed that most of it was only half-an-inch thick.

When questioned about the uneven seam down the center of the driveway, Mr. Carbaugh testified that he believes the Respondent's screed (a part of the equipment used to lay asphalt that levels it while it is being laid) was both too cold and not set properly. The former would cause the finished surface to be rough, and the latter could cause the driveway to be higher on one side than on the other.[9] After the asphalt cooled off even slightly, it would have been impossible to remove the resulting seam between the two levels. Mr. Carbaugh hypothesized that, having noticed that the amount of asphalt applied on its first pass was too thin, the Respondent may have tried to correct the problem by raising the screed too much for the next pass. The Respondent then apparently tried to roll the seam out, because the asphalt in that area was beginning to turn white—a sign of being rolled too much, which reduces its strength.

Both the unevenness and cracking at the edges of the driveway could have been avoided, in Mr. Carbaugh's opinion, if the Respondent had had an additional crew member (that is, as part of a four-person crew instead of a three-person crew) to compact the seam as the asphalt was

[9] The difference in height at the seam varies, but is between a quarter and a third of an inch, which Mr. Carbaugh characterized as "substantial."

laid. In his experience, a job like the Claimant's typically requires a four-person crew. Mr. Carbaugh testified that the half-inch layer of asphalt that the Respondent applied compounded the other problems because aggregate must be compacted before it cools and the thinner the layer, the less time there is to do this properly. In his opinion, the minimum thickness that can be effectively compacted is one inch.

Overall, Mr. Carbaugh opined that the Respondent's work on the Claimant's driveway was one of the worst jobs that he has seen in the years that he has been in the asphalt business. He characterized it as both unworkmanlike and inadequate due to the insufficient amount of compacted overlay, the rough and uneven surface, and the lack of a "tie-in"[10] between the new layer of asphalt and the concrete apron of the garage. When asked about the cost to complete the necessary corrective work on the Claimant's driveway, Mr. Carbaugh estimated that most contractors would charge between $3,000.00 and $3,500.00. In his view, therefore, the $2,300.00 estimate from Jeter Paving is much less than what it would cost to have another company do the repairs.

Based on the uncontradicted testimony summarized above, I find that the work performed by the Respondent failed to meet industry standards in several material respects, and thus, was both unworkmanlike and inadequate. I conclude, therefore, that the Claimant is eligible for compensation from the Fund.

I now turn to the amount of the award, if any, to which the Claimant is entitled. 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). MHIC's regulations provide three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3).

[10] As described, this involves cutting out some of the existing asphalt to allow the new layer to be no higher than the abutting concrete. As noted above, the Respondent did not cut out any of the existing asphalt.

In the instant case, the MHIC recommended that I apply the following formula that, essentially, reimburses of the cost of replacement:

> [T]he 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.

COMAR 09.08.03.03B(3)(c). As the Respondent contractor has done some work under the Contract, I agree that the above formula should be utilized as it is the most appropriate measure of the Claimant's actual loss.

Specifically, the Business Regulation Article defines an "actual loss" for the purposes of reimbursement as "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 (2015) (emphasis added). According to the Claimant's bid from Jeter Paving, the actual cost of repair or replacement of the Respondent's work on his driveway is $2.300.00.[11]

The Claimant paid $3000.00 to have his driveway overlaid, and he should not be required to expend additional funds to get it done competently. On the other hand, although much of the Respondent's overlay may need to be removed in order to correct the problems discussed above, there is no evidence that *all* of that overlay must be removed. While I sympathize with the Complainant's desire to receive a full refund of the money he paid to the Respondent, I cannot find that the Claimant has received or will receive *no* benefit from the Respondent's work. Under such circumstances, an award of $2300.00 in actual repair or replacement costs is the most equitable result.

[11] Clmt. Ex. 2. Mr. Carbaugh estimated that the current market price of the necessary corrective work is roughly $3000-$3500, and I have no reason to doubt his testimony. Similarly, I have no reason to doubt the *bona fides* of Jeter Paving's bid, however, and based on the record before me $2300.00 is the best estimate of the Claimant's actual cost of repair or replacement in this case.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss as a result of the Respondent's acts and omissions. I further conclude that the amount of that actual and compensable loss is $2,300.00. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); 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 $2,300.00; 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;[12] and

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

Signature on File

January 18, 2017
Date Decision Issued

Marina Lolley Sabett
Administrative Law Judge

MLS/emh
#165984

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

PROPOSED ORDER

WHEREFORE, this 8th day of March, 2017, 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

Panel B

MARYLAND HOME IMPROVEMENT COMMISSION