

IN THE MATTER OF THE CLAIM	* BEFORE WILLIS GUNTHER BAKER,
OF BARBARA FLOYD,	* 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 BRANDON GILK,	*
T/A TRINITY ASPHALT PAVING,	* OAH No.: LABOR-HIC-02-23-32449
RESPONDENT	* MHIC No.: 23 (75) 1330

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On July 26, 2023, Barbara Floyd (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)¹ Guaranty Fund (Fund) for reimbursement of \$13,060.00 for actual losses allegedly suffered as a result of a home improvement contract with Brandon Gilk, trading as Trinity Asphalt Paving (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2023).² On December 15, 2023, the MHIC issued a Hearing

¹ The MHIC is under the jurisdiction of the Department of Labor (Department).

² Unless otherwise noted, all references to the Business Regulation Article are to the 2015 Volume of the Maryland Annotated Code.

Order on the Claim. On December 15, 2023, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On July 5, 2024, I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. Jonathan Phillips, Assistant Attorney General, Department, represented the Fund. The Claimant was self-represented. The Respondent failed to appear.

After waiting fifteen minutes for the Respondent or the Respondent's representative to appear, I proceeded with the hearing. Applicable law permits me to proceed with a hearing in a party's absence if that party fails to attend after receiving proper notice. Code of Maryland Regulations (COMAR) 28.02.01.23A. On April 29, 2024, the OAH provided a Notice of Hearing (Notice) to the Respondent by certified mail and first-class mail. Bus. Reg §§ 8-312(d), 8-407(a); COMAR 28.02.01.05C(1). The Notice stated that a hearing was scheduled for July 5, 2024, at 9:30 a.m., at the OAH in Hunt Valley, Maryland. COMAR 09.08.03.03A(2). The Notice further advised the Respondent that failure to attend the hearing might result in "a decision against you."

The certified Notice was returned to the OAH with the notation "Attempted-Not Known." The first-class mail was not returned. The Respondent did not notify the OAH of any change of mailing address. COMAR 28.02.01.03E. During the fifteen minute wait period required before proceeding, Mr. Phillips called the MHIC and confirmed that the mailing address used by the OAH on April 29, 2024 was the address of record on file at the MHIC.³

Furthermore, this matter was originally scheduled for hearing on March 21, 2024 and the Respondent clearly received the original notice at the same address because he sent an email

³ The MHIC also noted that the Respondent changed his address with the MHIC on May 20, 2024, but that was a month after the Notice was mailed. The new mailing address for the Respondent is 47 Asbury Lane, Apt. 7, Falling Waters, West Virginia 25419.

requesting a postponement.⁴ I determined that the Respondent received proper notice, and I proceeded to hear the captioned matter. COMAR 28.02.01.05.

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 & Supp. 2023); 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 the compensable loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits offered by the Claimant:

- Clmt. Ex. 1 - Contract between the parties for resurfacing of existing tennis court, October 14, 2021
- Clmt. Ex. 2 - Payments to the Respondent, check #1150 on October 21, 2021; check #167 on October 22, 2021; check #168 on November 17, 2021
- Clmt. Ex. 3 - Letter from the Claimant's attorney to the Respondent, January 4, 2023
- Clmt. Ex. 4 - Complaint to the MHIC, April 20, 2023
- Clmt. Ex. 5 - MHIC Order to respond to the Respondent, April 27, 2023
- Clmt. Ex. 6 - MHIC Claim form with repair estimate and summary of the claim, July 29, 2023
- Clmt. Ex. 7 - Letter to Judge William Burnham from the Claimant regarding postponement request for incorrect address on hearing notice, March 26, 2024
- Clmt. Ex. 8 - Text messages between the parties, April 20, 2022 to December 16, 2023

⁴ The Respondent failed to provide documentation of his conflict so his request was not granted, but the case was ultimately postponed because the Claimant did not receive notice due to a typographical error in her address.

Clmt. Ex. 9 - Four photographs of the tennis court after the Respondent did work, undated

I admitted the following exhibits offered by the Fund:

Fund Ex. 1 - Notices of Hearing, April 29, 2024 and January 24, 2024

Fund Ex. 2 - MHIC Hearing Order, December 15, 2023

Fund Ex. 3 - Home Improvement Claim Form, received July 26, 2023

Fund Ex. 4 - Respondent's Licensing History, printed July 1, 2024

The Respondent was not present and did not submit any exhibits.

Testimony

The Claimant testified and presented John Haynes as a witness.

The Fund did not present 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 5676975.
2. On October 14, 2021, the Claimant and the Respondent entered into a contract to resurface a tennis court on the Claimant's property (Contract).
3. The Claimant is the trustee of a land preservation trust that owns the property at Jones Road in Woodbine, Maryland, and it is her only residence. The Claimant is responsible for all expenses and maintenance involving the property.
4. The Contract included cleaning of entire area; saw cut and removal of cracks and faulty areas prior to paving; recompact of all base and remaining areas; install hot mix asphalt to areas when asphalt removed and roll to compaction; skim coat low areas and roll to compaction to level the court; Court to be paved with 2" of tennis court mix asphalt and rolled to compaction.

Because the paving needed to cure, completion was scheduled for spring 2022 for color coating and restripe, with final payment of \$7,000.00 due at that time.

5. The original agreed-upon Contract price was \$25,000.00.
6. The Claimant paid the Respondent an \$8,000.00 deposit on October 14, 2021; \$10,000.00 by check #1150 on October 21, 2021; and \$2,500.00 by check #168 on November 17, 2021, for a total of \$20,500.00.
7. The Claimant reimbursed her friend Johns Haynes \$8,000.00 by check #167 on October 22, 2021, for a contribution he made on her behalf to the project.
8. The November 17, 2021 payment was not in the contract but was requested by the Respondent in order to purchase the painting materials that he needed for the spring completion, so the Claimant paid him \$2,500.00.
9. The Claimant was out of town after November 19, 2021 and did not return until late March 2022.
10. In April 2022, the Claimant texted the Respondent to inquire when he would return to finish the work.⁵
11. In July, the Respondent contacted the Claimant to advise that he was finishing another big job and he would contact her in a few weeks. After a few other texts, the Respondent advised he would come back on August 8, 2022, but he did not.
12. The Respondent and the Claimant communicated by text over August and September 2022, but the Respondent never returned, excusing his behavior due to the weather, a funeral for a relative, and his own health issues.

⁵ Findings of Fact 10-13 are derived from Clmt. Ex. 8 and the Claimant's testimony.

13. The Claimant continued to contact the Respondent in October, November, and December 2022, but received no response.

14. On January 4, 2023, the Claimant's attorney contacted the Respondent and requested reimbursement of the \$2,500.00 since no work had been done related to that payment. (Clmt. Ex. 3).

15. On April 20, 2023, the Claimant filed a complaint with the MHIC. The Respondent did not respond to the complaint. (Clmt. Ex. 4).

16. On July 19, 2023, the Respondent received an estimate from Metropolitan Construction (Metro) to fix the Respondent's work at a cost of \$17,560.00. (Clmt. Ex. 6).

17. Metro advised the Claimant that to do the job correctly, they would need to completely remove the Claimant's work because the Respondent used road grade asphalt, not tennis court asphalt. However, to remove the Respondent's work and start over would come at a much greater cost than the Claimant could afford.

18. On July 20, 2023, the Claimant filed a claim with the Fund. (Clmt. Ex. 6).

19. The Respondent left the Claimant's tennis court with an uneven surface that does not drain and causes water to pool. The tennis court is unusable in its current condition.

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); 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 Cnty. 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) (Supp. 2023); *see also* COMAR 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. For the following reasons, I find that the Claimant has proven eligibility for compensation.

The Claimant grew up on the property where she currently resides. She has played tennis on the court there her whole life, but in recent years the court fell into disrepair and needed resurfacing. The Claimant hired the Respondent to restore the tennis court. The Claimant recalled that the Respondent was very friendly, a good talker, and indicated he had the requisite experience with tennis courts, so the parties entered into the Contract. The initial work began in fall 2021, with completion set for spring 2022 because the asphalt needed to set before the court could be finished. Unfortunately, the Respondent was paid \$20,500.00 but never returned to finish the work. And the work that was completed was uneven, pooled water, and did not drain properly. According to the Claimant’s witness, Mr. Haynes, Metro informed him that the asphalt used by the Respondent was street grade, not tennis court grade.

Both the Claimant and Mr. Haynes testified credibly about their experiences with the Respondent, the condition of the court after the Respondent abandoned the job, and the opinions of Metro to provide a usable tennis court after what was left by the Respondent. The Claimant was very emotional when she described what the tennis court has meant to her family and how important it was to restore it. While she did not produce a copy of the check for the deposit, the Claimant noted that the Respondent signed off on her copy of the Contract every time a payment

was made. The initial deposit was made by Mr. Hayes and the Claimant produced evidence of a repayment to Mr. Hayes in the same amount. Based on the text messages provide by the Claimant, it is clear the three payments totaling \$20,500.00 were made to the Respondent.

The Respondent failed to appear so he did not produce any evidence to counter the Claimant's case. It appears that the Respondent is no longer licensed with the MHIC and no longer lives in Maryland.

The Respondent was a licensed home improvement contractor at the time the Respondent entered into the Contract with the Claimant; therefore, the Claimant has the right to file a claim against 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) (2015 & Supp. 2023). 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) (Supp. 2023). The parties did not enter into a valid agreement to submit their disputes to arbitration. *Id.* §§ 8-405(c), 8-408(b)(3) (2015 & Supp. 2023). 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) (Supp. 2023). The Claimant did not unreasonably reject good faith efforts by the Respondent to resolve the claim, because the Respondent made no such effort. *Id.* § 8-405(d) (Supp. 2023).

The Respondent performed unworkmanlike, inadequate, or incomplete home improvements. 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) (Supp. 2023); 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 intends to retain other contractors to complete or 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).

The Fund argued that the value of the Respondent's work was \$0 since Metro told Mr. Hanley that the only way to properly fix the work would be to completely tear out what the Respondent did and start new.⁶ However, the estimate provided by Metro envisioned keeping the Respondent's work, leveling it, and adding layers above for a cost of \$17,560.00. There was no expert testimony or estimate for a complete "do over."

⁶ I also note that the Claim filed by the Claimant was only for \$13,060.00.

In this case the formula for determining the actual loss is:

Amount paid to Respondent under the Contract	\$20,500.00
Amount estimated for others to complete the Contract	+ \$17,560.00
TOTAL PAID + AMOUNT to CORRECT	\$38,060.00
Minus the original Contract price	- \$25,000.00
ACTUAL LOSS	\$13,060.00

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.⁷ Bus. Reg. § 8-405(e)(1), (5) (Supp. 2023); COMAR 09.08.03.03B(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 their actual loss of \$13,060.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$13,060.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2023); COMAR 09.08.03.03B(3)(c). I further conclude that the Claimant is entitled to recover that amount from the Fund. Bus. Reg. § 8-405(e)(1), (5) (Supp. 2023); COMAR 09.08.03.03B(4).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$13,060.00; and

⁷ On or after July 1, 2022, the increased cap is applicable to any claim 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").

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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;⁸ and

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

September 24, 2024
Date Decision Issued

Willis Gunther Baker

Willis Gunther Baker
Administrative Law Judge

WGB/dlm
#214042

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

PROPOSED ORDER

WHEREFORE, this 24th day of February, 2025, 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.

Chandler Loudon

Chandler Loudon

Panel B

**MARYLAND HOME IMPROVEMENT
COMMISSION**