

IN THE MATTER OF THE CLAIM	* BEFORE MICHAEL J. JACKO,
OF MARK BRAISTED,	* 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-02-24-08966
RESPONDENT	* MHIC No.: 23 (75) 972

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On September 16, 2023, Mark Braisted (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)¹ Guaranty Fund (Fund) for reimbursement of \$20,000.00 for actual losses allegedly suffered as a result of a home improvement contract with Brandon Gilk, trading as Trinity Asphalt Paving (Respondent).² On March 29, 2024, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing. On April 1, 2024, the MHIC issued its Hearing Order on the Claim.³

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

² Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2023). Unless otherwise noted, all references to the Business Regulation Article are to the 2015 Volume of the Maryland Annotated Code.

³ It is unclear from the record why the hearing order is dated after the matter was forwarded to the OAH.

On July 10, 2024, I held a hearing at the OAH in Hunt Valley, Maryland.⁴ Jonathan Phillips, Assistant Attorney General, Department of Labor (Department), represented the Fund. The Claimant was self-represented.

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.⁵ On April 16, 2024, the OAH provided a Notice of Hearing (Notice) to the Respondent by certified mail and first-class mail.⁶ The Notice stated that a hearing was scheduled for July 10, 2024, at 9:30 a.m., at the OAH.⁷ The Notice further advised the Respondent that failure to attend the hearing might result in "a decision against you."

On May 11, 2024 the United States Postal Service returned to the OAH the copy of the Notice sent via certified mail with the notation "unclaimed / unable to forward." The Postal Service did not return the Notice sent via first class mail. The Respondent did not notify the OAH of any change of mailing address.⁸ The Department advised that the Respondent changed his address on file with the MHIC on or about May 22, 2024,⁹ thirty-six days after the Notice was sent by regular mail and eleven days after the copy sent via certified mail was returned to the OAH. I determined that the Respondent received proper notice, and I proceeded to hear the above-captioned matter.¹⁰

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the OAH govern procedure.¹¹

⁴ Bus. Reg. §§ 8-407(a), 8-312.

⁵ Code of Maryland Regulations (COMAR) 28.02.01.23A.

⁶ Bus. Reg. §§ 8-312(d), 8-407(a); COMAR 28.02.01.05C(1).

⁷ COMAR 09.08.03.03A(2).

⁸ COMAR 28.02.01.03E.

⁹ See Bus. Reg. § 8-309 ("Within 10 days, a licensee shall notify the [MHIC] of a change of ... address.")

¹⁰ COMAR 28.02.01.05.

¹¹ 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 Appellant and Respondent, December 20, 2021
- Clmt. Ex. 2 - Checks from Appellant to Respondent, December 21, 2021, and January 14, 2022
- Clmt. Ex. 3 - Text messages between Appellant and Respondent, November 11 to 30, 2022¹²
- Clmt. Ex. 4 - Photographs of the Appellant's driveway, January 2023
- Clmt. Ex. 5 - Notes of MHIC investigator Jennifer Grimes, April 28, 2023
- Clmt. Ex. 6 - Invoice from J & Son Paving, LLC, July 17, 2023

I admitted the following exhibits offered by the Fund:

- Fund Ex. 1 - Notice of Hearing, April 16, 2024
- Fund Ex. 2 - MHIC Hearing Order, April 1, 2024
- Fund Ex. 3 - Home Improvement Claim Form, August 31, 2023
- Fund Ex. 4 - Respondent's MHIC Registration, generated July 1, 2024

Testimony

The Claimant testified and presented the following witnesses: Roger Stone and Doug O'Rourke.

The Fund did not present any witnesses.

¹² The caption on the exhibit indicates that the communications were from November of 2023, but the Appellant clarified in his testimony that he erroneously typed the caption and that these messages were actually sent in November of 2022.

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. The Claimant is one of six homeowners (Affected Homeowners) who, by virtue of the deeds to their respective properties, have joint responsibility for the maintenance of a long, shared driveway.
3. In 2021, the other Affected Homeowners authorized the Claimant to identify a contractor to repave the shared driveway and agreed to share the cost of the project.
4. On December 20, 2021, the Claimant and the Respondent entered into a contract to resurface the driveway by cleaning and edging the existing surface, removing loose and broken asphalt, building up and compacting the base, adding 2.5 inches of topping, and widening the existing driveway by two feet (Contract).¹³
5. The original Contract recorded an agreed-upon price of \$30,000.00, to be paid in three installments.
6. The Contract stated that work would begin on December 21, 2021. It did not specify when the job was to be completed. The Respondent gave some verbal indication that the entire job would require approximately three days of work.¹⁴
7. On December 21, 2021, the Claimant paid the Respondent \$10,000.00.
8. On a date unclear from the record, the Respondent spread a portion of the gravel necessary to make up the compacted base for the project.

¹³ Because the Claimant entered into the Contract with the Respondent, he is a proper party to this case. See Bus. Reg. §§ 8-101(k), 8-405(a).

¹⁴ It is unclear from the record whether the Respondent indicated that those would be consecutive days or, if not, whether he indicated a date by which all work would be complete.

9. On January 14, 2022, the Claimant paid the Respondent an additional \$10,000.00 pursuant to the Contract.

10. By November 2022, the Respondent had still not performed any additional work under the Contract, despite the Claimant's attempts to resolve the matter.

11. On November 11 and 30, 2022, the Respondent acknowledged by text messages that he still had not fulfilled his contractual obligations and that it "should have been done a long time ago," and he professed hope that he would "have this resolved by monday [sic]," December 5, 2022.¹⁵

12. By January 2023, the gravel that had been installed in January 2022 had eroded from the driveway.

13. After the Respondent had still not responded to complete the job, the Claimant contacted the MHIC about his dispute on a date not specified in the record. In response, the MHIC assigned Jennifer Grimes to investigate the matter.

14. On or about April 27, 2023, Ms. Grimes met with the Claimant and the Respondent at the Claimant's property. On Ms. Grimes' urging, the Claimant gave the Respondent until May 2023 to fulfill his obligations under the Contract.

15. The Respondent never returned to the project to finish spreading the gravel base or to apply the asphalt topcoat.

16. On August 31, 2023, the Claimant submitted his claim to the MHIC.

17. In July 2023, the Claimant entered into a new contract with J & Son Paving, LLC, (Remedial Contract) to perform much of the work that had been subject of the Contract with the Respondent. Like the original Contract, the Remedial Contract provided for building up a compacted gravel base as needed, applying two-and-a-half inches of asphalt on top, and edging

¹⁵ Clmt. Ex. 3.

the resulting driveway. However, the Remedial Contract did not contemplate widening the existing driveway. There were also portions of the original driveway that were to be resurfaced under the original Contract, but, because they were still in usable condition, were not resurfaced under the Remedial Contract.

18. The cost of the Remedial Contract was \$28,800.00.

19. Work under the Remedial Contract was completed in July 2023.

DISCUSSION

The Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence.¹⁶ 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.¹⁷

An owner may recover compensation from the Fund “for an actual loss that results from an act or omission by a licensed contractor.”¹⁸ “[A]ctual loss’ means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.”¹⁹ An owner includes “a homeowner, tenant, or other person who buys, contracts for, orders, or is entitled to a home improvement.”²⁰ For the following reasons, I find that the Claimant has proven eligibility for compensation.

The Claimant meets the statutory definition of “owner” in that he is a homeowner who contracted for a home improvement.²¹ By statute, certain owners are excluded from recovering from the Fund altogether. In this case, there are no such statutory impediments to the Claimant’s

¹⁶ Bus. Reg. § 8-407(e)(1); State Gov’t § 10-217 (2021); COMAR 09.08.03.03A(3).

¹⁷ *Coleman v. Anne Arundel Cnty. Police Dep’t*, 369 Md. 108, 125 n.16 (2002).

¹⁸ 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.”).

¹⁹ Bus. Reg. § 8-401.

²⁰ Bus. Reg. § 8-101(k).

²¹ *See id.* While the Contract was intended to benefit all of the Affected Homeowners, and while the Claimant entered into it with the rest of their input and financial assistance, their involvement does not affect my analysis.

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.²² The Claimant resides at the property that is the subject of the claim.²³ The parties did not enter into a valid agreement to submit their disputes to arbitration.²⁴ The Claimant is not a relative, employee, officer, or partner of the Respondent, nor is he related to any employee, officer, or partner of the Respondent.²⁵

The Respondent performed inadequate or incomplete home improvements. When much of the driveway providing access to the properties of the Affected Homeowners had fallen into disrepair in late 2021, the Claimant identified a contractor to repave it and solicited funds from his neighbors to help cover the cost of the project. On December 20, 2021, the Respondent agreed, for a sum of \$30,000.00, to install a compacted gravel base on top of the dilapidated portions of the driveway, to widen the existing driveway by two feet, and to cover the entire span with a two-and-a-half-inch-thick layer of new asphalt. The Respondent expected the project to take approximately three days. The Claimant provided the Respondent an initial downpayment of \$10,000.00 on December 21, 2021. At a date unclear from the record, the Respondent began work by installing a portion of the gravel base. On January 14, 2022, the Claimant paid the Respondent an additional \$10,000.00, which was due prior to commencement of laying the asphalt topcoat. The Respondent never returned to the property to perform any further work, and by November 2022, the Respondent acknowledged that he had not fulfilled the Contract.²⁶

²² *Id.* §§ 8-405(g), 8-408(b)(1) (2015 & Supp. 2023).

²³ *Id.* § 8-405(f)(2) (Supp. 2023).

²⁴ *Id.* §§ 8-405(c), 8-408(b)(3) (2015 & Supp. 2023).

²⁵ *Id.* § 8-405(f)(1) (Supp. 2023).

²⁶ By text message, the Respondent conceded on November 30, 2022, that work “should have been done a long time ago” and indicated that he was still “trying to get a crew together” to do it. Clmt. Ex. 3.

The Claimant did not unreasonably reject good faith efforts by the Respondent to resolve the claim.²⁷ The record shows that in April 2023, the Claimant gave the Respondent additional time to fulfill his obligations under the Contract, but the Respondent failed to do so.

I 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.²⁸ The MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work:

- (a) If the contractor abandoned the contract without doing any work, the claimant's actual loss shall be the amount which the claimant paid to the contractor under the contract.
- (b) If the contractor did work according to the contract and the claimant is not soliciting another contractor to complete the contract, the claimant's actual loss shall be the amount which the claimant paid to the original contractor less the value of any materials or services provided by the contractor.
- (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 measurement accordingly.²⁹

However, when the particular circumstances of a case require a unique measurement of actual loss, the regulations allow for that as well.³⁰ In this case, the Respondent did perform some work under the Contract, and the Claimant did solicit another contractor to complete the contract. However, formula (c), above, fails to adequately capture the facts of this case.

²⁷ Bus. Reg. § 8-405(d) (Supp. 2023).

²⁸ Bus. Reg. § 8-405(e)(3) (Supp. 2023); COMAR 09.08.03.03B(1).

²⁹ COMAR 09.08.03.03B(3).

³⁰ *Id.*

Of the work contemplated by the Contract, the Respondent only laid a portion of the required compacted gravel base on the driveway. Without an asphalt topcoat to hold it in place, the installed gravel wore away over the following year. In July 2023, the Claimant entered into the Remedial Contract with J & Son Paving, LLC, to perform the most critical portion of the work that had been subject of the Contract with the Respondent.³¹ The cost for the Contract was \$30,000.00 and the cost for the Remedial Contract was \$28,800.00. However, the \$1,200.00 difference in price between these is not the result of value conveyed by the Respondent. In fact, on April 27, 2023, the Respondent acknowledged to Jennifer Grimes, the MHIC investigator, that of the initial work performed under the Contract, no value remained.³² Rather, the difference in price between the two contracts is because the scope of the Remedial Contract was narrower than that of the original Contract (as was the driveway itself). Under the Remedial Contract, several hundred feet of driveway that was still in usable condition was not resurfaced, and none of the driveway was widened. Thus, at the time when they entered into the Remedial Contract, the Claimant was in the same position he was at the time he entered into the Contract with the Respondent, and upon completion of the Remedial Contract, he was still not in the same position in which he would have been had the Respondent fulfilled his obligations under the Contract.

Formula (c) normally applies to circumstances where a contractor has done some work according to the contract, but a homeowner retains another contractor to complete the contract.³³ On its face, that premise describes the posture of the Claimant and Respondent. However, this case is distinguishable in that the Claimant here received nothing of value from the Respondent.

³¹ The Claimant testified that the repairs under the Remedial Contract had become necessary because the driveway had deteriorated to the point that the Affected Homeowners were risking damage to their vehicles due to the presence of potholes.

³² Clmt. Ex. 5.

³³ COMAR 09.08.03.03B(3)(c).

Therefore, I find formula (c) to be inapplicable. Instead, even though the Respondent did perform some work under the Contract, I find this case to more closely resemble those in which a contractor abandons a project without performing any work, which is the premise for formula (a).³⁴ For that reason, it is appropriate here to measure the Claimant's actual loss by simply identifying the total amount he paid to the Respondent.³⁵ Accordingly, I find the Claimant's actual loss to total \$20,000.00.

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.³⁶ In this case, the Claimant's actual loss is equal to the amount paid to the Respondent and less than \$30,000.00. Therefore, the Claimant is entitled to recover his actual loss of \$20,000.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$20,000.00 as a result of the Respondent's acts or omissions.³⁷ I further conclude that the Claimant is entitled to recover that amount from the Fund.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$20,000.00; and

³⁴ COMAR 09.08.03.03B(3)(a).

³⁵ Whether equating actual loss with the total amount paid to the contractor makes this an application of formula (a) or a "unique measurement" of actual loss, the result is the same.

³⁶ Bus. Reg. § 8-405(e)(1), (5) (Supp. 2023); COMAR 09.08.03.03B(4). 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").

³⁷ Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2023); COMAR 09.08.03.03B(3).

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;³⁸ and

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

August 9, 2024
Date Decision Issued



Michael J. Jacko,
Administrative Law Judge

MJJ/dlm
#212845

³⁸ 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 Louden

Chandler Louden

Panel B

**MARYLAND HOME IMPROVEMENT
COMMISSION**