

IN THE MATTER OF THE CLAIM	* BEFORE LORRAINE E. FRASER,
OF BETH M. FABEY,	* 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 JOSEPH MARINI,	* OAH No.: DLR-HIC-02-15-11003
T/A JOSEPH MARINI ASPHALT	* MHIC No.: 14 (90) 222
PAVING,	*
RESPONDENT	*

* * * * *

PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
PROPOSED FINDINGS OF FACT
DISCUSSION
PROPOSED CONCLUSION OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On March 7, 2014, Beth M. Fabey (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$16,650.00 in alleged actual losses suffered as a result of a home improvement contract with Joseph Marini t/a Joseph Marini Asphalt Paving (Respondent).

I held a hearing on June 22, 2015 at the St. Mary's County Library in Leonardtown, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). The Claimant represented

herself. The Respondent represented himself. Eric B. London, 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 Proposal, 5/17/13
- Cl. Ex. 2 Account Statement, 6/24/13
- Cl. Ex. 3 Letter to the Respondent from the Claimant, 6/26/13
- Cl. Ex. 4 6 photographs of driveway adjoining carport, taken between 5/31/13- 6/26/13
- Cl. Ex. 5 3 photographs of water on driveway, taken 5/2/13
- Cl. Ex. 6 6 photographs of curbs along driveway, taken 5/2/13
- Cl. Ex. 7 18 photographs of curbs along driveway, taken 5/2/13
- Cl. Ex. 8 Certified mail receipt and tracking, 6/26/13
- Cl. Ex. 9 The Claimant's handwritten note, 7/25/13
- Cl. Ex. 10 Consumer Protection Division Complaint Form, 7/24/13
- Cl. Ex. 11 Letter to the Claimant from the Consumer Protection Division, 8/1/13

- Cl. Ex. 12 HIC Complaint Form, 8/27/13
- Cl. Ex. 13 Proposal Beltway Paving Company, 2/20/14
- Cl. Ex. 14 Licensing information for Timothy Moore, Beltway Paving Company, 5/1/15
- Cl. Ex. 15 Claimant's note, 10/8/13
- Cl. Ex. 16 Letter to the Respondent from the HIC, 9/9/13

The Respondent did not offer any exhibits into evidence.

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. 1 Notice of Hearing, 4/20/15
- Fund Ex. 2 Hearing Order, 3/12/15
- Fund Ex. 3 The Respondent's licensing history, 6/19/15
- Fund Ex. 4 Home Improvement Claim Form, 3/7/14
- Fund Ex. 5 Letter to the Claimant from the HIC, 3/12/15

Testimony

The Claimant testified and presented the testimony of William Fabey, her son.

The Respondent testified.

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 01 7363.
2. On May 17, 2013, the Claimant and the Respondent entered into a contract to lay a new two inch layer of asphalt on her driveway and curbs, and hand tamp the edges, curbs, and spillways.
3. The original agreed-upon contract price was \$5,600.00.

4. On May 31, 2013, the Respondent performed the work on the Claimant's driveway.
5. On May 31, 2013, the Claimant paid the Respondent \$5,600.00.
6. The new layer of asphalt laid by the Respondent on the curbs has loose aggregate in places and is crooked in places.
7. When he laid the new layer of asphalt, the Respondent did not raise the concrete splash block under the downspout on the front of the house or otherwise direct water from the downspout to drain away from the home. As a result, water can pond at the base of the downspout.
8. The estimated cost to correct the problems with the curbs is \$800.00. The estimated cost to direct water away from the downspout with an asphalt or concrete curb is \$50.00.
9. The Claimant's actual loss is \$850.00.

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) (2015). *See also* COMAR 09.08.03.03B(2) ("actual losses . . . incurred as a result of misconduct by a 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). 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 with the Claimant. The Respondent performed unworkmanlike, inadequate or incomplete home improvements to the Claimant's driveway. Specifically, the asphalt curbs have

loose aggregate in places and are crooked in places. In addition, the Respondent did not raise the concrete splash block under the downspout on the front of the house or otherwise direct water from the downspout to drain away from the home. As a result, water can pond at the base of the downspout.

The Claimant claimed that water was flowing toward the carport and house and was ponding on the driveway. However, her photographs do not show water in the carport or flowing toward the house. Her photographs show some water ponding on the driveway and at the base of the downspout. However, she did not offer any expert testimony or a written estimate from a licensed contractor to show that the ponding on the driveway constituted unworkmanlike paving. She also did not demonstrate how deep the standing water was or how long it remained after a rain event.

Moreover, the estimate the Claimant offered to show how much repairs would cost was for substantially more work than she contracted for with the Respondent. The Claimant's contract with the Respondent stated that he would put a layer of new hot asphalt over the existing curbs and hand tamp. The contract explicitly stated: "DO NOT REMOVE THE CURBS." Cl. Ex. 1. The contract also stated that the Respondent would lay two inches of hot asphalt over the existing asphalt and roll to compaction. In contrast, the estimate from Beltway Paving calls for removing of 2,200 square feet of asphalt, regrading the existing subbase, installing three inches of hot asphalt, removing the existing curbs, and installing new six inch curbs. Further, the estimated cost from Beltway Paving is \$16,650.00, far in excess of the \$5,600.00 the Claimant paid the Respondent.

The Respondent testified, in response to the Fund's questions, that it would cost approximately \$800.00 to repair the loose aggregate and straighten the curbs. He also testified that it would cost approximately \$50.00 to direct water from the downspout away from the

home. The Claimant did not offer any evidence itemizing the cost to repair the curbs and downspout drainage; her evidence was the cost of replacing the curbs and portions of the driveway. In the absence of any other evidence regarding the cost of the repairs to the curbs and downspout drainage, I accept the Respondent's estimates. Further, I note that the portion of Beltway Paving's estimate regarding the curbs is for \$8,100.00, which also exceeds the \$5,600.00 the Claimant paid the Respondent.

Thus, I find that the Claimant is eligible for compensation from the Fund for the cost of repairing the Respondent's work.

Having found eligibility for compensation 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). The following formula offers an appropriate measurement to determine the amount of actual loss 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's actual loss is calculated as follows:

Amount the Claimant paid to the Respondent	\$5,600.00
Amount to repair the work	<u>+\$850.00</u>
	\$6,450.00
Original contract price	<u>-\$5,600.00</u>
Claimant's actual loss	\$850.00

Pursuant to the Business Regulation Article, the maximum recovery from the Fund is limited to the lesser of \$20,000.00 or the amount paid by or on behalf of the Claimant to the Respondent. Bus. Reg. § 8-405(e)(1), (5) (2015). In other words, in this case, the Claimant's potential recovery was limited to the \$5,600.00 she paid the Respondent. The actual loss computed above is \$850.00, which is less than the \$5,600.00 the Claimant paid to the Respondent. Accordingly, the Claimant is entitled to reimbursement of \$850.00. Bus. Reg. § 8-405(e)(5) (2015).

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$850.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015).

RECOMMENDED ORDER

I RECOMMEND that the Maryland Home Improvement Commission:

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$850.00; 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 (10%) as set by the Maryland Home Improvement Commission;¹ and

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

ORDER that the records and publications of the Maryland Home Improvement

Commission reflect this decision.

Signature on File

September 18, 2015
Date Decision Issued

Lorraine E. Fraser
Administrative Law Judge

LEF/dlm
#158182

PROPOSED ORDER

WHEREFORE, this 27th day of October, 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.

Marilyn Jumalon

***Marilyn Jumalon
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION