

IN THE MATTER OF THE CLAIM	*	BEFORE MICHAEL J. WALLACE,
OF MARY AND MICHAEL	*	AN ADMINISTRATIVE LAW JUDGE
WINPISINGER,	*	OF THE MARYLAND OFFICE
CLAIMANTS	*	OF ADMINISTRATIVE HEARINGS
AGAINST THE MARYLAND HOME	*	
IMPROVEMENT GUARANTY FUND	*	
FOR THE ALLEGED ACTS OR	*	
OMISSIONS OF JONATHAN COOK,	*	OAH No.: DLR-HIC-02-15-28731
T/A LOW MAINTENANCE	*	MHIC No.: 15(90)593
LANDSCAPING	*	
RESPONDENT	*	

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On June 4, 2015, Mary and Michael Winpisinger (Claimants) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) in the amount of \$16,900.00 for reimbursement for alleged actual losses suffered as a result of a home improvement contract with Jonathan Cook, trading as Low Maintenance Landscaping (Respondent).

I convened a hearing on February 10, 2016, at the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015).¹ The Claimants were present and represented themselves. The Respondent failed to appear for the hearing. Kris King, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR), MHIC, represented the Fund.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the DLLR, 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), Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02, and 28.02.01.

ISSUES

1. Did the Claimants 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 behalf of the Claimants:

- Cl. Ex. 1 Original contract between Claimants and Respondent, dated March 12, 2014
- Cl. Ex. 2 Flyer of Low Maintenance Landscaping
- Cl. Ex. 3 Copies of six checks issued by Claimants to Respondent between March 13, 2014 and May 7, 2014 in the total amount of \$21,500.00
- Cl. Ex. 4 Email to Respondent from Claimants, dated October 28, 2014

¹ Unless otherwise noted, all citations of the Business Regulation Article hereinafter refer to the 2015 Replacement Volume.

- Cl. Ex. 5 Complaint by Claimants, dated November 2014
- Cl. Ex. 6 Amended complaint by Claimants, dated May 28, 2015
- Cl. Ex. 7 Proposal of Oaklawn Landscaping in the amount of \$16,900.00, dated May 26, 2016
- Cl. Ex. 8 Series of photographs of the Claimants' front porch, sidewalk and driveway

No documents were submitted on behalf of the Respondent

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. 1 Transmittal letter from the MHIC, dated January 20, 2016 with attached Notice of Hearing, dated December 20, 2015, and Hearing Order, dated August 18, 2015 with certified mail receipts
- Fund Ex. 2 Hearing Order, dated August 18, 2015
- Fund Ex. 3 The Respondent's licensing history, dated February 8, 2016
- Fund Ex. 4 Affidavit of Thomas Marr, dated February 3, 2016
- Fund Ex. 5 Claim Form, filed June 4, 2015
- Fund Ex. 6 Claim Transmittal Letter from DLLR to Respondent, dated June 5, 2015

Testimony

The Claimants testified on their own behalf. There was no testimony presented on behalf of the Respondent or the Guaranty Fund.

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 01-20233. His license expired in May 2014 and he is not currently licensed.

2. On or about March 12, 2014, the Claimants and the Respondent entered into a contract to provide landscaping services to the Claimants' home located in Howard County, Maryland. The contract called for the following:²

- Front porch to be resurfaced with interlocking brick with bullnose brick to be installed at the outer edges.
- The front walkway, sixty-five feet in length, to be removed and hauled away and a new walkway of interlocking brick (pavers) to be installed. The new walkway to be approximately 3 ½ feet wide and will curve instead of run straight like the existing walkway.
- Remove entire driveway and parking pad (approximately 1000 square feet) and haul away.
- Install new concrete driveway. Concrete to be five to six inches in thickness, be reinforced with fiber mesh, wire and rebar. Rebar to be connected to floor of garage and will mesh into and be part of the new driveway.
- Expansion joints will be installed in driveway as needed.
- All work was to be completed by no later than May 20, 2014.
- All construction was guaranteed for two years.

3. The contract price for the entire project including the above work was \$21,500.00.

4. Work on the project began on or about March 28, 2014 and was completed on or about May 7, 2014.

5. The Claimants made six payments to the Respondent between March 13, 2014 and May 7, 2014 totaling \$21,500.00.

6. Over the next several months from May 2014 until October 2014, the Claimants noticed that the concrete mix between the bricks on the front porch was deteriorating and some of the bricks began to come loose.

7. The Claimants sent emails and made phone calls to the Respondent during that time but the Respondent failed to respond to the Claimants' calls and emails.

² The contract also called for other services at the residence but only the services indicated in the Findings of Fact were at issue in this case.

8. In October 2014, the Claimants saw the Respondent at a home show in Howard County and again asked him why he had not responded to their calls and emails. He told them that he had planned to call them in the next week to ten days and stated that he would come to their house to address the problems with the porch.

9. The Respondent returned to the Claimants house in early November 2014 and made attempts to repair the loose bricks and crumbling dry mix/mortar on the porch.

10. After he left, in the next several months, his repairs proved to be ineffective as the bricks were still coming loose and the dry mix was still deteriorating.

11. Then Claimants made several more attempts to contact the Respondent but he failed to respond or to make any further attempts to repair his work.

12. In November 2014 the Claimants contacted the MHIC concerning the problems they were having with the Respondent. A claim was not filed at that time.

13. After the Claimants filed their complaint with the MHIC, they noticed that the driveway, poured by the Respondent had begun to spall and chip. In addition, they noticed that the driveway also began to crack in the area where it joined the garage floor. There was no expansion joint installed in this area by the Respondent.

14. After more unsuccessful attempts to contact the Respondent and after the driveway began to deteriorate further, the Claimants contacted Oaklawn Landscaping, a licensed home improvement contractor on May 26, 2015 to obtain an estimate for the replacement of the driveway.

15. Oaklawn provided a written proposal to remove and replace the existing driveway at a cost of \$16,900.00. In addition, Oaklawn provided a verbal estimate of \$4,000.00 to repair the front porch and walkway.

16. On May 28, 2015, the Claimants updated their complaint to reflect that the driveway was deteriorating and that Oaklawn was contacted to provide an estimate for the removal and replacement of the driveway.

17. On the same date, the Claimants completed a Guaranty Fund claim form in the amount of \$16,900.00 to reflect the work on the driveway only. The Claim was filed on June 4, 2015.

DISCUSSION

Respondent's Failure to Appear

Section 8-312 of the Business Regulation Article provides that the MHIC shall give the person against whom the action is contemplated an opportunity for a hearing. Md. Code Ann., Bus Reg. § 8-312(a), § 8-407(a). On December 1, 2015, the OAH mailed a Notice to the Respondent via regular and certified mail using his address of record with the MHIC as well as with the Maryland Motor Vehicle Administration. The Notice advised the Respondent that a hearing on the Claimants' claim against the Fund was scheduled for February 10, 2016, that it would begin at 9:30 a.m., and would be held at the OAH at 11101 Gilroy Road in Hunt Valley, Maryland 21031. The Respondent failed to accept delivery of either of the Notices. The address on the Notices, however, is the address in the MHIC database and is the Respondent's address of record according to records of the Motor Vehicle Administration. As such, it is presumed that the Respondent received adequate notice of the hearing.

On February 10, 2016, I convened the hearing in accordance with the Notice. The Respondent, however, failed to appear for the hearing. After waiting approximately fifteen minutes to give the Respondent an opportunity to appear for the hearing, he still failed to appear. Since the Respondent received due notice of the hearing, I conclude that he was afforded an

opportunity to participate in the hearing, but failed to appear. Accordingly, I found it appropriate to proceed in the Respondent's absence. COMAR 09.01.02.09.

Merits of Claimant's Claim

A homeowner 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). *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. For the following reasons, I find that the Claimants have 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 on the Claimants' home.

It is undisputed that the Respondent was a licensed home improvement contractor under MHIC license number 01-20233 at all times relevant to this case. His license expired in May 2014 and he is not currently licensed. On or about March 12, 2014, the Claimants and the Respondent entered into a contract to provide landscaping services to their home in Howard County, Maryland. The contract called for a multitude of landscaping services but the only ones at issue in this case were the work done on the front porch, the front sidewalk and the driveway. Specifically, the front porch was to be resurfaced with interlocking brick with bullnose brick to be installed at the outer edges. The front walkway was to be removed and hauled away and a new walkway of interlocking brick pavers was to be installed. The entire driveway and parking pad was to be removed and hauled away and a new concrete driveway was to be installed. The concrete was to be five to six inches in thickness, be reinforced with fiber mesh, wire and rebar

and was to be connected to the floor of garage. Expansion joints were to be installed in the driveway as needed. The work was completed in a timely manner and the Claimants made six payments to the Respondent between March 13, 2014 and May 7, 2014 totaling \$21,500.00. Over the next several months from May 2014 until October 2014, however, the Claimants noticed that the concrete mix between the bricks on the front porch was deteriorating and some of the bricks began to come loose. The Claimants sent emails and made phone calls to the Respondent during that time but the Respondent failed to respond to the Claimants' calls and emails. In October 2014, the Claimants saw the Respondent at a home show in Howard County and asked him why he had not responded to their calls and emails. He told them that he had planned to call them in the next week to ten days and stated that he would come to their house to address the problems with the porch. He then returned to the Claimants' house in early November 2014 and made attempts to repair the loose bricks and crumbling dry mix/mortar on the porch, but in the next several months, his repairs proved to be ineffective as the bricks were still coming loose and the dry mix was still deteriorating.

The Claimants made several more attempts to contact the Respondent but he failed to respond or to make any further attempts to repair his work so in November 2014 the Claimants contacted the MHIC concerning the problems they were having with the Respondent. Subsequently, the Claimants noticed that the driveway had begun to spall, chip and crack in certain areas as well. On May 26, 2015, after more unsuccessful attempts to contact the Respondent and after the driveway began to deteriorate further, the Claimants contacted Oaklawn Landscaping to obtain an estimate for the replacement of the driveway. Oaklawn provided a proposal to remove and replace the existing driveway at a cost of \$16,900.00.

On May 28, 2015, the Claimants updated their complaint to reflect that the driveway was deteriorating and that Oaklawn was contacted to provide an estimate for the removal and

replacement of the driveway. On the same date, the Claimants completed a Guaranty Fund claim form in the amount of \$16,900.00 to reflect the work on the driveway only. The Claim was not filed until June 4, 2015 and did not include any work or estimates to repair any work on the porch or the sidewalk.

The Respondent did not refute the claims of the Claimants as he was not present during at the hearing, despite being notified of the hearing. I find, therefore, that the Respondent performed unworkmanlike work on the driveway. Because the Claimants did not include any amounts for work or repairs to the sidewalk or front porch, the Respondent was not on notice of these claims. I find, therefore, that the Claimants are eligible for compensation from the Fund for the poor work done by the Respondent on the driveway.

Having found eligibility for compensation I now turn to the amount of the award, if any, to which the Claimants are 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 Claimants' actual loss is calculated after considering that they contracted with the Respondent for a total amount of \$21,500.00 and actually paid that amount. The Claimants also established that they obtained a written estimate from Oaklawn in the amount of \$16,900.00 to replace the driveway and that Oaklawn provided a verbal estimate of \$4,000.00 to repair the front porch. The Claimants, however, failed to include this amount in their claim form and as such, the Respondent was not on notice of anything other than the costs to repair the driveway.

The award from the fund is, therefore, computed as follows:

Amount paid to the Respondent	\$21,500.00
Amount paid to complete/repair work contracted to Respondent	<u>+16,900.00</u>
Subtotal	\$38,400.00
Minus original contract price	<u>-21,500.00</u>
Award amount	\$ 16,900.00

Based on the above considerations, the Claimants are entitled to a reimbursement from the Fund in the amount of \$16,900.00. Md. Code Ann., Bus Reg. §8-405 (e)(1).

PROPOSED CONCLUSION OF LAW

I conclude that the Claimants have sustained an actual and compensable loss of \$16,900.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405.

PROPOSED ORDER

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


ORDER that the Maryland Home Improvement Guaranty Fund award the Claimants \$16,900.00;

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;³ and

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

April 12, 2016
Date Decision Issued

MJW/da
161019


Signature on File

Michael J. Wallace
Administrative Law Judge

³ See Md. Code Ann., Bus. Reg. § 8-410(a); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 3rd day of June, 2016, 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.

J. Jean White

***I. Jean White
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION