

**IN THE MATTER OF THE CLAIM
OF WILL TOSTEN,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF CORINA MILLS, T/A
LICKING CREEK PAVING &
HAULING LLC,
RESPONDENT**

*** BEFORE MARY SHOCK,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
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* OAH No.: DLR-HIC-02-17-40109
* MHIC No.: 17 (90) 513
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PROPOSED DECISION

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ISSUES
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PROPOSED FINDINGS OF FACT
DISCUSSION
PROPOSED CONCLUSION OF LAW
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STATEMENT OF THE CASE

On February 10, 2017, Will Tosten, (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$6,400.00 in actual losses allegedly suffered as a result of a home improvement contract with Corina Mills, trading as Licking Creek Paving & Hauling LLC (Respondent).

On May 18, 2018, I held a hearing at the Office of Administrative Hearings in Cumberland, Maryland. Md. Code Ann., Bus. Reg. § 8-407(e) (2015). The Claimant represented

himself. The Respondent represented herself. Andrew Brouwer, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, 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 & Supp. 2017); Code of Maryland Regulations (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 for the Claimant:

- CL 1 Contract between Claimant and Respondent, July 25, 2016
- CL 2 Text Messages between Claimant and Respondent, August 3, 2016 to October 4, 2016
- CL 3 Fifteen photographs of Claimant's driveway, undated
- CL 4 Hillis-Carnes Engineering Associates, Inc., Report, October 14, 2016
- CL 5 Hillis-Carnes, Engineering Associates, Inc., Certificate of Accreditation, March 20, 2018
- CL 6 Checks from Claimant to Respondent, August 7 and 10, 2016
- CL 7 Pavement Maintenance of Maryland LLC, Estimate/Proposal, February 4, 2017

I admitted the following exhibit for the Respondent:

- RSP 1 Ten photographs of the Claimant's driveway, undated

I admitted the following exhibits for the Fund:

- GF 1 Hearing Order, December 11, 2017
- GF 2 Notice of Hearing, March 26, 2018
- GF 3 Letter from MHIC to Respondent, February 23, 2017, with Home Improvement Claim Form, February 10, 2017
- GF 4 Respondent's Licensing Record, March 19, 2018
- GF 5 Affidavit of Michael L. Miller, MHIC, May 9, 2018

Testimony

The Claimant testified and called:

1. His wife; and
2. Cullen Coleman, Hillis-Carnes Engineering Associates, Inc., accepted as an expert in general construction material testing.

The Respondent testified and called:

1. Her husband; and
2. Jeremy Harsh, accepted as an expert in compaction in road construction.

The Fund did not call 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 91787.
2. On July 25, 2016, the Claimant and the Respondent entered into a contract for installation of a new driveway of 244 square yards at the Claimant's residence. The Respondent would: tear out the existing driveway; remove grass and topsoil, regrade and add stones as needed; and pave three inches of surface asphalt.
3. The original agreed-upon contract price was \$5,100.00.
4. The Claimant and Respondent later agreed that for an additional \$1,300.00 the Respondent would pave a larger area than originally stated in the contract. The Claimant and Respondent did not put the agreement in writing.
5. The Respondent began work on August 1, 2016 and completed work on August 3, 2016.
6. The Respondent poured three inches of asphalt and compacted the material to a core thickness of 2.25 inches in the center and right-back area, and to a thickness of 1.5 inch at the right-front area.

7. The Claimant paid the Respondent \$1,300.00 on August 7, 2016, and \$5,100.00 on August 10, 2016.

8. Crabgrass has grown up around the edges of the driveway.

DISCUSSION

In this case, the Claimant has the burden of proving the validity of the claim by a preponderance of the evidence. Md. Code Ann., Bus. Reg. §8-407(e)(1) (2015); Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3). 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. If the evidence is evenly balanced, then the fact-finder must find against the party who has the burden of proof. *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002) (quoting *Maryland Pattern Jury Instructions* 1:7 (3d 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);¹ *see also* COMAR 09.08.03.03B(2). 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 not proven eligibility for compensation.

The Claimant testified that when the Respondent completed work, the driveway looked great. He and his wife did not drive on the driveway for three to seven days. He did not drive his work van on the driveway for two weeks. However, about two weeks later, divots appeared in the driveway and grass began growing up around the pavement. He stated the driveway sunk in

¹ Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 Replacement Volume of the Maryland Annotated Code.

the middle. The Claimant testified he contacted the Respondent who looked at the driveway and told the Claimant's wife she should not turn her wheels on the asphalt for one year.

The Claimant testified he took photographs of the driveway in October and December 2016. (CL 3.) In the photographs, the Claimant pointed out a divot in the asphalt, which appears about the size of one-third of a tire mark; a tire mark at the back of the driveway; sinking, which looks like ripples on the surface of the drive; and grass at the edge of the drive (CL 3, #2, #3, #7, #13.)

The Claimant's wife testified she did not drive on the pavement for seven days. She stated she spoke with the Respondent about the issues and he said the sinking was supposed to be there for water to run off. In response to the Respondent's claim that someone turned their wheels on the driveway, she stated she only pulled onto the patio once and then turned to drive off. She stated there is a dip at the end of the driveway just before the gravel where the water now puddles when it rains.

Cullen Coleman, Project Manager, Hillis-Carnes Engineering Associates, Inc., testified for the Claimant. Mr. Coleman was accepted as an expert in general construction material testing. He is an engineering technician. He testified he visited the property on October 4, 2016. He observed the surface of the drive where tires had turned and areas where the asphalt had sunk. He took three core samples from the driveway. He confirmed the findings set out in his report, which states the asphalt content was sufficient but the core thickness of the asphalt was not three inches. Instead, the thickness was 2.25 inches in the center and back-right of the driveway and 1.5 inches in the front-right of the driveway. (CL 4.) Based on his testing, Mr. Coleman found the Respondent did not achieve three inches of compacted asphalt. As a result, in Mr. Coleman's opinion, the Respondent performed an unworkmanlike home improvement. On cross-examination, Mr.

Coleman testified he based his conclusion of unworkmanlike performance on the contract calling for three inches of asphalt. (CL 1.)

The Respondent testified she has been working the paving business for eighteen years. She has never seen a core test of a residential driveway. She stated that the three inches called for in the contract does not mean the compacted asphalt will be three inches thick. Instead, the asphalt is compacted one-fourth of an inch for each of the inches called for in the contract. In other words, three inches of asphalt is poured from the paver and then the asphalt is rolled and compacted one-fourth inch per inch poured.

The Respondent's husband testified. He stated he has been working in the paving business for thirty years. He stated the marks on the Claimant's driveway were caused by someone turning their tires. Also, the roller used to compress the asphalt will leave some marks. With regard to the crabgrass, the Respondent's husband stated he sprayed the area before he poured the asphalt, but grass will grow in from the edge; one cannot prevent the crabgrass from growing.

Jeremy Harsh testified for the Respondent. He is certified through the Mid-Atlantic Region Technician Certification Program to perform compaction testing. He was first certified in June 2012. Mr. Harsh stated he has worked on State and local roads, parking lots, and driveways. He has participated in installing over 3,000 residential driveways. He was accepted as an expert in compaction in road construction.

Mr. Harsh explained the purpose of compaction is to fill the spaces between the stones beneath the asphalt. A paver does not want to compact the asphalt too much because that would break the stones and blow out the rocks. Mr. Harsh testified on State roads, the State requires 3.5 inches rolled compacted, but that is not a requirement for residential driveways.

Mr. Harsh further testified he ran the roller over the Claimant's driveway. He stated the job looked good and water was rolling off. He also testified that pavement is never completely

flat and one can see waves and divots appear over time. He stated the added area in the back was on dirt, not on old blacktop. He stated the compaction on the Claimant's driveway was "decent." In his opinion, the compaction on the Claimant's driveway was correct and not unworkmanlike.

Mr. Harsh presented more convincing testimony than Mr. Coleman on the relevant issue in this case, which is whether the compaction was proper. Mr. Harsh has extensive experience installing public roads and residential driveways. Mr. Coleman's expertise relates to testing core samples. While Mr. Coleman may have accurately tested the core samples, his opinion was based on the three inches of asphalt required under the contract. The Respondent testified the three inches means three inches of asphalt poured. The Claimant did not understand what the three inches meant and there is no evidence the Respondent explained the requirement to the Claimant or that the Claimant asked about that contractual obligation. Given the ambiguity in the contract, Mr. Coleman's testimony fails to prove unworkmanlike performance based solely on fewer than three inches compacted asphalt.

As set out above, the Respondent testified there will be one-fourth inch compaction for each inch of asphalt poured. The Claimant did not present any evidence to refute that position. As a result, two of the three cores Mr. Coleman took meet that standard. (CL 4.) Arguably, the third core with a 1.5 inch thickness indicates an insufficient amount of asphalt was poured in that area. However, the Claimant did not establish the exact size of the 1.5-inch area. There is insufficient evidence to prove the driveway is defective based on this one core sample.

With regard to divots, Mr. Harsh stated a pavement is never completely flat and one can see waves and divots appear over time. The Claimant failed to present any evidence to contradict Mr. Harsh's testimony. As a result, the Claimant failed to show that any divots are the result of unworkmanlike installation of the driveway.

With regard to tire marks, although the Claimant's wife testified she did not turn her wheels on the driveway, she admitted she pulled onto the patio once and then backed out onto the driveway. She would then have to turn to drive off the driveway. Given this testimony, the Claimant failed to prove the tire marks were the result of unworkmanlike installation of the driveway.

With regard to the crabgrass, the photographs show the grass growing in from the edge of the driveway. There is no grass growing from the center of the driveway. (CL 3, #13-#14, CL 4.) The Claimant did not present any evidence to contradict the Respondent's husband's testimony that he sprayed the area before pouring the asphalt. Consequently, the Claimant failed to prove the crabgrass is the result of unworkmanlike installation of the driveway.

The Claimant has the burden of proof in this case. The evidence here, given Mr. Harsh's persuasive testimony and opinion, is sufficient to defeat the Claimant's evidence offered to prove the Respondent performed an unworkmanlike home improvement. Even if I found the evidence evenly balanced, I still must find against the party who has the burden of proof. The Claimant failed to prove he is eligible for compensation from the Fund.

PROPOSED CONCLUSION OF LAW

I conclude the Claimant failed to prove he sustained an actual and compensable loss as a result of the Respondent's acts or 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 deny the Claimant's claim; and

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

Signature on File

August 3, 2018
Date Decision Issued

Mary Shock
Administrative Law Judge

MKS/cmg
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PROPOSED ORDER

WHEREFORE, this 14th day of September, 2018, 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