IN THE MATTER OF THE CLAIM	*	BEFORE SYEETAH HAMPTON-EL,
OF DAVID SCHREINER,	*	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 CHRISTOPHER	*	
AYERS,	*	OAH No.: LABOR-HIC-02-20-24228
T/A C. M. AYERS ENTERPRISES,	*	MHIC No.: 20 (75) 272
LLC,	*	
RESPONDENT	*	

* * * * * * * * * * * * *

REVISED PROPOSED DECISION[1]

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STATEMENT OF THE CASE

On October 18, 2019, David Schreiner (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund), under the jurisdiction of the Department of Labor (Department),[2] for reimbursement of $4,885.00 in actual losses allegedly suffered as a result of a home improvement contract with Christopher Ayres,

[1] COMAR 28.02.01.27C provides that a final decision may be revised at any time on the judge's own initiative due to a clerical mistake. The Decision issued on February 9, 2021 with an incorrect MHIC No. This Revised Decision is issued to correct that clerical mistake.
[2] On July 1, 2019, the Maryland Department of Labor, Licensing, and Regulation became the Department of Labor.

trading as C. M. Ayres Enterprises, LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015).[3] On November 2, 2020, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on December 7, 2020 at the OAH. Bus. Reg. § 8-407(c)(1). Justin S. Dunbar, Assistant Attorney General, Department, represented the Fund. The Claimant represented himself. The Respondent represented himself.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, 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 & Supp. 2020); Code of Maryland Regulations (COMAR) 09.01.03; and 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 on the Fund's behalf:

Fund Ex. 1 - Notice of Hearing, dated November 9, 2020

Fund Ex. 2 - MHIC Hearing Order, dated October 28, 2020

Fund Ex. 3 - MHIC Claim Form, dated October 18, 2019

Fund Ex. 4 - Licensing Record for the Respondent, dated December 7, 2020

I admitted the following exhibits on the Claimant's behalf:

Clmt. Ex. 1 - Estimate from the Respondent, dated November 9, 2017

[3] Unless otherwise noted, all references hereinafter to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.

Clmt. Ex. 2 - Two Copies of a Sketch of the Claimant's Driveway, undated
Clmt. Ex. 3 - Picture of Driveway, undated

Clmt. Ex. 4 - Letter from Arborare Tree Experts, Inc. to the Claimant, dated December 4, 2020

Clmt. Ex. 5 - Estimate from David Olinger Asphalt Paving and Sealing, dated June 14, 2019

Clmt. Ex. 6 - Written Summary from the Claimant and his wife, dated August 30, 2019

Clmt. Ex. 7 - Emails between the Claimant and Respondent, various dates

Clmt. Ex. 8 - Letter from George C. Davis, Esquire to the Respondent, dated May 13, 2019

Clmt. Ex. 9 - Picture of Driveway after Repairs, undated

Clmt. Ex. 10 - Picture of Driveway after Repairs, undated

Clmt. Ex. 11 - Picture of New Paving on Driveway, undated

Clmt. Ex. 12 - Picture of Driveway after the Respondent but before Mr. Olinger, undated

Clmt. Ex. 13 - Picture of Driveway after the Respondent but before Mr. Olinger, undated

Clmt. Ex. 14 - Picture of Driveway after Repairs, undated

Clmt. Ex. 15 - Picture of Driveway Near the Gate, undated

Clmt. Ex. 16 - Email from Mr. Olinger to the Claimant, dated November 30, 2020

Clmt. Ex. 17 - Copy of $8,200.00 check from the Claimant to the Respondent, dated October 16, 2018

I admitted the following exhibits on the Respondent's behalf:

Resp. Ex. 1 - Copy of Md. Code Ann., Bus. Reg. § 8-605

Resp. Ex. 2 - Invoice from Maryland Paving, October 16, 2018

Resp. Ex. 3 - Not Admitted[4]

[4] Although I did not admit Respondent's exhibit 3, I did retain the exhibit. "All exhibits marked for identification, whether or not offered in evidence and, if offered, whether or not admitted, shall be retained for purposes of judicial review." COMAR 28.02.01.22C. I did not consider the exhibit in this decision.

Testimony

The Claimant testified and presented the testimony of Elizabeth "Yancey" Carey, the Claimant's wife.

The Respondent testified and presented the testimony of McKinley Ayres, the Respondent's son.

The Fund did not present the testimony of 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 132630.

2. The Claimant and his wife reside at a home located in Baltimore County, Maryland. (Property). The Property is owned by the Claimant's wife, Elizabeth Carey.

3. On November 9, 2017, the Claimant and the Respondent entered into a contract to "prep and blacktop 6922 sq. ft. of driveway, 2.5 inches compacted, remove, fill, and compact [two] stumps." (Contract). (Clmt. Ex. 1). The Contract did not list a start or end date.

4. The Contract included a hand-drawn sketch of the areas to be paved and included measurements taken by the Claimant. The measurements totaled 6,922 sq. ft. to be paved by the Respondent.

5. The original agreed-upon Contract price was $12,470.20.

6. On August 15, 2018, the Claimant paid Arborare Tree Experts, Inc to remove a tree in preparation for the driveway paving.

7. On September 10, 2018, the Claimant paid the Respondent a deposit of $4,200.00 and on October 16, 2018, the Claimant paid the Respondent $8,200.00 for a total of $12,400.00. The Respondent agreed that the Claimant paid him in full.[5]

8. In October 2018, the Respondent paid Maryland Paving $7,486.41 for paving materials to pave 6,922 sq. ft. of Property.

9. On October 16, 2018, the Claimant immediately noticed that the pavement did not cover all of the stone as agreed in the Contract.

10. The Respondent did not pave the 6,922 sq. ft as agreed in the Contract.

11. In November 2018, the Respondent returned to the Property as requested by the Claimant.

12. On June 14, 2019, the Claimant hired David Olinger to complete the paving. Mr. Olinger paved 980 sq. ft. for a price of $4,885.00.

DISCUSSION

In this case, the Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Bus. Reg. § 8-407(e)(1); Md. Code Ann., State Gov't § 10-217 (2014); 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 Cty. 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); *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,

[5] Neither the Respondent nor the Claimant provided additional information regarding why the Contract was paid in full at a price of $12,400.00 versus the original Contract price of $12,470.20.

[illegible]

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 testified he entered into a Contract with the Respondent to pave 6,922 sq. ft of driveway at the Property and paid a deposit of $4,200.00. The Claimant testified he lives with his wife at this Property, but it is solely owned by her. The Claimant explained he is a schoolteacher and knew the Respondent since the Respondent is the father of a student in the Claimant's class. Upon meeting with the Respondent, the Claimant said he told the Respondent, "wherever you see stone, we want pavement." He explained that his wife drives a school bus and a horse trailer, and they required a driveway with room for both large items and their motor vehicles. During the initial meeting, the Claimant measured the driveway and provided the measurements to the Respondent. The measurements were inserted on a sketch. In preparation for the paving, the Claimant testified he hired Arborare Tree Experts, Inc to remove a tree. The Claimant explained that the Respondent started a little later than originally scheduled because of the wet summer and other pavement jobs rescheduled. A few days before the beginning of the pavement job, the Respondent met with the Claimant and his wife at the Property to review the areas to be paved.

At the conclusion of the Contract, the Claimant paid the remaining $8,200.00 and gave the workers a tip for the work. However, once the workers left, the Claimant testified he walked the driveway and noticed that the pavement did not cover all of the stone as agreed. The Claimant called the Respondent, but he did not get any response. Finally, in November 2018, the Respondent came out to the Property to meet with the Claimant about the issues. The Claimant testified that the Respondent agreed that the pavement did not cover the stone as agreed. Further, the Respondent measured all of the missing areas and agreed to prepare an estimate to pave the

areas that were not paved; the Respondent told the Claimant that the cost for this paving would be in addition to the amount the Claimant had already paid and that the Claimant's job would be the first one he did in the Spring. The Claimant testified that after the November 2018 meeting with the Respondent, he saw him in Pennsylvania and reminded him about the Spring job. However, the Claimant said when Spring came, the Respondent did not return to the Property. As a result, the Claimant hired an attorney to send a letter to the Respondent. The Claimant said that after the letter, the Respondent came to the Property and agreed to complete the paving of the driveway.

The Claimant testified that the Respondent ultimately decided not to finish paving the driveway. The Claimant hired David Olinger for $4,885.00 to finish the incomplete work performed by the Respondent.

Elizabeth Carey, the Claimant's wife and Property owner testified on behalf of the Claimant. Ms. Carey testified that she is a school bus driver and needed a wider driveway at the Property. Therefore, she agreed with the Claimant that the Respondent would pave wherever there was stone. She explained that on the day of the paving, the Respondent went back and forth with her about increasing the driveway width. The Respondent told her that the wider driveway with a jagged edge versus a straight line would look bad and that he did not have enough base. Ms. Carey testified that she did not agree with the Respondent but could not stay and debate it further as she had to get to work. However, she did recall telling the Respondent that there would a change to the sketch, specifically the area near the barn. Ms. Carey agreed with the Claimant that the Respondent did not pave the driveway as agreed.

She recalled the meeting with Mr. Olinger who explained that the Property had existing stone but required additional base to properly complete the job. Ms. Carey recalled that the Respondent did not bring additional stone base to add to the stone already on-site.

The Respondent testified that he has owned his business since 2007 and has six employees. Before opening his business, he gained paving experience while working for another company. He testified that he determined the square feet by measuring the length and width, calculating the area, and placing the resulting information on the sketch created by the Claimant. Based on the sketch and the 6,922 sq. ft. measurements, the Respondent determined the Contract price. He explained that the job would take two days; one day to prep and the second day to lay the blacktop or pave the areas.

The Respondent noted that on the morning of October 16, 2018 he, his son, and a helper arrived at the Property. The Respondent had his son knock on the door to get Ms. Carey to review the existing edges of the stone driveway and the proposal. He stated that Ms. Carey insisted on changes to the sketch and as a result he "laid down the sketch" and followed the direction of Ms. Carey in establishing the width of the driveway. The Respondent denied pressuring Ms. Carey to make a change, namely, making the edge straight not jagged. He did not dispute that the sketch noted a fourteen-foot-wide area and he instead paved an eleven-foot area. In addition, he did not dispute that the sketch noted a fifty-foot-wide area and he instead paved a thirty-nine-foot space. The Respondent explained the differences occurred because of the changes imposed by the owner of the property, Ms. Carey. The Respondent also testified that he did not bring additional base or stone with him, because based on the sketch, the Property had more than enough on-site.

The Respondent testified he purchased enough blacktop from Maryland Paving to complete the job for 6,922 sq. ft. based on the sketch. He explained that at the end of the day, the Claimant returned home from work, said the job looked good, and paid the Contract balance, and tipped the workers. At some point after completion of the work, the Respondent stated that the Claimant called and complained that the pavement did not go to the edge of the stone as

agreed. The Respondent replied that he paved to the lines as determined by Ms. Carey on the morning of the job. He testified that initially he agreed to address any issues but changed his mind as the Claimant and his wife became nasty toward him and continued to increase the scope of issues to be addressed. Beyond describing the Claimant and his wife as "never happy" he did not explain how the scope of issues changed or increased.

As a result of the changes, the Respondent testified that he did not install 6,922 sq. ft of blacktop. He testified he did not measure the areas when left, but knew it was less than 6,922 sq. ft. as agreed in the Contract because of the changes by Ms. Carey. As for the work performed by Mr. Olinger, the Respondent noted he observed the patch work performed by Mr. Olinger. He explained driving and seeing the driveway seams installed on each side of the longer part of the driveway. He did not deny that the seams included areas he originally agreed to pave. He testified that the Mr. Olinger widened the driveway and he believed Mr. Olinger added base or stone, but he admitted he did not measure the space. The Respondent agreed that the Mr. Olinger charged a reasonable price of $4,855.00 or $4.98 per sq. ft. for the 980 sq. ft. he paved.

McKinley Ayres, the Respondent's son testified on behalf of his father. He testified that he has worked with his father since age sixteen. In this case, he recalled knocking on the door to get Ms. Carey to go over the job with his father. He recalled Ms. Carey directing the location of the string and paint used to determine the perimeter of the driveway.

Based on the evidence presented, I find that the Claimant has met his burden to show that the Respondent completed incomplete work. The Claimant and the Respondent agreed that the Contract provided that the driveway at the Property would be 6,922 sq. ft and the same measurements were outlined on the sketch. The Respondent agreed that he used the sketch and measurements to purchase blacktop from Maryland Paving and based his price on the square

footage. The Respondent and the Claimant agree that the Respondent did not pave pursuant to the sketch and dimensions noted.

The Respondent argued that he deviated from the sketch at the direction of the owner, Ms. Carey, pursuant to section 8-605 of the Business Regulations Article. Section 8-605 of the Business Regulation Article applies to abandonment of and the failure to perform a contract and in this case, I do not find that the Respondent abandoned the Contract. However, I do find that the Respondent failed to perform the Contract and performed incomplete work as he did not pave to the specifications of the sketch and the required 6,922 sq. ft.

There is no dispute that 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. The Respondent acknowledged that he deviated from the sketch and the measured spaces and width of the driveway. Section 101(k) of the Business Regulations Article defined owner as "a homeowner, tenant, or other person who buys, contracts for, orders, or is entitled to a home improvement." In this case, the owner included the Claimant as the person who initially contracted with the Respondent and Ms. Carey the Property owner. The reason offered by the Respondent to deviate from the Contract is an excuse. I find that the Respondent did not provide credible testimony regarding his interaction with Ms. Carey and the changes made to the dimensions. I find it more likely than not that the Respondent pressured Ms. Carey to hurriedly agree to changes as she prepared to leave for work. I find that the Respondent made a poor decision to interact with Ms. Carey on the morning of since he had been to the property on multiple occasions, walked the driveway, and had a sketch with specific measurements. Further, the Claimant and Ms. Carey provided consistent testimony that where there was stone, they wanted it to be paved and that spaced totaled 6,922 sq. ft. I do not believe the testimony of the Respondent that he did not have remaining blacktop after

finishing the driveway. There is just no way that he ordered enough blacktop from Maryland Paving to pave 6,922 sq. ft of space, not pave that space, and not have leftover blacktop.

I find that the Claimant and his wife provided credible testimony as compared to the Respondent and his son regarding the ultimate changes to the Contract. I believe the testimony of the Claimant and his wife that they wanted all the stone covered with pavement and that amounted to 6,922 sq. ft. I find that the Respondent's son provided consistent testimony with that of his father, which failed to truly explain why they had any contact with Ms. Carey causing ultimate changes in the agreed upon Contract terms and provided sketch. In addition, even with the changes, I do not understand how the Respondent left the driveway incomplete yet allegedly did not have remaining blacktop. The testimony is inconsistent with the evidence presented, namely the invoice from Maryland Paving. I find it hard to believe that Ms. Carey or the Claimant intended the Respondent to leave the driveway incomplete such that another contractor would ultimately have to come and complete the remaining 980 sq. ft.

The Respondent contracted with the Claimant to pave the driveway to specific dimensions and failed to complete the job. After the Respondent declined to return and complete the job, the Claimant hired David Olinger for $4,885.00. Based on the testimony and the before and after pictures, I find that the Mr. Olinger did not go beyond the original Contract. In fact, Mr. Olinger only paved the remaining areas left unpaved by the Respondent; specifically, 980 sq. ft.

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); 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.

In this case, the Respondent performed some work under the Contract, and the Claimant retained another contractor 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 Claimant paid the Respondent $12,400.00 for the original Contract and paid $4,885.00 to Mr. Olinger to complete the original Contract. The agreed-upon Contract price between the Claimant and the Respondent was $12,470.20. The Respondent agreed that upon receipt of the $12,400.00, the Claimant paid him in full.

Calculation:

Amount paid to the Respondent:	$12,400.00
Amount paid to the new contractor:	+ $4,885.00
Minus the Original Contract Price:	- $12,470.20
Total:	$4,814.80

The Business Regulation Article caps a claimant's recovery at $20,000.00 for acts or omissions of one contractor and provides that a claimant may not recover more than the amount paid to the contractor against whom the claim is filed. Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a). In this case, the Claimant's actual loss is less than the amount paid to

the Respondent and less than $20,000.00. Therefore, the Claimant is entitled to recover his actual loss of $4,814.80.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of $4,814.80 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(C). 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 $4,184.80; 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 ten percent (10%) as set by the Maryland Home Improvement Commission;[6] and

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

April 7, 2021
Date Decision Issued

Syeetah Hampton-EL
Administrative Law Judge

SAH/cj
#191434

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

PROPOSED ORDER

WHEREFORE, this 2nd day of June, 2021, 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
Chairman
Panel B
MARYLAND HOME IMPROVEMENT COMMISSION