

<p>IN THE MATTER OF THE CLAIM</p> <p>OF GUS CRALLE,</p> <p>CLAIMANT</p> <p>AGAINST THE MARYLAND HOME</p> <p>IMPROVEMENT GUARANTY FUND</p> <p>FOR THE ALLEGED ACTS OR</p> <p>OMISSIONS OF JAMES TESTA,</p> <p>T/A TESTA ASPHALT PAVING,</p> <p>RESPONDENT</p>	<p>* BEFORE NANCY E. PAIGE,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>* OAH No.: DLR-HIC-02-17-15614</p> <p>* MHIC No.: 17 (90) 222</p> <p>*</p> <p>*</p> <p>*</p>
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PROPOSED DECISION

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STATEMENT OF THE CASE

On October 25, 2016, Gus Cralle (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$4,900.00 in alleged actual losses suffered as a result of a home improvement contract with James Testa, trading as Testa Asphalt Paving (Respondent).

I held a hearing on August 22, 2017 at the County Office Building, 1400 McCormick Drive, Largo, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). The Claimant represented himself. Hope Sachs, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. After waiting more than fifteen minutes for

the Respondent or the Respondent's representative to appear, I proceeded with the hearing.

Code of Maryland Regulations (COMAR) 28.02.01.23A.¹

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 govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2017); 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

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

- Cl. # 1. October 22, 2015 and November 2, 2015 cancelled checks
- Cl. # 2. October 22, 2015 Contract between Claimant and Respondent
- Cl. # 3. A-E Photographs
- Cl. # 4. June 28, 2016 Laurel Paving Co. Estimate for Surfacing
- Cl. # 5. June 28 – August 3, 2016 emails between Claimant and Respondent
- Cl. # 6. April 25 – May 24, 2016 AT&T telephone records
- Cl. # 7. Photographs
- Cl. # 8. Photographs

¹ Notice of the hearing was mailed to the Respondent at the address of record by regular and certified mail on July 6, 2017. COMAR 09.08.03.03A(2). The certified mail was returned as unclaimed on August 9, 2017. The regular mail was not returned. Applicable law permits me to proceed with a hearing in a party's absence if that party fails to attend after receiving proper notice. COMAR 28.02.01.23A. I determined that the Respondent had received proper notice, and proceeded to hear the captioned matter.

I admitted the following exhibits on behalf of the Fund:

GF # 1. August 10, 2017 memorandum from Sandra L. Sykes to Legal Services with attachments

GF # 2. August 21, 2017 Licensing History

GF # 3. October 25, 2016 letter from Kevin Niebuhr to Respondent with attachments

Testimony

The Claimant testified in his own behalf. No other witnesses 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 4895657.
2. On October 22, 2015, the Claimant and the Respondent entered into a contract to pave the driveway at the Claimant's home and install a parking pad adequate to support a structure (carport) in the future.
3. The original agreed-upon contract price was \$8,000.00.
4. On October 22, 2015, the Claimant paid the Respondent \$2,000.00. On November 2, 2015, the Claimant paid the Respondent an additional \$6,000.00.
5. The Respondent completed the work on November 3, 2015.
6. Six months later, the Claimant observed vegetation coming through the paving and delamination of the surface in a number of areas, as well as depressed tire tracks.
7. The natural grade of the parking pad ran from front (high) to rear (low). The Respondent agreed to correct the grade to prevent water from flowing into the area proposed for a future carport. He failed to do so and water continued to drain toward the rear of the parking pad.

8. Between May 2016 and June 23, 2016, the Claimant called the Respondent and left messages and emailed the Respondent multiple times. The Respondent did not call back.

9. On April 28, 2017, after being notified by MHIC of the Claimant's claim, the Respondent returned and installed another layer of asphalt. Tires continue to leave impressions in the paving and water continues to accumulate in depressions in the pavement.

10. The cost to correct the Respondent's work is \$4,600.00

11. The Claimant's actual loss is \$4,600.00.

DISCUSSION

In this case, the Claimant has the burden of proving the validity of his claim by a preponderance of the evidence. Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3).² "[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." *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);³ 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 Claimant has proven eligibility for compensation.

² As noted above, "COMAR" refers to the Code of Maryland Regulations.

³ Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 Replacement Volume.

The Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant. The Respondent performed an unworkmanlike home improvement. The Claimant testified that, within six months of the Respondent's installation of asphalt paving, vegetation had sprouted through wide areas of the paving and the paving showed signs of failure, including delamination, depressed tire tracks and other depressions which collected water. He also testified that the Respondent failed to adjust the grade of a new parking pad so that water would drain away from the pad. He testified that the contract provided that the pad was intended to support a carport in the future and that it was agreed and understood at the time of the contract that the natural grade would have to be adjusted to prevent water from draining toward his home and accumulating in the proposed carport. This testimony is consistent with the written contract, which states, "Install pad for proposed structure, level + or - 1", then pave drive to markings." The Claimant provided photographs to corroborate his testimony. Since the Respondent failed to appear, the Claimant's evidence was uncontradicted and was facially credible.

The Claimant further testified that he reluctantly allowed the Respondent to return to attempt to remedy the problems because he was advised by the MHIC investigator that if he refused to do so it would negatively impact his claim. The Claimant said that the attempted remedy was unsuccessful. Water still accumulated in depressions in the paving and there were already tire tracks, only four months after completion of the "fix." I take notice, based upon common experience, that a driveway should not deteriorate to the extent apparent in the Claimant's photographs within four months.

The Claimant also testified that the surface of the new asphalt is rough, which he attributed to the use of stone aggregate that is too large. There was no expert opinion as to whether the aggregate used in the asphalt paving was below standard and I do not have a

competent opinion to support the Claimant's contention that the asphalt material installed was substandard. The photographs do not show a surface that is sufficiently poor to be considered inadequate by lay standards. I therefore cannot find that the paving material used by the Respondent was below industry standards.

For the reasons stated above, I find that the Claimant is eligible for compensation from the Fund and I now turn to the amount of the award, if any, to which the Claimant is entitled. The Claimant produced an estimate from Laurel Paving Co. in the amount of \$4,600.00 (including a \$300.00 discount) to repair the Respondent's poor work. The estimate includes cleaning the areas to be repaired, applying an agent to bond new asphalt to the existing asphalt, repair of all cracked and depressed areas by prefilling with asphalt and compacting, and then resurfacing 2,450 square feet with two inches of asphalt topping and three to four inches in the proposed carport area. The cost of this repair is somewhat over half the cost of the Respondent's contract. There was no expert testimony as to the reasonableness of this charge, but it was not challenged by the Fund and the Respondent forfeited his right to challenge the cost by failing to appear. I therefore accept the estimate as the reasonable cost of correcting the Respondent's work.

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).

Applying this formula, the Appellant's actual loss is calculated as follows:

Amount paid to Respondent	\$8,000.00
Amount to repair poor work	+ <u>\$4,600.00</u>
	\$12,600.00
Less original contract price	<u>\$8,000.00</u>
Actual loss	\$4,600.00

Pursuant to the applicable law, 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). The Claimant's actual loss is \$4,600.00 computed using the formula in COMAR 09.08.03.03B(3)(c). Accordingly, the Claimant is entitled to reimbursement of \$4,600.00. Bus Reg. § 8-405(a).

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$4,600.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(c).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$4,600.00; 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 ten percent (10%) as set by the Maryland Home Improvement Commission;⁴ and

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

Signature on File

November 9, 2017
Date Decision Issued



Nancy E. Paige
Administrative Law Judge

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⁴ See Bus. Reg. § 8-410(a)(1)(iii); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 2nd day of February, 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.

Andrew Snyder

***Andrew Snyder
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION