IN THE MATTER OF THE CLAIM	*	**BEFORE KIMBERLY FARRELL,**
OF JENINE STOCKDALE,	*	**AN ADMINISTRATIVE LAW JUDGE**
ADMINISTRATOR, on behalf of THE	*	**OF THE MARYLAND OFFICE**
JAMES WILEY COOKE & VENUS H.	*	**OF ADMINISTRATIVE HEARINGS**
COOKE TUA, [1]	*	
CLAIMANT	*	
AGAINST THE MARYLAND HOME	*	**OAH No.: LABOR-HIC-02-19-23191**
IMPROVEMENT GUARANTY FUND	*	**MHIC No.: 18 (05) 1394**
FOR THE ALLEGED ACTS OR	*	
OMISSIONS OF RONNIE NICHOLS,	*	
T/A NICHOLS ASPHALT PAVING &	*	
SEALCOATING,	*	
RESPONDENT	*	

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

PROPOSED DECISION

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

STATEMENT OF THE CASE

On September 11, 2018, Jenine Stockdale, as an Administrator on behalf of the James Wiley Cooke & Venus H. Cooke TUA (Claimant), filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of

[1] TUA is a designation for a particular type of trust. In this case, the property being improved is owned by a trust.

$29,791.00 in actual losses allegedly suffered as a result of a home improvement contract with Ronnie Nichols, trading as Nichols Asphalt & Paving (Respondent).[2] Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015). On July 8, 2019, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on October 17, 2019, at the OAH, 11101 Gilroy Road, in Hunt Valley, Maryland. Bus. Reg. § 8-407(e). Shara Hendler, Assistant Attorney General, Department of Labor (Department),[3] represented the Fund. The Claimant was represented by Ms. Stockdale. 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. 2019); 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 the compensable loss?

SUMMARY OF THE EVIDENCE

Exhibits

Ms. Stockdale brought all exhibits organized in a partially tabbed three-ring binder. At the outset, I numbered consecutively each section of the binder, whether tabbed or not, as Claimant's exhibits 1 – 12. Each section had been given a title by the Claimant, which I use in this proposed decision for convenience. Some of the exhibits were admitted; others were not admitted, either

[2] After discussion at the hearing and with the agreement of the parties, the Claimant was amended at the hearing to be the trust rather than Ms. Stockdale personally.
[3] On July 1, 2019, the Maryland Department of Labor, Licensing and Regulation became the Department of Labor.

because I sustained an objection to their admission in whole or in part, or because they were never offered in evidence:

CLMT #1	General Overview of Driveway (printouts of three photographs)
CLMT #2	Measurement (printouts of seven photographs)
CLMT #3	Water Ruts and Bumps (printouts of eight photographs)
CLMT #4	Portland Cement Spots (printouts of two photographs)
CLMT #5	Wires (printout of a photograph)
CLMT #6	Not admitted
CLMT #7	Not admitted
CLMT #8	Nichols Contracts, pages E – J, N, O, and P[4]
CLMT #9	Emails/Texts
CLMT #10	Attorney General[5]
CLMT #11	DLLR[6], pages A and B
CLMT #12	Materials
CLMT #13	Sample piece of metal material used by Respondent in driveway[7]

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

RESP # 1	Thumb drive containing nine color photographs and printouts of the pictures[8]

I admitted the following exhibits on behalf of the Fund:

FUND # 1	Hearing Order, July 1, 2019
FUND # 2	Notice of Hearing, August 20, 2019
FUND # 3	Home Improvement Claim Form, signed September 10, 2018, received by the MHIC September 11, 2018
FUND # 4	MHIC licensing records for the Respondent, August 28, 2019

Testimony

The Claimant presented testimony from Jenine Stockdale, Lawrence Cooke, and Michael Benhoff. Mr. Benhoff was accepted as an expert in roadways construction and estimating projects of the type involved in this case. The Respondent testified on his own behalf. No additional witnesses were called.

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[4] Pages in this section were labeled A-P.
[5] This section contains documents that were sent and received as part of a Consumer Protection Division Program aimed at reaching an agreement between parties in dispute.
[6] DLLR stands for the Department of Labor, Licensing and Regulation. That Department's name changed to the Department of Labor.
[7] The Claimant referred to these pieces of metal as "wires," so I will use that term in this decision, but the term wire tends to understate how large and thick the pieces of metal are.
[8] The other materials on the thumb drive are not in evidence. I printed out the nine pictures and incorporated them into this exhibit. I discussed this with the parties and there were no objections.

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 01-20727.

2. The Claimant owned a house at 4313 Church Road in Hampstead, Maryland. The house had a driveway that was roughly one third of a mile long. The driveway needed work done on it.

3. Ms. Stockdale was solely responsible for selecting a contractor, negotiating contract terms and making payments and arrangements for this project on behalf of the trust that owned it. Ms. Stockdale lived in Colorado.

4. On July 25, 2017, after more than a year of communication and negotiation, the Claimant and the Respondent entered into a contract that called for the Respondent to prepare and pave portions of the Claimant's driveway and a pad and pull-off related to the driveway. The contract did not cover the entire driveway. The Respondent was to grade some areas, install four plus (4+) inches of machine-set CR6[9] and some Portland treated stone, and roll this with a 3-5 ton roller, followed by applying 3½" of asphalt and rolling it with a 3-5 ton roller. The width of the roadway portion of the driveway (excluding the pull-off and the pad) was to be a minimum of 10' 4".

5. The agreed-upon contract price was $33,000.00.

6. In addition to the proposal that became the contract, the Respondent sent to the Claimant a separate sheet of paper with possible start dates, and information about a draw schedule. The draw schedule was to include $11,000.00 due before the start of the project, $11,000.00 due "before asphalt installed," and $11,000.00 due upon completion. The sheet

[9] CR6 is stone that is crushed at a manufacturing plant and graded as to size – the 6 in CR6 denotes the size.

requested that the first two payments be sent as a single check for $22,000.00 or that two checks for $11,000.00 each be sent together, dated a day or two apart. The stated reason for this request was so that there would be no delay during the work process for payments to be made.

7. The contract did not contain any projected date for starting or finishing, but the Respondent told Ms. Stockdale that the entire job would take three to four days.[10]

8. Prior to the start of the project, the Claimant sent two checks for $11,000.00 each.

9. The Respondent cashed the first check on July 31, 2017.

10. Work began under the contract on Tuesday, August 1, 2017.

11. On August 2, 2017, the Respondent cashed the second check for $11,000.00.

12. Several days into the project, Lawrence Cooke, Ms. Stockdale's brother and caretaker of a house on the property with the driveway at issue, questioned the Respondent about certain aspects of the project. Mr. Cooke favored another contractor and was resentful that the Respondent had been awarded the job by Ms. Stockdale. Ms. Stockdale advised the Respondent prior to work being done that Mr. Cooke was a "perfectionist" and it was very important that rock and asphalt depths measure at or above what was called for in the contract.[11]

13. Mr. Cooke did not believe the Respondent was living up to the requirements of the contract; specifically, he thought that the materials and the equipment the Respondent was using failed to meet the contract's specifications, and that the Respondent was not using as much material as called for in the contract. The interaction between Mr. Cooke and the Respondent was unpleasant.

[10] CLMT #9, email of June 17, 2017, at 7:21 p.m.
[11] CLMT #9, email of June 26, 2017, (no time given)

14. Mr. Cooke believed that the Respondent was using recycled concrete (RC6)[12] where the contract called for CR6. He believed that neither the RC6 nor the CR6 reached a consistent depth of 4+ inches, and he believed that the roller being used on the driveway was lighter than the weight called for in the contract.

15. The Respondent used RC6 and CR6 for the driveway base. The RC6 used by the Respondent contained numerous pieces of wire ranging from a few inches to almost two feet in length. The wires were thick and many had ends sharp enough to puncture a tire, and, in fact, one did puncture a tire after the Respondent left the job.

16. The roller used by the Respondent was not as heavy as it was required to be under the contract.

17. As work continued, Mr. Cooke's dissatisfaction with the project increased. He tried to call the Respondent to discuss the matter, but the phone number appearing on the Respondent's equipment was not in service.

18. After work proceeded for an additional week or so, Mr. Cooke went back to the property and confronted the Respondent about what he perceived to be shoddy work.

19. After this confrontation, which took place on or about August 11, 2017, the Respondent removed his equipment from the site and stopped all work.

20. The Respondent did not contact Ms. Stockdale to discuss the situation prior to leaving the job.

21. By letter dated August 15, 2017, the Respondent advised Ms. Stockdale that:

> During this period [when the Claimant had been on the job], we were constantly harassed by a gentleman who introduced himself as Mr. Cooke and stated that he lived in the house on the premises. Mr. Cooke continually questioned our methods, our choice of materials, and the type of equipment we were utilizing. Each time we were confronted, we answered his questions both honestly and

[12] RC6 is recycled concrete. Sometimes the concrete is screened before going to a consumer and sometimes it is not. Sometimes magnets are used to remove rebar and other metal pieces before the product is sold, sometimes that does not occur. In this case, substantial pieces of metal were strewn throughout the RC6 used for the project.

accurately, in the hope of satisfying his doubts. He very clearly stated that he had absolutely no faith in what we were doing.

He continually stated that he was very unhappy with the fact that you had not chosen another contractor, which had also submitted a bid on the project. Mr. Cooke explained in detail why he believed you should have chosen the other contractor and why he was unhappy with what we were doing at the site.

Considering Mr. Cooke's ongoing animosity toward our work product and general discontent, we are hereby deeming our Agreement as **Null and Void**. This correspondence will serve as formal notice that we have removed our equipment from the site and will not be returning to complete the project.[13]

To date we have received ($22,000) from the Cooke Trust as payment toward completion of the project. We have completed a substantial amount of work on the project, which we value at ($15,000). Therefore, we are refunding ($7,000.00) of your payments along with this letter.

We are sincerely sorry that we have been forced to make this difficult decision, but simply cannot work where we are obviously not wanted and our integrity is continually being brought to question. We wish you well with your new contractor and move forward knowing that we have done a good job with the work, which we have completed.[14]

22. The letter was accompanied by a check for $7,000.00, which was made out incorrectly to the "Cooke Trust." Due to strict rules governing trust accounts, the check could not be deposited in the Claimant's account.

23. Ms. Stockdale contacted or attempted to contact the Respondent multiple times through phone calls, texts, emails, and correspondence sent through the U. S. mail, seeking to discuss the matter with him and have him return to the site and finish the job.

24. The Respondent would not answer or respond to Ms. Stockdale's attempts at contact. This was in sharp contrast to the Respondent's responsiveness in the lengthy negotiation period leading up to the contract.

25. The Claimant sought to resolve the matter through an Attorney General's Consumer Protection Division process. It was not successful. During that process the Respondent wrote several letters outlining his position. He categorically refused to return to the job.

[13] Bold font and underlining in original.
[14] CLMT #10, Attorney General section.

26. At no time prior to the hearing did the Respondent allege that racial or ethnic slurs were used during the two confrontations between himself (and others on the site) and Mr. Cooke. The Respondent also never suggested that Mr. Cooke had touched his equipment, become physically aggressive, made threats, spit or attempted to spit on them or near them, or been intoxicated during the confrontations. He asserted at the hearing that all of these things had occurred.

27. The Respondent purchased and installed in the Claimant's driveway approximately 517 tons of CR6 and RC6 before leaving the job. He rolled some or all of the stone. The Respondent never installed any asphalt.

28. Once the CR6 and RC6 were in place, it was essential to install asphalt as soon as possible to keep the stone from being washed away and thus losing the benefit of the Respondent's work.

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).[15] "[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)[16]; *see also* COMAR 09.08.03.03B(2) ("actual losses . . . incurred as a result of misconduct by a

[15] As noted above, "COMAR" refers to the Code of Maryland Regulations.
[16] References to the Business Regulation Article are to the 2015 Volume of the Maryland Annotated Code.

licensed contractor"). "'[A]ctual 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. The Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimant and he performed incomplete home improvements. The Respondent has acknowledged that he owes the Claimant $7,000.00.

Ms. Stockdale exchanged emails with the Respondent's son on behalf of the Respondent for over a year discussing various options for the areas of the driveway that would be done, the materials to be used, and the contract price. She was solely responsible for all contract negotiations and payment. Eventually the parties came to terms and signed a contract. The Respondent advised that the project should take three to four days. He asked Ms. Stockdale to provide $22,000.00 either in one check or split into two, ostensibly so that the Respondent would not get delayed once he started the project.

The Respondent cashed the first check and started working on the driveway the next day. Two days after cashing the first check (so one day after starting the project), the Respondent cashed the second check. The second $11,000.00 draw was due "before asphalt installed." It was cashed before asphalt was installed. Ms. Stockdale interpreted "before asphalt installed" as meaning essentially "when the asphalt is installed," which is not unreasonable, but is not what the contract actually says. For reasons that were never explained, what was supposed to be a three or four day project stretched over the better part of two weeks and was still not completed. During this time, Ms. Stockdale was out of the country.

Mr. Cooke, who was angry about the selection of the Respondent as the contractor for the job, checked on the progress with the driveway. He was unhappy with almost everything he saw. He was unhappy that RC6 was being used. It was a less expensive material than the CR6

called for in the contract and contained large pieces of metal in lengths up to two feet that were thick enough and pointed enough to damage tires. He believed that some of the rock had been erroneously spread on property that did not belong to the Claimant. He believed that the rock was not to the correct depth. He believed that the equipment being used to compact the base was not as heavy as called for in the contract. He engaged with the Respondent regarding these issues at least twice.

Mr. Cooke and the Respondent recalled the confrontations very differently. Mr. Cooke describes two brief exchanges where he merely questioned the Respondent about the perceived deficiencies and mentioned that he would have preferred a different contractor, during which he believed the Respondent's feeling were hurt. The Respondent described multiple instances of an angry, yelling, possibly drunk Mr. Cooke coming to the site, turning off machinery while it was being operated by the Respondent's son, laying hands on the Respondent's son, referring to the Respondent and his son as "dumb Mexicans," and threatening legal action including civil action or possible criminal action for trespass.

I do not find either version of events completely credible. I do not believe the encounters were as quiet and benign as Mr. Cooke indicated, and I do not believe they were as dramatic as the Respondent suggested, with Mr. Cooke putting his hand on the Respondent's son's shoulder as if to pull him off a machine and nearly spitting on the son. I do not find Mr. Cooke's version credible because he was adamantly opposed to Ms. Stockdale's selection of the Respondent. Ms. Stockdale used the word "perfectionist" as a warning to the Respondent that Mr. Cooke would be examining everything with a very critical eye. Mr. Cooke's tone in an email to family members is disparaging of both Ms. Stockdale, for her handling of the matter, and the Respondent, whom Mr. Cooke came to believe never intended to finish the project after cashing the first two checks

so quickly.[17] Mr. Cooke directly denied specific points raised by the Respondent, such as that he was drunk, called anyone a dumb Mexican or shut off a running machine, but he was vague and evasive when asked repeatedly about details of what did actually happen.

On the other hand, the Respondent gave several written accounts of why he left the job. The first is quoted at length in the Findings of Fact. He mentioned "Mr. Cooke's ongoing animosity toward our work product and general discontent." In that letter the Respondent never mentioned any of the alarming actions he now claims made him fear returning to the job. Further, the Respondent submitted additional material to the Attorney General's Office on November 17, 2017, January 2, 2018, and April 13, 2018. While the Respondent mentions that he believes he was "harassed," he never mentions spitting or attempting to spit, physical aggression by Mr. Cooke, the use of slurs, or any attempt to interfere with the use of machinery.

At the hearing, the Respondent testified from notes he took to the witness stand, recounting events alleged to have happened on many days, not just two as suggested by the Claimant, but, on cross-examination, it was established that the notes had been created the day of the hearing and the day before the hearing based on his recollection and did not represent anything created substantially contemporaneously with the events at issue. It is very unlikely that the Respondent, in his correspondence with both Ms. Stockdale and the Attorney General's Office, would fail to mention physical assaults or racial slurs in describing why he felt it was necessary to leave the job, a factor which casts doubt on some of his testimony at the hearing.

The encounters between Mr. Cooke and the Respondent are important, because they are the reason the Respondent gives for leaving the job. The Respondent should have contacted Ms. Stockdale before unilaterally deciding he would not honor the contract. He should also have answered when she made numerous attempts to contact him after receiving his letter. His

[17] CLMT #10, email of August 30, 2017.

reasons for failing to do so, which he testified were because he thought she might be "mad or mean" with him, should be beneath the dignity of an experienced businessman. He expressed concern that he might be accused of saying things he did not really say, which, I note, could have been avoided by written communication. He entered into a contract with her after extended negotiations and the least he owed her was the courtesy of some communication regarding his decision to stop all work beyond his initial letter unilaterally declaring the contract null and void.

But based on the evidence before me, I cannot say that the Respondent was not threatened with legal action, civil or criminal, if he remained on the property and continued to work. The Respondent left the job because Mr. Cooke was coming around criticizing every aspect of the job and questioning the Respondent's integrity and professional capability. Mr. Cooke was a stranger to the contract, but he had rights in and on the property. He was the caretaker for the property, so a threat to sue the Respondent or to have him charged criminally with trespass did not appear empty from the Respondent's perspective.

When the Respondent ceased work, the Claimant was left with a job that was only partially completed and which the Respondent acknowledged was worth substantially less than the Claimant had paid under the contract. I find that the Claimant is eligible for compensation from the Fund because the licensed home improvement contractor performed an incomplete home improvement. I must now 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 different formulas to measure a claimant's actual loss, depending on the status of the contract work.

In a case like this, where the Respondent performed some work under the contract, and the Claimant intends to retain other contractors to complete or remedy that work, 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 original agreed upon contract price was $33,000.00. Where I run into difficulty applying the formula is calculating the amount the Claimant will be required to pay another contractor to complete the contract. The Claimant offered the testimony of a well-qualified expert about the status of the driveway, but his observations were very recent. By all accounts the driveway has changed dramatically from its condition the day the Respondent left. Currently it is in about the same condition as it was when the parties first signed the contract. Further, there was testimony that prices have increased substantially for the materials needed to complete the project in the intervening two years.

I have carefully examined the evidence presented in support of the claim, including the February 16, 2018 proposal (February proposal) from J. G. Benhoff.[18] The Claimant represented that this proposal exactly matched the specifications of the original contract. The proposal was not prepared by the Claimant's expert witness – it was prepared by someone else at J. G. Benhoff. Mr. Benhoff was not able to address the condition of the driveway as it existed when the proposal was prepared, which was roughly a year and a half before he visited the property, so

[18] CLMT #10, 5 pages from the end of the exhibit.

it is not clear how much stone had been lost over the six months between the Respondent leaving the job and the date of the estimate. The Respondent disputed that the specifications were the same as the original. Mr. Benhoff testified that the grading performed by the Respondent was improper, based on the washed out condition of the rock, but again, his observations were made shortly before the hearing. The February proposal does not mention any grading, whereas the original contract called for at least some.

In short, while I believe the Respondent performed an incomplete home improvement and that the Claimant suffered a loss, I cannot calculate an award under the formula found in COMAR. What I am able to say with confidence is that the Respondent owes the Claimant a minimum of $7,000.00. The Respondent stated from the very first communication he sent to the Claimant giving notice that he would not complete the job that he was refunding that much. The Claimant received a check that, as mentioned above, it could not deposit due to bank rules or policies regarding trusts. In the intervening time the Claimant has never received that money in a usable form. It is entirely reasonable to order an award in that amount from the Fund.

Ms. Stockdale's frustration was palpable at the hearing. She spent a long time negotiating this contract and working out many details. She expected a smooth job that would be finished in less than a week. More than two years later she is fighting on behalf of the Claimant to recover the loss suffered by the Respondent's unilateral action. I understand that an award of $7,000.00, essentially a number picked by the Respondent long ago, is unsatisfying, especially in view of the escalating costs to have the driveway improved now. Nevertheless, it is the appropriate award based on the evidence.

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 $7,000.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of $7,000.00 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 $7,000.00; 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;[19] and

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

January 10, 2020
Date Decision Issued

Kimberly Farrell
Administrative Law Judge

KAF/cmg
Document #183442

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

IN THE MATTER OF THE CLAIM OF JENINE STOCKDALE ADMINISTRATOR, on behalf of THE JAMES WILEY COOKE & VENUS H. COOKE TUA	*	**MARYLAND HOME IMPROVEMENT COMMISSION**
AGAINST THE MARYLAND HOME IMPROVEMENT GUARANTY FUND FOR THE ACTS OR OMMISSIONS OF RONNIE NICHOLS, T/A NICHOLS ASPHALT PAVING & SEALCOATING	*	**MHIC CASE NO. 18(05)1394 OAH CASE NO. LABOR-HIC-02-19-23191**

* * * * * * *

FINAL ORDER

This matter was originally heard before an Administrative Law Judge ("ALJ") of the Office of Administrative Hearings ("OAH") on October 17, 2019. Following the evidentiary hearing, the ALJ issued a Proposed Decision on January 10, 2020 concluding that the homeowner, Jenine Stockdale, Administrator of the James Wiley Cooke & Venus H. Cooke TUA ("Claimant") proved that she sustained an actual loss as a result of the acts or omissions of Ronnie Nichols ("Contractor") in conection with a contract to resurface portions of a driveway and awarded the Claimant $7,000.00 from the Home Improvement Guaranty Fund ("Guaranty Fund"). *ALJ Proposed Decision* pp. 13-15. In a Proposed Order dated February 10, 2020, the Maryland Home Improvement Commission ("MHIC" or "Commission") affirmed the Proposed Decision of the ALJ to grant Claimant an award from the Guaranty Fund. The Claimant subsequently filed exceptions of the MHIC Proposed Order.

On August 20, 2020, a three-member panel ("Panel") of the MHIC held a remote hearing on the exceptions filed in this matter. The Claimant and the Contractor participated without counsel. Assistant Attorney General Andrew Brouwer appeared at the exceptions hearing to present preliminary exhibits and legal argument on behalf of the Guaranty Fund. The following preliminary exhibits were offered by AAG Brouwer and admitted into evidence at the exceptions

hearing: 1) February 10, 2020 transmittal letter, OAH Proposed Decision, and Proposed Order; 2) February 14, 2020 transmittal letter, OAH Proposed Decision, and Proposed Order; 3) Claimant's Exceptions; 4) February 27, 2020 hearing notice; 5) April 8, 2020 Hearing Postponement Notice and Claimant's April 7, 2020 postponement request; 6) May 27, 2020 Notice of Hearing Postponement and Rescheduling; 7) Claimant's June 2, 2020 request for a remote hearing; and 8) Claimant's June 8, 2020 request for a remote hearing and MHIC's June 8, 2020 reply. Neither the Claimant nor the Contractor produced a copy of the transcript of the hearing before the ALJ. Therefore, the Panel's review of the record was limited to the preliminary exhibits offered by AAG Brouwer at the exceptions hearing, the OAH Proposed Decision and the exhibits introduced into evidence at the OAH hearing. COMAR 09.01.03.09(G) - (I).

In her written exceptions and during argument before the Panel, the Claimant asserted that the ALJ's Proposed Decision erroneously calculated the amount of her award, citing the February 16, 2018, proposal of J.G. Benhoff, LLC (OAH Hearing Claimant's Exhibit 10) to complete the driveway work that the Contractor was to perform. The Claimant also made factual arguments, but did not cite to the record. The Contractor refuted the Claimant's factual arguments, also without reference to the record.

The Guaranty Fund argued that, because the Claimant solicited bids from other home improvement contractors to complete the contracted work and submitted the bids as evidence before the ALJ, the ALJ erred in declining to apply the formula prescribed by Code of Maryland Regulations ("COMAR") 09.08.03.03(B)(3)(c) to calculate the Claimant's actual loss.

The Commission agrees that the ALJ erred in calculating the Claimant's actual loss and award. COMAR 09.08.03.03(B)(3) provides that, unless a particular claim requires a unique measurement of the claimant's actual loss,

> [i]f 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.

The formula can be expressed as the following equation:

Amount paid to or on behalf of the contractor + Cost to correct and complete the work

- Original contract price = Actual Loss

In this case, the ALJ found that the Contractor did some work under the contract but failed to complete the work according to the contract and that the Claimant intended to retain another contractor to complete the work. *ALJ Proposed Decision* pp. 12-13. The Commission agrees with these findings. However, rather than applying the formula prescribed by COMAR 09.08.03.03(B)(3), the ALJ found the Claimant's actual loss to be $7,000.00 because the Contractor voluntarily offered to refund $7,000.00 to the Claimant when he stopped work under the contract. The ALJ explained that she did not use the formula from COMAR 09.08.03.03(B)(3) because the Claimant's expert witness at the hearing did not observe the Claimant's driveway until a year and a half after the Contractor stopped work and the driveway had deteriorated as a result of rain washing away the stones laid for the incomplete driveway.

The Commission finds that the February 16, 2018 proposal of J.G. Benhoff, LLC (OAH Hearing Claimant's Exhibit 10) for $32,323.00, is the proper measure of the cost to complete the Contractor's work because it (1) was created approximately six months after the Contractor stopped work, (2) was for the same scope of work as the original contract according to the Claimant's testimony, *ALJ Proposed Decision* p. 13, and (3) was $677 less than and within 3% of

the amount of the original contract. Because the Claimant solicited another contractor, J.G. Benhoff, LLC to complete the contract, the formula set forth in COMAR 09.08.03.03B(3)(c) should be used to calculate the Claimant's actual loss.

In this case, the amount the Claimant paid to or on behalf of the Contractor is $22,000.00. *ALJ Proposed Decision* p. 5. The Commission finds, based on the estimate of J.G. Benhoff, LLC, that the cost to correct and complete the work is $32,323.00. (OAH Hearing Claimant's Exhibit 10.) The original contract price was $33,000.00. Accordingly, the Commission's calculation of actual loss is as follows:

$22,000.00 Amount paid to or on behalf of the contractor

+ $32,323.00 Cost to correct and complete the work

$54,323.00.00

- $33,000.00 Original contract price

$21,323.00 Actual Loss

The Commission may not make an award from the Guaranty Fund in excess of $20,000. *Md. Code Ann.*, Bus. Reg. § 8-405(e)(5). Because the Claimant's actual loss exceeds $20,000.00, the Commission finds that the proper award is $20,000.00.

Having considered the parties' arguments, the evidence contained in the record, and the ALJ's Proposed Decision, it is this 2nd day of September 2020, **ORDERED:**

A. That the Findings of Fact of the Administrative Law Judge are **AMENDED**;

B. That the Conclusions of Law of the Administrative Law Judge are **AMENDED**;

C. That the Proposed Decision and Recommended Order of the Administrative Law Judge is **AMENDED;**

D. That the Claimant is awarded **$20,000.00** from the Maryland Home Improvement Guaranty

Fund;

E. That the Contractor shall remain ineligible for a Maryland Home Improvement Commission license until the Contractor reimburses the Guaranty Fund for all monies disbursed under this Order plus annual interest of at least ten percent (10%) as set by the Commission, *Md Code Ann.*, Bus. Reg. §§ 8-410(a)(1)(iii), 8-411(a);

F. That the records and publications of the Maryland Home Improvement Commission shall reflect this decision; and

G. Any party has thirty (30) days from the date of this Final Order to appeal this decision to Circuit Court.

Jean White
Chairperson –Panel
Maryland Home Improvement Commission