IN THE MATTER OF THE CLAIM	*	**BEFORE LAURIE BENNETT,**
OF LAWRENCE B. JOHNSON,	*	**AN ADMINISTRATIVE LAW JUDGE**
CLAIMANT	*	**OF THE MARYLAND OFFICE**
AGAINST THE MARYLAND HOME	*	**OF ADMINISTRATIVE HEARINGS**
IMPROVEMENT GUARANTY FUND	*	**OAH No.: DLR-HIC-02-15-27344**
FOR THE ALLEGED ACTS OR	*	**HIC No.: 14 (90) 870**
OMISSIONS OF MONICA GUDAITIS,	*	
t/a GRANITITE,	*	
RESPONDENT	*	

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PROPOSED DECISION

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STATEMENT OF THE CASE

On May 5, 2014, Lawrence B. Johnson (the Claimant) filed a claim (the Claim) with the Maryland Home Improvement Commission (the MHIC) Guaranty Fund (the Fund) for reimbursement of alleged losses suffered as a result of a home improvement contract with Monica Gudaitis, trading as GraniTite (the Respondent).

I held a hearing on January 11, 2016 in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015).[1] The Claimant represented himself. The Respondent

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

represented herself. John D. Hart, Assistant Attorney General, Department of Labor, Licensing and Regulation (the Department), represented the Fund.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, 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), Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02, and 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 that the Claimant offered:

1. Photograph
2. Photograph
3. Photograph
4. Photograph
5. Contract, July 23, 2011
6. Two personal checks from the Claimant to the Respondent, July 23, 2011 and July 28, 2011
7. Proposal from Father & Son Construction, not dated

I admitted the following exhibits that the Respondent offered:

1. ConcreteNetwork.com article on Spalled Concrete Driveway – Fixing Spalling Issues

2. Struck from the record[2]

3. E-mail from the Respondent to the Claimant, March 31, 2014

4. Letter from Brad Gant to the Department, January 10, 2016

I admitted the following exhibits that the Fund offered:

1. Notice of Hearing, October 9, 2015

2. MHIC's Hearing Order, August 6, 2015

3. The Respondent's MHIC licensing history

4. Claim form, filed with the MHIC on May 5, 2014

5. Letter from the MHIC to the Respondent, May 9, 2014

6. Letter from the MHIC to the Claimant, August 7, 2015

7. Invoice from Beltway Builders, Inc., July 14, 2015

8. Business card for Beltway Builders, Inc.

Testimony

The Claimant presented testimony from his wife, Sandra Johnson.

The Respondent testified.

The Fund did not present witnesses.

PROPOSED FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. At all relevant times, the Respondent was a licensed home improvement contractor under MHIC license number 128472.

2. The Claimant and his wife (the Wife) reside at 1814 Newcastle Road, Baltimore, Maryland 21224 in a semi-detached house.

[2] I initially admitted this two-page print-out from the website ConcreteNetwork.com but struck it when I realized that page two did not naturally flow from page one and the Respondent could not produce the proper pages.

3. Neither the Claimant nor the Wife is the Respondent's spouse or other immediate relative; the Respondent's employee, officer, or partner; or the Respondent's immediate relative of an employee, officer, or partner.

4. The Claimant contacted the Respondent about replacing concrete blocks in the walkway at her residence. During their initial meeting, the Wife told the Respondent that she wanted the Respondent to use 4500 PSI[3] cement (*i.e.* concrete). The Respondent told her that 4500 PSI is not necessary for a walkway.

5. On July 23, 2011, the Claimant and the Respondent entered into a home improvement contract in which the Respondent would demolish and replace an unspecified number of concrete blocks in the walkway.[4] The contract called for the Claimant to use 3500 PSI concrete with fiber mesh.

6. The total contract price was $2,500.00, which the Claimant paid in full in two equal installments, first as a down payment and then upon completion of the job.

7. The Respondent purchases concrete from a seller who delivers to and pours the concrete at a job site, after which the Respondent completes the job. Concrete is sold by the yard and concrete sellers require a minimum purchase. The Respondent purchased the minimum yardage possible for the Claimant's job from Shuster Concrete, which delivered and poured the concrete in 95 degree weather. The concrete contained a fiber mesh to reinforce the concrete.

8. The Respondent had concrete left over from the Claimant's job and she or her worker suggested using it to replace one additional block in the walkway. The Wife objected on the

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[3] Pounds per square inch.

[4] The contract does not specify the number of blocks that the Respondent would replace. The Wife testified that she could not say how many blocks the contract covered. Claimant Exhibit 4 shows a length of walkway that is comprised of a series of blocks separated by joints. The number of blocks in the photograph does not necessarily equal the number of blocks at issue. Also, the contract seems to contemplate porch work, although the porch is not the subject of the hearing.

basis that the suggested block was in perfect condition and did not need replacing. The Wife nevertheless authorized the Respondent to replace the extra block.

9. About nine months after the Respondent completed the contract, the Wife noticed a hairline crack in one of the blocks that the Respondent installed. The crack eventually got bigger and the Wife called the Respondent and talked to a woman who relayed the Wife's concern to the Respondent. After some unspecified delay, the Respondent returned the call. The Respondent told the Wife that she does not warranty her work against cracks.

10. Two years after the Respondent completed the contract, one or more of the concrete blocks she installed started to spall (*i.e.* to flake and or crumble).[5]

11. The Claimant asked the Respondent to fix the blocks that showed spall. The Respondent refused on the basis that she was not responsible for the condition.

12. The Claimant sought an estimate from Father & Son Construction, a licensed home improvement contractor (MHIC # 777), to redo the Respondent's work. The estimate was for "concrete walkway complete replacement," for $2,880.00, and for an additional item (that is illegible on the contract), for a total of $3,800.00. The Claimant did not accept the bid.

13. The Claimant hired Beltway Builders, a licensed home improvement contractor (MHIC # 46868), to redo the Respondent's work and to perform additional concrete walkway work, for a total of $4,100.00, and to do other home improvement work for an additional cost. The contract is not itemized to show what portion of the $4,100.00 is attributable to redoing the Respondent's work versus the additional concrete walkway work.

[5] The Claimant did not present evidence about the number of blocks that showed spall.

DISCUSSION

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). "[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 (3rd. 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." 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 Claimant has not proven eligibility for compensation.

The only undisputed issue is that the Respondent was a licensed contractor when she contracted with the Claimant. The disputed issues are whether the work was unworkmanlike, inadequate or incomplete home improvement and, if so, whether the Claimant suffered an actual loss. The Fund argued generally that the Claimant is not eligible for reimbursement from the Fund because he did not offer an expert witness to prove that the Respondent performed unworkmanlike, inadequate, or incomplete home improvement. The Claimant and the Respondent made specific arguments as follows.

First, the Claimant asserts that the Respondent improperly used 3500 PSI concrete even though his Wife told the Respondent that she wanted a higher PSI. The Respondent does not dispute that she and the Wife talked about what strength PSI to use. The contract, however, calls

for 3500 PSI, and the Claimant accepted the contract. Thus, the Respondent was not required to use a higher PSI.

Moreover, the evidence does not prove that 3500 PSI concrete is inadequate for a residential walkway. The Wife testified that she talked to other concrete installers, whose names she did not mention, who said that 3500 PSI is not strong enough and that the Respondent should have used 4000-4500 PSI. The Claimant did not present any expert witnesses or other persuasive evidence to prove that 3500 was inadequate. The Wife's testimony about what she was told is not sufficient to prove the point because the record does not show who she spoke to and whether those people are skilled in residential walkway concrete installations. The Respondent testified that 3500 PSI is recommended in a residential walkway and in fact 3000 to 3500 is used for house foundations. The Respondent's testimony is arguably self-serving. On the other hand, it is not disputed by any persuasive evidence. I therefore find that the Respondent is correct that 3500 PSI is acceptable for the Claimant's walkway application.

The Claimant next asserts that the Respondent should have used rebar or a fiber mesh underlayment to reinforce the concrete. The Respondent testified that she used concrete that has a fiber mesh mixed in the concrete rather than a mesh underlayment. The Wife testified that the Respondent's worker rubbed some concrete between his fingers to show her that it contains fiber mesh. The Claimant does not dispute that the concrete included the mesh, but he finds such mesh insufficient. The Claimant did not present any expert testimony or other persuasive evidence that concrete that contains mesh is inadequate or that the industry required the Respondent to use rebar or a mesh underlayment. The Respondent testified that concrete that contains a fiber mesh is acceptable in a residential walkway. Absent persuasive evidence to the contrary, I find that the Respondent is correct.

The Claimant next asserts that the Respondent's poor workmanship caused the walkway to crack after just nine months. The record does not reveal how many cracks have formed. The Wife testified about one particular crack that she said was so small she could barely see it at first, but it grew. The record does not establish the length of the crack, but it is quite obvious in the photograph at Claimant Exhibit 2, where it appears to traverse one entire block of concrete.[6] The Respondent testified that neither she nor any concrete installer guarantees their work against cracks. The record does not include any evidence that the industry standard holds otherwise. The Respondent testified, as she wrote in an e-mail to the Claimant, that cracks may result from the earth moving or ground moisture. The Claimant has the burden of proving that the crack resulted from unworkmanlike, inadequate or incomplete home improvement. I cannot conclude from the mere existence of a crack, however long, that the Respondent did something wrong. The Claimant did not present any expert or other persuasive evidence to prove otherwise.

The Claimant asserts that two years after the Respondent completed the concrete work, the concrete began to spall. I infer that the Claimant wants me to conclude that the existence of spall necessarily means that the Respondent performed unworkmanlike, inadequate or incomplete home improvement. The Claimant did not present any expert testimony or other persuasive evidence to prove the point. In other words, the record does not show that spalling two years after installation necessarily means the Respondent did something wrong.

The Respondent testified that spall is caused by freezing and thawing in the winter, and from salt (used to melt ice) on concrete. To support her testimony, the Respondent offered a print-out from the internet from a group called Concrete Network. The Respondent testified that this national group provides information about concrete. A consumer posed a question to

[6] The record does not include the size of the block.

Concrete Network about spalling in her concrete driveway. The author, from a company called ChemSystems, Inc., responded that sapling, or scaling,

> is more common in colder climates where freeze-thaw cycles and deicing chemicals are prevalent. Freezing causes the water in the capillaries of the concrete to expand creating pressure. Over time, the expansive pressure from repeated cycles of freezing and thawing can break away the top surface of the concrete, leaving pit marks and exposing the coarse aggregate. Deicing chemicals only aggravate the already-stressed concrete by allowing more water to migrate into the concrete, thus increasing the size and depth of the spalling failures when a freeze occurs. That's why the problem occurred [for the consumer] only in front of the garage, where the cars are often parked. Deicing chemicals picked up from the road dripped onto the surface, allowing water to permeate that area.

Respondent Ex. 1. I accept the author's contention to the extent it is consistent with the Respondent's testimony. The other information, about a problem near the garage, is not relevant for purposes of this case. In other words, I find that it is possible the concrete started spalling because of winter weather and salt. The evidence does not prove that the Respondent did something to facilitate the spall, or that she did not do something that would have prevented the spall.

The Claimant next asserts that the Respondent poured the concrete in such a way that water pooled on its surface and after she had the walkway redone by another contractor, the water runs off and the walkway is barely wet. The Respondent testified that she poured concrete with "pitch," meaning a slant to the blocks. Neither party presented evidence of the amount of the pitch. I cannot conclude from the presence of standing water that the blocks were improperly pitched (or that the pitch caused the crack or spalling). Indeed, the Claimant did not present any expert testimony or other persuasive evidence on what constitutes proper pitching.

The Claimant next asserts that it was too hot outside when the Respondent poured concrete. The Wife testified that it was 95 degrees. The Respondent testified that it is common to pour concrete in hot weather, as evidenced by the fact that concrete is poured in Florida and

other hot climates across the country. She added that in hot weather it is necessary to ensure that the concrete does not harden while the work is in progress, and this may require spraying the concrete to keep it wet. The Clamant did not present any expert evidence that pouring concrete in 95 degree weather is against the industry standard. Indeed, the Respondent's business is seasonal and she pours throughout the summer. Absent evidence to the contrary, I accept the Respondent's testimony that laying concrete in 95 degree weather is quite common and is consistent with industry standards.

The Claimant next asserts that the Respondent had only one person doing the concrete work. The Respondent said that is not so; rather, she had two workers and she was often on site. Whether the Respondent had one, two or three people on site does not prove that the Claimant performed unworkmanlike, inadequate or incomplete home improvement.

The Claimant next asserts that the Respondent should not have replaced a perfectly good block of concrete in the walkway. The Respondent explained that she had leftover concrete that the Claimant had paid for and it made sense to use it rather than give it to another job for free. The Claimant permitted the Respondent (or her worker) to replace the block. While I understand that the Claimant is now remorseful of that decision, the fact remains that he (or his Wife) authorized the replacement at the time. I cannot therefore conclude that the Respondent performed unworkmanlike, inadequate or incomplete home improvement.

Finally, the Claimant questions whether the concrete was defective. The Respondent disavowed any responsibility for the concrete that Schuster delivered. However, "for purposes of recovery from the Fund, the act or omission of a licensed contractor includes the act or omission of a subcontractor, salesperson, or employee of the licensed contractor, whether or not an express agency relationship exists." Md. Code Ann., Bus. Reg. § 8-405(b). In other words, if Schuster's concrete was defective, the Claimant could obtain reimbursement from the

Respondent through the Fund if the defective concrete caused an actual loss. The Claimant, however, has not proven that the concrete was defective.

For all of these reasons, I find that the Claimant has not proven that the Respondent performed unworkmanlike, inadequate or incomplete home improvement. The Claimant is therefore not eligible for compensation for money he paid to Beltway Builders to re-do the Respondent's work. Even if the Claimant had proven that the Respondent performed unworkmanlike, inadequate or incomplete home improvement, he would not be eligible for reimbursement from the Fund because he did not prove the value of his loss.

The Claimant contracted with Beltway Builders for a "concrete walkway," for $4,100.00, and for other items. The Wife was forthcoming when she testified that Beltway replaced more blocks than the Respondent had installed. The Wife tried to remember how many blocks the Respondent versus Beltway installed and she simply could not remember. I therefore could not prorate the $4,100.00. I turned to the Father & Son Construction contract to see whether it contains helpful information, but it does not. The Father & Son Construction contract was vague in that it assessed $2,800.00 for "concrete walkway complete replacement." The evidence does not show whether Father & Son Construction covered redoing only the Respondent's work or more of the walkway.

MHIC regulations offer three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). Of the three, the one that is possibly appropriate in the Claimant's case states as follows:

> 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). To do this calculation, it is necessary to know how much it cost to redo the Respondent's work. The evidence does not establish that cost.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has not proven that he sustained an actual and compensable loss as a result of the Respondent's acts and 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

February 9, 2016
Date Decision Issued

Laurie Bennett
Administrative Law Judge

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