

IN THE MATTER OF THE CLAIM
 OF VIOLA MYERS,
 CLAIMANT
 AGAINST THE MARYLAND HOME
 IMPROVEMENT GUARANTY FUND
 FOR THE ALLEGED ACTS OR
 OMISSIONS OF MINNIE BAILEY,
 T/A FIVE STAR CONCRETE
 CONSTRUCTION, INC.,
 RESPONDENT

* BEFORE TARA K. LEHNER,
 * AN ADMINISTRATIVE LAW JUDGE
 * OF THE MARYLAND OFFICE
 * OF ADMINISTRATIVE HEARINGS
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 * OAH No.: DLR-HIC-02-16-25383
 * MHIC No.: 16 (90) 542
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PROPOSED DECISION¹

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

STATEMENT OF THE CASE

On March 8, 2016, Viola Myers (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of

¹ Code of Maryland Regulation 09.08.02.01B provides that “[a]ll contested case hearings delegated to the Office of Administrative Hearings shall be governed by COMAR 09.01.03.” COMAR 09.01.03.08 states:

- A. Upon completion of the hearing, the ALJ shall submit a proposed decision to the administrative unit.
- ...
- C. The proposed decision shall comply with the requirements of the Administrative Procedure Act and COMAR 28.02.01.22, and shall include:
 - (1) Written findings of fact;
 - (2) Proposed conclusions of law; and
 - (3) A recommended order.
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\$7,900.00² in alleged actual losses suffered as a result of a home improvement contract with Minnie Bailey, trading as Five Star Concrete Construction, Inc. (Respondent).

I held a hearing on February 28, 2017, at the Office of Administrative Hearings (OAH), 10400 Connecticut Avenue Suite 208, Kensington, Maryland 20895 (Kensington Office). Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015).³ The Claimant appeared and represented herself. The Respondent did not appear for the hearing. Jessica Kaufman, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Fund did not send a party representative.

The contested case provisions of the Administrative Procedure Act, the MHIC procedural 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. 2016), Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02.01B, and 28.02.01.

ISSUES

1. Did the Claimant sustain an actual loss compensable by the Fund as a result of any acts or omissions of the Respondent?
2. If so, what is the amount of that loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the Fund:

GF Ex. 1A - Notice of Hearing, December 27, 2016, with Undeliverable Mail to Respondent, returned to OAH on February 1, 2017

² At the hearing, the Claimant made a request to amend her Claim to \$8,980.00 in accordance with COMAR 09.08.03.02C. As will be discussed further below, at the time the Claimant filed the Claim she was not, and could not have been, aware that the estimate to repair would increase from \$7,900.00 to \$8,980.00, due to the rise of material and labor costs. Thus, under COMAR 09.08.03.02C(1), I recommend that the Fund permit the amendment to the Claim. However, as outlined below, the amendment does not affect the recommended award.

³ All citations to the Business Regulation article are to the 2015 volume.

- GF Ex. 1B - Notice of Hearing, October 13, 2016, with Undeliverable Mail to Respondent, returned to OAH on October 20 and November 3, 2016
- GF Ex. 2 - Transmittal from MHIC to OAH, undated, with Hearing Order, dated August 11, 2016, and Claim Form, received by MHIC March 8, 2016
- GF Ex. 3 - MHIC Licensing Information for the Respondent, undated
- GF Ex. 4 - Letter to the Respondent from MHIC, dated March 15, 2016, with Claim Form, received by MHIC March 8, 2016 attached
- GF Ex. 5 - Letter to MHIC from the Respondent, dated November 2015⁴

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

- Cl. Ex. 1 - Letter to the Respondent from the Claimant, dated September 24, 2015
- Cl. Ex. 2 - Contract, dated June 28, 2015, with the following attachments:
- Copies of checks to the Respondent
 - Certificate of Liability Insurance
 - Respondent's Limited Warranty
- Cl. Ex. 3 - Photographs (four) of the concrete installed by the Respondent
- Cl. Ex. 4 - Letter to the Claimant from MHIC, dated December 3, 2015, with the following attachments:
- Claimant's Complaint, dated October 22, 2015
 - MHIC Order, dated November 3, 2015
- Cl Ex. 5 - Green Future Construction Estimates and License
- Cl Ex. 6 - Contact notes, various dates

No exhibits were offered by the Respondent.

Testimony

The Claimant testified on her own behalf and did not call any other witnesses.

The Respondent was not present to testify or present witnesses.

The Fund did not present any witnesses.

FINDINGS OF FACT

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

1. At all times relevant to the subject matter of this hearing, the Respondent was a licensed home improvement contractor under MHIC license number 01-03519 (individual) and 05-19409 (corporation). The Respondent traded as Five Star Concrete Construction, Inc.

⁴ The date on the letter only states a month and year.

2. The Respondent's address associated with the MHIC individual license is 11945 Simpson Road, Clarksville Maryland 21029 (Individual Address). The Respondent's address associated with the MHIC corporation license is 254 Brock Bridge Road, Laurel Maryland 20724 (Corporate Address).

3. On or about June 26, 2015, the Claimant and the Respondent entered into a contract for the removal and replacement of the concrete under her carport and behind her house at the Claimant's primary residence and only home in Maryland (Contract). The Contract price was \$6,210.00.

4. The Respondent provided a warranty with its concrete work. The warranty defined "major cracking" as cracks in the concrete wider than ¼ inch.

5. On or about June 30, 2015, the Respondent performed and completed the work under the Contract.

6. The Claimant paid the Respondent \$6,210.00 as follows:

- \$2,070.00 on June 26, 2015 (Check # 705)
- \$2,070.00 on June 30, 2015 (Check # 710)
- \$2,070.00 on June 30, 2015 (Check # 714)

7. On or about July 22, 2015, the Claimant noticed that the concrete the Respondent installed was cracking. Over time the cracks increased and spread.

8. Between July 22 and November 14, 2015, the Claimant made calls to the Respondent regarding the cracks in the driveway. The Respondent's employees came twice and tried to repair the cracks in the driveway. Additional cracks appeared after these attempted repairs and the Claimant again called the Respondent. The Respondent did not return the Claimant's additional calls and never returned again to make any additional repairs to the driveway.

9. Many of the cracks in the driveway are at least one inch wide and run for at least three feet. The cracks are so significant that repair is not appropriate. The only proper fix for the cracks is the removal and replacement of the concrete.

10. On October 22, 2015, the Claimant filed a complaint with the MHIC regarding the Respondent's concrete work.

11. In November 2015, the Respondent sent a letter to the MHIC admitting that the newly installed concrete at the Claimant's home had cracks.

12. In January 2016, the Claimant received an estimate from Green Future Construction (Green Future), a MHIC licensed contractor, for the removal and replacement of the concrete installed by the Respondent. The estimate calls for the same scope of work that was performed by the Respondent. The estimate price was \$7,900.00. The Claimant received an updated estimate in February 2017 from Green Future for the same work for the price of \$8,980.00, due to an increase in the cost of material and labor.

13. On October 13, 2016, the OAH mailed a Notice of Hearing (Notice) by United States Postal Service (USPS) Certified Mail Return Receipt and by First Class Mail to the Respondent at the Individual Address. This Notice advised the Respondent that a hearing was scheduled for February 28, 2017, at 10:00 a.m., at the OAH Kensington Office. Both the Certified Mail Return Receipt and First Class Mail were returned to the OAH by the USPS as "Not deliverable as addressed unable to forward." The Respondent's Individual Address is the same address on the Respondent's November 2015 letter to the MHIC discussed in finding of fact number 11.

14. On December 27, 2016, the OAH mailed a copy of the same Notice to the Respondent at the Corporate Address by both USPS Certified Mail Return Receipt and First Class Mail. This Notice once again stated that a hearing was scheduled for February 28, 2017, at

10:00 a.m. at the OAH Kensington Office. The Certified Mail Return Receipt Notice was returned to the OAH by the USPS as "Insufficient address unable to forward." The First Class Mail Notice was not returned to the OAH by the USPS.

15. No party made a request to postpone the February 28, 2017 hearing.

16. The Claimant is not: a spouse or other immediate relative of the Respondent; an employee, officer, or partner of the Respondent; or an immediate relative of an employee, officer, or partner of the Respondent.

17. The Contract does not contain an arbitration clause.

18. The Claimant has not taken any action to recover monies for the Respondent's Contract work, other than the instant Claim.

DISCUSSION

The Respondent's Failure to Appear

As discussed in the Findings of Fact above, the OAH mailed multiple copies of the Notice regarding the date, time and location of this hearing to the Respondent to all known addresses. Most of these mailing were returned to the OAH by the USPS as undeliverable. The First Class Mail Notice to the Corporate Address was not returned by the USPS as undeliverable.

On February 28, 2017, at 10:00 a.m. I convened a hearing in this case at the OAH Kensington Office. By 10:20 a.m., neither the Respondent, nor anyone claiming to represent the Respondent, appeared for the hearing. The OAH did not receive any request for postponement of the hearing.

The Respondent was properly notified of the date, time and location of this hearing. The Notice was mailed to all addresses the Respondent provided to the MHIC. Despite proper notice being sent, the Respondent failed to appear for the hearing. As a result, I proceeded with the hearing in the Respondent's absence.

The Claim

An owner bears the burden of proof, by a preponderance of the evidence, that the owner is entitled to an award from the Fund. Md. Code Ann., Bus. Reg. § 8-407(e); COMAR 09.08.03.03A(3); Md. Code Ann., State Gov't § 10-217 (2014). 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); *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.”). Actual loss “means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.” Md. Code Ann., Bus. Reg. § 8-401. However, 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), and may not compensate a claimant for more than was paid to the original contractor. Md. Code Ann., Bus. Reg. § 8-405(e)(1) and (5).

In addition, an owner must prove that at all relevant times: (a) the owner owned fewer than three residences/dwelling places or resides in the home as to which the claim is made; (b) the owner was not an employee, officer or partner of the contractor or the spouse or other immediate relative of the contractor or the contractor’s employees, officers or partners, or a spouse or other immediate relative of the contractor; (c) the work at issue did not involve new home construction; (d) the owner did not unreasonably reject the contractor’s good faith effort to resolve the claim; (e) any remedial work was done by licensed contractors; (f) the owner complied with any contractual arbitration clause before seeking compensation from the Fund; (g) there is no pending claim for the same loss in any court of competent jurisdiction and the owner did not recover for the actual loss from any source; and (h) the owner filed the claim with the MHIC within three years of the date the owner knew or with reasonable diligence should have

known of the loss or damage. Md. Code Ann., Bus. Reg. §§ 8-405(c), (d), (f), and (g); 8-408(b)(1) and (2).

The evidence at the hearing clearly proves that the Respondent was a licensed home improvement contractor at the time the Claimant entered into the Contract with the Respondent and when the Contract work was performed and that there is no arbitration clause contained within the Contract. In addition, the Claimant presented the following uncontroverted evidence: the Claimant resides in the home where the Contract work was completed; the work performed under the Contract was not related to new home construction; the Claimant is not an employee, officer or partner (past or present) of the Respondent; the Claimant is not an immediate relative of the Respondent, his spouse or any of his partners, officers or employees; the Claimant has not recovered for the Respondent's acts or omissions from any other source; and there are no actions or claims for the Respondent's acts or omissions pending in any court of competent jurisdiction or with any other source of recovery.

The parties also do not dispute that the Respondent completed the work under Contract. The issue before me is whether the Respondent's work, as completed, was inadequate and/or unworkmanlike, and if so, the extent of the actual loss suffered by the Claimant. As will be discussed in further detail below, I find that the Claimant produced copious and compelling evidence that the Respondent's work was inadequate and unworkmanlike.

The Exterior Concrete Limited Warranty (Warranty) offered by the Respondent with the Contract defines "Major Cracking" as a crack wider than ¼ inch and more than 30% of the length of the joint for that concrete portion. The Warranty provides that if Major Cracking occurs within one year of installation, and that the cracks were due to defective materials or workmanship, that the cracking will be repaired and/or replaced by the Respondent.

At the hearing, the Claimant offered photographs⁵ that clearly document that the concrete installed by the Respondent has significant cracks. There are six cracks at least one-inch in width, four of which run the entire length of the joint and the others appearing in the photographs to be at least 30% of the length of the joint. The Claimant testified the concrete is under her carport and in her backyard and stated she is using the concrete for the same purposes she has always used it. Also relevant is her testimony that old concrete the Respondent removed was not cracked even after years of use.⁶

I do not need expert testimony to conclude the Respondent's concrete work is inadequate and unworkmanlike. The Court of Appeals has held that expert testimony is not necessary in instances where the deviation from applicable industry standards is so obvious that the trier of fact can easily recognize that it violates the applicable standard. *See Schultz v. Bank of America, N.A.*, 413 Md. 15, 29 (2010). The pictures of the current state of the Respondent's work clearly prove that it was installed poorly; the pictures show significant cracking that even a lay person would acknowledge falls outside of the scope of acceptable concrete installation. Additionally, the standard outlined in the Respondent's Warranty further demonstrates the concrete was installed by the Respondent in an inadequate and unworkmanlike way.

The Claimant also produced abundant evidence that she gave the Respondent every chance to repair the work once she advised the Respondent of the inadequacies. She testified she called the Respondent many times between July 22 and November 14, 2015 to advise the Respondent of the cracking and that the Respondent came to her home on at least two occasions to make repairs. She also testified that the cracks continued, and that despite additional calls to

⁵ The Claimant testified that the pictures were taken a few weeks before the hearing and that they document the current status of the concrete installed by the Respondent.

⁶ She testified that one area of the old concrete, the size of a basketball, had begun to crumble after many years of use and that is why she hired the Respondent to replace it.

the Respondent, the Respondent did not return again to make any additional repairs to the driveway.

Based on the above, I find that the installation of the concrete by the Respondent was inadequate and unworkmanlike, and, thus, the Claimant is eligible for an award from the Fund for her "actual loss." Md. Code Ann., Bus. Reg. §§ 8-401 and 8-405(a).

Proposed Award

The Claimant makes a demand for the \$8,980.00 that she states she will need to pay Green Future, a MHIC licensed contractor, to replace the concrete the Respondent installed. Based on the pictures in evidence, I find that the total replacement of the concrete is appropriate. The existing patched cracks are very unsightly.

The Green Future estimates call for the same scope of work that was performed by the Respondent; the removal of the existing concrete and the installation of new concrete with the same specifications that the Contract with the Respondent provided. The Claimant explained that Green Future told her that the price of the work went up to \$8,980.00 after the initial estimate due to the rising costs of labor and material.

The Fund recommended that I use the formula set forth in COMAR 09.08.03.03B(3)(c), which provides if a contractor did work according to a contract and a 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. Based on the facts of this case, I agree this is the appropriate formula.

It is undisputed that the Claimant paid the Respondent \$6,210.00 by way of three checks. It is also undisputed that the Contract price was \$6,210.00. Using that formula, the computation is as follows:

	<u>\$7,900 estimate⁷</u>	<u>\$8,980 estimate</u>
Amount paid to the Respondent:	\$6,210.00	\$6,210.00
Plus amount payable to repair and replace:	\$7,900.00	<u>\$8,980.00</u>
Total:	\$14,110.00	\$15,190.00
Minus Contract price	\$6,210.00	\$6,210.00
Actual Loss:	\$7,900.00	\$8,980.00

However, 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. Md. Code Ann., Bus. Reg. § 8-405(e)(1) and (5). Thus, whether I find her actual loss was \$7,900.00 or \$8,980.00, the Claimant's recovery is limited to \$6,210.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual loss of \$8,980.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405(a) (2015); COMAR 09.08.03.03B(3)(c). I further conclude that the Claimant is limited to recovering \$6,210.00, the amount she paid to the Respondent, from the Fund. Md. Code Ann., Bus. Reg. § 8-405(e)(5) (2015).

⁷ I include the \$7,900.00 estimate to document that whether or not the Claim is amended, the recommended award remains the same.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$6,210.00; 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 at least ten percent (10%) as set by the Maryland Home Improvement Commission;⁸ and

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

Signature on File

March 21, 2017
Date Decision Issued

Tara K. Lehner
Administrative Law Judge

TKL/sw.
#167138

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

PROPOSED ORDER

WHEREFORE, this 19th day of April, 2017, 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