

IN THE MATTER OF THE CLAIM	* BEFORE EILEEN C. SWEENEY,
OF CARLITA Z. MCDONALD,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT,	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	* OAH No.: DLR-HIC-02-15-01701
FOR THE ALLEGED ACTS OR	* MHIC No.: 13 (90) 229
OMISSIONS OF MARTIN	*
GONZALEZ VIDELA,	*
T/A G & V CONSTRUCTION, INC.,	*
RESPONDENT	*

* * * * *

PROPOSED DECISION

STATEMENT OF THE CASE
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STATEMENT OF THE CASE

On May 17, 2013, Carlita Z. McDonald (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$5,500.00 in alleged actual losses suffered as a result of a home improvement contract with Martin Gonzalez Videla, t/a G & V Construction, Inc. (Respondent).

I held a hearing on May 28, 2015 at Largo Government Center, #102, 9201 Basil Court, Largo, Maryland 20774. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). The Claimant

represented herself. The Respondent represented himself. Eric B. London, Assistant Attorney General, Department of Labor, Licensing and Regulation (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 any acts or omissions committed by the Respondent?
2. If so, what is the amount of that loss?

SUMMARY OF THE EVIDENCE

Exhibits

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

- CL Ex. 1 May 3, 2012 contract between the Claimant and the Respondent (Contract)
- CL Ex. 2 May 3, 2012 cancelled check made payable from the Claimant to the Respondent in the amount of \$1,833.00
- CL Ex. 3 May 11, 2012 cancelled check made payable from the Claimant to the Respondent in the amount of \$3,667.00
- CL Ex. 4A-J Photographs
- CL Ex. 5A-N Photographs
- CL Ex. 6 February 6, 2013 Proposal for Work from Barlow Concrete Construction, Inc. (Barlow Construction)
- CL Ex. 7 August 13, 2012 MHIC Complaint Form, with attachment
- CL Ex. 8 September 24, 2012 letter from the Respondent to the MHIC
- CL Ex. 9 June 1, 2013 letter from the Respondent to the MHIC

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

- Resp. Ex. 1 Marked photograph
- Resp. Ex. 2 May 11, 2012 invoice from Chaney Enterprises
- Resp. Ex. 3 Photograph
- Resp. Ex. 4 September 17, 2012 printout from www.homeconstuctionimprovement.com
- Resp. Ex. 5 May 27, 2015 printout from www.homeconstuctionimprovement.com
- Resp. Ex. 6 May 27, 2015 printout from www.masterbuilder.co.in
- Resp. Ex. 7 May 28, 2015 printout from www.concretenetwork.com
- Resp. Ex. 8 March 2007 American Concrete Institute ACI 224.1R-07
- Resp. Ex. 9 May 27, 2015 printout from www.cfawalls.org
- Resp. Ex. 10 Undated American Society of Concrete Contractors (ASCC) Position Statement #33

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

- Fund Ex. 1 March 18, 2015 Notice of Hearing
- Fund Ex. 2 January 6, 2015 Hearing Order
- Fund Ex. 3 May 27, 2015 licensing Information
- Fund Ex. 4 May 17, 2013 Home Improvement Claim Form
- Fund Ex. 5 May 22, 2015 letter from the MHIC to the Respondent
- Fund Ex. 6 Photograph
- Fund Ex. 7A-B Photographs
- Fund Ex. 8 Photograph
- Fund Ex. 9 Photograph
- Fund Ex. 10 Photograph

Testimony

The Claimant testified and presented the testimony of her husband, Walter McDonald.

The Respondent testified on his own behalf.

The Fund did not present the testimony of any witnesses.

PROPOSED FINDINGS OF FACT

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

1. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor under MHIC license numbers 4149889, 4422987, and 4597883.
2. On May 3, 2012, the Claimant and the Respondent entered into a Contract for the Respondent to install a driveway, sidewalk, steps, and retaining wall at the Claimant's home, and to demolish the existing driveway and columns.
3. The Contract stated that work would begin "A.S.A.P." and would be completed "A.S.A.P."
4. The original agreed-upon Contract price was \$5,500.00.
5. The Claimants believed that she was contracting for a smooth unbroken product. The Respondent never told the Claimants that the driveway was likely to develop cracks.
6. On May 3, 2012, the Claimant paid the Respondent \$1,833.00; on May 11, 2012, she paid the Respondent \$3,667.00.
7. The Respondent completed the job on May 11, 2012.¹
8. The Respondent never told the Claimant that the driveway was likely to develop cracks.
9. Sometime in late June or early July 2012, cracks began to appear in the driveway.

¹ Neither party made clear when the Respondent started the job.

10. After the Claimant contacted the Respondent in early July 2012 to express her dissatisfaction with the condition of the driveway, the Respondent inspected the driveway and advised the Claimant and her husband, Walter McDonald, that he believed he had done everything right, but that he could do some patching. The Claimant declined the Respondent's offer to patch the cracks and advised him that he had to replace the entire driveway. The parties then agreed that the Respondent would dig up and replace the portion of the driveway where cracks had appeared; however, the Respondent advised the Claimant that he could not guarantee that the color of the material (wheat light) would match the same color previously applied. He asked that the Claimant allow him twenty days to perform the work.

11. On July 25, 2012, while the Claimant was out of town, the Respondent called and spoke to Mr. McDonald to advise him that he would be coming to redo the areas where the cracks had appeared.

12. On July 26, 2012, the Respondent arrived at the Claimant's home with his crew; however, after Mr. McDonald showed him a new crack in another portion of the driveway, the Respondent advised Mr. McDonald that it would be too much work to repair the additional portion and that he did not believe that the Claimant would be satisfied with the work. He told Mr. McDonald that when the Claimant returned they could get together, talk it over, and come up with a fair figure to be refunded, with the Claimant living with the cracks.

13. On July 30, 2012, the Claimant advised the Respondent that she and Mr. McDonald were not satisfied with the recommended solution because they believed the cracks should not have occurred in such a short time and because they were getting worse. She told the Respondent that he had two choices: (1) correct the "situation" or (2) refund the Claimant's money. (CL Ex. 7.)

14. The Respondent advised the Claimant that “he spent an awful lot of time on this job and [the Claimant] was causing him to lose money if he had to correct the job and felt that he shouldn’t have to refund [the Claimant’s] monies.” (CL Ex. 7.)

15. The cost to repair the cracks in the Claimant’s driveway is \$500.00.

16. The Claimant’s actual loss is \$500.00.

DISCUSSION

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); *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 (2015). For the following reasons, I find that the Claimant has proven eligibility for compensation.

In this case, the Claimant contended that the Respondent performed an unworkmanlike, inadequate home improvement when he installed a driveway at her home, which quickly developed multiple cracks, which have enlarged over time.

The Respondent contended that he properly performed the work on the driveway and that he was willing to repair the cracks.

Licensing

Initially, I find, based on the licensing information presented by the Fund that the Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimant.

Unworkmanlike, Inadequate Home Improvement

For the following reasons, I further find that the Respondent did not perform a workmanlike, adequate home improvement.

The Claimant testified that approximately one and a half to two months after the Respondent installed a concrete driveway at her home, cracks appeared in the driveway. She presented photographs taken in July or August 2012 showing numerous horizontal cracks in the driveway. The Claimant also submitted into evidence photographs taken on May 26, 2015, which show a substantial crack at the bottom of concrete steps and other cracks in the driveway, which she testified have increased over time, as well as vertical cracks in the driveway and a crack in an area near the house, which she testified were not present at the time of the first set of photographs. The Claimant denied that the cracks are simply hairline cracks. She did not measure them but testified that some are large.

The Claimant stated in her complaint to the MHIC that after she contacted the Respondent in early July 2012 to complain, he inspected the driveway and advised the Claimant and her husband that he believed he had done everything right, but that he could do some patching of the cracked areas. The Claimant testified that she declined the Respondent's offer to patch the cracks because more cracks were showing up. She advised him that he had to replace the entire driveway. The Respondent said he would dig up and replace a portion of the driveway; however, the Respondent advised the Claimant that he could not guarantee that the color of the material would match the same color previously applied.

The Claimant testified that while she was out of town, the Respondent arrived at the Claimant's home with his crew to redo a portion of the driveway where cracks had appeared; however, after Mr. McDonald showed him a new crack in another portion of the driveway, he advised Mr. McDonald that it would be too much work to also repair the additional portion and

that he did not believe that the Claimant would be satisfied with the work. He told Mr. McDonald that when the Claimant returned they could get together, talk it over, and come up with a fair figure to be refunded, with the Claimant living with the cracks.

According to the Claimant, she advised the Respondent on July 30, 2012 that she and Mr. McDonald were not satisfied with the recommended solution because they believed the cracks should not have occurred in such a short time and because the cracks were getting worse. They did not believe the Respondent's representations to them that the driveway would not crack anymore. The Claimant told the Respondent that he had two choices: (1) correct the "situation" or (2) refund the Claimant's money. (CL Ex. 7.) The Claimant indicated in her complaint that the Respondent advised her that "he spent an awful lot of time on this job and [the Claimant] was causing him to lose money if he had to correct the job and felt that he shouldn't have to refund [the Claimant's] monies." (CL Ex. 7.)

Mr. McDonald testified that the reason he and the Claimant wanted the driveway replaced was because the old one was cracked.² He corroborated his wife's testimony regarding the presence of the cracks in the new driveway, and their increasing nature. He acknowledged that he did not tell the Respondent that the reason he wanted a new driveway was because the old one was cracked.

The Respondent testified that he followed the proper procedure with regard to installing the driveway in accordance with American Concrete Institution guidelines: prepping the area; breaking up the existing concrete; compacting the sub base; putting down a material called "rc6;" and compacting again. He then put forms and wire-mesh in the driveway. On the third day, he poured the concrete. The concrete was unloaded in forty-three minutes and no water was added.

² The Claimant testified that was not the only reason – they wanted a completely new driveway.

According to the Respondent, he “asked [the Claimant’s] approval . . . before placing the concrete.” (CL Ex. 8.)

The Respondent contended that it is the nature of concrete to crack, usually in the early days and months. Such factors as moisture, humidity, temperature, earth movement, and settlement can result in cracks. According to the Respondent, cracks of 3/8 inch or less (height difference or gap) are normal. He described the cracks in the Claimant’s driveway as “micro-cracks” and emphasized that the cracks are not only normal, but are aesthetic in nature and not indications of a lack of structural soundness

Nonetheless, the Respondent was willing to repair the cracks. (He denied using the term “patch” when talking to the Claimant). He testified that the “micro cracks” in the driveway have not gotten bigger over time and that he could easily fill in the hairlines. He denied any structural damage, but testified that epoxy crack filler could be used to restore structural strength. He acknowledged that he initially agreed to replace a section to appease the Claimant; however, the Claimant was adamant that he redo the entire driveway or refund her money. The Respondent denied that he ever told the Claimant the driveway would not develop any more cracks.

In response to my question at the hearing, the Respondent stated that he did not have any discussions with the Claimant before the Contract was signed regarding the possibility that cracks would appear in the driveway.³

Analysis

I found the Claimant and her husband to be credible witnesses. Their testimony was consistent with each other’s and with the Claimant’s written statement submitted with her claim to the MHIC. Their testimony that numerous cracks have appeared in their driveway since the

³ In a letter to the MHIC dated September 24, 2012, the Respondent confusingly stated, “At any moment before or after we signed the contract, we discuss about future cracks.” (CL Ex. 8.)

Respondent completed the work was supported by the photographs submitted into evidence. The Respondent disputed the severity and amount of those cracks, but the testimony of the Claimant and her markings on an enlarged photograph of the driveway show that there were numerous cracks, some very obvious and others relatively faint.

The Claimant did not present any expert testimony or even a written report from an expert, however, to establish that the cracks in the driveway were caused by faulty workmanship on the part of the Respondent. The Respondent also did not present testimony or a report from an expert to support his assertion that such cracks are normal and/or could have many causes other than poor workmanship. Nonetheless, the burden of proof in this case is on the Claimant, and because she failed to present such evidence, I am left to speculate as to the cause of the cracks.

Regardless, the Respondent's own testimony established that he never told the Claimant that the driveway was likely to develop cracks. Certainly, she was entitled to rely upon him to provide her with a smooth unbroken finished product that appeared that way for more than a month or two. At the very least, she was entitled to rely upon the Respondent, as a concrete professional, to advise her that cracks would appear, particularly so many cracks in so many locations. This is consistent with the following guideline from the American Concrete Institute (ACI 302.1-04) submitted into evidence by the Respondent and referred to in his June 1, 2013 letter to the MHIC:⁴

Even with the best floor designs and proper construction, it is unrealistic to expect crack-free and curl-free floors. Consequently, **every owner should be advised by both the designer and contractor that it is normal to expect some amount**

⁴ Although the quote appears to related to concrete flooring, the Respondent relied the publication as the applicable standard, referring to it as "the Bible of the concrete industry."

of cracking and curling on every project, and that such occurrence does not necessarily reflect adversely on either the adequacy of the floor's design or the quality of its construction.

(CL Ex. 9.) (Emphasis supplied.)

Indeed, had the Claimant known before she contracted with the Respondent that the concrete driveway was likely to crack, she may have opted to contract instead for the use of a different type of material(s). Accordingly, I find that the Claimant did not obtain the product she contracted and paid for and, thus, is eligible for compensation from the Fund.

Remedy

Having found eligibility for compensation I now turn to the amount of the award, if any, to which the Claimant is entitled. Pursuant to the Business Regulation Article, 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) (2015). 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). I find that 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).

The Claimant submitted into evidence a proposal from licensed contractor, Barlow Construction, in the amount of \$9,167.05 to remove and replace the driveway, carport, steps and lead walk to the areaway. She testified that someone from Barlow Construction told her that the driveway could not be patched and that it had to be torn down. She gave no further explanation and could not say why the estimate was almost twice the amount the Respondent charged.

The Respondent testified that it is not necessary to replace the Claimant's entire driveway, and the cracks can be fixed with crack filler and/or epoxy injections at a cost of \$450.00 to \$500.00 if performed by another contractor.

Because the burden of proof is on the Claimant and she did not present any expert testimony to establish that the entire driveway has to be replaced, I have relied upon the Respondent's estimate of the cost to repair the cracks in reaching my determination of the actual loss suffered by the Claimant. Thus, I calculate the Claimant's loss as follows:

Amounts Claimant has paid to or on behalf of Respondent under original contract	\$5,500.00
Plus any reasonable amounts Claimant has paid or will be required to pay another contractor to repair poor work done by Respondent	<u>+ 500.00</u>
	\$6,000.00
Less the original contract price	<u>- 5,500.00</u>
Actual Loss	\$ 500.00

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$500.00 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:

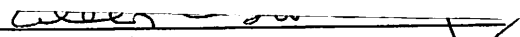
ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$500.00; and

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;⁵ and

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

Signature on File

June 19, 2015
Date Decision Issued


Eileen C. Sweeney
Administrative Law Judge

ECS/emh
#156596

⁵ See Md. Code Ann., Bus. Reg. § 8-410(a) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 22nd day of July, 2015, 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.

Michael Shilling

***Michael Shilling
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION