

IN THE MATTER OF THE CLAIM	* BEFORE THOMAS G. WELSHKO,
OF KATHLEEN L. HERATH,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	*
FOR THE ALLEGED ACTS OR	* OAH No.: DLR-HIC-02-15-01505
OMISSIONS OF	* MHIC No.: 15 (90) 175
BETSY DELOZIER, T/A	*
GRACE BUILT HOME	*
IMPROVEMENTS,	*
RESPONDENT	*
	*

* * * * *

PROPOSED DECISION

STATEMENT OF THE CASE
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STATEMENT OF THE CASE

On September 29, 2014, Kathleen L. Herath (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission’s (MHIC) Guaranty Fund (Fund) for reimbursement of \$3,970.00 in alleged actual losses suffered as a result of a home improvement contract with Betsy Delozier, t/a Grace Built Home Improvements (Respondent).

I held a hearing on May 13, 2015 at the Office of Administrative Hearings' (OAH) Cumberland, Maryland Regional Office. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). The Claimant represented herself. Robert Alderson, Attorney-at-Law, represented the Respondent, who was present. Hope Sachs, 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 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 one multipart exhibit on behalf of the Claimant, no exhibits on behalf of the Respondent, and three exhibits on behalf of the Fund. (I have attached a complete Exhibit List as an Appendix to this decision.)

Testimony

The Claimant testified on her own behalf, and the Respondent testified on her own behalf. The Fund did not call any witnesses.

PROPOSED FINDINGS OF FACT

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

1. At all times relevant, the Respondent held a valid MHIC contractors' license (License No. 4430855). (Fund Ex. 2.)
2. On May 31, 2013, the Claimant and the Respondent entered into a contract to build a retaining wall and to pour a new concrete slab underneath an existing deck at the Claimant's Cumberland, Maryland home. (Test. Cl.; Cl. Ex. 1.)
3. The concrete slab portion of the contract called for the Respondent to perform the following work:
 - Tear out existing concrete slab via saw cut and dispose of old concrete
 - Provide form for new slab and utilize wire mesh and/or rebar for strength
 - Pour new slab @ 4" thick meeting at same height of wall of the house
 - Broom or smooth finish (customer has choice)(Test. Cl.; Cl. Ex. 1.)
4. The total original agreed-upon contract price was \$5,410.00. Of that amount, \$3,115.00 was for the cost of the retaining wall, and \$2,295.00 was for the cost of the concrete slab. (Test. Cl. Cl. Ex. 1.)
5. The Claimant paid the full amount of the contract to the Respondent by check in two installments. On May 31, 2013, she made a \$2,705.00 down payment, and on July 9, 2013, she paid the remaining \$2,705.00 balance. (Test. Cl.; Cl. Ex. 1.)
6. In mid-to-late July 2013, the Respondent performed the work under the contract. (Test. Cl.)
7. The Respondent hired a subcontractor named Chris to perform the installation of the concrete slab. (Test. Cl.)

8. The Respondent's subcontractor poured the concrete for the deck in a rainstorm, which is counter to the standards of the concrete trade. (Test. Cl.; Stipulation of Resp.)

9. Concrete poured in wet weather does not set properly. (Test. Cl.; Stipulation of Resp.)

10. Soon after the Respondent poured the concrete slab, it began to crack, chip and develop holes. (Test. Cl.)

11. From August 2013 through October 2013, the Claimant repeatedly attempted to reach the Respondent by telephone, without success, with the intention of having her return to the Claimant's property to repair the concrete slab. (Test. Cl.)

12. In November 2013, the Claimant communicated her concerns about the deterioration of the concrete slab to the Respondent by e-mail. The Respondent sent a workman to the Claimant's property to make repairs to the concrete slab. (Test. Cl.; Cl. Ex. 1.)

13. The Respondent's workman filled holes in the concrete slab. (Test. Cl.)

14. In the spring of 2014, the Claimant removed her patio furniture from winter storage and placed it on the concrete slab. While arranging the patio furniture on the concrete slab, the Claimant noticed that the slab was cracking everywhere. (Test. Cl.)

15. On May 13, 2014, the Claimant sent an e-mail to the Respondent, in which she complained about the worsening deterioration of the concrete slab. (Test. Cl.; Cl. Ex. 1.)

16. On May 17, 2014, the Respondent sent a response e-mail to the Claimant, in which she informed the Claimant that there was nothing more that she could do to resolve the issues associated with the deteriorating concrete slab. (Test. Cl.; Cl. Ex. 1.)

17. On July 2, 2014, Brad Barmoy of First General Services of Western MD (First General), a licensed home improvement contractor, came to the Claimant's property at the Claimant's request to provide an estimate for removing and replacing the concrete slab poured

by the Respondent's subcontractor. On September 23, 2014, Mr. Barmoy e-mailed that estimate, in the amount of \$3,970.05, to the Claimant. (Test. Cl.; Cl. Ex. 1.)

18. As of May 2015, the concrete slab had essentially crumbled and completely separated from the foundation of the house. (Test. Cl.)

19. There are no structural problems with the retaining wall built by the Respondent. (Test. Cl.)

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." Md. Code Ann., Bus. Reg. § 8-401 (2015). 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 she entered into the contract with the Claimant. There are no impediments barring the Claimant from recovering compensation from the Fund (owning more than three houses, being related to the Respondent, recovering damages in court, etc.)

The Respondent conceded that she performed the concrete slab portion of the contract in an unworkmanlike manner. She acknowledged that the subcontractor she hired poured the concrete while it was raining; concrete installed during wet weather does not set properly. Consequently, over time, the concrete slab turned to rubble. At present, it has completely deteriorated. (The Claimant emphasized in the narrative that accompanied her claim that, by contrast, the original concrete slab that the Respondent removed and replaced was twenty-four

years old. It had only a few small cracks that the Claimant believed were the result of her house settling.) At the Claimant's request, in November 2013, the Respondent sent a workman to address the deterioration in the concrete slab. That workman's efforts failed to stop the slab's deterioration.

Although the Respondent concedes that her subcontractor poorly installed the concrete slab and that the slab needs to be completely removed and replaced, she disputes the amount of the Claimant's claim. The Respondent maintains that the \$3,970.05 estimate that First General provided to the Claimant was unreasonably high. The Respondent also questioned why the Claimant only obtained one estimate when it would have been customary to seek at least three estimates to establish a reasonable cost for removing and replacing a defective home improvement.

Moreover, the Respondent also emphasizes that section 8-405(e)(5) of the Business Regulation Article prohibits the Fund from reimbursing to any one claimant "an amount in excess of the amount paid by or on behalf of the claimant to the contractor against whom the claim is filed." The Respondent notes that although the total contract price, which includes the construction of the retaining wall, was \$5,410.00, and the Claimant paid her this amount in full, only \$2,295.00 of that amount was for pouring the concrete slab. On this basis, the Respondent contends that the Claimant cannot recover any more than this \$2,295.00 amount from the Fund pursuant to section 8-405(e)(5), which is the amount that she paid solely for the pouring of the concrete slab.

The Fund accepts the Respondent's concession that she poorly installed the concrete slab and that, as a result, the Claimant is entitled to compensation from the Fund. The Fund, however, takes issue with the Respondent's interpretation of section 8-405(e)(5) of the Business Regulation Article. The Fund asserts that the MHIC does not construe section 8-405(e)(5) to

mean that when contractors separate specific tasks in a contract into line items, each line item then becomes a distinct, new contract. The Fund notes that under such a scheme, contractors who do not itemize would be penalized with regard to Fund reimbursements, while contractors who do itemize would gain an advantage. Section 8-405(e)(5)'s cap was not meant to be manipulated by contractors in such a way. Consequently, the Fund avers that I should consider \$5,410.00 as the contract price, which would not cap the amount of the Claimant's recovery at \$2,295.00. The Fund also indicated that it considers the First General contract as an acceptable measure of the Claimant's actual loss, because contract amounts can vary over a wide range.

Given that the parties agree that the Respondent is responsible for the poor installation of the concrete slab underneath the deck of the Claimant's home, and that they agree that slab removal and replacement is the only acceptable remedy, my only task is to determine the amount of the award, if any, to which the Claimant is entitled. As noted, section 8-405(a) of the Business Regulation Article limits a claimant's recovery to his or her "actual loss." In this regard, the Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. COMAR 09.08.03.03B(1). MHIC's regulations provide three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). The following formula offers an appropriate measurement to determine the amount of actual loss in this case.

If the contractor did work according to the contract and the claimant has solicited or is soliciting another contractor to complete the contract, the claimant's actual loss shall be the amounts the claimant has paid to or on behalf of the contractor under the original contract, added to any reasonable amounts the claimant has paid or will be required to pay another contractor to repair poor work done by the original contractor under the original contract and complete the original contract, less the original contract price. If the Commission determines that the original contract price is too unrealistically low or high to provide a proper basis for measuring actual loss, the Commission may adjust its measurement accordingly.

COMAR 09.08.03.03B(3)(c).

Here, the Claimant entered into a \$5,410.00 contract, which required the Respondent to construct a retaining wall and pour a concrete slab. While the retaining wall installation was adequate, the Respondent, through her subcontractor,¹ performed the concrete slab portion of the contract in a poor and unworkmanlike manner. The itemized amount of the concrete slab portion of the contract, as noted above, was \$2,295.00. The Claimant, however, obtained a \$3,970.05 estimate from First General to remove and replace the poorly installed slab. The Claimant did not seek any other estimates.

First, I reject Respondent's theory that itemization creates separate contracts for each item. The Claimant entered into a single contract that had two parts. She did not enter into two *distinct* contracts with the Respondent for building the retaining wall and pouring the concrete slab. Moreover, agency interpretations of the statutes that they administer must be given considerable weight. *Md. Aviation Admin. v. Noland*, 386 Md. 556, 572 (2005). Therefore, pursuant to *Noland*, I will accord great weight to the Fund's interpretation of section 8-405(e)(5) of the Business Regulation Article that the Respondent's cost itemization did not create separate contracts.

With regard to the Claimant's use of the First General estimate as a measure of actual loss, I find that the Claimant's offering of that estimate constitutes *prima facie* evidence of the reasonable cost of the removal and replacement of the concrete slab poorly installed by the Respondent. There is no statutory or regulatory requirement for the submission of any more than one estimate as evidence of the cost of remediating a poorly performed home improvement.²

¹ Section 8-405(b) of the Business Regulation Article (2015) states, "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." [Emphasis added.]

² In fact, COMAR 09.08.03.03B(3)(c) refers to "another contractor" (singular).

Once a party with the burden of proof offers *prima facie* evidence on an issue of material fact, such as the First General estimate, it becomes the opposing party's burden to present cogent evidence to refute the validity of that *prima facie* evidence. *Motor Vehicle Admin. v. Karwacki*, 340 Md. 271, 283 (1995). The Respondent failed to refute the validity of the First General estimate. It is true that the Respondent offered her own testimony as evidence that the First General estimate was unreasonably high, but her testimony was self-serving and unsupported by other evidence from an unbiased and, therefore, more credible source. For example, the Respondent did not call an independent home inspector to testify, nor did she provide information from a public resource, such as the HomeTech cost estimator catalog, to demonstrate that First General's estimated price was out of line with the current regional cost of pouring a concrete slab. Without this kind of neutral evidence to buttress the Respondent's obviously biased testimony, it is possible that the Respondent's original price was the one that was out of line with the norm, not First General's.

With the above in mind, I have performed the following calculations to compute the Claimant's actual loss:

\$5,410.00	Amount paid by the Claimant to or in behalf of the Respondent
<u>+3,970.05</u>	Reasonable cost of repair and completion
\$9,380.05	
<u>-5,410.10</u>	Original contract price
\$3,970.05	Actual loss by the Claimant

Accordingly, the Claimant's actual loss is \$3,970.05. Even so, the Claimant truncated the nickel at the end of the First General estimate when she typed in her claim amount on her MHIC Claim Form. I cannot award the Claimant any more than what she sought in her original claim.

Therefore, the Claimant is entitled to reimbursement of her claim amount, namely \$3,970.00.

Md. Code Ann., Bus. Reg. § 8-405(a) (2015); COMAR 09.08.03.03B(3)(c).

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$3,970.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401 and 8-405 (2015); COMAR 09.08.03.03B(3)(c).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Commission Guaranty Fund award the Claimant \$3,970.00; 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. Md. Code Ann., Bus. Reg. § 8-411(a) (2015); and

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

Signature on File

June 5, 2015
Date Decision Issued

Thomas G. Welshko
Administrative Law Judge

TGW/dlm
#156180

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* * * * *

FILE EXHIBIT LIST

Claimant's Exhibit:

1. Folder, containing the following documents:
 - Series of photographs depicting the condition of the concrete slab, taken in 2014 and 2015
 - Narrative composed by the Claimant chronicling the events that led to her claim against the Fund
 - March 31, 2013 contract that the Claimant entered with the Respondent
 - Two cancelled check images, each in the amount of \$2,705.00
 - September 18, 2014 estimate for \$3,970.05 provided by Brad Barmoy of First General Services of Western MD
 - November 12, 2013 e-mail from the Claimant to the Respondent
 - May 13, 2014 e-mail from the Claimant to the Respondent

- May 17, 2014 e-mail from the Respondent to the Claimant
- May 18, 2014 e-mail from the Claimant to the Respondent
- July 2, 2014 Complaint Form filed by the Claimant with the MHIC
- Copy of September 26, 2014 Claim Form sent by the Claimant to the MHIC (and received by the MHIC on September 29, 2014)
- August 6, 2014 letter sent by the Claimant and her husband to the MHIC

Respondent's Exhibits:

The Respondent did not offer any exhibits.

Fund's Exhibits:

1. April 2, 2015 Hearing Notice with attached January 7, 2015 Hearing Order from the MHIC
2. May 12, 2015 Licensing Record for the Respondent
3. October 15, 2014 letter from the MHIC to the Respondent, alerting her about the Claimant's claim, with the Claimant's September 29, 2014 Claim Form attached

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