

The Maryland Home  
 Improvement Commission

v. Randy Gossman  
 t/a RTM Concrete Construction LLC  
 (Contractor)  
 and the Claim of  
 Fred Harris  
 (Claimant)

\* BEFORE THE  
 \* MARYLAND HOME IMPROVEMENT  
 \* COMMISSION  
 \*  
 \* MHIC No.: 10 (75) 1431  
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**FINAL ORDER**

WHEREFORE, this 29th day of April, 2015, Panel B of the Maryland Home  
 Improvement Commission ORDERS that:

1. The Findings of Fact set forth in the Proposed Order dated January 20, 2015 are AFFIRMED.
2. The Conclusions of Law set forth in the Proposed Order dated January 20, 2015 are AFFIRMED.
3. The Proposed Order dated January 20, 2015 is AFFIRMED.
4. This Final Order shall become effective thirty (30) days from this date. During the thirty (30) day period, any party may file an appeal of this decision to Circuit Court.

*Joseph Tunney*  
 Joseph Tunney, Chairperson  
 PANEL B

**MARYLAND HOME IMPROVEMENT COMMISSION**

PHONE: 410-230-6309 • FAX: 410-962-8482 • TTY USERS, CALL VIA THE MARYLAND RELAY SERVICE  
 INTERNET: WWW.DLLR.MARYLAND.GOV • E-MAIL: MHIC@DLLR.STATE.MD.US

IN THE MATTER OF  
THE CLAIM OF FRED HARRIS,  
CLAIMANT  
AGAINST THE MARYLAND HOME  
IMPROVEMENT COMMISSION  
GUARANTY FUND  
FOR THE ACTS OR OMISSIONS OF  
RANDY GOSSMAN,  
RESPONDENT,  
t/a RTM CONCRETE  
CONSTRUCTION, LLC

\* BEFORE LATONYA B. DARGAN,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
\* OAH Case No.: DLR-HIC-02-14-22348  
\* MHIC Case No.: 10 (75) 1431  
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**PROPOSED DECISION**

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

**STATEMENT OF THE CASE**

On April 21, 2011, Fred Harris (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$10,867.00 for actual monetary losses alleged suffered as a result of the inadequate, incomplete, or unworkmanlike home improvement performed by Randy Gossman (Respondent), t/a RTM

Concrete Construction, LLC. The MHIC ordered the Claimant should have a hearing in order to prove entitlement to an award from the Fund.

A hearing was originally held on March 12, 2013 before an Administrative Law Judge (ALJ) of the Maryland Office of Administrative Hearings (OAH). The ALJ issued a Proposed Decision and Order, which recommended the Claimant's claim should be dismissed on the grounds the claim had not been filed within the applicable three-year statute of limitations. Specifically, the ALJ found that the limitations period began to run in October 2007 and, therefore, a claim filed in April 2011 was not timely. The ALJ's finding was based on testimony from the Claimant that he initially noticed scaling in portions of the concrete driveway in October 2007. The Claimant filed exceptions to the ALJ's decision and requested to present oral argument regarding the Proposed Order. During an argument hearing on March 6, 2014, the Claimant proffered that he was mistaken when he testified he first noticed the scaling in the sidewalk in October 2007; he meant to testify the first date he noticed any problems was sometime in October 2008.

After consideration of the arguments, the MHIC determined there was insufficient evidence in the current record to reach a finding when the three-year limitations period began to run for the claim. On June 12, 2014, the MHIC remanded the matter to the OAH to conduct a *de novo* hearing "on all issues related to the claim, including the issue of whether the claim was timely filed under the applicable 3-year period of limitations." (Fund Ex. 2, p. 2.)

On September 17, 2014, I conducted a hearing at OAH headquarters in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2010 and Supp. 2014). The Claimant represented himself. Jessica B. Kauffman, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR), represented the Fund. No one appeared on behalf of

the Respondent. The Notice of Hearing (Notice) was sent to the parties via certified mail, return receipt requested, on July 17, 2014. On July 21, 2014,<sup>1</sup> the OAH received the certified mail return receipt card for the copy of the Notice sent to the Respondent. Accordingly, I found the Respondent received proper notice of the hearing and, despite receiving notice, he failed to appear. I conducted the hearing in the Respondent's absence. Md. Code Ann., Bus. Reg. § 8-312(h); Md. Code Ann., State Gov't II § 10-209 (2014); and, Code of Maryland Regulation (COMAR) 09.01.02.07.

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 II §§ 10-201 through 10-226 (2014), Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02, and 28.02.01.

### **ISSUES**

1. Was the claim timely filed;
2. Did the Claimant sustain an actual loss as a result of the Respondent's acts or omissions in performing home improvement work; and, if so,
3. What is the amount of the award to which the Claimant is entitled from the Fund?

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

I admitted the following exhibits for the Claimant:

- Cl. Ex. 1: Statement of Claim Amount, with attached documents including: Letter from Southard Brothers Concrete Construction, Co.; May 13, 2007 Contract with RTM Concrete Construction Co., LLC; April 3, 2011 Invoice from Southard Brothers Concrete Construction; Photographs
- Cl. Ex. 2: Drawings depicting condition of sidewalk in May 2008, October 2008 and December 2008

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<sup>1</sup> The OAH received the Claimant's return receipt card on July 23, 2014.

Cl. Ex. 3: March 10, 2011 Petrographic Inspection Report, prepared by Michael A. Ozol, Ph.D.

I admitted the following exhibits for the Fund:

Fund Ex. 1: July 17, 2014 Notice of Hearing

Fund Ex. 2: June 12, 2014 Remand Order

Fund Ex. 3: The MHIC's June 12, 2014 Hearing Transmittal to OAH, with attached Order for Hearing

Fund Ex. 4: The Respondent's License and Registration History with MHIC

Fund Ex. 5: The MHIC's April 22, 2011 Letter to the Respondent, with attached April 20, 2011 Claim Form

No exhibits were offered on behalf of the Respondent.

### Testimony

The Claimant presented the testimony of his wife, Esther Harris, and Michael A. Ozol, Ph.D., whom I accepted as an expert in concrete inspection and investigations. The Fund did not present any witnesses. No one testified on behalf of the Respondent.

### **FINDINGS OF FACT**

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

1. At all times relevant to this matter, the Respondent was a home improvement contractor licensed with MHIC under registration number 91771.
2. On or around May 13, 2007, the Claimant entered into a contract with the Respondent for the Respondent to perform the following work at the Claimant's residence at 7212 Denberg Road, Baltimore, Maryland (the Property):
  - a. Supply all labor and material to pour and finish concrete driveway approximately 20' x 55' and patios approximately 10' x 18' and 10' x 24'
  - b. All concrete is to be broom finished

- c. New concrete driveway to have stone base and 6" of concrete
  - d. Patio areas to be 4" of new concrete, fiber mesh, re-bar, expansion and control joints as required
3. The total contract price was \$15,565.00, which the Claimant paid in full across five installments from May 14, 2007 through June 1, 2007.
4. The Respondent began work at the Property on or around May 23, 2007 and completed work at the Property on or around June 1, 2007.
5. With respect to the pouring/laying of concrete surfaces, typical industry practice calls for a sufficient "curing" period when a new concrete construction is poured. Curing is the process by which the materials that combine to form the concrete mixture are repeatedly and consistently moistened to ensure maximum adhesive bonding. The length of time for curing depends on the type of materials which comprise the concrete mixture, but if the curing process is inadequate or insufficient (i.e., either not long enough, not moist enough, or some combination of those factors), the concrete will not adequately adhere. As a result, deterioration of the concrete surface occurs at a more rapid pace and the potential for scaling increases. Scaling is the local flaking or peeling of a finished concrete surface as a result of exposure to freezing and thawing.
6. At some point in late May or early June 2008, the Claimant noticed several areas of the driveway displayed significant scaling. The surface layer of concrete was worn away to the point the aggregate particles of the comprising materials were visible to the naked eye. The degree and nature of scaling and deterioration could not be

- accounted for by the application of any anti-freezing agents and salting agents which might have been applied to the driveway during the previous winter.
7. The Claimant noticed the scaling got progressively worse as the year wore on, and it could be seen in several locations of the driveway. Additionally, there were several areas of scaling where the concrete actually began to crack and crumble to the touch.
  8. The Claimant contacted the Respondent sometime in December 2008 and advised him of the problems with the driveway. The Respondent explained that working with concrete in the winter is not optimal, and he promised he would return in the spring to inspect and repair the damage.
  9. The Claimant made several attempts to contact the Respondent during Spring 2009, but he was non-responsive.
  10. The Respondent never returned to the Property after June 1, 2007.
  11. The driveway continued to deteriorate and finally, in or around June 2012, the Claimant contracted with Southard Brothers Concrete & Construction Co. (MHIC Reg. No. 43577) to replace the driveway and apron.
  12. The total cost for Southard Brothers to repair the work performed by the Respondent was \$10,867.20, which the Claimant paid in full on June 7, 2012.

### **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) (Supp. 2014); *see also* COMAR 09.08.03.03B(2). 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 (2010). A claim must be brought against the

Fund “within 3 years after the claimant discovered or, by use of ordinary diligence, should have discovered the loss or damage.” Md. Code Ann., Bus. Reg. § 4-805(g) (2010). The Claimant bears the burden of proof by a preponderance of the evidence to show entitlement to an award from the Fund. COMAR 09.08.03.03A(3). For the following reasons, I find that the Claimant has proven eligibility for compensation.

There is no dispute that the Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimants and during the time he performed work at the Property. Ester Harris testified that she and the Claimant first noticed areas of erosion (also referred to as “scaling”) on the new drive in late May/early June 2008. She was able to describe that initially, the erosion was confined to one side of the driveway, but as the year wore on, it became noticeable in other areas of the driveway. Mrs. Harris presented as having clear recall of the season and time of year when she and the Claimant first noticed the problems and she indicated it was noticeable precisely because the driveway was new. Based on Mrs. Harris’ testimony, I find the claim was timely filed with the Fund. The Harrises first noticed problems with the driveway in late May/early June 2008. The Claimant filed the claim on April 21, 2011, which is within the three-year limitations period articulated at Business Regulation § 4-805(g).

The Claimant’s evidence further demonstrates the Respondent’s performance was inadequate and unworkmanlike. Dr. Michael A. Ozol, whom I accepted as an expert in concrete inspection and investigations, testified on behalf of the Claimant as to the inadequacy of the Respondent’s work. Dr. Ozol is a certified geologist and petrographer who has studied concrete and concrete making materials, including assessments of their suitability for intended uses, since 1983. He presented as a very knowledgeable and thoughtful witness, and many of his



observations were based on his in-person inspection of the Claimant's driveway, which he conducted on March 3, 2011.

Dr. Ozol explained that concrete mixtures may contain any number of aggregate substances, but that it is critical, no matter what the concrete mixture is comprised of, for the mixture to be sufficiently cured both at the time of mixing and once it is poured. He explained, in layman's terms, that curing is the process which strengthens the adhesive bonding of the materials within the concrete mixture. If curing is done properly, the concrete surface should last for a considerable time with minimal erosion or scaling. It was Dr. Ozol's opinion that a properly-cured concrete mixture, once settled and hardened, would not display the amount and degree of scaling the Harrises reported seeing in their driveway after less than a year, and that he himself observed almost three years after the driveway was poured.

When Dr. Ozol conducted his inspection of the Claimant's driveway, the top layer of concrete was wholly worn away in several areas, to the point the aggregate material that was contained in the mixture was *visible to the naked eye*. (See, Cl. Ex. 3, p. 7.) In Dr. Ozol's opinion, the deterioration both he and the Harrises observed was the direct result of the Respondent's failure to properly cure the concrete while mixing it and after he poured it. As a result of an inadequate curing process, the concrete did not hydrate properly while it was mixed and after it was poured, so the aggregate materials did not adhere to one another properly. This deficiency in turn meant the mixture as a whole, once poured, did not harden properly. Consequently, the scaling, or erosion, of the Claimant's driveway occurred at a much faster pace and over a much larger surface area, than one would expect to see only three years after the driveway was installed.

Having found that the Claimant is eligible for compensation, I now turn to the amount of the award. 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 offer three formulas for measurement of a claimant's actual loss. COMAR 09.08.03:03B(3)(a), (b) and (c). One of those formulas, as follows, offers an appropriate measurement 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).

Applying the formula set out above, I find that the Claimant sustained an actual loss as follows:

Amount Paid to the Respondent	\$15,565.00
Amount Paid to Correct or Complete Work	<u>+\$10,867.20</u>
	\$26,432.20
Amount of Original Contract	<u>-\$15,565.00</u>
Amount of Actual Loss	<b>\$10,867.20</b>

Under Business Regulation § 8-405(e)(5) (Supp. 2014), the amount of an award to a claimant is limited to the amount the claimant paid the contractor whose work was inadequate, incomplete, or unworkmanlike. Accordingly, I recommend an award to the Claimant in the amount of \$10,867.20.

**CONCLUSIONS OF LAW**

Based on the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Claimant suffered an actual loss of \$10,867.20, and he is entitled to be compensated in the amount of \$10,867.20 as a result of the acts or omissions of the Respondent. Md. Code Ann., Bus. Reg. §§ 8-401 (2010), 8-405(e)(5) (Supp. 2014); COMAR 09.08.03.03B(3)(c).

**PROPOSED ORDER**

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

**ORDER** that the Maryland Home Improvement Guaranty Fund award the Claimant \$10,867.20; 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 as set by the Maryland Home Improvement Commission. Md. Code Ann., Bus. Reg. § 8-411(a) (2010); and,

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

**Signature on File**

December 11, 2014  
Date Decision Mailed

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Latonya B. Dargan  
Administrative Law Judge

LBD/kkc  
#153404