

THE MARYLAND HOME	* BEFORE MARC NACHMAN,
IMPROVEMENT COMMISSION	* AN ADMINISTRATIVE LAW JUDGE
v.	* OF THE MARYLAND OFFICE
IDALECIO JOHN SALIERO, t/a	* OF ADMINISTRATIVE HEARINGS
SALIERO CONSTRUCTION,	* OAH NO.: DLR-HIC-04-08-21622
RESPONDENT	* MHIC NO.: 07(75)1025
AND THE CLAIM OF	*
TIMOTHY BARRY, CLAIMANT	*
AGAINST THE MARYLAND HOME	*
IMPROVEMENT GUARANTY FUND	*
FOR THE RESPONDENT'S ALLEGED	*
ACTS OR OMISSIONS	*

* * * * *

RECOMMENDED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On October 17, 2006, Timothy Barry (Claimant) filed a complaint with the Maryland Home Improvement Commission (MHIC) and, on January 9, 2007, a claim against the MHIC Guaranty Fund (Fund) for reimbursement of \$14,920.00 for actual losses allegedly suffered as a result of a home improvement contract with the Respondent.

On May 27, 2008, the MHIC issued charges against the Respondent alleging that the Respondent violated Maryland home improvement law. Md. Code Ann., Bus. Reg. §§ 8-311(a)(10), 8-501(c)(1)(i), (iii) and (viii), and 8-611 (2004). The MHIC transmitted the case to the Office of Administrative Hearings on March 18, 2009.

I held a hearing on September 17, 2009 at the Maryland Department of Agriculture, 50 Harry S. Truman Parkway, Annapolis, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a) (2004) and 8-407(c)(2)(i) (Supp. 2009). Jessica Berman, Assistant Attorney General, represented the MHIC. The Claimant represented himself. Jerome W. Berman, Esquire, represented the Respondent, who was present.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department of Labor, Licensing and Regulation, and the Rules of Procedure of the Office of Administrative Hearings govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009); Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02.01; and 28.02.01.

ISSUES

1. Did the Respondent perform a home improvement in an unworkmanlike or inadequate manner?
2. Did the Respondent perform a home improvement violating a building law of the State or its political subdivisions?
3. Did the Respondent use a contract form which failed to contain one or more items required by law?
4. If so, did the Claimant sustain an actual loss compensable by the Fund?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the MHIC:

- | | |
|--------------|---|
| MHIC Ex. # 1 | Notice of Hearing, dated April 16, 2009 |
| MHIC Ex. # 2 | Statement of Charges and Order for Hearing, dated May 27, 2008;
Home Improvement Claim Form, dated January 6, 2007 |
| MHIC Ex. # 3 | Licensing History for Respondent |
| MHIC Ex. # 4 | Proposal and Contract, undated and unsigned |
| MHIC Ex. # 5 | Photographs (individually labeled A through Q) |
| MHIC Ex. # 6 | Complaint form and attachments, dated October 15, 2006 |
| MHIC Ex. # 7 | Licensing History for Paulo DaSilva, DaSilva Construction
Company, Inc. |
| MHIC Ex. # 8 | MHIC letter to Frank Kaiss, III, dated June 23, 2007, with
attachments |
| MHIC Ex. # 9 | Report by Frank J. Kaiss, & Associates, dated July 17, 2007, with
attachments and photographs |

I admitted the following exhibits on behalf of the Claimant:

- | | |
|-----------------|---------------------|
| Claimt. Ex. # 1 | Photographs of pool |
| Claimt. Ex. # 2 | Photographs of pool |
| Claimt. Ex. # 3 | Photographs of pool |
| Claimt. Ex. # 4 | Photographs of pool |

I admitted the following exhibits on behalf of the Respondent:

- | | |
|---------------|--------------------|
| Resp. Ex. # 1 | Photograph of pool |
|---------------|--------------------|

Resp. Ex. # 2	Photograph of pool
Resp. Ex. # 3	Photograph of pool
Resp. Ex. # 4	Photograph of pool
Resp. Ex. # 5	Photograph of pool
Resp. Ex. # 6	Photograph of pool
Resp. Ex. # 7	Photograph of pool

The Fund did not submit any documents to be admitted into evidence.

Testimony

The MHIC presented the following witness: the Claimant; and Frank J. Kaiss, III, who was accepted as an expert in home improvements and specifically concrete decking and estimating the cost to repair or replace concrete decking.

The Claimant testified on his own behalf.

The Respondent testified on his own behalf.

The Fund did not present the testimony of any witnesses.

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 license number 49398 (MHIC Ex. # 7).
2. The Claimant and his wife own a house located at 7318 Musical Way, Severn, Maryland (the Property).
3. In August 2005, the Claimant signed a contract with Sunrise Pools (Sunrise) to install a swimming pool in the backyard of the Property. Part of that contract included the installation of a cement pool deck extending three feet from the perimeter of the pool. Sunrise retained the

Respondent's company to install the cement pool deck extending three feet from the perimeter of the pool.

4. When the Claimant met with the Respondent, they agreed that the Respondent would extend and expand the pool deck beyond the three feet called for in the Sunrise contract at an additional cost to the Claimant, to be paid to the Respondent directly and not through Sunrise.

5. The Respondent prepared and presented to the Claimant a Proposal and Contract (Contract) detailing the scope of the work that the Respondent agreed to perform and that the Claimant would pay the additional cost (MHIC Ex. # 4).

6. The Contract called for the installation of approximately 2,800 square feet of concrete, of which approximately 1,800 square feet would be Stone Mark concrete and the balance would be Brushed concrete.

7. The Contract also contained the following terms:

- a. The concrete was to be installed at 3,500 p.s.i.¹ with nycon fibers for reinforcement.
- b. Expansion joints would be installed every six to eight feet as needed.
- c. The Contract price included digging piers, framing the steps leading from the basement of the house to the pool deck, and installing a deck drain
- d. The Respondent was responsible for providing all of the labor, equipment and materials necessary to complete the work described in the Contract.
- e. The Claimant was to provide access to the job site.

¹ "Pounds per square inch."

8. All of the construction material was guaranteed to be "as specified" and the work was to be "performed in accordance with the drawings and specifications submitted...and completed in a substantial workmanlike manner...."

9. The Contract did not include backfill or grading.

10. The Claimant agreed to pay \$19,000.00 for the concrete installation, of which \$10,000.00 was due from the Claimant at the start of the work and \$9,000.00 was due immediately following completion of the work.

11. The Contract did not list the Licensee's MHIC license number.

12. The Contract did not contain a statement that home improvement contractors and their subcontractors must be licensed by the MHIC or that anyone can ask the MHIC about a contractor of subcontractor.

13. The Contract did not contain the approximate date on which the work was to begin or when it would be substantially completed.

14. The Respondent began the concrete installation in August 2005 and the work was completed some time in September 2005.

15. The Claimant made timely and complete payments to the Respondent.

16. The Claimant and his wife were initially satisfied with the work performed by the Respondent at the time of its completion. Some time in the following spring 2006, however, the Claimant and his wife noticed irregular markings and discoloration in the concrete the Respondent installed. They also observed that the concrete surface appeared to be deteriorating in some areas, particularly around the expansion joints and edges.

17. The Claimant initially contacted Sunrise about the appearance of the concrete; a representative from Sunrise inspected the pool deck, took photographs, and advised the Claimant that it would contact the Respondent.

18. Following the Sunrise inspection, the Claimant did not hear from Sunrise or from the Respondent until August 2006.

19. The Claimant and the Respondent agreed to meet at the Property on August 16, 2006, for the latter to inspect the concrete.

20. The Respondent did not appear for the August 16, 2006, meeting, nor did he return some of the Claimant's telephone calls to inquire about his nonattendance. The Respondent eventually met with the Claimant one time, but the Respondent did not agree on a means to correct the apparent defects.

21. Because the Respondent did not correct the defects in the concrete, in October 2006, the Claimant contacted DaSilva Construction (DaSilva) to propose corrective action.

22. DaSilva identified defects in the concrete and proposed three alternative solutions to correct the defects it observed: two proposals ranging from \$13,750 to \$14,920 to bond the concrete with Texture-Crete, a topping agent, and to repair the steps leading from the basement of the house to the pool deck. DaSilva also prepared one proposal for \$35,278.68 to remove and reinstall all of the concrete installed by the Respondent (MHIC Ex. # 6).

23. On October 15, 2006, the Claimant filed a complaint against the Respondent with the MHIC, which received the complaint on October 17, 2006.

24. On January 6, 2007, the Claimant filed a claim form with the MHIC Fund, which received the claim on January 9, 2007.

25. The MHIC retained Frank J. Kaiss, III, of Frank J. Kaiss & Associates, a home improvement contractor and consultant, to inspect the Respondent's work. Mr. Kaiss reviewed the Claimant's complaint and the Contract, and he inspected the concrete the Respondent installed (MHIC Ex. # 9).

26. Mr. Kaiss determined that the concrete was not installed in a workmanlike manner and that the fair cost to correct the poor workmanship and to restore the work within the scope of the Contract was \$17,916.00, which included reconstruction of the steps leading from the basement of the house to the pool deck.

27. The actual loss sustained by the Claimant as a result of the Respondent's unworkmanlike and inadequate home improvement is \$14,420.00.

DISCUSSION

I. Regulatory Charges.

The MHIC presented two witnesses to prove that the Respondent violated sections 8-311(a)(10) and 8-611(1) of the Business Regulation Article: the Claimant and Frank J. Kaiss, III, the MHIC's expert consultant. It also presented copies of the Contract to support the allegations concerning the violation of section 8-501(c)(1)(i), (iii) and (viii) of the Business Regulation Article. Each of the MHIC's charges is discussed as follows.

A. Concrete spalling and discoloration and expansion strip installation: Performing a home improvement in an unworkmanlike or inadequate manner, in violation of Bus. Reg. § 8-311(a)(10).

The MHIC alleged that the Respondent performed a home improvement in a poor or unworkmanlike manner. Section 8-311(a)(10) of the Business Regulation Article states:

§ 8-311. Denials, reprimands, suspensions, and revocations - Grounds; penalty.

(a) *In general.* - Subject to the hearing provisions of § 8-312 of this subtitle, the Commission may deny a license to an applicant, reprimand a licensee, or suspend or revoke a license if the applicant or licensee or the management personnel of the applicant or licensee:

...
(10) as a contractor or subcontractor lacks competence, as shown by the performance of an unworkmanlike, inadequate, or incomplete home improvement[.]

Md. Code Ann., Bus. Reg. § 8-311(a)(10) (Supp. 2009).

The Claimant testified about defects in the concrete work that he and his wife observed. The Claimant's observations were supported by the photographs he presented and Mr. Kaiss's report, which included photographs. The Claimant's photographs (MHIC Ex. # 5 a through q) showed spalling² or flaking of the concrete (MHIC Ex. # 5 a, b, c, k, m, n, and o), particularly around the expansion joints and the edges of the pool deck (MHIC Ex. # 5 e and h), cracks (MHIC Ex. # 5 d, and j), the lack of or improperly installed expansion joints (MHIC Ex. # 5 g, l and q), and discoloration of the concrete (MHIC Ex. # 5 f, i and p). The photographs submitted by the Claimant (Cl. Ex. # 1, 2 and 3) showed similar defects as those stated above and near the edge of the pool.³

The Respondent also submitted additional photographs that he took in August 2006 when he inspected the Property, in an attempt to show that some of the discoloration was caused by the manner in which the Claimant maintained his property. His contentions, however, were not supported by the evidence. Contrary to the Respondent's assertion, the Claimant denied that he

² Spalling is a deterioration of the surface of concrete, evidenced by a chipping or flaking of a concrete surface. In some areas, the aggregate stones are visible when they should not be.

³ Mr. Kaiss also examined the PVC patio drain, photographing its defective condition. MHIC Ex. # 9, photo J. As this issue did not appear in the Claimant's initial complaint or claim (MHIC Ex., ## 2 and 6), I will not consider this issue in rendering this proposed decision.

kept a barbecue grill on the deck which could have caused discoloration; there was no evidence, testimonial or photographic, proving the presence of a grill at any relevant period of time or that the grill would have in fact caused the cement to discolor or spall.

The Respondent also pointed in his photographs the difference in the color of the cement on the pool deck and that which was under the Claimant's wooden deck over the pool deck area; he attempted to explain that the difference in color between those areas was acceptable. He did not, however, explain why a color difference in those two areas would be acceptable cement work. Nevertheless, even if such a color difference in those areas were acceptable, the discoloration also was apparent on contiguous areas of the pool deck that were not under the wooden deck. This difference in color in visible and contiguous areas was not acceptable to the Claimant and not acceptable within the trade, according to Mr. Kaiss.

The Claimant testified that he was initially generally satisfied with the concrete installation,⁴ although he later expressed some reservations about the installation of part of the concrete poured late at night and in inclement weather. He testified that the last part of the concrete installation – which corresponds to the portion of the cement installation about which the Claimant complains – was done the same day as the earlier pours, but was done late at night and before a sudden rain storm. The Respondent placed protective plastic over the wet cement, but he acknowledged that if there were too much water on the surface of the drying cement, spalling could occur. This is apparently what happened.

⁴ The Claimant now complains that the concrete was not installed using the Stone Mark pattern that he chose, and that he did not like the manner in which the Brushed concrete was finished as well. The Claimant was present for at least some of the time of the concrete was poured and finished; for the reasons expressed in the following paragraph, the Claimant was present when the concrete was being finished. The Claimant testified that chose not to complain about this discrepancy at the time that the concrete was being finished. As this complaint was not documented at the time of the concrete installation, or in his complaint or claim form, and it seems like an afterthought, I do not consider this complaint to be valid.

Mr. Kaiss, who was accepted as an expert in home improvements and specifically in concrete decking and estimating the cost to repair or replace concrete decking, testified that excess water on the surface of recently poured cement could account for spalling. He also observed this condition and photographed the resulting damage to the concrete surface, attaching the photographs to his report. MHIC Ex. #9. Mr. Kaiss's opinion was that there was excess water present on the surface of the concrete as it was being poured, causing damage to the areas poured last and in the rainfall. His observations and explanation was consistent with the testimony of the Claimant and the Respondent. He also noted problems with the expansion joints that do not extend the entire length of the deck and one such joint that did not have the proper cover. He also noted a lack of required caulking around the pool edge. Mr. Kaiss's testimony was supported by the photographic and testimonial evidence and clearly described the damage he observed and gave a rational and logical explanation for its appearance. I found this witness to be experienced, credible and his explanation was supported by the facts, rational, authoritative and logical.

Considering the evidence presented by the parties, I find that the concrete was discolored and spalled in the sections that were damaged by excessive water, and because the damage was so pervasive that the entire concrete deck must be removed and reinstalled or covered by a bonding agent. Some of the expansion joints were also not properly installed, requiring their reinstallation. Consequently, I conclude that the Respondent performed work under the contract in a poor and unworkmanlike manner and, therefore, the Respondent violated section 8-311(a)(10) of the Business Regulation Article.⁵

⁵ The Respondent testified that he wanted the opportunity to return to the property and suggested placing a bonding agent over the damaged cement, but that the Claimant did not allow him to do so. Although I tend not to consider this testimony because it approaches evidence of a settlement that is generally not admissible, I find it irrelevant.

B. Steps: violating a building law of the State or its political subdivisions, in violation of Bus. Reg. § 8-611(1).

Mr. Kaiss also measured the steps coming from the basement to the pool deck area. The Respondent did not create these steps, but he incorporated the existing steps into his cement work. Mr. Kaiss measured the height between each of the stair risers, finding that the three "existing" risers were approximately 7 ¼" high, while the "top riser" was only 5 ½" high. Mr. Kaiss considered the disproportional risers to be a trip hazard and a building code violation. Although the "framing of steps" was among the terms of the Contract (MHIC Ex. # 4), neither the MHIC nor the Claimant adequately proved that any steps that existed prior to the Contract complied with the building code, or that the Respondent was required to, or in fact did, perform any work on these steps. As neither the MHIC nor the Claimant proved that the redesign of the steps was within the scope of the Contract, or that any building code violation was the responsibility of the Respondent, the MHIC did not prove by a preponderance of the evidence that any work performed by the Respondent on the steps was specifically contemplated by the Contract or a violation of a building law of the State of a political subdivision thereof. Bus. Reg. §8-611(1).

C. Failure to use a contract that contained the minimum information required by Bus. Reg. § 8-501

The MHIC alleged that the Respondent did not include in his contract information required by law. Each home improvement contract must contain the following:

because the Claimant attempted to contact the Respondent without much success, and when he did eventually contact him, the Respondent failed to appear at the appointment. Both parties acknowledged that when they did meet, they were unable to agree on corrective actions. I do not find that, by the time the Claimant came to an adverse opinion about the Respondent, that the Claimant unjustifiably refused to allow the Respondent onto the Property.

§ 8-501. Contracts

...

(c)(1) In addition to any other matters on which the parties lawfully agree, each home improvement contract shall contain:

(i) the name, address, and license number of the contractor;

...

(iii) the approximate dates when the performance of the home improvement will begin and when it will be substantially completed;

...

(vii) a notice that gives the telephone number of the Commission and states that:

1. each contractor and each subcontractor must be licensed by the Commission; and
2. anyone may ask the Commission about a contractor or subcontractor.

The Contract contains no such terms (MHIC Ex. # 4).⁶ The Maryland Home Improvement law requires the above reference information to be included in home improvement contracts. The Respondent's Contract with the Claimants did not contain the information. The MHIC has proven this violation by a preponderance of the evidence.

D. Penalties.

The Respondent is subject to sanctions for unworkmanlike and inadequate workmanship and for failure to include required terms in his contract. He is not subject to any sanctions for constructing the steps in violation of a building law of the State or its political subdivisions. Bus. Reg. § 8-611(1).

The Respondent continues to hold a home improvement contractor's license which is subject to reprimand, suspension or revocation, under section 8-311(a) of the Business

⁶ Because the Contract did not contain signatures of the Claimant or the Respondent, the Respondent initially claimed that there was no signed contract. The Respondent conceded, however, that, although he did not remember if there was actually a signed contract, the parties operated under the Contract submitted into evidence by the MHIC. The Respondent prepared and presented the Contract to the Claimant in order to secure additional concrete installation work over and above the scope of the concrete installation included in the Sunrise contract with the Claimant.

Regulation Article. The MHIC seeks a thirty day suspension of the Respondent's license, which the Respondent contends is excessive.

In addition, section 8-311(c) of the Business Regulation Article states, "Instead of or in addition to reprimanding a licensee or suspending or revoking a license, the [MHIC] may impose a civil penalty under § 8-620 of this title." Section 8-620 of the Business Regulation Article states the following:

§ 8-620. Civil penalties.

(a) *In general.* - The Commission may impose on a person who violates this title, including § 8-607(4) of this subtitle, a civil penalty not exceeding \$5,000 for each violation, whether or not the person is licensed under this title.

(b) *Considerations.* - In setting the amount of a civil penalty, the Commission shall consider:

- (1) the seriousness of the violation;
- (2) the good faith of the violator;
- (3) any previous violations;
- (4) the harmful effect of the violation on the Claimant, the public, and the business of home improvement;
- (5) the assets of the violator; and
- (6) any other relevant factors.

Md. Code Ann., Bus. Reg. § 8-620 (2004). The MHIC seeks a civil penalty of \$2,500.00 for the unworkmanlike home improvement work and \$250.00 for each of the contract violations.

Considering the factors for assessing a penalty listed in section 8-620(b), in light of the arguments made by the MHIC, I find that the Respondent's violation of section 8-311(a)(10) is serious. The Claimant uses his outdoor deck often, as an extension of his home for entertaining

friends. He relies on this portion of the Property for its aesthetics, which are now lacking due to the mismatched colorations, cracks and spalling. The law contemplates that licensed contractors will adhere to the standards of the various home improvements trades and not perform work in an unworkmanlike or inadequate manner.

The Respondent's failure to include required contract terms specified in sections 8-501(c)(1)(i), (iii) and (viii) are not as serious, but nonetheless contravene the Maryland Home Improvement law. His contracts must comply with the law so that consumers are informed of important information and rights.

The Respondent showed little good faith in attempting to correct the concrete deficiencies, but it was not clear that the disregard that he showed the Claimant was totally the Respondent's responsibility. The Claimant initially attempted to contact the Respondent through Sunrise, and it was not clear what percentage of attempts were made through that channel as opposed to making contact directly with the Respondent. On the other hand, the Respondent failed to keep his appointment with the Claimant and failed to return what appeared to be direct telephone contact after the missed meeting. They did meet once, but without resolving the dispute. He may have been willing to correct the problem, but initially did not consider it to be one – in fact, he commended himself on his completing the concrete work late into the night and in the rain, although the latter condition caused the spalling to have occurred. He did not directly offer to refund any portion of the Claimant's money nor did he appear to be serious about correcting the defects; even at the hearing, he contended that the discolorations occurred mainly under the deck, claiming that it was not that visible and, therefore, not in need of repair. His

initial solution was to correct only 800 square feet of the concrete, which would have appeared to be different than the concrete that would remain.⁷

The Fund previously paid claims on the Respondent's behalf to two claimants other than the Claimant, which will be discussed below. Additionally, the Respondent's poor performance of this contract reflects badly on all licensed contractors and diminishes public confidence in the home improvement contracting profession as a whole. The Respondent's assets were not in evidence, so the extent of those assets is not being considered in assessing a penalty.

Weighing all of the above-listed factors, I recommend that the MHIC order the Respondent to pay a \$1,500.00 civil penalty for violating section 8-311(a)(10) of the Business Regulation Article and \$250.00 for each of the violations of section 8-501(c)(1)(i), (iii) and (viii) of that same article, for a total civil penalty of \$2,250.00. I have reduced the MHIC's request for the unworkmanlike charge because I did not find that the Licensee violated a building law of the State of a political subdivision thereof (which was claimed as a one of the three violation cited by the MHIC and, therefore, may have also formed the basis of the MHIC's calculation), and because the Respondent did express some responsibility for the concrete damage.

The Respondent has been subject to a fund repayment in December 2002, which was repaid to the Fund in January 2003. In an earlier claim, the Respondent repaid the Fund its award in the same calendar month that it made its payment, December 2001. He was suspended as a result of findings in those two cases. A thirty day suspension is excessive because the Respondent will again be responsible for repaying the Fund award or face suspension for nonpayment: he must remain working in order to earn the necessary fees to repay the Fund. I

⁷ Even if the colors were to match at the time of installation, the concretes would age differently and would mismatch colors over time.

recommend that the Respondent be suspended, but only for a period of ten days, recognizing that the prior violations were somewhat remote in time (2001 and 2002), and that the Respondent timely repaid his obligations when they were assessed.

II. Fund Claim

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. 2009), 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 (2004). For the following reasons, I find that the Claimant has proven eligibility for compensation.

First, the Respondent was a licensed home improvement contractor at the time he and the Claimant entered into the contract.

Second, the Respondent performed an unworkmanlike and inadequate home improvement for the reasons set forth above..

Having proven eligibility for compensation, I now turn to the amount of the award, if any. 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). 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 measurements accordingly.

COMAR 09.08.03.03B(3)(c).

Having proven eligibility for compensation, I now turn to the amount of the award, if any. The cement was not properly installed due to the water content on the surface, creating the spalling and flaking condition; it also contributed to the discoloration. It is not reasonable to remove and reinstall 800 square feet of the pool cement, as when it is reinstalled, the color will not match the existing cement, which was one of the Claimant's complaints. The expansion joints were also not installed properly and need to be reinstalled. I am not, however, including the cost to repair the steps, as I did not find that the repair of the existing steps was within the scope of the Contract. The Claimant solicited an estimate from DaSilva to put a bonding agent, Texture-Crete, over the surface of the cement which would not only correct the spalling and flaking, but will also assure that the surface of the concrete pool deck will match. The Claimant submitted this proposal with the initial claim and Mr. Kaiss endorsed it. Therefore, I adopt Mr. Kaiss's assessment, save for the repair to the steps and caulking, which was not in the scope of the Contract, for the reasons referenced above. The claim was not amended. Accordingly, the calculation of the Fund award is as follows:

\$19,000.00		Amount paid by the Claimant to the Respondent, plus
	\$14,920.00	Fair market cost to make corrections and complete Contract
	(\$500.00)	work, less
		Estimate of cost to re-form the steps
<u>\$14,420.00</u>	\$14,420.00	Subtotal of correction costs
\$33,420.00		Subtotal, less
<u>(\$19,000.00)</u>		Original contract price, equals
\$14,420.00		Amount of the Claimant's actual loss

CONCLUSIONS OF LAW

I conclude that the Respondent violated Maryland home improvement law. Md. Code Ann., Bus. Reg. §§8-311(a)(10) and 8-501(c)(1)(i), (iii) and (viii)(2004). The Respondent is subject to sanction. Md. Code Ann., Bus. Reg. § 8-311 (2004); the Respondent is also subject to civil penalties. Md. Code Ann., Bus. Reg. § 8-620 (2004); and the Claimant has sustained an actual loss of \$14,420.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2004).

RECOMMENDED ORDER

I RECOMMEND that the Maryland Home Improvement Commission:

ORDER that the Respondent, violated Md. Code Ann., Bus. Reg. §8-311(a)(10); and

ORDER that the Respondent, violated Md. Code Ann., Bus. Reg. §§ 8-501 (c)(1)(i), (iii) and (viii); and

ORDER that the Respondent, did not violate Md. Code Ann., Bus. Reg. §8-611(1); and

ORDER that the Respondent be fined \$2,250.00, pursuant to Md. Code Ann., Bus. Reg. § 8-620 (2004), and pay the amount of this fine to the Maryland Home Improvement Commission within thirty days of the adoption of this Recommended Order by the Maryland Home Improvement Commission; and

ORDER that the Respondent be suspended for ten days, pursuant to Md. Code Ann., Bus. Reg. §8-311(c) (2004), and

ORDER that the Claimant be awarded \$14,420.00 from the Maryland Home Improvement Guaranty Fund; 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 (2004), and

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

December 16, 2009
Date Decision mailed

A large black rectangular redaction box covering the signature of Marc Nachman.

Marc Nachman
Administrative Law Judge

MN/
110293

THE MARYLAND HOME	* BEFORE MARC NACHMAN,
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FILE EXHIBIT LIST

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I admitted the following exhibits on behalf of the MHIC:

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Company, Inc.
- MHIC Ex. # 8 MHIC letter to Frank Kaiss, III, dated June 23, 2007, with
attachments
- MHIC Ex. # 9 Report by Frank J. Kaiss, & Associates, dated July 17, 2007, with
attachments and photographs

I admitted the following exhibits on behalf of the Claimant:

Claimt. Ex. # 1	Photographs of pool
Claimt. Ex. # 2	Photographs of pool
Claimt. Ex. # 3	Photographs of pool
Claimt. Ex. # 4	Photographs of pool

I admitted the following exhibits on behalf of the Respondent:

Resp. Ex. # 1	Photograph of pool
Resp. Ex. # 2	Photograph of pool
Resp. Ex. # 3	Photograph of pool
Resp. Ex. # 4	Photograph of pool
Resp. Ex. # 5	Photograph of pool
Resp. Ex. # 6	Photograph of pool
Resp. Ex. # 7	Photograph of pool

The Fund did not submit any documents to be admitted into evidence.

**IN THE MATTER OF
IDALECIO JOHN SALIERO, t/a
SALIERO CONSTRUCTION**

* **MARYLAND HOME
IMPROVEMENT COMMISSION**

*

**AND THE CLAIM OF
TIMOTHY BARRY**

* **MHIC CASE NO. 07 (75) 1025**

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PROPOSED ORDER

WHEREFORE, this 26TH day of March, 2010, Panel B of the Maryland Home Improvement Commission ORDERS that:

- 1) The Findings of Fact of the Administrative Law Judge are Affirmed.**
- 2) The Conclusions of Law of the Administrative Law Judge are Affirmed.**
- 3) The Recommended Order of the Administrative Law Judge is Amended as follows:**
 - A) The recommended award of \$14,420.00 to the Claimant from the Home Improvement Guaranty Fund is Affirmed.**
 - B) The Civil Penalty of \$2,250.00 imposed on the Respondent is Affirmed.**
 - C) The license suspension of ten (10) days imposed on the Respondent is Reversed.**
 - D) The Respondent is Reprimanded.**
- 4) Unless any party 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, any party then has an additional thirty (30) day period during which they may file an appeal to Circuit Court.**

**In The Matter Of
Idalecio John Saliero
t/a Saliero Construction
March 26, 2010
Page 2**

***Joseph Tunney*
Chairperson - Panel B
Maryland Home Improvement Commission**

IN THE MATTER OF
IDALECIO JOHN SALIERO, t/a
SALIERO CONSTRUCTION

AND THE CLAIM OF
TIMOTHY BARRY

* MARYLAND HOME
* IMPROVEMENT COMMISSION

* MHIC CASE NO. 07 (75) 1025
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**In The Matter Of
Idalecio John Saliero
t/a Saliero Construction
March 26, 2010
Page 2**

Joseph Tunney
Chairperson - Panel B
Maryland Home Improvement Commission