

<p>IN THE MATTER OF THE CLAIM</p> <p>OF JODI USHER,</p> <p>CLAIMANT,</p> <p>AGAINST THE MARYLAND HOME</p> <p>IMPROVEMENT GUARANTY FUND</p> <p>FOR THE ALLEGED ACTS OR</p> <p>OMISSIONS OF ROBERT SPERO,</p> <p>T/A MARYLAND POOLS, INC.,</p> <p>RESPONDENT</p>	<p>* BEFORE MICHAEL R. OSBORN,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>* OAH No.: DLR-HIC-02-16-36001</p> <p>* MHIC No.: 15 (05) 1219</p> <p>*</p> <p>*</p> <p>*</p>
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PROPOSED DECISION¹

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

STATEMENT OF THE CASE

On September 7, 2016, Jodi Usher (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of

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

- A. Upon completion of the hearing, the ALJ shall submit a proposed decision to the administrative unit.
- ...
- C. The proposed decision shall comply with the requirements of the Administrative Procedure Act and COMAR 28.02.01.22, and shall include:
 - (1) Written findings of fact;
 - (2) Proposed conclusions of law; and
 - (3) A recommended order.
- ...

\$33,044.00 in alleged actual losses suffered as a result of a home improvement contract² with Robert Spero, trading as Maryland Pools, Inc. (Respondent).

I held a hearing on April 10, 2017 at the Tawes State Office Building, Room C-1A, Department of Natural Resources, 580 Taylor Avenue, Annapolis, MD 21401. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015).³ The Claimant represented herself. Andrew Brouwer, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. The Respondent and his attorney of record, Robert M. Stahl, Esquire, did not appear for the hearing. After waiting fifteen minutes for the Respondent or a representative to appear, I proceeded with the hearing. Code of Maryland Regulations (COMAR) 28.02.01.23A.⁴

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, 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 & Supp. 2016); COMAR 09.01.03; COMAR 28.02.01.

ISSUES

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

² The Claimant and her husband, Anthony Robert Usher, executed the contract with the Respondent. A sales representative for the Respondent executed the contract on the Respondent's behalf. Anthony Robert Usher attended the hearing but did not testify. The Claimant is the only person whose name appears on the MHIC Home Improvement Claim Form. The MHIC, in its correspondence with the Respondent and in its Hearing Order of October 18, 2016, refer to both the Claimant and her husband, Anthony R. Usher, as the Claimants. For ease of understanding, I will refer to Jodi Usher as the Claimant.

³ Unless otherwise noted, all references to the Business Regulation Article are to the 2015 volume.

⁴ Notice of the hearing was mailed to the Respondent at the address of record by certified mail on January 5, 2017, and was claimed by the Respondent on January 14, 2017. COMAR 09.08.03.03A(2).

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits offered by the Claimant:

- Clmt. Ex. 1 – Check from Claimant to Respondent for \$2,000.00, dated December 12, 2014;
- Clmt. Ex. 2 – Check from Claimant to Respondent for \$17,500.00, dated April 16, 2015;
- Clmt. Ex. 3 – Contract between Claimant and Respondent, dated December 12, 2014;
- Clmt. Ex. 4 – Check from Claimant to Respondent for \$24,062.00, dated April 29, 2015;
- Clmt. Ex. 5 – Contract between Claimant and Arcadia Pools, dated June 19, 2015;
- Clmt. Ex. 6 – Check from Claimant to Arcadia Pools for \$3,000.00, dated June 19, 2015;
- Clmt. Ex. 7 – Check from Claimant to Arcadia Pools for \$12,765.00, dated July 14, 2015;
- Clmt. Ex. 8 – Check from Claimant to Arcadia Pools for \$6,741.00, dated August 10, 2015;
- Clmt. Ex. 9 – Check from Claimant to Tri Star Electric for \$2,655.00, dated July 23, 2015;
- Clmt. Ex. 10 – Check from Claimant to Tri Star Electric for \$440.00, dated July 28, 2015;
- Clmt. Ex. 11 – Check from Claimant to Santana Design/Build for \$2,366.00, dated July 28, 2015;
- Clmt. Ex. 12 – Check from Claimant to Santana Design/Build for \$5,077.00, dated August 4, 2015;
- Clmt. Ex. 13 – Two Pictures of unfinished pool construction, undated;
- Clmt. Ex. 14 – Summary of Payments from Claimant to Vendors, undated.

The Respondent failed to appear and offered no exhibits.

I admitted the following exhibits offered by the Fund:

- Fund Ex. 1 – Hearing Order, dated October 18, 2016;
- Fund Ex. 2 – Notice of Hearing, dated January 5, 2017;
- Fund Ex. 3 – Letter from DLLR to Respondent, dated September 12, 2016;
- Fund Ex. 4 – Professional License History, DLLR, dated February 14, 2017.

Testimony

The Claimant testified on her own behalf.

The Respondent failed to appear.

The Fund did not present any testimony.

PROPOSED FINDINGS OF FACT

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

1. At all times relevant to the subject matter of this hearing, the Respondent, who traded as Maryland Pools Inc. (Maryland Pools), was licensed as a home improvement contractor under MHIC license numbers 01-93100 (Individual License) and 05-6694 (Company License).

2. The Respondent's address associated with his MHIC Individual License is 18 Trojan Horse Drive, Phoenix, Maryland 21131 (Individual Address). The Respondent's address associated with his MHIC Company License is 9515 Gerwig Lane, #121, Columbia, Maryland 21046 (Company Address).

3. On December 12, 2014, the Claimant and her husband entered into a contract (Contract) with Maryland Pools to construct an in-ground pool at a residential property in Pasadena, Maryland owned by the Claimant and her husband. The total Contract price was \$54,900.00. The Contract did not include any specific date work would begin as performance was contingent on final approval of financing by a lender, and contingent on arrival of weather appropriate for pool construction.

4. The scope of work to be performed under the Contract included excavation of the pool site, construction of pool walls, and installation of: all plumbing supply lines and drain lines; all lighting and electrical systems; a water filtering system; a concrete pool skirt; all tile and trim work on various pool surfaces; a diving board and waterfall; and, a concrete pool deck.

5. On December 12, 2014, the Claimant paid the Respondent a \$2,000.00 deposit.

6. In or about April 2015, Maryland Pools excavated and prepared the ground for installing the pool. On April 16, 2015, the Claimant paid a \$17,500.00 progress payment to the Respondent.

7. Following excavation, the Respondent installed some plumbing supply lines and drain lines, and some water filtering components of the pool, over which the Respondent installed concrete pool walls. On April 29, 2015, the Claimant paid to the Respondent a \$24,062.00 progress payment.

8. The Claimant paid the Respondent \$43,562.00 of the total Contract price of \$54,900.00. The Claimant still owed the Respondent \$9,338.00 on the Contract.

9. On April 29, 2015, the pool was an unfinished concrete shell, surrounded by mounds of dirt, with numerous water lines and drain lines running through open ditches in various states of connection to other lines, with rain water collecting in the deep end of the pool, all surrounded by temporary plastic fencing.

10. Following several days without progress, the Claimant inquired of both junior employees and senior managers at Maryland Pools about the status of the pool construction, without any satisfaction. The Claimant learned through social media that Maryland Pools' President,⁵ Robert Landon, committed suicide on May 17, 2015.

11. On or about May 18, 2015, the Claimant visited Maryland Pools, where she spoke to the Respondent, Robert Spero, and Bob Brucksch, a corporate manager. The Respondent and Mr. Brucksch explained that Maryland Pools was deeply in debt, and that Maryland Pools would, nevertheless, finish the Claimant's pool. Either the Respondent or Mr. Brucksch told the Claimant that pumps, filters, and other components had to be ordered, which would take time.

⁵ In a January 20, 2017 letter to the OAH, which was made part of the administrative file in this matter, Robert M. Stahl, Esquire, advised the OAH that he was legal counsel for Robert Spero and Maryland Pools, and that Maryland Pools' President, Robert Landon, who was responsible for all Maryland Pools operations, committed suicide on May 17, 2015.

12. On the day after the Claimant visited Maryland Pools, Mr. Brucksch visited the Claimant's residence, inspected the progress, and again told the Claimant that the pool would be finished.

13. The Claimant was unable to reach anyone at Maryland Pools, and no one at Maryland Pools responded to her e-mail inquiries after Mr. Brucksch's visit. All calls to Maryland Pools went directly to a voicemail box.

14. Two days after Mr. Brucksch's visit, the Claimant visited Maryland Pools' offices and found the doors locked and the lights out, with no cars in the parking lot and no evidence anyone was present.

15. Shortly after discovering no one present at Maryland Pools, the Claimant called a woman she knew to be a Maryland Pools employee, who told the Claimant that she and all other Maryland Pools employees had been called together the previous Friday. She said the employees were all told they would not be paid any salaries or wages and should not return to work, and that they were told that Maryland Pools would shortly be filing for bankruptcy.

16. Maryland Pools did no further work under the Contract and abandoned the Contract.

17. On July 6, 2015, Maryland Pools filed a voluntary bankruptcy petition with the United States Bankruptcy Court in Baltimore, Maryland.⁶

⁶ See Mr. Stahl's letter to OAH of January 20, 2017, in which he advised the OAH that Maryland Pools filed for bankruptcy and in which he requested all proceedings before the OAH be stayed. The OAH denied this request. See also in the OAH file a letter from Joel Jacobson, Assistant Attorney General, DLLR, to Mr. Stahl, dated January 19, 2017, in which Mr. Jacobson advised Mr. Stahl that the United States Bankruptcy Court for the District of Maryland ruled that the automatic stay provisions of the Bankruptcy Code are inapplicable to proceedings by homeowners to recover from the Fund. In this letter, Mr. Jacobson advised Mr. Stahl that under COMAR 09.08.01.04C(3), the individual licensed contractor of record and the corporation are jointly and severally liable for any claim against the Fund and that, as a result, while collection efforts against Maryland Pools may be barred by the bankruptcy filing, collection efforts against Mr. Spero are not barred.

18. On June 23, 2015, the Claimant and her husband entered into a contract with Arcadia Pools, a licensed contractor, to complete some of the work under the Contract abandoned by the Respondent (Arcadia Contract). This work included completion of plumbing and drain lines, installation of pumps and filters, and installation of tile finishes on the surfaces of the pool and pool skirts. The total cost of work to be performed under the Arcadia Contract was \$22,506.00. Arcadia Pools completed the work and the Claimant and her husband paid the agreed-upon amount under the Arcadia Contract with progress payments in June, July, and August 2015.

19. In July 2015, the Claimant and her husband paid Tri-Star Electric, a licensed contractor, \$3,095.00 to complete electrical work on the Contract abandoned by the Respondent.

20. In July and August 2015, the Claimant and her husband paid Santana Design and Build \$7,443.00 to grade various surfaces, to grade and prepare the subsurface for installation of a concrete pool deck, and for installation of a concrete pool deck.

21. The total cost of completion of the Contract after abandonment by the Respondent was \$33,044.00 (Arcadia Pools, \$22,506.00; Tri-Star Electric, \$3,095.00; Santana Design and Build, \$7,443.00).

22. The Contract price was \$52,900.00, of which the Claimant paid \$43,562.00. The Claimant paid \$33,044.00 to complete the pool. The amount paid by the Claimant to the Respondent, \$43,562.00, plus the amount paid to complete the pool, \$33,044.00, was \$76,606.00. The total amount paid, \$76,606.00, minus the Contract price, \$52,900.00, is \$23,706.00.

23. On September 12, 2016, the Claimant filed the Claim with the MHIC.

24. On September 12, 2016, the MHIC notified the Respondent, through its counsel, Robert Stahl, Esquire, that it received the Claimant's claim, and requested the Respondent respond to this claim within ten days.

25. On October 18, 2016, the MHIC issued a Hearing Order stating that it had referred the Claim to the OAH for a hearing.

26. On January 5, 2017, the OAH mailed a Notice of Hearing (Notice) by United States Postal Service (USPS) Certified Mail Return Receipt and by First Class Mail to the Respondent's Individual Address and to his attorney of record, Robert M. Stahl, Esquire. This Notice advised the Respondent that a hearing was scheduled for April 10, 2017, at 10:00 a.m., at the Department of Natural Resources, 580 Taylor Avenue, Annapolis, Maryland 21401.

27. The Certified Mail Return Receipt for the Notice mailed to the Respondent's Individual Address was signed as received by Robert Spero on January 14, 2017. The Certified Mail Return Receipt for the Notice mailed to Mr. Stahl was signed as received on January 10, 2017 by N. Lyons. The First Class Mail Notices were not returned to the OAH by the USPS.

28. On January 20, 2017, Mr. Stahl wrote a letter to the OAH, identifying himself as the attorney for the Respondent and Maryland Pools, and asked the OAH to stay this case because Maryland Pools had filed a voluntary bankruptcy petition. The request for stay was denied.

29. No party made a request to postpone the April 10, 2017 hearing.

30. The Contract contains an arbitration clause. As of the date of the hearing, the Respondent had not advised the Claimant, the MHIC or the OAH that he intends to participate in arbitration of the issues underlying this Claim.

31. Besides the January 20, 2017 letter from Mr. Stahl, neither the Respondent, nor anyone authorized to represent him, initiated any contact with the Claimant, the MHIC or the OAH after the filing of this Claim.

32. The Claimant and her spouse are not: a spouse or other immediate relative of the Respondent; an employee, officer, or partner of the Respondent; or an immediate relative of an employee, officer, or partner of the Respondent.⁷

33. The Claimant has not taken any action to recover monies for the Respondent's and/or Maryland Pools' failure to recover for completion of the pool, other than the instant Claim.

34. The property where the work under the Contract was performed is the Claimant's only residential property in Maryland and it is her primary residence.

DISCUSSION

The Respondent's failure to appear

As discussed in the Findings of Fact above, the OAH mailed the Notice regarding the date, time and location of this hearing, via both First Class and Certified Mail, to the Respondent, individually and as the representative of Maryland Pools, to his Individual Address. The Notice was also mailed, via both First Class and Certified Mail, to Mr. Stahl, the attorney representing both the Respondent and Maryland Pools. The Certified Mail Notices were signed as received by someone at both the Respondent's and Mr. Stahl's address. The First Class Mail Notices were not returned to the OAH by the USPS.

⁷ A claimant must also prove that at all relevant times: (a) the owner owned fewer than three dwelling places or resides in the home as to which the claim is made; (b) the owner was not an employee, officer or partner of the contractor or the spouse or other immediate relative of the contractor or the contractor's employees, officers or partners; (c) the work at issue did not involve new home construction; (d) the owner did not unreasonably reject the contractor's good faith effort to resolve the claim; (e) there is no pending claim for the same loss in any court of competent jurisdiction and the owner did not recover for the actual loss from any source; and (f) the owner filed the claim with the MHIC within three years of the date the owner knew or with reasonable diligence should have known of the loss or damage. Bus. Reg. §§ 8-405(d), (f), and (g), 8-408(b)(1) and (2), and 8-101(g)(3)(i) (Supp. 2016). The Claimant meets all of these requirements.

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

The Respondent was properly notified of the date, time and location of this hearing. The Notice was mailed almost three months before the scheduled hearing by both First Class and Certified Mail to the address the Respondent provided to the MHIC. Md. Code Ann., Bus. Reg. § 8-312(d) (the hearing notice shall be sent at least ten days before the hearing by certified mail to the business address of the licensee on record with the MHIC); *see also id.* § 8-407(a). The Notice was also mailed to his attorney of record. Despite proper notice being sent, the Respondent failed to appear for the hearing. As a result, I proceeded with the hearing in the Respondent's absence. COMAR 28.02.01.23A.

Arbitration clause

The Contract between the Claimant and Maryland Pools contains an arbitration clause, which states, in pertinent part, as follows:

Any controversy, action, claim, dispute, breach or questions of interpretation relating to or arising out of this contract shall be resolved by arbitration in accordance with Commercial Arbitration Rules of the American Arbitration Association and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction.

...
Under Business Regulation Article SS8-405(C) [sic], Annotated Code of Maryland, a claim against the Home Improvement Guaranty Fund by an owner shall be stayed until completion of any mandatory arbitration proceeding.⁸

⁸ The arbitration language cited above appears on the back of the contract between the Claimant, her husband, and the Respondent.

Section 8-405(c) requires that the Claimant prove that she complied with any contract arbitration clause before seeking compensation from the Fund. Md. Code Ann., Bus. Reg.

§ 8-405(c). Additionally, COMAR 09.08.03.02E provides:

E. Compulsory Binding Arbitration. When a contract between a claimant and a contractor requires that all contract disputes be submitted to binding arbitration, the claimant shall either:

- (1) Submit their dispute to binding arbitration as required by the contract;
or
- (2) Provide evidence to the Commission that the claimant has made good faith efforts to bring the dispute to binding arbitration which the contractor has either rejected or not responded to. The Commission shall then give the contractor written notice that, if the contractor does not agree to binding arbitration, the Commission will consider the compulsory arbitration clause to be void and process the claimant's claim pursuant to this chapter.

COMAR 09.08.03.02E.

At the hearing, Mr. Brouwer, the Assistant Attorney General representing the Fund, stated that the MHIC is aware that the Contract contains this arbitration clause, and proffered that it is the MHIC's position that the Respondent waived his contractual right to compel arbitration and that the Claim may properly be considered at this time.

Section 8-405(c) of the Business Regulation Article protects the Fund from being depleted and ensures its continued solvency for the payment of future claims. Section 8-410 provides that once the MHIC pays a claim, the MHIC is subrogated to all rights of the claimant, and the MHIC may sue the contractor for the amount paid by the Fund on the claim. Md. Code Ann., Bus. Reg. § 8-410(a) and (b). This subrogation right allows the Fund to collect from the offending contractor what it has paid to a claimant, thus replenishing the Fund so that it continues to have sufficient resources to make payments on future awards. However, when the MHIC initiates a lawsuit against a contractor, the MHIC steps into the shoes of the claimant, and the contractor may assert any defenses against the MHIC that it would have had against the claimant, including the claimant's failure to bring the dispute to arbitration. *See Hill v. Cross*

Country Settlements, LLC, 402 Md. 281, 313 (2007) (the substituted person “can exercise no right not possessed by his predecessor, and can only exercise such right under the same conditions and limitations as were binding on his predecessor.”) (quoting *Poe v. Phila. Cas. Co.*, 118 Md. 347, 353 (1912)). Accordingly, to ensure the future solvency of the Fund through future subrogation actions against contractors, section 8-405(c) limits the MHIC’s ability to pay an award from the Fund when a claimant has not complied with a contract arbitration clause.

There are times, however, when a contract at issue in a claim contains an arbitration clause, but a claimant is unable to engage the contractor in arbitration. Clearly, the purpose of the Fund is to compensate homeowners for actual losses incurred at the hands of a licensed contractor, and this dictates that a claimant, who is barred from complying with a contract arbitration clause due to the actions of a contractor, should nevertheless be permitted to seek recovery from the Fund.

Maryland courts recognize that the right to arbitrate is a right created by contract, and that a party to that contract may waive its right to arbitrate. 2 Maryland Law Encyclopedia, *Alternative Dispute Resolution* § 23 (Westlaw 2017); see also *Brendsel v. Winchester Const. Co., Inc.*, 162 Md. App. 558, 573, cert. granted, 389 Md. 124 (2005), aff’d, 392 Md. 601 (2006). Usually, a court will only determine that a party waived its right when it does so through unequivocal acts or language. *Brendsel*, 162 Md. App. at 574. However, it is possible for waiver to be established when a party delays in demanding arbitration. *Id.* at 573; see also *Redemptorists v. Coulthard Servs., Inc.*, 145 Md. App. 116, 141 (2002). COMAR 09.08.03.02E is a mechanism for the Fund to establish a factual record that a contractor waived arbitration with a claimant. If the MHIC follows the procedures contained in COMAR 09.08.03.02E, it creates a factual record that may be used in any future subrogation lawsuit against defense of “failure to arbitrate” asserted by the contractor.

Clearly, however, if the facts of a particular case already are sufficient to prove waiver of the arbitration clause by the contractor, it is unnecessary for the MHIC to follow the provisions of COMAR 09.08.03.02E. In this case, there is sufficient evidence to support the MHIC's position that the Respondent's action in this case, or more accurately his inaction, is sufficient to prove that he waived his right to arbitrate, and therefore, it was unnecessary for the MHIC to require that it and the Claimant strictly adhere to the procedures outlined in COMAR 09.08.03.02E. The Respondent knew that this Claim was pending before the Fund since September 2016. *See* GF Ex. 3 (September 12, 2016 letter to the Respondent advising him that this Claim was pending against the Fund). Additionally, the Respondent was reminded of the pendency of this Claim through the MHIC and OAH hearing notices. *See* GF Ex. 1, and OAH Notice of Hearing. Despite this repeated actual notice, the Respondent never attempted to compel arbitration either through the Claimant, the MHIC, or the OAH. The Claimant testified that the Respondent never contacted her about submitting the claim to arbitration. Mr. Brouwer proffered that the Respondent never contacted the MHIC to demand that the matter be submitted to arbitration, and the OAH case file does not include any correspondence from the Respondent addressing arbitration. Most interestingly, on January 20, 2017, Mr. Stahl contacted the OAH on behalf of the Respondent and Maryland Pools, and requested that the hearing on the Claim be stayed pending Maryland Pool's voluntary bankruptcy petition; however, Mr. Stahl's letter was silent regarding arbitration. *See* OAH Case File, docket entry 4. Finally, the Respondent did not avail himself of his right to attend the hearing on the Claim and to object to the hearing of the matter prior to arbitration.

Based on these facts, I conclude that the Respondent waived his right to arbitrate this Claim, and that it was appropriate for the MHIC to forward this Claim for a merits hearing,

despite the presence of an arbitration clause in the Contract and despite the Claimant's and the MHIC's strict adherence to the procedures contained in COMAR 09.08.03.02E.

The merits of the claim

The Claimant has the burden of proving the validity of her claim by a preponderance of the evidence. Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3). “[A] preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces . . . a belief that it is more likely true than not true.” *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002) (quoting *Maryland Pattern Jury Instructions* 1:7 (3d ed. 2000)).

An owner may recover compensation from the Fund “for an actual loss that results from an act or omission by a licensed contractor.” Md. Code Ann., Bus. Reg. § 8-405(a); *see also* COMAR 09.08.03.03B(2) (“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. 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 he entered into the contract with the Claimant.

The Respondent performed inadequate or incomplete home improvements.

The Claimant had \$9,338.00 due to pay under the Contract. The Claimant had to pay \$33,044.00 to licensed contractors to complete the work the Respondent was supposed to perform.

I thus find that the Claimant is eligible for compensation from the Fund.

Having found eligibility for compensation, I now turn to the amount of the award, if any, to which the Claimant is entitled. 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).

Amount paid to the Respondent:	\$43,562.00
plus	
Amount paid to others to complete:	<u>\$33,044.00</u>
	\$76,606.00
minus	
Original contract price	<u>\$52,900.00</u>
Actual loss	\$23,706.00

Pursuant to the applicable law, the maximum recovery from the Fund is limited to the lesser of \$20,000.00 or the amount paid by or on behalf of the Claimant to the Respondent. Md. Code Ann., Bus. Reg. § 8-405(e)(1), (5).

Accordingly, the Claimant is entitled to reimbursement from the Fund in the amount of \$20,000.00. *Id.* § 8-405(e)(1); COMAR 09.08.03.03B(3)(c).

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$20,000.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(c).

During the hearing, the Assistant Attorney General stated that this case is only one of many against Maryland Pools. Section 8-405(e)(2) of the Business Regulation Article provides for a statutory cap of \$100,000.00 to cover all claimants for the acts or omissions of one contractor, unless the contractor reimburses the Fund. Thus, although I recommend an award of \$20,000.00 to the Claimant, this award may be limited by the statutory cap of section 8-405(e)(2).

RECOMMENDED ORDER

I RECOMMEND that the Maryland Home Improvement Commission:

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$20,000.00; 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 ten percent (10%) as set by the Maryland Home Improvement Commission;⁹

⁹ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

ORDER that the records and publications of the Maryland Home Improvement

Commission reflect this decision.

Signature on File

June 6, 2017
Date Decision Issued

Michael R. Osborn
Administrative Law Judge

MRO/sm
#168252

PROPOSED ORDER

WHEREFORE, this 10th day of July, 2017, Panel B of the Maryland Home Improvement Commission approves the Recommended Order of the Administrative Law Judge and unless any parties files with the Commission within twenty (20) days of this date written exceptions and/or a request to present arguments, then this Proposed Order will become final at the end of the twenty (20) day period. By law the parties then have an additional thirty (30) day period during which they may file an appeal to Circuit Court.

Joseph Tunney

***Joseph Tunney
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION