

# DLLR

STATE OF MARYLAND

DEPARTMENT OF LABOR, LICENSING AND REGULATION

MARTIN O'MALLEY, Governor  
ANTHONY G. BROWN, Lt. Governor  
THOMAS E. PEREZ, Secretary

Division of Occupational & Professional Licensing  
Maryland Home Improvement Commission  
Stanley J. Botts, Commissioner

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IN THE MATTER OF  
OF JOHN SIBIGA  
t/a WHISPERING VALLEY  
CONTRACTORS  
AND THE CLAIM OF  
LORIE A. ST. CYR  
AGAINST THE MARYLAND HOME  
IMPROVEMENT GUARANTY FUND

\* MARYLAND HOME  
IMPROVEMENT COMMISSION

\*  
\*  
\* MHIC CASE NO. 06 (75) 234  
\*  
\*

\* \* \* \* \*  
**FINAL ORDER**

WHEREFORE, this 3<sup>RD</sup> day of December, 2008, 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 Amended as follows:
  - A) COMAR 09.08.03.03B(3) provides that the Commission may determine that a particular claim requires a unique measurement of actual loss.
  - B) Based upon review of the record, and consideration of the arguments presented, the Commission Panel concludes that the fair and reasonable measure of the Claimant's actual loss is the estimate of \$5,256.56 provided by the Commission's inspector, Alphonso M. Harris. (Finding of Fact No. 21).



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In The Matter of John Sibiga  
t/a Whispering Valley Contractors  
December 3, 2008  
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- 3) The Recommended Order of the Administrative Law Judge is Amended as follows:
  - A) The Claimant is awarded \$5,256.56 from the Home Improvement Guaranty Fund.****
- 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.**

***Andrew Snyder*** \_\_\_\_\_  
**Chairperson - Panel B**  
**MARYLAND HOME IMPROVEMENT**  
**COMMISSION**

IN THE MATTER OF THE CLAIM OF  
LORIE A. ST. CYR

v.

JOHN SIBIGA  
t/a WHISPERING VALLEY  
CONTRACTORS

\* MARYLAND HOME  
IMPROVEMENT COMMISSION

\* MHIC CASE NOS. 06 (75) 234

\* \* \* \* \*

**PROPOSED ORDER**

WHEREFORE, this 25<sup>th</sup> day of April, 2008, 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 Amended as follows:
  - A) The Commission Panel concludes that the repair estimate of \$12,388.00 provided to the Claimant by Complete Concrete represents the most fair and reasonable measure of the Claimant's repair cost. The estimate of Complete Concrete closely corresponds to the per square foot estimate of the MHIC's independent inspector, Alphonso M. Harris. According to the Administrative Law Judge, "[b]y extrapolation, his [Harris'] estimate for 1026 square feet would be approximately \$13,141.00." (ALJ, p. 16). By contrast, the estimate provided by Hohne Pools is nearly 50% higher per square foot than both the Complete Concrete and Harris estimates.
  - B) Pursuant to the formula set forth in COMAR 09.08.03.03B(3)(c), the correct measure of the Claimant's actual loss is as follows:

Amount paid to Respondent	\$41,845.00
Reasonable cost to repair	+ <u>\$12,388.00</u>
	\$54,651.00
Less original contract price	- <u>\$43,845.00</u>
Actual Loss	\$10,806.00

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Lorie A. St. Cyr  
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3) The Recommended Order of the Administrative Law Judge is Amended as follows:

A) The Claimant is Awarded \$10,806.00 from the Home Improvement Guaranty Fund.

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.

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

IN THE MATTER OF THE CLAIM	* BEFORE MICHAEL J. WALLACE,
OF LORIE A. St. CYR	* AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND HOME	* OF THE MARYLAND OFFICE
IMPROVEMENT COMMISSION	* OF ADMINISTRATIVE HEARINGS
GUARANTY FUND	* OAH NO.: DLR-HIC-02-07-06977
FOR THE VIOLATIONS OF	* MHIC NO.: 06 (75) 234
JOHN SIBIGA	*
t/a WHISPERING VALLEY	*
CONTRACTORS	*

\* \* \* \* \*

**RECOMMENDED DECISION**

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

**STATEMENT OF THE CASE**

On August 2, 2006, Lorie A. St. Cyr ("Claimant") filed a claim with the Maryland Home Improvement Commission ("MHIC") Guaranty Fund ("Fund") for reimbursement of \$24,434.90 for actual losses suffered as a result of incomplete home improvement work performed by John Sibiga t/a Whispering Valley Contractors ("Respondent").

A hearing was held on October 23, 2007, at the Carroll County Health Department in Westminster, Maryland, before Michael J. Wallace, Administrative Law Judge ("ALJ"), on behalf of the MHIC. Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407(c)(2) (2004 & Supp. 2007). The

Claimant was present and represented herself. The Respondent was also present and represented himself. Hope D. Miller, Assistant Attorney General, represented the Fund.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act ("APA"), the procedural regulations of the Department of Labor, Licensing and Regulation ("DLLR"), and the Rules of Procedure of the Office of Administrative Hearings ("OAH"). Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2004 & Supp. 2007); Code of Maryland Regulations ("COMAR") 09.01.03, 09.08.02, and 09.08.03; and COMAR 28.02.01.

### **ISSUE**

The issue is whether the Claimant sustained an actual loss compensable by the Fund as a result of the acts or omissions of the Respondent and, if so, the amount of the loss.

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

The Claimant submitted the following exhibits, which were admitted into evidence:

Claimant Ex. #1 Notebook containing the following:

- A Contract with Respondent, dated March 2004 with cancelled checks and payment information.
- B Series of six photographs taken during construction phase.
- C Series of 76 photographs and pool diagram.
- D Letter from Jim Titus, Arnold Pools Inc., dated October 22, 2007 and series of eight photographs.
- E Series of seven photographs.
- F Series of seven photographs.
- G Series of two photographs.
- H Copy of location drawing for Claimant's property.
- I Letter from Greentech Landscaping, Inc., undated and six photographs.
- J Three estimates for repair of Respondent's work and correspondence between the Claimant and Respondent regarding Respondent's inspection of job site.

Claimant Ex. #2 DVD made by Claimant showing pool area and defects in workmanship.

The Respondent submitted the following exhibits for consideration, which were admitted into evidence:

- Respondent Ex. #1 Addendum (Dig Clause) to March 2004 contact, dated April 14, 2004.
- Respondent Ex. #2 Two letters from the Respondent to the HIC, undated.
- Respondent Ex. #3 - Ex. #15 Photographs of pool area.
- Respondent Ex. #16 Inspection report by Alphonso M. Harris, dated October 21, 2005.

The Fund submitted the following exhibits, which were admitted into evidence:

- Guaranty Fund Ex. #1 Notice of Hearing, dated September 7, 2007.
- Guaranty Fund Ex. #2 Licensing information regarding Respondent, showing license number 01-46403 with a current expiration date of June 28, 2008.
- Guaranty Fund Ex. #3 Hearing Order, dated February 8, 2007.
- Guaranty Fund Ex. #4 Letter from HIC to Respondent, dated August 4, 2006 with attached Home Improvement Claim Form, filed August 2, 2006.

### Testimony

The Claimant testified on her own behalf and presented the testimony of her husband, Spencer St. Cyr. The Respondent testified on his own behalf. In addition, he presented the testimony of the following:

- Richie Astlin – Concrete Foreman employed by the Respondent.
- Vernon Noratel – Employee of the Respondent.
- Kirk Becker - Employee of the Respondent.
- Paul Thayer - Employee of the Respondent.

The Fund did not present any witness testimony.

### FINDINGS OF FACT

Having considered all of the evidence presented, 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 operating under license number 01-46403. The Respondent's license is currently active with an expiration date of June 28, 2008.

2. The Claimant and her husband own the property located at 5973 Cecil Way, Eldersburg, Maryland 21784.

3. In early 2004, the Claimant and her husband decided to have a pool built in the back yard of their property. They contacted several contractors and decided to have the Respondent do the work.

4. In March 2004, the Claimant and her husband entered into a contract with the Respondent to build a sixteen foot by thirty-six foot rectangular pool that also included a set of steps, a diving board and a swim out. The contract also called for the installation of a concrete deck around the pool that was to be three feet wide around all sides and six feet around the steps and diving board (approximately 480 square feet). The contract also provided for excavation, backfilling and the construction of a retaining wall at the diving board end of the pool.

5. On April 14, 2004, the Claimant signed a "Dig Clause" addendum to the March 2004 contract, which provided that the excavation of the pool was limited to the pool area and the backfilling of the pool. The addendum also provided that the Respondent's finish grading was limited to rough grading only and that the Respondent was not responsible for any further landscaping.

6. The contract price was set at \$42,695.00. This amount was reduced by \$6,500.00 when an optional spa was excluded from the scope of the contract, leaving a total of \$36,195.00.

7. The Claimant wanted a larger concrete deck than was described in the contract. The larger deck is approximately ten feet wide at the shallow end of the pool up to the foundation of the house and six feet wide on the other three sides of the pool. An additional \$7,650.00 was added to the contract, in part, to cover the additional concrete.

8. Work began on the pool at the beginning of June 2004 and was completed sometime in mid-July 2004.



9. The Claimant made payments to the Respondent as follows:

- 6/15/04 \$500.00
- 6/17/04 \$10,000.00
- 6/22/04 \$14,500.00
- 7/1/04 \$12,045.00
- 8/26/04 \$4800.00

10. Other work, including final grading and landscaping, was done by another contractor.

11. On August 26, 2004, the Respondent went to the Claimant's house for a final meeting with and to obtain payment from the Claimant's husband.

12. The Claimant's husband told the Respondent that he was not satisfied with the concrete work and stated that the concrete deck was sloping toward the pool causing unstable water conditions and dirty water. The Claimant's husband advised that there were problems with the retaining wall because dirt was washing through the wall and into the pool after rains. The Claimant's husband also stated that the Respondent's crew damaged a portion of his fence during construction as well as a smaller existing above ground pool that the Respondent's crew had moved. A heated argument ensued and the Respondent ultimately agreed to take \$2000.00 off of the contract price to address some of the issues raised. He also agreed to correct the problem behind the retaining wall by excavating, placing filter cloth against the inside of the wall and backfilling at no charge.

13. After the winter and when the pool was opened for the summer of 2005, the Claimant discovered that there was sediment and other debris in the pool, that there were hairline cracks in the concrete and that there was a tear in the liner near the ladder. Around the tear was a rust colored stain.

14. The Claimant contacted the Respondent sometime around May 2005 to discuss these issues and the Respondent came to the Claimant's house to observe the condition of the pool. The Respondent explained to the Claimant that hairline cracking in the concrete was normal and would not affect its performance. He noted the tear in the liner and patched it. He also explained to the Claimant that dirty water and some sediment and other debris in the pool upon opening was normal.

15. The Claimant later noted more holes in the liner and contacted the Respondent who provided a patch kit for the Claimant to use at no cost.

16. One of the cracks in the shallow end of the pool near the left corner and the steps was getting wider and caps on the coping at the steps and swim out were missing. She brought these matters to the attention of the Respondent.

17. The Respondent told the Claimant that cracking in the concrete was a normal condition and would not affect its performance. He promised to supply the missing caps for the coping.

18. In July 2005, the Claimant filed a complaint with the MHIC.

19. On October 19, 2005, the MHIC contacted Home Inspector Alphonso M. Harris of AMH Light Renovation, to perform an inspection of the Claimant's pool and the Respondent's work.

20. On October 20, 2005, Mr. Harris performed the inspection and on October 21, 2005, he submitted his report.

21. He concluded that the quality of the workmanship regarding the pool and concrete deck was poor because the deck sloped toward the pool causing runoff from the surrounding area into the pool. He also noted several "unsightly" cracks in the concrete deck and rust marks on the pool liner. He determined that it would be necessary to remove the walkway around the

pool, properly excavate the surrounding area and to replace the walkway around the pool to allow water runoff [away from the pool]. He stated that the pool liner had to be "corrected" to prevent rust. He provided an estimate of \$5256.56 to correct the problems with the pool.

22. On June 1, 2005, the Claimant obtained an estimate from Complete Concrete Patio and Spas, Inc. for the removal and replacement of the concrete deck around the pool in the amount of \$12,388.00. The estimate was for 999 square feet.

23. On July 12, 2006, the Claimant obtained an estimate for the removal and replacement of the pool concrete deck from Hohne Pools in the amount of \$18,256.90. The estimate was for 1089 square feet.

24. By the end of July 2006, the problems had not been resolved to the satisfaction of the Claimant so she filed a claim with the Guaranty Fund in the amount of \$24,434.90. The Claim was received by the Fund on August 2, 2006.

### **DISCUSSION**

The burden of proof in this case is by a preponderance of the evidence and rests with the Claimant. Md. Code Ann., State Govt. § 10-217 (2004 & Supp. 2007). After considering the evidence and testimony presented as well as observing the witnesses and forming an opinion as to their credibility, I conclude that the Respondent provided, for the most part, a workmanlike product with the exception of the concrete deck and that the Claimant is entitled to reimbursement from the Fund to remove and replace this deck. Md. Code Ann., Bus. Reg. §8-401 (2004 & Supp. 2007) and COMAR 09.08.03.03B(3)(b). For the reasons that follow, I conclude that the Claimant proved an actual loss of \$15,000.00.

At the hearing, the Claimant testified and established that she and her husband contracted with the Respondent to build a pool in the backyard of their home in Eldersburg, Maryland. The parties met in March 2004, discussed the project and ultimately entered into a contract for the

construction of the pool and a concrete deck around the pool. The contract provided for excavation of the worksite at the pool and deck areas, the construction of the pool and a retaining wall outside of the deep end of the pool and backfilling the excavated areas around the pool. The contract provided for rough grading around the immediate pool area but final grading and landscaping around the area of the pool was not included. In fact, the Claimant contracted with a landscape contractor for this work and the parties do not dispute that the Respondent was not responsible for this work. The total price of the contract was set at \$36,195.00. The Claimant wanted a larger concrete pool deck than that included in the original contract, which added \$7750.00 to the contract price, bringing the total to \$43,845.00.

Work on the project began in June 2004 and was completed by mid-July 2004. Almost immediately, the Claimant noted problems with the pool deck in that it sloped slightly toward the pool on three of the four sides of the pool and that dirty water flowed across the deck and into the pool from behind the retaining wall after rains. The Claimant also had issues with the fact that the Respondent's workers slightly damaged a fence in the yard as well as a small above ground pool that was moved prior to excavation. Payments were made by the Claimant on schedule and on August 26, 2004, the Respondent went to the Claimant's house to obtain final payment for the project. The Respondent and the Claimant's husband discussed the issues regarding the pool, and at one point, the discussion became rather heated. Ultimately, the Respondent agreed to accept \$2000.00 less than what was owed at that point to compensate for the damages and, according to the Respondent, to settle all outstanding issues. The Respondent also agreed to excavate behind the retaining wall, to install filter cloth and to backfill in order to correct the problem with the muddy runoff from behind the retaining wall. He agreed to do this work at no charge.

The pool was closed and covered for the winter then reopened in the spring of 2005. When the cover was removed, the Claimant noted hairline cracks in the concrete, a small tear in the liner surrounded by a rust colored stain, dirty water and a substantial amount of sediment and other debris in the bottom of the pool. She contacted the Respondent who came to the house to inspect the pool. He explained to the Claimant that it was normal to have dirty water with some debris after the pool had been covered during the winter months without the filter running. He also stated that some of the debris and sediment in the pool was due to the poor landscaping and final grading in the area surrounding the pool and that this condition caused runoff into the pool over the winter months. He also explained that it was normal for concrete to develop hairline cracks over time and that this in no way affected the performance of the concrete. He observed the tear in the liner and told the Claimant that he was not responsible for it. He did, nonetheless, repair the tear with a patch.

Approximately one month later, the Claimant contacted the Respondent again and stated that there were more holes in and rust colored staining on the pool's liner, that the deck sloped toward the pool causing more runoff into the pool and that there were more cracks in the concrete. She also noted that the trim work around the edge of the pool at the coping was sloppy and that there were caps missing from the top of some of the trim at the coping.

The Respondent provided the Claimant with a patch kit at no cost and again explained that the holes and tear in the liner did not occur during construction because his workers could not have properly seated the liner at that time if there were holes present. The Claimant was not satisfied with the Respondent's explanation or failure to take further steps to correct any of the perceived defects, so in July 2005, she completed a MHIC Complaint Form which was ultimately received by MHIC in October 2005.

On October 19, 2005, the MHIC contacted Alphonso Harris of AMH Light Renovation who conducted an inspection of the pool on October 20, 2005. After his inspection, he concluded that the quality of the workmanship of the pool was poor and below average. He noted that the concrete deck sloped toward the pool causing runoff from the surrounding area into the pool. He also noted several "unsightly" cracks in the concrete deck and rust marks on the pool liner. He determined that it would be necessary to remove the walkway around the pool, properly "excavate" the surrounding area and to replace the walkway around the pool to allow water runoff [away from the pool]. He stated that the pool liner had to be "corrected" to prevent rust. He provided an estimate of \$5256.56 to repair or replace the Respondent's work.

In the meantime, the Respondent, in correspondence to the MHIC, contended that the concrete was installed in a workmanlike manner. He stated that the Claimant wanted a larger concrete deck than called for in the original proposal but that increasing the size of the deck would push the deck up to the edge of the house foundation and the retaining wall. He stated that this was discussed with the Claimant and that the Claimant was presented with several options for diverting water including a "Decker drain" but that the Claimant chose the option of having the concrete slope toward the pool on both ends. The Respondent admitted that the concrete sloped toward the pool but only on the ends at the retaining wall and at the steps near the house. The Respondent stated that the reason the concrete needed to be sloped toward the pool on the end at the steps was to divert water away from the foundation of the house. Similarly, he stated that the concrete needed to be sloped toward the pool at the retaining wall end to divert water away from the base of the retaining wall. He further contended that any sediment runoff into the pool was a result of the improper final grading done by another contractor and because of edging that the Claimant placed on the edge of the concrete deck where the lawn met the deck that trapped water

on the deck. The Respondent noted that the final grading was not his responsibility according to the terms of the contract.

The Respondent also stated that the cracks in the concrete are normal and are impossible to prevent. He contended that he took all necessary precautions in specifying the type of concrete mix to be used and in pouring the concrete. He stated that the concrete was properly reinforced and that expansion joints were installed. He explained that surface cracking is normal because the ground and pool structure are always moving with expansion and contraction cycles.

With regard to the tears and holes in the liner, the Respondent testified that his workers were not responsible for the tears and holes and that this condition was not caused during construction. He explained that liners are installed and seated by using a vacuum process and that the liner in this case could not have been properly seated if it was not air/water tight. He also stated that any holes would have been noticed during installation. He further testified that the edges and surface of the structural side components of the pool were smoothed and taped to eliminate any sharp metal edges. Once filled, the weight of the water pulling against the liner made it impossible for any objects or other hole-causing debris to fall down between the liner and side structure wall.

At the hearing, the Respondent's testimony was consistent with his written statements to the MHIC detailed above. The Claimant and her husband also presented credible evidence including their testimony and a video showing the conditions around the pool.

It is clear from the evidence presented that the concrete deck slopes toward the pool in all but a few spots. The Respondent stated that it sloped toward the pool only at the ends but the other evidence, including some of the Respondent's own photographs, clearly shows that the deck slopes to the pool in many more areas than contended by the Respondent, including areas along the sides.

The Respondent stated that the sloping deck is not the cause of the problems regarding the runoff and sediment in the pool but that the poor final grading is. I have no doubt that the poor final grading exacerbates the runoff problems and greatly exaggerates the fact that the concrete deck is sloped to the pool but even though the incorrect slope by itself may be only a minor problem, the fact remains that it is an unworkmanlike condition as detailed in Mr. Harris' inspection report. The poor final grading and landscaping performed by another contractor, thus, simply highlights the problem with the concrete deck and the runoff is, therefore, only a symptom of some of the problems which, most importantly, include the Respondent's unworkmanlike deck. While the Respondent contends that the Claimant chose the option of sloping the concrete toward the pool at the foundation and at the retaining wall, the Claimant disputes this. Furthermore, the evidence shows that the deck sloped to the pool around most of the edges, not just at the ends as the Respondent contends. The evidence, notably Mr. Harris' report, also establishes that sloping a concrete deck toward the pool is an unworkmanlike practice without providing some alternate means of preventing water runoff into the pool. Accordingly, I find that the deck sloping toward the pool is an unworkmanlike condition and must be corrected.

In addition, there are a number of cracks around the pool in the surface of the deck. The wealth of the testimony supports the notion that this is a normal condition and in no way affects the performance of the concrete. In and of itself, hairline cracks (those that are less than an inch or two, according to the Respondent's witnesses) are a normal condition and do not evidence unworkmanlike practices. There is, however, a significant crack in the concrete near the steps. One of the Respondent's witnesses, who testified that he has been doing concrete work for 30 years, stated that it is in fact a "bad" crack and not a normal hairline crack. Under normal circumstances, the area of the crack could be sawed, removed and re-poured to correct the



condition but in this case, this type of repair alone would not be warranted because it will not correct the other problems with the remainder of the deck. To correct the slope problem, the entire deck must be removed and repoured.

With regard to the holes in the liner, the Claimant failed to establish that the condition was caused by the Respondent. Based on the unrefuted testimony of the Respondent and his witnesses, the liner could not have been properly installed with holes in it and it is unlikely that the holes were caused by debris or by a sharp metal edge on the structural members underneath of the liner. The Respondent provided detailed testimony regarding how a liner is installed and the precautions that are taken to assure that it is seated properly. There was no evidence provided to show that the Respondent or his crew caused any of the holes and in fact, there was evidence provided to suggest that the holes were created after construction had been completed. Many possible causes for the holes were suggested but none were definitively shown to be the actual cause. The Claimant is required to establish that the Respondent did in fact cause the tears and/or holes in the liner through unworkmanlike practices or neglect, but the Claimant failed to do so.

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) (2004 & Supp. 2007). "Actual loss" is defined as "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 & Supp. 2007). When the Fund pays money to a homeowner as a result of the faulty performance of a home improvement contractor, the responsible contractor is obligated to reimburse the Fund. Md. Code Ann., Bus. Reg. § 8-410 (2004 & Supp. 2007). The MIIC may suspend the license of any such contractor until he or she makes full reimbursement. Md. Code Ann., Bus. Reg. § 8-411 (2004 & Supp. 2007).

COMAR 09.08.03.03B governs the calculation of awards from the Fund:

**B. Measure of Awards from Guaranty Fund.**

- (1) The Commission may not award from the Fund any amount for:
  - (a) Consequential or punitive damages;
  - (b) Personal injury;
  - (c) Attorney's fees;
  - (d) Court costs;
  - (e) Interest.
  
- (2) The Fund may only compensate claimants for actual losses they incurred as a result of misconduct by a licensed contractor.
  
- (3) Unless it determines that a particular claim requires a unique measurement, the Commission shall measure actual loss as follows:

...

- (c) 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, 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.

As detailed above, the evidence is more than adequate to establish that the Respondent provided an unworkmanlike product with regard to the concrete deck which is worth less than what the Claimant paid him. The Claimant provided detailed and credible testimony and other documentary evidence to establish that the Respondent failed to provide a quality finished product regarding the pool deck despite requests from the Claimant to repair or correct the problems noted.

At all times, the Claimant acted in good faith and attempted to cooperate with the Respondent as evidenced by her willingness to work with him and by making timely payments. Likewise, the Respondent acted in good faith as well by coming back to the Claimant's house

several times to discuss the problems and to attempt to correct those that he thought he could correct. The Respondent testified that he believed that he provided a quality product and in many aspects, he did. The problem with the pool deck, however, is a problem that was verified by an independent contractor and needs to be repaired.

After it became clear to the Claimant that that the Respondent was not going to take any further steps to repair the unworkmanlike conditions, the Claimant contacted other contractors to provide estimates of the costs to repair the deck and liner. The Claimant provided a detailed breakdown of the estimates. The Claimant has not yet contracted with any of the other contractors to do the repair work.

After reviewing all of the estimates provided by the Claimant along with the report of Mr. Harris, I find that the Claimant established a claim in excess of the \$15,000.00 maximum allowed by law.

The Claimant provided estimates from Hohne Pools, Arnold Pools and Complete Concrete Patio and Spas, but the scope of each of these estimates was different. The estimates were also obtained at different times so some are older than the others. Complete Concrete provided a price of \$12,388.00 to remove and replace the concrete deck but this cost was for 999 square feet while the Claimant's deck is actually about 1026 square feet. This estimate was obtained on June 1, 2005 so it is likely that this price has gone up substantially since then. Arnold Pools only provided an estimate to replace the liner, but not the deck. On July 12, 2006, Hohne Pools provided an estimate to replace the liner and to replace the deck at a total cost of \$24,434.90. Of this amount, \$18,256.90 was for the removal and replacement of the deck. This estimate was for 1089 square feet. Mr. Harris' October 2005 report provided a breakdown of the costs associated with the removal and replacement of the concrete deck which he set at

\$5,256.56. His estimate, however, appears to cover only 400 square feet. By extrapolation, his estimate for 1026 square feet would be approximately \$13,141.00.

After considering the estimates submitted, the one provided by Hohne Pools is the most recent and most likely reflects the most realistic current price for repairing the concrete deck.

In this case, the formula set forth in COMAR 09.08.03.03B(3)(c) applies as follows to calculate the amount of the Claimant's actual loss:

Amount paid to Respondent	\$41,845.00
Reasonable cost of repair/complete work	<u>+18,256.90</u>
Subtotal	60,101.90
Respondent's contract price	<u>- 43,845.00</u>
Claimant's actual loss	\$16,256.90

Because COMAR 09.08.03.03D(2)(a) limits the amount payable from the Guaranty Fund to \$15,000.00, the Claimant's award is limited to this amount.

#### **CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the Claimant is entitled to recover \$15,000.00 from the Fund as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2004 & Supp. 2007).

#### **RECOMMENDED ORDER**

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


**ORDER**, that the Claimant be awarded \$15,000.00 from the Maryland Home Improvement Guaranty Fund; and

**ORDER**, that the Respondent be 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%) under Md. Code Ann., Bus. Reg. § 8-411 (2004 & Supp. 2007); and

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

December 4, 2007  
Date Decision Mailed

MJW:cf  
#92611



Michael J. Wallace  
Administrative Law Judge



Respondent Ex. #2 Two letters from the Respondent to the HIC, undated.  
Respondent Ex. #3 - Ex. #15 Photographs of Pool Area.  
Respondent Ex. #16 Inspection report by Alphonso M. Harris, dated October 21, 2005.

The Fund submitted the following exhibits, which were admitted into evidence:

Guaranty Fund Ex. #1	Notice of Hearing, dated September 7, 2007.
Guaranty Fund Ex. #2	Licensing information regarding Respondent, showing license number 01-46403 with a current expiration date of June 28, 2008.
Guaranty Fund Ex. #3	Hearing Order, dated February 8, 2007.
Guaranty Fund Ex. #4	Letter from HIC to Respondent, dated August 4, 2006 with attached Home Improvement Claim Form, filed August 2, 2006.