

IN THE MATTER OF THE CLAIM
OF BENJAMIN LIFSEY,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF VERA FRANCISCO,
T/A R&D MASONRY, INC.,
RESPONDENT

* BEFORE MICHAEL D. CARLIS,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
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* OAH No.: LABOR-02-19-18793
* MHIC No.: 18 (05) 1346

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PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
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DISCUSSION
PROPOSED CONCLUSION OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On September 5, 2018, Benjamin Lifsey (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (Commission)¹ Guaranty Fund (Fund) for an alleged actual loss of \$8,401.44 arising out of a home improvement contract² with Vera Francisco, trading as R&D Masonry, Inc., (Respondent). On June 4, 2019, the Commission ordered a

¹ The Commission is a unit of the Department of Labor (Department). Md. Code Ann., Bus. Reg. § 2-108(a)(15) (2015).

² A “home improvement contract” is an “oral or written agreement between a contractor and an owner for the contractor to perform a home improvement.” *Id.* § 8-101(h) (Supp. 2019). An “owner” includes a “homeowner.” *Id.* § 8-101(k). A “home improvement” includes “construction . . . on land adjacent to a building, of a . . . swimming pool[.]” *Id.* § 8-101(g)(2)(i).

hearing to allow the Claimant an opportunity to prove his Claim. The Commission sent the case to the Office of Administrative Hearings (OAH) on June 7, 2019, to conduct the hearing.

On August 23, 2019, I held a hearing in Rockville, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015).³ The Claimant represented himself. Ms. Francisco represented the Respondent. Shara Hendler, Assistant Attorney General, and the Office of the Attorney General, represented the Fund.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and OAH's Rules of Procedure govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2019); Code of Maryland Regulations (COMAR) 09.01.03; COMAR 28.02.01.

ISSUES

The issues are:

- A. Whether the Claimant sustained an actual loss compensable by the Fund as a result of the Respondent's acts or omissions; and, if so,
- B. What is the amount of that loss?

SUMMARY OF THE EVIDENCE

Exhibits

I entered the following exhibits offered by the Claimant:

Claimant Ex. 1: Home Improvement Claim Form, dated August 31, 2019, with attached letter, dated July 18, 2018; the Respondent's response, dated July 10, 2018; and a Complaint Form, dated June 14, 2018;

Claimant Ex. 2: Contractor Services Agreement, dated October 6, 2017, with attached Work Estimate, dated September 12, 2017;

³ All subsequent citations to the Business Regulation Article of the Annotated Code of Maryland shall be to "Bus. Reg." of the 2015 Replacement Volume, unless otherwise indicated.

Claimant Ex. 3: Emails, dated December 4, 6, and 15, 2017, and attached checks, dated October 11, 2017; November 17, 27, and 29, 2017; and December 15, 2017;

Claimant Ex. 4: Narrative summary of conversation with "Diogo,"⁴ dated March 19, 2018;

Claimant Ex. 5: Photographs of stone and bricks, Sales/Dispatch form, ruler measurements, concrete, pipes, deck drain, crack in concrete, rusty nail, caps, and tiles;

Claimant Ex. 6: Pearl Swimming Pool Proposal, signed by the Claimant on May 1, 2018, with attached invoices and checks;

Claimant Ex. 7: C.L. Pitcher, Inc., invoice, dated June 28, 2018;

Claimant Ex. 8: Invoice from Sid Khan, dated September 2, 2018, with attached check;

Claimant Ex. 9: Email from Rocha Construction, dated April 16, 2018; and

Claimant Ex. 10: A print-out from a part of 2015 International Building Code.

I entered the following exhibits offered by the Respondent:

Respondent Ex. 1: Contractor Services Agreement, dated October 11, 2017, with attached Work Estimate, dated September 12, 2017;

Respondent Ex. 2: Drawing;

Respondent Ex. 3: Checks from the Claimant, dated November 17, 27, and 29, 2017, and December 15, 2017;

Respondent Ex. 4: R&D Masonry, Inc., invoice, dated December 6, 2017; and

Respondent Ex. 5: Emails, dated October 20 and 25, 2017.

I entered the following exhibits offered by the Fund:

GF Ex. 1: Hearing Order, dated June 4, 2019;

GF Ex. 2: Notice of Hearing, dated June 19, 2019;

GF Ex. 3: Home Improvement Claim Form, dated August 31, 2018, with attached letter, dated September 13, 2018; and

GF Ex. 4: License History.

⁴ Diogo" is the "owner" of the Respondent. He is married to Ms. Francisco, the Manager of the Respondent.

Testimony

The Claimant and Susan Lifsey, the Claimant's wife, testified for the Claimant. Ms. Francisco, the Respondent's Manager, testified for the Respondent. The Fund offered no witnesses.

PROPOSED FINDINGS OF FACT

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

1. At all relevant times, the Respondent was a licensed home improvement contractor.
2. The Claimant and his wife live in a single family home in Montgomery County, Maryland.
3. On October 11, 2017, the Claimant and Respondent entered into a home improvement contract (Contract). The home improvement included the removal and replacement of an existing pool deck, refurbishing an existing in-ground pool, modifying a foundation wall, removing an existing wall and rebuilding the wall with stone veneer, and pressure testing the pool lines for leaks.
4. The total cost of the home improvement was \$52,099.75. To pay this amount, the Claimant was to make five payments according to the following schedule: (i) \$10,000.00 deposit upon approval of the Contract; (ii) \$13,000.00 after demolition of the existing "timber" wall and completion of the footers for the new wall; (iii) \$13,000.00 after completion of the coping, tile, and gravel base for the pool deck; (iv) \$13,000.00 after the pool deck was poured and the wall finished; and (v) \$3,099.75 after the pool was plastered.
5. On November 14, 2017, the Respondent began work on the home improvement. The Claimant made the first three payments in full, totaling \$36,000.00.
6. On a date that is not established in the record, the Claimant discovered that the deck dividers were not correctly aligned. On December 4, 2017, the Respondent acknowledged the

“slightly off location” of the dividers and gave the Claimant a credit on the fourth payment of \$1,435.00 (the cost of the dividers) and offered to pay the cost of filling the pool.

7. On or about December 15, 2017, the Claimant paid \$5,000.00 to the Respondent. This payment was \$6,565.00 less than the adjusted (for the credit) fourth payment ($\$13,000.00 - \$1,435.00 = \$11,565.00 - \$5,000.00 = \$6,565.00$). The Claimant explained to the Respondent that it did not make the full payment because the drains and caulking had not been finished, the poured concrete was uneven, striped, and different colored, and the deck and wall were not finished.

8. The total amount of the payments that the Claimant made to the Respondent for the home improvement was \$41,000.00.

9. On March 19, 2018, Ms. Lifsey and Diogo⁵ met to discuss the status of the home improvement and the concerns she and the Claimant had about some of the Respondent’s workmanship. Diogo became upset at this meeting. He accused the Claimant and Ms. Lifsey of complaining about everything; he told Ms. Lifsey that they were the worst customers he had ever had; and he told her to keep the rest of their money and not to contact him. Diogo left the job, and the Respondent never returned to complete the home improvement.

10. The home improvement was not complete at the time the Respondent stopped working and abandoned the home improvement. The Contract included the caulking and plastering of the pool. That was not done. In addition, the back of the retainer wall was only partially covered with veneer stone.

11. Some of the Respondent’s work on the home improvement was performed in an unworkmanlike manner. The Claimant had chosen Dove Gray for the stone on the new wall. The Respondent used Chocolate Gray. A large and unsightly crack developed on the concrete

⁵ Diogo is Ms. Francisco’s husband and the President of R&D Masonry, Inc.

deck within three months after it had been poured. The surfaces on the flagstone caps on the wall did not match: some had a smooth finish and others had a rough finish. And, some drain or other pipes were not buried to daylight.

12. On or about May 7, 2018, the Claimant hired Pearl to plaster and caulk the pool. The Claimant paid \$6,232.50 for that work.

13. On September 2, 2018, the Claimant paid \$1,100.00 to Siddique Khan. Seven hundred dollars of that payment was to correct the piping that was not run to daylight.

14. On April 16, 2018, the Claimant obtained an estimate from Rocha Construction, LLC (Rocha) to make the surfaces of the flagstone caps uniform. The estimate was between \$600.00 and \$800.00.

DISCUSSION

Summary of the Parties' Cases

The Claimant

The Claimant testified about a number of problems with the Respondent's work to "refinish[]" his pool, remove and reinstall the pool deck, and build a stone retaining wall. The parties signed the Contract on October 11, 2017. An attached Work Estimate lists the cost for each part of the Contract.

The Contract includes eight parts, as follows: (1) "POOL DECK, PATIO & STEPS" to include removing existing pool deck and patio, installing gravel base as needed, and pouring broom finished concrete pool deck, patio, and steps for \$19,527.75; (2) "DRAINS" to include installing deco drains and connecting "existing downspouts and daylight" for \$1,762.00; (3) "DIVIDERS" to include installing "paver dividers" at pool deck to match coping for \$1,435.00; (4) "FOUNDATION WALL" to include cutting existing foundation wall and installing brick for \$650.00; (5) "WALL" to include removing existing timber wall, excavating soil at new wall

location and for footers, pouring concrete footers, installing block eighteen inches above ground and veneer stone on face of wall, capping wall with flagstone, installing drain pipe and gravel behind wall, and backfilling behind wall for \$12,225.00; (6) "POOL COPING & TILE" to include draining pool, removing existing pool coping and tile, and installing new pool coping and tile for \$8,300.00; (7) "CAULKING" to include caulking between deck and coping for \$1,200.00; and (8) "PRESSURE TEST" to include pressure testing pool lines for leaks for \$1,000.00; and (9) "POOL PLASTER" to include surface preparation and plastering for \$6,000.00.

The Claimant also testified that he had a verbal agreement with the Respondent related to "some details" of the home improvement. He testified the verbal agreement included Dove Gray as the color of the stone for the wall and four inches as the thickness of the poured concrete for the deck.⁶

The total cost of the Contract was \$52,099.75 to be paid according to the following schedule: first payment of \$10,000.00 upon the execution of the Contract; second payment of \$13,000.00 upon demolition of wall and construction of new footer; third payment of \$13,000.00 after finishing the coping, tiling, and the gravel base for the pool deck; fourth payment of \$13,000.00 after the concrete for the deck is poured and the wall finished; and final payment of \$3,099.75 at the completion of the plastering.

The parties agreed that the Claimant paid \$41,000.00 to the Respondent, including the full deposit of \$10,000.00 (first payment), a payment totaling \$26,000.00, and a final payment by check dated December 15, 2017, for \$5,000.00. In an email to the Respondent, the Claimant explained why he did not remit the entire fourth payment of \$13,000.00: "[S]ince the drains and caulking are not finished, and the concrete is multi-colored, uneven, and striped, the deck and

⁶ See footnote 2.

wall are not complete [sic]. Therefore, I am deducting an appropriate amount and as Diogo told me, we will have to wait until the spring to see how the deck cures.” Claimant Ex. 3 at page 2.

The Claimant testified that the Respondent made several “mistakes” during the construction of the home improvement, which began on November 14, 2017. The Claimant testified the “veneer stone” used for the wall was the wrong color and “we went round and round” to try to get that corrected but the Respondent refused because “a good portion” of the wall had been completed before the Claimant noticed the mistake. Ms. Lifsey also testified that the stone used for the wall was Chocolate Gray. She testified that color has brown in it which clashes with the blue-gray color of their recently painted house. Ms. Lifsey testified Irwin Stone (Irwin), the company that supplied the stone to the Respondent, confirmed that the stone was Chocolate Gray. Ms. Lifsey testified that she was “adamant to get Dove Gray.” She testified she and the Claimant made it “very clear” to Diogo on “multiple occasions” that they wanted Dove Gray stone.

The Claimant also testified that the pattern of the dividers on the pool deck was not properly aligned with each other on both sides of the deck. The record includes an email from Ms. Francisco on December 4, 2017, in which she acknowledged this mistake:

Diogo mentioned this morning that the dividers are slightly off location. Because of this we will be crediting all of the cost of the dividers. That is a credit of \$1435 that I will be applying to your 4th payment invoice. We would also like to offer to cover the costs of filling the pool after plaster is completed in the spring time because of the inconvenience. Claimant Ex. 3 at page 1.

The Claimant also testified that the Respondent used two different colors of concrete for the deck. According to the Claimant, the concrete was delivered in three different batches, with the last batch being lighter in color than the others. In addition, the Claimant testified that the Respondent broom-swept the concrete in two different directions causing it to look “striped” and “not uniform” due to how light reflects off the surface.

The Claimant testified that he pointed out the mistakes to Diogo, who said any fixes would have to wait until spring. According to the Claimant, Diogo returned to the property on March 19, 2018, to discuss the unfinished home improvement and spoke to Ms. Lifsey. The Claimant testified that Diogo refused to repair or fix any of the mistakes and abandoned any further work on the home improvement.

Ms. Lifsey testified about the meeting with Diogo. She testified that it lasted about fifteen minutes and conducted “like a punch list” in that she pointed out concerns with the Respondent’s workmanship and Diogo responded. Ms. Lifsey created a summary of the meeting, which is part of the record evidence. Based on the summary, the following items were discussed:

- two black drainage tubes that are sticking up from behind the retaining wall,
- the color of “the weep holes,”
- white plastic tubes that are sticking up from the ground in the grass by the deck,
- a white chalky substance on the retaining wall,
- flagstone caps that vary in length and have different finishes,
- crack in the cement near the stairs to the patio, and
- streaks in the cement.

Claimant Ex. 4. According to Ms. Lifsey, Diogo’s “mood changed” after he denied the concrete was broom-swept in two different directions, and she insisted that is what she had observed. At that point, Diogo described the Lifseys as the “worst clients,” who complained about “even the smallest thing,” and ultimately stating, as he left the property, “I’m done,” you can keep your money” and “don’t call me.”

The Claimant testified that after the March 2018 meeting, the Respondent never returned to complete the home improvement. The Claimant testified that the Respondent did not plaster or caulk the pool and did not correct the drains pipes that had not been run to “daylight.” The Claimant also testified that sometime before the March 2018 meeting, a large crack developed in the concrete deck and he measured the thickness of the concrete at “barely three inches.” The

Claimant testified that a Montgomery County Code required the concrete deck to be at least three and one-half inches thick. The Respondent attributed the crack to the thickness of the concrete: "I believe that's why the deck was cracking because it's too thin in some areas." The Claimant testified that the crack ran from one end of the deck to the other.

In addition, the Claimant testified that he paid \$6,607.50 to Pearl to plaster and caulk the pool. The record includes copies of checks for that total amount that are dated on May 1, 2018, and July 2 and 19, 2018. The Claimant also testified that he paid \$825.00 to C.L. Pitcher to fill the pool with water. The record includes an invoice for that amount that is date-stamp "PAID" on June 29, 2018. In addition, the Claimant testified he paid Siddique Khan \$700.00 to bury pipes that the Respondent had left above ground. The record includes a check written to Mr. Khan on September 2, 2018, for \$1,100.00, but the Claimant testified only \$700.00 of that amount was to repair the Respondent's work. Finally, the Claimant testified that he received an estimate from Rocha to repair the flagstone caps on the coping because some of the flagstone was of different widths and some edges were smooth and others were rough. The record includes an email from Rocha to the Claimant on April 16, 2018, that includes the following: "The flagstone caps could be re-finished at the stone supplier. This would cost about \$600-\$800 depending on the supplier's cost. We would also replace the shorter piece for a wider one."

Clamant Ex. 9.

The Respondent

Ms. Francisco testified that she reviewed the entire Contract with the Claimant to "mak[e] sure everything he wanted was put in the Contract." She testified that the Respondent completed the pool deck, patio, and steps; drains; the foundation wall; the other wall; and pressure tested to ensure that there were no leaks in the pool's pipes. Ms. Francisco also testified that there was no "daylighting" of any pipe because what the Claimant showed as an exposed

pipe is a "perforated" pipe that allows the water to drain and that the Respondent credited the Claimant for the full cost of the dividers because he was "unhappy that "two lines" did not "line up exactly." She agreed that the caulking and plaster were not completed because they were to have been done in the spring. Ms. Francisco testified that the Claimant has a "balance due" of \$6,565.00.

Ms. Francisco also testified that the Respondent it is not responsible for the color of the concrete used for the deck and testified that the thickness of the concrete measured four inches from the gravel base to the top of the coping. Ms. Francisco described the formula the Respondent uses to determine the amount of concrete it must order to pour four-inch for any project, which, according to the Respondent, was used for the Contract. She testified that its supplier delivers concrete in ten-yard batches, and the amount of concrete needed for the Contract was more than twenty yards therefore requiring three separate deliveries. Ms. Francisco testified that the Respondent cannot control the color of the concrete "because it is mixed at the plant." She also testified that the Respondent is not responsible for the crack in the concrete because, based on the "nature of the product," no contractor can guarantee that properly poured concrete will not crack. She specifically denied and relationship between the thickness of concrete and the likelihood it will crack.

In regard to the color of the stones, Ms. Francisco testified that the Claimant had not decided on the color of the stone before the Contract was signed. She testified that she suggested that the Claimant visit Irwin to select the stone he wanted, and testified that the cost of the Contract was based on the cost of the following colors: Chocolate Gray, Chocolate Brown, Lake George, and Western Maryland. According to Ms. Francisco, the Claimant (or Ms. Lifsey) never mentioned Dove Gray. Ms. Francisco testified that the Lifseys selected Chocolate Gray from the samples that were provided. According to Ms. Francisco, she "believe[d]" she ordered the stone,

but she could not recall who told her what stone to order, whether it was Diogo or another employee of the Respondent's.

Ms. Francisco testified that the Contract required caulking for 111 linear feet. The Respondent testified she did not know where Poole's additional charge for an extra fifty linear feet came from.

When asked by the Fund whether the Respondent intended to return to complete the home improvement after the March 2018 discussion between Ms. Lifsey and Diogo, the Respondent testified it would have completed the caulking, plaster, and flaming of the stone caps to create a uniform appearance had the Claimant paid the remainder of the fourth payment.

Summary of the Parties' Cases

The Claimant

The Claimant argued that the Respondent abandoned the Contract without finishing the home improvement when Diogo walked away from March 2018 meeting and declared the Lifseys the worst clients ever, told them to keep their money, and told them to not call him.

The Claimant argued that the Respondent made mistakes and was unprofessional and his work was unworkmanlike. The Claimant specifically mentioned that the concrete deck was "well under four inches" and it was "ludicrous" and "defie[d] logic" for Ms. Francisco to testify that the thickness of the concrete had nothing to do with the crack. The Claimant also emphasized the different color of the concrete. He argued that he hired other contractors to complete the unfinished parts of the Contract and that he and his wife were denied the use of the pool due to the Respondent's unfinished work. For the Claimant, it "boils down to" not getting what he paid for.

The Respondent

The Respondent argued that the Claimant has an unpaid balance for the work that was done under the Contract and that it would be willing to credit the Claimant \$300.00 to have the stone caps “flamed” to create a uniform appearance and the cost for filling the pool, which would still leave an unpaid balance.

The Fund

The Fund argued that the Respondent abandoned the Contract based on Diogo’s clear statements that he was not going to return to finish the job and that he did not want the Lifseys to call him.

The Fund also pointed out that it seemed “odd” that the Respondent would put stone veneer on only part of the back wall and justify that by claiming the unfinished wall is not considered a “face” surface. In regard to the inconsistent broom strokes to finish the concrete deck and the thickness of the concrete, the Fund argued the broom strokes “should at least be consistent” but that the evidence of the thickness of the concrete was inconclusive.

The Fund also argued that the calculation of actual loss is the most problematic part of the Claimant’s case. By one measure of actual loss (COMAR 09.08.03.03B(3)(c)), there is no compensable actual loss. By another measure (COMAR 09.08.03.03B(3)(b)), there would be no compensable loss because the value of the Respondent’s work could not reasonably be calculated. The Fund did not recommend a specific amount of actual loss.

Analysis

Legal context

The Claimant has the burden of proof 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)).

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. A homeowner may receive compensation from the Fund “for an actual loss that results from an act or omission by a licensed contractor.” *Id.* § 8-405(a); *see also* COMAR 09.08.03.03B(2) (The “Fund . . . compensates claimants for actual losses . . . incurred as a result of misconduct by a licensed contractor.”).

What were the Claimant’s specific complaints?

On September 5, 2018, the Claimant filed his Claim with the Commission. He claimed the cost of the original Contract was \$52,099.75, which was revised by credits of \$1,435.00 and \$825.00 to \$50,664.75.⁷ The Claimant attached two tables to the Claim form. One table listed the parts of the Contract that the Respondent left unfinished or did poorly:

- the concrete deck was too thin, cracking, striped, and multi-colored with irregular m finish,
- the drains and foundation wall were unfinished,
- the stones on the retaining wall were the wrong color and size and the caps were irregular,
- pressure testing indicated a leak, and
- the coping and tile were unfinished and stained.

⁷ The Claimant’s calculation on the Claim form is incorrect. The amount of the total credits is \$2,260.00 (\$1,435.00 + \$825.00 = \$2,260.00). $\$52,099.75 - \$2,260.00 = \$49,839.75$. The Claimant’s revised amount of the Contract was reached by subtracting only the credit of \$1,435.00 from the original Contract amount. The credits represent the Respondent’s offer to pay for the water to fill the pool (\$825.00) and the construction of the divider pavers that were not correctly aligned (\$1,435.00).

In addition to these alleged deficiencies in the Respondent's performance under the Contract, the Claimant also claimed that the Respondent abandoned the home improvement without plastering and caulking the pool, pool tiles fell out, and the edges on the flagstone caps had different surfaces. Whether these alleged problems constituted incomplete, inadequate, or unworkmanlike home improvement is discussed below.

Did the Respondent abandon an incomplete home improvement?

The Contract does not include a start or end date. The Claimant testified that work began on the home improvement on November 14, 2017. He and Ms. Lifsey testified that on March 19, 2018, Diogo abruptly terminated a conversation with Ms. Lifsey and walked off the job clearly indicating he wanted nothing further to do with the Lifseys or with completing the home improvement. On this matter, I find the Claimant and Ms. Lifsey credible witnesses, and I accept the accuracy of Ms. Lifsey's written summary of the conversation.

The summary indicates that Diogo left the meeting, complaining that the Lifseys were "the worst clients" and telling Ms. Lifsey that if she were unhappy with the work then the Lifseys could keep their money and he would walk off the job, which he did. "I'm done," and "don't call me," he told her. After this, the Respondent had no further contact with the Claimant and no further work was performed on the home improvement. The caulking and plastering were left incomplete.

The Respondent offered no evidence to refute the Claimant's or Ms. Lifsey's testimony about the March 19, 2018, meeting or Ms. Lifsey's written summary of what transpired during the meeting. The Respondent agreed during her testimony that the plastering and caulking of the pool were "not done." However, the Respondent seemed to suggest that Diogo acted properly when he stopped work on the home improvement because the Claimant's fourth payment was

less than what the Contract required, and that the Contract permitted the Respondent to stop work in that circumstance.

The Contract calls for the following payments:

- First payment: \$10,000.00 at the approval of the Contract;
- Second payment: \$13,000.00 after demolition of wall and pouring of new footers;
- Third payment: \$13,000.00 after completion of coping, tiling and gravel base for deck;
- Fourth payment: \$13,000.00 after concrete for pool deck poured and the wall was completed; and
- Final payment: \$3,099.75 after plastering of pool.

The parties do not dispute what payments were made. The first payment of \$10,000.00 was made by check dated October 11, 2017; the second and third payments, totaling \$26,000.00, were made by a single cashier's check on November 29, 2017.⁸ On December 4, 2017, the Respondent credited \$1,435.00 to the Claimant's remaining balance, to be applied to the fourth payment, to resolve the dispute related to the "slightly off" dividers. By check dated December 15, 2017, the Claimant paid \$5,000.00 to the Respondent. The amount due on this fourth payment was \$11,565.00 (\$13,000.00 – \$1,435.00 (credit) = \$11,565.00). In an email to the Respondent, the Claimant explained that he made only a partial fourth payment because the drains and caulking were not finished; the concrete was multi-colored, uneven, and striped; and the deck and wall were not finished.

The Contract provides: "In in the event Owner [the Claimant] shall fail to pay any periodic or installment payment due hereunder, Contractor [Respondent] may cease work without breach pending payment or resolution of any breach." The Respondent seemed to rely

⁸ This check replaced two checks of \$13,000.00, dated November 17 and 27, 2017. A disagreement between the parties about the quality of the Respondent's work and some uncertainty whether the Respondent planned to continue to work led the Claimant to stop payment on those checks, but later that matter was sufficiently resolved and the Claimant issued the cashier's check for \$26,000.00.

on this language to argue that it was justified to stop work because the Claimant failed to pay the full amount of the fourth payment.

The Respondent's justification argument is misplaced because this litigation is an administrative proceeding under Title 8, Subtitle 4 of the Business Regulation Article. It is not a breach of contract proceeding in court. If it were a breach of contract action in court, the language quoted above would be relevant. However, in this administrative proceeding, the issue being addressed is whether the Respondent engaged in unworkmanlike, inadequate, or incomplete home improvement that resulted in the Claimant's actual loss. Accordingly, I reject the Respondent's argument that it is protected against the possible actual loss consequences of its decision to stop work on the home improvement before the plastering and caulking of the pool had been done.

Did the Respondent perform inadequate or unworkmanlike home improvement?⁹

The home improvement involved refurbishing a pool, removing and replacing an existing pool deck, patio, and stairs, altering an existing wall, and removing and replacing an existing wall. As such, the project required the skills of a tradesman working with concrete, stone, gravel, and other materials. The specific techniques and methods of working with those materials are not commonly known by non-tradesmen. I note this here because neither party offered any expert testimony or established an appropriate foundation for any witness to offer an opinion about acceptable workmanship within the relevant trades. This was a significant oversight, given that I must now decide whether certain claims of unworkmanlike performance are supported by competent and sufficiently probative evidence.

⁹ Neither "unworkmanlike" nor "inadequate" is defined in the relevant statute or regulations, or in any case law that addresses those statutes or regulations. The common definition of "inadequate" is not "sufficient for a specific requirement" or "barely sufficient or satisfactory." *Merriam-Webster's Collegiate Dictionary* 15 and 627 (11th ed. 2006). The Claimant's complaints here are about the Respondent's workmanship. "Workmanlike" means "characterized by the skill and efficiency typical of a good workman" and "competent and skillful but not outstanding or original." *Merriam Webster's* at 1443.

The Deck

The Claimant claims that (1) the Respondent broom swept the new concrete deck in two different directions thereby causing light to reflect differently from the surface and the deck to look “different.” The Claimant compared the deck’s appearance to a baseball diamond that has different shades of color because it is cut in different directions. The Claimant testified that concrete is supposed to be brushed in the same, consistent direction. He called the decks appearance not uniform, not workmanlike, and not professional. The Claimant also claims that (2) the concrete deck has two, different colors because the last and smallest batch of concrete that was transported to the worksite was from a different mix. In addition, the Claimant testified that (3) a large crack developed in the concrete deck within three months after it was poured because the concrete was not poured four inches deep. For the following reasons, I find that the Respondent’s construction of the concrete deck was unworkmanlike based only on the large and unsightly crack that developed within three months after the concrete was poured. However, I do not find that the thickness of the concrete was less than four inches or the thickness of the concrete caused the crack.

The record contains two photographs of a very small portion of the deck: one photograph is captioned: “striped and multicolored due to improper broom finish and third load of concrete late”; and the other photograph is captioned: “two-toned striped look due to improper broom finish strokes in opposite directions.” Both photographs show some variation in the color of the concrete showing some variation in shade (lighter and darker). However, they show only a slight variation in shade; they depict only a very small portion of the deck; and, as discussed above, there was no expert testimony that the Respondent’s construction of the deck was unworkmanlike. Neither the Claimant nor Ms. Lifsey is an expert in how concrete decks are properly constructed, and neither cited to any authoritative source to establish that the

Respondent's work was not competent and skillful or typical of a good workman. Accordingly, even assuming the Respondent broom swept the concrete deck in two different directions, as testified to by Ms. Lifsey, and that the third batch of concrete was slightly different in appearance, I do not find that the Respondent's construction of the deck was unworkmanlike, based on these reasons.

However, the photographs also show a large, unsightly crack in the cement deck. I credit the Claimant's testimony that it runs the full length of the deck. The Respondent addressed the crack by testifying it is not responsible for cracks under the Respondent's contractual warranty.

The Contract contains the following:

Warranty for the work mention [sic] in this contract will consist of workmanship defects to be covered for a period of one year from the completion date but does cover repair work. R&D will not be held responsible for any concrete damage such as scaling or flaking from chemicals such as salt or deicers. Concrete cracks or mortar cracks are not covered under the R&D warranty.

Claimant Ex. 2; Respondent Ex. 1.

As discussed above, this is not a contract action. It is an administrative action that claims an actual loss as a result of the Respondent's unworkmanlike construction of a concrete deck. Under section 8-401 of the Business Regulation Article, the Respondent is responsible for the construction of the concrete deck in a workmanlike manner. The issue before me is not whether concrete cracks are covered under a warranty. The issue is whether the Claimant suffered an actual loss as a result of the Respondent's unworkmanlike construction of the concrete deck.

The Claimant testified that the thickness of the deck is less than four inches of concrete. He offered two photographs that include a ruler that measures the concrete at less than three inches of thickness. On the other hand, Ms. Francisco testified that the Respondent used a formula that calculated the amount of concrete needed for a four-inch thick deck. Ms. Francisco also testified the Claimant's measurement cannot be considered reliable because it does not show

whether the area measured was from the top of the gravel base to the top of the coping, which she claimed was the correct way to measure thickness. Ms. Francisco testified that the end of the ruler the Claimant used to measure the concrete's thickness, which is not visible in the photographs, could have been hitting against a beam and not the gravel base, based on where the Claimant took the measurement.

I am not persuaded by the quality of the Claimant's evidence that the concrete is less than four inches. It is unclear to me from my review of the photographs that the ruler correctly measures the thickness. Accordingly, I do not find that the concrete deck is less than four inches thick. Furthermore, the record contains no competent evidence to support the Claimant's speculation that there is a cause and effect relationship between the thickness of concrete—especially between thickness of four versus about three inches—and the likelihood of cracking. The Claimant is not an expert in the nature and properties of concrete.

However, based on common sense, I find it more likely than not that poor workmanship in building the concrete deck is responsible for the substantial and unsightly crack that developed in the concrete less than three months after the deck was built. A properly constructed concrete deck should not develop such a crack. No reasonable consumer expects such an outcome and no good workman would find it acceptable to produce such an outcome. Accordingly, I find it more likely than not that the crack in the concrete is the result of the Respondent's poor workmanship.

Drains and Foundation Wall

The Claimant testified that the Respondent left the drain behind the foundation wall "unfinished" in that it is "protruding from the ground" when it should have been "run to daylight." The record includes a photograph of the drain. The Claimant also testified that "vents" for "drain pipes" were unfinished because they were left "sticking up from the ground." The record includes a photograph of a cluster of four pipes protruding from the ground, two are

uncapped and the other two are capped. The Claimant captioned this photograph as: "improper and incomplete drain cleanout resulting in broken pipes and large sinkhole requiring repair."

Claimant Ex. 5 at page 11.¹⁰

The Respondent testified that the exposed pipe that is behind the foundation wall is a perforated pipe that is supposed to be exposed.

The Claimant also testified that the Respondent did not complete installing the veneer stone on the back side of the foundation wall. The record includes a photograph that shows part of the back of a wall uncovered by stone.

The Respondent testified that the back of the wall is not fully covered with stone because it is not considered a "face." The Contract contains the following in the "WALL" section: "Install veneer stone on face of wall." The Respondent testified that only the front and sides of the wall are considered a "face" of the wall.

Under "DRAINS," the Contract calls for the installation of 118 linear feet of "pool deco drains" and states: "[c]onnect existing downspouts and daylight (70 linear ft)." The Contract contains no other mention of "daylight." I am not persuaded that the "drain" protruding beyond the wall is a "drain" under the Contract, and I am not persuaded that it should have been cut to daylight. The Claimant did not challenge the Respondent's testimony that this is perforated plastic pipe that should not be buried and run to daylight. In regard to the drains that are depicted at Claimant Ex. 5 page 11, which the Claimant testified were "vents from the drain pipe," I am satisfied these pipes were installed in an unworkmanlike manner because no

¹⁰ The record also includes another photograph of three "pipes" that protrude above ground level. The Claimant testified that these pipes were buried run to daylight but had not been buried deep enough and became exposed when the surrounding area settled. The Claimant testified these exposed pipes have not been fixed and he had no estimate of the cost to fix them. The Respondent testified these pipes "look like" pool pipes that are not brought to daylight.

homeowner, or any reasonable person, would accept such an unsightly appearance or the risk of injury that the exposed pipes create.

In regard to the back of the wall that is partially covered with veneer stone, I reject Ms. Francisco's testimony that the back surface of the wall is not a "face" of the wall. The Contract does not define or describe what is meant by "face." Ms. Francisco's testimony that the back of the wall is not a face of the wall does not make sense because if that were true, the Respondent would not have to cover any part of it with veneer stone. But that is not what the Respondent did; instead it covered part of the surface with stone and left the rest unfinished. Accordingly, I find that the Respondent did not complete that part of the home improvement.

Color and Size of the Stone

The Claimant and Ms. Lifsey testified that the Respondent agreed to use Dove Gray stone for the retainer wall but instead used Chocolate Gray. Ms. Lifsey testified that she and the Claimant told Diogo "many times" and it was "very clear" that they wanted Dove Gray. Ms. Lifsey testified they were "adamant" about that because their house had recently been painted and the brown in the Chocolate Gray clashed with the color of the home. She testified she visited Irwin several times in order to choose the right stone.

Ms. Francisco testified that she ordered the stone and was told by either Diogo or one of the Respondent's other employees that the Lifseys had chosen Chocolate Gray for the foundation wall. Ms. Francisco further testified she had suggested that the Lifseys visit Irwin to choose the stone they wanted. In addition, on October 25, 2017, Ms. Francisco emailed the Claimant about selecting both tile and stone for the home improvement. In that email, she wrote that the price of the Contract contemplated the use of Chocolate Gray and several other colors, but Dove Gray was not mentioned. In this email, Ms. Francisco wrote: "The veneer stone Diogo suggested you visit Irwin Stone [sic]. . . if you want to see the stone displays to pick." Respondent Ex. 5.

I found Ms. Lifsey a credible witness. She was very clear that she and the Claimant had selected Dove Gray for the wall and provided a logical explanation for that selection—there was no brown in the Dove Gray but there was brown in the Chocolate Gray and brown clashed with their newly painted house. She was equally clear that she and the Claimant told Diogo that they had chosen Dove Gray. Accordingly, I find that the Lifseys chose Dove Gray stone for the wall. Ms. Francisco testified either Diogo or another employee told her that the Lifseys had chosen Chocolate Gray and she relied on what she was told to order Chocolate Gray. However, neither Diogo nor any other employee testified at the hearing. The Respondent's evidence that the Lifseys had chosen Chocolate Gray is based on hearsay, and I find it insufficiently reliable to give it any probative weight. Accordingly, I find it unworkmanlike to use materials different from what the customer has chosen without a legitimate reason.

In regard to the flagstone caps on the retainer wall, the Claimant testified the side surfaces are different, some have a smooth finish and others have a rough finish. A photograph of some of the caps corroborates that testimony. The Respondent did not refute this evidence. Ms. Francisco testified that had the Claimant made the full fourth payment the Respondent would have flamed the smooth surfaces to give them a rough finish. An expert is not needed to establish that the lack of a uniform finish on the caps constitutes both incomplete and unworkmanlike home improvement.

Pressure Testing

The Claimant testified that the pool has an undetected leak and testified air bubbles are visible. Ms. Francisco testified that the pool was pressure tested and no leaks were found in the pool drains. The Claimant has the burden of proof. Other than his brief testimony, he offered no evidence to establish the existence of a leak. Ms. Francisco refuted the Claimant's testimony. I

also note that the Claimant did not mention a leak in the complaint he filed with the Commission. Accordingly, I do not find that pressure testing uncovered a leak.

The Unfinished and Stained Coping and Tile

The Claimant did not offer any evidence that specifically related to this allegation. None of the photographs depicts unfinished and stained coping or tiles. Accordingly, I do not find any Respondent misconduct related to this issue.

Did the Claimant suffer an actual loss?

As discussed above, I have found that the Respondent left the home improvement incomplete. When Diogo made it clear to the Claimant that he would not return to the property to do any further work on the home improvement, the Respondent had not plastered or caulked the pool. In addition, I have also found the following unworkmanlike or incomplete parts of the home improvement: (1) The concrete deck based on the unsightly crack; (2) the flagstone caps based on the variation in the finish; (3) the use of the wrong color stone for the foundation wall; and (4) the failure to run certain pipes to daylight.

COMAR 09.08.03.03B determines the calculation of a homeowner's actual loss. This regulation provides in pertinent part as follows:

B. Measure of Awards from Guaranty Fund.

...

(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:

(a) If the contractor abandoned the contract without doing any work, the claimant's actual loss shall be the amount which the claimant paid to the contractor under the contract.

(b) If the contractor did work according to the contract and the claimant is not soliciting another contractor to complete the contract, the claimant's actual loss shall

be the amount which the claimant paid to the original contractor less the value of any materials or services provided by the contractor.

(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 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.

This case does not require a unique measurement of actual loss. None of the parties advocated for such a measurement, and I cannot see any reason why a unique measurement is called for in this case. Therefore, COMAR 09.08.03.03B(3) does not apply.

The measurement of actual loss found at COMAR 09.08.03.03B(3)(a) is appropriate only when the "contractor abandoned the contract without doing any work." That did not occur in this case. The Respondent performed substantial work on the Contract. Therefore, COMAR 09.08.03.03B(3)(a) does not apply.

COMAR 09.08.03.03B(3)(b) is an appropriate measure of actual loss when a claimant is not soliciting other contractors to complete the contract. In addition, this measurement requires a finding of the value of "any materials or services provided by the contractor." This measure does not apply because the Claimant has solicited other contractors to complete the job and the record does not contain any competent and sufficiently probative evidence to reasonably find the value of the materials and service provided by the Respondent. On the claim form, the Claimant listed \$32,598.56 as the "estimated value of the work done by the contractor." The form also instructed the Claimant to "provide proof" of the value. As an attachment to the form, the Claimant listed the value of the Respondent's work in the areas of pool deck, drains, foundation wall, retaining wall, pressure testing, and coping and tiling by taking seventy-five percent of the cost that the Respondent listed on a Work Estimate for each of those parts of the Contract. At

the hearing, the Claimant could not explain why his determination of value was anything other than arbitrary. Because the Claimant has solicited other contractors to finish the Contract and his estimate of the value of the Respondent's work on the Contract was arbitrary, and because the record does not contain any evidence from which I can reasonably calculate the value of materials or services, this method of calculating actual loss does not apply.

COMAR 09.08.03.03B(3)(c) provides the only possibly viable measure of actual loss. This method requires a determination of (1) the amount the Claimant paid to the Respondent under the Contract, (2) any reasonable amount the Claimant has paid or will be required to pay another contractor to repair poor work or complete the Contract, and (3) the Contract price.

The amount the Claimant paid to the Respondent was not disputed. The Claimant paid \$41,000.00 to the Respondent. The Contract price was not disputed. The Contract price was \$52,099.75. The reasonable price the Claimant has paid other contractors to complete the Contract or repair unworkmanlike work has been established in the record. The Claimant paid \$6,232.50 to Pearl to plaster and caulk the pool. The Claimant paid Siddique Khan \$700.00 to bury drain pipes to daylight. The Claimant also obtained an estimate for Rocha Construction of between \$600.00 and \$800.00 to refinish the flagstone caps.¹¹ The total amount, using the lower amount of the estimate from Rocha Construction, is \$7,532.50. Therefore, the Claimant's actual loss is $\$41,000.00 + \$7,532.50 = \$48,532.00 - \$52,099.75 = -\$3,567.00$. Accordingly, I find that the Claimant is not entitled to any award from the Fund because he did not prove that he suffered an actual loss.

¹¹ The Claimant paid \$825.00 to C.L. Pritcher to fill the pool. This is not counted in the actual loss calculation because it is outside the scope of the original contract. The Claimant provided no estimate of the cost to repair the crack in the deck, to replace the stone with the correct color, or to finish surfacing the back of the retainer wall with stone veneer. Furthermore, even if I had found that the concrete deck was built in an unworkmanlike manner based on the uneven color and brush stroke pattern, it would not have changed this actual loss analysis because the Claimant offered no evidence to establish the cost to repair or replace the deck.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has not sustained an actual loss as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B.

RECOMMENDED ORDER

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

1. The Maryland Home Improvement Guaranty Fund deny the Claimant's Claim; and
2. The records and publications of the Maryland Home Improvement Commission reflect this decision.

November 21, 2019
Date Proposed Decision Issued

CONFIDENTIAL

Michael D. Carlis
Administrative Law Judge

MDC/da
#182860

PROPOSED ORDER

WHEREFORE, this 28th day of January, 2020, 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

Chairman

Panel B

MARYLAND HOME IMPROVEMENT
COMMISSION

