

IN THE MATTER OF THE CLAIM OF	*	BEFORE MARY SHOCK,
JOYCE PHILIP	*	AN ADMINISTRATIVE LAW JUDGE
AGAINST THE MARYLAND HOME	*	OF THE MARYLAND OFFICE
IMPROVEMENT GUARANTY FUND	*	OF ADMINISTRATIVE HEARINGS
FOR THE ALLEGED ACTS OR	*	OAH No: DLR-HIC-02-10-02630
OMISSIONS OF TERRY SAVARD,	*	MHIC No: 07 (90) 2644
T/A WATER WORKS, INC.	*	

\* \* \* \* \*

**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 May 8, 2008, Joyce Philip (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$4,365.00 for actual losses allegedly suffered as a result of a home improvement contract with Terry Savard, t/a Water Works, Inc. (Respondent).

I held a hearing on September 21, 2010 at the Office of Administrative Hearings (OAH) in Wheaton, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312, 8-407 (2010). John R. Garza, Esquire, represented the Claimant, who was present. The Respondent represented himself. Eric London, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department of Labor, Licensing and Regulation, and the Rules of Procedure of the Office of Administrative Hearings govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2010), Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02.01; and 28.02.01.

### ISSUE

Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?

### SUMMARY OF THE EVIDENCE

#### Exhibits

I admitted the following exhibits on the Claimant's behalf:

CL #1	Contract, April 14, 2006
CL #2	Contract, July 10, 2006
CL #3	Photocopy of photograph of pool, undated
CL #4	Letter from Claimant to Respondent, July 3, 2006
CL #5	Letter from Claimant to Respondent, December 28, 2006
CL #6	Respondent Invoice/Statement to Claimant, December 1, 2006
CL #7	Letter from Claimant to Respondent, May 7, 2007
CL #8	Proposal, Swimstyle, May 24, 2008
CL #9	Contract, Swimstyle, June 5, 2008, check to Swimstyle, July 17, 2008, Checking Account Statement, June 10 to July 10, 2008
CL #10	Letter from Claimant to HIC, May 18, 2007
CL #11	Letter from Claimant to HIC, April 10, 2008, with Swimstyle Proposal, July 7, 2007, Frank O'Connor & Son, Inc., Proposal, October 9, 2007, Neskel Contractors, L.L.C., Proposal, October 15, 2007
CL #12	Photograph of pool, undated

I admitted the following exhibits on the Respondent's behalf:

RSP #1	Respondent Work Order, September 12, 2006
RSP #2	Letter from Claimant to Respondent, February 7, 2007
RSP #3	Contract, April 16, 2006

I admitted the following exhibits on the Fund's behalf:

FUND #1	Notice of Hearing, June 3, 2010, and Hearing Order, November 19, 2009
FUND #2	Notice of Hearing, Rescheduled, August 16, 2010

FUND #3 Letter from Fund to Respondent, May 14, 2008, with Home Improvement Claim Form, May 8, 2008  
FUND #4 Letter from Claimant to Fund, February 25, 2009  
FUND #5 Respondent's Licensing History, August 4, 2010  
FUND #6 Claimant's Checks to Respondent, April 16, 2006 and June 23, 2006  
FUND #7 Letter from Respondent to Fund, May 27, 2008  
FUND #8 Letter from Respondent to Fund, June 26, 2007

### Testimony

The Claimant testified on her own behalf.

The Respondent testified and presented the testimony of Monty Savard, son and employee. Mr. Savard was accepted as an expert in pool renovation, repair, and maintenance.

The Fund did not call any witnesses.

### **FINDINGS OF FACT**

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

1. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor under MHIC license number 01-86363 and 05-122227.
2. On April 14, 2006, the Claimant and the Respondent entered into a contract to renovate the Claimant's in-ground pool. The Respondent would remove the existing liner, install new protective wall foam, if required, and install the new liner.
3. The contract stated that work would begin in the spring 2006 and be completed in four to six weeks.
4. The original agreed upon contract price was \$3,037.75.
5. On April 17, 2006, the Claimant paid the Respondent \$1,012.00. On June 23, 2006, the Claimant paid the Respondent \$2,025.75, the balance of the contract price.
6. On April 19, 2006, the Respondent partially emptied the pool to measure for the new liner. He ordered the liner on April 24, 2006. On June 23, 2006, the Respondent drained the remaining water from the pool to remove the old liner. Between

April and June 2006, there had been a lot of rain, and the ground water pushed one of the pool walls inward.

7. When the Respondent removed the old liner, he found that the coping stones that held the liner in place were too old to uniformly hold the new liner. On July 10, 2006, the Claimant and Respondent entered into a contract to install a heavy duty aluminum liner track to secure the liner. The contract cost was \$955.00. The Claimant paid \$155.00 toward the contract cost, leaving a balance of \$800.00.

8. The Respondent repaired the pool wall by digging out the dirt behind the wall, bracing the wall and then back-filling the dirt.

9. After back-filling, several buckets of dirt were left over. The Respondent instructed the Claimant to keep the dirt at the house and he would return to refill the area as the dirt settled. The Claimant ordered the Respondent to take the dirt away. The Respondent complied, but told the Claimant that he would charge her to haul the dirt back to her house.

10. On July 15, 2006, the Respondent completed installation of the track and liner and refilled the pool. At that time, the pool wall and liner were straight, vertical, and plumb.

11. In September 2006, the Claimant telephoned the Respondent and told him that the dirt had settled. The Respondent went to the home. He told the Claimant that he would charge her \$495.00 to back-fill the dirt. The Claimant did not accept the offer.

12. On December 28, 2006, the Claimant owed the Respondent \$800.00. She told the Respondent that she had paid another contractor \$250.00 to fix the problem, and offered the Respondent \$550.00 in full settlement of the bill. The Respondent agreed.

13. The Claimant had not hired or paid another contractor to back-fill the dirt.

14. On February 7, 2007, the Claimant paid the Respondent \$550.00 in full and final payment of his bill.

15. On May 7, 2007, the Claimant told that Respondent that the wall had collapsed again and that, under the one-year warranty, she wanted him to fix the pool.

### DISCUSSION

An owner may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor." Md. Code Ann., Bus. Reg. § 8-405(a) (2010). *See also* COMAR 09.08.03.03B(2). Actual loss "means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." Md. Code Ann., Bus. Reg. § 8-401 (2010). Maryland law further provides that the Commission may deny a claim if the Claimant unreasonably rejects good faith efforts by the contractor to resolve the claim. Md. Code Ann., Bus. Reg. § 8-405 (d). For the following reasons, I find that the Claimant failed to prove that she is eligible for compensation.

The Respondent testified that his son, Monty Savard, handled most of the work at the Claimant's house, and he dealt with the Claimant's brother. The Respondent stated that the company repaired the pool wall and advised the Claimant that she would have to back-fill more dirt as the ground settled. The Respondent further advised the Claimant that if she insisted that he remove the left over dirt needed to back-fill the wall, he would charge her to haul the dirt back to her house. The Claimant did not contradict the Respondent's testimony on this point. When the dirt settled, and the Respondent was going to charge the Claimant to return, the Claimant told him that she had another contractor complete the work for \$250.00.

The Claimant testified that she did not, in fact, hire another contractor. Instead, she just told the Respondent that she had done so to stop him from sending her invoices for the \$800.00 she still owed him for the new liner track. The Claimant then offered to settle the bill with the

Respondent, stating that she would pay \$550.00 on the \$800.00 bill, subtracting the \$250.00 she allegedly paid another contractor. (CL #5). The Respondent agreed and on February 7, 2007, the Claimant sent him a check with a letter stating that she had "enclosed a check in the amount of \$550.00 in full and final payment of costs for work that your company performed on the pool at the above address." (RSP #2). There is no evidence that the Claimant ever completed the back-filling as the dirt settled. On May 7, 2007, when the wall collapsed again, the Claimant demanded that the Respondent fix the problem. (CL #7).

I find that the Respondent made a good faith effort to resolve the problem. When he completed the work in July 2006, the wall was plumb. He advised the Claimant to keep the extra dirt and he would return to back-fill the area as the dirt settled. If, however, she insisted that he remove the dirt, he would charge her to return. The Claimant refused to keep the dirt, and when she asked the Respondent to return and he charged her as promised, she told him she had another contractor do the work. The Claimant failed to explain why she refused to keep the dirt in the first place. She stated that, for the most part, her brother dealt with the Respondent's son on the job site. Based on Mr. Savard's testimony, it appears that he and the Claimant's brother did not have a good working relationship. Whatever the reason the Claimant refused to keep the dirt, she knew, before the Respondent took it away, that he would charge her to haul the dirt back. Under the circumstances, I find that it was unreasonable for the Claimant to reject the Respondent's offer to return and back-fill for no cost if she kept the dirt, or to charge her if she wanted him to haul the dirt away and then bring it back, and then to tell the Respondent that she had another contractor perform the work.

Finally, as stated above, when the Respondent did agree to return, but for the promised charge, the Claimant told the Respondent that another contractor had performed the work when she had not hired or paid another contractor to do so. The Claimant's failure to back-fill the dirt

in September 2006 caused the wall's subsequent collapse. The wall's collapse was not the result of the Respondent's unworkmanlike, inadequate or incomplete home improvement.

**CONCLUSIONS OF LAW**

I conclude that the Claimant failed to prove that she sustained an actual loss as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. § 8-401 (2010).

**RECOMMENDED ORDER**

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

**ORDER** that the Maryland Home Improvement Guaranty Fund deny the Claimant's claim.

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

November 19, 2010

Date decision mailed

MKS/tc  
#117354



Mary Shock  
Administrative Law Judge

IN THE MATTER OF THE CLAIM OF \* BEFORE MARY SHOCK,  
 JOYCE PHILIP \* AN ADMINISTRATIVE LAW JUDGE  
 AGAINST THE MARYLAND HOME \* OF THE MARYLAND OFFICE  
 IMPROVEMENT GUARANTY FUND \* OF ADMINISTRATIVE HEARINGS  
 FOR THE ALLEGED ACTS OR \* OAH No: DLR-HIC-02-10-02630  
 OMISSIONS OF TERRY SAVARD, \* MHIC No: 07 (90) 2644  
 T/A WATER WORKS, INC. \*

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**FILE EXHIBIT LIST**

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 CL #12 Photograph of pool, undated

I admitted the following exhibits on the Respondent's behalf:

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FUND #7 Letter from Respondent to Fund, May 27, 2008  
FUND #8 Letter from Respondent to Fund, June 26, 2007

**PROPOSED ORDER**

***WHEREFORE, this 9th day of February 2011, 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.***

***Marilyn Jumalon***

***Marilyn Jumalon  
Panel B***

**MARYLAND HOME IMPROVEMENT COMMISSION**