

**IN THE MATTER OF THE CLAIM
OF JOHN FRADO AND KRISTINA
CALABRESE
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ACTS OR OMISSIONS
OF DONALD SEYFFERTH t/a
SUNRISE PREMIERE POOL
BUILDERS, LLC**

**MARYLAND HOME IMPROVEMENT
COMMISSION**

**MHIC CASE NO. 16(90)1186
OAH CASE NO. DLR-HIC-02-17-02758**

* * * * *

FINAL ORDER

This matter was originally heard before an Administrative Law Judge (“ALJ”) of the Office of Administrative Hearings (“OAH”) on June 2, 2017. Following the evidentiary hearing, the ALJ issued a Recommended Decision on July 31, 2017, concluding that the homeowners John Frado and Kristina Calabrese (“Claimants”) sustained an actual and compensable loss of \$13,340.00 as a result of the acts and omissions of the contractor Donald Seyfferth t/a Sunrise Premiere Pool Builders, LLC (“Contractor”). *ALJ Recommended Decision* p. 11. In a Proposed Order dated August 21, 2017, the Maryland Home Improvement Commission (“MHIC”) affirmed the Recommended Decision of the ALJ to award the Claimant’s \$13,340.00 from the MHIC Guaranty Fund. The Contractor subsequently filed exceptions of the MHIC Proposed Order.

On February 1, 2018, a hearing on the exceptions filed in the above-captioned matter was held before a three- member panel (“Panel”) of the MHIC. The Claimants and the Contractor were present without counsel. Hope Sachs, Assistant Attorney General, appeared at the exceptions hearing on behalf of the MHIC. Because no requests to admit new evidence were submitted, and no transcript of the hearing of the ALJ was provided, the parties were limited to citing to the ALJ’s decision and any exhibits introduced into evidence at the OAH hearing. Code of Maryland Regulations (“COMAR”) 09.01.03.09G-L.

Through his written exceptions and oral argument the Contractor disputed the ALJ's finding of fact that the Contractor positioned the rebar too close to the surface of the pool which caused the rebar to rust and stain the pool shell. *ALJ Recommended Decision* p. 5. The Contractor argues now through his exceptions that core samples of the concrete should be done, because that is the only way to determine whether the rebar was placed too shallow in concrete of the pool.

At the OAH hearing, however, the ALJ was presented with photographs that she found "unmistakably show the bleeding of rust on the surface of the pool shell and around the pool lights, as well as the unsightly patches where the Respondent's contractor cut out samples of the damaged shell." *ALJ Recommended Decision* p. 9-10. The ALJ also based her finding on testimony that the subcontractor sent by the Contractor to inspect the Claimant's pool in 2014, cut-out pieces of the pool shell and informed the Claimants that either the concrete was not poured thick enough or the rebar was too close to the surface of the concrete. *ALJ Recommended Decision* p. 7. The ALJ was also presented with the report and testimony of the structural engineer, Al Erdi, P.E., who was admitted as an expert in pool construction, engineering and industry standards at the OAH hearing. *ALJ Recommended Decision* p. 8. Mr. Erdi concluded that the finish of the pool was inadequate because of the shallow placement of the rebar that caused staining and discoloration in the finished surface of the pool. *ALJ Recommended Decision* p. 9; *OAH Hearing Claimant's Exhibit 1*. The evidence introduced at the OAH hearing is sufficient for the ALJ to reasonably conclude that the damage to the pool was caused by the Contractor's inadequate placement of the rebar. The ALJ's decision is thorough, supported by the evidence in the record and correct as a matter of law. Having heard the arguments presented by the parties, the Panel does not find that the ALJ erred in her decision and will not overturn it

on exceptions.

Having considered the parties' arguments, the documentary evidence contained in the record, and the ALJ's Recommended Decision, it is this 2nd day of May 2018 ORDERED:

- A. That the Findings of Fact of the Administrative Law Judge are **AFFIRMED**;
- B. That the Conclusions of Law of the Administrative Law Judge are **AFFIRMED**; AND
- C. That the Recommended Decision and Order of the Administrative Law Judge is **AFFIRMED**;
- D. Any party has thirty (30) days from the date of this Final Order to appeal this decision to Circuit Court.

Joseph Tunney
Chairperson –Panel
Maryland Home Improvement
Commission

IN THE MATTER OF THE CLAIM	*	BEFORE M. TERESA GARLAND,
OF JOHN FRADO AND KRISTINA	*	AN ADMINISTRATIVE LAW JUDGE
CALABRESE,	*	OF THE MARYLAND OFFICE
CLAIMANTS	*	OF ADMINISTRATIVE HEARINGS
AGAINST THE MARYLAND HOME	*	
IMPROVEMENT GUARANTY FUND	*	
FOR THE ALLEGED ACTS OR	*	
OMISSIONS OF DONALD	*	OAH No.: DLR-HIC-02-17-02758
SEYFFERTH T/A SUNRISE	*	MHIC No.: 16 (90) 1186
PREMIERE POOL BUILDERS, LLC,	*	
RESPONDENT	*	

* * * * *

PROPOSED DECISION

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

STATEMENT OF THE CASE

On September 23, 2016, John Frado and Kristina Calabrese (Claimants) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$15,765.00 in alleged actual losses suffered as a result of a home improvement contract with Donald Seyfferth, trading as Sunrise Premiere Pool Builders, LLC (Respondent).

I held a hearing on June 2, 2017 at the Bel Air Branch of the Harford County Public Library, 100 E. Pennsylvania Avenue, Bel Air, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). The Claimants were represented by Ms. Calabrese.¹ Andrew Brouwer, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. Edy Seyfferth, the Respondent's wife, by Special Power of Attorney, represented the Respondent.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the Office of Administrative Hearings (OAH) govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2016); Code of Maryland Regulations (COMAR) 09.01.03; COMAR 28.02.01.

ISSUES

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

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on the Claimants' behalf:

- Clmt. Ex. 1 - Investigation by C.C.M. Inc., September 2, 2016
- Clmt. Ex. 2 - Agreement with Respondent, February 3, 2010
- Clmt. Ex. 3 - Two photographs (labeled A and B)
- Clmt. Ex. 4 - Black & white photograph
- Clmt. Ex. 5 - Photograph
- Clmt. Ex. 6 - E-mails, April 23, 2015 and July 29, 2015
- Clmt. Ex. 7 - E-mail from Catalina PoolBuilders, May 20, 2015
- Clmt. Ex. 8 - Black & white photograph
- Clmt. Ex. 9 - Four photographs

¹ When referring to Ms. Calabrese, I shall use the singular Claimant.

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

Resp. Ex. 1 - Agreement with Claimants, February 3, 2010

I admitted the following exhibits on behalf of the Fund:

- Fund Ex. 1 - Hearing Order, January 20, 2017
- Fund Ex. 2 - Notice of Hearing, February 10, 2017
- Fund Ex. 3 - Home Improvement Claim Form, dated July 5, 2016
- Fund Ex. 4 - MHIC information on the Respondent
- Fund Ex. 5 - MHIC information on Clarence Seyfferth, IV

Testimony

Ms. Calabrese testified on the Claimants' behalf and presented the testimony of Al Erdi, P.E., accepted as an expert in Pool Construction, Engineering, and Industry Standards.

The Respondent did not testify.

The Fund did not present any testimony.

PROPOSED FINDINGS OF FACT

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

1. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor under MHIC license number 45494.
2. On February 3, 2010, the Claimants and the Respondent entered into a contract to build a swimming pool at the Claimants' home.
3. The original agreed-upon contract price was \$40,000.00.
4. The Claimants paid the Respondent the full amount of the contract, in five installments, as well as an additional \$2,000.00 pursuant to a March 15, 2010 contract addendum.
5. The pool passed a final building inspection on August 26, 2010.

6. Sometime in the summer of 2012, the Claimants noticed red and black stains on the side of the pool shell. The Claimants contacted the Respondent who advised them to use a wire brush on the stains. The Claimants believed that algae caused the stains.

7. The Claimants closed the pool at the end of the 2012 season believing that the algae would dissipate over the winter.²

8. When the Claimants opened the pool in the spring of 2013, they noticed that the staining was worse than when they closed the pool in 2012.

9. The Claimants again contacted the Respondent who promised to remediate the staining at the end of the 2013 pool season.

10. The Respondent did not follow-up on his promise to remediate the Claimants' pool stains in 2013 and never came to their home to inspect the staining. He promised to come to the Claimants' home in the beginning of the 2014 pool season.

11. In 2014, the Respondent sent a subcontractor to the Claimants' home to assess and repair the pool.³ The subcontractor drained and acid-washed the pool and cut stained pieces from the pool shell and patched them. There are visible patches in the pool.

12. The subcontractor informed the Claimants that either the Respondent did not pour the concrete thick enough, or he positioned the reinforcing bar (rebar) too close to the surface of the concrete. The rebar was rusting and the rust was bleeding through the concrete pool shell.

13. The Claimants immediately informed the Respondent of the subcontractor's findings.

² Closing the pool occurs in October and opening the pool occurs in April.

³ It was unclear whether the subcontractor came to the Claimants' home before or after the 2014 pool season; however, because the subcontractor drained the pool, I infer that his inspection occurred at the close of the 2014 pool season.

14. On April 23, 2015, the Claimants sent the Respondent an email which detailed the history of events since they discovered the pool staining, as well as their efforts to have the Respondent repair the pool.

15. The Respondent telephoned the Claimants in response to their April 2015 email and informed the Claimants that he would not pay for any repairs to their pool as the warranty had expired. The Respondent became agitated and hung up on the Claimants.

16. Industry standards require that the concrete or gunite⁴ shell should be six to six and one-half inches thick, with the rebar situated approximately in the middle, or at three to three and one quarter inches, followed by plaster on the surface of the pool shell.

17. During the construction of the pool, the Respondent positioned the rebar, in numerous places throughout the pool shell, too close to the surface of the cement which caused the rebar to rust and stain the pool shell.

18. The entire pool shell must be replastered and the stained areas repaired.

19. The Claimants sustained an actual loss of \$13,340.00

DISCUSSION

In this case, the Claimants have the burden of proving the validity of their claim by a preponderance of the evidence. Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3).⁵ "[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)).

⁴ Gunite is the pressurized application of concrete.

⁵ As noted above, "COMAR" refers to the Code of Maryland Regulations.

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) (2015);⁶ *see also* COMAR 09.08.03.03B(2) (“actual losses . . . incurred as a result of misconduct by a licensed contractor”). Actual loss “means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.” Bus. Reg. § 8-401. For the following reasons, I find that the Claimants have proven eligibility for compensation.

The Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant. The Respondent performed unworkmanlike, inadequate or incomplete home improvements.

The Claimants’ Case

The Claimant testified that she and her husband entered into a contract with the Respondent in February 2010 to construct a swimming pool on their property in Harford County, Maryland. In total, the Claimants paid the Respondent the full contract price of \$40,000.00 and an additional \$2,000.00 pursuant to a contract addendum, which brought the total contract price to \$42,000.00. (Cl. Ex. 2).

There were no obvious issues during the construction of the pool. The issues arose in 2012 when the Claimants noticed “stains” on the pool shell. Believing the stains were caused by algae, the Claimants purchased an algae-remover product. They also contacted the Respondent about the stains and, pursuant to the instructions of the Respondent, used a wire brush to try to ameliorate the stains. The Claimants closed the pool at the end of the 2012 season and believed the algae would die over the winter. However, the staining was worse when the Claimants

⁶ Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 Replacement Volume.

opened the pool in 2013. The Claimants again contacted the Respondent who told them that he would come to their home at the end of the 2013 pool season and remedy the staining problem. The Respondent failed to keep his promise to come to the Claimants home, but promised he would come in 2014.

In 2014, the Respondent sent a contractor to the Claimants' home to inspect their pool. The contractor drained and acid-washed the pool, and cut stained pieces from the pool shell, which left visible patches. (Cl. Exs. 3a and 3b). The contractor left the cut-out pieces of the pool shell with the Claimants and informed them that the staining was caused by rusting rebar which occurred because either the concrete was not poured thick enough or the rebar was positioned too close to the surface of the concrete. (Cl. Ex 4). The Claimants telephoned the Respondent and relayed the information the contractor had given them. The Respondent took no action to remedy the problems with the pool in 2014.

In April 2015, the Claimants again called the Respondent to repair the deficiencies in the construction of their pool. During that conversation, the Respondent informed the Claimants that the pool was no longer under warranty and that they would have to pay for any work the Respondent performed to repair the pool.

The Claimants sent the Respondent a follow-up email, dated April 23, 2015, which outlined the chain of events from 2012 until their most recent phone conversation with the Respondent. The email asserted that the pool was still under warranty and implored the Respondent to repair the problems with the pool. (Cl Ex. 6.) In response to the Claimants' email, the Responded phoned the Claimants and informed them that he would not pay for anything else related to the pool repair and that their warranty had expired. However, he would send a contractor over to inspect the pool in June 2015, as May was a very busy time for him. The Respondent became agitated and abruptly ended the phone call by hanging up on the Claimants.

On July 29, 2015, the Claimants again emailed the Respondent asking that he correct the deficiencies in the pool and honor the warranty. The Claimants had no further contact with the Respondent. (Cl. Ex. 6.)

The Claimants obtained an estimate of \$13,340.00 from Catalina PoolBuilders to repair the defects to their pool, which did not include \$1,300 to refill the pool with water, \$250.00 to replenish the initial pool chemicals and \$875.00 for bond coating, which were listed separately on the estimate. (Cl. Ex. 7.)⁷

In further support of their claim, the Claimant presented the testimony of Al Erdi, P.E., a structural engineer who was accepted as an expert in pool construction, engineering and industry standards. He holds a bachelor of science in civil engineering and a master's degree in structural engineering. He has been a consultant to the swimming pool industry since 1975 and prepared the plans for the Claimants' pool in 2010. (Cl. Ex. 1).

Mr. Erdi conducted visual and physical examinations on the pool shell and other pool-related components between July 15, 2016 and August 25, 2016 and prepared a report of his findings. (Cl. Ex. 1). He noted discoloration/rusty areas along the walls of the pool as well as on the bottom of the pool shell. Mr. Erdi testified that industry standards require that the concrete or gunite shell should be six to six and one-half inches thick, with the rebar situated approximately in the middle, or at three to three and one quarter inches, followed by plaster on the surface of the pool shell. In conjunction with his inspection and assessment, the Claimants showed Mr. Erdi the portion of the pool shell which the Respondent's contractor had cut out in 2014 (sample). Mr. Erdi determined that the rebar was "quite close" to the surface of the concrete. In fact, the gunite portion of the sample measured only two and three eighths inches, not the industry standard six

⁷ I find that the additional expenses related to the pool refill, pool chemicals and bond coating were not directly related to the pool repair, but are consequential damages and cannot be considered in determining the Claimants' actual loss. COMAR 09.08.03.03B(1)

to six and one half inches. The rebar ran parallel at the surface of the gunite, so close to the surface that the rebar appeared quite rusted. (Cl. Ex. 1, attachment 8).⁸ Mr. Erdi observed the filled pool and could see discoloration close to the tile line and verified that rebar was at or very near the surface of the gunite. He concluded that the finish on the pool was inadequate because of the shallow placement of the rebar within the gunite. The only acceptable way to repair the existing condition of the pool is to remove all of the plaster down to the steel rebar, repair the damaged areas and apply new plaster to the entire pool.

The Respondent

The Respondent was not present at the hearing and, thus, did not testify. His wife/authorized representative offered a copy of the Contract in support of the Respondent's position that the pool was no longer under warranty. (Resp. Ex. 1.)

Analysis

First, I reject the Respondent's contention that the pool is no longer covered by warranty. The warranty portion of the Contract clearly provides that the pool shell is warranted "for as long as you own your pool." (Cl. Ex. 2; Resp. Ex. 1.) There is no evidence before me that the Claimants were in any way responsible, through "improper drainage, maintenance, winterization, misuse or [their] failure to follow operating instructions" for the rusting which was evident in their pool. *Id.*

The evidence before me is quite clear that the Respondent's workmanship on the Claimants pool was inadequate because he did not follow industry standards in the placement of the rebar in the center of the gunite or cement. The photographs offered by the Claimants unmistakably show the bleeding of rust on the surface of the pool shell and around the pool

⁸ The photographs attached to Cl. Ex. 1 were pre-marked as "exhibits." For the sake of clarity, I will refer to them as "attachments."

lights, as well as the unsightly patches where the Respondent's contractor cut out samples of the damaged shell. Even a spot or two of rust on the pool shell would warrant eligibility for compensation; however, the damage caused by the inadequately placed rebar is evident on many places throughout the pool shell. I thus find that the Claimants are eligible for compensation from the Fund.

Having found eligibility for compensation, I now turn to the amount of the award to which the Claimants are entitled. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest. COMAR 09.08.03.03B(1). MHIC's regulations provide three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). The following formula offers an appropriate measurement to determine the amount of actual loss in this case.

If the contractor did work according to the contract and the claimant has solicited or is soliciting another contractor to complete the contract, the claimant's actual loss shall be the amounts the claimant has paid to or on behalf of the contractor under the original contract, added to any reasonable amounts the claimant has paid or will be required to pay another contractor to repair poor work done by the original contractor under the original contract and complete the original contract, less the original contract price. If the Commission determines that the original contract price is too unrealistically low or high to provide a proper basis for measuring actual loss, the Commission may adjust its measurement accordingly.

COMAR 09.08.03.03B(3)(c).

Applying the above formula to the facts of this case, the calculation of damages is as follows:

Amount paid to the Respondent:	\$42,000.00
Cost to repair	+ <u>\$13,340.00</u>
	= \$55,340.00
Original contract price	- \$42,000.00
Actual loss	= \$13,340.00

Pursuant to the applicable law, the maximum recovery from the Fund is limited to the lesser of \$20,000.00 or the amount paid by or on behalf of the Claimants to the Respondent. Md. Code Ann., Bus. Reg. § 8-405(e)(1), (5) (2015).

PROPOSED CONCLUSION OF LAW

I conclude that the Claimants have sustained an actual and compensable loss \$13,340.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(c).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimants \$13,340.00; and

ORDER that the Respondent is ineligible for a Maryland Home Improvement Commission license until the Respondent reimburses the Guaranty Fund for all monies disbursed under this Order, plus annual interest of ten percent as set by the Maryland Home Improvement Commission;⁹ and

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

Signature on File

July 31, 2017
Date Decision Issued


M. Teresa Garland
Administrative Law Judge

MTG/sw
#168462

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

PROPOSED ORDER

WHEREFORE, this 21st day of August, 2017, Panel B of the Maryland Home Improvement Commission approves the Recommended Order of the Administrative Law Judge and unless any parties files with the Commission within twenty (20) days of this date written exceptions and/or a request to present arguments, then this Proposed Order will become final at the end of the twenty (20) day period. By law the parties then have an additional thirty (30) day period during which they may file an appeal to Circuit Court.

Joseph Tunney

***Joseph Tunney
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION