

**IN THE MATTER OF THE CLAIM OF \* MARYLAND HOME  
THOMAS HYSON \* IMPROVEMENT COMMISSION  
AGAINST THE MARYLAND HOME \*  
IMPROVEMENT GUARANTY FUND \* MHIC CASE NO. 18(90)1199  
FOR THE ACTS OR OMISSIONS OF \* OAH CASE NO. LABOR-HIC-  
WILLIAM O'BRIEN T/A MID- \* 02-19-18826  
ATLANTIC POOL SERVICE, INC. \***

\* \* \* \* \*

**FINAL ORDER**

This matter was originally heard before an Administrative Law Judge (“ALJ”) of the Office of Administrative Hearings (“OAH”) on September 12, 2019. Following the evidentiary hearing, the ALJ issued a Corrected Proposed Decision on January 8, 2020, concluding that the homeowner, Thomas Hyson (“Claimant”) failed to prove that he suffered an actual loss as a result of the acts or omissions of William O’Brien t/a Mid-Atlantic Pool Service, Inc. (“Contractor”). *ALJ Corrected Proposed Decision* p.7. In a Proposed Order dated February 10, 2020, the Maryland Home Improvement Commission (“MHIC” or “Commission”) affirmed the Corrected Proposed Decision of the ALJ to deny an award from the Home Improvement Guaranty Fund. The Claimant subsequently filed exceptions to the MHIC Proposed Order.

On October 15, 2020, a three-member panel (“Panel”) of the MHIC held a remote hearing on the exceptions filed in this matter. The Contractor participated without counsel. The Claimant, whose request that the hearing be continued until it could be conducted in-person was denied because he failed to demonstrate good cause for not proceeding with a remote hearing, did not participate in the remote hearing. Assistant Attorney General Shara Hendler appeared at the exceptions hearing on behalf of the Guaranty Fund. The Commission entered the following preliminary exhibits as part of the record of the exceptions hearing without objection: 1) July 14, 2020 hearing notice; 2) February 10, 2020 transmittal letter, ALJ Proposed Decision, and MHIC Proposed Order; 3) Claimant’s exceptions; 4) October 5, 2020 virtual hearing notice. Neither the



Claimant nor the Contractor produced a copy of the transcript of the hearing before the ALJ. The Claimant sought to introduce new evidence but he failed timely to submit a request to present additional evidence, and the record demonstrates that he discovered the document he wanted in evidence, a \$15,900.00 estimate from Nova Pools, was available before the OAH hearing because he referenced it during his testimony before the ALJ, *ALJ Corrected Proposed Decision* p. 8. Therefore, the Panel's review of the record was limited to the preliminary exhibits for the exceptions hearing, the ALJ's Corrected Proposed Decision, and the exhibits admitted into evidence at the OAH hearing. COMAR 09.01.03.09(G) - (I).

The claim in this proceeding relates to a contract between the parties for the installation of a swimming pool at the Claimant's home. The ALJ found that the Claimant failed to prove that he suffered an actual loss as a result of unworkmanlike, inadequate, or incomplete performance by the Contractor. *ALJ Corrected Proposed Decision* pp. 6-8.

On exception, the Claimant argued that the ALJ should have allowed him to submit additional evidence.

Although the ALJ's Corrected Proposed Decision does not mention a request by the Claimant to present additional evidence at the OAH hearing and the Claimant did not provide a transcript of the OAH hearing, it appears that the additional evidence that he hoped to present was a \$15,900.00 Nova Pools estimate that the Claimant referenced during his testimony. The Commission finds no error with the ALJ's purported refusal to allow the Claimant to present additional evidence after the hearing. It was the Claimant's responsibility to bring his evidence with him to the OAH hearing and present it during the hearing so that the Contractor would have an opportunity to respond to the evidence. There is no indication in the record that allowing the submission of evidence after the hearing would have been proper.



Having considered the parties' arguments, the evidence contained in the record, and the ALJ's Recommended Decision, it is this 23rd day of October 2020, **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**;
- C. That the Proposed Decision and Recommended Order of the Administrative Law Judge is **AFFIRMED**;
- D. That the records and publications of the Maryland Home Improvement Commission shall reflect this decision; and
- E. Any party has thirty (30) days from the date of this Final Order to appeal this decision to Circuit Court.

**Michael Shilling**  
**Chairperson –Panel**  
**Maryland Home Improvement**  
**Commission**



<p><b>IN THE MATTER OF</b></p> <p><b>THE CLAIM OF THOMAS HYSON,</b></p> <p><b>CLAIMANT,</b></p> <p><b>AGAINST THE MARYLAND HOME</b></p> <p><b>IMPROVEMENT COMMISSION</b></p> <p><b>GUARANTY FUND FOR THE ACTS</b></p> <p><b>OR OMISSIONS OF WILLIAM</b></p> <p><b>O'BRIEN t/a MID-ATLANTIC POOL</b></p> <p><b>SERVICE, INC.,</b></p> <p><b>RESPONDENT</b></p>	<p><b>* BEFORE LATONYA B. DARGAN,</b></p> <p><b>* AN ADMINISTRATIVE LAW JUDGE</b></p> <p><b>* OF THE MARYLAND OFFICE</b></p> <p><b>* OF ADMINISTRATIVE HEARINGS</b></p> <p><b>*</b></p> <p><b>*</b></p> <p><b>*</b></p> <p><b>*</b></p> <p><b>* OAH No.: DLR-HIC-02-19-18826</b></p> <p><b>* MHIC No.: 18 (90) 1199<sup>1</sup></b></p>
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**CORRECTED PROPOSED DECISION**

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

**STATEMENT OF THE CASE**

On December 20, 2018, Thomas Hyson (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) seeking reimbursement for actual monetary losses allegedly suffered as the result of the acts or omissions of William O'Brien (Respondent), t/a Mid-Atlantic Pool Service, Inc., under a home improvement contract for a project at the Claimants' residence. Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411

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<sup>1</sup> On January 7, 2020, the Maryland Home Improvement Commission notified the Office of Administrative Hearings that this matter was transmitted to the OAH with an incorrect MHIC case number. This Corrected Proposed Decision is issued to amend the MHIC case number from 19 (90) 1199 to the proper case number, 18 (90) 1199. The Proposed Decision is otherwise unchanged.

(2015).<sup>2</sup> On June 4, 2019, the MHIC ordered that the Claimant should have a hearing to establish his eligibility for an award from the Fund. On June 7, 2019, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On September 12, 2019, I conducted a hearing at the OAH in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. § 8-407(e). The Claimant represented himself. William Butler, Esquire, represented the Respondent, who was present. Kris King, Assistant Attorney General, Department of Labor (Department)<sup>3</sup>, represented the Fund.

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

### ISSUES

1. Did the Claimant sustain an actual monetary loss compensable by the Fund as a result of the Respondent's acts or omissions; and, if so
2. What is the amount of the loss?

### SUMMARY OF THE EVIDENCE

#### Exhibits

I admitted the following exhibits for the Claimant:

- CL Ex. 1: Contract, March 24, 2017
- CL Ex. 2: Photograph, Tarp, May 2017
- CL Ex. 3: Photograph, Corner of the Pool, May 2017
- CL Ex. 4: Photograph, Corner of the Pool, May 2017
- CL Ex. 5: Photograph, Corner of the Pool, May 2017
- CL Ex. 6: Photograph, Side of the Pool, May 2017
- CL Ex. 7: Photograph, Expansion Joint, May 2017
- CL Ex. 8: Photograph, Coping, May 2017 (orient with water at bottom)
- CL Ex. 9: Photograph, Corner of the Pool, Near the Retaining Wall, May 2017

<sup>2</sup> Unless otherwise specified, all references to the Business Regulation Article are to the version contained in the 2015 volume and 2019 supplement.

<sup>3</sup> On July 1, 2019, the Maryland Department of Labor, Licensing & Regulation became the Department of Labor.



- CL Ex. 10: Photograph, Painted Overlay, August 2017  
CL Ex. 11: Photograph, Expansion Joints and Painting, August 2017  
CL Ex. 12: Photograph, Crack in Cement Deck, November/December 2017

I admitted the following exhibits for the Fund:

- FUND Ex. 1: OAH Notice of Hearing, issued on July 23, 2019, with attached MHIC Order for Hearing, issued on June 4, 2019  
FUND Ex. 2: Respondent's MHIC Licensure Information, printed September 11, 2019  
FUND Ex. 3: MHIC Claim Form, signed December 16, 2018, received at the MHIC on December 20, 2018, with attachment  
FUND Ex. 4: MHIC's Letter to the Respondent, January 7, 2019

The Respondent did not submit exhibits.

### Testimony

The Claimant testified and did not present other witnesses. Neither the Respondent nor the Fund presented 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 home improvement contractor licensed by the MHIC.
2. On March 24, 2017, the Claimant entered into a contract (Contract) with the Respondent for the Respondent to construct an in-ground pool at the Claimant's residence in Perry Hall, Maryland.
3. Under the Contract, the Respondent was to construct a 361 square foot concrete deck around the pool. Both the deck and the bottom of the pool were to have a "broom finish", which is done to ensure the concrete surface is not too slick or smooth, because if the surface is either of those things, a fall hazard is created once the surface gets wet.
4. Under the Contract, the installation of the pool included the following:
  - Excavation
  - Erection of steel walls

- Installation of concrete bond beam around perimeter of the pool wall
- Sanding of the pool floor
- Installation of pool liner.

5. In addition to the broom finish, the Respondent was to lay down a coating of Ardex on the pool deck, which is designed to ensure the concrete surface is uniform in color and appearance.

6. Under the Contract, the pool workmanship was guaranteed for one year from the date of completion of the job.

7. The total contract price was \$30,500.00. The Claimant paid the Respondent nearly the full price, \$30,000.00, upon the signing of the Contract on March 24, 2017, with the balance due at the time the liner was installed and the pool filled with water.

8. Work on the project took place between approximately April 2017 and July 2017.

9. Once the concrete for the deck was poured and set, the Claimant was dissatisfied as the concrete appeared to be rough and spiky in some sections, and cracked and separating in others.

10. The Claimant contacted the Respondent and relayed his concerns. The Respondent suggested sanding the surface in the problem areas. The Claimant agreed, but was still dissatisfied with the feel of the deck and pool surface even after the Respondent sanded the problem areas.

11. The Claimant was also concerned because there were some areas of the deck where the concrete was not flush against the coping and expansion joints.

12. The Respondent used two subcontractors, Montana Concrete and DaSilva Construction, to try to fix the issues the Claimant had with the concrete surface of the deck and pool floor, but the Claimant remained dissatisfied. At some point in or around July 2017, the Claimant advised the Respondent he wanted the job torn up and redone. At that point, the

Respondent advised the Claimant there was nothing more he could do and that he had already spent too much money attempting to correct the areas with which the Claimant was dissatisfied.

13. At some point in 2018, the Claimant obtained an estimate from Nova Pools for the cost of re-doing the work performed by the Respondent, in the amount of \$15,900.00.

### DISCUSSION

In this case, the Claimant has the burden of proving the validity of the claim by a preponderance of the evidence. Md. Code Ann., Bus. Reg. §8-407(e)(1); 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)). Under this standard, if the supporting and opposing evidence is evenly balanced on an issue, the finding on that issue must be against the party who bears the burden of proof. *Id.*

An owner may recover compensation from the Fund “for an actual loss that results from an act or omission by a licensed contractor.” Md. Code Ann., Bus. Reg. § 8-405(a); *see also* COMAR 09.08.03.03B(2) (“actual losses . . . incurred as a result of misconduct by a licensed contractor”). “[A]ctual 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. After considering the evidence, I find the Claimant is not eligible for an award from the Fund.

The evidence demonstrates the Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimant. The dispute between the parties centers on the workmanship of the Respondent’s construction/installation of the pool. According

to the Claimant, the concrete work was substandard. It was rough, patchy, and spiky in several places, and in other places, the concrete was not flush against the expansion joints or pool coping, which is the material above the tile line that generally covers the top of the pool structure. Additionally, in approximately November or December 2017, a crack developed along the pool deck. The Claimant argued he advised the Respondent, multiple times, of his dissatisfaction with the concrete work, and he gave the Respondent several opportunities to correct the issues the Claimant had, but the Respondent was not able to do so. The Claimant felt that because the pool was new, it "should have been perfect" and there were too many visible imperfections, even after the Respondent had two different concrete subcontractors attempt corrections. The Claimant sought an award from the Fund in the amount of \$15,900.00, which was the estimate given to him by Nova Pools for the cost of essentially tearing out the current pool and completely replacing it.

Both the Respondent and the Fund argued against an award to the Claimant. The Respondent argued the Claimant has not satisfied his burden of persuasion to demonstrate an actual monetary loss as a result of the inadequate, incomplete or unworkmanlike work performed by the Respondent. The Respondent acknowledged he met with the Claimant several times to discuss the Claimant's concerns about the job and then, at the Respondent's expense, he attempted to fix the Claimant's concerns. The Respondent argued that although the Claimant elected to have the entire job torn up and done again, he presented no expert testimony from anyone within the pool installation industry that either (i) the complete demolition of the job was necessary, first of all, or (ii) it was necessary *because of* the Respondent's inadequate, incomplete, or unworkmanlike performance as a home improvement contractor. There was no documentary evidence, such as an estimate from another contractor who installs in-ground pools, to demonstrate the alleged faults with the Respondent's work, or to demonstrate what it would cost to repair the allegedly faulty work.

The Fund concurred with the Respondent. It further noted the Claimant has not presented evidence to support the \$15,900.00 amount included on Line 9 of the Claim Form. There was no estimate from another contractor containing that amount in the documentary evidence, or explaining how that amount was determined to be the cost of repairing or replacing the Respondent's existing work. The Fund additionally argued the record does not contain any meaningful evidence demonstrating the allegedly inadequate and unworkmanlike job by the Respondent. For example, there was no expert opinion – either written or provided via testimony – to explain what the Respondent allegedly did incorrectly; the evidence presented does not support a finding the entire job had to be redone.

I agree with the Respondent and the Fund. The only evidence which provides a visual record of the Respondent's work after its completion is the photographs. As a layperson, I am not able to discern anything substandard or inadequate about the work depicted. I do see some areas of separation, but I can reasonably infer that is to be expected not only once the concrete dries (and thus shrinks), but also as the pool itself settles into the surrounding ground. (CL Exs. 3-5, 7, 11.) Of the photographs which depict the pool coping, the edging of the concrete against the coping does not appear to be unduly amiss and it is clear that photographs were taken close up, and not from the vantage point of someone standing or walking at their full height along the pool deck; there is nothing that appears inadequate about the concrete relative to the coping. (CL Exs. 6, 8.) The photographs do not convey the unusually rough, patchy, spiky nature of the concrete as described by the Claimant, and at least three of the photographs depict a relatively smooth finish. (CL Exs. 9-11.) The large, visible crack in Claimant Exhibit 12 is concerning, but the Claimant did not produce any evidence to demonstrate the crack occurred because of the Respondent's allegedly inadequate or unworkmanlike performance.

The Claimant seeks an award from the Fund in the amount of \$15,900.00. As the Respondent and the Fund correctly noted, there is no evidence to support that amount. The Claimant referenced an estimate from Nova Pools, and he used the estimate amount as the award he was seeking from the Fund in preparing his claim. (Fund Ex. 3.) The Claimant did not, however, produce the estimate as documentary evidence, nor did he have anyone from Nova Pools testify about how the \$15,900.00 amount was determined, including what portion of that amount would go towards the cost of repairing or replacing the work done by the Respondent. The Claimant has failed to demonstrate he sustained an actual monetary loss compensable by the Fund. I recommend against an award to the Claimant.

**PROPOSED CONCLUSIONS OF LAW**

Based on the Proposed Findings of Fact and Discussion, I conclude as a matter of law that the Claimant did not sustain an actual monetary loss compensable by the Fund as a result of the Respondent's acts or omissions, and the Claimant is not entitled to an award from the Maryland Home Improvement Commission Guaranty Fund. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015).

**RECOMMENDED ORDER**

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

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

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

January 8, 2020  
Date Decision Issued

**CONFIDENTIAL**

Latonya B. Dargan  
Administrative Law Judge

LBD/cmg  
#183888

PROPOSED ORDER

*WHEREFORE, this 10<sup>th</sup> day of February, 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.*

*Robert Altieri*

*Robert Altieri*

*Panel B*

*MARYLAND HOME IMPROVEMENT  
COMMISSION*

