

**IN THE MATTER OF THE CLAIM
OF ANGELA M. RATHELL,
CLAIMANT,
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF ARTHUR C. TATE, JR.,
T/A NOVA CONSTRUCTION,
RESPONDENT**

*** BEFORE JOY L. PHILLIPS,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No.: DLR-HIC-02-13-25828
* MHIC No.: 13 (90) 47
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PROPOSED DECISION

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

STATEMENT OF THE CASE

On November 8, 2012, Angela M. Rathell (Claimant), filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$11,000.00 for alleged actual losses suffered as a result of a home improvement contract with Arthur C. Tate, Jr., t/a Nova Construction (Respondent).

I held a hearing on May 16, 2014 at the Department of Agriculture, Riva Road, Annapolis, Maryland. Md. Code Ann., Bus. Reg. § 8-312 (Supp. 2013) and § 8-407 (2010). Hope Sachs, Assistant Attorney General, Department of Labor, Licensing and Regulation

(Department), represented the Fund. The Claimant represented herself. The Respondent represented himself.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, 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 (2009 & Supp. 2013), Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02, and 28.02.01.

ISSUES

1. Did the Claimant 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 Claimant's behalf:

Claimant Ex. 1	Photos, power point explanation of case and water bills
Claimant Ex. 2	E-mail exchange between the parties, dated June 20-21, 2012
Claimant Ex. 3	Contract, signed August 5, 2008
Claimant Ex. 4	Bank statement for October 2008
Claimant Ex. 5	Bank statement for February 2013

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

Fund Ex. 1	Notice of Hearing, dated March 20, 2014
Fund Ex. 2	Notice of Hearing, dated October 10, 2013 and Hearing Order
Fund Ex. 3	Licensing Information, printed February 10, 2014
Fund Ex. 4	Letter from MHIC to the Respondent, dated November 30, 2012

The Respondent submitted no exhibits to be admitted into evidence.

Testimony

The Claimant testified in her own behalf.

The Respondent presented the testimony of Mark Weeks.

The Fund presented no witnesses.

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 01-45377.

2. On August 5, 2008, the Claimant and the Respondent entered into a contract to install an in-ground pool and surrounding patio at the Claimant's home (Contract).

3. The original agreed-upon Contract price was \$57,000.00. The parties agreed to one verbal change order, adding a diving board to the pool at a cost of \$1,750.00, bringing the final Contract price to \$58,750.00.

4. The Claimant paid the Respondent as follows:

\$7,000.00	10/3/2008
22,000.00	10/16/2008
8,000.00	10/16/2008
10,000.00	11/16/2008
8,750.00	12/2/2008
2,000.00	1/23/2009
TOTAL PAID: \$57,750.00	

5. The pool and patio were completed by April 1, 2009.

6. Sometime in 2010, a hole was discovered in the pool liner. The Respondent agreed to replace the pool liner and he did so.

7. As the new liner was being installed by the Respondent's crew, a hole was created in the liner near one of the jets and was improperly patched.

8. Sometime after the new liner was installed in 2010, the Claimant noticed that the pool water decreased at a noticeably quick rate and as a result, the Claimant had to add water to the pool about every other day. During the winter months, when the pool was closed and the water level was reduced beneath the level of the jets, the water level did not decline.

9. During the summer of 2011, after the pool was reopened and the water level was raised above the jets, the water again noticeably declined and as a result, the Claimant had to add water to the pool about every other day. Additionally, the Claimant noticed that some of the pavers in the pool patio were shifting, tilting and depressing, reflecting a weakening in the foundation. Again during the winter of 2011, when the pool was closed and the water level was below the jets, the pool did not lose water.

10. John Stinemire of Excalibur Leak Detection evaluated the water leakage in June 2012 and discovered the improperly patched hole around the jet.

11. In June 2012, after the hole around the jet was discovered, the Claimant e-mailed the Respondent, who agreed to address the problem but asked the Claimant to remit the balance of payments, which the Respondent claimed was \$6,000.00.

12. In July 2012, John Stinemire patched the hole, at a total cost to the Claimant of \$350.00. His repair stopped the Claimant's pool water leakage.

13. In February 2013, the Claimant hired Done Right Lawn and Landscaping to remove the shifting, tilting, depressed pavers and replace the foundation and pavers around the pool patio. The Claimant paid Done Right \$4,500.00.

14. Since the Claimant had the pool liner repaired and the pavers and foundation of the pool patio replaced, the water leakage has stopped and there has been no further damage to the patio.

15. The Claimant's actual loss is \$3,850.00.

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) (Supp. 2013). *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.” Md. Code Ann., Bus. Reg. § 8-401 (2010). For the following reasons, I find that the Claimant has proven eligibility for compensation.

The Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant. The Claimant established that she hired the Respondent to install an in-ground pool at her home in 2008-2009. The pool was to be surrounded by a patio comprised of pavers. There was one verbal change order calling for the installation of a diving board, bringing the total Contract price to \$58,750.00. The Respondent installed the pool as contracted. In 2010, a hole was discovered in the original pool liner and the Respondent agreed to replace the liner, which he did. It was at this point that the problem developed.

Without the knowledge of the Respondent’s job supervisor, Mark Weeks, when the new liner was installed, a hole was created around one of the jets. The worker installing the liner apparently patched the hole without telling Mr. Weeks, but the patch was inadequate and poorly applied. As a result of the faulty patch, water began to leak out of the pool at a rapid enough rate that the Claimant had to add water to the pool about every other day. In the fall of 2010, the pool was closed up for the winter, the water level decreased to beneath the jet, and the water leakage stopped. In the spring of 2011, when the pool was reopened, the water leakage began again. The Claimant also began to notice problems with some of the patio pavers tilting and depressing. The Claimant put up with the problems throughout that summer and closed the pool in the fall.

In the spring of 2012, when the pool was reopened, the water leakage began again. Again, the Claimant noticed that the pavers were sinking, shifting and caving into the foundation.

Photographs of the pool and patio show clearly the inadequate hole patch and the problem with the pavers. The Claimant hired John Stinemire, an expert in the area of pool leak detection, to diagnosis the problem. Mr. Stinemire discovered the faulty patch and explained that it was source of the water leakage and the patio paver problem.

The Claimant contacted the Respondent to ask that he repair the problems. The Respondent agreed to do so in an e-mail dated June 20, 2012, but alleged that the Claimant still owed him \$6,000.00 on the Contract price and said he wanted payment before making the repairs. Instead, the Claimant hired Mr. Stinemire to install an inexpensive patch that has solved the problem of the water leakage. The following February, the Claimant hired a landscaping business to replace the pavers and foundation. Since those repairs have been completed, the pool no longer leaks water and the pavers and foundation of the patio no longer shift or cave in.

Mark Weeks testified that he has installed many pools during his career. He acknowledged that the patio pavers were caving in and shifting but said there are many possible causes for that happening, including drainage issues, underground water and pool leakage. He testified that he did not actually install the replacement liner himself. He acknowledged that the pool liner had been patched around the jet where a hole had been cut and that he had no knowledge of either the hole or the faulty patch. He admitted that one of his workers could have installed the patch after realizing that the liner had been cut and damaged and not told him.

While I respect Mr. Weeks' years of experience in installing pools, the evidence shows that since the faulty patch was installed and the patio foundation and pavers were replaced, the pool no longer leaks water and the patio pavers no longer shift and cave in. There is no evidence that anything other than the faulty patch caused the problems. Thus, I conclude that the

problems with the pool and patio stemmed directly from the faulty patch installed by one of the Respondent's workers in 2010. Accordingly, I conclude that the Respondent performed unworkmanlike, inadequate or incomplete home improvements. I thus find that the Claimant is eligible for compensation from the Fund.

Having found eligibility for compensation I now turn to the amount of the award, if any, to which the Claimant is 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 offer three formulas for measuring a claimant's actual loss. COMAR 09.08.03.03B(3). One of those formulas, as follows, 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).

In an effort to repair the shifting, depressed pavers and the pool liner, the Claimant obtained several estimates from various companies. One company, Ashlyn Pools, estimated that it would cost \$12,000.00 to repair the pool and the patio. This estimate involved replacing the pool liner. Another company, Continental Landscape, estimated it would cost \$6,300.00 to replace the pavers. Ultimately, the Claimant hired Done Right to replace the pavers and foundation at a cost of \$4,500.00, after John Stinemire repaired the pool liner, at a cost of \$350.00. The Claimant made a reasonable attempt to request that the Respondent repair the problem. When he declined to do so, citing an unpaid balance on her bill, she hired others to

make the repairs at the lowest cost available. Once the repairs were made, the pool stopped leaking water and the patio pavers stopped shifting and depressing. Thus, the Claimant's repairs were both necessary and reasonable.

The Claimant was able to provide bank statements showing cancelled checks for each payment she made to the Respondent with one exception. On January 23, 2009, she wrote a check to the Respondent for \$2,000.00 (check #3272). She did not bring in a bank statement to the hearing to show that cancelled check, but her notes did indicate the check number. Because she knew the check number and because I found her credible in all other respects in regard to her testimony and how she handled this matter, I conclude that she did, in fact, make another payment of \$2,000.00 in January 2009. Thus, I conclude that the Claimant's total payments to the Respondent were \$57,750.00.

The Claimant also requested reimbursement from the Fund for the cost of the water that leaked out of the pool between 2010 and 2012, when the leak was repaired. She compared the amount of water her household used in 2010 through 2013, showed that her water usage increased during the years before the hole in the pool liner was discovered and patched and argued that she should be reimbursed for the excess water usage. She created a chart to support her request for \$265.32 in reimbursement, reflecting an excess usage of an average of 49.5 units in 2010 and 2011 at \$2.68 per unit. (Claimant Ex. 1, p. 22.) I am sympathetic to the Claimant's argument, but she did not introduce evidence in support of her chart, so I am unable to determine her actual water usage or the cost per unit she was charged. Accordingly, I do not find she has supported her argument with satisfactory evidence and decline to propose reimbursement for excess water usage.

The Respondent argued that the claim should be barred because it was filed outside of the three-year statute of limitations period. He contended that it should have been filed no later than April 2012, three years after he installed the pool. The Respondent is incorrect.

The relevant regulation is found at COMAR 09.08.03.02 and provides as follows:

G. Time Limitation. A claim may not be brought against the Fund after 3 years from the date that the claimant discovered, or by exercise of ordinary diligence should have discovered, the loss or damage.

The basis for the claim did not arise in 2009 when the first pool liner was installed as part of the original construction of the pool and patio, but in 2010, when the Respondent replaced the original pool liner due to a hole in the liner. It was at that point that another hole was created in the pool liner and inadequately patched. The water leakage from that hole and patch continued over the next two years until the Claimant was able to correctly diagnose the problem. It took some time for the water leakage to affect the patio pavers. Once the inadequate patch was discovered and repaired by Mr. Stinemire, in 2012, the water leakage stopped. The Claimant filed her claim only a few months after she discovered the damage, in November 2012. As was pointed out by the Fund in its argument, the claim was filed well within the statutory period.

The Fund agreed that the Claimant established her claim for reimbursement except as to the evidence of water loss, which, it argued and as I also concluded, was too speculative to support the claim.

Applying the formula set out above, I find that the Claimant sustained an actual loss as follows:

Amount Paid to the Respondent	\$57,750.00
Amount Paid to Correct Work	<u>+\$ 4,850.00</u>
	\$62,600.00
Amount of Contract	<u>-\$58,750.00</u>
Amount of Actual Loss	\$ 3,850.00

Accordingly, I recommend an award to the Claimant in the amount of \$3,850.00.

PROPOSED CONCLUSION(S) OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Claimant has sustained an actual and compensable loss of \$3,850.00 as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401 (2010); COMAR 09.08.03.03B(3)(c).

PROPOSED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$3,850.00; 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 at least ten percent as set by the Maryland Home Improvement Commission. Md. Code Ann., Bus. Reg. § 8-411(a) (2010); and

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

Signature on File

July 22, 2014
Date Decision Mailed

Joy L. Phillips
Administrative Law Judge

JLP/kkc
#150554

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FILE EXHIBIT LIST

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- Claimant Ex. 2 E-mail exchange between the parties, dated June 20-21, 2012
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