IN THE MATTER OF THE CLAIM	*	**BEFORE DEBORAH S. RICHARDSON,**
OF ANDREA PAIGHT AND	*	**AN ADMINISTRATIVE LAW JUDGE**
MICHELLE LEBAN,	*	**OF THE MARYLAND OFFICE**
CLAIMANTS	*	**OF ADMINISTRATIVE HEARINGS**
AGAINST THE MARYLAND HOME	*	
IMPROVEMENT GUARANTY FUND	*	
FOR THE ALLEGED ACTS OR	*	
OMISSIONS OF MARK MASTEN,	*	**OAH No.: LABOR-HIC-02-19-37821**
T/A MASTEN POOLS, INC.,	*	**MHIC No.: 19 (90) 1183**
RESPONDENT	*	

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PROPOSED DECISION

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STATEMENT OF THE CASE

On June 25, 2019, Michelle Leban and Andrea Paight (Claimants) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund), under the jurisdiction of the Department of Labor (Department),[1] for reimbursement of $23,500.00 in actual losses allegedly suffered as a result of a home improvement contract with Mark Masten, trading as Masten Pools, Inc. (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411

[1] On July 1, 2019, the Maryland Department of Labor, Licensing, and Regulation became the Department of Labor.

(2015).[2] On November 15, 2019, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on March 11, 2021 via the Webex videoconferencing platform. Bus. Reg. §§ 8-407(a), 8-312: Code of Maryland Regulations (COMAR) 28.02.01.20B. Edward Norwind, Esquire, represented the Claimants, who were present. The Respondent represented himself. Andrew Brouwer, Assistant Attorney General, Department, 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 in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2020); COMAR 09.01.03; and 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 the compensable loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on the Claimants' behalf:

Clmt. Exs. 1A-1M -	Photographs, undated
Clmt. Ex. 2 -	Letter from Trevor Sherwood To Ms. Paight and Melissa Leban, September 6, 2018
Clmt. Ex. 3 -	Emails between the Claimants and the Respondent, various dates
Clmt. Ex. 4 -	Masten Pools Estimate, March 22, 2016

[2] Unless otherwise noted, all references hereinafter to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.

Clmt. Ex. 5 - PoolTech Renovation Quote, May 2, 2019

Clmt. Ex. 6 - Hearing Statement, undated

The Respondent did not offer any exhibits for admission into evidence.

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

Fund Ex. 1 - Hearing Order, November 12, 2019

Fund Ex. 2 - Notice of Remote Hearing, September 4, 2020;
Notice of Remote Hearing, July 7, 2020;
Notice of Hearing, February 13, 2020

Fund Ex. 3 - Home Improvement Claim Form, June 25, 2019

Fund Ex. 4 - Licensing History, October 28, 2020

Fund Ex. 5 - Notice of Remote Hearing, December 7, 2020

Testimony

Both Claimants testified and presented the testimony of Trevor Sherwood, Vice President, Pool Operation Management, accepted as an expert in swimming pool construction, renovation, inspection, and remediation.

The Respondent testified in his own behalf.

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 4645113.

2. The Claimants own a home in Dorchester County, Maryland.

3. Beginning in February 2016, the Claimants began discussing renovations to their pool with the Respondent.

4. The Respondent provided the Claimants with several proposals, but none included a proposal to tear down the original plaster in their pool.

5. On March 22, 2016, the Claimants and the Respondent entered into a contract to renovate the existing pool at the Claimants' home (the Contract). The Contract provided the Respondent would drain the pool, pressure test the pies, demolish and restore tile, coping and beam, install new white plaster including all leveling preparation needed and a bonding coat installed, refill the pool, remove and replace a section of patio, add a trench pipe to extend the existing slot drain, cover anchors redrilled into the new patio, chemically treat the existing patio, and fill the joints at the brick (Contract).

6. The Respondent made an oral representation that he warrantied his work for two years.

7. The original agreed-upon Contract price was $28,000.00.

8. The parties agreed to some change orders to change the type of tile, add additional tile, and upgrade to LED lights. The change orders brought the total Contract price to $30,285.00.

9. The Respondent began work on the Contract in April 2016.

10. The Claimants paid the Respondent the full $30,285.00.

11. On June 7, 2016, the Respondent emailed the Claimants that he needed to reapply the bond coat he had installed a few days prior. He stated he believed they had a bad batch of product.

12. By June 9, 2016, the Respondent informed the Claimants the patio had been poured and the bond coat corrected.

[illegible]

13. By June 16, 2016, the Respondent was working on the punch-list to complete the Contract. At that time, the Claimants brought to the Respondent's attention their concern about expansion joints which were uneven and receding.

14. The Respondent finished work on the Contract by July 1, 2016.

15. On August 14, 2016, the Claimants sent the Respondent an email that they were concerned about some cracks developing in the bottom of their pool.

16. After inspecting the pool a week later, the Respondent informed the Claimants that these type of cracks were to be expected. He stated that 25% of all new pools that he builds get shrinkage cracks in new plaster and once fixed, they rarely cause issues. He described the cracks as "hairline cracks." The Respondent also told the Claimants that the concrete shell, which he did not replace, was 30 years old and had many hairline cracks in it and that new cracks would continue to form as the shell continued to age, and some of these cracks would emboss through into the new plaster.

17. The Respondent informed the Claimants the repair would be done by Wilcoxon, a subcontractor, on August 25, 2016.

18. The Claimants asked the Respondent to coordinate the repair to be done at a time when they would be home, as they were concerned because the cracks were growing in number and size.

19. On November 1, 2016, the Claimants emailed the Respondent stating they had noticed additional cracks in the pool.

20. On June 30, 2017, the Claimants emailed the Respondent that they had opened the pool a couple of weeks prior and the cracking was still of concern.

21. Delamination occurs when the new plaster surface separates from the surface below it.

22. On July 27, 2017, the Respondent emailed the Claimants that he had inspected the pool that day. He said that the pool is about 600 square feet, and there is a small area of 15 square feet where the plaster has delaminated. He could not tell if the new plaster had peeled or if the old plaster below the new plaster had peeled, but either way the repair to be done was the same. The Respondent said he could do the repair in late September or October, when they would be done using the pool for the season.

23. The Respondent insisted that the Claimants pay for the repairs needed.

24. On August 22, 2017, the Respondent emailed the Claimants that they had made the choice to resurface over old plaster rather than remove the old plaster, and because of that they were facing these repairs.

25. On September 24, 2017, the Claimants emailed the Respondent about the current situation with their pool, which consisted of the following:

- Major delamination of pool plaster
- Hollow spots in various places within the pool
- Cracks in the pool bottom and along the sides of the pool
- Spot etching in multiple places
- Water ring lines on the sides
- Rust marks in the deep and shallow ends of the pool
- Uneven finish work around vacuum inset and light

26. On September 25, 2017, the Respondent emailed the Claimants that water rings, rust marks and etching were all service related. He said they were warned about the possibilities of losing spots of plaster because they elected not to chip out the old plaster first, and if they wanted the spots fixed, they would have to pay for it.

27. On August 29, 2018, Mr. Sherwood inspected the Claimants' pool. Mr. Sherwood observed the following deficiencies:

- There was pitting, cracking, and crazing throughout the entire pool
- There was unsightly streaking on the walls and step risers
- The pool surface was rough to the touch, especially below the tile line, around ports, and the rope and floats hook-up
- There were cracks that were rough as calcium has effervesced on the pool walls
- There were areas on the pool walls emitting "champagne bubbles" when touched as there was air trapped between the original pool surface and the failing re-plastered surface
- There were a few chipped areas in the pool
- The vacuum port adapter and light were uneven and not sitting flush with the wall
- The pool floor was mostly hollow and there were multiple cracks on the pool floor, greater than one foot in length and most areas where you step the floor cracked below your feet
- The area of delamination on the floor measured approximately five feet long by three and one-half feet wide and extended toward the deep end up to one foot and up to eight feet toward the shallow end and three feet on each width below the failing re-plastered surface

- Portions of the delaminated surface were present showing measurements of less than 3/8" up to greater than 3/4"
- There were trowel markings on the deep end floor and walls
- The expansion joint was cracked
- There were cracks between the coping and the top of the tile in multiple areas
- Multiple coping stones were hollow at the handrail, both sides of the deep end skimmer, and most of the length opposite the steps.

28. The purpose of the expansion joint is to isolate concrete deck movement from the pool coping and bond beam. A cracked expansion joint and cracks between the tile and coping can cause problems by allowing water to penetrate in those joints and get beneath and behind the coping, tiling, and/or pool shell. When that water freezes it expands, and when it thaws it will contract. This repeated freezing and thawing causes tile and coping to become hollow, crack, and fall off.

29. The poor condition of the Claimants' pool was caused by the improper plastering performed by the Respondent. The resurfacing done in 2016 did not meet the thickness parameters that are industry standard. The original pool shell was not properly prepped to ensure a firm bonding between it and the re-plaster. Since the surface was not properly prepared the replastered surface did not bond to the pool. The calcium effervescence, trowel marks, and rough surfaces are a result of improper application.

30. The damage is too severe to remove and patch the delaminated areas. The existing pool surface needs to be removed, the substrate properly prepped, and then the pool properly re-plastered. The expansion joint needs to be repaired in multiple areas.

31. The Claimants' pool can be repaired for $23,500.00.

DISCUSSION

In this case, the Claimants have the burden of proving the validity of the Claim by a preponderance of the evidence. Bus. Reg. § 8-407(e)(1); Md. Code Ann., State Gov't § 10-217 (2014); COMAR 09.08.03.03A(3). To prove a claim by a preponderance of the evidence means to show that it is "more likely so than not so" when all the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002).

An owner may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor . . . ." Bus. Reg. § 8-405(a); *see also* COMAR 09.08.03.03B(2) ("The Fund may only compensate claimants for 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." Bus. Reg. § 8-401.

The Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimants. Certain claimants are excluded from recovering from the Fund altogether. In this regard, a claimant must prove that: (a) the claimant resides in the home as to which the claim is made, or owns no more than three dwelling places; (b) the claimant is not an employee, officer or partner of the contractor; or the spouse or other immediate relative of the contractor or the contractor's employees, officers or partners; (c) the work at issue did not involve new home construction; (d) the claimant did not unreasonably reject the contractor's good faith effort to resolve the claim; (e) the claimant complied with any contractual arbitration clause before seeking compensation from the Fund; (f) there is no pending claim for the same loss in any court of competent jurisdiction and the claimant did not recover for the actual loss from any source; and (g) the claimant filed the claim with the MHIC within three years of the

date the claimant knew, or with reasonable diligence should have known, of the loss or damage. Md. Code Ann., Bus. Reg. §§ 8-405(c), (d), (f), and (g), 8-408(b)(1); Md. Code Ann., Bus. Reg. § 8-101(g)(3)(i) (Supp. 2019). The undisputed evidence in this case establishes there are no *prima facie* impediments barring the Claimants from recovering from the Fund. *Id.* For the following reasons, I find that the Claimants have proven eligibility for compensation.

The photographs provided by the Claimants show a pool in shockingly poor condition, within only two years of the pool renovation. The delamination is severe, obvious to a layperson, and gives the appearance of an abandoned pool. It is not only unsightly, but extremely dangerous, given the possibility of someone getting a limb or article of clothing caught in the gaps. Moreover, the cracking and delamination began to occur within only months of the completion of the project.

The Respondent argued vehemently that he informed the Claimants that he recommended ripping out the plaster due to the age of their pool and the concrete. While he claims that he provided them with this proposal, which was $8,000.00 or $10,000.00 more than the price the Claimants paid, the Respondent was unable to produce that proposal. The Respondent, who all parties agreed drafted the written contract, contends that he had a verbal agreement with the Claimants that he was providing a one year warranty on the replumbing, tile, coping, and poured concrete decking, but specifically informed the Claimants he would not and could not warranty the plaster.

The Respondent's testimony is simply unbelievable. He contends that he specifically recommended the Claimants rip out the former plaster and warned them of the problems they might experience if they did not do so, but has nothing in writing to support that. Moreover, he claims a very detailed recollection that he provided a warranty as to four items, but not as to a

fifth, but again, there exists nothing in writing to support that claim. In any event, this is not a warranty issue – it is an issue of adequate and workmanlike home improvement. There is nothing in the Business Regulation Article of the Maryland Code that would allow the Respondent to specifically preclude a homeowner's right to receive adequate, complete, and workmanlike home improvement.

The Claimants' expert, who was thorough and eminently credible, testified that the problem with the Claimants' pool was not the existing plaster or concrete, as the Respondent argued, but the application of the new plaster coat. It was done poorly and not to industry specifications. The Respondent's argument that the Claimants' expert did not conduct his inspection until two years after the pool renovation is unavailing, as the cracks and delamination began to appear within months of the completion of the project. An adequate and workmanlike home improvement should last more than months after a $30,000.00 pool renovation and in the case of a project this large, should have lasted years.

The Respondent performed unworkmanlike, inadequate, or incomplete home improvements. I thus find that the Claimants are eligible for compensation from the Fund.

Having found eligibility for compensation I must determine the amount of the Claimants' actual loss and the amount, if any, that the Claimants are entitled to recover. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney fees, court costs, or interest. Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1). The MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work.

In this case, the Respondent performed some work under the Contract, and the Claimants intend to retain other contractors to complete or remedy that work. The Claimants' expert was

credible with respect to the repairs needed for the pool. He testified that the entire renovation needed to be redone, and that the proposal obtained by the Claimants was reasonable. Accordingly, the following formula appropriately measures the Claimants' actual loss:

> 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). The Claimants paid $30,285.00 under the original contract, to which I must add $23,500.00, the amount the Claimants must pay another contractor to repair the work. This equals $53,785.00, from which I subtract $30,285.00, the original contract price, for a total of $23,500.00.

The Business Regulation Article caps a claimant's recovery at $20,000.00 for acts or omissions of one contractor and provides that a claimant may not recover more than the amount paid to the contractor against whom the claim is filed. Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a). In this case, the Claimants' actual loss of $23.500.00 exceeds $20,000.00. Therefore, the Claimants' recovery is limited to $20,000.00. Bus. Reg. § 8-405(e)(1); COMAR 09.08.03.03D(2)(a).

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimants have sustained an actual and compensable loss of $23.500.00 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(3)(c). I further conclude that the Claimants are entitled to recover $20,000.00 from the Fund. Bus. Reg. § 8-405(e)(1); COMAR 09.08.03.03D(2)(a).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimants $20,000.00; 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 (10%) as set by the Maryland Home Improvement Commission;[3] and

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

Deborah S. Richardson

June 9, 2021
Date Decision Issued

Deborah S. Richardson
Administrative Law Judge

DSR/kdp
#192441

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

PROPOSED ORDER

WHEREFORE, this 30th day of August, 2021, 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