

IN THE MATTER OF THE CLAIM	*	BEFORE TRACEE N. HACKETT,
OF JOHN AND CAROL	*	AN ADMINISTRATIVE LAW JUDGE
HUTCHINSON,	*	OF THE MARYLAND OFFICE
CLAIMANTS ¹	*	OF ADMINISTRATIVE HEARINGS
AGAINST THE MARYLAND HOME	*	
IMPROVEMENT GUARANTY FUND	*	
FOR THE ALLEGED ACTS OR	*	
OMISSIONS OF DAVID	*	OAH No.: LABOR-HIC-02-23-01509
HOFMEISTER,	*	MHIC No.: 986 (75) 022
T/A PURE WATER POOLS,	*	
RESPONDENT	*	

* * * * *

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 July 8, 2022, John Hutchinson (Claimant) filed a Claim with the Maryland Home Improvement Commission (MHIC)² Guaranty Fund (Fund) for reimbursement of \$11,547.40 for actual losses allegedly suffered as a result of a home improvement contract with David

¹ Mr. Hutchinson signed and filed the claim (Claim). However, at the beginning of the hearing, Mr. Hutchinson indicated that Mrs. Hutchinson would present the case because she was the one primarily involved in the communications with the Respondent. *Sua sponte*, I interpreted this as an amendment to include Mrs. Hutchinson as a Claimant, because she is not a licensed attorney and could not represent her husband during the hearing. *See* Code of Maryland Regulations (COMAR) 09.08.03.02C.
² The MHIC is under the jurisdiction of the Department of Labor (Department).

Hofmeister, trading as, Pure Water Pools (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to 411 (2015 & Supp. 2022).³ On January 6, 2023, the MHIC issued a Hearing Order on the Claim. On January 17, 2023, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On March 2, 2023, I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. Jessica Kaufman, Assistant Attorney General, Department, represented the Fund. The Claimants were present and represented themselves. The Respondent was present and represented himself.

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 (2021); 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 the compensable loss?

SUMMARY OF THE EVIDENCE

Exhibits

I have attached a complete Exhibit List as an Appendix.

Testimony

The Claimants testified and did not present other witnesses.⁴

The Respondent testified and did not present other witnesses.

The Fund did not present any witnesses.

³ Unless otherwise noted, all references to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.

⁴ Only Mrs. Hutchinson testified and presented the case. For the ease of writing this decision, I will use "Claimants."

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 numbers, contractor license 01-101154 and trade license 05-125685.
2. On September 16, 2020, the Claimants and the Respondent entered into a contract to construct a 750-square foot swimming pool with a 110-foot perimeter at the Claimant's home, which included among other things, installation of a Pentair® IntelliChlor Electronic Chlorine Generator/Salt Chlorinator (sea salt generator, sea salt system or chlorine generator), installation of a three-rail black aluminum fence, and provision of a Dolphin⁵ self-programming robotic pool cleaner (Contract).⁶
3. The original agreed-upon Contract price was \$64,750.00, which included an initial deposit of \$2,500.00; \$24,900.00 due upon excavation of the pool; \$31,125.00 due upon installation of the concrete shell; and \$6,245.00 due upon installation of the interior finish.
4. On some unidentified date, the Claimant paid the Respondent the full Contract price.⁷
5. The Contract stated that work would begin "approximately 10 working days after permit has been obtained, and shall be completed on or before 35 business days after excavation of pool, weather permitting." Clmt. Ex. 2.
6. In November 2020, the Respondent began the excavation (digging) for the swimming pool but could not complete the work due to weather delays.

⁵ Dolphin is the name of the manufacturer of this product.

⁶ Although the Claimants referred to other portions of the Contract being deficient, they only claimed actual damages as it related to the three items specified in this Finding of Fact.

⁷ The Respondent agreed that the Claimants paid the full Contract price; therefore, the manner and dates were not further specified.

7. Between November 2020 and June 2021, the Respondent did not complete any additional work on the Contract.

8. On or around July 23, 2021, the Claimant's pool was filled with water; however, the Respondent had only installed a temporary construction fence, had not installed the sea salt cell generator, nor provided the Dolphin robotic cleaner.

9. Between July 23, 2021 and November 17, 2021, the Respondent continued to service the pool at least once per month but did not complete the outstanding work.

10. On January 20, 2022, the Claimants, through their attorney, Ami J. Ba, Esquire, sent a certified demand letter to the Respondent at his address on Fox Catcher Road in Bel Air, Maryland. The letter requested that the Respondent remedy the outstanding work including the installation of the salt cell, provision of the dolphin cleaner, and installation of the fence per Harford County Building Codes, within thirty days of his "affirmative response." Clmt. Ex. 1. Additionally, the demand letter requested that the Respondent email the Claimants within ten days of the letter to advise them of his intentions and an email address was provided for the Claimants and the attorney.

11. At some time not identified in the record, an individual signed for the receipt of the January 20, 2022 certified letter which was sent to the Respondent's address of record with the MHIC.⁸

12. The Respondent never responded to the Claimants' demand letter.

13. On February 12, 2022, the Claimants entered into a contract with Rustic Rail Fence Company to install a four-foot black aluminum fence with a gate per the "pool code" for \$6,630.00.

⁸ As explained in the Analysis, the Respondent testified that he did not sign for it and did not know who signed for this letter.

14. In February 2022, the Rustic Rail Fence Company complete the installation of the four-foot black aluminum fence with the gate.
15. On February 7, 2022, the Claimant purchased a Pentair® Power Center, an IC60 salt cell, and a M600 Dolphin robotic cleaner for \$4,547.40.
16. On March 23, 2022, the Claimant paid \$195.00 to Any-Time Spas and Pools, Inc. for work it completed to install the chlorine generator.
17. On April 2, 2022, the Claimant paid \$175.00 to DG Electrical for work it completed to mount the electrical power center for the salt cell system and to furnish and install all wiring terminations and supporting means for a fully operational salt cell power center.
18. On April 5, 2022, the Respondent ordered a M200 Dolphin robotic cleaner, an IntelliChlor IC40 SCG (Salt Chlorine Generator) Cell and a 110/220V IntelliChlor Power Center from 69-Baltimore SCP Dept. for a total of \$2,280.81, in conjunction with the Contract.
19. At some unidentified date in April 2022, the Respondent came to the Claimant's home with equipment and indicated that he was ready to complete the project. The Claimant informed the Respondent that the work had already been completed because the Respondent did not respond to the demand letter.
20. On July 8, 2022, the Claimants filed their MHIC Claim.
21. On July 18, 2022, the Claimants filed a demand for arbitration with the American Arbitration Association.
22. On August 15, 2022, the Claimants paid their portion (\$575.00) of the \$925.00 arbitration filing fee.
23. On or around August 29, 2022, the Claimants sent a certified copy of the arbitration demand to the Respondent at his address of record with the MHIC, which was returned to sender on or around September 1, 2022.

24. On or around September 14, 2022, the Claimants paid the Respondent's portion (\$575.00) of the \$925.00 arbitration filing fee.

25. On November 23, 2022, the American Arbitration Association awarded the Claimants "damages in the amount of \$11,547.00" after finding that the Respondent "failed to submit documents after due notice by mail in accordance with the Rules." Clmt. Ex. 13. Further, the Award of the Arbitrator also included that the Respondent was responsible for paying the total \$925.00 administrative fees and \$1,150.00 compensation for the arbitrator and that all sums were to be paid before fifteen days from the date of the Award. *Id.*

DISCUSSION

Legal Framework

The Claimants have the burden of proving the validity of the Claim by a preponderance of the evidence. Bus. Reg. § 8-407(e)(1); State Gov't § 10-217; 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 Cnty. 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) (Supp. 2022); *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. For the following reasons, I find that the Claimants have proven eligibility for compensation.

The Position of the Parties

The Claimants argued that the Respondent failed to complete the home improvement for their pool and that the electrical work was inadequate. More specifically, the Claimants argued that the Respondent failed to complete the work in a timely manner, including installation of a permanent fence around the pool, installation of the sea cell, and provision of the Dolphin cleaner. It was the Claimants' position that the construction fencing was insufficient as it violated the Harford County Building Code and posed a danger to children in the neighborhood. Furthermore, the Claimants argued that the Respondent delayed completion of the project by giving excuses related to the COVID-19 pandemic. Further, the Claimants argued that the Respondent told them during a phone call that he was going to close his business and no longer cared about this Contract, which in turn, caused the Claimants to request their attorney to send the Respondent a demand letter to complete the outstanding items. It was the Claimants' position that when the Respondent failed to respond to the demand letter, using other contractors to complete the work on the pool was necessary. As result of obtaining other contractors to complete the work and paying those contractors for completion of the pool, the Claimants argued that they incurred an actual loss and presented receipts to support his position. Lastly, the Claimants argued that they are also entitled to payment of the costs associated with attending the arbitration meeting required by the Contract and that but for the Respondent's failure to complete the work, the Claimants would not have incurred the arbitration costs.

The Respondent argued that he did not provide unworkmanlike, inadequate, or incomplete work on the Claimants' pool. The Respondent argued that the delays with completing the work within the Contract terms was attributable to the COVID-19 pandemic, which impacted his ability to order and receive necessary materials/supplies to complete the work. He further argued that he incurred unanticipated costs for the excavation, which he did not

charge to the Claimants, even though the Contract permitted him to do so. It was the Respondent's position that because the hole had to be dug wider, this increased the pool size and therefore, increased the size of the fence required to encase the pool. The Respondent vehemently denied receiving any letters from the Claimants and argued that he was also unaware of the arbitration meeting because he had moved from his address. It was the Respondent's position that he completed all of his pool contracts which were outstanding in 2022, once he was able to order the supplies. He argued that he continued to service the pool, free of charge, due to the delays and that his electrician also came to the Claimants' home to redo some of the electrical work. The Respondent argued that he ordered the supplies for the Claimants' pool, and when he attempted to complete the work in April 2022, the Claimants denied him the opportunity to do so. The Respondent provided documentation to show that he had made the order and argued that the equipment/materials could not be returned. The Respondent also argued that the Claimants should not have opened the pool as early as they did, and as a result of opening the pool too early, the Claimants paid other contractors more than they would have paid him had they allowed him to complete the work. Finally, the Respondent argued that the Claimants should not be awarded payment and if so, he would file a suit for the additional charges he incurred which he originally did not charge to the Claimants.

The Fund argued that the Claimants met their burden and are entitled to recover from the Fund for the costs incurred to complete and repair the work. However, the Fund further argued that despite it having no objection to the Claimants' request to amend the Claim during the hearing, the arbitration costs should be excluded because they do not meet the definition of actual loss. Lastly, the Fund argued that I should utilize COMAR 09.08.03.03B(3)(c) to calculate the Claimants' actual loss.

Request to Amend Claim

During the hearing, the Claimants requested to include recovery for the costs of arbitration in their claim. Their original claim included a request for recovery for an actual loss of \$11,547.00. They requested a total additional cost of \$2,075.00, which included the \$925.00 total arbitration filing fees and the \$1,150.00 compensation for the arbitrator. The Fund argued that under COMAR 09.08.03.02C, the Claimants should be permitted to amend the Claim because although they had reason to know of the mandatory arbitration clause when they signed the Contract, the amendment does not prejudice the Respondent who was aware of this Contract requirement. COMAR 09.08.03.02C specifically states:

Once a verified claim has been filed with the Commission, the claimant may not amend the claim unless the claimant can establish to the satisfaction of the Commission that either the:

- (1) Claimant did not know and could not have reasonably ascertained the facts on which the proposed amendment is based at the time the claim was filed; or
- (2) Claimant's proposed amendment would not prejudice the contractor whose conduct gave rise to the claim.

Since the Respondent had knowledge of the mandatory arbitration requirements and actually informed the MHIC of such requirements in his response (Fund Ex. 5), I concur with the Fund that the Respondent is not prejudiced by this amendment to the Claim. Therefore, I accepted the Claimants' amendment to the amount of the alleged actual loss in the Claim.

Good Faith Efforts to Resolve

The Claimants did not unreasonably reject the good faith efforts by the Respondent to resolve the Claim. *Id.* § 8-405(d) (Supp. 2022). The Respondent argued that there were delays with completing the Contract work due to supply shortages attributed to the COVID-19 pandemic and that once he was able to order the remaining equipment, he attempted complete the work at the Claimants' home in April 2022. It is undisputed that the Claimants denied the

Respondent access to complete the work, because the Claimants had already had the work completed by another contractor. For the reasons stated below, I find the Claimants' decision to hire another contractor to be reasonable.

The Claimants and the Respondent entered into a contract on September 14, 2020, which required the work to be completed within thirty-five business days after the excavation. The Respondent last performed work at the Claimants' home on November 17, 2021. After numerous calls to the Respondent to attempt to get him to complete the work, the Claimants' attorney sent a demand letter to the Respondent's last known address, which was signed for by an individual at the address. Although the Respondent testified that he did not receive the certified letter, that it is was not his signature, and that he did not know whose signature was on the return receipt, the Claimants exercised due diligence in attempting to resolve the dispute. Further, the Claimants testified credibly that during the last phone call with the Respondent in or around January 2022, he indicated that did not care about their Contract. The expectation was that the Claimants and their family would have been able to use the pool in the spring/summer of 2021. There was also no dispute that the Claimants paid the full contract price. I do not find it unreasonable that the Claimants rejected the Respondent's attempt to complete the work, more than a year after the work should have been completed and after he ignored the Claimants' reasonable attempts to have the work completed.

Arbitration

As part of the Contract, the parties enter into a valid agreement to submit their disputes to arbitration. *Id.* §§ 8-405(c), 8-408(b)(3) (2015 & Supp. 2022). The Contract provided that “[a]ny controversy, claim, dispute, breach or question of interpretation relating to or arising out of or relating to this agreement shall be settled in accordance with the Commercial Arbitration Rules set forth by the American Arbitration Association.” Clmt. Ex. 2. The Contract also

required that any claim with the MHIC Fund would be stayed pending the outcome of the arbitration. On or around June 14, 2022, the Respondent emailed the Fund explaining the mandatory arbitration clause in his response to the Claim.⁹ See Fund Ex. 5. As a result of the Fund reminding the Claimants of this requirement, the Claimants filed a demand for arbitration with the American Arbitration Association on July 18, 2022, which resulted in a final award on November 23, 2022.

In addressing how a final arbitration award impacts the MHIC Fund's award of a claim, the court reasoned the following:

Thus, an award arising out of either judicial or arbitration proceedings may compensate the claimant for items of damage which do not fall within the statutory definition of "actual loss." Mindful of this potential scenario, the legislature in drafting the statute, required that Fund claimants who choose to proceed initially in court or through arbitration supply the Commission with a final judgment or award which states the amount of actual loss, the amount which can be paid legally from the Fund. In particular, the court's or arbitrator's award must contain an express finding of fault on the part of the contractor and a determination of the dollar value of actual loss before the Commission can authorize payment from the Fund.

Brzowski v. Maryland Home Imp. Comm'n, 114 Md. App. 615, 631–32 (1997) (footnotes omitted). Further, in footnote seven, the court further explained that section 8-408 "merely proscribes the Commission from reviewing the validity of an award rendered by either a court or an arbitrator. This provision does not obviate the Commission's duty to ascertain which portion of the award meets the definition of actual loss so that it can be compensated from Fund." *Id.* Lastly, the court reasoned, "[i]nstead we construe section 8-409(a)(2)(i) as requiring that a judicial decision or arbitration award state in substance that, based on the merits, the claimant has suffered actual loss due to fault on the part of a licensed contractor." *Id.* at 639.

⁹ The Respondent acknowledged that the email address on the response was his sister's email address, but simultaneously testified that he did not submit a response to the Fund. I do not find his testimony that he did not submit a response to the Fund to be credible.

The final Award of Arbitrator signed by the Arbitrator on November 23, 2022 does not expressly find that the Claimants suffered an actual loss as a result of the acts or omissions of the Respondent as required by the statute and reiterated by the court in *Brzowski*. Instead, the final award indicated that the Respondent “materially breached” his obligations to the Claimants “causing the Claimants damages in the amount of \$11,547.40.” A breach of contract is not the equivalent of an actual loss, which has a specific legal definition under the Business Regulation article. Therefore, I concur with the MHIC’s decision that this matter move forward to a hearing¹⁰ based upon the fact that the final arbitration award did not explicitly contain a finding of “actual loss” or even language similar to actual loss as noted in *Brzowski* (referring to the amount to correct construction deficiencies was sufficient to meet the definition of actual loss). I find that the November 23, 2022 final arbitration award is insufficient to justify payment from the Fund.

Unworkmanlike, Inadequate or Incomplete Work

The Respondent performed inadequate and incomplete home improvements. The Claimants testified credibly that the Respondent failed to install the permanent rail fence, the sea salt cell and generator, and did not provide the Dolphin robotic cleaner. The Claimants’ testimony was corroborated by the receipts of the other contractors who finished the work, and the pictures of how the project was left incomplete by the Respondent and the finished product completed by other contractors. The Claimants testified credibly that the temporary construction fence posed a safety hazard to children in their community and was in violation of the Harford County Building Codes. The Claimants testified that the pool had leaves from the trees on the

¹⁰ As an aside, I also note that it is unclear how the arbitrator found that the Respondent had proper notice of the arbitration and failed to submit documentation, when at a minimum, the certified letter sent by the Claimant was returned as undeliverable. The Respondent also testified that he was unaware of the arbitration. Additionally, the “The Nature of the Dispute” section in the form for the Demand for Arbitration did not list the items in dispute or it was omitted in the printed version. Regardless of these issues, the final award does not meet the legal requirements of finding actual loss and cannot serve as the means by which the MHIC issues payment on the Claim.

property, and due to the Respondent not providing the Dolphin robotic cleaner, they were unable to use it. The Claimants also testified that in addition to the Respondent failing to install the sea salt cell, the electrical work had to be rewired when the generators were installed due to faulty work by the Respondent's electrician.

Although the Respondent's testimony that the Claimants should not have opened the pool that early and that they incurred higher fees as a result may be true; it does not excuse the fact that he did not complete the project. The Respondent never communicated his intention to the Claimants, that he would order the materials and complete the work in April 2022. Instead, he just showed up to the Claimants' home in April 2022 without any advanced notice.

Additionally, I did not find the Respondent's testimony that he did not receive the January 2022 demand letter to be credible, as he could not offer any explanation as to why a stranger would be inside of his home and sign his name. He testified that he did not move until July 2022; therefore, I would have no reason to believe that he did not receive the demand letter.¹¹

Additionally, he did not successfully refute the Claimants' credible testimony that during a phone call in January 2022, he told the Claimants that he was closing his business and did not care about their Contract. Although the Respondent denied making these statements, I found the Claimants' testimony to be more persuasive. Based upon the fact that the Respondent did not perform any work since November 2021, his lack of communication, and his affirmative statement that he did not care about the Contract, the Respondent's words and actions clearly communicated to the Claimants that he was abandoning completion of the work.

¹¹ "In Maryland, a finding that an individual properly mailed a letter raises a presumption that the letter 'reached its destination at the regular time and was received by the person to whom it was addressed.'" *Bock v. Ins. Comm'r*, 84 Md. App. 724, 733 (1990). The Respondent's testimony did not overcome this presumption.

Actual Loss

I thus find that the Claimants are eligible for compensation from the Fund. Based upon the record before me, there are no statutory exclusions to the Claimants' recovery. Bus. Reg §§ 8-405 (f), (g), 8-408(b)(1) (2015 & Supp. 2022). 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) (Supp. 2022); COMAR 09.08.03.03B(1).

As referenced above, "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. By employing the word "means," as opposed to "includes," the legislature intended to limit the scope of "actual loss" to the items listed in section 8-401. *Brzowski* at 629. The Fund was established to provide an additional remedy for homeowners who suffered actual loss due to unsatisfactory work performed by a home improvement contractor. *See Brzowski* at 628. The payment of claims from the Fund is limited to "only those claims that establish that a homeowner has suffered 'actual loss' due to the act or omission of a licensed contractor." *Id.* The Commission is presumed to be "aware of the Fund's limited purpose, to compensate for actual loss," and to act within the scope of its authority when making such an award. *Brzowski* at 631. I agree with the Fund's argument that the cost of arbitration is not a cost associated with the restoration, repair, replacement, or completion of the Contract. Furthermore, the arbitration costs are similar to court fees which are prohibited from recovery from the Fund. Additionally, these arbitration costs were consequential; in other words, they were not costs incurred to finish the incomplete work, but were costs incurred as a consequence of the Respondent not completing the work. Such consequential costs are expressly prohibited from recovery by the Fund. Bus. Reg.

§8-405(e)(3) (Supp. 2022). For all of these reasons, I find that the arbitration costs are prohibited from recovery.

The MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work. I agree with the Fund that the formula under COMAR 09.08.03.03B(3)(b) is applicable.

The Respondent performed some work under the Contract, and the Claimants have retained other contractors to complete or remedy that work. 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).

Under the Contract, the Claimants paid the Respondent the total Contract price of \$64,750.00, which was undisputed by the parties. The Contract included the cost of labor and materials. The Claimants testified that the work was completed by other contractors, including installation of the fence by Rustic Rail Fencing Company in the amount of \$6,630.00; installation of the chlorine generator by Any-Time Spas and Pools, Inc. in the amount of \$195.00; and mounting the electrical power center for the salt cell system and installation of wiring by DG Electrical in the amount of \$175.00. Additionally, the Claimants purchased the outstanding materials for \$4,547.40, which was used by the other contractors to complete the work. This would make the actual loss \$11,547.40, calculated as follows:

Amount paid to the Respondent:	\$64,750.00
Added to	+
Amount paid to another contractor/for materials:	<u>\$11,547.40</u>
	\$76,297.40
Less	-
The original contract price:	<u>\$64,750.00</u>
	\$11,547.40

Effective July 1, 2022, a claimant's recovery is capped at \$30,000.00 for acts or omissions of one contractor, and a claimant may not recover more than the amount paid to the contractor against whom the claim is filed.¹² Bus. Reg. § 8-405(e)(1), (5) (Supp. 2022); COMAR 09.08.03.03B(4). In this case, the Claimants' actual loss is less than the amount paid to the Respondent and less than \$30,000.00. Therefore, the Claimants are entitled to recover their actual loss of \$11,547.40.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimants have sustained an actual and compensable loss of \$11,547.40 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2022); COMAR 09.08.03.03B(3)(c). I further conclude that the Claimants are entitled to recover that amount from the Fund. Md. Code Ann., Bus. Reg. § 8-405(e)(1), (5) (Supp. 2022); COMAR 09.08.03.03B(4).

RECOMMENDED ORDER

I **RECOMMEND** that the Maryland Home Improvement Commission:
ORDER that the Maryland Home Improvement Guaranty Fund award the Claimants \$11,547.40; and

¹² On or after July 1, 2022, the increased cap is applicable to any claim regardless of when the home improvement contract was executed, the claim was filed, or the hearing was held. See *Landsman v. MHIC*, 154 Md. App. 241, 255 (2002) (explaining that the right to compensation from the Fund is a "creature of statute," these rights are subject to change at the "whim of the legislature," and "[a]mendments to such rights are not bound by the usual presumption against retrospective application").

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;¹³ and

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

April 19, 2023
Date Decision Issued

Tracee N. Hackett

Tracee N. Hackett
Administrative Law Judge

TNH/at
#204119

¹³ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 8th day of June, 2023, 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.

Michael Newton

Michael Newton

Panel B

***MARYLAND HOME IMPROVEMENT
COMMISSION***

**IN THE MATTER OF THE CLAIM OF * MARYLAND HOME
JOHN AND CAROL HUTCHINSON * IMPROVEMENT COMMISSION
AGAINST THE MARYLAND HOME *
IMPROVEMENT GUARANTY FUND * MHIC CASE NO. 22(75)986
FOR THE ACTS OR OMISSIONS OF * OAH CASE NO. LABOR-HIC-
DAVID HOFMEISTER AND * 02-23-01509
PURE WATER POOLS, LLC *
* * * * ***

FINAL ORDER

This matter was originally heard before an Administrative Law Judge (“ALJ”) of the Office of Administrative Hearings (“OAH”) on March 2, 2023. Following the evidentiary hearing, the ALJ issued a Proposed Decision on April 19, 2023, concluding that the homeowners, John and Carol Hofmeister (“Claimants”) suffered an actual loss as a result of the acts or omissions of David Hofmeister and Pure Water Pools, LLC (collectively, “Contractor”). *ALJ Proposed Decision* p.16. In a Proposed Order dated June 8, 2023, the Maryland Home Improvement Commission (“MHIC” or “Commission”) affirmed the Proposed Decision of the ALJ to grant an award of \$11,547.40 from the Home Improvement Guaranty Fund. The Contractor subsequently filed exceptions to the MHIC Proposed Order.

On July 20, 2023, a three-member panel (“Panel”) of the MHIC held a remote hearing on the exceptions filed in this matter. The Claimants and Contractor participated without counsel. Assistant Attorney General MacKenzie Read 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) hearing notice; 2) transmittal letter, ALJ Proposed Decision, and MHIC Proposed Order; and 3) Contractor’s exceptions. Neither the Claimants nor the Contractor produced a copy of the transcript of the hearing before the ALJ. Therefore, the Panel’s review of the record was limited to the preliminary exhibits for the exceptions hearing, the OAH Proposed Decision, and the exhibits offered as 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 construction of a swimming pool at the Claimants' home. The ALJ found that the Contractor's performance under the contract was incomplete. *ALJ's Proposed Decision* p. 13.

On exception, the Contractor made several factual assertions without support in the record. The Contractor's only specific allegation of error by the ALJ was that the ALJ erred in finding that the he did not order the Claimants' robotic cleaner, salt chlorine generator, and power center until April 5, 2022. The Commission finds no error, as the "order date" on the invoice for those items is April 5, 2022. (OAH Hearing Respondent's Exhibit 1.)

During the exceptions hearing, the Contractor advised the Commission that Pure Water Pools, LLC ("Pure Water"), has filed a bankruptcy petition. In light of Pure Water's filing of a bankruptcy petition, the Commission finds that the ALJ's recommended order that Pure Water and David Hoffmeister be ineligible for a home improvement contractor licenses until the Guaranty Fund is reimbursed for monies disbursed to the Claimants must be amended. The Commission may only suspend Mr. Hoffmeister's individual license, not the corporate license of Pure Water, if Mr. Hoffmeister and Pure Water fail to reimburse the Guaranty Fund for the Claimants' award. In the event that Mr. Hoffmeister's individual license is suspended for failure to reimburse the Guaranty Fund, Pure Water may maintain its corporate license while its bankruptcy petition is pending or after its obligation is discharged if it employs another licensed individual contractor as required by COMAR 09.08.01.04.B.

Having considered the parties' arguments, the evidence contained in the record, and the ALJ's Recommended Decision, it is this 3rd day of August 2023, **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 **AMENDED**;
- D. That the Claimants are awarded \$11,547.40 from the Maryland Home Improvement Guaranty Fund;
- E. That David Hoffmeister shall remain ineligible for a Maryland Home Improvement Commission license until the Contractor reimburses the Guaranty Fund for all monies disbursed under this Order plus annual interest of at least ten percent (10%) as set by the Commission, Md. Code Ann., Bus. Reg. §§ 8-410(a)(1)(iii), 8-411(a);
- F. That the records and publications of the Maryland Home Improvement Commission shall reflect this decision; and
- G. Any party has thirty (30) days from the date of this Final Order to appeal this decision to Circuit Court.

ROBERT ALTIERI
Chairperson –Panel
Maryland Home Improvement
Commission