

<b>IN THE MATTER OF THE CLAIM</b>	<b>* BEFORE LAURIE BENNETT,</b>
<b>OF JESSICA BARNO,</b>	<b>* AN ADMINISTRATIVE LAW JUDGE</b>
<b>CLAIMANT</b>	<b>* OF THE MARYLAND OFFICE</b>
<b>AGAINST THE MARYLAND HOME</b>	<b>* OF ADMINISTRATIVE HEARINGS</b>
<b>IMPROVEMENT GUARANTY FUND</b>	<b>* OAH No.: DLR-HIC-02-15-28591</b>
<b>FOR THE ALLEGED ACTS OR</b>	<b>* HIC No.: 15 (90) 178</b>
<b>OMISSIONS OF GIORA GAFNY,</b>	<b>*</b>
<b>t/a UNLIMITED LANDSCAPING OF</b>	<b>*</b>
<b>AMERICA,</b>	<b>*</b>
<b>RESPONDENT</b>	<b>*</b>

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**PROPOSED DECISION**

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

**STATEMENT OF THE CASE**

On March 31, 2015, Jessica Barno (the Claimant) filed a claim (the Claim) with the Maryland Home Improvement Commission (the MHIC) Guaranty Fund (the Fund) for reimbursement of alleged losses suffered as a result of a home improvement contract with Giora Gafny, trading as Unlimited Landscaping of America (the Respondent).

I held a hearing on January 20, 2016 in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015).<sup>1</sup> The Claimant represented herself. The Respondent represented himself. Kris King, Assistant Attorney General, Department of Labor, Licensing and Regulation (the Department), represented the Fund.

I kept the record open for ten days after the hearing to permit the Claimant to submit additional documentation regarding the value of her alleged loss. The Claimant did not submit documentation.<sup>2</sup>

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 (2014), 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?

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<sup>1</sup> Unless otherwise noted, all citations of the Business Regulation Article hereinafter refer to the 2015 Replacement Volume.

<sup>2</sup> It was my understanding at the end of the hearing that the parties might continue to negotiate a settlement. When I did not receive additional evidence from the Claimant, I questioned whether they reached an agreement. Thus, on February 12, 2016, I sent a letter to the Claimant, with copies to the Respondent and the Fund, stating as follows: "On February 11, 2016, my assistant, Sumintra Janack, called Kris King, Assistant Attorney General, to inquire whether the captioned case settled after the January 20, 2016 hearing. Mr. King said it had not, and he added that you submitted an itemized repair estimate, as I had left the record open for you to do. My office does not have any record of having received that document. Please fax the document to my attention at 410-229-4266, along with any transmission record from the earlier fax." The Claimant did not respond to the letter.

## SUMMARY OF THE EVIDENCE

### Exhibits

I admitted the following exhibits that the Claimant offered:

1. Contract between the Claimant and the Respondent, March 30, 2014
2. Invoice from the Respondent, May 30, 2014
3. Three cancelled checks, March 30, 2014, May 13, 2014, and May 17, 2014
4. "Directions for Laying Stone Patio at 723 Grundy Street," from the Claimant to the Respondent, not dated
5. (A through T) Photographs
6. Proposal from DCI Landscaping, Inc., March 12, 2015
7. E-mail from DCI Landscaping to the Claimant, March 12, 2015

I admitted the following exhibits that the Respondent offered:

1. Photograph
2. Photograph

I admitted the following exhibits that the Fund offered:

1. Notice of Hearing, October 16, 2015, with certified mail green cards
2. MHIC's Hearing Order, August 18, 2015
3. Memo regarding the Respondent's MHIC licensing history, January 5, 2016
4. Claim form, filed with the MHIC on March 31, 2015
5. Letter from the MHIC to the Respondent, March 31, 2015
6. Licensing print-out, January 19, 2016

## Testimony

The Claimant testified.

The Respondent testified.

The Fund did not present 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 licensed home improvement contractor under MHIC license number 90704.
2. The Claimant is not the Respondent's spouse or other immediate relative; the Respondent's employee, officer, or partner; or the Respondent's immediate relative of an employee, officer, or partner.
3. The Claimant resides at 723 Grundy Street, Baltimore, Maryland 21224 in a two-story row home.
4. The Claimant contacted the Respondent about installing a bluestone tile patio outside the rear basement door of her house and a walkway that would extend from the patio toward the alley. The patio would replace an existing concrete patio. The Respondent proposed installing one step up from the door to the start of the patio. The Claimant agreed. The Claimant told the Respondent that she wanted to make sure that rainwater flows away from the house. The Respondent told her that he would pitch the patio away from the house. The Claimant agreed. The Respondent and the Claimant agreed that the walkway would have steps sloping down toward the back alley. The Respondent and the Claimant agreed that the Respondent would use bluestone tiles throughout the job except for pavers on the walkway stair risers.

5. On March 30, 2014, the Claimant and the Respondent entered into a home improvement contract. The Respondent drafted the contract, which includes a rough sketch of the project<sup>3</sup> and the following terms: "Haul away old concrete patio[.] Built [sic] a bluestone paio [sic] approx. 420 [square feet] with up to 2 x 3 stone size." The Respondent wrote on the contract that he would use bluestone tile for the patio and walkway. The contract does not include any other agreed upon terms.
6. Before starting the work, the Claimant asked the Respondent to obtain a construction permit. The Respondent did not obtain a permit.
7. The total contract price was \$8,000.00. The Claimant paid a total of \$8,100.00, including a \$100.00 tip to the Respondent upon completion of the job.<sup>4</sup>
8. Before the Respondent started the work, the Claimant gave him written directions for the job that specified, among other items, that the Respondent would:
  - a. use 1" thick bluestone tiles,
  - b. fill the 3/8" to 1/2" joints between the tiles with a sand grout, and
  - c. slope the installation away from the house 1 inch for every 8 feet.
9. The Respondent demolished the concrete patio and installed the bluestone patio and walkway. He started the job on April 28, 2014, and completed it on or about May 17, 2014.

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<sup>3</sup> The sketch is so rough that I doubt anyone looking at it would understand what the patio and walkway would look like. At the hearing, the Claimant added the handwritten annotations "Rear of House" and "Alley" to orient the sketch. The original contract that the Respondent submitted to the Claimant for her consideration included the Respondent's handwritten annotations "Blue Stone" and "Grass" with corresponding arrows pointing to the sketch.

<sup>4</sup> The Claimant made three \$2,700.00 payments, on March 30, 2014, May 13, 2014 and May 17, 2014.

10. The Respondent used bluestone tiles on the walkway risers, as agreed, and in what he considered “tight” spaces, such as on the step by the back door of the house to the start of the patio.
11. The grout line between the tiles is as narrow as 1/16<sup>th</sup> inch to over one inch.
12. The Claimant researched grout and she told the Respondent she wanted him to use “Gator” brand grout. She knew that when it rained the grout would expand and harden. The Respondent said he would use Gator or a comparable brand. The Claimant agreed.
13. The Respondent used polymeric sand for grout. The sand expands when it is wet and hardens over time. The Respondent did not give the Claimant any instructions to wet the sand to promote hardening. The Claimant researched the grout and knew she would have to maintain it. By July 27, 2014, the grout was washing away and crumbling under foot and moss and weeds started growing in the grout line.<sup>5</sup> If the tiles were properly grouted, weeds and moss would not grow.
14. The bluestone has formed a cloudy film around the top outer edges of some tiles. The tile should not have a cloudy film.
15. Facing the walkway from the back of the house, the left side of the walkway has a wavy edge. The edge should be straight.
16. The bluestone tiles in the patio should be but are not level with each other. As a result, the patio has peaks and valleys, and water pools in the valleys.
17. The Claimant contacted DCI Landscaping, Inc. (DCI), about repairing the Respondent’s work. DCI proposed removing and reinstalling the tile patio and, to ensure that water

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<sup>5</sup> The Claimant did not give specific dates when she first noticed problems. She testified, however, that on July 27, 2014, she took photographs of the problematic tile and grout. See Claimant Ex. 5. I have thus decided that the Claimant first noticed the problems on this date.

runs way from the house, installing a 4” drain outside the rear basement door and connecting and burying the downspout, for a total of \$3,000.00.

### DISCUSSION

An owner may recover compensation from the Fund “for an actual loss that results from an act or omission by a licensed contractor.” 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”). 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.

The Claimant has the burden of proving the validity of his claim by a preponderance of the evidence. 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 (3rd. ed. 2000).

The Claimant is seeking reimbursement for the cost of labor to redo the Respondent’s work. For the reasons that follow, I find that the Claimant has proven that the Respondent performed unworkmanlike or inadequate home improvement that would make her eligible for compensation from the Fund, but she has failed to prove the value of her loss.

The sole undisputed issue is that the Respondent was a licensed contractor when he contracted with the Claimant. The disputed issues are whether the work was unworkmanlike, inadequate or incomplete home improvement and, if so, whether the Clamant suffered an actual loss. My finding that the Respondent performed unworkmanlike or inadequate home

improvement is based the Claimant's credible testimony, the Respondent's not credible testimony, and the documentary evidence.

The Respondent was not a credible witness for numerous reasons. First, the Respondent testified that he filed an application for a building permit, and obtained a permit, with Baltimore City after the Claimant told him he should obtain one. The Claimant testified that she never saw a permit posted at the job site. The Respondent did not produce a copy of the permit or the application at the hearing and he did not offer any details about obtaining the permit that would cause me to believe he had applied for one. He could not remember, for example, when he got the permit or what information he put in the application, other than the fact he was building a patio.

The Respondent said that he maintains a file for every job he does (in which he would keep a copy of the permit), but not for this job. He did not explain why he did not maintain a file for this or what he would have done with the job-related documents if not keep them in a file.

The Respondent testified that he would need a final inspection on a permitted job. He nevertheless did not obtain a final inspection in this job. I find that the only reason the Respondent did not obtain a final inspection is because he did not obtain a permit.

The Respondent did not offer any persuasive evidence that he actually obtained the permit. I therefore find that he did not obtain one and his testimony to the contrary was not truthful.

The Respondent testified that the Claimant e-mailed the permit to him but upon further questioning clarified that he had received an e-mail from her that included a sample permit. The Claimant had no reason to send the Respondent a sample. The Respondent did not offer the e-mail or offer any other persuasive evidence of it, and I doubt its existence.



The Respondent testified that he did not know he needed a permit because he usually does landscaping, not "hardscaping," such as a patio. Upon further questioning, however, the Respondent testified that he has installed 25-30 bluestone patios. Regardless of whether a permit was needed, I find that the Respondent initially misrepresented his experience with patios.

The Respondent testified that the life expectancy of the patio is 20-30 years if it is properly maintained. He testified that the Claimant obviously did not properly maintain the sand in accordance with the instructions he sent her by e-mail. The Respondent did not produce the e-mail and the Claimant testified that she did not receive instructions. The Claimant testified that she knew she needed to maintain the grout by wetting it. Nevertheless, with respect to the Respondent's credibility, I find that the Respondent did not give her instructions and his testimony to the contrary was not truthful.

The Respondent testified that he and the Claimant agreed that he would use pavers instead of bluestone in certain "tight" areas of the job, which he defined as areas close to the edge of the patio and around the step coming out from the house. The Respondent did not amend the contract and he did not otherwise reduce the change to writing. The Claimant testified that they agreed to use pavers on the risers but not elsewhere. Because the Respondent was generally not a credible witness, I did not find his testimony on this point credible. Thus, I find the Respondent used pavers other than as he and the Claimant agreed.

The Claimant testified that she gave the Respondent instructions about the job before he started work. The Respondent first said that it is possible the Claimant e-mailed the document to him, but then he said does not recall seeing it. He testified that he has kept the Claimant's e-mails, but he did not say whether he checked the e-mails for the document. Because the Respondent waffled about whether he received the document and because the Claimant offered

credible testimony that she gave him the document and she produced the document, I find that that the Respondent received the directions and the Respondent was not honest when he suggested otherwise.

For all of these reasons, the Respondent was not credible. On the other hand, the Claimant was credible.

The Claimant offered detailed, plausible descriptions of her conversations with the Respondent. She corroborated her testimony with numerous photographs and other documentary evidence. When she did not know something, she said so; she did not waffle or make excuses.

With this assessment in mind, I will evaluate the merits of the case.

The Claimant asserts that the Respondent exhibited unworkmanlike home improvement by improperly grouting the tiles, laying the tiles with an inconsistent grout line, using pavers in an impermissible way and laying tiles with a crooked edge. The Respondent responded that the Claimant was sufficiently satisfied with the job that she paid him in full and gave him, not his workers, a \$100.00 tip. The Claimant responded that she tipped the Respondent because she thought it was the right thing to do and she was initially satisfied. Soon after the Respondent finished the job, however, various neighbors stopped by to see the installation and they started pointing out defects. Whether the Claimant was initially satisfied is immaterial. The material fact is that the Claimant exhibited inadequate workmanship.

The Claimant testified that she measured the grout lines and they were as narrow as 1/6<sup>th</sup> inch and as wide as one inch. Photographs confirm the inconsistent line and that it is so narrow in places the tiles are touching. The Respondent agreed that the grout line should not have been so narrow as to permit the tiles to touch and to the extent they do, he improperly laid them. The Claimant proved that the Respondent laid the tile improperly.

The Claimant also proved that the Respondent did not properly install the grout. The Claimant testified and she presented photographs to show that the grout is crumbling. Further, she testified that walking on the tile causes marks in the grout. The Respondent testified that he used a polymeric sand grout that expands when it is wet and hardens over time. The grout obviously did not harden. The Respondent claimed that the grout did not harden because the Claimant did not properly maintain the grout. The Respondent, however, did not give the Claimant any maintenance instructions. The Claimant testified that she researched patio grout and she knew it would harden in the rain and that she would have to maintain it. The Claimant did not testify what she knew about maintenance and the Respondent did not question her about her understanding. Because the Respondent did not give her instructions for the grout he used, I cannot find that the Claimant caused or contributed to the crumbling grout.

The Respondent testified that the grout is washing away because the patio has standing water, possibly from a hole in the Claimant's garden hose. The evidence does not prove that the hose has a hole. It is more likely that water is pooling because the tiles are not level with each other and, thus, there are peaks and valleys across the patio surface.

The evidence is more likely than not that the grout is crumbling and washing away because the Respondent did not install it correctly or the grout did not harden because he did not tell the Claimant how to maintain it. In either event, the Respondent is responsible for the crumbling grout.

The Claimant also argues that the Respondent used pavers instead of bluestone in a manner inconsistent with their agreement. They agreed that the Respondent would use pavers on the stair risers, which he did. He also used them in what he described as "tight" areas. The Respondent testified that he necessarily used the pavers in tight areas because the bluestone

could not be cut small enough for those areas. Because the Respondent was not a credible witness, I cannot find that he used the pavers by necessity. Because all of the tiles need to be re-set, whether the Respondent is correct about a few pavers is inconsequential.

The Claimant also proved, through her testimony and photographs, that one edge of the walkway is not straight. The Respondent looked at a photograph of the edge and agreed.

The Claimant also proved that the patio tiles are not level with each other. The Respondent testified that the tiles are sloped to allow water runoff and one would therefore not expect them to be level. The patio as a whole may slope, as it should, but the top edge of the tiles should be flush with each other. In other words, one tile should not sit higher than another. The Claimant used a level on the tiles to show that the tiles are not flush with each other.

The only way to correct the defective tiles with inconsistent grout lines and tiles that are not level is to remove and re-set the tiles and apply new grout.

The Claimant testified that some of the bluestone tiles have a developed a film around the top outer edges. The Claimant is not asking for the cost of replacing the tiles. Rather, she expects to re-use them. Accordingly, I need not comment further.

As I have decided that the Respondent performed inadequate home improvement, the next question is the value of the loss. HIC regulations offer three formulas for measurement of a claimant's actual loss. COMAR 09.08.03.03B(3). Of the three, the one that is appropriate in the Claimant's case states as follows:

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). To do this calculation, it is necessary to know how much it costs to redo the Respondent's work.

The Claimant contacted DCI Landscaping, Inc., about repairing the Respondent's work. DCI proposed removing and reinstalling the tile patio and, to ensure that water runs away from the house, installing a 4" drain outside the rear basement door and connecting and burying the downspout, for a total of \$3,000.00. The Claimant did not contract with the Respondent to install a drain or connect and bury a downspout; accordingly, the Claimant is not eligible for reimbursement for the cost of this home improvement. The Claimant is only entitled to, and indeed is only asking for, the cost of redoing the tile work. DCI's estimate only gives a total cost, not a cost for the tile work versus the drain and downspout.

The Fund argued that the Claimant is entitled to the cost of drain and the tile work. I disagree that the Claimant is entitled to reimbursement for the new drain. The Claimant and Respondent talked about drainage. The Claimant was clear that she wanted the patio to slope in a way that water would wash away from the house. The Respondent agreed to slope the patio; the Claimant did not pay him to install a drainage system. The drainage system that DCI proposes is a new line item for which the Respondent is not responsible.

I gave the Claimant an opportunity to supplement the record with an updated itemized repair estimate showing the cost of just the tile work, but she did not submit anything to me. I therefore cannot determine the value of the Claimant's loss.

**PROPOSED CONCLUSION OF LAW**

I conclude that the Claimant has not proven that she sustained an actual and compensable loss as a result of the Respondent's acts and omissions. 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.

March 28, 2016  
Date Decision Issued

**Signature on File**

Laurie Bennett  
Administrative Law Judge

*(Alle)*

LB/cj  
#160504