

IN THE MATTER OF THE CLAIM
OF OLEG BORISOV,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF JAMES JOHNSON,
T/A JOHNSON'S LANDSCAPE
SERVICE, INC.,
RESPONDENT

* BEFORE RICHARD O'CONNOR,
* ADMINISTRATIVE LAW JUDGE,
* THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
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* OAH No.: DLR-HIC-02-17-28257
* MHIC No.: 17 (90) 450
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PROPOSED DECISION

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STATEMENT OF THE CASE

On January 31, 2017, Oleg Borisov (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$7,210.00 in losses allegedly suffered as a result of a home improvement contract with James Johnson, trading as Johnson's Landscape Service, Inc. (Respondent).

I held a hearing on March 7, 2018 at the Office of Administrative Hearings (OAH) in Kensington, Maryland. Md. Code Ann., Bus. Reg. § 8-407(e) (2015). The Claimant participated without representation. Kris King, Assistant Attorney General, Department of Labor, Licensing,

and Regulation (Department), represented the Fund. Robert M. McCarthy, Esquire, represented the Respondent, who did not attend the hearing.

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. 2017); Code of Maryland Regulations (COMAR) 09.01.03; COMAR 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 into evidence on the Claimant's behalf:

- Cl. Ex. 1. Contracts between the Claimant and the Respondent, April 26, June 26, and June 29, 2015.
- Cl. Ex. 2. Emails between the Claimant and the Respondent, April 17, 2015 to September 30, 2016.
- Cl. Ex. 3. Photographs of the Respondent's work, March 2018 (Ex. 3A to 3E); September 2016 (Ex. 3F to 3K); and April 2016 (Ex. 3L to 3O).
- Cl. Ex. 4. The Respondent's response to the MHIC, October 31, 2016.
- Cl. Ex. 5. Report from J&B Discovery Inspections, January 14, 2018; report from Dustin Roath of First Impression Hardscapes, September 21, 2016.
- Cl. Ex. 6. Proposal from First Impression Hardscapes, LLC, undated.

The Respondent did not offer any exhibits.

I admitted the following exhibits into evidence on behalf of the Fund:

- Fund Ex. 1. Notice of Hearing, January 19, 2018.

- Fund Ex. 2. Hearing Order, August 30, 2017.
- Fund Ex. 3. The Respondent's licensing history with the MHIC.
- Fund Ex. 4. Home Improvement Claim Form, received January 31, 2017.
- Fund Ex. 5. Letter from the MHIC to the Respondent, February 8, 2017

Testimony

The Claimant testified in support of his claim.

The Respondent presented testimony from Darwin Ceja, Operations Manager for the Respondent; Matt Johnson, co-owner of Johnson's Landscape Service, Inc.; and Charles Johnson, co-owner of Johnson's Landscape Service, Inc.

The Fund presented no 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 01-11514.
2. On April 26, 2015, the Claimant and the Respondent entered into a contract to, among other things, install a 400-square-foot rear patio made of random-size rectangular pavers with a border of six-by-six block edge pavers.

3. The contract price was \$11,087.00.
4. On June 26, 2015, the Claimant and the Respondent entered into a contract to, among other things, install a walkway in the front of the Claimant's home, constructed of the same materials as the rear patio.
5. The contract price was \$4,959.00.

6. On June 29, 2015, the Claimant and the Respondent entered into a contract to use the bricks from the old patio to line the edges of planting beds, and use flagstone from the old walkway as steppers on the left side of the driveway.

7. The contract price was \$1,440.00.

8. The Claimant paid the Respondent \$17,486.00 in full payment of the three contracts.

9. The Respondent completed the work called for in the three contracts around the end of June 2015.

10. The contract specifications for installation of both the patio and the walkway were the same: a four-inch base of "stone dust," which is a compound of gravel, aggregate, and sand, sold under the name CR-6; a fabric underlayment; Bristol Stone Random Rectangular pavers bordered by six-by-six paver blocks (sometimes called "soldier pavers"); polymeric sand between the pavers; and linear plastic edge restraint around the outside edges of the pavers, held in place by spikes.

11. The contract specifications for installation of the patio and the walkway did not include any mortar, cement, or concrete.

12. The patio and the walkway were installed as called for in the contracts.

13. The Claimant was unhappy with the Respondent's work almost immediately and began complaining about defects. Several of the complaints involved landscaping issues such as sod and soil, which the Respondent addressed successfully.

14. On July 22 and 23, 2015, the Respondent sent a crew back to the site to remove edge from the front walkway, re-establish the foundation in certain areas, and reset the edge.

15. On August 25, 2015, the Respondent sent a crew back to again reset some edge pavers in the walkway and fill in some gaps with polymeric sand.

16. On September 14, 2015, the Claimant complained that gaps between pavers were again present. Aerating and reseeded of the Claimant's lawn was about to occur, so he and the Respondent agreed to wait until that had been completed before addressing the complaints.

17. On October 9, 2015, the Respondent's employees filled in the gaps between some pavers with polymeric sand and did some landscape work that the Claimant had complained about.

18. By December 2015, the Claimant had again noticed gaps between pavers with grass and weeds growing in some gaps. He complained to the Respondent.

19. The Respondent replied that he would return in the Spring, when temperatures would be warmer, to install more polymeric sand under warranty.

20. The Respondent's employees returned to the Claimant's home on May 16, 2016 to remove and reset the pavers that the Claimant had complained about and install more polymeric sand between the pavers.

21. In September 2016, the Claimant complained to the Respondent that the walkway looked worn out and that its integrity was unacceptable. He asked the Respondent to return to perform a complete repair.

22. The Respondent refused to perform any more repairs without additional payment.

23. As of September 2016, some of the polymeric sand had disappeared from between the pavers, there was one half-inch gap between some pavers, two pavers rocked and could be lifted out, and a few blades of grass were growing in two areas between pavers.

24. As of the date of the hearing, the walkway was in place as constructed, in approximately the same condition as in September 2016.

25. The Claimant received a proposal from First Impression Hardscapes, LLC to remove the existing patio and walkway, dig trenches around the edges of the patio and walkway,

install Concrete Bond beams in the trenches, repair the base layers, reinstall the pavers, and mortar the border pavers in place atop the Concrete Bond beam.

26. The contract price for this proposal was \$7,210.00.

27. The Claimant received another proposal for repair of the patio and walkway for about \$2,500.00.

28. The Claimant has not accepted either proposal nor had any additional work done on the patio and walkway.

DISCUSSION

In this case, the Claimant has the burden of proving the validity of his claim by a preponderance of the evidence. Md. Code Ann., Bus. Reg. §8-407(e)(1) (2015); Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3). “[A] preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces . . . a belief that it is more likely true than not true.” *Coleman v. Anne Arundel Cty. Police Dep’t*, 369 Md. 108, 125 n.16 (2002) (quoting *Maryland Pattern Jury Instructions* 1:7 (3d ed. 2000)).

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) (2015); *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 (2015). For the following reasons, I find that the Claimant has not proven eligibility for compensation.

The Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant. Based on the evidence before me, I find that the Respondent did

not perform unworkmanlike, inadequate or incomplete home improvements. On this issue, the Respondent's evidence simply outweighs that offered by the Claimant.

The Claimant's evidence primarily consists of his own observations and impressions. He testified that the gaps between some of the pavers are too large, that the polymeric sand has disappeared, that two of the edge pavers rock and can be lifted out, and that in two areas the edges of the walkway pavers tilt down on the outside. He submitted photographs (Clt. Ex. 3) to bolster his testimony.

The Claimant testified about the photographs and annotated some of those that he took in September 2016, after the Respondent performed final repairs (Clt. Ex. 3F to 3K). For example, one of the photographs in Claimant Exhibit 3F is labeled "This edge is sinking and sliding." But the picture does not actually show sliding or sinking. The border pavers seem to be solidly in the ground, not detached from the rest of the walkway. The other photograph in this exhibit bears the annotation "It looks ugly with open gaps." The gaps, though, do not appear overly wide, and ugliness, like beauty, is in the eye of the beholder and does not prove unworkmanlike construction.

The photographs do establish that there is an area about three feet long where there is a gap of about one-half an inch between the border pavers and the rest of the walkway. Also, the polymeric sand is gone from between some of the pavers.

The photographs from March 2018 (Clt. Ex. 3A to 3E) seem to show the walkway in about the same condition as in 2016, although there is one picture of a hand lifting a border paver. This appears to be the same paver that was noted as rocking in the earlier pictures.

The Claimant also submitted two inspection reports, one from Berlin I. Dean of J&B Discovery Inspections and one from Dustin Roath of First Impression Hardscapes. Both purport to detail deficiencies in the installations of the patio and the walkway. As I explained to the

Claimant at the hearing, these documents were accepted only for the factual information they contain, not for the opinions expressed. The authors of the reports did not testify, and I have no way of knowing their education, training, experience, qualifications, or expertise. Therefore, I give their opinions no weight because the Claimant could not establish the authors' qualifications to give those opinions.

The Claimant also produced a proposal from Mr. Roath to rebuild the patio and walkway for \$7,210.00. By its terms, the proposed rebuild would provide much more robust installations than those called for in the contracts with the Respondent. The plan would be to disassemble the existing installations, dig trenches around the edges, and install in the trenches something called Concrete Bond beams, which I suppose are solid objects used to support the border pavers. Those pavers would be mortared into place on top of the beams, then the other pavers re-installed over a rebuilt foundation. This procedure is not equivalent to that of the original contracts, which included no trenches, no Concrete Bond beams, and no mortar.

The claim of \$7,210.00 submitted in this case appears to seek reimbursement for Mr. Roath's proposal. The Claimant testified that he also received another proposal for around \$2,500.00, but he could not say what company submitted that bid or explain the scope of the work. The Claimant had no paperwork relating to the \$2,500.00 proposal.

The Claimant's evidence does not include anything that might support a claim of unworkmanlike installation of the back patio. The Claimant did not testify that there was anything wrong with it and did not mention it in his emailed complaints to the Respondent. Claimant's Exhibits 3N to 3O were said to show "issues with the back patio," but show only a few small weeds growing between the border pavers and the plastic retainer, an anthill between two pavers, and one edge paver that seems slightly tilted. This evidence certainly does not establish that the patio needs to be rebuilt or that it was installed in an unworkmanlike manner.

The Respondent presented three witnesses: Mr. Ceja, Operations Manager, and the two Messrs. Johnson, co-owners of the business. Matt Johnson described himself as devoted primarily to sales and marketing, while Charles Johnson is the field supervisor and production manager. The latter testified that he went to the job site twice after receiving the original complaint and saw nothing to indicate problems with the installation. He stated that half-inch gaps between pavers can be normal for this type of installation and that, since the edge blocks are not mortared into place they can sometimes be lifted out by hand. This is normal, according to Charles Johnson, as is the gradual disappearance of polymeric sand over time.

Mr. Ceja testified that he went to the Claimant's home four times in response to complaints, but never dealt directly with the Claimant. He described the number of call-backs as "unusual – unique." Pavers were removed and reset on each visit because Mr. Ceja wanted to be sure that his crews were not doing something wrong. He also confirmed that none of the complaints or repairs involved the patio.

Mr. Ceja did introduce somewhat of a "red herring" into the proceedings by saying that he suspected that the edge pavers were loosened by the Claimant's lawn service's equipment. He testified that he saw tracks from such equipment on the lawn at his first visit. This testimony is pure speculation and carries no weight.

Matt Johnson testified that the Claimant complained about the slope of the soil off the edge of the patio after the installation was complete, so the Respondent went back with dirt to fill in the area. That was the only complaint involving the patio that the witness ever heard, and it had nothing to do with the pavers.

The evidence shows that both the Claimant and the Respondent fulfilled the contracts they executed. The Respondent installed the patio, the walkway, and the other items called for in

the contracts exactly as specified. The Claimant paid the contract prices in full. The Claimant's complaint is that after installation, problems with the pavers that the Respondent could not fix appeared. He believes, therefore, that the entire installation, both walkway and patio, needs to be removed and rebuilt.

The Claimant has failed to prove this allegation. The gaps between the pavers and the looseness of two of the blocks are essentially minor cosmetic defects. Polymeric sand must be replaced periodically. These minor issues are not the result of any unworkmanlike or incomplete home improvement work by the Respondent.

It is now almost three years since the Respondent completed the installation, and the evidence establishes that the Claimant got what he paid for. The photographs taken in March 2018 (Cl. Ex. 3A to 3E) actually show quite an attractive walkway in the front of the Claimant's house. Despite the Claimant's dissatisfaction, nothing in the record supports his contention that the walkway and patio must be rebuilt or given extensive repairs or that the Respondent provided an unworkmanlike or inadequate home improvement.

I thus find that the Claimant is not eligible for compensation from the Fund.

PROPOSED CONCLUSION OF LAW

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

Signature on File

June 5, 2018
Date Decision Issued

Richard O'Connor
Administrative Law Judge

JLG

ROC/emcl
#172760

PROPOSED ORDER

WHEREFORE, this 23rd day of July, 2018, 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 Shilling

***Michael Shilling
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION