

IN THE MATTER OF THE CLAIM * **BEFORE DOUGLAS E. KOTEEN,**
OF LARRY & PATRICIA JOHNSON, * **AN ADMINISTRATIVE LAW JUDGE**
CLAIMANTS * **OF THE MARYLAND OFFICE**
AGAINST THE MARYLAND HOME * **OF ADMINISTRATIVE HEARINGS**
IMPROVEMENT GUARANTY FUND * **OAH No. DLR-HIC-02-19-08693**
FOR THE ALLEGED ACTS OR * **MHIC No. 18 (90) 1080**
OMISSIONS OF JOHN WEBER, *
T/A WHEATON DOOR & WINDOW, *
RESPONDENT *

* * * * *

PROPOSED DECISION

STATEMENT OF THE CASE
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STATEMENT OF THE CASE

On August 10, 2018, Larry and Patricia Johnson (Claimants) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$14,980.00 in actual losses allegedly suffered as a result of a home improvement contract with John Weber, trading as Wheaton Door & Window (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015). On March 21, 2019, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on June 28, 2019 at the County Office Building, 1400 McCormick Drive, Largo, Maryland 20774. Bus. Reg. § 8-407(e). Shara Hendler, Assistant Attorney General,

Department of Labor (Department),¹ appeared and represented the Fund. The Claimants were present and represented themselves. Timothy Eagan, an employee of the Respondent, represented the Respondent, pursuant to a power of attorney issued by the Respondent, John Weber.

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. 2018); Code of Maryland Regulations (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 admitted the following exhibits on the Claimants' behalf:

- CL Ex. 1. Photograph, dated June 2019;
- CL Ex. 2. Photograph, dated March 2018;
- CL Exs. 3-4. Photographs, dated June 2019;
- CL Ex. 5. Home Improvement Contract between Claimants and Respondent, dated May 14, 2015; and
- CL Exs. 6-9. Photographs, dated June 2019.

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

- Resp. Ex. 1. Maryland Limited Power of Attorney, dated June 19, 2019;
- Resp. Ex. 2. Home Depot Special Services Customer Invoice, dated June 6, 2017; and
- Resp. Ex. 3. Home Improvement Contract between Claimants and Respondent, approved May 21, 2015, with attached Deck Wizard Addendum, dated May 14, 2015.

I admitted the following exhibits on behalf of the Fund:

- GF Ex. 1. MHIC Hearing Order, dated March 15, 2019;
- GF Ex. 2. Notice of Hearing, dated April 25, 2019;

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

GF Ex. 3. Home Improvement Claim Form, filed August 10, 2018, with attached Letter from Joseph Tunney, Chairman, MHIC, dated August 21, 2018; and
GF Ex. 4. MHIC I.D. Registration and Occupational/Professional License History, dated May 23, 2019.

Testimony

Each of the Claimants testified on their own behalf. Timothy Eagan, an employee of the Respondent, testified on the Respondent's behalf. The Fund did not present any witnesses.

PROPOSED FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor under MHIC registration number 96780.
2. On May 14, 2015, the Claimants and the Respondent entered into a contract to refinish the existing deck at the Claimants' residence in Clinton, Maryland by applying new sealer, sandy beach in color, on the deck and rails. The contract also called for preparation of the deck surface by filling cracks, sanding deck boards, and replacing warped or rotted boards as indicated in writing on the addendum. The parties also contracted for the Respondent to install Aberdeen Stone Edge flagstone pavers, baja beige in color, in place of the Claimants' existing concrete patio. The home improvement contract provided for an estimated start date of May 14, 2015, with an estimated completion date of July 14, 2015.
3. The original agreed-upon Contract price was \$14,000.00.
4. On or about May 14, 2015, the Claimants paid a \$4,000.00 deposit to the Respondent. In or about July 2015, the Claimants paid the remaining contract price of \$10,000.00.
5. The Respondent began work in July 2015 and completed the work in August 2015.

6. During the course of performing the work, the Respondent replaced several damaged boards on the deck surface and railing. No boards were replaced on the deck stairs.

7. The contract includes, in pertinent part, the following language:

Deck Wizard warrants its deck seal application against manufacturing or labor defects for a period of one (1) year from application. This warranty does not include normal color fading and wear, especially in areas exposed to heavy foot traffic or extreme weather, nor does it cover growth of mildew, direct or indirect contact with extreme heat sources, damage from pressure washing, contact with sharp objects including tools to remove snow or ice, nor acts of Nature, such as flooding, fire, hurricanes, earthquakes, lightning, etc. After one year, should customer be dissatisfied with the product or its application, Deck Wizard agrees to supply Buyer with an equivalent amount of new product that matches the existing finish. However, Deck Wizard shall not be responsible for the labor to remove the existing finish or to apply a new one.

(CL Ex. 5, p. 2); (Resp Ex. 3, 5).

8. After the Respondent installed the flagstone pavers on the patio, the Claimants made several requests for the Respondent to apply a sealant to the flagstone. The Respondent advised that he could not apply a sealant for at least six months to a year until the flagstone product had settled. Subsequently, on or about June 5, 2017, the Claimant Patricia Johnson (PJ) contacted the Respondent and again requested that the Respondent apply a sealant to the flagstone pavers. The Respondent agreed to apply a sealant to the flagstone pavers to protect and weatherize the flagstone.

9. On June 6, 2017, the Respondent purchased two gallons of Behr wet-look sealer at Home Depot at a cost of \$59.32. (Resp. Ex. 2). Later on June 6, 2017, the Respondent applied the sealer to the flagstone pavers on the Claimants' patio. The Claimants and the Respondent did not prepare a written contract to address the application of sealer to the flagstone.

10. At some point after the sealer was applied to the deck, the Claimants became dissatisfied with certain cracks, scratches, discoloration, and chipped paint on the deck. The

Claimants contacted the Respondent concerning their dissatisfaction with the appearance of the deck.

11. The flagstone pavers are a natural product so the colors on the flagstone varied and were not uniform.

12. The Claimants were not satisfied with the appearance of the flagstone pavers.

13. The Claimants have not obtained a proposal from any other contractor to make repairs to the deck or to the patio flagstone pavers.

14. The Claimants filed a claim with the Fund on August 10, 2018 seeking an award of \$14,980.00.

DISCUSSION

Legal Authority

In this case, the Claimants have the burden of proving the validity of their 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)²; *see also* COMAR 09.08.03.03B(2) (“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.”

² Unless otherwise noted, all references to the Business Regulation Article herein cite the 2015 Replacement Volume of the Maryland Annotated Code.

Bus. Reg. § 8-401. For the following reasons, I find that the Claimants have not proven they are eligible for compensation from the Fund for an actual loss.

Home Improvement Contract

The Claimants and the Respondent entered into a home improvement contract on May 14, 2015 to perform some work on the deck and patio of their home in Clinton, Maryland. (CL Ex. 5; Resp. Ex. 3). The contract provided for the following work to be performed:

1. Deck Wizard in being done to check [addendum] for details [sic].
2. Patio stone – Aberdeen color baja beige. Check [addendum] for details.
3. All coupons and special apply.

(CL Ex. 5).

There was a factual dispute among the parties as to the total contract price. The Claimants alleged that the total cost of the contract was \$14,980.00 and that they paid this amount in full. However, they did not submit any documents to establish the full amount they paid the Respondent for the home improvement work. Timothy Eagan (Eagan), the Respondent's representative and witness, testified that the full contract price was only \$14,000.00. I agree with Eagan's testimony regarding the contract price because it is supported by the signed contract. The Claimants submitted a document entitled "Proposal" that listed the cost as \$14,980.00. (CL Ex. 5, p. 3). However, that Proposal was not signed by any of the parties. In contrast, the contract document setting forth the total contract price of \$14,000.00 was signed by all parties. (CL Ex. 5, p. 5); (Resp. Ex. 3, p. 1). Moreover, this document was also consistent with Eagan's testimony that the Claimants paid a deposit of \$4,000.00 on or about May 14, 2015, and then paid the outstanding balance of \$10,000.00 in July 2015. For these reasons, I find by a preponderance of the evidence that the total contract price was \$14,000.00, and that the Claimants paid this amount in full.

A separate page of the contract entitled "Deck Wizard" included the following preprinted specifications with regard to the application of sealer on the deck:

Coating Package

Countersink nails on deck surface only.

Fill cracks on deck surface only.

Replace warped or rotted boards *as indicated in writing on addendum*. Additional charges will apply based on actual linear feet for replaced wood.

Sand deck boards to prep for coating.

Apply 2 coats of sealer in colors indicated.

(Resp. Ex. 3, p. 4) (emphasis supplied). The contract provided that the color of the deck sealer was sandy beach on both the deck and rails. (Resp. Ex. 3, p. 4).

The addendum for the deck work included a drawing showing the size of the deck, excluding the stairs and landing, as twelve feet by eleven and one-half feet. The deck addendum also stated, "We are not going to do bottom section only from the fascia [sic] and up." (Resp. Ex. 3, p. 6). This addendum did not specify the location of any warped or rotted boards to be replaced, as required by the specifications noted above, and did not include any further explanation of the work to be performed on the deck. (Resp. Ex. 3; CL Ex. 5). The deck addendum had a section entitled "Other Repairs." In that section, the addendum stated "Deck Board," with the numbers "3" and "14." (Resp. Ex. 3, p. 6). Beneath the "3", was a pound symbol (#), and beneath the "14," was the word "size." There was no further written explanation of the deck work in the addendum or elsewhere in the contract, and the Claimants did not address the meaning of this language in the addendum or the precise work to be performed.

A separate page of the contract concerning the patio work included a drawing showing the size of the patio as eighteen feet by thirteen feet. It stated, "Aberdeen Stonedged Collection. Color baja beige. Mix with small and large stones." (CL Ex. 5; Resp. Ex. 3). The contract did not include any further statement of work to be performed on the patio, and the parties did not reduce to writing their agreement for the Respondent to apply a sealer to the flagstone pavers.

Deck Work

Both Claimants testified they were dissatisfied with the quality of the work performed by the Respondent on the deck and the patio. With regard to the deck, the Claimant Patricia Johnson testified that she believed the work performed on the deck was unsatisfactory because some of the paint was chipped, there were scratches and cracks in the wood, and some of the wood became discolored. She claimed that one of the Respondent's workers told her the deck sealer would last for fifteen years. PJ was also dissatisfied because the Respondent did not agree to replace additional boards on the deck and stairs. The Claimants submitted five photographs that depict the condition of the deck in June 2019. (CL Exs. 3-4, 6-8). PJ testified that she took these photographs of the deck the day before the hearing, which would have been June 27, 2019.

According to PJ's own testimony, the photographs the Claimants submitted at the hearing depict the condition of the deck only in June 2019, which is nearly four years after the Respondent performed work on the deck in July and August 2015. Although the photographs do show cracks in the wood, chipped paint, and some discoloration of the wood in June 2019, the Claimants have not established through testimony or documents the specific condition of the deck immediately after the work was performed, or even one year after the work was performed on the deck. This timeline is significant because of certain limitations that appear in the contract.

The contract includes language that limits the warranty for application of the deck seal to one year. In this regard, the contract states "Deck Wizard warranties its deck seal application against manufacturing or labor defects for a period of one (1) year from application." The contract also provides that the warranty "does not include normal color fading and wear, especially in areas exposed to heavy foot traffic or extreme weather, nor does it cover growth of mildew, direct or indirect contact with extreme heat sources, damage from pressure washing,

contact with sharp objects including tools to remove snow or ice, nor acts of Nature, such as flooding, fire, hurricanes, earthquakes, lightning, etc.” (Resp. Ex. 3, p. 5); (CL. Ex. 5, p.2).

As the contract only warranted the deck seal application against manufacturing or labor defects for one year, and the Claimants have failed to establish in this record the condition of the deck after one year, they have failed to prove that the Respondent performed inadequate or unworkmanlike work with regard to application of the deck sealant. The limited one year warranty against manufacturing and labor defects refutes the Claimants’ contention that the deck seal should have lasted for fifteen years. Even if one of the Respondent’s employees or subcontractors erroneously made this statement, the contract language is controlling and limits the warranty for defects in the labor performed to only one year. Furthermore, the contract expressly excludes from the warranty fading colors and wear and tear, especially in areas exposed to heavy foot traffic or extreme weather. The contract also expressly excludes from the warranty any damage from mildew, pressure washing, sharp objects, and acts of nature, among others items. (Resp. Ex. 3, p. 5); (CL Ex. 5, p. 2).

PJ acknowledged at the hearing that the contract she signed included a one year warranty against manufacturing and labor defects with regard to application of the deck sealant. Moreover, Timothy Eagan, the Respondent’s representative and witness, testified that the sealant was only good for about one year and had to be reapplied thereafter. Because the photographs of the deck were taken in June 2019, the Claimants have failed to establish with any specificity the condition of the deck after application of the deck seal, or within one year of its application. Furthermore, the Claimants have failed to prove that any defects were caused by the Respondent’s acts or omissions, rather than by wear and tear, extreme weather, mildew, sharp objects, or acts of nature, which are expressly excluded under the contractual warranty.

The Claimant Larry Johnson (LJ) testified that the Respondent never sanded down the deck or filled in cracks on the boards. He testified that the Respondent merely power washed the deck, took the stain off, and then painted over the deck. However, PJ testified that the Respondent performed work under the contract, which included refinishing the deck, removing and replacing some bad boards, shaving and smoothing the deck, and applying new stain.

The Claimants have demonstrated through the photographs they submitted that in June 2019 some paint on the deck was chipped, the deck surface showed cracks, and some boards were discolored. While the appearance of the deck was less than ideal four years after the sealant was applied, the Claimants have failed to prove that the Respondent performed the home improvement in an inadequate or unworkmanlike manner under the terms of the contract. They did not establish the condition of the deck immediately following application of the sealant or within one year after this work was performed through contemporaneous photographs or specific testimony. Furthermore, they did not present testimony or a written report from an expert in deck construction or the application of sealant, from a professional inspector, or from a different contractor who inspected the deck and prepared a written proposal to make repairs to the deck. The Claimants also failed to prove that the deck sealant should have lasted for fifteen years after its application rather than the warranty period of one year. For these reasons, I conclude that the Claimants failed to prove that this deck work was performed in an inadequate or unworkmanlike manner.

The Claimants also argued that the Respondent failed to replace certain damaged boards on the deck and stairs that they claim needed replacement. The contract contemplates that some warped or rotted boards would be replaced. However, the contract also states that this work would be done "as indicated in writing on the addendum." (Resp. Ex. 3, p. 4). A review of the addendum concerning the deck work is ambiguous and inconclusive regarding this issue. There

is no clear statement on the deck addendum or elsewhere in the contract as to how many boards were to be replaced on the deck or the location of any damaged boards requiring replacement.

The Claimants failed to testify with specificity concerning this issue and did not address the contract language. Both Claimants acknowledged that the Respondent did replace some damaged boards on the deck, and they failed to establish that the Respondent violated the terms of the contract regarding this issue. As required by the contract language on page four, the deck addendum on page six does not explain the work to be performed with regard to the replacement of damaged boards on the deck. (Resp. Ex. 3, pp. 4, 6). Moreover, I can only speculate as to whether the number "3" that appears on the addendum indicates that the parties agreed that three boards would be replaced on the deck. If the parties intended for the addendum to reflect that the parties had agreed in writing that only three boards would be replaced, then the testimony of both Claimants would establish that this aspect of the contract was satisfied. Both Claimants acknowledged that the Respondent replaced several damaged boards on the deck.

LJ testified that the Respondent did not replace any boards on the steps. He stated that he subsequently requested that the Respondent replace all of the boards on the steps, but that the Respondent refused to do this and agreed only to re-paint or re-stain the steps. Eagan stated that LJ subsequently requested that the Respondent replace six additional boards on the deck, and re-sand and re-stain the entire deck. Eagan acknowledged that when the Respondent returned to make some repairs to the steps, LJ requested more extensive repairs that the Respondent had never agreed to perform. Eagan also testified that when the Respondent did not agree to perform the more extensive repairs requested by the Claimants, LJ then refused to permit the Respondent to perform any further work. LJ confirmed that the parties never agreed on the extent of repairs to be performed and, as a result, the Respondent performed no additional work on the deck.

The evidence established that the Respondent did replace several damaged boards on the deck. As the parties did not specify in the addendum or elsewhere in the written contract the precise number and location of the boards to be replaced as the contract required, the Claimants have failed to prove that the Respondent violated the terms of the contract or that the Respondent's work with regard to the replacement of damaged boards was inadequate, unworkmanlike, or incomplete.³ Moreover, when the Respondent agreed to make some repairs and the Claimants refused to permit them to do any further work because of their disagreements, I conclude that the Claimants unreasonably rejected good faith efforts by the Respondent to resolve the claim. Md. Code Ann., Bus. Reg. § 8-405(d).

Patio Work

The Claimants also raised their dissatisfaction with the work performed by the Respondent on the flagstone pavers on the patio because they contend the flagstones were not uniform in color, did not match the color of the deck, and the color subsequently faded after the Respondent applied the sealer. Neither version of the written contract included in this record addresses the application of sealer to the flagstone pavers. (CL Ex. 5); (Resp. Ex. 3). However, both parties agreed in their testimony that the Claimants requested, and the Respondent agreed, to apply a sealer to the flagstone pavers. There were factual disputes, however, concerning when this work was performed and whether the sealer was intended to be transparent or opaque. The Claimants contend the sealer was applied approximately one year after the flagstone pavers were installed, and they desired that it be an opaque product that matched the color of the deck. PJ claimed the flagstone work was incomplete because the color was incorrect and did not match the color of the deck. In contrast, Eagan stated that the sealer was applied to the pavers on June

³ The Claimants submitted a written contract, dated May 14, 2015, that was seven pages in length. (CL Ex. 5). The Respondent submitted a written contract, also dated May 14, 2015, that was six pages in length. (Resp. Ex. 3). The contracts are substantially similar, but include several variations. While only the Respondent's version of the contract includes the deck addendum, because the signature of both Claimants appear on that addendum I conclude it was properly part of the contract. (Resp. Ex. 3, p. 6).

6, 2017, about two years after the initial patio work was completed. He also testified essentially that the sealer was transparent, was intended to protect and weatherize the flagstone, and that the sealer would not cause the flagstone pavers to change color.

As the parties never prepared written contract language to address the application of the sealer to the flagstone pavers, the Claimants have failed to establish through any contract language that the Respondent used the wrong product or improperly applied sealer to the flagstone. I shall credit the testimony of the Respondent's witness, Timothy Eagan, concerning the sealant and color issues because his testimony was detailed and logical, and was supported by the relevant documents. The Respondent submitted an invoice from Home Depot, which indicates that the Respondent purchased two gallons of Behr wet-look sealer from Home Depot on June 6, 2017. (Resp. Ex. 2). Eagan testified that the Respondent purchased this product from Home Depot on June 6, 2017 in response to the Claimants' June 5, 2017 request that the Respondent apply a sealant to the flagstone. Eagan testified that this sealer was applied to the flagstone pavers that same day, which was about two years after the flagstone pavers were originally installed.⁴ Eagan also pointed out that the job number listed on the Home Depot invoice, 17022, matched the job number listed on the contract, which further supported Eagan's testimony that the Respondent applied this Behr wet-look sealer to the Claimants' flagstone pavers on June 6, 2017. (Resp. Exs. 2, 3).

Eagan denied that any discoloration of the flagstone pavers was caused by the Respondent's work. He testified that the sealant the Respondent applied to the flagstone pavers would enhance the color of the stone, but would not make the flagstones change color. He also stated that the sealant would last for only one year and would have to be reapplied every year to

⁴ I agree with counsel for the Guaranty Fund that the Claimants' Fund claim was timely filed. Although the claim was not received by the Fund until August 10, 2018, I conclude that it was filed within three years of when the Claimants discovered or should have discovered any loss or damage because the Respondent did not complete the home improvement work until June 2017. Md. Code Ann., Bus. Reg. § 8-405(g); (Resp. Exs. 2, 3); (GF Ex. 3).

protect the stone. Therefore, he asserted that any sealant that was applied to the flagstone pavers back in June 2017 would no longer be present on the stones. He testified that power washing the stones or applying too much sealant might cause some discoloration, but he denied that the Respondent's work was responsible for any discoloration in the flagstone pavers. He pointed out that the sealant was applied more than two years before the pictures were taken, and he had no knowledge of what had been done to the flagstone since that time. Eagan also stated that flagstone is a natural product so there will be variations in the color and appearance of the stone. He also denied that there is any solid opaque product or paint that could be applied to the flagstone.

I find that the Claimants have failed to prove on this record that the Respondent was responsible for any discoloration in the flagstone. Furthermore, the Claimants have not proven that the parties contracted for the color of the flagstone patio to match the color of the deck. The evidence establishes that the Respondent agreed to apply a transparent sealer to the flagstone in June 2017 at the Claimants' request. As there is no written contract language regarding application of the sealer to the flagstone, I must rely on the Home Depot invoice and the testimony of the parties.

The Home Depot invoice identifies the sealer product as "Behr wet-look sealer." (Resp. Ex. 2). There is no color noted on this invoice, so it is logical to conclude that the product was a transparent sealant designed to protect and weatherize the flagstone as Eagan testified. Although the Claimants contend they desired to have the flagstone match the color of the deck, a preponderance of the evidence fails to demonstrate that they contracted with the Respondent to achieve that result. The Claimants contracted for the Respondents to install Aberdeen patio stone that was baja beige in color, and to install a mix of large and small stones. (Resp. Ex. 3, pp. 1, 3). The Claimants also contracted for the Respondents to apply a sealer to the deck with the color described as "sandy beach." (Resp. Ex. 3, pp. 4, 6). The written contract does not call

for the color of the patio stone to match the color of the deck. The Claimants contracted for two distinct colors, respectively, for the flagstone patio and for the deck sealant. Moreover, there is no written agreement between the parties regarding application of the sealant to the flagstone, so there is certainly no written agreement in this record that the sealant was intended to change the color of the flagstone to match the color of the deck.

The Claimants also asserted their dissatisfaction that the color of the flagstone pavers did not appear to be one solid uniform color. However, Eagan testified logically and credibly that flagstone is a natural product that will have variations in color and appearance. This is the natural product the Claimants contracted to have installed on their patio. (Resp. Ex. 3); (CL Ex. 5).

The Claimants also contend that the Respondent's work caused the color of the flagstone pavers to fade and become discolored. However, the Claimants have failed to prove on this record that the Respondent's acts or omissions caused fading or discoloration of the flagstone pavers. The photographs submitted by the Claimants demonstrate that the flagstone pavers continued to have a deep natural tan and grey appearance in March 2018 and in June 2019. This is reflected in the photographs submitted as Claimants' Exhibit Nos. 2 and 9. These two photographs do not show faded or discolored stones. The Claimants contend, however, that the photograph identified as Claimants' Exhibit No. 1 does show faded and discolored stones. Although on its face, this photograph appears to show some faded colors on the flagstone, PJ's own testimony calls this appearance into question. PJ testified that the lighter colors depicted in Claimants' Exhibit No. 1 might have been caused by the way the sunlight was hitting the flagstone or based on the time of day in which the photograph was taken. The Claimants failed to explain why the colors of the flagstone pavers in Claimants' Exhibit No. 9 appeared darker and quite different from the colors of the flagstone pavers in Claimant's Exhibit No. 1, even though, according to PJ's testimony, both photographs were taken in June 2019.

Considered in the light most favorable to the Claimants' position, the various photographs appear to show that the color has faded on some of the flagstone pavers, but has not faded on other stones on the same patio. The Claimants contend that the flagstone pavers became faded and discolored as a result of the Respondent's application of the sealer to the flagstones in June 2017. However, if this were truly the cause, the Claimants have failed to explain why the some of the flagstones would have faded in color and some would not have faded, even though the two gallons of sealer were applied to the entire flagstone patio. No witness claimed that the sealer was not applied to all of the flagstones on the patio.

The Claimants also contend that some of the flagstones were not laid flat and are uneven. They contend this is visible in the June 2019 photograph at Claimants' Exhibit No. 9. Eagan testified that the Claimants never brought this issue to the Respondent's attention. Although the photograph appears to show a slight discrepancy in height in one of the stones, there is no indication that this issue was ever raised with the Respondent in a timely manner, the extent of the issue is unclear, and the Claimants presented no evidence from another contractor to establish that this issue constitutes a true defect, or regarding the cost of repair.

The Claimants have the burden of proof in this case to establish that they have suffered an actual loss as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-405(a), 8-407(e). An actual loss is defined as the cost to restore, repair, replace or complete an unworkmanlike, inadequate, or incomplete home improvement. Md. Code Ann., Bus. Reg. § 8-401. For the reasons addressed above, I conclude that the Claimants have failed to prove on this record that the Claimants suffered an actual loss as a result of any defective work by the Respondent with regard to his performance of work on the deck or patio at the Claimants' residence. Therefore, I find that the Claimants are not eligible for compensation from the Fund.

Cost to Repair

Even if I were to conclude that some of the Respondent's work performance on the deck or patio was inadequate, unworkmanlike, or incomplete, the Claimants must still prove the cost of any repairs that would be necessary to correct the defective work. The Claimants have failed to prove on this record the cost of any repairs they seek for the deck or patio.

If I were to find the Claimants eligible for compensation from the Fund, I must still determine the amount of the Claimant's actual loss and the amount, if any, the Claimant would be 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).

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 Claimants have not claimed that the Respondent abandoned the contract without doing any work. Therefore the formula that measures the Claimants' actual loss if the Respondent had abandoned the contract is not applicable. COMAR 09.08.03.03B(3)(a).

If the Respondent performed some work under the contract and the Claimants were not seeking other contractors to complete or remedy that work, then the following formula would be used to appropriately measure the Claimants' actual loss:

If the contractor did work according to the contract and the claimant is not soliciting another contractor to complete the contract, the claimant's actual loss shall be the amount which the claimant paid to the original contractor less the value of any materials or services provided by the contractor.

COMAR 09.08.03.03B(3)(b). PJ testified that she was not sure whether she would seek another contractor to perform the work. LJ testified that he would like someone else to come out and do the work. The Claimants were seeking the full amount they paid to the Respondent, which I found to be \$14,000.00. However, they failed to prove the value of the work performed by the Respondent.

If the Respondent performed some work under the contract, and the Claimants had retained or intended to retain other contractors to complete or remedy that work, then the following formula would be used to appropriately measure 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 any of the formulas, the Claimants must provide some evidence to demonstrate the value of the work that was performed by the Respondent and/or how much it would cost to make any needed repairs. In this case, the Claimants have not provided any evidence to demonstrate the value of the work the Respondent did perform or the cost of making any repairs the Claimants believe are necessary. They certainly did not prove on this record that the Respondent's work had no value. Moreover, the Claimants did not solicit any other contractors to make repairs. They presented no evidence to show how many boards they believed required replacement, and they presented no evidence by which I could calculate how much it would cost to replace some damaged boards on the deck or stairs. Nor did they present any evidence to show how much of the deck they believed required further sanding or the application of additional sealant. Additionally, they provided no evidence to determine the cost to sand and apply sealant to portions of the deck they believed were inadequate.

With regard to the patio, the Claimants failed to present any evidence to show what portion of the flagstone pavers they believed to be faded or discolored, and how much it would cost to repair or replace any damaged or discolored flagstone pavers.

The Claimants could have solicited another contractor to explain deficiencies in the work and prepare a proposal for the cost of repairs to the deck and the patio. The Claimants failed to prevent such evidence, and did not offer any other evidence or method to by which the cost of repairs could be calculated, or even the value of the work performed by the Respondent. Therefore, even if I had found that some of the Respondent's work performed on the deck or patio was inadequate, unworkmanlike, or incomplete, I would still have to deny reimbursement because the Claimants have failed to provide sufficient evidence by which to calculate the value of work performed by the Respondent, or the cost to repair any purported defective work.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimants have 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, 8-407 (2015); COMAR 09.08.03.03B(3). For the reasons addressed above, I conclude that the Claimants have failed to prove on this record that Respondent performed home improvement work in an inadequate, unworkmanlike, or incomplete manner. Even if the Claimants had proven that some of the Respondent's work was defective, the Claimants failed to provide sufficient evidence to calculate the value of the work performed by the Respondent, or the cost of any needed repairs.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund deny the Claimants' Claim; and **ORDER** that the records and publications of the Maryland Home Improvement Commission reflect this decision.

September 25, 2019
Date Decision Issued

DEK/da
182040

Signature on File

Douglas E. Koteen
Administrative Law Judge

PROPOSED ORDER

WHEREFORE, this 20th day of November, 2019, 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.

Lawrence Helminiak

Lawrence Helminiak

Panel B

***MARYLAND HOME IMPROVEMENT
COMMISSION***

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