

<p><b>IN THE MATTER OF THE CLAIM</b></p> <p><b>OF KAREN BARBOUR,</b></p> <p><b>CLAIMANT</b></p> <p><b>AGAINST THE MARYLAND HOME</b></p> <p><b>IMPROVEMENT GUARANTY FUND</b></p> <p><b>FOR THE ALLEGED ACTS OR</b></p> <p><b>OMISSIONS OF JOSEPH LEE, T/A</b></p> <p><b>MARYLAND LANDSCAPE</b></p> <p><b>CONSTRUCTION, LLC,</b></p> <p><b>RESPONDENT</b></p>	<p><b>* BEFORE KATHLEEN A. CHAPMAN,</b></p> <p><b>* AN ADMINISTRATIVE LAW JUDGE</b></p> <p><b>* OF THE MARYLAND OFFICE</b></p> <p><b>* OF ADMINISTRATIVE HEARINGS</b></p> <p><b>*</b></p> <p><b>*</b></p> <p><b>*</b></p> <p><b>* OAH No.: LABOR-HIC-02-22-29163</b></p> <p><b>* MHIC No.: 23 (75) 22</b></p>
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**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 October 7, 2022, Karen Barbour (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)<sup>1</sup> Guaranty Fund (Fund) for reimbursement of \$14,850.00 for actual losses allegedly suffered as a result of a home improvement contract with Joseph Lee, trading as Maryland Landscape Construction, LLC (Respondent). Md. Code Ann.,

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<sup>1</sup> The MHIC is under the jurisdiction of the Department of Labor (Department).

Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2022).<sup>2</sup> On November 21, 2022, the MHIC issued a Hearing Order on the Claim. On November 28, 2022, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On April 3, 2023,<sup>3</sup> I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. Assistant Attorneys General Hope Sachs and Ernie Dominguez, Department, represented the Fund. Jonathan C. Weetman, Esquire, represented the Claimant, who was present. The Respondent 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); 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 the compensable loss?

### SUMMARY OF THE EVIDENCE

#### Exhibits

I have attached a complete Exhibit List as an Appendix.

#### Testimony

Both the Claimant and Respondent testified, and presented no additional witnesses. The Fund offered no witness testimony.

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<sup>2</sup> Unless otherwise noted, all references to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.

<sup>3</sup> This case was originally scheduled for February 24, 2023, but was postponed at the request of the Respondent who, on the date of hearing, indicated that he felt ill with Covid-like symptoms.

**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 01-95843.

2. The Claimant and the Respondent entered into a series of contracts<sup>4</sup> (collectively, hereinafter referred to as the Contract) to perform the following home improvement projects, in pertinent part:

<b>Contract date</b>	<b>Scope of work</b>	<b>Contract price</b>
August 7, 2021 (#1)	<ul style="list-style-type: none"> <li>• Remove/replace all existing 4x8 brick pavers from the under deck patio, gazebo patio area, and deck steps.</li> <li>• Supply/install 950 sq. ft. of "stone ridge" Nicolock® pavers on 1" concrete sand</li> <li>• Perform cutting, as needed, to install border 6x6 or 6x9, as border</li> <li>• Install snap edge paver restraint with 10" spikes</li> <li>• Backfill patio edges</li> <li>• Supply/sweep alliance G2 polymeric sand and tamp down</li> <li>• Seed/straw any turf areas disturbed during construction</li> <li>• Remove/replace existing concrete steps with 4' wide natural stone steppers (a total of two)</li> <li>• Assess/add/remove base material</li> <li>• Set elevations according to structural improvements</li> </ul>	\$16,680.00
August 7, 2021 (#2)	<ul style="list-style-type: none"> <li>• Remove existing small natural stone steppers</li> <li>• Excavate area, as needed</li> <li>• Install 5-6 larger natural stone steppers (Western Maryland stone) on compacted 3/4" washed gravel</li> <li>• Repair/re-mulch area, as needed</li> </ul>	\$ 2,180.00
August 9, 2021	<ul style="list-style-type: none"> <li>• Remove existing 3/4" gravel and excavate soil, as needed</li> <li>• Provide/place 3-4" of compacted cr8 as base material</li> <li>• Lay approximately 120 sq. ft. of existing 4x8 brick, to the 11x11 patio area</li> <li>• Provide a (1) 50 gallon rain barrel</li> </ul>	\$ 2,970.00

<sup>4</sup> During direct examination of the Claimant, Mr. Weetman made a point of calling the written documents in evidence, at Claimant Exhibit 1, "proposals". The parties do not dispute that the various proposal became contracts to perform home improvements.

	<ul style="list-style-type: none"> <li>• Excavate small area, level 2x2 area by downspout with pavers set on concrete sand</li> </ul>	
August 14, 2021	<ul style="list-style-type: none"> <li>• Demo all existing bricks on steps and risers</li> <li>• Remove all mortar down to original concrete steps</li> <li>• Provide/lay ledgerstone veneer as step riser including corners</li> <li>• Provide and set 6x12" fullnose coping as step treads</li> <li>• Coping treads to be installed using srw<sup>5</sup> concrete adhesive</li> <li>• Remove lower brick landing area</li> <li>• Overlay concrete with Nicolock<sup>®</sup> stone ridge pavers in Westchester blend</li> <li>• Perform cutting, as needed, to install border 6x6 or 6x9, as border</li> <li>• Backfill</li> <li>• Mulch</li> </ul>	\$ 8,375.00
September 22, 2021	<ul style="list-style-type: none"> <li>• Demo and remove all existing brick pavers from top patio, approx. 250 sq. ft.</li> <li>• Remove existing stone dust bedding</li> <li>• Compact base</li> <li>• Supply/lay Nicolock<sup>®</sup> stone ridge pavers in marble blend on 1" concrete</li> <li>• Perform cutting, as needed, to install border 6x6 or 6x9, as border</li> <li>• Install snap edge paver restraint with 10" spikes</li> <li>• Sweep G2 polymeric sand throughout paver surface, compact pavers for final elevation</li> <li>• Supply and install 1-75 gallon rain barrel to existing downspout</li> <li>• Build level platform with existing pavers to match patio</li> </ul>	\$ 6,480.00
	<b>TOTAL:</b>	<b>\$36,685.00</b>
December 13, 2021 (Miscellaneous additional work)	<ul style="list-style-type: none"> <li>• Patio removal and extension behind shed (additional 40 sq ft installed per customer request); original area marked and stated in contract was 11x11</li> <li>• Required additional labor, stone base, bedding material, paver restraint and spikes</li> </ul>	\$ 860.00
	<ul style="list-style-type: none"> <li>• Removal and disposal of 6x6 timber edging on upper patio per customer request</li> <li>• Includes labor, removal of pavers, additional stone base, bedding material, paver restraint, and spikes</li> </ul>	\$ 575.00
	<ul style="list-style-type: none"> <li>• Purchase and install two additional rain barrels (1-60 gallon and 1-90 gallon)</li> </ul>	\$ 875.00

<sup>5</sup> Neither party explained the acronym "srw."

	• Three pallets of sod @\$350.00/each	\$ 750.00 <sup>6</sup>
	<b>TOTAL:</b>	<b>\$39,745.00<sup>7</sup></b>
December 13, 2021 (Miscellaneous adjustments)	• Fountain liner	(\$ 250.00)
	• Walkway steps	(\$ 850.00)
	<b>TOTAL:</b>	<b>\$38,645.00<sup>8</sup></b>

Clmt. Ex. 1.

3. The Claimant paid a total of \$38,070.00 for labor and materials, via the following installments:

- Check #3410, in the amount of \$11,895.00, November 1, 2021
- Check #3413, in the amount of \$11,000.00, November 20, 2021
- Check #3414, in the amount of \$1,320.00, November 22, 2021
- Check #3416, in the amount of \$6,000.00, December 8, 2021
- Paypal receipt, in the amount of \$7,855.00, March 22, 2022

Clmt. Exs. 22B and 23.

4. The Contract did not contain an estimated timeframe for performing or completing the work; however, the Respondent began work in November 2021 and completed the work in March 2022.

5. According to one of the August 7, 2021 contracts, the Respondent agreed to “[I]nstall 5-6 larger natural stone steppers ([W]estern Maryland stone) on compacted 3/4” washed gravel.” Clmt. Ex. 1, August 7, 2021 (#2) contract.

6. On November 11, 2021, the Respondent purchased 3.18 tons of Western Maryland stone steppers from Greco’s Landscaping Supplies, at a cost of \$758.43. Resp. Ex. 1. The Respondent installed those same steppers at the project site. Clmt. Ex. 3.

<sup>6</sup> The Respondent only charged the Claimant his “at cost” price of \$750.00 as opposed to \$1,050.00 (\$350.00 x 3).

<sup>7</sup> \$36,685.00 + \$860.00 + \$575.00 + 875.00 + \$750.00 = \$39,745.00.

<sup>8</sup> \$39,745.00 - \$250.00 - \$850.00 = \$38,645.00.

7. The Claimant demanded that the Respondent remove and replace the steppers, claiming that the steppers were not true Western Maryland stone. The Respondent refused.

8. Not included in any of the written contracts mentioned above is the purchase and installation of a fountain pump which the Parties agreed the Respondent would perform. The Respondent installed the fountain pump, as agreed. However, before the Claimant had an opportunity to see whether the pump was operational, the Respondent left the project. The Respondent never gave the Claimant a copy of the receipt or the warranty paperwork from the manufacturer. The pump has not been operated since the date it was installed.

9. The Appellant has a shed in her backyard that she uses as an outdoor art studio that is insulated, has electricity, a granite floor, as well as a wine cooler. T. of Clmt. The shed was installed in 1997 (T. of Clmt.), and is approximately twenty-four inches below grade on the back side (T. of Clmt. and Resp.).

10. According to the August 9, 2021 and December 13, 2021 contracts, the Respondent agreed to lay approximately 120 square feet of 4x8 brick to a pre-existing cement patio area behind the shed, and include an extension of approximately 40 additional square feet beyond the existing cement pad. The pre-existing cement pad was not level. The Respondent performed work, as specified. Clmt. Ex. 1, August 9, 2021, and December 13, 2021 contracts.

11. The Claimant complained to the Respondent that she believed the finished product was too slanted (i.e., not level). The Respondent agreed to remove and reinstall the brick to offset the slant. The second installation of the brick improved the slant, but did not cause the patio to be level.

12. Whether pre-existing<sup>9</sup> or as a newly discovered issue,<sup>10</sup> the Claimant complained to the Respondent that she was noticing water intrusion inside the shed. The Respondent did not return to the project to assess the cause or cure for the water intrusion.

13. The Respondent installed Nicolock<sup>®</sup> pavers on the Claimant's property in three separate areas, including under a deck patio, a gazebo patio, and an upper patio by the deck steps. The Respondent installed the pavers pursuant to Nicolock<sup>®</sup> guidelines and industry standards.

14. Several months post installation, the Claimant observed blemishes in the pavers that she coined as "sand pops." Approximately one hundred pavers had visible sand pops.

15. At the Claimant's request, the Respondent removed and replaced approximately fifty pavers. As more sand pops developed, however, the Respondent declined to remove and replace any more pavers.

16. The Claimant contacted Nicolock<sup>®</sup>, who confirmed that sand pops are normal. However, Nicolock<sup>®</sup> agreed to replace the affected product pursuant to its warranty because it was determined that the pavers were structurally defective given the unusually high number of pavers with sand pops. The Respondent refused to return to the project to remove and replace the affected pavers with the new pavers to be supplied by Nicolock<sup>®</sup>.<sup>11</sup>

17. Pursuant to the August 7, 2021 (#1), August 9, 2021, August 14, 2021, and September 22, 2021 contracts, the Respondent agreed to install and secure border pavers with G2 polymeric sand. After the installation of the border pavers, the Claimant began to notice weeds

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<sup>9</sup> The Respondent testified that he was asked to install the brick to a pre-existing cement slab that had a "pretty significant grade difference" of approximately twelve inches. He also indicated that at the back of the shed, the shed was below grade by approximately eighteen to twenty-four inches. The Respondent further stated that he observed water behind pooling the shed before he began work on the project.

<sup>10</sup> The Claimant testified that, not since she installed the drywall, approximately three years earlier, had she had a water intrusion issue inside the shed prior to the Respondent's performance under the contract.

<sup>11</sup> The Claimant did not follow through in obtaining the new pavers, which were on warranty, from Nicolock<sup>®</sup>.

between seams, water coming up from the ground, and loose pavers. The Respondent did not return to the Claimant's home to address any of these complaints.

18. According to the August 7, 2021 (#1) contract, the Respondent agreed to remove existing brick pavers from the gazebo patio (approximately 12x12) and replace them with Nicolock® pavers. Included in this project was the installation of a "runway" leading from the patio behind the home to the gazebo patio. *See* Clmt. Ex. 18; Resp. Ex. 3.

19. The Claimant complained to the Respondent that he failed to perform the work, as specified, because whenever it rains water pools to the center of the gazebo and causes sediment to gravitate toward the runway and gazebo patio. The Respondent offered to correct the drainage issue by raising the center pad under the gazebo to draw the water away, but the Claimant rejected the offer as unacceptable because it would cause the table and chairs located under the gazebo to be unsteady.

20. To access the various areas of the Claimant's backyard, the Respondent used a mini skid loader. The Respondent agreed to seed/straw any turf area disturbed during construction. The Respondent performed the work, as specified. In addition, at the Claimant's request, the Respondent purchased and installed three pallets of sod. Clmt. Ex. 1, December 13, 2021 contract. The Claimant, however, complained to the Respondent that runoff from the sediment and mud dredged up by the skid loader caused significant damage to the adjacent lawn. The Claimant demanded that the Respondent seed and sod all areas of the adjacent lawn. The Respondent refused.

21. The Claimant obtained the following quote from Deer Park Landscaping, Inc., who is a MHIC licensed contractor, to address each of her complaints, as follows:



Item	Description	Total
Paver Repair	Remove and replace all pre-marked pavers. Approx. 40-50 pavers.	\$ 600.00
Paver Repair	Remove and install new pavers and use some old pavers. Approx. 200 sq. ft.	\$ 6,000.00
Polymeric Sand	Sandlock all pavers.	\$ 800.00
Paver Repair	Remove and re-install pavers behind the shed for better drainage. May raise existing wall.	\$ 3,500.00
Steps – Stone	Remove existing Pa steppers and replace them with Western MD steps. Approx. 8-10 steps 36-48” wide.	\$ 2,500.00
Miscellaneous	Remove and replace fountain pump.	\$ 250.00
Sod	Grade and topsoil an estimated 600 sq. ft. area. Sod area.	\$ 1,200.00
<b>TOTAL:</b>		<b>\$14,850.00</b>

See Clmt. Ex. 21.

22. The Claimant suffered an actual loss in the amount of \$800.00 for the application of polymeric sand to all pavers; \$250.00 for the removal and replacement of the fountain pump, and \$6,000.00 for removal and installation of paver to level the gazebo patio, for a total of \$7,050.00.

### DISCUSSION

#### Position of the Parties

##### Western Maryland stone steppers

The Claimant testified that she was unhappy with the Respondent’s installation of stone steppers that, in the Claimant’s opinion, failed to meet the parameters of the August 7, 2021 (#2) contract. According to the Claimant, the Respondent was supposed to “install 5-6 larger natural stone steppers (western Maryland stone) on compacted 3/4” washed gravel,” see Claimant Exhibit 1, and, instead, he placed five unidentifiable stones that looked nothing like the Western Maryland stone she bargained for. The Claimant asserted that the Respondent knew or should have known that the stone steppers were not Western Maryland stone because he installed the correct stones, as seen in Claimant Exhibit 2. As proof of this position, the Claimant asked that I

compare and contrast the pictures of the stone steppers (Claimant Exhibit 3) against a true version of a Western Maryland stone (Claimant Exhibit 2). The Claimant also testified that two contractors after-the-fact told her that the stone steppers, indeed, were not Western Maryland stone. For this alleged inadequate home improvement, the Claimant is seeking \$2,500.00 to “[r]emove existing Pa steppers and replace [them] with Western MD steps. Approx 8-10 steps 36-48” wide.” See Clmt. Ex. 21.

The Respondent took issue with the Claimant’s characterization that he failed to supply and install Western Maryland steppers, as required under the Contract. In support of his testimony, the Respondent supplied an invoice from Greco’s Landscaping Supplies showing that, on November 12, 2021, he purchased 3.18 tons of Western Maryland steppers. Resp. Ex. 1.

The Respondent further commented that there is a definite difference between steppers, which tend to be irregular in shape (*see* Claimant Exhibit 3), and steps, which tend to be more uniform in shape (*see* Claimant Exhibit 2). The Respondent also pointed out that the Deer Park Landscaping estimate in evidence, at Claimant Exhibit 21, would enrich the Claimant because the estimate calls for the installation of eight to ten *STEPS* as opposed to five or six natural stone *STEPPERS*.

*Fountain pump*

The Claimant testified that the Respondent agreed to seal all cracks in an outdoor fountain to prevent water from leaking as well as install a new pump for the fountain. Clmt. Ex. 4. According to the Claimant, she has been unable to use and enjoy the fountain because she has no idea if the pump works, and she has no way of testing the pump to see if it does work. Compounding the problem, the Claimant stated that the Respondent told her to contact the manufacturer for instructions on how to resolve this issue. The Claimant felt this was an

unworkable solution since she did not purchase the pump, the Respondent did, and the manufacturer needed, at the very least, a receipt or warranty paperwork for which she did not have. The Claimant testified that the Respondent was aware of her dilemma regarding the pump but did not agree to mitigate the issue. The Claimant insisted that the Respondent should have provided her with the necessary paperwork to support the purchase of the pump. For this alleged inadequate home improvement, the Claimant is seeking \$250.00 to “[r]emove and replace fountain pump.” *See* Clmt. Ex. 21.

The Respondent does not dispute the Claimant’s version of events concerning the receipt, warranty book, or that the fountain pump could not be turned on until such time the fountain repairs cured. He also does not dispute that he left the project before ensuring that the pump worked to the Claimant’s satisfaction. That said, Respondent testified that he plugged the pump into a power source the same day he installed it, and it worked fine.

*The shed*

The Claimant presented a picture of a structure located in her backyard, which she called a shed. Clmt. Ex. 5. According to the Claimant, she asked the Respondent to remove the existing brick from one location and install it behind the shed.

Claimant Exhibit 6 shows the work performed by the Respondent behind the shed. The Claimant pointed out that the Respondent had to install the brick twice because, in her words, “the first time there was such a slant, and they re-did it.” Despite the second installation, the Claimant claims that a slant still exists. Moreover, after the second installation of the brick, the Claimant described discovering that certain corners of the laid brick were crumbling, and a subsequent contractor had to install pavers to stabilize the brick patio. Clmt. Ex. 7. Apparently,

the crusher stone the Respondent installed at the edge of the brick patio dissipated during several rainstorms leaving a hole in the soil.

Claimant Exhibit 8 depicts a pre-existing retaining wall topped with mulch bags located next to the shed. The Claimant stated that she placed the mulch bags on the retaining wall because the installed brick was not properly abutted up against the shed, thus allowing water to enter the shed. While the shed is below grade in the back, the Claimant contends that the area affected by the water is at level with where the work was performed. As a result, mold began to grow in the shed. *See Clmt. Exs. 9-11.*

The Claimant further asserted that she had never had this problem prior to the Respondent performing the work. The Claimant consulted with Deer Park Landscaping, who told her that the reason rain continues to infiltrate the shed is because “the patio is slanting toward the shed and that water is going to continue to be a problem and it needs to be pulled up and re-laid and regraded.” T. of Clmt. For this alleged unworkmanlike home improvement, the Claimant is seeking \$3,500.00. *See Clmt. Ex. 21 (“Remove and re-install pavers behind shed for better drainage. May raise existing wall.”).*

The Respondent took the position that he installed the brick onto an existing concrete slab at the rear of the shed. According to the Respondent, the concrete slab was already out of plumb before he began the project. To illustrate this point, the Respondent said that the shed was originally built below grade, by approximately twelve inches in the rear. The Respondent also testified that before he began working on this element of the Contract, he observed standing water in the area that the Claimant now complains. As such, the Respondent strongly opposes being responsible for this pre-existing condition.

Nicolock® pavers

Initially, the Claimant offered, as proof of the Respondent's unworkmanlike performance under the Contract, Claimant Exhibit 12, which shows a post where the Respondent failed to install a small piece of paver.

The bulk of her complaints, however, pertained to the Nicolock® pavers themselves. Here, the Claimant described seeing many unsightly blemishes (i.e., circles), which she described as "sand pops," that surfaced on the Nicolock® pavers after installation. See Clmt. Exs. 13-15. The affected areas included the deck patio, gazebo patio, and the upper patio by the deck steps where the Respondent installed the Nicolock® pavers. In an effort to discern why this was occurring, the Claimant spoke directly to the Nicolock® company and they told her that it was normal to see sand pops in the product. Furthermore, Nicolock® confirmed that it was "common to get a few." Yet, after the Claimant explained seeing approximately over a hundred sand pops in the pavers, Nicolock® agreed to replace the damaged pavers under warranty. The Claimant testified that while the Respondent replaced some of the pavers, he refused to replace the other pavers. For this reason, the Claimant is seeking reimbursement from the Fund in the amount of \$600.00 for another contractor to remove and replace the affected pavers. See Clmt. Ex. 21 ("Remove and replace all pre-marked pavers. Approx. 40-50 pavers.").

The Respondent testified that he has been performing hardscape projects for approximately twenty years. And over that timeframe, he has installed Nicolock® pavers for hundreds of different projects. This is the first time he has ever encountered an issue such as this where the Nicolock® pavers had excessive sand pops. Since this is a manufacturer issue, the Respondent stressed that he should not be held accountable for removing and replacing the failed Nicolock® pavers.

### Border pavers

In reference to Claimant Exhibits 16 and 17, the Claimant challenged whether the Respondent performed the contracts with fidelity when it came to installing various border pavers. Regarding Claimant Exhibit 16, the Claimant testified that the Respondent was required to “fill [the edges] in with sand” but instead she was seeing water coming up from the ground. This led her to believe that “some type of mortar,” as opposed to sand, was used and it now needs to be scraped out and reset.

With regard to Claimant Exhibit 17, on the other hand, the Claimant testified that the Respondent clearly did not install any sand between the border pavers which is causing them to be loose. The Claimant highlighted the fact that these border pavers are located at the landing of a set of stairs and when she walks on them, “they wobble” and can be readily pulled up by hand.

For this alleged unworkmanlike and inadequate home improvement, the Claimant is seeking \$800.00 to “[s]andlock all pavers.” *See* Clmt. Ex. 21.

The Respondent testified that he and his crew meticulously supplied and swept polymeric sand, with a vibratory plate tamper, to ensure every border paver was set properly. That said, the Respondent described situations where this technique would be inappropriate such as when placing pavers on cement or impacted stone base.

### Gazebo

With reference to Claimant Exhibit 18, the Claimant complains that the Respondent incorrectly installed “the runway” leading toward the gazebo in the backyard. Specifically, the Claimant contends that the runway “is not level, it goes in at a slant, and water runs down there and pools in the middle of the brick that he installed under the gazebo.” T. of Clmt. The Claimant claims that the Respondent discussed this issue with her and acknowledged “in an

email somewhere” that the situation was “unacceptable to me” and “he was going to fix it.” T. of Clmt. The Claimant said the Respondent never fixed the problem. In order to ameliorate the situation, she believes that the runway needs to be regraded and leveled. For this alleged unworkmanlike home improvement, the Claimant is seeking \$6,000.00 to [r]emove and install new pavers and use some old pavers. Approx. 200 sq ft.” See Clmt. Ex. 21.

The Respondent did not challenge the Claimant’s testimony on this point, but for the cost to repair which will be addressed below.

#### Arbor

With reference to Claimant Exhibit 19, the Claimant asserts that the Respondent took down the arbor, as seen in the picture, in order to seed and sod the grass, but failed to correctly re-install the arbor. According to the Claimant, the arbor was slanted because it was not firmly placed in the ground. The Claimant indicated that she hired two people to fix the problem because the Respondent’s employees initially failed to do it properly. The Claimant’s primary purpose for mentioning this item was to highlight the sloppiness in the Respondent’s work ethic while working at her home. In any event, she did not testify to the amount she paid to another contractor to fix this issue.

The Respondent did not make any comments regarding the arbor.

#### Sod

With reference to Claimant Exhibit 20, the Claimant contends that the Respondent thoroughly damaged her lawn when he used “his machines” to support the project. While the Claimant does not contest that the Respondent properly seeded and sodded all areas, as required by the various contracts in evidence, she, instead, claims that due to the runoff from sediment and mud dredged up by the machines used caused significant damage to the adjacent lawn. The

four pictures highlighted in Claimant Exhibit 20 show swaths of healthy green grass surrounded by dry, patchy lawn. The Claimant is \$1,200.00 to “[g]rade and topsoil an estimated 600 sq ft area. Sod area.” See Clmt. Ex. 21.

The Respondent testified that he and his crew were very careful in their use of the skid loader during the project. The Respondent was adamant that he absolutely seeded and laid straw in all turf areas disturbed by the skid loader. In fact, he also indicated that he purchased and supplied sod, at cost to the Claimant, because she asked for that upgrade. Moreover, like the Claimant, the Respondent presented his own photographs showing the turf repairs he made, per the Contract, as compared to the pre-existing lawn that he did not touch or damage. Resp. Exs. 2, 3, and 5.

#### Invisible fence

The Claimant described having an invisible fence around her property that was present at all times the Respondent performed work under the contracts. According to the Claimant, the Respondent damaged a portion of the fence when he installed the brick behind the shed but, in addition, his workers severed another end of the fence wire and crumbled it up into a ball afterwards. The Claimant believes it may cost her approximately \$250.00 to fix.

The Respondent did not make any comments regarding the invisible fence.

#### Burden of Proof

The Claimant has 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). The Respondent, on the other hand, bears the burden of showing that



the Claimant unreasonably rejected any good faith efforts he made to resolve the claim by a preponderance of the evidence. COMAR 28.02.01.21K(1), (2)(b); *see also* Bus. Reg. § 8-405(d) (Supp. 2022).

*Statutory and Regulatory Language*

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 Claimant has proven eligibility for compensation.

First, by statute, certain claimants are excluded from recovering from the Fund altogether. However, I find that there are no such statutory impediments to the Claimant’s recovery in this case. The Claim was timely filed, there is no pending court claim for the same loss; and the Claimant did not recover the alleged losses from any other source. Bus. Reg. §§ 8-405(g), 8-408(b)(1) (2015 & Supp. 2022). The Claimant must reside in the home that is the subject of the claim or does not own more than three dwellings. *Id.* § 8-405(f)(2) (Supp. 2022). The Parties did not enter into a valid agreement to submit their disputes to arbitration. *Id.* §§ 8-405(c), 8-408(b)(3) (2015 & Supp. 2022). The Claimant is not a relative, employee, officer, or partner of the Respondent, and are not related to any employee, officer, or partner of the Respondent. *Id.* § 8-405(f)(1) (Supp. 2022).

Second, there is no dispute that the Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimant.

Third, I further find that the Claimant did not unreasonably reject good faith efforts by the Respondent to resolve the Claim. *Id.* § 8-405(d) (Supp. 2022). The Claimant testified that she gave the Respondent plenty of opportunities to fix or correct the work, but his response was to say some choice words to her and exclaim that he did not want to deal with the project anymore. The Claimant also asserted that she submitted all of her written communications (text messages and emails) with the Respondent to the Fund along with her Claim, but she did not have that same material available as an exhibit at the hearing. For his part, the Respondent did not suggest a different narrative from the Claimant. It was clear from his comments that the two parted on unfavorable terms.

Fourth, the credible evidence supports a finding that the Respondent performed *some* unworkmanlike, inadequate, or incomplete home improvements. The Claimant's presentation consisted of her describing the issues she had with the Respondent's performance under the various contracts in evidence by going through a series of pictures (i.e., color photocopies) that she and/or her attorney took of the work in March or April of 2022. Clmt. Exs. 2-20. The Claimant did not rely, however, on any expert testimony to establish many of the statements she made. Though the estimate from Deer Park Landscaping provides some commentary about the description of work to be performed, the Claimant's evidence on several genuine issues to be resolved, such as whether the Respondent performed an unworkmanlike, inadequate, or incomplete home improvement, were entirely reliant on hearsay evidence (i.e., the Claimant reporting what other contractors told her was the problem). While "[e]vidence may not be excluded solely on the basis that it is hearsay," COMAR 28.02.01.21C, I am free to give whatever "probative effect to that evidence," COMAR 28.02.01.21B, as is necessary.

To begin, I am not persuaded by the Claimant's testimony that the Respondent performed an inadequate home improvement with regard to the Western Maryland natural stone steppers. The photographs in evidence (Claimant Exhibits 2 and 3), coupled with the Deer Park Landscaping estimate (Claimant Exhibit 21), do not demonstrate an error in the Respondent's performance or that there is an identifiable actual loss. Claimant Exhibit 2 clearly shows that the Respondent installed 5-6 natural stone steppers as prescribed by the August 7, 2021 (#2) contract. Clmt. Ex. 1. Contemporaneous in time to the project, on November 12, 2021, the Respondent purchased 3.18 "[t]ons of Maryland Steppers" from Greco's Landscaping Supplies. Resp. Ex. 1. In addition, the Respondent credibly explained that for every one ton purchased, he gets two stones – hence, a total of six stones.

The Respondent also pointed out during his testimony that the Deer Park Landscaping estimate the Claimant relied on sought to replace the stones he installed with 8-10 Western Maryland steps. According to the Respondent, this would be an obvious upgrade from the stones bargained for. I agree. Claimant Exhibits 2 and 3 are the best evidence of the difference between one to the other. Visually, to the untrained eye, Claimant Exhibit 3 depicts a *STEP* and Claimant Exhibit 2 depicts a *STEPPER*. They are not one in the same. Given the Parties' competing documentary evidence and testimony, I am not persuaded by a preponderance of the evidence that the Respondent installed the wrong stone steppers. The Claimant simply failed to provide sufficient evidence that establishes one, that the stones installed by the Respondent were wrong and two, the estimate from Deer Park was for a like, kind, and quality stone. Therefore, this aspect of her Claim fails. The Fund concurred.

In reference to the fountain pump, there is no dispute that the Respondent supplied a fountain pump and installed it, per the terms of the Contract. The credible evidence, however,

based on the Parties' respective testimony, shows that the Respondent failed to demonstrate to the Claimant's satisfaction that the fountain pump worked as intended. While the Respondent claimed the pump worked prior to installing it, he never gave the Claimant an opportunity to see the pump working in action. Both sides agreed that the fountain repairs were still being cured before he left the project. Moreover, he also did not supply the Claimant with a receipt or warranty booklet for her to inquire about replacement should the pump not work later. Therefore, the Deer Park Landscaping estimate of \$250.00 to remove and replace the fountain pump is credible and supported by evidence. The Fund concurred.

According to the August 9, 2021 and December 13, 2021 contracts, the Respondent was required to lay approximately 120 square feet of existing 4x8 brick on a patio area, 11x11 in size, to the rear of the shed. *See* Clmt. Ex. 1, August 9, 2021, and December 13, 2021 contracts. There is no dispute that the Respondent performed this aspect of the project. The complaint instead concerns water intrusion inside the shed after the Respondent installed the brick. The Claimant attributed the water intrusion to the Respondent's failure to correct the slant in the finished product that allowed the water to flow directly into her shed. As proof of an unworkmanlike performance under the Contract, the Claimant relied on photographs (Claimant Exhibits 9-11) and the Deer Park Landscaping estimate for establishing reimbursement from the Fund.

While it is indisputable that the pictures clearly show sediment on the floor and mold developing on the walls in the shed, the pictures alone do not tell the whole story of what caused that outcome. Conversely, while the Deer Park Landscaping estimate identifies a drainage issue as the potential culprit, the estimate is nevertheless unspecific. It does not delineate between how much of the \$3,500.00 estimate pertains to the removal and re-installation of brick pavers

behind the shed for better drainage as opposed to the potential raising of an existing wall. When asked about this, the Claimant could not say with any definiteness how much of the estimate pertained to the wall. And since the wall was not part of the original Contract, the estimate is not a reliable gauge for determining whether the Claimant sustained an actual loss because of unworkmanlike installation of the brick. The Claimant did not know whether increasing the height of the wall or changing the configuration of the wall would stem the tide of water entering into the shed, or whether the reinstallation of the brick alone would fix the problem. The Fund concurred.

The Respondent installed a multitude of Nicolock<sup>®</sup> pavers in the Claimant's backyard in three separate areas – the under deck patio (approximately 35x16), gazebo patio (approximately 12x12), and upper patio (approximately 15x16).<sup>12</sup> As described above, the batch of Nicolock<sup>®</sup> pavers the Respondent purchased and installed were defective. The Fund nevertheless recommended reimbursement in the amount of \$600.00 for the damaged Nicolock<sup>®</sup> pavers. I disagree. The Claimant testified that given the excessive number of pavers impacted by sand pops, the Nicolock<sup>®</sup> company agreed to provide her with a pallet of pavers for free, under warranty. In doing so, I find it reasonable to infer from this record that the Respondent installed the pavers pursuant to Nicolock<sup>®</sup> guidelines and industry standards, otherwise Nicolock<sup>®</sup> would not have covered the cost of a pallet of pavers. This supports the Respondent's testimony that he had never before encountered a situation like this in his twenty years of installing hardscapes. Accordingly, I am not persuaded by this record that the Respondent committed an unworkmanlike performance as it pertains to the installation of the Nicolock<sup>®</sup> pavers.

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<sup>12</sup> The August 7, 2021 (#1) contract indicated the square footage to be approximately 240 square feet:  $15 \times 16 = 240$  square feet.

According to the August 7, 2021 (#1) contract, the Respondent agreed to “[i]nstall border paver (6x6 or 6x9 as border); [i]nstall snap edge paver restraint along edges with 10” spikes; [s]upply and sweep alliance G2 polymeric sand in conjunction with vibratory plate tamper for final elevation; [s]weep poly sand clean from surface; [and] water to harden joints.” Clmt. Ex. 1, August 7, 2021 (#1) contract. As proof of an unworkmanlike performance under the Contract, the Claimant relied on two photographs, Claimant Exhibits 16 and 17, to show that the final product did not live up to promises made by the Respondent to secure the border pavers with polymeric sand. Claimant Exhibit 16 clearly shows weeds developing between the pavers and Claimant Exhibit 17 clearly shows loose pavers. Despite the lack of expert testimony on this point, it is reasonable for a lay person to infer from these pictures that the Respondent’s performance was unworkmanlike. I also find that the Deer Park Landscaping estimate corroborates the Claimant’s testimony insofar as the estimate lists a line item, sandlocking the pavers, which correlates with the complaint described by the Claimant. The Fund concurred.

The August 7, 2021 (#1) contract required the Respondent to “[a]ssess existing base material, add/remove compacted CR8 as needed for proper grade and drainage” and “[s]et elevations according to structural improvements (deck steps, sliding back door, etc.)” Clmt. Ex. 1, August 7, 2021 (#1) contract. As proof of an unworkmanlike performance under the Contract, the Claimant relied on a single photograph (Claimant Exhibit 18), showing debris and sediment on the runway leading toward the gazebo, and the Deer Park Landscaping estimate as proof that the installation of the Nicolock<sup>®</sup> pavers were not level and needed to be removed and replaced. The cost of the repair is \$6,000.00.

The Respondent acknowledged knowing about the water drainage toward the gazebo and did not dispute that he failed to ameliorate the problem. Instead, he questioned the quote from

Deer Park Landscaping as being excessively high by approximately \$2,000.00. On this point, the Respondent testified he would normally charge \$20.00 per square foot to remove and install new pavers. And given that the alleged culprit for the water drainage issue is likely the runway, at 200 square feet, the cost should be \$4,000.00 instead.

When the Claimant was asked clarifying questions on cross-examination about the Deer Park Landscaping estimate, the Claimant indicated that the quote took into account that both the gazebo and runway may be impacted by reworking the grade to address the water drainage issue. I found this explanation credible and supported by the evidence. The Fund concurred.

As it pertains to the sod, the Claimant stressed that the Respondent carelessly damaged her lawn and refused to resod all of the affected areas. While the Claimant offered the Deer Park Landscaping estimate as additional proof that her lawn required repair, the estimate was woefully lacking in any detail describing what the unworkmanlike performance was under the Contract. Moreover, whereas the Claimant and Respondent offered competing explanations for what was depicted in the photographs, I cannot find by a preponderance of the evidence that the Claimant is eligible for reimbursement for this alleged actual loss. The Fund concurred.

I thus find that the Claimants are eligible for compensation from the Fund.

#### Consequential Damages

The Fund, however, 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). Though neither the statute nor the regulation defines the term consequential, it commonly refers to something “indirect.” *Merriam-Webster’s Collegiate Dictionary* 365 (Eleventh Ed. 2003). This is in line with the Black’s Law Dictionary definition which provides that consequential damages are “[l]osses that do not flow directly and

immediately from an injurious act but that result indirectly from the act.” *Black’s Law Dictionary* 195 (Fourth Pocket Ed. 1996).

As identified above, the Claimant testified that she also suffered financial losses when the Respondent improperly inserted the arbor and damaged the electric fence during the installation of the brick pavers near the shed. None of these items qualify as compensable claims. For obvious reasons, each of these items are indirect damages caused by the Respondent’s work crew’s carelessness.<sup>13</sup>

#### Fund Compensation and Calculation

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 MHIC’s regulations provide three formulas to measure a claimant’s actual loss, depending on the status of the contract work.

The Respondent performed some work under the Contract, and the Claimants 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).

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<sup>13</sup> Assuming *arguendo* that the Claimant’s lawn was damaged by the skid loader, the damage would also be considered consequential damages.



The credible evidence shows that the Claimant solicited an estimate from Deer Park Landscaping to complete those items that needed repair to complete the Contract. Clmt. Ex. 21. The reasonable amounts listed in the estimate for the application of polymeric sand to all pavers is \$800.00; the removal and replacement of the fountain pump is \$250.00; and removal and installation of paver to level the gazebo patio is \$6,000.00.

Therefore, I find the Claimants are eligible to receive the following award from the Fund:

Amount paid under the Contract.....	\$38,070.00
Plus, amount paid to correct.....	\$ 7,050.00 <sup>14</sup>
Subtotal .....	\$45,120.00
Minus original Contract price .....	\$38,645.00
Total .....	\$ 6,475.00 <sup>15</sup>

Recovery Cap

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.<sup>16</sup> Bus. Reg. § 8-405(e)(1), (5) (Supp. 2022); COMAR 09.08.03.03B(4). In this case, the Claimant’s actual loss of \$6,475.00 neither exceeds the recovery cap amount nor the amount paid to the Respondent. Therefore, the Claimant’s recovery is \$6,475.00.

<sup>14</sup> See Findings of Fact No. 22.

<sup>15</sup> The Fund recommended a reimbursement amount of \$6,725.00 based on an original Contract price of \$38,995.00. I was able to discern from the record that the Fund added together the totals from the August 7, 2021 (#1) and (#2), August 9, 2021, August 14, 2021, and September 22, 2021 contracts, to items one, two, and three from the December 31, 2021 contract, to arrive at a \$38,995.00 Contract price. Unfortunately, this calculation does not take into consideration that the parties added additional items and deducted some items, which modified the Contract price. See Claimant Ex. 1, December 31, 2021 contract; see also Findings of Fact No. 2.

<sup>16</sup> 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”).

**PROPOSED CONCLUSIONS OF LAW**

I conclude that the Claimants sustained an actual and compensable loss of \$6,475.00 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 Claimant is only entitled to recover \$6,475.00 from the Fund. 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 Claimant \$6,475.00; and

**ORDER** that the Respondent is ineligible for a Maryland Home Improvement Commission license until the Respondent reimburses the Guaranty Fund for all monies disbursed under this Order, plus annual interest of ten percent (10%) as set by the Maryland Home Improvement Commission;<sup>17</sup> and

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

June 26, 2023  
Date Decision Issued

*Kathleen A. Chapman*  
\_\_\_\_\_  
Kathleen A. Chapman  
Administrative Law Judge

KAC/sh  
#205810v1A

<sup>17</sup> See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

IN THE MATTER OF THE CLAIM OF \* MARYLAND HOME  
KAREN BARBOUR \* IMPROVEMENT COMMISSION  
AGAINST THE MARYLAND HOME \*  
IMPROVEMENT GUARANTY FUND \* MHIC CASE NO. 23(75)22  
FOR THE ACTS OR OMISSIONS OF \* OAH CASE NO. LABOR-HIC-  
JOSEPH LEE AND MARYLAND \* 02-22-29163  
LANDSCAPE CONSTRUCTION, LLC \*

\* \* \* \* \*

**FINAL ORDER**

This matter was originally heard before an Administrative Law Judge (“ALJ”) of the Office of Administrative Hearings (“OAH”) on April 3, 2023. Following the evidentiary hearing, the ALJ issued a Proposed Decision on June 26, 2023, concluding that the homeowner, Karen Barbour (“Claimant”) suffered an actual loss as a result of the acts or omissions of Joseph Lee and Maryland Landscape Construction, LLC (collectively, “Contractor”). *ALJ Proposed Decision* p. 26. In a Proposed Order dated July 28, 2023, the Maryland Home Improvement Commission (“MHIC” or “Commission”) affirmed the Proposed Decision of the ALJ to grant an award of \$6,475.00 from the Home Improvement Guaranty Fund. The Claimant subsequently filed exceptions to the MHIC Proposed Order.

On October 5, 2023, a three-member panel (“Panel”) of the MHIC held a remote hearing on the exceptions filed in this matter. Jonathan Weetman, Esq. represented the Claimant. The Contractor participated without counsel. Assistant Attorney General Jessica Kaufman 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) Claimant’s exceptions. The Claimant provided a copy of the transcript of the hearing before the ALJ. Therefore, the Panel’s review of the record included the OAH transcript, 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 numerous landscaping improvements at the Claimant's home. The ALJ found that the Contractor's performance under the contract was unworkmanlike, inadequate, or incomplete in several respects, but found that the Claimant failed to prove that the Contractor's performance was deficient with respect to the installation of large Western Maryland stone steppers, the reinstallation of a brick patio behind the Claimant's shed, and the installation of defective Nicolock brand pavers. *ALJ's Proposed Decision* pp. 10-11.

On exception, the Claimant first argued that the ALJ erred in denying her claim regarding the installation of the brick patio behind her shed. She argued that she testified at the OAH hearing that there was not any water intrusion into her shed before the Contractor installed the patio, and that the Contractor only testified to there being water issues outside the back of the shed, and, therefore, the ALJ could only have reasonably concluded that the installation of the patio was the but for cause of the water intrusion in her shed. The Commission disagrees. Even assuming, as the Claimant testified, that there was not a water intrusion into the shed before the patio was installed, the Claimant, who had the burden of proof, did not present sufficient evidence to demonstrate that, more likely than not, the water intrusion was caused by unworkmanlike, inadequate, or incomplete performance by the Contractor. The Claimant did not present expert testimony regarding deficiencies in the patio installation or present photos or video demonstrating that the patio installation caused the water intrusion. In addition, as the ALJ correctly noted, the estimate from Deer Park Landscaping, Inc., that the Claimant presented to show the cost to correct the patio installation does not specifically attribute the water intrusion to the Claimant's installation of the patio or conclude that the Contractor's installation was inadequate. Rather, it states that the

patio would be removed and reinstalled for better drainage, and that it may also have to raise the wall behind the shed. At the exceptions hearing, the Claimant even conceded that Deer Park Landscaping estimate was based on incomplete information because there is no way to know what caused the water intrusion until the existing patio was removed, which has not occurred. Accordingly, the Commission holds that the Claimant failed to prove that the Contractor's installation of the patio behind the shed was unworkmanlike, incomplete, or inadequate.

The Claimant next argued on exception that the ALJ erred in denying her claim for the Contractor's installation of purported Western Maryland stone steppers. The Commission finds no error. The Claimant argued that the ALJ erred in relying on the Contractor's testimony regarding the difference between "steps" and "steppers" because the Contractor used the term "stepper" in the parties' two August 7, 2021, contracts (OAH Hearing Claimant's Exhibit 1), pursuant to which the Contractor installed two different materials. (*See* OAH Hearing Claimant's Exhibits 2-3.) However, the first August 7 contract regarding the patio area called for the installation of "4' wide natural stone steppers (2 total)" without specifying the type of stone, while the second August 7 contract regarding the firepit area called for the installation of "5-6 larger natural stone steppers (western Maryland stone)". Therefore, the visible difference between the two materials does not demonstrate that the material installed in the firepit area was not Western Maryland stone. In addition, the Contractor testified that the material used for the steps in the patio area was not Western Maryland stone. Also, the Contractor presented an invoice for "Western Maryland Steppers" that he testified he installed pursuant to the firepit area contract. (OAH Hearing Respondent's Exhibit 1.) Finally, the corrective contract proposal from Deer Park Landscaping called for the installation of 8-10 "steps" rather than the 5-6 larger natural stone steppers called for in the firepit area contract (OAH Hearing Claimant's Exhibit 21), which

indicates to the Commission that the Claimant was seeking the installation of something of a different size than the original contract. The Commission notes that the Deer Park Landscaping estimate indicated that the materials the Contractor installed in the patio area were “Pa steppers,” but the Commission finds the Contractor’s testimony and invoice for Western Maryland steppers to be more persuasive than the estimate, as the individual who prepared the estimate did not testify and was not subject to cross examination.

Finally, the Claimant argued on exception that the ALJ erred in denying the her claim regarding the Contractor’s installation of Nicolock pavers that had a manufacturing defect because the Contractor started to replace the defective pavers and testified that he warrants the materials he installs, but refused to replace the remainder of the defective pavers. The Commission finds no error. To be eligible for a Guaranty Fund award, a homeowner must demonstrate that the suffered an actual loss as a result of their contractor’s performance of an unworkmanlike, inadequate, or incomplete home improvement. Md. Code Ann., Bus. Reg. § 8-401. There is no evidence that the Contractor knew or should have known that the pavers he installed were defective at the time he installed them or that his installation of the pavers was otherwise unworkmanlike, inadequate, or incomplete. Although the Claimant may have a breach of warranty claim against the Contractor relating to the defective Nicolock pavers, she is not eligible for Guaranty Fund award because of a breach of warranty.

Having considered the parties’ arguments, the evidence contained in the record, and the ALJ’s Recommended Decision, it is this 25<sup>th</sup> day of October 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

**AFFIRMED;**

- D. That the Claimant is awarded \$6,475.00 from the Maryland Home Improvement Guaranty Fund;
- E. That the Contractor 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.

*Joseph Tunney*  
**Chairperson –Panel  
Maryland Home Improvement  
Commission**

**PROPOSED ORDER**

***WHEREFORE, this 28<sup>th</sup> day of July, 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.***

***Robert Altieri***

***Robert Altieri***

***Panel B***

***MARYLAND HOME IMPROVEMENT  
COMMISSION***