

IN THE MATTER OF THE CLAIM	*	BEFORE SUN E. CHOI,
OF JACKIE R. MANIS,	*	AN ADMINISTRATIVE LAW JUDGE
CLAIMANT	*	OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	*	OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	*	
FOR THE ALLEGED ACTS OR	*	
OMISSIONS OF JAMES JOHNSON,	*	
III, T/A JOHNSON'S LANDSCAPING	*	
SERVICES, INC.,	*	OAH No.: LABOR-HIC-02-23-14553
RESPONDENT	*	MHIC No.: 23 (75) 421
* * * * *		

PROPOSED DECISION

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STATEMENT OF THE CASE

On January 25, 2023, Jackie R. Manis (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC)¹ Guaranty Fund (Fund) for reimbursement of \$13,730.36 for actual losses allegedly suffered as a result of a home improvement contract with James Johnson, III, trading as Johnson's Landscaping Services, Inc. (Respondent).^{2,3}

¹ The MHIC is under the jurisdiction of the Department of Labor (Department).
² James Johnson, III, was the former owner of Johnson's Landscaping Services, Inc. (business). The business was purchased by Mr. Johnson's sons, Matthew and Charles Johnson, who were the owners of the business at all times relevant to this matter. Charles Johnson will be referred to as the Respondent throughout the decision.
³ Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015 & Supp. 2023). Unless otherwise noted, all references to the Business Regulation Article (Bus. Reg.) are to the 2015 Volume of the Maryland Annotated Code.

On May 10, 2023, the MHIC issued a Hearing Order on the Claim. On May 22, 2023, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On January 4, 2024,⁴ I held a hearing at the OAH, in Rockville, Maryland.⁵ The Claimant was self-represented. Robert M. McCarthy, Esquire, represented the Respondent, who was present. Ernie Dominguez, Assistant Attorney General, Department, represented the Fund.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the OAH govern procedure.⁶

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 admitted the following exhibits offered by the Claimant:

- Clmt. Ex. 1 - Claimant's written opening statement, undated
Table of Contents, undated
United States Postal Service certified mail receipt, October 3, 2022
Complaint Form, October 2, 2022
- Clmt. Ex. 2 - Claimant's email to the Respondent, September 14, 2022
Respondent's email to the Claimant, September 15, 2022
Respondent's Proposal, September 15, 2022
Bienstock Law, LLC's letter to the Respondent, September 23, 2022
Respondent's Counsel's letter to the Fund, November 18, 2022
Respondent's Counsel's letter to the Claimant's counsel, November 1, 2022⁷
- Clmt. Ex. 3 - Respondent's Proposal – Backyard Landscape Project - 1707, May 7, 2021
Respondent's Proposal - Backyard Landscape Project – 2179, July 13, 2021

⁴ The hearing was originally scheduled for an in-person hearing on September 18, 2023. It was continued due to illnesses of Mr. Dominguez and the Respondent.

⁵ Bus. Reg. §§ 8-407(a), 8-312.

⁶ Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021 & Supp. 2023); Code of Maryland Regulations (COMAR) 09.01.03; COMAR 28.02.01.

⁷ This letter was not admitted but retained in the file.

- Clmt. Ex. 4 - Allentuck Landscaping Co. (Allentuck) letter by Adam Norton, General Manager, undated
- Clmt. Ex. 5 - Clean Sweep Enterprises, Inc. (Clean Sweep) test results of the Claimant's home, September 6, 2022, and September 9, 2022
Four photographs taken by Clean Sweep, undated
Four photographs taken by the Claimant, undated
- Clmt. Ex. 6 - Invoice summary page, undated
Clean Sweep Invoice 40808, September 12, 2022
Clean Sweep Microbial Remediation Terms and Conditions, September 6, 2022
Len the Plumber (plumber) Invoice 207629554, September 6, 2022
Bienstock Law, LLC engagement letter to the Claimant, September 13, 2022
Allentuck Proposal, November 11, 2022
Henriquez & Plumbing Invoice INV0011, July 5, 2023

I admitted the following exhibits offered by the Respondent:

- Resp. Ex. 1 - Johnson Landscaping Service, Inc., Proposal – Backyard Drainage – Under Deck 2022-3979, September 15, 2022
- Resp. Ex. 2 - Fourteen photographs (pp. A through N), September 7, 2022

I admitted the following exhibits offered by the Fund:

- Fund Ex. 1 - Notice of Hearing, October 31, 2023
- Fund Ex. 2 - Hearing Order, May 10, 2023
- Fund Ex. 3 - Home Improvement Claim Form, January 25, 2023
- Fund Ex. 4 - Department, I.D. Registration and License History of the Respondent, various dates

Testimony

The Claimant testified and did not present other witnesses. The Respondent presented the testimony of Charles L. Johnson and did not present other witnesses. The Fund did not present any witness.

PROPOSED FINDINGS OF FACT

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

1. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor under MHIC license number 01-11514.

2. On or about May 7, 2021, the Claimant and the Respondent entered into a contract to build two patios, an upper patio and a lower patio, in the Claimant's backyard (Contract). Specifically, the scope of the Contract included the following:

- Excavate soil and haul away from the upper area
- Prepare and install a new flagstone patio on stone dust base
- Existing stone wall will be extended approximately five feet
- Install new seat wall running along parallels to deck approximately twenty feet in total length along with a half circle
- Transplant existing shrubs and relocate according to new design
- Point and tuck existing wall and steps
- Mortar and secure step
- Fill in any semi larger gaps with matching stone
- Secure any loose stone on top of walls
- At lower area, strip out section agreed on of all grass
- Haul away existing yellow gravel
- Fine grade install landscape fabric along with ¾" Delaware river rock with Pennsylvania step stones in between to have access from steps to basement sliding doors
- Install aluminum edging to maintain new Delaware gravel in its place
- Leave a thirty-six-inch-wide space along the front lower wall for any future plantings
- Beds will be furnished with soil, edge, and mulch
- All generated debris will be hauled away

3. The Contract did not include any work addressing issues of water intrusion, seepage, or drainage.

4. The Contract contains a limited warranty. Specifically, under the Construction Warranty, the Respondent "does not warrant drainage work; nor does it guarantee against water

leakage into buildings.”⁸ In addition, under the Planting Warranty, the Respondent “does not warrant drainage work nor does it guarantee against water leakage into houses.”⁹

5. The original agreed-upon Contract price was \$27,478.67. A change to the original agreed-upon Contract price was \$2,000.30. The total Contract price was \$29,478.97.

6. The Respondent began work under the Contract on July 8, 2021, and completed the work on August 27, 2021; the Claimant paid the Respondent a total of \$29,478.97.

7. From August 27, 2021, through September 6, 2022, the Claimant did not notice water intrusion, seepage, or drainage issues in her home.

8. On September 6, 2022, the Claimant noticed water damage on her carpet in front of her bookcase in the basement guest room. The floor and wall were saturated with water.¹⁰ The saturated wall abuts the river rock patio that the Respondent installed on or about August 27, 2021.

9. Since the Claimant’s purchase of her home in 2011, she has not had any problems with water intrusion, seepage, or drainage, until September 6, 2022.

10. On September 6, 2022, the plumber came to the Claimant’s home to assess whether the water damage was the result of plumbing issues inside or outside the Claimant’s home. The plumber charged the Claimant \$212.00 for his services, which the Claimant paid.

11. On September 6, 2022, the Claimant called Nationwide Insurance (Nationwide), her home insurance carrier, who denied her claim for coverage of the water damage.

12. The Claimant contacted the Respondent; on September 7, 2022, the Respondent came to the Claimant’s home, assessed the issue, and took photographs of the lower patio and backyard.

⁸ Clmt. Ex. 3.

⁹ *Id.*

¹⁰ Clmt. Ex. 5.

13. The Claimant's neighbor's home is situated north or above the Claimant's upper patio. The Claimant's home is south or below the neighbor's home, at the bottom of a slope.

14. Allentuck offered the Claimant two options to address the water intrusion, seepage, or drainage issue: (a) install a drain that cost \$2,809.53, or (b) fully repair the lower river rock patio that cost \$4,892.65.

15. On September 15, 2022, the Respondent provided to the Claimant a proposal to fully repair the lower river rock patio, which cost \$4,030.00 and consisted of installing an eighteen-inch channel drain.

16. The Claimant rejected the Respondent's September 15, 2022 proposal to fully repair the lower river rock patio and hired Allentuck to install a drain.

17. The Claimant made the following payments, totaling \$9,067.72, consisting of: \$2,801.19 paid to Kebab Sweep, \$212.00 paid to Len the Plumber, \$750.00 paid for an attorney retainer, \$2,809.53 paid to Allentuck, and \$2,400 paid to Henriquez & Plumbing.

DISCUSSION

The Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence.¹¹ 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.¹²

An owner may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor."¹³ "[A]ctual loss' means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement."¹⁴

¹¹ Bus. Reg. § 8-407(e)(1); State Gov't § 10-217 (2021); COMAR 09.08.03.03A(3).

¹² *Coleman v. Anne Arundel Cnty. Police Dep't*, 369 Md. 108, 125 n.16 (2002).

¹³ Bus. Reg. § 8-405(a) (Supp. 2023); *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.").

¹⁴ Bus. Reg. § 8-401.

By statute, certain claimants are excluded from recovering from the Fund altogether. In this case, there are no such statutory impediments to the Claimant's recovery. 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.¹⁵ The Claimant resides in the home that is the subject of the Claim or does not own more than three dwellings.¹⁶ The parties did not enter into a valid agreement to submit their disputes to arbitration.¹⁷ The Claimant is not a relative, employee, officer, or partner of the Respondent and is not related to any employee, officer, or partner of the Respondent.¹⁸ The Claimant did not unreasonably reject good faith efforts by the Respondent to resolve the Claim since no good faith effort or offer was provided by the Respondent.¹⁹ For the following reasons, the Claimant has not proven eligibility for compensation.

Summary of the Evidence

The Claimant

On or about September 6, 2022, one year and ten days after the Respondent completed work under the Contract, the Claimant discovered water damage to the carpet and wall of her basement guest room. Prior to this date, she did not see any water damage because the area where water intruded was blocked by a bookcase. Immediately thereafter, the Claimant contacted a plumber and her home insurance company.²⁰

On September 6, 2022, the plumber came to the Claimant's home to assess the problem. According to the plumber, there were no plumbing issues inside or outside the Claimant's home that could have caused the water damage. He confirmed that there was no damage to the pipes in the house and ruled out pipe issues as the cause of the water intrusion.

¹⁵ Bus. Reg §§ 8-405(g), 8-408(b)(1) (Supp. 2023).

¹⁶ *Id.* § 8-405(f)(2) (Supp. 2023).

¹⁷ *Id.* §§ 8-405(c), 8-408(b)(3) (Supp. 2023).

¹⁸ *Id.* § 8-405(f)(1) (Supp. 2023).

¹⁹ *Id.* § 8-405(d) (Supp. 2023).

²⁰ Findings of Fact (FOF) Nos. 10-11.

However, the plumber noticed water pooling. He told the Claimant that water was coming down the stairs because the area was not sloped away from the house. He told her that the slope was tilted toward the house and not away. He also showed the Claimant the pathway of the water and stated to the Claimant that he believed that water was pooling on the flagstone patio, running down the steps, and collecting in the river rock due to the slope. He also stated that the edging made the problem worse because it ensured that no water could leave the river rock. He told the Claimant that the gravel area had not been properly sloped away from the house, and appropriate drainage was not installed.

The Claimant then called her home insurance carrier. The Claimant testified that an insurance adjuster came to the house, walked around it, and said the same thing as the plumber, that the slope was wrong. The adjuster told the Claimant there is a drainage problem, and it is not covered by insurance. His words were “the house was not sloped properly.”

To clean up the water damage, the Claimant called Clean Sweep. They pulled out the carpet and the wall because which had sustained considerable damage. They checked for mold, set up fans, and ran tests to make sure the area was safe. The Claimant admitted that she did not understand the tests.²¹ I also did not understand the tests. Nonetheless, it was determined that the area was safe.

Based on the conversations she had with the plumber and the insurance adjuster, she concluded that the Respondent’s work under the Contract was defective or unworkmanlike and caused the water intrusion and resulting damage.

The Claimant contacted the Respondent. On September 7, 2022, the Respondent came to the Claimant’s home to assess the issue. The Claimant contends that the Respondent admitted that the area was not properly graded and that there was no way for the water to drain from the

²¹ Clmt. Ex. 5.

rocks. The Claimant stated that the Respondent told her that he would send a plan and would work with her on covering the cost of the damage and repair. The Claimant testified that the Respondent presented her with a new invoice rather than an offer to repair the defective work or the subsequent damage to her home and property.

While the Claimant's and the Respondent's attorneys were communicating back and forth, the Claimant spoke with a representative of Allentuck. The representative told her that "the river rock was not put down correctly, and the liner that was used was incorrect."²² He explained that the pitch is toward the house, and the flagstone patio slopes toward the steps leading down to the river rock area, and the filter fabric beneath the rock is incorrect.

Allentuck offered her two options to address the problem: an estimate to install a drain, and an estimate to fully repair the lower river rock patio.²³ The full repair at \$4,892.65 was too expensive, so the Claimant decided to install the drain, although she did not want that.

The Claimant explained that the Respondent's work was defective on the lower patio because when the upper patio was built, it had to be rebuilt. Initially, the upper patio was built on a slope, and she was unable to put any furniture on the upper patio because the furniture would slide. When she objected, the Respondent took apart the upper patio and rebuilt it on "level grade." The Claimant could not tell what grade it was when the upper patio was rebuilt. She contends that the upper patio is still sloped. However, this is not a part of the Claim that she filed against the Fund. Her argument is that since the upper deck was installed improperly back then and had to be rebuilt, it stands to reason that the work on the lower deck is also defective. She explained that the problem is the lower patio.

²² Claimant's testimony; Clmt. Ex. 4.

²³ FOF No. 14.

The slope of the lower patio is titled toward the home and not away. When water pools, it has nowhere to go down and out,²⁴ which caused the water intrusion.

The Respondent

The Respondent testified that he and his brother Matthew are co-owners of the business their father established in 1960. With a forty-year tenure, starting at the age of fourteen, he holds extensive experience in landscaping and worked on “hundreds of the same type of work at that Claimant had.”²⁵

The Respondent clarified that upon completing work at the Claimant's residence in 2021, any slope or pitch issues would typically manifest during the first significant storm, revealing potential water problems. However, during the work at the Claimant's home, neither the Claimant nor his workers brought to his attention any concerns about water intrusion, seepage, or drainage.

On September 14, 2022, the Respondent visited the Claimant's home and took numerous photographs, which were detailed during the hearing.²⁶ Initially, the Respondent observed what appeared to be a flat gravel slant.

He explained that photograph 1A revealed a water issue where water was intruding into the house, swelling in the middle due to inadequate drainage. The Respondent noted erosion next to the grass, indicated by yellowing and near absence of grass due to limited sunlight and standing water, depicted in photograph B. Additionally, photograph C displayed erosion from the downspout, while photograph D illustrated significant water pooling and runoff from the upper slope, contributing to erosion and movement of stones. Photograph E exhibited substantial runoff from the neighbor's property into the Claimant's, highlighting the forcefulness of the runoff.

²⁴ Clmt. Ex. 5.

²⁵ Respondent's testimony.

²⁶ See Resp. Ex. 2.

The Respondent speculated on the source of the neighbor's runoff, emphasizing that the neighbor's property is positioned much higher than the Claimant's upper deck level.

Furthermore, the Respondent mentioned a water spigot, potential siding damage or replacement, and drainage considerations for utilities in photographs F and G. Mold on the siding, attributed to lack of sunlight and constant moisture in shaded areas, was evident in photographs F and H. The Respondent identified a drain line in photograph H and observed algae and mold on stairs due to dampness and shade, noted in photograph I. The Respondent also pointed out gravel washout at the top of the stairs and failing lawn on the far-right side in photographs J and K. Although he did not know the source of the water, the Respondent suggested that based on the photographs presented that the water source may be from the neighbor's water runoff down to the Claimant's property.

Based on the Respondent's observations and assessment, he provided the Claimant with a new proposal to address the water intrusion.²⁷ The Respondent's September 15, 2022 proposal consisted of raking back gravel, install board in front, channel drain or gutter, and lay down a 4" pipe.²⁸ It too was a full repair but costing less than Allentuck's.

Work Outside the Scope of the Original Contract

When comparing the two proposals to fully repairing the lower river rock patio, the Respondent's proposal offered more work covering eighteen feet, whereas Allentuck's proposal covered fifteen feet. Additionally, the Respondent's proposal quoted a lower price for the same scope of work.

²⁷ FOF No. 15.

²⁸ Resp. Ex. 1.

The Claimant chose Allentuck and selected the less expensive option of laying down drainpipes, which is understandable. However, the work carried out by Allentuck exceeded the scope of the original Contract.²⁹ Allentuck's work included pulling back rock, laying drainpipes up to the stone steps, installing an underground pipe leading to the lawn, and removing the wall between the wall and grass.

I found the Respondent credible because he testified that he did not observe any issues before the work commenced. He stated that if others noticed a problem, he could not speak for them, but personally, he did not see any issue. Additionally, neither the Claimant nor his workers notified him of any problem. The Respondent also admitted he could not determine if he accurately assessed a drainage issue because he genuinely did not know to look for one. This lack of knowledge was understandable since neither the Claimant nor his workers mentioned any drainage issues to him.

The Claimant presented a letter from Allentuck detailing the problem, but no information was provided regarding Allentuck's qualifications and experience. In contrast, the Respondent has extensive experience, having worked at his father's landscaping business for over forty years. The Respondent testified credibly that before the work began, he was unaware of any drainage issues because the Claimant did not mention them, and none of his crew notified him. The Claimant argued that the Respondent's crew was aware of drainage issues from the neighbor's home and runoff and had installed a drain for the upper patio. However, the Respondent could not find any associated costs for this installation and concluded that if it was indeed installed, the Claimant was not charged for it. Furthermore, the Claimant did not raise any complaints about the rebuild until the hearing, specifically regarding its slope.

²⁹ FOF No. 2.

If a drain was installed on the upper deck, then it is not covered by warranty. The Contract includes a limited warranty, but no warranty on any drainage work.³⁰ The Respondent testified that under their Contract no drainage work is under warranty because there are too many factors that cannot be controlled. The Contract addresses warranty in four places that emphasize this point.

The Respondent testified that the neighbor's property is situated north of the Claimant's home. Her home is at the bottom of the slope in relationship to the neighbor's home. The Respondent explained that the source of the water is unknown, however, it appeared to him that there was water runoff from the neighbor's property to the Claimant's home. Based on the photograph, I was able to see where the Claimant's home is in relationship to her neighbor's home. I found the Respondent's explanations credible and supported by the photographic evidence.

The Fund argued that the Respondent did not demonstrate that its work was not the cause of the water intrusion into the Claimant's home. Specifically, the Fund argued that the Respondent did not know if the Claimant's project areas were properly assessed for drainage issues prior to the installation of the two patios. In addition, the Fund argued that the Claimant received information from various individuals, including Allentuck, regarding why she had a water intrusion and drainage issue. The Fund urged me to recommend an award to the Claimant for the sum of \$8,105.72.³¹ I disagree and decline to make that recommendation.

The Respondent countered that he does not have the burden of proof to prove the quality, adequacy, or completeness of home improvements. Instead, the burden of proof lies with the Claimant to demonstrate, by a preponderance of evidence, that she suffered actual losses due to

³⁰ FOF No. 4.

³¹ FOF No. 17 (\$9,067.72 - \$212.00 - \$750.00 = \$8,105.72. The Fund argued that the amounts \$212.00 and \$750.00 are consequential damages.

the Respondent's work. I concur with the Respondent's position. The Claimant has not sufficiently shown, by a preponderance of evidence, that the Respondent's actions or omissions resulted in actual losses. The work performed by Allentuck was outside the original Contract scope because it addressed a water drainage issue whose source could not be definitively determined.³²

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has not sustained an actual and compensable loss of as a result of the Respondent's acts or omissions.³³

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund deny the Claimant's Claim; and

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

March 25, 2024
Date Decision Issued



Sun E. Choi
Administrative Law Judge

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³² FOF No. 2.

³³ Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2023); COMAR 09.08.03.03B(2).

PROPOSED ORDER

WHEREFORE, this 11th day of June, 2024, 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.

Joseph Tunney

Joseph Tunney

Chairman

Panel B

*MARYLAND HOME IMPROVEMENT
COMMISSION*