

**IN THE MATTER OF THE CLAIM
OF KARAMIE PLATT,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF KENNETH BOWEN,
T/A KB SERVICES, LLC ,
RESPONDENTS**

*** BEFORE ROBERT B. LEVIN,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
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* OAH No.: LABOR-HIC-02-21-04010
* MHIC No.: 20 (75) 412**

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PROPOSED DECISION

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STATEMENT OF THE CASE

On December 2, 2019, Karamie Platt (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund), under the jurisdiction of the Department of Labor (Department),¹ for reimbursement of \$5,075.00 in actual losses allegedly suffered as a result of a home improvement contract with Kenneth Bowen, t/a KB Services, LLC (KB) (collectively Respondents).² Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015).³

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

² The Fund noted in its closing statement that there are technically two Respondents in this case (Mr. Bowen and KB, each with their own license number), and that any award of compensation from the Fund would be joint and several.

³ Unless otherwise noted, all references hereinafter to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.

On January 27, 2021, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a remote hearing on April 12, 2021, via the Webex audiovisual platform. I was at the OAH, and the other parties were at their respective locations. Bus. Reg. §§ 8-407(a), 8-312; Code of Maryland Regulations (COMAR) 28.02.01.20B. Andrew Brouwer, Assistant Attorney General, Department, represented the Fund. The Claimant represented herself. Mr. Bowen represented himself and, in his capacity as KB's principal, also represented KB. Bus. Reg. § 8-312.

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. 2020); COMAR 09.01.03; and COMAR 28.02.01.

ISSUES

1. Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondents' 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 Claimant's behalf:

- Clmt. Ex. 1 - Index of documents, with the following attachments, which the Claimant pre-marked as Exhibits A through H:
- A. Complaint Form, September 19, 2019
 - B. KB Estimate no. 1117, October 22, 2018
 - C. Photocopies of Claimant's check no. 3238 payable to KB in the amount of \$4,000.00, November 7, 2018; and Claimant's check no. 3245 payable to KB in the amount of \$4,170.00, December 14, 2019
 - D. Emails between the Claimant and Mr. Bowen, September 17, 2019 – October 23, 2019

- E. Fence Pictures
- F. Fence Post Pictures
- G. Home Improvement Claim Form, December 2, 2019
- H. J. Thomas Fence, LLC Proposal, November 20, 2019, with attached Invoice no. 1174, February 25, 2020

The Respondents did not offer any exhibits.

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

- Fund Ex. 1 - Hearing Order, January 20, 2021
- Fund Ex. 2 - Notice of Remote Hearing, March 4, 2021
- Fund Ex. 3 - Correspondence from Joseph Tunney, Chairman, MHIC, to Mr. Bowen, December 16, 2020
- Fund Ex. 4 - Home Improvement Claim Form, December 2, 2020, a duplicate of Claimant's Exhibit 1-G

Testimony

The Claimant testified and did not present other witnesses.

Mr. Bowen testified and did not present other witnesses.

The Fund did not present any witness testimony.

PROPOSED FINDINGS OF FACT

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

1. At all times relevant to the subject of this hearing, the Respondent, Mr. Bowen, was a licensed home improvement contractor under MHIC license number 01-114816, and the Respondent, KB, was a licensed home improvement contractor under MHIC license number 05-135111.
2. Mr. Bowen is the principal of KB.
3. On October 22, 2018, the Claimant and the Respondents entered into a contract (Contract) for the Respondents to install a vinyl privacy fence at the Claimant's residence. The Contract specifically provided the Respondents to furnish the following materials and services:

Vinyl 6 ft. privacy fence-Purchase and installation of 6 ft x 8 vinyl privacy fence with 6x6 post @ 3 ft deep. Map out and layout of 40 5x5 vinyl white post 41 vinyl white panels, 25 bags of quickcrete. 3 6x4 vinyl gate kits (22 for back to make 8 ft. opening) one for front. Gate lock hardware. Price includes all material labor and cleanup associated with work being provided. (Claimant's Ex. 1-B, emphasis added).

4. The agreed-upon Contract price was \$8,170.00.
5. On November 7, 2018, the Claimant paid KB \$4,000.00, and on December 14, 2018, the Claimant paid KB the remaining \$4,170.00 due under the Contract.
6. KB completed the installation of the fence on December 14, 2018.
7. The back gates were the wrong size and were not operational.
8. On December 21, 2018, the fence began to lean. The Claimant and her husband had to secure it with straps and rebar stakes.
9. The winter brought wind and snow that caused parts of the fence to collapse and damage the fence railings.
10. The Respondents improperly installed the fence, in that the Contract required the fence posts to be installed at a depth of three feet, but they were not.
11. The Respondents cut some posts, due to the Claimant's yard's partially irregular topography, to a length that made it impossible to reinstall them three feet deep.
12. The Claimant contacted the Respondents several times between December 21, 2018 and January 28, 2019, and informed Mr. Bowen of the issues she was experiencing with the fence. On January 28, 2019, the Respondents uninstalled the fence.
13. On February 3, 2019, the Claimant emailed the Respondents, thanking them for uninstalling the fence, and relaying her concerns about the posts not being installed three feet deep, the damage to the fence from improper installation, and the back gates being the wrong size and not operational.

14. The cause of the fence leaning was the Respondents' failure to install the posts three feet deep.

15. The Respondents offered to repair and reinstall the fence for an additional payment of \$1,600.00 by the Claimant. The Claimant refused this offer.

16. The Claimant had another fence contractor, J. Thomas Fence, LLC (Thomas Fence), reinstall the fence. Thomas Fence used what was left of the usable materials provided by the Respondents, and charged the Claimant \$2,275.00 for new materials and \$2,800.00 for labor, for a total price of \$5,075.00. Thomas Fence could not reuse the posts that the Respondents had cut to a length that made it impossible for them to be installed three feet deep and still support other fence structures.

DISCUSSION

In this case, the Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Bus. Reg. § 8-407(e)(1); Md. Code Ann., State Gov't § 10-217 (2014); 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 Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002). The Respondents bear the burden to establish their defense that the Claimant unreasonably rejected their good faith efforts to resolve the claim by a preponderance of the evidence. Bus. Reg. § 8-405(d); COMAR 28.02.01.21K[(2)(b)].

An owner may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor." Bus. Reg. § 8-405(a); *see also* COMAR 09.08.03.03B(2) ("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.

The Respondents performed unworkmanlike and inadequate home improvements. The evidence, including numerous photographs taken by the Claimant, shows observable deficiencies: the fence substantially leaned away from an upright position, and had to be secured with straps and stakes. It effectively failed.

The evidence further shows that what caused the fence to lean was the Respondents’ failure to install the fence posts at a depth of three feet, as expressly required under the Contract. A series of photographs (Claimant Ex. 1-F) show by comparison with a measuring stick or tape that forty-one posts were installed only to depths ranging from five to eighteen inches. They needed to be installed deeper or at least braced with four by four wood bracing. As the Fund argued in recommending an award, expert testimony was not required to show the posts were not installed at a proper depth as called for in the Contract, which caused them to lean under the force of wind. Further, there was no evidence of unusual levels of wind or snow at the Claimant’s property.

Mr. Bowen argued on behalf of the Respondents that the cause of the fence’s leaning (which he did not dispute) and its eventual failure was that the Claimant’s yard held water and experienced high wind. He stated that this was his second job, and his business was just getting under way.

The Claimant credibly responded that the fence as reinstalled by Thomas Fence is not leaning over, even though her yard does retain water and experience wind. She persuasively argued that the cause of the problem was improper installation by the Respondents, who did not install the posts at the contractually-required three foot depth. The Fund agreed.

Mr. Bowen sincerely argued that he wanted to take care of his customer and make things right. He offered to reinstall the fence for an additional \$1,600.00 payment by the Claimant. She rejected that proposal.

I note that the Contract provided that the agreed-upon price, which the Claimant paid in full, "includes all material labor and cleanup associated with work being provided." (Claimant's Ex. 1-B). Thus, the Claimant had already paid for the posts to be installed three feet deep.

Both the Claimant and the Fund persuasively argued that the dramatic nature of the fence's failure made it reasonable for the Claimant to reject the Respondents' offer, which would have required her to pay for work and/or materials that should already have been provided under the parties' Contract. I agree that the Claimant did not unreasonably reject the Respondents' proposal to provide, for an additional \$1,600.00, services and materials for which the Claimant had already paid the full contract price.

I further conclude that the Claimant reasonably paid Thomas Fence \$5,075.00 to repair the Respondents' poor work. Thomas Fence was able to reuse some of the materials provided by the Respondents, but not those posts that KB had cut before installation and therefore were too short to be installed three feet deep and still support other fence structures. Thomas Fence charged and the Claimant paid a total of \$5,075.00 (\$2,275.00 for materials and \$2,800.00 for labor). The Claimant testified the fence no longer leans.

I find after consideration of the entire record that the Claimant is eligible for compensation from the Fund. Having found eligibility for compensation I must determine the amount of the Claimant's actual loss and the amount, if any, that the Claimant is 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). The 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 Respondent performed work under the Contract, and the Claimant has retained other contractors to complete or remedy that work. Accordingly, the following formula appropriately measures the Claimant's 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).

Application of this formula is straightforward. The Claimant paid the Respondent KB \$8,170.00. The Claimant paid Thomas Fence \$5,075.00 in repair/replacement costs. Adding \$8,170.00 to \$5,075.00 yields \$13,245.00. Subtracting \$8,170.00 from \$13,245.00 yields \$5,075.00, which I find is the amount of the Claimant's actual loss under the above formula.

The Business Regulation Article caps a claimant's recovery at \$20,000.00 for acts or omissions of one contractor and provides that a claimant may not recover more than the amount paid to the contractor against whom the claim is filed. Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a). In this case, the Claimant's actual loss is less than the amount paid to the Respondent and less than \$20,000.00. Therefore, the Claimant is entitled to recover her actual loss of \$5,075.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$5,075.00 as a result of the Respondents' acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405

(2015); COMAR 09.08.03.03B(3)(c). I further conclude that the Claimant is entitled to recover that amount from the Fund. Md. Code Ann., Bus. Reg. § 8-405(a), (e) (2015); COMAR 09.08.03.03B(3)(c).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$5,075.00; and

ORDER that the Respondents Kenneth Bowen and KB Services, LLC are ineligible for a Maryland Home Improvement Commission license until the Respondents (individually, jointly and/or severally)⁴ reimburse 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; and

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

June 22, 2021
Date Decision Issued

Robert B. Levin

Robert B. Levin
Administrative Law Judge

RBL/emh
#192766

⁴ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20, and *see also* footnote 2, above.

PROPOSED ORDER

WHEREFORE, this 6th day of September, 2021, 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.

Wm Bruce

Quackenbush

Wm Bruce Quackenbush

Panel B

**MARYLAND HOME IMPROVEMENT
COMMISSION**