IN THE MATTER OF THE CLAIM	*	**BEFORE STEPHEN W. THIBODEAU,**
OF ANGELA BAKER,	*	**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 STEVEN POMPELL,	*	
T/A K & S HOME IMPROVEMENTS,	*	**OAH No.: LABOR-HIC-02-19-33553**
LLC,	*	**MHIC No.: 18 (90) 1275**
RESPONDENT	*	

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PROPOSED DECISION

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STATEMENT OF THE CASE

On April 10, 2019, Angela Baker (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 $7,048.00 in actual losses allegedly suffered as a result of a home improvement contract with Steven Pompell, trading as K & S Home Improvements, LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through

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

8-411 (2015).[2] On October 15, 2019, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a remote hearing on December 4, 2020, via the Webex platform. 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.

After waiting an hour[3] for the Respondent or the Respondent's representative to appear, I proceeded with the hearing. Applicable law permits me to proceed with a hearing in a party's absence if that party fails to attend after receiving proper notice. COMAR 28.02.01.23A. On September 4, 2020, notice of the hearing was mailed to the Respondent at the address of record by regular and certified mail, COMAR 09.08.03.03A(2), and was returned as unclaimed on October 6, 2020. The Respondent did not notify the OAH of any change of address. COMAR 28.02.01.03E. I determined that the Respondent had received proper notice, and I proceeded to hear the captioned matter.

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 (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 Respondent's acts or omissions?

2. If so, what is the amount of the compensable loss?

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

[3] The start of the hearing was delayed in order to deal with technical issues and document downloads related to the remote hearing platform.

SUMMARY OF THE EVIDENCE

Exhibits

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

Clmt. Ex. 1 - Contract between the Claimant and the Respondent, March 15, 2018

Clmt. Ex. 2 - Check for $2,625.00 made out to the Respondent from the Claimant, March 15, 2018; Check for $1,226.00 made out to the Respondent from the Claimant, March 19, 2018; Check for $450.00 made out to the Respondent from the Claimant, April 10, 2018; Check for $949.00 made out to the Respondent from the Claimant, April 18, 2019

Clmt. Ex. 3 - Photos taken by the Claimant of the fence installed by the Respondent, including the following:

- Photo of the Claimant's fence with uneven panel and posts, taken May 2018;
- Photo of hinge at bottom of fence gate panel, taken May 2018;
- Photo of fence gate latch, taken May 2018;
- Photo of fence gate door, taken May 2018;
- Photo of fence post with wrong size post cap, taken May 2018;
- Photo of uneven fence panels, taken May 2018;
- Photo of broken hinge on fence gate panel, taken May 2018;
- Close up photo of broken hinge on fence gate panel, taken May 2018;
- Photo of gate and wood block, taken June 2020;
- Photo of missing hinge on gate, taken June 2020;
- Photo of leaning fence posts and panel, taken June 2020; and
- Photo of detached post from fence, taken June 2020.

Clmt. Ex. 4 - Estimate of work from Frederick Fence Company, September 8, 2018

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

GF Ex. 1 - Hearing Order, October 8, 2019

GF Ex. 2 - Notice of Hearing, September 4, 2020

GF Ex. 3 - Notice of Hearing, February 4, 2020

GF Ex. 4 - Letter from the Fund to the Respondent, April 16, 2019, with attached copy of Home Improvement Claim from the Claimant, dated April 10, 2019

GF Ex. 5 - Licensing History for the Respondent, printed September 18, 2020

The Respondent did not offer any exhibits.

Testimony

The Claimant testified and did not present other witnesses. The Respondent and the Fund did not present any witnesses.

PROPOSED FINDINGS OF FACT

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

1. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor under MHIC license number 5471198.

2. On March 15, 2018, the Claimant and the Respondent entered into a contract (Contract) for work at her home in Hagerstown, Maryland. The Contract called for installing a privacy fence on the Claimant's property, as well as painting a hallway and one bedroom in the Claimant's home.

3. The original agreed-upon Contract price was $5,250.00.

4. The Claimant paid the Respondent the total amount of the Contract price via the following amounts on the following dates:

- $2,625.00 on March 15, 2018;
- $1,226.00 on March 19, 2018;
- $450.00 on April 10, 2018; and
- $949.00 on April 18, 2018.

5. The Contract called for the installation of 150 feet of privacy fence with six foot by eight foot panels connecting to five foot by five foot white vinyl posts that would be installed by digging holes and pouring concrete to secure the posts. In addition, the Contract provided for the installation of a four foot by four foot white vinyl gate. All hardware and labor was included.

6. After receiving the first payment from the Claimant, the Respondent began work on the Contract immediately. The Respondent worked on the Contract until he received his final check from the Claimant on April 18, 2018, pursuant to the Contract.

7. Within one month of the installation of the fence, the Claimant detected several problems with the fence, indicating that it was not properly installed. This included the gate falling off its hinges and lying on the ground; improperly installed posts that were installed several inches too high above the gate panels; where the Respondent did not dig a deep enough hole to install the posts; the wrong size post caps being installed on top of the posts (four foot by four foot caps installed on a five foot by five foot post); hinges and latches that were broken, cracked, falling off, or otherwise working improperly; significant gaps in the fence itself; and leaning panels.

8. Following receipt of the Claimant's final check on April 18, 2018, the Respondent was supposed to return to the Claimant's home to finish the project, in particular to repair the uneven fence posts and replace the fence post caps. However, he never returned.

9. The Claimant texted with the Respondent in May 2018 to ask him to remedy the problems with the fence, in particular the gate that fell off the fence. However, the Respondent told the Claimant his work was complete and he would not be coming back to remedy any issues with the fence.

10. On September 8, 2018, the Claimant received an estimate from Frederick Fence Company (Frederick), a Maryland-licensed home improvement contractor, to remedy the problems with the fence.

11. Frederick provided an estimate of $6,698.00 to replace the fence because the Respondent's work could not be remedied without a full replacement of the fence.

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).

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.

There is no dispute that the Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimant. Therefore, the only question I must decide, in order to determine with the Claimant is eligible for compensation from the Fund, is whether the Respondent performed unworkmanlike, inadequate, or incomplete home improvements. To that end, the Claimant provided ample evidence that the Respondent's work was unworkmanlike, inadequate, and incomplete.

In short, the fence installed by the Respondent began falling apart nearly a month after it was installed on the Claimant's property. In particular, the fence gate fell off onto the ground and was unusable. This was particularly distressing to the Claimant, who initially contracted for the fence in order to provide some security for her special needs child while playing in the yard. Moreover, the fence posts were improperly installed as the holes for the posts were not dug deep enough to match up with the installed panels, meaning the posts rose several inches above where they met up with the panels. This evidence alone demonstrated both an inadequate and an unworkmanlike home improvement that the Respondent never remedied.

In addition, the work on the Contract remained incomplete after the final payment on the Contract was made. The Claimant testified that the Respondent was supposed to return to the worksite on April 19, 2018, the day after the last check was issued, to remedy the problems with the fence posts and fence post caps. However, the Respondent never returned, and further indicated that he would not return at any time to address these issues. This means that the fence project is also an incomplete home improvement.

I thus find 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). 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 some work under the Contract, and the Claimant intends to retain 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).

The Claimant paid a total of $5,250.00 to the Respondent representing the total Contract price. The Claimant received an estimate from Frederick that it would cost $6,698.00 to remedy the Respondent's work. Therefore, in determining the Claimant's actual loss based upon

formula above, the Claimant's actual loss is $6,698.00, as the amount paid to the Respondent ($5,250.00) plus the amount needed to pay Frederick ($6,698.00) minus the amount of the original contract price ($5,250.00) equals $6,698.00.

However, the Business Regulation Article 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 of $6,698.00 exceeds the amount paid to the Respondent. Therefore, the Claimant's recovery is limited to $5,250.00, the amount paid to the Respondent. Bus. Reg. § 8-405(e)(5); COMAR 09.08.03.03B(4).

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of $6,698.00 as a result of the Respondent's 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 $5,250.00 from the Fund. Bus. Reg. § 8-405(e)(5); 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 $5,520.00; 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;[4] and

[4] *See* Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

[illegible]

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

February 23, 2021
Date Decision Issued

Stephen W. Thibodeau
Administrative Law Judge

SWT/da
#190546

PROPOSED ORDER

WHEREFORE, this 9th day of June, 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.

Lauren Lake

Lauren Lake
Panel B
MARYLAND HOME IMPROVEMENT COMMISSION