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| <p><b>IN THE MATTER OF THE CLAIM</b></p> <p><b>OF MUNIR ESMAIL,</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 FRANK ZEBERLEIN,</b></p> <p><b>T/A RUXTON DESIGN &amp; BUILD,</b></p> <p><b>LLC<sup>1</sup></b></p> <p><b>RESPONDENT</b></p> | <p>* <b>BEFORE WILLIAM F. BURNHAM,</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>*</p> <p>*</p> <p>*</p> <p>* <b>OAH No.: LABOR-HIC-02-19-24131</b></p> <p>* <b>MHIC No.: 18 (05) 130</b></p> <p>*</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 May 18, 2018, Munir Esmail (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$22,054.00 in actual losses allegedly suffered as a result of a home improvement contract with Frank Zeberlein, trading as Ruxton Design & Build, LLC (Respondent). Md. Code Ann., Bus.

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<sup>1</sup> The Respondent is currently operating under the business name of Ardent Home Improvement, LLC.

Reg. §§ 8-401 through 8-411 (2015 & Supp. 2019).<sup>2</sup> On July 26, 2019, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on February 13, 2020 at the OAH in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. § 8-407(e). Shara Hendler, Assistant Attorney General, Department of Labor (Department),<sup>3</sup> represented the Fund. Scott Marder, Esquire, represented the Claimant, who was present. John Grason Turnbull, Esquire, represented the Respondent, who was present.

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. 2019); 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 admitted the following exhibits on the Claimant's behalf:

- Cl. Ex. 1 – Binder with Numbered Tabs:
1. Not admitted<sup>4</sup> (pp. 1-2)
  2. Contract between the Respondent and the Claimant, February 13, 2017 (pp. 3-11)
  3. Invoices from the Respondent to the Claimant and checks, various dates (pp. 12-18)

<sup>2</sup> Unless otherwise noted, all references to the Business Regulation Article herein cite the 2015 Replacement Volume and 2019 Supplement of the Maryland Annotated Code.

<sup>3</sup> On July 1, 2019, the Maryland Department of Labor, Licensing, and Regulation became the Department of Labor.

<sup>4</sup> The binder was presented at the outset of the hearing. The binder contains 13 tabs and an addendum tab with hand-numbered pages, but some of the tabs were not admitted. Exhibits not admitted remain in the file for completeness but were not considered in this decision.

4. Not admitted (p. 19)
5. Communication timeline created by the Claimant, February 1, 2017 to June 26, 2017 (pp. 20-22)
6. Call log created by the Claimant, February 13, 2017 to June 26, 2017 (pp. 23-24)
7. Emails between the Claimant, the Respondent and other parties regarding the home improvement project, various dates (pp. 25-64)
8. ELO Inspection Services, LLC inspection of the Claimant's property, July 2, 2017 (pp. 65-81)
9. Letter from the Claimant's counsel to the Respondent, July 25, 2017 (pp. 82-83)
10. AES Builder & Home Improvements Proposal, Clarksville Construction Services Proposal & Project Overview and Addendums, signed August 2, 2017 (84-106)
11. Not Admitted (pp. 107-17)
12. Invoices from Clarksville Construction Services to the Claimant and checks, various dates (pp. 118-22)
13. Howard County Permits related to the Claimant's home improvement project, various dates in May 2017 (pp. 123-28)

APP: T Mobile Account Summaries, February 6, 2017 to June 2, 2017 (pp. 129-47)

- Cl. Ex. 2 – Blueprint Drawings of Home Improvement, designed February 9, 2017 and printed February 13, 2017
- Cl. Ex. 3 – Photographs of the Respondent's Instagram Account, various dates in May and June 2017
- Cl. Ex. 4 – Photograph of the Claimant's home, undated
- Cl. Ex. 5 – Photograph of the Claimant's home, undated
- Cl. Ex. 6 – Excel Calculations by the Claimant, undated
- Cl. Ex. 7 – Not Admitted.

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

- Resp. Ex. 1 – Complaint Form filed with the HIC, July 30, 2017
- Resp. Ex. 2 – Letter from the MHIC to the Claimant, October 26, 2017
- Resp. Ex. 3 – Letter from the MHIC to the Claimant, January 9, 2019
- Resp. Ex. 4 – Letter from the Respondent's counsel to the MHIC, August 22, 2017

Resp. Ex. 5 – Letter from the Claimant’s counsel to the Respondent’s counsel, January 3, 2018.

I admitted the following exhibits on behalf of the Fund:

Fund Ex. 1 – Hearing Order, July 19, 2019

Fund Ex. 2 – Notice of Hearing, November 13, 2019

Fund Ex. 3 – Home Improvement Claim Form, received on May 10, 2018

Fund Ex. 4 – Licensing history, printed on September 19, 2019.

Testimony

Both the Claimant and the Respondent testified. Neither party, nor the Fund, presented any additional 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 the MHIC license number 93550.
2. On January 10, 2017, the Respondent filed for Chapter 11 bankruptcy for his business entity and the Chapter 11 filing was eventually converted to a liquidation (Chapter 7).
3. The Respondent sold the home improvement project to the Claimant and he prepared the drawings for the Claimant’s home improvement project.
4. On February 13, 2017, the Claimant and the Respondent entered into a contract to enclose the living room, add two new bedrooms and an addition to the Claimant’s home. The agreement included demolition, framing, electrical, plumbing, HVAC, drywall, tile, cabinets, hardware, countertops and granite, glasswork, trim work, closets, carpet, painting, siding, roofing, gutters, and clean-up (Contract).
5. The Contract did not contain a begin or an end date.

6. The Respondent told the Claimant that the project would take six to eight weeks.
7. The Contract constituted the entire understanding between the parties.
8. The original agreed-upon Contract price was \$76,240.00, based upon a payment

schedule, as follows:

A deposit of \$25,413.33 required for scheduling (maximum 33 1/3%).

A payment of \$20,330.67 at the start of the job.

A payment of \$20,330.67 due upon completion of drywall.

Balance of \$10,165.33 due upon completion of above work.

Cl. Ex. 1, T2. There was one "overage" for a shower tub system and vanity light that was agreed to by the parties of \$688.93. The overage of \$688.93 was an additional charge.

9. On page 8, paragraph 12 of the Contract, the parties agreed to submit any dispute "relating to the extent of work to be performed under this [contract or] the quality of work performed or any other matter" to arbitration. Cl. Ex. 1, T2.

10. The Contract did not contain the following information as required by the MHIC:

- a. whether an arbitrator's findings are binding;
- b. whether there are any mandatory fees for arbitration;
- c. whether a claim against the Fund would be stayed until completion of any mandatory arbitration proceeding;
- d. that formal mediation of disputes between homeowners and contractors is available through the MHIC;
- e. that the MHIC administers a Fund, which may compensate homeowners for certain actual losses caused by acts or omissions of licensed contractors; and
- f. that a homeowner may request that a contractor purchase a performance bond for additional protection against losses not covered by the Fund.

11. The parties also did not affix their initials and date immediately adjacent to the mandatory arbitration clause, as required by the MHIC.

12. On February 16, 2017, the Claimant paid the Respondent the initial deposit of \$25,413.33.

13. The Respondent did not tell the Claimant that he filed for bankruptcy prior to entering into the Contract, or beginning work on March 21, 2017, or before accepting subsequent payments from the Claimant in the amounts of \$20,330.67 on March 21, 2017 and \$688.93 on April 17, 2017.

14. The Claimant paid the Respondent \$46,432.93 toward the completion of the Contract.

15. After the project started, progress quickly slowed. The Claimant reported to the Respondent on March 30, 2017 that electricians had installed lighting on Tuesday, March 29th but had not returned. On March 31, 2017, the Respondent told the Claimant that weather had impacted the electricians and they would return on Tuesday April 4th.

16. Failure to obtain permits and schedule inspections of completed work delayed the project, and on April 24, 2017, the Respondent told the Claimant he was "working on it diligently." On May 2, 2017, the Claimant asked the Respondent about his progress in obtaining permits and inspections. The Respondent obtained the plumbing permit on May 9, 2017. The Respondent told the Claimant the plumbing inspection would occur on May 10, 2017, but then pushed back the inspection date to May 11th.

17. The Claimant inquired about the electrical inspection again on May 11, 2017 because he found that no inspection or permit was recorded with the county. On May 12, 2017 the permit for an electrical inspection of the project was requested and granted.

18. On May 16, 2017, the Complainant complained that no crew came, and the Respondent promised that crews would return the next day to close things up and then move forward with opening the roof in order to begin constructing the addition.

19. On May 18, 2017, the Complainant complained that although the project was eight weeks old, the initial progress had stalled and workers on the project were either absent or worked short periods before leaving, and he saw no progress if crews worked the previous day.

20. On May 31, 2017, the Claimant asked when the roof work for the addition would begin. The Respondent told the Claimant that weather delayed removing the roof and he would work on a schedule on June 5th. The Claimant expressed concern that workers were only working part of the day, if at all, and parts were not timely ordered and delivered despite having been purchased. The Claimant questioned the Respondent about the anticipated completion date because the project started eleven weeks before, and the Respondent previously assured him that after the inspections there would be no further delays.

21. On June 6, 2017, the parties engaged in a heated telephone discussion about the progress of the project.

22. On June 14, 2017, the Claimant outlined what he believed was still incomplete:

- Installation of recessed lights and switches in the downstairs area
- Bordering in the bathroom where the tile met the wall
- Bathroom sink, vanity, toilet, mirror, mirror lights, granite counter, faucets, shower system towel bars and toilet paper hangers
- Roof and bedroom work had not started

23. The Respondent performed no work on the project after June 14, 2017.

24. The Respondent did not complete the project by the anticipated due date.

25. The Claimant hired ELO Inspection Services, LLC (ELO), an MHIC-licensed contractor, to conduct an inspection of the project. On July 2, 2017, ELO inspected the project and provided a two-page summary of the work that was outstanding and needed completion.

26. On July 11, 2017, AES Builder & Home Improvements, a Maryland-licensed contractor, reviewed the project and determined the outstanding work that remained would cost an estimated \$53,168.00 to compete. Cl. Ex. 1, T10.

27. On August 2, 2017, Clarksville Construction Services, Inc. (Clarksville), a Maryland-licensed contractor, reviewed the project and determined that the following work remained outstanding with an estimated completion cost of \$52,550.00 (Clarksville Contract):

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| <b>Demo</b>   |
| <ul style="list-style-type: none"> <li>• Remove exterior soffit and portion of roof over living room fireplace</li> <li>• Remove transom windows and upper portion of vinyl siding</li> </ul>   |
| <b>Framing</b>  |
| <ul style="list-style-type: none"> <li>• Frame second story addition with reserve gable over living room facing the rear</li> <li>• Complete dividing space between both new bedrooms</li> <li>• Complete bedroom closets with bifold doors</li> <li>• Complete wall for tub</li> <li>• Complete closet area for washer/dryer</li> </ul>  |
| <b>Electrical</b>   |
| <ul style="list-style-type: none"> <li>• Add electrical receptacles to code in both new bedrooms</li> <li>• Provide and install up to eight six-inch bulbs and trims in ceiling over living room</li> <li>• Provide and install up to eight six-inch recessed lights in each bedroom</li> <li>• Provide and install two GFCI receptacles near sinks</li> <li>• Check venting for exhaust fan near shower location</li> <li>• Provide and install one mounted light over bathroom sink</li> <li>• Provide and install wall receptacles to code in hallway</li> <li>• Provide and install electric to washer and dryer</li> <li>• Provide and install ceiling light and switch</li> </ul> |
| <b>Plumbing</b>   |
| <ul style="list-style-type: none"> <li>• Provide and install porcelain sink and faucet</li> <li>• Provide and install toilet</li> <li>• Provide and install tub and shower/faucet</li> <li>• Provide and install all plumbing necessary to complete project including plumbing water and supply lines to complete new bathroom</li> <li>• Check addition of washer box and pan with drain, plumbing waste and supply lines for second floor laundry room</li> <li>• Relocate two sprinkler heads as needed for new bedrooms</li> <li>• Complete all work in accordance with local and State building codes</li> </ul>   |
| <b>HVAC</b>   |



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| <ul style="list-style-type: none"> <li>• Install one new supply register in each new bedroom and tap into existing unit and ductwork</li> <li>• Provide and install a dryer vent to the exterior</li> </ul>   |
| <b>Drywall</b>  |
| <ul style="list-style-type: none"> <li>• Provide and install one-half-inch sheet rock on all new framing and prepare for paint</li> </ul>   |
| <b>Tile</b>   |
| <ul style="list-style-type: none"> <li>• Provide and install ceramic or porcelain tile on the shower walls and bathroom floor</li> <li>• Provide and install new marble thresholds in doorway</li> </ul>  |
| <b>Cabinets</b>   |
| <ul style="list-style-type: none"> <li>• Provide and install one vanity cabinet with full extension, easy close drawer glides, and soft close door hardware to include a full overlay door style</li> </ul>   |
| <b>Hardware</b>   |
| <ul style="list-style-type: none"> <li>• Provide and install all cabinet hardware, matching towel bar and tissue holder, and shower curtain rod</li> </ul>  |
| <b>Countertops and Granite</b>  |
| <ul style="list-style-type: none"> <li>• Provide and install level C countertop on base cabinets, matching granite with standard eased edge detail, and granite shelves in the shower</li> </ul>  |
| <b>Glasswork</b>  |
| <ul style="list-style-type: none"> <li>• Provide and install framed mirror at vanity</li> <li>• Provide and install two vinyl energy start approved, low E glass, argon-filled windows in new rear wall</li> </ul>  |
| <b>Trim Work</b>  |
| <ul style="list-style-type: none"> <li>• Provide and install baseboard and shoe moldings</li> <li>• Provide and install door and window trim as needed</li> <li>• Provide and install five new six-panel pre-hung doors</li> <li>• Prepare for paint</li> </ul> |
| <b>Closets</b>  |
| <ul style="list-style-type: none"> <li>• Provide and install wire shelving and hanging rods in two new bedroom closets</li> </ul>   |
| <b>Carpet</b>   |
| <ul style="list-style-type: none"> <li>• Provide and install forty-four square yards</li> </ul>   |
| <b>Painting</b>   |
| <ul style="list-style-type: none"> <li>• Paint both bedrooms, closets, laundry and bathroom with one coat of primer and two coats of finish</li> <li>• Paint hallway wall to match existing hallway paint</li> </ul>  |
| <b>Siding</b>   |
| <ul style="list-style-type: none"> <li>• Provide and install matching siding on new addition</li> </ul>   |
| <b>Roofing</b>  |
| <ul style="list-style-type: none"> <li>• Provide and install asphalt architectural shingles</li> </ul>  |
| <b>Gutters</b>  |
| <ul style="list-style-type: none"> <li>• Provide and install gutter and down spouts for new roof line</li> </ul>  |
| <b>Clean Up</b>   |
| <ul style="list-style-type: none"> <li>• Provide container for removal of all work-related debris and materials</li> </ul>  |
| <b>Existing Laundry Room</b>  |
| <ul style="list-style-type: none"> <li>• Remove and reset washer and dryer</li> </ul>   |

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| <ul style="list-style-type: none"> <li>• Terminate plumbing, electric and dryer vent</li> <li>• Patch and finish drywall, and prime and paint area</li> </ul> |
| <ul style="list-style-type: none"> <li>• Provide new closet built in to cover hole in floor</li> </ul>  |

28. The Clarksville Contract was substantially similar to the AES proposal.

29. The Clarksville Contract identified two phases for completion of the agreement with the Claimant. Phase one was to finish all the work the Respondent started but did not finish, and phase two was to work on the addition, e.g. the roof and two new bedrooms.

30. The Claimant paid \$56,129.32 to Clarksville in the following installments:<sup>5</sup>

- August 2, 2017 \$15,765.00
- October 5, 2017 \$21,971.82
- November 12, 2017 \$15,765.00
- December 19, 2017 \$ 2,627.50

31. The Claimant sustained an actual monetary loss in the amount of \$22,054.00.

### DISCUSSION

#### **Legal Framework**

An owner may recover compensation from the Fund “for an actual loss that results from an act or omission by a licensed contractor.” Md. Code Ann., Bus. Reg. § 8-405(a); *see also* COMAR 09.08.03.03B(2) (“actual losses . . . incurred as a result of misconduct by a licensed contractor”). “[A]ctual loss’ means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.” Md. Code Ann., Bus. Reg. § 8-401.

#### **Statutory Eligibility**

Certain claimants, however, are excluded from recovering from the Fund altogether. In this regard, a claimant must prove that: (a) the claimant resides in the home as to which the claim

<sup>5</sup> The Claimant did not explain why he paid more than the contract price.

is made, or owns no more than three dwelling places; (b) the claimant is not an employee, officer or partner of the contractor; or the spouse or other immediate relative of the contractor or the contractor's employees, officers or partners; (c) the work at issue did not involve new home construction; (d) the claimant did not unreasonably reject the contractor's good faith effort to resolve the claim; (e) the claimant complied with any contractual arbitration clause before seeking compensation from the Fund; (f) there is no pending claim for the same loss in any court of competent jurisdiction and the claimant did not recover for the actual loss from any source; and (g) the claimant filed the claim with the MHIC within three years of the date the claimant knew, or with reasonable diligence should have known, of the loss or damage. Md. Code Ann., Bus. Reg. §§ 8-101(g)(3)(i); 8-405(c), (d), (f), and (g); 8-408(b)(1).

In this case, the Respondent claims that the Claimant is barred from recovering any monies under the Fund because the Claimant filed a claim with the MHIC without first pursuing arbitration and rejected good faith efforts to resolve the claim. Pursuant to COMAR 28.02.01.21K(1), (2)(b), the party asserting "[a]n affirmative defense bears the burden of proof regarding the defense" by a preponderance of the evidence. The Respondent bears the burden by a preponderance of evidence that the Claimant is barred from recovering under the Fund. Based on the record before me, I find that the Respondent failed to present credible evidence that the Claimant is barred from any recovery under the Fund.

With respect to whether the Claimant unreasonably rejected the Respondent's good faith efforts to resolve the claim, in an August 22, 2017 letter signed by the Respondent's then lawyer, Stephen J. Kleeman, the Respondent summarized his view of the project to the MHIC. The Respondent told the MHIC that he was "thrown off" the project after the Claimant discovered that the Respondent had filed Chapter 11 bankruptcy on January 10, 2017. The Respondent

indicated that all the “materials were ordered and available” and he was “never in danger of not being able to complete the project.” As of the date of the letter, the Respondent’s company was operating under Ardent Home Improvement, LLC and the Respondent was “was willing and able to complete the contract immediately.” The letter indicated that the Claimant was informed of all this information over the phone. Resp. Ex. 4. In addition, the Respondent expressed a desire to participate in mediation. *Id.*

The Respondent testified that he spoke to the Claimant sometime after mid-June 2017 and the Claimant told him to remove his dumpster and lock box. He said that he did not have any phone records to support his claim because they were seized in the bankruptcy proceedings. Further, he testified he asked Mr. Kleeman for records but never got them, and, in any event, did not anticipate that whether he spoke to the Claimant by telephone or not would become an issue. The Respondent said he told the Claimant he was not going to remove the dumpster and lock box because there was an arbitration clause in the Contract. According to the Respondent, the Claimant told him three times at the top of his voice that the Claimant was not interested in arbitration. The Claimant was only interested in getting the project “done now” and the Respondent testified that at the time he “could not get it done now,” and he told the Claimant that he had a good bit of the materials and was waiting on other materials.

The Respondent testified that his life was in turmoil during the bankruptcy and he had six or seven jobs from which he was trying to get money. He could not open the Claimant’s roof when he had financial problems and was “circling the drain,” and at the time he was “putting out a lot of fires.” He also testified he could not open the roof because there was a threat of rain every week and he could not schedule workers when rain was in the forecast but could put a tarp over the roof if it began to rain. He further testified he would have ordered materials for the

inside of the project had he known the Claimant wanted that completed first and testified that he could not do inside work because it could be compromised when he opened the roof.

Additionally, it was fiscally irresponsible to complete the inside work because workers would have to return to the same job more times than was usual.

The Respondent testified that he did not file for arbitration because he believed it was the Claimant's responsibility to do so and in addition, he had never been in "this situation" before. He testified that the Claimant was offered all the materials the Respondent had received for the project that were still in his possession. He felt the controversy with the Claimant would go away in arbitration because the Respondent wanted to arbitrate with the Claimant before his company "went under." According to the Respondent, arbitration was impossible after "everything was done" and the Claimant's project was done, and so he had to "concede." The Respondent testified that the Claimant had the dumpster and lockbox removed in June 2017 after the Claimant told him not to return and there was nothing the Respondent could do after he was told not to return. According to the Respondent, although he had approximately \$30,000.00 still to collect from the Claimant for finishing the project, he viewed the job as "a wash."

The Claimant, on the other hand, presented a different view of the events leading up to his signing the August 2, 2017 contract with Clarksville. He testified that following delays and misinformation provided by the Respondent, he contacted the MHIC who explained that the Claimant should have the project inspected, create a timeline of events, and file a claim with the Fund.

According to the Claimant, the last contact he had with the Respondent was June 6, 2017 and the last day any work was performed on the project was some tiling completed on June 14, 2017. The Claimant testified that he attempted to call the Respondent several times after

June 14, 2017 but was never able to speak with the Respondent again. According to the Claimant, he left messages with the Respondent's secretary and on voicemail that were never returned and referred to a communication timeline (timeline) that he created as proof. Cl. Ex. 1, T5. The Claimant produced telephone bills from February 2017 through the first week of June 2017 to corroborate the timeline. See Cl. Ex. 1, App.

The Claimant sent a letter to the Respondent, signed by the Claimant's attorney, on July 25, 2017 and indicated that because the Claimant left "at least four" messages after June 14, 2017 that were not returned, the Respondent was deemed to have abandoned the project. Further, the Claimant alleged that the Contract lacked many provisions required by the Maryland Home Improvement Act. He testified he rejected the Respondent's August 22, 2017 offer to honor the Contract and mediate because he had not heard from the Respondent since early June 2017 and no longer believed him.

There is no dispute between the parties that the last day the Respondent completed any work on the project was June 14, 2017. The Respondent stated that he was always ready to complete the project because he needed the \$30,000.00 that was still due on the Contract and told the Claimant during phone calls after June 14, 2017 that he wanted to finish the project. I do not believe the Respondent's testimony because it is contradictory in places and the Claimant's testimony was more credible. The Respondent testified at the hearing, and claimed in his August 22, 2017 letter, that the materials to complete the project were ordered and available. The Respondent said he had the materials in his warehouse, but also testified that the reason he did not have materials available when the Claimant wanted specific tasks completed was because he was sticking to a budget and did not have space to store project materials. Both assertions cannot be true.

There were several instances where the Respondent delayed aspects of the project because materials were unavailable. For example, there was an issue regarding the selection of tile and vanity hardware at the end of May 2017. The Claimant questioned why the orders were not completed and the Respondent's secretary indicated it was a lapse on her part. Additionally, the crews were working half days because there were no materials for them. I believe the Respondent's testimony that his life was in turmoil over the bankruptcy. I also believe the Respondent's testimony that at times he did not have materials for the Claimant's project. The Respondent testified that materials were not ready because of budgetary concerns. He testified that he was not ready to "trim out" and, therefore, materials were not present but that the materials began to arrive shortly following the Claimant kicking him off the project. That timeline is convenient to the Respondent's story but given the credible testimony, unlikely because nothing happened to move the project forward after June 14, 2017 and, therefore according to the Respondent, there was no need for further materials. The reason he did not have the materials is more likely than not related to the bankruptcy that began well before he signed the Contract with the Claimant and, in any event, precipitated delay after delay over the nearly four months between the signing of the Contract and the last day of work by the Respondent.

The Respondent also stated in his August 22, 2017 letter that the reason for delay was related to permits. He said that he did not want to proceed without a permit and approved drawings because this was not a typical renovation project and he "wanted to be absolutely sure he had a solid plan, drawings and permits before continuing work." However, the Respondent testified that it was standard practice for him to begin work without permits and take photographs of the work for the inspectors later.

In addition, he testified that the reason he did not begin the addition was because there was a threat of rain every week from the end of May 2017 to early June 2017 and he could not schedule workers to begin the demolition if he did not have five to six days without rain in the forecast. In his August 22, 2017 letter, he indicated that rain was in the forecast from mid-June to mid-July and that was the reason he could not address the roof. The Respondent testified that a tarp could cover the roof and protect the project if it were to rain even though workers could not work in the rain. One would have to believe that rain was forecast from mid-May to mid-July and that the mere forecast of any rain prevented the scheduling of roof work. The Respondent's testimony that the area could be tarped and the Claimant's evidence that it was, is evidence that it was more likely than not possible to schedule the roof work. *See* Cl. Ex. 5. In addition, the Respondent never returned to the worksite for any reason after June 14, 2017 and the first communication in the record from the Respondent after that date was the August 22, 2017 letter. Given the evidence presented in this record, it is more likely than not that the Respondent had no communication with the Claimant after the heated discussion of June 6, 2017.

Therefore, I do not believe that the Claimant disregarded all good faith efforts to resolve the claim. Good faith refers to "[a] state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or seek unconscionable advantage." *Black's Law Dictionary*, 836 (11th ed. 2019). The Respondent's contradictory testimony and communications with the Claimant lead me to believe that he was not forthright with the Claimant. The Respondent did not tell the Claimant he was in bankruptcy when the Contract was signed. The Respondent was not honest about the bankruptcy filing



before signing the Contract, taking payments or beginning work on the project. The Respondent denied the Claimant any opportunity to cancel the Contract before the work began in order to hire another contractor. This amounted to failure on the Respondent's part to engage in fair dealing with the Claimant. The Respondent was putting out fires and circling the drain throughout his time working on the project and his financial situation more likely than not contributed to his inability to complete the Contract.

The Respondent made contradictory statements during his testimony as outlined above. The contradictions undermine his credibility. He delayed the project and could not collect the final payment because he did not have the materials and manpower to finish it. His attempt to lay blame on the Claimant for too many emails and a misunderstanding of construction principles is belied by his delays and failures to produce results on a six to eight-week project that was not finished seventeen weeks after signing the Contract. His August 22, 2017 letter indicated that the project could not have been completed in the four weeks between his last day on the job and the Claimant's July 25, 2017 letter because of poor weather forecasts.

There is no evidence of, and I do not believe the Respondent's testimony that, there was \$10,000.00 worth of materials for the Claimant's project in the Respondent's possession. I do not believe that the Respondent offered any materials to the Claimant in a good faith effort to resolve his inability to complete the project. In fact, by the time the August 22, 2017 letter was sent to the Claimant, the Respondent was operating a new company – a company with which the Claimant had no business relationship.

With respect to the contractual arbitration clause, the Respondent indicated that the Contract specifically contained language requiring all disputes be submitted to arbitration and the Claimant failed to engage in arbitration. The Claimant did not deny this but indicated that the

Contract did not contain the provisions to require arbitration. See COMAR 09.08.01.25. The mandatory provisions are contained in COMAR 09.08.01.25 which provides:

**.25 Arbitration Clause.**

A. A mandatory arbitration clause in a home improvement contract shall include the following information:

(1) The name of the person or organization that will conduct the arbitration;

(2) Whether any mandatory fees will be charged to the parties for participation in the arbitration and include the fee schedule;

(3) Whether the arbitrator's findings are binding; and

(4) A disclosure that, under Business Regulation Article, §8-405(c), Annotated Code of Maryland, a claim against the Home Improvement Guaranty Fund by an owner shall be stayed until completion of any mandatory arbitration proceeding.

B. The parties shall affix their initials and date immediately adjacent to any mandatory arbitration clause in a home improvement contract, at the time of execution of the contract.

C. This regulation shall apply to all home improvement contracts executed after October 31, 1994.

The Contract lacked the requisite language. The Contract's purported arbitration clause stated as follows:

In the event of a dispute between the parties relating to the extent of the work to be performed under this Contractor (sic) the quality of the work performed or any other matter, the parties agree to submit such dispute to arbitration under the applicable provisions of the Better Business Bureau Care Program and conducted in accordance with Better Business Bureau rules of Mediation and Arbitration. The arbitrator award may be entered as a judgment in any Court in this state (sic).

There was no disclosure in the purported arbitration clause that, under Annotated Code of Maryland, Business Regulation Article, §8-405(c), a claim against the Home Improvement Guaranty Fund by the Claimant shall be stayed until completion of any mandatory arbitration proceeding. No initials from either party to the Contract appear near the alleged clause. Additionally, no fees were addressed, and the only indication the arbitrator's decision was binding was that an award may be entered in a State court.

The Respondent alleged that the Claimant was responsible for submitting the claim to arbitration and never did so. COMAR 09.08.03.02E(2) provides:

E. Compulsory Binding Arbitration. When a contract between a claimant and a contractor requires that all contract disputes be submitted to binding arbitration, the claimant shall either:

- (1) Submit their dispute to binding arbitration as required by the contract; or
- (2) Provide evidence to the Commission that the claimant has made good faith efforts to bring the dispute to binding arbitration which the contractor has either rejected or not responded to. The Commission shall then give the contractor written notice that, if the contractor does not agree to binding arbitration, the Commission will consider the compulsory arbitration clause to be void and process the claimant's claim pursuant to this chapter.

The Contract did not contain a proper arbitration clause. It lacked the requirements under the Maryland Home Improvement Act, and for the reasons set forth above the Contract did not have a binding arbitration clause.

In addition, the Respondent filed for bankruptcy on or about January 10, 2017 and then the Chapter 11 was converted to a Chapter 7. The Respondent was unclear when his Chapter 11 bankruptcy converted to a Chapter 7 bankruptcy and that is important to whether the alleged arbitration clause could have any effect. When the Chapter 11 was converted to a Chapter 7, all the Respondent's debts were discharged.

Under Chapter 11, oftentimes referred to as a reorganization, the debtor may seek an adjustment of debts, either by reducing the debt, extending the time for repayment, or seeking a more comprehensive reorganization. *See generally* 11 United States Code Annotated (U.S.C.A.) §§ 1101 – 1195 (2017). Filing a petition under Chapter 7, with some exceptions, automatically stays or stops most collection actions against the debtor or the debtor's property.<sup>6</sup> 11 U.S.C.A. § 362(a)(1) (2017). "As long as the stay is in effect, creditors generally may not initiate or continue lawsuits, wage garnishments, or even telephone calls demanding payments."

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<sup>6</sup> None of the exceptions apply here. *See* 11 U.S.C.A. § 362(b)(2).

(<https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-7-bankruptcy-basics>) (last viewed on April 6, 2020). While the Respondent might have voluntarily negotiated any discharged debt related to the Claimant's addition project, the debt was more likely than not no longer legally enforceable and therefore, any favorable arbitration for the Claimant could not be enforced in a court. See <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/discharge-bankruptcy-bankruptcy-basics> (last viewed on April 6, 2020).

The Respondent abandoned the project on June 14, 2017 and never responded to the Claimant's June 14, 2017 email or the Claimant's June 16, 21, and 26, 2017 telephone calls. The credible evidence in this record indicates that the Respondent contacted the Claimant and offered to mediate on August 22, 2017, after he was no longer in business as Ruxton Design and Build and more likely than not after any arbitration award could no longer be enforced by the Claimant in any Maryland court. Accordingly, the credible evidence establishes there are no *prima facie* impediments barring the Claimant from recovering from the Fund. Md. Code Ann., Bus. Reg. §§ 8-101(g)(3)(i); 8-405(c), (d), (f), and (g); 8-408(b)(1).

## **The Merits**

### **Burden of Proof**

In this case, the Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Md. Code Ann., Bus. Reg. § 8-407(e)(1); Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.08.03.03A(3). "[A] preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces . . . a belief that it is more likely true than not true." *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002) (quoting *Maryland Pattern Jury*

*Instructions 1:7 (3d ed. 2000)*). For the following reasons, I find that the Claimant has proven eligibility for compensation.

*Unworkmanlike, Inadequate or Incomplete Home Improvement*

It is undisputed that the Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimant. The scope of work to be performed under the Contract consisted of a plan to enclose the living room, add two new bedrooms and an addition to the Claimant's home. The agreement included demolition, framing, electrical, plumbing, HVAC, drywall, tile, cabinets, hardware, countertops and granite, glasswork, trim work, closets, carpet, painting, siding, roofing, gutters, and clean-up. And while the work performed was workmanlike, the core issue here is that the Respondent abandoned and failed to finish the project, and the Claimant hired another contractor to complete the original contract.

There is no dispute between the parties that the Respondent failed to finish the project as prescribed by the Contract. The parties disagree about what percentage of the project the Respondent completed. According to the Claimant, the inspection outlined significant work left incomplete when the Respondent abandoned the job. The Respondent, on the other hand, testified that thirty to forty percent of the project had been completed and he denied ever abandoning the job for the reasons previously described (*see* the discussion above regarding good faith) and was always willing and able to complete the rest of the project.

Between the two witnesses, I found the Claimant's testimony far more credible. The Claimant's position was sound and supported by emails, credible testimony, the timeline and phone records. For example, the timeline mirrored his telephone records. *See* Cl. Ex. 1, T5 and App. Although the phone bills end on June 6, 2017, the Claimant testified that he used two monitors and transcribed the dates from his phone records to the timeline. I believe he did so

and that he made the calls he testified to making on June 16, 21 and 26, 2017. The calls are consistent with previous calls he made to the Respondent, e.g. either leaving a voice mail for the Respondent to call him back or leaving a message with the Respondent's secretary for the Respondent to call him back. The Respondent admitted that he was not responding to the Claimant because he believed some of the calls and emails were unnecessary. For example, the Respondent testified he never responded to the Claimant's June 14, 2017 email because he "already knew" what was incomplete. In the same manner, it is more likely than not that he did not respond to the Claimant's telephone calls on June 16, 21, or 26, 2017.

The Claimant listed in his June 14, 2017 email to the Respondent what he believed to be the incomplete items. Having received no response from the Respondent, he contacted the MHIC and was told to have the project inspected, which the Claimant did. The Claimant also obtained quotes from two separate Maryland-licensed contractors who estimated the cost to complete the project at \$53,168.00 (AES) and \$52,550.00 (Clarksville). The Respondent maintained that the project was thirty to forty percent complete but testified that he would drive by the project at night after his crews left to see what was done. So, the Respondent had no idea of how far along the project was when work stopped on June 14, 2017 because, as he admitted on cross-examination, he drove by the home once or twice per week and if the guys were working, he would review progress, but he could not tell how much of the electric or plumbing was completed and admitted that virtually all areas of the Contract remained incomplete as of his last day on the project..

The original Contract price was \$76,240.00 and there was an addition of \$688.93 bringing the total cost of the Contract to \$76,928.93. If the Respondent was correct that he completed 30% of the project, then the cost to complete seventy percent of the project was

roughly \$53,850.25. The two quotes list the cost to complete the work to be about that amount, therefore, I am persuaded by the Claimant's testimony, the inspection and the two quotes that the project took \$52,550.00 to complete when the work stopped.

As for the work to be performed to complete the work in the Contract, I found the Claimant's testimony credible and supported by the record. He sought two quotes from two contractors and settled on Clarksville to perform the work. He chose Clarksville because the owner came to his home to review what was necessary, the estimate was slightly below the AES estimate, and he was familiar with the owner from his child's school.

Even though no one from Clarksville appeared at the hearing to provide firsthand knowledge of its involvement in bringing the project to fruition, I am persuaded by the documents in evidence that the work performed was necessary. Cl. Ex. 1, T10. That the Respondent believes that Clarksville must have gone beyond the Contract to complete the project was unsupported by any evidence in the record. The Respondent's feeling does not constitute persuasive fact. And based on the Claimant's testimony, which I found credible, the work was consistent with the AES estimate, which was also itemized by task. *Id.* Therefore, the scope of work from Clarksville is entirely consistent with the facts presented in this case. Therefore, I am persuaded by a preponderance of the evidence that the Claimant is eligible for compensation from the Fund.

#### Amount of Actual Loss

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. Md. Code Ann., 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 approximately thirty percent of the work required per the Contract, and the Claimant retained other contractors to complete 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).

Based on this formula, the Claimant's actual loss is \$22,054.00.

|                                      |                                 |
|--------------------------------------|---------------------------------|
| Amount paid under the Contract.....  | \$46,432.93                     |
| Plus amount paid to Clarksville..... | <u>\$52,550.00</u> <sup>7</sup> |
| Subtotal.....                        | \$98,982.93                     |
| Minus original Contract price.....   | <u>\$76,928.93</u>              |
| Total.....                           | \$22,054.00                     |

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. Md. Code Ann., 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 \$22,054.00 exceeds \$20,000.00. Therefore, the Claimant's recovery is limited to \$20,000.00. Md. Code Ann., Bus. Reg. § 8-405(e)(1); COMAR 09.08.03.03D(2)(a).

<sup>7</sup> This figure does not include the amount paid to Clarksville over the contract price because the reason for the payment was not explained.



**PROPOSED CONCLUSIONS OF LAW**

I conclude that the Claimant has sustained an actual and compensable loss \$22,054.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & 2019 Supp.); COMAR 09.08.03.03B(3)(c). I further conclude that the Claimant is entitled to recover \$20,000.00 from the Fund.

**RECOMMENDED ORDER**

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

**ORDER** that the Maryland Home Improvement Guaranty Fund award the Claimant \$20,000.00; 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>8</sup> and

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

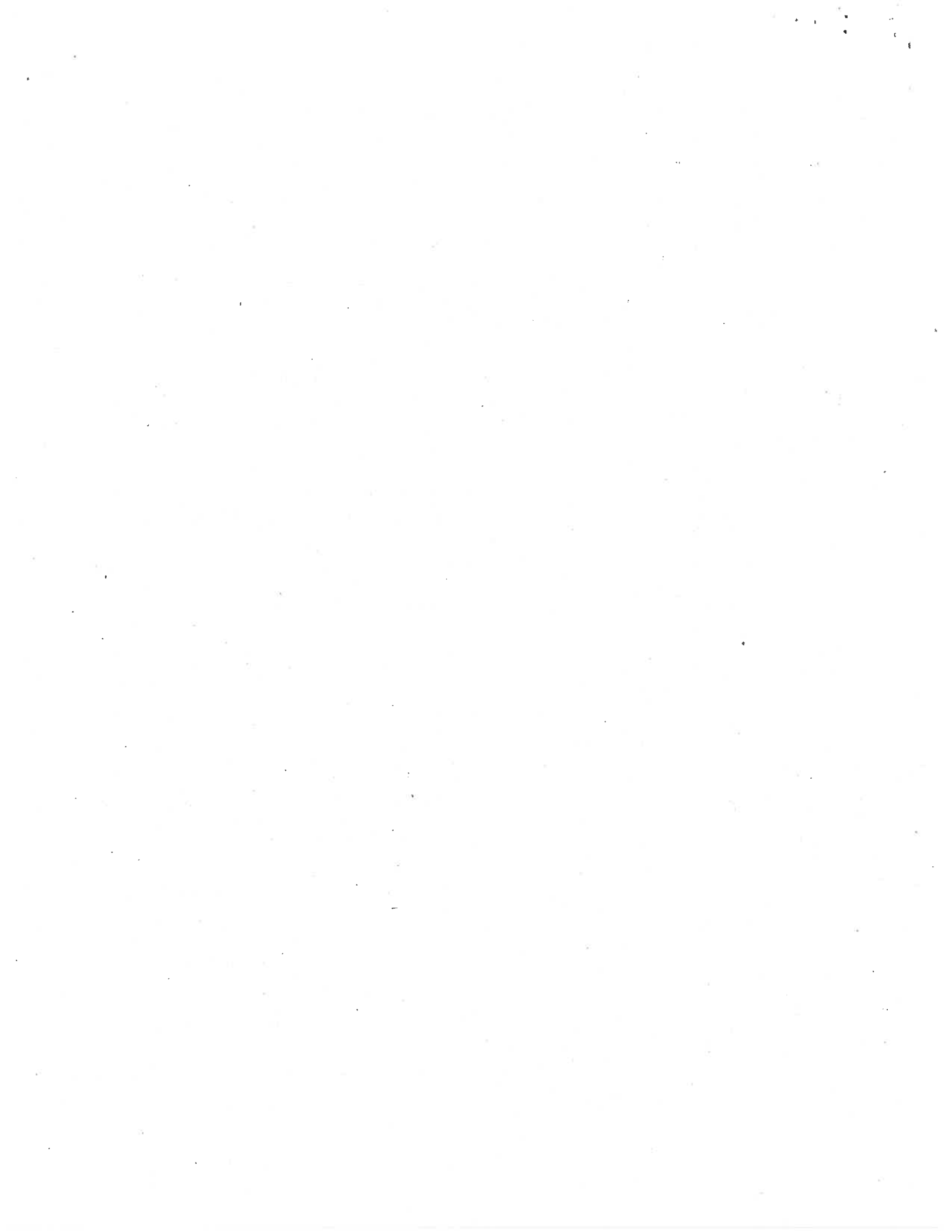
April 7, 2020  
Date Decision Issued

WFB/cj  
# 185511

**CONFIDENTIAL**

*William F. Burnham*  
William F. Burnham  
Administrative Law Judge

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



**PROPOSED ORDER**

***WHEREFORE, this 13<sup>th</sup> day of May, 2020, 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***