

**DENISE R. YOUNG,**

**CLAIMANT**

**v.**

**THE HOME IMPROVEMENT**

**COMMISSION GUARANTY FUND**

**FOR THE ALLEGED ACTS OR**

**OMISSIONS OF CARLOS A.**

**JIMENEZ, t/a JIMENEZ**

**CONSTRUCTION COMPANY,**

**RESPONDENT**

**\* BEFORE STEVEN V. ADLER,**

**\* ADMINISTRATIVE LAW JUDGE**

**\* OF THE MARYLAND OFFICE**

**\* OF ADMINISTRATIVE HEARINGS**

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**\* OAH No.: LABOR-HIC-02-21-00856**

**\* MHIC No.: 19 (05) 711**

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**PROPOSED DECISION**

**STATEMENT OF THE CASE  
ISSUES**

**SUMMARY OF THE EVIDENCE  
PROPOSED FINDINGS OF FACT**

**DISCUSSION**

**PROPOSED CONCLUSIONS OF LAW  
RECOMMENDED ORDER**

**STATEMENT OF THE CASE**

On October 4 and 11, 2019, and on November 8, 2019, Denise R. Young (Claimant) filed a claim (Claim)<sup>1</sup> with the Maryland Home Improvement Commission (MHIC or Commission) Guaranty Fund (Fund) for reimbursement of actual losses allegedly suffered as a result of a home improvement contract with Carlos A. Jimenez, trading as Jimenez Construction Company (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015).<sup>2</sup>

<sup>1</sup> The Claimant amended the Claim on October 11 and November 9, 2019, to reflect the Respondent's compliance with a judgment of restitution and for other reasons she could not recall.

<sup>2</sup> All later citations to the Business Regulations Article of the Annotated Code of Maryland are to the 2015 Replacement Volume to the Code.



On December 21, 2020, the Chairperson of the Commission determined a hearing was warranted on the Claim and on December 29, 2020, the Commission transmitted the matter to the Office of Administrative Hearings (OAH) for an evidentiary hearing, delegating its authority to the OAH to issue a proposed decision.

I held a hearing on the merits of the Claim on March 8, 2021, remotely, via the Webex videoconferencing platform. Md. Code Ann., Bus. Reg. § 8-407(e); Code of Maryland Regulations (COMAR) 28.02.01.20B(1)(b). The Claimant represented herself. The Respondent failed to appear for the hearing after proper notice. John D. Hart, Assistant Attorney General, counsel to the Department of Labor (Department), represented the Fund.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the OAH Rules of Procedure govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2020); 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, if any, of the Claimant's compensable loss?

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

I admitted the following exhibits in evidence offered by the Claimant:

- CL Ex. 1 - Renovation Construction Loan Agreement, dated June 25, 2018
- CL Ex. 2 - Construction Construct, dated June 21, 2018
- CL Ex. 3 - Estimate, dated June 15, 2018, with attachments
- CL Ex. 4 - Letter from the MHIC to the Claimant, dated February 1, 2019, with attachments

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- CL Ex. 5 - Change Order, dated August 9, 2018
- CL Ex. 6 - Subpoena *ad testificandum*, *State v. Jimenez*, dated May 1, 2019, with attachments
- CL Ex. 7 - SM Concrete Construction, Inc. Proposal, dated November 12, 2018, with attachments
- CL Ex. 8 - 37 Photographs of the subject property, taken in October/November 2018

I admitted the following exhibits in evidence offered by the Fund:

- GF Ex. 1 - Letter Order and Notice of Remote Hearing, dated March 2, 2021
- GF Ex. 2 - Notice of Hearing, dated January 29, 2021
- GF Ex. 3 - Notice of Hearing (reissued with an additional address for the Respondent), dated February 23, 2021
- GF Ex. 4 - Hearing Order, Claim No. 19 (05) 711, dated December 21, 2020
- GF Ex. 5 - Letter from the MHIC to the Respondent, dated October 23, 2019, with attachments
- GF Ex. 6 - Department Identification Registration for the Respondent, dated March 3, 2021
- GF Ex. 7 - Maryland Judiciary Case Search, Case Information: *State v. Jimenez*, printed March 4, 2021

There were no other exhibits offered in evidence.

Testimony

The Claimant testified on her own behalf. The Respondent failed to appear for the proceeding and, accordingly, no testimony was offered on his behalf. The Fund did not present any witness testimony.

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### **PROPOSED FINDINGS OF FACT**

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

1. At all times relevant to the proceeding, the Respondent was a licensed home improvement contractor under MHIC registration number 114904.
2. The Claimant is not related to the Respondent or any of his employees, by blood or marriage.
3. The Claimant owns and resides in the subject property and during the relevant times, owned one other property in the State.
4. On June 25, 2018, the Claimant and the Respondent entered into a contract for the Respondent to complete a renovation to the Claimant's property in Parkville, Maryland.
5. The agreed-upon contract price was \$53,990.00 for all labor and materials.
6. Work began under the contract in July 2018.
7. On August 9, 2018, the parties executed a change order amending the contract for \$3,800.00 of additional work to be performed by the Respondent at the subject property; the total contract price after the change order was \$57,790.00.
8. Funds to pay for the renovation came from a construction loan. The lender was Movement Mortgage, LLC (Movement).
9. After a certain amount of work was completed on the contract, Movement would cause a check to be issued from its account with JPMorgan Chase Bank of Atlanta, Georgia, made payable to the Respondent and the Claimant as co-payees. Both the Respondent and the Claimant would have to endorse the check before it could be negotiated.

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10. Between July 5, 2018 and September 17, 2018, Movement issued checks to the Respondent and the Claimant totaling \$40,069.50 (check no. 891, dated September 17, 2018, for \$13,815.00; check no. 734, dated September 5, 2018, for \$1,200.00; check no. 494, dated August 17, 2018, for \$16,956.00; and check no. 10071, dated July 5, 2018, for \$8,098.50).

11. On October 24, 2018, Movement issued check no. 1380, in the sum of \$6,569.10, made payable to the Respondent and the Claimant as co-payees.

12. On or about October 26, 2018, the Respondent forged the Claimant's signature on check no. 1380, it was negotiated without her knowledge or consent, and the funds converted to the Respondent's use.

13. After the Claimant discovered the Respondent had cashed check no. 1380 without her consent and forged her endorsement, she sent the Respondent a letter by certified mail terminating their contract and informing him he was no longer permitted to return to the subject property.

14. The Respondent was charged criminally in the District Court of Maryland for Baltimore City and convicted of the crimes of theft and obtaining money by forgery. The Court ordered the Respondent to pay restitution to the Claimant for the sum of check no. 1380: \$6,569.10, which the Respondent paid to the Claimant on September 30, 2019.

15. No work was performed under the contract after November 8, 2018.

16. As of the last day work was performed under the contract, work remained incomplete.

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17. The Claimant engaged other contractors to complete the contract. Between approximately February 2018 and August 2019, the Claimant paid \$14,578.00 in labor and materials to MHIC licensed contractors to complete the contract (\$12,200.00 to SM Concrete Construction, Inc.; \$1,800.00 to Carter's Air Conditioning, Refrigeration, and Heating Service; and \$578.00 to Michael A. Johnson Plumbing).<sup>3</sup>

18. During the same period, the Claimant directly purchased materials needed to complete the contract totaling \$3,540.94 (\$1,306.20 to Northeastern Supply; \$2,124.50 to Home Depot; and \$110.24 to Lowes Home Centers, LLC).

## DISCUSSION

### *I*

#### *Notice*

It is well-settled that the constitutional requirements for sufficiency of notice are satisfied by the government sending notice to a person through the mail when the person has an obligation to provide their address to the government; this is a mechanism reasonably calculated to provide actual notice. *Jones v. Flowers*, 547 U.S. 220, 226, 231 (2006); *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 490 (1988); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 792, 798 (1983); accord *Snider Int'l Corp. v. Town of Forest Heights*, 739 F.3d 140, 146-48 (4th Cir. 2014); *Griffin v. Bierman*, 403 Md. 186, 196-98 (2008). Even if the notice is returned, "if there were no reasonable additional steps the government could have taken upon return of the unclaimed notice letter, it cannot be faulted for doing nothing." *Jones*, 547 U.S. at 234.

On February 23, 2021, the OAH mailed a Notice of Hearing (Notice) to the Respondent, via first-class and certified mail, at his home and business addresses of record with the MHIC,

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<sup>3</sup> The Claimant also contracted with an unlicensed contractor, Dorsey Brockington, to perform work under the contract not completed by the Respondent. CL Ex. 7. In her closing argument, the Claimant stated that she was not seeking recompense from the Fund for the monies she paid to Mr. Brockington.

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setting forth the date, time, and location of the hearing.<sup>4</sup> GF Exs. 3, 6; Md. Code Ann., Bus. Reg. §§ 8-312(d), 8-407(a) (2015); COMAR 09.08.03.03A(2). The Notice further provided, in all capital letters, that “failure to appear may result in dismissal of your case or a decision against you.” GF Ex. 3. Neither the Notice sent by first-class mail nor by certified mail to the Respondent were returned by the United States Postal Service as being undeliverable, unable to forward, or for any other reason.

On March 2, 2021, upon motion of the Fund, I converted the scheduled in-person proceeding to a remote hearing and issued a Letter Order and Notice of Remote Hearing (Order) on the same date. GF Ex. 1. The Order set forth the time and date of the hearing, the Webex hearing room number, and instructions for how to participate in a remote hearing using Webex. *Id.* The Order set forth in boldface type that “failure to join and participate in the hearing, as scheduled, may result in a default order or a decision against that party.” *Id.* The Order was sent by first-class mail and by email to all parties and the Respondent’s copy was not returned.

As a licensee of the MHIC, the Respondent is obliged to maintain his address with the MHIC, and during the pendency of a proceeding, with the OAH. Md. Code Ann., Bus. Reg. §§ 8-309, 8-407(a); COMAR 09.08.01.11; COMAR 28.02.01.03E. As set forth above, the Respondent’s Notice and the Order were mailed to his addresses of record with the MHIC and the OAH and not returned. GF Exs. 1, 3, 6. The OAH and the MHIC have no other addresses for the Respondent. *Id.*

I find, therefore, that proper notice of the hearing was sent to the Respondent and he failed to appear for the hearing after proper notice. *Id.*; *Jones*, 547 U.S. at 226, 231, 234; COMAR 28.02.01.05. As such, I concluded I may hear and issue a proposed decision in this

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<sup>4</sup> The OAH originally issued a hearing notice to all parties on January 29, 2021 and reissued Notice on February 23, 2021 to include an additional address for the Respondent. GF Exs. 2-3. The hearing date and time remained unchanged. *Id.*

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matter, without the Respondent being present, in accord with the applicable law, due process, and the governing regulations. Md. Code Ann., Bus. Reg. §§ 8-407(a), 8-312(h) (2015); *Jones*, 547 U.S. at 226, 231, 234; COMAR 28.02.01.23A.

## II

### ***Governing Law, Controlling Regulations, and Burden of Proof***

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); COMAR 09.08.03.03B(2). Actual 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. “For purposes of recovery from the Fund, the act or omission of a licensed contractor includes the act or omission of a subcontractor, salesperson, or employee of the licensed contractor, whether or not an express agency relationship exists.” Md. Code Ann., Bus. Reg. § 8-405(b).

At a hearing on a claim for reimbursement from the Fund, the Claimant has the burden of proof. Md. Code Ann., Bus. Reg. § 8-407(e)(1); COMAR 09.08.03.03(A)(3). The standard of proof is by a preponderance of the evidence. Md. Code Ann., State Gov’t § 10-217 (2014). To prove something by a “preponderance of the evidence” means “to prove that something is more likely so than not so,” when all of the evidence is considered. *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)); *see also Mathis v. Hargrove*, 166 Md. App. 286, 310 n.5 (2005).

For the following reasons, I am persuaded that the Claimant has proven eligibility for an award from the Fund.

The following table shows the results of the tests conducted on the various samples of material used in the construction of the bridge. The tests were conducted in accordance with the provisions of the American Institute of Steel Construction, Inc., Specification for Structural Steel Buildings, 1989 Edition, and the American Institute of Steel Construction, Inc., Specification for High-Strength Low-Alloy Structural Steel, 1989 Edition.

The table is divided into three columns: (1) Sample No., (2) Location of Sample, and (3) Results. The results are given in terms of yield strength, tensile strength, and elongation.

Sample No.	Location of Sample	Yield Strength (ksi)	Tensile Strength (ksi)	Elongation (%)
1	Top Flange	58	78	22
2	Web	58	78	22
3	Bottom Flange	58	78	22
4	Top Flange	58	78	22
5	Web	58	78	22
6	Bottom Flange	58	78	22
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100	Top Flange	58	78	22

The results of the tests show that the material used in the construction of the bridge meets the requirements of the American Institute of Steel Construction, Inc., Specification for Structural Steel Buildings, 1989 Edition, and the American Institute of Steel Construction, Inc., Specification for High-Strength Low-Alloy Structural Steel, 1989 Edition.



### *III*

#### *Positions of the Parties*

The Claimant testified that on June 25, 2018, she entered into a contract with the Respondent for the renovation of her home, which after a change order, totaled \$57,790.00. The Claimant contends the Respondent performed some work under the contract and was paid \$40,069.50 through four draws issued by her lender. The Claimant avers the Respondent then forged her signature to a check and converted to his own use the sum of \$6,569.10, after which she terminated the contract. At the time of contract termination, the work remained incomplete and the Claimant was required to employ the services of other contractors to complete the work agreed to under the contract, paying \$14,578.00 to complete the contract work and an additional \$3,540.94 in materials she purchased from building and supply stores. Due to the Respondent's failure to complete the home improvement, the Claimant avers she suffered an actual monetary loss and seeks just compensation from the Fund to redress this loss.

The Fund agreed with the Claimant's position that the Respondent performed an incomplete home improvement and that it was reasonable for the Claimant to cease her business relationship with the Respondent after he forged her signature to check no. 1380. The Fund observed that there was no legal impediment to recovery and recommended an award to the Claimant for her actual loss as calculated by the tribunal.

### *IV*

#### *Analysis of the Merits of the Claim*

There was no expert testimony offered in this case. "It is well settled that expert testimony is required when the subject of the inference is so particularly related to some science or profession that it is beyond the ken of the average layman." *Wood v. Toyota Motor Corp.*, 134 Md. App. 512, 518 (2000) (internal citations and quotation omitted). The nature of the

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incomplete work in this case does not require expert testimony to persuasively establish; it turns on a question of fact that is not beyond the ken of a layperson—was the contract work fully performed or not—an inquiry that turns on my review of the testimonial and documentary evidence of record. See *Suburban Hospital Ass'n v. Hadary*, 22 Md. App. 186, 194 (1974);<sup>5</sup> see also *Para v. 1691 Ltd. P'ship*, 211 Md. App. 335, 380 (2013) (expert testimony is not necessary in an agency hearing before a presumably expert hearing office.).

The Claimant's testimony was delivered clearly, consistently, and sincerely without any signs of doubt, evasion, falsity, deception, or contradiction; it was supported by documentation, including pictures taken contemporaneously with the performance of the work at issue, court records, and invoices detailing the Respondent's malfeasance and the costs to complete the contract work and to purchase materials needed to complete the contract work. CL Exs. 1-8; see *B.H. v. Anne Arundel Cty. Dep't of Soc. Servs.*, 209 Md. App. 206, 224-25 (2012). The Claimant's account was not refuted or contravened on the record before me. I find the Claimant's testimony and her account of events credible and I give it great weight. See *Dickey v. State*, 404 Md. 187, 202-03 (2008) (factors to be weighed by a fact-finder in assessing credibility); *Maryland Bd. of Physicians v. Elliott*, 170 Md. App. 369 (2006) (a finder-of-fact is authorized to determine the credibility of a witness's testimonial evidence based on the witness's demeanor); *Montgomery Cty. Dep't of Health & Human Servs. v. P.F.*, 137 Md. App. 243, 268 (2001) (the credibility to be given a witness and the weight to be given his testimony is the exclusive province of the finder-of-fact).

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<sup>5</sup> In *Suburban Hospital Association*, a hospital stored sterile and nonsterile needles in the same cabinet and a physician used a nonsterile needle in performing a liver biopsy, requiring a patient to undergo a painful series of gamma globulin injections. The Court determined expert testimony was not essential for the jury to determine that storage of the needle was inconsistent with hospital's obligation to use due care. The Court held that where, as analogous here, an issue of performance is not related to technical matters peculiarly within the knowledge of practitioners in the field, but to circumstances where common knowledge and the experience of reasonable persons can evaluate the conduct of professionals, expert testimony is not essential for the factfinder. *Id.* at 194-95.

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For these reasons, I am persuaded that, more likely than not, the home improvement at issue was incomplete, as that term is used in the law and regulations. *Steinberg v. Arnold*, 42 Md. App. 711, 712 (1979) (“as fact finder, [the judge] has the usual jury prerogatives of whether to believe or disbelieve witnesses, how much weight to give testimony and ultimately whether to be persuaded or not to be persuaded”).

Based upon the credible evidence of record, I find the Respondent, a licensed contractor, entered into a written agreement with the Claimant to perform a home improvement to the Claimant’s property, accepted payment totaling \$40,069.50, and forged the Claimant’s endorsement on a check; converting monies intended for work under the contract to his own use. At the time of the Respondent’s criminal acts, the performed work on the contract was incomplete and it was reasonable for the Claimant, under these circumstances, to terminate the contract and not permit the Respondent to return to the subject property. Further, I find there is no dispute that the Claimant is the owner of the subject property and that there are no procedural impediments barring her from recovery from the Fund. Md. Code Ann., Bus. Reg. § 8-405(f), (g); COMAR 09.08.01.13.

I conclude, therefore, that the home improvement at issue here is incomplete within the meaning of the statute, the Claim is not barred by any relevant statutory or regulatory provisions, and the Claimant is eligible for compensation from the Fund. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405.

V.

*Award of Compensation from the Fund*

Having found eligibility for compensation, I now turn to the amount of the award, if any, to which the Claimant is entitled. The Claimant may not be compensated for consequential or punitive damages, personal injury, attorney’s fees, court costs, or interest. Md. Code Ann., Bus.

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Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1). In the November 8, 2019 Claim, the Claimant seeks an award from the Fund in the sum of \$7,619.00. GF Ex. 5.

The Commission's regulatory scheme offers three formulas for measurement of a claimant's actual loss unless a unique measurement is necessary. COMAR 09.08.03.03B(3) (a)-(c).

It is undisputed that the Respondent performed some work under the contract. I am persuaded the credible evidence of record establishes that the Claimant engaged other licensed contractors to complete the original contract after the Respondent left the work incomplete. Accordingly, the following formula, which most closely fits the facts, 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).

Applying this formula to the facts of the case at bar: I add \$40,069.50 (the amount paid to the Respondent under the contract) to \$18,118.94 (the amount paid to other licensed contractors to complete the contract work and the amount paid by the Claimant to purchase materials to complete the contract), which equals \$58,188.44. I then subtract from this figure \$57,790.00 (the original contract price), which yields the sum of \$398.44 (the Claimant's actual loss).

The law and controlling regulations cap a claimant's recovery at \$20,000.00 for the acts or omissions of one contractor, and expressly provide 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.

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FAX: 773/936-3333  
WWW: WWW.CHEM.UCHICAGO.EDU

RESEARCH INTERESTS  
The research interests of the laboratory are in the area of the synthesis and properties of novel materials. The laboratory is currently engaged in the synthesis of new materials with unique properties. The laboratory is also interested in the study of the physical and chemical properties of these materials. The laboratory is currently engaged in the study of the physical and chemical properties of these materials. The laboratory is also interested in the study of the physical and chemical properties of these materials.

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§ 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a). In this case, the Claimant's actual loss of \$398.44 is less than the statutory maximum of \$20,000.00 and the amount paid to the Respondent. Therefore, the Claimant is entitled to an award from the Fund in the sum of \$398.44. Md. Code Ann, Bus. Reg. § 8-405(e)(1); COMAR 09.08.03.03D(2)(a).

**PROPOSED CONCLUSIONS OF LAW**

I conclude, as a matter of law, that the Claimant sustained an actual loss of \$398.44 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg.

§§ 8-401, 8-405, § 8-407(e)(1) (2015); COMAR 09.08.03.03(A)(3). I further conclude, as a matter of law, that the Claimant is entitled to an award of \$398.44 from the Fund. *Id.*; COMAR 09.08.03.03B(3), (4), D(2)(a).

**RECOMMENDED ORDER**

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

**ORDER** that the Maryland Home Improvement Guaranty Fund award the Claimant \$398.44;

**ORDER** that the Respondent is deemed to be ineligible for a Maryland Home Improvement Commission license until the Respondent reimburses the Maryland Home Improvement Guaranty Fund for all monies disbursed under this Order, plus annual interest of at least ten percent, as set by the Maryland Home Improvement Commission<sup>6</sup>; and

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

June 1, 2021  
Date Decision Issued

*Steven V. Adler*  
\_\_\_\_\_  
Steven V. Adler  
Administrative Law Judge

SVA/at  
#192414

<sup>6</sup> Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

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**PROPOSED ORDER**

***WHEREFORE, this 16<sup>th</sup> day of August, 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.***

***Joseph Tunney***

***Joseph Tunney***

***Chairman***

***Panel B***

***MARYLAND HOME IMPROVEMENT  
COMMISSION***

SECRET

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