IN THE MATTER OF THE CLAIM	*	**BEFORE WILLIAM F. BURNHAM,**
OF MATTHEW LOWRY,	*	**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 STEPHEN	*	
WHEATLEY,	*	**OAH No.: LABOR-HIC-02-21-15302**
T/A 50 EAST, LLC	*	**MHIC No.: 21 (75) 44**
RESPONDENT	*	

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PROPOSED DECISION

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STATEMENT OF THE CASE

On January 20, 2021, Matthew Lowry (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund), under the jurisdiction of the Department of Labor (Department), for reimbursement of $20,986.00 for actual losses allegedly suffered as a result of a home improvement contract with Stephen Wheatley, trading as 50 East, LLC (Respondent). Md. Code Ann., Bus. Reg.

§§ 8-401 to -411 (2015).[1] On June 9, 2021, the MHIC issued a Hearing Order on the Claim. On June 21, 2021, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On September 8, 2021, I held a hearing at the OAH in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-407(a), 8-312; Code of Maryland Regulations (COMAR) 28.02.01.20. Andrew Brouwer, Assistant Attorney General, Department, represented the Fund. Matthew J. Bernhardt, Esquire, represented the Claimant, who was present. The Respondent failed to appear.

After waiting over fifteen minutes 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 July 13, 2021, the OAH provided a Notice of Hearing (Notice I) by United States mail certified delivery to the Respondent's addresses on record[2] with the OAH. COMAR 09.08.03.03A(2); COMAR 28.02.01.05C(1). Notice I stated that a hearing was scheduled for August 17, 2021, at 9:30 a.m., at the OAH in Hunt Valley, Maryland. A Daniel Collins signed for delivery at the Mago Vista address on July 17, 2021. On July 20, 2021, the hearing was postponed at the request of the Claimant. On July 28, 2021, the OAH provided a Notice of Hearing (Notice II) by United States mail certified delivery to the Respondent's addresses on record[3] with the OAH. COMAR 09.08.03.03A(2); COMAR 28.02.01.05C(1). Notice II stated that a hearing was scheduled for September 8, 2021, at 9:30 a.m., at the OAH in Hunt Valley, Maryland. The Respondent signed for delivery at the Mago Vista address on September 7, 2021.

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[1] Unless otherwise noted, all references hereinafter to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.
[2] Mago Vista Road in Arnold, Maryland and State Circle in Annapolis, Maryland. On July 26, 2021, Notice I sent to the Respondent at State Circle was returned as undeliverable.
[3] Mago Vista Road in Arnold, Maryland and State Circle in Annapolis, Maryland. On August 11, 2021, Notice II sent to the Respondent at State Circle was returned as undeliverable.

Notice II further advised the Respondent that failure to attend the hearing might result in "a decision against you."

The Respondent made no request for postponement prior to the date of the hearing. COMAR 28.02.01.16. I determined that the Respondent received proper notice, and I proceeded to hear the captioned matter. COMAR 28.02.01.05A, C.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the OAH govern procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021); 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?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits offered by the Claimant:

CL. Ex. 1 - Invoice from 50 East Remodeling, October 11, 2019[4]

CL. Ex. 2 - Invoice from 50 East Remodeling, October 11, 2019

CL. Ex. 3 - Inspection Report, Pro-Spex Residential & Commercial Inspection Services (Pro-Spex), undated

CL. Ex. 4 - Payment Receipt, Pro-Spex, May 1, 2020

CL. Ex. 5 - Estimate, Maryland Decking, May 3, 2020

CL. Ex. 6 - Nine pages of photographs, undated

CL. Ex. 7 - Letter from the Claimant to the Respondent, May 7, 2020

[4] Although titled "Invoice," the Claimant identified this document as an estimate. The costs associated with each document differs.

CL. Ex. 8 - USB drive containing video of the Claimant's property, received September 13, 2021.[5]

The Respondent did not appear and offered no exhibits.

I admitted the following exhibits offered by the Fund:

Fund Ex. 1 - Hearing Order, June 9, 2021

Fund Ex. 2 - Notice II, July 28, 2021

Fund Ex. 3 - Letter from the Department to the Respondent and attached Complaint, January 27, 2021

Fund Ex. 4 - Department licensing history for the Respondent, August 16, 2021

Testimony

The Claimant testified and presented the testimony of Glenford Blanc, Inspector, accepted as an expert in home inspections and improvements.

The Respondent did not present witnesses.

The Fund did not present 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 133688.

2. On or about October 11, 2019, the Claimant and the Respondent entered into a contract to construct a waterproofing system under the Claimant's deck (Contract). The Contract provided that the Respondent would provide all of the necessary drawings and obtain permits for completion of the Contract which included some replacement and reconstruction of the deck.

3. The original agreed-upon Contract price was $27,000.00.

[5] The video was hyperlinked to the photographs in CL. Ex. 3. I allowed the Claimant until close of business September 17, 2021 to provide the video via USB for the file.

4. On a date not reflected in this record, the Claimant and the Respondent modified the Contract to alter a staircase which resulted in the Contract costing $23,800.00.

5. The Claimant paid the Respondent $23,800.00 in several payments. The Respondent began work in January 2020.

6. The Respondent provided no drawings and obtained no permits to install the waterproofing system.

7. In April 2020, the Claimant believed that the Respondent was improperly installing the waterproofing system because the system was trapping water in the deck's joists and support posts. The Claimant contacted the manufacturer of the system the Respondent was using and discovered the system was not installed correctly.

8. The Claimant asked the Respondent to stop work shortly after speaking with the manufacturer.

9. In May 2020, the Claimant hired Pro-Spex to inspect the Respondent's waterproofing work.

10. Pro-Spex discovered that the waterproofing was substandard and would not provide a waterproof shelter under the deck. Pro-Spex discovered several problems including poor installation, poor design, and improper use of material. The system leaked and held water that would eventually lead to future rot and damage the structure of the deck.

11. Pro-Spex concluded that the Respondent's work could not be salvaged, and the entire system should be removed and replaced.

12. The Claimant obtained a proposal from Maryland Decking to demolish the Respondent's work and correct the defects of the Respondent's design. Maryland Decking estimated the cost to be $20,986.00.

13. The Claimant provided the Pro-Spex report and Maryland Decking proposal to the Respondent in May 2020. The Respondent told the Claimant his installation was correct, and he would not repair the work. The Respondent declined the Claimant's offer to mediate.

14. The Claimant hired Maryland Decking to install a waterproofing system on his deck. Maryland Decking completed the demolition of the Respondent's work and completed the waterproofing system.

15. The Claimant paid Maryland Decking $20,986.00.

16. The Claimant is not a relative, employee, officer, or partner of the Respondent; the Claimant is not related to any of the Respondent's employees, officers, or partners.

DISCUSSION

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 (2021); 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." Md. Code Ann., 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." Md. Code Ann., Bus. Reg. § 8-401. For the following reasons, I find that the Claimant has proven eligibility for compensation.

The Respondent performed unworkmanlike, inadequate, or incomplete home improvements. Mr. Blanc testified that on the day he visited the Claimant's property to conduct

the inspection, it was sunny, however, it had rained three days earlier and he could evaluate the waterproofing system. Even though the system was supposed to prevent people under the deck from getting wet, the system that was installed was not preventing water from getting under the deck. He asked for drawings and was informed that no drawings existed. He testified there were numerous problems with the waterproofing including trapped versus draining water, and the incorrect use of flashing tape. Mr. Blanc testified that the slope of the system caused water to be trapped instead of draining. He further saw that screws and nails that were not corrosive resistant were used on the system. He referred to the photos entered as exhibits and played a video that showed trapped water leaking from the deck. In his view, there was no way to repair the damage without removing the waterproofing system installed by the Respondent and starting anew. It was his opinion at the time that it would cost $15,000.00 to $20,000.00 to properly construct a waterproofing system under the Claimant's deck.

The Claimant testified that he hired the Respondent to construct a waterproofing system that would allow him to use the underside of his deck in the rain. He contracted with the Respondent and agreed to a price of $27,000.00. That price was renegotiated to $23,800.00 when changes were made to a staircase on the deck that reduced the construction costs. The Claimant testified he was "hands off" during the time the Respondent did his work but because he was versed in sprinkler construction in commercial buildings, he became concerned about the waterproofing system installed by the Respondent. According to the Claimant, it appeared the Respondent was piecing things together in a "hodge podge" manner and some parts were out of alignment.

For example, the system retained water, the Respondent used black tape which was not cosmetically correct, and some deck rails were uncentered. The Claimant called the manufacturer of the system the Respondent said he was installing and learned that it was not

meant to be an under deck waterproofing system. The Claimant testified that he then contacted Pro-Spex and discovered that the system was improperly designed and installed. When he confronted the Respondent with the inspection report and proposal from Maryland Decking, the Respondent refused to fix the system or refund the Claimant's payments because he insisted his design was correct. The Respondent also declined to mediate.

The Claimant then hired Maryland Decking to remove the Respondent's work and install another system. Maryland Decking completed the work in about one month and the deck's waterproofing system now operates as designed. The Claimant paid Maryland Decking $20,986.00 to fix the Respondent's construction.

The evidence in this case establishes there are no impediments barring the Claimant from recovering from the Fund. The home improvement work was performed on the Claimant's residence. The Claimant is not a relative, employee, officer, or partner of the Respondent; the Claimant is not related to any of the Respondent's employees, officers, or partners. The Claimant did not unreasonably reject any efforts by the Respondent to resolve the claim, as the Claimant requested that the Respondent mediate, and his offer was rejected. There is no evidence that the Contract between the Claimant and the Respondent contains an arbitration provision. The Claimant timely filed his Claim with the MHIC on January 20, 2021. Finally, the Claimant has not taken any other legal action to recover monies. Md. Code Ann., Bus. Reg. §§ 8-101(g)(3)(i), 8-405(c), (d), (f), and (g), 8-408(b)(1). The Claimant is therefore not statutorily precluded from collecting from the Fund.

The Respondent performed an inadequate, unworkmanlike, and incomplete home improvement. The record demonstrates that the system installed by the Respondent was improper. The expert testimony was that the water that was retained in the system would eventually lead to corrosion and rot and had to be entirely removed. The Respondent used

improper materials and a system not designed for under deck waterproofing. Further, he failed to pull permits or make drawings as required under the Contract. All of the construction for the project had to be demolished and rebuilt. The photographs taken of the property and the project document numerous issues with crooked construction, water retention, and improper fasteners. *See* CL. Exs. 3, 6. 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. 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.

The Respondent performed some work under the Contract, and the Claimant retained another contractor to complete and 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 the Respondent $23,800.00 pursuant to the Contract. *See* CL. Ex. 2. The Claimant paid Maryland Decking $20,986.00 to demolish the Respondent's construction and rebuild the project correctly. *See* CL. Ex. 6. In addition, the Claimant paid Pro-Spex $310.00 to inspect the Respondent's work; however, those are

consequential damages and cannot be compensated. Md. Code Ann., Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1).

Using the COMAR 09.08.03.03B(3)(c) formula, I calculate the Claimant's actual monetary loss as follows:

Amount paid to the Respondent	$ 23,800.00
+ Amount paid to correct or complete the work	$ 20,986.00
	$ 44,786.00
- Amount of original contract	$ 23,800.00
Amount of actual loss	**$ 20,986.00**

"The Commission may not award more than $20,000 for acts or omissions of one contractor." COMAR 09.08.03.03D(2)(a). In this case, the Claimant's actual loss is more than $20,000.00. Therefore, the Claimant is entitled to recover $20.000.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of more than $20,000.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2021); 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;[6] and

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

November 24, 2021
Date Decision Issued

William F. Burnham
Administrative Law Judge

WFB/at
#195467

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

PROPOSED ORDER

WHEREFORE, this 9th day of March, 2022, 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

IN THE MATTER OF THE CLAIM OF MATTHEW LOWRY AGAINST THE MARYLAND HOME IMPROVEMENT GUARANTY FUND FOR THE ACTS OR OMISSIONS OF STEPHEN WHEATLEY AND 50 EAST, LLC	* * * * * * *	**MARYLAND HOME IMPROVEMENT COMMISSION** **MHIC CASE NO. 21(75)44** **OAH CASE NO. LABOR-HIC-02-21-15302**

* * * * * * *

FINAL ORDER

This matter was originally heard before an Administrative Law Judge ("ALJ") of the Office of Administrative Hearings ("OAH") on September 8, 2021. Following the evidentiary hearing, the ALJ issued a Proposed Decision on November 24, 2021, concluding that the homeowner, Matthew Lowry ("Claimant") suffered an actual loss as a result of the acts or omissions of Stephen Wheatley and 50 East, LLC (collectively, "Contractor"). *ALJ Proposed Decision* p. 10. In a Proposed Order dated March 9, 2022, the Maryland Home Improvement Commission ("MHIC" or "Commission") affirmed the Proposed Decision of the ALJ to grant an award from the Home Improvement Guaranty Fund. The Contractor subsequently filed exceptions to the MHIC Proposed Order.

On July 7, 2022, a three-member panel ("Panel") of the MHIC held a remote hearing on the exceptions filed in this matter. Jonathon Scruggs, Esq., represented the Contractor. Matthew Bernhardt, Esq., represented the Claimant. Assistant Attorney General John Hart appeared at the exceptions hearing on behalf of the Guaranty Fund. The Commission entered the following preliminary exhibits as part of the record of the exceptions hearing: 1) hearing notice; 2) transmittal letter, ALJ Proposed Decision, and MHIC Proposed Order; 3) Contractor's exceptions; and 4) OAH Hearing notice and USPS certified mail green cards. Neither the Claimant nor the Contractor produced a copy of the transcript of the hearing before the ALJ. The Commission granted leave to the Contractor to testify regarding the circumstances of his failure to appear at the OAH hearing.

Therefore, the Panel's review of the record was limited to the preliminary exhibits for the exceptions hearing, the OAH Proposed Decision, the exhibits offered as evidence at the OAH hearing, and the Contractor's testimony at the exceptions hearing. COMAR 09.01.03.09(G) - (I).

The claim in this proceeding relates to a contract between the parties for improvements to a deck at the Claimant's home. The ALJ found that the Contractor's performance under the contract was unworkmanlike, incomplete, and inadequate. *ALJ's Proposed Decision* pp. 8-9. The Contractor did not attend the OAH hearing.

On exception, the Contractor argued that he was denied due process because he did not receive timely notice of the September 8, 2021. In support of his assertion, the Contractor cited the ALJ's finding that he signed for delivery of the hearing notice on September 7, 2021, COMAR 09.08.03.03.A(2)(c), which he argued "requires that a Respondent receive notice of a hearing not less than ten (10) days before the scheduled date," and the fact that the hearing notices that OAH sent to an alternate address for the Contractor were returned as undeliverable.

The Commission finds that OAH provided timely notice of the hearing to the Contractor and that the Contractor received timely notice of the OAH hearing, and, therefore, holds that the Contractor received due process.

OAH's file on this case, which OAH transmitted to the Commission in the normal course of business following the merits hearing, reveal that OAH sent the notice of the September 8, 2021, hearing to the parties on July 28, 2021, including copies to the Contractor at an address on State Circle in Annapolis and Mago Vista Road in Arnold, the Contractor signed for the hearing notice delivered to the Mago Vista Road address on August 7, 2021, the Post Office returned the proof of delivery with the Contractor's signature to OAH on August 9, 2021 (31 days before the Contractor claims to have signed it). (Exceptions Hearing MHIC Exhibit 4.) Therefore, the ALJ's

finding that the Contractor signed for the hearing notice on September 7, 2021, was erroneous.

In addition, assuming, arguendo, that the Contractor did not receive the hearing notice via certified mail until September 7, 2021, the Commission finds that OAH provided the Contractor with timely notice in accordance with COMAR 09.08.03.03.A(2)(c). That regulation requires that notice of a hearing "be mailed so as to give at least 10 days notice of the claim hearing." It does not require that the parties receive the notice at least 10 days' notice of the hearing and it does not require that notice be sent or received via certified mail. In this case, OAH sent the notice via regular and certified mail to the parties 42 days before the hearing date. In addition, although the hearing notices that OAH sent to the Contractor at an alternate address were returned as undeliverable, the hearing notices that OAH sent to the Contractor at the Mago Vista Road address were not returned, indicating that they were delivered. Therefore, the Commission finds that OAH sent the notice so as to give at least 10 days' notice of the hearing and that the Contractor received the notice more than ten days before the hearing, and, even assuming that the Contractor did not receive the copy of the notice sent via certified mail until September 7, 2021, as the ALJ erroneously stated, that the Contractor in fact received notice of the hearing prior to the hearing date.

Alternatively, the Contractor asserted that his failure to attend the hearing was justified because his grandmother, for whom he alleged he was the primary caregiver, experienced a medical emergency on September 8, 2021, and was taken to the hospital via ambulance. The Contractor did not provide any documentary evidence of the emergency, his presence at the hospital with his grandmother, his caregiving responsibility for his grandmother, or his efforts to notify the OAH of the purported reason he missed the hearing before, during, or after the hearing. The Commission does not find the Contractor's testimony to be credible. First, the Commission

notes that the Contractor represented to the Commission in his written exceptions that he did not receive notice of the OAH hearing until September 7, 2021, which the Commission found to be untrue. Second, the Contractor represented in his written exceptions and his direct testimony that his grandmother passed soon after she went to the hospital, but, on cross examination, conceded that she did not pass until November 15, 2021, more than two months later. Third, although the Contractor testified that he called OAH the day after the hearing to explain why he missed the hearing, the Contractor could not identify who he spoke to and conceded that he did not follow up with OAH in writing. In addition, there is no reference to the Contractor's purported call in the ALJ's Proposed Decision or the OAH file, whereas, in the Commission's experience, when a party fails to attend a hearing at OAH, OAH staff notifies the ALJ of correspondence with the absent party and the ALJ addresses the issue in the Proposed Decision or rehears the case. Accordingly, the Commission does not find the Contractor's excuse for missing the hearing to be credible or his failure to attend the hearing to be justified and holds that a new hearing is not necessary to afford due process to the Contractor.

Although not raised by the parties, effective July 1, 2022, the Maryland General Assembly amended section 8-405(e)(1) of the Business Regulation Article of the Maryland Code to increase the cap on Guaranty Fund awards to a single claimant for the acts and omissions of a single contractor from $20,000.00 to $30,000.00. This amendment applies to all pending claims. *See Landsman v. Maryland Home Improvement Comm'n*, 154 Md. App. 241, 251–62 (2003). Therefore, the Commission holds that the Claimant is entitled to recover his entire actual loss of $20,986.00.

Having considered the parties' arguments, the evidence contained in the record, and the ALJ's Recommended Decision, it is this 12th day of July 2022, **ORDERED:**

A. That the Findings of Fact of the Administrative Law Judge are **AMENDED;**

B. That the Conclusions of Law of the Administrative Law Judge are **AMENDED;**

C. That the Proposed Decision and Recommended Order of the Administrative Law Judge is **AMENDED;**

D. That the Claimant is awarded $20,986.00 from the Maryland Home Improvement Guaranty Fund;

E. That the Contractor shall remain ineligible for a Maryland Home Improvement Commission license until the Contractor reimburses the Guaranty Fund for all monies disbursed under this Order plus annual interest of at least ten percent (10%) as set by the Commission, *Md Code Ann.*, Bus. Reg. §§ 8-410(a)(1)(iii), 8-411(a);

F. That the records and publications of the Maryland Home Improvement Commission shall reflect this decision; and

G. Any party has thirty (30) days from the date of this Final Order to appeal this decision to Circuit Court.

Michael Shilling
Chairperson –Panel
Maryland Home Improvement Commission