

IN THE MATTER OF THE CLAIM	* BEFORE DANIEL ANDREWS,
OF JULIA PONTING,	* 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 IRA LIBOWITZ t/a	*
COLUMBIA HOME CONTRACTORS,	*
RESPONDENT	* OAH No.: DLR-HIC-02-18-28798
	* MHIC No.: 17 (75) 1211

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On September 6, 2017, Julia Ponting (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of an actual loss suffered as a result of a home improvement contract with Ira Libowitz, trading as Columbia Home Contractors (Respondent). On September 7, 2018, the Department of Labor, Licensing, and Regulation (Department), MHIC, issued a Hearing Order and referred the matter to the Office of Administrative Hearings (OAH) to hold a hearing.

On January 18, 2019, I convened the hearing as scheduled at the Largo Government Center, 9201 Basil Court, Largo, Maryland 20774. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015).¹ The Claimant represented herself. The Respondent was represented by David J. Hirsch, Esquire. The Fund was represented by Andrew J. Brower, Assistant Attorney General.

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. 2018); Code of Maryland Regulations (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 that loss?

SUMMARY OF THE EVIDENCE

Exhibits

Unless otherwise indicated, I admitted the following exhibits on behalf of the Claimant:

- CL 1 Complaint Form, MHIC, dated May 10, 2017
- CL 2 Contract between Claimant and Respondent, dated July 21, 2003
- CL 3 Change in Contract Form, dated August 27 and 28, 2003
- CL 4 Tower Federal Credit Union, Transactions and Summaries, dated October 1 through October 31, 2003
- CL 5 Four photographs of the Claimant's interior roof
- CL 6 Contract between Claimant and Nations Home Remodelers, Inc. (Nations Home), dated April 25, 2017

¹ Unless otherwise noted, all references to the Business Regulation Article hereinafter cite the 2015 volume.

- CL 7 Photocopy of Claimant's personal check numbers 3231, and 3224, dated May 31, 2017 and April 28, 2017, respectively, paid to Nations Home
- CL 8 Letter from Respondent to MHIC, dated July 26, 2017
- CL 9 (Not Admitted) Letter from Claimant to MHIC, dated July 30, 2017²
- CL 10 Claim Form, MHIC, dated August 30, 2017
- CL 11 (Not Admitted) Letter from Henry Hentzmen, President of Nations Home, dated January 16, 2019³
- CL 12 (Not Admitted) Video of Nations Home inspecting the Claimant's roof⁴

I admitted the following exhibits on behalf of the Respondent:

- RP 1 Respondent's typed-written notes of contract terms contained on the contract dated July 21, 2003
- RP 2 Respondent's Cost Sheet for contract with Claimant for dates August 12 and 14, 2003 and September 12 and 21, 2003; Roof Center Invoice, dated August 12, 2003; Prompt Inc. Invoice, dated August 14, 2003, RCG Innovations, Inc. Invoice, dated September 12, 2003, Home Depot Invoices, dated September 12 and 13, 2003, and In & Out Seamless Gutters Invoice, dated September 2003
- RP 3 Respondent's note regarding service request by Claimant, dated October 5, 2004

I admitted the following exhibits on behalf of the Fund:

- GF 1 Hearing Order, dated September 7, 2018
- GF 2 OAH Notice of Hearing, dated December 26, 2018
- GF 3 OAH Notice of Hearing, dated November 14, 2018
- GF 4 MHIC letter to Respondent, dated September 14, 2017, with attached Home Improvement Claim Form, received dated September 6, 2017
- GF 5 MHIC Licensing History for Respondent, print dated January 17, 2019

Testimony

The Claimant testified her own behalf.

² Instead of offering this exhibit into evidence, the Claimant testified about its content.

³ Claimant's exhibits 11 and 12 were not admitted into evidence because I found the exhibits to contain incompetent evidence. Md. Code Ann., State Gov't §10-213(d)(1) (2014).

⁴ The Claimant did not have the video in a format which permitted its retention for the record.

The Respondent testified on his own behalf and was accepted as an expert in roof installation and repair.

The Fund did not present any witness testimony.

PROPOSED FINDINGS OF FACT

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

1. Since November 1983, the Respondent has maintained a home improvement contractor license issued by the MHIC under registration number 01-19959.
2. In 2003, the Respondent was performing home improvements under the business name of Columbia Home Contractors, Inc.
3. On July 21, 2003, the Claimant entered into a home improvement contract with the Respondent to repair and replace the Claimant's roof on her residential home (Contract).
4. The Contract required the Respondent to:
 - replace wood eaves where damaged on front left corner, rear left corner, and two additional spots on the rear of approximately twenty to thirty lineal feet;
 - tear off and install twenty year white GAF roofing onto existing wood using fifteen pound felt, flashing, drip edge and warranty;
 - replace up to 100 square feet of bad wood, if needed; and
 - clean up all job debris.
5. The total Contract price was \$6,292.00 and required a \$2,000.00 deposit.
6. On or about July 22, 2003, the Claimant paid the Respondent \$2,000.00 by a personal check.
7. On August 27, 2003, the Claimant and Respondent entered into an agreement to change the original Contract terms, which required the Respondent to install an additional seventy-four feet of wood at \$4.00 per square feet at a total cost of \$296.00 (Change Order 1).

8. On August 28, 2003, the Claimant and Respondent entered into another agreement to change the original Contract terms, which required the Respondent to install approximately seventy feet of new gutter, with existing downspouts to remain at a cost of \$315.00 (Change Order 2). However, the Respondent provided the Claimant a credit of \$50.00 reducing the total cost to \$265.00.

9. The total Contract price including the cost of Change Orders 1 and 2 was \$6,853.00.

10. On or about October 3, 2003, after the Respondent performed the Contract, the Claimant paid the Respondent the remaining balance of the total Contract price in the amount of \$4,853.00.

11. In 2017, approximately fourteen years later, the Claimant was again experiencing issues with her roof.

12. On April 25, 2017, the Claimant entered into a home improvement contract with Nations Home. The contract required Nations Home to:

- tear off and haul away existing shingles and felt on main house and garage;
- check for and replace rotten wood at a cost of \$55.00 per four by eight sheet of plywood (Nations Home furnished seventy sheets of plywood to main roof and lower garage roof);
- furnish and install new piping collars and flashing to chimney;
- furnish and install drip edge to all gutter lines and rakes;
- furnish and install Certainteed Landmark shingles, colonial slate color;
- clean out existing gutters and re-nail existing spikes, if needed;
- furnish and install Certainteed Lanmark ridge vent; and
- clean up and haul away all job debris.

13. The total contract price of the Nations Home contract was \$12,500.00.

14. On April 28, 2017, the Claimant paid Nations Home a deposit of \$3,000.00 by personal check.

15. On or about May 10, 2017, the Claimant filed a complaint with the MHIC which complained about the work performed by the Respondent in 2003.

16. On May 13, 2017, after Nations Home performed the contract, the Claimant paid the remaining balance owed to Nations Home in the amount of \$9,500.00 by personal check.

17. On September 6, 2017, the MHIC received a claim from the Claimant seeking reimbursement from the Fund for the work performed by the Respondent in 2003 in the amount of \$6,853.00.

DISCUSSION

The Claimant has the burden of proving the validity of her claim by a preponderance of the evidence. 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 (3rd ed. 2000).

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”). Actual loss “means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.” *Id.* at § 8-401.

For the following reasons, I find that the Claimant has not established by a preponderance of the evidence an actual loss and is not eligible for compensation from the Fund.

There is no dispute that, on July 21, 2003, the Claimant entered into the Contract with the Respondent, a home improvement contractor licensed by the MHIC, to repair and replace the roof on the Claimant's residential home. The original contract price was \$6,292.00 and required the Respondent to perform the work described in my finding of fact number four. Of importance to the Claimant's claim against the Fund is that the original Contract required the Respondent to replace up to 100 square feet of bad wood, if needed, and to install flashing and drip edge. Further, the Claimant and Respondent entered into two change orders to the original contract because the Respondent was required to install an additional seventy-four square feet of wood at a cost of \$296.00 and was required to install seventy feet of new gutters at a cost of \$265.00, which caused the total contract price to become \$6,853.00. By October 2003, the Claimant fully paid the Respondent the amount required by the Contract and change orders.

The focus of the Claimant's claim against the Fund is that she paid the Respondent to replace up to 174 square feet of bad wood and to install flashing and a drip edge but the Respondent did not perform any of that work. In support of her position, the Claimant explained that she was experiencing issues with her roof in 2017. As a result, the Claimant entered into a contract with Nations Home on April 27, 2017 to install a new roof on her home.

Based on information provided by a representative with Nations Home, the Claimant contends that the roofing shingles installed in 2003 were placed over the original wood installed in 1968 when the home was built and that no new wood was installed by the Respondent in 2003. Also, based on information provided by a representative with Nations Home, the Claimant asserts that there was no flashing or drip edged installed by the Respondent in 2003. In further support of her allegations, the Claimant offered into evidence four photographs which were taken from the interior of her attic by a representative of Nations Home and purport to show the

condition of the plywood supporting her roof in 2017. In at least one of these photos, the plywood appears to be peeling and splintering.

In her own testimony, the Claimant acknowledged a discussion in 2003 with a representative of the Respondent about replacing only portions of the plywood sections of her roof but did not know what portions of plywood were to be replaced. The Claimant also testified that in 2003 she was not told that the plywood on her roof was marginal but instead recalled being told that if the plywood was bad it would be replaced, which she believed had been done especially since there was a change order for the installation of an additional seventy-four feet of wood. Finally, the Claimant acknowledged that except for two issues with her roof after the Respondent performed the Contract, which the Respondent corrected, she had no other issues with her roof until 2017.

As to the discovery of the incomplete, inadequate, or unworkmanlike work performed by the Respondent, the Claimant explained that she was unable to go into her attic to discover the issues she had with the work performed by the Respondent earlier than 2017. She further explained that she has access to the attic through an access port, which requires the use of a ladder. The Claimant stated that she is physically unable to climb the ladder. The Claimant added that when she began having issues with the roof in 2017, she contacted Nations Home and when a representative with Nations Home inspected the roof, she discovered the issues of which she complains regarding the Respondent's work from 2003.

The Respondent explained that his company performed the Contract for the Respondent in 2003. He explained that he maintains notes and records for all work performed by his company. Based on his notes and records, the Respondent explained that the Contract was performed in two or three days and required the installation of fascia and soffit board behind the

gutters due to existing water damage, a tear off of the old shingles which were replaced with new shingles, and the replacement of up to 100 square feet of plywood, if needed.

In his response to the MHIC regarding the complaint filed the Claimant, the Respondent explained the Contract with the Claimant required the installation five sheets of new plywood, which is approximately 150 square feet of plywood and the total square footage of her roof was 2,500. CL 8. The Respondent explained that if any existing plywood could hold a nail it would not be replaced. *Id.* Except for the plywood that was replaced, the Respondent explained that the existing plywood was “good enough to hold her shingles in place for the last fourteen years.” *Id.*

The Respondent produced an invoice from the Roof Center, which demonstrated that the Respondent purchased a drip edge and pipe collar flashing for installation at the Claimant’s home and which indicated that the material purchased was to be delivered to the Claimant’s roof top for installation. The Respondent also produced invoices from Prompt Inc. and RCG Innovations, Inc. which demonstrated that these two subcontractors had installed plywood and replaced fascia and soffit boards at the Claimant’s home. The Respondent agreed that the invoices were from his subcontractors and since he was not physically at the work site he cannot positively state that the material was installed; however, the Respondent also explained ninety-five percent of his contracting work was performed through subcontractors and that he had no reason to believe that the subcontractors did not install the materials delivered to the worksite.

A claim shall be brought against the Fund within three years after the claimant discovered or, by the use of ordinary diligence, should have discovered the loss or damage. Md. Code Ann., Bus. Reg. § 8-405(g). Without question, the Claimant did not discover the alleged actual loss or damage caused by the alleged incomplete, inadequate, or unworkmanlike performed by the Respondent until she contracted with Nations Home in April 2017 to repair her roof.

Subsequently, she filed a claim against the Fund on September 6, 2017, which is a period within three years of actual discovery of the alleged actual loss. However, this case presents an issue of whether the Claimant's claim against the Fund was untimely filed because with ordinary diligence, the Claimant should have discovered the alleged actual loss three years or more after 2003. The Claimant contends that although she had access to the attic and roof of her home, it required the use of a ladder which she could not physically use. As a result, she placed her trust in the Respondent and his employees that the work she contracted to be done was performed. The Respondent argues that the Claimant had access to the roof and should have discovered her alleged actual loss much sooner than 2017. The Fund contends that based on the circumstances of this case, it was reasonable for the Claimant to not discover the alleged actual loss until she became aware of issues with her roof in 2017 which required Nations Home to make the repairs that it performed and resulted in the discovery of her alleged actual loss.

"Ordinary diligence" is reasonable person standard and can be defined as "that degree of diligence that an ordinary prudent person would have exercised under the same or similar circumstances." See *Rios v. Montgomery County*, 157 Md. App. 462, 482 (2007) (discussing how Maryland courts evaluate good cause). In this case, the Respondent performed the work in 2003 and the claim against the Fund was not received until September 6, 2017, which is a time period of approximate fourteen years. The Appellant had no reason to inspect the interior or exterior of her roof during this time period. I accept as true that the Claimant reasonably relied on the Respondent and his employees that they adequately and completely performed the Contract and, for this reason, did not access the interior or exterior of her roof to confirm the work was performed. I have no reason to say that an ordinary prudent person would have done anything different than what the Claimant did. I agree with the Fund's position, that it was reasonable for the Claimant to not discover her actual loss until she hired another roofing

contractor in 2017 to make additional repairs to her roof and as a result of that repair work was informed that that the work she believed was done in 2003 was not performed as she alleged in her claim against the Fund. For this reason, I find that her claim against the Fund was timely filed.

As discussed earlier, the Claimant is required to establish by preponderance of the evidence that she sustained an actual loss caused by an incomplete, inadequate, or unworkmanlike home improvement performed by the Respondent. To establish her actual loss, the Claimant alleges that the Respondent did not install any plywood, flashing, or a drip edge as required by the Contract. The Claimant attempted to support her allegations based on information from representatives of Nations Home that, based on an inspection of her roof in 2017, the Respondent installed the roof shingles on rotten wood and did not install any flashing or a drip edge. The evidence she attempted to present during the hearing to establish these allegation were four photographs of the interior of her roof and depicted the condition of her roof's plywood paneling in 2017, a letter from the President of Nations Home, and a video of her roof which as take by a representative of Nations Home. Although I admitted the photographs, the photographs offer limited views of four sections of the interior plywood paneling and there was no supporting testimony to explain which portion of the roof was photographed or if the sections photographed were of areas of the roof which were allegedly repaired by the Respondent. The letter and video from Nations Home were not admitted into evidence because I sustained objections as to the admissibility of these items. The letter contained hearsay statements by the President of Nations Home and conclusions that that the Respondent did not install flashing or a drip edge and placed new shingles on top of existing rotted wood. The video also contained images of the Claimant's roof with narrations by a representative of Nations Home as to the condition of the Claimant's roof.

Generally, in an administrative hearing, evidence may not be excluded solely on the basis that it is hearsay. Md. Code Ann., State Gov't §10-213(c) (2014), COMAR 28.02.01.21C. "Hearsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted." *Garner v. State*, 183 Md. App. 122, 137 (2008). However, an administrative law judge may exclude incompetent evidence. *Id.* at § 10-213(d)(1). Incompetent evidence is evidence that is inadmissible for reasons other than relevancy. *See Grier v. State*, 351 Md. 241, 261 (1998).

The statements contained in the letter and the video contained hearsay statements but more importantly contained observations and conclusions by the hearsay declarant that plywood, flashing, and or a drip edge were not installed in 2003. I found those conclusions required the hearsay declarant to demonstrate an adequate factual basis to reach those conclusions that was not based on conjecture or speculation and also required the hearsay declarant to demonstrate an expertise to make such conclusions. The letter and video did not provide any such information thus rendering the evidence not only unreliable but incompetent. For those reasons, I found the evidence inadmissible. Even though the Claimant was able to present allegations that the Respondent failed to install plywood paneling, flashing, and a drip edge as contracted for and paid for by the Claimant, she was unable to present any credible evidence to support her allegations. Without such evidence, the Claimant failed to establish by a preponderance of the evidence that she sustained an actual loss caused by an incomplete, inadequate or unworkmanlike home improvement performed by the Respondent.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has not established an actual and compensable loss as a result of the Respondent's acts and omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund deny the Claimant's claim; and

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

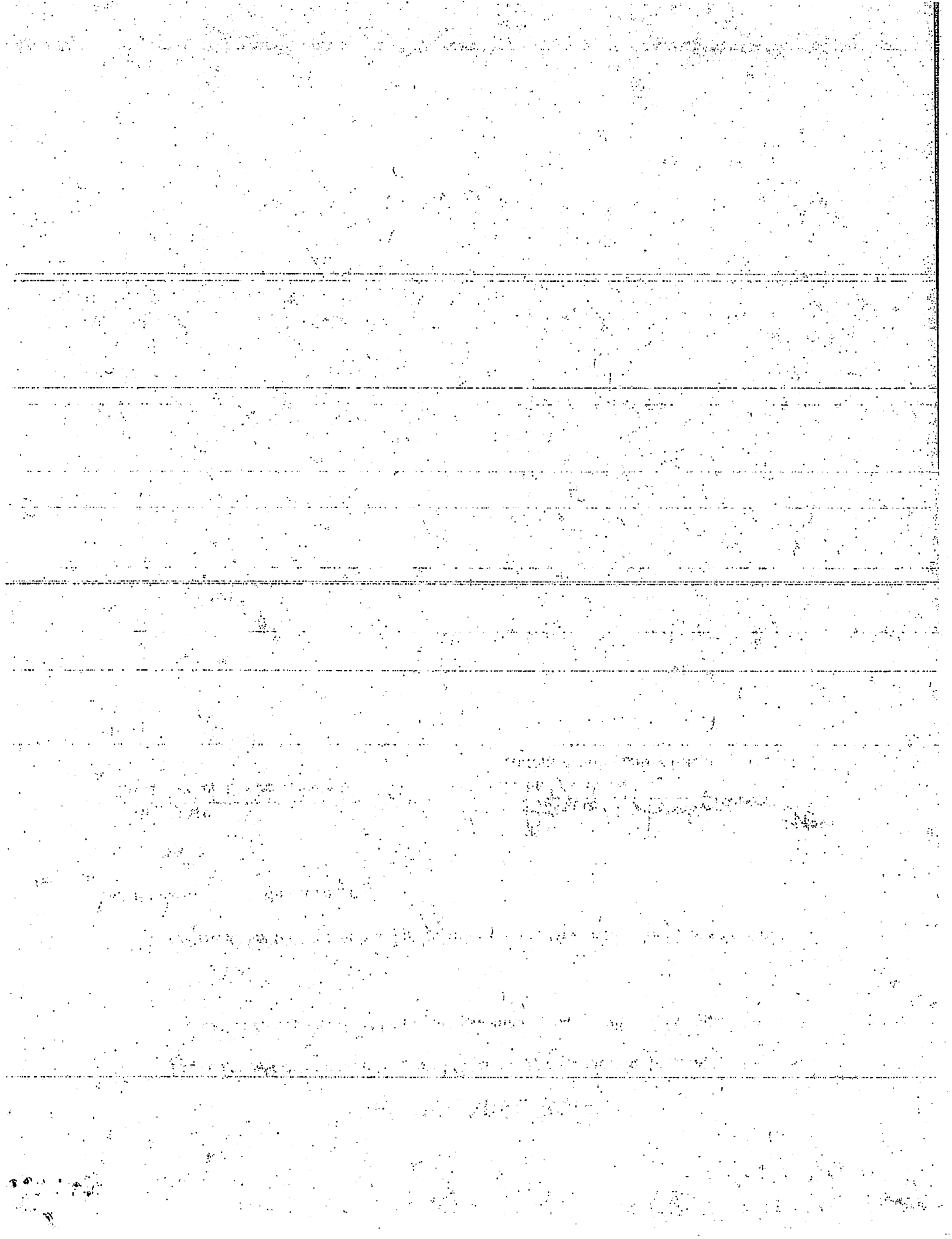
Signature on File

April 2, 2019
Date Proposed Decision Issued

25)

Daniel Andrews
Administrative Law Judge

DA/kp
#177875



PROPOSED ORDER

WHEREFORE, this 3rd day of May, 2019, 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.

Michael Shilling

***Michael Shilling
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION