

<p>IN THE MATTER OF THE CLAIM</p> <p>OF MANISH NAYAK,</p> <p>CLAIMANT</p> <p>AGAINST THE MARYLAND HOME</p> <p>IMPROVEMENT GUARANTY FUND</p> <p>FOR THE ALLEGED ACTS OR</p> <p>OMISSIONS OF WILLIAM YOST,</p> <p>T/A YOST CONTRACTING,</p> <p>RESPONDENT</p>	<p>* BEFORE STEPHEN W. THIBODEAU,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>*</p> <p>*</p> <p>*</p> <p>* OAH No.: LABOR-HIC-02-21-12938</p> <p>* MHIC No.: 20 (75) 1062</p>
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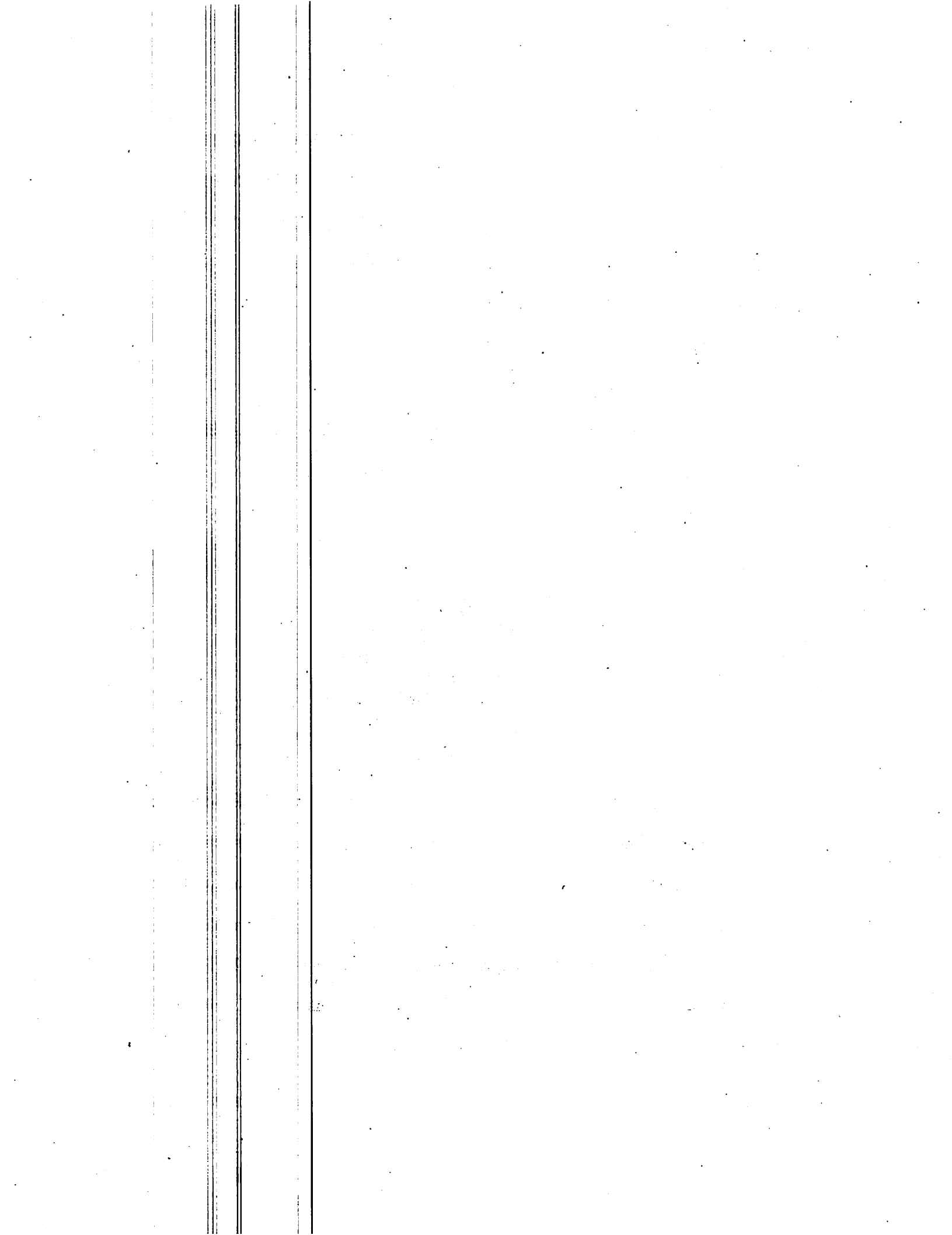
PROPOSED DECISION

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PROPOSED CONCLUSIONS OF LAW
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STATEMENT OF THE CASE

On June 12, 2020, Manish Nayak (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 \$12,801.41 in actual losses allegedly suffered as a result of a home improvement contract with William Yost, trading as Yost Contracting (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015).¹ On May 28, 2021, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

¹ Unless otherwise noted, all references hereinafter to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.

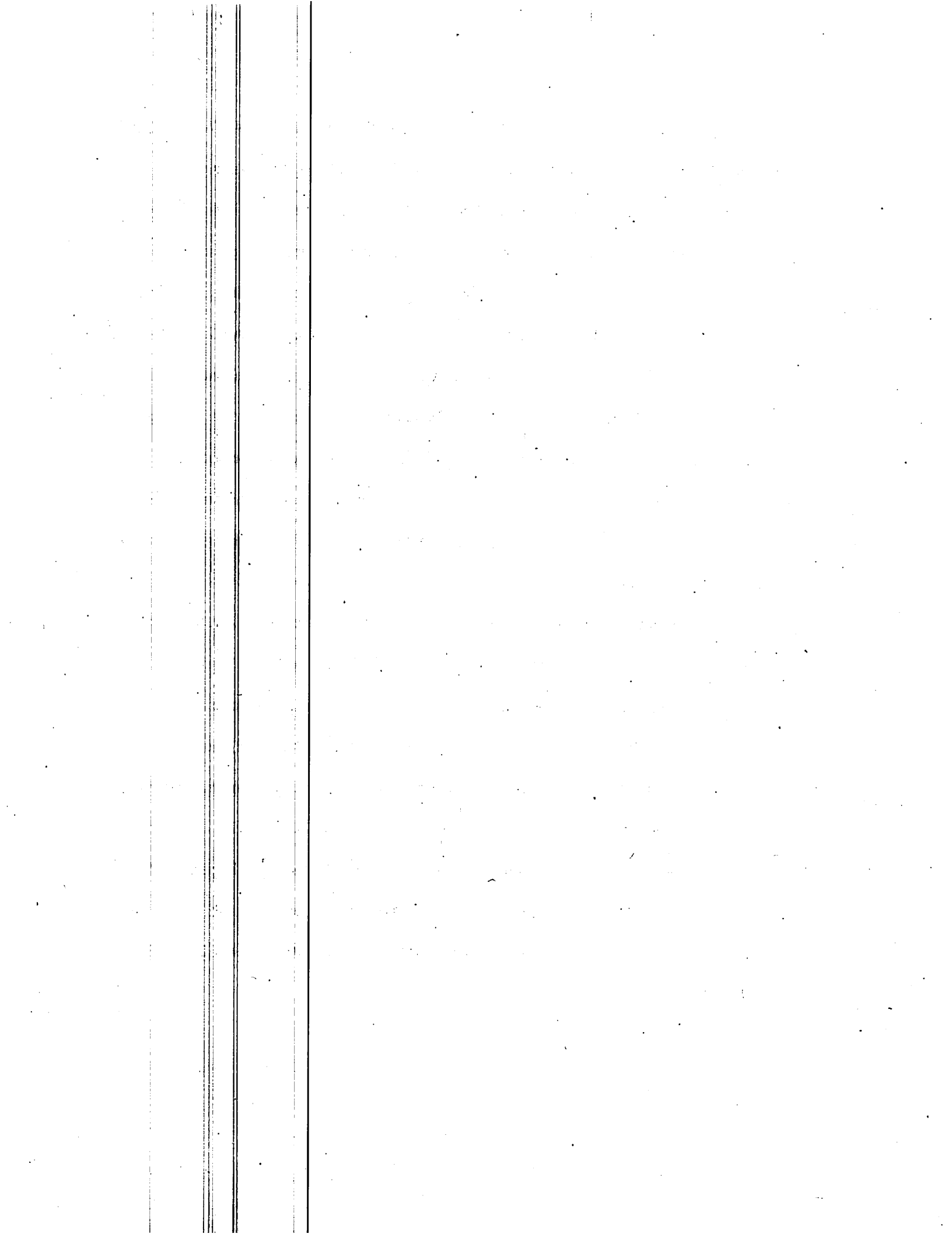


On July 22, 2021, I held a hearing via videoconference. Bus. Reg. §§ 8-407(a), 8-312; Code of Maryland Regulations (COMAR) 28.02.01.20B. Eric London, Assistant Attorney General for the Department, represented the Fund. The Claimant represented himself.

After waiting 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 June 9, 2021, the OAH provided a Notice of Hearing (Notice) to the Respondent by United States mail. COMAR 09.08.03.03A(2); COMAR 28.02.01.05C(1). The Notice stated that a hearing was scheduled for 9:30 a.m. on July 22, 2021 via the Webex videoconferencing platform, and provided instructions on how to access the platform at the date and time on the Notice. The Notice further advised the Respondent that failure to attend the hearing might result in "a decision against you."

The United States Postal Service did not return the Notice to the OAH. A return certified mail receipt indicated that the Notice was signed by a "B. Ellis" on June 12, 2021, at the Respondent's address. The Respondent did not notify the OAH of any change of mailing address. COMAR 28.02.01.03E. 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 in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2020); COMAR 09.01.03; and COMAR 28.02.01.



ISSUES

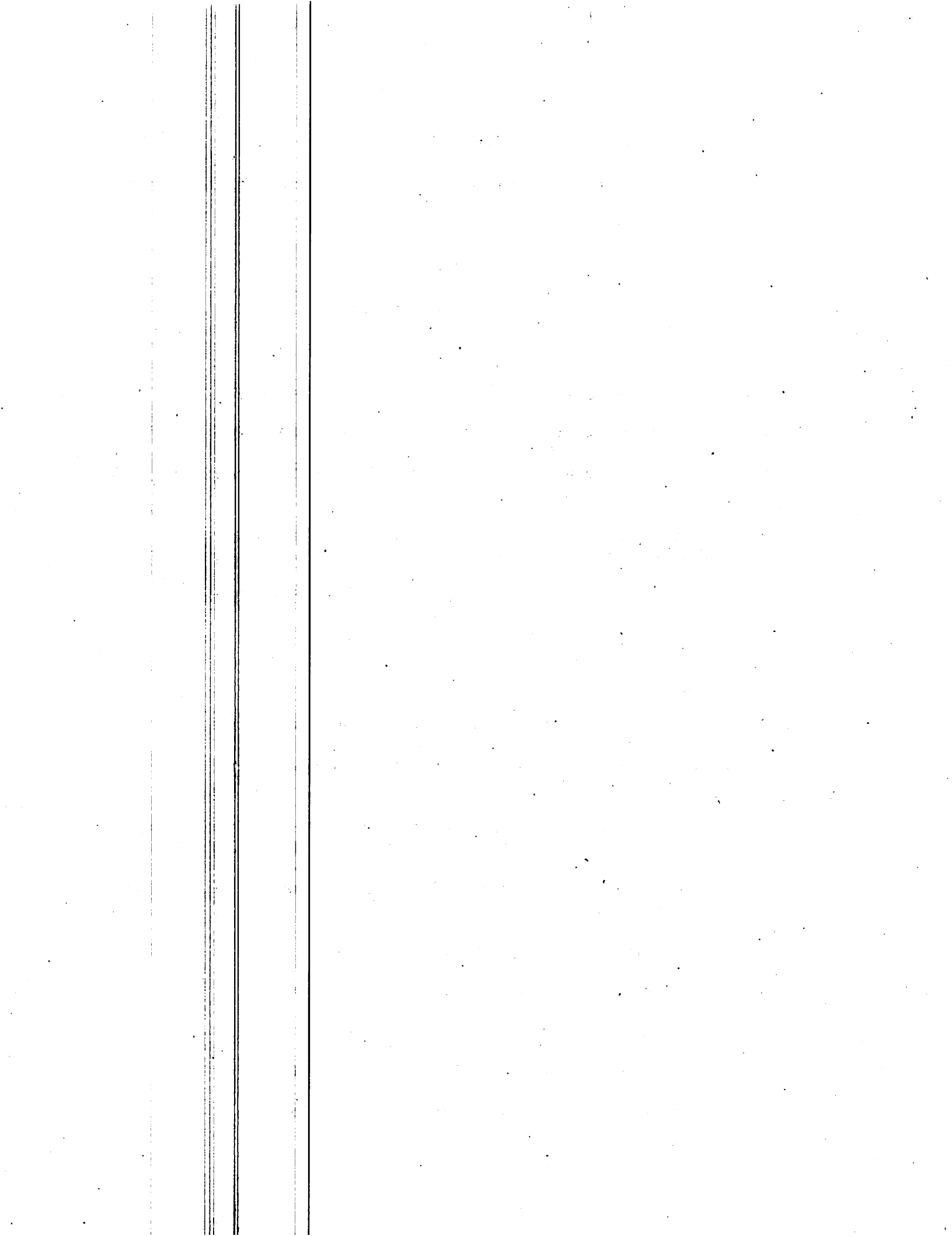
1. Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?
2. If so, what is the amount of the compensable loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on the Claimant's behalf, unless otherwise noted:

- Clmt. Ex. 1 - Contract between the Claimant and the Respondent, August 29, 2019
- Clmt. Ex. 2 - Text messages between the Claimant and the Respondent, September 2019 through February 2020
- Clmt. Ex. 3 - Thirteen photographs of unfinished deck, gazebo, and debris, taken by the Claimant in late February, 2020
- Clmt. Ex. 4 - Three checks written to the Respondent from the Claimant, as follows:
- \$6,000.00 on August 29, 2019
 - \$4,000.00 on October 17, 2019
 - \$4,000.00 on January 16, 2020
- Clmt. Ex. 5 - Itemized list of expenses for remedying the Respondent's work, undated
- Clmt. Ex. 6 - Copies of receipts and bank statements for the Claimant's expenses, sub-numbered as follows:
- 6a: Claimant's bank statement ending March 13, 2020, with five transactions to Ritchie Lumber and Building Supply (Ritchie) for March 2020
- 6b: Claimant's bank statement ending April 9, 2020, with one transaction to Ritchie for March 18, 2020
- 6c: Photocopy of receipt from Ritchie, February 29, 2020
- 6d: Photocopy of receipt from Ritchie, March 9, 2020
- 6e: Photocopy of receipt from Ritchie, undated
- 6f: Photocopy of receipt from Ritchie, March 10, 2020
- 6g: Photocopy of Home Depot receipt, March 14, 2020



6h: Photocopy of Home Depot receipt, March 7, 2020

6i: Photocopy of Home Depot receipt, March 11, 2020

6j: Claimant's bank statement ending March 13, 2020, with seven transactions from Home Depot for February and March 2020

6k: Claimant's bank statement ending April 13, 2020, with four transactions from Home Depot for March, 2020

6l: Claimant's bank statement ending May 13, 2020, with one transaction from The Roof Center, April 22, 2020

6m: Receipt from Wayfair, March 14, 2020

6n: Offered but not admitted

6o: Offered but not admitted

6p: Trex deck estimate, undated

6q: Amazon receipt, March 4, 2020

Clmt. Ex. 7 - Three photographs of Claimant's deck taken by the Claimant in February, 2020; two photographs of Claimant's deck taken by the Claimant on July 22, 2021

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

Fund Ex. 1 - Notice of Hearing, June 9, 2021

Fund Ex. 2 - Hearing Order, May 17, 2021

Fund Ex. 3 - Licensing History for the Respondent, June 25, 2021

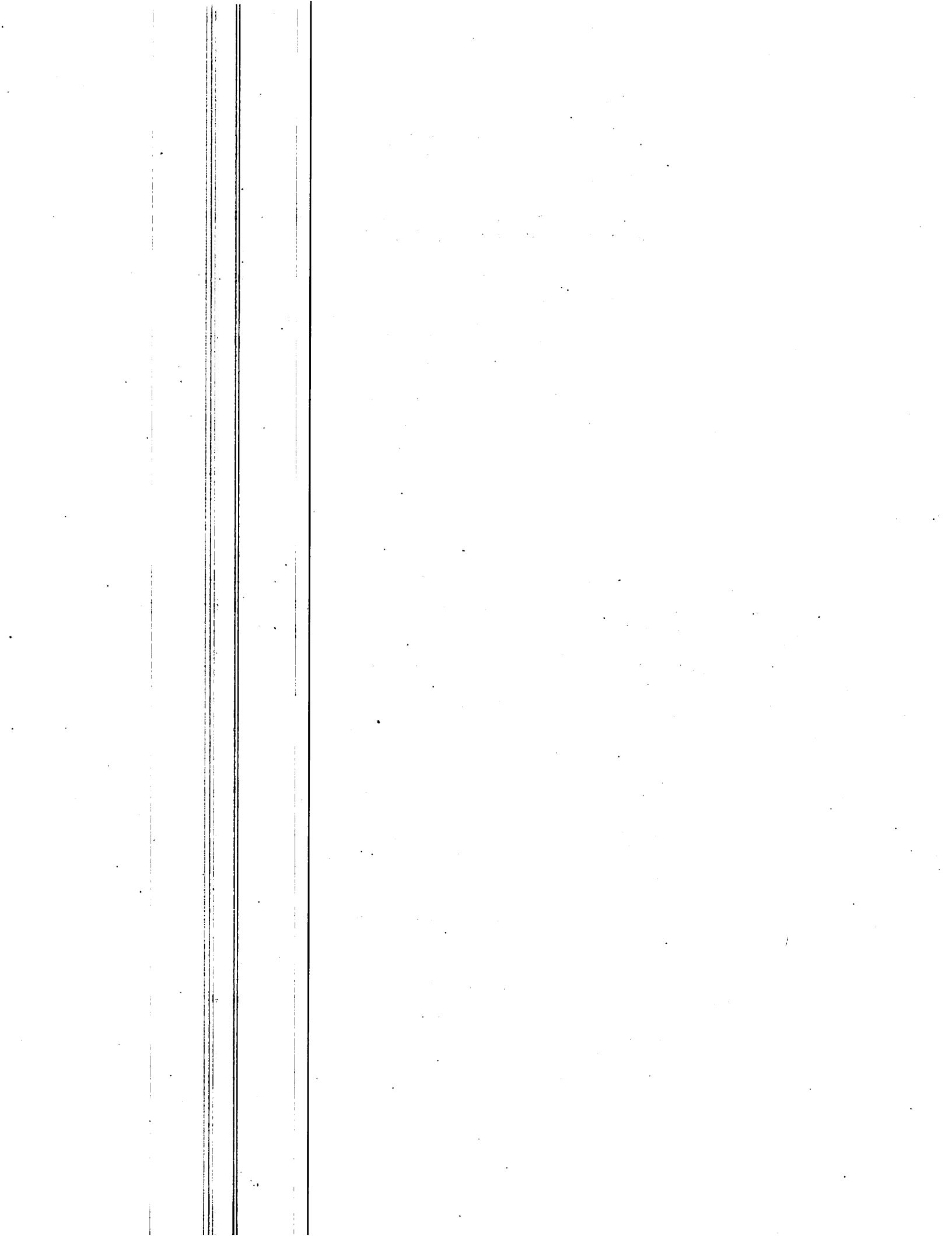
Fund Ex. 4 - Claimant's Home Improvement Claim Form, May 18, 2020

Fund Ex. 5 - Letter from the HIC to the Respondent, June 24, 2020

No exhibits were offered or admitted on behalf of the Respondent.

Testimony

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



PROPOSED FINDINGS OF FACT

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

1. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor under MHIC license number 01-80972.
2. On August 29, 2019, the Claimant and the Respondent entered into a contract to construct a 480 square foot deck and gazebo at the Claimant's home at 3318 Burton Drive, Ellicott City, Maryland (Contract).
3. The original agreed-upon Contract price was \$20,000.00.
4. The Contract had an initial start date of October 1, 2019, with a projected completion date of November 1, 2019.
5. The Respondent began work on the Contract in October 2019. However, there was very little progress on the project. The completion date was pushed back to November 15, 2019, and again to December 15, 2019.
6. During this time, the initial joists for the deck were installed; stairs for the lower level of the deck were installed; and some of the posts for the gazebo were installed. However, the Respondent would only appear at the property sporadically to perform work.
7. The completion date for the project was pushed back to January 11, 2020, then pushed back again to February 14, 2020. During 2020, no progress was made on the project.
8. Following the Respondent's lack of work on the project in 2020, in late February 2020, the Claimant told the Respondent to stop any work on the Contract and requested a refund of the money he already paid the Respondent.
9. On the following dates, the Claimant paid the Respondent the following amounts on the Contract:
 - \$6,000.00 on August 29, 2019;

500

- \$4,000.00 on October 17, 2019; and
- \$4,000.00 on January 16, 2020.

10. The Respondent did not refund any of the Claimant's money.

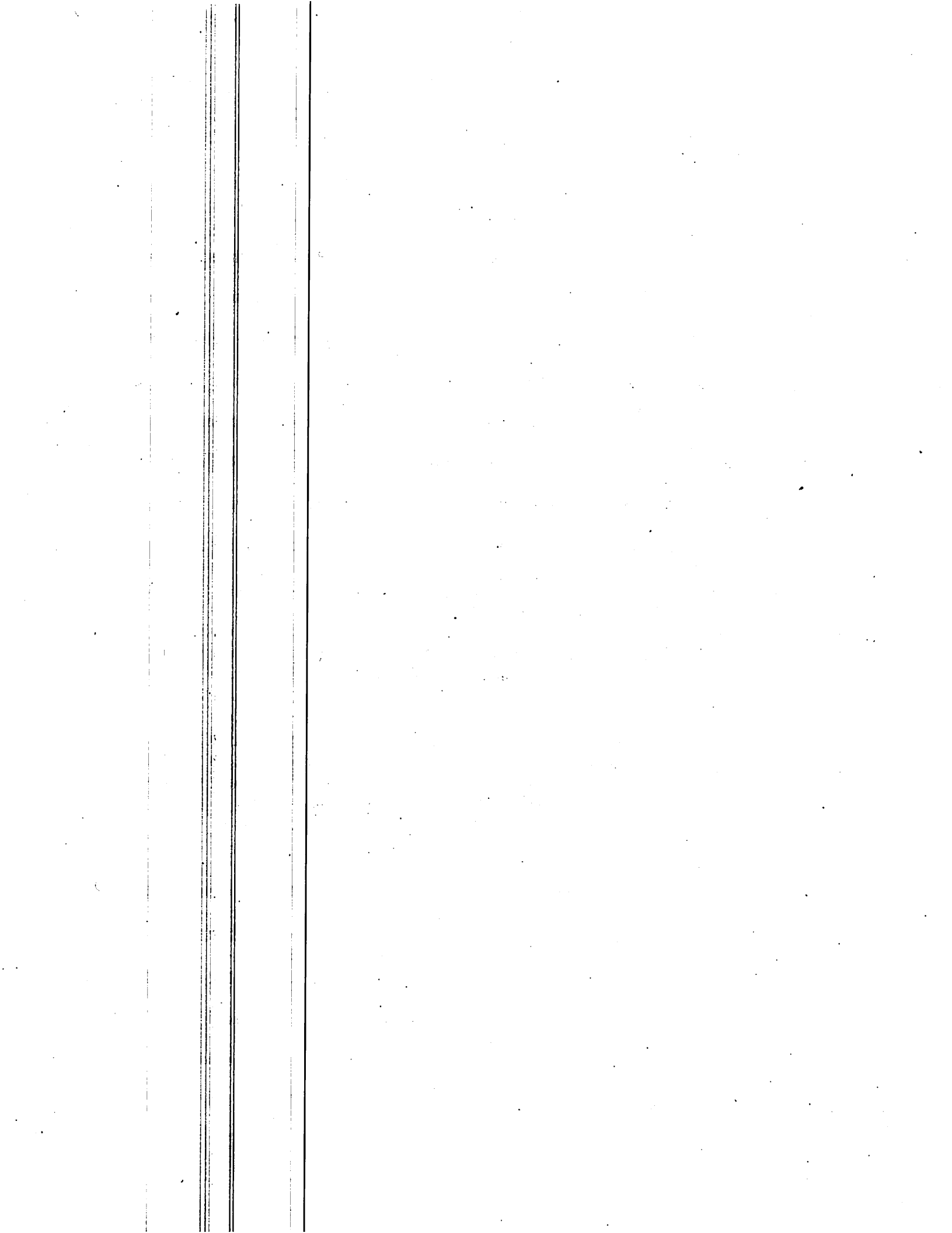
11. At the time the Claimant requested a refund from the Respondent, some of the flooring on the deck had been completed. However, the deck flooring was installed unevenly, and the joists did not support the floor in several sections, with significant gaps between the flooring and the joists. Moreover, the gazebo was incomplete, leaving just some posts and an uncovered roof area. Additional posts that were installed were too short in areas, and a significant amount of debris and uninstalled materials were left behind by the Respondent.

12. To remedy the Respondent's work, the Claimant began purchasing materials to complete the project. The Claimant made the following purchases of materials:

- Deck material and hardware from Ritchie Lumber and Building Supply (Ritchie): \$5,458.82 on March 2, 2020;
- Deck material and hardware from Home Depot: \$5.28 on March 7, 2020;
- Deck material and hardware from Home Depot: \$398.23 on March 7, 2020;
- LED Deck lighting kit from Amazon: \$286.18 on March 8, 2020;
- Deck material and hardware from Home Depot: \$231.02 on March 9, 2020;
- Deck material and hardware from Ritchie: \$623.04 on March 10, 2020;
- Deck material and hardware from Ritchie: \$773.59 on March 11, 2020;
- Deck material and hardware from Ritchie: \$318.11 on March 12, 2020;
- Deck material and hardware from Home Depot: \$77.29 on March 13, 2020;
- Deck material and hardware from Home Depot: \$360.13 on March 14, 2020;
- Cupula for gazebo from Wayfair: \$188.14 on March 14, 2020;
- LuxLumin LED Strip Lights connectors from Amazon: \$48.70 on March 15, 2020;
- Extension cable wire with connectors from Amazon: \$40.26 on March 15, 2020;
- Deck material and hardware from Home Depot: \$25.87 on March 16, 2020;
- Deck material and hardware from Ritchie: \$857.43 on March 18, 2020;
- J-channel from The Roof Center: \$23.40 on April 22, 2020; and
- Deck light wires, clips, and loop lock from Amazon: \$28.41 on May 10, 2020.

13. The Claimant needed to return some of the materials he purchased to complete the project, and received the following credits for returning items to the following vendors:

- \$136.74 from Ritchie on March 5, 2020;



- \$19.04 from Home Depot on March 16, 2020; and
- \$81.71 from Home Depot on March 20, 2020.

14. The total amount the Claimant paid for materials to finish the project was \$9,506.41 (\$9,743.90 minus \$237.49 in refunds equals \$9,506.41).

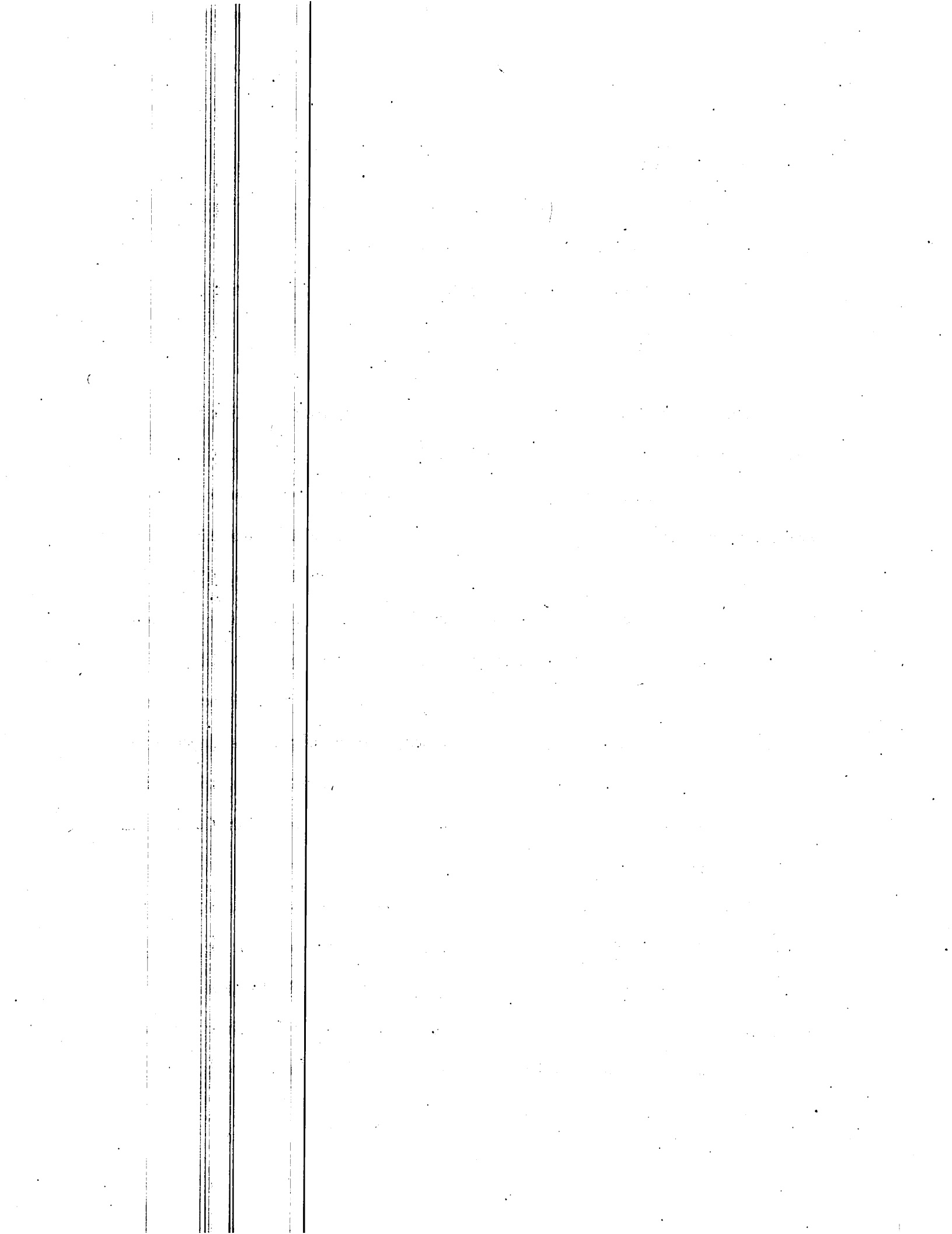
15. The Claimant hired an unlicensed contractor, Tobias Fernandez, to complete the labor on the project left unfinished by the Respondent.

DISCUSSION

In this case, the Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Bus. Reg. § 8-407(e)(1); Md. Code Ann., State Gov't § 10-217 (2014); COMAR 09.08.03.03A(3). To prove a claim by a preponderance of the evidence means to show that it is "more likely so than not so" when all the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002).

An owner may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor." Bus. Reg. § 8-405(a); *see also* COMAR 09.08.03.03B(2) ("The Fund may only compensate claimants for actual losses . . . incurred as a result of misconduct by a licensed contractor."). "[A]ctual loss' means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." Bus. Reg. § 8-401. For the following reasons, I find that the Claimant has proven eligibility for compensation.

There is no dispute the Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimant. Therefore, I must determine whether the Claimant is eligible for compensation from the Fund due to unworkmanlike, inadequate, or incomplete home improvements performed by the Respondent, and what the Claimant's actual loss was as a result. Based on the evidence presented at the hearing, I find the Respondent unworkmanlike, inadequate, and incomplete home improvements.



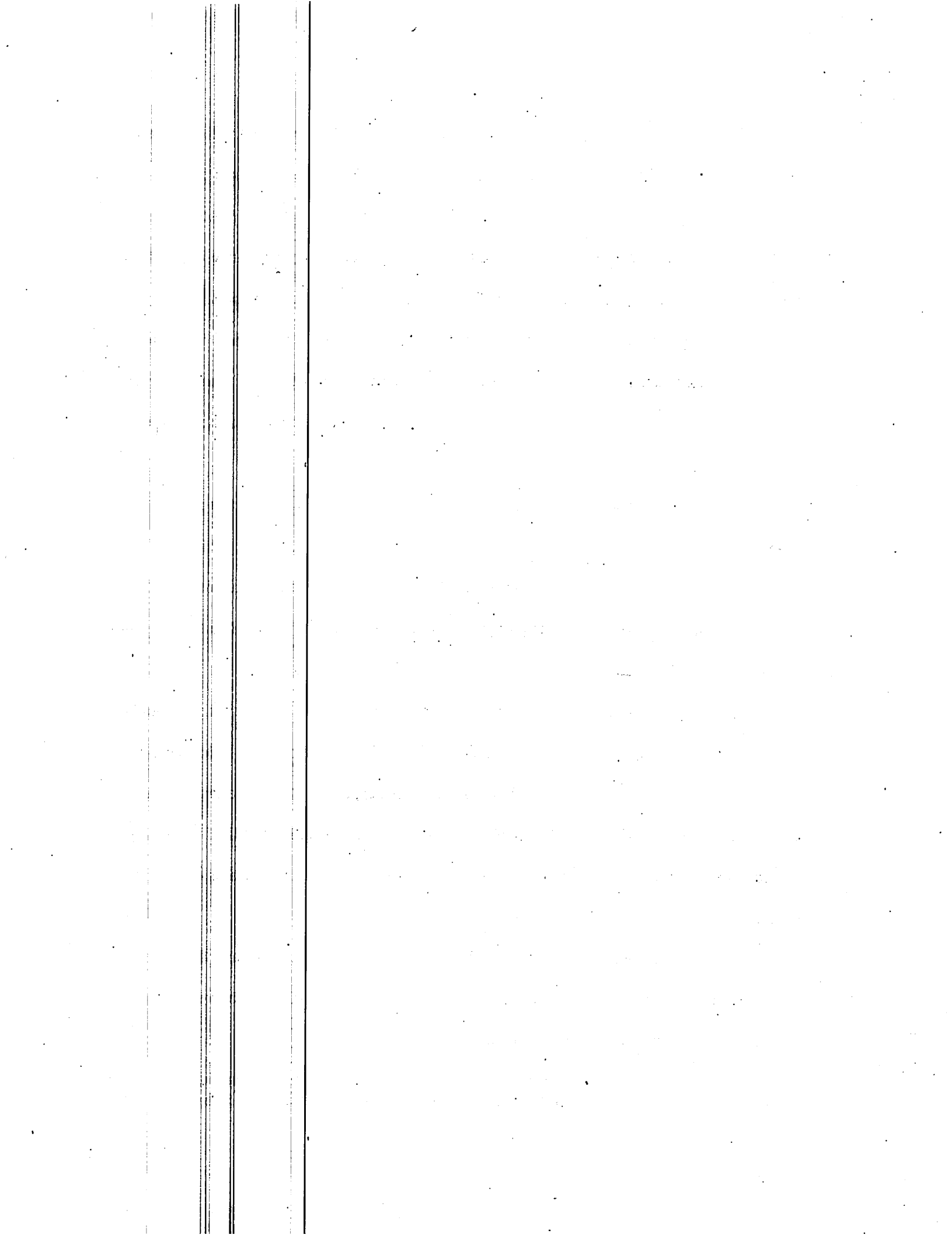
The Claimant testified and presented evidence that he contracted with the Respondent for a new deck and gazebo at his residence. From the beginning, there were delays in construction, causing the completion date of the project – originally set for November 1, 2019 – to be pushed back several months. During each delay, the Respondent performed only sporadic work on the project, and the work he did perform was defective in several areas, including poor installation of the deck flooring and inadequate joists to support weight on the deck. In addition, beams to support the gazebo and roof of the deck were the wrong size. At the time the Claimant told the Respondent to stop work, the gazebo was incomplete, and materials were left on the property unused.

Given the significant delays in the project which was originally scheduled to take a month to complete, it was not unreasonable for the Claimant to ask for a refund over three months after the project was originally scheduled to be completed. The Respondent never refunded any money to the Claimant and did not return to the property to complete the project. I thus find that the Claimant is eligible for compensation from the Fund.

Having found eligibility for compensation I must determine the amount of the Claimant's actual loss and the amount, if any, that the Claimant is entitled to recover. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney fees, court costs, or interest. Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1). MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work.

In this case, the Respondent performed some work under the Contract, and the Claimant retained other contractors to complete or remedy that work. Accordingly, the following formula appropriately measures the Claimant's actual loss:

If the contractor did work according to the contract and the claimant has solicited or is soliciting another contractor to complete the contract, the claimant's



actual loss shall be the amounts the claimant has paid to or on behalf of the contractor under the original contract, added to any reasonable amounts the claimant has paid or will be required to pay another contractor to repair poor work done by the original contractor under the original contract and complete the original contract, less the original contract price. If the Commission determines that the original contract price is too unrealistically low or high to provide a proper basis for measuring actual loss, the Commission may adjust its measurement accordingly.

COMAR 09.08.03.03B(3)(c).

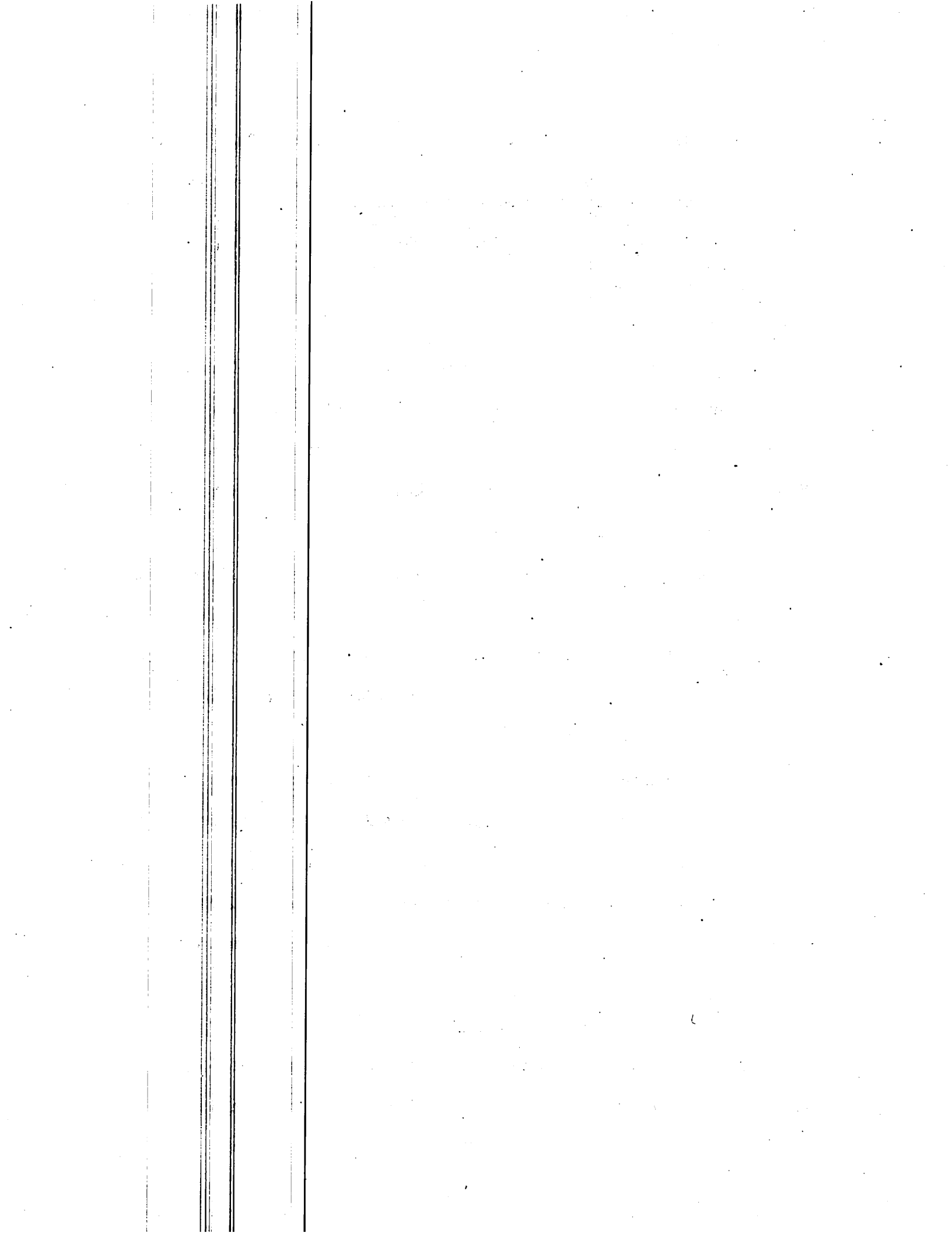
In this case, the Claimant hired an unlicensed contractor to complete the labor required to finish the Respondent's work. The Fund will not compensate for labor performed by an unlicensed contractor to remedy the poor workmanship of the Respondent. As a result, the Claimant is entitled to claim only the cost of materials paid by the Claimant to complete the work. As noted above, the total cost of materials was \$9,506.41.

The Claimant provided an itemized list of expenses as Claimant's Exhibit 5, along with several bank statements and receipts, to establish his claim. One item listed on Claimant's Exhibit 5 for \$500.00 for "other miscellaneous expenses", including trash pickup and disposal, did not have any accompanying receipts. As a result, it is not included in the total cost of materials credited to the Claimant as part of his claim.

The total Contract cost was \$20,000.00, and the Claimant paid the Respondent \$14,000.00 before the work on the project stopped. As a result, applying the formula above, the Claimant's total loss is \$3,506.14 (\$14,000.00 paid to the Respondent by the Claimant plus \$9,506.41 paid to remedy the Respondent's work equals \$23,506.41, minus the \$20,000.00 original contract price equals an actual loss of \$3,506.41). Therefore, the Claimant is entitled to recover \$3,506.14 from the Fund.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$3,506.14 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405



(2015); COMAR 09.08.03.03B(3)(c). I further conclude that the Claimant is entitled to recover that amount from the Fund.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$3,506.14; 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;² and

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

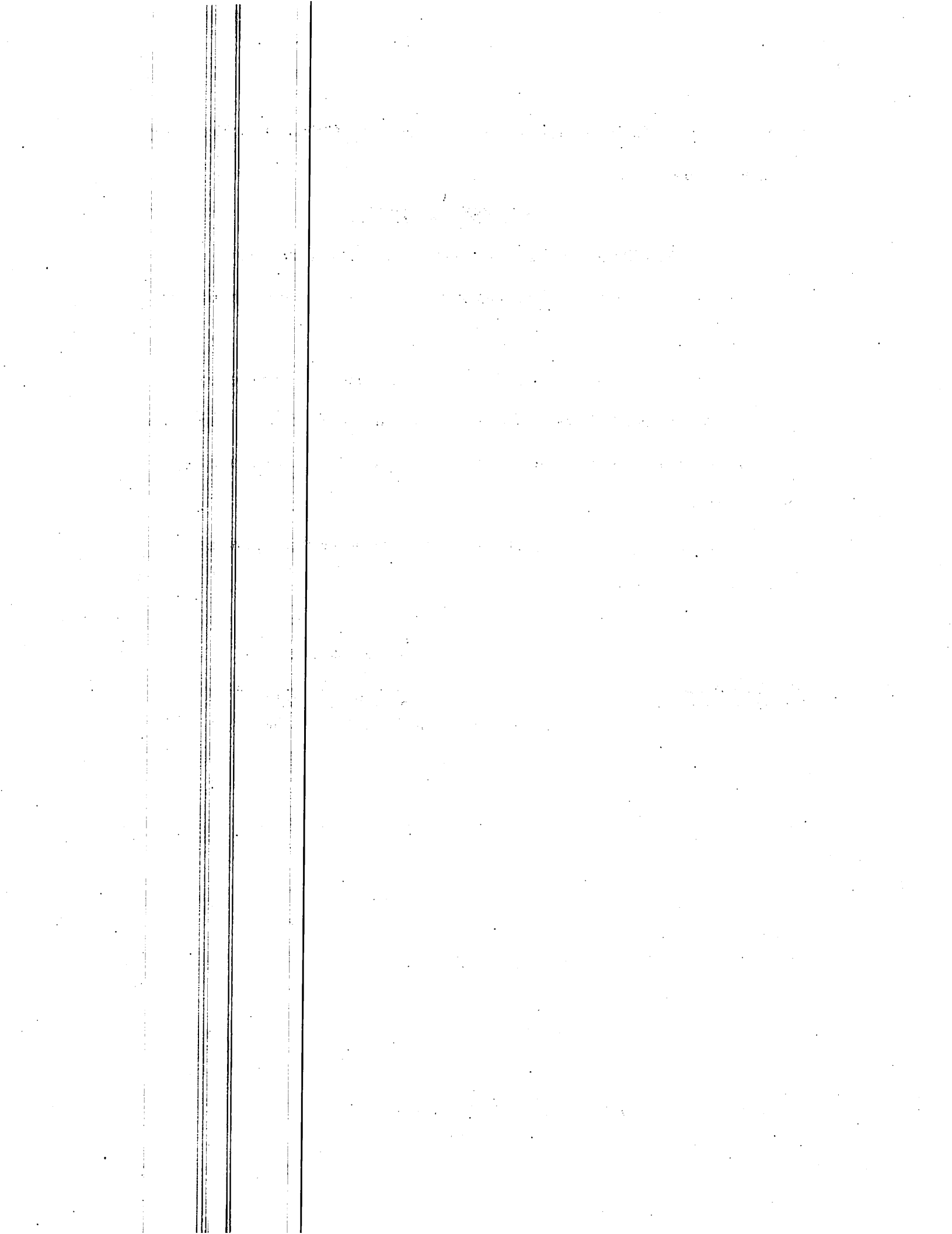
October 7, 2021
Date Decision Issued

Stephen W. Thibodeau.

Stephen W. Thibodeau
Administrative Law Judge

SWT/at
#194420

² See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.



PROPOSED ORDER

WHEREFORE, this 2nd day of February, 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.

J Jean White

I Jean White

Panel B

***MARYLAND HOME IMPROVEMENT
COMMISSION***

