

<p>IN THE MATTER OF THE CLAIM</p> <p>OF JERRY AND KRISTEN FISHER,</p> <p>CLAIMANTS</p> <p>AGAINST THE MARYLAND HOME</p> <p>IMPROVEMENT GUARANTY FUND</p> <p>FOR THE ALLEGED ACTS OR</p> <p>OMISSIONS OF GRAHAM H. K.</p> <p>SHERWOOD T/A GRAHAM</p> <p>SHERWOOD</p> <p>RESPONDENT</p>	<p>* BEFORE SUSAN A. SINROD,</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-02-22-10984</p> <p>* MHIC No.: 21 (75) 1032</p> <p>*</p>
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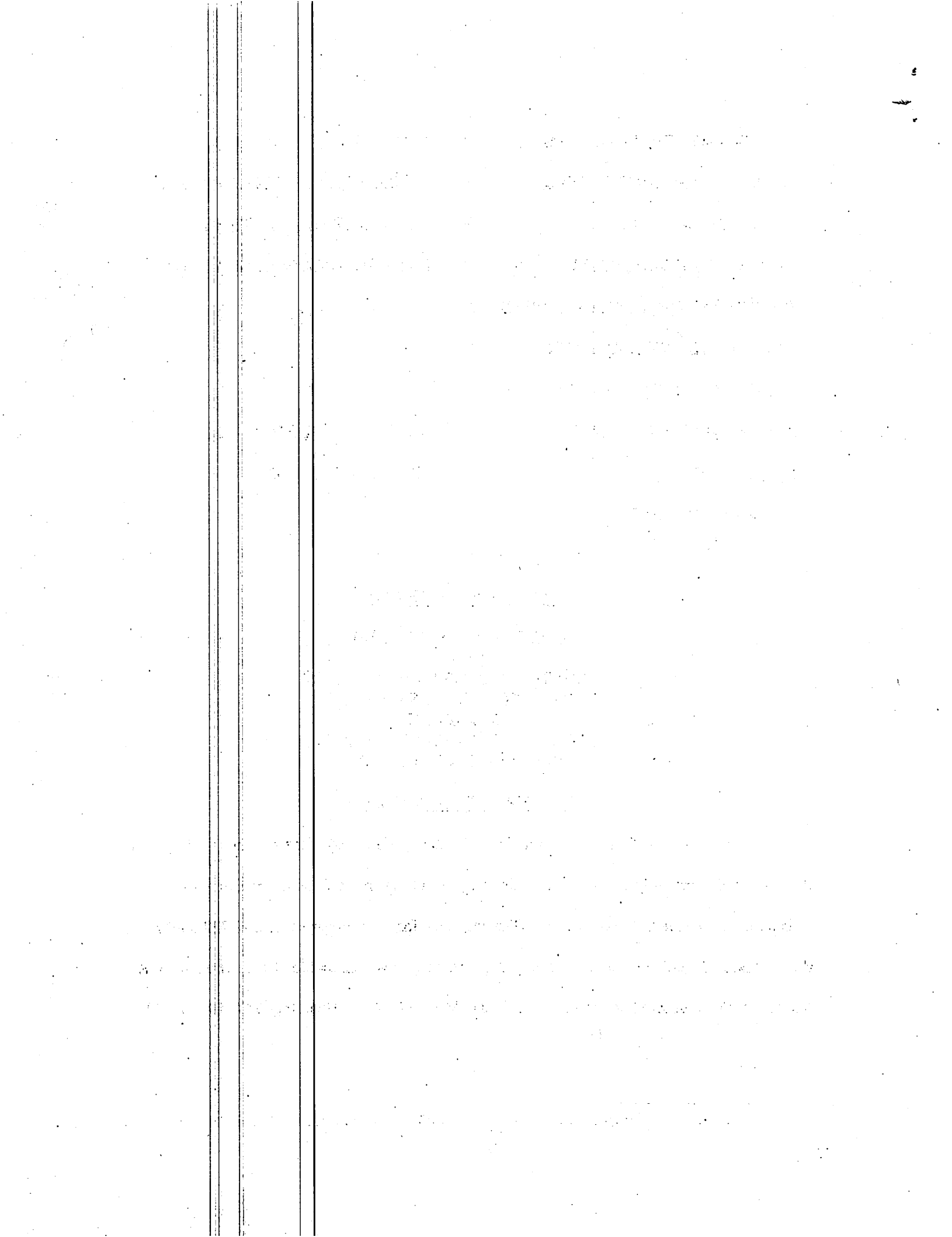
PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
PROPOSED FINDINGS OF FACT
DISCUSSION
PROPOSED CONCLUSIONS OF LAW
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STATEMENT OF THE CASE

On February 18, 2022, Jerry and Kristen Fisher (Claimants)¹ 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 \$32,728.00 for actual losses allegedly suffered as a result of a home improvement contract with Graham H. K. Sherwood, t/a Graham Sherwood (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411

¹ Where it is necessary to refer to the Claimants individually, I will refer to them as either Mr. or Mrs. Fisher.



(2015).² On May 6, 2022, the MHIC issued a Hearing Order on the Claim. On May 11, 2022, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On July 21, 2022, I conducted a hearing at the OAH in Salisbury, Maryland. Bus. Reg. §§ 8-407(a), 8-312. Catherine Villareale, Assistant Attorney General, Department, represented the Fund. The Claimants represented themselves. The Respondent represented himself.

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); Code of Maryland Regulations (COMAR) 09.01.03; and COMAR 28.02.01.

ISSUES

1. Did the Claimants 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

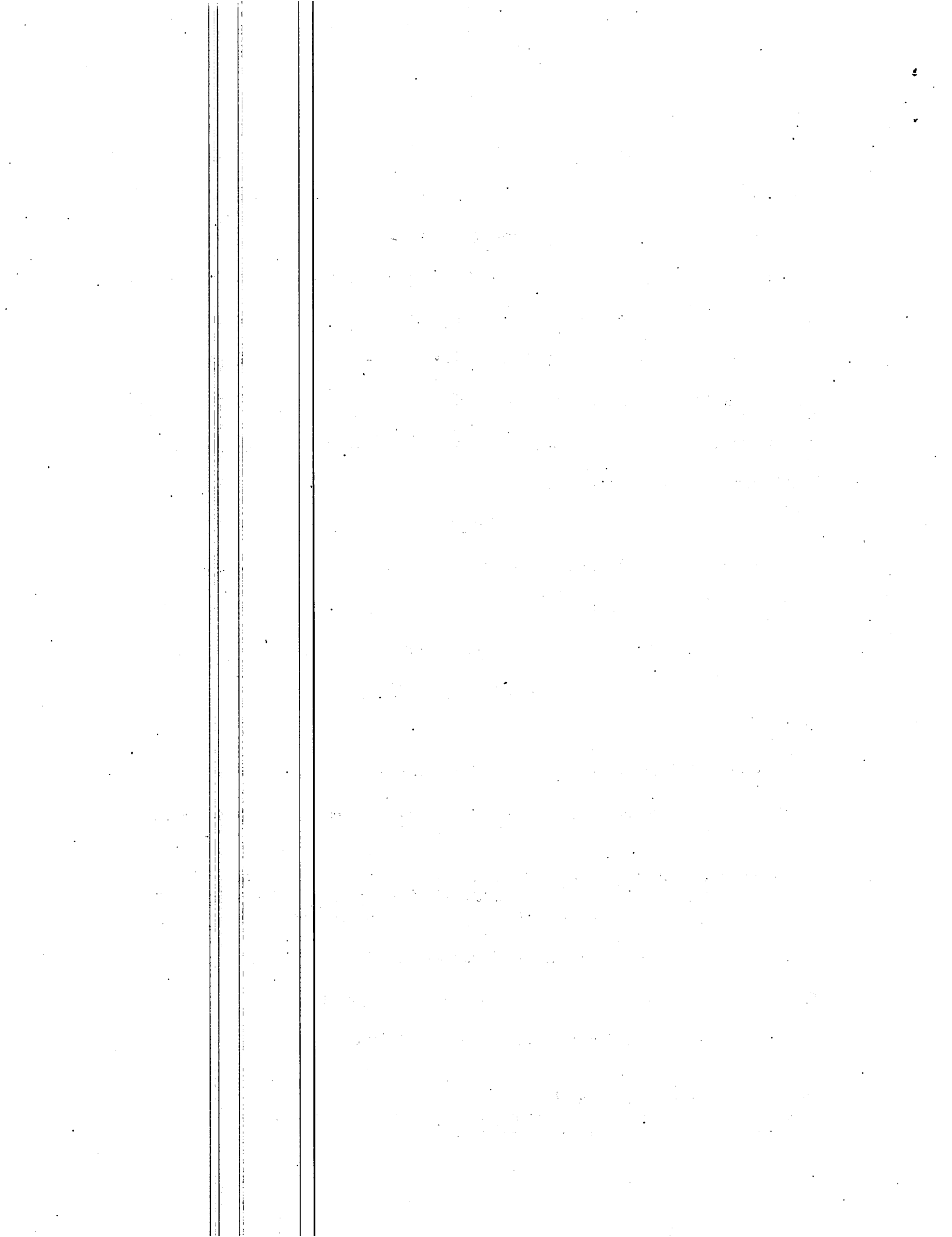
I admitted the following exhibits offered by the Claimants, unless otherwise noted:

- Cl. Ex. #1- Text message from Matthew Sherwood to the Claimants,³ dated November 13, 2018
- Cl. Ex. #2- Five invoices from the Respondent, dated February 18, 2019, March 5, 2019, March 18, 2019, April 5,⁴ and June 23, 2019; copies of a cashier's check and canceled checks from the Claimants to the Respondent, varying dates
- Cl. Ex. #3- Estimate from All Exteriors, dated March 8, 2021
- Cl. Ex. #4- Proposal from Marasun Roofing, dated March 5, 2021
- Cl. Ex. #5- Marasun Roofing report of roof assessment, dated July 14, 2022

² Unless otherwise noted, all references hereinafter to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.

³ I cannot tell from this exhibit if Matthew Sherwood sent this text message to Mr. or Mrs. Fisher.

⁴ The year was omitted from the date of this invoice; however, I assume it is 2019.



Cl. Ex. #6- Not admitted⁵

Cl. Ex. #7(a)-(y)- Photographs from work under the contract between the Claimants and the Respondent, undated

Cl. Ex. #8- Invoices from Marasun Roofing, varying dates

Cl. Ex. #9- Text messages between the Claimants⁶ and the Respondent, varying dates

Cl. Ex. #10- Claimants' notes regarding conversation with Matthew Sherwood, undated

Cl. Ex. #11- Receipt from Lowe's, dated March 30, 2021

The Respondent did not submit any exhibits for admission into evidence.

I admitted the following exhibits offered by the Fund:

Fund Ex. #1- Letter from the MHIC to the Respondent, with Home Improvement Claim Form attached, dated March 2, 2022

Fund Ex. #2- Hearing Order, dated May 6, 2022

Fund Ex. #3- Notice of Hearing, dated May 24, 2022

Fund Ex. #4- Respondent's licensing history, dated July 20, 2022

Testimony

The Claimants both testified.

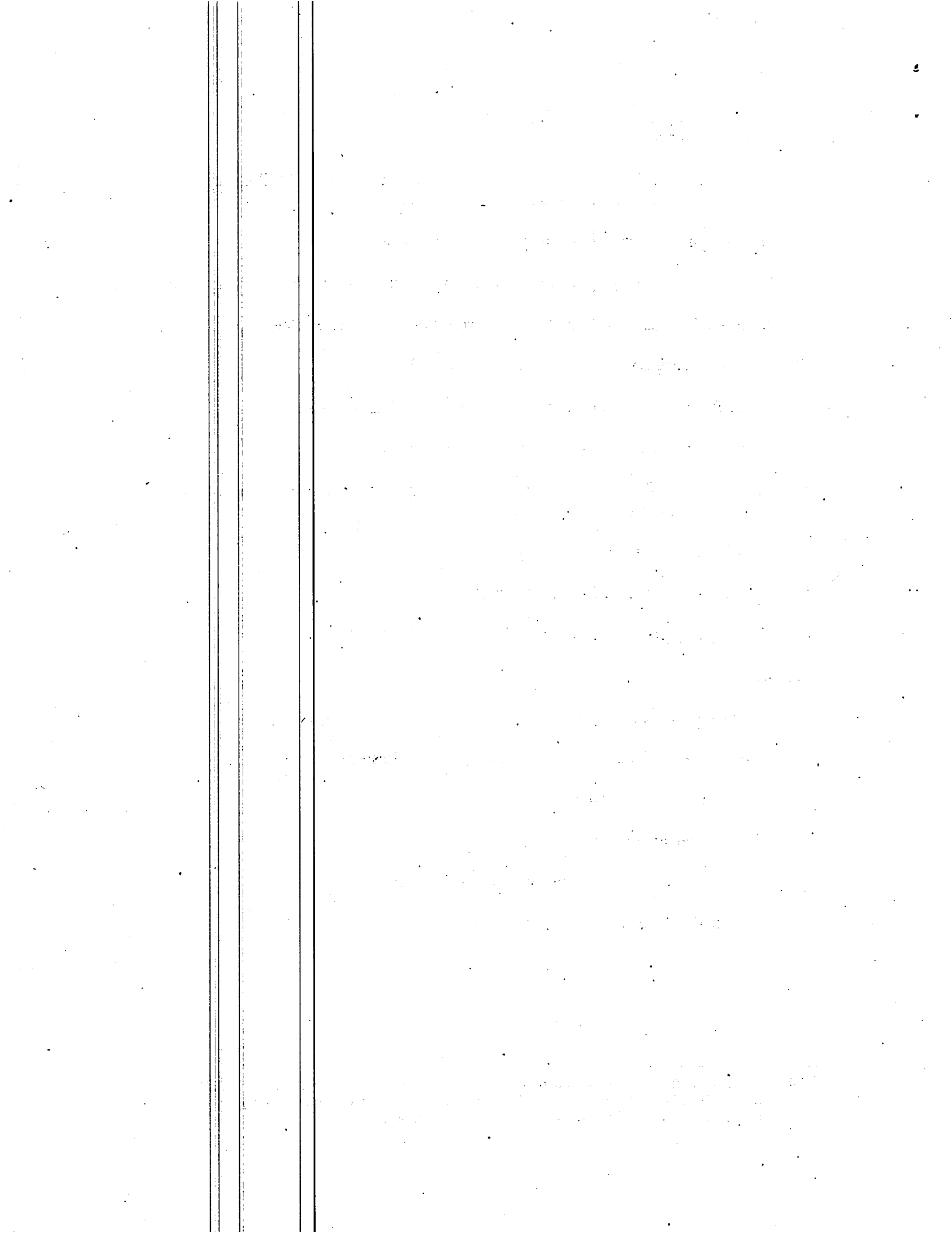
The following witnesses testified on behalf of the Respondent:

1. Matthew Sherwood
2. Graham Sherwood
3. Tanner Barlow, an employee of the Respondent

The Fund did not present any witnesses.

⁵ This exhibit has been retained in the file for the purpose of judicial review. COMAR 28.02.01.22C.

⁶ Similar to footnote 3, I cannot tell which of the Claimants was the recipient of these text messages. Some of them were clearly sent to Mrs. Fisher; however, for most of them, it is unclear.

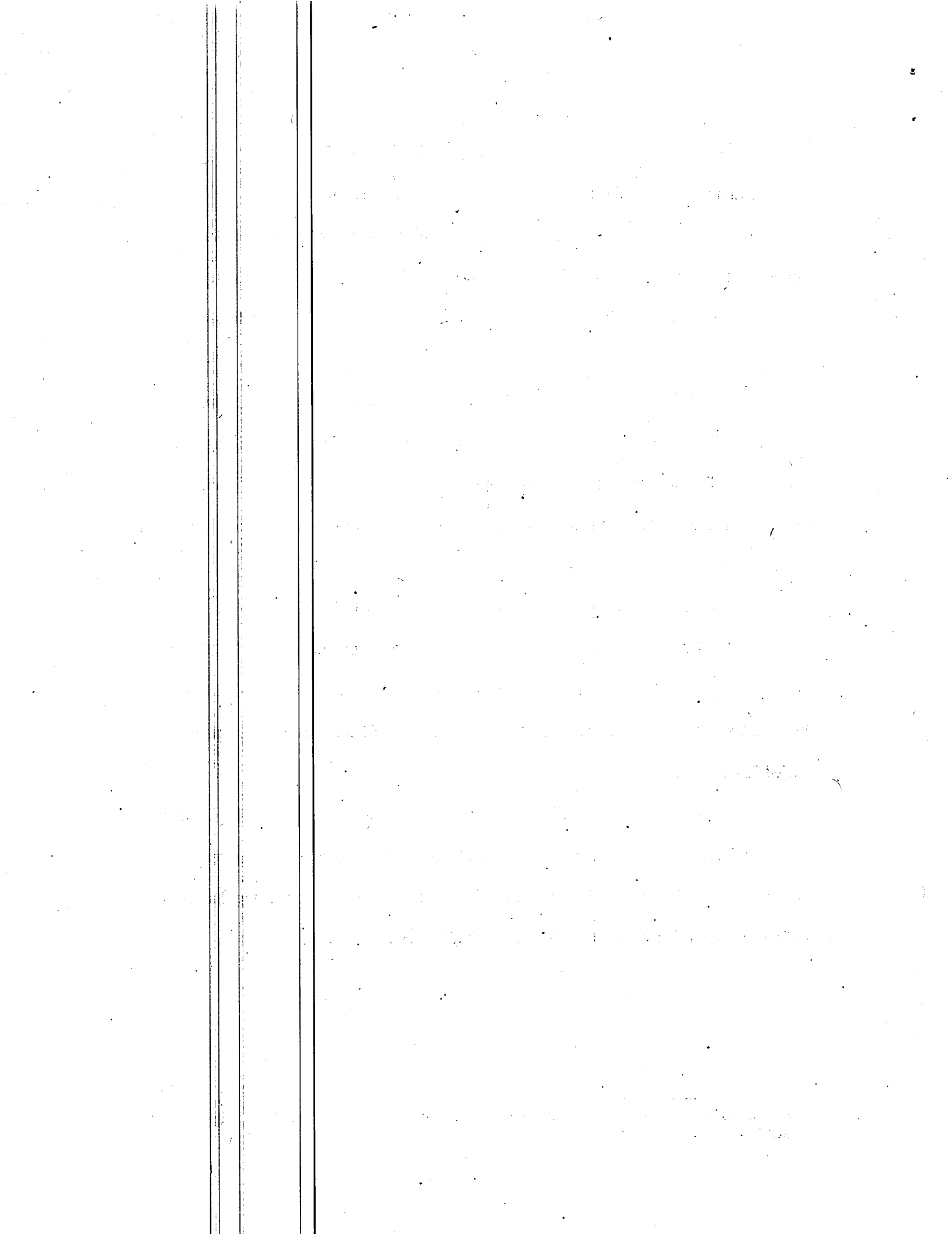


PROPOSED FINDINGS OF FACT

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 01-32831. Graham Sherwood (Graham) holds the MHIC license. Matthew Sherwood (Matthew) is his son who works with him.
2. On November 13, 2018, the Claimants and the Respondent entered into an agreement wherein the Respondent agreed to remove and replace the roof and siding, soffits, fascia, and replace windows and the front door on the Claimants' rental property (Contract). The Contract is memorialized in a text message. Neither the Claimants nor the Respondent signed the Contract.
3. The original agreed-upon Contract price was \$23,500.00.
4. The Claimants paid the Respondent in the following manner: \$6,000.00 by check on February 7, 2019; \$5,866.66 by check on March 6, 2019; \$8,292.00 by check on March 20, 2019; \$5,756.00 by cashier's check on April 12, 2019; and \$6,366.00 in cash. The payments totaled \$32,280.66.⁷
5. The Claimants' roof is pitched in the front and the back is flat. The Claimants previously had a roll roof, not shingles, on the flat part. At the beginning of the project, the Claimants asked Matthew if shingles could be installed all the way back over the flat part of the roof instead of a roll roof. Matthew said that could be done.

⁷ The Claimants said that they paid \$32,728.00 to the Respondent; however, the record reflects total payments of \$32,280.00.



6. Matthew was initially concerned about the lack of pitch of the back part of the roof and suggested that the Claimants either reframe the roof to change the pitch or hire another contractor to install a flat roof system. The Claimants declined to do either.

7. The Respondent installed the roof with the shingles going all the way back over the flat part of the roof as the Claimants requested. The Respondent never issued, executed or had the Claimants execute any written or oral disclaimer for problems that could result from installation of the roof as the Claimants requested despite his concerns about the pitch of the roof.

8. The Respondent completed the work in a timely manner between February and April 2019.

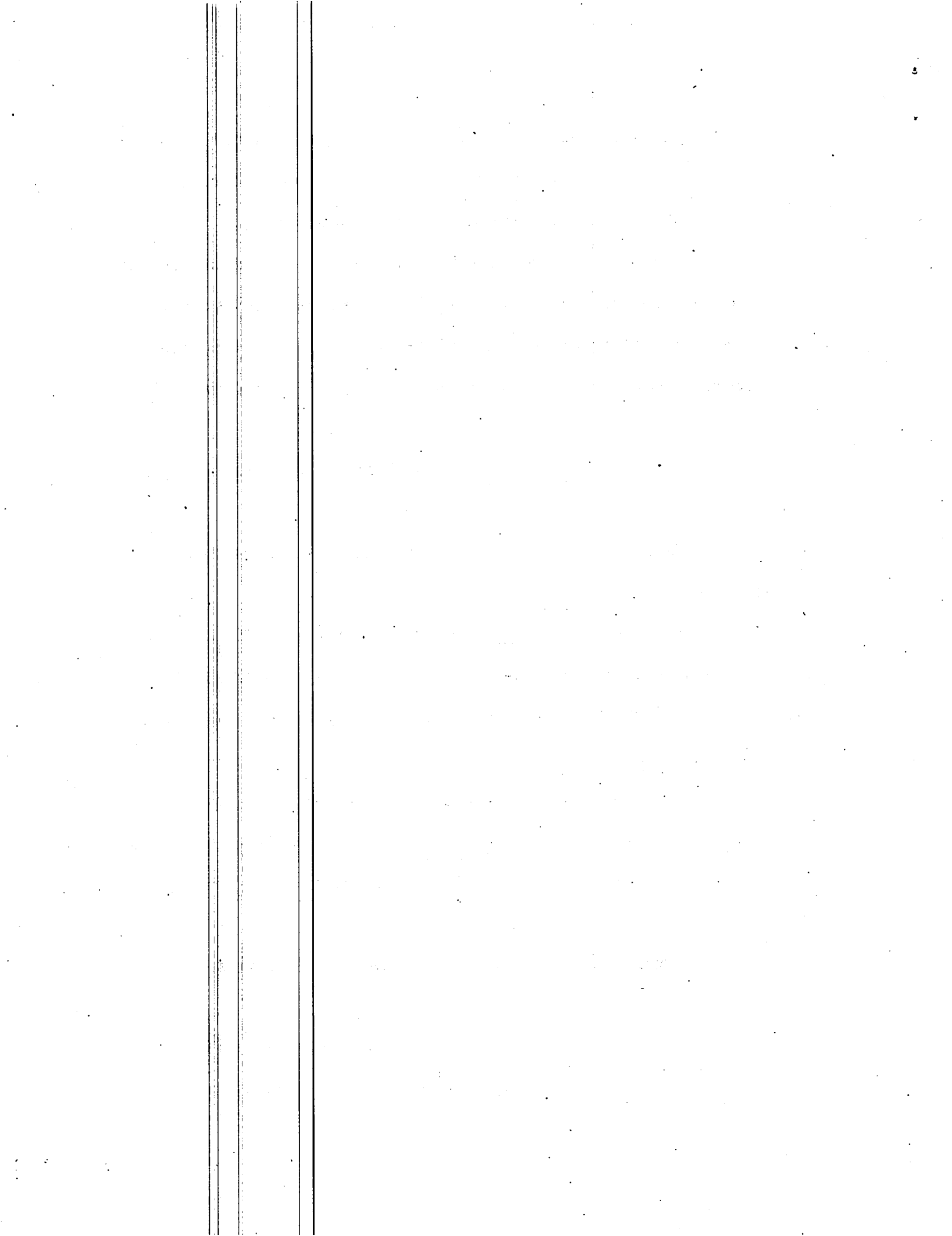
9. In January 2020, the Claimants discovered a leak in the roof. Matthew came and applied caulk, which did not fix the leak.

10. Matthew came back to the property with the intent to lay a silicone coating over the shingles. However, the Claimants came upon information which indicated that it was improper to apply the silicone over the shingles. Matthew agreed. He instead removed shingles and applied the silicone underneath.

11. Subsequently it snowed, and when the snow melted, water sat on top of the roof and instead of running off, it leaked into the house. Mr. Fisher contacted Matthew, who, at that point told him that the problem was the pitch of the roof, and there was nothing more he could do about it.

12. The leaks saturated and damaged interior drywall in multiple rooms inside the house. The water damage was extensive.

13. The Claimants hired Marasun Roofing (Marasun) to repair the leaks. After assessing the situation, Marasun determined that because there was widespread water damage to



the sheathing and multiple leaks, the only option was to completely tear off the roof, remove and replace the plywood sheathing, and reinstall a new roofing system.

14. The scope of work Marasun was to perform included: removal of a layer of existing shingles and underlayment; replacement of damaged decking, and installation of a drip edge around the perimeter of the roof; installation of "Ice and Water Shield" on eaves, valleys, and wall joints; installation of synthetic underlayment on the remainder of the roof, starter strips, ridge vent, and pipe collars on vent pipes. If Marasun needed additional roofing than what was encompassed in the proposal, the cost was \$50.00 per sheet of asphalt shingles and \$75.00 per square for cedar shakes.

15. The Marasun proposal was for \$6,089.06 to complete this work. However, due to a change order, the total invoice for the project was \$7,929.06, and the Claimants paid Marasun that amount.

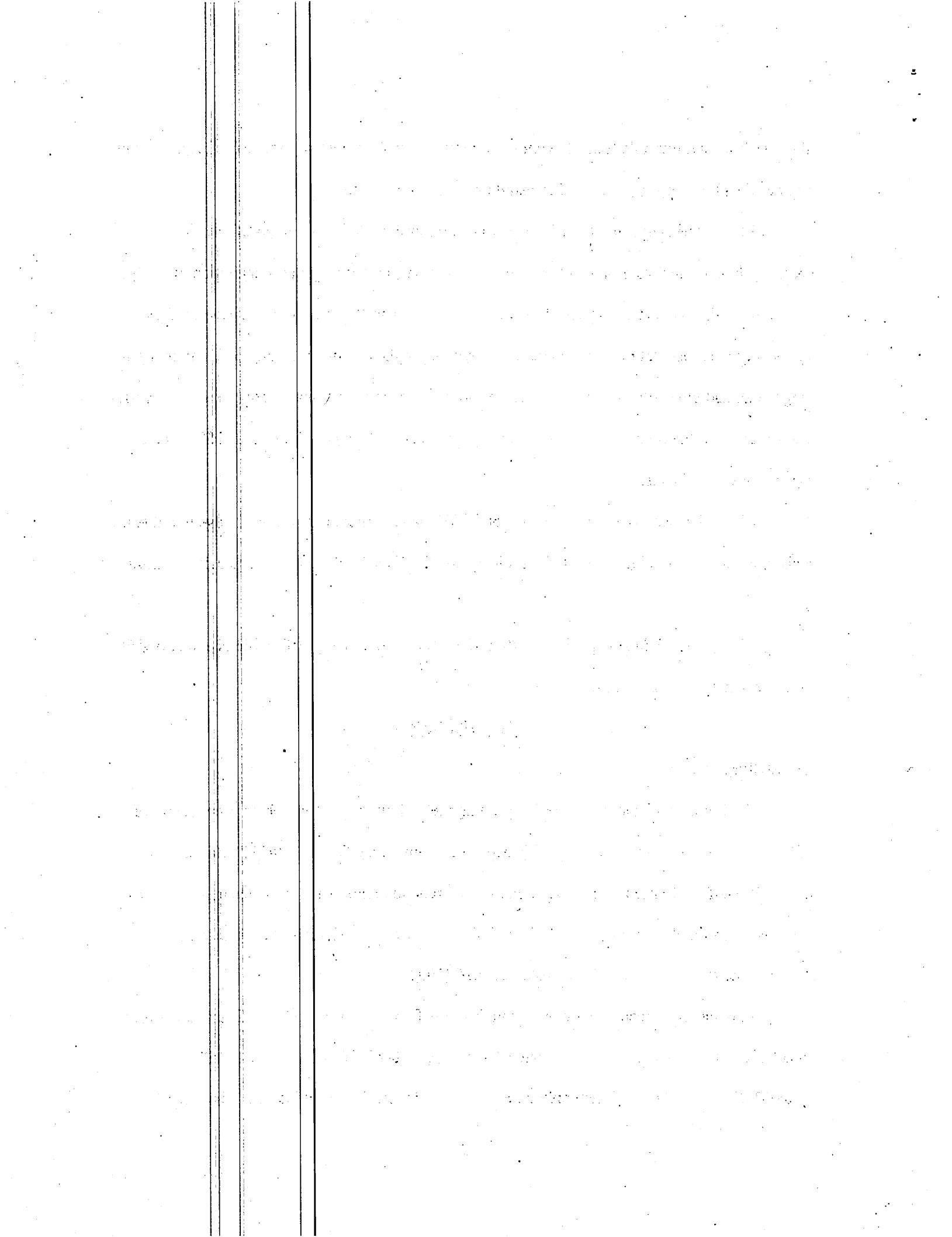
16. The Claimants paid \$190.75 to Lowe's to purchase drywall to replace the drywall that was damaged by the leaks.

DISCUSSION

LEGAL FRAMEWORK

The Claimants have 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 (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." 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

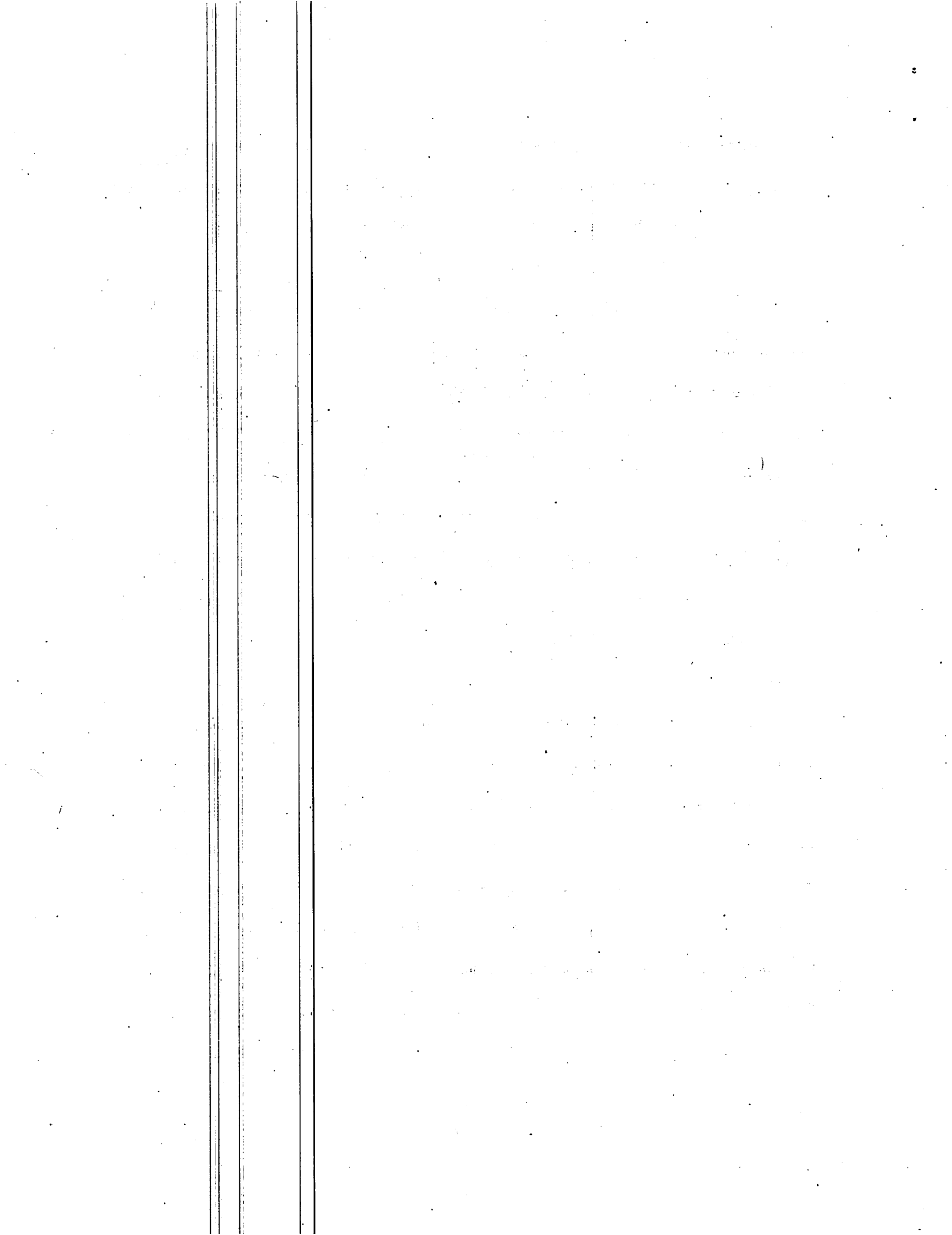


result of misconduct by a licensed contractor.”). “[A]ctual loss’ means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.” Bus. Reg. § 8-401. For the following reasons, I find that the Claimants have proven eligibility for compensation.

By statute, certain claimants are excluded from recovering from the Fund altogether. In this case, there are no such statutory impediments to the Claimants’ recovery. The claim was timely filed, there is no pending court claim for the same loss, and the Claimants did not recover the alleged losses from any other source. Bus. Reg §§ 8-405(g), 8-408(b)(1). The Claimants do not reside in the home that is the subject of the claim, but they do not own more than three dwellings. *Id.* § 8-405(f)(2). The parties did not enter into a valid agreement to submit their disputes to arbitration. *Id.* §§ 8-405(c), 8-408(b)(3). Neither Claimant is a relative, employee, officer, or partner of the Respondent, nor are they related to any employee, officer, or partner of the Respondent. *Id.* § 8-405(f)(1).

POSITIONS OF THE PARTIES

Mr. Fisher and Matthew were friends before this project. Mr. Fisher testified regarding the problems with the roof, the leaks, the saturated and sagging drywall, all which he claimed resulted from the Respondent’s faulty roof installation. He said Matthew told him it would be okay to install shingles over the flat part of the roof, and as a result, the Claimants made the decision to proceed in that fashion. He maintained that the Respondent’s silicone repair actually made the problem worse. Mr. Fisher believed that the Respondent, not being a roofer, should have subcontracted the roof replacement to an actual roofer. Despite Matthew’s assertion that the problem was the pitch of the roof, Mr. Fisher noted that both All Exteriors and Marasun informed him that the pitch of the roof was not the problem. Mr. Fisher insisted that the roof



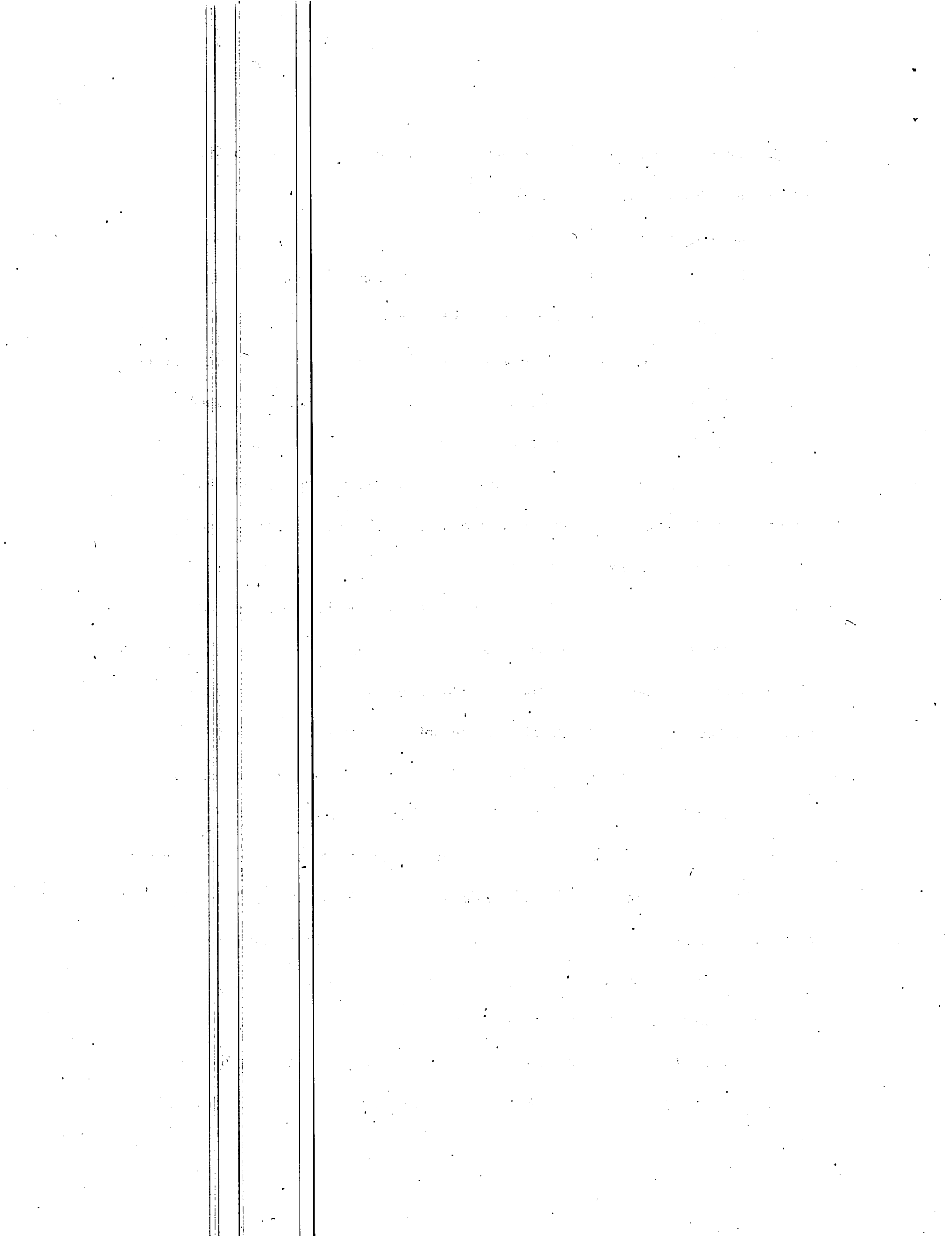
was leaking from both the back flat portion as well as the front pitched portion of the roof because of the Respondent's faulty installation.

Matthew Sherwood testified that the house was in bad condition when he began his work; the floor joists were bad, and the fascia was rotten and unusable. The reason the Claimants paid \$10,000.00 over and above the Contract price was because there were a lot of problems Matthew discovered after the work began, and which he could not see when he created the estimate. From the beginning, Matthew was concerned that there was not enough pitch in the back part of the roof, and he advised the Claimants on more than one occasion that he could reframe the roof when everything was removed, or they should hire a roofer who has experience in flat roof systems. The Claimants declined to take either option. Matthew said it was the Claimants' decision to proceed with shingles over the entire roof, including the flat portion; he had no part in that decision. Matthew did the best he could, but leaks kept appearing in the back of the house.

According to Matthew, he was not the general contractor on this project; that was the Claimants' role. He did not have the authority to hire a roof subcontractor for the work, as he was just a subcontractor himself. He told the Claimants that there was nothing more he could do after he applied the silicone because, as he stated from the beginning, the roof needed to be reframed or a flat roof system installed; the Claimants declined both suggestions.

Matthew disagreed that Marasun needed to replace the whole roof to repair the leaks; he insisted that the back of the roof just needed a flat roof system. He asked Mrs. Fisher why the estimates were for the whole roof, and she responded that it was just in case there were future problems. Matthew never went to inspect the damage after Marasun removed the roof; in hindsight, he recognized that he should have done so.

Graham testified regarding Matthew's concerns from the beginning about the pitch of the roof. He explained that old flat roofs like the one on the Claimants' property were designed to



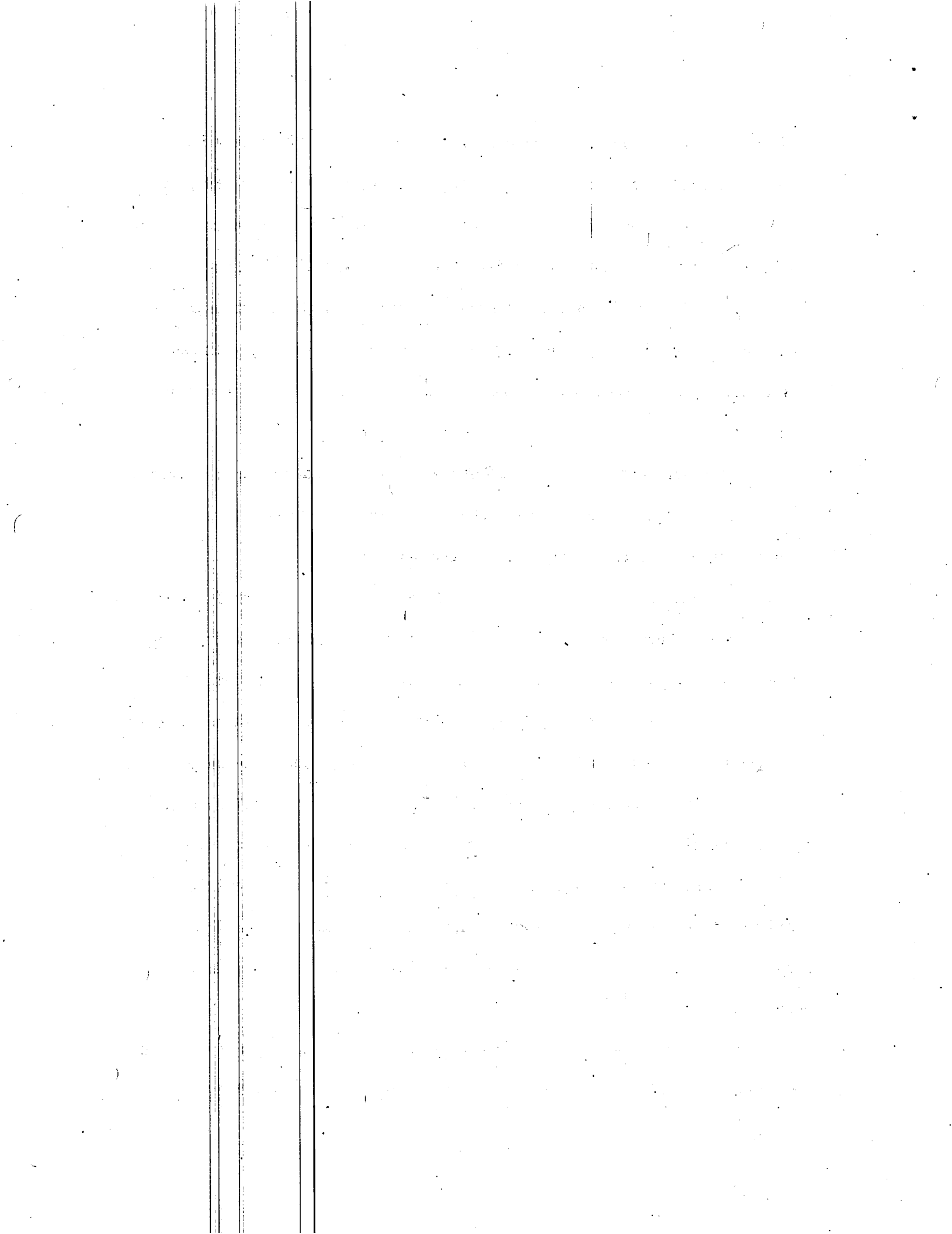
hold water so that they would not crack from the sun. He insisted that it was only the controversial flat back of the roof that leaked; the front of the roof had enough pitch for water to run off. According to Graham, leaks do not flow straight down. Water from the back part of the roof could have run through the wall boards and flowed to a completely different room than where the leak was located. On cross examination, he partially retracted that statement, because he conceded that he did not know there was a vaulted ceiling in the living room. Graham also noted that they gave the Claimants extra materials they had in an effort to save them some money.

Tanner Barlow, an employee of the Respondent, was present during the discussions regarding the roof replacement. He heard Matthew (Matthew) suggest both options to the Claimants; either install a flat roof system or reframe the roof.

On rebuttal, Mrs. Fisher testified that initially, she asked the Respondent if there was any way to change the pitch of the roof. She said the Respondent directed them away from that option, saying it would be too expensive. That is why the Claimants decided on shingles.

Although there was some dispute as to whether the roof leaked from just the back or from the front also, the parties did not dispute that the roof failed or the extent of the damage the water leaks caused. The dispute is simply whether the leaks occurred as the result of the Respondent's faulty workmanship. The Respondent's primary argument was that the Claimants did not choose either of the Respondent's two suggested options, and instead chose just to have shingles installed even over the flat part of the roof, which ultimately resulted in the leak. The Respondent went forward with the Claimants' request despite Matthew's concern about the pitch of the roof.

The Claimants obtained estimates from Marasun and All Exteriors, both of which told them that the roof pitch was not the problem. Rather, the Respondent installed the roof



improperly, including spacing of the nails on the shingles, incorrectly spaced shingles, incorrect nailing on top of the roofing compound the Respondent put down to try to repair the leaks, and the shingles should not have been extended to cover the flat part of the roof. Cl. Ex. #9.

Marasun fixed the roof by tearing off the roof the Respondent installed, reinstalling a new roof properly, and returning to the roll roof rather than the shingles on the flat part of the roof.

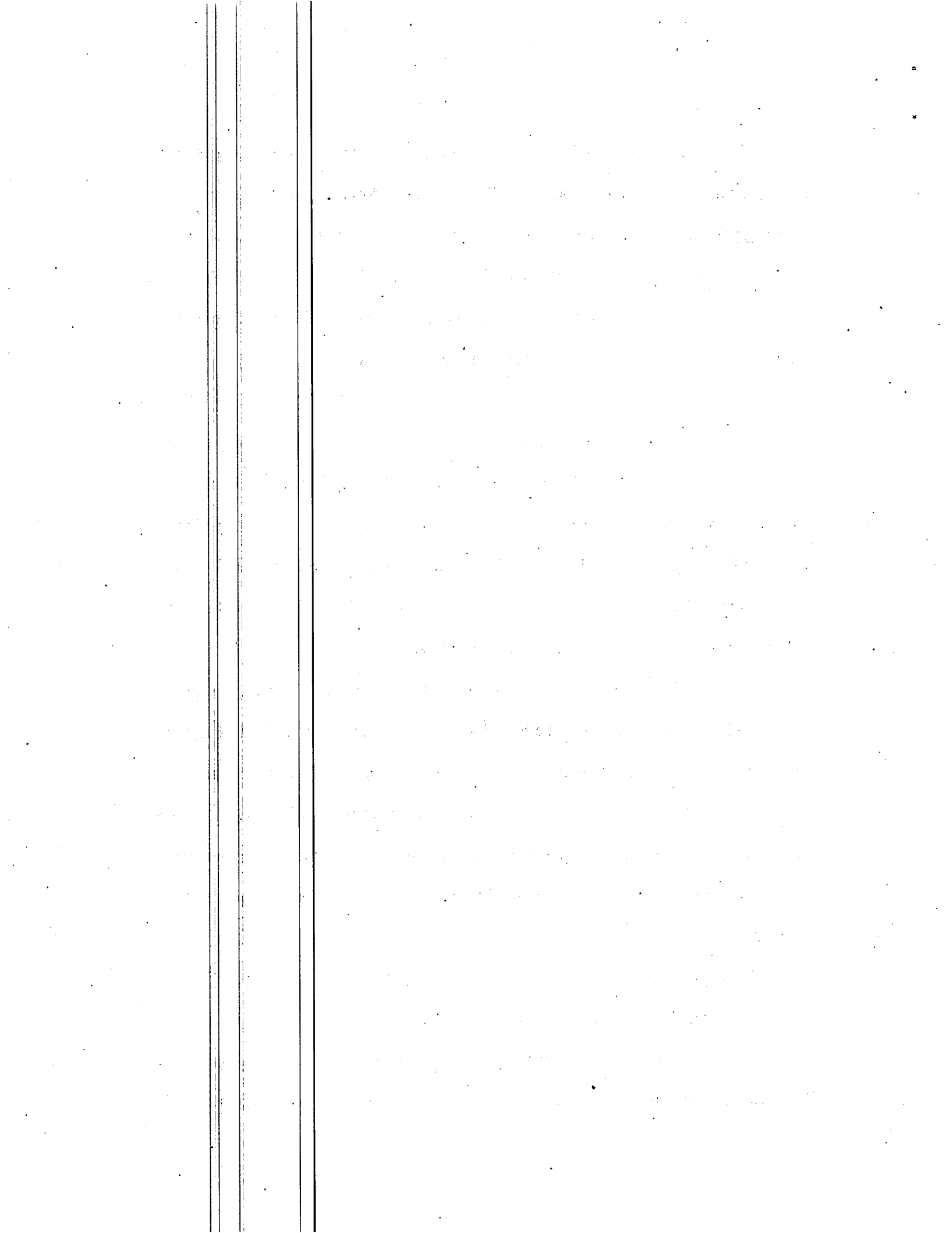
Marasun completed its work in March 2021, and there have been no leaks since.

ANALYSIS

I found Matthew's testimony to be credible, however he did not present any evidence to substantiate his claim that the pitch of the roof caused the leaks. I did not consider the information the Claimants obtained from Marasun and All Exteriors to be expert opinions in any way regarding the problems with the roof. However, Marasun re-installed the roof without changing the pitch and fixed the problem, which directly contradicts Matthew's belief that the lack of pitch in the flat part of the roof caused the leaks.

Section 8-501 of the Business Regulation article requires that a home improvement contract be in writing and signed by both parties. Md. Code Ann., Bus. Reg. § 8-501(b) and (c). However, Section 8-501(a) of the Business Regulation article provides that the contract will not be considered to be invalid if it fails to comply with the provisions of the statute. The record does not contain any evidence that the Respondent provided a disclaimer, written or otherwise, for issues that might have resulted from installation of the roof in a manner against the Respondent's advice.

The Respondent is not a roofer. However, the Respondent does perform roof replacements. Matthew conceded that if the Claimants had opted for the flat roof system, they would have had to hire a roofer who had experience in flat roof systems. The Respondent was concerned about the pitch of the roof from the beginning, and laid out the two options for the

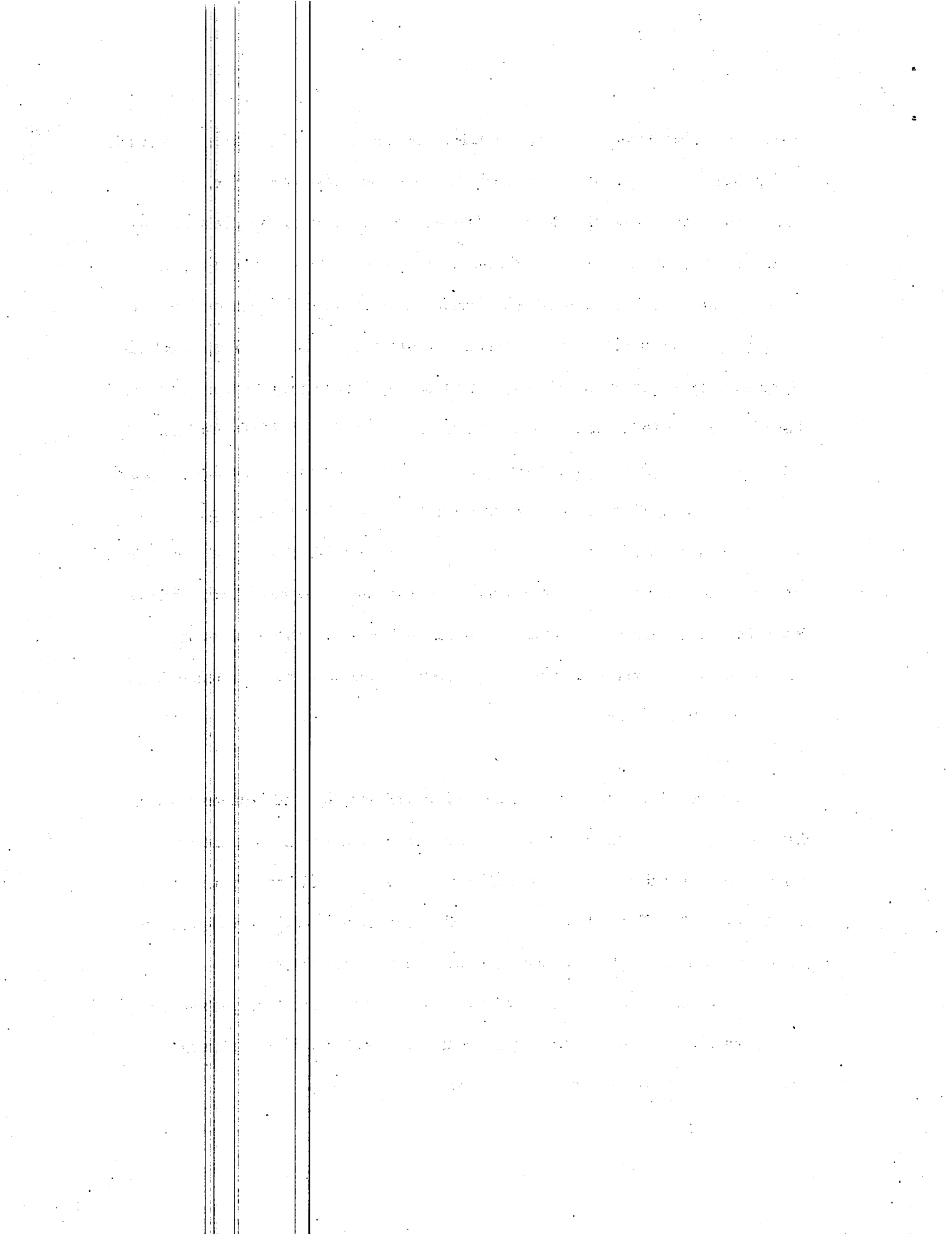


Claimants, neither of which they chose. Whether or not Matthew actually told the Claimants that laying shingles all the way back to include the flat part of the roof was acceptable, the Respondent installed a roof that Matthew did not believe would hold up given the pitch of the roof. He told the Claimants they needed a flat roof system but, instead, installed shingles knowing there was a chance it would fail. Regardless of whether the Claimants were trying to cut costs, or whether the Claimants rejected Matthew's recommendations, the Respondent was charged with the responsibility under the Contract for installing a roof in a workmanlike manner. Instead, the Respondent accepted money and installed a roof that failed. Matthew did not provide, or have the Claimants acknowledge any disclaimer for work the Respondent performed against the Respondent's own advice. Without a disclaimer, the Respondent accepted responsibility for such a failure. The Claimants may have rejected the Respondent's suggestions, but there is nothing in the record that even implies the Claimants knew the roof would fail as a result. I conclude that the Claimants established that the Respondent performed unworkmanlike home improvement upon the Claimants rental property, and the Claimants are therefore eligible from compensation by the Fund.

ACTUAL LOSS

I must now determine the amount of the Claimants' actual loss and the amount, if any, that the Claimants are 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.

The Respondent performed some work under the Contract, and the Claimants retained another contractor to complete or remedy that work. Accordingly, the following formula appropriately measures the Claimants' actual loss:



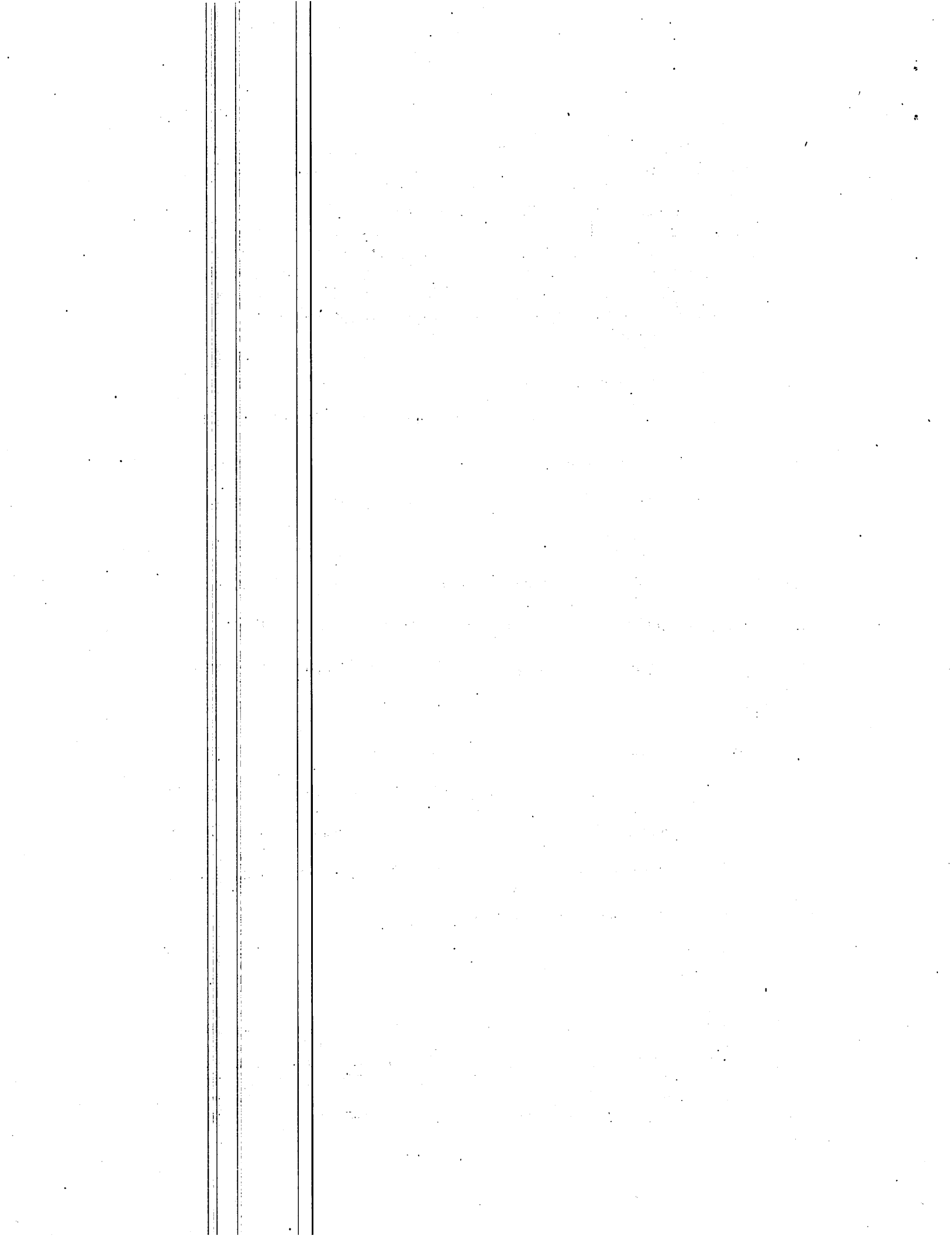
If the contractor did work according to the contract and the claimant has solicited or is soliciting another contractor to complete the contract, the claimant's actual loss shall be the amounts the claimant has paid to or on behalf of the contractor under the original contract, added to any reasonable 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 original Contract price was \$23,500.00, but the record reflects that the Claimants paid \$32,280.00 as a result of additional necessary work the Respondent discovered when they removed the roofing materials. The Claimants paid \$7,929.06 to remove and repair the Respondent's faulty work, plus and an additional \$190.75 to replace the damaged drywall, which totals \$8,119.81. Therefore, based on the calculation set forth above, \$32,280.00 paid to the Respondent, plus \$8,119.81 to Marasun and to purchase drywall, totals \$40,399.81. After subtracting the total adjusted Contract price of \$32,280.00, the Claimants' actual loss is \$8,119.81.

Effective July 1, 2022, a claimant's recovery is capped at \$30,000.00 for acts or omissions of one contractor, and a claimant may not recover more than the amount paid to the contractor against whom the claim is filed.⁸ In this case, the Claimants' actual loss is less than the amount paid to the Respondent and less than \$30,000.00. Therefore, the Claimants are entitled to recover their actual loss of \$8,119.81.

⁸ H.D. 917, 2022 Leg., 444th Sess. (Md. 2022) (to be codified in section 8-405(e)(1) of the Business Regulation Article). See also Bus. Reg. § 8-405(e)(5); COMAR 09.08.03.03B(4), D(2)(a). The increased cap is applicable to any claim on or after July 1, 2022, regardless of when the home improvement contract was executed, the claim was filed, or the hearing was held. See *Landsman v. MHIC*, 154 Md. App. 241, 255 (2002) (explaining that the right to compensation from the Fund is a "creature of statute," these rights are subject to change at the "whim of the legislature," and "[a]mendments to such rights are not bound by the usual presumption against retrospective application").



PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimants have sustained an actual and compensable loss of \$8,119.81 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 Claimants are entitled to recover from the Fund.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimants \$8,119.81; 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;⁹ and

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

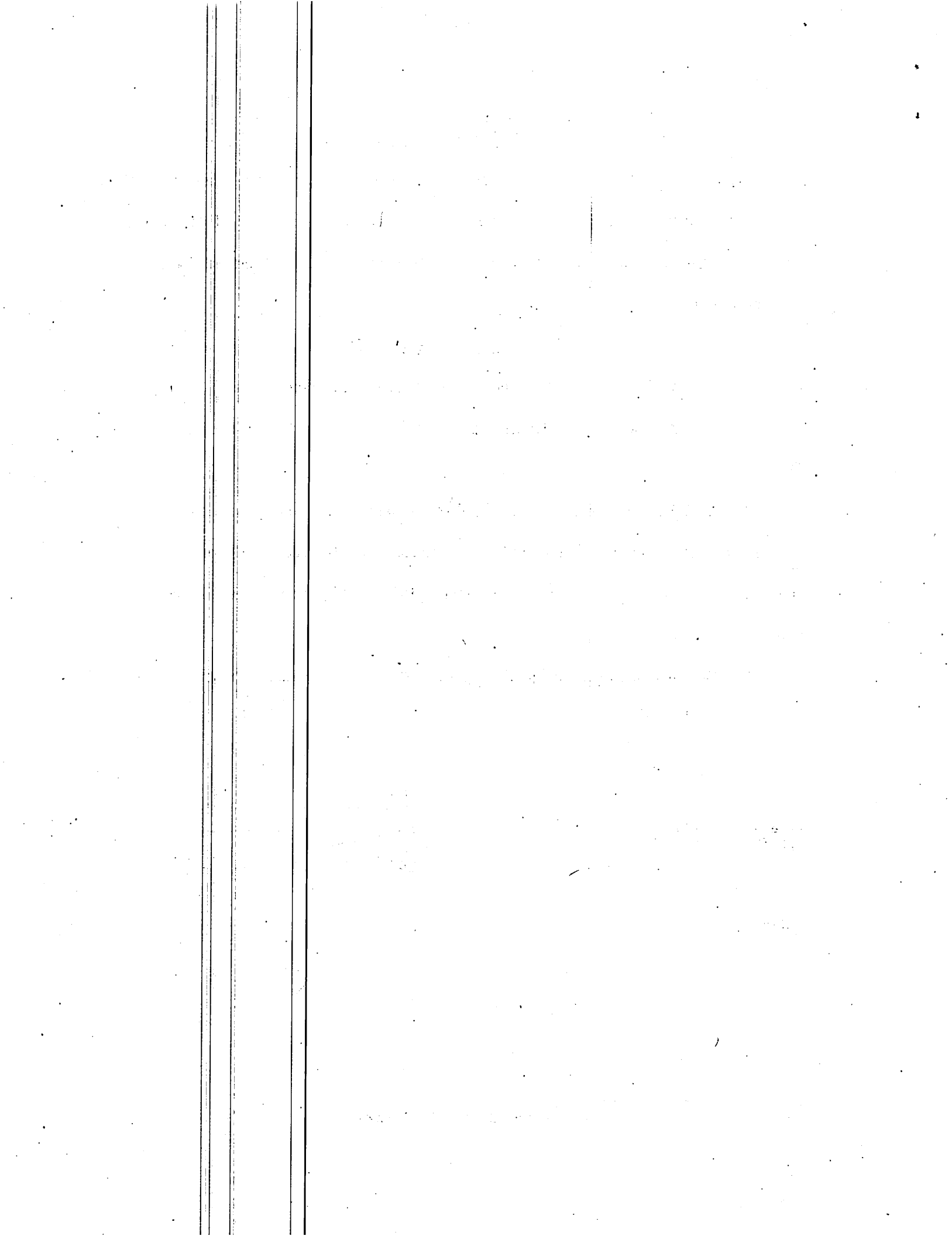
September 29, 2022
Date Decision Issued

Susan Sinrod

Susan A. Sinrod
Administrative Law Judge

SAS/emh
#200711

⁹ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.



PROPOSED ORDER

WHEREFORE, this 4th day of November, 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.

Lauren Lake

Lauren Lake

Panel B

***MARYLAND HOME IMPROVEMENT
COMMISSION***

