

IN THE MATTER OF THE CLAIM	* BEFORE BRIAN ZLOTNICK,
OF KELLY PARKS,	* 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 RICHARD	*
SULLIVAN,	* OAH No.: LABOR-HIC-02-22-09847
T/A R J SULLIVAN, LLC	* MHIC No.: 21 (75) 726
RESPONDENT	*

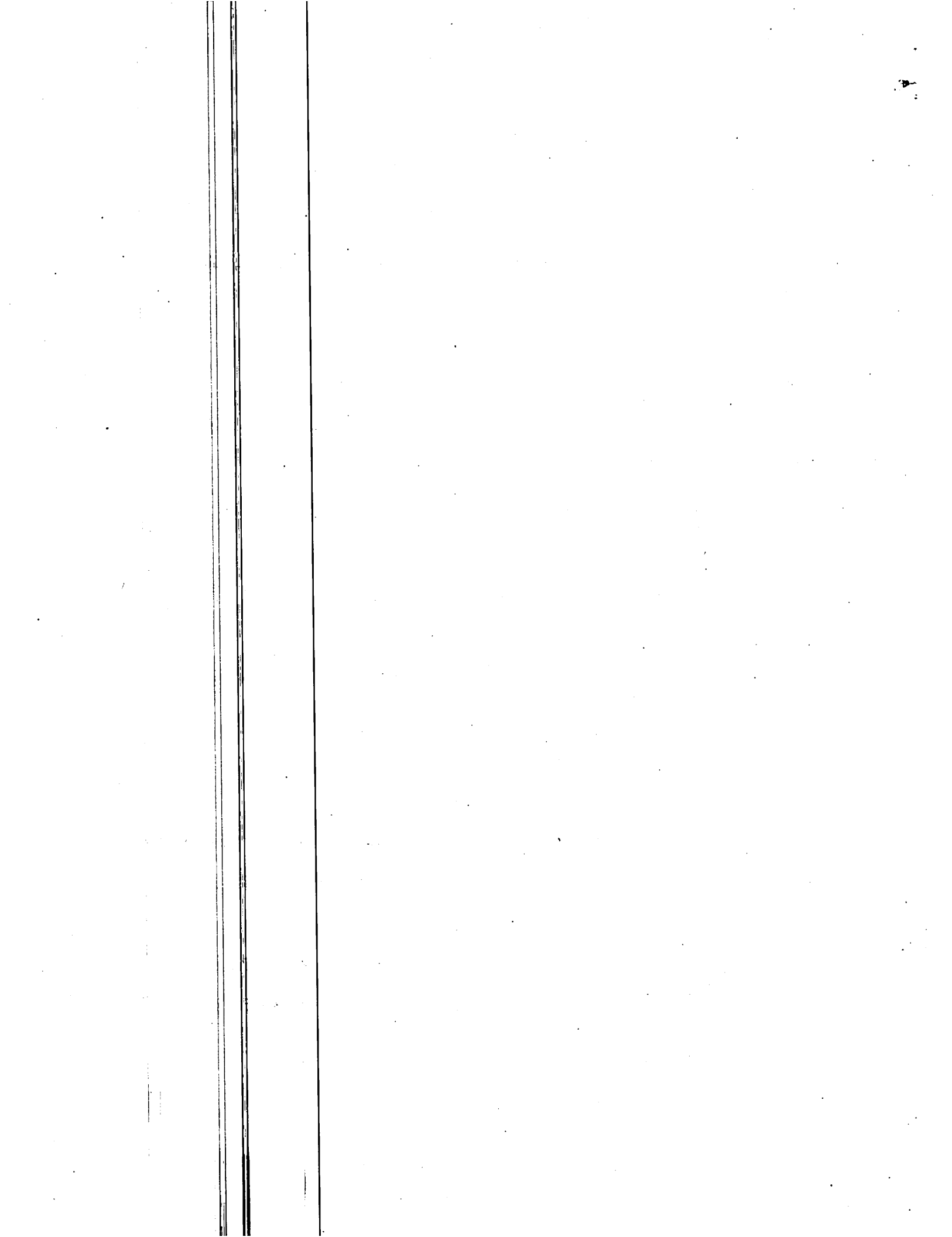
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PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
PROPOSED FINDINGS OF FACT
DISCUSSION
PROPOSED CONCLUSION OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On October 13, 2021, Kelly Parks (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 \$10,763.52 for actual losses allegedly suffered as a result of a home improvement contract with Richard Sullivan, trading as R J Sullivan, LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015 & Supp.



2022).¹ On April 22, 2022, the MHIC issued a Hearing Order on the Claim. On April 28, 2022, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On November 3, 2022, I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. Nicholas Sokolow, Assistant Attorney General, Department, represented the Fund. The Claimant was self-represented. Joshua A. Welborn, Esquire, represented the Respondent, who was present.

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; 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

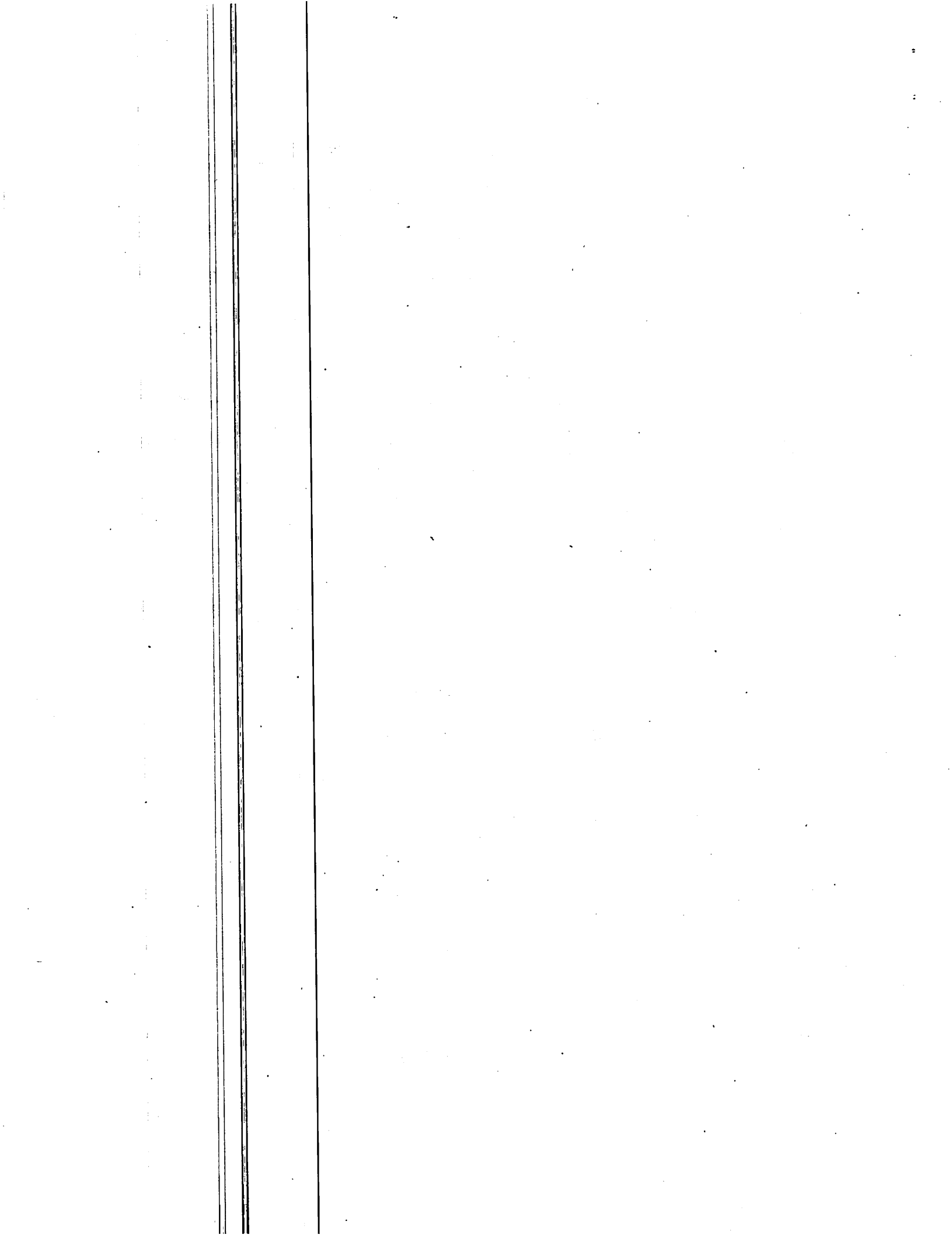
I admitted the following exhibits offered by the Claimant:

- Clmt. Ex. 1 - Contract, December 30, 2019
- Clmt. Ex. 2 - Photograph of side basement wall, April 13, 2020
- Clmt. Ex. 3 - Photograph of southeast basement corner, March 26, 2020
- Clmt. Ex. 4 - Photograph of basement wall, April 30, 2020
- Clmt. Ex. 5 - Photograph of southeast basement corner, June 7, 2020
- Clmt. Ex. 6 - Estimate from Maryland Mold and Waterproofing, November 1, 2022

I admitted the following exhibits offered by the Respondent:

- Resp. Ex. 1 - Estimate from Charles A. Pastrana & Sons, December 13, 2019
- Resp. Ex. 2 - Estimate from A.C.S., Inc., December 16, 2019

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



- Resp. Ex. 3 - Photograph of southeast basement corner, December 11, 2019
- Resp. Ex. 4 - Photograph of foundation repairs, January 5, 2020
- Resp. Ex. 5 - Photograph of exterior of southeast basement corner, January 10, 2020
- Resp. Ex. 6 - Photograph of retaining wall, January 10, 2020
- Resp. Ex. 7 - Photograph of retaining wall, January 10-13, 2020
- Resp. Ex. 8 - Photograph of southeast basement corner, January 13, 2020
- Resp. Ex. 9 - Photograph of southeast basement corner, May 28, 2020
- Resp. Ex. 10 - Estimate from George Miller & Sons, undated

I admitted the following exhibits offered by the Fund:

- Fund Ex. 1 - OAH Hearing Notices, July 20, 2022
- Fund Ex. 2 - MHIC Hearing Order, April 22, 2022
- Fund Ex. 3 - Home Improvement Claim Form, filed October 13, 2021
- Fund Ex. 4 - Respondent's Licensing Information, September 30, 2022

Testimony

The Claimant testified and did not present other witnesses.

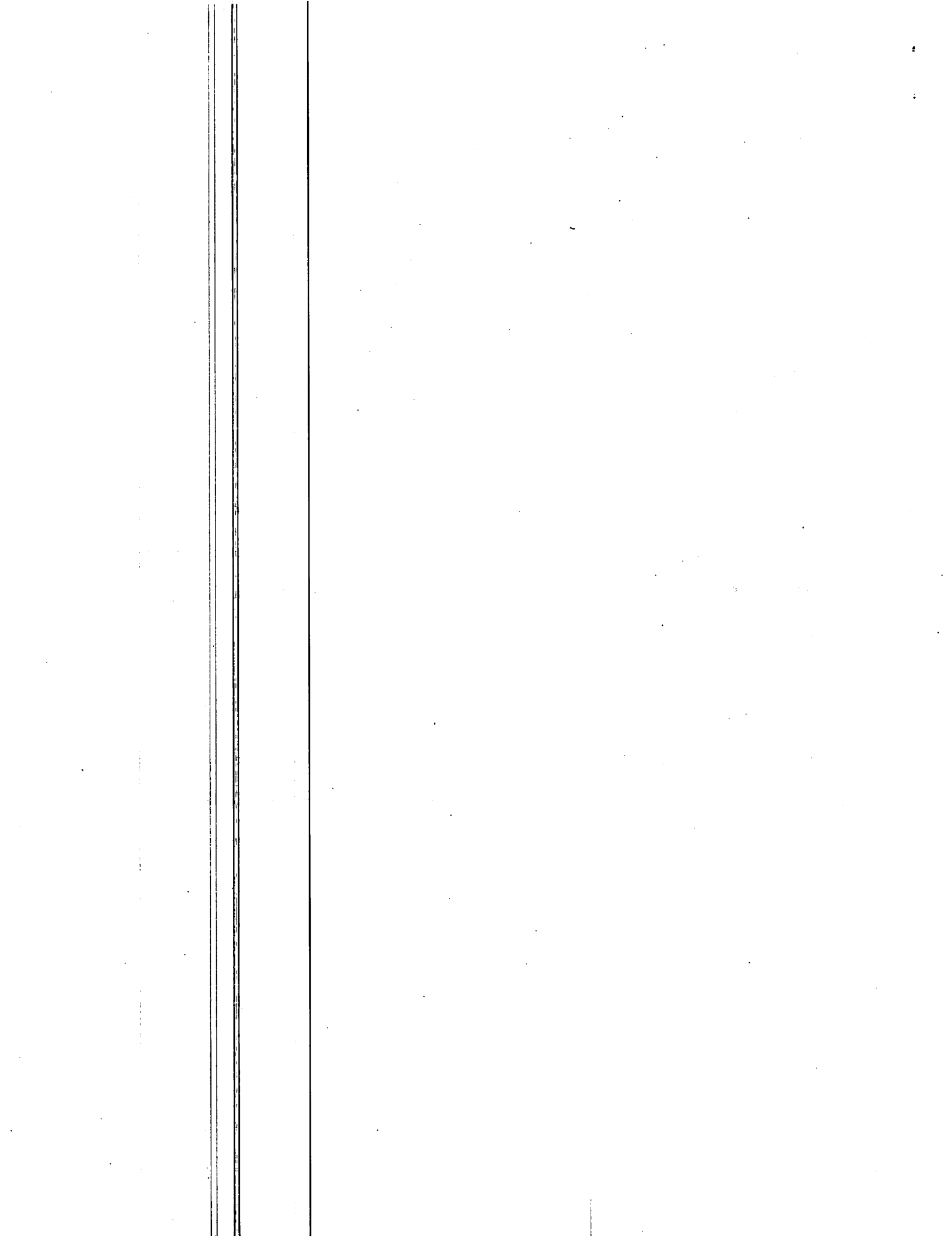
The Respondent testified and presented the testimony of Robert Lawrence, Jr., Owner of Ichan BL Remodeling, accepted as an expert in general contracting and waterproofing.

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 numbers 01-11940 and 05-137821.
2. On December 11, 2019, the Claimant contacted the Respondent to remediate water intrusion in her basement. On December 11, 2019, the Respondent inspected the Claimant's home and discovered deteriorating foundation cinder blocks and a non-functioning existing French drainage system.
3. The Respondent also noted that there was a four-degree slope toward the back and side of the Claimant's home, which allowed pooling of water beside the home.



4. On December 30, 2019, the Claimant and the Respondent entered into a contract to waterproof the southeast corner of her basement (Contract) which entailed the following:

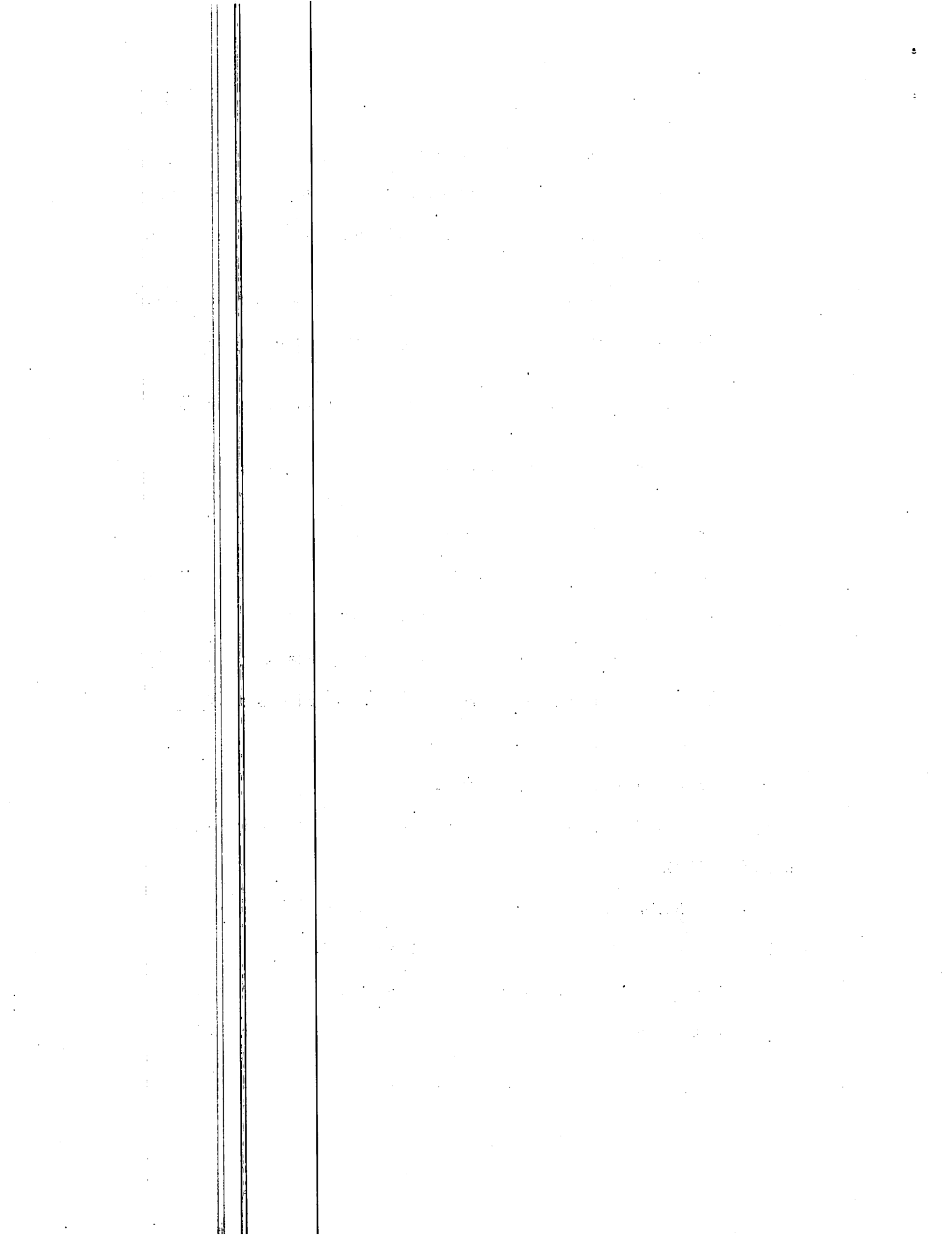
- Waterproofing of exterior southeast corner of foundation, concrete masonry unit and cinder block walls
- Remove side yard gate and six by six foot wooden post, concrete surrounding post
- Remove and store on site all related downspout piping, sump pump discharge pipe
- Hand dig along outside wall to expose corner foundation walls – approximately eleven feet
- Pressure wash exposed foundation walls to expose joints in cinder block foundation walls
- Repair any failures in foundation wall with hydraulic cement
- Re-parge foundation walls as needed
- Apply fibered cement over repair work to further seal repair work
- Build a retaining wall adjoining the home from the south east corner of home
- Re-install gate post, gate, discharge sump pump pipe and downspout piping
- Fill any cracks with hydraulic cement.

5. The agreed-upon Contract price was \$10,763.54.

6. On December 30, 2019, the Claimant paid the Respondent an initial deposit payment of \$3,587.84.

7. The Respondent began work on the Contract in January 2020 and the Claimant paid the Respondent a second payment of \$3,587.84 on January 6, 2020.

8. The Respondent removed earth on the southeast side of the Claimant's home, digging down approximately eleven feet to expose the home's southeast foundation wall. The



Respondent filled in a crack in the foundation wall with hydraulic cement and re-parged² the foundation wall. The Respondent then built a retaining wall outside the southeast corner of the home to keep water away from the home.

9. The Respondent completed his work on the Contract on January 10, 2020, and the Claimant made her final payment of \$3,587.86 to the Respondent on that date.

10. On March 15, 2020, the Claimant texted the Respondent that water was leaking through the southeast corner of the basement. Through a series of texts from March 2020 through May 2020 the Claimant reported continued leaking in the southeast corner of her basement and asked the Respondent to correct the issue.

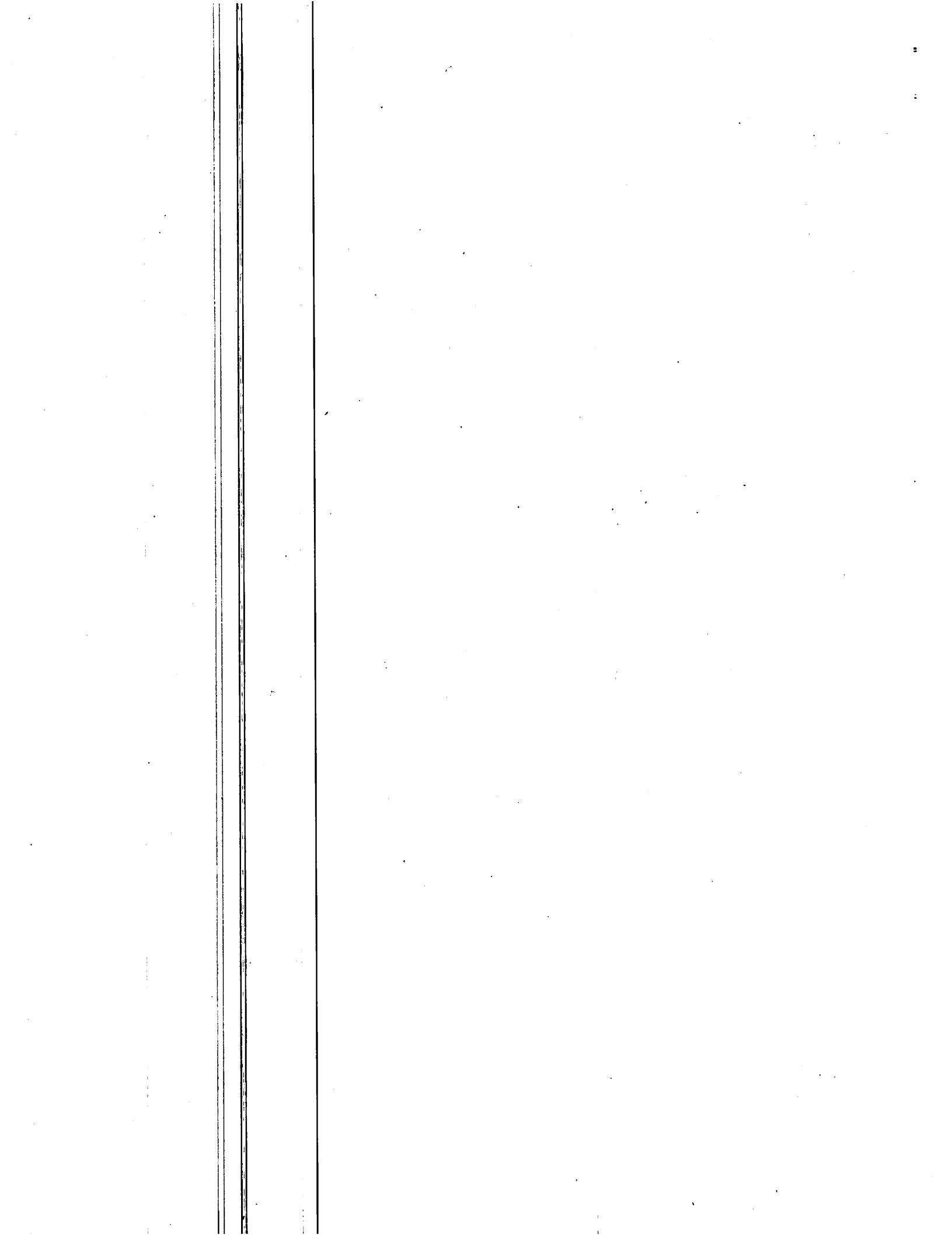
11. On March 26, 2020, water leaked through the southeast corner of the basement.

12. On May 26, 2020, the Respondent filled in the loose gravel area at the base of the southeast basement corner with concrete to create a smooth flat surface to cure any water intrusion in this area.

13. On May 30, 2020, the Respondent had George Miller inspect the Claimant's home to address any existing water intrusion issues. Mr. Miller recommended waterproofing the side and front wall of the home, installing new brick sills on the front of the home, and constructing a new exterior drain on the right side of the house.

14. On August 4, 2020, the Claimant texted the Respondent that the southeast corner of the basement was still leaking water. The Respondent responded on August 4, 2020, with a text saying that the water issue was better than it was before they performed their work. The Respondent also indicated in this response that the Claimant should watch the area and see what effect the leaking water has.

² Parging is the application of a thin coat of cement to a masonry surface. The Respondent explained that parging maintains the integrity of the foundation walls and usually lasts approximately forty years. The Respondent indicated that the Claimant's home was built in the 1970s.



15. On September 4, 2020, the Claimant texted the Respondent that the water intrusion had worsened. On October 2, 2020, the Respondent texted the Claimant that he could come to the home the following week and apply “Stay Dry” to the walls. On October 2, 2020, the Claimant responded that she did not want “Stay Dry” applied until the water intrusion issue was fixed.

16. On September 13, 2021, Maryland Mold and Waterproofing provided an estimate to waterproof the Claimant’s basement, which consisted of a full demolition of the basement, waterproofing all exterior areas, installing a second sump pump, and constructing a new French drainage system at a cost of \$33,000.00.

17. The Claimant filed her claim with the MHIC on October 13, 2021.

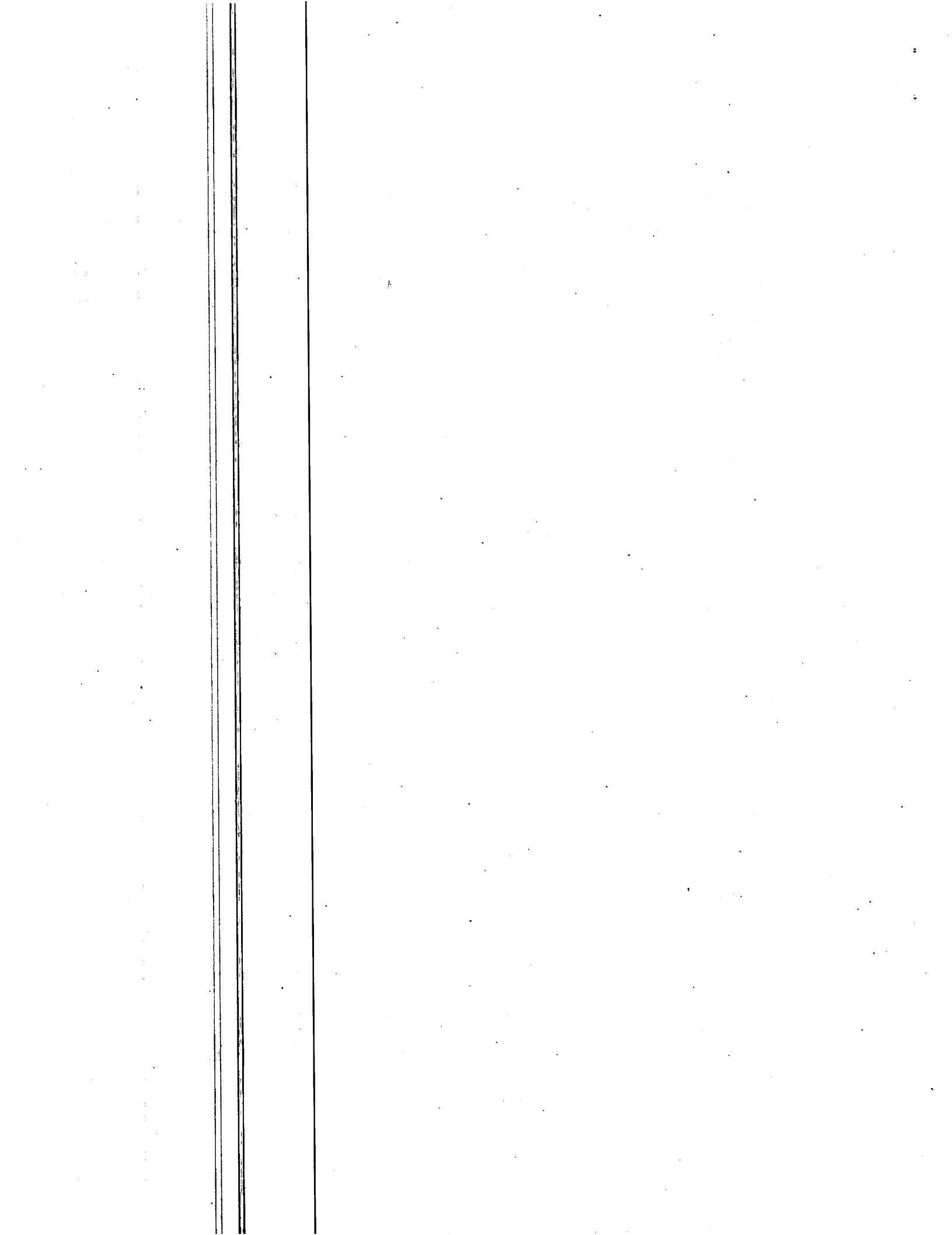
18. After October 2, 2020, there were no further communications between the Claimant and the Respondent until a June 2022 text from the Claimant to the Respondent asking for confirmation of his receipt of the rescheduling notice for the hearing before the OAH.

DISCUSSION

Governing Law, Controlling Regulations and Burden of Proof

The Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Bus. Reg. § 8-407(e)(1); State Gov’t § 10-217; 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 Cnty. 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) (Supp. 2022); *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



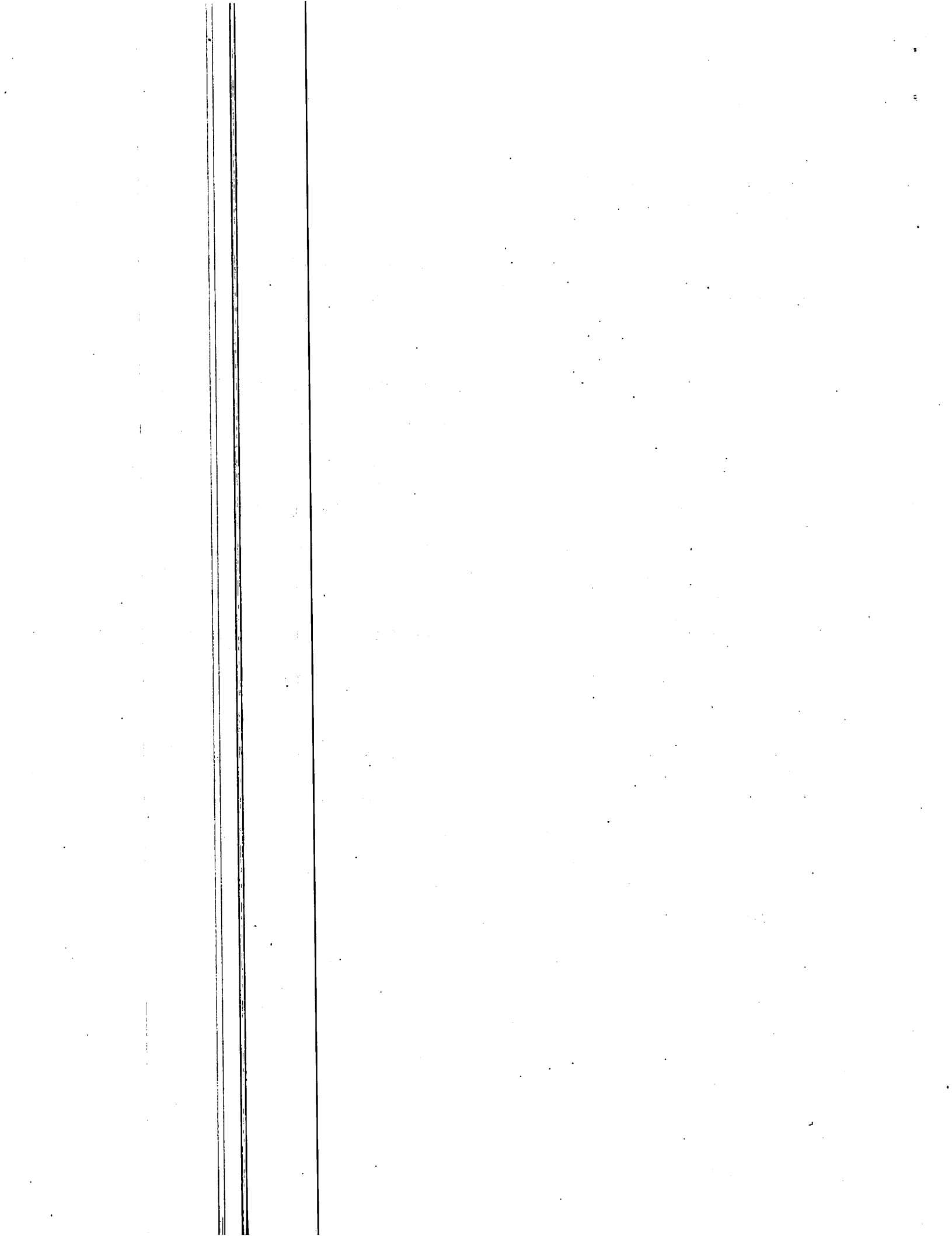
restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.” Bus. Reg. § 8-401. For the following reasons, I find that the Claimant has proven eligibility for compensation.

By statute, certain claimants are excluded from recovering from the Fund altogether. In this case, there are no such statutory impediments to the Claimant’s recovery. The claim was timely filed, there is no pending court claim for the same loss, and the Claimant did not recover the alleged losses from any other source. Bus. Reg §§ 8-405(g), 8-408(b)(1) (2015 & Supp. 2022). The Claimant resides in the home that is the subject of the claim or does not own more than three dwellings. *Id.* § 8-405(f)(2) (Supp. 2022). The parties did not enter into a valid agreement to submit their disputes to arbitration. *Id.* §§ 8-405(c), 8-408(b)(3) (2015 & Supp. 2022). The Claimant is not a relative, employee, officer, or partner of the Respondent, and is not related to any employee, officer, or partner of the Respondent. *Id.* § 8-405(f)(1) (Supp. 2022).

The Claimant did not unreasonably reject good faith efforts by the Respondent to resolve the claim. *Id.* § 8-405(d) (Supp. 2022). The Claimant contacted the Respondent numerous times from March 2020 through October 2020 asking the Respondent to correct the water intrusion in the southeast corner of her home. The only remedy proposed by the Respondent was an offer to apply “Stay Dry” to the basement walls in October 2020. I find that the Claimant’s denial of the Respondent’s remedy was reasonable because she wanted the water intrusion issue fixed first. Therefore, I find that the Claimant did not reject any good faith efforts by the Respondent to resolve the water seepage through the southeast corner of her basement.

Argument and Testimony of the Parties

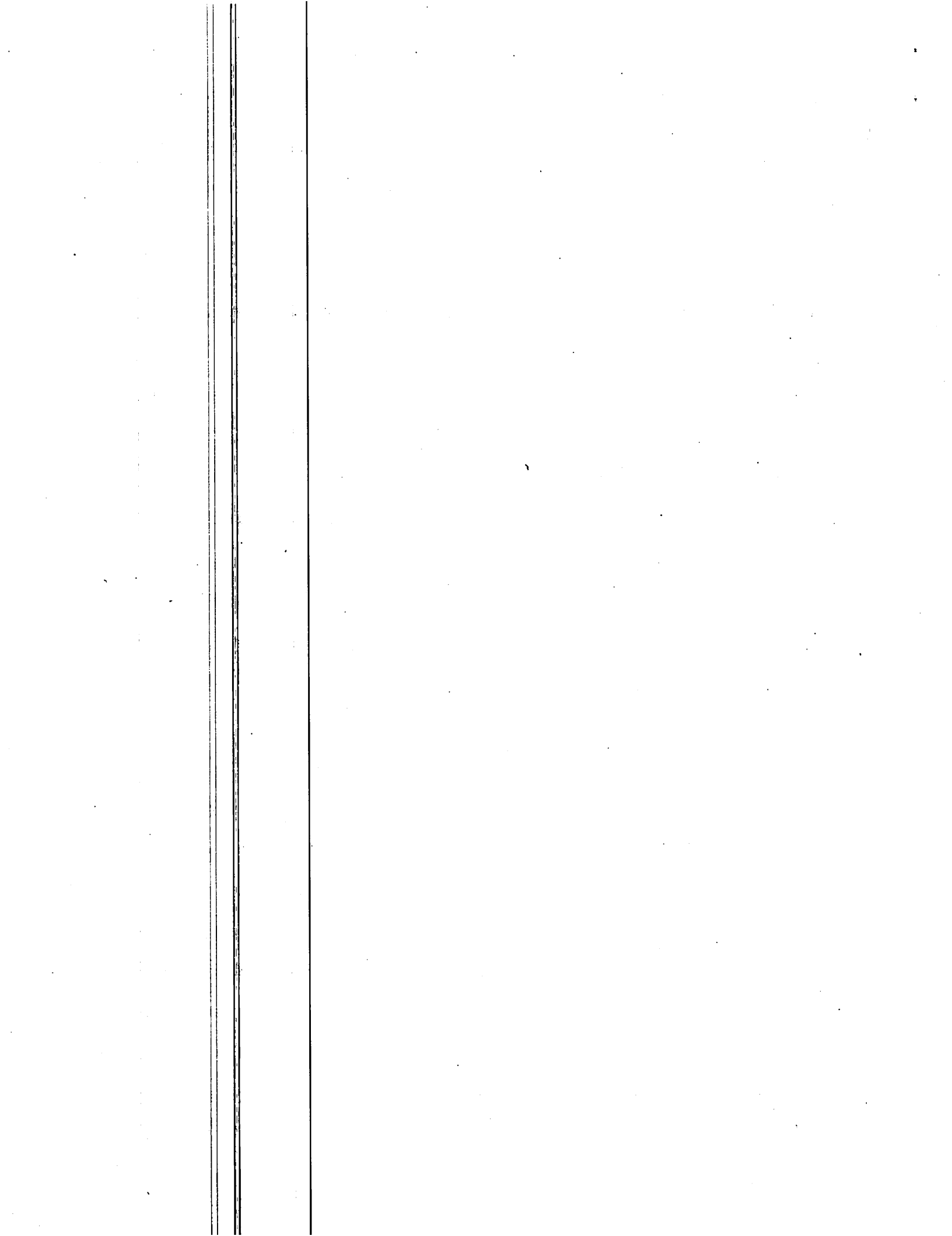
Some facts are undisputed in this matter. The Claimant and Respondent agreed that the Claimant entered into a contract with the Respondent for improvements to the Claimant’s home on December 30, 2019. The parties agreed that the home improvement involved the



waterproofing of the Claimant's southeast corner of her basement. The parties further testified that work on the project began in January 2020 and concluded on January 10, 2020; that the original agreed-upon contract price was \$10,763.54 and was paid in full; and that at the conclusion of the work on January 10, 2020, both the Claimant and Respondent considered the project to be complete and performed to both parties' satisfaction. Here the parties' accounts diverge.

The Claimant testified that approximately two months later, in March 2020, she began to observe water leaking in the southeast corner of her basement. The Claimant indicated that she texted the Respondent on March 15, 2020, regarding the leaking basement and that the Respondent replied that the southeast corner of her basement is watertight and that she had nothing to worry about. The Claimant asserted that she continued to communicate with the Respondent through October 2020 regarding the continual leaking of water through the southeast corner of her basement but the only corrective measure offered by the Respondent was to apply "Stay Dry" to her basement walls.

The Respondent did not disagree with the Claimant's description of the continued water leakage and, in fact, confirmed during his direct testimony that Clmt. Ex. 3 illustrated water intrusion in the southeast corner of the Claimant's basement on March 26, 2020. The Respondent argued that this water intrusion was due to the Claimant's defective French drain system that she did not want to pay to have corrected by the Respondent. The Respondent argued that he told the Claimant in December 2019 that his contracted work may not solve her water intrusion problems due to her French drain system. The Respondent also asserted that the Contract did not contain any guarantees that his work would solve the Claimant's water intrusion issues. The Respondent indicated that he performed multiple daily inspections of the work conducted by his employees and that all work performed conformed with industry standards. He



testified that the retaining wall he built was designed to divert water away from the southeast corner of the basement by creating a path in the earth to move water away from the Claimant's home which was designed to prevent the pooling of water beside the home. The Respondent also contended that his crew re-parged the southeast foundation wall to prevent water intrusion. The Respondent further indicated that when he inspected the Claimant's basement on May 26, 2020, he used a water meter device in the southeast corner and it registered an "8," which was a dry reading. During cross examination the Respondent stated that the pictures of water intrusion presented by the Claimant were in areas of the basement that he was not contracted to work on and that these areas were not re-parged by him, which allowed water to seep in through the foundation.

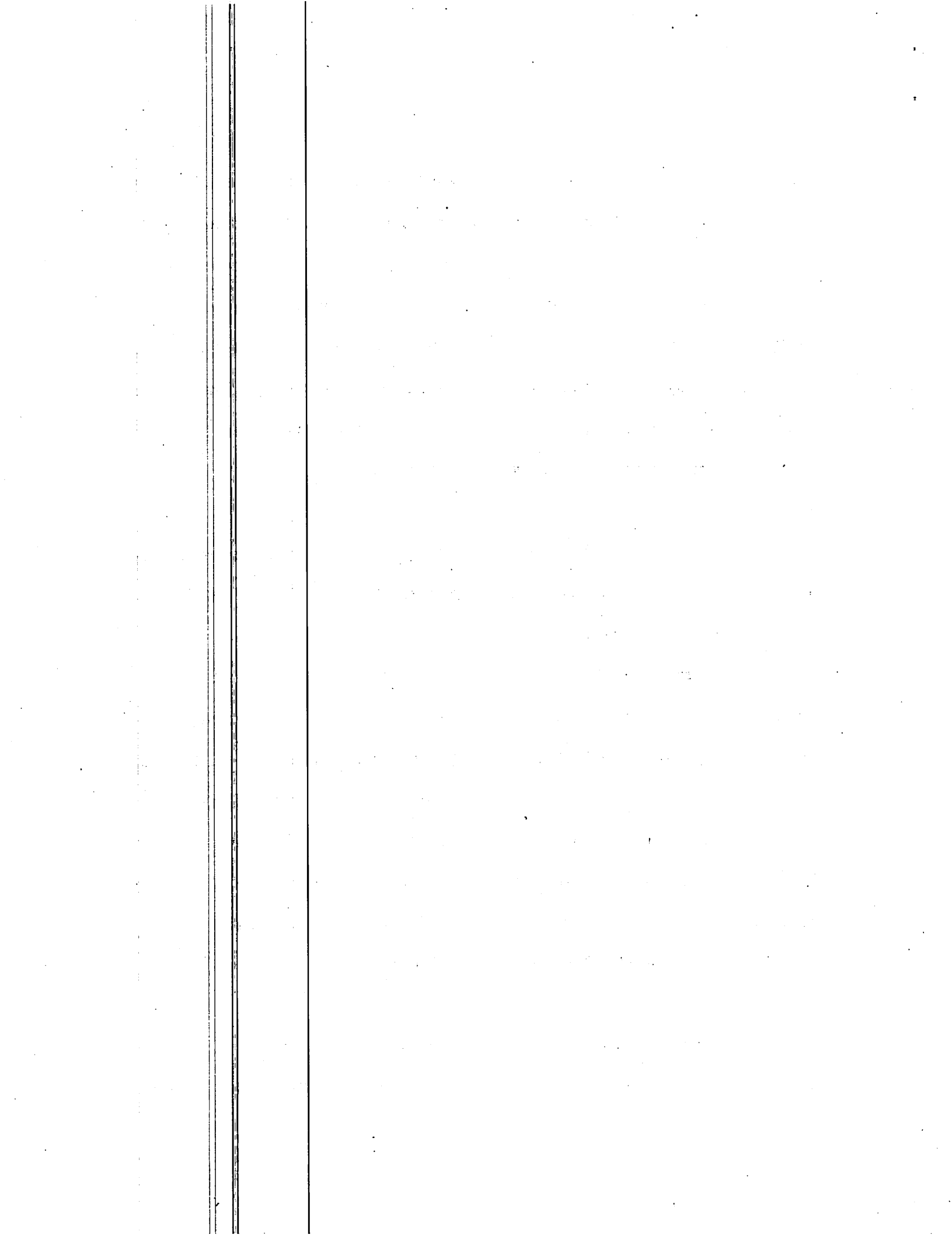
Both the Claimant and Respondent agree that the Claimant continues to experience water leakage from the area of the home improvement work performed by the Respondent—the southeast corner of the basement.

The Fund argued simply that the Claimant contracted with the Respondent for the waterproofing of the southeast corner of her basement and the Claimant has not received the benefit of that bargain, despite the Respondent's best efforts to cure the leakage. Employing a *res ipsa loquitur* analysis, as discussed below, the Fund argued that the continued water leakage establishes that the Respondent's work was unworkmanlike, inadequate or incomplete, without the need to establish a direct causal link between the Respondent's work and the continued water leaks; the Fund argued that it can be reasonably inferred from the undisputed facts of record.

I am persuaded that the Claimant and the Fund are correct.

Analysis

There is no dispute that the Respondent held a valid contractor's license in 2019, and at all times relevant to this matter, when he entered into the home improvement contract at issue.



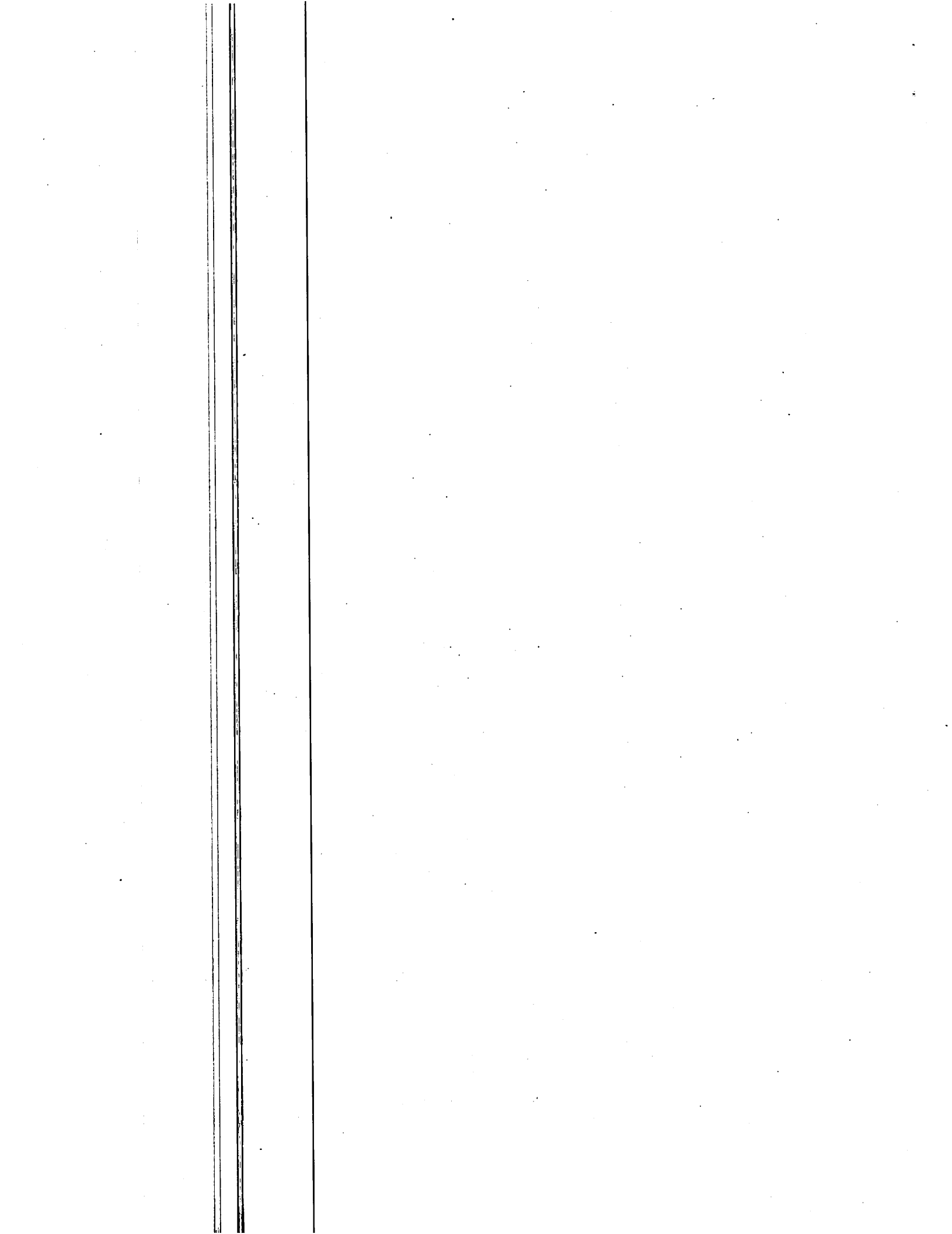
with the Claimant. Further, there is no dispute that the Claimant is an owner of the subject property and that there is no procedural impediment barring her from recovering from the Fund. Md. Code Ann., Bus. Reg. § 8-405(f) (2015).

The Respondent argued that he explained to the Claimant that a new French drain system might be necessary to prevent further water intrusion but that the Claimant did not want to pay the extra costs associated with that installation. The Respondent further asserted that the Contract did not guarantee that it would prevent all water intrusion but that it was his hope that his work would stop water infiltration in the southeast basement corner. The Claimant testified that those discussions regarding a French drain did not take place. Ultimately, I found that even if the French drain issue was discussed, the Respondent still offered a contract to waterproof the southeast corner of the Claimant's basement for nearly \$11,000.00. While the Contract does not contain a guarantee, it does state that the work was intended to waterproof that specific area of the basement, yet that work failed to achieve its objective.

There are no further material facts in dispute in this matter. The Claimant and Respondent contracted for the installation of a waterproofing system to prevent water intrusion in the southeast corner of the Claimant's basement. The Respondent performed the work as specified in the contract but shortly after completion of the work, the Claimant began to experience water leakage in the basement's southeast corner. This water penetration has continued unabated despite the Respondent's efforts to cure the leak.

The Appellate Court of Maryland has provided an instructive and detailed analysis on the history, evolution, adoption and applicability of the doctrine of *res ipsa loquitur* in this State:

The rule of *res ipsa loquitur* is limited by the following considerations: (1) The apparatus must be such that in the ordinary instance no injurious operation is to be expected unless from a careless construction, inspection or user; (2) Both inspection and user must have been at the time of the injury in the control of the party charged; and (3) The injurious occurrence or condition must



have happened irrespective of any voluntary action at the time by the party injured.

It is merely one kind of circumstantial evidence, in which [a fact-finder] may reasonably infer both negligence and causation from the mere occurrence of the event and the defendant's relation to it. As was early suggested by the Court of Appeals, the doctrine serves to supply an inference.

Chesapeake & Potomac Tel. Co. of Maryland v. Hicks, 25 Md. App. 503, 515, 526 (1975)

(internal citations and quotations omitted) (emphasis added).

Discussing permitted inferences, the courts of appeal of this State have held that as the finder-of-fact, I am permitted to draw reasonable inferences from evidence in the record, but I may not make conclusions that strain logic or require leaps of reasoning. *See Motor Vehicle Admin. v. Atterbeary*, 368 Md. 480, 499 (2002); *North v. North*, 102 Md. App. 1 (1994); *Neal v. State*, 191 Md. App. 297 (2010).

Applying the fundamental concepts undergirding the doctrine of *res ipsa loquitur* to the facts of the case at bar, I find that it is a reasonable inference to draw that absent negligent installation, a waterproofing remediation of a southeast corner of a basement should not leak months after completion; that the Claimant continues to experience water entering the southeast basement corner; that the installation of waterproofing measures for the southeast basement corner was within the exclusive control of the Respondent and his employees; and the water leakage was not caused by any act of the Claimant. Thus, I find that "it is more likely so than not so" that the Claimant's continued water leakage was caused by the Respondent's unworkmanlike, inadequate or incomplete home improvement and, in turn, that the Claimant is eligible for compensation from the Fund.

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

09.08.03.03B(1). Further, the MHIC may deny a claim if it finds that the Claimant unreasonably rejected good faith efforts by the contractor to resolve the claim. Md. Code Ann., Bus. Reg. § 8-405(d) (2015). Here, the Respondent attempted to cure the leak in May 2020 by filling in concrete to a gravel area outside the southeast basement to smooth out that area but the water continued to leak through the walls. I also considered that the numerous attempts made by the Claimant after March of 2020 to have the Respondent correct this issue were met with cavalier responses that the area should be fine because it's watertight and that the water intrusion is less than what it was before his work. Finally, the Respondent's offer to apply "Stay Dry" to the basement walls in October 2020 did not address the structural issue of continued water intrusion into the southeast corner of the basement. The Respondent did not communicate any further with the Claimant from October 2020 until 2022 after her claim was filed with the MHIC. Considering the totality of the circumstances, I cannot conclude the Claimant unreasonably rejected good faith efforts by the Respondent to resolve the claim, in violation of the controlling statute. *Id.*

MHIC's regulations offer three formulas for measurement of a claimant's actual loss, unless a unique measurement is necessary. COMAR 09.08.03.03B(3)(a)-(c). As explained more fully below, none of those prescribed formulas are appropriate in this case, and thus I shall apply a formula unique to the facts of this matter, as described below. COMAR 09.08.03.03B(3).

On November 1, 2022, the Claimant received a proposal from Maryland Mold and Waterproofing to waterproof the Claimant's basement. (CL Ex. 6.) At the hearing, the parties agreed that the work proposed by Maryland Mold and Waterproofing is not an equal replacement of the work performed by the Respondent in terms of materials utilized but is instead an upgrade to the work performed by the Respondent. Therefore, the costs contained in Maryland Mold and

Waterproofing cannot reasonably serve as an accurate measure of the Claimant's loss and so a unique measure must be employed. COMAR 09.08.03.03B(3).

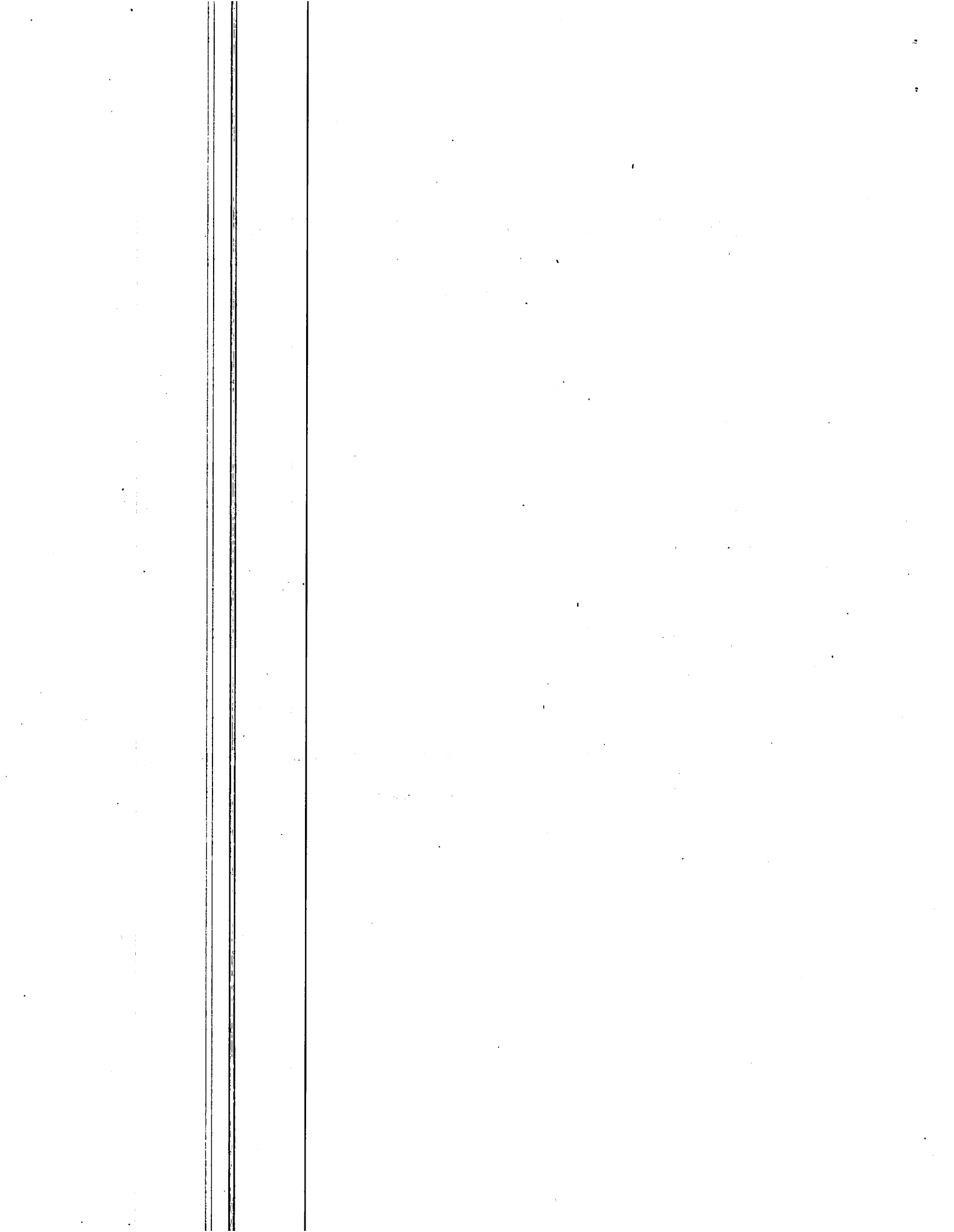
It is undisputed that the work was performed for the full contract price of \$10,763.54 and these sums were tendered by the Claimant to the Respondent at or before the January 10, 2020 completion date. As the Respondent's work to waterproof the Claimant's southeast basement corner was ineffective, that work had no value and therefore the Claimant is entitled to a refund of the money paid to the Respondent for the Contract. I therefore find that the correct measure of the Claimant's actual loss is \$10,763.54. COMAR 09.08.03.03B(3).

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.³ Bus. Reg. § 8-405(e)(1), (5) (Supp. 2022); COMAR 09.08.03.03B(4). In this case, the Claimant's actual loss is equal to the amount paid to the Respondent and less than \$30,000.00. Therefore, the Claimant is entitled to recover her actual loss of \$10,763.54.

PROPOSED CONCLUSION OF LAW

I conclude, as matter of law, that the Claimant has sustained an actual and compensable loss in the sum of \$10,763.54, as a result of the Respondent's acts and omissions. *Chesapeake & Potomac Tel. Co. of Maryland v. Hicks*, 25 Md. App. 503, 515, 526 (1975); Md. Code Ann., Bus. Reg. §§ 8-401 and 8-405 (2015 and Supp. 2022).

³ On or after July 1, 2022, the increased cap is applicable to any claim 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").



RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$10,763.54; 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;⁴ and

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

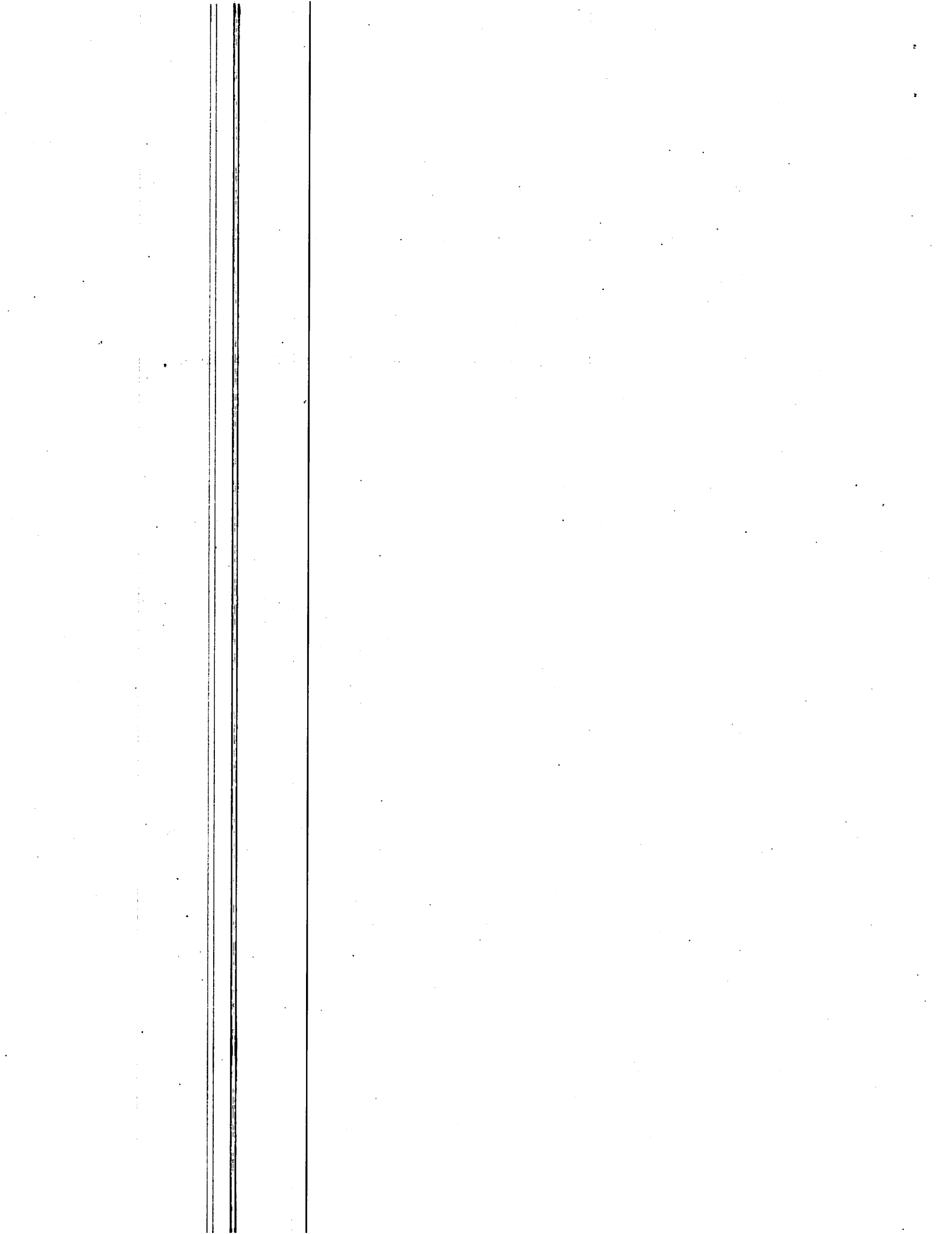
January 20, 2023
Date Decision Issued

BMZ/emh
#203004

Brian Zlotnick

Brian Zlotnick
Administrative Law Judge

⁴ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.



PROPOSED ORDER

WHEREFORE, this 22nd day of February, 2023, 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.

Chandler Louden

Chandler Louden

Panel B

***MARYLAND HOME IMPROVEMENT
COMMISSION***

