

IN THE MATTER OF THE CLAIM
OF TOBY RAND,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF JOHN CROCKETT,
T/A CROCKETT & SONS
CONCRETE, INC.,
RESPONDENT

* BEFORE JENNIFER M. CARTER JONES,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
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* OAH No.: LABOR-HIC-02-22-00891
* MHIC No.: 21 (75) 870
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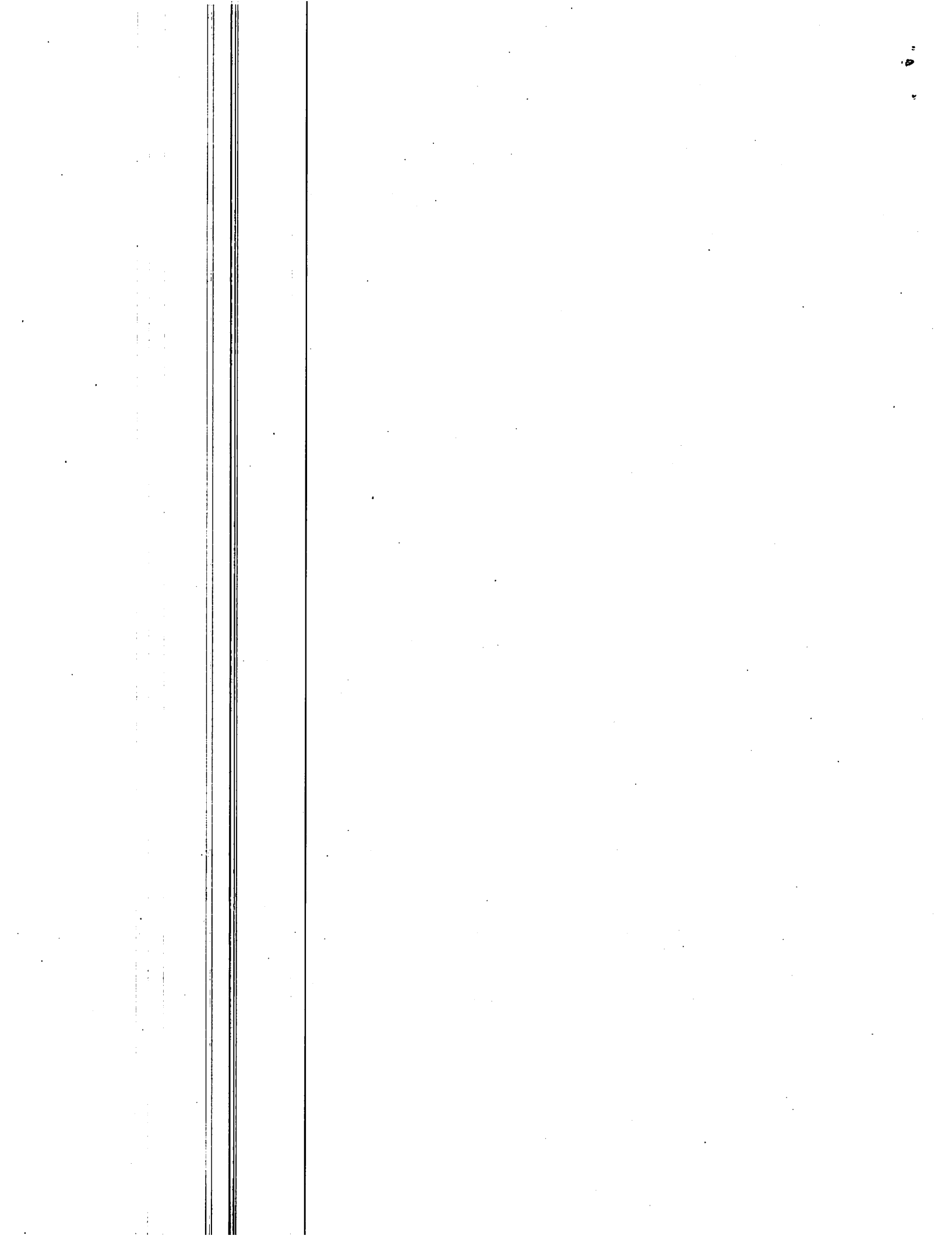
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PROPOSED DECISION

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

STATEMENT OF THE CASE

On August 6, 2021, Toby Rand (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 \$7,000.00 for actual losses allegedly suffered as a result of a home improvement contract with John Crockett, trading as Crockett &



Sons Concrete, Inc. (Respondent).¹ On December 6, 2021, the MHIC issued a Hearing Order on the Claim. On December 16, 2021, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On September 27, 2022, I held a hearing at the OAH in Hunt Valley, Maryland.² Andrew Brouwer, Assistant Attorney General, Department, represented the Fund. The Claimant was self-represented. Anthony J. DiPaula, 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.³

ISSUES

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

SUMMARY OF THE EVIDENCE

Exhibits

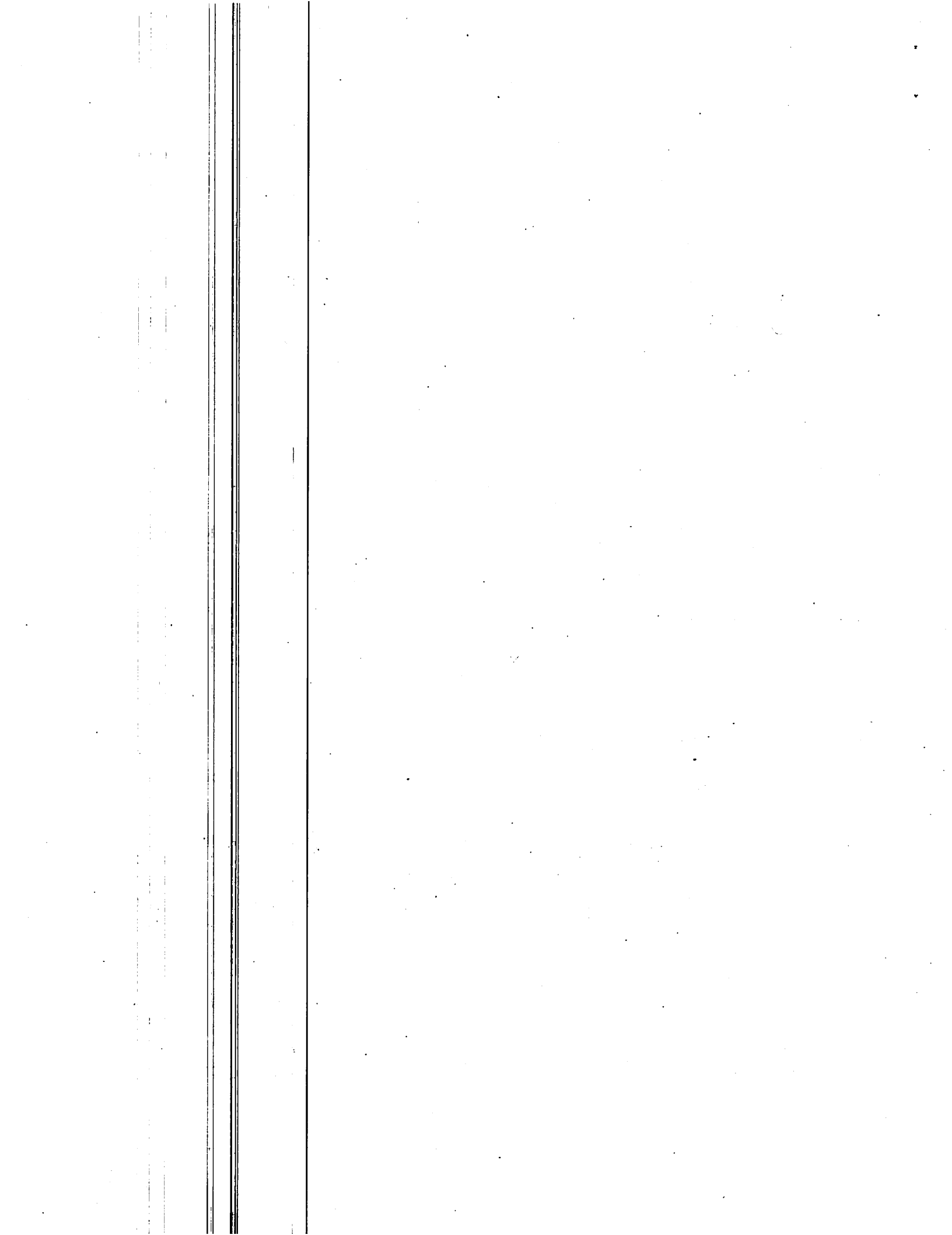
I admitted the following exhibits offered by the Claimant:

- CL. Ex. 1 – Contract between the Respondent and Paige Williamson (Ms. Williamson), the Claimant's wife, March 30, 2020, with attached plans
- CL Ex. 2 – Summary of events, photos of type of driveway and sidewalk the Claimant wished the Respondent to install (figure 1 and figure 2), undated; photograph of the final finish on the driveway (figure 3); taken at the completion of the project; photograph of the project after being sealed (figure 4 and figure 5); overlay before being colored (figure 6); surface and overlay (figure 7); puddling water (figure 7 and figure 8)

¹ Md. Code Ann., Bus. Reg. §§ 8-401 to 8-411 (2015 & Supp. 2022). Unless otherwise noted, all references hereinafter to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.

² Bus. Reg. §§ 8-407(a), 8-312.

³ Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021); Code of Maryland Regulations (COMAR) 09.01.03; COMAR 28.02.01.

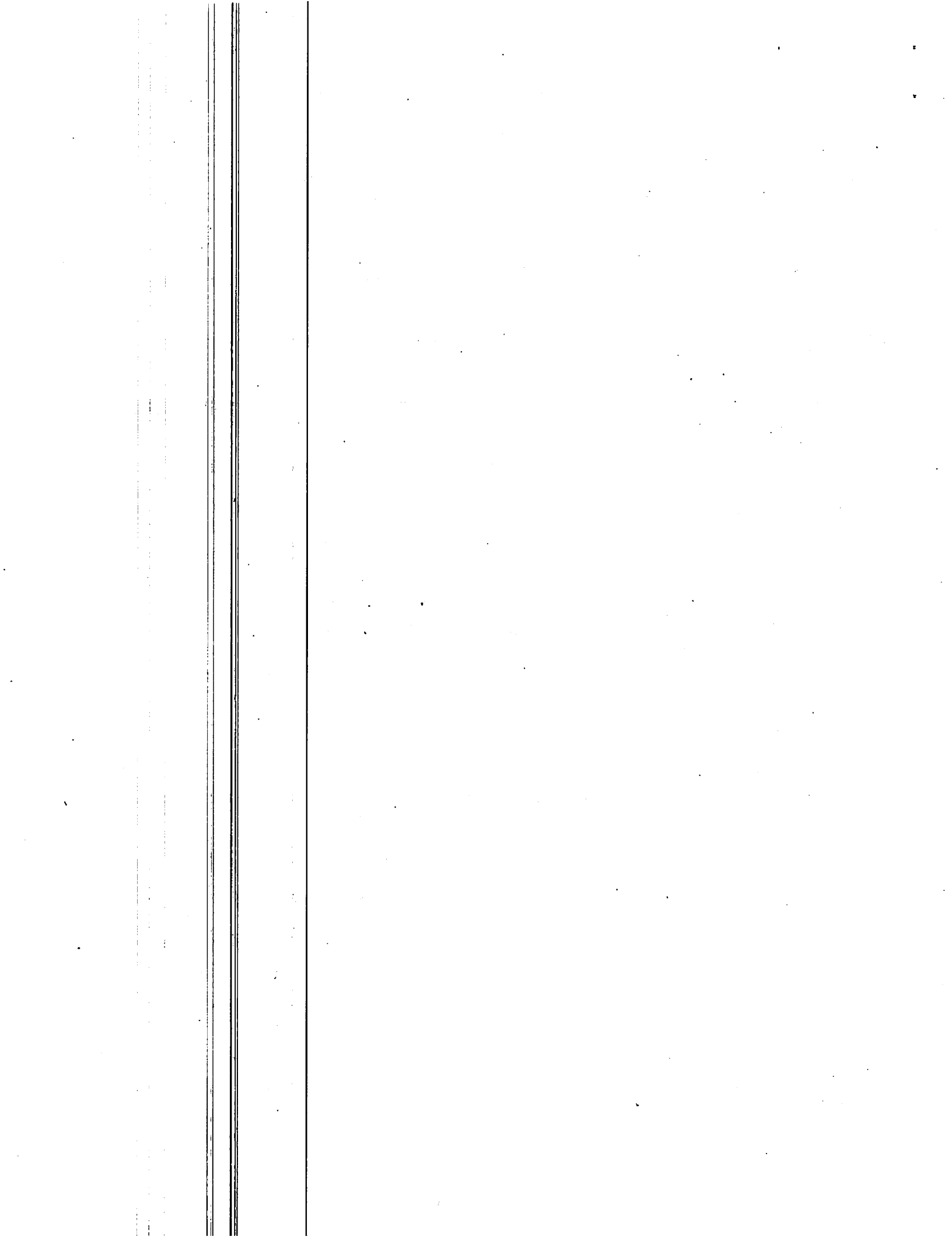


- CL Ex. 3 - Plans with alterations, undated
- CL Ex. 4 - Text messages between Ms. Williamson and the Respondent, July 8, 2020
- CL Ex. 5 - Photographs of steps and concrete border, July 2020
- CL Ex. 6 - Contract for \$1,500.00 between Ms. Williamson and the Respondent, August 11, 2020
- CL Ex. 7 - Text messages between the Respondent and Ms. Williamson, July 30 and 31, 2020
- CL Ex. 8 - Text messages between the Respondent and the Claimant, August 20 through September 25, 2020
- CL Ex. 9 - Photographs of concrete border and overlay, September 25 or 26, 2020
- CL Ex. 10 - Email from the Respondent to Ms. Williamson, September 26, 2020
- CL Ex. 11 - Email from the Respondent to the Claimant, September 28 or 29, 2020
- CL Ex. 12 - Photograph of concrete border and overlay, January 2021
- CL Ex. 13 - Proposal from Hyde Concrete, June 17, 2021
- CL Ex. 14 - Photographs of concrete borders and overlay, taken after September 2021
- CL Ex. 15 - Not admitted

I admitted the following exhibits offered by the Respondent:

- Resp Ex. 1 - Photograph of the front of the Claimant's house before the driveway replacement, September 2014
- Resp Ex. 2 - Text messages between the Claimant and the Respondent, July 1, 2020
- Resp Ex. 3 - Photographs of gravel and rebar for the driveway and steps, undated⁴
- Resp Ex. 4 - Photograph of one of two borders installed with local polymerized grey cement with a binding agent, July 2020
- Resp Ex. 5 - Photographs (2) of a portion of the driveway project in process, July 2020

⁴ There is no dispute that this photograph was taken shortly before the Respondent poured the concrete for the new driveway.



- Resp Ex. 6 - Estimate/Contract for \$3,300.00 between Ms. Williamson and the Respondent, July 7, 2020
- Resp. Ex. 7 - Butterfield Color 1000® Fine Overlay Technical Data Sheet, undated
- Resp. Ex. 8 - Not offered
- Resp. Ex. 9 - Photograph of the finished driveway (photo a) and photograph of the finished driveway and a portion of the porch (photo b), September 2020

I admitted the following exhibits offered by the Fund:

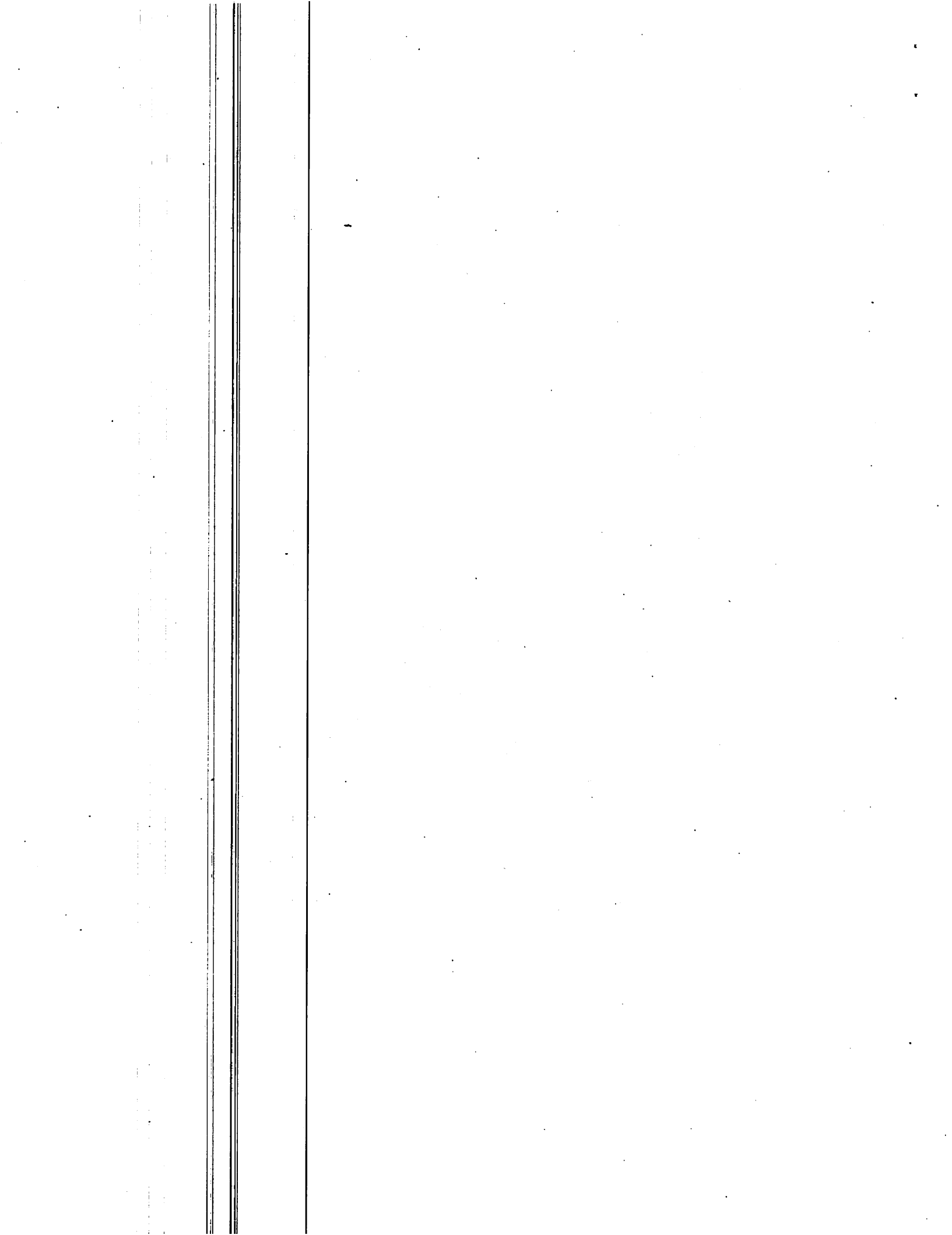
- Fund Ex. 1 - Labor Hearing Order, December 6, 2021
- Fund Ex. 2 - OAH Notice of Hearing, Rescheduled, March 14, 2022
- Fund Ex. 3 - OAH Notice of Hearing, January 20, 2022
- Fund Ex. 4 - Letter from Joseph Tunney, MHIC Chairman, to the Respondent, August 31, 2021, with attached Home Improvement Claim Form, completed by the Claimant, July 26, 2021
- Fund Ex. 5 - Licensing History for the Respondent, printed March 28, 2022
- Fund Ex. 6 - OAH Notice of Hearing, Rescheduled, August 9, 2022
- Fund Ex. 7 - OAH Notice of Hearing, Rescheduled, June 10, 2022
- Fund Ex. 8 - OAH Notice of Hearing, Rescheduled, April 21, 2022

Testimony

The Claimant testified and presented the testimony of Ms. Williamson.

The Respondent testified and was accepted as an expert in concrete construction in general. The Respondent did not present the testimony of any other witnesses.

The Fund did not present any testimony.



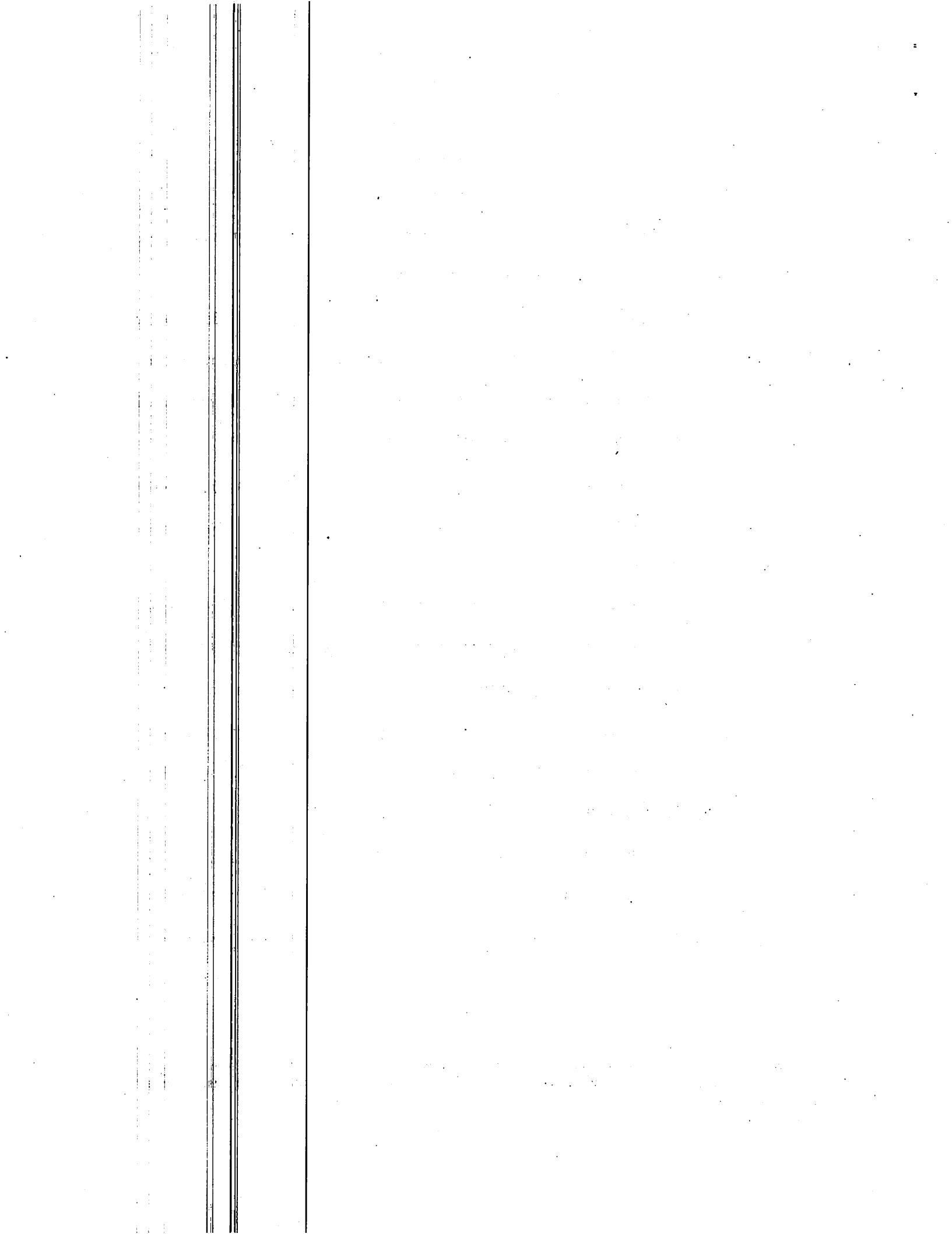
PROPOSED FINDINGS OF FACT

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 0171648.
2. On March 30, 2020, the Claimant, Ms. Williamson and the Respondent entered into a contract for \$17,200.00 to demolish their existing asphalt driveway, install a new concrete driveway with exposed aggregate finish, and to remove and replace the existing front patio with aggregate concrete⁵ that matched the driveway (Contract).⁶
3. The Contract called for installing smooth concrete borders around square patches of the aggregate concrete on the driveway and patio. The steps along the driveway were to match the smooth concrete borders.
4. The Claimant and Ms. Williamson provided the Respondent with photographs depicting how they wanted the driveway to appear. In the photographs, the square aggregate portions of the driveway were light grey and the borders were dark grey and smooth.
5. The original plan for the driveway was to install two square, straight, aggregate patches on the driveway and three square aggregate patches to make up the patio. The borders between the aggregate patches were to be horizontal.
6. The Claimant paid the Respondent \$17,200.00.
7. When the Respondent began installing the driveway, the sightline of the driveway from the porch precluded the installation of straight square aggregate concrete patches with

⁵ Aggregate concrete includes various sizes of visible pebbles, giving the concrete a rough appearance.

⁶ The Contract was signed by Ms. Williamson. There is no dispute that the Claimant and Ms. Williamson were both parties to the Contract.



horizontal borders, so the Respondent installed rectangular, diagonal aggregate concrete patches and borders instead.

8. To make the design of the driveway appear symmetrical, the Respondent installed an additional border in the driveway, making two diagonal borders in the driveway. The Respondent coated these borders with local polymerized grey cement with a binding agent. These borders were a darker grey than the aggregate patches.

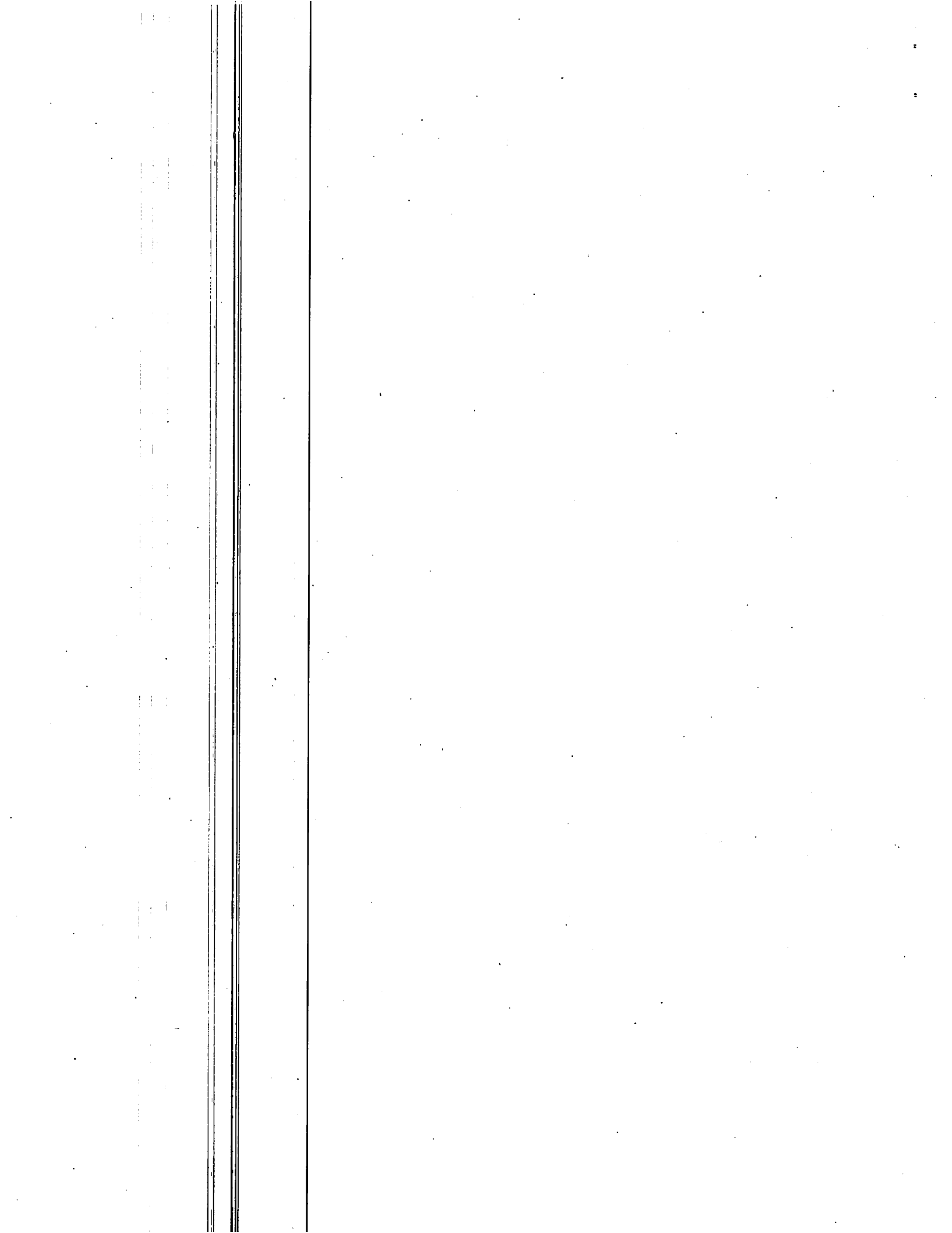
9. In mid-July, the Respondent applied sealant to the driveway and the steps, which was supposed to turn the remaining borders and the steps a darker grey. The sealant left the steps blotchy and rough. Sealant was running down the vertical concrete stair raisers in an uneven manner.

10. Once the Respondent saw the uneven and rough appearance of the borders and the steps, he knocked on the Claimant's door and suggested that the sealant would look better if they gave it time to cure.

11. The sealant did not look better and the borders were a light grey rather than dark grey as the Claimant requested. The Claimant complained to the Respondent, and the Respondent suggested that he remove the sealant from the borders and the steps and install a Butterfield or Ardex overlay,⁷ which the Respondent represented would result in dark grey borders and steps. Alternatively, the Respondent offered to coat the borders and steps with the local polymerized grey cement with a binding agent he used on the original diagonal driveway borders.

12. On or about July 6, 2020, the Respondent presented the Claimant and Ms. Williamson with a contract for \$3,300.00 to install a Butterfield T1000 overlay with smoke

⁷ Butterfield and Ardex are concrete product brand names.



pigment to all of the driveway borders and steps and to seal those areas with Butterfield Solvent Sealant (First Overlay Contract).

13. On or about August 11, 2020, the Respondent presented the Claimant and Ms. Williamson with a contract for \$1,500.00 to remove the sealant and “[i]ninstall Ardex/Butterfield blend over all borders and steps.”⁸ (Second Overlay Contract).

14. The Claimant and Ms. Williamson agreed to the Second Overlay Contract and Ms. Williamson signed the Second Overlay Contract on August 12, 2020.

15. With the Second Overlay Contract, the Claimant and Ms. Williamson agreed to pay the Respondent a total of \$18,700 for the entire home improvement project.

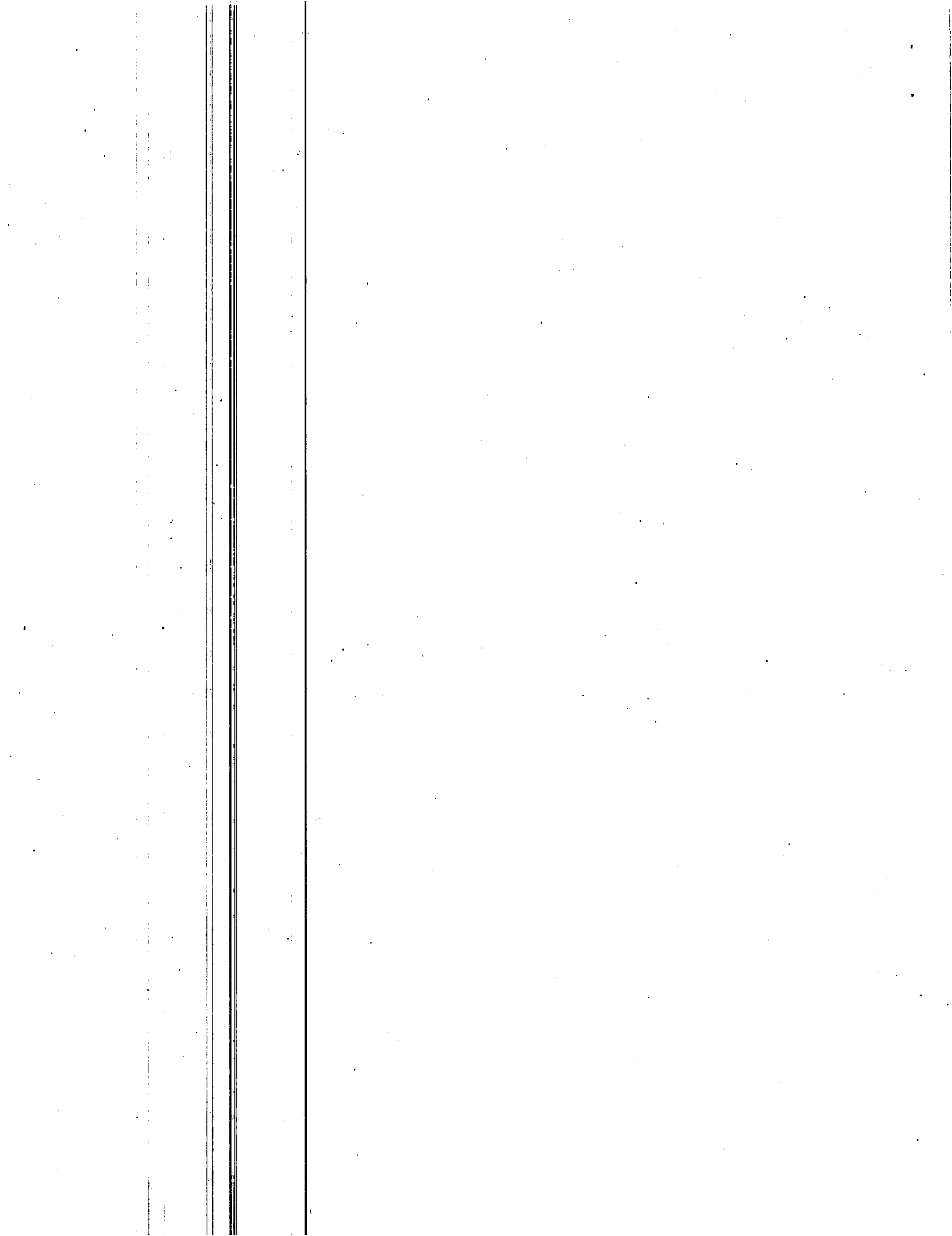
16. On August 20, 2020, the Claimant sent the Respondent a text and advised him that they had picked “pewter” as the color of the Butterfield overlay they wished to have applied to the borders and the steps. The Claimant advised the Respondent by text that he and Ms. Williamson were available to have the project completed the week of September 7, 2020.

17. By September 8, 2020, the Respondent had not responded to the Claimant’s August 20, 2022 text and the Claimant sent the Respondent a text inquiring when the Respondent would return to finish the project.

18. On September 17, 2020, at 7:21 a.m., the Respondent sent the Claimant a text and advised him that he would return to install the overlay Thursday or Friday of the following week.

19. At 8:13 a.m. on that same date, the Claimant returned the Respondent’s text and asked if the Respondent would be using the Butterfield color overlay as specified in the overlay Contract.

⁸ CL Ex. 6.



20. On Tuesday, September 22, 2020, the Respondent sent the Claimant a text and stated: "Have you scheduled for Friday for the Butterfield overlay."⁹

21. On or about September 25, 2020, the Respondent installed an overlay on the borders and steps, which resulted in a color closer to white than dark grey.

22. The Respondent did not seal the overlay on the borders and the steps.

23. On or about September 25 or September 26, 2020, Ms. Williamson sent the Respondent an email advising him she was unhappy with the light color of the overlay.

24. On September 26, 2020, the Respondent returned Ms. Williamson's email advising her that he used the same overlay for the recent work as he did for the initial darker grey horizontal driveway borders. Specifically, the Respondent stated:

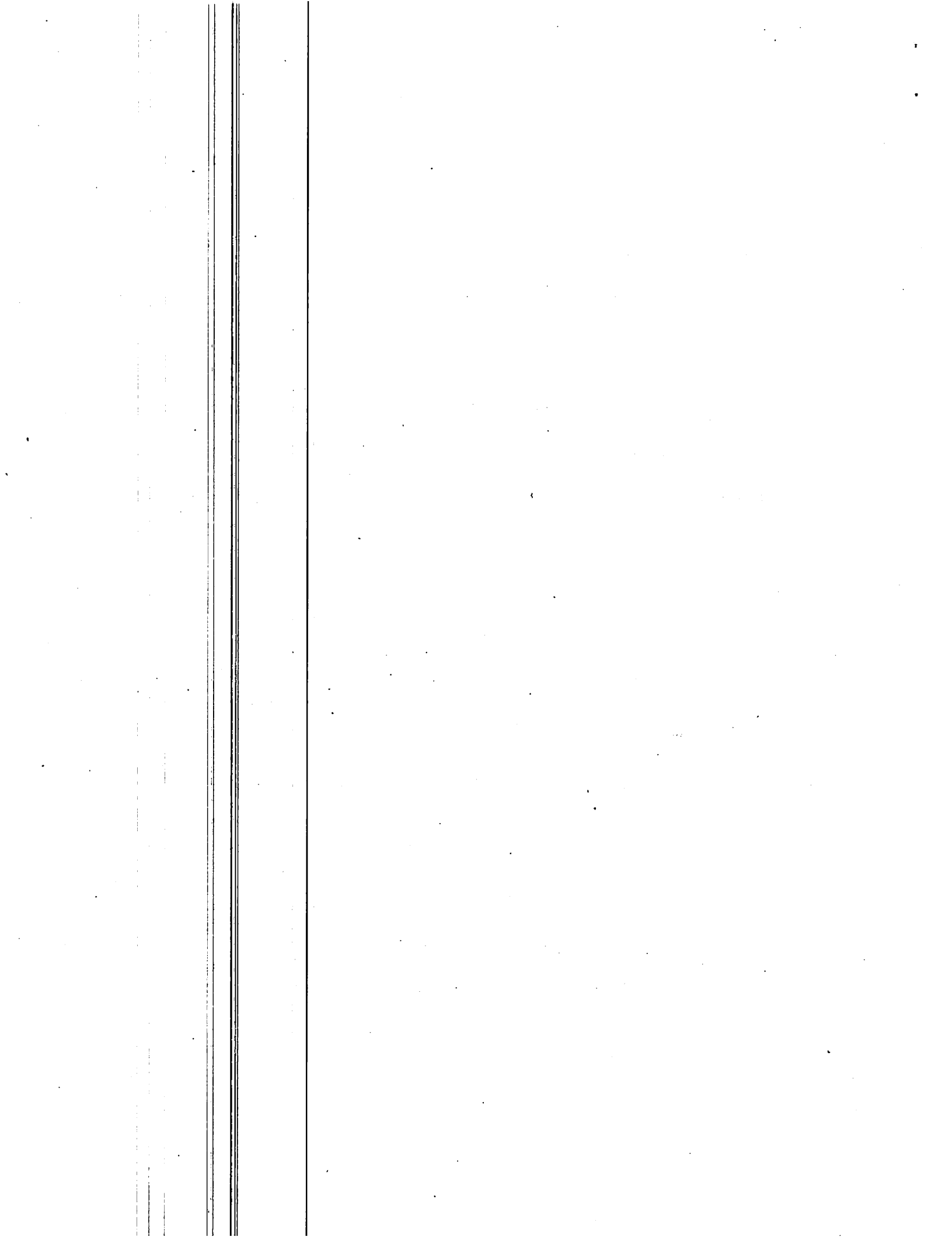
I'm not sure at this point how to make you happy or if I'm even capable. We used the exact blend of materials as we did on the last overlay and you loved them. The pictures you sent me look great as did the pictures my men took on the job yesterday. I believe at this point, you may need to lower your expectations on how cement products are matching. It's raw materials that vary from batch to batch, day to day. Unfortunately it's not like paint that is manufactured in a controlled environment with all factors remaining the same constantly. It's a beautiful driveway. Are you really wanting to mess with it again for a shade or two difference?¹⁰

25. The Claimant also sent the Respondent an email expressing his dissatisfaction with the light color of the overlay. The Respondent replied to the Claimant's email, stating the following:

I'm confident that we both feel we are right. Unfortunately [,] that doesn't get us anywhere. Attached[,] you will see the conformation [sic] from [Ms. Williamson,] which clearly says that she wanted to go with the blend we had previously installed. This is after she had asked about the color and then decided against it. Evidently[,] we have a big misunderstanding. However[,] you contracted with me to redo the border. We did that. Now[,] if you are not happy with it[,] fine. However, we have a contract and [I] expect to get paid for the material and the labor at a minimum. I will discount the invoice to \$1000.00. That will cover the

⁹ CL Ex. 8.

¹⁰ CL Ex. 10.



labor and material. If this isn't acceptable[,] we will have to file a lien on the property for unpaid services. The product that we installed is easily stained. I'm sure you are more than capable of staining it yourself. We would prefer not to work on it anymore. We have tried our very best to please you on several occasions and cannot. I hope you understand where I am coming from.¹¹

26. By January 2021, the overlay the Respondent installed in September 2020 began to peel and crack. The Claimant obtained an estimate for repairing and replacing the overlay installed by the Respondent, but the Claimant determined it was too expensive.

27. The Claimant bought concrete overlay, stained it, and installed it on the borders and steps himself. The borders continue to chip, flake, and deteriorate.

28. The Claimant obtained an estimate from Hyde Concrete for \$7,000.00 to repair cracks and peeling, remove the overlay the Respondent applied to the borders, apply new overlay, and apply a clear sealant.

29. The Claimant paid the Respondent \$17,200.00. as specified in the Contract. He did not pay the \$1,500.00 the Respondent charged in the Overlay Contract.

DISCUSSION

The Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence.¹² 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.¹³

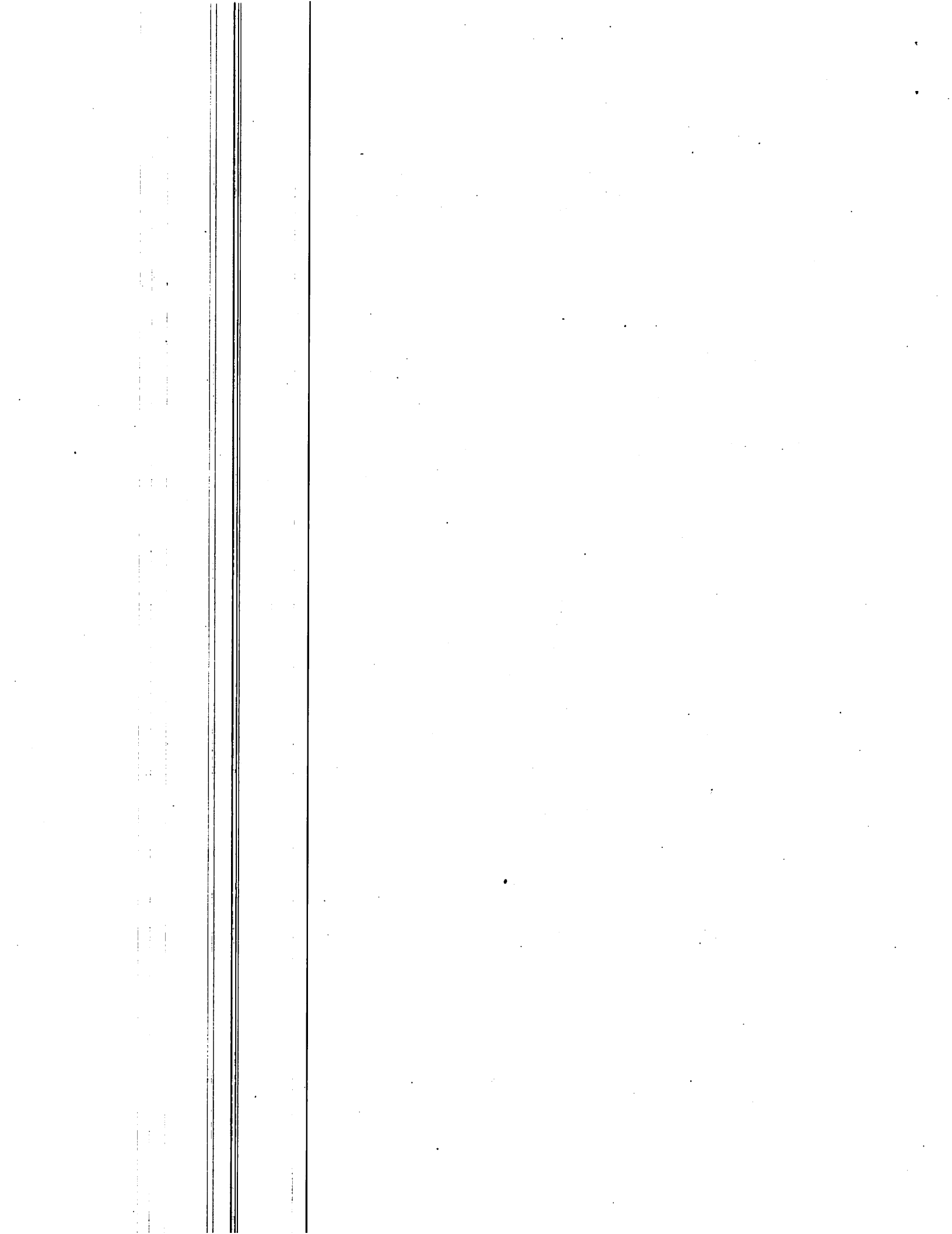
An owner may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor."¹⁴ "[A]ctual loss' means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete

¹¹ CL Ex. 11.

¹² Bus. Reg. § 8-407(e)(1); State Gov't § 10-217; COMAR 09.08.03.03A(3).

¹³ *Coleman v. Anne Arundel Cnty. Police Dep't*, 369 Md. 108, 125 n.16 (2002).

¹⁴ 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.").



home improvement.”¹⁵ 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.¹⁶ The Claimant resides in the home that is the subject of the claim or does not own more than three dwellings.¹⁷ The parties did not enter into a valid agreement to submit their disputes to arbitration.¹⁸ 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.¹⁹

The Parties’ positions

The Claimant

The Claimant asserts that the Respondent did not complete the installation of the driveway and patio borders and the adjacent steps in a workmanlike manner. Specifically, the Claimant testified that before the Respondent began installing the driveway, patio, and steps, he and Ms. Williamson were very clear that they wanted the Respondent to install a grey aggregate driveway with smooth borders and steps in a grey darker than the aggregate portions. To that end, the Claimant testified that he and Ms. Williamson provided the Respondent with photographs of driveways clearly depicting the lighter grey aggregate concrete surrounded by the darker grey smooth borders.

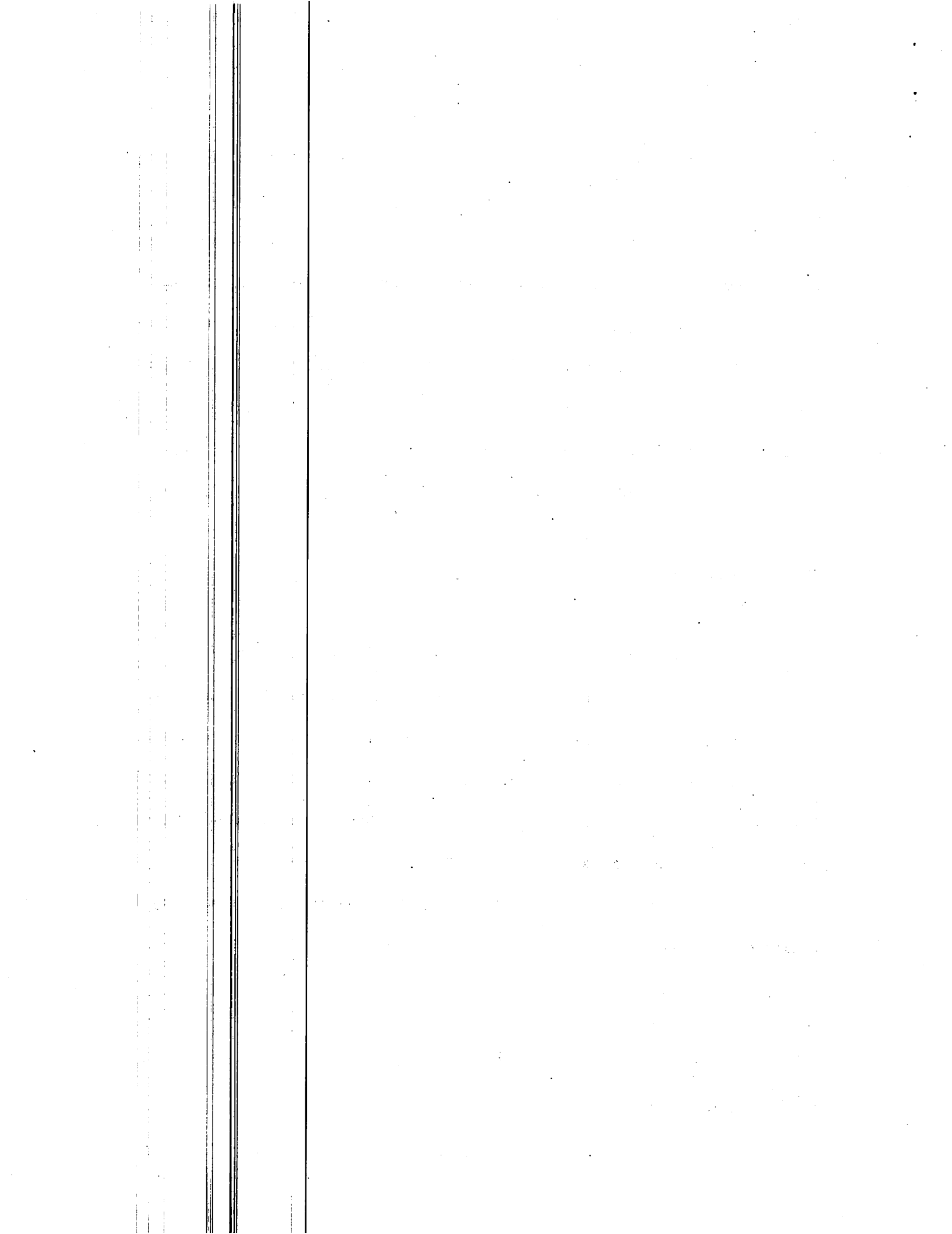
¹⁵ Bus. Reg. § 8-401.

¹⁶ Bus. Reg §§ 8-405(g), 8-408(b)(1) (2015 & Supp. 2022).

¹⁷ *Id.* § 8-405(f)(2) (Supp. 2022).

¹⁸ *Id.* §§ 8-405(c), 8-408(b)(3) (2015 & Supp. 2022).

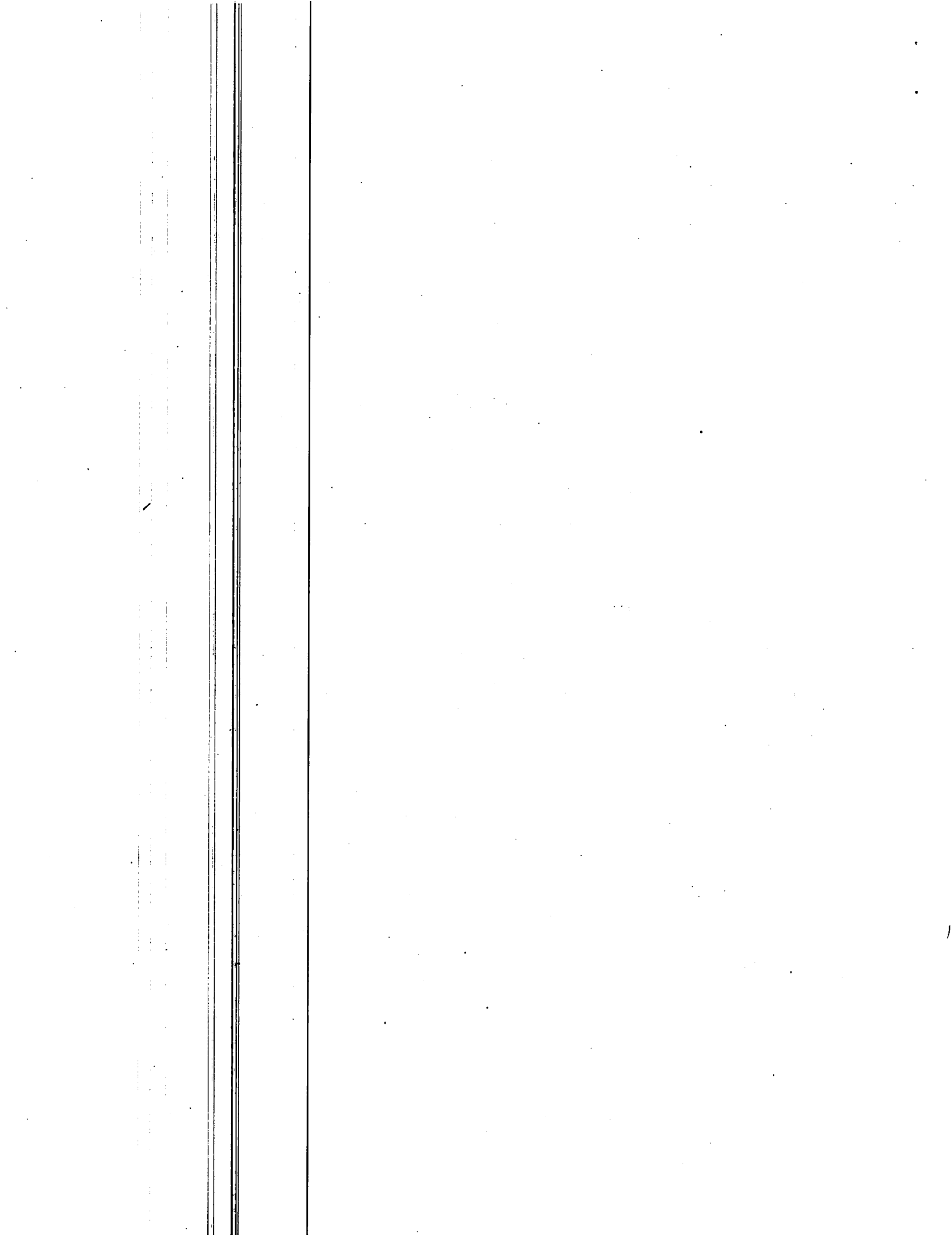
¹⁹ *Id.* § 8-405(f)(1) (Supp. 2022).



According to the Claimant, when the Respondent began the project, the driveway was to consist of two large squares of aggregate concrete bordered on all sides by the smooth darker grey borders. However, just before the Respondent was going to pour the aggregate concrete, he advised the Claimant that due to the configuration of the driveway and the porch, the two large squares would not work. Accordingly, the Respondent altered the design, placing the borders diagonally and adding an additional border at the base of the driveway. When installing two of the borders between the aggregate concrete, the Respondent used local polymerized grey cement with a binding agent, which was darker than the aggregate concrete.

The Claimant further testified that the Respondent advised him that he would achieve a similar darker grey color on the rest of the driveway and patio borders and the steps using a tinted sealant. However, when the Respondent applied the sealant, it ran down the steps, puddled, and appeared generally unworkmanlike. According to the Claimant, the Respondent also thought the sealant was messy and unworkmanlike as the Respondent knocked on the door and advised the Claimant that it looked pretty bad. The Claimant testified that the Respondent suggested that the borders and the steps would look better after the sealant had time to cure.

According to the Claimant, he and Ms. Williamson remained dissatisfied with the appearance of the borders and the steps and asked the Respondent to fix the problem. The Respondent offered to remove the sealant from the steps and the borders and to install an overlay that would achieve the desired effect, and advised the Claimant that he would charge \$1,500.00 for this work. Although the Claimant did not believe he and Ms. Williamson should have to pay the Respondent any additional money to remedy what they felt was sloppy work, the Claimant testified that they agreed to pay the \$1,500.00 because the driveway borders and steps were unacceptable in its then-current state.

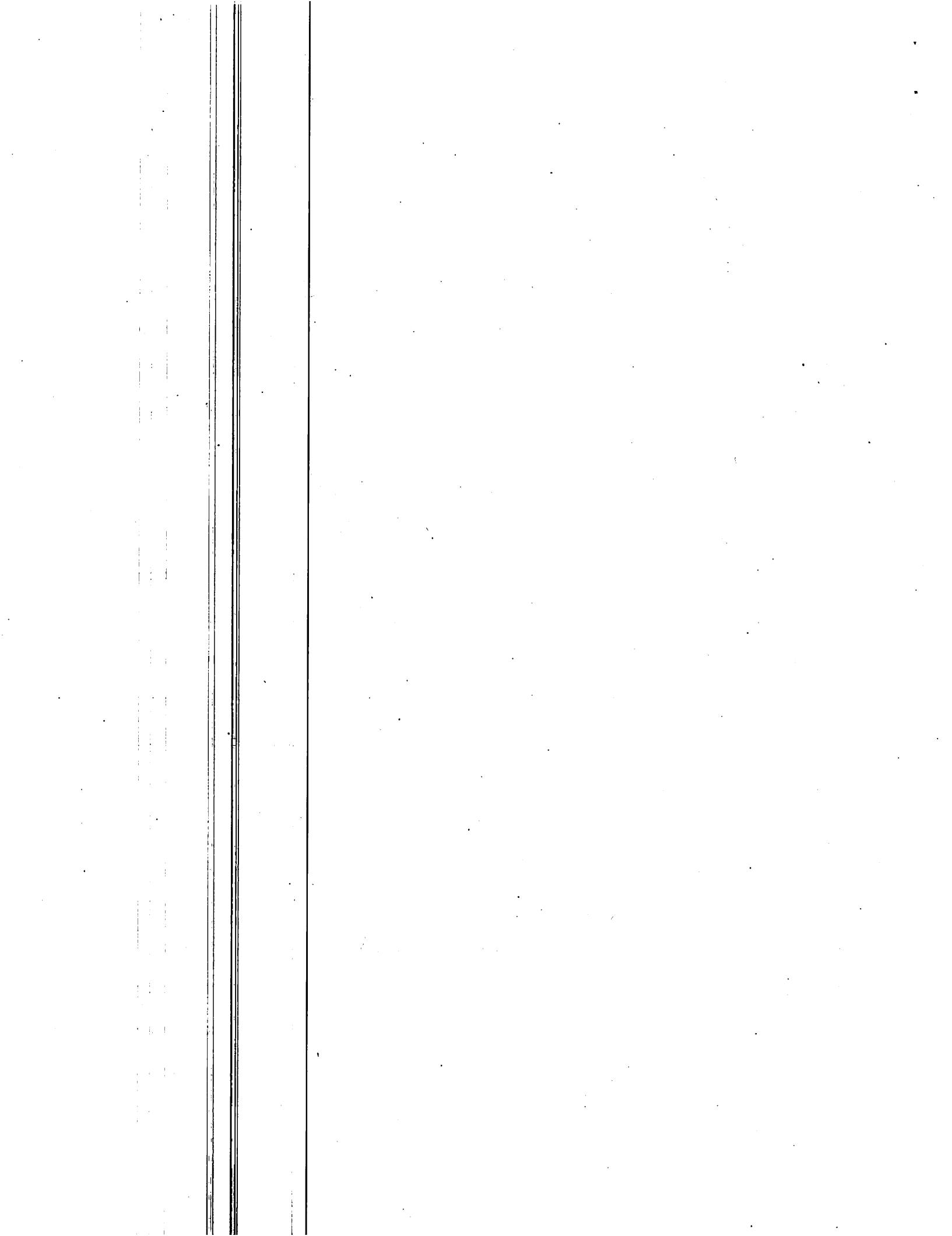


The Claimant submitted into evidence the Second Overlay Contract for \$1,500.00, signed by Ms. Williamson on August 12, 2020, which states that the Respondent would remove the sealant from the borders and steps and install an Ardex or Butterfield blend overlay in those areas. After Ms. Williamson signed that contract and before the Respondent performed the work in the Second Overlay Contract, the Claimant testified that he and Ms. Williamson attempted to ensure that the Respondent would install an overlay that was dark grey. To that end, the Claimant submitted text messages between Ms. Williamson and the Respondent in which Ms. Williamson requested that the Respondent use the polymerized cement with the binding agent the Respondent initially applied to the first two bands of the driveway borders.

The Claimant also submitted text messages between the Respondent and the Claimant between August 20 and September 22, 2020, in which the Claimant advised the Respondent that he had selected the "pewter" color of the Butterfield overlay. According to the Claimant, the Respondent did not confirm the color of overlay he planned to use, and simply responded on September 20, 2020, that he had the Claimant "scheduled for Friday for the Butterfield overlay."

According to the Claimant, on or about September 25, 2020, the Respondent applied the overlay on the borders and steps; however, the overlay the Respondent installed was not pewter-colored or dark grey, like the initial polymerized grey cement borders. Rather, the borders and the sidewalk were closer to white. Furthermore, some of the overlay was installed in a manner that left portions of the borders uncovered.

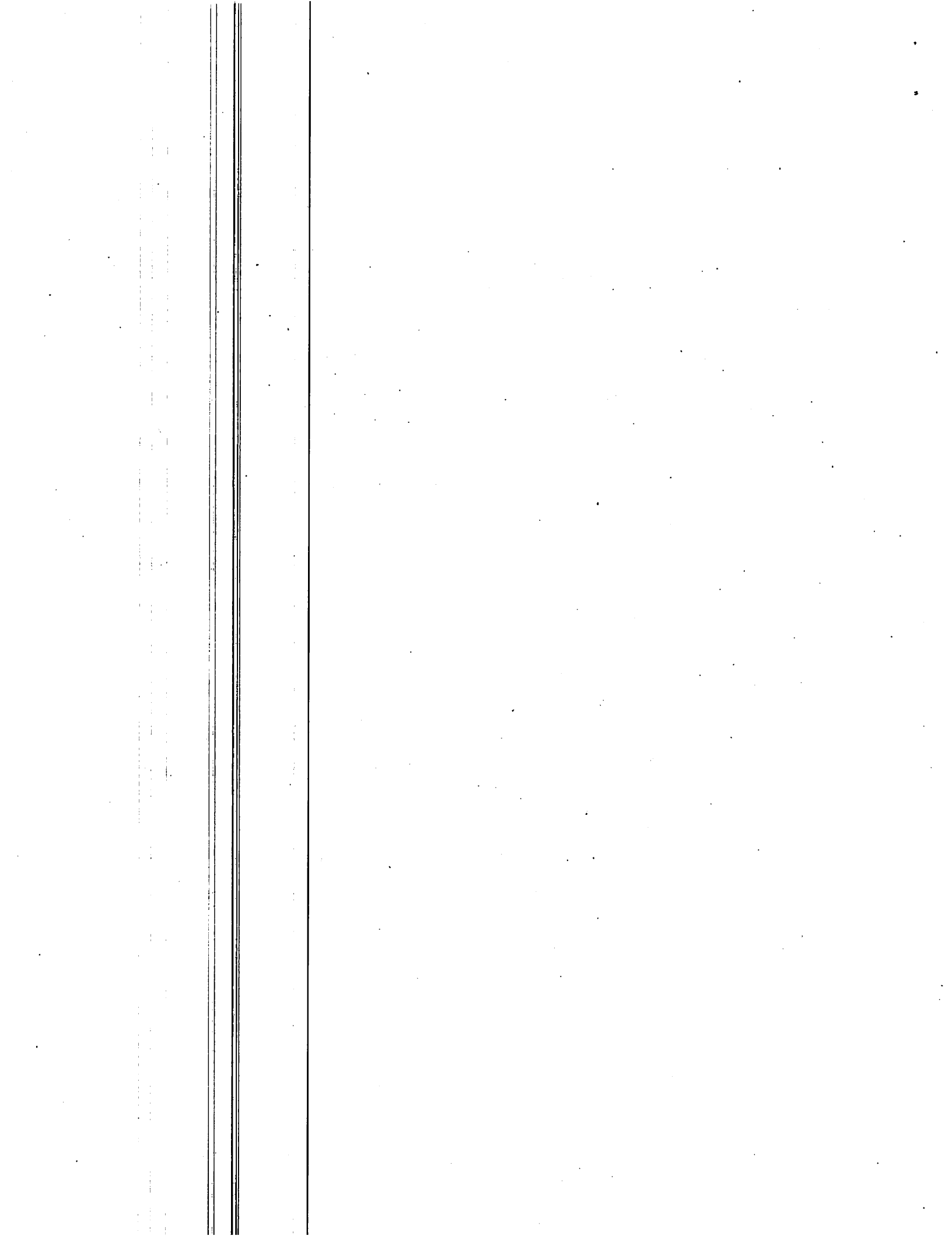
The Claimant testified that he and Ms. Williamson each contacted the Respondent by email and expressed their dissatisfaction with the overlay. The Claimant submitted into evidence the Respondent's replies to their emails. In his reply to Ms. Williamson, the Respondent advised that he used the same polymerized grey cement he used when he installed the initial two borders



in the driveway. The Respondent further stated that the color of cement products varies from batch to batch, and Ms. Williamson should lower her expectations on having an exact match to the dark grey borders.

In his reply to the Claimant, the Respondent pointed out that Ms. Williamson told him to use the polymerized grey cement he used on the initial driveway borders, which he did. The Respondent offered the Claimant a discount on the cost of installing the overlay from \$1,500.00 to \$1,000.00 to cover the cost of materials and labor and stated that he would file a lien on the property for any unpaid service. The Respondent further stated that he preferred not to work on the project any longer, that it was easy to stain the overlay he installed, and that he believed the Claimant was more than capable of staining the overlay himself.

The Claimant testified that he did not pay the Respondent the \$1,500.00 the Respondent charged in the Second Overlay Contract because the overlay he applied was white, not dark grey, as the Claimant and Ms. Williamson made clear to the Respondent from the beginning of the project was their preference. Furthermore, according to the Claimant, the white overlay quickly began to deteriorate, flake, chip, and wear away in various areas throughout the borders and the steps. As a result of the deteriorating borders and steps, the Claimant testified that he obtained estimates to make the repairs to the borders and steps, and apply an overlay meeting the Claimant's and Ms. Williamson's specifications, but those estimates were too high. Ultimately, the Claimant explained that he researched how to stain the overlay and stained it himself. Unfortunately, the overlay continue to chip and peel, leaving areas of the borders and the steps unsightly and prone to puddling.

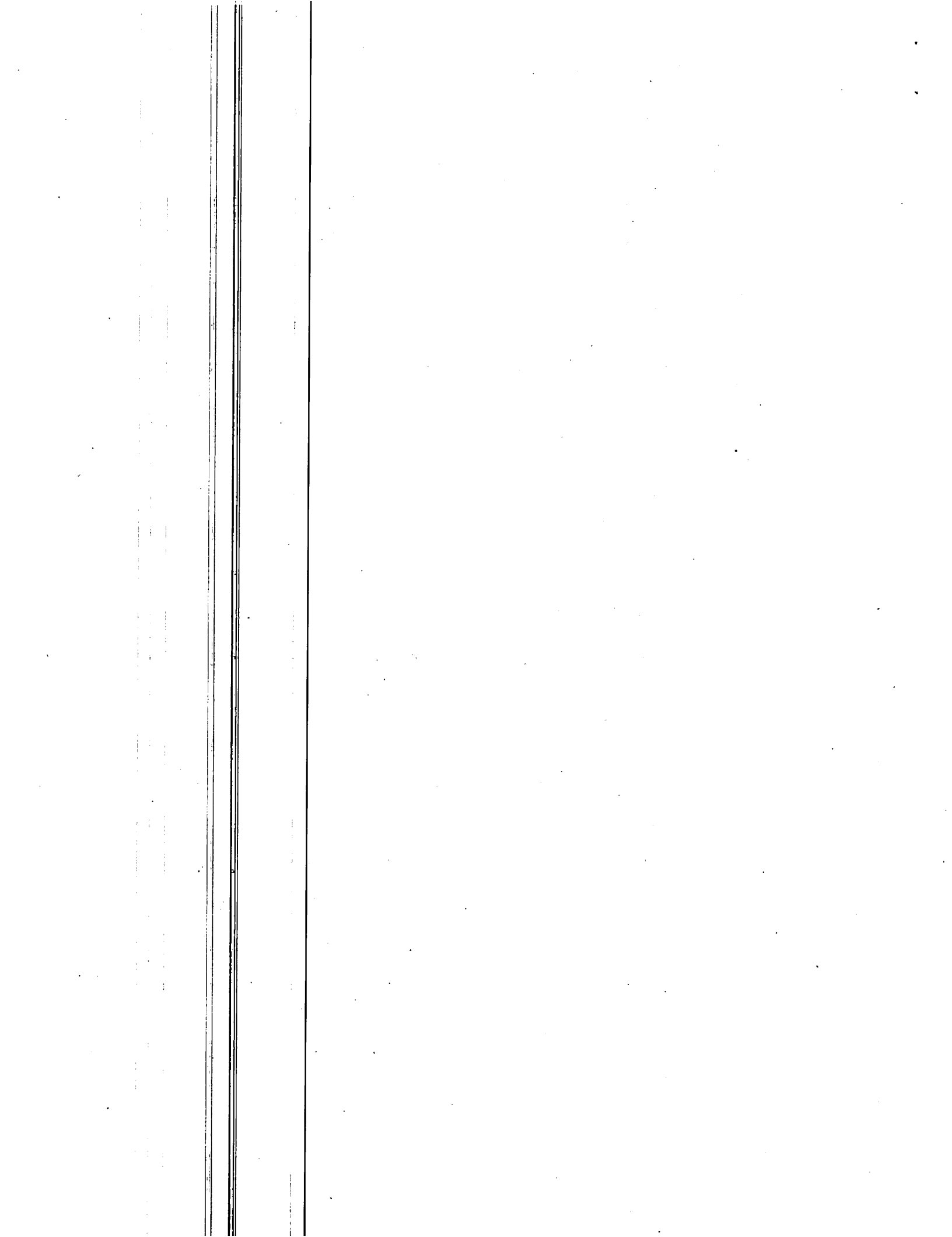


To demonstrate what it would cost to repair and replace the deteriorating steps and overlay, the Claimant submitted an estimate from licensed contractor Hyde Concrete. Hyde concrete estimated that it would cost \$7,000.00 to remove the existing overlay, repair the deterioration in the borders and steps, install a new overlay matching the Claimant's color choice, and apply a sealant to the overlay. Accordingly, the Claimant argues that he and Ms. Williamson experienced a loss of \$7,000.00 as a result of the Respondent's unworkmanlike application of the overlay.

The Respondent

The Respondent concedes that he had to stray from the original design of the driveway because the configuration and placement of the space made it impossible to provide the Claimant and Ms. Williamson with the design they originally requested. However, the Respondent testified that he made every effort to alter the design in a manner that was agreeable to them. To that end, the Respondent testified that to appease them, he added borders to the design that were not contemplated in the Contract without charge for the additional work. The Respondent testified, however, that the Claimant never presented him with photographs depicting his and Ms. Williamson's desired result for the driveway, steps and patio.

The Respondent also concedes that after he installed the borders and the steps, he advised the Claimant that he would apply a solvent-based sealant, which would darken the borders and steps. However, about halfway through the application of the sealant, he noticed that the aggregate areas of concrete where he applied the sealant were mottled, so he advised the Claimant of what he observed. According to the Respondent, he did not tell the Claimant he thought the sealant looked bad and the borders were not mottled.

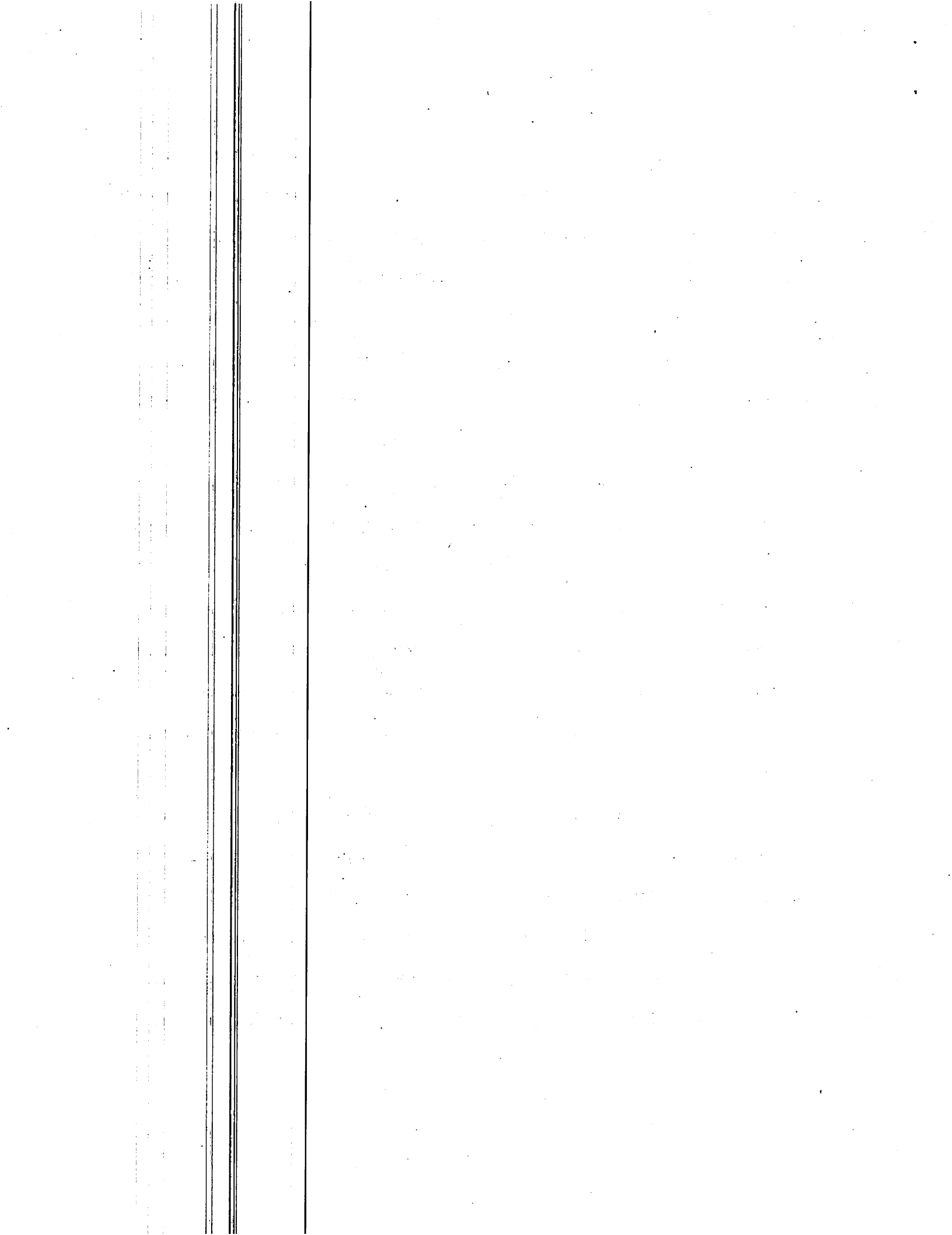


Similar to the Claimant's testimony, the Respondent testified that the Claimant was not satisfied with the appearance of the driveway and steps, so the Respondent offered to remove the sealant and apply a new overlay to the borders and steps for an additional \$1,500.00. According to the Respondent, Ms. Williamson requested that instead of Butterfield overlay, she requested that the Respondent apply the same polymerized grey cement he used for the initial driveway borders as the overlay for the borders and the steps, which is what he did. The Respondent conceded that the new polymerized grey cement overlay he applied was lighter than the overlay he applied to the original borders, but the completed driveway was beautiful.

Furthermore, the Respondent testified that once the Claimant and Ms. Williamson advised him that they wanted to replace the borders and the steps, he gave them the first overlay Contract for \$3,300.00, which stated that he would install a Butterfield T1000 overlay with "smoke" pigment to the borders and steps; however, Ms. Williamson decided she wanted the Respondent to install the polymerized grey cement he used on the original borders to the rest of the borders and steps. Therefore, he reduced the price for the installation of the overlay from \$3,800.00 to \$1,500.00 because although the polymerized cement was grey, it did not have any added color.

The Respondent argued that the Claimant and Ms. Williamson were overly critical of the outcome and he did not believe it was possible to make them happy; therefore, he decided not to complete any additional work on the project.

The Respondent also testified that when the Claimant stained the borders and steps, he used acid-based stain, which is highly corrosive. The Respondent surmised that the corrosive nature of the acid-based stain may have caused the chipping, flaking and deterioration of the



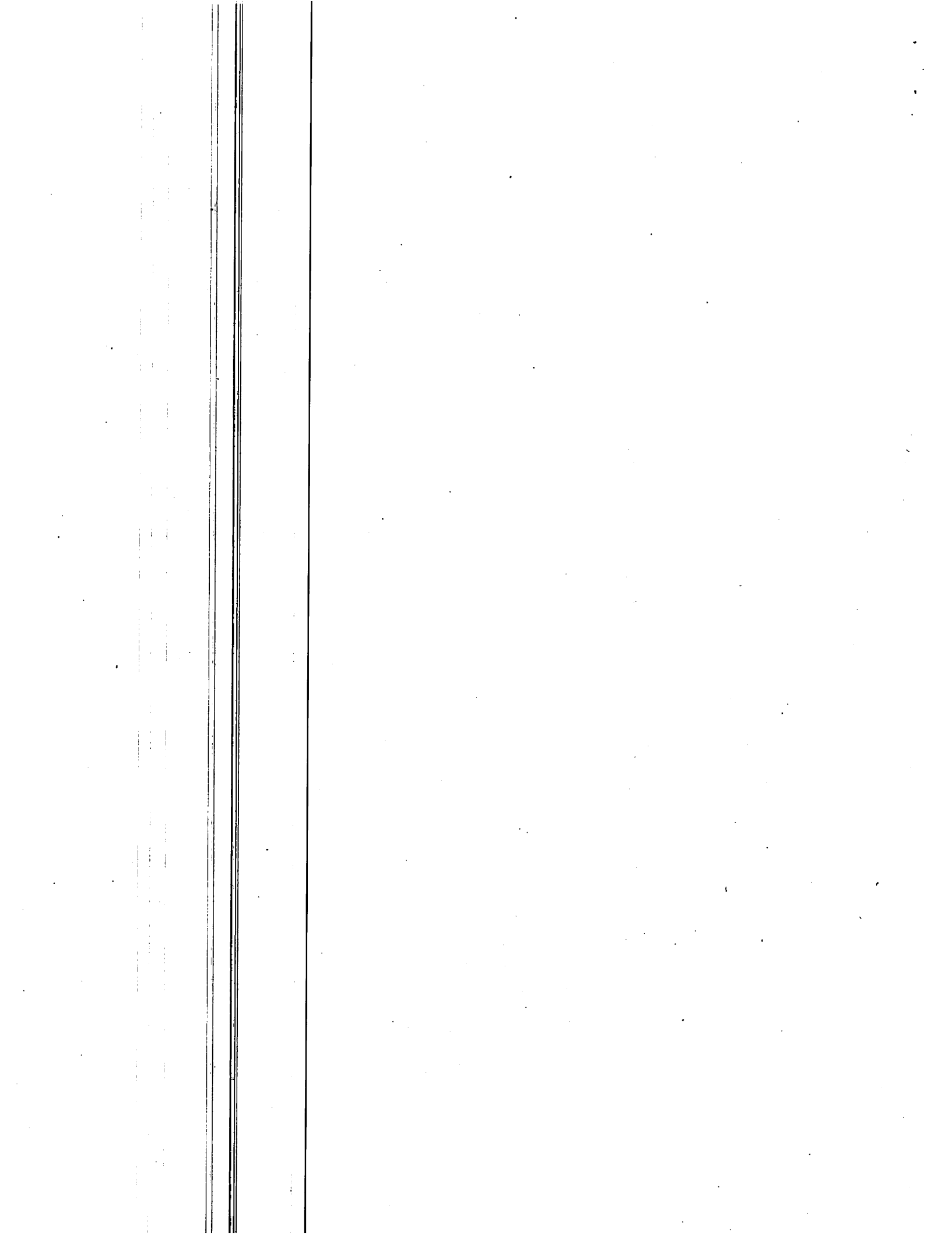
borders and the steps the Claimant complains of. The Respondent testified that the Claimant should have used an eco-stain or a solvent-based stain instead of the acidic stain.

Analysis

For the following reasons, I conclude that the Claimant has proven that he experienced an actual loss as a result of the acts or omissions of the Respondent.

I find the Claimant credible that from the inception of the project, he and Ms. Williamson made clear that they wanted the Respondent to install a driveway and patio with grey aggregate squares surrounded by smooth, darker grey borders. The Claimant submitted photos into evidence both he and Ms. Williamson testified they provided to the Respondent. I find it wholly reasonable that the Claimant and Ms. Williamson would provide the Respondent with photos depicting how they wished their driveway to appear, as the design was stylized and not a typical concrete or asphalt driveway. Therefore, I do not find the Respondent's testimony credible that neither the Claimant nor his wife ever provided him with a photograph of how they wished the driveway and steps to appear.

Furthermore, I conclude that the Respondent failed to adequately communicate with the Claimant and Ms. Williamson. The Claimant submitted evidence that on July 30, 2020, in response to a text message the Respondent sent to the Claimant before he removed the sealant and installed new overlay, Ms. Williamson requested that the Respondent install the polymerized grey cement the Respondent originally installed on two borders in the driveway. My review of the text messages between the Respondent and Ms. Williamson indicates that prior to Ms. Williamson's request that the Respondent install the polymerized grey cement, the Respondent informed Ms. Williamson that the Butterfield overlay was in short supply; accordingly, Ms. Williamson asked the Respondent to use the polymerized grey cement to ensure that that the



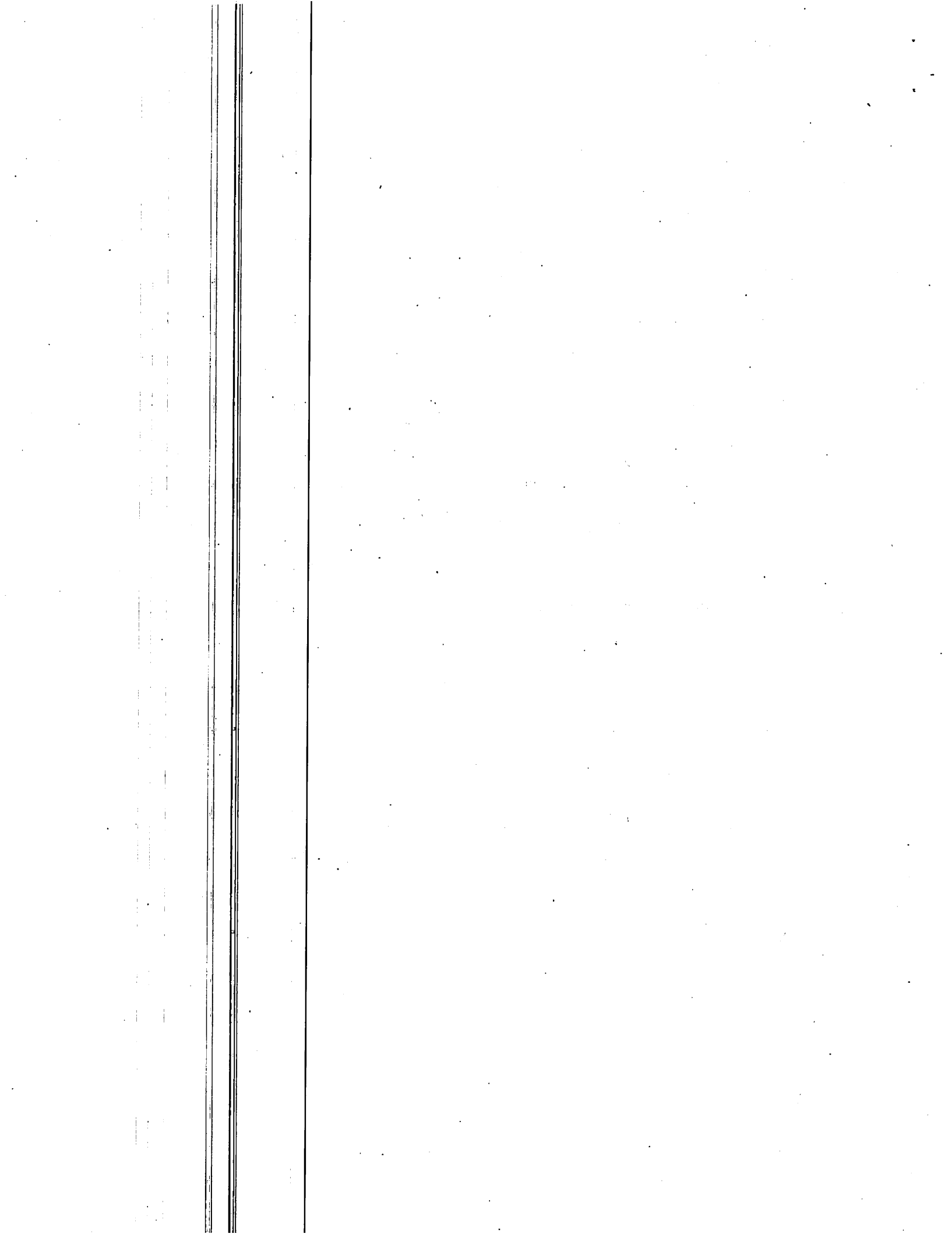
borders and steps would appear darker grey in color like the original diagonal borders the Respondent installed at the beginning of the project.

According to the Second Overlay Contract, dated August 12, 2020, the Respondent agreed to remove the mottled sealant and install an “Ardex/Butterfield blend over all borders and steps.”²⁰ The Claimant submitted evidence that he advised the Respondent by an August 20, 2020 text message that he had selected the pewter color of the Butterfield T1000 overlay for the borders and the steps. The Claimant then sent a text to the Respondent on September 17, 2020 asking the Respondent to confirm that the Respondent intended to apply the Butterfield overlay as stated in the Second Overlay Contract. The only response the Respondent provided to the Claimant was in a September 22, 2020 text in which the Respondent stated: “Have you scheduled for Friday for the Butterfield overlay.”²¹ Accordingly, I conclude that it was reasonable for the Claimant to conclude that the Respondent would apply the Butterfield T1000 overlay using the pewter color.

The text messages between the Respondent and the Claimant and the Respondent and Ms. Williamson are somewhat confusing in that the Claimant requested pewter Butterfield overlay and Ms. Williamson requested that the Respondent apply the same polymerized grey cement he used on the original two driveway borders. What is not confusing is that both the Claimant and the Respondent made it abundantly clear that they wanted the borders and the steps to be a darker color grey than the aggregate driveway. My review of the photographs the Claimant submitted of the final project depict borders and steps that are closer to white than grey, and are certainly a lighter shade than the aggregate concrete portions of the driveway. The Respondent had ample opportunity to advise the Claimant that he did not intend to apply the

²⁰ CL Ex. 6.

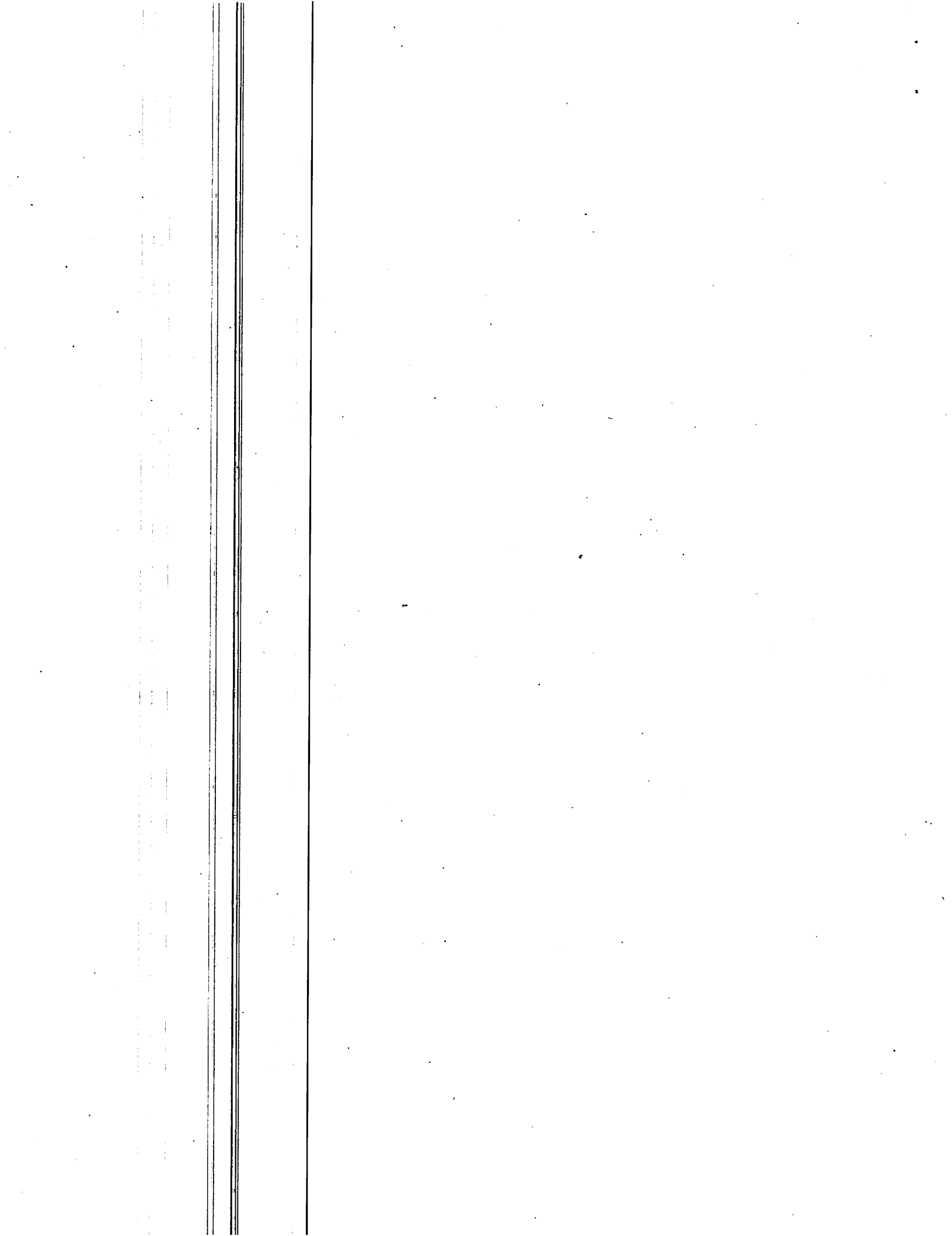
²¹ CL Ex. 8.



pewter Butterfield overlay as the Claimant clearly believed he would according to his text message. The Respondent also had ample opportunity to advise Ms. Williamson that the polymerized grey cement varies from batch to batch, and thus, the overlay might be lighter than the original borders he installed at the beginning of the project. The Respondent did not make such disclosures despite the Claimant's and Ms. Williamson's patent dissatisfaction with the light appearance of the borders and the steps. As the Respondent was the sole party to the contracts with expertise in concrete construction, I conclude that the Claimant and Ms. Williamson reasonably relied on his knowledge and representations to conclude that the Respondent would apply a dark grey overlay as they requested.

The Claimant testified that it was too expensive for him to hire another contractor to stain the border overlay and steps to the appropriate color; therefore he conducted research on how to stain the overlay and stained them himself, as the Respondent advised him to do in his late September 2020 email to the Claimant. Notwithstanding the Respondent's failure to construct borders and steps in dark grey as requested by the Claimant and Ms. Williamson, the sole basis of the Claimant's claim is that the overlay the Respondent installed began to chip, flake, and deteriorate beginning in January 2021. The Claimant submitted photographic evidence of this chipping, flaking, and deterioration and testified, without rebuttal, that these conditions arose before he stained the overlay in late spring 2021.

There is no dispute that the Respondent never sealed the overlay he applied to the borders and the steps in September 2020. Accordingly, it is reasonable to conclude that without such sealant, the overlay the Respondent installed would be exposed to the elements, making it vulnerable to deterioration. I give little weight to the Respondent's argument that the Claimant's use of acid-based stain on the borders and steps contributed to their deterioration. Although the



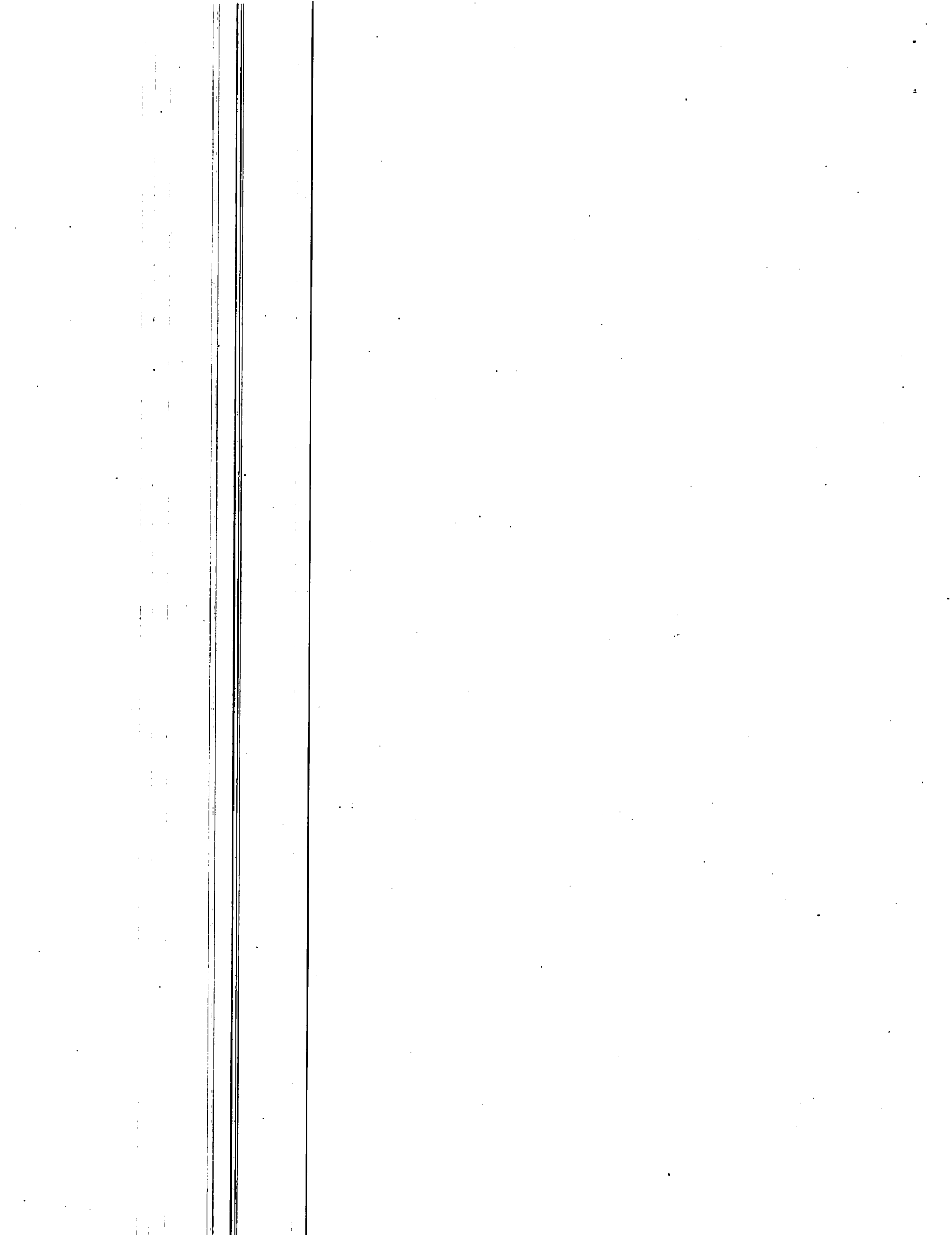
Respondent testified that it would have been preferable for the Claimant to use an eco-based or solvent-based stain rather than an acid-based stain, he offered no evidence to corroborate or support that testimony. As I have stated, the Respondent is the only party accepted as an expert in concrete construction. In his September 26, 2020 email to the Claimant, the Respondent advised the Claimant that “[t]he product is easily stained.²² I’m sure you are more than capable of staining it yourself.” The Respondent offered the Claimant no warning or advice that he should avoid acid-based stains. I find it inappropriate to hold the Claimant accountable for undertaking the very advice the expert Respondent gave him and staining the overlay himself.

Moreover, as the deterioration began before the Claimant applied the stain, I conclude that the preponderance of the evidence merits the conclusion that the origin of that deterioration predates the Claimant’s stain application. The Claimant submitted evidence in the form of an estimate from Hyde Concrete, that it would cost the Claimant \$7,000.00 to repair and replace the deteriorated overlay attributable to the Respondent’s faulty work. I received no evidence indicating that the \$7,000.00 Hyde Concrete proposed to repair and replace the overlay was unreasonably high. As this is an expense the Claimant would not have to pay if the Respondent had properly installed the overlay and sealant, I conclude that the Claimant has experienced an actual loss eligible for compensation by the MHIC 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.²³

²² The product to which the Respondent referred was the overlay he applied on the borders and stairs.

²³ Bus. Reg. § 8-405(e)(3) (Supp. 2022); 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.

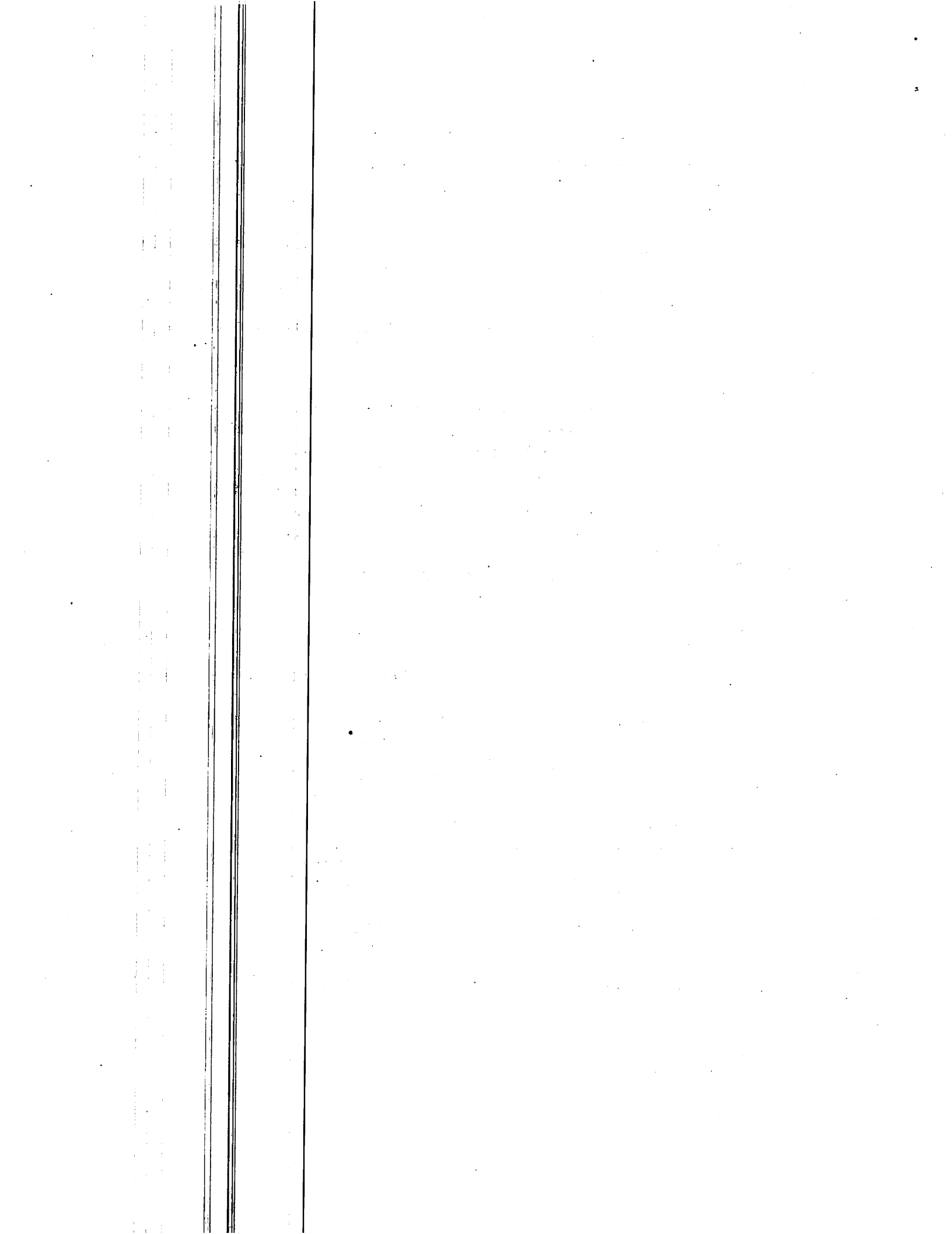
The Respondent performed some work under the Contract, and the Claimant obtained an estimate from Hyde Concrete of what it would cost to repair, replace, and seal the border the Respondent installed. Accordingly, the following formula appropriately measures the Claimant's actual loss:

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.²⁴

The Claimant paid the Respondent \$17,200.00. The reasonable cost the Claimant would have to pay to repair and replace the borders and steps is \$7,000.00. The total amount of the original contract plus the Second Overlay Contract was \$18,700.00. Accordingly the amount of the Claimant's actual loss is calculated as follows:

Amount paid to the Respondent:	\$17,200.00
Reasonable cost to repair and replace the Respondent's work	<u>+ \$ 7,000.00</u> \$24,200.00
Total amount of the Contract with the Respondent	<u>- \$18,700.00</u>
Claimant's actual loss	\$ 5,500.00

²⁴ COMAR 09.08.03.03B(3)(c).



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.²⁵ In this case, the Claimant's actual loss is less than the amount paid to the Respondent and less than \$30,000.00. Therefore, the Claimant is entitled to recover his actual loss of \$5,500.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$5,500.00 as a result of the Respondent's acts or omissions.²⁶ I further conclude that the Claimant is entitled to recover that amount from the Fund.²⁷

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$5,500.00; and

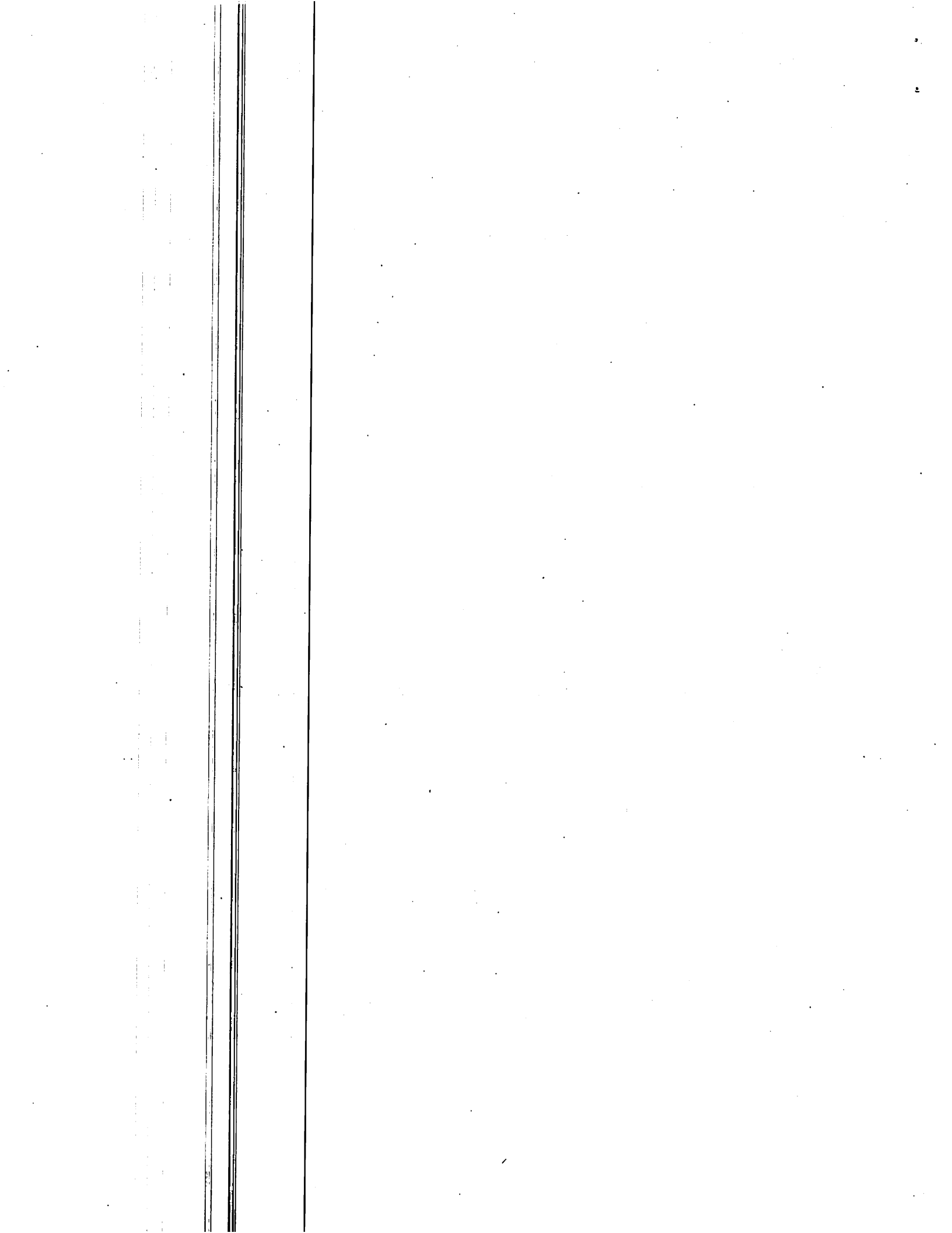
ORDER that the Respondent is ineligible for a Maryland Home Improvement Commission license until the Respondent reimburses the Guaranty Fund for all monies disbursed under this Order, plus annual interest of ten percent (10%) as set by the Maryland Home Improvement Commission,²⁸ and

²⁵ Bus. Reg. § 8-405(e)(1), (5) (Supp. 2022); COMAR 09.08.03.03B(4). 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").

²⁶ Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2022); COMAR 09.08.03.03B(3)(c).

²⁷ Bus. Reg. § 8-405(a) (Supp. 2022); COMAR 09.08.03.03B(2).

²⁸ See Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.



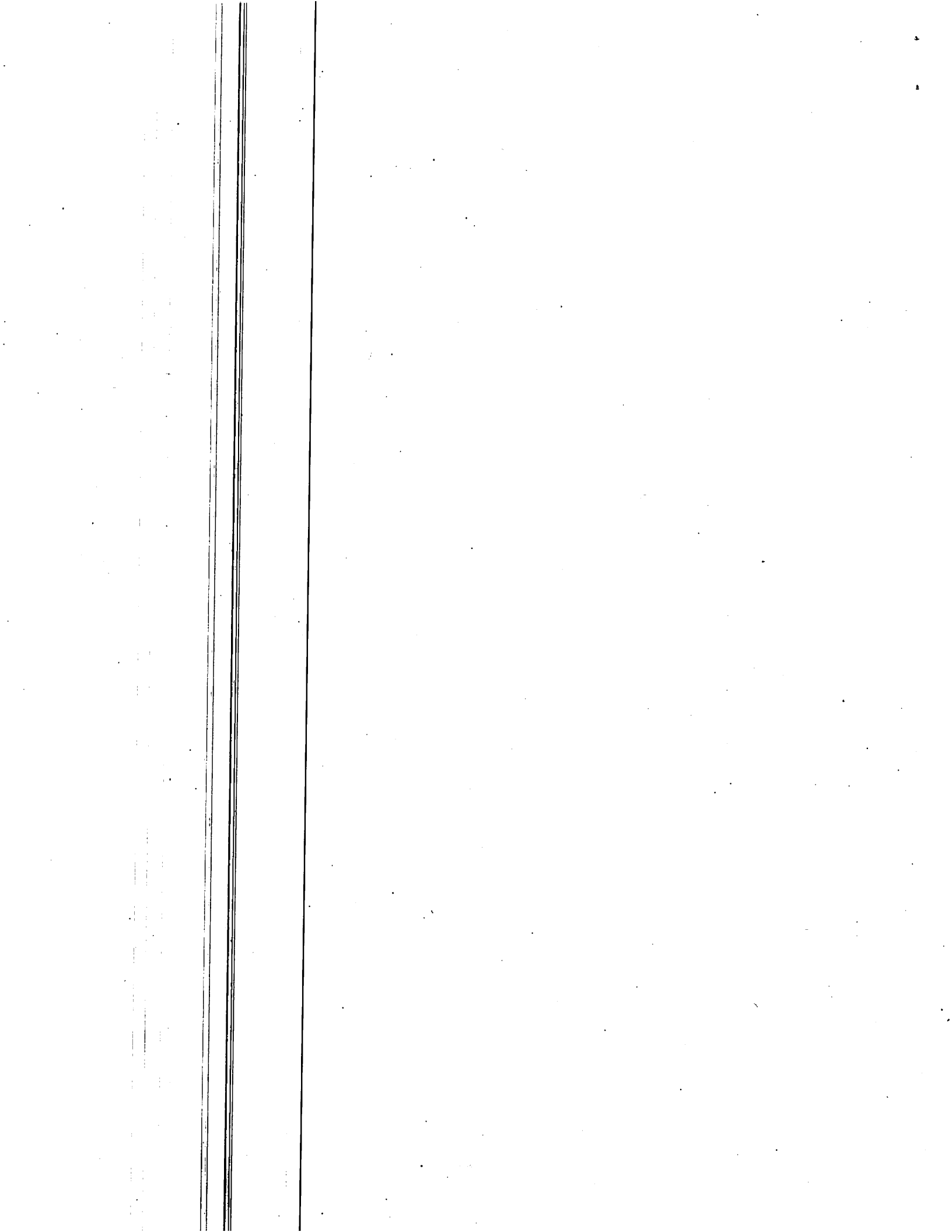
ORDER that the records and publications of the Maryland Home Improvement Commission reflect this decision.

December 27, 2022
Date Decision Issued



Administrative Law Judge

JCI/cj
#202605



PROPOSED ORDER

WHEREFORE, this 14th 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.

Joseph Tunney

Joseph Tunney

Chairman

Panel B

***MARYLAND HOME IMPROVEMENT
COMMISSION***

