

<p>IN THE MATTER OF THE CLAIM</p> <p>OF SARAH JONES,</p> <p>CLAIMANT</p> <p>AGAINST THE MARYLAND HOME</p> <p>IMPROVEMENT GUARANTY FUND</p> <p>FOR THE ALLEGED ACTS OR</p> <p>OMISSIONS OF WILLIAM YOST,</p> <p>T/A W YOST CONTRACTING,</p> <p>RESPONDENT</p>	<p>* BEFORE MARY PEZZULLA,</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-02-22-01128</p> <p>* MHIC No.: 21 (75) 963</p>
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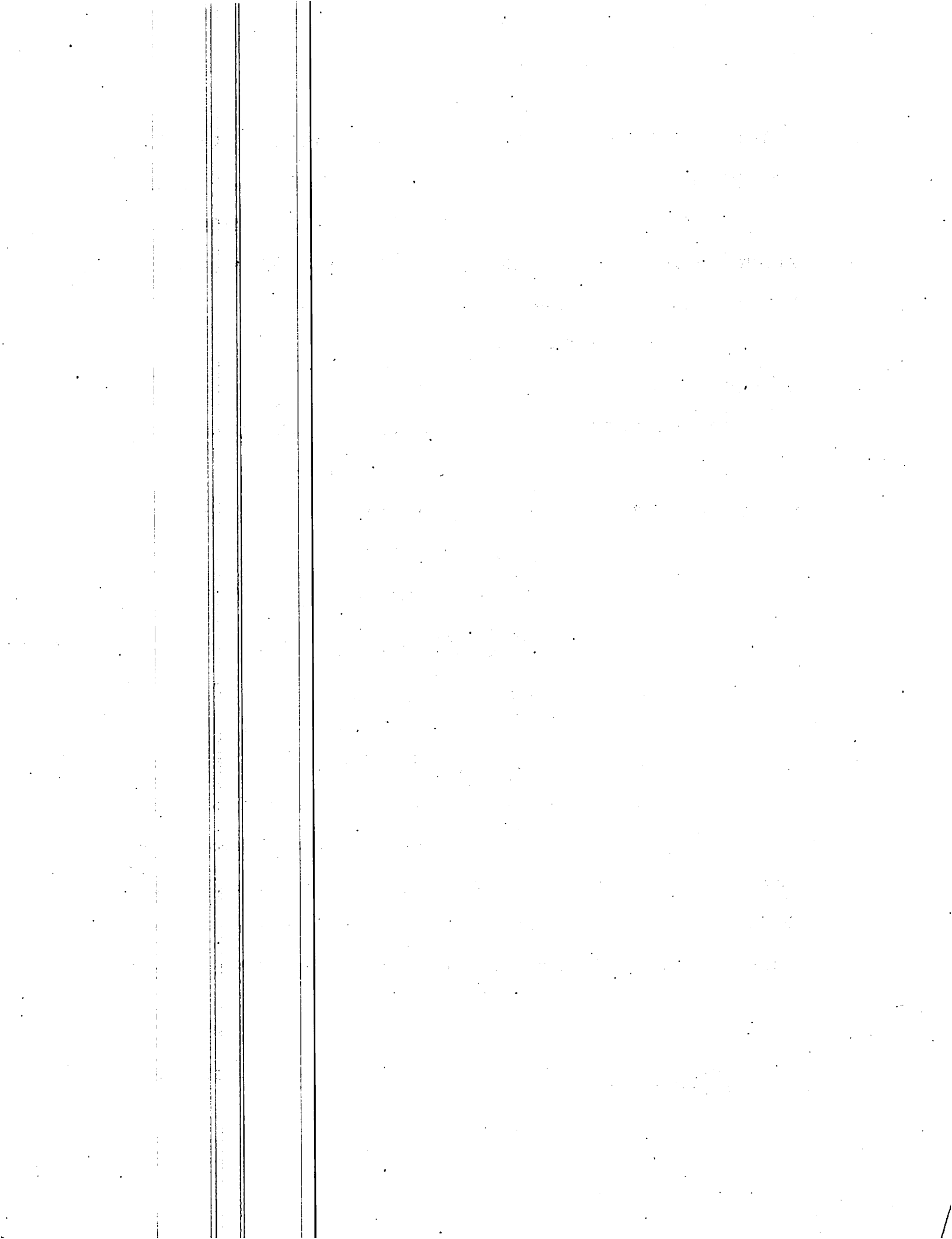
PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
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PROPOSED FINDINGS OF FACT
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STATEMENT OF THE CASE

On October 1, 2021, Sarah Jones (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 \$4,300.00 for actual losses allegedly suffered as a result of a home improvement contract with William Yost, trading as W Yost Contracting (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015).¹ On January 12,

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

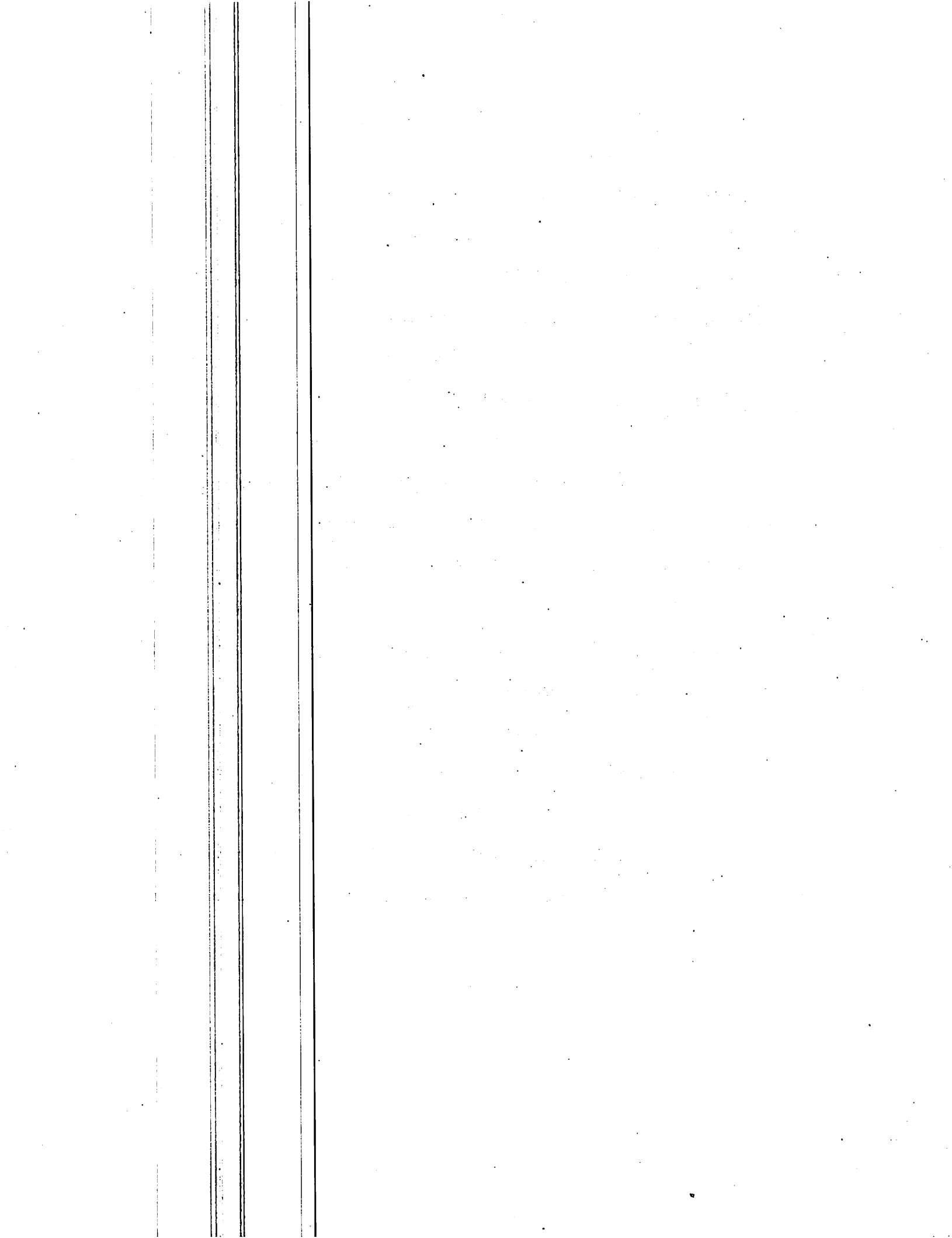


2022, the MHIC issued a Hearing Order on the Claim. On that same date, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On April 12, 2022, I held a remote hearing by video. Bus. Reg. §§ 8-407(a), 8-312; Code of Maryland Regulations (COMAR) 28.02.01.20B(1)(b). Hilary Baker, Assistant Attorney General, Department, represented the Fund. The Claimant represented herself.

After waiting fifteen minutes for the Respondent or the Respondent's representative to appear, I proceeded with the hearing. Applicable law permits me to proceed with a hearing in a party's absence if that party fails to attend after receiving proper notice. COMAR 28.02.01.23A. On February 1, 2022, the OAH provided a Notice of Remote Hearing (Notice) to the Respondent by regular United States mail, as well as certified mail to the Respondent's address on record with the OAH. COMAR 09.08.03.03A(2); COMAR 28.02.01.05C(1). The Notice stated that a hearing was scheduled for April 12, 2022, at 9:30 a.m., to be held remotely on the Webex videoconferencing platform. The Notice further advised the Respondent that failure to attend the hearing might result in "a decision against you."

The United States Postal Service did not return the Notice to the OAH. Additionally, the certified mail was not returned and the Domestic Return Receipt, or "green card" was returned to the OAH which indicated the certified mail had been delivered, although the card did not contain a signature. The Respondent did not notify the OAH of any change of mailing address. COMAR 28.02.01.03E. The Respondent made no request for postponement prior to the date of



the hearing. COMAR 28.02.01.16. I determined that the Respondent received proper notice, and I proceeded to hear the captioned matter.² COMAR 28.02.01.05A, C.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the OAH govern procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021); COMAR09.01.03; and COMAR 28.02.01.

ISSUES

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

SUMMARY OF THE EVIDENCE

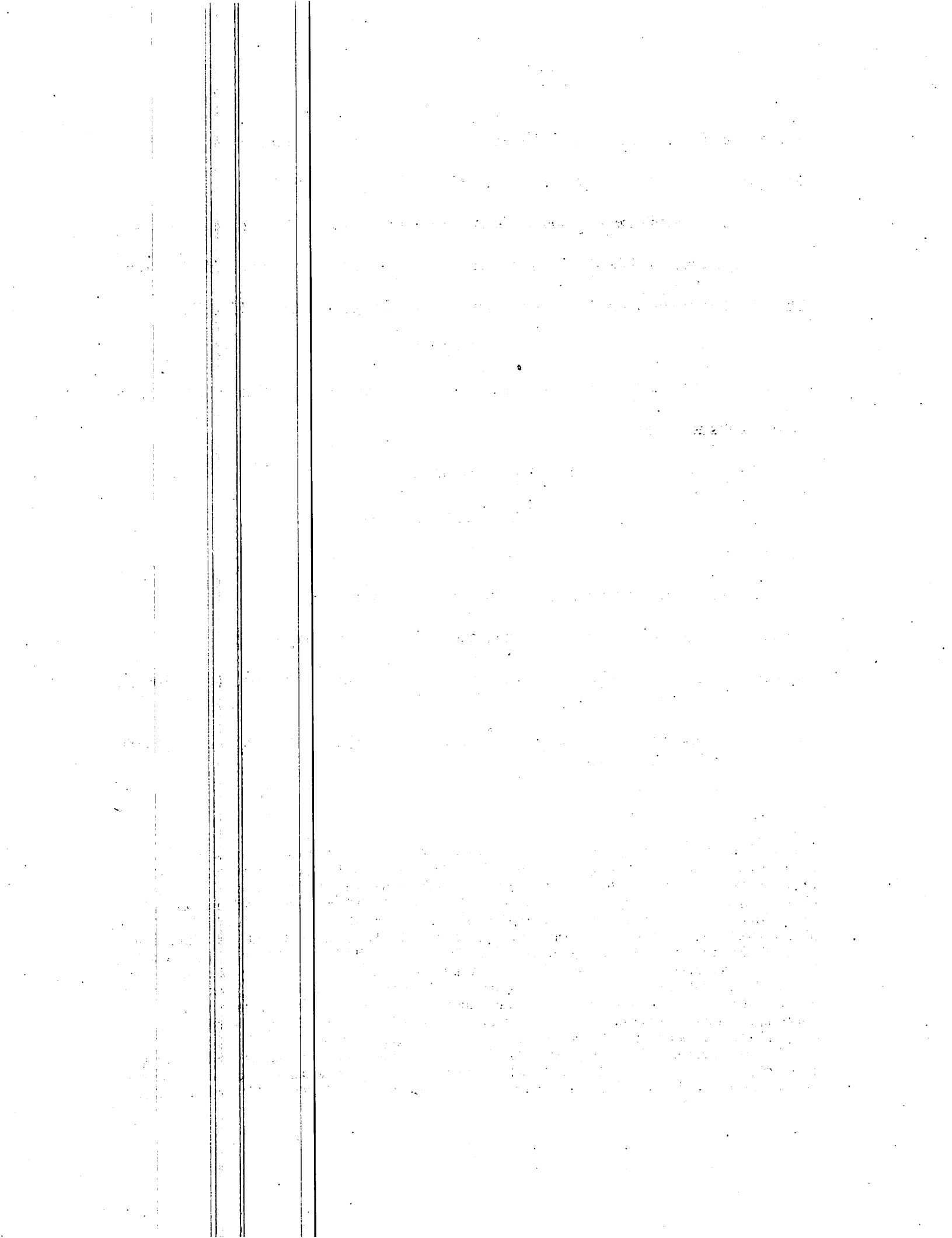
Exhibits

I admitted the following exhibits offered by the Claimant:

- Clmt. Ex. 1 - Contract between the Claimant and the Respondent, June 30, 2020
- Clmt. Ex. 2 - Check no. 1135 from the Claimant to the Respondent in the amount of \$2,100.00, June 20, 2020
- Clmt. Ex. 3- Check no. 1140 from the Claimant to the Respondent in the amount of \$2,200.00, October 31, 2020

² As a preliminary matter, I noted that one of the Claimant's proposed exhibits contained information that the Respondent had filed for bankruptcy. Under section 362(a) of the Bankruptcy Code, the "filing of a bankruptcy petition operates as an automatic stay of several categories of judicial and administrative proceedings." *Bd. of Governors of the Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 39 (1991) (footnote omitted); *see also U.S. Dep't of Hous. & Urban Dev. v. Cost Control Mktg. & Sales Mgmt. of Va.*, 64 F.3d 920, 927 (4th Cir. 1995) ("[The] filing of a bankruptcy petition ordinarily acts as a stay of pending judicial proceedings."). OAH has jurisdiction to decide whether to proceed with a hearing. *Sullivan v. Ins. Comm'r of Md.*, 291 Md. 277, 281 (1981) ("[A] court has jurisdiction to determine the issue of its own jurisdiction to proceed."); *see also Gilchrist v. Gen. Elec. Cap. Corp.*, 262 F.3d 295, 303 (4th Cir. 2001). There is an exception to the automatic stay to "enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power." 11 U.S.C.A. § 362(b)(4) (2015 & Supp. 2021).

As the primary purpose of the laws governing the MHIC are to promote public safety and welfare by ensuring that contractors are licensed and perform workmanlike home improvements, I found this regulatory power exception applies and I proceeded with the hearing in this matter. *Safety-Kleen, Inc. v. Wyche*, 274 F.3d 846 (4th Cir. 2001).



- Clmt. Ex. 4 - Text message chain between the Claimant and the Respondent, various dates between June 28, 2020 and April 24, 2021
- Clmt. Ex. 5 - Respondent's Voluntary Petition for Individuals Filing for Bankruptcy, pages 1-4, 6, 8-9, 16, 29, and 33, February 25, 2021³
- Clmt. Ex. 6 - Complaint filed with the Better Business Bureau against the Respondent, April 1, 2021; Respondent's response, April 2, 2021
- Clmt. Ex. 7 - Email chain between the Claimant and the MHIC, June 16, 2021
- Clmt. Ex. 8 - Claimant's MHIC Complaint Form, April 26, 2021
- Clmt. Ex. 9 - Email chain between the Claimant and the MHIC, May 4, 2021
- Clmt. Ex. 10 - Email chain between the Claimant and the MHIC, April 21-22, 2021
- Clmt. Ex. 11 - Contract between the Claimant and Chesapeake Home Improvement Group., Inc. (Chesapeake), August 25, 2021
- Clmt. Ex. 12 - Check no. 1148 from the Claimant to Chesapeake in the amount of \$500.00, August 15, 2021; Check no. 1149 from the Claimant to Chesapeake in the amount of \$8,500.00, September 7, 2021; Check no. 1154 from the Claimant to Chesapeake in the amount of \$4,475.00, October 12, 2021
- Clmt. Ex. 13 - Letter from Chesapeake To whom it may concern, March 9, 2022
- Clmt. Ex. 14 - Thirteen photographs of the Claimant's yard and partially constructed deck, undated⁴

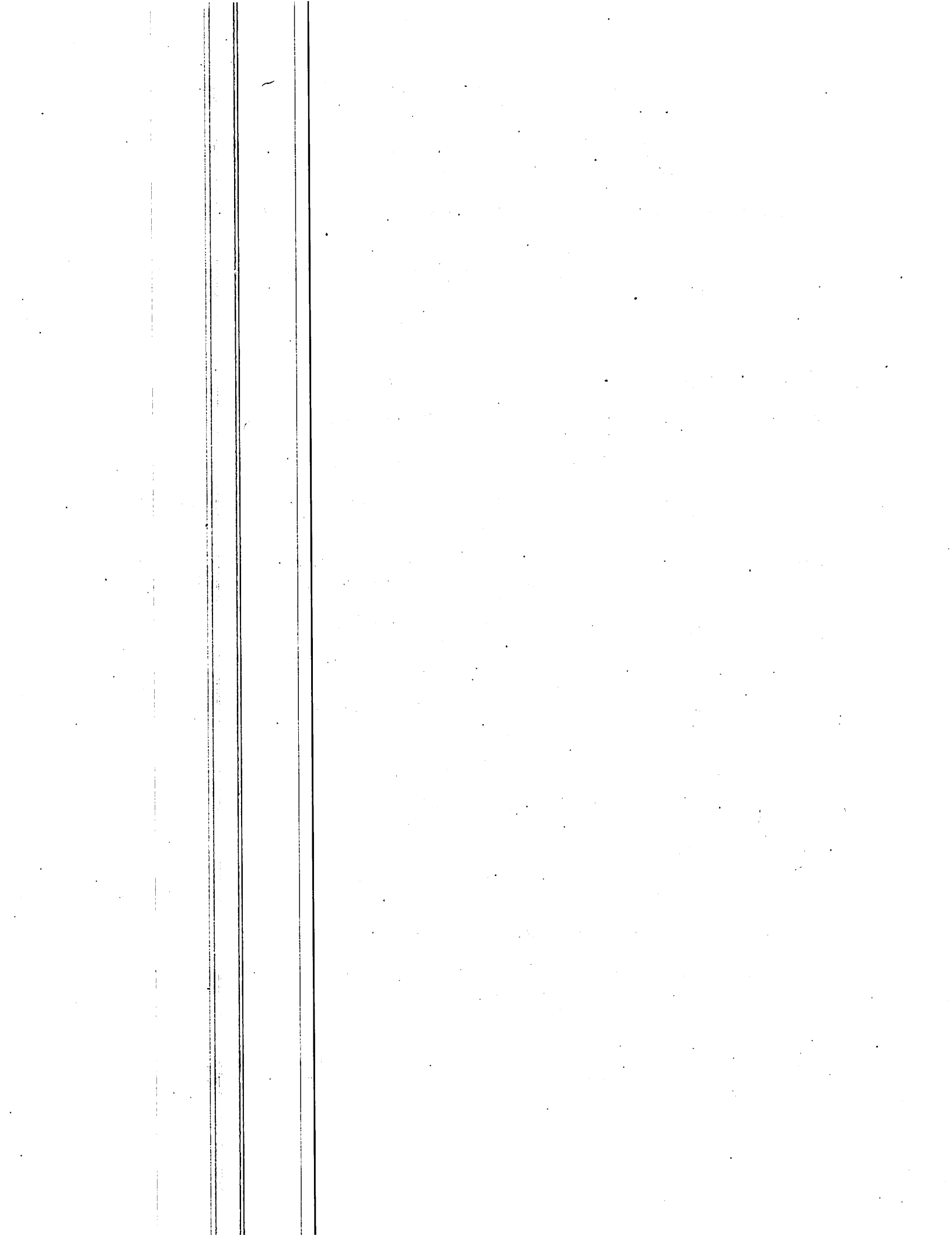
The Respondent did not appear and did not offer any exhibits.

I admitted the following exhibits offered by the Fund:

- Fund Ex. 1 - Notice of Remote Hearing, February 1, 2022
- Fund Ex. 2 - Hearing Order, January 12, 2022
- Fund Ex. 3 - MHIC Licensing information for the Respondent, March 24, 2022
- Fund Ex. 4 - Letter from the MHIC to the Respondent, November 5, 2021 with attached Home Improvement Claim Form, September 28, 2021

³ The Claimant did not provide an explanation as to why only certain pages of this document were included.

⁴ The Claimant testified that she took the first photograph on October 31, 2020 and the remainder of the photographs on April 13, 2021.



Testimony

The Claimant testified and did not present other witnesses.

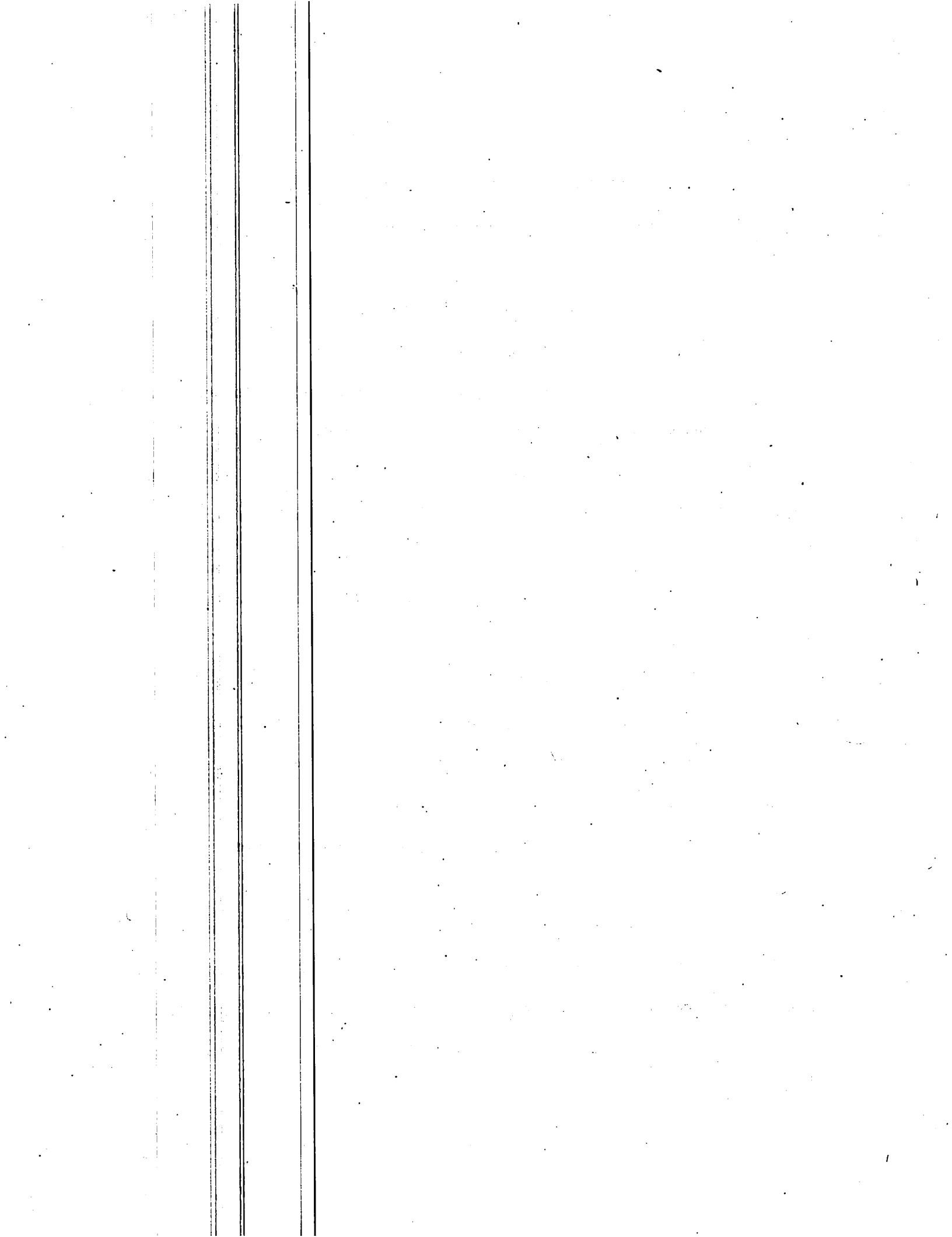
The Respondent did not appear or present any testimony.

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 numbers 0180972 and 5385669.
2. On June 30, 2020, the Claimant and the Respondent entered into a contract to construct a 16' x 20' deck at the Claimant's home in Cecil County, Maryland (Contract).
3. The original agreed-upon Contract price was \$6,400.00.
4. Upon signing the Contract on June 30, 2020, the Claimant paid an initial deposit to the Respondent in the amount of \$2,100.00.
5. The Contract stated that work would begin in September 2020.
6. The Respondent did not begin work on the deck until October 31, 2020.
7. On October 31, 2020, the Respondent dug holes for three footers and the Claimant paid the Respondent \$2,200.00.
8. The Respondent returned to the property on November 6, 2020 and poured concrete into each footer hole.
9. The Respondent did not return to the property to continue any work until April 13, 2021. Between November 2020 and April 2021, the Claimant attempted numerous times to contact the Respondent to ascertain when he would continue the project. The Respondent either did not respond to the Claimant's messages or stated that he would be back, but never showed.



10. On April 9, 2021, the Claimant requested that the Respondent refund to her the \$4,300.00 she had paid to him.

11. On April 13, 2021, the Respondent returned to the Claimant's home and performed some work on the deck, including removing water and mud from the footer holes, installing footer posts, and creating a frame box for the deck.

12. The Respondent told the Claimant he would have additional supplies delivered on April 14 or 15, 2021. No supplies were delivered.

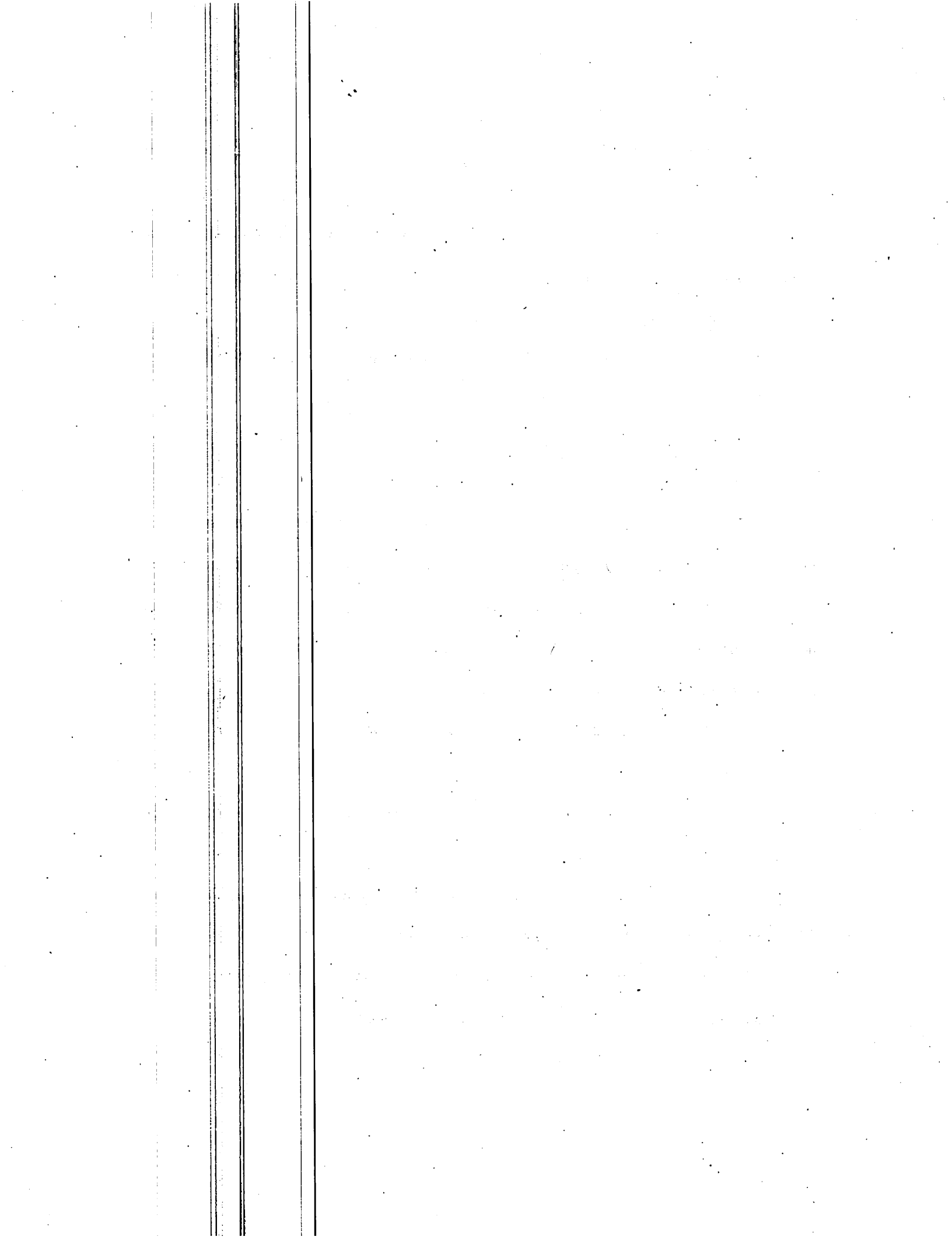
13. On April 16, 2021, the Claimant attempted to contact the Respondent, but received no response to her message.

14. On April 19, 2021, the Claimant again sent the Respondent a text message. He responded to this message, stating that he would refund the Claimant's money if he could, but he did not have it to refund. He suggested that the Claimant purchase the lumber directly and that he would complete the work. The Claimant indicated by text message that she was agreeable to this solution, but the Respondent did not reply.

15. On August 25, 2021, the Claimant contracted with Chesapeake to build a 16' x 20' deck on her property. The contract price was \$13,475.00.

16. Chesapeake was not able to use any of the work done by the Respondent and had to remove and reframe the "entire deck box, post beams & joist including proper fasteners." (Clmt. Ex. 13). Although the footers had already been dug, Chesapeake had to verify the depth of the footers, and had to dig next to each footer to confirm.

17. The Claimant is not an officer or employee of the Respondent, related to the Respondent, or related to an officer or employee of the Respondent.



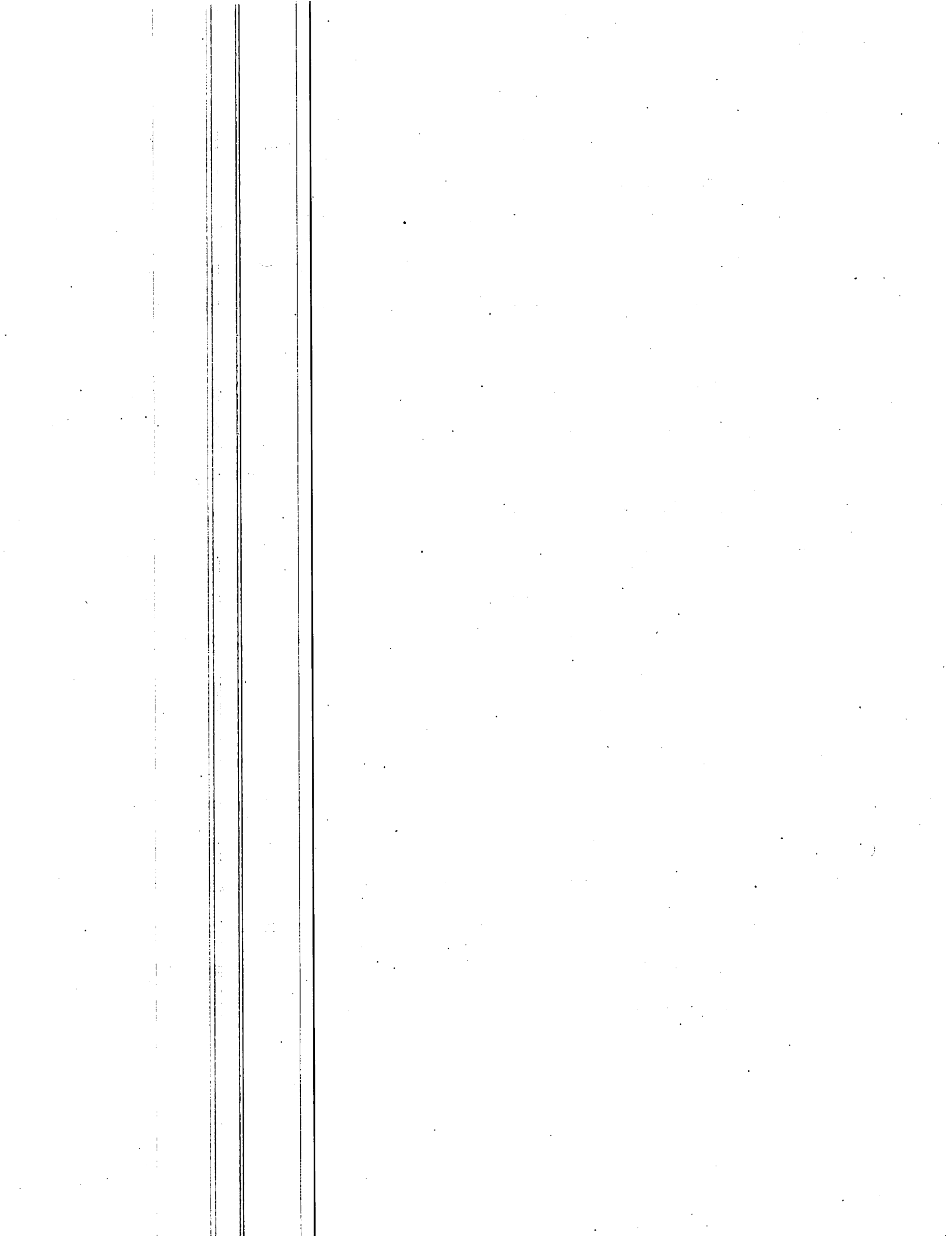
18. The Claimant has no other pending claims related to this matter and has not otherwise recovered for any losses connected to the Claim.

DISCUSSION

The Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Bus. Reg. § 8-407(e)(1); Md. Code Ann., State Gov't § 10-217 (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 Claimant has proven eligibility for compensation.

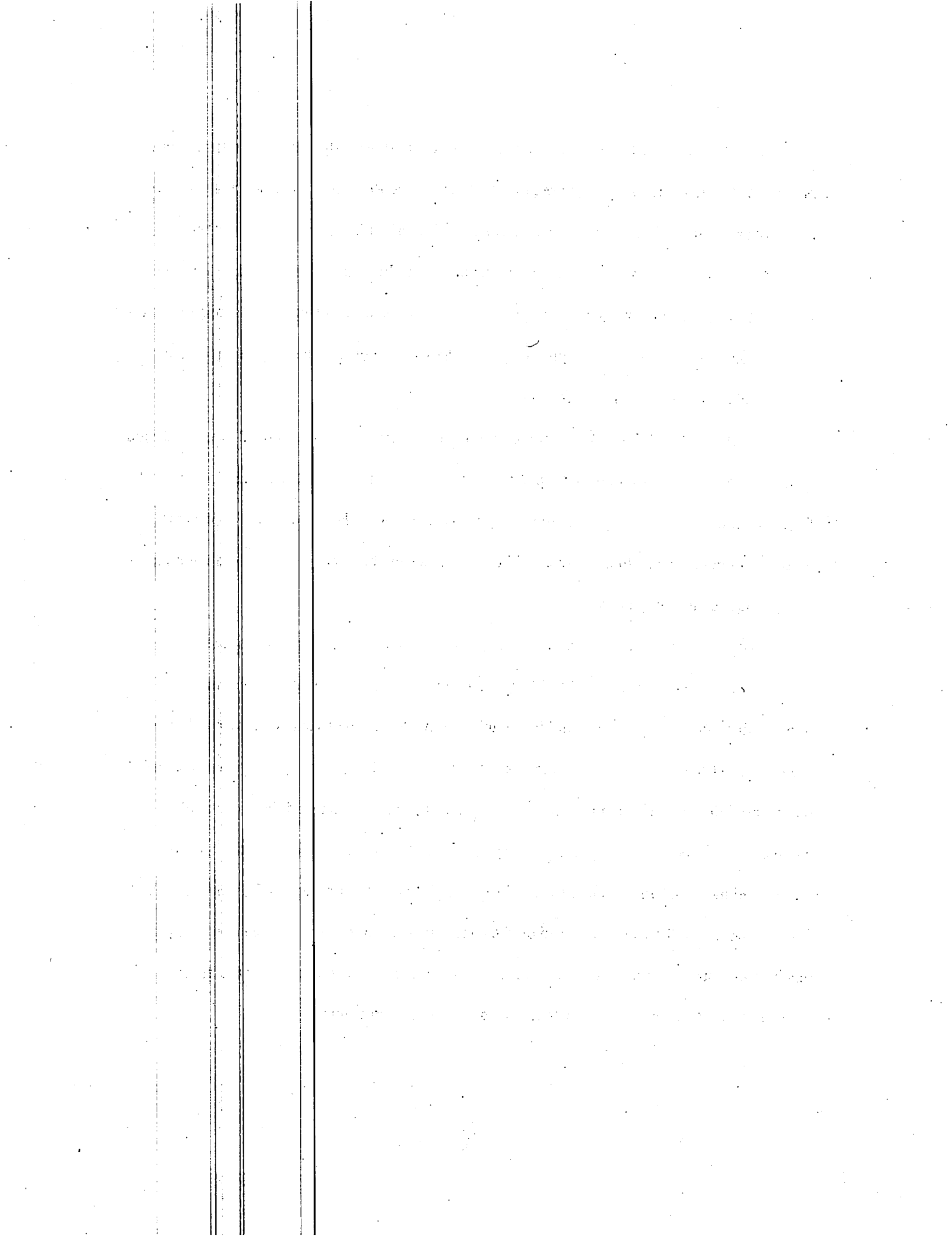
The Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimant. The Claimant presented uncontroverted testimony and evidence showing that the Respondent performed an incomplete and unworkmanlike home improvement on her home located in Cecil County, Maryland. The Claimant testified that she had delays with the Respondent from the beginning of the project, which was supposed to start in September of 2020, but, which did not begin until October 31, 2020. Per the Contract, the Claimant paid the Respondent an initial deposit of \$2,100.00 (Clmt. Ex. 2) and then \$2,200.00 (Clmt. Ex. 3) when he began work on October 31, 2020.



On October 31, 2020, the Respondent dug three footers for the deck. He returned on November 6, 2020 and poured concrete into each hole. The Respondent did not return to the property or do any additional work on the project until April 2021. Between November 2020 and April 2021, the Claimant contacted the Respondent multiple times to get updates on when he would return to finish the project. It was not until the Claimant requested the Respondent return her \$4,300.00 that the Respondent provided a date he would return to the property and then actually returned and performed additional work.

On April 13, 2021, the Respondent returned to the property. He removed water and mud from the footer holes, installed footer posts and created a box frame for the deck. The boards the Respondent used to complete the frame had gaps between them. He used screws, not carriage bolts to secure the beams to the posts, and he did not use any deck hangers to secure the boards to the header board, only nails.

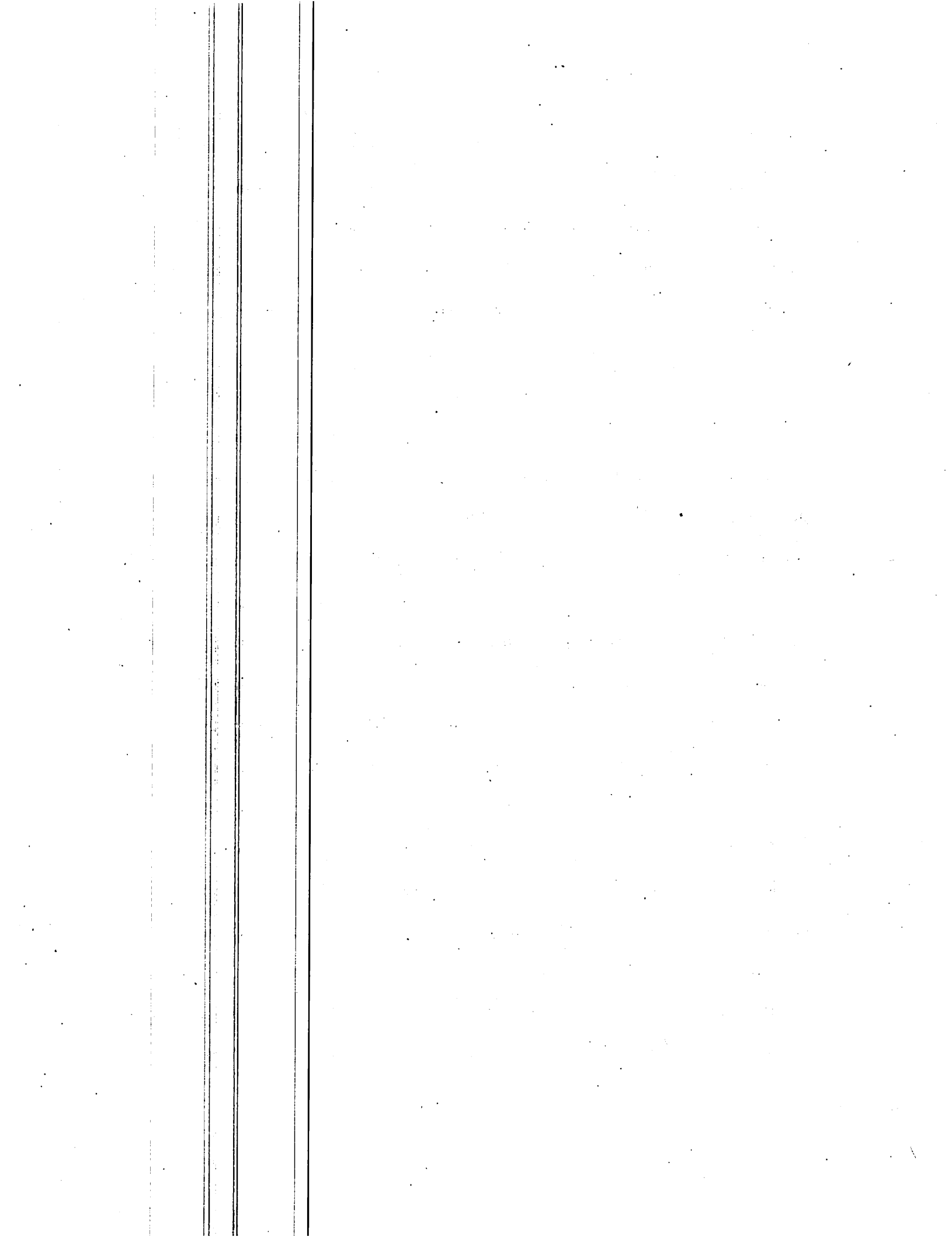
After April 13, 2021, the Respondent did not return to the property or provide any additional work on the project. The Claimant again reached out to the Respondent multiple times to find out when or if he would be completing the deck. The Respondent responded on April 19, 2021 that he would return the Claimant's money to her, but he did not have it. Instead, he proposed that the Claimant pay the supplier directly for the lumbar and then he would complete the project. The Respondent also alerted the Claimant to the fact that the price of lumbar had increased and he believed the cost of the lumbar would be approximately \$2,700.00, \$600.00 more than the Claimant owed on the contract. The Claimant was agreeable to paying this increase, but the Respondent never ordered the lumbar, never returned to complete any work, and never responded to the Claimant's attempts to contact him.



On August 25, 2021, the Claimant contracted with Chesapeake to install a 16' x 20' deck. The contract with Chesapeake included labor and materials, as well as any permits in order to have the deck reinspected. (Clmt. Ex. 11). Chesapeake was not able to use the frame that the Respondent had built and had to remove the framing and reframe the deck, post beams, and joist. (Clmt. Ex. 13). Chesapeake was able to use the existing footers, but still had to dig next to them in order to verify the footers were at the proper depth.

The Claimant's testimony shows that while she was frustrated with the slow and inconsistent progress the Respondent made on her deck project, she provided him ample opportunities to complete the project. Her testimony was clear that she paid the Respondent a total of \$4,300.00 and that the Respondent did not complete the project – only digging the footers, pouring the concrete, and framing the deck. The Claimant's evidence details that the Respondent's work on the deck was unworkmanlike in that the framing had to be removed and reframed. The Claimant also credibly explained that from June of 2020 when she signed the Contract with the Respondent, to August 2021 when she signed a new contract with Chesapeake, the cost of both labor and materials had significantly increased, causing her contract with Chesapeake to be more than double her contract price with the Respondent. She further explained that even though it was frustrating to have to pay more for the same project, she needed the use of her yard back after more than a year, and took out a loan to cover the cost. As the evidence is clear that the Respondent performed unworkmanlike and incomplete home improvements, I thus find that the Claimant is eligible for compensation from the Fund.

Having found eligibility for compensation I must determine the amount of the Claimant's actual loss and the amount, if any, that the Claimant is entitled to recover. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney fees,



court costs, or interest. Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1). MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work.

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

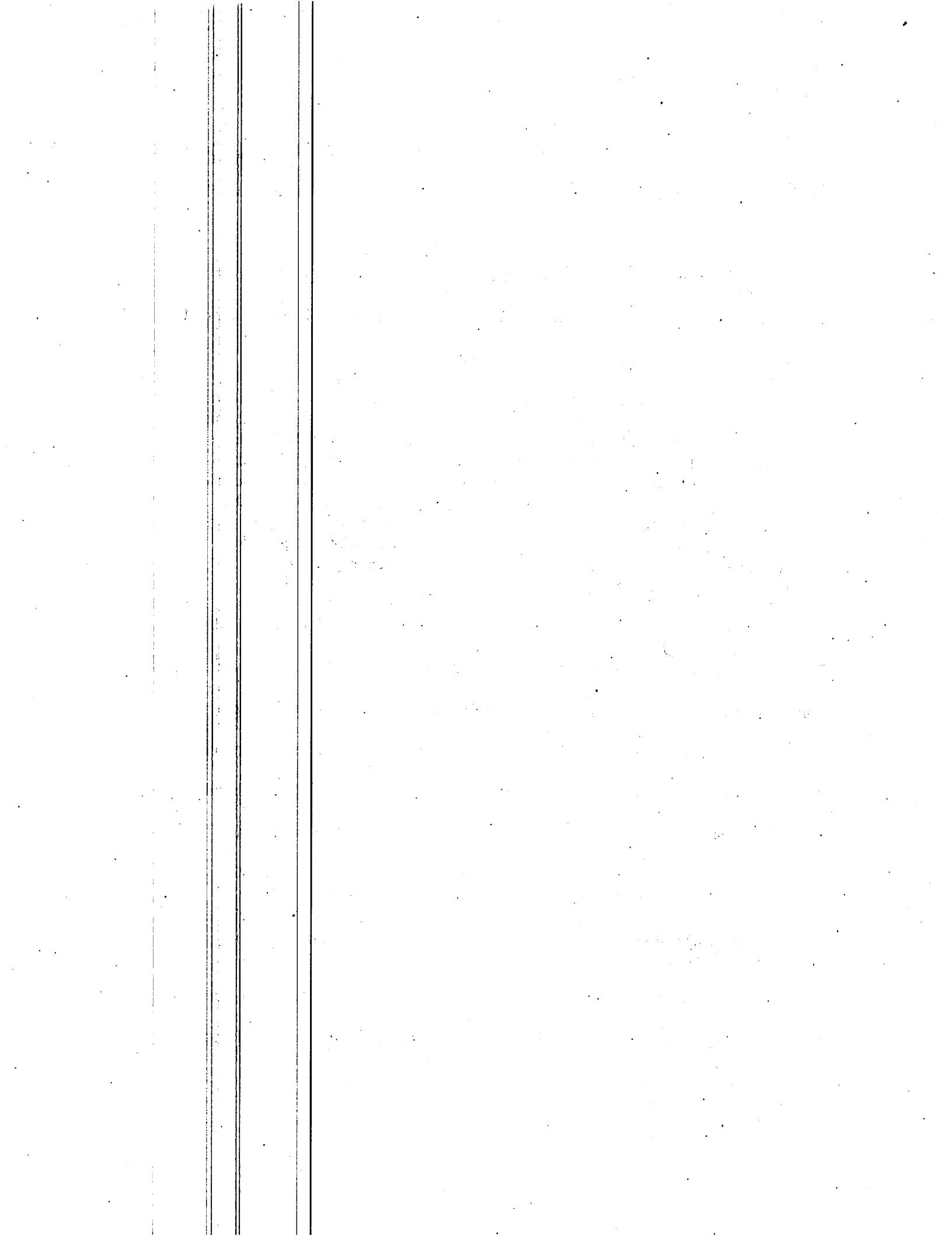
If the contractor did work according to the contract and the claimant has solicited or is soliciting another contractor to complete the contract, the claimant's actual loss shall be the amounts the claimant has paid to or on behalf of the contractor under the original contract, added to any reasonable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

COMAR 09.08.03.03B(3)(c). The evidence is clear that the Claimant paid the Respondent a total of \$4,300.00⁵ toward the Contract price of \$6,400.00. The Claimant then hired Chesapeake to finish the project. Due to the fact that Chesapeake had to redo the work performed by the Respondent and there was a surge in material and labor costs that occurred during the year between contracts, the Claimant paid Chesapeake \$13,475.00 to build the 16' x 20' deck. Using the above formula, the Claimant's actual loss is calculated as follows:

Amount the Claimant paid to the Respondent	\$ 4,300.00
Amount the Claimant paid to repair/complete the work	+ \$13,475.00
	<u>\$17,775.00</u>
Minus contract price	<u>-\$ 6,400.00</u>
Actual loss	\$11,375.00

The Business Regulation Article caps a claimant's recovery at \$20,000.00 for acts or omissions of one contractor and provides that a claimant may not recover more than the amount

⁵ \$2,100.00 + \$2,200.00 = \$4,300.00.



paid to the contractor against whom the claim is filed. Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a). In this case, the Claimant's actual loss of \$11,375.00 exceeds the amount paid to the Respondent. Therefore, the Claimant's recovery is limited to \$4,300.00, the amount paid to the Respondent. Bus. Reg. § 8-405(e)(5); COMAR 09.08.03.03B(4).

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$4,300.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015) ; COMAR 09.08.03.03B(3)(c). I further conclude that the Claimant is entitled to recover \$4,300.00 from the Fund. Bus. Reg. § 8-405(e)(5); COMAR 09.08.03.03B(4).

RECOMMENDED ORDER

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


ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$4,300.00; 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;⁶ and

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

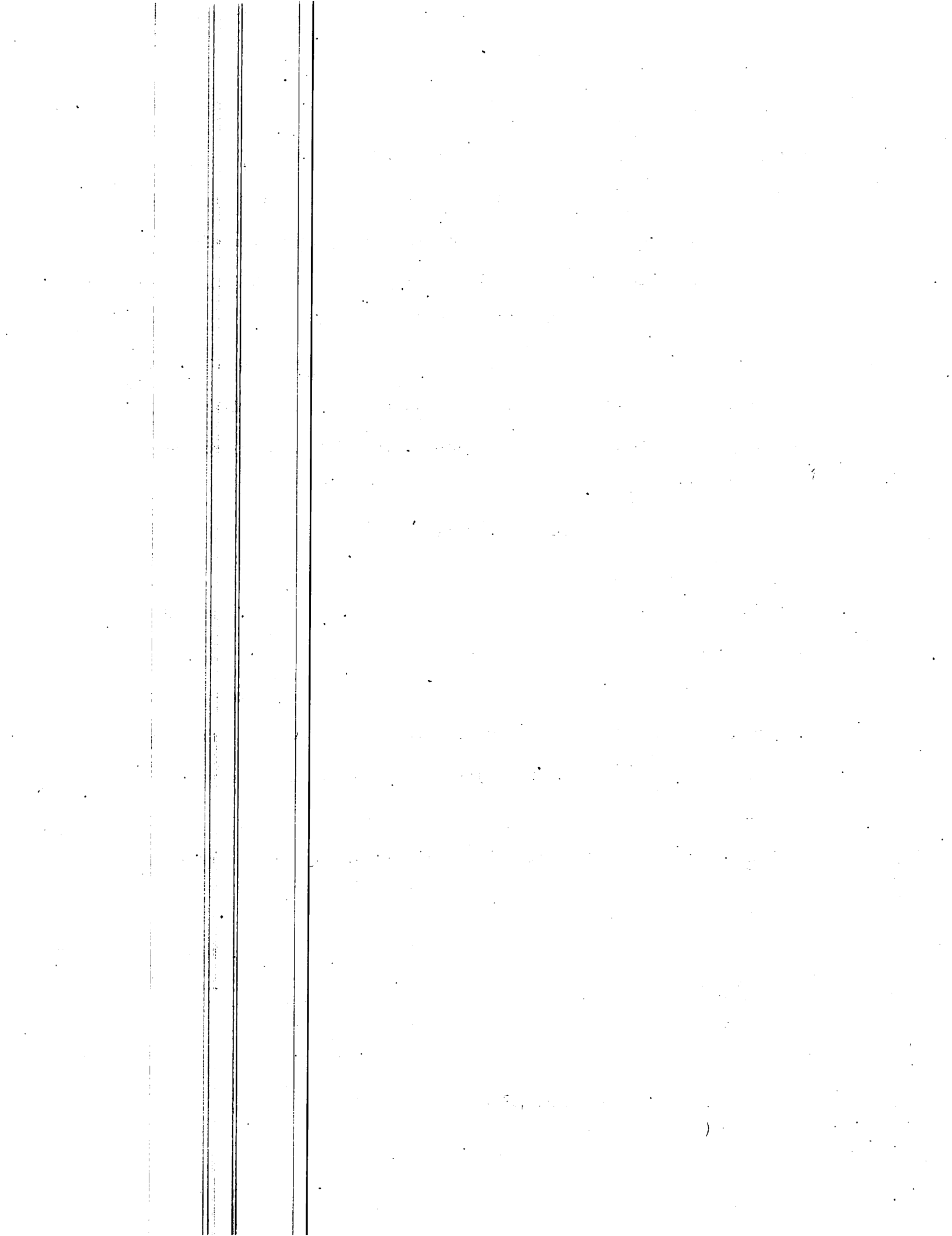
June 22, 2022
Date Decision Issued

MP/dlm
#197660



Mary Pezzulla
Administrative Law Judge

⁶ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.



PROPOSED ORDER

WHEREFORE, this 2nd day of August, 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.

Joseph Tunney

Joseph Tunney

Chairman

Panel B

***MARYLAND HOME IMPROVEMENT
COMMISSION***

