

IN THE MATTER OF THE CLAIM

* BEFORE WILLIAM SOMERVILLE,

OF MATTHEW D. HOCH,

* 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 WILLIAM YOST,

*

T/A W YOST CONTRACTING,

* OAH No.: LABOR-HIC-02-21-08021

RESPONDENT

* MHIC No.: 20 (75) 1210

* * * * *

PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES

SUMMARY OF THE EVIDENCE
PROPOSED FINDINGS OF FACT
DISCUSSION

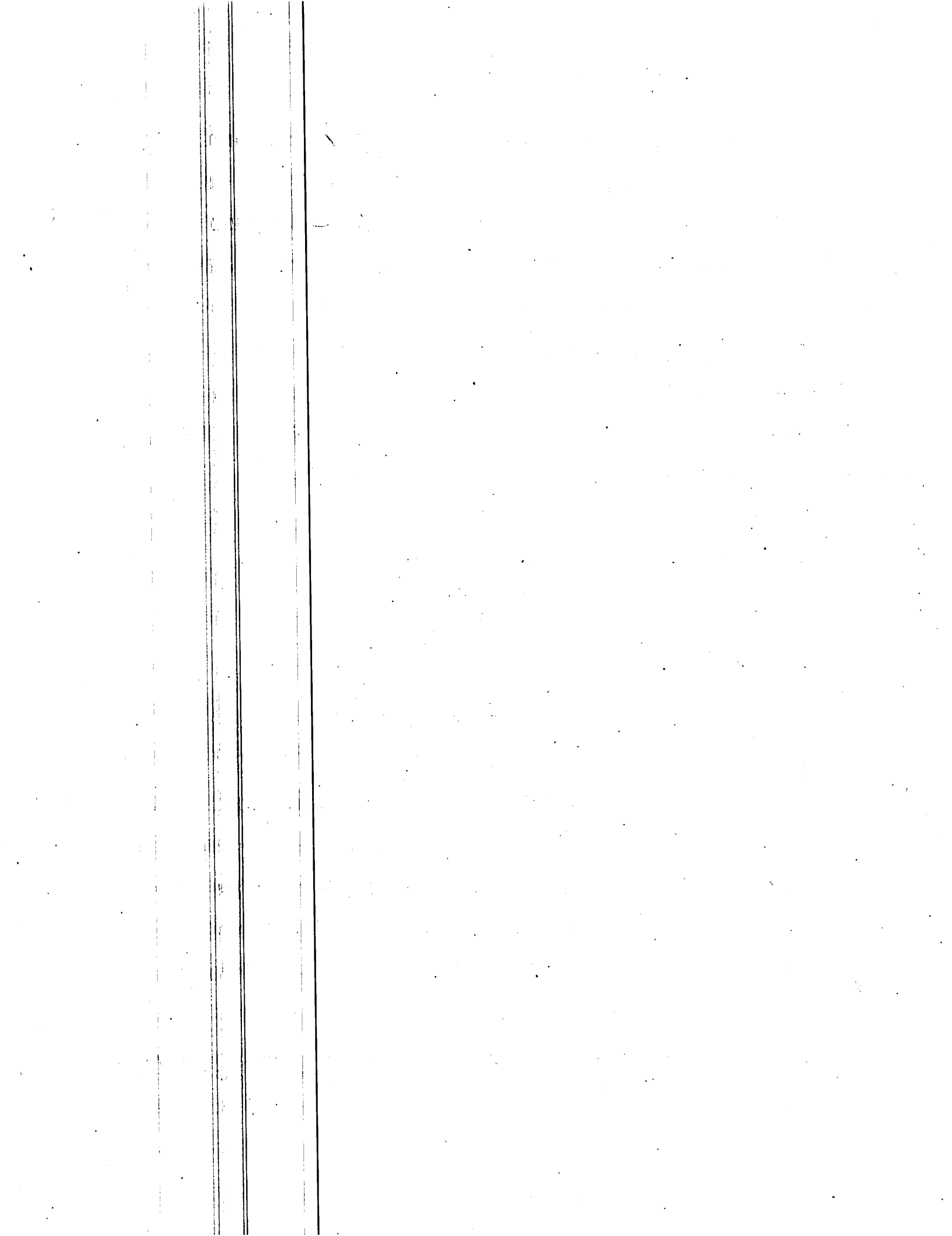
PROPOSED CONCLUSION OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On July 28, 2020, Matthew D. Hoch (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund), under the jurisdiction of the Department of Labor (Department),¹ for reimbursement of \$20,247.84 in 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 through 8-411 (2015).² On

¹ On July 1, 2019, the Maryland Department of Labor, Licensing, and Regulation became the Department of Labor.

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



March 23, 2021, the MHIC referred the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on May 21, 2021, by Webex videoconference.³ Md. Code Ann., Bus. Reg. §§ 8-407(a), 8-312. Nicholas C. Sokolow, Assistant Attorney General, represented the Fund. Raymond S. Butler, Esquire, represented the Claimant, who was present. The Respondent failed to appear.

After waiting at least fifteen minutes for the Respondent or the Respondent's representative to appear, I proceeded with the hearing.⁴

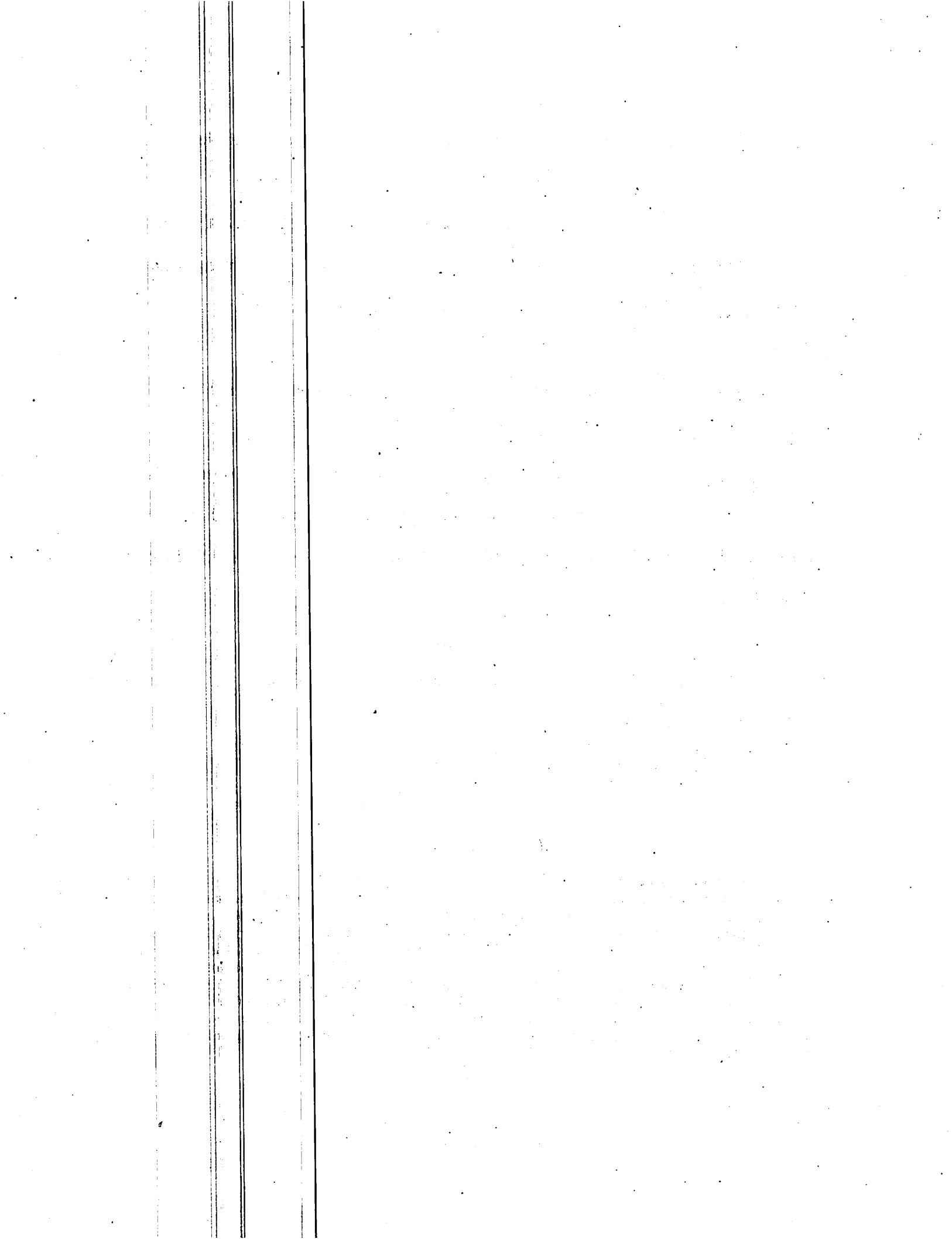
The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2020); COMAR 09.01.03; and COMAR 28.02.01.

ISSUES

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

³ COVID-19 restrictions required the remote hearing.

⁴ Applicable law authorizes me to proceed with a hearing in a party's absence if that party fails to attend after receiving proper notice. Code of Maryland Regulations (COMAR) 28.02.01.23A. On May 3, 2021, the OAH provided a Notice of Hearing (Notice) to the Respondent by United States 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 May 21, 2021, at 9:30 a.m., in Webex virtual hearing room no. 129 913 6772. 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. 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 before the date of the hearing. COMAR 28.02.01.16. I determined that the Respondent received proper notice, and I proceeded to hear the captioned matter. COMAR 28.02.01.05A, C.



SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits offered by the Claimant:

- Clmt. Ex. 1 - Packet of documents including a one-page contract document, copies of checks, and an email message, various dates
- Clmt. Ex. 2 - Packet of documents including contract documents and invoices of a remedial contractor, various dates
- Clmt. Ex. 3 - Packet of twelve black and white photographs
- Clmt. Ex. 4 - Opinion letter, 7-16-2020
- Clmt. Ex. 5 - Licensing History document, 4-26-2021

I admitted the following exhibit offered by the Fund:

- Fund Ex. 1 - Affidavit, 4-30-2021

Testimony

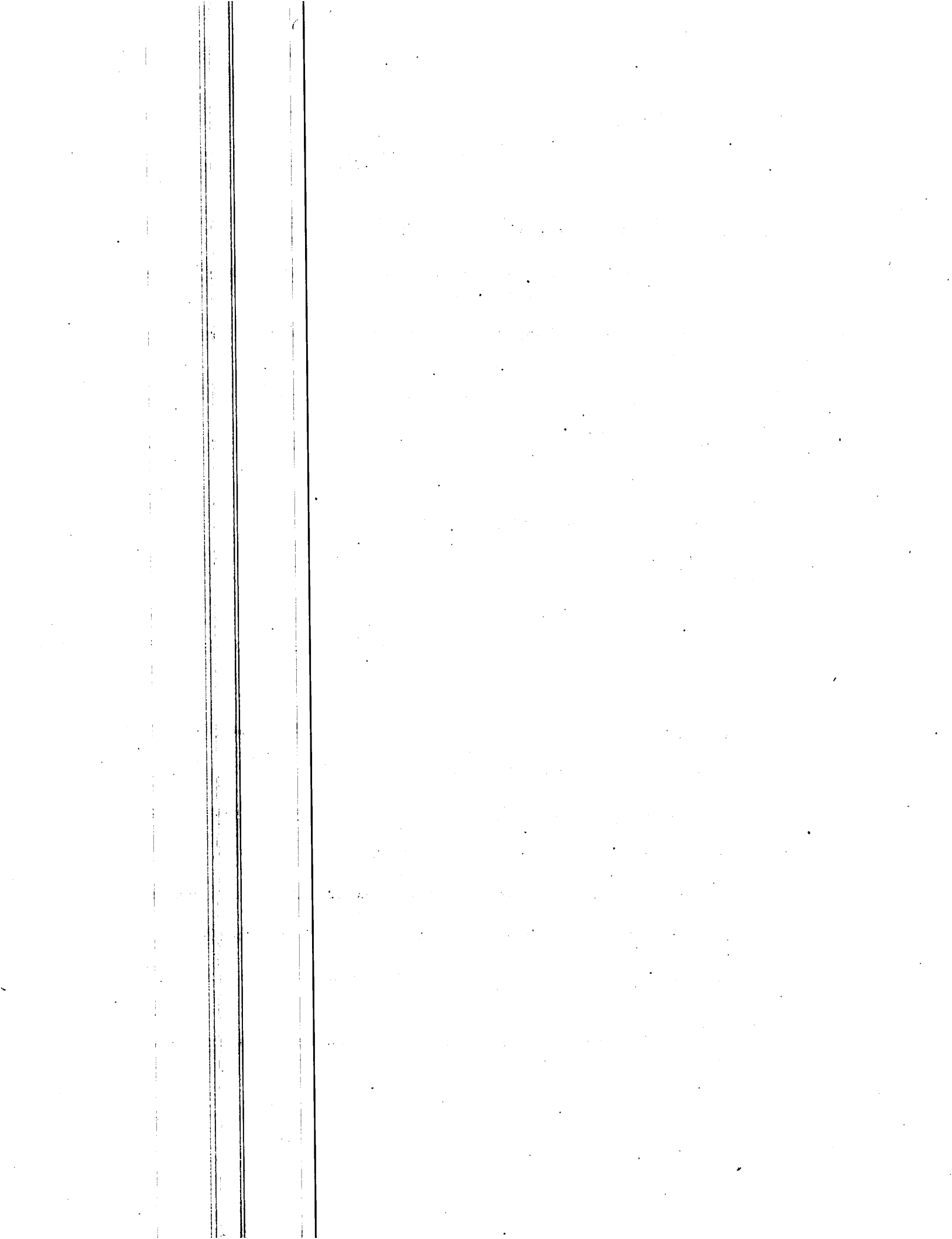
The Claimant and Melissa E. Hoch testified in the Claimant's case. No one else testified.

PROPOSED FINDINGS OF FACT

Having considered demeanor evidence, testimony, and other evidence, 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, trading as "W Yost Contracting."
2. On February 15, 2018, the Claimant and the Respondent entered into a contract⁵ by which the Claimant would pay \$26,800.00 and the Respondent would construct a 20 foot by fourteen foot three-season porch room and a ten foot by fourteen foot deck on the back of the

⁵ There were two almost identical proposal documents offered into evidence. One, however, was signed and dated and showed a contract price of \$26,800.00.



Claimant's residence. The contract document was a bare-bones description of the project with a photograph of a similar three-season room. The project would include steps, vinyl windows, one 6 foot sliding glass door, a knee wall around the three-season room, a "soffit ceiling⁶," vinyl flooring, and electric wiring for a fan and for two outlets, two skylights, an open deck made of TrexTM material, and vinyl rails and trim. There was no mention in the contract document of interior finishes, recessed lights, transoms and French doors, or paint. On that date, the Claimant paid the Respondent \$8,900.00 by check.

3. On May 1, 2018, the Respondent began working on the project. On that date, the Claimant paid the Respondent another \$10,200.00 by check.

4. At some point thereafter, the Claimant requested a change order to enlarge the open deck portion of the project to fourteen feet by fourteen feet. The change order cost was \$2,500.00.

5. Work progressed slowly.

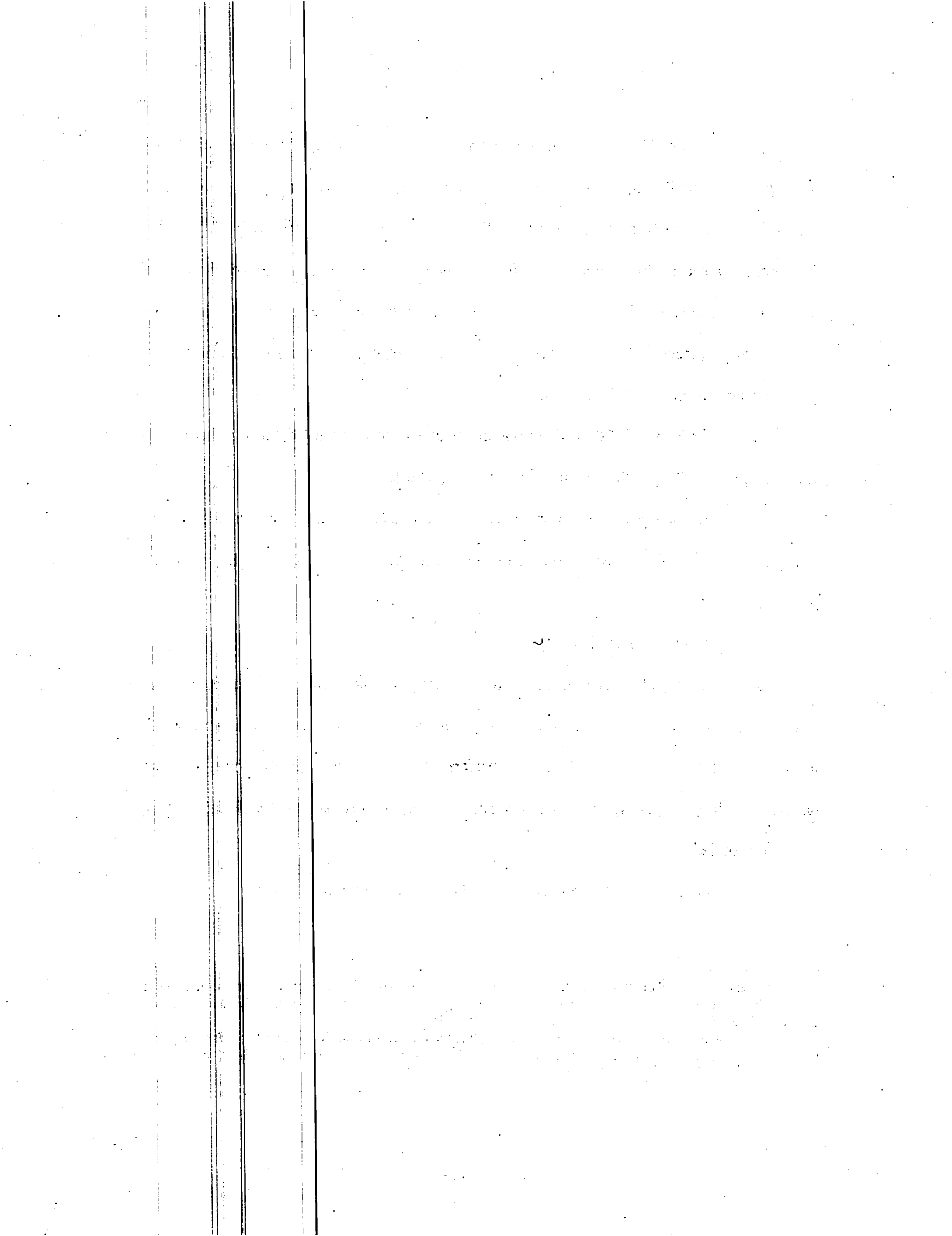
6. In May 2019, an electrical subcontractor performed some wiring work on the site. The wiring was not connected to existing wiring in the house. That subcontractor work was the last work that the Respondent, or his agents, performed on the project.⁷ At that time, windows had not been installed, the sliding glass door had not been installed, and the "soffit ceiling" had not been installed.

7. In August 2019, the Claimant filed a complaint with the MHIC⁸.

⁶ The term was not defined or explained. It might mean a ceiling covered with aluminum or plastic soffit material.

⁷ The Claimant saw that the Respondent had started a neighbor's project and the Respondent offered excuses to the Claimant about why he was not working on the Claimant's project.

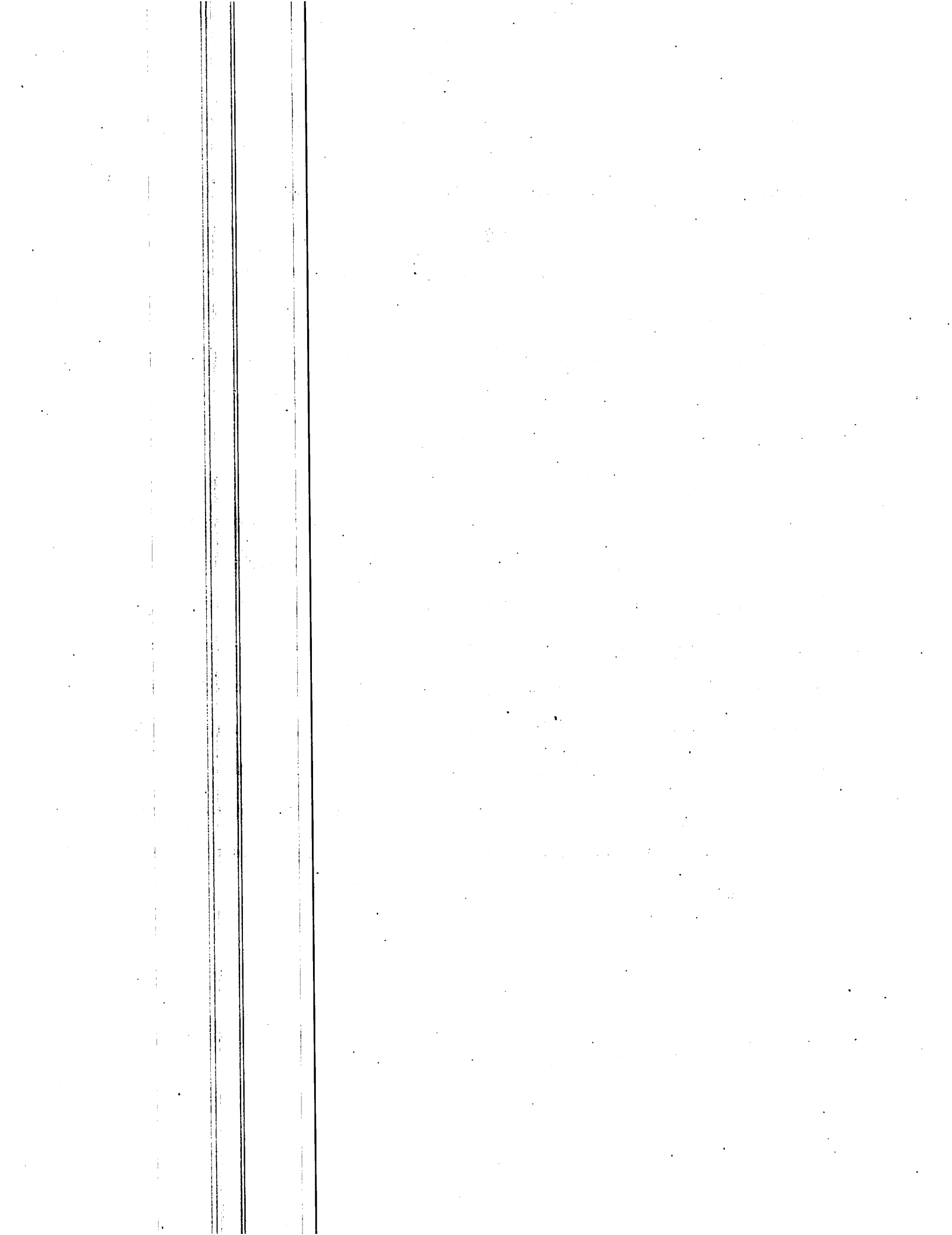
⁸ There was no evidence of a request, after August 2019, that the Respondent finish the project. No party argued that the Claimant rejected good faith efforts to resolve the matter. *See* Md. Code Ann., Bus. Reg. § 8-405(d).



8. On or before October 4, 2019, the Claimant had another contractor, Clarksville Construction Services, Inc., inspect the site and assess what items needed to be remedied or completed. The following items needed to be remedied in order to meet industry standards or building code requirements: add supplemental posts or pilings to support the project; add bolts in joists where the Respondent had only used screws; sister additional joists and rafters onto existing ones in the three-season room; reframe walls where exposure to the elements had caused some two by four framing to twist; upgrade and add safety items to the electrical portion of the project; and reframe the window openings to fit the windows.

9. On October 4, 2019, the Claimant entered into a contract with the second contractor. In that contract, the Claimant was to pay \$27,211.50, and the contractor was to remedy the items listed above (Finding of Fact 8), install tongue and groove planks on the interior of the knee walls and ceiling, install trim boards around the interior and exterior of openings, align siding, install trim on stair stringers, install windows, install a four-track French door,⁹ reset siding as needed, paint the ceiling, paint the posts and beams under the deck, repair some drywall inside the house, "and paint corner to corner." (Clmt. Ex. 2, p. 2.) In addition, the second contractor was also to add four recessed lights, complete the installation of the outlets, install a ceiling fan, and call for a final inspection. The contract called for the contractor to meet with a county building inspector to determine if the scope and cost of the agreement needed to be increased in order to meet county building code requirements.

⁹ The contract document was unclear with regard to whether it called for the contractor to install the French door and also a transom, or whether the contractor was to install the French door in an opening over which there was an existing transom. (Clmt. Ex. 2, p. 2.)



10. Between October 4, 2019, and February 12, 2020, the Claimant paid the second contractor \$30,447.84.

11. All work done by the second contractor passed all inspections.

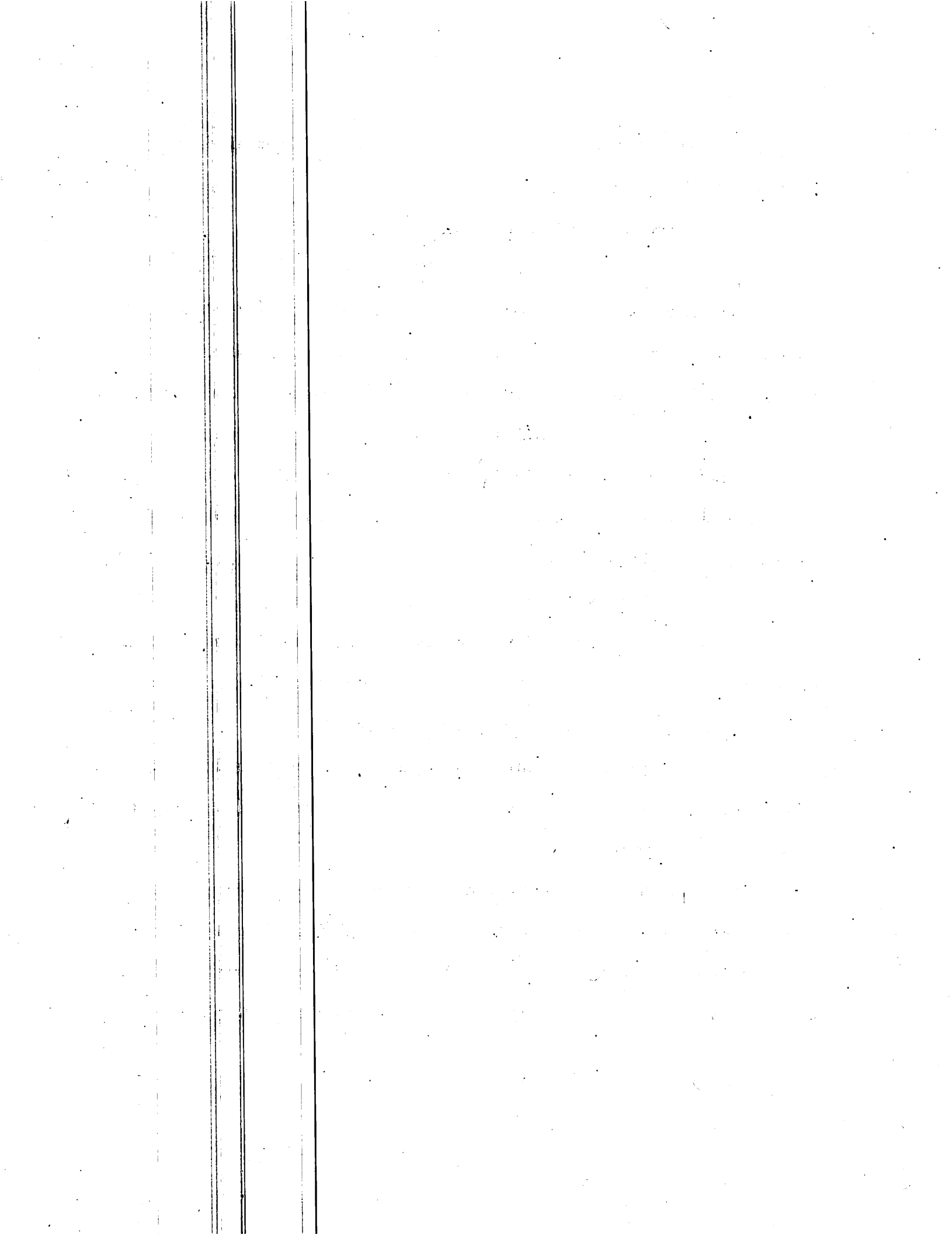
DISCUSSION

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

An owner may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor." Md. Code Ann., 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." Md. Code Ann., Bus. Reg. § 8-401.

For the following reasons, I conclude that the Claimant has proven that the Respondent, a licensed home improvement contractor at the time, performed some unworkmanlike, inadequate, or incomplete home improvement work.

It is clear from the evidence presented that some of the Respondent's framing, including the posts, joists, and rafters, did not meet a local building code. (Finding of Fact 8.) In order to meet home improvement industry standards, a builder must, at a minimum, meet county building code standards. Md. Code Ann., Bus. Reg. §§ 8-311(a)(10) (competence in industry); 8-505



(violation of certain building codes and requirements); 8-611(a)(1) (violation of county building codes). The Claimant has shown that the Respondent's work product fell short of the mark. In addition, the Respondent left some items unfinished, such as windows, the sliding glass door, and the "soffit ceiling."

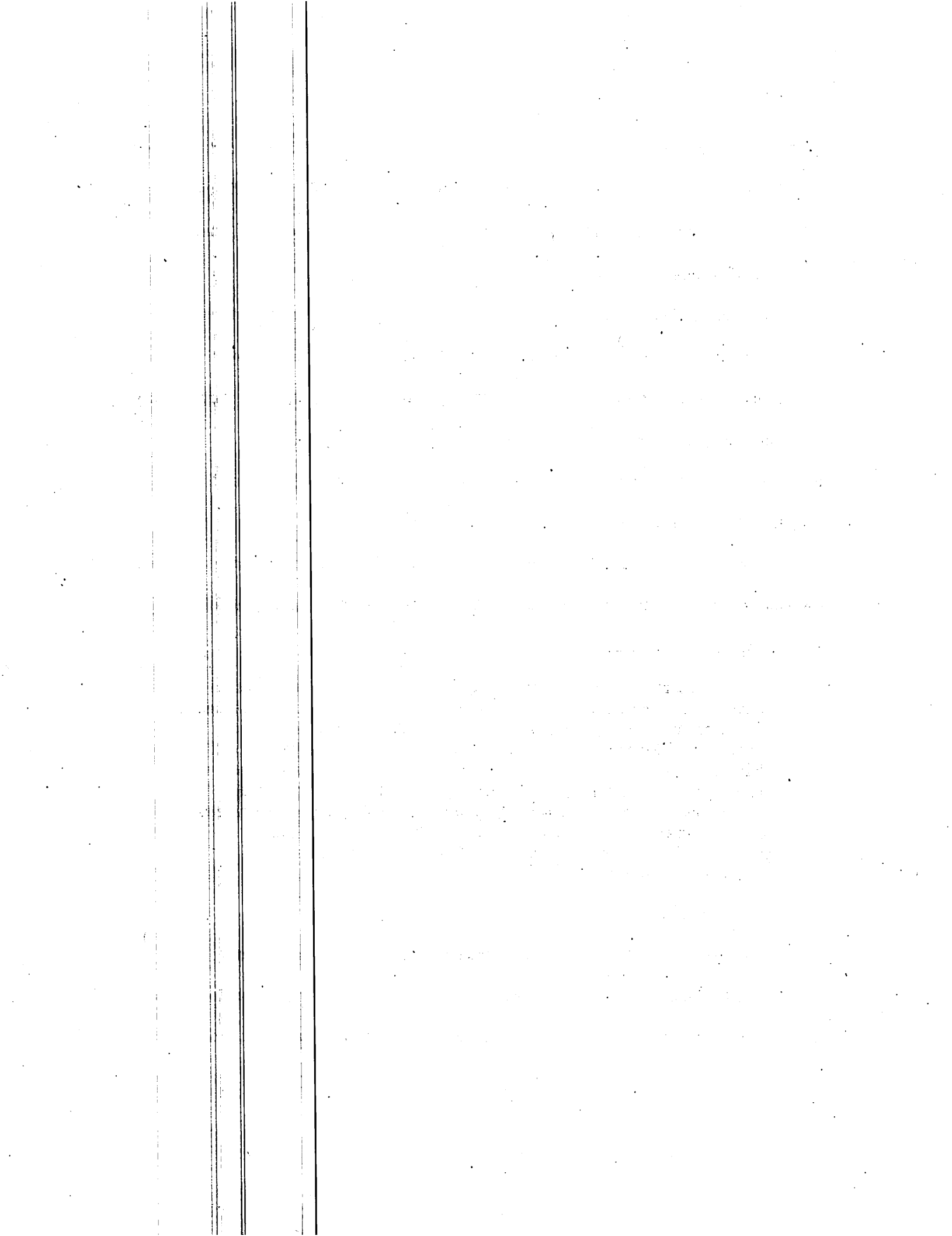
Having found eligibility for compensation, I must determine the amount of the Claimant's actual loss and the amount, if any, that the Claimant is entitled to recover. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney fees, court costs, or interest.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

In this case, the Respondent performed some work under the Contract, and the Claimant has 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).

In this particular case, the remedial contract included significant items that were not included in the original contract. (Findings of Fact 2, 8, and 9.) There was no mention in the original contract document of interior finishes, recessed lights, transoms and French doors, or



paint. Items in the remedial contract were not individually priced such that anyone could determine a cost to remedy only those substandard items included in the original contract. The second contract does not allow me to calculate costs to remedy substandard items in the original contract. I cannot speculate on values and costs that a party must prove. *See Roebuck v. Stuart*, 76 Md. App. 298, 314 (1988) (amounts must be proven with reasonable certainty, and not be based on speculation or conjecture).

With the Findings of Fact in mind, an "actual loss" calculation could be made as follows:

\$19,100.00	Amount paid to the contractor under the original agreement
+ unknown	Amount paid to the remedial contractor to remedy those inferior items within the scope of the original contract
- \$29,300.00	Price of the original agreement and change order
<hr/>	
unknown	Actual loss

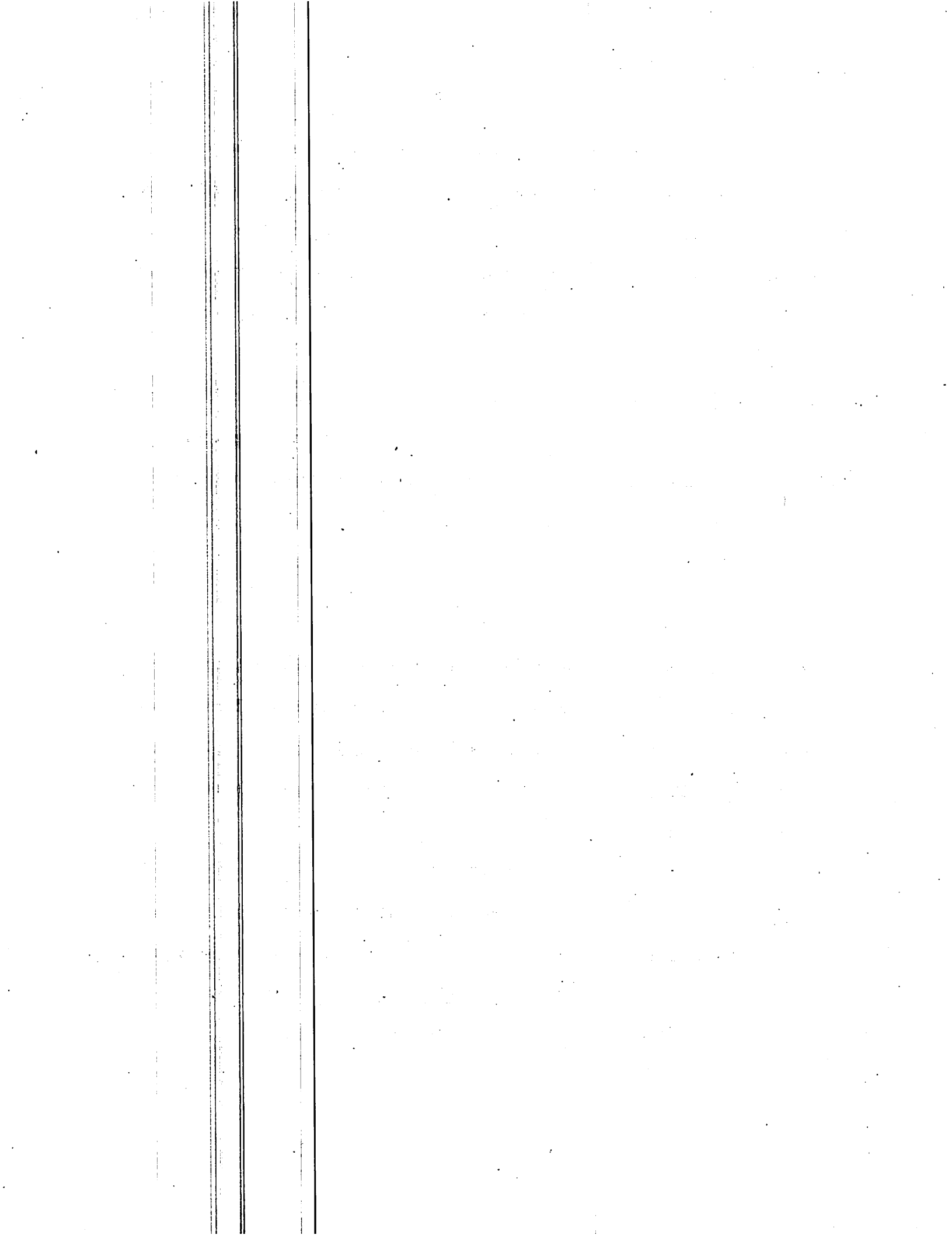
The Business Regulation Article caps a claimant's recovery at \$20,000.00 for acts or omissions of one contractor and provides that a claimant may not recover more than the amount paid to the contractor against whom the claim is filed. Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a). In this case, the Claimant's compensable actual loss is not determinable from the evidentiary record.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has not demonstrated an actual and compensable loss as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015).

RECOMMENDED ORDER

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



ORDER that the Maryland Home Improvement Guaranty Fund deny the Claimant's claim; and

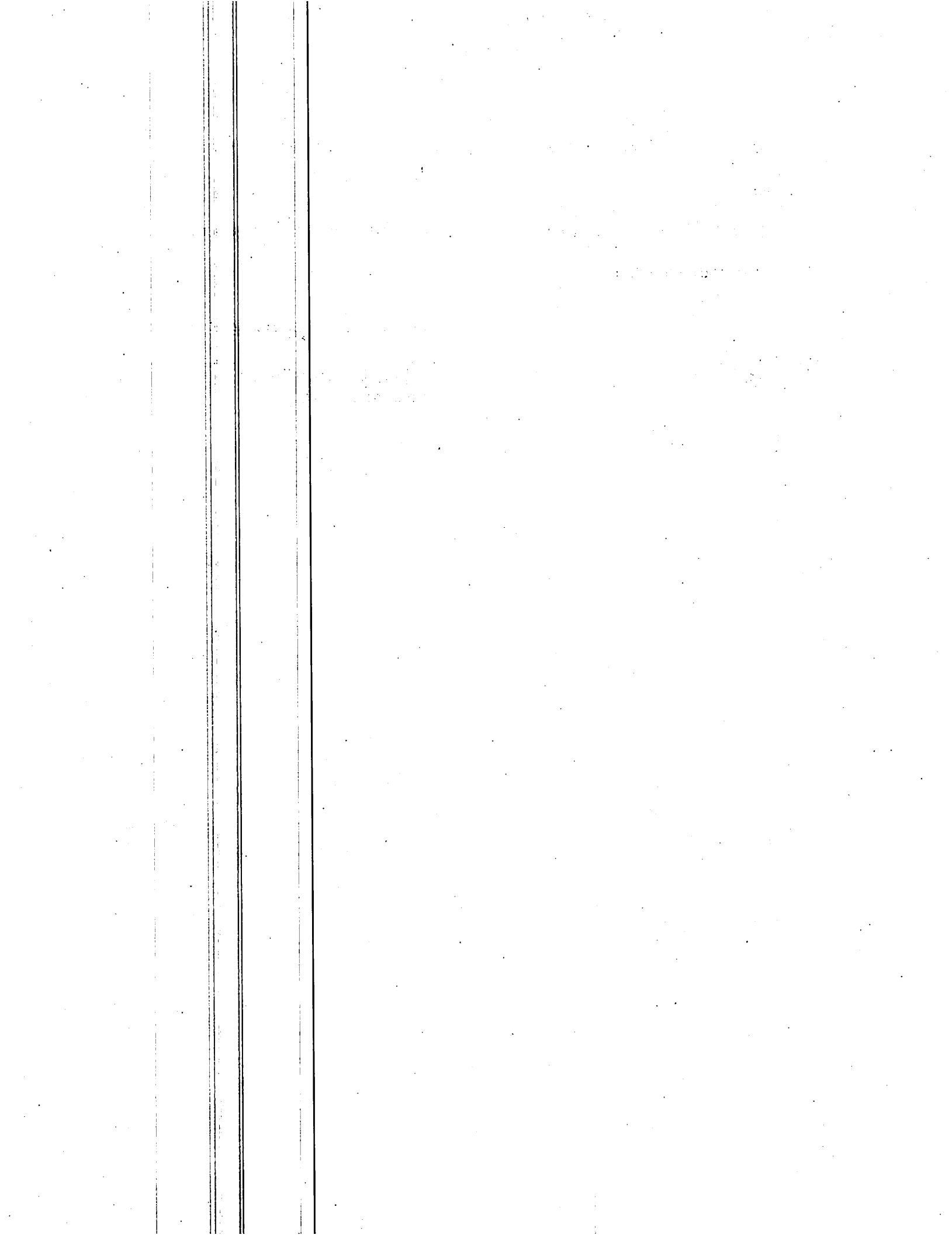
ORDER that the records and publications of the Maryland Home Improvement Commission reflect this decision.

August 11, 2021
Date Decision Issued

WS/emh
#193348

William J.D. Somerville III

William J.D. Somerville III
Administrative Law Judge



PROPOSED ORDER

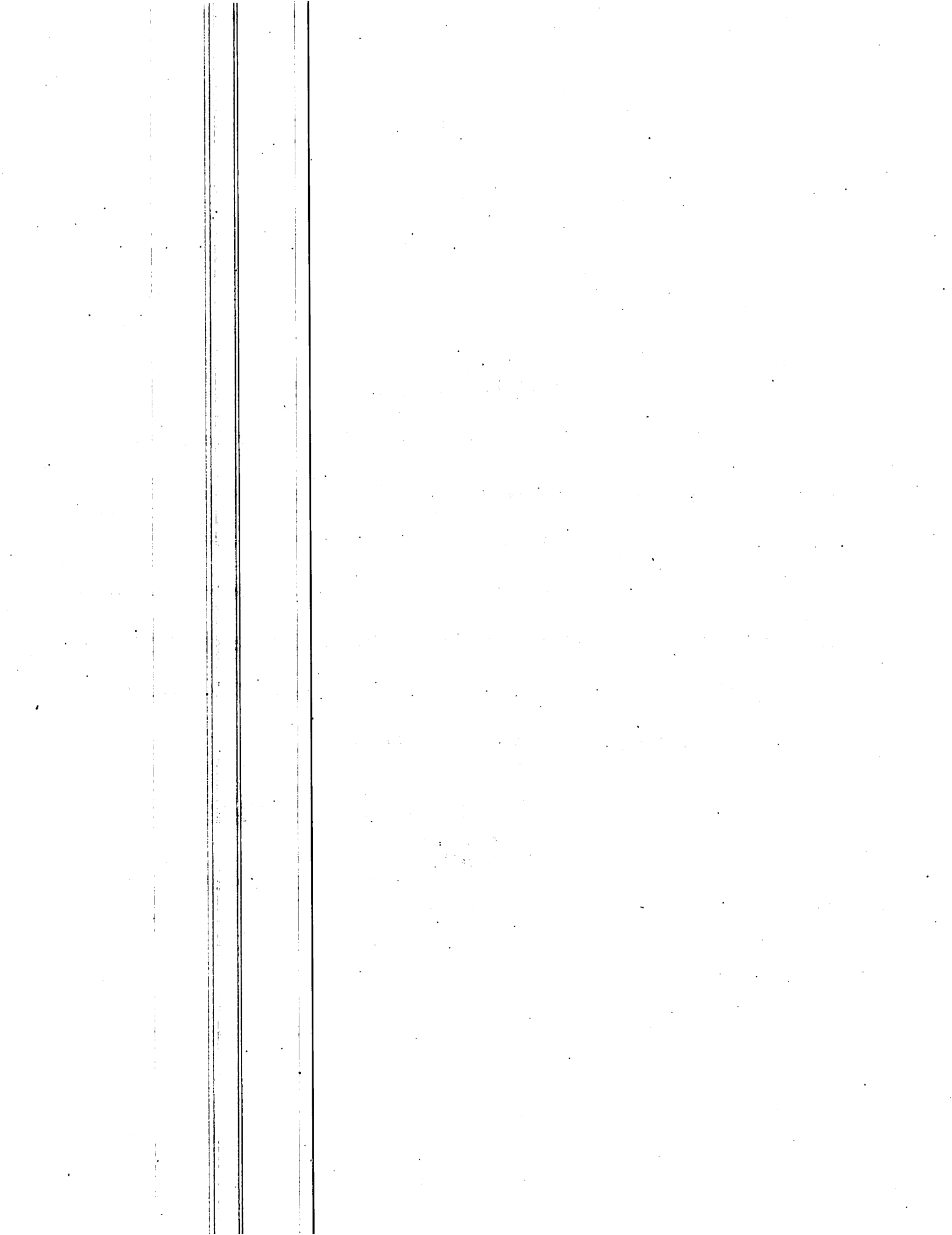
WHEREFORE, this 22nd day of November, 2021, Panel B of the Maryland Home Improvement Commission approves the Recommended Order of the Administrative Law Judge and unless any parties files with the Commission within twenty (20) days of this date written exceptions and/or a request to present arguments, 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.

Michael Newton

Michael Newton

Panel B

***MARYLAND HOME IMPROVEMENT
COMMISSION***



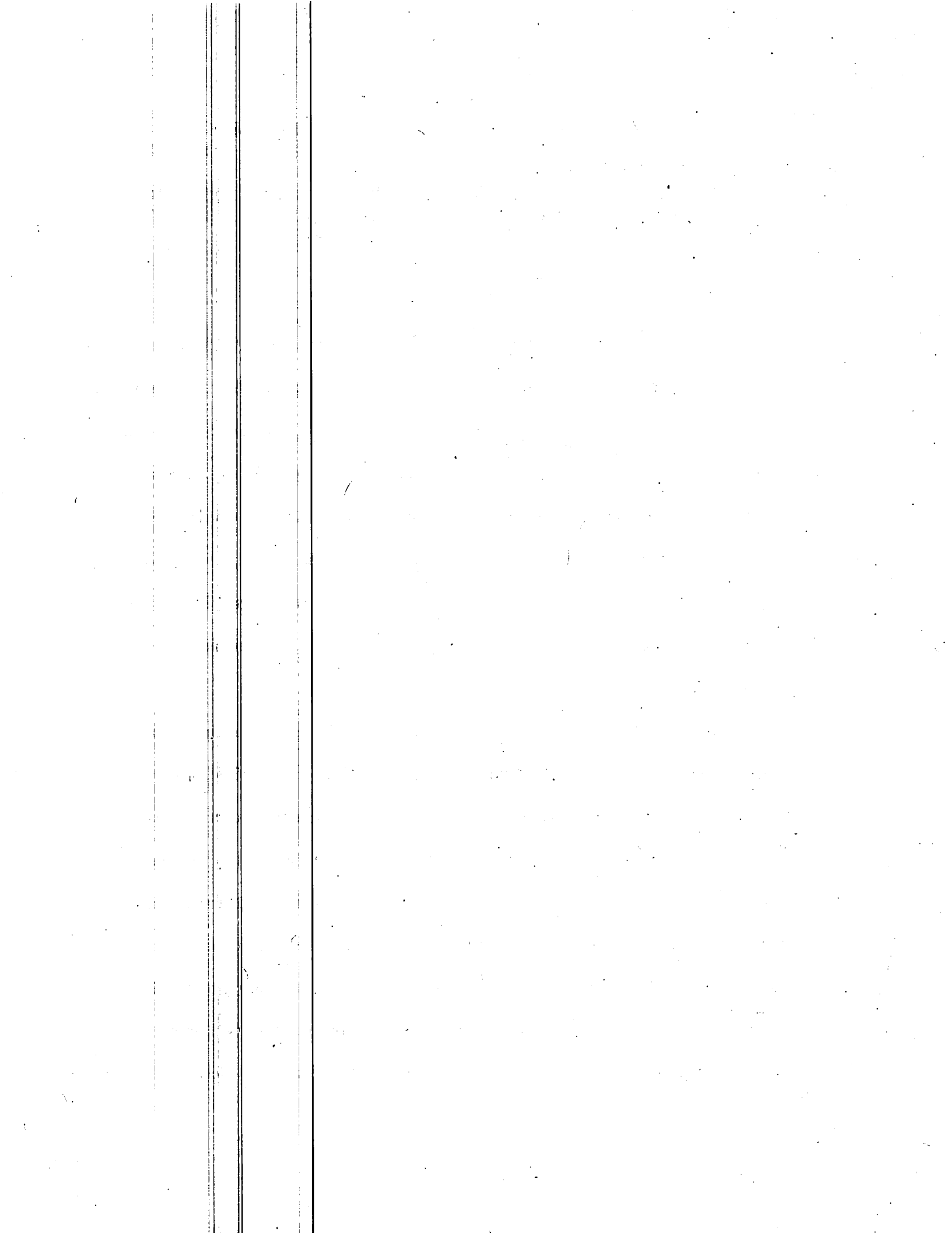
<p>IN THE MATTER OF THE CLAIM OF MATTHEW HOCH AGAINST THE MARYLAND HOME IMPROVEMENT GUARANTY FUND FOR THE ACTS OR OMISSIONS OF WILLIAM YOST T/A W YOST CONTRACTING</p>	<p>* MARYLAND HOME * IMPROVEMENT COMMISSION * * MHIC CASE NO. 20(75)1210 * OAH CASE NO. LABOR-HIC- * 02-21-08021 *</p>
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FINAL ORDER

This matter was originally heard before an Administrative Law Judge (“ALJ”) of the Office of Administrative Hearings (“OAH”) on May 21, 2021. Following the evidentiary hearing, the ALJ issued a Proposed Decision on August 11, 2021, concluding that the homeowner, Matthew Hoch (“Claimant”) failed to prove the amount of the actual loss that he suffered as a result of the acts or omissions of William Yost t/a W Yost Contracting (collectively, “Contractor”). *ALJ Proposed Decision* p. 8. In a Proposed Order dated November 22, 2021, the Maryland Home Improvement Commission (“MHIC” or “Commission”) affirmed the Proposed Decision of the ALJ to deny an award from the Home Improvement Guaranty Fund. The Claimant subsequently filed exceptions to the MHIC Proposed Order.

On May 19, 2022, a three-member panel (“Panel”) of the MHIC held a remote hearing on the exceptions filed in this matter. The Claimant participated without counsel. The Contractor was not present. Assistant Attorney General Nicholas Sokolow appeared at the exceptions hearing on behalf of the Guaranty Fund. The Commission entered the following preliminary exhibits as part of the record of the exceptions hearing without objection: 1) hearing notice; 2) transmittal letter, ALJ Proposed Decision, and MHIC Proposed Order; and 3) Claimant’s exceptions. Neither the Claimant nor the Contractor produced a copy of the transcript of the hearing before the ALJ. Therefore, the Panel’s review of the record was limited to the preliminary exhibits for the exceptions hearing, the OAH Proposed Decision, and the exhibits offered as evidence at the OAH



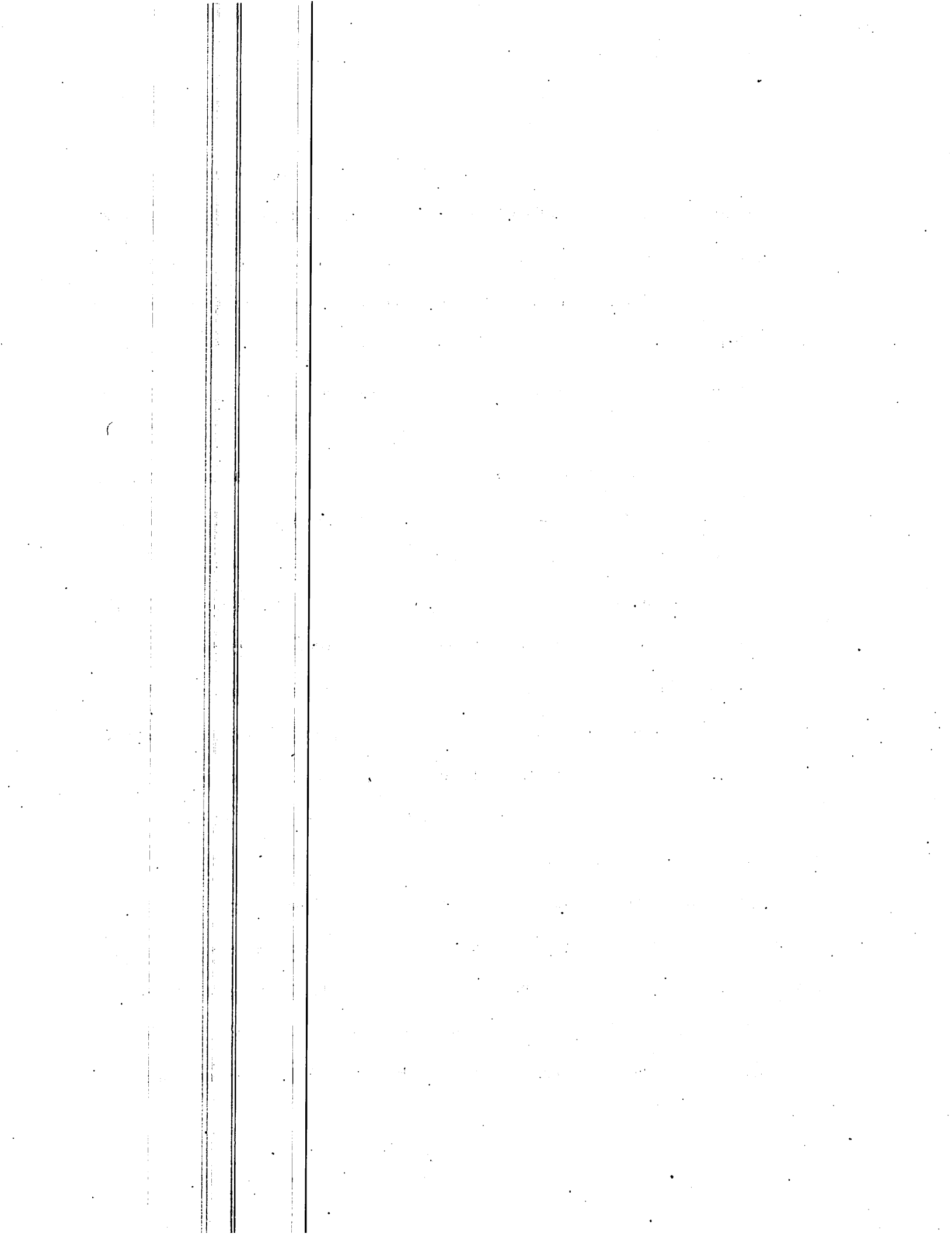
hearing. COMAR 09.01.03.09(G) - (I).

The claim in this proceeding relates to a contract between the parties for the construction of a three-season room and deck at the Claimant's home. The ALJ found that the Contractor's performance under the contract was unworkmanlike and incomplete, but that the Claimant failed to prove the amount of his actual loss because the contract the Claimant entered for the correction and completion of the original contracted work included items beyond the scope of the original contract and did not itemize the cost of the items necessary to correct and complete the original project.

On exception, the Claimant and Assistant Attorney General Sokolow argued that the ALJ should have used a unique measurement to calculate the Claimant's actual loss. The Commission agrees that several unique facts in this case justify the use of a unique measurement.

First, the Commission finds that the contract between the parties is devoid of details necessary for the Commission to determine what was necessary to complete the project. Second, the Commission finds that the Contractor significantly underbid the project, as evidenced by the observation of the corrective contractor. Third, apart from the materials the Contractor provided, the performance by the Contractor had essentially no value, as the framing and support posts were not up to code, the Contractor used improper fasteners, the windows did not fit in the window frames, and the electrical work was unsafe.

Because of the foregoing facts, the Commission concludes that the appropriate method measuring the Claimant's actual loss is to subtract the value of the materials provided by the Contractor from the amount the Claimant paid to the Contractor. The Commission finds that the value of the materials provided by the Contractor was \$15,000.00 (OAH Hearing Claimant's Exhibit 4) and that the Claimant paid the Contractor \$19,100.00 (OAH Hearing Claimant's Exhibit



1). Therefore, the Commission finds that the Claimant suffered an actual loss of \$4,100.00

Having considered the parties' arguments, the evidence contained in the record, and the ALJ's Recommended Decision, it is this 25th day of May 2022, **ORDERED:**

- A. That the Findings of Fact of the Administrative Law Judge are **AMENDED**;
- B. That the Conclusions of Law of the Administrative Law Judge are **AMENDED**;
- C. That the Proposed Decision and Recommended Order of the Administrative Law Judge is **AMENDED**;
- D. That the Claimant is awarded \$4,100.00 from the Maryland Home Improvement Guaranty Fund;
- E. That the Contractor shall remain ineligible for a Maryland Home Improvement Commission license until the Contractor reimburses the Guaranty Fund for all monies disbursed under this Order plus annual interest of at least ten percent (10%) as set by the Commission, *Md Code Ann.*, Bus. Reg. §§ 8-410(a)(1)(iii), 8-411(a);
- F. That the records and publications of the Maryland Home Improvement Commission shall reflect this decision; and
- G. Any party has thirty (30) days from the date of this Final Order to appeal this decision to Circuit Court.

Jean White
Chairperson –Panel
Maryland Home Improvement
Commission

