

<p>IN THE MATTER OF THE CLAIM</p> <p>OF CHRISTIE VARIO,</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 JENNIFER KUNKEL,</p> <p>T/A, J & J HOME REVIVAL, LLC,</p> <p>RESPONDENT</p>	<p>* BEFORE EDWARD J. KELLEY,</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-02-22-09838</p> <p>* MHIC No.: 21 (75) 1112</p>
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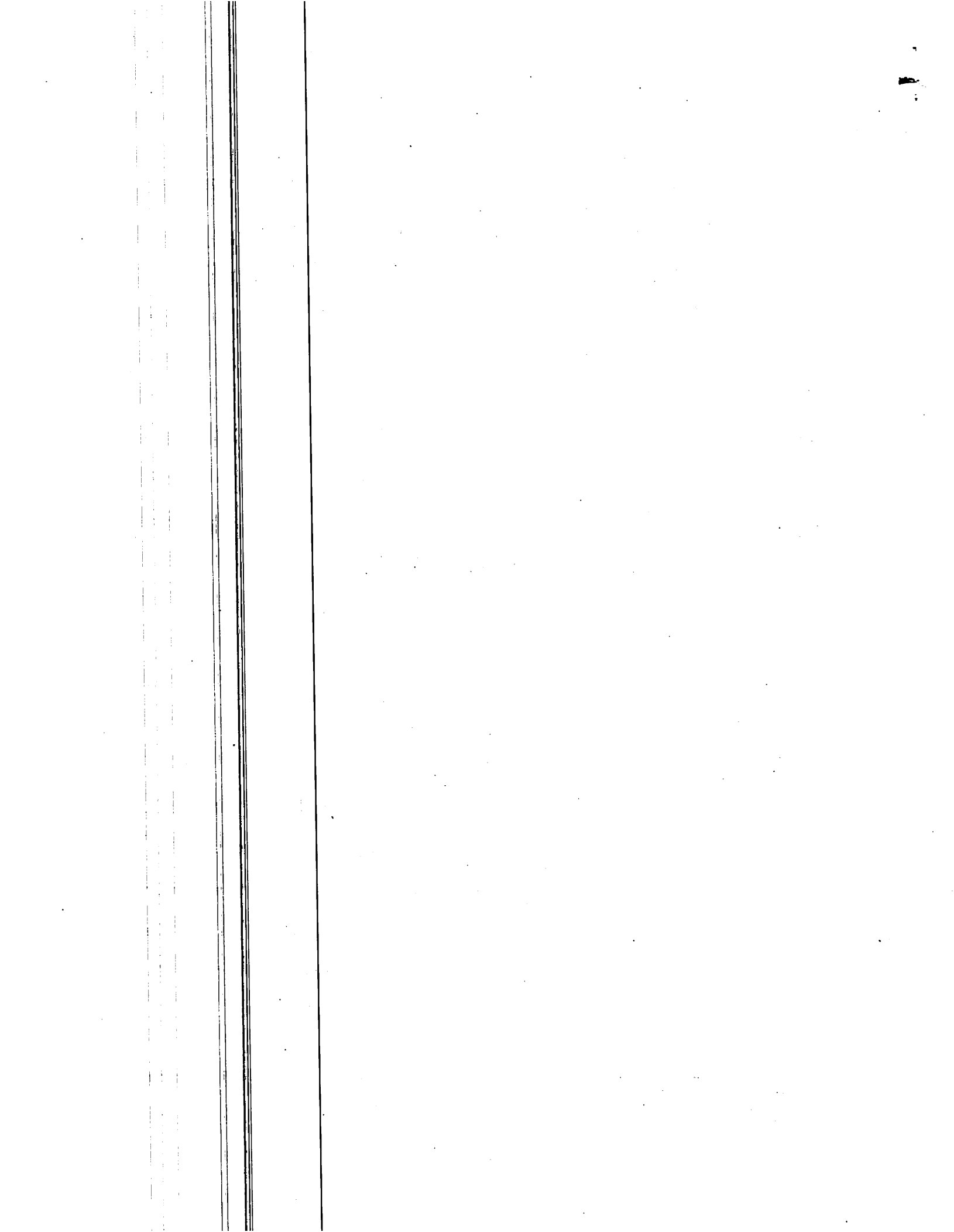
PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
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STATEMENT OF THE CASE

On February 22, 2022, Christie Vario (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 \$5,916.66 for actual losses allegedly suffered as a result of a home improvement contract with Jennifer Kunkel, trading as J & J Home Revival, LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015).¹ On April 22,

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



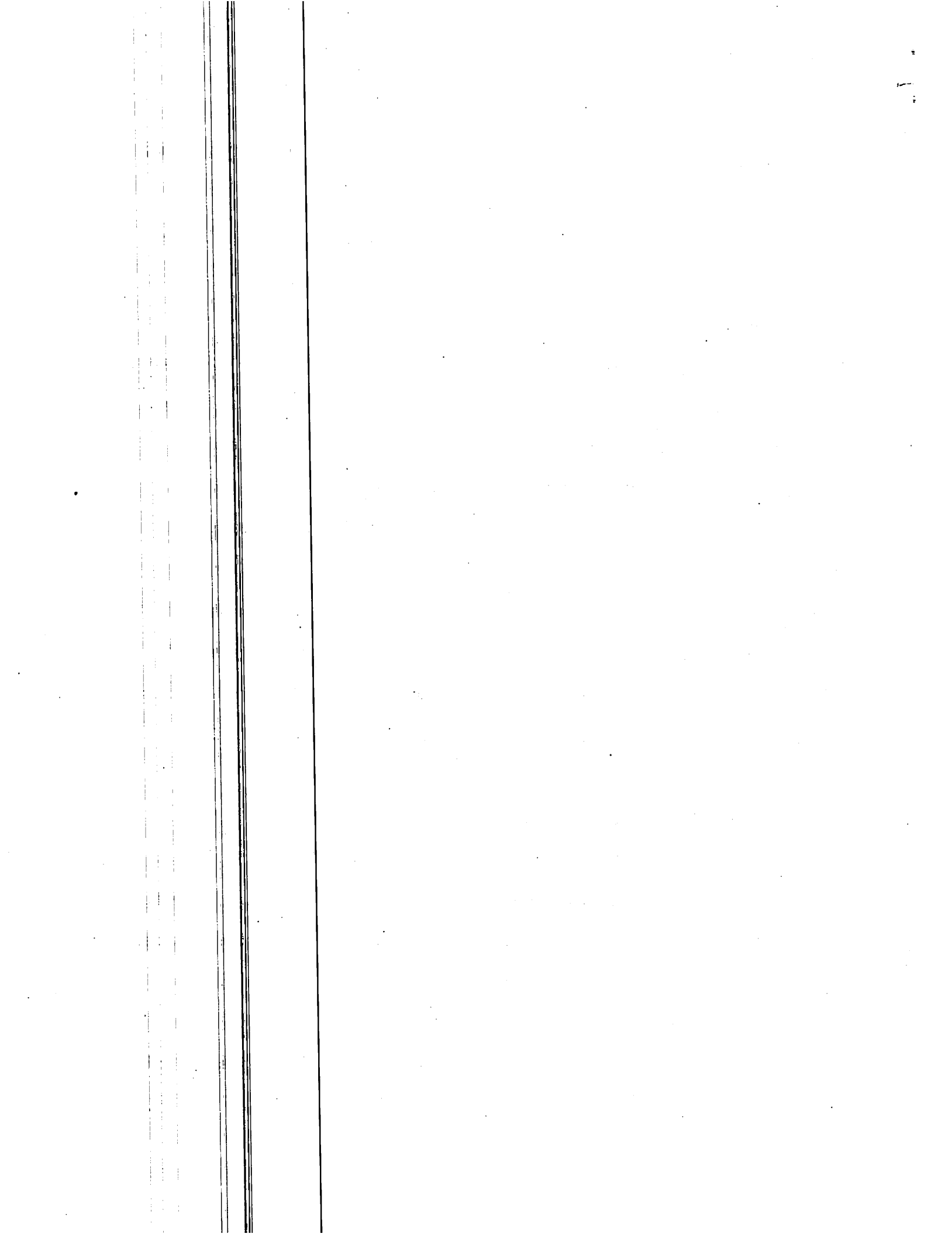
2022, the MHIC issued a Hearing Order on the Claim. On April 28, 2022, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On October 7, 2022, I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. Hope Sachs, Assistant Attorney General, Department, represented the Fund. The Claimant was self-represented. The Respondent did not appear.

After waiting over 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. Code of Maryland Regulations (COMAR) 28.02.01.23A. On May 5, 2022, the OAH sent a Notice of Hearing (Notice) to the Respondent at her address on record with the OAH by first-class mail and certified mail. COMAR 09.08.03.03A(2); COMAR 28.02.01.05C(1). The Notice stated that a hearing was scheduled for July 13, 2022, at 9:30 a.m., at the OAH in Hunt Valley, Maryland. 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 sent first-class mail to the OAH, and the green card for the certified mail was signed as received by the Respondent.

The July 13, 2022, hearing was postponed at the request of the Claimant. On June 2, 2022, the OAH sent a Notice to the Respondent at the address on record by first-class mail and certified mail stating that a hearing was scheduled for July 25, 2022, at 9:30 a.m., at the OAH in Hunt Valley, Maryland. The United States Postal Service did not return the Notice sent first-class mail to the OAH, but the certified mail was returned as "unclaimed."

The July 25, 2022, hearing was postponed at the request of the Claimant. On July 11, 2022, the OAH sent a Notice to the Respondent at the address on record by first-class mail and



certified mail stating that a hearing was scheduled for October 7, 2022, at 9:30 a.m., at the OAH in Hunt Valley, Maryland. The United States Postal Service did not return the Notice sent first-class mail to the OAH, and the green card for the certified mail was not returned.

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. 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); COMAR 09.01.03; COMAR 28.02.01.

ISSUES

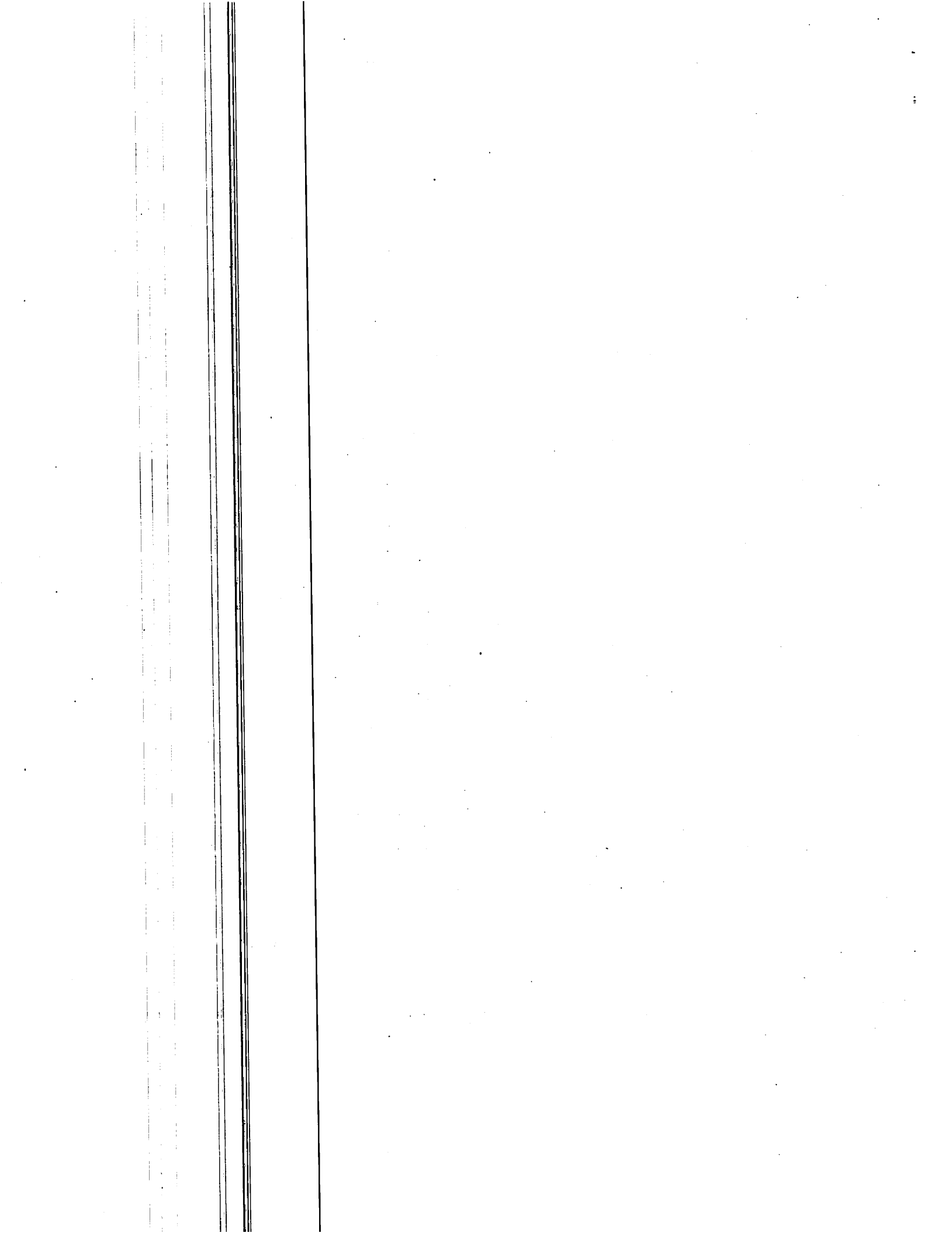
1. Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?
2. If so, what is the amount of the compensable loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits offered by the Claimant:

- Clmt. Ex. 1 - Contract between the Claimant and the Respondent, March 2, 2021
- Clmt. Ex. 2 - Screenshots of text messages, various dates
- Clmt. Ex. 3 - Venmo account statement, February – March 2021
- Clmt. Ex. 4(a)-(h) - Photographs of project, undated
- Clmt. Ex. 5 - Copy of Checks from Philip Vario to Chavez Brothers, May 30, 2021 and June 3, 2021
- Clmt. Ex. 6(a)-(c) - Photographs of project, undated



I admitted the following exhibits offered by the Fund:

Fund Ex. 1: Notice of Hearing, July 11, 2022

Fund Ex. 2: Hearing Order, April 22, 2022

Fund Ex. 3: The Respondent's licensing history, September 30, 2022

Fund Ex. 4: MHIC Claim Form, February 22, 2022

The Respondent did not appear at the hearing or offer any exhibits.

Testimony

The Claimant testified and presented the testimony of her husband, Philip Vario.

The Fund did not present any witnesses.

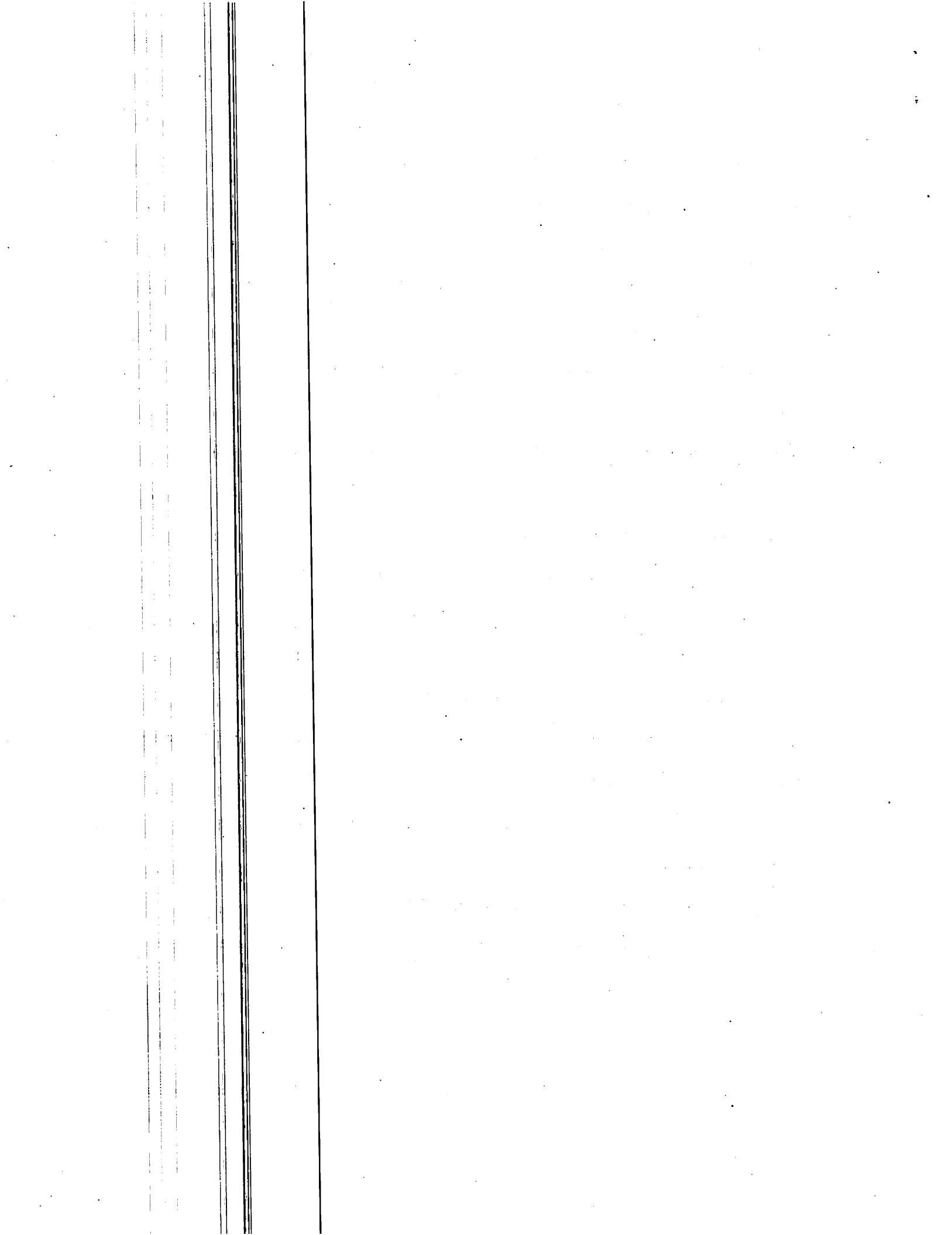
The Respondent did not appear at the hearing.

PROPOSED FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. On March 2, 2021, the Claimant and the Respondent entered into a contract to remodel the Claimant's garage into a playroom (Contract).
2. The Respondent received a home improvement contractor license, MHIC license number 01-142142, on March 26, 2021.
3. The Claimant did not know the Respondent was unlicensed at the time the Contract was executed.
4. The original agreed-upon Contract price was \$9,250.00.
5. The Respondent told the Claimant she could complete the entire project in five days.²

² Jesse Fincham worked on the project on behalf of the Respondent and was the Claimant's primary contact person for the Contract.



6. The Contract was to be paid in three installments. The first installment of \$3,083.33 was due on the date the Contract was executed. The second installment of \$3,083.33 was due on the date the Respondent began working on the project. The final installment of \$3,083.34 was due upon completion of the Contract.

7. On March 2, 2021, the Claimant paid the Respondent \$3,083.33.

8. On March 16, 2021, the Respondent started the project, and the Claimant paid the Respondent \$3,083.33.

9. The Respondent made very little progress on the project during March and April 2021. The Respondent offered a series of excuses for the delay, such as a family emergency, bad weather, and a broken down vehicle.

10. In April 2021, the Respondent installed some drywall but after it was installed she admitted to the Claimant that the drywall work was substandard and needed to be replaced by someone more competent.

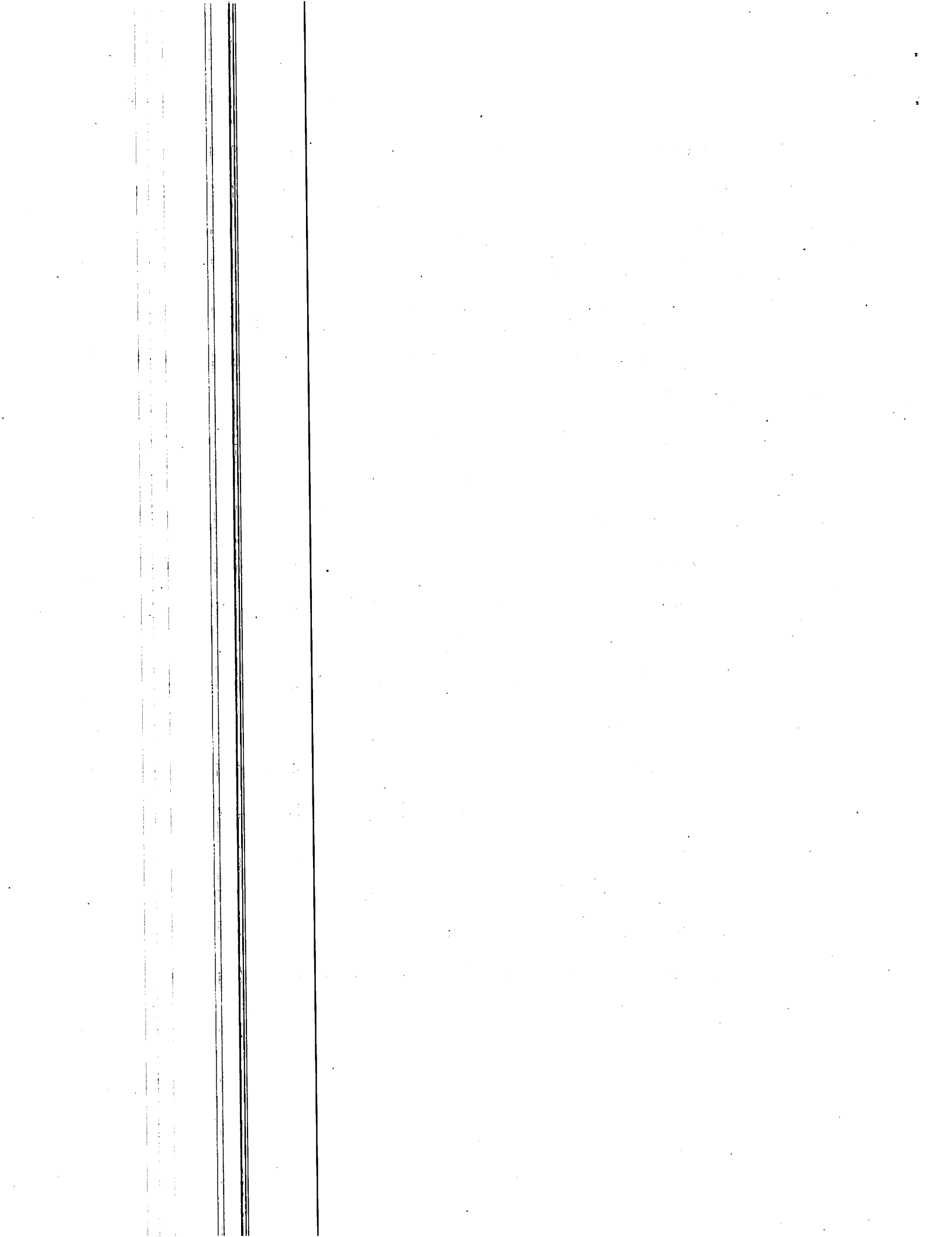
11. On Tuesday, May 4, 2021, the Respondent told the Claimant that the project would be completed by Friday, May 7, 2021.

12. The Respondent did no work on the project between May 4 and 7, 2021.

13. On May 10, 2021, the Respondent told the Claimant that the project would be completed by May 14, 2021.

14. After May 10, 2021, the Respondent did some drywall work, but the project remained substantially incomplete as of May 14, 2021.

15. On May 23, 2021, the Claimant told the Respondent that the project must be completed no later than May 25, 2021, and the Respondent agreed to this demand.



16. The Respondent did not complete the project by May 25, 2021, as agreed, and the Claimant terminated the Contract.

17. A substantial portion of the Respondent's actions with regard to the Contract occurred after the Respondent became licensed.

18. In May 2021, the Claimant hired another contractor, Chavez Brothers, to complete the project to the same specifications of the Contract for \$9,000.00.

19. The Chavez brothers began working on the project on May 30, 2021, and finished the project on June 3, 2021.

DISCUSSION

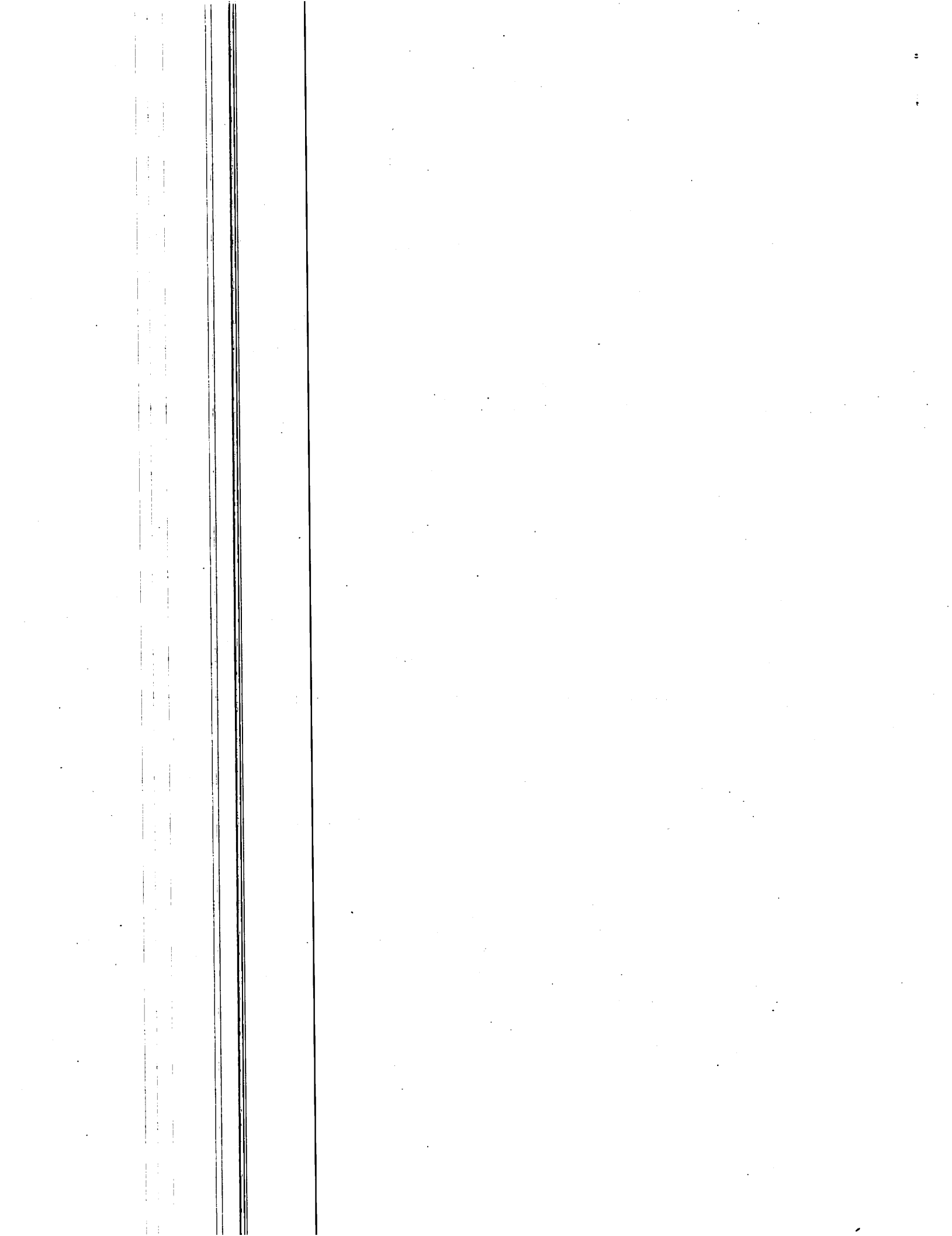
LEGAL FRAMEWORK

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).

A home improvement claim is subject to dismissal as legally insufficient if the contractor was unlicensed when the contract was entered into but licensed during the performance of the contract unless:

- (i) The claimant establishes by a preponderance of the evidence that the claimant did not know that the contractor was unlicensed at the time the contract was entered into; and
- (ii) A substantial portion of the contractor's alleged misconduct occurred after the contractor became licensed.

COMAR 09.08.03.02D(3)(d).

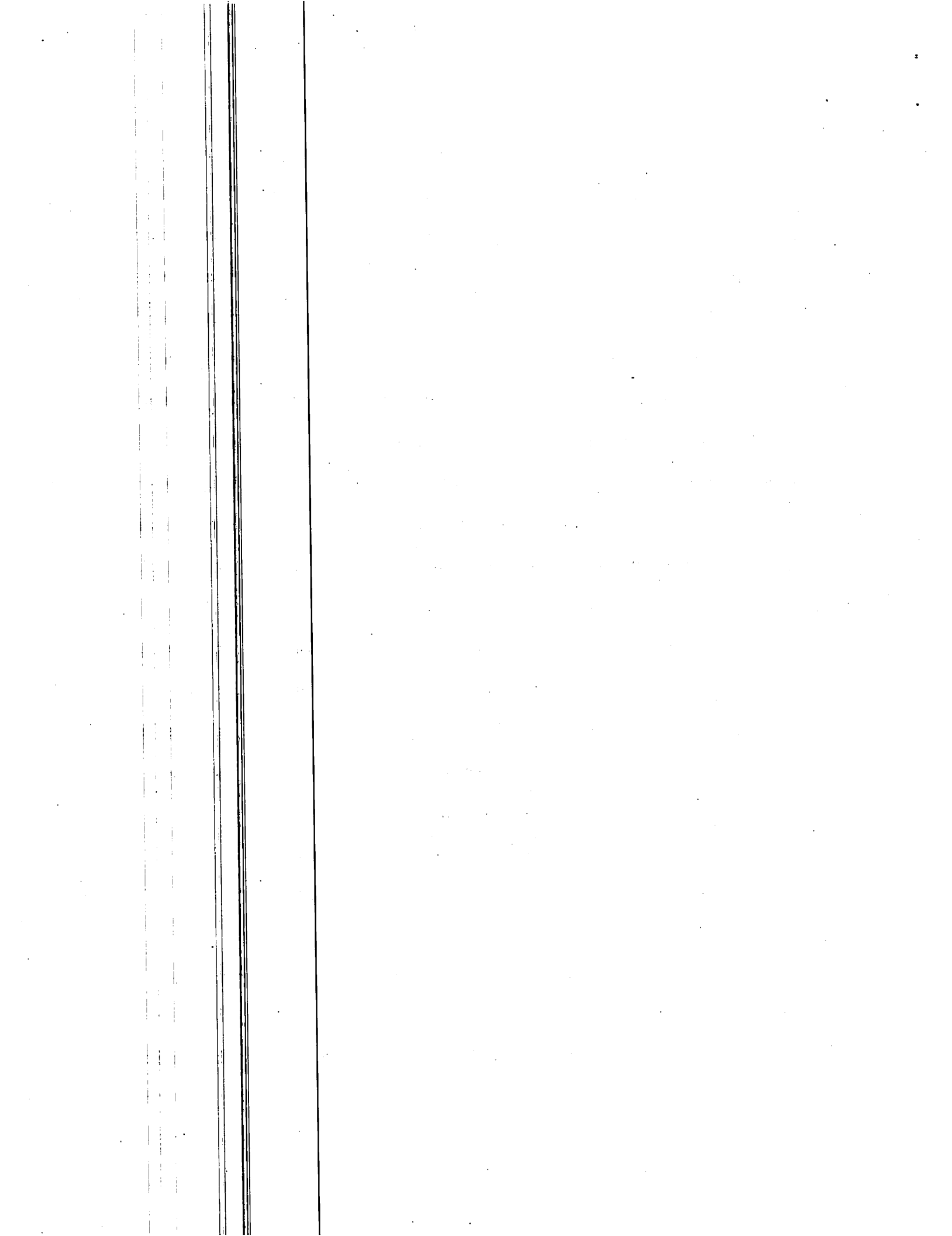


Certain claimants are excluded from recovering from the Fund altogether. Therefore, a claimant must prove that: (a) the claimant resides in the home as to which the claim is made, or owns no more than three dwelling places; (b) the claimant is not an employee, officer or partner of the contractor; or the spouse or other immediate relative of the contractor or the contractor's employees, officers or partners; (c) the work at issue did not involve new home construction; (d) the claimant did not unreasonably reject the contractor's good faith effort to resolve the claim; (e) the claimant complied with any contractual arbitration clause before seeking compensation from the Fund; (f) there is no pending claim for the same loss in any court of competent jurisdiction and the claimant did not recover for the actual loss from any source; and (g) the claimant filed the claim with the MHIC within three years of the date the claimant knew, or with reasonable diligence should have known, of the loss or damage. Bus. Reg. §§ 8-405(c), (d), (f), and (g), 8-408(b)(1); Bus. Reg. § 8-101(g)(3)(i) (Supp. 2021).

If not excluded on these grounds, a claimant 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.

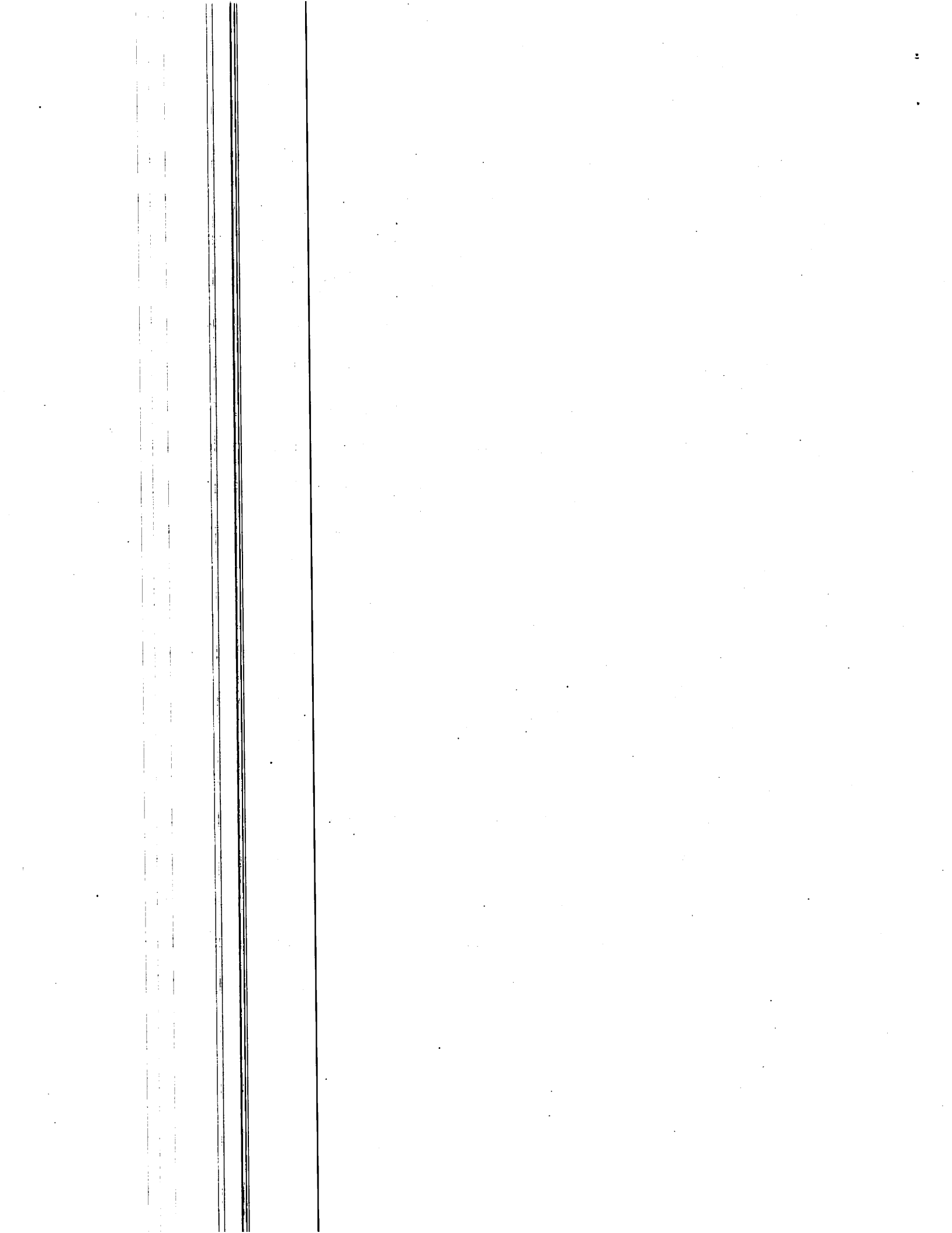
ANALYSIS

Although the Respondent was not a licensed contractor at the time the Contract was signed on March 2, 2021, the evidence demonstrated that the Claimant did not know that the contractor was unlicensed on that date. Specifically, the Claimant testified credibly that she did



not know the Respondent was not licensed with the MHIC when the Contract was signed. This testimony was not refuted. Moreover, the fact that the Respondent obtained the MHIC license on March 26, 2021, validates the Claimant's belief that the Respondent was a licensed contractor at the time the Contract was signed. The evidence also showed that a substantial portion of the Respondent's alleged misconduct occurred after she became licensed. Indeed, the evidence demonstrated that very little work occurred on the project prior to March 26, 2021. While the inaction during that timeframe constitutes part of the Respondent's malfeasance, the majority of the Respondent's misconduct occurred in April and May 2021 after she became licensed. It was during this period when the Respondent incompetently installed inferior drywall work, delayed the project without any reasonable justification, and failed to complete the project as promised. Thus, as the Fund's representative acknowledged at the hearing, the Claimant's claim is not subject to dismissal under COMAR 09.08.03.02D(3)(d).

Based on the evidence presented at the hearing, I find that the Claimant was not subject to any of the statutory exclusions for recovery from the Fund. Additionally, the undisputed evidence demonstrated that the Respondent performed an inadequate and incomplete home improvement by failing to timely and competently complete the project as required by the Contract. The Claimant and her husband testified credibly about all facets of the project, and their unrefuted testimony was fortified by exhibits, which included pictures demonstrating the status of the Respondent's incomplete and inadequate work months after it was supposed to be completed. The Claimant fulfilled her contractual obligation by paying the Respondent the first two installments due on the Contract, and she was more than patient as the project was delayed well beyond a reasonable completion date.



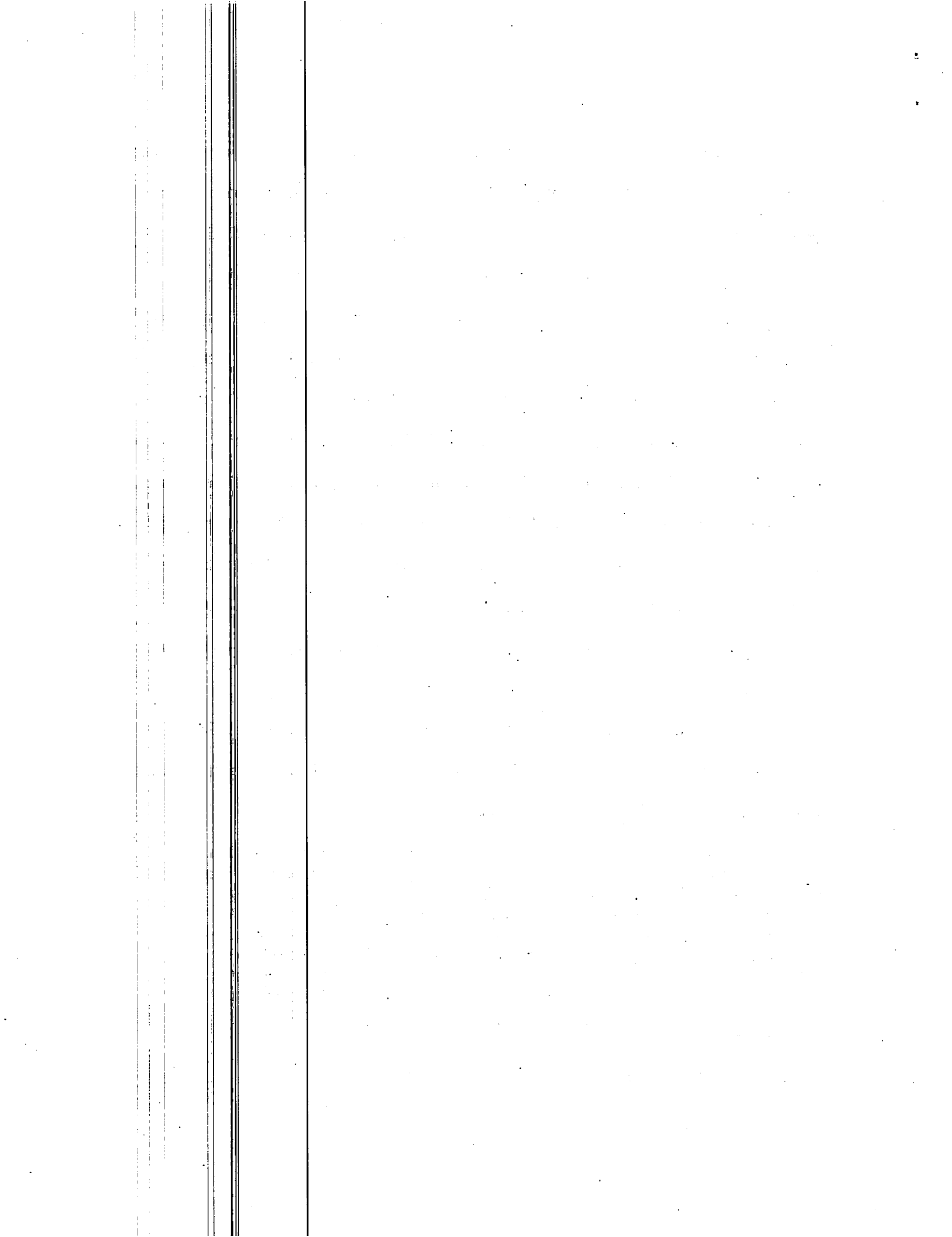
The Respondent did not fulfill her obligation to perform an adequate and complete home improvement; indeed, the Respondent clearly took advantage of the Claimant's patience and goodwill and never delivered on her part of the Contract despite accepting \$6,166.66 in payments. The Respondent proffered dubious excuses for her delayed performance and repeatedly misled the Claimant to believe the project would be completed in short order. The work that was done was substandard and needed to be replaced. The Fund agreed that the Respondent failed to meet the standards of a licensed home improvement contractor and recommended an award. 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). The 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 hired 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).



Here, the Claimant proved she paid the Respondent \$6,166.66 pursuant to the Contract. The Claimant then paid Chavez Brothers \$9,000.00 to complete the Contract to the Contract's same specifications. When these figures are added together, the total is \$15,166.66. Based on the above-referenced formula, the Claimant's actual loss is the \$15,166.66 minus the original Contract price, \$9,250.00, which comes to \$5,916.66.

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. In this case, the Claimant's actual loss, \$5,916.66, is less than the amount paid to the Respondent, \$6,166.66, and less than \$30,000.00. Therefore, the Claimant is entitled to recover her actual loss of \$5,916.66.

PROPOSED CONCLUSIONS OF LAW

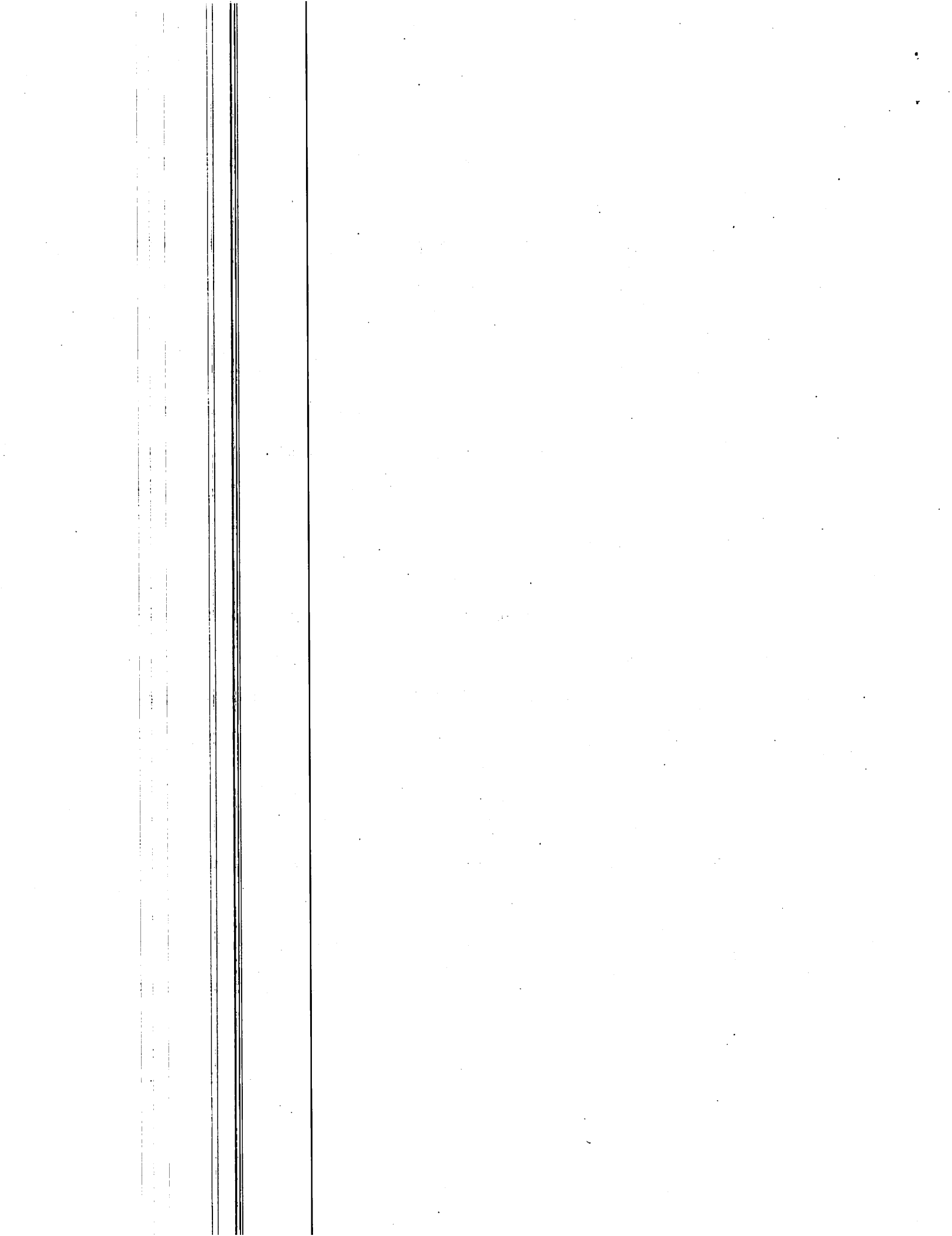
I conclude that the Claimant has sustained an actual and compensable loss of \$5,916.66 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(c). I further conclude that the Claimant is entitled to recover \$5,916.66 from the Fund. Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$5,916.66; 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;³ and

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

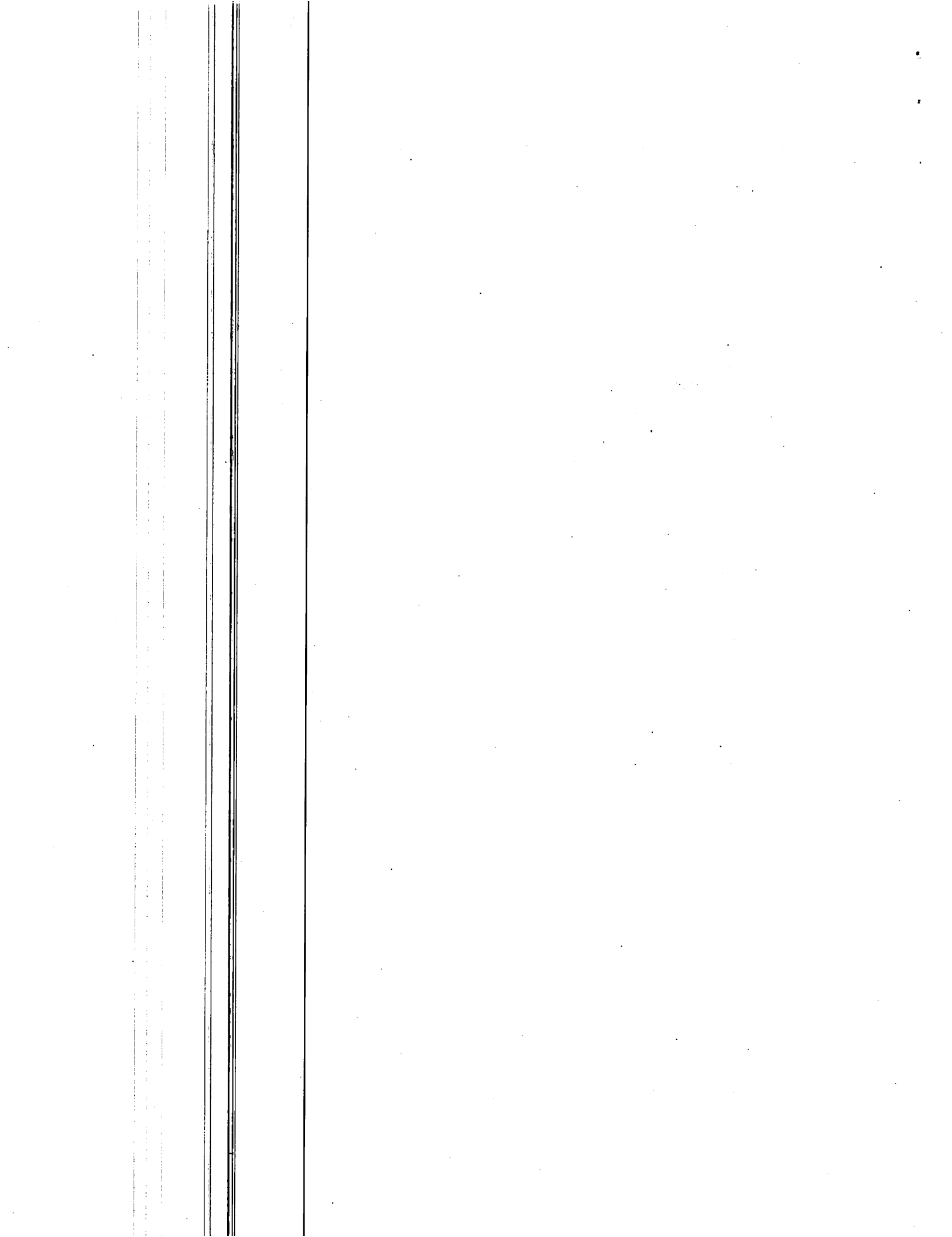
December 7, 2022
Date Decision Issued

EJK/dlm
#201534



Edward J. Kelley
Administrative Law Judge

³ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.



PROPOSED ORDER

WHEREFORE, this 25th day of January, 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.

Michael Newton

Michael Newton

Panel B

***MARYLAND HOME IMPROVEMENT
COMMISSION***

