

IN THE MATTER OF THE CLAIM	*	BEFORE WILLIS GUNTHER BAKER,
OF BARBARA L. OGDEN,	*	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 DAVID GEORGE	*	
FINAN,	*	OAH No.: LABOR-HIC-02-21-15294
T/A WHEATON DOOR & WINDOW,	*	MHIC No.: 20 (75) 394
RESPONDENT		

* * * * *

PROPOSED DECISION

STATEMENT OF THE CASE
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RECOMMENDED ORDER

STATEMENT OF THE CASE

On December 23, 2020, Barbara L. Ogden (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 \$29,302.00 in actual losses allegedly suffered as a result of a home improvement contract with David Finan, trading as Wheaton Door and Window, doing business as Deck Wizard (Respondent).¹ Md. Code Ann.,

¹ The Claimant never dealt directly with Mr. Finan but interacted with several of his employees who are all included under the term "Respondent."

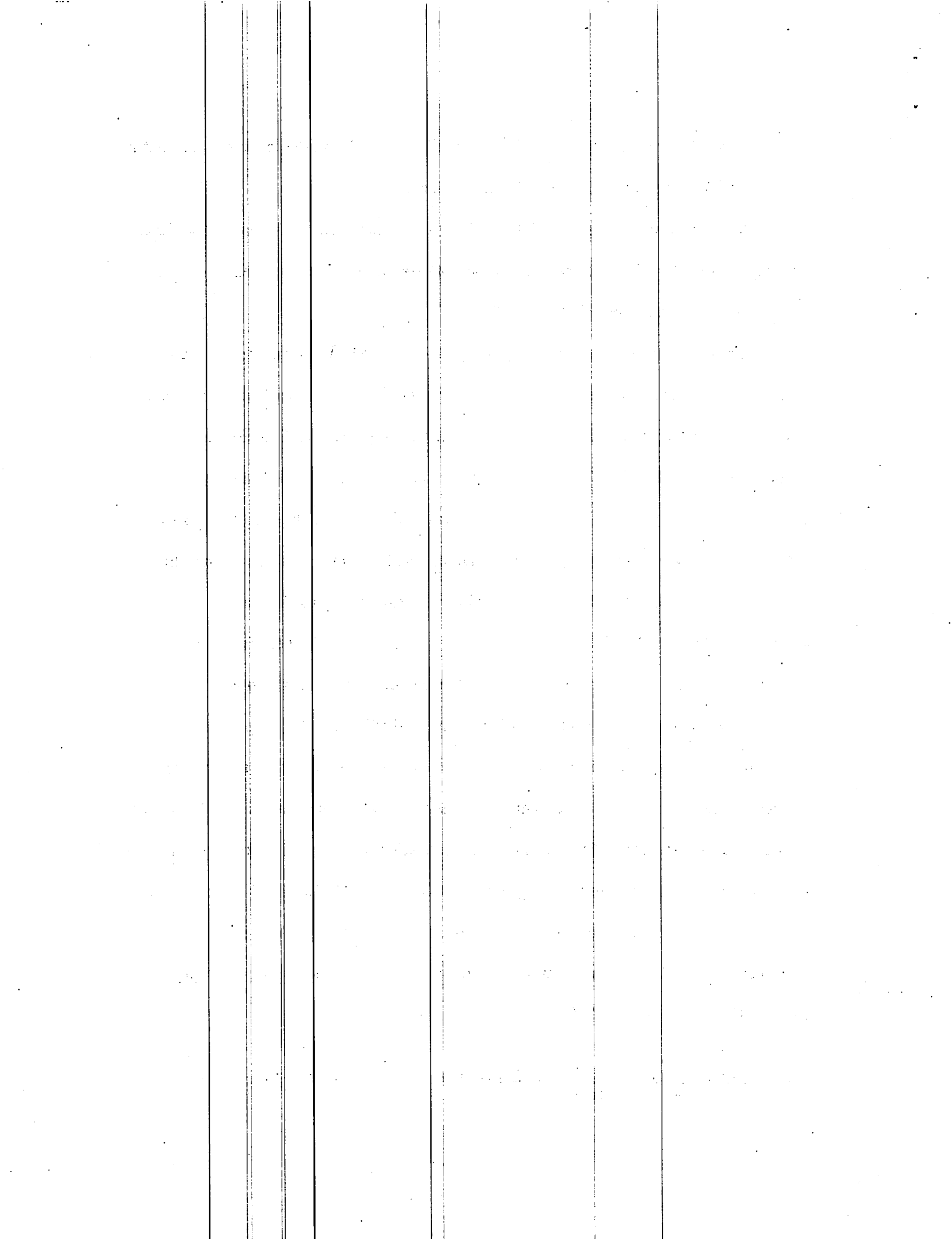
Bus. Reg. §§ 8-401 through 8-411 (2015).² On June 21, 2021, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on August 12, 2021 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 represented herself.

After waiting twenty 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 July 13, 2021, the OAH provided a Notice of Hearing (Notice) to the Respondent by United States mail and certified mail to the Respondent's two addresses on record with the OAH, a business address in Maryland and an address in California. COMAR 09.08.03.03A(2); COMAR 28.02.01.05C(1). The Notice stated that a hearing was scheduled for August 12, 2021 at 9:30 a.m. at the OAH. The Notice further advised the Respondent that failure to attend the hearing might result in "a decision against you."

The Notices mailed by United States mail and certified mail to the Respondent's Maryland Sunnyside Avenue business address were returned to the OAH with the notation "No mail receptacle." The OAH received a green certified mail card returned and signed by Jennifer Gomez, noted as "agent" for the Respondent, for the California address. 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.

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



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; 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

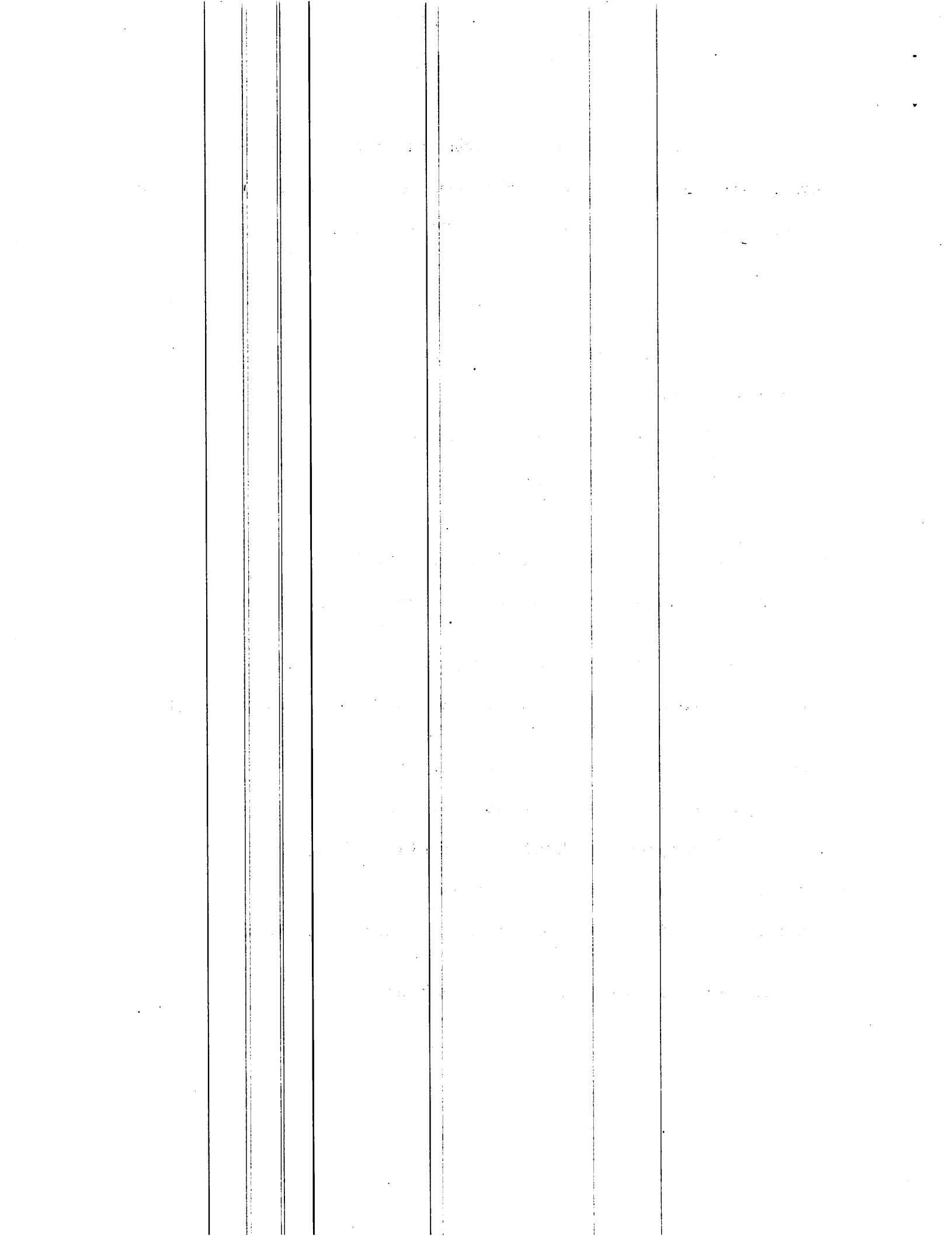
I admitted the following exhibits on the Claimant's behalf:

- Clmt. Ex. 1 - Contract between the Claimant and the Respondent for renovations to the Claimant's existing deck, July 8, 2018 (Contract)
- Clmt. Ex. 2 - Multi-Tech Inspection Services Inspection Report, July 5, 2021
- Clmt. Ex. 3 - Emails between the parties August 22-24, 2018, August and September 2019, and March 17, 2020
- Clmt. Ex. 4 - Freedom Fence and Deck Estimate, August 8, 2020

I admitted the following exhibits on the Fund's behalf:

- Fund Ex. 1 - Hearing Notice attaching MHIC Hearing Order, July 13, 2021
- Fund Ex. 2 - Respondent's MHIC licensing information
- Fund Ex. 3 - Letter from MHIC to the Respondent notifying of Claim and attaching the Claim Form, January 15, 2021

The Respondent was not present and did not submit any exhibits.



Testimony

The Claimant testified and did not present other witnesses.

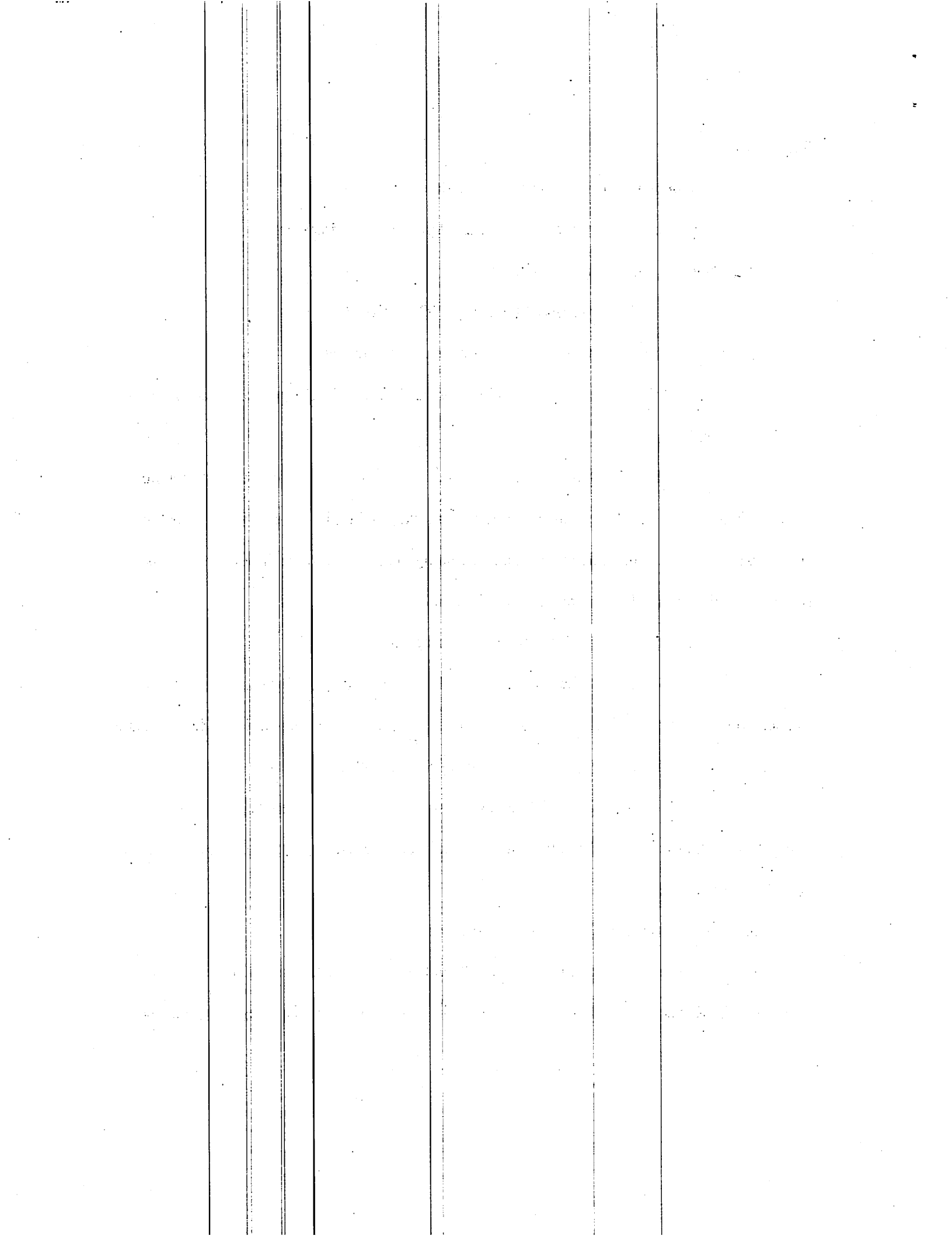
The Respondent was not present and did not present any witnesses.

The Fund did not present any witnesses.

PROPOSED FINDINGS OF FACT

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

1. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor.
2. On July 8, 2018, the Claimant and the Respondent entered into the Contract for deck work at the Claimant's residence, including removing and replacing existing deck board, adding rails, removing and replacing gates, and coating the deck and rails. The Contract was signed by Stefani Walmsley on behalf of the Respondent.
3. The original agreed-upon Contract price was \$12,993.00.
4. On July 8, 2018, the Claimant paid the Respondent \$4,331.00 as a deposit and financed the remaining \$8,662.00 with SERV Finance offered by the Respondent. The Claimant paid the Respondent in full for the Contract price of \$12,993.00.
5. On August 22, 2018, the deck work was completed, but the Claimant was unhappy with the work and refused to sign off. Ms. Walmsley, on behalf of the Respondent, agreed to redo the work.
6. In September 2018, the deck work was redone.
7. During July through September 2019, the Claimant communicated numerous times with the Respondent's representatives, Val, Sharon, Juan, and Hillary, regarding uneven



surfaces and pooling of water on the deck. The Respondent attempted a minor repair, but the problems persisted.

8. Sometime around November or December 2019, the Respondent's representative, Tim Eagan, acknowledged the deficiencies with the Respondent's work and verbally agreed to again replace the deck work. The Claimant requested the agreement in writing, but never received a response.

9. In December 2019, the Claimant filed an initial Claim with MHIC. The Claimant filed a revised claim form on October 12, 2020.

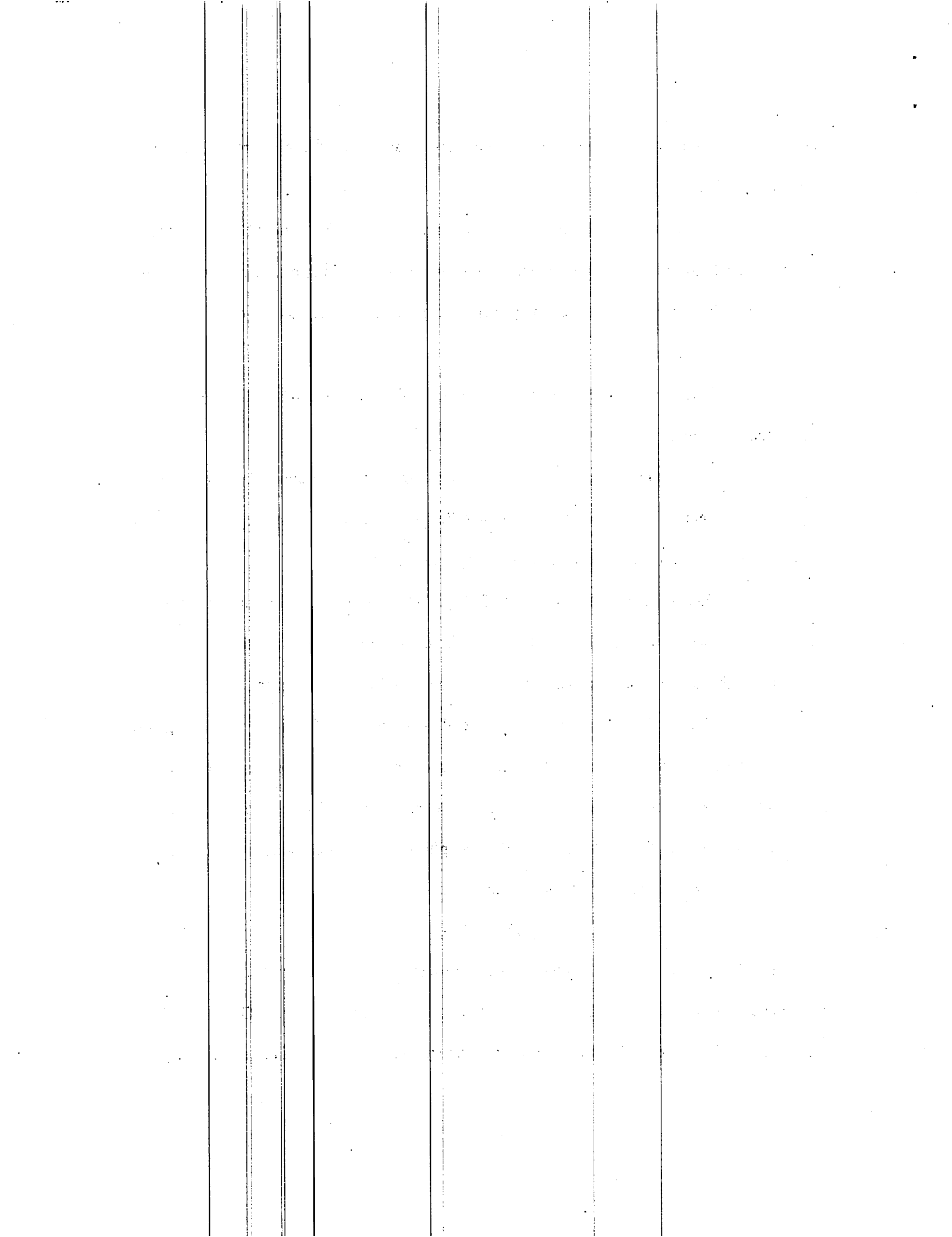
10. In February 2020, the Claimant followed up with the Respondent regarding the deck work and again received no response. In late February, the Claimant spoke with Tim Eagan who advised that he no longer worked for the Respondent.

11. On July 5, 2021, Volney Ford of MultiTech Inspection Services provided the Claimant an Inspection Report (Inspect Report) outlining the various code violations and safety hazards with the Claimant's deck, stairs, and rail constructed by the Respondent.

12. The Respondent's deck work included the following deficiencies: uneven sizes of the tread depths and riser heights on the steps; missing or unsafe handrails on steps; uneven and unsupported decking boards with poor transitions; uneven spacing of deck planking; non-code compliant spacing in railing components; and missing fastening screws to secure the deck planks to the joists, requiring repairs and replacements.

DISCUSSION

In this case, 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 (2014); COMAR 09.08.03.03A(3). To prove a claim by a preponderance of the evidence means

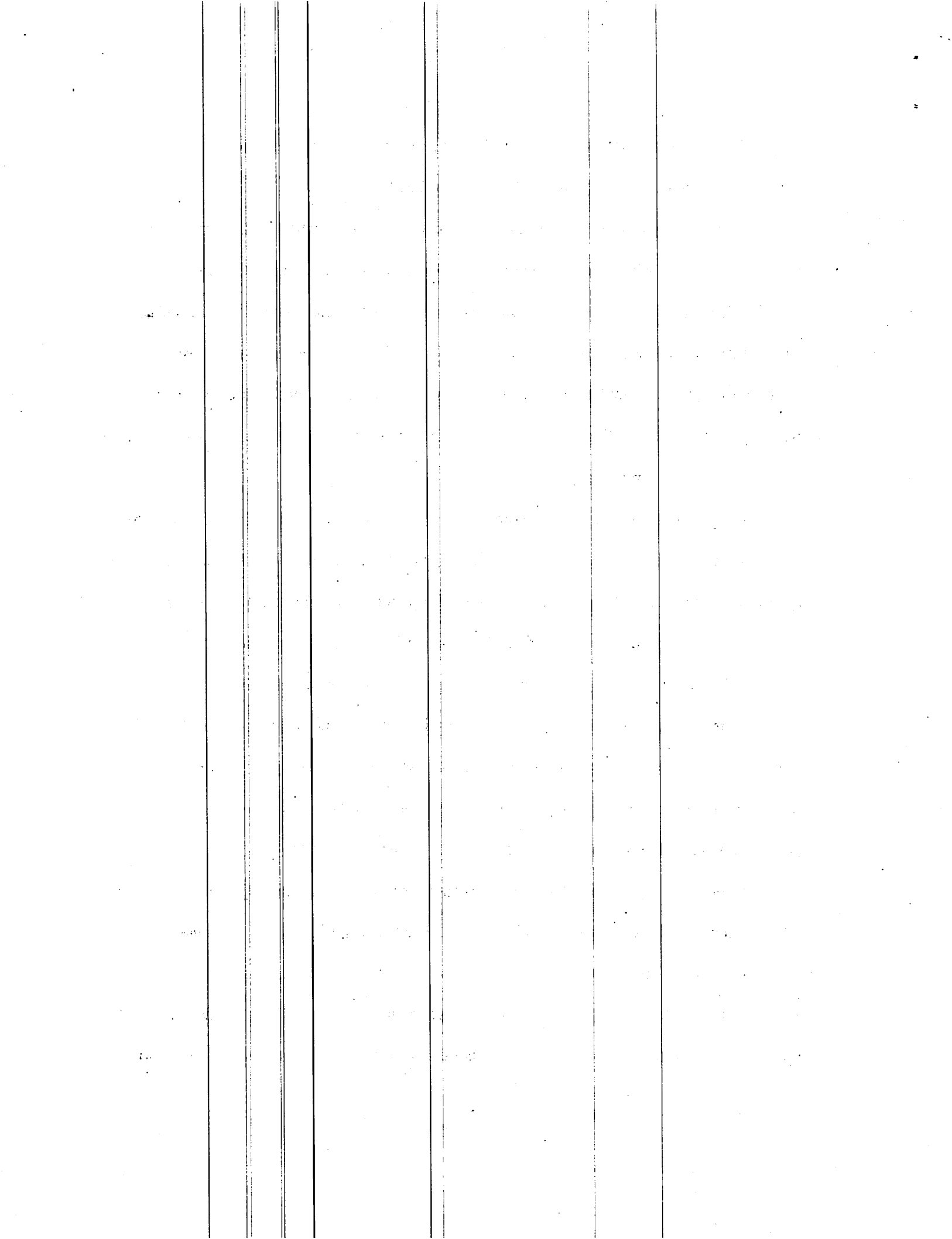


to show that it is “more likely so than not so” when all the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep’t*, 369 Md. 108, 125 n.16 (2002).

An owner may recover compensation from the Fund “for an actual loss that results from an act or omission by a licensed contractor.” 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 the Contract with the Claimant. And while the Claimant never dealt directly with David Finan, there is no question that she dealt with employees of the Respondent throughout the three years involved in her Claim. By the Respondent’s own admission, the initial work done at the Claimant’s house was so poorly performed the Respondent replaced it almost immediately. Within a year, the Claimant noticed poor workmanship regarding uneven surfaces, pooling of water, and warping and unsecure stairs. The Claimant sought warranty repairs in 2019 and was promised by the Respondent’s representative that the work would be redone, but she was strung along for months by the Respondent, resulting in her claim to the MHIC.

On July 1, 2021, Volney Ford of MultiTech Inspection Services inspected the Claimant’s deck and subsequently issued an Inspection Report. The Inspection Report noted dangerous code violations and shoddy workmanship throughout the Claimant’s deck, rails, and stairs constructed by the Respondent, including such things as: uneven sizes of the tread depths and riser heights on the steps; missing or unsafe handrails on steps; uneven and unsupported decking



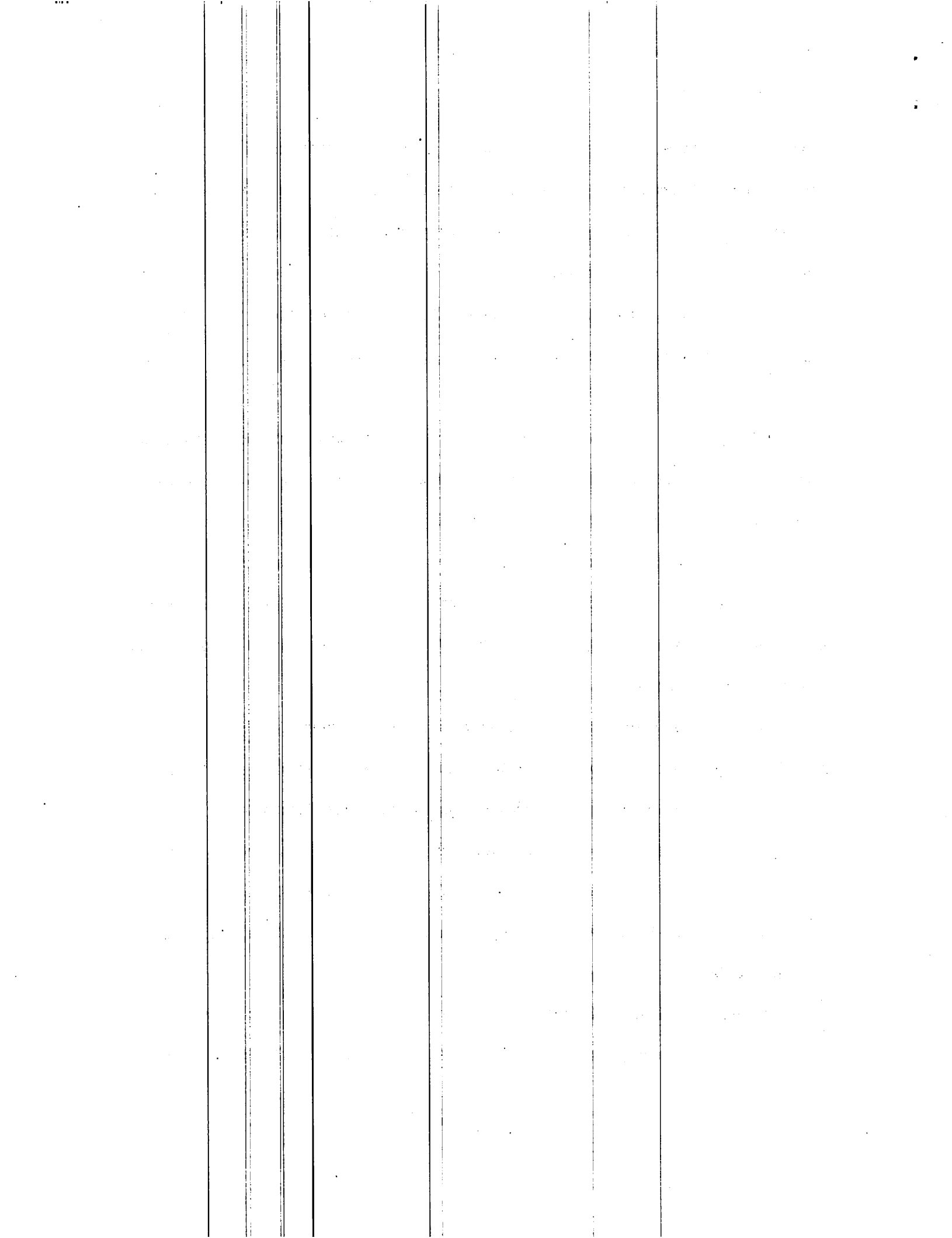
boards with poor transitions; uneven spacing of deck planking; non-code compliant spacing in railing components; and missing fastening screws to secure the deck planks to the joists. The Inspection Report contained suggestions for specific repairs to remedy the deficient construction but did not include an estimate for the repairs.

The Claimant provided an estimate from Freedom Fence and Deck for a complete replacement of her deck system and stairs, which she agreed was beyond the scope of the contact provided by the Respondent.

I find that the Respondent performed unworkmanlike, inadequate, and incomplete home improvements and the Claimant is eligible for compensation from the Fund. The Claimant's evidence is undisputed that she contracted with the Respondent to make modifications and add stairs and rails to her existing deck and that the work was not completed in a workmanlike manner or to code. The Respondent attempted minor repairs that were inadequate and failed to improve the shoddy workmanship. Indeed, the Respondent admitted that the entire work needed to be redone but failed to follow through.

There are no statutory impediments to the Claimant's recovery from the Fund. Md. Code Ann., Bus. Reg. §§ 8-405 (c), (d), (f), (g), 8-408(b)(1). The Claimant is neither a relative of the Respondent nor an officer, partner, or employee of the company. The Claimant owns the subject property, which is her home. The Claimant has no suit pending against the Respondent nor has the Claimant filed any insurance or other claims to compensate her for the Respondent's unworkmanlike and inadequate work. Having met those qualifications, the Claim is therefore a compensable claim against 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

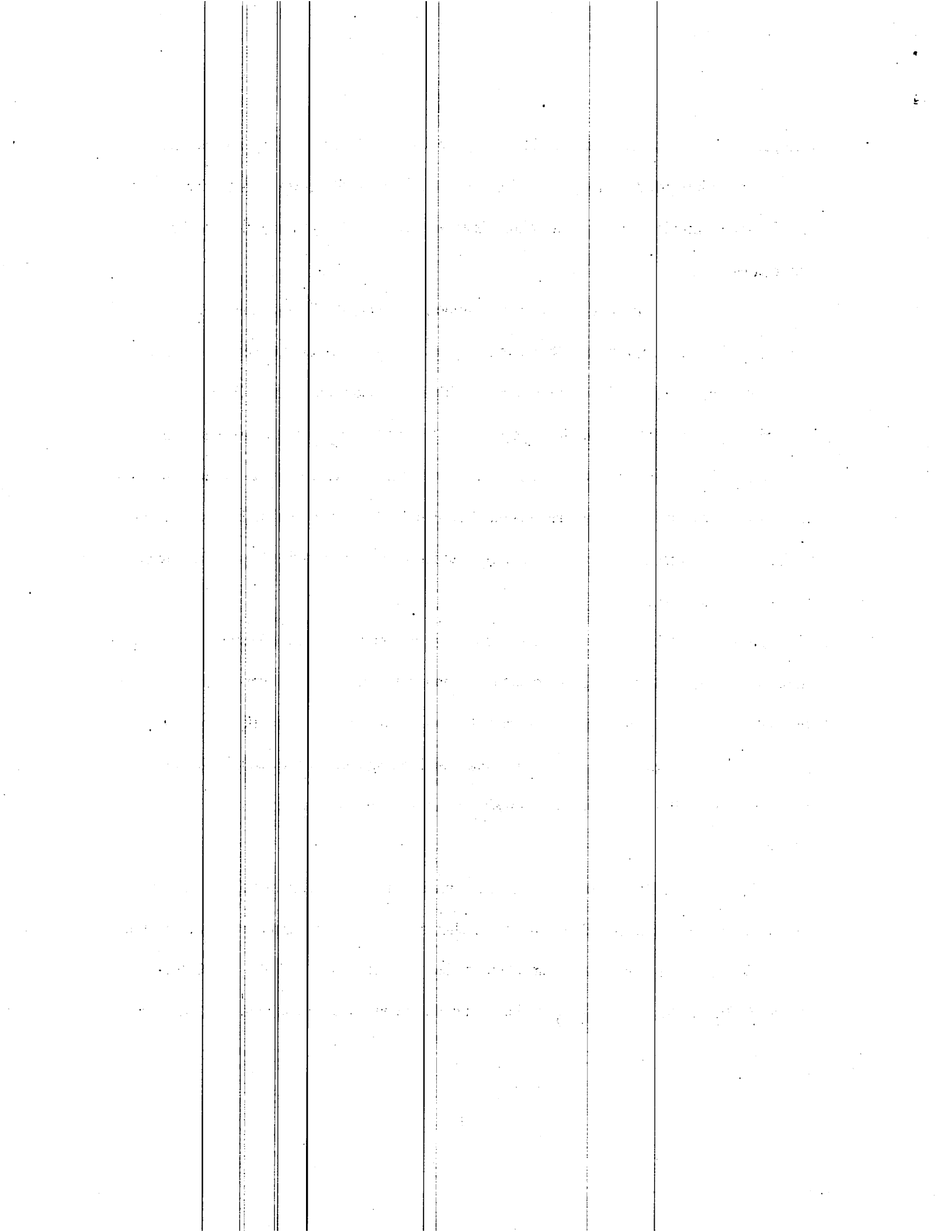


compensate a claimant for consequential or punitive damages, personal injury, attorney fees, court costs, or interest. Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1). MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work.

In this case, the Respondent performed some work under the Contract, and the Claimant is not seeking other contractors to complete or remedy that work, because the estimate the Claimant provided goes far beyond the work specified in the Contract with the Respondent. Accordingly, the following formula appropriately measures the Claimant's actual loss: "If the contractor did work according to the contract and the claimant is not soliciting another contractor to complete the contract, the claimant's actual loss shall be the amount which the claimant paid to the original contractor less the value of any materials or services provided by the contractor." COMAR 09.08.03.03B(3)(b).

Since the Claimant will be required to remove and replace all of the Respondent's work in order to bring the deck, stairs, and rails to code and make them safe and workmanlike, I find that the Respondent's work provided no value to the Claimant and she is entitled to recover the entire amount of the Contract. The Fund agreed that the Respondent provided no value to the Claimant and that it would not be unreasonable to award the entire contract amount of \$12,993.00.

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 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 is less than the amount paid to



the Respondent and less than \$20,000.00. Therefore, the Claimant is entitled to recover her actual loss of \$12,993.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$12,993.00 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)(b). I further conclude that the Claimant is entitled to recover that amount 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 \$12,993.00; 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;³ and

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

Willis Gunther Baker

October 4, 2021
Date Decision Issued

Willis Gunther Baker
Administrative Law Judge

WGB/cj
#194514

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

PROPOSED ORDER

WHEREFORE, this 18th day of February, 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.

Michael Newton

Michael Newton

Panel B

***MARYLAND HOME IMPROVEMENT
COMMISSION***

