

**IN THE MATTER OF THE CLAIM
OF ERIC YOUNG,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF CARLOS HEMBECK,
T/A G AND H HOME
IMPROVEMENT, LLC,
RESPONDENT**

*** BEFORE MICHELLE W. COLE,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
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* OAH No.: LABOR-HIC-02-21-10825
* MHIC No.: 20 (75) 751

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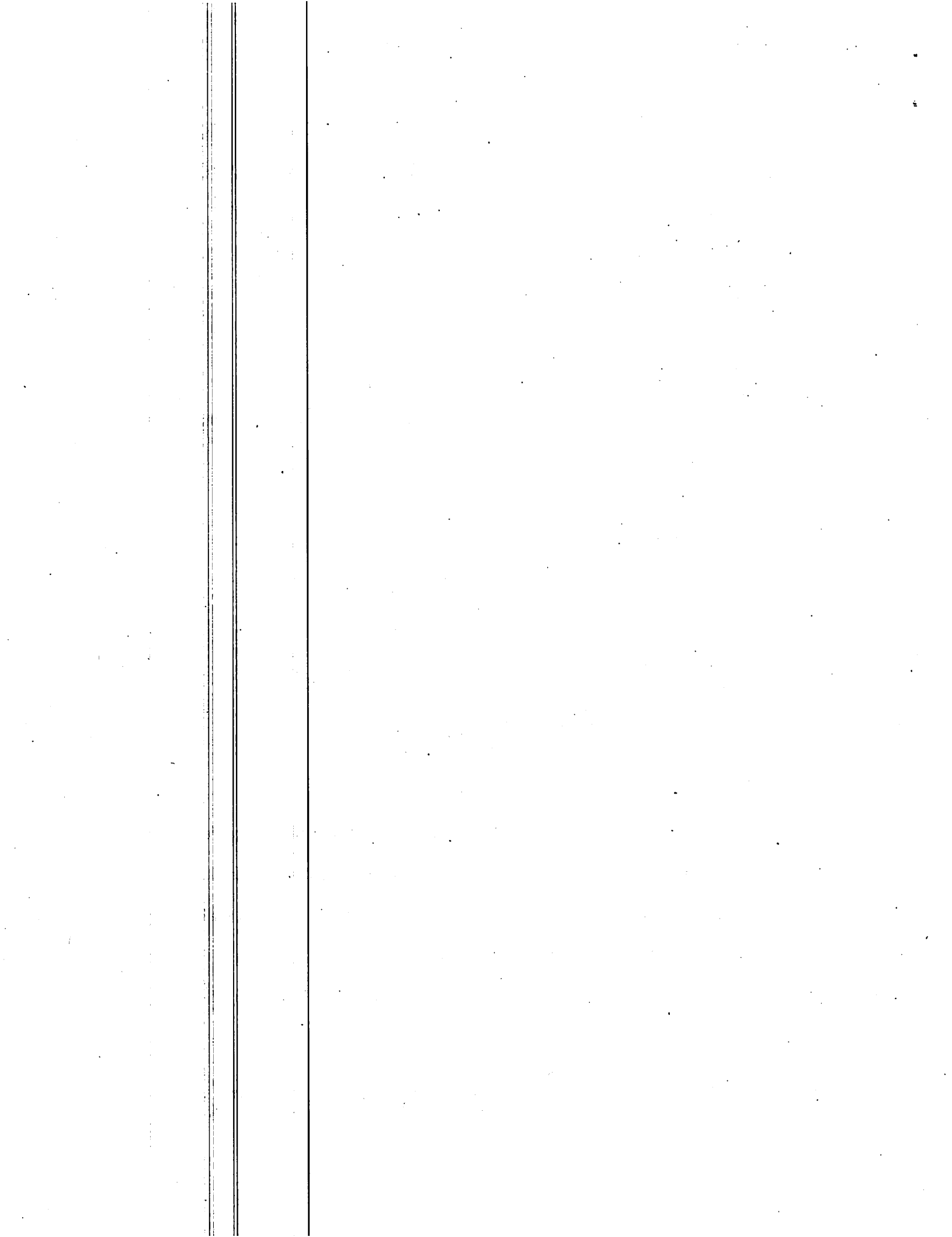
PROPOSED DECISION

**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 April 3, 2020, Eric Young (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 \$4,800.00¹ in actual losses allegedly suffered as a result of a home improvement contract with Carlos Hembeck, trading as G and H Home Improvement, LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through

¹ On the claim form, the Claimant indicated that he was seeking \$7,864.00 in actual damages; however, at the hearing, the Claimant amended his Claim. The Respondent and the Fund did not object to the amendment, which was for less than the amount originally claimed. Therefore, I allowed the Claimant to amend the Claim.



8-411 (2015).² On May 4, 2021, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a remote hearing on June 30, 2021, at the OAH in Hunt Valley, Maryland, via Webex. Md. Code Ann., Bus. Reg. §§ 8-407(a), 8-312; COMAR 28.02.01.20B. Andrew Brouwer, Assistant Attorney General, Department, represented the Fund. The Claimant represented himself. The Respondent represented himself.

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); Code of Maryland Regulations (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 an unworkmanlike, inadequate, or incomplete home improvement by the Respondent?
2. If so, what is the amount of the compensable loss?

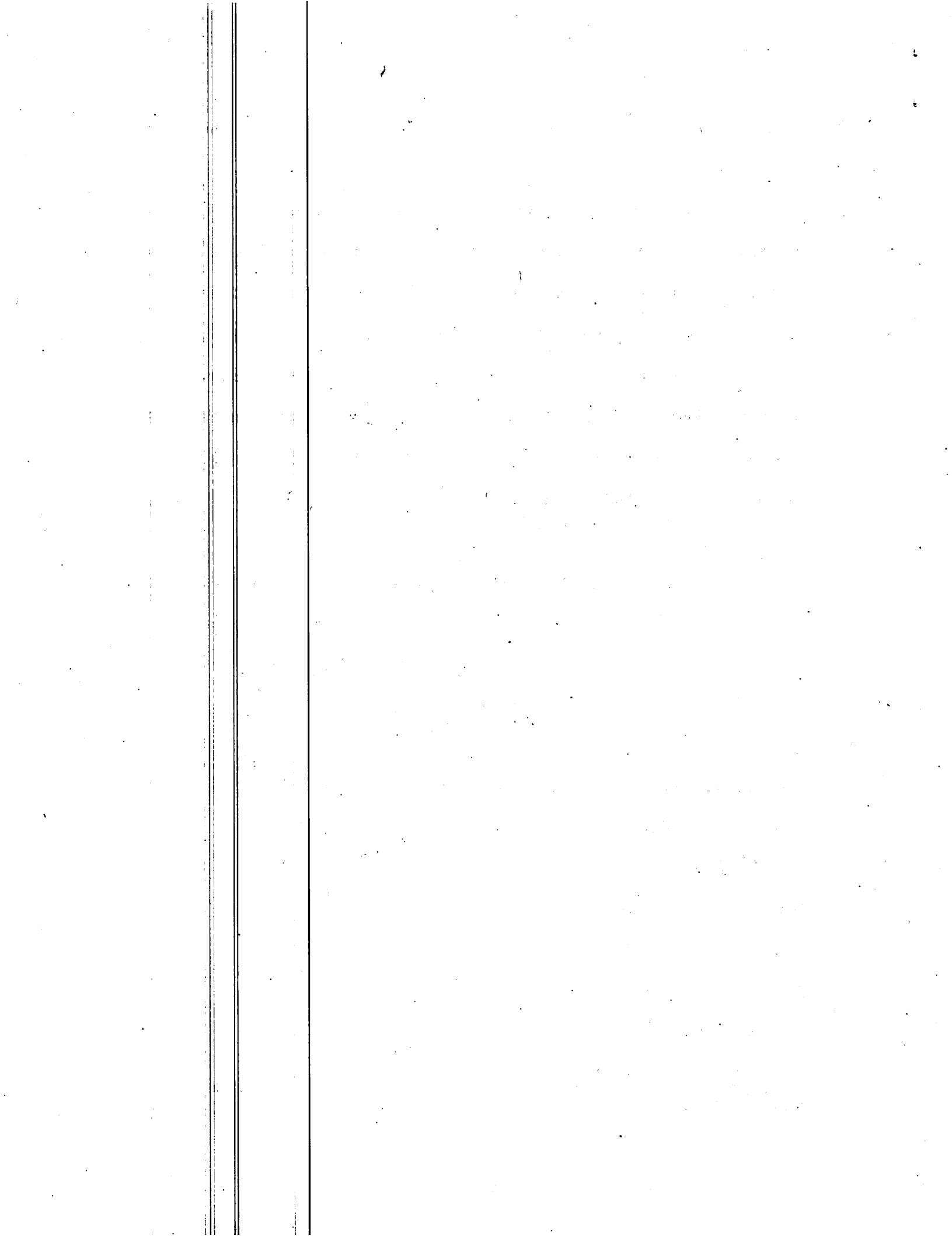
SUMMARY OF THE EVIDENCE

Exhibits

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

- Clmt. Ex. 1 Email from Claimant to other parties in the case, June 17, 2021
- Clmt. Ex. 1a Photograph
- Clmt. Ex. 1b Photograph
- Clmt. Ex. 2 Photograph
- Clmt. Ex. 3 Photograph
- Clmt. Ex. 4 Photograph

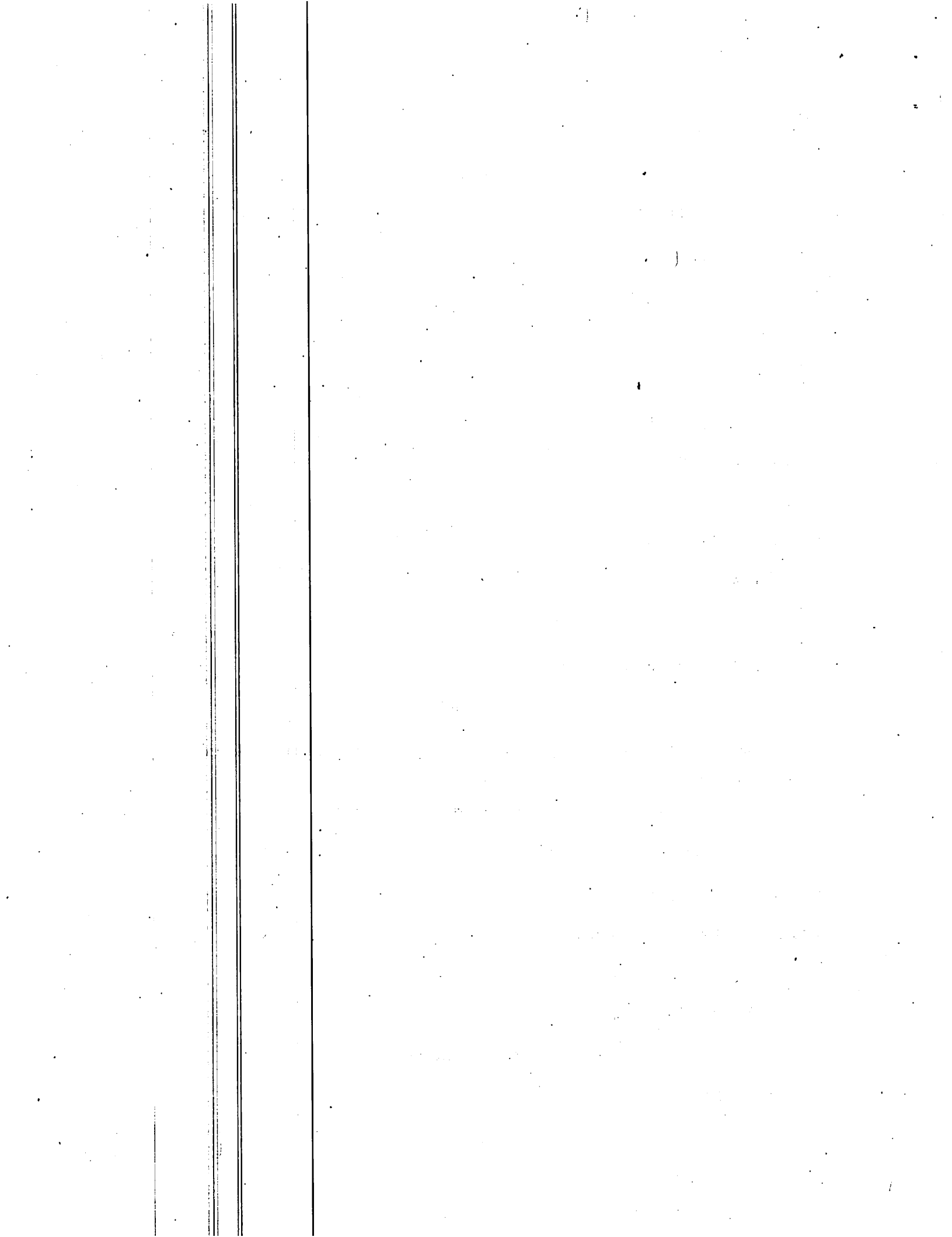
² Unless otherwise noted, all references hereinafter to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.



- Clmt. Ex. 5 Photograph
- Clmt. Ex. 6 Photograph
- Clmt. Ex. 7 Photograph
- Clmt. Ex. 8 Photograph
- Clmt. Ex. 9 Photograph
- Clmt. Ex. 10 Photograph
- Clmt. Ex. 11 Photograph
- Clmt. Ex. 12 Photograph
- Clmt. Ex. 13 Photograph
- Clmt. Ex. 14 Photograph
- Clmt. Ex. 15 Photograph
- Clmt. Ex. 16 Photograph
- Clmt. Ex. 17 Long Fence Estimate, February 22, 2020
- Clmt. Ex. 18 Complaint Form, November 22, 2019
- Clmt. Ex. 19 Home Improvement Contract, March 25, 2019
- Clmt. Ex. 20 J. F. Fuentes General Construction, LLC (J. F. Fuentes) Estimate, February 24, 2020

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

- Resp. Ex. 1 Proposal, June 30, 2021
- Resp. Ex. 2 Photograph
- Resp. Ex. 3 Drawings, May 2, 2019
- Resp. Ex. 4 Permit, May 16, 2019
- Resp. Ex. 5 Framing Plans, undated
- Resp. Ex. 6 Certificate of Use and Occupancy, April 12, 2019
- Resp. Ex. 7 Not Admitted



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

- Fund Ex. 1 Hearing Order, April 22, 2021
- Fund Ex. 2 Notice of Remote Hearing, June 8, 2021
- Fund Ex. 3 Notice of Remote Hearing, May 20, 2021
- Fund Ex. 4 Letter from the MHIC to the Respondent, April 20, 2020; Home Improvement Claim Form, March 30, 2020
- Fund Ex. 5 MHIC Registration Inquiry and License History, June 17, 2021

Testimony

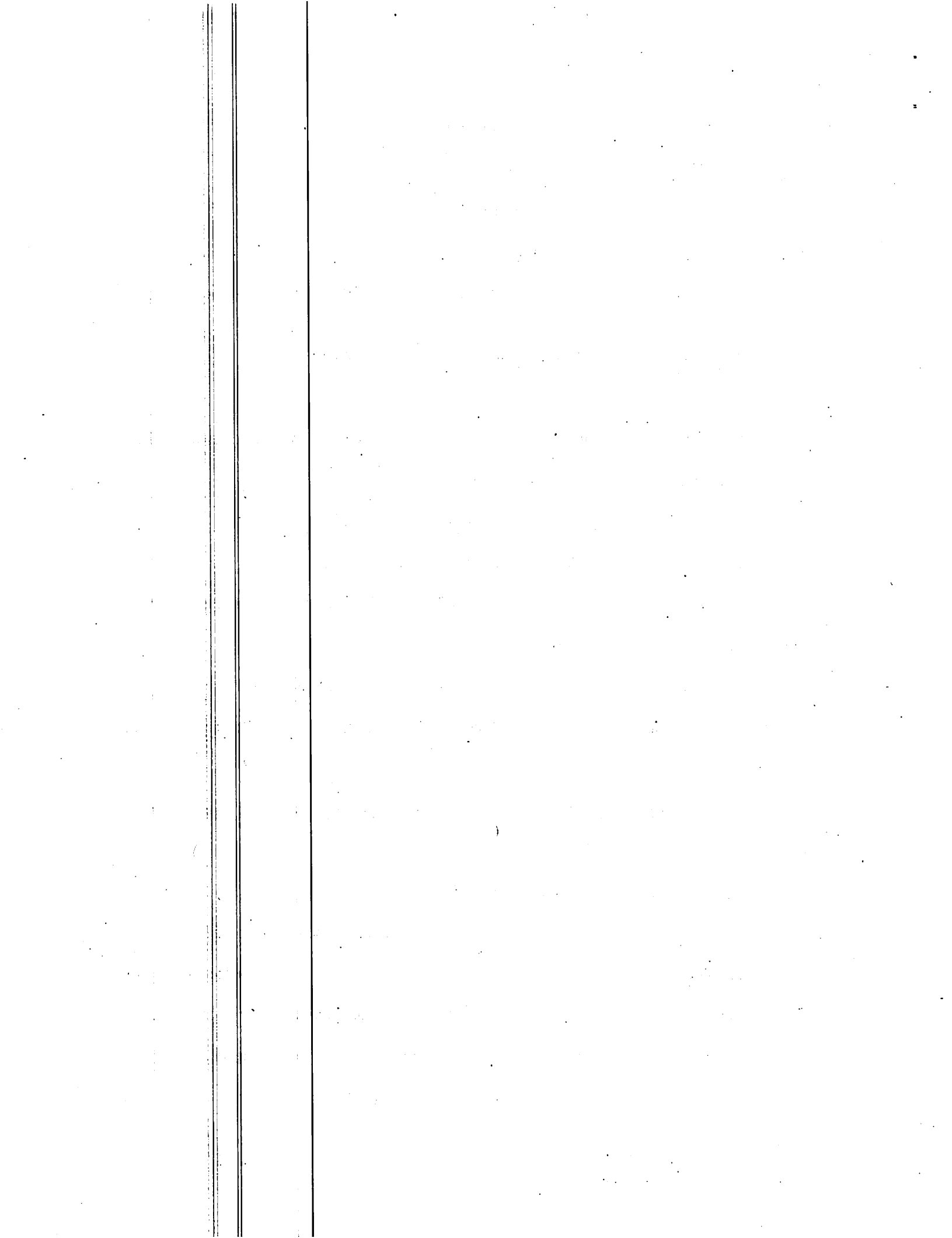
The Claimant testified on his own behalf. The Respondent testified on his own behalf.

The Fund did not present any witness 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 the MHIC.
2. On March 25, 2019, the Claimant and the Respondent entered into a contract to build a new freestanding deck on the back of the Claimant's home located in Waldorf, Maryland (Contract).
3. The original agreed-upon amount to complete the deck home improvement was \$14,000.00.
4. Under the Contract, the dimensions of the deck were to be 20 feet by 27 feet.
5. The Contract provided: "Written Change Orders signed by both parties are required for any changes or additional work." (Cl. Ex. 19). The change orders were required to state whether the change will increase or decrease the amount of the Contract, the cost of the additional work, and the new total amount of the Contract. Prior to commencing work under the Change Order, the Respondent was required to present the signed Change Order to the Claimant.



6. At some point, the Respondent informed the Claimant that the deck dimensions needed to be changed based on the location of a propane tank at the rear of the home foundation. The parties did not discuss specific details regarding the changes to the dimensions of the deck or any changes to the Contract price. There was no Change Order to reflect any changes to the terms of the Contract.

7. The Respondent submitted new framing plans with dimensions of 22 feet by 23 feet; the plans were approved by Charles County.

8. The Respondent completed the deck in June 2019.

9. The completed deck had dimensions of 22 feet by 23 feet. The deck railing of the completed deck ended in front of the middle of a window.

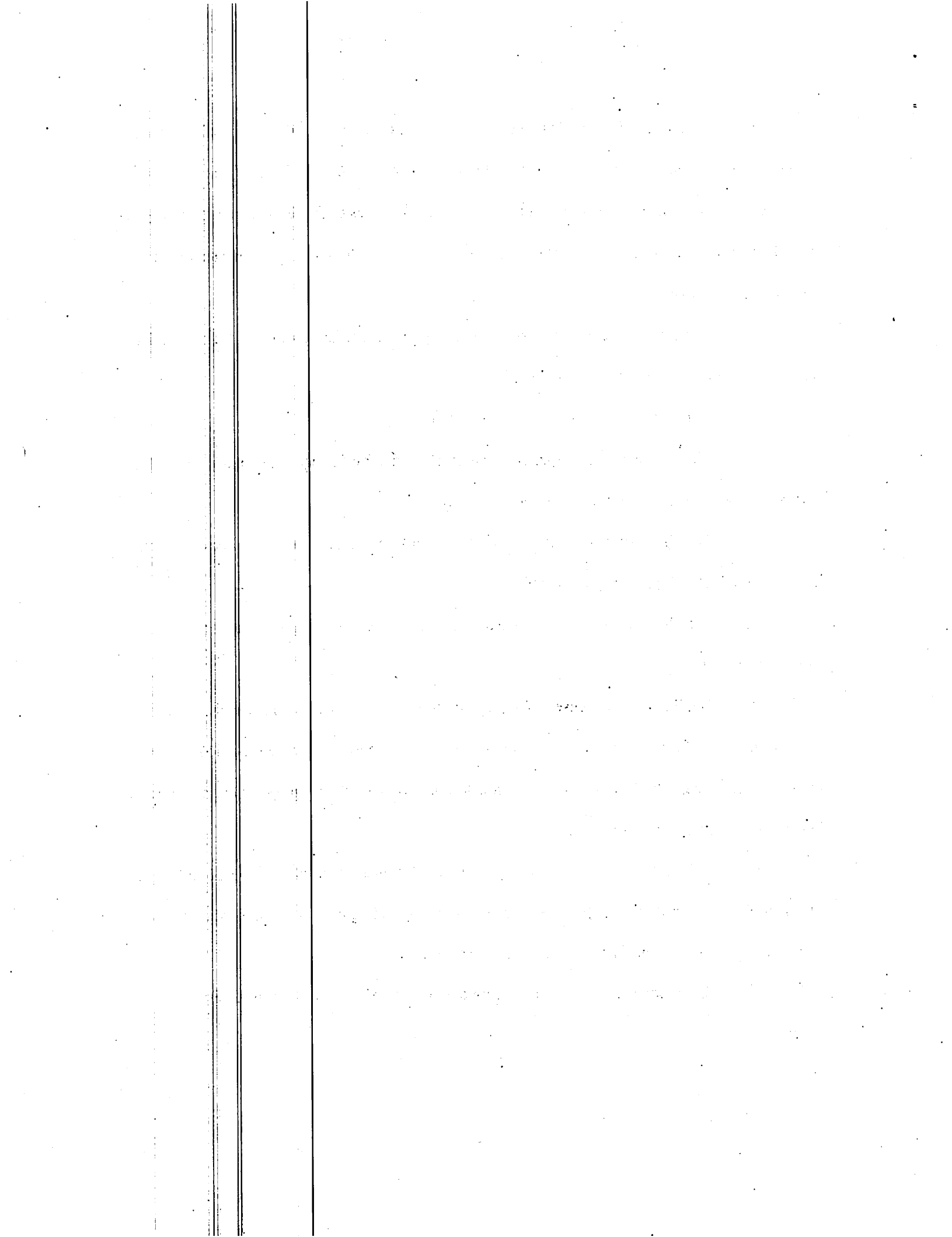
10. The Claimant asked the Respondent to make certain repairs to the deck, including cuts in the railing, which were completed.

11. The Claimant also asked the Respondent to move the railing so that it did not block the window.

12. The Respondent presented a proposal to the Claimant which moved the location of the railing to before the window and added stairs. This proposal increased the amount of the total Contract price. The Claimant did not agree to the Respondent's proposal or to any increase in the amount of the Contract price.

13. The Claimant made three payments to the Respondent totaling \$13,332.00. He asked the Respondent to complete his requested repairs, including changing the location of the railing, before he made the final payment under the Contract.

14. The Respondent refused to continue working on the deck without additional payment.



15. On February 22, 2020, Long Fence submitted an estimate in the amount of \$33,809.00 to remove some portions of the existing deck and construct an extension of the length of the deck to 29 feet.

16. On February 24, 2020, J. F. Fuentes submitted an estimate in the amount of \$4,800.00 to extend the length of the deck by one foot and perform the following work:

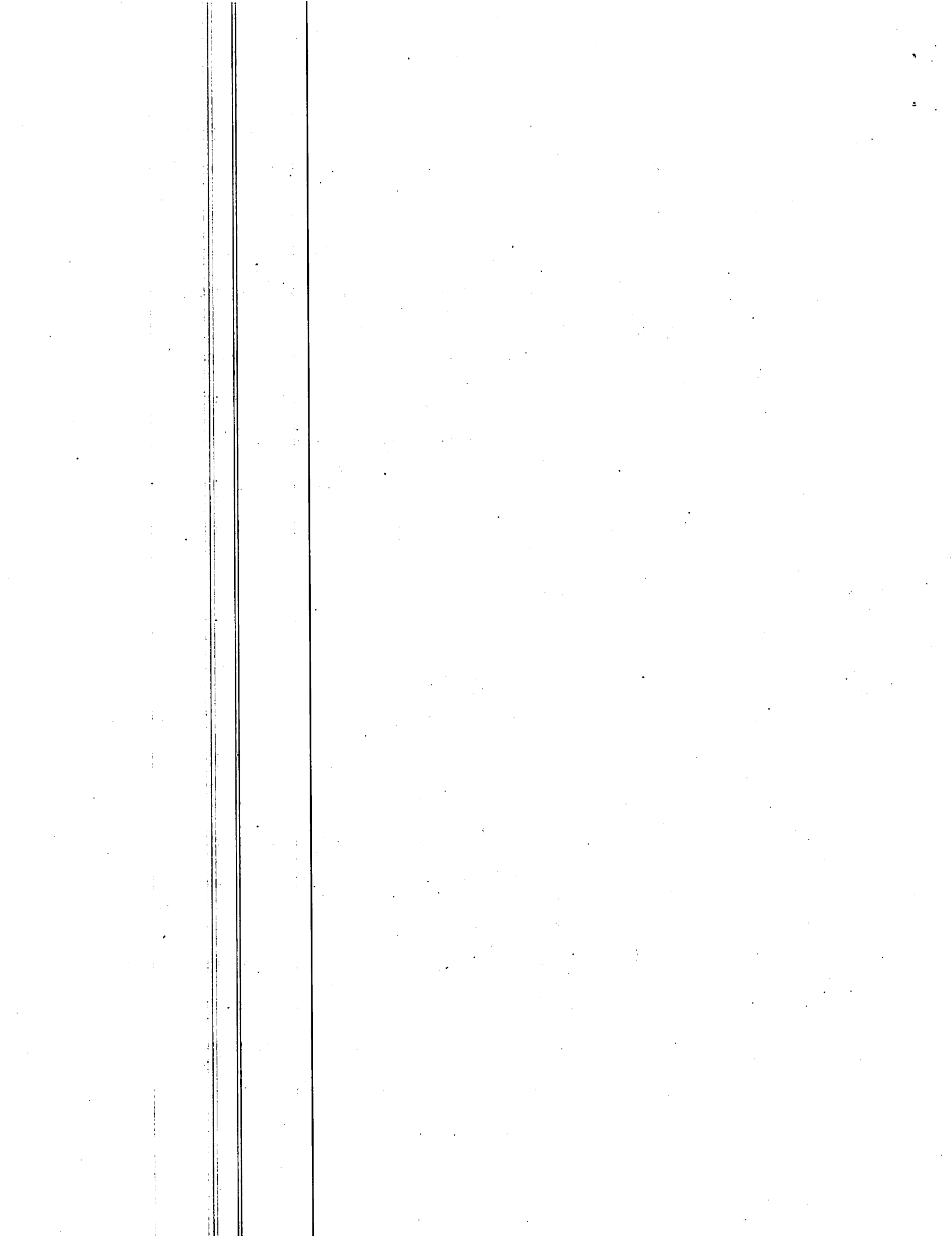
- Remove the railings of the right side of the deck.
- Extend the existing deck one foot out to the right, to remove the blocking of the window.
- If possible we will reuse the railing, if necessary we will replace the wooden railing.
- Remove one side of the floor where the flooring is vertical.
- Replace the flooring with trex enhance flooring.
- We will combine the 2 sides to have a consistent pattern for the flooring.
- Trash will be removed from the job site.
- Repair the siding near the deck. Add a piece so the siding goes down to the ground.
- We will match the existing flooring.
- All materials are included.

(Cl. Ex. 20).

DISCUSSION

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.

The Claimant filed a Claim with the MHIC and argued that he sustained actual damages as a result of the Respondent’s unworkmanlike, incomplete, and inadequate home improvement. 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



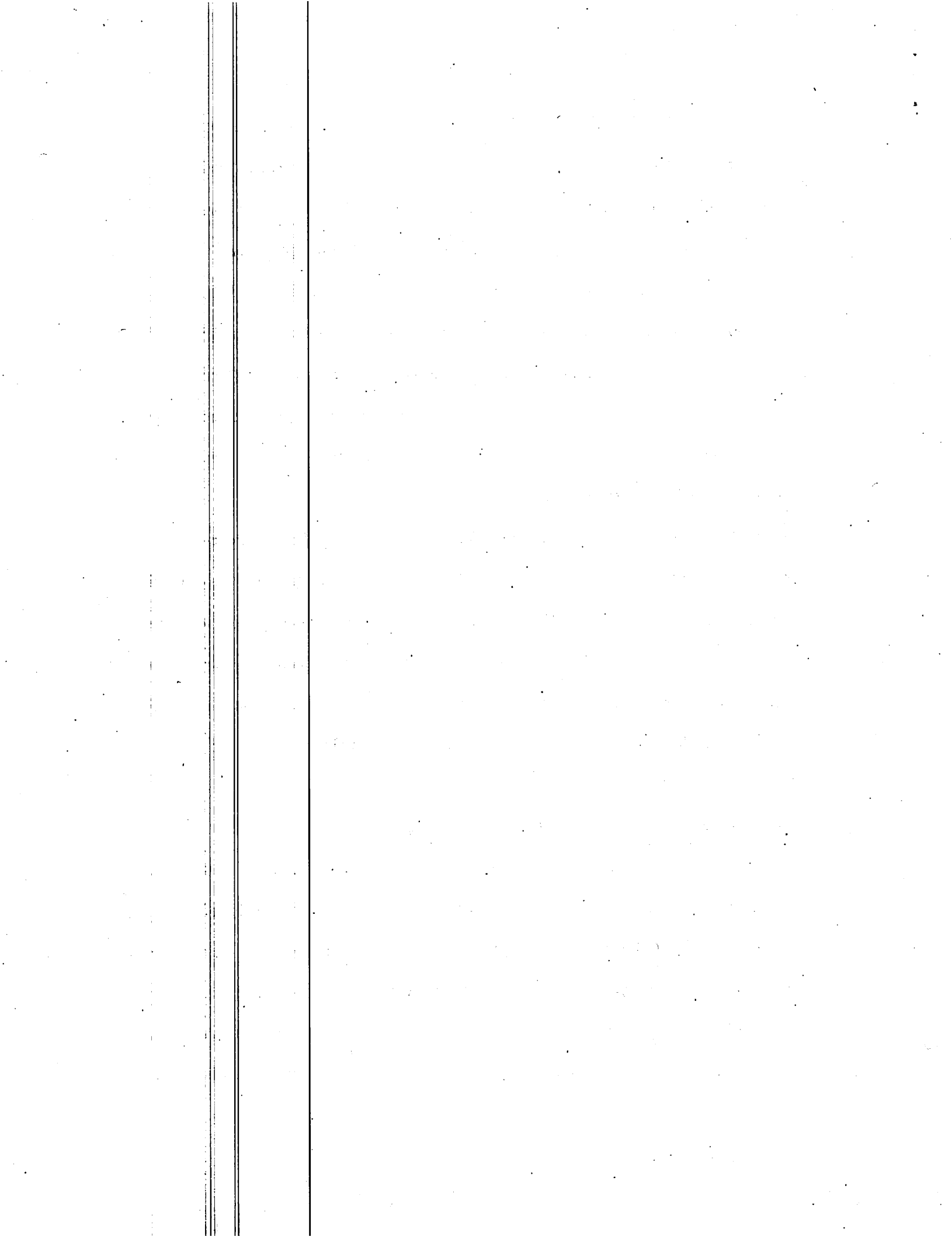
§ 10-217 (2014); COMAR 09.08.03.03A(3).. To prove a claim by a preponderance of the evidence means to show that it is “more likely so than not so” when all the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep’t*, 369 Md. 108, 125 n.16 (2002). For the following reasons, I find that the Claimant has proven eligibility for compensation.

At the hearing, the Claimant argued that the new deck constructed by the Respondent was poorly constructed and smaller than agreed under the Contract. He presented photographs of the deck and pointed to several problems that he observed such as splits in the wood, gaps in spacing, uneven cuts in the house siding, and areas of the deck that appeared not to be level. Most significantly, he noted that the newly constructed deck was smaller than the size of the deck that was promised under the Contract.

The Respondent denied the Claimant’s claim of an unworkmanlike, incomplete, or inadequate home improvement by him. He agreed that the deck was smaller than the dimensions set forth in the Contract, but stated that the Claimant agreed to the proposed changes to the deck structure. He explained that he needed to change the deck dimensions because there was a fuel tank located at the rear of the foundation that affected where the footers were placed. Regarding his workmanship, the Respondent stated that the deck was structurally competent and was provided at a good price.

The Claimant is not barred from recovering from the Fund.

Certain claimants are excluded from recovering from the Fund altogether. In this regard, a claimant must prove that: (1) the claimant resides in the home as to which the claim is made, or owns no more than three dwelling places; (2) 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; (3) the work at issue did not involve new home construction; (4) the claimant did not unreasonably reject the contractor’s good faith effort to resolve the claim;

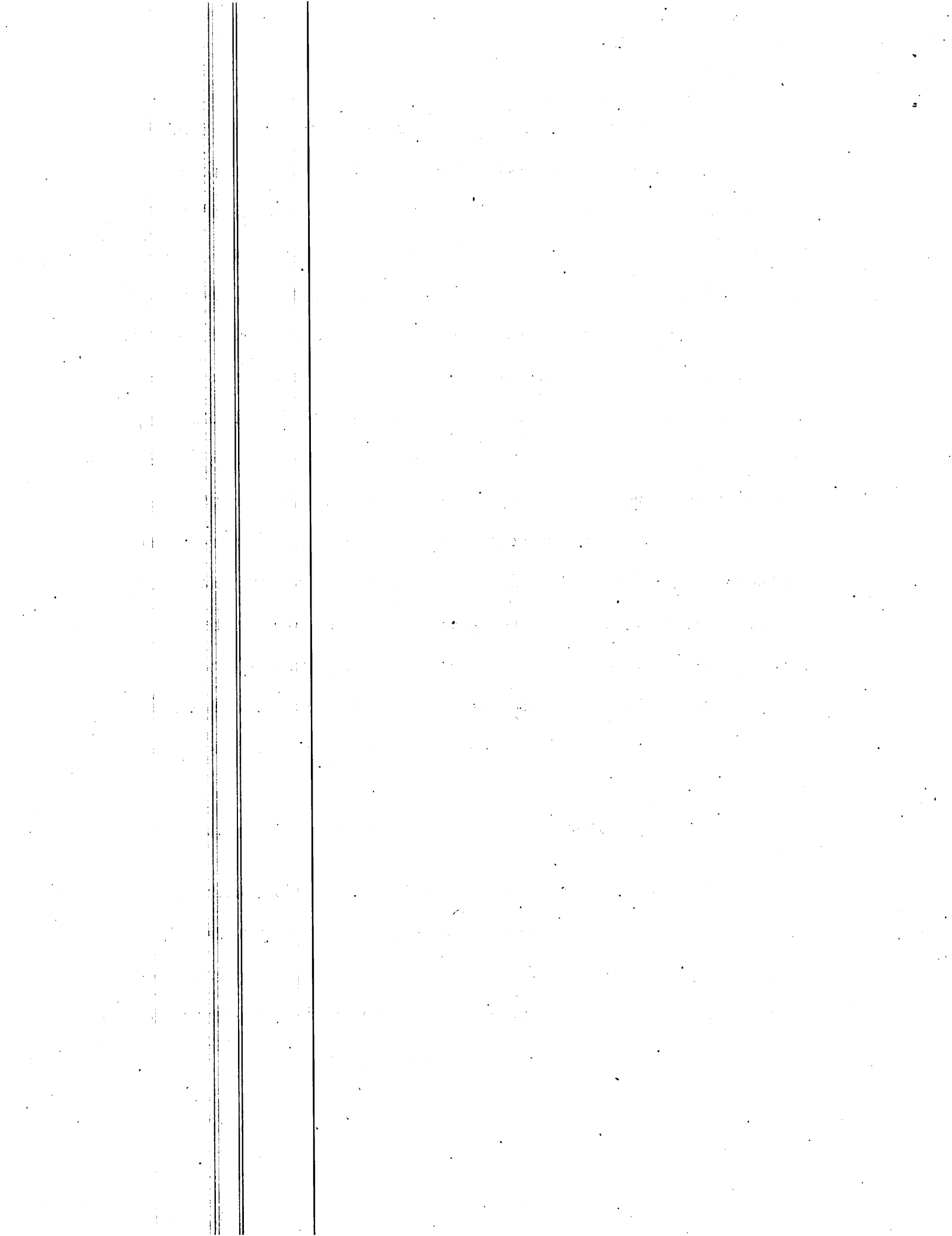


(5) the claimant complied with any contractual arbitration clause before seeking compensation from the Fund; (6) there is no pending claim for the same loss in any court of competent jurisdiction and the claimant did not recover for the actual loss from any source; and (7) the claimant filed the claim with the MHIC within three years of the date the claimant knew, or with reasonable diligence should have known, of the loss or damage. Md. Code Ann., Bus. Reg. §§ 8-405(c), (d), (f), (g), 8-408(b)(1); Md. Code Ann., Bus. Reg. § 8-101(g)(3)(i) (Supp. 2020).

The undisputed evidence in this case establishes there are no prima facie impediments barring the Claimant from recovering from the Fund. There is no argument to the contrary, and the evidence establishes that the Claimant resides in the home as to which the claim is made; that he has never been an employee, officer or partner of the Respondent and is not related to any of the Respondent's employees, officers or partners; that the home improvement was not new home construction; that the Claimant did not reject any good faith effort by the Respondent to resolve the claim or fail to participate in arbitration; that the Claimant has not taken any other legal action to recover monies for any actual loss in connection with the Respondent's work; and the Claimant timely filed his claim within three years of the date he became aware of the problems with the home improvement work. Finally, at all times relevant to this matter, the Respondent was a licensed home improvement contractor under the MHIC.

The Claimant has not established that the Respondent's home improvement work was unworkmanlike.

The Claimant complained about uneven cuts in the siding, unlevel flooring, splits in the wood, gaps between the posts, and the placing of the deck railing in front of a window. He presented photographs of each item and described the alleged deficiencies. The Respondent characterized the Claimant's complaints as aesthetic complaints, which he stated are common for deck construction and did not affect the competency of the deck.



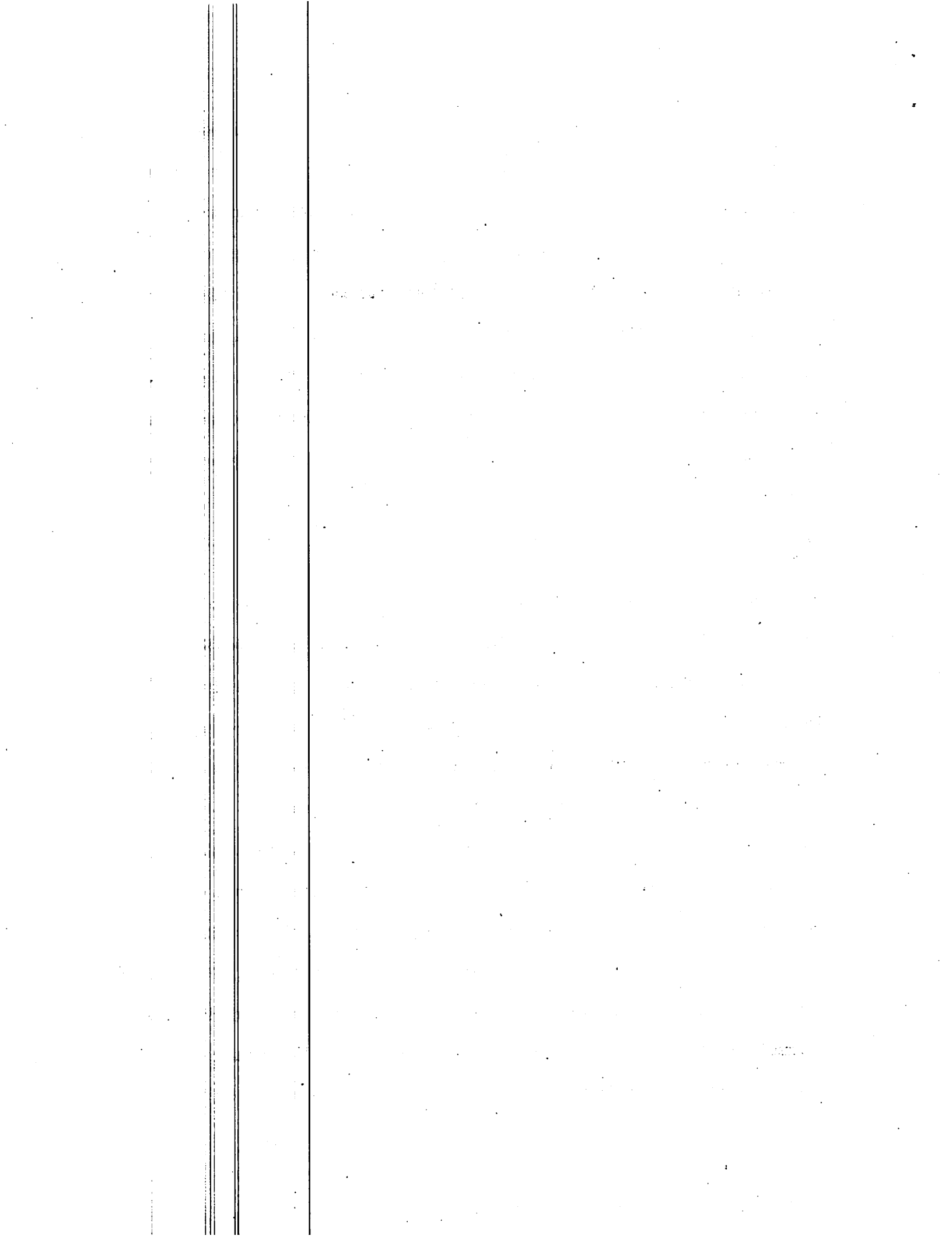
Based on the evidence, I agree with the Respondent that many of the Claimant's complaints are aesthetic in nature. Other than the Claimant's testimony, there was no evidence to suggest that the items cited by the Claimant affected the functionality or competency of the deck. Indeed, there was no expert testimony offered in the case. There also was no evidence to establish that these areas of complaint were inconsistent with accepted practices in the field. The Respondent reported that the deck structure was competent and passed all inspections. He described easy fixes for the Claimant's aesthetic complaints, which he characterized as common issues for a deck construction. Based on the evidence presented at the hearing, I do not find the evidence to support the Claimant's claim that the Respondent's home improvement work was unworkmanlike.

The Claimant has not established that the Respondent's home improvement work was incomplete.

I do not find the evidence to support a conclusion that the Respondent's home improvement work was incomplete. The evidence established that the Claimant and the Respondent entered into a Contract for the construction of a new deck, which was completed in June 2019. There is no argument that the Respondent abandoned the home improvement before the deck was completed. Rather, the argument is that the home improvement was deficient. I do not find the Claimant eligible for compensation from the Fund on this ground.

The Claimant has established that the Respondent's home improvement work was inadequate.

I am persuaded, however, that the Respondent performed an inadequate home improvement by failing to construct a new deck according to the terms of the Contract. The Contract provided for the construction of a new deck with dimensions of 20 feet by 27 feet. The deck constructed by the Respondent was 22 feet by 23 feet. While it appears that the Respondent discussed changes to the deck structure with the Claimant, there is no evidence to support the Respondent's claim that the Claimant agreed to the construction of a smaller deck for the



original Contract price. To the contrary, the Claimant testified that he never agreed to the construction of a deck with less total square footage than described in the Contract. I found the Claimant's testimony on this point to be persuasive. Certainly, it is reasonable to conclude that, had the Claimant agreed to the construction of a smaller deck, the Contract price would have reflected this change.

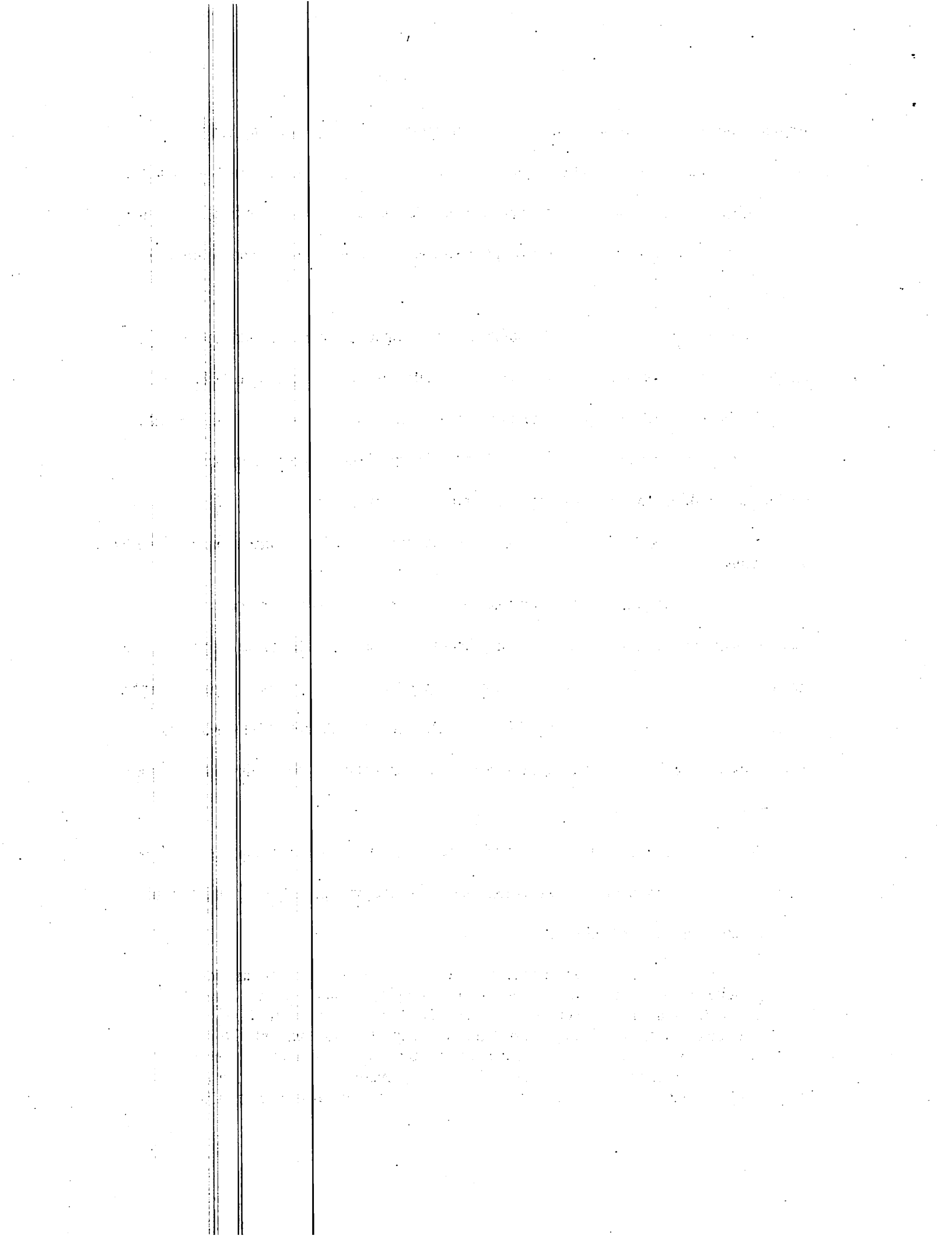
Moreover, under the Contract, "before commencing the additional or changed work[,]" the Respondent was required to "provide [the Claimant] with a copy of the signed Change Order form[,]" which set forth the changes including any change to the Contract price. (Cl. Ex. 19). The parties agree that there were no written Change Orders. I find that the Claimant has established eligibility for compensation from the Fund on this ground.

The Claimant has established an actual loss as the result of an inadequate home improvement by the Respondent

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 intends to retain other contractors 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 Claimant paid \$13,332.00 to the Respondent and presented an estimate for another contractor to correct the Respondent's work in the amount of \$4,800.00,³ which results in an actual loss of \$4,132.00, computed using the formula in COMAR 09.08.03.03B(3)(c): $\$13,332.00 + \$4,800.00 - \$14,000.00 = \$4,132.00$.

Mr. Brouwer, representative for the Fund, pointed to the estimates provided by the Claimant, which he stated lacked detail, and recommended no award based on his conclusion that the Claimant failed to establish the amount of an actual loss. I was not persuaded by this argument. I found the J. F. Fuentes estimate sufficiently detailed to establish the amount that the Claimant would be required to pay to correct the Respondent's inadequate home improvement. This estimate described the work that is required to extend the length of the deck by one foot, increasing the total deck size to 528 square feet. No additional work beyond what was called for under the Contract was included.

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 \$4,132.00.

³ J. F. Fuentes provided an estimate to extend the length of the deck by one foot, making the deck dimensions 22 feet by 24 feet.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$4,132.00 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 \$4,132.00 from the Fund.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$4,132.00; 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;⁴ and

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

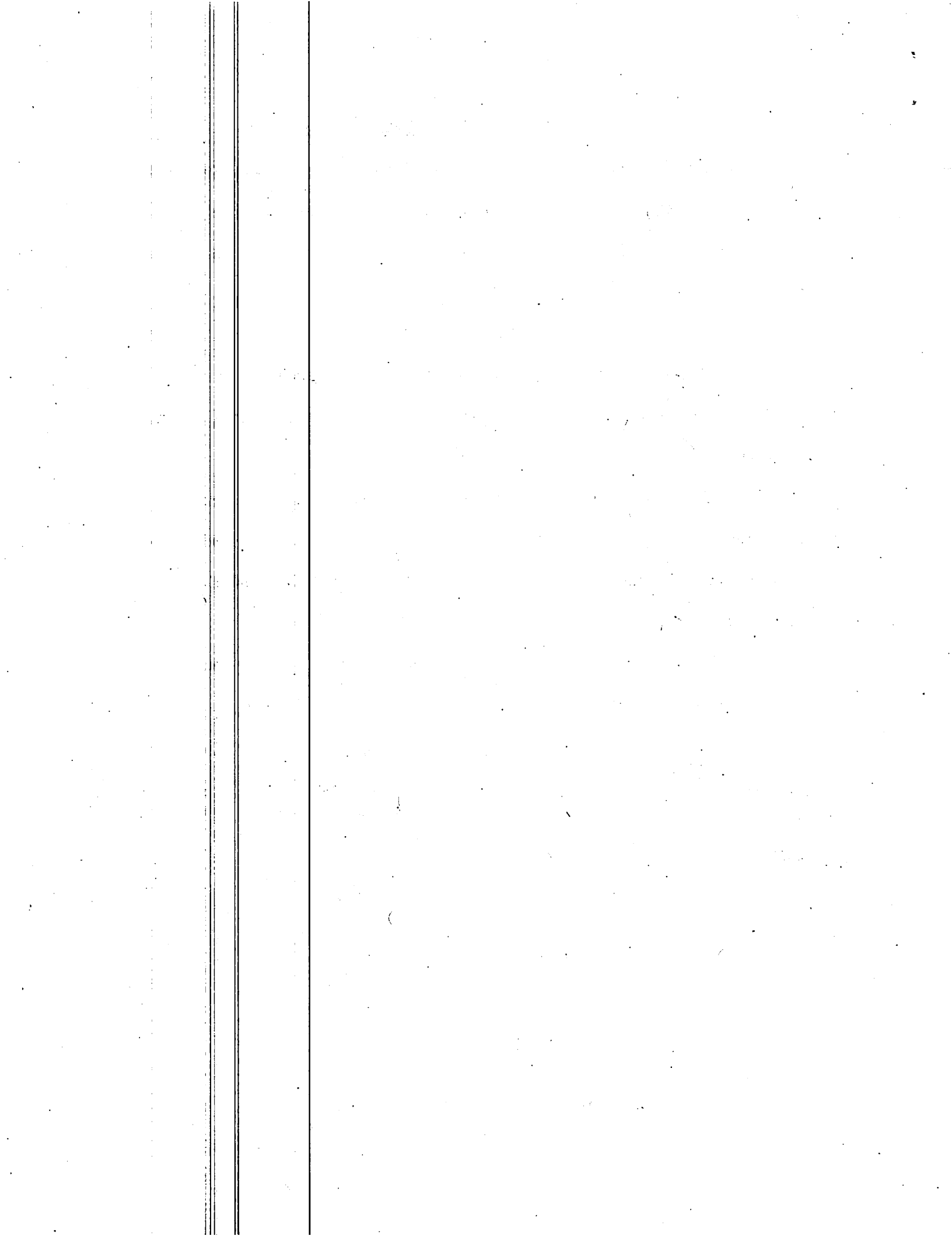
September 22, 2021
Date Decision Issued

Michelle W. Cole

Michelle W. Cole
Administrative Law Judge

MWC/da
#194422

⁴ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.



PROPOSED ORDER

WHEREFORE, this 28th day of January, 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.

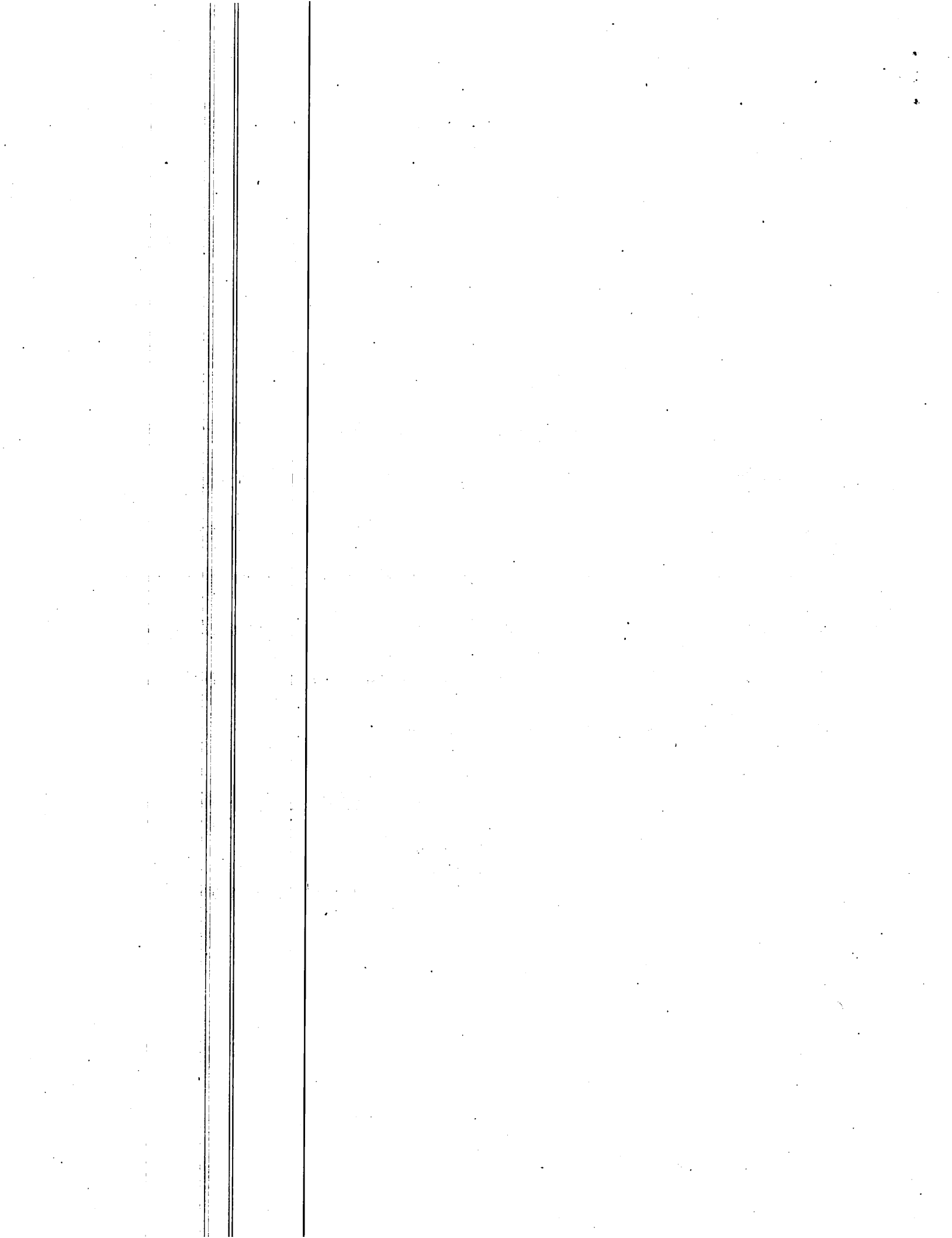
Joseph Tunney

Joseph Tunney

Chairman

Panel B

***MARYLAND HOME IMPROVEMENT
COMMISSION***



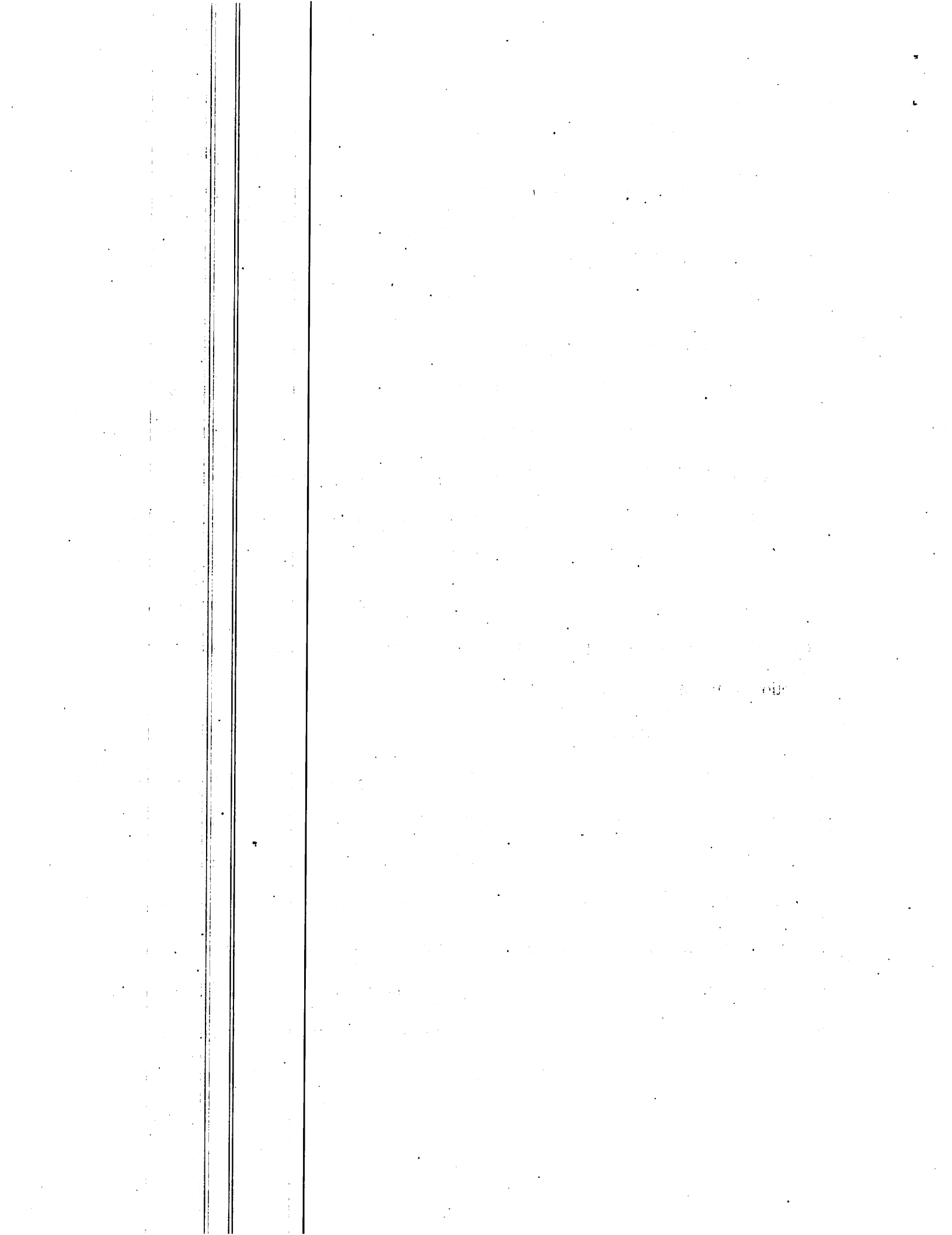
**IN THE MATTER OF THE CLAIM OF * MARYLAND HOME
ERIC YOUNG * IMPROVEMENT COMMISSION
AGAINST THE MARYLAND HOME *
IMPROVEMENT GUARANTY FUND * MHIC CASE NO. 20(75)751
FOR THE ACTS OR OMISSIONS OF * OAH CASE NO. LABOR-HIC-
CARLOS HEMBECK AND G AND H * 02-21-10825
HOME IMPROVEMENT, LLC ***

* * * * *

FINAL ORDER

This matter was originally heard before an Administrative Law Judge (“ALJ”) of the Office of Administrative Hearings (“OAH”) on June 30, 2021. Following the evidentiary hearing, the ALJ issued a Proposed Decision on September 22, 2021, concluding that the homeowner, Eric Young (“Claimant”) suffered an actual loss as a result of the acts or omissions of Carlos Hembeck and G and H Home Improvement, LLC (collectively, “Contractor”). *ALJ Proposed Decision p. 12.* In a Proposed Order dated January 28, 2022, the Maryland Home Improvement Commission (“MHIC” or “Commission”) affirmed the Proposed Decision of the ALJ to grant an award of \$4,132.00 from the Home Improvement Guaranty Fund. The Contractor subsequently filed exceptions to the MHIC Proposed Order.

On May 5, 2022, a three-member panel (“Panel”) of the MHIC held a remote hearing on the exceptions filed in this matter. The Claimant and Contractor participated without counsel. Assistant Attorney General Hope Sachs 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) Contractor’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).

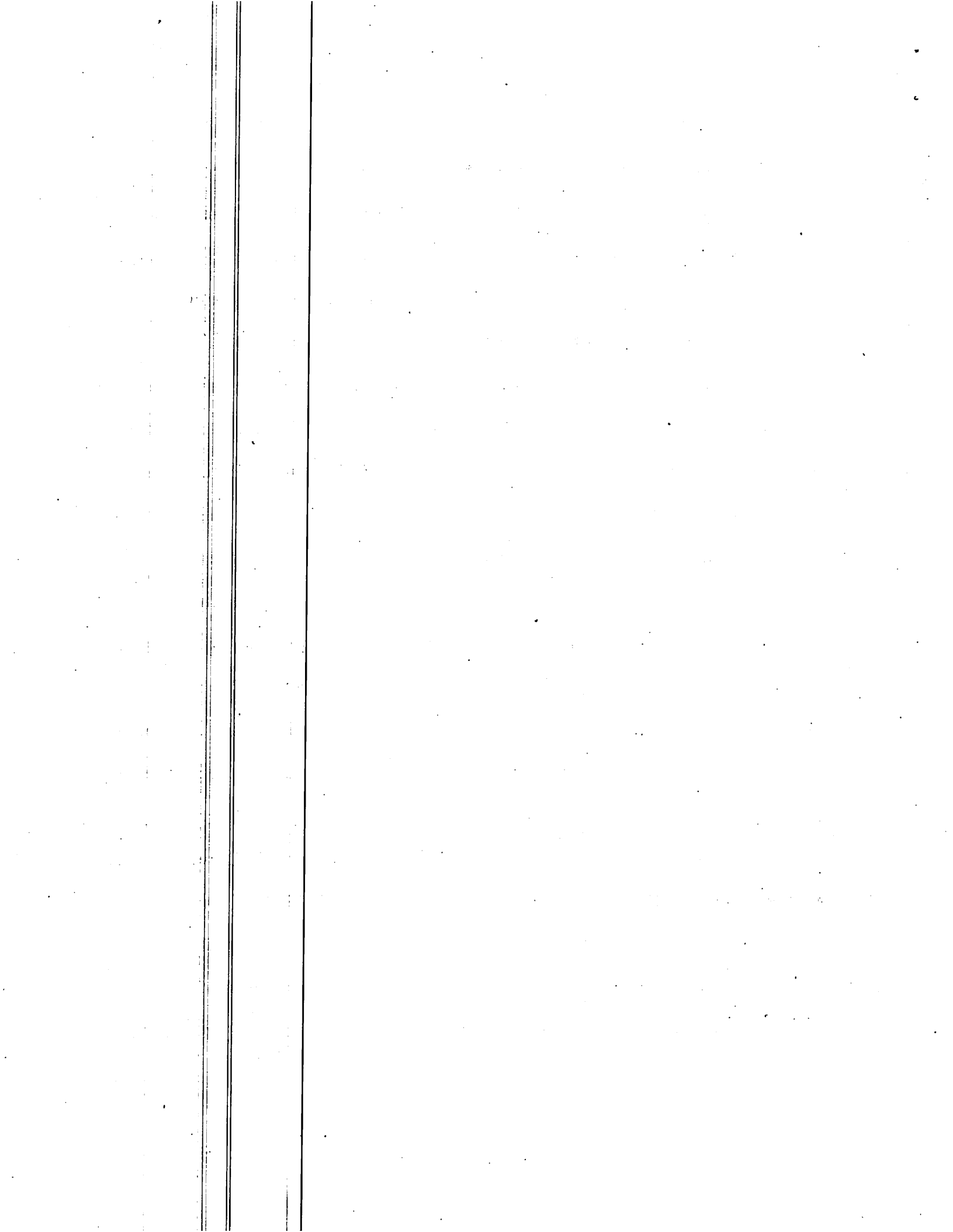
The claim in this proceeding relates to a contract between the parties for the construction of a deck at the Claimant's home. The ALJ found that the Contractor's performance under the contract was inadequate because the deck the Contractor constructed was smaller than specified in the contract. The ALJ noted that the contract called for written change orders and the absence of a written change order for the size reduction. *ALJ's Proposed Decision* pp. 9-10.

On exception, the Contractor argued that the ALJ erred in finding his performance to be inadequate because the homeowner agreed to a reduction in the size of the deck. The Contractor asserted that no change order was necessary because the cost of the project did not change as a result of the size reduction.

The Commission agrees with the ALJ. The Contractor did not identify evidence in the record demonstrating that the Claimant agreed to reduce the size of the deck. In addition, the contract provides that "Written Change Orders signed by both parties are required *for any changes* or additional work." (OAH Hearing Claimant's Exhibit 19 (emphasis added).) Therefore, the contract required a written change order for the reduction in the size of the deck, and the Commission finds that the Claimant did not agree to the change based, in part, on the absence of a written change order.

Having considered the parties' arguments, the evidence contained in the record, and the ALJ's Recommended Decision, it is this 18th day of May 2022, **ORDERED:**

- A. That the Findings of Fact of the Administrative Law Judge are **AFFIRMED;**
- B. That the Conclusions of Law of the Administrative Law Judge are **AFFIRMED;**
- C. That the Proposed Decision and Recommended Order of the Administrative Law Judge is **AFFIRMED;**



- D. That the Claimant is awarded \$4,132.00 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.

Bruce Quackenbush
Chairperson –Panel
Maryland Home Improvement
Commission

