

<p>IN THE MATTER OF THE CLAIM</p> <p>OF MARK VENTURA,</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 PATRICIA M. DEMAIO,</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-02-22-01127</p> <p>* MHIC No.: 21 (75) 841</p>
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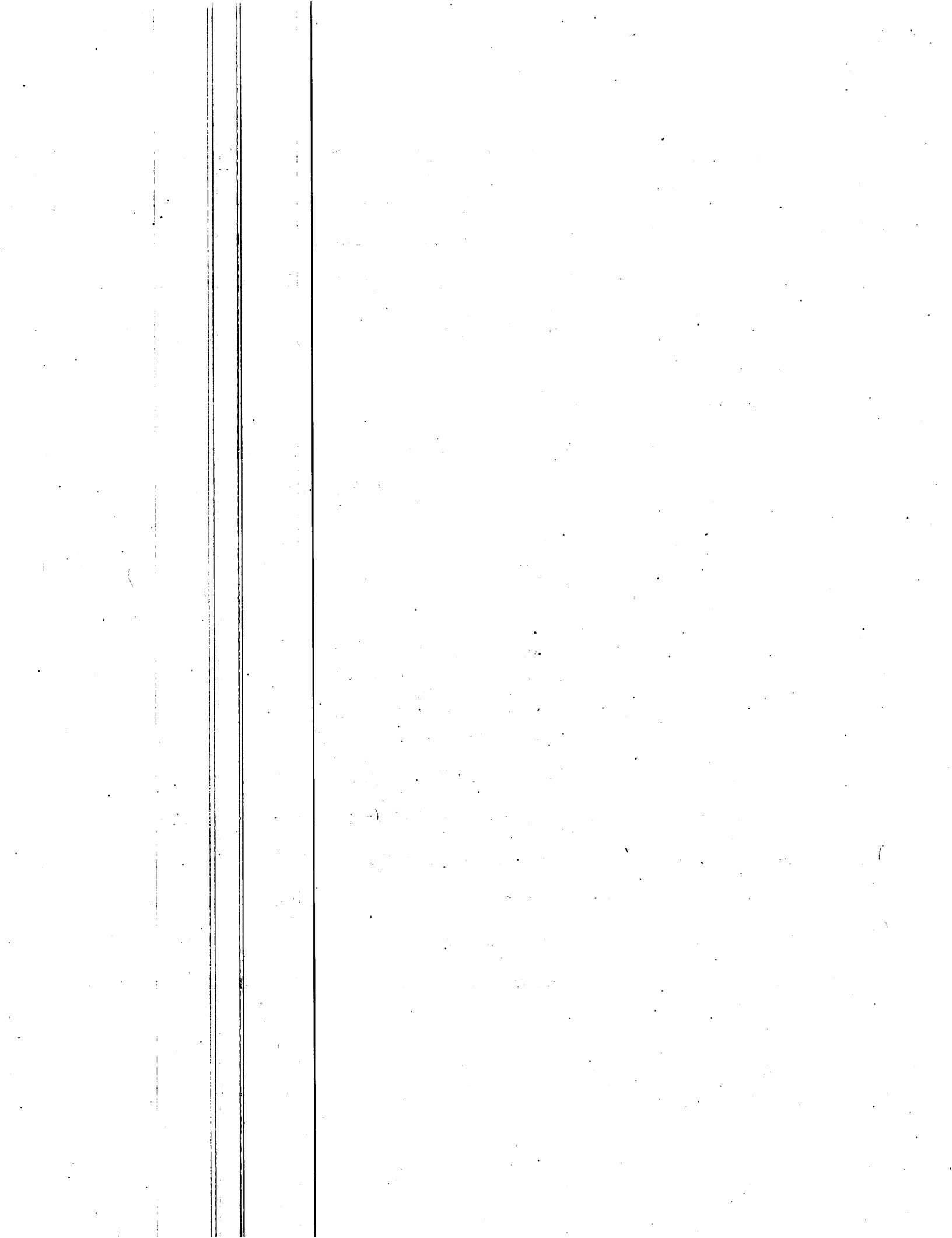
PROPOSED DECISION

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STATEMENT OF THE CASE

On October 27, 2021, Mark Ventura (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 \$9,770.75¹ 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 8-411 (2015).² On January

¹ Amount provided on line 10 of the Home Improvement Claim Form.
² Unless otherwise noted, all references hereinafter to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.



12, 2022, the MHIC issued a Hearing Order and forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On April 11, 2022, I held a hearing at the OAH in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-407(a), 8-312. Andrew Brouwer, Assistant Attorney General, Department, represented the Fund. The Claimant represented himself. The Respondent failed to appear for the hearing.

After waiting over thirty 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 February 1, 2022, the OAH provided a Notice of Hearing (Notice) to the Respondent by standard and certified 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 April 11, 2022, 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."

On February 8, 2022, the return receipt from the Notice sent to the Respondent by certified mail was received by the OAH. The signature section on the receipt was blank. The United States Postal Service did not return the certified or standard mail 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 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 an unworkmanlike, inadequate, or incomplete home improvement by the Respondent?
2. If so, what is the amount of the compensable loss?

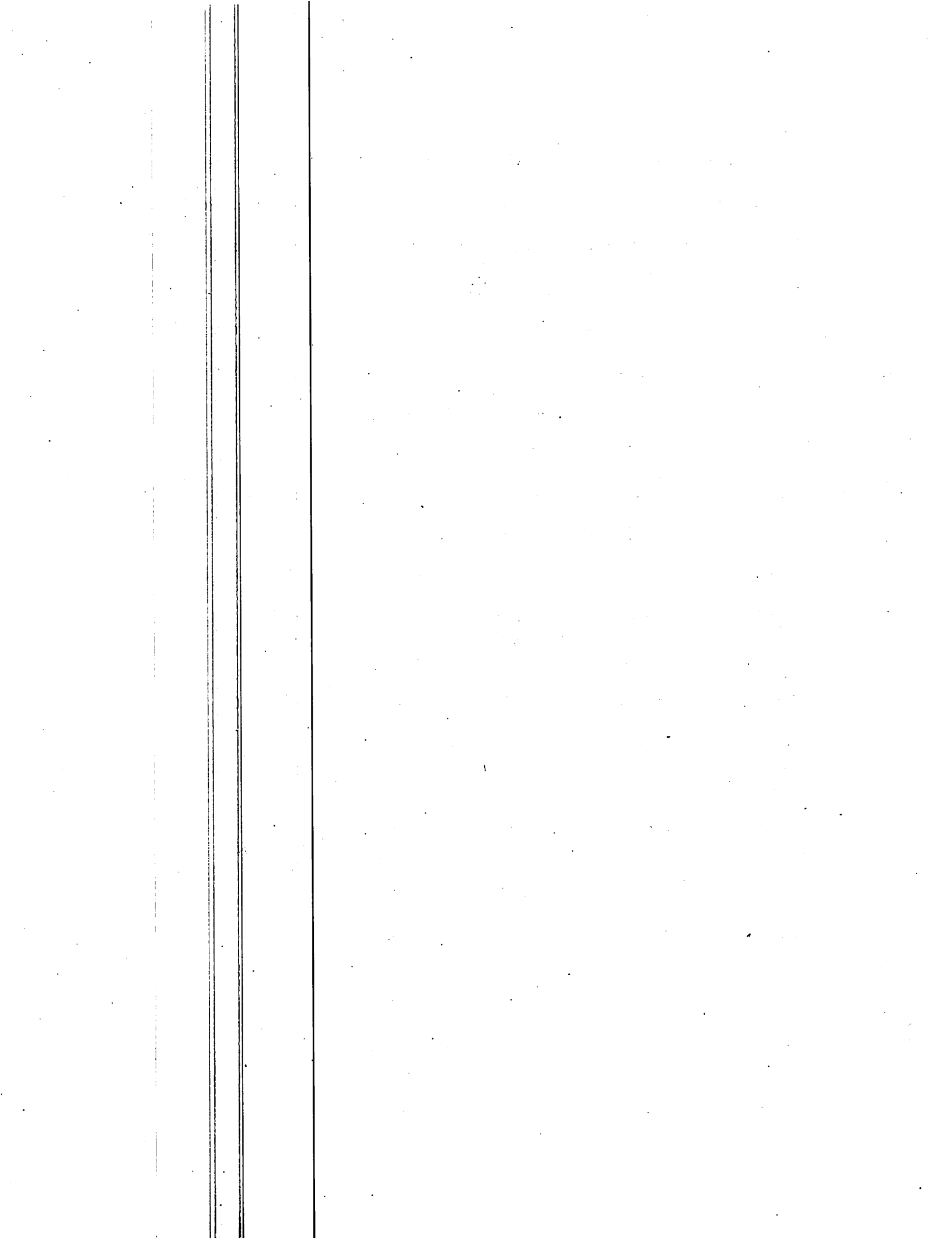
SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits offered by the Claimant:

- Clmt. Ex. 1 Contract between Claimant and Respondent, October 6, 2020 - \$13,000.00
- Clmt. Ex. 2 Statements of receipt and cancelled checks paid to Respondent:
- October 6, 2020 - \$4,000.00
 - November 6, 2020 - \$5,000.00
- Clmt. Ex. 3 Baltimore County building inspection receipt, November 9, 2020
- Clmt. Ex. 4 Photographs of incomplete deck, March 10, 2021³
- Clmt. Ex. 5 Baltimore County building inspection receipt, May 7, 2021
- Clmt. Ex. 6 Scutro Properties, LLC contract, July 7, 2021 - \$13,770.75
- Scutro Properties, LLC invoice, August 12, 2021 - \$13,770.75
 - Lazo Landscaping estimate, July 6, 2021 - \$18,500.00
 - Wood Bros, Inc. estimate, undated - \$17,450
- Clmt. Ex. 7 Baltimore County building inspection receipts:
- August 2, 2021
 - August 6, 2021
 - August 9, 2021

³ There are nine photographs that were admitted collectively as Clmt. Ex. 4.



I admitted the following exhibits offered by the Fund:

- Fund Ex. 1 Hearing Order, January 12, 2022
- Fund Ex. 2 Notice of Hearing, February 1, 2022
- Fund Ex. 3 Letter to the Respondent from Joseph Tunney, Chairman MHIC, with attached Claim, November 5, 2021
- Fund Ex. 4 Department I.D. registration printout – Respondent, printed March 25, 2022
- Fund Ex. 5 Affidavit from David Finneran, Executive Director MHIC, March 25, 2022

The Respondent did not attend the hearing and did not offer any exhibits.

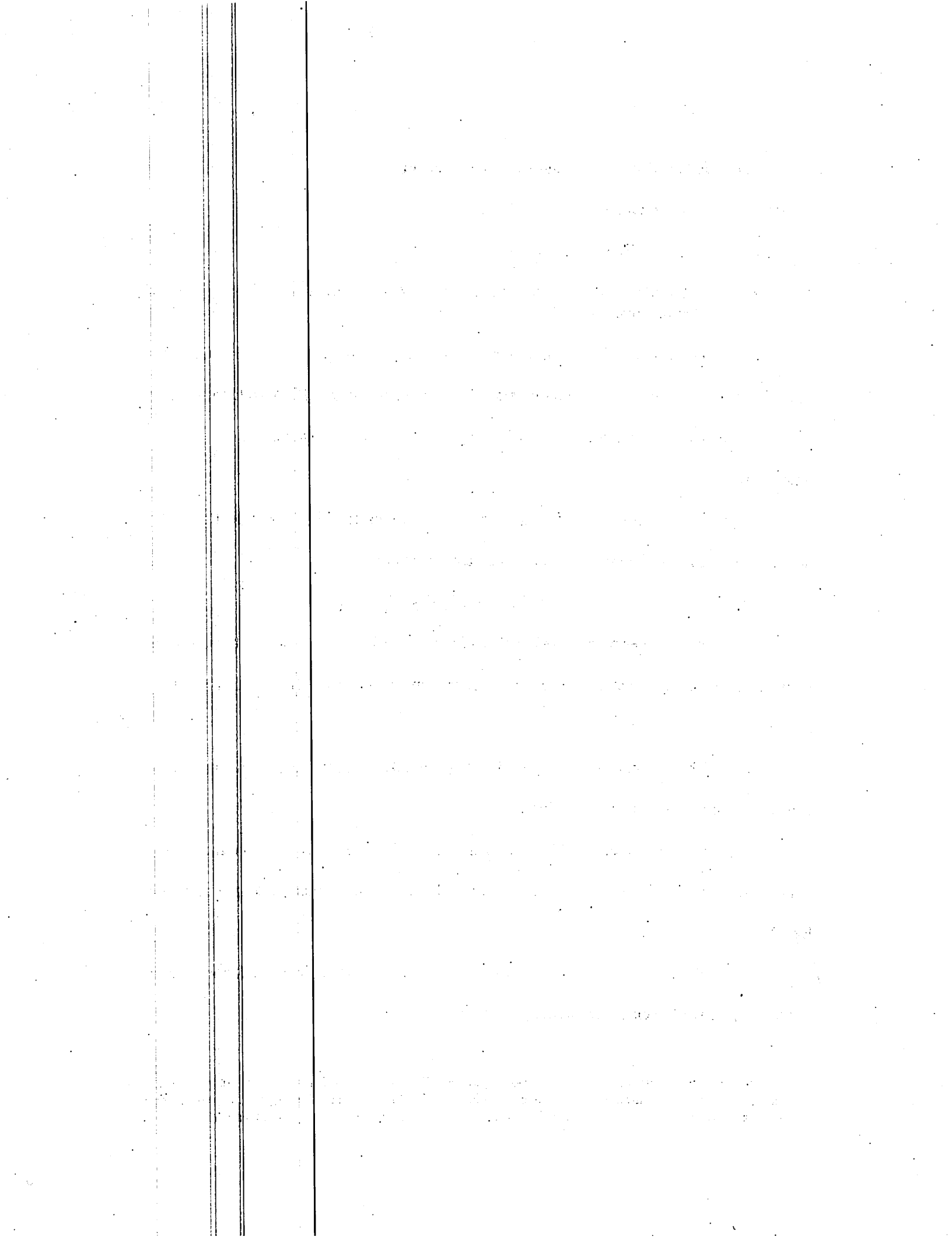
Testimony

The Claimant testified and did not present other witnesses. The Respondent did not attend the hearing and the Fund did not present any witnesses.

PROPOSED FINDINGS OF FACT

1. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor under MHIC license number 01-80972. (Fund Ex. 4, Clmt. Ex. 1).
2. The Claimant's property subject to this matter is located in Nottingham, Maryland and is the Claimant's residence (the Property).
3. On October 6, 2020, the Claimant and the Respondent entered into a contract to build an 18' x 26' deck⁴ (deck addition) attached to the rear of the Property (Contract). (Clmt. Ex. 1).
4. The agreed-upon Contract price was \$13,000.00 which included labor, materials, and a one-year workmanship warranty. (Clmt. Ex. 1).

⁴ The Contract lists the measurements for the deck addition as 18' x 18' w/ 10' x 8' (404 sq. ft). However, the deposit receipt lists the measurements for the deck addition as 18' x 26'. Based on the diagram of the deck addition that was drawn on the Contract and the testimony of the Claimant, I find that the measurements are 18' x 26'.



5. On October 6, 2020, the Claimant paid the Respondent \$4,000.00, which was the amount due at signing as specified in the Contract. (Clmt. Exs. 1, 2).

6. The Contract stated that, depending on weather, construction of the deck addition would begin on November 2, 2020 and would be completed within two weeks of the start date. (Clmt. Ex. 1).

7. Without explanation, the Respondent did not report to the Property on November 2, 2020. The Claimant contacted the Respondent via text and the Respondent advised the Claimant that he would begin working at the Property on November 6, 2020.

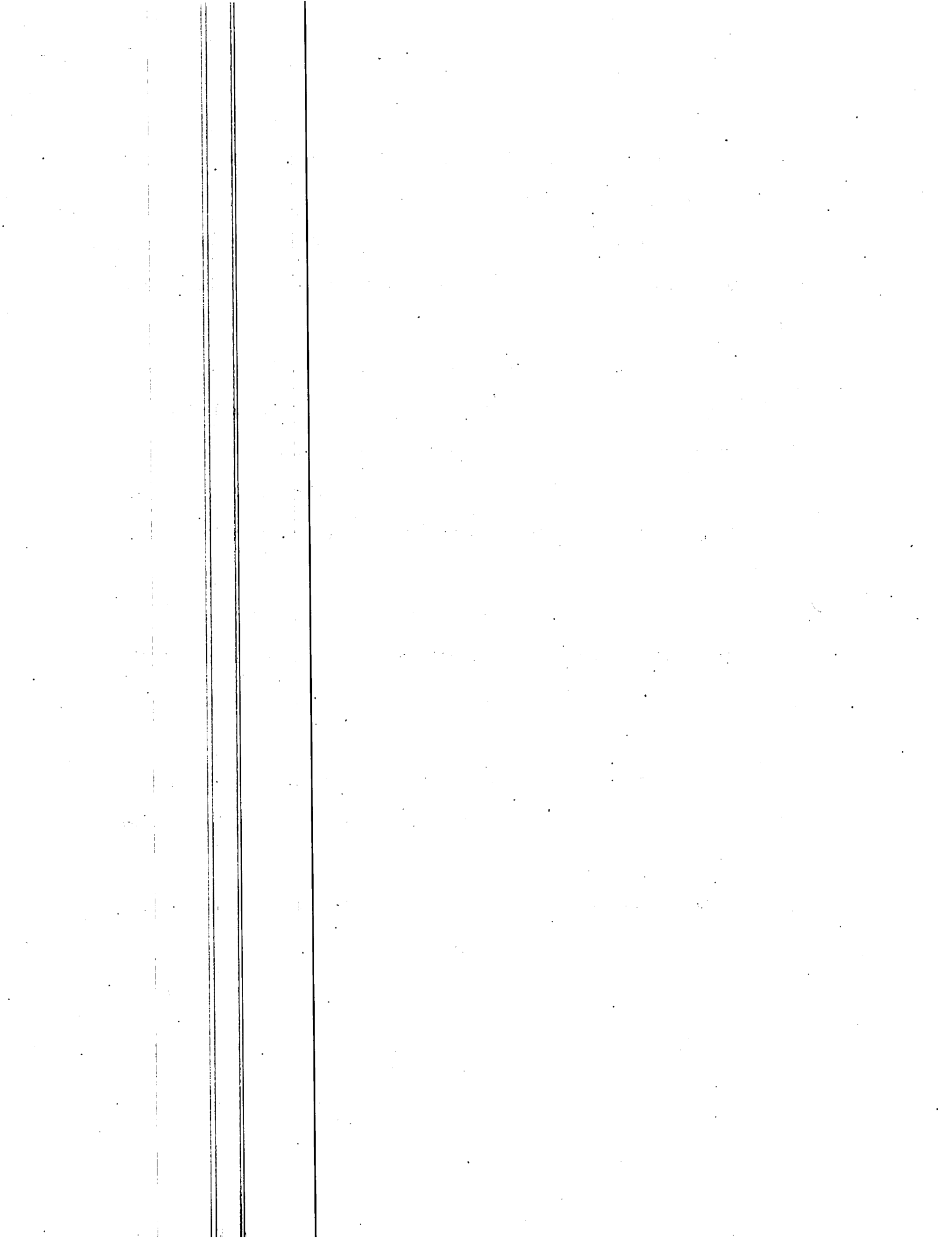
8. On November 6, 2020, the Claimant paid the Respondent \$5,000.00, which was the amount due at the start of construction of the deck addition as specified in the Contract. (Clmt. Exs. 1, 2).

9. On November 6, 2020, the Respondent spent approximately two hours at the Property digging seven holes into the ground to be used to create the footings⁵ for the deck. The Respondent advised the Claimant that he would return to the Property after Baltimore County inspected the holes.

10. Baltimore County inspects structures in phases and the Respondent could not move forward with the deck addition until the first phase of the deck addition had been inspected and approved.

11. On November 9, 2020, a Baltimore County inspector approved six of the seven holes. (Clmt. Ex. 3).

⁵ Deck footings create the foundation for the deck.



12. On November 10, 2020, the Respondent returned to the Property and poured cement in the six holes that had been approved by the Baltimore County inspector. The seventh hole was not cemented because it had not been approved by the inspector.

13. Between November 10, 2020 and November 22, 2020, the Respondent did not work at the Property.

14. On November 23, 2020, the Respondent returned to the Property. On November 23 – 24, 2020, the Respondent attached structural posts on top of the cement and placed gravel and soil around the posts.

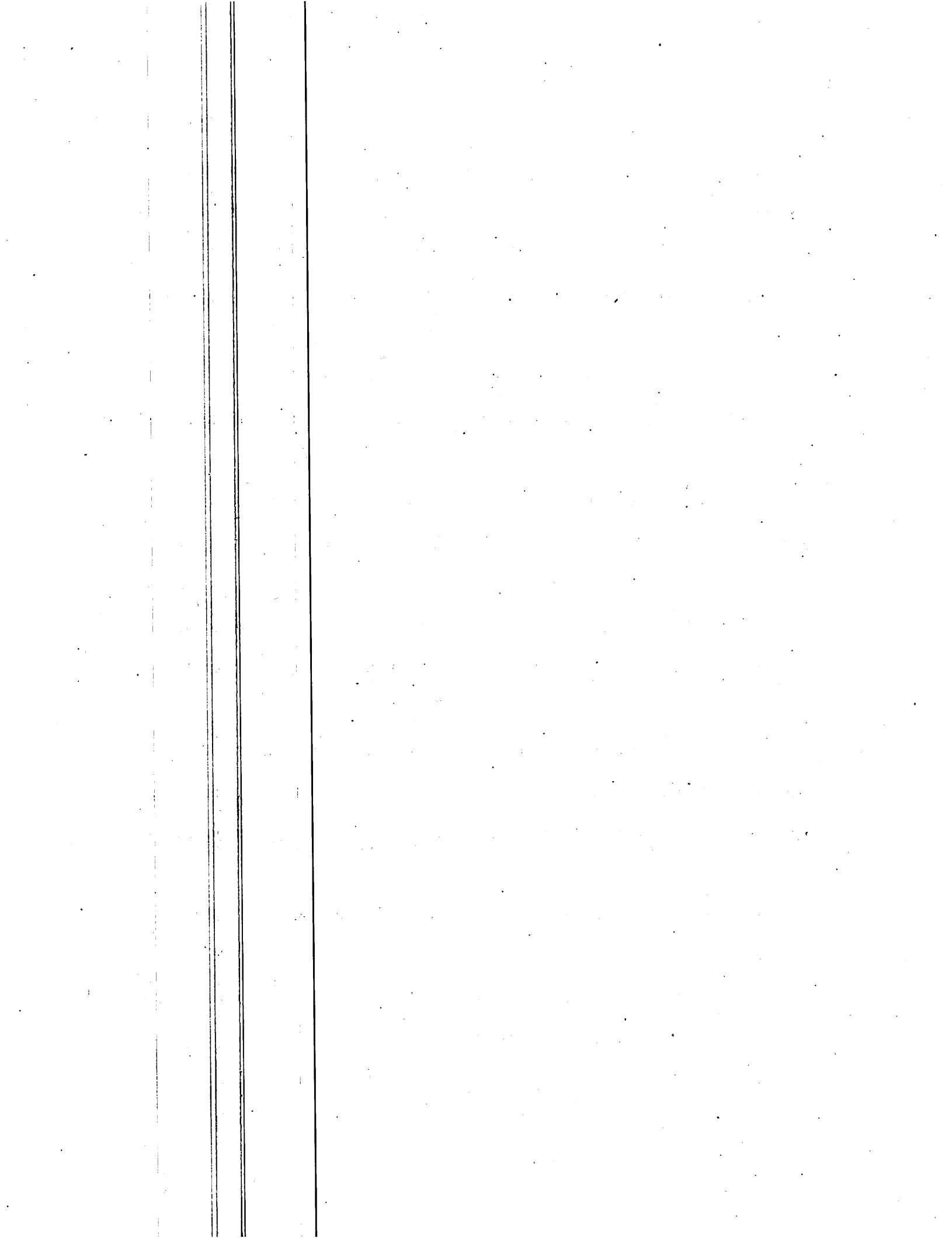
15. Between November 25, 2020 and December 15, 2020, the Respondent did not return to the Property. Throughout this period, the Claimant repeatedly texted and called the Respondent to inquire about the Respondent completing the project. On several occasions, the Respondent failed to reply or provided excuses regarding why he had not returned to complete the deck addition. On more than ten occasions, the Respondent set a date to return to the Property and subsequently failed to appear without providing notice.

16. On December 15, 2020, the Claimant texted the Respondent and stated that he wanted a refund if the Respondent was unable to finish the deck addition by a mutually agreed upon date. The Respondent advised the Claimant that he would finish the project by the end of 2020.

17. Between December 16, 2020 and January 5, 2021, the Respondent did not return to the Property.

18. On January 6, 2021, the Respondent returned to the Property and installed steps and railing posts to the structure for the deck addition.

19. The Respondent did not return to the Property after January 6, 2021.



20. The Claimant repeatedly called and texted the Respondent to attempt to have him complete the deck addition. On several occasions, the Respondent failed to reply or would provide a date that he would return to the Property but ultimately failed to appear each time.

21. On March 1, 2021, the Respondent texted the Claimant advising him that he would provide an update about the deck addition on March 2, 2021.

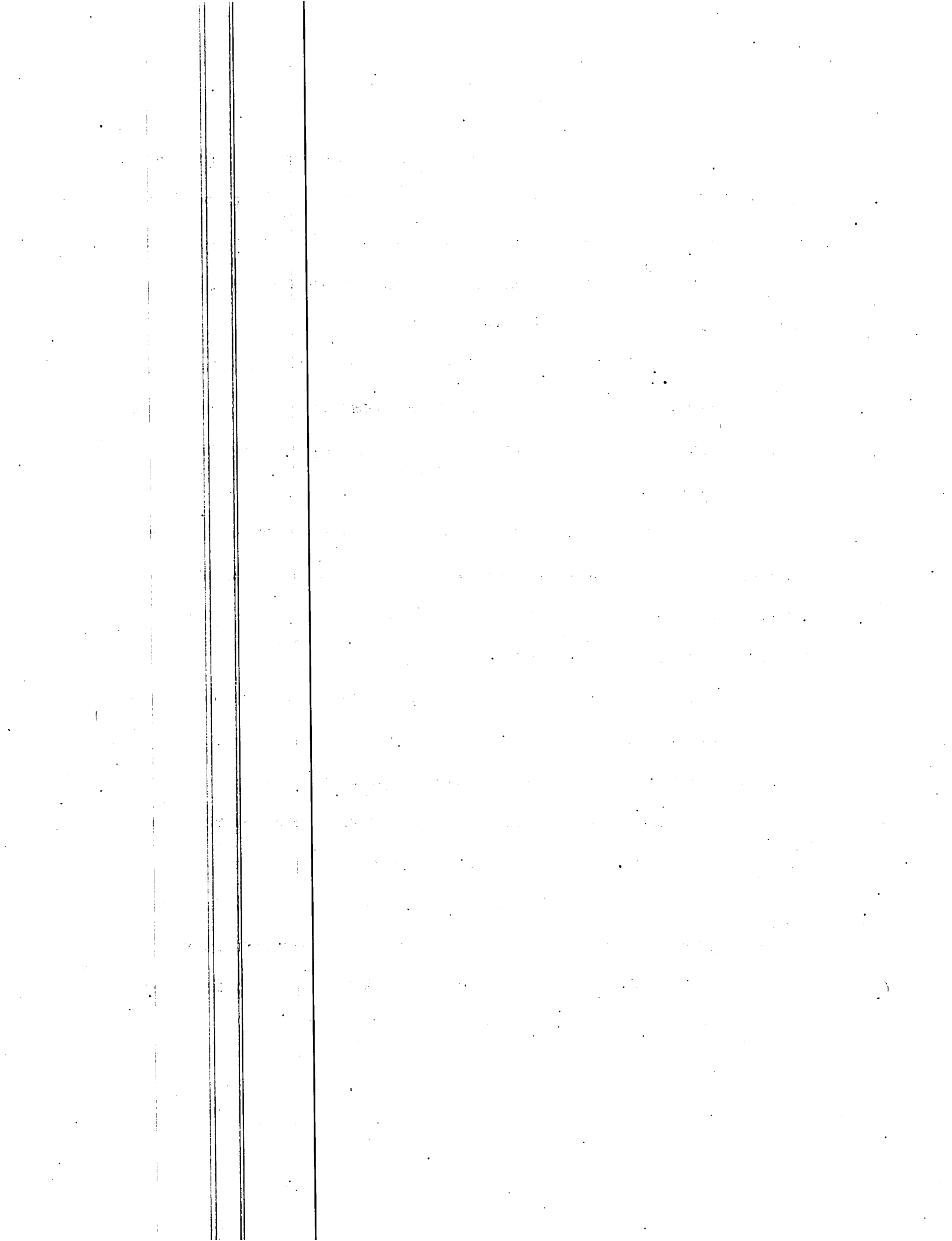
22. On March 4, 2021, the Respondent texted the Claimant and stated that he was filing bankruptcy and was closing his business. The Respondent advised the Claimant that he would finish the deck addition if the Claimant agreed to pay the supplier directly for the materials necessary to complete the project.

23. On March 12, 2021, the Respondent notified the Claimant that he sent the list of necessary materials to 84 Lumber Company. The same day, the Claimant spoke with a representative of 84 Lumber Company who provided the Claimant with a \$3,200.00 estimate for the materials necessary to complete the deck flooring only.

24. The Claimant attempted to contact the Respondent to obtain an estimate for the cost of the materials necessary to complete the deck railings, but the Respondent did not reply. The Claimant did not obtain an estimate for the materials necessary to complete the railings.

25. On a date not specified in the record, the Claimant contacted Baltimore County and requested that the Respondent's work toward the deck addition be inspected.

26. On May 7, 2021, a Baltimore County inspector approved the seventh hole that had previously been rejected but disapproved the rest of the Respondent's framing work noting that the fireplace cantilever cannot be used to support the deck, the guard posts must be blocked, and tension ties and cross bracing needed to be installed. (Clmt. Ex. 5).



27. On July 6, 2021, the Claimant obtained an estimate from Lazo Landscaping for remediation and completion of the deck addition. The total estimated cost was \$18,500.00. (Clmt. Ex. 6).

28. On a date not specified in the record, the Claimant obtained an estimate from Wood Bros, Inc. for remediation and completion of the deck addition. The total estimated cost was \$17,450.00. (Clmt. Ex. 6).

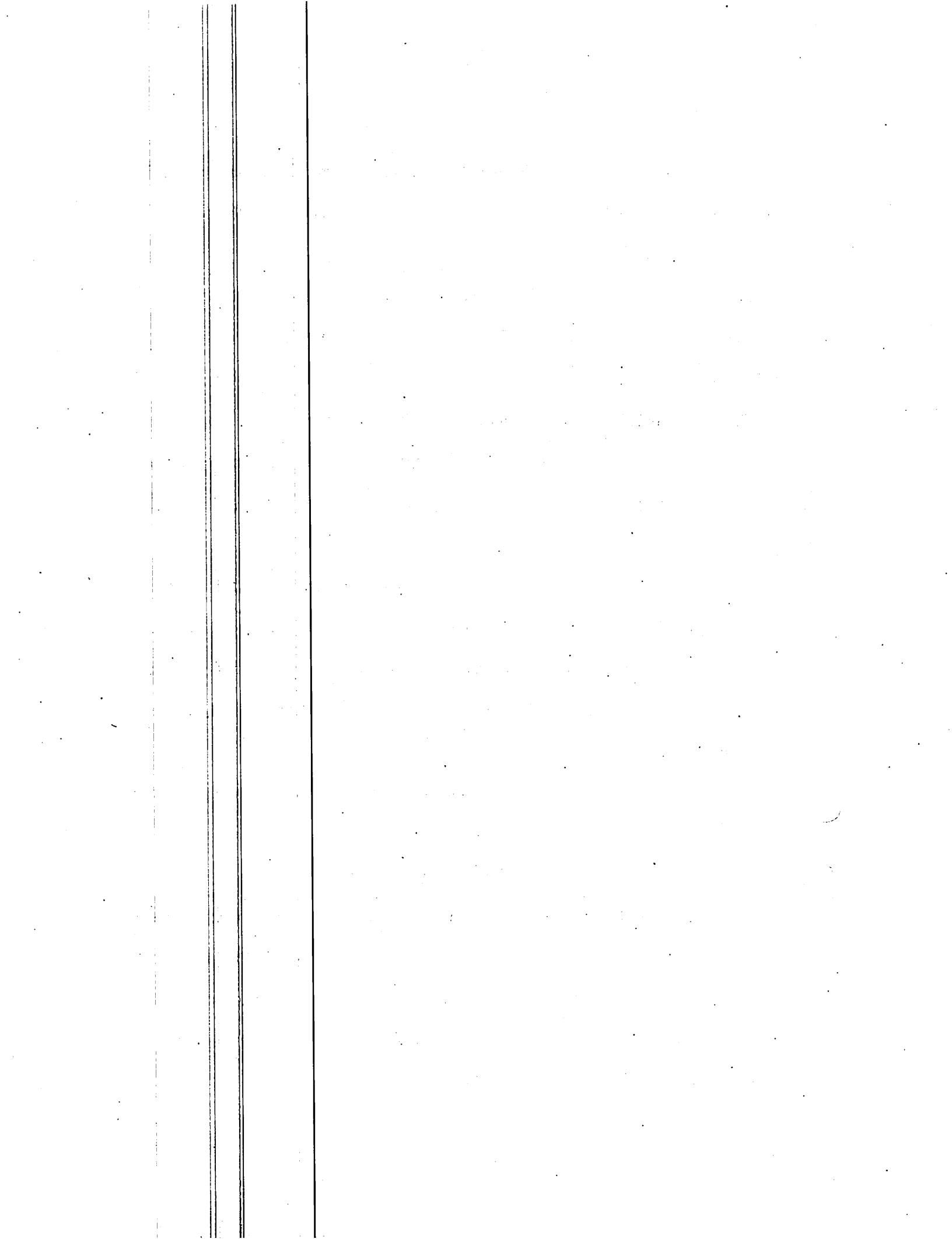
29. On July 7, 2021, the Claimant entered into a contract with Scutro Properties to remediate and complete the deck addition to the same specifications contained in the original Contract between the Claimant and the Respondent. The total contract price was \$13,770.75 (Clmt. Ex. 6).

30. To remediate and complete the project, Scutro had to remove a portion of the existing framing; realign and install additional support for the remaining framework, dig two holes in the ground near the fireplace to remediate the issue with the fireplace cantilever; dig two holes in the ground near the stair posts, dig two holes near the base of the stairs; and remove and reassemble the stairs.

31. On August 9, 2021, the deck addition was completed by Scutro and approved by a Baltimore County inspector. (Clmt. Ex. 7).

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 Cnty. Police Dep't*, 369 Md. 108, 125 n.16 (2002).

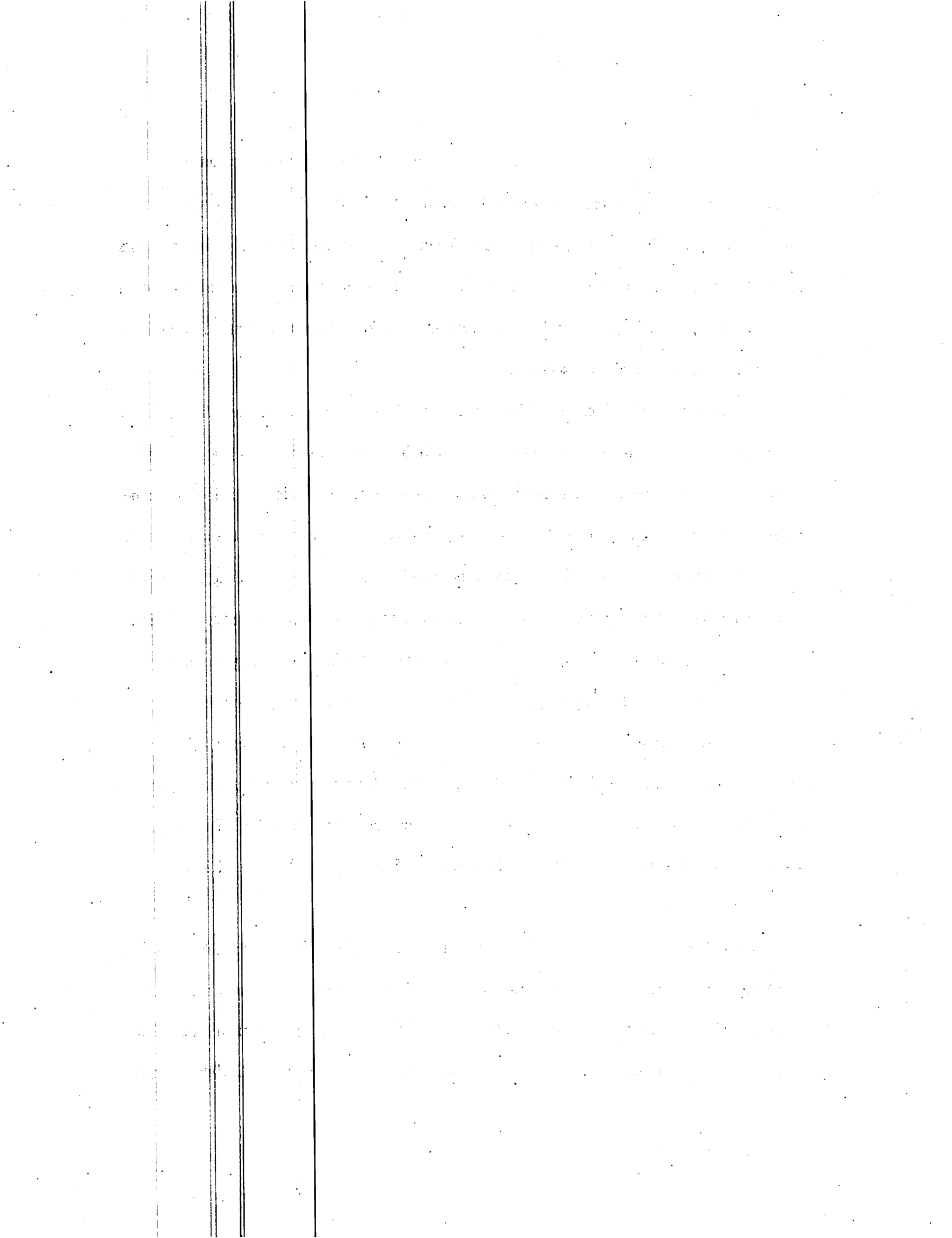


An owner may recover compensation from the Fund, “for an actual loss that results from an act or omission by a licensed contractor.” Bus. Reg. § 8-405(a); *see also* COMAR 09.08.03.03B(2) (“The Fund may only compensate claimants for actual losses . . . incurred as a result of misconduct by a licensed 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.

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), and (g), 8-408(b)(1), (3); Bus. Reg. § 8-101(g)(3)(i) (Supp. 2021).

Statutory Eligibility

The evidence in this case establishes there are no impediments barring the Claimant from recovering from the Fund. The home improvement work was to be performed on a residential property in Maryland in which the Claimant resides and did not involve new construction. The Claimant is not a relative, employee, officer, or partner of the Respondent; the Claimant is not

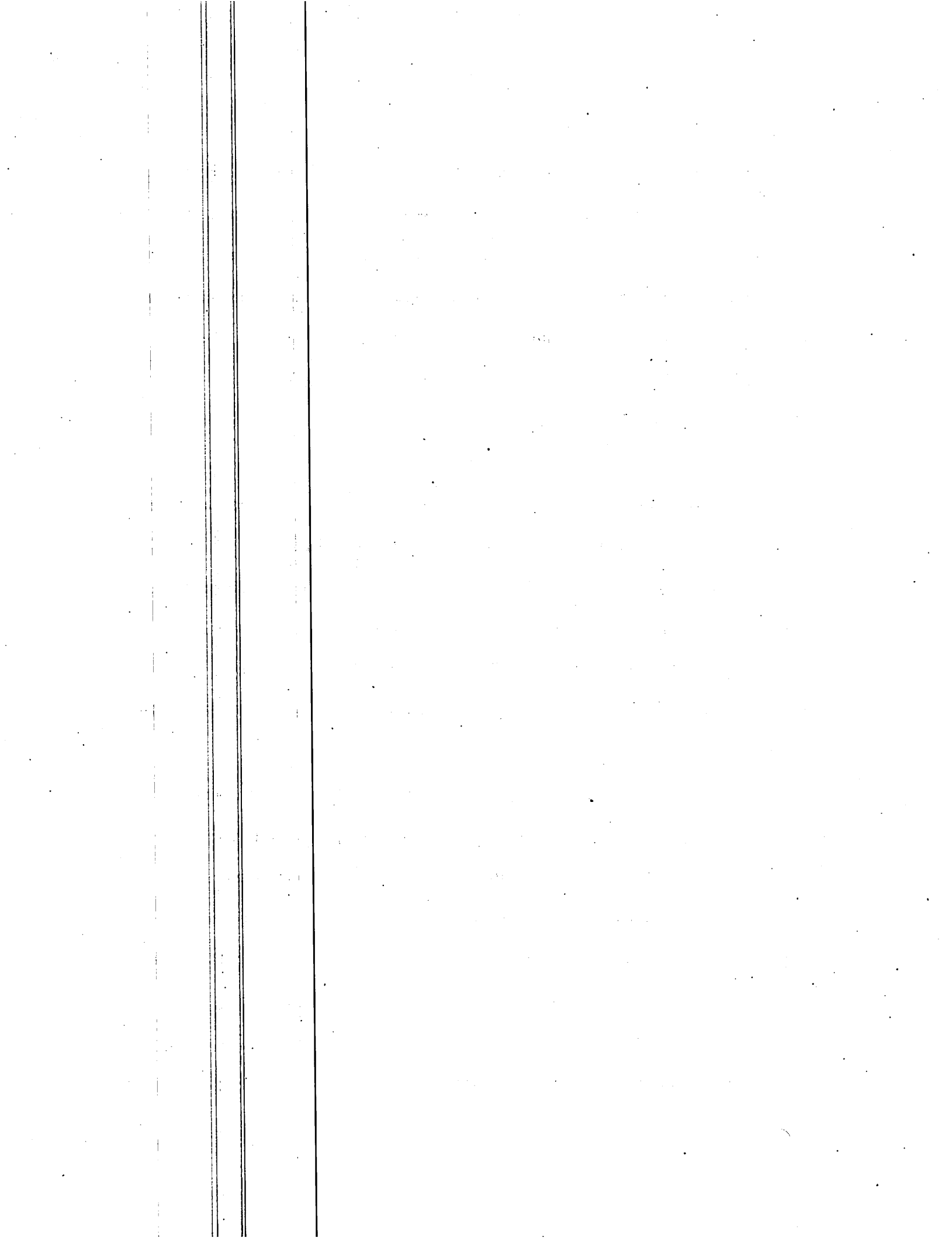


related to any of the Respondent's employees, officers, or partners. The Claimant did not reject any efforts by the Respondent to resolve the claim. The Contract between the Claimant and the Respondent does not contain an arbitration provision. Further, the Claimant has not taken any other legal action to recover financially for the same loss and the Claimant did not recover for the actual loss from any source. Finally, the Claimant timely filed the Claim with the MHIC on October 27, 2021. Bus. Reg. §§ 8-405(c), (d), (f), and (g), 8-408(b)(1); Bus. Reg. § 8-101(g)(3)(i) (2015 & Supp. 2021).

Analysis

The Claimant testified in detail and provided credible evidence which documented the unworkmanlike, inadequate, and incomplete work performed by the Respondent as well as the remediation necessary to complete the deck addition in compliance with the Baltimore County code requirements. The Claimant credibly testified that the Respondent did very little work toward completing the deck addition. The Claimant emphasized that the only portion of the deck addition that the Respondent completed that was code compliant were the holes the Respondent dug for the footers.

The Claimant explained that while the Respondent agreed to complete the deck addition within two weeks of the start date, over four months passed, and the Respondent had not completed the deck addition and subsequently stopped all work on the home improvement project. During his testimony, the Claimant outlined the steps he took to try to get the Respondent to complete the project. The Claimant credibly testified that for more than three months, he made repeated attempts to contact the Respondent by calling and texting. The Respondent had a consistent pattern of either not responding to the Claimant or failing to appear, without explanation, after he would schedule a date to return to work at the Property. Even after

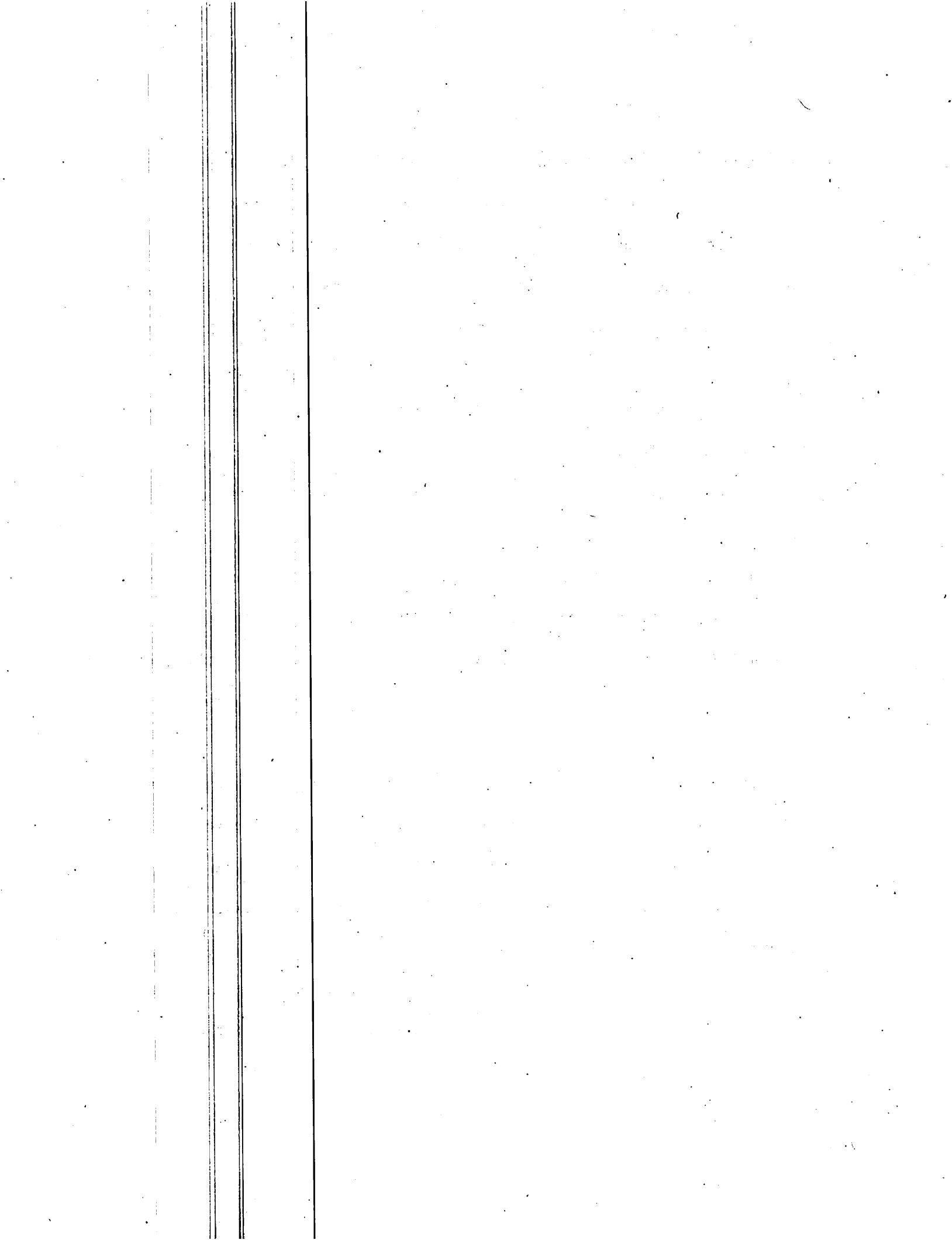


the Respondent advised the Claimant that he was filing bankruptcy and would only complete the project if the Claimant purchased the necessary materials, the Claimant attempted to move forward and contacted the supplier to obtain an estimate for the cost of the materials. Subsequently, the Respondent stopped returning the Claimant's calls and texts. The Claimant stated that he had no options and had to find another company to complete the deck addition.

Prior to contacting new contractors, the Claimant had Baltimore County inspect the existing unfinished structure. Equipped with the inspection receipts noting several violations, the Claimant obtained estimates for the cost to remediate the Respondent's work and complete the deck project. The Claimant explained that he hired Scutro Properties because their estimate was the lowest.

The Respondent failed to appear for the April 11, 2022 hearing and did not present any witnesses or testimony to rebut the Claimant's case. Thus, the Claimant's evidence is undisputed. Accordingly, after considering the testimony, and after reviewing all exhibits, I find that the Respondent performed an unworkmanlike, inadequate, and incomplete home improvement.

The Claimant established, by a preponderance of the evidence, the Contract price, the amount paid to the Respondent, and that the Respondent performed a home improvement that was inadequate, unworkmanlike, and incomplete. The Claimant established that the Respondent abandoned the home improvement project without making any serious efforts to complete the project, resulting in the Claimant suffering an actual loss. The Claimant further established that the Respondent's work did not comply with the Baltimore County code. Finally, the Claimant provided evidence of the amount necessary to remediate and complete the deck addition.



The Fund agreed that the Respondent performed work on the deck addition in an inadequate, unworkmanlike, and incomplete manner. The Fund argued that the Claimant's credible evidence shows that he sustained a loss from the Respondent's acts or omissions, and it therefore recommended an award to the Claimant from the Fund. Based on all of the above, I 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," unless a unique measure is necessary. COMAR 09.08.03.03B(3).

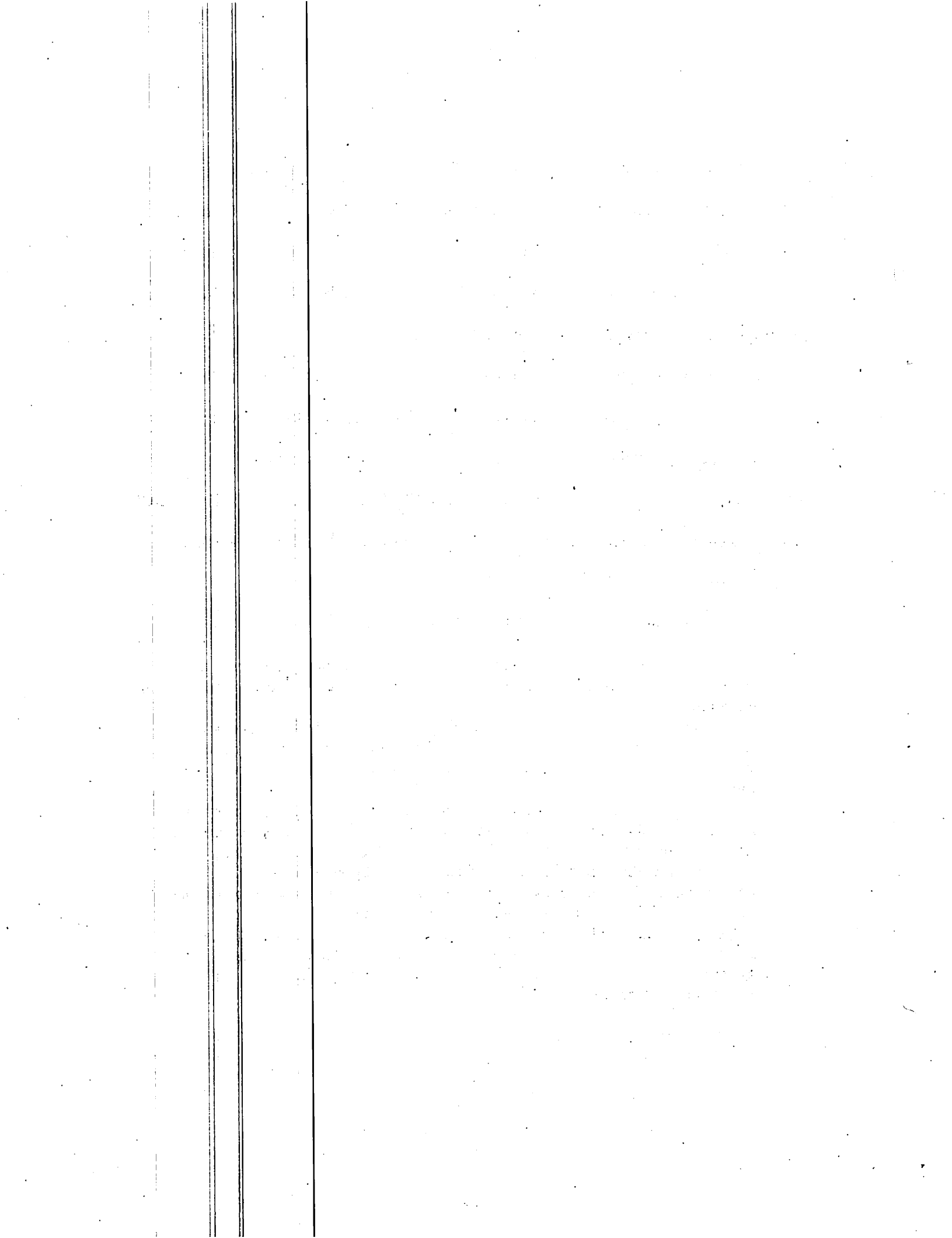
The controlling regulation provides, as follows:

(a) If the contractor abandoned the contract without doing any work, the claimant's actual loss shall be the amount which the claimant paid to the contractor under the contract.

(b) 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.

(c) 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)(a)-(c).



The Respondent performed some work under the Contract, and the Claimant retained another contractor to remediate and complete the unworkmanlike, inadequate, and incomplete work done by the Respondent. The Fund argued, and I agree, that the third regulatory formula as outlined in COMAR is appropriate in this case. Therefore, I shall apply COMAR 09.08.03.03B(3)(c) to measure the Claimant's actual loss, using the following calculations:

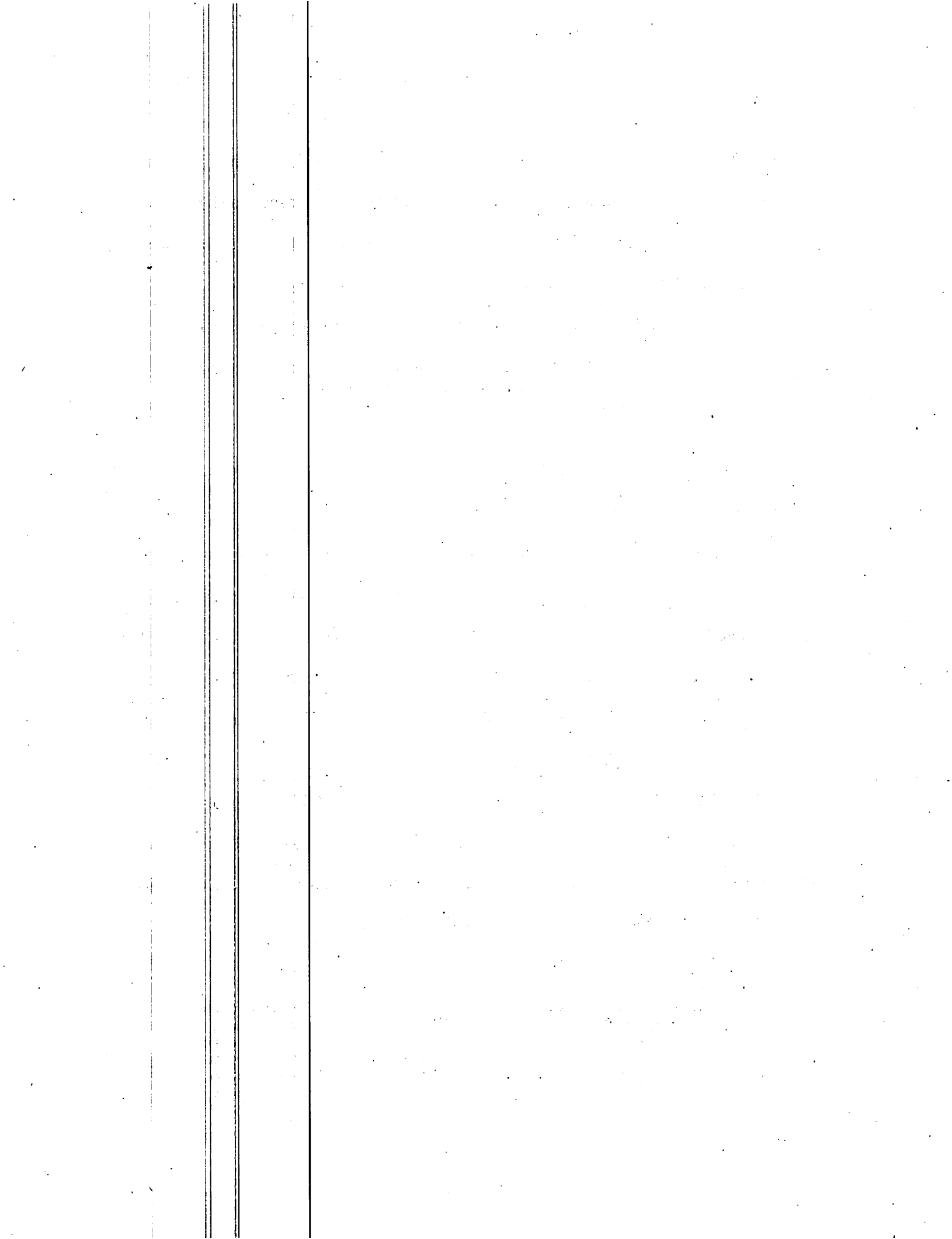
	\$13,770.75	Amount the Claimant paid Scutro Properties to remediate and complete the deck addition
	+ \$9,000.00	Amount the Claimant paid the Respondent
Total	\$22,770.75	
	<u>-\$13,000.00</u>	Less the Original Contract Amount
Equals	\$9,770.75	Actual Loss

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.⁶ In this case, the Claimant's actual loss of \$9,770.75 exceeds the amount the Claimant paid the Respondent. Therefore, the Claimant's recovery is limited to \$9,000.00 which is the amount paid by the Claimant to the Respondent.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual loss of \$9,770.75 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). I further conclude that the Claimant is entitled to recover \$9,000.00 from the Fund. Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a).

⁶ H.D. 917, 2022 Leg., 444th Sess. (Md. 2022) (to be codified in section 8-405(e)(1) of the Business Regulation Article). See also Bus. Reg. § 8-405(e)(5); COMAR 09.08.03.03B(4), D(2)(a). The increased cap is applicable to any claim on or after July 1, 2022, regardless of when the home improvement contract was executed, the claim was filed, or the hearing was held. See *Landsman v. MHIC*, 154 Md. App. 241, 255 (2002) (explaining that the right to compensation from the Fund is a "creature of statute," these rights are subject to change at the "whim of the legislature," and "[a]mendments to such rights are not bound by the usual presumption against retrospective application").



RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$9,000.00; 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;⁷ and

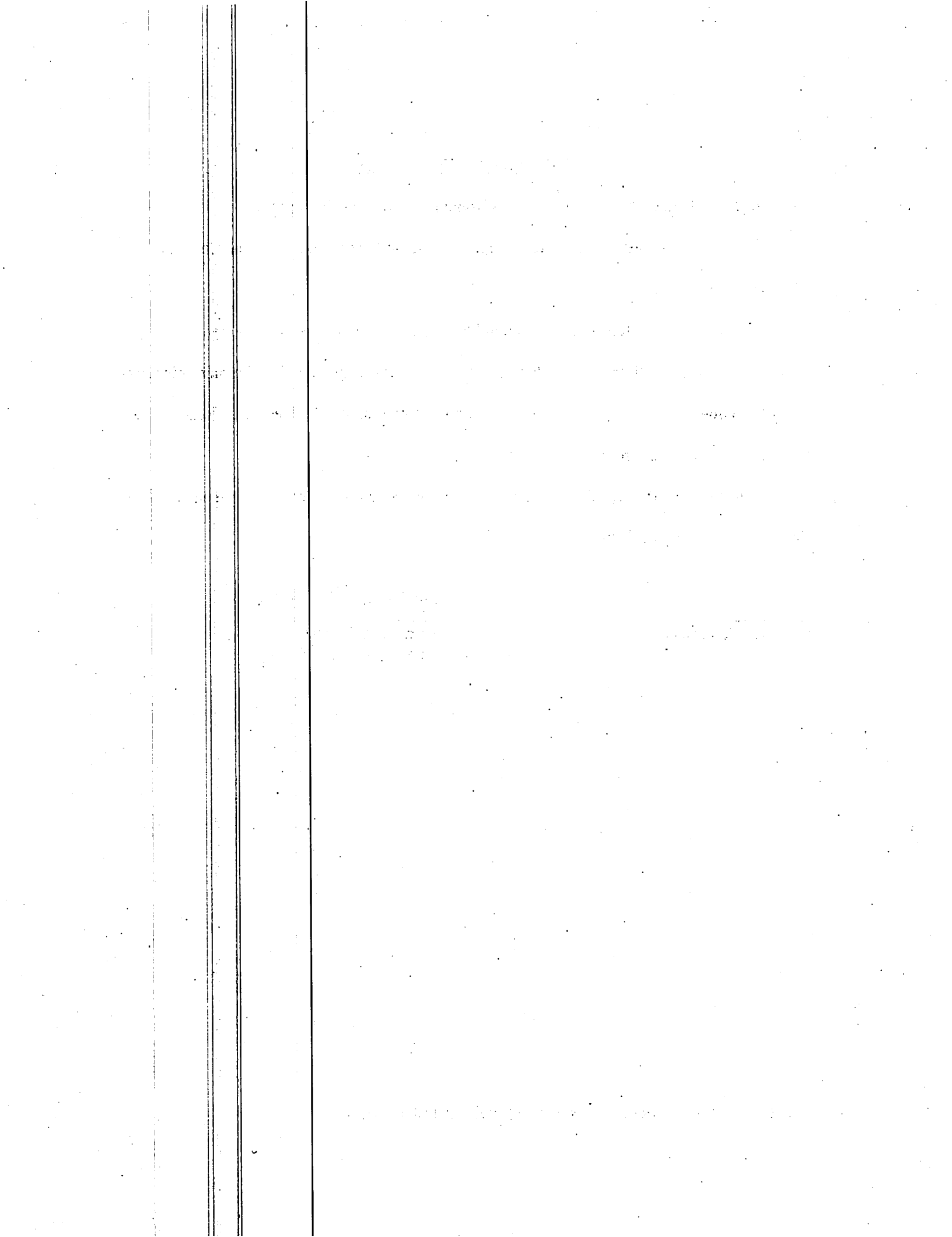
ORDER that the records and publications of the Maryland Home Improvement Commission reflect this decision.

July 8, 2022
Date Decision Issued

Patricia M. DeMaio
Patricia M. DeMaio
Administrative Law Judge

PMD/da
#199420

⁷ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.



PROPOSED ORDER

WHEREFORE, this 19th 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***

