

<p>IN THE MATTER OF THE CLAIM</p> <p>OF CAROL BRAIN,</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 TIMOTHY POWELL,</p> <p>T/A POWELL CONTRACTING</p> <p>COMPANY, INC.</p> <p>RESPONDENT</p>	<p>* BEFORE WILLIS GUNTHER BAKER,</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-02-22-14054</p> <p>* MHIC No.: 17 (75) 731</p> <p>*</p>
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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 June 3, 2019, Carol Brain (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 \$6,000.00 for actual losses allegedly suffered as a result of a home improvement contract with Timothy Powell, trading as Powell Contracting Company, Inc.(Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015 &

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Supp. 2022).¹ On June 8, 2022, the MHIC issued a Hearing Order on the Claim.² On June 13, 2022, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On October 6, 2022, I held a hearing at the OAH in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. John Hart, Assistant Attorney General (AAG), Department, represented the Fund. The Claimant was self-represented. The Respondent was self-represented.

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); 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 the Respondent's acts or omissions?
2. If so, what is the amount of the compensable loss?

SUMMARY OF THE EVIDENCE

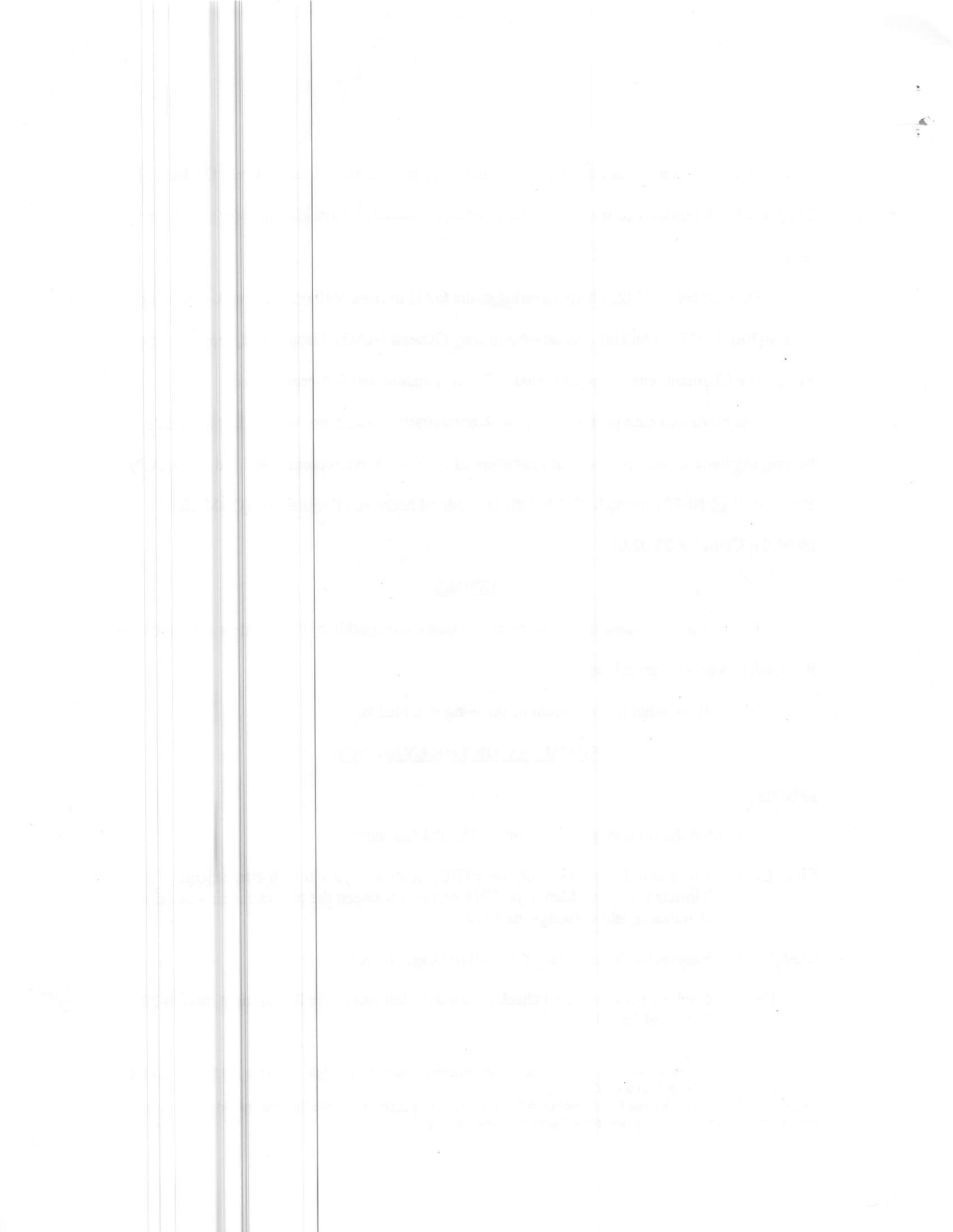
Exhibits

I admitted the following exhibits offered by the Claimant:

- Clmt. Ex. 1 - Complaint Form filed with the MHIC, October 12, 2016 with attachments of Timeline, copy of March 28, 2016 contract between the parties for new decking (Contract), and drawings, undated
- Clmt. Ex. 2 - Respondent's Response to the MHIC Complaint, undated
- Clmt. Ex. 3 - Copies of two tendered checks from the Claimant to the Respondent, March 28, 2016 and June 14, 2016

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

² A previous Hearing Order and OAH hearing in 2020 resulted in settlement, but the Respondent did not comply with the terms and the MHIC granted the Claimant a new hearing.



Clmt. Ex. 4 - Baltimore Weather History Reports for May, June, and July 2016

Clmt. Ex. 5A-C - Photos of conditions of deck removals, July 2, 2016

Clmt. Ex. 6 - HNH Deck and Porch, LLC (HNH) contract, August 4, 2016

Clmt. Ex. 7 - Emails between the Claimant and AAG Sokolow regarding the failure of settlement, April 21, 2020 to May 1, 2020

I admitted the following exhibit offered by the Respondent:

Resp. Ex. 1 - Building Permit, June 2, 2016

Resp. Ex. 2 - Offered, not admitted

I admitted the following exhibits offered by the Fund:

Fund Ex. 1 - Hearing Notice, June 29, 2022

Fund Ex. 2 - The Respondent's Licensing Information, September 1, 2022

Fund Ex. 3 - Notification to the Respondent of Claim with Claim Form attached, June 12, 2019

Testimony

The Claimant testified and did not present other witnesses.

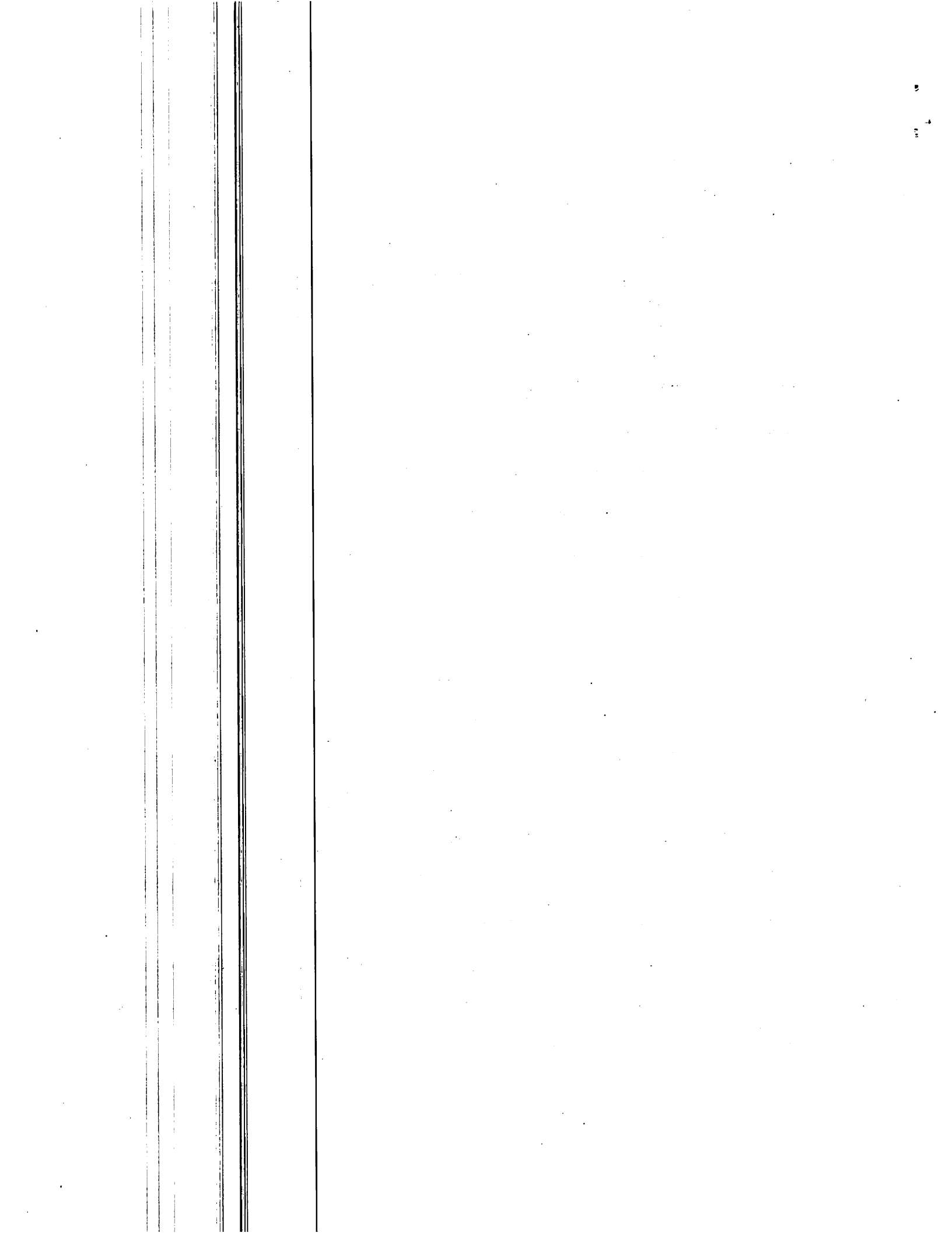
The Respondent testified and did not present other witnesses.

The Fund did not offer any witnesses.

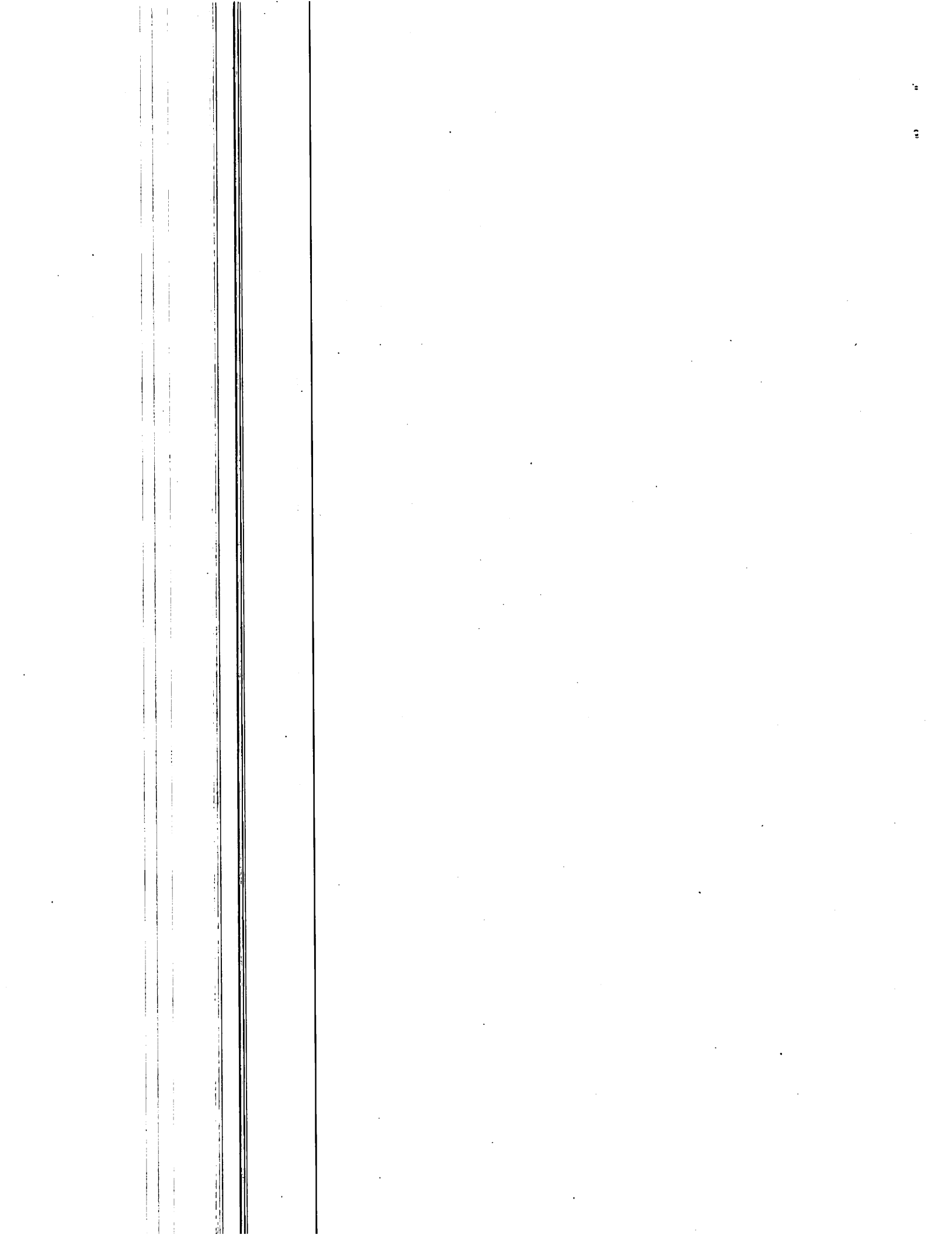
PROPOSED FINDINGS OF FACT

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

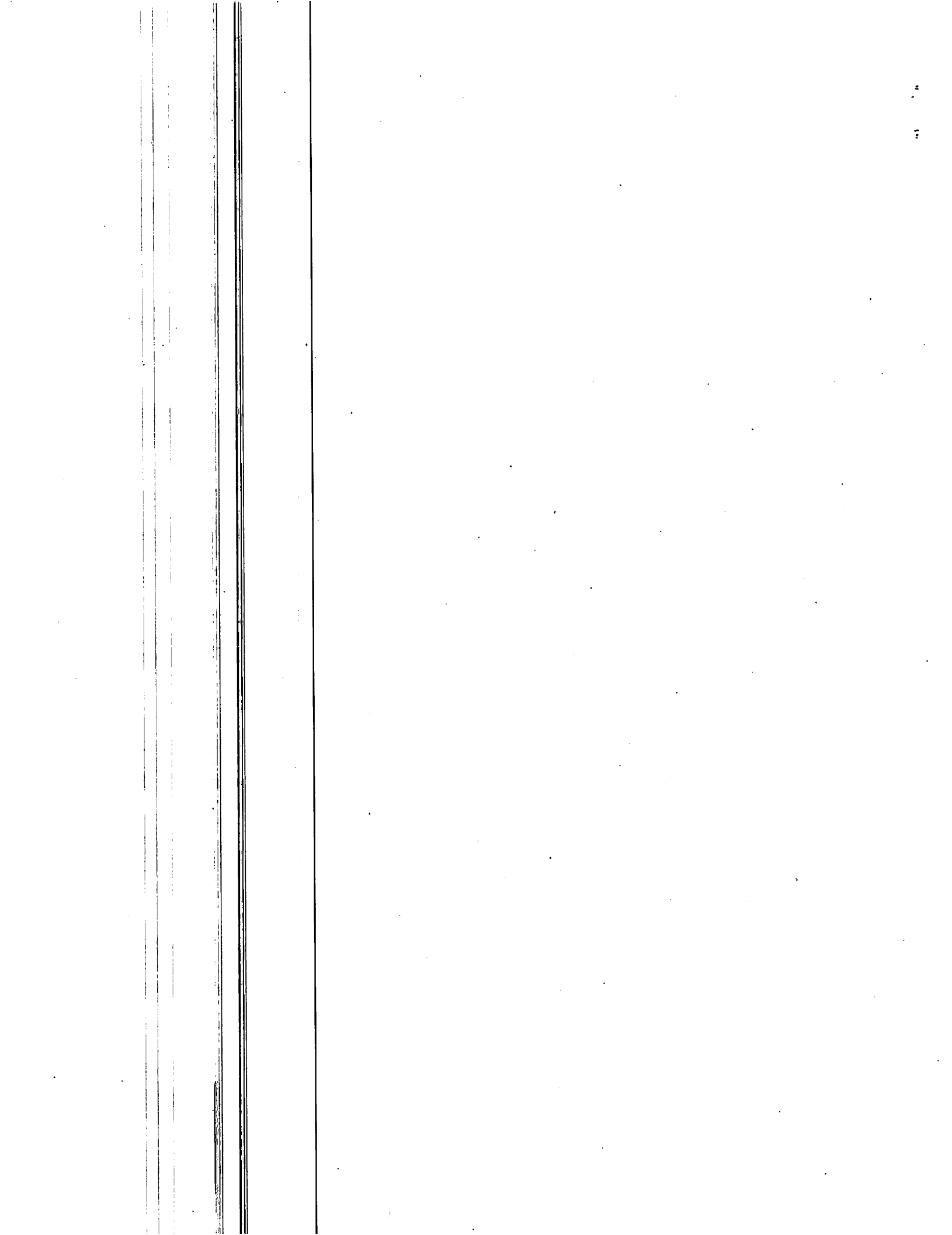
1. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor under the MHIC.
2. On March 28, 2016, the Claimant and the Respondent entered into the Contract for removal and replacement of two exterior decks on the first and second level of the Claimant's home.



3. The original agreed-upon Contract price was \$21,140.00.
4. On March 28, 2016 the Claimant paid the Respondent \$3,000.00.
5. The Contract had an approximate start date of May 9, 2016 with an approximate completion date of May 24, 2016.
6. On May 9, 2016, the Respondent did not begin work.
7. On May 10, 2016, the Respondent notified the Claimant that work would begin on May 16, 2016.
8. The Claimant communicated to the Respondent that she desired to have the job completed prior to the arrival of her daughter and grandchildren on June 4, 2016 because she did not want the safety hazard of the porch being removed without the replacement in place, but the Respondent did not respond.
9. The Respondent did not begin work between May 16, 2016 and June 4, 2016.
10. The Respondent did not apply for the builder's permit until June 2, 2016.
11. The Respondent called the Claimant on June 4, 2016 to ask when the Claimant's guests would be there. The Claimant advised that she did not want construction occurring while her grandchildren were present for their safety and that the work could not now begin until June 13, 2016, after her guests left.
12. The Claimant communicated to the Respondent that she needed to have the job completed prior to July 1, 2016 because she was undergoing chemotherapy in July, would be unable to walk up and down stairs, and needed to be able to use her upstairs deck. The Respondent stated it would be no problem to begin work on June 13, 2016 and be finished in two weeks.



13. The Respondent promised that the work would be completed by July 1, 2016.
14. The Respondent removed the Claimant's old decks on June 13 and 14, 2016.
15. The Respondent advised that he would dig footers and have the inspector present on June 15, 2016 for the approval of the footers and needed the draw of \$5,000.00 per the Contract.
16. On June 15, 2016 the Claimant was unable to be present at her home due to a doctor's appointment, but left a check for \$5,000.00 for the Respondent with the understanding that the check was for completion of the footers.
17. The Respondent cashed the check, but had not completed the footers. Only three of the seven footers had been dug and approved by the county inspector by June 15, 2016.
18. The Respondent did not return to the Claimant's home that week. The Claimant called the Respondent for the next four days following June 15, 2016 with no response.
19. The Respondent called the Claimant on June 20, 2016 and again advised that the job would be complete by July 1, 2016 and that he would be arriving with lumber and the building inspector the next day.
20. The Respondent did not return to the Claimant's property between June 16 and June 27, 2016.
21. On June 28, 2016 the Respondent returned and completed the lower deck demolition and clean up. The Respondent did not call or return on June 29, 2016.
22. On June 30, 2016 the Respondent worked at the property on footers for less than two hours in the afternoon and advised the Claimant he would return with the building inspector and the lumber on July 1, 2016.



23. On July 1, 2016 some lumber was delivered to the Claimant's home, but the Respondent and the building inspector did not appear.

24. On July 2, 2016, the Claimant called the Respondent to cancel the Contract, request a refund, and advise the Respondent to come collect his tools and supplies.

25. On August 4, 2016 the Claimant contracted with HNH to construct her two exterior decks of the same materials and dimensions as the Contract with the Respondent at an agreed upon price of \$27,110.00. The decks were completed on October 11, 2016 and the contract was paid in full.

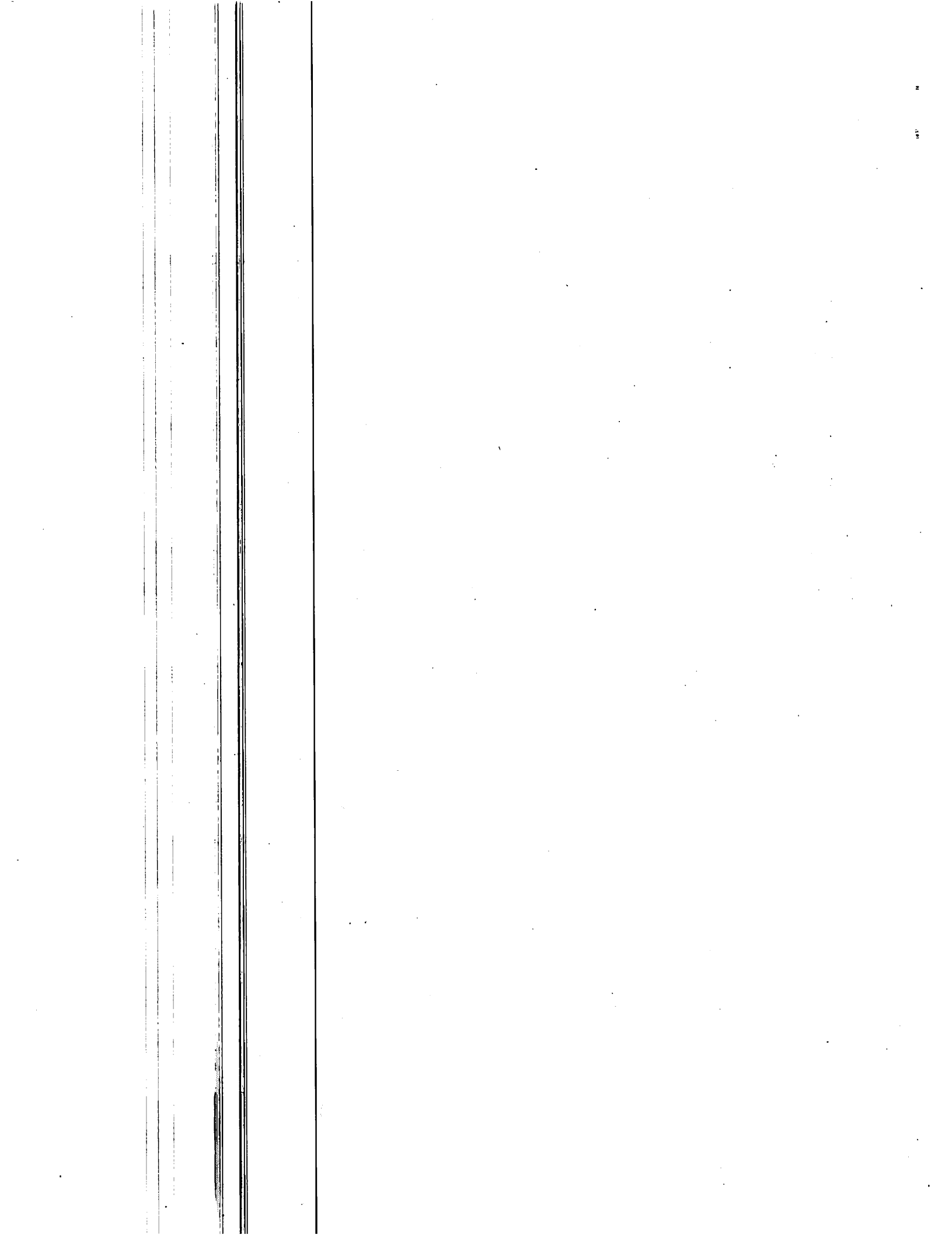
26. The removal of the old decks was not in the HNH contract because the Respondent had already removed and hauled away the old decks. The three footers that had been approved by the county inspector and the other footers dug by the Respondent were unable to be used by HNH, so they dug their own footers.

27. The Claimant filed a Complaint with the MHIC on October 12, 2016 and filed the Claim for \$6,000.00 with the MHIC on May 27, 2019.

28. The Claim was timely filed, there is no pending court claim for the same loss, and the Claimant has not recovered her loss from any other source. The Claimant resides in the home that is the subject of the Claim and does not own other dwellings. The parties did not agree to submit their disputes to arbitration. The Claimant is not a relative, employee, officer, or partner of the Respondent, and is not related to any employee, officer, or partner of the Respondent.

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); State Gov't § 10-217; COMAR 09.08.03.03A(3). To

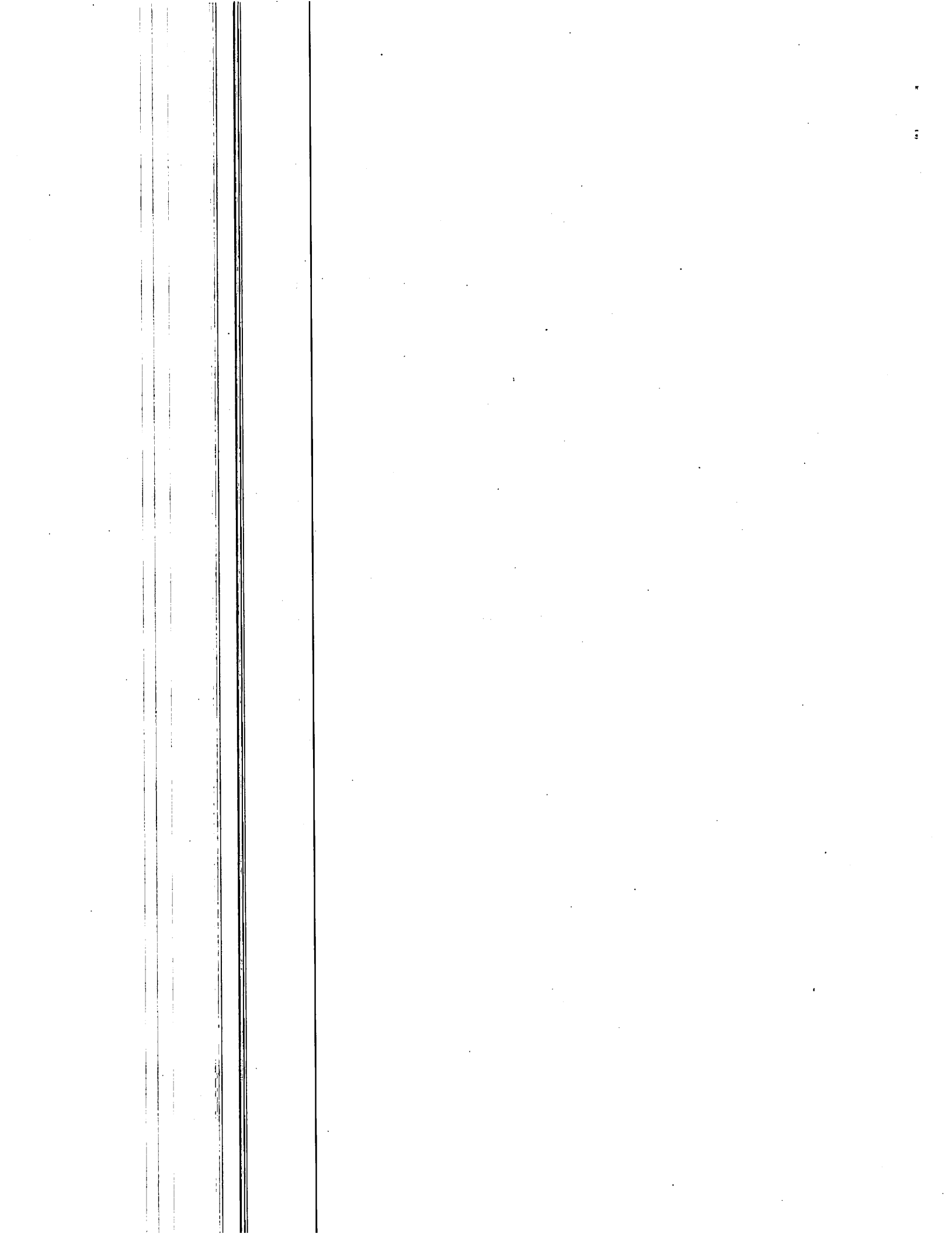


prove a claim by a preponderance of the evidence means to show that it is “more likely so than not so” when all the evidence is considered. *Coleman v. Anne Arundel Cnty. Police Dep’t*, 369 Md. 108, 125 n.16 (2002).

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) (Supp. 2022); *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.

By statute, certain claimants are excluded from recovering from the Fund altogether. In this case, there are no such statutory impediments to the Claimant’s recovery. The Respondent was a licensed home improvement contractor at the time the Respondent entered into the Contract with the Claimant. The claim was timely filed, there is no pending court claim for the same loss, and the Claimant did not recover the alleged losses from any other source. Bus. Reg §§ 8-405(g), 8-408(b)(1) (2015 & Supp. 2022). The Claimant resides in the home that is the subject of the claim and does not own more than three dwellings. *Id.* § 8-405(f)(2) (Supp. 2022). The parties did not enter into a valid agreement to submit their disputes to arbitration. *Id.* §§ 8-405(c), 8-408(b)(3) (2015 & Supp. 2022). The Claimant is not a relative, employee, officer, or partner of the Respondent, and is not related to any employee, officer, or partner of the Respondent. *Id.* § 8-405(f)(1) (Supp. 2022).

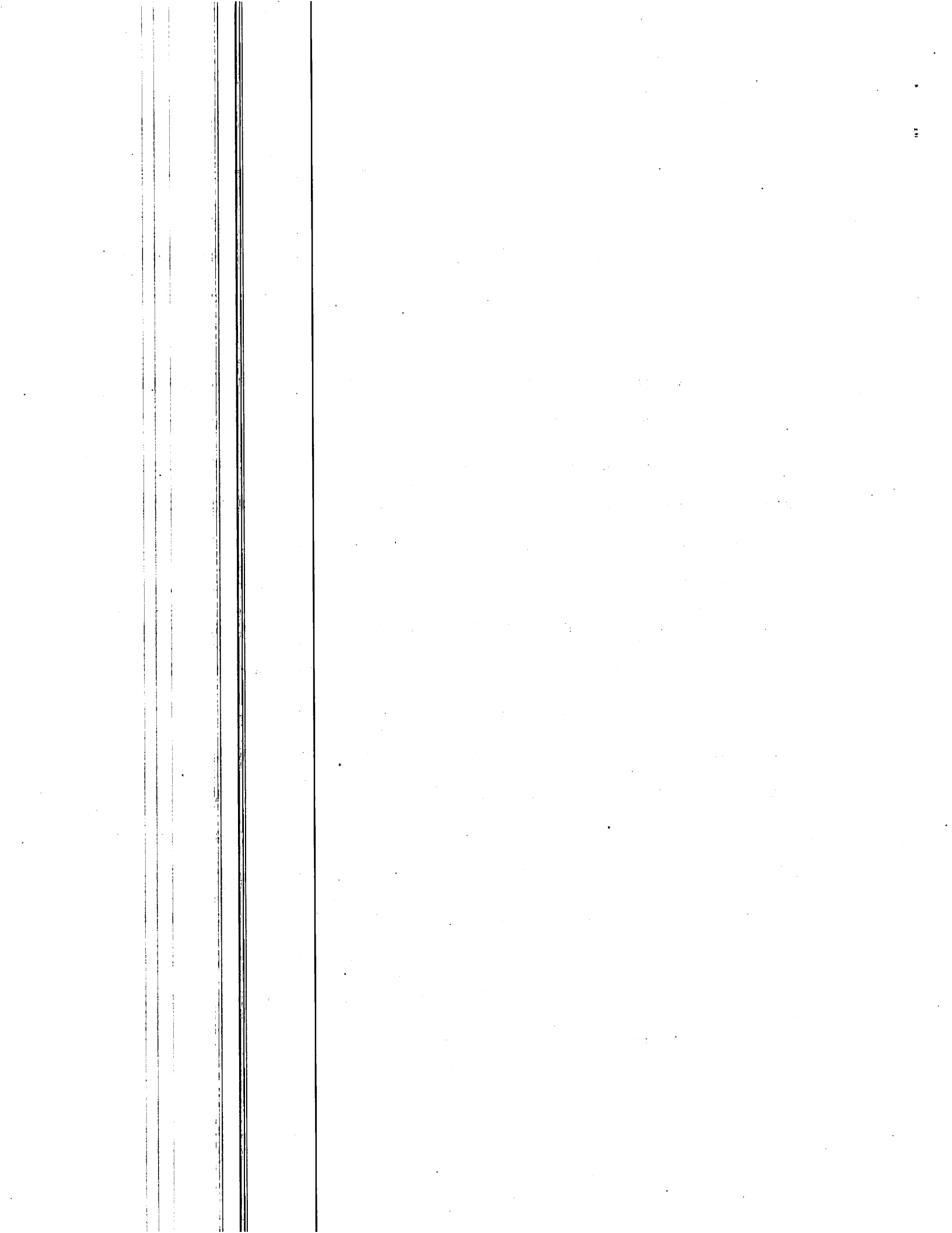
The Claimant outlined her many unanswered communications she had with the Respondent throughout May and June and testified she kept a calendar of all her messages and



conversations with the Respondent. The Respondent blamed bad weather for delaying the start, but he was unsure if he ever communicated this issue to the Claimant. The Respondent admitted that it had been a long time and he did not have the recall. The Respondent also admitted that he would need a crew to install the new decks, but never brought a crew to the Claimant's home, coming by himself on the few occasions he showed up.

The Fund argued that the Claimant was at least partially to blame for the delay because she would not allow the Respondent to start until mid-July and then refused to let him finish once he did and that the completion date in the Contract was not legally enforceable because it was approximate not certain. However, the Fund agreed that if the Claimant was found to have good cause to cancel the contract, she was entitled to recover her claim amount.

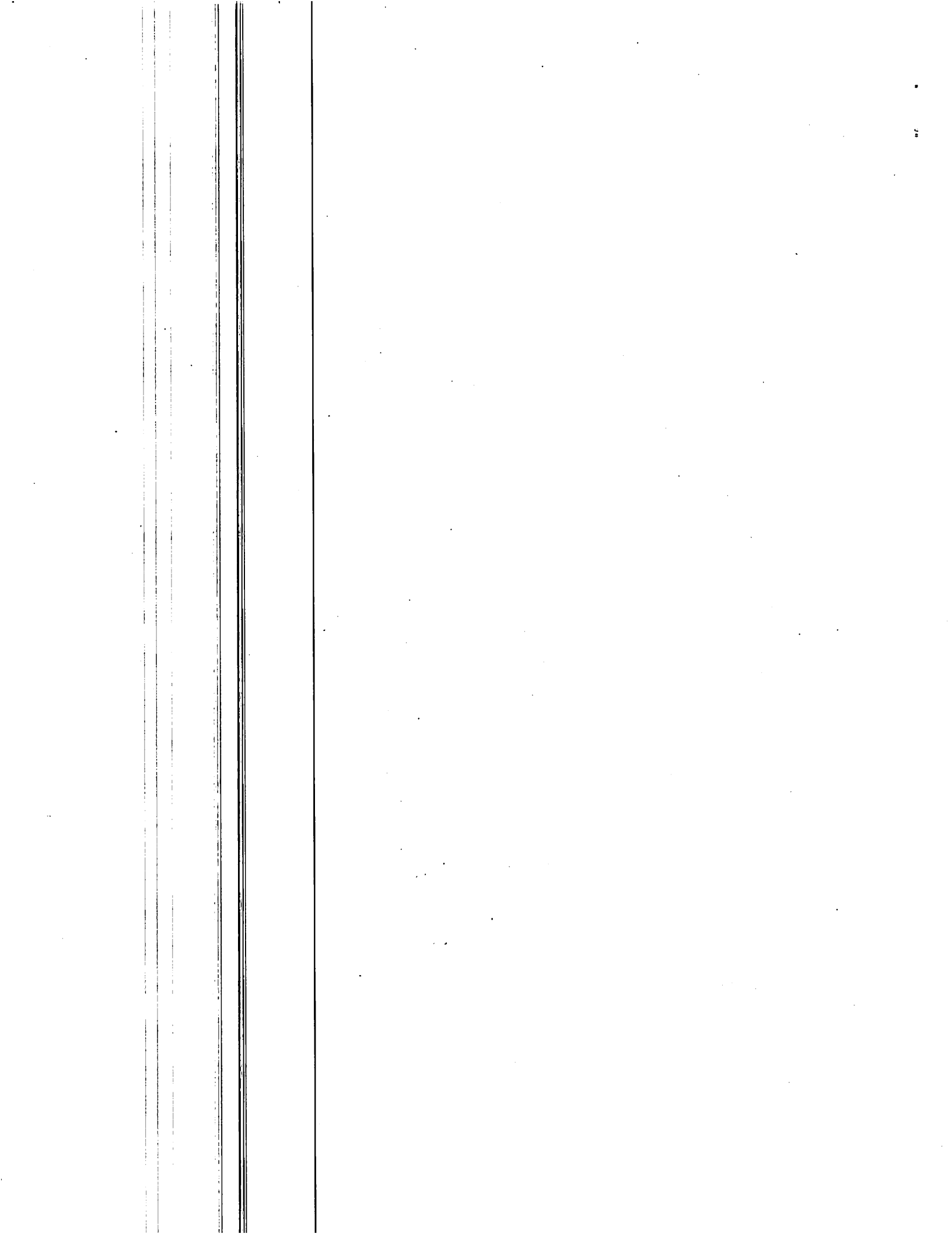
I find the Claimant very credible as she took copious notes in real time and presented the timeline of the events from May through July 2016. She researched the weather report for the time frame at issue to demonstrate that the Respondent's claims of rain delays were mostly unfounded. The Claimant also had to pay an attorney to contact the Respondent in June in order to get the Respondent to show up. The Claimant clearly communicated her needs to the Respondent regarding the first agreed upon completion date of June 4, 2016 and the second promised completion date of July 1, 2016. And while the urgency of completion certainly resonated more with the Claimant than the Respondent, he should not have assured her of a completion date of July 1, 2016 if he had no intention or ability to deliver. When it was obvious that the decks would not be completed by July 1, 2016, the Claimant's reluctance to rely on the Respondent any further and terminate the Contract was justified by the Respondent's repeated failures to communicate and follow through on his promises.



The Claimant did not unreasonably reject good faith efforts by the Respondent to resolve the Claim. *Id.* § 8-405(d) (Supp. 2022). In fact, the Claimant agreed to resolve the matter when it first came to the OAH for hearing, but the Respondent failed to make the required payments. And while it was likely the Respondent could have finished the job long before the contractor that the Claimant hired to complete it, I do not find that the Claimant acted in bad faith by terminating the Contract with the Respondent. Six years later the toll on the Claimant was still visible at the hearing.

By failing to complete the work within the time frame agreed upon, the Respondent performed unworkmanlike, inadequate, or incomplete home improvements. The Claimant testified that she chose the Respondent for the job because he agreed to a start and completion time that was within her time frame prior to her July 2016 cancer treatments. The job was supposed to take two weeks, but kept getting pushed out. Once it started, the Respondent did not come back for days or weeks at a time and never had additional assistance with the work, which he admitted would be required to build the decks. And while it is clear that the Respondent did some work of tearing off the decks and hauling debris, none of the work of rebuilding was completed. The Respondent claimed that the footers he dug kept filling with rainwater, and he had to come and bail them out multiple times. The Claimant provided weather history printouts that did not support the Respondent's contentions regarding rainfall.

It is clear that only three of the footers were dug and passed inspection at the time the Respondent cashed the second check. The Contract had two slightly different draw schedules related to the footers. The first page of the Contract said the second payment of \$5,000.00 was "Payable on Approval of Footings" but the specifications on the third page of the Contract said it was to be paid "when footings are dug." (Comp. Ex. 1.) In either case, the Respondent was not



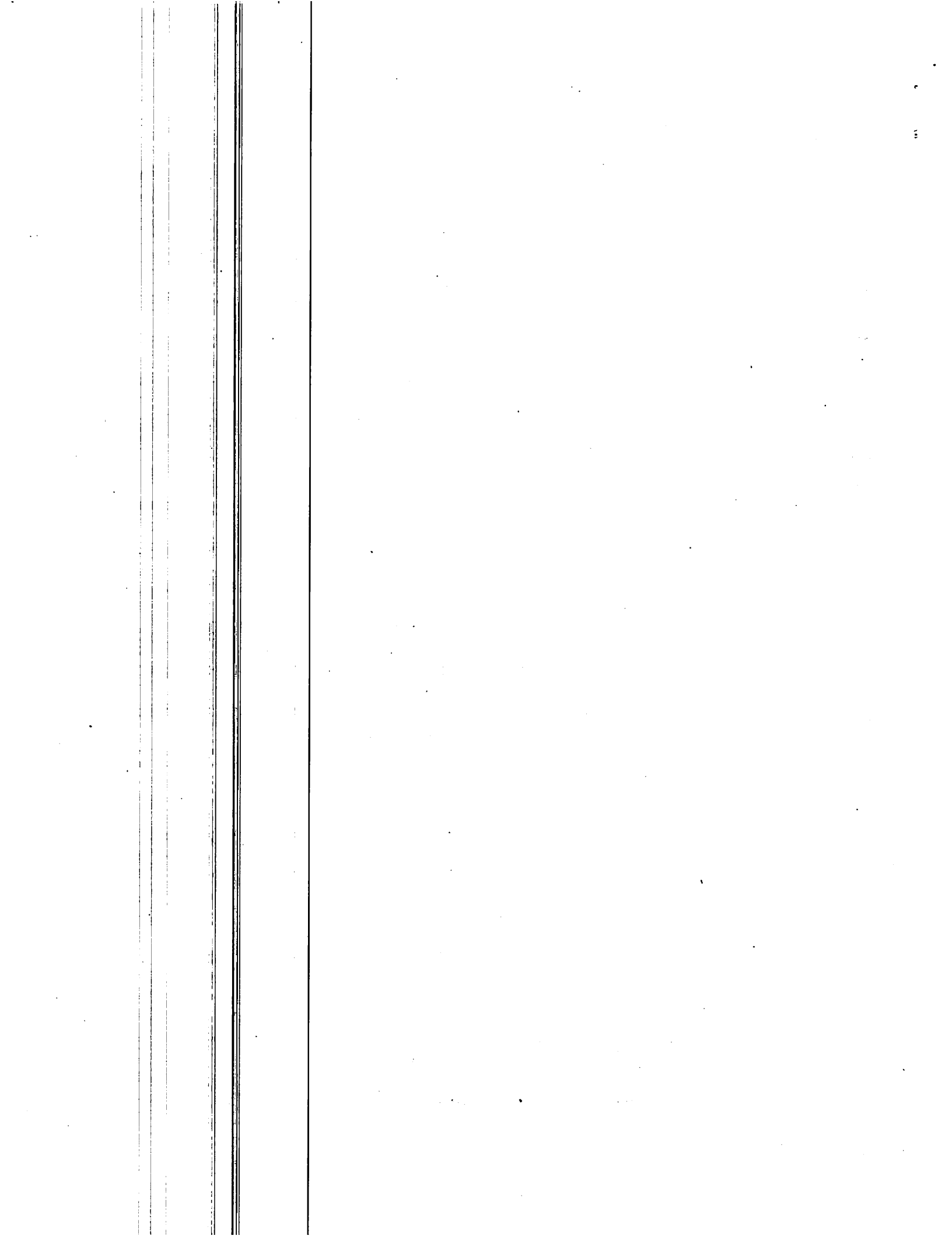
entitled to the second draw on June 15, 2016 because only three of the seven footers had been dug and approved.

It is unclear why the Respondent's footers could not be used by HNH, but I find the Claimant credible that HNH told her it was unable to use them and had to dig its own footers. In a case such as this, it is reasonable for a second contractor to not utilize partial work done by another contractor who had proved unreliable. I find that the Claimant did not get what she paid for with the incomplete work of the Respondent. 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) (Supp. 2022); 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 Contract was not abandoned without any work being performed so the first formula does not apply. The work was completed by another contractor so the second formula does not apply.

The Respondent performed some work under the Contract, and the Claimant 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

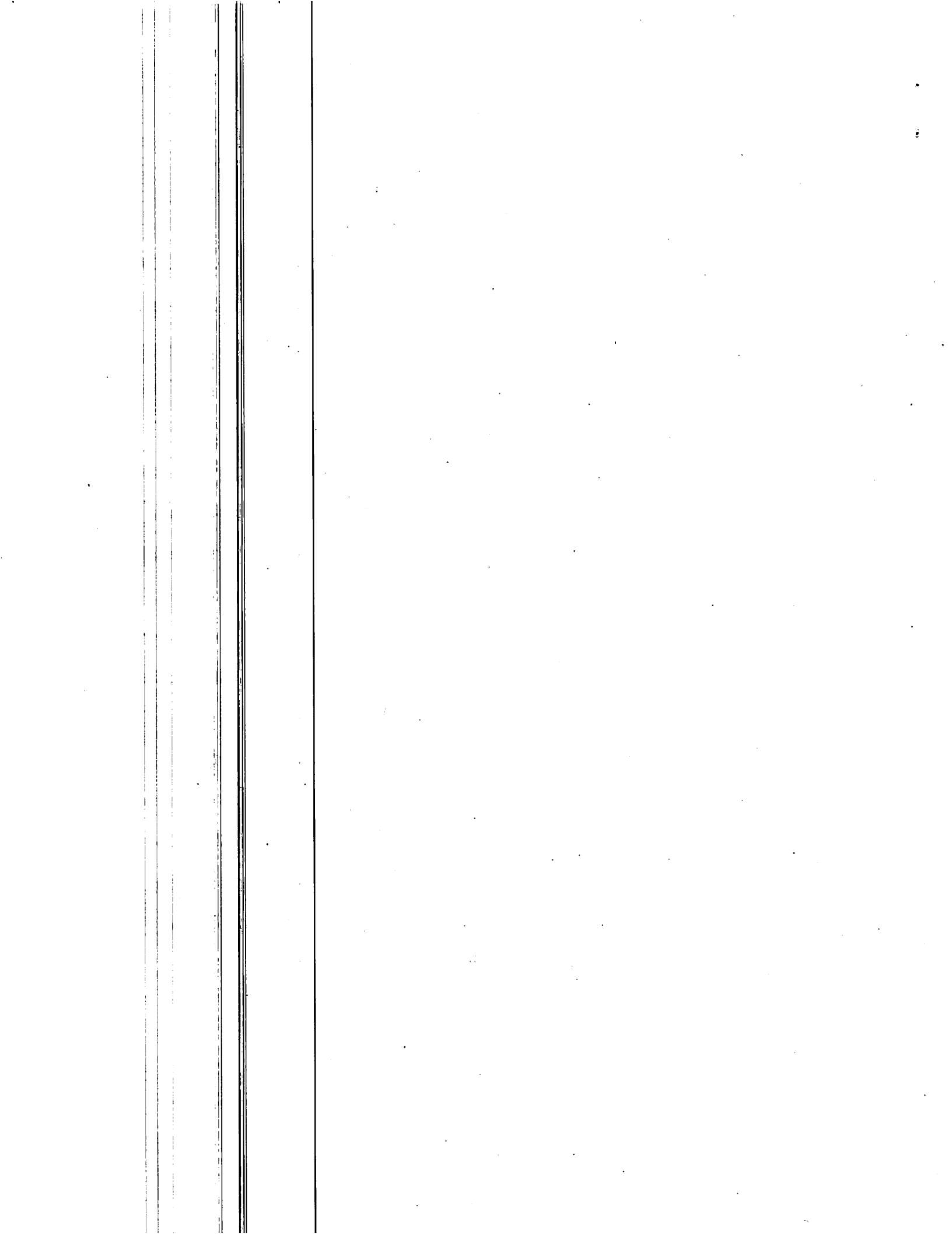


proper basis for measuring actual loss, the Commission may adjust its measurement accordingly.

COMAR 09.08.03.03B(3)(c).

The Claimant paid the Respondent \$8,000.00. The Claimant paid HNH \$27,110.00 to complete the deck project that was the same as the project the Respondent was to complete. The original Contract price between the Claimant and the Respondent was \$21,140.00. The payment to the Respondent plus the cost to complete is \$35,110.00 (\$8000.00 + \$27,110.00) minus the contract price (\$21,140.00) equals the Claimant's actual loss of \$13,970.00. However, a claimant may not recover more than the amount paid to the contractor against whom the claim is filed, in this case \$8,000.00. Bus. Reg. § 8-405(e)(1), (5) (Supp. 2022). The Claimant only sought the return of the money she paid (\$8,000.00) minus what she believed was a fair payment for the work done (\$2,000.00), so her Claim was for \$6,000.00. It would be inappropriate to award a greater amount than the Claimant's Claim because the Respondent and the Fund were only on notice of a \$6,000.00 claim. I find that the Claimant may recover \$6,000.00 from the Fund.

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. Bus. Reg. § 8-405(e)(1), (5) (Supp. 2022); COMAR 09.08.03.03B(4). In this case, the Claimant's actual loss is more than the amount paid to the Respondent and less than \$30,000.00. Therefore, the Claimant's recovery is limited to the amount paid to the Respondent, and further limited by her Claim amount.



PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$6,000.00 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2022); COMAR 09.08.03.03B(3)(c). I further conclude that the Claimant is entitled recover that amount from the Fund. Bus. Reg. § 8-405(e)(1), (5) (Supp. 2022); COMAR 09.08.03.03B(4).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$6,000.00; 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;³ and

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

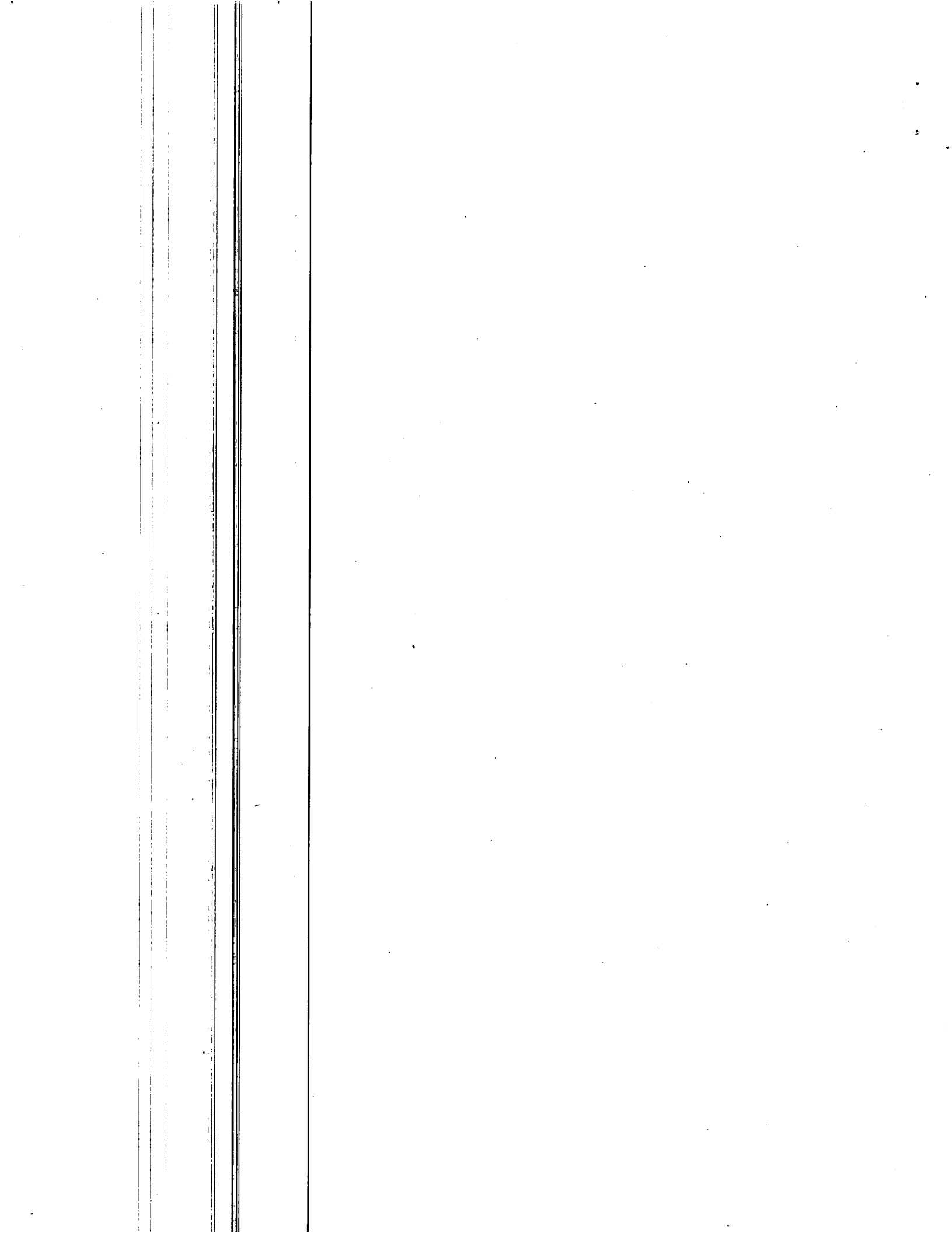
Willis Gunther Baker

December 30, 2022
Date Decision Issued

Willis Gunther Baker
Administrative Law Judge

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



PROPOSED ORDER

WHEREFORE, this 14th day of February, 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.

Joseph Tunney

Joseph Tunney

Chairman

Panel B

***MARYLAND HOME IMPROVEMENT
COMMISSION***

