

IN THE MATTER OF THE CLAIM	* BEFORE SUN E. CHOI,
OF MOLLY AND CALVIN LEE	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANTS	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	*
FOR THE ALLEGED ACTS OR	*
OMISSIONS OF BENJAMIN	*
TONKEN, T/A TONKEN	*
REMODELING, LLC,	* OAH No.: LABOR-HIC-02-22-00459
RESPONDENT	* MHIC No.: 21 (75) 1102

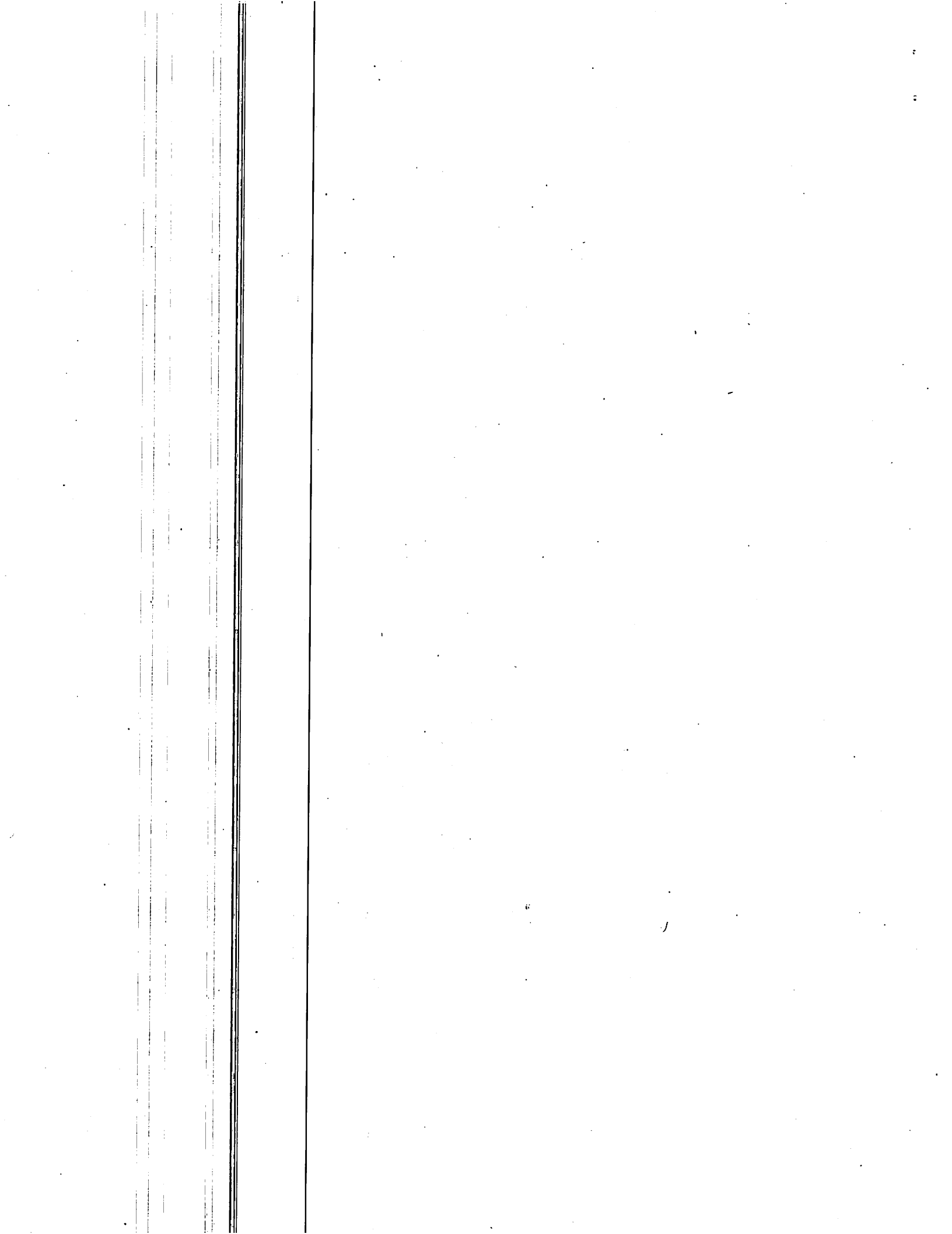
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PROPOSED DECISION

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 September 10, 2021, Molly and Calvin Lee (Claimants) 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 \$30,379.81 for actual losses allegedly suffered as a result of a home improvement contract with Benjamin Tonken, t/a Tonken Remodeling, LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -



411 (2015).¹ On December 6, 2021, the MHIC issued a Hearing Order on the Claim. On December 6, 2021, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On May 6, 2022, and July 26, 2022, I held a hearing at the OAH in Rockville, Maryland. Bus. Reg. §§ 8-407(a), 8-312. John Hart, Assistant Attorney General, Department, represented the Fund. The Claimants represented themselves. Robert D. Roseman, Esquire, represented the Respondent, who was present.

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; and COMAR 28.02.01.

ISSUES

1. Did the Claimants 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?

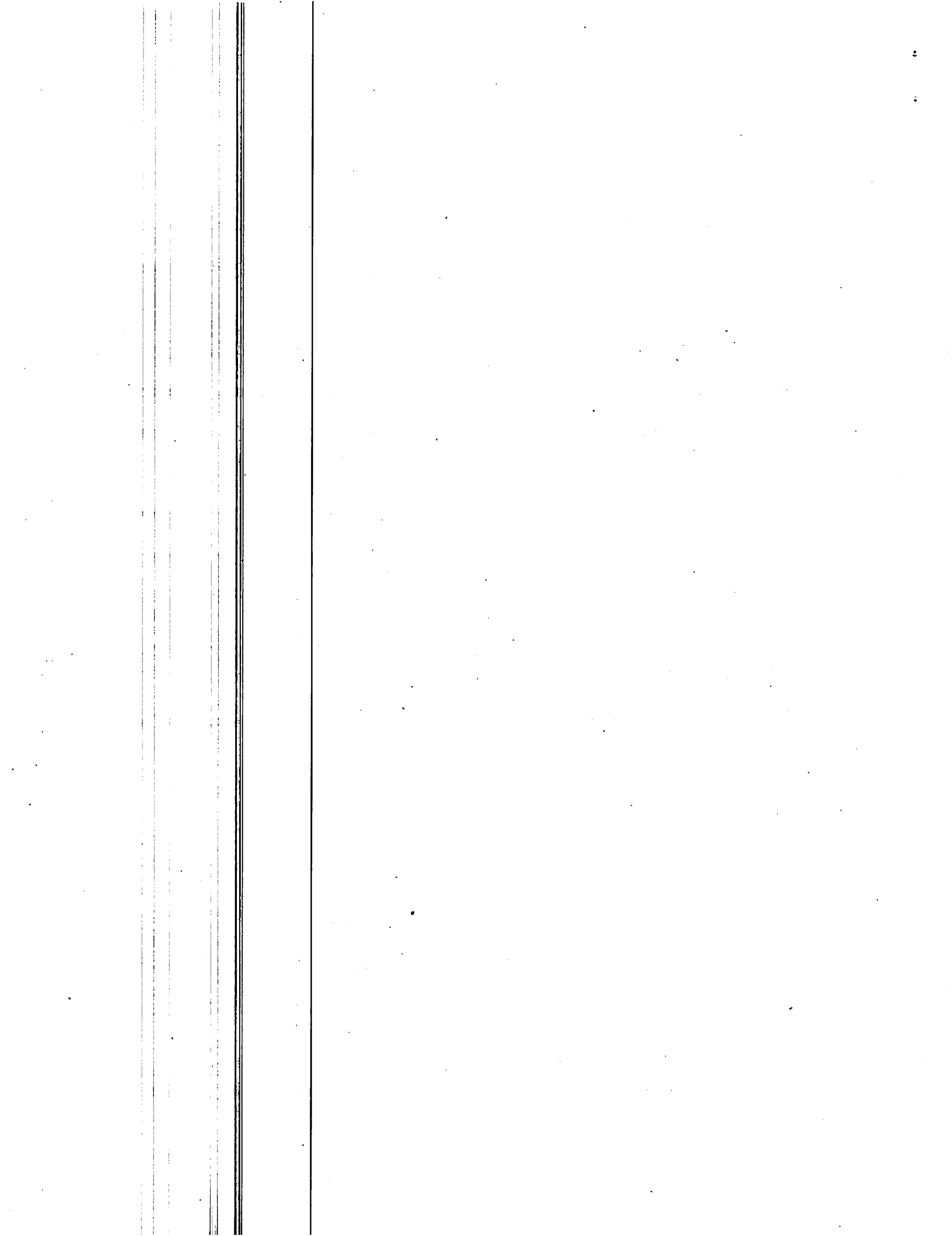
SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits offered by the Claimants:

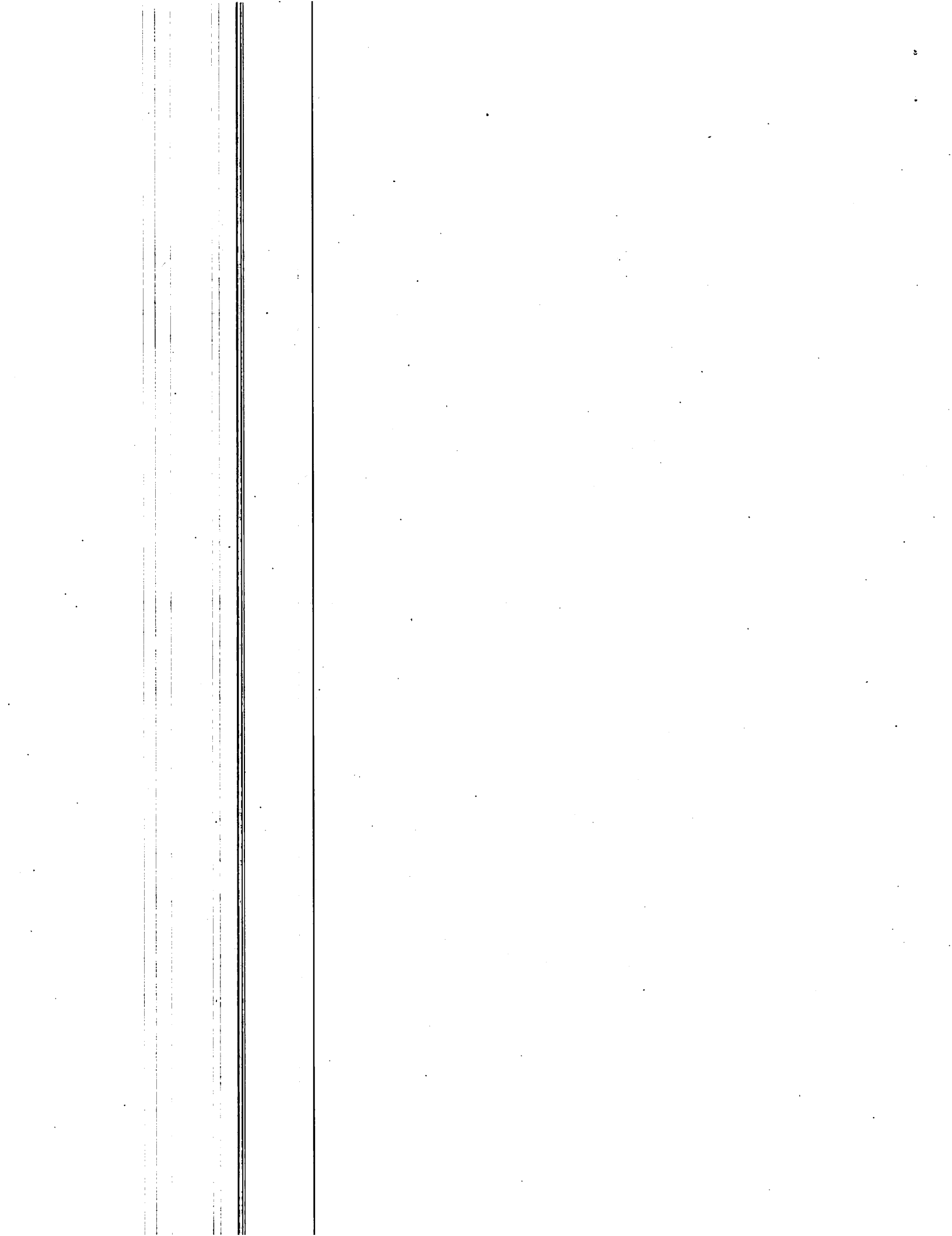
- Clmt. Ex. 1 - COREtec Installation Manual (pp. 1-16), February 23, 2021
- Clmt. Ex. 2 - Notarized Letter from Delbert G. Liu and D.G. Liu Contractors, LLC (D.G. Liu), February 11, 2022
- Clmt. Ex. 3 - Photographs from demolition of basement flooring consisting of COREtec luxury vinyl plank (LVP), cement board, Schluter DITRA-HEAT (DITRA) panel, and DRICORE subfloor, undated

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



- Clmt. Ex. 4 - DRICORE Installation Guide, undated
- Clmt. Ex. 5 - Emails from Claimants to Respondent requesting proof of purchase of DITRA system, January 16, 2021, January 25, 2021, and February 9, 2021
- Clmt. Ex. 6 - Claimants' notes from conversations with Jennifer,² Customer Service Representative and Bryan Von Blohn, Territory Manager of Schluter, various dates
- Clmt. Ex. 7 - DITRA Installation Handbook (pp. 1-43), 2020
- Clmt. Ex. 8 - DITRA Technical Bulletin, undated
- Clmt. Ex. 9 - Email from Bryan Von Blohn to Claimants, October 24, 2021
- Clmt. Ex. 10 - Claimants' letter to Respondent, via certified mail, February 23, 2021
- Clmt. Ex. 11 - Claimants' email to Respondent, March 29, 2021
- Clmt. Ex. 12 - Home Improvement Claim #21 (75) 1102 (p. 1), September 5, 2021, with the following attachments:
- Claimants' written statement (pp. 2-11), undated
 - Appendix A, Contract between Claimants and Respondent (pp. 12-19), June 18, 2020
 - Appendix B, consisting of:
 - Clmt. Ex. 10 (pp. 20-25), February 23, 2021
 - Clmt. Ex. 11 (pp. 26-28), March 29, 2021
 - Appendix C, consisting of:
 - Floor Surfaces Inspection Service, LLC's Hard Surface Floor Inspection Report (pp. 29-50)
 - Claimants' Check #9018 for \$200.00, to Kevin H. Donlea, front and back (p. 51), January 21, 2021
 - COREtec Resilient Installation Guidelines (pp. 52-53), February 23, 2021
 - Appendix D, consisting of:
 - Two photographs of IKEA pantry doors (p. 54), undated
 - IKEA receipt (pp. 55-65), June 25, 2020
 - IKEA Distribution Goods Summary (pp. 57-59), booked date July 24, 2020
 - Appendix E, consisting of:
 - Claimants' Letter to Respondent (p. 60), January 13, 2021
 - Claimants' Letter to Respondent (p. 61), January 17, 2021

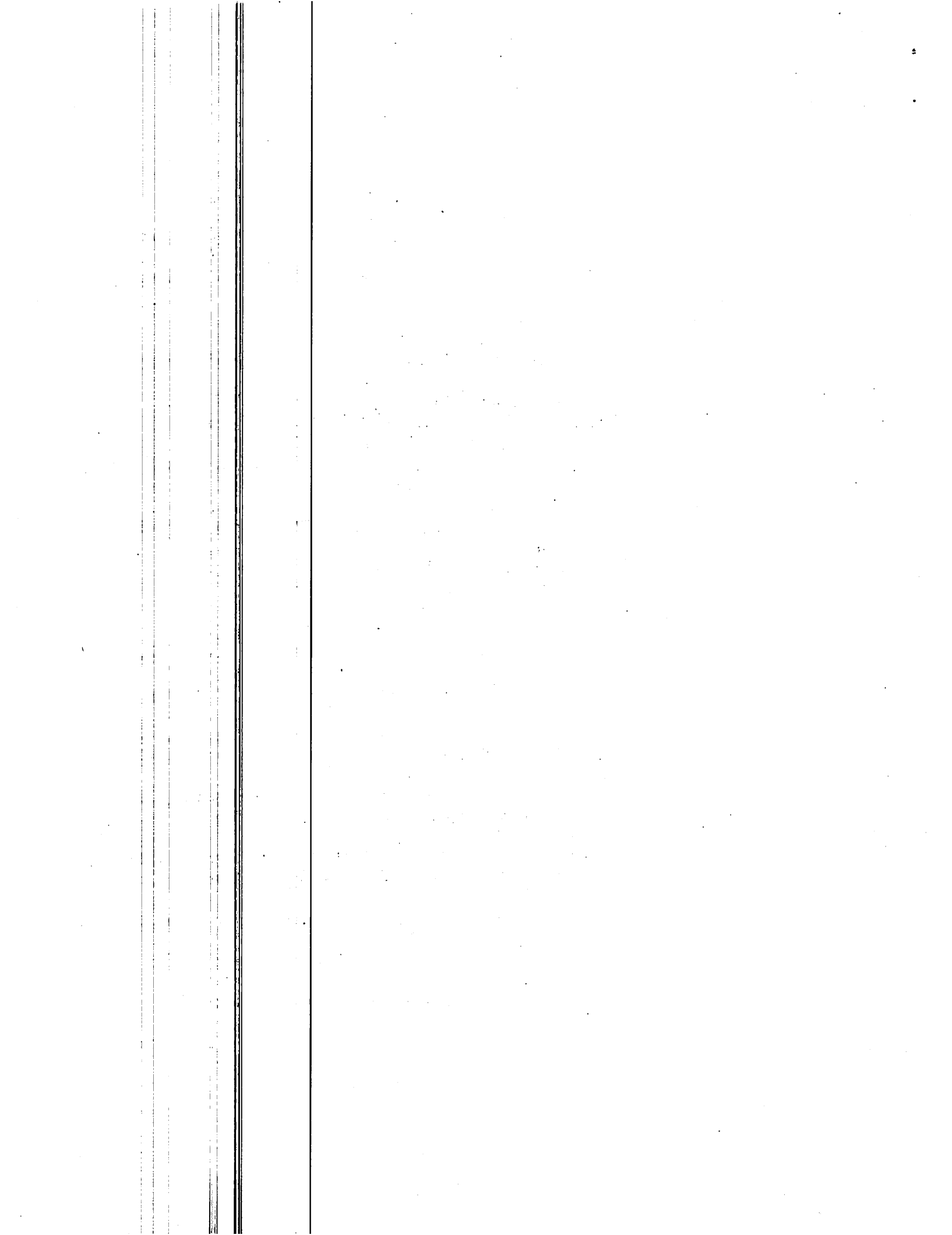
² The last name was not provided.



- Claimants' Check #9014 to Respondent, for \$2,000.00 (p. 62), December 21, 2020
- Claimants' Check #1875 to Respondent for \$2,000.00 (p. 63), January 13, 2021
- Claimants' Check #9017 to Respondent, for \$300.00, front and back (p. 64), January 17, 2021
- Appendix F, consisting of:
 - Photograph of water heater (p. 65), undated
 - Warning Ticket from Washington Gas and Electric (p. 66), January 4, 2021
 - Respondent's Email to Claimants (p. 67), January 4, 2021
 - Respondent's Email to Claimants (p. 68), January 17, 2021
 - Contract Change Order (p. 69), August 6, 2020
 - Claimants' Check #9001 to Respondent, for \$11,500.00, front and back (p. 70), August 10, 2020
- Appendix G, consisting of:
 - Letter from D.G. Liu to Claimants (pp. 71-72), March 30, 2021, with attachments:
 - Summary of overall construction Cost (p. 73), undated
 - Schedule and itemized costs (pp. 74-75), undated
 - Flooring materials estimate (p. 76), undated
- Appendix H, consisting of Claimant's Checks to Respondent:
 - Check #9000, for \$24,333.00, for basement, front and back (p. 77), June 18, 2020
 - Check #9001, for \$11,500.00, for CO³ payment, front and back (p. 78), August 10, 2020
 - Check #9002, for \$4,800.00, front and back (p. 79), August 18, 2020
 - Check #9003, for \$7,200.00, for CO payment, front and back (p. 80), August 25, 2020
 - Check #9004, for \$4,800.00, front and back (p. 81), September 1, 2020
 - Check #9005, for \$600.00 for chimney, front and back (p. 82), September 7, 2020
 - Check #9006, for \$4,800.00, front and back (p. 83), September 7, 2020
 - Check #9007, for \$4,800.00, front and back (p. 84), September 21, 2020
 - Check #9008, for \$2,000.00, for Change Orders October 1,⁴ front and back (p. 85), October 1, 2020
 - Check #9009, \$4,800.00, for payment #7, front and back (p. 86), October 5, 2020
 - Check #9010, \$4,800.00, for payment #8, front and back (p. 87), October 20, 2020
 - Check #9011, for \$2,000.00, for bathroom tile and heat (p. 88), front and back, December 4, 2020

³ CO is not defined.

⁴ No year is indicated.



- Check #9012, for \$2,000.00 for electrical panel, front and back (p. 89), December 7, 2020
- Check #9013, for \$2,000.00 for flooring, front and back (p. 90), December 18, 2020
- Check #9014, for \$50.00 for dimmer, front and back (p. 91), December 24, 2020
- Check #1875, for \$2,000.00, for paint and carpentry, front and back (p. 92), January 13, 2021
- Check #1876, for \$500.00, for returned check fee, front and back (p. 93), January 13, 2021
- Check #9016, for \$700.00, for stair payment, front and back (p. 94), January 17, 2021
- Check #9017, for \$300.00, front and back (p. 95), January 17, 2021
- Appendix I, consisting of:
 - Contract Change Order (p. 96), August 6, 2020
 - Contract Change Order (p. 97), August 23, 2020
 - Contract Change Order (p. 98), September 2, 2020
 - Contract Change Order (p. 99), September 30, 2020

Clmt. Ex. 13 - MHIC Order letter to Respondent, June 22, 2021

Clmt. Ex. 14 - MHIC letter to Claimants, August 19, 2021

Clmt. Ex. 15 - MHIC letter to Claimants, November 17, 2021

Clmt. Ex. 16 - Estimate from D.G. Liu, March 30, 2021

Clmt. Ex. 17 - Contract between Claimants and D.G. Liu, June 21, 2021

Clmt. Ex. 18 - Two photographs of basement flooring demolition, undated

Clmt. Ex. 19 - Email from D.G. Liu to Claimants, November 2, 2021

Clmt. Ex. 20 - Itemized costs for work by D.G. Liu, undated

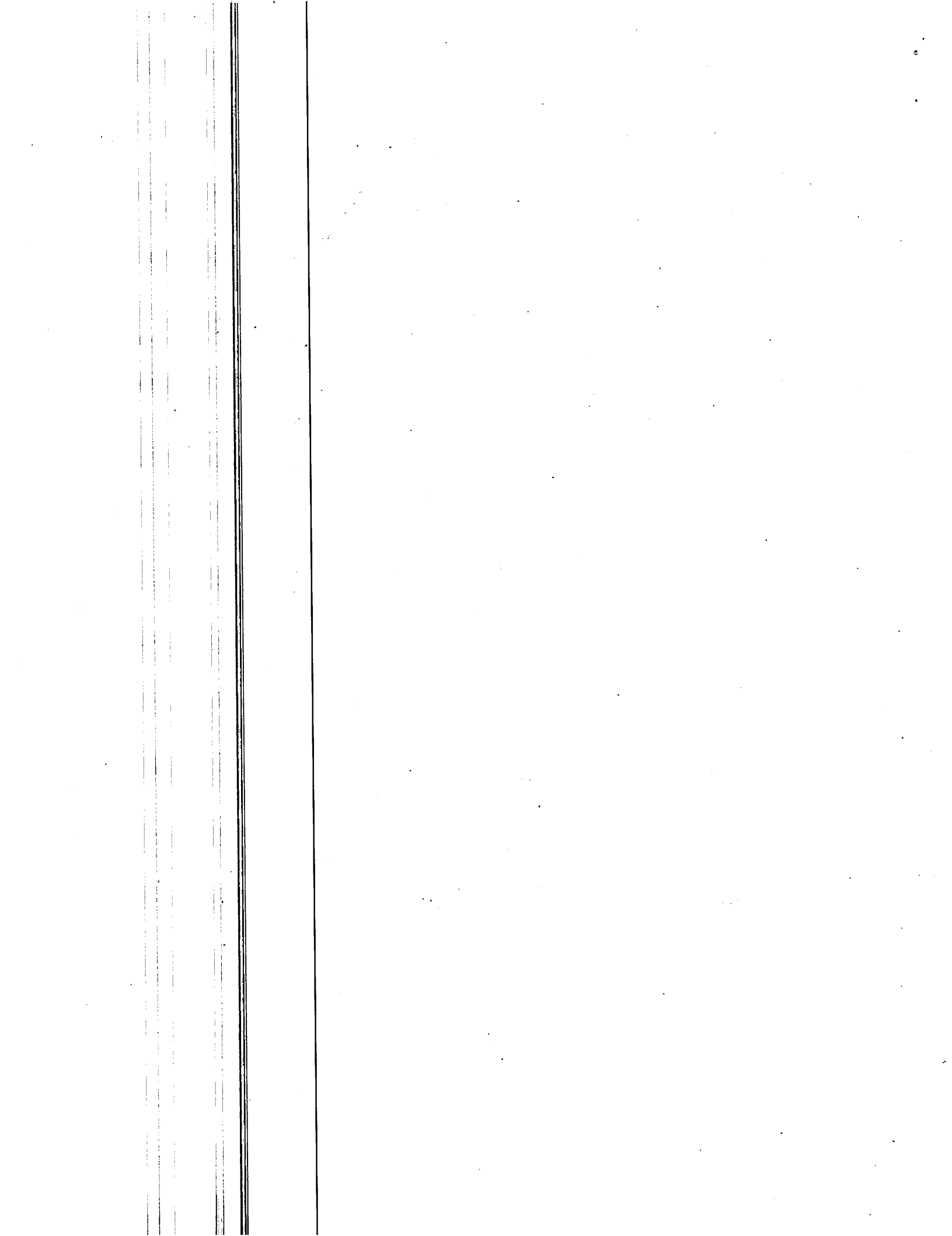
Clmt. Ex. 21 - Contract between Claimants and Respondent, June 18, 2020

Clmt. Ex. 22 - The Tile Shop receipt and summary of tiles purchased and returned, August 20, 2020

Clmt. Ex. 23 - Cost of materials of DITRA system, bathroom tile and threshold, DRICORE subfloor, and cement board, August 20, 2020, and June 2021

Clmt. Ex. 24 - Total cost of D.G. Liu's labor and materials, undated

Clmt. Ex. 25 - Kevin Harold Donlea's curriculum vitae, undated



Clmt. Ex. 26 - Floor Inspection Service, LLC's Hard Surface Floor Inspection Report (pp. 1-21),
January 21, 2021

I admitted the following exhibits offered by the Respondent:

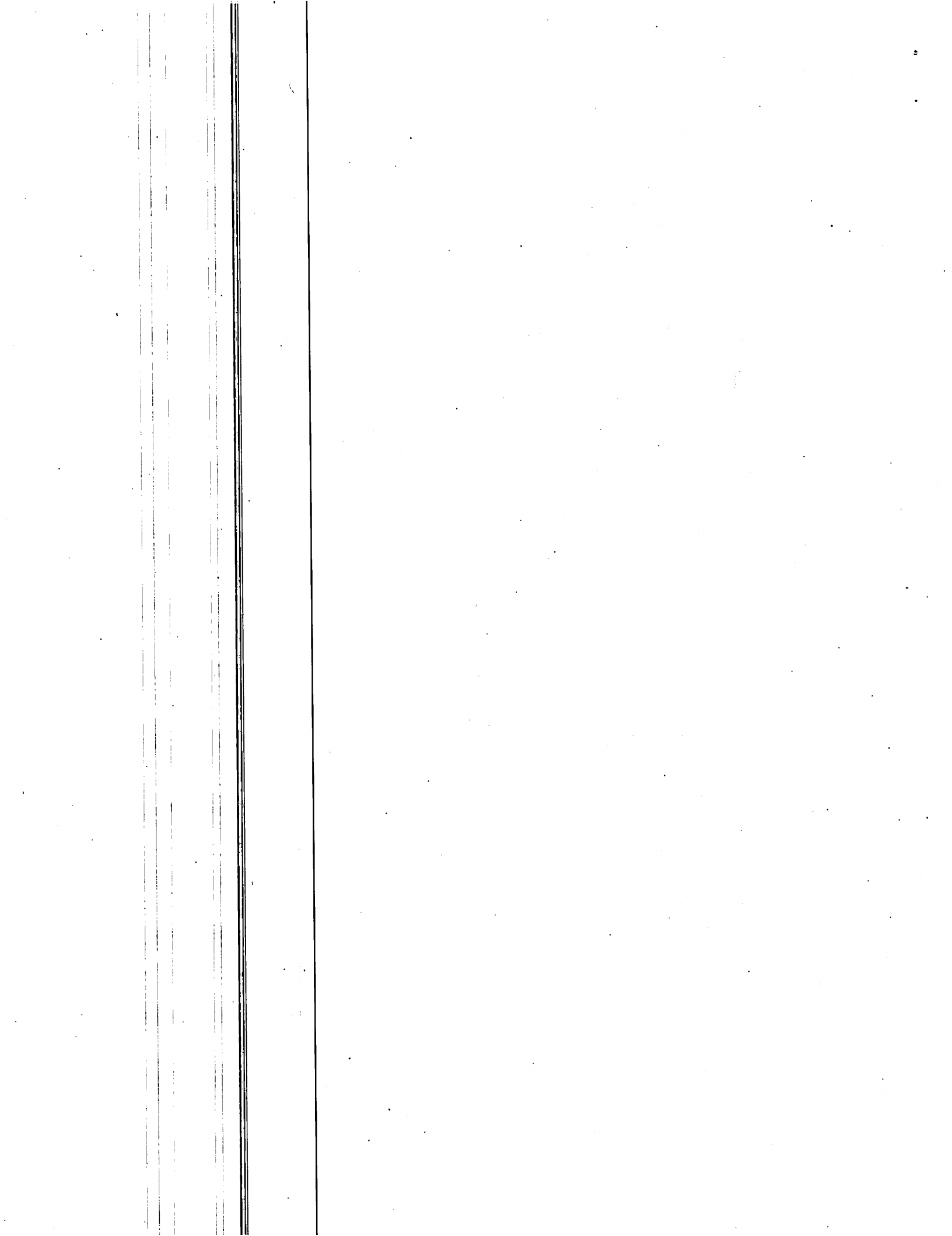
- Resp. Ex. 1 - Photographs of basement floor layers, undated
- Resp. Ex. 2 - DRICORE Subfloor information, project calculator, and Frequently Asked Questions (FAQ), undated
- Resp. Ex. 3 - DITRA system brochure, undated
- Resp. Ex. 4 - DITRA Installation Handbook, 2022
- Resp. Ex. 5 - MAPEI Primer T information, October 10, 2018
- Resp. Ex. 6 - MAPEI Novoplan 2 Plus information, May 26, 2022
- Resp. Ex. 7 - MAPEI Ultraplan 1 Plus information, May 11, 2022
- Resp. Ex. 8 - DRICORE Subfloor features and benefits information, undated
- Resp. Ex. 9 - DRICORE Subfloor features and benefits information, undated

I admitted the following exhibits offered by the Fund:

- Fund Ex. 1 - Notice of Hearing, March 28, 2022
- Fund Ex. 2 - Hearing Order, December 6, 2021
- Fund Ex. 3 - MHIC letter to Respondent regarding Claimants' Claim, September 29, 2021
- Fund Ex. 4 - MHIC licensing history for Respondent, report date February 25, 2022

Testimony

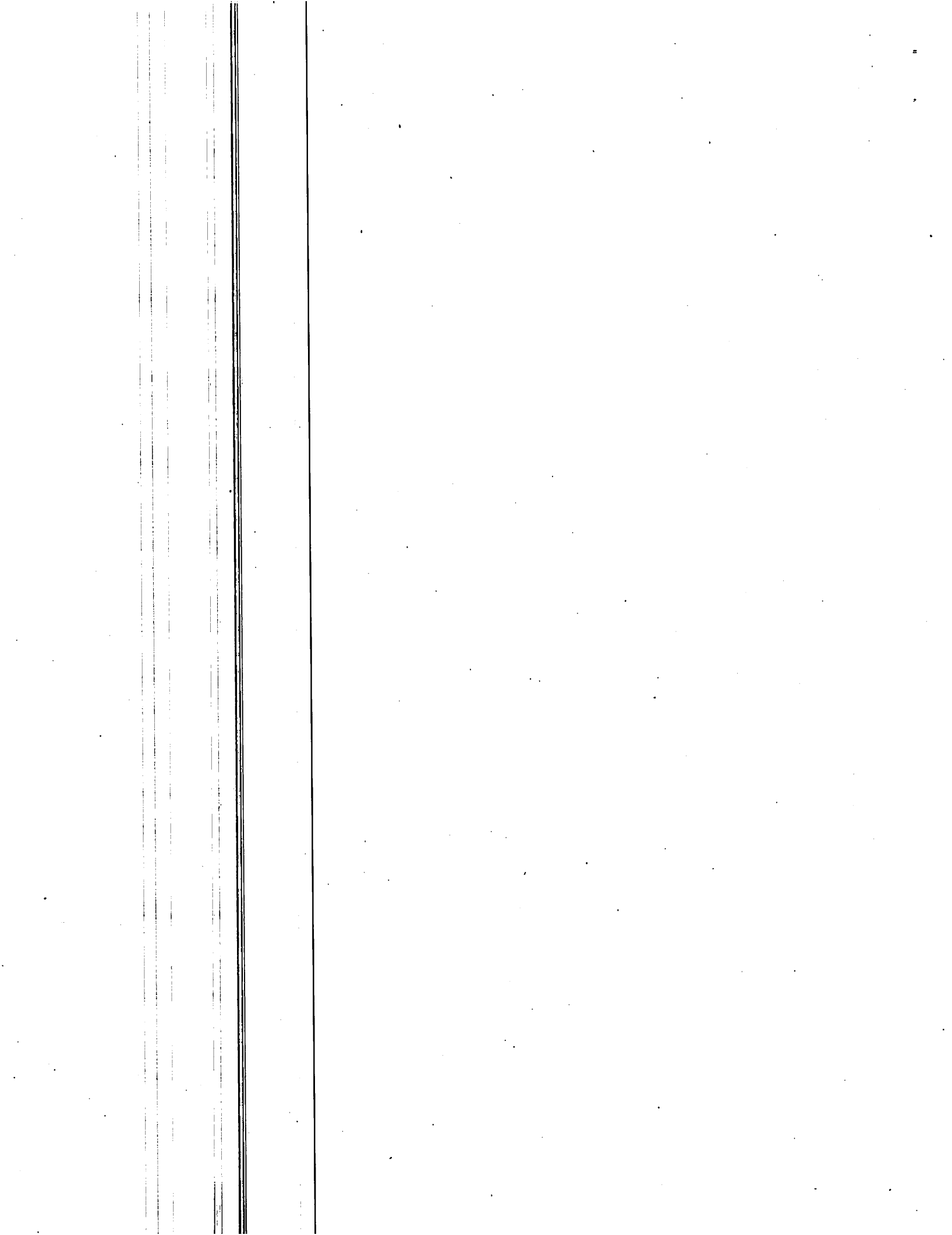
The Claimants testified and presented the testimony of Kevin Harold Donlea, whom I accepted as an expert in the field of floor installation and inspection. The Respondent testified and did not present other witnesses. The Fund did not present the testimony of any witnesses.



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 MHIC license numbers 5229749 and 5666523.
2. On June 18, 2020, the Claimants and the Respondent entered into a home improvement contract wherein the Respondent agreed to finish the Claimants' unfinished basement (Contract) at their home located at 1717 Noyes Lane, Silver Spring, Maryland 20910 (home).
3. The Claimants purchased the DITRA system to be installed on their basement floor on top of the existing concrete base with asbestos tile.
4. The following Contract terms are relevant to the Claim, and all other terms in the Contract were not addressed at this hearing. (Clmt. Ex. 21).
 - a. Install DITRA system at bathroom and main recreation floors of the basement with programmable thermostats.
 - b. Install DITRA system at TV/couch area ("front half") of basement excluding stair landing, utility, and laundry rooms.
 - c. For the main floor, including laundry, install floating COREtec LVP.
5. The original agreed-upon Contract price was \$73,000.00. With change orders added to the Contract, the final Contract price was \$84,900.00.
6. The Respondent began work on August 4, 2020, and completed work on January 17, 2021.
7. The Respondent selected all the materials for the basement flooring, except for the DITRA system, which the Claimants selected.



8. The Respondent installed DRICOR subfloors on top of the existing basement concrete base with asbestos tiles. Due to the asbestos, the concrete base was not primed and/or otherwise disturbed.

9. The Respondent installed the DITRA system on top of the DRICORE subfloor.

10. The Respondent installed cement boards on top of the DITRA system.

11. The Respondent installed COREtec LVP on top of the cement boards as the final and top layer of the basement flooring.

12. When the Respondent completed the work on the basement flooring, it consisted of the following layers: the original concrete base with asbestos tiles, DRICORE subfloor, cement boards, DITRA system, and COREtec LVP.

13. The Claimants paid the Respondent a total of \$84,183.00. (Clmt. Ex. 12, Appendix H).

14. Immediately after the Respondent completed work on the basement flooring, the Claimants noticed that the COREtec LVP flooring was uneven or “out of flat.”

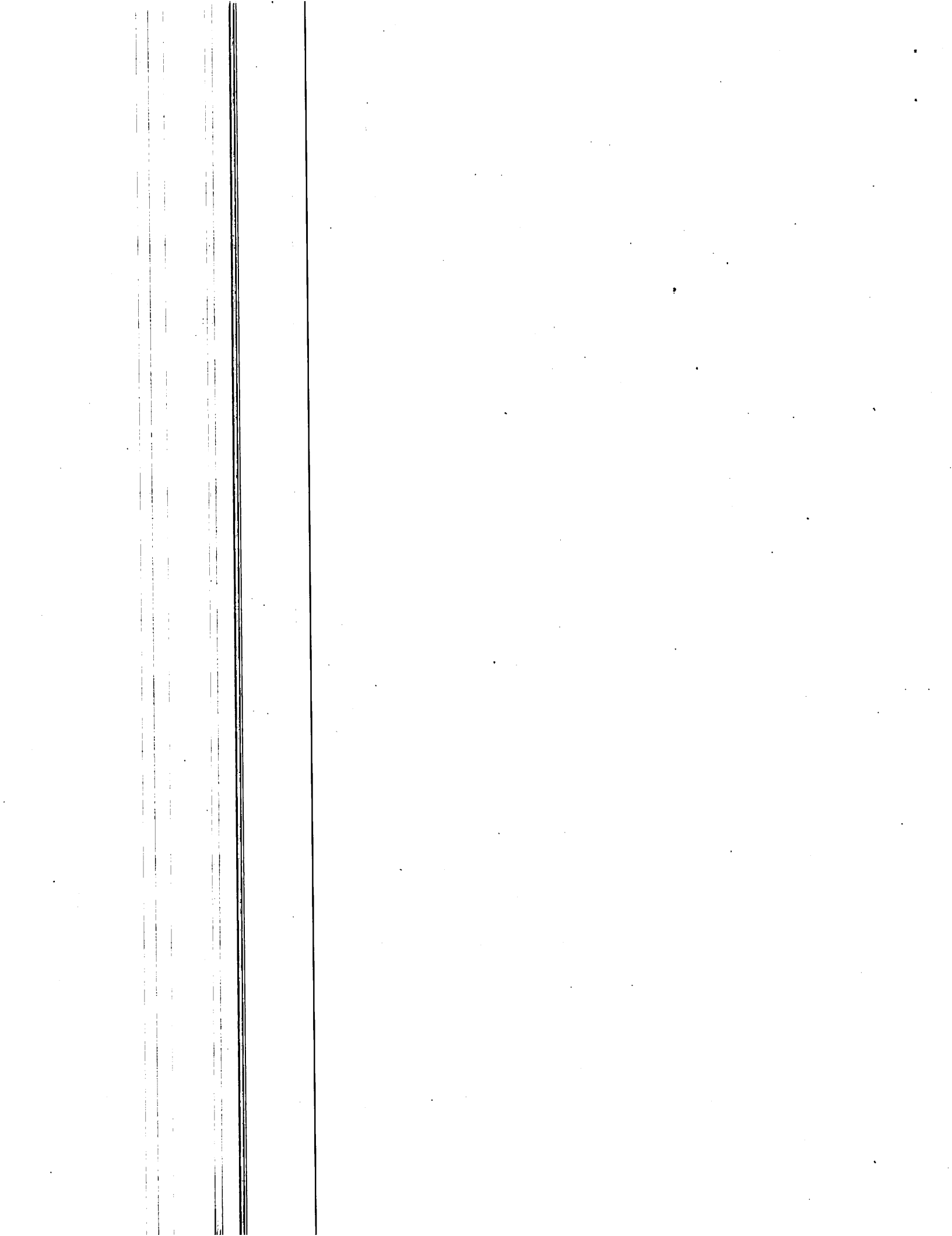
15. COREtec LVP’s specified requirements after installation allows for one-eighths of an inch of unevenness or “out of flat” per six feet of COREtec LVP flooring.

16. The Claimants were denied a warranty from Schluter on their purchase of the DITRA system due to the cement boards that were installed on top of the DITRA system.

17. The Claimants’ attempts to resolve the alleged deficiencies with the Respondent on February 23, 2021, and March 29, 2021, were unsuccessful.

18. The Claimants hired D.G. Liu, a subsequent contractor, to replace the basement flooring work completed by the Respondent.

19. On September 10, 2021, the Claimants filed a Claim with the Fund.



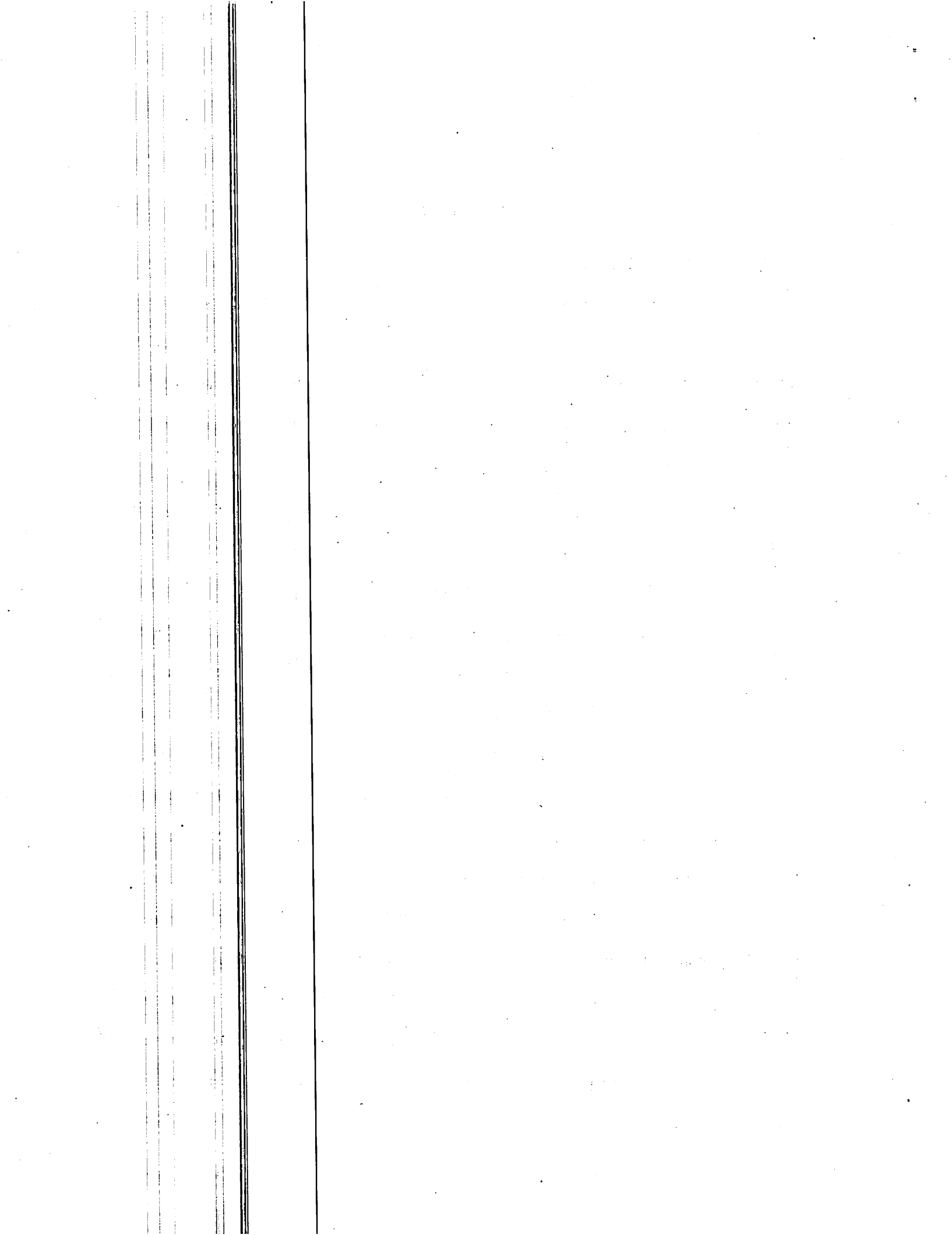
DISCUSSION

Burden of Proof and Legal Framework

The Claimants have 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 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 Claimants have proven eligibility for compensation.

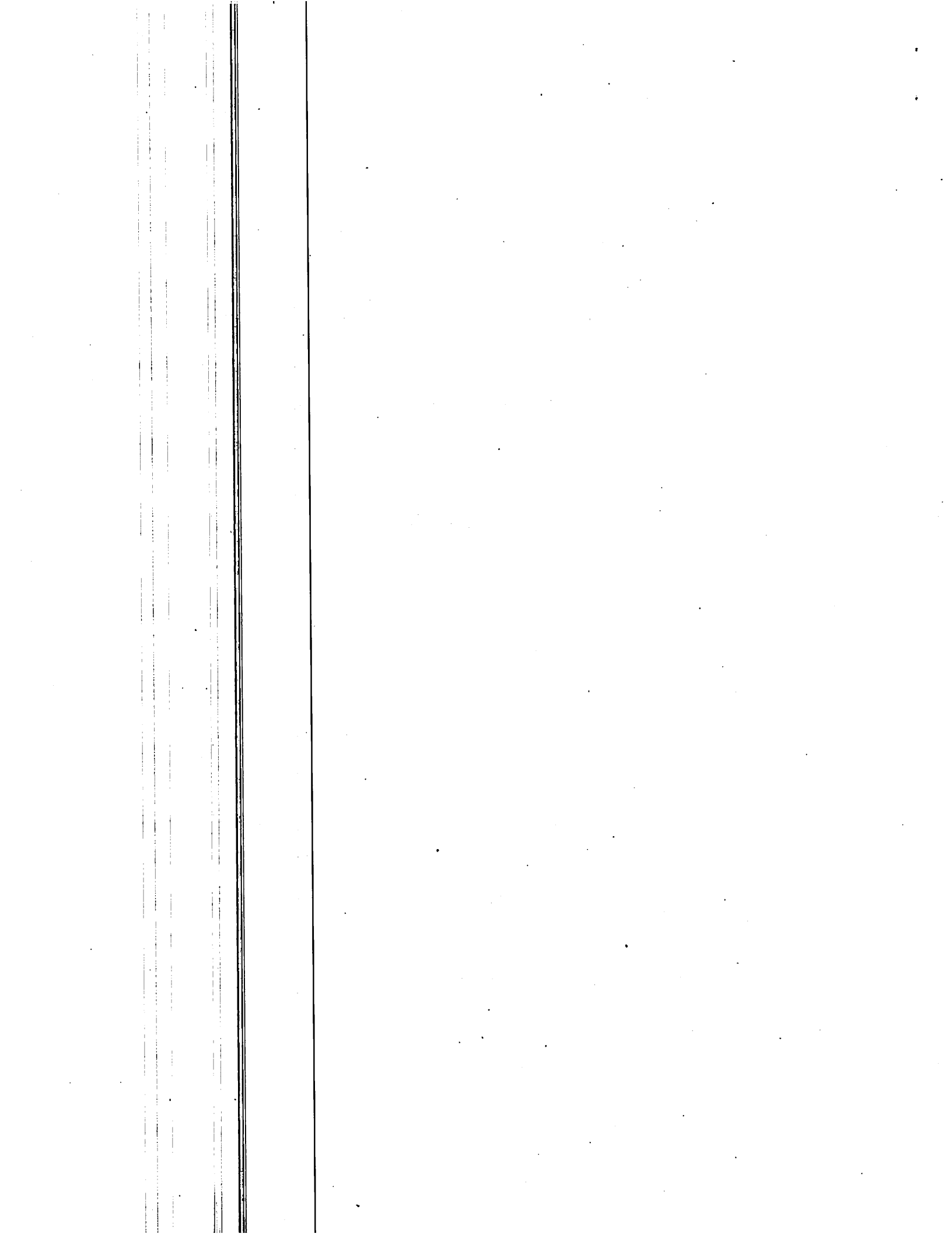
By statute, certain claimants are excluded from recovering from the Fund altogether. In this case, there are no such statutory impediments to the Claimants' recovery. The claim was timely filed, there is no pending court claim for the same loss, and the Claimants did not recover the alleged losses from any other source. Bus. Reg §§ 8-405(g), 8-408(b)(1). The Claimants reside in the home that is the subject of the claim, and they do not own more than three dwellings. *Id.* § 8-405(f)(2). The parties did not enter into a valid agreement to submit their disputes to arbitration. *Id.* §§ 8-405(c), 8-408(b)(3). Neither Claimant is a relative, employee, officer, or partner of the Respondent, nor are they related to any employee, officer, or partner of the Respondent. *Id.* § 8-405(f)(1).



The Parties' Positions

The Claimants assert that the Respondent failed to provide adequate work on their basement flooring, which resulted in unevenness of the floor causing danger to their family members who may trip, fall, or injure themselves. In addition, the Respondent's installation of cement boards on top of the DITRA system caused their request for a warranty from Schluter to be denied because cement boards are not approved for use with the DITRA system. The Claimants advanced three arguments to establish that they suffered an actual loss for remedial work performed due to the Respondent's acts and/or omissions: 1) the installation of an unapproved subfloor, DRICORE, underneath the DITRA system, 2) the installation of unapproved cement boards on top of the DITRA system, and 3) the failure to apply a self-leveling underlayment (SLU) or compound on top of the concrete base floor, which resulted in the unevenness of the installed COREtec LVPs.

The Respondent disputes the Claimants' assertions that he performed inadequate work. He contends that the evidence will establish that: 1) DRICORE subfloor is approved for installation under the DITRA system, which also addressed the Claimants' water intrusion, insulation, and structural issues, 2) the cement boards over the DITRA system were approved by Bryan Von Blohn, of Schluter, and 3) due to the asbestos on the basement concrete base floor, the Respondent was unable to prime and/or lay a SLU prior to laying down the DRICORE subfloor. In addition, any uneven areas of the COREtec LVP were dealt with by placing leveling shims in the areas that the Respondent deemed necessary.



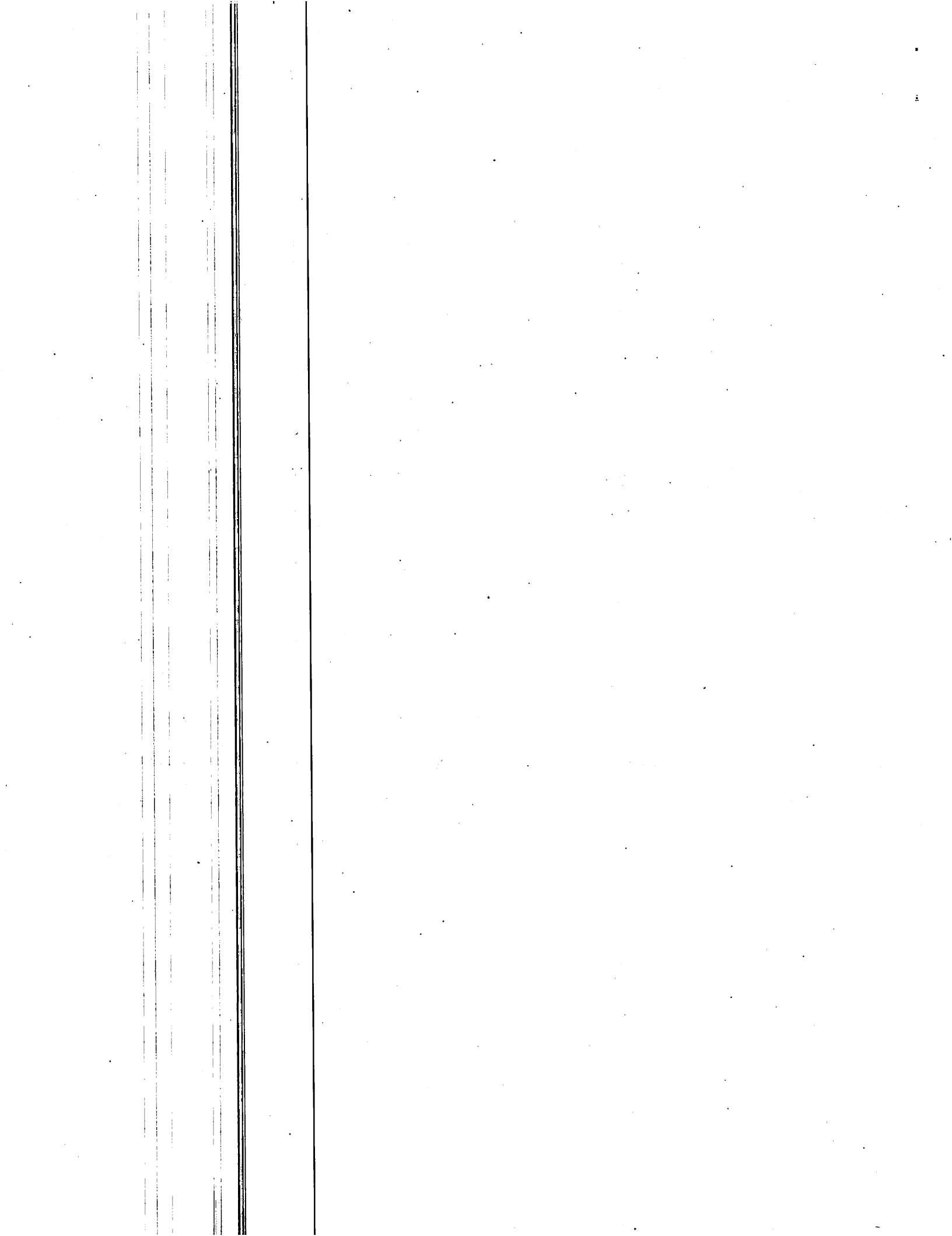
Analysis

Dricore OSB⁵ Substrate or Subfloor

The first issue the Claimants raise is the Respondent's installation of the DRICORE subfloor. They contend that DRICORE is not an approved subfloor or substrate to lay underneath the DITRA system. The Claimants testified that they spoke with a customer representative, Jennifer, of Schluter, the manufacturer of the DITRA system. Jennifer told the Claimants that DRICORE was not approved. However, there is no evidence regarding Jennifer's qualifications and/or experience to indicate that her statement is credible and or accurate. I simply do not have enough information about Jennifer's knowledge, experience, and/or expertise to give this evidence any weight. The Claimants then spoke with Bryan Von Blohn. (Clmt. Ex. 6). The Claimants assert that Mr. Von Blohn also stated that DRICORE was not an approved subfloor.

The Respondent is a licensed contractor in Maryland and Virginia. He has been in business for twenty years, and his previous work never failed inspection. The Respondent contends that the DRICORE subfloor he used underneath the DITRA system was proper. The Respondent selected DRICORE to address several issues with the Claimant's basement flooring. The Respondent testified that water would pour into the basement when it rained. To address the water intrusion issue, he built a sump pump system for water management. He then selected DRICORE because the Claimants spent a lot of money on the DITRA system. The DRICORE subfloor would allow the Respondent to install any product on top of it. Additionally, the DRICORE subfloor would prevent the DITRA system from losing heat since the DITRA system was being installed on top of an existing concrete base. Therefore, the Respondent selected the

⁵ Oriented strand board.



DRICORE subfloor that provided the best value to address the issues concerning water intrusion, insulation, and structure.

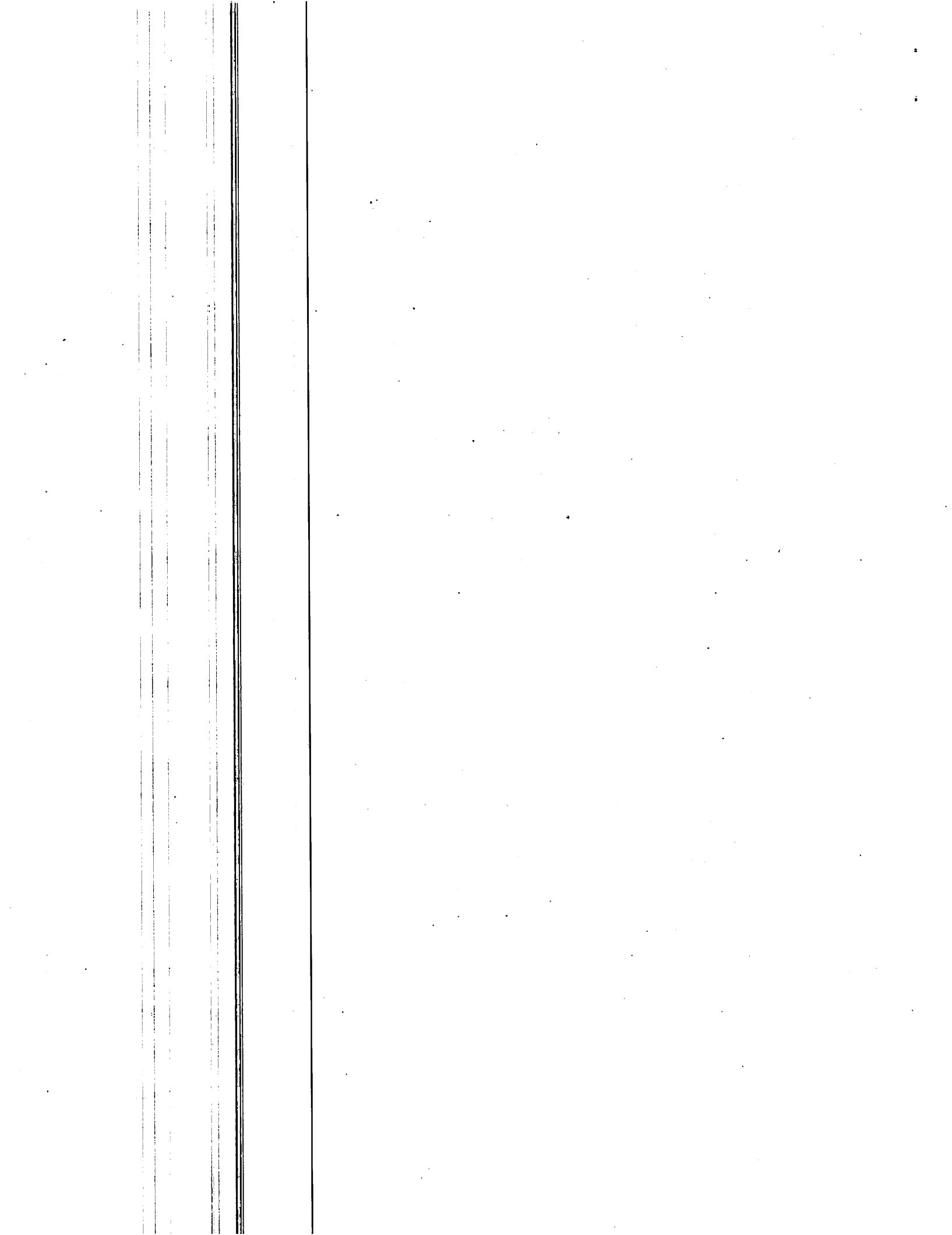
The Respondent points to DRICORE subfloor's FAQs, where it states, "It is recommended to install radiant floor heating systems on top of DRICORE subfloor panels for optimal performance." (Resp. Ex. 2). The DITRA system is a radiant flooring system. In addition, the Respondent asserts that in the 2022 Schluter DITRA Installation Handbook, it states that for ceramic or porcelain tile interior floors, the area of application includes, "over any even and structurally sound OSB or plywood subfloor with sixteen inch (406 mm) o.c.⁶ joist spacing and/or interior dry or wet areas." (Resp. Ex. 4). The Respondent argued that DRICORE is an OSB, which the Claimants did not realize. These facts establish that what the Respondent built with the DRICORE subfloor underneath the DITRA system is superior to what was required per the diagram in the Schluter DITRA Installation Handbook. The Claimants did not provide any evidence to the contrary.

Based on the evidence before me, the Claimants did not present any testimony and/or exhibits that would support their assertion that DRICORE was not an approved subfloor. As such, the Claimants did not establish by a preponderance of the evidence that the DRICORE subfloor is not approved to use under the DITRA system.

Cement Board over the DITRA Heat System

The Claimants' second issue involves the Respondent's installation of one-quarter inch cement boards on top of the DITRA system. They contend that cement boards are not approved to be used with the DITRA system, and as a result Schluter declined to provide them with a warranty of their purchase of the DITRA system. The Claimants argue that the DITRA handbook

⁶ On-center.

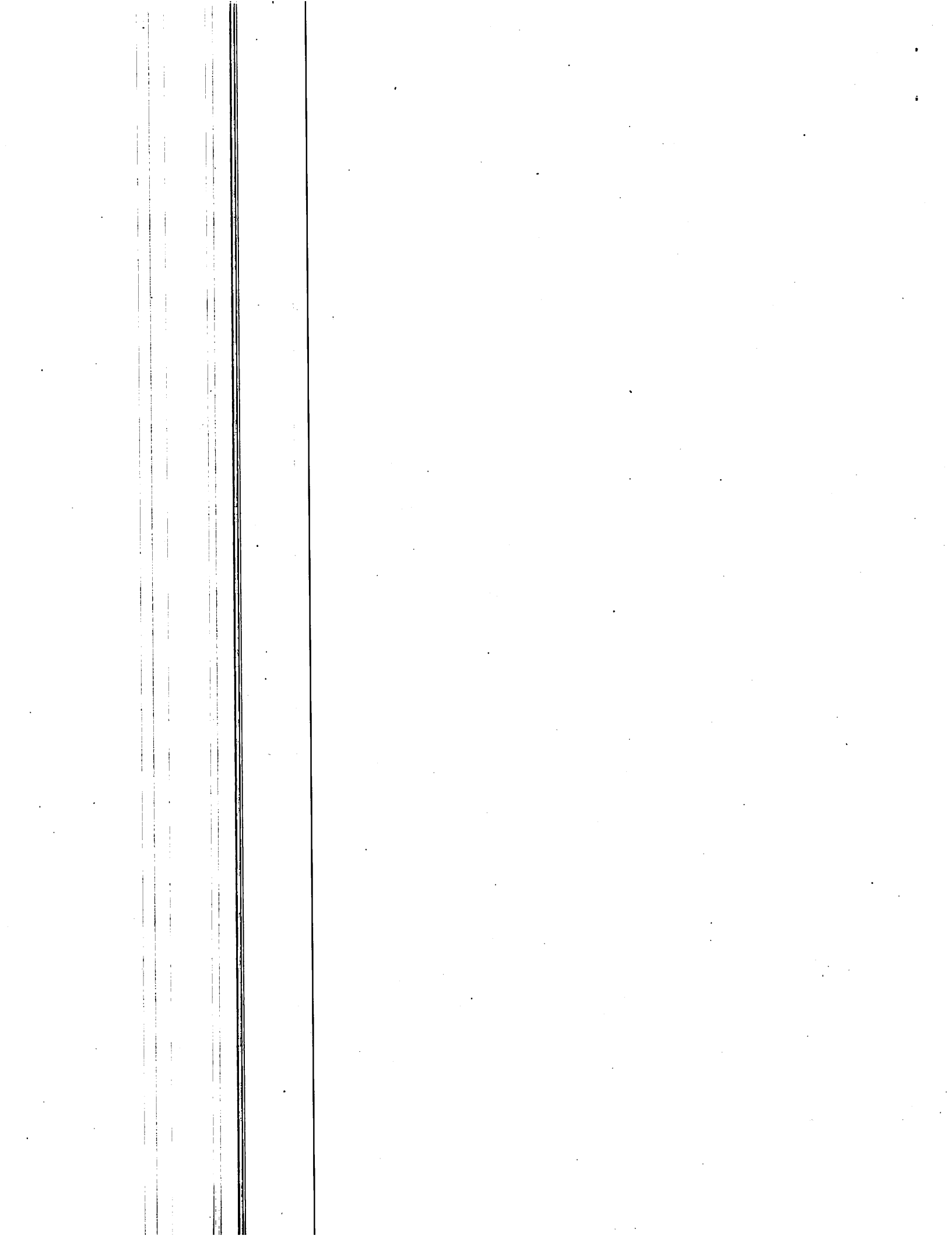


indicates that if a LVP is installed above the DITRA system, then, one-quarter inch membrane studs must be installed beneath the LVP. The Claimants' argued that the Respondent used one-quarter inch cement boards, rather than membrane studs. The Claimants contend that according to the information they found, "cement boards covering the DITRA system affects the effectiveness of the floor heat system." (Clmt. Ex. 7). As such, Schluter would not provide a warranty.

The Respondent testified that he called Mr. Von Blohn because he is the "go-to guy" for questions involving Schluter products. According to the Respondent, Mr. Von Blohn is so knowledgeable that his response superseded any other customer service representations from Schluter. Mr. Von Blohn stated that cement boards on top of the Schluter DITRA system requires LVPs on top, but that the one-quarter inch voids must be filled. After speaking with Mr. Von Blohn, the Respondent testified that he was comfortable proceeding and installing the cement boards.

However, Mr. Von Blohn wrote to the Claimants in an email dated October 24, 2021, that, "There is nothing in our installation detail about cement board over our heating system. Without having the opportunity to properly test this type of installation we could not provide a warranty." (Clmt. Ex. 9).

Based on the evidence before me, the Claimants have established that the cement boards are not approved to use on top of the DITRA system, since cement boards do not adhere to the DITRA installation manual and prevents the Claimants from getting a warranty. As such, the installation of the cement boards constitutes inadequate work by the Respondent. There was no evidence of installation of cement boards in the bathroom. Therefore, I conclude that the unapproved cement boards were not installed in the bathroom.



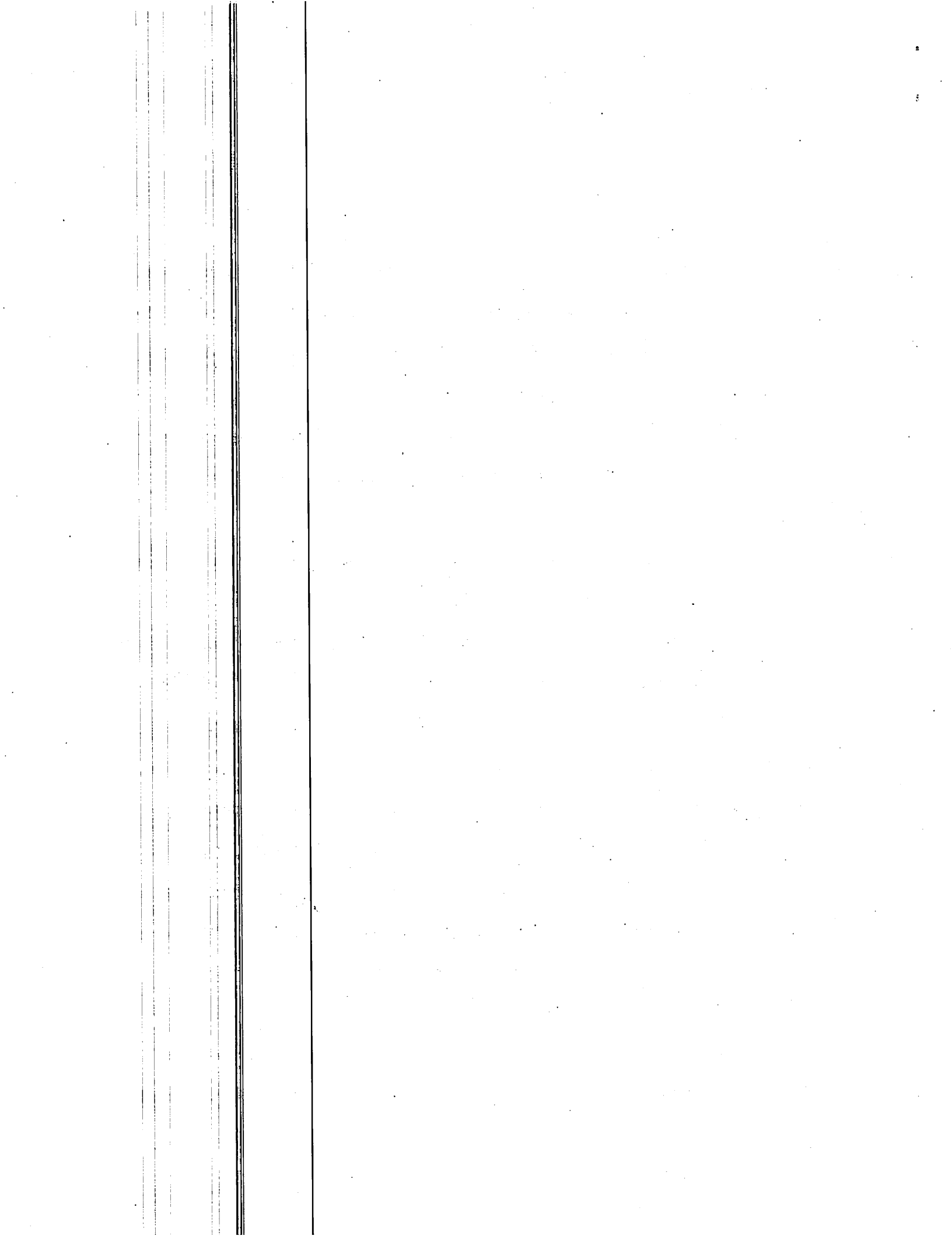
Uneven or “Out of Flat” Floors

The Claimants’ third issue concerns the flatness of the COREtec LVPs. The Respondent layered the basement base concrete slabs with the following: 1) DRICORE subfloor, 2) DITRA system, 3) cement boards, and 4) COREtec LVP on the top. The Claimants contend that after the Respondent completed work, they noticed that their basement floors were uneven. This concerned the Claimants because they have a young daughter who dances in the recreation room portion of the basement and an elderly mother with balance issues. Both can easily trip and injure themselves.

The Claimants reached out to the COREtec LVP customer service representatives. Based on their contacts with various individuals, the Claimants hired a master floor inspector. The Claimants presented the testimony of Mr. Kevin Donlea. Mr. Donlea owns Floor Inspections Service, LLC and has been in the floor industry since 1977. He is Master Certified FCITS.⁷ (Clmt. Ex. 25). Mr. Donlea has inspected over 1,200 floors, mostly for manufacturers in Maryland, Virginia, and parts of West Virginia and North Carolina. Of the 1,200 inspections, Mr. Donlea inspected approximately 800 COREtec LVP floors and is very familiar with COREtec LVPs. He has completed twelve to fourteen different installation training programs offered by various manufacturers. *Id.* Mr. Donlea has been qualified as an expert in the past and has testified several times regarding floor installation and inspection. Based on his knowledge, experience, and training, I accepted him as an expert in the field of floor installation and inspection.

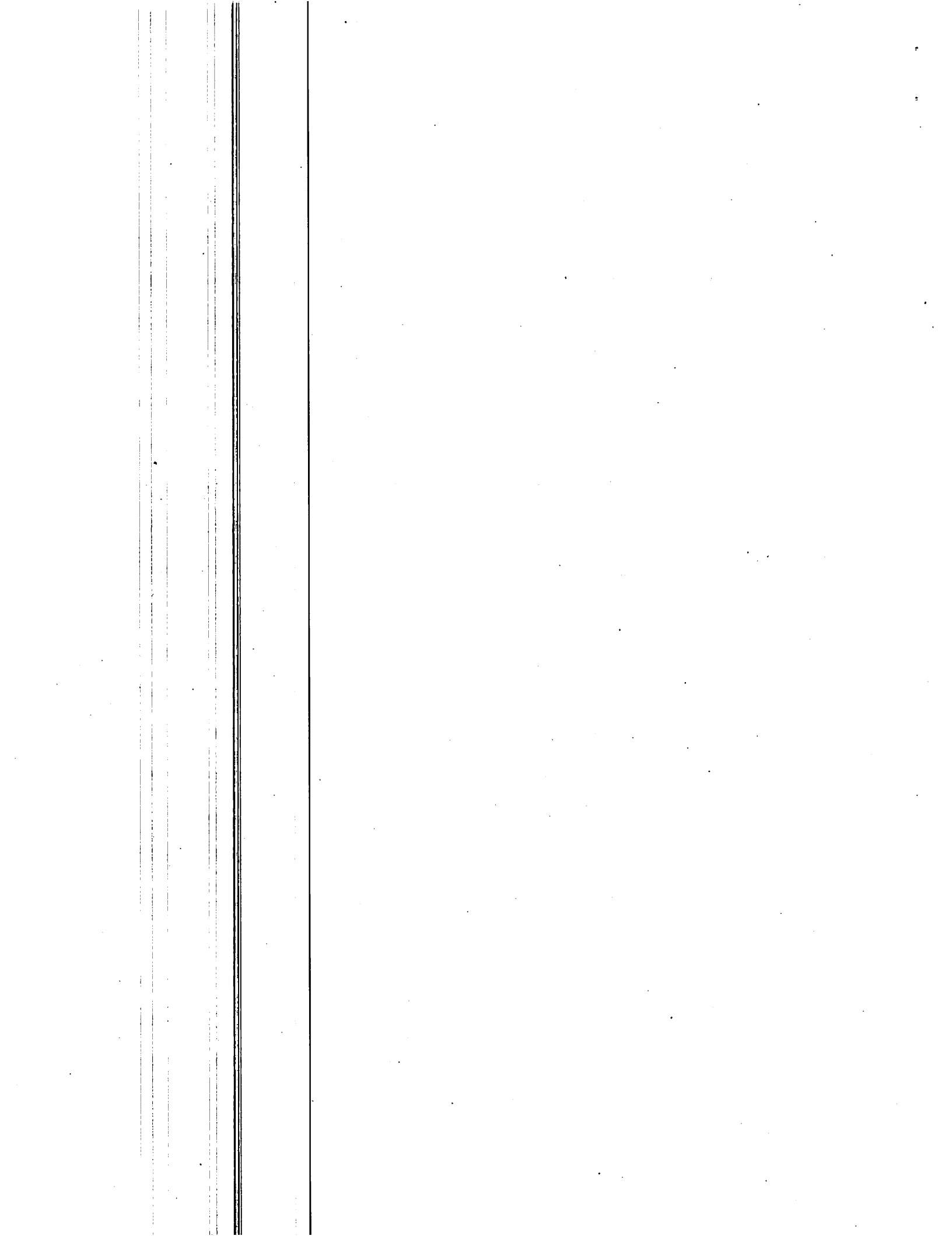
On January 21, 2021, Mr. Donlea was hired and inspected the Claimant’s basement flooring. Mr. Donlea immediately noticed that the COREtec LVP floor was uneven or “out of

⁷ Flooring Consultant Inspection Training Services.



flat." Mr. Donlea testified that he conducted fourteen tests to measure the flatness of the COREtec LVP. He used a six feet straight edge, a handheld lantern, and a metal caliper to measure the flatness of the floor. He selected fourteen random areas of the basement floor, nearly 500 square feet, to test for flatness. He took photographs of the caliper measurements as well as the test areas that showed a level placed on top of hardwood surfaces. Light is clearly visible below the level, indicating that the surfaces were not flat. (Clmt. Exs. 26, pp. 3, 5, 8, 19, 20, 22). The fourteen measurement readings indicated: 0.126" (one-eighth of an inch), 0.257" (one quarter of an inch), 0.215" (three sixteenths of an inch), 0.286" (nine thirty-seconds of an inch), 0.411" (thirteen thirty-seconds of an inch), 0.472" (fifteen thirty-seconds of an inch), 0.157" (five thirty-seconds of an inch), 0.194" (three sixteenths of an inch), 0.635" (five eighths of an inch), 0.715" (eleven sixteenths of an inch), 0.294" (nine thirty-seconds of an inch), 0.198" (three sixteenths of an inch), 0.208" (three sixteenths of an inch), and 0.458 (seven sixteenths of an inch). (Clmt. Exs. 26, pp. 4, 6, 7, 10, 12 - 16, 17, 21). COREtec's engineers set specified flatness requirements which allows one-eighth of an inch unevenness per six feet of floor. In COREtec's installation manual, it states, "All subfloors must be clean, flat, dry, and structurally sound. The correct preparation of the subfloor is a major part of a successful installation. Subfloor must be flat, 3/16" per ten feet or 1/8" per six feet of flooring." (Clmt. Ex. 1, p. 2). Of the fourteen readings; thirteen exceeded the COREtec's specified measurements for flatness, according to Mr. Donlea. (Clmt. Ex. 26).

Mr. Donlea explained that the extreme out of flat measurements will likely cause the installed flooring joints to disconnect and render the floor unusable. Mr. Donlea testified that he recommended to the Claimants that the Coretec LVP flooring be removed carefully, and the



concrete floor should be flattened and evened out to COREtec's installation requirements. (Clmt. Ex. 26).

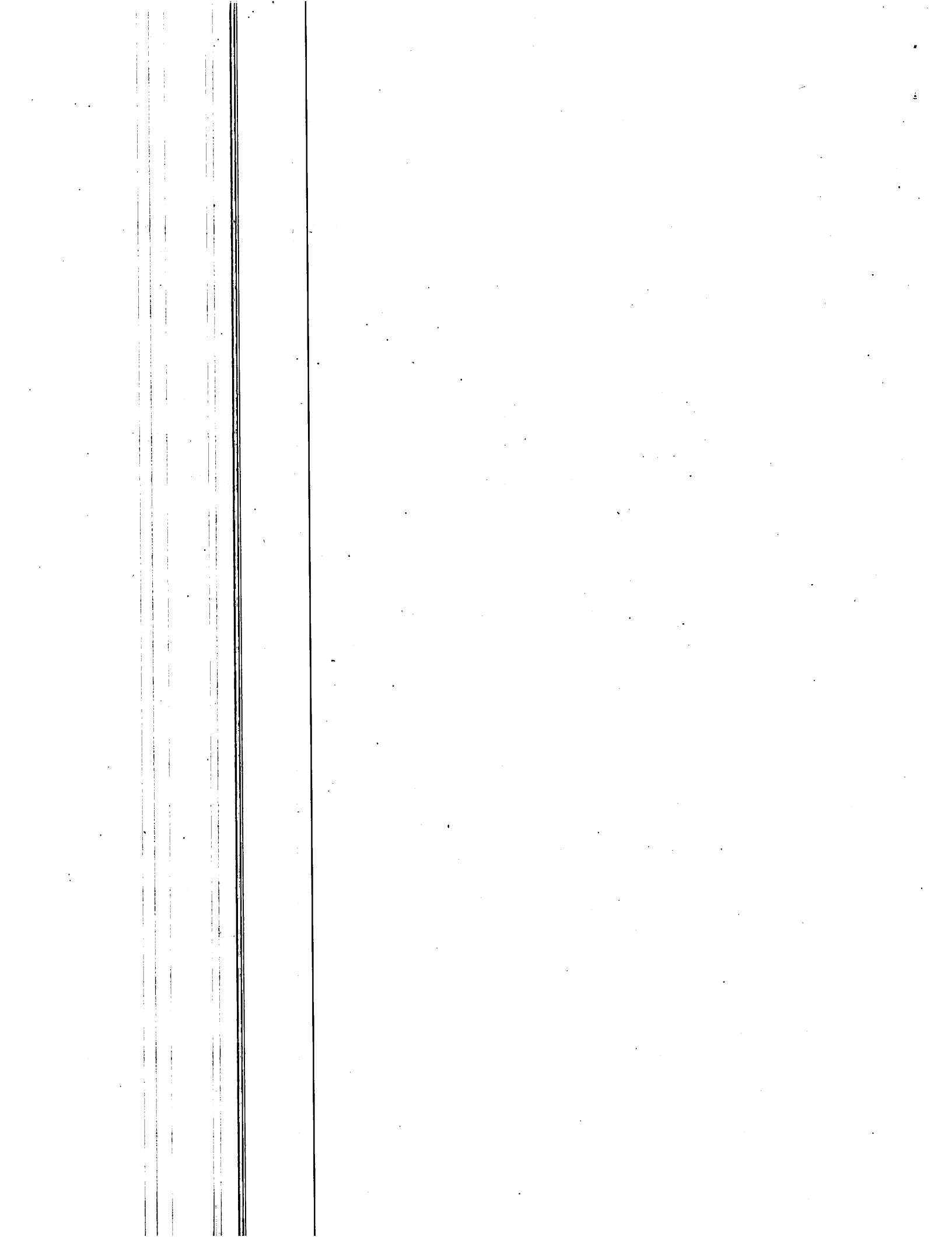
Mr. Donlea testified that he did not test the bathroom floor for flatness. Therefore, there is no evidence shown that the bathroom floor was uneven or "out of flat."

After receiving Mr. Donlea's inspection report and findings, the Claimants consulted the COREtec's 2020 manual, which supported Mr. Donlea's findings. The Claimants also spoke to contractors who explained that a self-leveling underlayment (SLU) or compound should have been applied on top of the concrete base before installing the various layers of flooring.

The Claimants hired D.G. Liu to remove the multiple layers of basement flooring. The photographs of the demolition showed the following layers from bottom to top: concrete base floor, DRICORE subfloor, DITA system, and COREtec LVP. (Clmt. Ex. 3). After removing the layers, D.G. Liu did not find any SLU between the original concrete base floor and the DRICORE subfloor.

The DRICORE Installation Guide indicated, "any dips or low spots in the concrete surface greater than ¼" should be troweled level with a Portland cement compound or leveled with a self-leveling compound to ensure an accurate installation." (Clmt. Ex. 4). To remedy the Respondent's work, D.G. Liu applied a SLU on top of the concrete base and installed the new COREtec floor covering according to the manufacturer's specifications. (Clmt. Ex. 2). The Claimants did not install the DITRA system. Rather, D.G. Liu installed a floorboard heating system.

The Respondent countered that he did not prime or apply a SLU because the concrete base floor contained asbestos. MAPEI who produces primers and SLU indicated, "Do not install over unprimed surfaces. Do not install over flooring products, adhesive residue or substrates



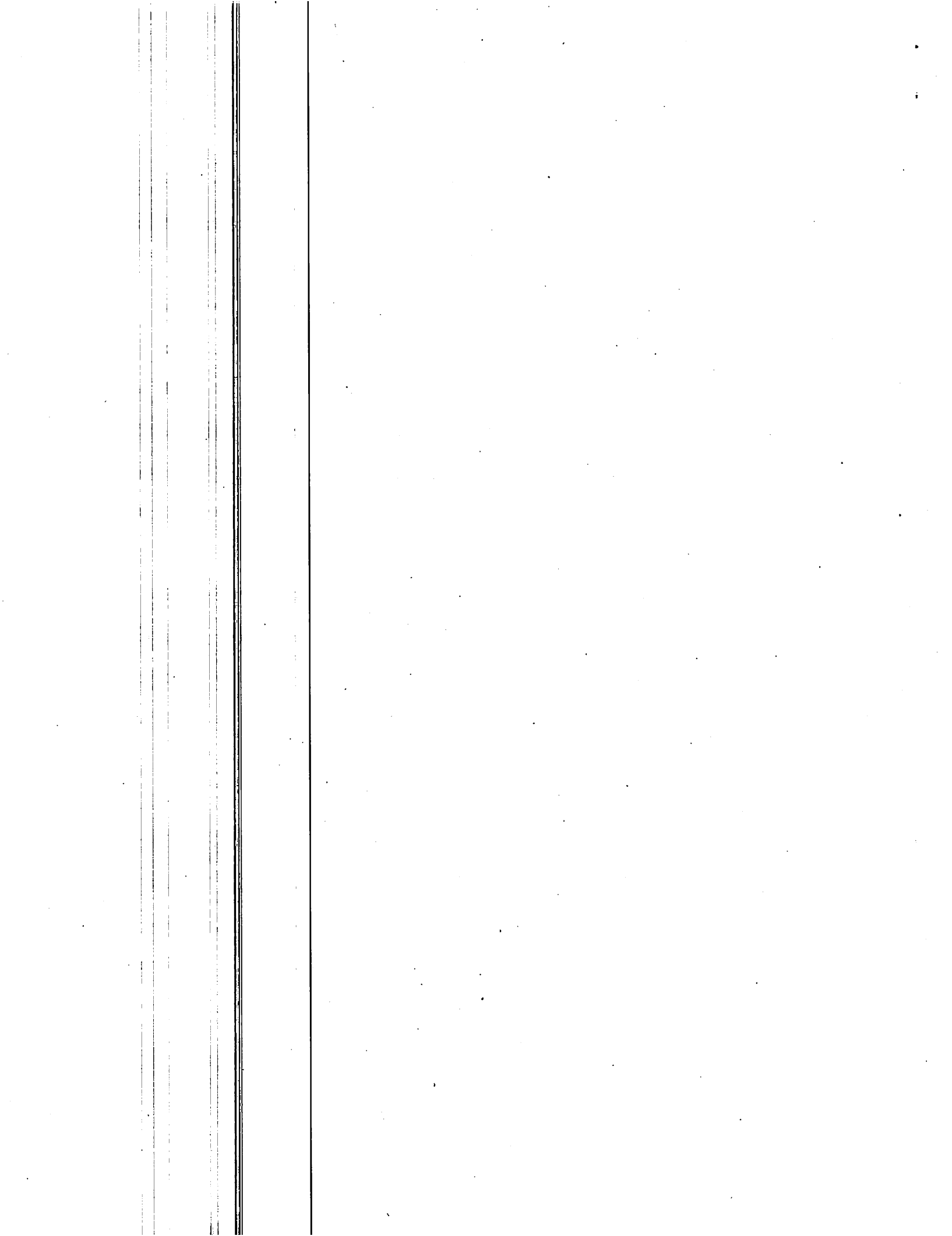
containing asbestos.” (Resp. Ex. 6). As such, the Respondent followed the instructions from the leading manufacturer of primers and SLUs and did not prime or apply SLU for fear of disturbing the asbestos contained in the basement concrete base floor. (Resp. Exs. 5-7).

The Respondent disagrees with Mr. Donlea’s testimony and disputes the Claimants’ contention that the floors are not flat. The Respondent contends that Mr. Donlea is no expert, and his testimony should be disregarded. He argued that a true expert would have provided better photographs, with calibration readings of the caliper, and the light beneath what appears to be a level means nothing significant. However, the Respondent did not provide any evidence that contradicted Mr. Donlea’s testimony, photographs, and readings. The Respondent testified that he checked for flatness and used shims where he deemed them necessary.

I gave Mr. Donlea’s testimony and report significant weight because of his training, experience, knowledge, and the detailed testimony provided during the hearing. Based on the evidence before me, the Claimants have established that the lack of flatness of the COREtec LVP flooring demonstrated that the Respondent’s work was inadequate. I thus find that the Claimants are eligible for compensation from the Fund.

Amount of Actual Loss

Having found eligibility for compensation I must determine the amount of the Claimants’ actual loss that the Claimants are 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 Claimants retained other contractors to complete or remedy that work. Accordingly, the following formula appropriately measures the Claimants' 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).

Ultimately, the Claimants did not use the DITRA system. The Claimants installed a completely different system, floorboard heating, that according to the Respondent, is inferior to the DITRA system, a radiant heating system. The Claimants provided estimates from D.G. Liu regarding the work he completed. That work, however, includes more than the remedial work in the recreation room of the basement.

To replace the uneven COREtec LVP, the entire basement flooring had to be demolished because the DRICORE subfloor beneath the DITRA system and the cement boards were all fastened together. Therefore, it was not possible to remove any particular layer of flooring without disturbing all of the levels. Everything had to be demolished and started from scratch. Because the bathroom flooring was a separate system, the estimates involving the bathroom were not included. Furthermore, because D.G. Liu used a completely different heat flooring system in the recreation room area of the basement, that cost was not included. Claimants' Exhibit number 23, provides the breakdown of the material costs and labor for the living room area:

Amount paid to Respondent:	\$84,183.00
Plus amount for demolition labor for Respondent's work: ⁸	\$4,950.00
Plus amount for demolition material:	\$165.00
Plus amount for labor for installation of new COREtec LVP:	\$5,280.00
Plus amount for new COREtec LVP material:	\$4,450.00
Minus original Contract price with change orders:	(\$84,900.00)
Plus reasonable cost of DITRA system (living room): ⁹	\$4,042.19
Plus reasonable cost of DRICORE subfloor membrane:	\$1,508.34
Plus reasonable cost of cement board:	\$348.75
Minus credit for IKEA cabinets from Respondent: ¹⁰	(\$1,200.00)
Total Actual Loss:	\$18,827.28

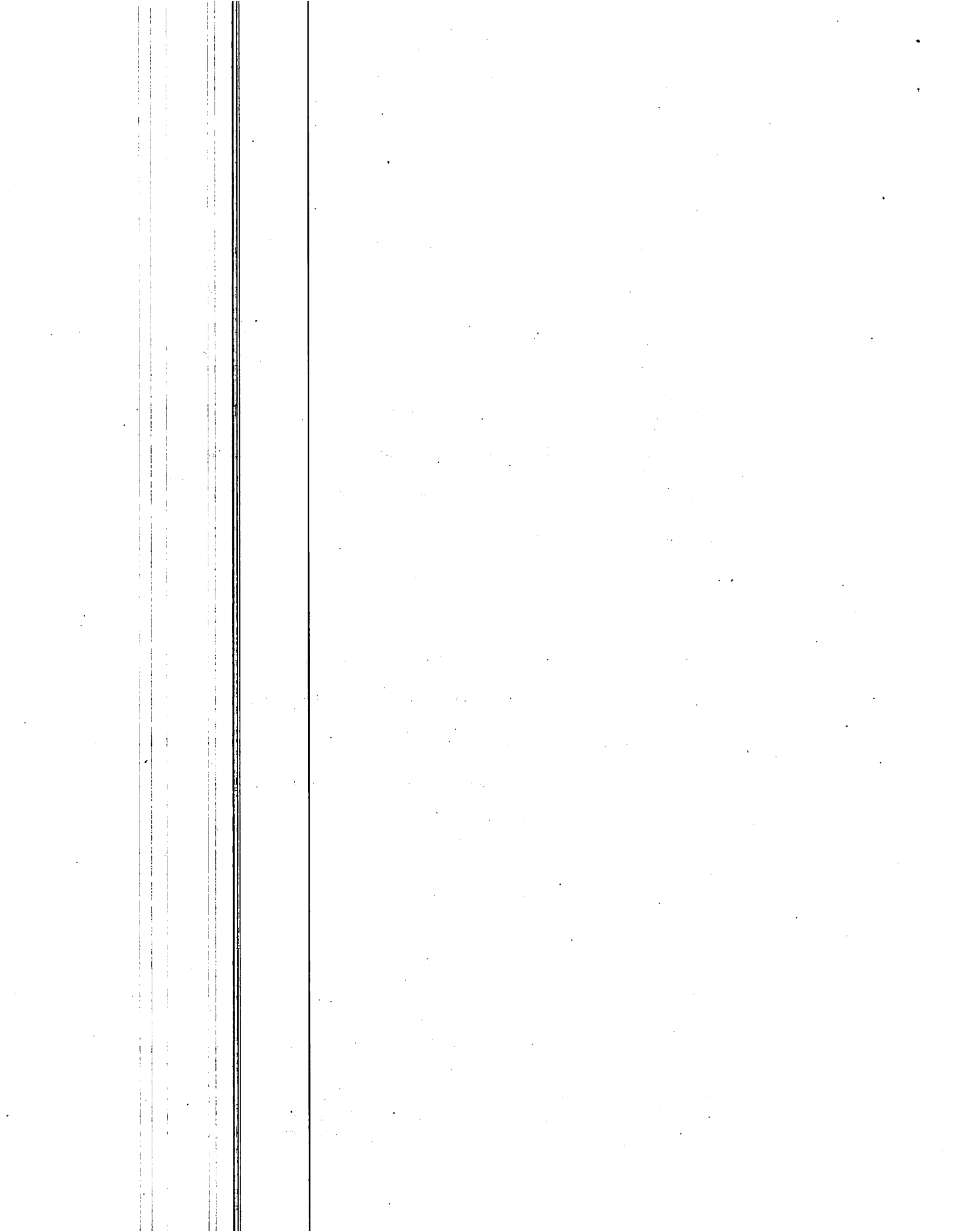
Effective July 1, 2022, a claimant's recovery is capped at \$30,000.00 for acts or omissions of one contractor, and a claimant may not recover more than the amount paid to the contractor against whom the claim is filed.¹¹ In this case, the Claimants actual loss is less than the amount paid to the Respondent and less than \$30,000.00. Therefore, the Claimants are entitled to recover their actual loss of \$18,827.28.

⁸ The amounts involving the demolition labor and materials of the Respondent's work as well as the labor and materials to install the new COREtec LVP are itemized in Clmt. Ex. 20.

⁹ The amounts involving the DITRA system, DRICORE subfloor and cement board for the living room area are itemized in Clmt. Ex. 23.

¹⁰ The IKEA cabinets were not a part of the Claim.

¹¹ 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). On or after July 1, 2022, the increased cap is applicable to any claim 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").



PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimants sustained an actual and compensable loss of \$18,827.28 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 Claimants are entitled to recover \$18,827.28 from the Fund.

RECOMMENDED ORDER


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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$18,827.28; 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;¹² and

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

October 7, 2022
Date Decision Issued



Sun E. Choi
Administrative Law Judge

SEC/ja
#198063

¹² See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

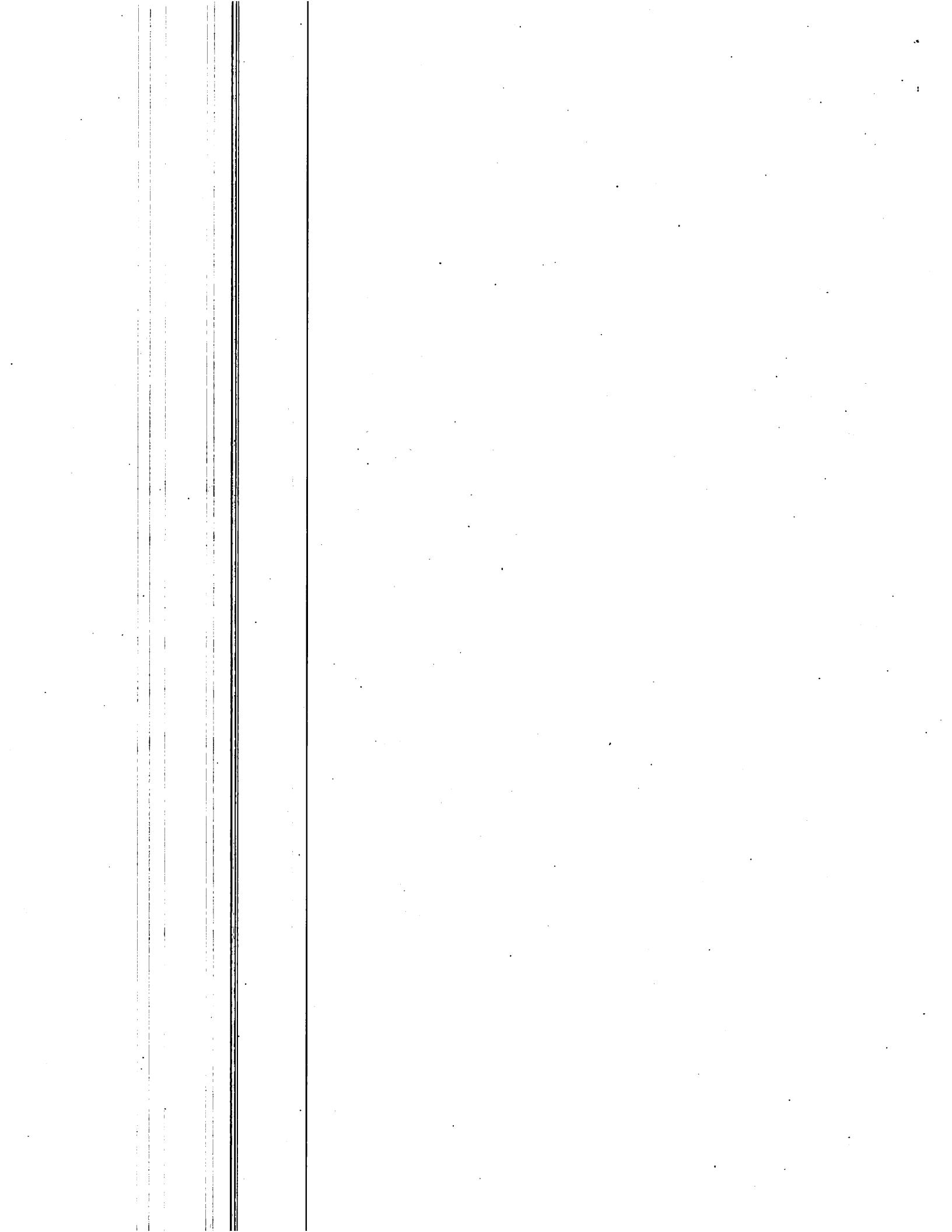
WHEREFORE, this 4th day of November, 2022, Panel B of the Maryland Home Improvement Commission approves the Recommended Order of the Administrative Law Judge and unless any parties files with the Commission within twenty (20) days of this date written exceptions and/or a request to present arguments, 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.

Lauren Lake

Lauren Lake

Panel B

***MARYLAND HOME IMPROVEMENT
COMMISSION***



IN THE MATTER OF THE CLAIM OF * MARYLAND HOME
MOLLY AND CALVIN LEE * IMPROVEMENT COMMISSION
AGAINST THE MARYLAND HOME *
IMPROVEMENT GUARANTY FUND * MHIC CASE NO. 21(75)1102
FOR THE ACTS OR OMISSIONS OF * OAH CASE NO. LABOR-HIC-
BENJAMIN TONKEN AND TONKEN * 02-22-00459
REMODELING, INC. *

* * * * *

FINAL ORDER

This matter was originally heard before an Administrative Law Judge (“ALJ”) of the Office of Administrative Hearings (“OAH”) on May 6, 2022, and July 26, 2022. Following the evidentiary hearing, the ALJ issued a Proposed Decision on October 7, 2022, concluding that the homeowners, Molly and Calvin Lee (“Claimants”) suffered an actual loss as a result of the acts or omissions of Benjamin Tonken and Tonken Remodeling, LLC (collectively, “Contractor”). *ALJ Proposed Decision* p. 20. In a Proposed Order dated November 4, 2022, the Maryland Home Improvement Commission (“MHIC” or “Commission”) affirmed the Proposed Decision of the ALJ to grant an award of \$18,827.28 from the Home Improvement Guaranty Fund. The Contractor subsequently filed exceptions to the MHIC Proposed Order.

On March 2, 2023, a three-member panel (“Panel”) of the MHIC held a remote hearing on the exceptions filed in this matter. Robert Roseman, Esq., represented the Contractor. Steven Bright, Esq., represented the Claimants. 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

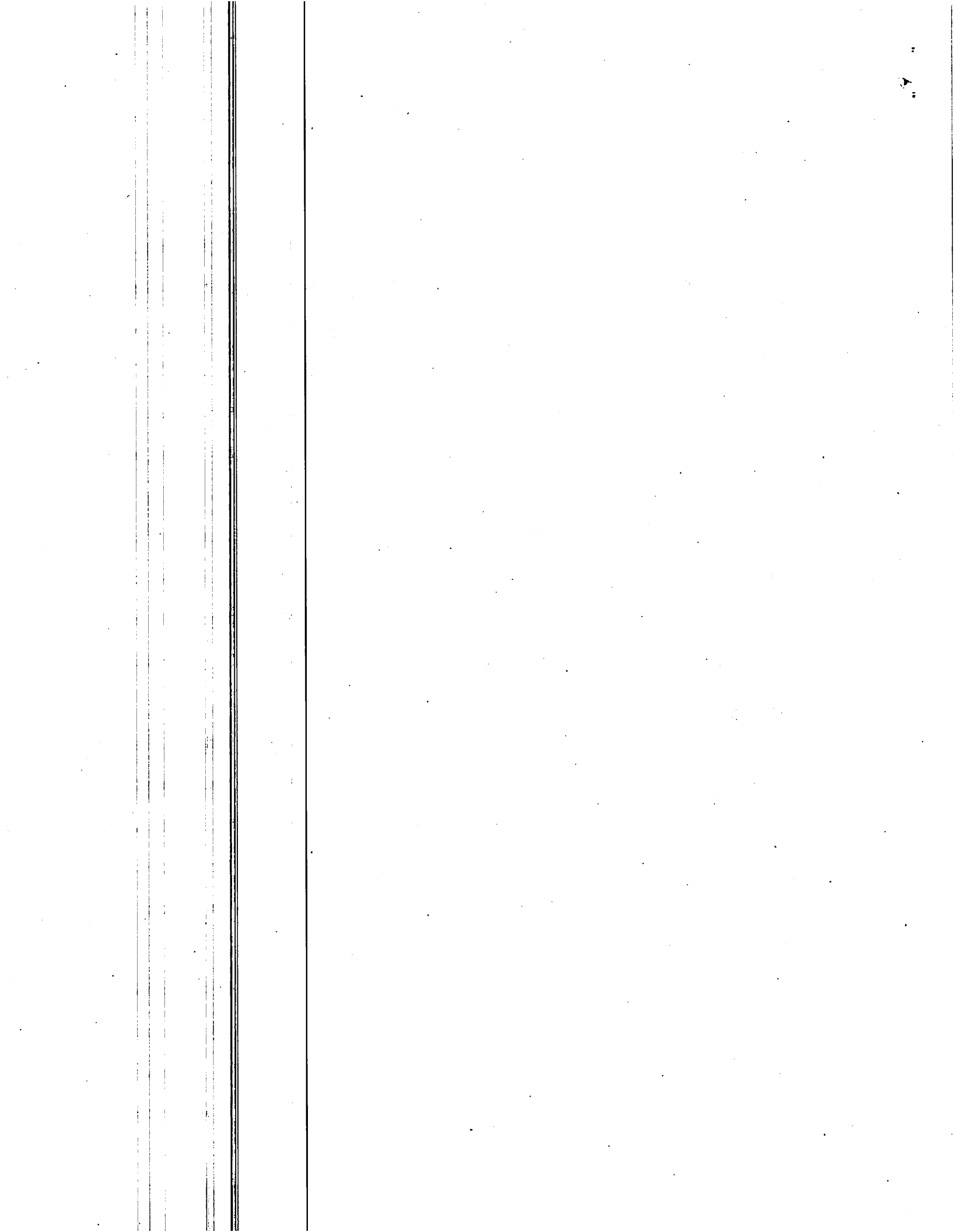
offered as evidence at the OAH hearing. COMAR 09.01.03.09(G) - (I).

The claim in this proceeding relates to a contract between the parties to finish the basement of the Claimants' home. The ALJ found that the Contractor's performance under the contract was unworkmanlike with respect to the installation the flooring throughout the basement, except for the basement bathroom, because the Contractor installed cement boards over a DITRA in-floor heating system, which was not approved by the manufacturer of the DITRA system, *ALJ's Proposed Decision* p. 13, and because the vinyl flooring installed by the Contractor was out of flat in excess of industry standards, *ALJ's Proposed Decision* p. 17.

On exception, the Contractor argued that several of the ALJ's findings of fact were erroneous. First, the Contractor argued that the ALJ's finding that the Claimant selected the DITRA system was erroneous. However, the Contractor did not identify evidence in the record in support of this argument, and the Commission finds no error. Moreover, which party selected the DITRA system is not material to the outcome of the claim.

The Contractor also argued that the ALJ erred in finding that he installed subfloors on top of asbestos tiles over a "concrete base," asserting that it was installed on top of asbestos tiles over a "concrete slab." The Commission finds no error. Again, the Contractor did not identify evidence in the record in support of his argument. In addition, a concrete slab under the tile constitutes a concrete base. Finally, the base under the asbestos tile is not material to the outcome of the Claimant's claim.

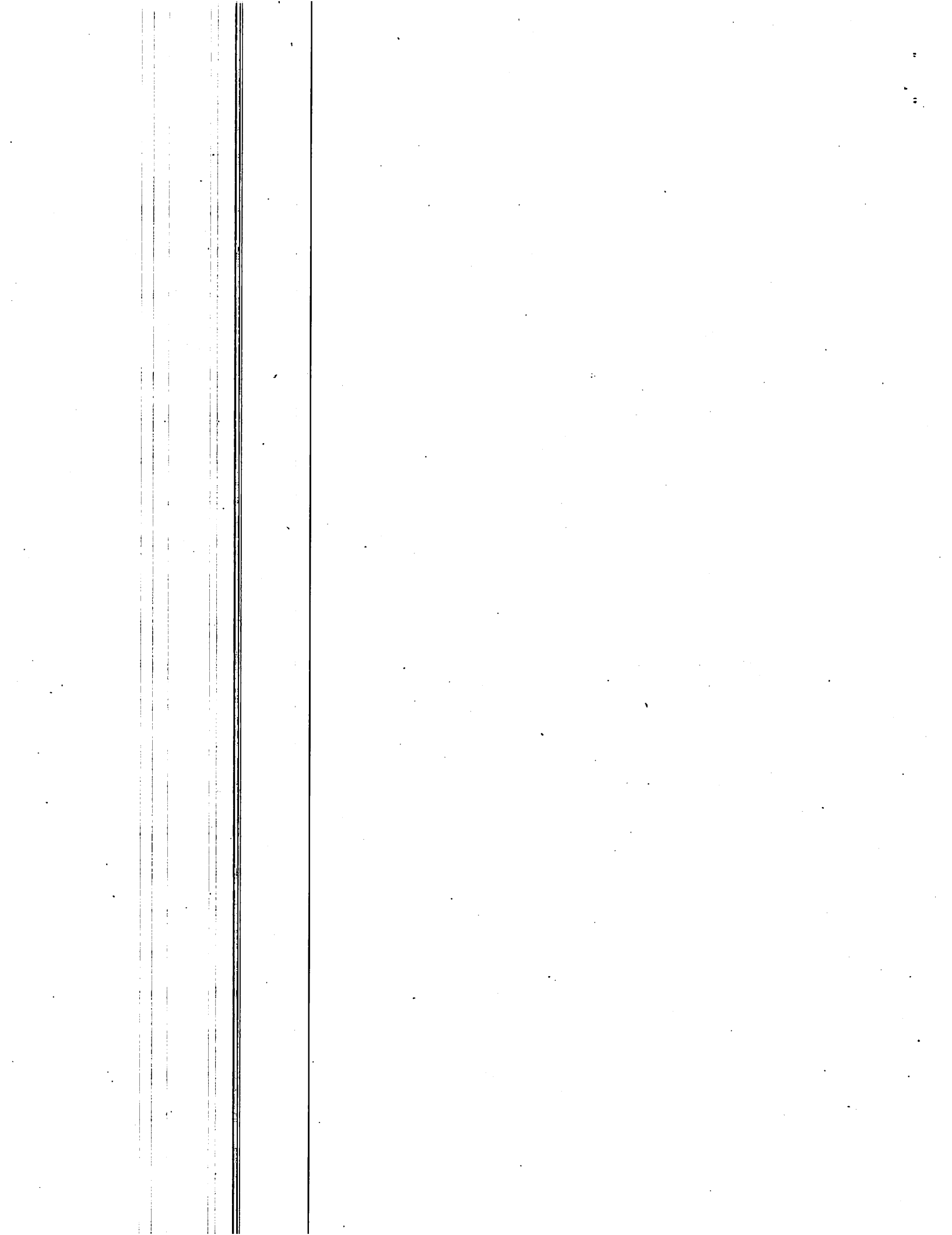
The Contractor also argued that the ALJ erred in finding that his efforts to correct the deficiencies in his performance were unsuccessful because he demonstrated to the Claimants that the in-floor heating systems in the bathroom and living areas worked and because they passed inspection. The Commission finds no error. Again, the Contractor did not identify evidence in



the record in support of his argument. In addition, as discussed below, the vinyl floor in the living area was out of flat and did not conform to industry standards, and the Contractor improperly installed cement boards over the DITRA heating system. Therefore, the Commission finds that the Contractor did not correct his deficient performance.

The Contractor also argued that the ALJ erred in finding the installation of cement board over the DITRA system voided the warranty. Specifically, the Contractor argued that the October 24, 2021, email from Bryan Von Blohn, a representative of Schluter Systems, LP, the manufacturer of the DITRA system, did not indicate that the warranty void because Mr. Von Blohn merely stated that a test of the installation would be required to determine if it voids the warranty. The Commission agrees with the ALJ. Mr. Von Blohn stated, "There is nothing in our installation detail about cement board over our heating system. Without having the opportunity to properly test this type of installation we could not provide a warranty." The Commission understands Mr. Von Blohn to be stating that Schluter Systems has not tested or approved the installation of cement board over the DITRA system, which is why it is not included in its installation detail, and therefore excludes the product from warranty coverage. Notably, the detail in the DITRA Installation Handbook calls for the use of unmodified thin-set mortar, modified thin-set mortar, or cementitious self-leveling underlayment over the DITRA system, not cement board, and the warranty provides that coverage is available only if the product is installed in accordance with with the Installation Handbook and industry guidelines not in conflict with the Installation Handbook.

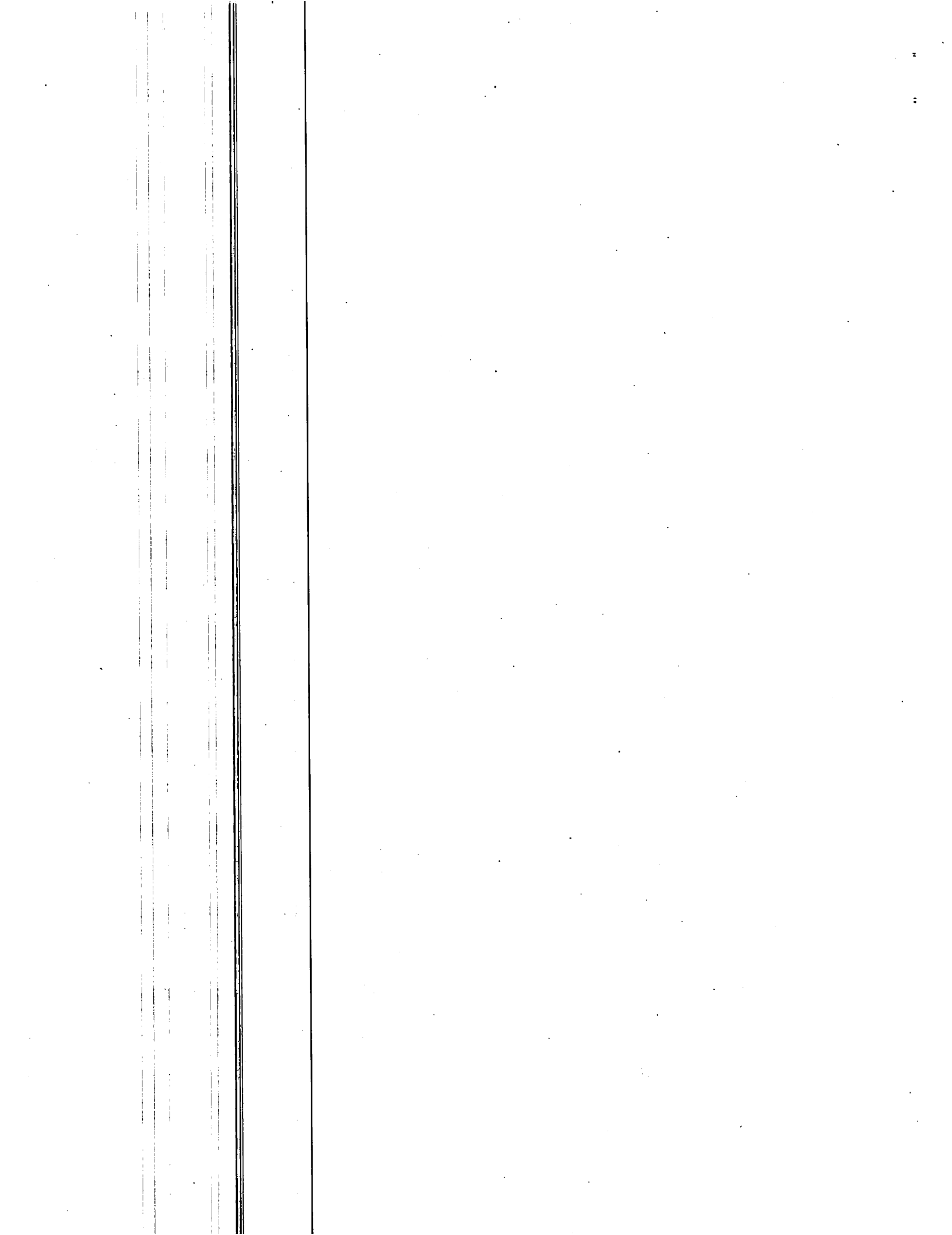
The Contractor next argued that the ALJ erred in qualifying the Claimant's floor inspector, Kevin Donlea, as an expert because he does not teach floor inspection classes, has not been trained by Coretec, the manufacturer of the Claimants' flooring, because he gained a portion of his professional experience before luxury vinyl flooring such as the Contractor installed was on the



market, and because of the poor quality of his photographs. The Commission holds that the ALJ properly deemed Mr. Donlea to be an expert on flooring because of his extensive experience and training regarding flooring and his certification as a Master Inspector by the Flooring Consultants and Inspection Training Service.

The Contractor also argued that the ALJ erred in calculating the Claimants' actual loss because, although the ALJ found that the Contractor properly installed the bathroom floor and that the cost of removing and replacing the bathroom floor he installed would be excluded from the calculation, the ALJ in fact included the cost of demolishing the bathroom floor and installing baseboard heat in the bathroom in the calculation. The Claimants countered that the bathroom and living area floors were interlocked and, therefore, the ALJ was correct to use the entire cost of demolition to calculate the actual loss. The Commission agrees with the Contractor that the \$4,950.00 in labor and \$165.00 in materials that the ALJ found to be the cost of demolishing the Contractor's unworkmanlike work improperly included the cost of demolishing the bathroom floor. The ALJ, consistent with the evidence in the record and the finding that the Contractor's installation of the bathroom floor was sufficient, expressly stated that the subsequent costs the Claimants incurred with respect to the bathroom floor were excluded from the calculation of actual loss. The ALJ's statement that the entire floor had to be removed cited by the Claimants clearly and expressly referred to all of the layers of the floor in the area with vinyl flooring and cement boards, and not the bathroom, which had neither vinyl flooring nor cement boards.

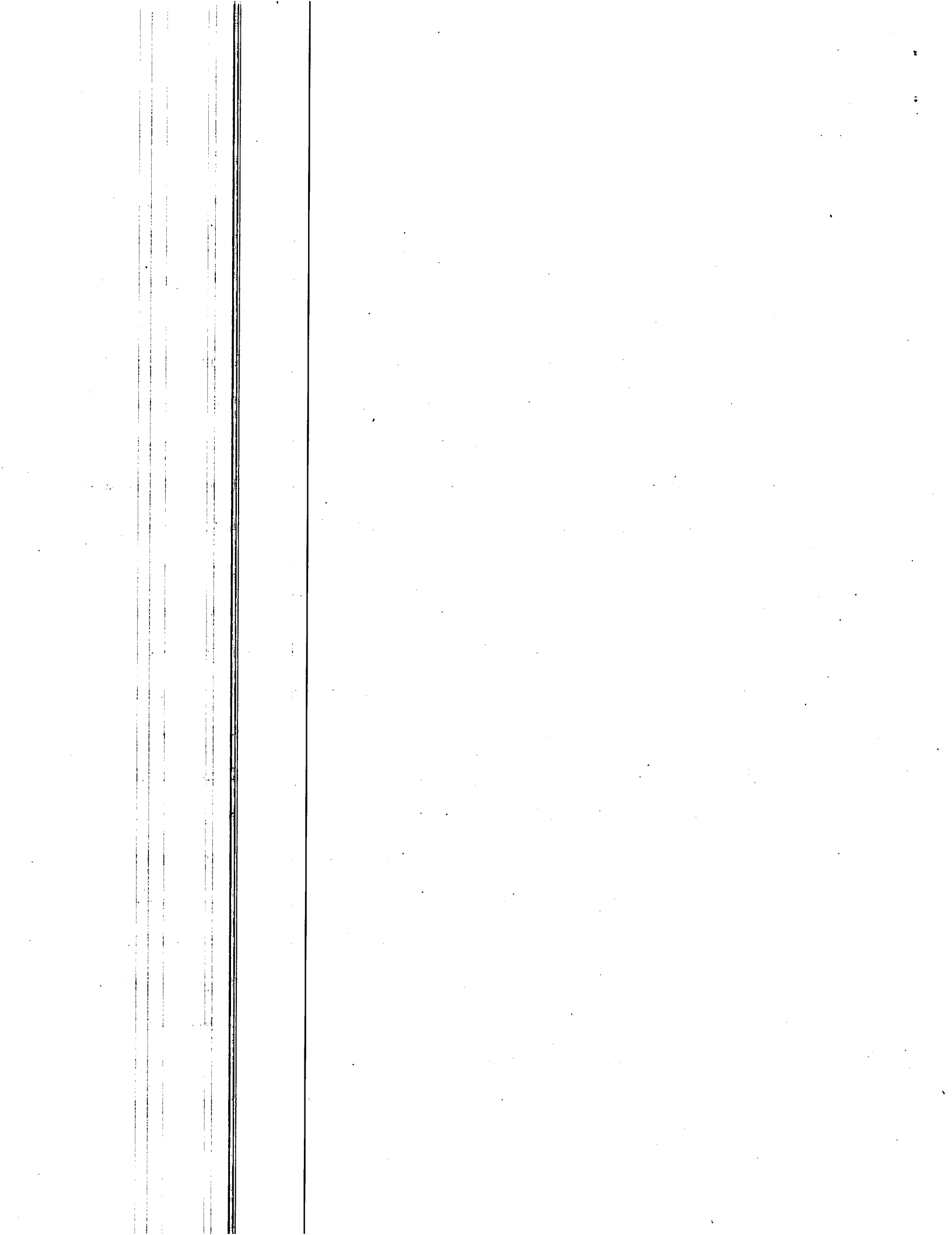
The record demonstrates that the bathroom floor is 29 square feet and the living area of the basement with the improperly installed vinyl flooring is 585 square feet. Therefore, the living area constitutes 94.4% of the area demolished by the Claimants' subsequent contractor. Accordingly, the Commission finds that the \$5,115.00 cost of the labor and materials that the ALJ attributed to



correcting the Contractor's unworkmanlike performance must be reduced by 5.6% to properly calculate the Claimant's actual loss. Accordingly, the Commission finds that the cost of labor and materials for demolition attributable to correcting the Contractor's unworkmanlike performance is \$4,828.56.

The Contractor also argued that the ALJ erred in calculating the Claimants' actual loss because the cost of installing the vinyl flooring that the ALJ relied upon included the installation of a baseboard heater in the bathroom. The Commission finds that the ALJ's calculation did not include the cost of installing a baseboard heater in the bathroom. Rather, it included the cost of removing one baseboard in the bathroom and one baseboard in the living area, cutting the baseboards to facilitate the installation of baseboard heaters, and the reinstallation of the baseboards. The Commission finds that, although this work was not attributable to the correcting the Contractor's deficient installation of the living area floor, it involved no material costs and de minimis labor costs that were significantly less than labor costs of properly installing a DITRA heating system, a cost that would have contributed to the Claimant's actual loss had they not decided to abandon the DITRA system in the living area. Accordingly, the Commission finds no error with the ALJ's calculation relating to the cost of installing the vinyl flooring.

The Contractor further argued that the ALJ erred in relying on the Claimants' calculation of the cost of the subfloor and DITRA system materials for the calculation of actual loss because the Claimant estimated those costs using cost estimators rather than the parties contract or the testimony of the Contractor. The Commission finds no error. The parties' contract does not provide the cost of any materials, and the Contractor did not provide the Commission with a transcript, so, if the Contractor did provide testimony on the cost of materials, it is not available to the Commission. Moreover, the record demonstrates that the Claimant's requested the invoice for



the DITRA system materials from the Contractor and that the Contractor failed to provide it to them. Therefore, the ALJ was correct to rely on the Claimants' calculation of the cost of those materials.

Accordingly, the Commission finds that the ALJ's calculation of the Claimants' actual loss of \$18,827.28 must be reduced by the portion of the demolition costs attributable to the bathroom floor, \$286.44, resulting in an actual loss of \$18,540.84.

Having considered the parties' arguments, the evidence contained in the record, and the ALJ's Recommended Decision, it is this 29th day of March 2023, **ORDERED:**

- A. That the Findings of Fact of the Administrative Law Judge are **AMENDED**;
- B. That the Conclusions of Law of the Administrative Law Judge are **AMENDED**;
- C. That the Proposed Decision and Recommended Order of the Administrative Law Judge is **AMENDED**;
- D. That the Claimant is awarded \$18,540.84 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

