

IN THE MATTER OF THE CLAIM
OF MICHELLE AND DANIEL
JACKSON,

CLAIMANTS

AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF
KONSTANTIN AXIOTIS,
T/A AXS TILE CONSTRUCTION
SERVICES, INC.,

RESPONDENT

* BEFORE BRIAN ZLOTNICK,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
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* OAH No.: LABOR-HIC-02-22-10985
* MHIC No.: 22 (75) 500
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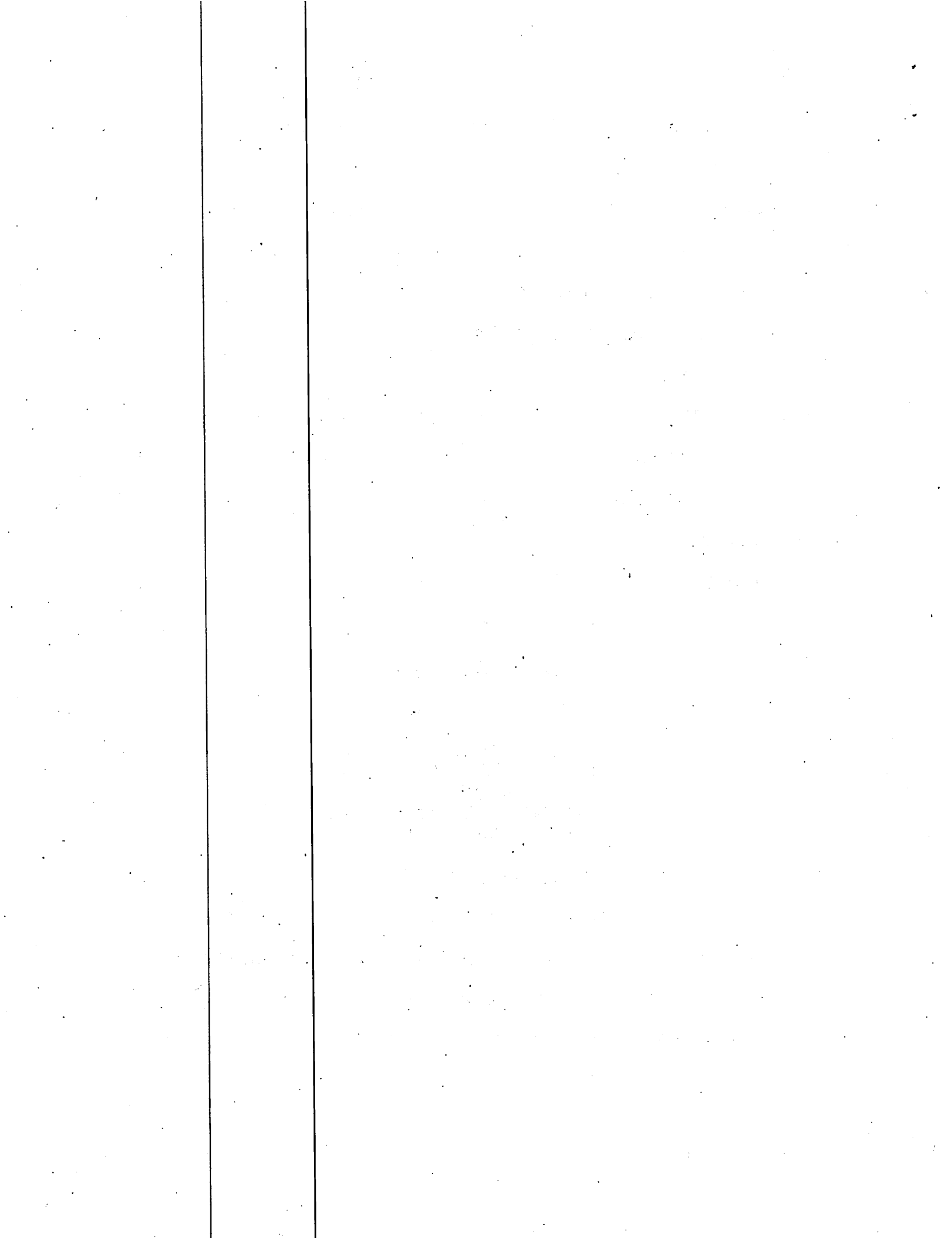
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PROPOSED DECISION

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 March 3, 2022, Michele and Daniel Jackson (Claimants) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) under the jurisdiction of the Department of Labor (DOL) for reimbursement of \$9,408.99 in alleged actual losses suffered as a result of a home improvement contract with Konstantin Axiotis, T/A AXS



Tile Construction Services, Inc. (Respondent).¹ On May 11, 2022, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On July 22, 2022, I held a hearing at the OAH in Hunt Valley, Maryland.² John Hart, Assistant Attorney General, DOL, represented the Fund. The Claimants represented themselves.³ The Respondent, owner of AXS Tile Construction Services, Inc., represented himself.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the OAH govern procedure.⁴

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 that loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on the Claimants' behalf:

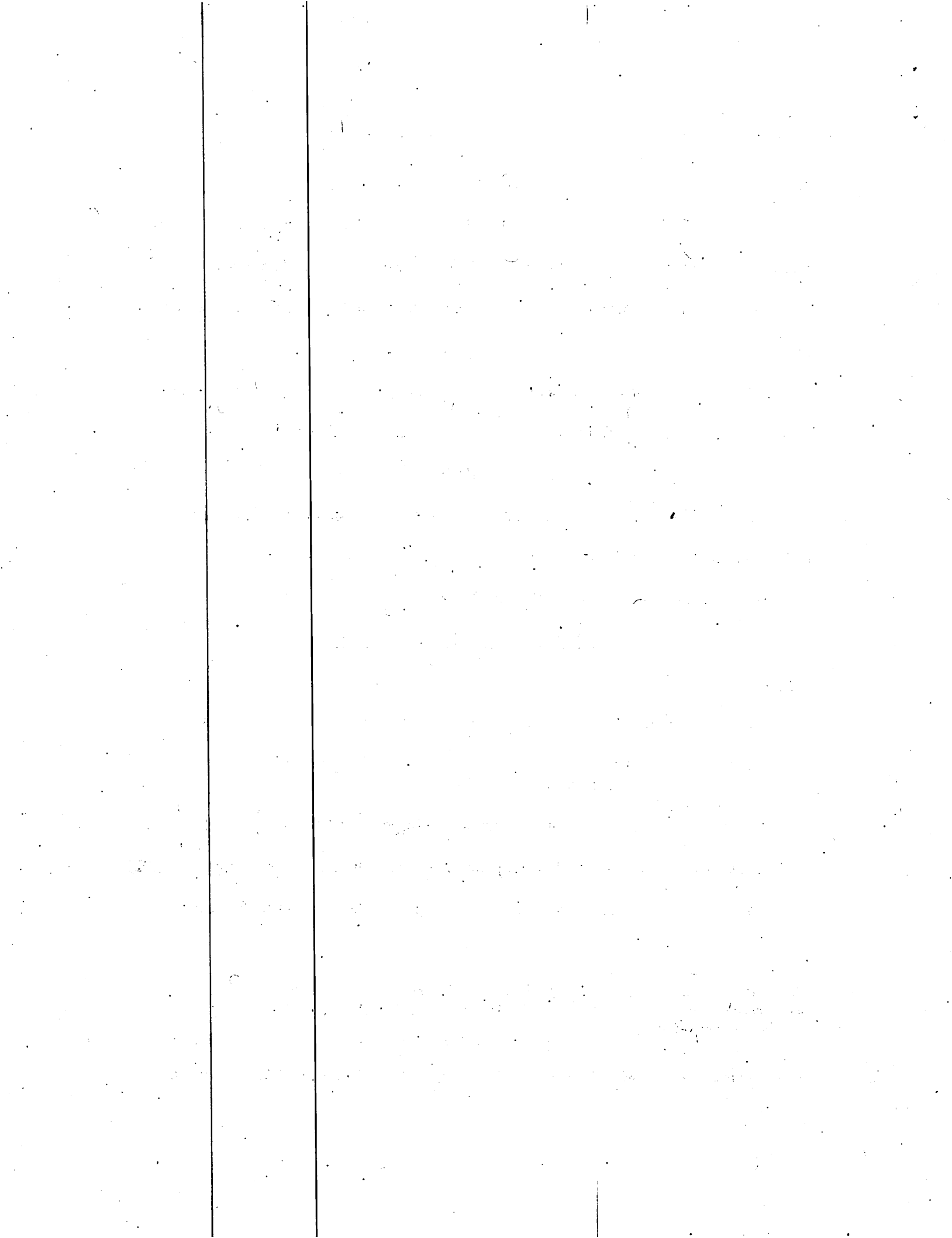
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|-------|---|
| CL #1 | Contract between the Claimants and the Respondent dated January 11, 2021 (Contract) |
| CL #2 | E-mail from Mr. Jackson to the Respondent, February 21, 2021 |
| CL #3 | \$983.33 check paid by the Claimants to the Respondent, January 12, 2021 |
| CL #4 | \$983.33 check paid by the Claimants to the Respondent, February 17, 2021 |

¹ Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015). Unless otherwise noted, all references to the Business Regulation Article are to the 2015 Replacement Volume of the Maryland Annotated Code.

² Bus. Reg. §§ 8-407(a), 8-312.

³ Ms. Jackson presented their case and testified on behalf of the Claimants. Mr. Jackson was present for the hearing but did not testify.

⁴ Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021); COMAR 09.01.03; and COMAR 28.02.01.



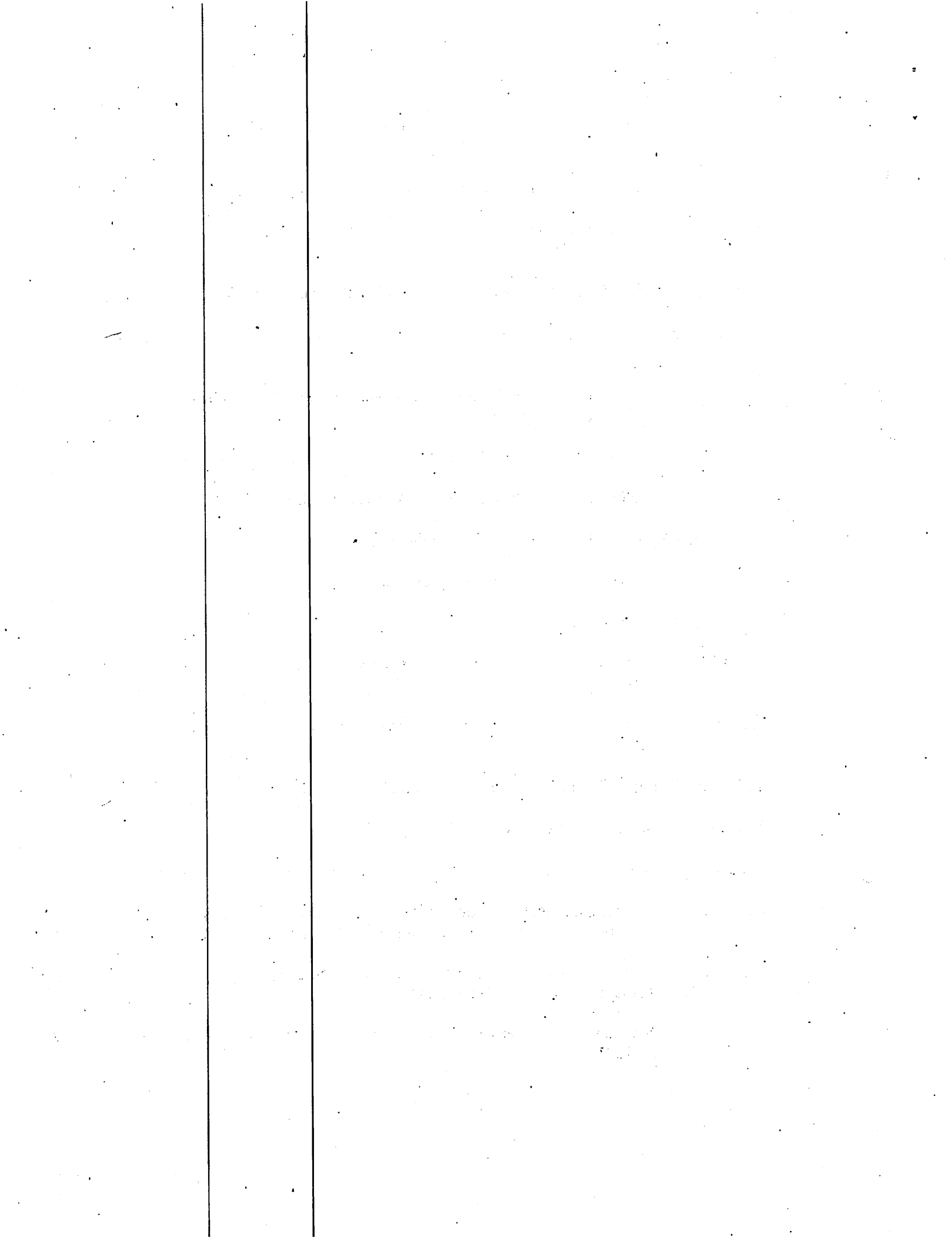
- CL #5 \$1,167.33 check paid by the Claimants to the Respondent, February 23, 2021
- CL #6 \$1,167.33 Invoice from the Respondent, February 23, 2021
- CL #7 Claimants' thumb-drive containing three photographs and a video taken in August 2021
- CL #8 Text from the Respondent to the Claimants, September 23, 2021
- CL #9 Three photographs of the shower pan, taken by the Claimants, September 2021
- CL #10 E-mail with attached picture from Claimants to the Respondent, September 26, 2021
- CL #11 E-mail from the Claimants to the Respondent, October 7, 2021
- CL #12 Estimate from Wills Remodeling & Repairs, February 9, 2022

I admitted the following exhibits on behalf of the Fund:

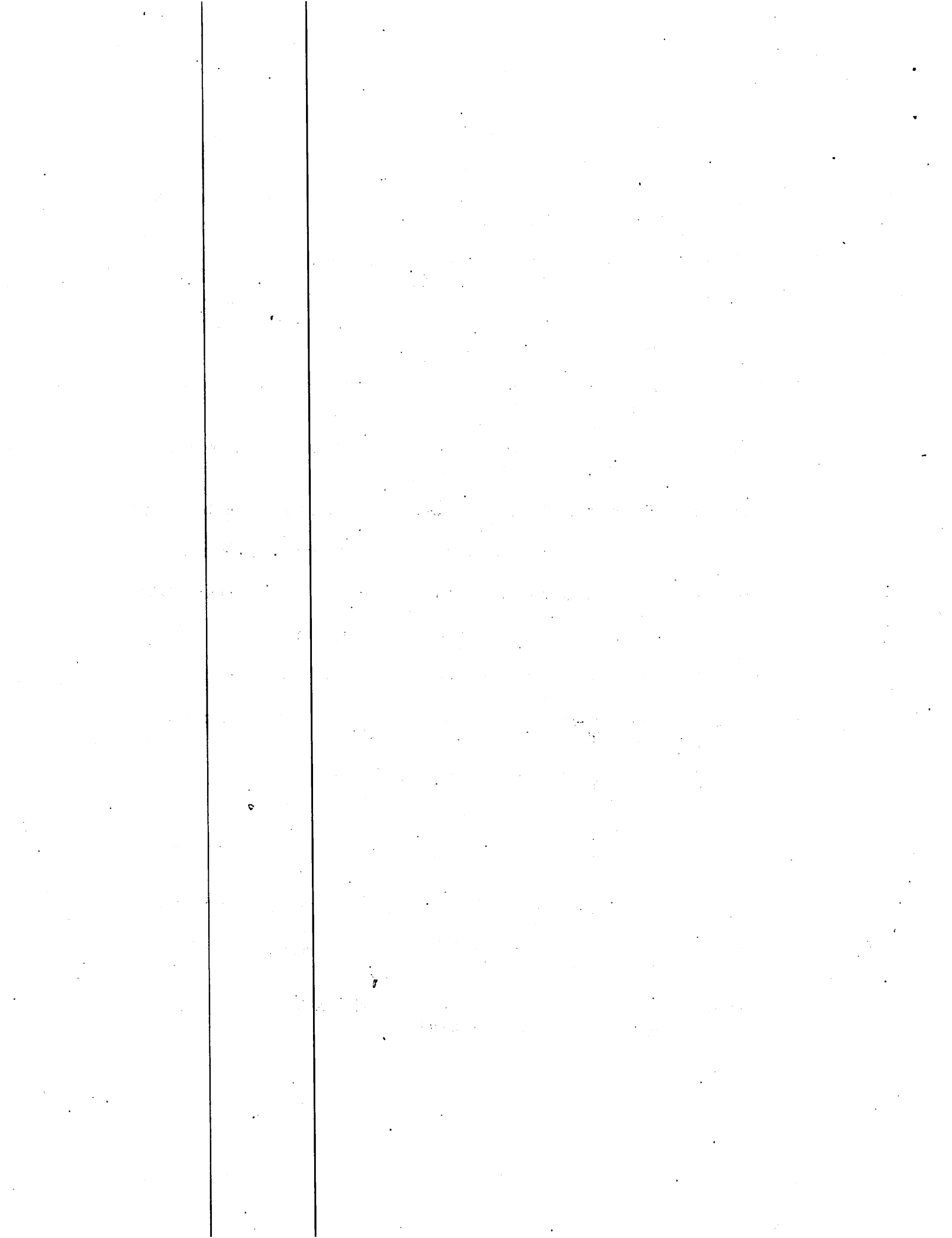
- Fund #1 OAH Notice of Hearing, May 24, 2022
- Fund #2 DOL Hearing Order, May 6, 2022
- Fund #3 Home Improvement Claim Form, received by the MHIC on March 3, 2022
- Fund #4 The Respondent's licensing history with the MHIC, printed on July 21, 2022

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

- Resp. #1 Written response to Claimants' MHIC Complaint, undated
- Resp. #2 Note written by the Claimants, September 17, 2021.
- Resp. #3 Photograph of bathroom floor with removed tile from marble threshold to the shower pan, taken by the Respondent on September 17, 2021
- Resp. #4 Photograph of marble threshold with removed tile, taken by the Respondent on September 17, 2021
- Resp. #5 Photograph of shower wall tiles, taken by the Respondent on September 17, 2021



- Resp. #6 Photograph of shower after installation of silicone, taken by the Respondent on September 18, 2021
- Resp. #7 Photograph of shower pan floor before installation of silicone, taken by the Respondent on August 25, 2021
- Resp. #8 Photograph of shower pan floor after installation of silicone, taken by the Respondent on September 20, 2021
- Resp. #9 Photograph of shower pan floor and marble threshold, taken by the Respondent on September 20, 2021
- Resp. #10 Photograph of shower pan floor and marble threshold, taken by the Respondent on September 20, 2021
- Resp. #11 Photograph of shower pan floor and marble threshold, taken by the Respondent on September 20, 2021
- Resp. #12 Text messages from the Claimants to the Respondent, September 29, 2021
- Resp. #13 Text message from the Claimants to the Respondent, September 28, 2021
- Resp. #14 Text message from the Respondent to the Claimants, September 23, 2021
- Resp. #15 Text message from the Claimants to the Respondent, September 23, 2021
- Resp. #16 Text message from the Respondent to the Claimants, September 23, 2021
- Resp. #17 Text messages between the Respondent and the Claimants, September 22 and 23, 2021
- Resp. #18 Text messages between the Respondent and the Claimants, September 21, 2021
- Resp. #19 Handwritten transcribed text from the Claimants to the Respondent, October 7, 2021
- Resp. #20 Photograph of shower taken by the Respondent on September 17, 2021
- Resp. #21 Photograph of shower pan floor taken by the Respondent on September 17, 2021
- Resp. #22 Photograph of shower pan floor and marble threshold after silicone was applied, taken by the Respondent on September 20, 2021



Resp. #23 Photograph of shower pan floor and marble threshold after silicone was applied, taken by the Respondent on September 20, 2021

Testimony

Michelle Jackson, Claimant, testified on behalf of the Claimants.

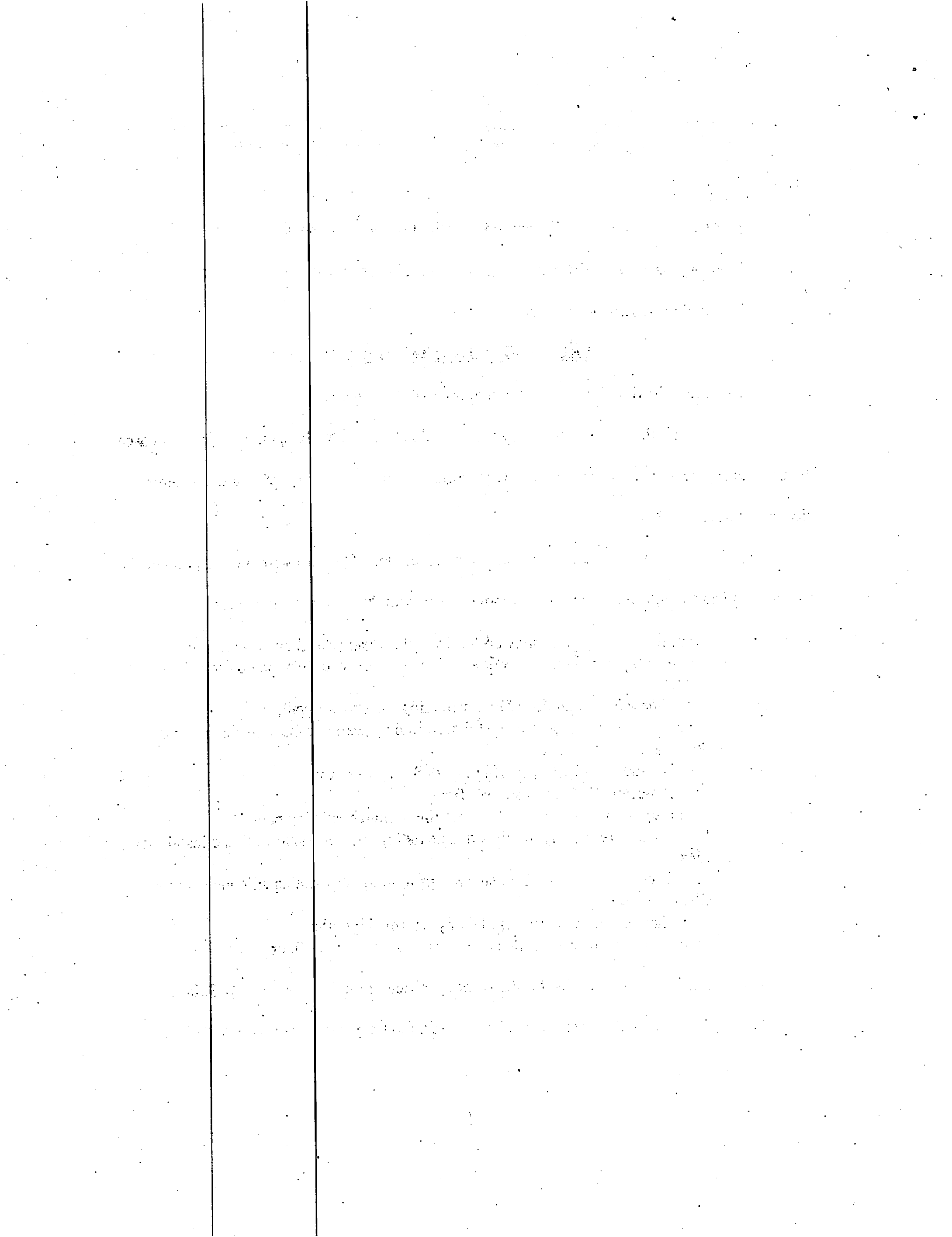
Konstantinos Axiotis, Respondent, testified on his own behalf.

The Fund presented no witnesses.

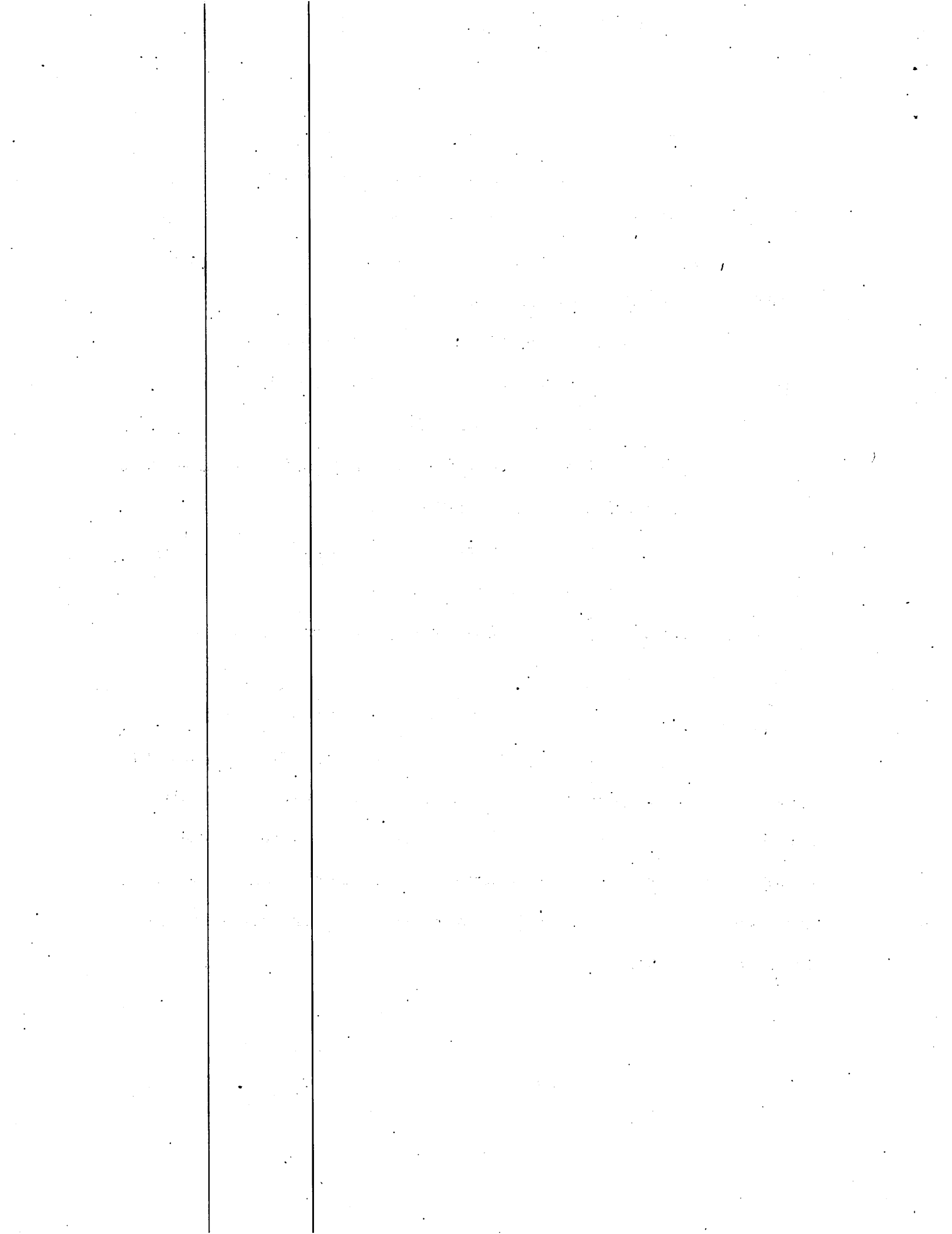
PROPOSED FINDINGS OF FACT

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

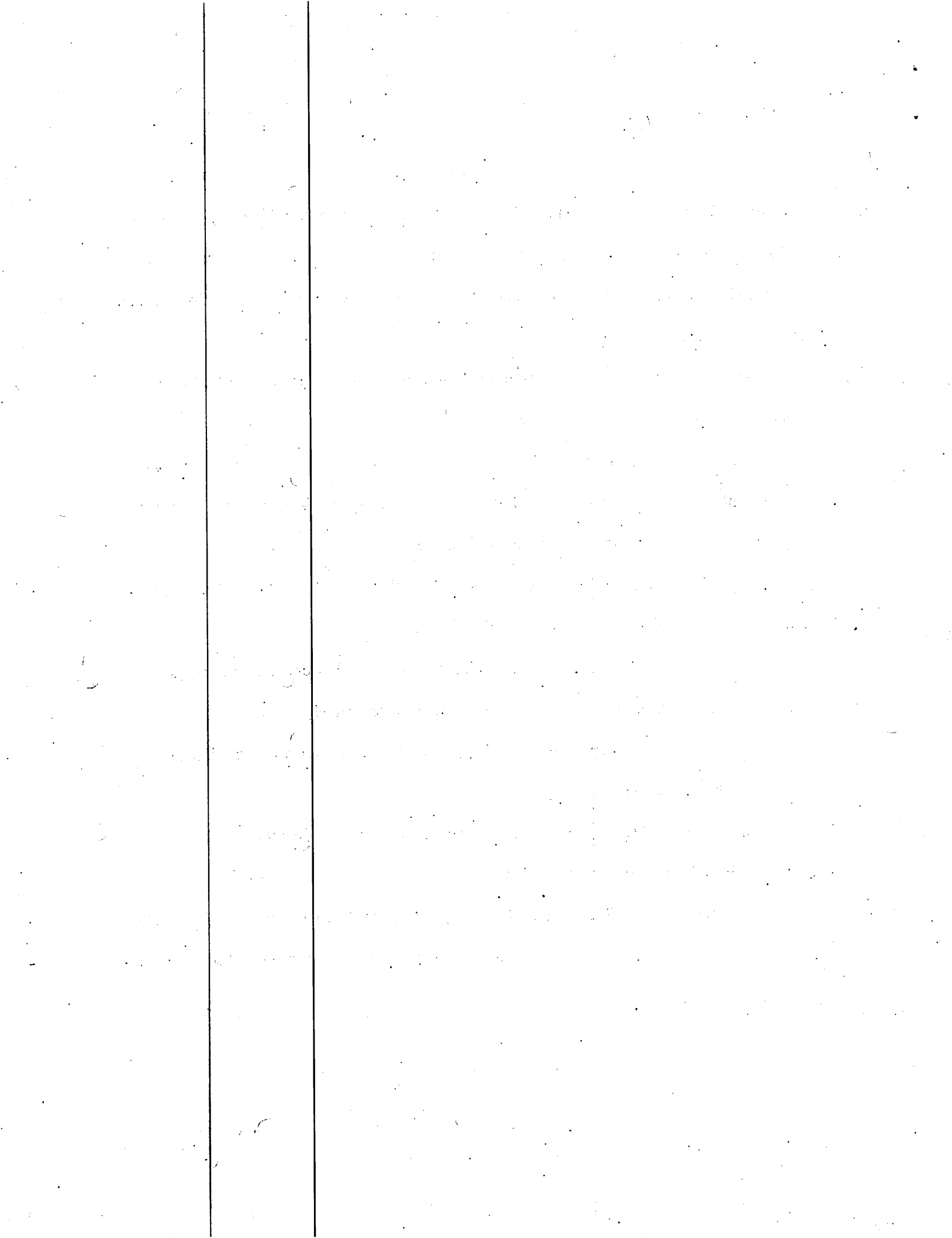
1. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor under MHIC personal license number 5817924 and corporate license number 05-135265.
2. On January 11, 2021, the Claimants entered the Contract with the Respondent for the Respondent to replace the master bedroom shower with the following attributes:
 - Remove existing glass shower door, vinyl shower pan, shower wall tile; Move existing drainage to center and install curb with two inch by four inch studs;
 - Install new drain and liner for surrounding tile shower wall;
 - Install mud shower, cement board surrounding wall and curb inside and out;
 - Waterproof wall and curb;
 - Furnish and install white marble threshold top of curb;
 - Install mosaic tile in mud shower floor
 - Install three inch by six inch ceramic tile to match existing pattern
 - Remove approximately ten tiles from existing shower frame wall and install new tiles
 - Install two base left and right shower grout to match existing silicone corners
 - Clean job site
 - New shower door material and labor performed by others
 - Customer to furnish wall tile and mosaic tile for shower floor
3. The agreed-upon price for the work specified in the Contract was \$2,950.00.
4. On January 12, 2021, the Claimants paid the Respondent a deposit of \$983.33.



5. The Respondent began working on the Contract on or about February 11, 2021.
6. On February 17, 2021, the Claimants paid the Respondent \$983.33.
7. On February 23, 2021, the Respondent provided a final invoice which charged the Claimants the final \$983.33 due for the Contract and additional costs of \$125.00 for mosaic tile, \$12.00 for tile trim, and \$47.00 for grout, totaling \$1,167.33.
8. On February 23, 2021, the Claimants made a final payment of \$1,167.33 to the Respondent. The Claimants paid the Respondent a total of \$3,133.99. The Respondent completed its work on the Contract on February 23, 2021.
9. On April 19, 2021, the shower glass door was installed by Laurel Glass, which the Respondent was not responsible for in accordance with the Contract.
10. Mr. Jackson began using the shower in April 2021 and did not experience any leaking issues. Mr. Jackson takes five minute showers.
11. Ms. Jackson began using the shower in August 2021 and she takes twenty to twenty-five minute showers.
12. On August 16, 2021, the Claimants notified the Respondent that water was leaking below the master bathroom shower through the kitchen recessed lighting fixture. Laurel Glass came out to the Claimants' home in August 2021 to test the shower door and Laurel Glass determined that the shower door was water tight. The Claimants ran water down the drain without allowing any water to touch the shower pan surface and found no leaks from the drain. Also in August 2021, the Claimants filled the shower pan with water from a hose without using the shower faucet and this resulted in a leak.



13. On August 17, 2021, the Claimants texted the Respondent regarding the leak in the shower. The Respondent visited the Claimants' home after August 17, 2021 and tested the shower by running it and filling the shower pan with water which resulted in drops of water leaking through the kitchen recessed light fixture below the shower. The Respondent came back to the Claimants' home on September 1, and 2, 2021 and again observed water leaking from the shower after testing it.
14. The Respondent returned to the Claimants' home on September 14, 2021, and again observed leaking from the shower.
15. On September 17, 2021, the Respondent returned to the Claimants' home and removed the curved tile borders surrounding the shower pan, applied waterproofing in those areas and then reassembled the tiles with new tiles over the waterproofed area.
16. On September 21, 2021, the Respondent returned to the Claimants' home and applied silicone to the grouted areas surrounding the shower pan.
17. On September 22, 2021, the Claimants tested the shower and it did not leak. The Respondent did not return to the Claimants' home after September 21, 2021.
18. On or about September 28, 2021; the Claimants removed all of the silicone installed by the Respondent.
19. On October 7, 2021, the Claimants notified the Respondent that the shower was leaking again and asked for a refund of their Contract payments.
20. On February 9, 2022, the Claimants obtained an estimate from Wills Remodeling & Repairs (Wills) to repair the shower leak and also to replace the shower unit. Wills estimated



that it would cost \$6,670.00 to repair the shower leak and \$9,225.00 to completely replace the shower unit installed by the Respondent.

21. The Respondent did not refund any money to the Claimants.

DISCUSSION

The Claimants have the burden of proving the validity of her claim by a preponderance of the evidence.⁵ “[A] preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces . . . a belief that it is more likely true than not true.”⁶

An owner may recover compensation from the Fund “for an actual loss that results from an act or omission by a licensed contractor.”⁷ Actual loss “means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.”⁸ For the following reasons, I find that the Claimants have proven eligibility for compensation.

Based on the unrefuted evidence, the Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimants. The Claimants paid the Respondent \$3,133.99 to install a new shower pan and shower wall tiles and flooring in the Claimants’ master bathroom.

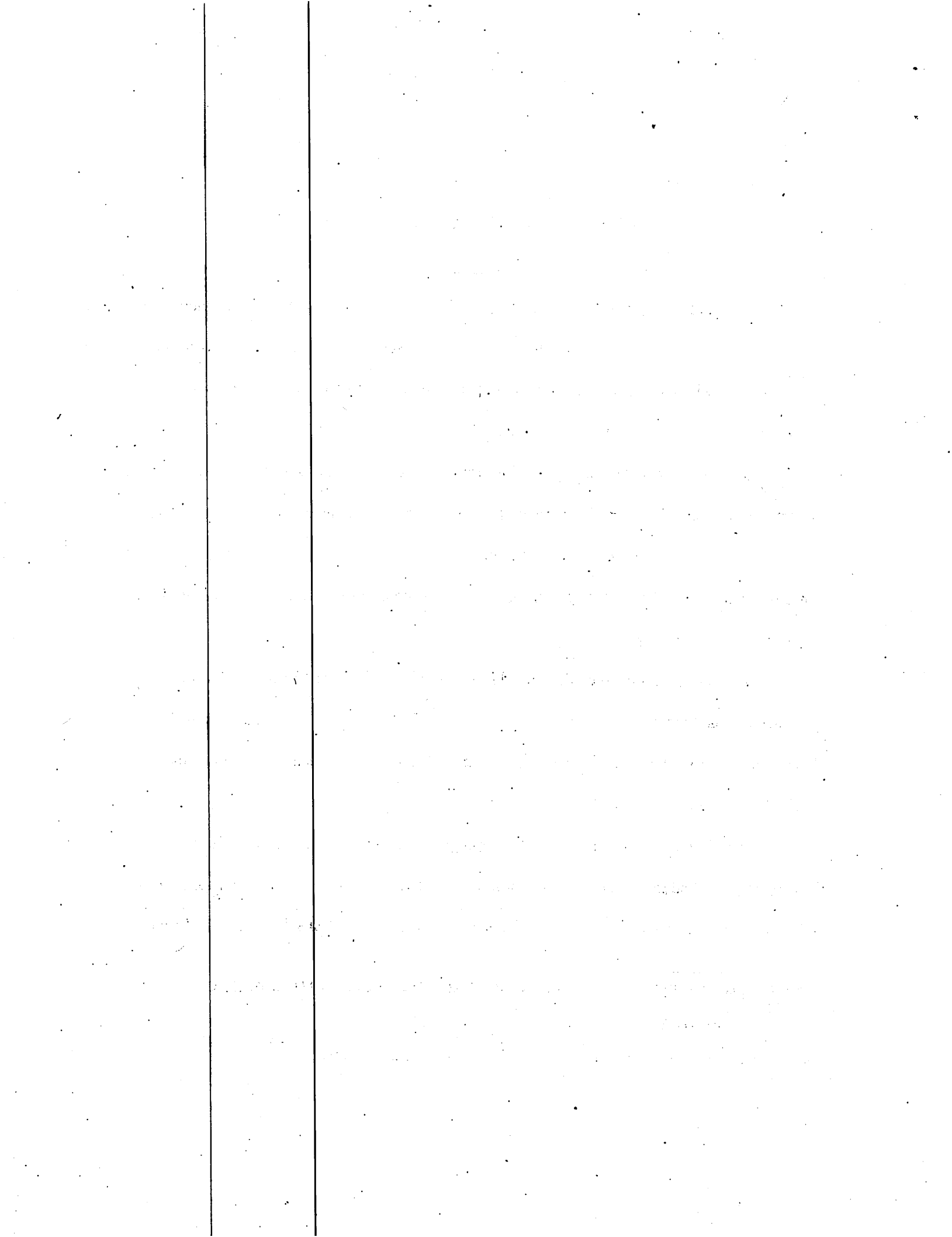
According to the Claimants, the shower began leaking around six months after the Respondent finished the Contract. Ms. Jackson testified that only her husband used the shower initially and that his short five minute showers did not result in any leaks, but when she began

⁵ Bus. Reg. § 8-407(e)(1); Md. Code Ann., State Gov’t § 10-217 (2021); COMAR 09.08.03.03A(3); COMAR 28.02.01.21K(1).

⁶ *Coleman v. Anne Arundel Cty. Police Dep’t*, 369 Md. 108, 125 n.16 (2002).

⁷ Md. Code Ann., Bus. Reg. § 8-405(a); *see also* COMAR 09.08.03.03B(2) (“The Fund may only compensate claimants for actual losses . . . incurred as a result of misconduct by a licensed contractor.”).

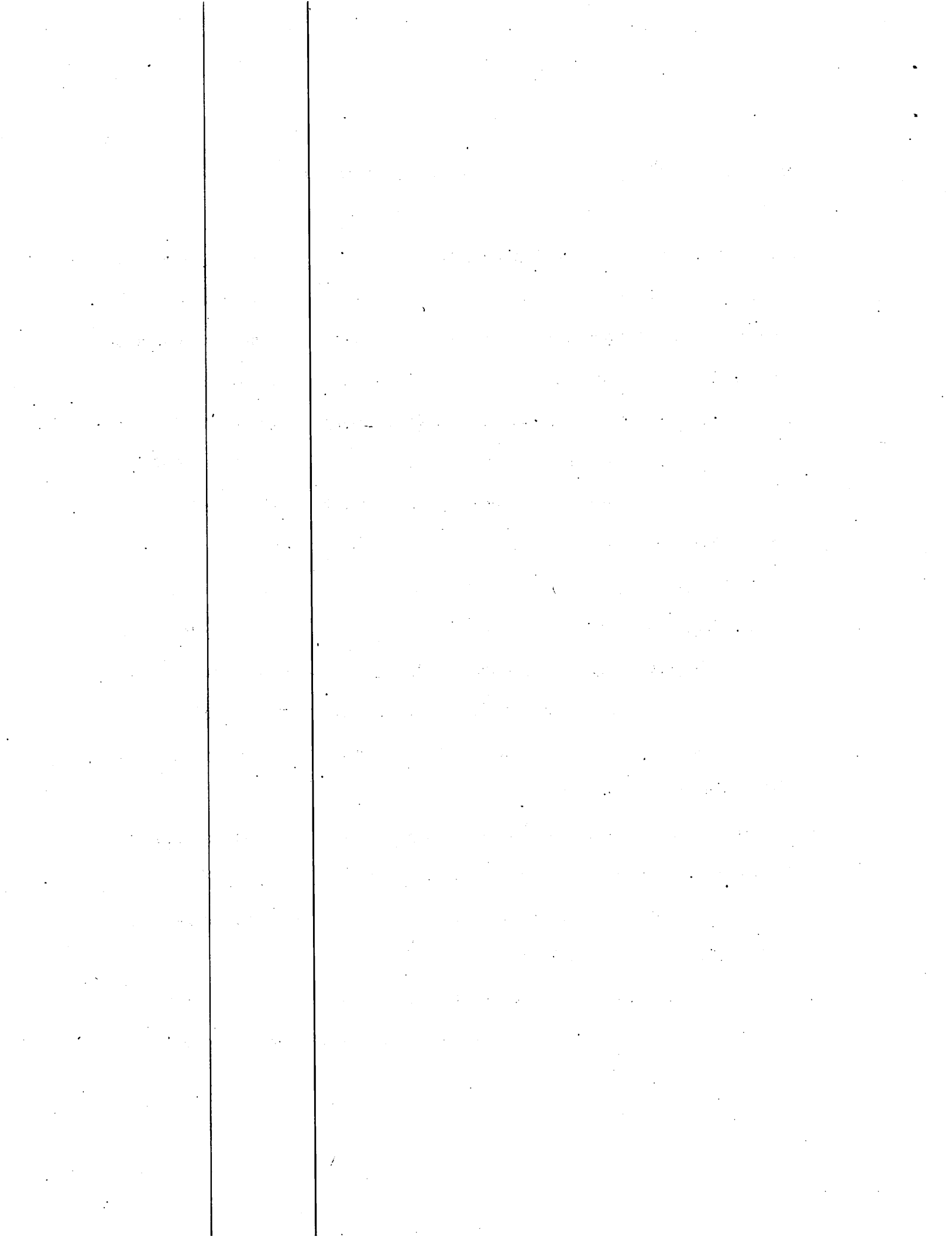
⁸ Md. Code Ann., Bus. Reg. § 8-401.



taking twenty minute showers in the master bathroom in August 2021, it leaked through the recessed lighting fixture in the kitchen below the master bathroom. The Claimants initially notified the Respondent about the leak on August 16, 2021. The Claimants indicated that the Respondent came to their house on August 21, 2021 and tested the shower area by running the water and observed the leak while sitting in the kitchen located below the master bathroom. The Claimants asserted that they asked the Respondent to fix this issue and that after their household COVID quarantine ended on September 14, 2021, the Respondent returned and again observed the kitchen ceiling leak from the shower. The Claimants stated that on September 17, 2021, the Respondent returned to their home and attempted to fix the leak by removing the curved tile borders of the shower pan to apply a waterproofing membrane to that area before reattaching those tiles. The Claimants also stated that the Respondent came back to their home on September 21, 2021 and applied a thick, clear coat of silicone to shower pan grout areas. On September 22, 2021, the Claimants informed the Respondent that the shower did not leak when used after the Respondent's application of silicone. The Claimants told the Respondent that they did not like the aesthetics of the silicone and they ultimately decided to remove it on September 28, 2021. On October 7, 2021, the Claimants texted the Respondent that the shower was leaking and asked for a refund of their money.

Ms. Jackson testified that the Respondent's remedy of applying large amounts of silicone to the shower grout areas was unacceptable as it left a messy and unappealing appearance. The Claimants contended that if the Contract was executed in a workmanlike manner, there would be no need for silicone to prevent the shower from leaking.

Ultimately, the Claimants obtained two estimates from Wills of \$6,670.00 to repair the leak and \$9,225.00 to replace the master bathroom shower unit. The Claimants indicated that

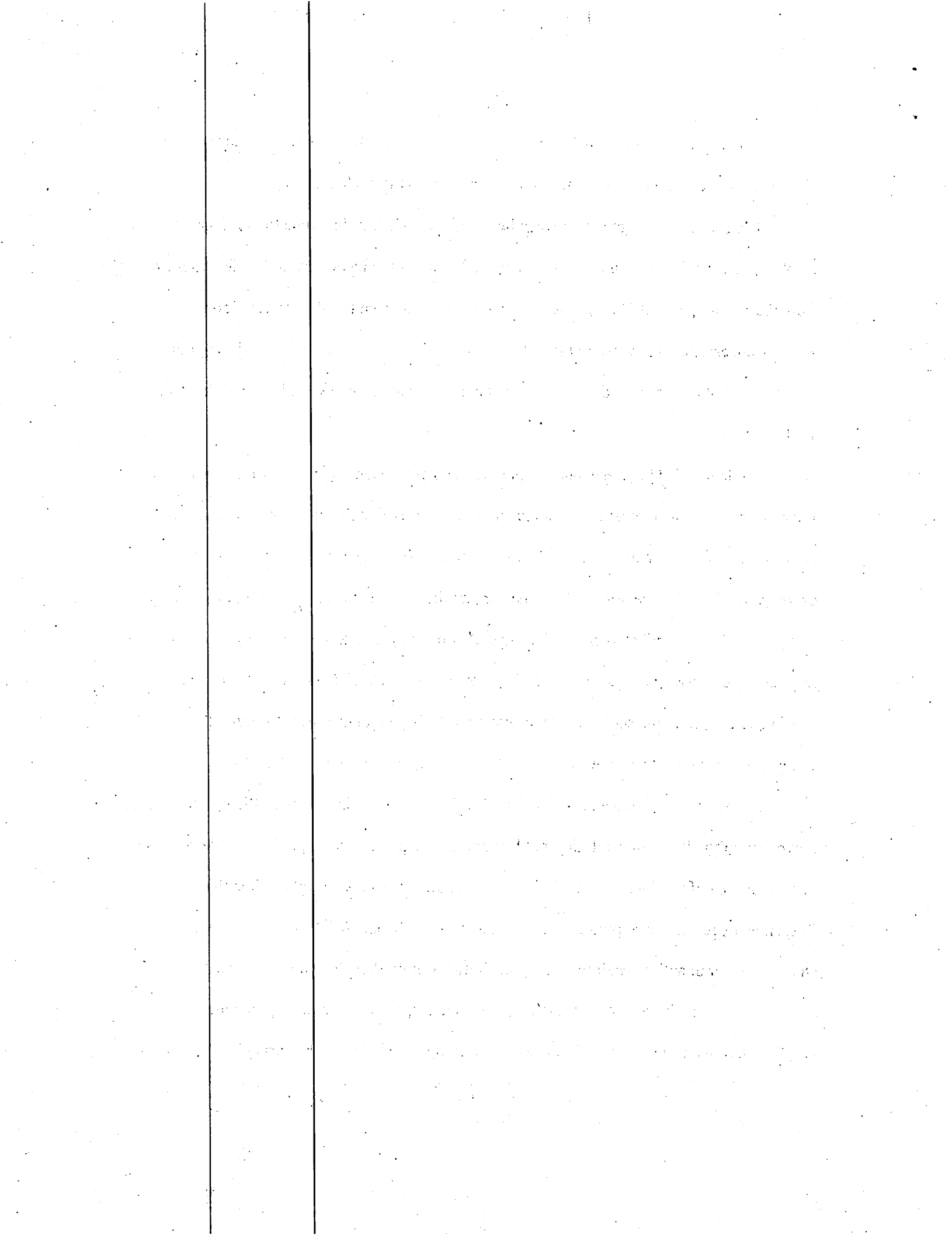


they have not gone forward with any work from Wills or any other contractors and that they have abstained from using the shower after finishing repairs to the kitchen ceiling.

The Respondent argued that when he came to the Claimants' home to investigate the leak he observed a cracked tile on the shower pan wall. The Respondent argued that the leak came from the shower pan wall through that cracked tile and not from the shower pan floor. The Respondent asserted that when Laurel Glass installed the shower door it drilled through the marble threshold when installing the door which resulted in that cracked tile on the shower pan wall.

I conclude that the Respondent's performance of the Contract was unworkmanlike. The Respondent's argument regarding that the cracked tile caused by the installation of the shower door as being the source of the leak is flawed. The Respondent acknowledged during cross examination that when he removed the shower pan tiles on September 17th the cracked tile was removed. The Respondent then indicated that after he re-applied a waterproofing membrane, he replaced all of those tiles with new tiles. Therefore, after September 17, 2021, the cracked tile was longer present in the shower, yet the shower leaked again in October 2021 after the Claimants removed the silicone applied by the Respondent on September 21, 2021.

Further, the Respondent also conceded during cross examination that silicone allows for movement of the floor and wall tiles, but it is not used to prevent leaking. The Respondent went on to admit that if no silicone is used, the shower should still be watertight. I find that the Respondent's remedy of applying unsightly amounts of silicone to the shower pan area does not equate to a workmanlike repair to remedy the initial leaking shower. The Respondent acknowledged that the shower should have been watertight even without any silicone. It is unrefuted that the shower leaked as the Respondent observed those leaks during his August and

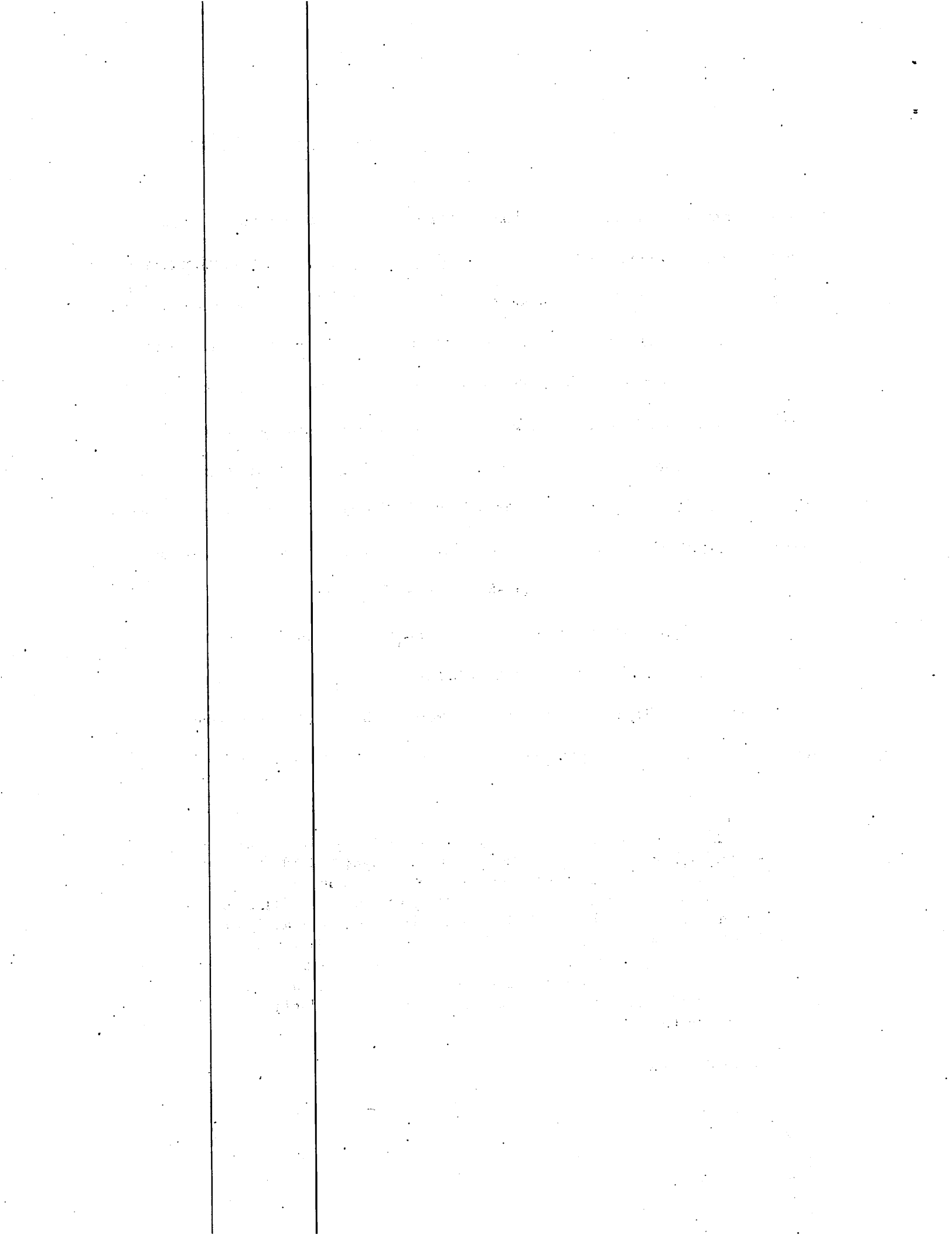


September 2021 visits when he tested the shower. I also found the Ms. Jackson's testimony that the leak was not the result of faulty plumbing to be convincing when she noted their testing of the shower pan by filling it with water from a hose instead of the faucet resulted in a leak through the kitchen ceiling. Additionally, the Claimants had the shower glass installer come to the home and verify that the shower door is watertight. Therefore, I find that the Claimants have met their burden to show that the shower leak was the result of the Respondent's unworkmanlike and inadequate performance of the Contract and not the result of cracked tile caused by the shower glass installer. I further conclude that the Claimants have provided evidence, in the form of the Estimates from Wills, that it will cost them at least an additional \$6,670.00 to repair the shower unit and \$9,225.00 to replace it. Accordingly, the Claimants have experienced an actual loss in the difference between the amount they will be required to pay a contractor to repair or replace the work and the amount they paid the Respondent under the Contract.

MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work. In this case, the Respondent performed work under the Contract, and the Claimant has retained or will retain another contractor to complete or remedy that work. Accordingly, the following regulatory formula 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.⁹

⁹ COMAR 09.08.03.03B(3)(c).



The calculation is as follows:

\$3,133.99 paid to the Respondent under the Contract
+\$6,670.00 payable to repair or complete the home improvements
\$9,803.99
- \$3,133.99 (original Contract price + additional charges by Respondent)
\$6,670.00

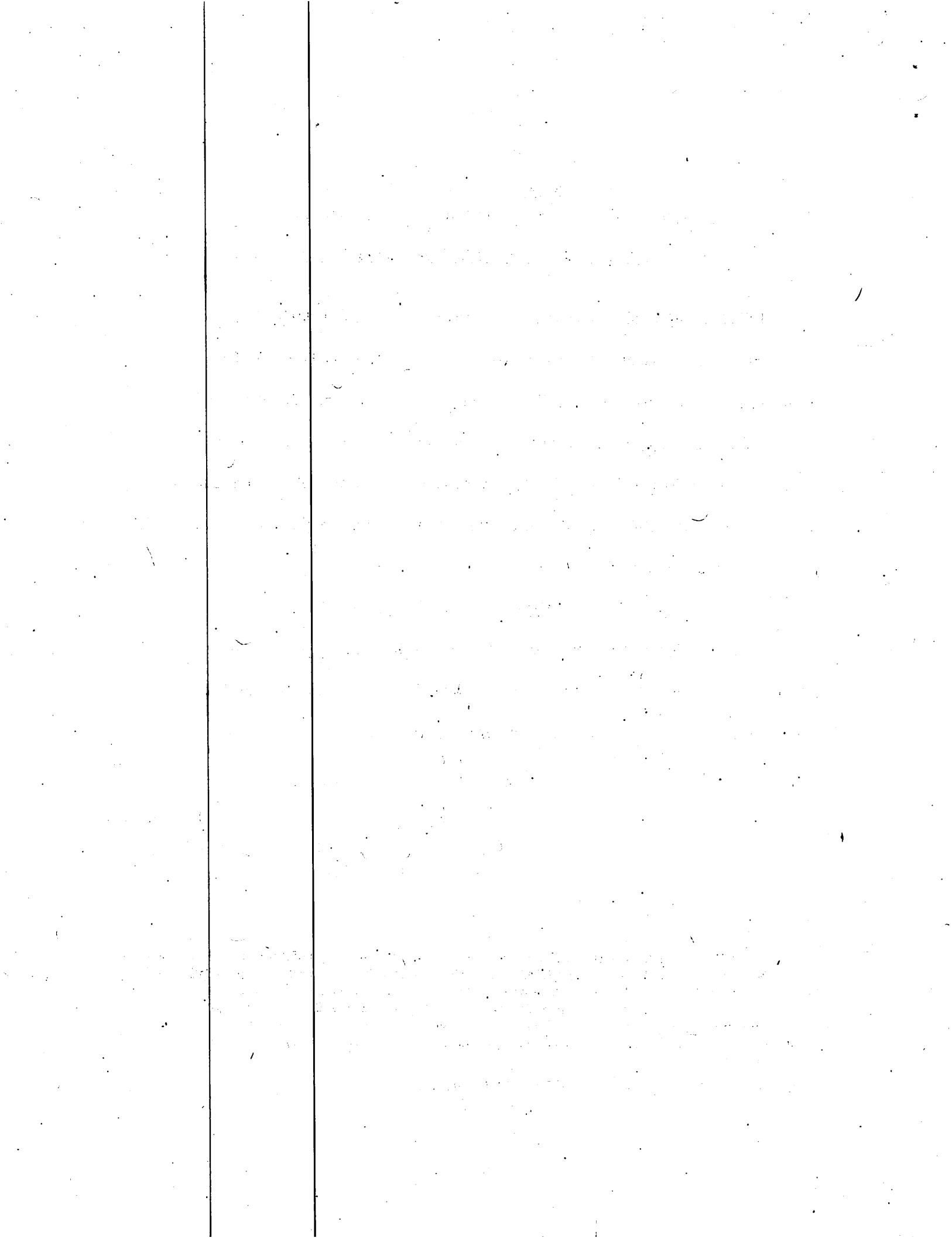
Effective July 1, 2022, a claimant's recovery is capped at \$30,000.00 for acts or omissions of one contractor.¹⁰ However, pursuant to COMAR 09.08.03.0B(4), "[t]he Commission may not award from the Fund an amount in excess of the amount paid by or on behalf of the claimant to the contractor against whom the claim is filed." In this case, the Claimants paid the Respondent \$3,133.99 under the Contract; accordingly, their actual loss compensable by the MHIC Fund is limited to that amount. Therefore, the Claimants are entitled to recover their actual loss of \$3,133.99.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimants have sustained an actual and compensable loss of \$3,133.99. as a result of the Respondent's acts or omissions.¹¹ I further conclude that the Claimants are entitled to recover that amount from the Fund.

¹⁰ 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").

¹¹ Md. Code Ann., Bus. Reg. §§ 8-401, 8-405; COMAR 09.08.03.03B(3)(c).



RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Commission Guaranty Fund award the Claimants \$3,133.99; and

I **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

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

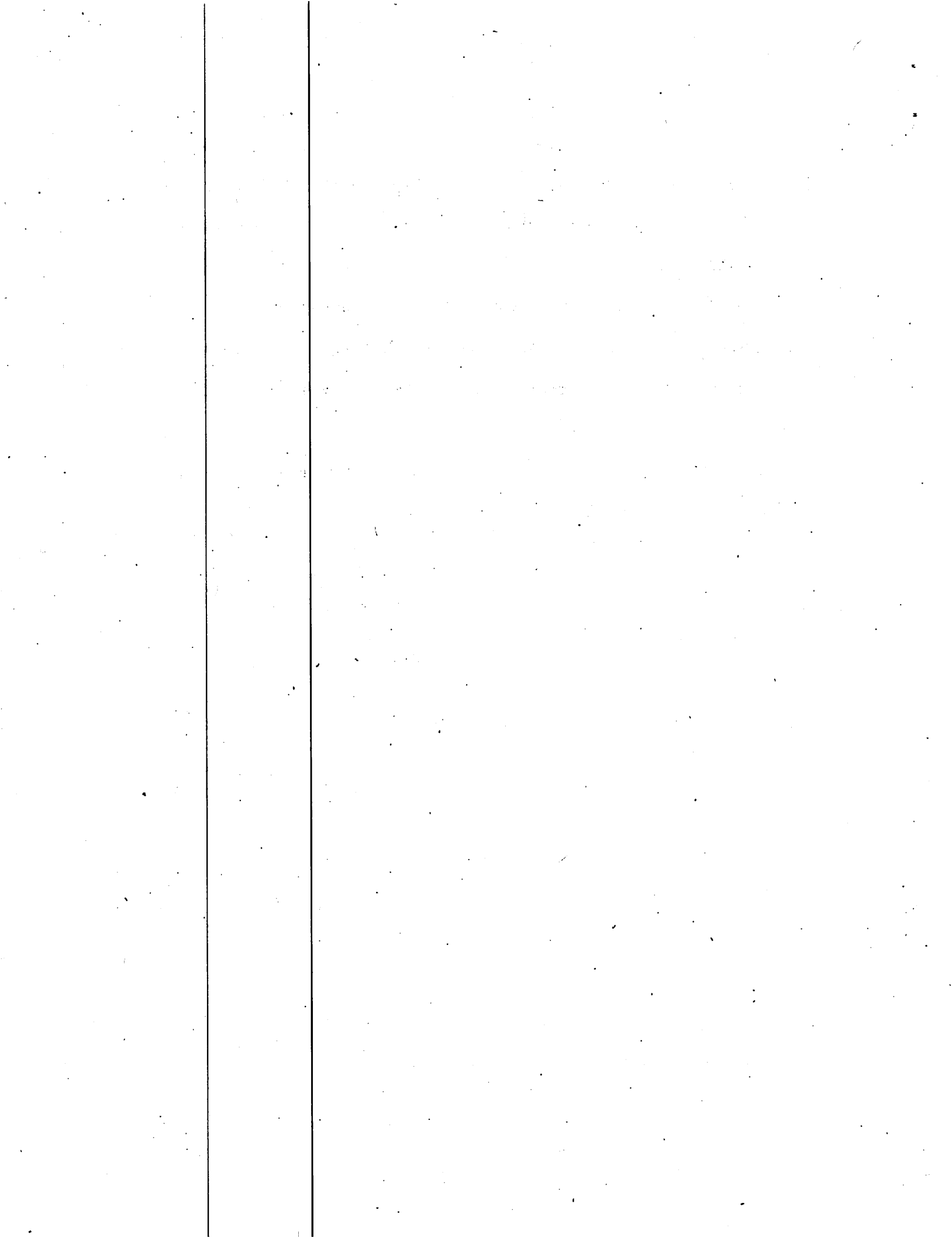
October 20, 2022
Date Decision Issued

Brian Zlotnick

Brian Zlotnick
Administrative Law Judge

BMZ/emh
#201364

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



PROPOSED ORDER

WHEREFORE, this 7th day of December, 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***

