

IN THE MATTER OF THE CLAIM
OF ROGER DUROSKO,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF
CHAD BARRICK, CONTRACTOR
T/A BARRICK AND SONS LAWN
SERVICE, LLC
RESPONDENT

* BEFORE JOHN T. HENDERSON, JR.
* ADMINISTRATIVE LAW JUDGE
* THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
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* OAH No.: LABOR-HIC-02-21-13458
* MHIC No.: 20(75)1004
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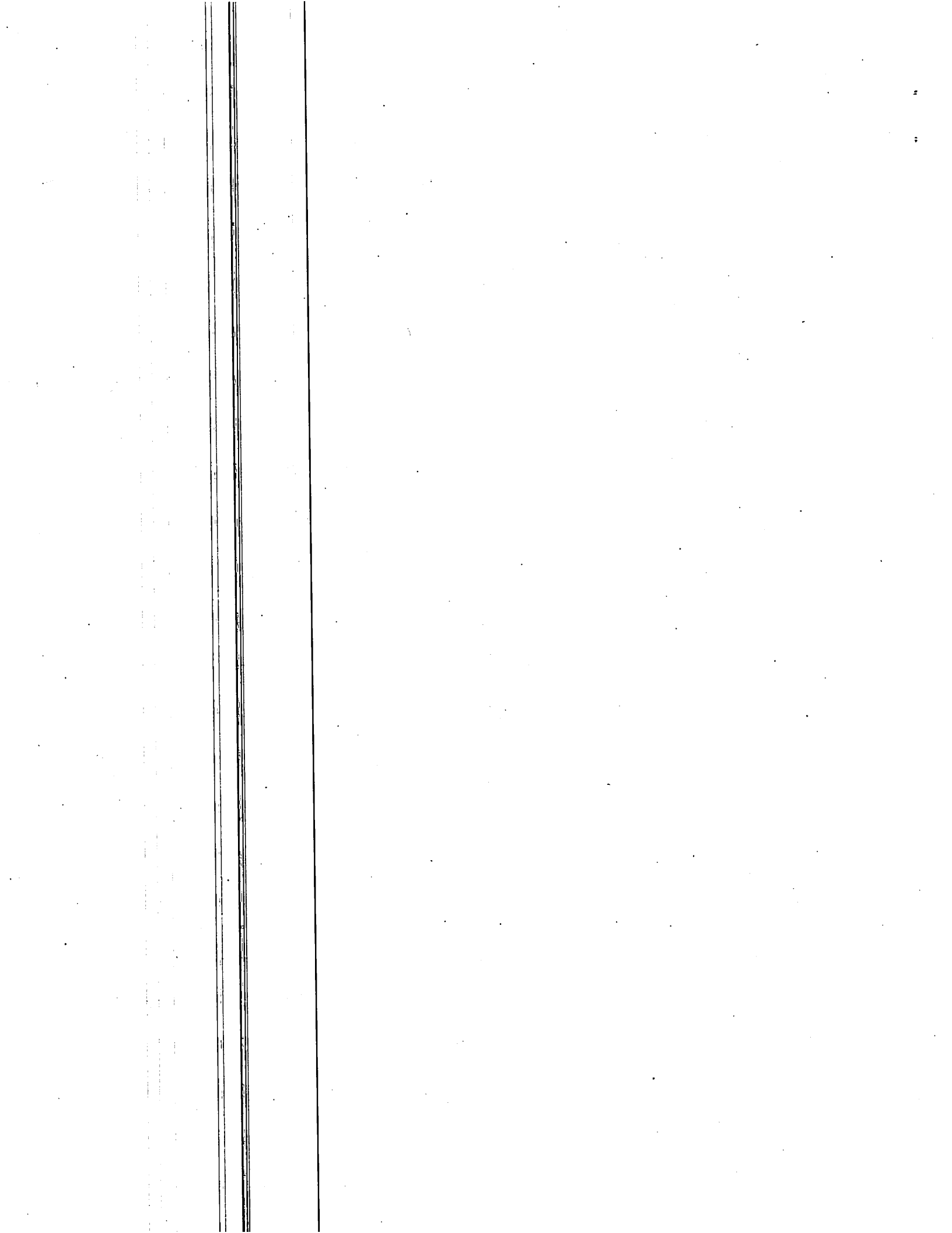
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PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
PROPOSED FINDINGS OF FACT
DISCUSSION
PROPOSED CONCLUSION OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On May 4, 2020, Roger Durosko (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) under the jurisdiction of the Department of Labor (Department), for the reimbursement of \$7,784.88 of actual losses allegedly suffered because of a home improvement contract with Chad Barrick, t/a Barrick and Sons Lawn Service, LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411



(2015).¹ On May 17, 2021, the MHIC issued a Hearing Order on the Claim. On May 28, 2021, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

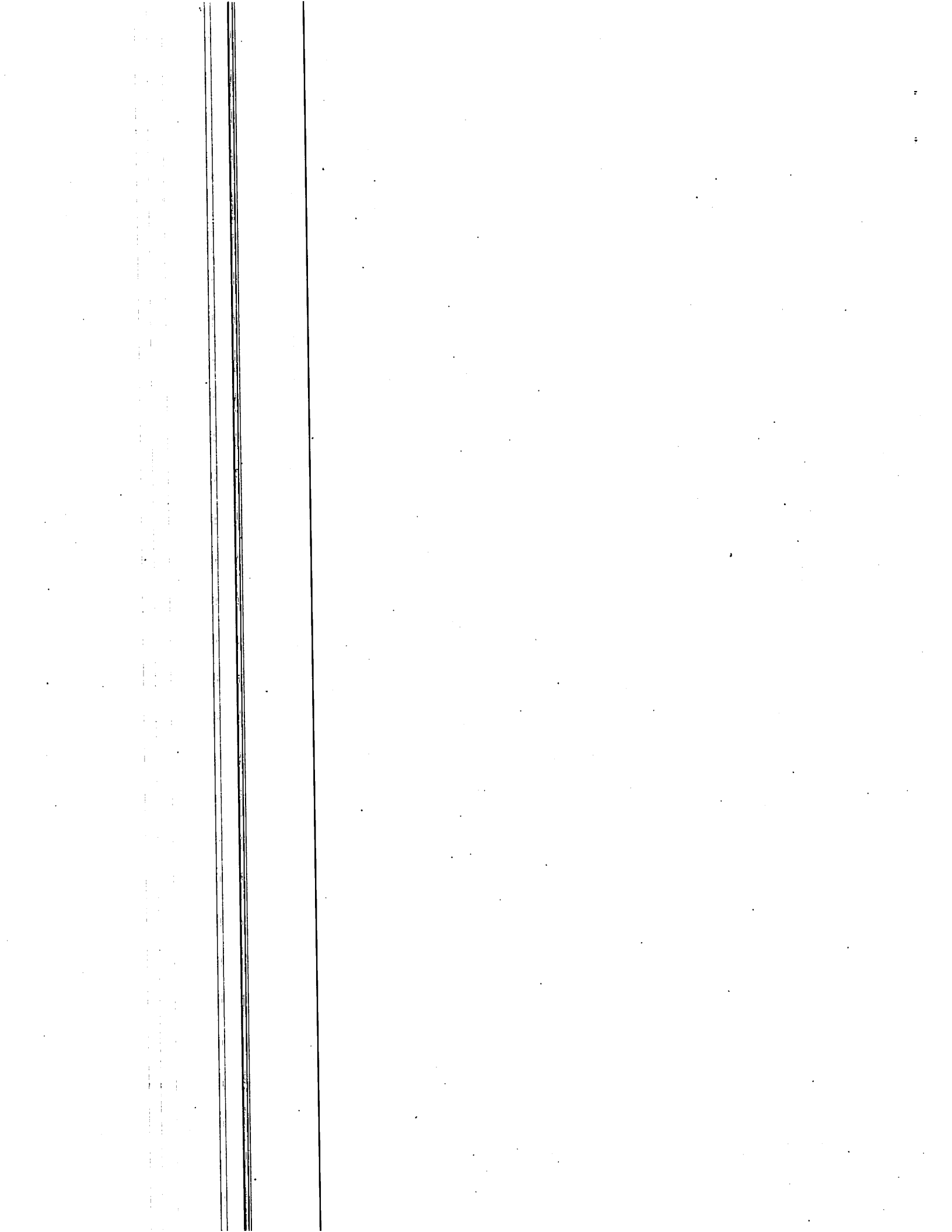
On July 30, 2021, I held a hearing at the OAH in Rockville, Maryland. Bus. Reg. §§ 8-407(a), 8-312; Code of Maryland Regulations (COMAR); COMAR 28.02.01.20. The Claimant appeared and represented himself. The Respondent appeared and was represented by Nicholas Toms, Vice-President of Barrick & Sons Lawn Service, LLC, pursuant to a Special Power of Attorney dated July 30, 2021. Shara Hendler, Assistant Attorney General for the Department, represented the Fund.

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021); COMAR 09.01.03; and 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?

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



SUMMARY OF THE EVIDENCE

Exhibits²

I admitted into evidence exhibits offered by the Claimant, as follows:

- Cl. Ex. 1 Claimant's narrative statement, undated
 - 1a Contract for home improvement between Claimant and Respondent, May 16, 2016
 - 1b Respondent's Proposal for home improvement, undated
 - 1c Diagram drawing of proposed home improvement, prepared by Claimant, undated
 - 1d Claimant's check number 303, payable to Respondent in the sum of \$8,400.00, March 30, 2016
 - 1e Invoice from Respondent, for \$25,200.00, June 1, 2016
 - 1f Claimant's check number 317, payable to Respondent in the sum of \$16,800.00, for balance owed for home improvement, June 4, 2016
 - 1g Emails between Respondent to Claimant, July 15, 16 and 17, 2019; electronic proposal for home improvement from the Respondent to the Claimant, undated; emails between Respondent to Claimant, June 5, 2016; October 23 and 24, 2018

- Cl. Ex. 3 Claimant's Complaint Form and Narrative filed with the Department, February 18, 2020;

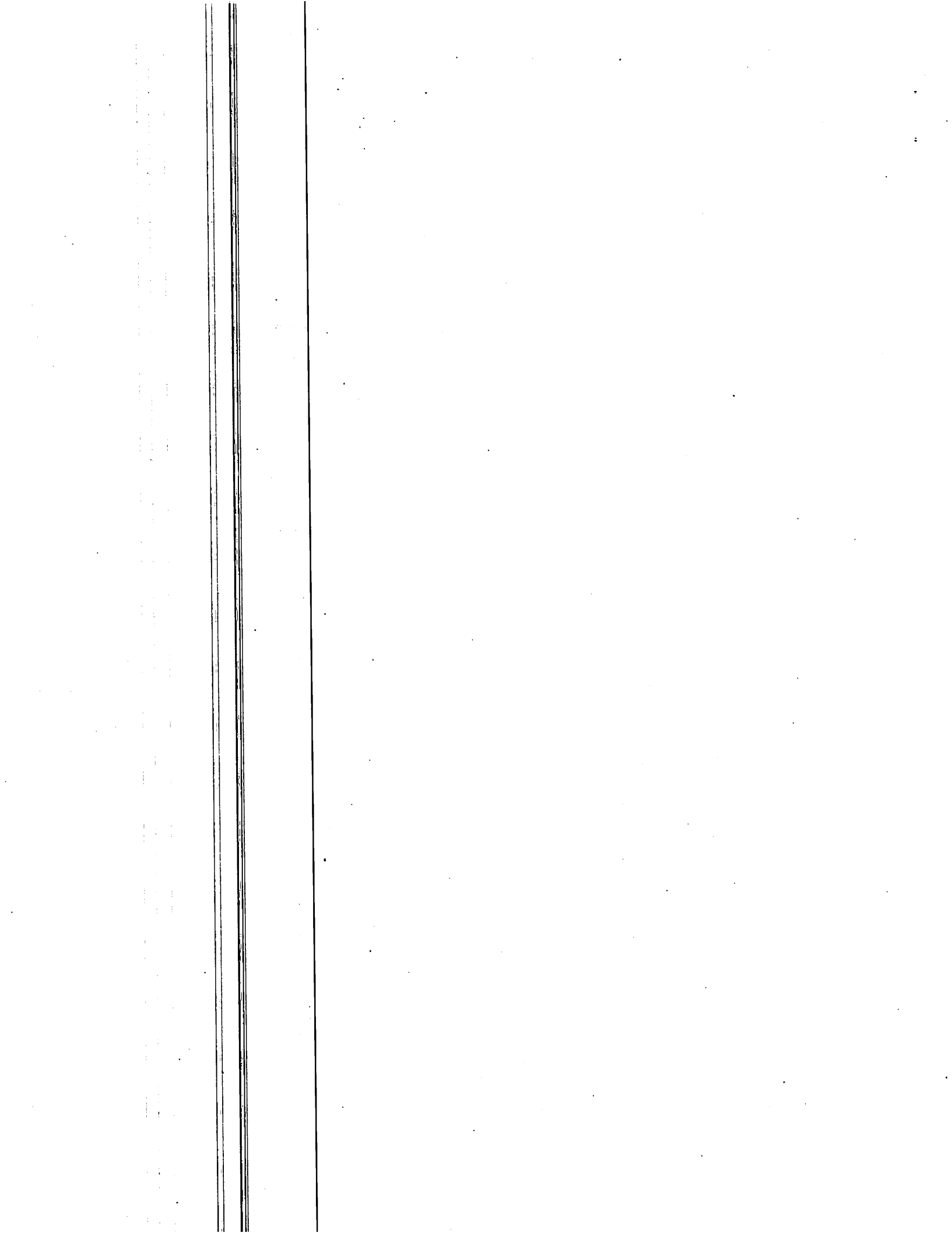
- Cl. Ex. 6 Letter from the Respondent to MHIC, March 5, 2020

- Cl. Ex. 8 Contractor Repair Estimates, prepared by Claimant, undated

- Cl. Ex. 9
 - 9a Estimate from Xtra Care Landscaping & Design, Inc. (Xtra), March 18, 2020
 - 9b Design drawing from Xtra, revised March 5, 2020
 - 9c Check number 486, from the Claimant to Xtra, in the sum of \$4,339.94, March 18, 2020

² The following exhibits, being included in the record herein, were offered by the Claimant but not admitted into evidence:

- Cl. Ex. 2 Letter from the Better Business Bureau to the Claimant; Complaint Activity Report for case number 36156988, August 26, 27 and 29, 2019
- Cl. Ex. 4 Letter from MHIC to the Respondent, March 5, 2020
- Cl. Ex. 5 Email to and from the Claimant and MHIC, March 29 and 24, 2020
- Cl. Ex. 7 Email from MHIC to the Respondent, March 11, 2020
- Cl. Ex. 10 Estimate from Future Contractors, LLC, February 18, 2020
- Cl. Ex. 11 Estimate from Bluecollar Scholar Landscapes, February 2, 2020
- Cl. Ex. 12 Proposal from Metro Landscapes & Construction, Inc., March 24, 2020
- Cl. Ex. 13 Contract between Claimant and 7th State Builders, LLC, February 27, 2020
- Cl. Ex. 14 Letter from Xtra, not addressed, May 1, 2020



- 9d Check number 489 from the Claimant to Xtra, in the sum of \$4,339.94, April 17, 2020
- 9e Invoice number 9534 from Xtra to the Claimant, April 17, 2020
- Cl. Ex. 15 Claimant's Home Improvement Claim Form, May 4, 2020
- Cl. Ex. 16 Timeline of Events prepared by Claimant
- Cl. Ex. 17 Sixteen photographs of home improvement

I admitted into evidence exhibits offered by the Respondent as follows:

- Resp. Ex. 1. Letter from Andrew T. Nichols, Esquire, attorney for the Respondent, to MHIC, May 29, 2020; emails between Respondent to Claimant, July 17, 2019; electronic proposal for home improvement from the Respondent to the Claimant, undated; emails to and from Respondent to Claimant, June 5, 2016; October 23 and 24, 2018; July 15 and 16, 2019; ten photographs of subject home improvement

I admitted into evidence exhibits offered by the Fund as follows:

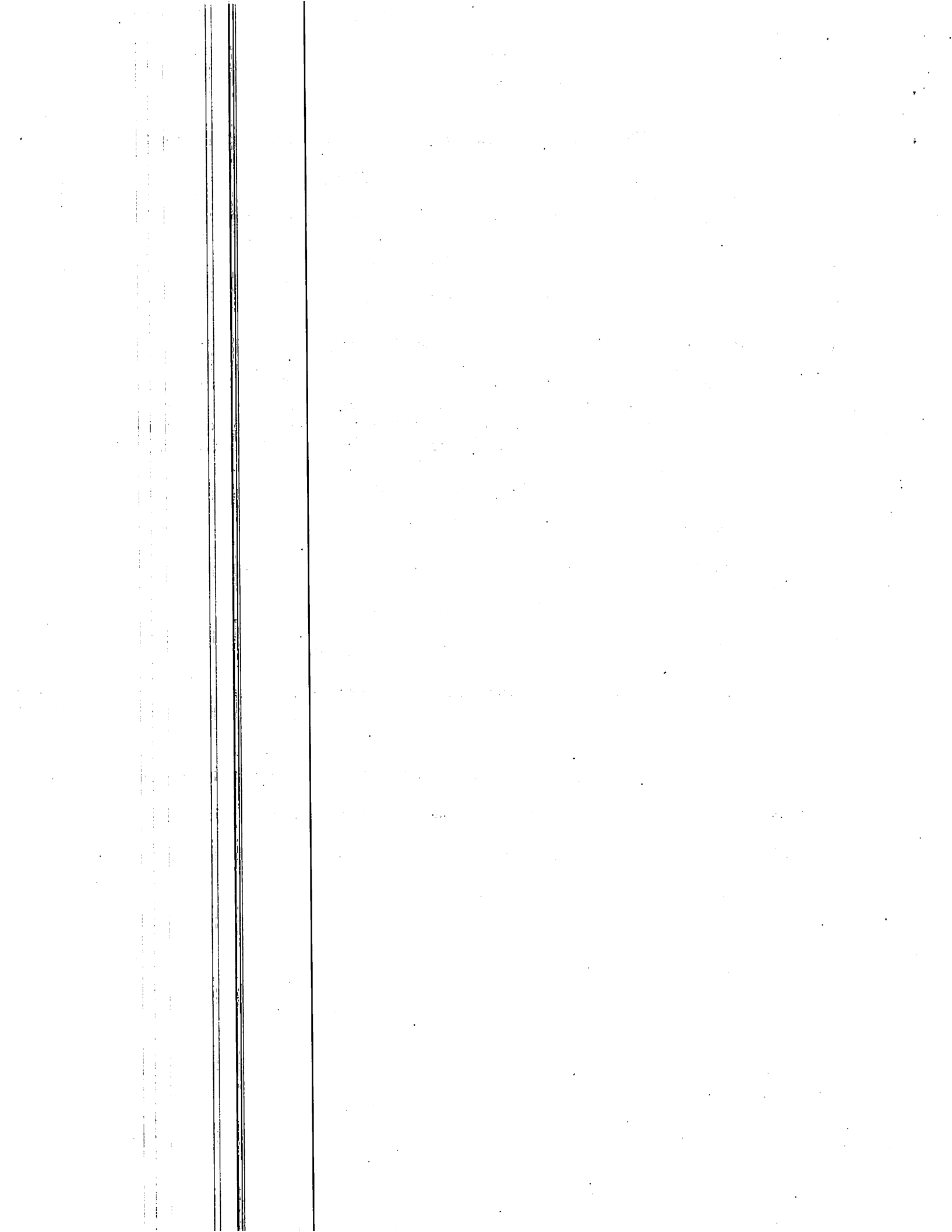
- GF Ex. 1 MHIC Hearing Order, May 17, 2021
- GF Ex. 2 OAH Notice of Hearing, June 15, 2021
- GF Ex. 3 Home Improvement Claim Form, May 4, 2020
- GF Ex. 4 Respondent's licensing registration, printed July 16, 2021

Testimony

The Claimant testified on his own behalf.³ Nicholas Toms, Vice-President of the Respondent LLC testified on behalf of the Respondent. Chad Barrick owner, testified on his behalf as the contractor and on behalf of the LLC.

The Fund did not present any witnesses.

³ The Claimant's spouse, Jean Durosko, was present and observed the hearing.



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 contractor's license number 5537876, trading as Barrick & Sons Lawn Service, LLC, license number 05-121497.

2. The Claimant is not related to the Respondent.

3. The Claimant's property subject to this matter is on Bradenton Court, Gaithersburg, Maryland (the Property).

4. The Claimant has not filed other claims against the Respondent outside of these proceedings.

5. On March 30, 2016, the Claimant and the Respondent contracted for the Respondent to do, in summary, the following home improvement:

- Construct a walkway from the front of the Claimant's home to the street
- Remove and replace the front walkway along the house and remove and replace the side steps and wood timber retaining walls with pavers

6. Further details of the contracted home improvement are provided within the Contract (Cl. Ex. 1a).

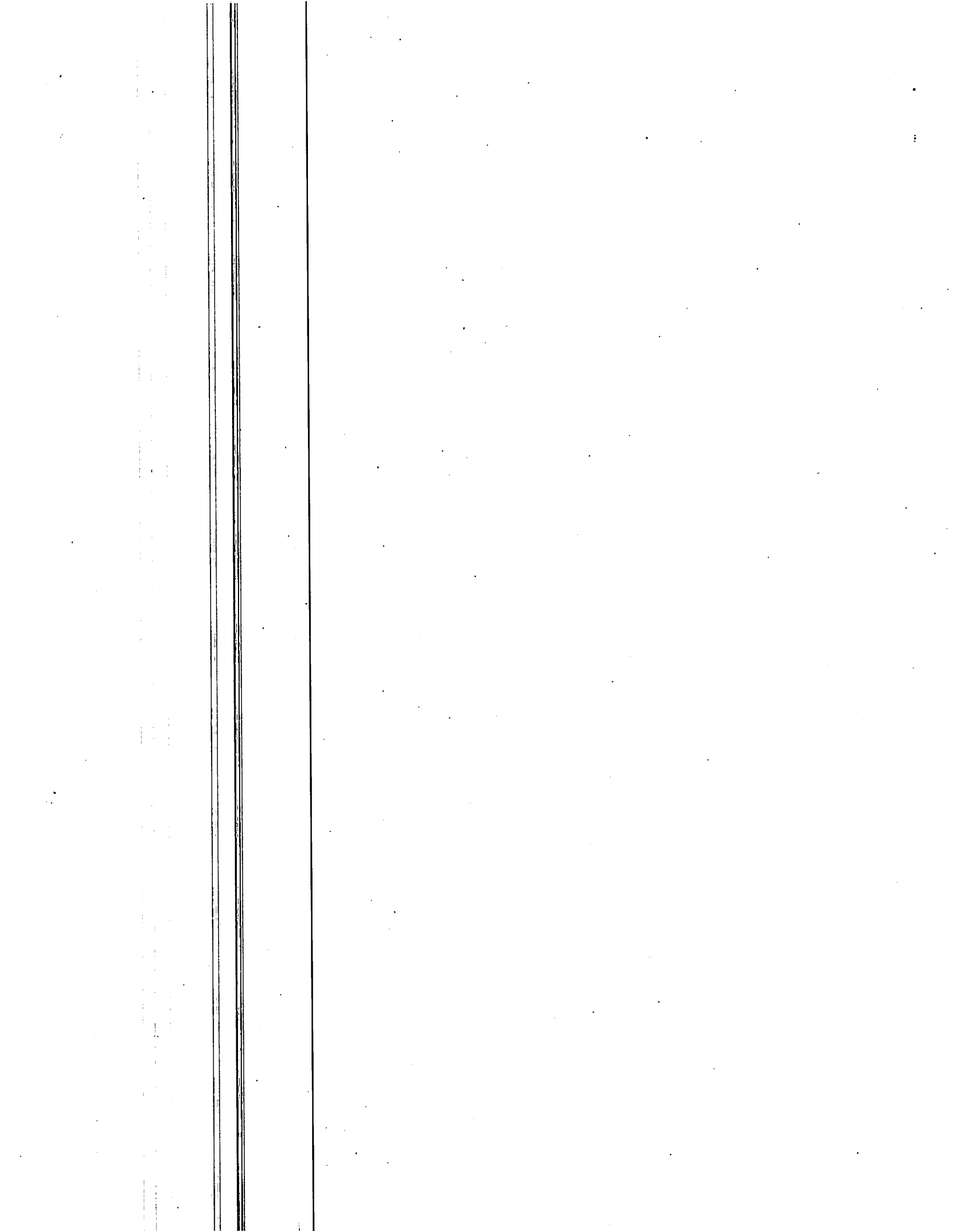
7. The Contract did not contain an arbitration clause.

8. The Contract price was \$25,200.00, determined as follows:

1/3 Deposit	\$ 8,400.00
Upon substantial completion	<u>\$16,800.00</u>
Total	\$25,200.00

9. The Contract included a five-year workmanship warranty.

10. The Claimant paid the Respondent the one-third deposit of \$8,400.00, on March 30, 2016.



11. The Respondent began the home improvement on May 18, 2016 and completed it on June 3, 2016.

12. On June 5, 2016, the Claimant emailed the Respondent to report his being very happy with the construction of the home improvement and the favorable work ethic of the Respondent's workers. The Claimant also expressed that the Respondent completed the home improvement to the Claimant's satisfaction pursuant to the Contract.

13. On June 14, 2016, the Claimant paid the Respondent the balance owed of \$16,800.00, having paid a total of \$25,200.00 pursuant to the Contract.

14. In June 2018, approximately two years from the date of completion of the home improvement, the Claimant noticed problems arising from the Respondent's construction.

15. The step blocks and pavers were sliding to the front and to the side of the walkway and there was a lack of Polymeric sand⁴ in the paver joints.

16. On October 23, 2018, the Claimant emailed Mr. Toms, Vice-President of the Respondent, to report the problems with the home improvement.

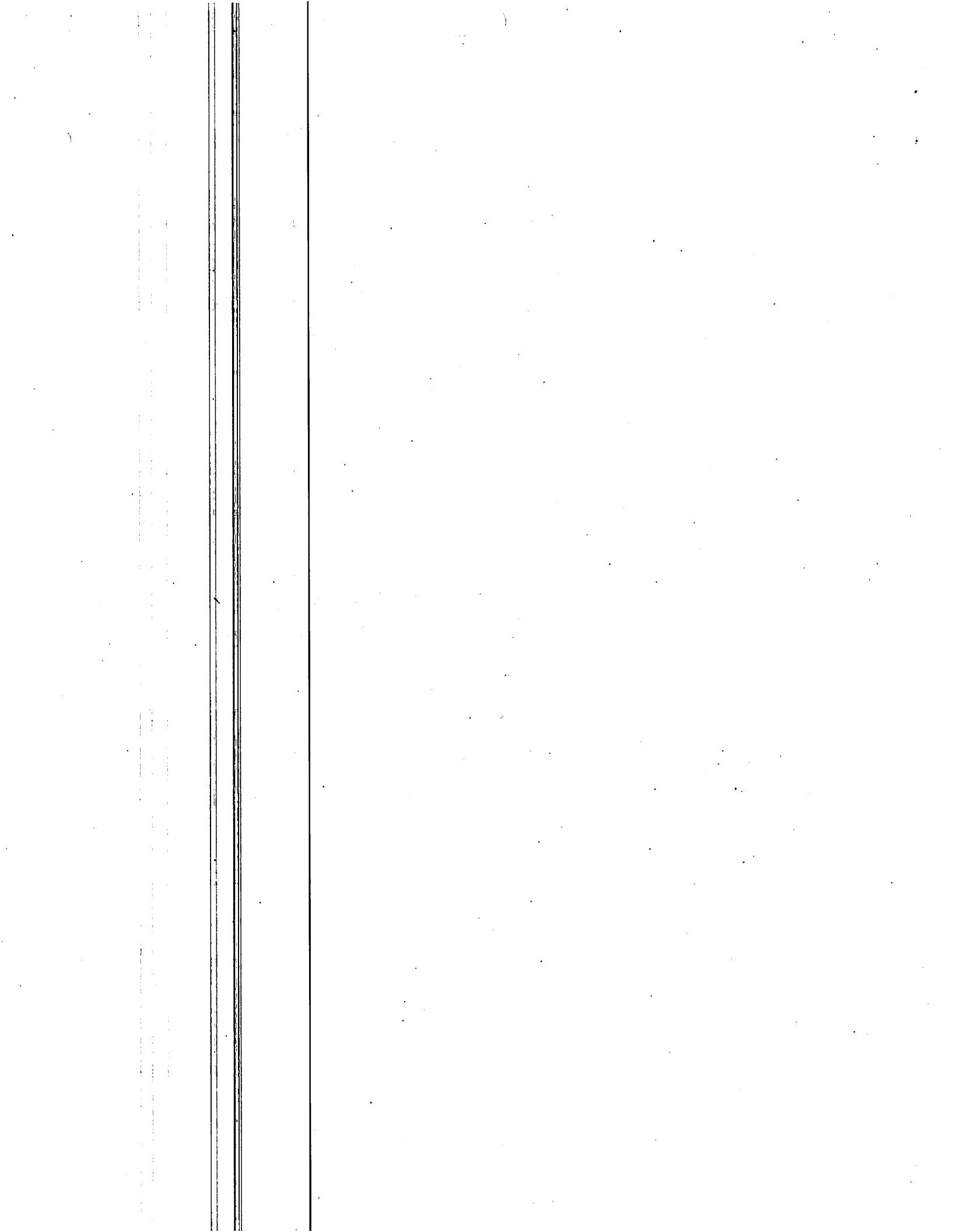
17. On October 30, 2018, Mr. Toms sent Dale Hillis, an employee of the Respondent, to investigate and determine any warranty repair needed for the paver walkway.

18. Mr. Hillis proceeded to make repairs by lifting certain pavers, adding some additional gravel, then recompacting, resettling and replacing certain pavers.

19. Mr. Hillis' warranty repair work was not done to the satisfaction of the Claimant.

20. On July 15, 2019, the Claimant emailed Mr. Toms to inquire about further repairs to the walkway, specifically reporting that there was a lack of Polymeric sand within the walkway's paver joints.

⁴ According to the Claimant, Polymeric sand is a special sand that is impregnated with a hardener. When the sand is placed between the pavers, it is sprayed with water and it hardens.



21. Pursuant to the July 15, 2019 email from the Claimant, Mr. Toms dispatched Mr. Hillis a second time to make the repairs.

22. In July 2019, neither the Claimant, Mr. Hillis, nor the Respondent agreed on a proper warranty repair protocol for the walkway and pavers.

23. On July 17, 2019, Mr. Toms emailed the Claimant to advise him of the termination, after year three, of the five-year workmanship warranty. The Claimant told the Respondent not to return to the property.

24. In August 2019, the Claimant made efforts to kill the moss growing between the pavers of the walkway by applying a liquid chemical solution.

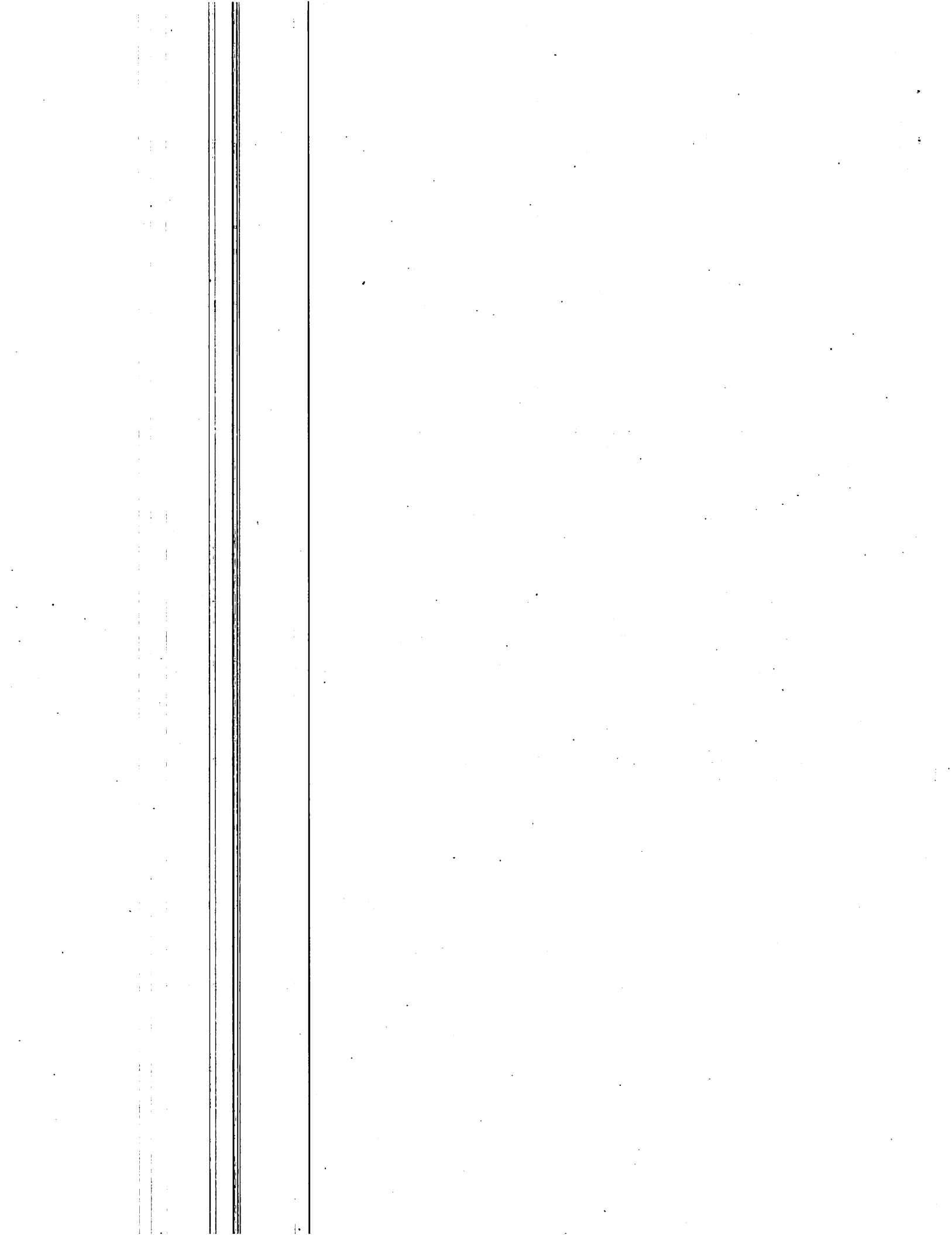
25. On April 9, 2020, the Claimant contracted with Xtra to make repairs to the step block and pavers constructed by the Respondent. Xtra completed that work on April 16, 2020. The cost of the work performed by Xtra was \$7,784.88.

26. On March 18, 2020, the Claimant paid Xtra \$4,339.94 and on April 17, 2020, paid Xtra \$4,339.94 for total payments of \$8,679.88 in satisfaction of the April 9, 2020 contract with Xtra.

27. The sum of \$895.00 of the April 17, 2020 Xtra invoice is the charge for power washing and the installation of polymeric sand. The Claimant is not claiming that amount as an actual loss.

DISCUSSION

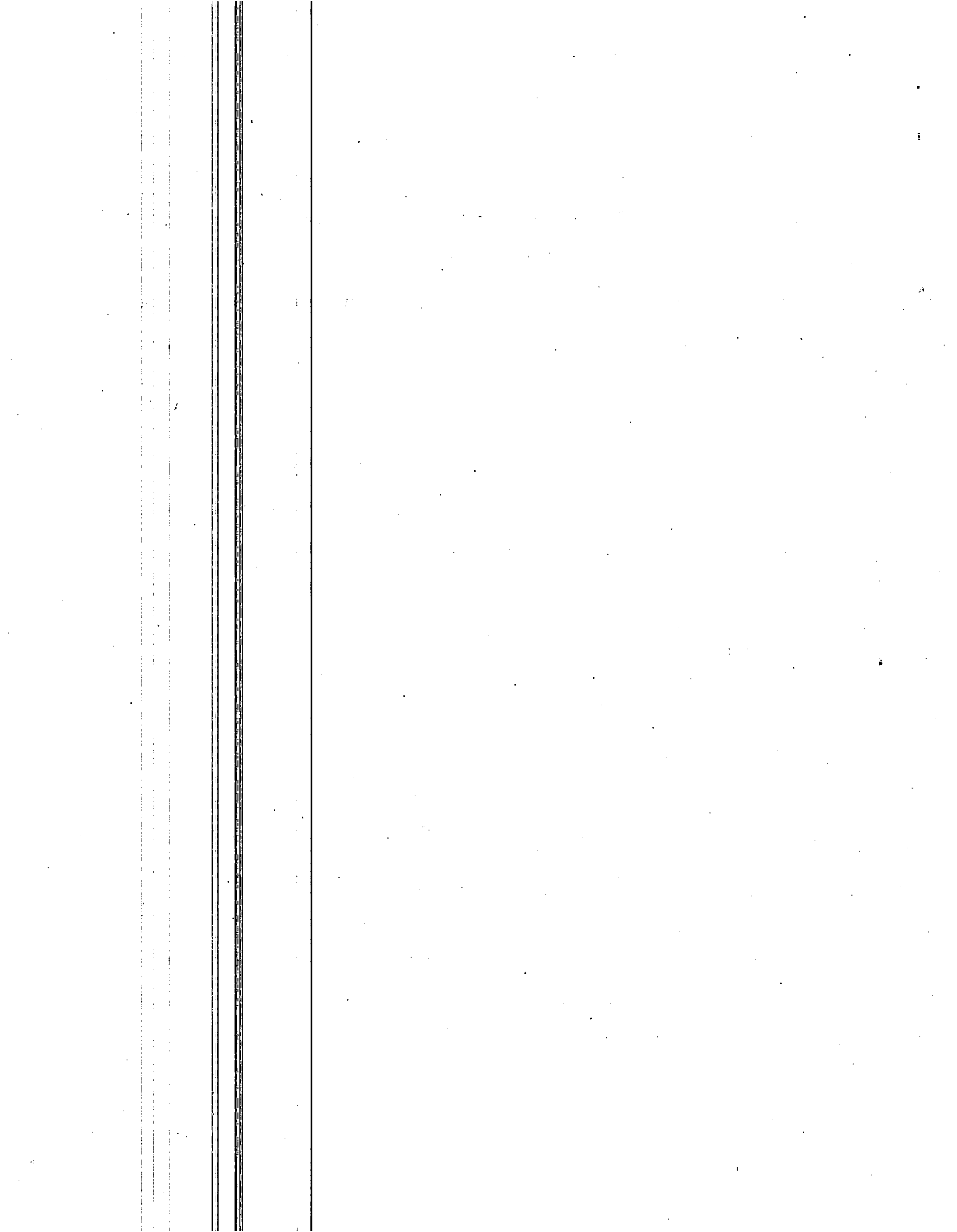
In 1985, the Maryland General Assembly enacted legislation that first established the Fund. By this means, the legislature sought to create a readily available reserve of money from which homeowners could seek relief for actual losses sustained because of unworkmanlike, inadequate, or incomplete home improvement work performed by a licensed home improvement contractor. Md. Code Ann., Bus. Reg. §§ 8-401 to 8-411 (2015). Under this statutory scheme, licensed contractors are assessed fees, which subsidize the Fund. Homeowners who sustain losses by the actions of licensed contractors may seek reimbursement for their "actual losses" from this



pool of money, for no more than \$20,000.00 or the amount paid by or on behalf of the claimant to the contractor. Md. Code Ann., Bus. Reg. § 8-405(e)(1), (5). A homeowner is authorized to recover from the Fund when he or she sustains an actual loss that results from an act or omission by a licensed contractor. Md. Code Ann., Bus. Reg. § 8-405(a). When the Fund reimburses a homeowner as a result of an actual loss caused by a licensed contractor, the responsible contractor is obligated to reimburse the Fund. Md. Code Ann., Bus. Reg. § 8-410. The MHIC may suspend the license of any such contractor until he or she reimburses the Fund in full, with annual interest as set by law. Md. Code Ann., Bus. Reg. § 8-411(a).

Recovery against the Fund is based on “actual loss,” as defined by statute and regulation. “[A]ctual loss’ means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.” Md. Code Ann., Bus. Reg. § 8-401. “By employing the word ‘means,’ as opposed to ‘includes,’ the legislature intended to limit the scope of ‘actual loss’ to the items listed in section 8-401.” *Brzowski v. Md. Home Improvement Comm’n*, 114 Md. App. 615, 629 (1997). The Fund may only compensate claimants for actual losses incurred as a result of misconduct by a licensed contractor. COMAR 09.08.03.03B(2).

At a hearing on a claim, the claimant has the burden of proving the validity of the claim by a preponderance of the evidence. Md. Code Ann., State Gov’t §10-217 (2021); COMAR 09.08.03.03A(3). “[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.” *Coleman v. Anne Arundel Cty. Police Dep’t.*, 369 Md. 108, 125, n. 16 (2002) (quoting *Maryland Pattern Jury Instructions* 1:7 (3d ed. 2000)).



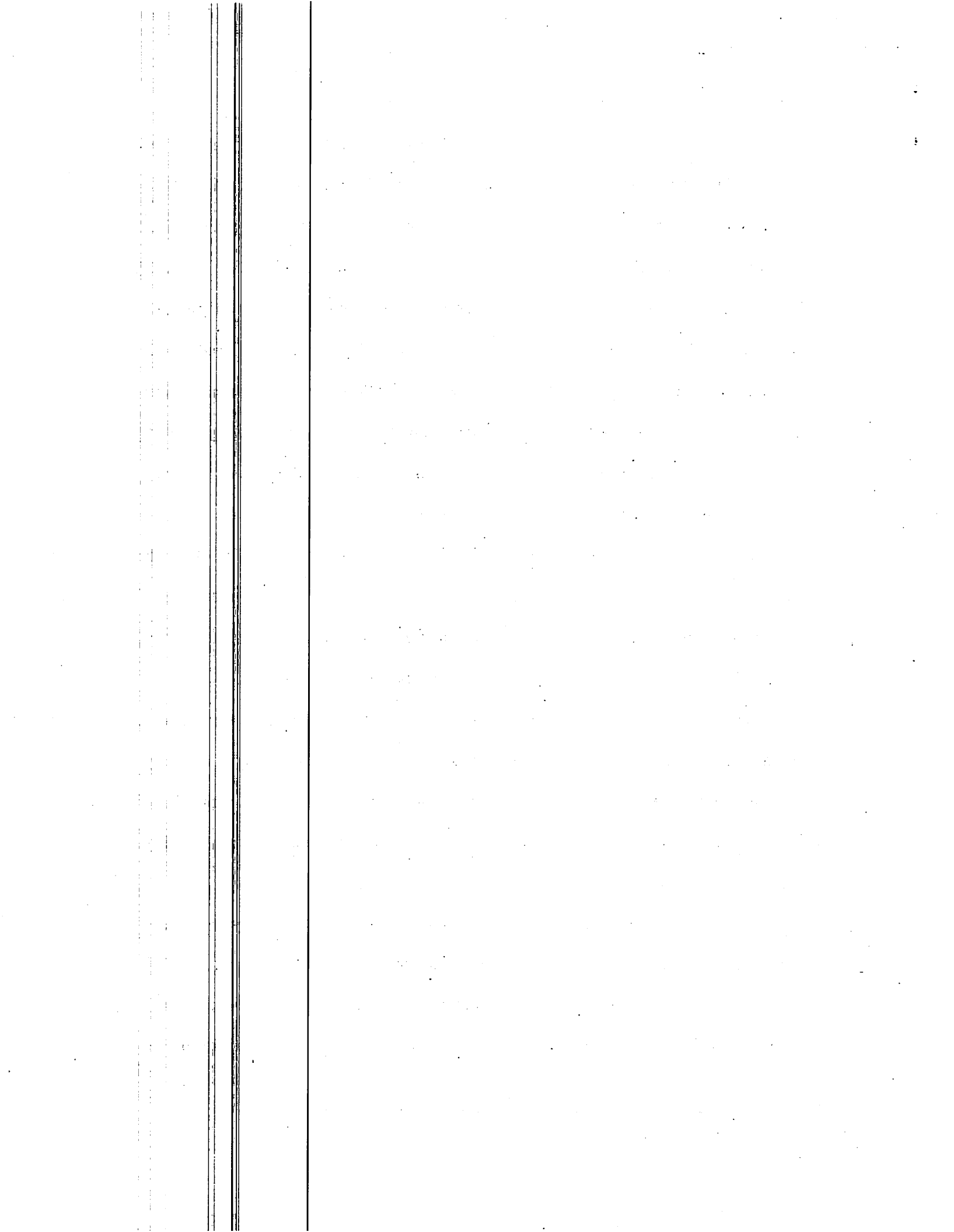
There is no dispute that the Respondent held a valid MHIC contractor's license in 2016 when he and his company entered into the Contract with the Claimant. Md. Code Ann., Bus. Reg. § 8-405(a). There is no dispute that the Claimant resides in the subject property and has no procedural impediment barring him from recovering from the Fund. Md. Code Ann., Bus. Reg. § 8-405(a), (f)(2)(i). The next issue is whether the Respondent performed an unworkmanlike, inadequate, or incomplete home improvement, and if so, whether the Respondent made good faith efforts to resolve the claim. The claim may be denied if the Claimant unreasonably rejected good faith efforts by the Respondent to resolve the claim. Md. Code Ann., Bus. Reg. § 8-405(d). For the following reasons, I find that the Claimant has not proven eligibility for compensation from the Fund because he did not suffer an "actual loss."

The Claimant testified that he contracted with the Respondent on March 30, 2016. The scope of the agreed upon work included the construction of a walkway from the front of the Claimant's home to the street; remove and replace the front walkway along the house and remove and replace the side steps and wood timber retaining walls with pavers.

The Respondent completed the agreed upon work and was paid in full by the Claimant. The Claimant also emailed the Respondent after completion, praising the work constructed by the Respondent and his employees. The photographs in evidence taken after the completion of the work show that the construction was complete, adequate, and performed in a workmanlike manner.

Two years later, the Claimant noticed certain deterioration of the walkway, to include separation of the pavers within the joints creating large gaps, giving it an unseemly look.⁵ The Claimant contacted the Respondent to make a warranty claim and argued that the deterioration or the negligent application of the product Polymeric sand was the cause of the separation of the

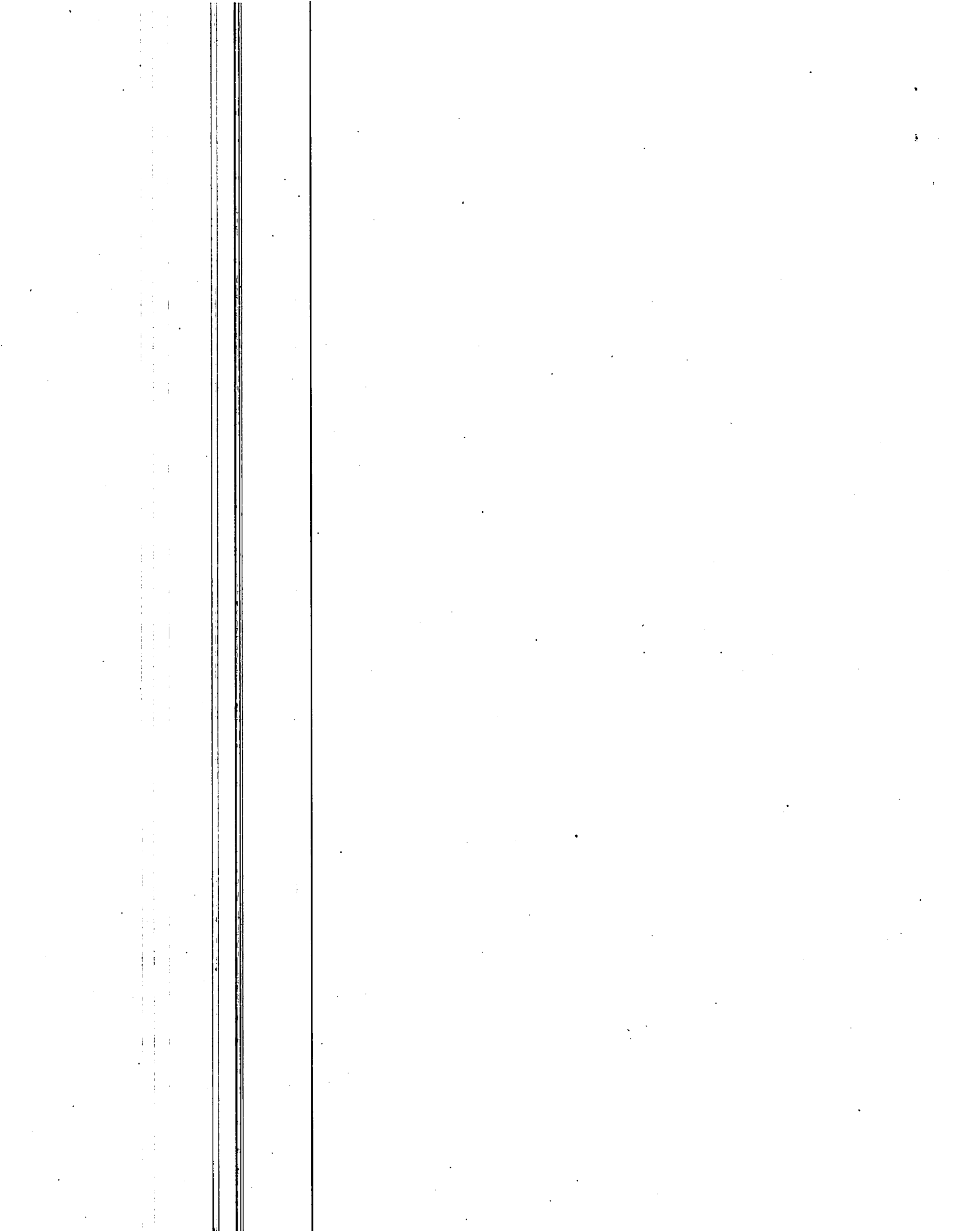
⁵ The Claimant is not making a claim for the construction of the retaining wall.



paving joints. The Respondent declined performing any repairs due to a problem with the Polymeric sand as a warranty claim and maintained the position that the use of the product and its alleged failure did not fall within the warranty agreement. The Respondent offered to provide the Claimant with some additional Polymeric sand for the Claimant to apply himself. In addition, the Respondent did send its employee, Mr. Hillis, to determine if there was any repair work that could be done under the workmanship warranty. Mr. Hillis' attempt to make workmanship warranty repairs on July 15, 2019 was not done to the Claimant's satisfaction.

The Claimant testified by reading his narrative report. His specific complaint, he testified, concerned his seeing several problems arising from the construction, in June 2018, two years after the completion of the work. His complaint concerns his discovering the step blocks and pavers sliding off to the front and to the side; and a lack of the Polymeric Sand remaining between the paver joints. The Claimant confirmed during his testimony that the Respondent completed everything to his satisfaction on June 3, 2016 and did the scope of work identified within the Contract. Nevertheless, photographs admitted into evidence and taken in June 2018, depict the pavers with moss growing between the joints and separating from each other. The Claimant further testified that on April 16, 2020, Xtra replaced the walkway for the sum of \$7,784.88.

Mr. Toms testified that he worked for the Respondent for sixteen years and serves as its vice-president and that the Respondent has been in business for twenty years. According to Mr. Toms, he sent Mr. Hillis to meet with the Claimant within two days after the Claimant contacted him about a workmanship warranty claim. He testified that he had Mr. Hillis make some repairs on July 15, 2019. According to Mr. Toms, the Claimant was not satisfied with those repairs and insisted that his warranty claim be honored and to include replacing the Polymeric sand between the joints as well as constructing the walkway as it was in its original condition on June 3, 2016.



Mr. Toms testified that the use of a product (Polymeric sand) or the product's failure does not fall within the workmanship warranty provided to the Claimant pursuant to the Contract. Mr. Toms confirmed that he voided the five-year warranty after three years, it appears, due, to his belief that the Claimant did not maintain the walkway and pressure washed it, despite the Claimant denying that he did. According to Mr. Toms' testimony, he severed the business relationship with the Claimant on July 17, 2019.

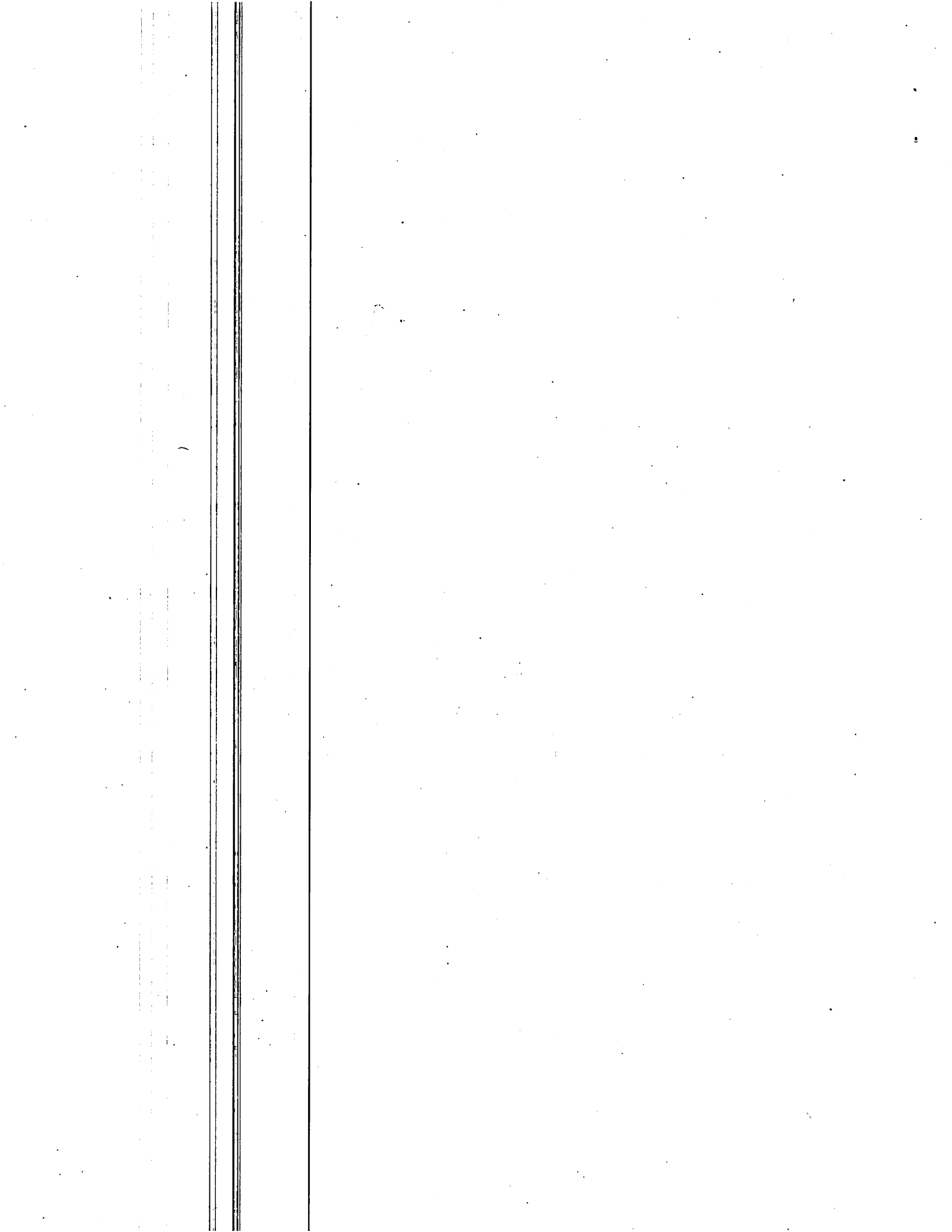
The Fund did not conclude in argument that the Claimant met his burden of proof or that he is entitled to an award from the Fund. According to the Fund, in August 2019, the Claimant, acting on the maintenance information he received from the Respondent, tried to remove the moss between the pavers of the walkway which resulted in a loss of Polymeric sand, causing a shift in the pavers by March 2020.

Nevertheless, the Claimant has not presented evidence by a preponderance, that the June 2018 deterioration and shifting of the paver walkway is the result of an unworkmanlike, inadequate, or incomplete home improvement constructed by the Respondent on June 3, 2016. In fact, the evidence shows that the work was completed to the Claimant's satisfaction.

The credible evidence shows that the Respondent actually performed and completed the contracted work on June 3, 2016. The Claimant failed to prove by a preponderance of the evidence in this matter that the Respondent performed an unworkmanlike, inadequate, or incomplete home improvement that resulted in the Claimant suffering an actual loss. Therefore, the claim is denied.

PROPOSED CONCLUSION OF LAW

I conclude that the Claimant has not shown by a preponderance of the evidence that he suffered an actual loss compensable by the Fund. Md. Code Ann., Bus. Reg. §§ 8-401- 8-411 (2015).



RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund deny the Claimant's claim of May 4, 2020; and

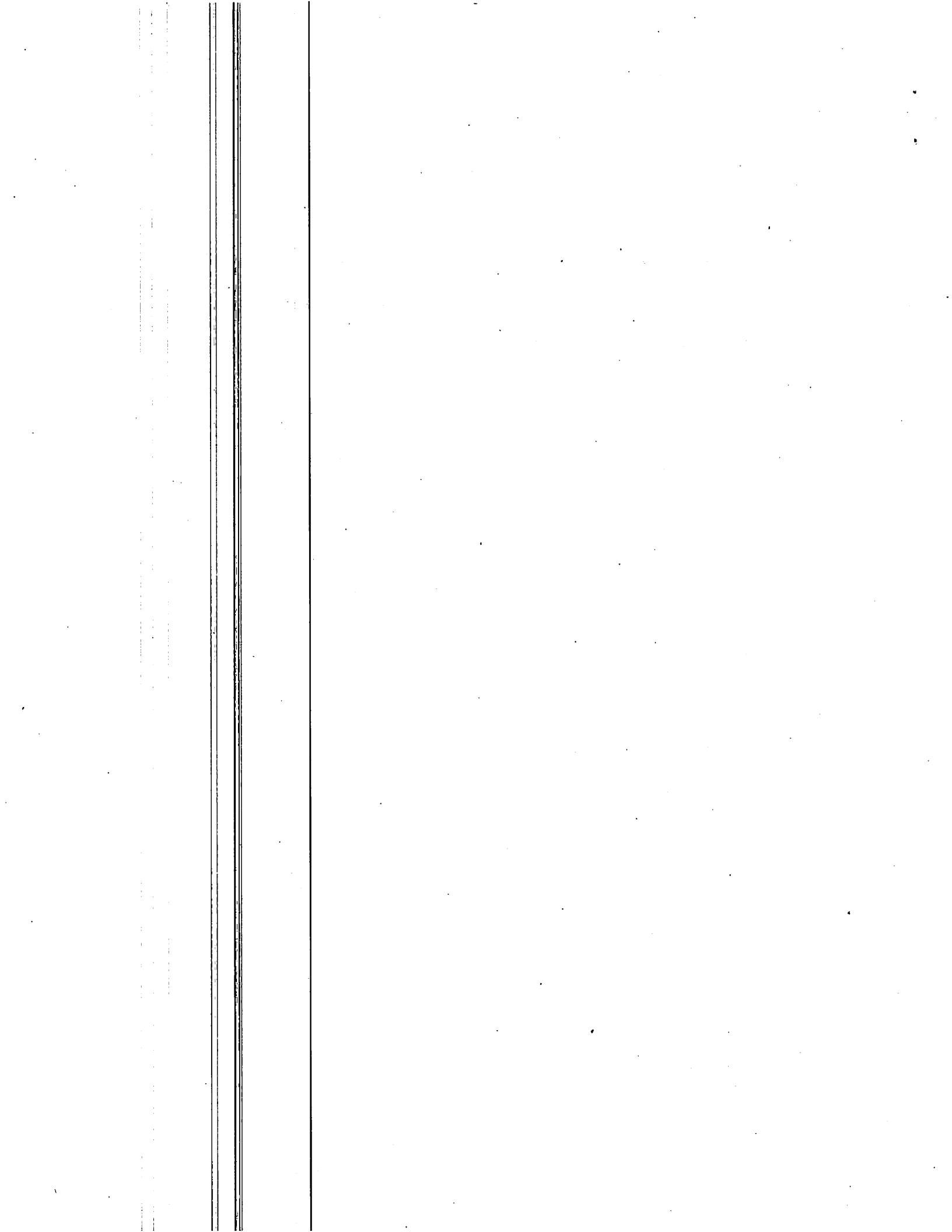
ORDER that the records and publications of the Maryland Home Improvement Commission reflect this decision.

October 27, 2021
Date Decision Issued

JTH/emh
#194999

John T. Henderson, Jr.

John T. Henderson, Jr.
Administrative Law Judge



PROPOSED ORDER

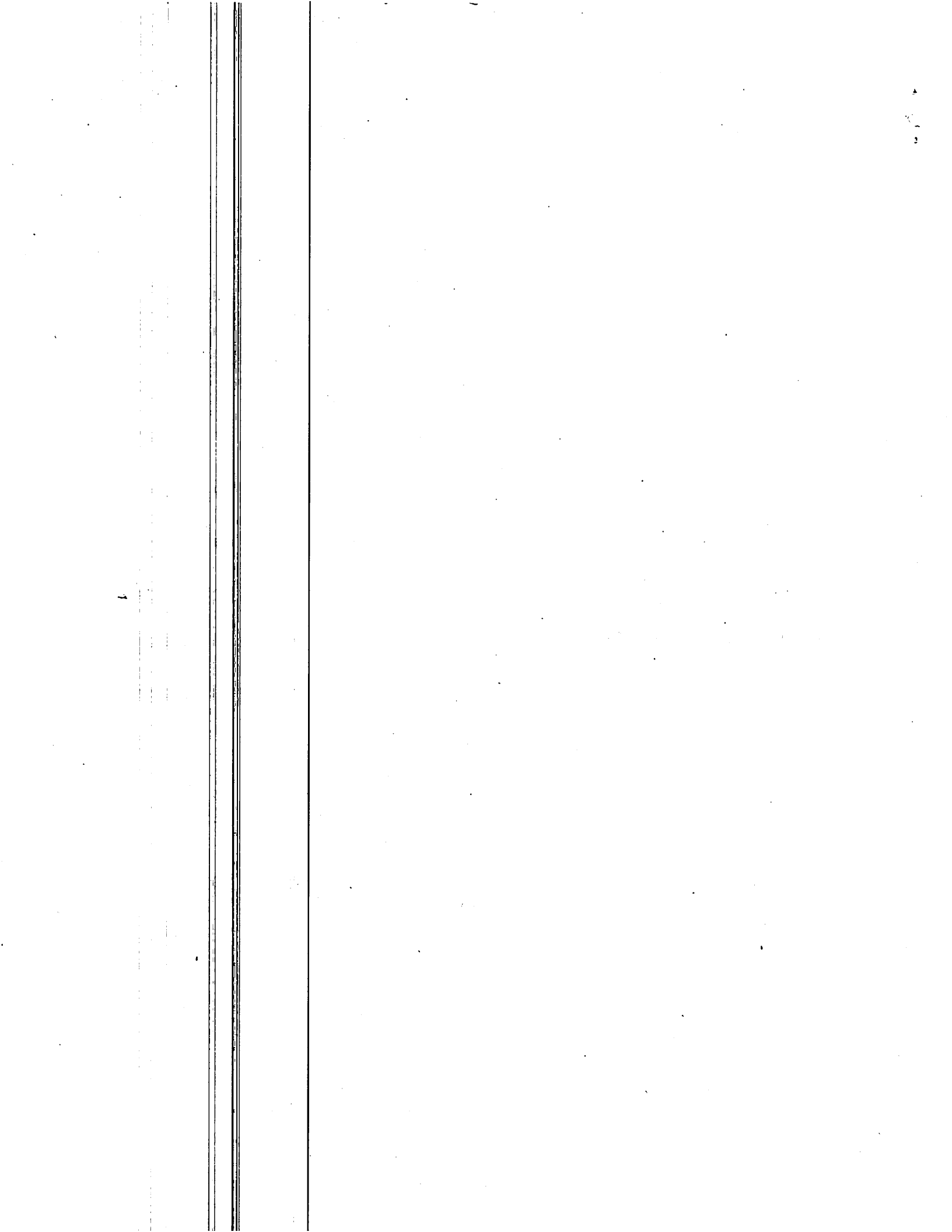
WHEREFORE, this 25th day of February, 2022, Panel B of the Maryland Home Improvement Commission approves the Recommended Order of the Administrative Law Judge and unless any parties files with the Commission within twenty (20) days of this date written exceptions and/or a request to present arguments, 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.

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Panel B

***MARYLAND HOME IMPROVEMENT
COMMISSION***



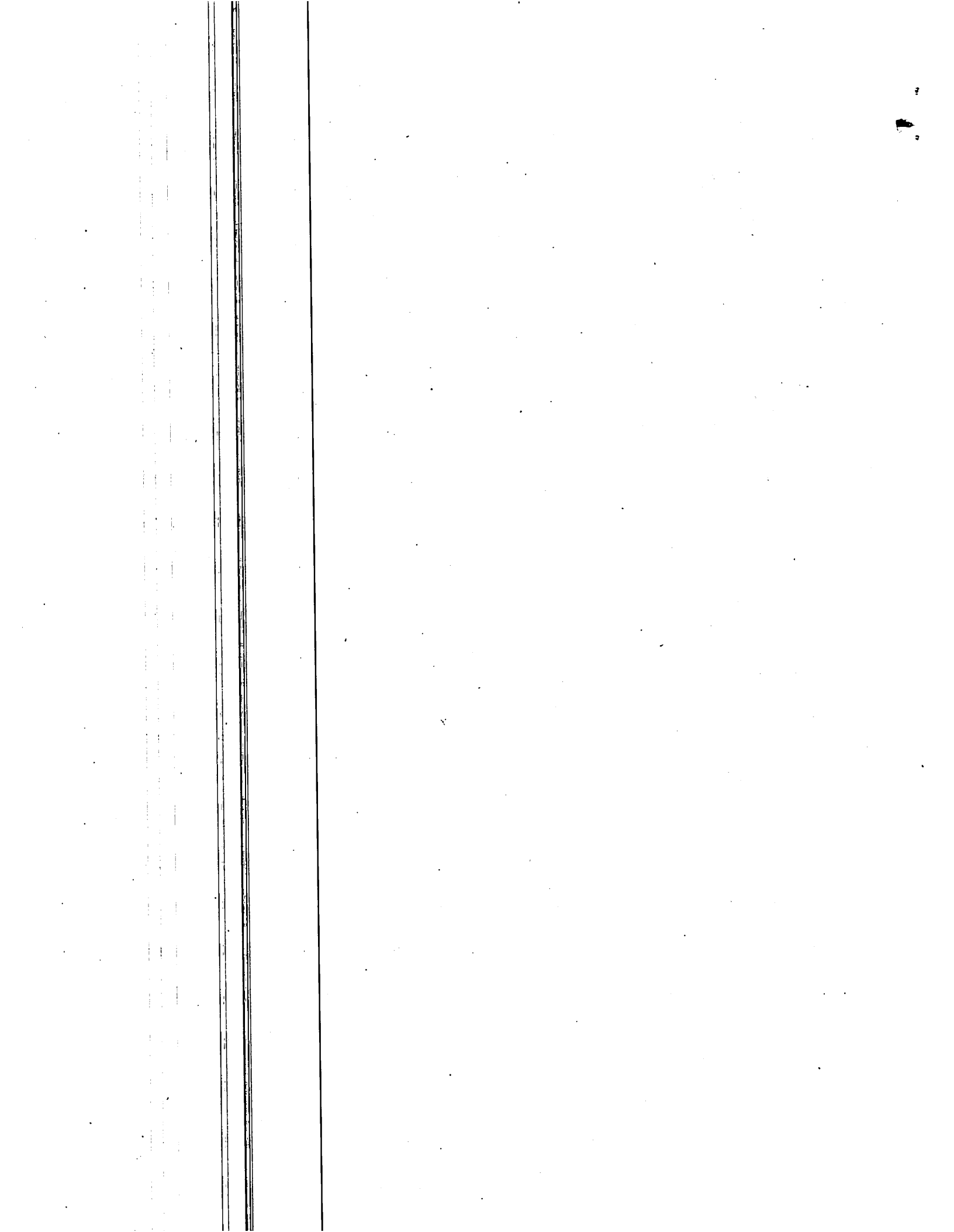
**IN THE MATTER OF THE CLAIM OF * MARYLAND HOME
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FOR THE ACTS OR OMISSIONS OF * OAH CASE NO. LABOR-HIC-
CHAD BARRICK AND BARRICK * 02-21-13458
AND SONS LAWN SERVICE, LLC ***

* * * * *

FINAL ORDER

This matter was originally heard before an Administrative Law Judge (“ALJ”) of the Office of Administrative Hearings (“OAH”) on July 30, 2021. Following the evidentiary hearing, the ALJ issued a Proposed Decision on October 27, 2021, concluding that the homeowner, Roger Duroske (“Claimant”) failed to prove he suffered an actual loss as a result of the acts or omissions of Chad Barrick and Barrick and Sons Lawn Service, LLC (collectively, “Contractor”). *ALJ Proposed Decision* p. 11. In a Proposed Order dated February 25, 2022, the Maryland Home Improvement Commission (“MHIC” or “Commission”) affirmed the Proposed Decision of the ALJ to deny an award from the Home Improvement Guaranty Fund. The Claimant subsequently filed exceptions to the MHIC Proposed Order.

On May 19, 2022, a three-member panel (“Panel”) of the MHIC held a remote hearing on the exceptions filed in this matter. The Claimant and Contractor participated without counsel. Assistant Attorney General Nicholas Sokolow 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) Claimant’s exceptions. Neither the Claimant nor the Contractor produced a copy of the transcript of the hearing before the ALJ. Therefore, the Panel’s review of the record was limited to the preliminary exhibits for the exceptions hearing, the OAH Proposed Decision, and the exhibits offered as evidence at the OAH hearing. COMAR

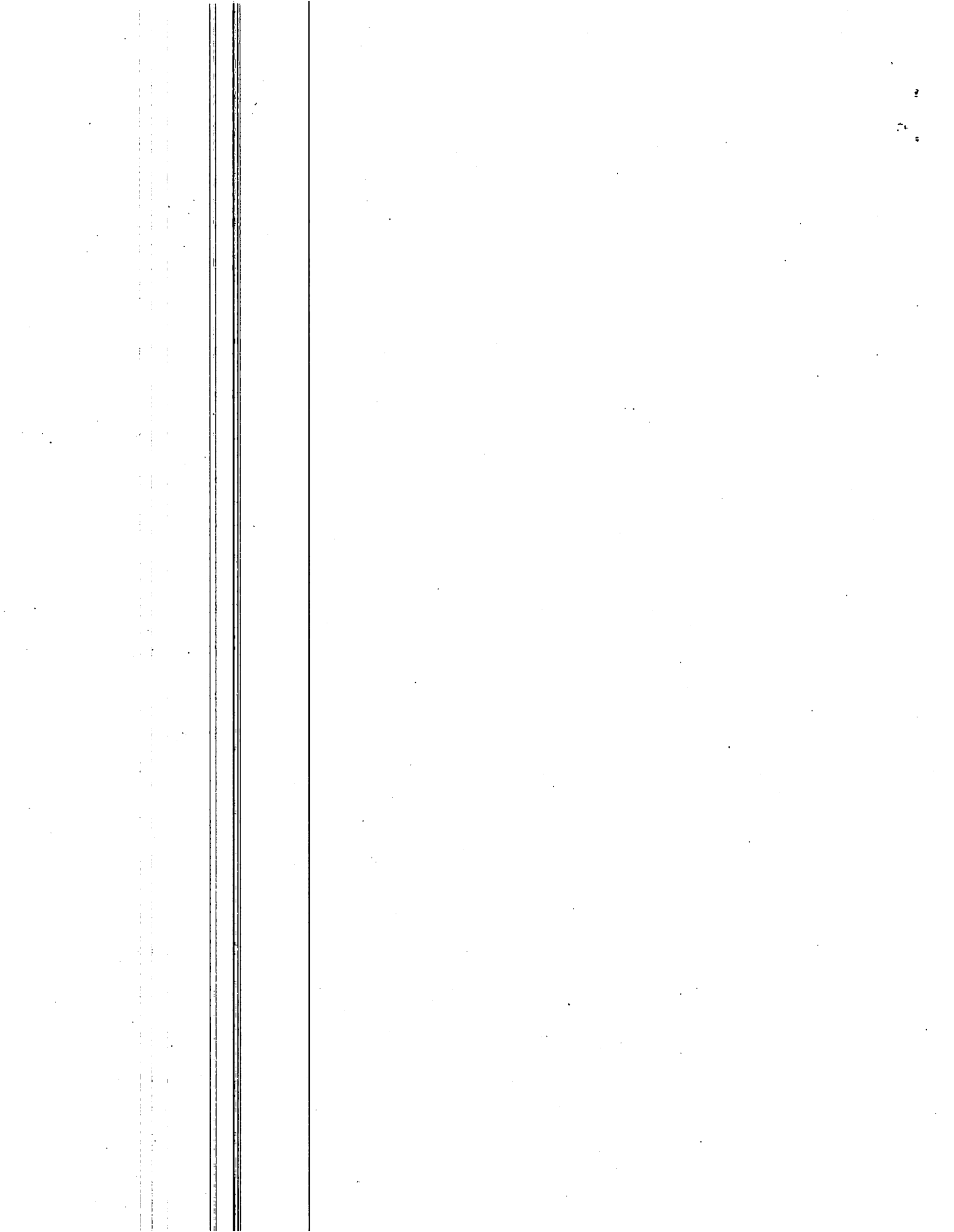


09.01.03.09(G) - (I).

The claim in this proceeding relates to a contract between the parties for the installation of an exterior walkway, steps, and retaining wall at the Claimant's home. The ALJ found that the Claimant failed to prove that the Contractor's performance under the contract was unworkmanlike. *ALJ's Proposed Decision* p. 11.

On exception, the Claimant argued that the ALJ erred in concluding that he did not prove that the deterioration of the walkway was the result of unworkmanlike performance by the Contractor because the ALJ incorrectly focused on the issue of the Polymeric sand between the pavers installed by the Contractor rather than the shifting and separation of step blocks and pavers.

The Commission agrees with the Claimant and finds that the Contractor's installation of the walkway and steps was unworkmanlike. The Claimant presented photographs that show that, approximately two years the Contractor completed the project, the outer edges of the walkway was sinking and pulling away and the steps were separating from each other. (OAH Hearing Claimant's Exhibit 17.) The Claimant also presented a contract with Xtra Care Landscaping & Design, Inc., for the repair of the wall that describes the shortcomings of the Contractor's work, including the failure to install sufficient base material, failure to sufficiently compact the base material, and failure to support the edges of the steps and walkway with a block wall. (OAH Hearing Claimant's Exhibit 9.) The Commission does not find the Contractor's assertion that the Claimant caused the sinking, sliding, and separation of the walkway and steps by pressure washing the sand from between the pavers. Rather, consistent with the observations of the contractors the Claimant had provide estimates to correct the defects as well as the Contractor's initial efforts to address the Claimant's concerns by lifting pavers and adding gravel and recompacting the gravel under the pavers, the Commission finds that the Contractor's installation of the walkway was



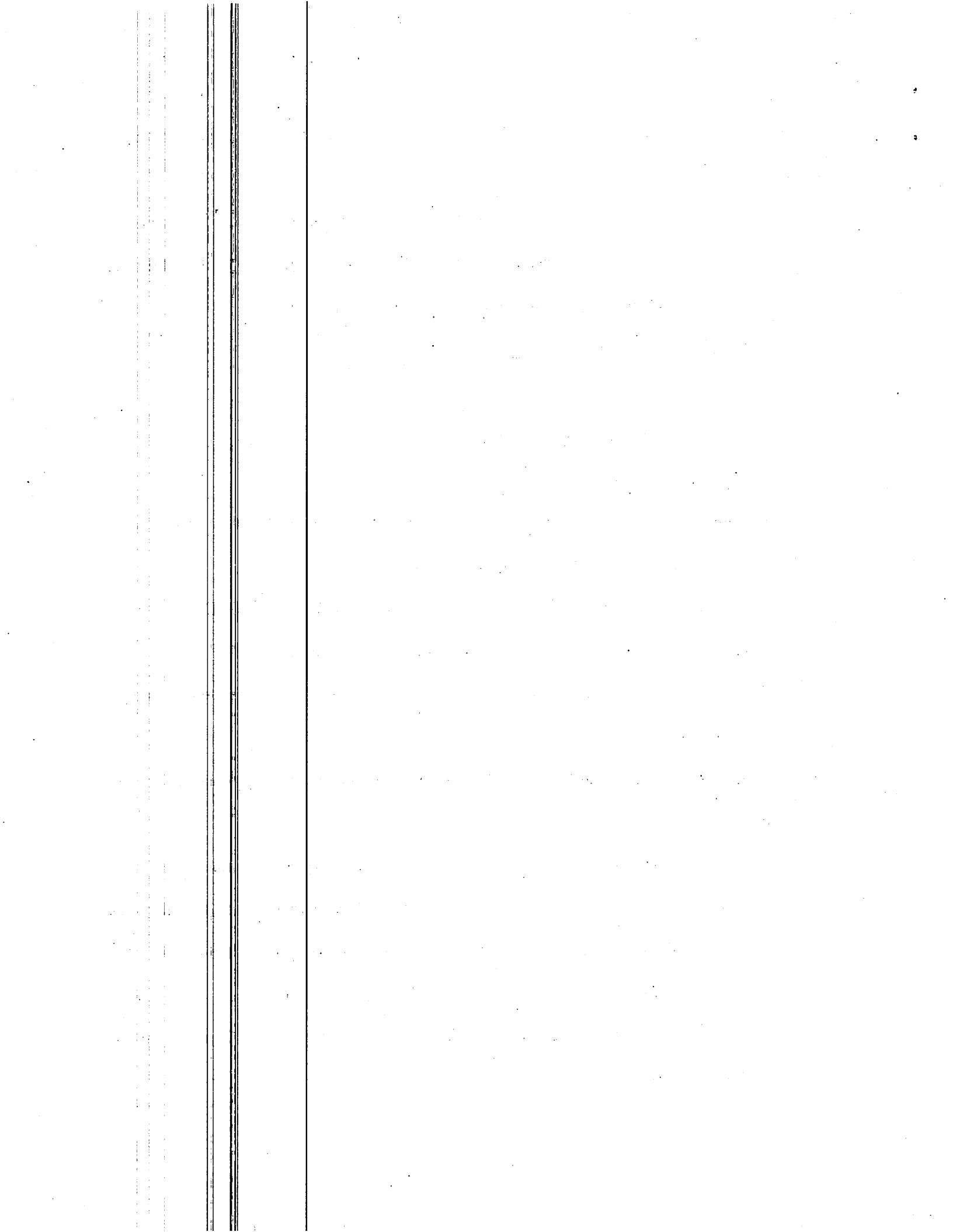
unworkmanlike because the Contractor failed properly to prepare the base and support the edge of the walkway.

Accordingly, the Commission concludes that the Claimant suffered an actual and compensable loss, which we calculate in accordance with COMAR 09.08.03.03B(3) as follows:

	\$25,200.00	Amount paid to or on behalf of the contractor
+	<u>\$7,784.88</u>	<u>Cost to correct and complete the work</u>
	\$32,984.88	
-	<u>\$25,200.00</u>	<u>Original contract price</u>
	\$7,784.88	Actual Loss

Having considered the parties' arguments, the evidence contained in the record, and the ALJ's Recommended Decision, it is this 31st day of May 2022, **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 \$7,784.88 from the Maryland Home Improvement Guaranty Fund;
- E. That the Contractor shall remain ineligible for a Maryland Home Improvement Commission license until the Contractor reimburses the Guaranty Fund for all monies disbursed under this Order plus annual interest of at least ten percent (10%) as set by the Commission, *Md Code Ann.*, Bus. Reg. §§ 8-410(a)(1)(iii), 8-411(a);
- F. That the records and publications of the Maryland Home Improvement Commission shall reflect this decision; and



G. Any party has thirty (30) days from the date of this Final Order to appeal this decision to Circuit Court.

Jean White
Chairperson –Panel
Maryland Home Improvement
Commission

