

<p>IN THE MATTER OF THE CLAIM</p> <p>OF BRENDA K. LUCAS,</p> <p>CLAIMANT</p> <p>AGAINST THE MARYLAND HOME</p> <p>IMPROVEMENT GUARANTY FUND</p> <p>FOR THE ALLEGED ACTS OR</p> <p>OMISSIONS OF PETER BORMAN,</p> <p>T/A AMERICAN CONSTRUCTION</p> <p>SERVICES,</p> <p>RESPONDENT</p>	<p>* BEFORE MARY R. CRAIG,</p> <p>* AN ADMINISTRATIVE LAW JUDGE</p> <p>* OF THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>*</p> <p>*</p> <p>*</p> <p>* OAH No.: LABOR-HIC-02-21-15259</p> <p>* MHIC No.: 20(75)696</p> <p>*</p>
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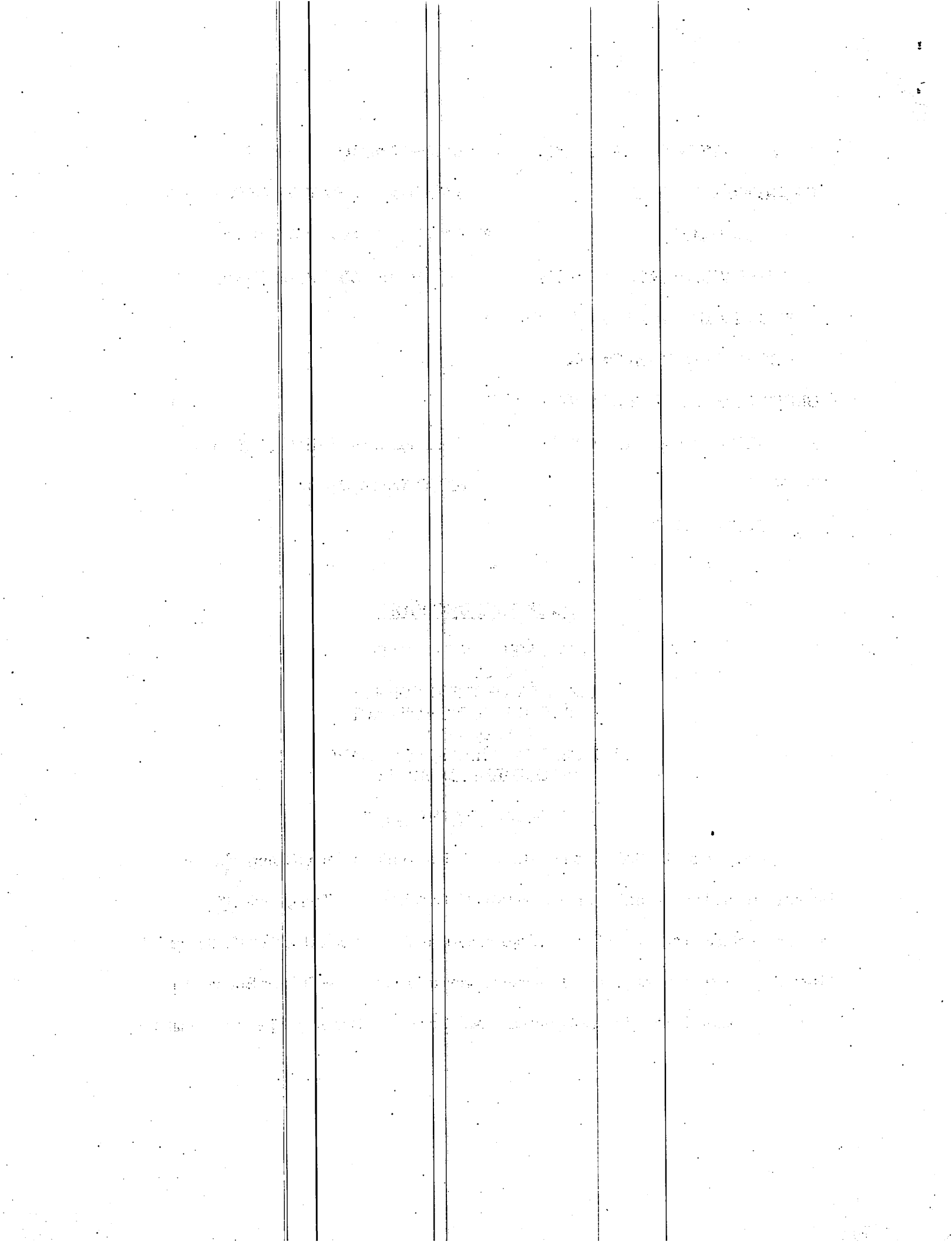
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PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
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DISCUSSION
PROPOSED CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On September 8, 2020, Brenda K. Lucas (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund), under the jurisdiction of the Department of Labor (Department), for reimbursement of \$2,335.00 in actual losses allegedly suffered as a result of a home improvement contract with Peter Borman, t/a American Construction Services (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-



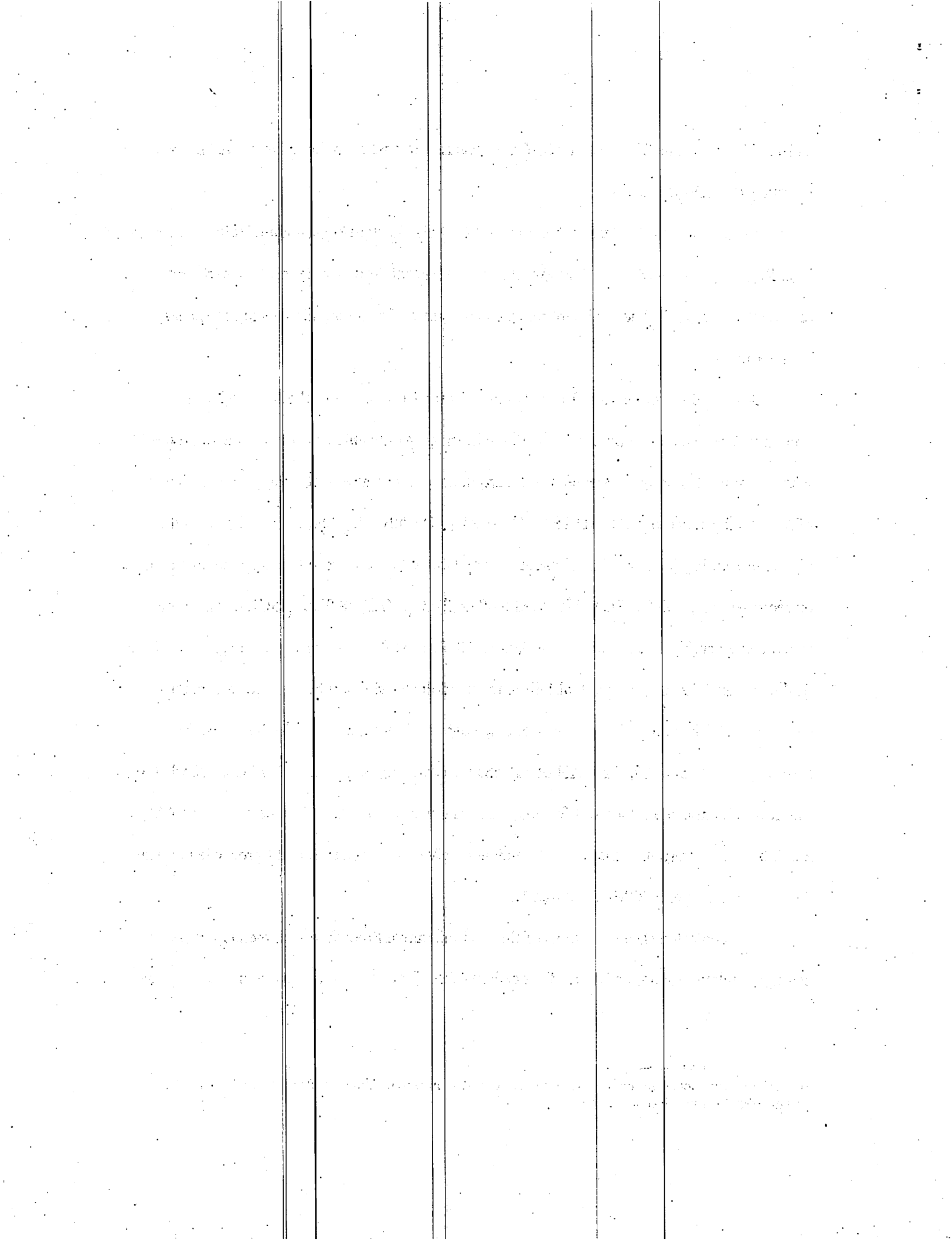
411 (2015).¹ On June 21, 2021, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on August 10, 2021 at the OAH Headquarters in Hunt Valley, Maryland. Bus. Reg. §§ 8-407(a), 8-312. Andrew Brouwer, Assistant Attorney General, Department, represented the Fund. The Claimant represented herself. The Respondent failed to appear for the hearing.

After waiting more than fifteen minutes for the Respondent or the Respondent's representative to appear, I proceeded with the hearing. Applicable law permits me to proceed with a hearing in a party's absence if that party fails to attend after receiving proper notice. Code of Maryland Regulations (COMAR) 28.02.01.23A. On July 12, 2021, the OAH provided a Notice of Hearing (Notice) to the Respondent by United States mail to the Respondent's address on record with the OAH. COMAR 09.08.03.03A(2); COMAR 28.02.01.05C(1). The Notice stated that a hearing was scheduled for August 10, 2021 at 9:30 a.m. at Hunt Valley. The Notice further advised the Respondent that failure to attend the hearing might result in "a decision against you." The United States Postal Service did not return the Notice to the OAH. The Respondent did not notify the OAH of any change of mailing address. COMAR 28.02.01.03E. The Respondent made no request for postponement prior to the date of the hearing. COMAR 28.02.01.16. I determined that the Respondent received proper notice, and I proceeded to hear the captioned matter. COMAR 28.02.01.05A, C.

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

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



Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2020); 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?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the Claimant:

- Clmt. Ex. 1 - Agreement between Claimant and Respondent (with detailed estimate of work to be performed) and waiver of right to cancel, June 13, 2019
- Clmt. Ex. 2 - Home Improvement Claim, September 2, 2020; Complaint, November 8, 2019; Claimant's timeline, undated
- Clmt. Ex. 3 - Photograph of window on Claimant's House, November 5, 2019
- Clmt. Ex. 4 - Claimant's check, June 13, 2019
- Clmt. Ex. 5 - Emails between Claimant and Respondent, June 10, 2019 through October 24, 2019
- Clmt. Ex. 6 - Email from MHIC to Respondent, December 6, 2019; Order, December 6, 2019; Letter from MHIC to Claimant, June 19, 2020; Letter from MHIC to Respondent, September 16, 2020; Letter from MHIC to Claimant, June 9, 2021
- Clmt. 7 - Not admitted
- Clmt. 8 - Not admitted

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

- Fund Ex. 1 - Hearing Order, June 9, 2021
- Fund Ex. 2 - OAH Notice of Hearing, July 12, 2021
- Fund Ex. 3 - Letter from MHIC to Respondent enclosing Claim form, September 16, 2020

Fund Ex. 4 - Respondent's licensing history, printed July 22, 2021

The Respondent did not appear for the hearing.

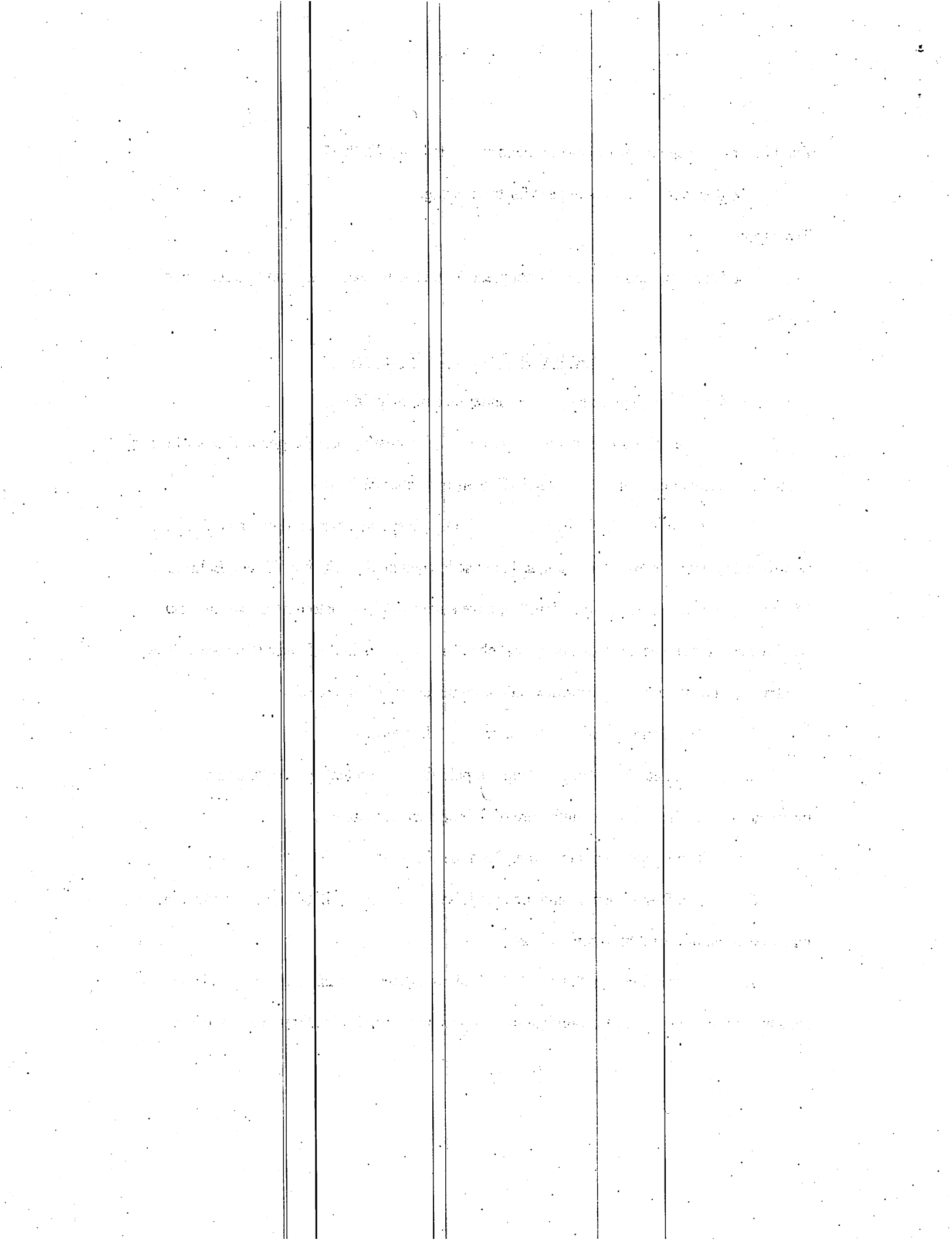
Testimony

The Claimant testified and did not present other witnesses. The Fund presented no witness.

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 number 01 24615.
2. On June 3, 2019, the Claimant and the Respondent entered into a contract to: remove a bay window from the Claimant's house located at 4812 Stafford Street, Baltimore, Maryland (House); assess existing damage; have a new window custom made; install new window; seal the replacement window; and check all windows in the House (Contract). The Contract did not state when the work would commence or be completed.
3. The Contract did not state a price for the work.
4. On June 13, 2019, the Claimant paid the Respondent \$3,335.00 as a down payment to cover the cost of manufacture of the replacement window.
5. The Respondent never measured the old window.
6. The Respondent abandoned the job without any justification; he provided no materials or labor pursuant to the Contract.
7. Over a four month period, the Claimant repeatedly asked the Respondent about the status of the work. The Respondent made up excuses for his abandonment of the job.



8. After four months of inaction, the Respondent asked to start work on the project. The Claimant refused to permit him to do so as she had no trust in his promise to perform the required work.

9. On August 4, 2019, the Respondent promised the Claimant a full refund.

10. On August 28, 2019, the Respondent gave the Claimant \$1,000.00 cash as a partial refund. The Respondent did not refund \$2,335.00, the balance of the down payment the Claimant paid him.

11. On September 9 and 25, 2019, the Claimant demanded the balance due from the Respondent. On September 30, 2019, the Respondent promised to pay the Claimant, but he did not do so.

12. The Claimant asked for the refund again on October 5, 9, and 18, 2019. The Respondent promised to pay the Claimant, but did not do so.

13. The Respondent never asked the Claimant to submit their dispute to arbitration pursuant to the arbitration clause in the Contract.

14. There is no barrier, such as familial or business relationship, that would prevent the Claimant from being reimbursed by the Fund.²

15. The Claimant sustained an actual loss of \$2,335.00.

DISCUSSION

The Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Bus. Reg. § 8-407(e)(1); Md. Code Ann., State Gov't § 10-217 (2014); COMAR 09.08.03.03A(3). To prove a claim by a preponderance of the evidence means to show that it is

² See Bus. Reg. § 8-405(f)(1).

Year	No. of Males	No. of Females	No. of Children	Total Population
1860	150	150	150	450
1870	180	180	180	540
1880	220	220	220	660
1890	250	250	250	750
1900	300	300	300	900
1910	350	350	350	1050
1920	400	400	400	1200
1930	450	450	450	1350
1940	500	500	500	1500
1950	550	550	550	1650
1960	600	600	600	1800
1970	650	650	650	1950
1980	700	700	700	2100
1990	750	750	750	2250
2000	800	800	800	2400
2010	850	850	850	2550
2020	900	900	900	2700
2030	950	950	950	2850
2040	1000	1000	1000	3000
2050	1050	1050	1050	3150
2060	1100	1100	1100	3300
2070	1150	1150	1150	3450
2080	1200	1200	1200	3600
2090	1250	1250	1250	3750
2100	1300	1300	1300	3900
2110	1350	1350	1350	4050
2120	1400	1400	1400	4200
2130	1450	1450	1450	4350

“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 Claimant has proven eligibility for compensation.

The Respondent received \$3,335.00 from the Claimant on June 13, 2019 under the pretense that the amount was needed to order the new window contemplated by the Contract. The Respondent took the Claimant’s money and did not even make a pretense of performance. He never measured the window requiring replacement. The Claimant believed that it might take six to eight weeks for the unknown vendor to fabricate a replacement window, so she was not concerned when she heard nothing from the Respondent for the period of mid-June to the end of July. However, when the Respondent was unresponsive, the Claimant repeatedly called and emailed him.

The Claimant testified clearly and calmly, describing how she gradually became worried that the Respondent was unable or unwilling to do any work on her window. She did not exaggerate or become emotional during the hearing. I detected no bias in her testimony. The Claimant prepared a detailed timeline summarizing her interactions with the Respondent, and offered all of their emails into evidence. Clmt. Ex. 1 & 5. I found the Claimant to be a very credible witness.

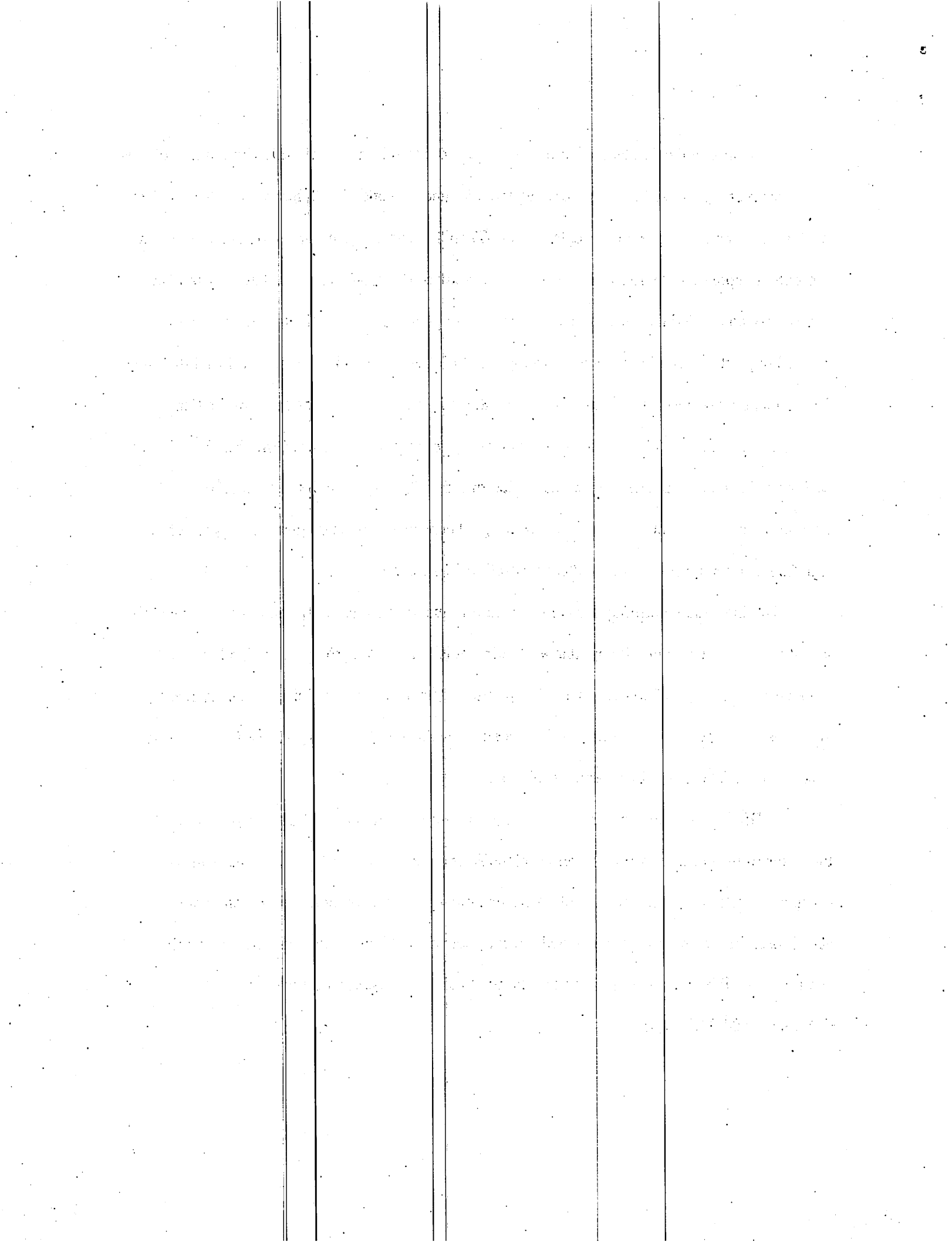
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11	12	13	14	15
16	17	18	19	20
21	22	23	24	25
26	27	28	29	30
31	32	33	34	35
36	37	38	39	40
41	42	43	44	45
46	47	48	49	50
51	52	53	54	55
56	57	58	59	60
61	62	63	64	65
66	67	68	69	70
71	72	73	74	75
76	77	78	79	80
81	82	83	84	85
86	87	88	89	90
91	92	93	94	95
96	97	98	99	100

The simple fact is that the Respondent entered into a Contract with the Claimant, took her down payment, promised to order her new window, and absconded with her money, leaving her with a window needing repair or replacement. The Claimant diligently tried to get some action from the Respondent, to no avail. The Respondent offered so many excuses that the Claimant reasonably concluded that he had no intention to complete the work. She justifiably refused his belated request that she let him start working months after he should have begun. I find that the Respondent abandoned the job and the Claimant is eligible for compensation from the Fund.

I note that the Contract contains a mandatory arbitration provision. Clmt. Ex. 1, Contract p. 2, para. 9. The Respondent never demanded that the Claimant submit the dispute to arbitration, and he did not appear for the hearing. Therefore, I conclude that the Respondent's right to insist on mandatory contractual arbitration was waived.

Having found eligibility for compensation I must determine the amount of the Claimant's actual loss and the amount, if any, that the Claimant is entitled to recover. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney fees, court costs, or interest. Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1). The Claimant has sought none of the prohibited elements of a claim.

MHIC's regulations provide formulas to measure a claimant's actual loss, depending on the status of the contract work. In this case, the Respondent abandoned the Contract without doing any work. Accordingly, the following formula appropriately measures the Claimant's actual loss: "If the contractor abandoned the contract without doing any work, the claimant's actual loss shall be the amount which the claimant paid to the contractor under the contract." COMAR 09.08.03.03B(3)(a).



The Claimant paid the Respondent \$3,335.00 and received a refund of \$1,000.00. The Claimant is entitled to recover her actual loss of \$2,335.00.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$2,335.00 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)(a). I further conclude that the Claimant is entitled to recover that amount from the Fund. COMAR 09.08.03.03B(3)(a).

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$2,335.00; and

ORDER that the Respondent is ineligible for a Maryland Home Improvement Commission license until the Respondent reimburses the Guaranty Fund for all monies disbursed under this Order, plus annual interest of ten percent (10%) as set by the Maryland Home Improvement Commission;³ and

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

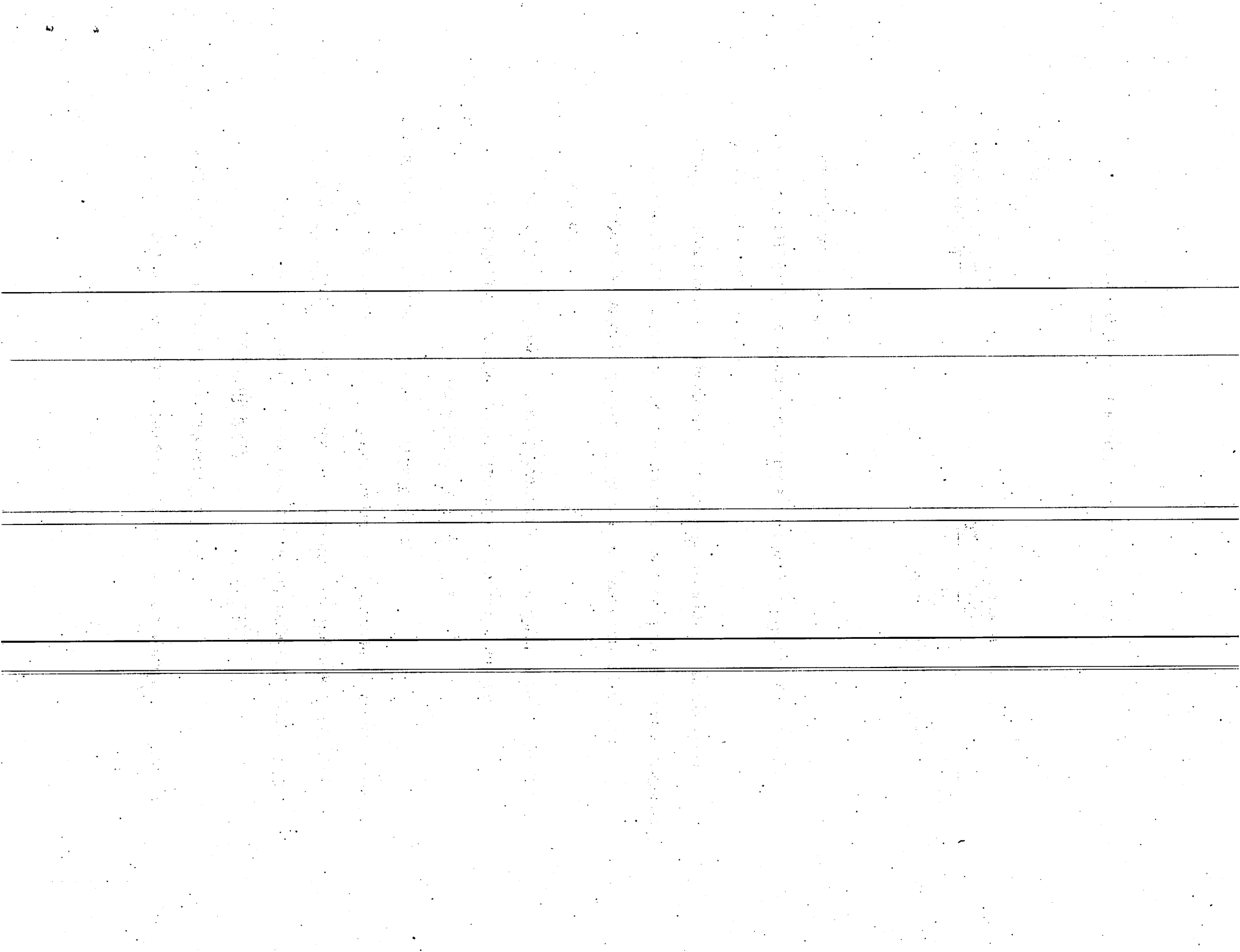
Mary R. Craig

August 11, 2021
Date Decision Issued

Mary R. Craig
Administrative Law Judge

MRC/cj
#193734

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



PROPOSED ORDER

WHEREFORE, this 22nd day of November, 2021, 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.

Michael Newton

Michael Newton

Panel B

***MARYLAND HOME IMPROVEMENT
COMMISSION***

