

<p>IN THE MATTER OF THE CLAIM</p> <p>OF SAMUEL ABRAMS,</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 CLARENCE MOTT,</p> <p>T/A ROOF RIGHT, INC.,</p> <p>RESPONDENT</p>	<p>* BEFORE RICHARD O'CONNOR,</p> <p>* ADMINISTRATIVE LAW JUDGE,</p> <p>* THE MARYLAND OFFICE</p> <p>* OF ADMINISTRATIVE HEARINGS</p> <p>*</p> <p>*</p> <p>*</p> <p>* OAH No.: LABOR-HIC-02-22-01133</p> <p>* MHIC No.: 21 (75) 556</p>
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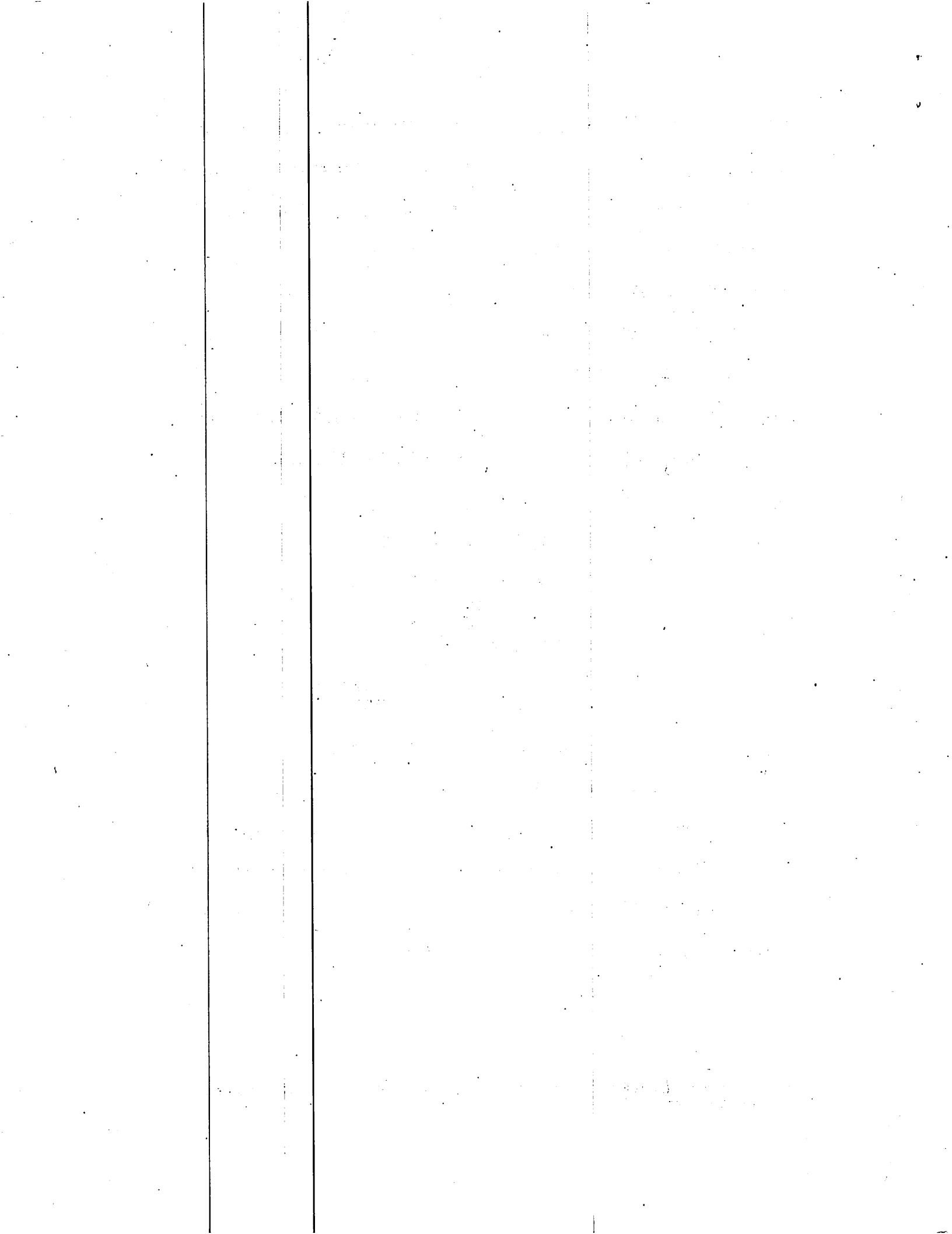
PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
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PROPOSED FINDINGS OF FACT
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PROPOSED CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On March 18, 2021, Samuel Abrams (Claimant) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund), under the jurisdiction of the Department of Labor (Department), for reimbursement of \$6,036.00 for actual losses allegedly suffered as a result of a home improvement contract with Clarence Mott, trading as Roof Right, Inc. (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 to -411 (2015).¹ On January 12, 2022,

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



the MHIC issued a Hearing Order on the claim. On the same date, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

On April 14, 2022, I held a hearing at the OAH in Rockville, Maryland. Bus. Reg. §§ 8-407(a), 8-312. John Hart, Assistant Attorney General, represented the Fund. The Claimant was present and participated without representation. Kendra Leite, Esquire, represented the Respondent, who was not 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 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 into evidence the following exhibits offered by the Claimant:

- Clt. Ex. 1. Photograph of a piece of trim around the skylight, April 2022.
- Clt. Ex. 2. Two photographs of the skylight and trim, October 16, 2020.
- Clt. Ex. 3. Seven photographs of nail pops, April 2022.
- Clt. Ex. 4. Text messages between the Claimant and the Respondent, December 2 to 10, 2020; emails between the Claimant and the Respondent, December 10 and 13, 2020.
- Clt. Ex. 5. Photograph of a vent and surrounding area, April 2022.
- Clt. Ex. 6. Three photographs of a gable vent and surrounding area, April 2022.

1. The first part of the document discusses the importance of maintaining accurate records of all transactions. It emphasizes that proper record-keeping is essential for the integrity of the financial system and for the ability to detect and prevent fraud.

2. The second part of the document outlines the various methods used to collect and analyze data. It describes the use of statistical techniques to identify trends and anomalies in the data, and the importance of using reliable sources of information.

3. The third part of the document discusses the role of the auditor in the process. It explains that the auditor's primary responsibility is to provide an independent and objective assessment of the financial statements. This involves a thorough review of the records and a comparison of the results with the applicable accounting standards.

4. The fourth part of the document discusses the importance of transparency and accountability in the financial system. It argues that the public has a right to know how their money is being spent, and that this information should be made available in a clear and accessible format.

5. The fifth part of the document discusses the role of the government in the financial system. It explains that the government has a responsibility to ensure that the financial system is fair and efficient, and that it should take steps to prevent and punish any wrongdoing.

6. The sixth part of the document discusses the role of the courts in the financial system. It explains that the courts have a responsibility to enforce the law and to provide a fair and impartial forum for the resolution of disputes. This involves a thorough review of the evidence and a fair and impartial judgment.

7. The seventh part of the document discusses the role of the media in the financial system. It explains that the media has a responsibility to provide accurate and unbiased information to the public, and to hold those in power accountable for their actions. This involves a thorough investigation of the facts and a fair and impartial report.

8. The eighth part of the document discusses the role of the public in the financial system. It explains that the public has a responsibility to be informed and to participate in the decision-making process. This involves staying informed about the issues and expressing their views through the appropriate channels.

9. The ninth part of the document discusses the role of the private sector in the financial system. It explains that the private sector has a responsibility to operate in a fair and ethical manner, and to contribute to the overall well-being of the community. This involves following the applicable laws and regulations, and acting in a socially responsible manner.

10. The tenth part of the document discusses the role of the international community in the financial system. It explains that the international community has a responsibility to work together to address global financial issues, and to promote a fair and efficient global financial system. This involves cooperation and coordination between all countries.

- Cl. Ex. 7. Contract between the Claimant and the Respondent, prepared October 19, 2020, unsigned.
- Cl. Ex. 8. Proposal from Superior Damage Restoration, December 29, 2020.
- Cl. Ex. 9. Handwritten list of nail pops and dimples, undated.
- Cl. Ex. 10. MHIC Complaint Form, December 18, 2020; signed contract between the Claimant and Respondent, November 3, 2020; text messages and emails as in Cl. Ex. 4.

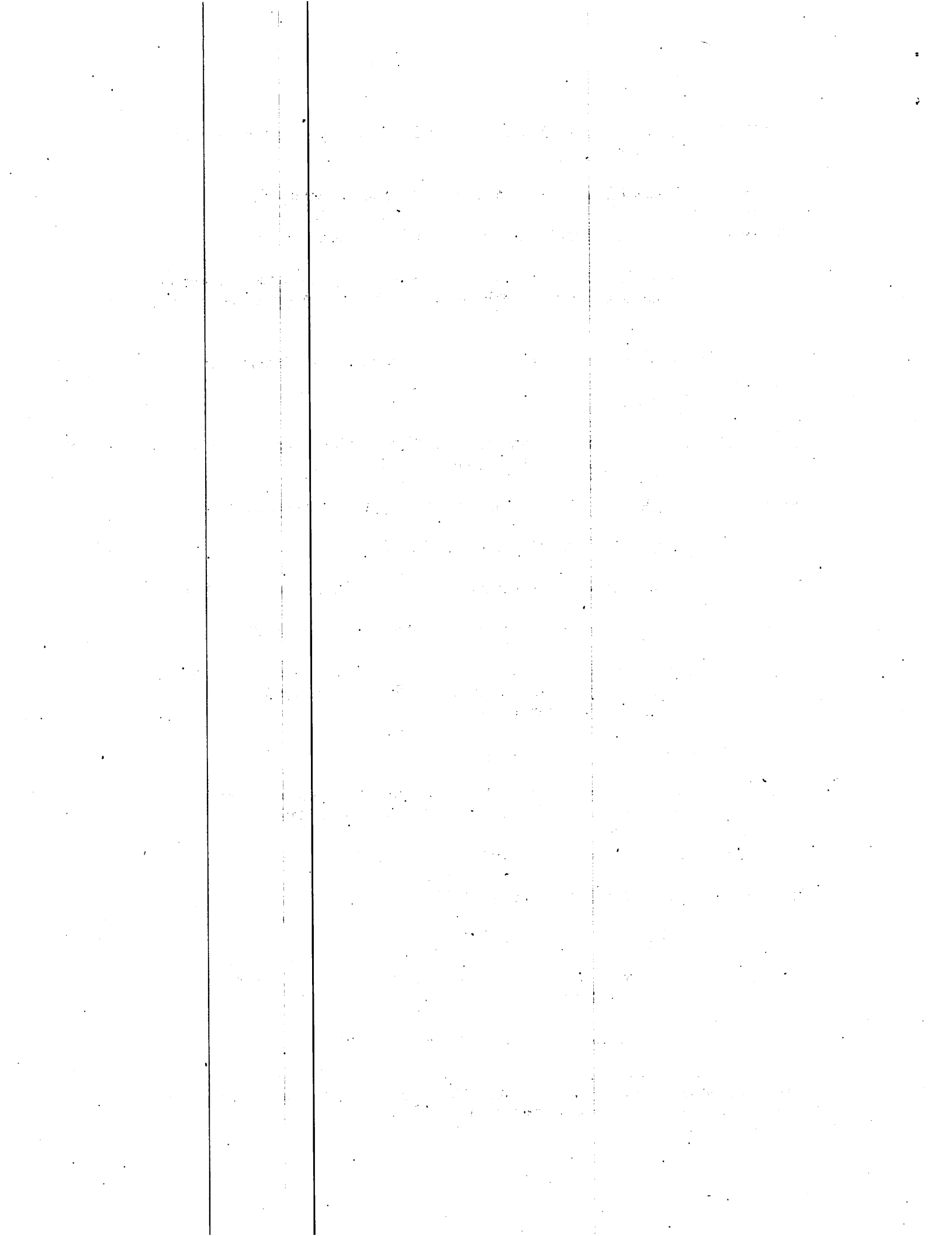
I admitted into evidence the following exhibits offered by the Respondent:

- Resp. Ex. 1. Deed, October 14, 2020.
- Resp. Ex. 2. State Department of Assessments and Taxation Real Property Data Search results for the Claimant's property, produced April 14, 2022.
- Resp. Ex. 3. Six photographs of the Claimant's property, taken October 16, 2020.
- Resp. Ex. 4. Photograph of a skylight, taken October 16, 2020.
- Resp. Ex. 5. Contract between the Claimant and the Respondent, November 3, 2020.
- Resp. Ex. 6. Email from the Respondent to the Claimant, December 18, 2020.²
- Resp. Ex. 7. Home Improvement Claim Form, March 14, 2021, with a note from the Claimant attached; one page of the proposal from Superior Damage Restoration; two pages of the contract between the Claimant and the Respondent.
- Resp. Ex. 8. Punch List Items with photographs, December 13, 2020.
- Resp. Ex. 9. List of payments, April 5, 2022; invoice from the Respondent, February 1, 2021; invoice from Beacon, January 25, 2021 (mostly illegible).

I admitted into evidence the following exhibits offered by the Fund:

- GF Ex. 1. Notice of Hearing, February 1, 2022.
- GF Ex. 2. Hearing Order, January 12, 2022.
- GF Ex. 3. Letter from the MHIC to the Respondent with Home Improvement Claim Form attached, March 18, 2021.
- GF Ex. 4. The Respondent's licensing history with the MHIC, April 13, 2022.

² Other emails and text messages were attached to this exhibit, but the Respondent did not offer them as evidence. They remain in the file as part of the administrative record.



Testimony

The Claimant testified and did not present other witnesses.

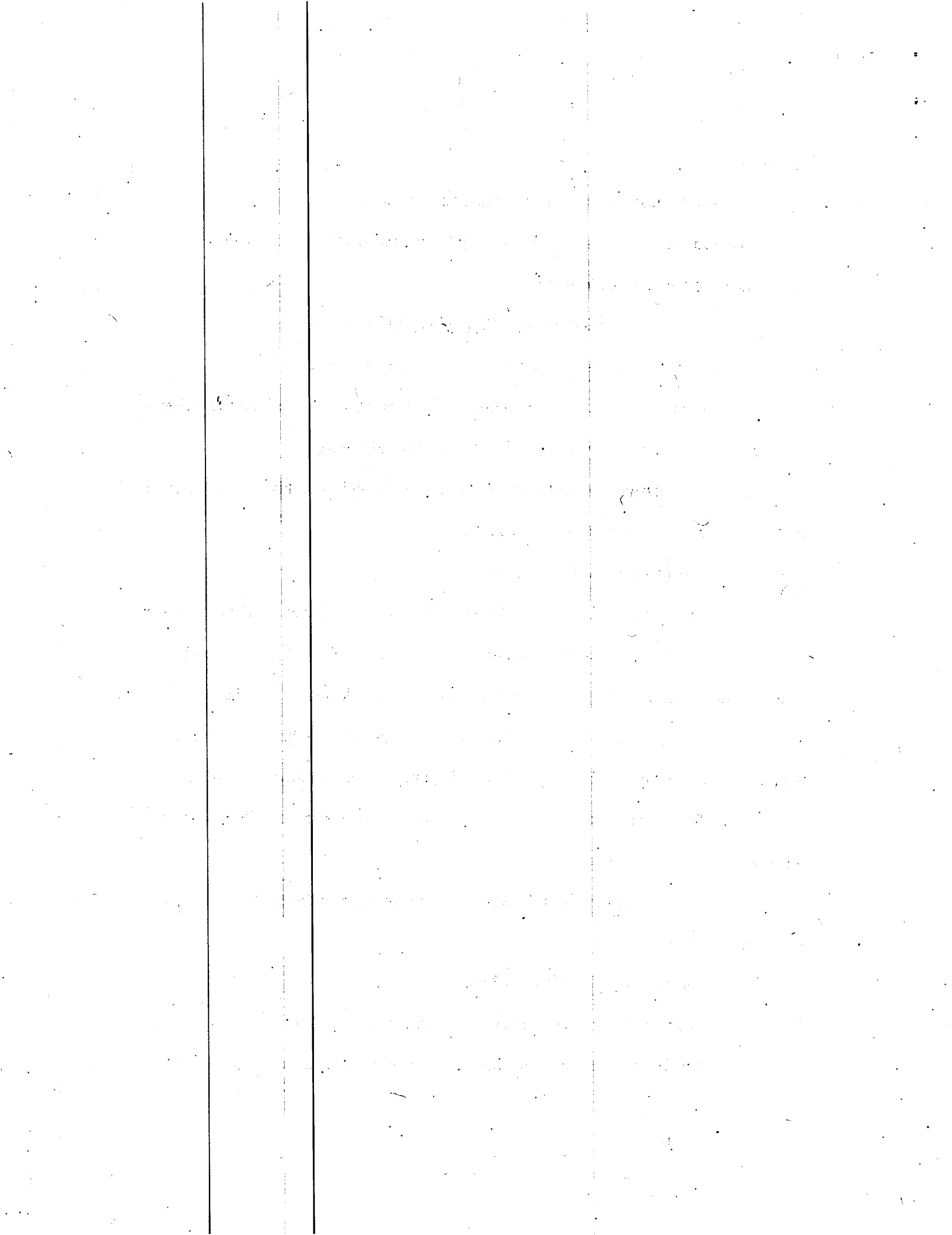
Craig Mott, General Manager of Roof Right, Inc., testified for the Respondent

The Fund presented no testimony.

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 01-49631
2. The Claimant bought the townhouse that is the subject of this claim on October 14, 2020 and was moved in by October 23, 2020.
3. The townhouse was built in 1988.
4. On November 3, 2020, the Claimant and the Respondent entered into a contract to replace the Claimant's roof, including installation of a new skylight, closing up the gable vent, installing a ridge vent, spraying the chimney with siloxane, and cleaning up debris.
5. The contract did not include interior trim around the skylight. The contract contained a check-box option to include interior trim, but the Claimant did not choose it.
6. The contract states that the Respondent is not responsible for ceiling cracks and nail pops.
7. The contract states that the Respondent is not responsible for paint or trim around replacement skylights.
8. The contract price was \$8,708.00.
9. Claimant paid the Respondent \$8,708.00 under the contract.
10. The Respondent performed the contract work on November 17 and 18, 2020.



11. The Respondent completed the roof and installed the skylight. He did not close off the gable vent or spray the chimney with siloxane, and the ridge vent did not meet current provisions of the building code.

12. The Respondent cracked some drywall around the fan in the master bathroom when attaching the vent to the fan.

13. The Respondent's workers were in the Claimant's attic to perform some of the work under the contract.

14. After the work was completed as above, the Claimant noticed nail pops and dimples in the ceilings of the first and second levels of the home, as well as damaged trim and drywall around the skylight.

15. The Claimant complained to the Respondent, who returned in early February 2021 to modify the ridge vent to meet code, close up the gable vent, remove debris from the attic, and spray siloxane on the chimney.

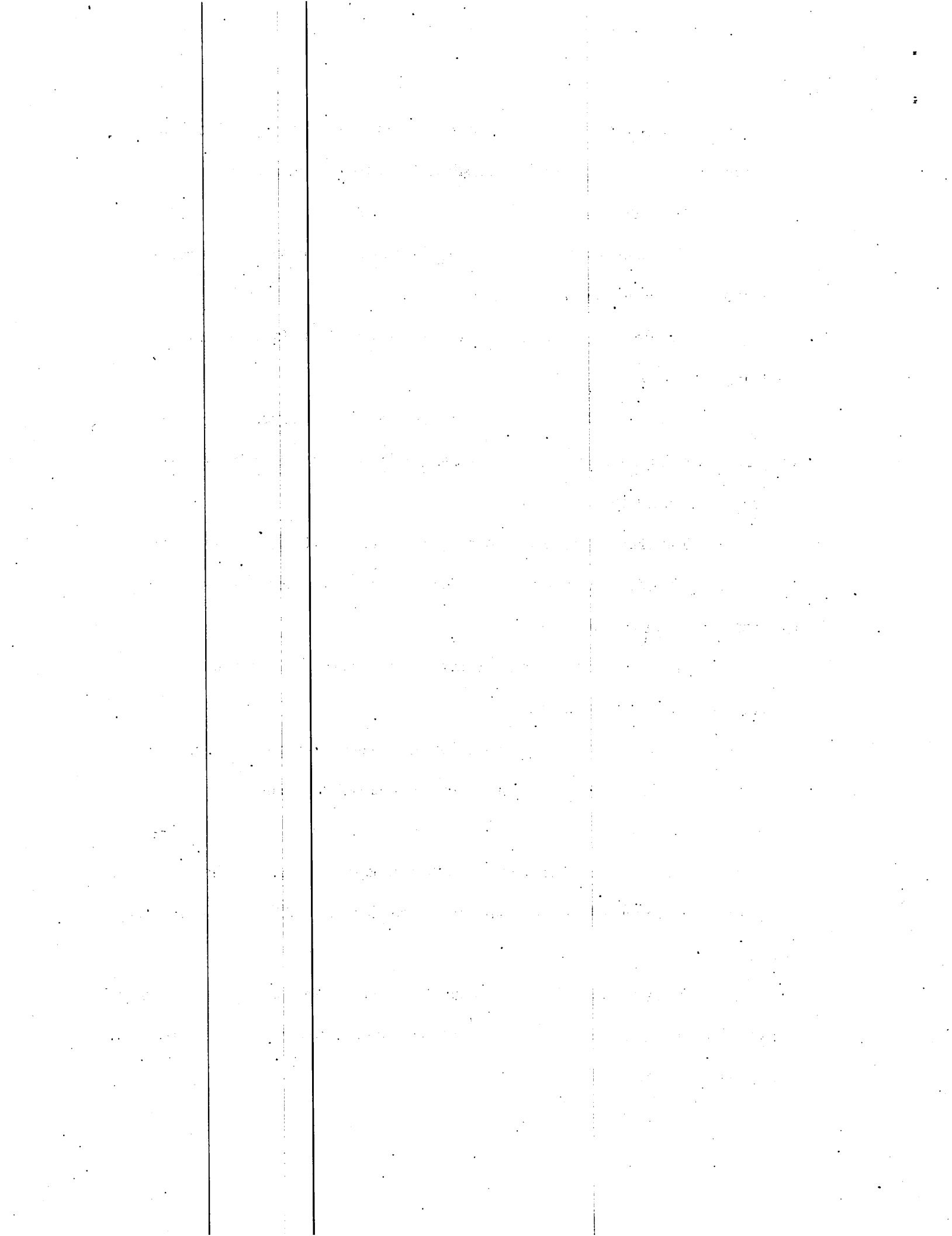
16. The Respondent hired a subcontractor to repair the drywall around the fan in the master bathroom at a cost of \$225.00.

17. The subcontractor did not repair nail pops in the master bathroom ceiling.

18. As of the date of the hearing, there were four nail pops in the master bathroom ceiling.

19. The Respondent declined to repair the nail pops and dimples in other areas of the house, as well as the trim and drywall around the skylight, insisting that they were pre-existing damage.

20. Shortly before the hearing, the Claimant's wife counted twenty-nine nail pops and twenty-eight dimples in the ceiling of the second level, and seven nail pops and eighteen dimples in the ceiling of the first level.



21. On December 29, 2020, the Claimant received an estimate of \$6,036.00 from Superior Damage Restoration to repair nail pops throughout the home.

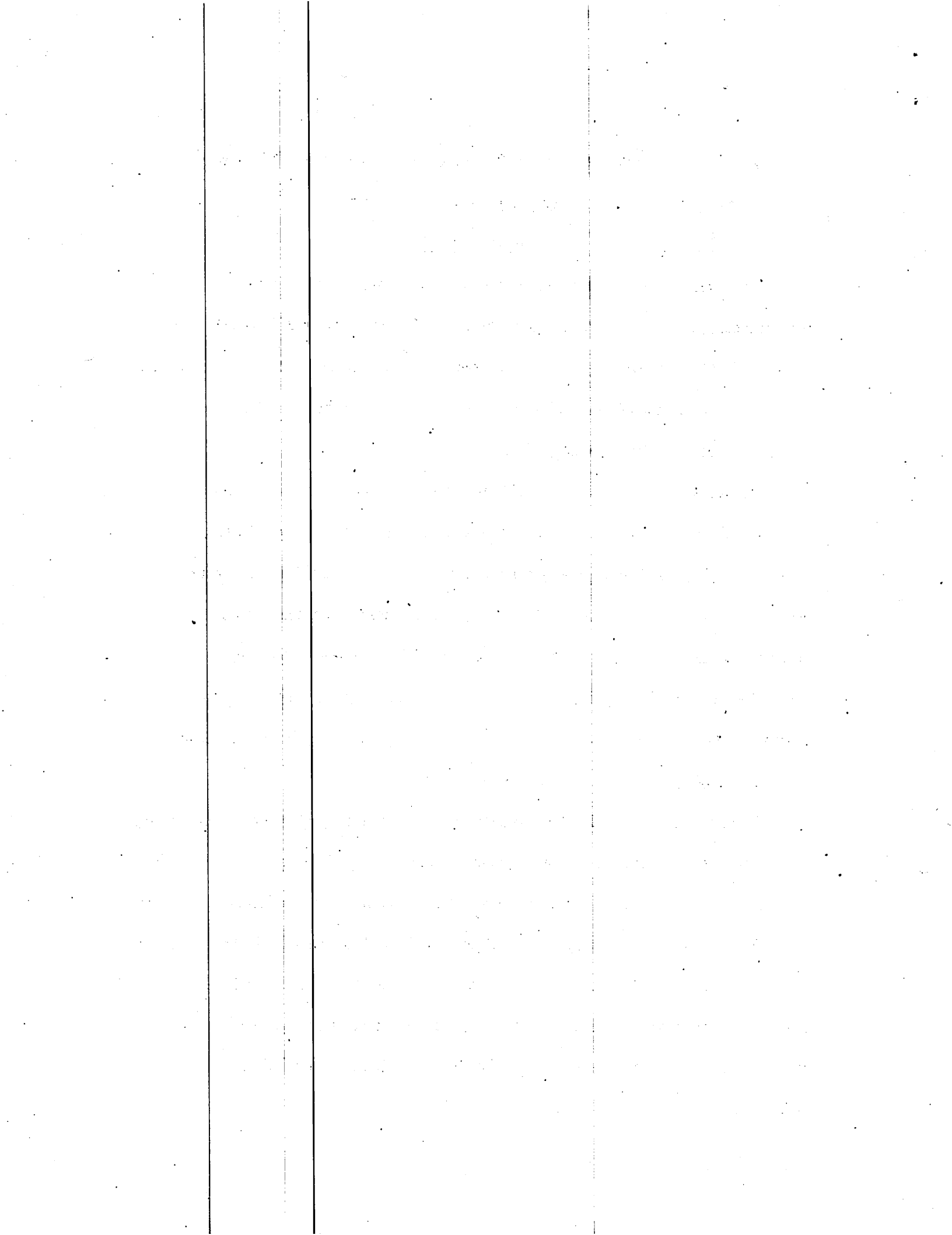
DISCUSSION

The Claimant has the burden of proving the validity of his 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. 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 Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant. By statute, certain claimants are excluded from recovering from the Fund altogether. In this case, there are no statutory impediments to the Claimant's recovery.

The Claimant was unhappy with the Respondent's work almost from the beginning of the project. He complained that the workers showed up unexpectedly on November 17, 2020 and made a great deal of noise while replacing the roof. The Claimant testified that, at the completion of the job, the crew left dirt on the carpet under the new skylight, as well as debris, nails, and tools at the job site.



The Claimant complained immediately to the Respondent, who sent Rick Fenner to the home on November 25, 2020. Mr. Fenner agreed that some aspects of the job had not been completed properly and a crew would return to address the Claimant's complaints.

Subsequently, the parties had discussions about the scope of the additional work and when it would be performed. On December 10, 2020, Mr. Fenner told the Claimant that the Respondent would repair drywall cracks and nail pops in the master bathroom ceiling but not anywhere else in the house. The Respondent agreed to close up the gable vent, modify the ridge vent to meet code, clean up debris in the attic, spray the chimney with siloxane, and make another sweep of the yard with a magnet to pick up nails. After some delays, the Respondent performed this work on February 1, 2021. At around the same time, the Respondent paid a subcontractor \$225.00 to repair the drywall around the fan in the master bathroom ceiling.

Essentially, this leaves two points of contention between the Claimant and Respondent: nail pops and dimples in the other areas of the house and trim around the skylight. The Respondent argued that two provisions of the contract relieve him of responsibility for those items – a clause that states that the Respondent is not responsible for nail pops, ceiling cracks, and paint and trim around replacement skylights; and the Claimant's failure to check the box in the contract stating that he wanted interior trim around the skylight.

The first of these provisions is called an exculpatory clause in contract law and can be valid in many circumstances. *Adloo v. H.T. Brown Real Estate, Inc.*, 344 Md. 254 (1996). However, claims brought against the Fund are not decided under contract law but, as previously stated, under the statutory provisions of the Business Regulation Article, which require a claimant to prove an actual loss caused by the contractor's unworkmanlike, inadequate, or incomplete home improvement. Thus, if the Claimant can prove that the Respondent's work was

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unworkmanlike, inadequate, or incomplete, he would be able to recover from the Fund despite the language of the exculpatory clause.

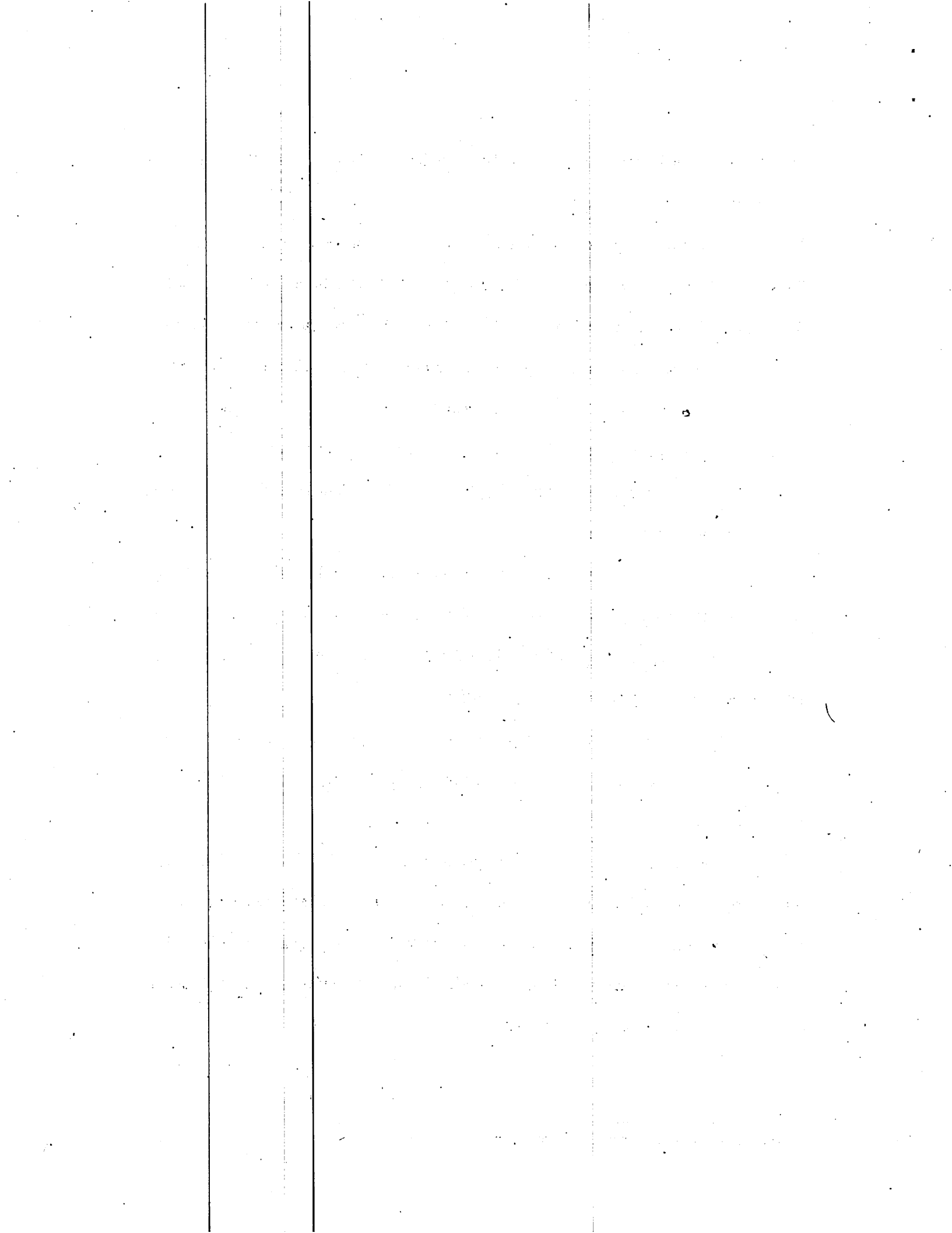
The provision in the contract concerning the skylight is more problematic for the Claimant. The Claimant wanted the existing skylight replaced, and the contract called for that work to be performed. There is also a checkbox in the preprinted contract next to the clause "Skylight Interior Finishing: Includes the installation of trim, caulk and/or paint required to make the skylight interior complete. This work is done at the discretion of Roof Right Inc. Any additional interior repairs requested by homeowner shall be quoted and executed per additional/separate contract." Resp. Ex. 5. The box is not checked, meaning that the Claimant chose not to have this work performed.

Mr. Mott testified that when he visited the home on October 16, 2020,³ he saw "issues" in the skylight well including cracked tape, one nail pop, and water damage. He concluded that any problems with the skylight trim and drywall pre-dated the Respondent's work. The Claimant acknowledged the prior water damage in his testimony.

The Claimant argued that the Respondent should have pointed out the skylight trim checkbox in the contract and explained that the trim would not be replaced unless the Claimant chose that option.

I do not find the Claimant's argument persuasive. The checkbox is on the first page of the contract, right under the box for installing the skylight, which is checked. The interior trim checkbox is not hidden or difficult to understand. Checking the box may have benefitted the Respondent slightly by increasing the contract price, but the Respondent had no duty to point out the option or encourage the Claimant to check the box.

³ This was about two weeks before the parties executed the contract.

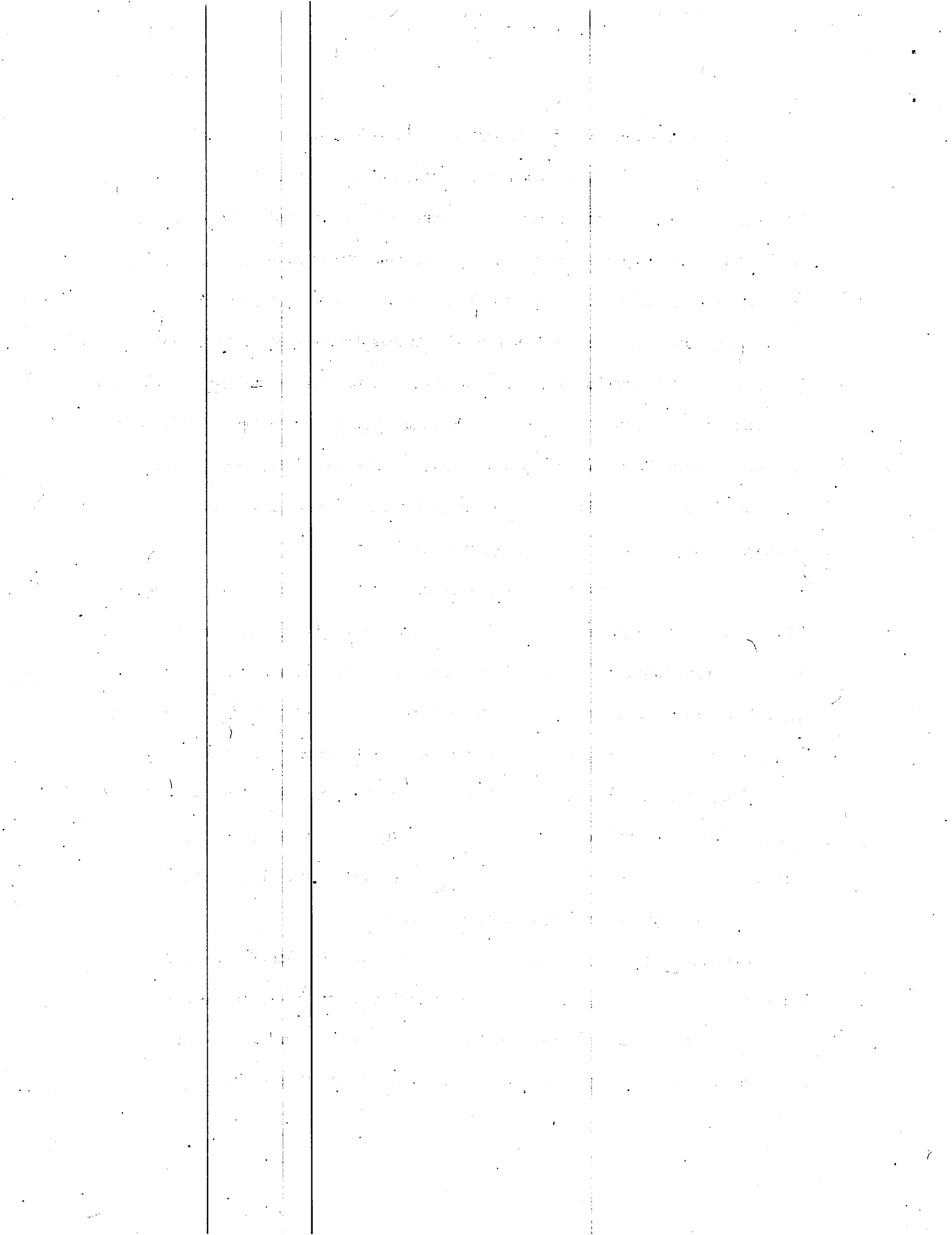


The sum of the evidence on this point is that the parties agree that there was existing water damage around the skylight, and the Claimant chose not to have the interior trim replaced. The Respondent's failure to replace the trim or repair the drywall was not poor workmanship or an inadequate home improvement; he was simply doing the work called for in the contract. The Claimant is not entitled to recover from the Fund for anything related to the skylight.

I turn now to the issue of the nail pops in areas other than the master bathroom ceiling. The Claimant testified that he did not see any nail pops or dimples before the Respondent's work began but did notice them on the same day the roof was completed, November 18, 2020. He conjectured that the Respondent's workers caused the nail pops by throwing materials onto the roof. The Claimant admitted his lack of expertise in this area. He argued that the Respondent's work was the only possible source of the nail pops and dimples.

Mr. Mott did not testify as an expert but did recite his extensive experience (since age fifteen) in the construction trades. He explained that nail pops happen when the framing of a house flexes but the drywall remains stationary, forcing the nail out from the surface of the drywall. Dimples are formed the opposite way – the drywall flexes but the framing does not. Mr. Mott stated that in his experience, any jolt to the frame of the house that would produce nail pops in the ceilings would have the same effect on the walls. In other words, if the Respondent's workers had caused the nail pops and dimples, they would be in the walls and ceilings, not just the ceilings. Since there were none in the walls, Mr. Mott concluded that the nail pops in the ceilings must have been present before the Respondent's work.

The Claimant's evidence on this point can be summarized as "after this, therefore because of this," which is a logical fallacy and is not sufficient to establish causation. It may be that the Respondent did cause the nail pops, but the evidence before me on this issue is just guesswork and far less than a preponderance of the evidence. To prevail, the Claimant would



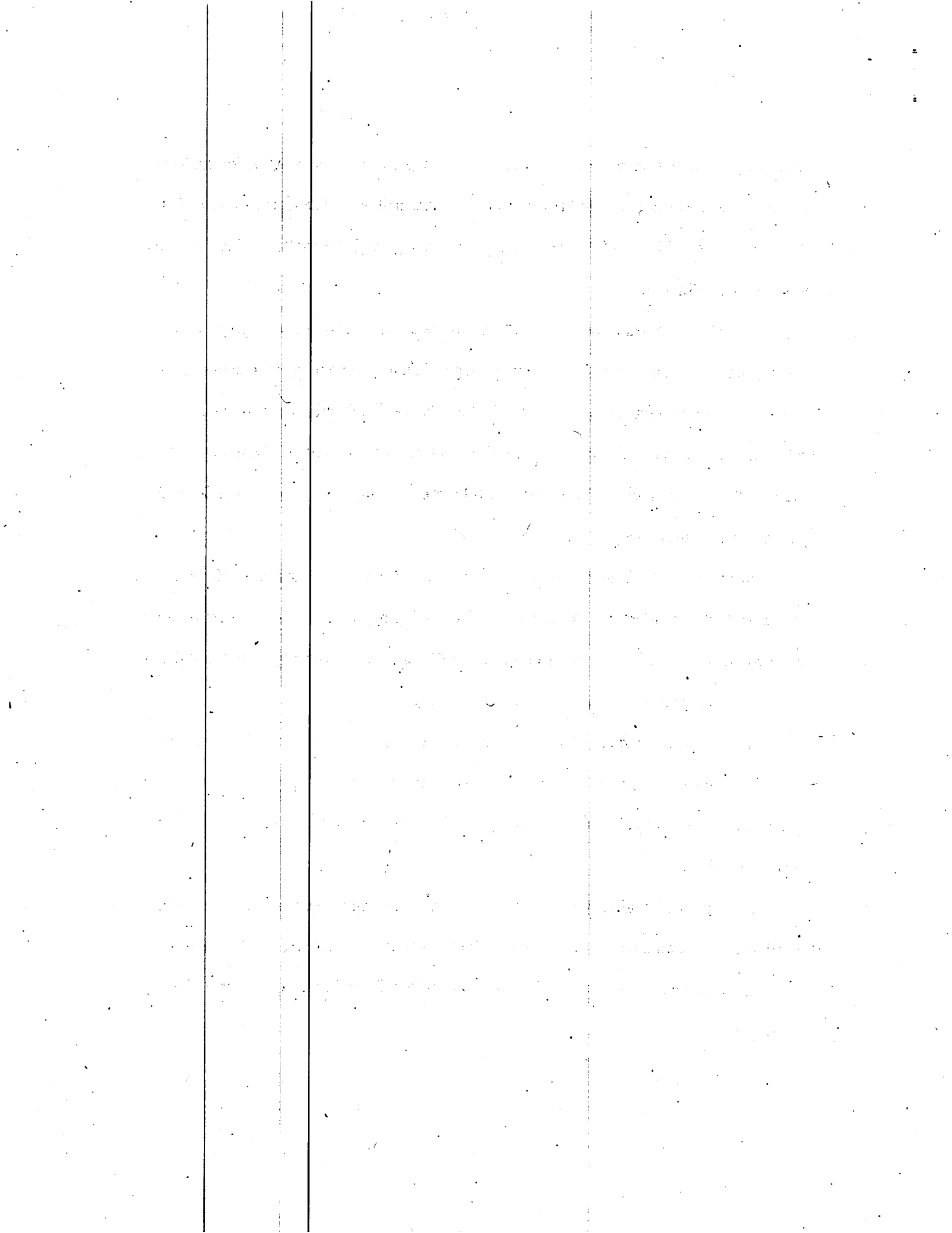
need some evidence from an expert or someone with experience in the construction trades that the Respondent's inadequate workmanship produced the nail pops. The record as it stands is devoid of any proof that the Respondent caused the damage to the drywall anywhere other than in the master bathroom.

Mr. Mott accepted responsibility for the cracks and nail pops in the master bathroom ceiling, stating that his workers caused this damage when they were in the attic to put a new vent pipe on the bathroom fan. For reasons that are unexplained, the Respondent's drywall subcontractor repaired only the cracks around the fan, not the nail pops. Mr. Mott testified that \$225.00, the same amount the Respondent paid for repairing the cracks, would be a fair and reasonable price to fix the four nail pops in the ceiling.

In summary, the Claimant has proven that he is entitled for reimbursement from the Fund for repairs to the master bathroom ceiling. He has failed to prove that the Respondent performed an unworkmanlike, inadequate, or incomplete home improvement with respect to the skylight trim and the nail pops and dimples elsewhere in the house.

The Claimant's requested recovery from the Fund was \$6,036.00, which was the estimate to repair nail pops that Superior Damage Restoration provided in 2020. The Claimant testified that he has not hired or paid Superior Damage Restoration but does intend to hire a contractor to repair the drywall.

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. MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work.



The Respondent performed work under the contract, and the Claimant intends to retain another contractor to complete or remedy that work. Accordingly, the following formula appropriately measures the Claimant's actual loss:

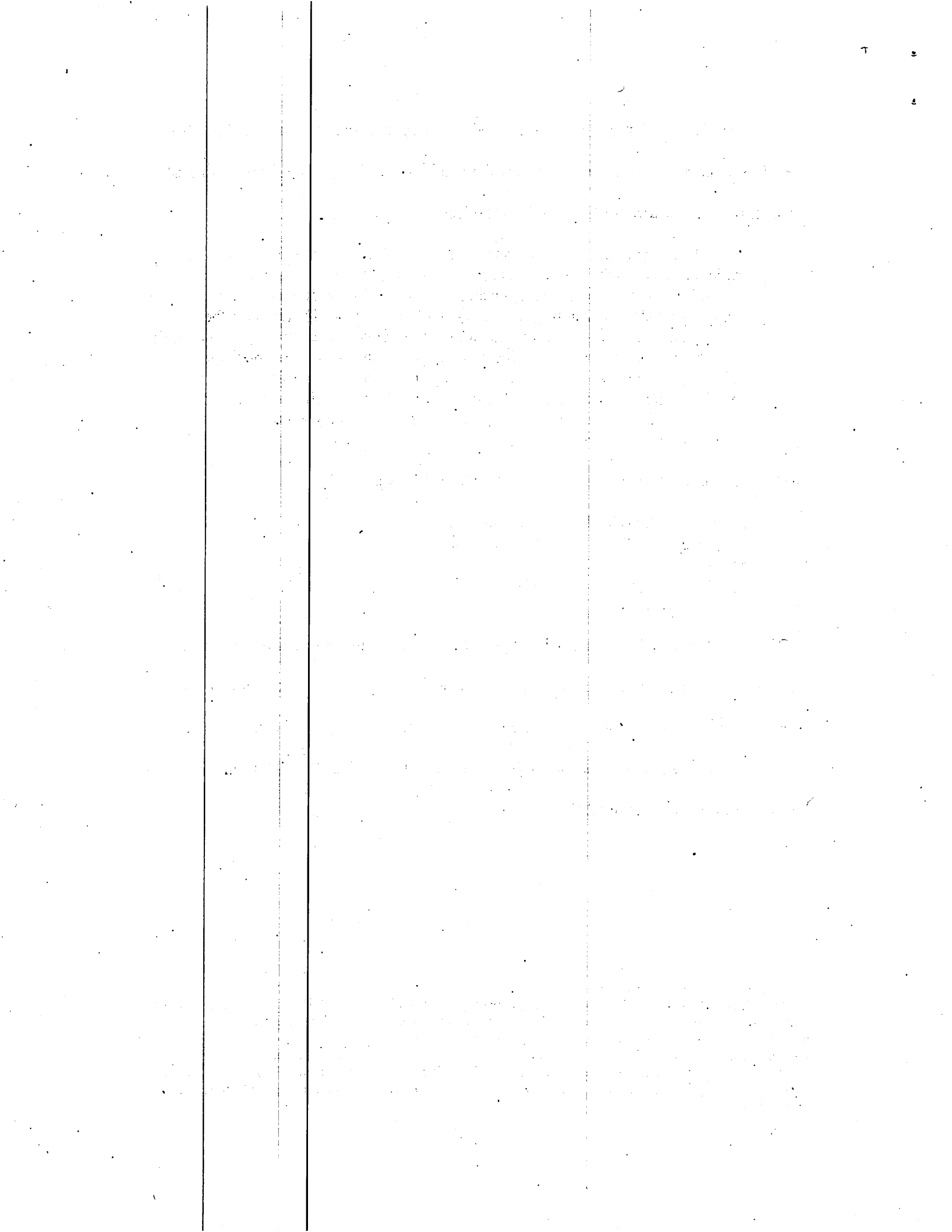
If the contractor did work according to the contract and the claimant has solicited or is soliciting another contractor to complete the contract, the claimant's actual loss shall be the amounts the claimant has paid to or on behalf of the contractor under the original contract, added to any reasonable amounts the claimant has paid or will be required to pay another contractor to repair poor work done by the original contractor under the original contract and complete the original contract, less the original contract price. If the Commission determines that the original contract price is too unrealistically low or high to provide a proper basis for measuring actual loss, the Commission may adjust its measurement accordingly.

COMAR 09.08.03.03B(3)(c). The calculation is as follows:

\$8,708.00 paid to the Respondent; plus
+225.00 cost to repair faulty work; equals
\$8,933.00 minus
-8,708.00 contract price; equals
\$225.00 actual loss.

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.⁴ In this case, the Claimant's actual loss is less than the amount paid to the Respondent and less than \$30,000.00. Therefore, the Claimant is entitled to recover his actual loss of \$225.00.

⁴ 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").



PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$225.00 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)(c). I further conclude that the Claimant is entitled to recover that amount from the Fund.

RECOMMENDED ORDER

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

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$225.00; 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;⁵ and

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

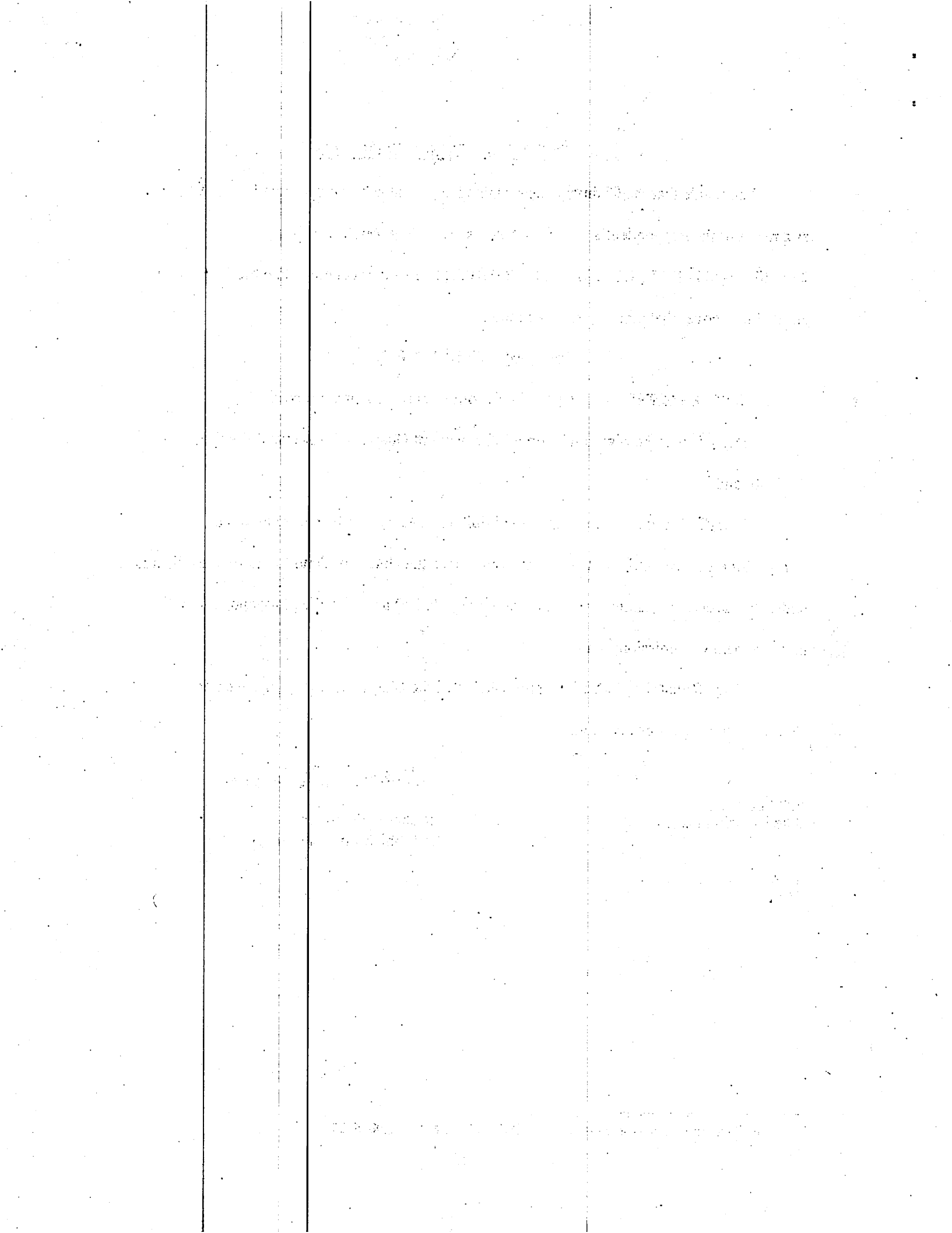
July 6, 2022
Date Decision Issued

Richard O'Connor

Richard O'Connor
Administrative Law Judge

ROC/da
#199207

⁵ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.



PROPOSED ORDER

WHEREFORE, this 19th day of August, 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.

Joseph Tunney

Joseph Tunney

Chairman

Panel B

***MARYLAND HOME IMPROVEMENT
COMMISSION***

