

STATE OF WEST VIRGINIA

Report

of the

Court of Claims

1983-1985



Volume

15

STATE OF WEST VIRGINIA

REPORT

OF THE

COURT OF CLAIMS

For the Period from July 1, 1983
to June 30, 1985

by

CHERYLE M. HALL
CLERK

VOLUME XV



(Published by authority Code 14-2-25)

BJW PRINTERS, BECKLEY, WV

TABLE OF CONTENTS

Claims reported, table of	LXII
Claims classified according to statute, list of	XXIV
Court of Claims Law	VII
Letter of transmittal	V
Opinions of the Court	LXI
Personnel of the Court	IV
References	307
Rules of Practice and Procedure	XVIII
Terms of Court	VI

**PERSONNEL
OF THE
STATE COURT OF CLAIMS**

HONORABLE GEORGE S. WALLACE, JR. Presiding Judge
 HONORABLE JAMES C. LYONS Judge
 HONORABLE WILLIAM W. GRACEY Judge
 CHERYLE M. HALL Clerk

CHARLIE BROWN Attorney General

FORMER JUDGES

HONORABLE JULIUS W. SINGLETON, JR. July 1, 1967
 -July 31, 1968

HONORABLE A.W. PETROPLUS August 1, 1968
 -June 30, 1974

HONORABLE HENRY LAKIN DUCKER July 1, 1967
 -October 31, 1975

HONORABLE W. LYLE JONES July 1, 1967
 -June 30, 1976

HONORABLE JOHN B. GARDEN June 1, 1974
 -December 31, 1981

HONORABLE DANIEL A. RULEY, JR. July 1, 1976
 -February 28, 1983

LETTER OF TRANSMITTAL

To His Excellency
The Honorable Arch A. Moore, Jr.
Governor of West Virginia

Sir:

In conformity with the requirements of section twenty-five of the Court of Claims law, approved March eleventh, one thousand nine hundred sixty-seven, I have the honor to transmit herewith the report of the State Court of Claims for the period from July one, one thousand nine hundred eighty-three to June thirty, one thousand nine hundred eighty-five.

Respectfully submitted,
CHERYLE M. HALL,
Clerk

TERMS OF COURT

Two regular terms of court are provided for annually the second Monday of April and September.

CLAIMS DUE AND AGAINST THE STATE

**ARTICLE 2.
CLAIMS AGAINST THE STATE.**

Sec.

- 14-2-1. Purpose.
- 14-2-2. Venue for certain suits and actions.
- 14-2-3. Definitions.
- 14-2-4. Creation of court of claims; appointment and terms of judges; vacancies.
- 14-2-5. Court clerk and other personnel.
- 14-2-6. Terms of court.
- 14-2-7. Meeting place of the court.
- 14-2-8. Compensation of judges; expenses.
- 14-2-9. Oath of office.
- 14-2-10. Qualifications of judges.
- 14-2-11. Attorney general to represent State.
- 14-2-12. General powers of the court.
- 14-2-13. Jurisdiction of the court.
- 14-2-14. Claims excluded.
- 14-2-15. Rules of practice and procedure.
- 14-2-16. Regular procedure.
- 14-2-17. Shortened procedure.
- 14-2-18. Advisory determination procedure.
- 14-2-19. Claims under existing appropriations.
- 14-2-20. Claims under special appropriations.
- 14-2-21. Periods of limitation made applicable.
- 14-2-22. Compulsory process.
- 14-2-23. Inclusion of awards in budget.
- 14-2-24. Records to be preserved.
- 14-2-25. Reports of the court.
- 14-2-26. Fraudulent claims.
- 14-2-27. Conclusiveness of determination.
- 14-2-28. Award as condition precedent to appropriation.
- 14-2-29. Severability.

§ 14-2-1. Purpose.

The purpose of this article is to provide a simple and expeditious method for the consideration of claims against the State that because of the provisions of section 35, article VI of the Constitution of the State, and of statutory restrictions, inhibitions or limitations, cannot be determined in the regular courts of the State; and to provide for proceedings in which the State has a special interest.

§ 14-2-2. Venue for certain suits and actions.

(a) The following proceedings shall be brought and prosecuted only in the circuit court of Kanawha county:

(1) Any suit in which the governor, any other state officer, or a state agency is made a party defendant, except as garnishee or suggestee.

(2) Any suit attempting to enjoin or otherwise suspend or affect a judgment or decree on behalf of the State obtained in any circuit court.

(b) Any proceeding for injunctive or mandamus relief involving the taking, title, or collection for or prevention of damage to real property may be brought and presented in the circuit court of the county in which the real property affected is situate.

This section shall apply only to such proceedings as are not prohibited by the constitutional immunity of the State from suit under section 35, article VI of the Constitution of the State.

§ 14-2-3. Definitions.

For the purpose of this article:

“Court” means the state court of claims established by section four [§ 14-2-4] of this article.

“Claim” means a claim authorized to be heard by the court in accordance with this article.

“Approved claim” means a claim found by the court to be one that should be paid under the provisions of this article.

“Award” means the amount recommended by the court to be paid in satisfaction of an approved claim.

“Clerk” means the clerk of the court of claims.

“State agency” means a state department, board, commission, institution, or other administrative agency of state government: Provided, that a “state agency” shall not be considered to include county courts, county boards of education, municipalities, or any other political or local subdivision of this State regardless of any state aid that might be provided.

§ 14-2-4. Creation of court of claims; appointment and terms of judges; vacancies.

The “court of claims” is hereby created. It shall consist of three judges, to be appointed by the president of the senate and the speaker of the house of delegates, by and with the advice and consent of the senate, one of whom shall be appointed presiding judge. Each appointment to the court shall be made from a list of three qualified

nominees furnished by the board of governors of the West Virginia State bar.

The terms of the judges of this court shall be six years, except that the first members of the court shall be appointed as follows: One judge for two years, one judge for four years and one judge for six years. As these appointments expire, all appointments shall be for six year terms. Not more than two of the judges shall be of the same political party. An appointment to fill a vacancy shall be for the unexpired term.

§ 14-2-5. Court clerk and other personnel.

The court shall have the authority to appoint a clerk and deputy clerks. The salaries of the clerk and the deputy clerks shall be fixed by the joint committee on government and finance, and shall be paid out of the regular appropriation for the court. The clerk shall have custody of all records and proceedings of the court, shall attend meetings and hearings of the court, shall administer oaths and affirmations, and shall issue all official summonses, subpoenas, orders, statements and awards. A deputy clerk shall act in the place and stead of the clerk in the clerk's absence.

The joint committee on government and finance may employ other persons whose services shall be necessary to the orderly transaction of the business of the court and fix their compensation.

§ 14-2-6. Terms of court.

The court shall hold at least two regular terms each year, on the second Monday in April and September. So far as possible, the court shall not adjourn a regular term until all claims then upon its docket and ready for hearing or other consideration have been disposed of.

Special terms or meetings may be called by the clerk at the request of the court whenever the number of claims awaiting consideration, or any other pressing matter of official business, make such a term advisable.

§ 14-2-7. Meeting place of the court.

The regular meeting place of the court shall be at the state capitol, and the joint committee on government and finance shall provide adequate quarters therefor. When deemed advisable, in order to facilitate the full hearing of claims arising elsewhere in the State, the court may convene at any county seat.

§ 14-2-8. Compensation of judges; expenses.

Each judge of the court shall receive one hundred forty dollars for each day actually served, and actual expenses incurred in the performance of his duties. The number of days served by each judge shall not exceed one hundred in any fiscal year, except by authority of the joint committee on government and finance: Provided, that in computing the number of days served, days utilized solely for the exercise of duties assigned to judges and commissioners by the provisions of article two-A [§ 14-2A-1 et seq.] of this chapter shall be disregarded. Requisitions for compensation and expenses shall be accompanied by sworn and itemized statements, which shall be filed with the auditor and preserved as public records. For the purpose of this section, time served shall include time spent in the hearing of claims, in the consideration of the record, in the preparation of opinions and in necessary travel.

§ 14-2-9. Oath of office.

Each judge shall before entering upon the duties of his office, take and subscribe to the oath prescribed by section 5, article IV of the Constitution of the State. The oath shall be filed with the clerk.

§ 14-2-10. Qualifications of judges.

Each judge appointed to the court of claims shall be an attorney at law, licensed to practice in this State and shall have been so licensed to practice law for a period of not less than ten years prior to his appointment as judge. A judge shall not be an officer or an employee of any branch of state government, except in his capacity as a member of the court and shall receive no other compensation from the State or any of its political subdivisions. A judge shall not hear or participate in the consideration of any claim in which he is interested personally, either directly or indirectly.

§ 14-2-11. Attorney general to represent State.

The attorney general shall represent the interests of the State in all claims coming before the court.

§ 14-2-12. General powers of the court.

The court shall, in accordance with this article, consider claims which, but for the constitutional immunity of the State from suit, or

for some statutory restrictions, inhibitions or limitations, could be maintained in the regular courts of the State. No liability shall be imposed upon the State or any state agency by a determination of the court of claims approving a claim and recommending an award, unless the claim is (1) made under an existing appropriation, in accordance with section nineteen [§ 14-2-19] of this article, or (2) a claim under a special appropriation, as provided in section twenty [§ 14-2-20] of this article. The court shall consider claims in accordance with the provisions of this article.

Except as is otherwise provided in this article, a claim shall be instituted by the filing of notice with the clerk. In accordance with rules promulgated by the court, each claim shall be considered by the court as a whole, or by a judge sitting individually, and if, after consideration, the court finds that a claim is just and proper, it shall so determine and shall file with the clerk a brief statement of its reasons. A claim so filed shall be an approved claim. The court shall also determine the amount that should be paid to the claimant, and shall itemize this amount as an award, with the reasons therefor, in its statement filed with the clerk. In determining the amount of a claim, interest shall not be allowed unless the claim is based upon a contract which specifically provides for the payment of interest.

§ 14-2-13. Jurisdiction of the court.

The jurisdiction of the court, except for the claims excluded by section fourteen [§ 14-2-14], shall extend to the following matters:

1. Claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the State or any of its agencies, which the State as a sovereign commonwealth should in equity and good conscience discharge and pay.
2. Claims and demands, liquidated and unliquidated, ex contractu and ex delicto, which may be asserted in the nature of setoff or counterclaim on the part of the State or any state agency.
3. The legal or equitable status, or both, of any claim referred to the court by the head of a state agency for an advisory determination.

§ 14-2-14. Claims excluded.

The jurisdiction of the court shall not extend to any claim:

1. For loss, damage, or destruction of property or for injury or death incurred by a member of the militia or national guard when in the service of the State.

2. For a disability or death benefit under chapter twenty-three [§ 23-1-1 et seq.] of this Code.

3. For unemployment compensation under chapter twenty-one-A [§ 21A-1-1 et seq.] of this Code.

4. For relief or public assistance under chapter nine [§ 9-1-1 et seq.] of this Code.

5. With respect to which a proceeding may be maintained against the State, by or on behalf of the claimant in the courts of the State.

§ 14-2-15. Rules of practice and procedure.

The court shall adopt and may from time to time amend rules of procedure, in accordance with the provisions of this article, governing proceedings before the court. Rules shall be designed to assure a simple, expeditious and inexpensive consideration of claims. Rules shall permit a claimant to appear in his own behalf or be represented by counsel.

Under its rules, the court shall not be bound by the usual common law or statutory rules of evidence. The court may accept and weigh, in accordance with its evidential value, any information that will assist the court in determining the factual basis of a claim.

§ 14-2-16. Regular procedure.

The regular procedure for the consideration of claims shall be substantially as follows:

1. The claimant shall give notice to the clerk that he desires to maintain a claim. Notice shall be in writing and shall be in sufficient detail to identify the claimant, the circumstances giving rise to the claim, and the state agency concerned, if any. The claimant shall not otherwise be held to any formal requirement of notice.

2. The clerk shall transmit a copy of the notice to the state agency concerned. The state agency may deny the claim, or may request a postponement of proceedings to permit negotiations with the claimant. If the court finds that a claim is prima facie within its jurisdiction, it shall order the claim to be placed upon its regular docket for hearing.

3. During the period of negotiations and pending hearing, the state agency, represented by the attorney general, shall, if possible, reach an agreement with the claimant regarding the facts upon which the claim is based so as to avoid the necessity for the introduction of evidence at the hearing. If the parties are unable to agree upon the

facts an attempt shall be made to stipulate the questions of fact in issue.

4. The court shall so conduct the hearing as to disclose all material facts and issues of liability and may examine or cross-examine witnesses. The court may call witnesses or require evidence not produced by the parties; may stipulate the questions to be argued by the parties; and may continue the hearing until some subsequent time to permit a more complete presentation of the claim.

5. After the close of the hearing the court shall consider the claim and shall conclude its determination, if possible, within thirty days.

§ 14-2-17. Shortened procedure.

The shortened procedure authorized by this section shall apply only to a claim possessing all of the following characteristics:

1. The claim does not arise under an appropriation for the current fiscal year.
2. The state agency concerned concurs in the claim.
3. The amount claimed does not exceed one thousand dollars.
4. The claim has been approved by the attorney general as one that, in view of the purposes of this article, should be paid.

The state agency concerned shall prepare the record of the claim consisting of all papers, stipulations and evidential documents required by the rules of the court and file the same with the clerk. The court shall consider the claim informally upon the record submitted. If the court determines that the claim should be entered as an approved claim and an award made, it shall so order and shall file its statement with the clerk. If the court finds that the record is inadequate, or that the claim should not be paid, it shall reject the claim. The rejection of a claim under this section shall not bar its resubmission under the regular procedure.

§ 14-2-18. Advisory determination procedure.

The governor or the head of a state agency may refer to the court for an advisory determination the question of the legal or equitable status, or both, of a claim against the State or a state agency. This procedure shall apply only to such claims as are within the jurisdiction of the court. The procedure shall be substantially as follows:

1. There shall be filed with the clerk, the record of the claim including a full statement of the facts, the contentions of the claimant, and such other materials as the rules of the court may require. The

record shall submit specific questions for the court's consideration.

2. The clerk shall examine the record submitted and if he finds that it is adequate under the rules, he shall place the claim on a special docket. If he finds the record inadequate, he shall refer it back to the officer submitting it with the request that the necessary additions or changes be made.

3. When a claim is reached on the special docket, the court shall prepare a brief opinion for the information and guidance of the officer. The claim shall be considered informally and without hearing. A claimant shall not be entitled to appear in connection with the consideration of the claim.

4. The opinion shall be filed with the clerk. A copy shall be transmitted to the officer who referred the claim.

An advisory determination shall not bar the subsequent consideration of the same claim if properly submitted by, or on behalf of, the claimant. Such subsequent consideration, if undertaken, shall be de novo.

§ 14-2-19. Claims under existing appropriations.

A claim arising under an appropriation made by the legislature during the fiscal year to which the appropriation applies, and falling within the jurisdiction of the court, may be submitted by:

1. A claimant whose claim has been rejected by the state agency concerned or by the state auditor.

2. The head of the state agency concerned in order to obtain a determination of the matters in issue.

3. The state auditor in order to obtain a full hearing and consideration of the merits.

The regular procedure, so far as applicable, shall govern the consideration of the claim by the court. If the court finds that the claimant should be paid, it shall certify the approved claim and award to the head of the appropriate state agency, the state auditor, and to the governor. The governor may thereupon instruct the auditor to issue his warrant in payment of the award and to charge the amount thereof to the proper appropriation. The auditor shall forthwith notify the state agency that the claim has been paid. Such an expenditure shall not be subject to further review by the auditor upon any matter determined and certified by the court.

§ 14-2-20. Claims under special appropriations.

Whenever the legislature makes an appropriation for the payment

of claims against the State, then accrued or arising during the ensuing fiscal year, the determination of claims and the payment thereof may be made in accordance with this section. However, this section shall apply only if the legislature in making its appropriation specifically so provides.

The claim shall be considered and determined by the regular or shortened procedure, as the case may be, and the amount of the award shall be fixed by the court. The clerk shall certify each approved claim and award, and requisition relating thereto, to the auditor. The auditor thereupon shall issue his warrant to the treasurer in favor of the claimant. The auditor shall issue his warrant without further examination or review of the claim except for the question of a sufficient unexpended balance in the appropriation.

§ 14-2-21. Periods of limitation made applicable.

The court shall not take jurisdiction of any claim, whether accruing before or after the effective date of this article [July 1, 1967], unless notice of such claim be filed with the clerk within such period of limitation as would be applicable under the pertinent provisions of the Code of West Virginia, one thousand nine hundred thirty-one, as amended, if the claim were against a private person, firm or corporation and the constitutional immunity of the State from suit were not involved and such period of limitation may not be waived or extended. The foregoing provision shall not be held to limit or restrict the right of any person, firm or corporation who or which had a claim against the State or any state agency, pending before the attorney general on the effective date of this article [July 1, 1967], from presenting such claim to the court of claims, nor shall it limit or restrict the right to file such a claim which was, on the effective date of this article [July 1, 1967], pending in any court of record as a legal claim and which, after such date was or may be adjudicated in such court to be invalid as a claim against the State because of the constitutional immunity of the State from suit.

§ 14-2-22. Compulsory process.

In all hearings and proceedings before the court, the evidence and testimony of witnesses and the production of documentary evidence may be required. Subpoenas may be issued by the court for appearance at any designated place of hearing. In case of disobedience to a subpoena or other process, the court may invoke the aid of any

circuit court in requiring the evidence and testimony of witnesses, and the production of books, papers and documents. Upon proper showing, the circuit court shall issue an order requiring witnesses to appear before the court of claims; produce books, papers and other evidence; and give testimony touching the matter in question. A person failing to obey the order may be punished by the circuit court as for contempt.

§ 14-2-23. Inclusion of awards in budget.

The clerk shall certify to the department of finance and administration, on or before the twentieth day of November of each year, a list of all awards recommended by the court to the legislature for appropriation. The clerk may certify supplementary lists to the governor to include subsequent awards made by the court. The governor shall include all awards so certified in his proposed budget bill transmitted to the legislature.

§ 14-2-24. Records to be preserved.

The record of each claim considered by the court, including all documents, papers, briefs, transcripts of testimony and other materials, shall be preserved by the clerk and shall be made available to the legislature or any committee thereof for the reexamination of the claim.

§ 14-2-25. Reports of the court.

The clerk shall be the official reporter of the court. He shall collect and edit the approved claims, awards and statements, shall prepare them for submission to the legislature in the form of an annual report and shall prepare them for publication.

Claims and awards shall be separately classified as follows:

1. Approved claims and awards not satisfied but referred to the legislature for final consideration and appropriation.
2. Approved claims and awards satisfied by payments out of regular appropriations.
3. Approved claims and awards satisfied by payment out of a special appropriation made by the legislature to pay claims arising during the fiscal year.
4. Claims rejected by the court with the reasons therefor.

5. Advisory determinations made at the request of the governor or the head of a state agency.

The court may include any other information or recommendations pertaining to the performance of its duties.

The court shall transmit its annual report to the presiding officer of each house of the legislature, and a copy shall be made available to any member of the legislature upon request therefor. The reports of the court shall be published biennially by the clerk as a public document. The biennial report shall be filed with the clerk of each house of the legislature, the governor and the attorney general.

§ 14-2-26. Fraudulent claims.

A person who knowingly and wilfully presents or attempts to present a false or fraudulent claim, or a state officer or employee who knowingly and wilfully participates or assists in the preparation or presentation of a false or fraudulent claim, shall be guilty of a misdemeanor. A person convicted, in a court of competent jurisdiction, of violation of this section shall be fined not more than one thousand dollars or imprisoned for not more than one year, or both, in the discretion of such court. If the convicted person is a state officer or employee, he shall, in addition, forfeit his office or position of employment, as the case may be.

§ 14-2-27. Conclusiveness of determination.

Any final determination against the claimant on any claim presented as provided in this article shall forever bar any further claim in the court arising out of the rejected claim.

§ 14-2-28. Award as condition precedent to appropriation.

It is the policy of the legislature to make no appropriation to pay any claims against the State, cognizable by the court, unless the claim has first been passed upon by the court.

§ 14-2-29. Severability.

If any provision of this article or the application thereof to any person or circumstance be held invalid, such invalidity shall not affect other provisions or applications of the article which can be given effect without the invalid provision or application, and to this end the provisions of this article are declared to be severable.

Rules of Practice and Procedure of the Court of Claims

- | | |
|--|---|
| Rule 1. Clerk, custodian of papers, etc. | Rule 11. Original papers not to be withdrawn; exceptions. |
| Rule 2. Filing papers. | Rule 12. Withdrawal of claim. |
| Rule 3. Records. | Rule 13. Witnesses. |
| Rule 4. Form of claims. | Rule 14. Depositions and interrogatories. |
| Rule 5. Copy of notice of claims to attorney general and state agency. | Rule 15. Rehearings. |
| Rule 6. Preparation of hearing docket. | Rule 16. Records of shortened procedure claims submitted by state agencies. |
| Rule 7. Proof and rules governing procedure. | Rule 17. Application of Rules of Civil Procedure. |
| Rule 8. Appearances. | |
| Rule 9. Briefs. | |
| Rule 10. Continuances; dismissal for failure to prosecute. | |

Rule 1. Clerk, custodian of papers, etc.

The clerk shall be responsible for all papers and claims filed in his office; and will be required to properly file, in an index for that purpose, any paper, pleading, document, or other writing filed in connection with any claim. The clerk shall also properly endorse all such papers and claims, showing the title of the claim, the number of the same, and such other data as may be necessary to properly connect and identify the document, writing, or claim.

Rule 2. Filing papers.

(a) Communications addressed to the court or clerk and all notices, petitions, answers and other pleadings, all reports, documents received or filed in the office kept by the clerk of this court, shall be endorsed by him showing the date of the receipt or filing thereof.

(b) The clerk, upon receipt of a notice of a claim, shall enter of record in the docket book indexed and kept for that purpose, the name of the claimant, whose name shall be used as the title of the case, and a case number shall be assigned accordingly.

(c) No paper, exclusive of exhibits, shall be filed in any action or proceeding or be accepted by the clerk for filing nor any brief, deposition, pleading, order, decree, reporter's transcript or other paper to be made a part of the record in any claim be received except that the same be upon paper measuring 8½ inches in width and 11 inches in length.

Rule 3. Records.

The clerk shall keep the following record books, suitably indexed in the names of claimants and other subject matter:

(a) Order book, in which shall be recorded at large, on the day of their filing, all orders made by the court in each case or proceeding.

(b) Docket book, in which shall be entered each case or claim made and filed, with a file or case number corresponding to the number of the case, together with brief chronological notations of the proceedings had in each case.

(c) Financial ledger, in which shall be entered chronologically, all administrative expenditures of the court under suitable classifications.

Rule 4. Form of claims.

Verified notice in writing of each claim must be filed with the clerk of the court. The notice shall be in sufficient detail to identify the claimant, the circumstances giving rise to the claim, and the state agency concerned, if any. The court reserves the right to require further information before hearing, when, in its judgment, justice and equity may require. It is recommended that notice of claims be furnished in triplicate. A suggested form of notice of a claim may be obtained from the clerk.

Rule 5. Copy of notice of claims to attorney general and state agency.

Upon receipt of a notice of claim to be considered by the court, the clerk shall forthwith transmit a copy of the notice to the state agency concerned, if any, and a copy thereof to the office of the attorney general of the State, and the clerk shall make a note of the time of such delivery.

Rule 6. Preparation of hearing docket.

On and after the date of adoption of these rules by the court, the clerk shall prepare fifteen days previous to the regular terms of court a docket listing all claims that are ready for hearings by the court, and showing the respective dates, as fixed by the court for the hearings thereof. The court reserves the right to add to, rearrange or change said docket when in its judgment such addition, rearrangement or change would expedite the work of the term. Each claimant or his counsel of record and the attorney general shall be notified as to the date, time, and place of the hearing.

Rule 7. Proof and rules governing procedure.

(a) Claims asserted against the State, including all the allegations in a notice of claim, are treated as denied, and must be established by the

claimant with satisfactory proof, or proper stipulation as hereinafter provided before an award can be made.

(b) The court shall not be bound by the usual common law or statutory rules of evidence. The court may accept and weigh, in accordance with its evidential value, any information that will assist the court in determining the factual basis of the claim.

(c) The Attorney General shall, within twenty days after a copy of the notice has been furnished his office, file with the clerk a notice in writing, either denying the claim, requesting postponement of proceedings to permit negotiations with the claimant, or otherwise setting forth reasons for further investigation of the claim, and furnish the claimant or his counsel of record a copy thereof. Otherwise, after said twenty-day period, the court may order the claim placed upon its regular docket for hearing.

(d) It shall be the duty of the claimant or his counsel in claims under the regular procedure to negotiate with the office of the attorney general so that the claimant and the state agency and the Attorney General may be ready at the beginning of the hearing of a claim to read, if reduced to writing, or to dictate orally, if not reduced to writing, into the record such stipulations, if any, as the parties may have been able to agree upon.

(e) Where there is a controversy between a claimant and any state agency, the court may require each party to reduce the facts to writing, and, if the parties are not in agreement as to the facts, the court may stipulate the questions of fact in issue and require written answers to the said stipulated questions.

(f) Claims not exceeding the sum of \$10,000.00 may be heard and considered, as provided by law, by one judge sitting individually.

Rule 8. Appearances.

Any claimant may appear in his own behalf or have his claim presented by counsel, duly admitted as such to practice law in the State of West Virginia.

Rule 9. Briefs.

(a) Claimants or their counsel, and the attorney general, may file with the court for its consideration a brief on any question involved, provided a copy of said brief is also presented to and furnished the opposing party or counsel. Reply briefs shall be filed within fifteen days.

(b) All briefs filed with, and for the use of, the court shall be in quadruplicate — original and three copies. As soon as any brief is received by the clerk he shall file the original in the court file and deliver the three copies, one each, to the judges of the court.

Rule 10. Continuances; dismissal for failure to prosecute.

(a) After claims have been set for hearing, continuances are looked upon by the court with disfavor, but may be allowed when good cause is shown.

(b) A party desiring a continuance should file a motion showing good cause therefor at the earliest possible date.

(c) Whenever any claim has been docketed for hearing for three regular terms of court at which the claim might have been prosecuted, and the State shall have been ready to proceed with the trial thereof, the court may, upon its own motion or that of the State, dismiss the claim unless good cause appear or be shown by the claimant why such claim has not been prosecuted.

(d) Whenever a claimant shall fail to appear and prosecute his claim on the day set for hearing and shall not have communicated with the clerk prior thereto, advising of his inability to attend and the reason therefor, and if it further appear that the claimant or his counsel had sufficient notice of the docketing of the claim for hearing, the court may, upon its own motion or that of the State, dismiss the claim.

(e) Within the discretion of the court, no order dismissing a claim under either of the two preceding sections of this rule shall be vacated nor the hearing of such claim be reopened except by a notice in writing filed not later than the end of the next regular term of court, supported by affidavits showing sufficient reason why the order dismissing such claim should be vacated, the claim reinstated and the trial thereof permitted.

Rule 11. Original papers not to be withdrawn; exceptions.

No original paper in any case shall be withdrawn from the court files except upon special order of the court or one of the judges thereof in vacation. When an official of a state department is testifying from an original record of his department, a certified copy of the original record of such department may be filed in the place and stead of the original.

Rule 12. Withdrawal of claim.

(a) Any claimant may withdraw his claim. Should the claimant later refile the claim, the court shall consider its former status, such as previous continuances and any other matter affecting its standing, and may redocket or refuse to redocket the claim as in its judgment, justice and equity may require under the circumstances.

(b) Any department or state agency, having filed a claim for the court's consideration, under the advisory determination procedure or the shortened procedure provision of the Court Act, may withdraw the claim without prejudice to the right of the claimant involved to file the claim under the regular procedure.

Rule 13. Witnesses.

(a) For the purpose of convenience and in order that proper records may be preserved, claimants and state departments desiring to have subpoenas for witnesses shall file with the clerk a memorandum in writing giving the style and number of the claim and setting forth the names of such witnesses, and thereupon such subpoenas shall be issued and delivered to the person calling therefor or mailed to the person designated.

(b) Request for subpoenas for witnesses should be furnished to the clerk well in advance of the hearing date so that such subpoenas may be issued in ample time before the hearing.

(c) The payment of witness fees, and mileage where transportation is not furnished to any witness subpoenaed by or at the instance of either the claimant or the respondent state agency, shall be the responsibility of the party by whom or at whose instance such witness is subpoenaed.

Rule 14. Depositions and interrogatories.

(a) Depositions may be taken when a party desires the testimony of any person, including a claimant. The deposition shall be upon oral examination or upon written interrogatory. Depositions may be taken without leave of the court. The attendance of witnesses may be compelled by the use of subpoenas as provided in Rule 13.

(b) To take the deposition of any designated witness, reasonable notice of time and place shall be given the opposite party or counsel, and the party taking such deposition shall pay the costs thereof and file an original and three copies of such deposition with the court. Extra copies of exhibits will not be required; however, it is suggested that where exhibits are not too lengthy and are of such nature as to permit it, they should be read into the deposition.

(c) Depositions shall be taken in accordance with the provision of Rule 17 of this court.

(d) Unless otherwise permitted by the court for good cause, no party shall serve upon any other party, at one time or cumulatively, more than 30 written interrogatories, including parts and subparts. Sufficient space for insertion of the answer shall be provided after each inter-

rogatory or subpart thereof. The original shall be filed with the clerk, and two copies shall be served upon the answering party. After inserting answers on the copies served him, the answering party shall file one copy with the clerk and serve one copy on the issuing party. If there is insufficient space on the original for insertion of answers, the answering party may attach supplemental pages.

Rule 15. Rehearings.

A rehearing shall not be allowed except where good cause is shown. A motion for rehearing may be entertained and considered ex parte, unless the court otherwise directs, upon the petition and brief filed by the party seeking the rehearing. Such petition and brief shall be filed within thirty days after notice of the court's determination of the claim unless good cause be shown why the time should be extended.

Rule 16. Records of shortened procedure claims submitted by state agencies.

When a claim is submitted under the provisions of chapter 14, article 2, paragraph 17 [§ 14-2-17] of the Code of West Virginia, concurred in by the head of the department and approved for payment by the attorney general, the record thereof, in addition to copies of correspondence, bills, invoices, photographs, sketches or other exhibits, should contain a full, clear and accurate statement, in narrative form, of the facts upon which the claim is based. The facts in such record among other things which may be peculiar to the particular claim, should show as definitely as possible that:

(a) The claimant did not through neglect, default or lack of reasonable care, cause the damage of which he complains. It should appear he was innocent and without fault in the matter.

(b) The department, by or through neglect, default or failure to use reasonable care under the circumstances caused the damage to claimant, so that the State in justice and equity should be held liable.

(c) The amount of the claim should be itemized and supported by a paid invoice, or other report itemizing the damages, and vouched for by the head of the department as to correctness and reasonableness.

Rule 17. Application of Rules of Civil Procedure.

The Rules of Civil Procedure will apply in the court of claims unless the Rules of Practice and Procedure of the court of claims are to the contrary.

REPORT OF THE COURT OF CLAIMS
For the Period July 1, 1983 to June 30, 1985

(1) Approved claims and awards not satisfied but to be referred to the 1986 Legislature for final consideration and appropriation:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-85-166	William K. Bunner	Department of Agriculture - State Soil Conservation Committee	\$ 1,468.20	\$ 1,468.20	6-28-85
CC-85-163	City of Moundsville	Department of Public Safety	283.48	283.48	6-28-85
CC-85-62	Fire Chief Fire Extinguisher Co.	Department of Veterans Affairs	22.26	22.26	6-28-85
CC-85-118	Fisher Scientific	Department of Public Safety	32.90	32.90	6-28-85
CC-84-257	Lucy Kathleen Gardner	Board of Regents	210.31	210.31	6-28-85
CC-85-131	Laura L. Michael	Board of Regents	60.00	60.00	6-28-85
CC-85-57	Moore Business Forms, Inc.	Department of Natural Resources	2,358.81	2,354.90	6-28-85
CC-85-69	James P. Mylott	Department of Health	527.02	523.37	6-28-85
CC-85-60	Ohio Valley Office Equipment	Division of Vocational Rehabilitation	174.08	174.08	6-28-85

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1983 to June 30, 1985.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-83-341	A.H. Robins Company	Department of Health	\$ 208.68	\$ 208.68	1-30-84
CC-85-34	Aarom Boonsue, M.D., Inc.	Department of Public Safety	290.00	290.00	2-27-85
CC-82-203	Terry W. Ahalt	Department of Highways	172.46	172.46	10-21-83
CC-84-33	Alling & Cory Company	Department of Public Safety	2,242.00	2,242.00	5-25-84
CC-84-83a	AM International Inc., Debtor in Possession Varsityper Division	Department of Education	524.00	524.00	5-4-84
CC-84-83b	AM International Inc., Debtor in Possession Varsityper Division	Department of Public Safety	600.00	600.00	5-4-84
CC-81-205	American Bridge Division of United States Steel Corporation	Department of Highways	1,814,669.54	734,449.30	1-25-85
CC-83-352	American National Property & Casualty, Subrogee of Charles R. Hart	Department of Highways	644.25	644.25	4-6-84
CC-84-294	Anderson Equipment Company	Department of Highways	2,453.34	2,453.34	2-15-85

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1983 to June 30, 1985.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-84-152	William F. Angel	Department of Highways	224.93	224.93	2-15-85
CC-84-178	Appalachian Power Company	Alcohol Beverage Control Commissioner	229.17	229.17	10-31-84
CC-83-340	Zeik Auvil	Department of Corrections	519.00	519.00	1-30-84
CC-83-284	Avery Label, Div. of Avery International	Department of Finance and Administration	100.00	100.00	12-1-83
CC-84-230	Mary Ann Babich	Board of Regents	540.00	540.00	10-31-84
CC-81-143	Bates & Rogers Construction Corporation	Department of Highways	11,424.65	11,424.65	1-4-85
CC-84-260	Baysal & Associates, Inc.	Department of Corrections	130.00	130.00	12-13-84
CC-84-327	Elliott A. Bigelow	Board of Regents	497.90	497.90	2-4-85
CC-85-35	Bob Dalton Investigations, Inc.	Treasurer	294.53	294.53	2-27-85
CC-84-113	Carroll L. Bolyard	Department of Highways	535.24	535.24	10-31-84
CC-83-231	Bethany L. Browning	Board of Regents	75.72	75.72	12-1-83
CC-84-71	Shirley G. Burbridge	Department of Highways	122.89	122.89	10-31-84

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1983 to June 30, 1985.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-83-44	Sylvia A. Cadle	Department of Highways	8,630.00	8,630.00	1-30-85
CC-84-253	Carl E. Stephens Construction Company, Inc.	Department of Highways	1,000.00	1,000.00	1-30-85
CC-79-458	Stella Cecil, Administratrix of the Estate of O'Dell M. Cecil, deceased	Department of Highways	500,000.00	137,328.25	1-27-84
CC-84-325	Central Beverage Distributors, Inc.	Alcohol Beverage Control Commissioner	7,659.76	7,659.76	1-30-85
CC-84-324	Central Distributing Co., Inc.	Beer Commission	505.10	505.10	1-30-85
CC-83-344	Chapman Printing Company	Board of Regents	410.00	205.00	9-27-84
CC-83-120	Judy W. Chontos	Supreme Court of Appeals	56.80	56.80	10-18-83
CC-83-199	City of Shinnston	Department of Highways	801.50	801.50	10-25-83
CC-84-223	City of Wellsburg	Department of Public Safety	22.50	22.50	11-21-84
CC-85-67	Sophia Clark	Department of Health	2,613.00	2,613.00	3-14-85

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1983 to June 30, 1985.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-83-359	Phyllis Jean Cole, Clerk of the Circuit Court of Kanawha County	Attorney General	15.00	15.00	2-6-84
CC-84-167	Consolidated Business Forms Company	Department of Public Safety	178.49	178.49	11-21-84
CC-83-193	Consolidated Rail Corporation	Department of Finance and Administration	1,950.00	1,950.00	10-4-83
CC-84-25	Aaron D. Cottle	Department of Health	45.00	45.00	2-1-84
CC-84-56	Myrtle Craddock	Department of Highways	224.62	224.62	8-6-84
CC-85-42	Dental Arts Laboratory, Inc.	Department of Health	135.20	135.20	2-27-85
CC-83-320	Department of Employment Security	Board of Regents	21,698.03	7,219.51	1-30-84
CC-84-313	Department of Employment Security	Board of Regents	446.88	436.53	2-15-85
CC-83-321	Department of Employment Security	Civil Service Commission	5,438.75	5,235.44	1-30-84
CC-83-322	Department of Employment Security	Department of Banking	79.76	73.53	1-30-84
CC-83-323	Department of Employment Security	Department of Corrections	83,642.91	81,188.10	1-30-84

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1983 to June 30, 1985.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-83-324	Department of Employment Security	Department of Culture and History	3,428.40	3,322.31	1-30-84
CC-83-325	Department of Employment Security	Department of Health	52,236.25	50,683.58	1-30-84
CC-83-326	Department of Employment Security	Department of Labor	492.62	478.17	1-30-84
CC-83-327	Department of Employment Security	Department of Mines	2,168.63	2,104.99	1-30-84
CC-83-328	Department of Employment Security	Farm Management Commission	7,547.92	7,280.60	1-30-84
CC-83-330	Department of Employment Security	Human Rights Commission	3,151.05	3,073.00	1-30-84
CC-84-315	Department of Employment Security	Human Rights Commission	437.86	424.00	2-15-85
CC-83-331	Department of Employment Security	Nonintoxicating Beer Commission	172.27	167.22	1-30-84
CC-83-332	Department of Employment Security	Railroad Maintenance Authority	6,680.61	6,484.58	1-30-84
CC-83-333	Department of Employment Security	Secretary of State	1,440.83	1,396.25	1-30-84
CC-83-334	Department of Employment Security	State Fire Commission	178.12	174.00	1-30-84

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1983 to June 30, 1985.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-83-310	Larry R. Dexter and Sharon K. Dexter	Department of Highways	375.61	375.61	1-30-84
CC-83-336	Dial-Page	Department of Highways	250.00	250.00	2-2-84
CC-84-64	Doctor's Urgent Care, Inc.	Department of Public Safety	55.00	55.00	4-23-84
CC-84-321	Janet Dooley	Board of Regents	7,886.00	7,886.00	1-30-85
CC-84-340	Eagle Aviation, Inc.	Department of Public Safety	3,577.00	3,577.00	1-30-85
CC-83-307	Eagle Coal and Dock Company, Inc.	Department of Public Safety	5,950.00	5,950.00	1-30-84
CC-84-302	Engineered Products, Inc.	Department of Highways	13,139.81	13,139.81	1-30-85
CC-81-82	Erie Insurance Exchange, Subrogee of Joseph E. Martin & Goldie J. Martin	Department of Highways	6,077.50	4,980.00	2-15-85
CC-84-308	Richard R. Fisher	Department of Highways	2,752.95	2,477.65	2-15-85
CC-85-13	Beverly Pisegna Fulmer	Board of Regents	228.00	228.00	3-1-85
CC-84-145	W. Auvil Godwin	Department of Corrections	2,700.00	2,700.00	8-1-84

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1983 to June 30, 1985.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-84-11	Norval D. Goe, Executor of the Estate of William Robert Goe, dec.	Attorney General	7,569.42	7,569.42	12-17-84
CC-83-309	Goodwin Drug Company	Department of Health	47.39	47.39	1-17-84
CC-83-306	Goodyear Tire and Rubber Company (The)	Department of Agriculture	174.54	174.54	1-17-84
CC-84-296a	Goodyear Tire & Rubber Company (The)	Department of Natural Resources	344.00	344.00	12-13-84
CC-84-296b	Goodyear Tire & Rubber Company (The)	Department of Natural Resources	57.00	57.00	12-13-84
CC-84-51	Goodyear Tire & Rubber Co. (The)	Department of Public Safety	2,764.50	2,764.50	4-23-84
CC-84-265	Grafton Sanitary Sewer Board	Department of Corrections	1,725.00	1,725.00	12-13-84
CC-84-311	Greenbrier Physicians, Inc.	Department of Public Safety	50.00	50.00	2-15-85
CC-83-286	Greenbrier Valley Soil Conservation District	Department of Public Safety	338.10	338.10	1-30-84
CC-84-208	Leonard J. Gwiazdowsky	Department of Health	502.50	502.50	11-21-84
CC-83-41	Judith Ann Hall	Board of Regents	469.41	469.41	10-21-83

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1983 to June 30, 1985.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-84-292	Kanawha Valley Radiologists, Inc.	Department of Public Safety	100.00	100.00	12-13-84
CC-85-44	Keizer Saw & Mower	Department of Natural Resources	309.95	309.95	2-27-85
CC-84-80	Kellogg Sales Company	Department of Health	137.50	137.50	5-4-84
CC-85-2	Richard D. Koval	Board of Regents	65.44	65.44	2-4-85
CC-84-1	Kramer's Photo Supply, Inc.	Department of Health	31.79	31.79	2-6-84
CC-84-210	Krown Research, Inc.	Division of Vocational Rehabilitation	194.00	194.00	10-31-84
CC-77-11	L.G. De Felice, Inc.	Department of Highways	1,751,743.63	998,297.33	11-1-84
CC-82-199	L.R. Skelton & Company	Department of Highways	368,955.82	382,203.06	3-1-85
CC-84-273	John Vincent Lacey, Jr.	Board of Regents	459.36	459.36	2-4-85
CC-84-16	Lawhead Press, Inc. (The)	Board of Regents	1,152.00	576.00	1-30-85
CC-84-15	Lawhead Press, Inc. (The)	Department of Natural Resources	561.05	561.05	2-1-84
CC-83-298	Lawyers Co-operative Publishing Company	Supreme Court of Appeals	6,865.65	6,865.65	1-30-84

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1983 to June 30, 1985.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-83-21	David Leadman (Mr. & Mrs.)	Department of Highways	1,500.00	1,500.00	12-1-83
CC-84-205	Jeffrey S. Life	Department of Health (Office of the Chief Medical Examiner)	45.00	35.00	10-31-84
CC-84-10	Logan Corporation	Department of Highways	1,089.50	1,089.50	1-30-84
CC-83-292	Randy Paul Lowe	Department of Health	15.00	15.00	1-17-84
CC-83-177	John R. Lukens	Public Legal Services	441.15	441.15	8-12-83
CC-83-170	Mabscott Supply Company	Department of Highways	529.00	529.00	7-25-83
CC-83-22	Machinery & Systems Division, a Division of Carrier Corp.	Department of Public Safety	833.00	833.00	12-19-83
CC-80-275	Pauline G. Malcomb	Alcohol Beverage Control Commissioner	73,501.54	3,000.00	1-27-84
CC-83-155	Fannie Lee Malone	Board of Regents	656.00	656.00	10-18-83
CC-83-219	Fred Marcum	Department of Highways	275.92	275.92	10-21-83
CC-84-102	Marjorie Garden Associates	Department of Public Safety	210.00	210.00	9-27-84

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1983 to June 30, 1985.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-81-82	Joseph E. Martin & Goldie J. Martin	Department of Highways	100.00	100.00	2-15-85
CC-80-371	Elsie Mast	Department of Highways	20,700.62	20,700.62	12-5-83
CC-80-371	Elsie Mast and Willis Mast, d/b/a Willis Mast	Department of Highways	9,277.31	1,000.00	12-5-83
CC-83-6	Livestock Trucking Elliott E. Maynard, III	Department of Highways	6,934.20	4,953.00	10-21-83
CC-84-291	Barbara Ann McCabe	Board of Regents	269.47	269.47	2-15-85
CC-84-272	D. Verne McConnell, M.D.	Department of Corrections	22.00	22.00	12-13-84
CC-84-78	Means Charleston Center	Department of Public Safety	137.84	137.84	5-4-84
CC-84-278	Medical Dental Bureau, Inc. (Agent for Ohio Valley Medical Center, Inc.)	Department of Corrections	186.76	186.76	12-13-84
CC-83-337	Michie Company (The)	Department of Health	163.31	163.31	1-30-84
CC-84-182	Mid-Atlantic Paving	Department of Highways	3,929.25	3,929.25	12-13-84
CC-81-417	Herbert Midkiff	Department of Highways	5,679.00	3,679.00	8-1-84

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1983 to June 30, 1985.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-84-7	Nora A. Miller	Board of Regents	225.00	225.00	1-30-84
CC-83-312	Moore Business Forms, Inc.	Secretary of State	1,106.50	774.55	1-30-84
CC-83-314	Moore Business Forms, Inc.	Department of Motor Vehicles	763.92	763.92	1-30-84
CC-84-207	Moore Business Forms, Inc.	Board of Regents	575.87	490.07	12-17-84
CC-84-76	Elizabeth D. Morgan	Board of Regents	1,543.04	766.00	8-1-84
CC-83-279	Jack E. Murray	Department of Highways	287.47	287.47	5-4-84
CC-83-228	Barbara M. Neri	Department of Highways	23,800.00	11,040.00	3-1-85
CC-81-411	New River Building Company	Board of Regents	156,309.83	40,779.08	2-6-84
CC-84-133	Steven Gerard Noonan	Board of Regents	60.00	60.00	8-1-84
CC-83-266	Ohio Valley Medical Center, Inc.	Supreme Court of Appeals	8,494.69	3,000.00	2-6-84
CC-83-171	Pagano Industries, Inc.	Department of Public Safety	1,560.00	1,560.00	7-25-83
CC-84-74	Parke-Davis	Department of Health	6,864.00	6,864.00	5-4-84
CC-83-342	Pendleton County Bank	Department of Motor Vehicles	274.67	274.67	2-6-84

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1983 to June 30, 1985.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-83-4	John Casey Peters	Department of Human Services	2,500.00	2,040.03	12-15-83
CC-84-120	Pfizer, Inc.	Department of Health	190.80	190.80	6-26-84
CC-84-143	Pfizer, Inc.	Department of Health	3,557.76	3,557.76	11-21-84
CC-80-264	William G. Poling and Delores J. Poling	Department of Highways	500.00	500.00	10-21-83
CC-83-204	Brenda Ann Poole and Michael Ray Poole	Department of Highways	341.13	125.50	12-15-83
CC-84-285	Putnam General Hospital	Department of Public Safety	1,533.40	1,533.40	12-13-84
CC-83-289	Vera B. Ramsey	Public Employees Insurance Board	332.76	332.76	1-17-84
CC-84-46	Regina M. Rhoads	Department of Highways	100.00	100.00	12-17-84
CC-84-297a	Richard F. Terry, M.D., Inc.	Department of Corrections	65.00	65.00	12-13-84
CC-84-297b	Richard F. Terry, M.D., Inc.	Department of Corrections	670.00	670.00	12-13-84
CC-83-11	Theresa Ritz	Department of Highways	100,00.00	21,418.80	1-30-85
CC-83-363	Roane General Hospital	Department of Health	1,020.03	1,020.03	1-30-84

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1983 to June 30, 1985.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-83-257	Roentgen Diagnostics, Inc.	Division of Vocational Rehabilitation	75.00	75.00	12-1-83
CC-84-53	Roentgen Diagnostics, Inc.	Department of Public Safety	39.00	39.00	4-23-84
CC-83-244	Lillian Rose	Department of Health	10.50	10.50	10-21-83
CC-84-22	S.R.C. Associates	State Board of Education and Department of Finance and Administration	622.60	311.30	6-22-84
CC-82-99	Dennis L. Sanders and Nancy J. Sanders	Department of Highways	505.00	505.00	9-27-84
CC-85-9	Sheriff and Treasurer of Kanawha County (The)	Supreme Court of Appeals	200,016.15	200,016.15	1-30-85
CC-83-271	Carl Eugene Shockey, d/b/a Gene's Mobile Homes	Department of Highways	500.00	500.00	1-30-85
CC-82-45	Melvin Sickles	Department of Highways	444.00	444.00	1-30-84
CC-83-281	Simplex Time Recorder Co.	Secretary of State	505.76	505.76	12-1-83
CC-84-161	Danny R. Sinclair	Board of Regents	696.57	696.57	2-4-85
CC-83-217	Elvin D. Slater	West Virginia Radiologic Technology Board of Examiners	109.20	109.20	10-21-83

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1983 to June 30, 1985.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-84-281	Timothy E. Smith	Board of Regents	239.52	239.52	2-4-85
CC-83-300	Edward Sowell	Board of Regents	456.00	456.00	1-17-84
CC-83-7	Sperry Univac	Department of Finance and Administration	3,057.00	3,057.00	10-18-83
CC-84-323	St. Joseph's Hospital	Department of Health	317.27	317.27	2-15-85
CC-84-173	St. Joseph's Hospital	Department of Public Safety	6.00	6.00	11-21-84
CC-84-301	St. Joseph's Hospital	Division of Vocational Rehabilitation	131.00	131.00	1-30-85
CC-84-310	St. Joseph's Hospital	Division of Vocational Rehabilitation	5,178.40	4,868.40	3-1-85
CC-80-378	Fred Staffilino, Jr. and Linda Staffilino	Department of Highways	75,000.00	14,000.00	3-1-85
CC-83-209	Standard Publishing	State Tax Department	4,312.00	1,304.00	1-30-84
CC-84-6	Elaine B. Stample	Board of Regents	150.00	150.00	1-30-84
CC-83-301	Bobbie E. Stevens	Board of Regents	467.04	467.04	1-17-84
CC-82-328	Sandra Stiltner	Department of Highways	453.11	453.11	10-4-83

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1983 to June 30, 1985.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-85-8	Stonewall Jackson Memorial Hospital	Department of Health	1,085.79	1,085.79	1-30-85
CC-83-164	Charles D. Stout and Joyce L. Stout	Department of Highways	1,000.00	1,000.00	12-1-83
CC-83-293	Janet T. Surface	Human Rights Commission	46.09	46.09	1-17-84
CC-82-290	Harold C. Swiger	Department of Highways	292.01	292.01	10-21-83
CC-83-360	Thompson's of Morgantown, Inc.	Department of Public Safety	295.32	295.32	2-6-84
CC-84-330	Three Community Cable TV	Department of Public Safety	164.00	164.00	1-30-85
CC-83-245	3M Company	Department of Motor Vehicles	3,828.00	3,828.00	10-21-83
CC-84-119	3M Company	Department of Health	565.09	565.09	6-26-84
CC-84-179	3M Company	Department of Public Safety	246.16	246.16	12-13-84
CC-82-161	Tucker's Used Cars, Inc.	Department of Highways	17,964.70	10,778.82	3-1-85
CC-84-320	Virginia Electric and Power Company	Department of Corrections	110.00	110.00	2-15-85
CC-81-429	Wayne Concrete Company	Department of Highways	13,882.88	13,477.88	1-30-84

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1983 to June 30, 1985.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-83-249	Pearl Patsy Webb	Department of Health	36.00	36.00	12-01-83
CC-83-291	West Virginia Telephone Company	Department of Health	274.64	274.64	1-17-84
CC-82-296	West Virginia Utility Contractors Association	Governor's Office of Economic and Community Development	6,750.00	3,374.57	12-17-84
CC-84-290	Wheeling Electric Company	Department of Corrections	4,602.64	4,602.64	12-13-84
CC-84-171	Amelio J. White	Department of Highways	133.36	133.36	12-17-84
CC-84-87	Harry L. White	Department of Highways	1,897.61	1,707.85	8-6-84
CC-84-276	James K. White and Barbara White	Department of Highways	579.04	579.04	2-15-85
CC-82-23	Whitten Corporation	Board of Regents	40,503.57	18,627.20	2-28-84
CC-84-52	Anita Faye Wickline	Board of Regents	163.05	98.85	8-6-84
CC-83-161	Harry E. Wilmoth	Department of Highways	491.64	250.00	9-28-84
CC-82-135	John J. Wright	Department of Highways	2,640.00	1,350.00	1-30-84
CC-84-23	Xerox Corporation	Department of Health	5,006.13	5,006.13	5-4-84
CC-84-60	Xerox Corporation	Department of Mines	913.98	913.98	5-25-84
CC-84-104	Xerox Corporation	Department of Motor Vehicles	848.25	848.25	6-26-84

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1983 to June 30, 1985.

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-84-312	Xerox Corporation	Department of Mines (Office of Oil & Gas)	1,691.83	1,691.83	2-15-85
CC-82-236	Xerox Corporation	Department of Natural Resources	12,065.88	8,500.00	3-1-85
CC-82-224	Peter Yerkovich, Jr.	Department of Highways	84.62	84.62	10-18-83
CC-84-332	Alfred D. Yoppi, Jr.	Board of Regents	231.48	231.48	2-4-85
CC-85-1	Nickolas F. Zara	Board of Regents	207.90	207.90	2-4-85

(3) Approved claims and awards satisfied by payment out of a special appropriation made by the Legislature to pay claims arising during the fiscal year: (None).

REPORT OF THE COURT OF CLAIMS (Continued)

(4) Claims rejected by the Court with reasons therefor:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-83-63	Wanetta F. Adkins	Supreme Court of Appeals	1,664.00	Disallowed	12-15-83
CC-83-158	Edith Estella Akers	Department of Highways	143.41	Disallowed	4-6-84
CC-82-127	Michael Angiulli	Department of Highways	46,157.99	Disallowed	3-18-85
CC-82-289	Danny Vernon Ankeny	Board of Education		Disallowed	10-31-84
CC-83-186	George H. Armstrong	Department of Highways	504.31	Disallowed	12-1-83
CC-84-202	Mary Frances Aubrey	Alcohol Beverage Control Commissioner	231.00	Disallowed	2-15-85
CC-81-419	Helen E. Bailey	Department of Highways	8,000.00	Disallowed	10-4-83
CC-82-128	Jerrell Barnhill and Anna Barnhill	Department of Highways	250,000.00	Disallowed	12-17-84
CC-81-79	Hazel Bartram Foster Lee Bartram	Department of Highways	225,000.00	Disallowed	10-18-83
CC-82-120	Ruth A. Bates and John E. Bates, and James M. Bates, an infant who sues by his father and next friend, John E. Bates and John E. Bates	Department of Highways	1,000,000.00	Disallowed	7-26-84
CC-83-273	Avonel Bero	Department of Highways	222.60	Disallowed	9-27-84

REPORT OF THE COURT OF CLAIMS (Continued)

(4) Claims rejected by the Court with reasons therefor:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-81-216	Henry Besse and Diana K. Besse	Department of Highways	25,000.00	Disallowed	10-25-83
CC-83-206	Michael A. Beulike	Department of Highways and Public Employees	176.40	Disallowed	4-6-84
CC-84-9	David Bobenhausen	Department of Highways	352.94	Disallowed	8-1-84
CC-84-94	David Bobenhausen	Department of Highways	94.60	Disallowed	8-1-84
CC-82-119	Paul V. Boos	Department of Highways	426.00	Disallowed	10-4-83
CC-83-64	Deborah K. Bowers	Supreme Court of Appeals	1,664.00	Disallowed	12-15-83
CC-83-287	Joseph E. Bowery, II	Department of Highways	50.39	Disallowed	8-6-84
CC-83-247	Gene W. Bradford	Department of Highways	57.35	Disallowed	4-6-84
CC-80-361	Minnie Lee Brown	Department of Highways	35,000.00	Disallowed	9-28-84
CC-83-304	Amy Bucklin	Department of Highways	400.00	Disallowed	5-25-84
CC-83-65	Paula D. Burch	Supreme Court of Appeals	1,677.00	Disallowed	12-15-83
CC-82-322	C.G.M. Contractors, Inc.	Department of Health	75,027.00	Disallowed	8-6-84
CC-77-39	Myrtle W. Campolio	Department of Natural Resources	450,000.00	Disallowed	2-14-84
CC-84-217	Charles David Carpenter	Department of Highways	1,500.00	Disallowed	3-27-85

REPORT OF THE COURT OF CLAIMS (Continued)

(4) Claims rejected by the Court with reasons therefor:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-83-299	Michael R. Carpenter	Department of Highways	712.86	Disallowed	8-6-84
CC-78-160	Sandra Kay Cassidy and Brooks Cassidy	Department of Highways	150,000.00	Disallowed	10-23-84
CC-84-40	Barbara S. Cobb	Department of Highways	344.97	Disallowed	1-30-85
CC-83-66	Sheila E. Casteel Cogar	Supreme Court of Appeals	2,600.00	Disallowed	12-15-83
CC-84-30	Patricia Coleman	Department of Highways	1,181.43	Disallowed	8-6-84
CC-83-67	Marcella M. Austin Cook	Supreme Court of Appeals	1,830.40	Disallowed	12-15-83
CC-81-199	Shelby J. Steele Cook	Department of Highways	75,000.00	Disallowed	10-23-84
CC-84-172	Erma G. Creasy	Department of Motor Vehicles	105.00	Disallowed	1-30-85
CC-83-311	Gloria Vance Cress	Board of Regents	3,895.00	Disallowed	12-17-84
CC-84-49	Lynna G. Crittendon	Department of Highways	453.51	Disallowed	8-1-84
CC-81-465	Saron M. Crowder	Board of Regents	6,410.45	Disallowed	10-23-84
CC-83-68	JoAnne Y. Dailey	Supreme Court of Appeals	3,328.00	Disallowed	12-15-83
CC-82-19	Charles R. Daniels and Essie Daniels	Department of Welfare	21,223.49	Disallowed	11-21-84

REPORT OF THE COURT OF CLAIMS (Continued)

(4) Claims rejected by the Court with reasons therefor:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-81-66	Gary Lynn Daniels, Admin. of the Estate of Mary Ellen Daniels; Alberta Daniels, in her own right; and Brian Kelly Daniels, by Alberta Daniels	Department of Highways	50,000.00	Disallowed	3-27-85
CC-83-181	Andrew Danzig (Mr. & Mrs.)	Department of Highways	65.34	Disallowed	10-4-83
CC-83-69	Judith Davis	Supreme Court of Appeals	2,600.00	Disallowed	12-15-83
CC-83-149	Joseph B. Decker	Department of Highways	147.08	Disallowed	10-18-83
CC-83-70	Paula Jeannine Dolan	Supreme Court of Appeals	3,660.80	Disallowed	12-15-83
CC-83-71	Helen Echard Duke	Supreme Court of Appeals	1,677.00	Disallowed	12-15-83
CC-82-324	Paris Leonard Dulaney, Jr.	Department of Motor Vehicles	38,000.00	Disallowed	4-23-84
CC-83-243	Orvill E. Edens	Department of Health	933.81	Disallowed	9-27-84
CC-80-300	Paul Edmonds and Brenda Key Edmonds	Department of Highways	15,000.00	Disallowed	9-27-84
CC-84-65	Carl L. Elam and Kristine M. Elam	Department of Highways	42.19	Disallowed	8-1-84
CC-82-126	Equilease Corporation	Board of Regents	26,633.01	Disallowed	4-6-84

REPORT OF THE COURT OF CLAIMS (Continued)

(4) Claims rejected by the Court with reasons therefor:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-84-82a	Penny M. Esworthy and Charles R. Bickerton	Department of Highways	180.04	Disallowed	8-1-84
CC-84-82b	Penny M. Esworthy and Charles R. Bickerton	Department of Highways	211.85	Disallowed	8-1-84
CC-83-179	Martha E. Faulkner	Department of Highways	354.50	Disallowed	4-6-84
CC-84-248	Federal Kemper Insurance Company, as subrogee of Sibyl Chase and Sibyl Chase, Individually	Department of Highways	250.00	Disallowed	3-27-85
CC-84-90	Kelly L. Fisher	Department of Highways	203.88	Disallowed	10-31-84
CC-83-72	Lori L. Fitzwater	Supreme Court of Appeals	1,794.00	Disallowed	12-15-83
CC-83-295	Shirlene Sue Godbey, Individually and as Admin. of the Estate of Robert Eugene Godbey, deceased	Department of Highways	400,000.00	Disallowed	3-27-85
CC-83-248	William E. Grimsley, Jr.	Department of Public Safety	107.53	Disallowed	2-14-84
CC-84-141	Roberta Sharp Gudmundsson	Department of Highways	500.00	Disallowed	1-30-85

REPORT OF THE COURT OF CLAIMS (Continued)

(4) Claims rejected by the Court with reasons therefor:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-83-73	Anita Hager	Supreme Court of Appeals	3,328.00	Disallowed	12-15-83
CC-84-148	Earl B. Hager	Department of Highways	93.27	Disallowed	1-30-85
CC-80-406	Bertha Hall	Board of Regents	8,434.00	Disallowed	10-25-83
CC-78-44	Lilly M. Hall	Department of Highways	10,000.00	Disallowed	12-1-83
CC-82-302	Wallace Hancock	Department of Highways	63.97	Disallowed	2-14-84
CC-83-74	Patricia Ann Hanlon	Supreme Court of Appeals	1,830.40	Disallowed	12-15-83
CC-84-246	Curtis T. Hardman, Jr.	Department of Highways	825.19	Disallowed	3-18-85
CC-82-178	Harrison Enterprises, Inc.	Department of Highways	36,672.00	Disallowed	10-4-83
*CC-84-190	Katherine L. Hart	Department of Employment Security	2,040.00	Disallowed	6-28-85
CC-84-72	Danny K. Hatfield	Department of Highways	3,376.64	Disallowed	9-27-84
CC-84-268	Kenneth D. Hatfield	Department of Highways	3,045.33	Disallowed	3-27-85
CC-83-75	Teresa Lynn Hatten	Supreme Court of Appeals	1,664.00	Disallowed	12-15-83
CC-83-76	Nancy J. Haught	Supreme Court of Appeals	1,794.00	Disallowed	12-15-83
CC-83-77	Ruby Kay Hawkins	Supreme Court of Appeals	3,328.00	Disallowed	12-15-83

*Claim held open for complete hearing.

REPORT OF THE COURT OF CLAIMS (Continued)

(4) Claims rejected by the Court with reasons therefor:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-84-45	Haynes, Ford and Rowe	Department of Public Safety	2,621.96	Disallowed	2-15-85
CC-83-137	Carlisle L. Hedrick and Robert L. Hedrick	Department of Highways	724.00	Disallowed	3-18-85
CC-83-78	Debra E. Hixenbaugh	Supreme Court of Appeals	1,664.00	Disallowed	12-15-83
CC-80-337	Hooten Equipment Company	Board of Regents	31,051.00	Disallowed	3-18-85
CC-84-3	Charlotte Hubbell	Department of Highways	480.03	Disallowed	8-6-84
CC-83-191	Helen D. Hudson and Joseph E. Hudson	Department of Highways	10,000.00	Disallowed	10-23-84
CC-84-158	Jimmy B. Hudson	Department of Highways	282.45	Disallowed	1-30-85
CC-84-109	Danny C. Huffman	Department of Highways	145.43	Disallowed	1-30-85
CC-83-79	Helen Idleman	Supreme Court of Appeals	1,656.00	Disallowed	12-15-83
CC-84-111	Noah Jackson	Department of Highways	75.35	Disallowed	1-30-85
CC-80-347	Judith Lynn Jeffers Pickens, Admin. of the Estate of John Roger Jeffers, dec.	Department of Highways	603,000.00	Disallowed	11-21-84
CC-83-147	Rex Allen Johnson	Department of Highways	71.59	Disallowed	10-18-83
CC-83-146	Stephen A. Johnston	Department of Highways	231.24	Disallowed	10-4-83

REPORT OF THE COURT OF CLAIMS (Continued)

(4) Claims rejected by the Court with reasons therefor:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-83-205	Thomas M. Jones & Debra L. Jones	Department of Highways	74.93	Disallowed	4-6-84
CC-82-239	Jones-Cornett Electric Company	Department of Human Services	58,484.52	Disallowed	4-23-84
CC-83-235	Lucille Jordan, Administratrix of the Estate of Jerry Lee McComas, dec.	Governor's Office of Economic and Community Development, Governor's Summer Youth Program & Department of Highways	1,000,000.00	Disallowed	12-17-84
CC-83-80	Rosetta Mae Jordan	Supreme Court of Appeals	1,173.00	Disallowed	12-15-83
CC-84-127	Allen Kaplan and Pauline Kaplan	Department of Highways	165.00	Disallowed	3-27-85
CC-83-81	Jane C. Keller	Supreme Court of Appeals	1,794.00	Disallowed	12-15-83
CC-82-303	Mary P. Kelly	Department of Highways	259.55	Disallowed	10-4-83
CC-84-36	James D. Kittle	Department of Highways	1,500.00	Disallowed	10-31-84
CC-83-82	Janet S. Koontz	Supreme Court of Appeals	2,600.00	Disallowed	12-15-83
CC-82-48	George Korbanic	Board of Probation and Parole	Unliquidated	Disallowed	10-23-84
CC-83-46	Donald A. Kuntz	Department of Highways	70.00	Disallowed	10-25-83
CC-83-187	Jeffery D. Lavalley and Teresa D. Sayble	Department of Health	250.00	Disallowed	2-14-84

REPORT OF THE COURT OF CLAIMS (Continued)

(4) Claims rejected by the Court with reasons therefor:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-83-106	Edward Lawson and Beulah Lawson	Department of Highways	10,000.00	Disallowed	9-27-84
CC-81-380	Eric M. Lee	Board of Regents	250,000.00	Disallowed	4-6-84
CC-82-154	Liberty Mutual Insurance Company, as subrogee of Jeffrey Stein and Connie Stein	Department of Highways	2,449.29	Disallowed	8-6-84
CC-83-83	Penny S. Long	Supreme Court of Appeals	2,600.00	Disallowed	12-15-83
CC-83-84	Frances Ann Lutman	Supreme Court of Appeals	1,794.00	Disallowed	12-15-83
CC-83-85	Carolyn E. Mason	Supreme Court of Appeals	1,664.00	Disallowed	12-15-83
CC-83-162	Charles L. McComas	Department of Motor Vehicles	65.00	Disallowed	10-25-83
CC-83-86	Mary L. McCord	Supreme Court of Appeals	1,677.00	Disallowed	12-15-83
CC-84-32	John P. McDowell and Donna R. McDowell	Department of Highways	252.79	Disallowed	10-31-84
CC-81-452	Benjamin F. McKinley and Barbara A. McKinley	Department of Highways	200.00	Disallowed	9-27-84
CC-82-121	Meredith, Quinn & Stenger, CPA's	Region VI Planning and Development Council	2,715.00	Disallowed	6-26-84

REPORT OF THE COURT OF CLAIMS (Continued)

(4) Claims rejected by the Court with reasons therefor:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-84-29	Cora Marie Merrill	Department of Highways	253.00	Disallowed	10-31-84
CC-83-87	Robin A. Michael	Supreme Court of Appeals	1,794.00	Disallowed	12-15-83
CC-83-195	Monongalia County Commission	Department of Finance and Administration	13,500.00	Disallowed	5-25-84
CC-81-216	Charles D. Morgan and Penny A. Morgan	Department of Highways	25,000.00	Disallowed	10-25-83
CC-83-88	Christy L. Morris	Supreme Court of Appeals	1,242.00	Disallowed	12-15-83
CC-84-18	Edgar L. Moss	Department of Highways	102.97	Disallowed	8-6-84
CC-83-183	J. Douglas Mundy and Karen J. Mundy	Department of Highways	191.24	Disallowed	10-18-83
CC-83-253	Steve Mutnich	Department of Highways	530.94	Disallowed	4-6-84
CC-83-89	Patricia A. Napier	Supreme Court of Appeals	1,664.00	Disallowed	12-15-83
CC-83-90	Sally J. Napier	Supreme Court of Appeals	1,664.00	Disallowed	12-15-83
CC-83-91	Patricia A. Noland	Supreme Court of Appeals	1,664.00	Disallowed	12-15-83
CC-82-18	Karen Sue Nuzum	Department of Highways	57,000.00	Disallowed	10-25-83
CC-82-29	Linda F. Pate	Department of Highways	13,073.90	Disallowed	10-4-83
CC-83-92	Janet Elizabeth Price	Supreme Court of Appeals	1,830.40	Disallowed	12-15-83
CC-83-93	Terry Lynn Prior	Supreme Court of Appeals	1,794.00	Disallowed	12-15-83

REPORT OF THE COURT OF CLAIMS (Continued)

(4) Claims rejected by the Court with reasons therefor:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-83-94	Rhonda P. Radabaugh	Supreme Court of Appeals	1,664.00	Disallowed	12-15-83
CC-84-168	Derrick A. Ramsey	Department of Highways	665.49	Disallowed	1-30-85
CC-83-213	John and Patsy Reed	Department of Highways	2,798.70	Disallowed	12-19-83
CC-82-336	William E. Richards	Governor's Office of Economic and Community Development	14,637.75	Disallowed	9-28-84
CC-82-234	Doris Roberts	Department of Highways	40,000.00	Disallowed	3-27-85
CC-83-138	Brenda Brown Robertson	Department of Highways	2,473.34	Disallowed	2-14-84
CC-83-95	Janice Kay Roth	Supreme Court of Appeals	1,664.00	Disallowed	12-15-83
CC-83-96	Cheryl J. Rudolph	Supreme Court of Appeals	1,664.00	Disallowed	12-15-83
CC-81-446	Bobby Ryder and Othella A. Ryder	Department of Highways	150,000.00	Disallowed	10-4-83
CC-84-174	Keith B. Sayre	Department of Highways	200.00	Disallowed	12-17-84
CC-83-110	Patricia Ann Schwertfeger	Supreme Court of Appeals	1,664.00	Disallowed	12-15-83
CC-82-338	Jeffrey C. Shaffer	Department of Highways	1,091.37	Disallowed	7-25-83
CC-83-39	James R. Shaver, Jr.	Department of Highways	1,290.00	Disallowed	4-6-84
CC-84-162	Frances P. Sheppard	Department of Highways	177.24	Disallowed	1-30-85

REPORT OF THE COURT OF CLAIMS (Continued)

(4) Claims rejected by the Court with reasons therefor:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-83-10	S. Dean Six	Board of Regents	963.00	Disallowed	9-28-84
CC-84-206	Ronald B. Smith	Department of Highways	286.68	Disallowed	1-30-85
CC-83-97	Sharon L. Smith	Supreme Court of Appeals	1,794.00	Disallowed	12-15-83
CC-84-13	Richard A. Smoot	Department of Highways	26.87	Disallowed	8-1-84
CC-84-310	St. Joseph's Hospital	Division of Vocational Rehabilitation	227.76	Disallowed	3-1-85
CC-84-95	Jesse W. Starcher	Department of Health	45.00	Disallowed	1-30-85
CC-81-312	State Construction, Inc.	Department of Highways	63,135.48	Disallowed	5-23-85
CC-83-127	Edgar Stephan, III	Department of Highways	262.50	Disallowed	10-4-83
CC-84-123	Paul H. Stewart	Department of Highways	507.15	Disallowed	1-30-85
CC-84-156	Polly Tankersley	Department of Highways	242.92	Disallowed	1-30-85
CC-83-98	Hilda R. Tenney	Supreme Court of Appeals	3,328.00	Disallowed	12-15-83
CC-84-50	Doris A. Terry and Michael A. Terry	Department of Highways	112.46	Disallowed	8-1-84
CC-82-270	Julius A. Testa	Department of Highways	76.69	Disallowed	10-4-83
CC-80-248a	Carl Mike Thompson	Department of Corrections	Unliquidated	Disallowed	2-14-84
CC-80-248b	Carl Mike Thompson	Department of Corrections	175,000.00	Disallowed	2-14-84

REPORT OF THE COURT OF CLAIMS (Continued)

(4) Claims rejected by the Court with reasons therefor:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-83-351	E. Milton Thompson, Jr.	Department of Highways	234.35	Disallowed	8-6-84
CC-83-25	Linda Dean Thompson	Department of Highways	174.83	Disallowed	7-25-83
CC-83-182	Alvin R. Toler	Department of Highways	2,000.00	Disallowed	2-14-84
CC-83-18	Transportation Rentals Corporation	Department of Highways	5,131.26	Disallowed	2-14-84
CC-83-227	Transportation Rentals Corporation	Department of Highways	2,638.49	Disallowed	4-6-84
CC-83-169	Tube Sales, Inc.	Department of Highways	28.50	Disallowed	10-18-83
CC-77-88	Johnnie L. Turner and Beverly J. Turner	Department of Highways	1,500,000.00	Disallowed	10-23-84
CC-84-170	Flowvounia Tyler	Department of Highways	227.09	Disallowed	1-30-85
CC-84-69	Venezia Hauling, Inc.	Department of Highways	1,859.00	Disallowed	6-28-85
CC-83-99	Gail C. Viands	Supreme Court of Appeals	1,664.00	Disallowed	12-15-83
CC-82-287	Shirley Sue Walker	Department of Highways	316.94	Disallowed	10-25-83
CC-82-228	Mary Catherine Waters	Supreme Court of Appeals	1,690.00	Disallowed	12-15-83
CC-83-100	Mary Catherine Waters	Supreme Court of Appeals	1,830.40	Disallowed	12-15-83

REPORT OF THE COURT OF CLAIMS (Continued)

(4) Claims rejected by the Court with reasons therefor:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-83-101	Alleen F. Weaver	Supreme Court of Appeals	1,677.00	Disallowed	12-15-83
CC-83-185	Lawrence Ray Wells	Department of Highways	34.88	Disallowed	10-18-83
CC-83-102	Sandra Sue Whiteley	Supreme Court of Appeals	2,600.00	Disallowed	12-15-83
CC-83-103	Doris R. Whiting	Supreme Court of Appeals		Disallowed	12-15-83
CC-83-104	Sally J. Wilks	Supreme Court of Appeals	3,328.00	Disallowed	12-15-83
CC-83-105	Carolyne C. Wilson	Supreme Court of Appeals	1,664.00	Disallowed	12-15-83
CC-84-262	Richard A. Wilson	Department of Highways	100.00	Disallowed	3-18-85
CC-83-357	Timothy Wilson	Department of Education	4,200.00	Disallowed	8-6-84
CC-84-247	Pat R. Withrow	Department of Highways	89.20	Disallowed	3-18-85
CC-81-125	V.F. Young	Department of Highways	440.89	Disallowed	4-6-84

REPORT OF THE COURT OF CLAIMS (Continued)

(5) Advisory determinations made at the request of the Governor or the head of a State agency:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-84-236	Cleveland Clinic Foundation	Board of Regents	3,286.05	3,286.05	12-17-84
CC-84-221	William B. Frampton, Architect	State Building Commission	12,236.80	11,013.12	3-1-85
CC-83-240	John R. Hess, Inc.	Board of Regents	5,000.00	5,000.00	10-5-83
CC-85-157	Josten's, Inc.	Board of Regents	3,540.00	3,540.00	6-28-85
CC-82-295	S.J. Groves & Sons Company	Department of Highways	39,160.08	Disallowed	10-5-83

REPORT OF THE COURT OF CLAIMS (Continued)

(6) Claims rejected by the Court but payments made by special appropriations by the Legislature:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-83-234	Appalachian Power Company	Department of Corrections	28,029.79	Disallowed	10-4-83
CC-83-345	Bluefield Community Hospital	Department of Corrections	275.00	Disallowed	1-30-84
CC-83-285	Board of Trustees of Cabell County General Hospital (The), aka Cabell Huntington Hospital	Department of Health	22,991.31	Disallowed	1-17-84
CC-85-17	Bush Industries Feed & Grain	Farm Management Commission	2,805.00	Disallowed	2-15-85
CC-84-35	Dunlow Volunteer Fire Department	State Fire Marshal	2,744.39	Disallowed	6-26-84
CC-84-228	FCI Alderson	Department of Corrections	118,352.21	Disallowed	10-31-84
CC-83-201	General Telephone Company of the SE	Department of Corrections	1,264.30	Disallowed	10-4-83
CC-83-262	Kerr Gooch, d/b/a Southern Glass Service	Farm Management Commission	492.00	Disallowed	12-1-83
CC-83-154	Greenbrier Valley Hospital	Department of Corrections	4,470.34	Disallowed	7-25-83
CC-84-8	Humana Hospital Greenbrier Valley Hospital Association, Inc.	Department of Corrections	408.15	Disallowed	1-30-84

REPORT OF THE COURT OF CLAIMS (Continued)

(6) Claims rejected by the Court but payments made by special appropriations by the Legislature:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
CC-83-348	Memorial General Hospital, Inc.	Department of Corrections	314,554.27	Disallowed	1-30-84
CC-84-5	Nuclear Medicine Services, Inc.	Department of Health	152.70	Disallowed	1-30-84
CC-83-252	Ohio Valley Medical Center, Inc.	Department of Corrections	9,689.34	Disallowed	12-1-83
CC-83-267	Ohio Valley Medical Center, Inc.	Department of Corrections	5,702.09	Disallowed	12-1-83
CC-83-266	Ohio Valley Medical Center, Inc.	Department of Health	3,000.00	Disallowed	2-6-84
CC-84-84	Raleigh Orthopaedic Association, Inc.	Department of Corrections	250.00	Disallowed	5-4-84
CC-83-239	Reynolds Memorial Hospital, Inc.	Department of Corrections	154,947.08	Disallowed	12-1-83
CC-83-302	St. Mary's Hospital	Department of Health	97,993.90	Disallowed	2-1-84
CC-84-19	Stonewall Jackson Memorial Hospital	Department of Health	557.58	Disallowed	1-30-84
CC-84-34	Wheeling Hospital	Department of Corrections	1,385.10	Disallowed	4-23-84

OPINIONS

TABLE OF CASES REPORTED

A.H. Robins Company v. Department of Health	78
Aarom Boonsue, M.D., Inc. v. Department of Public Safety	270
Adkins, Wanetta F. v. Supreme Court of Appeals	60
Ahalt, Terry W. v. Department of Highways	32
Akers, Edith Estella v. Department of Highways	119
Alling & Cory v. Department of Public Safety	139
AM International Inc., Debtor in Possession Varityper Division v. Department of Education	136
AM International Inc., Debtor in Possession Varityper Division v. Department of Public Safety	136
American Bridge Division of United States Steel Corporation v. Department of Highways	227
American National Property & Casualty, Subrogee of Charles R. Hart v. Department of Highways	119
Anderson Equipment Company v. Department of Highways	257
Angel, William F. v. Department of Highways	258
Angiulli, Michael v. Department of Highways	286
Ankeny, Danny Vernon v. Board of Education	187
Appalachian Power Company v. Alcohol Beverage Control Commissioner	189
Appalachian Power Company v. Department of Corrections	8
Armstrong, George H. v. Department of Highways	48
Aubrey, Mary Frances v. Alcohol Beverage Control Commissioner	258
Auvil, Zeik v. Department of Corrections	79
Avery Label, Div. of Avery International v. Department of Finance and Administration	48
Babich, Mary Ann v. Board of Regents	189
Bailey, Helen E. v. Department of Highways	8
Barnhill, Jerrell and Anna Barnhill v. Department of Highways	214
Bartram, Hazel and Foster Lee Bartram v. Department of Highways	23
Bates & Rogers Construction Corporation v. Department of Highways	225

Bates, Ruth A. and John E. Bates, and James M. Bates, an infant who sues by his father and next friend, John E. Bates and John E. Bates v. Department of Highways	145
Baysal & Associates, Inc. v. Department of Corrections	208
Bero, Avonel v. Department of Highways	164
Besse, Henry and Diana K. Besse v. Department of Highways	40
Beulike, Michael A. v. Department of Highways and Public Employees Insurance Board	120
Bigelow, Elliott A. v. Board of Regents	256
Bluefield Community Hospital v. Department of Corrections	79
Board of Trustees of Cabell County General Hospital (The), aka Cabell Huntington Hospital v. Department of Health	69
Bob Dalton Investigations, Inc. v. Treasurer	270
Bobenhausen, David v. Department of Highways (CC-84-9)	146
Bobenhausen, David v. Department of Highways (CC-84-94)	147
Boos, Paul V. v. Department of Highways	10
Bolyard, Carroll L. v. Department of Highways	190
Bowers, Deborah K. v. Supreme Court of Appeals	60
Bowery, Joseph E., II v. Department of Highways	155
Bradford, Gene W. v. Department of Highways	121
Brown, Minnie Lee v. Department of Highways	173
Browning, Bethany L. v. Board of Regents	49
Bucklin, Amy v. Department of Highways	140
Bunner, William K. v. Department of Agriculture - State Soil Conservation Committee	299
Burbridge, Shirley G. v. Department of Highways	190
Burch, Paula D. v. Supreme Court of Appeals	60
Bush Industries Feed & Grain v. Farm Management Commission	259
C.G.M. Contractors, Inc. v. Department of Health	156
Cabell County General Hospital (The Board of Trustees of), aka Cabell Huntington Hospital v. Department of Health	69
Cadle, Sylvia A. v. Department of Highways	231
Campolio, Myrtle W. v. Department of Natural Resources	110

Carl E. Stephens Construction Company, Inc. v. Department of Highways	233
Carpenter, Charles David v. Department of Highways	291
Carpenter, Michael R. v. Department of Highways	157
Cassidy, Sandra Kay and Brooks Cassidy v. Department of Highways	177
Cecil, Stella, Administratrix of the Estate of O'Dell M. Cecil, deceased v. Department of Highways	73
Central Beverage Distributors, Inc. v. Alcohol Beverage Control Commissioner	234
Central Distributing Co., Inc. v. Beer Commission	234
Chapman Printing Company v. Board of Regents	165
Chontos, Judy W. v. Supreme Court of Appeals	25
City of Moundsville v. Department of Public Safety	299
City of Shinnston v. Department of Highways	46
City of Wellsburg v. Department of Public Safety	207
Clark, Sophia v. Department of Health	285
Clerk of the Circuit Court of Kanawha County v. Attorney General	103
Cleveland Clinic Foundation v. Board of Regents	215
Cobb, Barbara S. v. Department of Highways	235
Cogar, Sheila E. "Casteel" v. Supreme Court of Appeals	60
Coleman, Patricia v. Department of Highways	157
Consolidated Business Forms Company v. Department of Public Safety	201
Consolidated Rail Corporation v. Department of Finance and Administration	10
Cook, Marcella M. "Austin" v. Supreme Court of Appeals	60
Cook, Shelby J. Steele v. Department of Highways	179
Cottle, Aaron D. v. Department of Health	100
Craddock, Myrtle v. Department of Highways	158
Creasy, Erma G. v. Department of Motor Vehicles	235
Cress, Gloria Vance v. Board of Regents	216
Crittendon, Donna G. v. Department of Highways	148
Crowder, Sharon M. v. Board of Regents	181
Dailey, JoAnne Y. v. Supreme Court of Appeals	60
Daniels, Charles R. and Essie Daniels v. Department of Welfare	201

Daniels, Gary Lynn, Admin. of the Estate of Mary Ellen Daniels; Alberta Daniels, in her own right; and Brian Kelly Daniels, by Alberta Daniels v. Department of Highways	292
Danzig, Andrew (Mr. & Mrs.) v. Department of Highways	11
Davis, Judith v. Supreme Court of Appeals	60
Decker, Joseph B. v. Department of Highways	25
Dental Arts Laboratory, Inc. v. Department of Health	271
Department of Employment Security v. Board of Regents (CC-83-320)	80
Department of Employment Security v. Board of Regents (CC-84-313)	260
Department of Employment Security v. Civil Service Commission	81
Department of Employment Security v. Department of Banking	81
Department of Employment Security v. Department of Corrections	82
Department of Employment Security v. Department of Culture and History	83
Department of Employment Security v. Department of Health	83
Department of Employment Security v. Department of Labor	84
Department of Employment Security v. Department of Mines	84
Department of Employment Security v. Farm Management Commission	85
Department of Employment Security v. Human Rights Commission (CC-83-330)	85
Department of Employment Security v. Human Rights Commission (CC-84-315)	260
Department of Employment Security v. Nonintoxicating Beer Commission	86
Department of Employment Security v. Railroad Maintenance Authority	86
Department of Employment Security v. Secretary of State	87
Department of Employment Security v. State Fire Commission	87
Dexter, Larry R. and Sharon K. v. Department of Highways	88

Dial-Page v. Department of Highways	102
Doctor's Urgent Care, Inc. v. Department of Public Safety	130
Dolan, Paula Jeannine v. Supreme Court of Appeals	61
Dooley, Janet v. Board of Regents	236
Duke, Helen Echard v. Supreme Court of Appeals	61
Dulaney, Paris Leonard, Jr. v. Department of Motor Vehicles	130
Dunlow Volunteer Fire Department v. State Fire Marshal	143
Eagle Aviation, Inc. v. Department of Public Safety	237
Eagle Coal and Dock Company, Inc. v. Department of Public Safety	88
Edens, Orvil E. v. Department of Health	166
Edmonds, Paul and Brenda Kay Edmonds v. Department of Highways	167
Elam, Carl L. and Kristine M. Elam v. Department of Highways	148
Engineered Products, Inc. v. Department of Highways	237
Equilease Corporation v. Board of Regents	122
Erie Insurance Exchange, Subrogee of Joseph E. Martin & Goldie J. Martin v. Department of Highways	261
Esworthy, Penny M. and Charles R. Bickerton v. Department of Highways (CC-84-82a)	149
Esworthy, Penny M. and Charles R. Bickerton v. Department of Highways (CC-84-82b)	150
FCI Alderson v. Department of Corrections	191
Faulkner, Martha E. v. Department of Highways	123
Federal Kemper Insurance Company, as subrogee of Sibyl Chase and Sibyl Chase, Individually v. Department of Highways	293
Fire Chief Fire Extinguisher Co. v. Department of Veterans Affairs	300
Fisher, Kelly L. v. Department of Highways	192
Fisher, Richard R. v. Department of Highways	262
Fisher Scientific v. Department of Public Safety	300
Fitzwater, Lori L. v. Supreme Court of Appeals	61
Frampton, William B., Architect v. State Building Commission	271
Fulmer, Beverly Pisegna v. Board of Regents	272
Gardner, Lucy Kathleen v. Board of Regents	301

General Telephone Company of the SE v. Department of Corrections	12
Godbey, Shirlene Sue, Individually, and as Admin. of the Estate of Robert Eugene Godbey, deceased v. Department of Highways	294
Godwin, W. Auvil v. Department of Corrections	151
Goe, Norval D., Executor of the Estate of William Robert Goe, dec. v. Attorney General	218
Gooch, Kerr, d/b/a Southern Glass Service v. Farm Management Commission	49
Goodwin Drug Company v. Department of Health	69
Goodyear Tire & Rubber Company (The) v. Department of Agriculture	70
Goodyear Tire & Rubber Company (The) v. Department of Natural Resources (CC-84-296a)	208
Goodyear Tire & Rubber Company (The) v. Department of Natural Resources (CC-84-296b)	209
Goodyear Tire & Rubber Co. (The) v. Department of Public Safety	132
Grafton Sanitary Sewer Board v. Department of Corrections	209
Greenbrier Physicians, Inc. v. Department of Public Safety	264
Greenbrier Valley Hospital v. Department of Corrections	1
Greenbrier Valley Soil Conservation District v. Department of Public Safety	89
Grimley, William E., Jr. v. Department of Public Safety	111
Gudmundsson, Roberta Sharp v. Department of Highways	238
Gwiazdowsky, Leonard J. v. Department of Health	202
Hager, Anita v. Supreme Court of Appeals	61
Hager, Earl B. v. Department of Highways	239
Hall, Bertha v. Board of Regents	42
Háll, Judith Ann v. Board of Regents	32
Háll, Lilly M. v. Department of Highways	50
Hamilton Business Systems v. Department of Motor Vehicles	192
Hancock, Wallace v. Department of Highways	112
Hanlon, Patricia Ann v. Supreme Court of Appeals	61

Hanover Shoe, Inc. (The) v. Department of Public Safety	89
Harbert, Max B. v. Department of Highways	193
Hardman, Curtis T., Jr. v. Department of Highways.....	287
Harrison Enterprises, Inc. v. Department of Highways	12
Hart, Katherine L. v. Department of Employment Security.....	304
Hatfield, Danny K. v. Department of Highways	168
Hatfield, Kenneth D. v. Department of Highways	295
Hatten, Teresa Lynn v. Supreme Court of Appeals	61
Haught, Nancy J. v. Supreme Court of Appeals	61
Hawkins, Ruby Kay v. Supreme Court of Appeals.....	61
Haynes, Ford and Rowe v. Department of Public Safety.....	264
Hedrick, Carlisle L. and Robert L. Hedrick v. Department of Highways	288
Hiddemen, Thomas J., Jr. v. Department of Highways.....	262
High Voltage Systems, Inc. v. Department of Highways	4
Hildebrand, Karl Van v. Board of Regents	256
Hissom, George B. v. Department of Highways	90
Hixenbaugh, Debra E. v. Supreme Court of Appeals.....	61
Holloway, Clyde, next friend of Kay Lee Holloway v. Department of Highways	33
Holzer Clinic v. Department of Health.....	265
Holzer Hospital Foundation, d/b/a Holzer Medical Center v. Department of Health	240
Hooten Equipment Company v. Board of Regents.....	289
Hooten Equipment Company v. Board of Regents (Rehearing)	290
Hubbell, Charlotte v. Department of Highways	159
Hudson, Helen D. and Joseph E. Hudson v. Department of Highways	183
Hudson, Jimmy B. v. Department of Highways	240
Huffman, Danny C. v. Department of Highways	241
Humana Hospital Greenbrier Valley Hospital Association, Inc. v. Department of Corrections	90
Idleman, Helen v. Supreme Court of Appeals.....	61
Interstate Equipment Sales, Inc. v. Department of Highways.....	26
Jackson, Noah v. Department of Highways	241

James & Law Company (The) v. Department of Public Safety	203
James C. Dawes Company, Inc. v. Department of Highways	11
Jeffers, Judith Lynn (Pickens), Admin. of the Estate of John Roger Jeffers, dec. v. Department of Highways	203
John R. Hess, Inc. v. Board of Regents	19
Johnson Controls, Inc. v. Department of Finance and Administration (CC-83-361)	100
Johnson Controls, Inc. v. Department of Finance and Administration (CC-83-362)	101
Johnson Controls, Inc. v. Departmental of Natural Resources	242
Johnson, Rex Allen v. Department of Highways	27
Johnson, Terry A. v. Board of Regents	256
Johnston, Stephen A. v. Department of Highways	14
Jones, Dianna Rinehart v. Department of Highways	244
Jones, James E. and Ruth Jones v. Department of Highways	103
Jones, Thomas M. & Debra L. Jones v. Department of Highways	124
Jones-Cornett Electric Company v. Department of Human Services	133
Jordan Chiropractic Clinic, Inc. v. Department of Public Safety	266
Jordan, Lucille, Administratrix of the Estate of Jerry Lee McComas, dec. v. Governor's Office of Economic and Community Development, Governor's Summer Youth Program & Department of Highways	219
Jordan, Rosetta Mae v. Supreme Court of Appeals	61
Josten's, Inc. v. Board of Regents	301
Justice, Joseph H. v. Department of Highways	266
Kanawha River Docking and Marine, Inc. v. Blennerhassett Historical Park Commission	33
Kanawha Valley Radiologists, Inc. v. Department of Public Safety	210
Kaplan, Allen and Pauline Kaplan v. Department of Highways	296
Keizer Saw & Mower v. Department of Natural Resources	272
Keller, Jane C. v. Supreme Court of Appeals	61
Kellogg Sales Company v. Department of Health	137

Kelly, Mary P. v. Department of Highways	14
Kittle, James D. v. Department of Highways	194
Koontz, Janet S. v. Supreme Court of Appeals	61
Korbanic, George v. Board of Probation and Parole	184
Koval, Richard D. v. Board of Regents	256
Kramer's Photo Supply, Inc. v. Department of Health	104
Krown Research, Inc. v. Division of Vocational Rehabilitation	195
Kuntz, Donald A. v. Department of Highways	43
L. G. De Felice, Inc. v. Department of Highways	54
L.G. De Felice, Inc. v. Department of Highways	197
L.R. Skelton & Company v. Department of Highways	275
Lacey, John Vincent Jr. v. Board of Regents	256
Lavalley, Jeffery D. and Teresa D. Sayble v. Department of Health	113
Lawhead Press, Inc. (The) v. Board of Regents	244
Lawhead Press, Inc. (The) v. Department of Natural Resources	101
Lawson, Edward and Beulah Lawson v. Department of Highways	169
Lawyers Co-operative Publishing Company v. Supreme Court of Appeals	91
Leadman, David (Mr. & Mrs.) v. Department of Highways	51
Lee, Eric M. v. Board of Regents	125
Liberty Mutual Insurance Company, as subrogee of Jeffrey Stein and Connie Stein v. Department of Highways	160
Life, Jeffry S. v. Department of Health (Office of the Chief Medical Examiner)	195
Logan Corporation v. Department of Highways	91
Long, Penny S. v. Supreme Court of Appeals	61
Lowe, Randy Paul v. Department of Health	70
Lukens, John R. v. Public Legal Services	4
Lutman, Frances Ann v. Supreme Court of Appeals	61
Mabscott Supply Company v. Department of Highways	1
Machinery & Systems Division, a Division of Carrier Corp. v. Department of Public Safety	67
Malcomb, Pauline G. v. Alcohol Beverage Control Commissioner	77
Malone, Fannie Lee v. Board of Regents	28
Marcum, Fred v. Department of Highways	35

Marjorie Garden Associates v. Department of Public Safety	170
Martin, Joseph E. & Goldie J. v. Department of Highways	261
Mason, Carolyn E. v. Supreme Court of Appeals	61
Mast, Elsie v. Department of Highways	59
Mast, Elsie and Willis Mast, d/b/a Willis Mast Livestock Trucking v. Department of Highways	59
Maynard, Elliott E., III v. Department of Highways	35
McCabe, Barbara Ann v. Board of Regents	267
McComas, Charles L. v. Department of Motor Vehicles	44
McConnell, D. Verne, M.D. v. Department of Corrections	210
McCord, Mary L. v. Supreme Court of Appeals	61
McDowell, John P. and Donna R. McDowell v. Department of Highways	196
McKinley, Benjamin F. and Barbara A. McKinley v. Department of Highways	171
Means Charleston Center v. Department of Public Safety	137
Medical Dental Bureau, Inc. (Agent for Ohio Valley Medical Center, Inc.) v. Department of Corrections	211
Memorial General Hospital, Inc. v. Department of Corrections	92
Meredith, Quinn & Stenger, CPA's v. Region VI Planning and Development Council	144
Merrill, Cora Marie v. Department of Highways	196
Michael, Laura L. v. Board of Regents	302
Michael, Robin A. v. Supreme Court of Appeals	61
Michie Company (The) v. Department of Health	92
Mid-Atlantic Paving v. Department of Highways	211
Midkiff, Herbert v. Department of Highways	151
Miller, Nora A. v. Board of Regents	93
Monongalia County Commission v. Department of Finance and Administration	141
Moore Business Forms, Inc. v. Board of Regents	220
Moore Business Forms, Inc. v. Department of Motor Vehicles	94
Moore Business Forms, Inc. v. Department of Natural Resources	302
Moore Business Forms, Inc. v. Secretary of State	93
Morgan, Charles D. and Penny A. Morgan v. Department of Highways	40
Morgan, Elizabeth D. v. Board of Regents	153

Morris, Christy L. v. Supreme Court of Appeals	61
Moss, Edgar L. v. Department of Highways.....	161
Moundsville, City of v. Department of Public Safety.....	299
Mundy, J. Douglas and Karen J. Mundy v. Department of Highways	28
Murray, Jack E. v. Department of Highways	137
Mutnich, Steve v. Department of Highways	126
Mylott, James P. v. Department of Health	303
Napier, Patricia A. v. Supreme Court of Appeals	61
Napier, Sally J. v. Supreme Court of Appeals.....	61
Neri, Barbara M. v. Department of Highways	273
New River Building Company v. Board of Regents	104
Noland, Patricia A. v. Supreme Court of Appeals	62
Noonan, Steven Gerard v. Board of Regents.....	153
Nuclear Medicine Services, Inc. v. Department of Health	94
Nuzum, Karen Sue v. Department of Highways	45
Ohio Valley Medical Center, Inc. v. Department of Corrections (CC-83-252)	51
Ohio Valley Medical Center, Inc. v. Department of Corrections (CC-83-267)	51
Ohio Valley Medical Center, Inc. v. Department of Health	108
Ohio Valley Medical Center, Inc. v. Supreme Court of Appeals	108
Ohio Valley Office Equipment v. Division of Vocational Rehabilitation	304
Pagano Industries, Inc. v. Department of Public Safety	2
Parke-Davis v. Department of Health	138
Pate, Linda F. v. Department of Highways	8
Pendleton County Bank v. Department of Motor Vehicles	108
Peters, John Casey v. Department of Human Services	63
Pfizer, Inc. v. Department of Health (CC-84-120)	144
Pfizer, Inc. v. Department of Health (CC-84-143)	206
Pickens, Judith Lynn (Jeffers), Admin. of the Estate of John Roger Jeffers, dec. v. Department of Highways	203
Poling, William G. and Delores J. v. Department of Highways	37

Poole, Brenda Ann and Michael Ray v. Department of Highways	65
Price, Janet Elizabeth v. Supreme Court of Appeals	62
Prior, Terry Lynn v. Supreme Court of Appeals	62
Putnam General Hospital v. Department of Public Safety	212
Radabaugh, Rhonda P. v. Supreme Court of Appeals	62
Raleigh Orthopaedic Association, Inc. v. Department of Corrections	138
Ramsey, Derrick A. v. Department of Highways	245
Ramsey, Vera B. v. Public Employees Insurance Board	71
Reed, John and Patsy v. Department of Highways	68
Reynolds Memorial Hospital, Inc. v. Department of Corrections	52
Rhoads, Regina M. v. Department of Highways	221
Richard F. Terry, M.D., Inc. v. Department of Corrections (CC-84-297a)	212
Richard F. Terry, M.D., Inc. v. Department of Corrections (CC-84-297b)	213
Richards, William E. v. Governor's Office of Economic and Community Development	174
Ritz, Theresa v. Department of Highways	246
Roane General Hospital v. Department of Health	95
Roberts, Doris v. Department of Highways	297
Robertson, Brenda Brown v. Department of Highways	113
Roentgen Diagnostics, Inc. v. Department of Public Safety	135
Roentgen Diagnostics, Inc. v. Division of Vocational Rehabilitation	52
Rose, Lillian v. Department of Health	37
Roth, Janice Kay v. Supreme Court of Appeals	62
Rudolph, Cheryl J. v. Supreme Court of Appeals	62
Ryder, Bobby and Othella A. v. Department of Highways	15
S.J. Groves & Sons Company v. Department of Highways	20
S.R.C. Associates v. State Board of Education and Department of Finance and Administration	142
Sanders, Dennis L. and Nancy J. v. Department of Highways	172
Sayre, Keith B. v. Department of Highways	222
Schwertfeger, Patricia Ann v. Supreme Court of Appeals	62
Shaffer, Jeffrey C. v. Department of Highways	2

Shaver, James R., Jr. v. Department of Highways	127
Sheppard, Frances P. v. Department of Highways	248
Sheriff and Treasurer of Kanawha County (The) v. Supreme Court of Appeals	249
Shinnston, City of v. Department of Highways	46
Shockey, Carl Eugene d/b/a Gene's Mobile Homes v. Department of Highways	250
Sickles, Melvin v. Department of Highways	95
Simplex Time Recorder Co. v. Secretary of State	53
Sinclair, Danny R. v. Board of Regents	256
Six, S. Dean v. Board of Regents	175
Slater, Elvin D. v. West Virginia Radiologic Technology Board of Examiners	38
Smith, Ronald B. v. Department of Highways	250
Smith, Sharon L. v. Supreme Court of Appeals	62
Smith, Timothy E. v. Board of Regents	256
Smoot, Richard A. v. Department of Highways	154
Sowell, Edward v. Board of Regents	71
Sperry Univac v. Department of Finance and Administration	29
St. Joseph's Hospital v. Department of Health	268
St. Joseph's Hospital v. Department of Public Safety	207
St. Joseph's Hospital v. Division of Vocational Rehabilitation (CC-84-301)	253
St. Joseph's Hospital v. Division of Vocational Rehabilitation (CC-84-310)	279
St. Mary's Hospital v. Department of Health	102
Staffilino, Fred, Jr. and Linda v. Department of Highways	279
Standard Publishing v. State Tax Department	96
Starcher, Jesse W. v. Department of Health	251
State Construction, Inc. v. Department of Highways	298
Stemple, Elaine B. v. Board of Regents	96
Stephan, Edgar, III v. Department of Highways	17
Stevens, Bobby E. v. Board of Regents	72
Stewart, Paul H. v. Department of Highways	252
Stiltner, Sandra v. Department of Highways	18
Stonewall Jackson Memorial Hospital v. Department of Health (CC-85-8)	253
Stonewall Jackson Memorial Hospital v. Department of Health (CC-84-19)	97

Stout, Charles D. and Joyce L. v. Department of Highways	53
Surface, Janet T. v. Human Rights Commission	72
Swiger, Harold C. v. Department of Highways	38
Tankersley, Polly v. Department of Highways	254
Tenney, Hilda R. v. Supreme Court of Appeals	62
Terry, Doris A. and Michael A. Terry v. Department of Highways	154
Testa, Julius A. v. Department of Highways	17
Thompson, Carl Mike v. Department of Corrections (CC-80-248a)	114
Thompson, Carl Mike v. Department of Corrections (CC-80-248b)	115
Thompson, E. Milton, Jr. v. Department of Highways	161
Thompson, Linda Dean v. Department of Highways	3
Thompson's of Morgantown, Inc. v. Department of Public Safety	109
Three Community Cable TV v. Department of Public Safety	254
Three M Company v. Department of Health	145
Three M Company v. Department of Motor Vehicles	39
Three M Company v. Department of Public Safety	213
Toler, Alvin R. v. Department of Highways	116
Transportation Rentals Corporation v. Department of Highways (CC-83-18)	117
Transportation Rentals Corporation v. Department of Highways (CC-83-227)	128
Tube Sales, Inc. v. Department of Highways	30
Tucker's Used Cars, Inc. v. Department of Highways	282
Turner, Johnnie L. and Beverly J. v. Department of Highways	185
Tyler, Flowvounia v. Department of Highways	255
Venezia Hauling, Inc. v. Department of Highways	305
Viands, Gail C. v. Supreme Court of Appeals	62
Virginia Electric and Power Company v. Department of Corrections	268
Walker, Shirley Sue v. Department of Highways	47
Waters, Mary Catherine v. Supreme Court of Appeals (CC-82-228)	66

Waters, Mary Catherine v. Supreme Court of Appeals (CC-83-100)	62
Wayne Concrete Company v. Department of Highways	97
Weaver, Alleen F. v. Supreme Court of Appeals	62
Webb, Pearl Patsy v. Department of Health	54
Wells, Lawrence Ray v. Department of Highways	31
Wellsburg, City of v. Department of Public Safety	207
West Virginia Telephone Company v. Department of Health	73
West Virginia Utility Contractors Association v. Governor's Office of Economic and Community Development	223
Wheeling Electric Company v. Department of Corrections	214
Wheeling Hospital v. Department of Corrections	135
White, Amelio J. v. Department of Highways	224
White, Harry L. v. Department of Highways	162
White, James K. and Barbara v. Department of Highways	269
Whiteley, Sandra Sue v. Supreme Court of Appeals	62
Whiting, Doris R. v. Supreme Court of Appeals	62
Whitten Corporation v. Board of Regents	117
Wicklaine, Anita Faye v. Board of Regents	163
Wilks, Sally J. v. Supreme Court of Appeals	62
Wilmoth, Harry E. v. Department of Highways	176
Wilson, Carolyn C. v. Supreme Court of Appeals	62
Wilson, Richard A. v. Department of Highways	290
Wilson, Timothy v. Department of Education	163
Withrow, Pat R. v. Department of Highways	291
Wright, John J. v. Department of Highways	99
Xerox Corporation v. Department of Health	139
Xerox Corporation v. Department of Mines (CC-84-60)	142
Xerox Corporation v. Department of Mines (Office of Oil & Gas [CC-84-312])	269
Xerox Corporation v. Department of Motor Vehicles	145
Xerox Corporation v. Department of Natural Resources	284
Yerkovich, Peter, Jr., v. Department of Highways	30
Yoppi, Alfred D., Jr. v. Board of Regents	256
Young, V.F. v. Department of Highways	129
Zara, Nickolas F. v. Board of Regents	256

Cases Submitted and Determined in the Court of Claims in the State of West Virginia

Opinion issued July 25, 1983

GREENBRIER VALLEY HOSPITAL
vs.
DEPARTMENT OF CORRECTIONS
(CC-83-154)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based on the allegations of the Notice of Claim and the respondent's Answer.

Claimant seeks payment of the sum of \$4,470.34 for services rendered to an inmate of the Anthony Correctional Center. In its Answer, the respondent admits the validity of the claim, but also states that there were no funds remaining in the respondent's appropriation for the fiscal year in question from which the obligation could have been paid.

While the Court feels that this is a claim which in equity and good conscience should be paid, the Court is further of the opinion that an award cannot be made, based on our decision in *Airkem Sales and Service, et al. v. Dept. of Mental Health*, 8 Ct.Cl. 180 (1971).

Claim disallowed.

Opinion issued July 25, 1983

MABSCOTT SUPPLY COMPANY
vs.
DEPARTMENT OF HIGHWAYS
(CC-83-170)

No appearance by claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted for decision based upon a written stipulation to the effect that on or about September 5, 1980, claimant and

respondent entered into two contracts, whereby claimant furnished oxygen and acetylene to respondent's Pineville and Beckley Headquarters. At the end of the contract, respondent was to return the empty oxygen and acetylene cylinders to claimant. Three cylinders were not returned to claimant. The parties agree that \$529.00 is a fair and equitable estimate of the damages sustained by the claimant.

Based on the foregoing facts, an award in the amount of \$529.00 is hereby made.

Award of \$529.00.

Opinion issued July 25, 1983

PAGANO INDUSTRIES, INC.

vs.

DEPARTMENT OF PUBLIC SAFETY

(CC-83-171)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based on the allegations of the Notice of Claim and the respondent's Answer.

Claimant seeks payment of the sum of \$1,560.00 for merchandise delivered to respondent. In its Answer, the respondent admits the validity of the claim, but states that payment was not made because correct bidding procedures had not been followed.

Based on the foregoing, the Court hereby makes an award to the claimant in the amount of \$1,560.00.

Award of \$1,560.00.

Opinion issued July 25, 1983

JEFFREY C. SHAFFER

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-338)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On December 12, 1982, at midnight, claimant was driving his 1974 Cutlass on Campbell's Creek Road in Charleston, Kanawha County, West Virginia. Campbell's Creek Road is a State-maintained road. It

was snowing, and approximately four inches of snow had accumulated, covering the road's surface. Claimant was traveling at about 10 miles per hour. A bridge over Campbell's Creek is at a 90 degree angle to the road. As claimant turned onto the bridge, his car began to slide. The bridge is a wooden floor bridge, and claimant testified that the boards were uneven. He stated that "when my wheels caught the high level part, it spun the rear end of my car around and knocked me off the bridge." Claimant's vehicle went into the creek. An estimate of damage of \$1,049.37 was introduced into evidence. Claimant also incurred a \$42.00 wrecking charge.

After careful review of the testimony, the Court concludes that a combination of factors caused the accident in question. Traveling under the adverse conditions described by claimant is a hazardous undertaking. As this Court has often stated, the State is neither an insurer nor a guarantor of the safety of motorists on its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E. 2d 81 (1947). It would be speculative for the Court to conclude that respondent negligently failed to maintain the bridge in a safe condition and that, but for the condition of the bridge, this accident would not have occurred. The Court is therefore of the opinion to, and does, deny the claim.

Claim disallowed.

Opinion issued July 25, 1983

LINDA DEAN THOMPSON

vs.

DEPARTMENT OF HIGHWAYS
(CC-83-25)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On December 23, 1982, claimant was a passenger in her 1980 Toyota Celica, traveling on Route 44 at Omar, Logan County, West Virginia. The automobile was being driven by claimant's husband. At the approach to a one lane bridge at Cow Creek, the vehicle struck a bent sign post which extended into the road. The right front headlight and signal light were broken, and there were scratches on the front and rear fenders. The damage was estimated at \$174.83.

Claimant testified that the accident occurred about 9:15 p.m. They had travelled the same road at about noon on that day and the post was not bent into the road at that time. Dreama Vance, a clerk at

respondent's Logan County Headquarters, testified that no complaints had been received about the sign post on December 23, 1982.

The evidence established that the sign post was bent into the road sometime after noon on the date of the accident, but there was no evidence as to how, or by whom, the post was so positioned. In order for the respondent to be liable, the claimant must prove that respondent had actual or constructive knowledge of the existence of the defect, and a reasonable amount of time to take suitable corrective action. *Davis v. Dept. of Highways*, 11 Ct.Cl. 150 (1976). As the claimant did not meet this burden of proof, the claim must be denied.

Claim disallowed.

Opinion issued August 12, 1983

JOHN R. LUKENS

vs.

PUBLIC LEGAL SERVICES

(CC-83-177)

No appearance by claimant.

Henry C. Bias, Jr., Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted for decision based on the Notice of Claim and respondent's Answer.

Claimant is an attorney at law who seeks \$441.15 as legal fees pursuant to court-appointed representation of an indigent accused. This fee was approved by an order of the Circuit Court of Kanawha County, West Virginia, for case number AP-CRS-81-36. Respondent has acknowledged the validity of the claim and states that there were sufficient funds on hand from the appropriate fiscal year from which the claim could have been paid.

Based on the foregoing, the Court makes an award of \$441.15.

Award of \$441.15.

Opinion issued October 1, 1983

HIGH VOLTAGE SYSTEMS, INC.

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-140)

Vincent V. Chaney and Michael T. Chaney, Attorneys at Law,
for claimant.

S. Reed Waters, Jr., Attorney at Law, for respondent.

RULEY, JUDGE:

The claimant and respondent entered into a contract in September

1973 for the installation of traffic signals in Clarksburg. There were two projects in the contract designated as T-4009(1) and F-282(76). The respondent gave the claimant notice to proceed in October 1973, at which time claimant negotiated with suppliers for the various materials needed for the projects. Construction of the projects began on July 23, 1974, with a scheduled completion date of December 30, 1974. Completion of construction occurred in June 1975. Claimant contends that problems which occurred during construction caused claimant to incur additional costs in the amount of \$75,841.00; that delays attributable to the respondent resulted in extra costs of \$17,646.00; that non-productive labor costs of \$71,000.00 resulted from those delays; and, that respondent wrongfully assessed liquidated damages against the claimant in the amount of \$24,450.00. The total sum claimed is \$188,937.00.

When the respondent gave the notice to proceed, the claimant issued purchase orders to suppliers for materials needed to begin construction. Those materials included poles, mast arms for signal heads, anchor bolts and controller boxes. Construction began when claimant received the anchor bolts needed for installing the foundations. In the initial construction, claimant experienced some problems with foundations due to unforeseen obstructions, and the respondent ordered their relocation.

Upon completion of the foundations, the claimant began the installation of underground conduit. Claimant planned to perform that work by boring across the intersections. There were 50 intersections of which claimant bored 26 and open cut 24. The open cuts of 48% of the crossings (made necessary by underground obstructions) were made during the fall of 1974 and spring of 1975.

The contract specifically provided for open trenching in Section 2.155.3.8.7 as follows:

“If it is determined by the Engineer that it is impractical to bore the conduit under the pavement due to unforeseeable obstructions, the Contractor may, with the Engineer’s permission, cut the existing pavement. A concrete saw shall be used in order to provide a neat uniform trench across the pavement.”

Claimant notified the respondent of its request for payment for the extra work required for the open cutting in October 1975, a substantial time *after* the work was performed. Section 105.17 of the *Standard Specifications Roads and Bridges*, adopted in 1972, requires the claimant to give notice of intent to charge for extra work performed on a project. More specifically, §105.17 provides as follows:

“If, in any case, the Contractor deems that additional compensation is due him for work or material not clearly covered in the Contract or not ordered by the Engineer as extra work, as defined herein, the Contractor shall notify the Engineer in writing of his intention to make claim for such additional compensation *before* he begins the work on which he bases the claim. If such notification is not given, and the Engineer is not afforded proper facilities by the Contractor for keeping strict account of actual cost as required, then the Contractor hereby agrees to waive any claim for such additional compensation.”

Since the notification required by §105.17 was not given before the work was begun, the claim for extra work must be denied.

A problem with the purchase of rigid bracket mounts which claimant asserts were not indicated on the plans resulted in an additional expense to the claimant in the amount of \$5,460.00, less a credit of \$455.00 for the returned swing brackets, or a total of \$5,005.00. The respondent contends that the plans did provide for the rigid bracket mounts. The swinging brackets originally supplied by the claimant could not be used because they would have caused the signal heads to be mounted on the brackets lower than the minimum height provided in the plans. Reordering and fabrication of the rigid mounts occasioned a three-month delay to the claimant from January 6, 1975 to March 8, 1975. The Court is disposed to make an award in the amount of \$5,005.00 for the rigid bracket mounts.

A substantial delay also occurred in the installation of controller cabinets. These cabinets were originally “green tagged”, i.e., accepted and approved by the respondent at the site of the manufacturer. However, the green tags were removed in December 1974. No work could be performed in the installation of the cabinets until March 1975, when the respondent reapproved the controller cabinets which had been originally approved. The problems with the cabinets were later rectified by the supplier in an agreement between the supplier and the respondent. The delay of three months to solve that problem prevented claimant from proceeding with work on the projects.

Another problem which resulted in a delay during the period from December 1974 to March 1975 involved the interconnect cable. The cable was originally “green tagged” and then the green tags were removed at the project site due to a problem with elongation requirements. A delay of three months occurred while the respondent’s consultant tested the cable. The cable ultimately was approved for use



on the project. That three-month delay contributed to cause additional costs to the claimant.

This Court previously has held that delays attributable to the "green tagging" process will be borne by the respondent. See *Stark Electric, Inc. vs. Dept. of Highways*, Dec. 1, 1982. It is the opinion of the Court that an adjustment is due the claimant for the approximate three-month delay which occurred due to the problems experienced with the rigid bracket mounts and the interconnect cable. The additional cost to claimant for labor and equipment during this three-month period was \$12,641.00. The delay also resulted in costs for the additional time spent on the project as a result of the delay. The Court has determined that an award of \$24,854.00 for that delay is a reasonable sum.

Claimant was assessed \$24,450.00 in liquidated damages for 163 days. The imposition of 90 days of the 163 days is unreasonable as respondent itself caused a three-month delay to the claimant as mentioned before. The general rule for assessment of liquidated damages is found in 22 Am.Jur. 2d "Damages", §233, p. 319 as follows:

"The plaintiff cannot recover liquidated damages for a breach for which he is himself responsible or to which he has contributed, and as a rule there can be no apportionment of liquidated damages where both parties are at fault. Hence, if the parties are mutually responsible for the delays, because of which the date fixed by the contract for completion is passed, the obligation for liquidated damages is annulled and, in the absence of some provision under which another date can be substituted, cannot be revived."

The delay by the respondent in approving the materials through the "green tag" process contributed to the delay, and the record fails to establish that the respondent sustained any damage by reason of the delay. See *Whitmyer Bros., Inc. vs. Dept. of Highways*, 12 Ct.Cl. 9 (1977) and *Vecellio & Grogan, Inc. vs. Dept. of Highways*, 12 Ct.Cl. 294 (1979). However, claimant failed to begin the project at the time the order to proceed was issued by the respondent in October 1973. Rather, claimant began construction on July 23, 1974. For the reasons above, the Court has determined that the liquidated damages should be limited to an assessment of 73 days and that the claimant should not be penalized for the remaining 90 days at \$150.00 per day, for a total of \$13,500.00.

Pursuant to West Virginia Code §14-3-1, payment of interest at six percent per annum on amounts not paid within 150 days after final ac-

ceptance of a completed project are recoverable by a contractor. See *Vecellio & Grogan, Inc. vs. Dept. of Highways*, 12 Ct.Cl. 294 (1979). The Court is informed that the 151st day after final acceptance on this project was July 31, 1977, from which interest is calculated to October 1, 1983, the date of this opinion.

Award of \$59,415.88.

Opinion issued October 4, 1983

APPALACHIAN POWER COMPANY

vs.

DEPARTMENT OF CORRECTIONS

(CC-83-234)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer. Claimant seeks payment of \$28,029.79 for unpaid electrical service bills for the Leckie Center in Leckie, McDowell County, West Virginia. Respondent, in its Answer, admits the amount and validity of the claim, but states that there were no funds remaining in respondent's appropriation in the fiscal year 1982-83 from which the obligation could have been paid.

Although the Court feels that this is a claim which in equity and good conscience should be paid, the Court is further of the opinion that an award cannot be made, based upon the decision in *Airkem Sales & Service, et al. v. Dept. of Mental Health*, 8 Ct.Cl. 180 (1971).

Claim disallowed.

Opinion issued October 4, 1983

HELEN E. BAILEY

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-419)

and

LINDA F. PATE

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-29)

David S. Skeen, Attorney at Law, for claimants.

Nancy J. Aliff, Attorney at Law, for respondent.

WALLACE, JUDGE:

These claims were consolidated for hearing as the factual situations in each are identical. On November 7, 1981, the claimants, driving in separate automobiles, struck a concrete island at the north end of the Patrick Street Bridge in Charleston, Kanawha County, West Virginia. Both vehicles were damaged and both claimants sustained injuries. Ms. Bailey seeks an award of \$8,000.00; Ms. Pate seeks \$13,073.90.

The concrete island at the north end of the bridge was located in the right-hand lane and designed to direct motorists to the right to proceed to the Kanawha Boulevard. The claimants struck the island as they attempted to drive straight ahead through the intersection at the end of the bridge. Ms. Bailey's accident occurred at 6:00 p.m.; Ms. Pate's approximately three hours later. It was clear and dry, and the bridge was lit with artificial lights. A two-year construction project involving the replacement of the deck of the Patrick Street Bridge had just been completed prior to the accidents. As part of the construction, the contractor on the project was required to restore the bridge to its original condition. The concrete island in question had been present on the bridge for 20 or 22 years according to William Wilshire, Jr., assistant director of the Traffic Engineering Division, but had been removed when the construction began. During the construction, traffic had travelled straight ahead off the bridge through an intersection.

David T. Corrie, the project engineer, testified that the island was replaced on November 5, 1981. At that time, two "Right Lane Must Turn Right" signs, which had been covered during the construction, were uncovered. Claimants testified that they did not notice the signs. The evidence was uncontroverted that the island was not painted, nor were any warning markers placed on it.

The Court concludes that respondent was negligent in failing to adequately warn the travelling public of the newly replaced concrete island. However, the claimants, by their own testimony, failed to notice the signs which were present. It is the opinion of the Court that the negligence of the claimants equalled or exceeded that of the respondent. Therefore, the claims must be denied.

Claims disallowed.

Opinion issued October 4, 1983

PAUL V. BOOS

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-119)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On March 18, 1982, at approximately 7:00 a.m., claimant's vehicle, a 1977 Volkswagen, was struck by a falling rock on Route 2, approximately three miles south of Wellsburg, Brooke County, West Virginia. The vehicle was a total loss. Claimant seeks \$426.00, which was the difference between what claimant's insurance company paid him for the Volkswagen and the cost of the vehicle claimant purchased to replace the Volkswagen.

This Court has held that the unexplained falling of a rock or boulder onto a highway, without a positive showing that respondent knew or should have known of a dangerous condition and should have anticipated injury to person or property, is insufficient to justify an award. *Hammond v. Dept. of Highways*, 11 Ct.Cl. 234 (1977). There was no evidence in this case of notice to or knowledge on the part of respondent which would make respondent liable for the damages claimant has incurred. Therefore, the Court must deny the claim.

Claim disallowed.

Opinion issued October 4, 1983

CONSOLIDATED RAIL CORPORATION

vs.

DEPARTMENT OF FINANCE AND ADMINISTRATION

(CC-83-193)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and the respondent's Answer. Claimant seeks an award of \$1,950.00 for rental due claimant for 3,875 square feet of land in Charleston, West Virginia, under State lease #FEA-001-679. The respondent, in its Answer, admits the amount and validity of the claim. Based on the foregoing, the Court grants an award of \$1,950.00.

Award of \$1,950.00.

Opinion issued October 4, 1983

MR. AND MRS. ANDREW DANZIG

vs.

DEPARTMENT OF HIGHWAYS

(CC-83-181)

Claimants appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimants' 1981 Toyota Tercel was damaged on May 13, 1981, while driving on County Route 59, also known as VanVoorhis Road, Morgantown, Monongalia County, West Virginia. The vehicle encountered the broken edge of the roadway damaging the right front tire in the amount of \$65.34. The break along the edge of the pavement was approximately six inches deep, extended 12-20 inches into the road, and approximately eight feet down the road. Mrs. Danzig, driver of the vehicle at the time of the incident, testified that she had driven on Route 59 only once before and had not seen the break.

The State is neither an insurer nor a guarantor of the safety of motorists on its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E. 2d 81 (1947). In order for the respondent to be liable for the damages incurred, notice, either actual or constructive, of the defect in the road must be shown. As there was no evidence of notice to the respondent, the claim must be denied.

Claim disallowed.

Opinion issued October 4, 1983

JAMES C. DAWES COMPANY, INC.

vs.

DEPARTMENT OF HIGHWAYS

(CC-83-220)

No appearance by claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted for decision based upon a written stipulation to the effect that respondent is liable to the claimant for damages in the amount of \$912.00, based upon the following facts.

On or about May 29, 1981, claimant and respondent entered into a contract, whereby claimant was to furnish oxygen and acetylene to respondent's District Six Offices in Moundsville. Pursuant to this contract, claimant supplied respondent with oxygen and acetylene cylinders. Upon expiration of the contract on May 29, 1982, respon-

dent was to return the empty cylinders to claimant. Respondent failed to return six of the cylinders. The parties have agreed that \$912.00 is a fair and equitable estimate of the damages sustained by claimant.

In view of the foregoing, the Court grants an award to the claimant in the amount of \$912.00.

Award of \$912.00.

Opinion issued October 4, 1983

GENERAL TELEPHONE COMPANY OF THE SE
vs.
DEPARTMENT OF CORRECTIONS
(CC-83-201)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and in the respondent's Answer. Claimant seeks payment of \$1,264.30 for telephone service provided to respondent's Leckie Center for the period of August, 1982 through May, 1983. In its Answer, respondent admits the validity of the claim, but states that there were insufficient funds remaining in its fiscal year 1982-83 appropriation from which the obligation could have been paid.

Although the Court feels that this claim should in equity and good conscience be paid, the Court is of the further opinion that an award cannot be made, based upon the decision in *Airkem Sales & Service, et al. v. Dept. of Mental Health*, 8 Ct.Cl. 180 (1971).

Claim disallowed.

Opinion issued October 4, 1983

HARRISON ENTERPRISES, INC.
vs.
DEPARTMENT OF HIGHWAYS
(CC-82-178)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

WALLACE, JUDGE:

The claimant is the owner of a parcel of land, which is improved by

a one-story building of approximately 3700 sq. ft. This property is located between Route 50/37 and Route 50/20 near Murphytown, Wood County, West Virginia. Beginning in mid-1978, two slips began to develop on Route 50/37 at the northeast end of the property. At that time, the property was being rented by a contractor which had placed two office trailers on the land. In July 1979, the contractor ceased renting the property. Claimant alleges that the slide made the property unusable after July 1979. Claimant has not rented either the land or the building since that date and seeks \$7,000.00 as rental for the property. This figure was calculated at a rate of \$200.00 per month for 35 months. The property was purchased by the State for \$35,300.00 by deed dated November 23, 1982, which deed contained the following provision:

“And for the consideration hereinbefore set forth, the said party of the first part does hereby release the party of the second part from any and all claims for damages that may be occasioned to the residue of the lands of the party of the first part by reason of the construction and maintenance of a state road over, upon and under the parcel of land herein conveyed.”

During claimant's testimony, it was established that the claimant had been contacted by persons interested in renting and purchasing the property. These contacts occurred in 1980 and 1981. Claimant testified that he did not negotiate with these persons, because he felt the property was not suitable for rental. It is a well settled principle of law that a party has a duty to mitigate his damages.

“The law imposes upon a party injured by another's breach of contract or tort the active duty of using all ordinary care and making all reasonable exertions to render the injury as light as possible. If by his negligence or wilfulness he allows the damages to be unnecessarily enhanced, the increased loss, that which was avoidable by the performance of his duty, falls upon him.” 5B M.J. *Damages* §16.

The claimant candidly admitted that he refused to rent the property to available tenants. For reasons herein stated, the Court denies this claim.

Claim disallowed.

Opinion issued October 4, 1983

STEPHEN A. JOHNSTON

vs.

DEPARTMENT OF HIGHWAYS

(CC-83-146)

John Polak, Attorney at Law, for claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimant seeks \$231.24 for damages to his 1982 BMW automobile which struck a pothole on County Route 15 in Wheeling, Ohio County, West Virginia. Route 15 is also known as Waddell's Run. The incident occurred on February 26, 1983, at approximately 11:30 p.m. The pothole was described by the claimant as being 8-10 inches wide, 30-36 inches long, and 4-6 inches deep. Claimant testified that he did not see the pothole prior to striking it and had no knowledge of how long it had been in existence.

John Vanaman, Ohio County Road Supervisor, testified for respondent. He stated that he patrols the road at least once a week and when a bad pothole is encountered, it is filled the following day. Mr. Vanaman also stated that prior to February 26, 1983, there were no complaints of specific potholes on Waddell's Run.

The State is neither an insurer a guarantor of the safety of motorists travelling on its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order for the respondent to be liable for the damages sustained, it must have had either actual or constructive notice of the particular pothole and a reasonable time to take corrective action. The claimant has not met this burden of proof. Accordingly, the claim must be denied.

Claim disallowed.

Opinion issued October 4, 1983

MARY P. KELLY

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-303)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimant seeks \$259.55 for damages to her 1975 AMC Pacer incur-

red on August 1, 1982. Claimant was driving on Route 119/12 near Morgantown, Monongalia County, West Virginia, when she drove over a boulder in the road causing damage to the vehicle. She testified that the boulder has been in the road for at least 40 years.

James A. Trickett, a supervisor with respondent, testified that Route 119/12 is a one-lane, low-priority, dirt road which the respondent is required to inspect and maintain only on a yearly basis. Mr. Trickett described the boulder as being embedded in the road's surface. The boulder has been there since the road was built. According to Mr. Trickett, the boulder is of the same contour as the road, and he stated that he had no way of knowing the size or depth of the boulder.

After careful consideration of the evidence presented, the Court can find no basis for liability on the part of respondent. The presence of the boulder was not due to the acts or omissions of respondent, but was a pre-existing condition of the road over which respondent had no control. As no negligence has been shown, the Court must deny the claim.

Claim disallowed.

Opinion issued October 4, 1983

**BOBBY RYDER AND
OTHELLA A. RYDER**

vs.

**DEPARTMENT OF HIGHWAYS
(CC-81-446)**

Richard L. Vital, Attorney at Law, for claimants.

Nancy J. Aliff, Attorney at Law, for respondent.

RULEY, JUDGE:

The claimants own property on Local Service Road 12/1, also known as Deer Pen Road, Lesage, Cabell County, West Virginia. The property consists of approximately 49 acres, located on the north and south sides of Deer Pen Road. Of this 49 acres, approximately 5½ acres, in the form of three fields located on the south side of the road, are the subject of this claim. Two landslides blocked claimants' access to the fields, and claimants seek an award of \$150,000.00 for damage to their land. Prior to the slides, claimants reached the fields by way of two private roads. When access was still possible, the fields had been used to raise tobacco, which claimants sold, and produce for their own consumption. Hay and corn, used to feed their animals, were also grown. Claimants allege that they have lost over \$3,800.00 in three years for their tobacco crop.

The earlier of the two slides occurred in either 1979 or 1980 and blocked access to one of the fields. This slide was located entirely on the south side of Deer Pen Road, and did not affect the road itself. No evidence was presented by claimants as to the cause of this slide. Respondent's witnesses testified that they were unable to determine its origin. As no evidence was presented by claimants to establish that any acts or omissions of the respondent were the proximate cause of the damage in question, the Court is of the opinion, and does, deny an award for this portion of the claim.

The later slide occurred in the spring of 1981. This slide originated on the property of an adjoining landowner on the north side of Deer Pen Road. The slide, measuring approximately 150 feet wide and 125 feet long, covered both Deer Pen Road and claimants' private road to the two fields.

James A. Amenta, a soils geologist employed by respondent, testified that the slide resulted when the adjacent landowner removed timber from the land. Mr. Amenta said:

“. . . it's a slide prone area and there have been sliding constantly but whenever you get in here in this area and you take off the trees and you allow water to get into the slide area, you're increasing your slide chances tremendously. So apparently when this man was in here clearing out with the dozer, he allowed water to get into the slide and it increased the slide probability of the area and as this thing slid, it slid down over the road and down onto Mr. Ryder's private road.”

Clarence F. Scarberry, a general foreman who performed the slide correction, testified that he saw “about five” holes filled with water on the hillside. These holes occurred “where a dozer had been hung up.” Mr. Scarberry stated that he drained one hole which contained “a tremendous amount of water,” but the others were on the adjoining landowners' property and not respondent's right of way. As the evidence presented indicates that the acts of a third party were the proximate cause of the slide, rather than any acts or omissions of the respondent, the claim must be denied.

Claim disallowed.

Opinion issued October 4, 1983

EDGAR STEPHAN, III

vs.

DEPARTMENT OF HIGHWAYS

(CC-83-127)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On February 11, 1983, the claimant was driving his 1973 Datsun 240 Z on I-70 near Wheeling, Ohio County, West Virginia, when the vehicle struck a pothole estimated by the claimant to be approximately three inches deep, two to three feet wide, and one and one-half to two feet long. The automobile sustained damages to the left rear strut cartridge, lower control arm bushings and shaft and rear universal joint in the amount of \$262.50. The claimant testified that he travelled the highway daily, but had not observed the pothole on any previous occasion. He stated that he believed the pothole had been in existence "just a few days."

The State is neither an insurer nor a guarantor of the safety of motorists travelling on its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E. 2d 81 (1947). To be found liable, the respondent must have had actual or constructive knowledge of the defect and a reasonable amount of time to take suitable corrective action. *Davis v. Dept. of Highways*, 11 Ct.Cl. 150 (1976). As there was no evidence of notice to the respondent, the Court must deny the claim.

Claim disallowed.

Opinion issued October 4, 1983

JULIUS A. TESTA

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-270)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimant seeks \$76.69 as the replacement cost of a tire for a 1979 Chevrolet pickup truck. The tire was damaged on September 11, 1982, as claimant was driving south on I-79, leaving Monongalia County, West Virginia. Claimant struck a pothole on a bridge, which he

testified was about two feet in diameter and three or four inches deep. Claimant said that he had travelled the highway a week before the incident and the pothole was not there.

The State is neither an insurer nor a guarantor of the safety of motorists on its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). For the State to be found liable, it must first have had either actual or constructive notice of the defect and a reasonable amount of time to take corrective action. Since there was no evidence in this case that the State had notice of the defect, the claim must be denied.

Claim disallowed.

Opinion issued October 4, 1983

SANDRA STILTNER

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-328)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimant's vehicle, a 1973 Dodge Polara, was damaged on November 10, 1982, at approximately 1:30 p.m. as she drove under a State maintained bridge in Fairmont, Marion County, West Virginia. Claimant alleges that a piece of cement broke off the bridge and landed on her car, damaging the vinyl top and breaking the windshield. The damage was estimated at \$453.11.

The State is neither an insurer nor a guarantor of the safety of motorists travelling on its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). However, the respondent has the duty to use reasonable care to maintain streets and bridges in a safe condition. This Court previously granted an award in a claim, wherein the claimant's vehicle was damaged by concrete falling from a bridge owned and maintained by the respondent. See *Lynch v. Dept. of Highways*, 13 Ct.Cl. 187 (1980). In the instant case, the Court is of the opinion that the respondent has not met the duty of care required in the maintenance of a bridge, and, therefore makes an award to the claimant.

Award of \$453.11.

Advisory Opinion issued October 5, 1983

JOHN R. HESS, INC.

vs.

BOARD OF REGENTS

(CC-83-240)

William J. Kronstain, Manager of Operations, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

WALLACE, JUDGE:

Pursuant to the provisions of W.Va. Code §14-2-18, William J. Kronstain, Manager of Operations for John R. Hess, Inc., hereinafter referred to as Hess, and Robert R. Ramsey, Jr., Chancellor, W.Va. Board of Regents, have jointly requested an advisory determination respecting the claim of John R. Hess, Inc., a corporation, based upon the following facts.

By contract awarded February 23, 1982, the Board of Regents entered into a contract with Hess, by which Hess was to perform the construction of the Marshall University Science Building in Huntington, Cabell County, West Virginia, for the sum of \$5,831,000.00. Hess was notified to commence work on March 18, 1982. At the time Hess was awarded the contract, the Board of Regents had the obligation to relocate certain electrical lines on the project site in order that Hess would have free and open access to the construction area. Due to an unexpected freeze of available funds, the Board of Regents was unable to accept bids or award a contract for the electrical services.

By special arrangement, a contract and purchase order were issued on March 17, 1982, for the electrical services in question. Due to the delay in awarding the second contract, and due to the discovery of previously unlocated telephone line, the relocation of the electrical lines and telephone line was not completed until May 20, 1982. These delays caused Hess to incur additional expenses for labor and increased material costs.

Hess, by letter dated June 14, 1982, requested reimbursement in the amount of \$12,800.00 for the additional expenses incurred. The Board of Regents objected to several items enumerated in Hess' request and Hess, by letter dated July 12, 1982, submitted a second request for the additional expenses in the amount of \$9,635.00. The Board of Regents, after reviewing Hess' second request and completing its own study, has determined that \$5,000.00 represents expenses and increased material costs directly attributable to its inability to provide access to the construction site as obligated under the contract. Hess has indicated its willingness to accept \$5,000.00 in full satisfaction of its requests.

It is the determination of this Court, therefore, that the Board of Regents is legally liable to Hess in the amount of \$5,000.00 in full discharge of the claim in question. As this is an advisory opinion, no award will be made, but the Clerk of the Court is directed to file this advisory opinion and to transmit a copy thereof to the parties.

Advisory Opinion issued October 5, 1983

S.J. GROVES & SONS COMPANY
vs.
DEPARTMENT OF HIGHWAYS
(CC-82-295)

John G. Sarff and Stanley E. Deutsch, Attorneys at Law, for claimant.

S. Reed Waters, Jr., Attorney at Law, for respondent.

LYONS, JUDGE:

This claim came on for consideration upon a request for an advisory determination under Chapter 14, Article 2, Section 18 of the West Virginia Code, 1931, as amended. The Department of Highways, as petitioner, requested the Court to provide a legal interpretation of subsections 207.3.1 and 207.15 of the West Virginia Department of Highways, Special Provision 207 - Excavation and Embankment, dated April 21, 1977, revised on January 5, 1978.

Section 207.3.1 provides as follows:

“Slopes: Slope lines shall conform to the lines and grades shown on the Plans or established by the Engineer within the following tolerances: For all slopes back of the ditch line a construction tolerance of plus or minus one foot, measured in a horizontal plane, will be permitted. No change will be permitted in the width, grade or dimensions of the roadway ditch due to the tolerance. The slope may be varied only by permission of the Engineer. Slopes shall be trimmed neatly to present a uniform surface, free from hollows or protrusions and loose or overhanging rocks. Slopes shall not be undercut. The tops of all slopes, except where the material is of solid rock, shall be founded as shown on the Plans.

The Contractor shall take precautions by benching or other methods, as directed by the Engineer, to prevent slides and slipouts.

In all roadway cuts, including areas where ledges of rock or hard shale, boulders, coal or other solid formations are encountered at or near subgrade elevation, the excavation shall be carried to a minimum depth of six inches below the surface of the subgrade for the full cross section width of the roadway between the ditches. The surface of all areas excavated below subgrade elevation shall be graded in such a manner that undrained pockets are eliminated before placing subgrade material. Excavation to the six-inch limit will be paid for at the contract unit price bid for 'Unclassified Excavation'. Excavation made below this six-inch limit will not be paid for."

Subsection 207.15 of the Special Provision states as follows:

"The quantity of unclassified excavation work done under this item will be measured in cubic yards of 'Unclassified Excavation', which shall be the material actually moved and disposed of as herein prescribed, measured in its original position and determined from the cross sections by the method of average end areas. The quantity of unclassified excavation for payment will be the number of cubic yards as hereinafter further described. The quantities shall be computed using the cross section areas shown on the Plans with deductions from or additions to such cross section areas in accordance with 109.2 and authorized deviations. The quantity for payment will be to plan lines for material excavated in accordance with the construction tolerance set forth in 207.3.1 except as hereinafter provided. In no case where the tolerance line has not been reached will the quantity for payment exceed the quantity actually excavated; unless otherwise authorized, the Contractor will be required to continue or resume excavation until within tolerance rather than receive payment for a lesser (out-of-tolerance) excavated quantity.

No material removed beyond the slope lines or below the grade line shown on the Plans, except as provided in 207.3.1 and 207.9, will be included for payment unless authorized in writing by the Engineer. When authorized by the Engineer in writing, payment will be made for material excavated beyond plan slope lines when removal is necessary due to slides or unusual rock

formation and is not due to carelessness, overshooting or negligent construction methods on the part of the Contractor.

The quantity of subgrade work done under this item will be the number of cubic yards of 'subgrade' established in the Proposal, subject to adjustment as provided for in 104.2 and 109.2. Any additional work beyond the scope of the original Plans but authorized by the Engineer will be measured in cubic yards, compacted in place, and paid for at the unit bid price for subgrade, subject to the provisions of 104.2.

Subgrade constructed outside the lines, dimensions and cross sections shown on the Plans or designated by the Engineer will not be measured for payment.'''

As pointed out by the Petitioner's counsel, the fundamental questions are as follows: (1) Does subsection 207.15 or the Court's decision in *Vecellio & Grogan, Inc. v. Dept. of Highways*, 12 Ct.Cl. 294 (1979) require the Department to pay the contractor for material not actually moved in front of the Plan slope line above the subgrade in the event such work falls within the one foot (1 ft.) tolerance in front or the Plan slope line permitted by subsection 207.3.1? (2) Does subsection 207.15 or the Court's holding in *Vecellio and Grogan, Inc.*, require the Department to pay the Contractor for material actually moved behind the Plan slope line above the subgrade in the event such work falls within the one foot tolerance behind the Plan slope line permitted by subsection 207.3.1? The evidence indicated in the *Vecellio & Grogan* case that a contractor could vary somewhat from the Plan slope line and that it was practically impossible to stay within the Plan line of the slopes using the pre-splitting technique.

Therefore, this Court granted a tolerance of one foot on each side of the Plan line. The intention was to permit equity to prevail in case the contractor strayed somewhat from the Plan line. It was not the intention of this Court to allow the contractor to vary from the Plan line and also to be paid for the material removed beyond the Plan line. The contractor enters into an agreement with the Department of Highways to remove material from the Plan line and to allow him to vary from the Plan line and to be paid for the variance would be improper. The contractor's contract with the State of West Virginia Department of Highways and his bid was based upon removing material from one point to another point and the quantity removed would be measured from Plan line to the other Plan line. To vary from this proposition would create too many uncertainties.

From a careful reading of the Specifications under consideration in this advisory opinion, the Court has concluded that the respondent clearly intended to permit a tolerance of 12 inches in front of the plan line. However, the respondent did not intend to permit the tolerance beyond or in back of the Plan line which would obviously result in increased expenses to the respondent.

Therefore, this Court holds that subsection 207.15 requires the Department to pay the contractor for material not actually moved in front of the Plan slope line above the subgrade in the event such work falls within the one foot tolerance in front of the Plan slope line as permitted by subsection 207.3.1. Subsection 207.15 does not require the Department to pay the contractor for material actually moved behind the Plan slope line above the subgrade in the event such work falls within the one foot tolerance behind the Plan slope line permitted by subsection 207.3.1.

Opinion issued October 18, 1983

HAZEL BARTRAM AND
FOSTER LEE BARTRAM

vs.

DEPARTMENT OF HIGHWAYS
(CC-81-79)

Stephen P. Meyer, Attorney at Law, for claimants.

Nancy J. Aliff, Attorney at Law, for respondent.

WALLACE, JUDGE:

The claimants, Hazel Bartram and Foster Lee Bartram, husband and wife, filed this claim in the amount of \$225,000.00 against the respondent for injuries sustained by Mrs. Bartram, medical and doctor bills, and damages sustained by Mr. Bartram's automobile in a single car accident on February 3, 1981.

On the day of the accident, the claimant, Hazel Bartram, was driving her husband's automobile from the Southern West Virginia Community College located in Williamson, West Virginia, to her home in Lenore, West Virginia. She was proceeding easterly on W.Va. Secondary Route 3/5 at approximately 20 mph. Route 3/5 is a two-lane blacktop road which runs generally east and west. On the south side of the road, in the accident area, there is an embankment and drainage ditch. On the northerly side there is a creek. At a point where a driveway enters the highway from the south, Mrs. Bartram came upon an icy spot which had formed from water draining from the driveway onto the highway. The record indicates that ice extended about four

feet onto the roadway and covered an area of 10-12 feet. Mrs. Bartram testified that she did not see the ice until she came upon it; that the automobile skidded, she lost control, and the vehicle came to rest in the creek. Mrs. Bartram further testified that she travelled the road twice a week, each Tuesday and Thursday, going to and from school. On the day of the accident, she travelled the road at about 9:00 a.m. going to school. At the time, she observed no water or ice on the highway.

Both claimants testified that they had seen water in the ditch line and on the road on prior occasions, but had never seen ice; that there were two sections of drainpipe lying on the ground near the road beside the driveway that had been there for several months. Mr. Bartram testified that the ditch line was stopped up at the driveway. Both testified that there had been a thaw on the day of the accident causing water to drain onto the highway, followed by a drop in temperature causing the water to freeze. Mrs. Bartram stated that she thought the road had been salted.

Records introduced through the claims investigator for the respondent indicated that salt and abrasives had been applied to the road surface by the respondent on the day of the accident. Respondent had no record that it had received any complaints of an unsafe road condition.

The claims investigator testified that the two sections of drainpipe beside the highway were purchased by the property owner and that the respondent had agreed to install them in the driveway ditch line, but was unable to do so because the property owner had not obtained a band to connect the sections of pipe together.

As a result of the accident, Mrs. Bartram received a broken collarbone, a chipped bone in her neck, damage to her teeth, and cuts and bruises. She received no permanent injuries. Her medical, hospital, and doctors' bill were approximately \$1,600.00. Claimants' insurance paid for all damage to the automobile except a \$100.00 deductible.

From the record, the Court does not believe there is a clear showing that respondent knew or should have known a condition existed which would be expected to cause injury or damage. The law is well established in West Virginia that the State is neither an insurer or guarantor of the safety of a traveler on its highways. *Adkins v. Sims*, 130 W. Va. 645, 46 S.E.2d 81 (1947), *Parsons v. State Road Comm'n.*, 8 Ct.Cl. 35 (1969). For the respondent to be found liable for damages caused by said conditions of this type, the claimants must prove that the respondent had actual or constructive knowledge of the condition and a reasonable amount of time to take suitable corrective action.

Cash v. Dept. of Highways, 13 Ct.Cl. 252 (1980). The evidence establishes that water did drain onto the roadway from the ditch line, but the evidence also established that the respondent had placed salt and abrasives on the surface of the road. For the foregoing reasons, this claim must be denied.

Claim disallowed.

Opinion issued October 18, 1983

JUDY W. CHONTOS

vs.

SUPREME COURT OF APPEALS

(CC-83-120)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based on the allegations of the Notice of Claim and the respondent's Answer.

Claimant seeks payment of \$56.80 for various expenses incurred when her driver's license was unjustly suspended. Respondent has admitted the validity of the claim and requests that the claim be honored. In view of the foregoing, the Court grants an award of \$56.80.

Award of \$56.80.

Opinion issued October 18, 1983

JOSEPH B. DECKER

vs.

DEPARTMENT OF HIGHWAYS

(CC-83-149)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was originally filed in the joint names of Joseph B. Decker and Marilyn K. Decker, but when the testimony established that the damaged vehicle, a 1976 Pontiac Sunbird, was titled solely in the name of Joseph B. Decker, the Court on its own motion amended the style of the claim to reflect this fact.

On March 20, 1983, Marilyn Decker was driving on Route 60 in Caldwell, Greenbrier County, West Virginia, when she struck a pothole near the Greenbrier River Bridge. She testified that she had driven the road before, but had no knowledge of the pothole. She could not avoid striking it when she saw it in the road. Damage to the vehicle amounted to \$147.08. A \$28.00 towing charge was paid by insurance.

The State is neither an insurer nor a guarantor of the safety of travellers on its highways. *Adkins v. Sims*, 130 W.Va. 645 (1947). In order for the State to be liable, actual or constructive notice of the defect in the road must be given. As there was no proof of notice of the defect, the claim must be denied.

Claim disallowed.

Opinion issued October 18, 1983

INTERSTATE EQUIPMENT SALES, INC.

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-11)

William E. Hamb, Attorney at Law, for claimant.

S. Reed Waters, Jr., Attorney at Law, for respondent.

PER CURIAM:

Claimant seeks payment of \$10,100.00 allegedly due under a contract with respondent for the rental of six tractors, four equipped with hydroclippers and two with brush hogs. Claimant alleges that the contract was for a three-month period, while respondent alleges that the contract was for rental on a monthly basis. Respondent had possession of the equipment for two months and has paid for that period of time. This claim is for the third month's rental.

When respondent discovered that it needed the equipment in question, Raymond Tabor, Assistant Superintendent of the Equipment Division, District 1, sought bids from three dealers on June 6, 1980. Mr. Tabor requested the equipment for three months. Claimant was high bidder; however, one dealer did not have the proper equipment and the other withdrew its bid. Claimant was informed on or about June 13, 1980, that its bid had been accepted. At that time, Edward M. Rowan, President of Interstate Equipment Sales Inc., took the tractors and brush hogs off the market, as reflected by its inventory sheets, and placed an order for the hydroclippers with Ford Motor

Co. Due to delay on respondent's part, claimant did not receive a purchase order for the equipment until July 29, 1980. Claimant had the machinery ready for respondent on August 2, 1980, and respondent took possession shortly thereafter, returning the equipment two months later.

Claimant's price quotation and respondent's purchase order state a rental price per month per unit as well as a rental price for three months per unit. The purchase order, however, lists a specific rental period of July 1, 1980 through September 30, 1980. Mr. Tabor testified that he never told Mr. Rowan that respondent would use the equipment for only two months.

The price quotation and the purchase order indicate that the parties intended a three-month rental of the equipment in question. The quotation did not specify a time period, and Mr. Rowan testified that it did not matter which three months respondent used the equipment. Respondent specified the time period, but its own delay resulted in its having possession for only two months. Mr. Rowan bid on the basis of a three-month rental and stated it would not be economically possible to rent the equipment for a lesser period of time. Claimant had the equipment available to respondent for a third month's use and has lost this rent due to respondent's delay. The Court, therefore, is of the opinion and does grant an award of \$10,100.00 to claimant.

Award of \$10,100.00.

Opinion issued October 18, 1983

REX ALLEN JOHNSON

vs.

DEPARTMENT OF HIGHWAYS

(CC-83-147)

Robin Lee Johnson appeared for claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was originally filed in the name of Robin Lee Johnson and Rex Allen Johnson, but when the testimony established that the damaged vehicle, a 1981 Monte Carlo, was titled in the name of Rex Allen Johnson alone, the Court, on its own motion, amended the style of the claim to reflect Rex Allen Johnson as the proper claimant.

Claimant seeks \$71.59 for the replacement of a tire which was damaged when his vehicle struck a pothole on Route 61, a quarter of a

mile south of Montgomery, Fayette County, West Virginia. The incident occurred February 28, 1983, at approximately 5:30 p.m. Robin Lee Johnson, the driver of the automobile, testified that she drove on that road every other week, but had no knowledge of the pothole.

The State is neither an insurer nor a guarantor of the safety of travellers on its highways. *Adkins v. Sims*, 130 W.Va. 645 (1947). In order for the State to be found liable, it must first have had either actual or constructive notice of the defect in the roadway. Since there was no proof that the State had notice of the defect, the claim must be denied.

Claim disallowed.

Opinion issued October 18, 1983

FANNIE LEE MALONE

vs.

BOARD OF REGENTS

(CC-83-155)

No appearance by claimant.

J. Bradley Russell, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Amended Answer.

Claimant is employed as a Nursing Assistant at the West Virginia University Medical Center. As a result of clerical error, claimant's rate of pay was miscalculated for the period of October 1981 through January 1983. The amount of the error was \$656.00. Respondent admits the validity of the claim and states that there were sufficient funds on hand from which the claim could have been satisfied during the appropriate fiscal year. In view of the foregoing, the Court makes an award to the claimant in the amount of \$656.00.

Award of \$656.00.

Opinion issued October 18, 1983

J. DOUGLAS MUNDY and

KAREN J. MUNDY

vs.

DEPARTMENT OF HIGHWAYS

(CC-83-183)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was originally titled in the name of J. Douglas Mundy, but when the evidence established that the vehicle, a 1982 Renault LeCar, was titled in the joint names of J. Douglas Mundy and his wife, Karen J. Mundy, the Court, on its own motion, amended the style to reflect Karen J. Mundy as an additional claimant.

On April 22, 1983, claimant was travelling westbound on I-64 between St. Albans and Winfield, Kanawha County, West Virginia. The right-hand lane was closed due to road repairs, and approximately 115 feet after the barricades stopped, claimant changed from the left to the right-hand lane. As he did, he struck a pothole located in the center of the two lanes. The right front tire was punctured, the rim damaged beyond repair, and the front end required realignment. Damages totaled \$191.24. Claimant testified that he travelled the road about once a week and he knew the road was under construction. He stated that he was not aware of the pothole in question, although he may have seen it. He stated that there were numerous potholes on that stretch of road.

The evidence presented indicated that respondent was performing repair work on a stretch of I-64 just ahead of the site of this incident. The Court concludes that respondent should have had constructive, if not actual, notice of the pothole. However, claimant testified that he was aware of the condition of the road and travelled it on a regular basis. Therefore, the Court concludes that any negligence on the part of the respondent was equalled or exceeded by that of the claimant. Under the doctrine of comparative negligence, the Court denies the claim.

Claim disallowed.

Opinion issued October 18, 1983

SPERRY UNIVAC

vs.

DEPARTMENT OF FINANCE AND ADMINISTRATION
(CC-83-7)

Phillip C. Bold appeared for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

Claimant and respondent entered into a long-term lease for word processing equipment on October 1, 1976. Under the lease agreement, payments were to be made on a monthly basis. Through

administrative error on claimant's part, payment of \$3,057.00 under Invoice No. 35786, covering March 1980, was not collected. This oversight was not discovered until after the close of the fiscal year in question. There was no dispute that services were rendered for March 1980.

The Court concludes that failure to grant an award to the claimant would result in unjust enrichment of the respondent. The Court, therefore, grants an award in the amount of \$3,057.00.

Award of \$3,057.00.

Opinion issued October 18, 1983

TUBE SALES, INC.

vs.

DEPARTMENT OF HIGHWAYS

(CC-83-169)

Rita K. Gray appeared for claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was originally filed in the name of Rita K. Gray, but when the testimony established that the damaged vehicle, a 1982 Oldsmobile, was titled in the name of Tube Sales, Inc., the Court on its own motion amended the claim to reflect this fact.

Claimant seeks \$28.50 for replacement of a hubcap which was damaged when the vehicle struck a pothole on I-64, travelling east-bound from Huntington, Cabell County, West Virginia. The incident occurred on March 19, 1983, at approximately 5:30 p.m.

The State is neither an insurer nor a guarantor of the safety of motorists on its highways. *Adkins v. Sims*, 130 W.Va. 645 (1947). In order for respondent to be found liable, notice, either actual or constructive, of the defect in the roadway must be shown. As the claimant has not met its burden of proof, the claim must be denied.

Claim disallowed.

Opinion issued October 18, 1983

PETER YERKOVICH, JR.

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-224)

No appearance by claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted upon written stipulation which revealed

the following facts: Claimant is the owner of real property located on Route 1, Worthington, Harrison County, West Virginia. In early summer, 1982, respondent placed a concrete drainage vessel under Local Service Route 44/6 and caused a certain portion of the drainage system and two holes to be constructed on claimant's property. Respondent did not obtain a drainage easement from claimant. In the course of claimant's operating his hay baler on his property, the hay baler slipped into a hole, sustaining damage to its axle. The parties agree that \$84.62 is a fair and equitable estimate of the damages sustained by claimant.

As the respondent's negligence in digging the hole on claimant's property was the proximate cause of the damages suffered by claimant, the Court hereby makes an award to the claimant in the amount stipulated.

Award of \$84.62.

Opinion issued October 18, 1983

LAWRENCE RAY WELLS

vs.

DEPARTMENT OF HIGHWAYS

(CC-83-185)

Renee Wells appeared on behalf of claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was originally filed in the name of Renee Wells, but when evidence presented indicated that the vehicle in question, a 1978 Camaro, was titled in the name of her husband, Lawrence Ray Wells, the Court on its own motion amended the style to reflect Lawrence Ray Wells as the proper claimant.

On April 21, 1983, at approximately 2:00 p.m., Renee Wells was driving on Route 61 near Crown Hill, Kanawha County, West Virginia, when she struck a pothole located near the berm. The front end had to be aligned at a cost of \$19.88 and one rim replaced at a cost of \$15.00.

The State is neither an insurer nor a guarantor of the safety of motorists travelling on its highways. *Adkins v. Sims*, 130 W.Va. 645 (1947). In order for the respondent to be found liable, it must be shown that the respondent had notice, either actual or constructive, of the defect in the road. As no evidence was presented that the respondent had notice, the claim must be denied.

Claim disallowed.

Opinion issued October 21, 1983

TERRY W. AHALT

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-203)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimant seeks an award of \$172.46 for the replacement of the windshield of his 1981 Ford Fairmont, which was cracked by a piece of limestone which came off the back of a dump truck. Claimant testified that he was travelling several car lengths behind the truck on Lee Town Road in Jefferson County, West Virginia, on July 2, 1982, when the incident occurred. He stated that the truck belonged to respondent and was hauling the limestone to a local job site. There was no cover over the stone.

The Court is of the opinion that the claimant has established that the truck in question belonged to respondent and that the stone that broke his windshield came off respondent's vehicle. The Court, therefore, makes an award in the amount sought. *Kessler v. Dept. of Highways*, 13 Ct.Cl. 436 (1981); W.Va. Code §17C-17-6.

Award of \$172.46.

Opinion issued October 21, 1983

JUDITH ANN HALL

vs.

BOARD OF REGENTS

(CC-83-41)

Claimant appeared in person.

J. Bradley Russell, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based on the allegations of the Notice of Claim and the respondent's Answer.

Claimant is a Licensed Practical Nurse II, who, through clerical error, failed to receive a 15-cents-an-hour pay raise during the period of July 1, 1980 through 1982. In its Answer, respondent admits that the error amounted to \$469.41 and states that there were sufficient funds available from which the claim could be paid during the fiscal year.

In view of the foregoing, the Court grants an award to the claimant in the amount of \$469.41.

Award of \$469.41.

Opinion issued October 21, 1983

CLYDE HOLLOWAY, as the next friend of
KAY LEE HOLLOWAY

vs.

DEPARTMENT OF HIGHWAYS
(CC-83-12)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

WALLACE, JUDGE:

On November 9, 1982, at approximately 7:45 p.m., claimant Clyde Holloway was driving a 1973 Dodge which is titled in his daughter's name, on State Route 19/73 in Fairmont, Marion County, West Virginia. As he drove under a State maintained bridge, a piece of concrete fell from the bridge damaging the vehicle in the amount of \$1,252.57. Claimant testified that he saw the concrete as it fell from the bridge. He stated that the bridge "is in bad shape." There is wire fencing under the bridge to catch debris, but claimant stated that the material had gotten so heavy it had fallen through the wire.

While the State is neither an insurer nor a guarantor of the safety of travelers on its highways, the respondent has a duty of using reasonable care to keep roadways and bridges in reasonably safe condition. See *Lynch v. Dept. of Highways*, 13 Ct.Cl. 187 (1980). Based on the evidence presented, the Court concludes that respondent has been negligent in the maintenance of the bridge in question. The Court, therefore, makes an award in the amount of \$1,252.57.

Award of \$1,252.57.

Opinion issued October 21, 1983

KANAWHA RIVER DOCKING
AND MARINE, INC.

vs.

BLENNERHASSETT HISTORICAL
PARK COMMISSION
(CC-83-130)

Ronald F. Stein, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

WALLACE, JUDGE:

This claim for \$3,488.05 involves work performed by the claimant on an LCM-3 landing craft owned by respondent. The claimant

alleges the work was extra work over and above the price quotation given by claimant to respondent. The contract price of \$22,500.00 has been paid by respondent. Respondent contends that the contract covered all the work which was described as extras, and therefore, no further payments are due claimant.

The contract states, in part, that claimant is:

“To supply all parts and labor sufficient to effect repairs to an LCM-3 Landing Craft, by removing, repairing, and reinstalling two (2) Gray Marine 671 engines and gear boxes, and to rebuilding exhaust system, hooking up engine piping and electrical controls and miscellaneous parts.

The 671 engines will be rebuilt using new style engine blocks, new pistons, liners, main bearings, and any other parts required.

The gear boxes will be disassembled and repaired as per factory specifications.”

The “extra” work for which claimant submitted an invoice involved work on raw and fresh water pumps, flywheel repairs, cleaning gear boxes, and work on the tailshaft and exhaust system. There was also a charge for packing material. Michael B. Balch, President of Kanawha River Docking and Marine, Inc., testified that none of the invoiced labor and materials was contemplated by the original contract. He further stated that authorization for the work was given by James Snyder, respondent’s field superintendent who oversaw the work. Daniel Fowler, respondent’s Executive Director, testified that he was “the only one empowered to make any commitments of a financial nature” and he did not do so.

After careful consideration of the evidence presented, the Court concludes that certain work performed by claimant was not contemplated by the terms of the contract, and claimant should be compensated for this work. Failure to do so would result in unjust enrichment to the respondent. Mr. Balch testified that the raw and fresh water pumps were not a part of the engines, but accessories to the engine, which evidence was not controverted by respondent. The work on the tailshaft was likewise not contemplated by the terms of the contract. The packing material was purchased by respondent as a separate transaction. The exhaust system, gear boxes, and flywheel are clearly included under the broad terms of the contract. No award will be made for the portion of the claim regarding these items. The repairs to the water pumps amounted to \$700.40, and to the tailshaft, \$220.00.

The packing material cost \$63.00. The Court grants an award to claimant in the amount of \$983.40.

Award of \$983.40.

Opinion issued October 21, 1983

FRED MARCUM

vs.

DEPARTMENT OF HIGHWAYS
(CC-83-219)

No appearance by claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted for decision based upon a written stipulation that respondent is liable to claimant for damages in the amount of \$275.92, based upon the following facts.

On or about July 1, 1983, claimant was driving his 1979 Chevrolet pickup truck on West Virginia Local Service Route 1 in Mingo County, West Virginia. As claimant crossed a bridge over Twelve Pole Creek, the vehicle struck a piece of board protruding from the bridge which is owned and maintained by respondent. The board damaged the right portion of the truck bed. Respondent's negligent maintenance of the bridge was the proximate cause of the damages sustained by the claimant.

Accordingly, the Court makes an award to the claimant in the amount of \$275.92.

Award of \$275.92.

Opinion issued October 21, 1983

ELLIOTT E. MAYNARD, III

vs.

DEPARTMENT OF HIGHWAYS
(CC-83-6)

Huston Mitchell, Attorney at Law, for claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimant seeks an award of \$6,934.20 for damages sustained by his 1979 Pontiac TransAm which was involved in a single-car accident on Route 52 at the Wayne-Mingo County line near Kermit, West Virginia, on November 20, 1982. Claimant alleges that as he entered a curve on Route 52, he encountered coal deposits extending into the

road which caused him to lose control of the vehicle. The automobile slid into a hillside, overturned, and was rendered a total loss.

Larry E. Wood, an insurance adjuster and investigator, visited the accident scene with claimant on November 21, 1982. Mr. Wood testified that he measured the coal in the roadway and found that it extended approximately 200 feet down the road. The coal extended as much as five feet, six inches into the roadway, and was up to three inches deep. The coal was up to seven inches deep on the berm. Photographs introduced into evidence show the extent of the coal deposits on Route 52.

David M. Ramey, an officer with the Kermit Police Department at the time of the accident, testified that he went to the site of the accident and viewed coal in the road. Officer Ramey stated that the curve was a recognized trouble spot. When asked how long coal had been in the road, he replied, "I couldn't basically tell how long it had been there but it's been there I'd say a year anyway, different times. Maybe not this particular pile but there is coal trucks going down through there every day." Bruce Stroud, with the Mingo County Sheriff's Department, who was also on the scene, testified the coal had been present "a long time." Neither had reported the condition to respondent.

Curtis Asbury, Wayne County Maintenance Supervisor, testified that he travelled Route 52 an average of once every two months and had not viewed coal in the travelled portion of the roadway. He also stated that his office had not received any complaints concerning coal in the roadway at the site of the accident.

This Court has repeatedly held that the State is neither an insurer nor a guarantor of the safety of motorists on its highways. The testimony presented indicated that the coal on Route 52 came from coal trucks which travel on that highway. There was no evidence that respondent had actual knowledge of the condition of Route 52 at the accident site. However, the testimony also indicated that this condition was of long-standing duration, during which time respondent should have learned of its existence and taken corrective measures. The Court is constrained to find that claimant was also negligent in failing to notice the coal deposit until he was upon it. Photographs introduced into evidence clearly show coal in the distance looking down Route 52. The Court, under the doctrine of comparative negligence, reduces claimant's award by 25%, and, therefore, makes an award of \$4,953.00. This award is based on the value of the vehicle, \$8,161.25, less the salvage value of \$1,557.25.

Award of \$4,953.00.

Opinion issued October 21, 1983

**WILLIAM G. POLING and
DELORES J. POLING**

vs.

**DEPARTMENT OF HIGHWAYS
(CC-80-264)**

John W. Cooper, Attorney at Law, for claimants.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted for decision upon written stipulation based upon the following facts. Claimants are the owners of real property located in Tucker County, West Virginia. Prior to July 3, 1979, respondent had maintained the road adjacent to claimants' property, under the designation of Tucker County Secondary Route 17/7. During maintenance of the roadway, which respondent believed was Route 17/7, respondent damaged claimants' property and fences. Claimants brought an action for declaratory judgment in the Circuit Court of Tucker County, alleging that the alternate road was Route 17/7 and the road adjacent to claimants' property was a private road. On July 3, 1979, the Circuit Court of Tucker County rendered a judgment for the claimants.

The parties have agreed that \$500.00 is a fair and equitable estimate of the damages sustained by the claimants. In view of the foregoing, the Court grants an award of \$500.00 to claimants.

Award of \$500.00.

Opinion issued October 21, 1983

LILLIAN ROSE

vs.

**DEPARTMENT OF HEALTH
(CC-83-244)**

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based on the allegations in the Notice of Claim and respondent's Answer. Claimant is an employee of Huntington State Hospital, Huntington, Cabell County, West Virginia. On June 13, 1983, she accompanied a number of patients to Ritter Park. One patient became hostile, hitting and kicking

staff members who tried to restrain her. Claimant's watch band was broken by the patient as claimant attempted to control her. Claimant replaced the watch band at a cost of \$10.50. Respondent, in its Answer, has acknowledged the amount and validity of the claim.

In view of the foregoing, the Court makes an award to the claimant in the amount of \$10.50.

Award of \$10.50.

Opinion issued October 21, 1983

ELVIN D. SLATER

vs.

WEST VIRGINIA RADIOLOGIC
TECHNOLOGY BOARD OF EXAMINERS
(CC-83-217)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer. Claimant printed 2,000 two-color licenses on parchment for respondent, for which respondent failed to submit an invoice for payment. The licenses were printed for a cost of \$109.20. Respondent has acknowledged the amount and validity of the claim. In view of the foregoing, the Court grants an award in the amount of \$109.20.

Award of \$109.20.

Opinion issued October 21, 1983

HAROLD C. SWIGER

vs.

DEPARTMENT OF HIGHWAYS
(CC-82-290)

Clifton G. Swiger appeared for claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was originally filed in the name of Clifton G. Swiger. The transcript reflects that the true owner of the vehicle, a 1975 Chevy Nova, is Harold C. Swiger, and the Court, on its own motion, amends the style of the claim to reflect the true owner as claimant.

On October 27, 1982, Clifton G. Swiger was driving his father's automobile in Fairmont, Marion County, West Virginia. As he passed beneath a State maintained bridge, pieces of concrete or rock fell on the vehicle causing damages to the hood, front fender, and back window in the amount of \$292.01. Mr. Swiger testified that the debris came from the underside of the bridge and that a wire screen had been placed under the bridge to try to prevent this from happening.

The State is neither an insurer nor a guarantor of the safety of motorists on its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). The respondent, however, has a duty of using reasonable care to keep roadways and bridges in reasonably safe condition. See *Lynch v. Dept. of Highways*, 13 Ct.Cl. 187 (1980). The Court concludes, therefore, that the respondent has been negligent in the maintenance of the bridge in question and makes an award to the claimant in the amount of \$292.01.

Award of \$292.01.

Opinion issued October 21, 1983

3M COMPANY

vs.

DEPARTMENT OF MOTOR VEHICLES

(CC-83-245)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer. Claimant seeks \$3,828.00 for goods supplied to respondent. Due to an error, claimant shipped the goods twice on one purchase order. Respondent paid for the first shipment, but not the second. Both shipments were received and used by respondent. Respondent, in its Answer, has acknowledged the validity and amount of the claim. The Court, therefore, makes an award to the claimant in the amount sought.

Award of \$3,828.00.

Opinion issued October 25, 1983

HENRY BESSE & DIANA K. BESSE
AND
CHARLES D. MORGAN & PENNY A. MORGAN
vs.
DEPARTMENT OF HIGHWAYS
(CC-81-216a&b)

Phillip D. Gaujot, Attorney at Law, for claimants.

Nancy J. Aliff, Attorney at Law, for respondent.

WALLACE, JUDGE:

These claims were consolidated for hearing as the factual situations involved in each are identical.

Claimants, at the time of the incident which is the subject of these claims, were adjacent landowners on Valley Drive, Cross Lanes, Kanawha County, West Virginia. A small creek, known as Armour Creek runs perpendicular to and under Valley Drive. Both homes are located on the south side of Armour Creek. Armour Creek flows in an easterly direction through a 60-inch culvert under Valley Drive. On June 12, 1981, during a rainstorm, both properties sustained flood damage, allegedly due to the insufficient size of the culvert and to increased water run-off from I-64, which is situated behind Valley Drive. The Besses and Morgans each seek \$25,000.00 for damages to real and personal property as a result of the flood. The respondent alleges that the construction of I-64 decreased the drainage area in the vicinity of claimants' properties. Respondent further alleges that Valley Drive and the drainage underneath it were not constructed by respondent, but were taken into the State road system "as is."

The section of I-64 situated above Valley Drive was constructed in 1964-65. Bhajan S. Saluja, a civil engineer, testified that the drainage area which empties into Armour Creek is approximately 340 acres. Mr. Saluja calculated the run-off produced by this drainage area using two different methods. With each method he calculated the run-off for two-year, five-year and ten-year frequency storms. As part of the calculation, Mr. Saluja determined what portions of this watershed were I-64 pavement, reclaimed grass area, developed area, and wooded area. A second set of calculations was made without the I-64 construction by adding the acreage for I-64 and the reclaimed grass area to the wooded area. According to these calculations, the I-64 construction increased the water run-off by approximately 40%.

Under cross-examination, Mr. Saluja stated that his figures with and without I-64 construction were based on conditions that presently exist. This was done, he said, to demonstrate the relative impact of the

construction. This impact, however, does not encompass the pre-1964 conditions with respect to the amounts of developed and wooded areas. According to Randolph Epperly, Jr., Chief Engineer, In-House Design Section with respondent, an interstate system is designed for the development that currently exists. He testified that, "You design on the conditions as they exist and make sure your design does not increase the flow or discharge into any drain system that would cause any problems on below there." Mr. Epperly stated that the Cross Lanes area within this watershed has developed greatly since the I-64 construction and this would increase the water run-off. He also testified that the I-64 construction resulted in a decrease of the drainage area by six acres.

Mr. Saluja stated that the culvert is inadequate to carry the flow of water when Armour Creek is flowing at full capacity. Mr. Epperly disputed this contention, stating that by his calculations, the hydraulic capacity of Armour Creek is less than the culvert capacity. The differing figures arise out of different cross-sections used to compute the creek channel. Both men agreed that the top of the culvert is located above the level of the Besse property and would, therefore, cause the property to flood if the culvert was filled to capacity.

Robert Campbell, an engineer with respondent, testified that Valley Drive was taken into the State highway system on September 22, 1979. Mr. Campbell said that when a road is taken into the system, no guarantee is made that the road will be upgraded. This includes the drainage under the road. In a letter from respondent to the residents of Valley Drive, outlining the procedure for requesting that the road be taken into the system, this fact is explained. The letter states, in part:

"When and if subject road is included into the State Road System, the Department is not committed to upgrade the roadway, but only to give it its share of routine maintenance with consideration to other road needs throughout the State."

Although much of the testimony of the expert witnesses was contradictory, it is clear that the flooding resulted from a combination of factors. First, the properties are in a low lying area. The Besse property is higher than Armour Creek, but below the top of the culvert. Photographs indicate that the Morgan property is at a slightly higher elevation than the Besse property. Mr. Saluja and Mr. Epperly agreed that in order to alleviate the problem the culvert would have to be placed at a level below that of the properties or enlarged to provide greater capacity. It is apparent, therefore, that the culvert has con-

tributed to the damages. However, the culvert was not constructed by the respondent, and respondent did not undertake to upgrade the drainage system when Valley Drive became part of the State road system. There was also no evidence that respondent had notice of any problems with this culvert prior to the flooding.

A second factor involved is the increased water run-off in the area of Valley Drive. The Court cannot find that the construction of I-64 was the proximate cause of the increased run-off. While the interstate may contribute in some part to the increase, the residential and commercial growth within the watershed has also contributed. This Court cannot speculate as to what portion of the damages, if any, was directly attributable to the construction of I-64. Based on the evidence presented, the Court cannot conclude that the acts or omissions of the respondent were the proximate cause of the damages suffered. While this Court is not unmindful of the claimants' losses, the claims must be denied.

Claims disallowed.

Opinion issued October 25, 1983

BERTHA HALL

vs.

BOARD OF REGENTS

(CC-80-406)

R.F. Gallagher, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

WALLACE, JUDGE:

Claimant was employed as a laundry worker at West Virginia University Medical Center on September 1, 1972. On April 20, 1979, she was terminated for alleged insubordination and for allegedly striking her supervisor with her fist. Claimant appealed her discharge, and the Hearing Panel upheld her dismissal. Upon review of the decision, President Gene A. Budig concluded that the Panel had failed to give sufficient weight to the recommendation of The Arbitration Review Board, which had recommended that claimant be reinstated with back pay. In a letter to claimant dated May 20, 1980, President Budig directed the personnel office to assist claimant in finding "a position comparable in duties and pay to the one you held before your termination." She was re-employed at the University on July 1, 1980, and seeks \$8,434.00 as back pay allegedly due for the period April 20, 1979 through June 30, 1980.

After careful consideration of the authorities cited, the Court concludes that this claim is governed by the principles established in *Lippert v. Sims*, 143 W.Va. 542, 103 S.E.2d 533 (1958). In that case, a discharged employee was rehired in a comparable position, but was not awarded back pay. W.Va. Code §12-3-13 provides that "No money shall be drawn from the treasury to pay the salary of any officer or employee before his services have been rendered." No services were rendered by the claimant during the period in question. This is not a situation where an employee was reinstated after being wrongfully terminated. The claimant was given the opportunity to re-employment and is entitled to compensation only for the time she actually worked. The Court is of the opinion to, and does, deny the claim.

Claim disallowed.

Opinion issued October 25, 1983

DONALD A. KUNTZ

vs.

DEPARTMENT OF HIGHWAYS

(CC-83-46)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimant is the owner of a 1981 Toyota Tercel which was damaged when it struck a pothole on I-64 near Cross Lanes, Kanawha County, West Virginia, on January 17, 1983. The right front tire and rim were damaged in the amount of \$70.00. Claimant testified that he did not see the pothole until he struck it. He stated that he travels the road once or twice a month and that the highway is in need of repair. Claimant had not made any complaints to respondent about the condition of the road prior to this incident.

The State is neither an insurer nor a guarantor of the safety of persons travelling on its highways. *Adkins v. Sims*, 130 W.Va. 645 (1947). For the State to be found liable, it must first have had either actual or constructive notice of the defect in the roadway. Since there was no proof in this case that the State had notice of the defect, the claim must be denied.

Claim disallowed.

Opinion issued October 25, 1983

CHARLES L. McCOMAS

vs.

DEPARTMENT OF MOTOR VEHICLES

(CC-83-162)

Claimant appeared in person.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

Claimant seeks an award of \$65.00 for suspension fees and pick-up order fees which he paid respondent and which he alleges were wrongfully assessed by respondent. Claimant, by personal check dated June 15, 1982, paid an \$8.00 license fee for a trailer. The check was returned for insufficient funds. Claimant was notified in early July 1982 that the check had been returned and he should submit \$18.00 for the license and returned check fee. Claimant mailed a second personal check in the amount of \$18.00 to respondent. At some point in July, claimant said he received the license and assumed the matter was settled. He claims he did not receive any further letters from respondent until March 1983 when he received the suspension order. The order suspended claimant's license and registration and directed the Department of Public Safety to pick up the same for non-payment of fees. As a result of the order, the claimant was assessed \$65.00 which he paid to respondent.

Robert Morrison, Manager of the Bureau of Administration with respondent, stated that several letters were written to claimant concerning the fees. After the initial check was returned, claimant was notified that \$18.00 would be required and it would have to be in the form of a certified check or money order. Departmental regulations do not allow a second personal check in payment of a previous personal check which was returned for insufficient funds. The second personal check was, therefore, returned to claimant according to Mr. Morrison. Other correspondence with claimant resulted in no payment, so the suspension order was issued. Mr. Morrison stated that the letters sent to claimant were addressed to the same address as the initial letter, and none were returned to respondent.

Based on the evidence presented, the Court can find no basis for an award to the claimant. Claimant was notified that a check in the amount of \$18.00 would have to be in the form of a certified check or money order; however, he mailed a personal check in the amount of \$18.00. Although claimant stated that he heard nothing further from respondent, there exists a presumption in the law that a letter, properly addressed, will be received, and the Court finds that claimant has not presented sufficient evidence to override the presumption. The Court must, therefore, disallow the claim.

Opinion issued October 25, 1983

KAREN SUE NUZUM
vs.
DEPARTMENT OF HIGHWAYS
(CC-82-18)

Michael R. Tatterson, Attorney at Law, for claimant.

Nancy J. Aliff, Attorney at Law, and Henry C. Bias, Jr., Deputy Attorney General, for respondent.

WALLACE, JUDGE:

Claimant is the owner of a house on U.S. Route 119 in Webster, Taylor County, West Virginia. The house is located on the west side of Route 119, which runs north and south. There is a hillside on the east side of Route 119. The road slopes from the south towards claimant's home. Claimant alleges that due to respondent's negligence in maintaining the culverts and ditches in the area, her property sustained water damage on June 5, 1981, and various dates since that initial flood. As a result of the water, part of the basement wall has fallen in, and certain items of personal property have been lost. Claimant seeks \$57,000.00 in damages. Respondent alleges that the flooding did not occur due to any action or inaction on its part, but rather that the property is in a low-lying area and that the initial flooding occurred during a period of an unusually hard rain.

Claimant testified that she purchased the property in May 1980 for \$10,000.00. There was a retaining wall alongside the road when claimant purchased the property. The wall washed out during the June 5, 1981, flooding and has not been replaced. At the time of the purchase, claimant made inquiries about water damages in the area. She stated that a neighbor had informed her of water run-off from the hillside. This run-off caused a porch and steps on the side of the house to wash out sometime before June 5, 1981.

Claimant testified that she contacted respondent prior to June 5, 1981, to try to have work done on the road. She said that she could see water problems developing and wanted to prevent any damage. Various representatives of respondent viewed the property, she said, but no action was taken. She stated that she believed cleaning the ditches along the road and installing "appropriate culverts" would prevent further damage.

Toxell O. Mason, a civil engineer, testified for claimant. He said that there were three streets or approaches to the south of claimant's property on the east side of Route 119. The culverts under the approaches and the ditches along the road are inadequate, according to Mr. Mason. When the rain started, he testified, the water had nowhere to go except across the road and onto claimant's property.

Jeffrey A. Newlon, a civil engineer employed by respondent, testified that the ditch and culverts are adequate to handle a normal rainstorm. He determined that the cause of the flooding was water running off the hillside on the east side of Route 119. The water was collected on the side streets which directed the water across Route 119 before it would be directed into the ditch line. Flooding would occur in this manner during periods of excessive rainfall only. The addition of culverts or deeper ditches would not help the situation, according to Mr. Newlon, because the water does not reach the ditch. He stated that he did not know of anything that could be done to correct the problem.

Paul Curry, a road maintenance supervisor, testified that there had been between three and four inches of rain in an hour on June 5, 1981, which was an unusually heavy amount. He also stated that the ditches are cleaned on Route 119 every year, and had last been cleaned approximately seven months before the initial flooding on October 30, 1980. He added that the fact that the retaining wall had not been replaced contributed to the continuing water problem.

After careful consideration of the record in this case, the Court has determined that no action or inaction on the part of the respondent was the proximate cause of the damage suffered by claimant. Rather, it appears that the damage occurred during a period of unusually heavy rainfall, where the water followed its natural course onto claimant's property. While the Court is sympathetic to claimant's plight, claimant has not established, by a preponderance of the evidence, actionable negligence on the part of respondent; the Court must, therefore, deny the claim. *Wotring v. Dept. of Highways*, 12 Ct.Cl. 162 (1978).

Claim disallowed.

Opinion issued October 25, 1983

CITY OF SHINNSTON

vs.

DEPARTMENT OF HIGHWAYS

(CC-83-199a)

John S. Kaull, Attorney at Law, for claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted for decision based upon a written stipula-

tion that respondent is liable to claimant for damages in the amount of \$801.50, based upon the following facts.

The claimant is the owner of a 100 ACP Raw Water Line, parallel to Route 250 south of Fairmont, Marion County, West Virginia. On or about March 23, 1982, at approximately 9:30 a.m., respondent was ditching along Route 250, and in the process of ditching, damaged claimant's water line. This damage was due to the negligence of the respondent.

In view of the foregoing, the Court makes an award to claimant in the amount of \$801.50.

Award of \$801.50.

Opinion issued October 25, 1983

SHIRLEY SUE WALKER

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-287)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimant seeks damages in the amount of \$316.94 for the replacement of the windshield of her 1978 Oldsmobile which was cracked on September 13, 1982. On that date, claimant was driving south on Route 15 towards Fairview, Marion County, West Virginia, when a passing truck picked up a piece of gravel from the road, throwing it into the claimant's windshield. Claimant testified that the truck belonged to respondent and that the gravel was being used to fill in potholes. Claimant's husband, who was also in the vehicle at the time of the incident, testified that he thought the truck was travelling too fast for the road condition.

The State is neither an insurer nor a guarantor of the safety of motorists travelling its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). This Court cannot hold that the damage sustained by the claimant was foreseeable, nor that the incident would not have occurred had the truck been travelling at a slower rate of speed. As no actionable negligence on the part of respondent has been shown, the Court must deny the claim.

Claim disallowed.

Opinion issued December 1, 1983

GEORGE H. ARMSTRONG

vs.

DEPARTMENT OF HIGHWAYS

(CC-83-186)

Claimant appeared in person.

Olivia Cooper Bibb, Attorney at Law, for respondent.

PER CURIAM:

On May 15, 1983, claimant was driving her 1978 Oldsmobile Cutlass on Pioneer Drive in Cross Lanes, Kanawha County, West Virginia, when the vehicle struck a pothole. The automobile sustained damage to the frame, brake line, and right front tire in the amount of \$504.31. The incident occurred at about 10:00 p.m. during a rainstorm. Claimant testified that he did not see the pothole that night because it was filled with water, but that he was aware of its existence as he travelled the road frequently. The hole measured approximately two feet wide and three or four feet long.

The State is neither an insurer nor a guarantor of the safety of motorists travelling on its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order for negligence on the part of the respondent to be shown, proof of notice of the defect is required. *Davis Auto Parts v. Dept. of Highways*, 12 Ct.Cl. 31 (1977). In this claim, no evidence of notice to the respondent was presented. The Court is of the opinion to, and does, deny the claim.

Claim disallowed.

Opinion issued December 1, 1983

AVERY LABEL, DIVISION OF AVERY INTERNATIONAL

vs.

DEPARTMENT OF FINANCE & ADMINISTRATION

(CC-83-284)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer. Claimant seeks \$100.00 for gummed labels furnished to respondent under a purchase order dated November 17, 1981. Payment was not sought until after the close of the 1981-82 fiscal year. Respondent, in its Answer, has

acknowledged the validity and amount of the claim. In view of the foregoing, the Court makes an award to claimant in the amount of \$100.00.

Award of \$100.00.

Opinion issued December 1, 1983
BETHANY L. BROWNING
vs.
BOARD OF REGENTS
(CC-83-231)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer. Claimant seeks \$75.72 as the amount she alleges is due as a salary increase for the month of May 1983. Claimant, in its Answer, admits the amount and validity of the claim.

In view of the foregoing, the Court makes an award to the claimant in the amount sought.

Award of \$75.72.

Opinion issued December 1, 1983
KERR GOOCH, D/B/A/ SOUTHERN GLASS SERVICE
vs.
FARM MANAGEMENT COMMISSION
(CC-83-262)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks an award of \$492.00 for various supplies delivered to the respondent by the claimant on September 3, 1980. Respondent, in its Answer, admits the validity of the claim, but states that there were no funds remaining in its appropriation in the fiscal year 1980-1981 from which the claim could have been paid.

While the Court feels that this is a claim which in equity and good conscience should be paid, the Court is further of the opinion that an award cannot be made, based upon the decision in *Airkem Sales and Service, et al. v. Department of Mental Health*, 8 Ct.Cl. 180 (1971).

Claim disallowed.

Opinion issued December 1, 1983

LILLY M. HALL

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-44)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On February 19, 1976, claimant was a passenger in a vehicle being driven by Wilma L. Hunt on Route 12/7 near Philippi, Barbour County, West Virginia. Route 12/7 is also known as Arden Grade Road. The road is a stone-based secondary road. The vehicle struck a pothole in the road which caused the claimant, who was sitting in the front seat, to hit her head against the sun visor over the windshield. She seeks \$10,000.00 as a result of the injury.

Mrs. Hunt testified that they were driving on Arden Grade Road as a part of a group touring a school bus route. She said the road was in bad shape. She was driving approximately five miles per hour and did not see the hole in the road because it was filled with mud.

Randall Biller, who, on the date of the incident, was District Maintenance Engineer for District 7, including Arden Grade Road, testified that Arden Grade Road was then a stone-based secondary road; that in January of 1976, the month before the incident, 250 tons of aggregate and stones were placed on the road to repair potholes. There was no evidence that the respondent had notice of the pothole where the incident occurred.

The State is neither an insurer nor a guarantor of the safety of motorists on its highways. *Adkins v. Sims*, 130 W.Va. 645 (1947). In order for the respondent to be liable, there must be evidence that respondent had either actual or constructive knowledge of the defect in the roadway.

Claim disallowed.

Opinion issued December 1, 1983

MR. and MRS. DAVID LEADMAN

vs.

DEPARTMENT OF HIGHWAYS

(CC-83-21)

Henry Wood, Attorney at Law, for claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted upon a written stipulation based upon the following facts. Claimants are the owners of real property in Huntington, Cabell County, West Virginia. On June 9, 1982, and August 16, 1982, claimants' property flooded due to water from the adjacent roadway. The flood damage was due to respondent's negligent maintenance of the drainage system in the vicinity of claimants' property. As a result of the flooding, claimants' yard, furnace, and septic tank were damaged and required cleaning and replacement. The parties have agreed that \$1,500.00 is a fair and equitable estimate of the damages sustained. In view of the foregoing, the Court grants an award in the amount of \$1,500.00.

Award of \$1,500.00.

Opinion issued December 1, 1983

OHIO VALLEY MEDICAL CENTER, INC.

vs.

DEPARTMENT OF CORRECTIONS

(CC-83-252 and CC-83-267)

John L. Bremer, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

These claims were submitted for decision based upon the allegations in the Notices of Claim and respondent's Answers.

Claimant seeks payment of \$9,689.34 and \$5,702.09 respectively, representing unpaid medical expenses incurred by inmates of the West Virginia Penitentiary at Moundsville, West Virginia. Respondent has admitted the validity of the claims, but states that there were no funds remaining in its appropriation for the fiscal year in question from which the claims could have been paid.

While the Court in equity and good conscience feels that these are claims which should be paid, the Court is also of the opinion that awards cannot be made, based upon the decision in *Airkem Sales and Service, et al. v. Department of Mental Health*, 8 Ct.Cl. 180 (1971).

Claim disallowed.

Opinion issued December 1, 1983

REYNOLDS MEMORIAL HOSPITAL, INC.

vs.

DEPARTMENT OF CORRECTIONS

(CC-83-239)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$154,947.08 for medical care and services provided to inmates of the West Virginia Penitentiary. The respondent, in its Answer, admits the validity of the claim but states that there were no funds available in its appropriation for the fiscal year in question from which the obligation could have been paid.

While the Court feels that this claim is one which in equity and good conscience should be paid, the Court is further of the opinion that an award cannot be made, based upon the decision in *Airkem Sales and Service, et al. v. Department of Mental Health*, 8 Ct.Cl. 180 (1971).

Claim disallowed.

Opinion issued December 1, 1983

ROENTGEN DIAGNOSTICS, INC.

vs.

DIVISION OF VOCATIONAL REHABILITATION

(CC-83-257)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

In this claim submitted for decision based upon the pleadings, claimant seeks \$75.00 for diagnostic services performed on July 3, 1981. Respondent, in its Answer, admits the validity and amount of the claim.

In view of the foregoing, the Court grants an award in the amount of \$75.00.

Award of \$75.00.

Opinion issued December 1, 1983

SIMPLEX TIME RECORDER CO.

vs.

SECRETARY OF STATE

(CC-83-281)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer. Claimant seeks \$505.76 for a Simplex Time stamp which was supplied to respondent and for which payment has not been made. Respondent has acknowledged the validity and amount of the claim. The Court, therefore, makes an award to claimant in the amount of \$505.76.

Award of \$505.76.

Opinion issued December 1, 1983

CHARLES D. STOUT AND

JOYCE L. STOUT

vs.

DEPARTMENT OF HIGHWAYS

(CC-83-164)

No appearance by claimants.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted upon a written stipulation based upon the following facts: Claimants are the owners of real property on Route 3, Salem, Doddridge County, West Virginia. On May 18, 1982, respondent's crews placed Torodon 10-K pellets along County Route 25 to kill multiflora rose bushes. As a result, claimants' pine tree was killed. The loss of the tree was due to the negligence of respondent in placing the pellets in the vicinity of the tree. The parties have agreed that \$1,000.00 is a fair and equitable estimate of the damages sustained. In view of the foregoing, the Court makes an award to claimants in the amount of \$1,000.00.

Award of \$1,000.00.

Opinion issued December 1, 1983

PEARL PATSY WEBB

vs.

DEPARTMENT OF HEALTH

(CC-83-249)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant is employed as an aide at Huntington State Hospital in Huntington, Cabell County, West Virginia. On July 8, 1983, while attempting to restrain a patient, claimant's clothes were torn by the patient. She seeks \$36.00 in damages. Respondent, in its Answer, admits the validity and amount of the claim. The Court, therefore, grants an award to claimant in the amount of \$36.00.

Award of \$36.00.

Opinion issued December 2, 1983

L.G. DE FELICE, INC.

vs.

DEPARTMENT OF HIGHWAYS

(CC-77-11)

George S. Sharp and Jack M. Quartararo, Attorneys at Law, for the claimant.

Stuart Reed Waters, Jr., Attorney at Law, for the respondent.

RULEY, JUDGE:

This is what commonly is called a changed condition claim, growing out of a highway construction contract. Under the contract, dated October 13, 1971, claimant agreed to construct 23,073 linear feet of Appalachian Corridor Highway, in Nicholas County, for the sum of \$4,025,247.70. The original completion date of July 31, 1973, was extended to October 12, 1974, and the actual completion date was November 15, 1974. By supplemental agreements dated August 22, 1972, and January 10, 1975, the contract price was increased \$779,700 for 226,000 cubic yards of rock borrow excavation. The original amount of this claim was \$1,835,814.91 but, at the trial, the claimant withdrew three items of the claim totalling \$84,071.28, leaving a claim in the sum of \$1,751,743.63.

The claim is based upon the following provisions of Specification 104.2, Standard Specifications Roads and Bridges, Adopted 1968:

“104.2 — Alteration of Plans or Character of Work:

* * * *

Should the Contractor encounter or the Commission discover during the progress of the work subsurface or latent physical conditions at the site differing materially from those indicated in the contract, or unknown physical conditions at the site of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract, the Engineer shall be notified in writing of such conditions; and if the Engineer finds the conditions do materially differ and cause an increase or decrease in the cost of, or the time required for performance of the contract, an equitable adjustment will be made and the contract modified in writing accordingly.”

In gist, claimant contends that it encountered “subsurface * * * conditions at the site differing materially from those indicated in the contract” and that it is entitled to an “equitable adjustment” of the contract. As in virtually all highway construction projects in this state, this one involved a series of cuts and fills. The more specific contention of the claimant is that the respondent’s plans showed that the cuts contained more than a sufficient supply of hard stone which could be utilized in the fills when, in fact, they contained virtually no stone which was satisfactory for that purpose. For that reason, claimant was obliged to obtain the stone from other, more remote places and was obliged to waste the cut material rather than utilize it in the fills. This misfortune naturally resulted in several ramifications including various delays which, in turn, naturally involved increased costs.

The preponderance of the evidence demonstrates that the claimant did encounter subsurface conditions “differing materially from those indicated in the contract” as illustrated by a letter dated January 29, 1973, over the signature of L.G. Wickline, respondent’s assistant district engineer, in which he stated:

“As indicated in the attached letter, *the plans did show a surplus of select rock within the project excavation limits. This rock was not available, and the contractor had to borrow the material off the right of way in*

order to complete the embankment.” (emphasis supplied)

And, in view of other correspondence between the parties, the respondent cannot be heard to say that it did not receive, or timely receive, the written notice “of such conditions” for which provision is made in Section 104.2. In fact, it appears that supplemental agreements 3 and 6 were equitable adjustments and were made pursuant to that section. By letter dated July 7, 1972, claimant requested compensation for 120,000 cubic yards of rock “from an outside source” (the exact amount authorized by supplemental agreement 3). Other correspondence from the claimant to the respondent related to the reasons for delays (responsive to which, apparently, the completion date of July 31, 1973, was extended to October 12, 1974) and to changes in cut slopes.

At no time, however, until claimant’s letter to respondent dated May 7, 1975, which apparently was written in response to respondent’s letter of April 23, 1975, notifying claimant that it would be assessed liquidated damages of \$8,100.00 for 27 days delay from October 12, 1974 to November 15, 1974, was there any written notice whatever to the respondent to the effect that the claimant expected to receive additional compensation for other additional work or expense attributable to the difference in subsurface conditions. In that letter, claimant states:

“As you know, the time extension granted to us was, for the most part, because of the excessive number of days lost to inclement weather during the life of the Project. It should be understood, however, that the inclement weather alone was not the main reason for this excessive loss of working time; but rather, it was the detrimental subsurface soils and water conditions which differed materially from those indicated on the original bid drawings in combination with the inclement weather that caused us to require nearly 15 extra months to complete the Contract. More specifically, when we bid this Project, the plan core borings and plan quantity sheets indicated that there would be a considerable amount of medium rock and hard rock encountered in the excavation cuts throughout the Project. These boring and quantity sheets were completely erroneous since we encountered practically no rock at all. As a result, our excavation and grading operations became mired and bogged down in the mud every time it rained (and for

several days afterwards) rather than our being able to operate on the hard surface of rock cuts and being able to haul over rock surfaced haul roads, regardless of rain or not, as we had planned.

Furthermore, excessive underground water conditions, which were not provided for in the original Contract design, caused us to undercut our roadways and our drainage lines to a far greater degree than had been anticipated. These underground water conditions also worsened (sic.) the unstable condition of the cut areas during construction.

As a result of these differing conditions, we were required to use methods of construction different than planned on, re-do work previously completed, perform extra work at no additional pay, all of which resulted in the inefficient use of our men, equipment, and project management for a much longer time than originally contemplated.

We have discussed these items with you from time to time during the length of the Project, as well as other related items of extra cost, without resolution. Since the final estimate represents our last chance to obtain payment under the Contract for the financial hardship that we suffered, we would appreciate an opportunity to meet with you, or with your Charleston office, to discuss deletion of liquidated damages and to arrive at an equitable adjustment in the final estimate for these additional costs.”

Specification 105.17 provides, in part:

“105.17 — Claims for Adjustment and Disputes:

*If, in any case, the Contractor deems that additional compensation is due him for work or material not clearly covered in the Contract or not ordered by the Engineer as extra work, as defined herein, the Contractor shall notify the Engineer in writing of his intention to make claim for such additional compensation before he begins the work on which he bases the claim. If such notification is not given, and the Engineer is not afforded proper facilities by the Contractor for keeping strict account of actual cost as required, then the Contractor hereby agrees to waive any claim for such additional compensation. * * **”

It was the specification which was the basis of the comment by Judge Wallace in *A.J. Balthes, Inc. v. Department of Highways*, 13 Ct.Cl. 1, at 3 (1979), where he stated:

“According to the Standard Specifications, and under the terms of the contract, the claimant was required to give the Engineer written notice that it intended to make claim for additional compensation in the form of an equitable adjustment due to differing site conditions. The contract further provides that such notice shall be given before work is commenced in the claimed area so that the Engineer is afforded the opportunity for keeping strict account of the actual cost. Failure to comply with this provision under the contract is to be considered a waiver by the claimant or contractor of any claim for additional compensation.”

In *Balthes*, the claimant gave such written notice approximately two months after the materially different condition was encountered, providing the basis for the Court's conclusion there that, as soon as it became apparent that a substantial changed condition existed, the notice of intention to claim additional compensation was given. In this case, there is no such basis for such conclusion. It hardly needs be said that, when the respondent received claimant's letter of May 7, 1975 (almost six months after the contract was completed), it was impossible for respondent's engineer to keep "strict account of actual cost". In fact, it appears from the evidence that the claimant itself did not keep an account of actual cost incurred as a result of the changed condition.

Whether the respondent had timely actual notice of claimant's intention to make a claim for the additional work which is the subject of this claim and, by its conduct, waived the written notice requirement of Specification 105.17 does not appear from the evidence thus far introduced. For that reason, the Court is disposed to grant a motion to reopen this claim for the purpose of hearing evidence on those subjects, provided such motion is filed within 30 days after this opinion is issued.

Opinion issued December 5, 1983

ELSIE MAST and ELSIE MAST & WILLIS MAST,
D/B/A/ WILLIS MAST LIVESTOCK TRUCKING

vs.

DEPARTMENT OF HIGHWAYS
(CC-80-371)

Gregory W. Evers, Attorney at Law, for claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

WALLACE, JUDGE:

Claimant seeks an award in the amount of \$29,977.93 for damages incurred when her tractor trailer truck was involved in an accident on Route 50/16 near West Union, Doddridge County, West Virginia. The accident occurred on October 14, 1978. Claimant alleges that respondent's negligent maintenance of the road was the proximate cause of the accident. From the record in this claim, it appears that the tractor trailer truck was titled in the name of Elsie Mast, individually. The livestock loss was incurred by Elsie Mast and Willis Mast, d/b/a Willis Mast Livestock Trucking. The style of the claim has been so amended.

Claimant's employee, Dale D. Doup, was the driver of the truck at the time of the accident. Mr. Doup testified that he drove down Route 50/16 to pick up a truckload of cattle. As he drove back down Route 50/16, which is a two-lane road, he moved over to give room to an automobile passing in the other direction. As he did,

“ . . . the truck just stopped moving and I pushed on the accelerator and it still didn't go and I heard a loud crack and I looked back and I seen the trailer was tilting and about the time the cattle shifted and the trailer just kept tilting on over and just dragged the tractor and trailer and all right down the hill.”

Mr. Doup said that a portion of the road under the trailer had given way. The trailer was about four feet from the edge of the roadway at that time. Mr. Doup said that he saw no signs or other warning devices on the road, nor were there any signs posting a weight limit. He estimated the combined weight of truck and livestock at 70,000 pounds. He also stated that this was the first time he had occasion to drive on Route 50/16.

Trooper David L. Doak investigated the accident. He made measurements of the road just before the slip and determined that the width was 18 feet. At the slip, the road's width was 11 feet. Trooper Doak stated that in the slip were “several logs and brush” and that fill had been placed in the road “for some time.”

John Gum, maintenance supervisor for Doddridge County, testified that the road had been subject to slips for twenty years. He could not say whether there were any hazard signs on the road on the date of the accident. Mr. Gum said the road has been marked with hazard paddles, but that the signs have been subject to theft. The evidence presented indicates that the respondent had knowledge of the condition of the roadway and was negligent in failing to post signs warning of the potential hazard or for not limiting the weight of vehicles travelling on Route 50/16.

Willis Mast, co-owner of Willis Mast Livestock Trucking, testified that damages to the truck amounted to \$19,500.62. These damages included the replacement of the cab and repairs to the trailer. He also expended \$1,200.00 in towing charges. The loss of several head of cattle amounted to \$4,261.53, of which all but \$1,000.00 was paid by insurance. The truck was out of service for 12 or 14 days and Mr. Mast estimated that his loss of business was \$5,015.78. He later stated that this was a gross loss and would figure that his net loss was around \$2,000.00. The Court finds that the loss of business damages are too speculative and declines to make an award for that element of damage. Therefore, the Court grants an award of \$21,700.62.

Award of \$20,700.62 to Elsie Mast.

Award of \$1,000.00 to Elsie Mast and Willis Mast, d/b/a Willis Mast Livestock Trucking.

Opinion issued December 15, 1983

WANETTA F. ADKINS

(CC-83-63)

DEBORAH K. BOWERS

(CC-83-64)

PAULA D. BURCH

(CC-83-65)

SHEILA E. (CASTEEL) COGAR

(CC-83-66)

MARCELLA M. "AUSTIN" COOK

(CC-83-67)

JOANNE Y. DAILEY

(CC-83-68)

JUDITH DAVIS

(CC-83-69)

PAULA JEANNINE DOLAN
(CC-83-70)
HELEN ECHARD DUKE
(CC-83-71)
LORI L. FITZWATER
(CC-83-72)
ANITA HAGER
(CC-83-73)
PATRICIA ANN HANLON
(CC-83-74)
TERESA LYNN HATTEN
(CC-83-75)
NANCY J. HAUGHT
(CC-83-76)
RUBY KAY HAWKINS
(CC-83-77)
DEBRA E. HIXENBAUGH
(CC-83-78)
HELEN IDLEMAN
(CC-83-79)
ROSETTA MAE JORDAN
(CC-83-80)
JANE C. KELLER
(CC-83-81)
JANET S. KOONTZ
(CC-83-82)
PENNY S. LONG
(CC-83-83)
FRANCES ANN LUTMAN
(CC-83-84)
CAROLYN E. MASON
(CC-83-85)
MARY L. McCORD
(CC-83-86)
ROBIN A. MICHAEL
(CC-83-87)
CHRISTY L. MORRIS
(CC-83-88)
PATRICIA A. NAPIER
(CC-83-89)
SALLY J. NAPIER
(CC-83-90)

PATRICIA A. NOLAND
(CC-83-91)
JANET ELIZABETH PRICE
(CC-83-92)
TERRY LYNN PRIOR
(CC-83-93)
RHONDA P. RADABAUGH
(CC-83-94)
JANICE KAY ROTH
(CC-83-95)
CHERYL J. RUDOLPH
(CC-83-96)
SHARON L. SMITH
(CC-83-97)
HILDA R. TENNEY
(CC-83-98)
GAIL C. VIANDS
(CC-83-99)
MARY CATHERINE WATERS
(CC-83-100)
ALLEEN F. WEAVER
(CC-83-101)
SANDRA SUE WHITELEY
(CC-83-102)
DORIS R. WHITING
(CC-83-103)
SALLY J. WILKS
(CC-83-104)
CAROLYNE C. WILSON
(CC-83-105)
AND
PATRICIA ANN SCHWERTFEGER
(CC-83-110)

vs.

SUPREME COURT OF APPEALS

Jack Kinder, representing W.Va. Magistrates Association.

Sterl F. Shinaberry, Attorney at Law, for respondent.

PER CURIAM:

The claimants are magistrate court clerks, deputy court clerks, and assistants in various counties throughout West Virginia. They seek to recover wages not paid to them (in accordance with the salary scale based upon the 1980 decennial census) for the 1981-82 fiscal year.

The respondent has moved to dismiss the claims based upon the West Virginia Supreme Court decision of *Ruth A. Donaldson, Magistrate, etc., et al. v. Gainer, Jr., Auditor, et al.*, W. Va., 294 S.E. 2d 103 (1982).

Salaries for magistrates and their support staff members are funded by appropriation for the judicial branch of government. The Legislature approves such funding for the next ensuing fiscal year. In the *Donaldson* opinion, the W.Va. Supreme Court of Appeals determined that because of this funding scheme, which requires that the budget bill be proposed in advance of the fiscal year to which it applies, salary increases for magistrates and staff members could not be appropriated until the next ensuing fiscal year after publication of the new census figures. The *Donaldson* opinion states that magistrates have recourse to this Court in order to recover such amounts as may be due for that period prior to the new fiscal year.

However, the *Donaldson* opinion draws a distinction between magistrates' salaries, which are fixed by statute, and the salaries of supporting staff members. The salary of a clerk is fixed by the Judge of the Circuit Court of the county within a maximum limit allowable (W.Va. Code 50-1-8). The salaries of deputy clerks and assistants are fixed by the magistrate within a maximum limit allowable (W.Va. Code 50-1-9 and 50-1-9a). The salaries of deputy clerks and assistants not being fixed by statute, there appears to be no retroactive entitlement to salary.

This Court must, therefore, grant respondent's motion to dismiss. Claims dismissed.

Opinion issued December 15, 1983

JOHN CASEY PETERS

vs.

DEPARTMENT OF HUMAN SERVICES

(CC-83-4)

Claimant appeared in person.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was originally filed against the Department of Welfare, but when the testimony revealed that the respondent agency had been renamed the Department of Human Services, the Court, on motion of the parties, amended the style of the claim to reflect that fact.

Claimant is the lessee of a building located on South High Street in Morgantown, Monongalia County, West Virginia. On June 18, 1980, claimant entered into an agreement with respondent to sublease to respondent 6,764 square feet, out of a total 12,000 square feet, for use as office space. Respondent occupied that portion of the building from July 1, 1980, until August 1, 1982. After respondent vacated the premises, claimant alleges that the carpeting in the building was damaged beyond that of normal wear and tear, and that a portion of a suspended ceiling, which had been removed to accommodate a file retrieving machine, had been damaged and required replacement. He also alleged damage to part of a drywall partition.

Photographs introduced by the claimant show that some of the carpeting was badly stained, and this was admitted by Nancy C. Corrothers, who was the office manager. Claimant and Ms. Corrothers both stated that soft drinks were the source of many stains. A soft drink machine was located in the waiting room area. Claimant testified that a portion of the carpet would have to be replaced and the rest required cleaning.

There was also photographic evidence of the damaged drywall partition and the removal of a portion of the ceiling. Mrs. Corrothers testified she did not recall the damaged drywall partition and was not sure where all of the ceiling tile was stored. Jeffrey G. Smith, field supervisor for the West Virginia Department of Employment Security, which occupied the other portion of claimant's building, testified that he viewed the respondent's part with claimant and did recall the damaged drywall partition.

The evidence presented indicated that claimant's building suffered damages beyond that of normal wear and tear, and that claimant is entitled to compensation.

An estimate of \$632.04 for the replacement of 52.67 square yards of carpeting was admitted into evidence. An estimate of \$1,400.00 for cleaning the total area of carpeting (at \$0.20 per square foot) was also presented. Deducting the amount of square footage to be replaced leaves \$1,257.99 for carpet cleaning. Claimant estimated the replacement cost for materials and labor for the drywall partition and ceiling tile at \$395.00 for which the Court is disposed to allow \$150.00. The foregoing allowances total \$2,040.03.

Award of \$2,040.03.

Opinion issued December 15, 1983

BRENDA ANN POOLE
and MICHAEL RAY POOLE

vs.

DEPARTMENT OF HIGHWAYS
(CC-83-204)

Claimants appeared in person.

Olivia Cooper Bibb, Attorney at Law, for respondent.

PER CURIAM:

On June 12, 1983, at approximately 3:00 p.m., claimants were driving their 1976 Chevrolet Chevette west on I-64 in Huntington, Cabell County, West Virginia. The vehicle had just passed the Fifth Street exit when it ran through a pothole, damaging the right front tire and the front end suspension in the amount of \$341.13, of which all but \$100.00 was paid by insurance. Claimants also incurred a towing charge of \$25.50. Michael Ray Poole, driver of the vehicle at the time of the incident, testified that he was driving at about 50 mph when he encountered the pothole. He did not see the hole before he struck it because it was located in a curve, just over a hill, and on a small downgrade, and they were following a tractor trailer truck. He estimated the pothole to be two feet long and eight or ten inches wide. Mrs. Poole testified that she thought the hole was three feet long and two feet wide and five inches deep. Both claimants agreed that the hole was deep enough that the undercarriage of the vehicle struck the reinforcing steel rods in the highway.

This Court has repeatedly held that respondent is neither an insurer nor a guarantor of the safety of travellers on its highways. However, the respondent does have a duty of using reasonable care and diligence in the maintenance of its highways. In the case of a heavily travelled major highway in this State, the Court has held respondent liable for failure to repair a pothole of this size, as it cannot have developed overnight. See *Lohan vs. Dept. of Highways*, 11 Ct.Cl. 39 (1975); *Baker vs. Dept. of Highways*, 11 Ct.Cl. 48 (1975); *Stone vs. Dept. of Highways*, 12 Ct.Cl. 259 (1979); *Bailey vs. Dept. of Highways*, 13 Ct.Cl. 144 (1980); *Snodgrass vs. Dept. of Highways*, 13 Ct.Cl. 247 (1980). The Court, therefore, makes an award to claimants in the amount of \$125.50, which is the amount of claimants' deductible plus the towing charge. Other claims for damage, including inconvenience, increased insurance rates, and loss of food in a cooler, are denied as an award for these items would be speculative.

Award of \$125.50.

Opinion issued December 15, 1983

MARY CATHERINE WATERS

vs.

SUPREME COURT OF APPEALS

(CC-82-228)

No appearance on behalf of the claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

WALLACE, JUDGE:

The claimant, a magistrate assistant in Boone County, has filed this action to recover wages not paid to her (in accordance with a salary scale based upon the 1980 decennial census) for the 1981-82 fiscal year.

The respondent contends that the claim should be denied based upon the West Virginia Supreme Court opinion in *Ruth A. Donaldson, Magistrate, etc., et al. v. Gainer, Jr., Auditor et al.* (June 30, 1982).

Salaries for magistrates and their support staff members are funded by appropriation for the judicial branch of government. The Legislature approves such funding for the next ensuing fiscal year. In the *Donaldson* opinion, the W.Va. Supreme Court of Appeals determined that because of this funding scheme, which requires that the budget bill be prepared in advance of the fiscal year to which it applies, salary increases for magistrates and staff members could not be appropriated until the next ensuing fiscal year after publication of the new census figures. The *Donaldson* opinion states that magistrates have recourse to this Court in order to recover such amounts as may be due for that period prior to the new fiscal year.

However, the *Donaldson* opinion draws a distinction between magistrates' salaries, which are fixed by statute, and the salaries of supporting staff members. The salary of a clerk is fixed by the Judge of the Circuit Court of the county within a maximum limit allowable (W.Va. Code 50-1-8). The salaries of deputy clerks and assistants are fixed by the magistrate within a maximum limit allowable (W.Va. Code 50-1-9 and 50-1-9a). The salaries of deputy clerks and assistants not being fixed by statute, there appears to be no retroactive entitlement to salary.

Claim disallowed.

Opinion issued December 19, 1983

**MACHINERY & SYSTEMS DIVISION,
A DIVISION OF CARRIER CORP.**

vs.

**DEPARTMENT OF PUBLIC SAFETY
(CC-83-22)**

Frederick William Maier, Jr., Branch Service Supervisor, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

Claimant seeks \$833.00 allegedly due under a contract to maintain air conditioning equipment at the West Virginia State Police Academy in Institute, Kanawha County, West Virginia. The contract began on January 1, 1980, and was to extend for one year. The last month's invoice, dated December 1, 1980, was not honored. Respondent alleges that it had entered into a contract with another company to do the services which claimant was required to perform and that claimant did not, in fact, perform any services during December 1980.

The contract involved has a cancellation clause by which respondent may cancel the contract upon 15 days written notice. There was no evidence presented of notice to claimant. The contract required claimant to furnish the following:

“I. Vendor's total maintenance contract includes recommended preventative maintenance procedures performed during regularly scheduled inspections (twelve annually) as well as any necessary emergency service, repair parts, refrigerant or repair labor.”

The contract goes on to describe various types of services to be performed monthly “as required” or monthly “during the cooling season.”

Frederick William Maier, Jr., Branch Service Supervisor, testified that his company did not perform any routine maintenance for December 1980 because the system was shut off. Had there been any service requests during that time, claimant would have performed the work. Mr. Maier stated that the contract did not require twelve monthly inspections, and his records indicated that work was performed during every month except December.

The language of the contract clearly states that it is to run for one year with payment of \$833.00 per month. The contract does not state claimant will perform certain functions monthly. It is obvious that the duties claimant would be required to perform under this contract

would be seasonal in nature, but payment for those services would be prorated over the term of the contract. Claimant should not be made to lose money on the contract simply because respondent entered into a second contract which overlapped the first. No evidence was presented that claimant did not fulfill the terms of the contract as required, nor was there any indication that any notice of cancellation was given. The Court, therefore, makes an award of \$833.00.

Award of \$833.00.

Opinion issued December 19, 1983

JOHN REED and PATSY D. REED

vs.

DEPARTMENT OF HIGHWAYS

(CC-83-213)

Claimant, Patsy D. Reed, appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimants seek an award of \$2,798.70 for damage to their 1971 Ford truck, which occurred when the vehicle was involved in an accident on June 22, 1983. As claimants travelled along State Local Service Route 7/8 near Charleston, Kanawha County, West Virginia, a portion of the road gave way and the truck went off the road and rolled over. Claimant, Patsy D. Reed, who was a passenger in the truck being driven by her husband, testified that there was a washed out area under the road, which, in her opinion, caused the road to give way. Mrs. Reed's mother, Lena Martin, testified that she had driven to the accident site upon receiving a telephone call from her daughter. Mrs. Martin took a photograph of the road surface and testified that even after a portion of the road had given way, there was up to 14 inches of road surface not supported by earth. She estimated that the broken area of pavement extended approximately four feet along the roadway surface.

The State is neither an insurer nor a guarantor of the safety of motorists travelling on its highways. *Adkins vs. sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order for the respondent to be found liable, evidence of notice, either actual or constructive, of the defect in the road must be established. In this case, there was not adequate evidence of notice to the respondent. The Court must, therefore, deny the claim.

Claim disallowed.

Opinion issued January 17, 1984

THE BOARD OF TRUSTEES OF
CABELL COUNTY GENERAL HOSPITAL
a/k/a CABELL HUNTINGTON HOSPITAL

vs.

DEPARTMENT OF HEALTH
(CC-83-285)

Glen D. Moffett, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$22,991.31 for medical care and treatment rendered to a patient of Huntington State Hospital. Respondent, in its Answer, admits the validity of the claim, but further states that there were insufficient funds remaining in its appropriation for the fiscal year in question from which the claim could have been paid.

While the Court believes that this is a claim which, in equity and good conscience should be paid, the Court is further of the opinion that an award cannot be made, based upon the decision in *Airkem Sales and Service, et al. vs. Dept. of Mental Health*, 8 Ct.Cl. 180 (1971).

Claim disallowed.

Opinion issued January 17, 1984

GOODWIN DRUG COMPANY

vs.

DEPARTMENT OF HEALTH
(CC-83-309)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$47.39 for goods delivered to Denmar State Hospital in Hillsboro, West Virginia. Respondent, in its Answer, admits the validity and amount of the claim.

In view of the foregoing, the Court makes an award to claimant in the amount of \$47.39.

Award of \$47.39.

Opinion issued January 17, 1984

THE GOODYEAR TIRE AND RUBBER COMPANY
vs.
DEPARTMENT OF AGRICULTURE
(CC-83-306)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks payment of the sum of \$174.54 for merchandise received by respondent. Respondent, in its Answer, admits the validity and amount of the claim.

The Court, therefore, grants an award to the claimant in the amount of \$174.54.

Award of \$174.54.

Opinion issued January 17, 1984

RANDY PAUL LOWE
vs.
DEPARTMENT OF HEALTH
(CC-83-292)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant is an employee of Spencer State Hospital who seeks \$15.00 for the replacement cost of a shirt which was torn by a patient at Spencer. Respondent, in its Answer, admits the validity and amount of the claim. In view of the foregoing, the Court grants an award in the amount of \$15.00.

Award of \$15.00.

Opinion issued January 17, 1984

VERA B. RAMSEY

vs.

PUBLIC EMPLOYEES INSURANCE BOARD

(CC-83-289)

Claimant appeared in person.

Henry C. Bias, Jr., Deputy Attorney General, and J. Bradley Russell, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant is a retired employee of the Fayette County West Virginia Board of Education, which is covered by respondent. In June 1980, claimant became eligible for Medicare coverage. This information was not, apparently, related to respondent, who continued to withhold the full amount of insurance premiums from claimant's retirement payments, instead of a reduced amount. The excess withholding from June 1, 1981 to June 30, 1982, the period covered by this claim, amounts to \$332.76.

Richard A. Folio, Administrative Assistant of the Public Employees Insurance Board, testified that a refund for that period was not made because it occurred in a prior fiscal year. The Court, therefore, makes an award to claimant in the amount of \$332.76.

Award of \$332.76.

Opinion issued January 17, 1984

EDWARD SOWELL

vs.

BOARD OF REGENTS

(CC-83-300)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant is an employee of respondent, who seeks \$456.00 in back pay, which he did not receive due to an administrative error in the calculation of a pay raise. Respondent, in its Answer, admits the validity and amount of the claim. The Court, therefore, grants an award to claimant in the amount of \$456.00.

Award of \$456.00.

Opinion issued January 17, 1984

BOBBIE E. STEVENS

vs.

BOARD OF REGENTS

(CC-83-301)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant is an employee of respondent, who seeks \$467.04 in back pay, which he did not receive due to an administrative error in the calculation of a pay raise. Respondent, in its Answer, admits the validity and amount of the claim. The Court, therefore, grants an award to claimant in the amount of \$467.04.

Award of \$467.04.

Opinion issued January 17, 1984

JANET T. SURFACE

vs.

HUMAN RIGHTS COMMISSION

(CC-83-293)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant is a court reporter who seeks \$46.09 for reporting services rendered to respondent in Logan, West Virginia. Respondent, in its Answer, admits the validity and amount of the claim. The Court, therefore, makes an award to the claimant in the amount of \$46.09.

Award of \$46.09.

Opinion issued January 17, 1984

WEST VIRGINIA TELEPHONE COMPANY

vs.

DEPARTMENT OF HEALTH

(CC-83-291)

Sarah Sullivan, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations of the Notice of Claim and respondent's Answer.

Claimant seeks payment of the sum of \$274.64 for unpaid bills incurred at respondent's Colin Anderson Center in St. Mary's, West Virginia. Respondent, in its Answer, admits the validity and amount of the claim.

In view of the foregoing, the Court makes an award to claimant in the amount of \$274.64.

Award of \$274.64.

Opinion issued January 27, 1984

STELLA CECIL, ADMINISTRATRIX OF THE
ESTATE OF O'DELL M. CECIL, DECEASED

vs.

DEPARTMENT OF HIGHWAYS

(CC-79-458)

Gregory W. Evers, Attorney at Law, for claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

WALLACE, JUDGE:

On September 19, 1978, claimant's decedent, O'Dell M. Cecil, was driving a tractor trailer truck south on W.Va. Route 34 towards Hamlin, Lincoln County, West Virginia. The decedent was involved in an accident which resulted in his death. His widow, as administratrix of his estate, brings this wrongful death action in the amount of \$500,000.00, based upon the respondent's allegedly negligent maintenance of the berm along Route 34. Respondent alleges that the decedent's negligence was the proximate cause of the accident.

Bobby H. Walden, a resident of Hamlin, West Virginia, was driving behind the decedent's tractor trailer at the time of the accident. Mr. Walden stated that the decedent was travelling downhill into a right-

hand curve at approximately 45 mph; that the right rear wheels of the trailer dropped off the road and went into a depression or rut in the berm along the edge of the road. When the trailer came out of the rut, according to Mr. Walden, it jumped, the truck turned over, and slid across the road and down a hillside. Mr. Walden left his vehicle, climbed down 30 or 40 feet to the truck, and found Mr. Cecil, who was already dead.

Mr. Walden described Route 34 as a narrow, two-lane, blacktop road. He testified that the decedent had moved over towards the berm as an oncoming car passed by. Apparently, as the car was passing, the decedent's truck was entering a curve. Mr. Walden described the curve.

“It's a long, gradual inside curve and any normal driver, regardless of whether he's driving a car or truck, has to get in there because you just can't see all the traffic that's going to meet you and you just have to get over there as a safety driver [sic] or what-have-you. It's just normal driving, in other words, to not face a road you don't know.”

James A. Kidd, an associate with Kidd Enterprises, Incorporated, which employed the decedent, visited the scene of the accident shortly after it occurred. Mr. Kidd measured the rut along the edge of the berm and found its deepest point was eighteen inches. The rut extended 60 to 70 feet along the road. Later examination of the truck revealed asphalt on the undercarriage of the truck which Mr. Kidd said corresponded with the “torn place in the asphalt where he went off the road.” Mr. Kidd stated that there were no warning signs or barrels in the vicinity of the accident.

Dennis Lynn Cecil, one of the decedent's three sons, estimated that the berm had been in poor condition for “about a year” prior to his father's accident. Mr. Cecil and Mr. Kidd both stated that the decedent had driven the tractor trailer truck before and was an experienced driver.

Larry Z. Adkins, maintenance supervisor for Lincoln County, West Virginia, from November 1977 until August 1978, testified that there was maintenance work performed on Route 34 during the time he held that position. He stated that his office “probably” received complaints about the berm on Route 34, but could not remember any specific instances of that happening. The following testimony was elicited:

“Q. And what would you call a deep rut 18 inches deep

along the side of the road about 30 feet long? Would you call that a — if you're going to work on that, is that berm work or ditch line work?

A. Well, that would constitute both because the erosion has caused the ditch to move in next to the pavement.

Q. Would you consider that to be a major hazard for a road?

A. I sure would; one of the worst hazards.

Q. Why is it one of the worst hazards?

A. Well, if a vehicle drops off the pavement, then you can't control it.

Q. And would you consider it, especially on that particular road, to be a dangerous problem on that hillside?

A. I would say — I can't remember specifically . . . I would say it's more than possible that the shoulders were low on the hill because we didn't have the men there on the equipment to take care of all the complaints but I can't remember specifically if that was the case though.

Q. Would you consider 18 inches to be a little more than low?

A. Yes."

The evidence in this claim establishes that a dangerous condition existed on the berm along Route 34 at the accident scene, and that this condition had been present for a long period of time. The berm or shoulder of the road must be maintained in a reasonably safe condition for use when the occasion requires, and liability may ensue when a motorist is forced onto the berm in an emergency or otherwise necessarily uses the berm of the highway. 39 Am.Jur. 2d "Highways, Streets, and Bridges" §488. This Court has held previously that a driver of a vehicle who must necessarily use the berm of a road may recover in those instances where the berm has not been maintained in a reasonably safe condition. *Wood v. Dept. of Highways*, 13 Ct.Cl. 305 (1980); *Peters v. Dept. of Highways*, 13 Ct.Cl. 325 (1980); *Dunlap v. Dept. of Highways*, 13 Ct.Cl. 285 (1980). In the instant claim, the testimony of the eyewitness indicated that the deceased was driving his vehicle down the hill into a curve at approximately 45 mph. To provide more passing room for a vehicle which was travelling in the opposite direction, he drove to the edge of the highway. In so doing, the wheels of the trailer left the road, and the accident occurred. The

evidence indicates that the respondent knew or should have known the condition of the berm.

The Court finds from the record that the respondent was negligent in its maintenance of the berm along Route 34 at the scene of the accident and further finds from the record that the decedent had knowledge of the road and the berm condition and was negligent in driving the tractor trailer at 45 mph down the hill into the curve. This negligence on the part of the decedent amounted to 10%, with 90% being attributable to the respondent.

The decedent, who was 57 years old at the time of his death, had been employed in his present job for a period of eight days and was being paid at the rate of \$6.00 per hour. He previously had earned approximately \$12,000.00 per year. At the time of his death, he lived with his wife, Stella Cecil, and three children, Kenton, age 22, Dennis, age 19, and Kim, age 14. He was the sole support of his family. The family apparently had a close relationship which was greatly affected by his death. The youngest child, Kim, has had considerable emotional problems affecting his school work and causing him to withdraw into himself. His mother attempted to seek employment after the death of her husband, but was unable to continue because it was necessary for her to remain at home to tend to the needs of her youngest son.

West Virginia Code §55-7-6 provides:

“in . . . action for wrongful death the jury may award such damages as it may seem fair and just, and may direct in what proportion they shall be distributed to the surviving spouse and children”

The Court realizes that all three of the children suffered from the loss of their father, but it also realizes that the record indicates that special consideration must be given to the youngest child.

The Court makes an award to the claimant in the amount of \$150,000.00, less 10%, the resulting sum of \$135,000.00, to be proportioned as herein set out, and in addition thereto, \$2,328.25 for the funeral expenses.

- 1) To Stella Cecil, as Administratrix of the Estate of O'Dell Cecil, deceased - \$135,000.00, proportioned as follows:

a) Stella Cecil	\$109,000.00
b) Kenton Cecil	3,000.00
c) Dennis Cecil	3,000.00
d) Kim Cecil	20,000.00

The record establishes that Kim Cecil is under age, and the administratrix must distribute his share to his legally qualified guardian.

- 2) To Stella Cecil, as Administratrix of the Estate of O'Dell Cecil, deceased, the sum of \$2,328.25, for funeral expenses.

Award of \$137,328.25.

Opinion issued January 27, 1984

PAULINE G. MALCOMB

vs.

ALCOHOL BEVERAGE CONTROL COMMISSIONER
(CC-80-275)

Robert P. Martin, Attorney at Law, for claimant.

Gene Hal Williams, Deputy Attorney General, for respondent.

WALLACE, JUDGE:

The claimant seeks to recover \$73,501.54 expended in remodeling her store building and barn for use as a liquor store for the sale of alcoholic beverages as an agency of the respondent.

The hearing of this claim was bifurcated, and as a result of a hearing on the question of liability, the Court found the respondent liable for damages sustained by the claimant after full consideration of any benefits realized by the claimant.

The facts of this claim are fully set forth in the prior opinion and need not be restated here.

Of the damages sought, \$25,580.66 was expended to enlarge the store building; the balance was spent renovating the barn after it was determined that the addition to the store was inadequate. In her testimony, the claimant stated that the barn had no commercial value prior to remodelling and that most of the renovation work was done after the agency agreement had been terminated. After the work was completed on the barn, the claimant rented it for \$16,000.00 per year under a five-year lease, with an option to renew for an additional like period. The lease provided for increments for increased rentals. Accordingly, the Court finds that the claimant sustained no damage as a result of the barn renovation. It had no commercial value prior to the remodeling, but is now a building of value suited for various purposes beneficial to the claimant.

After the claimant received her agency agreement from the respondent, she engaged a contractor to enlarge her store building by adding

a storage room of 1000 sq. ft. for \$25,500.00. She did not take any other bids. The contractor testified that he dealt only with the claimant in the preparation of the plans for the renovation work and that the only change requested by the respondent was the re-location of a door and certain electrical wiring. The cost of these changes was less than \$400.00.

Prior to the time of the negotiations with respondent for the agency agreement, claimant operated a small restaurant and gas station in the store building. Under the agency agreement, she continued the same operation and also sold a few grocery items. After the agency agreement was terminated, she continued her business until the store building was rented to Robert Bennett for \$1500.00 per month.

The claimant testified that she had hoped to realize \$1000.00 per month from the operation of the liquor store and that she realized about \$1500.00 for the month of December. The agency opened for business on November 8, 1979, and the claimant was notified to close effective January 17, 1980. The agreement was terminated February 16, 1980.

The claimant knew that the cost of furnishing proper quarters to house the agency was her responsibility and further that the agreement could be cancelled by either party upon thirty days' notice.

After considering the entire record, the Court finds that because of the particular facts of this claim which arose by reason of the establishment of a liquor agency in a dry county necessitating its closure in less than three months, and, in spite of the fact that claimant is now receiving rental of \$1500.00 per month for the remodelled store building, claimant is entitled to an award of \$3,000.00.

Award of \$3,000.00.

Opinion issued January 30, 1984

A.H. ROBINS COMPANY

vs.

DEPARTMENT OF HEALTH

(CC-83-341)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks payment of the amount of \$208.68 for merchandise

delivered to respondent. Respondent, in its Answer, admits the validity of the claim, and states that the claim was not paid as the transmittal for payment was misplaced and not presented to the State Auditor until after the close of the fiscal year.

In view of the foregoing, the Court makes an award in the amount requested.

Award of \$208.68.

Opinion issued January 30, 1984

ZEIK AUVIL

vs.

DEPARTMENT OF CORRECTIONS

(CC-83-340)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$519.00 for damage sustained by claimant's Porta-John, which was set on fire while at the West Virginia State Penitentiary. Of that amount, \$400.00 is the cost of the Porta-John and the remaining \$119.00 is a freight charge.

Respondent, in its Answer, admits the validity of the claim. The Court finds that respondent was the bailee of claimant's property, that the property was damaged while in the possession of respondent, and that respondent is, therefore, liable to claimant for the damages claimed.

Award of \$519.00.

Opinion issued January 30, 1984

BLUEFIELD COMMUNITY HOSPITAL

vs.

DEPARTMENT OF CORRECTIONS

(CC-83-345)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks payment of the sum of \$275.00 for medical services rendered to an inmate of the Anthony Correctional Center at Neola, West Virginia. Respondent, in its Answer, admits the validity of the claim, but states that there were insufficient funds left in its appropriation for the fiscal year in question from which the claim could have been paid.

While the Court believes that this is a claim which, in equity and good conscience should be paid, the Court further believes that an award cannot be made based on the decision in *Airkem Sales and Service, et al. vs. Department of Mental Health*, 8 Ct.Cl. 180 (1971).

Claim disallowed.

Opinion issued January 30, 1984

DEPARTMENT OF EMPLOYMENT SECURITY

vs.

BOARD OF REGENTS

(CC-83-320a - Glenville State College)

(CC-83-320b - Marshall University)

(CC-83-320c - Parkersburg Community College)

(CC-83-320d - West Liberty State College)

(CC-83-320e - W.Va. College of Graduate Studies)

(CC-83-320f - W.Va. Institute of Technology)

Jack O. Friedman, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

In these claims, the claimant seeks to recover \$7,567.05, of which sum \$7,219.51 is the amount of unemployment compensation tax owed by respondent and \$347.54 is accumulated statutory interest of 1% per month. The following is a breakdown by tax and interest.

Institution	Tax	Interest
Glenville State College	\$3,727.56	\$115.27
West Liberty State College	\$ 905.39	\$ 27.64
W. Va. College of Graduate Studies	\$ 380.87	\$ 35.20
W. Va. Institute of Technology	\$2,205.69	\$169.43
Total	\$7,219.51	\$347.54

The factual situation in this claim is identical to that in *Dept. of Emp. Sec. vs. Dept. of Corrections*, 14 Ct.Cl. 387 (1983). Following the precedent established in that decision, the Court makes an award to the claimant in the amount of the unemployment compensation tax, but denies an award, based on W. Va. Code §14-2-12, for the accumulated interest.

Claims CC-83-320b, against Marshall University, and CC-83-320c, against Parkersburg Community College, have been paid in full by those institutions.

Award of \$7,219.51.

Opinion issued January 30, 1984

DEPARTMENT OF EMPLOYMENT SECURITY

vs.

CIVIL SERVICE COMMISSION

(CC-83-321)

Jack O. Friedman, Attorney at Law, for claimant.

J. Bradley Russell, Assistant Attorney General, for respondent.

PER CURIAM:

The claimant seeks \$5,438.75 for unemployment compensation tax owed by the respondent, of which amount \$5,235.44 is the tax due and \$203.31 is accumulated interest.

The factual situation in this claim is identical to that in *Department of Employment Security vs. Department of Corrections*, 14 Ct.Cl. 387 (1983), and, accordingly, the Court makes an award to the claimant in the amount of \$5,235.44.

Award of \$5,235.44.

Opinion issued January 30, 1984

DEPARTMENT OF EMPLOYMENT SECURITY

vs.

DEPARTMENT OF BANKING

(CC-83-322)

Jack O. Friedman, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

The claimant seeks \$79.76 for unemployment compensation tax

owed by the respondent, of which amount \$73.53 is the tax due and \$6.23 is accumulated interest.

The factual situation in this claim is identical to that in *Department of Employment Security vs. Department of Corrections*, 14 Ct.Cl. 387 (1983), and, accordingly, the Court makes an award to the claimant in the amount of \$73.53.

Award of \$73.53.

Opinion issued January 30, 1984

DEPARTMENT OF EMPLOYMENT SECURITY

vs.

DEPARTMENT OF CORRECTIONS

(CC-83-323a - Department of Corrections)

(CC-83-323b - Adult Female Offenders)

(CC-83-323c - Leckie Center)

(CC-83-323d - Industrial School for Boys)

(CC-83-323e - W.Va. Penitentiary)

Jack O. Friedman, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

In these claims, the claimant seeks to recover \$83,642.91, of which sum \$81,188.10 is the amount of unemployment compensation tax owed by respondent and \$2,454.81 is accumulated statutory interest of 1% per month. The following is a breakdown by tax and interest:

Institution	Tax	Interest
Department of Corrections	\$ 2,360.66	\$ 71.37
Adult Female Offenders	\$18,555.82	\$ 560.94
Leckie Center	\$ 1,567.70	\$ 47.86
Industrial School for Boys	\$52,438.43	\$1,585.23
W. Va. Penitentiary	\$ 6,265.49	\$ 189.41
Total	\$81,188.10	\$2,454.81

The factual situation in this claim is identical to that in *Dept. of Emp. Sec. vs. Dept. of Corrections*, 14 Ct.Cl. 387 (1983). Following the precedent established in that decision, the Court makes an award to the claimant in the amount of the unemployment compensation tax, but denies an award, based on W.Va. Code §14-2-12, for the accumulated interest.

Award of \$81,188.10.

Opinion issued January 30, 1984

DEPARTMENT OF EMPLOYMENT SECURITY

vs.

DEPARTMENT OF CULTURE & HISTORY

(CC-83-324)

Jack O. Friedman, Attorney at Law, for claimant.

J. Bradley Russell, Assistant Attorney General, for respondent.

PER CURIAM:

The claimant seeks \$3,428.40 for unemployment compensation tax owed by the respondent, of which amount \$3,322.31 is the tax due and \$106.09 is accumulated interest.

The factual situation in this claim is identical to that in *Department of Employment Security vs. Department of Corrections*, 14 Ct.Cl. 387 (1983), and, accordingly, the Court makes an award to the claimant in the amount of \$3,322.31.

Award of \$3,322.31.

Opinion issued January 30, 1984

DEPARTMENT OF EMPLOYMENT SECURITY

vs.

DEPARTMENT OF HEALTH

(CC-83-325a - Denmar State Hospital)

(CC-83-325b - Hopemont State Hospital)

(CC-83-325c - Lakin State Hospital)

(CC-83-325d - Pinecrest State Hospital)

(CC-83-325e - Weston State Hospital)

Jack O. Friedman, Attorney at Law, for claimant.

J. Bradley Russell, Assistant Attorney General, for respondent.

PER CURIAM:

In these claims, the claimant seeks to recover \$52,236.25, of which sum \$50,683.58 is the amount of unemployment compensation tax owed by respondent and \$1,552.67 is accumulated statutory interest of 1% per month. The following is a breakdown by tax and interest:

Institution	Tax	Interest
Hopemont State Hospital	\$32,774.17	\$ 990.77
Lakin State Hospital	\$ 1,815.80	\$ 74.86
Pinecrest State Hospital	\$14,352.75	\$ 433.89
Weston State Hospital	\$ 1,740.86	\$ 53.15
Total	\$50,683.58	\$1,552.67

The factual situation in this claim is identical to that in *Dept. of Emp. Sec. vs. Dept. of Corrections*, 14 Ct.Cl. 387 (1983). Following the precedent established in that decision, the Court makes an award to the claimant in the amount of the unemployment compensation tax, but denies an award, based on W.Va. Code §14-2-12, for the accumulated interest.

Claim No. CC-83-325a, against Denmar State Hospital, was withdrawn as the claim was paid in full.

Award of \$50,683.58.

Opinion issued January 30, 1984

DEPARTMENT OF EMPLOYMENT SECURITY

vs.

DEPARTMENT OF LABOR

(CC-83-326)

Jack O. Friedman, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

The claimant seeks \$492.62 for unemployment compensation tax owed by the respondent, of which amount \$478.17 is the tax due and \$14.45 is accumulated interest.

The factual situation in this claim is identical to that in *Department of Employment Security vs. Department of Corrections*, 14 Ct.Cl. 387 (1983), and, accordingly, the Court makes an award to the claimant in the amount of \$478.17.

Award of \$478.17.

Opinion issued January 30, 1984

DEPARTMENT OF EMPLOYMENT SECURITY

vs.

DEPARTMENT OF MINES

(CC-83-327)

Jack O. Friedman, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

The claimant seeks \$2,168.63 for unemployment compensation tax owed by the respondent, of which amount \$2,104.99 is the tax due and \$63.64 is accumulated interest.

The factual situation in this claim is identical to that in *Department of Employment Security vs. Department of Corrections*, 14 Ct.Cl. 387 (1983), and, accordingly, the Court makes an award to the claimant in the amount of \$2,104.99.

Award of \$2,104.99.

Opinion issued January 30, 1984

DEPARTMENT OF EMPLOYMENT SECURITY

vs.

FARM MANAGEMENT COMMISSION

(CC-83-328)

Jack O. Friedman, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

The claimant seeks \$7,547.92 for unemployment compensation tax owed by the respondent, of which amount \$7,280.60 is the tax due and \$267.32 is accumulated interest.

The factual situation in this claim is identical to that in *Department of Employment Security vs. Department of Corrections*, 14 Ct.Cl. 387 (1983), and, accordingly, the Court makes an award to the claimant in the amount of \$7,280.60.

Award of \$7,280.60.

Opinion issued January 30, 1984

DEPARTMENT OF EMPLOYMENT SECURITY

vs.

HUMAN RIGHTS COMMISSION

(CC-83-330)

Jack O. Friedman, Attorney at Law, for claimant.

J. Bradley Russell, Assistant Attorney General, for respondent.

PER CURIAM:

The claimant seeks \$3,151.05 for unemployment compensation tax owed by the respondent, of which amount \$3,073.00 is the tax due and \$78.05 is accumulated interest.

The factual situation in this claim is identical to that in *Department of Employment Security vs. Department of Corrections*, 14 Ct.Cl. 387 (1983), and, accordingly, the Court makes an award to the claimant in the amount of \$3,073.00.

Award of \$3,073.00.

Opinion issued January 30, 1984

DEPARTMENT OF EMPLOYMENT SECURITY
vs.
NON-INTOXICATING BEER COMMISSION
(CC-83-331)

Jack O. Friedman, Attorney at Law, for claimant.

J. Bradley Russell, Assistant Attorney General, for respondent.

PER CURIAM:

The claimant seeks \$172.27 for unemployment compensation tax owed by the respondent, of which amount \$167.22 is the tax due and \$5.05 is accumulated interest.

The factual situation in this claim is identical to that in *Department of Employment Security vs. Department of Corrections*, 14 Ct.Cl. 387 (1983), and, accordingly, the Court makes an award to the claimant in the amount of \$167.22.

Award of \$167.22.

Opinion issued January 30, 1984

DEPARTMENT OF EMPLOYMENT SECURITY
vs.
RAILROAD MAINTENANCE AUTHORITY
(CC-83-332)

Jack O. Friedman, Attorney at Law, for claimant.

J. Bradley Russell, Assistant Attorney General, for respondent.

PER CURIAM:

The claimant seeks \$6,680.61 for unemployment compensation tax owed by the respondent, of which amount \$6,484.58 is the tax due and \$196.03 is accumulated interest.

The factual situation in this claim is identical to that in *Department of Employment Security vs. Department of Corrections*, 14 Ct.Cl. 387 (1983), and, accordingly, the Court makes an award to the claimant in the amount of \$6,484.58.

Award of \$6,484.58.

Opinion issued January 30, 1984

DEPARTMENT OF EMPLOYMENT SECURITY

vs.

SECRETARY OF STATE

(CC-83-333)

Jack O. Friedman, Attorney at Law, for claimant.

J. Bradley Russell, Assistant Attorney General, for respondent.

PER CURIAM:

The claimant seeks \$1,440.83 for unemployment compensation tax owed by the respondent, of which amount \$1,396.25 is the tax due and \$44.58 is accumulated interest.

The factual situation in this claim is identical to that in *Department of Employment Security vs. Department of Corrections*, 14 Ct.Cl. 387 (1983), and, accordingly, the Court makes an award to the claimant in the amount of \$1,396.25.

Award of \$1,396.25.

Opinion issued January 30, 1984

DEPARTMENT OF EMPLOYMENT SECURITY

vs.

STATE FIRE COMMISSION

(CC-83-334)

Jack O. Friedman, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

The claimant seeks \$178.12 for unemployment compensation tax owed by the respondent, of which amount \$174.00 is the tax due and \$4.12 is accumulated interest.

The factual situation in this claim is identical to that in *Department of Employment Security vs. Department of Corrections*, 14 Ct.Cl. 387 (1983), and, accordingly, the Court makes an award to the claimant in the amount of \$174.00.

Award of \$174.00.

Opinion issued January 30, 1984

LARRY R. DEXTER & SHARON K. DEXTER

vs.

DEPARTMENT OF HIGHWAYS

(CC-83-310)

No appearance by claimants.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted for decision upon a written stipulation based upon the following facts: On November 5, 1983, claimants were driving their 1982 Ford Granada on Interstate 64 near Huntington, Cabell County, West Virginia. As they crossed an overpass near the 25th mile post, the vehicle struck a metal reinforcing rod which protruded from the overpass and penetrated the undercarriage of the vehicle. Damage to the vehicle amounted to \$375.61. The Court finds, therefore, that the negligence of respondent was the proximate cause of the damage suffered by the claimants, and makes an award in the amount stipulated.

Award of \$375.61.

Opinion issued January 30, 1984

EAGLE COAL AND DOCK COMPANY, INC.

vs.

DEPARTMENT OF PUBLIC SAFETY

(CC-83-307)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$5,950.00 for rental of a helicopter to respondent for 17.5 hours at \$340.00 per hour. Respondent, in its Answer, admits the validity and amount of the claim. The Court, therefore, grants an award of \$5,950.00 to claimant.

Award of \$5,950.00.

Advisory Opinion issued January 30, 1984

GREENBRIER VALLEY SOIL CONSERVATION DISTRICT
vs.
DEPARTMENT OF PUBLIC SAFETY
(CC-83-286)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for an advisory determination based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$338.10 for the replacement of a tire on an Allis-Chalmers 175 tractor. The tractor was confiscated by a State trooper and when it was returned to claimant, it was discovered that the rear tire was punctured. Respondent, in its Answer, admits the validity of the claim. The Court is of the opinion that the respondent is liable to claimant in the amount of \$338.10 and directs the clerk of the Court to file this advisory opinion and forward copies thereof to the parties.

Opinion issued January 30, 1984

THE HANOVER SHOE, INC.

vs.

DEPARTMENT OF PUBLIC SAFETY
(CC-83-339)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$1,511.40 for shoes which were delivered to respondent, but not invoiced within the proper fiscal year. Respondent, in its Answer, admits the validity and amount of the claim. The Court, therefore, grants an award to claimant in the amount of \$1,511.40.

Award of \$1,511.40.

Opinion issued January 30, 1984

GEORGE B. HISSOM

vs.

DEPARTMENT OF HIGHWAYS

(CC-84-12)

No appearance by claimant.

Olivia Cooper Bibb, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted on a written stipulation based upon the following facts: On or about December 20, 1983, claimant was operating his vehicle on Interstate 64 in Kanawha County, West Virginia, when the automobile struck a loose metal strip which extended across the highway. The metal strip cut one of the tires of claimant's vehicle, resulting in damages in the amount of \$106.91. The Court finds that respondent was negligent and that this negligence was the proximate cause of claimant's damage. The Court, therefore, makes an award in the amount stipulated.

Award of \$106.91.

Opinion issued January 30, 1984

HUMANA HOSPITAL GREENBRIER VALLEY

vs.

DEPARTMENT OF CORRECTIONS

(CC-84-8)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations of the Notice of Claim and respondent's Answer.

Claimant seeks payment of the sum of \$408.15 for medical services rendered to various inmates of the Anthony Correctional Center. Respondent, in its Answer, admits the validity of the claim, but states that there were insufficient funds remaining in its appropriation for the fiscal year in question from which the claim could be paid.

While this is a claim which in equity and good conscience should be paid, the Court is of the opinion that an award cannot be made based on the decision in *Airkem Sales and Service, et al. vs. Department of Mental Health*, 8 Ct.Cl. 180 (1971).

Claim disallowed.

Opinion issued January 30, 1984

LAWYERS CO-OPERATIVE PUBLISHING COMPANY

vs.

SUPREME COURT OF APPEALS

(CC-83-298)

Alfred B. McCuskey, II, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks payment of \$6,865.65 for law books purchased from claimant for the Monroe County Law Library. Respondent, in its Answer, admits the validity and amount of the claim. In view of the foregoing, the Court grants an award to the claimant in the amount of \$6,865.65.

Award of \$6,865.65.

Opinion issued January 30, 1984

LOGAN CORPORATION

vs.

DEPARTMENT OF HIGHWAYS

(CC-84-10)

Franklin L. Gritt, Jr., Attorney at Law, for claimant.

Olivia Cooper Bibb, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted upon written stipulation to the effect that respondent is liable for damages in the amount of \$1,089.50, based upon the following facts: On or about March 24, 1983, claimant rented a Sullair 750 DP Air Compressor, Serial No. 81808, to respondent. While in the possession of respondent, the air compressor was negligently damaged. As this negligence was the proximate cause of the damage suffered by claimant, the Court makes an award to claimant in the amount stipulated.

Award of \$1,089.50.

Opinion issued January 30, 1984

MEMORIAL GENERAL HOSPITAL ASSOCIATION, INC.

vs.

DEPARTMENT OF CORRECTIONS

(CC-83-348)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations of the Notice of Claim and respondent's Answer.

Claimant seeks payment of \$314,554.27 for medical services rendered to various inmates of the Huttonsville Correctional Center. Respondent, in its Answer, admits the validity of the claim, but states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the claim.

While the Court believes that this is a claim which in equity and good conscience should be paid, the Court further believes that it cannot be paid based on the decision in *Airkem Sales and Service, et al. vs. Department of Mental Health*, 8 Ct.Cl. 180 (1971).

Claim disallowed.

Opinion issued January 30, 1984

THE MICHIE COMPANY

vs.

DEPARTMENT OF HEALTH

(CC-83-337)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and in respondent's Answer.

Claimant seeks \$163.31 for books purchased by Spencer State Hospital, which were not paid for during the appropriate fiscal year. Respondent, in its Answer, admits the validity and amount of the claim. In view of the foregoing, the Court makes an award to the claimant in the amount of \$163.31.

Award of \$163.31.

Opinion issued January 30, 1984

NORA A. MILLER

vs.

BOARD OF REGENTS

(CC-84-7)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks the sum of \$225.00 as a salary increase which, due to administrative error, was not paid to her for a period of three months. Respondent, in its Answer, admits the validity of the claim. In view of the foregoing, the Court makes an award in the amount requested.

Award of \$225.00.

Opinion issued January 30, 1984

MOORE BUSINESS FORMS, INC.

vs.

SECRETARY OF STATE

(CC-83-312)

Jim Ruziska, Sales Representative, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, and J. Bradley Russell, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant seeks \$1,106.50 for gold pre-stamped State seals which were furnished to respondent under a contract dated October 1, 1982. By terms of the contract, the seals were required to have raised imprint, and claimant was furnished samples of the seal before the contract was awarded. Upon delivery of the first shipment of the seals, the respondent discovered that the seals lacked the required raised imprint. Respondent, however, had need of the seals and used the ones claimant furnished.

There is no dispute in this claim that the seals claimant provided did not conform to the contract specifications. There is likewise no dispute that respondent used those seals, and would be unjustly enriched were this claim to be denied. The Court, therefore, makes an award to the claimant, but reduces that award by 30%, which amount the Court has determined is fair and equitable in view of the nonconforming nature of the goods provided respondent.

Award of \$774.55.

Opinion issued January 30, 1984

MOORE BUSINESS FORMS, INC.

vs.

DEPARTMENT OF MOTOR VEHICLES

(CC-83-314)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$763.92 for goods delivered to respondent on two invoices, which could not be paid as these were submitted after the end of the fiscal year. The respondent, in its Answer, admits the validity and amount of the claim. The Court, therefore, makes an award to the claimant in the amount of \$763.92.

Award of \$763.92.

Opinion issued January 30, 1984

NUCLEAR MEDICINE SERVICES, INC.

vs.

DEPARTMENT OF HEALTH

(CC-84-5)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks payment of the sum of \$152.70 for unpaid medical bills incurred by a patient of Weston State Hospital. Respondent, in its Answer, admits the validity of the claim, but states that there were insufficient funds remaining in its appropriation for the fiscal year in question from which the claim could be paid.

While the Court feels that this is a claim which, in equity and good conscience, should be paid, the Court also believes that an award cannot be made based on the decision in *Airkem Sales and Service, et al. vs. Dept. of Mental Health*, 8 Ct.Cl. 180 (1971).

Claim disallowed.

Opinion issued January 30, 1984

ROANE GENERAL HOSPITAL

vs.

DEPARTMENT OF HEALTH

(CC-83-363)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks payment of the sum of \$1,020.03 for medical services rendered to a patient of Spencer State Hospital. Respondent, in its Answer, admits the validity of the claim. In view of the foregoing, the Court grants an award in the amount requested.

Award of \$1,020.03.

Opinion issued January 30, 1984

MELVIN SICKLES

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-45)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimant, as owner of real estate on Route 40/2, Mannington, Marion County, West Virginia, presented this claim for damages to property resulting when a nearby creek overflowed its banks and flooded his garage during the winter of 1982. There had been no previous flooding. His testimony was to the effect that the Department of Highways, using Department of Labor personnel, had relocated the creek bed and had placed two 16" culverts within 25 feet of a 36" culvert, thus causing the flooding. The two 16" culverts were later removed, and there was no subsequent flooding. The Department of Highways offered no testimony or exhibits to contest the claim. The claimant's testimony and exhibits supported his claim in the amount of \$444.00.

The evidence established that respondent agency was negligent in its actions and that the claimant's property damage was a proximate result. The Court, therefore, makes an award in the amount of \$444.00.

Award of \$444.00.

Opinion issued January 30, 1984

STANDARD PUBLISHING

vs.

STATE TAX DEPARTMENT

(CC-83-209)

Cory O'Donnell, Commercial Sales Representative, appeared for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

WALLACE, JUDGE:

Claimant printed the 1982 West Virginia Income Tax Forms under contract with respondent. It now seeks \$4,312.00, \$3,008.00 of which represents additional costs and \$1,304.00 for alteration charge.

Cory O'Donnell, Commercial Sales Representative for claimant, testified that the additional costs were incurred preparing film used to prepare the red and blue tax tables in the income tax instruction book. He stated that respondent advised that film used the previous year would be made available, but when received by claimant, was not in usable form. Claimant's contract did not require respondent to furnish the film. The Court, therefore, denies this portion of the claim.

However, the contract provided that "Any cancellation or alteration costs will be paid by the Tax Department." Mr. O'Donnell testified that the alteration charges were the result of alterations and changes made by respondent to proof of tax forms prepared by claimant. Mr. O'Donnell, in his testimony, indicated several examples of alterations required by respondent. Although a detailed breakdown of the charges was not introduced, the Court finds that the record is sufficient to make an award to the claimant of \$1,304.00 for the alteration cost.

Award of \$1,304.00.

Opinion issued January 30, 1984

ELAINE B. STEMPLE

vs.

BOARD OF REGENTS

(CC-84-6)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$150.00 for a salary increase which, due to administrative error, was not paid to her for a period of two months. Respondent, in its Answer, admits the validity and amount of the claim. In view of the foregoing, the Court makes an award to claimant in the amount requested.

Award of \$150.00.

Opinion issued January 30, 1984

STONEWALL JACKSON MEMORIAL HOSPITAL

vs.

DEPARTMENT OF HEALTH

(CC-84-19)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks payment of the sum of \$557.58 which represents various bills for medical services rendered to patients of Weston State Hospital. Respondent, in its Answer, admits the validity of the claim, but states that there were insufficient funds remaining in respondent's appropriation for the fiscal year in question from which the claim could be paid.

While this is a claim which in equity and good conscience should be paid, the Court finds that an award cannot be made based on the decision in *Airkem Sales and Service, et al. vs. Dept. of Mental Health*, 8 Ct.Cl. 180 (1971).

Claim disallowed.

Opinion issued January 30, 1984

WAYNE CONCRETE COMPANY

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-429)

James W. St. Clair, Attorney at Law, for claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

WALLACE, JUDGE:

Claimant seeks \$13,882.88 for damages sustained by its truck which partially fell through the Falls Branch Bridge on West Virginia Route

52/4 in Wayne County, West Virginia, on August 14, 1981. The truck in question was a site mix concrete truck which was being driven to a work site by Dorsey W. Daniel, Jr., President of Wayne Concrete Company. Mr. Daniel testified that he looked for weight limit signs as he approached the bridge, but did not observe any. As he proceeded across the bridge the bridge collapsed and the back end of the truck fell through the wooden decking and wedged against the bridge abutment. The truck was estimated to weigh 50,000 pounds. A wrecker and two cranes were used to remove the truck from the bridge at a total cost of \$1,654.56. Various invoices for parts to repair the truck totalled \$9,142.43. Labor and equipment charges amounted to \$2,660.00. Additional damages of \$400.00 for loss of use of the truck, \$5.00 for a copy of the accident report, and \$20.89 for miscellaneous materials were also presented.

John Wilson Braley, District 2 Bridge Engineer, testified that he had visited the bridge about a month before the accident, and did not recall seeing signs posting a weight limit. The bridge at some time had been posted with an eight ton weight limit. The weight limit signs were found in the creek below the bridge following the accident. Mr. Braley further stated that he usually would request a sign be replaced if it is damaged or missing, but did not know why he did not do so before the accident. A bridge that is not posted is rated for the full legal load capacity. The road where the accident occurred is rated for 65,000 pounds, but claimant's truck was licensed for 54,000 pounds. Mr. Braley arrived at the bridge shortly after the accident and stated that he thought the truck was overloaded. He estimated the weight of the truck at 56,000 pounds.

The evidence presented compels the conclusion that respondent knew or should have known of the absence of the weight limit signs on Falls Branch Bridge. While there was some testimony that the truck may have been overloaded, this evidence was based on visual inspection of the truck only, and the Court does not find this evidence persuasive. There was no evidence that the driver was negligent; by his testimony he specifically checked for weight limit signs. The Court, therefore, makes an award to claimant in the amount of \$13,477.88. The award does not include the \$5.00 charge for the accident report, nor the \$400.00 for loss of use, because the testimony supporting this item of damage was speculative and not substantiated.

Award of \$13,477.88.

Opinion issued January 30, 1984

JOHN J. WRIGHT

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-135)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimant is the owner of property located in Worthington, Marion County, West Virginia. Claimant alleges that as the result of a stopped-up culvert under Route 218, his home has been flooded on numerous occasions. The stoppage is on the outlet end of the culvert, which is on the east side of Route 218. Claimant's property is located on the west side. He seeks damages of \$2,640.00. Claimant testified that he reported the condition to respondent on several occasions since 1979, but the culvert was not cleaned until early 1983. There is also a four-inch pipe running from under claimant's house to the culvert which is partially blocked. Claimant testified that his pipe "probably backed in up there approximately the same time," as the culvert.

Duane Allen Miller, general foreman in Marion County, testified that the culvert was cleaned in February or March 1983. At that time, he stated, the culvert needed to be cleaned. He had no knowledge as to the last time the culvert was cleared of debris.

It is apparent to the Court that the clogged condition of the culvert resulted in damage to claimant's property and that the respondent was negligent in failing to clean the culvert. However, the Court has concluded that claimant's failure to clear the pipe under his property has also contributed to his damages, and apportions his degree of negligence at 10%. *Watts v. Department of Highways*, 13 Ct.CL. 302 (1980).

As to damages, an estimate for the replacement cost of the furnace, in the amount of \$1,500.00, was presented. The evidence as to other damages was too vague and uncertain as to amount, date of loss, etc., to be considered. The Court grants an award of \$1,500.00, less 10% to reflect comparative negligence, or \$1,350.00.

Award of \$1,350.00.

Opinion issued February 1, 1984

AARON D. COTTLE

vs.

DEPARTMENT OF HEALTH

(CC-84-25)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$45.00 for medical services rendered to a patient in one of respondent's hospitals. Respondent, in its Answer, admits the validity of the claim. In view of the foregoing, the Court makes an award in the amount requested.

Award of \$45.00.

Opinion issued February 1, 1984

JOHNSON CONTROLS, INC.

vs.

DEPARTMENT OF FINANCE AND ADMINISTRATION

(CC-83-361)

Harry F. Bell, Jr., Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$4,786.83 for parts and services supplied to respondent under six invoices. Respondent, in its Answer, admits the validity of the claim. In view of the foregoing, the Court makes an award in the amount sought.

Award of \$4,786.83.

Opinion issued February 1, 1984
JOHNSON CONTROLS, INC.

vs.

DEPARTMENT OF FINANCE & ADMINISTRATION
(CC-83-362)

Jeffrey M. Wakefield, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$1,889.80 for services and parts supplied to respondent under four invoices. Respondent, in its Answer, admits the validity of the claim. In view of the foregoing, the Court makes an award in the amount sought.

Award of \$1,889.80.

Opinion issued February 1, 1984
THE LAWHEAD PRESS, INC.

vs.

DEPARTMENT OF NATURAL RESOURCES
(CC-84-15)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$561.05 as the charge for customer changes on the printing of the West Virginia Small Impoundment Fishing Guide. This cost was not paid as it was not invoiced within the fiscal year time period. Respondent, in its Answer, admits the validity of the claim. Based on the foregoing, the Court makes an award in the amount sought.

Award of \$561.05.

Opinion issued February 1, 1984

ST. MARY'S HOSPITAL
vs.
DEPARTMENT OF HEALTH
(CC-83-302)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$97,993.90 for medical services rendered to various patients of Huntington State Hospital. Respondent, in its Answer, admits the validity of the claim, but states that there were no funds remaining in its appropriation for the fiscal year in question from which the claim could be paid.

While this is a claim which in equity and good conscience should be paid, the Court finds that an award cannot be made based upon the decision in *Airkem Sales and Service, et al. vs. Dept. of Mental Health*, 8 Ct.Cl. 180 (1971).

Claim disallowed.

Opinion issued February 2, 1984

DIAL-PAGE
vs.
DEPARTMENT OF HIGHWAYS
(CC-83-336)

No appearance by claimant.

Olivia Cooper Bibb, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted upon written stipulation based upon the following facts. On October 4, 1983, respondent rented a Motorola "tone-only" pager from claimant. Soon thereafter, respondent lost the pager. This was due to the negligence of respondent. The parties have agreed that \$250.00 is a fair and equitable estimate of the damages suffered by the claimant. Based on the foregoing, the Court makes an award to claimant in the amount stipulated.

Award of \$250.00.

Opinion issued February 6, 1984

JAMES E. JONES AND RUTH JONES

vs.

DEPARTMENT OF HIGHWAYS

(CC-83-198)

William Sanders, Attorney at Law, for claimant.

Olivia Cooper Bibb, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted upon written stipulation based on the following facts. Claimants are owners of real property on Sand Lick Creek, near Mercer County Route 71/13 near Princeton, West Virginia. During July 1978, a culvert was installed under respondent's bridge over Sand Lick Creek. The culvert was improperly installed and unable to contain water during periods of heavy rain. As a result, water was diverted onto claimants' property, flooding and damaging their yard and residence in April 1982 and April 9, 1983. The damage occurred because of the negligence of respondent and the parties have agreed that \$5,000.00 is a fair and equitable estimate of the damages sustained.

In view of the foregoing, the Court makes an award in the amount stipulated.

Award of \$5,000.00.

Opinion issued February 6, 1984

CLERK OF THE CIRCUIT COURT OF KANAWHA COUNTY

vs.

OFFICE OF THE ATTORNEY GENERAL

(CC-83-359)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based on the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$15.00 as fees for indexing to the Supreme Court of Appeals three civil actions. The fees were not paid as the invoice was not presented to respondent within the proper fiscal year. Respondent, in its Answer, admits the validity of the claim. In view of the foregoing, the Court makes an award in the amount requested.

Award of \$15.00.

Opinion issued February 6, 1984

KRAMER'S PHOTO SUPPLY, INC.

vs.

DEPARTMENT OF HEALTH

(CC-84-1)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based on the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$31.79 for goods purchased by respondent. Respondent, in its Answer, admits the validity of the claim. In view of the foregoing, the Court makes an award in the amount requested.

Award of \$31.79.

Opinion issued February 6, 1984

NEW RIVER BUILDING COMPANY

vs.

BOARD OF REGENTS

(CC-81-411)

Cordell M. Parvin, Attorney at Law, and William R. Wooton, Attorney at Law, for claimant.

Ann V. Gordon, Assistant Attorney General, for respondent.

WALLACE, JUDGE:

New River Building Company filed this action to recover \$156,309.83 as extra costs incurred in the construction of a retaining wall on the campus of West Virginia Institute of Technology (WVIT) located in Montgomery, West Virginia. New River will hereinafter be referred to as the contractor.

The contractor and the West Virginia Board of Regents entered into a contract for the construction of the retaining wall on the campus of WVIT, an institution under the control and supervision of the Board of Regents, on August 17, 1979, in the total amount of \$487,000.00. Under the terms of the contract, the method of construction to be used by the contractor for the majority of the length of the wall was sheet piling. In order to use sheet piling, the contractor would need a crane with a boom to drive the sheet piling into the ground to hold back the earthen bank, while the footers were excavated and completed prior to the wall construction. The sheet piling method of construction was not the method of construction used by the contrac-

tor, due to the presence of electric utility lines on the construction site. The contractor asserts that the alternate method of timber shoring resulted in increased time for performance of the contract, which in turn caused an increase in construction costs. The contractor also asserted that delays which occurred on the project were the fault of respondent and that the contractor should be reimbursed for costs attributed to those delays.

The contractor was to begin site preparation on or about October 1, 1979. However, at the request of President Nelson of WVIT, the date was moved to October 22, 1979, to keep the street adjacent to the wall open to accommodate persons attending a homecoming football game. The contractor had no objection to this request and actual construction began October 22, 1979. During the first week of excavation, the contractor came across an active sewer line and a 13,000 volt electrical line, neither of which was indicated on the plans. The electrical line was actually severed by a laborer during excavation. Fortunately, no personal injuries occurred during this incident. The contractor was delayed in construction progress while solutions to these two problems were worked out.

During the second week of construction, it was determined that the elevations on the plans were erroneous. It was necessary for the architect to send a survey team to check the drawings and then make the proper revisions. The revised drawings were delivered to the contractor on November 19, 1979. A delay of approximately six weeks occurred during which time the contractor used the crew for this project on another project so as not to lose the men when construction of the wall could resume.

During the construction of the first 200 feet of the wall, the contractor used the timber shoring method. The sheet piling was to be used where the wall was higher and the bank less stable. However, Appalachian Power Company (APCO) did not move its utility poles. The T-bar type poles had the electrical lines running parallel to and just about directly over the wall being constructed. The contractor was unable to utilize a crane and boom to drive sheet piling, not only due to the location of the poles and lines, but also to conform to the Occupational Safety and Health Act (OSHA) regulations, which prohibit use of a crane and boom within ten feet of electrical lines. The contractor informed the respondent and the architect that sheet piling could not be used on the project with the electrical lines over the wall. Neither the respondent nor the architect attempted to resolve this problem. The contractor and APCO worked out a method for moving the poles and lines as the contractor excavated for the wall. The ar-

rangement was satisfactory to the contractor, but this method prevented the contractor from using sheet piling as contemplated in the contract document.

Subsequently, an error in the design plans was discovered in the construction of the sidewalk, which was not a part of the original plans. When the sidewalk was added to the design, the architect failed to change the original design for the drainage system behind the wall. It was then necessary for the contractor to construct a drainage system from behind the wall under the sidewalk out to the street. This involved extra work and extra costs for the contractor as different types of pipe and catch basins behind the wall were necessary and additional drains were required under the sidewalk.

When it became apparent to the parties that sheet piling would not be used on the project, the respondent and the architect requested that the contractor provide an estimate of the costs for timber shoring, with a credit for the sheet piling at the contract price. The contractor refused to provide the cost estimate asserting that it was not feasible to estimate these costs without knowing how long the project would take to complete.

The wall was completed in 14 months. The contract provided for completion in 190 days. The contractor asserts that the necessity of using the timber shoring method of construction plus the delays caused by the respondent and the architect resulted in the extra time for the project.

The Court has carefully considered all of the allegations of the parties. The contractor did incur extra costs on this project as a result of the failure of the respondent to provide the contractor with the construction site as indicated in the contract, i.e., without electrical lines on the job site. The inability of the contractor to use sheet piling caused the contract construction period to increase greatly. The Court is of the opinion that the contractor is due an award for the extra labor costs and the extended field office overhead for the extra time required on the project.

The Court has concluded from an examination of all of the evidence that the contractor incurred additional costs for construction of the retaining wall. The Court has reviewed all elements of damages attributed to delays occasioned on the project. To simplify the elements of damages the Court has denied or awarded, the following is an itemization of the damages alleged and the Court's action thereon:

Three-week delay due to late start on the part of the contractor.	Denied
Delay on project due to errors in the elevations.	Award of \$4,344.85
Delays experienced for redrawing of the plans.	Award of \$9,519.60
Cost of using wood shoring versus the sheet piling - considering a \$39,850.00 credit to the respondent as sheet piling is a more expensive item.	Award of \$26,914.63
Request for reimbursement of hazard pay.	Denied
Profit of 10% on the project.	Denied.
<hr/>	
Total Award	\$40,779.08

The Court denies respondent's request for assessment of liquidated damages as there is no basis for such assessment. The contractor was not charged with liquidated damages during performance of the contract. It was assessed as a set-off to contractor's claim herein. It is generally accepted that where a party is not damaged by the delay, or when its own actions contributed to the delay on the project, liquidated damages are precluded. See *Whitmyer Brothers, Inc. vs. Dept. of Highways*, 12 Ct.Cl. 9 (1977).

The Court denies all costs relating to general and administrative expenses of the contractor. These are the costs for doing business and are too speculative for the contractor to assess on a project-by-project basis.

The Court has determined that claimant is entitled to an award of \$40,779.08 for the cost overruns and delays experienced on this project, and, accordingly, the Court grants an award to the contractor in that amount.

Award of \$40,779.08.

Opinion issued February 6, 1984

OHIO VALLEY MEDICAL CENTER, INC.

vs.

DEPARTMENT OF HEALTH; SUPREME COURT OF APPEALS;
DEPARTMENT OF HUMAN SERVICES; DEPARTMENT OF
CORRECTIONS, AND THE STATE OF WEST VIRGINIA
(CC-83-266)

P. Kimberly McCluskey, Attorney at Law, for claimant.

David Patrick Lambert, Assistant Attorney General, and Paul
Crabtree, Administrative Director, Supreme Court of Appeals, for
respondents.

PER CURIAM:

This claim was submitted on written stipulation based upon the following facts: Between September 9 and October 19, 1982, claimant provided medical and other services to a juvenile, pursuant to West Virginia Code §27-6A-1(f). Under West Virginia Code §27-6A-8(b), the State of West Virginia is obligated to pay, in whole or part, for the services rendered to the juvenile. Respondent, Supreme Court of Appeals, has agreed to pay \$3,000.00 of the claim. Respondent, Department of Health, has agreed to pay \$3,000.00, but states that there are insufficient funds in its appropriation from which to pay the claim. The Court, therefore, must deny that portion of the award based on the decision in *Airkem Sales and Service, et al. vs. Dept. of Mental Health*, 8 Ct.Cl. 180 (1971).

Award of \$3,000.00 against the Supreme Court of Appeals.

Award disallowed against the Department of Health.

Opinion issued February 6, 1984

PENDLETON COUNTY BANK

vs.

DEPARTMENT OF MOTOR VEHICLES
(CC-83-342)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based on the allegations in the Notice of Claim and respondent's Answer.

On January 19, 1979, respondent issued title No. H106358 to Billy Lee and Mary Catherine Sites, with a recorded lien in favor of clai-

mant. On June 22, 1981, respondent issued title No. L959775 to Roger M. Cotrill for the same vehicle without surrender of the first title to the Sites or the release of claimant's lien. Claimant received no notification from respondent prior to or at the time of the title's transfer to Cotrill. The Sites have not paid the balance of the loan and claimant seeks \$274.67 as the balance due as claimant has no recourse against the vehicle.

Where the respondent negligently issues title to a vehicle without the claimant's lien being recorded thereon, and the claimant sustains a loss as the result of said negligence, this Court has made an award to the claimant. See *Wood County Bank vs. Department of Motor Vehicles*, 12 Ct.Cl. 276 (1979). As the facts of this case are uncontested, and the respondent presented no evidence contrary thereto, the Court makes an award to the claimant in the amount requested.

Award of \$274.67.

Opinion issued February 6, 1984

THOMPSON'S OF MORGANTOWN, INC.

vs.

DEPARTMENT OF PUBLIC SAFETY

(CC-83-360)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based on the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$295.32 for a storage cabinet which was delivered to respondent, but not paid for before the close of the fiscal year in question. Respondent, in its Answer, admits the validity of the claim. The Court, therefore, makes an award in the amount claimed.

Award of \$295.32.

Opinion issued February 14, 1984

MYRTLE W. CAMPOLIO

vs.

DEPARTMENT OF NATURAL RESOURCES

(CC-77-39)

James A. Kent, Jr., Attorney at Law, for claimant.

Edgar E. Bibb, III and J. Bradley Russell, Assistant Attorneys General, for respondent.

WALLACE, JUDGE:

This claim was bifurcated on the joint request of counsel following the hearing of the claim and comes before the Court on the issue of liability only.

Claimant was employed by respondent at Blackwater Falls State Park on March 21, 1975. On that date, she alleges that she was intentionally assaulted by a coworker and, as a result, sustained a broken right femur and a bruised shoulder. The coworker was employed to supervise boys from the Davis Center in their work activities, such as cutting wood, mowing grass, and cleaning ditches. Claimant testified that she went to the coworker to ask him to keep the boys away from her automobile, because she feared that they would put sand in her gasoline tank. The coworker became angry, she testified, and she started to leave. She was then pushed by the coworker and fell to the ground, resulting in the injuries mentioned above.

As a result of her injuries, claimant spent seven weeks in the hospital. Claimant received Workmen's Compensation payments for a period of three years, and her medical bills were also paid by Workmen's Compensation. Claimant took early retirement in November 1975, after attaining the age of 62. Respondent alleges that it is not liable for the coworker's conduct as that conduct was outside the scope of his employment.

This Court has previously enunciated a test for determining whether an act is within an employee's scope of employment:

“The test of liability of the principal for the tortious act of his agent is whether the agent at the time of the commission of the act was acting within the scope of his authority in the employment of the principal, and not whether the act was in accordance with his instructions. If such act is done within the scope of authority and in furtherance of the principal's business, the principal is responsible. But if the agent steps outside the boundaries of the principal's business, for however short a

time, the agency relation is for that time suspended, and the agent is not acting within the scope of his employment." *Heater v. Dept. of Highways*, 12 Ct.Cl. 138 (1978).

Encompassed within this test is whether the act was one which could reasonably have been expected by an employee in the type of work he was performing. See also *Pierson v. State Road Comm'n.*, 2 Ct.Cl. 273 (1944). The Court concludes that the action of the coworker in the claim presently under consideration was not within the scope of his employment. Furthermore, respondent had no reason to anticipate such an act on the part of its employee. Daniel L. Pase, the coworker's supervisor, testified that he had no knowledge of any previous problems with the coworker. The Court is not unmindful of the injuries suffered by the claimant, but cannot conclude that the respondent is liable for the actions of the coworker. Therefore, the Court is of the opinion to, and does, disallow the claim.

Claim disallowed.

Opinion issued February 14, 1984

WILLIAM E. GRIMSLEY, JR.

vs.

DEPARTMENT OF PUBLIC SAFETY

(CC-83-248)

Claimant appeared in person.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

On June 26, 1983, a drowning occurred in the Poca River in Putnam County, West Virginia. Claimant, the owner of a 1964 26-foot Criss Craft Cabin Cruiser, allowed his boat to be used to assist in the recovery of the body. After the body was recovered, claimant found that the bow hatch cover was cracked and the starboard stern rail broken. The damage was repaired at a cost of \$107.53.

Claimant testified that two of respondent's divers were on board his boat, as well as other unidentified persons who may have been part of a local volunteer fire department. He stated that he did not see the damage occur, nor did he know who caused the damage. Corporal Robert R. Custer, Jr., the diver who recovered the body, testified that he did not cause the damage to claimant's boat and did not believe the other trooper caused the damage.

While the claimant is to be commended for his actions, no evidence was presented as to who caused the damage to claimant's boat. It is regrettable that claimant has incurred a financial burden as the result of his public-spirited act, but the Court must, under the circumstances, deny an award.

Claim disallowed.

Opinion issued February 14, 1984

WALLACE HANCOCK

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-302)

Judith Ann Hancock appeared for claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was originally filed in the names of Wallace Hancock and Judy Hancock, but when the testimony revealed that the damaged vehicle, a 1978 Ford Bronco, was titled in the name of Wallace Hancock, the Court amended the style of the claim to reflect that fact.

On November 12, 1982, Mrs. Hancock was driving on Witcher Road in Kanawha County, West Virginia, when the right rear tire was damaged by a metal plate, which had come loose from a bridge. The incident occurred at approximately 2:00 p.m. Mrs. Hancock had driven over the bridge, which is a one-lane bridge, between eight and nine o'clock that morning and the plate was in place. The tire was replaced at a cost of \$63.97.

The State is neither an insurer nor a guarantor of the safety of motorists on its highways, *Adkins v. Sims*, 130 W. Va. 645, 46 S.E. 2d 81 (1947). In order for the respondent to be found liable for the damage sustained by claimant, it must have had actual or constructive notice of the defect and a reasonable amount of time to correct it. *Davis v. Dept. of Highways*, 11 Ct.Cl. 150 (1977). There was no evidence indicating notice to respondent, and apparently, the metal plate had become loose only a short time before the accident. The Court must, therefore, deny the claim.

Claim disallowed.

Opinion issued February 14, 1984

BRENDA BROWN ROBERTSON

vs.

DEPARTMENT OF HIGHWAYS

(CC-83-138)

Mark G. Robertson appeared for claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was originally filed in the name of Mark G. Robertson, but when the testimony revealed that the automobile in question, a 1980 Plymouth Champ, was titled in the name of Brenda Brown Robertson, the claimant amended the style of the claim to reflect that fact.

Mark G. Robertson, claimant's husband, was driving on Route 41 in Raleigh County, West Virginia, when a rock rolled in front of the vehicle, damaging the transaxle, fuel tank, and exhaust system. The incident occurred on March 21, 1983, at approximately 5:30 a.m. Cost of repair to the vehicle amounted to \$795.00. Mr. Robertson testified that he saw the rock when it entered the roadway, but was unable to stop or avoid hitting it. He stated that he was aware of other rock falls along Route 41, which he travelled daily to work.

The State is neither an insurer nor a guarantor of the safety of motorists traveling on its roadways. The unexplained falling of a rock or boulder into a highway, without a positive showing that respondent knew or should have anticipated damage to property, is insufficient to justify an award. *Hammond v. Department of Highways*, 11 Ct.Cl. 234 (1977). Darrell Hypes, an employee of respondent's Lookout Garage, testified that there had been no complaints of rock falls on Route 41 on March 21, 1983. The Court, therefore, concludes that claimant has not shown, by a preponderance of the evidence, any negligence on the part of respondent to justify an award in this claim.

Claim disallowed.

Opinion issued February 14, 1984

JEFFERY D. LAVALLEY AND TERESA D. SAYBLE

vs.

DEPARTMENT OF HEALTH

(CC-83-187)

Claimants appeared in person.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

Claimants seek reimbursement for clothing which was damaged by fire. On January 7, 1983, claimants were attending a funeral at the Spring Hill Cemetery in Huntington, West Virginia, when they saw a man whose clothing was on fire. Both claimants ran to the man and were able to extinguish the flames. Claimants later discovered that the man was a patient at Huntington State Hospital, that he had left the grounds of the hospital, and that he had set himself on fire. Mr. Lavalley's suit coat and pants, valued at \$130.00, were damaged beyond repair as was Ms. Sayble's coat which was valued at \$120.00.

This Court commends the claimants for their actions which quite probably saved a man's life. While it is regrettable that they have incurred a financial loss as a result of their deed, the Court can find no basis by which to compensate them for their loss. There was no evidence as to how the patient left the hospital, and even if there was negligence on the part of the hospital in allowing him to leave, it was not foreseeable that he would set himself on fire. The claimants were volunteers, and, therefore, the Court must disallow their claims.

Claims disallowed.

Opinion issued February 14, 1984

CARL MIKE THOMPSON

vs.

DEPARTMENT OF CORRECTIONS

(CC-80-248a)

Claimant appeared in person.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

WALLACE, JUDGE:

Claimant was convicted in the Intermediate Court of Ohio County, West Virginia, on November 8, 1965, of breaking and entering, and sentenced on January 10, 1966, to life imprisonment under the Recidivist Statute. By order dated February 11, 1969, in the United States District Court for the Northern District of West Virginia, claimant's conviction was vacated and the Ohio County Circuit Court was ordered to resentence claimant. Claimant was resented to life on January 17, 1972. Claimant, again by Court-appointed attorney, again appealed to the United States District Court, which again ordered that claimant be resented. On April 3, 1973, the Ohio County Circuit Court resented claimant to one to ten years. Claimant served a total sentence of seven years, eleven months, and twelve

days. Claimant alleges that under the one-to-ten-year sentence, he would have been released after five years, and seeks damages for the additional two years, eleven months, and twelve days of confinement.

Respondent filed a Motion to Dismiss alleging that the claim was barred by the Statute of Limitations, W.Va. Code 55-2-12, as the claim was not filed until June 17, 1980. Claimant stated that he had no knowledge of the second voided life sentence or of the assignment of errors in the second appeal until 1979. He, therefore, states that the Statute of Limitations should be tolled until 1979. With this contention the Court cannot agree. It is a well settled principle of law that mere lack of knowledge of an actionable wrong does not suspend the statute. See, e.g., *Merchants' National Bank vs. Spates*, 41 W.Va. 27, 23 S.E. 691 (1895); *Boyd vs. Beebe*, 64 W.Va. 216, 61 S.E. 304 (1908). Furthermore, this Court cannot conclude that claimant would, in fact, have been released after serving five years of the one-to-ten-year sentence and, therefore, sustained any damage for the additional time period.

The Court, therefore, sustains respondent's Motion to Dismiss. Claim dismissed.

Opinion issued February 14, 1984

CARL MIKE THOMPSON

vs.

DEPARTMENT OF CORRECTIONS

(CC-80-248b)

Claimant appeared in person.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

WALLACE, JUDGE:

Claimant seeks damages for a medical condition allegedly resulting from his incarceration in the State Penitentiary in Moundsville, Marshall County, West Virginia. Claimant was incarcerated in 1966 and in 1968. While still in prison, he developed a skin condition known as seborrheic dermatitis. He alleges that the condition resulted from unsanitary conditions in the prison.

Letters from two dermatologists, which were admitted into evidence, indicate that seborrheic dermatitis, which is a form of eczema, is a chronic skin condition of unknown cause and has no definite cure. Treatment in the form of medicated shampoo and lotions was prescribed, and one of the dermatologists indicated that

the condition usually subsides spontaneously within a few months to a year.

The medical evidence presented indicates that claimant's skin condition is of unknown origin. Claimant has, therefore, not met his burden of proof to establish that conditions at the Penitentiary caused the condition about which he complains. The Court must, therefore, deny the claim.

Claim disallowed.

Opinion issued February 14, 1984

ALVIN R. TOLER

vs.

DEPARTMENT OF HIGHWAYS

(CC-83-182)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimant is the owner of a 1972 Ford Mustang which was damaged when he struck a pothole on Route 85 near Greenwood, Boone County, West Virginia. The incident occurred at approximately 3:30 p.m. on May 18, 1983. Claimant testified that the vehicle hit a hole which extended across the road. This caused a tire to burst, sending the car to the other side of the road where it struck a second pothole and then a telephone pole. Claimant valued the vehicle as a complete loss and seeks \$2,000.00 in damages.

Claimant testified that Route 85 was deteriorated in the area of the accident. He said that he knew of other persons who had suffered vehicle damage on that road, but he was not certain whether any of them reported those incidents to respondent. Claimant stated that he rode Route 85 daily and was aware of the condition of the road.

The State is neither an insurer nor a guarantor of the safety of motorists travelling on its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order for the respondent to be found liable, proof of actual or constructive notice of the defect in the road is required. *Davis Auto Parts v. Dept. of Highways*, 12 Ct.Cl. 31 (1977). While there may have been notice to respondent, the Court is of the opinion that the claimant, with his prior knowledge of the road's condition, was also negligent. Under the doctrine of comparative negligence, the Court finds that the claimant's negligence was equal to

or greater than any negligence on the part of the respondent, and disallows the claim.

Claim disallowed.

Opinion issued February 14, 1984

TRANSPORTATION RENTALS CORPORATION

vs.

DEPARTMENT OF HIGHWAYS

(CC-83-18)

Robert Malloy appeared for claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimant seeks \$5,131.26 for damages to a 1982 Oldsmobile Ciera, which was involved in an accident on Route 2 near Moundsville, Marshall County, West Virginia, on December 27, 1982. The vehicle apparently struck rocks which had fallen into the roadway, but the driver of the rented automobile was not present to testify about the accident. Christopher Minor, Assistant Supervisor, Maintenance Division, Marshall County, testified that Route 2 is posted with "Falling Rock" signs in both the northbound and southbound lanes.

The State is neither an insurer nor a guarantor of the safety of motorists travelling on its roadways. The unexplained falling of a rock into a highway, without a positive showing that respondent knew or should have anticipated such an occurrence, is insufficient to justify an award. In this case, the Court has not been presented with any direct evidence as to how the accident occurred. The Court cannot, therefore, make any determination as to whether there has been any actionable negligence on the part of respondent, and denies the claim.

Claim disallowed.

Opinion issued February 28, 1984

WHITTEN CORPORATION

vs.

BOARD OF REGENTS

(CC-82-23)

Randall L. Trautwein, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, Donald L. Darling and Ann Ewart, Assistant Attorneys General, for respondent.

PER CURIAM:

This claim was submitted for decision upon a written stipulation, based on the following facts.

Respondent let separate bids for the construction of a multi-purpose physical education facility known as the Henderson Center, at Marshall University, Huntington, West Virginia. Respondent requested separate bids for general, mechanical, electrical, seating, and swimming pool construction. On June 6, 1979, claimant and respondent entered into a written agreement, whereby claimant was to construct a swimming pool in the Henderson Center within a period of 650 days from the issuance of a notice to proceed. Claimant was notified to commence work on August 8, 1979. Claimant was informed by the prime contractor and project coordinator, Mellon-Stuart Company, that site conditions would not permit claimant to begin its work. Several amended project schedules were issued, and claimant was finally permitted to commence work on or about May 27, 1980.

Claimant prepared its bid based upon labor and material costs in effect for the calendar year 1979. Due to the delay, claimant incurred additional labor, material, and miscellaneous expenses. Under the terms of the contract, any changes, alterations or additions to the original agreement entitle claimant to receive 15% overhead and 3.7% business and occupation tax on labor and material expenses incurred.

The parties have agreed that claimant is entitled to \$18,627.20, based upon the following breakdown:

Job Supervisor Labor	\$ 1,575.00
Laborers' Wages, Taxes and Insurance	4,430.31
Tile Contract Labor	3,892.00
Materials	5,772.32
15% Overhead	2,342.95
B & O Tax Payable	664.62
Total	<u>\$18,627.20</u>

Claimant has waived its claim to the following items:

Construction Supervisor Labor	\$ 360.00
Miscellaneous Expenses	\$ 3,336.00

Claimant further waived its claim of \$19,776.30, which represents the claim of claimant's subcontractor, Den-Ral, Inc.

In view of the foregoing, the Court makes an award to claimant in the amount of \$18,627.20.

Award of \$18,627.20.

Opinion issued April 6, 1984

EDITH ESTELLA AKERS

vs.

DEPARTMENT OF HIGHWAYS

(CC-83-158)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On January 1, 1983, claimant was travelling on Route 3 in Monroe County, West Virginia, when her vehicle, a 1982 Aries K, struck a break in the pavement. The right front wheel was bent and the hubcap lost. Total damages amounted to \$143.41. John C. Johnson, who was driving claimant's vehicle when the incident occurred, testified that he did not see the break in the pavement prior to striking it. He did not stop the vehicle at that time, but stated that he knew "something was wrong with the right wheel." Mr. Johnson said that he was unaware of the broken pavement, and neither he nor claimant had made a complaint to respondent concerning the defect.

The State is neither an insurer nor a guarantor of the safety of persons traveling on its highways. *Adkins v. Sims*, 130 W. Va. 645, 46 S.E.2d 81 (1947). For the respondent to be held liable for damage caused by a defect of this sort, it must have had either actual or constructive notice of the defect and a reasonable amount of time to take suitable corrective action. *Davis v. Dept. of Highways*, 11 Ct.Cl. 150 (1977). As the claimant did not meet this burden of proof, the claim must be denied.

Claim disallowed.

Opinion issued April 6, 1984

AMERICAN NATIONAL PROPERTY & CASUALTY,
SUBROGEE OF CHARLES R. HART

vs.

DEPARTMENT OF HIGHWAYS

(CC-83-352a)

No appearance by claimant.

Olivia Cooper Bibb, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted for decision on a written stipulation based upon the following facts.

Claimant is the subrogee of Charles R. Hart, who is the owner of a 1982 Lincoln Town Car. On or about August 24, 1983, respondent was spray painting inside its Cabell County maintenance garage with the front garage doors open. Claimant's insured's automobile, which was parked in an assigned parking place outside respondent's garage, was damaged by being sprayed with paint. Claimant's insured's automobile was damaged in the amount of \$644.25, which amount claimant paid to its insured. This damage was due to the negligence of respondent.

In view of the foregoing, the Court makes an award in the amount stipulated.

Award of \$644.25.

Opinion issued April 6, 1984

MICHAEL A. BEULIKE

vs.

DEPARTMENT OF HIGHWAYS AND
PUBLIC EMPLOYEES INSURANCE BOARD
(CC-83-206)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, and Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

Claimant, an employee of the Department of Highways, seeks a refund of \$176.40 as the difference between single and family coverage insurance rates which claimant alleges was erroneously paid during his first seven months of employment. Claimant was hired on November 22, 1982. At that time, he completed a number of forms including a "West Virginia Public Insurance Board acceptance and payroll deduction authority" card. On this card, claimant contends, he was erroneously instructed to write "AF" as his coverage code. "AF" is the code for family coverage; "AS" is for single. Claimant stated that this code was not explained to him and that he did not desire family coverage. A refund was sought after claimant discovered the error, but was denied. Richard A. Folio, administrative assistant of the Public Employees Insurance Board, testified that the refund was denied because claimant was afforded family coverage during the period in question.

While the claimant may have been given certain misinformation in regard to this form, the Court notes that claimant failed to complete the form. On the front of the form are two boxes. Next to one it reads

“I wish to enroll my eligible dependents.” Next to the other is “I do not wish to enroll my eligible dependents.” Had claimant checked one of the boxes the overpayment might not have occurred. The Court cannot find any negligence on the part of employees of the Department of Highways that was the proximate cause of the overpayment in question. Therefore, this claim is denied.

Claim disallowed.

Opinion issued April 6, 1984

GENE W. BRADFORD

vs.

DEPARTMENT OF HIGHWAYS

(CC-83-247)

Claimant appeared in person.

Nancy J. Aliff and Olivia Cooper Bibb, Attorneys at Law, for respondent.

PER CURIAM:

On July 4, 1983, at approximately 3:40 p.m., claimant was driving east on Interstate 64 in Kanawha County, West Virginia. He encountered a buckled area of pavement which damaged the right front shock absorber of his 1982 Volkswagen Jetta in the amount of \$57.35. Claimant testified that he drove the road daily and that the hazard was not present the day before. He stated that he believed the buckling was due to the temperature, which was in excess of 90 degrees.

Herbert Boggs, interstate supervisor, testified that he was informed of the buckling between 4:00 and 4:15 p.m. that day. He immediately dispatched a work crew to temporarily patch the road. Mr. Boggs said that blow-ups such as this one occur in very hot weather, but that it is impossible to predict when and where the buckling will occur.

The State is neither an insurer nor a guarantor of the safety of travellers on its highways. *Adkins vs. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order for the respondent to be held liable for damages caused by road defects of this type, the claimant must prove that respondent had actual or constructive notice of the defect and a reasonable amount of time to take suitable corrective action. *Davis vs. Dept. of Highways*, 11 Ct.Cl. 150 (1976). The evidence indicated that the defect could not be predicted, that it must have occurred sometime after claimant travelled I-64 on July 3, and that respondent acted quickly after being informed of the buckling. The Court, therefore, denies the claim.

Claim disallowed.

Opinion issued April 6, 1984

EQUILEASE CORPORATION

vs.

BOARD OF REGENTS

(CC-82-126)

Thomas C.G. Coyle, Jr. and Charles L. Woody, Attorneys at Law,
for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

WALLACE, JUDGE:

On or about July 1, 1980, claimant and respondent entered into what was described as a "State and municipal lease agreement" whereby claimant rented to respondent four Savin Plain Paper Copiers. The agreement was for a term of 60 months, at a monthly rental of \$740.59. These machines were installed at the West Virginia College of Graduate Studies, (COGS), in Institute, West Virginia. On June 17, 1981, respondent sent claimant an equipment rental addendum which claimant refused to sign. Claimant is a financing company, and by the terms of the lease agreement, provided no services to the machines. The addendum would have required claimant to maintain the copiers, and for that reason, the addendum was not signed. Respondent, thereafter, made no further rental payments and the claimant subsequently removed the machines. At that time, around April 1982, respondent made a final payment of \$9,627.67. Respondent paid a total of \$15,552.39, which is payment in full for the period during which respondent had possession of the copiers. Claimant now seeks \$26,633.01 for the remaining period of the agreement. This amount excludes the \$2,250.00 which claimant received on the sale of the copiers in question. Respondent contends that no further monies are due as the respondent has already paid for the use of the machines, and also alleges that the agreement was void under W.Va. Chapter 5A, governing the Department of Finance & Administration.

As the validity of this lease has been questioned, the Court must examine the terms of the agreement first in order to determine whether there is a valid agreement and, if so, whether respondent is liable to claimant. The Court notes that while this agreement is termed a lease, it is actually a lease-purchase contract. Paragraph 15 of the agreement provides respondent with the option to purchase the copiers at the end of the rental period. Hence, this contract is governed by the provisions of Chapter 5A of the W. Va. Code.

§ 5A-3-3(8) provides, in part, that:

"The director, under the direction and supervision of the commis-

sioner, shall be the executive officer of the purchasing division and shall have the power and duty to:

(8) Examine the provisions and terms of every contract entered into for and on behalf of the State of West Virginia which imposes any obligation upon the State to pay any sums of money or perform any particular service or do any act or deed, and approve said contract as to said provisions and terms; . . .”

§ 5A-3-15 states:

“Contracts shall be signed by the commissioner in the name of the State. They shall be approved as to form by the attorney general. A contract that requires more than six months for its fulfillment shall be filed with that state auditor.”

The contract in question was signed only by the director of financial affairs at COGS. No approval for the contract was sought or obtained from the Department of Finance & Administration as required by the Code. Hence, it imposes no obligation upon respondent. While the Court does not condone the actions of the respondent in entering into a void contract, it is noted that claimant has been paid for respondent's actual use of the copiers. The claim for the remaining rent must, however, be denied.

Claim disallowed.

Opinion issued April 6, 1984

MARTHA E. FAULKNER

vs.

DEPARTMENT OF HIGHWAYS

(CC-83-179)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimant lives on Amandaville Road or State Route 17/1 in St. Albans, West Virginia. She seeks \$354.50 for various appliances which were damaged when a fallen tree limb struck an electrical line causing a power surge in her house. This occurred on April 14, 1983, at approximately 9:15 a.m. Three televisions, a radio, and a clock were among the damaged items. Claimant stated that limbs had fallen from the tree before and she believed the tree was dead. She had made no complaints to respondent prior to this incident, but believed that a neighbor had. The tree has since been removed by Appalachian Power Company.

Lloyd Myers, a supervisor employed by respondent, testified that he had had no complaints about the tree until May of 1983. He said that any complaints made to his district office would have been referred to him. Mr. Myers said he viewed the tree shortly after receiving the complaint and stated that the tree was alive. He also stated that it was located partly on respondent's right-of-way and partly on land owned by someone else.

In order for the claimant to prevail in a claim of this kind, it must be shown that respondent knew, or should have known, that the tree in question posed a hazard. The evidence was in conflict as to whether the tree was alive and the testimony concerning prior notice to respondent was unsubstantiated. The Court concludes, therefore, that the claimant has not established, by a preponderance of the evidence, that respondent was negligent, and denies the claim.

Claim disallowed.

Opinion issued April 6, 1984

THOMAS M. JONES & DEBRA L. JONES

vs.

DEPARTMENT OF HIGHWAYS

(CC-83-205)

Claimants appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was originally filed in the name of Thomas M. Jones, but when the testimony revealed that the damaged automobile, a 1981 Chrysler Reliant K, was titled in the joint names of Thomas M. Jones and his wife, Debra L. Jones, the Court, on its own motion, amended the style of the claim to include Debra L. Jones as an additional claimant.

On April 23, 1983, claimants were travelling on Interstate 64 west of the Nitro Bridge in Kanawha County, when their vehicle struck a pothole. Mrs. Jones, the driver of the vehicle, testified that they had just passed through an area of road construction and one lane of traffic was blocked off. Past the barricades, she changed lanes and struck the pothole which was located in the center of the two lanes. Replacement of the damaged right front tire amounted to \$74.93.

The State is neither an insurer nor a guarantor of the safety of persons travelling on its highways. *Adkins v. Sims*, 130 W. Va. 645, 46

S.E.2d 81 (1947). In order for the State to be held liable for the damage incurred, it must have had either actual or constructive notice of the defect involved. No evidence of actual notice was presented. The presence of road repair construction near the pothole may be sufficient to establish constructive notice; however, respondent must also have sufficient time to repair the defect after notice is given. Here there was no testimony concerning the amount of time the pothole had been in existence. The Court is, therefore, disposed to deny the claim.

Claim disallowed.

Opinion issued April 6, 1984

ERIC M. LEE

vs.

BOARD OF REGENTS

(CC-81-380)

Claimant appeared in person.

Edgar E. Bibb, III, and J. Bradley Russell, Assistant Attorneys General, for respondent.

PER CURIAM:

Claimant seeks damages for alleged continuing physical and mental injuries allegedly resulting from the administration of certain antipsychotic medications at the West Virginia University Medical Center (hereinafter referred to as the Medical Center) in October 1971. Claimant was taken to the Emergency Room at the Medical Center on September 27, 1971, where he was examined by Dr. James Stevenson, a psychiatrist and the current Chairman of the Department of Behavioral Medicine and Psychiatry at the Medical Center. It was determined at that time that the claimant would be better served by admission onto a closed ward, and was transported to Ohio Valley General Hospital, a private hospital in Wheeling, West Virginia, where it appeared that he signed documents that may have been voluntary admittance forms. In October 1971, claimant was returned to the Medical Center where he remained for two weeks. He continued treatment as an outpatient with Dr. Stevenson for a period of seven months. Claimant alleges that as a result of unreasonable treatment at the Medical Center, he has had continual problems adjusting to his environment, as well as physical problems, including hypotension and an allergic condition resulting in problems with his eyes.

Dr. Stevenson testified about his treatment of claimant and about the treatment claimant received at Ohio Valley General Hospital, as

reflected in records received from that institution. The claimant was given two types of anti-psychotic medications while at Ohio Valley, one of which was discontinued after claimant developed a skin rash. The rash cleared after the drug was no longer administered. Claimant was placed on another type of anti-psychotic drug at the Medical Center, which was discontinued after two weeks, as claimant exhibited no psychotic thinking. During the period claimant was given these drugs, he complained of other side effects, such as blurred vision and motor restlessness. These effects were described by Dr. Stevenson as being acute and allergic reactions to the drugs. These problems ended once the drugs were discontinued.

Dr. Stevenson stated that other side effects can result from long-term chronic use of anti-psychotic medications, but in his opinion, claimant does not suffer from any long-term adverse reactions to the drugs. He added that the treatment claimant received during the two weeks at the Medical Center was medically appropriate, an opinion also voiced by Dr. David Z. Morgan, Associate Dean of the West Virginia University School of Medicine and family physician for claimant's family.

After reviewing all of the evidence presented, the Court concludes that the claimant has not established, by a preponderance of the evidence, that he has suffered permanent physical or mental injuries as a result of medications administered at the Medical Center. The expert medical testimony indicated that any side effects suffered by claimant were temporary in nature, and that the treatment he received was consistent with accepted medical practices. The Court must, therefore, disallow the claim.

Claim denied.

Opinion issued April 6, 1984

STEVE MUTNICH

vs.

DEPARTMENT OF HIGHWAYS

(CC-83-253)

Claimant appeared in person.

Nancy J. Aliff and Olivia Cooper Bibb, Attorneys at Law, for respondent.

PER CURIAM:

On October 8, 1982, claimant was driving his 1977 Cadillac El Dorado on Route 16 in Sprague, Raleigh County, West Virginia. He struck a sewer drain which claimant testified was about eight inches below the level of the pavement. His vehicle incurred damages in the amount of \$530.94. The drain was located on the right edge of Route 16 next to a curb. Claimant testified that he drove Route 16 "practically every day," but was not aware of the location of the drain. He stated that the drain was not visible from the surface of the road.

Evidence was presented to indicate that the drain was below the level of the pavement due to the resurfacing of the road. Photographs of the scene show that the drain is located off the travelled portion of the road. Charles W. Bragg, Assistant Maintenance Supervisor for Raleigh County, testified that the road is approximately 40 feet wide at the accident scene and that traffic travels about four feet from the drain.

This Court has previously held that the berm or shoulder of a highway must be maintained in a reasonably safe condition for use when an emergency occurs or when a motorist otherwise necessarily uses the berm. The location of the drain eight inches below the pavement did create an unsafe condition. However, the Court cannot find that claimant necessarily used the berm. W. Va. Code § 17C-7-1 provides in part: "Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway." A roadway is defined in W. Va. Code § 17C-1-37 as "that portion of a highway improved, designed, or ordinarily used for vehicular traffic, *exclusive of the berm or shoulder.*" (Emphasis supplied.) The Court concludes, therefore, that claimant was also negligent, and that his negligence equalled or exceeded that of respondent. Thus, this claim must be denied. See *Sweda vs. Dept. of Highways*, 13 Ct.Cl. 249 (1980).

Claim disallowed.

Opinion issued April 6, 1984

JAMES R. SHAVER, JR.

vs.

DEPARTMENT OF HIGHWAYS
(CC-83-39)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

GRACEY, JUDGE:

On December 29, 1982, claimant was driving his 1973 Chevrolet Impala south on Route 250 near Fairmont, Marion County, West

Virginia. At approximately 5:30 a.m., a rock slide occurred which rendered the car a total loss. The claimant estimated the value of the vehicle at \$1,290.00. Claimant testified that he did not see the rocks "until they started coming through the windows" and that while he drove the road every day, he had never seen a slide there before.

In order for a claimant to establish liability on the part of the respondent, it must be shown that respondent knew or should have known of the particular hazard involved. No evidence was presented to show that respondent had any reason to anticipate a rock slide at this location. Based on numerous prior opinions of the Court, this claim must be denied. See *Hammond v. Dept. of Highways*, 11 Ct.Cl. 234 (1977) and *Dunlap v. Dept. of Highways*, 13 Ct.Cl. 75 (1979).

Claim disallowed.

Opinion issued April 6, 1984

TRANSPORTATION RENTALS CORP.

vs.

DEPARTMENT OF HIGHWAYS

(CC-83-227)

Paul Lambert, Vice President of Operations, appeared for claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimant seeks \$2,638.49 for damages incurred by its 1983 Datsun Sentra which was involved in an accident on May 5, 1983, on U.S. Route 119 and Route 3 near Danville, Boone County, West Virginia. The vehicle was being driven by a Susan Miller, who did not testify at the hearing. Trooper Gary A. Bain, who investigated the accident, stated that Ms. Miller was travelling south on Route 119 and entered the intersection of Route 119 and Route 3. There was supposed to be a stop sign at that intersection, but it was not present. Ms. Miller entered the intersection and collided with a north-bound vehicle. No evidence was presented concerning the length of time the stop sign had been missing, nor was there any evidence of notice to respondent about this sign.

The State is neither an insurer nor a guarantor of the safety of travellers on its highways, *Adkins vs. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order for the respondent to be found liable, proof of either actual or constructive notice of the defect must be shown. In this claim no notice was established. Furthermore, without the

testimony of the driver of the vehicle, the Court would be engaged in speculation concerning the circumstances surrounding the accident. This it cannot do. The claim must, therefore, be denied.

Claim disallowed.

Opinion issued April 6, 1984

V.F. YOUNG

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-125)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimant seeks \$440.89 for damages to his 1980 Pinto station wagon from striking a piece of concrete on the Patrick Street Bridge in Kanawha County, West Virginia, on March 31, 1981. Claimant testified that the bridge was under repair at the time of the incident. He stated that he did not know whether the respondent or a contractor was performing the repairs. Claimant was also unsure whether the concrete had been lying in the roadway or whether it had been dislodged from the road by the car travelling in front of him.

The State is neither an insurer nor a guarantor of the safety of motorists travelling on its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order for the State to be found liable for damages of this kind, it must be shown that respondent had actual or constructive notice of the hazard and a reasonable amount of time to take suitable corrective action. *Davis v. Dept. of Highways*, 11 Ct.Cl. 150 (1979). The claimant's testimony suggests that the concrete may have been dislodged by the car in front of him. The Court cannot conclude, therefore, that there has been actionable negligence on the part of respondent on which to base an award. The claim must be denied.

Claim disallowed.

Opinion issued April 23, 1984

DOCTOR'S URGENT CARE, INC.

vs.

DEPARTMENT OF PUBLIC SAFETY

(CC-84-64)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$55.00 for medical services rendered to an employee of the respondent. Respondent, in its Answer, admits the validity and amount of the claim.

In view of the foregoing, the Court makes an award in the amount of \$55.00.

Award of \$55.00.

Opinion issued April 23, 1984

PARIS LEONARD DULANEY, JR.

vs.

DEPARTMENT OF MOTOR VEHICLES

(CC-82-324)

Claimant appeared in person.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

GRACEY, JUDGE:

The claimant, Paris Leonard Dulaney, Jr., was a resident of West Virginia when he entered the U.S. Marine Corps. His military service was terminated eight years later when he was stationed at a base in North Carolina, and he then took residence with his parents at Bintree, West Virginia. At that time, he held a valid North Carolina driver's license showing a North Carolina residence address.

On February 13, 1981, about 30 days after his service termination, he was cited in Virginia for driving while intoxicated, of which he was convicted upon a guilty plea. Incident to this citation, he had been asked where he was then living, and he had replied that he was then living at Bintree, West Virginia.

On August 18, 1981, the West Virginia Department of Motor Vehicles, the respondent, issued a West Virginia driver's license to the claimant, replacing his North Carolina driver's license. On March 23,

1982, the respondent suspended that West Virginia driver's license, and the claimant surrendered the license upon notification. The suspension was based upon a reciprocity agreement report then recently received by the respondent from the State of Virginia showing the claimant's conviction of driving while intoxicated in that State.

Upon several visits to the office of the respondent, the claimant unsuccessfully contended that his West Virginia driver's license had been improperly suspended. On October 5, 1982, the suspension was vacated and the license was returned to him. He had obtained for the respondent a letter from the State of North Carolina to the effect that his North Carolina driver's license issued April 14, 1977, and expiring August 16, 1981, was not otherwise suspended, revoked or cancelled. Ron R. Bolen, then Director of the respondent's Driver Control Division, testified that in a similar type of case, a Judge of the Circuit Court of Kanawha County, West Virginia, had then recently ruled that the West Virginia Department of Motor Vehicles could not lawfully take the license of a person who was not a West Virginia resident when convicted.

In his Notice of Claim filed with the Clerk of this Court on December 22, 1982, damages in the amount of \$21,000.00 were claimed for loss of earnings caused by the alleged wrongful suspension of his West Virginia driver's license by the respondent. By letter dated December 6, 1982, Nationwide Insurance advised the claimant that his automobile insurance policy was being terminated as of January 25, 1983; that the cancellation action was influenced by information in a report made to the company, at its request, by the respondent. On April 22, 1983, the claimant amended his Notice of Claim, alleging additional loss of earnings from January 25, 1983 to June 22, 1983, the date scheduled for hearing, and increasing his damages claim to \$38,000.00.

Claimant's evidence of lost earnings was a promise of coal mine employment 20 miles from his residence. There was nothing definite about this promised employment. Nothing had been discussed as to what type of work, working days, hours, etc. He had taken a course which made him eligible for coal mine employment as of October 20, 1981. He made no contact with the prospective employer after the promised employment and the suspension of his driver's license. He surmised that he might have been employed as a night watchman and estimated what his earnings might have been. Although not alleged in his Notice of Claim, he also testified that his driver's license suspension and auto insurance termination had denied him opportunities of income from employment, and possibly from earning rewards, as a

private detective or investigator, for which he had been issued a license by the West Virginia Secretary of State on August 1, 1982. Again, there was no real evidence of such lost earnings.

The Court perceives no negligence or wrongful act of the respondent in the suspension of the claimant's West Virginia driver's license on March 23, 1982, and until October 5, 1982. The claimant was, in fact, a resident of West Virginia on February 13, 1981, when cited and subsequently convicted of driving while intoxicated in the State of Virginia. Nor does the Court have in evidence any report which the respondent may have furnished to Nationwide Insurance. The Court cannot arbitrarily assume that such a report, if in fact one was given, was inaccurate, or wrongfully influenced the insurance company to terminate claimant's automobile insurance policy.

The Court is of the opinion that the claimant has failed to carry the burden of proof necessary to establish liability of the respondent. The claim must be denied.

Claim disallowed.

Opinion issued April 23, 1984

THE GOODYEAR TIRE & RUBBER CO.

vs.

DEPARTMENT OF PUBLIC SAFETY

(CC-84-51)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$2,764.50 for merchandise supplied to respondent but not invoiced in the proper fiscal year. Respondent, in its Answer, admits the validity and amount of the claim. In view of the foregoing, the Court grants an award in the amount sought.

Award of \$2,764.50.

Opinion issued April 23, 1984

JONES-CORNETT ELECTRIC COMPANY
vs.
DEPARTMENT OF HUMAN SERVICES
(CC-82-239)

Leon K. Oxley, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

GRACEY, JUDGE:

The claimant seeks damages of \$58,484.52 it allegedly expended in the making of alterations and installation of a fire alarm system in its building at Welch, West Virginia, for use of the Department of Welfare (now known as the Department of Human Services). Of said claim, \$8,042.31 is for attorney fees and expenses.

By lease dated and effective June 1, 1970, the State of West Virginia leased 17,500 square feet of the building from the claimant for ten years, to May 31, 1980, at a rent of \$1.88 per square foot per year. At the termination of that lease, the respondent offered to extend the term on a month-to-month basis at the same rent, but the claimant counterproposed an increase of rent to \$3.00 per square foot per year. By lease dated October 15, 1980, the respondent leased the same premises from the claimant for two years, from June 1, 1980 to May 31, 1982, at \$3.00 per square foot per year. Both of these leases have several common clauses found in state leases of real estate, one of which, in the ten-year lease, reads as follows:

“(5) The Lessor will remove and correct any fire or health hazards not caused by the neglect or acts of the Lessee, its agents, employees, or servants which any public authority may order corrected or removed during the term of this lease. Upon refusal or neglect of Lessor to comply with any such order, the Lessee may comply therewith and deduct the costs and expenses thereof from the rents which may become due and payable thereafter to the Lessor until the Lessee is fully reimbursed therefor.”

This same clause appears as paragraph numbered (6), headed “FIRE AND HEALTH HAZARDS”, in the two-year lease, except that the word “Tenant” is therein substituted for the word “Lessee”.

On November 21, 1980, a fire safety inspection of the premises was made by Frank Ubeda, of the State Fire Marshal's office, working out of the Beckley area. A comprehensive report, listing many requirements, including an electrically supervised fire alarm system, was

issued and submitted to the respondent and claimant. By August 28, 1981, some \$20,000.00 had been expended by the claimant toward compliance. Betty Jo Jones, then the respondent's Area Administrator in charge of the office at Welch, was dissatisfied with the progress of the work, and the respondent withheld the monthly rent for several months. At a meeting held on that date, the claimant contends that its representatives received assurances that the respondent would be continuing to lease the premises, after termination of the two-year lease, and that the claimant, upon such assurances, continued with its work toward compliance. Respondent's witnesses deny giving any such assurances or commitment, although respondent admits that it may have then told the claimant's representatives that it then had no plans or intentions of moving its offices at the termination of the two-year lease.

Claimant contends that it may or may not have continued its compliance work without such assurances; that it would have been a business consideration; that only upon such assurances could it depend on recovering its expenses in a new lease after termination of the two-year lease then in effect. It is clear from the evidence that negotiations toward a possible new lease had been ongoing for some time, as one might expect. Claimant intimates that at the beginning of the ten-year lease, the then Commissioner of Finance and Administration had agreed that certain proposed specifications, including a fire alarm system, could be deleted; that the rent would have been accordingly higher otherwise, to recover the cost.

Whatever assurances were or were not in fact given at the August 28, 1981 meeting, or at other meetings, or assumed by the claimant from the conduct of ongoing negotiations for a new lease at the termination of the two-year lease, it appears to the Court that the claimant, in incurring the expense incident to fire safety compliance, was simply fulfilling its obligation, as Lessor, under the terms and provisions of the lease then in effect, and is not entitled to reimbursement.

All rent payable, including the several months rent temporarily withheld, was fully paid to the claimant. In late 1981 or early 1982, the respondent responded to offers of owners of other premises for lease, and moved to another location at the termination of the two-year lease. As the respondent fulfilled its obligations in accordance with the terms of the lease, the Court is of the opinion to disallow the claim.

Judge Wallace did not participate in the hearing or decision of this claim.

Claim disallowed.

Opinion issued April 23, 1984

ROENTGEN DIAGNOSTICS, INC.

vs.

DEPARTMENT OF PUBLIC SAFETY

(CC-84-53)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks the sum of \$39.00 for services rendered to the respondent. Respondent, in its Answer, admits the validity and amount of the claim. The Court, therefore, grants an award in the amount of \$39.00.

Award of \$39.00.

Opinion issued April 23, 1984

WHEELING HOSPITAL

vs.

DEPARTMENT OF CORRECTIONS

(CC-84-34)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$1,385.10 for medical services rendered to an inmate at the West Virginia State Penitentiary. Respondent, in its Answer, admits the validity of the claim, but states that there were insufficient funds remaining in its appropriation for the fiscal year in question from which the claim could be paid.

While this is a claim which in equity and good conscience should be paid, the Court is of the opinion that an award cannot be made, based on the decision in *Airkem Sales & Service, et al. vs. Dept. of Mental Health*, 8 Ct.Cl. 180 (1971).

Claim disallowed.

Opinion issued May 4, 1984

AM INTERNATIONAL INC., DEBTOR IN
POSSESSION VARITYPER DIVISION

vs.

DEPARTMENT OF EDUCATION
(CC-84-83a)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$524.00 for services performed under two service contracts. Respondent, in its Answer, admits the validity of the claim. In view of the foregoing, the Court makes an award in the amount sought.

Award of \$524.00.

Opinion issued May 4, 1984

AM INTERNATIONAL INC., DEBTOR IN
POSSESSION VARITYPER DIVISION

vs.

DEPARTMENT OF PUBLIC SAFETY
(CC-84-83b)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$600.00 for service performed under a service contract. Respondent, in its Answer, admits the validity of the claim. In view of the foregoing, the Court makes an award in the amount sought.

Award of \$600.00.

Opinion issued May 4, 1984

KELLOGG SALES COMPANY

vs.

DEPARTMENT OF HEALTH

(CC-84-80)

Michael V. Murphy, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$137.50 for merchandise delivered to respondent. Respondent, in its Answer, admits the validity and amount of the claim. The Court, therefore, makes an award in the amount sought.

Award of \$137.50.

Opinion issued May 4, 1984

MEANS CHARLESTON CENTER

vs.

DEPARTMENT OF PUBLIC SAFETY

(CC-84-78)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

The claimant seeks \$137.84 for merchandise delivered to respondent by invoice number 05300908, which was not paid due to the expiration of the fiscal year. Respondent, in its Answer, admits the validity and amount of the claim. The Court, therefore, makes an award in the amount sought.

Award of \$137.84.

Opinion issued May 4, 1984

JACK E. MURRAY

vs.

DEPARTMENT OF HIGHWAYS

(CC-83-279)

No appearance by claimant.

Olivia Cooper Bibb, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted on written stipulation that respondent is liable to claimant in the amount of \$287.47 based upon the following facts.

Claimant is the owner of real property located near Reedsville in Preston County, W. Va. In the late fall of 1982, respondent erected a snow fence on claimant's property with the permission of claimant. Respondent, in the process of removing the fence, negligently left fence posts in claimant's field. Claimant was not aware that the posts had been left until his hay binder was damaged by driving over one of the posts.

The Court finds that respondent was negligent in failing to remove the fence posts and that this negligence was the proximate cause of the damages suffered by claimant. The Court, therefore, makes an award to claimant in the amount of \$287.47.

Award of \$287.47.

Opinion issued May 4, 1984

PARKE-DAVIS

vs.

DEPARTMENT OF HEALTH

(CC-84-74)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$6,864.00 for an unpaid invoice, #77506 dated May 19, 1982. Respondent, in its Answer, admits the validity and amount of the claim. The Court, therefore, makes an award in the amount sought.

Award of \$6,864.00.

Opinion issued May 4, 1984

RALEIGH ORTHOPAEDIC ASSOCIATION, INC.

vs.

DEPARTMENT OF CORRECTIONS

(CC-84-84)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$250.00 for medical services rendered to an inmate of the Huttonsville Correctional Center assigned to the Beckley Work Release Program. Respondent, in its Answer, admits the validity and amount of the claim, but states that there were insufficient funds remaining in its appropriation for the fiscal year in question from which the claim could be paid.

While this is a claim which in equity and good conscience should be paid, the Court is of the opinion that an award cannot be made based upon the decision in *Airkem Sales and Service, et al. vs. Dept. of Mental Health*, 8 Ct.Cl. 180 (1971).

Claim disallowed.

Opinion issued May 4, 1984

XEROX CORPORATION

vs.

DEPARTMENT OF HEALTH

(CC-84-23)

Michael J. Samis, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$5,006.13 for meter usage and basic use charges for a Xerox 5600 copier used by respondent. Respondent, in its Answer, admits the validity and amount of the claim. In view of the foregoing, the Court makes an award in the amount sought.

Award of \$5,006.13.

Opinion issued May 25, 1984

ALLING & CORY COMPANY

vs.

DEPARTMENT OF PUBLIC SAFETY

(CC-84-33)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Amended Answer.

Claimant seeks \$2,242.00 for eight cartons of Mactac Break Away, Fluorescent Red Paper. Claimant delivered the paper to respondent pursuant to a "Request for Quotation" issued by respondent. Claimant assumed the "Request for Quotation" was an order and respondent accepted and used the paper. Claimant was not the low bidder for the paper; the amount of \$2,242.00 represents the amount of the low bid. Respondent, in its Amended Answer, admits the validity of the claim and joins with claimant in requesting that the claim be paid.

The Court has considered this claim in accordance with the provisions of W. Va. Code §14-2-19, which pertains to claims under existing appropriations during the current fiscal year 1983-84. The Court hereby directs the respondent to pay the claim in accordance with W. Va. Code §14-2-19.

Award of \$2,242.00.

Opinion issued May 25, 1984

AMY BUCKLIN

vs.

DEPARTMENT OF HIGHWAYS

(CC-83-304)

No appearance by claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim comes before the Court upon respondent's written Motion to Dismiss.

In the Notice of Claim, claimant alleges that in July 1981, employees of the respondent were using a bulldozer to clean a ditch along the highway near claimant's property in Crab Orchard, Raleigh County, W. Va. In the course of the work, the bank along which claimant's fence stood was undermined. This caused the fence to fall. Claimant spent \$400.00 to have the fence replaced.

Respondent, in its Motion to Dismiss, states that it agrees with the facts in the Notice of Claim and with the amount, but moves to dismiss the claim as it is barred by the applicable statute of limitations. Under W. Va. Code §55-2-12, this claim must have been brought within two years from the date of the injury. The claim was filed November 8, 1983. The Court, under the provisions of W. Va. Code §14-2-21, has no jurisdiction over a claim which is not filed within the time specified by the applicable statute of limitations. The Court must, therefore, sustain respondent's Motion to Dismiss.

Claim dismissed.

appropriation of public funds, as that would violate the above-cited section of the Constitution. The Court states, in dicta, that:

“We assume that no one will contend that an official of the State, even with legislative authority, could legally enter into such a contract of indemnity, for the Constitution says: ‘*** nor shall the State ever assume, or become responsible for the debts or liabilities on any county, city, township, corporation or person***.’ ”

This Court finds that even though the respondent entered into this contract which contained an indemnity clause, and did so with the approval of the Attorney General’s office, the indemnity provision is null and void. The claim must, therefore, be denied.

Claim disallowed.

Opinion issued May 25, 1984

XEROX CORPORATION

vs.

DEPARTMENT OF MINES

(CC-84-60)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent’s Amended Answer.

Claimant seeks \$913.98 for rental of a 3100 copier. Respondent, in its Amended Answer, admits the validity and amount of the claim.

In view of the foregoing, the Court makes an award in the amount sought.

Award of \$913.98.

Opinion issued June 22, 1984

S.R.C. ASSOCIATES

vs.

STATE BOARD OF EDUCATION AND
DEPARTMENT OF FINANCE & ADMINISTRATION

(CC-84-22)

No appearance by claimant.

J. Bradley Russell, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent’s Answer.

Opinion issued May 25, 1984

MONONGALIA COUNTY COMMISSION

vs.

DEPARTMENT OF FINANCE & ADMINISTRATION

(CC-83-195)

Phillip Magro and Thomas H. Newbraugh, Attorneys at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

LYONS, JUDGE:

Claimant seeks \$13,500.00 allegedly due from respondent pursuant to an indemnity clause in a contract between claimant and respondent. The contract provided for bus services in Monongalia County. One of claimant's employees failed to enroll one of the bus drivers for life insurance coverage. When the driver died, his heirs instituted a suit in the Circuit Court of Monongalia County to recover the amount of the benefits. The parties settled the claim for \$13,500.00, the amount claimant now seeks to recover from respondent.

The indemnity clause states, in pertinent part:

"21. *Indemnity.* Grantor [respondent] agrees to indemnify the Commission any and all liability, loss or damage the Commission may suffer as a result of claims, demands, costs, or judgements against it arising, in any manner from the operation of this contract whether the liability, loss, or damage is caused by, or arises out of, the negligence of the commission or of its officers, agents, employees, or otherwise."

The respondent argues that the indemnity provision violates Article X, Section VI of the Constitution of West Virginia. This section provides in part that:

"The credit of the State shall not be granted to, or in aid of any county, city, township, corporation or person; nor shall the State ever assume, or become responsible for the debts or liabilities of any county, city, township, corporation or person; . . ."

Respondent cites in support of its argument the case of *State ex rel. B & O Railroad Co. v. Sims*, 132 W.Va. 13, 53 S.E. 2d 505 (1948). In that case, the title to property became vested with the State. Previously, the property was the subject of a contract between two private corporations and contained an indemnity clause. This provision was binding on the successors and assigns of the parties. The W. Va. State Court held that the indemnity provision could not be the basis of an

Opinion issued June 26, 1984

MEREDITH, QUINN & STENGER, CPA'S

vs.

REGION VI PLANNING AND DEVELOPMENT COUNCIL
(CC-82-121)

William J. Quinn appeared for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

Claimant seeks \$2,715.00 for performing an audit of respondent's financial records for the twelve-month period ending June 30, 1978. A statement for services was sent to respondent on July 12, 1979, but was not paid as respondent's funds were frozen effective July 18, 1979. Respondent has moved to dismiss the claim on the grounds that the respondent is not an agency of the State and this Court has no jurisdiction to hear the claim.

Regional planning and development councils are established under W. Va. Code §8-25-1, *et seq.* Chapter 8 of the W. Va. Code is titled "Municipal Corporations," and a careful reading of Article 25 establishes that the regional council is a political subdivision of the State and not a State agency. The definition of "State agency" specifically excludes "political or local subdivisions of this State regardless of any state aid that might be provided," W. Va. Code §14-2-3. This Court, therefore, lacks jurisdiction over the above-styled claim, and sustains respondent's Motion to Dismiss.

Claim dismissed.

Opinion issued June 26, 1984

PFIZER, INC.

vs.

DEPARTMENT OF HEALTH
(CC-84-120)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks an award of \$190.80 for goods supplied to respondent's Denmar State Hospital. In its Answer, respondent admits the validity and amount of the claim. The Court, therefore, makes an award to claimant in the amount sought.

Award of \$190.80.

Claimant seeks \$622.60 for forms supplied to respondent, State Board of Education, which were not accepted by respondent as the forms were not the required size due to a misunderstanding in the Purchase Order. The claim was originally filed against the Department of Education; however, upon a Motion to Amend the style of the claim by the respondent, the Court included the Department of Finance & Administration as a co-respondent. Respondents, in their Answer, state that the parties have agreed to settle the claim for \$311.30. Respondent, State Board of Education, admits liability in the amount of \$155.65, and respondent, Department of Finance & Administration, also admits liability in the amount of \$155.65.

The Court has considered this claim in accordance with the provisions of W. Va. Code §14-2-19, which pertains to claims under existing appropriations during the current fiscal year 1983-84. The Court hereby directs the respondents to pay this claim in accordance with W. Va. Code §14-2-19.

Award of \$155.65 against the State Board of Education.

Award of \$155.65 against the Department of Finance & Administration.

Opinion issued June 26, 1984

DUNLOW VOLUNTEER FIRE DEPARTMENT

vs.

STATE FIRE MARSHAL

(CC-84-35)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

The claimant seeks an award of \$2,744.39 which, due to oversight, it failed to receive under the statutory distribution of funds to volunteer fire departments. Respondent, while admitting the validity of the claim, states that there were insufficient funds remaining in its appropriation for the fiscal year in question from which the claim could be paid.

While this is a claim which in equity and good conscience should be paid, the Court finds that an award cannot be made based on the decision in *Airkem Sales & Service, et al. vs. Dept. of Mental Health*, 8 Ct.Cl. 180 (1971).

Claim disallowed.

Opinion issued June 26, 1984

3M COMPANY

vs.

DEPARTMENT OF HEALTH

(CC-84-119)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$565.09 for meter usage on a copier rented by respondent. In its Answer, respondent admits the validity and amount of the claim. In view of the foregoing, the Court makes an award of \$565.09.

Award of \$565.09.

Opinion issued June 26, 1984

XEROX CORPORATION

vs.

DEPARTMENT OF MOTOR VEHICLES

(CC-84-104)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$848.25 for services rendered to respondent. Respondent, in its Answer, admits the validity and amount of the claim. The Court, therefore, makes an award in the amount sought.

Award of \$848.25.

Opinion issued July 26, 1984

RUTH A. BATES AND JOHN E. BATES, AND JAMES M. BATES,
AN INFANT WHO SUES BY HIS FATHER AND NEXT FRIEND,
JOHN E. BATES AND JOHN E. BATES

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-120a&b)

Louis R. Tabit, Attorney at Law, for claimant.

Nancy J. Aliff, and Olivia Cooper Bibb, Attorneys at Law, for respondent.

PER CURIAM:

On April 17, 1984, the Court heard testimony concerning an automobile accident involving the claimants, which occurred on February 8, 1981, on Route 39 near Drennen, Nicholas County, West Virginia. At the conclusion of claimants' cases, both claimants and respondent made motions for directed verdicts. The Court treated respondent's motion as a Motion to Dismiss and claimants' motion as a Motion for Summary Award. The Court, after hearing oral arguments on the motions, unanimously sustained respondent's Motion to Dismiss and in effect, overruled claimants' Motion for Summary Award.

The claimants, Ruth A. Bates and James M. Bates, sustained personal injuries when the vehicle being driven by John E. Bates went out of control on Route 39, left the roadway, and struck an unprotected section of guardrail. Mr. Bates stated that he hit "something in the road. It was either a pothole, a chunk of ice or a rock or something that threw the car out of control." Mr. Bates testified that whatever he struck in the road was the beginning of the accident, but he did not contend that anything that respondent did caused his vehicle to leave the travelled portion of Route 39. The Court determined that there was no causal relationship between any alleged negligence of the respondent and the happening of the accident and, therefore, the claimants failed to prove a cause of action upon which relief could be granted.

Claims disallowed.

Opinion issued August 1, 1984

DAVID BOBENHAUSEN

vs.

DEPARTMENT OF HIGHWAYS

(CC-84-9)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On October 28, 1983, claimant was driving south on Interstate 79 near milepost 61, when he encountered a "break" in the pavement. This "break" was a difference in pavement elevation where a resurfacing project was occurring. As a result, claimant's vehicle, a 1978 Volkswagen Rabbit, suffered a broken front spring, shock absorber, and constant velocity joint. The damage was repaired at a cost of

\$352.92. Claimant testified that the incident occurred at approximately 7:00 p.m. and that it was dark. He stated that he only remembered a flashing sign at the construction site, but that there may have been others.

John Campbell, maintenance crew supervisor for the project in question, testified that this work was begun on October 26 or 27, 1983. He stated that no more than two inches of roadway surface was removed at that time. Mr. Campbell also testified that there were two portable flashing arrows, one stationary flashing arrow, and approximately 10 signs erected near the construction site.

The evidence as presented indicates that claimant's automobile was damaged in an area of construction. Mr. Campbell's testimony indicated that this construction area was properly marked. The Court can only conclude that claimant's failure to observe the warning signs was the proximate cause of the damages suffered. The claim must, therefore, be denied.

Claim disallowed.

Opinion issued August 1, 1984

DAVID BOBENHAUSEN

vs.

DEPARTMENT OF HIGHWAYS

(CC-84-94)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimant seeks \$94.60 for damages sustained by his 1978 Volkswagen Rabbit which struck rocks in the roadway. The incident occurred on January 26, 1984, at approximately 6:00 a.m., on Route 39 near Swiss, Nicholas County, West Virginia. The right front tire and wheel were replaced following the accident. Claimant testified that the rocks appeared to have fallen within several hours of his striking them. Ernest Eugene Stewart, general maintenance foreman in Nicholas County, testified that there were no complaints of rock falls in the vicinity of the accident on the date in question.

The State is neither an insurer nor a guarantor of the safety of persons travelling on its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). For the State to be found liable, it must first have had either actual or constructive notice of the defect in the roadway. As there was no such proof in this case, the claim must be denied.

Claim disallowed.

Opinion issued August 1, 1984

DONNA G. CRITTENDON

vs.

DEPARTMENT OF HIGHWAYS

(CC-84-49)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On December 22, 1983, at approximately 8:00 p.m., claimant was traveling east on Interstate 77, at the Charleston city limits, when her vehicle, a 1983 Oldsmobile Cutlass, struck an expansion joint which had arisen in the highway. The right front and rear tires and rims were damaged. The damage was repaired at a cost of \$428.51. Claimant's insurance company paid all of that sum except for a \$100.00 deductible. Claimant also incurred a \$25.00 towing charge. She testified that several other vehicles had been damaged by the expansion joint, but did not know how long the condition had existed. Herbert C. Boggs, Interstate Supervisor in District 1, testified that he had been notified of the broken expansion joint at about 8:30 or 9:00 p.m. He immediately dispatched a crew to repair the joint.

The State is neither an insurer nor a guarantor of the safety of travellers on its highways. *Adkins vs. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). For the respondent to be held liable for damages caused by road defects of this type, the claimant must prove that respondent had actual or constructive notice of the existence of the defect and a reasonable amount of time to correct it. *Davis vs. Dept. of Highways*, 11 Ct.Cl. 150 (1976). The evidence indicated that there was no advance warning of any problems with the expansion joint, and that respondent acted promptly upon notification of the condition. The Court must, therefore, deny the claim.

Claim disallowed.

Opinion issued August 1, 1984

CARL L. ELAM AND KRISTINE M. ELAM

vs.

DEPARTMENT OF HIGHWAYS

(CC-84-65)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was originally filed in the name of Kristine M. Elam, but

when the testimony indicated that the vehicle, a 1982 Toyota Tercel, was titled in the names of Carl L. Elam and Kristine M. Elam, the Court, on its own motion, amended the style to include Carl L. Elam as an additional claimant.

On February 20, 1984, claimant, Kristine M. Elam, was driving west on Route 60 from Montgomery, West Virginia, when the vehicle struck a pothole. The hole was located near the right edge of the pavement. Claimants seek \$42.19 for replacement of a damaged tire. Claimant testified that she was aware of the pothole but had not reported it to respondent. She stated that she had previously maneuvered around the hole, but was unable to this time.

The State is neither an insurer nor a guarantor of the safety of motorists on its highways. *Adkins vs. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). For the respondent to be liable for the damages caused by the pothole, proof of actual or constructive notice of the defect is required. Although photographs of the pothole demonstrate that the hole must have been in existence for some time, so that respondent should have had constructive notice of it, the Court finds that claimant, with her prior knowledge of the hole, was likewise negligent. Under the doctrine of comparative negligence, the Court is of the opinion that this negligence is equal to or greater than respondent's, and disallows the claim. *Hall vs. Dept. of Highways*, 13 Ct.Cl. 408 (1981).

Claim disallowed.

Opinion issued August 1, 1984

PENNY M. ESWORTHY AND
CHARLES R. BICKERTON

vs.

DEPARTMENT OF HIGHWAYS
(CC-84-82a)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was originally styled in the name of Penny M. Esworthy, but when the testimony established that the vehicle, a 1984 BMW, was titled in the names of Penny M. Esworthy and her husband, Charles R. Bickerton, the Court, on its own motion, joined Charles R. Bickerton as an additional claimant.

On February 23, 1984, at approximately 8:30 p.m., claimant was traveling south on Route 62 in Kanawha County, West Virginia, when her vehicle struck a pothole in the road. The left front wheel was

damaged in the amount of \$180.04. Claimant testified that she did not observe the pothole prior to striking it.

The State is neither an insurer nor a guarantor of the safety of motorists on its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order for respondent to be found liable for the damages sustained, proof of actual or constructive notice of the defect in question must be shown. The claimant testified that when she reported the pothole to respondent after the accident, she was told it had not been reported previously. As there was no proof of notice, the claim must be denied.

Claim disallowed.

Opinion issued August 1, 1984

PENNY M. ESWORTHY AND
CHARLES R. BICKERTON

vs.

DEPARTMENT OF HIGHWAYS
(CC-84-82b)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was originally styled in the name of Penny M. Esworthy, but when the testimony established that the vehicle, a 1984 BMW, was titled in the names of Penny M. Esworthy and her husband, Charles R. Bickerton, the Court, on its own motion, joined Charles R. Bickerton as an additional claimant.

On January 1, 1984, claimants' vehicle struck a pothole on Route 62 between Charleston and Cross Lanes, West Virginia. The right front wheel was damaged as a result of the incident. Claimants seek \$211.85 for the replacement of the damaged wheel. Claimant testified that she had no knowledge as to how long the pothole had been in existence or whether respondent had been given notice of the defect.

The State is neither an insurer nor a guarantor of the safety of persons travelling on its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order for the respondent to be liable, it must first have had either actual or constructive notice of the defect in the roadway. Since there was no proof in this case that the respondent had notice of the defect, the claim must be denied.

Claim disallowed.

Opinion issued August 1, 1984

W. AUVIL GODWIN

vs.

DEPARTMENT OF CORRECTIONS

(CC-84-145)

No appearance by claimant.

J. Bradley Russell, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer. Claimant seeks \$2,700.00 for services rendered to respondent's Huttonsville Correctional Center. Claimant oversaw the operation of respondent's wastewater plant from October 1982 through June 1983. Respondent, in its Answer, admits that this is valid and owing. In view of the foregoing, the Court grants an award in the amount sought.

Award of \$2,700.00.

Opinion issued August 1, 1984

HERBERT MIDKIFF

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-417)

Herbert H. Henderson, Attorney at Law, appeared for claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimant Herbert Midkiff is the owner of property located at 2599 Hutchinson Branch Road in Kenova, Wayne County, West Virginia, which he purchased in December of 1974. Hutchinson Branch Road, known as State Local Service Route 8/1, is owned and maintained by the respondent.

Mr. Midkiff testified at the hearing that, as early as 1975, he noticed a drainage problem on Hutchinson Road. The claimant contends that the failure of the respondent to properly ditch the road has resulted in excessive drainage upon his property causing damage thereto.

In 1979 the flow of water from Route 8/1 onto claimant's land saturated the soil in the area of the leach bed for the septic tank, causing it to fail.

Testifying on behalf of the respondent was Curtis Asbury, Wayne County Maintenance Supervisor, who stated that State Local Service

Route 8/1 is a "low priority" road because of the traffic count. As such, the road must receive "at least routine maintenance once a year." When asked how many times the ditch along Route 8/1 in the vicinity of claimant's property had been cleaned in the past five years, Mr. Asbury replied, "three times."

Liability for surface water damage has been imposed upon the State by this Court when the Department of Highways has improperly diverted surface water or collected it in a mass and caused it to flow onto a claimant's land in three basic situations: where culverts were improperly maintained or inadequate in size, where drainpipes were negligently maintained, and where ditch lines were not properly maintained. On the other hand, no liability on the part of the State has been found where water flows in a natural course downward onto lower property. *Wotring v. Dept. of Highways*, 12 Ct.Cl. 162 (1978).

The record in this claim indicates that the damage to the claimant's property resulted from a combination of causes. Photographs introduced into evidence show Mr. Midkiff's property to be lower than the adjoining areas. Water flowed naturally from the higher elevation of Route 8/1 down to claimant's land. However, the testimony of Mr. Midkiff, that the water came from the improperly maintained ditch on the opposite side of the roadway, flowed across the road, and then down to his property, cannot be ignored.

The excessive amount of water cast upon the claimant's land damaged claimant's septic tank requiring it to be replaced at a cost of \$2,555.00. The claimant also expended \$1,124.00 for work performed on his driveway and the road in an attempt to correct the water problem. The alleged loss of \$2,000.00 in an attempted sale of the property is purely speculative in nature and will not be considered by the Court as damages.

From the record in this claim, the Court is of the opinion that excessive water, beyond that which naturally would have occurred, was cast upon claimant's land as a result of inadequate maintenance of the ditch line on Hutchinson Branch Road; therefore, the Court allows the claim in the amount of \$3,679.00.

Award of \$3,679.00.

Opinion issued August 1, 1984
ELIZABETH D. MORGAN
vs.
BOARD OF REGENTS
(CC-84-76)

No appearance by claimant.

J. Bradley Russell, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$1,543.04 for back wages allegedly due her based upon an incorrect job classification. Respondent, in its Answer, denies that claimant is due \$1,543.04, but admits that claimant is due \$766.00. Claimant has agreed to accept \$766.00 in full settlement of her claim. The Court, therefore, makes an award to claimant in the amount of \$766.00.

Award of \$766.00.

Opinion issued August 1, 1984
STEVEN GERARD NOONAN
vs.
BOARD OF REGENTS
(CC-84-133)

No appearance by claimant.

J. Bradley Russell, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks an award for emergency medical service charges incurred when he injured his right arm on a broken porcelain tile in his dormitory at West Virginia University. Respondent, in its Answer, admits the validity of the claim and joins claimant in requesting that \$60.00 be awarded to claimant. The Court, therefore, makes an award in the amount of \$60.00.

Award of \$60.00.

Opinion issued August 1, 1984

RICHARD A. SMOOT

vs.

DEPARTMENT OF HIGHWAYS

(CC-84-13)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimant seeks \$26.87 for the replacement of a tire on his 1979 Subaru Brat which was damaged when he struck a pothole on U.S. Route 60 near Campbell's Creek, West Virginia. The incident occurred on November 24, 1983, at approximately 7:00 p.m. Claimant described the hole as being approximately 16 inches long, 28 inches wide, and eight inches deep when he viewed what he thought was the hole a week after the incident. Claimant testified that he did not see the pothole prior to striking it, but stated he was aware of holes in that area.

The State is neither an insurer nor a guarantor of the safety of motorists on its highways. *Adkins vs. Sims*, 130 W. Va. 645, 46 S.E.2d 81 (1947). In order for the respondent to be found liable for the damages, it must have had actual or constructive knowledge of the defect in question. While there was no evidence of actual notice, a hole of the dimensions described by claimant could not have developed overnight, and respondent is therefore charged with constructive knowledge of the hole. However, claimant, with his prior knowledge of the condition of the road, was likewise negligent, and the Court finds that this negligence was equal to or greater than respondent's. The Court must, therefore, deny the claim.

Claim disallowed.

Opinion issued August 1, 1984

DORIS A. TERRY AND MICHAEL A. TERRY

vs.

DEPARTMENT OF HIGHWAYS

(CC-84-50)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was originally styled in the name of Doris A. Terry, but when the testimony indicated that the vehicle, a 1983 Volkswagen Rabbit GTI, was titled in the name of Doris A. Terry and Michael A.

Terry, the Court, on its own motion, amended the style to include Michael A. Terry as an additional claimant.

The claimant, Doris A. Terry, testified that she struck a pothole on Coal River Road, 1.8 miles from St. Albans, in Kanawha County, West Virginia. The incident occurred on January 24, 1984, at approximately 6:20 p.m. The right front tire was replaced and the wheels aligned for a total cost of \$112.46. Claimant testified that she drove the road daily, but had not seen the pothole before.

The State is neither an insurer nor a guarantor of the safety of motorists on the highways. *Adkins vs. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order for the respondent to be found liable for the damages incurred, proof of notice, either actual or constructive, of the defect in question must be shown. As there was no such evidence presented, the claim must be denied.

Claim disallowed.

Opinion issued August 6, 1984

JOSEPH E. BOWERY, II

vs.

DEPARTMENT OF HIGHWAYS

(CC-83-287)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On June 3, 1982, claimant was driving north on Interstate 77 between mile markers 125 and 126, when the right front tire of his automobile caused a piece of pavement to come out of the surface of the road. The right rear tire of claimant's 1980 Datsun 310 struck the pavement, causing the tire to go flat. Claimant seeks \$50.39 for the replacement of the tire.

The State is neither an insurer nor a guarantor of the safety of travellers on its highways. *Adkins vs. Sims*, 130 W. Va. 645, 46 S.E.2d 81 (1947). In order for the respondent to be found liable for damages caused by a defect in the road, the respondent must have had either actual or constructive notice of the defect. There was no evidence of notice in this claim and, therefore, the claim must be denied.

Claim disallowed.

Opinion issued August 6, 1984
C.G.M. CONTRACTORS, INC.
vs.
DEPARTMENT OF HEALTH
(CC-82-322)

Joseph W. McFarland, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

LYONS, JUDGE:

On or about July 14, 1981, claimant entered into a contract with respondent for the construction of a food services building at the Colin Anderson Center in St. Mary's, West Virginia. Claimant's bid for the project was \$839,938.00, but deducted from that sum was \$75,027.00 as the amount deleted per contract alternate #1. The alternate reads:

“Delete all kitchen equipment except exhaust hoods for cooking equipment, walk-in refrigeration units, and dishwashing system. Provide rough-in for future installation only.”

Claimant contends that by the terms of this alternate, claimant was not responsible for furnishing and installing the refrigerator and dishwasher, and bid the contract and alternate accordingly. Claimant now seeks to recover \$75,027.00 for supplying and installing the equipment in question. Respondent contends that the contract documents require claimant to furnish the refrigerator and dishwasher, and states that this is clearly indicated by an addendum to the contract which lists all omitted kitchen equipment. Neither the refrigerator nor the dishwasher is listed on the addendum.

Gene Gorrell, Executive Vice-President and Senior Estimator at C.G.M. Contractors, testified that the amount of the deduction covered all the kitchen equipment, except for exhaust hoods. Mr. Gorrell stated, however, that while there are exhaust systems for the walk-in refrigerator and dishwasher units, there are no exhaust hoods. He further stated that the addendum listing the omitted kitchen equipment does not list the refrigerator or dishwasher.

The Court finds that by the clear and unambiguous language of the contract alternate and addendum, claimant was responsible for the refrigerator and dishwasher. Therefore, any error in the deduction is due to a mistake on claimant's part and does not arise out of any ambiguity in the contract documents. The Court is of the opinion to, and does, deny the claim.

Claim disallowed.

Opinion issued August 6, 1984

MICHAEL R. CARPENTER

vs.

DEPARTMENT OF HIGHWAYS

(CC-83-299)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimant seeks \$712.86 for damages sustained by his 1978 Jeep CJ5 on September 14, 1983, in an accident on Route 39/14 in Nicholas County, West Virginia. Route 39/14 is a narrow road which is paved at the accident site. Claimant had moved off the road to allow another vehicle to pass in the opposite direction, when he struck a slab of cement which was hidden by grass. There was a pole in the cement, and claimant was unsure whether he struck the pole, pulling the cement slab out of the ground, or whether the slab was already above ground level. Claimant testified that he had driven the road daily for three months prior to the accident, but had never noticed the pole or cement slab.

The State is neither an insurer nor a guarantor of the safety of travellers on its roadways. *Adkins vs. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order for the respondent to be liable, actual or constructive notice of the defect must be shown. Although the claimant testified that respondent's crews had worked on part of Route 39/14 prior to the incident, they had not worked in this particular segment. The sole negligence alleged is that respondent had not cut the grass around the slab. There was no evidence that respondent owned or placed the slab at the site, nor that it was on respondent's right of way. The Court cannot conclude that respondent had notice of the slab, or was otherwise negligent. The claim is denied.

Claim disallowed.

Opinion issued August 6, 1984

PATRICIA COLEMAN

vs.

DEPARTMENT OF HIGHWAYS

(CC-84-30)

Charles Coleman and David Turley represented claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was originally styled in the names of Charles Coleman and David Turley, but when the testimony indicated that the vehicle, a 1981 Chevette, was titled in the name of Patricia Coleman, the Court amended the style to reflect that fact.

David Turley, claimant's son and driver of the vehicle at the time of the accident, testified that he was travelling on Route 61 from Marmet, West Virginia, when he lost control of the vehicle after encountering ice on a bridge. The incident occurred on February 11, 1983, at approximately 11:45 p.m. Mr. Turley testified that the road was dry except for the ice on the bridge. The vehicle was damaged in the amount of \$1,181.43. It is alleged that respondent was negligent for failing to post the bridge with a sign stating bridge freezes before road.

The State is neither an insurer nor a guarantor of the safety of travellers on its highways. *Adkins vs. Sims*, 130 W. Va. 645, 46 S.E.2d 81 (1947). This Court has previously held that the mere presence of ice on a bridge in wintertime does not constitute negligence on the part of respondent. Furthermore, it is common knowledge that precipitation may freeze on bridge surfaces when other roadway areas are dry. *Bodo vs. Dept. of Highways*, 11 Ct.Cl. 179 (1976). The Court, therefore, denies the claim.

Claim disallowed.

Opinion issued August 6, 1984

MYRTLE CRADDOCK

vs.

DEPARTMENT OF HIGHWAYS

(CC-84-56)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was originally filed in the names of Lucian and Myrtle Craddock, but the testimony established that the vehicle, a 1981 Oldsmobile Cutlass, was titled in the name of Myrtle Craddock alone. The Court, on its own motion, amended the style to reflect the true owner of the vehicle.

On January 7, 1984, claimant was travelling south on Route 10

towards Logan, West Virginia, when she struck a pothole, damaging the right tires and rims of the vehicle in the amount of \$224.62. Claimant testified that the hole was about 14 inches around and seven inches deep. She did not see the hole because it was full of water and stated she only travels Route 10 about once a year.

The State is neither an insurer nor a guarantor of the safety of travellers on its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order for the claimant to prevail in a case like this, respondent must have had either actual or constructive notice of the defect in question. In this claim, there was no evidence of actual notice. However, the Court finds that in view of the size of the pothole, respondent should have known of its existence. Route 10 is a main road for travel between Huntington and Logan, and as a pothole of this size could not have developed overnight, respondent is charged with constructive notice of its existence. The Court, therefore, makes an award to the claimant in the amount of \$224.62.

Award of \$224.62.

Opinion issued August 6, 1984

CHARLOTTE HUBBELL

vs.

DEPARTMENT OF HIGHWAYS

(CC-84-3)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimant's vehicle, a 1974 Chevrolet Nova, was damaged on November 17, 1983, between 9:45 p.m. and 10:00 p.m., when she struck a piece of cement on I-64 near Winfield, West Virginia. The claimant testified that she saw something in the road which appeared to be "sheet rock no more than an inch or two high," but later estimated the cement to be eight inches high and 2 feet by 4 feet. This estimate was based, not on actual viewing of the cement, but on marks on the underside of the vehicle. The gas tank, exhaust pipe, and fly wheel were damaged. Claimant received an estimate of repair for \$471.03 and incurred a towing charge of \$9.00. Claimant had no knowledge of how long the cement had been in the road.

The State is neither an insurer nor a guarantor of the safety of motorists on the highways. *Adkins vs. Sims*, 130 W. Va. 645, 46 S.E.2d 81 (1947). In order for the respondent to be found liable for the damages incurred, proof of actual or constructive notice of the

defect in question must be shown. As there was no evidence of notice in this case, the claim must be denied.

Claim disallowed.

Opinion issued August 6, 1984

LIBERTY MUTUAL INSURANCE COMPANY,
AS SUBROGEE OF JEFFREY STEIN AND CONNIE STEIN

vs.

DEPARTMENT OF HIGHWAYS
(CC-82-154)

William E. Mohler, III, Attorney at Law, for claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimant seeks \$2,449.29, which amount includes a \$200.00 deductible on behalf of its insured, Jeffrey Stein, as a result of an accident which occurred on November 7, 1981, at 7:15 p.m. on the Patrick Street Bridge in Charleston, West Virginia. Claimant's insured, Jeffrey Stein, was driving his 1978 Toyota Celica on the bridge when he struck a newly installed concrete island at the north end of the bridge. At that time, a construction project involving the bridge had just been completed, resulting in a new bridge deck being built. The island had been present prior to the commencement of the project, but had been removed when the construction began. The island had served to direct motorists to the right onto Kanawha Boulevard. During the construction, traffic could proceed straight ahead through an intersection instead of having to make a right-hand turn.

Robert Campbell, who was an Area Engineer of Construction at the time of the accident, testified that the island had been reinstalled a day or two before the accident. He said that two signs on the bridge reading "Right Lane Must Turn Right" were uncovered before the island's construction was completed. The island itself was not marked by either reflectors or other warning devices. Mr. Stein testified that he saw no signs on the bridge.

It is the opinion of the Court that respondent negligently failed to adequately warn the travelling public of the newly reinstalled island. However, claimant's insured failed to observe the signs which were present. This Court finds that this negligence was equal to or greater than respondent's, and under the doctrine of comparative negligence, the claim is denied. See: *Bailey vs. Dept. of Highways*, 15 Ct.Cl. _____, opinion issued October 3, 1982.

Claim disallowed.

Opinion issued August 6, 1984

EDGAR L. MOSS

vs.

DEPARTMENT OF HIGHWAYS

(CC-84-18)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimant seeks \$102.97 for the replacement of two tires on his 1980 Dasher station wagon, which were damaged when claimant struck a pothole on Doc Bailey Road, near Cross Lanes, Kanawha County, West Virginia. The incident occurred on December 12, 1983, at about 9:30 p.m. Claimant testified that Doc Bailey Road is a narrow, two-lane road. He encountered the pothole in a curve, and, as there was on-coming traffic, he could not avoid the hole. He stated he had not driven the road for "a couple months" and was not aware of the pothole.

The State is neither an insurer nor a guarantor of the safety of persons travelling on its highways. *Adkins vs. Sims*, 130 W.Va. 645, 46 S.E. 2d 81 (1947). For the respondent to be found liable for damages caused by road defects of this type, the claimant must prove that respondent had actual or constructive notice of the defect. As there was no such evidence presented, the claim must be denied.

Claim disallowed.

Opinion issued August 6, 1984

E. MILTON THOMPSON, JR.

vs.

DEPARTMENT OF HIGHWAYS

(CC-83-351)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was originally filed in the names of E. Milton Thompson, Jr. and Lois Ann Thompson, but when the testimony established that the vehicle, a 1979 Ford Fiesta, was titled in the name of E. Milton Thompson, Jr. alone, the Court amended the style of the claim to reflect that fact.

On November 17, 1983, claimant's wife, Lois Ann Thompson, was driving on I-64 near Winfield, West Virginia, at about 9:45 p.m.,

when she struck a piece of cement in the road. The cement damaged the right front and back tires, alignment, and a strut, in the amount of \$234.35. Mrs. Thompson testified that she did not see the cement before striking it. The cement appeared to have broken out of the road, and measured about 9 inches in diameter. Mrs. Thompson had no knowledge of how long the piece of pavement had been in the road.

The State is neither an insurer nor a guarantor of the safety of motorists on its highways. *Adkins vs. Sims*, 130 W. Va. 645, 46 S.E.2d 81 (1947). In order for the respondent to be held liable, proof of actual or constructive notice of the defect is required. As there was no evidence of notice in this claim, it must be denied.

Claim disallowed.

Opinion issued August 6, 1984

HARRY L. WHITE

vs.

DEPARTMENT OF HIGHWAYS

(CC-84-87)

Robert Morganstern, AFSCME representative, for claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimant was employed by respondent as a mechanic at its District 1 Garage in Charleston, West Virginia. During the weekend of February 25 - 26, 1984, certain mechanic's tools, owned by claimant, were stolen from the garage. Claimant seeks \$1,897.61 as the replacement cost of the tools stolen. He was required to keep his own tools at the garage for use in his job, but was not required to have the tools on the premises beyond working hours. Claimant alleges that respondent negligently failed to provide adequate security for the garage. There was no night watchman there and the garage windows did not lock.

After careful consideration of the record, the Court concludes that it would be unreasonable to have expected claimant to take his tools home on weekends, considering the number of tools involved. He was required to have tools on the job, and respondent failed to provide adequate security for the building.

Some of the tools were only two years old. Some were from five to ten years old. The Court deems the tools to have a value of 90% of replacement cost.

Award of \$1,707.85.

Opinion issued August 6, 1984

ANITA FAYE WICKLINE

vs.

BOARD OF REGENTS

(CC-84-52)

Claimant appeared in person.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

Claimant seeks \$163.05 as the replacement cost of several textbooks, notebooks, and posters which were damaged or destroyed in her dormitory room at West Virginia Institute of Technology in Montgomery. The damage occurred on December 27, 1983, during the Christmas break, when a water pipe in the dormitory froze and burst. Claimant alleges that respondent is liable for the damage based upon Provision III (11) of Institute's Housing and Food Service Contract. The Provision states:

“The Institution does not assume responsibility for any and all losses to persons or property while in the residence halls by reason of any utility failure, accident, injury, loss or damage except for negligence on the part of employees of the institution.”

At the time of this incident, there was a prolonged and bitter cold spell occurring. The Court finds that there was negligence on the part of the respondent in turning off the heat in the dormitory at such a time, and that this negligence was the cause of the damage to claimant's personal property.

Claimant's posters and notebooks were destroyed, at a loss of \$34.65. Claimant's textbooks, with a replacement cost of \$128.40, were damaged but usable, and the Court has allowed damages of 50%, or \$64.20 for the textbooks.

Award of \$98.85.

Opinion issued August 6, 1984

TIMOTHY WILSON

vs.

DEPARTMENT OF EDUCATION

(CC-83-357)

No appearance by claimant.

J. Bradley Russell, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant was hired by the McDowell County Board of Education in August 1982 to perform substitute teaching work. He was terminated on September 17, 1982, because he did not qualify for a substitute teaching permit. Claimant alleges that he had an oral contract with the late Superintendent of the McDowell County Board of Education to teach until December 1982. Claimant sought to recover \$4,200.00 from the County Board of Education which he alleges he could have earned had he worked until December 1982. The claim was denied and claimant now seeks to recover the monies allegedly due him from respondent.

The respondent has filed a Motion to Dismiss alleging that this Court lacks subject matter jurisdiction over the complaint as the proper party is the McDowell County Board of Education. It is clear that even if claimant was due any money in this claim, it would be owing from the County Board of Education and not respondent. This Court was established to hear claims against the State and its agencies. Specifically excluded from the definition of a State agency is a county board of education. W.Va. Code §14-2-3. It is therefore apparent that the Court does not have jurisdiction over this claim, and the Court sustains respondent's Motion to Dismiss.

Claim dismissed.

Opinion issued September 27, 1984

AVONEL BERO

vs.

DEPARTMENT OF HIGHWAYS
(CC-83-273)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

The claimant seeks \$222.60 for the removal of paint from her automobile, a 1981 Buick Skylark. On September 1, 1983, claimant was travelling on Route 250 in Marion County, West Virginia, when she came up behind respondent's truck which was painting a yellow line down the middle of the road. Claimant testified that she initially started to move over to try to pass the truck, but was motioned back by an employee of respondent. She then followed behind the truck for a distance of several miles, until it pulled off to the side of the road. Upon arriving at her destination, claimant discovered yellow paint in

the left wheel wells and lower left hand side of the vehicle. There was no paint on any other portion of the automobile.

From an inspection of the vehicle, the Court concludes that the claimant must have driven the left wheels on the newly painted line. The location of the paint indicated that it was thrown onto the car by the tires. This conclusion was further strengthened by the fact that the front of the car was free of paint. The Court must, therefore, deny the claim.

Claim disallowed.

Opinion issued September 27, 1984

CHAPMAN PRINTING COMPANY

vs.

BOARD OF REGENTS

(CC-83-344)

William P. Gerichten, Division Manager, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

Claimant seeks \$410.00 allegedly owed by respondent for the printing of forms for Fairmont State College. The Request for Quotations submitted to claimant stated the form was an "Instructor's Grade Report - 3 part - Exactly as per attached sample. No substitutes will be accepted." However, the form which was attached was labelled a "Receipt Form" for the Business Office of Fairmont State College. William P. Gerichten, Division Manager of Chapman Printing, testified that it was his company's policy to print the form as attached. No inquiry was made to respondent concerning the discrepancy. When the forms were delivered to Fairmont, claimant was informed they were not the correct forms, and payment was refused. Mr. Gerichten was uncertain whether the printed materials had been returned to claimant or were still in Fairmont State College's possession.

It is obvious that a discrepancy existed between the form described on the Request for Quotations and the sample form attached thereto. This was due to an error on the part of respondent. It is also obvious that this discrepancy was not brought to respondent's attention by the claimant.

The Court finds that the parties were equally at fault for allowing an obvious error to go uncorrected. As both claimant and respondent

are at fault, they should be held responsible for an equal portion of the cost. The Court, therefore, makes an award to claimant in the amount of \$205.00.

Award of \$205.00.

Opinion issued September 27, 1984

ORVILL E. EDENS

vs.

DEPARTMENT OF HEALTH
(CC-83-243)

Claimant appeared in person.

J. Bradley Russell, Assistant Attorney General, for respondent.

PER CURIAM:

The claimant seeks \$933.81 for repairs of damage to his automobile, a 1976 Oldsmobile, on July 22, 1983. On that date, claimant left the vehicle, with the keys in its ignition switch, parked in front of a bank in Philippi, Barbour County, West Virginia. He went inside the bank to deliver a message, and as he left the bank, he observed his automobile being driven away. Claimant identified the driver as a former patient released from Weston State Hospital, who was at that date being cared for by a Philippi nursing home under the direction of Region 7 Mental Health Center. The driver struck two vehicles before he was stopped. Claimant alleges that the respondent is liable for the damages to his vehicle as the driver was under the respondent's care.

The Court cannot concur with the claimant's contention. The damage to claimant's automobile would not have occurred had the claimant not left the keys in the ignition switch of his unattended automobile. No evidence was presented concerning why the driver happened to be on the streets of Philippi on July 22, 1983. The Court cannot speculate about the advisability of placing this man in the nursing home. The Court, therefore, denies the claim.

Claim disallowed.

Opinion issued September 27, 1984

PAUL EDMONDS AND BRENDA KAY EDMONDS

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-300)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

LYONS, JUDGE:

Claimants, Paul Edmonds and Brenda Kay Edmonds, filed their claim against the respondent for the loss of their property situate on Chestnut Ridge Road in the District of Cologne, Mason County, West Virginia.

By deed dated the 19th day of April 1977, the claimants purchased a tract of real estate situate on Chestnut Ridge Road in Mason County, West Virginia, and on this tract of real estate, claimants made certain improvements, including the drilling of a well, installation of water lines and pipes, and the installation of a septic tank. Claimants placed thereon their 1973 Liberty mobile home.

Starting in the month of November 1979, and continuing through the date of the filing of this claim, claimants contend the road and surrounding earth located along claimants' property slid, causing their well to cave in, their septic tank to fail to function properly, and their mobile home foundation to crack, and causing other related damage to the mobile home. This action, claimants contend, is the result of negligence on the part of the West Virginia Department of Highways to properly maintain a ditch line along Chestnut Ridge Road.

The pictorial exhibits indicate that claimants' mobile home was set on land which embraced certain unnatural drainage areas. James Amenta, soils geologist, testified on behalf of the respondent that the specific landslide that damaged the claimants' property was basically due to the amount of rainfall and the saturation of the soil in the ground over a period of time, especially two consecutive years of heavy rainfall, and he was of the opinion that the heavy rainfall caused the landslides. Mr. Amenta also testified that for the year of 1979, a total of 170 landslides had been referenced to his division for the entire State, and that 51 of these landslides were localized in the area of Mason County.

Mr. Barney Stinnett, soils engineer for the materials control testing division of the Department of Highways, and who had investigated approximately 800 to 900 landslides, including the landslide which affected the claimants' property, was also of the opinion that the in-

creased rainfall had caused the landslide, and not the accumulation of water in the ditch line above claimants' property.

This Court cannot arbitrarily disregard the testimony of the respondent's expert witnesses. Therefore, a clear preponderance of the evidence indicates that the slide was caused by the increased rainfall in the area of the claimants' property and not by the negligence of the Department of Highways.

Claim disallowed.

Opinion issued September 27, 1984

DANNY K. HATFIELD

vs.

DEPARTMENT OF HIGHWAYS

(CC-84-72)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On February 14, 1984, at approximately 9:00 p.m., claimant was driving his 1974 Lincoln north on Route 10 in Lincoln County when the vehicle struck a boulder in the road. The automobile was damaged in the amount of \$3,376.64. Claimant testified that he did not see the boulder prior to striking it because it was dark and he had been temporarily blinded by the headlights of an oncoming vehicle. He said, however, that even if he had seen it, he could not have missed it because it was too large to maneuver around. Claimant testified that he did not know how long the boulder had been in the road prior to his striking it. He added that he drives that route almost daily, and had never seen rocks on the road in that area prior to this incident.

The State is neither an insurer nor a guarantor of the safety of motorists on its highways. *Adkins vs. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). This Court has held on numerous occasions that the unexplained falling of rocks onto a highway without a positive showing that respondent knew or should have known of a dangerous condition is insufficient to justify an award. *Hammond vs. Dept. of Highways*, 11 Ct.Cl. 234 (1977), *Adkins vs. Dept. of Highways*, 13 Ct.Cl. 307 (1980). As no evidence was presented to establish notice of the rock in the road, the Court must deny the claim.

Claim disallowed.

Opinion issued September 27, 1984

EDWARD LAWSON AND BEULAH LAWSON

vs.

DEPARTMENT OF HIGHWAYS

(CC-83-106)

Barbara J. Keefer, Attorney at Law, for claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

LYONS, JUDGE:

Claimants own real property located in Greenville, Logan County, West Virginia. This property fronts on Main Street, which is also known as Route 11/3. Behind the property lies Burgess Avenue, or Route 702/7. Claimants have a house on the property. They allege that work performed by respondent's employees on Burgess Avenue has resulted in water run-off from the road onto their land, causing \$10,000.00 in damages.

Burgess Avenue is little more than a dirt alley which gradually slopes downhill from Claypool Street to Park Street. Claimants' house is situated near the midpoint between those two streets. There is a hillside behind Burgess Avenue. Mr. Lawson testified that in the summer of 1980, respondent placed dirt on Burgess Avenue on the Park Street end. According to Mr. Lawson, this caused a greater slope on Burgess Avenue and caused water to flow onto the property. Mr. Lawson testified that work, in approximately June 1982, consisting of grading and laying drainpipe, did not improve the situation. Claimants dug ditches along the sides of their house to try and redirect the water away from the house. Various expenditures were incurred to repair damage to the house, but much of this evidence was lost when the house burned in October 1982. Claimants received an insurance settlement for the house, but not for the water damages. Claimants have since rebuilt, but make no claim for damage to the present house.

John Sammons, a technician in the maintenance section for District Two, which includes Logan County, testified that Burgess Avenue did not become part of the State road system until June 1981. At that time, a portion of the road, from Park Street to about the midpoint of claimants' property, was taken into the system. The rest of the road was undriveable and, therefore, not included. Mr. Sammons stated that work was performed to improve the drainage on Burgess Avenue in January 1983. A drainpipe was installed and the road was ditched in order to divert the water from the hillside. This work was done on the portion of Burgess Avenue which is within the State road system.

Everett Bowden, a foreman with respondent, testified that prior to 1981, the only time work performed on Burgess Avenue that he was

aware of, occurred in 1980. At that time, dirt and gravel were dumped in potholes on both the Claypool and Park Street ends of Burgess Avenue. Ivan Browning, a highway engineer, testified that this would have had no effect on the drainage in the vicinity of claimants' home. He explained that the water drains in another direction from Claypool Street and Park Street is downhill from claimants' land. Mr. Browning said that the water comes off the hillside and onto claimants' property. There were other contributing factors to the water problem. These include the addition of several houses on the hillside, a driveway directly behind the claimants' land, and grading on Burgess Avenue which was done by a private contractor in the summer of 1980. All of these factors serve to concentrate water onto the lower lying properties.

A preponderance of the evidence clearly indicates that the claimants' property is located in a natural drainage area, and the work performed by the State was not the proximate cause of the damage to claimants' property. *Wotring vs. Dept. of Highways*, 12 Ct.Cl. 162 (1978).

Claim disallowed.

Opinion issued September 27, 1984

MARJORIE GARDEN ASSOCIATES

vs.

DEPARTMENT OF PUBLIC SAFETY

(CC-84-102)

R.F. Gallagher, Attorney at Law, for claimant.

J. Bradley Russell, Assistant Attorney General, for respondent.

PER CURIAM:

The claimant, a West Virginia Limited Partnership, seeks \$210.00 for extra cleaning costs incurred in the cleaning of its apartment in the Marjorie Gardens Apartment Complex in Morgantown, West Virginia. The apartment was the scene of a murder which was investigated by respondent. During the course of the investigation, black and white forensic powder, used for fingerprint detection, was applied extensively throughout the apartment. James Musgrave, head maintenance supervisor of the apartment complex, testified that the apartment was cleaned twice at a cost of \$50.00 in order to remove the powder. The carpet was cleaned at a cost of \$85.00, and the apartment had to be painted a second time at a cost of \$75.00. An apartment in the complex is always repainted when vacated, and no claim was made for the first painting.

It is apparent to the Court that the claimant incurred additional maintenance expenses due to the use of the forensic powder. The use of the powder was necessary to the respondent's investigation, but it would not be equitable to require claimant to expend the additional sums for the cleaning. The Court, therefore, makes an award in the amount of \$210.00.

Award of \$210.00.

Opinion issued September 27, 1984

BENJAMIN F. MCKINLEY AND BARBARA A. MCKINLEY

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-452)

Claimants appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

The claimants seek \$200.00 to resurvey their property in order to replace two pipe and angle iron survey markers, the tops of which were bent by respondent's brush hog. Mr. McKinley testified that on February 27, 1981, respondent was mowing brush along U.S. Route 35, in Henderson, Mason County, West Virginia. He stated that he "heard one happen and I looked out the window and I saw the other one happen." He added that the markers stood approximately 6 inches above the surface of the ground and alleged that they should have been visible to the mower operator. The two markers had been placed upon survey in 1975, and he had later placed concrete around the base of each. These markers were not uprooted, but bent over, and Mr. McKinley contended that this destroyed the accuracy. The bases of the markers were still in the concrete, and he was not sure whether the concrete had been moved.

The damaged markers had not been examined by a surveyor. Mr. McKinley simply presented an estimate of cost sent to him by a survey company following a telephone call. No testimony was adduced from any qualified witness to satisfy the Court that the integrity of the survey or markers was compromised by the tops of the markers being bent over, nor of the actual expense or costs which may necessarily be incurred to restore integrity and/or to replace the markers. The Court cannot speculate, and the claim must be denied.

Claim disallowed.

Opinion issued September 27, 1984

DENNIS L. SANDERS AND NANCY J. SANDERS

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-99)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

The claimants are the owners of property located on the north side of County Route 72, also known as Deep Hollow Road, in Morgantown, Monongalia County, West Virginia. The Deep Hollow Road runs east-west. Claimants moved onto the property in November 1978. Claimant, Dennis L. Sanders, originally filed this claim in his own name; however, the record reflects that his wife, Nancy J. Sanders, also has an interest in the property which is the subject of this claim. The Court, on its own Motion, amended the style of the claim to include Nancy J. Sanders as a party claimant. In early 1979, claimants began to experience water problems. They seek \$505.00 for bulldozer work and the replacement of gravel on their driveway. Claimant, Dennis L. Sanders, testified that the water came onto his property from State Route 3, known as Summer School Road, from which Deep Hollow Road turns. The ditch lines on Route 3, claimant alleged, were filled with debris and did not carry the water from Route 3. Instead, it flowed downhill from Route 3, across the property on the south side of Deep Hollow Road, over that road and onto claimants' land. Photographic evidence showed that the ditch lines adjacent to Route 3 were filled with rocks and other types of debris, as well as water flowing out of the ditch lines and across the road.

The testimony and photographs indicate that the damage claimants have experienced arises from respondent's improper maintenance of the ditch lines on Route 3. Respondent's failure to maintain the ditch lines resulted in water flowing down the hillside, across Deep Hollow Road, and onto claimants' property, resulting in the damage alleged. The Court, therefore, makes an award to claimants in the amount sought.

Award of \$505.00.

Opinion issued September 28, 1984

MINNIE LEE BROWN

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-361)

John Boettner, Jr., Attorney at Law, for claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

LYONS, JUDGE:

The claimant is the owner of property located at 822 Avesta Drive, St. Albans, Kanawha County, West Virginia. This property was the subject of a prior claim, *Brown v. Dept. of Highways*, 12 Ct.Cl. 125 (1978). In that claim, claimant received an award of \$4,500.00 for damages to her property as the result of surface water run-off from the road, and from an improperly maintained drainpipe under the road. Claimant alleges that subsequent repairs made by the respondent have not alleviated the situation, and she seeks \$35,000.00 in damages.

Claimant testified that the repairs undertaken by respondent included replacing the drainpipe under the road and resurfacing the road. These measures lessened the problem "to a very small degree" and, following further complaints to respondent, a blacktop curb was installed on Avesta Drive. She stated that the curb was installed in June of 1981 or 1982. Claimant submitted evidence of various costs, in the amount of \$1,546.41, incurred in attempting to prevent further water damage. An appraisal report prepared by Gerald Terry estimated the cost to cure at \$1,200.00 to \$1,500.00. He suggested constructing a catch basin with a wing wall to direct water to the basin, and a drain line built from the basin to the existing drain line as a means of diverting the water.

Joseph T. Deneault, Assistant District Engineer in District 1, testified that claimant's current water problems arise from several sources. Part of the water enters claimant's property from adjoining properties. Part of the water comes from the roadway surface, but Mr. Deneault stated that claimant's property is part of the natural drainage area, and the curbing directs water which would go onto the land before reaching the curb. Mr. Deneault testified that the measures respondent has taken have corrected the problem as much as feasible without redirecting the water that otherwise flows on the land to the natural drains. He said that the volume of water on claimant's land would not "cause damage to her property." Mr. Deneault added that Mr. Terry's suggestion of building a catch basin with a wing wall was a solution to the problem, but he did not know whether it was "a feasible one or the best one."

The Court is of the opinion that the claimant has failed to establish by a preponderance of the evidence that the actions by the respondent resulted in damage to her house.

Accordingly, the Court is of the opinion that the claimant has not shown, by a preponderance of the evidence, that her damages were the result of negligence on the part of the Department of Highways, and hereby disallows the claim.

Claim disallowed.

Opinion issued September 28, 1984

WILLIAM E. RICHARDS

vs.

GOVERNOR'S OFFICE OF ECONOMIC & COMMUNITY
DEVELOPMENT (W. VA. AERONAUTICS COMMISSION)
(CC-82-336)

David Cecil, Attorney at Law, for claimant.

Brenda Nichols Harper, Attorney at Law, for respondent.

LYONS, JUDGE:

Claimant was formerly employed as the Executive Director of the West Virginia State Aeronautics Commission. His employment was terminated by letter dated August 13, 1982, from Charles C. Miller, Chairman, West Virginia Aeronautics Commission. The funding for the Aeronautics Commission had been eliminated from the 1982-83 budget. Responsibility for the Aeronautics Commission programs was transferred to the Governor's Office of Economic & Community Development (hereinafter referred to as GEOCD). Claimant seeks payment for accumulated sick leave and annual leave as of June 30, 1982, the last day of the 1981-82 fiscal year. On that date claimant had 116 days of sick leave and 35 days of annual leave.

Claimant was informed by Miles Dean, Director of the GEOCD, by letter dated May 11, 1982, that his position would be terminated. The letter stated in part, "As the funding for the agency is not included in the State budget for Fiscal 1982-83, I would encourage you to begin the process of using your accumulated annual leave in such a way that does not result in the inability to be paid beyond June 30, 1982." Claimant did not use any of his annual leave prior to June 30, 1982.

Claimant was on sick leave prior to June 30, 1982 through his last day of work. His treating physician, Dr. Rocco A. Morabito, in a letter dated August 31, 1982, wrote that claimant would be able to return

to work on September 7, 1982. At the time claimant went on sick leave, he did not inform any of the members of the Aeronautics Commission of that fact. He explained, however, that this was customary procedure. Respondent alleges that claimant's failure to inform his employer of his illness has resulted in his loss of benefits for sick leave.

The Court, in *Jarrell vs. Department of Highways*, 14 Ct.Cl. 407 (1983), denied an award of sick leave where the employee was terminated as part of the reduction in force. The same would also hold true for annual leave.

Claim disallowed.

Opinion issued September 28, 1984

S. DEAN SIX

vs.

BOARD OF REGENTS

(CC-83-10)

Claimant appeared in person.

J. Bradley Russell, and Edgar Bibb, Assistant Attorneys General, for respondent.

LYONS, JUDGE:

Claimant files this claim as a result of loss of items which claimant alleges were taken between the hours of six o'clock a.m. and nine o'clock a.m. on November 9, 1982, while claimant was a student at West Virginia University.

While a student, claimant took a position in the University residence hall, which required claimant to live within the residence hall. His apartment was provided, and had a sliding glass door that opened onto an outside alley.

The claimant lived in this apartment for three years; and the evidence indicates that the lock was inadequate, but the University maintenance staff furnished the claimant with a two-by-four, which the evidence indicates was cut in such a manner that, with proper installation, it would bar the door and provide an adequate lock.

Claimant indicates that the two-by-four brace supplied was an inadequate brace, and, therefore, the door could be jarred and opened. The evidence clearly indicates that the claimant notified the University maintenance of the defective door. This testimony is corroborated by claimant's supervisor.

Mr. Nick Asbestos, Assistant Supervisor of Maintenance, stated that on numerous occasions, Mr. Six's door was left partially open. He also stated that the two-by-four was not too long, as stated by Mr.

Six, and that Mr. Six had been instructed as to the use of the two-by-four. Mr. John Lawson, the Maintenance Mechanic, stated that he had also seen Mr. Six's door open on numerous occasions. Mr. Hubert Moyers, Maintenance Supervisor, stated that he had instructed Mr. Six on the use of the two-by-four as a means of security, and, also that he noticed Mr. Six's door open on several occasions.

A preponderance of the evidence clearly indicates that the claimant himself was negligent in that he left the door open on numerous occasions. He himself testified that students were in and out of this room. The evidence clearly indicates that the University took precautions that, if adequately followed, would have saved Mr. Six's room from being burglarized.

Claim disallowed.

Opinion issued September 28, 1984

HARRY E. WILMOTH

vs.

DEPARTMENT OF HIGHWAYS

(CC-83-161)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

LYONS, JUDGE:

Claimant filed this claim alleging damages in the amount of \$491.64 to his 1977 model Mercury Monarch. The claimant, on September 11, 1982, was driving on Harrison Avenue, U.S. Route No. 33, near the intersection of North Randolph Avenue and U.S. Route 219 in Elkins, Randolph County, West Virginia, when his vehicle struck a broken and unmarked steel culvert in the paved portion of the roadway, damaging his right front rally wheel and rim, shock absorber, and tires.

The evidence indicates that the grading of the culvert was about five inches below the roadway surface. The culvert abuts the curb.

The evidence further indicates that the claimant travelled this road approximately three or four times per day for nearly twenty-five years, but never observed the culvert.

The undisputed evidence is that the condition of the culvert had existed for some time and was a condition that was hazardous to all who travelled on that portion of the highway.

A preponderance of the evidence showed that the claimant was not

negligent, and that the Department of Highways should have had notice of this condition as the evidence indicated that it had existed for a number of months.

The evidence further revealed that the claimant's actual damage was \$250.00.

The Court, therefore, makes an award to the claimant in the amount of \$250.00.

Award of \$250.00.

Opinion issued October 23, 1984

SANDRA KAY CASSIDY AND BROOKS CASSIDY

vs.

DEPARTMENT OF HIGHWAYS

(CC-78-160)

Gregory W. Evers, Attorney at Law, for claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

GRACEY, JUDGE:

On February 22, 1978, claimant, Sandra Kay Cassidy, was involved in a single-vehicle accident on an elevated portion of Interstate 64 near the Fort Hill Bridge in Charleston, Kanawha County, West Virginia. During that winter, snowfalls in Kanawha County had been heavy, and respondent, in order to keep the interstate clear, had allowed snow to be plowed against the retaining wall. Claimant, upon approaching the bridge, lost control of her vehicle, struck the left retaining wall, crossed three lanes of traffic, and struck the right retaining wall. The vehicle ran up a bank of snow which had been plowed against the wall, travelled on top of the retaining wall for a short distance, and struck a lamp post. The vehicle then fell off the retaining wall approximately 70 feet to MacCorkle Avenue below. Claimants seek \$150,000.00 in damages, alleging that respondent was negligent in placing snow against the retaining wall which reduced the protection the walls afforded motorists.

Claimant Sandra Kay Cassidy testified that as she approached the area of the bridge, she was travelling approximately 42-43 m.p.h. At the time, it was neither snowing nor raining. There was powdery snow on the road, but no accumulation. As she entered a curve, her vehicle, a 1969 Oldsmobile station wagon, slid to the left hitting the retaining wall. The vehicle then began sliding to the right. Claimant's attempt to straighten out the vehicle failed, and the automobile went up and over

the right retaining wall. Claimant sustained a fractured right shoulder, a broken knuckle, facial lacerations, and several broken teeth. She was treated and released from the hospital on the date of the accident. The vehicle was a total loss.

Trooper W.D. Sellards of the West Virginia Department of Public Safety was investigating another accident on I-64 when he observed the Cassidy vehicle sliding across the highway. He stated that he saw the automobile only after it had struck the left retaining wall. The vehicle appeared to him to be sliding on rock salt which had been applied to the highway a short time before. The highway seemed to him to be free of ice. Trooper Sellards stated his opinion that the accident resulted from the claimant's failure to maintain control of her vehicle, but he made no actual investigation of the incident. He further stated that the vehicle struck the right retaining wall at about a 45° angle.

Garland W. Steele, Construction Maintenance and Materials Engineer, testified that there were snowfalls prior to claimant's accident. He said that respondent was engaged in "almost continuous snow and ice control operations." The snowfall was, in fact, the heaviest since the opening of the interstate. Mr. Steele said that maintenance procedures at that time first required clearing the travelled portions by storing snow on the shoulders. After all roads are plowed or otherwise treated and "the work has progressed to the point where you can spare the resources to do so, you begin to remove snow set back, as the terminology is, the snow that's on the shoulder of roadways and remove stored snow from bridges and areas such as that." Snow is removed from drainage areas before other berm areas, according to Mr. Steele, and on this section of I-64, the drains are located on the left side of the road. The procedures respondent followed in 1978 were nationally accepted standards for snow removal, Mr. Steele testified, and this statement was confirmed by other employees of respondent.

Charles R. Lewis, II, a Traffic Engineer stated that he reviewed different barrier or retaining wall designs. The design of the barriers is such that vehicles which come in contact with them should be deflected back into the highway. The testing of the barriers generally involves vehicles which strike them at angles up to 15°. There was also some testing, Mr. Lewis said, at angles of 25°, but none that he was aware of which tested the effectiveness of the barriers when struck at an angle of 45°. Mr. Lewis added that there has been no testing of barriers in snow or ice conditions.

In order for the Court to make an award in this case, the claimant must establish that the respondent is guilty of negligence by a

preponderance of the evidence. The negligence alleged in this claim is the temporary storing of snow along the barrier which allegedly caused claimant's vehicle to leave the highway. This Court has held repeatedly that the State is neither an insurer nor a guarantor of the safety of persons travelling on its roadways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). Respondent has been charged with the qualified duty of reasonable care and diligence in the maintenance of the highways under all circumstances. *Parsons v. State Road Commission*, 8 Ct.Cl. 35 (1969). The Court has concluded that claimant has not established, by a preponderance of the evidence, that respondent has failed in this duty of reasonable care and diligence. Although certain of respondent's employees conceded that plowing snow against the barrier could be hazardous, it was shown that at the time of this accident, this was an accepted practice nationwide. Furthermore, it would be pure speculation on the part of this Court to hold that the stored snow was the proximate cause of claimant's vehicle leaving the highway, as there is little, if any, evidence of the barrier's effectiveness when struck by a vehicle at a 45° angle. Finally, it has not been established why claimant lost control of her vehicle at the outset of the accident, and the Court would again be forced to speculate what negligence, if any, on her part may have caused or contributed to the accident. The facts certainly suggest that she was operating her vehicle at a speed greater than was reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. The Court is therefore of opinion to deny the claim.

Claim disallowed.

Opinion issued October 23, 1984

SHELBY J. STEELE COOK

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-199)

H. John Taylor, Attorney at Law, for claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

LYONS, JUDGE:

Claimant was employed in early September 1980 by the Bernard Pipe Line Construction Company as a flagger on a project on Route 119 in Boone County, West Virginia. She alleges that on October 9, 1980, she was injured when she jumped backwards to avoid being

struck by a truck. This truck was allegedly being driven by an employee of respondent, who deliberately swerved the truck at claimant in an attempt to harass her. Claimant alleges that the driver, now deceased, was one of several employees of respondent who had verbally harassed claimant and other female employees of Bernard Company. As a result of jumping backwards, claimant fell to the ground, resulting in lumbosacral strain and contusion of the low back. She was hospitalized from October 26 through November 11, 1980, after her condition failed to respond to home treatment. Claimant received a temporary total compensation award from the Industrial Commission of Ohio, the principal place of business of the Bernard Company. She now seeks an award of \$75,000.00. Respondent denies that any of its employees harassed female workers of Bernard Company, that its employee swerved a truck at claimant, and that even if the allegations were true, respondent would not be liable as this action by its employee was outside the scope of his employment.

Testimony in this case was in sharp conflict on several major points. The claimant and a co-worker, Judy Dotson, testified that they had complained to respondent's general foreman, George Milam, about the harassment on two occasions prior to claimant's accident. Mr. Milam denied any knowledge of the complaints. Claimant and Ms. Dotson stated that the men would tell them that they should be home cleaning and taking care of their children instead of being out taking men's jobs. On the date in question, claimant alleges that the driver was in a Department of Highways dump truck, carrying a load of gravel, when he failed to heed her directions to stop and swerved the truck at her as he passed by. Claimant stated that she had known the driver for several years and clearly saw him in the truck. Official payroll sheets and foreman's daily reports, however, indicate that on October 9, 1980, the employee did not work and was considered "AWOL."

The test of whether an act is within an employee's scope of employment is whether the act was within the scope of his authority in the employment of the principal and in furtherance of the principal's business. *Heater vs. Dept. of Highways*, 12 Ct.Cl. 138 (1978). Included in this test is whether the act might reasonably have been expected of an employee in his type of work. The Court concludes that even if the alleged driver was working on the date of the incident, the alleged wrongful act was outside the scope of his employment. There was, furthermore, no reason for respondent to anticipate such an act, even when construing the testimony in the light most favorable to claimant. There are no allegations that the driver or any other employee of

respondent threatened claimant or other female workers with bodily injury. There are no allegations that the driver's work record should have caused his supervisor concern. The Court, therefore, cannot hold the respondent liable for the acts of its employee, and disallows the claim. See also: *Campolio vs. Dept. of Natural Resources*, (CC-77-39), opinion issued February 14, 1984.

Claim disallowed.

Opinion issued October 23, 1984

SHARON M. CROWDER

vs.

BOARD OF REGENTS

(CC-81-465)

Judy L. Humphries, Attorney at Law, for claimant.

Edgar E. Bibb, III, Assistant Attorney General, and J. Bradley Russell, Assistant Attorney General, for respondent.

GRACEY, JUDGE:

The claimant, Dr. Sharon M. Crowder, was employed by the Board of Regents in June of 1978 for the fiscal year 1978-1979, and subsequently for the fiscal years 1979-1980 and 1980-1981, each beginning on July 1 and ending on the following June 30. She was employed as a salaried Instructor in the Department of Prosthodontics of the School of Dentistry of West Virginia University. She was additionally paid for dental services she rendered to patients for the West Virginia University Dental Corporation, a separate entity.

In January of 1981, she was accepted as a student in the postgraduate program of the University of California at Los Angeles, to begin in the fall of 1981. She so advised Dr. Henry J. Bianco, Jr., chairman of the Department of Prosthodontics. According to her testimony, he requested that she submit a letter of resignation so that her job position could be advertised for a new person to take her place. Under date of February 3, 1981, she submitted her letter of resignation to Dr. W. Robert Biddington, Dean of the School of Dentistry, in which she stated:

“My last working day will be June 26, 1981. Having accrued 43 days of vacation my date of termination will be August 27, 1981.”

Under date of March 3, 1981, Dr. Biddington's letter to her stated:

“Under the terms of your contract, your termination

from the payroll will be June 30, 1981. Please contact our office to determine the number of accrued vacation days which must be taken prior to June 30, 1981.’’

Dr. Crowder was similarly advised that her employment would be terminated June 30, 1981, and that her accrued vacation time must be taken as vacation prior to that date, by letters and memorandums sent to her by Dr. Bianco under dates of March 11 and March 23 and May 6, 1981, and by Charles E. Andrews, Vice President for Health Services, dated March 6 and March 12, 1981. In his letter of March 23, 1981, Dr. Bianco advised her:

“In my memorandum of March 11, 1981, you were asked to meet with me in order to arrange a leave schedule that would enable you to utilize all accrued vacation prior to June 30, 1981. Since such arrangements have not been made, I have scheduled you to take your vacation from May 8, 1981 through June 30, 1981. Consequently, you will not have assigned duties during this period. It is important to know that failure to comply with this schedule will result in the loss of accrued vacation days.’’

Upon submitting her resignation, and throughout the remainder of that fiscal year and thereafter, Dr. Crowder has claimed that she was and is entitled to be paid for her accrued vacation days, in addition to her salary through June 26, 1981, the date chosen as her last working day in her letter of resignation. She claims salary for 43 accrued vacation days, retirement benefits on same, and an additional 30 days’ pay as liquidated damages, all in the total amount of \$6,410.45 plus interest, attorney’s fees and costs.

Claimant substantially relies upon provisions as to vacation or leave as set out in a Faculty Handbook and an Employee Handbook and alleges that many employees previously terminated had been granted pay, for accrued vacation days, by being kept on the payroll into a following fiscal year.

The handbooks provide statements of policies and procedures with reference to many subjects. With reference to vacation and leave time, a formula is provided, and it is therein stated that “An employee is entitled to accumulated leave at termination of services,” and “Annual leave is arranged to fit operating schedules with consideration given to an employee’s request.’’

During the fiscal year 1980-1981, the Governor had imposed a budgetary reduction on State agencies. The School of Dentistry deem-

ed itself in a bind and felt that it could not pay two employees occupying one Instructor position, in the early months of fiscal year 1981-1982, one on terminal leave and the other in service. To have delayed, until August 27, 1981, the hiring of a replacement for Dr. Crowder, would have interfered with operations. The Court is of the opinion that nothing shown in the facts or law of this case required it to do so. It was discretionary, depending on whether the employee's actual on-the-job services were needed at times when a vacation might otherwise have been taken. The contract, so far as compensation is concerned, was for one year plus earned vacation days not used. Dr. Crowder was given her earned vacation days and full compensation for the contract year, ". . . at the total salary of \$23,460.00 payable in 12 monthly installments."

Claim disallowed.

Opinion issued October 23, 1984

HELEN D. HUDSON AND JOSEPH E. HUDSON

vs.

DEPARTMENT OF HIGHWAYS

(CC-83-191)

Lawrence L. Manypenny, Attorney at Law, for claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimants are the owners of real property located on Commerce Street, New Cumberland, Hancock County, West Virginia. The property is improved with a house and detached garage. The property is on the lower side of a hill. Above the house runs County Route 20, also known as Cemetery Hill Road, a state-maintained roadway. Claimants allege that on June 8, 1981, claimants' garage was damaged by water and mud. This damage was alleged to be the result of respondent's failure to correct a drainage problem on Cemetery Hill Road, causing the water to be diverted onto claimants' property. They seek \$10,000.00 for the damage. Respondent alleges that there were no drainage problems on Cemetery Hill Road, but that the damage resulted during an unusually heavy rainfall, which was stipulated by the parties to be 3.7 inches from 7:25 p.m. June 8 to 7:30 a.m. June 9, 1981.

The evidence established that following the rain, a culvert on Cemetery Hill Road was blocked with debris, but no one could state

whether this was due to the rain, or had existed prior to the storm. There was also evidence of an earlier flooding incident in 1978, following which complaints were made to respondent. Residents in the area complained that the sewer lines on Cemetery Hill Road were too small. Respondent's records indicate that the flooding occurred during a severe rain. There was also testimony concerning flooding in 1956. Donnie L. Bensenhaver, Assistant Maintenance Engineer, testified that a secondary road like Cemetery Hill Road is designed for a one in ten year storm. This means that the road stands a chance of flooding once every ten years, and he stated that the flooding of Cemetery Hill Road is consistent with the design criteria.

After reviewing the testimony, and after examining rainfall records covering from 1964 - 1984, which were submitted by the parties, it is apparent to the Court that the damage to claimants' property occurred during a period of extremely heavy rainfall. The flood damage was the result of this rain, for which the drainage on Cemetery Hill Road was not designed to handle. As it has not been established that the damage was the result of inadequate maintenance of the drainage system on Cemetery Hill Road, the Court must deny the claim.

Claim disallowed.

Opinion issued October 23, 1984

GEORGE KORBANIC

vs.

BOARD OF PROBATION AND PAROLE

(CC-82-48)

Claimant appeared in person.

J. Bradley Russell, Assistant Attorney General, and Edgar E. Bibb, III, Assistant Attorney General, for respondent.

GRACEY, JUDGE:

In his Notice of Claim, the claimant, George Korbanic, requested damages for hospital and other medical expenses and for lost earnings during time missed from work incident to bullet wounds inflicted upon his person on March 5, 1980. He was then 65 years of age. In the evening of that day, he was enjoying his newspaper and television in his rural home near Middlebourne, in Tyler County, when several rounds were fired through the window, three bullets striking him.

Leeman Warren Mason, then Sheriff of Tyler County, testified that one Scott Dailey, a parolee from the West Virginia Penitentiary and

son of the claimant's neighbor, was arrested for the shooting, pleaded guilty to attempted murder, and was taken back to the Penitentiary. The Sheriff had thought Scott Dailey was still incarcerated at the Penitentiary, incident to a previous offense, and had no information that he had been placed on parole. According to the Sheriff, and the records, Dailey had no record of prior crimes of violence but had been involved in property crimes. As the Sheriff had transported the claimant to the Wetzel County Hospital, the claimant ". . . was semi-unconscious and kept saying something about Scott Dailey."

The claimant testified that he had a casual acquaintance with Dailey and had not known of his prior criminal record or that he was then on parole. Dailey had visited with him on the afternoon of the shooting and had split some logs for him. They had had beer and sandwiches, and talked, and Dailey left. His concern about "Scotty" (Dailey) had been what prompted him to mention his name to the Sheriff. Claimant testified, "I was concerned about Scotty, to stop and see if something had happened to him." Dailey was arrested about thirty minutes later, and had later told the Sheriff that a television program he had been watching had influenced him to shoot the claimant.

Medical records admitted into evidence covered claimant's emergency hospitalization and surgery at Wetzel County Hospital and subsequent hospitalization and surgery at The Western Pennsylvania Hospital at Pittsburgh.

The claim is based upon the claimant's theory that a person placed upon parole by the respondent, the West Virginia Board of Probation and Parole, is a ward of the State and that the State is liable for the results of such a person's misconduct. Unfortunately for the claimant, his theory is but a theory, not the law.

Claim disallowed.

Opinion issued October 23, 1984

JOHNNIE L. TURNER AND BEVERLY J. TURNER

vs.

DEPARTMENT OF HIGHWAYS

(CC-77-88)

Rodney P. Jackson and Franklin S. Fragale, Jr., Attorneys at Law,
for claimant.

Henry C. Bias, Jr., Deputy Attorney General, and Nancy J. Aliff,
Attorney at Law, for respondent.

LYONS, JUDGE:

Claimants, husband and wife, seek an award of \$1,500,000.00 for

injuries sustained by claimant Johnnie L. Turner in a bicycle accident which occurred on August 10, 1975, on West Virginia Route 3 near Sweetland, Lincoln County, West Virginia. At the time of the accident, Johnnie L. Turner was participating in a bicycle tour sponsored, in part, by John's Cyclery of St. Albans, West Virginia, of which he was an owner. Claimants allege that there was dirt and gravel in a blind right-hand curve in the road, and when the debris was encountered, Turner was not able to control the bicycle. He skidded across the road and into the guardrail on the opposite side. He was then thrown onto the guardrail and rendered a paraplegic.

Steven D. King, a friend of claimants', testified that he had cycled the route on August 7, 1975, in order to make a map for participants of any hazards on the route. During this tour, he was stopped by respondent's work crew which was cleaning ditches along Route 3. This was about 2½ miles from the accident site. Respondent's records indicate that 2 4/10 miles of ditching occurred on August 8, but do not indicate where the ditching occurred or in what direction the ditching operation was proceeding. Mr. King stated that he did not remember informing claimant of the ditching operation. It is alleged that this work, being performed three days prior to the incident herein, was the source of the debris on the road.

Mr. Turner testified that before the accident, he was riding at about 12 or 13 m.p.h. He was riding on the front portion of a tandem bicycle; Mr. King rode at the rear. This was a well-travelled route for both riders; they had cycled it at least 20 times that year, about 12 times on the tandem. They were decelerating prior to entering a sharp right-hand turn. Mr. Turner stated that there was not time to react to the debris. The bicycle lost traction and slid across the road. Mr. Turner said the debris was composed of small rocks, sand and dirt, and appeared to extend towards the center line.

Charles Dennie, a participant in the tour, testified that he was riding behind the claimant and Mr. King, but did not observe the accident. He said that the road had "very fine grit" on it, and appeared to be freshly graded. Stephen G. Fisher, another cyclist travelling with claimant, said that, "As we approached the curve, I remember John saying like, 'watch out,' and at that time I was having problems with my bike, trying to keep it up, and I fell." Mr. Fisher said there was mud on the surface; there had been rain earlier that morning. He also said that he observed dirt in "various locations" along the route. None of the other cyclists recalled debris at other points.

A summary of the facts allegedly establishing liability on the part of respondent are as follows: Three days before the bicycle tour, respon-

dent's work crew was seen cleaning ditches several miles from the accident site. Debris was encountered in a curve in the road. The debris caused claimant to lose control of the tandem bicycle. Several cyclists said that the debris "looked like" residue from a ditching operation. It is concluded by claimant, therefore, that respondent's crews negligently failed to clear the roadway.

The Court, however, cannot make such an assumption. There are other possible reasons for the debris on the road, e.g., it may have come off a truck or the rain may have washed mud onto the road. Furthermore, respondent's work records give only the amount of ditching done - they do not list either a starting or stopping point, nor in which direction the ditching was proceeding. Mr. King found no evidence of negligent work on that Thursday; he did not note the work on either the map or to Mr. Turner. Lastly, the Court cannot determine if there is liability on respondent's part; or what part claimant's own negligence, if any, may have played in the accident. The curve was repeatedly described as a sharp, blind curve. Yet, claimant was not braking the bicycle, merely decelerating. It is not possible to know if this contributed to the accident. This Court has held that a motorcycle is a more hazardous vehicle to operate than an automobile. *Bartz vs. Dept. of Highways*, 10 Ct.Cl. 170 (1975). This is also true of a two-wheeled bicycle and perhaps more so with a tandem bicycle. The State is neither an insurer nor a guarantor of the safety of persons travelling on its roadways. *Adkins vs. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). The Court is not unmindful of claimant's injuries, but it is necessary to examine all of the facts in evidence in reaching a decision. In order to find respondent liable, the Court would be required to speculate, which it cannot do. The claim must, therefore, be denied.

Claim disallowed.

Opinion issued October 31, 1984

DANNY VERNON ANKENY

vs.

BOARD OF EDUCATION

(CC-82-289)

Theodore R. Dues, Jr., Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

Claimant seeks lost wages and benefits by the failure of respondent

to give him a job pursuant to an alleged oral contract of employment. On August 13, 1982, claimant interviewed for a position as an Accountant II with respondent. The interview was conducted by Eileen Moyer, who was then the manager of the financial office, and Dewey Randolph, the director of the financial office. Later that day, claimant was informed by Ms. Moyer that he would have the job beginning August 18, 1982. Claimant, however, was informed on August 17, 1982, that he could not be given the position.

Upon being informed he would not be hired, claimant went to Ms. Moyer's office in order to secure an explanation. He asked for and received from Ms. Moyer that explanation in writing. The statement said, in part:

“[o]n Friday, August 13, 1982, Mr. Danny Ankeny was advised by me that he would be employed as an accountant to fill a vacant position on August 18, 1982.

. . .

When I reported to work on August 16, I was told that we could not fill the position as yet because of the uncertainty of funding.”

Ms. Moyer testified that she had been told to call claimant and offer him the job by Mr. Randolph, although neither of them had hiring authority. This authority was vested in the assistant state superintendent in charge of that office. It was through a conversation with the assistant superintendent, a Mr. Smith, that Ms. Moyer learned that the position would not be filled at that time.

This Court has held previously that where a person deals with an agent, it is that person's duty to determine the extent of the agency, and the State will not be bound where the agent exceeds his authority. *Lavender vs. Dept. of Highways*, 13 Ct.Cl. 241 (1980). It is apparent that respondent's agent exceeded her authority when she informed claimant he would be hired, and therefore, no contract for employment was made. The Court must deny the claim.

Claim disallowed.

Opinion issued October 31, 1984

APPALACHIAN POWER COMPANY

vs.

**ALCOHOL BEVERAGE CONTROL COMMISSIONER
(CC-84-178)**

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer. The claimant seeks an award of \$229.17 for unpaid electric service bills incurred by two of respondent's facilities. The respondent, in its Answer, admits the validity and amount of the claim and that the respondent expired sufficient funds in the appropriate fiscal year from which the obligation could have been paid. The Court, therefore, makes an award in the amount claimed.

Award of \$229.17.

Opinion issued October 31, 1984

MARY ANN BABICH

vs.

**BOARD OF REGENTS
(CC-84-230)**

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer. Claimant is employed by respondent as a Programmer III. The job salary for the position was upgraded on May 1, 1984. Due to an oversight, claimant did not receive the increase until July 1984, and seeks \$540.00 as the difference between the two salaries. Respondent, in its Answer, admits the validity and amount of the claim. The Court, therefore, makes an award to claimant in the amount of \$540.00.

Award of \$540.00.

Opinion issued October 31, 1984

CARROLL L. BOLYARD

vs.

DEPARTMENT OF HIGHWAYS

(CC-84-113)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimant is the owner of a 1984 Nissan pickup which was damaged on March 26, 1984, while travelling on Route 119 outside Grafton, Taylor County, West Virginia. At about 11:30 a.m., claimant's vehicle, which was headed south, was passed by a northbound Department of Highways truck. The truck was carrying an uncovered load of gravel, and some fell off, cracking the windshield and chipping paint from the hood and top of the truck. The estimated cost of repair was \$535.24.

W. Va. Code §17C-17-6(b) states that "It shall be unlawful to operate on any highway any vehicle or combination of vehicles with any load unless said load and any covering thereon is securely fastened so as to prevent said covering or load from becoming loose, detached, or in any manner a hazard to other users of the highway." As it appears that respondent was operating a vehicle with a load which was not properly secured, respondent is liable for the damages sustained. The Court, therefore, makes an award to the claimant in the amount of \$535.24.

Award of \$535.24.

Opinion issued October 31, 1984

SHIRLEY G. BURBRIDGE

vs.

DEPARTMENT OF HIGHWAYS

(CC-84-71)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On February 23, 1984, at approximately 5:45 p.m., claimant was driving his 1982 Escort station wagon on old Route 50, west of Salem, Harrison County, West Virginia, when he struck a pothole. The right front tire and wheel were damaged in the amount of \$122.89. Clai-

mant was not aware of the pothole, which measured approximately 56" long, 30" wide, and 4" deep, prior to striking it, although he stated that there were numerous holes in that section of road.

While the State does not insure the safety of travellers on its highways, respondent does owe a duty of reasonable care and diligence in the maintenance of the highways. This Court has previously held respondent liable for damages caused by large potholes, where it has been determined that respondent should have discovered and repaired the defect. *Lohan vs. Dept. of Highways*, 11 Ct.Cl. 39 (1975), *Bailey vs. Dept. of Highways*, 13 Ct.Cl. 144 (1980). The Court finds that this pothole was of sufficient size and that it must have been there for some time, and makes an award to claimant.

Award of \$122.89.

Opinion issued October 31, 1984

FCI ALDERSON

vs.

DEPARTMENT OF CORRECTIONS

(CC-84-228)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer. Claimant seeks \$111,304.31 for providing care and custody of respondent's female inmates at the Federal Correctional Institute at Alderson, West Virginia. Respondent, in its Answer, admits the validity of the claim, but further states that there were insufficient funds remaining in its appropriation for the fiscal year in question from which the claim could be paid.

Claimant also seeks \$7,047.90 as interest accrued on the obligation. The agreement between the parties states, in part, "5. . . . [b]ills not paid by the due date will be considered overdue and a late charge will be computed and applied at a percentage rate published quarterly by the U.S. Department of Treasury." W.Va. Code §14-2-12 states, in part, ". . . [i]n determining the amount of a claim, interest shall not be allowed unless the claim is based upon a contract which specifically provides for the payment of interest." The Court finds that this claim falls under the purview of that section, and that the interest is owed on the obligation.

While this is a claim which in equity and good conscience should be paid, the Court finds that an award cannot be made based upon the decision in *Airkem Sales & Service, et al. vs. Dept. of Mental Health*, 8 Ct.CL. 180 (1971). The claim is, therefore, denied.

Claim disallowed.

Opinion issued October 31, 1984

KELLY L. FISHER

vs.

DEPARTMENT OF HIGHWAYS
(CC-84-90)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On February 29, 1984, claimant's vehicle, a 1984 Chevrolet Chevette, was damaged while driving on Route 33 east of Buckhannon, Upshur County, West Virginia. Claimant was travelling in an easterly direction and was passed by two of respondent's trucks, travelling westerly. The trucks were spreading cinders on the road, and as the first truck passed, cinders from the top of the truck hit claimant's vehicle, cracking the windshield. The damage was repaired at a cost of \$203.88. Claimant testified that she was reimbursed for the full amount of the damage by her insurance company. Since the claimant has sustained no actual loss, the Court need not make a determination concerning liability, and dismisses the claim.

Claim disallowed.

Opinion issued October 31, 1984

HAMILTON BUSINESS SYSTEMS

vs.

DEPARTMENT OF MOTOR VEHICLES
(CC-84-196)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in

the Notice of Claim and respondent's Answer. This claim for \$39.43 is for supplies on a Savin Model 840 Plain Paper Copier which were delivered and used by respondent. Respondent, in its Answer, admits the validity and amount of the claim. It appearing to the Court that the respondent expired sufficient funds in the appropriate fiscal year from which the obligation could have been paid, the Court makes an award in the amount sought.

Award of \$39.43.

Opinion issued October 31, 1984

MAX B. HARBERT

vs.

DEPARTMENT OF HIGHWAYS

(CC-84-114)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On March 8, 1984, the windshield of claimant's 1984 Plymouth Reliant was cracked by cinder material which came off respondent's truck. The incident occurred on Interstate 79 between Weston and Lost Creek, West Virginia. Claimant was driving behind the truck, and as they started up an incline, claimant moved into the other lane to pass. Claimant was unsure whether the material hit the windshield while the vehicles were in the same lane or while passing. Damage was repaired at a cost of \$217.59, of which sum all but \$50.00 was paid by claimant's insurance company.

W. Va. Code §17C-17-6(b) provides that it is unlawful to operate a vehicle with a load unless the load is secured in such a manner as to prevent it from becoming loose, detached, or in any manner a hazard to other travellers. Claimant testified that the truck "had no cover on the bed at all and material was heaped up around the top, over the top of it . . ." The Court, therefore, makes an award to the claimant for the amount of his deductible.

Award of \$50.00.

Opinion issued October 31, 1984

JAMES D. KITTLE

vs.

DEPARTMENT OF HIGHWAYS

(CC-84-36)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimant is the owner of a 1976 Chevrolet Impala. On September 21, 1983, at approximately 11:30 p.m., as he was travelling southbound, the vehicle was damaged in an accident on W. Va. Route 2, north of Follansbee, Brooks County, West Virginia. At that time, construction work was being performed on Route 2. Claimant stated that he was aware of the construction work because he drove Route 2 daily to his job. Barrels had been placed along the dividing line in the road. The accident occurred when claimant struck the first barrel, which had tipped into the road. He was travelling at approximately 35 m.p.h. when he hit the barrel. He lost control of the vehicle and struck the second barrel which was ten to twelve feet away. The vehicle then veered sharply to the left across the northbound lane and struck a concrete barrier almost head-on. Claimant testified that he could not see the barrel because it was dirty and the area was very dark. He estimated the damage at \$1,200.00 to \$1,300.00. The vehicle was purchased in 1981 for \$1,300.00, although claimant estimated its current value at \$2,500.00 based upon prices for comparable cars listed in a newspaper.

The State is neither an insurer nor a guarantor of the safety of motorists traveling on its highways. *Adkins vs. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order for the respondent to be found liable for the damage, notice of the condition must be established. Gordon S. Peake, respondent's area engineer, testified that there had been no report of a barrel in the traffic lane prior to claimant's accident. He stated that he ordered new lights placed on the barrels on September 13, 1983, and also that the barrels be cleaned. He thought new barrels were placed instead of cleaning the old ones between September 13 and September 21. Mr. Peake added that the barrels were usually moved from the dividing line in the evenings, but the Court does not find that this is such an act of negligence as to hold respondent liable for the damage to claimant's vehicle. Since there was no evidence of notice presented, the Court is of the opinion to, and does, disallow the claim.

Claim disallowed.

Virginia, when she struck a pothole and damaged the vehicle. The automobile sustained a cracked flywheel and damage to the starter, which were repaired at a cost of \$253.00. Claimant testified that there was a light mist of snow on the ground but that the road was fairly clear. She said that she was aware of potholes on the bridge and was looking for them, but couldn't see clearly. The pothole she struck had been fixed on several occasions over a period of "a couple of months."

The State is neither an insurer nor a guarantor of the safety of travellers on its highways. *Adkins vs. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). For the respondent to be held liable for damages caused by the pothole, proof of notice of the defect is required. *Davis Auto Parts vs. Dept. of Highways*, 12 Ct.Cl. 31 (1977). The Court finds that while respondent probably had constructive notice of the defect, the claimant, with her prior knowledge of the bridge's condition, was likewise negligent. Under the doctrine of comparative negligence, the Court is of the opinion that the claimant's negligence was equal to or greater than the respondent's, and disallows the claim. *Hull vs. Dept. of Highways*, 13 Ct.Cl. 408 (1981).

Claim disallowed.

Opinion issued November 1, 1984

L.G. DE FELICE, INC.

vs.

DEPARTMENT OF HIGHWAYS

(CC-77-11)

George S. Sharp and Jack M. Quartararo, Attorneys at Law, for the claimant.

S. Reed Waters, Jr., Attorney at Law, for the respondent.

LYONS, JUDGE:

This claim was brought before the Court for the specific purpose of determining whether notice provisions in §104.2 and §105.17 of the *Standard Specifications Roads and Bridges* had been complied with by the claimant, L.G. De Felice, Inc., hereinafter referred to as the contractor. An opinion was issued by this Court on December 2, 1983. In that opinion, the Court held that the respondent had notice of a changed condition on the project. More specifically, the Court stated that ". . . in view of other correspondence between the parties, the respondent cannot be heard to say that it did not receive, or timely receive, the written notice 'of such conditions' for which provision is made in Section 104.2."

In that opinion, the Court also determined that "whether the respondent had timely actual notice of claimant's intention to make a claim for the additional work which is the subject of this claim and, by its conduct, waived the written notice requirement of Specification 105.17 does not appear from the evidence thus far adduced." For this reason, a further hearing was conducted on the question of notice.

Respondent contends that written notice was not given by the contractor; therefore, respondent was not in the position of maintaining a strict account of the extra work performed by the contractor.

A review of the notice sections of the specifications applicable to the contract between the parties herein is necessary for the Court to render an opinion.

Section 104.2 of the Specifications provides in part that the Commission (Department of Highways) reserves the right to make alterations in the plans or quantities of work based upon a formula of 25%; reference is made to §104.3 for Extra Work if the contractor and engineer do not agree on the work to be performed when alterations to the contract are made; the Commission may omit items or materials in the contract; the changed condition clause is contained in this section; payment for additional work required by the engineer may be permitted where the work is required when operations are substantially completed; and the final paragraph of the section provides for payment in accordance with §109.3 or contract time adjustment under §108.6.

This section encompasses many situations which may occur on a project, not just the changed condition clause which is of interest in this particular claim.

§105.17, titled Claims for Adjustments and Disputes covers the situation wherein the contractor deems that additional compensation is due him for work or material not covered by the contract or not ordered by the engineer as extra work. In that situation, this section provides then that the contractor notify the engineer in writing of the intention to make a claim for such additional work before he begins the work. If notice is not given, and the engineer is not afforded proper facilities for keeping strict account of the work, the contractor waives his claim for additional compensation. If the engineer maintains records, it is not to be used to substantiate the claim; however, the engineer may determine that the contractor is entitled to additional compensation for the claim. The last sentence in this section reads as follows: "Nothing in this subsection shall be construed as establishing any claim contrary to the terms of subsection 104.2." This sentence refers back to §104.2 - the whole section - not just the changed condition clause. Keeping in mind that §104.2 also encompasses the extra

Opinion issued October 31, 1984

KROWN RESEARCH, INC.

vs.

DIVISION OF VOCATIONAL REHABILITATION

(CC-84-210a-e)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This consolidated claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Amended Answer. Claimant seeks \$194.00 for five invoices which were not paid by respondent due to the expiration of the fiscal year. In its Amended Answer, respondent admits the validity and amounts of the invoices, and that it had expired sufficient funds in the appropriate fiscal year from which the obligation could have been paid. The Court, therefore, makes an award to the claimant in the amount of \$194.00.

Award of \$194.00.

Opinion issued October 31, 1984

JEFFRY S. LIFE

vs.

OFFICE OF THE CHIEF MEDICAL EXAMINER

(CC-84-205)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision upon the allegations in the Notice of Claim and respondent's Answer. Claimant seeks \$45.00 for a post-mortem examination performed January 23, 1983. Respondent, in its Answer, states that claimant is owed \$35.00 and not \$45.00. W. Va. Code §61-12-14 gives the chief medical examiner the power to set fees for such services. The amount of the fee prior to July 1, 1983, was \$35.00. The respondent also indicated that it expired sufficient funds in the appropriate fiscal year from which the obligation could have been paid. The Court, therefore, makes an award to the claimant in the amount of \$35.00.

Award of \$35.00.

Opinion issued October 31, 1984

JOHN P. MCDOWELL AND DONNA R. MCDOWELL

vs.

DEPARTMENT OF HIGHWAYS

(CC-84-32)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was filed for damages incurred by claimants' 1976 Volkswagen Rabbit when it struck a pothole on Route 19 near Fairmont, Marion County, West Virginia. The pothole was located on the Bellview Bridge. The incident occurred on December 12, 1983. Damages to the vehicle amounted to \$252.79. Claimant, Donna R. McDowell, testified that she drove over the bridge twice a day and was aware of a number of potholes there. She stated that potholes had been fixed periodically on the bridge for approximately six months prior to the incident, but that the holes recurred.

The State is neither an insurer nor a guarantor of the safety of motorists on its highways. *Adkins vs. Sims*, 130 W. Va. 645, 46 S.E.2d 81 (1947). In order for the respondent to be found liable for damages caused by the pothole, proof of actual or constructive notice of the defect must be shown. *Davis Auto Parts vs. Dept. of Highways*, 12 Ct. Cl. 31 (1977). Although constructive notice of the pothole was present in this case, claimant's prior knowledge of the condition of the bridge makes her likewise negligent. Under the doctrine of comparative negligence, the Court finds that this negligence was equal to or greater than respondent's, and disallows the claim.

Claim disallowed.

Opinion issued October 31, 1984

CORA MARIE MERRILL

vs.

DEPARTMENT OF HIGHWAYS

(CC-84-29)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On December 25, 1983, claimant was driving her 1973 Chevrolet Nova on Route 19 over the Bellview Bridge near Fairmont, West

work provisions and that the changed condition clause contains its own reference to notice of the changed condition and an equitable adjustment for compensating the contractor for an increase or decrease in the cost of, or the time required for performance of the contract, this Court feels impelled to conclude that §105.17 does not apply to a changed condition situation. Once a contractor has satisfied the requirements of §104.2, he has a claim for all the damages flowing from the changed condition. However, if the contractor makes a claim for extra work, i.e., "work or material not clearly covered in the contract," caused by the changed condition, in that instance §105.17 applies requiring notice in writing to the engineer.

In the instant claim, it was previously determined by this Court that §104.2 has been complied with by the claimant and equitable adjustments were made by respondent. However, these adjustments compensated the contractor for the changed condition on the south end of the project. The contractor performed the work on the north end of the project without an equitable adjustment. Conditions on that portion of the project were essentially the same - lack of rock with which to construct the roadbed. The contractor maintains that he is entitled to compensation for the conditions prevailing throughout the project. To require notice by the contractor on each portion of the project would be inconsistent with the specification provisions. A changed condition occurred on this construction project for which the contractor is entitled to be compensated.

It is the Court's opinion that the contractor herein should be compensated for those costs on the north end of the project which resulted from a lack of rock. The Court directs the parties to enter into a stipulation for review by the Court itemizing those amounts due the contractor which were the direct result of a lack of rock. The matter will be held open for 90 days for counsel to file the stipulation on damages.

L.G. DeFELICE, INC.,
A CORPORATION,
Claimant,

v. Claim No. CC-77-11

WEST VIRGINIA DEPARTMENT
OF HIGHWAYS, A CORPORATION,
Respondent

ORDER

Upon the Order and Opinion of the Court heretofore filed in deciding the subject claim and the representations of the claimant and

respondent pursuant to said Order and Opinion of the Court, it is Ordered by the Court that the claimant is entitled to recover from the respondent the following sums of money on the following items:

Rock Excavation	\$393,323.76
Idle Rock Excavation Equipment	81,946.59
Wet Embankment - Shutdown Idle Equipment	113,830.63
Show up Time Cost	10,705.03
Waste Operations 1974	19,238.16
Previous Stipulation and Order of the Court Entered on September 25, 1981 on Item 12(1)(a) Roadway Excavation (Undercuts) 5,933.98 cubic yards @ \$1.20 per cu. yd.	\$7,120.78
Item 12(1)(b) Slope Excavation 6,721.9 cu. yd. @ \$1.20 cu. yd.	8,066.28
	15,187.06
TOTAL	634,231.23
Statutory Interest at 6% from July 11, 1975 to the 30th day of January, 1985	364,066.10
TOTAL	\$998,297.33

It is further agreed by and between the claimant and the respondent hereto that all other items of claims and parts of items of claims as set out and alleged in claimant's Notice of Claim filed in this action not agreed to be paid herein, are to be disallowed and not considered by the Court for any award and are to be dismissed.

Accordingly, the Court hereby Orders that the claimant be, and it is hereby granted, an award against the respondent in the total amount of Six Hundred Thirty-Four Thousand Two Hundred Thirty-One Dollars and Twenty-Three Cents (\$634,231.23), plus statutory interest of Three Hundred Sixty-Four Thousand Sixty-Six Dollars and Ten Cents (\$364,066.10), for a total amount of Nine Hundred Ninety-Eight Thousand Two Hundred Ninety-Seven Dollars and Thirty-Three Cents (\$998,297.33).

It is hereby further Ordered that all other items of claims and parts

Maggie Runyon by the Department of Welfare, now known as the Department of Human Services. Claimants allege that on February 14, 1981, Alvis and Maggie Runyon left Gordon Epling without adequate supervision at their home in Wayne County. As a result, the boy left the house, went to claimants' property, and burned claimants' barn and its contents.

In order for the claimants to receive compensation for their loss, it must be established that the Department of Welfare was guilty of negligence which was the proximate cause of the damage to claimants' property. The issue is not new to this Court.

Facts similar to those recited here formed the basis for a denial in *Armstead v. Dept. of Welfare*, 13 Ct.Cl. 119 (1980). Two boys, who were wards of the respondent living with foster parents, ran away from home and vandalized the home of a neighbor four miles away. The Court determined that there was no negligence on the part of the respondent and that neither the respondent nor the foster parents could have done anything to prevent what happened.

In the instant case, the testimony revealed that Gordon Epling ventured into claimants' barn where he saw something, probably a rat, run into a lumber pile. Gordon "got down and struck a match" to see where the animal went, and caught the barn on fire. (Transcript, page 12.) Nothing in the record of this claim shows that the Department of Welfare was guilty of a negligent act which proximately caused the damage to claimants' property. The Court therefore finds no liability on the part of the respondent, and hereby disallows the claim.

Claim disallowed.

Opinion issued November 21, 1984

LEONARD J. GWIAZDOWSKY

vs.

DEPARTMENT OF HEALTH

(CC-84-208)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer. Claimant seeks \$502.50 in lost wages. The loss occurred when claimant was transferred from respondent's employment to the Department of Education. Respon-

of claims set out and alleged in claimant's Notice of Claim, which were not allowed in the above award, are hereby disallowed.

Entered this 14th day of February, 1985.

Opinion issued November 21, 1984

CONSOLIDATED BUSINESS FORMS COMPANY

vs.

DEPARTMENT OF PUBLIC SAFETY

(CC-84-167)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer. Claimant seeks an award in the amount of \$178.49 which represents the freight bill and overrun cost on forms delivered to respondent. Respondent, in its Answer, admits the validity and amount of the claim. It appearing to the Court that respondent had sufficient funds in the appropriate fiscal year from which the obligation could have been paid, the Court makes an award in the amount sought.

Award of \$178.49.

Opinion issued November 21, 1984

CHARLES R. DANIELS

AND ESSIE DANIELS

vs.

DEPARTMENT OF WELFARE

(CC-82-19)

Claimants appeared in person.

J. Bradley Russell, Assistant Attorney General, for respondent.

LYONS, JUDGE:

Claimants Charles R. and Essie Daniels seek to recover the sum of \$21,223.49 for the destruction of a barn on their property in Wayne County, West Virginia.

According to the claimants, their barn was set on fire by Gordon Epling, a child who had been placed in the foster home of Alvis and

driver employed by respondent, was part of a work crew performing work on Secondary Route 29/1 in Mason County, West Virginia. The job involved filling a large hole in the road with dirt and rock. The hole was located across a one-lane bridge over Crab Creek. As the deceased drove his loaded dump truck, which weighed approximately 10 tons, over the bridge, it collapsed, causing his death. The bridge had previously been posted with a three-ton weight limit. Claimant alleges that respondent willfully, wantonly, and recklessly required the deceased to cross the bridge in violation of the weight limit and seeks \$603,000.00 as a result of his death.

The foreman of the deceased's work crew, Kenneth Gardner, was the only witness to the accident. Mr. Gardner testified that when he and the deceased arrived at the bridge, he, Gardner, left the truck and walked across the bridge. His stated purpose was to make sure the truck, after crossing the bridge, was not backed into the hole which he estimated was 10 to 15 feet from the left edge of the bridge. Mr. Gardner said that he followed the same procedure earlier that day when another dump truck, driven by John Hughes, delivered the first load of dirt and gravel to the site. That truck crossed the bridge without incident. Mr. Gardner testified that he had visited the site several days prior to October 3, 1979, in order to check the hole. He also stated that he accompanied John Hayman, assistant county maintenance superintendent, to inspect the bridge, although Mr. Hayman denied Mr. Gardner's presence. Mr. Gardner denied seeing weight limit signs on the bridge on any prior visit.

Mr. Hayman drove to the bridge at the request of G.C. Sommer, county supervisor, to check its condition. Mr. Hayman testified that he performed a visual inspection of the bridge and that "the steel and the structure on the bridge, the bridge deck itself, looked all right." He drove a pickup truck over the bridge and examined both ends. Although he is neither an engineer nor a bridge inspector, Mr. Hayman testified that he had looked at bridges on different occasions to determine if they were safe. He reported that the bridge looked "safe for going ahead and doing the work that would need to be done," and that the work would include driving a dump truck over it. During the course of the inspection, Mr. Hayman noticed the weight limit sign, but added that respondent had disregarded weight limit signs on bridges before in order to perform work. There had never been any problems on other bridges, and Mr. Hayman stated he did not think the bridge over Crab Creek would collapse.

W.Va. Code §32-2-6 provides that a contributing employer to the Workmen's Compensation Fund shall not be liable for damages at

dent, in its Answer, admits the validity and amount of the claim. It appearing that respondent had sufficient funds in the appropriate fiscal year from which the obligation could have been paid, the Court makes an award in the amount sought.

Award of \$502.50.

Opinion issued November 21, 1984

THE JAMES & LAW COMPANY

vs.

DEPARTMENT OF PUBLIC SAFETY

(CC-84-163)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer. Claimant seeks \$182.90 for merchandise delivered to respondent's headquarters in Elkins, West Virginia. Respondent, in its Answer, admits the validity and amount of the claim. It appearing to the Court that respondent had sufficient funds in the appropriate fiscal year from which the obligation could have been paid, the Court makes an award in the amount sought.

Award of \$182.90.

Opinion issued November 21, 1984

JUDITH LYNN JEFFERS PICKENS,
ADMINISTRATRIX OF THE ESTATE OF
JOHN ROGER JEFFERS, DECEASED

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-347)

Don C. Kingery and David Nibert, Attorneys at Law, for claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

LYONS, JUDGE:

This claim was brought by claimant as administratrix of the estate of her late husband, John Roger Jeffers, who died on October 3, 1979, as a result of drowning. On that date, the deceased, a truck

wanton and reckless misconduct. The legislation requires proof of one of two standards. The first is proof that the employer acted with a consciously, subjectively and deliberately formed intention to produce the specific result of injury or death to the employee.

The second is proof of all the following facts:

1. The existence of a specific unsafe working condition presenting a high degree of risk.

2. The employer had a subjective realization and appreciation of the existence of the unsafe condition and degree of risk.

3. The unsafe condition violated a state or federal safety statute, rule, regulation or other safety standard.

4. Notwithstanding these facts, the employer intentionally exposed the employee to the unsafe working condition, and

5. The employee suffered injury or death as a direct and proximate result of the unsafe condition.

Under the more stringent legislative standard, the Court's conclusion necessarily remains the same. Although Mr. Hayman testified that respondent's employees routinely overlooked weight limits on bridges in order to perform work, the employer's subjective realization is not present. As previously discussed, a finding of negligence or even gross negligence on the part of the respondent is insufficient to establish liability in this claim. The Court is not unmindful of the claimant's loss, but the claim must be dismissed, and is dismissed.

Claim dismissed.

Opinion issued November 21, 1984

PFIZER, INC.

vs.

DEPARTMENT OF HEALTH

(CC-84-143)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$3,557.76 for merchandise supplied to respondent's Huntington State Hospital, but not paid for due to the expiration of the fiscal year. Respondent, in its Answer, admits the validity and amount of the claim. It appearing to the Court that respondent had

common law or by statute for the injury or death of an employee. Respondent is a contributing employer. An exception to this rule has been made and is codified in W. Va. Code §23-4-2(b) which provides a cause of action where injury or death to an employee resulted from "the deliberate intention of his employer to produce such injury or death." The record in this claim established that the claimant received benefits from the Workmen's Compensation Fund until the time of her remarriage in 1983. Claimant's infant son will receive benefits during the period of his dependency, either until age 18 or 25 if a full-time student. Therefore, if an award is to be made, it must be established that respondent acted with deliberate intent to cause the death of the decedent.

Deliberate intent was discussed by the W. Va. Supreme Court in the case of *Mandolidis v. Elkins Industries, Inc.*, ___ W. Va. ___, 246 S.E.2d 907 (1978). "An employer loses immunity from common law actions where such employee's conduct constitutes an intentional tort or wilful, wanton, and reckless misconduct." Intentional means that the actor desires to cause the consequences of the act or believes the consequences are substantially certain to result. The Court states that "willfulness or wantonness imports premeditation or knowledge and consciousness that injury is likely to result from the act done or from the omission to act." A distinction is found between wilful, wanton and reckless misconduct and negligence. The terms are mutually exclusive; not even gross negligence rises to a wilful, wanton standard as the terms imply different states of mind. Negligence implies inadvertence as distinguished from premeditation or formal intention.

Claimant argues, in her brief, that respondent acted with deliberate intent. Claimant looks to the actions of the deceased's supervisor, Kenneth Gardner, who stated that despite several prior trips to the accident site, he failed to see the weight limit signs. The fact that Mr. Gardner walked across the bridge before the trucks is alleged by claimant to indicate that Gardner was aware of the signs, and acted in a wilful and wanton manner. The Court must conclude differently. Whether the signs were viewed or not, the fact that an inspection of the bridge was conducted serves to remove knowledge and consciousness that injury would result. The Court is fully aware that the inspection was performed by someone not technically qualified to do so; nevertheless, the conscious appreciation of risk ceased.

In light of the *Mandolidis* decision and later court cases, the W. Va. Legislature passed a legislative standard for loss of employer immunity. W. Va. Code §23-4-2(c)(1) declares that this standard for loss of immunity is more narrow and specific than the standard of wilful,

sufficient funds in the appropriate fiscal year from which the obligation could have been paid, the Court makes an award in the amount sought.

Award of \$3,557.76.

Opinion issued November 21, 1984

ST. JOSEPH'S HOSPITAL

vs.

DEPARTMENT OF PUBLIC SAFETY

(CC-84-173)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer. Claimant seeks \$6.00 for emergency room service and follow-up examination for a state trooper. Respondent, in its Answer, admits the validity and amount of the claim. It appearing to the Court that respondent had sufficient funds in the appropriate fiscal year from which the obligation could have been paid, the Court makes an award in the amount sought.

Award of \$6.00.

Opinion issued November 21, 1984

CITY OF WELLSBURG

vs.

DEPARTMENT OF PUBLIC SAFETY

(CC-84-223)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer. Claimant seeks \$22.50 for a garbage service fee owed by respondent. In its Answer, respondent admits the validity and amount of the claim. It appearing to the Court that respondent had sufficient funds in the appropriate fiscal year from which the obligation could have been paid, the Court makes an award in the amount sought.

Award of \$22.50.

Opinion issued December 13, 1984

BAYSAL & ASSOCIATES, INC.

vs.

DEPARTMENT OF CORRECTIONS

(CC-84-260)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$130.00 for services rendered to an inmate of the West Virginia Penitentiary. Respondent, in its Answer, admits the validity and amount of the claim. It appearing to the Court that respondent had sufficient funds left in the appropriate fiscal year from which the obligation could have been paid, the Court makes an award in the amount sought.

Award of \$130.00.

Opinion issued December 13, 1984

THE GOODYEAR TIRE & RUBBER COMPANY

vs.

DEPARTMENT OF NATURAL RESOURCES

(CC-84-296a)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks an award of \$344.00 for merchandise delivered to respondent. In its Answer, respondent admits the validity and amount of the claim. It appearing to the Court that respondent had sufficient funds in the appropriate fiscal year from which the obligation could have been paid, an award is made in the amount sought.

Award of \$344.00.

Opinion issued December 13, 1984

THE GOODYEAR TIRE & RUBBER COMPANY

vs.

DEPARTMENT OF NATURAL RESOURCES

(CC-84-296b)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks an award of \$57.00 for merchandise delivered to respondent. In its Answer, respondent admits the validity and amount of the claim. It appearing to the Court that respondent had sufficient funds in the appropriate fiscal year from which the obligation could have been paid, an award is made in the amount sought.

Award of \$57.00.

Opinion issued December 13, 1984

GRAFTON SANITARY SEWER BOARD

vs.

DEPARTMENT OF CORRECTIONS

(CC-84-265)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$1,725.00 for payment of an overdue sewage bill for the W. Va. Industrial School. Respondent, in its Answer, admits the validity and amount of the claim. It appearing to the Court that respondent had sufficient funds in the appropriate fiscal year from which the obligation could have been paid, the Court makes an award in the amount sought.

Award of \$1,725.00.

Opinion issued December 13, 1984

KANAWHA VALLEY RADIOLOGISTS, INC.

vs.

DEPARTMENT OF PUBLIC SAFETY

(CC-84-292)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks an award of \$100.00 for medical services rendered to claimant's employee. In its Answer, respondent admits the validity and amount of the claim. It appearing to the Court that respondent had sufficient funds in the appropriate fiscal year from which the obligation could have been paid, an award is made in the amount sought.

Award of \$100.00.

Opinion issued December 13, 1984

D. VERNE McCONNELL

vs.

DEPARTMENT OF CORRECTIONS

(CC-84-272)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$22.00 for medical services rendered to an inmate at the W. Va. State Penitentiary in Moundsville. Respondent, in its Answer, admits the validity and amount of the claim. It appearing to the Court that respondent had sufficient funds in the appropriate fiscal year from which the obligation could have been paid, an award is made in the amount sought.

Award of \$22.00.

Opinion issued December 13, 1984

MEDICAL DENTAL BUREAU, INC.
(AGENT FOR OHIO VALLEY MEDICAL CENTER, INC.)

vs.

DEPARTMENT OF CORRECTIONS
(CC-84-278)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks an award of \$186.76 for medical services provided to an inmate at W. Va. State Penitentiary at Moundsville. Respondent, in its Answer, admits the validity and amount of the claim. It appearing to the Court that respondent had sufficient funds in the appropriate fiscal year from which the obligation could have been paid, an award is made in the amount sought.

Award of \$186.76.

Opinion issued December 13, 1984

MID-ATLANTIC PAVING COMPANY, INC.

vs.

DEPARTMENT OF HIGHWAYS
(CC-84-182)

W.D. McGee for the claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted upon a written stipulation which revealed that on November 2, 1983, claimant delivered to the respondent an order of asphalt totalling \$3,929.25. The respondent subsequently utilized the material, but an invoice submitted by the claimant was never paid. The Court therefore finds the respondent liable, and makes an award to the claimant in the amount of \$3,929.25.

Award of \$3,929.25.

Opinion issued December 13, 1984

PUTNAM GENERAL HOSPITAL
vs.
DEPARTMENT OF PUBLIC SAFETY
(CC-84-285)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks an award of \$1,533.40 for medical services provided to respondent's employee. Respondent, in its Answer, admits the validity and amount of the claim. It appearing to the Court that respondent had sufficient funds in the appropriate fiscal year from which the obligation could have been paid, an award is made in the amount sought.

Award of \$1,533.40.

Opinion issued December 13, 1984

RICHARD F. TERRY, M.D., INC.
vs.
DEPARTMENT OF CORRECTIONS
(CC-84-297a)

Gary A. Sacco, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$65.00 for medical services rendered to an inmate at the W. Va. State Penitentiary in Moundsville. In its Answer, respondent admits the validity and amount of the claim. It appearing to the Court that respondent had sufficient funds in the appropriate fiscal year from which the obligation could have been paid, an award is made in the amount sought.

Award of \$65.00.

Opinion issued December 13, 1984

RICHARD F. TERRY, M.D., INC.

vs.

DEPARTMENT OF CORRECTIONS

(CC-84-297b)

Gary A. Sacco, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$670.00 for medical services rendered to an inmate at the W. Va. State Penitentiary in Moundsville. In its Answer, respondent admits the validity and amount of the claim. It appearing to the Court that respondent had sufficient funds in the appropriate fiscal year from which the obligation could have been paid, an award is made in the amount sought.

Award of \$670.00.

Opinion issued December 13, 1984

3M COMPANY

vs.

DEPARTMENT OF PUBLIC SAFETY

(CC-84-179)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks an award of \$246.16 for rental and usage charges on a Model 777CGS copier. Respondent, in its Answer, admits the validity and amount of the claim. It appearing to the Court that respondent had sufficient funds in the appropriate fiscal year from which the obligation could have been paid, an award is made to claimant in the amount sought.

Award of \$246.16.

Opinion issued December 13, 1984

WHEELING ELECTRIC COMPANY

vs.

DEPARTMENT OF CORRECTIONS

(CC-84-290)

John B. Garden, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$4,602.64 for electrical service provided to the W. Va. Penitentiary in Moundsville, W. Va. Respondent, in its Answer, admits the validity and amount of the claim. As it appears to the Court that respondent had sufficient funds in the appropriate fiscal year from which the obligation could have been paid, an award is made in the amount sought.

Award of \$4,602.64.

Opinion issued December 17, 1984

JERRELL & ANNA BARNHILL

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-128)

Stephen P. Meyer, Attorney at Law, for claimant.

Olivia Cooper Bibb, Attorney at Law, for respondent.

WALLACE, JUDGE:

This claim was bifurcated for hearing, and only the issue of liability was presented to the Court for determination.

Claimant seeks damages in the amount of \$250,000.00 for personal injuries allegedly sustained due to respondent's negligent maintenance of County Route 3/7 in the Laurel Campgrounds in Mingo County, West Virginia. On August 1, 1981, at approximately 9:15 p.m., claimant was a passenger in a van driven by Kenneth Mullins. As the van proceeded down Route 3/7, which is a dirt road, it came to a concrete bridge. The bridge was 22 feet 4 inches wide but the road on either side of the bridge is one lane. As the van travelled over the bridge, it struck a hole off the right-hand edge of the bridge, where part of the ground had eroded. Claimant struck the dashboard of the van, resulting in injury. She testified that she did not see the hole, that it was dark, and

that the hole was unmarked. The driver of the van, Kenneth Mullins, was not present to testify; however, claimant stated that he drove the van to the campground because he lived in the area and had been to the site on other occasions.

Bruce Collinsworth, superintendent of Laurel Lake, testified that the erosion had occurred two or three months prior to the incident. He had notified respondent of the damage. Jimmy Messer, an engineer with respondent, viewed the situation and determined that it was not a priority repair. He said this was because the road was not highly travelled, was posted for 10 m.p.h., and the erosion at the edge of the bridge was not in the traveled portion of the road. Mr. Collinsworth stated that he marked the hole by placing a one-ton rock before it on the bridge, but that the rock had been rolled off the bridge sometime during the afternoon of August 1, 1981.

The State is neither an insurer nor a guarantor of the safety of motorists on its highways. *Adkins vs. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order for the respondent to be found liable, proof of actual or constructive notice of the defect and a reasonable amount of time to take suitable corrective action must be shown. *Davis vs. Dept. of Highways*, 11 Ct.Cl. 150 (1976). In this case it is clear that respondent had actual notice of the defect. However, Mr. Messer testified that highly travelled roads in the area had a greater priority for repairs than Route 3/7. The Court is aware of respondent's need to allocate its resources and manpower on a priority basis, and notes that an attempt was made to mark the hole until repairs could be made. It is the opinion of the Court that claimant has not met the burden of proof necessary to establish liability, and disallows the claim.

Claim disallowed.

Advisory Opinion issued December 17, 1984

CLEVELAND CLINIC FOUNDATION

vs.

BOARD OF REGENTS

(CC-84-236)

James L. Weisenberger for the claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for an advisory determination pursuant to W.Va. Code §14-2-18. Claimant requests payment of \$3,286.05 for medical services rendered to Greg W. Dunning, a student at Glenville

State College. Mr. Dunning became ill while playing in a varsity football game for Glenville State, and was treated at Cleveland Clinic.

In its Answer, the respondent admits the amount and validity of the claim, and states that there were sufficient funds available in the pertinent fiscal year from which the claim could have been paid. The Court therefore concludes that the respondent is liable to the claimant in the amount of \$3,286.05. As this is an advisory opinion, no award will be made; however, the Clerk of the Court is directed to file this opinion and to forward a copy to the respondent so that the claim may be paid.

Opinion issued December 17, 1984

GLORIA VANCE CRESS

vs.

BOARD OF REGENTS

(CC-83-311)

Frederick P. Stamp, Jr., and Barbara L. Baxter, Attorneys at Law,
for claimant.

J. Bradley Russell, Assistant Attorney General, for respondent.

WALLACE, JUDGE:

Claimant, Gloria Vance Cress, seeks payment of the sum of \$3,895.00 under a contract of employment with respondent's West Virginia Northern Community College in Wheeling, West Virginia.

According to the claimant, she was hired by the College on October 16, 1981, for the position of Personnel Director III at a beginning salary of \$15,000.00 per year. Her initial contract referred to her position as Personnel Officer III, a Pay Grade 13. The \$15,000.00 salary was below even the minimum salary for a Pay Grade 12.

On July 1, 1983, claimant was redefined a Pay Grade 12, and is now claiming the amount allegedly due her during the time she was classified at the higher Pay Grade 13, which represents an underpayment of \$3,895.00.

At the hearing, the claimant testified that at the time the job of Personnel Officer III, Grade 13, was offered to her, she was informed that the rate of pay would be \$15,000.00 per year. On October 15, 1981, claimant assumed her duties at the College. In February of 1982, she became aware of the general salary schedule for all employees at the College, and discovered that the minimum annual salary for Pay Grade 13 was \$17,280.00. Claimant testified that she informed her

supervisor of the discrepancy in her salary, and was told it would be rectified.

The following academic year, 1982-83, claimant was reappointed to her position as Personnel Officer III at the same salary and pay grade. Again, claimant brought the matter to the attention of her supervisor, who informed her that the Governor had placed a freeze on salaries, but as soon as funds became available, the mistake would be corrected.

The third academic year, 1983-84, when the same contract of employment was offered to the claimant, she decided not to sign it. Only after viewing copies of two letters given to her by her supervisor, did the claimant sign the contract. Those letters (Claimant's Exhibits 8 and 9) were written by and between the President of West Virginia Northern Community College and the Chancellor of the West Virginia Board of Regents. That correspondence indicated that the College was in error with regard to the beginning pay rate of three employees, including the claimant. However, the Chancellor's letter (Claimant's Exhibit 8) indicated that the position of Personnel Officer was advertised at the \$15,000.00 figure, and that all applicants, including Mrs. Cress, were aware of the beginning salary rate.

The letter goes on to say that the pay grade should have been changed in the personnel office, but the change was never made.

From the evidence adduced at the hearing of this case, it is apparent to the Court that a valid contract of employment was entered into by the parties. There was mutual agreement to the same terms, a "meeting of the minds" with respect to the conditions of employment, including the salary issue. The basic rule in the construction of contracts is that the intention of the parties governs, as expressed by them in the words they have used. *Columbia Gas Transmission Corp. v. E. I. du Pont de Nemours & Co.*, 217 S.E.2d 919 (W.Va. 1975).

Claimant's argument is based upon the fact that the pay grade number of her job was not consistent with the salary schedule. However, the claimant did not become aware of the discrepancy until after she accepted the offer of employment. At the time the contract was made, there was agreement between the parties regarding the terms of employment. The Court can therefore find no liability on the part of the respondent, and must deny the claim.

Claim disallowed.

Opinion issued December 17, 1984

ESTATE OF WILLIAM ROBERT GOE, DECEASED
BY NORVAL D. GOE, EXECUTOR

vs.

ATTORNEY GENERAL

(CC-84-11)

John W. Woods and J. Thomas Lane, Attorneys at Law, for the claimant.

Victor A. Barone, Deputy Attorney General, for the respondent.

LYONS, JUDGE:

This claim was submitted upon a written stipulation and briefs filed by the parties. The stipulation revealed the facts which follow.

On July 30, 1980, Byron Dennison filed a civil rights action in U.S. District Court against William Goe, individually and as Community and Civic Affairs Coordinator of the West Virginia Department of Highways, alleging that Dennison had been wrongfully discharged from his employment with the Department of Highways. On June 7, 1982, while the civil rights action was pending, William Robert Goe died. Norval D. Goe, his brother, is executor of the estate.

On July 20, 1982, Norval D. Goe, as executor, was notified by the Attorney General that the Attorney General would no longer represent the interest of William Robert Goe. Norval D. Goe, as executor, then retained the law firm of Bowles, McDavid, Graff & Love to represent the estate.

In August of 1982, the Estate of William Robert Goe petitioned the West Virginia Supreme Court of Appeals for a writ of mandamus to require the Attorney General to continue representing the estate. The West Virginia Supreme Court awarded the writ of mandamus, ruling that the Attorney General had a clear legal duty to continue to represent the estate, since Mr. Goe had been sued as a result of an act which was directly out of the discharge of his official duties, pursuant to W.Va. Code §5-3-2.

After the awarding of the writ, the Attorney General again assumed representation of Mr. Goe's interest. The trial lasted four weeks and resulted in a hung jury. Byron Dennison again brought the case but later took a dismissal with prejudice.

As a result of the Attorney General's decision not to represent Mr. Goe's estate, legal expenses of \$7,569.42 were incurred by the estate, as shown by a stipulation agreed to by the parties.

The West Virginia Supreme Court of Appeals ruled in the case of *Goe v. Browning*, 296 S.E.2d 45 (1982), that where the Attorney General undertakes to represent a State employee in a civil suit arising

from the discharge of the employee's official duties, and after representation has been undertaken the State employee dies and his estate is substituted as a party defendant, the Attorney General has a clear legal duty to represent the estate of the State employee. Accordingly, the Court makes an award of \$7,569.42 to the claimant.

Award of \$7,569.42.

Opinion issued December 17, 1984

LUCILLE JORDAN, ADMINISTRATRIX OF THE ESTATE OF
JERRY LEE McCOMAS, DECEASED

vs.

GOVERNOR'S OFFICE OF ECONOMIC & COMMUNITY
DEVELOPMENT, GOVERNOR'S SUMMER YOUTH
PROGRAM and DEPARTMENT OF HIGHWAYS
(CC-83-235)

Richard L. Vital and Ray L. Hampton, Attorneys at Law, for claimant.

Brenda Nichols Harper, Assistant Attorney General, Henry C. Bias, Jr., Deputy Attorney General, and Nancy J. Aliff, Attorney at Law, for respondents.

PER CURIAM:

On September 24, 1984, and September 26, 1984, the Court heard testimony concerning the drowning death of claimant's decedent, which occurred on July 29, 1981. At the conclusion of claimant's case, the respondents made Motions to Dismiss, and after oral arguments on the Motions, the Court unanimously sustained respondents' Motions and dismissed the claim.

On July 27, 1981, claimant's decedent was employed by respondent, Governor's Office of Economic and Community Development, through the summer Youth Program. As part of his employment, he was cutting weeds along Four-Pole Creek in Ritter Park, Huntington, West Virginia. Two of the deceased's co-workers saw him in the creek and they informed their supervisor that he was swimming or playing around in the water. When they returned to the creek, which is very shallow in most places, the deceased could not be found. After a search of the area, the work crew left the park, concluding that the deceased had returned home. On a previous occasion the deceased had been in the creek, and after being admonished by his supervisor not to play in the creek again, he left the park without notifying anyone and

went home. On the day in question, his body was discovered in an eroded area of the creek, in approximately six feet of water. The Court, after hearing all the facts, determined that the claim was a proper one for Workmen's Compensation. There was no evidence of willful, wanton or reckless misconduct on the part of respondents, nor an intent to injure decedent, which would remove the bar of Workmen's Compensation. As this Court's jurisdiction does not extend to Workmen's Compensation claims, the claim was dismissed. W. Va. Code §14-2-14.

Claim dismissed.

Opinion issued December 17, 1984

MOORE BUSINESS FORMS, INC.

vs.

BOARD OF REGENTS

(CC-84-207)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

Claimant seeks \$575.87 for stock computer paper supplied to respondent. Respondent, in its Answer, alleges that claimant had no lawful contract to supply goods to respondent. It is further stated that respondent received and used the goods. As it would be unjust enrichment not to make an award in this claim, the Court will make an award on a quantum meruit basis.

Claimant supplied 14 7/8 x 11 size paper at \$7.97 per thousand and 9 1/2 x 11 size which reduces to 8 1/2 x 11 at \$5.97 per thousand. It was determined that a later contract was negotiated at \$6.32 per thousand for the larger paper, and a greater amount for the smaller paper. The Court, therefore, makes an award to claimant for the material supplied at \$6.32 per thousand and \$5.97 per thousand, for a total award of \$490.07.

Award of \$490.07.

Opinion issued December 17, 1984

REGINA M. RHOADS

vs.

DEPARTMENT OF HIGHWAYS

(CC-84-46)

Delby B. Pool, Attorney at Law, for claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On September 16, 1983, claimant was involved in an automobile accident at approximately 5:00 p.m., on W.Va. Rt. 24, in Bridgeport, Harrison County, West Virginia. She was driving her 1981 Datsun 200SX in a southerly direction, and as she was negotiating a sharp turn in the road, the rear portion of the vehicle began to slide. It collided with an automobile owned by Andrew Tomasik, Jr., which was headed northbound. Damage to the claimant's vehicle amounted to \$1,268.40, and damage to the Tomasik vehicle was \$330.86. Claimant's insurance paid for the damages to both vehicles, except for \$100.00 deductible on claimant's automobile.

At the time of the incident, the pavement was wet. Officer James M. Miles, who investigated the accident, testified that he did not issue a citation to the claimant. He stated that the road became slippery when wet due to some unknown substance in the road. When asked whether the road had an oily surface, Officer Miles replied:

"I would say that, yes, it had some type of an oily type of substance which would cause it to be slippery. I can give an example that I can stop my car at the top of the hill here, exiting my cruiser, stand on my feet with my feet perpendicular to the roadway, I would slide down the road."

He felt that the road was sloped in the wrong direction, with the outside of the curve lower than the inside. Officer Miles added that there had been other accidents of a similar nature under similar conditions.

Captain William E. Allender of the Bridgeport Police Department testified that he sent a letter on October 16, 1980, to respondent concerning the accident site on Route 24. The letter stated, in part:

". . . the majority of the accidents recently are vehicles failing to negotiate the ninety degree curve on W.Va. Rt. 24 at the Hall Street intersection. Most of these accidents have occurred (sic) during the time that the pavement was wet and the speed of the vehicles did not appear to be a contributing factor.

The problem seems to be a lack of traction on a ninety degree downhill curve with improper elevation.”

Captain Allender stated that a representative of respondent suggested placing signs showing slippery road at the site. There was no evidence presented to indicate that the signs were installed. He was asked whether anything was done to the roadbed itself, and replied, “Not to my knowledge.”

Respondent’s witness, Ronald C. Smith, Jr., a civil engineer in the maintenance department, testified that Route 24 was properly elevated with the inside of the curve slightly lower than the outside. He also said that he was unaware of any substance in the pavement at the location which made the road slippery when wet. Under cross-examination, Mr. Smith stated that he had never worked on the road and had no knowledge of what the road surface was made of.

It is well established that the State neither insures nor guarantees the safety of travellers on its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to find respondent liable for the damages incurred, actual or constructive notice of the defect must be shown. In this claim, actual notice was established by the letter of October 16, 1980. The Court finds that respondent has failed to establish that the road was free from defects and negligently failed to take corrective action. Respondent is therefore liable to the claimant for her actual out-of-pocket losses. The Court makes an award to claimant in the amount of \$100.00, the amount of her deductible.

Award of \$100.00.

Opinion issued December 17, 1984

KEITH B. SAYRE

vs.

DEPARTMENT OF HIGHWAYS
(CC-84-174)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On April 28, 1984, at approximately 12:10 p.m., the claimant was operating his 1981 Audi Coupe automobile in a westerly direction on 7th Avenue in North Charleston, West Virginia, when he struck a pothole in the road which was estimated to be 18 inches long by 12 inches wide and 8-10 inches deep. As a result of the accident, claimant

incurred expenses of \$660.07. His insurance covered all but a \$200 deductible, the amount of claimant's actual out-of-pocket loss.

The claimant testified at the hearing that the weather was clear and that he was travelling about twenty feet behind a truck. The truck swerved suddenly, and claimant's car struck the pothole.

It is well established that the State is not an insurer nor guarantor of the safety of motorists upon its highways. *Adkins v. Sims*, 130 W. Va. 645, 46 S.E.2d 81 (1947). There was no evidence introduced showing that the respondent had actual notice of any hazardous road condition; however, a pothole of this size cannot have developed overnight, and the respondent is charged with constructive notice of the defect. The Court finds, however, that the claimant was travelling too close to the vehicle in front of him, and did not allow himself sufficient time to see and avoid the pothole. This negligence was equal to or greater than respondent's, and under the doctrine of comparative negligence, the claim is denied. *Hull v. Dept. of Highways*, 13 Ct.Cl. 408 (1981).

Claim disallowed.

Opinion issued December 17, 1984

WEST VIRGINIA UTILITY
CONTRACTORS ASSOCIATION

vs.

GOVERNOR'S OFFICE OF ECONOMIC
AND COMMUNITY DEVELOPMENT
(CC-82-296)

William T. Brotherton, Jr., Attorney at Law, for the claimant.

Brenda N. Harper, Assistant Attorney General, for the respondent.

LYONS, JUDGE:

This claim arises out of a 1978 contract entered into by the claimant, West Virginia Utility Contractors Association (hereinafter referred to as "WVUCA") and the respondent, Governor's Office of Economic and Community Development (hereinafter referred to as "OECD"), by which the claimant was to perform certain work under grants from the respondent for work training programs. On February 15, 1978, claimant WVUCA subcontracted the work to an independent training company known as "Vrain," in Virginia.

All work under the grants was completed and all questions regarding reimbursement for expenses were resolved except for the sum of \$6,750.00, the amount of this claim.

The disputed sum is sought by WVUCA as reimbursement for the salary paid to Mrs. Norma Ciccarello, an employee of the subcontractor, Vrain. An internal audit was conducted in May 1978 wherein it was determined that the employment of Mrs. Ciccarello constituted nepotism, since her husband's company was hired by WVUCA to manage the training programs. Federal funds were involved, and the nepotism was deemed in violation of applicable federal regulations. Respondent contends that that violation serves as a bar to recovery by the claimant of the salary paid to its subcontractor's employee.

The Court must conclude that the agreement entered into by the claimant and its subcontractor, Vrain, was valid; however, contrary to the policy which governed the employment training programs, Vrain hired the wife of claimant's executive director. When notice of the wrongdoing was given to the parties, it was recommended that payments to Mrs. Ciccarello should cease as of July 1, 1978.

From the evidence presented in the form of copies of cancelled checks issued by Vrain to Mrs. Ciccarello, the Court finds that the total amount paid to her for the period in question was \$5,146.51. No further payments were made after the recommended cutoff date of July 1, 1978. However, the date of the internal audit was May 16, 1978, when the claimant was first notified of the existence of the nepotism violation. At that point, Mrs. Ciccarello had been paid a total of \$3,374.57.

The Court concludes that the respondent is liable for the amount paid to claimant's subcontractor's employee up to the time the claimant had notice of the improper hiring. An award of \$3,374.57 is therefore made to the claimant.

Award of \$3,374.57.

Opinion issued December 17, 1984

AMELIO J. WHITE

vs.

DEPARTMENT OF HIGHWAYS

(CC-84-171)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimant alleges that on the evening of April 4, 1984, while travelling on Route 60 from Montgomery to Charleston, West Virginia, his

1981 Plymouth Reliant station wagon was damaged when it struck a pothole extending across the right lane. The claimant testified that he had been driving at a speed of 40-45 mph and that it was raining.

Damage to the vehicle amounted to \$397.88, of which sum claimant's insurance company paid \$264.52, leaving a balance of \$133.36, the amount of the claim.

The claimant testified that the hole which he struck measured eighteen inches wide and eight inches deep. Claimant stated that he had travelled that portion of highway several months before, and had not noticed a hole or bump in the road at that location. In the fall of 1983, according to the claimant, the road had been blacktopped and was in good shape.

While the State is not an insurer of the safety of motorists using its highways, it does have the affirmative duty of using reasonable care for their safety. Although there was no evidence that the respondent had actual knowledge of the existence of this defect, the Court is of the opinion that it did have constructive notice. Route 60 is one of the main highways in this State, and it is clear that a pothole of the size described by the claimant could not have developed overnight. *Lohan v. Dept. of Highways*, 11 Ct.Cl. 39 (1975). Therefore, an award is made to the claimant in the amount of \$133.36.

Award of \$133.36.

Opinion issued January 4, 1985

BATES & ROGERS CONSTRUCTION CORPORATION

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-143)

Charles E. Hurt, counsel for the claimant.

S. Reed Waters, Jr., counsel for the respondent.

WALLACE, JUDGE:

Claimant, Bates & Rogers Construction Corporation, entered into a contract with the respondent for construction of a bridge ramp known as Project I-IC-77-3(97)99, C-7, Kanawha County, West Virginia. Claimant's subcontractor, Charleston Concrete Floor Company, performed the deck overlay work with latex modified concrete. Claimant asserts that a loss of \$11,424.65 resulted when respondent required the subcontractor to repair a portion of the deck overlay which did not meet specifications.

The placing of the latex modified concrete occurred in a sequence of 14 days. The work performed on each day was designated as a "pour." On the first day, referred to by the parties as the first pour, the subcontractor used a heavy steel tined broom, to finish the surface, at the request of Kenneth Webb, an employee of the respondent. Problems were encountered by the subcontractor in using the heavy steel tined broom. The subcontractor then switched to a soft brush broom which performed satisfactorily. The subcontractor covered the surface with wet burlap for curing purposes. However, this first pour cracked and had to be replaced at a later date.

The subcontractor then experimented with different brooms in an attempt to achieve the finished surface desired by respondent. A reed tine broom was used on the second pour, a soft bristle broom on the third pour, and, finally, a single tine steel broom was used on the fifth pour which achieved the finish desired. This single tine steel broom was successfully used on the remainder of the pours with satisfactory results.

The subcontractor testified that he had placed latex modified concrete previously and always used a soft bristle broom for the finished surface. On this particular project a different finish with deeper grooves was desired. The specifications which apply to the placement of latex modified concrete refer to finishing with a broom but no specific broom is indicated.

The subcontractor used various brooms in an attempt to satisfy the respondent and achieve the finish desired. The experimental use of the heavy steel tined broom did not achieve the desired surface finish.

It is the opinion of the Court that the subcontractor should be reimbursed for the repairs to the deck overlay. Therefore, an award is made to claimant in the amount of \$11,424.65, which amount was stipulated by the parties.

Award of \$11,424.65.

Opinion issued January 25, 1985

AMERICAN BRIDGE DIVISION
OF UNITED STATES STEEL CORPORATION
AND AMERICAN BRIDGE DIVISION
OF UNITED STATES STEEL CORPORATION,
ON BEHALF OF FOSTER & CREIGHTON COMPANY
vs.
DEPARTMENT OF HIGHWAYS
(CC-81-205)

James R. Watson, Attorney at Law, for claimants.

S. Reed Waters, Jr., Attorney at Law, for respondent.

WALLACE, JUDGE:

This claim was filed against the respondent by American Bridge Division of United States Steel Corporation and American Bridge Division of United States Steel Corporation, on behalf of Foster & Creighton Company, a corporation (hereinafter referred to as Foster & Creighton).

United States Steel Corporation, through its American Bridge Division, entered into a contract with the respondent, dated June 28, 1973, to erect the New River Gorge Bridge in Fayette County, West Virginia [Project AC-APD-APD-482(52)], for the total amount of \$33,984,011.55. Foster & Creighton Company was a subcontractor of U.S. Steel. This bid was twelve million dollars under the engineer's estimate and five million dollars under the closest competitor. American Bridge seeks to recover \$1,508,260.39 and for the Foster & Creighton portion of the claim, \$306,409.15, for additional costs incurred due to alleged changed conditions in the work site.

The bridge was to be constructed on a series of piers or bents numbered one to twenty-two from the south side of the gorge to the north side. To construct the bridge, U.S. Steel erected a twin cableway system to move the structural steel to the piers and arch span. The cableway consisted of two tramway towers on each side of the gorge with two trolleys to carry the steel. The towers were secured by tie back anchors on each side of the gorge.

The south end of the cableway collapsed on March 25, 1975, and was not back in operation until July. This caused a three-month delay in the placement of steel. Damages sustained by reason of this tower collapse are not being claimed in this action.

In accordance with the planned sequence, Foster & Creighton commenced excavations at the northernmost pier, number twenty-two. Adequate rock foundation was not reached at the depth indicated by the contract. The respondent directed that the work cease on the pier and redesigned the footer.

Subsequent to this, additional problems were encountered and it became necessary for the respondent to redesign the footers on Piers 21, 1, 3, and 4, and a mine haul road had to be relocated necessitating the construction of a retaining wall to hold the relocated road.

The claimant contends that because of these redesigns and modifications it is entitled to an equitable adjustment under Section 104.2 of the *Standard Specifications Roads and Bridges*, adopted 1972, of the West Virginia Department of Highways. This section provides in part:

. . . .

“Should the contractor encounter or the Department discover during the progress of the work subsurface or latent physical conditions at the site differing materially from those indicated in the contract, or unknown physical conditions at the site of an unusual nature, . . . and if the Engineer finds the conditions do materially differ and cause an increase or decrease in the cost of, or the time required for performance of the contract, an equitable adjustment will be made and the contract modified in writing accordingly.”

By reason of the redesign and modifications made by the respondent, the claimant was required to do additional work, and the planned sequence of work was disrupted while the redesign work was being accomplished by the respondent. Additional exploratory drilling was required as well as additional structural excavation and the pouring of additional concrete.

The respondent recognized that it was necessary that additional work be performed and did pay the subcontractor for the quantity of the work performed and extended the completion date of the contract from October 1, 1976, to October 11, 1977. The contract was completed on October 14, 1977, and three days liquidated damages of \$900.00 were assessed.

The claimant contends that although the respondent paid the subcontractor for the increase in quantities, it is entitled to be compensated for additional costs resulting from having to alter the sequence and method of work.

The respondent contends that the general provisions of the contract allowed for the change in dimensions and elevations when necessary; that the contractor was adequately compensated for any additional work and that there were no differing site conditions that were within reasonable probability of being encountered.

During the period in which the sequence of the work was being delayed, claimant attempted to commence the construction of the tie back anchor for the cableway on the south side of the gorge. The tie back anchor was to be located in an area to be cleared by the grading contractor, Greer Brothers and Young. The clearing work had not been completed, and to accelerate this work, claimant agreed to Change Order No. 1, dated September 11, 1973, wherein the claimant's contract was reduced by \$28,000.00, and a like amount was added to the contract of Greer Brothers and Young to compensate it for additional costs incurred by changing its original sequence of construction. The change order required the excavation to be completed by October 20, 1973. The excavation was actually completed on November 9, 1973, and claimant contends the \$28,000.00 should be restored to its contract.

The Court is of the opinion that the claimant is entitled to an equitable adjustment necessitated by changed site conditions. This adjustment should be in addition to the compensation received for the increase in quantities and the granting of an extended contract completion date.

The claimant is seeking to recover the total sum of \$1,814,669.54. The evidence adduced at the hearing was extensive and all-inclusive. Although the Court is of the opinion that claimant is entitled to an equitable adjustment, such an adjustment is not warranted to the extent or in the amount claimed. After careful consideration of the evidence, the Court finds that the claimant is entitled to an award of \$518,505.65 and a restoration of one-half of the \$28,000.00 deducted from the contract to compensate for the excavation work of Greer Brothers and Young. Although Greer Brothers and Young did not complete the excavation in the time required by Change Order No. 1, the claimant was benefited by the change order which enabled work to commence on the installation of the south side tie back anchor earlier than would have been possible without the change order.

The amount of the award was calculated as follows. The monetary damages in the American Bridge Division of U.S. Steel Corporation portion of the claim are shown in Claimant's Exhibit 41. It is alleged that 6,383.3 man-hours were lost due to subsurface problems prior to the start of the erection of structural steel. The Court finds this figure excessive and bases its award in this portion of the claim on 2,000 lost man-hours. This figure is multiplied by \$8.71, which represents the average hourly wage rate. The direct labor additive is calculated at 33%, and not the claimed 49%. The Court has arrived at this figure by removing the department overhead cost. This provides an award for labor prior to the start of steel erection of \$23,168.60.

The total amount of lost man-hours claimed by American Bridge for labor after the start of erection is granted, but the Court again reduces the direct labor additive to 33%. This labor figure is \$254,217.46. In both labor figures, the Court has eliminated general and administrative expenses and profit.

All claims for equipment costs and fixed expenses have been eliminated as the Court finds these figures to be speculative. The Court has calculated the State Business & Occupation Tax at 2.2% and the performance bond at .18% and added the \$14,000.00 for the change order to arrive at the total award for the American Bridge Division of United States Steel Corporation portion of the claim of \$297,987.84.

The claim for the Foster & Creighton portion of claimant's claim is found in Claimant's Exhibit 48. The claims for equipment rentals from itself and from other companies are denied as speculative. This is also true of the claim for fuel for the equipment. The claims for salaried personnel and job site office expense are awarded, but no award is made for headquarter expense or markup. State B & O Tax of 2.2% and performance bond at .36% are again granted. This results in a total figure of \$189,837.11. Claimant reduced its total requested award for manpower and equipment by 46% to reflect the actual amount of time used in excavation. The Court employs a 56% figure, instead of the 46%, because claimant bases its figure on ideal estimated production rates which the Court finds are overly optimistic. This results in a partial award of \$83,528.33 for salaried personnel and job site office expense. An award of \$150,989.48 is granted for labor on structural excavation. This figure does not include labor costs incurred on the retaining wall or on the change order on the bridge. State B & O Tax of 2.2% and the performance bond at .36% once again are granted on the resultant labor cost. Labor insurance and markups are denied. The Court does not need to consider the deduction of 64% for effective utilization of excavation force since the equipment costs are not awarded and the estimated figures too speculative, as these are again based on the ideal. The total award as calculated for the Foster & Creighton portion of claimant's claim is \$234,517.81.

In accordance with the provisions of West Virginia Code §14-3-1, interest at 6% per annum is calculated on this award based on the final acceptance date of the project of May 5, 1978. Interest is allowed from the one hundred fifty-first day after the date of final acceptance, October 3, 1978, until the issuance date of this opinion, January 25, 1985.

Award of \$532,505.65, with interest in the amount of \$201,943.65, for a total award of \$734,449.30.

Opinion issued January 30, 1985

SYLVIA A. CADLE

vs.

DEPARTMENT OF HIGHWAYS
(CC-83-44)

David J. Cecil, Attorney at Law, for claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

GRACEY, JUDGE:

Claimant Sylvia Cadle is the owner of her residential real estate at 4728 Big Tyler Mountain Road, also known as West Virginia Route No. 501, in Kanawha County. Her property is on the easterly side of the road, a gravel driveway leading downhill to her frame residence with partial basement. She testified that she had no problem with water drainage prior to 1975 when the respondent widened the pavement of Route 501, adding 2.5 feet of pavement width on her easterly side of the highway. She described how a drainage ditch, paralleling the highway, and on her side, had been eliminated in the pavement widening project. This ditch had carried the surface water northerly, downhill, beyond her driveway and residence. After the project, the gravel berm sloped downward from the pavement, without a parallel ditch, and the surface water came over the hill, down her driveway, and into her yard and basement. The result, she explained, was destruction of the partial basement and foundation of her residence, destruction of a garage, and a continuing landslide, all caused by water saturation of the real estate. On two occasions she had culverts placed under the entrance of her gravel driveway, but these did little good, and became clogged with gravel from the berm.

Claimant's expert witness, George Allen Hall, a professional consulting engineer, examined claimant's property once in September 1982 and again in July 1984. He testified his examination of Route 501 north of claimant's property revealed an old landslide which had been corrected by the respondent with piling being placed adjacent to the road. To the south of this landslide and between claimant's property and the slide area is an unstable area of ground. To the east of claimant's property is a creek or stream. On the south of claimant's property is a concrete driveway beneath which twin 15-inch culverts had

been installed. Mr. Hall concluded that the whole area is "landslide susceptible" and that ". . . the change in the water conditions which originally dumped the water into the slide area . . . now dumps the water into the area above, including the area under the Cadle home, has contributed considerably."

Respondent's witnesses included Charles A. Cavender, a surveyor for respondent; Ralph Ivan Adams, a geologist with Materials Control, Soil and Testing Division of the respondent; and Barney Clifford Stinnett, a Senior Soils Engineer for respondent.

Mr. Cavender surveyed Route 501 in front of claimant's property and the concrete driveway adjacent to the property on the south. His survey revealed that Route 501 is level for some distance and then slopes towards claimant's property for a distance of 32 feet. The cement road also slopes towards claimant's property.

Mr. Adams testified that he first examined the site in September 1982. He observed that the toe of the landslide is in the creek behind claimant's property. There is erosion occurring in the creek bed. All of the land is moving as the toe of the slope erodes. Claimant's property is, therefore, subject to the same land movement. Mr. Adams did not feel that the widening of Route 501 affected the amount of surface water flowing onto claimant's property.

Mr. Stinnett testified that the erosion in the creek bed created an unstable condition which has affected the area above the creek including claimant's property. He also stated that water draining from the road would affect the stability of the slide. He testified that "removal of the toe of a slide is much more critical than adding water up in the slide because you are affecting, removing any resistance to movement." However, Mr. Stinnett did indicate that water, subsurface as well as drainage, is a secondary cause of a slide.

After examining all of the evidence submitted in this claim, the Court has determined that claimant's property is in a slide prone area. The alteration of the drainage of water from the surface of Route 501, by widening the road and eliminating a drainage ditch, has resulted in more water flowing onto claimant's property.

The common law rule that surface water is considered a common enemy, and that each landowner may fight it off as best he can, prevails in Virginia and West Virginia, with the modification that an owner of higher ground may not inflict injury on the owner of lower ground beyond what is necessary. *Norfolk & W. R. Co. v. Carter*, 91 Va. 587, 22 S.E. 517, *Jordan v. Benwood*, 42 W.Va. 312, 26 S.E. 266, and *Lindamood v. Bd. of Education*, 92 W.Va. 387, 114 S.E. 800.

Mr. Larry Wayne Robinson, owner of G & R Masonry Contractors,

had inspected the dwelling and foundation, and provided an itemized estimate of \$8,630.00 for restoring the basement and foundation. Mrs. Cadle said her original claim of damages had included \$2,500.00 for the surrounding property, but no satisfactory evidence was offered to confirm this figure, nor was any other damage evidence presented.

It is the opinion of this Court that the widening of Route 501 did result in surface water flowing onto claimant's property. This flow of water aggravated a slide condition already present. The claimant's property sustained damages in the amount of \$8,630.00 for which the Court grants an award.

Award of \$8,630.00.

Opinion issued January 30, 1985

CARL E. STEPHENS CONSTRUCTION COMPANY, INC.

vs.

DEPARTMENT OF HIGHWAYS

(CC-84-253)

No appearance by claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted for decision upon a written stipulation based upon the following facts. On or about March 7, 1984, an employee of respondent contacted claimant to request pricing on a proposed Department of Highways facility to be located in Pleasants County. Claimant prepared a basic set of plans and specifications and presented the design plans to respondent. Respondent utilized the design plans with minor changes. The claimant and respondent never entered into a contract for said services. Since the services were not authorized by a contract, respondent has no fund from which the services can be paid, even though respondent admits the services were provided by the claimant. The parties have stipulated that \$1,000.00 is a fair and equitable estimate of the damages sustained by the claimant.

In view of the foregoing, the Court makes an award in the amount stipulated.

Award of \$1,000.00.

Opinion issued January 30, 1985

CENTRAL BEVERAGE DISTRIBUTORS, INC.

vs.

ALCOHOL BEVERAGE CONTROL COMMISSIONER

(CC-84-325)

Louie A. Paterno, Jr., Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$7,659.76 for taxes paid to respondent on a stock of wine which claimant did not sell and cannot sell, due to its withdrawal from the business of selling wine. Respondent, in its Answer, admits the validity and amount of the claim and states that there were sufficient funds in the appropriate fiscal year from which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount sought.

Award of \$7,659.76.

Opinion issued January 30, 1985

CENTRAL DISTRIBUTING CO., INC.

vs.

BEER COMMISSION

(CC-84-324)

Louie A. Paterno, Jr., Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

Claimant seeks to recover \$505.10 for taxes paid on beer. Of this amount, \$104.50 in taxes was paid to respondent on draft beer which became outdated and was destroyed in the presence of respondent's representative. The balance of \$400.60 was paid on beer that was sold to a Georgia company, distributed in Georgia, and state taxes in Georgia were paid. At a hearing on the claim, the respondent admitted that the taxes were paid. It is the opinion of the Court that it would be unjust enrichment for the State to keep the tax money. An award is made to the claimant in the amount of \$505.10.

Award of \$505.10.

Opinion issued January 30, 1985

BARBARA S. COBB

vs.

DEPARTMENT OF HIGHWAYS

(CC-84-40)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimant Barbara S. Cobb alleges in her Notice of Claim that on the evening of January 6, 1984, she was operating her vehicle in a westerly direction on the Kanawha Turnpike in South Charleston, West Virginia, when she struck two potholes, damaging the left front tire and rim in the amount of \$183.16. At the hearing, the claimant stated that she had been driving her 1982 Camaro at a speed of 35 miles per hour, and that she had never before travelled that particular road. She produced additional proof of damages to the shocks, bringing the total amount of her claim to \$344.97.

Claimant further testified that there had been no vehicles in front of her, and that she did not see the holes prior to striking them. Claimant was unable to relate the dimensions of the potholes.

Nothing in the record of this claim indicates that the respondent had actual or constructive notice of the existence of the potholes in question. Without such notice, there can be no finding of negligence on the part of the respondent, and the claim must be denied.

Claim disallowed.

Opinion issued January 30, 1985

ERMA G. CREASY

vs.

DEPARTMENT OF MOTOR VEHICLES

(CC-84-172)

Claimant appeared in person.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

Claimant seeks \$105.00 for the towing and storing of her 1974 Dodge truck, which was erroneously licensed by respondent. The vehicle was towed from outside claimant's residence in Charleston, Kanawha County, West Virginia, by C.C. Copley Garage, Inc., on May 14, 1984, and stored until May 29, 1984. The towing was ap-

parently done at the direction of the Charleston Police Department. Claimant, who had been out of state for a period of time, discovered the vehicle was missing upon her return. She went to the police department and learned that the license plate number listed on the registration card which respondent had issued did not correspond with the license plate.

In order for respondent to be found liable for the damages sustained, it must be shown that respondent acted negligently, and this negligence was the proximate cause of the damages. Although it is clear that respondent erroneously issued claimant a registration card bearing the wrong license number, it is unclear whether this was the cause of the towing of claimant's truck. The bill issued by Copley Garage indicates that the truck was "broke down." Claimant denies this. Claimant also denies that the truck was left illegally parked. However, it is clear to the Court that there had to be a reason for the Charleston Police Department to have checked claimant's license and determined its erroneous registration. It is the opinion of the Court that claimant has not established, by a preponderance of the evidence, that the erroneous registration of her vehicle was the sole, or proximate, cause of its towing, and the claim is therefore denied.

Claim disallowed.

Opinion issued January 30, 1985

JANET DOOLEY

vs.

BOARD OF REGENTS

(CC-84-321)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant was employed by respondent and paid at a lower entry rate than advertised although she met the qualifications for the position as advertised. The entry rate of pay has affected subsequent earnings and resulted in a net loss of pay of \$7,886.00 over a five-year period. In its Answer, respondent admits the validity and amount of the claim. It appearing to the Court that respondent had sufficient funds available during the appropriate fiscal years from which the claim could have been paid, an award is made in the amount sought.

Award of \$7,886.00.

Opinion issued January 30, 1985

EAGLE AVIATION, INC.

vs.

DEPARTMENT OF PUBLIC SAFETY

(CC-84-340)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$3,577.00 for repairs to a storm scope. In its Answer, respondent admits the validity and amount of the claim, and that sufficient funds were available from which to pay the claim in the fiscal year in question. In view of the foregoing, the Court makes an award in the amount of \$3,577.00.

Award of \$3,577.00.

Opinion issued January 30, 1985

ENGINEERED PRODUCTS, INC.

vs.

DEPARTMENT OF HIGHWAYS

(CC-84-302)

James R. Snyder, Attorney at Law, for claimant.

S. Reed Waters, Jr., Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted for decision upon a written stipulation that respondent is liable to claimant in the amount of \$13,139.81, based upon the following facts.

On or about February 3, 1984, respondent issued a Notice to Contractors inviting bids for the construction of the Litwar Bridge and approaches to be constructed at Litwar, West Virginia. Turman Construction Company requested a Contractor's Proposal form from respondent. The contractor's proposal form specified that an Acrow Panel Bridge span be used. This specification erroneously was issued in spite of respondent's knowledge that the Mabey and Johnson Universal Bridge was equal to or better than the Acrow Panel Bridge in terms of quality, and met all of respondent's requirements.

Upon receiving notice that respondent was soliciting bids for construction of the Litwar Bridge, claimant furnished a quotation to

Turman Construction Company for the Mabey Universal Bridge. Although Turman's bid documents specified use of the Acrow bridge, claimant's quotation to furnish a Mabey bridge was utilized by Turman in computing the amount of its bid with the understanding that, if Turman were awarded the project, it would seek respondent's permission to substitute the Mabey bridge.

Turman was the low bidder and the contract was entered into on or about March 26, 1984. Following execution of the contract which did not provide for the substitution of equal or better products, Turman requested permission to substitute the Mabey for the Acrow bridge. Despite the fact that respondent was advised as to the particulars of the Mabey bridge, respondent refused any substitution on the ground that it lacked authority to authorize the change. Were it not for this refusal, Turman would have utilized the Mabey bridge.

Respondent is required by W.Va. Code §17-4-20 to award construction contracts for roads and bridges "to the lowest responsible bidder for the type of construction selected." The specification calling for the bridge manufacturer to be Acrow Corporation of America, as construed by respondent to not allow any equal or substitute product, is a proprietary specification violating public bidding requirements.

As a result of respondent's actions, claimant has incurred losses in the form of lost profits and expenses incurred with respect to work and negotiations regarding the Litwar Project. The total amount of these expenses, as itemized in the written stipulation, is \$13,139.81. In view of the foregoing, the Court makes an award to claimant in the amount of \$13,139.81.

Award of \$13,139.81.

Opinion issued January 30, 1985

ROBERTA SHARP GUDMUNDSSON

vs.

DEPARTMENT OF HIGHWAYS

(CC-84-141)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimant was the owner of a 1973 Subaru which was totalled when it struck a pothole on Route 16, a two-lane blacktop road, between Bickmore and Clay, Clay County, West Virginia. The vehicle was

valued at \$500.00, and was sold for \$10.00. The incident occurred on April 19, 1984, at about 4:30 p.m. The vehicle was being driven by claimant's husband, Agust G. Gudmundsson. He testified that he was not familiar with the area. A passenger in the vehicle pointed out the pothole as they approached it. Mr. Gudmundsson started to move into the other lane to avoid the pothole, but saw a truck approaching in the opposite direction, and struck the pothole as he returned to his lane. He had no knowledge of how long the pothole had been in existence. The State is neither an insurer nor a guarantor of the safety of persons travelling on its highways. *Adkins vs. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). For the State to be found liable, it must have had actual or constructive notice of the defect in question. Since there was no proof of notice in this case, the claim must be denied.

Claim disallowed.

Opinion issued January 30, 1985

EARL B. HAGER

vs.

DEPARTMENT OF HIGHWAYS

(CC-84-148)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On the evening of April 14, 1984, claimant was driving his 1982 Ford Mustang on Route 44 near Monitor, West Virginia. He struck a pothole which caused damage to the vehicle in the amount of \$93.27. Claimant had no knowledge of how long the pothole had been in existence or whether it had been reported to respondent.

The State is neither an insurer nor a guarantor of the safety of travellers on its highways. *Adkins vs. Sims*, 130 W. Va. 645, 46 S.E.2d 81 (1947). For the respondent to be found liable for damages caused by a road defect of this type, the claimant must prove that the respondent had actual or constructive notice of the defect and a reasonable amount of time to take suitable corrective action. *Davis vs. Dept. of Highways*, 12 Ct.Cl. 31 (1977). Claimant testified that respondent had an office about a mile from the hole, and he did not understand why the hole had not been fixed. The Court finds, however, that while respondent may have had constructive notice of the pothole, claimant has not established, by a preponderance of the evidence, that respondent had sufficient time to correct the defect. The claim must therefore be denied.

Claim disallowed.

Opinion issued January 30, 1985

HOLZER HOSPITAL FOUNDATION D/B/A
HOLZER MEDICAL CENTER

vs.

DEPARTMENT OF HEALTH
(CC-85-3)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$476.25 for medical services rendered to a resident of respondent's Lakin Hospital. In its Answer, respondent admits the validity and amount of the claim and that sufficient funds were available in the appropriate fiscal year from which the claim could have been paid. The Court, therefore, makes an award in the amount sought.

Award of \$476.25.

Opinion issued January 30, 1985

JIMMY B. HUDSON

vs.

DEPARTMENT OF HIGHWAYS
(CC-84-158)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On April 1, 1984, claimant Jimmy B. Hudson was operating his motorcycle on Route 60 from Montgomery to Charleston, West Virginia, when he struck a pothole in the road. Damage to a wheel and tire amounted to \$274.05; at the hearing, claimant amended that amount to reflect additional charges for a total of \$282.45.

It was the claimant's testimony that the weather was clear and dry, and that he was travelling at approximately 50 mph. The claimant also stated that he was three car lengths from the hole when he first noticed it.

Nothing in the evidence of this claim indicates that the respondent had ever been notified of the existence of the pothole in question. In order for the respondent to be held liable, it must have had either actual or constructive notice of the damage-causing hazard. *Davis v. Dept. of Highways*, 11 Ct.Cl. 150 (1976). As negligence has not been established, the claim must be denied.

Claim disallowed.

Opinion issued January 30, 1985

DANNY C. HUFFMAN

vs.

DEPARTMENT OF HIGHWAYS

(CC-84-109)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimant is the owner of a 1979 Ford Pinto which was damaged on March 25, 1984, on Route 60 East at Glasgow, Kanawha County, West Virginia. The vehicle, which was being driven by claimant's son, struck a pothole. A rim was bent and a hubcap lost, at an estimated cost of \$145.43. Claimant was not present when the accident occurred, and his son did not appear to testify. Without the testimony of the son to explain the circumstances of the incident, the Court does not have any evidence on which an award can be based. As the Court cannot grant an award based on speculation, the claim must be denied.

Claim disallowed.

Opinion issued January 30, 1985

NOAH JACKSON

vs.

DEPARTMENT OF HIGHWAYS

(CC-84-111)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On March 15, 1984, claimant was driving on Route 25 in Nitro, Kanawha County, West Virginia, when he struck a pothole. His vehicle, a 1977 Chevrolet Van, sustained damage in the amount of \$75.35. Claimant testified that he saw the pothole prior to striking it, but could not avoid it because there was oncoming traffic. He stated that he travelled Route 25 about once a week. Claimant knew the pothole had been there, but added that it had been filled the last time prior to March 15 that he had travelled Route 25.

The State is neither an insurer nor a guarantor of the safety of travellers on its highways. *Adkins vs. Sims*, 130 W. Va. 645, 46 S.E.2d 81 (1947). In order for respondent to be found liable for the damage incurred, there must be proof of actual or constructive notice of the defect in question and sufficient time to correct it. The Court finds that claimant did not meet this burden of proof and must therefore deny the claim.

Claim disallowed.

Opinion issued January 30, 1985

JOHNSON CONTROLS, INC.

vs.

DEPARTMENT OF NATURAL RESOURCES

(CC-82-225)

Bruce Berger, Attorney at Law, for claimant.

Robert Pollitt, Assistant Attorney General, for respondent.

WALLACE, JUDGE:

Claimant Johnson Controls, Inc. filed this claim in the amount of \$15,326.67 for rebuilding the chiller in an air conditioning unit located at Twin Falls State Park in Mullens, West Virginia. Claimant had a contract with respondent for service and maintenance of the air conditioning equipment.

The claimant rebuilt the chiller of the air conditioning unit at Twin Falls State Park in May 1981, for which it was paid by the respondent. The air conditioning then operated in a normal manner until August 10, 1981, at which time it ceased to function. The claimant was then summoned to repair the system.

Bobby Exline, branch manager of the Charleston Branch for Johnson Controls, testified that the 100-ton Trane Chiller is a piece of equipment that generates cold water to circulate through the building for the air conditioning. The particular unit involved herein is operated by a three-phase motor. If power is not present on one phase, there is a loss of power to the motor, which is referred to as a single phase condition, causing the motor to operate with a voltage imbalance.

William Robert Holstein, a service technician employed by claimant, testified that he was sent to service the equipment after the August breakdown. In his opinion, the motor burned out due to a single phase condition rather than a voltage imbalance. He also testified that a phase guard installed in equipment would prevent a single phase condition. He had recommended that a phase guard be installed by the respondent to prevent voltage imbalance or single phase condition after the first rebuild of the chiller unit in May 1981. The phase guard was not installed.

Isaac K. Gillenwater, a pipefitter employed by claimants, testified for claimant. He assisted in the rebuild of the chiller after the August breakdown of the equipment. He also was of the opinion that a single phase condition caused the motor to burn out.

Alan Scott Durham, Park Superintendent at Twin Falls State Park, testified as to the events surrounding the first rebuild of the chiller in May 1981. He testified that the air conditioning unit was started by

personnel from Johnson Controls, Inc., on May 22, 1981. Within twenty-four hours the unit broke down on May 23, 1981. The first rebuild was completed on June 19, 1981, and the unit was started. He testified that each time the chiller started, the Park experienced other electrical problems. More specifically, he stated that lights flashed and the telephone rang in his office. He contacted an employee of claimant, Stan Brulator, who advised Mr. Durham that there was a power supply problem and to contact the power company. Appalachian Power Company (APCO) was contacted and responded that the power supply was good. Mr. Durham again contacted claimant, which sent other employees to review the situation. During this same time frame Twin Falls was experiencing other problems relating to the power supply. Most of these problems were corrected on July 21, 1981, when APCO discovered that two fuses on two poles were blown, causing a single phase condition in the power supply to the Park. The chiller broke down on August 10, 1981, approximately two weeks after APCO discovered the blown fuses and replaced them. Mr. Durham also testified that APCO advised him to purchase phase guard equipment and sent brochures containing information about phase guards.

Owen Weldon, an engineering supervisor of APCO, explained that Twin Falls had three phase service. The phase guard is a device which protects three phase motors from single phase conditions. When APCO discovered the blown fuses, the problem with voltage imbalance was solved.

It is apparent to the Court throughout the record in this claim that Twin Falls was having power supply problems throughout the Park during the months in which the rebuilds of the chiller were required. These problems resulted in voltage imbalance on other equipment. It is also evident that the voltage imbalance which occurred caused the motor in the chiller to malfunction and eventually to break down, necessitating the rebuild completed by the claimant. The Court is therefore disposed to make award to the claimant in the amount of \$15,326.67.

Award of \$15,326.67.

Judge Lyons did not participate in the hearing or the decision of this claim.

Opinion issued January 30, 1985

DIANNA RINEHART JONES

vs.

DEPARTMENT OF HIGHWAYS

(CC-84-126)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On March 25, 1984, claimant's vehicle, a 1982 Subaru DL, was damaged when she struck a pothole on Route 25 near the St. Albans Bridge in Kanawha County. The pothole measured 21 inches wide, 65 inches long, and 9 inches deep. Claimant did not see the pothole because it was filled with water. Damage to the car was repaired at a cost of \$401.20, of which sum, all but \$100.00 was paid by claimant's insurance carrier.

The State is neither an insurer nor a guarantor of the safety of travellers on its highways. *Adkins vs. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order for respondent to be found negligent, proof of actual or constructive notice of the defect must be shown. Although no evidence of actual notice was presented, a pothole of the dimensions described by the claimant could not have developed overnight, and the respondent should have known of the defect. Accordingly, the Court finds that the respondent had constructive notice of the pothole, and makes an award to the claimant in the amount of her deductible, or \$100.00.

Award of \$100.00.

Opinion issued January 30, 1985

THE LAWHEAD PRESS, INC.

vs.

BOARD OF REGENTS

(CC-84-16)

John Good, President, The Lawhead Press, Inc., for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

Claimant, the Lawhead Press, Inc., was the successful bidder on respondent's Purchase Order dated August 30, 1982, for the printing, by November 15, 1982, of 3,000 Basketball Promotional Viewbooks and 3,000 Basketball Media Guides for Marshall University. Materials submitted to the claimant were at variance with what had been set out in the Purchase Order. Claimant, in its Notice of Claim and by its

evidence, to justify its claim of extra costs of \$1,252.00, itemized the variations as follows:

- Four additional four color subjects \$756.00
- Full bleed posterizations required for
inside covers \$106.00
- Reflection copy provided for front cover
instead of specified transparency \$175.00
- Eight additional pages than specified \$240.00
- Twenty-five fewer black and white
halftones were required - credit of (\$125.00)

To the Court, it appears this is a claim of \$1,152.00, rather than \$1,252.00.

The testimony was conflicting with reference to whether the variations were discussed before, or not until after, the printing was done. It is clear that a change order should have been requested and obtained. Nevertheless, the printing was done and the product was accepted and used by the respondent. To deny an award to the claimant would be unconscionable. *Modern Press, Inc. vs. Board of Regents*, 13 Ct.Cl. 341. The Court finds the parties equally responsible for the additional costs incurred, and makes an award to the claimant in the amount of \$576.00.

Award of \$576.00.

Opinion issued January 30, 1985

DERRICK A. RAMSEY

vs.

DEPARTMENT OF HIGHWAYS

(CC-84-168)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was originally filed in the names of Derrick A. Ramsey and his wife, Karen S. Ramsey. At the hearing, the Court amended the style of the claim to reflect that the true owner of the vehicle involved was Derrick A. Ramsey.

Claimant's vehicle was travelling in a westerly direction on State Route 3 on the afternoon of April 21, 1984, near Sylvester, West Virginia, when rocks came off a hill and struck the vehicle as it passed. The damage totalled \$665.49.

At the hearing, the driver of the car, Karen S. Ramsey, testified that she had been travelling home from the drug store at approximately 40 mph when the rocks struck. The car was shoved across the road into the brush, then slid back into the middle of the road.

Claimant Derrick A. Ramsey testified that he and his wife had lived in the area for ten years, and that the hillside was subject to falling rocks. The respondent's Boone County Maintenance Supervisor, James S. Meadows, stated that his office received no complaints with regard to rocks or rock falls on Route 3 immediately prior to April 21, 1984. Mr. Meadows testified that the Department of Highways was engaged in pothole repair prior to the date of the accident, but was not working on the berm or the rock cliff.

The law in West Virginia is well settled that the State is neither an insurer nor a guarantor of the safety of motorists travelling upon its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). To be found liable, the respondent must have had notice of the particular hazard. *Davis v. Dept. of Highways*, 11 Ct.Cl. 150 (1976). Nothing in the record of this case indicates that the respondent was aware of the condition of the rock cliff; therefore, the claim must be denied.

Claim disallowed.

Opinion issued January 30, 1985

THERESA RITZ

vs.

DEPARTMENT OF HIGHWAYS
(CC-83-11)

James G. Bordas, Jr., Attorney at Law, for claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

LYONS, JUDGE:

On April 13, 1981, claimant was driving her 1980 Chevrolet Chevette on Route 88 near Wheeling, Ohio County, West Virginia, when she struck a pothole and lost control of the vehicle. Claimant testified that "something snapped underneath the car" and she lost the ability to brake or steer the automobile. She then struck a vehicle parked on the side of the road, crossed over the road, travelled through a cable guardrail, and down an embankment coming to rest in a creek. Claimant sustained injuries to her back and ankle, and seeks \$100,000.00 based on respondent's alleged negligent maintenance of Route 88.

Claimant testified that she did not observe the pothole before striking it as it was dark and the hole was filled with water. She further stated that she did not travel Route 88 on a regular basis, but was aware of potholes on that road. She had no specific knowledge of the pothole she struck. Claimant estimated her speed at 15-20 m.p.h.

John Vanaman, Ohio County Road Supervisor, testified that he was familiar with the pothole claimant struck. He said that the hole was about two feet in diameter and six or seven inches deep. He stated that Route 88 is considered a primary road and, consequently, it is inspected at least once a week. He said that during the period of March and April 1981, the road was patched "quite a few times, numerous times" with cold mix. Cold mix is a temporary patching agent which is all that is available at that time of year. Mr. Vanaman said that cold mix will stay on the road unless it rains or snows. Hot mix is used as patch material and is not available until mid-May each year, he said.

Gordon S. Peake, area engineer for Ohio County in 1981, testified that he had observed the pothole being patched three times between mid-March and the time of claimant's accident. He also said that the guardrail was not "in real good shape," but was functional in that it should have stopped a vehicle.

Dr. Harry Weeks, Jr., whose vehicle was struck by claimant's automobile, testified that he knew of at least two occasions when the pothole was patched in the 4 to 6 weeks prior to the accident.

Claimant was hospitalized for her injuries until May 15, 1981. Dr. John P. Griffith, Jr., an orthopedic surgeon, treated claimant while she was hospitalized. He described her ankle injury as consisting of torn ligaments and a change in the normal configuration of the ankle joint. A cast was applied to the leg until May 27, 1981, and Dr. Griffith stated that claimant has no permanent disability due to the ankle injury. Her back injury was described as a compression fracture to the body of the 12th dorsal vertebra. This injury required claimant to wear a back brace for six months following the accident. Dr. Griffith stated that this injury probably was permanent in nature, in that claimant would likely continue to suffer pain and discomfort as a result of this injury.

This Court on numerous occasions has held that the State is not a guarantor of the safety of travelers on its highways, and its duty to travelers is a qualified one of reasonable care and diligence in the maintenance of a highway under all the circumstances. *Parsons v. State Road Commission*, 8 Ct. Cl. 35 (1969). However, the State may be found liable "If the maintenance of the roads falls short of the standard of reasonable care and diligence . . . under all circumstances." *Farley v. Dept. of Highways*, 13 Ct.Cl. 63 (1979).

Having knowledge of the dangerous conditions of the highway, it then became the duty of the respondent under that standard to correct the danger or erect warning signs. *Pullen v. Dept. of Highways*, 13 Ct.Cl. 278 (1980).

The respondent's failure to erect warning signs of rough road ahead, or to correct the dangerous condition, constituted negligence which proximately caused the accident and the resulting injury of the claimant. The condition of the potholes and of the guardrails existed for some time, and no explanation was offered for the respondent's failure to warn motorists of the danger created by the potholes.

Claimant introduced the hospital bill in the amount of \$5,919.45. However, this bill must have been paid as it is in the name of John Williams, claimant's ex-husband, and also was billed to Equitable Life Assurance Society. Claimant also introduced the bill of Dr. Griffith and Vukelich Associates in connection with her injury in the amount of \$698.00.

The Court has determined that claimant sustained a back injury which has caused and will continue to cause her severe pain and suffering, and makes an award in the amount of \$35,000.00 plus doctor bills in the amount of \$698.00, for a total of \$35,698.00. The Court has determined that there was negligence on the part of the claimant due to her knowledge of the condition of the road. The award will accordingly be reduced by 40 percent to reflect claimant's negligence.

Award of \$21,418.80.

Opinion issued January 30, 1985

FRANCES P. SHEPPARD

vs.

DEPARTMENT OF HIGHWAYS

(CC-84-162)

James K. Sheppard appeared for the claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Originally filed in the name of James K. Sheppard, this claim was amended by the Court at the hearing to reflect that the true owner of the vehicle involved was Frances P. Sheppard.

According to Mr. Sheppard, who was driving his wife's 1983 Toyota Tercel on March 27, 1984, the weather was good as he travelled at 35-40 mph in an easterly direction on West Washington Street

(Highway 62) in or near Charleston, West Virginia. Suddenly, the right front wheel struck a pothole in the right-hand portion of his lane of travel.

He testified that he was 15-20 yards away from the pothole when he first saw it, and he was unable to estimate its dimensions. Damage to the vehicle amounted to \$177.24.

No evidence was presented to show that the respondent had actual or constructive notice of the existence of the pothole in question. Such notice must be established in order for the respondent to be found guilty of negligence. The Court must therefore deny the claim.

Claim disallowed.

Opinion issued January 30, 1985

SHERIFF OF KANAWHA COUNTY

vs.

SUPREME COURT OF APPEALS

(CC-85-9)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks an award of \$200,016.15 for jury vouchers not refunded by respondent for the court terms beginning in 1982 and ending in 1984. In its Answer, respondent admits the validity of the claim and states that it could not be paid because the fiscal year had ended. Respondent further states that sufficient funds were on hand at the close of the fiscal year in question.

In view of the foregoing, the Court grants an award to the claimant in the amount of \$200,016.15.

Award of \$200,016.15.

Opinion issued January 30, 1985

CARL EUGENE SHOCKEY,
D/B/A/ GENE'S MOBILE HOMES

vs.

DEPARTMENT OF HIGHWAYS
(CC-83-271)

Larry L. Skeen, Attorney at Law, for claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted upon written stipulation that respondent is liable to claimant in the amount of \$500.00 based upon the following facts.

Carl Eugene Shockey is the owner and operator of Gene's Mobile Homes, a company licensed to transport mobile homes. Gene's Mobile Homes was formerly Gene Shockey Trucking, and the claim is amended to reflect this change. On August 8, 1983, at approximately 10:15 a.m., claimant's employee, David W. Shockey, was transporting a mobile home from Danville, Boone County, to Sandyville, Jackson County, West Virginia, on U.S. Route 119. Route 119 is owned and maintained by respondent. While travelling on Route 119, claimant's vehicle struck a section of highway in which the edge of the pavement and the berm had deteriorated and was approximately 12 inches lower than the main travelled portion of the roadway. As a result of striking the deteriorated berm, the vehicle and mobile home sustained damages. The deteriorated berm presented a hazard and was the proximate cause of the damages suffered by claimant. The vehicle and mobile home sustained damages to the tires, wheels, and axles, and \$500.00 is a fair and equitable estimate of the damages.

In view of the foregoing, the Court makes an award to the claimant in the amount stipulated.

Award of \$500.00.

Opinion issued January 30, 1985

RONALD B. SMITH

vs.

DEPARTMENT OF HIGHWAYS
(CC-84-206)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimant alleges in his Notice of Claim that on May 26, 1984, at ap-

proximately 6:30 p.m., he was travelling on Route 33 in Mason County, West Virginia, when his vehicle struck a pothole. Damage to a wheel, tire, and hubcap amounted to \$286.68.

At the hearing, the claimant testified that a truck had overturned about one hundred yards from the pothole, and traffic was flagged around the accident by civilians at the scene. Upon his return to the right-hand lane, the claimant's 1981 Oldsmobile struck the hole.

The next morning, the claimant and his brother returned to the site and examined the pothole. Claimant estimated the size to be three feet long and three to four inches deep.

In order for liability to exist on the part of the respondent, it must be shown that the respondent had actual or constructive notice of the hazard which caused the damage. *Davis v. Dept. of Highways*, 11 Ct.Cl. 150 (1976). No evidence of notice was presented in the record of this case; therefore, no negligence can be established, and the claim must be denied.

Claim disallowed.

Opinion issued January 30, 1985

JESSE W. STARCHER

vs.

DEPARTMENT OF HEALTH

(CC-84-95)

Claimant appeared in person.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

Claimant Jesse W. Starcher, an employee of Spencer State Hospital, alleges in his complaint that on February 16, 1983, his eyeglasses were damaged when a hospital resident, Randy Nunley, struck the claimant with a clock radio. Damage to the frames totalled \$45.00, the amount of the claim.

At the hearing, the claimant testified that the incident occurred at 5:25 a.m. as the claimant was escorting Mr. Nunley to his room. According to the claimant, Mr. Nunley whirled around and struck him with a clock radio, knocking his glasses off and breaking the frames. When questioned about the person or persons he contended were guilty of some type of wrongdoing, the claimant acknowledged that only Mr. Nunley himself was involved, and that no one in the State's employ could have prevented it.

The record in this case is devoid of any evidence of negligence on the part of the respondent or its employees. Absent such proof, no liability is established, and the Court must disallow the claim.

Claim disallowed.

Opinion issued January 30, 1985

PAUL H. STEWART

vs.

DEPARTMENT OF HIGHWAYS

(CC-84-123)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On March 15, 1984, at approximately 8:30 p.m., claimant was driving on County Route 52/2, also known as Pinch Creek Road, in Kanawha County, West Virginia, when he struck a pothole. His vehicle, a 1977 Chevrolet Chevette, sustained damage in the amount of \$507.15. The pothole was located about a foot from the edge of the road and was filled with water. Claimant did not see the hole prior to striking it. Claimant had driven the road about two weeks prior to the incident, but had not noticed the pothole. He did not know how long the pothole had existed.

The State is neither an insurer nor a guarantor of the safety of motorists on its roadways. *Adkins vs. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order for the respondent to be found liable for the damage sustained, proof of actual or constructive notice of the defect in question must be shown. Since there was no proof in this case that respondent had notice of the defect, the claim must be denied.

Claim disallowed.

Opinion issued January 30, 1985

ST. JOSEPH'S HOSPITAL

vs.

DIVISION OF VOCATIONAL REHABILITATION

(CC-84-301)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$131.00 for out-patient medical services provided at respondent's request. Respondent, in its Answer, admits the validity and amount of the claim. It appearing to the Court that respondent had sufficient funds available in the appropriate fiscal year from which the obligation could have been paid, an award is granted in the amount sought.

Award of \$131.00.

Opinion issued January 30, 1985

STONEWALL JACKSON MEMORIAL HOSPITAL

vs.

DEPARTMENT OF HEALTH

(CC-85-8)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$1,085.79 for medical services rendered to various patients from respondent's Weston State Hospital. In its Answer, respondent admits the validity and amount of the claim and states that there were sufficient funds available in the appropriate fiscal year from which the claim could have been paid. In view of the foregoing, the Court makes an award in the amount of \$1,085.79.

Award of \$1,085.79.

Opinion issued January 30, 1985

POLLY TANKERSLEY

vs.

DEPARTMENT OF HIGHWAYS

(CC-84-156)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

The claimant is the owner of a 1980 Volkswagen truck which was damaged when she struck a pothole on March 23, 1984. The incident occurred as she left a parking lot and entered onto Stafford Drive in Princeton, Mercer County, West Virginia. The oil pan was damaged and the exhaust system was replaced at a cost of \$242.92.

The State is neither an insurer nor a guarantor of the safety of travellers on its highways. *Adkins vs. Sims*, 130 W. Va. 645, 45 S.E.2d 81 (1947). In order for the respondent to be found liable for the damages incurred, it must be shown that respondent had actual or constructive notice of the defect in question and a reasonable amount of time to correct it. Since there was no evidence presented to establish notice, the Court is of the opinion to, and does, disallow the claim.

Claim disallowed.

Opinion issued January 30, 1985

THREE COMMUNITY CABLE TV

vs.

DEPARTMENT OF PUBLIC SAFETY

(CC-84-330)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$164.00 for cable TV service provided to respondent during the months of March through June of 1984. Respondent, in its Answer, admits the validity and amount of the claim. It appearing to the Court that respondent had sufficient funds available in the appropriate fiscal year from which the obligation could have been paid, the Court makes an award in the amount sought.

Award of \$164.00.

Opinion issued January 30, 1985

FLOWVOUNIA TYLER

vs.

DEPARTMENT OF HIGHWAYS

(CC-84-170)

Lucille Gore appeared for the claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On April 6, 1984, at approximately 2:30 p.m., Lucille D. Gore was operating a vehicle titled in the name of her aunt in a westerly direction on Route 60 from Rand to Charleston, West Virginia. The vehicle, a 1980 Cadillac Eldorado, was damaged after striking a pothole in the right portion of the lane. At the hearing, the style of the claim was amended to reflect the true owner of the vehicle, Flowvounia Tyler.

According to the testimony of Lucille D. Gore, the weather on the day of the accident was cloudy and drizzly. She was driving at a speed of 25-30 mph and had just negotiated a curve when the pothole was struck. Damage to a wheel and rim, and the cost of alignment, amounted to \$227.09. Mrs. Gore stated that prior to the date of the accident, she had travelled that particular road only occasionally, and had no knowledge of the pothole having been reported to the Department of Highways.

It is well established law in the State of West Virginia that the State cannot guarantee the safety of travellers upon its highways. *Adkins vs. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). There was no evidence that the respondent had ever been notified of the existence of the pothole in question. Without notice, there can be no negligence, and hence, no liability.

Claim disallowed.

Opinion issued February 4, 1985

DANNY R. SINCLAIR
vs.
BOARD OF REGENTS
(CC-84-161)
JOHN VINCENT LACEY, JR.
vs.
BOARD OF REGENTS
(CC-84-273)
TERRY A. JOHNSON
vs.
BOARD OF REGENTS
(CC-84-280)
TIMOTHY E. SMITH
vs.
BOARD OF REGENTS
(CC-84-281)
KARL VAN HILDEBRAND
vs.
BOARD OF REGENTS
(CC-84-298)
ELLIOTT A. BIGELOW
vs.
BOARD OF REGENTS
(CC-84-327)
ALFRED D. YOPPI, JR.
vs.
BOARD OF REGENTS
(CC-84-332)
NICKOLAS F. ZARA
vs.
BOARD OF REGENTS
(CC-85-1)
RICHARD D. KOVAL
vs.
BOARD OF REGENTS
(CC-85-2)

No appearance by claimants.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

These consolidated claims were submitted for decision based upon the allegations in the separate Notices of Claim and respondent's Answers thereto.

Each of the claimants is an employee of the Morgantown Personal Rapid Transit System (PRT) at West Virginia University. Each was restricted to his place of work during his lunch break, based upon a memorandum dated December 22, 1982, issued by R.J. Bates, Director, PRT. Each of the claimants seeks overtime compensation for the time they were required to be at their work place during their lunch breaks. In its Answers, respondent admits the validity and amounts of the claims and states that there were sufficient funds available in the appropriate fiscal year from which the claims could have been paid. Accordingly, the Court makes awards to the claimants in the following amounts.

Award of \$696.57 to Danny R. Sinclair.
Award of \$459.36 to John Vincent Lacey, Jr.
Award of \$120.54 to Terry A. Johnson.
Award of \$239.52 to Timothy E. Smith.
Award of \$287.20 to Karl Van Hildebrand.
Award of \$497.90 to Elliott A. Bigelow.
Award of \$231.48 to Alfred D. Yoppi, Jr.
Award of \$207.90 to Nickolas F. Zara.
Award of \$65.44 to Richard D. Koval.

Opinion issued February 15, 1985

ANDERSON EQUIPMENT COMPANY

vs.

DEPARTMENT OF HIGHWAYS

(CC-84-294)

No appearance by claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted for decision upon written stipulation based upon the following facts.

Claimant was the owner of an Ingersoll-Rand Model DA-50, self-propelled vibratory compactor, which was rented by respondent on or about April 2, 1984. Claimant delivered the compactor to respondent on May 11, 1984. Respondent agreed to pay a monthly rental fee of \$3,200.00 per month. Respondent returned the equipment on July 3, 1984. Claimant pro-rated the second month's rental, and respondent therefore owes claimant the amount of \$2,453.34.

Based upon the foregoing, the Court makes an award in the amount of \$2,453.34.

Award of \$2,453.34.

Opinion issued February 15, 1985

WILLIAM F. ANGEL

vs.

DEPARTMENT OF HIGHWAYS

(CC-84-152)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On April 5, 1984, claimant was driving his 1980 Thunderbird westerly on Route 60 near the Montgomery Bridge, when the vehicle struck a pothole and was damaged. Claimant estimated the pothole to be six and one half to seven feet long, three and one half feet wide, and five and one half to six inches deep. Claimant purchased two new tires and had the front end aligned at a cost of \$224.93. The rims were also bent, but claimant had only verbal estimates of their replacement cost of \$225.00 each.

While the respondent is not an insurer of the safety of motorists on its highways, it does owe a duty of exercising reasonable care and diligence in the maintenance of the highways. Route 60 is one of the most heavily travelled highways in the State. This Court has previously held that as a heavily travelled road, Route 60 deserves greater attention from a maintenance standpoint than some lesser roadways. *Lohan v. Dept. of Highways*, 11 Ct.Cl. 39 (1975). A pothole of the size described by claimant could not have developed overnight, and the respondent should have discovered its existence. The Court finds that claimant has not presented sufficient evidence as to the cost of the rims and makes an award for the purchase of the tires and alignment only.

Award of \$224.93.

Opinion issued February 15, 1985

MARY FRANCES AUBREY

vs.

ALCOHOL BEVERAGE CONTROL COMMISSIONER

(CC-84-202)

Claimant appeared in person.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

Claimant is an employee of respondent agency. On July 2, 1982, she

was working as a clerk in Store 66 on Ohio Avenue in Charleston, Kanawha County, West Virginia. The assistant manager of the store asked claimant to get a case of wine for a customer. The wine cases were stacked higher than claimant, and as she reached for the top case, it slipped, striking and breaking her glasses. A bill for \$231.00 was admitted into evidence.

Claimant testified that it was part of her job duties to get cases of liquor for customers. She stated that she sometimes asked other employees for assistance, but did not on this occasion. No evidence was presented that the wine had been stacked improperly, or was in violation of respondent's regulations. Without such evidence, no negligence on the part of respondent or its employees is established, and the Court must, therefore, deny the claim.

Claim disallowed.

Opinion issued February 15, 1985

BUSH INDUSTRIES FEED & GRAIN

vs.

FARM MANAGEMENT COMMISSION

(CC-85-17)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

Claimant alleges that on April 27, 1984, and May 1, 1984, it delivered fertilizer to Barboursville and Lakin state farms, and received no payment therefor. The unpaid invoices totalled \$2,805.00.

Respondent, in its Answer, admits the validity of the claim. However, there were insufficient funds remaining in respondent's appropriation for the fiscal year in question from which to pay the claim. While the claim is one which in equity and good conscience should be paid, the Court is of the opinion that an award cannot be made, based upon the decision in *Airkem Sales and Service, et al. vs. Dept. of Mental Health*, 8 Ct.Cl. 180 (1971).

This claim is, therefore, denied.

Claim disallowed.

Opinion issued February 15, 1985

DEPARTMENT OF EMPLOYMENT SECURITY

vs.

BOARD OF REGENTS

(CC-84-313)

Jack O. Friedman, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks an award of \$446.88 for unemployment compensation tax owed by respondent. Of this sum, \$436.53 is the amount of the tax, and \$10.35 is accumulated statutory interest. At the hearing of the claim, it was revealed that the amount owed by respondent was not certified by the respondent to the State Auditor for payment. It was further established that the claim cannot now be paid, directly by the respondent, due to the close of the fiscal year in question.

It is the opinion of the Court that the respondent owes the claimant for unemployment compensation tax. See *Dept. of Employment Security vs. Dept. of Corrections*, 14 Ct.Cl. 387 (1983). An award of interest cannot be made, based upon W. Va. Code §14-2-12. An award is therefore made in the amount of \$436.53.

Award of \$436.53.

Opinion issued February 15, 1985

DEPARTMENT OF EMPLOYMENT SECURITY

vs.

HUMAN RIGHTS COMMISSION

(CC-84-315)

Jack O. Friedman, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$437.86 for unemployment compensation tax owed by respondent. Of this sum, \$424.00 is the amount of the tax, and \$13.86 is accumulated statutory interest. In its Answer, respondent admits the validity of the claim and states that there were sufficient funds in the appropriate fiscal year from which the claim could be

paid. The Court has determined that interest cannot be awarded on the claim, based upon W. Va. Code §14-2-12. An award is therefore made to the claimant in the amount of the unemployment compensation tax.

Award of \$424.00.

Opinion issued February 15, 1985

ERIE INSURANCE EXCHANGE, SUBROGEE FOR
JOSEPH E. MARTIN AND GOLDIE J. MARTIN, AND
JOSEPH E. MARTIN AND GOLDIE J. MARTIN,
INDIVIDUALLY

vs.

DEPARTMENT OF HIGHWAYS
(CC-81-82)

Peter Dinardi, Attorney at Law, for claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

LYONS, JUDGE:

This claim was originally filed in the name of Erie Insurance Exchange, subrogee of Joseph E. Martin and Goldie J. Martin, but when the evidence revealed that the Martins incurred a loss of \$100.00, the claim was amended to add Joseph E. Martin and Goldie J. Martin, individually, as claimants.

On August 19, 1980, claimant's insured, Joseph E. Martin, was driving his 1979 Ford Bronco on W. Va. Route 13 near Mannington, Marion County, West Virginia. A mudslide was present on the left side of the road, and respondent's employees were clearing the slide. Claimant's insured was in the second vehicle which was stopped in a line of traffic while the work proceeded. A flagman motioned the vehicles through, and as Mr. Martin drove by, the roadway on the right side gave way and the vehicle rolled over into a creek, totalling the vehicle. Mr. Martin testified that there was a tree limb or branch sticking out of the mud and only about seven feet of pavement from the edge of the slide to the edge of the road. He said that because of the limb, the passage was narrow, and the bank broke away as he tried to get by the slide. Several witnesses to the incident testified that there was only six to seven feet to travel through on the road.

Glen Wayne Laque, a physical damage appraiser for claimant, testified that the Bronco had a value of \$6,177.50 before the accident. After the accident, the vehicle was sold by Erie Insurance Exchange

for a salvage value of \$1,097.50. Claimant paid its insureds \$6,077.50 for the Bronco, as there was a \$100.00 deductible on the vehicle.

After reviewing the testimony, it is the opinion of the Court that respondent was negligent in failing to provide sufficient room for the passage of the Martin vehicle on Route 13. This negligence was the proximate cause of the damages sustained. The Court, therefore, makes awards for the losses sustained.

Award of \$4,980.00 to Erie Insurance Exchange, subrogee for Joseph E. Martin and Goldie J. Martin.

Award of \$100.00 to Joseph E. Martin and Goldie J. Martin, individually.

Opinion issued February 15, 1985

RICHARD R. FISHER

vs.

DEPARTMENT OF HIGHWAYS
(CC-84-308)

and

THOMAS J. HIDDEMEN, JR.

vs.

DEPARTMENT OF HIGHWAYS
(CC-84-309)

Claimants appeared in their own behalf.

Nancy J. Aliff, Attorney at Law, for respondent.

LYONS, JUDGE:

Claimant Fisher and claimant Hiddemen filed their respective claims to recover the value of their mechanic's tools stolen from respondent's shop at Chelyan, West Virginia. The claims were consolidated at the hearing as the theft of the tools occurred in the same incident.

Claimant Fisher testified that he and claimant Hiddemen were required by the respondent to provide their own mechanic's tools as a condition to their employment. Both claimants kept the tools in a padlocked cabinet located in the office adjacent to the shop. The shop and office were separated by a door which was also padlocked. The shop itself had three metal garage doors which were secured with chains. There was also an entry door to the shop which was locked with a padlock. As lead mechanic, claimant Fisher was responsible for securing the shop each evening. The shop is located inside a chain-link

fenced area which contains other buildings belonging to respondent and also an independent company. Therefore, the main gate to the area is not kept locked at night.

Claimant Fisher further testified that on the evening of October 18, 1984, he left the shop with all of the locks secured as well as the garage doors secured with chains. When he arrived at work the following morning, he noticed that the padlock was missing from the entrance door to the shop. He found the lock on the ground. Apparently, the lock had been cut with bolt cutters. Inside the building the padlocks on the inside door to the office and on the tool cabinet had also been cut. His tool box and tools were gone as were several tools belonging to claimant Hiddeman. He reported the theft to his superiors and also to the Department of Public Safety. To this date there has been no apprehension of the individual(s) responsible for the theft, nor a recovery of the tools.

James B. Dingess, maintenance supervisor for respondent, testified that mechanics employed by respondent are required to provide their own tools. Claimants, as mechanics for respondent, are considered on duty to perform maintenance on respondent's vehicles twenty-four hours a day. Claimants were not required to keep their tools at the shop but could transport the tools to and from their place of work as they chose.

Jack E. Boyer, Sr., a maintenance crew leader for respondent at the Chelyan facility, testified that he had requested better locks and a protection device for the locks several times prior to the theft of claimants' tools. His request were not acted upon by his superiors.

In the opinion of the Court, respondent was negligent in failing to provide a more secure locking system for the shop. See *White v. Dept. of Highways*, 15 Ct.Cl. (1984) and *Hall v. Dept. of Highways*, 14 Ct.Cl. 58 (1981).

Claimant Fisher estimated the replacement value of his tools at \$2,752.95 and claimant Hiddemen placed a replacement value of \$167.50 on his tools. The tools had been purchased over a five to ten year period by the claimants, and the Court depreciates the value of the tools by ten percent and makes an award to claimant Fisher in the amount of \$2,477.65 and to claimant Hiddemen in the amount of \$150.75.

Award of \$2,477.65 to Richard R. Fisher.

Award of \$150.75 to Thomas J. Hiddemen, Jr.

Opinion issued February 15, 1985

GREENBRIER PHYSICIANS, INC.

vs.

DEPARTMENT OF PUBLIC SAFETY

(CC-84-311)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

Claimant seeks payment of the sum of \$50.00 for medical services rendered to an employee of the respondent in May and June of 1984.

Respondent admits the amount and validity of the claim, and states that sufficient funds remained in its appropriation for that fiscal year from which the obligation could have been paid. Accordingly, the Court makes an award to the claimant of \$50.00.

Award of \$50.00.

Opinion issued February 15, 1985

HAYNES, FORD AND ROWE

vs.

DEPARTMENT OF PUBLIC SAFETY

(CC-84-45)

James J. Rowe, Attorney at Law, for the claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

Claimant, a law firm, asserts in its Notice of Claim that it represented two officers of the Department of Public Safety in two separate legal actions in Summers County, West Virginia.

In July 1980, claimant was employed to represent the two officers, who were charged in the Magistrate Court in Summers County with malicious wounding. The case was dismissed upon the preliminary hearing. Claimant submitted a bill to the Department of Public Safety, which bill was paid in January 1981.

According to claimant's brief, misdemeanor indictments, for assault and battery, were returned by a Summers County grand jury, against the two officers, in September 1980. The claimant law firm represented the officers, and the indictments were dismissed. Whether the claimant submitted a statement for this legal service is not indicated.

Misdemeanor indictments, for battery, were returned by a Summers

County grand jury, against the two officers, in January 1981. The claimant law firm again represented the officers. Claimant's evidentiary exhibit, itemizing its services, shows the first services (time expended) on January 14, 1981, and continues through September 17 and 18, 1981, being the dates of trial. Thus, it appears that we are dealing only with a claim for legal services rendered with reference to this second set of indictments. The total amount of the statement is \$4,621.96, of which respondent has paid \$2,000.00, leaving a balance of \$2,621.96 for which this claim was made.

Employment of the claimant law firm was approved by the respondent, apparently pursuant to W.Va. Code §15-2-22, which authorizes ". . . the superintendent to authorize any member of the department to employ an attorney of such member's choice to act in proceedings wherein criminal charges are brought against such member because of action in line of duty." This code section also provides "For such attorney's services an amount determined by the judge in whose court the action is pending, not to exceed one thousand dollars, may be expended in any one case."

Similarly, W. Va. Code §51-11-8 authorizes fees to be paid to court-appointed legal counsel for indigent defendants and limits payment to a maximum of one thousand dollars. In denying awards in *George M. Cooper vs. Administrative Office of the Supreme Court of Appeals*, 13 Ct.Cl. 394 (1981) and in *David M. Finnerin vs. Office of the State Auditor*, 13 Ct.Cl. 431 (1981), this Court refused to circumvent the plain and unambiguous language of the statute.

The Court views the instant case in the same light; that this claim must be denied.

Claim disallowed.

Opinion issued February 15, 1985

HOLZER CLINIC
vs.
DEPARTMENT OF HEALTH
(CC-85-20)

No one appeared for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

Claimant alleges that Lakin Hospital failed to pay a bill for services rendered to a patient in the amount of \$105.00 because of the close of the fiscal year.

The respondent's Answer admits the amount and validity of the claim, and states that there were sufficient funds in its appropriation for that fiscal year from which the claim could have been paid.

The Court therefore makes an award of \$105.00 to the claimant.
Award of \$105.00.

Opinion issued February 15, 1985

JORDAN CHIROPRACTIC CLINIC, INC.

vs.

DEPARTMENT OF PUBLIC SAFETY

(CC-84-328)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

Claimant seeks payment in the sum of \$130.00 for medical services rendered to an employee of the respondent.

Respondent admits the amount and validity of the claim. As sufficient funds remained in its appropriation at the close of the fiscal year in question from which the obligation could have been paid, the Court hereby makes an award to the claimant in the amount requested.

Award of \$130.00.

Opinion issued February 15, 1985

JOSEPH H. JUSTICE

vs.

DEPARTMENT OF HIGHWAYS

(CC-84-287)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was originally filed in the names of Bernieda Justice and Joseph H. Justice, but when the evidence established that the damaged vehicle, a 1981 Oldsmobile Ninety-Eight, was titled in the name of Joseph H. Justice alone, the Court on its own motion amended the style of the claim to reflect that fact.

On October 19, 1984, claimant's daughter, Jennifer R. Justice, was

driving her father's automobile on a one-lane blacktop road which runs parallel to State Route 10 in Stollings, Logan County, West Virginia. This road is maintained by respondent. As the vehicle crossed a wooden bridge, the bridge collapsed, causing damages to the vehicle in the amount of \$815.06. The incident occurred at 10:20 p.m. and Ms. Justice testified that there were no warning signs on the bridge. She stated that she inspected the bridge after the accident and found that the wood had rotted.

While the State is neither an insurer nor a guarantor of the safety of travellers on its highways, respondent does owe a duty of reasonable care in the maintenance of its bridges and highways. The evidence indicates that the bridge planks had rotted, and there were no signs or lights on the bridge. The Court finds that respondent was negligent in failing to discover the condition of the bridge and to make necessary repair. An award is made to the claimant for the damages incurred.

Award of \$815.06.

Opinion issued February 15, 1985

BARBARA ANN McCABE

vs.

BOARD OF REGENTS

(CC-84-291)

No one appeared for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

Claimant seeks payment of the sum of \$269.47 in back pay allegedly due her from the West Virginia University Medical Center where she had been employed as a medical records analyst. A raise in pay was given, but claimant did not receive it because the Personnel Office had listed her in the wrong job classification.

The respondent, in its Answer, admits the amount and validity of the claim, stating that the claimant was underpaid by \$.41 per hour for 657.25 hours, and that sufficient funds remained in its appropriation from which the obligation could have been paid. The Court therefore makes an award to the claimant in the amount requested.

Award of \$269.47.

Opinion issued February 15, 1985

ST. JOSEPH'S HOSPITAL

vs.

DEPARTMENT OF HEALTH

(CC-84-323a&b)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

Claimant filed these claims for reimbursement of charges for the treatment of two Weston State Hospital patients. The balance due for medical services rendered to the two patients is \$317.27.

The respondent admits the amount and validity of the claims, and further states that sufficient funds remained in its appropriation at the close of the fiscal year in question from which the claims could have been paid. Accordingly, the Court makes an award of \$317.27 to the claimant.

Award of \$317.27.

Opinion issued February 15, 1985

VIRGINIA ELECTRIC AND POWER COMPANY

vs.

DEPARTMENT OF CORRECTIONS

(CC-84-320)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

Claimant seeks reimbursement for emergency repairs to facilities owned by the West Virginia Department of Corrections at the Anthony Center in Neola, West Virginia. The repairs were completed on November 29, 1983, and an invoice in the amount of \$110.00 was returned to the claimant without payment.

Respondent admits the amount and validity of the claim, and further states that there were sufficient funds in its appropriation at the close of the fiscal year in question from which the obligation could have been paid.

The Court, therefore, makes an award to the claimant in the amount requested.

Award of \$110.00.

Opinion issued February 15, 1985

JAMES K. WHITE AND BARBARA WHITE

vs.

DEPARTMENT OF HIGHWAYS

(CC-84-276)

Claimants appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimants seek an award of \$579.04 for damage to their 1979 Ford Bronco, which occurred on a bridge on the Whitman Creek Road in Logan County, West Virginia, on October 8, 1984. Barbara White was driving the vehicle at the time of the incident. As the vehicle crossed the bridge, which is a wooden planked bridge, one of the planks, a two by eight, dislodged and tore a hole through the bottom of the Bronco.

The State is neither an insurer nor a guarantor of the safety of travellers on its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to charge respondent with negligence, actual or constructive notice of the defect is required. There was no evidence of actual notice to respondent, but this Court has previously held, under similar circumstances, that respondent's failure to discover the condition of the bridge floor constituted negligence. *See: Eller v. Dept. of Highways*, 13 Ct.Cl. 155 (1980); *Williams v. Dept. of Highways*, 11 Ct.Cl. 263 (1977). The Court, therefore, makes an award to the claimants in the amount of \$579.04.

Award of \$579.04.

Opinion issued February 15, 1985

XEROX CORPORATION

vs.

DEPARTMENT OF MINES

(CC-84-312)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

Claimant seeks reimbursement of the sum of \$1,691.83 for services rendered to the respondent's Office of Oil and Gas.

Respondent admits the amount and validity of the claim. As sufficient funds remained in its appropriation for the fiscal year in question from which the obligation could have been paid, the Court makes an award to the claimant in the amount requested.

Award of \$1,691.83.

Opinion issued February 27, 1985

AAROM BOONSUE, M.D., INC.

vs.

DEPARTMENT OF PUBLIC SAFETY

(CC-85-34)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$290.00 for medical services rendered to one of respondent's employees. Respondent, in its Answer, admits the validity and amount of the claim and states that there were sufficient funds available in the appropriate fiscal year from which the claim could have been paid. In view of the foregoing, the Court makes an award in the amount sought.

Award of \$290.00.

Opinion issued February 27, 1985

BOB DALTON INVESTIGATIONS, INC.

vs.

TREASURER'S OFFICE

(CC-85-35)

Roger Redmond, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$294.53 for security work performed for respondent. In its Answer, respondent admits the validity and amount of the claim and states that there were sufficient funds available at the close of the fiscal year in question from which to pay the claim. In view of the foregoing, the Court makes an award in the amount sought.

Award of \$294.53.

Opinion issued February 27, 1985

DENTAL ARTS LABORATORY, INC.

vs.

DEPARTMENT OF HEALTH

(CC-85-42)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks an award of \$135.20 for dental services rendered to a patient at respondent's Greenbrier Center. In its Answer, respondent admits the validity and amount of the claim and states that there were sufficient funds remaining in its appropriation for the fiscal year in question from which the claim could have been paid. The Court, therefore, makes an award in the amount sought.

Award of \$135.20.

Advisory Opinion issued March 1, 1985

WILLIAM B. FRAMPTON, ARCHITECT

vs.

STATE BUILDING COMMISSION

(CC-84-221)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for an advisory determination pursuant to W. Va. Code §14-2-18. Claimant, an architect, supplied respondent with architectural plans for the renovation of respondent's headquarters in Charleston, Kanawha County, West Virginia. Claimant's fee for the work amounted to \$12,236.80. No payment has been made to claimant because the established purchasing procedures were not technically complied with. Renovation work on the building is 90% complete; however, due to inclement weather, completion of the project has been postponed. Respondent has requested that the Court issue this advisory opinion to authorize payment of \$11,013.12, or 90% of the total claim at this time. There are sufficient funds in respondent's appropriation in the current fiscal year from which the claim could be paid. Respondent will request payment of the remaining \$1,223.68 upon completion of the project.

In view of the foregoing, the Court hereby finds respondent liable to the claimant in the amount of \$11,013.12. The Clerk of the Court is directed to file this opinion and transmit a copy to claimant and respondent agency.

Opinion issued March 1, 1985

BEVERLY PISEGNA FULMER

vs.

BOARD OF REGENTS

(CC-85-13)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$228.00 for back pay which she did not receive for the months of September and October 1984, after she changed from part-time to full-time employment. Claimant had received a mandated salary adjustment on July 1, 1984, but this adjustment was not reflected in September and October after she had become a full-time employee. In its Answer, respondent admits the validity and amount of the claim and states that there were sufficient funds available in its appropriation for the fiscal year in question from which the claim could have been paid. The Court, therefore, makes an award in the amount sought.

Award of \$228.00.

Opinion issued February 27, 1985

KEIZER SAW & MOWER

vs.

DEPARTMENT OF NATURAL RESOURCES

(CC-85-44)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks an award of \$309.95 for goods delivered to respondent. In its Answer, respondent admits the validity and amount of the claim and further states that there were sufficient funds available in its appropriation for the fiscal year in question from which the claim could have been paid. The Court, therefore, makes an award in the amount sought.

Award of \$309.95.

Opinion issued March 1, 1985

BARBARA M. NERI

vs.

DEPARTMENT OF HIGHWAYS

(CC-83-228)

Barbara J. Keefer, Attorney at Law, for claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

WALLACE, JUDGE:

The claimant is the owner of a house and lot which fronts on County Route 3, also known as Coal River Road, in St. Albans, Kanawha County, West Virginia. The lot is pie-shaped and slopes towards Coal River Road. The house is a one-story frame structure with cement block foundation. The front of the house faces the point of the pie. The claimant alleges that as a result of respondent's widening of Coal River Road, and subsequent ditching in front of the property, the land has begun to slide, causing damage to the foundation of the house, and necessitating installation of a retaining wall to stabilize the land.

Claimant testified that she purchased the property in 1974. At that time, the foundation and lot were stable. According to the claimant, in approximately 1975, Coal River Road was widened, and in the process she stated she observed about four feet of land being removed on her side of the road. She testified that respondent's crews ditched along the side of the road on a yearly basis, cutting into the bank about six to eight inches on each occasion. About a year after the widening, claimant stated that she began to observe changes in the contour of her land. A number of cracks developed in the foundation, all but one of which are located on the side of the house facing Coal River Road. The cracks have continued to get larger, one of which was estimated to be three or four inches wide. Photographic evidence not only shows the cracks in the foundation, but also the shift in the foundation itself.

John W. James, a civil engineer, testified that the damage to the property was the result of a slide. He stated that the removal of land at the bottom of the slope precipitated the beginning of the movement. The pattern of the damage to the house indicated that the movement of the land was more horizontal than vertical. He also found evidence of an overthrusting of the soil near the base of the ditch which is consistent with slide movement. This indicated that the damage was not the result of settlement of the house that occurs with age, or a shrink-swell type of movement. The ditch line also did not drain properly, he found, and, this keeps the land soft, which contributes to the slide.

Leonard D. Wells, a general contractor, testified that he visited the property and made an estimate for a stone retaining wall. This estimate was in the amount of \$8,800.00, for a wall to run the length of the property along Coal River Road.

David C. Casto, a real estate appraiser, testified that he viewed the property and estimated the cost to repair the footer and foundation of the house. He stated that the cost to cure would be \$5,000.00. Joseph D. McClung, an estimator, testified that repairing claimant's home would cost between \$10,000.00 and \$11,000.00. Repairs would entail lifting the house off the foundation, and then removing and replacing the block work, but he did not provide a breakdown of this estimate.

Claude Blake, a claims investigator employed by respondent, testified that the widening of Coal River Road occurred in 1977, and was performed under a contract with respondent by Black Rock Contracting, Inc. Since the repaving, only routine maintenance has been performed on Coal River Road, and respondent's records do not indicate any specific locations of this work.

Glen R. Sherman, a geologist with respondent, testified that he visited claimant's property. He stated that he believed the damage to claimant's property resulted from soil creep. He defined this as extremely slow movement of soil; slower than that which occurs in a landslide. He felt that the cracks in the foundation resulted from shrinking and swelling of the soil. This occurred when soil dried in the summer, causing cracks in the soil, into which other soil would fall. When moisture was added to the ground, the soil would then swell. He added that the fact that the house had no gutters added to the problem, in that this allowed water to concentrate in the soil instead of being directed away.

After careful review of all the evidence presented, the Court is of the opinion that the damage to claimant's property resulted from several factors. Photographs taken by the claimant after Coal River Road was ditched in 1983 show that the bank was cut into in such a

way as to remove a portion of the slope. The photographs also show water standing in the ditch line instead of draining away. Although the widening of the road was performed by a contractor under contract with respondent, there has been no evidence presented to refute claimant's allegation that respondent routinely cut further back into the slope during its ditching operations. Whether the slide began with the repaving is unclear; however, it is clear that respondent's actions have further aggravated the condition. It is also clear that the lack of gutters on the house contributed to the damages sustained. It is the opinion of the Court that respondent was negligent in its maintenance of Coal River Road in the vicinity of claimant's property, but that claimant was likewise negligent. Under the doctrine of comparative negligence, the Court apportions this negligence 80% to respondent and 20% to claimant. The Court makes an award for the retaining wall and for the cost to cure as estimated by Mr. Casto, or \$13,800.00, which is reduced by 20% for a total award of \$11,040.00.

Award of \$11,040.00.

Opinion issued March 1, 1985

L.R. SKELTON & COMPANY

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-199)

Wayne A. Sinclair and John Jenkins, Attorneys at Law, for the claimant.

S. Reed Waters, Jr., Attorney at Law, for the respondent.

GRACEY, JUDGE:

Claimant, L.R. Skelton & Company, a contractor of Columbus, Ohio, filed this claim seeking \$368,955.82 additional compensation on the performance of its contract with the respondent, the Department of Highways.

Claimant was the low and successful bidder, and was awarded a contract in the sum of \$634,726.00 for the repair of Slide No. 1995 on Riverside Drive, designated County Route 40, near Grafton in Taylor County. The contract was awarded October 31, 1980, and called for completion of the work by November 27, 1981. The slide was over 400 feet long, a section of both lanes of the two-lane highway slipping toward the river on the downhill side. The respondent's Materials Control, Soil and Testing Division designed the repair plan, under supervision of Rex C. Buckley, a geologist. Thirteen test borings were

made to determine the nature of the soil, the top level, and the nature of the subsurface rock. The repair plan and contract included the installation of a row of 144 vertical steel I beam pilings, three feet apart on center. One-third of the total length of each piling beam was to be set into subsurface rock, a minimum of ten feet. The holes, to be drilled for the placement of each piling beam, were to be large enough in diameter to allow the beam to be lowered into the hole by its weight. Generally, these holes were 24 inches in diameter, and had to be about 45 feet deep, below the surface. Grout was used to hold the beams in proper position and alignment.

The test borings were illustrated on the contract plans, showing the elevation of the top of the subsurface rock. The symbol "MH" was shown to indicate that the rock was medium hard. Mr. Buckley testified that his classification was made by the driller, and represented a resistance to drilling; that the classification was not based on the Piteau Classification method not then in use in the division. The Piteau Classification method involves a compression testing, rock being classified, as to hardness, after determination of the pressure required to break it. The test borings were about 4 inches in diameter, using an auger drill through soft materials, then a spoon to determine hardness of the rock, and then a core barrel to drill into the rock. Only one test boring went to a depth of 10 feet into rock, the others being only 5 feet deep into rock. The plans did not reveal the type of drilling equipment used.

After being awarded the contract, the claimant, not having adequate drilling equipment, subcontracted the drilling to E.J. Koker and Company, another Ohio firm having considerable drilling experience and equipment. No test drilling was done, before bidding, by the claimant, nor by E.J. Koker and Company before entering into the drilling subcontract. They both relied on the medium hard rock classification shown on the plans. Section 105.2 of the West Virginia Department of Highways Standard Specifications Roads and Bridges Adopted 1978 included the statement:

"The Contractor is not bound to accept or rely on the data shown on drawings, but may make such additional borings and investigations, including test piles, as he may desire in order to satisfy himself concerning the lengths of piles and the conditions governing or entering into the construction of foundations."

In the General Notes, appearing on page 4 of the drawings, appears the statement:

“The contractor shall satisfy himself that his equipment can obtain satisfactory penetration into the rock stratum a depth equal to $1/3$ the total length of the pile to be installed.”

Respondent contends that the claimant was remiss and negligent in not making its own test borings before bidding; that E.J. Koker and Company should have made its own test borings before entering into its drilling subcontract.

Claimant contends that such contractor test borings are not economically feasible; that there is no way to recover such costs if the contract is not awarded to it. Claimant relies on Section 104.2 of the aforementioned Standard Specifications, which provides in part:

“Should the Contractor encounter or the Department discover during the progress of the work subsurface or latent physical conditions at the site differing materially from those indicated in the contract, or unknown physical conditions at the site of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the contract . . . an equitable adjustment will be made and the contract modified in writing accordingly.”

This Section requires contractor notice in writing to the Engineer, and an Engineer finding that the conditions do materially differ.

Work began in December of 1980 after a November 13 preconstruction meeting. The work was shut down in February when, the contractor contends, hard rock was encountered, rock so hard that it could not be drilled with normal drilling equipment. Larry Koker, president of E.J. Koker and Company, related the twenty-five years' experience of his company in performing drilling contracts, some 3,500 jobs. In pricing the subcontract at \$19.00 per lineal foot, his company had relied on the medium hard rock classification shown on the plans, and he had been confident that a rock auger type drill bit could be used. When extremely hard rock was encountered, he had difficulty finding equipment which would penetrate it. When work resumed, in May or June of 1981, the rate of drilling was much slower than the fifteen or more feet per hour he had expected. Joint Exhibit No. 25, being a summary prepared from Koker drilling logs on 101 of the 144 holes, illustrated a drilling rate of 18.1 linear feet per hour on 2,494.6 feet of dirt and shale, and 2.2 linear feet per hour on 1,113.1 feet of hard and very hard rock. Joint Exhibit No. 15a, being excerpts from respondent's construction drilling logs, show that 732.04 linear feet, or

63.7% of 1,140.35 feet of rock drilling, was marked "Hard".

James W. Mahar, a Geotechnical Consultant presented as an expert witness by claimant, was of the opinion that no pre-bid or pre-contract boring by the claimant or Koker would have been recommended by him had he been consulted; that the respondent's exploratory work was adequate. Upon his employment, he had reviewed the records and had supervised five exploratory borings. He discussed the Piteau Rock Classification system developed in the early 1970's, and methods of drilling.

The Court is satisfied, from the evidence, that much of the rock encountered was hard rock, somewhat harder and more costly to drill than the medium hard rock indicated by the plans. Although a contractor is not bound to accept or rely on the data shown on the contract drawings, it is the opinion of the Court that a contractor is privileged to do so, and is entitled to an equitable adjustment where the data is erroneous or incomplete and different, more costly, conditions are encountered. In February 1981, the claimant notified the respondent by telephone and letter of the hard rock encountered and that an equitable adjustment would be requested. The respondent refused to issue a Change Order, and ordered the claimant back to work.

At the conclusion of the evidence, the parties submitted an agreed stipulation as to compensation for extra work, to which the claimant might be entitled, in the total amount of \$326,999.56, which includes \$146,186.44 additional compensation for L.R. Skelton & Company and \$180,813.12 attributed to the E.J. Koker & Company portion of the claim.

Accordingly, the Court hereby makes an award to the claimant, L.R. Skelton & Company, in the sum of \$326,999.56 as additional compensation, and in the sum of \$55,203.50 as interest at 6% per annum from May 7, 1982 (being the 151st day after final acceptance of the project on December 7, 1981).

Award of \$382,203.06.

Opinion issued March 1, 1985

ST. JOSEPH'S HOSPITAL

vs.

DIVISION OF VOCATIONAL REHABILITATION

(CC-84-310a&b)

Ronald Anspaugh, Manager of Accounts, appeared for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

These claims were brought by claimant for medical services provided to various patients of respondent. At a hearing on the claims, the claimant requested that Claim No. CC-84-310a be withdrawn, and the Court dismissed the claim. In Claim No. CC-84-310b, the respondent, in its Amended Answer, admitted the validity of a portion of that claim. The total amount sought in this claim was \$5,178.40, of which respondent admitted \$4,868.40. Ronald Anspaugh, claimant's Manager of Accounts, requested that the disputed portion of the claim as to patient Linda Clem in the amount of \$310.00, be held open for further hearing, and the Court continued that portion generally. As the respondent has admitted part of Claim No. CC-84-310b and has stated that there were sufficient funds remaining in its appropriation for the fiscal year in question from which to pay the claim, the Court makes an award in the amount of \$4,868.40.

Claim dismissed in CC-84-310a.

Award of \$4,868.40 in CC-84-310b.

Opinion issued March 1, 1985

FRED STAFFILINO, JR. AND

LINDA STAFFILINO

vs.

DEPARTMENT OF HIGHWAYS

(CC-80-378)

William Keifer, Attorney at Law, for claimants.

Nancy J. Aliff, Attorney at Law, for respondent.

WALLACE, JUDGE:

Claimants are the owners of real estate located on West Virginia Route 105, commonly known as Pennsylvania Avenue, in Weirton, West Virginia. Two buildings exist on the property. A commercial building and parking area front on West Virginia Route 105. At the rear of the property and to the left of the parking area and commercial

building is a dwelling house with a basement garage. An asphalt driveway is located adjacent to the parking area. This driveway extends from Route 105 to the garage door at the basement level of the dwelling house. Claimants normally rented the commercial building as a restaurant-bar and the basement of the building was rented separately for storage purposes. The dwelling house was rented as well.

During the months of May and June of 1980, there was a series of three storms during which flooding occurred on claimants' property. As a result of the flooding, certain damage occurred: an asphalt driveway to the dwelling house was damaged; the concrete porch of the dwelling house was pushed off its foundation and into the basement of the house; the retaining wall adjacent to the parking area of the commercial building was damaged; water flooded the basements of the commercial building and the dwelling, damaging furnaces, water heaters, wiring and plumbing; and landscaping was eroded. Claimants also contend that the property suffered a diminution of value and a loss of business because the premises became difficult to rent.

Claimants allege that the flooding which occurred to the property was caused by failure of the respondent to properly maintain certain catch basins located on the north side of West Virginia Route 105. The basins filled with water and overflowed across the road onto the parking area of the commercial property and also down the driveway to the dwelling house.

Silvio Pinciario, father-in-law of claimant Fredrick Staffilino, testified that he managed the property for the claimants. He had purchased the property in 1968 and sold it in 1972. In 1979, his daughter and son-in-law, claimants herein, purchased the property. During the time that Mr. Pinciario owned the property in 1969, he had constructed the parking area adjacent to the commercial building. In so doing, he moved the driveway to the dwelling house and also constructed a catch basin and drainage system from Route 105 down the east side of the property where it crossed in front of the dwelling house through an open, concrete block drain into a steel pipe which connected to a 24-inch drain on the west side of the dwelling house. He testified that the property had not experienced any flooding problems during the years which he owned the property.

After the first flood in May 1980, Mr. Pinciario explained that he examined the catch basins on the road where water was standing and determined that several were plugged up with dirt and debris. The water was flowing across the road and onto claimants' property. He complained first to the City of Weirton which sent him to the respondent. He complained to the respondent but no action was taken. He

complained again after the second flood. The respondent attempted some remedial measures at that time which did not work. After the third flood, the respondent took actions to clean the catch basins and to open the clogged drain. Thereafter, the claimants experienced no further problems with flooding on the property.

Donnie L. Bensanhaver, an engineer and maintenance assistant in District 6 of the Department of Highways, testified for respondent. He explained the relevance of the elevations of the drains and points on claimants' property. In general, the property is below the level of the surface of the road. The dwelling house on the property is located in a natural water channel. He theorized that the drainage system constructed by Mr. Pinciario located in front of the house would overflow onto the property in a heavy rainstorm.

Thomas A. Bryant, II, a field operations engineer for respondent, testified that the respondent's county maintenance personnel had the responsibility to inspect the ditches and pipes along West Virginia Route 105 on an annual basis to ascertain that the systems were open. He also explained that respondent constructed a curb in front of the driveway on claimants' property to control the problem of water overflowing onto claimants' property.

Elmer B. Shepherd, respondent's maintenance supervisor for Hancock County, testified that the drainage ditches and pipes were cleaned on an annual basis. This process includes inspection of the drop inlets or catch basins on an annual basis to determine if debris has clogged them. He testified that the maintenance generally occurred in the fall and the summer.

After an examination of the evidence and testimony presented in this claim, the Court concludes that the flooding which occurred on claimants' property resulted from the overflow of the catch basins located on West Virginia Route 105. The respondent had noticed from claimants after the first flood but failed to remedy the clogged basins, and the Court finds the respondent liable to the claimants for the damages which occurred to the property during the second and third floods.

Both claimants and respondent submitted depositions of real estate appraisers who testified as to the before and after market values of the property. Claimants' appraiser determined the difference in market values to be \$44,900 while respondent's appraiser determined this difference in value to be \$7,000.00. The Court has reviewed the basis for each appraisal and has determined that a difference in market value of \$20,000.00 is fair and reasonable. The Court reduces this amount by 30 percent for damages attributable to the first flood and makes an

award to the claimants in the amount of \$14,000.00 for damages which occurred during the second and third floods.

Award of \$14,000.00.

Opinion issued March 1, 1985

TUCKER'S USED CARS, INC.

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-161)

Robert Q. Sayre, Attorney at Law, for claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

GRACEY, JUDGE:

Claimant, Tucker's Used Cars, Inc., a corporation based at Darlington, South Carolina, claims damages to its tractor-trailer rig, two automobiles on the trailer, and for expenses incurred, all incident to an accident which occurred about 1:30 a.m., on July 4, 1980, on the southbound off ramp, Exit 114, of I-77, in Kanawha County.

On the previous day, a contractor had finished a blacktop resurfacing project for the Department of Highways. It was about 612 feet in length and covered the previous pavement from edge to edge. From north to south, the resurfacing began 150 feet northerly from the northerly end of a bridge, extended southerly that 150 feet, another 212 feet crossing the bridge, and another 250 feet southerly from the southerly end of the bridge. As one travels southerly, the left bridge guardrail is parallel with the left edge of the left lane of the two southbound lanes. But, again, as one travels southerly, the off ramp pavement, to the right, begins at or near the northerly end of the bridge, and becomes wider as the bridge is crossed. The right bridge guardrail is not parallel with the southbound lanes, but is parallel with the right edge of the off ramp pavement. There was no physical separation of the off ramp from the right southbound lane for about 619 feet southerly from the southerly end of the bridge. At that point, the two split, and there had been a "114 EXIT" sign there until another accident, about twenty-four hours before this subject accident, had caused that sign to be knocked down. The resurfacing had covered all previous highway lining and no new lining had been done. Thus, for the 612 feet of the project, no lining defined the pavement edges, nor the separation of the two southbound lanes, nor the separation of the off ramp from the right southbound lane. There were no construction warning signs or devices present. One mile north of the exit was a sign advising southbound motorists "EXIT 114 POCATALICO 1 MILE". About three-tenths of a mile north of the exit was a sign ad-

vising southbound motorists "EXIT 114 POCATALICO NEXT RIGHT".

The claimant's tractor-trailer was proceeding southerly on I-77. Several used automobiles had been purchased and loaded at Columbus, Ohio, and were being transported to Darlington, South Carolina. It was raining and quite foggy. Claimant's employee, William Lee Wise, was driving and testified that it was very dark and "extremely difficult to see". He said the headlights were on; that he had slowed to 40 miles per hour when he had encountered the rain about 20 miles northerly; and that he was going 35 miles per hour or less as he crossed the bridge. There being no lining on the new blacktop, he had trouble orienting himself. He said he could see the bridge guardrail, apparently the one on his right, and that he had tried to use it as an alignment factor. His fellow driver, Thorna Lee Evans, had just gotten out of the sleeper and shouted to him, "Pull to the left; we're on the ramp!" When he pulled left, the trailer had started to tip, so he then pulled right and hit the brakes. The trailer jackknifed against the tractor, and the rig slid down the ramp into the guardrail, on the left of the ramp, at a 90 degree turn to the right. The rig came to rest at that point, the back of the tractor and the front of the trailer having gone over the guardrail.

Bobby Lee Tucker, president of the claimant corporation, testified concerning damages. The tractor, a 1974 GMC, had a pre-accident value of \$16,500.00, was damaged beyond economical repair, and had a salvage value of \$2,800.00, resulting in a loss of \$13,700.00. Trailer repair cost was \$2,100.00. Repairs to a 1977 Cadillac cost \$805.00. Repairs to a 1978 Oldsmobile cost \$160.00. Local wrecker service had cost \$419.70. \$780.00 had been paid for other recovery and towing services. The total of these items is \$17,964.70.

There was no evidence presented that the respondent had any notice of the knocked down "114 EXIT" sign. In the absence of highway lighting, the Court deems the respondent 60% negligent for not having construction warning signs or devices in place where 612 feet of new surface covered pre-existing highway lining, particularly in view of the manner in which the off ramp there departed from the highway traffic lanes.

The Court is of the opinion that the speed of the claimant's tractor-trailer was greater than a reasonable speed under the circumstances and conditions then and there existing, and finds the claimant, through its driver, 40% negligent.

Therefore, the Court makes an award to the claimant of 60% of its damages, in the amount of \$10,778.82.

Award of \$10,778.82.

Opinion issued March 1, 1985

XEROX CORPORATION

vs.

DEPARTMENT OF NATURAL RESOURCES

(CC-82-236)

David W. Johnson, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

GRACEY, JUDGE:

This claim was heard by the Court on December 9, 1982, and the opinion of the Court was issued March 16, 1983, to the effect that the claimant was entitled to a monetary award on a quantum meruit basis, and directing the parties to agree “. . . upon an amount fair to both parties based upon the reasonable value of the use of the equipment rented by the respondent.” The claim was to be held open for 60 days for such agreement to be filed with the Court. *Xerox Corporation v. Dept. of Natural Resources*, 14 Ct.Cl. 435 (1983).

Generally, the claim involves rental of a Xerox Model 8200 copying machine installed on a limited trial basis, under a written contract which was invalid because of a failure to obtain approval of the Department of Finance and Administration. The respondent's Department of Water Resources had the use of the machine from September 25, 1981, to mid-June 1982.

The parties failed to file any reasonable value of use agreement with the Court, and an Order was entered dismissing the claim, without prejudice, on November 18, 1983. Claimant filed a Petition for Rehearing and Reconsideration, and an Order was entered February 6, 1984, granting same. At a hearing on September 25, 1984, additional evidence was presented as to the reasonable value of the use of the equipment.

The evidence indicated that 340,514 copies were made on the machine during the time period the machine was in use. A knowledgeable witness testified that the price of purchasing such copying services from a printing service in the Charleston area would be \$17,332.14 less \$3,405.14 (1¢ per copy) for toner, developer, and paper separately purchased, but this testimony was based upon his assumptions with reference to how many original items were copied, how many copies from each original, etc., and there was no evidence presented to verify such assumptions. Assuming that all 340,514 copies were produced as one job, from a single original being copied, this being at the lowest price per copy (3.94¢), the local price would have been \$13,416.25 less the \$3,405.14 cost for toner, developer, and paper. On cross-examination, the witness agreed that the prices he was

suggesting would include a variable profit for the printer and a profit to Xerox Corporation in its rental of a copying machine to the printer.

The invalid lease agreement in question included a monthly rental of \$1,220.00 with no additional charge for the first 30,000 copies produced in that month, so each of those copies would have cost about 4.06¢. Each of the next 20,000 copies was to cost respondent 1.41¢ per copy. And each additional copy was to cost respondent .073¢ per copy. Using this pricing guide, the claimant had billed, and claims in this action, the sum of \$12,065.88 including an equipment removal charge of \$365.00.

The Court has no way of knowing how many originals were copied, how many copies were made from any original, the profit margin of the claimant, etc. The Court can only estimate what is an amount “. . . fair to both parties based upon the reasonable value of the use of the equipment,” and the Court fixes that amount at \$8,500.00.

Award of \$8,500.00.

Opinion issued March 14, 1985

SOPHIA CLARK

vs.

DEPARTMENT OF HEALTH

(CC-85-67)

No appearance by claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$2,613.00 for the payment of a Social Security tutor for her child, Tracey Brown, a resident of respondent's Greenbrier Center. The respondent ascertained that claimant should not have paid for the educational services rendered to her child as this expense was the responsibility of the respondent. The respondent, in its Answer, admits the validity and amount of the claim and states that there were sufficient funds in the appropriate fiscal year from which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount sought.

Award of \$2,613.00.

Opinion issued March 18, 1985

MICHAEL ANGIULLI

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-127)

James C. West, Jr., Attorney at Law, for claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

GRACEY, JUDGE:

On Friday morning, June 26, 1981, the claimant and his wife were travelling northerly on I-79 at a speed of about 55 miles per hour, passing other cars, when the claimant alleges his car ran over an exposed steel rail in the roadway, being the southerly approach end of a bridge at or near Mile Post 61, in Braxton County near the Sutton Exit, causing his car to go into the air and fall back to the highway. At the next bridge, roughly a quarter mile northerly, he alleges that the car dropped from the exit end of the bridge. As a result, claimant alleges damages to his automobile, a 1974 Dodge Dart, in the amount of \$187.11. Claimant also alleges that he sustained neck and back injuries resulting in medical expenses of \$970.88. He seeks an additional \$45,000.00 for pain and suffering.

Claimant testified that as he drove up I-79, he came upon a section of road where "it was apparent that it was a construction site." At the site, the surface of the pavement had been planed in order to resurface the approach. Claimant said that he saw no machinery and no warning signs or flagmen at the site. Claimant estimated that there was about a five-inch difference in elevation between where the pavement had been planed and the surface of the bridge. He said that he entered the bridge at a speed of 50 to 55 miles per hour. Claimant continued to drive until he reached a rest area, approximately 20 miles beyond the bridges, before stopping. While there, he met one of respondent's employees, to whom he complained about the bridges.

Following the incident, claimant testified that he had pain in his neck, back, and legs. He first sought medical attention on July 9, 1981, and has undergone physical therapy as an outpatient on a number of occasions. His testimony revealed that he had a leg injury during World War II, and was medically retired from his employment as a fire fighter in 1964 as a result of back injuries. He had further injured his back in an automobile accident in 1967, and had worn a back brace since 1963. Claimant added that the pains he has had since the incident in question were different than any he had had before.

Marvin Murphy, respondent's District Maintenance Engineer at the time of the incident, testified that the records for this job indicated

that approximately 2.4 inches of road surface had been planed from the approach of the bridge. He indicated that work was begun on June 22, 1981, at which time signs had been placed at the scene.

Richard Paul Thoms, Traffic Service Supervisor, testified that signs were placed at Mile Post 61 on June 22. He testified that "Road Work Ahead" signs would be placed one mile and one-half mile ahead of the bridge, and also at the 1500-foot mark. While work was in progress, "Keep Left" or "Keep Right" signs would be used, and a "Bump" sign would be in place just at the site of the work. No work was performed at the scene on June 26, but Mr. Thoms stated that the signs would remain until all work was completed.

Robert Michael SanJulian, respondent's Safety Officer, travelled on I-79 past the site at approximately 5:00 p.m. on June 26, 1981. He testified that at that time, there were three signs indicating work ahead at one mile and one-half mile, and a bump sign with a speed limit of 25 miles per hour.

In view of the evidence presented, the Court is of the opinion that claimant has not established, by a preponderance of the evidence, any negligence on the part of respondent in the maintenance of this construction site. Rather, the evidence indicates that claimant's own negligence, in failing to observe warning signs and in driving through the construction area at an excessive speed, was the proximate cause of the damages incurred. The Court can only conclude that if the warning signs were present at 5:00 p.m. on the day in question, and respondent's employees were not working on that day, the signs must have been present that morning. Therefore, the Court is of the opinion to, and does, disallow the claim.

Claim disallowed.

Opinion issued March 18, 1985

CURTIS T. HARDMAN, JR.

vs.

DEPARTMENT OF HIGHWAYS

(CC-84-246)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On August 9, 1984, at approximately 5:07 p.m., claimant's vehicle struck a loose expansion joint on Interstate 64 near the Broad Street exit in Charleston, West Virginia. The vehicle, a 1979 Pontiac Lemans, sustained damage in the amount of \$825.19. Claimant had

no knowledge of how long prior to his accident that the expansion joint had been loose. Herbert C. Boggs, Interstate Coordinator, testified that respondent's records indicated work was performed on the expansion joint on the evening of August 9 or on August 10. He stated that the problem with the expansion joint was reported sometime after 5:00 p.m. on August 9.

The State is neither an insurer nor a guarantor of the safety of motorists on its highways. *Adkins v. Sims*, 130 W. Va. 645, 46 S.E.2d 81 (1947). In order for respondent to be found liable for the damages incurred, proof of actual or constructive notice of the defect and a reasonable amount of time to correct it must be shown. As there was no proof of such notice, the claim must be denied.

Claim disallowed.

Opinion issued March 18, 1985

CARLISLE L. HEDRICK AND ROBERT L. HEDRICK

vs.

DEPARTMENT OF HIGHWAYS

(CC-83-137)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

LYONS, JUDGE:

Claimant, Carlisle L. Hedrick, was the owner of a 1971 Volkswagen Beetle, which was totalled in an accident on Route 5 in Marshall County, West Virginia, on February 23, 1983. At the time of the incident, the vehicle was being driven by his son, Robert L. Hedrick. Carlisle L. Hedrick seeks damages in the amount of \$300.00, as the fair market value of the automobile. Robert L. Hedrick seeks \$424.00 for wages which he lost due to injuries sustained in the accident.

On the date of the incident, Robert L. Hedrick and a friend were driving on Route 5, a two-lane paved road. He testified that the road was narrow in places due to slippage. He stated that he had driven off the road on the right side because a car was coming in the opposite direction. As he attempted to get back onto the road, he hit a place where the berm had slipped, which caused the vehicle to overturn down an embankment. Robert Hedrick stated that he drove the road two or three times a week and had observed areas of slippage.

Christopher Minor, Assistant County Maintenance Supervisor for Marshall County, testified that there have been problems with slip-

page on Route 5, and some have been corrected. He said that there had been no complaints about drainage on Route 5 in February 1983. Mr. Minor stated that respondent's employees drive Route 5 approximately every two weeks to check its condition and to place signs at any dangerous spot. He added that the road is two lanes except for bridge areas, and any "deteriorated area that we felt was not safe for two vehicles to pass, we would sign it with standard hazard board markers." He viewed photographs of the accident scene and said the road was two-laned.

The State is neither an insurer nor a guarantor of the safety of travellers on its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order for the respondent to be found negligent, constructive or actual notice of the defect must be shown. Although there is no evidence of actual notice of the slippage area, respondent's employees routinely checked the road. While there may be sufficient evidence to charge respondent with constructive notice, the Court is of the opinion that the driver was guilty of negligence in leaving the travelled portion of the road, when there appeared to be sufficient room for two vehicles to pass. This negligence was equal to or greater than any negligence of respondent, and based on the doctrine of comparative negligence, the Court denies the claim.

Claim disallowed.

Opinion issued March 18, 1985

HOOTEN EQUIPMENT COMPANY

vs.

BOARD OF REGENTS

(CC-80-337)

Robert H. C. Kay, Attorney at Law, and Michael Bonasso, Attorney at Law, for claimant.

Henry C. Bias, Jr., Deputy Attorney General, for respondent.

GRACEY, JUDGE:

An opinion of the Court, disallowing this claim, was previously issued. See 14 Ct.Cl. 503. Claimant filed a petition for rehearing. By Order dated February 24, 1984, the Court granted a rehearing ". . . for the limited purpose of adducing evidence with regard to the following four (4) questions:

1. By whom, and with what direct or indirect reference, if

- any, to carrousel unit Model No. 1652, as manufactured by SMS Division of Metalers Corp., St. Paul, Minnesota, were the specifications prepared for Item 22 in the contract?
2. Had other carrousels, Model No. 1652, as manufactured by SMS Division of Metalers Corp., St. Paul, Minnesota, previously been manufactured and sold to other purchasers? If so, did such units refrigerate the lower shelf to a temperature of 40°F?
 3. As designed and delivered, and assuming the absence of defects, should the carrousel, Model No. 1652, as manufactured by SMS Division of Metalers Corp., St. Paul, Minnesota, have refrigerated the lower shelf to a temperature of 40°F?
 4. Why did the unit delivered not refrigerate the lower shelf to a temperature of 40°F?"

The rehearing was on September 28, 1984. From the evidence then presented, the Court finds no basis for amending its previously issued opinion.

Claim disallowed.

Opinion issued March 18, 1985

RICHARD A. WILSON

vs.

DEPARTMENT OF HIGHWAYS
(CC-84-262)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On September 21, 1984, claimant was driving his 1980 Ford Fairmont station wagon from Oakridge Drive onto Greenbrier Drive in Kanawha County, West Virginia. As claimant turned on Greenbrier Drive, he struck the last in a line of recently installed lane dividers. These dividers are approximately six inches around and three and one half to four inches tall, and are used to divide the lanes on Greenbrier Drive by allowing the outside lane to continue while traffic turns into the left lane from Oakridge Drive. Claimant's right front tire and rim were damaged. Claimant testified that he was aware the markers had been installed, but added that they "squeezed you" into the left lane.

Claude Blake, a claims investigator employed by respondent, took photographs of the accident site. The photographs indicate that the dividers are placed just to the inside of the divider lines on the right-hand side of Greenbrier Drive. There was no evidence presented to indicate that the dividers were improperly placed, or that the divider which claimant struck was defective. As there was no evidence that respondent was negligent, the claim must be denied.

Claim disallowed.

Opinion issued March 18, 1985

PAT R. WITHROW

vs.

DEPARTMENT OF HIGHWAYS
(CC-84-247)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimant seeks \$89.20 for damages sustained by his 1971 Buick Electra which struck a pothole on Leatherwood Road in Kanawha County, West Virginia. The incident occurred on July 8, 1984, at about 9:30 a.m. Claimant testified that he swerved to avoid one pothole and then struck the one in question. He had not travelled that road for about a year and had no knowledge of how long the pothole had been in existence.

The State is neither an insurer nor a guarantor of the safety of motorists on its highways. *Adkins vs. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). For respondent to be held liable for defects of this type, the claimant must prove that respondent had actual or constructive notice of the defect. As there was no evidence of notice, the claim must be denied.

Claim disallowed.

Opinion issued March 27, 1985

CHARLES DAVID CARPENTER

vs.

DEPARTMENT OF HIGHWAYS
(CC-84-217)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimant seeks an award of \$1,500.00 for the total destruction of his 1971 Jeepster Commando in an accident which occurred on July 26, 1983, at approximately 7:30 p.m. The incident occurred on Route 14 north of Spencer, West Virginia. The claimant testified he encountered a section of highway which was in poor condition for approximately 40 feet. In the middle of the 40-foot section of road was a sunken area. Claimant stated that when he reached the worst part of the road, his vehicle began to bounce erratically. The wheels on the right side of the vehicle left the road, and struck a culvert in the ditch line. This caused the vehicle to overturn, throwing the claimant out of the jeep. The vehicle ended up submerged in a creek across from the road.

Corporal T.E. Guthrie of the West Virginia Department of Public Safety testified that he investigated the accident. He stated that there were side scuffs on the road, indicating that the vehicle was already sliding when it went into the rough area. In view of the evidence that was presented, the Court is of the opinion to, and does, disallow the claim.

Claim disallowed.

Opinion issued March 27, 1985

GARY LYNN DANIELS, INDIVIDUALLY AND
GARY LYNN DANIELS, AS ADMINISTRATOR OF THE
ESTATE OF MARY ELLEN DANIELS; ALBERTA DANIELS,
IN HER OWN RIGHT; AND BRIAN KELLY DANIELS,
BY HIS NEXT FRIEND, ALBERTA DANIELS

vs.

DEPARTMENT OF HIGHWAYS
(CC-81-66)

Ralph C. Young, Attorney at Law, for claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

LYONS, JUDGE:

Claimants seek to recover \$50,000.00 for damages arising out of an automobile accident which occurred on January 18, 1980. On that date, claimant, Gary Lynn Daniels, was driving his 1968 Chevrolet Camaro on W. Va. Route 61, northbound, from Oak Hill. He was accompanied by his wife, Alberta Daniels, and their two small children. At approximately 8:30 p.m., he encountered rocks in the road. He attempted unsuccessfully to avoid striking the rocks. As a result of the accident, the claimants were injured, and the vehicle destroyed. Mary Ellen Daniels, claimant's infant daughter, died of her injuries a week

after the accident. Claimants allege that the respondent was negligent in failing to promptly remove the rocks after receiving notice of the condition.

Claimants introduced evidence from two people who stated that they called respondent's Oak Hill Garage to inform them of rocks. One witness, Patricia K. Nichols, placed the time of her call at shortly after 8:00 p.m. She testified that she was told by whoever answered the telephone that the condition had already been reported. The other witness, Bonnie Bragg, could not establish the time of her call, but also said that she was told that the slide had already been reported. The three employees on duty at the Oak Hill Garage all testified that the first notice they had received was a call from the W. Va. Department of Public Safety, and that this call was received after the accident had occurred.

The State is neither an insurer nor a guarantor of the safety of travellers on its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order for the respondent to be found liable for the damages sustained, the claimants must prove that the respondent had actual or constructive notice of the defect and a reasonable amount of time to take suitable corrective action. *Davis v. Dept. of Highways*, 11 Ct.Cl. 150 (1976). Considering the evidence in the light most favorable to the claimants, and assuming that respondent received notice of the rocks prior to the accident, the Court is constrained to find that there was not a sufficient amount of time for respondent to act. Although the Court is sympathetic toward the claimants, in view of the foregoing, the Court must disallow the claim.

Claim disallowed.

Opinion issued March 27, 1985

FEDERAL KEMPER INSURANCE COMPANY, AS SUBROGEE
OF SIBYL CHASE AND SIBYL CHASE, INDIVIDUALLY

vs.

DEPARTMENT OF HIGHWAYS
(CC-84-248)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On July 18, 1984, claimant was driving her 1984 Dodge Omni on I-64 near Hurricane, West Virginia, when she struck a pothole causing

damage to the vehicle. The incident occurred about 11:15 p.m. The front and rear left wheels struck the hole and both rims and one tire were replaced. The total amount of the damage was \$544.42, of which claimant, Sibyl Chase, paid \$250.00.

The State is neither an insurer nor a guarantor of the safety of motorists on its highways. *Adkins v. Sims*, 130 W. Va. 645, 46 S.E.2d 81 (1947). In order for respondent to be found liable for the damages incurred, proof of actual or constructive notice of the defect must be shown. As there was no proof of notice in this claim, the claim is denied.

Claim disallowed.

Opinion issued March 27, 1985

SHIRLENE SUE GODBEY, INDIVIDUALLY AND
SHIRLENE SUE GODBEY, ADMINISTRATRIX OF THE
ESTATE OF ROBERT EUGENE GODBEY, DECEASED

vs.

DEPARTMENT OF HIGHWAYS
(CC-83-295)

Christopher S. Butch and Morton I. Taber, Attorneys at Law, for claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On December 14, 1984, the Court heard testimony concerning the death of claimant's decedent, which occurred on February 6, 1982. At the conclusion of claimant's case, the respondent made a Motion to Dismiss, and after oral argument on the Motion, the Court unanimously sustained respondent's Motion and dismissed the claim.

On February 6, 1982, claimant's decedent left their home for work at approximately 6:20 a.m. He travelled to work on Route 61 in Kanawha County. At a place on Route 61 commonly referred to as the Cheylan straight-away, his vehicle left the road and went over the guardrail into the Kanawha River. The vehicle was found in the river the next day; the body was not recovered until June 1983. Claimant alleged that respondent failed to properly maintain the guardrail on Route 61, and had the guardrail been maintained, the decedent would be alive today.

At the conclusion of claimant's evidence, the respondent made a Motion to Dismiss for failure to state a cause of action. Respondent stated that there was no evidence to establish the cause of the accident

and, therefore, no causal relationship between the accident and any alleged negligence on the part of respondent. After due consideration of the arguments, the Court sustained respondent's Motion to Dismiss. The Court determined that there was no proximate cause between the alleged poor maintenance of the guardrail, and the accident itself. The claim was, therefore, dismissed.

Subsequent to the dismissal of this claim by the Court, claimant filed a petition for rehearing, which petition, having been considered by the Court, is denied.

Claim dismissed.

Opinion issued March 27, 1985

KENNETH D. HATFIELD

vs.

DEPARTMENT OF HIGHWAYS

(CC-84-268)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On October 11, 1983, at approximately 9:30 p.m., claimant was travelling on I-64 eastbound in Kanawha County, West Virginia, when he was involved in an automobile accident. At the time of the accident, it was raining heavily. As claimant drove his 1983 Toyota Cressida through a curve, he came upon respondent's employees who were in the process of setting up a construction project in the lane in which claimant was travelling. Claimant braked the vehicle, but struck the vehicle in front of him which was slowing down. Both vehicles were damaged. Claimant stated that at the time of the accident only two orange cones were in place in front of a lighted arrow sign, and that he felt this inadequate. He added, however, that he probably could have seen the arrow sign except for the fact that a large truck camper was in front of him in the other lane and this prevented him from seeing the sign until he was upon it.

This Court has held on a number of occasions that the State is neither an insurer nor a guarantor of the safety of motorists on its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). Although the claimant stated that respondent was negligent in apparently putting the arrow sign in place prior to putting up the cones, the Court finds that the accident resulted from a combination of cir-

cumstances. The poor weather conditions were a factor. The Court does not determine whether there was negligence on respondent's part, however, as the Court finds that the fact that claimant's vision was obscured was the proximate cause of the accident. The claimant stated that he probably would have seen the sign except for the camper. The Court is of the opinion to, and does, deny the claim.

Claim disallowed.

Opinion issued March 27, 1985

ALLEN KAPLAN AND PAULINE KAPLAN

vs.

DEPARTMENT OF HIGHWAYS

(CC-84-127)

Claimant appeared in person.

Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was originally filed in the name of Allen Kaplan, but when the testimony established that the damaged vehicle, a 1984 BMW 318-I, was titled in the name of Allen Kaplan and his mother, Pauline Kaplan, the Court, on its own motion, amended the style of the claim to reflect that fact.

On March 24, 1984, the claimant was driving his vehicle on 5th Avenue in Huntington, West Virginia, when he struck a pothole. The left front rim was damaged. The claimant testified that he drove the road daily, but had not noticed the pothole. He had no knowledge as to how long the pothole had been in existence.

The State is neither an insurer nor a guarantor of the safety of travellers on its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order for the respondent to be found liable for the damages incurred, proof of notice of the defect must be shown. As there was no evidence of notice to respondent, the claim must be denied.

Claim disallowed.

Opinion issued March 27, 1985

DORIS ROBERTS

vs.

DEPARTMENT OF HIGHWAYS

(CC-82-234)

James T. Steele, Jr., Attorney at Law, for claimant.

Nancy J. Aliff, Attorney at Law, for respondent.

WALLACE, JUDGE:

On May 23, 1981, claimant was attending a party near Castleman's Run Lake in Brooke County, West Virginia. The party was at an outdoor shelter on property adjacent to Local Service Route 32. Claimant arrived at the party around 8:30 p.m. and entered the property by a gravel pathway. As claimant left the party at about 11:00 p.m., she did not leave by the pathway, but cut across the property and fell into the drainage ditch which runs along Route 32. As a result of the fall, claimant's left ankle was fractured. She was hospitalized from May 24, 1981 until June 16, 1981, and during that time, she underwent four operations on her leg. She re-entered the hospital a year later for further treatment. Claimant seeks an award of \$40,000.00, alleging that respondent was negligent in the maintenance of the drainage ditch.

The claimant testified that as she left the party, she was either walking fast or jogging slowly across the property toward the road. She stated that she thought it was just a flat field, and that she could not see the ditch. She said that there were no lights on the road. The only lights in the area were at the shelter, which claimant estimated was between 100 - 200 feet back from the road. There was also a bonfire at the shelter. Claimant said that she did not know why she cut across the field instead of using the path.

James Willis, maintenance foreman in Brooke County, testified that the drainage ditch in question was not unusual in any way. The ditch was cleaned sometime in the spring of 1981, and weeds were cut on the side of the ditch nearest the road. He stated that weeds were not cut on the other side, the direction claimant was approaching, because that was private property.

After careful review of the evidence presented, the Court can find no basis upon which to find respondent negligent. The drainage ditch was maintained as any other in this State and no breach of duty by respondent has been shown. Rather, the evidence indicates that the claimant was negligent in jogging across an unfamiliar, and dimly lit, field. Under the circumstances, the Court is of the opinion to, and does, disallow the claim.

Claim disallowed.

Opinion issued May 23, 1985

STATE CONSTRUCTION, INC.

vs.

DEPARTMENT OF HIGHWAYS

(CC-81-412)

John H. Hankins, Attorney at Law, for claimant.

S. Reed Waters, Jr., Attorney at Law, for respondent.

LYONS, JUDGE:

Claimant and respondent entered into a contract on July 10, 1979, for the construction of 2.92 miles of Steer Run Road in Gilmer County, West Virginia, designated Project S 311-50-0.00. Claimant and respondent entered into a second contract for the construction of 4.27 miles of Erbacon Road in Webster County designated Project U 351-9-9:72-10 on June 25, 1979. Claimant contends that it was required to enter into a Supplemental Agreement during the course of these contracts. Claimant alleges that a price reduction provided in the Supplemental Agreement resulted in a loss to claimant on both projects in the amount of \$63,135.48 for which the claimant filed this claim.

The claimant was operating a stone crushing plant in Webster County when it was the successful bidder on the above-mentioned projects for the respondent. During the construction of the two projects, the claimant was advised by the respondent that the specification requirements were not being met for "soundness" (a sodium sulfate test). The respondent shut down the projects until an agreement could be worked out by the parties whereby the claimant accepted a penalty. There were negotiations between the parties which resulted in Supplemental Agreement No. 1 Change Order No. 1 signed by the parties on January 8, 1980. The agreement provided that the material which failed the soundness test would be used as base stabilization with a twenty-five percent reduction in price. This penalty was accepted by the claimant.

After the completion of the projects, claimant signed the Final Estimates to the contracts on August 11, 1981, with exceptions noted thereon to the terms of the Supplemental Agreement and that claimant intended to file a petition in the Court of Claims.

The Supplemental Agreement was a change in the terms of the contract. The parties negotiated the terms of the agreement which was then placed in writing and signed by all parties. The Supplemental Agreement constitutes a contract in and of itself.

For these reasons the Court is of the opinion to, and does, disallow the claim.

Claim denied.

Judge William W. Gracey did not participate in the decision of this claim.

Opinion issued June 28, 1985

WILLIAM K. BUNNER

vs.

DEPARTMENT OF AGRICULTURE -
STATE SOIL CONSERVATION COMMITTEE
(CC-85-166)

No appearance by claimant.

Robert D. Pollitt, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks \$1,468.20 for compensation (\$132.00) and for travel expenses (\$1,336.20) incurred by claimant in his position as District Supervisor. In its Amended Answer, respondent admits the validity and amount of the claim and states that there were sufficient funds available at the close of the fiscal year in question from which to pay the claim. In view of the foregoing, the Court makes an award in the amount sought.

Award of \$1,468.20.

Opinion issued June 28, 1985

CITY OF MOUNDSVILLE

vs.

DEPARTMENT OF PUBLIC SAFETY
(CC-85-163)

No appearance by claimant.

Robert D. Pollitt, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks a \$283.48 public safety fee mandated by Section 37.08 of the Code of the City of Moundsville. In its Amended Answer, respondent admits the validity and amount of the claim and states that there were sufficient funds available at the close of the fiscal year in question from which to pay the claim. In view of the foregoing, the Court makes an award in the amount sought.

Award of \$283.48.

Opinion issued June 28, 1985

FIRE CHIEF FIRE EXTINGUISHER CO.

vs.

DEPARTMENT OF VETERANS AFFAIRS

(CC-85-62)

No appearance by claimant.

Robert D. Pollitt, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks an award of \$22.26 for shipping charges not included on an invoice for fire extinguishers shipped to the respondent, which were not paid before the end of the 1984 fiscal year. In its Answer, respondent admits the validity of the claim and states that the shipping charges could not be paid because the fiscal year in which the obligation was incurred had ended. Respondent further states that sufficient funds were on hand at the close of the fiscal year in question.

In view of the foregoing, the Court grants an award to the claimant in the amount of \$22.26.

Award of \$22.26.

Opinion issued June 28, 1985

FISHER SCIENTIFIC

vs.

DEPARTMENT OF PUBLIC SAFETY

(CC-85-118)

No appearance by claimant.

Robert D. Pollitt, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks an award of \$32.90 for filter paper sold to the respondent which was shipped and billed after the end of the 1984 fiscal year. In its Answer, respondent admits the validity of the claim and states that it could not be paid because the fiscal year had ended. Respondent further states that sufficient funds were on hand at the close of the fiscal year in question.

In view of the foregoing, the Court grants an award to the claimant in the amount of \$32.90.

Award of \$32.90.

Opinion issued June 28, 1985

LUCY KATHLEEN GARDNER

vs.

BOARD OF REGENTS

(CC-84-257)

No appearance by claimant.

Robert D. Pollitt, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks an award of \$210.31 for damage done to her parked vehicle. An employee of West Virginia Northern Community College permitted the vehicle to be moved from one parking space to another in the college parking lot by a student employee. While moving the vehicle, another parked vehicle was struck causing the damage to claimant's vehicle. Respondent's Answer requests that an award be made to the claimant.

The Court is of the opinion that respondent's employee's negligence caused the damage to claimant's vehicle for which the Court makes an award to claimant.

Award of \$210.31.

Advisory Opinion issued June 28, 1985

JOSTEN'S, INC.

vs.

BOARD OF REGENTS

(CC-85-157)

No appearance by claimant.

Robert D. Pollitt, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for an advisory determination pursuant to W. Va. Code §14-2-18. Claimant, a yearbook publishing company, printed for the respondent the 1983-1984 Chief Justice, the Marshall University yearbook. Claimant was paid \$25,223.00 on March 20, 1985. However, several changes which were not included in the original bid were made. These changes amount to an additional cost of \$3,540.00. No payment for the additional costs has been made because the statutory procedures were not complied with. The Court is of the opinion that to deny an award to this claimant would be un-

conscionable. *The Lawhead Press, Inc. v. Board of Regents*, CC-84-16 (1985). The respondent accepted and used the handbooks, and for it now to escape paying for them would be unjust enrichment.

In view of the foregoing, the Court hereby finds respondent liable to the claimant in the amount of \$3,540.00. The Clerk of the Court is directed to file this opinion and transmit a copy to claimant and respondent agency.

Opinion issued June 28, 1985

LAURA L. MICHAEL

vs.

BOARD OF REGENTS

(CC-85-131)

Claimant appeared in person.

Robert D. Pollitt, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer. Claimant is employed by West Virginia University. Due to an oversight, the payroll department of the University calculated that claimant's yearly salary was \$12,000, instead of the correct amount of \$12,900. Claimant was therefore shorted \$60 in her first payroll check. The respondent, in its Answer, admits the validity and amount of the claim and states that there were sufficient funds in the appropriate fiscal year from which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount sought.

Award of \$60.00.

Opinion issued June 28, 1985

MOORE BUSINESS FORMS, INC.

vs.

DEPARTMENT OF NATURAL RESOURCES

(CC-85-57)

No appearance by claimant.

Robert D. Pollitt, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer. The claimant seeks an award of \$2,358.81 for the purchase of Antlerless Deer Stamps by the respondent.

Respondent admits the validity of the claim, but due to a discrepancy in freight charges, finds the correct amount of the claim to be \$2,354.90. Respondent states that it was not paid because the 1984 fiscal year had ended, and further states that there were sufficient funds on hand at the end of the fiscal year in question.

Based upon the foregoing, the Court makes an award in the amount of \$2,354.90.

Award of \$2,354.90.

Opinion issued June 28, 1985

JAMES P. MYLOTT

vs.

DEPARTMENT OF HEALTH

(CC-85-69)

No appearance by claimant.

Robert D. Pollitt, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks an award of \$527.02 for damages to his home caused by a Spencer State Hospital patient who left the hospital facility, and forced his way into claimant's home. In its Answer, respondent admits the validity of the claim in the amount of \$523.37 which it determined to be the correct amount. The respondent apparently deeming itself negligent, resulting in the escape and damage, the Court makes an award in the amount of \$523.37.

Award of \$523.37.

Opinion issued June 28, 1985

OHIO VALLEY OFFICE EQUIPMENT

vs.

DIVISION OF VOCATIONAL REHABILITATION

(CC-85-60)

No appearance by claimant.

Robert D. Pollitt, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer.

Claimant seeks an award of \$174.08 for the rental of a Minolta 310 Copier from February 15, 1982 through March 15, 1982. The rental invoice was overlooked, and was never paid. In its Answer, respondent admits the validity of the claim and states that it could not be paid because the fiscal year had ended. Respondent further states that sufficient funds were on hand at the close of the fiscal year in question.

In view of the foregoing, the Court grants an award to the claimant in the amount of \$174.08.

Award of \$174.08.

Opinion issued June 28, 1985

KATHERINE L. HART

vs.

DEPARTMENT OF EMPLOYMENT SECURITY

(CC-84-190)

William Flanigan, Attorney at Law, for claimant.

D.B. Daugherty, Attorney at Law, for respondent.

PER CURIAM:

Claimant was hired as a 30-day Emergency Employment Counselor I at the Beckley office of the Department of Employment Security on August 29, 1983. It was recommended by Beckley Job Service Manager, Larry Shyblosky, that claimant apply for a permanent position with Jennifer Childers of the Ronceverte Job Service office. Ms. Childers offered claimant a job, and in reliance on this oral contract, claimant relocated with her husband to Lewisburg on September 15, 1983. On September 22, 1983, claimant learned that the promise of employment had been withdrawn. The costs incurred by claimant for moving, rent, utilities, etc., amount to \$2,040.00.

Claimant, by her counsel, William Flanigan, and respondent, by its counsel, D.B. Daugherty, entered into a stipulation by which respondent admitted liability to claimant in the amount of \$2,040.00.

The Court has held previously that where an individual deals with an agent, it is that individual's duty to determine the extent of the agency, and the State will not be bound when the agent exceeds his authority. *Lavender vs. Dept. of Highways*, 13 Ct.Cl. 241 (1980). The Court, relying on *Lavender*, ruled more recently in *Ankeny vs. Board of Education*, CC-82-289, opinion issued October 31, 1984, that when respondent's agent exceeded her authority in insuring claimant employment, no contract for employment was made.

It is the Court's opinion that the facts so far presented do not disclose whether Ms. Childers had the authority to hire claimant, and whether or not she exceeded such authority. For this reason, the Court will set this claim for full hearing at the instance of either party.

Opinion issued June 28, 1985

VENEZIA HAULING, INC.

vs.

DEPARTMENT OF HIGHWAYS

(CC-84-69)

Claimant's representative, John Joseph Venezia, Executive Vice-President and General Manager of Venezia Hauling, Inc., appeared on behalf of claimant.

Nanvy J. Aliff, Attorney at Law, for respondent.

WALLACE, JUDGE:

Claimant company filed this action to recover damages sustained by one of its trucks, a three-axle Mack truck, which occurred when the truck was struck by rocks on W. Va. State Route 2 near Moundsville, West Virginia. The damage to the truck was in the amount of \$1,859.00.

Jerry Lee Moore, an employee of the claimant, testified that he was driving the Mack truck on February 13, 1984, on W. Va. Route 2. He was proceeding northerly at a point south of Moundsville, West Virginia. It was approximately 9:00 p.m., and there was a heavy rain. He was proceeding at approximately 40 to 45 miles per hour when he felt something hit the side of the truck, and at the same time, he noticed rocks falling around the vehicle. He hit the brakes, and at approximately the same time, a big rock hit the side of the truck. He in-

dicated that he had not noticed any “Falling Rock” signs in the area.

Kamal R. Shaar, a geologist employed by the Materials Control, Soil and Testing Division of the respondent, testified that this portion of Route 2 was constructed during the 1960’s. A benching system was built according to the plans that were provided when the highway was built. The hillside consists of a total of nine (9) benches at the full height of the cut which extends almost 400 feet above the highway. He stated that “as far as the design of the roadway, it was designed adequately and according to plan.” The purpose of the benching system and design of the rock cut is to control falling rocks.

This Court has consistently held that the State is neither an insurer nor a guarantor of the safety of persons traveling its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). The evidence herein indicates that the respondent took precautions to protect the traveling public from falling rocks when it constructed the highway, and there was no evidence that respondent had notice, actual or constructive, of any inherent danger of a pending rock fall. Accordingly, the Court disallows the claim.

Claim disallowed.

REFERENCES

- Advisory Opinions
- Agency
- Annual Leave
- Attorney General
- Board of Regents
- Bridges
- Building Contracts
- College and Universities -
 - See Board of Regents
- Comparative Negligence
- Contracts - See also
 - Building Contracts
- Damages
- Department of Motor Vehicles
- Drains and Sewers - See also
 - Waters and Watercourses
- Electricity
- Expenditures - See also Office
 - Equipment and Supplies
- Falling Rocks - See also
 - Landslides
- Flooding
- Hospitals
- Insurance
- Interest
- Jurisdiction
- Landlord and Tenant
- Landslides - See also
 - Falling Rocks
- Limitation of Actions
- Motor Vehicles - See also
 - Negligence; Streets and Highways
- Negligence - See also
 - Motor Vehicles;
 - Streets and Highways
- Notice
- Office Equipment and Supplies
- Personal Services
- Physicians and Surgeons -
 - See also Hospitals
- Prisons and Prisoners
- Public Institutions
- Real Estate
- Rehearing
- Scope of Employment
- State Agencies
- Stipulation and Agreement
- Streets and Highways - See also
 - Falling Rocks;
 - Landslide; Motor Vehicles; Negligence
- Taxation
- Trees and Timber
- Trespass
- Unemployment Compensation
 - Tax
- Waters and Watercourses -
 - See also Drains and Sewers; Flooding
- W. Va. University - See
 - Board of Regents

ADVISORY OPINIONS

The Court issued an advisory determination pursuant to West Virginia Code §14-2-18 as the respondent admitted the amount and validity of the claim and that there were sufficient funds available in the pertinent fiscal year from which the claim could be paid. *Cleveland Clinic Foundation vs. Board of Regents.* (CC-84-236) 215

The Court issued an advisory determination pursuant to West Virginia Code §14-2-18 where claimant performed architectural services for the respondent but was unable to be paid as established purchasing procedures were not technically complied with. The Court recommended that the agency pay for the services rendered. *William B. Frampton, Architect vs. State Building Commission.* (CC-84-221) 271

The Court, in an advisory opinion, found that the respondent is liable to claimant for damage to a tractor tire which occurred when the tractor was in respondent’s possession. *Greenbrier Valley Soil Conservation District vs. Dept. of Public Safety.* (CC-83-286) 89

In an Advisory Opinion the Court determined that the respondent was legally liable to the claimant to discharge a claim in question. *John R. Hess, Inc. vs. Board of Regents.* (CC-83-240) 19

An advisory determination which recommended that respondent reimburse claimant for printing charges was issued by the Court. *Josten’s Inc. vs. Board of Regents* (CC-85-157) 301

A request for advisory determination was made by the Court in interpreting certain subsections relating to a tolerance in excavation wherein the technique of presplitting is used by the contractor. The Court determined that the respondent did not intend to permit a tolerance beyond or in back of the plan line, and the Court so held that the respondent does not have to pay a contractor for material actually moved behind the planned slope line. *S.J. Groves & Sons vs. Dept. of Highways* (CC-82-295) 20

AGENCY

Claimant alleged an oral contract of employment resulted in damages incurred by him when he was not employed as anticipated. The Court denied the claim as the claimant was dealing with an agent and it is that person’s duty to determine the extent of the agency and the State will not be bound where the agent exceeds his authority. *Danny Vernon Ankeny vs. Board of Education* (CC-82-289) 187

ANNUAL LEAVE

The Court denied a claim for accrued vacation time where the claimant was instructed by her superiors to take the vacation time prior to the last date indicated in her contract for employment. *Sharon M. Crowder vs. Board of Regents* (CC-81-465) 181

Claimant sought payment for accumulated sick and annual leave which accrued while he was Executive Director of the West Virginia State Aeronautics Commission. The Court denied the claim as the position was eliminated and claimant was terminated for that reason. *William E.*

<i>Richards vs. Governor's Office of Economic & Community Development (W. Va. Aeronautics Commission) (CC-82-336)</i>	174
---	-----

ATTORNEY GENERAL

The Court made an award for legal expenses incurred by the Estate of the decedent as the West Virginia Supreme Court of Appeals ruled that where the Attorney General undertakes to represent a State employee in a civil suit arising from the discharge of the employee's official duties, and the employee dies and his Estate is substituted as a party defendant, the Attorney General has a clear and legal duty to represent the Estate of the employee. <i>Estate of William Robert Goe, Deceased by Norval D. Goe, Executor vs. Attorney General. (CC-84-11)</i>	218
---	-----

BOARD OF REGENTS

The Court denied a claim for accrued vacation time where the claimant was instructed by her superiors to take the vacation time prior to the last date indicated in her contract for employment. <i>Sharon M. Crowder vs. Board of Regents. (CC-81-465)</i>	181
---	-----

An award was made for back pay for a pay raise not received by the claimant. <i>Beverly Pisegna Fulmer vs. Board of Regents. (CC-84-13)</i>	272
---	-----

Claimant's claim for alleged continuing physical and mental injuries due to the administration of anti-psychotic drugs at West Virginia University Medical Center was denied, as the expert testimony indicated that any side effects of the drugs were temporary and the treatment consistent with accepted medical practices. <i>Eric M. Lee vs. Board of Regents. (CC-81-380)</i> ..	125
---	-----

The Court made an award to claimant for emergency medical charges incurred when claimant received an injury to his arm from broken tile in his dormitory room. <i>Steven Gerard Noonan vs. Board of Regents. (CC-84-133)</i>	153
--	-----

An award was made to the claimant for damage to her personal property which occurred when a water pipe burst in her dormitory during the Christmas break where the evidence showed that the respondent had turned the heat off in the building. <i>Anita Faye Wickline vs. Board of Regents. (CC-84-52)</i>	163
---	-----

BRIDGES

The Court denied a claim for damage to a vehicle and personal injuries when the vehicle struck an area of an interstate in which there was apparently a difference in elevation between the surface of the pavement and the surface of a bridge. The Court determined that claimant's own negligence in failing to observe warning signs and in driving through the construction area at an excessive speed was the proximate cause of the damages incurred. <i>Michael Angiulli vs. Dept. of Highways. (CC-82-127)</i> ..	286
--	-----

Claim for personal injury which occurred when a vehicle struck a hole at the edge of a bridge was denied when it was determined that respondent had actual notice of the defect and an attempt was made to mark the hole until

repairs could be made. *Jerrell & Anna Barnhill vs. Dept. of Highways.* (CC-82-128) 214

Where the claimant does not meet the burden of proof necessary to establish liability on the part of the respondent, the Court will disallow the claim. The Court disallowed this claim for damage to a vehicle and personal injuries to the claimant where a van struck a hole at the edge of a bridge where the part of the ground eroded. *Jerrell & Anna Barnhill vs. Dept. of Highways.* (CC-82-128) 214

The Court denied a claim for damage to a vehicle which was damaged after the driver encountered ice on a bridge causing him to lose control of the vehicle, where it was determined that the mere presence of ice on a bridge in the wintertime does not constitute negligence and it is common knowledge that bridges may freeze before other sections of road. *Patricia Coleman vs. Dept. of Highways* (CC-84-30) 157

An award for damage to a tire which struck a metal plate on a bridge was denied as respondent must have notice of the condition and a reasonable amount of time to correct it. *Wallace Hancock vs. Dept. of Highways.* (CC-82-302) 112

An award was made for damage to a vehicle sustained when a piece of concrete fell due to negligent maintenance of a bridge. *Clyde Holloway, as the next friend of Kay Lee Holloway vs. Dept. of Highways* (CC-83-12) ... 33

The Court made an award to the claimant for damage to his vehicle which occurred when a wooden bridge collapsed causing damages to the vehicle. The Court found the respondent negligent in failing to discover the condition of the bridge and to make the necessary repairs. *Joseph H. Justice vs. Dept. of Highways.* (CC-84-287) 266

A claim for damage to a vehicle which struck a piece of board protruding from a bridge owned and maintained by respondent was granted by the Court as respondent's negligent maintenance of the bridge was the proximate cause of the damages to the vehicle. *Fred Marcum vs. Dept. of Highways* (CC-83-219) 35

The Court denied a claim for damage to a vehicle when the vehicle struck potholes on a bridge as the Court applied the doctrine of comparative negligence based upon claimants' prior knowledge of the condition of the bridge. *John P. McDowell and Donna R. McDowell vs. Dept. of Highways* (CC-84-32) 196

The Court denied a claim for damage to a vehicle which occurred when the vehicle struck a pothole on a bridge as the Court determined that respondent had constructive notice of the defect, but the claimant, with her prior knowledge of the bridge's condition, was likewise negligent. *Cora Marie Merrill vs. Dept. of Highways* (CC-84-29) 196

Where claimant's decedent died when a bridge over which he was driving a dump truck for the respondent collapsed causing his death, the Court denied the claim based upon the *Mandolidis* decision and the standard for the loss of employer immunity in the W.Va. Code. *Judith Lynn Jeffers Pickens, Administratrix of the Estate of John Roger Jeffers; Deceased vs. Dept. of Highways* (CC-80-347) 203

A claim for damage to a vehicle which occurred when the vehicle slid on a snow covered wooden bridge was denied as the Court concluded that a combination of factors caused the accident and it would be speculative for the Court to conclude that respondent negligently failed to maintain the bridge in a safe condition. *Jeffrey C. Shaffer vs. Dept. of Highways* (CC-82-338) 2

A claim for damage to a vehicle, which occurred when a piece of cement broke off of a bridge under which the vehicle was travelling, was granted by the Court as the respondent has the duty to use reasonable care to maintain streets and bridges in a safe condition. *Sandra Stiltner vs. Dept. of Highways* (CC-82-328) 18

A claim for damage to a vehicle, which occurred when a piece of concrete fell from a bridge under which the vehicle was travelling, was granted by the Court as the Court concluded that the respondent was negligent in the maintenance of the bridge. *Harold C. Swiger vs. Dept. of Highways* (CC-84-290) 38

An award was made for damage to a truck which partially fell through a bridge where the evidence established that the respondent knew or should have known that the weight limitation signs on the bridge were not present. *Wayne Concrete Company vs. Dept. of Highways* (CC-81-429)..... 97

The Court made an award for damage to a vehicle which occurred as the vehicle crossed the bridge and two of the planks tore a hole through the bottom of the vehicle. The respondent's failure to discover the condition of the bridge floor constituted negligence. *James K. White and Barbara White vs. Dept. of Highways.* (CC-84-276) 269

A claim for damage to a vehicle which struck a piece of concrete on a bridge was denied where it was not established that the respondent had actual or constructive notice of the defect. *V.F. Young vs. Dept. of Highways* (CC-81-125) 129

BUILDING CONTRACTS

An award was made based upon a changed condition in a contract requiring an equitable adjustment based upon the man-hours which were lost due to the sub-surface problems. *American Bridge Division of United States Steel Corporation vs. Dept. of Highways.* (CC-81-205) 227

The Court made an award to the claimant for an equitable adjustment necessitated by changed site conditions on a project involving the construction of the New River Gorge Bridge as the claimant incurred additional costs resulting from having to alter the sequence and method of its work. The equitable adjustment should be in addition to the compensation received for the increase in quantities and granting of an extended contract completion date with which the respondent agreed during the project. *American Bridge Division of United States Steel Corporation vs. Dept. of Highways.* (CC-81-205) 227

An award was made for repair to a portion of deck overlay which did not meet respondent's specifications, because the subcontractor performed the

original work under instruction from the respondent. *Bates & Rogers Construction Corporation vs. Dept. of Highways.* (CC-81-143) 225

The parties submitted the claim upon a stipulation which set forth the facts that the respondent would not allow any equal or substitute product used in the construction of a bridge which violates public bidding requirements. *Engineered Products, Inc. vs. Dept. of Highways.* (CC-84-302) 237

The Court issued an advisory determination pursuant to West Virginia Code §14-2-18 where claimant performed architectural services for the respondent but was unable to be paid as established purchasing procedures were not technically complied with. The Court recommended that the agency pay for the services rendered. *William B. Frampton, Architect vs. State Building Commission.* (CC-84-221) 271

A contract claim for extra work performed in the installation of traffic signals was denied by the Court as the claimant failed to give notification as required by Specification §105.17. *High Voltage Systems, Inc. vs. Dept. of Highways* (CC-78-140) 4

A partial award for liquidated damages assessed against a contractor was made by the Court where a portion of the delay in completing the contract was attributed to the respondent. *High Voltage Systems, Inc. vs. Dept. of Highways* (CC-78-140) 4

An award was made to the claimant in a contract action based upon delay caused by the respondent where the Court determined that actions on the part of the respondent in "green tagging" certain items and then removing the green tags on the project did cause considerable delay and expense to the claimant. *High Voltage Systems, Inc. vs. Dept. of Highways.* (CC-78-140) 4

The Court determined that a changed condition existed on a project for which the claimant is entitled to an equitable adjustment in compliance with Section 104.2 of the *Standard Specifications Roads and Bridges* which applies to the contract. *L.G. De Felice, Inc. vs. Dept. of Highways* (CC-77-11) 54

Contractor was permitted an equitable adjustment on one half of a project, then denied the same equitable adjustment for the second half of a project. An award was made as it would be inconsistent with the specification provisions to require notice by a contractor of a changed condition on each portion of a contract. *L.G. De Felice, Inc. vs. Dept. of Highways* (CC-77-11) 54

In a changed condition claim growing out of a highway construction contract, the Court determined that a preponderance of the evidence demonstrated that the claimant did encounter sub-surface conditions which differed materially from those indicated in the contract. However, the Court held the claim open for the purpose of adducing evidence on the question of actual notice to the respondent of claimant's intention to make a claim for the additional work as a result of the changed condition. *L.G. De Felice, Inc. vs. Dept. of Highways* (CC-77-11) 54

In a contract action based upon changed condition, the Court determined that actual notice of the intent to claim additional compensation is a re-

quirement of Specification 105.17. The Court held the claim open for the purpose of hearing evidence with respect to that aspect of the claim. *L.G. De Felice, Inc. vs. Dept. of Highways* (CC-77-11) 54

Claimant contractor was awarded a contract to correct a slide on a state highway. The Court determined that a changed condition occurred on the project when the rock encountered by the claimant was determined to be hard rock not medium rock as indicated in the plans. *L.R. Skelton & Company vs. Dept. of Highways*. (CC-82-199) 275

The Court made an award to a contractor for a changed condition when the contractor encountered hard rock where the plans disclosed medium hard rock. It was the opinion of the Court that a contractor may accept or rely on the data shown on contract drawings and is entitled to an equitable adjustment where the data is erroneous and more costly conditions are encountered. *L.R. Skelton & Company vs. Dept. of Highways*. (CC-82-199) 275

The Court made an award for extra costs incurred by a contractor in the construction of a retaining wall where the contractor was unable to use the method of construction provided by the terms of the contract. *New River Building Company vs. Board of Regents*. (CC-81-411) 104

A request for advisory determination was made of the Court in interpreting certain subsections relating to a tolerance in excavation wherein the technique of presplitting is used by the contractor. The Court determined that the respondent did not intend to permit a tolerance beyond or in back of the plan line, and the Court so held that the respondent does not have to pay a contractor for material actually moved behind the planned slope line. *S.J. Groves & Sons vs. Dept. of Highways* (CC-82-295) 20

A contract claim for additional expenses incurred in complying with a supplemental agreement on a project was denied by the Court as a supplemental agreement constitutes a change in the terms of the contract. The parties negotiated the terms of the agreement which was then placed in writing and signed by all parties. The penalty complained of by the claimant was accepted by the claimant when the supplemental agreement was signed. *State Construction, Inc. vs. Dept. of Highways*. (CC-81-412) 298

COLLEGES AND UNIVERSITIES—See Board of Regents

COMPARATIVE NEGLIGENCE

The Court denied a claim for damage to a vehicle and personal injuries when the vehicle struck an area of an interstate in which there was apparently a difference in elevation between the surface of the pavement and the surface of a bridge. The Court determined that claimant's own negligence in failing to observe warning signs and in driving through the construction area at an excessive speed was the proximate cause of the damages incurred. *Michael Angiulli vs. Dept. of Highways*. (CC-82-127) 286

The Court determined that claimant's decedent, who had knowledge of the unsafe condition of the berm, was negligent and under the doctrine of comparative negligence, the Court reduced the award. *Stella Cecil, Administratrix of the Estate of O'Dell M. Cecil, deceased vs. Dept. of Highways*. (CC-79-458) 73

The Court applied the doctrine of comparative negligence where the respondent should have known of the existence of a pothole, but the claimant had prior knowledge of the hole, the Court denied the claim. <i>Carl L. Elam and Kristine M. Elam vs. Dept. of Highways.</i> (CC-84-65)	148
The Court denied a claim for damage to a vehicle which occurred when the vehicle was driven off the road as the Court determined that the negligence of the driver was equal to or greater than any negligence of the respondent as there appeared to be sufficient room for two vehicles to pass on the road. <i>Carlisle L. Hedrick and Robert L. Hedrick vs. Dept. of Highways.</i> (CC-83-137)	288
The Court denied a claim for damage to a vehicle which struck a newly installed concrete island on a bridge based upon the doctrine of comparative negligence, where the respondent failed to adequately mark the island, but the claimant failed to observe signs which were present on the bridge. <i>Liberty Mutual Insurance Company, as Subrogee of Jeffrey Stein and Connie Stein vs. Dept. of Highways.</i> (CC-82-154)	160
A claim for damage to a vehicle which slid on coal deposits extending into the road surface was granted in part by the Court. The Court applied the doctrine of comparative negligence as the claimant was also negligent in failing to notice the coal deposits in the road. <i>Elliott E. Maynard, III vs. Dept. of Highways,</i> (CC-83-6)	35
The Court denied a claim for damage to a vehicle which occurred when the vehicle struck a pothole on a bridge as the Court determined that respondent probably had constructive notice of the defect, but the claimant, with her prior knowledge of the bridge's condition, was likewise negligent. <i>Cora Marie Merrill vs. Dept. of Highways.</i> (CC-84-29)	196
A claim for damage to a vehicle which struck a pothole in a construction area on a highway was denied as the negligence on the part of the respondent was equaled or exceeded by that of the claimant. <i>J. Douglas Mundy and Karen J. Mundy vs. Dept. of Highways.</i> (CC-83-183)	28
A claim for damage to a vehicle was denied based upon the doctrine of comparative negligence as the evidence was that the drain struck was located off of the traveled portion of the road. <i>Steve Mutnich vs. Dept. of Highways,</i> (CC-83-253)	126
Widening of a road contributed to damages to claimant's house and claimant was also negligent in failing to provide proper gutters resulting in an award based upon the doctrine of comparative negligence apportioning 20% to the claimant. <i>Barbara M. Neri vs. Dept. of Highways.</i> (CC-83-228)	273
The Court denied a claim for damage to a vehicle as the Court determined that the claimant was travelling too close to the vehicle in front of him and did not allow himself sufficient time to see and avoid the pothole which the vehicle struck. This negligence was equal to or greater than respondent's under the doctrine of comparative negligence. <i>Keith B. Sayre vs. Dept. of Highways.</i> (CC-84-174)	222
A claim for stolen property was denied as the evidence indicated that the claimant himself was negligent in failing to take the proper precautions to lock the door of his residence. <i>S. Dean Six vs. Board of Regents.</i> (CC-83-10)	175

A claim for damage to a vehicle which struck a pothole was denied when the Court determined that claimant had prior knowledge of the condition of the road. *Richard A. Smoot vs. Dept. of Highways*. (CC-84-13) 154

The Court denied an award for damage to claimant's vehicle which struck a pothole as claimant testified that he was aware of the condition of the road and the Court found that claimant's negligence was equal to or greater than any negligence on the part of the respondent. *Alvin R. Toler vs. Dept. of Highways*. (CC-83-182) 116

The Court determined that the respondent was 60% negligent for not having constructed warning signs or devices where a new surface covered pre-existing highway lines which prevented claimant's driver from observing an off ramp causing him to subsequently jackknife a tractor-trailer. *Tucker's Used Cars, Inc. vs. Department of Highways*. (CC-82-161) 282

The Court determined that the speed of claimant's tractor-trailer was greater than a reasonable speed under the circumstances and conditions then and there existing and determined that the driver was negligent in part as was the respondent. The award was apportioned. *Tucker's Used Cars, Inc. vs. Department of Highways*. (CC-82-161) 282

CONTRACTS—See also Building Contracts

An award was made for services performed under a service contract where respondent admitted the validity and amount of the claim. *AM International Inc., Debtor in Possession Varsity Division vs. Dept. of Education*. (CC-84-83a) 136

An award was made for service performed under a service contract where respondent admitted the validity and amount of the claim. *AM International Inc., Debtor in Possession Varsity Division vs. Dept. of Public Safety*. (CC-84-83b) 136

The Court denied a claim for the furnishing and installing of kitchen equipment in respondent's Colin Anderson Center, where the clear and unambiguous language of the contract indicated that the claimant was responsible for the equipment. *C.G.M. Contractors, Inc. vs. Dept. of Health*. (CC-82-322) 156

Where a discrepancy existed between the form for quotations and the sample attached, the Court determined that the parties were equally at fault for allowing an obvious error to go uncorrected. Therefore, each party was responsible for an equal portion of the cost. *Chapman Printing Company vs. Board of Regents*. (CC-83-344) 165

A claim for additional compensation was denied under a contract of employment made and accepted by claimant. *Gloria Vance Cress vs. Board of Regents*. (CC-83-311) 216

A claim for empty cylinders which were to be returned to the claimant by the respondent pursuant to a contract was granted by the Court where the parties stipulated the facts and amount of the claim. *James C. Dawes Company, Inc. vs. Dept. of Highways*. (CC-83-220) 11

The Court confirmed its disallowance of a claim after a limited rehearing. The Court could find no basis for amending its previously issued opinion. *Hooten Equipment Company vs. Board of Regents*. (CC-80-337) 289

A contract claim for rental of equipment was granted to the claimant in accordance with the contract provisions that the equipment be rented for a period of three months. <i>Interstate Equipment Sales, Inc. vs. Dept. of Highways.</i> (CC-82-11)	26
Since the materials submitted to the claimant were at a variance with what had been set out in purchase order, the Court found the parties equally responsible for the additional costs incurred although a change order should have been requested and obtained by the claimant. <i>The Lawhead Press, Inc. vs. Board of Regents.</i> (CC-84-16)	244
In a contract claim where the Court made an award to the claimant, the Court also calculated interest at 6% per annum from the 151st day after final acceptance of the project. <i>L.R. Skelton & Company vs. Dept. of Highways.</i> (CC-82-199)	275
A claim for work performed by the claimant on a landing craft owned by the respondent was granted in part as the Court concluded that certain work performed by the claimant was not contemplated by the terms of the contract. <i>Kanawha River Docking and Marine, Inc. vs. Blennerhassett Historical Park Commission.</i> (CC-83-130)	33
The Court made an award for oxygen and acetylene cylinders which respondent failed to return to the claimant in accordance with the terms of the contract. <i>Mabscott Supply Company vs. Dept. of Highways.</i> (CC-83-170) . .	1
An award was made for money due under a contract to maintain air conditioning equipment where there was no evidence that the claimant failed to perform its duties under the contract or that the contract had been cancelled. <i>Machinery & Systems Division, a Division of Carrier Corp. vs. Dept. of Public Safety.</i> (CC-83-22)	67
The Court denied a claim based upon an indemnity provision in a contract with the State when it was determined that the provision violated Article X, Section VI of the Constitution of West Virginia. <i>Monongalia County Commission vs. Dept. of Finance & Administration.</i> (CC-83-195)	141
The Court determined that although claimant supplied respondent with paper without having a proper contract, it would be unjust enrichment not to make an award as the respondent received and used the goods. <i>Moore Business Forms, Inc. vs. Board of Regents.</i> (CC-84-207)	220
The Court made an award for merchandise delivered under a contract with respondent which was used by respondent, but reduced the amount of the award as the merchandise did not conform to the specifications in the contract. <i>Moore Business Forms, Inc. vs. Secretary of State.</i> (CC-83-312)	93
An award was made for extra costs incurred in a construction project as the construction site differed from the contract. <i>New River Building Company vs. Board of Regents.</i> (CC-81-411)	104
The Court granted an award for alteration charges resulting from the printing of the West Virginia Income Tax Forms where the contract stated that respondent would pay those costs. A charge for additional costs was denied as no provision was made for those costs in the contract. <i>Standard Publishing vs. State Tax Dept.</i> (CC-83-209)	96

The claimant sought rental on a copying machine installed at a State agency. The agency was unable to pay the rent as the written contract was invalid due to a failure to obtain approval of the Department of Finance and Administration. The Court made an award based upon an estimate fair to the parties. <i>Xerox Corporation vs. Dept. of Natural Resources</i> . (CC-82-236)	284
---	-----

DAMAGES

Where the claimant testified that she was reimbursed for the full amount of damage to her vehicle by her insurance company, the claimant sustained no actual loss and the Court denied the claim. <i>Kelly L. Fisher vs. Dept. of Highways</i> . (CC-84-90)	192
---	-----

When the Court made an award for tools which had been stolen while claimant was employed by the respondent, the Court depreciated the value of the tools by 10% in making the award. <i>Richard R. Fisher vs. Dept. of Highways</i> . (CC-84-308)	262
---	-----

Recovery for loss of rent was denied as the claimant failed to mitigate his damages. <i>Harrison Enterprises, Inc. vs. Dept. of Highways</i> . (CC-82-178) . . .	12
--	----

The Court determined that failure of the claimant to proceed with the project in an orderly manner was the result of unavoidable delay and denied a portion of liquidated damages. <i>High Voltage Systems, Inc. vs. Dept. of Highways</i> . (CC-78-140)	4
--	---

The Court determined that a changed condition existed on a project for which the claimant is entitled to an equitable adjustment in compliance with Section 104.2 of the <i>Standard Specifications Roads and Bridges</i> which applies to the contract. <i>L.G. De Felice, Inc. vs. Dept. of Highways</i> . (CC-77-11)	54
---	----

In a contract claim where the Court made an award to the claimant, the Court also calculated interest at 6% per annum from the 151st day after final acceptance of the project. <i>L.R. Skelton & Company vs. Dept. of Highways</i> . (CC-82-199)	275
---	-----

An award was made for extra costs incurred in a construction project as the construction site differed from the contract. <i>New River Building Company vs. Board of Regents</i> . (CC-81-411)	104
--	-----

The Court made an award to the claimant for out-of-pocket losses for damages to her vehicle, where the evidence established that her insurance carrier had paid for the damages to the vehicle except for claimant's deductible. <i>Regina M. Rhoads vs. Dept. of Highways</i> . (CC-84-46)	221
---	-----

DEPARTMENT OF MOTOR VEHICLES

The Court denied a claim for lost earnings following the allegedly wrongful suspension of claimant's drivers license, where the evidence did not establish that the respondent acted negligently. <i>Paris Leonard Dulaney, Jr. vs. Dept. of Motor Vehicles</i> . (CC-82-324)	130
---	-----

A claim for suspension fees and pickup orders alleged to be wrongfully assessed by the respondent was denied as claimant was notified that he would need to forward a certified check or money order to the respondent, which he did not do. <i>Charles L. McComas vs. Dept. of Motor Vehicles</i> . (CC-83-162) . .	44
--	----

The claimant sought damages sustained by respondent's failure to record claimant's lien on a certificate of title. The Court determined that claimant's loss resulted from respondent's negligence and an award was made. *Pendleton County Bank vs. Dept. of Motor Vehicles.* (CC-83-342) 108

DRAINS AND SEWERS—See also Waters and Watercourses

A claim for personal injuries and damages to a vehicle which occurred when the vehicle struck an icy spot on a highway was denied as the evidence established that the water did drain onto the road but it was also established that the respondent had placed salt and abrasives on the road to treat the icy condition. *Hazel Bartram and Foster Lee Bartram vs. Dept. of Highways.* (CC-81-79) 23

Claims for flood damages to homes which occurred during a rainstorm when a culvert backed up were denied by the Court as the flooding resulted from a combination of factors. *Henry Besse & Diana K. Besse and Charles D. Morgan & Penny A. Morgan vs. Dept. of Highways.* (CC-81-216a&b) 40

Claimant sought an award for damage to real property from drainage onto her property. The Court denied the claim, as the claimant failed to establish by a preponderance of the evidence that actions by the respondent resulted in the damage to the home. *Minnie Lee Brown vs. Dept. of Highways.* (CC-80-361) 173

Where damage to property was the result of extremely heavy rainfall rather than alleged inadequate maintenance of a drainage system, the Court denied a claim for damage to claimants' property. *Helen D. Hudson and Joseph E. Hudson vs. Dept. of Highways.* (CC-83-191) 183

The Court made an award for water damage to claimants' property which occurred due to an improperly installed culvert near the property as the parties stipulated the amount of damage. *James E. Jones and Ruth Jones vs. Dept. of Highways.* (CC-83-198) 103

When a preponderance of the evidence clearly indicates that claimants' property is located in a natural drainage area and work performed by the respondent was not the proximate cause of the damage to claimants' property, the Court will deny the claim. *Edward Lawson and Beulah Lawson vs. Dept. of Highways.* (CC-83-106) 169

The Court made an award for water damage to claimants' property which occurred due to respondent's negligent maintenance of the drainage system in the vicinity of the property. *Mr. and Mrs. David Leadman vs. Dept. of Highways.* (CC-83-21) 51

Claim for physical injuries was denied as the Court determined that the claimant was negligent in jogging across an unfamiliar, and dimly lit field. *Doris Roberts vs. Dept. of Highways.* (CC-82-234) 297

Claim for personal injury which occurred when the claimant fell into a drainage ditch was denied as the Court determined that the drainage ditch was maintained in a routine manner and there was no breach of duty. *Doris Roberts vs. Dept. of Highways.* (CC-82-234) 297

An award was made for damage which occurred from water which flowed from the ditch line, across the road, and onto claimants' property due to

failure to maintain the ditch lines. *Dennis L. Sanders and Nancy J. Sanders vs. Dept. of Highways*. (CC-82-99) 172

Claimants sustained property damage which the Court determined was caused by respondent's failure to maintain the ditch lines causing water to flow onto claimants' property. The Court made an award for the damage. *Dennis L. Sanders and Nancy J. Sanders vs. Dept. of Highways*. (CC-82-99) 172

A claim for damages to claimant's water line was granted by the Court where the parties stipulated that the damage was the result of negligence on the part of the respondent. *City of Shinnston vs. Dept. of Highways*. (CC-83-199a) 46

The Court made an award to claimant for water damage to his property where the evidence established that the respondent was negligent in the placement of two culverts in a nearby creek. *Melvin Sickles vs. Dept. of Highways*. (CC-82-45) 95

The Court made an award to claimant for damage to his property which resulted from respondent's failure to maintain a culvert near his property. *John J. Wright vs. Dept. of Highways*. (CC-82-135) 99

ELECTRICITY

The Court made an award for unpaid electric service bills incurred by respondent where the respondent admitted the amount and validity of the claim and that it expired sufficient funds from which the obligation could have been paid. *Appalachian Power Company vs. Alcohol Beverage Control Commission*. (CC-84-178) 189

A claim for unpaid electrical service bills was denied by the Court based upon the *Airkem* principle as the respondent indicated that it did not have sufficient funds remaining in its appropriation for the proper fiscal year with which to pay the claim. *Appalachian Power Company vs. Department of Corrections*. (CC-83-234) 8

An award for the cost of rebuilding a chiller unit in a State park was granted when it was determined electrical problem was result of problem with power source entering park. *Johnson Controls, Inc. vs. Dept. of Natural Resources*. (CC-82-225) 242

EXPENDITURES—See also Office Equipment and Supplies

The Court made an award to the claimant for merchandise and/or services which it delivered or provided to the respondent but for which it had not been paid and sufficient funds were available within the proper fiscal year with which the agency could have paid the obligation. *A.H. Robins Company vs. Dept. of Health* (CC-83-341) 78

The following claims were decided upon the same principle:

Avery Label, Division of Avery International vs. Dept. of Finance & Administration (CC-83-284) 48

Baysal & Associates, Inc. vs. Dept. of Corrections (CC-84-260) 208

Bob Dalton Investigation, Inc. vs. Treasurer's Office (CC-85-35) 270

<i>Aarom Boonsue, M.D., Inc. vs. Dept. of Public Safety</i> (CC-85-34)	270
<i>Phyllis Jean Cole, Clerk of the Circuit Court of Kanawha County vs. Office of the Attorney General</i> (CC-83-359)	103
<i>Consolidated Business Forms Company vs. Dept. of Public Safety</i> (CC-84-167)	201
<i>Consolidated Rail Corporation vs. Dept. of Finance and Administration</i> (CC-83-193)	10
<i>Dental Arts Laboratory, Inc. vs. Dept. of Health</i> (CC-85-42)	271
<i>Doctor's Urgent Care, Inc. vs. Dept. of Public Safety</i> (CC-84-64)	130
<i>Eagle Aviation, Inc. vs. Dept. of Public Safety</i> (CC-84-340)	237
<i>Fisher Scientific vs. Dept. of Public Safety</i> (CC-85-118)	300
<i>W. Auvil Godwin vs. Dept. of Corrections</i> (CC-84-145)	151
<i>The Goodyear Tire and Rubber Company vs. Dept. of Agriculture</i> (CC-83-306)	70
<i>The Goodyear Tire and Rubber Company vs. Dept. of Natural Resources</i> (CC-84-296a)	208
<i>The Goodyear Tire and Rubber Company vs. Dept. of Natural Resources</i> (CC-84-296b)	209
<i>The Goodyear Tire and Rubber Company vs. Dept. of Public Safety</i> (CC-84-51)	132
<i>Grafton Sanitary Sewer Board vs. Dept. of Corrections</i> (CC-84-265)	209
<i>Greenbrier Physicians, Inc. vs. Dept. of Public Safety</i> (CC-84-311)	264
<i>Hamilton Business Systems vs. Dept. of Motor Vehicles</i> (CC-84-196)	192
<i>The Hanover Shoe, Inc. vs. Dept. of Public Safety</i> (CC-83-339)	89
<i>Holzer Clinic vs. Dept. of Health</i> (CC-85-20)	265
<i>Holzer Hospital Foundation D/B/A Holzer Medical Center vs. Dept. of Health</i> (CC-85-3)	240
<i>The James & Law Company vs. Dept. of Public Safety</i> (CC-84-163)	203
<i>Johnson Controls, Inc. vs. Dept. of Finance and Administration</i> (CC-83-361)	100
<i>Johnson Controls, Inc. vs. Dept. of Finance and Administration</i> (CC-83-362)	101
<i>Jordan Chiropractic Clinic, Inc. vs. Dept. of Public Safety</i> (CC-84-328)	266
<i>Kanawha Valley Radiologists, Inc. vs. Dept. of Public Safety</i> (CC-84-292)	210
<i>Keizer Saw & Mower vs. Dept. of Natural Resources</i> (CC-85-44)	272
<i>Kellogg Sales Company vs. Dept. of Health</i> (CC-84-80)	137
<i>Kramer's Photo Supply, Inc. vs. Dept. of Health</i> (CC-84-1)	104
<i>Krown Research, Inc. vs. Division of Vocational Rehabilitation</i> (CC-84-210 a-e)	195
<i>The Lawhead Press, Inc. vs. Dept. of Natural Resources</i> (CC-84-15)	101
<i>Lawyers Co-operative Publishing Company vs. Supreme Court of Appeals</i> (CC-83-298)	91

<i>D. Verne McConnell vs. Dept. of Corrections (CC-84-272)</i>	210
<i>Means Charleston Center vs. Dept. of Public Safety (CC-84-78)</i>	137
<i>Medical Dental Bureau, Inc. (Agent for Ohio Valley Medical Center, Inc.) vs. Dept. of Corrections (CC-84-278)</i>	211
<i>The Michie Company vs. Dept. of Health (CC-83-337)</i>	92
<i>Mid-Atlantic Paving Company, Inc. vs. Dept. of Highways (CC-84-182)</i>	211
<i>Moore Business Forms, Inc. vs. Dept. of Motor Vehicles (CC-83-314)</i>	94
<i>Ohio Valley Office Equipment vs. Division of Vocational Rehabilitation (CC-85-60)</i>	304
<i>Pagano Industries, Inc. vs. Dept. of Public Safety (CC-83-171)</i>	2
<i>Parke-Davis vs. Dept. of Health (CC-84-74)</i>	138
<i>Pfizer, Inc. vs. Dept. of Health (CC-84-120)</i>	144
<i>Pfizer, Inc. vs. Dept. of Health (CC-84-143)</i>	206
<i>Putnam General Hospital vs. Dept. of Public Safety (CC-84-285)</i>	212
<i>Richard F. Terry, M.D., Inc. vs. Dept. of Corrections (CC-84-297a)</i>	212
<i>Richard F. Terry, M.D., Inc. vs. Dept. of Corrections (CC-84-297b)</i>	213
<i>Roentgen Diagnostics, Inc. vs. Dept. of Public Safety (CC-84-53)</i>	135
<i>Roentgen Diagnostics, Inc. vs. Division of Vocational Rehabilitation (CC-83-257)</i>	52
<i>S.R.C. Associates vs. State Board of Education and Dept. of Finance and Administration (CC-84-22)</i>	142
<i>Simplex Time Recorder Co. vs. Secretary of State (CC-83-281)</i>	53
<i>Elvin D. Slater vs. West Virginia Radiologic Technology Board of Examiners (CC-83-217)</i>	38
<i>St. Joseph's Hospital vs. Division of Vocational Rehabilitation (CC-84-301)</i>	253
<i>St. Joseph's Hospital vs. Dept. of Health (CC-84-323 a&b)</i>	268
<i>Stonewall Jackson Memorial Hospital vs. Dept. of Health (CC-85-8)</i>	253
<i>Thompson's of Morgantown, Inc. vs. Dept. of Public Safety (CC-83-360)</i>	109
<i>Three Community Cable TV vs. Dept. of Public Safety (CC-84-330)</i>	254
<i>3M Company vs. Dept. of Health (CC-84-119)</i>	145
<i>3M Company vs. Dept. of Public Safety (CC-84-179)</i>	213
<i>Virginia Electric and Power Company vs. Dept. of Corrections (CC-84-320)</i>	268
<i>City of Wellsburg vs. Dept. of Public Safety (CC-84-223)</i>	207
<i>Wheeling Electric Company vs. Dept. of Corrections (CC-84-290)</i>	214
<i>Xerox Corporation vs. Dept. of Health (CC-84-23)</i>	139
<i>Xerox Corporation vs. Dept. of Mines (CC-84-60)</i>	142
<i>Xerox Corporation vs. Dept. of Mines (CC-84-312)</i>	269
<i>Xerox Corporation vs. Dept. of Motor Vehicles (CC-84-104)</i>	145

The Court made an award to the claimant in accordance with the provisions of W.Va. Code §14-2-19, which pertains to claims under existing appropriations during the current fiscal year. *Alling & Cory Company vs. Dept. of Public Safety* (CC-84-33) 139

The Court made an award to the claimant for monthly rental fees of equipment where the respondent and the claimant submitted the claim upon a written stipulation of the facts. *Anderson Equipment Company vs. Dept. of Highways*. (CC-84-294) 257

An award was made for damage to claimant's Porta-John which was set on fire at the West Virginia State Penitentiary where the respondent admitted the validity of the claim. *Zeik Auvil vs. Dept. of Corrections* (CC-83-340) 79

Where claimants have sought payment for various goods and services furnished to respondent, but the respondent alleged that sufficient funds were not available at the close of the fiscal years in question from which the obligations could have been paid, the Court denied the claims based upon the principle established in *Airkem Sales and Service, et al. vs. Dept. of Mental Health*, 8 Ct. Cl. 180 (1970). *Bush Industries Feed & Grain vs. Farm Management Commission*. (CC-85-17)..... 259

The following claims were decided upon the same principle:

FCI Alderson vs. Dept. of Corrections (CC-84-228) 191

Greenbrier Valley Hospital vs. Dept. of Corrections (CC-83-154) 1

Kerr Gooch, d/b/a Southern Glass Service vs. Farm Management Commission (CC-83-262) 49

Memorial General Hospital Association, Inc. vs. Dept. of Corrections (CC-83-348) 92

Ohio Valley Medical Center, Inc. vs. Dept. of Corrections (CC-83-252) .. 51

Ohio Valley Medical Center, Inc. vs. Dept. of Corrections (CC-83-267) .. 51

Raleigh Orthopaedic Association, Inc. vs. Dept. of Corrections (CC-84-84) 138

Reynolds Memorial Hospital, Inc. vs. Dept. of Corrections (CC-83-239). 52

Where a discrepancy existed between the form for quotations and the sample attached, the Court determined that the parties were equally at fault for allowing an obvious error to go uncorrected. Therefore, each party was responsible for an equal portion of the cost. *Chapman Printing Company vs. Board of Regents* (CC-83-344) 165

The Court made an award where the parties stipulated the amount of damage incurred for merchandise lost by respondent. *Dial-Page vs. Dept. of Highways* (CC-83-336) 102

The Court disallowed a claim for funds based upon the statutory distribution to volunteer fire departments under the *Airkem* doctrine. *Dunlow Volunteer Fire Department vs. State Fire Marshal* (CC-84-35) 143

An award was made for the rental of a helicopter where the respondent admitted the validity and amount of the claim. *Eagle Coal and Dock Company, Inc. vs. Dept. of Public Safety* (CC-83-307) 88

Claimant sought an award for shipping charges for which the respondent admitted the amount and validity. The Court made an award for the charges. *Fire Chief Fire Extinguisher Company vs. Dept. of Veterans Affairs* (CC-85-62) 300

The Court issued an advisory determination pursuant to West Virginia Code §14-2-18 where claimant performed architectural services for the respondent but was unable to be paid as established purchasing procedures were not technically complied with. The Court recommended that the agency pay for the services rendered. *William B. Frampton, Architect vs. State Building Commission*. (CC-84-221) 271

A claim for services provided to the respondent was denied by the Court as the respondent indicated that there were insufficient funds remaining in its appropriation from which the obligation could have been paid and the Court denied the claim based upon the decision in *Airkem Sales & Service, et al. vs. Dept. of Mental Health*, 8 Ct.Cl. 180 (1971). *General Telephone Company of the SE vs. Dept. of Corrections* (CC-83-201) 12

Since the materials submitted to the claimant were at a variance with what had been set out in purchase order, the Court found the parties equally responsible for the additional costs incurred although a change order should have been requested and obtained by the claimant. *The Lawhead Press, Inc. vs. Board of Regents*. (CC-84-16) 244

The Court made an award for a post-mortem examination performed by the claimant for which the claimant had not been paid by the respondent. *Jeffry S. Life vs. Office of the Chief Medical Examiner* (CC-84-205) 195

The Court determined that although claimant supplied respondent with paper without having a proper contract, it would be unjust enrichment not to make an award as the respondent received and used the goods. *Moore Business Forms, Inc. vs. Board of Regents* (CC-84-207) 220

The Court made an award for the purchase of antlerless deer stamps as the respondent admitted the amount and validity of the claim. *Moore Business Forms, Inc. vs. Dept. of Natural Resources* (CC-85-57) 302

The Court made an award for merchandise delivered under a contract with respondent which was used by respondent, but reduced the amount of the award as the merchandise did not conform to the specifications in the contract. *Moore Business Forms, Inc. vs. Secretary of State* (CC-83-312) .. 93

An award was made for a Public Safety fee for which respondent was indebted to the city of Moundsville, W.Va. *City of Moundsville vs. Dept. of Public Safety* (CC-85-163)..... 299

The claimant sought an award for jury vouchers which were not refunded by respondent as the claimant failed to present the vouchers in the proper fiscal year. The Court made an award to the claimant. *The Sheriff and Treasurer of Kanawha County vs. Supreme Court of Appeals*. (CC-85-9) .. 249

Claimant, a court reporter, was granted an award for reporting services rendered to respondent. *Janet T. Surface vs. Human Rights Commission* (CC-83-293) 72

A claim for goods supplied to respondent which occurred as a result of an error on the part of the claimant in shipping supplies twice on one purchase order was granted as respondent received and used both shipments. *3M Company vs. Dept. of Motor Vehicles* (CC-83-245) 39

FALLING ROCKS—See also Landslides

A claim for damage to a vehicle which occurred when the vehicle was struck by falling rock was denied as the Court has held that an unexplained falling of a rock without a positive showing that respondent knew or should have known of a dangerous condition and should have anticipated injury to person or property is insufficient to justify an award. *Paul V. Boos vs. Dept. of Highways* (CC-82-119) 10

The Court denied a claim for damages arising out of an automobile accident which occurred when the driver attempted to avoid striking rocks in the road as the Court determined that there was not a sufficient amount of time for respondent to act to remove the rocks from the road. *Gary Lynn Daniels, Individually and Gary Lynn Daniels, as Administrator of the Estate of Mary Ellen Daniels; Alberta Daniels, In Her Own Right; and Brian Kelly Daniels; By His Next Friend, Alberta Daniels vs. Dept. of Highways.* (CC-81-66) 292

The Court held that the unexplained falling of rocks onto a highway, without a positive showing that respondent knew or should have known of a dangerous condition, is insufficient to justify an award. *Danny K. Hatfield vs. Dept. of Highways* (CC-84-72) 168

Claimant's vehicle was damaged when rocks came off a hill and struck the vehicle as it passed. The Court denied the claim as it is well settled law in West Virginia that the State is neither an insurer nor guarantor of the safety of motorists traveling upon its highways. To be found liable, the respondent must have had notice of the particular hazard. As nothing in the record of this claim indicates the respondent was aware of the condition of the rock cliff, the claim is denied. *Derrick A. Ramsey vs. Dept. of Highways.* (CC-84-168) 245

The Court denied an award for damage to a vehicle which struck a rock as the unexplained falling of a rock into a highway without a showing that respondent knew or should have anticipated such an event is insufficient to justify an award. *Brenda Brown Robertson vs. Dept. of Highways* (CC-83-138) 113

A claim for the destruction of an automobile by a rock slide was denied as there was no evidence that respondent should have anticipated a slide at that location. *James R. Shaver, Jr. vs. Dept. of Highways* (CC-83-39) 127

A claim for damage to a vehicle which struck rocks in a roadway was denied as there was no evidence that respondent knew or should have anticipated the falling of the rocks. *Transportation Rentals Corporation vs. Dept. of Highways* (CC-83-18) 117

The Court denied a claim for damage to claimant's truck which occurred when rocks fell onto the road, striking the vehicle. The Court determined that the respondent took precaution to protect the traveling public from falling rocks, when it constructed the highway. *Venezia Hauling, Inc. vs. Dept. of Highways.* (CC-84-69) 305

Where there was no evidence that the respondent had notice of any inherent danger of a pending rock fall, the Court denied a claim for damage to a truck which was struck by falling rock. *Venezia Hauling, Inc. vs. Dept. of Highways* (CC-84-69) 305

FLOODING

Recovery for damage to claimant’s home caused by flooding was denied as the Court determined that no action on the part of the respondent was the proximate cause of the damage. *Karen Sue Nuzum vs. Dept. of Highways* (CC-82-18) 45

Damages to property were awarded as the result of flooding from three storms where catch basins were filled with debris. *Fred Staffilino, Jr. and Linda Staffilino vs. Dept. of Highways*. (CC-80-378) 279

HOSPITALS

The Court denied an award based on the *Airkem* doctrine for medical services rendered to an inmate of the Anthony Correctional Center. *Bluefield Community Hospital vs. Dept. of Corrections* (CC-83-345) 79

The Court denied an award for medical services rendered to claimant based upon the *Airkem* decision where respondent admitted the validity of the claim, but stated that there were insufficient funds in its appropriation from which to pay the claim. *The Board of Trustees of Cabell County General Hospital a/k/a Cabell Huntington Hospital vs. Dept. of Health* (CC-83-285) 69

The Court granted an award for medical services rendered to a patient in one of respondent’s hospitals. *Aaron D. Cottle, M.D. vs. Dept. of Health* (CC-84-25) 100

The Court made an award for goods delivered to Denmar State Hospital where respondent admitted the validity and amount of the claim. *Goodwin Drug Company vs. Dept. of Health* (CC-83-309) 69

An award for medical services was denied based upon the *Airkem* decision where the respondent admitted the validity of the claim but stated that there were insufficient funds in its appropriation from which the claim could be paid. *Humana Hospital Greenbrier Valley vs. Dept. of Corrections* (CC-84-8) 90

The Court determined that it was not foreseeable that a patient who had eloped from the grounds of Huntington State Hospital would set himself on fire; therefore, the Court denied an award for claimant’s clothing which was damaged extinguishing the fire. *Jeffery D. Lavalley and Teresa D. Sayble vs. Dept. of Health* (CC-83-187) 113

Claimant’s claim for alleged continuing physical and mental injuries due to the administration of anti-psychotic drugs at West Virginia University Medical Center was denied, as the expert testimony indicated that any side effects of the drugs were temporary and the treatment consistent with accepted medical practices. *Eric M. Lee vs. Board of Regents* (CC-81-380) . 125

An award was made to claimant for the replacement cost of a shirt which was torn by a patient at Spencer State Hospital. *Randy Paul Lowe vs. Dept. of Health* (CC-83-292) 70

An award for unpaid medical bills was denied based upon the decision in *Airkem Sales and Service, et al. vs. Dept. of Mental Health*, 8 Ct.Cl. 180 (1971). *Nuclear Medicine Services, Inc. vs. Dept. of Health* (CC-84-5) 94

- The Court made an award against the Supreme Court of Appeals but denied an award against the Dept. of Health based upon the *Airkem* doctrine, where those parties stipulated that each was partly liable for medical and other services rendered by claimant to a juvenile pursuant to West Virginia Code §27-6A-1(f). *Ohio Valley Medical Center, Inc. vs. Dept. of Health and Supreme Court of Appeals*. (CC-83-267) 108
- An award was made for medical services where the respondent admitted the validity of the claim. *Roane General Hospital vs. Dept. of Health* (CC-83-363) 95
- An award for medical services rendered to various patients of Huntington State Hospital was denied based upon the *Airkem* doctrine. *St. Mary's Hospital vs. Dept. of Health* (CC-83-302) 102
- The Court made an award for medical services rendered by the claimant for which the respondent admitted the amount and validity of the claim and stated that there were sufficient funds in the appropriation for the proper fiscal year with which to pay the invoices. *St. Joseph's Hospital vs. Division of Vocational Rehabilitation*. (CC-84-310a&b) 279
- Claimant alleged that his eye glasses were damaged when a hospital resident struck the claimant. The Court denied the claim as there was no evidence of negligence on the part of the respondent or its employees. *Jessee W. Starcher vs. Dept. of Health*. (CC-84-95) 251
- The Court denied an award for medical services based upon the *Airkem* doctrine where the respondent admitted the validity of the claim but stated that there were insufficient funds in its appropriation from which the claim could be paid. *Stonewall Jackson Memorial Hospital vs. Dept. of Health* (CC-84-19) 97
- An award was made to claimant for damage to her clothes which occurred as she attempted to restrain a patient at Huntington State Hospital. *Pearl Patsy Webb vs. Dept. of Health* (CC-83-249) 54
- An award was made for unpaid bills incurred at the Colin Anderson Center where the respondent admitted the validity and amount of the claim. *West Virginia Telephone Company vs. Dept. of Health* (CC-83-291) 73
- The Court denied a claim based upon the *Airkem* doctrine where respondent admitted the validity of the claim, but stated that there were insufficient funds in the proper fiscal year for the services rendered. *Wheeling Hospital vs. Dept. of Corrections* (CC-84-34) 135

INSURANCE

- Claim for a refund of the difference between single and family coverage insurance rates was denied where it was established that claimant failed to properly complete the form. *Michael A. Beulike vs. Dept. of Highways and Public Employees Insurance Board* (CC-83-206) 120

INTEREST

- The Court made an award for unemployment compensation tax owed by the respondent as the respondent admitted the amount and validity of the claim; however, the Court determined that interest could not be awarded based upon West Virginia Code §14-2-12. *Department of Employment Security vs. Human Rights Commission*. (CC-84-315) 260

JURISDICTION

Where there was no real evidence of willful, wanton, or reckless misconduct on the part of respondents, nor an intent to injure the decedent which would remove the bar of Workmen’s Compensation, the Court dismissed a claim as the Court’s jurisdiction does not extend to Workmen’s Compensation claims. See W.Va. Code §14-2-14. *Lucille Jordan, Administratrix of the Estate of Jerry Lee McComas, Deceased vs. Governor’s Office of Economic & Community Development, Governor’s Summer Youth Program and Dept. of Highways.* (CC-83-235) 219

The Court dismissed a claim for lack of jurisdiction where it appeared that the respondent was a political subdivision of the State and not a State agency. *Meredith, Quinn & Stenger, CPA’s vs. Region VI Planning and Development Council* (CC-82-121) 144

The Court dismissed a claim for pay allegedly due claimant as the proper party respondent was a county board of education over which this Court has no jurisdiction. *Timothy Wilson vs. Dept. of Education* (CC-83-357) 163

LANDLORD AND TENANT

The Court denied a claim for the cost of installing a fire alarm system in a building rented by respondent as that cost was part of claimant’s obligation as lessor of the building under the terms of the lease. *Jones-Cornett Electric Company vs. Dept. of Human Services* (CC-82-239) 133

An award was made for damage to claimant’s building which respondent had rented for office space as the damage was beyond that of normal wear and tear. *John Casey Peters vs. Dept. of Human Services* (CC-83-4) 63

LANDSLIDES—See Also Falling Rocks

A clear preponderance of the evidence indicated that a slide was caused by increased rainfall in the area of claimants’ property rather than the negligence of the respondent. The Court will deny the claim. *Paul Edmonds and Brenda Kay Edmonds vs. Dept. of Highways* (CC-80-300) 167

Respondent’s actions in cutting back a slope into claimant’s property aggravated a slide condition which caused damage to claimant’s house and property; therefore, the Court made an award. *Barbara M. Neri vs. Dept. of Highways.* (CC-83-228) 273

A claim for damage to real property as a result of a slide on a highway maintained by the respondent was denied by the Court as the evidence presented indicated that the acts of a third party were the proximate cause of the slide. *Bobby Ryder and Othella A. Ryder vs. Dept. of Highways* (CC-81-446) 15

LIMITATION OF ACTIONS

The Court sustained respondent’s Motion to Dismiss where it appeared that the claim had not been filed within the applicable statute of limitations. *Amy Bucklin vs. Dept. of Highways* (CC-83-304) 140

A claim for damages based upon time allegedly wrongfully spent in prison was denied based upon the Statute of Limitations. The Court held

that mere lack of knowledge of an actionable wrong does not suspend the statute. *Carl Mike Thompson vs. Dept. of Corrections* (CC-80-248a) 114

MOTOR VEHICLES—See also Negligence; Streets and Highways

An award was made for damages to a vehicle which occurred when the windshield was cracked by a piece of limestone, which came off the back of a dump truck, belonging to respondent. *Terry W. Ahalt vs. Dept. of Highways* (CC-82-203) 32

The Court made an award for damage to claimant's insured's vehicle where it was stipulated that respondent was negligent spraying paint in its garage and getting paint on the vehicle. *American National Property & Casualty, Subrogee of Charles R. Hart vs. Dept. of Highways* (CC-83-352a) 119

An award was made for damage to claimant's vehicle struck by gravel from a state truck which was not properly secured. *Carroll L. Bolyard vs. Dept. of Highways* (CC-84-113) 190

The Court denied a claim for towing charges as the claimant did not establish by a preponderance of the evidence that an erroneous registration on her vehicle was the proximate cause of the towing of the vehicle. *Erma G. Creasy vs. Dept. of Motor Vehicles*. (CC-84-172) 235

A vehicle was damaged when a roadway gave way and the vehicle rolled into a creek, and the Court made an award for damage to the vehicle as the respondent was negligent in failing to provide sufficient room for the passage of the vehicle around a construction area. *Erie Insurance Exchange, Subrogee for Joseph E. Martin and Goldie J. Martin, and Joseph E. Martin and Goldie J. Martin, Individually vs. Dept. of Highways*. (CC-81-82) 261

The Court made an award for damage to claimant's vehicle which occurred when an employee of the respondent was moving the vehicle while it was parked in respondent's lot. *Lucy Kathleen Gardner vs. Board of Regents* (CC-84-257) 301

A claim for damage to a vehicle which occurred at a construction site on I-64 was denied by the Court as the Court determined that claimant's vision was obscured and this was the proximate cause of the accident. The claimant was unable to see a lit arrow sign as a camper vehicle was in front of the claimant. *Kenneth D. Hatfield vs. Dept. of Highways*. (CC-84-268) 295

The Court denied a claim for damage to a vehicle which occurred when the vehicle was driven off the road as the Court determined that the negligence of the driver was equal to or greater than any negligence of the respondent as there appeared to be sufficient room for two vehicles to pass on the road. *Carlisle L. Hedrick and Robert L. Hedrick vs. Dept. of Highways*. (CC-83-137) 288

An award was made for damage to a vehicle sustained when a piece of concrete fell due to negligent maintenance of a bridge. *Clyde Holloway, as the next friend of Kay Lee Holloway vs. Dept. of Highways* (CC-83-12) 33

The Court cannot grant an award based upon speculation; therefore, a claim was denied when the driver of the vehicle was not present to testify as to the incident in which the vehicle was damaged. *Danny C. Huffman vs. Dept. of Highways*. (CC-84-109) 241

The Court made an award to the claimant for damage to his vehicle which occurred when a wooden bridge collapsed. The Court found the respondent negligent in failing to discover the condition of the bridge and to make the necessary repairs. *Joseph H. Justice vs. Dept. of Highways*. (CC-84-287) 266

A claim for damage to a vehicle, which occurred when a piece of cement broke off of a bridge under which the vehicle was travelling, was granted by the Court as the respondent has the duty to use reasonable care to maintain streets and bridges in a safe condition. *Sandra Stiltner vs. Dept. of Highways* (CC-82-328) 18

A claim for damage to a vehicle which struck a bent sign post was denied as there was no evidence as to how or by whom the post was bent, nor did the respondent have actual or constructive knowledge of the existence of the defect. *Linda Dean Thompson vs. Dept. of Highways* (CC-83-25) 3

Where there was no evidence that the respondent had notice of any inherent danger of a pending rock fall, the Court denied a claim for damage to a truck which was struck by falling rock. *Venezia Hauling, Inc. vs. Dept. of Highways* (CC-84-69) 305

The Court denied a claim for damage to a vehicle which occurred when the vehicle struck lane dividers on a highway as there was no evidence presented to indicate that the dividers were improperly placed or that the divider which the vehicle struck was defective. *Richard A. Wilson vs. Dept. of Highways*. (CC-84-262) 290

NEGLIGENCE—See also Motor Vehicles; Streets and Highways

The Court made an award for damage to claimant’s insured’s vehicle where it was stipulated that respondent was negligent spraying paint in its garage and getting paint on the vehicle. *American National Property & Casualty, Subrogee of Charles R. Hart vs. Dept. of Highways* (CC-83-352a) 119

Damage to a vehicle which struck a concrete island was denied because the negligence of the claimant equaled or exceeded that of the respondent. See also *Linda F. Pate vs. Dept. of Highways* (CC-82-29) 15 Ct.Cl. (1983). *Helen E. Bailey vs. Dept. of Highways* (CC-81-419) 8

The Court granted respondent’s Motion to Dismiss the claims where it was determined that there was no causal relationship between the respondent’s alleged negligence in maintenance of a guardrail of the accident in which Ruth A. Bates and James M. Bates were injured. *Ruth A. Bates and John E. Bates, and James M. Bates, an Infant who Sues by his Father and Next Friend, John E. Bates vs. Dept. of Highways* (CC-82-120 a&b) 145

Where claimant’s tools were stolen from respondent’s garage, the Court made an award for the loss of tools as respondent was negligent in failing to provide a more secure locking system for the shop where the tools were kept. *Richard R. Fisher vs. Dept. of Highways*. (CC-84-308) 262

An award for damage to claimant’s boat which was used by respondent to recover a drowning victim was denied as there was no evidence that respondent’s personnel caused the damage. *William E. Grimsley, Jr. vs. Dept. of Public Safety* (CC-83-248) 111

Claimant's tools were stolen from respondent's garage for which the Court made an award as respondent was negligent in failing to provide a secure locking system for the shop where the tools were kept. *Thomas J. Hiddemen, Jr. vs. Dept. of Highways*. (CC-84-309) 262

As no evidence of notice was presented to establish that the barrel in the highway struck by claimant's vehicle was there due to negligence on the part of the respondent, the Court denied the claim. *James D. Kittle vs. Dept. of Highways*. (CC-84-36) 194

An award was made for damage to claimant's hay binder which drove over fence posts left in claimant's field by the respondent where the parties stipulated that respondent's negligence was the proximate cause of the damages sustained. *Jack E. Murray vs. Dept. of Highways* (CC-83-279) ... 137

An award for damage to claimant's home caused by a patient from respondent's hospital facility was made due to respondent's negligence. *James P. Mylott vs. Dept. of Health* (CC-85-69) 303

Where claimant received benefits from Workers' Compensation Fund when her husband died as the result of drowning in an accident while employed by the respondent, Department of Highways, a finding of negligence or even gross negligence on the part of the respondent is insufficient to establish liability in the claim. *Judith Lynn Jeffers Pickens, Administratrix of the Estate of John Roger Jeffers, Deceased vs. Dept. of Highways* (CC-80-347) 203

An award was made for damage to claimants' vehicle which struck a pothole on Interstate 64, where it was apparent that the pothole could not have developed overnight and respondent was negligent in failing to repair it. *Brenda Ann Poole and Michael Ray Poole vs. Dept. of Highways* (CC-83-204) 65

The Court made an award for damages to claimant's vehicle when the vehicle slid on pavement which was slippery when wet due to some unknown substance in the road. The respondent failed to establish that the road was free from defects and negligently failed to take corrective action. *Regina M. Rhoads vs. Dept. of Highways* (CC-84-46) 221

The Court determined that respondent's failure to erect warning signs of rough road ahead or to correct a dangerous condition constituted negligence which proximately caused the accident and resulting injury to the claimant. *Theresa Ritz vs. Dept. of Highways*. (CC-83-11) 246

Claimant alleged that his eye glasses were damaged when a hospital resident struck the claimant. The Court denied the claim as there was no evidence of negligence on the part of the respondent or its employees. *Jesse W. Starcher vs. Dept. of Health*. (CC-84-95) 251

A claim for damage to a vehicle, which occurred when a piece of concrete fell from a bridge under which the vehicle was travelling, was granted by the Court as the Court concluded that the respondent was negligent of the maintenance of the bridge. *Harold C. Swiger vs. Dept. of Highways* (CC-82-290) 38

An award was made to the claimant for the loss of his mechanic's tools which were stolen from respondent's garage where the Court determined

that the respondent failed to provide adequate security for the building. *Harry L. White vs. Dept. of Highways (CC-84-87)* 162

An award was made to the claimant for damage to her personal property which occurred when a water pipe burst in her dormitory during the Christmas break where the evidence showed that the respondent had turned the heat off in the building. *Anita Faye Wickline vs. Board of Regents (CC-84-52)* 163

The Court made an award to the claimant for damage to his vehicle which occurred when the vehicle struck a culvert which was maintained in a negligent manner. *Harry E. Wilmoth vs. Dept. of Highways (CC-83-161)* . . 176

The Court granted an award for damage to a haybaler where respondent's negligence in digging a hole on claimant's property was the proximate cause of the damage. *Peter Yerkovich, Jr. vs. Dept. of Highways (CC-82-224)* 30

NOTICE

For the respondent to be held liable for damages caused by road defects, the claimant must prove that the respondent had actual or constructive knowledge of the existence of the defects and a reasonable amount of time to take suitable corrective action. *Edith Estelle Akers vs. Dept. of Highways (CC-83-158)* 119

The following claims were decided upon the same principle:

George H. Armstrong vs. Dept. of Highways (CC-83-186) 48

Barbara S. Cobb vs. Dept. of Highways (CC-84-40) 235

Penny M. Esworthy and Charles R. Bickerton vs. Dept. of Highways (CC-84-82a) 149

Penny M. Esworthy and Charles R. Bickerton vs. Dept. of Highways (CC-84-82b) 150

Federal Kemper Insurance Company, as Subrogee of Sybil Chase and Sybil Chase, Individually vs. Dept. of Highways (CC-84-248) 293

Roberta Sharp Gudmundsson vs. Dept. of Highways (CC-84-141) 238

Lilly M. Hall vs. Dept. of Highways (CC-78-44) 50

Curtis T. Hardman, Jr. vs. Dept. of Highways (CC-84-246) 287

Charlotte Hubbell vs. Dept. of Highways (CC-84-3) 159

Jimmy B. Hudson vs. Dept. of Highways (CC-84-158) 240

Noah Jackson vs. Dept. of Highways (CC-84-111) 241

Thomas M. Jones and Debra L. Jones vs. Dept. of Highways (CC-83-205) 124

Allen Kaplan and Pauline Kaplan vs. Dept. of Highways (CC-84-127) . . . 296

Edgar L. Moss vs. Dept. of Highways (CC-84-18) 161

John Reed and Patsy D. Reed vs. Dept. of Highways (CC-83-213) 68

Ronald B. Smith vs. Dept. of Highways (CC-84-206) 250

Paul H. Stewart vs. Dept. of Highways (CC-84-123) 252

Polly Tankersley vs. Dept. of Highways (CC-84-156) 254

<i>Doris A. Terry and Michael A. Terry vs. Dept. of Highways (CC-84-50)</i>	154
<i>Flowvounia Tyler vs. Dept. of Highways (CC-84-170)</i>	255
<i>Pat R. Withrow vs. Dept. of Highways (CC-84-247)</i>	291
A claim for damage to a vehicle which struck rocks in the roadway was denied as the respondent had no actual or constructive notice of the defect. <i>David Bobenhausen vs. Dept. of Highways (CC-84-94)</i>	147
A claim for damage to a vehicle which occurred when the vehicle was struck by falling rock was denied as the Court has held that an unexplained falling of a rock without a positive showing that respondent knew or should have known of a dangerous condition and should have anticipated injury to person or property is insufficient to justify an award. <i>Paul V. Boos vs. Dept. of Highways (CC-82-119)</i>	10
The Court held that respondent has a duty to maintain the berm of a highway in reasonably safe condition for use by a motorist when the occasion requires. The respondent knew or should have known of the unsafe condition of the berm at the site of claimant's decedent's accident and was liable for failing to maintain the berm. <i>Stella Cecil, Administratrix of the Estate of O'Dell M. Cecil, deceased vs. Dept. of Highways (CC-79-458)</i>	73
An award was made for damage sustained by claimant's vehicle where the evidence established that respondent should have known of the existence of the pothole due to its size. <i>Myrtle Craddock vs. Dept. of Highways (CC-84-56)</i>	158
The Court denied a claim where a vehicle struck a raised expansion joint in the highway as the respondent had no actual or constructive notice of the defect. <i>Donna G. Crittendon vs. Dept. of Highways (CC-84-49)</i>	148
The Court made an award for damages to a vehicle where it determined that the respondent had constructive notice of the pothole based upon the dimensions of the pothole described by the claimant, as the pothole could not have developed overnight. <i>Dianna Rinehart Jones vs. Dept. of Highways. (CC-84-126)</i>	244
An award for damage to a tractor trailer truck was made when the evidence indicated that respondent had knowledge of the condition of the roadway and failed to post warning signs or weight limitation signs. <i>Elsie Mast and Elsie Mast & Willis Mast, d/b/a Willis Mast Livestock Trucking vs. Dept. of Highways (CC-80-371)</i>	59
Notice that the respondent had actual or constructive notice of the existence of a pothole in the road must be established in order for the respondent to be found guilty of negligence. <i>Frances P. Sheppard vs. Dept. of Highways. (CC-84-162)</i>	248
A claim for damage to a vehicle which struck a piece of concrete in a roadway was denied as the respondent did not have notice of the defect. <i>Milton Thompson, Jr. vs. Dept. of Highways (CC-83-351)</i>	161
A claim for damage to a vehicle which struck a bent sign post was denied as there was no evidence as to how or by whom the post was bent, nor did the respondent have actual or constructive knowledge of the existence of the defect. <i>Linda Dean Thompson vs. Dept. of Highways (CC-83-25)</i>	3

A claim for damage to a vehicle which was involved in an accident allegedly resulting from a missing stop sign was denied where it was not established that respondent had notice of the defect and the driver of the vehicle was not present to testify about the circumstances of the accident. *Transportation Rentals Corp. vs. Dept. of Highways* (CC-83-227) 128

The Court made an award for damages to a vehicle which occurred when the vehicle struck a pothole as the Court determined that, although there was no evidence that respondent had actual knowledge of the existence of the defect, the Court is of the opinion that it had constructive notice. *Amelio J. White vs. Dept. of Highways* (CC-84-171) 224

OFFICE EQUIPMENT AND SUPPLIES

The Claim for additional rental allegedly owed under a 60 month lease agreement was denied as the Court determined that the lease was void under the provisions of Chapter 5A of the West Virginia Code. *Equilease Corporation vs. Board of Regents* (CC-82-126) 122

An award was made for a damaged air compressor rented by respondent where the parties stipulated that the damage occurred because of the negligence of respondent. *Logan Corporation vs. Dept. of Highways* (CC-84-10) 91

A claim for rent due under a lease agreement was granted even though an administrative error on claimant’s part resulted in the failure of the respondent to make timely payment in the proper fiscal year. Failure to grant an award would result in unjust enrichment of the respondent. *Sperry Univac vs. Dept. of Finance & Administration*. (CC-83-7) 29

In awarding a claim for rental of a copy machine the Court based the award upon an estimate of an amount “. . . fair to both parties based upon the reasonable value of the use of the equipment”. *Xerox Corporation vs. Dept. of Natural Resources*. (CC-82-236) 284

PERSONAL SERVICES

The Court denied salary increases to magistrate support personnel as the magistrate support personnel’s salaries are fixed by Circuit Court Judges or magistrates based upon a maximum salary range and not by statute based upon census figures. *Wanetta F. Adkins, et al. vs. Supreme Court of Appeals* (CC-83-63 through CC-83-105 and CC-83-110) 60

The Court made an award to the claimant for an increase in her salary which she did not receive in a timely manner as the respondent admitted the amount and validity of the claim. *Mary Ann Babich vs. Board of Regents* (CC-84-230) 189

The Court made an award to claimant for a salary increase which she did not receive due to an administrative error. *Bethany L. Browning vs. Board of Regents* (CC-83-231) 49

The Court made an award for compensation and travel expenses incurred by claimant as the respondent admitted the amount and validity of the claim. *William K. Bunner vs. Dept. of Agriculture* (CC-85-166) 299

Claimant sought payment for the services of a social security tutor for her child which should have been paid for by the respondent as the child was a resident of respondent's Greenbrier Center. The Court made an award to the claimant. <i>Sophia Clark vs. Dept. of Health</i> . (CC-85-67)	285
A claim for additional compensation was denied under a contract of employment made and accepted by claimant. <i>Gloria Vance Cress vs. Board of Regents</i> . (CC-83-311)	216
Claimant was employed by respondent and paid at a lower entry rate than advertised. The Court made an award for the net loss of pay where the respondent admitted the amount and validity of the claim. <i>Janet Dooley vs. Board of Regents</i> . (CC-84-321)	236
An award was made for back pay for a pay raise not received by the claimant. <i>Beverly Pisegna Fulmer vs. Board of Regents</i> . (CC-85-13)	272
An award for services rendered was made to claimant where the respondent admitted the validity and amount of the claim. <i>W. Auvil Godwin vs. Dept. of Corrections</i> (CC-84-145)	151
Court made an award for wages lost to the claimant during a transfer from one agency to another. <i>Leonard J. Gwiazdowsky vs. Dept. of Health</i> (CC-84-208)	202
Back pay sought by the claimant was denied by the Court as the claimant was re-employed and is entitled to compensation only for the time actually worked. <i>Bertha Hall vs. Board of Regents</i> (CC-80-406)	42
A claim for lost wages which occurred through a clerical error on the part of the respondent was granted by the Court as the respondent admitted the error and that there were sufficient funds available during the proper fiscal year from which the wages might have been paid. <i>Judith Ann Hall vs. Board of Regents</i> (CC-83-41)	32
Claimant, a law firm, asserted that it represented two officers in the Department of Public Safety in two separate legal actions and requested payment for services rendered beyond the \$1,000.00 per case permitted by West Virginia Code §15-2-22. The Court refused to circumvent the plain and unambiguous language of the statute. <i>Haynes Ford and Rowe vs. Dept. of Public Safety</i> . (CC-84-45)	264
A claim for legal fees for Court appointed representation of an indigent was awarded as the respondent acknowledged the validity of the claim and that there were sufficient funds in the appropriate fiscal year to pay the claim. <i>John R. Lukens vs. Public Legal Services</i> (CC-83-177)	4
The Court made an award where the claimant's rate of pay was miscalculated for a period of time and the respondent admitted the validity and the amount of the claim and that there were sufficient funds from which the claim could have been satisfied during the appropriate fiscal year. <i>Fannie Lee Malone vs. Board of Regents</i> (CC-83-155)	28
An award was made to claimant for back pay due for pay raise not received due to listing in the wrong job classification. <i>Barbara Ann McCabe vs. Board of Regents</i> . (CC-84-291)	267
An award was made to correct error in salary paid claimant. <i>Laura L. Michael vs. Board of Regents</i> (CC-85-131)	302

The Court made an award for a salary increase which was not paid to claimant due to an administrative error. <i>Nora A. Miller vs. Board of Regents</i> (CC-84-7)	93
The Court made an award for back wages where the parties agreed to the amount due. <i>Elizabeth D. Morgan vs. Board of Regents</i> (CC-84-76)	153
An award was made for erroneous excessive withholding of insurance premiums from claimant's retirement payments. <i>Vera B. Ramsey vs. Public Employees Insurance Board</i> (CC-83-289)	71
A claim for damaged personal property which occurred while claimant was performing her duties as an employee of the respondent was granted as the respondent acknowledged the amount and validity of the claim. <i>Lillian Rose vs. Dept. of Health</i> (CC-83-244)	37
The Court made awards to certain individuals for overtime compensation when they were required to be at their work place during lunch breaks. The respondent admitted the amounts and validity of each claim. <i>Danny R. Sinclair et al. vs. Board of Regents</i> . (CC-84-161)	256
Claimant was granted an award for back pay which he did not receive due to an administrative error in the calculation of a pay raise. <i>Edward Sowell vs. Board of Regents</i> (CC-83-300)	71
The Court made an award for a salary increase which was not paid to claimant due to an administrative error. <i>Elaine B. Stemple vs. Board of Regents</i> (CC-84-6)	96
Claimant was granted an award for back pay which he did not receive due to an administrative error in the calculation of a pay raise. <i>Bobbie E. Stevens vs. Board of Regents</i> (CC-83-301)	72
A salary increase to a magistrate assistant was denied as the assistant's salary is based upon a maximum salary range and not by statute based upon census figures. <i>Mary Catherine Waters vs. Supreme Court of Appeals</i> (CC-82-228)	66
The Court determined that the respondent was liable to the claimant for salary paid to a subcontractor's employee up to the time that the claimant had notice of improper hiring which was deemed a violation of applicable federal regulations. <i>West Virginia Utility Contractors Association vs. Governor's Office of Economic and Community Development</i> (CC-82-296)	223

PHYSICIANS AND SURGEONS—See also Hospitals

The Court made an award for medical services rendered to a State trooper where the respondent had sufficient funds in the appropriate fiscal year from which the obligation could have been paid. <i>St. Joseph's Hospital vs. Dept. of Public Safety</i> (CC-84-173)	207
---	-----

PRISONS AND PRISONERS

The Court denied a claim for medical expenses incurred when claimant was shot by an individual placed upon parole by the respondent, the W. Va. Board of Probation and Parole. A person placed upon parole is not a ward of the State, and the State is not liable for the misconduct of the parolee. <i>George Korbanic vs. Board of Probation and Parole</i> (CC-82-48)	184
---	-----

A claim for damages based upon time allegedly wrongfully spent in prison was denied based upon the Statute of Limitations. The Court held that mere lack of knowledge of an actionable wrong does not suspend the statute. *Carl Mike Thompson vs. Dept. of Corrections (CC-80-248a)* 114

Damages based upon a skin condition allegedly resulting from claimant's incarceration in the State Penitentiary in Moundsville were denied as the evidence indicated that the condition was of unknown origin. *Carl Mike Thompson vs. Dept. of Corrections (CC-80-248b)* 115

PUBLIC INSTITUTIONS

An award was made for damage to claimant's Porta-John which was set on fire at the West Virginia State Penitentiary where the respondent admitted the validity of the claim. *Zeik Auvil vs. Dept. of Corrections (CC-83-340)* 79

A former patient of the respondent who was placed in a nursing home stole claimant's vehicle while the keys were left in the ignition switch. The Court denied the claim for damage to the vehicle, as the Court cannot speculate about the advisability of placing a person in the nursing home. *Orvill E. Edens vs. Dept. of Health (CC-83-243)* 166

REAL ESTATE

A claim for damage to real property resulting from flooding was denied by the Court, as the Court could not determine that the construction of the Interstate was the proximate cause of the increased runoff, and the Court could not conclude that any acts or omissions of the respondent were the proximate cause of the damages sustained to the property. *Henry Besse & Diana K. Besse and Charles D. Morgan & Penny A. Morgan vs. Dept. of Highways (CC-81-216a&b)* 40

The claimants sought to recover compensation for the destruction of a barn on their property which occurred when a child placed by the Department of Welfare allegedly set the barn on fire. The Court denied the claim as there was nothing in the record to show that the Department of Welfare was guilty of a negligent act which proximately caused the damage to claimants' property. *Charles R. Daniels and Essie Daniels vs. Dept. of Welfare (CC-82-19)* 201

The Court made an award to the owner of an apartment in which members of the Dept. of Public Safety had used forensic powder extensively throughout the apartment in an investigation and the claimant incurred maintenance expenses due to the use of the powder. *Marjorie Garden Associates vs. Dept. of Public Safety (CC-84-102)* 170

The Court denied a claim wherein claimant alleged that survey markers were bent over by employees of the respondent. There was no evidence that the accuracy of the markers was compromised. *Benjamin F. McKinley and Barbara A. McKinley vs. Dept. of Highways (CC-81-452)* 171

A claim for damage to claimant's real property was awarded by the Court as the parties stipulated that the respondent damaged claimant's property while performing maintenance on a road. *William G. Poling and Delores J. Poling vs. Dept. of Highways (CC-80-264)* 37

A claim for damage to real property as a result of a slide on a highway maintained by the respondent was denied by the Court as the evidence presented indicated that the acts of a third party were the proximate cause of the slide. *Bobby Ryder and Othella A. Ryder vs. Dept. of Highways* (CC-81-446) 15

REHEARING

The Court confirmed its disallowance of a claim after a limited rehearing. The Court could find no basis for amending its previously issued opinion. *Hooten Equipment Company vs. Board of Regents.* (CC-80-337) 289

SCOPE OF EMPLOYMENT

Respondent was not liable for the action of its employee who allegedly assaulted claimant as the act was not within the employee's scope of employment. *Myrtle W. Campolio vs. Dept. of Natural Resources* (CC-77-39) 110

A claim for personal injury which occurred while claimant was employed as a flagger on a construction project was denied as the Court cannot hold the respondent liable for the acts of its employees where the wrongful act was outside the scope of the employment. *Shelby J. Steele Cook vs. Dept. of Highways* (CC-81-199) 179

STATE AGENCIES

A claim by the employee of the respondent for glasses which were broken while claimant was reaching for a case of wine was denied by the Court as there was no evidence presented that the wine was improperly stacked or in violation of respondent's regulations. *Mary Frances Aubrey vs. Alcohol Beverage Control Commissioner.* (CC-84-202) 258

The Court granted an award to the claimant for various expenses incurred when his driver's license was unjustly suspended as the respondent admitted the validity of the claim. *Judy W. Chontos vs. Supreme Court of Appeals* (CC-83-120) 25

The Court made an award for legal expenses incurred by the Estate of the decedent as the West Virginia Supreme Court of Appeals ruled that where the Attorney General undertakes to represent a State employee in a civil suit arising from the discharge of the employee's official duties, and the employee dies and his Estate is substituted as a party defendant, the Attorney General has a clear and legal duty to represent the Estate of the employee. *Estate of William Robert Goe, Deceased by Norval D. Goe, Executor vs. Attorney General.* (CC-84-11) 218

An award for the cost of rebuilding a chiler unit in State park was granted when it was determined electrical problem was the result of a problem with power source entering the park. *Johnson Controls, Inc. vs. Dept. of Natural Resources.* (CC-82-225) 242

An award was made for expenses in remodeling a store when the agency contract terminated in less than three months after it was discovered that the agency had been established in a dry county. *Pauline G. Malcomb vs. Alcohol Beverage Control Commissioner* (CC-80-275) 77

The claimant sought damages sustained by respondent’s failure to record claimant’s lien on a certificate of title. The Court determined that claimant’s loss resulted from respondent’s negligence and an award was made. *Pendleton County Bank vs. Dept. of Motor Vehicles* (CC-83-342) . . . 108

An award was made for damage to claimant’s building which respondent had rented for office space as the damage was beyond that of normal wear and tear. *John Casey Peters vs. Dept. of Human Services* (CC-83-4) 63

An award was made to claimant for damage to her clothes which occurred as she attempted to restrain a patient at Huntington State Hospital. *Pearl Patsy Webb vs. Dept. of Health* (CC-83-249) 54

Where an allegation of nepotism was deemed in violation of applicable Federal regulations regarding the employment of an individual in a training program, the Court determined that the respondent was liable for the amount paid to the employee up to the time that the claimant had notice of the improper hiring. *West Virginia Utility Contractors Association vs. Governor’s Office of Economic and Community Development* (CC-82-296) 223

The claimant sought rental on a copying machine installed at a State agency. The agency was unable to pay the rent as the written contract was invalid due to a failure to obtain approval of the Department of Finance and Administration. The Court made an award based upon an estimate fair to the parties. *Xerox Corporation vs. Dept. of Natural Resources*. (CC-82-236) 284

STIPULATION AND AGREEMENT

The Court made an award for damage to claimant’s insured’s vehicle where it was stipulated that respondent was negligent spraying paint in its garage and getting paint on the vehicle. *American National Property & Casualty, Subrogee of Charles R. Hart vs. Dept. of Highways* (CC-83-352a) 119

The Court made an award to the claimant for monthly rental fees of equipment where the respondent and the claimant submitted the claim upon a written stipulation of the facts. *Anderson Equipment Company vs. Dept. of Highways*. (CC-84-294) 257

The parties submitted the claim upon a written stipulation which set forth the facts that respondent utilized a design plan prepared by claimant but for which claimant was not authorized by a contract. The Court made an award based upon a fair and equitable estimate of the damages sustained by the claimant. *Carl E. Stephens Construction Company, Inc. vs. Dept. of Highways*. (CC-84-253) 233

The parties submitted the claim upon a stipulation which set forth the facts that the respondent would not allow any equal or substitute product used in the construction of a bridge which violates public bidding requirements. *Engineered Products, Inc. vs. Dept. of Highways*. (CC-84-302) 237

The Court required a hearing when the stipulation entered into by the parties did not provide all of the facts necessary to render a decision. *Katherine L. Hart vs. Dept. of Employment Security* (CC-84-190) 304

The Court made an award to claimant for damage to his vehicle which struck a loose metal strip which extended across the highway where the parties stipulated the amount of damages. *George B. Hissom vs. Dept. of Highways* (CC-84-12) 90

A claim for empty cylinders which were to be returned to the claimant by the respondent pursuant to a contract was granted by the Court where the parties stipulated the facts and amount of the claim. *James C. Dawes Company, Inc. vs. Dept. of Highways* (CC-83-220) 11

An award was made for a damaged air compressor rented by respondent where the parties stipulated that the damage occurred because of the negligence of respondent. *Logan Corporation vs. Dept. of Highways* (CC-84-10) 91

The Court made an award against the Supreme Court of Appeals but denied an award against the Dept. of Health based upon the *Airkem* doctrine, where those parties stipulated that each was partly liable for medical and other services rendered by claimant to a juvenile pursuant to West Virginia Code §27-6A-1(f). *Ohio Valley Medical Center, Inc. vs. Dept. of Health and Supreme Court of Appeals; Dept. of Human Services* (CC-83-266) 108

A claim for damages to claimant's water line was granted by the Court where the parties stipulated that the damage was the result of negligence on the part of the respondent. *City of Shinnston vs. Dept. of Highways* (CC-83-199a) 46

The Court made an award based upon a written stipulation by the parties that claimant's vehicle was damaged as the result of striking deteriorated berm which presented a hazard and was the proximate cause of the damages. *Carl Eugene Shockey, D/B/A Gene's Mobile Homes vs. Dept. of Highways*. (CC-83-271) 250

The Court made an award under the terms of the stipulation wherein the respondent and claimant indicated that due to the delay on a contract to construct a swimming pool the claimant incurred additional expenses. *Whitten Corporation vs. Board of Regents* (CC-82-23) 117

STREETS AND HIGHWAYS—See also Falling Rocks; Landslide; Motor Vehicles; Negligence

The Court made an award for damage to a vehicle sustained when the vehicle struck a pothole as the size of the pothole described by claimant could not have developed overnight and the respondent should have discovered its existence. *William F. Angel vs. Dept. of Highways*. (CC-84-152) 258

Damage to a vehicle which struck a concrete island was denied because the negligence of the claimant equalled or exceeded that of the respondent. See also *Linda F. Pate vs. Dept. of Highways* (CC-82-29) 15 Ct.Cl. (1983). *Helen E. Bailey vs. Dept. of Highways* (CC-81-419) 8

Claim for personal injury which occurred when a vehicle struck a hole at the edge of a bridge was denied when it was determined that respondent had actual notice of the defect and an attempt was made to mark the hole until

repairs could be made. <i>Jerrell & Anna Barnhill vs. Dept. of Highways.</i> (CC-82-128)	214
A claim for personal injuries and damages to a vehicle which occurred when the vehicle struck an icy spot on a highway was denied as the evidence established that the water did drain onto the road but it was also established that the respondent had placed salt and abrasives on the road to treat the icy condition. <i>Hazel Bartram and Foster Lee Bartram vs. Dept. of Highways</i> (C-81-79)	23
A claim for damage to a vehicle by paint was denied as the Court inspected the vehicle and concluded that the claimant must have driven the wheels of the vehicle over the paint. <i>Avonel Bero vs. Dept. of Highways</i> (CC-83-273)	164
A claim for damage to a vehicle which struck rocks in the roadway was denied as the respondent had no actual or constructive notice of the defect. <i>David Bobenhausen vs. Dept. of Highways</i> (CC-84-94)	147
The Court denied a claim for damage to a vehicle which occurred at an area of construction where the proximate cause of the accident was claimant's failure to observe warning signs. <i>David Bobenhausen vs. Dept. of Highways</i> (CC-84-9)	146
A claim for damage to a vehicle which occurred when the vehicle struck a pothole was denied by the Court based upon the case of <i>Adkins vs. Sims</i> , 130 W.Va. 645 (1947). <i>Joseph E. Bowery, II vs. Dept. of Highways</i> (CC-83-287)	155
The following claims were decided upon the same principle:	
<i>Mr. and Mrs. Andrew Danzig vs. Dept. of Highways</i> (CC-83-181)	11
<i>Joseph B. Decker vs. Dept. of Highways</i> (CC-83-149)	25
<i>Rex Allen Johnson vs. Dept. of Highways</i> (CC-83-147)	27
<i>Stephen A. Johnston vs. Dept. of Highways</i> (CC-83-146)	14
<i>Donald A. Kuntz vs. Dept. of Highways</i> (CC-83-46)	43
<i>Edgar Stephan, III vs. Dept. of Highways</i> (CC-83-127)	17
<i>Julius A. Testa vs. Dept. of Highways</i> (CC-82-270)	17
<i>Tube Sales, Inc. vs. Dept. of Highways</i> (CC-83-169)	30
<i>Shirley Sue Walker vs. Dept. of Highways</i> (CC-82-287)	47
<i>Lawrence Ray Wells vs. Dept. of Highways</i> (CC-83-185)	31
Claim for damage to a vehicle which struck a buckled area of pavement was denied where it was established that this buckling may occur in extremely hot weather, and is impossible to predict when and where it may occur. <i>Gene W. Bradford vs. Dept. of Highways</i> (CC-83-247)	121
While the State does not insure the safety of travellers on its highways, the respondent does owe a duty of reasonable care and diligence in the maintenance of the highways. The Court made an award for damage to a vehicle caused by large potholes, where it was determined that respondent should have discovered and repaired the defect in the road. <i>Shirley G. Burbridge vs. Dept. of Highways</i> (CC-84-71)	190
The Court denied a claim for damage to a vehicle which occurred on a section of highway maintained in poor condition as the Court determined	

from the evidence that the vehicle was sliding already when it went into the rough area. *Charles David Carpenter vs. Dept. of Highways*. (CC-84-217) . 291

A claim for damage to a vehicle which struck a slab of cement which was hidden by grass was denied as there was no evidence that the respondent owned or placed the slab at the accident site, nor that it was on respondent's right of way. *Michael R. Carpenter vs. Dept. of Highways* (CC-83-299) 157

A claim for personal injuries which occurred when claimant's vehicle went over a retaining wall on an interstate was denied as the Court determined it would be pure speculation to hold that snow stored against the retaining wall was the proximate cause of the vehicle leaving the highway. *Sandra Kay Cassidy and Brooks Cassidy vs. Dept. of Highways*. (CC-78-160) 177

The Court determined that claimant's decedent, who had knowledge of the unsafe condition of the berm, was negligent and under the doctrine of comparative negligence, the Court reduced the award. *Stella Cecil, Administratrix of the Estate of O'Dell M. Cecil, deceased vs. Dept. of Highways* (CC-79-458) 73

The Court held that respondent has a duty to maintain the berm of a highway in reasonably safe condition for use by a motorist when the occasion requires. The respondent knew or should have known of the unsafe condition of the berm at the site of claimant's decedent's accident and was liable for failing to maintain the berm. *Stella Cecil, Administratrix of the Estate of O'Dell M. Cecil, deceased vs. Dept. of Highways* (CC-79-458) ... 73

An award was made for damage sustained by claimant's vehicle where the evidence established that respondent should have known of the existence of the pothole due to its size. *Myrtle Craddock vs. Dept. of Highways* (CC-84-56) 158

The Court denied a claim where a vehicle struck a raised expansion joint in the highway as the respondent had no actual or constructive notice of the defect. *Donna G. Crittendon vs. Dept. of Highways* (CC-84-49) 148

The Court denied a claim for damages arising out of an automobile accident which occurred when the driver attempted to avoid striking rocks in the road as the Court determined that there was not a sufficient amount of time for respondent to act to remove the rocks from the road. *Gary Lynn Daniels, Individually and Gary Lynn Daniels, as Administrator of the Estate of Mary Ellen Daniels; Alberta Daniels, In Her Own Right; and Brian Kelly Daniels, By His Next Friend, Alberta Daniels vs. Dept. of Highways*. (CC-81-66) 292

An award was made for damage to claimants' vehicle which occurred on Interstate 64 when the vehicle struck a reinforcing rod as the parties stipulated the facts and the amount of damages. *Larry R. Dexter and Sharon K. Dexter vs. Dept. of Highways* (CC-83-310) 88

A vehicle which was damaged when a roadway gave way and the vehicle rolled into a creek, the Court made an award for damage to the vehicle as the respondent was negligent in failing to provide sufficient room for the passage of the vehicle around a construction area. *Erie Insurance Exchange, Subrogee for Joseph E. Martin and Goldie J. Martin, and Joseph*

<i>E. Martin and Goldie J. Martin, Individually vs. Dept. of Highways.</i> (CC-81-82)	261
Where the claimant testified that she was reimbursed for the full amount of damage to her vehicle by her insurance company, the claimant sustained no actual loss and the Court denied the claim. <i>Kelly L. Fisher vs. Dept. of Highways</i> (CC-84-90)	192
A wrongful death claim was denied after consideration of claimant's evidence as the Court determined that there was no proximate cause between the alleged poor maintenance of a guardrail and the accident which occurred causing the death of claimant's decedent. <i>Shirlene Sue Godbey, Individually and Shirlene Sue Godbey, Administratrix of the Estate of Robert Eugene Godbey, Deceased vs. Dept. of Highways.</i> (CC-83-295)	294
The Court denied a claim for damage to a vehicle which struck a pothole as the claimant did not establish by a preponderance of the evidence that the respondent had sufficient time in which to correct the defect. <i>Earl B. Hager vs. Dept. of Highways.</i> (C-84-148)	239
The Court made an award to claimant for a windshield cracked by cinder material which came off of respondent's truck, as the Court applied W. Va. Code §17C-17-6(b) which provides that it is unlawful to operate a vehicle with a load unless the load is secured. <i>Max B. Harbert vs. Dept. of Highways</i> (CC-84-114). (For the same principle as enunciated in the above headnote, please see: <i>Carol L. Bolyard vs. Dept. of Highways</i> (CC-84-113) at page _____.)	190
The Court held that the unexplained falling of rocks onto a highway, without a positive showing that respondent knew or should have known of a dangerous condition, is insufficient to justify an award. <i>Danny K. Hatfield vs. Dept. of Highways</i> (CC-84-72)	168
A claim for damage to a vehicle which occurred at a construction site on I-64 was denied by the Court as the Court determined that claimant's vision was obscured and this was the proximate cause of the accident. The claimant was unable to see a lit arrow sign as a camper vehicle was in front of the claimant. <i>Kenneth D. Hatfield vs. Dept. of Highways.</i> (CC-84-268)	295
The Court denied a claim for damage to a vehicle which occurred when the vehicle was driven off the road as the Court determined that the negligence of the driver was equal to or greater than any negligence of the respondent as there appeared to be sufficient room for two vehicles to pass on the road. <i>Carlisle L. Hedrick and Robert L. Hedrick vs. Dept. of Highways.</i> (CC-83-137)	288
The Court made an award to claimant for damage to his vehicle which struck a loose metal strip which extended across the highway where the parties stipulated the amount of damages. <i>George B. Hissom vs. Dept. of Highways</i> (CC-84-12)	90
An award was made for damage to a vehicle sustained when a piece of concrete fell due to negligent maintenance of a bridge. <i>Clyde Holloway, as the next friend of Kay Lee Holloway vs. Dept. of Highways.</i> (CC-83-12) . . .	33
The Court made an award for damages to a vehicle where it determined that the respondent had constructive notice of the pothole based upon the	

dimensions of the pothole described by the claimant, as the pothole could not have developed over night. *Dianna Rinehart Jones vs. Dept. of Highways*. (CC-84-126) 244

A claim for damage to a vehicle which went over a boulder which was a part of the road was denied by the Court as the presence of the boulder was not due to the acts or omissions of the respondent, but was a pre-existing condition of the road. *Mary P. Kelly vs. Dept. of Highways* (CC-82-303) 14

As no evidence of notice was presented to establish that the barrel in the highway struck by claimant's vehicle was there due to negligence on the part of the respondent, the Court denied the claim. *James D. Kittle vs. Dept. of Highways* (CC-84-36) 194

An award for damage to a tractor trailer truck was made when the evidence indicated that respondent had knowledge of the condition of the road and failed to post warning signs or weight limitation signs. *Elsie Mast and Elsie Mast & Willis Mast, d/b/a Willis Mast Livestock Trucking vs. Dept. of Highways* (CC-80-371) 59

A claim for damage to a vehicle which occurred when the vehicle slid on coal deposits extending onto the surface of the road was granted by the Court as the testimony indicated that the condition was of long-standing duration and the respondent should have learned of its existence and taken corrective measures. *Elliott E. Maynard, III vs. Dept. of Highways* (CC-83-6) 35

A claim for damage to a vehicle which struck a pothole in a construction area on a highway was denied as the negligence on the part of the respondent was equaled or exceeded by that of the claimant. *J. Douglas Mundy and Karen J. Mundy vs. Dept. of Highways* (CC-83-183) 28

An award was made for damage to claimants' vehicle which struck a pothole on Interstate 64, where it was apparent that the pothole could not have developed overnight and respondent was negligent in failing to repair it. *Brenda Ann Poole and Michael Ray Poole vs. Dept. of Highways* (CC-83-204) 65

The Court made an award for damages to claimant's vehicle when the vehicle slid on pavement which was slippery when wet due to some unknown substance in the road. The respondent failed to establish that the road was free from defects and negligently failed to take corrective action. *Regina M. Rhoads vs. Dept. of Highways* (CC-84-46) 221

The Court determined that respondent's failure to erect warning signs of rough road ahead or to correct a dangerous condition constituted negligence which proximately caused the accident and resulting injury to the claimant. *Theresa Ritz vs. Dept. of Highways*. (CC-83-11) 246

The Court denied a claim for damage to a vehicle as the Court determined that the claimant was travelling too close to the vehicle in front of him and did not allow himself sufficient time to see and avoid the pothole which was the vehicle struck. This negligence was equal to or greater than respondent's under the doctrine of comparative negligence. *Keith B. Sayre vs. Dept. of Highways* (CC-84-174) 222

That the respondent had actual or constructive notice of the existence of a pothole in the road must be established in order for the respondent to be found guilty of negligence. *Frances P. Sheppard vs. Dept. of Highways.* (CC-84-162) 248

A claim for damage to a vehicle which struck a piece of concrete in a roadway was denied as the respondent did not have notice of the defect. *E. Milton Thompson, Jr. vs. Dept. of Highways* (CC-83-351) 161

The Court determined that the respondent was 60% negligent for not having constructed warning signs or devices where a new surface covered pre-existing highway lines which prevented claimant’s driver from observing an off ramp causing him to subsequently jackknife a tractor-trailer. *Tucker’s Used Cars, Inc. vs. Dept. of Highways.* (CC-82-161) 282

The Court denied a claim for personal injuries to a bicyclist who slid in debris on a roadway, as the Court could not make the assumption that the debris was on the road due to actions by the respondent. *Johnnie L. Turner and Beverly J. Turner vs. Dept. of Highways.* (CC-77-88) 185

The Court denied a claim for damage to claimant’s truck which occurred when rocks fell onto the road, striking the vehicle. The Court determined that the respondent took precaution to protect the traveling public from falling rocks, when it constructed the highway. *Venezia Hauling, Inc. vs. Dept. of Highways.* (CC-84-69) 305

The Court made an award for damages to a vehicle which occurred when the vehicle struck a pothole as the Court determined that, although there was no evidence that respondent had actual knowledge of the existence of the defect, it had constructive notice. *Amelio J. White vs. Dept. of Highways.* (CC-84-171) 224

The Court denied a claim for damage to a vehicle which occurred when the vehicle struck lane dividers on a highway as there was no evidence presented to indicate that the dividers were improperly placed or that the divider which the vehicle struck was defective. *Richard A. Wilson vs. Dept. of Highways.* (CC-84-262) 290

TAXATION

The Court made an award for unemployment compensation tax owed by the respondent as the amount owed by respondent was not certified to the State Auditor within the proper fiscal year during which the amount should have been paid. The Court denied the interest. *Department of Employment Security vs. Board of Regents.* (CC-84-313). (See also Unemployment Compensation Tax notes.) 260

The Court made an award for taxes paid on draft beer which was later destroyed due to the fact that it would be unjust enrichment for the State. *Central Distributing Co., Inc. vs. Beer Commission.* (CC-84-324) 234

An award was made for taxes paid to respondent on a stock of wine which claimant did not sell due to its withdrawal from the business of selling wine. *Central Beverage Distributors, Inc. vs. Alcohol Beverage Control Commission.* (CC-84-325) 234

TREES AND TIMBER

Claimant's claim for damages to various electrical appliances damaged when a fallen tree limb struck a power line resulting in a power surge in her house was denied where the evidence was in conflict as to whether the tree was alive. *Martha E. Faulkner vs. Dept. of Highways.* (CC-83-179) 123

An award was made for claimants' pine tree which was killed when respondent placed Torodon 10-K pellets, used to kill multiflora rose bushes, near the tree. *Charles D. Stout and Joyce L. Stout vs. Dept. of Highways.* (CC-83-164) 53

TRESPASS

The Court denied a claim wherein claimant alleged that survey markers were bent over by employees of the respondent. There was no evidence that the accuracy of the markers was compromised. *Benjamin F. McKinley and Barbara A. McKinley vs. Dept. of Highways.* (CC-81-452) 171

A claim for damage to claimant's real property was awarded by the Court as the parties stipulated that the respondent damaged claimant's property while performing maintenance on a road. *William G. Poling and Delores J. Poling vs. Dept. of Highways.* (CC-80-264) 37

The Court granted an award for damage to a haybaler where respondent's negligence in digging a hole on claimant's property was the proximate cause of the damage. *Peter Yerkovich, Jr. vs. Dept. of Highways.* (CC-82-224) 30

UNEMPLOYMENT COMPENSATION TAX

The Court made awards for the amounts of unemployment compensation tax owed by various respondent state agencies to claimant. *Dept. of Employment Security vs. Board of Regents.* (CC-83-320a-f) 80

See also:

Dept. of Employment Security vs. Civil Service Commission (CC-83-321) 81

Dept. of Employment Security vs. Dept. of Banking (CC-83-322) 81

Dept. of Employment Security vs. Dept. of Corrections (CC-83-323a-e) 82

Dept. of Employment Security vs. Dept. of Culture & History (CC-83-324) 83

Dept. of Employment Security vs. Dept. of Health (CC-83-325a-e) 83

Dept. of Employment Security vs. Dept. of Labor (CC-83-326) 84

Dept. of Employment Security vs. Dept. of Mines (CC-83-327) 84

Dept. of Employment Security vs. Farm Management Commission (CC-83-328) 85

Dept. of Employment Security vs. Human Rights Commission (CC-83-330) 85

Dept. of Employment Security vs. Non Intoxicating Beer Comm'n. (CC-83-331) 86

Dept. of Employment Security vs. Railroad Maintenance Auth. (CC-83-332) 86

Dept. of Employment Security vs. Secretary of State (CC-83-333) 87

Dept. of Employment Security vs. State Fire Commission (CC-83-334) 87

The Court made an award for unemployment compensation tax owed by the respondent as the amount owed by respondent was not certified to the State Auditor within the proper fiscal year during which the amount should have been paid. The Court denied the interest. *Department of Employment Security vs. Board of Regents.* (CC-84-313) 260

The Court made an award for unemployment compensation tax owed by the respondent where the respondent admitted the amount and validity of the claim. The Court determined that interest could not be awarded based upon West Virginia Code §14-2-12. *Department of Employment Security vs. Human Rights Commission.* (CC-84-315) 260

WATERS AND WATERCOURSES—See also Drains and Sewers; Flooding

A claim for damage to real property resulting from flooding was denied by the Court, as the Court could not determine that the construction of the Interstate was the proximate cause of the increased runoff, and the Court could not conclude that any acts or omissions of the respondent were the proximate cause of the damages sustained to the property. *Henry Besse & Diana K. Besse and Charles D. Morgan & Penny A. Morgan vs. Dept. of Highways.* (CC-81-216a&b) 40

The common law rule that surface water is considered a common enemy and that each landowner may fight it off as best he can prevails in Virginia and West Virginia with the modification that an owner of higher ground may not inflict injury on an owner of lower ground beyond what is necessary. In applying this law the Court made an award to the claimant for damage to her property resulting from the flow of surface water off a state road. *Sylvia A. Cadle vs. Dept. of Highways.* (CC-83-44) 231

The Court made an award for property damages sustained by the claimant when respondent’s actions in widening the road adjacent to the property resulted in surface water flowing onto claimant’s property which aggravated a slide condition already present. *Sylvia A. Cadle vs. Dept. of Highways.* (CC-83-44) 231

The Court made an award to claimant for damage to his land and septic system which resulted from excessive water being cast upon the land as the result of inadequate maintenance of a ditch line. *Herbert Midkiff vs. Dept. of Highways.* (CC-81-417) 151

Recovery for damage to claimant’s home caused by flooding was denied as the Court determined that no action on the part of the respondent was the proximate cause of the damage. *Karen Sue Nuzum vs. Dept. of Highways* (CC-82-18) 45

WV UNIVERSITY—See Board of Regents