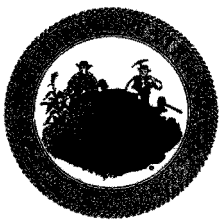
STATE OF WEST VIRGINIA

Report

of the

Court of Claims

1967-1969



Volume

7

STATE OF WEST VIRGINIA

REPORT

OF THE

COURT OF CLAIMS

For the period from September 1, 1967,
to May 1, 1969.

By

CHERYLE M. HALL

Clerk

VOLUME VII

(Published by authority. Code 14-2-25).

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PERSONNEL

OF THE

STATE COURT OF CLAIMS

HONORABLE HENRY LAKIN DUCKER ... Presiding Judge

HONORABLE W. LYLE JONES ..... Judge

HONORABLE A. W. PETROPLUS ..... Judge

CHERYLE M. HALL ..... Court Clerk

CHAUNCEY BROWNING, JR. ..... Attorney General

Letter of Transmittal

To His Excellency

The Honorable Arch Alfred 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 September first, one thousand nine hundred sixty-seven to May first, one thousand nine hundred sixty-nine.

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.

STATE COURT OF CLAIMS LAW

Passed March 11, 1967

CHAPTER 14 CODE

Article 2. Claims Against the State.

§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.

§14-2-3. 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 the 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. The clerk's salary 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.

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 seventy-five 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. 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 accord-

ance 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 wth the clerk. Each claim shall be considered by the court 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 set-off 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.

§14-2-26. 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

STATE COURT OF CLAIMS

(Adopted by the Court
September 11, 1967.)

TABLE OF RULES

Rules of Practice and Procedure

Rules of Practice and Procedure

OF THE

Court of Claims
State of West Virginia

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.

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.

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.

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 re-docket or refuse to re-docket 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 either 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.

(a) Depositions to be read as part of the record in any claim under the regular procedure shall not be taken, recognized or allowed except in accordance with this Rule of the Court.

(b) Before any deposition shall be taken, permission shall be obtained from the Court if in session, or from the Presiding Judge or one of the other regular Judges in the vacation of the Court. Application for such permission shall be made in writing and show good and sufficient reason why the designated witness, whose deposition is sought to be taken, cannot appear and testify before the Court when such claim shall come up in regular order for hearing and investigation.

(c) If such permission is granted to take the deposition of any designated witness, reasonable notice of the 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 a nature as to permit it, they should be read into the deposition.

RULE 15. RE-HEARINGS.

A re-hearing shall not be allowed except where good cause is shown. A motion for re-hearing may be entertained and considered ex parte, unless the Court otherwise directs, upon the petition and brief filed by the party seeking the re-hearing. 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 of the Code of West Virginia, con-

curred 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 the 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.

REPORT OF THE COURT OF CLAIMS
For the Period September 1, 1967 to May, 1968

(1) Approved claims and awards referred to the Legislature, 1968, for the period September 1, 1967 to April 1, 1968:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
B-369	Ansline, Louis	State Road Commission	$ 2,853.37	$ 2,853.37	January 17, 1968
D-30	Armco Steel Corporation	State Road Commission	11,697.34	11,697.34	January 17, 1968
C-37	Asbestos and Insulating Company	Department of Welfare	11,490.38	11,490.38	February 15, 1968
C-37	B & N Plumbing and Heating Company	Department of Welfare	31,875.38	31,875.38	February 15, 1968
B-393	Biggs-Johnston-Withrow	Department of Welfare	4,400.00	4,400.00	January 17, 1968
B-398	Biller, Clifford	State Road Commission	124.00	124.00	December 27, 1967
B-192	Bowman, Irving, etc. and Fred Wiedersum etc.	Department of Commerce	23,582.15	23,582.15	December 27, 1967
B-391	Brown, Ott	State Road Commission	68.25	68.25	December 12, 1967
B-392	Buchanan, Emmett	State Road Commission	102.40	102.40	December 27, 1967
B-280	Buckeye Union Casualty Co. and Melvin O'Brien	State Road Commission	69,023.30	39,775.00	December 27, 1967
B-387	Calhoun, Sam D.	State Road Commission	30.90	30.90	January 17, 1968
B-297	Charleston Concrete Floor Company	State Road Commission	19,794.48	14,500.00	October 30, 1967
B-397	Clark, James D.	State Road Commission	74.62	70.15	January 15, 1968
B-385	Collins, Russell	State Road Commission	58.70	50.00	December 12, 1967
B-384	Collins, Russell	State Road Commission	453.10	453.10	January 17, 1968
B-379	Dotson, Clarence E.	State Road Commission	87.55	87.55	December 12, 1967
C-43	Floor Fashions, Inc. d/b/a Arrow Rug Company	Department of Welfare	7,925.61	7,925.61	February 5, 1968
B-320(a)	Fowler, Hubert	State Road Commission	859.00	859.00	January 17, 1968
C-41	Harris Brothers Roofing Company	Department of Welfare	23,120.65	12,290.65	February 5, 1968
B-395	Hendershott, George C. and Audra H.	State Road Commission	350.79	350.79	December 27, 1967

REPORT OF THE COURT OF CLAIMS (Continued)

(1) Approved claims and awards referred to the Legislature, 1968, for the period September 1, 1967 to April 1, 1968:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
C-39	Hunt Electric Company	Department of Welfare	43,204.18	34,198.83	February 5, 1968
B-377	Hurley, Mary Jane	State Road Commission	800.00	75.00	January 17, 1968
B-331	Kenton Meadows Co., Inc.	State Road Commission	54,384.28	28,535.00	December 12, 1967
B-292	C. J. Langenfelder and Son, Inc.	State Road Commission	296,597.12	269,116.08	December 27, 1967
D-34	McElwee, Charles R.	Department of Welfare	2,700.00	2,700.00	December 27, 1967
C-37	Meeker, Bernard O.	Department of Welfare	7,458.60	7,458.60	February 15, 1968
B-389	Miller, Harry L.	State Road Commission	36.00	36.00	January 17, 1968
C-37	Moore, E. E.	Department of Welfare	1,190.12	1,190.12	February 15, 1968
B-338	Mountain State Construction Company	State Road Commission	67,681.89	67,288.99	December 27, 1967
B-388	Neeley, Marshall	State Road Commission	125.73	125.73	January 17, 1968
C-37	O'Dell, R. W.	Department of Welfare	2,062.14	2,062.14	February 15, 1968
C-37	R. B. Wyatt and Sons, Inc.	Department of Welfare	2,575.00	2,575.00	February 15, 1968
D-43	Remington Rand Office Systems Division, Sperry Rand Corporation	Department of Welfare	13,245.37	13,245.37	January 31, 1968
B-320(a)	Robbins, John	State Road Commission	759.00	759.00	January 17, 1968
B-374	Sargis, Alice and Shual	Adjutant General	12,400.00	3,277.11	January 17, 1968
B-366	Southern Coals Corp.	State Road Commission	14,020.17	3,099.67	October 30, 1967
B-390	State Farm Mutual Automobile Insurance Company	State Road Commission	24.81	24.81	January 17, 1968
C-37	Sturgeon, Worth	Department of Welfare	11,344.86	11,344.86	February 15, 1968
C-37	Swain, Elbert A.	Department of Welfare	2,196.00	2,196.00	February 15, 1968
B-396	Tenny, Delos	State Road Commission	225.00	225.00	January 17, 1968
C-37	W. A. Abbitt Co.	Department of Welfare	87,903.78	87,903.78	February 15, 1968
B-91	Warner, Roy L.	State Road Commission	640.16	640.16	December 27, 1967
B-394	Wood, John L.	State Road Commission	1,450.00	1,450.00	December 12, 1967

REPORT OF THE COURT OF CLAIMS (Continued)

(1-b) Approved claims and awards referred to the Leggislature, 1969, for the period April 1, 1968 to May 1, 1969:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-65	Akers, Everett Lee	State Road Commission	$ 1,000.00	$ 25.00	July 2, 1968
D-36	Albert, Acie W.	State Road Commission	88.07	88.07	July 9, 1968
D-95	Baker & Hickey Co.	State Road Commission	12,320.28	11,151.12	January 27, 1969
C-21	Beasley, Henry A.	State Road Commission	700.00	100.00	July 2, 1968
C-26	Blankenship, Walter L.	State Road Commission	68.61	68.61	April 24, 1968
D-68[1]	Borbely, Leslie	Dept. of Mental Health	600.00	600.00	June 12, 1968
D-35[2]	Byrd, Norma Jean	Dept. of Mental Health	500.00	500.00	June 12, 1968
D-10(a)	C. A. Robrecht Co.	Department of Education	1,720.79	1,687.74	July 9, 1968
D-10(b)	C. A. Robrecht Co.	Department of Education	605.23	646.41	July 9, 1968
D-11	C. A. Robrecht Co.	Dept. of Mental Health	170.78	170.78	May 24, 1968
D-12	C. A. Robrecht Co.	Dept. of Mental Health	202.72	135.96	July 12, 1968
D-14	C. A. Robrecht Co.	Dept. of Mental Health	95.94	83.75	July 2, 1968
C-27	Central Asphalt Paving Company	State Road Commission	47,777.27	16,483.75	July 2, 1968
C-28	Central Asphalt Paving Company	State Road Commission	13,363.16	10,600.00	July 2, 1968
D-15	Chamberlain, Warren and Justine	State Road Commission	110.16	110.16	July 2, 1968
D-78	Chapman, Peter	State Road Commission	73.24	73.24	October 16, 1968
D-6	Charleston Concrete Floor Company	State Road Commission	24,680.35	9,713.78	June 5, 1968
D-105	Charleston Construction, Inc.	State Road Commission	2,412.19	1,245.95	January 27, 1969
D-33	Chatfield, Katharine	State Road Commission	247.07	247.07	July 2, 1968
D-86	Chesapeake & Ohio Railway Company	State Road Commission	212.01	212.01	November 8, 1968
C-7	City of Morgantown	Adjutant General	180.00	150.00	May 16, 1968
D-82	Columbia Ribbon and Manufacturing Co.	Department of Finance and Administration	94.94	94.94	October 16, 1968
C-2	Curry, William and Mary E.	State Road Commission	2,275.56	2,106.71	June 5, 1968

REPORT OF THE COURT OF CLAIMS (Continued)

(1-b) Approved claims and awards referred to the Legislature, 1969, for the period April 1, 1968 to May 1, 1969:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-85	DeBolt, Mary Ann	Dept. of Mental Health	400.00	177.42	October 16, 1968
D-131	Deskins, Thornton	State Road Commission	200.00	100.00	January 28, 1969
D-62	Dotson, C. L.	State Road Commission	23.00	23.00	September 9, 1968
D-64[3]	Earles, Louis A.	Dept. of Mental Health	500.00	500.00	June 12, 1968
D-29	Elmore, Clarence C.	Alcohol Beverage Control Commission	803.79	803.79	May 24, 1968
D-20	Eureka Pipe Line Co.	Dept. of Natural Resources	6,741.99	6,741.99	May 24, 1968
D-9	Federal Insurance Company and Raymond T. Dalton	State Road Commission	677.33	677.33	May 16, 1968
C-13	Doran Frame, d/b/a Doran Frame Electrical Contractors	State Road Commission	3,801.73	3,801.73	May 16, 1968
D-7	Gano, W. E., Sr.	State Road Commission	16.48	16.48	May 16, 1968
D-136	Gordon, Richard	State Road Commission	646.77	646.77	January 28, 1969
D-32	Greene, J. E.	State Road Commission	6,317.90	6,008.45	September 9, 1968
D-109	Hass, J. I.	State Road Commission	94,272.93	23,108.00	February 24, 1969
C-16	Haynes Construction Company	State Road Commission	283,825.56	144,349.53	October 16, 1968
D-18	Haynes, J. C.	State Road Commission	7,053.59	4,033.76	January 27, 1969
D-42	International Business Machines Corporation	Department of Finance and Administration	7,882.03	7,882.03	July 2, 1968
D-143	Jordon, Lawrence V.	Department of Education	272.14	272.14	January 28, 1969
D-50	Keith, Kenneth G.	State Road Commission	52.53	52.53	July 2, 1968
D-38	Kucera, Charles J. and Josephine Ann	State Road Commission	75.00	75.00	November 8, 1968
C-10	Laird Office Equipment Company	State Road Commission	1,026.54	1,026.54	May 15, 1968
D-73	Lewis, Mr. and Mrs. James P.	State Road Commission	177.35	177.35	December 9, 1968
D-135	Lopez, Vincent	State Road Commission	804.09	804.09	January 28, 1969
D-103	McKinney, Shirley	State Road Commission	94.35	94.35	January 27, 1969

REPORT OF THE COURT OF CLAIMS (Continued)

(1-b) Approved claims and awards referred to the Legislature, 1969, for the period April 1, 1968 to May 1, 1969:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-49	Matheny, James L.	State Road Commission	265.00	240.00	September 9, 1968
C-25	Medley, W. E.	State Road Commission	3,000.00	2,500.00	May 16, 1968
D-100[4]	Mountain State Consultants, Inc.	Workmen's Compensation Fund	7,200.00	7,200.00	January 27, 1969
C-1	National Rubber and Leather Company	State Road Commission	1,016.41	1,016.41	July 12, 1968
D-4	Nickell, Martha J. and Stonewall Casualty Co.	State Road Commission	104.31	104.31	May 16, 1968
D-81	Otis Elevator Company	Department of Finance and Administration	426.61	426.61	October 16, 1968
D-134	Owens, Robert C.	State Road Commission	681.73	681.73	January 28, 1969
D-48	Phillips, Ralph	Aeronautics Commission	1,744.00	1,744.00	July 2, 1968
D-90	Rahall Realty Company	Department of Welfare	45,000.00	40,500.00	January 28, 1969
D-31	Reliance Electric and Engineering Company	Department of Public Institutions	53.54	53.54	May 16, 1968
D-119	Robison, James and Norma	State Road Commission	202.62	202.62	January 28, 1969
D-91	S. J. Groves and Sons Inc.	State Road Commission	47,660.16	17,583.06	February 10, 1969
D-47	Shinn, Lois	State Road Commission	1,400.00	435.00	September 9, 1968
D-2	Smith, Raymond R.	State Road Commission	12,000.00	2,400.00	July 12, 1968
D-21	Southern Coals Corp.	State Road Commission	5,401.31	5,401.31	July 2, 1968
D-141	Southern, George B., Jr.	State Road Commission	316.08	316.08	January 28, 1969
D-115	State Construction Co.	State Road Commission	296,308.28	87,823.61	April 24, 1969
D-5	State Farm Mutual Automobile Insurance	State Road Commission	148.01	148.01	May 24, 1968
D-52	State Farm Mutual Automobile Insurance	State Road Commission	36.05	36.05	July 2, 1968
B-344[5]	Stollings, Marilyn	State Road Commission	10,000.00	10,000.00	January 17, 1968

REPORT OF THE COURT OF CLAIMS (Continued)

(1-b) Approved claims and awards referred to the Legislature, 1969, for the period April 1, 1968 to May 1, 1969:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-70	T & L—Wheeling Plumbing and Industrial Supply Company	Department of Public Institutions	2,275.22	2,275.22	November 8, 1968
D-61	United Air Lines, Inc.	Department of Finance and Administration	512.91	512.91	October 16, 1968
D-127	Vincent, Robert	State Road Commission	181.08	181.08	January 28, 1969
C-24	C. E. Wetherall, d/b/a C. E. Wetherall Company	State Road Commission	15,380.17	5,506.55	July 12, 1968
D-26	Williams, Patrick C.	Department of Vocational Rehabilitation	24.00	24.00	May 24, 1968
D-87	Williams, Prince A.	State Road Commission	88.20	88.20	January 27, 1969
D-73	Wilson, William L.	Department of Public Institutions	31.00	31.00	December 9, 1968
C-15	Wisecarver, Donald L.	State Road Commission	45.00	45.00	April 24, 1968

[1]Borbely, Leslie. Claim paid by Federal funds.
[2]Byrd, Norma Jean. Claim paid by Federal funds.
[3]Earles, Louis A. Claim paid by Federal funds.
[4]Mountain State Consultants, Inc. Claim denied by Court of Claims but awarded by Legislature.
[5]Stollings, Marilyn. Claim denied by Court of Claims but awarded by Legislature.

(2) Approved claims and awards satisfied by payments out of regular appropriations for the biennium: (None.)

(3) Approved claims and awards satisfied by payments out of special appropriations made by the Legislature to pay claims arising during the biennium: (None.)

REPORT OF THE COURT OF CLAIMS (Continued)

(4) Claims rejected by the Court:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
C-5b	Aetna Life and Casualty Company	State Road Commission	$ 84.59	Dismissed	April 8, 1968
C-23	Ashby, Elwin	State Road Commission	102.99	Dismissed	April 8, 1968
D-63	Bache & Co., Inc.	State Tax Commissioner	8,792.03	Disallowed	November 8, 1968
D-67	Bice's Greenhouse	State Road Commission	26.00	Dismissed	May 16, 1968
D-60	Blankenship, Michael	State Road Commission	71.57	Dismissed	April 26, 1968
D-37	Blondheim, Margaret and Randal K.	Department of Public Institutions	50,000.00	Disallowed	November 8, 1968
C-17	Bryant, John E.	State Road Commission	128.46	Dismissed	March 22, 1968
D-77	Cavanaugh Landscaping Company	Department of Natural Resources	583,492.70	Disallowed	January 27, 1969
B-298	Central Asphalt Paving & Concrete Construction Company	State Road Commission	8,418.31	Denied	January 17, 1968
C-29	Central Asphalt Paving & Concrete Construction Company	State Road Commission	23,783.06	Disallowed	May 24, 1968
D-57	Cephas, Charles H.	Department of Public Institutions	50,000.00	Disallowed	September 9, 1968
B-386	Chesapeake and Ohio Railway Company	State Road Commission	96.31	Dismissed	December 27, 1968
D-46	City of Morgantown	Board of Governors of W. Va. University	40,886.22	Dismissed Disallowed	November 8, 1968
B-378	Crowder & Freeman, Inc.	State Road Commission	753.05	Denied	January 17, 1968
D-25	Dave Ellies Industrial Design, Inc.	Dept. of Commerce	7,569.80	Dismissed	April 8, 1968
C-20	Federico, Emanuel	State Road Commission	8,914.50	Disallowed	September 9, 1968
D-1	Freeman, Mrs. Bryan	State Road Commission	55.09	Dismissed	April 8, 1968
D-19	Fuller, Wadie	State Road Commission	500.00	Dismissed	September 9, 1968
D-83	Hammack, Jack E.	State Road Commission	957.00	Disallowed	November 8, 1968
D-76	Harris, Paul N. and Virgie	State Road Commission	20,000.00	Disallowed	December 16, 1968

(4) Claims rejected by the Court:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-22	Harrison, Mr. & Mrs. T. E.	State Road Commission	439.00	Disallowed	September 9, 1968
D-51	Harrouff, Brooks	State Road Commission	50.00	Dismissed	May 16, 1968
D-74	Hockaday, A. K.	State Road Commission	1,014.73	Dismissed	September 9, 1968
D-27	Hott, Gary	Dept. Natural Resources	233.40	Disallowed	June 5, 1968
D-79	Insured Transporters Inc.	State Road Commission	272.31	Dismissed	September 9, 1968
D-23	Interstate Lumber Co.	W. Va. National Guard	2,011.00	Dismissed	April 8, 1968
C-3	Johnson, Harry G. and Ruth M.	State Road Commission	12,000.00	Dismissed	December 9, 1968
C-31	Kerns, Harold	State Road Commission	108.15	Dismissed	March 21, 1968
C-4	Lovejoy, Gilbert and Hevalene	State Road Commission	12,000.00	Dismissed	December 9, 1968
D-72	Marlow, Maurice A.	State Road Commission	20.00	Dismissed	September 9, 1968
D-54	McCoy, Guy E.	Secretary of State and State Auditor	225.00	Disallowed	September 9, 1968
D-75	Meadows, Jimmie	State Road Commission	131.30	Dismissed	September 9, 1968
D-41	Mertz, Michael, Jr.	State Road Commission	500.00	Dismissed	September 9, 1968
D-100	Mountain State Consultants, Inc.	Workmen's Compensation Fund	7,200.00	Disallowed	January 27, 1969
C-8	Nuzum, Mary Ann	State Road Commission	30.00	Dismissed	February 23, 1968
D-24	Oliver, Charles C.	State Road Commission	175.94	Disallowed	September 19, 1968
B-399	Oscar Vecellio, Inc.	State Road Commission	46,564.80	Disallowed	January 17, 1968
B-380	Oxley, Geary	State Road Commission	71.00	Denied	November 1, 1967
C-18	Parrish, Everett L.	Aeronautics Commission	1,650.00	Denied	May 16, 1968
D-59	Powers, Robert Lee	Board of Education	15,000.00	Dismissed	November 8, 1968
C-5	Ramey, C. F., Jr.	State Road Commission	194.53	Dismissed	April 8, 1968
D-8	Roberts, Golda D.	State Road Commission	1,260.80	Disallowed	June 5, 1968
B-375	Short, Teresa Ann by her next friend Mary Louise Short	Department of Public Institutions	10,000	Disallowed	December 27, 1967
D-53	Silvester, Anthony	State Road Commission	128.75	Dismissed	May 16, 1968
C-12	Smith, Lewis W.	State Road Commission	46.35	Dismissed	March 23, 1968

REPORT OF THE COURT OF CLAIMS (Continued)

(4) Claims rejected by the Court:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-66	Smith, Walter Boone	State Road Commission	20.60	Dismissed	May 16, 1968
B-381	State Farm Mutual Insurance Company	State Road Commission	88.79	Disallowed	November 1, 1967
D-55	State Farm Mutual Insurance Company	Department of Public Institutions	1,002.24	Disallowed	September 19, 1968
D-80	State Farm Mutual Insurance Company	State Road Commission	79.26	Disallowed	November 8, 1968
B-344	Stollings, Marilyn	State Road Commission	10,000.00	Disallowed	January 17, 1968
C-11	Swisher, Charles L.	State Tax Commissioner	288.57	Denied	April 24, 1968
D-89	Teer, Nello L.	State Road Commission	19,975.50	Disallowed	January 27, 1969
C-9	Thompson, Delbert, Adm. of Estate of Creola Thompson, dec.	State Road Commission	25,000.00	Disallowed	May 24, 1968
C-22	Webb, Mrs. Rudolph	State Road Commission	900.00	Denied	May 16, 1968

(5) Advisory determinations made at the request of the Governor or the head of a state agency: (None.)

NOTE: Subsections (1), (2), (3), (4), and (5), respectively, of the above table conform to and correspond with the similarly numbered subsections of section 25 of the Court of Claims Law.

OPINIONS

TABLE OF CASES REPORTED

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

Opinion issued October 30, 1967

CHARLESTON CONCRETE FLOOR COMPANY

v.

STATE ROAD COMMISSION

(No. B-297)

A claim for losses sustained by contractor because of delays attributable to State Road Commission, and no fault of contractor, will be approved.

Frank L. Taylor, Jr., for claimant

Theodore L. Shreve, for respondent

Jones, Judge:

This claim was filed before the Attorney General, prior to the creation of this Court; and now comes before the Court upon a stipulation of facts which may be summarized as follows:

In the years 1958, 1959 and 1960, the claimant was awarded contracts by the State Road Commission for the construction of 14 bridges incorporated in the Interstate Route 64 construction project. None of said contracts provided for the payment of labor rates in excess of those specifically set out. The contracts required that the claimant complete the bridges within a specified number of working days after the commencement of the several projects and it is not contended that the claimant failed in this respect. The claimant was not permitted to begin work on said projects until after lapses of time of nine months, seventeen months, three months, four months, fifteen months, thirteen months, ten months, six months, seven months, two months, two weeks, twelve months, nine and one-half months and four months, and on several of the projects the claimant

was required to cease work for periods of several weeks up to one year. The bids were made by the claimant on the basis of the hourly wages prescribed for the claimant pursuant to its contract with the Constructors' Labor Council of West Virginia, Inc., in effect at the time the bids were tendered. The labor contract provided for wage rate increases in January, 1959, 1960 and 1961. The State Road Commission has agreed upon "expected completion dates" for each of said bridge projects; and the applicable labor rates which the claimant was required to pay subsequent to said "expected completion dates" resulted in an increased cost to the claimant under each of the contracts. Had the claimant been allowed to proceed at the time it was awarded each contract the losses would not have occurred. The original claim of the claimant was for the aggregate amount of $19,794.48, and under the stipulation this has been reduced to $14,500.02.

In our opinion the losses sustained by the claimant were caused by the State Road Commission, and were in no way the fault of the claimant; the claim is just and proper; and an award is made to the claimant in the sum of $14,500.02.

Opinion issued October 30, 1967

SOUTHERN COALS CORPORATION

v.

STATE ROAD COMMISSION

(No. B-366)

Conflicting testimony will be considered and weighed, and only that portion of a claim which is proved by a preponderance of evidence will be allowed.

Lee M. Kenna, for claimant

Theodore L. Shreve, for respondent

Jones, Judge:

Originally, this claim was filed before the Attorney General. It arose from a contract awarded to the claimant by The State Road Commission for the construction of a portion of Interstate

Route 64 in Cabell County. The claim is in two parts, and both result from the failure of base course materials to meet specifications.

Claim A is for labor performed and equipment used by the claimant on May 14 and 15, 1964. The claimant contends that on May 13, John W. Miller, Project Engineer for the State Road Commission, informed the claimant's superintendent that the base course material in place between Stations 152 plus 10 and 138 plus 00 was approved for paving. Crews were ordered in, forms were set and preparations for paving were carried on throughout May 14 and 15. According to the State Road Commission Diary, Tom Miller, District Materials Division, visited the project office between 3:45 and 4:30 p.m. on May 15 and composed a letter for the signature of W. A. Cashion, acting project supervisor, directed to the contractor and informing him that the only base course material on the project meeting gradation specifications was that in place between Stations 152 plus 10 and 138 plus 00. At 5:30 p.m. on that day Cashion verbally ordered cessation of all operations. Cashion's letter of May 15, directed to Mr. Howard Lane, Superintendent, Southern Coals Corporation, Huntington, West Virginia, contains three paragraphs, as follows:

> "The Project Engineer of the above project has sent you a letter dated May 13, 1964, that instructed you to remove the base course material from Sta. 152 plus 10 to Sta. 149 plus 00. On May 14, 1964, you complied with these instructions.
>
> However, we must inform you that the only base course material placed on said project that met the gradation requirements was the material placed on May 14, 1964. This material was placed from Sta. 152 plus 10 to Sta. 138 plus 00 in the South Bound Lane. Therefore, in addition to the material you have previously removed, you are required to remove all base course material with the exception of the material placed on May 14, 1964.
>
> We request that this additional material be removed as soon as possible and replaced with specification material."

This letter was delivered after the work in question was done, but it does give credence to claimant's contention that it

proceeded under verbal instructions from the Project Engineer. Miller was not produced as a witness, and there is no evidence that he exceeded his authority. The claimant produced evidence, which is not contradicted, that its loss for work done and equipment used on May 14 and 15, 1964, was $3,099.67. We believe the contention of counsel for the State Road Commission that there was no privity of contract between the claimant and the State Road Commission is not sustained.

After all work was stopped at the end of the day on Friday, May 15, a meeting of the parties was set for Monday, May 18. It then appeared that all of the material in question was noncompliance material relative to specification requirements and the claimant would be required to remove all of the material from the project and replace the same with satisfactory material, or, in the alternative, the project would be shut down until further testing and analysis could be undertaken and concluded. It was agreed that there was a possibility of variations and errors in previous testings, and, mainly at the behest of the claimant, it was agreed that further tests should be made.

The claimant contends that the tests undertaken by the State Road Commission were unreasonably delayed and resulted in losses to the claimant in the sum of $10,920.50 over a period of one-half month. In fact, samples were taken on May 18, and delivered to the Material Controls Division on May 19, and the test results were reported on May 25, five working days after May 18. During the following days, the test results were analyzed, and on May 29 the Project Engineer and the contractor were notified that all results were negative. A letter confirming the results was written on June 2 and was received by the claimant on June 3.

It would appear that this testing was a major undertaking, one involving the entire project and requiring the most thorough testing and anaylsis. The eventual decision eliminated all of the base course materials provided by the claimant as being below standard and all of such material had to be removed from the project and was subsequently replaced. Claimant's witnesses contend that the tests and analyses should not have taken so long; expert testimony for the State Road Commission upheld its contention that the time taken was entirely necessary and reasonable. The situation was engendered by

the claimant; we feel that the State Road Commission acted with reasonable dispatch; and therefore Claim B is denied.

Claim A is allowed and an award is made in the sum of $3,099.67.

Opinion issued December 12, 1967

IRVING BOWMAN, DOING BUSINESS AS IRVING BOWMAN ASSOCIATES, and FREDERIC P. WIEDERSUM, NORMAN J. WIEDERSUM and FREDERIC G. WIEDERSUM, PARTNERS DOING BUSINESS AS FREDERIC P. WIEDERSUM ASSOCIATES

v.

DEPARTMENT OF COMMERCE

(No. B-192)

Vincent V. Chaney, for claimant

Thomas P. O'Brien, for respondent

Jones, Judge:

This claim was filed before the Attorney General of West Virginia on the 27th day of November, 1964. Evidence was taken on the 8th and 13th days of January, 1965, and the claim was submitted for decision on the latter date. No action having been taken prior to the creation of this Court, the claim was set down for further hearing on the 30th day of October, 1967, and at that time it was submitted for decision upon the record theretofore made.

By contract dated August 29, 1962, the Department of Commerce of the State of West Virginia employed International Fair Consultants, Inc., to furnish certain architectural, landscaping design and layout, and engineering services for the erection, construction, equipping and landscaping of an exhibition pavilion on the grounds of the New York World's Fair. By subcontract dated August 29, 1962, entered into with the knowledge and consent of the Department of Commerce, International Fair Consultants, Inc., employed the claimants to furnish all the architectural, landscaping and related services provided for in the prime contract.

The claimants proceeded to furnish the required services, but during the course of their employment, the State of West Virginia cancelled the International Fair Consultants, Inc., contract, and by letter dated April 21, 1964, informed the claimants that the termination of that contract in no way affected their position as architects of record for the Pavilion and that all payments due the claimants under their contract would be forthcoming. Accordingly, the claimants continued to perform the services contracted for and rendered statements for such services, part of which were paid. The invoices which were not paid and which constitute their claim, total the sum of $23,582.15.

Four witnesses were produced by the claimants and their testimony carefully details and describes the services performed and expenses incurred in pursuance of the agreement. The Department of Commerce produced no witnesses and in no way contradicts the claim. The Court is of opinion that the claim is supported by clear and convincing proof, and there being nothing more than token resistance on the part of the Department of Commerce, the Court hereby awards to the claimants the sum of $23,582.15.

Singleton, Judge, did not participate in this decision.

Opinion issued December 12, 1967

KENTON MEADOWS COMPANY, INC.

v.

STATE ROAD COMMISSION

(No. B-331)

John E. Davis, for claimant

John L. Ward, for respondent

Jones, Judge:

This claim originated before the Attorney General of West Virginia and was ready for decision when this Court was created.

The claimant entered into a contract with the State Road Commission, in January 1963, for relocation of a gas pipeline in Wood County at a total contract price of $152,608.25.

Item C of the contract provided for the removal of 12,570 lineal feet of pipeline to be salvaged and owned by the claimant, which was bid at 50 cents per lineal foot or a total of $6,285.00. The claimant proved that it had a firm commitment for the sale of the pipe to be salvaged at $1.00 per foot or $12,570.00. By letter, dated July 11, 1963, E. G. Loser, District Engineer, instructed the claimant not to perform the work under Item C of the contract, setting forth that the bid price for this item was less than 10% of the total contract price and, therefore, not considered to be a major item, and subject to deletion under Section 1.4.2 of the Standard Specifications, Roads and Bridges of the State Road Commission of West Virginia. Said Section 1.4.2 further provides the following:

> "The Commission may omit any item or items, in the Contract, provided that notice of intent to omit such item or items is given to the Contractor before any material has been purchased or labor involved has been performed, and such omission shall not constitute grounds for any claim for damages or loss of anticipated profits. The Commission may omit any item or items shown in the estimate, at any time, by agreeing to compensate the Contractor for the reasonable expense already incurred and to take over at actual cost any unused material purchased in good faith for use for the item or items omitted."

The claimant adds the contract price for Item C of $6,285.00 and the committed sales price of the salvaged pipe of $12,570.00 and contends that Item C involves $18,855.00, which is more than 10% of the total contract price, that it was the low bidder by approximately the amount of income it expected to receive from this item, and that it has been damaged in the amount of $12,570.00 which it expected to profit from this item.

While the Court believes that the part of the contract involved here is the bid figure of $6,285.00, which is less than 10% of the total contract price, and not the total amount that claimant expected to realize from the work performed, plus the anticipated profit from the sale of salvaged pipe to

a third party, the State Road Commission apparently relies primarily on the provision of the Standard Specifications quoted above. The claimant contends that the words, "Before any material has been purchased or labor involved has been performed" are intended to include actions taken by the contractor in reliance upon the contract which would result in financial detriment upon the omission of the item in question. The claimant also says that "The reasonable expense already incurred" is the third party's commitment to pay $12,570.00 for salvaged pipe, and that the State Road Commission could only omit the item by agreeing to pay said amount to the claimant. However, after stretching the language of the specifications as far as it will go, we have to deal with what we consider to be the controlling words of the Section which are: "* * * and such omission shall not constitute grounds for any claim of damage or loss of anticipated profits." The claimant did not show any out-of-pocket loss, but to the contrary, can only point to an anticipated profit of $12,570.00 which certainly is not "material * * *purchased", "labor * * *performed" or "reasonable expense."

Accordingly, the claim arising out of Item C of the contract is denied.

The second part of this claim is more difficult, involving the greater portion of a 530 page record of conflicting testimony taken before the Attorney General, and now before this Court for consideration and decision. The contract provided that "all specifications of welding procedures, materials, equipment, conditions, testing, etc., are to follow and be in strict agreement with the latest ASA-B31.1-1955 Code for Pressure Piping, Section 6, Chapter IV, or API Standard 1104 'Standard for Field Welding of Pipelines'." The contract documents further provide that:

> "The Commission shall be privileged at any time to cut welds from the pipeline for the purpose of testing each welder's work. The first such weld for each welder will be replaced by the Contractor at no cost to the Commission. Welds removed from the line shall be subjected to the same test as the qualification weld. If these tests are satisfactory to the Engineer, the Commission will bear the cost of replacing the weld (except as noted above). If the weld

> does not pass the tests, the Contractor shall bear the cost of replacing the weld, and the welder who made the weld shall be removed from the job."

The State Road Commission employed Robert W. Hunt Company, Engineers, for inspection of materials to be used by the claimant, qualification of welders and determination of fulfillment of API-1104 Specifications. The Robert W. Hunt Company subcontracted the inspection work to Consolidated Testing Laboratories. Trouble between the claimant and Consolidated Testing Laboratories started immediately. The contract between the State Road Commission and the claimant provided that the claimant should begin work within ten days and complete work on the project in ninety calendar days. The claimant commenced work on February 5, 1963, and was ready for inspections on March 27, 1963. Consolidated did not arrive at the project until April 3, 1963, apparently under an arrangement with the State Road Commission that it should commence work on April 2, 1963. The claimant asserts damages for delay and waiting time labor costs of $1,750.00 and delay and waiting equipment costs of $5,014.80, for one week's delay. Thereafter, during the course of the project, Consolidated rejected 133 of 400 welds as not meeting specifications of API-1104, and the claimant consistently contended that the specifications were not properly applied. The claimant protested strongly and frequently to the State Road Commission; and hired independent inspectors who checked much of the rejected work and agreed with the claimant that most of it was acceptable under the API-1104 Code. The claimant urged the State Road Commission to conduct independent tests, and on one occasion, three cut out welds, rejected by Consolidated, were taken to the State Laboratory where they were subjected to destructive tests (admittedly most accurate), and found to be acceptable. Neither Consolidated nor Hunt seemed to be interested in settling the controversy, remaining aloof and uncooperative. Considering the evidence of the claimant's experience and proven ability in the construction of pipelines, the 33-1/3% rejection rate imposed upon the claimant appears on its face to be excessive, and the evidence supports such a conclusion.

While the testimony taken in this case is highly conflicting, we are of opinion that a great many welds were improperly

rejected, that notices of acceptance or rejection were unduly withheld, and that resultant delays were substantial and damaging to the claimant. It also appears to be significant that work contracted to be performed in ninety days required an additional one hundred twenty days for completion, and the State Road Commission expressly waived any penalties for late performance. However, this portion of the claimant's demand, in the amount of $41,361.76, appears to include the complete cost of repairing and replacing all welds rejected by the inspectors and all of the waiting time labor and equipment occasioned by such rejections, which is not fully supported by the evidence. Neither are we convinced that the claimant is entitled to damages in the amount of $6,764.80 for a full week's delay at the commencement of work. A precise mathematical measurement of the claimant's damages is not possible, but we have endeavored to reach a decision that will be fair and equitable. It is our judgment that the claimant, Kenton Meadows Company, Inc., should recover, and we do hereby award to said claimant the sum of $28,535.00.

Opinion issued December 12, 1967

MOUNTAIN STATE CONSTRUCTION CO.,
A WEST VIRGINIA CORPORATION, Claimant,

vs.

THE STATE ROAD COMMISSION
OF WEST VIRGINIA, Respondent.

(Claim No. B-338)

W. T. Brotherton, Jr., Esquire, for Claimant.

Theodore Shreve, Esquire, for Respondent.

Singleton, Judge:

This claim was filed May 17, 1966, with the Attorney General. The evidence of claimant and respondent was taken and the record made before the Claims Examiner for that office at a hearing held November 15, 1966. No opinion was rendered by the Attorney General and the entire record and case file was

delivered to this Court after July 1, 1967, for consideration and decision.

The record discloses that claimant was on January 23, 1959, awarded a contract by the State Road Commission for construction of Mud River Bridge Number 2104 on Interstate 64 in Cabell County, known as Project No. I-64-1 (11)18, for the sum of $329,660.93, to be completed in 225 working days. The work was completed and the bridge opened to traffic in the fall of 1961, although the State Road Commission had disclosed that the bridge rocker on Pier Two was in tipped position. Deterioration or "spalling" of portions of the bridge deck began to appear in the spring of 1962 and this condition accelerated during subsequent months, use of the bridge by traffic continuing. On August 15, 1961, the State Road Commission by letter directed the claimant to reset the Pier Two rocker in question in accordance with plans prepared by the State Road Commission and advised Claimant that the State Road Commission would pay for this work on a "force account" basis. This same letter directed claimant to remove certain sections of the bridge deck affected by the "spalling" and replace same, this work to be done at claimants expense. Claimant protested replacement of portions of the deck at its expense and did not proceed until 1963, when the State Road Commission threatened to invoke the forfeiture provisions of the standard specifications. Claimant then advised the State Road Commission that it would proceed with the rocker correction and would also proceed with the bridge deck replacement, under protest, and file a claim for the replacement costs thereof in accordance with the specifications. At this same time, claimant requested that the State Road Commission join with it in obtaining the services of an independent consultant to evaluate the cause of the deck "spalling". The State Road Commission did not agree, and claimant then advised it would obtain the services of such a consultant at its expense. Claimant was paid for its work in connection with the correction of the Prier Two rocker but not for replacement of the bridge deck, and this claim in the amount of $67,681.89 was filed.

It is claimant's position that:

(1) The tilting of Pier Two resulting in the tipping of the rocker was not the result of faulty construction on its part,

but was due to a shift in the earth fill or to a design failure: and,

(2) That the "spalling" or deterioration of portions of the bridge deck was due primarily from tensile or lateral stresses exerted on the deck by the tilting of pier Two and the subsequent tipping and locking of the rocker, with the salting of the deck during the winters of 1961-62 and 1962-63 contributing to this deterioration.

Respondent contends that the spalling of the bridge deck resulted from poor workmanship and material in the batching, pouring and handling of the concrete.

The reports of both independent consultants were admitted into evidence, the report of Harry Balke, Consultant for the claimant, being marked Claimant's Exhibit No. 1 and the report of C. H. Scholer, Consultant for respondent, being marked Claimant's Exhibit No. 2. The Balke report places the cause for the spalling and deterioration of the bridge deck entirely upon the tilting of the piers, possibly contributed to by the "action of salt through two winters". The report of Scholer, the consultant for the respondent, surmises that inadequate placing and finishing practices by the contractor may have contributed to the poor results secured, but stated that it "is very doubtful if there is sufficient evidence to hold the contractor responsible for the unsatisfactory results". This Scholer report also raises the question as to the reasons for the additional three hours required to pour the Sequence 2 in the north span (the greatest portion of the bridge deck removed) as opposed to the pouring of the other sequences of the bridge deck. The record is silent as to the cause for this delay, and inasmuch as it is the contention of the State that such a delay was a contributing factor to the deterioration of the concrete, it is interesting to note that the engineer for the claimant was not cross examined or questioned at all concerning this issue so as to place any cause for the delay upon the contractor.

Claimant's exhibits Nos. 4, 5 and 6 were the testing reports of the Materials and Testing Labratory of the State Road Commission approving the sand, gravel and cement used in the batching and mixing of the concrete placed by the contractor in the bridge deck. The record discloses that all of the deck

concrete was prepared from these materials and while both consultants raise the question as to the adequacy of the aggregate, it was a material approved by the State Road Commission and specifically approved for use in this project. The evidence further discloses that the bridge deck was poured over a period of a month and a half and that only the sections in the vicinity of Pier Two, the tilted pier with the tipped rocker, deteriorated badly. There was no question, as is pointed out in the report of R. P. Davis, consulting bridge engineer, that an examinawas wrong with the concrete. These photographs were also adtion of the photographs taken of the deck concluded something mitted into evidence and made a part of the record by respondent.

After consideration of the record, the evidence and exhibits offered on behalf of the claimant, and the evidence and exhibits offered on behalf of the respondent, the Court is of the opinion that the claimant constructed the bridge and bridge deck in question in accordance with the plans and specifications, using the materials approved by the State Road Commission, and the mixing and supervision of the placement of said concrete being under the constant control and supervision of inspectors for the State Road Commission; and that other than conjecture that the claimant was guilty of faulty workmanship in the pouring of the deck in question, there is no evidence that the contractor was guilty of any negligence or poor workmanship contributing to the deterioration of the deck. While the Court is of the opinion that it is not incumbent upon the respondent to prove a defense to a claim by a preponderance of the evidence, there must be some evidence to sustain respondent's position where the claimant has made a clear prima facia case for relief. The Court is therefore of the opinion that the claimant has proven by a preponderance of the evidence that a moral obligation on the part of the State of West Virginia exists and that this claim clearly is one that in equity and good conscience the State should discharge and pay. Inasmuch as the reasonableness of the amount requested by claimant for the work and labor performed and materials furnished in the placement of the bridge deck was not questioned by the State Road Commission, it is further the opinion of the Court that the claimant, Mountain State Construction Company, a West Virginia Corporation, should recover, and an award is made

to the claimant in the amount of $67,288.99, the original amount of the claim having been reduced by the Court to reflect the reduction of the Business and Occupation tax rate for contractors from 2.6% to 2%.

Opinion issued December 27, 1967

CLIFFORD BILLER

vs.

STATE ROAD COMMISSION
OF WEST VIRGINIA

(No. B-398)

Thomas P. O'Brien, Assistant Attorney General and

Robert R. Harpold, Jr., Attorney, for respondent.

Singleton, Judge:

This claim was filed before the Attorney General of West Virginia on January 31, 1967, and set on the hearing docket of this Court for November 3, 1967.

Upon the case being called for hearing there was no appearance for the claimant, Clifford Biller. The Assistant Attorney General and the Attorney for the State Road Commission tendered to the Court a letter from George H. Samuels, Director of the Legal Division of the State Road Commission of West Virginia dated October 10, 1967, advising that an investigation of the allegations contained in claimant's petition filed herein had been found to be true and correct and the amount set forth as compensation for damages therein to be reasonable, and that the State Road Commission was willing to stipulate same.

On the basis of this information, there being no objection on the part of the Attorney General, it was the considered opinion of the Court that the facts set forth in the petition do present a claim within the jurisdiction of this Court, and the same are considered stipulated herein between claimant and respondent.

The Court further considered the facts set forth in the petition and the items of damage claimed by the claimant and the Court is of the opinion that said facts as set forth in said petition do constitute a valid claim against the State of West Virginia that in equity and good conscience should be paid; and the Court is of the opinion and it is our judgment that the claimant, Clifford Biller, should recover, and we do hereby award the said claimant the sum of $124.00.

Opinion issued December 12, 1967

OTT BROWN

v.

STATE ROAD COMMISSION

(B-391)

Frederick T. Kingdon, for claimant

Thomas P. O'Brien, for petitioner

Jones, Judge:

The claimant, Ott Brown, alleges that on June 24, 1966, while driving on a state highway between Maben and Saulsville in Wyoming County, he was stopped by a construction crew flagman, employed by the State Road Commission, to await a blast about to be set off along the road, and that the blast was set off by State Road Commission employees and a rock was blown onto the top of claimant's automobile, a 1960 Chevrolet, causing damage in the amount of $68.25. The State Road Commission has stipulated that the facts as alleged are true, that the same constitute negligence, and that the amount of the claim is reasonable.

Therefore, the claimant, Ott Brown, is awarded the sum of $68.25.

Opinion issued December 27, 1967

EMMETT BUCHANAN

vs.

STATE ROAD COMMISSION
OF WEST VIRGINIA

(No. B-392)

Thomas P. O'Brien, Assistant Attorney General and

Robert R. Harpold, Jr., Attorney, for respondent.

Singleton, Judge:

This claim was filed before the Attorney General of West Virginia on December 21, 1966, and set on the hearing docket of this Court for November 2, 1967.

Upon the case being called for hearing there was no appearance for the claimant, Emmett Buchanan. The Assistant Attorney General and the Attorney for the State Road Commission tendered to the Court a letter from George H. Samuels, Director of the Legal Division of the State Road Commission of West Virginia dated October 10, 1967, advising that an investigation of the allegations contained in claimant's petition filed herein had been found to be true and correct and the amount set forth as compensation for damages therein to be reasonable, and that the State Road Commission was willing to stipulate same.

On the basis of this information, there being no objection on the part of the Attorney General, it was the considered opinion of the Court that the facts set forth in the petition do present a claim within the jurisdiction of this Court, and the same are considered stipulated herein between claimant and respondent.

The Court further considered the facts set forth in the petition and the items of damage claimed by the claimant and the Court is of the opinion that said facts as set forth in said petition do constitute a valid claim against the State of West Virginia that in equity and good conscience should be paid; and the Court is of the opinion and it is our judgment that the claimant, Emmett Buchanan, should recover, and we do hereby award the said claimant the sum of $102.40.

Opinion issued December 27, 1967

BUCKEYE UNION CASUALTY COMPANY, A CORPORATION, AND MELVIN O'BRIEN, AN INDIVIDUAL, Claimants,

vs.

STATE ROAD COMMISSION STATE OF WEST VIRGINIA, respondent.

(Claim No. B-280)

Henry C. Bias, Jr., Esquire, for Claimant

Philip J. Sheets, Esquire, for Respondent

Singleton, Judge:

This claim was filed with the Attorney General and the evidence of the claimant and respondent offered and the record made before the Claims Examiner for that office at hearings held on the 30th day of September, 1965, and October 15, 1965. No opinion was rendered herein by the Attorney General and the entire record and case file was delivered to this Court after July 1, 1967 for consideration and decision.

It appears from the record that one E. O. Clower was awarded a contract by the State Road Commission on June 28, 1960 for the construction of approximately seven miles of gravel surfaced access road from Neola to Sherwood Lake in Greenbrier County, designated as Project No. F H 10-A, to be completed in 200 working days for the sum of $319,803.00. Subsequent change orders and engineering cost reimbursement to the State Road Commission resulted in the reduction of this figure to $304,582.41. The project was contracted for under the State Road Commission Standard Specifications, *1952.* E. O. Clower, because of financial difficulties, defaulted under this contract after completing work thereunder valued at $140,856.51 by the State Road Commission. Clower's surety on his performance bond, The Buckeye Union Casualty Company, by contract dated August 31, 1961, engaged Melvin O'Brien to complete the contract. O'Brien thereafter worked during the remainder of the construction season of 1961, the construction season of 1962 and the project was finally completed in Novem-

ber of 1963, although the final estimate and payment on the contract was not made until August 16, 1965. By instrument dated September 27, 1966, Buckeye Union assigned any and all of its interest in this claim to Melvin O'Brien, said instrument having been filed with the Attorney General and included in the file of this proceeding.

This claim is in the amount of $79,200.00 for extra work required of the contractor caused by State Road Commission grade errors; additional compensation over the unit price for a gravel over-run in excess of 40% (11,999.96 cubic yards); compensation for expenses incurred due to unwarranted delay in completion of the project caused by the State Road Commission changes in allowable tolerances in final grades, changes in methods of ascertaining grade, refusal of State Road Commission to permit contractor to do work on project during winter of 1962 that could have been done, and harrassment due to an excessive number of State Road Commission inspectors; expenses incurred in constantly re-grading previously finished work caused by State Road Commission's insistence that the road be constantly open to traffic; and under drain placement expense over and above the contract.

Testimony was offered by claimant O'Brien and his position substantiated generally by his two superintendents on this project. Respondent's chief witnesses were the project engineer, Mr. Pennell and the Assistant District Engineer, Mr. Shaluta. Various exhibits were offered to substantiate the losses sustained by claimant and the contract and specifications were made a part of the record by respondent. While there was some conflict as to the length of roadway removed and then required to be replaced by contractor due to a mistake in grade, there is no conflict in the evidence as to the fact that this mistake was on the part of the State Road Commission. The testimony of the State Road Project Engineer indicates that he felt that the contractor should be paid for this extra work and that it was an oversight on his part that no item was included in the final estimate for this project to cover this expense. (Record—Page 268—Pennell). The big item of damages claimed by the contractor is the $5.80 per cubic yard demanded for the gravel over-run of approximately 40% above the original contract estimate. (11,999.96 cubic yards). The unit price for an over-run

of this percentage is subject to negotiation under the standard specifications covering this project. The unit price called for in the contract was $1.90 per cubic yard, and the State Road Commission paid the contractor for the over-run at this unit price on the ground that he had failed in preliminary negotiations to substantiate any higher costs. While the Court is of the opinion that the contractor did not establish by a preponderance of the evidence that he had sufficient additional costs to warrant payment of the sum of $5.80 per cubic yard for this extra gravel, the Court is of the opinion that the evidence adduced on behalf of the claimant is more than sufficient to substantiate the additional sum of $1.50 per cubic yard. The evidence further discloses this project far exceeded the original estimate of 200 working days for completion. There is evidence to substantiate contractor's contention that he desired to continue some work in 1962 that could have been done despite weather conditions but he was prohibited by the State Road Commission. It is further uncontradicted that the tolerances permitted the contractor in his subgrade and top dressing grade were changed during the course of this contract from a tenth of a foot tolerance in 1962 to a half inch tolerance in 1963, and that the methods of checking these grades and tolerances were also changed from time to time. While it further appears that these changes in procedure were within the authority of the State Road Commission, it is also clear that they could not have been reasonably contemplated by the contractor in his undertaking of this contract, particularly the regrading of the approximately seven miles of roadbed at the completion of the project to conform to the newly established tolerance scale, and the Court is of the opinion that the evidence warrants some additional compensation to the claimant by reason of these changes, delays and extra work.

It is the opinion of the Court that the claimant would have been entitled to some additional compensation as a result of this contract and his performance thereof had this dispute arisen between two private individuals. The claimant did perform his contract, and in the words of Mr. Shaluta, respondent's witness, "whether he was going bankrupt or not, he did do the job and he did it in a proper manner." (Direct examination, Record, Page 288).

After consideration of the record, the evidence and exhibits offered on behalf of the claimant, the evidence and exhibits offered on behalf of the respondent, and the arguments in the record made by counsel for both claimant and respondent, the Court is of the opinion that the claimant has proven a valid claim against the State Road Commission of West Virginia which the State as a sovereign commonwealth should in equity and good conscience discharge and pay; and it is therefore our judgment that the claimant should recover the sum of $12,000.00 for the extra work and losses sustained in the removal and subsequent replacement of considerable length of roadbed due to a grading error on the part of the State Road Commission, additional compensation for the over-run in gravel in the amount of $18,000.00, and additional compensation for extra work and additional costs incurred due to delays occasioned by procedural changes through no fault of the claimant in the amount of $9,775.00, and a total award is hereby made to said claimant in the amount of $39,775.00.

Opinion issued December 12, 1967

RUSSELL COLLINS

vs.

STATE ROAD COMMISSION
OF WEST VIRGINIA

(No. B-385)

Thomas P. O'Brien, Assistant Attorney General and

Robert R. Harpold, Jr., Attorney, for respondent.

Singleton, Judge:

This claim was filed before the Attorney General of West Virginia on December 21, 1966, and the evidence offered on behalf of the claimant and respondent heard by this Court on November 1, 1967.

The claimant was not represented by counsel.

This claim is controlled by the same facts and circumstances applicable to Claim Nos. B-379 and B-384, all rising from blasting operations conducted by the State Road Commission on West Virginia State Route 49, near Lynn, in Mingo County, West Virginia.

It appears from the evidence that the damages to claimant's 1959 Anglia parked near his dwelling house adjacent to the aforementioned state highway on or about August 29, 1966, resulted from blasting operations being conducted by employees of the State Road Commission in accordance with orders from their appropriate supervisors to clear and reduce certain rock formations near to the highway. There is no evidence that the claimant was guilty of any act or omission that contributed to the damage sustained.

It is the opinion of this Court that the claimant has proven his case by a preponderance of the evidence and that this claim in equity and good conscience should be paid by the State of West Virginia.

The evidence as to the cost of repairs to the vehicle involved is conflicting, the claimant offering an estimate prepared by a qualified repair service and the State Road Commission offering evidence by a witness qualified in the field of automobile repairs. Considering all of said evidence relating to the cost of repairs, it is our judgment that the claimant, Russell Collins, should recover, and we do hereby award to him the sum of $50.00.

Opinion issued December 27, 1967

CLARENCE E. DOTSON

VS.

STATE ROAD COMMISSION
OF WEST VIRGINIA

(No. B-379)

Thomas P. O'Brien, Assistant Attorney General and

Robert R. Harpold, Jr., Attorney, for respondent.

Singleton, Judge:

This claim was filed before the Attorney General of West Virginia on December 21, 1966, and the evidence offered on behalf of the claimant and respondent heard by this Court on November 1, 1967.

The claimant was not represented by counsel.

This claim is for damages to a 1956 Chevrolet pick-up truck owned by the claimant which was parked adjacent to West Virginia State Route 49, at or near Lynn, Near Thacker, Mingo County, West Virginia, on or about August 29, 1966, said damages being allegedly caused by blasting operations conducted by employees of the State Road Commission. The evidence of the claimant and that of the respondent indicate that the employees of the State Road Commission were conducting blasting operations for the removal of certain shoulder rock along State Route 49; that as a result of one detonation fragments of rock and debris damaged claimant's vehicle as well as a dwelling house situate near by, and that the blasting operations were being conducted by the said employees of the State Road Commission in accordance with orders issued by their County and District Supervisors. There is no evidence that the claimant was guilty of any act or omission that contributed to the damage sustained.

It is the opinion of this Court that the claimant has proven his case by a preponderance of the evidence and that this claim in equity and good conscience should be paid by the State of West Virginia.

It is, therefore, the judgment of this Court that the claimant, Clarence E. Dotson, should recover, and we do hereby award to said claimant the sum of $87.55.

Opinion issued December 27, 1967

GEORGE C. HENDERSHOTT
AND AUDRA H. HENDERSHOTT

vs.

STATE ROAD COMMISSION
OF WEST VIRGINIA

(No. B-395)

Thomas P. O'Brien, Assistant Attorney General and

Robert R. Harpold, Jr., Attorney, for respondent.

Singleton, Judge:

This claim was filed before the Attorney General of West Virginia on January 31, 1967, and the evidence on behalf of claimants and respondent heard by this Court on November 3, 1967.

The claimants appeared in person to present their claim and were not represented by counsel.

Claimants are the owners of a farm adjacent to West Virginia State Secondary Route 11, in Ravenswood District, Jackson County, West Virginia. On June 15, 1966, employees of the State Road Commission, during the course of cutting and removing trees from the right-of-way of the State of West Virginia, cut a large tree and negligently permitted it to fall upon claimants' barn destroying approximately twelve feet of the barn's roof and breaking rafters therein. Claimants further ask damages for the loss of fifty bales of hay which were stored in the barn and which rotted due to being exposed to rain as a result of the hole in the barn roof. The evidence offered by the claimants clearly established the foregoing facts, and no conflicting evidence was offered by the State Road Commission.

After consideration of the record and the evidence and exhibits offered on behalf of the claimants, the Court is of the opinion that the claimants have proven by a preponderance of the evidence a valid claim against the State Road Commission of West Virginia which in equity and good conscience should be paid; and the Court is of the further opinion and it is our judgment that the claimants, George C. Hendershott and Audra H. Hendershott, should recover, and we do hereby award the said claimants the sum of $350.79.

Opinion issued December 27, 1967

CHARLES R. McELWEE

vs.

DEPARTMENT OF WELFARE

(No. D-34)

Singleton, Judge:

This claim was filed before the Court of Claims on November 14, 1967, there being filed with claimant's Petition a Stipulation of Facts executed and approved by the Claimant, L. L. Vincent, Commissioner of the Department of Welfare of the State of West Virginia and C. Donald Robertson Attorney General of the State of West Virginia, representing the Department of Welfare in this matter. The Petition, as corroborated by the Stipulation of Facts, sets forth that Charles R. McElwee, an attorney, was engaged by Mr. L. L. Vincent of the Department of Welfare of the State of West Virginia, to draft certain legislation for the Department of Welfare in 1966 for presentment to the 1967 Session of the West Virginia Legislature and that the claimant was to be paid for his services on the basis of hours expended and that the hourly rate for compensation was to be Seventeen Dollars and Fifty Cents ($17.50) per hour.

The Petition of claimant as corroborated by the Stipulation of Facts reveals that claimant did perform the services he had been requested to do, and did prepare legislation revising substantially Chapters Nine (9) and Forty-Nine (49) of the Code of West Virginia, all relating to the Department of Welfare of

the State of West Virginia; that he thereafter rendered his statement to the Department of Welfare in the amount of Two Thousand Seven Hundred Dollars ($2,700.00) for the work and services he had performed, it being stipulated by the Attorney General and the Commissioner of Welfare that the charges made by the claimant are fair and reasonable considering the services rendered.

On the basis of the claimant's Petition, the Stipulation of Facts above referred to and filed with this Court, and after examining all of same, it is the considered opinion of the Court that the facts set forth in the Petition do present a claim within the jurisdiction of this Court and the Stipulation of Facts filed as an exhibit with this petition is hereby accepted and approved.

After further consideration of the facts set forth in the Petition and the amount claimed by claimant as compensation for services rendered to the State of West Virginia, the Court is of the opinion that said facts do constitute a valid claim against the State of West Virginia that in equity and good conscience should be paid; and the Court is of the opinion and it is our judgment that the amount claimed as compensation by claimant is fair and reasonable, and that he, Charles R. McElwee, should recover, and we do hereby award the said claimant the sum of Two Thousand Seven Hundred Dollars ($2,700.00).

Opinion issued December 27, 1967

ROY L. WARNER

v.

STATE ROAD COMMISSION
OF WEST VIRGINIA

(No. B-91)

James C. West, Jr., Attorney at Law, Clarksburg, West Virginia for claimant.

Singleton, Judge:

This claim was filed before the Attorney General of West Virginia on November 13, 1962. Claimant alleges in his Petition

that he was the successful bidder and was awarded a water well drilling contract by the State Road Commission of West Virginia to drill a water well in a roadside park on United States Route No. 33, six miles east of Buckhannon, West Virginia. Although the claimant's bid as submitted by him and as evidenced in the record was for Two Dollars ($2.00) per foot for drilling and Two Dollars ($2.00) per foot for casing the well. The advance approval purchase order (not issued until August 24, 1962) provided that the amount to be paid for the well drilling was not to exceed the sum of One Thousand Two Hundred Dollars ($1,200.00).

Claimant commenced on this project on September 20, 1961, and by September 29, 1961, had drilled the well to a depth of 131 feet and had run 111 feet of six inch galvanized pipe into the well. At this point a stream of hard and unpalatable water was encountered, and under the direction of the State Road County Supervisor of Upshur County and Mr. Mendel, State Supervisor of Roadside Parks Development, claimant undertook to pull the pipe so that the well could be drilled deeper and the hard unpalatable water stream blocked. Difficulties were incurred and the claimant moved to another job for which he had previously contracted not connected with the State Road Commission.

In November of 1961 claimant was requested to resume work in the well in question and between November 27 and December 16, 1966, claimant worked an additional thirteen days at the well site on instructions of the State Road Commission representatives attempting to remove the casing by "jarring", running new four inch casing into the well, reaming the hole out deeper trying mudding and cementing operations to stop the flow of unpalatable water, and pulling and replacing the four inch pipe which was down three or four times. The well had now been drilled to a depth of 171 feet, on instructions of the State Road Commission. He then ceased operations and subsequently submitted his invoice to the State Road Commission for One Thousand Eight Hundred Forty Dollars and Sixteen Cents ($1,840.16), which itemized invoice is a part of the record in this proceeding. The State Road Commission, on an appropriate requisition, submitted this invoice for payment to the Budget Division but it was refused by the Budget Divi-

sion inasmuch as the total invoice was in excess of the original One Thousand Two Hundred Dollars ($1,200.00) authorized for this project. The State Road Commission re-submitted an invoice in the amount of One Thousand Two Hundred Dollars ($1,200.00) and this amount was paid to Mr. Warner, which amount he received conditionally with the express understanding that he would pursue his claim for the Six Hundred Forty Dollars and Sixteen Cents ($640.16) for his additional work and labor performed and materials furnished on this project.

As before stated his claim was then filed before the Attorney General and the matter set down for hearing by Philip J. Graziani, Assistant Attorney General, then Claims Examiner. It does not appear from the record, but the Court is advised that no hearing was held for the actual introduction of evidence and that the facts set forth in Mr. Warner's petition were agreed to as correct by the State Road Commission.

Under the procedure then in effect for the processing of claims against the State, the Attorney General's Office recommended to the Legislature that the claim of Mr. Roy L. Warner in the amount of Six Hundred Forty Dollars and Sixteen Cents ($640.16) be paid; this recommendation being made to the 1963 Session of the West Virginia Legislature. Mr. Warner's claim in this amount was included in a claims bill to be considered by the Legislature but that Legislature failed to pass any claims bill.

The file and record in this claim does not disclose any further action in regard to this claim and the file in this matter was turned over to this Court by the Office of the Attorney General after this Court was created July 1, 1967. By letter dated December 13, 1967, James C. West, Jr., attorney for the claimant moved this Court to consider this claim as one pending before the Attorney General at the time of the creation of the Court and that this Court review the file and record and render a decision in this matter.

After considering the file and record in this claim, this Court is of the opinion that this claim was pending before the Attorney General at the time of the creation of this Court and is, therefore, a proper claim to be considered by this Court. Upon

further consideration of all of the records and the exhibits and documents filed with this claim, and the letters of the Attorney General in this file, and further considering the recommendation of the Attorney General that this claim be paid, and the further fact that the State Road Commission originally submitted Mr. Warner's bill for payment of the full amount of Eighteen Hundred Forty Dollars and Sixteen Cents ($1,840.16) this Court is of the opinion that this claim is a just and proper one that the State of West Virginia in equity and good conscience should pay; and it is therefore our judgment that the claimant, Roy L. Warner, should recover, and we do hereby award the claimant the sum of $640.16.

W. Lyle Jones, Judge, did not participate in the consideration of this claim.

Opinion issued December 27, 1967

TERESA ANN SHORT, An Infant, by her next friend,

MARY LOUISE SHORT,

v.

WELCH EMERGENCY HOSPITAL AND THE COMMISSIONER OF PUBLIC INSTITUTIONS OF WEST VIRGINIA

(No. B-375)

Harry J. Capehart, Jr., Attorney at Law, Welch, West Virginia for claimant

Thomas P. O'Brien, Assistant Attorney General for respondent

Singleton, Judge:

This claim was filed December 19, 1966, before the Attorney General of West Virginia and was set down for the taking of evidence before this Court November 1, 1967.

Claimant on behalf of the infant claimant alleges that on or about the 20th day of December, 1964, infant claimant was admitted to Welch Emergency Hospital for a fracture of her

right arm or elbow; that her arm was put into a sling and she was released; that approximately nine days later her arm was encased in a cast at Stevens Clinic Hospital in Welch, West Virginia, and that during the healing of her arm a large lump or knot was formed, requiring in 1967 a surgical open reduction of this fracture performed at the Crippled Childrens Clinic in Charleston, West Virginia, and that all of this difficulty, injury and disfigurement was due to the negligence of Dr. George Riberio and the Welch Emergency Hospital in initially treating her injured arm; and damages are sought for her in the amount of Ten Thousand Dollars ($10,000.00).

The evidence adduced at the hearing from the hospital records reflects that Teresa Ann Short was admitted on December 20, 1964, at 3:35 P.M. and that her mother advised that she had injured her right elbow while playing. Dr. Gomez admitted her to the hospital with a diagnosis of possible fracture and x-rays were taken on the morning of December 21.

Her arm was put in a sling as soon as she was admitted to the hospital and ice compresses applied to the arm to reduce the swelling. The x-rays taken of the infant's arm the next morning, also exhibited at the hearing and examined by Dr. Riberio and the Court show a small supracondylar fracture of the lateral aspect of the humerus with the bones in good position. The evidence further discloses that the arm was not put into a cast but continued to be treated in a sling; and it was shown by Dr. Riberio's testimony that it was the customary and usual treatment for this type of fracture for a four year old infant, inasmuch as their healing ability is excellent, and that a cast was not recommended. The hospital records as introduced into evidence further disclosed that the patient was taken from the hospital on December 22, without being discharged or released; that she was again brought to the hospital on December 28, when the patient was again examined by Dr. Gomez, his notes reflecting there was still some swelling over the elbow and requesting that the patient be returned in one week. The evidence further discloses that Mrs. Short did not return her daughter to the Welch Emergency Hospital at any subsequent time, but that on or about January 4, 1965, she took Teresa Ann Short to the Stevens Clinic where her arm was again x-rayed and then placed in a cast by Dr. J. Hunter Smith. The reports

of the x-rays made at Stevens Clinic on January 4, 7, 8, 28 and May 23, 1967, were not presented at the time of hearing but were subsequently presented by the counsel for the claimant after inspection by the Attorney General to the Court for its consideration.

The only witness for the claimant was the mother. No medical by Dr. Riberio's testimony that it was the customary and usual x-ray reports submitted subsequent to the hearing. Dr. Riberio testified on behalf of respondent, testifying from the x-rays taken of claimant's arm and from the hospital records.

Claimant has alleged negligent treatment on the part of Dr. George Riberio and Welch Emergency Hospital and this negligence is the sole ground for any recovery that she might be entitled to. Viewing all of the evidence in its most favorable aspect regarding claimant, this Court unfortunately can find no direct evidence that the non-union of claimant's fracture was proximately caused by the negligence of Welch Emergency Hospital. Under the evidence in this proceeding this non-union of claimant's fracture and its failure to heal properly could just as well have been caused by the cast applied at Stevens Clinic on January 4, 1965.

This Court, therefore, finds that the claimant has failed to prove by a preponderance of the evidence the justness and merit of her claim based on negligent treatment at Welch Emergency Hospital, and it accordingly is the opinion of this Court that this claim must be and it is hereby denied.

Opinion issued December 12, 1967

JOHN L. WOOD

v.

STATE ROAD COMMISSION

(No. B-394)

W. Hayes Pettry, for claimant

Thomas P. O'Brien, for respondent

Jones, Judge:

This claim is in the amount of $1450 for damages to claimant's buildings situated on State Route No. 3 in Hinton, Summers County, West Virginia, resulting from negligent blasting by the State Road Commission during the period from February to June, 1963. The State Road Commission has stipulated that based on its investigation, the facts alleged by the claimant are true and that the amount claimed is reasonable. The amount of damages is further supported by a written appraisal by a State Appraiser, with approval by the Chief Reviewing Appraiser and the Chief Appraiser for the State.

Accordingly, we hereby award the claimant, John L. Wood, the sum of $1450.00.

Opinion issued January 17, 1968

LOUIS ANSLINE

v.

STATE ROAD COMMISSION
STATE OF WEST VIRGINIA

(No. B-369)

Gary Rymer, Esq. for the Claimant

Thomas P. O'Brien, Assistant Attorney General, and

Robert R. Harpold, Jr., Esq. for the State Road Commission

Ducker, Judge:

Claimant, Louis Ansline, owner of a 1965 GMC dump truck, claims damages in the sum of $2,853.37 to his truck caused by

a collision of a 1959 D500 dump truck, owned and operated by the State Road Commission, with claimant's truck on State Route No. 7 near the village of Sabraton, Monongalia County West Virginia.

The facts as alleged in the claim filed and as testified to by witnesses for the claimant are not disputed and the testimony fully substantiates the allegations both as to the cause of the collision and as to the damages alleged.

The proof shows that claimant's truck was proceeding north on Route 7 toward Morgantown, West Virginia, and the State Road Commission truck was proceeding south on said highway down a slight grade, whereupon the driver of the State Road Commission vehicle applied his brakes, lost control of the vehicle causing it to slide on the highway, the surface of which was then wet, and the State Road Commission truck turned around and around in the highway, crossing the center line and the left-hand lane thereof, and colliding with claimant's truck which by that time was over on the berm of its right-hand side of the highway.

Claimant's total damage amounted to $7,853.37, and in a settlement made by counsel representing all the parties, namely, the claimant, the State Road Commission, and the Buckeye Union Insurance Company as the insurance carrier on behalf of the State Road Commission and its employee driver, negotiated a partial settlement in the sum of $5,000.00, the limits of the insurance policy, which was paid in reduction of the total claim, leaving unpaid the sum of $2,853.37, which is the amount now claimed in the case.

As there is no dispute as to the facts and as it appears that this accident was wholly attributable to the operations of the State Road Commission, we are of the opinion to and do award the claimant the amount of his claim, namely, $2,853.37.

Claim Allowed.

Opinion issued January 17, 1968

ARMCO STEEL CORPORATION,
a corporation,

v.

STATE ROAD COMMISSION
STATE OF WEST VIRGINIA

(No. D-30)

R. Page Henley, Jr.,

Spilman, Thomas, Battle & Klostermeyer,
for the Claimant

Thomas P. O'Brien, Assistant Attorney General,

Robert R. Harpold, Jr. and *Theodore L. Shreve,*
for the State Road Commission

Singleton, Judge:

Claimant, Armco Steel Corporation, filed in this Court on October 31, 1967 its claim for $11,697.34 representing the price of 15,591 feet of Armco full-coated and paved pipe taken over by the State Road Commission from a previous contractor and which the Road Commission delivered to Central Asphalt Paving Company and V. N. Green & Company for use in the construction of a portion of highway Interstate I-64 designated as Project I-64-1 (37) 22.

All the facts were stipulated by counsel for the claimant and counsel for the State, and the only real question for determination is the legal question interposed by the attorneys representing the Road Commission, which question is whether in its final analysis the claim is barred by the statute of limitation.

In 1960, Howard Price & Company was awarded a contract to construct a portion of Interstate I-64 in Cabell County, West Virginia, and that company ordered on a rather uncertain basis from claimant the pipe necessary to complete such work. In 1961, the State Road Commission advised Howard Price & Company that that company would not be permitted to complete the work, and the Road Commission then re-advertised the project and on April 30, 1963 awarded the contract therefor

to Central Asphalt Paving Company and V. N. Green & Company with the express direction and understanding that the latter would not have to include the price of pipe in their bid and that they would not be required to pay for the pipe which had been delivered by claimant and which remained left on the project and unused by Price and which would be turned over to the new contractors. Such pipe was supplied to the new contractors and so used by them in the installation of the same in the summer of 1963. Claimant attempted to obtain judgment against Price in the District Court of the United States for the Southern District of West Virginia, but was denied judgment on the basis that it was not bought by Price but only ordered for use as needed. Whereupon, the claim was filed in this Court on the ground that the State Road Commission had taken the pipe, appropriated the pipe to its own use and furnished the same to the new contractors, and thus had had the benefit of the material, and that therefore the State either by unlawfully appropriating the property or by an implied contract with Armco should pay for it.

The question is whether the claim is barred by the statute of limitation, that is by the two year limitation which applies to actions ex delicto, or whether the five year limitation as to implied contracts controls. Much has been said in the brief of counsel for claimant as to just when the period of the statute begins under this set of facts, and whether the statute has been tolled by the suit in the Federal Court, the inability to make demand of payment because it didn't know as to whom demand should be made upon, and the lack of a Court to determine the question. We believe it unnecessary to determine any question of tolling, as the other facts and law applicable are sufficient for our decision.

It is the contention of the claimant that if the pipe was appropriated and converted by the State Road Commission to its own use without the consent of Armco, such act amounted to a tort. Under the well known principle of law as expressed and applied in *Walker* v. *Norfolk & Western Railway Co.* 67 W. Va. 273, 63 S. E. 722, claimant, as the owner of the pipe according to the decision of the Federal Court, had the right to waive the tort of the Road Commission and to sue on implied contract, and under such circumstances this tortious act, if it were such,

was committed by the State Road Commission in the spring and summer of 1963 when it delivered to or permitted the new contractors the right to use the same and the new contractors so used it for the State Road Commission; and within five years thereafter, namely, October 31, 1967, claimant filed this claim in this Court, and we think that the claimant had the right and now has the right to maintain this action at this time on the basis of implied contract, as the five year statute of limitations is the statute relating to the matter, and that statute has not run.

While the Federal Court did not say whose pipe it was when it was left on the project by Price, it did hold that Price was not liable to claimant for its value, which left the ownership or title to the pipe either in Armco or in the Road Commission, and since the Road Commission either tortiously took it or impliedly contracted with Armco for it, we believe Armco has the right to maintain this action in this Court as a tort waived and on an election by Armco to sue on contract implied by the facts within the five year period of the statute of limitation.

And in addition to the legal rights of the parties, we are of the opinion that the State has received full benefit of the property and is morally obligated to pay the claim, and we do hereby award claimant, Armco Steel Corporation, a corporation, the sum of $11,697.34.

Judge Ducker disqualified himself from participation in the consideration and decision of this case.

Awarded $11,697.34.

Opinion issued January 17, 1967

BIGGS-JOHNSTON-WITHROW

v.

DEPARTMENT OF HEALTH
STATE OF WEST VIRGINIA

(No. B-393)

Thomas P. O'Brien, Jr., Assistant Attorney General, for the Department of Health

Ducker, Judge:

The claimant, Biggs-Johnston-Withrow, a printing firm of Beckley, West Virginia, in accordance with an order received by it from the West Virginia Department of Health for the printing of 5,000 books, seeks payment of its charges therefor in the sum of $4,400.00.

On March 9, 1966, the West Virginia Division of Purchases sent to the claimant an order for the printing of 5,000 books entitled "A Guide for Teaching Dental Health in West Virginia Schools", which order was filled but the charges for such work amounting to $4,400.00 remain unpaid. Upon the hearing of this claim, it was stipulated by the Attorney General that the facts alleged by claimant are true and the amount of the charges therefor is reasonable and correct, and further that the only reason the claim was not paid was because the bill therefor was presented after the close of the fiscal year and funds to pay for the work performed were no longer available after the expiration of such fiscal year.

In view of such state of facts, there seems no reason for a denial of claimant's right to have payment of its claim.

We are of the opinion to and do hereby award the claimant the sum of $4,400.00.

Claim Allowed.

Opinion issued January 17, 1968

SAM D. CALHOUN

v.

STATE ROAD COMMISSION
STATE OF WEST VIRGINIA

(No. B-387)

Claimant present in person

Thomas P. O'Brien, Assistant Attorney General, and

Robert R. Harpold, Jr. for State Road Commission

Ducker, Judge:

Sam D. Calhoun claims damages to his 1965 Chevrolet by reason of the State Road Commission dropping gravel and cinders on his car when the Road Commission was cleaning drain pipes on a bridge.

The claim which had been filed with the Attorney General was heard by this Court on the stipulation by the parties that the facts as alleged in the petition were true and that the amount of the damages was correct and reasonable.

We are of the opinion, therefore, to allow the claim, and we hereby make an award to the said Sam D. Calhoun in the sum of $30.90.

Award of $30.90.

Opinion issued January 17, 1968

CENTRAL ASPHALT PAVING COMPANY

and

V. N. GREEN AND COMPANY, INC.

v.

STATE ROAD COMMISSION

and

STATE OF WEST VIRGINIA

(No. B-298)

Frank L. Taylor, Jr., Esq. for claimants

Theodore Shreve, Esq. for State Road Commission

Ducker, Judge:

The claimants, Central Asphalt Paving Company and V. N. Green and Company, Inc., filed their claim against the State Road Commission with the Attorney General of West Virginia on November 18, 1965, by virtue of the authority so granted under Chapter 14, Article 2, of the Code of West Virginia, for the payment of labor and materials furnished under Road Project No. S-661(8), Raleigh County, West Virginia, in the sum of $8,418.31, which claim after the taking of evidence by and before the Attorney General was pending for decision by this Court when it acquired jurisdiction of the same.

The Claimants were awarded an original contract dated May 6, 1963 for the laying of concrete for the road embraced in the project, and the present claim arose out of a Supplemental Agreement or Change Order dated July 13, 1964 which, among other things, provided that the asphaltic wearing course was to be reduced from 110 pounds per square yard to 80 pounds per square yard and that an experimental wearing course was to be added to the one originally specified, which additional wearing course was to consist of hot laid asphaltic concrete placed in accordance with specifications in an amount equal to 220 pounds per square yard, such work to form the basis for an experiment then being conducted by West Virginia University. Claimants

were to be compensated $649.06 per hour for actual working time expended in the "application" of the hot laid asphaltic concrete to the experimental course.

No question is presented as to the quality of the work done or as to the proper fulfillment of the contract. The only question presented here is as to the number of hours involved and consequently the amount of compensation for such work. The claimants' number of hours was calculated by them as 71.5 hours, which at the contract price amounted to $46,407.79, but the Road Commission calculated the time as 58.53 hours for which it paid claimants the sum of $37,989.48, making a difference of $8,413.31 in the amounts, which latter amount the claimants now seek to recover.

The difference arises by reason of the time alloted for the work in preparing the paver equipment for operation, called "start-up" time spent on it at the beginning of each day and the "clean-up" time spent on it at the end of each day. The claimants claim an hour and a half at the beginning and the same amount of time at the end of a day, but the Road Commission allowed and paid for only a half hour at the beginning of each day and the same amount of time at the end of each day. Settlement on the latter basis was made by the Road Commission because it determined that to be a reasonable adjustment of the controversy, and it was willing to do so because it recognized there was some conflict in the wording of the Supplemental Agreement as to just what was understood or intended by the word "application" of the concrete work. On the one hand "application" was to be construed as meaning only the time devoted to "spreading and finishing," while on the other hand it was to be construed as covering in addition to time devoted to spreading and finishing all other time involved in the work. The Road Commission concluded that some adjustment should be made and so concluded to allow a half hour as start-up time and a half hour for clean-up time.

From the exhibits filed both by the claimants and by the State Road Commission we find it difficult, if not impossible, to determine with any degree of accuracy just what is the correct amount of time so involved in start-up and clean-up time, and we believe the matter was one which was properly a subject for adjustment.

The State Road Commission's Exhibit No. 1, filed in the record with the transcript of the evidence, is a letter dated December 10, 1964 from Mark Fara, Research Manager of the Road Commission, to Russell Quinn, District Engineer, District 10, giving recogniton to the fact that there could have been some misunderstanding as to the meaning of the word "application" and that the Road Commission wanted to pay for such amount of time as was just and fair for start-up and clean-up time, and that according to experience of said Road Commission official an allowance of a half hour a day for start-up and a half an hour a day for clean-up time would be fair, and for that reason and on that basis the claimants were paid, and we agree with such conclusion and consider such settlement as fair and equitable.

In reviewing all the evidence in this claim, the Court is of the opinion to and it is our judgment that the claimants, Central Asphalt Paving Company and V. N. Green and Company, Inc., are not entitled to an award upon their claim, and that their claim filed herein should be and is hereby disallowed.

Claim Disallowed.

Opinion issued January 17, 1968

JAMES D. CLARK

vs.

STATE ROAD COMMISSION

(B-397)

Thomas P. O'Brien, Assistant Attorney General and

Robert R. Harpold, Jr., Attorney, for respondent.

Jones, Judge:

This claim was filed before the Attorney General of West Virginia on January 31, 1967 and the evidence of the claimant, who was not represented by counsel, was heard by the Court on November 3, 1967. No evidence was offered by the respondent.

Early in the morning of December 2, 1966, the claimant was driving his 1965 Volkswagen sedan along State Route No. 75 near Buffalo in Wayne County, West Virginia. The road and bridge over Twelve Pole Creek were covered with snow and ice, and the claimant was traveling at a moderate rate of speed. The claimant had traveled this road and bridge, morning and evening, for 9 or 10 years, and he had no knowledge of any defect in the bridge.

As the claimant crossed the bridge, a piece of the black top floor fell out and a rear wheel of the claimant's automobile fell through the hole, causing considerable damage to the vehicle. There is no evidence that the claimant was guilty of any act or omission that contributed to the damage sustained. The claimant paid $70.15 for repairs.

It is the opinion of the Court that the claimant has proven his case by a preponderance of the evidence and that this claim in equity and good conscience should be paid by the State of West Virginia.

It is, therefore, the judgment of the Court that the claimant, James D. Clark, should recover and he is hereby awarded the sum of $70.15.

Opinion issued January 17, 1968

RUSSELL COLLINS and DAVID GRIFFEY

vs.

STATE ROAD COMMISSION

(B-384)

Thomas P. O'Brien, Assistant Attorney General, and

Robert R. Harpold, Jr., Attorney, for respondent.

Jones, Judge:

This claim was filed before the Attorney General of West Virginia on December 21, 1966 and the evidence offered on behalf of the claimant and the respondent was heard by the Court on November 1, 1967.

Originally, the claim was filed in the name of Russell Collins, but thereafter, because of a question of ownership of the damaged property, an attempt was made to amend the claim by substituting the name of David Griffey as the claimant. Russell Collins, not being represented by counsel, appeared in person and testified at the hearing; and no appearance was made by or on behalf of David Griffey. Upon the taking of testimony, it became apparent to the Court that Russell Collins was the true claimant, and, therefore, any claim which David Griffey may have is hereby disallowed, and consideration by the Court is given only to the claim of Russell Collins.

This claim is controlled by the same facts and circumstances applicable to Claims Nos. B-379 and B-385, all arising from blasting operations conducted by the State Road Commission on West Virginia State Route No. 49, near Lynn, in Mingo County, West Virginia.

It appears from the evidence that on or about August 29, 1966 damage to the claimant's dwelling house resulted from blasting operations conducted by employees of the State Road Commission pursuant to orders from their superiors to clear and reduce certain rock formations near the highway. Rocks and debris thrown by the blasting fell on the claimant's dwelling house causing substantial damage to the roof, siding, gutters and spouting. There is no evidence that the claimant was guilty of an act or omission that contributed to the damage sustained.

It is the opinion of the Court that the claimant has proven his claim by a preponderance of the evidence, and that in equity and good conscience the same should be paid by the State of West Virginia.

An estimate of the cost of necessary repairs in the amount of $453.10, made by Matewan Lumber Company, appears to the Court to be fair and reasonable; and it is the judgment of the Court that the claimant, Russell Collins. should recover and he is hereby awarded the sum of $453.10.

Opinion issued January 17, 1968

CROWDER & FREEMAN, INC.

vs.

STATE ROAD COMMISSION

(No. B-378)

Thomas P. O'Brien, Assistant Attorney General and

Robert R. Harpold, Jr., Attorney for respondent.

Jones, Judge:

This claim was filed before the Attorney General of West Virginia on December 21, 1966.

At the hearing held by this Court on November 1, 1967, the claimant appeared by its Vice President and Secretary, W. J. Freeman, Jr., and was not represented by counsel.

This claim is for damages to the windshields of seven used cars, ranging from a 1960 Pontiac to a 1964 Cadillac, owned by the claimant and located upon claimant's used car lot on Route 460 between Princeton and Bluefield, alleged to have been caused by blasting operations conducted by employees of the State Road Commission. It is contended by the claimant that all of the windshields were pitted by debris thrown by a dynamite blast on the opposite side of the highway. Damages claimed are for the installation of seven new windshields at a total cost of $753.05. The windshields were not installed and the claimant alleges that the cars were sold at prices reduced by the cost of new windshields.

The testimony of W. J. Freeman, Jr., for the claimant and Floyd Tolliver and J. S. McNulty for the respondent was generally conflicting; and upon consideration of all of the evidence, it is our opinion that the claimant failed to prove its claim by a preponderance of the evidence. Therefore, it is our judgment that this claim should be and it is hereby disallowed.

Opinion issued January 17, 1968

MARY JANE HURLEY

v.

STATE ROAD COMMISSION
STATE OF WEST VIRGINIA

(No. B-377)

Claimant present in person.

Thomas P. O'Brien, Assistant Attorney General, and

Robert R. Harpold, Jr., for State Road Commission

DUCKER, JUDGE:

Claimant alleges that the State Road Commission in widening and re-surfacing State Route No. 5 at Williams Mountain in Boone County, West Virginia, cut away stone steps which provided access to claimant's property, and while her claim which had been filed with the Attorney General set out no specific amount of damages, a later amended claim stated the amount to be $800.

Upon the hearing of the case before this Court, the testimony showed that on an indefinite date a number of years ago the Road Commission in re-grading the road within its right of way did damage to claimant's fence and destroyed the first two or three blocks of the steps to claimant's property. None of her property was taken for the right of way. The exact amount of damage was not proved except $20 or $25 for the fence wire. For the inconvenience which the Road Commission caused the claimant, this Court is of the opinion to allow the claimant $50.00, which with $25.00 for the fence wire makes a total of $75.00.

Wherefore, the claimant is awarded the sum of $75.00.

Award of $75.00.

Opinion issued January 17, 1968

MARSHALL NEELEY

vs.

STATE ROAD COMMISSION

(No. B-388)

Thomas P. O'Brien, Assistant Attorney General and

Robert R. Harpold, Jr., Attorney, for respondent.

Jones, Judge:

This claim was filed before the Attorney General of West Virginia on December 21, 1966 and the claimant's testimony was taken at a hearing held on November 2, 1967. No evidence was offered by the respondent.

The claimant was not represented by counsel.

This claim is for damages to a 1960 Chevrolet automobile owned by the claimant and being driven by him over State Route No. 25/6 in the City of Dunbar on October 7, 1966. It appears from the evidence that the rock-base road was deeply rutted and generally in a bad state of repair. The claimant's car dropped into a hole in the road and hit a washed-out manhole cover, not readily visible, impaling the car and causing it to come to an abrupt and violent stop, damaging the frame and other parts. There is no evidence that the claimant was guilty of any act or omission that contributed to the damages sustained.

An estimate of repair in the amount of $125.73 was obtained by the claimant, but thereafter it was determined that repairs were impractical and the car was sold for junk.

It is our opinion that the claimant has proven his case by a preponderance of the evidence and that this claim in equity and good conscience should be paid by the State of West Virginia.

It is, therefore, the judgment of the Court that the claimant, Marshall Neeley, should recover, and he is hereby awarded the sum of $125.73.

Opinion issued January 17, 1968

HARRY L. MILLER

vs.

STATE ROAD COMMISSION
OF WEST VIRGINIA

(No. B-389)

Thomas P. O'Brien, Assistant Attorney General and

Robert R. Harpold, Jr., Attorney, for respondent.

Singleton, Judge:

This claim was filed before the Attorney General of West Virginia on November 16, 1966, and set on the hearing docket of this Court for November 2, 1967.

Upon the case being called for hearing there was no appearance for the claimant, Harry L. Miller. The Assistant Attorney General and the Attorney for the State Road Commission tendered to the Court a letter from George H. Samuels, Director of the Legal Division of the State Road Commission of West Virginia dated October 10, 1967, advising that an investigation of the allegations contained in claimant's petition filed herein had been found to be true and correct and the amount set forth as compensation for damages therein to be reasonable, and that the State Road Commission was willing to stipulate same.

On the basis of this information, there being no objection on the part of the Attorney General, it was the considered opinion of the Court that the facts set forth in the petition do present a claim within the jurisdiction of this Court, and the same are considered stipulated herein between claimant and respondent.

The Court further considered the facts set forth in the petition and the items of damage claimed by the claimant and the Court is of the opinion that said facts as set forth in said petition do constitute a valid claim against the State of West Virginia that in equity and good conscience should be paid; and the Court is of the opinion and it is our judgment that the claimant, Harry L. Miller, should recover, and we do hereby award the said claimant the sum of $36.00.

Opinion issued January 17, 1968

OSCAR VECELLIO, INC.

v.

STATE OF WEST VIRGINIA

and

THE STATE ROAD COMMISSION OF WEST VIRGINIA

(No. B-339)

Arden J. Curry, Esq. for the claimant

Theodore Shreve, Esq. for State Road Commission

Ducker, Judge:

The claimant, Oscar Vecellio, Inc., a corporation, filed with the Attorney General of West Virginia on May 24, 1966 its claim in the total sum of $46,564.80 for alleged items of extra expenses and costs for which it was not paid by the State Road Commission in connection with the contract for grading, draining, basing and paving specified for road project U-282(8)-C-2, commonly known as the "Clarksburg Expressway," in Harrison County, West Virginia. The claim was heard and evidence taken by and before the Attorney General of West Virginia, Claims Division, beginning on July 14, 1966 in accordance with the law as contained in Chapter 14, Article 2, Section 3, of the Code of West Virginia, and was pending without decision by the Attorney General when this Court took jurisdiction.

The contract awarded to the claimant by the State Road Commission was originally calculated to be in the sum of $590,862.50 and upon the determination of the final estimate the amount paid the claimant was the sum of $694,055.60, which included, according to the final estimate, an overpayment by the State of West Virginia in the sum of $5,351.80. This final estimate covered the period of work from December 21, 1960 to July 8, 1965 and is set forth as the Road Commission Exhibit No. 6 with the transcript of the evidence. Practically all of the work under the contract was performed between the middle of 1959 and the middle of 1961, and all exhibits filed by the claimant with its testimony are dated in 1959 except as to a

quantity of materials estimate made by Wheeler Associates, Inc. in December 1965, approximately six months prior to the filing of the claim with the Attorney General. The State Road Commission denied the validity of claimant's claim as to every detail.

There seem to be no particular legal questions involved in the claim except the effect of the lack of written evidentiary proof by the claimant of the several items for which he demands payment and the effect of such lack of proof in the consideration by this Court of the several claims of the claimant, and except to say that such lack of written change orders or supplemental agreements in writing in which the State Road Commission agreed to recognize and pay for the claims of the claimant is in our opinion a material, if not fatal, defect in such proof. However, the Court in this case is not confining itself to strict legal rules of admissibility of evidence but is being governed primarily by the question of the justness of the claim, as viewed by it from all the evidence adduced. However, we do not sanction laxity on the part of contractors and others dealing with the State who should proceed orderly in their transactions and obtain proper authority in writing for additions to or changes in contracts.

The claimant's claim of $46,564.80 is made up of nine separate items as follows:

(1) $787.50 for an error claimed in calculating the amount of unclassified excavation;

(2) $6,174.75 to cover the cost of removal of additional dirt occasioned by an alleged slide in the hillside adjacent to the work contracted for;

(3) $3,449.25 for 4,599 cubic yards of stone and rock removed from outside the borrow pit area;

(4) $8,000.00 for cost of obtaining granular material to meet specifications for concrete cribbing;

(5) $1,800.00 cost of double handling of material due to a foot bridge obstruction;

(6) $3,000.00 cost of building a detour and maintaining traffic around bridge over expressway;

(7) $5,316.00 for extra work required to dispose of sewers and sewer water and rental of equipment for such purposes;

(8) $9,885.00 on account of an alleged delay of approximately one month by the State Road Commission in determining whether material stock piled by bridge boulders would compact according to the Road Commission specifications as to moisture contents;

(9) $8,152.30 for 500 cubic yards more concrete than the estimated quantities, the same being the amount claimant claims it was penalized because of State Road Commission's decision that the concrete did not meet specifications.

There are several factors which have weighed more or less in this Court's consideration of the several items of this claim, one of which is that the State Road Commission has allowed and paid to the claimant more than $100,000.00 over and above the original contract amount, which amount the Road Commission says is an overpayment of $5,351.80. The testimony of the principal witness for the claimant, its Project Manager, was in regard to transactions with or complaints to the State Road Commission officers or employees about six or seven years prior to the filing of the claim before the Attorney General and was made principally from what he described as his or the claimant's diary of the progress of the work done. There were no change orders or other writings by which the State Road Commission recognized or bound itself to pay for the items claimed by the claimant, although there were some letters purporting to complain of and to ask for extra payment for several of the items. There were few disinterested witnesses testifying as to important facts relating to the items of the claim of the claimant, and there appears to have been no objection to or rebuttal at the time the final settlement was made in July 1965, which final settlement was made according to State Road Commission witness J. M. Moss, who was the Senior Office Engineer in the Central Construction Office of the State Road Commission, and who testified that such final estimate showed all of the payments made to the claimant and the resulting overpayment made by the state, and whose testimony was that "the amount due to the State of $5,351.80 is the result of the final review that has been made as the result of a meeting of the personnel of the district and representatives of the contractor."

Reviewing the testimony of the witnesses for both the claimant and the State, we find considerable conflict with no real preponderance on the side of the claimant and clearly a great lack of anything in the nature of documentary evidence, unless self-serving diaries can be so classified. We fail to see from the over 200 pages of the transcript of the testimony clear proof that the claimant was either substantially misled or wrongly advised as to his obligations under the contract, or that the State Road Commission agreed to the matters involved in claimant's petition. To review and specify in detail or outline the insufficiency of the statements of the witnesses is not in order because statements taken out of context would not be fair and we cannot and will not attempt to burden this opinion with lengthy quotes from the testimony. Being triers of the facts as well as judges of the applicable law we must reach our decision on the substance as well as on the details of the evidence introduced. We do not infer any lack of verity on the part of any witness, but we have reached the conclusion that the claimant has not as to any of the separate nine items of its claim adequately proved that there has been either a breach of the contract on the part of the State Road Commission or that the claimant has been unfairly treated, or that the claimant has not been fully compensated for its work and services under its contract on the project.

It is the conclusion of this Court that the claimant has not proven a clear obligation for further compensation from the State, and this Court is of the opinion and it is its judgment that the claim of the claimant in this case be wholly disallowed.

Claim Disallowed.

Opinion issued January 17, 1968

JOHN B. ROBBINS

v.

STATE ROAD COMMISSION

No. B-320(A)

and

HUBERT FOWLER

v.

STATE ROAD COMMISSION

No. B-320(B)

Claimants present in person

Thomas P. O'Brien, Assistant Attorney General, and

Robert R. Harpold, Jr., for the State Road Commission

Ducker, Judge:

The claimants in these two cases base their claims, which were filed with the Attorney General, on the same facts with only differences in the amounts which they ask of the State.

Gary G. Taylor, as an employee of the State Road Commission, was in May, 1963 the driver of a Road Commission truck which, because of defective brakes, struck an automobile in which Audra Conner and her husband, Marshall Conner, were passengers, and by reason of such accident the said Audra Conner was killed and Marshall Conner was injured. The claimants were mechanics in the employ of the State Road Commission and as such had worked on the brakes of the truck so involved, and were by the impleading of the State Road Commission's insurance company made parties defendant to a suit brought by the Conners against Taylor. Claimants employed counsel for their defense of such suit and incurred costs of counsel fees in the sum of $759.00 and $859.00 respectively, which, upon request of claimants to the State Road Commission for payment, the Road Commission refused to pay.

As the claimants were brought into the litigation by the insurance company for the State Road Commission and were obligated to have counsel for their defense, we are of the opinion to and do award John B. Robbins the sum of $759.00 and Hubert Fowler the sum of $859.00.

Award to John B. Robbins $759.00.

Award to Hubert Fowler $859.00.

Opinion issued January 17, 1968

ALICE SARGIS and
SHUAL SARGIS

vs.

ADJUTANT GENERAL

(No. B-374)

J. Scott Tharp, for claimants.

Thomas P. O'Brien, Assistant Attorney General, for respondent.

Jones, Judge:

These claims were filed before the Attorney General of West Virginia on November 10, 1966, for personal injuries sustained by the claimant Alice Sargis, property damage to the automobile of the claimant Shual Sargis, and for medical expenses and other damages arising out of a collision between the Sargis automobile and a tractor-trailer driven by Carl Ervin Barnett, a member of the National Guard under the jurisdiction and employment of the Adjutant General of West Virginia. Evidence on behalf of the claimants and the respondent was heard by the Court on October 31, 1967.

The evidence shows that on November 18, 1964, Alice Sargis, 49 years of age, a resident of Ohio, attended a funeral in Lewis County, West Virginia and thereafter parked her husband's car, a 1957 Plymouth, on the north side of Second Street, in the City of Weston, near the intersection of the west line of Water

Street. Second Street is approximately 25 feet wide and Water Street is approximately 16 feet wide. The Barnett operated tractor-trailer, 38 feet long, was traveling east on Second Street and turned north on Water Street. In making the turn in the limited space afforded by the narrow streets, the tractor-trailer swung across the intersection and the rear portion of the trailer struck the left rear portion of the Sargis vehicle, and claimant Alice Sargis was violently thrown about, striking her head and chest.

Claimant Alice Sargis returned by bus to her home in Akron, Ohio, on Friday, November 20, 1964, and on the following Monday, five days after the accident, she consulted Dr. Lauren M. Brown, a general practitioner, who treated her with physiotherapy, a cervical collar and traction. She suffered considerable pain and was unable to perform her usual household work for a long period of time. Treatments continued to the date of the hearing. This claimant also was examined by an orthopedic physician, Dr. H. W. O'Dell. As late as July 22, 1967, Dr. O'Dell re-examined this claimant and stated his opinion that she will have a mild permanent disability of approximately 10 to 15 percent.

Although Barnett says that he did not see the claimants' automobile, we find no positive evidence to contradict the claimants' showing that the Sargis automobile was legally parked in a parking meter space. The record shows that the respondent's driver was negligent and no evidence was adduced to show contributory negligence. In our opinion, these are valid claims against the Adjutant General of West Virginia, which in equity and good conscience should be paid. The claimant Shual Sargis has claimed the sum of $1,707.11 for damages to his automobile and for doctor, hospital and medical expenses. The sum of $40.00 for x-rays reimbursed the claimant by insurance and $390.00 claimed for transportation expenses are disallowed as not proved; and it is our judgment that the claimant Shual Sargis should recover for the other items of his claim, and he is hereby awarded the sum of $1,277.11.

It is our judgment that the claimant Alice Sargis also should recover, and she is hereby awarded the sum of $2,000.00.

Opinion issued January 17, 1968

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY ON BEHALF OF ROLLAND C. MULLENAX

v.

STATE ROAD COMMISSION STATE OF WEST VIRGINIA

(No. B-381)

Robert J. Louderback, Esq. for the Claimant

Thomas P. O'Brien, Assistant Attorney General, and

Robert R. Harpold, Jr., for the State Road Commission

Ducker, Judge:

Claimant on December 21, 1966 filed with the Attorney General of West Virginia a claim of $88.79 for damages to the automobile of its insured, Rolland Carl Mullenax, alleged to have been caused by rocks and boulders in U. S. Route 220 in Grant County, West Virginia, and the case was heard by this Court.

The facts as stipulated by counsel for the claimant and the Attorney General were that at about 3:00 a.m. on January 3, 1965, when claimant was driving his automobile, a 1963 Chevrolet, on U. S. Route 220, then covered with snow, near Petersburg, Grant County, West Virginia, from his work to his home his car struck rocks and boulders in the road, cast there as a result of work of the State Road Commission in loosening with dynamite the bank of the road and a sudden change in the weather. Claimant proved no knowledge of or notice to the Road Commission of such facts or of any defective or dangerous condition of the road or of any negligence on the part of the Road Commission. Nor was there any evidence as to how claimant was driving his car or what the condition of weather was, except that the road was covered with snow.

We are of the opinion that the claimant has not proved facts sufficient to establish liability on the State, and we, therefore, disallow his claim.

Claim Disallowed.

Opinion issued January 17, 1968

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY ON BEHALF OF JAMES E. KEENE

v.

STATE ROAD COMMISSION STATE OF WEST VIRGINIA

(No. B-390)

Robert J. Louderback, Esq. for the Claimant

Thomas P. O'Brien, Assistant Attorney General, and

Robert R. Harpold, Jr., for State Road Commission

Ducker, Judge:

This claim is for damages to an automobile caused by a rock chip from State Road Commission work striking the wind shield of James E. Keene's car, resulting in damages in the sum of $24.81, the claimant being subrogated to the rights of Keene as the owner of the car. The claim was filed with the Attorney General and the case heard by this Court.

The evidence is to the following effect. On March 12, 1965, James E. Keene was operating his 1964 Volkswagon automobile on State Route 119 on MacCorkle Avenue in the vicinity of Evans Super Market in the City of Charleston when an employee of the State Road Commission, patching holes in the surface of the highway and chipping the concrete therein, caused a stone chip to strike the windshield of the Keene automobile, thereby damaging the same to the extent of $24.81 as the cost of repairing or replacing the windshield. There was no evidence to attribute negligence on the part of Keene, who had been directed by a flagman of the State Road Commission to pass the place of the work.

We are of the opinion to and do award the claimant the sum of $24.81.

Award of $24.81.

Opinion issued January 17, 1968

MARILYN STOLLINGS

v.

STATE ROAD COMMISSION
STATE OF WEST VIRGINIA

(No. B-344)

Glyn Dial Ellis, Esq. for the Claimant

Pete Barrow, Esq. for the State Road Commission

Ducker, Judge:

Claimant, Marilyn Stollings, alleged that she has been damaged in the sum of $10,000.00 on account of injuries, disfigurement and disabilities she suffered as a result of an automobile accident while she was operating a motor vehicle on State Route No. 10-w, near Mitchell Heights in Logan County, West Virginia, on June 6, 1964, the claim having been filed with and heard by and remained pending before the Attorney General until jurisdiction was assumed by this Court.

The basis of the claim is primarily that the road was not safe for travel as it had become slick by reason of tar "bleeding" out of the road surface causing the road to be hazardous, and that when driving upon that road her car swerved and slid, going round and round and finally over the hillside, injuring her legs, arms and back.

The record shows that the particular part of the road where this accident occurred was a blacktopped road, extending for about a mile from North Mitchell Heights to Peck's Mill Bridge, completed or resurfaced in April 1962 with tar and mixed sand and stone on top. Evidence was introduced to show that a car had wrecked on this road a "couple of weeks" after the construction because the road got slick when it rained, and that signs had thereafter been put up stating that the road was "Slippery When Wet." There was also testimony to the effect that several wrecks had occurred on this road, that the road would "bleed" tar on hot days, and that once or more the Road Commission had put "red dog," meaning slate or burnt coal, on the road to rough it up.

The evidence is undisputed that it had rained before or about the time of the accident and that the road was damp, like a frost on it, and wet. Daniel Carper, a disinterested witness, testified that he was going from Mill Creek to Logan on his right hand side of the road and at a fairly level or graded spot he saw claimant's car coming from Logan and swerving on the highway in the other lane, that is Carper's left hand lane, and that he would estimate that claimant's car was traveling "anywhere from 40 to 50 miles an hour," and that he, Carper, was going 25 to 30 miles an hour as his wife was expecting very shortly, although he thought 40 miles an hour would be safe.

The witness Kermit Hale said that he traveled this road twice a day and that 40 to 50 miles an hour was an unsafe speed for anyone who knew the road "or anyone else whether they knew it or not, anyone who traveled it." Alfred White, Jr. testified that it was apparent that this road was "slick when it was wet, frosted or snowed upon." One witness stated that the accident occurred at the bottom end of the hill as claimant's car started going up the hill, but claimant, who was pregnant when the accident occurred, said she came "to Henlawson before she ran into rain and came on down the road and went up the bank and just when I topped the bank my car started sliding, it started sliding, it went around with me and—completely around, and went over the mountain, over the bank," and that she was going 35 miles an hour and that she "drove that rate every day, it don't matter if its hot or any time," and further it was drizzling rain at the time of the accident.

Claimant testified that she was hospitalized in Logan for six or seven weeks and suffered greatly from her injuries and incurred considerable expense, the amount of which is not fully or clearly shown, as well as permanent disfigurement of her legs and arms.

A recital of other testimony and evidence we deem unnecessary, as the principal and only question presented to this Court is whether the claimant has made out a case of negligence on the part of State Road Commission in the maintenance of the State Road on which this accident occurred.

There are several factors involved in the determination of the question involved, namely, the type of road, the road main-

tenance, the weather at the time of the accident and its effect both upon the condition of the road and the speed at which the car was driven.

The road was definitely classified as a blacktopped highway. Tar and mixed sand and stone were used to resurface it in 1962, and on one or more occasions slate or burnt coal was used to roughen it. Claimant by unsatisfactory evidence tried to prove that several accidents had previously occurred on it. Signs of "Slippery When Wet" were posted. Whether the road was "bleeding" tar at the time of the accident does not positively appear. Nor does other evidence of either extra maintenance or any special lack of maintenance appear.

The weather was a drizzling rain and the road was slick, and claimant, who drove it frequently, knew it was slick when it was wet.

The testimony of claimant and one of her witnesses was that claimant was driving at a speed of 35 miles an hour and the speed limit was 55 miles an hour. As has been shown, Daniel Carper, the witness who saw the accident, said claimant was driving 40 to 50 miles an hour. Another witness testified that 40 to 50 miles an hour on that road was unsafe whether the driver knew the road or not. In determining whether a driver of an automobile has driven safely, the lawful speed limit may or may not be a factor in such determination. Weather is just as important and cannot be dismissed without serious consideration.

The evidence, we think, does not sufficiently show lack of proper maintenance for that type of road and the fact that other cars have wrecked may be corroborative in a limited way of specific fact showing negligence or lack of maintenance. There are too many other probable causes for wrecks. We cannot avoid believing that the speed at which the claimant was driving on a wet, slick road which she well knew, which speed was testified to by a wholly disinterested witness to be 40 to 50 miles an hour and unsafe, was the proximate cause of this accident, unfortunate as it was for all concerned.

It is the conclusion of this Court that the claimant has not proven sufficient facts to maintain her claim, and it is the

opinion of the Court that her claim should be, and it is hereby, disallowed.

Claim Disallowed.

Opinion issued January 17, 1968

DELOS TENNEY

v.

STATE ROAD COMMISSION
STATE OF WEST VIRGINIA

(No. B-396)

Claimant present in person

Thomas P. O'Brien, Assistant Attorney General, and

Robert R. Harpold, Jr., for State Road Commission

Ducker, Judge:

Claimant, Delos Tenney, owner of a farm on State Route 2 between Sago and Tallmansville, in Upshur County, West Virginia, filed with the Attorney General his claim for $225 for loss of cattle by poisoning from weed spraying of that road by the State Road Commission.

The evidence in this case presented to this Court shows that the claimant was raising three calves on his farm on State Route 2, and that in the summer of 1966 the State Road Commission in order to kill weeds along that highway adjacent to claimant's property sprayed the highway with a chlorinated hydrocarbon which went upon claimant's land and caused two of claimant's calves to die of acute toxemia. The one calf that did not die was sold for $137.00. The evidence is not clear as to just what was the value of the two dead calves. There is nothing in the evidence to contradict the testimony of the witnesses for the claimant, and we are of the opinion that his claim in the amount of $225.00 is unquestionably reasonable and we, therefore, award the claimant, Delos Tenney, the sum of $225.00.

Award of $225.00.

Opinion issued January 31, 1968

REMINGTON RAND OFFICE SYSTEMS DIVISION, SPERRY RAND CORPORATION

vs.

DEPARTMENT OF WELFARE

(No. D-43)

Hanna, Bias, Carman and Friedberg,

Donald C. Carman, for claimant.

Thomas P. O'Brien, Assistant Attorney General, for respondent.

Jones, Judge:

This claim was filed before the Court of Claims on December 11, 1967. At the same time there was filed a Stipulation, executed in behalf of the respondent by L. L. Vincent, Commissioner of the Department of Welfare, and C. Donald Robertson, Attorney General of West Virginia, which Stipulation recites that the respondent, "***having made a detailed analysis of and investigation into the facts and circumstances giving rise to said claim, stipulates the facts and amounts of damages as alleged in claimant's petition as being correct***."

The claimant's petition and its exhibits show that between October, 1964 and June, 1965, the claimant agreed to sell to the respondent certain equipment for the filing and retrieval of records, known as Remington Rand Lektrievers, to be delivered and installed in the district offices of the respondent. All purchase orders provided for the delivery and installation of the Lektrievers at specified locations. After the claimant had shipped the equipment from its factory in New York to the West Virginia locations, the respondent notified the claimant that suitable space for the installation of the Lektrievers was not available and that the claimant would have to take back and store all of the equipment until installation space could be provided. The claimant did not have adequate storage facilities and it was necessary to employ local haulers and storage companies to remove and store the equipment, and, when

space was finally available, the equipment was re-delivered to the various offices of the respondent. Copies of the storage, handling and hauling invoices in the total amount of $13,245.47, all of which are shown to have been paid in full by the claimant, were filed as exhibits with the respondent's petition. The claimant invoiced the Department of Welfare for said storage, handling and hauling charges, and the invoice was approved by the respondent and forwarded to the State Auditor, who refused payment on the ground that the charges did not correspond with the terms of the purchase orders.

On the basis of the claimant's petition, together with its exhibits, and the stipulation of facts above referred to and filed with this Court, and after examining and considering the same, it is the opinion of the Court that the facts set forth in the petition do present a claim within the jurisdiction of this Court, and the stipulation of facts filed herein is hereby accepted and approved.

After further consideration of the facts set forth in the petition and the amount claimed by the claimant as reimbursement for sums advanced by the claimant for the storage, handling and hauling of equipment, as a result of the respondent's failure to provide adequate facilities for the installation of the equipment ordered by the respondent and delivered by the claimant to the locations specified in the purchase orders, the Court is of the opinion that such facts do constitute a valid claim against the State of West Virginia which in equity and good conscience should be paid, and it is our judgment that the claimant, Remington Rand Office Systems Division, Sperry Rand Corporation, should recover the amount of its claim, and an award is made to said claimant in the amount of $13,245.47.

Opinion issued February 15, 1968

W. A. ABBITT COMPANY, LORY PLANING MILL COMPANY, ASBESTOS AND INSULATING COMPANY, HUNT ELECTRIC COMPANY, B&N PLUMBING & HEATING COMPANY, HARRIS BROTHERS ROOFING COMPANY, WORTH STURGEON AND FLOOR FASHIONS, INC., D/B/A ARROW RUG COMPANY

vs.

DEPARTMENT OF WELFARE

(Nos. C-37, C-36, C-38, C-39, C-40, C-41, C-42, C-43)

Henry C. Bias, Jr., James C. Reed, Jr., Larry W. Andrews, Albert F. Good, Hershel R. Hark, Edward H. Tiley and *J. M. Holcomb,* for claimants.

Thomas P. O'Brien, Assistant Attorney General, for respondent.

Jones, Judge:

These claims were filed before the Attorney General during the year 1965 for work performed and materials furnished in the renovation of the Conlon Bakery Building in Charleston, West Virginia for the purpose of providing offices for the Department of Welfare. A hearing of these claims was deferred pending the outcome of an action instituted in the Circuit Court of Kanawha County involving some of the same issues. The claimant, W. A. Abbitt Company, was the general contractor and the other claimants were subcontractors; and as the claim of W. A. Abbitt Company encompasses all of the claims of the subcontractors, the several claims were consolidated and heard together by this Court on November 29, 1967.

The Conlon Bakery Building, together with its parking area and other incidental facilities, occupies an entire city block and contains approximately 35,165 square feet of floor space on two floors. By agreement dated June 16, 1964, it was leased by The Todd Company to the Department of Welfare for yearly terms totaling ten years at a rental of $78,088.25 per year, of which $6,000.00 was allocated to parking and $7,088.25 for the unimproved building at $2.05 per square foot of floor space. This

rental contemplated the installation of heating and air conditioning by the lessor, and the amortization of tenant alterations over a ten-year period.

Then the claimant W. A. Abbitt Company entered into two agreements, one with The Todd Company for the installation of heating and air conditioning, and the second with the Department of Welfare, evidenced by a letter of intent by the Department dated June 19, 1964. This letter authorized the claimant W. A. Abbitt Company to proceed with the work as outlined on the basis of cost plus ten per cent profit, payments to be on a monthly basis. A formal contract by and between the State of West Virginia, State Department of Welfare, and W. A. Abbitt Company was executed on July 31, 1964, being signed in the name of the State by W. Bernard Smith, Commissioner of the Department of Welfare, but the same was not approved as to form by the Attorney General. The contract set out an estimate of the cost of work to be performed in the amount of $25,000.00, but provided that "it is expressly understood, however, that neither the Department or the contractor guarantees the correctness of the estimate. Should any changes be made, after the contract has been signed, which increase the above estimate, it shall be modified in writing accordingly." At that time the cost of work already performed was approximately $33,000.00 and the estimate was in the area of $60,000.00, but Robert E. Sheets, Vice-President of W. A. Abbitt Company was persuaded to sign the contract upon the assurance that the same was an open-end agreement which would be supplemented later. The contract was prepared by Robert Kaufman as attorney for the respondent, and previously had been signed and acknowledged by Commissioner Smith who was out of town and would not return for two weeks. Sheets was also admonished that no payments could be made to the contractor until some kind of written contract had been executed. Efforts of the claimant W. A. Abbitt Company to obtain further assurances in writing were to no avail, but the respondent continuously importuned the diligent prosecution of the construction work.

All of the work was done on an emergency basis, due to the critical need of the Department of Welfare for office space. Department personnel were moved into the building shortly after work started and continued to move in as the work pro-

gressed. As the need for space increased, the demands by the Department of Welfare upon the contractor for additional construction and renovation also increased. A project to accomodate two divisions of the Welfare Department was expanded to meet the requirements of seven divisions. No architect was employed and no plans or specifications were furnished. All work was on a day to day basis under the direction and supervision of the Department of Welfare. Work commenced in June, 1964, and continued without interruption until November 2, 1964, when work was stopped. At this time, the renovation work had been largely completed, but all invoices submitted by the claimant W. A. Abbitt Company had been rejected by the Auditor on the grounds that the work had exceeded the contract price and that the contract had not been approved by the Attorney General.

In order to ascertain to what extent The Todd Company was responsible for the work done, mechanics liens were filed and in due course a suit to enforce said liens was instituted in the Circuit Court of Kanawha County. By order entered on December 7, 1967, said Circuit Court found The Todd Company liable to W. A. Abbitt Company and three of the subcontractors in the aggregate amount of $27,309.00, and enforced the mechanics liens to that extent; and said Circuit Court further found that the remaining claims of W. A. Abbitt Company and its eleven subcontractors "constitute a valid obligation of the West Virginia Department of Welfare owing to the respective parties and are not obligations of The Todd Company, defendant herein."

Seven of said eleven subcontractors, being parties to the action, were awarded judgments against said W. A. Abbitt Company as follows: Asbestos and Insulating Company, $11,490.38; Worth Sturgeon, $11,344.86; Harris Brothers Roofing Company, $12,290.65; B&N Plumbing & Heating Company, $31,875.38; Floor Fashions, Inc. (Arrow Rug Co.), $7,925.61; Hunt Electric Company, $34,198.83; and Pearl Meeker, administratrix C.T.A. of the estate of Bernard O. Meeker, deceased, $7,458.60. The Circuit Court also listed the claims of the remaining four subcontractors who were not parties to the proceeding, as follows: E. E. Moore, $1,190.12; R. W. O'Dell, $2,062.14; Elbert A. Swain, dba Swain Window Cleaning Serv-

ice, $2,196.00; and R. B. Wyatt & Sons, Inc., $2,575.00. Recoveries under the mechanics liens reduced the aggregate claim to $213,585.97. From the evidence adduced at the hearing, it appears that the amount of business and occupation tax included in the claim should be reduced in the sum of $1,074.62 to conform with the legislative reduction in the rate of tax after the claim was filed, thereby further reducing the total amount claimed to $212,511.35.

There were no defense witnesses, the respondent relying on the legal proposition that the parties failed to comply with West Virginia Code 5A-3-15, which provides:

> "Contracts shall be signed by the commissioner in the name of the State. They shall be aproved as to form by the attorney general. A contract that requires more than six months for its fulfillment shall be filed with the State auditor."

The respondent contends that (1) no valid contract was ever entered into between the parties; (2) that Commissioner Smith did not act within the scope of his authority; and that (3) the claimant was required to take notice of the extent of Commissioner Smith's authority. In this case, Commissioner Smith did have authority to enter into a contract with the claimant, although his authority was not exercised in accordance with all legal requirements. Furthermore, the acts of a public officer improperly performed may be ratified and validated. 67 C.J.S., Officers, §§ 102 and 106. The facts of this case clearly establish ratification. The State has accepted the benefits of the work done and materials furnished, and has occupied and used the subject premises for approximately three and one-half years without any compensation to the claimant. About two hundred employees work in the offices constructed by the claimant. There is no dispute as to the amount of work done and materials furnished, the quality of materials or workmanship, or the amount of the aggregate claim. Based on comparable rentals in the City of Charleston, the respondent obtained an office building at a rental figure, $2.84 per square foot, which, taking into account the amortization of renovation costs, is shown to be fair and reasonable.

Under the facts of this case, the respondent's defense is a purely technical one which we believe must give way to West

Virginia Code 14-2-13 which extends the jurisdiction of this Court to claims "which the State as a sovereign commonwealth should in equity and good conscience discharge and pay." If this claim had arisen from a transaction between private individuals or corporations, it clearly would be an enforceable obligation.

After consideration of the record, the evidence and exhibits offered on behalf of the claimant, and the briefs and arguments submitted by counsel for both the claimant and respondent, the Court is of opinion that the claimant has proved a valid claim against the Department of Welfare which in equity and good conscience should be paid; and it is our judgment that the claimant W. A. Abbitt Company should recover, and an award is made to said claimant in the amount of $212,511.35.

Opinion issued April 24, 1968

WALTER L. BLANKENSHIP,

vs.

STATE ROAD COMMISSION
OF WEST VIRGINIA

(Claim No. C-26)

No appearance on behalf of claimant.

Thomas P. O'Brien, Assistant Attorney General, and

Robert R. Harpold, Jr., Esquire, for respondent.

Singleton, Judge:

This claim was filed before the Attorney General on June 28, 1967, and transferred to this Court after July 1, 1967, for its consideration and decision. The claim is in the amount of $68.61 for damages sustained to claimant's automobile as a result of rock being thrown through its windshield as a result of respondent's mowing operations. The damage is alleged to have occurred in Cabell County, near Huntington, West Virginia. This case was placed on the hearing docket of this Court and called for hearing on the 22nd day of March, 1968.

Upon the case being called for hearing there was no appearance for the claimant. The Assistant Attorney General and the counsel for the State Road Commission tendered to the Court a stipulation advising that an investigation of the allegations contained in the claimant's petition filed herein had been found to be true and correct and the amount set forth for compensation of the damages sustained to be reasonable and the respondent had reduced such a stipulation to writing and tendered it to the Court together with an order filing same.

Upon consideration of the stipulation, and there being no objection on the part of the Attorney General, it was the opinion of the Court that same should be ordered filed in this proceeding.

The facts as stipulated by counsel for the claimant and the Attorney General were that on or about the 1st day of October, 1966, the State Road Commission employees for and on behalf of the State of West Virginia were operating a power lawn mower on the State Road right-of-way on U.S. Route 60, in Cabell County, near Huntington, West Virginia; that in the operation of said power lawn mower a rock was negligently caused to be thrown by said mower, said rock striking the windshield of an automobile owned and operated by Walter L. Blankenship, the claimant herein, whose address is 1608 Beech Street, Kenova, West Virginia. There is no evidence in the petition or the record before this Court of any negligence on the part of the claimant nor of any action on his part that might lawfully preclude his recovery.

Upon consideration of the petition, the exhibits in the file, the stipulation, and the statements of counsel for the respondent, the Court is of the opinion that the facts set forth in the petition do present a claim within the jurisdiction of the Court; and the Court is of the further opinion that the allegations of said petition as stipulated by the respondent do constitute a valid claim against the State of West Virginia that in equity and good conscience should be paid and the Court is of the further opinion and it is our judgment that the claimant, Walter L. Blankenship, should recover, and we do hereby award the said claimant the sum of $68.61.

Opinion issued April 24, 1968

C. A. ROBRECHT COMPANY

v.

DEPARTMENT OF MENTAL HEALTH
STATE OF WEST VIRGINIA

(No. D-11)

Joseph M. Brown, Esq. for the Claimant

Thomas P. O'Brien, Assistant Attorney General, for the State

Ducker, Judge:

The Department of Mental Health ordered for Lakin State Hospital, at Lakin, West Virginia, on November 12 and November 27, 1964 from the claimant, C. A. Robrecht Co. Inc., of Parkersburg, West Virginia, three orders of frozen foods and other vegetables, which orders were filled and delivered according to receipts taken at the hospital for the use of the patients there. The total amount of the invoices is $170.78 which has not been paid because invoices were not received by the Department prior to the end of the fiscal year 1964-65, which the Department says would have been paid if the invoices had been received in time for payment within such fiscal year. Claimant also claims interest at 6% on the account in the sum of $27.38.

The Department of Mental Health by its Director and the Attorney General filed their Answer herein admitting the validity and correctness of the claim except as to interest thereon, and agreeing to submit the claim on the pleadings.

As the facts are admittedly true, and as we are of the opinion that the failure to file the claim with the Department within the fiscal year is not sufficient to justify the State in refusing to pay an otherwise just claim, we will sustain the claim, except as to interest, which under the statute this Court cannot allow in any case unless the contract in the matter expressly provides for the payment of interest.

Wherefore, this Court awards the claimant the sum of $170.78.

Claim awarded.

Opinion issued April 24, 1968

C. J. LANGENFELDER & SON, INC.,
A CORPORATION,

vs.

THE STATE OF WEST VIRGINIA AND
THE STATE ROAD COMMISSION OF WEST VIRGINIA.

(Claims Nos. B-292, 292-(b))

George P. Sovick, Jr., Esquire, Charleston, West Virginia; *Robert D. Myers*, Esquire; *Frank A. Simon*, Esquire; *Rhoads, Sinon*, and *Reader,,* Harrisburg, Pennsylvania, for claimant.

John L. Ward, Esquire, and *Philip J. Sheets*, Esquire, for respondent.

Singleton, Judge:

These claims, considered by the Court as one, were filed before the Attorney General respectively on December 3, 1965, and February 9, 1966, and the evidence of the claimant and respondent offered and the record made before the Claims Examiner for that office at hearings held in Charleston, West Virginia, on June 13, 14, and 15, 1966,; and the deposition of Mr. Nathan November was taken on June 17, 1966, in New York City. No opinion was rendered by the Attorney General on this claim and the entire record and case file was delivered to this Court after July 1, 1967, for consideration and decision.

The Claimant, C. J. Langenfelder and Son, Inc., is a Maryland Corporation duly authorized to carry on business in the State of West Virginia, has engaged in all types of heavy construction over the past 50 years and was qualified by the State Road Commission of West Virginia to bid and perform work on road construction projects in West Virginia. On July 16, 1963, claimant filed a bid for the construction of the Wheeling Tunnel on a section of Interstate Route 70 in Ohio County, West Virginia, and was awarded a contract for such construction on July 24, 1963, on the basis of its low bid of $6,961,144.20. This project, designated No. I-70-1 (12) 1 by the State Road Commission, was approximately 1,425 feet in length and the contract con-

tained the usual provision that time was of the essence of the contract and the claimant agreed to complete same in 720 calendar days. Claimant began work on the project on or about August 21, 1963, and completed the boring of the tunnels by March 15, 1964, but concreting operations could not be commenced inside the tunnels until May 20, 1964, because of a delay on the part of the respondent in approving the concrete mixture. All of the foregoing facts set forth in the petition of the claimant in Paragraphs 1 through 6, together with the special provisions of the contract relating to the removal forms as set forth in Paragraph 10 thereof, having been stipulated by claimant and respondent.

On July 16, 1964, the record discloses that the claimant began pouring operations on the concrete tunnel linings of the two tunnels, the claimant having previously performed initial concreting operations in the formation of anchor curbs in said tunnels and the forms for these anchor curbs having been stripped by claimant within 24 hours after completion with no objection by respondent. In pouring the concrete tunnel linings claimant used two specially constructed forms, (one for each tunnel) purchased specifically for this project. The record further discloses that on July 24, 1964, P. R. Hinkle, Project Engineer for the respondent, advised claimant by letter that claimant was removing the tunnel forms permaturely contrary to the provision of the contract and that the forms could not be removed for fourteen days or until the strength of the concrete had reached 2000 pounds per square inch. Claimant replied to this letter on July 28, 1964, asserting that the standard specifications referred to by Mr. Hinkle were overridden by the special damage provision of the special provisions of the contract.

The claim here considered is in the total amount of $293,432.08; $207,118.13 being for additional costs and expense due to maintenance of men and equipment during a thirty-two day shut down period, and the resultant additional cost of the tunnel concreting operations, all of said expenses being attributed to respondents' insistance upon erroneous interpretation of the specifications; $8,077.30 for additional costs incurred by the claimant to its subcontractor, Delta Concrete Company, by reason of said delays; $30,042.99 for additional costs of back-

filling operations as a direct result of materials erroneously represented by respondent to be of a certain compaction classification in the specifications, and $48,193.66 as reimbursement for the cost of additional cement required to be used in the concrete mix by the claimant as result of a change in the concrete formula to be used after the bidding and letting of the contract and immediately prior to the beginning of concreting operations.

The respondent denied all the claims and took the position that the standard specifications incorporated by reference into the contract superseded the special provisions set forth therein relating to stripping of forms; that the claimant had mistakenly relied upon representations of officials of the respondent relating to the formula for the concrete to be used; that the additional expense, costs and delay was solely the fault of claimant and that claimant by reason of its cessation of activities under the contract had therefore breached the contract and was estopped to make any claim.

No issue was raised by respondent concerning the reasonableness of the sums alleged and proved by claimant to represent the additional costs and expense forming the basis of this claim.

There is further no evidence that any of the concrete placed in the tunnels on this project was ever in fact rejected or ordered removed for any reason by the respondent.

As to the assertion of the respondent that the claimant is estopped by reason of its cessation of tunnel concreting operations on August 26, 1964, resumed on September 28, 1964, this Court is of the opinion that this contention is without merit. The record discloses that the claimant did cease tunnel concreting operations on August 26, 1964, but did continue with other operations on the project. It ceased operation on the ground that respondent was erroneous in interpreting the specifications relating to the stripping of forms and immediately undertook negotiations to resolve the dispute. This Court is of the opinion that the respondent may well have invoked the forfeiture provisions of the contract against the claimant, but is further of the opinion that this right was waived when respondent elected not to do so, modified its position, and so advised claimant by telegram.

Without embarking upon a laborious narration of the voluminous testimony offered on behalf of claimant and respondent, the documentary evidence tendered by the parties, the exhibits and expert reports offered, the deposition of Nathan November, the memorandums filed on behalf of claimant and respondent, the several motions to dismiss filed on behalf of respondent and the arguments of counsel, but after a careful examination of all of same, and after full consideration thereof, and the principles of contract law applicable and raised by the parties, the Court is of the opinion that the following premises were substantiated in law and by a preponderance of the evidence:

(1) That the special provisions of the contract relating to the stripping of forms governed operations on this project and that no provision of the standard specifications incorporated therein was shown to be applicable thereto;

(2) That the back fill materials to be excavated from the project and classified in the specifications on which the claimant bid as A-2-4 material by the respondents' personnel, did not, in fact, meet this compaction classification;

(3) That claimant did not prove by a preponderance of the evidence that all of its additional winterizing expense was solely due to respondents' action or inaction, the construction progress schedule filed by the claimant plainly contemplating certain winter concreting operations;

(4) That the claimant is entitled to reimbursement for the additional cost occasioned by the change in the number of bags of cement required to be used in the concrete mix;

(5) That the motions to dismiss as to the claims of Delta Concrete Company, a subcontractor of claimant, which claims are here filed as part of claimant's petition and set forth as an obligation of claimant, on the ground of lack of privity of contract on the part of Delta Concrete Company, and on the further ground of failure to exhaust all legal remedies, are without merit.

Therefore, after consideration of all of the evidence and exhibits offered on behalf of the parties and the memoranda of authority and the arguments of counsel, this Court is of the

opinion that claimant has proved a valid claim against the State Road Commission of West Virginia, which the State of West Virginia as a sovereign commonwealth, should in equity and good conscience discharge and pay; and it is therefore our judgment that the claimant should recover the sum of $182,802.13 for losses sustained and additional expense incurred in the tunnel concreting operations, which sum includes a portion of the winterizing expense claimed; the sum of $30,042.99 for additional back filling expense incurred by reason of the failure of the excavated materials to meet the respondents' representations, and the sum of $56,270.96 as compensation for additional costs incurred by claimant to its subcontractor, Delta Concrete Company, for winterizing expenses and the additional cement required by reason of the formula change; and a total award is hereby made to said claimant in the amount of $269,116.08.

Opinion issued April 24, 1968

CHARLES L. SWISHER

vs.

STATE TAX COMMISSIONER

(No. C-11)

Thomas P. O'Brien, Assistant Attorney General for respondent.

Jones, Judge:

This claim was filed before the Attorney General of West Virginia on March 2, 1967.

At the hearing held by this Court on March 21, 1968, counsel for the respondent stated that there being no factual issues involved and the claimant having agreed thereto, this claim was submitted for decision upon the record.

It appears from the record that on or about July 29, 1965, the claimant filed a claim before the State Tax Commissioner for a refund of business and occupation taxes overpaid by reason of reporting errors for the years 1958 to 1961, inclusive. A refund in the amount of $145.81 was made for the years 1962,

1963 and 1964. However, a refund for the years 1958, 1959, 1960 and 1961 for aggregate overpayments of $288.57 was denied on the ground that the claim in that amount was barred by the statute of limitations.

Chapter 11, Article 1, Section 2a of the Code of West Virginia provides as follows:

> "On and after the effective date of this section [June 8, 1951], any taxpayer claiming to be aggrieved through being required to pay any tax into the treasury of this State, may, within three years from the date of such payment, and not after, file with the official or department through which the tax was paid, a petition in writing to have refunded to him any such tax, or any part thereof, the payment whereof is claimed by him to have been required unlawfully; and if, on such petition, and the proofs filed in support thereof, the official collecting the same shall be of the opinion that the payment of the tax collected, or any part thereof was improperly required, he shall refund the same to the taxpayer * * *".

The claimant having failed to file his claim for a refund within the period of three years provided by the statute, it is contended by the respondent State Tax Commissioner that the claimant has slept on his rights and thereby has forfeited his claim.

While we recognize that the prescribed limitation would merely bar the remedy and would not extinguish a moral obligation, there is no showing in the record that the claimant was misled in any way or that there were any other extenuating circumstances which would involve the conscience of the State. The Court is of opinion that it should not, in effect, extend the time for making application for a refund of taxes; and that equity and good conscience do not require the relief prayed for in this case. Accordingly, it is our judgment that this claim should be and the same is hereby disallowed.

Opinion issued April 24, 1968

DELBERT THOMPSON, Administrator of the Estate of Creola Thompson, Deceased,

v.

STATE ROAD COMMISSION

(No. C-9)

Jerry Cook, Esq. for the Claimant

Robert R. Harpold, Jr., Esq. and

Thomas P. O'Brien, Assistant Attorney General, for the State

DUCKER, JUDGE:

Delbert Thompson, the duly qualified Administrator of the Estate of Creola Thompson, deceased, filed this claim, asking $25,000 as damages against the State Road Commission of West Virginia on account of the death of said Creola Thompson, who as a passenger in claimant's car, was killed as a result of an automobile collision between the car owned by Delbert Thompson, husband of the said Creola Thompson, and driven by Monty Dean Thompson, his son, and a car owned and driven by one Hassel Justice at or upon the Lick Creek Bridge on the Lick Creek Road in Boone County, West Virginia, on July 18, 1965.

The claimant bases his claim upon allegations that the State Road Commission had allowed large weeds and brush to grow up along the road leading to the Lick Creek Bridge and had failed to erect signs indicating that the bridge was a one-way bridge and had failed to keep the bridge in a proper state of repair.

The evidence in the case is substantially to the following effect.

Monty Dean Thompson, who was 17 years old at the time of the accident, had driven the family car with his mother, Creola Thompson, and his sister from Dayton, Ohio, to their home on Lick Creek, and had approached and driven upon the bridge, which was some two miles from Danville, West Virginia, and that the front wheels of his car were about to

pass off the far end of the bridge after passing over it when he collided with a car owned and operated by Hassel Justice, resulting in the injuries to and death of the said Creola Thompson.

The Thompson car was traveling, it is claimed at approximately 10 miles an hour at the time of the collision and the Justice car was traveling between 25 and 35 miles an hour immediately before or at the time of the collision. A member of the State Police testified that there was about a 200 foot straight stretch of road before entering to the left a turn approaching the bridge and after such turn there was a distance of 30 to 40 feet before reaching the bridge. The road on the other side of the bridge, from which Thompson was approaching the bridge, had a visibility of approximately 80 to 90 yards to the bridge on that side. The width of the bridge was 12 feet, 9 inches, and the width of each car was 6 feet, 3 inches; so for anyone traveling in either direction it was practically a one-way bridge, although two cars could, with only a three inch margin, pass each other. The exact condition of the weather on that day is not wholly certain, except that it was not raining, but that it had rained and the road was slick.

The claimant, his son and Hassel Justice had all lived in that vicinity many years and were accustomed to travel almost daily the road and bridge in question, and they knew its turns and condition, particularly the fact that they all considered the bridge a one-way bridge. While they testified that there were high weeds and brush on either side of the road, they were not prevented from seeing forward on the road or from seeing within reasonable distances each other's car approaching. As neither driver of the cars saw the other until it was too late to avoid the collision, it necessarily follows that at least one of them was not exercising due care in his driving, most probably Hassel Justice who admitted he was going between 30 and 35 miles an hour in his approach to the bridge.

Without passing upon the question as to who had the right of way, it would seem to us that inasmuch as the Thompson car was already on the bridge and about to go off of it and that Hassel Justice, knowing the narrowness of the bridge, was traveling at a speed of at least 25 to 30 miles an hour in his approach to the bridge, he should have slowed down and given

right of way to the Thompson car. Pictures of the bridge and approaches introduced in the evidence clearly show that neither the bridge nor the road were out of repair and the collision would not have taken place had the parties to the collision exercised reasonable and proper care under the circumstances.

The record shows that a suit was instituted by Hassel Justice against the claimant and the claimant filed a counter-claim against Justice in that case, and when the case came on for trial they took releases from each other, and that they did not prosecute their claims for the reason that claimant said he knew he could not realize anything from Justice because of the latter's financial condition and because Justice had no liability insurance.

The question resolves itself into whether the State Road Commission had been sufficiently negligent to be held morally responsible for the damages occasioned by this collision, and as we have indicated, the claimant's claim is based partly upon its failure to have road markers indicating a one-way bridge. The lack of such signs does not constitute negligence, as was stated in the opinion in the case of the *state ex rel. Vincent* v. *Gainer,* (W.Va.), decided December 12, 1967, 158 S. E. 2d 145. Nor do we think that the growth of weeds and brush along the side of a road, not in the passageway of a road, constitutes negligence, or such negligence on the part of the Road Commission as rendered it responsible for collisions on the road.

As all the parties well knew this well-traveled road and bridge, either the claimant or Justice or both must be considered guilty of the negligence causing the collision or both were guilty of contributory negligence, and as we see no negligence on the part of the Road Commission, we cannot consider that there is any moral obligation on the part of the State to pay damages for the negligent acts of others.

As the case is without proof that the negligence alleged against the State Road Commission was the primary cause and proximate cause of the collision, we disallow this claim and make no award to the claimant herein.

Claim Disallowed.

Opinion issued April 24, 1968

DONALD L. WISECARVER

vs.

STATE ROAD COMMISSION
OF WEST VIRGINIA

(Claim No. C-15)

No appearance on behalf of claimant.

Thomas P. O'Brien, Assistant Attorney General, and

Robert R. Harpold, Jr., Esquire, for respondent.

Singleton, Judge:

Claimant on October 4, 1967, filed with this Court a claim in the amount of $45.00 for damages sustained to claimant's automobile as a result of a rock being blown from respondent's blasting operation through the windshield of said automobile. in Berkeley County, West Virginia. This case was placed on The damage is alleged to have occurred in or near Greensburg, the hearing docket of this Court and called for hearing on the 21st day of March, 1968.

Upon the case being called for hearing the Assistant Attorney General and counsel for the State Road Commission, there being no appearance on behalf of Claimant, tendered to the Court a stipulation reciting that the respondent, State Road Commission, had made a thorough investigation into the facts and circumstances giving rise to said claim and as a result of said investigation stipulated that the facts as alleged in claimant's petition are true and that the amount of damages alleged to have been sustained is reasonable, and waived any right on the part of the respondent to produce any evidence concerning this claim. This stipulation was accordingly by order of this Court filed in this proceeding.

The facts as stipulated by counsel for the claimant and the Attorney General were that on or about February 23, 1967, in an area known as Greensburg, Berkeley County, West Virginia, employees and agents of the State Road Commission of West Virginia for and on behalf of the State of West Virginia, were

blasting rock along the side of a State highway; and that as a result of this blasting, a rock flew through the air breaking the windshield in the automobile owned by Donald L. Wisecarver, the claimant herein, whose address is Route 3, Box 71-A, Martinsburg, West Virginia. There is no evidence in the petition or the record before this Court of any negligence on the part of the claimant nor of any action on his part that might lawfully preclude his recovery. Upon consideration of the petition, the exhibits, the stipulations and the order filing same, this Court is of the opinion that the facts set forth in the petition do present a claim within the jurisdiction of this Court, and further the allegations of said petition as stipulated by the respondent do constitute a valid claim against the State of West Virginia that in equity and good conscience should be paid and the Court is of the further opinion, and it is hereby our judgment that the claimant, Donald L. Wisecarver, should recover, and we do hereby award the said claimant the sum of $45.00.

Opinion issued May 16, 1968

THE CITY OF MORGANTOWN

v.

STATE ADJUTANT GENERAL STATE OF WEST VIRGINIA

(No. C-7)

Mike Magro, Jr., Esq. for the Claimant

Thomas P. O'Brien, Assistant Attorney General, for the State Road Commission

Ducker, Judge:

The claimant, The City of Morgantown, West Virginia, filed a claim in the sum of $180.00, representing unpaid rent for hangar space by Army National Guard at claimant's municipal airport for the period beginning July 1, 1964 and ending December 1, 1964, the period for which the use of hangar space was kept by the National Guard for its use after the expiration of a previous year to year lease. There appears to be no month to

month tenancy involved requiring notice which might have obligated the Adjutant General to give notice in order to be relieved of rent for the month of December. The Adjutant General of West Virginia, under whose jurisdiction said matter was, admitted the correctness and justice of the claim, and when the same was presented to the Commissioner of Finance and Administration, that department of the State answered that as there was no appropriation for the claim it could not legally pay it although he considered the same a moral obligation.

The claim is in error in its amount of $180.00 representing six months of rent at $30.00 per month, because the period for which the same was used was only for a five months period between July 1, 1964 and December 1, 1964, which at $30.00 per month amounts to $150.00.

We are of the opinion, therefore, that the claim should be sustained to the extent of $150.00, and an award in that amount is hereby made.

Claim allowed in the amount of $150.00.

Opinion issued May 16, 1968

DORAN FRAME, d/b/a DORAN ELECTRICAL CONTRACTORS

v.

STATE ROAD COMMISSION STATE OF WEST VIRGINIA

(No. C-13)

George P. Sovick, Jr., for the Claimant

Thomas P. O'Brien, Assistant Attorney General, and

Robert R. Harpold, Jr., Esq. for the State

Ducker, Judge:

Doran Frame, doing business as Doran Electrical Contractors in the City of Charleston, West Virginia, was between February

24, 1964 and December 10, 1964, employed by the State Road Commission to perform various electrical services and furnish necessary materials for the State Road Commission upon the latter's property at various locations throughout the city of Charleston. Invoices or statements itemizing in detail the electrical services rendered and the materials furnished for the State Road Commission by the claimant at the various locations of the quarters or properties of the Commission are filed with and attached to the petition of the claimant, numbering some 19 different invoices in varying amounts ranging from $42.57 to $492.50 with a total of all said invoices amounting to $3,801.73. The claimant was advised on January 12, 1967 by the Director of the Department of Finance and Administration that that Department had received the invoices representing this claim which had been returned to it from the Division of Purchases, and that the Division of Purchases had refused payment of the claim because West Virginia Code, Section 17, Article 3, Chapter 12, prohibits the payment of claims incurred by officers without any legislative appropriation in the fiscal year for such payment. The claim was subsequently, on May 8, 1967, filed with the Attorney General, and as the same was pending before the Attorney General upon the effective date of the creation of this Court, the claim was forwarded to this Court for consideration and decision.

There is no dispute as to either the accuracy or the justness of the claim presented, and the State Road Commission, by its Director of the Legal Division, has stipulated that on the basis of his investigation, the facts presented in the petition are true, and that the amount claimed is reasonable. The only apparent reason for the denial of the claim by the State is the lack of compliance by the state officers with the statutory requirements for the prior appropriation for the purchase of the material and the employment of labor in this connection. While we do not wish to encourage or override the statutory provisions, we are of the opinion that the fault in this connection is so chargeable to the state officers in employing such services that the persons employed should not be denied fair compensation for the services and materials furnished by them, the benefit of all of which has been enjoyed by the State.

We are therefore of the opinion that there is a moral obligation on the part of the State to pay this claim, and, accordingly, we hereby award to the Doran Frame, doing business as Doran Electrical Contractors, the sum of $3,801.73.

Claim Allowed.

Opinion issued May 16, 1968

W. E. GANO, SR.

vs.

STATE ROAD COMMISSION

(No. D-7)

Thomas P. O'Brien, Assistant Attorney General, and

Robert R. Harpold, Jr., for respondent

Jones, Judge:

This claim was received in the office of the Attorney General of West Virginia on August 25, 1967 and was filed in this Court on September 14, 1967.

At the hearing of this claim the respondent State Road Commission tendered a stipulation in writing reciting that having made a thorough investigation of the facts and circumstances giving rise to the claim, it found the allegations of the claimant's petition to be true and the amount claimed to be reasonable, and said stipulation was duly filed.

The facts admitted are that on or about the 12th day of June, 1967, an employee of the State Road Commission was operating a rotary mower along State Route No. 48 in Jefferson County, West Virginia, when a rock was negligently thrown through a picture window of the claimant's dwelling house, and the cost of replacement was $16.48.

Upon consideration of the petition, the stipulation and statements of counsel for the respondent, the Court is of opinion that the allegations of the petition present a claim within the jurisdiction of the Court and the allegations as stipulated con-

stitute a valid claim against the State of West Virginia which in equity and good conscience should be paid, and, accordingly, it is the judgment of the Court that the claimant, W. E. Gano, Sr., should recover, and he is hereby awarded the sum of $16.48.

Opinion issued May 16, 1968

FEDERAL INSURANCE COMPANY and
RAYMOND T. DALTON

vs.

STATE ROAD COMMISSION
OF WEST VIRGINIA

(Claim No. D-9)

No appearance on behalf of claimant.

Thomas P. O'Brien, Assistant Attorney General and

Robert R. Harpold, Jr., Attorney at Law, for respondent.

Singleton, Judge:

This claim was filed before this Court on or about September 15, 1967, in the amount of $677.33 for damages sustained to claimant Dalton's automobile as a result of debris from blasting operations conducted by employees of the State Road Commission damaging claimant's 1965 Volkswagon on the top, sides and windshield. The damage is alleged to have occurred in or near Welch, West Virginia, McDowell County. This case was placed on the hearing docket of this Court for April 8, 1968.

Upon the case being called for hearing the Assistant Attorney General and counsel for the State Road Commission tendered to the Court a stipulation reciting that the respondent, State Road Commission, had caused to be made a thorough investigation into the facts and circumstances set forth in the Petition and that as a result of said investigation the respondent was willing to stipulate that the facts as alleged in claimant's Petition are true and that the amount of damages alleged to have been sustained is reasonable, and further waived any right of

the respondent to introduce any evidence on this claim. The stipulation together with the order filing same was inspected and considered by the Court and accordingly ordered filed in this proceeding.

The facts as stipulated disclosed that on or about June 26, 1967, a 1965 Volkswagon belonging to claimant, Raymond T. Dalton, was legally parked along Route 16, commonly known as Coalwood Road, about four miles from Welch, West Virginia. The facts further disclosed that employees of the State Road Commission were conducting blasting operations in this area and that rocks and other debris from a blast set off by the State Road Commission employees fell on and struck the Dalton vehicle substantially damaging its top, left and right sides and windshield. No where in the record does it appear that Mr. Dalton was warned of the blasting operations or that he failed to move his vehicle to safeguard it, or that he did any other act that might lawfully preclude his recovery. Upon consideration of the Petition, the exhibits, stipulation and the order filing same, this Court is of the opinion that the facts set forth do present a claim within its jurisdiction, and that said facts do constitute a valid claim against the State of West Virginia that in equity and good conscience should be paid. The Court is therefore of the opinion, and it is hereby our judgment, that the claimant, Raymond T. Dalton and Federal Insurance Company, should recover, and we do hereby award Raymond T. Dalton and Federal Insurance Company, jointly, the sum of $677.33.

Opinion issued May 16, 1968

LAIRD OFFICE EQUIPMENT COMPANY

v.

STATE ROAD COMMISSION
STATE OF WEST VIRGINIA

(No. C-10)

George P. Sovick, Jr., Esq.

K. D. Pauley, Esq. for the Claimant

Thomas P. O'Brien, Assistant Attorney General, and

Robert R. Harpold, Jr., Esq. for the State

Ducker, Judge:

The claimant, Laird Office Equipment Co., a corporation, filed its claim herein with the Attorney General of West Virginia in the sum of $1,026.54, representing the purchase price for office equipment sold and delivered by the claimant to the State Road Commission, and this cause was transferred from the office of the Attorney General to this Court for consideration and decision.

The petition shows that the claimant, Laird Office Equipment Company, while engaged in the office supply and equipment business in the City of Charleston, sold and delivered to the State Road Commission at the latter's offices in Charleston, West Virginia, in accordance with three orders from said Commission, the following personal property, namely: (1) On February 29, 1960, two desks and two chairs to State Road Commission District Number One Office at 1340 Wilson Street, Charleston, West Virginia, for the price of $455.50; (2) On July 6, 1960, one office table ordered by the Legal and Right-of-way Division of the State Road Commission at 1800 Washington Street, East, Charleston, in the amount of $50.00; and (3) on August 15, 1960, three desks ordered by the Legal and Right-of-way Division of the State Road Commission and delivered to 1800 Washington Street, East, Charleston, in the amount of $521.04.

These three orders and the fulfillment thereof were certified by the persons in charge of said office as having been received and having been used and as being still in use by the said Road Commission at the time of the submission by claimant of the bills for payment. The Director of the Legal Division of the State Road Commission, stipulated that these claims were just and reasonable. It appears from claimant's petition, and not contradicted, that the reason for the non-payment of this claim is that the fiscal year in which the goods were ordered and delivered had expired and that there was no authority for the payment thereof by the State.

We are, therefore, of the opinion that this claim is a just claim, and we hereby award to Laird Office Equipment Company the sum of $1,026.54.

Claim Allowed.

Opinion issued May 16, 1968

W. E. MEDLEY, JR.

vs.

STATE ROAD COMMISSION

(No. C-25)

Thomas P. O'Brien, Assistant Attorney General, and

Robert R. Harpold, Jr., for respondent.

Jones, Judge:

This claim was filed before the Attorney General of West Virginia in June, 1967, and came on for hearing before this Court on March 21, 1968. The claim is in the amount of $3,000.00 for the destruction of the claimant's building, situate on West Virginia Secondary Route No. 1/4, known as Angle Fork Road, in Kanawha County. The claimant alleged that the State Road Commission negligently created a landslide by adding rock in excessive quantities to the roadbed, thereby producing an overburden and causing the earth to give way, slip into and destroy the claimant's building, and that the State Road Commission

did nothing to avoid the impending damage when it could have reduced or arrested the slide.

At the hearing of this claim the respondent State Road Commission tendered a stipulation of agreement that the allegations of the claimant's petition were true and that the true and correct amount of damages was $2,100.00, and the claimant, being present in person, joined in said stipulation, and the same was duly filed.

Upon consideration of the petition, the exhibits filed, the stipulation, and statements of counsel for the respondent, the Court is of opinion that the allegations of the petition present a claim within the jurisdiction of the Court and the allegations as stipulated by the parties constitute a valid claim against the State of West Virginia which in equity and good conscience should be paid, and accordingly, it is the judgment of the Court that the claimant, W. E. Medley, Jr., should recover and he is hereby awarded the sum of $2,500.00.

Opinion issued May 16, 1968

MARTHA J. NICKELL and
STONEWALL CASUALTY COMPANY

vs.

STATE ROAD COMMISSION
OF WEST VIRGINIA

(Claim No. D-4)

No appearance on behalf of claimant.

Thomas P. O'Brien, Assistant Attorney General, and

Robert R. Harpold, Jr., Attorney at Law, for respondent.

Singleton, Judge:

Claimant on September 8, 1967, filed with this Court, a claim in the amount of $104.31 for damages sustained to Claimant Nickell's automobile as a result of employees of the State Road Commission negligently felling a tree on said automobile. The damage is alleged to have occurred at or near Ronceverte, in

Greenbrier County, West Virginia. This case was placed upon the hearing docket of this Court for April 8, 1968.

Upon the case being called for hearing, the Assistant Attorney General and counsel for the State Road Commission, there being no appearance on behalf of claimant, tendered to the Court a stipulation reciting that the respondent, State Road Commission, had made a thorough investigation into the facts and circumstances giving rise to said claim, and that as a result of said investigation it appears that the facts as alleged in claimant's Petition are true and that the amount claimed as compensation for the damages sustained is reasonable, said stipulation further waiving any right on the part of the respondent to introduce evidence concerning this claim. The stipulation was inspected and approved by the Court and ordered filed in this proceeding. The facts as stipulated on behalf of the claimant and by the Attorney General disclose that on or about September 15, 1966, Martha J. Nickell was operating her vehicle with her Mother, Mrs. M. O. Morgan, as a passenger on a West Virginia State highway South of Ronceverte, West Virginia, in Greenbrier County, where employees of the State Road Commission were cutting some trees from the bank above the State highway. The flagman for the State Road Commission signalled Mrs. Nickell to proceed past the cutting activity of the State Road Commission and as she was operating her vehicle passing this area one of the employees of the State Road Commission severed a large limb from a tree and it hit the Claimant Nickell's vehicle damaging the lefthand or driver's side thereof. The Petition does not disclose any action on the part of the Claimant Nickell that might lawfully preclude her recovery or constitute contributory negligence. Upon consideration of the Petition, the exhibits, the stipulation and the order filing same, this Court is of the Opinion that this claim is within the jurisdiction of this Court and that the facts as stipulated do constitute a valid claim against the State of West Virginia that in equity and good conscience should be paid. It is therefore the opinion of this Court, and it is hereby our judgment, that the Claimant, Martha J. Nickell, and her Insuror, Stonewall Casualty Company, should recover and we do hereby jointly award to them the sum of $104.31.

Opinion issued May 16, 1968

EVERETT L. PARRISH

v.

STATE AERONAUTICS COMMISSION
STATE OF WEST VIRGINIA

(No. C-18)

Claimant appearing in person

Thomas P. O'Brien, Assistant Attorney General, for the State.

Ducker, Judge:

The claimant, Everett L. Parrish, alleges in his petition that he was Executive Director of the West Virginia State Aeronautics Commission from March 16, 1962 until February 28, 1967, and that at the time he resigned that position he had 35½ days of accrued annual leave, which included three holidays, and that on the basis of his salary payment he was entitled to receive for said leave time the sum of $1,650.00. The claimant applied to the Aeronautics Commission for payment of this claim and the claim was submitted by the Aeronautics Commission to the Attorney General for his opinion as to the legality of the claim. The Attorney General advised the Commission that it could not legally pay the claim because the claimant was an appointive officer and not such a state employee as was entitled to such leave pay under the provisions of the Rules and Regulations of the Board of Public Works of West Virginia. So now this claim is now filed with this Court for a determination of the question.

There is no denial of the facts involved herein, as it appears from the testimony of the witnesses for the claimant that a record was made of the various days for which there has been an accrual of annual leave time and that the claimant has not been paid anything on this account.

Claimant in his testimony taken before this Court admits that the Aeronautics Commission appointed him Executive Director, that the Commission is composed of five members, and he was not an appointee of the Governor or otherwise what he describes as a political appointee, but he says that he was a regular employee and that accurate records, were kept of his time, and that it had been the custom for previous Executive

Directors of the Aeronautics Commission to be paid annual leave time in the same manner as he now claims he is entitled to be paid.

The rules and regulations governing West Virginia personnel, as issued by the Board of Public Works in the paragraph relating to annual leave, provide as follows: "Annual leave regulations shall not apply to elected or appointed state officials."

Any question of the number of leave time days involved is rendered immaterial, if this case is within the exception cited in the rules to the effect that no elective or appointive officers are entitled to payment for such annual leave time. The facts are conclusive in our opinion that the claimant was an appointive officer and not an ordinary state employee as contemplated in the rules. There is no specification in the rules that an appointive officer is only one appointed by the Governor. Various Commissions of the State have the power to appoint their officers, such as was given to the State Aeronautics Commission to appoint its Executive Director. The reason for such exception to the rules relating to payment for annual leave is no doubt based upon the primary fact that one in an executive position, such as the Executive Director in this case, is not paid on any hourly or daily basis, although the Commission may have had its own regulation to the effect that the Director should serve 5½ days per week. The very nature of any such office, in every reasonable contemplation, may involve many hours one week and much less another week, or so on from month to month or even from year to year. The fact that previous holders of a position had been granted payment for allowed annual leave time does not justify this Court in following such a precedent when to do so would again violate the law.

We are of the opinion that the advice given by the Attorney General to the Aeronautics Commission that it was improper for it to pay for annual leave because it would be contrary to the letter and intent of the rules and regulations promulgated by the Board of Public Works, is correct.

We are therefore of the opinion that claimant is not entitled to compensation from the State on his claim and the same is hereby disallowed.

Claim Disallowed.

Opinion issued May 16, 1968

RELIANCE ELECTRIC AND
ENGINEERING COMPANY

vs.

DEPARTMENT OF PUBLIC INSTITUTIONS
OF WEST VIRGINIA

(Claim No. D-31)

No appearance on behalf of claimant

Thomas P. O'Brien, Assistant Attorney General for respondent.

Singleton, Judge:

Claimant on November 6, 1967, filed with the Court of Claims its Petition for the sum of $53.34 as compensation and payment to it for an electric motor supplied and installed at the request of the West Virginia Department of Public Institutions in Pinecrest Sanitarium.

The case was set down for hearing before this Court for April 8, 1968, at which time there was no appearance on behalf of claimant, but counsel for the State of West Virginia and the West Virginia Department of Public Institutions, Assistant Attorney General Thomas P. O'Brien tendered to the Court a stipulation admitting the facts as alleged in the Petition and as set forth in the Answer. The stipulation was reviewed by the Court and, after consideration thereof, was accordingly ordered filed in this proceeding. The facts as admitted by stipulation disclosed that the claimant had supplied an electric motor to Pinecrest Sanitarium of a value of $53.34; that the motor was ordered by Respondent from claimant on or about February 15, 1967; that the motor was shipped on July 25, 1967, and thereafter claimant submitted an invoice for the payment of same to the respondent. The stipulation further discloses that inasmuch as the invoice was submitted after the close of the fiscal year 1966-67 (June 30, 1967), the appropriation of funds for payment of this invoice had expired.

It does not appear from the Petition or the record before this Court that claimant was guilty of any delay or negligence on

its part that might lawfully preclude its recovery. Upon consideration therefor of the Petition, the exhibits, the stipulation and the order filing and approving same, this Court is of the opinion that the facts set forth and stipulated do present a claim within the jurisdiction of this Court and that said facts do constitute a valid claim against the State of West Virginia that in equity and good conscience should be paid. The Court is further of the opinion, and it is hereby our judgment, that the claimant, Reliance Electric and Engineering Company, a corporation, should recover and we do hereby award the said claimant the sum of $53.34.

Opinion issued May 16, 1968

MRS. RUDOLPH H. WEBB

vs.

STATE TAX COMMISSIONER

(No. C-22)

Thomas P. O'Brien, Assistant Attorney General, and *Robert R. Harpold, Jr.,* for respondent.

Jones, Judge:

This claim was filed before the Attorney General on May 5, 1967.

At the hearing held by this Court on March 21, 1968, the claimant and her husband, Rudolph H. Webb, appeared in person, and were not represented by counsel.

The claimant in this case claims damages to the residence owned by the claimant and her husband situate at 2605 Roosevelt Avenue, St. Albans, West Virginia, alleged to have been caused by shock and vibrations originated by heavy trucks traveling over United States Route No. 60, which parallels Roosevelt Avenue approximately 180 feet north thereof. The claimant alleges that the vibrations emanated from a defective section of the concrete highway which had been patched on several occasions with asphalt, which in turn deteriorated and

was rough and bumpy. The claimant's residence is approximately seventeen years old and is one of several houses built at or near the same time as a Naval Ordinance project in a subdivision known as Ordinance Park. The claimant testified that the vibrations were so severe that plates were knocked off of the walls, nails were loosened and the walls of the house were cracked. The claimant testified that she had already spent $305.42 for repairs and that the lowest of two estimates for the entire repair job was $900.00. Only the claimant and her husband testified in support of the petition; and there was no valid evidence that any of the several houses located nearby were similarly damaged.

The respondent State Road Commission produced three employees of the Safety And Claims Division of the State Road Commission, all of whom visited the premises and were present when large trucks passed thereby. None of them felt any vibration although one of the State witnesses testified that he noted "some rattle to the windows of the kitchen".

John W. Webb, Geologist for the State Road Commission, testified that the house was built several feet above bedrock and that the damages alleged to have been sustained might have been caused by subsidence attributable to an unstable foundation and the seasonal fluctuation of the water table.

During the investigation of this claim, the respondent proposed that a seismograph reading of the alleged vibrations be taken on the premises. This was first agreed to by the claimant but before the seismograph could be installed the claimant changed her mind and informed the respondent that the reading could not be taken.

It is common knowledge that heavy trucks cause some vibrations as they pass along our highways; but upon consideration of all the evidence adduced in this case, the Court finds that the deterioration of the claimant's residence has not been sufficiently connected with any negligent act or failure to act on the part of the respondent, and that the claimant has failed to prove her claim by a preponderance of the evidence. Therefore, it is our judgment that this claim should be and it is hereby disallowed.

Opinion issued May 24, 1968

CENTRAL ASPHALT PAVING CO. and
CONCRETE CONSTRUCTION COMPANY

v.

STATE ROAD COMMISSION

(No. C-29)

Frank L. Taylor, Jr., Esq. *Kay, Casto & Chaney* for the claimant.

Thomas P. O'Brien, Assistant Attorney General, *Robert R. Harpold, Jr.*, Esq., *Theodore L. Shreve*, Esq. for the State.

Ducker, Judge:

The claimants, Central Asphalt Paving Co., a West Virginia corporation, and Concrete Construction Company, a West Virginia corporation, both with offices in Charleston, West Virginia, were the successful bidders on State Road Commission Project No. U-317(8), C-1, Kanawha County, West Virginia, sometimes known as the Southside Expressway Project, and according to a final estimate in March, 1966 they were fully paid except for the amount claimed in this proceeding.

The contention of the claimants here is that they were paid only $0.10 per cubic yard, the bid price, instead of $1.50 per cubic yard for "special rock fill" shown on the "Summary of Earthwork" estimated to be 20,425 cubic yards, the difference claimed being $1.40 per cubic yard for the actual amounts of yardage, namely, 16,987.9 yards, totaling $23,783.06. The claimants contend that they were misled or deceived by the State Road Commission by the latter's specifications upon which claimants made their bid on the project, the specifications being the information relating to a core drill report on Cross Secton Sheet No. 121 and the said "Summary of Earthwork" contained on Sheet No. 9 of the plans and specifications for the project, and that they did not find and/or were not permitted to use the rock which was or could have been excavated within the project land, but were required to obtain the rock listed as special rock fill from an adjoining quarry about two miles away owned by the Nello L. Teer Company, and the

cost in doing so involved additional expense of the $1.40 per cubic yard now claimed by these contractors. Claimants also say that the rock obtained from the project land was as good for the purpose as that they obtained from the Teer Company's quarry.

The respondent denies completely the claim of the claimants, saying first that there was no deception in the plans and specifications, and, secondly, that the bids were made and the contract was let in accordance with the "State Road Commission of West Virginia Specifications—Roads and Bridges adopted 1960", reference to which provisions was specifically set forth on the plans and specifications for this project. The provisions of those specifications are set forth in Sections 2.125.2 and 2.125.4 as follows:

> "If satisfactory rock is not found in the roadway excavation the Contractor shall secure suitable material from an approved source selected for this purpose."
> "Special rock fill may be reduced or eliminated depending upon the amount of suitable rock obtained from the roadway excavation."

There is evidence to the effect that there was some discussion of the situation at a meeting with the Road Commission officials and that the agent of the claimants expressed his opinion, without reply by the Commission, that there would be ample rock on the land in project to complete the special rock fill requirement of the specifications, but the minutes of the meeting of the Road Commission of January 15, 1962 contain no such reference or information, and there is no satisfactory proof of any agreement or understanding as to this. We consider what was said as too vague to be of real probative value.

Upon the question as to whether claimants have been deceived or misled by the plans and specifications, we fail to see how the claimants could have been misled by the log of the core hole, as that log is evidently correct and it is not alleged, nor does it show, that it necessarily represents the strata of the whole area. It could only represent the strata immediately around which the core was taken, and the claimnts had the same information as the Road Commission from which to estimate the amount of rock that could be obtained from the project area. Furthermore, the specifications only estimated the

number of cubic yards necessary for the fill, not how much rock could be recovered from the area. The contractors had to make their own independent estimate on that, and, of course, it is unfortunate that they based their bid on their own wrong premise. Nor are we unmindful of their claim that they were prohibited by the Road Commission from using the material they took or could have taken from the project area, but the evidence offered by claimants in that regard is not adequately convincing to justify this Court in finding the State Road Commission wrong in its decision of that question.

We are of the opinion that the claimants were fully aware, or should have been aware, of the specifications and their meaning. The words of the manual are in no sense ambiguous, and it was the clear duty of the claimants to secure suitable rock material for the fill whether the amount to be recovered from the project area was sufficient or not, as there was no provision, other than the log of the core, to the effect that rock material was available from the project area. The log of the core was only informative so far as it went. The contractors made no condition in their bid that demands the State Road Commission accept their interpretation of the plans or otherwise reduce the conditions or terms of the contract. When claimants discovered that they, or the Road Commission, were in error was the time for modification of the contract if desirable or necessary, and this court does not think it should do so now.

In view of our findings and reasons as hereinabove outlined, we are of the opinion to, and do disallow and make no award to the claimants herein.

Claim disallowed.

Opinion issued May 24, 1968

CLARENCE C. ELMORE

vs.

ALCOHOLIC BEVERAGE CONTROL COMMISSIONER
BOARD OF PUBLIC WORKS
OFFICE OF THE GOVERNOR,
AND STATE OF WEST VIRGINIA

(No. D-29)

Walter W. Burton, Burton and *Burkett,* for claimant.

Thomas P. O'Brien, Assistant Attorney General, for respondents.

Jones, Judge:

This claim was filed in this Court on October 27, 1967 and came on for hearing on April 8, 1968, at which time the respondents tendered and asked leave to file a stipulation in writing that all of the facts alleged in the claimant's petition are true. Said stipulation was duly filed and thereupon the claim was submitted for decision upon the record.

It appears from the claimant's petition that on or about May 5, 1966, the claimant was invited by the liquor commissioners of Norway and Finland to participate in a Joint Liquor Administrators Study Conference and inspection of the Liquor Control operations in three Scandinavian countries, from June 12-20, 1966; that this conference was coordinated and planned by the National Alcoholic Beverage Control Association, Inc., of which the State of West Virginia is a member; that by letter dated June 6, 1966, the Honorable Hulett C. Smith, Governor of the State of West Virginia, and Chairman of the Board of Public Works and the Out-of-State Travel Board, approved said trip and requested a full report upon the claimant's return; that the claimant departed New York on June 8, 1966, and visited Italy, Sweden, Norway, Denmark, France and England before returning to New York on June 28, 1966 in pursuance of a schedule furnished Governor Smith prior to receipt of the Governor's letter of approval; that the travel was undertaken for and on behalf of the State of West Virginia and in connec-

tion with the claimant's official duties; that on August 17, 1966, the claimant submitted a travel voucher seeking reimbursement for expenses in the amount of $803.79; that on August 18, 1966, the Honorable Denzil L. Gainer, Auditor of the State of West Virginia, refused to issue the State's warrant in payment of the voucher upon grounds that the claimant had not obtained the prior approval of the Board of Public Works as required by its rules and regulations, and that the meeting was not a meeting of an association or organization not requiring such prior approval; and the claimant further alleges that he paid the sum of $803.79 out of his personal funds for travel undertaken for the State of West Virginia and that he acted in good faith in relying upon Governor Smith's approval and permission.

It further appears from the exhibits filed and the Court's independent investigation that the State Administrators of West Virginia, Pennsylvania, Michigan and Washington and the National Administrators of Finland, Norway and Sweden participated in the conference; that no claim was made for expenses to New York; that the major portion of the claim is for travel, with the remainder being for hotel accommodations; that all other expenses were paid for by the host countries; and that upon his return the claimant made a detailed and extensive report to the Governor, which was released for public scrutiny.

Pursuant to Chapter 137, Acts of the Legislature 1965, relating to travel expenses, the Board of Public Works promulgated rules and regulations concerning out-of-state travel by state officials and employees, Section VI of which provides as follows:

> "Costs for out-of-state travel will be reimbursed only for travel deemed necessary for the proper conduct of the State's business and will require the certification of the department head before reimbursement is made. Prior approval of the Board of Public Works will be required for travel and attendance to any meeting outside the State, except to those meetings of associations or organizations for which membership for the State of West Virginia has been approved by the Board of Public Works."

The claimant did not obtain the prior approval of the Board of Public Works, and in the opinion of the Auditor, the travel

did not come within the exception to the rules and regulations which applies to meetings of associations for which membership of the State of West Virginia has been approved by the Board of Public Works. West Virginia is a duly approved member of the National Alcoholic Beverage Control Association, Inc., and the question arises as to whether the "study conference" was a meeting of the association within the meaning of the rules and regulations. This was not a meeting of all members of the association, but the study was intended to be for the benefit of all members, including West Virginia, and perhaps was of greater benefit to those states whose representatives actively participated. The fact that the Study Conference covered several countries in Europe did not make it any less a meeting.

We are of the opinion that this was not such a meeting as is contemplated by the exception hereinabove noted. However, there is room for interpretation and enough uncertainty to give support to the claimant's assertion that he acted in good faith. There are other substantial extenuating circumstances. The chief executive officer of the State, who was also Chairman of the Board of Public Works and Chairman of the Out-of-State Travel Board, approved participation in the Study Conference as "worthwhile" and "beneficial", and those in authority in the states of Pennsylvania, Michigan and Washington, apparently concurred. The claimant's letter to the Governor requesting approval of the trip specifically stated that "I will be traveling at State expense."

The respondents have stipulated that the travel was undertaken for and on behalf of the State and in conjunction with the claimant's official duties, and that the claimant acted in good faith. Therefore, it follows that the State has received the benefits arising from the expenditures in question. While we disapprove the procedure followed by the claimant, and there is the obvious temptation to make an example of the claimant for other officials and employees for the sake of strict compliance with the travel rules and regulations in the future, we are impressed in this case by the admitted good faith of the claimant, the opportunity for honest error in the interpretation of the rules and regulations, the cogent fact that the conduct of the claimant was approved in advance by the Governor

of West Virginia, and the undenied assertion that the State of West Virginia derived benefits from the expenditures for which reimbursement is sought.

Chapter 14, Article 2, Section 13 of the Code of West Virginia extends the jurisdiction of this Court to claims "which the State as a sovereign commonwealth should in equity and good conscience discharge and pay." After consideration of the petition, the exhibits, the stipulation of the parties admitting claimant's allegations and the Court's independent findings, it is our opinion that the claimant has proved a valid claim against the office of the Alcoholic Beverage Control Commissioner, which in equity and good conscience should be paid; and it is the Court's judgment that the claimant, Clarence C. Elmore, should recover, and he is hereby awarded the sum of $803.79.

Opinion issued May 24, 1968

EUREKA PIPE LINE COMPANY

v.

DEPARTMENT OF NATURAL RESOURCES STATE OF WEST VIRGINIA

(No. D-20)

John R. Morris, Esq. and *Charles R. McElwee,* Esq. for the Claimant.

Thomas P. O'Brien, Assistant Attorney General, for the State.

Ducker, Judge:

The claimant, Eureka Pine Line Company, a West Virginia corporation with offices in Parkersburg, West Virginia, owned and operated with easement rights two six-inch high pressure oil pipe lines which crossed Conaway Run, a branch of Middle Island Creek in Centerville District, Tyler County, West Virginia. The Department of Resources of the State of West Virginia proposed to construct a lake on Conaway Run which would inundate the right-of-way and pipe lines of claimant, and the representatives of the Department of Resources contacted claimant and submitted two alternative plans with

respect to the right-of-way and the pipe lines, one to be the taking of the right-of-way and the relocation of claimant's pipe lines around the proposed lake site at an estimated cost of $20,000.00, and the other alternate plan to be the replacement and up-grading of the existing pipe lines at an estimated cost of $5,693.00; that amount to be the actual cost of labor and material, but not limited to the said estimate figure. The State Agency accepted the latter offer and the parties entered into a written agreement dated April 1, 1961, which was processed in accordance with all legal requirements as to approval thereof by the Department of Finance and Administration and the Attorney General, and all work was done satisfactorily and in accordance with the agreement, but the total costs thereof amounted to a total of $6,963.38 according to a statement rendered by the claimant to the respondent showing in detail the exact amounts expended by claimant for labor, materials, equipment and all other costs, after giving credit to the State for the salvage value of the pipe removed. In addition to the testimony of the witnesses for claimant, a stipulation between the parties was filed and admitted in the evidence, and the only item in controversy is the amount of the claim. At the hearing the claimant moved that its claim be reduced to $6,741.99 because it had been discovered that the pipe recovered from the lake had been sold and the proper credit to the State was the sum of $221.39.

The sole question involved is whether or not the claimant is entitled to recover its total claim of $6,741.99, or is it limited to the amount designated as the estimated cost of $5,693.00 specified in the agreement of April 1, 1964 between the State and the claimant. The exact wording of the agreement in this respect is as follows:

> "Resources agrees to reimburse Eureka for the actual cost of said pipe lines. Said cost is estimated to be as follows (the separate items total $5,693.00). It is understood by and between the parties that the above cost estimate is an estimate only and not a declaration of maximum cost and it assumes the prevalence of favorable weather and working conditions."

The evidence clearly shows that it was contemplated that claimant would have time to remove the old pipe and install the new pipe before the area was submerged with lake water,

but such was not the case and claimant had to do the work after the dam was completed and the water lowered which necessitated the work being done in muddy and slimy conditions.

The express wording of the contract that it was only an estimate of the cost and not a maximum figure is entirely clear and not ambiguous, and the reason for such wording is further sustained by the evidence as to the working conditions.

Wherefore, it is the opinion of this Court that the claimant has proved its claim by uncontradicted evidence in accordance with the terms of the agreement, and we hereby award the claimant, Eureka Pipe Line Co. Inc., the sum of $6,741.99.

Claim awarded.

Opinion issued May 24, 1968

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

v.

STATE ROAD COMMISSION STATE OF WEST VIRGINIA

(No. D-5)

E. L. Copeland for the claimant.

Thomas P. O'Brien, Assistant Attorney General, and *Robert R. Harpold, Jr.,* for the State.

Ducker, Judge:

The claimant, State Farm Mutual Automobile Insurance Company, an Ohio corporation, as assignee in writing of Walter Tyler of Elm Grove, West Virginia, alleges that on February 17, 1967, Walter Tyler was driving his 1962 Corvair automobile along Peters Run Road in the City of Wheeling, West Virginia, following a State Road Commission truck loaded high with slag, and that when the truck "jerked", slag was thrown from the truck onto Tyler's automobile, causing damage in the sum of $148.01 to the fenders, hood and windshield of the Tyler car.

The Attorney General and Counsel for the Road Commission, after filing their answer to claimant's petition, filed their stipulation to the effect that the facts alleged by claimant were true and that the amount of damages was correct.

We are, therefore, of the opinion that the employees of the Road Commission were negligent in so loading the truck, that the claim is just and should be paid, and we hereby award claimant the sum of $148.01.

Claim awarded.

Opinion issued May 24, 1968

PATRICK C. WILLIAMS, JR.

v.

DEPARTMENT OF EDUCATION
STATE OF WEST VIRGINIA

(No. D-26)

Claimant in person

Thomas P. O'Brien, Assistant Attorney General, for the State

Ducker, Judge:

The claimant, Patrick C. Williams, Jr., M. D., states that at the request of the Division of Vocational Rehabilitation of the Department of Education of the State of West Virginia, he gave a medical consultation at Charleston Memorial Hospital on October 10, 1965 and made hospital visits at Charleston General Hospital on November 8, 9, 10 and 11, 1965 to one Norma Board, a client of the Rehabilitation Center, for which services he claims the sum of $24.00.

The Director of the Vocational Rehabilitation Division and the Attorney General have answered the petition stating that the claim was correct, that it was not paid by reason of error and the amount is just and due the claimant.

Wherefore, this Court is of the opinion that the claim is just and should be paid, and, accordingly, we award the claimant the sum of $24.00.

Claim awarded.

Opinion issued June 5, 1968

CHARLESTON CONCRETE FLOOR COMPANY

vs.

STATE ROAD COMMISSION

(Claim No. D-6)

Frank L. Taylor, Jr., Kay, Casto & Chaney, for claimant

Thomas P. O'Brien, Robert R. Harpold, Jr. and *Theodore L. Shreve,* for respondent

Jones, Judge:

In 1961 the claimant, Charleston Concrete Floor Company, was awarded a contract by the respondent State Road Commission to construct bridge number 2113 on Interstate Route 64. The claimant moved certain equipment onto the project site, some of which was owned by the claimant and some of which had been rented by the claimant for use on this project. Thereafter a delay and shutdown of work was occasioned by the necessity for the redesign of one of the bridge piers and the claimant's equipment was immobilized for the period from July 19, 1963 through August 30, 1963. The claimant alleged damages in the amount of $24,680.35 for loss of use of its equipment during the time the project was shut down. Upon the hearing of this claim it was stipulated by counsel for the parties that the foregoing statements are true except as to the amount of damages and that the claimant was in no way responsible for the delay. It was further stipulated that certain enumerated items of equipment were idle for specified numbers of hours at agreed rates per hour, and that the total compensation which the claimant is entitled to receive is the sum of $9,713.78.

Upon consideration of the petition and the stipulation and statements of counsel, the Court is of opinion that the petition and stipulation present a valid claim within the jurisdiction of the Court and against the State of West Virginia which in equity and good conscience should be paid, and accordingly, it is the judgment of the Court that the claimant, Charleston Concrete Floor Company, should recover and it is hereby awarded the sum of $9,713.78.

Opinion issued June 5, 1968

WILLIAM CURRY and
MARY E. CURRY

v.

STATE ROAD COMMISSION
OF WEST VIRGINIA

(Claim No. C-2)

No appearance on behalf of claimants.

Thomas P. O'Brien, Assistant Attorney General, and

Robert R. Harpold, Jr., Esquire, for respondent.

Singleton, Judge:

Claimant on December 9, 1965, filed before the Attorney General of the State of West Virginia, a claim in the amount of $2,275.76 for damages sustained to claimants' automobile and dwelling house as a result of these being struck by a State Road Commission truck. The damage was alleged to have occurred on their premises on Route 21 in Sandyville, Jackson County, West Virginia. The claim was subsequently transferred to this Court by the Attorney General after July 1, 1967, and set down on the hearing docket on February 23, 1968.

Upon the case being called for hearing the Assistant Attorney General and counsel for the State Road Commission, there being no appearance on behalf of claimants, tendered to the Court a stipulation reciting that the respondent, State Road Commission, had made a thorough investigation into the facts and circumstances giving rise to said claim and as a result of said investigation stipulated that the facts as alleged in claimants' petition are true and that the amount of damages alleged to have been sustained is reasonable, and waived any right on the part of the respondent to produce any evidence concerning this claim. This stipulation was accordingly by order of this Court filed in this proceeding.

The facts as stipulated by counsel for the claimant and the Attorney General were that on July 31, 1965, a State Road Commission dump truck loaded with gravel and operated by

Arthur B. Kirby, a State Road Commission employee, was proceeding on Route 21 in Jackson County in a southerly direction when the brakes failed on said truck causing it to leave the roadway and strike the house of the petitioners and also their automobile, which was setting on their driveway. There is no evidence in the record before this Court of any negligence on the part of the claimants nor any inaction on their part that might lawfully preclude any recovery, and it appears that the sole cause of the damage was defective condition of the brakes on the State Road Commission vehicle.

Upon consideration of the petitioner, the exhibits, the stipulation and the order filing same, this Court is of the opinion that the facts set forth in the petition do present a claim within the jurisdiction of this Court, and further the allegations of said petition as stipulated by the respondent do constitute a valid claim against the State of West Virginia that in equity and good conscience should be paid and the Court is of the further opinion, and it is hereby our judgment that the claimants, William Curry and Mary E. Curry, should recover, and we do hereby award the said claimants the sum of $2,106.71. It should be pointed out that the aforementioned sum awarded is not the sum alleged in the petition but is the actual expense incurred by the petitioners for the repairs to their dwelling and automobile as evidenced by exhibits and statements subsequently filed in this matter.

Opinion issued June 5, 1968

GARY R. HOTT

vs.

DEPARTMENT OF NATURAL RESOURCES

(No. D-27)

Claimant in person

Larry Skeen, Assistant Attorney General, and *Thomas P. O'Brien,* Assistant Attorney General, for respondent.

Jones, Judge:

On October 26, 1967, the claimant, Gary R. Hott, filed his claim for $233.40 for damages to his 1962 model Volkswagen

automobile, caused by a fire of undetermined origin which destroyed the "Old Mill" building at the Spring Run State Trout Hatchery at Dorcas, West Virginia, at about 1:00 o'clock in the morning on Saturday, May 20, 1967. The vehicle had been parked adjacent to the mill building by the claimant while he was performing routine hatchery duties as an employee of the West Virginia Department of Natural Resources, Division of Game and Fish. A State truck, parked nearer the building was practically destroyed by the fire, and there is satisfactory evidence that the claimant sustained damages in the amount claimed.

The claimant contends that the respondent was negligent in directing the claimant to place his vehicle in a position of danger and that the respondent was negligent in not removing the vehicle from the place of danger. The supervisor and assistant supervisor of the Hatchery lived nearby but there is no showing as to exactly when and under what circumstances they discovered the fire or what if any opportunity they had to remove the claimant's vehicle from the damaging heat. The frame building was old and dry and it burned quickly.

The State is not an insurer of its employee's automobile properly parked upon State property, and it is not liable for loss caused by accidental fire. The State could only be liable if it failed to exercise ordinary care for the safety of the property left in its keeping and there is no showing of negligence in that regard. No negligence on the part of the respondent has been proved by the claimant and therefore it is our judgment that this claim be and the same is hereby disallowed.

Opinion issued June 5, 1968

GOLDA DENNING ROBERTS

vs.

STATE ROAD COMMISSION

(Claim No. D-8)

Sam R. Harshbarger, E. G. Marshall, Marshall, Harshbarger & St. Clair, for claimant

Thomas P. O'Brien, Assistant Attorney General, *Robert R. Harpold, Jr.* and *John W. Swisher,* for respondents

Jones, Judge:

This claim was received in the office of the Attorney General of West Virginia on July 27, 1967 and was filed in this Court on September 15, 1967. The claimant, Golda Denning Roberts, contends that the respondent State Road Commission should pay her one year's interest in the amount of $1260.80 upon a judgment and award in a condemnation suit in the Circuit Court of Cabell County, West Virginia, in the amount of $21,013.34 which was paid into court on May 10, 1965 but according to the claimant such payment was intentionally or negligently concealed by the respondent through its counsel and not made known to her or her counsel until approximately one year later. This suit was instituted about five years before it was tried in December 1964 and resulted in a jury verdict of $16,000.00 plus interest for approximately five years. The final judgment order was presented to counsel for the claimant on March 22, 1965, was approved by him and was entered by the Circuit Court on March 24, 1965. Counsel for the respondent paid the amount of the judgment and interest to the Clerk of the Circuit Court on May 10, 1965 and he testified that within a day or two thereafter he informed a member of the law firm representing the claimant that payment had been made and that the same information was repeated on several occasions. One of counsel for the claimant testified that he was considering an appeal as late as August 1965; and that no mention of the payment into Court was ever made to him although he and counsel for the respondent discussed the case many times.

Another partner in the firm representing the claimant would not deny that he had received a telephone call from counsel for the respondent notifying him of the payment, but testified that he could remember no such conversation.

Prior to the passage of House Bill No. 699 by the Legislature of West Virginia, Regular Session, 1965, which was passed March 13, 1965 and became effective ninety days from passage, there was no statute requiring a condemnor to give notice to parties of record or their counsel of the payment of an award or judgment into court. Therefore, at the time of the payment in question there was no legal requirement that any notice be given. It appears from the evidence that in Cabell County it was customary for the State Road Commission to give informal notice to the parties of record or their counsel; that counsel for both sides had handled many condemnation cases; and that it was generally understood among counsel participating in condemnation cases that the approximate time for payment into Court after entry of the judgment order was five to six weeks. While counsel for the claimant approved the final order there is nothing to show that he ever checked to see if it had been entered, and he never checked the Circuit Clerk's office, even by telephone, to see if payment had been made.

We have here an unhappy failure of communication between the lawyers in this case but in our view this is not a determining factor. Reasonable diligence in behalf of the claimant readily would have revealed the fact that the money had been deposited in the Clerk's office; and upon consideration of all of the evidence we are of the opinion that claimant's counsel was not intentionally or negligently misled nor was the payment intentionally or negligently concealed from him. It is further our opinion that this is not a case wherein equity and good conscience require compensation to the claimant by the State of West Virginia and accordingly this claim is disallowed.

Opinion issued July 2, 1968

HENRY A. BEASLEY

vs.

STATE ROAD COMMISSION
OF WEST VIRGINIA

(Claim No. C-21)

Henry A. Beasley, claimant, in person.

Thomas P. O'Brien, Assistant Attorney General, and *Robert R. Harpold, Jr.,* Attorney at Law, State Road Commission, for respondent.

Singleton, Judge:

This claim was filed before the Attorney General of West Virginia on May 3, 1967, subsequently transferred to this Court after July 1, 1967, and came on for hearing on March 21, 1968. The claimant appeared in person, without counsel, and offered evidence that in March, 1967, a portion of claimant's bottom land was flooded due to a smashed-in and stopped-up culvert installed and negligently maintained by the State Road Commission and that, as a result, his top soil was washed away. The claimant further testified that he used the bottom land in question as pasture for horses. Claimant's land is located in Kanawha County, and the drain or culvert was installed about 1948. It was replaced after the flooding of Mr. Beasley's land in March of 1967 by two drains in a direct effort on the part of the State Road Commission to try to prevent any further flooding of claimant's land as a result of normal rainfall. The evidence of the respondent's witnesses further disclosed that the drain that was removed and which caused the flooding of Mr. Beasley's land did have debris in it, and the picture, claimant's exhibit No. 4, of the drain did disclose it to be in a smashed condition. While the record further discloses that even the new double drain installed by respondent could not possibly handle a rainfall of the magnitude of 1961, this Court is of the opinion that the evidence does sustain the contention of the claimant that the drain in question in March of 1967 had not been properly maintained by respondent in a serviceable condi-

tion and that the negligent maintenance of the drain coupled with the overflow of water unable to pass through it, did damage the bottom land of the claimant without any fault on his part. The claimant, however, claimed damages in the amount of $700.00 and this amount is unsubstantiated by the evidence. The evidence discloses that claimant paid approximately $115.00 an acre for the 18 acre tract, a portion of which was bottom land and a larger portion of which was on the hillside. The only evidence as to any amount of damages sustained by claimant was his testimony that he had expended the sum of $100.00 for fertilizer, seed and labor in an effort to recondition the bottom land prior to the 1967 flooding, and that this had all been washed away.

After consideration of the petition, the exhibits, and the testimony of claimant and the witnesses for the respondent, it is the opinion of this Court that this claim is within its jurisdiction, that the claimant by a preponderance of the evidence has sustained the allegations of his petition of negligent maintenance of the drain in question by the respondent and that this claim is a valid one against the State of West Virginia, which in equity and good conscience should be paid. It is accordingly the judgment of this Court that the claimant, Henry A. Beasley, should recover the sum of $100.00 and he is hereby awarded said sum.

Opinion issued July 2, 1968

C. A. ROBRECHT COMPANY, INC.

vs.

DEPARTMENT OF MENTAL HEALTH

(No. D-14)

Joseph M. Brown, for claimant

Thomas P. O'Brien, Assistant Attorney General, for respondent.

Jones, **Judge**:

This claim is on an account for produce ordered by the Department of Mental Health and delivered by the claimant, C.

A. Robrecht, Inc., to the West Virginia Training School, also known as Colin Anderson Center, at St. Marys in Pleasants County, West Virginia. The total of the several invoices is $83.75 and this amount has not been paid. The claimant also claims interest on the account in the sum of $12.16.

The Department of Mental Health by its Director and the Attorney General filed its answer herein admitting that the produce was ordered, received and used by the Colin Anderson Center and that the only reason said produce was never paid for was that the claimant failed to submit invoices to the respondent prior to the close of the fiscal year 1964-65. By agreement of the parties this claim was submitted on the pleadings.

From the allegations of the petition and the admissions of the respondent it appears that, except as to interest which under the pertinent statute may not be allowed, this is a claim which in good conscience and equity should be paid and therefore the Court is of opinion to and does hereby award the claimant, C. A. Robrecht Company, Inc., the sum of $83.75.

Opinion issued July 2, 1968

CENTRAL ASPHALT PAVING COMPANY

vs.

STATE ROAD COMMISSION OF WEST VIRGINIA

(Claim No. C-27)

Frank L. Taylor, Jr., Esquire, for claimant.

Thomas P. O'Brien, Assistant Attorney General,

Robert R. Harpold, Jr., Esquire, and

Theodore L. Shreve, Attorney at Law, for respondent.

Singleton, Judge:

This claim was filed before the Attorney General of West Virginia, on June 29, 1967, was subsequently transferred to this Court after July 1, 1967, and came on for hearing on the

9th day of April, 1968. The original petition was in the amount of $47,777.27 allegedly due to the claimant for extra labor, materials, and additional engineering, performed and supplied by the claimant to the State Road Commission in the performance of its contract of road construction on Project I-64-1 (48) 30, in Putnam County, West Virginia.

At the hearing, counsel for the claimant and respondent tendered a stipulation of agreement relating to the basis of this claim, the pertinent parts of said stipulation reading as follows:

> "2. The claimant furnished the labor and materials specified in the contract and has been paid in full therefor. However, this proceeding results from Central's claim that the respondents are indebted to it for labor and materials the State Road Commission required the claimant to furnish above and beyond the contract and for which the claimant has not been compensated. The respondents agree that compensation for said labor and materials should be paid.
>
> 3. The *claimant was required to prepare the sub-grade on the project* before the claimant could proceed under its contract. The sub-grade item *was the responsibility of another contractor under another contract.* However, the work was not completed to the satisfaction of the State Road Commission and, consequently, the claimant was required to complete the work in order to be permitted to proceed under the terms and provisions of its contract. The cost of completing the sub-grade preparation item is Seven Thousand Five Hundred Dollars *($7,500.00).*
>
> *The claimant was adversely affected because of a mistake in the State Road Commission's plans and specifications in that the plans miscalculated the quantity of traffic bound base course material needed to complete the weigh stations to be included in the project.* The claimant was required to crush and stockpile additional cubic yards of material in excess of that called for in the plans and specifications. Further, it was required to haul material to be used in completing the weigh stations from a point twenty-two (22) miles away from the project. The cost to the claimant for these services and for which it ought to be reimbursed

is Eight Thousand Nine Hundred Eighty-three Dollars and Seventy-five Cents ($8,983.75).

4. All other items claimed by Central Asphalt Paving Co. in its petition originally filed with the Attorney General but transferred to this Court are abandoned.

5. There is now due and owing from the respondents to the claimant the sum of Sixteen Thousand Four Hundred Eighty-three Dollars and Seventy-five Cents ($16,483.75)."

Upon consideration of the claimant's petition, the exhibits filed, the stipulation, and the statements and representations of counsel for the respondent, this Court is of the opinion that this claim is within the jurisdiction of this Court and that the allegations as stipulated by the parties do constitute a valid claim against the State of West Virginia which in equity and good conscience should be paid, and accordingly, it is the judgment of this Court that the claimant, Central Asphalt Paving Co., a corporation, should recover the sum of Sixteen Thousand Four Hundred Eighty-three Dollars and Seventy-five cents ($16,483.75), and it is hereby awarded this amount.

Despite the provisions of Paragraph 6 of the stipulation above referred to, this Court is not of the opinion that this claim arises under an appropriation made by the Legislature of West Virginia during the fiscal year to which the appropriation applies and that this is not a claim under an existing appropriation and that, therefore, the payment procedure as set forth in Chapter 14, Article 2, Section 19, of the Code of West Virginia, one thousand nine hundred thirty-one, as amended, is not applicable.

Opinion issued July 2, 1968

CENTRAL ASPHALT PAVING CO.

vs.

STATE ROAD COMMISSION

(C-28)

Frank L. Taylor, Jr., Kay, Casto & Chaney, for claimant

Thomas P. O'Brien, Robert R. Harpold, Jr. and *Theodore L. Shreve,* for respondent

Jones, Judge:

In 1961 the claimant, Central Asphalt Paving Co., was awarded a contract by the respondent, State Road Commission, to furnish labor and materials for the construction of a part of Interstate Route 64 in Cabell and Putnam Counties. Before the claimant could enter upon the work provided for in the contract, it became necessary under the direction and supervision of the State Road Commission for the claimant to regrade the entire project in order to correct the subgrade which had been undertaken by another contractor. The claimant was compensated for the repair and material furnished under the terms of its contract, but has not been paid for the extra labor and materials required by the respondent to complete the project.

Upon the hearing of this claim, it was stipulated by counsel for the parties that the foregoing statements are true. It was further stipulated that the fair and reasonable cost of completing the extra work was $10,600.00, although the amount set out in the claimant's petition was $13,363.16, and that all other items of damage claimed in the claimant's petition are abandoned.

Upon consideration of the petition and the stipulation and statements of counsel, the Court is of opinion that the petition and stipulation present a valid claim against the State of West Virginia within the jurisdiction of this Court, which in equity and good conscience should be paid, and accordingly, it is the judgment of the Court that the claimant, Central Asphalt Paving Co., should recover, and it is hereby awarded the sum of $10,600.00.

Opinion issued July 2, 1968

WARREN CHAMBERLAIN and JUSTINE CHAMBERLAIN
vs.
STATE ROAD COMMISSION

(No. D-15)

Frank T. Litton and *Jack W. DeBolt,* for claimant.

Thomas P. O'Brien, Assistant Attorney General, and *Robert R. Harpold, Jr.,* for respondent.

Jones, Judge:

The claimants' petition alleges that on or about September 30, 1965, in the City of New Cumberland, in Hancock County, negligent blasting by a construction crew of the State Road Commission caused damage to the claimants' residence in the amount of $110.16.

At the hearing of this claim, the respondent filed a stipulation in writing setting forth that it had made a thorough investigation of the facts and circumstances giving rise to the claim, and that based thereon, it believes the facts alleged by the claimant are true and the damages claimed are reasonable.

Upon consideration of the petition and the stipulation and statements of counsel, the Court is of opinion that the petition and stipulation present a valid claim within the jurisdiction of the Court and against the State Road Commission which in equity and good conscience should be paid and, accordingly, it is the judgment of the Court that the claimants, Warren Chamberlain and Justine Chamberlain, should recover and they are hereby awarded the sum of $110.16.

Opinion issued July 2, 1968

KATHERINE CHATFIELD

vs.

STATE ROAD COMMISSION
OF WEST VIRGINIA

(Claim No. D-33)

Robert J. Louderback, Attorney at Law, *Sprouse, McIntyre & Louderback,* for claimant

Thomas P. O'Brien, Assistant Attorney General, and *Robert R. Harpold, Jr.,* Attorney at Law, State Road Commission, for respondent.

Singleton, Judge:

This claim was filed before this Court on November 14, 1967, and set down for hearing on the regular hearing docket for the 15th day of May, 1968. At that time evidence on behalf of the claimant was offered. The witness for the respondent was unavailable and by agreement with counsel for the claimant, this Court continued the matter until the 24th day of May, 1968, for the purpose of respondent presenting its evidence. This evidence was taken on the 24th day of May, 1968, and the case submitted.

The evidence discloses that the claimant was traveling on Sunday, October 22, 1967, in her 1963 Rambler automobile from her home in Whitmans, West Virginia, to Logan, West Virginia, for the purpose of attending church. She was accompanied by her two grandchildren, both teenagers, and was driving on U.S. Route 119, near the outskirts of Logan, the route commonly being known as the "Boulevard." The roadway in question is a four lane highway at this point with a median strip dividing the two north bound lanes from the two south bound lanes. Claimant was operating her vehicle in the right hand lane of the two south bound lanes and was proceeding at an approximate speed of 35 miles per hour. The evidence further discloses that approximately four to six feet from the edge of the right hand lane there is a precipitous rock cliff approximately 150 feet in height and that above this the ground slopes back up the mountain.

The evidence of both claimant and respondent discloses that from time to time rock slides occurred at this point from loose material, rock and dirt coming off the mountain above the cliff and on occasion some rocks dropping from the cliff face itself. On the day in question, claimant noticed many small rocks had fallen across both lanes of the roadway but these rocks did not make the road impassable. As she approached the fallen rocks a large rock fell from the hillside landing approximately ten feet in front of her automobile, she was unable to stop to avoid striking the rock and her car ran upon this rock and severly damaged her vehicle. The automobile had to be jacked up off the rock. The evidence further discloses that there were no signs erected along the highway at this point cautioning motorists to beware of falling rock or of rock slides, even though the State Road Commission had knowledge of slides occurring in this vicinity over the past several years and their maintenance crews had always cleaned up the debris in each instance. At least one vehicle had been struck by falling rock and the occupant injured within the past three or four years. On other occasions the entire four lanes of the highway had been blocked by slides and traffic had to be re-routed. On cross-examination, counsel for the claimant elicited from the respondent's witness, the County Road Supervisor at the time of the accident, that this falling rock and debris on the road could be prevented by further clearing of the hillside above the rock cliff, that this type of work was beyond the normal maintenance functions of the county road crew, but that no work had ever been done to his knowledge to eliminate the hazard nor were there any signs warning of this hazard erected as of the date of the accident in question. Repairs to the automobile of the claimant totaled $247.07, and this amount appears from the various estimates submitted to this Court, and not disputed, to be a reasonable and necessary amount.

Upon the record of the evidence before this Court, it would appear that the opinion of the Supreme Court of Appeals of West Virginia, in the recent case of State ex rel. Robert Vincent vs. Denzil Gainer, Auditor of the State of West Virginia, 158 S. E. 2d 145, (1967) is controlling on the issue of negligence. It would appear that the basis of negligence in the instant case is comparable to the showing in the Vincent case in that rock and debris located at an elevation of the side of the highway

where this accident occured and because of climatic and weather conditions from time to time had been falling upon the highway travelled by the public, and at the place in question rock and debris had fallen from time to time on occasion blocking the highway. Notwithstanding these facts, no safety measure or remedial construction work whatsoever was undertaken by the State Road Commission or its employees according to the record. The evidence further shows that no warning signs had been placed near this location and does not show any protection provided, other than patrolling for the removal of fallen debris, or any effort on the part of the State Road Commission to remove remaining debris and rock on the hillside above the cliff which were likely to fall and did from time to time fall. The evidence further indicates that the claimant was travelling at a reasonable rate of speed and there is no indication of any negligent act on her part, which, if present, would perhaps be a defense to a finding by this Court of a moral obligation.

Upon consideration of the claimant's petition, the exhibits filed, the record of evidence made in this case, and the statement of counsel for the respective parties, this Court is of the opinion that this claim is within the jurisdiction of this Court and that a preponderance of the evidence sustaines the allegations of claimant's petition as constituting a valid claim against the State of West Virginia, which in equity and good conscience should be paid. Accordingly, it is the judgment of this Court that the claimant, Katherine Chatfield, should recover the sum of $247.07 and she is hereby awarded this amount.

Opinion issued July 2, 1968

INTERNATIONAL BUSINESS MACHINES CORPORATION

VS.

DEPARTMENT OF FINANCE AND ADMINISTRATION

(No. D-42)

Thomas P. O'Brien, Assistant Attorney General, for respondent.

Jones, Judge:

Under contracts entered into by the Department of Finance and Administration, the claimant, International Business Machines Corporation, furnished certain equipment and services during the months of May and June, 1967. Invoices therefor, in the total amount of $7,882.03, were submitted to the respondent in July, 1967. As the invoices were for goods and services furnished and performed in the prior fiscal year, they could not be processed for payment for the reason that the appropriated funds had expired. The Department of Finance and Administration, by its Commissioner and the Attorney General, filed its answer herein admitting that the claim is valid and in the proper amount and recommending that the same be paid. By agreement of the parties, this claim was submitted on the record.

It appears from the record that the goods and services covered by the claimant's invoices were duly furnished to the Department of Finance and Administration, that the amount claimed is fair and reasonable, and that in equity and good conscience the same should be paid. Therefore, the Court is of opinion to and does hereby award to the claimant, International Business Machines Corporation, the sum of $7,882.03.

Opinion issued July 2, 1968

RALPH E. PHILLIPS

VS.

STATE AERONAUTICS COMMISSION

(No. D-48)

Ralph E. Phillips, Claimant, in his own behalf.

Thomas P. O'Brien, Jr., Assistant Attorney General, for respondent.

Jones, Judge:

This claim is for legal services performed and costs advanced by the claimant, Ralph E. Phillips, an attorney, for and on behalf of the respondent, State Aeronautics Commission. The claimant was employed by the State Aeronautics Commission to examine titles and to prosecute condemnation suits in Jackson County, and the employment was specifically authorized in writing by the Attorney General of West Virginia. The agreement was for the payment of $10.00 an hour and the claimant's time sheet supports a charge of $1670.00. The court costs advanced are shown to be $74.00, making a total claim of $1744.00. The work consisted of examining titles to five parcels of land sought to be acquired by the State Aernoautics Commission, preparing and instituting condemnation proceedings against the owners of five parcels of land, and the prosecution of two hearings before Commissioners and one jury trial.

An answer was filed by the State Aeronautics Commission by the Attorney General admitting that the claimant was duly employed to perform the legal services in question and that he has not been paid for such services or the costs advanced. The claimant was the only witness who testified at the hearing of this claim.

Upon consideration of the petition and its exhibits, the answer of the respondent and the evidence given by the claimant, the Court is of opinion that this is a valid claim against the State Aeronautics Commission which in equity and good conscience should be paid, and accordingly, the claimant, Ralph E. Phillips, is awarded the sum of $1744.00.

Opinion issued July 2, 1968

SOUTHERN COALS CORPORATION

vs.

STATE ROAD COMMISSION

(No. D-21)

Lee M. Kenna, for claimant.

Thomas B. Yost, Assistant Attorney General and *Theodore L. Shreve,* for respondent.

Jones, Judge:

According to the record, the claimant in this case, Southern Coals Corporation, under a paving contract with the respondent, State Road Commission, entered into in January, 1964, and preparatory to commencing work thereunder, stockpiled slag aggregate at the project where it was inspected and approved by the State Road Commission and remained for several months. During July, 1965, the claimant moved in its personnel and equipment to begin the concrete pavement. Thereupon, the State Road Commission notified the claimant that the aggregate contained a small amount of iron and would have to be removed and replaced. While the claimant makes the uncontested averment that the presence of iron in the paving mix would produce no adverse effect, the claimant was required to remove all of the stockpiled aggregate and a two weeks' delay in its work under the contract resulted. The claimant alleges that it was required to expend the amount of $3,143.31 for labor and equipment to remove and replace the stockpiled aggregate. It further alleges that it was required to expend the additional sum of $2,258.00 for supervisory personnel who were idled by the unnecessary delay, and other items of overhead.

Upon the hearing of this claim, it was stipulated by the State Road Commission that the facts and amount of damages alleged in claimant's petition are true, and the claim was submitted without the taking of any testimony.

The Court has considered the petition and stipulation and statements of counsel, and is of opinion that the record presents

a valid claim within the jurisdiction of the Court and against the State Road Commission which in equity and good conscience should be paid, and, accordingly, it is the judgment of the Court that the claimant, Southern Coals Corporation, should recover, and it is hereby awarded the sum of $5,401.31.

Opinion issued July 2, 1968

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

vs.

STATE ROAD COMMISSION

(D-52)

Thomas P. O'Brien, Jr., Assistant Attorney General and *Robert R. Harpold, Jr.,* for respondent.

Jones, Judge:

The claimant, State Farm Mutual Automobile Insurance Company, alleges that on June 1, 1967, the automobile owned by its assured, Betty Ruth Talbert, was damaged in the amount of $36.05 by overspray from paint guns operated by State Road Commission employees while painting near the Mercer County Courthouse. The State Road Commission has stipulated that, based on a thorough investigation, the facts alleged by the claimant are true and the amount claimed is reasonable.

Accordingly, the claimant, State Farm Mutual Automobile Insurance Company, is awarded the sum of $36.05.

Opinion issued July 9, 1968

ACIE W. ALBERT

vs.

STATE ROAD COMMISSION

(No. D-36)

Acie W. Albert, present in person

Thomas B. Yost, Assistant Attorney General and *Thomas P. O'Brien, Jr.*, Assistant Attorney General, for respondent

Jones, Judge:

On October 24, 1967, the claimant, Acie W. Albert, a State Road Commission employee, was helping another State Road Commission employee, Edward Starling, who was in charge of blasting operations on the State Road Commission parking lot in Mercer County. The claimant was inexperienced in such work and his activities were mostly limited to tamping the powder put in holes by Starling, who had 18 or 19 years experience in blasting. At the suggestion of Starling and before the blasting was started, the claimant moved his Chevrolet automobile to the farthest part of the state property, some 300 yards from the blasting area. A rock from one of the blasts struck the windshield of the claimant's automobile and damaged it so that it had to be replaced at a cost to the claimant of $88.07.

It appears from the evidence that the claimant merely followed instructions, and was not responsible for the size or intensity of the blasting shots. On the other hand, it appears that Starling, with his years of experience, should have more accurately anticipated the possible consequences of the blasting, and the Court believes that his negligence was the direct cause of the damage to the claimant's automobile. It is the Court's judgment that this is a claim which in equity and good conscience should be paid and, therefore, the Court awards the claimant the sum of $88.07.

Opinion issued July 9, 1968

C. A. ROBRECHT COMPANY, INC.

vs.

DEPARTMENT OF EDUCATION

(No. D-10A)

Joseph M. Brown, for claimant

Thomas P. O'Brien, Jr., Assistant Attorney General, for respondent.

Jones, Judge:

This claim is for $1,720.79 for produce sold and delivered to Cedar Lakes, an FFA and FHA Camp at Ripley, West Virginia, under the supervision of the Division of Vocational Education of the State Department of Health. The claimant also claims the sum of $215.11 interest on the account.

The claimant maintains a place of business at Parkersburg, West Virginia and alleges in its petition that during the period from September 11, 1964 to June 9, 1965, it delivered produce to Cedar Lakes as shown by the invoices and ledger account which were introduced into evidence. Each of the delivery invoices in evidence show the name of the head cook or second cook purporting to be signed by the person receipting for the delivery. The claimant's bookkeeper testified that she made up all of the invoices from orders furnished her by salesmen and that she posted the several charges to the Cedar Lakes ledger account from the receipted copies of the delivery invoices. At the hearing it was shown that two invoices dated September 11, 1964 and September 16, 1964, totaling $33.05, were paid by a State warrant but there is no evidence that any of the other invoices were paid. The ledger account and supporting invoices show a continuation of charges but no credits from October 14, 1964 to July 16, 1965. Two drivers for the claimant testified that they delivered produce to Cedar Lakes as shown on certain of the unpaid invoices.

The head cook at Cedar Lakes who was responsible for ordering produce testified that she gave no orders, to the claimant

during the period in question and that the signature on the invoices could not be hers. The supervisor of the Camp during this period was in the military service at the time of the hearing and was not available to testify. The present supervisor testified that he searched for the alleged missing invoices and found none of them in the files.

While much of the evidence in this claim is in direct conflict and the issues are confused, the Court is of opinion that the claimant has proved its claim by a preponderance of the evidence. The bookkeeper's accounting appears to have been in the regular course of business and the charges posted by her are supported by a series of invoices and the testimony of the drivers who delivered the produce shown on several of the invoices. Except for the $33.05 item, there is no contention on the part of the respondent that any of the invoices were paid. By statute the interest claimed may not be allowed, but the Court is of opinion that the principal claim is one which in equity and good conscience should be paid, and, accordingly, an award is hereby made to the claimant, C. A. Robrecht Company, Inc., in the amount of $1,687.74.

Opinion issued July 9, 1968

C. A. ROBRECHT COMPANY, INC.

VS.

DEPARTMENT OF EDUCATION

(No. D-10B)

Joseph M. Brown, for claimant.

Thomas P. O'Brien, Jr., Assistant Attorney General, for respondent.

Jones, Judge:

This claim is for $573.66, plus $31.57 interest, for frozen foods sold and delivered to Cedar Lakes, an FFA and FHA Camp at Ripley, West Virginia, under the supervision of the Division of Vocational Education of the State Department of Health. The basis of this claim is substantially the same as that recited in

the Court's opinion filed contemporaneously herewith in the claim of C. A. Robrecht Company, Inc., versus Department of Education (No. D-10A), and the Court's view of the evidence and its conclusions in favor of the claimant are the same.

The invoice of August, 1966, in the amount of $109.25, is shown to have been paid; and it is the opinion of the Court that the remainder of the claim excepting interest, in the amount of $464.41, in equity and good conscience should be paid, and, accordingly, an award is hereby made to the claimant, C. A. Robrecht Company, Inc., in the amount of $464.41.

Opinion issued July 12, 1968

EVERETT LEE AKERS

vs.

STATE ROAD COMMISSION

(Claim No. D-65)

Everett Lee Akers, Claimant, present in person

Thomas P. O'Brien, Assistant Attorney General, and *Robert R. Harpold, Jr.,* Attorney at Law, for the respondent.

Singleton, Judge:

This claim was filed March 15, 1968, set on the hearing docket of this Court for May 16, 1968, on which date the evidence of claimant and his witnesses and that of respondent and its witnesses was heard and the case submitted to this Court for decision. Claimant was not represented by Counsel.

It appears from the evidence that claimant leased a 1.2 acre tract of land adjacent to New River from the Chesapeake and Ohio Railroad Company, at a rental of $2.00 per year; that he was the lessee of this tract in July of 1967; that on or about July 25, 1967, a State Road Commission employee, Mr. Spangler, did drive a state bulldozer across the premises in question while moving it to Marsh Fork, and that the bulldozer broke down thereon; that Spangler's supervisor, witness Sweeney, did go to the site, did observe a "No Trespassing" sign erected by

claimant, and after a conversation with claimant, did seek permission of the Railroad and the claimant to remove the dozer. The dozer was subsequently repaired and removed, exiting through the river bed and not re-crossing the property in question.

Claimant testified that the passage of the bulldozer over his leased premises destroyed three "rows" of strawberry plants and "covered up" a "setting" hen and her eggs. As to this loss he is substantiated in part by the testimony of witness Wade. Respondent witness Spangler, the operator of the bulldozer, testified he saw only weeds and brush, and no "crops."

It is the opinion of the Court that the Evidence clearly discloses an unintentional, but nevertheless actual, trespass on claimants lands, and that the claimant is entitled to any damages he has sustained as a result. Claimant alleged the sum of $1,000.00 in damages, but introduced no evidence that would begin to sustain this amount. Questioned by members of the Court and by counsel for the respondent, claimant declined, or was unable, to even state the cost of his strawberry plants or his hen. This Court has therefore exercised its statutory investigative powers to arrive at some reasonable value for these items.

After consideration of all the evidence, this Court is of the opinion that claimant is entitled to payment for the damages he sustained as a result of the trespass by respondent; and it is further the judgment of this Court that the claimant, Everett Lee Akers, should recover, and he is hereby awarded the sum of twenty-five dollars ($25.00).

Opinion issued July 12, 1968

Norma Jean Byrd Claim No. D-35

Louis A. Earles Claim No. D-64

Leslie J. Borbely, M. D., Claim No. D-68

vs.

Department of Mental Health
State of West Virginia

Claimants appeared in person, without counsel.

Thomas P. O'Brien, Assistant Attorney General, for respondent.

Singleton, Judge:

These three claims were filed respectively on November 14, 1967, March 8, 1968 and March 12, 1968, each against the Department of Mental Health, were consolidated without objection, and heard by this Court on May 16, 1968.

Claimant Borbely was the chief witness for himself and the other two claimants, both of whom testified briefly in corroboration of his testimony. Claimants were cross-examined by counsel for respondent, but no evidence was offered on behalf of respondent to dispute claimants' testimony.

The evidence is uncontradicted that the Department of Mental Health, State of West Virginia, received a grant from the United States Department of Health, Education and Welfare, National Institute of Mental Health for the purpose of treating alcoholic patients at Spencer State Hospital during the years 1964 and 1965. It is equally clear that this grant was conditioned on the State of West Virginia providing an adequate follow-up program of treatment and therapy for these alcoholic patients after their discharge from the hospital. An additional grant of Ten Thousand Dollars was made by the Federal Government for payment of personal services for the professional staff to conduct this follow-up program.

Claimants were each employed at Spencer State Hospital. They were professionally qualified and accepted by the National Institute of Mental Health to conduct the follow-up program.

With the consent of the Hospital Superintendent, and the Director of the Department of Mental Health, claimants, in their off-duty hours, did conduct this program by traveling to Parkersburg, West Virginia, and conducting therapy and other treatment on an out-patient basis. These facts are further corroborated by the documentary evidence submitted by the claimants. Each of the claimants made ten trips for these purposes, and the fee approved as payment for these services was Fifty Dollars per trip each for claimants, Earles and Byrd, and Sixty Dollars per trip for Dr. Borbely to be paid from the federal grant made for this particular follow-up program. These extra services rendered by claimants were un-related to their respective duties at Spencer State Hospital and not in diminution thereof, being performed in their "off-duty time." (See Claimants' Exhibit No. 1.) Requisitions for payment for these services from the federal grant in question were submitted by claimants to the Department of Mental Health, and were refused by the comptroller thereof on the ground that the state salary received by each was for a twenty-four hour working day. The evidence further discloses that the Director of Mental Health requested an opinion from the Attorney General of West Virginia on the question of legality of these payments, said request being dated April 9, 1965, but that no opinion was thereafter rendered or reply received to this request.

It also appears from the evidence that federal funds in the amount of $2,500.00 have continued to be made available to the Department of Mental Health for the payment of the services in question, and that an item in the amount of $1,600.00 appears in the Department expenditure schedule for fiscal 1967-68 for this purpose.

After consideration of all of the testimony and documentary evidence, this Court is of the opinion that these are valid claims against the State of West Virginia that in equity and good conscience should be paid. It is accordingly our judgment that the claimants be and they are hereby awarded the following amounts:

Norma Jean Byrd, Claim D-35	$500.00
Louis A. Earles, Claim D-64	500.00
Leslie J. Borbely, M.D., Claim D-68	600.00

It is not clear to this Court if the federal funds available for payment of these respective awards are available and unencumbered in the budget of the Department of Mental Health for fiscal 1968-69. If such is the fact, and the Director of the Department of Mental Health so certifies, this Court recommends, and it is our judgment that these respective awards be paid under the payment procedure as authorized and set forth in Chapter fourteen, Article two, Section nineteen, of the Code of West Virginia, One Thousand Nine hundred Thirty-one, as amended. If such an unencumbered current appropriation does not exist in said Department budget for fiscal 1968-69, then this Court is of the opinion that these awards should be paid in accordance with the regular payment procedures for awards as outlined in Chapter Fourteen.

Opinion issued July 12, 1968

C. A. ROBRECHT COMPANY

vs.

DEPARTMENT OF MENTAL HEALTH
STATE OF WEST VIRGINIA

Claim No. D-12

James M. Brown, Esquire, Ronning and *Bailey,* Parkersburg, for the claimant.

Thomas P. O'Brien, Assistant Attorney General, for the Respondent.

Singleton, Judge:

This claim was filed September 18, 1967, and the evidence relating thereto offered by claimant and respondent at a hearing held by this Court on April 8, 1968.

This claim is in the principal amount of $135.96, and the claimant further asks the additional sum of $21.76 as interest. No evidence was offered by claimant to prove that the contract under which the goods in question were supplied provided for the payment of interest. The fact that the invoices rendered contained a printed statement that six (6%) percent interest

would be charged on "past due accounts" is not, in the opinion of this Court, sufficient to satisfy the statutory requirement. See Code Chapter 14, Article 2, Section 12. Accordingly, the claim for interest is hereby disallowed.

This claim involves twelve invoices for fresh fruits and vegetables supplied and delivered, per order, to Lakin State Hospital Commissary, an institution operated by the West Virginia Department of Mental Health. In its answer to claimants petition, respondent admits that the fruits and vegetables itemized on seven of said invoices were "ordered, received and used by said hospital". These seven invoices total $69.31, and would have been paid had they been timely processed during fiscal year 1964-65 under current appropriations.

The remaining five invoices, totaling $66.65, for fruit and vegetables delivered during this same period, were not accompanied by driver delivery slips receipted by the signature of an authorized hospital or commissary storekeeper.

The claimant offered in evidence the original book records and ledger sheets relating to these transactions, together with the original delivery receipts evidencing the quantities and prices of the items delivered, the date thereof, and the name of the delivery man. The five transactions in question are widely spaced as to time, and involved deliveries made on July 2, July 30, August 6, September 24, and November 27, all in 1964. The two delivery men involved, one of whom is no longer employed by claimant, each testified that they delivered the goods covered by the respective delivery slips to the hospital, that the goods were left outside the door of the storeroom or commissary, this being the accepted and customary delivery method when the storeroom was not open and no one was present to sign for the goods.

Respondents witness Miller, storekeeper at Lakin State Hospital during 1964-65, testified that he could not recollect the deliveries in question (although recognizing the deliverymen), that he could not say the deliveries were not made and the goods not received, but that it would have been possible for the drivers to obtain receipts therefore had they gone to other parts of the hospital. It further appears from the evidence that the invoices in question represent a very small portion of the

business conducted between claimant and respondent during this period.

While this Court is aware of the constitutional prohibitions relating to payment by the state for goods and services, after consideration of all the evidence and exhibits, we are of the opinion that claimant has, by a preponderance of the evidence established the ordering of and the delivery of the goods in question and thereby proven a valid claim against the State that in equity and good conscience should be paid. It is accordingly the judgment of this Court that the claimant be and it is hereby awarded, the sum of $135.96.

Opinion issued July 12, 1968

C. E. WETHERALL d/b/a

C. E. WETHERALL COMPANY

vs.

STATE ROAD COMMISSION
OF WEST VIRGINIA

(Claim No. C-24)

Carney M. Layne, Esquire, for claimant

Thomas P. O'Brien, Assistant Attorney General, *Robert R. Harpold, Jr.,* Esquire, and *Theodore L. Shreve,* Esquire, for respondent.

Singleton, Judge:

This claim was filed with the office of the Attorney General of West Virginia, on June 27, 1967, subsequently transferred to this Court on July 1, 1967, and the evidence of claimant and respondent taken by this Court at a hearing held on April 10, 1968.

This claim is in the amount of $15,380.17, the sum of $8,097.25 thereof being admitted by the State to be due the claimant in accordance with the final estimate prepared by the State Road Commission on the project in question; and the sum of $7,282.92

claimed as compensation for extra work performed and equipment and material furnished by claimant for flood clean-up operations on the project as ordered by the State Road Commission. Claimant had been awarded a contract for excavating, draining, grading and surfacing approximately 2.8 miles of the Bramwell, West Virginia-Virginia State Line Road in Mercer County, West Virginia, Project S-647-1, said contract being dated November 21, 1955. The work for which additional compensation is claimed resulted from a flooding by the Bluestone River in late January and early February of 1957. Claimant had completed all sub grade work and removed his equipment from the project in December of 1956, contemplating a resumption of work on the project as soon as weather permitted in 1957. The claimant testified in person and submitted as documentary evidence the daily work report sheets covering the emergency flood clean-up work, this work having been done during the period from February 26, 1957, through March, 1957. Claimant's superintendent on the project who prepared the daily report sheets also testified in behalf of the claimant. Claimant testified that Mr. Scott Blankenship of the State Road Commission District Office in Princeton met with him at the project site in early February, requested that he return with his crew to remove the flood debris that had accumulated on the project and around a bridge over the Bluestone River near Bramwell, advising that the State Road crew themselves were unable to do all of the work involved and were needed elsewhere in the District; that he should keep a record of the expenses involved and turn the same in as a "force account" for payment. No executed force account work order was ever delivered to the claimant by the State Road Commission for the work involved, but claimant's evidence is to the effect that he proceeded to move his men and equipment on the job and to perform the work outlined by Mr. Blankenship. Mr. Blankenship was summoned as a witness by claimant and appeared in response to said summons. The attorney for the claimant thereafter advised the Court that he had interviewed Mr. Blankenship and that Mr. Blankenship said that inasmuch as the events had occurred over eleven years ago that he could not recollect the pertinent details and felt that he could contribute no information concerning this claim. Mr. Blankenship was, therefore, not called as a witness by the claimant, nor was he called as a witness by the respondent.

Claimant further offered in evidence (filed as Exhibit A with his Petition) a complete breakdown of the accounts for labor, material, equipment and overhead constituting the $7,282.92, claim for extra work.

The evidence for the respondent consisted of the testimony of Mr. Levi Scott, now retired, formerly respondent's inspector on the project in question, and (Respondent's Exhibit No. 1) the official diary maintained by Mr. Scott for the project covering the period in question. The official diary and the daily reports submitted by claimant (Claimant's Exhibit No. 1) at first glance appear to be completely conflicting for the days in question, but a careful day-by-day examination of same by the Court indicates that they coincide in the majority of instances for the work that was done on any particular day during this period and are identical in reflecting the visits of State Road Commission officials and engineers to the project. Mr. Scott's testimony corroborated the occurrence of the flood but tended to minimize the damage caused thereby and any extra work involved on the part of claimant, it being the contention of the respondent that claimant was reimbursed for any such extra work through the unit price items of payment as set forth in the contract and final estimate and that particularly claimant was reimbursed for extra stone that had to be used to replace base stone spoiled or damaged by the flood.

The final voucher estimate covering this contract and setting forth the amount of $8,097.25 due the claimant by the respondent was introduced into evidence (Claimant's Exhibit No. 2). It is apparent from the face of this estimate that the amount acknowledged to be due to the claimant by the respondent is made up of the sum of $584.59 for a railroad liability insurance policy premium on Force Account No. 6, and the amount of $7,512.66 in retained percentage under the terms of the contract. The original contract in question was in the amount of $228,-417.05, with approved overruns in labor and quantities in the amount of $158,048.29, underruns of $10,247.47, resulting in a net final contract figure of $376,217.87.

No where on the face of the final estimate does it appear, despite the contention of the respondent, that any payment was made to the claimant for the extra work he did perform in

flood clean up. No evidence was offered by respondent to point out any of the items under the contract that had been increased in quantity with a resultant increase in payment to the claimant, as a result of claimant's work and labor in flood clean up. Respondent witness Scott did testify that additional stone was used to replace stone in the road bed that had to be removed as a result of flood damage and that claimant was paid for this additional stone at the unit price under the contract. It should be pointed out that no item is included in this claim for any stone or for any material other than fuel for equipment use.

In comparing Claimant's Exhibit A, filed with its petition, and Claimant's Exhibit No. 1, admitted in evidence at the hearing, (the daily report sheets) the Court questions the propriety of charging the entire working day or longer in some instances of the project superintendent, R. C. Wetherall, solely to supervision of the flood clean-up work when, in fact, the daily report sheets and official diary (Respondent's Exhibit No. 1) reflect that considerable work under the regular contract was carried on during these particular days. R. C. Wetherall also appears as a dozer operator on at least two days for a full days work, but his wage rate is extended at a rate in excess of that paid to the dozer operator by the claimant on the same exhibit. While no question concerning these discrepancies was raised at the hearing by either respondent or claimant, it is the Court's duty and it has the authority to scrutinize the documentary evidence very closely.

After careful consideration of the evidence and exhibits of both claimant and respondent, this Court is of the opinion that the claimant, by a preponderance of the evidence, has proven that he actually did perform work and labor and furnish material at the request of the State Road Commission for emergency flood clean up over and above the work and labor contemplated under his contract with the State Road Commission for the improvement of the Bramwell, West Virginia-Virginia State Line Road, and that the final estimate as prepared by Respondent for this contract does not reflect that claimant was compensated for any of this extra work; and that claimant has established a claim before this Court that in equity and good conscience should be paid.

The Court is of the opinion therefore to award to the claimant the sum of $5,506.55, for the emergency work performed in flood clean-up, the original amount of this flood clean-up claim having been reduced by this Court as a result of the Court's question as to the propriety of certain labor charges made by the claimant in its exhibit A.

The claimant is therefore and he is hereby awarded the total sum of $5,506.55.

Opinion issued July 12, 1968

KENNETH G. KEITH

VS.

STATE ROAD COMMISSION
OF WEST VIRGINIA

(Claim No. D-50)

Thomas P. O'Brien, Assistant Attorney General, and *Robert R. Harpold, Jr.,* Esquire, for respondent.
Singleton, Judge:

This claim was filed January 8, 1968 and placed upon the hearing docket of this court for May 16, 1968.

The case being called for hearing, counsel for respondent and the Attorney General tendered a written stipulation of agreement as to the facts alleged in claimants petition for the consideration of this court. There was no appearance on behalf of the claimant, in person or by counsel.

It appears from the petition and exhibits filed therewith that claimants automobile was lawfully parked in a private parking area on November 10, 1967, in Ritchie County, W. Va. It further appears that a State Road Commission vehicle commonly called a "low boy," or "low boy trailer," being operated on the state highway adjacent to this parking area on state business and by a state employee. While passing the parking area, a wheel came off the "low boy" and rolled with considerable force into the side of claimants vehicle, necessitating repairs thereto amounting to $52.53.

Upon consideration of the petition, the exhibits, the stipulation, and the estimate of repairs filed herein, the court is of the opinion that this claim is within the jurisdiction of this court and the facts as stipulated constitute a valid claim against the State of West Virginia which in equity and good conscience should be paid, and the costs of repairs made being reasonable, that the claimant, Kenneth G. Keith, should recover, and he is hereby awarded the sum of $52.53.

Opinion issued July 12, 1968

NATIONAL RUBBER & LEATHER COMPANY,
A CORPORATION

vs.

STATE ROAD COMMISSION OF WEST VIRGINIA

(Claim No. C-1)

Harry N. Barton, Esquire, for claimant.

Thomas B. Yost, Assistant Attorney General, and *Robert R. Harpold, Jr.*, Esquire, for Respondent.

Singleton, Judge:

This claim was filed before the Attorney General on December 10, 1965, the accident from which it stems having occured June 30, 1964. The claim was subsequently transferred to this Court on July 1, 1967, and set down for hearing on February 23, 1968, at which time it was dismissed for claimant's failure to appear and prosecute same. On February 26, 1968, claimant's counsel moved this Court that the claim be reinstated and reset for hearing on the ground that he was hospitalized on the prior date and unable to appear. The Court, after consideration, sustained said Motion, reset this claim for hearing on May 15, 1968; at which time the evidence for claimant and respondent was introduced.

The evidence for claimant discloses that Richard Lee Crowder, who testified on behalf of claimant, was operating claimant's truck on West Virginia State Route 4 on the afternoon of June

30, 1964, in Clay County, West Virginia, that claimant's vehicle was proceeding in a northeasterly direction and following a State Road Commission truck and that it had been following said truck for approximately one-fourth to one-half a mile, that claimant's driver in a straight stretch of the road then proceeded to overtake and attempt to pass said State Road Commission truck, sounding his horn and proceeding at a reasonable speed; that when claimant's vehicle was partially along side said State Road Commission vehicle, the State Road Commission vehicle turned to the left and struck claimant's vehicle. The evidence of claimant is further that the left front wheel of the State Road Commission vehicle and the right front wheel of claimant's vehicle locked together and that the two vehicles veered to the left off the roadway and then back onto the roadway and came to a halt some distance down the road off to the right hand side of said road. There were no personal injuries and claimant contends its vehicle was damaged in the amount of $1,016.41, which amount was stipulated as reasonable and not questioned by respondent. Certain photographs were offered into evidence by claimant and admitted, depicting the area where the accident occured and showing that the highway was lined with a dotted line indicating a passing zone and disclosing the two vehicles side by side on the right hand side of the road after the accident occured. Respondent's principal evidence was given by William R. Taylor, driver of the State Road Commission truck involved, who testified that he was aware that claimant's vehicle was behind him and had been for approximately one-fourth of a mile; that when he prepared to make a turn off onto Secondary Route 14, he gave no hand signal but did activate his automatic left turn signal on his vehicle, although he testified that he did not know whether the turn signal was operating or not; that he had heard claimant's driver sound his horn to pass but that it appeared to him the horn was sounded just prior to the time that his vehicle collided with claimant's vehicle, that the two vehicles did lock together as testified to by claimant's driver and that while he had a rear view mirror he did not answer directly whether or not he had looked into it to observe any traffic coming from the rear prior to turning, but again responded that he knew the claimant's truck was behind him. Counsel for respondent moved the Court that the claim be dismissed on the ground that

claimant's vehicle was passing respondent's vehicle within 100 feet of an intersection in violation of Section 6, Article 7, Chapter 17-C of the Code of West Virginia, and that the unpaved Secondary Road joining with State Route 4 at this point constituted an intersection as the same is defined in Section 42, Article 1, Chapter 17-C of the Code of West Virginia. The respondent further introduced pictures indicating that State Route 4 at this point is double lined to prohibit passing and that signs are erected indicating an intersection. Cross-examination of the witness Calvert indicated that these pictures were taken on February 1, 1968, approximately four years after the accident.

This Court is of the opinion that the principles enunciated by the Supreme Court of Appeals of the State of West Virginia in the case of Adkins vs. Minton, decided November 29, 1966, 151 S. E. 2d 295, control the legal questions presented by the evidence in this claim. The Supreme Court in this opinion reaffirms its interpretation of Section 8, Article 8, Chapter 17-C of the West Virginia Code, providing that not only should an appropriate signal be given by a person making a turning movement but also that any such turning movement made by a vehicle from a direct course upon a roadway shall not be done unless and until such movement can be made with reasonable safety. To quote the Supreme Court, "In other words, the statute provides an additional requirement imposed upon the driver of a forward vehicle attempting to make a left turn into a passing lane other than merely giving the proper signal. The correlative statute requires the driver of a vehicle overtaking and passing another vehicle proceeding in the same direction to give an audible signal and pass to the left thereof at a safe distance. Code, 17C-7-3(a), as amended."

By respondent's driver's own testimony he has failed to comply with that important additional requirement of the statute providing that one intending to make a left turn must ascertain if it can be done with reasonable safety. This is especially true inasmuch as he admitted that he was aware that claimant's vehicle was behind him. Respondent's driver, while confident that he switched on the automatic left turn signal, did not know whether or not it was working and verified that he did not give any hand signal. In view of this evidence it is the

opinion of this Court that respondent's driver was guilty of negligence as a matter of law in accordance with the opinion of the Supreme Court of West Virginia in the above referred to case of Adkins vs. Minton. It is further the opinion of this Court that the physical evidence as shown by the pictures taken at the time of the accident discloses that the State Road Commission, itself, did not consider the joining of this unpaved secondary road with State Route 4 to constitute an intersection within the statutory definition of same, at least at the time of this accident. For this reason the motion of the respondent asking for the dismissal of this claim on the ground that violation of this statute constitutes prima facia negligence contributory to the accident and asking for dismissal of the claim is over-ruled.

After consideration of all of the evidence, including the documentary evidence introduced and the petition and exhibits, this Court is of the opinion that it has jurisdiction of this claim and so finds; that the damage sustained to claimant's vehicle was solely caused by the negligence on the part of respondent's driver and that this claim is one that in equity and good conscience should be paid by the State.

It is, therefore, the opinion of this Court that the claimant be, and he is hereby awarded the sum of $1,016.41.

Opinion issued July 12, 1968

RAYMOND R. SMITH

vs.

STATE ROAD COMMISSION
OF WEST VIRGINIA

(Claim No. D-2)

Donald A. Lambert, Esquire for the Claimant.

Thomas P. O'Brien, Esquire, Assistant Attorney General and *Robert R. Harpold, Jr.,* Esquire, for the respondent.

Singleton, Judge:

This claim was filed with this Court on September 8, 1967, placed on the hearing docket and evidence of claimant and respondent presented to the Court on May 16, 1968.

Claimant operated a private dumping facility for the disposal of solid waste, garbage and trash and litter on a 38 acre tract near South Charleston, West Virginia, adjacent to State Route 12/2, during the years 1964, 1965 and until October, 1966. Claimant testified that State Road Commissioner, Burl Sawyers and other State Road officials visited him in the fall of 1964, advised him that the State Road Commission had lost certain dumping privileges at Montgomery, West Virginia, and orally contracted to use his dump for the disposal of garbage and litter for the sum of $12,000.00 per year. Claimant further testified that he volunteered that the State could dump that portion of garbage and litter picked up on Route 60 in Kanawha County, free of charge, if the State would improve the State Road (12/2) providing access to his dump. Claimants dump was also being used by commercial trash and garbage collectors, each of whom paid claimant the sum of $4.00 for each large truck load deposited on his premises.

Respondent offered the evidence of Chilton Stalnaker, Supervisor of District No. 1, State Road Commission, during 1964, who testified that claimant called him in the fall of 1964, requesting certain repairs to State Route 12/2, that his district had just lost its dumping privileges in Montgomery, for the disposal of the trash, placed in the litter barrels in the county and that in return for Stalnakers assurances of repairs and improvements to Route 12/2, claimant agreed to permit the State Road Commission trucks to dump on his premises, and that he did not anticipate that it would be more than one load a day. Stalnaker stated he had no knowledge of any other arrangements made by the Road Commission for use of the dump. Respondent further offered in evidence the dollar amounts expended by the Road Commission for maintenance (materials, labor and equipment on Route 12/2 for the years 1964 ($427.58), 1965 ($600.08), 1966 ($5.84), 1967 ($998.88), and for 1968, to the date of hearing ($0.00). Despite some confusion on the part of claimant as to the date, this Court is of the opinion that it is quite clear that the Road Commission ceased using this dump in October or November of 1966, the dump having been ordered closed by the Circuit Court of Kanawha County on application of the West Virginia Department of Health.

Other witnesses for the claimant included commercial garbage haulers using his facility, and pig food scavengers, each of whom testified that they were at the dump five days a week during most of the period in question and they had personally observed State Road Commission trucks making three to five trips daily dumping garbage and trash on claimant's premises. Claimant further testified that he covered the deposited garbage and debris with earth cover, using a bulldozer and that when he was unable to do this, he hired a man and dozer to perform this task at a cost of $150.00 per week.

Claimant asks this Court to award him the sum of $4,000.00 for the use of his dump by the State Road Commission for the period in question, and does not pursue his claim on the alleged $12,000.00 annual oral contract set forth in his testimony.

Despite the evidentiary conflict surrounding the beginning of usage of claimants dump by the State Road Commission, the evidence is clear that it was used for a period from the fall of 1964 until on or about October of 1966. The evidence is further clear that claimant agreed to permit the State to dump free the litter barrel refuse from Route 60, in exchange for improved maintenance of State Route 12/2. His counsel argues that a pre-existing obligation in law (maintenance of State Road 12/2) is not a legal consideration for such a contract, and this is generally correct; but his counsel further stated to this Court that "of course, he made the deal and should be held to it." In this the Court concurs, and finds that one load a day was entitled to be dumped free. By the same token, we cannot arbitrarily overlook the evidence of claimant and other witnesses to the effect that respondents trucks dumped three to five loads a day, five days a week. Considering all of the evidence, and using the lesser amounts in each instance, this Court finds that respondent did use claimants dumping facilities an average of three times per day, five days per week over an approximate twenty month period, and that one of these loads each day was considered to be free. And further considering the evidence as to claimants normal charges to others, and the evidence as to his expense in treating and covering the refuse deposited, no evidence being offered by respondent as to the prevailing rates for such services, this Court is of the opinion

that three dollars per load is an equitable rate for the services afforded.

It is therefore the opinion of this Court that claimant has rendered services to the State of West Virginia for which he should be compensated and that in equity and good conscience should be paid; and he is accordingly awarded the sum of $2,400.00.

Opinion issued July 26, 1968

CHARLES C. OLIVER

VS.

STATE ROAD COMMISSION
STATE OF WEST VIRGINIA

(Claim No. D-24)

Claimant appearing in person.

Thomas B. Yost, Assistant Attorney General, and *Robert R. Harpold, Jr.,* representing the State.

Ducker, Judge:

The petitioner, Charles C. Oliver, claims damages in the sum of $175.94 by reason of alleged negligence on the part of the State Road Commission on June 9, 1967 in allowing a large rock to be or remain in the Browns Creek Road in Pocahontas County, which rock was struck by petitioner's wife, Louise Oliver, in driving his 1967 Pontiac automobile on said road, damaging the oil pan and other under parts of claimant's car.

The evidence shows the Road Commission road crew was cleaning ditches at that place in the afternoon of that day, pulling the dirt out in the road and picking it up with an end loader and hauling it out about two feet on the pavement. A "men working" sign had been placed ahead on the curving road about 8/10th of a mile according to the complainant's witness and 2/10th to 3/10th of a mile according to the respondent's witness, from the place of the accident. The road was dry and the petitioner's car was traveling between twenty and thirty miles an hour. The driver of the car admitted she saw dirt

where ditches had been cleaned, but she said it had been cleaned until she came to the turn in the road before she struck the rock, and that the rock was a "huge rock" among small rocks and dirt, and that she did not see the rock until after she had hit it. The road is a two lane road and no traffic was then approaching claimant's car. There was no watchman directing traffic and no hauling truck in sight.

The respondent denies items of damages such as the cost of an oil filter, oil pump, distributor cap and some of the labor charge of $70.25 as not having been caused by the accident. The claimant's loss was partly covered by liability insurance, but there is no subrogation claim filed herein.

A review of these facts clearly indicate to this Court that the driver of claimant's car was apprised of the fact that men were working on the road at or near the place of the accident, that she saw dirt on the road from the ditches but failed to see a huge rock in the road which she should have seen, or if seen she could have gone around on the two lane road with no vehicles approaching. These facts amount to such negligence on her part as to prevent her from recovering damages on account of this accident. Whether the Road Commission was negligent in not taking more precautions under the circumstances is doubtful, but inasmuch as we are of the opinion that there was at least contributory negligence on the part of the driver of claimant's car, we must hold that there can be no recovery on the part of claimant, and, consequently, we deny and make no award to the petitioner on his claim.

Claim disallowed.

Opinion issued July 26, 1968

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

vs.

DEPARTMENT OF PUBLIC INSTITUTIONS

(Claim No. D-55)

Robert J. Louderback, Esq. for the Claimant.

Thomas P. O'Brien, Assistant Attorney General, for the State.

Ducker, Judge:

The Claimant, by virtue of subrogation to the rights of Carroll E. Walters, who was the owner of the automobile for which damages are claimed, alleges that on April 2, 1967, in Moundsville, West Virginia, Arthur Franklin Carver escaped from confinement in the State penitentiary and went to the residence of Carroll E. Walters and took and drove said Walters' 1967 Chevrolet automobile about half a city block and collided with a 1961 Chrysler automobile driven by one James C. Meeks, causing damage to the Walters' automobile in the sum of $1,002.24

The main facts which are undisputed are substantially to the following effect. Carver was serving an indeterminate sentence in the State prison, and in having a good prison record was near release from the prison, and has since been released, but that at the time of this incident Carver was serving as a "trusty" and was assigned work at the chicken farm of the prison on an eight hour shift from eleven o'clock the night of April 1, 1967, until seven o'clock the next morning. In some way Carver obtained liquor and becoming "drunk", left the chicken farm and proceeded into Moundsville to the Walters' residence and there took the Walters' automobile which had the car keys in it and drove it away and caused it to collide with the Meek car.

The evidence further shows how the chicken farm was operated by inmates who were used also in connection with other operations and the extent of their custody and confine-

ment within the prison walls. The State Director of Correction who was in charge of all persons on probation and parole testified at length as to the practice of the prison officials in such matters and particularly as to the inmate Carver who caused the damage in this case. He said this inmate and many others were given work at the farm, chicken house, piggery and coal mine of the prison, and that there are approximately 165 men who work outside of the walls of the penitentiary each day. He also said that Carver had served a number of years in prison and was well-adjusted to such life; that Carver was not rebellious and that Carver's record was clean and that he was really a very good risk. This witness also said that a "trusty" such as Carver was, was checked on three times every twelve hours and by a lieutenant of the guards, and that apparently Carver left the chicken house about 12:45 a.m. the morning of April 2d, and went immediately to the Walter's home and after the accident was returned to the prison about three o'clock in the morning in a very intoxicated condition. The Director said that under the circumstances, particularly his near release time, he did not consider Carver an escapee but only an inmate who somehow on that one specific occasion got drunk and while drunk walked away.

It is considered good policy on the part of government institutions where persons are incarcerated because of criminal acts and convictions to include programs of rehabilitation and correction to place inmates on some type of or degree of probation and parole in order to give them some occupation or duties to perform, even where such duties must be performed outside the prison walls, and where a prisoner's record is clean and contains no act which would provide reason to believe he could not be trusted. From these facts we cannot conclude there was any negligence on the part of the prison officials in making Carver a trusty and allowing him to do the work assigned to him. If the claim herein were allowed, the wholesome practice of parole would be materially destroyed. Nor do we think that the fact that Carver was able to obtain liquor and become intoxicated, when it was not shown that he had previously done so, is sufficient to attribute negligence on the part of the prison officials when the prisoner had a clean record and was near release at the time of such happening. It is not shown

how he obtained the liquor or its kind or quality, or that there was negligence on the part of the prison officials in such regard, nor was said alleged failure a proximate cause of the acts of Carver.

Our Courts have held that while the warden of the State Penitentiary is the lawful custodian of the convicts there confined, he is not personally liable for a tort committed by a convict unless he directly participated in its commission by a breach of duty. *Kuhns* v. *Fair,* 124 W. Va. 761. Where, however, gross acts of negligence on the part of a sheriff and his deputies which operated to weaken or injure a prisoner physically, and possibly to kill, such officer or officers are liable. *Smith* v. *Slack,* 125 W. Va. 812. And the negligent act of a sheriff or jailer is not liable where such act is not the proximate cause of the injuries, as such act must be the natural and probable consequence of the negligence. *State ex rel Poulos* v. *Fidelity and Casualty Co.,* (W. Va.) 263 Fed. Supp. 88.

While in this claim the State is the defendant, this Court cannot waive the Constitutional immunity where there could be no liability against an individual or a corporation if the latter were defendant.

Considering the facts and the applicable law, we are of the opinion that there was no negligence on the part of the officers of the State and that there is no moral obligation on the part of State to pay the claim for damages in this case, and, consequently, we deny and make no award to the claimant in this case.

Claim Disallowed.

Opinion issued September 9, 1968

CHARLES HENRY CEPHAS

vs.

DEPARTMENT OF PUBLIC INSTITUTIONS

(No. D-57)

Robert G. Wolpert, Esq. for the Claimant.

Thomas P. O'Brien, Assistant Attorney General, for the State.

Ducker, Judge:

Claimant, Charles Henry Cephas, alleges that on December 4, 1941, he entered the West Virginia State Penitentiary at Moundsville to serve a life sentence for a felony conviction and that on October 14, 1966 he was released on parole from his imprisonment; that on December 5, 1966 he was admitted to Mountain State Hospital in Charleston for treatment of leg injuries diagnosed as thrombo-phlebitis where operations were performed and that he is still under the care of the doctor who so performed such operations; that said ailment has existed since he was first incarcerated in the penitentiary, and that the penitentiary officials wilfully and negligently failed and refused to provide claimant with adequate and proper medical treatment, resulting in the permanent disability of claimant and his inability to engage in any gainful employment, thus damaging him in the sum of $50,000.00, $1,000.00 of which is for hospital and medical expense.

The evidence consists of claimant's own testimony, the penitentiary hospital records from 1947 to date of claimant's release, and the testimony of the former warden of the penitentiary. No evidence of a medical nature other than the said penitentiary hospital records. The State penitentiary hospital records from 1941 to 1947 as to claimant were unobtainable, as it appears that such records could not be found. The claimant testified that in the latter part of 1940 while he was working on the W.P.A. as a driller near Beckley a drill bit broke and "tore up" his legs, and that his legs were still swollen when he was taken to the penitentiary in December, 1941, being placed in the hospital there for three months. He admitted he

received much treatment in the penitentiary from time to time and the records confirm that fact, but he says it was not adequate or proper.

The sole question at issue is whether the medical treatment afforded or not afforded claimant was the cause of claimant's suffering and condition. As to this the proof lies only in the claimant's own testimony. The cause originated it seems from the accident which occurred before his incarceration. Although about seven years of hospital records have been unobtainable, it hardly seems reasonable to assume they would show anything helpful to the claimant in proving his claim anymore than do the records which were obtained and introduced in evidence. The doctors who were employed by the State to render medical service to the inmates, including claimant, are not living, but the evidence shows they were respectable and qualified, and with no evidence to the effect that their treatment of the claimant was not proper or negligent it is difficult to believe otherwise, especially when there is no convincing proof of complaints during such time. The records are full of instances of the application of hot compresses and ultraviolet rays and zinc oxide ointment treatment to claimant's leg, penicillin shots, boric acid and warm and hot saline soakings of his leg. The records disclose many occasions on which claimant was a patient in the hospital for ailments other than those affecting his legs. On February 2, 1959 a report shows that claimant had "vericose veins on both legs for which he has been treated for quite some time, that this condition persists due to the fact that Cephas has not tried to do what has been prescribed for him." Except to say he has not been cured, claimant offered no proof to the effect that he would now be cured except for the negligence or improper treatment by the medical staff at the penitentiary hospital. We cannot assume it to be a fact that claimant could have been cured of his leg ailment.

We are not unmindful of the difficulty of patients to procure evidence to support claims of malpractice against physicians, but much more than has been offered in testimony in this regard is necessary to convince this Court that there has been any mistreatment or maltreatment of the claimant by the penitentiary hospital staff. The claimant is certainly no expert capable of

testifying as to what was or was not the proper treatment in his case, even though he may still be afflicted with the disease. It seems, too, that during the approximately twenty-five years of his incarceration he would have some independent proof as to negligent or improper treatment. Furthermore, it was his duty, if he was to wait this long before asserting his claim, to have made some reasonable effort to get assistance from someone in or out of the penitentiary to substantiate the allegations which he now makes. Although this case is primarily based upon the theory of being a continuing trespass, the long delay and the death of the doctors capable of testifying have destroyed much of the credibility which would otherwise apply to claimant's testimony.

Preponderance of evidence means sufficient evidence of such quality as to prevail, which in this case is to overcome the facts appearing to the contrary in the hospital records. Howsoever much the claimant believes the hospital staff was negligent or wilful in their treatment of him, such belief, even if accompanied by pain, does not constitute competent evidence to establish the allegations of the claim. We are of the opinion that claimant has not borne the burden of proving his case by a preponderance of the evidence, and conclude that he is not entitled to any compensation in this matter, and, accordingly, we do not make any award to him herein.

Claim Disallowed.

Opinion issued September 9, 1968

C. L. DOTSON

vs.

STATE ROAD COMMISSION
STATE OF WEST VIRGINIA

(No. D-62)

No one appeared for the Claimant.

Thomas P. O'Brien, Assistant Attorney General, and *Robert R. Harpold, Jr.* for the State Road Commission.

Ducker, Judge:

Claimant alleges that on December 8, 1967 at about 11:00 o'clock a.m. he was driving a 1967, 3/4 ton pickup truck on State Route 49, seven miles south of Matewan in Mingo County, West Virginia, when he was required by a State Road Commission flagman to stop his truck to allow the State Road Commission employees to put off a blasting shot, and that as a result of such shot a rock landed on the hood of claimant's truck and damaged the same to the extent of $23.00.

The facts and the extent of the damages as alleged by claimant are stipulated as true by the Attorney General, and, consequently, we are of the opinion that it is a claim which in good conscience should be paid, and therefore we hereby award to the claimant, C. L. Dotson, the sum of $23.00.

Award of $23.00.

Opinion issued September 9, 1968

EMANUEL FEDERICO

vs.

BURL A. SAWYERS, AS STATE ROAD COMMISSIONER OF THE STATE OF WEST VIRGINIA

(No. C-20)

Frank Pietranton, Esq. for the Claimant.

Thomas P. O'Brien, Assistant Attorney General, and *Robert R. Harpold, Jr., Esq.* for the State.

Ducker, Judge:

The petitioner, Emanuel Federico, claims damages in the sum of $8,914.50 for hospital, medical, truck repair expenses, cargo loss, personal pain and suffering past and future, and permanent disfigurement, all as the result of his 1966 GMC van truck overturning on U.S. Route 22, Cove Hill Road, just east of a place known as Country Cottage, Weirton, West Virginia, on November 9, 1966 at or about 2:00 p.m.

The evidence shows that the claimant conducted a grocery business in Steubenville, Ohio, and after making purchases of produce and grocery items at Pittsburgh was returning to Steubenville with a load of such items, and that while so driving his truck down grade on said Cove Hill Road the wheels of the truck dropped off the northern paved portion of the highway into a depression or gully resulting, when the driver attempted to get back on the pavement, in the truck turning over, spilling the cargo of the truck and injuring the claimant driver. The depression or gully in the very wide berm of the road was variably estimated to be four to eight inches in depth, from six to eight inches in width, and the paved part of the road was thirty-six feet consisting of three lanes, one westerly, or downhill, and two easterly, or uphill. The road was dry and the claimant was driving between twenty and twenty-five miles per hour, and when claimant's truck wheels went into the depression or gully on driver's right side of the road claimant, according to his testimony, "veered to the left and found myself rolling on my lane," turning the truck over completely.

It appears that there were curve signs on the road indicating such at the place of the accident. Claimant also testified that he made one or two trips a week over this road. There is some conflict in the evidence as to the color of the material in the berm of the road at the place of accident, witnesses for the petitioner stating it was practically the same as the blacktop paved portion of the road, while the State's witness stated it was much darker, which latter testimony is corroborated by pictures of the road taken subsequently in January 1967, which pictures this Court considers as quite corroborative in that there is little likelihood that any substantial change in the color of the road and the berm could have occurred.

There is no contradiction as to the loss and damages suffered by the claimant. The State defends solely on the ground that it is not liable because the facts show that the proximate cause of the accident was the claimant's negligence, and if such negligence was not the sole cause then it was a contributing cause sufficient to find the driver guilty of contributory negligence. In other words, the accident would not have happened if the claimant had driven his six foot wide truck over the road which he well knew, and which was twelve feet wide in his lane at the place of the accident, in a careful and prudent manner.

It seems apparent from the facts as hereinabove recited that claimant was negligent in allowing the wheels of his truck to go off the paved portion of the road into the gully edge of the wide berm when there was ample room in the paved portion of the road, especially when it does not appear that other vehicles were passing in either direction on the thirty-six foot wide road. While the berm of the road might have been left in a condition not good for travel or even emergency necessities, we can hardly say that the accident was sufficiently attributable to such condition. Claimant feeling the jerk in his front wheels attempted to turn them back to the left to get back on the road, but with the front wheels in the gully he was unable to negotiate the left turn. The berm of a road is not a travel section and the maintenance of it is primarily for the protection of the paved portion of a road and not for travel.

So in the light of the facts as shown by the evidence, we are of the opinion to and so find that the claimant is not entitled

to recover from the State the damages he claims, and, accordingly, we make no award to him in this case.

Claim Disallowed.

Opinion issued September 9, 1968

J. E. GREENE

vs.

STATE ROAD COMMISSION

and

DEPARTMENT OF FINANCE AND ADMINISTRATION

(No. D-32)

Chad W. Ketchum, Esq., for the Claimant

Thomas P. O'Brien, Assistant Attorney General, and *Robert R. Harpold, Jr.,* Esq., for the State.

Ducker, Judge:

The claimant, J. E. Greene, alleges that he is entitled to receive $6,317.90 from the State Road Commission and/or the Department of Finance and Administration as payment for labor and materials furnished by him in the construction of a masonry and structural steel equipment storage shed near Hart's Run in Greenbrier County, West Virginia, in March and April, 1965.

The evidence is that, by a stipulation between the Road Commission and Greene and otherwise, it was agreed that there were five bids on the project and that upon the withdrawal by the low bidder of the low bid in the sum of $12,969.50, Greene, whose bid in the sum of $13,748.61 was next lowest, was recommended by the Director of the Maintenance Division of the State Road Commission for an award of the contract. That Greene was told the State was very much in need of the building and that the Road Commission would like for him to start and complete it as soon as possible. There does not appear to have been any executed written contract for the project, but Greene, relying upon the directions given him, proceeded to order the materials which he needed and upon receiving them

proceeded with the construction work to the extent of about two-thirds completion when he was advised about April 17, 1965 that the contract had not been approved. Various checks and receipts were filed by Greene to show the extent of the cost incurred by him, as to which there is no denial by the respondents. The Road Commission thereafter took over the premises as partially constructed and completed the project, using all the materials at the location of the project placed there by Greene and the partly constructed building.

While this Court looks with disfavor on state contracts which are not authorized and executed according to statutory and budget requirements, we do not approve of unfair and unjust enrichment by the State in dealings which its officers have made in taking property and labor of others in projects such as this in which the State has so benefited. There appears no question as to the State receiving the benefit of all the labor and materials furnished by claimant and there is no dispute as to cost or value of the various items. In good conscience the claimant should be reimbursed and paid for all such labor and material, exclusive of an interest charge of $53.33 paid by claimant and less a salvage of doors, one-half of $512.25 or $256.12, and we are of the opinion to, and do so find and award to the claimant the sum of $6,008.45.

Claim awarded in amount of $6,008.45.

Opinion issued September 9, 1968

MR. AND MRS. T. E. HARRISON

vs.

STATE ROAD COMMISSION

(No. D-22)

Claimants appearing in person.

Thomas P. O'Brien, Assistant Attorney General, and *Robert R. Harpold, Jr., Esq.* for the State.

Ducker, Judge:

Claimants, T. E. Harrison and his wife as joint owners of property occupied by them as their home and situate between

Interstate Road 64 and U. S. Route 35 and known as 103 Fairland Drive, Nitro, West Virginia, claim damages in the amount of $439.00 done to their heating furnace as a result of water drainage from the Interstate 64 into the creek adjoining their property, causing the creek to overflow onto the claimants' property into the furnace beneath the floor of the house. They contend a thirty-inch pipe or culvert under Interstate 64 drains into an eighteen inch pipe which latter pipe is unable to carry off the drainage water as it flows into an open ditch, and which open ditch leads into a creek adjoining claimants' property; and that the flow of the water is then directed to a 48 inch culvert under Fairland Drive just westerly of claimants' house. That 48 inch culvert, claimants say, is not sufficient to carry the water off but forces the water to back up over their lot. Although the damage claimed is not disputed, it is not entirely well proven, but that is immaterial in view of the decision herein made.

It appears that claimants purchased their property in February, 1966 but they had little knowledge of the drainage of the area prior to their purchase, except some unclear hearsay evidence to support the contention they here make. Quite some testimony relates to the 48" culvert under Fairland Drive which they say may cause the water to back up and overflow claimants' property and we are of the opinion from such evidence that the backed-up water may seriously affect the claimants' adjoining land. It is clear from the evidence that the construction of the culvert was done by the real estate developers or other owners or parties without any participation therein by the State and that the State neither had nor has any obligation in the construction or maintenance of the same. It further appears that the creek or creek bed adjoining claimants' property receives the drainage of several creeks or smaller streams and has done so for years, and also that there has been considerable residential development and a large super market erected in the neighborhood, all of which has affected the natural drainage of the land in the area.

The State Road Commission's witnesses introduced as exhibits diagrams, pictures and contour maps showing the relative locations of creeks, drains, streets and road routes near or adjacent to claimants' home, and they testified that the natural

drainage of the area had not been affected by the construction of Interstate 64 or by the water from the drain pipe thereunder, and that the damage to claimants' property, if any, was caused by the other circumstances shown in the evidence.

The real question before this Court, therefore, is whether the State by its Road Commission has caused the damage claimed in this matter. We are of the opinion that claimants have not shown in any degree of certainty or accuracy that the drainage of the area has been changed or if there has been a change in drainage that such change caused the damage to the furnace and property of the claimants. Consequently, we are of the opinion to, and do not make any award to the claimants herein.

Claim disallowed.

Opinion issued September 9, 1968

JAMES L. MATHENY

VS.

STATE ROAD COMMISSION
STATE OF WEST VIRGINIA

(Claim No. D-49)

Claimant appearing in person.

Thomas P. O'Brien, Assistant Attorney General, and *Robert R. Harpold, Jr.*, for the State Road Commission

Ducker, Judge:

Claimant alleges damages in the sum of $265.00 on account of damages to his 1960 Falcon automobile which was struck by a State Road Commission 1962 Ford truck on November 24, 1967, at or near the junction of Leon Baden State Secondary Road 23 and U. S. Route 35 in Mason County. Claimant's car was parked along Route 35 and some ten feet or more from the paved road when the brakes on the State Road Commission truck, driven by Andrew McCallister, an employee of the Commission, down the hill of the Leon Baden Route 23 into the area near the intersection of Route 35, failed and collided with

claimant's car. The other facts are the same as set forth in this Court's opinion in Claim No. D-47, Lois and Dayton Shinn v. State Road Commission, decided contemporaneously herewith, and the damages herein having been the result of the same causes, we deem it unnecessary to further repeat them in this opinion.

The claimant's car had a salvage value of $25.00 and the estimates of the cost of repairs exceeded the used car book value of $265.00, and claimant is willing to accept the $265.00, less $25.00, or $240.00.

As the facts are undisputed and there is a clear case of liability on the part of the Road Commission and that the claimant is entitled to recover, we are of the opinion to and do hereby award to James L. Matheny the sum of $240.00.

Award of $240.00.

Opinion issued September 9, 1968

GUY E. McCOY

vs.

SECRETARY OF STATE
and STATE AUDITOR

(No. D-54)

Claimant appearing in person

Thomas P. O'Brien, Assistant Attorney General, for the State.

Ducker, Judge:

Claimant, Guy E. McCoy, alleges that he should be refunded by the Auditor and the Secretary of State of the State of West Virginia the sum of $225, which sum is composed of (1) $60 he paid for a corporation charter obtained on June 18, 1965 and charter taxes through June 30, 1966, (2) $50 he paid on September 23, 1965 when he requested approval by the State Auditor as the Commissioner of Securities of a stock offering, (3) $110 for registration to sell stock, and (4) $5 fee paid the Secretary of State to dissolve the corporation. The claim is based upon

the refusal by the Director of Securities to issue claimant a permit or license to sell the shares of capital stock of the corporation which he organized and dissolved. Liability on the claim was totally denied by the respondents on the basis that the fees paid were not refundable under the statute and were not collected upon the contingency of the claimant's success in obtaining a permit to sell the shares of the capital stock of the corporation or upon any other contingency.

The facts are entirely clear that claimant organized and obtained a charter for a corporation whose purpose was to engage in the manufacture of glass and glass products, commencing business with $5,000.00 deposited in the Harrison County Bank; that he had an approved bank loan of $16,000 and an approved U.S. Government ARA loan of $40,000, making a total of $61,000. Claimant desired to sell shares of the corporation in the amount of $50,000 and so applied to the Director of Securities for such permission and authority. The Securities Division advised claimant that among other requirements he would have to have $5,000 more capital in order to meet the State's requirements in that regard. Claimant contends that with the loans he had obtained he had sufficient funds for operation of the business without the $5,000 additional capital required by the State. Claimant never obtained the $5,000 additional capital, nor does it appear that he or his corporation ever met a number of other requirements specified by the Securities Division, and consequently claimant was not given permission to sell $50,000 worth of the company's stock, and thereafter the corporation was dissolved.

It is to be noted first that Section 6, Article 1, Chapter 32 of the Code of West Virginia specifically provides with reference to fees paid in the matter of an application for permission to sell corporate securities that "when an application is denied, the Commissioner shall retain the registration fee deposited." Even if this were not the express statutory law in that regard, we are of the opinion that it would take such a law to allow a refund to be authorized.

Claimant obtained the charter for his corporation by paying the statutory fee therefor. There was no agreement on the part of the State as to what he should do with it or as to whether it was going to continue to exist or be dissolved. The State

could not function on any such contingency, and it is inconceivable that one should think so, and, of course, there can be no basis for refunding any such costs to anyone on that account. We regret that anyone has such a conception that either the law or justice dictates any such liability. The work in issuing the charter is done when issued and the consequences to incorporators is an entirely different matter.

As to application for permission to sell shares of stock of the corporation in the amount of $50,000, there appears no conflict in the evidence. Claimant did not meet the requirements of the Director of Securities, who concluded that in order for the shares to be proper for sale to the public or to the persons interested there need be an additional $5,000 added to its capital structure. Loans in the total sum of $56,000 would constitute only liabilities in that amount, leaving only the $5,000 original capital as an equity of the business. This fact on its face without the other requirements specified would seem to justify the Commissioner in his refusal to issue the permit or authorization requested. The claimant does not show sufficient cause for this Court to think he has been unfairly treated. This Court is not to be substituted for courts which under the statute have jurisdiction to hear an appeal from, and if necessary overrule, a decision of the Commissioner.

From the facts and according to the law, we are of the opinion that claimant is not entitled to recover on his claim, and, accordingly, we deny and make no award to him in the matter.

Claim disallowed.

Opinion issued September 9, 1968

LOIS AND DAYTON SHINN

vs.

STATE ROAD COMMISSION
STATE OF WEST VIRGINIA

(Claim No. D-47)

Claimant appearing in person.

Thomas B. Yost, Assistant Attorney General, and *Thomas P. O'Brien,* Assistant Attorney General for the State Road Commission.

Ducker, Judge:

The claimants, Lois Shinn and Dayton Shinn, allege damages in the sum of $1,400 on account of their 1963 Fiat automobile having been struck by a State Road Commission 1962 Ford truck on November 24, 1967 at or near the junction of Leon Baden State Secondary Road 23 and U.S. Route 35 in Mason County. The claimant's car, owned entirely by Lois Shinn, was parked along Route 35 and some seven feet or more from the paved road when the brakes on the State Road Commission truck, driven by Andrew McCallister, an employee of the Commission, south on Route 23 into the intersection area of Route 35, failed and struck the Shinn car as so parked. The evidence is undisputed, and the fact that the accident was caused by the failure of the brakes on the State truck and the inability of the driver to stop the truck as it proceeded down the hill of the Leon Baden State Road No. 23 and into Route 35 where claimants and other cars were parked along side of Route 35, the State Road Commission driver having been forced to have his truck either hit claimant's car or go over the steep bank and down on the railroad tracks and possibly into the river below the road, convinces us that the State was entirely responsible for the damage done. An examination of the brakes by the State garage mechanics corroborated the fact that the brakes on the truck were defective and broken.

The claimant obtained estimates of the cost of repair of his car in the sum of $1,118.16 and $1,185.37 respectively, from two

garages in the area, but claimant admitted that she was willing to settle for the used car book value of $460, less a salvage value of $25.00.

As the facts are undenied and there is a clear case of liability on the part of the Road Commission, and that the claim is just, we are of the opinion to and do hereby award to Lois Shinn, the sum of $435.00.

Award of $435.00.

Opinion issued October 17, 1968

PETER CHAPMAN

vs.

STATE ROAD COMMISSION

(No. D-78)

Thomas P. O'Brien, Assistant Attorney General, and *Robert R. Harpold, Jr.,* Esq. for the State.

Ducker, Judge:

The claimant, Peter Chapman, of Lenore, West Virginia, claims damages against the State Road Commission in the sum of $73.24 occasioned by a rock fall from a mountain upon claimant's automobile, a 1965 Volkswagon, in which claimant was traveling north on State Route 65 about nine miles from Belco, Mingo County, West Virginia, on October 5, 1967. The rock fell upon claimant's automobile as a result of Aid to Families with Dependent Children of the Unemployed workers clearing the mountain side and there being no flagman or sign on the road to warn traffic of any damage. The facts are stipulated by the respondent as true and the amount of the costs of repair as reasonable. We are of the opinion that the claimant has a just claim, and accordingly we award him the sum of $73.24.

Award of $73.24.

Opinion issued October 17, 1968

COLUMBIA RIBBON & CARBON MANUFACTURING COMPANY, INC.

vs.

DEPARTMENT OF FINANCE & ADMINISTRATION

(No. D-82)

Thomas P. O'Brien, Assistant Attorney General, for the State.

Ducker, Judge:

Claimant, Columbia Ribbon & Carbon Manufacturing Company, Inc., of Glen Cove, New York, sold and delivered to the Department of Finance & Administration in June, 1964 office supplies evidenced by invoices totaling $94.94. The facts are stipulated by the respondent as true and the values fair, and the claim submitted on the pleadings and stipulation. As it appears that the only reason the claim was not paid was because the respondent was not invoiced until after the close of the fiscal year and so could not be paid, and as the respondent received and had the use of the personal property so sold and delivered to it, we are of the opinion to and do award the claimant the sum of $94.94.

Award of $94.94.

Opinion issued October 17, 1968

MARY ANN DeBOLT

vs.

DEPARTMENT OF MENTAL HEALTH

(No. D-85)

Jack W. DeBolt, for claimant.

Thomas P. O'Brien, Jr., Assistant Attorney General, for respondent.

Jones, Judge:

The claimant, Mary Ann DeBolt, alleges in her petition that she was employed by the Department of Mental Health of the

State of West Virginia in its summer work program at Colin Anderson Center, for the months of July and August, 1966; that she worked during the two months, and was paid for the month of July but not for the month of August; and that she is entitled to the sum of $400.00 for services performed and for which she received no compensation.

As required by Code 14-2-16 (3), the Attorney General of West Virginia investigated this claim and undertook negotiations with counsel for the claimant. As a result, it was determined from the records of the Department of Mental Health that there is justly due and owing to the claimant the sum of $177.42 for services rendered by her under contract with the Department, and the claimant has agreed to accept said sum in such settlement of her claim.

At the hearing of this matter, the foregoing facts were stipulated to be true, and it thus appearing that this is a claim which in equity and good conscience should be paid, an award is hereby made to the claimant, Mary Ann DeBolt, in the sum of $177.42.

Opinion issued October 17, 1968

HAYNES CONSTRUCTION COMPANY
and SAVAGE CONSTRUCTION COMPANY

vs.

STATE ROAD COMMISSION

(No. C-16)

Clarence E. Martin, Jr., for claimant.

Theodore L. Shreve, Robert R. Harpold, Jr., and *Thomas P. O'Brien, Jr.*, for respondent.

Jones, Judge:

A contract was awarded to the claimant by the State Road Commission on April 28, 1960, for paving a segment of Interstate 77 in Jackson County, construction to begin within ten calendar days after the award and to be completed within 145 working days. The claimant immediately moved equipment and personnel onto the job, but was unable to start its paving operations. According to the claimant, the delay was entirely

the fault of the State Road Commission and other contractors employed by the State Road Commission who failed to prepare the sub-grade required for the commencement of paving operations. There appears to be no question that there was several months' delay and the claimant was not permitted to withdraw its equipment, but the State Road Commission contends that much of the delay was due to the failure of the claimant to meet specifications for crushed rock to be used on the sub-grade. It appears from the evidence that the specifications were impossible of fulfillment, and after considerable delay, they were relaxed and altered. The total amount of the claim is $283,825.56, of which $264,933.00 is for delay, $9,762.16 for an increase in the price of cement, $1,100.00 for additional stockpile rental, $2,000.00 for an office trailer, $4,104.40 for stabilizing and reconditioning base materials, and for other materials furnished at the request of the State Road Commission at a cost of $1,468.42. While Savage Construction Company was a nominal claimant in this case, there was no showing that it had any interest in the recovery sought.

At the completion of the claimant's evidence, the parties requested a recess for the purpose of attempting to resolve the conflicts as to the time, quantities and costs involved in the claim. Thereafter, counsel for the parties announced that they had arrived at a settlement of their differences, and it was stipulated that the sum of $144,349.53 was justly due and owing to the claimant, being the sum of $134,081.70 for delay occasioned by the respondent and not the fault of the claimant, $9,717.83 for the increased expenditure for cement resulting from the delay, and $550.00 additional stockpile rental. All other claims were withdrawn or abandoned. The Attorney General of West Virginia concurred in the stipulation.

Upon consideration of the petition, the evidence adduced, the stipulation and statements of counsel, the Court is of the opinion that the claimant has presented a valid claim against the State of West Virginia within the jurisdiction of this Court, which in equity and good conscience should be paid, and, accordingly, it is the judgment of the Court that the claimant, Haynes Construction Company, should recover, and it is hereby awarded the sum of $144,349.53.

Opinion issued October 17, 1968

OTIS ELEVATOR COMPANY

vs.

DEPARTMENT OF FINANCE AND ADMINISTRATION

(No. D-81)

Thomas P. O'Brien, Jr., Assistant Attorney General, for respondent.

Jones, Judge:

This claim is for $426.61 for services performed by the claimant in the maintenance of the State Capitol elevators in the year 1966 under a contract between the claimant and the Department of Finance and Administration of the State of West Virginia.

The respondent filed its answer in writing, admitting that the claimant performed the services as alleged, that the sum claimed is due and owing, and that the only reason that said amount was never paid was that invoices for payment were not submitted until after the end of the year 1966, when appropriated funds for such purpose had expired.

The claim was submitted on the record, which clearly shows that the claim is just, and in equity and good conscience should be paid. Accordingly, we award the claimant, Otis Elevator Company, the sum of $426.61.

Opinion issued October 17, 1968

UNITED AIR LINES, INC.

vs.

DEPARTMENT OF FINANCE AND ADMINISTRATION

(No. D-61)

Thomas P. O'Brien, Jr., Assistant Attorney General, for respondent.

Jones, Judge:

This is a claim for air transportation incurred by Truman E. Gore, Curtis Wilson and Silas F. Starry, all employees of the

Department of Finance and Administration of the State of West Virginia, during the years 1964 and 1965. There was some delay in presenting invoices for the purchase of tickets and the claimant was advised that the balance owing could not be paid for the reason that appropriated funds had expired. The claimant was further advised by the Department to file its claim in this Court.

In its answer to the petition, the Department of Finance and Administration admits that the three employees took the trips as alleged on claimant's airline and that the trips were on official business for the State of West Virginia. The answer further admits that the sum of $512.91 is due and owing to the claimant. When called for hearing, the claim was submitted for decision on the pleadings.

Wherefore, the Court is of opinion that this claim is just, and in equity and good conscience should be paid. Accordingly, we award the claimant, United Air Lines, Inc., the sum of $512.91.

Opinion issued November 8, 1968

BACHE & CO., INCORPORATED

VS.

STATE TAX COMMISSIONER

(No. D-63)

Lee O. Hill, for claimant.

Thomas P. O'Brien, Jr., Assistant Attorney General, for respondent.

Jones, Judge:

The claimant, Bache & Co., Incorporated, filed its claim in this Court on February 29, 1968, for Business and Occupation taxes erroneously paid to the State Tax Commissioner of West Virginia for fiscal years ending January 31, 1957 through 1964. Such overpayments were made on the mistaken belief that interest income from loans made to West Virginia customers was subject to tax, whereas such income was not taxable. The

cumulative error was discovered by a Field Auditor for the State Tax Commissioner during the course of an audit for the years 1963 to 1967: Pursuant to the results of said audit, taxes in the total amount of $5,295.46 for the fiscal years ending in 1965, 1966 and 1967 were refunded to the claimant. Overpayments in the years 1963 and 1964 were calculated by the Field Auditor as $1,674.74 and $2,108.73, respectively, a total of $3,783.47, and this amount was not refunded for the reason that the recovery thereof was barred by the statute of limitations. The State Tax Commissioner did not have records for prior years but, based on its own records, the claimant claims an additional $5,008.56 for overpayments of tax for the years 1957 to 1962, the recovery of which is also barred by the statute of limitations. The claimant contends that the State has been unjustly enriched, and has a moral obligation to refund the overpayments in the total amount of $8,792.03.

Chapter 11, Article 1, Section 2a of the Code of West Virginia was amended in 1967, but the statute applicable to the years in question provides as follows:

> "On and after the effective date of this section [June 8, 1951], any taxpayer claiming to be aggrieved through being required to pay any tax into the treasury of this State, may within three years from the date of such payment, and not after, file with the official or department through which the tax was paid, a petition in writing to have refunded to him any such tax, or any part thereof, the payment whereof is claimed by him to have been required unlawfully; and if, on such petition, and the proofs filed in support thereof, the official collecting the same shall be of the opinion that the payment of the tax collected, or any part thereof was improperly required, he shall refund the same to the taxpayer***".

The Act creating the Court of Claims (Chapter 14, Article 2 of the Code of West Virginia) provides in Section 21 thereof the following:

> "The Court shall not take jurisdiction of any claim, whether accruing before or after the effective date of this article, unless notice of such claim be filed with the clerk within such period of limitation as would be applicable under article two, chapter fifty-five 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;***".

While the foregoing provision refers only to periods of limitation applicable under Article 2, Chapter 55 of the Code of West Virginia, the Court perceives the intention of the Legislature to be that claims against the State should not be allowed in any case where the Legislature has decreed that such claims shall be barred after a specified time. To allow this claim would constitute an invasion of the province of the Legislature, and would, in effect, set aside the legislative will. The Court is of opinion that equity and good conscience do not require the relief prayed for in this case and, accordingly, the claim is disallowed.

Opinion issued November 8, 1968

MARGARET MEADOWS BLONDHEIM
and RONDAL K. BLONDHEIM

vs.

DEPARTMENT OF PUBLIC INSTITUTIONS

(No. D-37)

John J. Curtis, Jr., for claimants.

Thomas P. O'Brien, Jr., Assistant Attorney General, for respondent.

Jones, Judge:

The complaint in this case was filed on November 17, 1967, for damages alleged to have resulted from negligent and unauthorized surgery performed at Fairmont Emergency Hospital on September 6, 1946, by a doctor employed by the State-operated institution.

The claimant, Margaret Meadows Blondheim, testified that she was admitted to the Fairmont Emergency Hospital on September 13, 1946 and was examined by Dr. C. M. Ramage, Superintendent, who diagnosed her illness as cholecystitis; that she consented to an operation to remove her gallbladder and to have her tubes tied; that she underwent the operation on September 16, 1946, and thereafter was told by Dr. Ramage

that "your gallbladder was not functioning, it was bad, and we removed it"; that she, her husband and three children moved from Marion County, West Virginia, to Akron, Ohio in April, 1954; that after she went to Ohio, a doctor examined her and told her she had "a coronary heart" and he put her on nitroglycerin; that she went to about five doctors during the period of about twenty years, and none of them said she had gallbladder trouble; that in April, 1966, she became very ill and went to Dr. Robert E. Mosteller, an osteopathic physician and surgeon; that Dr. Mosteller told her that her gallbladder was "acting up", whereupon she informed the doctor that her gallbladder had been removed in 1946; that Dr. Mosteller put her in the hospital for x-rays, and it was determined that her gallbladder was still in place; that since discovering that she still has a gallbladder, she has become more nervous, is subject to belching and abdominal pain, cannot sleep and has lost her appetite; and that she has undergone and will continue to undergo great pain and suffering.

The testimony of the claimant, Rondal K. Blondheim, corroborated substantial portions of his wife's testimony.

Dr. Mosteller's deposition was taken and filed in evidence, and his testimony is substantially as follows: The claimant visited his office for the first time on April 8, 1966, complaining of headaches and chest pain. After examination, his diagnosis was "Anemia, menopausal syndrome, exogenous obesity and coronary insufficiency." As to medical history: "She stated that she had had hypotension for 10 years. She stated that she had a cholecystectomy in 1946. Tubes were tied same year. Bowel surgery in 1960 for adhesions and appendix. Gastric surgery for peptic ulcer 1961. She stated she had heart trouble in 1963, has taken nitroglycerin since. Also, that two cervical cysts were excised." He prescribed nitroglycerin. X-rays were taken in March and November, 1967, all showing the existence of the gallbladder. "There appears to be a normal functioning gallbladder", but the doctor "suspects" that the claimant has biliary dyskinesia which "possibly" could require gallbladder surgery. He could not say whether the claimant's gallbladder would have to be removed in the future, or whether her life expectancy may be shortened. He further stated that there is "a degree of likelihood that Mrs. Blondheim will have difficulty

with her gallbladder in the future", and that such difficulty may bring about the necessity for surgery. The doctor testified that, in his opinion, the knowledge that she has a gallbladder has aggravated the claimant's nervous condition.

The hospital record which was introduced into evidence is made up of four pages. The Personal History page for "Margaret Meadows" has the name "Dr. Ramage" in the upper right corner, but on the signature line are the initials "LRC" which are the initials of Dr. L. R. Conley whose name appears on the operating record as assistant surgeon. The Physical Examination sheet shows "Examined by LRC." The Operative Record consisting of two pages shows the surgeon as Dr. C. M. Ramage, the assistant surgeon, L. R. Conley, and the operation to be "Cholecystectomy, Bilateral Tubal ligation," and again this report is signed "LRC". This record goes into considerable detail in describing the operation. As an example, we quote: "Upon entering the abdomen, examining hand was inserted into the gall bladder region. Gall Bladder was found to contain adhesions around the cystic duct and the wall was thickened and showed signs of inflammation of the gall bladder."

Dr. Ramage has been dead for many years, and the other principals present at the operation, except the claimant, are dead or have no recollection of the case. While it appears only to be a coincidence, sometime after the operation the claimants changed their last name from Meadows to Blondheim.

This is a most extraordinary case, and it appears that the complete and true facts can never be reconstructed. It strains credulity to think that Dr. Ramage or Dr. Conley wrote a gallbladder operative record out of the whole cloth—that it could have been deliberately falsified. If the recitals were true, then they had to apply to another patient which would mean that there was a mix-up in the hospital records or in the identity of patients, and some twenty-two years later, we are inclined to accept that view.

It is apparent that the claimant is not in good health and does suffer from her several ailments. The Court is satisfied that the claimant's gallbladder was not removed in 1946 and that it was then a healthy organ and should not have been removed. The Court believes that part of the operation—the tying of her

tubes—was useful, and that the claimant many years ago recovered from the operation without any ill effects. The Court does not believe that the recent discovery that she has a gallbladder, which had stood her in good stead for over twenty-one years and which, according to the evidence, is not likely to cause serious difficulty in the future, should cause the claimant any more distress than she already had at the time of such discovery; and the medical testimony is not sufficient to support the subjective symptoms and complaints.

There is little that is clear in this case, and all of the damages sought to be proved are highly speculative; and having weighed all of the evidence and all reasonable inferences derived therefrom, the Court is of opinion that the claimants have not sustained the burden of proof necessary to invoke the conscience of the State of West Virginia, and, therefore, this claim is disallowed.

Opinion issued November 8, 1968

THE CHESAPEAKE & OHIO RAILWAY COMPANY

VS.

STATE ROAD COMMISSION

(No. D-86)

Thomas P. O'Brien, Jr., Assistant Attorney General, and *Robert R. Harpold, Jr.*, Esq. for the State.

Ducker, Judge:

The claimant, The Chesapeake & Ohio Railway Company, claims damages in the sum of $212.01 against the State Road Commission, which damages resulted from the overturning and damaging of coal car No. 89076, owned by the said claimant, when blasting was done by employees of the State Road Commission on July 10, 1967 near Kelly, Logan County, West Virginia. The damages claimed are for the cost of the repairs only with no charge for uprighting, re-railing and moving the damaged car to the point of repair.

The above facts pertaining to this claim are stipulated by counsel for the claimant and by the Attorney General as being

accurate, and the cost of repair is agreed to as being fair, and there is no dispute or apparent reason to contradict the facts as so stipulated, and the Court being, therefore, of the opinion that the claim is just, does hereby award to the claimant the sum of $212.01.

Award of $212.01.

Opinion issued November 8, 1968

CITY OF MORGANTOWN

VS.

BOARD OF GOVERNORS OF
WEST VIRGINIA UNIVERSITY

(No. D-46)

Mike Magro, Jr., Esq., City Attorney, for the Claimant.

Thomas P. O'Brien, Assistant Attorney General, and *Robert R. Harpold, Jr.*, Esq. for the State.

Ducker, Judge:

The claimant, The City of Morgantown, West Virginia, claims $40,886.22 from the Board of Governors of West Virginia University as allegedly an agency of the State of West Virginia on account of unpaid fire protection service fees for the fiscal year 1966-1967, one-half of which was due November 1, 1966 and one-half May 1, 1967. The unpaid charges represented amounts which the Council of the City of Morgantown, as previously constituted, voted to credit to the University on total charges of $52,945.11 and $52,943.11 respectively for the two halves of such charges or assessments. The present council alleges that the former council had no authority to authorize such credits and claims that the amount of such credits is still due. The facts are stipulated by the parties as true; the validity of the claim is solely one of law.

The position is taken by the claimant that if the respondent could be given credit on its fire protection service fee as was done in this instance, it would amount to a discrimination in favor of the University and that such action would result in

the necessity to grant exceptions to literary, scientific, religious and charitable property as well as other State and Federal property, all of which are not exempt under the terms of the ordinance of the City of Morgantown. The authority of the City to adopt the ordinance relating to the fire service fee is contained in Chapter 8, Article 4, Section 20 of the Code of West Virginia, and no such exemptions are specified in the Statute, and no authority is cited upholding such an exemption. The action of the City Council as formerly constituted could, in view of the uniformity required under Section 9 of Article 10 of the Constitution, possibly be questioned as not meeting the uniformity.

As our decision herein must be determined on the jurisdictional ground hereinafter specified, this Court should not, and does not, decide the question of the validity or invalidity of the action of the Morgantown City Council or any consequent alleged liability on the part of the Board of Governors of West Virginia for the claim herein made.

As first shown, this claim is one against the Board of Governors of West Virginia University as an "agency" of the State of West Virginia within the meaning of the statute conferring jurisdiction on this Court. Counsel have not argued the question whether the University Board is or is not such an agency as gives this Court jurisdiction, but the Court considers that question as controlling.

Chapter 14, Article 2, Section 3 of the Code of West Virginia, provides that:

> "'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 the state regardless of any state aid that might be provided."

And in Section 13 of the same Article and Chapter the jurisdiction of the Court includes,

> "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."

The Board of Governors of West Virginia University is according to Chapter 18, Article 11, Section 1 of the Code of West Virginia, "a corporation, and as such may contract and be contracted with, sue and be sued, plead and be impleaded with, and have and use a common seal," and according to Section 1a of that same Article and Chapter the control of the financial, business and all other affairs of the University, including the title to all property, were transferred from the State Board of Control to the Board of Governors of the University.

The Claimant here evidently assumes that the constitutional immunity contained in Article VI, Section 35 of the Constitution of West Virginia to the effect that the State cannot be made a party defendant in any of the courts of this state prevents legal proceedings in the regular courts and that, as a consequence, this Court has jurisdiction of this matter. That assumption or conclusion would be correct if the Board of Governors of West Virginia University is truly an agent within the meaning of the above-quoted statutes defining the jurisdiction of this Court.

The State has yielded its sovereignty in many areas where it has established corporate municipalities, corporate organizations and other institutions which have the right to enact laws, levy taxes and fees and otherwise act independently of state control. County boards of education and municipalities are expressly excluded as a state agency under Chapter 14, Article 2, Section 3 above quoted. So there remains the question as to whether the term "state agency" includes a separate corporate entity such as West Virginia University. West Virginia University is not similar to the Road Commission or the Welfare Department where all governmental power remains in the State. Incorporated municipalities and county courts have independent jurisdiction in many respects and are not dependent on the Legislature for their financial support. The Board of Governors of West Virginia is dependent upon the State for its support but it does make its own contracts, controls all its own dispersal of funds and enforces its own rules except criminal laws. The fact that it obtains much financial support from the State does not negate its authority under its charter. The State cannot make the University's contracts, cannot sue for it and cannot control the University's affairs, except to give

or not give it funds for its operation. Like cities and counties, a plea of immunity from liability might be available to it when damages are inflicted on others in cases where there has been an exercise of a governmental as distinguished from a proprietary function. Such right to defend and escape liability by invoking the doctrine of immunity because of such exercise by a city or county or by the University does not of itself make such city, county or University an agency of the State. If that were the case, every legal action against any city or other state incorporated body in which there is sustained a governmental function plea of immunity from liability would come within the jurisdiction of this court under the agency theory. We cannot conclude that there was any such intention on the part of the Legislature in its enactment of the jurisdictional provisions of this Court, for otherwise there would be no limitation on the powers of this Court, and the number of such cases would be unlimited.

Furthermore, it is not, we think, unreasonable to conclude that if the State has yielded its sovereignty to cities, universities and other public corporations, and such corporations can sue and be sued, it is no longer a matter for the State to waive its constitutional immunity from liability on account of the acts or failures of such corporations, and therefore it is only a question of the conscience of the city or other public corporation and not of the State, and it is only as to claims against the State that are to be determined by this Court.

The wording of the definition of "state agency" to the effect that such an agency means a state department, board, commission, *or other administrative agency of the state government,* clearly limits such an agency to one which is in the true sense an officer or servant of its master, the State, and not one which acts as an independent principal. While it is true there is an express exception of cases of municipalities, county boards of education and county courts from the jurisdiction of this Court, it seems to us that the expression of those organizations as exempt is not the exclusion from the exemption of other organizations which are self-operating. In other words, a corporate organization such as The Board of Governors of West Virginia University which functions entirely separately and independently of any control by the State, is not truly an "admini-

strative" state agency, for whose liabilities this Court should determine whether in equity and good conscience the State should pay.

The decision of the Supreme Court of West Virginia in the case of *Hope Natural Gas Company* v. *West Virginia Turnpike Commission*, 143 W. Va. 913, 105 SE2d 630, is a case involving the principles here. There it was held that the Turnpike Commission, which had been given various powers including the right to sue and be sued and the right of condemnaton, was a creature of the State and not such an agent of the State, even though declared in the Act to be an agent of the State, as was entitled to constitutional immunity from the payment of damages for a tort committed by it in the construction of the turnpike.

There are many commissions and authorities, for example the airport authorities, which are separate creatures of the state, with grants of power from the state, which surely are not "agents" of the state. If these authorities or commissions do not have the benefit of the constitutional immunity of the state, we do not see where this Court has authority to hold that the State has a moral obligation to pay for misdeeds or contracts based upon the acts and obligations of such commissions or public corporations, and providing for payments therefor wholly from the State funds and not from the funds of such independent corporate entity.

For the reasons herein expressed, we are of the opinion to, and do hereby disallow and dismiss the claim made herein.

Claim Disallowed and Dismissed.

Opinion issued November 8, 1968

CHARLES J. KUCERA and
JOSEPHINE ANN KUCERA, Claimants

vs.

STATE ROAD COMMISSION, Respondent

(No. D-38)

No appearance for Claimants

Thomas P. O'Brien, Assistant Attorney General, and *Robert R. Harpold, Jr.,* Esq., for the Respondent

Petroplus, Judge:

Claimants have filed a claim for replacing evonymous vines and a Holly tree which were wrongfully cut down and removed by employees of the State Road Commission on the private property owned by the Claimants located in Weirton, Hancock County, West Virginia. It has been stipulated between counsel for the Claimants and counsel for the State Road Commission that the total amount of damages suffered by the Claimants is $75.00, based on an estimate filed with the Stipulation. The State has made a thorough investigation into the facts and agrees that the State Road Commission wrongfully came upon the property of the Claimants and cut down the evonymous ground covering and the Holly tree.

It is, therefore, the opinion of this Court that the Claimants be, and they are hereby awarded the sum of $75.00.

Claim allowed in the amount of $75.00.

Opinion issued November 8, 1968

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Claimant

vs.

STATE ROAD COMMISSION, Respondent

(No. D-80)

No appearance for Claimant.

Thomas P. O'Brien, Assistant Attorney General, and *Robert R. Harpold, Jr.*, Esq., for the Respondent.

Petroplus, Judge:

This claim is presented for determination on a Stipulation of Facts submitted by the Attorney General's Office.

The Stipulation states that Bobby Joe Honaker was driving on State Route No. 80 on February 26, 1968, at 2:30 P.M., at which time and place a State Road crew was cutting and chipping stones on the side of mountain along State Route No. 80. As Mr. Honaker passed the work area a rock came down the side of the hill and hit the left rear of his car causing damage in the amount of $79.26. The Respondent further stipulated that the amount of damages as alleged is reasonable.

Neither the Claimant's Petition nor the Stipulation sets forth any facts to establish liability for damages to the automobile of Mr. Honaker. The claim is presented by the Insurance Claimant by way of subrogation. The case of *Adkins, et al* v. *Sims*, 130 W. Va. 646, establishes as a principle of law in West Virginia that there is no moral obligation on the part of the State to compensate a person who is injured on a public highway of the State. The State is not an insurer of the safety of the roads and highways.

Inasmuch as the Stipulation fails to disclose any facts other than a falling rock in a work area, it is the opinion of the Court that public funds should not be paid to reimburse the Claimant unless it is clearly established that there is a moral obligation on the part of the State to pay compensation. No facts are presented that the injury sustained was the result of

the negligence of the State Road Commission or any of its agents and employes. No fault is attributed to any employee working on the road, on the right-of-way or on abutting property privately owned. The State does not, and cannot, assure a traveler a safe journey in a mountainous country, where many roads are narrow, with steep grades and sharp curves. An unexplained falling of a rock down a hillside does not satisfy the requirement of proof that the rock fell because of the failure of the road crew to exercise reasonable care in its work area, or as the result of conditions which the State Road Commission was instrumental in creating or maintaining. A negligent or wrongful act should be alleged.

The opinion expressed herein necessarily calls for a disallowance of the claim on the basis of the Stipulation filed. If an award would be made in this case, a precedent would be created to require compensation to every person injured on the highways of the State, and thereby impose an absolute liability on the State to maintain its roads in a safe condition.

Claim disallowed.

Opinion issued November 8, 1968

T&L—WHEELING PLUMBING
& INDUSTRIAL SUPPLY CO., Claimant

VS.

DEPARTMENT OF PUBLIC INSTITUTIONS,
STATE OF WEST VIRGINIA, Respondent

(No. D-70)

D. Paul Camilletti, Esq., for the Claimant.
Thomas P. O'Brien, Assistant Attorney General, for the Respondent.

Petroplus, Judge:

Claimant furnished building materials and supplies to the Department of Public Institutions of the State of West Virginia for use in the construction of a new wall at the State Penitentiary for the period beginning July 27, 1964, and ending October 19, 1966. For unknown reasons, the vouchers, copies of

which were attached to the claim as an Exhibit, were either lost or mislaid by Administrative Personnel of Respondent and were not processed for payment. A Stipulation signed by counsel for the Claimant and the Respondent states that the supplies and materials in question were ordered by an authorized representative of the Respondent and were used in the construction of the new wall at the West Virginia Penitentiary. It is admitted by the Respondent that the amount of the claim is true and correct and that the supplies and materials were actually furnished in the amount claimed.

It appearing that there remains due and unpaid on said account the sum of $2275.22, and that the Respondent has no objection to the payment of said claim, the Court is of the opinion that the Claimant is entitled to be compensated, and an award is accordingly made to it in the amount of $2275.22.

Claim allowed in the amount of $2275.22.

Opinion issued November 11, 1968

JACK E. HAMMACK, Claimant

vs.

STATE ROAD COMMISSION, Respondent

(No. D-83)

Claimant appearing in person.

Thomas P. O'Brien, Assistant Attorney General, and *Robert R. Harpold, Jr.*, Esq., for the Respondent.

Petroplus, Judge:

Claimant, Jack E. Hammack, the owner and occupant of a dwelling house situate in Bomont, Clay County, West Virginia, on land abutting on Route 1, a secondary road, claims damages in the amount of $957.00 for injuries sustained by his house as the result of a flow of water over his property after a heavy rainfall on March 12, 1968. A United States Weather Report shows a rainfall of 2.11 inches on that date for the area affected as compared with a total rainfall of 4.79 inches for the entire month of March.

The case presented involves a factual issue, rather than any questions of law, namely,—was the omission of the State Road Commission to keep open and functional an 18 inch culvert or drain under the road for the free passage of surface water the proximate and direct cause of the property damage? The amount of the damage is not in dispute.

The dwelling is located near the foot of a hill about 6 feet below the level of a paved asphalt road, 14 feet in width, and faces the road with a front yard of approximately 35 feet between the foundation wall and the road. The front basement wall, alleged to have collapsed as the result of the water flow, is constructed of cinder blocks and is about 40 feet in length. The road which passes the house has a downgrade of 4 to 6 percent.

Directly across from the claimant's dwelling is another hillside, partly cleared of vegetation, where a dirt driveway winds up the hill leading to a neighbor's house on the hillside.

It is alleged that the State Road Commission negligently permitted the 18 inch drain located under the paved road about 180 feet up the hill from the house to become clogged or stopped up with debris, thereby causing surface water to flow over the top of the road and down the hill, and be cast over the berm, across the front yard and against the front basement wall facing the road with sufficient force to undermine the wall and cause a 20 foot portion thereof to cave in. The claimant awoke when he heard the wall collapse at 3:30 A.M. of that date, and upon inspecting his basement found it filled with mud and debris. The other three walls of the basement were not damaged. A part of the concrete walk in front of his home was also washed away, and a loamy soil seems to have washed away and into his excavated basement. It is claimant's contention that if the drain of the State Road Commission had been open, it would have carried the surface water, or as much of it as it could handle, across the road and discharged it into a deep ditch on claimant's property, and eventually to a nearby creek. Instead of being ditched, the overflow traveled down the road and claimant testified it made a right turn over the berm and was cast directly in front of his house.

Photographs of the house and surrounding area, taken about a week later by a Safety Supervisor of the State Road Commission, reveal no mud, debris or loamy soil condition on the front lawn of the property, and further show two drainage ditches inside the basement, constructed to carry away water seeping through the walls in the basement. The drainage ditches were 4 inches by 12 inches and indicate a chronic water seepage problem in the excavated basement of the house. The evidence is not clear whether the house was provided with gutters and down spouts.

Paul Parsons, who owned the house on the hillside directly across from the claimant, privately installed a 7 inch pipe, 22 feet in length, to carry water away from his property into a ditch on the other side of the road. The testimony indicates this was also stopped up and covered by the dirt driveway leading to the Parsons home. On the claimant's property was another 6 inch metal pipe which was covered up by a driveway leading to the garage in his basement. This was also stopped up but may not have contributed significantly to the flooding of the basement.

It appears that the State Road Commission neglected to keep its drain up the road from the house open and unobstructed. Claimant purchased his property in October, 1967, and had sufficient time to acquaint himself with the drainage problems of the area. The location of the house well below the road level, the partially denuded hillside across the road from his house, the clogged drain of the State Road Commission which he admits inspecting before the damage occurred, the open ditch on his land connecting to the drain of the State, the seepage problem of his basement, all indicated the servitude to which his land was subjected by natural drainage of surface waters. Yet he made no effort to notify the State Road Commission maintenance crew of the stopped up drain, nor did he take any precautions to protect his property from drainage coming down the hillside directly opposite his property where a small and inadequate drain had been installed by the private property owner. The real issue before the Court, in our opinion, is not the contributory negligence of the claimant in failing to take precautions to protect his property, but the issue of proximate cause. Was the negligence of the State Road Commission a

circumstance or the direct proximate cause of the damage claimed in this case? In order to charge the Respondent with liability for injury to his property by flooding, claimant must show that such flooding was the direct and proximate result of the wrongful or negligent act complained of. It has not been shown in this case with any degree of certainty that the water overflowing from a stopped up drain 180 feet away from the property went down the road and then across the road, over the claimant's front yard, and was cast with force against his front basement wall, causing it to buckle and cave in. It is more reasonable to assume that surface water from the hill opposite his property and surrounding area had no course to follow except to cross the road and pour into his basement, already weakened by a prior seepage condition of long standing. We are of the opinion, after a careful consideration of all the evidence, photographs, exhibits, and relative location of the house with reference to stopped up drains, that claimant's damage is due to the natural drainage of the area and other intervening and superseding causes and is not directly attributable to the neglect of the State Road Commission in keeping its culvert open. Therefore, we are of the opinion to, and do not make any award to the claimant herein.

Claim disallowed.

Opinion issued December 13, 1968

HARRY GORDON JOHNSON and
RUTH MARGARET JOHNSON

vs.

STATE ROAD COMMISSION

(No. C-3)

GILBERT RAY LOVEJOY and
HEVALENE F. LOVEJOY

vs.

STATE ROAD COMMISSION

(No. C-4)

George W. Stokes, for claimants.

Thomas P. O'Brien, Jr., Assistant Attorney General, and *Robert R. Harpold, Jr.*, for respondent.

Jones, Judge:

Except for the amount of damages sought, the facts surrounding the above styled claims are the same, and, therefore, these claims were consolidated for hearing and decision. In both cases, the claimants seek damages to their adjoining residence properties allegedly caused by the negligent installation and maintenance of a drain under Interstate Route No. 64 adjacent to the claimants' properties near the City of Nitro, in Putnam County, resulting in the collection of large quantities of water and the diversion of same upon and over said properties. It is alleged that damages have continued intermittently from early 1965 to the present time.

When the claims came on for hearing, the respondent's counsel moved for the dismissal of the Johnson claim (No. C-3) on the ground of *res adjudicata,* contending that the issues in this claim were litigated and resolved in a condemnation proceeding. This motion is of doubtful validity and will not be considered for reasons hereinafter made apparent.

The respondent's counsel further moved for the dismissal of both claims for lack of jurisdiction. The Court took the motion

under consideration and, upon the request of the claimants and agreement of the respondent, proceeded to hear testimony upon the merits of the claims.

In substance, the evidence adduced by the claimants shows that at times of heavy rainfall, water from the highway is collected, drained through a pipe and discharged upon and near the claimants' properties and that as a result the claimants have sustained and will continue to sustain damages. On the other hand, the respondent contends that the subject properties lie in a natural drainage area and denies responsibility for any damages.

The Act creating the Court of Claims, Code 14-2-14, provides as follows:

> "The jurisdiction of the court shall not extend to any claim: ***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."

The question to be decided is whether these claims fall within the legislative prohibition.

It is well established that the State Road Commission may be compelled by mandamus to institute condemnation proceedings to determine damages to real estate and compensate property owners. Such an action is not a suit against the State in contravention of Article VI, Section 35, of the Constitution. *Hardy* v. *Simpson,* 118 W. Va. 440; *Riggs* v. *State Road Commissioner,* 120 W. Va. 298; *State* v. *Graney,* 143 W. Va. 643; *State ex rel. French* v. *Sawyers,* 147 W. Va. 619; *Smeltzer* v. *Sawyers,* 149 W. Va. 641. Syllabus 1 of *State ex rel. Griggs* v. *Graney,* 143 W. Va. 610, states:

> "If a highway construction or improvement results in probable damage to private property without an actual taking thereof and the owners in good faith claim damages, the State Road Commissioner has the statutory duty to institute proceedings within a reasonable time after completion of the work to ascertain damages, if any, and, if he fails to do so, after reasonable time, mandamus will lie to require the institution of such proceedings."

In *State ex rel. Pearl W. Lynch v. State Road Commission,* 151 W. Va. 858, the Court held that evidence given by petitioner

and corroborated by other witnesses to the effect that since construction of a state highway adjacent to petitioner's land, petitioner had been subjected to heavier, more damaging and longer flooding was sufficient to entitle petitioner to have eminent domain proceedings brought against her by the State Road Commission for the purpose of determining whether she had suffered damages and the amount thereof, if any. The Court said:

> "The testimony and allegations of the parties in relation to the alleged damage are in conflict. This is not unusual in our adversary system of justice. However, as hereinbefore related, in a proceeding of this nature, we are not called upon to determine whether or not the respondent has actually caused damage to the petitioner's property. It is sufficient if the petitioner has made a good faith showing of probable damage."

The claimants contend that their properties have been damaged and continue to be damaged as a direct result of the construction and maintenance of the respondent's highway. Under the cases cited, a mere showing of probable damage would require the award of a writ of mandamus, and the claimants, being entitled to a full judicial hearing and determination of the question, would have their day in Court. As mandamus proceedings may be maintained against the State by these claimants, it is clear that this case comes within the jurisdictional prohibition set out in Section 14, Article 2, Chapter 14 of the Code of West Virginia, and accordingly, these claims are hereby dismissed.

Opinion issued December 16, 1968

PAUL F. HARRIS and VIRGIE HARRIS, Claimants

vs.

STATE ROAD COMMISSION, Respondent

(No. D-76)

Claimants appearing in person

Thomas P. O'Brien, Assistant Attorney General, and *Robert R. Harpold, Jr.,* Esq., for the Respondent.

Petroplus, Judge:

This claim was filed to recover damages for personal injuries sustained by Virgie Harris, Claimant, and medical expenses incurred by her husband, Paul F. Harris, also claimant, as the result of their automobile going over an embankment on the east side of State Route 52, in Wayne County, while traveling in a northerly direction toward Huntington, West Virginia. The negligence charged to the State Road Commission is the failure to provide guard rails at the point of the accident, it being contended that the presence of said guard rails might have prevented the automobile from going over the embankment on the right side of the road.

The husband testified that on June 1, 1967, he was driving a 1954 Model Dodge Sedan, and his wife, was occupying the front seat as a passenger, when his car stalled on the highway. Being unable to start the motor again, the car was pushed by a passing motorist to the berm on the left side of the road in front of a grocery store, entirely off the paved portion of the road which was level and about 30 feet wide at that point. Mr. Harris further stated that he set his emergency brake, that his brake light was flashing and that he got out on the driver's side leaving the car occupied by his wife and a dog that was also in the car. He went into the grocery store to call a Service Station on the telephone, and a mechanic later came who apparently started the motor and left the scene. Shortly thereafter, the motor stopped again and Mr. Harris for a second time got out of his car, raised the hood and was checking or tinkering with the motor, when for an unexplained reason the motor sudden-

ly started up again and the car took off in gear before he could get back into the driver's seat. The automobile was equipped with an automatic transmission which had been placed in "neutral" position before the car started to move. Mr. Harris was struck by the car and thrown to the pavement after it began its movement. The car crossed the entire width of the highway which was level, traveling about 60 feet, crossed the berm of approximately six feet on the right side of the traveled portion of the highway and rolled over a bank into a ditch 25 feet below the level of the highway. Mr. Harris suffered a bone fracture and was hospitalized about 42 days as the result of being struck by the moving car, and Mrs. Harris sustained serious injuries, including a back injury and broken ribs. She was also hospitalized. The medical bills are quite substantial, and the car was totally demolished.

The alleged negligence of the State Road Commission is the failure to provide guard rails at the point of the accident which might have kept the car from going down the steep bank. In response to questions by the Court, Mr. Harris testified that he set his emergency brakes and turned off the ignition before going into the store to call a mechanic, getting out on the driver's side. After the motor stopped a second time, he got out a second time and opened the hood to see if there was a loose connection leaving his ignition key turned on. The car was in a neutral gear and when he touched something the motor started. He stated that he previously had been having trouble with his automatic transmission before the accident, saying "if you didn't hold that lever up it would drop down into gear". This in brief is the factual situation.

It becomes unnecessary in this opinion to apply or discuss questions of law involving the contributory negligence of Mrs. Harris, if any, and the question of intervening negligence on the part of the driver, or even the question of whether the absence of a guard rail at a dangerous point on the highway was the proximate cause of the injuries sustained. It appears that the law of this State has been well settled on the question of whether the failure of the State Road Commission to provide guard rails, place road markers or danger signals on paved highways constitutes primary negligence.

The case of *Adkins v. Sims*, 130 W. Va. 645, decided in 1947, on undisputed facts, and on a determination of the State Legislature declaring that a moral obligation existed on the part of the State to respond in damages when a car went over a precipitous bank killing its occupants, the State Road Commissioner having failed to install and maintain guard rails, the Court in that case clearly established a principle that the failure to provide guard rails by the State Road Commission does not create a moral obligation on the part of the State to compensate a person injured on the highway, allegedly resulting from such failure. This ruling was made notwithstanding a distinct and express legislative enactment stating there was such a moral obligation and appropriating the funds to make compensation. The Opinion holds that the State is not the insurer of the safety of the roads and highways, and that the construction and maintenance of public highways is a governmental function and the funds available for road improvements being necessarily limited, the State Road Commissioner is not required by any Statute to construct guard rails at dangerous points on the highway. This being the situation, every user of the highway travels at his own risk. The State does not and cannot assure him a safe journey. The failure of the State Road Commissioner to provide guard rails did not constitute negligence of any character, and particularly did not create a moral obligation on the part of the State to pay damages for injury or death, assumed to have occurred through such failure, and as the proximate cause thereof. In the very nature of things, and considering the financial limitations placed upon the Road Commissioner, public funds entrusted for road purposes must be expended in the discretion of the Road Commissioner, and at what points guard rails should be provided was a matter of discretion for the State Road Commissioner. The honest exercise of that discretion cannot be negligence.

Here there was no fault with the traveled portion of the road according to the testimony. If we should hold that an unattended automobile which had been brought to a complete stop on the left side of the road, which for some unexplained reason crosses the highway and goes over an embankment on the right side creates a moral obligation to compensate the driver and injured occupant, we would be creating a precedent that the State will be required to compensate every person in-

jured on the highways of the State, if the accident could have been prevented by maintaining guard rails at the point of the accident. We would also be rendering an opinion that the State has an obligation to maintain in absolutely safe condition every mile of our highways, primary and secondary. This would provide insurance underwritten by the State for every traveler and impose almost an absolute liability on the State to maintain its highways in a safe condition.

There being no showing of primary negligence from the evidence, it becomes unnecessary to consider the questions of proximate cause, contributory negligence or whose negligence proximately contributed to the claimants' injuries.

Although we are most sympathetic to the claimants for their misfortune and consequent suffering and medical expenses, we are constrained for the foregoing reasons to disallow the claim and accordingly dismiss this claim and make no award.

Claim dismissed.

No award.

Opinion issued December 19, 1968

MR. AND MRS. JAMES P. LEWIS

vs.

DEPARTMENT OF PUBLIC INSTITUTIONS

(D-73)

Mrs. James P. Lewis appearing in person.

Thomas P. O'Brien, Assistant Attorney General, for the respondent.

Jones, Judge:

At about 7:30 to 8:00 o'clock on the morning of March 31, 1967, four convicts assigned for work at Hopemont Sanitarium overpowered a guard and escaped. At about 10:00 o'clock that morning, they entered the home of the claimants, Mr. and Mrs. James P. Lewis, near Terra Alta, made Mr. Lewis and later Mrs. Lewis and one of their sons-in-law their prisoners and

helped themselves to the Lewises' clothing which they put on in place of their institutional uniforms. That night, two daughters, another son-in-law, William L. Wilson, and a small child went to the home and were also taken captive. Later that night, having stolen several items of property in addition to the clothing, the convicts tied up all of the family, except Wilson, whom they made their hostage and compelled to drive them away in his car. They went to Clarksburg, where they drove around for some time, and finally stole another car, leaving Wilson's car near Clarksburg, and forced him to accompany them in the stolen car. They drove to St. Marys and across into Ohio and back to Williamstown, where they tied Wilson up and left him along Route No. 21.

The question of negligence on the part of the respondent turns on the conduct of the guard at the time of the escape. Hopemont has a maximum security section where maximum security inmates with tuberculosis are housed and where Moundsville Penitentiary prisoners are employed as orderlies. Charles Robert Sarver, Director of Corrections at the time, testified that the only difference between the security at Hopemont and Moundsville is that there is no wall around Hopemont. Two guards are on duty at all times, one inside the maximum security section and one outside. On the day in question, the outside guard unlocked the steel door between the prison section and the office at the request of one of the convicts who wanted to get a haircut from a "trusty" whose shop was in the office. No other guard was present. As the convict came through the door, he struck the guard and as they scuffled, the guard's gun fell out of its holster onto the floor. With his gun out of reach, the guard was no physical match for the prisoner. The prisoner took the guard's gun and keys and released the other three prisoners. Then they opened the gun closet and took two more guns, stole the guard's automobile and drove away. Three of the four escapees were termed "dangerous". Early in February, 1967, one of the escapees had been sent back to Moundsville Penitentiary for attempting to escape from Hopemont, but about a month later, he was returned to the sanitarium.

There is a difference of opinion concerning "standard procedures" at the institution. Director Sarver testified as follows:

"Under the security rules or regulations in effect at the time, that door should not have been opened with one guard there alone. One guard from inside and one guard from outside should have been at the door when the door was opened. The investigation did reveal that that was not done in this situation, that one guard alone opened the door thus allowing or enabling the men to overpower him." The guard testified that "there has never been two guards at that door at no time the six years I've been up there and there's never been no rules or regulations set down to that effect." The guard also testified that the rule requiring two guards went into effect the day after the escape.

These being maximum security prisoners, known to be dangerous and under guard in a place where maximum security conditions were supposed to be in effect, the Court is of opinion that the security measures taken were not sufficient in the circumstances. The Director of Corrections termed the action "negligent", and the "two guards" rule became standard procedure the following day. The claimants and other members of their family were badly mistreated, and they sustained damages as a result of the negligence of employees of the respondent.

While the claimants' petition recited damages in the total amount of Five Hundred Dollars ($500.00), the damages were not itemized and the Court has had some difficulty in making its own itemization from the testimony of the witnesses. There is sufficient evidence to support the following: four shirts—$15.92; one sweatshirt—4.49; one suit—70.00; one suit—35.00; one transistor radio—40.00; one lady's car coat—19.00; two pair of pants—20.00; and one flashlight—2.99; a total of One Hundred Seventy-seven Dollars and Thirty-five Cents ($177.35).

The son-in-law, William L. Wilson, was not a petitioner, but he was made a party to the proceeding by the Court to permit him to prove his separate damages as follows: sweater—$9.00; wrist watch—10.00; and gasoline and other car expenses—12:00; a total of Thirty-one Dollars ($31.00). Several other items of damage were mentioned in the testimony but they were so vague and speculative in nature that the same cannot be allowed.

It is the Court's judgment that these are claims against the State of West Virginia which in equity and good conscience should be paid, and, therefore, the Court awards the claimants, Mr. and Mrs. James P. Lewis, the sum of One Hundred Seventy-seven Dollars and Thirty-five Cents ($177.35), and the claimant, William L. Wilson, the sum of Thirty-one Dollars ($31.00).

Opinion issued January 27, 1969

THE BAKER & HICKEY COMPANY

VS.

THE STATE ROAD COMMISSION OF THE STATE OF WEST VIRGINIA

(No. D-95)

George S. Sharp, Kay, Casto & Chaney, for the Claimant.

Thomas P. O'Brien, Assistant Attorney General, and *Theodore L. Shreve* for the State Road Commission

Ducker, Judge:

The claimant, The Baker & Hickey Company, was awarded a contract with the State Road Commission upon claimant's low bid of $744,999.79 for the construction of a bridge over Gimlet Hollow, Cabell County, West Virginia, designated as Project No. I-64-1 (53) 4, Contract No. 2, Cabell County Bridge No. 2227. Claimant claims herein damages totaling $35,435.74, alleging it was unreasonably delayed by the State Road Commission and prevented from performing the work under the contract. The claim is composed of two principal parts, the first being alleged damages suffered directly by the claimant in the sum of $18,795.35, and the second being alleged damages suffered by claimant's subcontractor, The Vogt and Conant Company, which was to erect the steel of the bridge, in the sum of $16,640.39, for which sum the claimant says it is liable to the subcontractor and therefore the Road Commission is liable for said sum to the claimant. These claims were first filed as two separate claims, one by the claimant and the other by the subcontractor, but inasmuch as there was no privity of contract between the subcontractor and the State, the claimant consolidated the two claims into one claim in its name.

The contract provided for a period of four hundred working days for the completion of the contract. The work was begun on May 4, 1964, and was completed on June 23, 1966. The four hundred working days expired on May 25, 1966, but no default was claimed by the Road Commission which had shut the work down on a stop order dated July 20, 1964 which remained in effect until May 26, 1965, a period of approximately ten months, due to a land or ground slippage on the west bank of Gimlet Hollow affecting No. 1 abuttment and No. 1 Pier. The cause of earth slippage was not known or at least none of the witnesses seem to know. It was, after long delay, rectified by the contractor of the work on the adjacent part of the project. The Road Commission explained the delay on the basis that time was necessary to study the slide in order to determine its cause before attempting to remedy the situation. The claimant alleges that the ten month delay was unnecessary and that its damages resulted from such delay, alleging that it could have finished the work under the contract earlier and not had the additional costs of equipment costs, rentals and labor.

The claimant maintains the position that the 400 day provision is one only to penalize the contractor if the contractor does not finish the work as specified. We cannot subscribe to that theory, as the Road Commission fixes such time as the reasonable period within which the work should and must be completed so that the whole project shall be available to the public. If the contractor can complete his work sooner and profit thereby, he is privileged to but not required to do so. As to things which occur such as the earth slide or slippage in this case, the State has not warranted to the contractor that such will not occur and the contractor must take such probabilities into his account, except that he should not be charged with working days while such exist. Section 1.8.4 of the Specifications-Roads and Bridges, of the State Road Commission, which was made a part of the contract involved in this case, provides as follows:

> "The Engineer shall have authority to suspend the work, wholly or in part, for such period or periods as he may deem necessary, due to unsuitable weather, or other conditions considered unfavorable for suitable prosecution of the work, or for such time as may be found necessary due to failure of the Contractor to

> carry out orders given or perform any or all provisions of the Contract. The suspension shall not constitute grounds for claim for damages or extra compensation by the Contractor. If it should become necessary to stop work for an indefinite period the Contractor shall store all materials so that they will not obstruct or impede the traveling public unnecessarily or became damaged. He shall take all precautions necessary to prevent damage to, or deterioration of, the work performed, provide suitable drainage of the roadway by opening ditches, shoulders, drains, etc., and erect temporary structures where necessary. The Contractor shall not suspend the work without proper authority."

We find nothing in the evidence questioning the authority or the propriety of the suspension of the work under this contract, except that the claimant says that the period of the suspension was unreasonable and unjustified. How unreasonable or unjustified is not clear, and it must be remembered that by far the larger part of the period of suspension was during the winter months. Claimant, while questioning the period of suspension, offered no clear proof that the period of the suspension should have been shortened or that the cause of the earth movement could have been earlier determined and corrected. Who can say whether some earlier elimination of the earth slippage would have been successful, and if not successful what other damage may have resulted. It was within the province and duty of the Road Commission to decide such question and to stop work under the contract until it was certain as to what steps should be taken. It is indeed unfortunate when such things happen, but we don't see where the State has become a guarantor against such an occurrence. We do not wish to absolve the Road Commission of any negligence, but delay alone as in this instance does not prove negligence.

The claimant says that it was delayed approximately ten months in the performance of the contract all on account of an unreasonable period of the stop order. It does not attempt to show what would have been a reasonable period under the circumstances. On the contrary, the State introduced evidence which showed a considerable amount of work was done by the claimant prior to winter and during the said ten month period. The claimant's own total alleged damages amount to $18,795.35

which if we would consider on a monthly basis would be $1,879.53 per month. As is hereafter shown, the steel work for the bridge completion was delayed by the Road Commission for approximately two months beyond the four hundred day working period by its action in giving incorrect information for the delivery of the steel. Because of such action, we are of the opinion that two months costs can be fairly charged to the Road Commission, and we can conceive of no other equitable manner to determine such damage than to allow for such two months of the average monthly cost of $1,879.53, which amounts to $3,759.06.

The second part of this claim which relates to the delay in the erection of the steel caused by the damaging act on the part of a Road Commission official in designating the time when the steel could be erected from Abutment No. 1 and on and to Pier No. 1. We are not satisfied from the evidence that there is unquestionable liability on the part of the claimant to the subcontractor, The Vogt & Conant Company, for any damages claimed by the latter. No contract between such parties was offered in evidence and the proof is that the subcontractor claimed it was billing the contractor for the claim and the contractor admitted such liability for the purpose of this claim. We have serious doubts as to whether this could bar the contractor from later denying liability to the subcontractor. However, this Court does not wish to be strictly technical on this point in view of the fact that some injustice has been done by the act of the Road Commission in so specifically designating a day when the steel work could be done on Pier No. 1.

Early in January 1965 the Road Commission advised claimant that No. 1 Pier would be released to claimant for work by March 1, but it was not so released until May 26, 1965, a date approximately three months later. Relying upon such specific information claimant had its subcontractor ship the steel which had been on order for many months to the bridge location and upon finding the pier not ready the subcontractor had to store the same, requiring an additional handling of the steel and the cleaning thereof after storage as well as some additional charges. The extra costs and expenses claimed in this connection consist of (1) labor and overhead $4,406.26; (2) premium

time $113.90; (3) idle equipment $7,347.10; (4) truck crane $1,700.00; (5) cost of cleaning steel $574.18; (6) Business & Occupation Tax of $377.49; (7) $201.23 extra zinc pouring costs; and (8) labor escalation costs, travel and trucking charges $1,920.23, making a grand total of $16,640.39.

Then of the above items claimed as damages the question for this Court is which of them in our opinion should be allowed. As to the zinc lead matter, we find no justification for allowances as such claim is not sustained by the proof. Nor are we satisfied about equipment rental or other claims based on idleness or loss of opportunity to the claimant to otherwise use. The record is not clear as to what use might have been made of such equipment but for the delay, although claimant says it was not practicable to move the equipment. We cannot conclude that there was an obligation on the part of the Road Commission to compensate for any such hazard, even though the delay may have been a material factor in the matter. The contractor and subcontractor were required to abide by the provisions of the hereinbefore quoted section 1.8.4 of the specifications and delays reasonably justified are hazards assumed by contractors, otherwise the provisions are practically meaningless. We do, however, feel constrained to and do consider valid the extra labor and overhead costs of $4,406.26, the premium time of $113.90, the cost of cleaning steel of $574.18, the Business & Occupation Tax of $377.49 and the labor escalation costs of $1,920.23, making a total of $7,392.06.

In view of all the facts and circumstances and an effort to find an equitable basis to adjust the controversial claims herein, we are of the opinion that the claimant should be awarded the sum of $3,759.06 for the loss incurred by it, and the sum of $7,392.06 for the loss occasioned to claimant's subcontractor, The Vogt & Conant Company, making a total award for both claims of $11,151.12, and we direct that payment be made to the contractor and subcontractor in said respective amounts.

Award of $11,151.12.

Opinion issued January 27, 1969

CAVANAUGH LANDSCAPING COMPANY

v.

DEPARTMENT OF NATURAL RESOURCES

(No. D-77)

Edward H. Tiley, Hoyt N. Wheeler, Kay, Casto and *Chaney* for Claimant.

Thomas P. O'Brien, Jr., Assistant Attorney General, and *Arden J. Curry*, Special Assistant Attorney General, for Respondent.

Jones, Judge:

On October 26, 1965, the claimant, Cavanaugh Landscaping Company of Akron, Ohio, entered into a written contract with the respondent, Department of Natural Resources, to construct four golf courses at West Virginia State Parks, two at Pipestem State Park, in Summers County, one at Twin Falls State Park, in Wyoming County, and one at Canaan Valley State Park, in Tucker County, for the contract sum of $710,000.00 One paragraph of the contract provides the following: "The Contractor hereby agrees to commence work under this contract on or before a date to be specified in a written 'Notice to Proceed' of the owner and to fully complete the project by *October 14, 1966*, as stipulated in the specifications. The Contractor further agrees to pay, as liquidated damages, the sum of *$100.00* for each successive calendar day thereafter as provided in Paragraph 19 of the General Conditions." The contract further provides that no changes in the work shall be made without the written approval of the Owner, charges or credits to be determined by specified methods, and the claimant was emphatically warned that no additional costs could be paid for without a Change Order. The State of West Virginia issued a Purchase Order dated October 30, 1965, acknowledging acceptance of the claimant's proposal dated September 27, 1965 showing the deletion of several Alternates and a base contract price of $710,000.00. The Notice to Proceed was given on January 28, 1966. Sundry change orders increased the total contract price to $762,399.80, and extended the contract time from October 15, 1966, to June 1, 1968.

The claimant contends that it is entitled to damages under the well established rule of law that a contractor is entitled to damages for delay caused by the owner, and also for damages for extra work done. Items of this claim as identified in the claimant's petition are as follows: 2 (b) Delay in giving notice to proceed, including $11,564.00 not alleged in the claimant's petition but permitted by the Court to be shown under an amendment of the pleadings at the time of hearing, $53,172.20; 2 (c) Delay resulting from faulty design and changes recommended by a "Citizens Committee" appointed by the governor, $20,750.00; 2 (d) Delay of the Department in furnishing mowing equipment, $42,715.00; 2 (e) Failure of the Department to furnish adequate water, $1,155.00; 2 (f) Damage to sprinkler heads, $1,295.00; 2 (g) Failure of the Department to provide adequate drainage, $16,430.00; 2 (h) Erroneous staking of courses, $24,255.00; 2 (i) Damages caused by heavy rains and delay relating to automatic water systems, $53,662.50; 2 (j) Delay due to traffic over public roads through two courses, $6,400.00; 2 (k) Delay caused by Farmer Mallow, who refused to vacate condemned land at Canaan Valley and threatened harm to the claimant's officers and employees, $5,952.00; 2 (l) Failure of the Department to provide an adequate water supply at the Pipestem Nine Hole Course, $1,245.00; 2 (m) Delay in location of a practice fairway at Pipestem Nine Hole Course, $1,720.00; and 2 (n) General delays causing injury to claimant's financial position and hindrance to its business as a going concern, $350,000.00; a total of $578,751.70.

The Department of Natural Resources denies that it owes the claimant anything and contends that any losses which the claimant may have sustained were due to the claimant's own fault.

The State had no right to delay the Notice to Proceed indefinitely, for example, to the day before the completion date of the contract as suggested by counsel for the claimant, and if the delay was unreasonable, claimant would have been entitled to an extension of time. The claimant made much of its concern about the $100.00 per day penalty after the completion date, but the record does not disclose that it ever requested an extension, and, in fact, it appears that the eventual change order extending the time was initiated by the respondent. The clai-

mant was put on notice at the outset that the contract must be approved by the Community Facilities Administration, a federal agency which was to furnish matching funds for the project, and that there were other preliminary matters which had to be consummated before work could be started. The claimant was told that if it performed any work prior to the Notice to Proceed, "It's on your own." During the latter part of November and early December, 1965, the claimant did send skeleton work forces to the several State Parks, being supervisory personnel who had no other work to do and apparently were making preparations for the following Spring. The severe Winter weather made work on the project practically impossible. The The Community Facilities Administration approved the project on January 12, 1966, whereupon the Attorney General's approval was obtained and other necessary requirements were completed, and the Notice to Proceed was issued on January 28, 1966. Contrary to the claimant's contentions, it was able to submit a work schedule dated February 22, 1966 showing that all work would be completed within the term of the contract. Under date of March 17, 1966, Daniel Cavanaugh, President of the claimant company wrote to the associate Architect/Engineer, Irving Bowman and Associates, in part as follows: "In answer to your letter of March 11, 1966, we wish to advise you that there has been no construction delays and we expect to finish on the specified date." Cavanaugh testified that this letter was written under coercion and fear of retaliation, but there is no corroboration of such averment, and in another letter written by him to Irving Bowman and Associates on May 10, 1966, he said: "We have had our normal share of problems so far and we have not been too concerned, but if you are not going to approve any more payments for Pipe Stem 18, we will have to stop all work there and request additional money for hold up." The claimant undoubtedly had problems during the period involved in Item 2 (b), but all of them should have been anticipated and were substantially "normal" problems as indicated by Cavanaugh in his letter of May 10, 1966. The claimant accepted the Notice to Proceed and undertook performance of the contract, without making any request for additional compensation or a change order. We are of opinion that there was no unreasonable delay on the part of the respondent;

and the damages claimed for this period in the total amount of $53,172.20 are clearly not supported by the evidence.

The Citizens Committee appointed by the Governor began its investigation in the latter part of December, 1965. They made several recommendations for changes in design at Pipestem. Work was suspended at Pipestem by an order of the Department from March 25, 1966 through May 23, 1966. According to the claimant's testimony, extra costs in the amount of $20,750.00, resulting from design changes in pursuance of recommendations of the Citizens' Committee, occurred in the months of July, August, September and October, 1966. The incongruity of the dates is not explained. By the letter of May 10, 1966, heretofore referred to, the claimant complained that it had not been paid $20,000.00 for work performed at Pipestem during the work stoppage period, and warned that if estimates were not paid, all work at Pipestem would have to stop and damages would be requested. In less than two weeks from the date of that letter, the order was given to resume work. Some of the recommended changes in design were made, but there is no clear showing that the claimant was damaged thereby. There is testimony to the effect that additional work was done, including additional grading, but no diary was kept, no payrolls specifically attributed to extra work, no measurements of dirt moved, and change orders were not requested. This was the only suspension of work ever ordered by the Department and it applied only to Pipestem, not to the other two State Parks. At least to some extent it appears that the Citizens Committee was more help than hindrance to the claimant, and the effort toward changing some of the design appears to have been a cooperative one. The Court is of opinion that the evidence adduced on behalf of the claimant is not sufficient to sustain the allegations of Item 2 (c).

Items 2 (b) and 2 (c) discussed above are typical of the remaining items of this claim. Items 2 (d), 2 (i), 2 (j), 2 (k), 2 (m) and 2 (n) all involve alleged delay as the proximate cause of increased costs. The evidence, and frequently the lack of it, indicates that inclement weather and the claimant's own failures substantially contributed to the claimant's discomfort, inconvenience and financial loss.

The claimant suffered inconvenience and some delay due to the recalcitrance of Farmer Mallow. However, the State had obtained the right of entry upon the Mallow land, as required by the contract, and upon notice of Mallow's threats and interference, an attorney was promptly employed by the State, an injunction was obtained in the Circuit Court of Tucker County, and the molestation ceased. The contract provides that the Owner shall not be responsible for any delay in furnishing the right of way, but in case such delay retards operations, the Owner shall grant an extension of time. No extra compensation or extension of time was then requested by the claimant.

Items 2 (e), 2 (f), 2 (g), 2 (h) and 2 (l) involve claims of additional work and expense which, under the contract, could not be paid for without the prior approval of the Department and a written change order. This work was done without change orders, and without proof of extra work or demand for extra compensation.

Item 2 (g) complains of the failure of the Department to furnish adequate drainage. The contract did not require the State to provide drainage, but when during the course of the work it became apparent that certain drainage was necessary, a change order was requested and provision for drainage costing $27,399.80 was granted.

The fact that the claimant was unable to obtain copper wire at the time it was needed for the installation of the automatic draining system at Twin Falls and the resultant damage in the claimed amount of $42,000.00 cannot be attributed to any fault of the Department of Natural Resources. This alternate was clearly a part of the base contract and the responsibility for having to dig the ditch twice was a combination of a scarcity of copper wire, weather and bad judgment. The claimant did no more than it was required to do under the contract.

Damages to the claimant's business and the loss of future profits claimed in Item 2 (n) are too remote and speculative to deserve serious consideration by the Court.

Obviously, this was not a happy or profitable experience for the claimant. The Court recognizes that the claimant sustained losses, some due to its own fault such as having to dig a ditch twice at an additional cost of $42,000.00, some as the result of

bad weather and perhaps some losses which may have been contributed to by the State, but not a single such item is examined, evaluated, described and explained so that the Court can say that for this period and for this cost of labor and equipment the claimant has been damaged in an amount certain by reason of delay or other act or omission of the State.

The Court is of opinion that the claimant has not proved its case by a preponderance of the evidence, and, accordingly, this claim is disallowed.

Opinion issued January 27, 1969

CHARLESTON CONSTRUCTION, INC.,
A CORPORATION, Claimant,

vs.

THE STATE ROAD COMMISSION OF
WEST VIRGINIA and THE STATE OF
WEST VIRGINIA, Respondents.

(No. D-105)

Lee M. Kenna, Esq., for the Claimant.

Thomas P. O'Brien, Jr., Assistant Attorney General, and *Theodore L. Shreve,* Esq., for the Respondents.

Petroplus, Judge:

Charleston Construction, Inc., the claimant, filed a claim in the amount of $2,412.19, with interest thereon from July 1, 1965, arising from work done on Project I-64-160 (10) in Cabell County. The respondents have filed no Answer, and the case is submitted on a stipulation admitting the facts and the amount of damages as alleged in the Notice of Claim. The Construction Agreement has not been made a part of the Record and the facts are sketchily presented.

It appears from the stipulation that the claimant at approximately 1:45 P.M. on June 30, 1965, received a shutdown letter from the Project Supervisor of the State Road Commission suspending its work as Contractor on the Project on the ground that the sand used on the Project did not meet specifications.

Five or six samples had been tested for gradation on the No. 100 Sieve in the testing laboratory of the respondents and more material passed through the sieve than the specifications allowed thereby appearing not to meet the specifications. The Contractor had just received a new shipment of sand, and assuming that the new product was not specification material, it began to separate the sand into stock piles in the hope that specification sand could be found and that the work might be resumed. It is not clear from the Complaint why this stockpiling was necessary. The Contractor instructed its men to report for work the following day. On July 1, 1965, the following day, another sample was taken and failed to meet specifications, and the Contractor sent its men home. Subsequent examination of the sieves in use by the testing laboratory of the State Road Commission revealed that the No. 100 Sieve had worn thin around the edge to such an extent that one opening had been enlarged to two or more in several areas on the sieve, or in other words, that the testing device was defective. It is not stipulated that the State Road Commission knew or in the exercise of reasonable care should have known that the testing device was defective. Immediately upon this discovery, a new sieve was substituted and passing gradations were obtained on the sand previously rejected. The State Road Commission personnel were advised of this at approximately 11:00 A.M. on July 1, 1965, and the Contractor was notified accordingly. The Contractor then re-combined the stock piles of sand for use.

The Contractor contends that it should be compensated for equipment rental sustained during the period of shutdown, the show-up time paid for the men during the delay, and for the time and equipment used in re-handling the sand, as well as for the material lost in re-handling.

The Specifications of the State Road Commission provide that materials failing to meet the requirements of these Specifications shall not be used, and that the Contractor shall furnish samples when required. All materials are to be approved before being incorporated in the work. The duration of the suspension of the work because of the defective laboratory tests was from 1:45 P.M. on one day until 11:00 A.M. of the next day. The prosecution of the work was delayed for a very short period of time, and even if we assume that the respondents were guilty of

negligence in not having proper equipment on hand in the materials testing laboratory, when the error was discovered, a correction was made and the Contractor was promptly notified that the material met specifications. The Contractor's work was not unreasonably delayed, although it is admitted there was an unjustified delay of a few hours.

It is the opinion of this Court that the claimant is entitled to reasonable compensation for any damages resulting from the improper isssuance of the shutdown order, but only for such damages as are the direct and proximate consequence of the shutdown order.

The unnecessary and additional stock piling of the sand in the hope that specification sand could be found appears to have been done in good faith and should be a proper item for compensation. Therefore, the claim for moving stock piles is allowed in the amount of $625.68. The equipment rental loss representing rental of various items of equipment on the job for an eight-hour period, in the opinion of this Court, is not compensable, as the equipment was already installed on the Project and could not have been removed and put to profitable use elsewhere and returned to the Project within the short duration of the temporary suspension. The equipment rental is an item of overhead that the Contractor would be required to pay whether or not the work had been suspended. This item in the aggregate amount of $1,166.24 is disallowed because of the minimum duration of delay. The State Road Commission has the discretion to suspend work if it deems it to be for the best interests of the State.

The show-up item claimed for the men who were ordered to return to work on July 1st, and sent home after another sample was taken, which failed to meet specifications, is allowed in the amount of $137.62, as a proximate item of damage. The cost of the sand wasted because of the re-handling of the material in a quantity of 197 tons, the stipulated amount, is allowed in the amount of $482.65, as a proper item of damage.

The Court is of the opinion, therefore, to award the claimant the sum of $1,245.95, said sum representing the aggregate of the above mentioned items allowed as damages for the erroneous temporary suspension of the work. It is the further

opinion of this Court that being unliquidated damages resulting from the suspension of the work, that no interest may be allowed from July 1, 1965, to the date of this Opinion.

Claim allowed in the amount of $1,245.95.

Opinion issued January 27, 1969

J. C. HAYNES

vs.

STATE ROAD COMMISSION

(No. D-18)

George P. Sovick, Jr., for claimant.

Thomas P. O'Brien, Jr., Assistant Attorney General, and *Theodore L. Shreve*, for respondent.

Jones, Judge:

This claim is for extra cost incurred in pre-drilling for steel piles to support a bridge over Interstate Route No. 64 near White Sulphur Springs. The fill work in the bridge area had been performed by another contractor and it appears that isolated argillaceous limestone material unintentionally was incorporated in the fill limits of the bridge which caused drilling difficulty not contemplated by the claimant or the State Road Commission at the time the contract was entered into. This work was performed in 1966; and the total amount claimed is $7,053.59. Engineers for the State Road Commission admitted the accuracy of the actual cost analysis of the claimant, but, based on experience and camparisons with similar projects, the State Road Commission contended that if a heavier rig and drill had been used, the delay and extra cost could have been substantially reduced.

By stipulation, duly filed herein, the parties hereto have agreed that the claimant is entitled to additional compensation based on calculations made by the State Road Commission engineers.

The Court is of opinion to accept and approve said stipulation, and accordingly, an award is made to the claimant, J. C. Haynes, in the sum of $4,033.76.

Opinion issued February 24, 1969

J. I. HASS CO., INC.

v.

STATE ROAD COMMISSION
STATE OF WEST VIRGINIA

(No. D-109)

Robert E. Douglas, Esq., *Hiserman, Keenan, Douglas & Kern,* for the Claimant.

Thomas P. O'Brien, Jr., Assistant Attorney General, and *Theodore L. Shreve,* Esq., for the State.

Ducker, Judge:

Claimant, J. I. Hass Co., Inc., was awarded on July 20, 1964 by the State Road Commission, a contract in the amount of $294,-370.00, on a lump sum bid, for the cleaning and painting of the Interstate Bridge over the Kanawha River at or near Nitro, Putnam County, West Virginia, and providing an Engineer's Field Office therefor, (Project 1- 64-1 (50) 43, Contract No. 3), the work under which contract was to be commenced within ten days after the date of the contract and was to be completed by November 30, 1964. A liquidated damages clause in the contract specified that the contractor was to be charged $100 per day for each day the contractor delayed the work after the date specified for completion of the work and as the work was not completed until 181 days had expired after the completion date, the Road Commission withheld $18,100 from the final estimate and payment. In addition to the liquidated damage amount, the final estimate shows there remained a balance of $5,008.05 remaining due the claimant.

Claimant now claims it is due the two items of $18,100.00 and $5,008.05, totaling $23,108.05, and extra caulking expenses of $2,837.44, and damages due to alleged defective specifications in the sum of $68,327.49, making the claim a grand total of $94,272.93. Inasmuch as our decision is to allow the $23,108.05 which will be hereafter discussed, we will proceed to consider the damages item of $68,327.49.

The specifications for the work were set out in great detail, providing that the first coat or primer should be a vinyl type primer which should be applied by brush to a dry film thickness of 1.5 millimeters on the steel which was to be blast-cleaned to white or near white metal, the second coat to a 1.5 millimeters thickness, and the third coat to a 3.0 millimeters thickness. After the claimant had the difficulties which it now alleges, the Road Commission agreed to a change in the specifications to the effect that the thickness of the primer could be reduced to 1 millimeter, the second coat to be 2 millimeters, and the third to 3 millimeters. This modification was made after the claimant complained of difficulty in obtaining the 1.5 millimeter thickness on the vertical or sloping beams and upright parts of the bridge structure when it applied the paint by spraying it instead of brushing it on as provided for in the specifications. The paint which claimant received, and presumably ordered, was specifically designated for spray application and in so applying it it did not result in a 1.5 millimeter thickness. It appears that there was some delay in submission to the Road Commission by the claimant of the paint formulation before it was applied to the bridge, although the formulations were approved from time to time. The evidence is contradictory as to the sand-blasting before the application of the paint, the Road Commission claiming that the sand used was not according to specifications. There is also evidence questioning the quality of the labor used by the contractor, the Road Commission contending that properly qualified and/or more labor could have done the work within the time allotted for the completion of the job.

The claimant's claim for damages on the basis of defective specifications has its inception in the fact that it attempted to use paint which, when applied by spraying, would not adhere to the vertical beams to provide the thickness required, and consequently it contends that it should not have been required to apply it by brush which would have necessitated more than one application to a coat. If that conclusion is justified, it seems to us that a contractor who claims sufficient knowledge and skill to undertake an almost three hundred thousand dollar painting job should have known that either the specifications were wrong when he bid on the project or that it would take brush applications to perform the contract. Furthermore, the

matter of the work in sandblasting was one which the claimant had to take into consideration in determining the amount of its bid on the project, as well as the amount of caulking or filling of cracks in the joints or separations in the steel structure.

The claimant has introduced evidence to the effect that the vinyl paint specified was not proper for the job, and this evidence was contradicted by the evidence of the Road Commission, the Commission contending that a coat of paint did not mean one application but, if necessary, it could mean more than one application to obtain the required thickness, under the specification that it was to be applied by brush until the Road Commission consented to the spray application and the reduction in the primer coat. The controversy, it appears to us, was of the claimant's own making in obtaining paint that was only to be spray applied and time and labor saved, instead of brushing or spraying with more than one application to obtain a coat of specified thickness. The paint was used and was sufficiently applied to finish the work.

It is unfortunate that the claimant had to do more work than it had contemplated, but we cannot attribute that to the fault of, or the claimant's interpretation of, the Road Commission's specifications. It may not be amiss to consider the fact that bids for this work ran from the claimant's low bid of approximately $294,000 to a high bid of approximately $393,000, and it is not unreasonable to conclude that some bidders must have properly interpreted the specifications and to have known that more work and labor would be necessary to apply the paint by brush. As experienced bridge painters, it seems also reasonable to conclude that the claimant should have known before bidding whether there were defects in the specifications and if there were defects it should not have bid or should have bid on a different basis for the work on the project. From all the facts we are constrained to conclude that the claim of $68,327.93 for damages for defective specifications should be disallowed.

The item of the claim alleging that the claimant is entitled to $2,837.44 for extra caulking expenses is not in our opinion sufficiently proven as work not included or contemplated in the contract bid, and we uphold the Road Commission in its refusal to honor the same.

As to the item of $5,008.05 representing the balance of the contract price, and which does not appear from the record to have been paid, we cannot see justification for the withholding of payment of the same from the claimant, and we include such amount in the award herein made.

The Road Commission withheld as liquidated damages the payment of the sum of $18,100 for a delay of 181 days at $100 per day. While liquidated damage clauses are generally enforceable when substantial damages have resulted, it seems to us that inasmuch as traffic was not seriously interrupted or inconvenienced and no substantial pecuniary loss was suffered by the State or the public by the delay in the controversy over the paint quality and application, such controversy was an extenuating circumstance which we think made the enforcement of the liquidated damage clause rather harsh and unjustifiable. So we conclude that the claimant should not suffer such loss and we so hold.

Accordingly, we are of the opinion to and do award the claimant the items of $5,008.05, the balance due under the contract, and the $18,100 withheld as liquidated damages, making a total award for both said items of $23,108.05.

Award of $23,108.05.

Opinion issued January 27, 1969

SHIRLEY McKINNEY, Claimant

vs.

STATE ROAD COMMISSION, Respondent

(No. D-103)

No one appeared on behalf of the Claimant.

Larry L. Skeen, Assistant Attorney General and *Robert R. Harpold, Jr.,* Esq., for the State.

Petroplus, Judge:

It has been stipulated by the parties that while the State Road Commission was conducting blasting operations three

miles east of the junction of U.S. Route 119, and State Local Service Road 119/16, on July 30, 1968, a stone was thrown against the front windshield of the automobile owned by the Claimant, which was legally parked at the time, causing damage to the windshield in the amount of $94.35.

In accordance with stipulation of the facts, which the Respondent thoroughly investigated, we are of the opinion to and find that there is absolute liability in this matter, and that the Claimant is entitled to recover from the State the damages so claimed. We make an award to her in the amount of $94.35.

Claimed allowed in the amount of $94.35.

Opinion issued January 27, 1969

MOUNTAIN STATE CONSULTANTS, INC.
a West Virginia Corporation, or in the alternative,
FRED L. RIPPETOE, Claimant,

VS.

THE STATE OF WEST VIRGINIA,
THE WEST VIRGINIA WORKMEN'S COMPENSATION FUND and THE WEST VIRGINIA WORKMEN'S COMPENSATION COMMISSIONER, Respondents

(No. D-100)

R. G. Kelly, Esq., and *John L. McClaugherty*, Esq., for the Claimant.

Thomas P. O'Brien, Jr., Assistant Attorney General, for the Respondents.

Mountain State Consultants, Inc., a corporation, has submitted this claim on the undisputed facts set forth in the Notice of Claim.

Fred L. Rippetoe had been employed as a Clerk in the Accounting Division of the Respondent, Workmen's Compensation Fund, from 1933 to 1935, when he was named Director of the Accounting Division, and held that position without interruption until July 1, 1966. At the 1965 Regular Session of the West

Virginia Legislature, a Compulsory Retirement Age Act was enacted, (Chapter 5, Article 14, West Virginia Code) prohibiting the employment of persons seventy years of age or older by the State of West Virginia, or any of its Departments or Agencies, subject to certain exceptions which did not apply to Mr. Rippetoe. At the time of the passage of this Act, Mr. Rippetoe was over seventy years of age and, therefore, could not be retained as a State employee. His retirement being forced by law, Mr. Rippetoe formed a corporation with members of his family, named it Mountain State Consultants, Inc., and offered Specialized Consultant Services in the field of Workmen's Compensation and Employment Security to the general public, and the Workmen's Compensation Commissioner contracted for the services of the corporation on behalf of the Department.

During his thirty-three years of service with the Workmen's Compensation Fund, Mr. Rippetoe became an expert with respect to the actuarial soundness of the Fund, the classification of its subscribers, rate making procedures, computation of merit ratings, and many other intricate accounting features, and developed a unique ability in resolving questions relating to the administration of the Fund. Apparently no one had been trained to replace him, and he became indispensable to the proper and efficient operation of the Fund.

The Workmen's Compensation Commissioner, alarmed at the enforced retirement of Mr. Rippetoe by the Act of the Legislature, and needing his services, sought the continued services of Mr. Rippetoe in negation of the Act by entering into a written Contract dated June 28, 1966, with the corporation he formed, Mountain State Consultants, Inc., for rendering the continued services of Mr. Rippetoe until a new Director of the Accounting Division could be trained to perform Mr. Rippetoe's duties. The corporation was to be paid the sum of $7,200.00 in quarterly installments for the fiscal year ending June 30, 1967, and the Contract was approved and consented to by the Director of the Division of Purchases of the West Virginia Department of Finance and Administration, the Workmen's Compensation Commissioner, and as to form by the Attorney General's Office. At the time of Mr. Rippetoe's retirement his annual salary was $9,600.00.

Upon presentation of the first quarterly statement for services rendered, the State Auditor requested an Opinion of the Attorney General as to the validity of the claim, and was advised that the corporate entity should be disregarded and payment refused because Mr. Rippetoe was employed in violation of the provisions of the Compulsory Retirement Age Act. The Auditor refused to issue a warrant in payment of the invoice, and advised that future invoices contemplated under the Contract would not be paid. The Workmen's Compensation Commissioner, disregarding the Attorney General's opinion, persuaded the Mountain State Corporation to continue rendering the services until the end of the fiscal year.

All of the aforementioned facts are admitted in the Answer of the State, and the claim of Mountain State Consultants, Inc., in the amount of $7,200.00 presents an issue of law for decision by this Court.

All of the powers, duties and responsibilities of the Workmen's Compensation Commissioner are statutory and are derived from Chapter 23 of the Official Code of West Virginia of 1931, as amended. *McGeary* v. *State Compensation Director,* 148 W. Va. 436, 135 S.E. (2d) 345. Among those powers delegated to the Commissioner are the right to employ a secretary, actuary, accountants, inspectors, examiners, experts, clerks, stenographers and other assistants, and fix their compensation. Chapter 23, Article 1, Section 6, W. Va. Code. The Compulsory Retirement Act placed limitations on this power to employ personnel for his Department. The authority of a public officer to enter into Contracts is defined by law, and by Constitutional limitation, even the Legislature may not authorize the payment of a claim created against the State under any Contract made without express authority of law. (See Art. 6, Sec. 38, W. Va. Constitution).

Although it is conceded that the employment of Mr. Rippetoe's corporation was for an essential service needed by the State for the efficient administration of the Department, and that the claim is meritorious, and that the State benefitted by the expert consultant services furnished by the claimant, we find no authority in the statutory law of our State authorizing the Workmen's Compensation Commissioner to enter into a

Contract of this nature. Parties contracting with the State or any of its Agencies do so at their peril, and must inquire into the legal powers of the State representatives to incur liability on behalf of the State.

In addition to finding that the Contract of Employment was unlawful, because it was not within the statutory powers of the Commissioner to engage an independent consultant who was not an employee of the State, we further find that the device of using a corporate entity to shield the reemployment of Mr. Rippetoe was in violation of the Compulsory Retirement Age Act. It did by indirection what could not be done directly. The legal entity will be disregarded where it is used to cloak or cover the circumvention of a Statute. No authority need be cited that the fiction of a corporation will be disregarded by the Courts if the corporation is formed to accomplish an illegal act, and the parties will be dealt with as though no corporation was formed. The corporate fiction under the facts was merely an alter ego or a business conduit for Mr. Rippetoe to continue his services to the State despite his mandatory retirement by law.

For the foregoing reasons, this Court is of the opinion to uphold the Auditor's refusal to issue a warrant for the payment of the claim and, therefore, no award is made.

Claim disallowed.

Opinion issued January 27, 1969

NELLO L. TEER COMPANY, a corporation, Claimant

vs.

STATE ROAD COMMISSION,
STATE OF WEST VIRGINIA, Respondent

(No. D-89)

Vincent V. Chaney, Esq., for the Claimant.

Thomas P. O'Brien, Jr., Assistant Attorney General and *Theodore L. Shreve, Esq.,* for the Respondent.

Petroplus, Judge:

The Nello L. Teer Company, claimant, on June 28, 1965, entered into a written Contract with the State Road Commission to

build and complete according to Plans and Specifications of the Commission a road in the Counties of Raleigh and Wyoming, in West Virginia, known as the 3 Forks to Bolt Road, Project No. 3848 C-1, and for unit prices based on estimated quantities set forth in a Proposal claimant agreed at its expense to furnish all the necessary materials, labor, tools and appliances to build the road in a good workmanlike and substantial manner. The estimated cost under the Contract was $1,736,891.20. Final payment by the State was in the amount of $2,025,803.48, due primarily to a substantial overrun in an item designated as "Unclassified Excavation" in the Contract. Unclassified excavation is defined in the Specifications as building a roadway and forming the embankments as required by the Plans, or as directed by the Engineer to conform to the Plans.

The Contract required the Contractor to sow seed, apply fertilizer, agricultural limestone and mulch material to areas shown on the Plans. The difference in the designed slopes and the actual slopes constructed gives rise to this claim for seeding and mulching in areas extending beyond the right-of-way of the road construction project.

The Standard Specifications, Roads and Bridges of the State Road Commission, adopted in 1960, were incorporated by reference in the contractual documents, supplemented by certain Special Specifications, and pertinent references thereto were attached as Exhibits to the claimant's Petition. The amount claimed is $19,975.50, for additional seeding and mulching performed by the claimant, which includes the additional limestone and fertilizer which is required for the excess seeding and mulching. The facts of this case have been substantially stipulated, and the quantities of material furnished and work performed are not in dispute. Neither is there any dispute that the work was properly performed in a workmanlike manner acceptable to the State Road Commission.

Due primarily to changes in the grade of the road, there was a substantial overrun of unclassified excavation in the amount of 324,000 cubic yards, with a resulting increase in the size and number of waste areas on the project for disposal of the excess waste material. The excess waste material was to be disposed of by and at the expense of the Contractor. The Standard Specifications provided:

"Waste: All surplus material shall be used in the uniform widening of embankments or shoulders as directed by the Engineer. * * * Whenever in the opinion of the Engineer, surplus material is not required for such widening, it shall be wasted in spoil banks or waste sites provided by the Contractor. * * * No material may be wasted at places other than those approved."

(Section 2. 2. 3 D (3) Waste)

The Special Specifications in the Contract provided:

"Location of waste areas and borrow pits must be approved by the Design Division."

"No waste areas shall be located above roadway."

"Borrow pits and waste sites as required (Including clearing and grubbing of same) to be furnished by the contractor at his expense, cost to be included in the unit price bid for Item 2, unclassified excavation."

"Borrow pits and *waste sites adjacent to new highway construction* will be graded to conditions satisfactory to the engineer and *seeded and mulched the same as roadway construction.*"

The only issue before the Court is to properly interpret the Contract and to ascertain the intention of the contracting parties with relation to the extra items claimed to be compensable. The Contractor has not been paid for all the seeding and mulching for which it would have been paid as normal seeding area on the designed slopes. Is the State Road Commission, under the terms of this Contract, required to pay Nello L. Teer Company, the Contractor, for all the seeding and mulching that the Contractor performed (Including the applications of limestone and fertilizer), or only for such seeding and mulching for which it would have been paid, had certain waste areas or spoil banks not been adjacent to the highway, thereby creating enlarged and extended slopes to be seeded and mulched.

The work was performed under the supervision of the Engineer of the State Road Commission, who decides all questions which may arise as to the quality and acceptability of the work and materials. He also is empowered to decide all questions which may arise as to the interpretations of the Plans and Specifications, and all questions as to the fulfillment of the

terms of the contract on the part of the Contractor. Any deviations from the approved Plans, profiles and cross-sections on file in the State Road Commission office, which arise by the exigencies of the construction, must be authorized by him in writing. All of these matters appear in the Specifications of the Contract.

The Contractor by choice and on his own volition secured Lease Agreements from property owners covering certain waste areas which were adjacent to the right-of-way, and on September 23, 1965, submitted his choice of locations to the Commission for approval. Such approval was given in writing by the Commission on November 17, 1965, subject to certain restrictions dealing with drainage and protection of the roadway embankments from erosion should the waste areas subside. It appears from the stipulation and the evidence that by choice of the Contractor the excess waste material was placed on the normal designed embankments and slopes called for in the Plans, thereby extending the embankments and slopes into areas appreciably beyond the road construction right-of-way. The claimant as a consequence created a situation requiring additional seeding and mulching beyond that originally contemplated by the terms of the Contract for the normal embankments and slopes of the road. The enlargement and extension of the slopes into areas of privately owned property required almost double the amount of seeding and mulching which would have been required had the waste areas not been adjacent to the highway. The Contractor now seeks payment on a unit price basis for the additional seeding and mulching, as well as additional agricultural limestone and fertilizer required, contending that under the Special Specification it was required to seed and mulch waste sites adjacent to the new highway construction in the same manner as roadway construction. We assume that had the excess material been disposed of elsewhere in spoil banks or waste sites away from the road construction that the additional seeding and mulching would not have been required by the terms of the Contract.

From October, 1966, to August, 1967, the additional seeding and mulching was performed without compensation and without complaint by the Contractor or his Subcontractor, and it was only when about four more acres remained to be seeded

that the question was raised that additional seeding and mulching had not been paid for as the work progressed on monthly estimates. On the final estimate dated April 3, 1968, the quantities allowed for limestone, fertilizer, seeding and mulching were based on normal seeding areas.

The Contractor contends that a proper interpretation of the contract requires that the excess seeding and mulching required by the contract to be performed be compensable. The State's position is that inasmuch as the Contractor was required to furnish waste sites at its expense, additional seeding and mulching required by unnecessarily using the surplus waste material for widening the embankments or shoulders of the road should not be a compensable item, especially since such seeding and mulching is in areas outside of the right-of-way. The actual slopes were almost doubled in area from the originally designed slopes by and for the benefit of the Contractor.

It is the opinion of this Court that the intention of the parties as expressed in the original contract was to make compensation for the seeding and mulching required for the designed embankments and slopes of the new road as shown by the Plans, profiles and cross-sections. At that time the location of the waste sites had not been determined, and when the Contractor later decided to select waste sites for reasons of his own adjacent to the highway, he subjected himself to the special provision that waste sites adjacent to the new highway had to be graded and seeded and mulched in the same manner as the originally designed roadway construction. The surplus material clearly was not reasonably required for road-widening purposes, and it was to be placed in waste sites provided by the Contractor at its expense, the cost of which was to be included in the unit price bid for cubic yards moved under unclassified excavation. The Contractor has been paid for the seeding and mulching that it would have performed on the normal embankments and slopes required to support the new road. The State Road Commission did not require the Contractor to waste in the areas in which he wasted excess material, but merely approved this method of handling the surplus material.

Even if we assume in this case that by giving its approval, the State Road Commission directed or ordered the Contractor

to dispose of the waste material on planned embankments and shoulders, thereby increasing the area to be seeded, this would constitute extra work ordered by the Commission and under the regulations required a Supplemental Agreement signed by both parties fixing a fair and equitable compensation for the extra work. Such an Agreement was not requested by either party to the Contract. We also call attention to the provision in the Standard Specification, 1.5.11, which requires a Contractor who deems extra compensation is due him for work or materials not clearly covered in the Contract, to notify the Engineer in writing of his intention to make claim for extra compensation before he begins the work on which he intends to base his claim. If such notification is not given, and it was not given in this case, then the Contractor agrees to waive any claim for such extra compensation.

The Contract in this case is not free from ambiguity as to who shall pay for the seeding and mulching of waste sites adjacent to the new highway construction. We feel that a reasonable and just construction, taking into consideration the object and purpose of the Contract, the designed embankments and slopes, the situation of the parties, the Plans and Specifications incorporated therein by reference, and the designation of slope lines for the embankments on the detailed Plans, constrain this Court to conclude that it was not the intention of the parties that the State Road Commission should pay for seeding and mulching enlarged and extended areas of slope beyond the right-of-way, which extended slopes resulted from disposal of excess waste materials in pits adjacent to the highway, and this notwithstanding that the specifications required these areas to be seeded and mulched. Since the furnishing of the waste sites was made the responsibility of the contractor, it would be reasonable to assume that any treatment required for these waste sites such as compaction, drainage, seeding or mulching should also be his responsibility and at his expense. We conclude that it was not the intention of the contracting parties to make the waste sites cost items of the contract, and unless the contract clearly provided that the waste sites were part of the road construction project we must assume that all costs connected therewith were to be borne by the Contractor. If the terms of the agreement were doubtful and uncertain on this point, the Court must give consideration to the fact that

the specifications outlined the procedures that the Contractor should follow to secure compensation for controvertible claims or so-called extra work, as well as to the conduct of the parties in not claiming or allowing additional seeding and mulching in the monthly estimates and work progress payments. True the latter conduct would not constitute an estoppel, but it would be some evidence of how the parties construed the contract. The claimant is chargeable with knowledge that it was dealing with a governmental agency, with employees and agents whose duties are defined by law and with limited powers to contract for cost items not clearly made a part of the contract. If such a contract did provide compensation for items outside of the limits of the roadside construction, we would also be confronted with the necessity of considering the *ultra vires* nature of such provisions.

After considering all of the facts stipulated, the evidence and all reasonable inferences derived therefrom, the Court is of the opinion that the claimant has not established that the State in equity and good conscience should discharge and pay the alleged claim, and, therefore, we are of the opinion, to and do not make any award to the claimant herein.

Claim disallowed.

Opinion issued April 15, 1969

ROBERT C. OWENS

(D-134)

VINCENT LOPEZ

(No. D-135)

RICHARD GORDON

(No. D-136)

VS.

STATE ROAD COMMISSION

H. Laban White, Jr., Attorney at Law, for the claimants.

Thomas P. O'Brien, Jr., Assistant Attorney General, for the State.

Robert R. Harpold, Jr., Attorney at Law, for the State.

Ducker, Judge:

The cases of the claimants, Robert C. Owens, in the amount of $681.73, Vincent Lopez in the amount of $804.09, and Richard Gordon in the amount of $646.77 against the State Road Commission are based upon the same material facts stipulated by the parties as true, and by agreement are jointly considered by the Court. There is one fact of difference, which the Court considers as immaterial, to the effect that Owens and Gordon cooperated with the Road Commission officials in their investigation of the matters involved, while Lopez did not initially do so, and, as a result, Lopez was considered as disciplinarily suspended from November 9, 1967 through January 2, 1968, and consequently not completely exonerated from the charge of wrong-doing, while Owens and Gordon were completely exonerated from the charges against them without any recorded suspension.

The claims are for loss of wages as employees of the State Road Commission, the claimants being plant inspectors of District Four, whose duty it was to make gradation and quality reports on materials and supplies sold and delivered by suppliers to the Commission. Upon an investigation to determine whether reports of such inspections were correct, it was discovered that false reports had been made by inspectors. In such investigation, eight inspectors, including these three clai-

mants, were suspended from their employment, five of whom admitting the charges of falsification and these three claimants denying any guilt in the matter. Upon the hearing, all three of the claimants herein were found not guilty, and completely exonerated, and reinstated to their employment, but no compensation in the form of lost wages or damages otherwise was awarded them. The sole question here is whether they should be paid the amounts claimed herein as loss of wages they would have earned during the period of their suspension.

Counsel for the claimants admit that there are no department rules or regulations covering the situation here involved, and it further appears that the claimants held their employment without any specific tenure, but only at the will of Road Commission, and consequently contractually they are without remedy at law unless as individuals they could maintain actions against the officers personally on some tort basis of damages resulting from the untrue charges made against them. It appears also that the claimants were not able to, or at least did not, procure other employment during the period of their unemployment, and consequently there was no reduction in their loss of wages. As they had no way of knowing how long the suspension would last, they could hardly have been expected to be able to minimize their loss by obtaining other employment, a quite improbable thing.

While it is generally the duty of this Court to base its findings against the State on grounds which would have been valid against an individual, nevertheless, we have the duty to weigh the equitable situation, particularly where the legal remedy may be insufficient. In the case here we are of the opinion that in equity and good conscience, these claimants have been unfairly damaged in their loss of wages during the period of the investigation of untrue charges as to which they were completely exonerated, and so we award the claimant, Robert C. Owens $681.73, Vincent Lopez $804.09 and Richard Gordon $646.77.

Awards:

Robert C. Owens $681.73.
Vincent Lopez $804.09.
Richard Gordon $646.77.

Opinion issued January 27, 1969

RAHALL REALTY COMPANY, INC.

v.

DEPARTMENT OF WELFARE

(No. D-90)

W. H. File, Jr., Esquire of Bowers, File, Hodson & Payne, for the claimant.

Thomas P. O'Brien, Jr., Assistant Attorney General for the State.

Ducker, Judge:

The claimant, Rahall Realty Company, Incorporated, was and is the owner of a building known as the President Hotel, located at 309 Neville Street, Beckley, Raleigh County, West Virginia, containing approximately 15,000 square feet including a parking space basement.

On January 3, 1967, a lease of said property was made to the State of West Virginia by the Commissioner of Finance and Administration for a five month period from February 1, 1967, to June 30, 1967, at a rental of $2,000 per month, and on July 1, 1967, a second lease between said parties was entered into for a one-year period from July 1, 1967 to June 30, 1968, at a rental of $3,000 per month. These leases were for the use of said property by the Department of Welfare, and it was contemplated that the rent would be paid by the Raleigh County Court to the extent of fifty-four per cent and by Federal matching funds to the extent of forty-six per cent. The respective payment amounts were to be paid into a special account of the State and by the latter to the lessor. As the County Court of Raleigh County did not provide its share of these funds, the State did not receive any matching funds from the Federal Government, and, consequently, the rentals contracted for in the leases were not paid, and claimant now claims a total sum of $40,500.00 representing three months at $2,000.00 per month and twelve months at $3,000.00 per month, less $1,500.00 which is deducted because Lessor deprived Lessee of possession of the premises for two weeks in March, 1968.

The record shows that there was not adequate room in the Raleigh County Court House to house the welfare department with approximately fifty-five employees, and office space was not available except to take over a building such as the one here involved with necessary extensive alterations and remodeling. The evidence shows that claimant expended approximately $92,000.00 in the making of such alterations and remodeling, although the same was originally estimated to cost about $65,000.00. The owner had previously been receiving $1,800.00 per month from the Army and about $1,000.00 per month from permanent guests without any alterations or remodeling. The amount of the rent provided for in the leases to the State was according to estimates and comparative values, fair. The Welfare Department took possession immediately in accordance with the terms of the first lease and continued to use and occupy said premises during the whole terms of said two lease agreements, but no rent was paid.

The Department of Welfare endeavored to get the Raleigh County Court to put into its budget and levy for the fiscal year 1967-1968 a sufficient amount to meet the County's share of the Welfare Department's cost in the matter, but it only provided the sum of $3,500.00 for all its welfare purposes. It appears that none of this appropriation was made applicable to this lease rent account.

The State Commissioner of Welfare by the Attorney General instituted a mandamus proceeding in the Supreme Court of Appeals of West Virginia seeking to compel the County Court of Raleigh County to amend its 1967-68 budget to include a sufficient amount to cover the rents specified in the leases, but the Supreme Court denied the petition, apparently for the reason that there was no clear legal right to require the County Court to do so, which left the State and the Lessor without any relief except through this Court which could waive the constitutional immunity of the State. So the case must be considered as to whether the claim is one on which the claimant could recover if the defendant were an individual or a private corporation, and is a claim which should in equity and good conscience be paid by the State. We believe that no defendant other than the State could escape liability for the rent indebtedness incurred where possession and use of the premises had

been obtained, the lessor had made expensive alterations, and the rent charges were fair and reasonable, surely on a quantum meruit basis.

It is indeed unfortunate that the State officers did not obtain the necessary action on the part of the Raleigh County Court to validate the contract in the beginning and place this burden on that county instead of on the State as a whole. The State officers purported to represent the State and while it may have been the duty of the Lessor to see that all legal prerequisites were met, nevertheless a citizen, relying upon the ability of and confidence in the public official and expending large sums of money to comply with the purported contract, should not in good conscience be deprived of his property, especially where the State has had full value in the matter.

We are, therefore, of the opinion to and do hereby award the claimant the sum of $40,500.00.

Award of $40,500.00.

Opinion issued July 21, 1969

THORNTON DESKINS, Claimant

vs.

STATE OF WEST VIRGINIA, Respondent

(No. D-131)

Claimant appeared in person.

Thomas P. O'Brien, Jr., Assistant Attorney General and *Robert R. Harpold, Jr.*, Esq., for the Respondent.

Petroplus, Judge:

Claimant, Thornton Deskins, gave notice of claim for the sum of Two Hundred Dollars based on a factual allegation that in September and October, 1968, employees of The State Road Commission were blasting rock on a roadway above and about 224 feet from his dwelling house, causing fragments and debris to fall on the roof of his house, thereby damaging the roof. It was also charged that the same employees dumped several truck loads of dirt and rock on his property damaging several

feet of a wire fence within the boundaries of his property. Upon the evidence presented, the Court is of the opinion to and does hereby allow said claim in the amount of $100.00 as fair and reasonable compensation for the damages sustained by the wrongful trespass on his property.

Award of $100.00.

Opinion issued July 21, 1969

LAWRENCE V. JORDAN

vs.

DEPARTMENT OF EDUCATION

(No. D-143)

No appearance for the claimant.

Thomas P. O'Brien, Jr., Assistant Attorney General, for the respondent.

Jones, Judge:

During the period July 3, 1964 to June 27, 1968, the claimant, Lawrence V. Jordan, was Director of Student Teaching at West Virginia State College, and in the course of his employment he made numerous trips and incurred expenses for which he was entitled to be reimbursed. Expense accounts for the twelve months are a part of the record, and the total claim in the amount of $272.14 was not contested by the State. It further appears from the record that this claim was presented to the Business Manager of West Virginia State College on June 30, 1968, the last day of the fiscal year, and at that time there were no funds available from which the claim could be paid.

The Attorney General admits the validity of this claim, and in equity and good conscience the same should be paid. Therefore, the Court hereby awards to the claimant, Lawrence V. Jordan, the sum of $272.14.

Opinion issued April 24, 1969

JAMES AND NORMA ROBISON

vs.

STATE ROAD COMMISSION

(No. D-119)

Claimants appeared in person.

Thomas P. O'Brien, Jr., Assistant Attorney General, and *Robert R. Harpold, Jr.,* for the respondent.

Jones, Judge:

This claim is for damages in the amount of $202.62, sustained when the claimant, Norma Robison, drove her 1966 model white Plymouth automobile over a State road between Stumptown and Frametown, in Braxton County, soon after the road had been treated by the State Road Commission with prime tar and during a hard rain which caused the tar to gather in pudddles and prevented it from soaking into the ground. There is nothing in the evidence to indicate that the claimant drove her car at an unreasonable speed, and claimant's testimony was corroborated by State Road Commission personnel to the effect that the tar did splash onto the painted surface of the automobile, and that the paint was severely damaged thereby.

Invoices were presented by the claimant showing the cost of cleaning and repainting portions of the automobile in the amount of $202.62, and in the Court's opinion such damage was the result of negligence on the part of State Road Commission employees and in equity and good conscience the claimants should be indemnified. Therefore, the claimants, James and Norma Robison, are hereby awarded the sum of $202.62.

Opinion issued February 10, 1969

S. J. GROVES & SONS COMPANY

VS.

STATE ROAD COMMISSION

(No. D-91)

George S. Sharp, *Kay, Casto & Chaney*, and *Thomas Healey*, for the claimant.

Larry L. Skeen, Assistant Attorney General, and *Theodore L. Shreve*, for the respondent.

Jones, Judge:

On August 19, 1964, the claimant, S. J. Groves & Sons Company, was awarded a contract by the respondent, State Road Commission of West Virginia, to construct approximately six miles of Interstate Route No. 81 near Pikeside in Berkeley County. The work was undertaken and completed within the specified time and a settlement was made, subject to the claimant's right to assert this claim. The claim, in the total amount of $40,756.02, is made up of three items, involving unclassified excavation, Portland Cement concrete pavement and borrow excavation.

With reference to the claim for unclassified excavation not paid for, the respondent's answer averred that the plans and specifications did not require the contractor to make a rock under cut in the median area, and that it therefore was unnecessary for the State Road Commission to keep any records in that connection. However, Section 2.2.3. (a) (4) of the State Road Commission Standard Specifications provides as follows:

> "In roadway cuts where ledges of rock or hard shale, boulders, or other solid formations are encountered at or near grade elevations, grading shall be carried to a depth of twelve inches below the subgrade elevation for the entire width of the road bed including the median."

And the typical cross section which is a part of the project plans shows a twelve-inch undercut in the median when rock is encountered. The claimant's drilling and blasting super-

intendent, grading superintendent, and field engineer all testified that this work was done, and the field engineer, who is a graduate geologist, further testified that, using planned cross sections, he calculated the quantity of rock undercut in the median strip to be 6,687 cubic yards. At the contract rate of $1.38 per cubic yard of unclassified excavation, the amount claimed for this item is $9,228.06. The State Road Commission paid for 730,926 cubic yards of rock undercut within the roadway, without field measurements, employing planned cross sections for the purpose. At one point during the hearing of this case, counsel for the State Road Commission stated that the claimant's evidence pertaining to this item of damage was the "*** type of information we had asked for ***" and indicated that a stipulation might be possible. No stipulation was forthcoming, but it appears to the Court that the evidence on this part of the claim preponderates in favor of the claimant.

The State Road Commission denied payment for 76.67 square yards of Portland Cement concrete pavement at $5.91 per square yard, a total of $453.12. The deduction was based on one core sample which measured 8½ inches instead of the specified 9 inches in thickness. Under the Standard Specifications, where there is a deficiency of ½ inch, the contractor may be required to remove the deficient area and replace the same with a slab of satisfactory quality and thickness, or the contractor will be allowed the choice of leaving the defective slab in place without receiving any compensation therefor. If the contractor believes that the cores and measurements taken are insufficient to fairly indicate the actual thickness of the pavement, he may request additional cores and measurements, the cost of which shall be paid by the party not prevailing. In this case, the claimant had no knowledge of the alleged deficiency until negotiations were underway on the final estimate. The claimant then requested an opportunity to measure the core sample and when a representative went to the place where the core had been stored, he found that it had been destroyed in a strength test. The claimant also asked permission to take its own corings, but was refused. The State Road Commission elected to leave the defective slab in place and assuming that its measurement was accurate, payment was properly withheld. However, under the Specifications, the claimant had the right to contest the measurement and it was given no opportunity to do so. The State

Road Commission having accepted the pavement under these circumstances, we are of opinion that the claimant should be compensated at the contract price in the total sum of $453.12.

No borrow excavation was contemplated in the original contract, but during the course of construction it was found that additional material outside the right-of-way would be needed and a supplemental agreement was entered into, providing for borrow material at $1.38 per cubic yard. It is agreed that 113,272 cubic yards of borrow material were incorporated in the project and that the claimant has been paid for 87,443 cubic yards. The claimant received no payment for the remaining 25,829 cubic yards. It is the State Road Commission's contention that the claimant wasted 21,135 cubic yards of suitable material which should be deducted from the borrow excavation. This quantity was derived from State Road Commission measurements of three waste pits and the measurements are not contested by the claimant. The claimant admits that it wasted 1,449 cubic yards of boulders and 9,862 cubic yards of wet material which could have been used for embankment on the project. The State Road Commission agrees that it directed the claimant to waste 1,689 cubic yards of unsuitable material, leaving 15,535 cubic yards in controversy. The claimant adduced testimony to show that the 15,535 cubic yards of waste pit material is made up of 5,000 cubic yards of base stone loss, 1,648 cubic yards of concrete paving loss, 3,226 cubic yards of batch plant area stripping, and 6,261 cubic yards of miscellaneous debris.

The State Road Commission's project engineer did not dispute the claimant's contention that approximately 5,000 cubic yards of base stone was delivered on the job and not paid for. However, he contended that the material was not taken to the waste pits but was literally wasted on the highway shoulders and median and used on private subdivision roads nearby. The claimant gave testimony that this quantity of stone was used to construct crossovers for batch trucks and, having been contaminated, was removed to the waste pits. Photographs produced by the State Road Commission show substantial quantities of excess stone in the median. The charge that some of this stone was used on other roads in the area was not substantiated. The Court recognizes a preponder-

ance of the evidence in favor of the claimant insofar as a portion of the base stone waste is concerned but not as to the quantity claimed. Further recognizing its inability to ascertain a quantity certain in this regard, the Court is of opinion to allow one-half of the quantity claimed, or 2,500 cubic yards.

A witness for the claimant testified that the normal paving loss, concrete batched but not paid for, was 7%, and this experience is not contested by the State Road Commission. The claimant estimated the 3% of the lost concrete may have wound up in the base course, and that 4% or 1,648 cubic yards, went to the waste pits. However, the State Road Commission project engineer testified that random corings showed the pavement to have an average depth of 9.4 inches instead of the 9 inch thickness called for in the contract, an overrun of 4.4%, which more than accounts for the claimed loss of 4%. Proof of this item by the claimant is inconclusive and the Court is constrained to disallow this portion of the claim.

The claimant's batch plant area was acquired under a contract with the owner of the land which provided that the topsoil should be saved and at the conclusion of the project, a 6 inch layer of earth, presumably contaminated by the batching operations, should be removed before the topsoil was replaced. The 6 inch strip from 4 acres of land was calculated to be 3,226 cubic yards. According to the claimant's evidence, this quantity was hauled to the waste pits. There is no real contradiction of claimant's testimony in this regard and the Court is of opinion to give the claimant credit for the quantity asserted.

The claimant further contends that it wasted miscellaneous materials such as stone fences, a concrete platform, a blockhouse, debris from a tire burning site, an automobile, bands and boxes from seeding operations, form lumber and root mat, and arrived at a quantity of 6,261 cubic yards by deducting the other waste items from the 21,135 cubic yards of material in the three waste pits. Proof of the waste of these miscellaneous materials is weak and unconvincing and this item of damage is disallowed.

The State Road Commission deleted from payment 6,383 cubic yards of borrow material for overembankment. This deletion was based on calculations of a Staff Engineer for the

Commission, working with a representative of the claimant. The State Road Commission Engineer testified that if he had adhered strictly to the "pay" or "neat" lines, "*** the deduction would have been 16,000 plus instead of 6,000." The Court believes that the claimant received the benefit of any doubt with regard to these computations and in the Court's opinion the deduction for overembankment was proper.

The claimant concedes that 3,311 cubic yards of borrow excavation should be deducted from the 25,829 cubic yards not paid for, and claims that it is entitled to payment for 22,518 cubic yards at $1.38 per yard, a total of $31,074.84. Summarizing our conclusions with regard to the several items in controversy, the Court is of opinion to require further deductions as follows: 2,500 cubic yards of base stone loss; 1,648 cubic yards of concrete paving loss; 6,261 cubic yards of miscellaneous waste; and 6,383 cubic yards of overembankment; a total of 16,792 cubic yards; and the Court will allow payment for the remaining 5,726 cubic yards at $1.38 per yard, a total of $7,901.88.

For the reasons hereinabove set forth, the Court is of opinion that the claimant should recover the following: $9,288.06 for rock undercut in the median; $453.12 for Portland Cement concrete pavement; and $7,901.88 for borrow excavation; a total of $17,583.06; that the allowance of such amount is just and equitable and in good conscience should be paid; and, therefore, it is the Court's judgment that the claimant, S. J. Groves & Sons Company, should be and is hereby awarded the sum of $17,583.06.

Opinion issued April 24, 1969

GEORGE B. SOUTHERN, JR.

vs.

STATE ROAD COMMISSION

(No. D-141)

No appearance for the claimant.

Thomas P. O'Brien, Jr., Assistant Attorney General, and *Robert R. Harpold, Jr.*, for the respondent.

Jones, Judge:

The claimant, George B. Southern, Jr., drove his private automobile in the performance of his duties as District Sign Foreman of the State Road Commission, and in so doing incurred expenses in the amount of $316.08 during the months of May and June, 1967. However, he filed his expense account after the end of the fiscal year and funds were not then available for the payment thereof.

Counsel for the State Road Commission and the Attorney General have stipulated that the amount of this claim is correct and is justly owing to the claimant. The Court is of opinion that the petition and stipulation present a valid claim against the State Road Commission which in equity and good conscience should be paid, and, accordingly, an award is hereby made to the claimant, George B. Southern, Jr., in the sum of $316.08.

Opinion issued April 24, 1969

STATE CONSTRUCTION, INC.

vs.

STATE ROAD COMMISSION

(No. D-115)

Carney M. Layne, for the claimant.

Thomas P. O'Brien, Jr., Assistant Attorney General, and *Theodore L. Shreve,* for the respondent.

Jones, Judge:

The claim of State Construction, Inc., against the State Road Commission in the total amount of $296,308.28 arises out of a highway construction project in Wayne County and comprises three items as follows: 2,148.24 cubic yards extra quantity of bituminous treated aggregate base course at the bid price of $6.40 per cubic yard, totaling $13,748.74; 32,954.85 gallons extra quantity of bituminous material at the bid price of 18c per gallon, totaling $5,931.87; and extra cost for overrun of unclassified excavation, which was allowed in the final estimate at the bid price of 90c per cubic yard, and for which the claimant contends that under the contract specifications it was entitled to a supplemental agreement with an increased cost price of $3.02 per cubic yard, plus 15%, or a total increase for this item of $276,627.67.

The bituminous treated aggregate base course and the bituminous material mixed therewith was processed in accordance with a "job mix" formula called for in the specifications. This formula had not been used before on a project requiring the maintenance of traffic during construction and it turned out badly. It developed that it took approximately seven days for the material to cure, set and harden, and it was continually damaged by traffic and had to be worked and reworked. The most severe damage was caused by heavy trucks hauling paving materials to an adjoining State Road Commission project. The Commission refused to provide for the detour of these trucks for the apparent reason that a longer haul would result and would require additional compensation to the other contractor.

The extreme rutting and splashing of the uncured base course material was clearly shown by photographs received in evidence. The State Road Commission made allowance for reblading and rerolling and the covering force account work order for costs of labor and equipment contained the following recital:

> "***to reblade and reroll Bituminous Treated Aggregate Base Course over entire length of project. Reason for Force Account Work Order: Traffic was maintained through the entire project and after the placement of the Bituminous Treated Aggregate Base Course, the material was disturbed by job traffic and heavy trucks traveling to the adjacent project."

However, no allowance was made for wasted material.

The Court is of opinion that the large overrun of bituminous treated aggregate base course and bituminous material was due to a combination of circumstances which were or should have been within the control of the State Road Commission. The contention of the Commission that the excess quantities must have resulted from extra thickness of the base course is not a persuasive defense in view of the fact that it established and set the elevations and supervised the laying of the material. There is no showing that either party anticipated the long curing time required by the experimental "job mix" specification or the extremely heavy traffic occasioned by the adjacent road project, and there is no doubt that these factors were burdensome and damaging to the claimant. The quantities of the materials delivered to the project were not questioned by the Commission; and the contract was let on the basis of a unit bid price for estimated quantities of these materials. Based on the foregoing findings, the Court is of opinion that the amounts claimed for extra materials are just and reasonable and should be allowed.

The claim for overrun of unclassified excavation was the result of several landslides which occurred in the work area and created a hazardous situation, requiring emergency operations. These slides endangered the tracks of the Norfolk & Western Railway and the public highway, and substantial extra equipment and personnel had to be rushed to the project. Much of the work was performed under adverse conditions and pres-

sures not contemplated by the contracting parties. The landslides and their troublesome consequences continued for several weeks. The estimated planned quantity of unclassified excavation was 322,700 cubic yards, and the overrun was 113,584 cubic yards, or approximately 35 per cent. The applicable provisions of the Standard Specification controlling this situation are as follows:

> "1.4.2 INCREASED OR DECREASED QUANTITIES: The Commission reserves the right to make alteration in the Plans or in the quantities of work as may be necessary, either before or after the beginning of work under the contract, to insure completion of the work. Such alterations shall not be considered as a waiver of any conditions of the contract nor invalidate any of the provisions thereof, provided such alterations do not decrease or increase the total cost of the project more than twenty-five per cent, based on the original contract quantities and the unit bid prices, and provided further that such alterations do not result in an increase or decrease of more than twenty-five per cent in quantity of any one major contract item. When alterations are made in excess of those herein specified, then either party to the contract, upon written demand, shall be entitled to a revised contract consideration to be fixed and agreed upon in a written supplemental agreement, covering the necessary changes, executed between the contracting parties.***
>
> "In the event the Engineer and the contractor are unable to arrive at a mutual agreement, the contractor may have the option either of proceeding with the work and receiving payment therefor, in an amount determined by the Engineer as the reasonable direct cost of the material and labor furnished by the contractor, in the manner and amount as hereinafter prescribed in Article 1.4.4 for Extra work; or of permitting the work necessary to be done at the time and in the manner deemed most expedient by the Commissioner.
>
> "A major item shall be defined as any item whose total cost is equal to or greater than ten per cent of the total original contract cost.***
>
> "1.4.4 EXTRA WORK: When so ordered in writing by the Engineer, the contractor shall furnish material and do extra work not otherwise provided for in the Plans and Specifications. Extra work shall be done in a workmanlike manner in accordance with the Plans and these Specifications. Payment therefor shall be

made at unit prices to be agreed upon by the contractor and the Commission before the work is begun and as hereinafter provided. If prices or compensation for extra work be not agreed upon, the Commission may order the contractor to do the work and payment shall be made therefor at its actual reasonable cost to the contractor, as determined by the Engineer, plus the percentages as provided for in Article 1.9.4 of these Specifications.***

"1.9.4 EXTRA AND FORCE ACCOUNT WORK: Extra work ordered and accepted shall be paid for under a Supplemental Agreement as provided in Article 1.4.2, or Force Account, as agreed upon and herein provided.***"

The overrun exceeding 25 per cent on a major item of the contract, negotiations toward a supplemental agreement were initiated as removal of the slides continued. There was a tentative agreement on a figure of $1.50 per cubic yard, but the State Road Commissioner contended that the claimant had not furnished sufficient proof of additional costs to support such a payment. Whether such proof was forthcoming prior to the hearing of this claim is uncertain, but the Court is of opinion that the proof offered by the claimant at the hearing did substantiate a charge of $1.50 per cubic yard for additional unclassified excavation, but not a higher figure as claimed. Therefore, the Court finds that the claimant is entitled to payment for this item on the basis of 113,584 cubic yards at the additional price of 60c per cubic yard or $68,150.40.

Accordingly, the Court is of opinion that the items of this claim which the Court has hereinabove found should be allowed, are fair and reasonable and in equity and good conscience should be paid; and the claimant, State Construction, Inc., is hereby awarded the sum of $87,823.61 against the State Road Commission.

Opinion issued April 15, 1969

ROBERT VINCENT

vs.

STATE ROAD COMMISSION

(No. D-127)

Claimant appearing in person.

Thomas P. O'Brien, Jr., Assistant Attorney General, and *Robert R. Harpold, Jr.*, Esq. for the State.

Ducker, Judge:

Claimant, Robert Vincent, a resident of Gooslin Bottom, Freeburn, Kentucky, and the owner of a 1963 Fairlane, Ford automobile, claims damages in the sum of $181.08 to his automobile caused by a rock falling from a cliff along side a newly constructed by-pass or cut-off road adjacent to State Route 49, at or near the town of Thacker, in Mingo County, West Virginia, on or about September 6, 1968.

The facts are undisputed and are substantially in the following statement.

Claimant's wife, Phyllis Vincent, and a neighbor, Virginia Gooslin of Freeburn, Kentucky, were en route in claimant's car, with the latter driving, from Freeburn to Williamson, West Virginia, on West Virginia State Route 49 to take the latter's daughter to a hospital, when after being given a sign by a Road Commission flagman on the road to proceed, the car was driven over the by-pass road constructed along the hillside adjacent to Route 49, and while being so driven rocks fell from the hillside upon the car damaging it to the extent of the amount of said claim.

Two cars were ahead of claimant's car at the place of accident and several cars behind it, but none of them were struck by any falling rocks. It was admitted by the Road Commission that the latter had been doing blasting on the hillside some half hour before the rocks fell. The amount of the damage is not denied.

With the clearance to pass given to the driver of the car and the cause of the damage being uncontradicted, we are of the opinion that the claimant is entitled to recover the amount of his claim, and accordingly we award him the sum of $181.08.

Award of $181.08.

Opinion issued January 27, 1969

PRINCE A. WILLIAMS

v.

STATE ROAD COMMISSION

(No. D-87)

Claimant appearing in person.

Larry L. Skeen, Assistant Attorney General, and *Robert R. Harpold, Jr.,* Esq. for the State.

Ducker, Judge:

The claimant, Prince A. Williams, was the owner of a 1954 Chevrolet pickup truck, which on May 1, 1968 he parked on the State Road Commission's Mercer County headquarters lot. While claimant's car was so parked, Carl Whitt, an employee of the State Road Commission operating a 1959 Warner Swasey Grade-all ED35-5, lost control of the same on account of a failure of the brakes thereon permitting the Grade-all to drift into claimant's truck, and damaging the side thereof and costing claimant a repair bill of $88.20.

The evidence is undisputed that the truck was lawfully parked, the repair bill reasonable, and that the damage was occasioned by an employee of the Road Commission operating a machine that had a brake failure, and consequently, we are of the opinion that the claimant is entitled to, and we hereby make, an award to him in the sum of $88.20.

Award of $88.20.

Opinion issued November 8, 1968

ROBERT LEE POWERS, ADMINISTRATOR OF THE ESTATE OF ROBERT LEE POWERS, JR.

vs.

WEST VIRGINIA BOARD OF EDUCATION

(No. D-59)

No appearance by Claimant.

Thomas P. O'Brien, Jr., Assistant Attorney General, for the State.

Ducker, Judge:

The claimant, Robert Lee Powers, Administrator of the Estate of Robert Lee Powers, Jr., deceased, claims damages in the sum of $15,000 by reason of the death of said decedent in a school building in the City of Chester, Hancock County, West Virginia, on March 4, 1966, the petition alleging such claim having been filed in this Court on February 20, 1968.

The facts appear to be that the decedent, a nine and a half year old pupil attending the school operated by the Board of Education of Hancock County, was negligently permitted to congregate, play and await bus transportation with others at the rear of the school building without watchful care and control by the school authorities, and that while there decedent fell into a concrete stairwell at such rear building place and sustained cerebral injuries, including skull fractures, from which he died. Claimant alleges that the school authorities were negligent in failing to install adequate safeguards such as a high fence around the outer perimeter of said concrete stairwell and that they were negligent in failing to have adequate personnel in attendance for the proper supervision, care and control of pupils at the rear of said school building, particularly at the time when pupils were yet on the school premises awaiting school bus transportation to their homes, and that they were negligent in allowing and permitting the schoool premises to be and remain in an allegedly extremely dangerous and hazardous condition.

The Attorney General filed a written motion to dismiss the claimant's petition on the ground that the Court lacked jurisdiction to hear the claim, and when the case was called on the day set for a hearing, the Attorney General then also moved that by reason of the failure of the claimant either in person or by counsel to appear, that the case be dismissed on the ground of non-appearance by claimant.

As is hereinafter shown, it is unnecessary for this Court to pass upon the latter motion, although it would be sufficient ground to dismiss the claim.

The written motion of the Attorney General to dismiss the claim on the basis of lack of jurisdiction, cites Chapter 14, Article 2, Section 3 of the Code of West Virginia, which in designating the jurisdictional powers of this Court in regard to claims against State agencies specifically provides:

> "* * * 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 the State regardless of any State aid that might be provided."

The facts show that it was the Board of Education of Hancock County which exclusively had control and operation of the school where decedent suffered the injuries resulting in his death. There are no allegations, claim or proof that the State had any control or management of the school property involved. Clearly the case involved only the property and employees of the Hancock County Board of Education.

As the claim falls within the above express provision excluding claims which are against county boards of education, we are of the opinion to and do sustain the motion of the Attorney General and dismiss this claim and make no award to claimant herein.

Claim Dismissed.

No award.

REFERENCES

AERONAUTICS COMMISSION

A claim by the executive director of the State Aeronautics Commission for accrued annual leave was disallowed on the ground that claimant was an appointive officer and not such a State employee as was entitled to leave pay under the provisions of the Rules and Regulations of the Board of Public Works of West Virginia. *Parrish* v. *State Aeronautics Comm'n* (No. C-18).... 89

AIR CARRIERS

Claimant was awarded the sum of $512.91 for air transportation furnished to employees of the Department of Finance and Administration while such employees were on official business for the State. *United Air Lines, Inc.* v. *Department of Fin. & Admin.* (No. D-61). 167

AIRPORTS

Airport authorities, which are separate creatures of the State, with grants of power from the State, are not "agents" of the State. *City of Morgantown* v. *Board of Governors of West Virginia University* (No. D-46)... 174

Claimant city was awarded $150, such sum representing unpaid rent for hangar space used by the National Guard at claimant's municipal airport. *City of Morgantown* v. *State Adjutant General* (No. C-7). 79

ALCOHOLIC BEVERAGE CONTROL COMMISSION

Claimant, whose trip to Europe for the purpose of participating in a joint liquor administrators study conference had been approved by the governor but not by the Board of Public Works as required by the Board's regulations, was awarded the sum of $803.79 as reimbursement for travel and hotel expenses, where it was stipulated that the trip was undertaken for and on behalf of the State and in conjunction with claimant's official duties and that claimant had acted in good faith in relying upon the governor's approval and permission. *Elmore* v. *Alcoholic Beverage Control Comm'r* (No. D-29). 97

AMENDMENT

Where a claim was originally filed in the name of Russell Collins, but thereafter, because of a question of ownership of the damaged property, an attempt was made to amend the claim by substituting the name of David Griffey as the claimant, and upon the taking of testimony, it became apparent to the Court that Collins was the true claimant, it was held that any claim which Griffey might have should be disallowed, and consideration was given only to the claim of Collins. *Collins* v. *State Road Comm'n* (No. B-384). 41

APPROPRIATIONS

Claimant, whose charges for printing 5,000 books for the Department of Health remained unpaid merely because its bill had not been presented until after the close of the fiscal year and funds were then unavailable, was awarded payment of its claim in the sum of $4,400. *Biggs-Johnston-Withrow* v. *Department of Health* (No. B-393). 36

Where the only apparent reason for the denial by the State of a claim for electrical services and material furnished was a statutory provision prohibiting the payment of claims incurred by State officers without any legislative appropriation in the fiscal year for such payment, the Court awarded claimant the sum of $3,801.73, stating that while it did not wish to encourage or override the statutory provision, it was of the opinion that the fault was so chargeable to the State officers in employing such services that the persons employed should not be denied fair compensation. See § 12-3-17, W. Va. Code. *Frame* v. *State Road Comm'n* (No. C-13). 80

ARCHITECTS

A claim for architectural services performed under subcontract in connection with the West Virginia pavilion at the 1964 New York World's Fair was supported by clear and convincing proof, where claimant had been informed by letter from the State that termination of the prime contract did not affect their position as architects of record for the pavilion. *Bowman* v. *Department of Commerce* (No. B-192). 5

ASSIGNMENTS

Claimant insurance company was awarded the sum of $148.01 for damages sustained by its assignor when slag was thrown from a State Road Commission truck onto the assignor's automobile. *State Farm Mut. Auto. Ins. Co.* v. *State Road Comm'n* (No. D-5). 102

ATTORNEYS

Claimant was awarded the sum of $1744 for legal services performed and costs advanced by him, where his employment by the State Aeronautics Commission for the purpose of examining titles and prosecuting condemnation suits had been specifically authorized in writing by the Attorney General. *Phillips* v. *State Aeronautics Comm'n* (No. D-48). 121

Claimant, an attorney, was awarded $2,700 as compensation for services performed in drafting certain legislation for the Department of Welfare for presentment to the 1967 session of the West Virginia Legislature. *McElwee* v. *Department of Welfare* (No. D-34). 24

ATTORNEYS' FEES—See Costs

BLASTING

Claimant, a State Road Commission employee, was awarded $88.07 for damage to his automobile resulting from blasting

operations in which he participated, where the evidence showed that claimant was inexperienced in such work and that the negligence of his fellow employee was the direct cause of the damage. *Albert* v. *State Road Comm'n* (No. D-36). 124

Claimant was awarded the sum of $68.25 for damages sustained when a rock was blown onto the top of his automobile as a result of blasting operations conducted by employees of the State Road Commission. *Brown v. State Road Comm'n* (No. B-391). 15

Claimants were awarded the sum of $110.16 for damage to their residence resulting from negligent blasting by a construction crew of the State Road Commission. *Chamberlain* v. *State Road Comm'n* (No. D-15). 116

Claimant railroad was awarded the sum of $212.01 for damages resulting from the overturning of its coal car when blasting was done by employees of the State Road Commission. *Chesapeake & O. Ry.* v. *State Road Comm'n* (No. D-86). 173

Claimant proved his claim by a preponderance of the evidence and was awarded the sum of $453.10 for damage to his dwelling house resulting from blasting operations conducted by employees of the State Road Commission. *Collins* v. *State Road Comm'n* (No. B-384). 41

Claimant proved his case by a preponderance of the evidence and was awarded a sum of $50 for damages to his parked automobile resulting from blasting operations conducted by employees of the State Road Commission. *Collins* v. *State Road Comm'n* (No. B-385). 20

A claim for damages to the windshields of seven automobiles located upon claimant's used car lot, alleged to have been caused by blasting operations conducted by employees of the State Road Commission, was disallowed, where claimant failed to prove its claim by a preponderance of the evidence. *Crowder & Freeman, Inc.* v. *State Road Comm'n* (No. B-378). 43

Claimant was awarded the sum of $100 for damages which occurred when employees of the State Road Commission were blasting rock on a roadway above his dwelling house, causing fragments and debris to fall on the roof. *Deskins* v. *State Road Comm'n* (No. D-131). 227

Claimant was awarded the sum of $23 for damages to his truck which occurred when State Road Commission employees set off a blasting shot which caused a rock to land on the hood of his vehicle. *Dotson* v. *State Road Comm'n* (No. D-62). 152

Claimant proved his case by a preponderance of the evidence and was awarded the sum of $87.55 for damages to his parked truck resulting from blasting operations conducted by employees of the State Road Commission. *Dotson* v. *State Road Comm'n* (No. B-379). 22

Claimant was awarded the sum of $677.33 for damages to his automobile caused by falling debris from blasting operations conducted by employees of the State Road Commission. *Federal Ins. Co.* v. *State Road Comm'n* (No. D-9). 83

Claimant was awarded the sum of $94.35 for damage to her automobile resulting from blasting operations conducted by the State Road Commission. *McKinney* v. *State Road Comm'n* (No. D-103). 212

Claimant was awarded the sum of $45 for damages sustained when, as a result of blasting operations conducted by employees of the State Road Commission, a rock was blown through the windshield of his automobile. *Wisecarver* v. *State Road Comm'n* (No. C-15). 78

Claimant was awarded the sum of $1450 for damages to his buildings resulting from negligent blasting by the State Road Commission. *Wood* v. *State Road Comm'n* (No. B-394). 31

BRIDGES—See also Damages

A total award of $11,151.12 was allowed for losses incurred by claimant and claimant's subcontractor as a result of delays caused by the State Road Commission in connection with a bridge construction contract. *Baker & Hickey Co.* v. *State Road Comm'n* (No. D-95). 195

Claimant was awarded $30.90 for damages to his automobile caused by gravel and cinders dropping on the vehicle while the State Road Commission was cleaning drainpipes on a bridge. *Calhoun* v. *State Road Comm'n* (No. B-387). 37

Where claimant, who was awarded a contract by the State Road Commission to construct a bridge, moved certain equipment onto the project site, and such equipment was immobilized for a six-week period due to a work shutdown occasioned by the necessity for redesigning one of the bridge piers, claimant was entitled to recover the sum of $9713.78 for loss of the use of its equipment during the time the project was shut down. *Charleston Concrete Floor Co.* v. *State Road Comm'n* (No. D-6). 104

Claimant was awarded $14,500.02 for losses sustained on several bridge construction contracts by reason of having to pay higher wage rates following delays caused by the State Road Commission. *Charleston Concrete Floor Co.* v. *State Road Comm'n* (No. B-297). 1

Claimant, whose automobile was damaged when a piece of black top floor fell out of a bridge while he was crossing, proved his case by a preponderance of the evidence and was awarded the sum of $70.15. *Clark* v. *State Road Comm'n* (No. B-397). 40

Claimant was awarded the sum of $4,033.76 for extra cost incurred in pre-drilling for steel piles to support a bridge over an interstate highway. *J. C. Haynes* v. *State Road Comm'n* (No. D-18). 208

Claimant was awarded the sum of $67,288.99 for work and labor performed and materials furnished in the placement of a bridge deck, such sum having been reduced by the Court to reflect a reduction of the business and occupation tax rate for contractors from 2.6% to 2%. *Mountain State Constr. Co.* v. *State Road Comm'n* (No. B-338). 10

The State Road Commission's failure to have road markers indicating a one-way bridge does not constitute negligence. *Thompson* v. *State Road Comm'n* (No. C-9)..... 75

Pictures of a bridge and approaches introduced in the evidence clearly showed that neither the bridge nor the road were out of repair and that the collision in which claimant's wife was killed would not have taken place had the parties to the collision exercised reasonable and proper care under the circumstances. *Thompson* v. *State Road Comm'n* (No. C-9). 75

CONTRACTS

Claimant, who alleged that the State Road Commission had appropriated and converted to its own use pipe which claimant had supplied to a highway contractor, had the right to waive the tort and to sue on a contract implied by the facts within the five-year statute of limitations. *Armco Steel Corp.* v. *State Road Comm'n* (No. D-30)..... 33

While the Court of Claims looks with disfavor on state contracts which are not authorized and executed according to statutory and budget requirements, it does not approve of unfair and unjust enrichment by the State in dealings which its officers have made in taking property and labor of others in projects in which the State has benefited. *Greene* v. *State Road Comm'n* (No. D-32)..... 155

The authority of a public officer to enter into contracts is defined by law and the Legislature may not authorize the payment of a claim created against the State under any contract made without express authority of law. See art. VI, § 38, W. Va. Const. *Mountain State Consultants, Inc.* v. *State* (No. D-100). 10

Claimant, who entered into a road-building contract with the State Road Commission, was chargeable with knowledge that it was dealing with a governmental agency, with employees and agents whose duties were defined by law and who had limited powers to contract for cost items not clearly made a part of the contract. *Nello L. Teer Co.* v. *State Road Comm'n* (No. D-89)..... 216

A citizen, relying upon the ability of and confidence in a public official and expending large sums of money to comply with a purported contract, should not in good conscience be deprived of his property, especially where the State has had full value in the matter. *Rahall Realty Co.* v. *Department of Welfare* (No. D-90)..... 225

Where claimant agreed to permit the State to dump refuse on his property in exchange for improved maintenance of a state road, respondent's pre-existing obligation in law to maintain the road was not legal consideration for such a contract. *Smith* v. *State Road Comm'n* (No. D-2)..... 141

Claimant's building renovation contract with the Commissioner of the Department of Welfare was valid, notwithstanding the fact that such contract had not been approved by the Attorney General as required by statute, where the evidence clearly established ratification of the Commissioner's acts,

the State having accepted the benefits of the work done and materials furnished, and there having been no dispute as to the amount of work done and materials furnished, the quality of materials or workmanship, or the amount of the aggregate claim. See § 5A-3-15, W. Va. Code. *W. A. Abbitt Co.* v. *Department of Welfare* (Nos. C-37, C-36, C-38, C-39, C-40, C-41, C-42, C-43). 62

CORPORATIONS

A claim for a refund of fees paid by claimant in connection with the incorporation and subsequent dissolution of a corporation organized by him was disallowed, where liability on the claim had been totally denied by respondents on the basis that the fees paid were not refundable under the statute and were not collected upon the contingency of the claimant's success in obtaining a permit to sell the shares of the capital stock of the corporation or upon any other contingency. See § 32-1-6, W. Va. Code. *McCoy* v. *Secretary of State* (No. D-54). 159

The corporate entity will be disregarded where it is used to cloak or cover the circumvention of a statute. *Mountain State Consultants, Inc.* v. *State* (No. D-100). 213

The fiction of a corporation will be disregarded by the courts if the corporation is formed to accomplish an illegal act, and the parties will be dealt with as though no corporation was formed. *Mountain State Consultants, Inc.* v. *State* (No. D-100) 213

The Workmen's Compensation Commissioner had no statutory power to engage an independent consultant who was not an employee of the State, and the use of a corporate entity to shield the reemployment of a former employee after he had reached the mandatory retirement age was in violation of the Compulsory Retirement Age Act. See former §§ 5-14-1 to 5-14-5, W. Va. Code. *Mountain State Consultants, Inc.* v. *State* (No. D-100). 213

COSTS

Where claimants, who were State Road Commission mechanics and as such had worked on the brakes of a truck involved in a fatal accident, were brought into litigation by the Commission's insurer and were obligated to have counsel for their defense, it was held that they were entitled to recover counsel fees in the amounts of $759 and $859, which the Commission had refused to pay. *Robbins* v. *State Road Comm'n* (No. B-320(A)). 51

DAMAGES

Where claimant sought $1,000 for damage resulting from the passage of a State bulldozer over his leased premises, allegedly destroying three rows of strawberry plants and "covering up" a "setting" hen and her eggs, but claimant declined, or was unable, to even state the cost of his strawberry plants or his hen, the court exercised its statutory investigative powers to arrive at some reasonable value for these items and awarded him the sum of $25. *Akers* v *State Road Comm'n* (No. D-65). 127

A claim for damages alleged to have resulted from negligent and unauthorized surgery performed at Fairmont Emergency Hospital was denied, where evidence indicated the possibility of a mix-up in the hospital records or in the identity of patients, where the medical testimony was not sufficient to support the subjective symptoms and complaints, and where the damages sought to be proved were highly speculative. *Blondheim* v. *Department of Pub. Institutions* (No. D-37). 170

Damages to claimant's business and the loss of future profits were too remote and speculative to deserve serious consideration. *Cavanaugh Landscaping Co.* v. *Department of Natural Resources* (No. D-77). 200

Liquidated damage clauses are generally enforceable when substantial damages have resulted. *J. I. Hass Co.* v. *State Road Comm'n* (No. D-109). 209

Where highway traffiic was not seriously interrupted or inconvenienced and no substantial pecuniary loss was suffered by the State or the public by a delay involving a controversy between claimant and the State Road Commission over the quality and application of paint on a bridge, such controversy was an extenuating circumstance which made enforcement of a liquidated damage clause harsh and unjustifiable. *J. I. Hass Co.* v *State Road Comm'n* (No. D-109). 209

Items of damage which were vague and speculative in nature could not be allowed. *Lewis* v. *Department of Pub. Institutions* (No. D-73). 192

DRAINS

Where the State Road Commission's negligent maintenance of a drain, coupled with the overflow of water unable to pass through it, damaged claimant's bottom land, and his allegations of damages in the amount of $700 were unsubstantiated by the evidence, claimant was awarded the sum of $100 which he had expended for fertilizer, seed and labor in an effort to recondition his land. *Beasley* v. *State Road Comm'n* (No. C-21) 110

A claim for damage to a dwelling house resulting from a flow of water over claimant's property after a heavy rainfall was disallowed, where the evidence showed that such damage was due to the natural drainage of the area and other intervening and superseding causes and was not directly attributable to the neglect of the State Road Commission in keeping its culvert open. *Hammack* v. *State Road Comm'n* (No. D-83). 182

A claim for damage done to claimant's furnace as a result of water drainage from an interstate highway was disallowed, where claimants failed to show in any degree of certainty or accuracy that the drainage of the area had been changed or, if there had been a change in drainage, that such change caused the damage to their furnace. *Harrison* v. *State Road Comm'n* (No. D-22). 156

ELECTION OF REMEDIES

Claimant, who alleged that the State Road Commission had appropriated and converted to its own use pipe which claimant had supplied to a highway contractor, had the right to

ELECTRICITY

ELEVATORS

EMINENT DOMAIN

EQUITY

EVIDENCE—See also Witnesses

Claimant, who alleged that penitentiary officials willfully and negligently failed and refused to provide him with adequate and proper medical treatment, was not an expert capable of testifying as to what was or was not the proper treatment in his case. *Cephas* v. *Department of Pub. Institutions* (No. D-57) 149

It is the duty of the Court of Claims, and the Court has the authority, to scrutinize documentary evidence very closely. *C. E. Wetherall* v. *State Road Comm'n* (No. C-24) 133

Where there was some conflict in the evidence as to the color of material in the berm of the road at the place of an accident which occurred on November 9, 1966, the testimony of a State's witness was corroborated by pictures of the road taken subsequently in January of 1967, there having been little likelihood that any substantial change in the color of the road and the berm could have occurred. *Federico* v. *Sawyers* (No. C-20) 153

There must be some evidence to sustain respondent's position where the claimant has made a clear prima facie case for relief. *Mountain State Constr. Co.* v. *State Road Comm'n* (No. B-338) 10

It is not incumbent upon the respondent to prove a defense to a claim by a preponderance of the evidence. *Mountain State Constr. Co.* v. *State Road Comm'n* (No. B-338) 10

Being triers of the facts as well as judges of the applicable law, the Court of Claims must reach its decision on the substance as well as on the details of the evidence introduced. *Oscar Vecellio, Inc.* v. *State* (No. B-339) 47

The lack of written change orders or supplemental agreements in writing in which the State Road Commission agreed to recognize and pay for claims in connection with a highway construction contract was a material, if not fatal, defect in the proof. *Oscar Vecellio, Inc.* v. *State* (No. B-339) 47

FELLOW SERVANTS

Claimant, a State Road Commission employee, was awarded $88.07 for damage to his automobile resulting from blasting operations in which he participated, where the evidence showed that claimant was inexperienced in such work and that the negligence of his fellow employee was the direct cause of the damage. *Albert* v. *State Road Comm'n* (No. D-36) 124

FOOD

By statute, the interest claimed on an account for produce sold and delivered by claimant to an FFA and FHA camp under the supervision of the Division of Vocational Education of the State Department of Health could not be allowed, despite allowance of the principal claim. *C. A. Robrecht Co.* v. *Department of Education* (No. D-10A) 125

Claimant was awarded the sum of $464.41 for frozen foods sold and delivered to an FFA and FHA camp under the supervision of the Division of Vocational Education of the State De-

GARBAGE

GOLF COURSES

HOSPITALS

INSURANCE

INTEREST

Interest cannot be allowed under the statute in any case unless the contract in the matter expressly provides for the payment of interest. *C. A. Robrecht Co.* v. *Department of Mental Health* (No. D-11) 68

The fact that claimant's invoices contained a printed statement that six percent interest would be charged on "past due accounts" was not sufficient to satisfy the statutory requirement that the contract under which the goods in question were supplied provide for the payment of interest. See § 14-2-12, W. Va. Code. *C. A. Robrecht & Co.* v. *Department of Mental Health* (No. D-12) 131

Claimant was awarded the sum of $83.75, excepting interest, for produce ordered by the Department of Mental Health and delivered by claimant to the West Virginia Training School. *C. A. Robrecht Co.* v. *Department of Mental Health* (No. D-14). 111

A claim for interest upon a judgment and award in a condemnation suit was disallowed, where payment had been made before the enactment of a statutory notice requirement and the evidence did not support claimant's allegation that such payment had been intentionally or negligently concealed by the respondent. *Roberts* v. *State Road Comm'n* (No. D-8) 108

JURISDICTION

The statutory definition of "state agency" clearly limits such an agency to one which is in the true sense an officer or servant of its master, the State, and not one which acts as an independent principal. See § 14-2-3, W. Va. Code. *City of Morgantown* v. *Board of Governors of West Virginia University* (No. D-46) 174

The Board of Governors of West Virginia University, which functions entirely separately and independently of any control by the State, is not truly an administrative state agency for whose liabilities the Court of Claims should determine whether in equity and good conscience the State should pay. *City of Morgantown* v. *Board of Governors of West Virginia University* (No. D-46) 174

The right to defend and escape liability by invoking the doctrine of immunity because of the exercise of a governmental function by a city or county or by West Virginia University does not of itself make such city, county, or university an agency of the State. If that were the case, every legal action against any city or other state incorporated body in which there is sustained a governmental function plea of immunity from liability would come within the jurisdiction of the Court of Claims under the agency theory. *City of Morgantown* v. *Board of Governors of West Virginia University,* (No. D-46). 174

Section 14-2-13, W. Va. Code, extends the jurisdiction of the Court of Claims to claims which the State as a soverign commonwealth should in equity and good conscience discharge and pay. *Elmore* v. *Alcoholic Beverage Control Comm'r* (No. D-29). 97

Where mandamus proceedings could be maintained against the State by claimants who contended that their properties

had been damaged as a direct result of highway construction and maintenance, it was clear that their claims came within the jurisdictional prohibition set out in § 14-2-14(5), W. Va. Code. *Johnson* v. *State Road Comm'n* (No. C-3)..... 186

The Court of Claims is not to be substituted for courts which have jurisdiction to hear an appeal from, and if necessary overrule, a decision of the commissioner of securities. *McCoy* v. *Secretary of State* (No. D-54)..... 159

A claim alleging negligence on the part of school officials resulting in the death of a pupil was disallowed on the ground that such claim fell within the statutory provision excluding claims against county boards of education, where there were no allegations or proof that the State had any control or management of the school property involved. See § 14-2-3, W. Va. Code. *Powers* v. *Board of Educ.* (No. D-59)..... 242

Section 14-2-13, W. Va. Code, extends the jurisdiction of the Court of Claims to claims which the State as a sovereign commonwealth should in equity and good conscience discharge and pay. *W. A. Abbitt Co.* v. *Department of Welfare* (Nos. C-37, C-36, C-38, C-39, C-40, C-41, C-42, C-43)..... 62

LANDLORD AND TENANT

Claimant city was awarded $150, such sum representing unpaid rent for hangar space used by the National Guard at claimant's municipal airport. *City of Morgantown* v. *State Adjutant General* (No. C-7)..... 79

Claimant was awarded the sum of $40,500 as compensation for unpaid rent on a building leased by claimant to the State for the use of the Department of Welfare, where state officers were unable to compel a county court to provide its share of the funds to pay the rentals as contemplated under the contract. *Rahall Realty Co.* v. *Department of Welfare* (No. D-90). 225

LIMITATION OF ACTIONS

Claimant, who alleged that the State Road Commission had appropriated and converted to its own use pipe which claimant had supplied to a highway contractor, had the right to waive the tort and to sue on a contract implied by the facts within the five-year statute of limitations. *Armco Steel Corp.* v. *State Road Comm'n* (No. D-30)..... 33

Claims against the State should not be allowed in any case where the Legislature has decreed that such claims shall be barred after a specified time. *Bache & Co.* v. *State Tax Comm'n* (No. D-63)..... 168

A claim for a refund for overpayment of business and occupation taxes was disallowed, where such claim had not been filed within the period of three years provided in § 11-1-2, W. Va. Code. *Swisher* v. *State Tax Comm'r* (No. C-11)..... 73

A claim for additional work and labor performed and materials furnished pursuant to a well-drilling contract with the

State Road Commission was properly considered by the Court of Claims, where such claim had been pending before the Attorney General at the time of the creation of the Court. *Warner* v. *State Road Comm'n* (No. B-91). 24

LIVESTOCK

Claimant, owner of a farm located on a state highway, was awarded the sum of $225 for the loss of cattle by poisoning from weed spraying along such highway by the State Road Commission. *Tenney* v. *State Road Comm'n* (No. B-396). 59

MANDAMUS

The State Road Commission may be compelled by mandamus to institute condemnation proceedings to determine damages to real estate and compensate property owners. Such an action is not a suit against the State in contravention of article VI, section 35, of the State constitution. *Johnson* v. *State Road Comm'n* (No. C-3). 186

MOTOR VEHICLES

Where claimant's total damages resulting from a collision with a State Road Commission vehicle amounted to $7,853.37, and the Commission had negotiated a partial settlement with its insurer in the sum of $5,000 (the limit of its policy), claimant was awarded the amount of his claim—$2,853.37. *Ansline* v. *State Road Comm'n* (No. B-369). 31

Claimant was awarded the sum of $68.61 for damages sustained when a rock struck the windshield of his automobile after being thrown from a power lawn mower operated by employees of the State Road Commission. *Blankenship* v. *State Road Comm'n* (No. C-26). 66

Claimant was awarded $30.90 for damages to his automobile caused by gravel and cinders dropping on the vehicle while the State Road Commission was clearing drainpipes on a bridge. *Calhoun* v. *State Road Comm'n* (No. B-387). 37

Claimant, whose automobile was damaged when a piece of black top floor fell out of a bridge while he was crossing, proved his case by a preponderance of the evidence and was awarded the sum of $70.15. *Clark* v. *State Road Comm'n* (No. B-397). 40

Claimants were awarded the sum of $2,106.71 for damage to their house and automobile, where the sole cause of the damage was the defective condition of the brakes on a State Road Commission truck which left the roadway and struck claimants' house and automobile. *Curry* v. *State Road Comm'n* (No. C-2). 105

A claim for damages sustained when claimant's truck overturned was disallowed, where the evidence showed that claimant was negligent in allowing the wheels of his vehicle to go off the paved portion of the road into the gully edge of the wide berm when there was ample room in the paved portion of the road. *Federico* v. *Sawyers* (No. C-20). 153

The state is not an insurer of the safety of the roads and highways.
Harris v. *State Road Comm'n* (No. D-76). 189

State Farm Mut. Auto. Ins. Co. v. *State Road Comm'n* (No. D-80). 180

The failure of the State Road Commission to provide highway guard rails does not create a moral obligation on the part of the State to compensate a person for injuries assumed to have occurred through such failure. *Harris* v. *State Road Comm'n* (No. D-76). 189

The State is not an insurer of its employees' automobiles properly parked upon State property and would not be liable for loss caused to such vehicles by accidential fire, unless it failed to exercise ordinary care for the safety of the property left in its keeping. *Hott* v. *Department of Natural Resources* (No. D-27).. 106

Claimant was awarded the sum of $52.53 for damage caused to his parked automobile when a wheel came off a moving vehicle operated by the State Road Commission and struck the side of claimant's vehicle. *Keith* v. *State Road Comm'n* (No. D-50). 137

Claimant was awarded the sum of $240 for damages sustained by his parked automobile when it was struck by a truck operated by an employee of the State Road Commission. *Matheny* v. *State Road Comm'n* (No. D-49)..... 158

Section 17C-8-8, W. Va. Code provides an additional requirement imposed upon the driver of a forward vehicle attempting to make a left turn into a passing lane other than merely giving the proper signal. The coorelative statute requires the driver of a vehicle overtaking and passing another vehicle proceeding in the same direction to give an audible signal and pass to the left thereof at a safe distance. *National Rubber & Leather Co.* v. *State Road Comm'n* (No. C-1)..... 138

Respondent's driver was guilty of negligence as a matter of law where he failed to comply with the statutory requirement that one intending to make a left turn must ascertain if it can be done with reasonable safety. See § 17C-8-8, W. Va. Code. *National Rubber & Leather Co.* v. *State Road Comm'n* (No. C-1). 138

Claimant recovered the sum of $125.73 for damages to his automobile which occurred when the vehicle dropped into a hole in the road and hit a washed-out manhole cover, not readily visible, impaling the car and causing it to come to an abrupt and violent stop, damaging the frame and other parts. *Neeley* v. *State Road Comm'n* (No. B-388)..... 45

Claimant and her insurer were awarded a sum of $104.31 for damages sustained by claimant's automobile as a result of the act of employees of the State Road Commission in negligently felling a tree on such vehicle. *Nickell* v. *State Road Comm'n* (No. D-4). 87

A claim for damages sustained when claimant's automobile struck a rock on the road was disallowed, where the evidence

showed contributory negligence on the part of the driver of claimant's car. *Oliver* v. *State Road Comm'n* (No. D-24)..... 144

Where claimants, who were State Road Commission mechanics and as such had worked on the brakes of a truck involved in a fatal accident, were brought into litigation by the Commissioner's insurer and were obligated to have counsel for their defense, it was held that they were entitled to recover counsel fees in the amounts of $759 and $859, which the Commission had refused to pay. *Robbins* v. *State Road Comm'n* (No. B-320 (A)). 51

Claimant was awarded the sum of $202.62 for damages sustained by her automobile when tar splashed onto the painted surface of the vehicle as a result of negligence on the part of State Road Commission employees. *Robison* v. *State Road Comm'n* (No. D-119)..... 229

Claimants recovered $3,277.11 for personal injuries and damages to their automobile arising out of a collision between their parked vehicle and a tractor-trailer driven by a member of the National Guard under the jurisdiction and employment of the Adjutant General of West Virginia. *Sargis* v. *Adjutant General* (No. B-374)..... 52

There is no moral obligation on the part of the State to compensate a person who is injured on a public highway of the State. *State Farm Mut. Auto. Ins. Co.* v. *State Road Comm'n* (No. D-80). 180

Claimant insurance company was awarded the sum of $24.81, where it had been subrogated to the rights of its insured, whose automobile was damaged when an employee of the State Road Commission, patching holes in the surface of the highway and chipping the concrete therein, caused a stone chip to strike the windshield of the automobile, after the insured had been directed by a flagman to pass the place of the work. *State Farm Mut. Auto. Ins. Co.* v. *State Road Comm'n* (No. B-390). 55

Claimants were awarded the sum of $435 for damages caused when their parked automobile was struck by a truck driven by an employee of the State Road Commission. *Shinn* v. *State Road Comm'n* (No. D-47)..... 162

In determining whether a driver of an automobile has driven safely, the lawful speed limit may or may not be a factor in such determination. Weather is just as important and cannot be dismissed without serious consideration. *Stollings* v. *State Road Comm'n* (No. B-344)..... 56

A claim for damages sustained when claimant's automobile swerved and slid on the road surface, going round and round and finally over a hillside, was disallowed, where the evidence was insufficient to show lack of proper maintenance and did not support claimant's contention that the road was not safe for travel because it had become slick by reason of tar "bleeding." *Stollings* v. *State Road Comm'n* (No. B-344). 56

The State Road Commission's failure to have road markers indicating a one-way bridge does not constitute negligence. *Thompson* v. *State Road Comm'n* (No. C-9)..... 75

MUNICIPAL CORPORATIONS

NATIONAL GUARD

NEGLIGENCE — SEE also Blasting; Bridges; Damages; Fellow Servant; Motor Vehicles; Physicians and Surgeons; Rock Slides

Where the State Road Commission's negligent maintenance of a drain, coupled with the overflow of water unable to pass through it, damaged claimant's bottom land, and his allegations of damages in the amount of $700 were unsubstantiated by the evidence, claimant was awarded the sum of $100 which he had expended for fertilizer, seed and labor in an effort to recondition his land. *Beasley* v. *State Road Comm'n* (No. C-21). 110

A claim for damages sustained when claimant's truck overturned was disallowed, where the evidence showed that claimant was negligent in allowing the wheels of his vehicle to go off the paved portion of the road into the gully edge of the wide berm when there was ample room in the paved portion of the road. *Federico* v. *Sawyers* (No. C-20). 153

Claimant was awarded the sum of $16.48 for damage to his house caused when a rock went through a picture window after being thrown from a rotary mower operated by an employee of the State Road Commission. *Gano* v. *State Road Comm'n* (No. D-7). 82

A claim for damage to a dwelling house resulting from a flow of water over claimant's property after a heavy rainfall was disallowed, where the evidence showed that such damage was due to the natural drainage of the area and other intervening and superseding causes and was not directly attributable to the neglect of the State Road Commission in keeping its culvert open. *Hammack* v. *State Road Comm'n* (No. D-83). 182

The honest exercise of the State Road Commissioner's discretion in determining at what points highway guard rails should be provided cannot be negligence. *Harris* v. *State Road Comm'n* (No. D-76). 189

Where employees of the State Road Commission, during the course of cutting and removing trees from the State right-of-way, cut a large tree and negligently permitted it to fall upon claimants' barn destroying approximately twelve feet of the barn's roof and breaking rafters therein, claimants were awarded $350.79 for damages to the barn and for the loss of fifty bales of hay which were stored in the barn and which rotted due to being exposed to rain as a result of the hole in the barn's roof. *Hendershott* v. *State Road Comm'n* (No. B-395). 23

The State is not an insurer of its employees' automobiles properly parked upon State property and would not be liable for loss caused to such vehicles by accidental fire, unless it failed to exercise ordinary care for the safety of the property left in its keeping. *Hott* v. *Department of Natural Resources* (No. D-27). 106

Claimant was awarded the sum of $2,500 for damages which occurred when the State Road Commission negligently created a landslide by adding rock in excessive quantities to a roadbed, thereby producing an overburden and causing the earth

OFFICE EQUIPMENT AND SUPPLIES

Claimant was awarded the sum of $7,882.03 for equipment and services furnished under contract to the Department of Finance and Administration. *International Business Mach. Corp.* v. *Department of Fin. & Admin.* (No. D-42)..... 120

Claimant was awarded the sum of $1,026.54, representing the purchase price for office equipment sold and delivered by claimant to the State Road Commission. *Laird Office Equip. Co.* v. *State Road Comm'n* (No. C-10)..... 85

Claimant was awarded the sum of $13,245.47 as reimbursement for sums it had advanced for the storage, handling, and hauling of office equipment as a result of respondent's failure to provide adequate facilities for the installation of such equipment, which had been ordered by respondent and delivered by claimant to locations specified in the purchase orders. *Remington Rand Office Sys. Div.* v. *Department of Welfare* (No. D-43). 60

PHOTOGRAPHS

Where there was some conflict in the evidence as to the color of material in the berm of the road at the place of an accident which occurred on November 9, 1966, the testimony of a State's witness was corroborated by pictures of the road taken subsequently in January of 1967, there having been little likelihood that any substantial change in the color of the road and the berm could have occurred. *Federico* v. *Sawyers* (No. C-20)..... 153

Pictures of a bridge and approaches introduced in the evidence clearly showed that neither the bridge nor the road were out of repair and that the collision in which claimant's wife was killed would not have taken place had the parties to the collision exercised reasonable and proper care under the circumstances. *Thompson* v. *State Road Comm'n* (No. C-9)..... 75

PHYSICIANS AND SURGEONS

A claim for damages alleged to have resulted from negligent and unauthorized surgery performed at Fairmont Emergency Hospital was denied, where evidence indicated the possibility of a mix-up in the hospital records or in the identity of patients, where the medical testimony was not sufficient to support the subjective symptoms and complaints, and where the damages sought to be proved were highly speculative. *Blondheim* v. *Department of Pub. Institutions* (No. D-37)..... 170

Claimants, employees at Spencer State Hospital, were awarded a total amount of $1,600 for "off-duty" professional services rendered in connection with a follow-up program for the treatment of alcoholic patients after their discharge from the hospital. *Byrd* v. *Department of Mental Health* (No. D-35)..... 129

Claimant, who alleged that penitentiary officials willfully and negligently failed and refused to provide him with adequate and proper medical treatment, was not an expert capable of testifying as to what was or was not the proper treatment in his case. *Cephas* v. *Department of Pub. Institutions* (No. D-57)..... 149

A claim for injury and disfigurement due to the negligence of a physician and hospital in treating claimant's injured arm

PIPELINES

POISONS

PRINTING

PRISONS AND PRISONERS—See also Physicians and Surgeons

While the warden of the state penitentiary is the lawful custodian of the convicts there confined, he is not personally liable for a tort committed by a convict unless he directly participated in its commission by a breach of duty. *State Farm Mut. Auto. Ins. Co.* v. *Department of Pub. Institutions* (No. D-55). 146

A claim for collision damages sustained when an automobile, the rights of whose owner had been subrogated to claimant insurance company, was stolen by an escaped prisoner was disallowed, where the fact that such prisoner, a trusty, was able to obtain liquor and become intoxicated, prior to leaving a prison chicken farm, was not sufficient to attribute negligence to the prison officials, and any alleged failure on their part was not shown to be a proximate cause of the prisoner's acts. *State Farm Mut. Auto. Ins. Co.* v. *Department of Pub. Institutions* (No. D-55). 146

Claimant was awarded the sum of $2,275.22 for building materials and supplies used in the construction of a new wall at the State penitentiary. *T & L-Wheeling Plumbing & Indus. Supply Co.* v. *Department of Pub. Institutions* (No. D-70). 181

PUBLIC OFFICERS—See also Contracts

Claimant, whose trip to Europe for the purpose of participating in a joint liquor administrators study conference had been approved by the Governor but not by the Board of Public Works, as required by the Board's regulations, was awarded the sum of $803.79 as reimbursement for travel and hotel expenses, where it was stipulated that the trip was undertaken for and on behalf of the State and in conjunction with claimant's official duties and that claimant had acted in good faith in relying upon the Governor's approval and permission. *Elmore* v. *Alcoholic Beverage Control Comm'r* (No. D-29). 97

Where the only apparent reason for the denial by the State of a claim for electrical services and material furnished was a statutory provision prohibiting the payment of claims incurred by State officers without any legislative appropriation in the fiscal year for such payment, the Court awarded claimant the sum of $3,801.73, stating that while it did not wish to encourage or override the statutory provision, it was of the opinion that the fault was so chargeable to the State officers in employing such services that the persons employed should not be denied fair and unjust enrichment by the State in dealings which its *Road Comm'n* (No. C-13). 80

While the Court of Claims looks with disfavor on state contracts which are not authorized and executed according to statutory and budget requirements, it does not approve of unfair and unjust enrichment by the state in dealings which its officers have made in taking property and labor of others in projects in which the State has benefited. *Greene* v. *State Road Comm'n* (No. D-32). 155

The authority of a public officer to enter into contracts is defined by law and the Legislature may not authorize the payment of a claim created against the State under any contract made without express authority of law. See art. VI, § 38, W. Va. Const. *Mountain State Consultants, Inc.* v. *State* (No. D-100). 213

Parties contracting with the State or any of its agencies do so at their peril, and must inquire into the legal powers of State representatives to incur liability on behalf of the State. *Mountain State Consultants, Inc.* v. *State* (No. D-100). 213

Claimant, who entered into road-building contract with the State Road Commission, was chargeable with knowledge that it was dealing with a governmental agency, with employees and agents whose duties were defined by law and who had limited powers to contract for cost items not clearly made a part of the contract. *Nello L. Teer Co.* v. *State Road Comm'n* (No. D-89). 216

The rules and regulations governing West Virginia personnel, as issued by the Board of Public Works in the paragraph relating to annual leave, provide that annual leave regulations shall not apply to elected or appointed State officials. *Parrish* v *State Aeronautics Comm'n* (No. C-18). 89

A claim by the executive director of the State Aeronautics Commission for accrued annual leave was disallowed on the ground that claimant was an appointive officer and not such a State employee as was entitled to leave pay under the provisions of the rules and regulations of the Board of Public Works of West Virginia. *Parrish* v. *State Aeronautics Comm'n* (No. C-18). 89

A citizen, relying upon the ability of and confidence in a public official and expending large sums of money to comply with a purported contract, should not in good conscience be deprived of his property, especially where the State has had full value in the matter. *Rahall Realty Co.* v. *Department of Welfare* (No. D-90). 225

Claimant was awarded the sum of $40,500 as compensation for unpaid rent on a building leased by claimant to the State for the use of the Department of Welfare, where State officers were unable to compel a county court to provide its share of the funds to pay the rentals as contemplated under the contract. *Rahall Realty Co.* v. *Department of Welfare* (No. D-90). 225

The acts of a public officer improperly performed may be ratified and validated. *W. A. Abbitt Co.* v. *Department of Welfare* (Nos. C-37, C-36, C-38, C-39, C-40, C-41, C-42, C-43). 62

Claimant's building renovation contract with the Commissioner of the Department of Welfare was valid, notwithstanding the fact that such contract had not been approved by the Attorney General as required by statute, where the evidence clearly established ratification of the Commissioner's acts, the State having accepted the benefits of the work done and materials furnished, and there having been no dispute as to the amount of work done and materials furnished, the quality of materials or workmanship, or the amount of the aggregate claim. See § 5A-3-15, W. Va. Code. *W. A. Abbitt Co.* v *Department of Welfare* (Nos. C-37, C-36, C-38, C-39, C-40, C-41, C-42, C-43). 62

RAILROADS

Claimant railroad was awarded the sum of $212.01 for damages resulting from the overturning of its coal car when blast-

ROCK SLIDES

SALARIES—See Wages

SCHOOLS

SECURITIES

STATE—See also Contracts

failed to exercise ordinary care for the safety of the property left in its keeping. *Hott* v. *Department of Natural Resources* (No. D-27). 106

STREETS AND HIGHWAYS—See also Blasting; Bridges; Drains; Eminent Domain; Livestock; Motor Vehicles; Negligence; Rock Slides; Trespass; Tunnels

Claimant was awarded the sum of $12,000 for extra work and losses sustained in the removal and subsequent replacement of a considerable length of roadbed due to a grading error on the part of the State Road Commission, additional compensation for an over-run in gravel in the amount of $18,000, and additional compensation for extra work and additional costs incurred due to delays occasioned by procedural changes through no fault of the claimant in the amount of $9,775. *Buckeye Union Cas. Co.* v. *State Road Comm'n* (No. B-280). 17

A claim for compensation for work involved in the application of hot laid asphalt concrete to an experimental course was disallowed, where it was difficult, if not impossible, to determine with any degree of accuracy the correct amount of time involved in start-up and clean-up time, and such matter was properly a subject for adjustment. *Central Asphalt paving and Concrete Construction Co.* v. *State Road Comm'n* (No. B-298). 38

Claimant was awarded the sum of $16,483.75 for extra labor, materials, and additional engineering performed and supplied to the State Road Commission pursuant to an interstate highway construction contract. *Central Asphalt Paving Co.* v. *State Road Comm'n* (No. C-27). 112

Claimant was awarded the sum of $10,600 for extra labor and materials required to complete an interstate highway construction project. *Central Asphalt Paving Co.* v. *State Road Comm'n* (No. C-28). 115

A claim for additional expense in obtaining special rock fill was disallowed, where the evidence did not support claimants' contention that they were misled or deceived by the State Road Commission's specifications upon which claimants made their bid on an expressway project. *Central Asphalt Paving and Concrete Construction Co.* v. *State Road Comm'n* (No. C-29). 94

Claimant was awarded the sum of $5,506.55 for emergency flood clean-up work performed over and above the work and labor contemplated under his highway construction contract with the State Road Commission. *C. E. Wetherall* v. *State Road Comm'n* (No. C-24). 133

Where claimant's work on an interstate highway construction contract was not unreasonably delayed by a shutdown order, claimant was entitled to reasonable compensation for any damages resulting from the improper issuance of the order, but only for such damages as were the direct and proximate consequence thereof; and such damages included a claim for moving stockpiles, for the cost of sand wasted because of rehandling, and for show-up time paid for men during

the delay, but did not include a claim for equipment rental loss sustained during the shutdown. *Charleston Constr., Inc.* v. *State Road Comm'n* (No. D-105.) 205

The berm of a road is not a travel section, and the maintenance of it is primarily for the protection of the paved portion of a road and not for travel. *Federico* v. *Sawyers* (No. C-20). 153

The construction and maintenance of public highways is a governmental function. *Harris* v. *State Road Comm'n* (No. D-76) 189

The State is not an insurer of the safety of the roads and highways.

Harris v. *State Road Comm'n* (No. D-76). 189

State Farm Mut. Auto. Ins. Co. v. *State Road Comm'n* (No. D-80) 180

Public funds entrusted for road purposes must be expended in the discretion of the Road Commissioner, and at what points guard rails should be provided is a matter of discretion for the State Road Commissioner. *Harris* v. *State Road Comm'n* (No. D-76). 189

The honest exercise of the State Road Commissioner's discretion in determining at what points highway guard rails should be provided cannot be negligence. *Harris* v. *State Road Comm'n* (No. D-76)..... 189

The failure of the State Road Commission to provide highway guard rails does not create a moral obligation on the part of the State to compensate a person for injuries assumed to have occurred through such failure. *Harris* v. *State Road Comm'n* (No. D-76). 189

Claimant was awarded the sum of $144,349.53, which included damages for delay occasioned by the State Road Commission in connection with a paving contract, for an increased expenditure for cement resulting from the delay, and for additional stockpile rental. *Haynes Constr. Co.* v. *State Road Comm'n* (No. C-16). 165

Claimant recovered the sum of $125.73 for damages to his automobile which occurred when the vehicle dropped into a hole in the road and hit a washed-out manhole cover, not readily visible, impaling the car and causing it to come to an abrupt and violent stop, damaging the frame and other parts. *Neeley* v. *State Road Comm'n* (No. B-388). 45

Claimant, who entered into a road-building contract with the State Road Commission, was chargeable with knowledge that it was dealing with a governmental agency, with employees and agents whose duties were defined by law and who had limited powers to contract for cost items not clearly made a part of the contract. *Nello L. Teer Co.* v. *State Road Comm'n* (No. D-89). 216

A claim for seeding and mulching in areas extending beyond the right-of-way of a road construction project was disallowed, where a reasonable interpretation of the contract led

to the conclusion that additional seeding and mulching resulted by the contractor's actions in unnecessarily using surplus waste material for widening the embankments or shoulders of the road should not be a compensable item. *Nello L. Teer Co.* v. *State Road Comm'n* (No. D-89) 216

The lack of written change orders or supplemental agreements in writing in which the State Road Commission agreed to recognize and pay for claims in connection with a highway construction contract was a material, if not fatal, defect in the proof. *Oscar Vecellio, Inc.* v. *State* (No. B-339). 47

Claimant was awarded, after completion of an interstate highway contract, the sum of $17,583.06 for rock undercut in the median, for Portland cement concrete pavement, and for borrow excavation. *S. J. Groves & Sons* v. *State Road Comm'n* (No. D-91). 230

Claimant recovered the sum of $3,099.67 for labor performed and equipment used on an interstate highway construction contract prior to receipt of an order to cease all operations because of the failure of the base course materials to meet specifications. *Southern Coals Corp.* v. *State Road Comm'n* (No. B-366). 2

Claimant was awarded the sum of $5,401.31 for labor and equipment required to remove and replace stockpiled aggregate from paving mix and for other items of overhead resulting from an ensuing delay in the performance of a paving contract. *Southern Coals Corp.* v. *State Road Comm'n* (No. D-21). 122

Claimant was awarded the sum of $87,823.61 for costs resulting from a large overrun of bituminous treated aggregate base course and bituminous material due to a combination of circumstances which were or should have been within the control of the State Road Commission. *State Constr., Inc.* v. *State Road Comm'n* (No. D-115). 236

Claimant insurance company was awarded the sum of $24.81, where it had been subrogated to the rights of its insured, whose automobile was damaged when an employee of the State Road Commission, patching holes in the surface of the highway and chipping the concrete therein, caused a stone chip to strike the windshield of the automobile, after the insured had been directed by a flagman to pass the place of the work. *State Farm Mut. Auto. Ins. Co.* v. *State Road Comm'n* (No. B-390). 55

There is no moral obligation on the part of the State to compensate a person who is injured on a public highway of the State. *State Farm Mut. Auto. Ins. Co.* v. *State Road Comm'n* (No. D-80). 180

The State does not, and cannot, assure a traveler a safe journey in a mountainous country, where many roads are narrow, with steep grades and sharp curves. *State Farm Mut. Auto. Ins. Co.* v. *State Road Comm'n* (No. D-80). 180

A claim for damages sustained when claimant's automobile swerved and slid on the road surface, going round and round and finally over a hillside, was disallowed, where the evidence

SUBROGATION

TAXATION

TORTS

TRESPASS

Where claimant sought $1,000 for damage resulting from the passage of a State bulldozer over his leased premises, allegedly destroying three rows of strawberry plants and "covering up" a "setting" hen and her eggs, but claimant declined, or was unable, to even state the cost of his strawberry plants or his hen, the Court exercised its statutory investigative powers to arrive at some reasonable value for these items and awarded him the sum of $25. *Akers* v. *State Road Comm'n* (No. D-65). 127

Claimants were awarded the sum of $2,106.71 for damage to their house and automobile, where the sole cause of the damage was the defective condition of the brakes on a State Road Commission truck which left the roadway and struck claimants' house and automobile. *Curry* v. *State Road Comm'n* (No. C-2). 105

Where employees of the State Road Commission, during the course of cutting and removing trees from the State right-of-way, cut a large tree and negligently permitted it to fall upon claimants' barn destroying approximately twelve feet of the barn's roof and breaking rafters therein, claimants were awarded $350.79 for damages to the barn and for the loss of fifty bales of hay which were stored in the barn and which rotted due to being exposed to rain as a result of the hole in the barn roof. *Hendershott* v. *State Road Comm'n* (No. B-395). 23

Claimant recovered the sum of $75 for inconvenience caused her when the State Road Commission, while regrading a road within its right-of-way, damaged claimant's fence, and destroyed the first two or three blocks of the steps to her property. *Hurley* v. *State Road Comm'n* (No. B-377). 44

Claimants were awarded the sum of $75 for vines and a tree which were wrongfully cut down and removed from their property by employees of the State Road Commission. *Kucera* v. *State Road Comm'n* (No. D-38). 179

A claim for damages to a residence, alleged to have been caused by shock and vibrations from the movement of heavy trucks over a nearby concrete highway, was disallowed, where the evidence did not sufficiently connect the deterioration of claimant's residence with any negligent act or failure to act on the part of the State Road Commission. *Webb* v. *State Road Comm'n* (No. C-22). 92

TUNNELS

Claimant was awarded a sum of $269,116.08 as compensation for losses sustained and additional expense incurred in tunnel concreting operations, for winterizing expenses, for backfilling expenses incurred by reason of the failure of excavated materials to meet respondent's representations, and for additional cement required by reason of a formula change. *C. J. Langenfelder & Son, Inc.* v. *State* (Nos. B-292, B-292(b)). 69

WAGES

Claimant was awarded the sum of $177.42 for services performed in connection with a summer work program for the

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ment in his case. *Cephas* v. *Department of Pub. Institutions* (No. D-57)..... 149

Where there was some conflict in the evidence as to the color of material in the berm of the road at the place of an accident which occurred on November 9, 1966, the testimony of a State's witness was corroborated by pictures of the road taken subsequently in January of 1967, there having been little likelihood that any substantial change in the color of the road and the berm could have occurred. *Federico* v. *Sawyers* (No. C-20)..... 153

WORKMEN'S COMPENSATION

All of the powers, duties, and responsibilities of the Workmen's Compensation Commissioner are statutory. *Mountain State Consultants, Inc.* v. *State* (No. D-100)..... 213

Among the powers delegated to the Workmen's Compensation Commissioner are the right to employ a secretary, actuary, accountants, inspectors, examiners, experts, clerks, stenographers and other assistants, and fix their compensation. See § 23-1-6, W. Va. Code. *Mountain State Consultants, Inc.* v. *State* (No. D-100)..... 213

The Workmen's Compensation Commissioner had no statutory power to engage an independent consultant who was not an employee of the State, and the use of a corporate entity to shield the reemployment of a former employee after he had reached the mandatory retirement age was in violation of the Compulsory Retirement Age Act. See former §§ 5-14-1 to 5-14-5, W. Va. Code. *Mountain State Consultants, Inc.* v. *State* (No. D-100)..... 213

The opinion of the *City of Morgantown* v. *The Board of Governors of West Virginia University* (Claim No. D-46) was subsequently remanded to the Court of Claims by the West Virginia Supreme Court of Appeals on the ground that the University is an agency of the State. The Court of Claims then issued an opinion allowing this claim.