

STATE OF WISCONSIN

Senate Journal

Ninety–Sixth Regular Session

WEDNESDAY, July 21, 2004

The Chief Clerk makes the following entries under the above date.

PETITIONS AND COMMUNICATIONS

State of Wisconsin

Department of Health and Family Services

July 15, 2004

The Honorable, The Senate:

As required by s.253.115 of the Wisconsin Statutes, I am enclosing the Department's annual report on the status of Universal Newborn Hearing Screening in Wisconsin. We are pleased to report that in 2003 Wisconsin hospitals have met the legislative criteria. By hospital report, 99.9% of all Wisconsin babies were born in hospitals with a universal newborn hearing screening program in 2003.

Sincerely,

HELENE NELSON
Secretary

State of Wisconsin Claims Board

July 15, 2004

The Honorable, The Senate:

Enclosed is the report of the State Claims Board covering the claims heard on June 25, 2004.

The amounts recommended for payment under \$5,000 on claims included in this report have, under the provisions of s. 16.007, Stats., been paid directly by the Board.

The Board is preparing the bill(s) on the recommended award(s) over \$5,000, if any, and will submit such to the Joint Finance Committee for legislative introduction.

This report is for the information of the Legislature. The Board would appreciate your acceptance and spreading of it upon the Journal to inform the members of the Legislature.

Sincerely,

JOHN E. ROTHSCHILD
Secretary

STATE OF WISCONSIN CLAIMS BOARD

The State Claims Board conducted hearings at the State Capitol Building in Madison, Wisconsin, on June 25, 2004, upon the following claims:

<u>Claimant</u>	<u>Agency</u>	<u>Amount</u>
1. Steve & Carla Newcomer	Natural Resources	\$4,925.00
2. Charles Armitage	Natural Resources	\$92,832.00
3. Michael Crowell	Natural Resources	\$2,632.00
4. Bergman Companies, Inc.	Natural Resources	\$5,118.75

5. Frankenmuth Insurance	University of Wisconsin	\$167.70
6. Ralph Rischmann	Health and Family Services	\$330.00
7. Ernestine Walker	Health and Family Services ⁴	\$3,394.0
8. Lifenet, LLC	Health and Family Services	\$20,800.00

The following claims were considered and decided without hearings:

<u>Claimant</u>	<u>Agency</u>	<u>Amount</u>
9. Elizabeth Barr	Natural Resources	\$884.57
10. Scott Knapp	Agriculture, Trade & Consumer Protection	\$400.00
11. Tommy Gubbin	Corrections	\$1,000.00
12. Village of Sturtevant	Administration / Corrections	\$158,800
13. Teresa Oettinger	Health and Family Services	\$1,025.00
14. David Ress	University of Wisconsin	\$506.00
15. John Sadowski	Wisconsin State Fair Park	\$3,024.85

The Board considered whether or not to reconsider the claim of David F. Kral, presented to the Claims Board at a hearing on December 5, 2003, and subsequently denied by the board.

The Board discussed a proposal for the development of a Claims Board web site.

The Board Finds:

1. **Steve and Carla Newcomer** of McFarland, Wisconsin claim \$4,925.00 for the cost of installing a shoreline riprap on their property. The claimants purchased property on Lake Waubesa in April 2003. The previous owner had installed his own shoreline riprap. Before closing, the claimants discovered that the property owner had no permits for the riprap installation. The Department of Natural Resources fined the property owner and made him remove the riprap and begin a shoreline restoration plan. The claimants state that they received a copy of a letter from the DNR, which allegedly stated that all requirements of the shoreline restoration plan had been met. The claimants state that two weeks after they purchased the property, spring storms raised the lake to its normal height and that the higher water level and winds caused a foot of the shoreline to erode into the lake. The claimants state that after many meetings with DNR personnel, they were granted a permit to build the riprap back to the way it was before they bought the property. The claimants believe that if the DNR had let the previous owner keep the riprap in place, they would not

have incurred the cost of reinstalling it. They believe that the DNR did not provide proper procedures for the shoreline restoration and used their lot as a test for a new shoreline restoration technique. They point to the fact that their property was the only property in the area that did not have any rock for shoreline protection. The claimants also believe that the DNR has been inconsistent and point to the fact that a neighbor installed a riprap without permits at the same time as the previous property owner but was never fined or told to remove it.

The DNR recommends denial of this claim. The claimants believe that the DNR acted wrongly in requiring the prior property owner to remove the riprap. The DNR states that this action took place prior to the claimants' purchase of the property and therefore the DNR owed them no duty at the time the decision was made to remove the original riprap. The DNR also states that removal of the original riprap was reasonable due to the fact that it was constructed without a permit and in excess of DNR standards. Furthermore, the DNR's research shows that rock riprap and sea walls destroy near shore habitat necessary for the health of a water body's food chain. The claimants also allege that the DNR did not provide an adequate shoreline restoration plan. The department states that this type of plan is frequently used by the DNR and is generally successful. The DNR states that this plan was provided to the prior owner and did not involve any duty owed to the claimants and that the claimants acquired the property with full knowledge of the plan. The claimants also allege that they received a copy of a letter from the DNR, which they assert stated that all the restoration plan requirements had been met. The DNR states that this interpretation of the letter is incorrect. The letter clearly states that, although some portions of the plan had been completed, re-establishment of vegetation had not been completed and that continuing efforts were needed to ensure shoreline protection as well as protection of the recently planted vegetation. The department believes that proper maintenance of the mulch and silt fence would have prevented the erosion and subsequent need for repairs at the site. Finally, the DNR states that the restoration plan provided by the department was only that, a plan, not an insurance policy. The DNR believes that there is no evidence that the erosion of the claimants' property was caused by any negligence or breach of duty by the DNR and requests denial of this claim.

The Board concludes the claim should be paid in the reduced amount of \$2,500.00 based on equitable principles. The Board further concludes, under authority of s. 16.007 (6m), Stats., payment should be made from the Department of Natural Resources appropriation s. 20.370 (4)(ma), Stats.

2. Charles H. Armitage d/b/a Neillsville Foundry, Inc., of Brookfield, Wisconsin claims \$92,832.00 for interest on money paid to the Department of Natural Resources in relation to the closing of a landfill. The claimant states that, despite testing showing that the material was not hazardous, the DNR ordered the claimant to cease storing waste sand at Neillsville Foundry and to formulate a remediation plan. The claimant states that in December 1996, he signed a stipulation agreeing to remediate and close the site by September 30, 1999. This stipulation required him to make 42 consecutive monthly payments of \$7750 to the Neillsville Foundry Remediation Fund and that money from this account was to be used for the actual site cleanup. The claimant states that the business was not able to support making these payments in addition to the \$5000 cost of shipping waste sand off site and was forced to shut down in 1997. The claimant signed another stipulation in 1999 to make additional payments but was unable to meet that obligation. The claimant states that throughout all negotiations, the DNR constantly emphasized the urgency of the remediation and that he does not understand why that remediation is still not

completed. The claimant believes that the remediation should have been completed within a couple of months of the original September 1999 target date. The claimant states that the settlement agreements provided that any remaining money in the fund, including accrued interest, was to be returned to him in proportion to the portion of his payments to the fund. The claimant believes that the state should pay him interest on the amount he has paid into the fund until such time as the site is remediated or the money is returned to him.

The DNR states that in 1995, the state sued Neillsville Foundry and the claimant for violation of solid waste disposal and storage laws. As part of a 1996 settlement agreement, the claimant agreed to pay \$50,000 in forfeitures and make monthly payments to fund remediation. The DNR states that the claimant had the option of either overseeing the remediation on his own or delegating the responsibility to the DNR and that he chose the latter. The DNR states that the 1996 agreement provided that any money left over after remediation would go to the state's Environmental Fund and also included provisions in case of default. One of the provisions in case of default was that all money in the Neillsville Foundry Fund was to be transferred to the Environmental Fund. The claimant defaulted on the agreement in March 1998 and the state brought a new action against him to recover the remaining money. The claimant signed a 1999 settlement agreement, which replaced the 1996 agreement. The 1999 stipulation called for the claimant to pay \$257,938.71 and for that payment and any remaining money in the Neillsville Fund to be transferred to the Environmental Fund. The claimant made final payment in October 1999. The DNR states that an addition investigation required before remediation was possible uncovered complications that have delayed the cleanup. The DNR states that, contrary to the claimant's assertion, the 1999 settlement clearly provided for all money to go to the Environmental Fund and that nothing in the agreement provided that any money would be returned to the claimant if not spent on the cleanup within a specified period of time. Furthermore, the DNR states that it is still continuing with the cleanup, for which it has spent \$90,000 thus far and earmarked an additional \$175,000. Finally, the DNR states that money in the Environmental Fund is used to fund projects based on priority and that funds and staff resources are limited, therefore, not every project can move forward immediately. The DNR states that it is moving forward with remediation of the Neillsville Foundry site as rapidly as its limited funds and available staff will allow.

The Board concludes there has been an insufficient showing of negligence on the part of the state, its officers, agents or employees and this claim is neither one for which the state is legally liable nor one which the state should assume and pay based on equitable principles.

3. Michael W. Crowell of Tomahawk, Wisconsin claims \$2,632.00 for lost furs, lost income and attorney's fees relating to a Department of Natural Resources enforcement action. In January 2002 a DNR warden questioned the claimant about two fisher pelts that the claimant brought into the DNR office to be tagged. The warden asked the claimant when the pelts had been tagged and the claimant stated that the tags had been placed on the fisher before they were transported, as required by law. The DNR warden alleges that it is unusual for the pelt tags to be clean and free of blood. The claimant states that he is an experienced trapper and is able to avoid getting blood and dirt on the tag during the pelting process. The claimant also disputes the DNR's allegation that the claimant's son, Zachary, admitted to the wardens that the animals were tagged after being pelted. The claimant alleges that the wardens lied to his son and intimidated him and that his son was not even present when the fisher were pelted. The claimant hired an attorney to defend him against the charges. Prior to the

case going before a jury, the fisher pelts were lost by the DNR and the prosecution decided to drop the case. The claimant believes that this was a malicious prosecution and that the DNR wardens lied, used intimidation and delayed the trial in order to harm the claimant. The claimant requests reimbursement of his \$1500 attorney fee, \$772 for 4 days lost wages, and \$360 for 3 fisher furs lost by the DNR.

The DNR states that the enforcement action initiated against the claimant was based on probable cause. Experienced DNR wardens observed that the fisher tags were free of blood, dust, hair and grease. Based on the wardens' experience, they believed that it was extremely improbable that properly tagged fisher (tagged in the field before skinning and fleshing) would have clean tags. The charges against the claimant were also based on an admission by the claimant's son that the furs were tagged after the animals were skinned. The DNR states that the only reason the prosecution against the claimant was dismissed was because the fisher furs were misplaced and the prosecutor chose not to proceed without that evidence. The claimant has presented no evidence that the DNR citations were malicious or improper. The DNR points to the fact that the claimant's legal expenses were incurred before the furs were lost and that, had they not been lost, his case would have proceeded to trial. If he had lost his case, the claimant would have incurred the same (and possibly additional) legal expenses plus a civil forfeiture. The DNR further states that, even if the claimant had won his case, he still would not have been able to recover his attorney's fees or lost wages because recovery of such fees are not available in civil or criminal prosecutions. The DNR believes that the state had a good faith case against the claimant even though the evidence against him was misplaced. The DNR states that, at most, the claimant would have been able to recover the fur and therefore is willing to reimburse him for the lost furs. Based on DNR records of the top price for fisher pelts at that time, the DNR offers \$57.72 per pelt, or \$173.16.

The Board concludes the claim should be paid in the reduced amount of \$173.16 based on equitable principles. The Board further concludes, under authority of s. 16.007 (6m), Stats., payment should be made from the Department of Natural Resources appropriation s. 20.370 (3)(mu), Stats.

4. Bergman Companies, Inc. of Eau Claire, Wisconsin claims \$5,118.75 for costs incurred due to an error made when quoting a price for a Department of Natural Resources project. The claimant was awarded a line-painting project at Copper Falls State Park. While working on that project, park staff requested that the claimant submit an estimate for crack sealing the entrance road to the park. The claimant's sales representative looked at the site and estimated that it would take approximately 5,214 linear feet of crack sealant to do the job and the claimant submitted a cost estimate of \$2,846.84. This bid was accepted and the project was expanded to include the crack sealing. The claimant states that the crack sealing job actually took 14,589 linear feet of sealant, considerably more than was originally estimated. The claimant now believes that the number given by the sales rep was probably the pounds of sealant required, not the linear feet (the sealant yields approximately 2.5 linear feet per pound). The claimant believes that it misunderstood the sales rep's estimate and therefore quoted the wrong units. Although the claimant realizes that this is not a justification for the increase in price, the claimant believes that it was an honest error and therefore requests reimbursement for the additional costs.

The DNR recommends denial of this claim. DNR agrees with the facts as stated by the claimant but also wishes to provide some additional information. DNR states that approximately halfway through the crack sealing project, the claimant's foreman approached park staff and indicated that the project would go over budget. No additional payments were

authorized by staff, however in an attempt to help the claimant reduce costs, the DNR waived the requirement that cracks had to be cut and cleaned out before sealing. (For the remainder of the project, the claimant did not cut the cracks before sealing as originally required.) DNR again states that no offer of additional payment was made and none was requested by the claimant. DNR also points to the fact that the crack sealing project was initiated by the park superintendent only because money was left over from the original line painting project. There was approximately \$3,000 remaining and the superintendent was authorized to seek quotes for the additional work, provided that the project was less than \$5,000. DNR states that, had the claimant correctly priced the project, it would not have been authorized because only \$3,000 in additional money was available and also because any project over \$5,000 would have been subject to bidding pursuant to DOA bidding requirements. DNR believes that this was probably an honest mistake on the part of the claimant and alleges no bad faith. However, DNR believes that payment of this claim would leave the party which made the mistake whole, while forcing Copper Falls State Park to spend money that it simply does not have and which it did not and does not have any authority to spend under either budgetary or bidding guidelines. For these reasons, DNR requests denial of this claim.

The Board concludes there has been an insufficient showing of negligence on the part of the state, its officers, agents or employees and this claim is neither one for which the state is legally liable nor one which the state should assume and pay based on equitable principles.

5. Frankenmuth Insurance of Blue Mounds, Wisconsin claims \$167.70 for tire damage allegedly related to ash used on roads in the Town of Blue Mounds during the winter of 2002-2003. The claimant states that the ash, which was provided by the University of Wisconsin, contained bits of hardened steel from radial tires that were burned to make the ash. The claimant alleges that these metal pieces ruined the tires on Frankenmuth's 2003 Chevy Impala. The claimant is requesting reimbursement for part of the cost to replace all four tires on the vehicle. The replacement tires cost \$335.39 however the claimant has depreciated the tires at 50% and is therefore requesting payment of \$167.70.

The UW recommends denial of this claim. According to Blue Mounds Township, ash obtained from the UW was used on their roads, but the township stopped using the ash in February 2003. The township has also indicated that all its roads were swept in early spring and June of 2003. The UW has paid several claims related to metal pieces in UW supplied ash and, in fact, paid a claim submitted by Mr. Brock for damage to the tires of his personal vehicle. However, the claim by Mr. Brock was submitted in a timely fashion (June 2003), while this claim is not timely. The UW contends that, given when the ash was spread and swept from the roads, any damage caused by the ash should have been apparent long before October 2003, when Mr. Brock had the tires replaced, especially in light of Mr. Brock's knowledge of the problem due to the damage to his personal vehicle. The UW also points to the fact that this vehicle may have been used by other employees in other areas, which brings up the possibility that damage to the tires came from a source other than the UW ash. Finally, the UW believes that tire replacement on a company vehicle should be considered a regular maintenance cost for the company and is not the responsibility of the state.

The Board concludes the claim should be paid in the amount of \$167.70 based on equitable principles. The Board further concludes, under authority of s. 16.007 (6m), Stats., payment should be made from the University of Wisconsin appropriation s.20.285 (1)(c), Stats.

6. Ralph Rischmann of Milwaukee, Wisconsin claims \$330.00 for property allegedly damaged caused by foster children in the care of a licensed foster parent. The claimant and his wife spend their winters in Florida and were not present when the damage occurred, on March 26, 2002. According to statements by his neighbors, the children damaged three houses on the street and were observed by one of the property owners, who detained the children and called the police. The police did not issue any citations because the children were both juveniles. When he returned from Florida at the end of April 2002, the claimant's neighbor informed him of the incident and told him he should contact the Department of Health and Family Services. The claimant states that he left numerous phone messages but that they were never returned. The claimant further states that he switched insurance coverage for his home while he was in Florida and therefore his new insurer, Omaha Mutual, would not cover the damage to the property, which was not recovered until after he returned to Wisconsin. The claimant therefore requests reimbursement for the cost to replace his broken window.

The DHFS recommends denial of this claim. The DHFS states that the foster parent insurance program described in s. 48.627, Stats., only provides for payment of claims in certain circumstances. That statute limits payment "to the extent not covered by any other insurance and subject to limitations ...for all of the following..." The statutory limitations include, "Bodily injury or property damage caused by act or omission of a child...for which the foster, treatment foster or family-operated group home parent becomes legally liable." One of the claimant's neighbors, the Brimleys, pursued legal action against the foster mother and a judge determined that she was not responsible for the damage caused by the foster children. Because the judge found that the foster parent was not legally liable, the DHFS had no statutory authority to pay the Brimley's claim. Although the Rischmann's have not pursued the same legal action, the result presumably would be the same. The DHFS states that there does not appear to be any basis to assign liability to the foster parents or foster care agency. State and county agencies and foster parents provide care to foster children who may have serious behavioral problems. The DHFS believes that it would be contrary to public policy to require foster parents and agencies to pay for the acts of troubled children unless there is a finding of legal liability on the part of the foster parent or agency. The DHFS further believes that the government is not and should not be the ultimate payer for all crimes or wrongs and that property owners are responsible for maintaining insurance to protect themselves against these types of damages. Although the claimant has indicated that, after he switched insurance, his new insurer would not cover the damages, he has not provided an explanation as to why the damage would not have been covered under his previous homeowners policy. The DHFS believes that if the board does decide to make an award to the claimant, that the amount of such award should be limited to the amount of any insurance deductible.

The Board concludes there has been an insufficient showing of negligence on the part of the state, its officers, agents or employees and this claim is neither one for which the state is legally liable nor one which the state should assume and pay based on equitable principles.

7. Ernestine Walker of Milwaukee, Wisconsin claims \$3,394.04 for uninsured property damage and additional out-of-pocket expenses related to a fire caused by a foster child. The claimant is the grandmother of Kimberly Walker who is the foster parent of 6-year-old K.N. Ms. Walker rents property from the claimant, which is next door to the claimant's residence. On January 2, 2004, K.N. was visiting in the claimant's home, when he found a fire starter and set the

contents of a closet on fire. As a result of the fire, there was a significant amount of fire and smoke damage to the claimant's home. The claimant's homeowner's insurance covered a portion of the damages but she incurred \$2,394.04 in uninsured costs and her daughter incurred an additional \$1,000 in clean up costs and other costs related to assisting her mother with resolving this claim (long-distance calls, travel expenses, etc.). The claimant attempted to obtain reimbursement for her damages through the foster parent insurance program but was denied. The claimant states that she was never notified that the state, which has guardianship of K.N., would not be responsible for any damages he caused. The claimant believes that it is inappropriate for the state to license a non-property owner as a foster parent without obtaining consent from the property owner and/or providing the property owner with information regarding potential liability for damages caused by the foster child. The claimant believes that the Department of Health and Family Services was negligent in failing to ensure that the foster mother had adequate insurance coverage for any damages caused by K.N. The claimant believes that pursuing a court action against the foster mother, as the DHFS suggests, would have caused both the claimant and the foster mother additional financial hardship, which would not have been in the best interest of the foster child. The claimant does not believe that it is good public policy to expect third parties to accept unlimited financial exposure and bear the burden of damages caused by the negligence of or inadequate oversight by foster care program personnel.

The DHFS recommends denial of this claim. The DHFS states that the foster parent insurance program described in s. 48.627, Stats., only provides for payment of claims to the extent that the damages are not covered by any other insurance and for which the foster parent becomes legally liable. As described by the claimant, K.N. was in the claimant's home with permission when he started the fire. The claimant's insurance was not sufficient to cover all the damages, however, the claimant did not pursue any court action against the foster parent to determine whether or not she was legally liable. The DHFS states that, without a finding of legal liability on the part of the foster parent, it is not able to pay the claim from the foster parent insurance fund. The DHFS believes that it is contrary to public policy to require that foster parents pay for the acts of troubled children in their care unless it is shown that they were legally liable. The department believes that doing so would place an unfair burden on foster parents and agencies, limiting resources available for foster children and punishing the foster parents who attempt to help them. Finally, the DHFS believes that the government can not and should not be the ultimate payer for all crimes or wrongs and that private property insurance is intended to protect against private property damage. The DHFS believes that, absent a showing of legal liability, neither the foster parent nor the state should bear the cost of protecting public property.

The Board concludes there has been an insufficient showing of negligence on the part of the state, its officers, agents or employees and this claim is neither one for which the state is legally liable nor one which the state should assume and pay based on equitable principles.

8. Lifenet, LLC, of Eau Claire, Wisconsin claims \$20,800.00 for the costs of photocopying documents related to an audit by the Department of Health and Family Services. In October 1999 the DHFS informed the claimant that it would be conducting a desk audit of the claimant's Medicaid documentation and billing practices. To comply with the audit, the claimant was required to provide numerous records to the DHFS. The claimant states that, in this instance, the DHFS' request for copies was broader than usual because DHFS staff did not come on-site and specifically identify the records they

wanted copied. The claimant states that the DHFS did not reimburse them for the copying costs of these initial records. The claimant states that the DHFS then informed them of additional concerns and encouraged the claimant to submit copies of clarifying documents. The claimant states that it submitted numerous documents in response to this second request. The claimant points to the fact that in a settlement later entered into with the DHFS, the state acknowledged that it had not paid the claimant “for the reproduction of costs associated with its submission of rebuttal materials.” The claimant disagrees with the department’s assertion that all the documents the claimant provided after its initial submission were rebuttal documents, which is a cost of the appeal and not reimbursable. The claimant believes that the appeal process was not triggered until May 21, 2002, when the claimant appealed the DHFS’ May 6th notice. The claimant states that its costs were incurred prior to May 21 and therefore cannot be considered a cost of the appeal.

The DHFS recommends denial of this claim. The DHFS states that the claimant submitted a bill for the initial documents submitted in response to the audit and that the DHFS reimbursed the claimant at the department’s usual rate of \$0.05 per page. The DHFS states that it requested additional records from the claimant because the documentation they submitted in response to the audit was inadequate and in violation of rules regarding required documentation under Medicaid. The DHFS states that it is its usual practice not to pay copying charges for rebuttal documents, which are considered part of the cost of the appeal process. The DHFS points to the fact that the Settlement Stipulation provides that “The parties agree to bear their own costs of representation in this matter, including attorneys fees and costs incurred or to be incurred, regarding the matters at issue.” Finally, the DHFS states that paragraph 7 of the settlement is merely an acknowledgement that the claimant had submitted a bill to the DHFS for copying charges associated with rebuttal documents and is clearly not an agreement to pay this claim.

The Board concludes there has been an insufficient showing of negligence on the part of the state, its officers, agents or employees and this claim is neither one for which the state is legally liable nor one which the state should assume and pay based on equitable principles.

9. Elizabeth A. Barr of Neillsville, Wisconsin claims \$884.57 for vehicle damage related to an accident with a Department of Natural Resources warden. The claimant lives across the street from DNR warden April Dombrowski. The claimant states that on February 14, 2004, she backed out of her driveway into the middle of the street and stopped, preparing to straighten her car and head west down the street. The claimant states that as she looked over her right shoulder, she saw a large pickup truck with two snowmobiles in it backing out of Dombrowski’s driveway into the side of the claimant’s vehicle. The claimant denies having ever told Dombrowski that she did not see her. The claimant states that the initial police report contained several inaccuracies, including the pictorial description of her vehicle’s position. The claimant asked to meet with Warden Dombrowski and the reporting officer after she received a copy of the initial report and she alleges that Dombrowski told her that she was too busy. The reporting officer advised the claimant to submit an addendum to the report, which the claimant did. The claimant states that the vehicle repair estimates show damage to the side of her vehicle, not the rear, which she believes supports her contention that her vehicle was stopped in the middle of the street, not backing up, when Dombrowski backed into her. She also states that there was no scraping type of damage on her vehicle, which she believes would have occurred had her vehicle been in motion at the time of the accident. The claimant believes that

Dombrowski was unable to see behind her because of the snowmobiles loaded into the truck and points to the fact that Dombrowski admitted in her statement that she was not aware that the claimant was behind her until she felt the impact. Finally, the claimant’s insurer informed her that her rates would increase by 25% if she filed a claim for these damages. The claimant does not believe that she should have to bear the cost of this rate increase and requests reimbursement for the entire cost of repairing her vehicle.

The DNR alleges that both parties were backing out of their respective driveways when they struck each other. Although the claimant objects to the characterization of the accident in the police report, the DNR believes that it remains the best evidence as to what happened. The DNR also points to the report filed by Warden Dombrowski, which supports the responding officer’s report. The DNR states that it has made an offer to the claimant to cover 60% of her expenses through State Risk Management. The DNR states that this offer is still available to the claimant and does not believe that the claimant should use the Claims Board process to circumvent the standard state procedure for settling auto accident claims.

The Board concludes the claim should be paid in the reduced amount of \$530.74 based on equitable principles. The Board further concludes, under authority of s. 16.007 (6m), Stats., payment should be made from the State Risk Management appropriation s. 20.505 (2)(k), Stats.

10. Scott Knapp, d/b/a SK Exotics and Rodentry of South Milwaukee, Wisconsin claims \$400.00 for the value of 40 rabbits, which allegedly had to be destroyed due to a quarantine issued by the Department of Agriculture, Trade & Consumer Protection. The claimant raises and sells a variety of small animals, including rabbits and prairie dogs. On June 6, 2003, the DATCP quarantined all mammals on the claimant’s property due to a Monkeypox outbreak. The claimant states that, although he was hospitalized and quarantined with symptoms of Monkeypox, his wife and uncle were not, and that they continued to care for the animals. The claimant states that the USDA recommends a quarantine remain in place for 30 days after the last contact with an infected person or animal. The claimant alleges that the rabbits were housed separately, never brought into the house, and never came into contact with any of the animals in the house. The claimant was hospitalized on May 30, 2004, which the claimant states would have been the last contact the rabbits had with an infected person. Based on the USDA guidelines, the claimant believes that the quarantine should have been lifted at the end of June, or at the very latest, mid-July, 30 days after the claimant was himself released from quarantine. The DATCP did not lift the quarantine until September 2, 2003. The claimant alleges that he contacted the state regarding the end date of the quarantine, however, release of the quarantine was denied. The claimant states that he was forced to destroy 40 rabbits because he was not equipped to house them long term and that, if it had not been for the quarantine, they would have been sold within 2 weeks of being acquired. The claimant believes that the quarantine should have been released by July 2003 and that the DATCP’s refusal to do so caused his damages.

The DATCP recommends denial of this claim. The DATCP states that it quarantined all mammals on the claimant’s premises on June 6, 2003, due to an exotic disease, which was subsequently determined to be Monkeypox. The DATCP states that all mammals on the premises were considered exposed because both the claimant and his wife cared for the animals and both had symptoms of Monkeypox. The DATCP states that there were concerns that the disease could be spread both from animals to humans and from humans to animals. The DATCP emphasizes that there was no information immediately available on the incubation period of

Monkeypox in species other than prairie dogs, so the quarantine was originally indefinite. The USDA and CDC recommended that quarantines remain in place for 30 days after the last symptomatic animals were removed and isolated from the premises. The DATCP states that, based on inspections by the department's veterinarian, information from the claimant as to when his symptoms subsided, and isolation of all prairie dogs for 30 days, the quarantine was released on September 2, 2003. Finally, the DATCP states that the decision to destroy the 40 rabbits was a business decision made by the claimant. The DATCP did not order the animals destroyed and should not be held responsible for any damages related to their destruction.

The Board concludes there has been an insufficient showing of negligence on the part of the state, its officers, agents or employees and this claim is neither one for which the state is legally liable nor one which the state should assume and pay based on equitable principles.

11. Tommy Gubbin of Madison, Wisconsin claims \$1,000.00 for reimbursement of a vehicle insurance deductible. The claimant is employed as a Probation and Parole Agent with the Department of Corrections. The claimant works in an office where there is one state vehicle for four agents. The claimant states that on November 11, 2003, he was scheduled to conduct a home visit. The state vehicle assigned to the office was in use by another agent. The claimant states that other available state vehicles were located in the central office, 8 miles away. Because this was further away than the home the claimant was visiting, he used his personal vehicle to conduct the home visit. The claimant states that use of his personal vehicle is part of his job description and a regular part of his job. As the claimant was travelling northbound on Allied Drive a southbound vehicle made an abrupt left turn in front of him and the claimant was unable to stop. The other driver was cited for failure to yield and driving without a valid license. The van the other driver was operating belonged to another individual and was not insured. The claimant states that the accident occurred during the regular course of his duties and he requests reimbursement of his \$1,000 deductible.

The DOC does not object to payment of this claim. The DOC states that agents are permitted to use their personal vehicles for state business when a state vehicle is not available. They do not have to obtain a "nonavailability" slip unless the trip mileage is 50 miles or more. The department agrees that the accident occurred while the claimant was engaged in state business and appropriately using his personal vehicle and that the claimant was not at fault. Based on the circumstances, DOC agrees that it should be responsible for payment of the claimant's insurance deductible.

The Board concludes the claim should be paid in the amount of \$1,000.00 based on equitable principles. The Board further concludes, under authority of s. 16.007 (6m), Stats., payment should be made from the Department of Corrections appropriation s. 20.410 (1)(b), Stats.

12. The Village of Sturtevant, Wisconsin claims \$158,800.00 plus interest for payment of a sewer connection fee related to the construction of a Department of Corrections 300 bed Regional Probation and Parole Holding Facility in the Village of Sturtevant. The village alleges that, in accordance with Village Code section 13.17(2), the state is required to pay the village a sewer connection fee of \$400 per fixture, for a total fee of \$158,800. The state has refused to pay the charge, citing s. 13.48(13), Stats. The village disagrees and believes that the payment must be made pursuant to s. 66.0821(4), Stats. It is the village's position that the sewer connection charge is neither a permit fee nor a charge relating to construction of a building, but rather is a service charge authorized under s. 66.0821(4), Stats. The village states that under this section there is no exemption for state facilities relating to payment of sewer

service charges. The village also points to a November 2, 2002, Legislative Council memo which cites s. 70.119(1), Stats. That section provides that the state "...shall make reasonable payments at established rates for water, sewer and electrical services and all other services directly provided by a municipality to state facilities..." The village believes that, based upon these two statutes, the state is required to pay the sewer connection charge.

The Department of Administration and Department of Corrections request denial of this claim. They maintain that the state is exempt from the sewer connection charges by virtue of s. 13.48(13)(a), Stats. The Department of Justice and Dane County Circuit Court both have found that this statute unambiguously exempts the state from local laws, permits and fees relating to construction. The village argues that the state must pay the connection charges under s. 66.0821(4), Stats. However, it is the state's position that, in order to be governed by local laws and ordinances, the state must clearly and unambiguously indicate that it consents to a waiver of sovereign immunity. The Attorney General has opined that "a statute of general application, no matter how inclusive its terms, will not be construed to apply to the government or its agencies if such construction would impair their rights or interests, unless the statute includes them expressly or by necessary implication." The state points out that the courts have consistently ruled in accord with this tenet. The state's position is that s. 66.0821(4) is of general applicability and lacks any express reference to the state or its agencies. The state points to s. 13.48(13), Stats., which specifically protects the state from local construction laws. The village also relies on s. 70.119(1), Stats., and argues that the connection charge is not related to the construction of the facility, thus negating s. 13.48(13), Stats. The DOA and DOC agree that the state will make regular payments for municipal services after construction is completed, as is the usual case. Section 70.119(1), Stats., requires the state to make reasonable payments "at established rates" for various services provided by a municipality. The rate is to be based on usage but applicable to all users. The state argues that the connection charge is clearly not a "rate" but rather a one-time fee that is not required of all users, only new customers. Further more, the state points to the fact that the ordinance ties the issuance of a permit to allow connection with the payment of the fee. Without connection, construction of the building cannot be finished, so the charge is therefore obviously a one-time permit fee, imposed during construction, not a rate applicable to all users as required under s. 70.119(1), Stats. The state relies on the long-standing protection of sovereign immunity. Without this protection, hundreds of state building projects each year would be subject to every kind of permit fees municipalities could impose, which would drive up costs for state taxpayers. Finally, the DOA states that permit fees are never included in a building project's budget and state taxpayers would be harmed if the state was required to forfeit monies already allocated for construction costs to one-time, unplanned permit fees. For these reasons, the state requests denial of this claim.

The Board concludes there has been an insufficient showing of negligence on the part of the state, its officers, agents or employees and this claim is neither one for which the state is legally liable nor one which the state should assume and pay based on equitable principles. *[Member Rothschild not participating.]*

13. Teresa Oettinger of Green Bay, Wisconsin claims \$1,025.00 for the cost of repairing siding allegedly damaged by a foster child in the care of the claimant's next door neighbor. The claimant states that on October 6, 2003, she observed the child throwing sticks and rocks at her neighbor's house, where he resides. The claimant states that she opened her window and

yelled at the child to stop, at which time he threw several stones at her, which struck the side of her home and damaged the aluminum siding. The claimant states that, according to the police report, the child's foster mother was home at the time he was throwing the stones but was afraid to go outside to confront him. The claimant does not believe that the foster mother provided appropriate supervisor of the child because she failed to even attempt intervention when the foster child was misbehaving. The claimant points to the fact that the foster mother does receive compensation for her role as foster parent and the claimant believes that along with that compensation comes some responsibility for the child's behavior. The claimant understands that laws are made to protect foster parents for the good of the community, however, she does not believe that those laws should absolve the foster parent of any and all responsibility for the child that has been entrusted to her care. The foster mother's homeowner's insurance would not cover the damage because it resulted from an intentional act. The claimant receives a "claim free" discount on her insurance premiums, which would increase if she filed a claim with her own homeowner's insurance. She also has a \$250 deductible. The claimant does believe it is fair for her to bear the burden of these costs because the foster mother sat in her home and did nothing but watch while the child in her care damaged the claimant's home.

The Department of Health and Family Services recommends denial of this claim. The DHFS states that the foster parent insurance program described in s. 48.627, Stats., only provides for payment of claims to the extent that the damages are not covered by any other insurance and for which the foster parent becomes legally liable. The claimant did not pursue any court action against the foster parent to determine whether or not she was legally liable and the claimant does have insurance to cover the damages. DHFS states that there does not appear to be any basis to assign liability to the foster parent or foster care agency. State and county agencies and foster parents provide care to foster children who may have serious behavioral problems. DHFS believes that it would be contrary to public policy to require foster parents and agencies to pay for the acts of troubled children unless there is a finding of legal liability on the part of the foster parent or agency. DHFS further believes that the government is not and should not be the ultimate payer for all crimes or wrongs and that property owners are responsible for maintaining insurance to protect themselves against these types of damages.

The Board concludes there has been an insufficient showing of negligence on the part of the state, its officers, agents or employees and this claim is neither one for which the state is legally liable nor one which the state should assume and pay based on equitable principles.

14. David Ress of Wausau, Wisconsin claims \$506.00 for property damage caused by flooding in a University of Wisconsin dorm. The claimant lived in Sullivan residence hall. He states that on November 7, 2003, a leaky and sagging bathroom sink broke away from the wall, ripped open a pipe and caused flooding in the claimant's room, which is located directly across the hall from the bathroom. The claimant states that he was told that the shutoff valve for the cold water pipe was rusted open and therefore could not be turned off by hand, which caused the flooding to continue for some time. The claimant and his roommate were not home at the time and were therefore unable to clear out the room. The claimant states that some of his friends who lived down the hall asked if they could go into the room to help protect his property from damage but that they were denied entrance to his room. The claimant was told that the flooding began between 9 and 10 PM. He returned to his room around 1 AM and the flooding had stopped by then, however, university maintenance did not arrive until 1:30 AM

to begin cleaning water out of the room. The claimant states that a maintenance employee told him they pumped 20–30 gallons of water out of his room. The claimant requests reimbursement for his property, all of which was lying on the floor of his room and therefore spent 3–4 hours immersed in water. The claimed damaged property includes a Playstation 2 console, controller, memory card and video game, and two textbooks. Two items originally reported to police as damaged (a DVD movie and a video game) were able to be cleaned and are now usable, therefore the claimant is not requesting any reimbursement for these items.

The UW recommends payment of this claim on equitable grounds. The university agrees with the facts of the incident as stated by the claimant. Although it is the university's position that it was not negligent, it does believe that equitable grounds warrant payment of the claimant's damages.

The Board concludes the claim should be paid in the amount of \$506.00 based on equitable principles. The Board further concludes, under authority of s. 16.007 (6m), Stats., payment should be made from the University of Wisconsin appropriation s. 20.285 (1)(h), Stats.

15. John Sadowski of Muskego, Wisconsin claims \$3,024.85 for uninsured medical expenses allegedly incurred due to an accident at State Fair Park. The claimant states that on August 2, 2003, he was at the Wisconsin Products building at SFP. He states that a woman with a baby stroller was coming out of the building and was having trouble pushing open the door. The claimant states that he went to assist the woman and that the door was very heavy. He states that the only way to push open the heavy door was to brace his other hand on the door jam. While the claimant had his hand on the jam, the door on the other side swung closed very quickly and crushed his pinky finger. The claimant requests payment for the portion of his medical costs not covered by his insurance.

Wisconsin State Fair Park recommends that this claim be denied. SFP believes that there was no negligence on the part of any state employee or agency. The claimant was holding a door open with his other hand placed on the door jam. According to the police report of the incident he "did not realize" where this hand was placed and someone else accidentally shut the other door on his finger. SFP does not believe that there was any negligence and that payment of the claim is not warranted.

The Board concludes there has been an insufficient showing of negligence on the part of the state, its officers, agents or employees and this claim is neither one for which the state is legally liable nor one which the state should assume and pay based on equitable principles.

The Board concludes:

1. The claims of the following claimants should be denied:

- Charles Armitage/Neillsville Foundry, Inc.
- Bergman Companies, Inc.
- Ralph Rischmann
- Ernestine Walker
- Lifenet, LLC
- Scott Knapp/SK Exotics and Rodentry
- Village of Sturtevant
- Teresa Oettinger
- John Sadowski

2. Payment of the following amounts to the following claimants from the following statutory appropriations is justified under s. 16.007, Stats:

- | | | |
|------------------------|------------|-------------------|
| Steve & Carla Newcomer | \$2,500.00 | s. 20.370 (4)(ma) |
| Michael W. Crowell | \$173.16 | s. 20.370 (3)(mu) |

Frankenmuth Insurance	\$167.70	s. 20.285 (1)(c)
Elizabeth A. Barr	\$530.74	s. 20.505 (2)(k)
Tommy Gubbin	\$1,000.00	s. 20.410 (1)(b)
David Ress	\$506.00	s. 20.285 (1)(h)

3. **The Board declines to reconsider the claim of David F. Kral, which was considered and denied by the Board on December 5, 2003.**
4. **The Board approves development of a Claims Board web site.**

Dated at Madison, Wisconsin this 13th day of July 2004.

Alan Lee, Chair
Representative of the Attorney General
John E. Rothschild, Secretary
Representative of the Secretary of Administration
Stan Davis
Representative of the Governor
Scott Fitzgerald
Senate Finance Committee
Dan Meyer
Assembly Finance Committee

**REFERRALS AND RECEIPT OF
COMMITTEE REPORTS CONCERNING
PROPOSED ADMINISTRATIVE RULES**

Senate Clearinghouse Rule 04-053

Relating to nursing homes and facilities for the developmentally disabled.

Submitted by Department of Health and Family Services.
Report received from Agency, July 19, 2004.

Referred to committee on **Health, Children, Families, Aging and Long Term Care**, July 21, 2004.

SENATE ENROLLED PROPOSALS

The Chief Clerk records:

Senate Joint Resolution 6

Report correctly enrolled on July 14, 2004.

CHIEF CLERK'S REPORT

The Chief Clerk records:

Senate Joint Resolution 6

Deposited in the office of the Secretary of State on July 16, 2004.