

STATE OF WISCONSIN

Senate Journal

One-Hundred and First Regular Session

MONDAY, May 19, 2014

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

PETITIONS AND COMMUNICATIONS

State of Wisconsin Claims Board

June 20, 2013

Enclosed is the report of the State Claims Board covering the claims heard on April 30, 2014. Those claims approved for payment pursuant to the provisions of s.16.007 and 775.05 Stats., have been paid directly by the Board.

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

Sincerely,
GREGORY D. MURRAY
Secretary

STATE OF WISCONSIN CLAIMS BOARD

The State of Wisconsin Claims Board conducted hearings at the State Capitol Building in Madison, Wisconsin, on April 30, 2014, upon the following claims:

<u>Claimant</u>	<u>Agency</u>	<u>Amount</u>
1. Martenson & Eisele, Inc.	Natural Resources	\$10,000.00
2. Estate of Forest Shomberg	Innocent Convict Compensation	\$102,500.00

The following claims were decided without hearings:

<u>Claimant</u>	<u>Agency</u>	<u>Amount</u>
3. Talgo, Inc.	Transportation	\$65,889,158.00
4. Progressive Direct Insurance	Natural Resources	\$1,089.11
5. Edward Matthews	Corrections	\$3,000.00

The Board Finds:

1. **Martenson & Eisele, Inc.**, of Menasha, Wisconsin, claims \$10,000.00 for expenses incurred to redesign a stormwater management plan. In 2012, the claimant was

hired to design a site which included in a stormwater pond in the Village of Winneconne. Prior to designing the site, the claimant checked the DNR's Surface Water Viewer website to find out whether a drainage ditch on the property was navigable. The DNR website indicated that the ditch was non-navigable. The claimant states that because the ditch was non-navigable, it was able to design a stormwater plan that was not required to meet any permitting standards as long as the pond was at the bottom of the ditch and was "on-line."

The claimant submitted its plan to the DNR in the spring of 2013. The claimant states that DNR told him it would not accept the plan because, contrary to its own website and prior staff determinations, DNR said that the ditch was navigable and therefore the pond could no longer be "on-line." The claimant said that it had to redesign the storm water management plan at considerable expense.

The claimant states that it corresponded with DNR for 6 months to try and resolve this issue. The claimant believes that DNR staff used its rules in order to obstruct the project. The claimant states that it met with DNR staff in November 2013 but that it never brought up the wetlands issue because the claimant's wetlands delineation (which was included in their original plan) showed that the pond had no impact on the wetlands.

The claimant disputes DNR's assertion that the critical issue is that the pond was originally designed to be "on-line." The claimant notes that NR 343.03(3), Admin. Code defines "connecting with a navigable waterway," in part, as: "...any artificial waterbody that is attached by means of enlargement...which tend[s] to confine and direct flow into the existing navigable waterway." The claimant states that this assumes there is a navigable waterway somewhere downstream from the site but that no such waterway has been identified. The claimant states that the rule is unclear as to how close a navigable waterway must be in order to be considered "connected." The claimant believes that DNR's interpretation of NR 343.03(3) would mean that any stormwater pond location in the state could be connected somehow to an unidentified navigable body of water somewhere downstream. The claimant believes this interpretation is unreasonable.

The claimant states that redesigning the stormwater management plan cost them \$18,000; however, the claimant is cognizant of the Claims Board's payment limitations and therefore requests reimbursement in the amount of \$10,000.

DNR recommends denial of this claim. The claimant asserts that pursuant to § 30.102(1), Stats., it should have been able to rely on the DNR's Surface Water Viewer as having an accurate navigability determination and that because it did not, the claimant incurred the alleged damages. DNR states that the information provided on the website was correct at the time it was viewed by the claimant. Prior to the claimant's project, the land in question was designated for agricultural use and the ditch's navigability determination pursuant to that use was non-navigable. However, the claimant's project changed the land use from agricultural to non-agricultural and the change in land use required a change in the navigability determination of the ditch from non-navigable to navigable.

DNR believes that the navigability issue is a minor one, which had no bearing on the need to redesign the plan. DNR states that the critical issues affecting the design were the presence of wetlands at the site and the claimant's decision to design a plan that was "on-line" in a "connected waterway." DNR states that because the pond was designed as "on-line," the claimant needed to obtain additional permits. DNR notes that the claimant could have continued with the original plan provided that they obtain the necessary permits, instead, the claimant chose to redesign the plan. DNR points to the fact that the claimant's redesign was submitted on April 17, 2013, before DNR made its formal navigability determination on April 22, 2013.

DNR states that it received the claimant's original plan in March 2013. DNR staff reviewed the plan and noticed that the pond was directly in the flow path of a stream channel ("on-line") as well as in a delineated wetlands area. Due to these facts, the project would need Chapter 30 and wetland permits. DNR states that they discussed the plan in detail with the claimant and told them that if the pond was designed "on-line" it would likely be considered a connected enlargement per NR 343.03(3), Admin. Code.

DNR notes that the claimant has 15 years' experience with these types of projects and should have been well aware that navigability determinations can change with land use, that permits are needed for an "on-line" stormwater pond, and that projects built near wetlands have additional permitting requirements. DNR states that the stormwater, wetlands, and connectivity issues related to this project are in no way unique to this site but are common issues that arise with this type of development. DNR notes that it is common practice for developers to call the DNR for pre-approval of these types of projects and that the claimant itself has done so in the past.

Finally, DNR believes that the claimant overstates its damages. DNR believes that only \$2,000-\$3,000 of the claimed damages are attributable to the plan re-design. However, regardless of the dollar amount claimed, DNR believes it should not be held responsible for the claimant's failure to check with DNR before designing the plan as "on-line" when the claimant should have been aware of the permitting requirements that would be required for an "on-line" system.

The Board states that state government exists to serve the people of the State of Wisconsin and must ensure effective lines of communication are in place for permit applicants. The Board believes that in this instance DNR did not communicate as well as it could have. The Board concludes the claim should be paid in the reduced amount of \$1,000.00 based on equitable principles. The Board further concludes, under authority of §16.007(6m), Stats., payment should be made from the Department of Natural Resources appropriation §20.370(4)(ma), Stats.

2. The Estate of Forest Shomberg, of Middleton, Wisconsin, claims \$102,500.00 for Innocent Convict Compensation. On 04/27/11, Forest Shomberg filed a claim for Innocent Convict Compensation related to his 2003 conviction for second degree sexual assault. Mr. Shomberg served six years in prison. Mr. Shomberg's conviction was vacated in November 2009 based on new evidence and he was awarded a new trial. The Milwaukee County District Attorney's Office subsequently dismissed the charges. Mr. Shomberg's requested Innocent Convict Compensation in the amount of \$25,000 and \$77,500 for legal fees relating to his appeal.

On 12/12/12, the Board held a hearing and unanimously denied the claim. Mr. Shomberg filed a Petition for Ch. 227 Judicial Review and on 06/08/13, the Eau Claire Co. Circuit Court issued a decision remanding claim to Claims Board for determination of amount of money that "will equitably compensate" claimant. The claim was scheduled for reconsideration at the 9/11/13 meeting of the Claims Board. However, several weeks prior to the meeting, the Board received notification of Mr. Shomberg's death and the claim was therefore removed from the 9/11/13 agenda. The claimant's mother retained legal counsel to represent claimant's estate and the estate was opened on 3/6/14.

The Estate states that, despite Mr. Shomberg's untimely death, the board should, as ordered by the Court, determine an equitable amount of compensation and award that compensation to Mr. Shomberg's estate. The Estate points to § 803.10(5), Stats., which states that "after a... finding by the court in any action, the action does not abate by the death of any party, but shall be further proceeded within the same manner as the cause of action survived by law; or the court may enter judgment in the names of the original parties if such offer, verdict, report or finding be not set aside." The Estate believes that the plain language of this statute establishes that, because Mr. Shomberg's death occurred after the court's finding that he was entitled to relief under § 775.05, Stats., the Estate is entitled to proceed with this claim.

The Estate notes that Mr. Shomberg's surviving heir, his mother, along with his late stepfather, actually paid for Mr. Shomberg's appellate attorney's fees by taking a loan against land that they owned. The Estate states that they were unable to keep up with the payments on this loan and lost the land. The Estate states that Mr. Shomberg had not reimbursed his mother for any of his attorney's fees at the time of his death. The Estate states that, to the extent that Innocent Convict Compensation is intended to compensate for pain and suffering, Mr. Shomberg's mother also

experienced considerable pain and suffering as a result of his wrongful imprisonment. The Estate also notes that Innocent Convict Compensation is intended, in part, to compensate the wrongfully convicted for lost wages and that any monies remaining from wages Mr. Shomberg would have earned, but for his wrongful conviction, would have been left to his heirs by way of his estate.

The Estate believes that awarding this claim would serve a number of purposes: acknowledging the mental and emotional anguish caused by this wrongful conviction, addressing the pecuniary losses, and bolstering the integrity of the justice system by making a meaningful attempt to rectify the system's errors.

Based on the written and testimonial evidence in this case and the decision by the Eau Claire County Circuit Court, the Board concludes that Mr. Shomberg should be awarded compensation for his six-year wrongful imprisonment. In determining the specific amount of compensation, the Board notes that § 775.05, Stats., provides for innocent convict compensation in an "amount which will equitably compensate the petitioner, not to exceed \$25,000 and at a rate of compensation not greater than \$5,000 per year for the imprisonment." The Board concludes that equitable principles justify an award in the amount of \$20,000.00. This determination is based upon a combination of weighing of the circumstances surrounding his wrongful imprisonment on the one hand along with his actions following release from the wrongful imprisonment prior to his death. In addition, the Board concludes that the compensation should include \$77,500 for Mr. Shomberg's post-conviction legal fees challenging his original conviction. The Board further concludes, under authority of § 16.007(6m), Stats., that the total award of \$97,500 should be made from the Claims Board appropriation § 20.505(4)(d), Stats., and paid to the Estate of Forest Shomberg. The Board finally notes that the unique and unprecedented circumstances of this matter (including the fact that Mr. Shomberg properly brought his original claim to the Board and said claim was upheld in circuit court prior to his death) provide the basis for paying this claim to the Estate of Forest Shomberg.

3. Talgo, Inc., of Seattle, Washington, claims \$65,889,158.00 for damages related to a 2009 contract to design, build and deliver two 14-car train sets to the State of Wisconsin.

In May 2009, the claimant signed a letter of intent with DOT for a four-stage contract that included 1) a Purchase Agreement ("PA") for two train sets, 2) a Maintenance Agreement ("MA") to service the train sets, 3) procurement of a maintenance facility, and 4) an option for DOT to purchase two additional train sets. The claimant alleges that this was a single, integrated contract and that the price of the train sets negotiated under the PA was contingent upon revenues the claimant would receive pursuant to the MA.

The claimant states that the PA and its corresponding contract documents provide that the claimant is responsible for "production testing" (meeting the specifications) but that DOT is responsible for the cost of any additional testing (Pre-Revenue testing to be conducted "by the Operator").

The claimant states that although it took steps to assist DOT with testing, it did not assume responsibility for paying for such testing. The claimant believes that the alleged disagreement over the testing requirements of the PA has been manufactured by DOT in order to get out of the contract. The claimant notes that it has completed testing on train sets supplied to the State of Oregon, which are the same type as those it manufactured for WI, and that the OR train sets have received Federal Railway Administration approval for service in the US. Therefore, the claimant contends that the WI train sets are fully tested and approved for service.

The claimant alleges the state is in breach of multiple agreements. The claimant states that WI defaulted on its obligation under the PA to pay for testing by trying to shift the testing costs to the claimant. The claimant also alleges that DOT improperly terminated the MA based on alleged non-appropriation of funds when the Joint Finance Committee (JFC) failed to approve funding for design and engineering of a permanent maintenance facility. The claimant states that the MA provided for a temporary facility until a permanent facility was built and that if DOT failed to provide a temporary maintenance facility, the state would compensate the claimant for any costs the claimant incurred to provide an alternate facility. The claimant alleges that JFC's denial of additional funds for the permanent maintenance facility was insufficient to trigger the appropriations clause in the contract because DOT had other funds available to pay for maintenance costs. The claimant also alleges that DOT asked for assistance with finding a Milwaukee maintenance facility and that the claimant located and leased such a facility. The claimant states that it negotiated a sublease with DOT for this maintenance facility but that DOT has refused to pay.

The claimant believes this entire dispute has been manufactured to serve a politically driven agenda because Governor Walker campaigned on a promise to "Stop the Train." The claimant alleges that in February 2011, unbeknownst to the claimant, the administration began trying to sell the train sets to other states while the claimant was working in good faith to complete the project. The claimant states that DOT presented a politically-motivated analysis to JFC containing inflated cost projections for use of the train sets. The claimant alleges that JFC's denial of funds was pre-orchestrated between the Governor's Office, DOT and JFC leadership.

The claimant believes DOT has acted in bad faith based on political considerations. The claimant believes the state has not only damaged the claimant's reputation but also its own because unless the claimant is compensated, no entity doing business with WI can be confident that the state is trustworthy and will abide by its agreements.

DOT recommends denial of this claim. DOT states that the claimant has not completed manufacture, testing, and delivery of the train sets. DOT also states that the claim is filled with false and erroneous facts and that the claimant has provided almost no data to support its alleged damages.

DOT states that the PA and the MA are two separate contracts, signed on different dates and based on separate

negotiations. DOT notes that the PA even contemplates that the claimant might not maintain the train sets provided under the PA.

DOT states that the PA clearly requires that the claimant conduct and pay for “dynamic testing,” (per Article 13) which must occur prior to delivery of the train sets for Pre Revenue testing (Article 14). DOT points to the fact that the claimant agreed in August 2011 (Amendment 1) to perform dynamic testing on the WI train sets but has failed to do so to date. DOT states that it defies belief that the state would agree to purchase untested trains.

DOT states that in late 2012 the claimant terminated the train set contract, declaring that it would keep both the trains and the work milestone payments DOT had made to date, and also demanding payments for the remaining outstanding work milestones. DOT finds it unbelievable that the claimant is now demanding tens of millions of dollars more. DOT states that the MA is a separate agreement from the PA and was properly terminated pursuant to the appropriations clause of the MA based upon JFC’s denial of funds. DOT states that, contrary to the claimant’s assertions that DOT had the money to continue with the MA, DOT did not have sufficient funds to cover even half the annual maintenance costs, much less build a permanent maintenance facility.

DOT states that, despite the claimant’s elaborately constructed conspiracy theories, the fact is that the High Speed Rail project was terminated by the Doyle administration, not Governor Walker. DOT stands by the analysis it presented to JFC regarding future costs associated with the train sets and states this analysis was produced by career civil servants without any political motivation. DOT notes that the claimant provides absolutely no evidence of the alleged conspiracy to “orchestrate” the JFC’s denial of funds.

DOT states that it has already paid over \$40 million for train sets the claimant promised would be ready in 2012 but which it has still not produced. DOT believes it is incredible that the claimant now requests \$70 million more of taxpayer money for unfinished, untested train sets. DOT states that if the claimant will simply complete the testing and commissioning of the train sets required by the PA, DOT will pay for the work.

DOT states that the claimant has acted in bad faith since the start of the project in 2009, engaging in a pattern of omission, deception and denial, and taking every opportunity to increase the agreed upon purchase price of the train sets, while denying and deflecting its work obligations. DOT believes that this claim is fundamentally false and should be denied.

The Board concludes this claim would be best resolved in a court of law. Therefore, this claim is denied. *[Member Hagedorn did not participate and exited closed session prior to deliberations.]*

4. Progressive Direct Insurance Co., of Los Angeles, California, claims \$1,089.11 for subrogation damage to a motorhome. On June 19, 2013, the claimant’s insured, Carolyn Kappmeyer, had her motorhome parked at a campsite at Merrick State Park. A park maintenance

employee passed too close to Ms. Kappmeyer’s motorhome with a riding lawnmower while mowing and scratched the side of the motorhome. The claimant requests reimbursement for the cost of repairing its insured’s motorhome.

DNR recommends denial of this claim. Although it is likely that the damage was caused by a DNR employee as alleged, it is not the owner of the motorhome making this claim but her insurer. DNR points to the fact that the Claims Board has a longstanding history of denying subrogation claims. DNR notes that Ms. Kappmeyer has paid her \$250 deductible and has the option of filing a claim for reimbursement of that deductible but that she is not a party to this action. DNR believes that the purpose of the Claims Board is to reimburse those who have suffered damages at the hands of the state and that an insurance company that pays out a claim to its insured has not suffered damages in that respect. DNR believes it has no responsibility to pay claims made on the basis of subrogation and recommends denial of this claim.

Based on its longstanding tradition of denying subrogation claims, 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 with the state should assume and pay based on equitable principles.

5. Edward Matthews, of Portage, Wisconsin, claims \$3,000.00 for value of photos which he allegedly was forced to throw away by DOC staff. The claimant was transferred from the La Crosse County Jail to Dodge Correctional Institution (DCI) on June 19, 2012. The claimant states that he arrived at DCI with 25 photos of his wife, live-in girlfriend, two daughters (one by each woman), and ultra-sound photos of his daughter by his girlfriend. The claimant states that the photos were studio-quality and varied in size from 3 x 5 to 8 x 10. The claimant alleges that Sgt. Ferdinand, a DCI employee, made derogatory comments about whether the claimant was truly legally married and the fact that he also had a girlfriend. The claimant believes that these comments were racially motivated because he is black and both his wife and girlfriend are white. The claimant states that he was humiliated by Sgt. Ferdinand’s comments. The claimant alleges that Sgt. Ferdinand told him he could not keep the photos of his girlfriend, the ultra-sound photos, and the photos of the baby. The claimant alleges he asked Sgt. Ferdinand why he could not keep the photos and Sgt. Ferdinand replied, “Because I said so.” The claimant was allowed to keep 12 photos of his wife and older daughter. The claimant states that Sgt. Ferdinand forced him to throw away the other photos and did not give him the option to contest the decision or mail the photos out. The claimant also alleges that Sgt. Ferdinand forced him to throw away a \$10 phone card and several envelopes.

The claimant later filed a complaint regarding the photographs and other property items. The complaint reviewer found in the claimant’s favor, stating that he should have been allowed to keep the photos because DCI rules allow for possession of 50 photos. However, the claimant was not awarded any monetary damages because the photos had already been thrown away. The claimant

alleges that Sgt. Ferdinand lied to the complaint examiner when he said that the claimant had thrown away the photos voluntarily. The claimant alleges that Sgt. Ferdinand also lied when he told the complaint examiner that the claimant said he did not have any envelopes in which to mail out the photos. The claimant points to his property inventory, which clearly indicates he arrived at DCI with envelopes. The claimant states that he is unable to obtain receipts showing the price of the photos but that they were priceless to him.

The claimant requests reimbursement in the amount of \$3,000 but is willing to accept \$420, as outlined in his claim.

DOC recommends denial of this claim. DOC notes that the claimant is no stranger to the penal system and was undoubtedly aware of prison grievance programs. DOC states that the claimant could have simply asked how to preserve the photos while challenging Sgt. Ferdinand's decision or asked to mail the photos out in one of the envelopes he brought with him; instead, he chose to throw away the photos. DOC notes that if the claimant had not thrown away the photos, they would have been preserved for 30 days while his complaint was reviewed.

DOC also states that the claimant appears to have lied in his submission to the board. DOC points to the fact that in his inmate complaint, the claimant alleged he had 16 photos, while in his Claims Board claim, he alleges he had 25. DOC does not believe the claimant should be allowed to profit from his lies and that this claim should be denied.

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:

That the following identified claimants are denied:

Talgo, Inc.
 Progressive Direct Insurance Co.
 Edward Matthews

That payment of the amounts below to the identified claimants from the following statutory appropriations is justified under § 16.007, Stats:

Martenson & Eisele, Inc. \$1,000.00 § 20.370(4)(ma), Stats.

That payment of the amounts below to the identified claimants from the following statutory appropriations is justified under § 775.05, Stats:

Estate of Forest Shomberg \$97,500.00 § 20.505(4)(d), Stats.

Dated at Madison, Wisconsin this 16th day of May, 2014.

COREY FINKELMEYER
 Chair, Representative of the Attorney General
GREGORY D. MURRAY
 Secretary, Representative of the Secretary of Administration
BRIAN HAGEDORN
 Representative of the Governor
LITHE OLSEN
 Senate Finance Committee
PATRICIA STRACHOTA
 Assembly Finance Committee

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

The committee on **Government Operations, Public Works, and Telecommunications** reports and recommends:

Senate Clearinghouse Rule 14-001

Relating to the use of state buildings and facilities.

No action taken on May 12, 2014.

Referred to joint committee for review of **Administrative Rules**, May 19, 2014.

PAUL FARROW
 Chairperson