STATE OF WEST VIRGINIA

Report

of the

Court of Claims

For the Period from July 1, 1995

to June 30, 1997

By

CHERYLE M. HALL

Clerk

Volume XXI

(Published by authority W.Va. Code § 14-2-25)

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Letter of Transmittal

To His Excellency
The Honorable Gaston Caperton
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 Court of Claims for the period from July one, one thousand nine hundred ninety-three to June thirty, one thousand nine hundred ninety-five.

Respectfully Submitted,

Cheryle M. Hall,
Clerk

Terms of Court

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

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

OPINION ISSUED JULY 3, 1995

TOMMY DIAMOND
VS.
DEPARTMENT OF TAX AND REVENUE
(CC-95-124)

Claimant represents self.
Carol A. Egnatoff, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant, a member of the State Athletic Commission, seeks $597.02 for travel expenses which he incurred as a member of the Commission. The travel expense statements were not processed for payment by respondent in the proper fiscal year; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity and amount of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which the travel expenses could have been paid.

In view of the foregoing, the Court makes an award in the amount of $597.02.

Award of $597.02.

OPINION ISSUED JULY 3, 1995

DIVISION OF HIGHWAYS
VS.
DIVISION OF REHABILITATION SERVICES
(CC-95-46)

Cynthia A. Majestro, Attorney at Law, for claimant.
Carol A. Egnatoff, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of $3,756.36 for telephone charges which were incurred by claimant on behalf of the respondent State agency. These telephone charges were not reimbursed by respondent to the claimant in the proper fiscal year; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity and amount of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which the travel expenses could have been paid.

In view of the foregoing, the Court makes an award in the amount of $3,756.36.

Award of $3,756.36.

OPINION ISSUED JULY 3, 1995

LISA R. EAKLE
VS.
DIVISION OF HIGHWAYS
(CC-91-89)

William C. Garrett, Attorney at Law, for claimant.
Andrew F. Tarr and Cynthia A. Majestro, Attorneys at Law, for respondent.

BAKER, JUDGE:

The claimant Lisa R. Eakle, seeks to establish liability on behalf of the respondent, Division of Highways, for damages arising from an automobile accident in Nicholas County. Ms. Eakle alleges that an ice covered area along Route 39 caused her to lose control of her vehicle whereupon her automobile slid and eventually struck a tree. She also alleges that the ice was a result of a clogged and damaged culvert which caused water to flow across Route 39.

Respondent contends that it did not have notice of any ice on Route 39 prior to claimant's accident. In fact, respondent asserts that it first received notice when two of its employees were driving to work, came upon the scene, and observed claimant's vehicle off the road. They proceeded to the Curtin Substation where they were assigned, and then had a truck dispatched to the accident

scene to treat the ice on Route 39.

The evidence adduced at the hearing on this claim on March 29, 1995, established that on January 3, 1990, at approximately 6:00 a.m., Ms. Eakle was traveling 30 miles per hour in the westbound lane of Route 39 across Fenwick Mountain. She was driving to Summersville and then she intended to continue to proceed to Smithers, Fayette County, where she was attending nursing school. Ms. Eakle was driving a Ford Bronco II registered to her ex-husband, Richard Eakle, and she was the only occupant of the vehicle. As she approached a slight curve in the road, Ms. Eakle unknowingly encountered an ice covered section of road. The vehicle immediately began to slide out of control. ms. Eakle attempted to regain control, but the vehicle spun around, rolled onto its passenger side door, and struck a tree. The vehicle slid approximately 475 feet. The ice covered area was located adjacent to a driveway along Route 39. Photographs of the scene of the accident indicate a culvert pipe was located under the driveway entrance. Ms. Eakle testified that it was cold at the time of the accident, and that there were patches of snow visible on the ground at various locations along Route 39. However, she did not observe any ice or snow on the road except for the one isolated ice covered area at the scene of the accident.

The record reflects that Ms. Eakle had recently divorced Richard Eakle, the owner of the Ford Bronco II. However, Ms. Eakle was entitled to possession of the vehicle until February 1, 1990. although the vehicle was insured, the policy in effect at the time of the accident did not cover any of Ms. Eakle's personal injuries.

Ms. Eakle's father, Dorsey Smith, went to the scene of the accident shortly after it occurred. When he arrived he discovered that the road had already been treated, but some ice and water were still visible on the pavement surface. He was of the opinion that water coming from a ditch where a culvert pipe crossed underneath a driveway to Route 39.

Mr. Smith testified that he worked for the respondent for eleven years and three months before retiring in November 1988. As part of his employment with the respondent, Ms. Smith served as a night watchman and dispatcher. During the winter months, he would answer road complaint calls at the Curtin Substation for the respondent. Mr. Smith recalled that he had received complaints about ice problems in the vicinity of the accident on several occasions while employed by the respondent. Although Mr. Smith is retired from his work with the respondent, he continues to receive road complaint calls at his home. Moreover, on the evening before the accident he received several complaints of ice on the road where the accident occurred. After receiving these calls, Mr. Smith testified that he attempted to telephone the dispatcher at the Curtin Substation, but received no answer.

There was evidence that the night watchman for the respondent at the Curtin Substation, Dwight Ralph Williams, was on duty from 11:00 p.m. on January 2, 1993, to 7:00 a.m. on January 3, 1993, but that he was unaware of any calls during this shift, and was present at the station for the entire shift.

The investigating officer, Wetzel Van Bennett, a Sergeant with the Nicholas County Sheriff's Department, arrived at the scene of the accident at 7:14 a.m. Upon arrival, he estimated the accident at 6:20 a.m. Officer Bennett also observed a very thin layer of ice near the scene of the accident. The icy area was approximately 50 feet long and covered the entire width of the road. Officer Bennett did not observe any water flowing onto the road, and attributed the ice to heavy dew and cold temperature conditions. While en route to the accident from the westerly side of the accident scene, Officer Bennett observed other similar ice covered areas along Route 39.

Respondent established through its witnesses that its first notice of ice on Route 39 was after claimant's accident when two of its Nicholas County employees, Raymond Tolley, a crew leader, and Flavie Boyce, an equipment operator, were proceeding to work at approximately 6:15 a.m. and passed the accident scene. They observed the ice covered area, and Mr. Tolley dispatched a crew to treat the area as soon as he arrived at work. In fact, Flavie Boyce was on e of the employees dispatched to the scene, and he drove the salt truck. Mr. Tolley testified that he has traveled on Route 39 over Fenwick Mountain for eighteen years and he has never observed any drainage problems in the area of claimant's accident. He had traveled through this same area on the evening prior to the accident and to the best of his recollection the road was clear and dry.

In West Virginia, the general rule is that the State is not an insurer of the safety of a traveler on its highways. *Adkins v. Sims,* 130 W.Va. 645, 46 S. E. 2nd 81 (1947). The respondent cannot be expected or required to keep its highways absolutely free of ice and snow at all times, and the presence of an isolated ice patch on a highway during winter months is normally insufficient to charge the respondent with negligence. *McDonald v. Dept. of Highways,* 13 Ct. Cl. (1979). Nevertheless, the respondent does owe a duty to travelers to exercise reasonable care and diligence in the maintenance of highways. *Lewis v. Dept. of Highways,* 16 Ct. Cl. 136 (1986). In order to establish liability on behalf of the respondent for a road defect of this type, a claimant must prove that the respondent had actual or constructive notice of the condition and a reasonable amount of time to take corrective action. *Bartram v. Dept. of Highways,* 15 Ct. Cl. 23 (1983).

In the instant claim, the record does not establish that the ice covered area was caused by a defective drainage culvert of which the respondent had notice. Although the evidence presented by the claimant established that there was an area of ice which covered a portion of Route 39, the evidence did not establish the existence of a defective drainage culvert and that this drainage culvert was the proximate cause of the claimant's accident, or that the respondent had notice of a drainage problem prior to the accident. Respondent's evidence, however, clearly established it did not have actual or constructive notice of a drainage problem or an icy condition at the time or at the location of the claimant's accident. In addition, the evidence presented suggests that the ice was caused by natural weather conditions.

In accordance with the findings of fact and conclusions of law as stated herein above, it is the opinion of the Court that the respondent was not negligent in maintaining Route 39 at the time and location of claimant's accident. Therefore, this claim is denied.

Claim disallowed.

OPINION ISSUED JULY 3, 1995

GOVERNMENT DATA PUBLICATIONS, INC.
VS.
DEPARTMENT OF ADMINISTRATION
(CC-95-140)

Claimant represents self.
Carol A. Engatoff, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $84.95 for a handbook provided to the respondent. The invoice for the handbook was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. In its Answer the respondent admits the validity and amount of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which the invoice could have been paid.

In view of the foregoing, the Court makes an award in the amount of $84.95.

Award of $84,95.

OPINION ISSUED JULY 3, 1995

BOBBY P. HUFFMAN
VS.
DIVISION OF HIGHWAYS
(CC-93-417)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action to recover $432.00 in increment pay which was not paid to him due to an error on the part of respondent. Claimant and respondent submitted this claim upon an agreed stipulation. The parties stipulated the following facts.

Claimant is an employee of the respondent and is entitled to receive incremental increases based upon his years of service with State in accordance with the provisions of W. Va. Code §5-5-1 and §5-5-2. In 1990, 1991, and 1992, Mr. Huffman's increment pay was improperly calculated by respondent. As a result, respondent should have paid claimant $432.00 more than he actually received during those three years. Respondent agrees that claimant should be paid this amount.

Accordingly, the Court makes an award to claimant in the amount of $432.00.

Award of $432.00.

OPINION ISSUED JULY 3, 1995

ROBERT F. MCVAY
VS.
DIVISION OF HIGHWAYS
(CC-94-821)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant, Robert F. McVay and respondent entered into an agreed stipulation of facts and submitted the claim to the Court for determination upon the stipulation. The facts provide as follows:

Claimant and his wife reside near Parkersburg in an area known as Red Hill Road which is also an old part of U. S. 50. A large willow tree located on respondent's right of way was apparently posing a danger to traffic on the road. Claimant as mistakenly informed that the tree was located on his property by an employee of the respondent. In reliance upon this mistaken information, claimant hired Morton Tree Service to cut down the tree and this was done on September 16, 1994. However, respondent's employees determined that the tree was located on its right of way, but did not inform claimant prior to the time that the tree was removed. Claimant incurred the expense of $750.00 to have the tree removed. Respondent agrees that it had the responsibility for removal of the tree and the associated costs.

The Court, having reviewed the stipulation and having determined that the amount incurred by the claimant is owed to him by the respondent, makes an award to the claimant in the amount of $750.00.

Award of $750.00.

OPINION ISSUED JULY 3, 1995

KELLI D. TALBOTT
VS.
ALCOHOL BEVERAGE CONTROL ADMINISTRATION
(CC-95-84)

Claimant represents self.
Carol A. Egnatoff, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of $160.00 for travel expenses which she incurred as an attorney for the respondent state agency. The travel expenses were not submitted to respondent in the proper fiscal year; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity and amount of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which the travel expenses could have been paid.

In view of the foregoing, the Court makes an award in the amount of $160.00.

Award of $160.00.

OPINION ISSUED JULY 3, 1995

TENNANT FUNERAL HOME
VS.
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
(CC-94-422 a, b, & c)

No appearance by claimant.
Carol A. Egnatoff, Assistant Attorney General, for respondent.

PER CURIAM:

The claimant, Tennant Funeral Home, seeks an award of $1,200.00 from the respondent, Department of Health and Human Resources, for services provided through the Indigent Burial Program. This claim was submitted for a decision based upon the allegations in the Notice of Claim and respondent's Answer.

On May 3, 1994 the respondent sent a letter to all licensed funeral homes listed with the Board of Embalmers which stated that Indigent Burial Program would close for all applicants where the decedent's date of death occurred between the dates of May 16, 1994 and June 30, 1994. In June of 1994, the claimant provided burial services for three indigent individuals who were murdered on June 26, 1994. In July of 1994, the claimant applied to the respondent for payment through the Indigent Burial Program.

Despite the respondent's attempt to avoid any liability for burial services provided to indigent individuals, the fact remains that a program was established by which the respondent was to pay for these services. Therefore the Court hereby finds this claim to be a moral obligation of the State, and grants an award to the claimant in the amount of $1,200.00.

Award of $1,200.00.

OPINION ISSUED JULY 5, 1995

MOUSA SHAFAGHAT
VS.
DIVISION OF HIGHWAYS
(CC-92-69)

Claimant represents self.
Andrew F. Tarr and Cynthia A. Majestro, Attorneys at Law, for respondent.

PER CURIAM:

Claimant, Mousa Shafaghat, seeks an award from respondent, Division of Highways, for water damage to his property. Claimant alleges that respondent's failure to maintain a drainage culvert and ditchline has caused water to flow into his home and place of business. In claimant's Notice of Claim, he estimated his damages to be $41,400.00.

At claimant's request this case was continued from two prior hearing dockets. Thereafter, a hearing was set for July 27, 1994. Prior to receiving opening statements, the Court offered claimant the opportunity to continue his claim to obtain legal representation. Claimant appeared not to understand the nature of the proceeding stating "...I am here today not for the hearings. I am here today to protest the government refusal. I asked for the public trial and one taxpayer complaining about government, and government is unfair to conduct that one by himself. I think this case is supposed to hear by public and public make decisions...It doesn't matter whether I have an attorney or not. When the next time, time coming, I would like to have a jury trial and public make the decision."

The Court explained that it is one of limited jurisdiction, with no provision for a jury trial. Following additional discussion, claimant indicated that he wanted to proceed with the hearing. The Court recognized claimant's right to proceed on his own behalf, and commenced the hearing. The testimony and evidence presented at the hearing, including an extensive video tape and photographs submitted by claimant, established the following.

FINDINGS OF FACT

1) Claimant is the sole owner of a house and property located adjacent to Route 9 in Morgan County, near the Pleasant View School. Claimant purchased this property in 1980. Shortly thereafter, claimant discovered water drainage problems on the property.

2) Some time after purchasing the property, claimant built an L-shaped addition to the house.

3) On May 10, 1989, claimant obtained a permit to construct and maintain a commercial approach to connect his driveway to Route 9. The permit specified a 15 inch diameter pipe was to be installed along Route 9 and the commercial approach was to be 20 feet wide.

4) The commercial approach is approximately 25 feet from the house, and the drainage culvert funds parallel to Route 9 and the house.

5) Claimant opened a restaurant, but this was closed by officials from the County Health Department.

6) Claimant's house is situate below a hill which extends behind and adjacent to the house. Water flows from this hillside which is causing erosion to the hillside. The hillside also is adjacent to Route 9 to the north of claimant's property and drainage from the hillside is into a ditch line at the bottom of the hill. The water flows south beside the highway.

7) There is a well located on the hill above claimant's house, and it is connected to the house by a buried water line.

8) The natural drainage pattern for claimant's property causes water to flow in the direction of the house and the ditch line along Route 9.

9) Rain water from the roof of the house is deposited by gutters and downspouts on the ground adjacent to the house. The downspouts may connect to pipes under the ground which carry the water away from the house itself, but it is not apparent how far from the house theses pipes are in the ground.

10) Although respondent has repeatedly cleaned the culvert in front t of claimant's house, there are occasional obstructions to the opening of the culvert pipe opening, many of which have been placed there by claimant.

11) Claimant alleges that water accumulates under the addition built onto claimant's house which is causing damage to the foundation. There also has been damage to various items of personal property.

12) The building on the claimant's property has no provision for crawl space ventilation or drainage on the lower side driveway. There is no way for moisture to escape.

13) There is no ditch line along the driveway to allow surface water to drain away from the building.

14) Surface water off the hill flows toward the building.

15) There are several factors which the Court must consider in this claim such as the topography of claimant's property, the existence of a water well above claimant's house, the location of downspout outlets, the location of the culvert and ditch line, and soil erosion behind claimant's house. All of these factors indicate that the drainage problem involves a combination of hydrologic variables.

16) Considering the complex nature of the drainage problem, claimant may have needed to seek assistance from a civil engineer to help him properly identify and remedy the problem.

17) The only expert testimony presented at the hearing was offered by respondent. Robert Amtower, a licensed civil engineer, explained a drain system was needed around the perimeter of the house and a crawl space was needed under the floor of the house. These modifications would divert water away from the foundation, and provide better ventilation for the house. However, Mr. Amtower was unable precisely to identify the cause of the drainage problem, and acknowledged there were several possible causes of the problem.

18) Respondent provided evidence to support its theory that there is water flowing onto claimant's property form other sources. Respondent also established that it properly maintains the ditch line in front of claimant's property.

CONCLUSIONS OF LAW

1) Although claimant alleges that there was debris is the ditch line causing water to flow onto his property, this fact was not substantiated by the evidence. Where there are many contributing factors causing the drainage problems on claimant's property, this Court has declined to find in favor of the claimant. See *Pandelos d/b/a Esquire Supper Club vs. Div. of Highways*, an Unpublished Opinion dated August 16, 1994, Claim No. CC-91-287.

2) After having reviewed the testimony and evidence in this claim, the Court has determined that although claimant may have a meritorious claim, he has failed adequately to establish that his damages are caused by water from respondent's culvert and ditch line. He also failed to establish that respondent neglected to maintain the ditch line.

3) Claimant failed to introduce any evidence to quantify the damages he has suffered. This Court will not speculate on issues of causation and damages. See *Porter and Caudill vs. Dept. of Highways,* 16 Ct. Cls. 15, 1985.

DECISION

While the Court is not unsympathetic to claimant's difficulty in representing himself, the Court cannot overlook the fact that no negligence has been established on the part of the respondent. In accordance with the findings of fact and conclusions of law as stated hereinabove, the Court is of the opinion to and does deny this claim.

Claim disallowed.

OPINION ISSUED SEPTEMBER 12, 1995

CUYAHOGA EXPLORATION & DEVELOPMENT COMPANY
VS.
DIVISION OF ENVIRONMENTAL PROTECTION
(CC-93-399)

J. Thomas Lane, Attorney at Law, for claimant
Franklin W. Lash, Assistant Attorney General for respondent.

PER CURIAM:

Cuyahoga Exploration & Development Company brought this action to recover $50,000.00 which represents the amount of a performance bond forfeited by the respondent, the Division of

Environmental Protection. Cuyahoga alleges that the Court of Claims is the only forum for it to recover monies taken from it by the respondent, even though the forfeiture was based upon an Order entered by the respondent.

Respondent contends that the Court of Claims lacks jurisdiction over this claim as Cuyahoga had a remedy at law available to it to contest the forfeiture action as Cuyahoga could have pursed an action in circuit court in accordance with the provisions of the State Administrative Procedures Act.

A hearing upon respondent's Motion to Dismiss was held by the Court at which time the following facts were established. Cuyahoga is a company involved in oil and gas production, and, in the course of its operations, it drilled certain oil and gas wells in Pleasants and Wood Counties. In 1986 inspectors for the respondent wrote several violations against these wells. Three years passed while the parties attempted to resolve these violations. Cuyahoga received notice from respondent in 1989 to take curative action to resolve the violations, but Cuyahoga was of the opinion that there would be ongoing discussions. It then received notification that the thirty day appeal period had passed and on June 6, 1989, an Order was entered by respondent to forfeit the performance bond which Cuyahoga had provided for its drilling operations. Cuyahoga contends that it was not granted an opportunity to have an evidentiary hearing prior to the forfeiture of the bond. Further, Cuyahoga contends that the forfeiture represents a windfall to the State of West Virginia.

Respondent asserts that the forfeiture represents punitive action taken by respondent for Cuyahoga's failure to comply with the Order. The Order stated that there was a thirty day appeal period, and therefore, no hearing was necessary. The State of Administrative Procedures Act provided a forum to Cuyahoga and it did not seek redress in accordance with the provisions of that Act. See WV Code 29A-5-4a.

The Court has reviewed the facts and the arguments of counsel at the hearing of the Motion to Dismiss and has determined that although Cuyahoga may have a meritorious claim against the State of West Virginia which may be a moral obligation of the State, this Court does not have jurisdiction over the subject matter of the claim. WV Code 14-2-14 provides that, "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." Cuyahoga had the opportunity to follow the agency guidelines or to proceed in circuit court against the respondent as provided in the State Administrative Procedures Act.

Accordingly, the Court sustains respondent's Motion to Dismiss and Orders the claim dismissed.

Claim dismissed.

OPINION ISSUED SEPTEMBER 26, 1995

KEITH L. ADKINS, SUN S. ADKINS AND KEITH L. ADKINS, II
VS.
DIVISION OF HIGHWAYS
(CC-94-415)

Claimant represents selves.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

The claimants, Keith L. Adkins, Sun S. Adkins, and Keith L. Adkins, II, seek an award of $765.94 from the respondent, Division of Highways, for damage to a 1990 Honda Accord GX, owned by claimant, Keith L. Adkins. On June 30, 1994, claimants Keith L. Adkins and Sun S. Adkins were traveling in the vehicle on Interstate 77 near Ripley, West Virginia. At this time, the wearing surface on Interstate 77 had been removed prior to the installation of a new wearing surface on Interstate 77 had been removed prior to the installation of a new wearing surface. consequently, the surface of Interstate 77 was very rough and loose gravel was present on the road. According to Mr. Adkins, the speed of the surrounding traffic caused the loose gravel to strike the hood and windshield of his vehicle. Mr. Adkins testified that there were no warning signs, flagmen, or construction workers in the area. AS a result of the incident, Mr. Adkins paid $765.94 to repair the hood and windshield of the vehicle. At the time of the accident, Mr. Adkins only maintained liability insurance on the vehicle.

The respondent contends that it should not be held liable for this damage because a private contractor was responsible for this paving project. However, the respondent did not call any witnesses to support this contention, and no evidence was presented to establish the existence or identity of the alleged private contractor.

This Court has held on numerous occasions that the respondent owes a duty to motorists to exercise reasonable care and diligence in maintaining roads under all circumstances. *Hobbs v. Dept. of Highways,* 13 Ct. Cl. 27 (1979); *Lewis v. Dept. of Highways,* 16 Ct. Cl. 136 (1985). After a careful review of the record, the Court finds that the evidence presented by the claimant established the respondent breached its duty, and this breach caused their damage.

Accordingly, the Court makes an award to the claimants in the amount of $765.94.

Award of $765.94.

OPINION ISSUED SEPTEMBER 26, 1995

RUTH E. BOGGS
VS.
DIVISION OF HIGHWAYS
(CC-94-131)

Claimant represents self.
Cynthia A. Majestro, Attorney at Law, for respondent.

PER CURIAM:

The claimant, Ruth E. Boggs, seeks an award of $1,588.69 from the respondent, Division of Highways, for damages to her vehicle, a 1978 Cougar. The evidence adduced at the hearing of this claim on May 17, 1995, established that on January 26, 1994, at approximately 6:00 p.m., Ms. Boggs was driving home from the Rita Mall in Logan County. As Ms. Boggs drove around a curve, her vehicle stuck several rocks in the road, and a large rock fell onto the hood of her vehicle. The impact form the collision immobilized the vehicle and caused it to turn sideways in the road. Shortly thereafter, several other motorists arrived and helped Ms. Boggs move her vehicle from the rockfall area. ms. Boggs reported the incident to law enforcement officials, and then she went to a hospital where she was treated and released. All of Ms. Boggs' medical expenses were paid by insurance. Ms. Boggs traveled though this area several hours before the accident occurred, and she did not observe any rocks on the road at that time. Moreover, Ms. Boggs has never seen any falling rocks in this area before the accident. Ms. Boggs purchased the vehicle approximately one year before the accident for $400.00. She sold the vehicle for $300.00 after the accident.

This Court has held on numerous occasions that the unexplained falling of a rock or boulder onto a highway without a positive showing that the respondent knew or should have known of a dangerous condition posing injury to person or property is insufficient to justify an award *Hammond v. Dept. of Highways,* 11 Ct. Cl. 234 (1977); *Coburn v. Dept. of Highways,* 16 Ct. Cl. 68 (1986); and *Rose v. Division of Highways,* unpublished opinion issued October 15, 1990, CC-90-88. After a careful review of the record, the Court has determined that there was no evidence to establish that the respondent had notice of the rockfall. Therefore, the Court must deny this claim.

Claim disallowed.

OPINION ISSUED SEPTEMBER 26, 1995

JAMES M. COLE AND OREDA S. COLE
VS.
DIVISION OF HIGHWAYS
(CC-91-307)

Andrew F. Tarr and Cynthia A. Majestro, Attorneys at Law, for respondent.
Larry D. Taylor, Attorney at Law, for claimants.

BAKER, JUDGE:

The claimants, James M. Cole and Oreda S. Cole, seek an award of $82,500.00 from the respondent, Division of Highways, for damages arising from a collision between an automobile and a rock slide along U.S. Route 119 in Kanawha County. The claimants allege that the respondent was aware of the potential for a rock slide due to road condition complaints and previous rock slides in the vicinity of the accident. The claimants also allege that the respondent's failure to act upon these complaints to eliminate the potential for rock slides was the proximate cause of the accident. The respondent contends that it had been unable to correct this area for the problem of rock slides because funds had not been available to perform the work necessary to eliminate the potential for rock slides. However, respondent had installed falling rock signs to warn motorists of the possibility of rock slides.

The evidence at the hearing of this claim on June 21, 1995, established that claimant's accident occurred on U. S. Route 119 approximately four-tenths of a mile south of county Route 57, also known as Blue Creek Road. At the location of the accident, U. S. Route 119 is a two-lane road with a black top surface. The northbound lane is twelve feet one inch wide and the southbound lane is twelve feet six inches wide. The berm adjacent to the northbound lane varies between seven and thirteen feet in width. The berm adjacent to the southbound lane varies between two and three feet in width. The pavement markings provide a broken yellow line for the northbound lane and a solid yellow line for the southbound lane. The line of sight for vehicles approaching the accident site from the south is two-tenths of a mile, and the line of sight is four-tenths of a mile for vehicles approaching from the north. There are several traffic signs located in the general vicinity of the accident. A rock fall sign, a slick road sign, and a speed zone ahead sign are located within a distance of one-tenth of a mile south of the accident location. Each sign is positioned to warn motorists traveling in the northbound lane.

On February 15, 190, at sometime after 3:00 a.m., Mr. Cole was driving north on U. S. Route 119. He was driving a 1987 Chevrolet Celebrity owned by his mother, Oreda S. Cole. He was taking his friend, Norman Buffington, home after they had eaten breakfast at the Country Kitchen in Mink Shoals. Although Mr. Cole was familiar with U. S. Route 119, he had not driven in the particular area of the accident scene on Route 119 on a regular basis. On that same morning, at approximately 4:09 a.m., Deputy T. W. Shannon of the Kanawha County Sheriff's Department had received notice of a rock slide on U. S. Route 119. Deputy Shannon responded from the Clendenin area, and arrived at the location of the rock slide at 4:17 a.m. Weather conditions were clear and dry. Deputy Shannon

parked his police cruiser across the road to block traffic. However, additional rocks began falling from the hillside, and he moved the police cruiser onto the berm of the road south of the rock slide area. According to Deputy Shannon, the police cruiser's flashing lights were on and it was parked along the edge of the northbound lane facing south. At approximately 4:22 a.m., while Deputy Shannon was removing flares from the trunk of his vehicle, he observed the headlights of the vehicle driven by Mr. Cole. He was approaching Deputy Shannon from the south. Deputy Shannon attempted to warn Mr. Cole by waving his flashlight at the vehicle several times, but the vehicle did not slow down. Mr. Cole drove past Deputy Shannon and into the rock slide where the vehicle struck a large boulder and rolled over. As a result of the collision, Mr. Buffington was killed, Mr. Cole was injured, and the vehicle was severely damaged.

The posted speed limit at the time and the location of the accident was 55 miles per hour, and Deputy Shannon estimated Mr. Cole was traveling 50 miles per hour. Mr. Cole testified that he slowed down to 40 miles per our as he approached the police cruiser. However, he continued to drive past the police cruiser because he thought the police had pulled someone over for a traffic violation. A road maintenance crew for the respondent arrived between 20 to 30 minutes after the accident, and began removing the rocks and debris from the road.

It is undisputed that rock slides have been continued to be a recurring problem along U. S. Route 119. Calvert Mitchell, an assistant county supervisor for the respondent, testified that there are several areas along U. S. Route 119 where rock slides occur. In addition, there are numerous rock fall signs along U. S. Route 119 including one near the location of the accident. Mr. Mitchell stated that a rock fall sign near the location of the accident has been in place for years and serves as a warning sign for northbound motorists.

The respondent's contention that funds were not available to correct the rock slide problem along U.S. Route 119 was supported by Carl Thompson, a district engineer for the respondent. He described the process counties were required to follow to obtain funds to correct rock slide areas at the time of the accident. Mr. Thompson testified that during February of 1990, the districts and counties did not have any money set aside for repairing rock slide areas. In order to obtain funds, counties were required to submit requests for corrections to their district office. The district office would determine the priorities for all of the requests and submit them to the central office. Mr. Thompson added that, as a practical matter, some projects would receive funding and others would not.

The basic approach applied by this Court when evaluating a claim resulting from a rock slide is stated in *Hammond v. Dept. of Highways,* 11 Ct. 234 (1977). In Hammond, the Court held that the State is not a guarantor of the safety of travelers on its highways, but is has a duty to exercise reasonable care while maintaining roads under all of the circumstances. Under this standard, a claimant must prove that the respondent had notice of the dangerous condition and, further, that respondent had a reasonable opportunity to correct the dangerous condition in order to establish negligence on the part of the respondent.

The Court has addressed the issues of what constitutes notice and a reasonable opportunity

to repair with respect to rock slide accidents in *Smith v. Dept. of Highways,* 11 Ct. Cl. 221 (1977) and *Varner v. State Road Commission,* 8 Ct. Cl. 119 (1970). In each of these claims the Court determined that the respondent had notice of the potential for rock slides through its knowledge of other rock slides near the accident locations and numerous complaints about the driving conditions. However, the respondent did not make any attempts to correct the rock slide problem, and merely cleaned the ditches and removed the fallen rocks on a routine basis. In finding the respondent liable in *Smith* and *Varner*, the Court stated that "when the [respondent]...knows or should have known that an unusually dangerous condition exists, there is a duty to inspect and to correct the condition within the limits of the funds appropriated by the Legislature..." (emphasis added).

In the instant claim, the record reveals a history of sporadic rock slides in the general vicinity where the accident occurred. The evidence also indicates that the respondent was aware of this problem, but was unable to eliminate the danger of rock slides due to the lack of funds to perform the work. While the Court is not unmindful of the decisions in *Smith* and *Varner*, the evidence in this claim reveals that the respondent had a process of assigning priorities to rock slide locations to establish an efficient plan to correct problem areas with the limited funds available. Although this accident was unfortunate, the essence of the respondent's duty to exercise reasonable care with respect to road maintenance precludes the idea that the decision to repair one area rather than another is an act of negligence when only limited funds are available. Moreover, as a practical matter, it is financially impossible for the respondent to bear the burden of having to correct immediately every area in West Virginia where there is a potential for rock slides.

In West Virginia, the mountainous terrain and numerous rural communities require that roads be constructed through areas which will naturally experience rock slides. To reduce the risk of injury to motorists, the respondent maintains rock fall warning signs at numerous locations across the State. Although these signs do not correct the underlying problem, they do serve as a warning to motorists until the funds can be obtained to correct the rock slide problem. Therefore, in the absence of evidence demonstrating an abuse of discretion in determining which rock slide areas should be corrected, the Court finds that the respondent's actions did not breach its duty to exercise reasonable care in this claim.

After a careful consideration of the evidence contained in the record, the Court is not persuaded that the claimant has established by a preponderance of the evidence that the respondent was negligent. In accordance with the findings of fact and conclusions of law as stated herein above, the Court is of the opinion to and does deny this claim.

Claim disallowed.

OPINION ISSUED SEPTEMBER 26, 1995

GINGER B. COMPTON

VS.
DIVISION OF HIGHWAYS
(CC-94-550)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

The claimant, Ginger B. Compton, seeks an award of 4746.61 from the respondent, Division of Highways, for damage to her 1994 Chevrolet Cavalier. On May 25, 1994, at approximately 8:00 a.m., Ms. Compton was driving between 45 to 50 miles per hour in the northbound lane of Route 54 in Wyoming County. The weather was clear and sunny, and the road was dry. According to her testimony, Ms. Compton observed a large truck approaching in the oncoming lane. In order to avoid a collision with the truck, she drove her vehicle along the white line marker on the right side of her lane. At this time, Ms. Compton's vehicle struck a broken section of pavement which resulted in damage to her vehicle. Receipts totaling 4746.61 were entered into evidence to support Ms. Compton's claim. Ms. Compton has full coverage insurance on the vehicle with a deductible of $500.00. Although Ms. Compton travels Route 54 five to six days per week, she was unaware of this road defect.

The Wyoming County maintenance supervisor for the respondent, Oliver Stewart, described Route 54 as a priority one road which has gravel shoulders. Although Mr. Steward is responsible for scheduling maintenance work along Route 54, he was unaware of a problem at the scene of the accident prior to May 25, 1994. Mr. Stewart testified that shoulder work was performed along Route 54 during February and March of 1994.

As a general rule, the respondent has a duty to maintain the berm of shoulder of a highway in a reasonably safe condition for use when the occasion requires. Liability may ensue when a motorist is forced into the berm in an emergency or otherwise necessarily uses the berm of the highway and it fails. *Sweda v. Dept. of Highways,* 13 Ct. Cl. 249 (1980). See also *Hinkle v. Division of Highways,* unpublished opinion issued December 10, 1990, CC-89-97.

In the instant claim, Route 54 is a high priority road in Wyoming County. The photographs of the scene of the accident indicate there is a substantial amount of space along Route 54 where respondent can create and maintain a berm with relatively little effort. Moreover, from Ms. Compton's testimony her use of the berm appears to have been reasonable and necessary in light of the circumstances. Therefore, the Court finds that respondent was negligent in its maintenance of the berm of Route 54 on the date of claimant's accident, and, further, that this negligence resulted in damage to Ms. Compton's vehicle. Accordingly, the Court makes an award to the claimant in the amount of the insurance deductible which is $500.00.

Award of $500.00.

OPINION ISSUED SEPTEMBER 26, 1995

LINDA SUSAN DENT
VS.
DIVISION OF HIGHWAYS
(CC-94-156)

Claimant represents self.
Cynthia A. Majestro, Attorney at Law, for respondent.

PER CURIAM:

The claimant, Linda Susan Dent, seeks an award of $227.70 from the respondent, Division of Highways, for damage to her vehicle, a 1994 Nissan. The damage occurred on Sunday, February 20, 1994, while Ms. Dent was traveling on a section of Route 60 located two miles west of the Putnam-Cabell County line. Ms. Dent was driving between 40 and 45 miles per hour when her vehicle struck a hole in the pavement. According to Ms. Dent, there were numerous holes in the pavement and berm along Route 60, and the hole which her vehicle struck extended from the berm into the paved portion of the road. Ms. Dent estimated that she traveled along this road once each week. At the time and location of the accident Route 60 was a two lane road, and no signs were present to warn motorists of the holes. As a result of the accident, the two passenger side tires of the vehicle were damaged, and the vehicle had to be towed to Ms. Dent's home.

Charles M. King, a crew chief for the respondent, testified that maintenance crews were engaged in snow removal and ice control operations during the week before the accident. In his opinion, the harsh winter weather and snow removal operations resulted in substantial deterioration of the pavement surfaces on a variety of roads. Although these conditions were not unique to Route 60, maintenance crews patched this road on a regular basis with cold mix material. Mr. King also testified that he was aware of a pavement problem at the location of the accident. However, this are was patched prior to the accident, and he was unaware of this particular hole until February 22, 1994.

This court has consistently followed the rule that the State is neither an insurer nor a guarantor of the safety of persons traveling on its highways. *Adkins v. Sims,* 130 W.Va. 645, 46 S. E. 2d 81 (1947). For the respondent to held liable for damage caused by a defect in the road, it must have had notice of the defect and a reasonable opportunity to take corrective action. *Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 91986). *Pritt v. Div. of Highways,* Unpublished opinion issued April 4, 1995, CC-94-26.

This Court is well aware of and takes official notice that the winter months of January and February 1994, were months with severe weather conditions. These conditions contributed to the severe deterioration of many of the roads and highways throughout the State. In the instant claim, the

record indicates that the respondent had patched the area where the accident occurred prior to February 20, 1994, and was unaware of this hole at the time of the accident. Therefore, the Court finds that the claimant has not established negligence on the part of the respondent. Accordingly, it is the decision of the Court that this claim must be denied.

Claim disallowed.

OPINION ISSUED SEPTEMBER 26, 1995

E & M PRODUCTS, INC.
VS.
DEPARTMENT OF ADMINISTRATION
(CC-95-164)

No appearance by claimant.
Carol A. Egnatoff, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of $25.00 for inspection and testing of a fire alarm system. The invoice for the service was not processed for payment in the proper fiscal y ear; therefore, the claimant has not been paid. In its Answer, respondent admits the validity and amount of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which the invoice could have been paid.

In view of the foregoing, the Court makes an award in the amount of $25.00.

Award of $25.00.

OPINION ISSUED SEPTEMBER 26, 1995

BRIAN SCOTT MILLER
VS.
DIVISION OF HIGHWAYS
(CC-95-154)

Claimant represents self.

Andrew J. Tarr, Attorney at Law, for respondent.

PRE CURIAM:

Claimant, Brian Scott Miller, brought this action to recover monetary damages for personal injuries he suffered when he injured his leg in the grill of a broken storm drain on Oakwood Road. Claimant and respondent agreed to submit this claim upon a stipulation filed with the Court on July 14, 1995. The stipulation presented the following facts to the Court.

The claimant was jogging on Oakwood Road in Kanawha County on June 26, 1993, when he injured his leg on the grill of a storm drain which was broken on this date. The storm drain grill is maintained by respondent. Claimant agrees to accept $1,000.00 as full settlement for the injuries to his leg.

The Court, having reviewed the stipulation, is of the opinion that respondent was negligent in the maintenance of the storm drain grill located on Oakwood Road on the date of claimant's accident; therefore, the Court makes an award to claimant in the amount of $1,000.00.

Award of $1000.00.

OPINION ISSUED SEPTEMBER 26, 1995

EDDIE E. NAPIER
VS.
DIVISION OF HIGHWAYS

(CC-94-823)

Claimant represents self.
Cynthia A. Majestro, Attorney at Law, for respondent.

PER CURIAM:

Claimant Eddie Napier brought this action to recover for damages to his vehicle and for personal injuries he incurred when he as driving on W. Va. Secondary Route 52/26 in Wayne County and his vehicle struck a tree which was across the road. This claim was submitted to the Court upon an agreed stipulation of the facts by the claimant and the respondent, Division of the Highways. The stipulation provided the following facts to the Court.

The claimant is the owner of a 1992 Chevrolet Lumina which the claimant was driving on November 21, 1994, on W. Va. Secondary Route 52/26, also known as Ardel Road in Wayne County. This road is owned and maintained by the respondent had notice that a tree was across the road on this date. Further, respondent failed to take action and remove this tree from the roadway. Claimant,

while driving on Ardel Road on this date, came upon the tree at which time his vehicle struck the tree causing damages to the vehicle and resulting in personal injuries to the claimant. Claimant had no opportunity to avoid the collision. He incurred expenses in the amount of $2,251.05 to effect repairs to his vehicle; $300.00 in medical bills; and $120.60 in lost wages, for a total amount of damages of $2,671.65.

The Court, having reviewed the stipulation of facts, has determined that respondent was negligent in its maintenance of Route 52/26 on the date of claimant's accident and that respondent is liable for claimant for the expenses which he incurred as a result of the accident.

Accordingly, the Court makes an award to the claimant in the amount of $2,571.65.

Award of $2,671.65.

OPINION ISSUED SEPTEMBER 26, 1995

SHARON HESS AND DEBRA L. PAULEY
VS.
DIVISION OF HIGHWAYS
(CC-94-707)

Claimants represent selves.
Cynthia Majestro, Attorney at Law, for respondent.

PER CURIAM:

Claimants Sharon Hess and Debra L. Pauley, seek an award of $318.41 from the respondent, Division of Highways, for damages to a 1978 Ford Granada owned by Ms. Hess. This claim came before the Court for hearing on February 23, 1995, and two witnesses for the claimants were unable to attend the hearing. Therefore, the claim was continued until July 15, 1995, at which time the Court heard the evidence which established the facts in the claim.

On January 5, 1994, at 1:00 p.m., Ms. Pauley was driving Ms. Hess' vehicle across the Seventh Avenue Bridge in Charleston, Kanawha County, when the vehicle unexpectedly struck a hole in the bridge. According to Ms. Pauley, the road conditions were slushy, due to a large amount of melting snow, and she was traveling at 25 miles per hour. The hole was between eight and ten inches deep. However, Ms. Pauley was unable to see the hole because it was filled with sludge. As a result of the accident, the vehicle lost a hubcap and sustained damage to the tire and rim. At the time of the accident, Ms. Pauley was in the process of buying the vehicle from Ms. Hess for 4350.00. Ms. Pauley sold the vehicle for $325.00 after the accident.

Joseph Weekley, a crew leader for the respondent, testified that his responsibilities include

routine road maintenance and repair in the vicinity of the accident. According to Mr. Weekley, road crews were engaged in snow and tree removal work on January 4, 5, and 6, 1994. During this three day period on patching work was performed since every crew member was needed for clearing roads.

This Court is well aware of the takes official notice of the fact that January 1994, was a month of severe weather which significantly impacted the condition of all the roads and highways throughout the State. The snow and rain created dangerous driving upon all of the roads and highways. The respondent, by necessity, concentrated its maintenance efforts upon snow and ice removal activities which had to take priority over all other maintenance activities.

In accordance with the findings of facts as stated hereinabove, the Court has determined that the claimants have not established any negligence on the part of the respondent at the time of Ms. Pauley's accident. Therefore, this claim is denied.

Claim disallowed.

OPINION ISSUED SEPTEMBER 26, 1995

DENNIS A. RICHARDS
VS.
DIVISION OF HIGHWAYS
(CC-94-329)

Claimant represents self.
Cynthia A. Majestro, Attorney at Law, for respondent.

PER CURIAM:

The claimant, Dennis A. Richards, seeks an award of $1,233.58 from the respondent, Division of Highways, for damage to his vehicle, a 1986 four wheel drive GMC Jimmy. The damage occurred as a result of a collision between the vehicle and a rock in the road.

The evidence presented at the hearing of this claim on July 25, 1995, established that Mr. Richards was driving in the northbound lane of Route 10 near Stone Branch in Logan County. the roadway was wet and slick, and Mr. Richards was traveling under 30 miles per hour when he observed a rock in the road. Mr. Richards was attempted to drive around the rock, but oncoming traffic prevented him from successfully avoiding the rock. The rock was located in Mr. Richards' lane, and it was approximately three feet from the edge of the road and one foot high. As a result of the accident, Mr. Richards' vehicle sustained damage to the passenger side running board, door, leaf spring, rims and tires. Mr. Richards testified that his vehicle was insured, but his insurance policy

contained a $500.00 deductible.

Curley Belcher, an assistnat county supervisor for the respondent, testified that Route 10 is a two lane road which is approximately 20 feet wide. Mr. Belcher arrived at the location of the accident shortly after it occurred. According to Mr. Belcher, he had received a call concerning a rock slide along Route 10 and was proceeding to the slide area when he observed Mr. Richards' truck along the road. Mr. Belcher estimated the rock weighed between 150 and 200 pounds.

This Court has consistently held that the unexplained falling of a rock or boulder onto a highway without a positive showing that the respondent knew or should have known of the dangerous condition posing injury to person or property is insuffient to justify an award. *Hammond v. Dept. of Highways,* 11 Ct. Cl. 234 (1977); *Coburn v. Dept. of Highways,* 16 Ct. Cl. 68 (1986).

In the instant claim the record reveals that the respondent was aware of the rock slide, and it immediately dispatched an employee to correct the problem. Although the respondent was unable to correct the problem before Mr. Richards' accident, it had taken reasonable steps to remove the rock from the road. Although the Court does not wish to minimize the loss suffered by Mr. Richards, the facts of this claim do not merit a finding of negligence on behalf of the respondent. Therefore, for the reasons stated above, this claim is denied.

Claim disallowed.

OPINION ISSUED SEPTEMBER 26, 1995

VERNIE SALMONS, FRANKIE SALMONS, JR.,
AND DONALD MITCHELL SALMONS
VS.
DIVISION OF HIGHWAYS
(CC-91-253)

KENNY SALMONS, ADMINISTRATOR OF THE
ESTATE OF MINERVA BRADLEY
VS.
DIVISION OF HIGHWAYS

(CC-92-403)

James C. Stebbins and James T. Cooper, Attorneys at Law, for claimants.
Andrew F. Tarr and Cynthia A. Majestro, Attorneys at Law, for respondent.

STEPTOE, JUDGE:

These claims were filed as a result of a single vehicle accident on U. S. Route 52 in Wayne County, which was allegedly caused by the negligence of the respondent. Prior to hearing, the claims were bifurcated upon issues of liability and damages. Since the facts of each claim arise from the same accident, the claims were consolidated for hearing upon the issue of respondent's liability.

The evidence adduced at the hearing of these claims on April 25, 1995, established the following facts. U. S. Route 52, also known as the Tolsia Highway, is a two lane high priority road which receives a substantial amount of coal truck traffic. Each lane is twelve feet wide, and adjacent to each side of the road is a paved berm approximately ten feet wide. On December 17, 1990, about 2:00 p.m., Vernie Dean Salmons, was driving north on U. S. route 52 in a 1985 Pontiac 6000, owned by her son, Donald Mitchell Salmons. Minerva Bradley was the only other occupant of the vehicle, and she was in the front passenger-side seat. The temperature was warm from December, and the road was clear of snow and ice. However, the pavement service was wet due to rainy weather. While Ms. Salmons was proceeding between 40 and 45 miles per hour, the vehicle struck a hole in the pavement. Ms. Salmons immediately lost control of the vehicle, and it slid into an embankment. According to Ms. Salmons, she was watching the road and was undistracted by Ms. Bradley, but she did not observe the hole before impact. The hole was located approximately four miles north of Fort Gay, and it extended across the entire north bound land of U. S. Route 52.

At approximately 3:00 p.m., Corporal Roger G. Wade of the West Virginia State Police arrived at the scene of the accident. He prepared an accident investigation report which evaluated the damage to the wrecked vehicle and the existing road conditions. The report indicated that the pavement surface was wet and rough. In addition, the report also indicated that rough road signs were located approximately 200 yards from the hole in the pavement. Corporal Wade testified that from his investigation he deduced that the vehicle was exceeding the safe speed from the existing driving conditions. While being cross-examined, Corporal Wade also testified that he believed a road sign would have served as an adequate warning to motorists of the road's condition. However, the record is unclear whether Corporal Wade believed the signs present at the scene of the accident were adequate to warn motorists.

The only other witnesses who observed the hole after the accident were the sons of Ms. Salmons, Kenny Ray Salmons and Donald Mitchell Salmons. Kenny Ray Salmons arrived at the scene of the accident at approximately 5:30 p.m. He examined the hole and estimated it was between five and six inches deep. Donald Mitchell Salmons testified that he used a ruler to measure the hole, and he determined that it was nine inches deep at its lowest point. Although Corporal Wade did not take any quantitative measurements of the hole, he testified the hole did not appear to be nine inches

deep.

A road maintenance crew for the respondent was dispatched to the scene of the accident sometime between 4:00 p.m. and 6:00 p.m. on December 17, 1990. Upon their arrival, the pavement surface was repaired using cold mix patching material.

The claimant called, as witnesses, several employees of the department of transportation for the Wayne County Board of Education in order to establish the respondent had notice of the road defect prior to Ms. Salmon's accident. This testimony indicated that a school bus driver reported a hole, located near the scene of Ms. Salmon's accident, to the Wayne County bus garage on the morning of December 17, 1990. At this time, the department had a procedure whereby it would inform the respondent of any road hazards reported to the bus garage. However, this procedure was in its early stages of implementation, and none of the witnesses was certain whether the procedure was followed for this particular hole. Moreover, employees for the respondent testified they were uncertain whether any complaints had been received concerning this hole prior to the accident.

In West Virginia the law governing claims resulting from road defects is well established. The duty owed by the respondent to motorists is one of reasonable care and diligence in the maintenance of highways under all circumstances. *Lewis v. Dept. of Highways,* 16 Ct. Cl. 136 (1986); *Hobbs v. Dept. of Highways,* 13 Ct. Cl. 27 (1979). However, this duty does not make the respondent a guarantor of the safety of motorists on its highways. In order to establish liability on behalf of the respondent for a road defect, the claimant must prove the respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Mounts v. Dept. of Highways,* 16 Ct. Cl. 7 (1985).

After carefully reviewing the record, the Court is of the opinion that the claimants have not established by a preponderance of the evidence that the respondent had actual notice of the road defect involved in this accident. Nevertheless, this does not end our analysis of this claim. The Court has, in past decisions, found the respondent liable for damages resulting from a road defect even where actual notice has not been established. However, the facts must indicate the respondent had constructive notice of the road defect. See *Gillispie v. Dept. of Highways,* 16 Ct. Cl. 148 (1987); *Hammon v. Dept. of Highways,* 16 Ct. Cl. 127 (1986); *Jordan v. Dept. of Highways,* 16 Ct. Cl. 129 (1986); and *Priddy v. Dept. of Highways,* 16 Ct. Cl. 133 (1986). The general principle applied in these claims is that the size of a hole or road defect is indicative of its existence for an extended period of time. Since large road defects, by their nature, present a more recognizable risk to motorists, they should be discovered and corrected through the respondent's exercise of reasonable maintenance practices. Therefore, in claims which involve unusually large road defects the respondent can be considered to have had constructive notice of the defect prior to the accident.

In the instant claim, the testimony regarding the size of the hole is contradictory. The photographs of the hole clearly show it spanned the entire northbound lane of U. S. Route 52 and varied in depth. While the photographs alone do not establish the existence of the hole for an extended period, they do illustrate a large hole which may have developed over several days. However, the respondent countered this evidence with testimony regarding recent maintenance work

performed on U. S. Route 52, and expert testimony which indicated that the pavement defect developed shortly before the accident.

In November of 1990, an extensive skip pavement project took place along U. S. Route 52. The scope of this operation included the use of a roto-mill to remove sections of pavement, where deteriorated, for a depth of two inches. After the deteriorated surface was removed, a new wearing surface material was placed over the existing material. The project supervisor, Phillip Jackson, identified the scene of the accident as the same area where a skip paving operation have been performed. Mr. Jackson is employed by the respondent as the district two resurfacing coordinator, and has worked for the respondent for 28 years. After Mr. Jackson examined several photographs of the hole, it was his opinion that the photographs illustrated a "mat failure" rather than a typical hole in the pavement. Mr. Jackson believed this type of failure could have been the result of a weak bond between the new wearing surface material and the existing remaining pavement. In addition, the bond failure between the two materials could have been caused by moisture at the time of construction or stresses placed on the surface from heavy loads on the highway. Regardless of the precise reason for the bond failure, Mr. Jackson believed that since the failure occurred in a section of road which have been roto-milled, it was unlikely the disturbed area was more than two and a half inches deep. Based upon his past experiences on skip paving projects, the amount of heavy truck traffic on U. S. Route 52, and the photographs of the pavement defect, it was Mr. Jackson's opinion that this particular failure could have developed in a matter of hours.

After evaluating the evidence presented in this claim, the Court has determined that it would be speculative to find that the road defect involved in this claim was present for a period of time, prior to December 17, 1990, sufficient to give the respondent constructive notice of its existence and to effect its repair. In accordance with the finding of facts as stated above, the Court is of the opinion that the claimants failed to establish, by a preponderance of the evidence, that the respondent was negligent.

Claims disallowed.

OPINION ISSUED SEPTEMBER 26, 1995

JANET T. SURFACE
VS.
DIVISION OF ENVIRONMENTAL PROTECTION
(CC-95-110)

No appearance by claimant.
Carol A. Egnatoff, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of $502.25 for court reporting services provided to the respondent. The invoices for the services were not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. In its Answer, respondent admits the validity and amount of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which the invoices could have been paid.

In view of the foregoing, the Court makes an award in the amount of $502.25.

Award of $502.25.

OPINION ISSUED SEPTEMBER 26, 1995

SHANNON VANCE AND DOROTHY VANCE
VS.
DIVISION OF HIGHWAYS
(CC-94-585)

Glyn Dial Ellis, Attorney at Law, for claimants.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

The claimants, Shannon Vance and Dorothy Vance, seek an award from the respondent, Division of Highways, for damages arising from a traffic accident on September 1, 1994. Shannon Vance is the son of Dorothy Vance and the record owner of the damaged vehicle, a 1988 Chevrolet S-10 pickup truck. The accident occurred at approximately 3:10 a.m. while Mr. Vance was driving himself to work on Route 10 in Logan County. The roadway was wet, and Mr. Vance was traveling at approximately 35 miles per hour. After Mr. Vance drove over the crest of a hill, he observed a fallen tree in the road. The tree was between 20 and 30 feet ahead of his vehicle. Mr. Vance applied the brakes to decelerate, but the vehicle skidded into the tree. The tree was approximately 40 feet long, and it blocked half of Mr. Vance's lance and the entire oncoming lane of the road. As a result of the accident, the vehicle sustained damages and is considered a total loss.

Curley Belcher, an assistant supervisor for the respondent, described Route 10 as a top priority road in Logan County. Mr. Belcher received notice of the fallen tree from law enforcement officials shortly after Mr. Vance's accident. Road crews were dispatched to the scene of the accident and removed the tree. According to Mr. Belcher's testimony, the respondent did not have any notice about the fallen tree prior to the accident.

The State is neither an insurer nor a guarantor of the safety of persons traveling on its highways. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E. 2d 81 (1947). For the respondent to be held liable for damage caused by debris on the roads, it must have had actual or constructive notice of the particular hazard which caused the accident and a reasonable opportunity to remove it. In the claim of *Britt v. Dept. of Highways,* 14 Ct. Cl. 378 (1983), the Court refused to grant an award where there was no evidence that the respondent had notice of a tree which had fallen across a road, or that the tree had been across the road for a prolonged period of time. After a careful review of the record in this claim, the Court can find no evidence which establishes the respondent had actual or constructive notice of the fallen tree prior to Mr. Vance's accident. Although the accident was unfortunate, without notice of the hazard and a reasonable opportunity to remove it, the respondent cannot be held liable.

In accordance with the findings of fact and conclusions of law as stated hereinabove, the Court is of the opinion to and does deny this claim.

Claim disallowed.

OPINION ISSUED SEPTEMBER 26, 1995

PHYLLIS N. VOORHEES
VS.
DEPARTMENT OF AGRICULTURE
(CC-95-184)

Claimant represents self.
Carol A. Egnatoff, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant, an employee of the respondent, seeks $972.00 which represents the portion of her increment increase which she did not receive during a ten year period when the amount of her increment increase was incorrectly calculated by respondent. In its Answer, the respondent admits the validity and amount of the claim, and states that there were sufficient funds expired in the appropriate fiscal years with which the correct amount of increment increase could have been paid to the claimant.

In view of the foregoing, the Court makes an award in the amount of $972.00.

Award of $972.00.

OPINION ISSUED SEPTEMBER 26, 1995

WEST VIRGINIA HOSPITALS, INC.
VS.
DIVISION OF CORRECTIONS
(CC-95-198)

No appearance by claimant.
Carol A. Egnatoff, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for a decision based upon the allegations contained in the pleadings.

The claimant seeks payment of $55,437.14 for medical services rendered to inmates in the Huttonsville Correctional Center, a facility of the respondent. In support of its claim, the claimant submitted five invoices for medical services with its Notice of Claim. In its Answer, the respondent asserts that only two of the five invoices are unpaid, and it admits the claim in the amount of $17,130.40. Subsequently, the claimant contacted the Court and indicated it would accept $17,130.40 as full and complete pavement.

In view of the foregoing, the Court makes an award to the claimant in the amount of $17,130.40.

Award of $17,130.40.

OPINION ISSUED OCTOBER 31, 1995

ARCHIE B. COAL COMPANY AND DAVID BAILEY
VS.
DIVISION OF ENVIRONMENTAL PROTECTION
(CC-94-59)

Walter L. Wagner, Jr., Attorney at Law, for claimants.
Carol A. Egnatoff, Assistant Attorney General, for respondent.

WALTER, JUDGE:

Archie B. Coal Company and David Bailey, its Treasurer, Claimants,[1] seek an award from the Division of Environmental Protection, Respondent,[2] in the face amount of a bank certificate of deposit ("CD") posted as a collateral bond and used to satisfy the bonding requirement for the transfer of an existing surface mining permit to another entity.

Upon revocation of said payment and forfeiture of the bond, Respondent, the holder thereof, surrendered said CD to the issuing bank and the face amount thereof was ultimately paid by the issuing bank to Respondent.

From the evidence at the hearings on November 18, 1994, and February 22, 1995, it appears that prior to August 21, 1986, Surface Mining Permit No. S-98-83 for a surface mining site not to exceed 135 acres near Julian, in Scott District, Boone County, West Virginia, had been issued or transferred to and was held by Big Tally Coal Corporation ("Big Tally") as the permit holder, and that in connection with said permit Claimants obtained a CD from 2nd Avenue Bank of South Charleston, South Charleston, West Virginia, later Shawnee Bank, ("issuing bank") and posted same as a collateral bond, which was used to satisfy all or part of the bonding requirements for the issuance or continuance of said permit.

The CD initially used was identified as No. 1519. It was replaced from time to time and identified by other numbers, including No. 1676, and eventually as No. 1872.

By letter dated May 2, 1986, Claimants requested that the CD, then No. 1519, "should continue to be used for surface mining bonding purposes on said permit when and as this permit is transferred to McClure excavating [sic]". By letter dated June 11, 1986, Claimants requested that said CD, then No. 1676, "should continue to be used for surface mining bonding purposes on said permit when and as this permit is transferred to McClure Excavating."

As of August 21, 1986, said permit was transferred by Respondent to McClure's Excavating, Incorporated [sic] ("McClure"), which became the permit holder ("permittee)".

On October 7, 1986, Claimants hand delivered a letter of the same date to Respondent attempting to cancel and void their letter of June 11, 1986, and stating that said CD was not to be used in any way or manner that would continue to bond the property originally permitted by permit No. S-98-83 or any successor permit that may have been issued. There is a typewritten note on the face of

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[1]Archie B. Coal Company and/or David Bailey, its Treasurer, will be referred to herein as Claimants.

[2]Since 1991 the Division of Environmental Protection is the state agency that regulates surface mining. From 1985 to 1991 that role was performed by the Department of Energy. Both agencies will be referred to herein as Respondent.

said letter signed by Thomas V. Rushman, Deputy Commissioner, dated October 7, 1986, as follows:

> Mike Muncy and David Bailey hand-delivered this document on 10/7/86. They were advised that the Department of Energy could not accept this request and that the CD would continue to be used as bond on S-98-83 until either a replacement was submitted or the permit final released. They then asked that this document be made a part of the file regardless.

On April 23, 1987, said CD, then No. 1872, was issued to "West Virginia Department of Energy or Archie B. Coal" in the face amount of $30,197.26. By letter dated May 21, 1987, Respondent advised the bank that the CD had been received, and that Respondent waived the right to interest on said deposit and assumed that the interest would be paid to Archie B. Coal Company. Sometime later (the date is not clear on the photocopy attached to Claimants' claim) the Respondent advised the issuing bank by letter that it had received a check for the interest on the CD and was returning the same to the bank for handling as Claimants were entitled to the CD interest and the Respondent did not have an address for the Claimants. Mr. Bailey testified that (evidently at some time during the controversy) Archie B. Coal Company received its mail at the issuing bank or his residence.

By letter dated August 4, 1987, Claimants advised Respondent that it was to continue to hold the CD but that they did not wish for the CD "to continue to secure the bond and permit either as currently placed with or under new ownership." Respondent replied to this letter by a letter to Claimants dated August 12, 1987, the second paragraph of which states:

> At the present time, this permit remains in the name of McClure Excavating, Inc. and the CD still being used as bond. We have no record in our office of this permit being transferred. However, the normal procedure ***for transfer*** would not allow for your CD to continue being used as bond without written permission from you to do so, as you have done for McClure Excavating, Inc. (Emphasis added.).

There were other letters from Claimants to Respondent in 1987 advising that they wished to be notified immediately of an action that might or could affect this bond, giving their address and telephone numbers and expressing opposition to any modification of the permit.

In 1988 the permit was renewed by the Respondent for an additional 5-year term with no other change being involved in the renewal.

During the late 1980's numerous activities took place with reference to said permit with the approval of Respondent, such as operator reassignments, modifications for increment bounding areas, and authorizing an additional drainage structure, all of which showed McClure to be the permittee.

Based on the evidence presented, all official communications initiated by Respondent after the 1986 transfer of the permit to McClure respecting activities under said transferred permit were addressed only to McClure, the permittee. There was no further transfer of the permit after the

transfer to McClure in 1986.

By certified mail letter dated January 31, 1990, Respondent notified McClure that it had thirty days from receipt of said letter to request a hearing to show cause why subject operation permit should not be revoked because of McClure's failure to keep the operation current and advising that failure to request a hearing or failure to show cause why revocation should not occur would result in permit revocation and immediate forfeiture of bond. Evidently a show cause hearing was held. By certified mail letter dated June 12, 1990, Respondent advised McClure that at the show cause hearing McClure had not shown cause why the permit should not be revoked and declaring that said permit should be revoked and the associated performance bond forfeited. By certified mail letter dated June 27, 1990, Respondent surrendered the CD to the issuing bank and requested that the bank remit the amount of the CD to Respondent. Claimants were not shown as addressees or information addressees on any of these letters.

By Cashier's Check dated November 22, 1993, the issuing bank paid the face amount of said CD to Respondent.

Claimants claim that after their letter of October 7, 1986, was hand-delivered to Respondent (i) Respondent was obligated to notify them prior to any permit modifications; (ii) Respondent was obligated to prohibit anyone other than the permittee from conducting operations on the permitted site; (iii) Respondent was obligated to notify them when the permit was to be revoked and the bond forfeited; (iv) Respondent was obligated to give Claimants the opportunity to accomplish the reclamation work required under the permit in lieu of forfeiting the collateral bond; and, (v) Respondent wrongfully converted the CD.

The Court disagrees.[3]

The Claimants have not cited any authority that supports their positions.

Respondent claims, Claimants admit and the Court is of the opinion that Claimants effectively assigned or transferred to McClure, under what terms we do not know an existing bank CD, representing a deposit made by Claimants in the issuing bank, in order for McClure to fulfill the bonding requirement for the transfer of Strip Mining Permit S-98-83 to McClure. Thereafter the permit was transferred to McClure and the CD was held by Respondent solely for the purpose mandated by the applicable law, which, stated simply, is the return of the area disturbed or affected by the surface mining to an acceptable condition. Until that was accomplished the collateral bond, the CD, had to be held and relied upon by Respondent unless it was replaced by an acceptable bond.

[3]The applicable statute at the time the surface mining permit was transferred to McClure, August 21, 1986, was the West Virginia Surface Mining and Reclamation Act, Acts 1985, c.77 (W. Va. Code §§22A-3-1 thru 4, Michie Replacement Volume).

As long as a permit is outstanding, the permittee is fully responsible to the Respondent for all activities on the area permitted and the law does not require the Respondent to deal with any other entity until there has been a failure by the permittee under the permit to such an extent revocation of the permit and forfeiture of the bond is called for.

Prior to forfeiture, the applicable rules or regulations[4] called for written notice to be given to the permittee ***and the surety on the bond, if any,*** informing them of the decision to forfeit the bond, if any, including the reasons for the forfeiture and the dollar amount to be forfeited. Claimants had not written notice addressed to them as addressees or as information addressees. However, Claimants were neither the permittee as that was McClure, nor the sureties on the bond because a collateral (not a surety) bond was posted and used.

A surety is one who has become legally liable for the debt, default, or failure in duty of another. *Webster's Third New International Dictionary.* "A surety is one bound that something shall be done, not by himself in the first instance, but by some other hand, and, in case of default by this prime agent, that the obligor shall perform the act or compensate for nonperformance." 21A M.J., Words and Phrases, citing *Field v. Harrison,* Wythe (1794) and Sherman v. Shaver, 75 VA. 1 (1880). The position of a surety has stood the test of time.

The Court recognizes the reason for a surety to be given notice of forfeiture. The surety gave nothing but a promise to do something in the future under specified conditions, and, when those conditions exist, it is imperative that the surety be notified that it must fulfill its promise. Claimants were not sureties. They did not undertake to legally liable for a failure by McClure. They did not promise to do something in the future in the event of McClure's failure. Claimants could not be compelled to do anything. They voluntarily did all that they intended to do, put up collateral, and they did it prior to and as a prerequisite for the transfer of the permit to McClure. Once the CD was effectively assigned or transferred to McClure, Claimants had no control over the CD nor the strip mining operation itself.

Claimants complain that they had not been notified of the show cause hearing by Respondent. The statute[5] requires that Respondent inform all interested parties of the time and place of the hearing. There is no statutory definition of "interested parties" nor instructions as to how the notice is to be given. The Claimants may have actually been interested, but, once the CD and permit were transferred to McClure, Respondent had not duty to recognize Claimants as interested parties in the administration of the permit, including the revocation and forfeiture process.

Claimants cannot change the rules under which the CD was used, increase the responsibilities of Respondent under the permit, or endow themselves with rights not granted to them by law. Therefore, the Court holds that Respondent was not obligated to notify Claimants of permit

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[4]WV CSR §38-2-12.4(a)(1)

[5]W.Va. Code §22A-3-17(b)

modifications; to prohibit others then McClure from conducting operations on the site; or, to notify Claimants when the permit was to be revoked and the bond forfeited.

Even if there had been a surety bond used in this instance, the applicable rules or regulations[6] provide that the Respondent ***may*** all the surety to complete the reclamation of a revoked permit site, which makes that decision discretionary. Respondent was under no obligation to offer anyone, including Claimants, an opportunity to accomplish the reclamation work.

As to the conversion of the CD, all actions taken by Respondent appear to have been proper, that is, notice to permittee given, show cause hearing held, revocation of the permit, forfeiture of the bond, and collection of the collateral. Having given up all control of the CD and not being sureties on the bond, Claimants were not entitled to notice of forfeiture. "Person who posted cash bail was not 'surety' and, therefore, was not entitled to notice of forfeiture." Words and Phrases "Surety", citing Matter of Marriage of Bralley, Div. 1, 855 P.2d 1174, 70 Wash. App. 644. The Court holds that there was no wrongful conversion of the CD.

Accordingly, the Court has determined that Claimants have failed to substantiate their claim against the Respondent, and further, the Court is of the opinion to and does hereby deny this claim.[7]

Claim disallowed.

OPINION ISSUED OCTOBER 31, 1995

CITY HOSPITAL, INC.
VS.
REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY
(CC-95-257)

George V. Piper, Attorney at Law, for claimant.
Chad Cardinal, Assistant Attorney General, for respondent.

PER CURIAM:

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[6]WV CSR §38-2-12.4(a)(2)(B)

[7]The Court notes that there was a period of approximately three and one-half years between time the Respondent surrendered the CD and the time the issuing bank paid same, which delay and who received the interest on same during said period is left unexplained.

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

Claimant seeks payment of $72,751.35 plus interest for medical services rendered to an inmate in the Eastern Regional Jail, a facility of the respondent.

The invoices for the services were not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. In its Answer, respondent admits the validity of the claim in the amount due after payment of $5,000.00 to the claimant by an entity which is not a party to this action. In addition, the respondent states in its answer that there were sufficient funds expired in the appropriate fiscal year with which the invoices could have been paid.

In view of the foregoing, the Court makes an award in the amount of $67,751.35 plus interest in the amount of $67,731.35 plus interest in the amount of 43,981.12 for a total award of $71,732.47.

Award of 471,732.47.

OPINION ISSUED OCTOBER 31, 1995

DAVIS MEMORIAL HOSPITAL
VS.
DIVISION OF CORRECTIONS
(CC-95-251)

Claimant represents self.
John S. Dalporto, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of $3,078.70 for medical services provided to inmates in the Huttonsville Correctional Center, a facility of the respondent. The invoices for the services were not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. In its Answer, respondent admits the validity and amount of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which the invoices could have been paid.

In view of the foregoing, the Court makes an award in the amount of $3,078.70.

Award of $3,078.70.

OPINION ISSUED OCTOBER 31, 1995

CAROLYN JANE MILLER, EXECUTRIX OF THE ESTATE
OF RONNIE ALLEN MILLER, DECEASED
VS.
DIVISION OF HIGHWAYS
(CC-93-188)

Bradley R. Oldaker and Gale E. Carroll, Attorneys at Law, for claimant.
Andrew F. Tarr and Cynthia A. Majestro, Attorneys at Law, for respondent.

STEPTOE, JUDGE:

In this action Carolyn Jane Miller, as Executrix of the Estate of Ronnie Allen Miller, seeks an award from the Division of Highways, for the wrongful death of her decedent on the 12th day of July, 1991, as a result of negligence of the Division of Highways in the design, construction, and maintenance of West Virginia Secondary Route #2, said public road 2, hereinafter known as Sand Fork Road.

The respondent has denied all of the allegations of the complaint, and has invoked comparative negligence as an affirmative defense.

By agreement of counsel, trial was bifurcated, so that the issue of liability might be resolved before the matter of damages be considered.

At the outset of trial, complainant acknowledged that liability would be predicted upon alleged negligence of respondent in maintaining the road.

The decedent had been employed by the owner of a large quantity of recently cut logs, Bill Petrice, to haul them away from a loading site near Sand Fork Road. After leaving the loading site in his loaded truck about 4:50 p.m. on said date, the decedent entered Sand Fork Road and while proceeding in an easterly direction thereon about a quarter of a mile to a point in a hilly wooded area, his truck went off the southerly side of the road, rolled over and down a steep embankment and struck a tree. Mr. Miller was instantly killed in the cab of the truck.

Decedent had made twenty to thirty earlier trips of like nature, from the loading site and along Sand Fork Road, to his destination for unloading.

Sand Fork Road is a short connecting public road, incorporated into the State highway system in 1933, since which date said road has been maintained by respondent. It was and is stone-based, and its surface is stone and soil. although its width varies, it is classified as a one-lane road; in most

places its width is 13 feet or more, but at the scene of the accident the width is only 10 feet, 7 inches, presumably because of the topography. There are only four to six houses along the road, and its average daily traffic is twenty vehicles. For maintenance purposes, the road is classified "third priority", a low classification, but it receives grading, ditching, and additional stone for the surface from time to time. There was no testimony as to prior accidents on the road. Respondent's witnesses testified that they had received no complaints, before the accident, about the condition of the road, and claimant produced no evidence to the contrary.

Weather and road surface conditions were bad at the time of and immediately preceding the time of the accident. While decedent was loading his truck with the assistance of Blondail Rohrbaugh, who had cut the logs and brought them to the site at which they were loaded, a heavy rain storm arose with thunder and lightning. Precipitation had somewhat abated before he left, and apparently ended about the time of the accident, but Sand Fork Road was wet and muddy. Visibility was reduced by overhanging clouds, and by fog.

The evidence on the question of causation for this tragic accident is conflicting, complicated by the fact that there were no eyewitnesses.

Complainant advanced two theories of negligent causation on the part of respondent. The first theory is that respondent failed to install and maintain proper erosion and drainage measures to control the accumulation of water in the steep embankment on the south side of Sand Fork Road, at the scene of the accident; that the heavy but brief rainfall of that afternoon exacerbated a previously wet condition of the embankment; and that when the decedent's heavily loaded truck passed over the area, at a point where the road was narrow, a slide occurred, or in the words of the investigating officer, Deputy Sheriff John J. Burkhart, "...the roadway edge gave way...", and the truck went down the embankment. Witness Ronnie Allen Miller, Jr., son of the decedent, who made a video tape of the scene on July 16, 1991, and who made measurements, testified that four to six feet of the bank had washed out, and later in his testimony characterized it as a slide.

The problem with this first theory is that neither Deputy Burkhart nor Ronnie Allen Miller, Jr., had ever viewed the scene before the accident, and so were unable to compare the scene as they found it (on July 12, by Burkhart, and on July 16, by Miller, Jr.) with the scene and condition of the road as it was before the accident. Other witnesses who were familiar with the scene before the accident. Other witnesses who were familiar with the scene before the accident, including Blondail Rohrbaugh, the first person on the scene after the accident, testified that the topography had not substantially changed; and the State's district maintenance engineer, Richard Davis, who visited the scene after the accident, apparently in the month of July 1991, testified that there was no evidence of a slide, vertical or parabolic. Miller, Jr., apparently thought that because the roadway at the scene was narrower than elsewhere, the difference (and more) could be attributed to a slide. There was no testimony about an accumulation of earth and rock at or in the vicinity of the bottom of the embankment. According to the testimony, the roadway at the scene received no special attention from the respondent after the accident, and is still in use. Claimant's expert witness, Kenneth Crowley, Ph.. D. (in transportation, planning and engineering), who viewed the scene in August 1991, did not testify to any evidence of a slide, nor did the investigating officer, who testified only that the road gave way

in his opinion.

The second theory, adopted by Dr. Crowley, is that respondent was negligent in failing to provide and maintain adequate drainage of surface water on and below Sand Fork Road, as a result of which failure the roadway at the scene of the accident, and below it on its southern side, became saturated, and lost its capacity to carry the weight of vehicles passing over it. This theory assumes that the Miller truck approached the narrow (10'7") area of the road, and on reaching said narrow area, the forward area of the truck passed over water-soaked road surface material, and that the middle and rear areas of the truck were so heavy that the berm material subsided, the rear end of the truck fell off the road, and the front end of the truck followed, and the whole truck violently struck a tree.

Three photographs of the scene of the accident, taken by Deputy Burkhart late on the day of the accident, were introduced, but were of such poor quality, due to absence of sufficient light and to inadequate photographic equipment, that they are of little evidentiary value. A video tape taken by Miller, Jr., on July 16, 1991, was helpful, as were photographs taken on July 19 and 20, by a member of the staff of claimant's attorney; but the video and these photographs were taken after the truck and the logs had been brought up from the embankment to the road, on July 13, during which activity the condition of the embankment and of the edge of the roadway was extensively disturbed by the heavy equipment used for such purpose, skids, winches, and wrecker truck equipment.

Blondail Rohrbaugh, who had helped the decedent load his truck, came by the scene of the accident about 10 minutes after the decedent had left the loading area, and saw something beside the road he thought was unusual, so he stopped, backed up, and found the truck. After establishing the he could do nothing for Mr. Miller, he hurried to the nearest telephone to report the accident, and after having done so, immediately returned to the scene of the accident, and waited for the arrival of police and emergency vehicles. While waiting he observed truck imprints in the muddy road, staring about 100 feet or more west of the scene and leading eastwardly to the scene of the accident. His testimony was:

> Well, I tracked the truck where it come out of a little curve there and he didn't cut it. He just drove it right on straight over the hill. That's what I couldn't figure out. He just naturally drove the truck right out of the road and right over the hill. You could just track it plain. Well, two or three weeks after you could yet see where the truck went. I showed a lot of people.

The tracks were also seen by Brian Skidmore, Darrell Ferguson, and Ronnie Ferguson, firemen from the Jackson's Mill Volunteer Fire Department, who were the first persons to arrive on the scene after Rohrbaugh, and who testified as to the tracks leading up to the scene of the accident, just as Rohrbaugh testified. The foregoing testimony of Rohrbaugh, Skidmore, Ferguson, and Ferguson was not controverted.

The Court does not know, nor does anybody know apparently, who the logging truck was

driven in a straight line until it slipped off the southerly side of Sand Fork Road, and turned over, and plunged down the embankment. When on the same course of a road that has curves, it is inevitable that a vehicle will get off the road and into trouble. In this case, the logging truck was driven further and further from the middle of the traffic lane and onto the south edge of the road and then went out of control; and this was the sole cause of the accident.

Respondent has disapproved the theory that the accident was caused by a slip or cave-in of part of the road.

Claimant has failed to prove by a preponderance of the evidence that a soft area at or near the south edge of the road (if there were one) was the proximate cause of the accident.

For the foregoing reasons, the claim is denied.

Claim disallowed.

(Judge Baker did not participate in the hearing or the decision of this claim.)

OPINION ISSUED OCTOBER 31, 1995

RADIOLOGY, INC.
VS.
DIVISION OF CORRECTIONS
(CC-95-252)

Claimant represents self.
John S. Dalporto, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of $220.00 for medical services provided to inmates who should have been in the custody of the respondent, but were being held in the Cabell County Jail. The invoices for the services were not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. In its Answer, respondent admits the validity and amount of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which the invoices could have been paid.

In view of the foregoing, the Court makes an award in the amount of $220.00.

OPINION ISSUED NOVEMBER 13, 1995

DEBRA Y. BROWN AND WENDELL D. BROWN
VS.
DIVISION OF HIGHWAYS
(CC-95-104)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimants, Debra Y. Brown and Wendell D. Brown, seek an award of $2,500.00 from respondent, Division of Highways, for damage to their vehicle, a 1986 Monte Carlo.

The damage to claimants' vehicle occurred while Mrs. Brown was driving on Route 73 near Campbells Creek on March 9, 1995, between 11:00 p.m. and 11:30 p.m. According to Mrs. Brown, she was traveling approximately 40 miles per hour when she observed a tree protruding into the road. Although Mrs. Brown attempted to avoid the tree, she was unable to drive around the tree due to oncoming traffic. As a result, the tree scraped claimants' vehicle and caused damage to the body of the vehicle. Mrs. Brown estimated the tree was ten inches in diameter and protruded one foot into the road. In addition, Mrs. Brown testified that the end of the tree which struck the vehicle had been cut off. Mrs. Brown submitted into evidence two different estimates for repairing the vehicle. the first estimate was made on March 15, 1995, and totaled $3,121.63. the second estimate was made on March 24, 1995, and totaled $1,988.21. At the time of the accident, Mrs. Brown believes the damaged vehicle was covered by comprehensive and liability insurance with a $300.00 deductible provision.

James Dingess, a supervisor for the respondent, testified he is responsible for general road maintenance in the vicinity of Route 73. Mr. Dingess described Route 73 as a two-lane second priority road. He also estimated the pavement surface is twenty-four feet wide with shoulders that are two feet wide. According to Mr. Dingess, the Campbells Creek area received high winds and a heavy snowfall on March 8, 1995. These conditions created slippery roads and resulted in numerous fallen trees throughout the area. In response, road crews were engaged in snow and tree removal operations on March 8, 1995. Although Mr. Dingess was unaware of the particular tree involved in this accident, he testified that tree removal work should include moving the cut trees off of the road and berm.

In West Virginia, respondent has a duty to exercise reasonable care and diligence in maintaining roads under all circumstances. *Hobbs v. Dept. of Highways,* 13 Ct. Cl. 27 (1979). For respondent to be hld liable for damage caused by a defective road condition, it must have had either actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dept. of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the record indicates that weather conditions caused trees to fall onto roads in several areas, and respondent dispatched road crews to remove the trees on the day prior to Mrs. Brown's accident. This is corroborated by evidence that the tree which damaged claimants' vehicle had been cut prior to the accident. Based upon the foregoing, it is the opinion of the Court that respondent had notice of the tree, and was negligent in failing to remove the tree from the traveled portion of the roadway.

Therefore, the Court makes an award in the amount of claimants' insurance deductible, $300.00.

Award of $300.00.

OPINION ISSUED NOVEMBER 13, 1995

CENTRAL SERVICE
VS.
OFFICE OF THE GOVERNOR
(CC-95-289)

No appearance by claimant.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of $320.20 for repairing an oven at the Governor's Mansion. The invoice for the services was not processed for payment in the proper fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity and amount of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which the invoice could have been paid.

In view of the foregoing, the Court makes an award in the amount of $320.20.

Award of $320.20.

OPINION ISSUED NOVEMBER 13, 1995

HILLARD W. HICKS
VS.
DIVISION OF HIGHWAYS
(CC-95-129)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant Hillard W. Hicks, seeks an award of $1,191.66 from respondent, Division of Highways, for damage to his 1987 Chevrolet Chevette.

According to Mr. Hicks, the damage occurred to his vehicle on March 10, 1995, at approximately 8:00 p.m., when he was driving on Route 73 near Campbells Creek. Mr. Hicks was traveling 40 miles per hour under clear conditions when he observed a tree protruding three and a half feet into his lane. Due to oncoming traffic, Mr. Hicks was unable to maneuver around the tree, and it scraped the side of his vehicle. The tree was approximately three inches in diameter and appeared to be sawed off at the estimate totaled $1,191.66, and the second totaled $1,178.42. Although Mr. Hicks has not had the vehicle repaired, he has continued to drive it since the accident. Mr. Hicks testified that he purchased the vehicle approximately one year before the accident for $500.00, and the vehicle was covered by liability insurance. The record indicates that the odometer reading on the vehicle was 113,733 miles at the time of the accident.

James Dingess, a supervisor for the respondent, testified he is responsible for general road maintenance in the vicinity of Route 73. Mr. Dingess described Route 73 as a two-lane second priority road. He estimated the pavement surface is twenty-four feet wide with shoulders that are two feet wide. According to Mr. Dingess, the Campbells Creek area received high winds and a heavy snowfall on March 8, 1995. These conditions created slippery roads and resulted in numerous fallen trees throughout the area. In response, road crews were engaged in snow and tree removal operations on March 8, 1995. Although Mr. Dingess was unaware of the particular tree involved in this accident, he testified that tree removal work should include moving the cut trees off of the road and berm.

It is well established law that respondent has a duty to exercise reasonable care and diligence in maintaining roads under all circumstances. *Hobbs v. Dept. of Highways,* 13 Ct. Cl. 27 (1979). For respondent to be held liable for damage caused by a defective road condition, it must have had either actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the record indicates that weather conditions caused trees to fall onto roads in several areas, and respondent dispatched road crews to remove the trees two days before Mr. Hicks' accident. This is corroborated by evidence that the tree which damaged the vehicle had been cut prior to the accident. Based on the foregoing, it is the opinion of the Court that respondent had notice of the tree, and was negligent in removing the tree from the traveled portion of the roadway.

The evidence relating to the damage to Mr. Hicks' vehicle indicates that the cost to repair his vehicle greatly exceeds its market value. Mr. Hicks testified that he purchased the vehicle for $500.00, and the cost to repair the vehicle ranges from $1,178.42 to $1,191.66.

In West Virginia, when the personal property is damaged and the cost to repair is in excess of the market value of the personal property, the owner may recover the lost value of the personal property, plus his expenses stemming from the injury including loss of use during the time he has been deprived of his property. *Checker Leasing, Inc. v. Sorbello,* 181 W.Va. 199 (1989). Based on the foregoing, the Court makes an award to claimant of $500.00.

Award of $500.00.

OPINION ISSUED NOVEMBER 13, 1995

SAMUEL JONES, JR.
VS.
DIVISION OF HIGHWAYS
(CC-94-720)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

On August 21, 1994, between 1:30 a.m. and 3:00 a.m., claimant, Samuel Jones, Jr., was traveling on Monongalia County Route 45, also known as the River Road. Mr. Jones, Jr., was the passenger in a 1980 Datsun pickup truck driven by Daniel Birch. The vehicle was proceeding approximately 40 miles per hour when Mr. Jones, Jr., observed a tree in the road. The tree was located fifteen yards ahead of the vehicle and blocked both lanes of traffic. Mr. Birch immediately applied the brakes. Unfortunately, he was unable to stop the vehicle and it hit the tree. After the accident, Mr. Jones, Jr., and Mr. Birch used a chain saw to cut the tree into pieces and remove it from the road. As a result of the collision Mr. Jones, Jr., seeks an award for personal injuries.

Katherine Westbrook, an assistant superintendent for respondent in Monongalia County, testified that her responsibilities include maintaining a safe roadway for the traveling public.

According to Ms. Westbrook, she was notified of the fallen tree on August 21, 1994, at 4:00 a.m. When Ms. Westbrook arrived at the scene of the accident, the tree had already been removed. Ms. Westbrook returned the following morning to examine the tree. She discovered that there were leaves and bark still on the tree, and she concluded the only sign of decay was on the side of the tree facing away from the road. Ms. Westbrook also testified that respondent did not have notice the tree was in danger of falling onto the road.

The State is neither an insurer nor a guarantor of the safety of motorists traveling on its highways. *Adkins v. Sims,* 130 W. Va. 645, 46 S.E.2d. 81 (1947). When the evidence indicates that respondent does not have notice of a hazard, such as a fallen tree, and a reasonable opportunity to remove it, respondent cannot be held liable. *Britt v. Dept. of Highways,* 14 Ct. Cl. 378 (1983).

In the instant case, respondent had no notice of the tree's condition or the tree's potential for falling onto the roadway. In addition, the testimony of witnesses for both parties leads to the conclusion that the tree had fallen shortly before the accident. Based on the reasons stated above, the Court is of the opinion that claimant has not established negligence on behalf of the respondent. Therefore, this claim is denied.

Claim disallowed.

OPINION ISSUED NOVEMBER 13, 1995

THOMAS W. MARCUM
VS.
DIVISION OF HIGHWAYS
(CC-95-106)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant, Thomas W. Marcum, seeks an award of $4,936.13 from respondent, Division of Highways, for damage to his vehicle and lost income resulting from the vehicles incapacity. The damage occurred on February 10, 1995, at approximately 10:45 a.m., in the northbound lane of U.S. Route 119 near the entrance to respondent's Mingo county maintenance headquarters. At this time the road surface was et and the skies were overcast. According to Mr. Marcum, he was driving his 1984 Ford F-700 flatbed truck 55 miles per hour, and while passing a tractor-trailer truck he observed a rock in his lane. The road was approximately 18 inches in diameter and 50 feet ahead of Mr. Marcum's vehicle. Mr. Marcum testified that he was unable to avoid the rock because the tractor-trailer truck was to the right of his vehicle and a passenger car was close behind his vehicle. Mr.

Marcum's vehicle made loud noises when it struck the rock. Shortly thereafter, Mr. Marcum drove his vehicle off the road to contact the Division of Highways and determine what damage occurred. As a result of the incident, the vehicle sustained damage to the tie rod, two speed unit, transmission, and tail lights. Mr. Marcum testified that he had full coverage insurance on his vehicle with a $500.00 deductible.

Charles Maynard testified that he was traveling along U.S. Route 119 during the early part of February 1995. According to Mr. Maynard, he observed a large rock fall from a State road truck near the location where Mr. Marcum's accident occurred. In addition, Mr. Maynard indicated that the truck's tail gate was not completely closed.

Barry Mullins, the Mingo County supervisor for the respondent testified that he is responsible for maintaining the roads in Mingo County. Mr. Mullins described U.S. Route 119 as a first priority road, and he acknowledged that it passes close to the county maintenance headquarters. According to Mr. Mullins' work records, Division of Highways trucks were carrying "shot rock" on February 10, 1995. Moreover, these rocks were similar in size to the rock struck by Mr. Marcum's vehicle.

Respondent owes a duty to motorists to exercise reasonable care and diligence under all the circumstances. *Hobbs v. Dept. of Highways,* 13 Ct. Cl. 27 (1979). The evidence in this claim indicates that respondent was hauling rocks on the day of the accident which were similar to the one struck by Mr. Marcum's vehicle. The record also indicates that the rock fell from one of respondent's trucks due to an improperly closed tail gate. Therefore, it is the opinion of this Court that respondent was negligent. After reviewing the record with respect to damages, the Court finds that the evidence related to lost income resulting from the vehicle's incapacity are speculative. Accordingly, the Court makes an award in the amount of claimant's insurance deductible, $500.00.

Award of $500.00.

OPINION ISSUED NOVEMBER 13, 1995

LINDA NELSON
VS.
DIVISION OF HIGHWAYS
(CC-95-96)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for claimant.

PER CURIAM:

Claimant, Linda Nelson, seeks an award of $119.25 from respondent, Division of Highways, for damage to her vehicle. On October 7, 1994, at approximately 8:30 p.m., Ms. Nelson stopped at a BP gas station along Route 32 in the town of Davis, West Virginia. As Ms. Nelson exited the gas

station, she drove her 1990 Subaru Legacy over a steel sign post. The sign post was located on respondent's right-of-way, and it extended between six and eight inches out of the ground. As a result, the right rear tire of Ms. Nelson's vehicle was damaged. According to Ms. Nelson, her insurance did not cover any of the damage to the vehicle.

Dayton Zirkle, the sign shop supervisor for respondent in district eight, testified that his responsibilities include installing new signs, maintaining existing signs, and applying pavement markings to road surfaces. Ms. Zirkle also explained that nine "no parking" signs were installed in the vicinity of Ms. Nelson's accident by respondent on July 24, 1990. However, according to Mr. Zirkle, he was not aware that the signs had been knocked down.

This Court has consistently followed the principle that the State is neither an insurer nor a guarantor of the safety of persons traveling on its highways. *Adkins v. Sims,* 130 W. Va. 645, 46 S.E.2d. 81 (1947). For respondent to be held liable for damage caused by a defective road condition, it must have had either actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dept. of Highways,* 16 Ct. Cl. 103 (1986). The evidence in this case indicates respondent was unaware of the protruding steel post before October 7, 1994. Therefore, claimant has not established negligence on the part of the respondent. Accordingly, it is the opinion of the Court that this claim must be denied.

Claim disallowed.

OPINION ISSUED NOVEMBER 13, 1995

LISA M. NORMAN
VS.
DIVISION OF HIGHWAYS
(CC-95-33)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant, Lisa M. Norman, seeks an award of $121.90 from respondent, Division of Highways, for damage to her Toyota Celica. The damage occurred on January 19, 1995, at 4:30 p.m., while Ms. Norman was traveling 55 miles per hour on the east bound lane of Route 50 traveling from Ripley to Clarksburg, near the Doddridge County Middle School. According to Ms. Norman, she observed a jagged piece of concrete approximately 20 yards ahead of her vehicle. She attempted to drive around the concrete. Unfortunately, Ms. Norman was unable to avoid the object, and it damaged the vehicle's left front tire. Ms. Norman testified that the object was the size of a cantaloupe and

appeared to be a piece of concrete from a hole in the highway. As a result of the incident, Ms. Norman paid $121.90 to replace the damaged tire.

Richard A. Brown testified that he is employed by respondent, and his responsibilities include maintenance of Route 50 in the vicinity of Ms. Norman's accident. He described Route 50 as a four lane highway with a priority one rating. As part of Mr. Brown's daily routing, each morning he dispatches maintenance personnel to drive the entire section or Route 50 within his authority to identify anything that needs attention or repair. According to Mr. Brown, on January 19, 1995, road crews were installing illumination posts along Route 50. However, Mr. Brown was unaware of any defective road conditions along Route 50 prior to January 19,1 995.

This Court has consistently followed the principle that the State is neither an insurer nor a guarantor of the safety of person traveling on its highways. *Adkins v. Sims,* 130 W. Va. 645, 46 S.E.2d 81 (1947). For respondent to be held liable for damage caused by a road defect, it must have had either actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways,* 16 Ct. Cl. 103 (1986). The evidence in this case indicates respondent was unaware of any debris on Route 50 prior to January 19, 1995. Therefore, Ms. Norman has not established negligence on the part of the respondent. Accordingly, it is the opinion of the Court that this claim must be denied.

Claim disallowed.

OPINION ISSUED NOVEMBER 13, 1995

ANITA GERALDINE PRIEST
VS.
DIVISION OF HIGHWAYS
(CC-94-439)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant, Anita Geraldine Priest, seeks an award of $363.55 from respondent, Division of Highways, for damage to her vehicle, a 1991 Geo Storm. On September 21, 1995, a hearing was held in which both parties appeared before the Court to present evidence related to this claim. Thereafter, this claim was submitted to the Court for determination.

The evidence adduced at the hearing of this claim established the following facts. On May 13, 1994, at 9:30 p.m., James Michael Priest was traveling on County Club Road, in Marion County. Mr. Priest was driving claimant's vehicle approximately 25 miles per hour when it struck a hole in the

road. The hole was located right of center of Mr. Priest's lane. Mr. Priest estimated the hole was two feet long, one foot wide, and several inches deep. At the time of the incident, driving conditions were rainy and dark. According to Mr. Priest, he was unfamiliar with this road and could not see the hole because it was filled with water. As a result of the incident, claimant's vehicle sustained damage in the amount of $363.55.

Jim Costello, a county road superintendent for respondent, testified he is responsible for supervising a work force to maintain roads in Marion County. According to Mr. Costello, Route 19/22, also known as County Club Road, was repaired on April 8, 1994, with hot mix patching material. In addition, Mr. Costello also testified that respondent operates a maintenance station along Country Club Road which is approximately one-half mile from the location of the hole.

In West Virginia, the law is well established that for respondent to be held liable for damage caused by a road defect, it must have had either actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dept. of Highways,* 16 Ct. Cl. 103 (1986).

The facts in this claim indicated that respondent's road crews had traveled over Country Club Road performing patching work approximately one month prior to the accident. Moreover, the hole was located very close to respondent's maintenance office where it was likely observed by respondent's employees. Therefore, after a careful review of the evidence, it is the opinion of the Court that respondent is liable for the damage to claimant's vehicle. The Court hereby makes an award to claimant in the amount of $363.55.

Award of $363.55.

OPINION ISSUED NOVEMBER 13, 1995

ANTHONY J. TALERICO
VS.
DIVISION OF HIGHWAYS
(CC-95-65)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant, Anthony J. Talerico, seeks an award of $66.77 from respondent, Division of Highways, for a damaged tire. On February 7, 1995, at 2:30 p.m., Mr. Talerico was driving his vehicle, a GMC pickup truck, on Route 6 in Harrison County. According to Mr. Talerico, he was proceeding between 30 and 35 miles per hour when he observed a deer. While Mr. Talerico was

watching the deer, his vehicle struck a hole in the pavement surface. Mr. Talerico testified that the hole was approximately ten inches deep and the surrounding pavement was cracked. As a result of the incident, a tire on Mr. Talerico's vehicle was damaged. Mr. Talerico purchased a replacement tire on February 9, 1995, for $66.77.

Michael Anthony Scott, the Harrison County Maintenance supervisor for respondent, described Route 6 as a two lane secondary road. He estimated the pavement surface was 30 feet wide. According to Mr. Scott, road maintenance crews were cutting brush along Route 6 during the month of February, 1995. However, Mr. Scott testified that he did not have any notice of a breakdown of the payment surface, and he had received no complaints about Route 6 concerning holes in the pavement.

This Court has consistently followed the principle that the State is neither an insurer nor guarantor of the safety of persons traveling on its highways. Adkins v. Sims, 130 W. Va. 645, 46 S.E.2d 81 (1947). For respondent to be liable for damage caused by a road defect, it must have had either actual or constructive notice of the defect and a reasonable time to take corrective action. Chapman v. Dept. of Highways, 16 Ct. Cl. 103 (1986). The evidence in this case indicates respondent was unaware of this particular hole prior to claimant's accident. Therefore, claimant has not established negligence on the part of respondent. Accordingly, it is the opinion of the Court that this claim must be denied.

Claim disallowed.

OPINION ISSUED NOVEMBER 13, 1995

WILLIAM P. THOMPSON, JR.
VS.
DIVISION OF HIGHWAYS
(CC-95-70)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant seeks an award of $602.38 from respondent, Division of Highways, for damage to his vehicle, a 1988 Oldsmobile International Supreme.

On December 8, 1994, at 7:30 p.m., claimant was traveling with his wife and daughter on the Tolsia Highway, also known as Route 52, in Wayne County. Claimant was driving approximately 55 miles per hour behind a large truck. The truck swerved to avoid a rock in the road, and before claimant could react, his vehicle struck the rock. Claimant estimated the rock was approximately one

foot long and located near the center line. Driving conditions were dark, cloudy, and cold at the time of the accident. However, the roadway was dry. Claimant also testified that he had traveled through this area earlier in the day, and he had not observed any rocks in the road.

As a result of the accident, claimant's vehicle sustained a broken strut and ruptured tire. The damage was covered by the vehicle's insurance, but claimant paid a $100.00 deductible and other expenses not covered by the insurance policy.

Shelby Sharps, a claim investigator for respondent, testified that she conducted an investigation of claimant's accident which revealed very little information. According to Ms. Sharps, she searched police records and road maintenance records in Wayne County, and could not find any reports or information concerning the accident.

It is well established that the unexplained falling of a rock or boulder onto a highway without a positive showing that respondent knew or should have known of the dangerous condition posing injury to person or property is insufficient to justify an award. *Hammond v. Dept. of Highways,* 11 Ct. Cl. 234 (1977). See also *Hatfield v. Dept. of Highways,* 15 Ct. Cl. 168 (1984) and *Coburn v. Dept. of Highways,* 16 Ct. Cl. 68 (1986).

After a careful review of the evidence, the Court finds that claimant has not established negligence on the part of the respondent. Therefore, the Court is of the opinion to and does deny this claim.

Claim disallowed.

JAMES L. FIELDS, Administrator of the Estate of
Robert Ray Fields, Deceased,
Claimant,
VS. CLAIM NO. CC-93-78

DIVISION OF HIGHWAYS,
Respondent.

ORDER

On this date this claim came before the Court upon a stipulation designated Settlement Order which document was filed by counsel for the claimant, Douglas B. Hunt, and counsel for the respondent, Andrew F. Tarr, and wherein the parties announced to the Court that the claimant agrees to accept the sum of three thousand dollars ($3,000.00) as full and complete satisfaction of the claim.

And the Court, having duly considered the Stipulation, hereby ORDERS that an award be

made to claimant James L. Fields, in the sum of three thousand dollars ($3,000.00) as full and complete satisfaction of this claim.

ENTERED: December 5, 1995

Robert M. Steptoe, Judge

DECEMBER 21, 1995

DONALD BUCHER
VS.
DEPARTMENT OF EDUCATION
(CC-95-258)

No appearance by claimant.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

The claimant seeks payment of $369.00 for tuition reimbursement. The invoice for the reimbursement was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity and the amount of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which the invoice could have been paid.

In view of the foregoing, the Court makes an award in the amount of $369.00.

Award of $369.00.

OPINION ISSUED DECEMBER 21, 1995

C. W. STICKLEY, INC.
VS.
DIVISION OF HIGHWAYS
(CC-95-190)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

The claimant, C. W. Stickley, Inc., seeks an award of $1,428.37 from the respondent, Division of Highways, for damage to a concrete truck. The damage occurred on May 23, 1995, while the concrete truck was en route to a construction site on Route 18/2 in Marion County. During the drive, the concrete truck operator, Edward Lee Morris, encountered a large drainage culvert. At this time, Mr. Morris stopped the truck and inspected the culvert. Mr. Morris testified that the culvert appeared to be safe, and he drove the concrete truck across the culvert. Shortly thereafter, a tow truck was dispatched to remove the immobilized concrete truck. Unfortunately, due to the maneuverability restrictions and weight of the concrete truck, the truck was damaged while being removed from the culvert.

Casey David Stickley, the vice-president and treasurer of the claimant corporation, testified that the cost of removing and repairing the concrete truck totaled $1,428.37. Mr. Stickley also testified that a majority of the damage to the concrete truck occurred while the truck was being removed from the culvert. However, Mr. Stickley believed a tow truck was the most economical way of removing the concrete truck.

The duty owed by the respondent to motorists is one of reasonable care and diligence in maintaining the roads under all circumstances. *Hobbs v. Dept. of Highways,* 13 Ct. Cl. 27 (1979). Although this duty does not make the respondent a guarantor of the safety of motorists, this duty does require the respondent to provide motorists a reasonably safe road to post weight limit restrictions where necessary.

The record in this claim indicates that the culvert in question was located on a road in which the respondent has a duty to maintain, and the damage to the truck occurred as a proximate result of the culvert failure. In addition, the operator of the concrete truck exercised due care before proceeding across the culvert, and the truck did not violate any posted weight limit restrictions on the road.

After a review of the record, the Court is of the opinion to that a respondent was negligent in maintaining the culvert at the time of the incident. Accordingly, the Court makes an award to the claimant in the amount of $1,428.37.

Award of $1,428.37.

OPINION ISSUED DECEMBER 21, 1995

CABELL COUNTY COMMISSION
VS.
DIVISION OF CORRECTIONS
(CC-95-213)

William T. Watson, Attorney at Law, for claimant.
John S. Dalporto, Assistant Attorney General, for respondent.

PER CURIAM:

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

The claimant, Cabell County Commission, is responsible for the incarceration of prisoners who have committed crimes in Cabell County, but have been sentenced to facilities owned and maintained by respondent, Division of Corrections. The claimant brought this action to recover the costs for providing medical care to prisoners who have been sentenced to a state penal institution, but due to circumstances beyond the control of the county, these prisoners have had to remain in the custody of the county for periods of the time beyond the date of the commitment order.

The Court previously determined in *County Comm'n. of Mineral County vs. Division of Corrections,* unpublished opinion issued November 21, 1990, CC-89-340, that the respondent is liable to the claimant for the cost of housing and providing medical care to inmates sentenced to a State penal institution.

Pursuant to the holding in *Mineral County,* the respondent reviewed this claim to determine the invoices for the services for which it may be liable. Respondent then filed an answer admitting the validity of the claim in the amount of $826.13.

On November, 17, 1995, the claimant's attorney contacted the Court and indicated that it would accept $826.13 as complete satisfaction for its claim.

In view of the foregoing, the court makes an award to claimant in the amount of $826.13.

Award of $826.13.

OPINION ISSUED DECEMBER 21, 1995

CONTEMPORARY GALLERIES
VS.
DIVISION OF NATURAL RESOURCES
(CC-95-281)

No appearance by claimant.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of $1,774.55 for office furniture provided to respondent. The invoice for the office furniture was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. In its Answer, respondent admits the validity and amount of the claim, and states that there were sufficient funds expired int the appropriate fiscal year with which the invoice could have been paid.

In view of the foregoing, the Court makes an award in the amount of $1,774,55.

Award of $1,774.55.

OPINION ISSUED DECEMBER 21, 1995

MOUNTAIN STATE TEMPORARY SERVICES d/b/a
MANPOWER TEMPORARY SERVICES
VS.
DIVISION OF CORRECTIONS
(CC-95-305)

No appearance by claimant.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of $580.08 for general office support and word processing services provided to the Mount Olive Correctional Complex, a facility of the respondent. The invoice for the services was not processed for payment in the proper fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity and amount of the claim., and states that there were sufficient funds expired in the appropriate fiscal year with which the invoice could have been paid.

In view of the foregoing, the Court makes an award in the amount of $580.08.

Award of $580.08.

OPINION ISSUED DECEMBER 21, 1995

BETTY MURPHY
VS.
DIVISION OF HIGHWAYS
(CC-95-185)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

The facts giving rise to this claim occurred on May 20, 1995, at approximately 9:00 a.m. At this time, the claimant, Betty Murphy, was walking on the stone shoulder along Route 10 near Lacoma, in Wyoming County. During her walk, the stone shoulder collapsed, and her leg fell into a hole. After the incident, Ms. Murphy's niece came to her assistance. According to Ms. Murphy, the stone shoulder looked as if it had been recently repaired, and the hole was not visible before the stone shoulder collapsed. Photographs of the hole indicate it was located approximately six inches from the edge of the pavement.

As a result of the incident, Ms. Murphy's leg was severely bruised, and she missed six days of work. Therefore, Ms. Murphy seeks an award of $457.04 from the respondent, Division of Highways, for her unpaid medical bills and lost wages. Claimant's Exhibits #4 and #5 indicate Ms. Murphy's medical bills total $92.00. In addition, Ms. Murphy testified that she earned $7.23 per hour and normally worked eight hours per day.

David Cox, the assistant maintenance supervisor for the respondent in Mingo County, testified that the hole was located on the respondent's property along Route 10. According to Mr. Cox, road crews installed gabion baskets in the vicinity of the hole a few months before Ms. Murphy's accident. This work was necessary because a portion of the roadway was washed out. However, Mr. Cox was unaware of any problems where Ms. Murphy injured her leg.

In West Virginia, the respondent has a duty to use a reasonable care and diligence in maintaining roadways under all circumstances. *Hobbs v. Dept. of Highways,* 13 Ct. Cl. 27 (1979).

The evidence in this claim indicates that the respondent was aware of the road problems in the vicinity of the hole, and the respondent had recently repaired a portion of the roadway near the hole. Nevertheless, the respondent failed properly to repair the portion of the shoulder where Ms. Murphy

was injured. Therefore, it is the opinion of the Court that the respondent was negligent in its maintenance of the shoulder along Route 10. Accordingly, the Court makes an award to Ms. Murphy in the amount of $439.04 for her medical expenses, and $1,500.00 for pain and suffering, for a total award of $1,939.04.

Award of $1,939.04.

OPINION ISSUED DECEMBER 21, 1995

POLAROID CORPORATION
VS.
DIVISION OF MOTOR VEHICLES
(CC-95-278)

No appearance by claimant.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

The claimant seeks payment of $36,382.53 for West Virginia photographic drivers' license and identification cards provided to the respondent in March of 1995. The invoice for the licenses and cards was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity and amount of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which the invoice could have been paid.

In view of the foregoing, the Court makes an award in the amount of $36,382.53.

Award of $36,382.53.

OPINION ISSUED DECEMBER 21, 1995

POLAROID CORPORATION
VS.
DIVISION OF MOTOR VEHICLES
(CC-95-279)

No appearance by claimant.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

The claimant seeks payment of $26,065.11 for West Virginia photographic drivers' licenses and identification cards provided to the respondent in February of 1995. The invoice for the licenses and cards was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity and amount of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which the invoice could have been paid.

In view of the foregoing, the Court makes an award in the amount of $26, 065.11.

Award of $26,065.11.

OPINION ISSUED DECEMBER 21, 1995

UNIVERSITY HEALTH ASSOCIATES
VS.
DIVISION OF CORRECTIONS
(CC-95-290)

No appearance by claimant.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

The claimant seeks payment of $41,517.05 for medical services rendered to inmates in the Huttonsville Correctional Center, a facility of the respondent. In support of its claim, the claimant submitted invoices for medical services with its Notice of Claim. In its Answer, the respondent asserts that ten of the invoices are for services provided in the current fiscal year and will be paid from current funds. Furthermore, the respondent admits the claim in the amount of $35,930.00. Subsequently, the claimant contacted the Court and indicated it would accept $35,930.00 as satisfaction for the claim.

In view of the foregoing, the Court makes an award to the claimant in the amount of $35, 390.00.

Award of $35,930.00.

OPINION ISSUED JANUARY 5, 1996

MARGARET BAILEY
VS.
DIVISION OF HIGHWAYS
(CC-93-160)

Claimant represents self.
Andrew F. Tarr and Nancy K. McCoy, Attorneys at Law, for respondent.

PER CURIAM:

The above styled claim was submitted to the Court based upon a stipulation of facts signed by the claimant, Margaret Bailey, and the respondent, Division of Highways. The stipulation was filed with the Court on December 4, 1995, and stated that both parties agree and stipulate to the following:

1) The claimant is a resident of Vienna, Wood County, West Virginia.

2) On April 28, a vehicle owned and driven by the claimant was damaged when pieces of cement fell from an overhead bridge onto the northbound lanes of Interstate 77 near Mineral Wells, Wood County.

3) Due to the fallen pieces of cement, the claimant's vehicle sustained damages in the amount of $89.54 which represents the replacement cost of one tire for the claimants' automobile.

4) There is sufficient evidence to establish that the respondent's maintenance of the aforementioned bridge at the location of the claimant's accident was deficient and that the deficiency was the proximate cause of the claimant's damages.

5) There is a moral obligation on the part of the respondent to compensate for her damages resulting from the respondent's negligence and that full and just compensation would be $89.54.

6) The claimant understands and acknowledges that with this stipulation and full and just

compensation for damages, she will forever release and totally discharge the respondent of any and all further claims in regard to the motor vehicle damages which occurred on April 28, 1993.

The Court, having reviewed the stipulation, has determined that the respondent was negligent in its maintenance of the bridge from which the cement fell onto Interstate 77. This negligence was the proximate cause of the damages recited in the stipulation. Based upon the aforementioned stipulation, the Court makes an award to the claimant of $89.54.

Award of $89.54.

OPINION ISSUED JANUARY 5, 1996

CABELL COUNTY COMMISSION
VS.
DIVISION OF CORRECTIONS
(CC-95-242)

William T. Watson, Attorney at Law, for claimant.
John S. Dalporto, Assistant Attorney General, for respondent.

PER CURIAM:

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

The claimant, Cabell County Commission, is responsible for the incarceration of prisoners who have committed crimes in Cabell County, but have been sentenced to facilities owned and maintained by the respondent, Division of Corrections. The claimant brought this action to recover the costs for providing medical care to prisoners who have been sentenced to a state penal institution, but due to circumstances beyond the control of the claimant, these prisoners have had to remain in the custody of the claimant for periods of time beyond the date of the commitment order.

The Court previously determined in *County Comm'n. of Mineral County vs. Div. of Corrections,* an unpublished opinion issued November 21, 1990, CC-89-340, that the respondent was liable to the claimant for the cost of housing and providing medical care to inmates sentenced to a State penal institution.

Pursuant to the holding in *Mineral County,* the respondent reviewed this claim to determine the invoices for the services in which it may be liable. The respondent then filed an answer admitting the validity of the claim in the amount of $840.43.

In view of the foregoing, the court makes an award to the claimant in the amount of $840.43.

Award of $840.43.

OPINION ISSUED JANUARY 5, 1996

TRANSPORT INTERNATIONAL POOL, INC. d/b/a
GE CAPITAL MODULAR SPACE
VS.
DIVISION OF PUBLIC SAFETY
(CC-95-357)

No appearance by claimant.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

The claimant seeks payment of $1,378.00 for damages to an office trailer leased to the respondent. The invoice for the repairs was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity and amount of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which the invoice could have been paid. Subsequently, the Court contacted the claimant and determined that the claimed amount included a sales tax of $78.00. Therefore, the proper amount of claim should be $1,300.00.

In view of the foregoing, the Court makes an award in the amount of $1,300.00.

Award of $1,300.00.

OPINION ISSUED JANUARY 11, 1996

DAVIS MEMORIAL HOSPITAL
VS.
DIVISION OF CORRECTIONS
(CC-95-324)

No appearance by claimant.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

The claimant seeks payment of $10,863.06 for medical services rendered to an inmate in the Huttonsville Correctional Center, a facility of the respondent. The invoice for the services was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity and amount of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which the invoice could have been paid.

In view of the foregoing, the Court makes an award in the amount of $10,863.06.

Award of $10,863.06.

OPINION ISSUED JANUARY 18, 1996

DOROTHY KEHRER
VS.
DIVISION OF HIGHWAYS
(CC-95-74)

Claimant represents self.
Cynthia A. Majestro, Attorney at Law, for respondent.

PER CURIAM:

The claimant, Dorothy Kehrer, seeks an award of $2,536.74 from the respondent, Division of Highways, for damage to her vehicle. The damage occurred on February 17, 1995, at approximately 7:00 a.m., when her son, William G. Kehrer, was driving a 1991 Chrysler Lebaron, owned by the claimant, on Route 5/3 near Glenville State College, in Gilmer County. According to Mr. Kehrer, he was attending Glenville State College at the time of this incident, and he was driving to a parking area at the school when he observed a vehicle slipping in the road as he proceeded up a steep hill. Mr. Kehrer applied his brakes to avoid a collision with the sliding vehicle stopped sliding when it stuck an embarkment along the road. Mr. Kehrer testified that temperatures were below freezing and the hillside was covered with ice.

As a result of the accident, the rear portion of the claimant's vehicle was severely damaged.

The cost to repair the claimant's vehicle was estimated to be $2,286.74. However, the claimant informed the Court that the damage was covered by insurance with a deductible of $250.00.

Max L. Marshall, the Gilmer County road supervisor for the respondent, testified that his responsibilities include routine road maintenance in the vicinity of the accident. According to Mr. Marshall, the respondent has six trucks available for treating roads and general road maintenance in Gilmer County. On February 17, 1995, four of the trucks were engaged snow removal and ice control on high priority roads, and two of the trucks were engaged in spot stabilization work. Mr. Marshall characterized Route 5/3 as a low priority road. However, he acknowledged that Route 5/3 is a problem area in the winter, and it can be unusually treacherous. In addition, Mr. Marshall testified that in some instances he would only trust his best driver to treat the hill section of the road. Nevertheless, there were no signs posted along Route 5/3 to warn motorists of this potentially treacherous condition.

The law in West Virginia is well established that the State is neither an insurer nor a guarantor of the safety of motorists traveling on its highways. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). This principle has resulted in a number of decisions holding that an isolated patch of ice on a highway is ordinarily insufficient to establish negligence on the part of the respondent. See *Cole v. Department of Highways,* 14 Ct. Cl. 350 (1983) and *Treadway v. Department of Highways,* 16 Ct. Cl. 101 (1986). However, this principle does not relieve the respondent of its duty to exercise reasonable care and diligence in maintaining roads under all circumstances.

The evidence in this case indicates that the respondent was aware that the hill on Route 5/3 had a history of being an unusually dangerous area during the winter months. However, the respondent did not take any measurers to warn motorists of this unusually dangerous condition. The Court finds it difficult to understand why no signs were posted to warn motorists of a potentially dangerous situation, if the area is a naturally dangerous section of road. This is especially true for a section of road where the respondent's own witness is reluctant to send snow plow operators under certain conditions, and the respondent can foresee that students will be traveling the section of road on a frequent basis. Therefore, based on the reasons stated above, it is the opinion of the Court that respondent is liable for the claimant's damages. Accordingly, the Court makes an award to the claimant in the amount of her insurance deductible, $250.00.

Award of $250.00.

OPINION ISSUED JANUARY 18, 1996

MICHELLE LEE LEVERO
VS.
DIVISION OF HIGHWAYS
(CC-94-713)

Claimant represents self.
Cynthia A. Majestro, Attorney at Law, for respondent.

PER CURIAM:

The claimant, Michelle Lee Levero, seeks an award of $235.18 from the respondent, Division of Highways, for damage to her vehicle, a 1992 Geo Storm. The damage occurred on the evening of August 19, 1994, at approximately 9:00 p.m., when the claimant's vehicle struck a hole in the pavement. At this time, the claimant was driving her vehicle between 45 to 50 miles per hour on Route 88 near West Liberty College in Ohio County. Driving conditions were clear and the vehicle's headlights were on. The hole was located near the white line lane marker along the edge of the pavement surface. According to the claimant, she was unable to avoid the hole because of oncoming traffic.

As a result of the accident, the front and rear tires and wheels were damaged on the right side of the claimant's vehicle. In addition, after the new wheels and tires were installed, the vehicle required alignment. Several receipts were entered into evidence indicating the claimant incurred out-of-pocket expenses of $224.13 to repair her vehicle.

The record reveals that Route 88 is a heavily traveled two lane road. Joseph L. Reed, the Ohio County Maintenance supervisor for the respondent, testified that he had not received any complaints about the hole involved in this accident until August 24, 1995. However, Mr. Reed was aware that the pavement was exhibiting alligator cracking throughout the area where the accident occurred. After Mr. Reed examined photographs of the hole and the alligator cracks surrounding the hole, he concluded that the hole was caused by a base failure under the pavement surface.

The respondent has a duty to exercise reasonable care and diligence in maintaining roads under all circumstances. *Hobbs v. Dept. of Highways,* 13 Ct. Cl. 37 (1969). Although this duty does not make the respondent a guarantor of the safety of motorists, this duty does require the respondent to provide motorists with a reasonable safe road to travel under the existing circumstances.

The record in this claim indicates that the respondent was aware of the deteriorating pavement and the cause of the deterioration prior to the claimant's accident. However, it is unclear why the respondent did not follow-up on this information or monitor the pavement condition more closely.

After a careful review of the evidence, the Court is of the opinion that the respondent was negligent in its maintenance of Route 88 at the time of the claimant's accident. Therefore, the Court makes an award to the claimant in the amount of $224.13.

Award of $224.13.

OPINION ISSUED JANUARY 26, 1996

DIVISION OF HIGHWAYS
VS.
BUREAU OF COMMERCE
(CC-95-36)

Patricia J. Lawson, Attorney at Law, for claimant.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

The claimant seeks payment $81,507.07 for maintenance services, gasoline, and signs provided to the respondent. In support of its claim, the claimant submitted invoices for the services, gasoline, and signs with its Notice of Claim. The invoices for the services and materials were not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. In its Amended Answer, the respondent admits the validity of the claim in the amount of $19,642.49 as satisfaction for the claim. The respondent also informed the Court that the Division of Natural Resources is responsible for $19,389.28 of the claim, and the Division of Tourism is responsible for $253.21 of the claim.

In view of the foregoing, the Court makes an award to the claimant in the amount of $19,642,49.

Award of $19,642.49.

OPINION ISSUED JANUARY 26, 1996

GARY M. HELLEMS
VS.
PUBLIC SERVICE COMMISSION OF WEST VIRGINIA
(CC-95-342)

Claimant represents self.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

The claimant seeks payment of $1,442.37 for travel expenses while an employee of the respondent. In support of its claim, the claimant submitted travel expense account forms (WVTMP 5.0) with his Notice of Claim. The travel forms were not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. In its Amended Answer, the respondent admits the validity of the claim in the amount of $1,442.37, and states that there were sufficient funds expired in the appropriate fiscal year with which the travel expenses could have been paid.

In view of the foregoing, the Court makes an award to the claimant in the amount of $1,442,37.

Award of $1,442.37.

OPINION ISSUED JANUARY 26, 1996

DAVID HILL
VS.
STATE OF WEST VIRGINIA
(CC-95-216)

Michael C. Allen, Attorney at Law, for claimant.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

The claimant, David Hill, seeks an award of $5,415.00 from the respondent, State of West Virginia, for damages arising from a criminal investigation. This claim was originally filed against the Treasurer of West Virginia; however, at the hearing of this claim on January 24, 1996, the claimant amended his claim to reflect the State of West Virginia as the respondent.

The evidence adduced at the hearing of this claim revealed that the claimant is the owner of an apartment building in Elkins, West Virginia. On March 4, 1991, one of the apartments in the claimant's building was locked by the West Virginia State Police because it was the location of a murder. When this occurred, the claimant could no longer enter the apartment. Sometime thereafter, State Police officials returned to the apartment and cleaned a foul smelling refrigerator. At this time, the windows were opened to allow fresh air into the apartment. Unfortunately the windows were not closed, and the water pipes in the apartment froze and broke.

As a result of the incident, the claimant was deprived of rent from the apartment in the amount of $200.00 per month for twenty-three months. In addition, the claimant incurred expenses of $815.00 to repair water damage and broken pipes in the apartment.

After a careful review of the evidence presented in this claim, the Court finds that the State of West Virginia took possession of the claimant's apartment to conduct a criminal investigation.

While in possession of the claimant's apartment employees of the respondent were negligent in their care of the apartment. Moreover, the Court also examined the amount of damages involved in this claim and finds that damages in the amount of $5,415.00 are fair and reasonable. Therefore, the Court makes an award to the claimant in the amount of $5,415.00.

Award of $5,415.00.

OPINION ISSUED JANUARY 26, 1996

SHAWN KNICELEY AND ELIZABETH KNICELEY
VS.
DIVISION OF HIGHWAYS
(CC-95-148)

Claimant represents self.
Cynthia A. Majestro, Attorney at Law, for respondent.

PER CURIAM:

Claimants, Shawn Kniceley and Elizabeth Kniceley, seek an award of $419.74 from respondent, Division of Highways, for damage to their vehicle, a 1994 Eagle Talon. The damage occurred on January 25, 1995, at approximately 3:00 p.m., while Ms. Elizabeth Kniceley was traveling on Harrison County Route 13. During the drive, Ms. Kniceley was proceeding between 30 to 35 miles per hour when she encountered a large hole which extended from the shoulder into the paved portion of the roadway. The hole was approximately one foot in diameter and between five and six inches deep. According to Ms. Kniceley, she was aware of the hole, and she had been able to drive around it on prior occasions. However, on this occasion, she was unable to avoid the hole because of oncoming traffic. although Ms. Kniceley was aware of the hole for several weeks prior to the accident, she never informed respondent about the hole.

As a result of the accident, the vehicle sustained damage to the alignment and a wheel. Receipts for the repairs to the vehicle were admitted into evidence which totaled $419.74. The vehicle was covered by an insurance policy which did not provide for recovery for damage to the wheels.

The Harrison County road maintenance superintendent, Mike Scott, testified that County Route 13 is a two-lane, paved road, and the pavement surface is approximately twenty feet wide at the location of the accident. According to Mr. Scott, road crews performed patching activity along County Route 13 on January 26, 1995, and he had not received any complaints about this hole until after the accident. The record also reveals that County Route 13 serves as primary feeder route to

Interstate 79, and carries a large volume of heavy vehicles.

This Court has consistently followed the principle that for respondent to be held liable for a road defect, it must have either actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dept. of Highways,* 16 Ct. Cl. 103 (1986). In the instant claim, the record establishes that there was a large hole on a heavily traveled feeder road from which the Court concludes that respondent, at the very least, had constructive notice, and that respondent was negligent in its maintenance of this road. The Court also is aware that the claimants had notice of the defect on County Route 13; therefore, the Court finds that the claimants were negligent and reduces the award by twenty-five percent (25%) for an award of $314.80.

Award of $314.80.

OPINION ISSUED JANUARY 26, 1996

JOEL A. MADDY
VS.
DIVISION OF HIGHWAYS
(CC-95-262)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

The claimant, Joel A. Maddy, seeks an award of $10-9.12 from the respondent, Division of Highways, for damage to his vehicle. On the evening of June 27, 1995, the claimant was traveling west on Route 12, also known as Smith Creek Road. The weather conditions were fair, and the claimant was driving a 1991 Honda Civic. As the claimant proceeded around a curve, the wheels of his vehicle dropped off of the roadway and into a ditch. According to the claimant, he was driving close to the ditch to avoid an oncoming vehicle. The record reveals that Route 12 is a two lane road, and the claimant's lane of travel was seven feet ten inches wide at the location of the accident. Photographs of Route 12 indicate that the pavement surface is adjacent to a ditch and a steep hillside. The photographs also illustrate that there is no space between the edge of the pavement and the ditch.

As a result of the accident, the tire and wheels of the vehicle were damaged. Although the damage was covered by the claimant's insurance, the claimant testified that the cost to repair his vehicle totaled $109.12 and his insurance deductible was $250.00.

Charles Smith, a maintenance crew chief for the respondent, admitted that the pavement surface on Route 12 narrows where the accident occurred. Mr. Smith also testified that the ditch line is partially blocked by a mailbox post. As a result, the ditch fills up with water which causes the edge

of the pavement to break apart.

This Court has held in other claims that the respondent has a duty to maintain road berms in a reasonably safe condition. *Sweda vs. Dept. of Highways,* 13 Ct. Cl. 249 (1980); *Hinkle vs. Division of Highways,* unpublished opinion issued December 10, 1991, CC-89-97.

The record in this claim indicates that the respondent was aware of the dangerous condition along Route 12 and failed properly to repair the pavement or warn motorists of the narrow roadway. Moreover, the claimant had a reasonable expectation that the pavement surface would be a consistent width throughout the length of the curve, and he was not negligent in the operation of the vehicle. Therefore, based on the above, the Court finds that the respondent is liable for the damage to the claimant's vehicle. Accordingly, the Court makes an award to the claimant in the amount of $109.12.

Award of $109.12.

OPINION ISSUED JANUARY 26, 1996

MERCER COUNTY COMMISSION
VS.
WEST VIRGINIA SUPREME COURT OF APPEALS
(CC-95-302)

No appearance by claimant.
No appearance by respondent.

PER CURIAM:

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

The claimant seeks payment of $1,950.00 because it has not been reimbursed for rent owed by a family law master. The invoices for the rent were not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity and amount of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which the invoices could have been paid.

In view of the foregoing, the Court makes an award in the amount of $1,950.00.

Award of $1,950.00.

OPINION ISSUED JANUARY 26, 1996

PATRICIA A. PARSONS-MILLS
VS.
DIVISION OF HIGHWAYS
(CC-95-328)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

The above styled claim was submitted for decision based upon a stipulation signed by both parties. The claimant, Patricia A. Parsons, seeks an award of $2,000.00 from the respondent, Division of Highways, for damage to her vehicle. According to the stipulation, the claimant and the respondent agreed to the following statements:

1. On or about August 18, 1995, the claimant and her brother drove to work in the claimant's 1993 Dodge Colt. The claimant works for the State Lottery Commission and her brother works for the respondent's Materials Division.

2. After leaving the claimant at her place of work, the claimant's brother drove her vehicle to the Materials Division and parked in the parking area next the respondent's chemical laboratory located on 312 Michigan Avenue in Charleston, West Virginia.

3. During the day in question, either some acid or acidic water from the respondent's chemical laboratory apparently leaked form a deteriorated gutter on the building and onto the claimant's vehicle.

4. As a result of the leak from the respondent's chemical laboratory, the claimant's light blue vehicle was covered by dark spots on several places. Unsuccessful attempts were made to remove the spots from the claimant's vehicle.

5. In order to restore the claimant's vehicle to the condition it was in before the leak, the claimant's vehicle will have to be repainted.

6. The respondent acknowledged responsibility for the damage done to the claimant's vehicle and agreed to compensate the claimant in the amount of $1,200.00. The claimant agreed to accept the $1,200.00.

The Court having reviewed the stipulation and finding that the amount of $1,200.00 is fair and reasonable. The Court hereby makes an award of $1,200.00 to the claimant.

Award of $1,200.00.

OPINION ISSUED JANUARY 26, 1996

PENNSYLVANIA COUNCIL OF CHILDREN'S SERVICES
VS.
WEST VIRGINIA SUPREME COURT OF APPEALS
(CC-95-375)

No appearance by claimant.
No appearance by respondent.

PER CURIAM:

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

The claimant seeks payment of $2,000.00 for consultation services provided to the respondent. The invoice for the services was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity and the amount of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which the invoice could have been paid.

In view of the foregoing, the Court makes an award in the amount of $2,000.00.

Award of $2,000.00.

OPINION ISSUED JANUARY 26, 1996

REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY
VS.
DIVISION OF CORRECTIONS
(CC-95-351)

John Dalporto, Assistant Attorney General, for claimant.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant, Regional Jail and Correctional Facility Authority, provides and maintains the Eastern Regional Jail, the Central Regional Jail, the South Central Regional Jail, the Southern Regional Jail, and the Northern Regional Jail as facilities for the incarceration of prisoners who have committed crimes in various counties. Some of the prisoners are held in these regional jails have been sentenced to facilities owned and maintained by the respondent, Division of Corrections. Claimant brought this action in the amount of $149,380.00, to recover the costs of housing prisoners who have been sentenced to a State penal institution, but due to circumstances beyond the control of the claimant, these prisoners have had to remain in the regional jails for periods of time beyond the dates of the commitment orders.

Respondent filed its Answer admitting the validity and the amount of the claim and stating that respondent expired sufficient funds in the 1995 FY with which to satisfy this obligation. The parties had a dispute regarding the dates certain court orders were received by the respondent, out-of-court costs, and names of inmates on various court orders, but the parties resolved the dispute and agreed that the sum of $149,380.00 is due and owing the claimant.

This Court has determined in prior claims by claimant for the cost of housing inmates that respondent is liable to claimant for these costs, and the Court has made the appropriate awards. This issue was considered by the Court previously in the claim of County Comm'n. of Mineral County v. Div. of Corrections, an unpublished opinion of the Court of Claims issued November 21, 1990, wherein the Court held that the respondent is liable for the cost of housing inmates.

In view of the foregoing, the Court makes an award to claimant in the amount of $149,380.00.

Award of $149,380.00.

ANDREW N. RICHARDSON, COMMISSIONER,
BUREAU OF EMPLOYMENT PROGRAMS,
DIVISION OF WORKERS' COMPENSATION,
Claimant,

vs. CC-95-376

DIVISION OF CORRECTIONS,
Respondent.

AGREED ORDER

On a prior day came the Claimant, by counsel, Laura Ellen Buchko, Esquire, and came the

Respondent, by counsel, John s. Dalporto, Senior Assistant Attorney General, and Jeffrey G. Blaydes, Assistant Attorney General, who represented to the Court that the matters at issue in this claim have been fully resolved and that the parties have agreed and stipulated that the sum of Five Hundred Sixty-nine thousand, Six Hundred Forty-nine and 42/100 dollars ($569,649.42) is the total amount of money due the Claimant for the subject period, which period includes January 31, 1996, and that such sum includes any and all claims for "advance quarterly premiums", interest and penalties which have been or may be asserted as due and owing by the Claimant under the Workers' Compensation Act at this time.

Upon all of which, it is hereby ORDERED that the Claimant is granted an award in the total amount of Five Hundred Sixty-nine thousand, Six Hundred Forty-nine and 42/100 dollars ($569,649.42), and the case is hereby dismissed from the docket, with prejudice.

Entered this 26th day of January, 1996.

ROBERT M. STEPTOE
Presiding Judge

Seen and Approved by:

LAURA ELLEN BUCHKO
Counsel for Claimant

JOHN S. DALPORTO
Senior Assistant Attorney General
Counsel for Respondent

JEFFREY G. BLAYDES
Assistant Attorney General
Counsel for Respondent

ANDREW N. RICHARDSON, COMMISSIONER,
BUREAU OF EMPLOYMENT PROGRAMS,
DIVISION OF WORKERS' COMPENSATION,
Claimant,

vs. CC-95-369

OFFICE OF MINERS' HEALTH & SAFETY,
Respondent.

AGREED ORDER

On a prior day came the Claimant, by counsel, Laura Ellen Buchko, Esquire, and came the respondent, by counsel, John s. Dalporto, Senior Assistant Attorney General, and Jeffrey G. Blaydes, Assistant Attorney General, who represented to the Court that the matters at issue in this claim have been fully resolved and that the parties have agreed and stipulated that the sum of One Hundred, Seventy-two thousand, Two Hundred one and 42/100 dollars ($172,201.42) is the total amount of money due the Claimant for the subject period, which period includes January 31, 1996, and that such sum includes any and all claims for "advance quarterly premiums", interest and penalties which have been or may be asserted as due and owing by the Claimant under the Workers' Compensation Act at this time.

Upon all of which, is hereby ORDERED that the Claimant is granted an award int the total amount of One Hundred Seventy-two thousand, Two Hundred one and 42/100 ($172,201.42), and the case is hereby dismissed from the docket, with prejudice.

Entered this 26th day of January, 1996.

ROBERT M. STEPTOE
Presiding Judge

Seen and Approved by:

LAURA ELLEN BUCHKO
Counsel for Claimant

JOHN S. DALPORTO
Senior Assistant Attorney General
Counsel for Respondent

JEFFREY G. BLAYDES
Assistant Attorney General
Counsel for Respondent

OPINION ISSUED JANUARY 26, 1996

GREGORY SELLARDS AND LINDA SELLARDS
VS.
DIVISION OF HIGHWAYS
(CC-95-23)

Claimant represents self.
Andrew F. Tarr, Cynthia A. Majestro, Attorney at Law, for respondent.

PER CURIAM:

The claimants, Gregory Sellards and Linda Sellards, seek an award of $196.19 from the respondent, Division of Highways, for damage to the windshield of their 1984 Oldsmobile. the damage occurred on December 30, 1994, while the claimants were traveling east on Route 33 in Jackson County. During the drive, a stone struck the claimants' vehicle while they were passing a tuck. According to Mr. Sellards, the pavement was covered with loose gravel, and the stone which struck the vehicle was the size of a quarter. The claimants allege that the respondent failed to remove the loose gravel from the roadway upon completion of maintenance work.

As a result of the incident, the windshield of the vehicle was broken and the chrome trim around the windshield was bent. The cost to repair the windshield was $160.44 and the damage to the chrome trim was estimated to be $35.45 for a total amount claimed of $196.19.

Bill McVay, a County Supervisor for the respondent, is responsible for maintaining the roads in a safe condition for motorists in Jackson County. According to Mr. McVay, road crews for the respondent repaired the berm and shoulder along Route 33 during December 27, 28, and 29, 1994. As part of this work, loose gravel was placed along the edge of the pavement. Then the gravel was graded and compacted to fill any holes or low places. After the gravel was compacted, any excess gravel was swept off the pavement surface. Mr. McVay also testified that he was unaware of any problems along Route 33 prior to the claimants' accident.

In West Virginia, the respondent has a duty to use reasonable care and diligence in maintaining roadways under all circumstances. *Hobbs v. Dept. of Highways,* 13 Ct. Cl. 27 (1979). The facts in this claim indicate that the respondent failed to remove the excess gravel from Route 33 after maintenance crews repaired the berm. The Court finds that the respondent should have been aware of this problem and could have prevented it through the exercise of reasonable diligence. Therefore, the Court makes an award to the claimants in the amount of $196.19.

Award of $196.19.

OPINION ISSUED JANUARY 26, 1996

SOUTH BERKELEY AUTO SALES
VS.
DIVISION OF MOTOR VEHICLES
(CC-95-214)

No appearance by claimant.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

The claimant, South Berkeley Auto Sales, seeks an award of $875.00 from the respondent, Division of Motor Vehicles. The claimant alleges that the respondent failed to note a creditor's lien on the title of a vehicle it purchased from an individual who appeared to have clear title to the vehicle. However, the vehicle was repossesses by a creditor after the claimant purchased the vehicle. The claimant contends that it should be reimbursed by the respondent for the loss of the vehicle.

In its Answer, the respondent admits the validity and amount of the claim, and states that one of its employees failed to note the creditor's lien on the title to the vehicle.

Based on the foregoing, the Court finds that the respondent was negligent in its failure to note the lien on the title of the vehicle. Therefore, the Court makes an award to the claimant in the amount of $875.00.

Award of $875.00.

OPINION ISSUED JANUARY 26, 1996

SYSTEM DESIGN ASSOCIATES
VS.
MUNICIPAL BOND COMMISSION
(CC-96-8)

No appearance by claimant.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

The claimant seeks payment of $1,173.00 for a computer and monitor provided to the respondent. In support of its claim, the claimant submitted the invoices for the computer and monitor with its Notice of Claim. The invoices were not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity and amount of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which the invoice could have been paid.

In view of the foregoing, the Court makes an award in the amount of $1,173.00.

Award of $1,173.00.

OPINION ISSUED JANUARY 26, 1996

SYSTEM DESIGN ASSOCIATES
VS.
ATTORNEY GENERAL'S OFFICE
(CC-96-9)

No appearance by claimant.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

The claimant seeks payment of $924.00 for computer hardware provided to the respondent. In support of its claim, the claimant submitted invoices for the computer hardware with its Notice of Claim which total $1,350.00. The record indicates that the computer hardware did not work as expected and the price was reduced. The invoices for the computer hardware were not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity and amount of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which to pay this claim.

In view of the foregoing, the Court makes an award in the amount of $924.00.

Award of $924.00.

OPINION ISSUED JANUARY 26, 1996

TELECOMMUNICATIONS INNOVATIONS d/b/a
THE TELEMANAGEMENT GROUP
VS.
DIVISION OF PERSONNEL

(CC-95-291)

No appearance by claimant.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

The claimant seeks payment of $879.32 for maintenance service on the respondent's telephone system. In support of its claim, the claimant submitted invoices for the services with its Notice of Claim. In its Answer, the respondent asserts that a portion of the maintenance work should have been covered by a service contract between the claimant and the respondent. Therefore, the respondent admits the validity of the claim in the amount of $789.32, and states that there were sufficient funds expired in the appropriate fiscal year with which this amount could have been paid. Subsequently, the claimant contacted the Court and indicated it would accept $789.32 as satisfaction for the claim.

In view of the foregoing, the Court makes an award to the claimant in the amount of $789.32.

Award of $789.32.

OPINION ISSUED JANUARY 26, 1996

ROBERT H. TRAIL AND LORI A. TRAIL
VS.
DIVISION OF HIGHWAYS
(CC-95-138)

Claimant's represent selves.
Cynthia A. Majestro, Attorney at Law, for respondent.

PER CURIAM:

The claimants, Robert H. Trail and Lori A. Trail, seek an award of $1,952.42 from the respondent, Division of Highways, for damage to a 1986 Chevrolet Camaro owned by Mrs. Trail. The damage occurred during the after noon of March 12, 1995, when a storm drain grate struck the undercarriage of Mrs. Trail's vehicle. The grate covered a storm drain inlet located in a parking lot for Dwight's restaurant which is adjacent to Route 19 near Hurricane, West Virginia. According to the claimants, the grate appeared to be in good condition. However, when the tire of the vehicle pressed against one corner of the grate. The other side of the grate struck the undercarriage of the

vehicle.

As a result of the accident, the transmission was severely damaged. The cost to repair the damaged vehicle was estimated to be $1,852.42. The claimants also incurred a bill in the amount of $90.00 to tow the vehicle away from the scene of the accident. In addition, the claimants paid $10.00 to obtain a police report for the incident. Mr. Trail testified that he has expended $600.00 partially to repair the vehicle. However, he was unable to present any tangible evidence to corroborate this amount.

The record reveals that the storm drain inlet was located approximately twenty-two feet from the edge of the Route 19. Although the storm drain appeared to be on a private parking lot, the record reveals that the inlet was located on the respondent's right-of-way. Gary Stanley, a crew chief for the respondent, testified that he was unaware that the inlet was on the respondent's right-of-way prior to claimants' accident. Nevertheless, Mr. Stanley admitted that the respondent was responsible for maintaining the storm drain involved in this claim.

In West Virginia, the respondent has a duty to maintain roads in a reasonably safe condition. Although this does not make the respondent an insurer of the safety of motorists, it does require the respondent to exercise reasonable diligence and care in monitoring and repairing road defects. Although the facts in this claim indicate that the storm drain inlet was not located on the roadway, it is clear that the defective inlet was on the respondent's right-of-way, and located in an area where motorists were likely to encounter the defect. Therefore, the Court finds that the respondent should have known of the defective inlet and corrected the problem in a timely manner.

Based on the above, the Court makes an award to the claimant in the amount of $1,952.42.

Award of $1,952.42.

OPINION ISSUED MARCH 6, 1996

CHARLES D. ANDERSON
VS.
DIVISION OF CORRECTIONS
(CC-95-153)

Claimant represents self.
Jeffrey G. Blaydes, Attorney at Law, for respondent.

PER CURIAM:

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

Claimant seeks payment for certain items of personal property which he had in his possession while an inmate in the Mount Olive Correctional Complex, a facility of respondent. When he was released from the medical unit at the Mount Olive Correctional Complex, various items of his personal property were missing and were not returned to him. He alleged the value of the items lost were in the amount of $664.00.

In its Answer, respondent admits the facts of the claim, but states that the reasonable value of the personal property belonging to the claimant is $545.74. The claimant indicated to the court in writing that he is willing to accept $545.74 as full and complete satisfaction of his claim.

The Court, having reviewed the facts in this claim, has determined that a bailment existed and that respondent failed to return personal property belonging to the claimant when it was in respondent's care and custody. The Court also has determined that $545.74 is fair and reasonable to compensate the claimant for his loss.

Accordingly, the Court makes an award to the claimant in the amount of $545.74.

Award of $545.74.

OPINION ISSUED MARCH 6, 1996

REBECCA A. GRIFFITH
VS.
DEPARTMENT OF EDUCATION
(CC-96-30)

No appearance by claimant.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

The claimant seeks payment of $150.00 for tuition reimbursement. The respondent, in its Answer, admits the validity and the amount of the claim, but states that there were sufficient funds expired in the appropriate fiscal year with which the tuition could have been paid.

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

Claim disallowed.

OPINION ISSUED MARCH 6, 1996

MILDRED FAYE TALLMAN
VS.
DEPARTMENT OF EDUCATION
(CC-96-14)

No appearance by claimant.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

The claimant seeks payment of $170.00 for lost wages due to the State's failure to meet equity requirements in the school-aid formula. The respondent, in its Answer, admits the validity and the amount of the claim, but states that there were sufficient funds expired in the appropriate fiscal year with which the wages could have been paid.

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

Claim disallowed.

OPINION ISSUED MARCH 6, 1996

SANDRA C. WILMOTH
VS.
DEPARTMENT OF EDUCATION
(CC-96-5)

No appearance by claimant.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

The claimant seeks payment of $950.00 for lost wages due to the State's failure to meet equity requirements in the school-aid formula. The respondent, in its Answer, admits the validity and the amount of the claim, but states that there were insufficient funds expired in the appropriate fiscal year with which the wages could have been paid.

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

Claim disallowed.

OPINION ISSUED APRIL 1, 1996

ANTHONY CATANIA, JR., D.P.M.
VS.
DIVISION OF CORRECTIONS
(CC-96-46)

No appearance by claimant.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

The claimant seeks payment of $70.00 for medical services rendered to an inmate in the West Virginia Industrial Home for Youth, a facility of the respondent. The invoices for the services was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity and amount of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which the invoice could have been paid.

In view of the foregoing, the Court makes an award in the amount of $70.00.

Award of $70.00.

OPINION ISSUED APRIL 1, 1996

ROGER D. DOLAN AND DEBRA HUFFMAN DOLAN
VS.
DIVISION OF HIGHWAYS
(CC-94-665)

Claimants represent themselves.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

The claimants, Roger D. Dolan and Debra Huffman Dolan, seek an award of $7,000.00 from the respondent, Division of Highways for damage to their 1990 four wheel drive Subaru Legacy. The damage occurred on July 17, 1994, at approximately 9:00 a.m., as a result of a traffic accident. According to Ms. Dolan, she was driving west on U.S. Route 60 west of Lewisburg, in Greenbrier County, when she encountered an oncoming vehicle. Ms. Dolan avoided the oncoming vehicle, but both tires on her vehicle "dropped off the pavement". Ms. Dolan attempted to gradually guide her vehicle back onto the roadway. However, she lost control of her vehicle and it slid over an embankment. Fortunately, Ms. Dolan escaped the accident without injury. Photographs of the accident location indicated that U.S. Route 60 is a two lane black top road, and the pavement surface is twenty-two feet wide. At the time of the accident, the roadway was wet, but was not covered with water. Ms. Dolan further testified that the vehicle which approached her never crossed the double-yellow line which separated the travel lanes of the highway. The cost to repair the claimants' vehicle was estimated to be $6,045.98.

The accident was investigated by Sergeant Bruce Arthur Sloan of the West Virginia State Police. Sgt. Sloan testified that the berm of the road was lower than the pavement surface, but he did not believe that this condition was a contributing factor to the accident. Sgt. Sloan further testified that the claimants' vehicle traveled between 400 and 500 feet from the point where it initially left the road to where it came to rest.

This Court has held on other occasions that the respondent has a duty to maintain road berms in a reasonably safe condition. *Sweda vs. Department of Highways,* 13 Ct. Cl. 249 (1980). However, this duty does not make the respondent a guarantor of the safety of motorists upon its highways. In order to recover an award, a claimant must prove a road defect existed which was the proximate cause of his or her damages, and that the respondent had notice of the defective berm and a reasonable opportunity to correct the defect.

The facts in this claim do not establish that the berm along U.S. Route 60 was the proximate cause of Ms. Dolan's accident. In addition, no evidence was presented to establish that the respondent had notice of any defect in the berm. Therefore, this claim must be denied.

Claim disallowed.

OPINION ISSUED MAY 1, 1996

JAN-CARE AMBULANCE SERVICE, INC.
VS.
DIVISION OF CORRECTIONS
(CC-96-121)

No appearance by claimant.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

The claimant seeks payment of $1,752.00 for medical services rendered to inmates in the Mount Olive Correctional Center, a facility of the respondent. The invoices for the services were not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity and amount of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which the invoices could have been paid.

In view of the foregoing, the Court makes an award in the amount of $1,752.00.

Award of $1,752.00.

OPINION ISSUED MAY 1, 1996

DENNIS W. ROWSEY, JR.
VS.
BOARD OF DIRECTORS OF THE STATE COLLEGE SYSTEM
(CC-96-25)

No appearance by claimant.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

The claimant seeks an award of $792.93 for damage to his personal property. The property sustained water damage while in a dormitory room on the campus of Concord College, a facility of the respondent. In its Answer, the respondent Admits the validity and amount of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which to pay for the damaged property.

In view of the foregoing, the Court makes an award in the amount of $792.93.

Award of $792.93.

OPINION ISSUED JULY 8, 1996

CARL W. PETTIT
VS.
DIVISION OF HIGHWAYS
(CC-95-333)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

The claimant, Carl W. Pettit, seeks an award of $1,355.50 from the respondent, Division of Highways, for damage to his 1972 Volkswagen Beetle resulting from a two vehicle accident. The damage occurred on the evening of November 26, 1993, while the claimant and his wife, Lorraine Pettit, were traveling west on Dairy Road in Putnam County. The claimant was unfamiliar with the condition of the roadway, and his visibility was limited by rain and darkness. According to the claimant, he was driving approximately twenty-five miles per hour when he unknowingly entered the intersection of Dairy Road and West Virginia Route 62. At this time, Mrs. Pettit screamed and the claimant immediately attempted to stop his vehicle. However, the vehicle slid into the intersection and struck a vehicle traveling north on West Virginia Route 62. The claimant testified that no stop sign was posted at the intersection, nor were there any signs along Dairy Road to warn motorists of the intersection.

As a result of the accident, the claimant's vehicle was substantially damaged. Fortunately, the claimant and Mrs. Pettit escaped the accident without physical injury. The cost to repair the

claimant's vehicle totaled $1,355.50. The claimant did not have automobile insurance which covered the damage to his vehicle.

Claude Blake, the Chief Claim Investigator for the respondent, testified that he questioned several employees at the respondent's Putnam County Headquarters about the intersection of Dairy Road and West Virginia Route 62. He also reviewed maintenance records and checked with state police officials to determine if any complaints were filed about a missing stop sign at the intersection of Dairy Road and West Virginia Route 62. Mr. Blake's investigation revealed no information concerning how the sign was removed or when and who replaced the sign.

Jim Russell, a traffic control supervisor for the respondent, testified that he is responsible for thousands of stop signs throughout Kanawha, Boone, Clay and Putnam counties. According to Mr. Russell, his records provided no indication of when the stop sign was removed. In addition, Mr. Russell was unable to determine who replaced the stop sign or when it was replaced.

The duty owed by the respondent to motorists in West Virginia requires the respondent to maintain roads in a reasonable and diligent manner for the typical circumstances for which roads are utilized. This standard applies to various kinds of road defects including the failure to post traffic control signs.

The evidence in this claim revealed that the intersection of Dairy Road and West Virginia Route 62 is located near a high school, housing development, and country club. Although the respondent's witnesses strongly denied any knowledge of the missing stop sign, it was undisputed that no stop sign was posted at the intersection when the accident occurred. Since the intersection was located in a heavily traveled area and the presence of a stop sign was pivotal to the safe flow of traffic through the intersection, this Court finds that the respondent failed to maintain the intersection in a safe and proper manner.

The Court, having determined that the respondent was negligent in its care and maintenance of the intersection of Dairy Road and West Virginia 62 at the time of the claimant's accident, hereby makes an award to the claimant in the amount of $1,355.50.

Award of $1,355.50.

OPINION ISSUED JULY 8, 1996

SERVICE AMERICA CORPORATION
VS.
DIVISION OF CORRECTIONS
(CC-96-96)

Kristen E. Briotte, Attorney at Law, for claimant.

Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

The claimant seeks payment of $35,928.89 for food services provided to inmates who were housed in the Northern Regional Jail, but were in the custody of the respondent. The invoices for the services were not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity of the claim in the amount of $30,850.97, and states that there were sufficient funds expired in the appropriate fiscal year with which this amount could have been paid. Subsequently, the claimant contacted the Court and indicated it would accept $30,850.97 as satisfaction for its claim.

In view of the foregoing, the Court makes an award in the amount of $30,850.97.

Award of $30,850.97.

OPINION ISSUED AUGUST 7, 1996

HATTIE D. CASTLE
VS.
DIVISION OF HIGHWAYS
(CC-95-367)

Claimant represents self.
Cynthia A. Majestro, Attorney at Law, for the respondent.

PER CURIAM:

The claimant, Hattie D. Castle, seeks an award of $87,40 from the respondent, Division of Highways, for damage to her vehicle, a 1995, Ford Escort. The damage occurred on the afternoon of November 23, 1995, while the claimant was traveling north on Route 52. During the drive, the claimant's vehicle struck a large hole in the pavement surface. Weather conditions were wet and rainy, and the hole was filled with water. According to the claimant, vehicles ahead of her drove around the hole; however, she was unable to avoid the hole due to the oncoming traffic. As a result

of the accident, a tire on the claimant's vehicle was damaged. The cost to replace the tire totaled $87.40.

Cecil W. Collins, an employee for the respondent, testified that his responsibilities included receiving and investigating road complaints. According to Mr. Collins, Route 52 was a top priority two lane road, and its pavement surface was in poor condition when the claimant's accident occurred. Nevertheless, maintenance records kept by the respondent revealed that Route 52 was patched with three tons of cold mix material on November 17, 1995. Mr. Collins also indicated that Route 52 was traveled by a large number of coal trucks, and he believed that these heavy trucks contributed to the rapid deterioration of the pavement surface.

The respondent is neither an insurer nor a guarantor of the safety of motorists upon its highways. For the respondent to be held liable for damage caused by a road defect, it must have had notice of the defect and a reasonable opportunity to correct the problem. The facts in this claim revealed that the respondent was aware of poor road conditions on Route 52, and it had performed a substantial amount of patching work on Route 52 shortly before the claimant's accident. Although the circumstances surrounding this claim are unfortunate, the Court finds that the respondent was not negligent in its maintenance of Route 52 on the date of this incident. Therefore, this claim is denied.

Claim disallowed.

OPINION ISSUED AUGUST 7, 1996

DARRELL D. AND MARILYN E. MITCHELL
VS.
DIVISION OF HIGHWAYS
(CC-96-18)

Claimant represents self.
Cynthia A. Majestro, Attorney at Law, for respondent.

PER CURIAM:

The claimants, Darrell D. Mitchell and Marilyn E. Mitchell, seek an award of $352.92 from the respondent, Division of Highways, for damage to their vehicle. The damage occurred on January 1, 1996, at approximately 1:00 a.m., while the claimants were traveling east on Piedmont Road in Kanawha County. During the drive, Mr. Mitchell was proceeding thirty-five miles per hour when his vehicle, a 1986 Toyota Camry, struck a rock in the road. According to Mr. Mitchell, foggy conditions restricted his sight distance, and he was unable to see the rock until his vehicle was within ten feet of it. As a result of the collision, the vehicle sustained transmission damage.

Laura Ann Conley-Rinehart, an engineer and maintenance assistance for the respondent,

testified that her responsibilities include general maintenance in the area where the claimants' accident occurred. According to Ms. Conley -Rinehart, the rock face adjacent to Piedmont Road was designed to prevent rocks from falling onto the roadway. In support of Ms. Conley-Rinehart's testimony, the respondent offered three photographs into evidence which depicted the accident location.

This Court has consistently held in several claims that the unexplained falling of a rock or boulder onto a highway, without a positive showing that the respondent knew or should have known of a dangerous condition posing a threat of injury to person or property, is insufficient to justify an award. *Coburn v. Dept. of Highways,* 16 Ct. Cl. 68 (1986); *Hatfield v. Dept. of Highways,* 15 Ct. Cl. 168 (1984); and *Hammond v. Dept. of Highways,* 11 Ct. Cl. 234 (1977).

The evidence presented in this claim established that the hillside adjacent to Piedmont Road was designed to minimize the risk of rocks falling on to the road. Moreover, the testimony of Ms. Conley-Rinehart indicated that rocks rarely fall onto the road. Therefore, on the basis of the evidence and testimony presented in this claim, the Court is of the opinion that the claimant has not established any negligence on behalf of the respondent. Accordingly, this claim is denied.

Claim disallowed.

OPINION ISSUED AUGUST 7, 1996

VICTOR AND MABLE PHARES
VS.
DIVISION OF HIGHWAYS
(CC-93-275)

Henry R. Cronin, Jr., Attorney at Law, for claimants.
Andrew F. Tarr and Cynthia A. Majestro, Attorneys at Law, for respondent.

PER CURIAM:

The claimants, Victor and Mable Phares, allege that their house has been damaged and continues to be damaged by vibrations from motor vehicles which travel on the Kingmont exit ramp of Interstate 79. They contend that vibrations began to affect their house when the Kingmont exit was built. The respondent contends that any vibrations from the roads surrounding the claimants' house are minimal and incapable of causing damage to the house. In addition, the respondent contends that the damage to the claimants' house was caused by settlement rather than vibrations.

The evidence presented in this claim reveals that the claimants' house is located adjacent to the Kingmont exit on Interstate 79 in Marion County. The house was built in 1942, and it has been Mable Phares' residence since 1946. The Kingmont exit was built in 1984. During its construction,

a substantial amount of the existing soil was excavated and replaced with stone. Shortly after the start of construction, numerous structural problems developed in the claimants' house. These problems consisted of cracks and gaps in the walls, misalignment of doors and windows, and uneven ceilings and floors. According to the claimants, the damage to their house is a direct result of vibrations which emanated from the Kingmont exit construction project and vibrations which continue to emanate from the roads near their property. The claimants also testified that the damage to their house has progressively worsened since 1984, and that their house is currently beyond repair.

Robert A. Amtower, a civil engineer employed by the respondent, examined the inside and outside of the claimants' house on July 26, 1995. Mr. Amtower's investigation revealed that the roof was sagging, jack posts had been installed in the basement to support the house, joint separations had formed between the cinder blocks in the basement walls, and residual moisture was present on the basement floor. According to Mr. Amtower, these observations indicated that the house was experiencing settlement damage rather than vibration damage.

Glen R. Sherman, a geologist employed by the respondent, testified that he was familiar with the procedures for detecting and measuring earth-born vibrations. On July 26, 1995, Mr. Sherman visited the claimants' house and conducted an investigation to measure vibrations in the vicinity of the house. Mr. Sherman checked for vibrations at three different locations around the claimants' house under various conditions. In each instance, vibrations were monitored with a device which measured particle velocity and displacement acceleration of a particle excited by vibrations. According to Mr. Sherman, the highest vibration reading was 0.230 inches per second. Mr. Sherman testified that a residential structure would not ordinarily sustain damage from vibrations which measured less than 1.5 inches per second. Therefore, Mr. Sherman concluded that the vibration level near the claimants' property was not high enough to cause damage to their house.

This claim presents an unfortunate set of circumstances in which the claimants' property has been visibly damaged by an unknown force. Although the claimants contend the damage was caused by vibrations from a poorly designed road, the record revealed a substantial amount of evidence which established that vibrations were not a significant problem in the area. Moreover, the record revealed that other possible causes exit for the damage to the claimants' house.

This Court has consistently held that an award cannot be based on speculation. *Perine v. Division of Highways,* unpublished opinion issued December 10, 1991, CC-94-124; *Mooney v. Department of Highways,* 16 Ct. Cl. 84 (1986). After a thorough review of the evidence, the Court finds that the claimants have established that their damage was caused by any negligence on the part of the respondent. Therefore, this claim is denied.

Claim disallowed.

Judge Webb did not participate in the hearing or decision of this claim.

OPINION ISSUED AUGUST 7, 1996

KAREN RACER
VS.
DIVISION OF HIGHWAYS
(CC-95-206)

Claimant represents self.
Cynthia A. Majestro, Attorney at Law, for respondent.

PER CURIAM:

The claimant, Karen Racer, seeks an award from the respondent, Division of Highways, for damage to her vehicle. The damage occurred on June 1, 1995, at approximately 1:30 p.m., while the claimant was traveling on Garretts Bend Road, also known as County Route 5, in Lincoln County. According to the claimant, she was driving thirty miles per hour when her vehicle struck a depression in the roadway. The claimant estimated that the depression was twelve inches deep and spanned the entire width of the roadway. The depression was located where a culvert pipe had been installed by the respondent, and the depression apparently was caused by the settlement of soil above the pipe. The speed limit for the section of road where the accident occurred was thirty-five miles per hour.

As a result of the accident, the claimant seeks an award of $800.00 for damage to a rim, hubcap, spoiler, strut, and the brakes on her vehicle. However, the only document offered by the claimant to corroborate her claim was a repair estimate which totaled $523.74.

The Lincoln County maintenance supervisor for the respondent, Larry Pauley, described Garretts Bend Road as a secondary road which has an asphalt surface sixteen feet wide. According to Mr. Pauley, the depression was directly above a corrugated steel culvert pipe. Mr. Pauley also testified that maintenance forces for the respondent installed the pipe on May 25, 1995; however, he as unable precisely to determine what caused the depression.

Although it is unclear why a depression formed above the culvert pipe six days after the pipe was installed, it is obvious that the respondent controlled the process for installing the pipe, and a depression of this nature does not normally occur when a culvert pipe is installed properly under a roadway. In addition, the testimony of the claimant indicated that she was driving in a reasonable and lawful manner for the expected road conditions.

Accordingly, the Court finds that the claimant has established liability on the part of the respondent for the damage to her vehicle arising from the accident on June 1, 1995, and, further, the Court makes an award to the claimant in the amount of $532.74 for the damages to her vehicle.

Award of $532.74.

OPINION ISSUED AUGUST 7, 1996

LLOYD A. REEVES
VS.
DIVISION OF HIGHWAYS
(CC-95-370)

Claimant represents self.
Cynthia A. Majestro, Attorney at Law, for respondent.

PER CURIAM:

The claimant, Lloyd A. Reeves, seeks an award from the respondent, Division of Highways, for damage to his 1978 Dodge Truck. The damage occurred on the morning of December 12, 1995, while the claimant's vehicle was driven by Christy Franciosi. According to Ms. Franciosi, she was driving slowly on Route 50/1, commonly known as Panther Lick Road, in Putnam County when the vehicle struck a culvert pipe which extended above the road surface. As a result of the accident, a tire on the claimant's truck was damaged. The replacement costs of the tire was $77.33. The claimant testified that the culvert pipe was exposed during road work performed approximately one month prior to the accident.

Michael J. Escue, a crew leader for the respondent, described Route 50/1 as a single lane, low priority, gravel road. Mr. Escue was familiar with the location where the accident occurred, and he stated that the road defect was a hole in the culvert pipe rather than a piece of pipe which protruded form the road surface. Ms. Escue also testified that the culvert pipe was scheduled to be replaced, but the work was delayed due to equipment problems.

It is well established that the respondent has a duty to correct and repair road defects in a timely and reasonable manner. The fact in this claim indicated that the respondent was on notice of a defect where the accident occurred, but failed to repair it in a timely manner. Therefore, it is the opinion of the Court that it has been established that the respondent failed to maintain Route 50/1 in a proper manner on the date of this incident. Accordingly, the Court makes an award to the claimant in the amount of $77.33.

Award of $77.33.

OPINION ISSUED AUGUST 7, 1996

W. STEPHEN RIGGS
VS.

DIVISION OF HIGHWAYS
(CC-95-233)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

The claimant, W. Stephen Riggs, seeks an award of $3,500.00 from the respondent, Division of Highways, for damage to his vehicle, a 1985 Chevrolet S-10 Blazer. The damage occurred during the early morning hours of August 6, 1995, at the intersection of Twenty-Fourth Street and Grand Central Avenue in Vienna, Wood County. At this time, the vehicle was driven by the claimant's son, Gregory Riggs. According to Mr. Riggs, he was accelerating from a stop sign while turning onto Grand Central Avenue. However, when the vehicle crossed a steel grate over a storm drain inlet, the grate popped up and struck the undercarriage of the vehicle. Mr. Riggs estimated he was driving ten miles per hour, and the vehicle came to an immediate stop upon impact with the steel grate. Photographs of the storm drain indicated that the concrete which supported the steel grate was remarkably deteriorated. The storm drain was located near the edge of Grand Central Avenue, and it was directly in the path of motorists turning onto Grand Central Avenue from Twenty-Fourth Street.

As a result of the accident, the vehicle sustained severe damage to the undercarriage and frame. Several receipts for replacement parts and repairs made to the vehicle were admitted into evidence. These receipts indicated that the claimant has sustained an economic loss of $2,113.51.

Edward Toothman, a crew leader for the respondent in Wood County, testified that his responsibilities include general road maintenance where the accident occurred. According to Mr. Toothman, Grand Central Avenue is a top priority road on which numerous storm drains are located. Mr. Toothman further testified that the respondent was unaware of the condition of the storm drain prior to the accident. However, the record revealed that the respondent does not have a procedure for periodically checking the condition of storm drains.

In West Virginia, it is well established that the respondent has a duty to maintain roads in a reasonably safe condition. Although this duty does not make the respondent liable for every subtle defect on a roadway, it does require the respondent to monitor road conditions on heavily traveled roads in a reasonable and prudent manner.

The evidence presented in this claim illustrated that the respondent does not inspect storm drains, but instead waits for an accident to occur before any repairs are performed. Although this Court is not unmindful of the fact that there are numerous storm drains on roads throughout West Virginia, the respondent's failure to examine the condition of storm drain inlets, in even cursory manner, does not meet the standard of maintaining roads in a reasonably safe condition. This is especially true on top priority roads where storm drains are likely to be crossed by numerous vehicles on a daily basis. The Court, for the reasons stated above, finds that the respondent is liable for the

damage caused to the claimant's vehicle.

Accordingly, the Court makes an award to the claimant in the amount of $2,113.51.

Award of $2,113.51.

OPINION ISSUED AUGUST 7, 1996

JAMES R. AND JUDITH R. ROGERS
VS.
DIVISION OF HIGHWAYS
(CC-95-288)

Claimants represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

The claimants, James R. Rogers, seek an award from the respondent, Division of Highways, for damage to a hot water tank. The claimants contend that a drop inlet located near their home did not function properly and caused water to flood their home during a period of heavy rain. The respondent admits that the storm drain pipe was obstructed, but it contends that the obstruction was located on private property.

The evidence presented at the hearing of this claim established that the claimants' house is adjacent to the intersection of West Virginia Route 622 and County Route 622/17 in Kanawha County. The drop inlet at issue in this claim is located along County Route 622/17. Sometime in June 1995, the claimants' home was flooded. A video tape of the incident indicated that water accumulated at a low place on County Route 622/17, the approximate location of the drop inlet, and flowed into a crawl space beneath the claimants' home. As a result, a hot water tank in the crawl space was destroyed. Fortunately, the claimants' house sustained no structural damage. According to Judith R. Rogers, she contacted the respondent on several occasions to complain about prior flooding incidents, but no corrective action was taken by the respondent. The cost to replace the hot water tank totaled $156.99.

James C. Markle, a maintenance manager for the respondent, testified that he has examined

the area surrounding the intersection of Route 622 and Route 622/17. According to Mr. Markle, the claimants' house is located in a low lying area, and water flows toward the house from several directions. Based on the observations, Mr. Markle believed the flooding was caused by an obstruction in a drainage pipe in which the drop inlet along Route 622/17 deposits water. Since the opening to the drop inlet appeared to be unobstructed, Mr. Markle deduced that the obstruction was in a section of the drain pipe located on an adjacent land owner with a blocked drain notice. At the time of this hearing, the respondent has taken no other action to correct the flooding problem.

The respondent has a duty to provide adequate drainage of surface water, and drainage devices must be maintained in a reasonable state of repair. *Haught v. Dept. of Highways,* 13 Ct. Cl. 237 (1980). When deciding whether the respondent has violated this duty, the Court will examine if the respondent negligently failed to protect a claimant's property from foreseeable damage.

The evidence in this claim revealed that the respondent was aware of the drainage problem, but refused to take corrective action. The fact that the flooding was caused by an obstructed drain pipe located on private property will not relieve the respondent from its duty to provide adequate drainage of surface waters. This is especially true in the instant claim, where the evidence established that the respondent utilized a private drainage system to control surface water from a public road. The respondent cannot ignore one of its duties because a problem is located on private property.

Based on the above, the Court finds that the claimants have established liability on behalf of the respondent. Therefore, the Court makes an award to the claimants in the amount of $156.99.

Award of $156.99.

OPINION ISSUED AUGUST 7, 1996

ROSA RUNYON
VS.
DIVISION OF HIGHWAYS
(CC-95-208)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

The claimant, Rosa Runyon, seeks an award of $790.28 from the respondent, Division of Highways, for damage to her vehicle, a 1992 Oldsmobile Cutlass Supreme. The damage occurred on May 21, 1995, at 12:30 p.m., while the claimant was driving west on Route 60 in Kanawha County. According to the claimant, she was traveling approximately fifty miles per hour when she observed

a rock on the roadway. The claimant attempted to drive over the rock because oncoming traffic prevented her from driving around it. However, the claimant's vehicle struck the rock and was severely damaged. The claimant's automobile insurance paid $2,556.65 for the damage to her vehicle, but the claimant incurred out-of-pocket expenses of $500.00 for her insurance deductible, $254.24 for renting a replacement vehicle, and $36.04 for a replacement tire. The claimant also testified that she traveled Route 60 on a regular basis and she has observed rocks along the roadway on prior occasions.

James Dingess, the respondent's maintenance supervisor for the eastern half of Kanawha County testified that his responsibilities include routine road maintenance where the accident occurred. Mr. Dingess described Route 60 as a two lane with a pavement surface approximately twenty feet wide. Mr. Dingess also testified that there were falling rock signs in the vicinity of the accident, and he was unaware of any rock falls on May 21, 1995.

In West Virginia, the mountainous topography creates a variety of road maintenance problems for the respondent. With this in mind, it is inevitable that numerous roads throughout the State will experience rock slides. Although the respondent's attempts to reduce the risk of damage resulting from rock slides varies from road to road, the respondent cannot be expected to completely eliminate the possibility of a rock slide damaging a motorist's vehicle. The respondent's duty to motorists is to maintain highways in a reasonably safe condition by using reasonable care and diligence. Unless the respondent has reason to anticipate a particular rock slide and has a reasonable opportunity to prevent it, the respondent cannot be held liable when a rock falls onto a highway. *Collins v. Dept. of Highways,* 13 Ct. Cl. 22 (1979).

In the instant claim, the record reveals that the area where the accident occurred was a rock fall area. The respondent posted "falling rock" signs in the area to warn motorists of the potential for rocks in the roadway. In addition, the claimant's testimony indicated that she was aware of falling rocks in the vicinity of the accident. For these reasons, the Court finds that the claimant has not established any negligence on the part of the respondent. Accordingly, this claim must be denied.

Claim disallowed.

OPINION ISSUED AUGUST 7, 1996

MICHAEL AND HELEN ANN SALMONS
VS.
DIVISION OF HIGHWAYS
(CC-95-292)

Claimants represent themselves.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

The claimants, Michael Salmon and Helen Ann Salmons, seek an award of $399.95 from the respondent, Division of Highways, for damage to their vehicle, a 1987 Nissan Maxima. The damage occurred while Mrs. Salmons was driving west on Interstate 64 between the Oakwood Road and Montrose exits in Kanawha County. Weather conditions were clear and sunny, and Mrs. Salmons was traveling approximately fifty miles per hour. During the drive, the claimants' vehicle struck a large timber plank in the roadway. According to Ms. Salmons, she first noticed the obstacle when it was forty feet ahead of her vehicle, but she was unable to avoid it. As a result of the collision, both wheels and tires on the left side of the vehicle were damaged. The cost to repair the damage totaled $339.90.

Herbert C. Boggs, an area maintenance supervisor for the respondent, testified that his responsibilities include road maintenance where the collision occurred. According to Mr. Boggs, he was unaware of any obstacles or complaints concerning obstacles in the road at the time and place of the accident.

This Court has consistently followed the principle that the respondent is neither an insurer nor a guarantor of the safety of motorists traveling on its highways. The mere existence of a foreign object on a roadway without any evidence to establish the respondent was on notice of the obstruction is insufficient to establish liability on behalf of the respondent. The evidence in this claim indicated that the respondent was unaware of this particular obstruction. Therefore, the claimant has not established negligence on the part of the respondent. Accordingly, it is the opinion of the Court that this claim must be denied.

Claim disallowed.

OPINION ISSUED AUGUST 7, 1996

JAMES SELLARDS
VS.
DIVISION OF HIGHWAYS
(CC-95-232)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

The claimant, James Sellards, seeks an award of $1,583.24 from the respondent, Division of Highways, for damage to his vehicle, a 1986 Pontiac Fiero. The claimant alleges that the damage was caused by defective road conditions on Route 28, also known as Frozen Camp Creek Road, in Jackson

County.

The evidence adduced at the hearing of this claim on April 10, 1996, established the following facts. On July 8, 1995, at approximately 2:00 a.m., the claimant was towing his vehicle behind a large truck. The claimant's vehicle was positioned on a towing dolly such that the rear wheels were immobilized on the dolly and the front wheels were rolling on the roadway. The vehicle was damaged when it was pulled through a hole in the roadway of Frozen Camp Creek Road, and the vehicle scraped the road surface. At the time of this accident, driving conditions were dark and foggy and the claimant was traveling ten miles per hour.

Later that same morning, the claimant drove his vehicle on the same portion of road where it had been damaged while being towed. On this occasion, the claimant's vehicle struck a different hole in the roadway and received additional damage.

Gregory R. Sellards, the claimant's father, testified that he lives along Frozen Camp Creek Road and he had informed the respondent about the condition of the roadway on several occasions. Moreover, Mr. Sellards stated that he had warned his son about the poor condition of Frozen Camp Creek Road prior to the accident. Ron Shaffer, an equipment operator for the respondent, also lives on Frozen Camp Creek Road, and that the respondent made some repairs to the road in May, 1995, shortly after a flood occurred. However, he believed the road remained in rough condition.

Bill McVay, the Jackson County maintenance superintendent for the respondent, described Frozen Camp Creek Road as a one lane secondary road with a chip and tar surface approximately fourteen feet wide. Mr. McVay further explained that Jackson County experienced periodic flooding during May and June, 1995. As a result, numerous rods throughout the county, including Frozen Camp Creek Road, were damaged.

In West Virginia , the law governing claims from road defects is well established. The duty owed by the respondent to motorists is one of reasonable care and diligence in the maintenance of highways under all circumstances. *Lewis v. Dept. of Highways,* 16 Ct. Cl. 136 (1986); *Hobbs v. Dept. of Highways,* 13 Ct. Cl. 27 (1979). However, this duty does not make the respondent a guarantor of the safety of motorists on its highways, nor does it mitigate the duty of motorists to operate their vehicles in an appropriate manner for the existing road conditions.

In this claim it was undisputed that Frozen Camp Creek Road, along with other roads in Jackson County, was adversely affected by floods which occurred during May and June, 1995. The record indicated that the respondent took immediate action to repair the rods corresponding to the priority of the road and the severity of the damage. This work included road stabilization, ditch cleaning, and installation of new culverts. Although the claimant challenges the sufficiency of these repairs, factors such as the priority of Frozen Camp Creek Road, the number of other roads in need of repair, and the limited resources available to the respondent, indicate that the respondent fulfilled its duty to exercise reasonable care. Therefore, the Court concludes that this claim must be denied.

Claim disallowed.

OPINION ISSUED AUGUST 7, 1996

TODD E. AND JERRI M. SHAFER
VS.
DIVISION OF HIGHWAYS
(CC-96-40)

Claimants represent themselves.
Cynthia A. Majestro, Attorney at Law, for the respondent.

PER CURIAM:

The claimants, Todd E. Shafer and Jerri M. Shafer, seek an award for damage to their vehicle. This matter came on for hearing May 17, 1996. After a hearing, both parties agreed to a stipulation which established the following as fact.

1). The claimants are the owners of a 1991 Pontiac LeMans.

2). On January 14, 1996, the claimants were traveling south on Interstate 79 near mile marker four in Kanawha County.

3). The respondent had taken snow from the shoulder of the roadway and placed it onto the pavement of the interstate to melt.

4). The claimants' vehicle came in contact with the snow, spun, and ran into a retaining well.

5). As a result of this incident, the claimants' vehicle sustained damages in the amount of $1,293.30.

The respondent has a duty to use reasonable care and diligence in maintaining roads under all circumstances. *Hobbs v. Dept. of Highways,* 13 Ct. Cl. 27 (1979).

Based on the foregoing, and the Court's determination that the claimants were not guilty of negligence which contributed to the loss, the Court finds that the claimants have established liability on behalf of the respondent. Accordingly, the Court makes an award to the claimants in the amount of $1,293.30.

Award of $1,293.30.

OPINION ISSUED AUGUST 7, 1996

HENRY C. WILKES
VS.
DIVISION OF CORRECTIONS
(CC-95-345)

Claimant represents self.
Jeffrey G. Blaydes, Attorney at Law, for respondent.

PER CURIAM:

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

Claimant seeks payment of $150.00 for certain items of personal property which were taken from him while he was being processed at the Huttonsville Correctional Center, a facility of the respondent. He was informed that his property would be mailed to his sister. Sometime thereafter, he determined that the property was missing.

In its Answer, respondent admits the facts of the claim, but states that were insufficient funds in the corresponding budget with which to pay the claim.

The Court, having reviewed the facts in this claim, has determined that a bailment existed and that respondent failed to return personal property belonging to the claimant when it was in respondent's care and custody. The Court also has determined that $150.00 is fair and reasonable to compensate the claimant for his loss.

Accordingly, the Court makes an award to the claimant in the amount of $150.00.

Award of $150.00.

OPINION ISSUED OCTOBER 10, 1996

MARK R. BARNARD
VS.
DIVISION OF HIGHWAYS
(CC-96-101)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

The claimant, Mark R. Barnard, seeks an award of $500.00 from the respondent, Division of Highways, for damage to his vehicle. The actual amount of damage to the claimant's vehicle totaled $785.60; however, the claimant testified that his automobile insurance will pay for the damage in excess of the initial $500.00. The damage occurred on February 2, 1996, at approximately 11:00 a.m., while the claimant was driving on Eli Locust Road in Wood County. He was traversing this road as an employee of the U.S. Postal Service to deliver mail to residents living in the area. during the drive, the claimant encountered an oncoming vehicle in a blind curve. Unfortunately, neither vehicle was able to stop and two vehicles struck head on. At the time of the collision, the roadway was snow covered and icy. According to the claimant, visibility was severely limited throughout the curve due to the topography of the terrain near the roadway. The claimant also added that he believes the curve poses a substantial hazard to motorists. Photographs of the accident location revealed that the sight distance through the curve is limited by high embankments adjacent to the road.

Tim Swearingen, a crew leader for the respondent, acknowledged that visibility was limited in the curve where the claimant's accident occurred, but he noted that the conditions on Eli Locust Road are similar to numerous other roads in Wood County. Mr. Swearingen also testified that Eli Locust Road was a low priority road; and therefore, it was not treated for snow and ice removal until the higher priority roads were clear.

This Court has consistently held that the respondent has a duty to exercise reasonable care in maintaining roads under a variety of circumstances. *Hobbs v. Dept. of Highways,* 13 Ct. Cl. 27 (1979). However, this duty does not make the respondent a guarantor of the safety of motorists traveling upon its highways, and every motorist has a responsibility to operate his or her vehicle in a cautious and prudent manner for the existing road conditions.

There are many low priority single lane gravel roads throughout West Virginia which follow a steep and winding course. The mountainous topography and rural nature of this State require the respondent to build these types of roads. Although these low priority roads must be maintained in a reasonable state of repair, it is impossible for the respondent to maintain these roads to the same degree as high priority roads which are used by a large number of motorists.

The evidence in this claim revealed that the accident occurred on a low priority one lane gravel road which is similar to many other roads throughout the State. Although the claimant's accident is unfortunate, the Court cannot find that the claimant has established any liability on behalf of the respondent for his damages. Accordingly, based on the reasons stated above, this claim must be denied.

Claim disallowed.

OPINION ISSUED OCTOBER 10, 1996

BELL ATLANTIC-WEST VIRGINIA, INC.
VS.
REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY
(CC-96-399)

No appearance by claimant.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

The claimant seeks payment of $3,804.36 for telephone services provided to the respondent. The invoices for the services were not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity and amount of the clam, and states that there were sufficient funds expired in the appropriate fiscal year with which the invoices could have been paid.

In view of the foregoing, the Court makes an award in the amount of $,3,804.36.

Award of $,3,804.36.

OPINION ISSUED OCTOBER 10, 1996

JOLENE BERRY, D.O.
VS.
DIVISION OF CORRECTIONS
(CC-96-444)

No appearance by claimant.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

The claimant seeks payment of $190.00 for medical services provided to an inmate in the Anthony Center, a facility of the respondent.

In its Answer, the respondent admits the validity and amount of the claim, but states that there were insufficient funds expired in the appropriate fiscal year with which the invoice could have been paid.

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

Claim disallowed.

OPINION ISSUED OCTOBER 10, 1996

JANIE S. DELUNG
VS.
DIVISION OF HIGHWAYS
(CC-96-92)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

The claimant, Janie S. DeLung, seeks an award of $129.21 from the respondent, Division of Highways, for damage to her vehicle. The damage occurred on February 16, 1996, at 10:00 p.m., while the claimant was driving on Route 612 in Fayette County. According to the claimant, she was traveling between thirty and thirty-five miles per hour when an oncoming truck forced her to drive off the paved portion of the road. As a result, the claimant's vehicle struck a large hole and damaged a tire. The cost to replace the tire totaled $129.21.

The claimant testified that she travels Route 612 every day, and she normally slows down when she approaches the hole. The claimant also stated that she had informed the respondent about the hole prior to the accident. Photographs of the hole indicated that it was located near the edge of pavement. The hole was approximately four feet long, eighteen inches wide, and nine inches deep.

John Zimmerman, the Fayette County supervisor for the respondent testified that he received a call about the hole from the claimant during the early part of 1996. However, Mr. Zimmerman testified that weather conditions prevented maintenance forces from repairing the hole.

This Court has held numerous occasions that the respondent has a duty to maintain the shoulder and berm adjacent to a roadway in reasonably safe condition. *Sweda vs. Dept. of Highways,*

13 Ct. Cl. 249 (1980); *Hinkle vs. Division of Highways,* unpublished opinion issued December 10, 1991, CC-89-97. However, severe winter weather can create adverse road conditions which require the respondent to concentrate its maintenance efforts upon snow removal and ice control activities rather than typical day-to-day maintenance activities. When these conditions arise and prevent maintenance work on road defects which present an unusual risk to motorists, the respondent should warn motorists of the problem by placing a sign or cone near the road defect until it can be repaired.

In the instant claim, the record indicated that the respondent was on notice of the hole for approximately one month prior to the accident, but the respondent was unable to correct the hole because its maintenance forces were primarily engaged in snow removal activities during January and February of 1996. Although these weather conditions prevented the respondent from repairing the hole, the weather should not have prevented the respondent from warning motorists of the hazardous road defect. However, the evidence also established that the claimant was familiar with the condition of Route 612, and she had successfully traveled through the area on other occasions.

Therefore, the Court finds that the accident involved in this claim is a result of the combined negligence of the respondent and claimant. Accordingly, the Court makes a reduced award to the claimant in the amount of 70% of her damages.

Award of 490.45.

OPINION ISSUED OCTOBER 10, 1996

VERNON DINGESS
VS.
DIVISION OF HIGHWAYS
(CC-96-125)

Claimant represents self.
Tammy R. Harvey, Attorney at Law, for respondent.

PER CURIAM:

The claimant, Vernon Dingess, seeks an award of $991.15 from the respondent, Division of Highways, for damage to his vehicle, a 1990 Ford Ranger. The damage occurred on February 12, 1996, while the claimant was traveling on Corridor G, also known as Route 119, near the Logan Exit. According to the claimant, the roadway was snow covered and slick, and he was driving approximately nine miles per hour. Nevertheless, the claimant's vehicle began to slide, and it veered off the road and struck two large rocks. As a result of the collision, the wheels, tires, and suspension were severely damaged. The claimant submitted several repair bills into the record. These bills totaled $770.48. The claimant further testified that he had insurance on his vehicle, and his deductible was $100.00. However, he refused to file a claim under his insurance policy because he did not

believe his insurance company was at fault.

Dana C. Vance, a crew leader for the respondent, testified that he was responsible for scheduling road maintenance work where the accident occurred. According to Mr. Vance, the two rocks involved in this claim fell off one of the respondent's trucks approximately one month before the claimant's accident. At this time, road crews for the respondent rolled the rocks off the berm and onto a grassy area adjacent to the roadway. Mr. Vance stated that he was unable to take a loader off the respondent's equipment lot to remove the rocks because it was needed for snow removal and ice control activities.

This Court has held on numerous occasions that the respondent does not guarantee the safety of motorists upon its highways. However, this principle does not alleviate the respondent of its duty to exercise reasonable care in maintaining roads under all circumstances. *Hobbs v. Dept. of Highways,* 13 Ct. Cl. 27 (1979). In essence, the respondent's duty requires that it conduct maintenance activities in a prudent manner to resolve problems as efficiently as possible.

The evidence presented in this claim revealed that the respondent created a traffic hazard along Route 119, and this hazard existed for approximately one month before action was taken to remedy the problem. Although this Court recognizes the importance of snow removal activities during the winter season, we cannot find that the respondent was engaged in these activities to the extent that it could not spare one piece of equipment at any time during the month of January to remove two rocks. This is especially true when one considers that the rocks were placed along the roadway by maintenance workers for the respondent.

Based on the reasons stated above, the Court finds that the respondent is liable for the damage to the claimant's truck. However, the record indicates that the damage was covered by the claimant's automobile insurance. In the claim of *Sommerville vs. Division of Highways,* unpublished opinion issued January 4, 1991 (CC-89-374), this Court noted that insurance premiums are paid by insureds for insurance, and accumulated premiums or reserves are used by insurers to pay claims by their insureds. If no claims are made, the premiums are never expended by the insurer. This is a risk assumed by insurance companies for valuable consideration, and there is no reason the company should escape this risk. Therefore, any award by this Court is limited to the amount of the deductible for the claimant's policy. Accordingly, the Court makes an award to the claimant in the amount of $100.00.

Award of $100.00.

OPINION ISSUED OCTOBER 10, 1996

CHERYL L. AND TERRY DOWNEY
VS.
DIVISION OF HIGHWAYS

(CC-96-143)

Claimants represent themselves.
Terry R. Harvey, Attorney at law, for respondent.

PER CURIAM:

The claimants, Cheryl L. Downey and Terry Downey, seek an award of $512.55 from the respondent, Division of Highways, for damage to their vehicle, a 1990 Ford Probe. The damage occurred on March 21, 1996, at approximately 7:00 a.m., while Ms. Downey was driving west on Route 60 in St. Albans. According to Ms. Downey, she was traveling between twenty-five and thirty miles per hour when her vehicle unexpectedly struck a large hole in the pavement surface. As a result of the accident, the claimants' vehicle sustained damage to the alignment and a tire. At the time of the accident, weather conditions were cold and snowy, and the road surface was wet.

Kevin Coll, a foremen for the respondent in the St. Albans area, testified that he was responsible for scheduling and overseeing road maintenance activities. According to Mr. Coll, the respondent was engaged in snow removal and ice control activities on March 21, 1996. Mr. Coll also stated that the respondent had no notice of the hole prior to Ms. Downey's accident.

The Court is well aware that adverse weather conditions can create poor driving conditions on roads throughout the State. When these conditions arise, the respondent must give priority to snow removal and ice control activities rather than typical maintenance work.

The evidence presented in this claim established that the respondent was engaged in snow removal operations when the accident occurred, and it was unaware of the road defect prior to the accident. Therefore, it is the opinion of the Court that the claimant has not established any liability on behalf of the respondent. Accordingly, this claim is denied.

Claim disallowed.

OPINION ISSUED OCTOBER 10, 1996

GREGORY A. AND LISA EDENS
VS.
DIVISION OF HIGHWAYS
(CC-96-87)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

The claimants, Gregory A. Edens and Lisa Edens, seek an award of $612.12 from the respondent, Division of Highways, for damage to their 1995 Oldsmobile Cutlass Supreme. The damage occurred on February 11, 1996, at approximately 12:00 midnight, while Ms. Edens was driving on Route 28 near Sissonville in Kanawha County. Driving conditions were dark and foggy, and Ms. Edens was traveling between fifteen and twenty miles per hour. Ms. Edens testified that as she proceeded around a curve, the vehicle unexpectedly struck a large hole located in the middle of the road. According to Ms. Edens, the hole was one foot deep, eighteen inches wide, and three foot long.

As a result of the collision, the claimants' vehicle sustained damage to the alignment and the driver's side tire and wheel. Several receipts were admitted into evidence which established that the total cost to repair the vehicle was $612.12.

Paul Lyttle, a road maintenance supervisor for the respondent testified that his responsibilities included general road maintenance in the vicinity of the accident. Mr. Lyttle described Route 28 as a second priority road, and he stated that the respondent did not have notice that the hole had developed in the roadway.

While the respondent is not an insurer of the safety of motorists traveling upon its roads, it does owe motorists a duty of reasonable care and diligence in maintaining its roads. To establish liability against the respondent, the claimant must prove the respondent had actual and constructive notice of the road defect and failed to repair it in a timely manner.

The evidence in this claim does not establish that the respondent had actual notice of the hole. Nevertheless, the size of the hole is indicative of the fact that the hole had been in existence for an extended period of time prior to Ms. Eden's accident. Therefore, the Court makes an award to the claimant in the amount of $6112.12.

Award of $612.12.

OPINION ISSUED OCTOBER 10, 1996

JOSEPH HALL
VS.
DIVISION OF HIGHWAYS
(CC-96-47)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

The claimant, Joseph Hall, seeks an award of $871.00 from the respondent, Division of Highways, for damage to his 1995 Hyundai Sonata. The damage occurred on January 4, 1996, at approximately 9:00 p.m., while the claimant was driving on Route 65/5 in Mingo County. During the drive, the claimant's vehicle struck a large hole which damaged both passenger side tires and wheels. Photographs of the hole indicated that it was several inches deep and extended from the edge of the pavement into the traveled portion of the roadway. As a result of the damage to his vehicle, the claimant purchased three new tires and a new wheel.

The record established that Route 65/5 is a second priority road which carries a substantial amount of coal truck traffic. Cecil Collins, a transportation worker for the respondent in Mingo County, testified that road crewmen in Mingo County were engaged in snow removal and ice control activities during the latter part of December 1995, and early part of January 1996. According to Mr. Collins snow removal and ice control work was a first priority maintenance activity which must take precedence over other types of maintenance work.

In West Virginia, the respondent has a duty to exercise reasonable care and due diligence while maintaining roads under all types of circumstances. Although this Court is well aware that snow removal and ice control activities are high priority maintenance activities which normally take priority over patching activities, there are occasions when a defective road condition should be addressed. Where an unusually large hole in a road presents an unreasonable and unexpected hazard to motorists, the respondent has a duty to warn motorists of the road defect until the defect can be corrected. This duty does not require that the respondent utilize its resources in such a manner to achieve the greatest benefit possible for motorists throughout the State.

After a careful review of the record in this claim, the Court finds that an unusually large hole existed in the traveled portion of Route 65/5, and the respondent should have provided notice to motorists of the road defect. Therefore, the Court makes an award to the claimant in the amount of $609.40 for the cost of replacing two tires and a wheel on his vehicle.

Award of $609.40.

OPINION ISSUED OCTOBER 10, 1996

CHRIS KENNEDY
VS.
DIVISION OF HIGHWAYS
(CC-93-355)

Tony O'Dell, Attorney at Law, for claimant.
Cynthia A. Majestro, Attorney at Law, for respondent.

PER CURIAM:

The claimant, Chris Kennedy, seeks an award of $145.28 from the respondent, Division of Highways, for damage to his vehicle. The damage occurred on November 8, 1995, while the claimant was driving on Route 3 in Raleigh County. During the drive, the claimant was proceeding forty miles per hour when his vehicle struck a hole in the pavement. Photographs of the hole indicated that it was approximately two and a half inches deep. The photographs also revealed that a railroad was embedded in the hole. As a result of the collision, the rim and tire on the claimant's vehicle were damaged. The cost to repair the vehicle totaled $145.28.

Dale Hughart, the assistant Raleigh County Supervisor for the respondent, testified that he was familiar with the area where the accident occurred and he described Route 3 as a high priority road. The respondent's maintenance records indicated that numerous holes in the surface of Route 3 were patched on November 2, 1995. However, on November 7, 1995, Mr. Hughart's office received a complaint about the hole and railroad rail. According to Mr. Hughart, an eighteen inch segment of the rail was removed; and the hole was patched that same day.

The evidence revealed that the railroad tracks had been abandoned by CSX sometime prior to November 8, 1995, and the respondent paved over the rails instead of removing them. Mr. Hughart indicated that the railroad tracks should have been removed prior to paving because the rails had a tendency to penetrate through the pavement surface. However, Mr. Hughart believed that CSX was responsible for removing the rails rather than the respondent.

In this State, the respondent has a duty to exercise reasonable care and diligence in the maintenance of highways. *Hobbs vs. Dept. of Highways,* 13 Ct. Cl. 27 (1979). Although this duty does not make the respondent an insurer of motorists upon its highways, the respondent must maintain its roads in a reasonably safe condition under all types of circumstances.

In the instant claim, the record revealed that the respondent was aware of the road defect and its recurring nature. Nevertheless, the respondent failed to properly correct the defect within a reasonable time period. Therefore, the Court finds that the respondent was negligent in its maintenance of Route 3. Based on the reasons stated above, the Court makes an award to the claimant in the amount of $145.28.

Award of $145.28.

OPINION ISSUED OCTOBER 10, 1996

SHEILA J. LARSEN AND TOM LARSEN
VS.
DIVISION OF HIGHWAYS
(CC-94-812)

Jack H. Vital, III, and J. R. Rogers, Attorneys at Law, for claimants.
Cynthia A. Majestro and Andrew F. Tarr, Attorneys at Law, for respondent.

STEPTOE, JUDGE:

Claimants, who are wife and husband, seek an award from respondent for damages arising from a vehicle accident which occurred about 8:35 a.m., on the 21st day of December, 1992, on a public road in Wayne County known as James River Road, as a result of which, it is alleged, Shelia J. Larsen sustained personal injuries, and both claimants sustained other damages.

Claimants' position is that respondent was negligent in failing to eliminate a depression in the paved surface of James River Road, at or near the scene of the accident, in which ice formed in cold weather, and that Mrs. Larsen's car hit ice in the depression and skidded, out of control and across the center line, and struck an oncoming vehicle; and that the alleged failure of the respondent to maintain the road was negligence which was the proximate cause of the accident.

Respondent denies any negligence on its part, and alleges that Mrs. Larsen's negligence was the proximate cause of the accident.

James River Road, at and near the scene of the accident is a very old, brick-based, two-lane, asphalt-covered, much-patched secondary road, with a basic width of sixteen feet, six inches. It is not heavily traveled, and is classified by respondent, for maintenance purposes, as a third-priority road. At the scene it ran in a generally east-west direction. On its north side, it abuts the main line right-of-way of property of the CSX Railroad, the nearest rail of which is approximately 12 ½ feet from James River Road, and the railroad track level is several feet above the level of James River Road. Between the railroad tracks and the traveled portion of the public road, the sloped surface is covered with railroad ballast and vegetation. From time to time, surface water drain toward and upon the public road.

At and immediately before the accident, weather conditions were clear, cold and dry.

From the scene of the accident, one has an unobstructed view along the road, in an easterly direction of approximately 1200 feet, and in a westerly direction about 1000 feet. The road to the east has a gentle grade downward to the area of the accident, while the road to the west has a slightly rising grade from the area of the accident. The speed limit in the area was 35 miles per hour.

The only known eyewitnesses to the accident were Mrs. Larsen and Mr. Danny Ray Patton, the driver of the oncoming car which the Larsen vehicle collided.

Mrs. Larsen, alone in her car, was proceeding in a westerly direction along James River Road. She testified that she unusually drove at whatever speed limit might be in a given area, and that in this instance she was not exceeding 35 miles per hour. She further testified as follows:

> "I drove down James River Road going west and I came over a little hill and started down the road and I saw something that I thought was water but I didn't realize it at the time. I continued to go down towards there and when I was out onto the ice I lost, the car, the car slid, the rear end of the car slid over into the other lane and then I was unable to control it because of the ice, and collided with another car."

Her vehicle came to rest, straddling the north edge of the pavement and the berm of the roadway reserved for the use of westbound traffic, at a point a little west of the point of the collision.

It appears from her testimony that she made no effort to reduce her speed after having noticed what she thought was water on the surface of the road, but which turned out to have been ice. She testified that her skid started where she observed ice on the road, but failed to identify that point.

The accident was investigated by Lewis E. Foshee, Jr., Chief Field Deputy of the Wayne County Sheriff's Department, with the present rank of captain, who arrived upon the scene about an hour after the accident. As part of his investigation, he took two Polaroid photographs of the scene, which were admitted into the evidence as Claimants' Exhibits No. 1 and No. 2, showing the damaged vehicles where they came to rest after the collision; and also showing the presence of ice over a wide-spread area of the paved road surface, extending along 300 feet or more along the road in the vicinity of the accident, in places which he identified as ice patches on the photographs. In some instances, the witness could not be sure that the spots were ice, saying they might have been just wet spots.

Claimants' Exhibit No. 1 was taken by Captain Foshee from a point just west of the scene of the accident, while he faced toward the east, the direction from which Mrs. Larsen was driving in approaching the scene. While the witness stand, Captain Foshee identified on this exhibit, with a red marker, the spots and strips, principally in the area of the yellow-painted center line, where he found ice on the surface of the road. To the Court, the designated substance appeared to be dark in color, not gleaming or jagged, and, therefore, probably soft ice or slush or perhaps just wet spots. This exhibit also shows, in the background, the James River Road to the east of the scene, for a distance of some 1200 feet, to the top of the rise and the place referred to by Mrs. Larsen as the "little hill". In his written report, admitted into the evidence as Claimants' Exhibit No. 3, Captain Foshee reported that claimant's view of the scene of the accident, on her approach, was unobstructed.

Claimants' Exhibit No. 2, a photograph taken by Captain Foshee while standing just east of the scene of the accident and facing in a westerly direction, shows ice or wet spots on the road surface and the positions of the Larsen and Patton vehicles at which they came to rest after the collision.

Danny Ray Patton, produced as a witness for the claimants, and the driver of the eastbound vehicle struck by the Larsen car, testified on direct examination, that there was ice on the road at the

time of the accident; and that when he looked at Larsen car just before the collision, it was 60 to 80 feet from him, and sliding sideways; and that he thereupon headed for the ditch on h is side of the road, to avoid collision. On cross-examination, he gave 80 to 100 feet as the distance between cars when he saw the Larsen vehicle out of control. He added that the Larsen car seemed to him to be going 40 to 45 miles per hour when proceeding down the slight grade, in a westerly direction, toward the scene of the accident.

In neither the testimony of Mrs. Larsen, nor that of Captain Foshee, nor that of Mr. Patton, nor in the accident report prepared by Captain Foshee, Claimants' Exhibit No. 3, (which contained brief statements as to the accident by Mrs. Larsen and Mr. Patton) is there any reference to a depression in the road, as presumed by the claimants' expert witness, Mr. Dempsey.

Luther James Dempsey, Jr., a civil engineer with experience in road construction and maintenance, testified as an expert witness for the claimant, on the basis of his examinations of the scene of the accident, the first of which was on the 11th day of November, 1994, on the basis of respondent's records of maintenance, and on the basis of certain sections of respondent's Maintenance Manual. He testified to a subsidence, or a depressed area, "very noticeable," in the vicinity of the accident scene, which he observed and which he believed, without stating why, was where the Larsen car went out of control on hitting ice. He further testified and opined that:

a) the natural flow of surface water, to and from the scene of the accident, was and is from east to west, and on both sides of the road; while there is a ditch to carry such water on the southerly side of the road, there is little or no ditching on the northerly side of the road, to carry off surface water from the CSX embankment; that surface water originating from the northerly side of the road, to the extend that it does not percolate, drains to the James River Road, and, near the accident scene, onto the road, some of it settling in a depressed area, where it can and sometimes does take the form of ice;

b) the area where Mrs. Larsen went into a skid, it was suggested, was the depression to which he referred, which he did not locate with reference to any fixed object, or measure, or attempt otherwise to describe; and

c) the respondent's Maintenance Manual required the respondent to repair, modify, or remove hazardous conditions in the traveled roadways, and this depression to which he referred was a hazardous condition which being visible should not have been allowed to continue to exist; and that the described hazard was the cause of the Larsen accident.

Other witnesses for the claimants, for the most part residents of the area, testified to wintertime presence of ice on the road, from time to time, but did not relate their sightings, in points of time or place, to the scene of the Larsen accident. Robert Jeffries, a road maintenance crew member employee of the respondent, called as a witness for the claimants, testified that before the 1992 accident of Mrs. Larsen, he had observed a "swag" in the road near the scene of the 1992 accident and that he had thought that it represented a cold-weather hazard because of its propensity to contain ice, but admitted that he had not communicated his opinion to responsible officials of the

respondent.

Respondent's witnesses testified to the lack of any previous accident at or near the side of the Larsen accident, resulting from ice on the road; to the fact that nobody had ever complained to respondent about the alleged depression or ice on the road in the vicinity of the accident; to the routine patrols it had caused to be made to discover hazardous conditions; and to the lack of any references, in its maintenance records, to the depression observed by Jeffries.

The numerous photographs submitted, including those taken by Captain Foshee, simply do not pick up a depression in the road; and the Court recognizes limitation of photography in displaying horizontal surfaces. There is no substantial evidence in the record showing the location of the alleged depression by reference to fixed objects, such as utility poles, centerlines or buildings; nor is there evidence in the record describing the depression by dimensions.

The assumption of the expert witness Dempsey as to the location of the depression is based upon the report of investigation by Captain Foshee, who did not mention a depression and whose photographs do not show a depression.

The witness Jeffries, called by claimants, attempted to fix the location of the depression by pointing to a place shown on a 1995 photograph, on which the Court cannot see a depression.

The foregoing leaves much to be desired from the standpoint of proof of causation of the accident in which Mrs. Larsen was injured. Assuming, however, that there was a depression (not perceptible to the Court from the photographic evidence), the Court believes, on the basis of the juxtaposition of 1) the point of the collision of the vehicles, and 2) the place of the depression as determined by the witness Jeffries, and 3) the position of utility poles depicted in the Foshee photographs, that the depression was quite close to the point of collision, so close in fact that, given the speed of at least 35 miles per hour, of the Larsen vehicle when the skid began, the skid probably originated at a point in the road well eastward of the point of the depression. The Court believes that if there were a depression, it was not a causative factor in producing the accident.

The law is well established in this State that respondent has a continuing duty to exercise reasonable care and diligence in the maintenance of public roads in all circumstances. *Hobbs v. Dept. of Highways,* 13 Ct. Cl. 27 (1979). This duty, however, does not make the respondent a guarantor of the safety of travelers and their personal property, on the public roads. *Adkins v. Sims,* 13 W.Va. 645, 46 S.E.2d 81 (1947). Nor is the respondent required to keep its roads completely free of water and ice at all times. Isolated ice covering a section of a road during winter is generally insufficient to establish negligence on the part of the respondent. *Cole v. Dept. of Highways,* 14 Ct. Cl. 350 (1983).

The Court concludes that:

1. Complainants have failed to prove, by a preponderance of the evidence, negligence on the part of the respondent; and

2. Complainants have failed to prove, by a preponderance of the evidence, that respondent had actual or constructive notice of any defect in its road at the site of the Larsen accident, if any there was.

In view of the foregoing conclusions, it is unnecessary for the Court to address any other issues which have been raised in this matter.

Claim disallowed.

OPINION ISSUED OCTOBER 10, 1996

SANDRA K. MORRIS
VS.
DIVISION OF HIGHWAYS
(CC-96-110)

Claimant represents self.
Tammy R. Harvey, Attorney at Law, for respondent.

PER CURIAM:

The claimant, Sandra K. Morris, seeks an award of $1,800.00 from the respondent, Division of Highways, for damage to her vehicle. The damage occurred on January 14, 1996, at approximately 10:00 a.m., while the claimant was driving south on Interstate 79 near the Elkview exit. The weather was cold, and snow was blowing across the road. However, the claimant stated that the pavement appeared to be dry. During the drive, the claimant lost control of her vehicle as she traveled across an ice covered bridge. According to the claimant, she was driving fifty miles per hour and her vehicle spun around and struck the bridge. As a result of the accident, the claimant's vehicle was severely damaged.

Steve Knight, an expressway maintenance supervisor for the respondent, testified that he is responsible for assigning and overseeing maintenance work on the Interstates in and around Charleston, West Virginia. According to Mr. Knight, road maintenance crews were spreading salt on Interstate 79 during the early morning hours of January 14, 1996. This work was in response to a snow storm which passed through the Kanawha County area and created slippery road conditions.

It is a well known fact that weather conditions can change rapidly in West Virginia during the winter months. The rapid fluctuations in temperature can cause moisture to collect on roads and precipitation to change forms which may create slippery road conditions. For these reasons, the Court has adhered to the principle that the State can neither be expected nor required to keep its highway during winter is generally insufficient to charge the State with negligence. *Cole vs. Dept. of Highways,* 14 Ct. Cl. 350 (1983); *Treadway vs. Dept. of Highways,* 16 Ct. Cl. 101 (1986).

The evidence in this claim revealed that the respondent was engaged in snow and ice removal

activities prior to the claimant's accident. However, due to the prevalent weather conditions the respondent was unable to keep Interstate 79 entirely clear of ice or snow. The evidence also revealed that the claimant was familiar with the roadway and observed snow blowing across the pavement surface prior to the accident.

Based on the reasons stated above, the Court finds that the claimant has not established any liability on behalf of the respondent. Accordingly, this claim must be denied.

Claim disallowed.

OPINION ISSUED OCTOBER 10, 1996

RONALD MACK PARSONS
VS.
DIVISION OF HIGHWAYS
(CC-96-159)

Claimant represents self.
Tammy R. Harvey, Attorney at Law, for respondent.

PER CURIAM:

The claimant, Ronald Mack Parsons, seeks an award of $399.05 from the respondent, Division of Highways, for damage to his vehicle. The damage occurred on April 2, 1996, at approximately 9:00 p.m., while the claimant was driving with his headlights on at a speed of forty-five miles per hour when he encountered a rock slide. The claimant testified that he was unable to avoid the slide, and his vehicle struck several of the rocks lying on the roadway. As a result, the wheels and tires on his vehicle were damaged.

Rex Angel, the Boone County Supervisor for the respondent, testified that his responsibilities include scheduling and overseeing maintenance projects in Boone County. Mr. Angel was informed about the rock slide involved in this claim shortly after it occurred, and he dispatched two maintenance workers to remove the rocks from the roadway. According to Mr. Angel, the area where the slide occurred was not known to be a rock fall area; however, he added that large amounts of melting snow and heavy rains triggered rock slides at various locations in Boone County which were not known to be slide areas.

The general rule for determining the respondent's liability for rock slides is stated in *Hammond vs. Dept. of Highways,* 11 Ct. Cl. 234 (1977). In Hammond, the Court held that the unexplained falling of rock or boulder onto a highway without a positive showing that the respondent knew or should have known of a dangerous condition and should have anticipated injury to person or property, is insufficient

to justify an award.

In the instant claim, the record revealed that the location where the rock slide occurred was not known by the respondent to be an area which posed any risk to motorists from rock slides. Since there is no evidence to establish notice on behalf of the respondent, the claimant has not established the respondent was negligent. Accordingly, based on the reasons stated above, this claim must be denied.

Claim disallowed.

OPINION ISSUED OCTOBER 10, 1996

DR. R. SAMPATH, M.D., INC.
VS.
DIVISION OF CORRECTIONS
(CC-96-440)

No appearance by claimant.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

The claimant seeks payment of $4,268.00 for medical services provided to an inmate in the Mount Olive Correctional Center, a facility of the respondent.

In its Answer, the respondent admits the validity and amount of the claim, but states that there were insufficient funds expired in the appropriate fiscal year with which the invoice could have been paid.

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

Claim disallowed.

OPINION ISSUED OCTOBER 10, 1996

SERETHA O. SAUNDERS

VS.
DIVISION OF HIGHWAYS & BUREAU OF EMPLOYMENT PROGRAMS
(CC-96-76)

Todd A. Twyman, Attorney at Law, for claimant.
Cynthia A. Majestro, Attorney at Law, for respondent.

PER CURIAM:

The claimant, Seretha O. Saunders, seeks an award of $500.00 from the respondents, Division of Highways and Bureau of Employment Programs, for damage to her vehicle. The damage occurred on October 5, 1995, at approximately 11:00 a.m., while the claimant was driving east on North Boulevard in Huntington, West Virginia. During the drive, the claimant was involved in an automobile accident while she proceeded through the intersection of North Boulevard and Fifth Street. According to the claimant, she stopped at a stop sign and looked in both directions before traveling through the intersection; however, she stated that her vision was obstructed by a bridge. When the claimant traveled straight across the intersection, her vehicle struck a truck which was turning east onto North Boulevard from the northbound lane on Fifth Street.

Shortly after the accident, an officer from the Huntington City Police Department arrived and prepared a traffic report. Although the officer did not issue a citation to either driver, the report indicated that the claimant did not have the right-of-way to proceed through the intersection. The report also indicated that the front of the claimant's vehicle struck the left rear side of the truck.

The claimant was employed by respondent Bureau of Employment Programs, as an Accounting Assistant II at the time of the accident. As part of her employment, the claimant was required to use her personal vehicle to travel throughout the State. On the morning of the accident, the claimant had visited a business to obtain reports for her employer, but the claimant was informed that the reports would be unavailable until after the lunch hour. The claimant decided to take her son to lunch while she waited, and the accident occurred while she was driving to meet her son.

At the hearing the claim, the accident report was marked as Claimant's Exhibit No. 1 and admitted without objection. Ben Savilla, a claim investigator for respondent, Division of Highways, examined the accident report and the intersection sometime after the accident. Mr. Savilla determined from his investigation that visibility was limited by a bridge located south of the intersection. However, he also determined that the line of sight distance from the est side of the intersection to the bridge varied between 150 and 600 feet.

Barry Warhoftig, a traffic operations engineer for respondent, Division of Highways, testified that his responsibilities included the arrangement of stop lights and stop signs at intersections throughout the State. According to Mr. Warhoftig, he was unaware of any significant problems with the intersection of North Boulevard and Fifth Street. Mr. Warhoftig also testified that the bridge located south of the intersection was built in 1929 and the roadway was taken into the state road

system in 1933.

The claimant alleges that a defective road condition existed at the intersection of North Boulevard and Fifth Street which caused her accident. The claimant also alleges that she was using her own vehicle while conducting business for the Bureau of Employment Programs. Therefore, the claimant contends that the respondents should reimburse her for the expenses she incurred as a result of the accident.

Following the decision in the case of *Adkins vs. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947), this Court has consistently followed the principle that the State is not a guarantor of the safety of motorists upon its roads, and it is the responsibility of every motorist operate his or her vehicle in a prudent and cautious manner under all circumstances.

In this claim, the Court finds that the claimant has not established, by a preponderance of the evidence, any liability on behalf of the respondents for the damage to her vehicle. The accident report noted that the claimant did not have the right-of-way as she proceeded through the intersection, and the damage to both vehicles indicated that it was the claimant's vehicle struck the other vehicle. Moreover, the claimant did not present any evidence to establish what the precise line of sight distance was from the intersection to the bridge, and she offered no expert testimony to support her allegation that a defective road condition existed at the intersection of North Boulevard and Fifth Street. In comparison, the testimony of Mr. Savilla and Mr. Warhoftig revealed: (1) the line of sight distance was adequate for the nature of the intersection; (2) the intersection was properly designed for the volume of traffic which traveled on North Boulevard and Fifth Street; and (3) the intersection did not present an unusual risk to motorists.

Therefore, based on the reasons stated above, this claim is denied.

Claim disallowed.

OPINION ISSUED OCTOBER 10, 1996

SCHAEFFER FUNERAL HOME, INC.
VS.
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
(CC-96-335)

No appearance by claimant.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for a decision based upon the allegations in the Notice of Claim and

the respondent's Answer.

The claimant seeks payment of $400.00 for burial services provided to an individual residing in Grant County, West Virginia. The burial billing form for the services was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity and amount of the claim, and states that there were sufficient funds expired in the appropriate fiscal year to pay for the services.

In view of the foregoing, the Court makes an award in the amount of $400.00.

Award of $400.00.

OPINION ISSUED OCTOBER 10, 1996

CECIL SCOTT
VS.
DIVISION OF HIGHWAYS
(CC-96-149)

Claimant represents self.
Tammy R. Harvey, Attorney at Law, for respondent.

PER CURIAM:

The claimant, Cecil Scott, seeks an award of $229.30 from the respondent, Division of Highways, for damage to his vehicle, a 1978 Pontiac Grand Prix. The damage occurred on January 17, 1996, at approximately 9:00 p.m., while the claimant was driving on Route 65/5 near Delbarton, Mingo County. During the drive, the claimant's vehicle struck a hole in the road. As a result of the collision, the vehicle sustained damage to the steering column and a tire. The cost of repair the claimant's vehicle totaled $229.28. According to the claimant, the hole was located near a blocked drainage culvert, and the pavement surface was covered with ice and water. The claimant was unaware of the hole prior to the accident, and foggy conditions prevented him from seeing the hole in time to avoid it.

Cecil Collins, a transportation worker for the respondent in Mingo County, testified that he was responsible for dispatching snow removal and ice control equipment and scheduling road maintenance work. Mr. Collins described Route 65/5 as a second priority road which is traveled by numerous coal trucks. According to Mr. Collins the respondent had received several complaints concerning the poor

condition of the road, and he knowledged that the road was in bad shape when the claimant's accident occurred.

This Court is well aware that adverse weather conditions can create poor driving conditions on roads throughout West Virginia, and when these conditions arise the respondent must concentrate its maintenance efforts upon snow and ice removal activities. Although snow and ice removal activities take priority over ordinary maintenance work, the respondent cannot ignore the existence of an unusually large road defect. In situations where a road defect presents an unusual threat to motorists, the respondent has a duty to warn motorists of the defective road condition until it can be repaired.

Based on the facts in the claim, the Court finds that the respondent had actual notice that Route 65/5 was in need of substantial repairs. It is fortunate that the respondent's maintenance forces were unable to repair the roadway in a timely manner, but this does not relieve the respondent of its duty to warn the claimant of the hazardous road condition. Accordingly, this Court finds that the respondent is liable for the damage caused to the claimant's vehicle. Therefore, the Court makes an award to the claimant in the amount of $229.28.

Award of $229.28.

OPINION ISSUED OCTOBER 10, 1996

HOWARD D. WESTBROOK
VS.
DIVISION OF HIGHWAYS
(CC-96-65)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

The claimant, Howard D. Westbrook, seeks an award of $495.72 from the respondent, Division of Highways, for damage to his vehicle. The damage occurred on January 31,1996, at approximately 2:40 p.m., in South Parkersburg, West Virginia. Weather conditions were clear and cold, but no snow was on the ground. The damage occurred when the claimant's vehicle struck an open drop inlet while he was driving into a private parking lot from Pike Street. Photographs of the inlet indicated that it was not located on the traveled portion of the roadway. Nevertheless, the inlet was within the boundaries of the respondent's right-of-way and very close to the entrance of the private parking lot.

Paul Reese, the Wood County supervisor for the respondent, testified that Pike Street was maintained by the respondent. He characterized the roadway as a high priority feeder route.

According to Mr. Reese, he was notified of a problem on Pike Street shortly after the claimant's accident. He immediately went to the accident location to access the problem. When he arrived, he observed several pieces of broken concrete several feet away from the drop inlet opening. Mr. Reese believed that the broken concrete had served as a curb around the inlet at one time. Based on his observations, Mr. Reese concluded that the damage to the inlet was caused by snow removal equipment. However, he did not believe that the damage was caused by one of the respondent's snow plows since their snow plow operators are specifically instructed not to plow private driveway entrances.

In this State it is well established that the respondent has a duty to maintain roads in a reasonable state of repair. However, this duty does not make the respondent an insurer of the safety of motorists traveling on its highways. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to establish liability on behalf of the respondent, a claimant must prove the respondent had notice of a road defect and had a reasonable opportunity to correct the defect. *Chapman vs. Dept. of Highways,* 16 Ct. Cl. 103 (1986).

The evidence in this claim revealed that the damage to the drop inlet was most likely caused by a snow plow. However, the evidence did not establish that one of the respondent's snow plows caused the damage. Instead, the record revealed that snow plow operators for the respondent are not permitted to plow private driveway entrances. Moreover, the respondent was unaware of this defective drop inlet until shortly after the claimant's accident.

Based on the reasons stated above, the Court finds that the claimant has not established any liability on behalf of the respondent for the damage caused by the defective drop inlet. Therefore, this claim must be denied.

Claim disallowed.

OPINION ISSUED OCTOBER 25, 1996

AUTHORIZED FACTORY SERVICE, INC.
VS.
DIVISION OF CORRECTIONS
(CC-96-479)

No appearance by claimant.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for a decision based upon the allegations in the Notice of Claim and

the respondent's Answer.

The claimant seeks payment of $464.70 for installing a temperature controller in the Mount Olive Correctional Complex, a facility of the respondent. The invoice for the services was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity and amount of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which the invoice could have been paid.

In view of the foregoing, the Court makes an award in the amount of $363.70.

Award of $363.70.

OPINION ISSUED OCTOBER 25, 1996

BELL ATLANTIC-WEST VIRGINIA, INC.
VS.
DEPARTMENT OF TAX AND REVENUE
(CC-96-391)

No appearance by claimant.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

The claimant seeks payment of $30,622.29 for telephone services provided to the respondent. The invoice for the services was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity and amount of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which the invoice could have been paid.

In view of the foregoing, the Court makes an award in the amount of $30,622.29.

Award of $30,622.29.

OPINION ISSUED OCTOBER 25, 1996

CABELL COUNTY COMMISSION

VS.
DIVISION OF CORRECTIONS
(CC-96-462)

William T. Watson, Attorney at Law, for the claimant.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

The claimant, Cabell County Commission, is occasionally responsible for the incarceration of prisoners who have committed crimes in Cabell County, but have been sentenced to facilities owned and maintained by the respondent, Division of Corrections. The claimant brought this action to recover medical payments and housing costs for prisoners who have been sentenced to a state penal institution. However, due to circumstances beyond the control of the claimant, the prisoners have had to remain in the Cabell County Jail for periods of time beyond the date of the sentencing order.

This Court previously determined in *County Comm'n. of Mineral County vs. Div. of Corrections,* unpublished opinion issued November 21, 1990, CC-89-340, that the respondent was liable for the costs of housing and providing medical care to inmates sentenced to a state penal institution.

Pursuant to the holding in *Mineral County*, the respondent has reviewed this claim to determine the appropriate costs associated with housing and providing medical care to the prisoners who should have been in a state penal institution. The respondent then filed an answer admitting the validity of this claim in the amount of $14,661.26.

Based on the reasons stated above, the Court makes an award to the claimant in the amount of $14,661.26.

Award of $14,661.26.

The Honorable David A. Baker, Judge, did not participate in the decision of this claim.

OPINION ISSUED OCTOBER 25, 1996

DIVISION OF HIGHWAYS
VS.
DIVISION OF CORRECTIONS

(CC-96-469)

Patricia J. Lawson, Attorney at Law, for claimant.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

The claimant seeks payment of $13,102.18 for various materials, equipment, and services provided to the respondent for resurfacing the entrance to the Huttonsville Correctional Center.

In its Answer, the respondent admits the validity and amount of the claim, but states that there were sufficient funds expired in the appropriate fiscal year with which to pay for the paving project.

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

Claim disallowed.

OPINION ISSUED OCTOBER 25, 1996

JIANSHENG LI
VS.
BOARD OF TRUSTEES OF THE UNIVERSITY SYSTEM (WVU)
(CC-96-13)

No appearance by claimant.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

The claimant seeks payment of $400.00 for damage to personal property. The damage occurred on December 2, 1995, at the Medical Center Apartments in Morgantown, West Virginia. At this time, the plumbing in the claimant's apartment malfunctioned, and water flowed into the apartment. The claimant notified maintenance personnel for the respondent of the problem on December 1, 1995, and he refrained from using his wash room in an attempt to prevent any damage. However, no one came

to repair the problem, and water eventually flowed into the claimant's apartment.

In its Answer, the respondent admits the validity and amount of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which to pay this claim.

In view of the foregoing, the Court makes an award in the amount of $400.00.

Award of $400.00.

OPINION ISSUED OCTOBER 25, 1996

MERCER, MCDOWELL, WYOMING MENTAL HEALTH COUNCIL d/b/a
SOUTHERN HIGHLANDS COMMUNITY MENTAL HEALTH
VS.
DIVISION OF MOTOR VEHICLES
(CC-96-380)

No appearance by claimant.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

The claimant seeks payment of $150.00 for DUI counseling services provided to individuals pursuant to an agreement with the respondent with the respondent. The invoice for the services was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity and amount of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which the invoice could have been paid.

In view of the foregoing, the Court makes an award in the amount of $150.00.

Award of $150.00.

OPINION ISSUED OCTOBER 25, 1996

DONALD WILSON, JR.
VS.
DIVISION OF CORRECTIONS
(CC-96-1)

Claimant represents self.
Jeffrey G. Blaydes, Attorney at Law, for respondent.

PER CURIAM:

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

The claimant, an inmate in the Mount Olive Correctional Complex, seeks payment of two items of clothing. The claimant contends that he sent a sweatshirt and a pair of sweatpants to the laundry area of the complex to be washed. However, the items were not returned to the claimant. The estimated value of the missing items is $18.25.

In its Answer, the respondent admits the validity and amount of the claim.

After reviewing the record, the Court has determined that the respondent failed to return the claimant's personal property. Accordingly, the Court makes an award to the claimant in the amount of $18.25.

Award of $18.25.

OPINION ISSUED DECEMBER 2, 1996

AMERICAN INVESTIGATIONS, INC.
VS.
OFFICE OF THE ATTORNEY GENERAL
(CC-96-538)

No appearance by claimant.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

The claimant seeks payment of $73.35 for serving a summons on behalf of the respondent. In

support of its claim, the claimant submitted an invoice for the service with its Notice of Claim. In its Answer, the respondent admits the validity of the claim in the amount of $69.20, and states that there were sufficient funds expired in the appropriate fiscal year with which this amount could have been paid. The difference between the amount claimed and the amount admitted represents sales tax which should not have been added to the cost of the service. Subsequently, the claimant contacted the Court and indicated it would accept $69.20 as satisfaction for the claim.

In view of the foregoing, the Court makes an award to the claimant in the amount of $69.20.

Award of $69.20.

OPINION ISSUED DECEMBER 2, 1996

BURTON ANDERSON, JR.
VS.
DIVISION OF HIGHWAYS
(CC-96-264)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

The claimant, Burton Anderson Jr., seeks an award of $616.72 from the respondent, Division of Highways, for damage to his 1987 Pontiac TransAm. The damage occurred on April 18, 1996, at approximately 8:00 p.m., while the claimant was driving on the Chestnut Street Exit from Route 50 in Harrison County. At this time, the claimant's vehicle struck a piece of steel rebar which protruded approximately two feet out of the concrete bridge deck. According to the claimant, it appeared as though the rebar broke through the concrete surface. As a result of the incident, the claimants vehicle sustained damage to the left front headlight and front bumper cover. The claimant obtained two estimates of the cost to repair his vehicle, and these estimates totaled $525.40 and $616.72.

Boyd Richards, a maintenance supervisor for the respondent in Harrison County, testified that the top one and a half inches of the bridge had been rotomilled prior to resurfacing the bridge. Mr. Richards believed that the protruding rebar could have broken loose from the underlying concrete due to vehicles traveling over the rebar.

This Court has consistently followed the principle that the respondent owes a duty to motorists to exercise reasonable care and diligence in maintaining roads under all circumstances. *Hobbs vs. Dept. of Highways,* 13 Ct. Cl. 27 (1979).

Based on the evidence presented in this claim, it appears that the respondent breached this duty

to the claimant by creating a dangerous road condition which caused damage to the claimant's vehicle. Therefore, this Court makes an award to the claimant in the amount of $535.40.

Award of $535.40.

OPINION ISSUED DECEMBER 2, 1996

BROWNING FUNERAL HOME, INC.
VS.
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
(CC-96-493)

No appearance by claimant.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

The claimant seeks payment of $400.00 for burial services provided to an individual who died on March 9, 1996. The respondent administers a burial services program which pays a portion of the funeral expenses for qualified individuals. The invoice for the services was not processed for payment in the proper fiscal year; therefore, the claimant has not bee paid. In its Answer, the respondent admits the validity and amount of this claim, and states that there were sufficient funds expired in the appropriate fiscal year with which the invoice could have been paid.

In view of the foregoing, the Court makes an award in the amount of $400.00.

Award of $400.00.

OPINION ISSUED DECEMBER 2, 1996

BROWNING FUNERAL HOME, INC.
VS.
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
(CC-96-506)

No appearance by claimant.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

The claimant seeks payment of $400.00 for burial services provided to an individual who died on October 6, 1995. The respondent administers a burial services program which pays a portion of the funeral expenses for qualified individuals. The invoice for the services was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity and amount of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which the invoice could have been paid.

In view of the foregoing, the Court makes an award in the amount of $400.00.

Award of $400.00.

OPINION ISSUED DECEMBER 2, 1996

CHARLES L. & WILMA BURR
VS.
DIVISION OF HIGHWAYS
(CC-96-89)

Claimants represent selves.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

The claimants, Charles L. and Wilma Burr, seek an award of $2,250.00 for damage to their vehicle, a 1985 Dodge Lancer. The damage occurred on January 26, 1996, at approximately 3:00 a.m., while Mr. Burr was driving on Route 33/250 near the Third Ward School in Elkins, Randolph County. During the drive, Mr. Burr was traveling between twenty-five and thirty miles per hour when the vehicle struck a large hole. The hole was located near the center line and it was approximately thirty-one inches wide. Mr. Burr testified that he was aware of the hole and he decelerated before the collision, but rain and darkness prevented him from seeing the hole in time to avoid it.

As a result of the accident, the vehicle sustained severe frame and suspension damage. Three repair estimates were admitted into evidence. Each estimate indicated that the value of the vehicle was less then the cost to repair the vehicle. The approximate value of the vehicle, prior to the accident, was $2,250.00.

Lewis B. Gardener, the assistant Randolph County Supervisor for the respondent, described Route 33/250 as a top priority road. Mr. Gardener testified that the hole involved in this claim was created when city employees repaired a water line under the roadway. Mr. Gardener was aware of the hole prior to the claimant's accident, and he noted that the water line problem occasionally caused ice to form on the road. Although Mr. Gardener believed that the City of Elkins was responsible for repairing the hole, he acknowledged that the respondent had a duty to make sure the roadway was properly repaired. Mr. Gardener also noted that during January, 1996, several roads in Randolph County were closed due to flood damage, and road maintenance efforts were focused on reopening these roads rather than performing patching work.

It is well established that the State has a duty to use reasonable care and diligence to maintain streets and highways in a reasonably safe condition. *Lewis vs. Dept. of Highways,* 16 Ct. Cl. 136 (1986); *Hobbs vs. Dept. of Highways,* 13 Ct. Cl. 27 (1979).

It is clear from the evidence in this claim that the respondent was aware of the hole and why the hole was present in the roadway, but it did not properly monitor the work by the City of Elkins to insure the hole was repaired. The evidence also established that the claimant was aware of the location of the hole, and he had avoided it on occasions before January 26, 1996.

Based on the above, the Court finds that the respondent and Mr. Burr were negligent. Therefore, the Court makes an award to the claimants in the amount of 70% of their damages for a total award of $1,575.00.

Award of $1,575.00.

OPINION ISSUED DECEMBER 2, 1996

ZACHARIAH J. CHITTUM
VS.
REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY
(CC-96-487)

Claimant represents self.
Jeffrey G. Blaydes, Attorney at Law, for respondent.

PER CURIAM:

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

The claimant seeks an award of $458.30 for various items of personal property which he surrendered to a guard when he entered the South Central Regional Jail. When the claimant was

released, the items were not returned to him.

In its Answer, the respondent admits the validity of the claim in the amount of $458.30.
The Court, having reviewed the facts in this claim, has determined that a bailment existed and that the respondent failed to return personal property belonging to the claimant when it was in respondent's care and custody. The Court also has determined that $458.30 is fair and reasonable to compensate the claimant for his loss.

Accordingly, the Court makes an award to the claimant in the amount of $458.30.

Award of $458.30.

OPINION ISSUED DECEMBER 2, 1996

MICHAEL A. COCHRAN
VS.
DEPARTMENT OF EDUCATION
(CC-96-182)

No appearance by claimant.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

The claimant seeks payment of $1,000.00 for back wages incurred when he was an employee at the Elkins Mountain School. The respondent, in its Answer, admits the validity of the claim in the amount of $900.00, but states that there were insufficient funds expired in the appropriate fiscal year with which the wages could have been paid. The Court has received correspondence from the claimant accepting $900.00 as complete satisfaction of this claim.

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

Claim disallowed.

OPINION ISSUED DECEMBER 2, 1996

COLONIAL FORD-LINCOLN-MERCURY, INC.
VS.
DEPARTMENT OF ADMINISTRATION
(CC-96-367)

No appearance by claimant.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

The claimant seeks payment of $1,963.22 for automobile repair services provided to the respondent. In support of its claim, the claimant submitted invoices for the services with its Notice of Claim. In its Answer, the respondent admits the validity of the claim in the amount of $1,852.10, and states that there were sufficient funds expired in the appropriate fiscal year with which this amount could have been paid. The difference between the amount claimed and the amount admitted represents sales tax which should not have been added to the cost of the repairs. Subsequently, the claimant contacted the Court and indicated it would accept $1,852.10 as full satisfaction for the claim.

In view of the foregoing, the Court makes an award to the claimant in the amount of $1,852.10.

Award of $1,852.10.

OPINION ISSUED DECEMBER 2, 1996

MARK FINKENBINDER AND DONNA FINKENBINDER
VS.
DIVISION OF HIGHWAYS
(CC-96-219)

Claimants represent themselves.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

The claimants, Mark and Donna Finkenbinder, seek an award of $459.22 from the respondent Division of Highways, for damage to their vehicle, a 1992 Ford Taurus. The damage occurred on

March 23, 1996, at approximately 2:30 p.m., while the claimants' daughter, Erin Marie Finkenbinder, was driving the vehicle. During the drive, Ms. Finkenbinder was proceeding at approximately thirty miles per hour Route 73/73 near the intersection with U.S. Route 250 in Marion County when the vehicle struck a large hole in the pavement. Mr. Finkenbinder estimated that the hole was three feet long, four feet wide, and between six and twelve inches deep. As a result of the collision, the vehicle sustained damage to the tie rods, rims, and tires. Two repair receipts were admitted into evidence. These receipts indicated that the cost to repair the vehicle was $459.22.

Harold Swidler, a transportation crew chief for the respondent in Marion County described Route 73/73 as a top priority two lane road. Mr. Swidler testified that he was aware of the hole involved in this claim approximately one month prior to Ms. Finkenbinder's accident. According to Mr. Swidler, the hole was a recurring problem, and road crews periodically checked the hole and repaired it with cold mix patching material. Mr. Swidler acknowledged that the cold mix material did not last very long, but he noted that permanent hot mix patching material was not available until April 10, 1996.

In *Hobbs vs. Dept. of Highways,* 13 Ct. Cl. 27 (1979), this Court determined that the respondent has a duty to exercise reasonable care and diligence in maintaining its roads under all circumstances. Under this standard, a claimant may establish liability on behalf of the respondent for damage caused by a defective road condition if the record reveals, by a preponderance of the evidence, that the respondent had actual or constructive notice of the defect and failed to take correction action within a reasonable time.

The record in this claim reveals that the respondent was aware of the hole prior to March 23, 1996, but it was unable adequately to repair the area due to the unavailability of hot mix patching material. Based on these facts, this Court believes that the respondent should have posted warning signs to alert motorists of the poor road condition. This Court also finds that the failure to warn motorists of a known roads defect which posed a substantial risk of harm to motorists was a breach of the respondent's duty to exercise reasonable care and prudence in maintaining its roads.

It is the decision of this Court that the claimants have established liability on behalf of the respondent for the damage to their vehicle. Accordingly, this Court makes an award to the claimants in the amount of $459.22.

Award of $459.22.

OPINION ISSUED DECEMBER 2, 1996

RANDALL L. AND DEBRA S. MORGAN
VS.

DIVISION OF HIGHWAYS
(CC-96-193)

Claimants represent themselves.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

The claimants, Randall L. and Debra S. Morgan, seek an award of $223.73 from the respondent, Division of Highways, for damage to their vehicle, a 1988 Plymouth Sundance. The damage occurred on March 19, 1996, at approximately 7:15 p.m., while Ms. Morgan was driving at thirty-five miles per hour on Route 73/73 in Marion County, near the Middletown Mall. During the drive, the claimants' vehicle struck a hole in the pavement surface near the right side of the roadway. The hole was eighteen inches wide and six inches deep. Ms. Morgan testified that there were no signs present to warn motorists of the hole. She also noted that she could not see the hole because it was covered with water. As a result of the collision, the vehicle sustained damage to its wheel, motor mount, and constant velocity joint. The cost to repair the vehicle totaled $223.73.

Harold Swidler, a transportation crew chief for the respondent in Marion County described Route 73/73 as a top priority two lane road. He estimated that each lane was ten feet wide. According to Mr. Swidler, the hole involved in this claim was a recurring problem, and road crews made several attempts to repair the hole with cold mix patching material. Mr. Swidler acknowledged that the cold mix material did not last very long, but he noted that permanent hot mix patching material was not available.

In *Hobbs vs. Dept. of Highways,* 13 Ct. Cl. 27 (1979), the Court determined that the respondent has a duty to exercise reasonable care and diligence in maintaining its roads under all circumstances. Under this standard, a claimant may establish liability on behalf of the respondent for damage caused by a defective road condition if the record reveals, by a preponderance of the evidence, that the respondent had actual or constructive notice of the defect and failed to take corrective action within a reasonable time.

The record in this claim revealed that the respondent was aware of the hole prior to Ms. Morgan's accident, but it was unable to adequately repair the area due to the unavailability of hot mix patching material. Based on these facts, this Court believes that the respondent should have posted warning signs to alert motorists of the poor road conditions. This Court also finds that the respondent's failure to warn motorists of a known road defect which posed a substantial risk of harm was a breach of its duty to exercise reasonable care and prudence in maintaining roads.

It is the decision of this Court that the claimants have established liability on behalf of the respondent for the damage to their vehicle. Accordingly, this Court makes an award to the claimants in the amount of $223.73.

Award of $223.73.

OPINION ISSUED DECEMBER 2, 1996

LISA J. PRATT
VS.
DIVISION OF HIGHWAYS
(CC-96-167)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

The claimant, Lisa J. Pratt, seeks an award of $695.28 from the respondent, Division of Highways, for damage to her vehicle, a 1994 Chevrolet Cavalier. The damage occurred on January 26, 1996, at approximately 6:30 a.m., while the claimant was traveling on Route 33 near Elkins, Randolph County. According to the claimant, she was driving thirty miles per hour when her vehicle struck a hole near the right side of the roadway. The claimant testified that she was aware of the hole, but she was unable to avoid it because a large truck crossed over the center line and into her lane. As a result, there was not enough space for the claimant to avoid the hole and the truck. After the collision, the claimant noticed that her vehicle began to vibrate and emit a strange odor. She later discovered that the suspension and radiator on the vehicle had been damaged. The cost to repair the vehicle totaled $695.28. The claimant testified that she had full coverage insurance on her vehicle with a $500.00 deductible, but that the deductible was only applicable if the damage was a collision claim rather than a comprehensive claim.

Lewis Garner, an assistant maintenance supervisor, for the respondent, described Route 33 as a top priority road in Randolph County. Mr. Gardner testified that he was aware of a recurring problem in the pavement surface where the claimant's accident occurred, prior to January 26, 1996. Nevertheless, Mr. Gardner noted that road crews were unable to patch the roadway due to other road problems which developed in Randolph County during January, 1996. According to Mr. Gardner, heavy snows and flooding created dangerous driving conditions and destroyed portions of roads at various locations throughout the county. The cumulative effect of these conditions required the respondent to concentrate its maintenance efforts on areas which posed more substantial risks to motorists than the area where the claimant's accident occurred.

In *Hobbs vs. Dept. of Highways,* 13 Ct. Cl. 27 (1979) this Court determined that the respondent owes a duty to motorists to exercise reasonable care and diligence in maintaining roads under all circumstances. However, this duty does not make the respondent an insurer of the safety of motorists, nor does it lessen a motorist's responsibility to operate his or her vehicle in a reasonable and prudent manner under existing road conditions.

The evidence reveals that the respondent was on notice of the deteriorating pavement surface where the claimant's accident occurred, and it had attempted to repair the area prior to the claimant's accident. The evidence also indicates that the claimant was aware of the defective road condition, and she had avoided it on prior occasions.

Based on these reasons, the Court finds that the respondent and the claimant were negligent. Therefore, the Court makes an award to the claimant in the amount of 70% of her damages for a total award of $486.70.

Award of $486.70.

OPINION ISSUED DECEMBER 2, 1996

CARNELLIA J. ROUPE AND CHARLES W. ROUPE,
ADMINISTRATOR OF THE ESTATE OF
CASIE RENEE ROUPE
VS.
DIVISION OF HIGHWAYS
(CC-94-721)

Claimants represent themselves.
Andrew F. Tarr and Cynthia A. Majestro, Attorneys at Law, for respondent.

PER CURIAM:

The claimants, Carnellia J. Roupe and Charles W. Roupe, brought this wrongful death action as administrators of the estate of Casie Renee Roupe, their daughter, who died in a single vehicle accident on November 3, 1992. The claimants contend that the death of Ms. Roupe was caused by the respondent's negligent design, installation and maintenance of the guardrail adjacent to the southbound lane of Interstate 79 near the boundary between Harrison and Lewis Counties. For these reasons, the claimants allege that the respondent is liable for the death of Ms. Roupe, and they seek an award of $1,000,000.00. The respondent contends that Ms. Roupe was intoxicated when the accident occurred, and that her intoxicated condition was the proximate cause of the accident.

On November 3, 1992, at approximately 5:45 a.m., Ms. Roupe, age 18, was driving south on Interstate 79 near mile post 106 in a 1988 Ford Tempo when her vehicle traveled into the median and struck the breakaway cable terminal section of a guardrail. Photographs of the accident indicated that the endpoint of the guardrail penetrated the side of the vehicle and struck Ms. Roupe resulting in her death.

A blood sample was taken from Ms. Roupe shortly after the accident, and a gas chromatograph test was performed on the sample by Dr. Donnell K. Cash, a toxicologist for the office of the Chief

Medical Examiner for the State of West Virginia. The test results indicated that Ms. Roupe's blood alcohol content was 0.21% at the time of her death. Dr. Cash testified that this level of intoxication was more than double the legal limit for operating a motor vehicle. Dr. Cash also noted that a blood alcohol content of 0.21% could cause a decrease in reaction time, reduced visual acuity, dizziness, incoordination, and slurred speech.

The accident was investigated by Deputy James Singleton of the Harrison County Sheriff's Department. Deputy Singleton arrived at the scene of the accident at approximately 6:09 a.m. His investigation revealed that: (1) the accident occurred along a straight section of road; (2) Ms. Roupe's vehicle traveled off the pavement approximately 238 feet before it struck the guardrail; and (3) the guardrail was located in the median approximately 15 feet from the edge of the pavement. Based on Deputy Singleton's inspection of the accident scene, he was unable to determine why the accident occurred.

Although the respondent has a duty to use reasonable care and diligence in maintaining its roads, it is not an insurer of the safety of motorists. In order to establish liability on behalf of the respondent, a claimant must prove by a preponderance of the evidence: (1) the existence of a defective road condition; (2) that the defective road condition was the proximate cause of the damage; and (3) that the respondent had notice of the defect, but failed to take corrective action within a reasonable amount of time.

After a careful review of the evidence, the Court finds that the claimants failed to establish through competent evidence that the respondent was negligent in the design, installation, and maintenance of the guardrail in place at the scene of the accident, and, further, that the claimants have not met the burden of proof required to establish liability for the accident involved in this claim. Therefore, the claim must be denied.

Claim disallowed.

OPINION ISSUED DECEMBER 2, 1996

JEAN A. SARTORIS
VS.
DIVISION OF HIGHWAYS
(CC-96-240)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

The claimant, Jean A. Sartoris, seeks an award of $30.14 from the respondent, Division of Highways, for damage to a tire on her vehicle. The damage occurred on May 14, 1996, at approximately 2:00 p.m., while the claimant was traveling on County Route 24 in Harrison County. During the drive, the claimant's vehicle struck a hole int the pavement surface. According to the claimant, she could not see the hole because it was filled with water. As a result of the collision, a tire on the vehicle was damaged. The cost to replace the tire totaled $30.14.

William Wyckoff, an assistant maintenance supervisor for the respondent in Harrison County described County Route 24 as a secondary two lane road. According to Mr. Wyckoff the roadway was periodically repaired with cold mix patching material on several occasions between February 22, 1996, and March 11, 1996. However, the respondent's road maintenance records indicated that no work had been performed on the road from March 12, 1996, through May 14, 1996.

In order for the claimant to establish negligence on behalf of the respondent for damage caused by a road defect, the claimant must prove by a preponderance of the evidence that the respondent had either actual or constructive notice of the defect and a reasonable opportunity to take corrective action. *Chapman vs. Dept. of Highways,* 16 Ct. Cl. 103 (1986); *Pritt vs. Div. of Highways,* Unpublished opinion issued April 4, 1995, CC-94-26.

The evidence in this claim established that the respondent was aware of the recurring road defect which damaged the claimant's tire, and it decided to temporarily repair the defect until permanent repairs could be performed. However the respondent apparently failed to monitor the effectiveness of the temporary repairs. Therefore, the Court believes that the claimant has established that the respondent was negligent.

Accordingly, the Court makes an award to the claimant in the amount of $30.14.

Award of $30.14.

OPINION ISSUED DECEMBER 2, 1996

DEBRA S. SHRIEVES
VS.
DIVISION OF HIGHWAYS
(CC-96-244)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

The claimant, Debra S. Shrieves, seeks an award of $77.52 from the respondent, Division of Highways, for damage to a tire on her 1987 Nissan Maxima. The damage occurred on May 18, 1996, at approximately 12:30 p.m., while the claimant was driving thirty-five miles per hour on Route 18 in Doddridge County. During the drive, the claimant's vehicle struck a hole in the pavement surface. According to the claimant, the hole was filled with water and the claimant did not see the hole prior to the collision. As a result of the accident, a tire on the vehicle was damaged. The cost to replace the tire totaled $77.52.

Larry Williams, an assistant superintendent for the respondent, testified that he was responsible for scheduling road maintenance work for the roads in Doddridge County, and he described Route 18 as a top priority road. Mr. Williams was aware that there were numerous holes in the road where the claimant's accident occurred, and he believed that these holes were a result of harsh weather conditions. The respondent's road maintenance records indicated that the area was repaired with cold mix patching material on January 29, 1996, and February 23, 1996. However, no evidence was presented to establish that the area had been inspected or repaired from February 23, 1996 through May 18, 1996.

In order for the claimant to establish negligence on behalf of the respondent for damage caused by a road defect, the claimant must prove by a preponderance of the evidence that the respondent had either actual or constructive notice of the defect and a reasonable opportunity to take corrective action. *Chapman vs. Dept. of Highways,* 16 Ct. Cl. 103 (1986); *Pritt vs. Division of Highways,* Unpublished opinion issued April 4, 1995, CC-94-26.

The evidence in this claim established that the respondent was aware of the recurring road defect which damaged the claimant's tire, and it decided to repair the defect by using temporary materials until more permanent repairs could be performed. However, the respondent apparently failed to monitor the condition of the road after it made the temporary repairs. Therefore, the Court believes that the claimant has established that the respondent was negligent. Based on the reasons stated above, the Court makes an award to the claimant in the amount of $77.52.

Award of $77.52.

OPINION ISSUED DECEMBER 2, 1996

PAUL A. VOSBURGH, III
VS.
OFFICE OF THE ADJUTANT GENERAL
(CC-96-468)

No appearance by claimant.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

The claimant seeks payment of $890.00 for tuition reimbursement under the West Virginia National Guard Education Encouragement Program. The invoice for the tuition was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity and amount of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which the tuition could have been paid.

In view of the foregoing, the Court makes an award in the amount of $890.00.

Award of $890.00.

OPINION ISSUED DECEMBER 19, 1996

DODDRIDGE COUNTY COMMISSION
VS.
DIVISION OF CORRECTIONS
(CC-96-548)

No appearance by the claimant.
Jeffrey G. Blaydes, Assistant Attorney General, for the respondent.

PER CURIAM:

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

The claimant, Doddridge County Commission, is occasionally responsible for the incarceration of prisoners who have committed crimes in Doddridge County, but have been sentenced to facilities owned and maintained by the respondent, Division of Corrections. The claimant brought this action to recover housing costs for prisoners who have been sentenced to a state penal institution. However, due to circumstances, beyond the control of the claimant, the prisoners have had to remain in the Richie County Jail for periods of time beyond the date of the sentencing order. The prisoners were held in the Ritchie County Jail because Doddridge County does not have a jail.

This Court previously determined in *County Comm'n. of Mineral County vs. Div. of Corrections,* unpublished opinion issued November 21, 1990, CC-89-340, that the respondent was liable for the costs of housing and providing medical care to inmates sentenced to a state penal institution.

Pursuant to the holding in *Mineral County,* the respondent has reviewed this claim to determine the appropriate costs associated with housing the prisoners who should have been in a state penal institution. The respondent then filed an Amended Answer admitting the validity of this claim in the amount of $1,155.00.

Based on the reasons stated above, the Court makes an award to the claimant in the amount of $1,155.00.

Award of $1,155.00.

OPINION ISSUED DECEMBER 19, 1996

STEVEN B. DRAIN
VS.
DIVISION OF HIGHWAYS
(CC-96-345)

Claimant represents self.
Cynthia A. Majestro, Attorney at Law, for respondent.

PER CURIAM:

The claimant, Steven B. Drain, seeks an award of $130.00 from the respondent, Division of Highways, for damage to a tire. The damage occurred on July 8, 1996, at 2:30 p.m., while the claimant was driving on Route 36, also known as the Opekiska Road, in Monongalia County. At this time, the claimant was following approximately 100 feet behind a tar and chip machine when a tire on his vehicle began losing air and immediately went flat. The claimant stopped his vehicle and discovered a piece of glass had cut one of his tires. The claimant's testimony indicated that the tar and chip machine was operated by the respondent, and there were no signs or traffic control devices to assist motorists around the machine. The claimant contends that the glass was placed on the road as part of the tar and chip mixture, and the respondent's employees failed to remove the glass after the tar and chip machine passed over the area.

As a result of this incident, the claimant's tire was damaged beyond repair. In the claimant's Notice of Claim he estimated that the cost to replace the tire could vary between $80.00 and $120.00. However, as estimate was admitted into evidence which indicated that the cost to replace the tire would total $130.00.

Kathy Westbrook, an assistant supervisor for the respondent in Monongalia County, confirmed that the respondent resurfaced a portion of Route 36 on July 8, 1996. According to Ms. Westbrook, it is normal procedure on a tar and chip project to install warning signs along the road, use a pilot truck to control traffic through the work area, and compact the tar and chip material after it is placed on the road, and she was unable to state with certainty that normal procedures were followed on July 8, 1996.

The law of West Virginia is well settled that the State is not guarantor of the safety of motorists upon its highways. *Adkins vs. Sims,* 130 W.Va. 645, 46 S.E.2d, 81 (1947). However, the State does have a duty to exercise reasonable care and diligence in the maintenance of its highways under all circumstances. *Adams vs. Dept. of Highways,* 14 Ct. Cl. 214 (1982); Hobbs vs. Dept. of Highways, 13 Ct. Cl. 27 (1979).

In the instant claim, there was no testimony from any of the respondent's employees who performed the tar and chip work to rebut the claimant's testimony. While there was no evidence that the respondent had actual notice of the road defect, the Court believes that the respondent failed to exercise reasonable care while resurfacing Route 36.

Therefore, the Court makes an award to the claimant in the amount of $130.00.

Award of $130.00.

OPINION ISSUED DECEMBER 19, 1996

HARRISON COUNTY COMMISSION
VS.
DIVISION OF CORRECTIONS
(CC-96-486)

No appearance by the claimant.
Jeffrey G. Blaydes, Assistant Attorney General, for the respondent.

PER CURIAM:

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

The claimant, Harrison County Commission, is occasionally responsible for the incarceration of prisoners who have committed crimes in Harrison County, but have been sentenced to facilities owned and maintained by the respondent, Division of Corrections. The claimant brought this action

to recover housing costs for prisoners who have been sentenced to a state penal institution. However, due to circumstances beyond the control of the claimant, the prisoners have had to remain in the Harrison County Jail for periods of time beyond the date of the sentencing order.

This Court previously determined in *County Comm'n. of Mineral County vs. Div. of Corrections,* unpublished opinion issued November 21, 1990, CC-89-340, that the respondent was liable for the costs of housing and providing medical care to inmates sentenced to a state penal institution.

Pursuant to the holding in *Mineral County,* the respondent has reviewed this claim to determine the appropriate costs associated with housing the prisoners who should have been in a state penal institution. The respondent then filed an Amended Answer admitting the validity of this claim in the amount of $3,900.00.

Based on the reasons stated above, the Court makes an award to the claimant in the amount of $3,900.00.

Award of $3,900.00.

OPINION ISSUED DECEMBER 19, 1996

ELMER R. WARNICK
VS.
DIVISION OF HIGHWAYS
(CC-96-302)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

The claimant, Elmer R. Warnick, seeks an award of 4177.94 from the respondent, Division of Highways, for damage to his vehicle, a 1995 Buick LeSabre Limited. The damage occurred during the evening of May 25, 1996, while the claimant was driving north on Route 21 near Barrackville, Marion County. During the drive, the claimant traveling twenty miles per hour when his vehicle struck a hole in the pavement surface. The hole was two feet in diameter and eight inches deep. The hole as located in the claimant's lane, approximately two and a half feet from the edge of the pavement. The claimant testified that a strip of paving material had been placed along the right side of the road,

but the strip did not cover the hole. As a result of the collision, the alignment and a tire were damaged. The cost to repair the vehicle totaled $177.94.

Route 21 is a two lane second priority road which is approximately sixteen feet wide. Harold Swidler, a transportation crew chief for the respondent in Marion County, testified that road maintenance work was performed on Route 21 during May 22, 1996. At this time, a section of blacktop five feet wide was placed over the right side of Route 21 where the claimant's accident occurred.

In *Hobbs vs. Dept. of Highways, 13 Ct. Cl. 27 (1979),* this Court has determined that the respondent owes a duty to motorists to exercise reasonable care and diligence in maintaining roads under all circumstances. Although this duty does not make the respondent an insurer of the safety of motorists, it does require the respondent to perform day-to-day road maintenance work in a prudent and sensible manner under existing road conditions.

Based on the evidence presented in this claim, it appears that the respondent failed to patch a large hole in the pavement surface which was located on a road that it had recently repaired. The evidence also supports the claimant's contention that the hole existed prior to the work performed by the respondent. Therefore, this Court finds that the claimant has established liability on behalf of the respondent for the damage to his vehicle. Accordingly, this Court makes an award to the claimant in the amount of $177.94.

Award of $177.94.

OPINION ISSUED JANUARY 14, 1997

GRAFTON CITY HOSPITAL
VS.
DIVISION OF CORRECTIONS
(CC-96-601)

No appearance by claimant.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

The claimant seeks payment of $6,141.13 for medical services provided to an inmate in the Huttonsville Correctional Center, a facility of the respondent.

In its Answer, the respondent admits the validity and amount of the claim, but states that there were insufficient funds expired in the appropriate fiscal year with which the invoice could have been paid.

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

Claim disallowed.

AMTRAC RAILROAD CONTRACTORS
OR MARYLAND, INC.,
an Indiana corporation,
Claimant,

v. Claim No. CC-95-125

WEST VIRGINIA RAILROAD
MAINTENANCE AUTHORITY,
Respondent.

FINAL ORDER

On a prior day came the Claimant, by counsel, James R. Watson, and came the Respondent, by counsel, John S. Dalporto, Senior Assistant Attorney General, and Jeffrey G. Blaydes, Assistant Attorney General, who represented to the Court that the matters at issue in this claim have been fully compromised and settled, subject to the approval of this Court and the Legislature, and that the parties have agreed that the sum of fifty thousand dollars ($50,000.00) should be paid to the claimant and that such sum includes any and all claims, causes of action, counterclaims, affirmative defenses, interest, and/or set-offs, of whatever design or character which each respective party may have or hereafter have by reason of the events more particularly described, set forth and/or elicited in the pleadings and prior proceedings of this claim, with the exception of any and all claims which the State or the Rail Authority may now have or in the future may have against Amtrac for latent defects or warranty obligations or both.

Upon consideration of all of which, it is hereby ORDERED that the Claimant is granted an award in the total amount of fifty thousand dollars ($50,000.00).

Entered this 29th day of January , 1997.

David W. Baker,

Presiding Judge

Seen and Approved by:

James R. Watson, Esq.
Counsel for Claimant

John S. Dalporto,
Senior Assistant Attorney General
Counsel for Respondent

Jeffrey G. Blaydes,
Assistant Attorney General
Counsel for Respondent

OPINION ISSUED FEBRUARY 5, 1997

KENNETH HEARD
VS.
DIVISION OF CORRECTIONS
(CC-96-354)

Claimant appeared on his own behalf.
Joy Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant brought this claim to recover the value of certain items of personal property that he alleges were lost by employees of the respondent. Claimant is an inmate in Mt. Olive Correctional Center. While he was serving a term of confinement in the lock-up section of the prison for the purpose of keeping property for inmates, but when claimant was returned to the mainline population, his property was returned to him except for certain items. Claimant placed a value of 4420.85 upon the lost items.

A hearing was conducted by the Court in this claim on December 12, 1996, at which time the claimant as to the facts and circumstances which gave rise to his claim. Claimant was transferred from the West Virginia State Penitentiary in Moundsville in February 1995, and his personal property was

brought to Mt. Olive Correctional Center by employees of the respondent. After the transfer, claimant received approximately 19 CDS and a book through the mail. These items were recorded in the personal property records as being that of the claimant. During April 1995, claimant was taken to magistrate court, and he was taken to the Quilliams pod for lockup from that hearing. It is the normal procedure for storing an inmate's personal belongings to place the belongings in a storage area, and then items may be given to the inmate while in lockup and other items may not be returned until the inmate is returned to a cell in the pods for the mainline population. For reasons not explained to the Court, certain items of claimant's personal property were never returned to him when he was released from lockup.

Linda Lou Pond, Acting Associate Warden, testified as to the procedures for handling personal property belonging to an inmate and she addressed the situation regarding the claimant's personal property. She was unable to explain what had happened to claimant's property, but her records supported the contention of the claimant that the had certain items in his possession which were not returned to him.

The Court views this claim as a bailment when personal property of an inmate is recorded for the inmate, taken for storage purposes for any reason, and then respondent has no satisfactory explanation for not returning the property to the inmate. The Court can only conclude that respondent was negligent in the manner in which it stored claimant's personal property, because it was not there to be returned to the claimant upon his release from the Quilliams pod.

In view of the foregoing, the Court is of the opinion to and does make an award to the claimant for his property in the amount of $420.85.

Award of $420.85.

OPINION ISSUED FEBRUARY 5, 1997

PAUL LALLANDE, OD, PC
VS.
WEST VIRGINIA COURT OF CLAIMS
(CC-97-34)

Claimant represents self.
John R. Homburg, Senior Attorney, for respondent.

PER CURIAM:

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

Claimant seeks $106.00 for providing medical services to a crime victim at the request of the respondent State agency. The Deputy Clerk of the West Virginia Court of Claims was contacted by a victim of domestic violence for assistance. She stated that she intended to file a claim with the Crime Victims Compensation Fund for injuries that she had received. Based upon that representation, the Deputy Clerk advised the claimant to provide medical services to the victim. The victim failed to file a claim after repeated attempts by the respondent to reach her. The Crime Victims Compensation Fund could not process the medical bill payment without having a claim processed on behalf of the victim.

The Court, on its own motion, amended the style of the claim to reflect the proper party respondent, the West Virginia Court of Claims.

In its Answer, the respondent admits the validity of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which the bill could have been paid if the victim had filed a claim.

In view of the foregoing, the Court makes an award in the amount of $106.00.

Award of $106.00.

OPINION ISSUED FEBRUARY 5, 1997

LCM CORPORATION
VS.
DIVISION OF ENVIRONMENTAL PROTECTION
(CC-96-630)

Claimant represents self.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $38,996.37 for the overpack, transport, and disposal of hazardous materials for the respondent. The invoice for these services was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity and the amount of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which the invoice could have been paid.

In view of the foregoing, the Court makes an award in the amount of $38,996.37.

Award of $38,996.37.

OPINION ISSUED FEBRUARY 5, 1997

MARION COUNTY COMMISSION
VS.
DIVISION OF CORRECTIONS
(CC-96-628)

Claimant represents self.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant, the Marion County Commission, is responsible for the incarceration of prisoners who have committed crimes in Marion County, but have been sentenced to facilities owned and maintained by the respondent, Division of Corrections. Claimant brought this action to recover the costs for housing prisoners who have been sentenced to a state penal institution, but due to circumstances beyond the control of the county, these prisoners have had to remain in the custody of the county for periods of time beyond the date of the commitment order.

The Court previously determined in *County Comm'n. of Mineral County v. Div. of Corrections* {hereinafter *Mineral County*}, an unpublished opinion of the West Virginia Court of Claims issued November 21, 1990, that the respondent is liable to the claimant for the cost of housing these inmates.

Pursuant to the holding in *Mineral County,* the respondent reviewed this claim to determine the number of inmate days for which respondent may be liable. Respondent then filed an answer admitting the validity of the claim and the amount of $155,050.00. The claimant has agreed to accept the amount of $155,050.00 as full payment for this claim.

In view of the foregoing, the Court makes an award to the claimant in the amount of $155,050.00.

Award of $155,050.00.

Judge Webb did not participate in the hearing or decision of this claim.

OPINION ISSUED FEBRUARY 5, 1997

MOUNTAINEER GAS COMPANY
VS.
DIVISION OF CORRECTIONS
(CC-97-35)

Claimant represents self.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $26,242.47 for providing gas services to the Northern Regional Jail and Correctional Center, a facility for which the respondent is responsible for utilities based upon an agreement with the Regional Jail and Correctional Facility Authority. The documentation for the services was not received by the respondent in the proper fiscal year; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity of the claim, and sates that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $26.242.47.

Award of $26,242.47.

OPINION ISSUED FEBRUARY 5, 1997

SCOTT G. PHELPS
VS.
DIVISION OF CORRECTIONS
(CC-96-317)

Claimant appeared on his own behalf.
Joy Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant brought this claim to recover the value of certain items of personal property that he alleges were lost by employees of the respondent. Claimant is an inmate in Mt. Olive Correctional Center. While he was serving confinement in the lockdown section of the prison, he alleges that

certain items of his personal property, namely a GPX AM-FM radio and eleven CDS, were lost or stolen. All of claimant's personal property was placed in an area for the purpose of keeping property for inmates, but when claimant was returned to the mainline population, his property was gradually returned to him except for these items. Claimant placed a value of $152.00 upon the lost items.

A hearing was conducted by the Court in this claim on December 12, 1996, at which time the claimant testified as to the facts and circumstances which gave rise to his claim. After he testified, counsel for the respondent, Joy Cavallo, Assistant Attorney General, stated to the Court that the respondent stipulates the claim as presented by the claimant.

In view of the foregoing, the Court is of the opinion to and does make an award to the claimant for his property in the amount of $152.00.

Award of $152.00.

OPINION ISSUED FEBRUARY 5, 1997

THOMAS F. PYLES AND LOTTIE J. PYLES
VS.
DIVISION OF TOURISM AND PARKS
(CC-96-542)

Claimants represent selves.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimants seek $525.00 for damage to trees on their property which is located in Marlinton, Pocahontas County, near Watoga State Park. The damages to the trees was estimated at $525.00.

Information provided by the respondent indicated that four inmates were employed by Watoga State Park, a facility of the respondent. While the inmates were trimming grass, they damaged certain trees on claimants' property. In its Answer, the respondent admits the validity of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid. The Court is aware that the respondent is unable to process a claim of this nature for payment unless the claim is filed with the Court of Claims and liability is determined by the Court. Having reviewed the Notice of Claim and the Answer of the respondent, the Court has determined that there was negligence on the part of the respondent which resulted in the damages incurred by the

claimants.

In view of the foregoing, the Court makes an award in the amount of $525.00.

Award of $525.00.

OPINION ISSUED FEBRUARY 5, 1997

DALE D. RADCLIFF
VS.
DIVISION OF MOTOR VEHICLES
(CC-94-830)

David G. Hanlon, Attorney at Law, for claimant.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted to the Court upon a stipulation agreed to by the claimant and the respondent . The stipulation establishes the following facts:

1. Claimant prepared and submitted a proposed contract for the position of Coordinator of the Motorcycle Safety Program to respondent during the month of May 1994.

2. Claimant incurred various expenses in good faith, believing that he would be appointed to the position of Coordinator of the Motorcycle Safety Program. These expenses totaled $7,112.35.

3. Claimant and respondent agreed to settle and compromise this claim for the amount of $3,500.00.

The Court, having reviewed the facts of this claim and having determined that the agreed upon amount of $3,500.00 is both fair and reasonable, is of the opinion that an award should be made to the claimant in accordance with the stipulation. Therefore, the Court makes an award to the claimant in the amount of $3,500.00.

Award of $3,500.00.

OPINION ISSUED FEBRUARY 5, 1997

REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY
VS.
DIVISION OF CORRECTIONS
(CC-96-569)

Chard Cardinal, Assistant Attorney General, for claimant.
Joy Cavallo, Assistant Attorney General for respondent.

PER CURIAM:

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

Claimant, Regional Jail and Correctional Facility Authority, provides and maintains the Eastern Regional Jail, the Central Regional Jail, the South Central Regional Jail, the Southern Regional Jail, and the Northern Regional Jail as facilities for the incarceration of prisoners who have committed crimes in various counties. Some of the prisoners held in these regional jails have been sentenced to facilities owned and maintained by the respondent, Division of Corrections. Claimant brought this action in the amount of $260,085.00, to recover the costs of housing and providing associated services to prisoners who have been sentenced to a State penal institution, but due to circumstances beyond the control of the claimant, these prisoners have had to remain in the regional jails for periods of time beyond the dates of the commitment orders.

Respondent and claimant filed a Stipulated Settlement Agreement admitting the validity of the claim and that the amount of $253,540.00 is a fair and reasonable settlement for the housing costs and associated services provided by claimant in this claim.

This Court has determined in prior claims by claimant for the cost of housing inmates that respondent is liable to claimant for these costs, and the Court has made the appropriate awards. This issue was considered by the Court previously in the claim of *County Comm'n. of Mineral County v. Div. of Corrections*, an unpublished opinion of the Court of Claims issued November 21, 1990, wherein the Court held that the respondent is liable for the cost of housing inmates.

In view of the foregoing, the Court makes an award to claimant in the amount of $253,540.00.

Award of $253,540.00.

OPINION ISSUED FEBRUARY 5, 1997

REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY
VS.
DIVISION OF CORRECTIONS
(CC-96-570)

Chad Cardinal, Assistant Attorney General, for claimant.
Joy Caval, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant, Regional Jail and Correctional Facility Authority, provides and maintains the Eastern Regional Jail, the Central Regional Jail, the South Central Regional Jail, the Southern Regional Jail, and the Northern Regional Jail as facilities for the incarceration of prisoners who have committed crimes in various counties. Some of the prisoners held in these regional jails have been sentenced to facilities owned and maintained by the respondent, Division of Corrections. Claimant brought this action in the amount of $48,020.00, to recover the costs of housing and for providing associated services to $48,020.00, to recover the costs of housing and for providing associated services to prisoners who have been sentenced to a State penal institution, but due to circumstances beyond the control of the claimant, these prisoners have had to remain in the regional jails for periods of time beyond the dates of the commitment orders.

Respondent and claimant filed a Stipulated Settlement Agreement wherein the parties agreed to the validity of the claim and that the amount of $38,710.00 is a fair and reasonable amount for the housing costs and associated services provided by the claimant. Further, the parties agreed to submit a Nunc Pro Tunc Order from the Circuit of Court of Mineral County for the housing costs of an inmate directed by the Circuit Court to be paid by the respondent in the amount of $12,377.52. The parties have agreed to have the Court make an award based upon this Order in order to avoid the filing of an additional claim. Therefore, the Court has considered the Order as a part of this claim. The total amount owed by the respondent to the claimant in this claim is $51,087.52.

This Court has determined in prior claims by claimant for the cost of housing inmates that respondent is liable to claimant for these costs, and the Court has made the appropriate awards. This issue was considered by the Court previously in the claim of *County Comm'n. of Mineral County v. Div. of Corrections,* an unpublished opinion of the Court of Claims issued November 21, 1990, wherein the Court held that the respondent is liable for the cost of housing inmates.

In view of the foregoing, the Court makes an award to claimant in the amount of $51,087.52.

Award of $51,087.52.

OPINION ISSUED FEBRUARY 12, 1997

HOBART ADKINS
VS.
DIVISION OF HIGHWAYS
(CC-97-38)

Crandall, Pyles and Haviland, Attorneys at Law, for claimant.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

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

Claimant seeks $590.60 for reimbursement of attorney fees which he incurred as respondent's Supervisor for Logan County. Apparently, the Mayor of the Town of West Logan filed misdemeanor charges against the claimant in his official capacity as respondent's Logan County Supervisor. Counsel for the claimant in that action provided professional services for which the claimant is now the responsible party. The documentation for the attorney fees was provided to the respondent, but respondent was unable to satisfy and pay the obligation on behalf of the claimant. Respondent properly advised the claimant to file this claim for consideration by the Court.

Although this claim represents an unusual situation, the Court has determined that claimant is entitled to recover these attorney fees which he incurred as an employee of the respondent. In view of the foregoing, the Court makes an award in the amount of $590.60.

Award of $590.60.

OPINION ISSUED FEBRUARY 12, 1997

MELINDA LOU FISH
VS.
DIVISION OF HIGHWAYS
(CC-96-207)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

The claimant, Melinda Lou Fish, seeks an award of $142.04 from the respondent, Division of Highways, for damage to her 1990 Dodge Daytona. The damage occurred on the morning of March 21, 1996, in Hancock County, while the claimant was driving on Route 3/4. During the drive, the claimant was traveling approximately five miles per hour when she encountered deep ruts which extended across the entire width of the road. As the vehicle proceeded through the rutted area, the claimant heard a "pop" which she believed was a shock absorber; however, the vehicle did not appear to be damaged.

Two days later, the claimant discovered that the stabilizer bar was broken. The claimant submitted an invoice into evidence which indicated that the cost to replace the stabilizer bar totaled $142.04.

Route 3/4 is a fourth priority one-lane dirt road which provides access to approximately thirteen homes. The claimant testified that she was familiar with the road, but it was in worse condition than she expected when the incident occurred. The claimant's mother, Mary Jane Fish, testified that she called the respondent's maintenance department in Hancock County on February 28, 1996, and requested that the ruts on Route 3/4 be repaired. Ms. Fish also stated that she contacted the respondent at regular intervals after her initial call, but the road was not repaired until after her daughter's accident.

Samuel J. DeCapio, the Hancock County superintendent for the respondent, testified that he was responsible for maintaining roads in a safe condition for motorists. According to Mr. DeCapio, Hancock County experienced harsh weather conditions during January, February, and March 1996, which required the respondent to concentrate its resources and manpower on activities such as snow removal and flood control. Mr. DeCapio acknowledged that his office had received a complaint about the condition of Route 3/4 on February 28, 1996, but he stated that maintenance forces were busy repairing higher priority roads.

In Hobbs vs. Dept. of Highways, 13 Ct. Cl. 27 (1979) this Court determined that the respondent owes a duty to motorists to exercise reasonable care and diligence in maintaining roads under all circumstances. Although this duty does not make the respondent a guarantor of the safety of motorists, it does require that the respondent act in an efficient and prudent manner so that road defects can be corrected as quickly as possible.

Based on the evidence presented in this claim, the Court finds that the respondent was aware

of the ruts on Route 3/4 for approximately three weeks before the claimants' vehicle was damaged, and it took no action to repair the ruts in the roadway. The Court recognizes that weather conditions periodically arose during this time period which prevented the respondent from working on low priority roads, but these conditions should not have prevented the respondent from addressing the road defect involved in this claim for such an extended period of time. Therefore, the Court finds that the claimant has established liability on behalf of the respondent for the damage to her vehicle.

Accordingly, the Court makes an award to the claimant in the amount of $142.04.

Award of $142.04.

OPINION ISSUED FEBRUARY 12, 1997

MARTHA GARDNER
VS.
DIVISION OF HIGHWAYS
(CC-94-464)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

The claimant, Martha Gardner, seeks an award of $265.32 from the respondent, Division of Highways, for damage to her vehicle. The damage occurred on July 2, 1994, at approximately 5:00 p.m., when the claimant drove her vehicle off the pavement surface of Poe Run Road in Randolph County. According to the claimant, she pulled off the road at the entrance to a private driveway and her vehicle scraped the pavement surface. As a result, the oil pan on her vehicle was damaged. The cost to repair the oil pan totaled $265.32. Although the damage was covered by the claimant's automobile insurance, she did not file a claim with her insurer because her insurance policy had a $250.00 deductible. The claimant's testimony indicated that she was aware that the road had been resurfaced, but she did not know the berm of the road was ten inches lower than the pavement surface.

Lewis B. Gardner, an assistant supervisor for the respondent, testified that the was responsible for road maintenance activities throughout Randolph County. Mr. Gardner described Poe Run Road as a second priority road, and his testimony confirmed that the road was resurfaced shortly before the claimant's accident. Mr. Gardner also noted that the edge of the pavement surface is usually sloped at the entrance to driveways when new asphalt is placed on roads; however, the edge of the pavement along Poe Run Road was not sloped at driveway entrances.

In *Hobbs vs. Dept. of Highways,* 13 Ct. Cl. 27 (1979) this Court determined that the respondent owes a duty to motorists to exercise reasonable care and diligence in maintaining roads under all

circumstances.

Based on the evidence presented in this claim, it appears that the respondent failed to slope the edge of the pavement at driveway entrances along Poe Run Road. As a result, the respondent created a road condition which damaged the claimant's vehicle. Therefore, this Court makes an award to the claimant in the amount of her insurance deductible, $250.00.

Award of $250.00.

OPINION ISSUED FEBRUARY 12, 1997

LARRY HAUGHT AND LINDA MARTIN-HAUGHT
VS.
DIVISION OF HIGHWAYS
(CC-96-347)

Claimant represents self.
Cynthia A. Majestro, Attorney at Law, for respondent.

PER CURIAM:

The claimants, Larry Haught and Linda Martin-Haught, seek an award of $4,000.00 from the respondent, Division of Highways, for damage to their vehicle. The damage occurred on June 19, 1996, at 10:25 p.m., while Ms. Martin-Haught was driving on Route 24, also known as Meadowbrook Road, in Harrison County. During the drive, she was traveling approximately twenty-five miles per hour when she unexpectedly encountered mud and gravel on the road surface. She immediately attempted to stop, and the vehicle slid off the roadway and struck a tree. As a result of the collision, the claimants' vehicle was severely damaged. The estimated value of the vehicle before the accident was $4,000.00. The estimated value of the vehicle after the accident was $400.00.

On June 19, 1996, the Harrison County area received a substantial amount of rain which caused flooding problems on several roads. Bill Wyckoff, an assistant maintenance superintendent for the respondent, testified that he was informed about a drainage problem on Route 24 at 8:30 p.m. At this time, a truck and loader were dispatched to the area to correct the problem. Later that evening, Mr. Wyckoff was informed that there was still debris on the pavement surface; therefore, he returned to the area to examine the condition of the road. When he arrived, he discovered that a local fire department had responded to Ms. Martin-Haught's accident. According to Mr. Wyckoff, there was a small amount of debris remaining on the road, and the fire department removed the debris by spraying the road with water.

The law of West Virginia is well settled that the State is not a guarantor of the safety of motorists upon its highways. *Adkins vs. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). However, the State does have a duty to exercise reasonable care and diligence in the maintenance of its highways

under all circumstances. *Adams vs. Dept. of Highways,* 14 Ct. Cl. 214 (1982); *Hobbs vs. Dept. of Highways,* 13 Ct. Cl. 27 (1979).

Based on the evidence presented in this claim, it is apparent that the respondent was aware of the debris on the pavement surface prior to the accident. In addition, the Court believes that the respondent attempted to clear the debris from the road, but it failed adequately to remove all of the debris from the roadway.

Accordingly, the Court makes an award to the claimants in the amount of $3,600.00 for the lost value of their vehicle.

Award of $3,600.00.

OPINION ISSUED FEBRUARY 12, 1997

CHERYL KESNER
VS.
DIVISION OF HIGHWAYS
(CC-95-202)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

The claimant, Cheryl Kesner, seeks an award of $5,000.00 from the respondent, Division of Highways, for damage to her vehicle, a 1986 Ford Escort GT. The damage occurred on June 23, 1995, at 12:00 noon, while Ms. Kesner was driving on Woolen Mill Road in Bruceton Mills, Preston County. The weather was overcast, and the pavement surface was wet and covered with freshly cut grass. According to Ms. Kesner, she was traveling approximately fifteen miles per hour when her vehicle unexpectedly slid off the roadway and into an embankment. Ms. Kesner's testimony indicated that she lost control of her vehicle because the grass clippings created a slippery road surface. Her testimony also revealed that the grass was deposited on the pavement surface by the respondent's employees while they were mowing along the roadway.

The damage to Ms. Kesner's vehicle was covered by her automobile insurance. However, Ms. Kesner testified that she was required to pay $500.00 deductible.

According to the respondent's work records, a road crew was mowing along Route 17 on July 23, 1995. This work was performed by using a Massey-Ferguson farm tractor with a slide mounted brush-hog. Ronald Burge, a general foreman for the respondent, testified that road signs were normally

placed at both ends of a mowing area and a signal truck follows the tractor to warn motorists of the mowing operation. However, his testimony indicated that the warning signs are normally placed at least three and a half miles apart. Mr. Burge, also admitted that the pavement is not ordinarily swept clean after an area is mowed, but he added that he has never seen a mower leave a significant amount of grass on a roadway.

The law of West Virginia is well settled that the State has a duty to exercise reasonable care and diligence in the maintenance of a highway under all circumstances. *Adams vs. Dept. of Highways,* 14 Ct. Cl. 214 (1982); and *Hobbs vs. Dept. of Highways,* 13 Ct. Cl. 27 (1979).

Based on the evidence presented in this claim, it appears that the respondent failed to exercise reasonable care while mowing an area adjacent to Route 17. As a result, it created a hazardous driving condition. Therefore, this Court finds that the claimant has established liability on behalf of the respondent. Accordingly, this Court makes an award to the claimant in the amount of $500.00.

Award of $500.00.

OPINION ISSUED FEBRUARY 12, 1997

JAMES W. KING
VS.
DIVISION OF HIGHWAYS
(CC-96-363)

Claimant represents self.
Cynthia A. Majestro, Attorney at Law, for respondent.

PER CURIAM:

The claimant, James W. King, seeks an award of $1,557.00 form the respondent, Division of Highways, for damage to his 1988 Chevrolet Beretta. The damage occurred on July 19, 1996, at 7:15 a.m., while the claimant's wife, Barbara Jean King, was driving the vehicle. Mrs. King testified that she was traveling approximately twenty-five miles per hour when the vehicle struck a large hole as she proceeded through an intersection. Mrs. King also noted that she was unaware of the hole because the roadway was covered with water. Photographs of the intersection indicated that the hole extended across the entire road.

As a result of the collision, the vehicle sustained severe engine damage. According to Mrs. King, the damage was covered by the claimant's automobile insurance, and his total out-of-pocket loss was $350.00.

Harold Swidler, a transportation crew chief for the respondent, described Route 17/21 as a top priority two-lane road in Marion County, West Virginia. According to Mr. Swidler, numerous heavy

trucks through this area and cause great harm to the pavement surface. The record also indicated that the roadway was in poor condition because the respondent had installed a drainage system under the road, and it had not yet surfaced the disturbed area.

The law of West Virginia is well settled that the State is not a guarantor of the safety of the or motorists upon its highways. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). However, the State does have a duty to exercise reasonable care and diligence in the maintenance of its highways under all circumstances. *Adams vs. Dept. of Highways,* 14 Ct. Cl. 214 (1982); *Hobbs vs. Dept. of Highways,* 13 Ct. Cl. 27 (1979).

After a careful review of all the evidence, this Court finds that the respondent did not act in a reasonable and prudent manner by leaving the roadway in a condition as depicted by the claimant's photographs. Based on the poor condition in which the respondent left the roadway, it was reasonably foreseeable that a vehicle could be damaged. Therefore, the Court makes an award to the claimant in the amount of $350.00.

Award of $350.00.

OPINION ISSUED FEBRUARY 12, 1997

ELEANOR MARTINO
VS.
DIVISION OF HIGHWAYS
(CC-96-23)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

The claimant, Eleanor Martino, seeks an award of $3,500.00 from the respondent, Division of Highways, for damage to her vehicle, a 1989 Oldsmobile Cierra. The damage occurred sometime during the first week of January 1996, while the claimant's husband, Louis Martino, was driving the vehicle on Route 73 in Harrison County. During the drive, Mr. Martino was traveling approximately forty-five miles per hour when the vehicle struck a "road closed" sign. The sign was positioned on a wood frame and located in Mr. Martino's lane, but it was facing away from Mr. Martino at the time of the accident. According to Mr. Martino, he was unable to see the sign because an oncoming vehicle had just passed him and his lights were dimmed.

As a result of the collision, the front end of the claimant's vehicle was damaged. An estimate from Harry Green Chevrolet, Inc. was submitted into evidence which indicated that the cost to repair

the vehicle would total $3,506.19. Mr. Martino also testified that the insurance policy on the vehicle had a $250.00 deductible for collision damage.

William H. Wyckoff, a maintenance assistant for the respondent in Harrison County, testified that a section of Route 73 was closed beginning on March 14, 1995, and the road was not opened until May 10, 1996. The road was closed because the pavement surface collapsed. According to Mr. Wyckoff, barricades and signs were placed on both ends of the are where the road was impassable, and an alternative route was established around the area.

In *Hobbs vs. Dept. of Highways,* 13 Ct. Cl. 27 (1979), this Court determined that the respondent owes a duty to motorists to exercise reasonable care and diligence in maintaining roads under all circumstances. As part of this duty, the respondent must position warning signs in such a way that the signs effectively warn motorists of road hazards without creating a substantial risk of harm.

The facts in this claim establish that a portion of Route 73 was closed to motorists during January 1996, and a detour using U.S. Route 50 and Benedem Airport Road was established to allow motorists around the area. Mr. Martino circumvented the impasse by traveling on a Bridgeport City street rather than the established detour. It appears that after he bypassed the closed section of the road, he drove onto Route 73 and continued until the vehicle struck a sign. The sign was located in Mr. Martino's lane, and it was apparently positioned to warn motorists traveling in the opposite lane that the road ahead was closed. The sign did not prevent motorists approaching the road closure in the other lane from passing the sign.

Based on the evidence, the Court believes that motorists could easily access the section of Route 73 between the road closure sign and the pavement failure from both directions. The Court also believes that it was the respondent's negligent positioning of the road closure sign on the traveled portion of Route 73 which caused the damage to the claimant's vehicle. Therefore, the Court makes an award to the claimant in the amount of her insurance deductible, $250.00.

Award of $250.00.

OPINION ISSUED FEBRUARY 12, 1997

JOSEPH M. MELCHER AND ASPASIA MELCHER
VS.
DIVISION OF HIGHWAYS
(CC-96-11)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

The claimants, Joseph M. Melcher and Aspasia Melcher, seek an award of $642.57 from the respondent, Division of Highways, for damage to their 1975 Mercedes Benz and towing expenses. The damage occurred on October 27, 1995, at 5:00 p.m., while Mr. Melcher was driving on Route 61 near Deep Water, Fayette County. During the drive, Mr. Melcher was traveling approximately forty miles per hour when the bottom of his vehicle struck a railroad crossing. The impact ruptured the oil pan and caused severe damage to the engine. According to Mr. Melcher, the collision was caused by a rise in the pavement surface near the railroad crossing. The impact ruptured the oil pan and caused by a rise in the pavement surface near the railroad crossing which reduced the ground clearance of his vehicle as it descended the rise. The claimants' insurance provider paid for most of the damage, but the claimants were required to pay a $500.00 deductible and $142.57 for towing expenses.

The claimants do not contend that the railroad crossing was defective or improperly marked. Instead, the claimants contend that the rise in the pavement near the railroad crossing caused their vehicle to hit the wooden crossing deck, and that the respondent should have placed a sign near the rise to warn motorists of this condition.

Ben Savilla, a claim investigator for the respondent, examined the railroad crossing and determined that the crossing was in excellent condition, and it was well marked with signals and stripes on the pavement surface. Mr. Savilla also testified that CSX was responsible for maintaining the railroad crossing, and the respondent has an easement to cross the railroad tracks.

Photographs of the railroad crossing and the pavement surface near the crossing were admitted as evidence. Several scrape marks on the wooden crossing deck and pavement surface were invisible in the photographs.

It is well settled that the respondent has a duty to exercise reasonable care and diligence in the maintenance of its highways under all circumstances. *Adams vs. Dept. of Highways,* 14 Ct. Cl. 214 (1982); *Hobbs vs. Dept. of Highways,* 13 Ct. Cl. 27 (1979). The evidence presented in this claim indicated that a road defect existed near a railroad crossing which caused the bottom of the claimants' vehicles to strike the crossing deck. Moreover, numerous scrape marks on the pavement surface and the crossing deck indicated that the problem has existed for a substantial time period. Therefore, the Court finds that the claimants have established liability on behalf of the respondent for the damage to their vehicle. The Court hereby makes an award to the claimants in the amount of $642.57.

Award of $642.57.

OPINION ISSUED FEBRUARY 12, 1997

GEORGE R. MUTH
VS.
DIVISION OF HIGHWAYS

(CC-95-277)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

The claimant, George R. Muth, seeks an award of $1,667.42 from the respondent, Division of Highways, for damage to his Harley-Davidson motorcycle. The damage occurred on August 5, 1995, at 11:30 a.m., when the motorcycle slid into a ditch along Route 48 in Marshall County. At this time, the claimant and Laura Ann Buck were riding together behind another motorcycle driven by Russell Anderson. According to the claimant, he was driving approximately fifteen miles per hour when he lost control of his motorcycle as it traveled through mud and gravel on the road. Mr. Anderson testified that the mud covered the entire width of the road for a distance of seventy-yards. Ms. Buck also observed the debris, and she testified that the mud was scattered across the entire road. The claimant testified that he was proceeding fifteen miles per hour because he had observed small amounts of mud and gravel at various locations on the road, and he was uncomfortable traveling any faster. The claimant contends that the mud and gravel was left on the roadway by the respondent after it finished cleaning the ditches adjacent to Route 48.

As a result of the accident, the claimant's motorcycle sustained damage in the amount of $1,667.42.

Ronald Faulk, the Marshall County maintenance supervisor for the respondent, described Route 48 as a second priority road. Mr. Faulk testified that a road maintenance crew cleaned the ditches along Route 48 on Friday, August 4, 1995. Mr. Faulk was not present while the work was performed, but he stated that there were no complaints about mud and gravel on the road after the work was completed. the respondent's maintenance records indicated that a grader, end loader, and dump truck were used to clean the ditches and remove debris from the road. According to Mr. Faulk, the end loader was used to scrape the debris off the road; however, he admitted that the loader normally leaves a small amount of material on the pavement. Mr. Faulk also noted that the respondent's maintenance procedure for cleaning ditches along secondary roads does not require the use of a sweeper.

The law of West Virginia is well settled that the State is not a guarantor of the safety of motorists upon its highways. *Adkins vs. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). However, the State does have a duty to exercise reasonable care and diligence in the maintenance of its highways under all circumstances. *Adams vs. Dept. of Highways,* 14 Ct. Cl. 214 (1982); *Hobbs vs. Dept. of Highways,* 13 Ct. Cl. 27 (1979).

After carefully considering the record, the Court finds that the claimant has established that his motorcycle was damaged as a result of debris on Route 48, and that he was operating his motorcycle in reasonable manner under the existing road conditions. The respondent admitted that it cleaned the ditches along Route 48 on August 4, 1995, and it established the normal procedures for performing this work. Nevertheless, the respondent did not present any testimony from its personnel who cleaned the

ditches to establish the condition of Route 48 immediately after the work was completed.

Based on the evidence presented in this claim, the Court finds that the claimant has established liability on behalf of the respondent for the damage to his motorcycle. Accordingly, the Court makes an award to the claimant in the amount of $1,667.42.

Award of $1,667.42.

OPINION ISSUED FEBRUARY 12, 1997

FRANK PENDRY
VS.
DIVISION OF HIGHWAYS
(CC-96-473)

Claimant represents self.
Cynthia A. Majestro, Attorney at Law, for respondent.

PER CURIAM:

The claimant, Frank Pendry, seeks an award of $133.68 from the respondent, Division of Highways, for damage to his vehicle. The damage occurred on September 3, 1996, at 9:40 a.m., while the claimant was driving on Route 10 near Oceana, Wyoming County. During the drive, the claimant was traveling twenty-five miler per hour when his vehicle dropped off the pavement surface and struck a large hole. The hole was located adjacent to the pavement surface, and it was approximately twenty-two inches deep. According to the claimant, he drove of the road to avoid a tractor-trailer truck in the opposite lane.

As a result of the accident, a tire and rim on the vehicle were damaged. The estimated cost to replace the tire and rim was $133.68; however, the claimant testified that the actual cost to replace the tire and rim was $52.00.

Route 10 is a top priority two-lane asphalt road which is approximately twenty-two feet wide. Stacy Stewart testified that he lives near Route 10 where the claimant's accident occurred, and that he informed the respondent about the hole during January 1996.

David Cox, an assistant supervisor for the respondent in Wyoming County, testified that he did not remember the precise date when he was notified about the hole, but he was certain that he was not informed about the hole prior to May 1996.

In West Virginia, the respondent has a duty to maintain road berms in a reasonably safe condition for use when the occasion requires, and liability may ensue when a motorist is forced onto the berm in an emergency or otherwise necessarily uses the berm of the highway. *Sweda vs. Dept. of Highways,* 13 Ct. Cl. 249 (1980).

The facts giving rise to this claim indicated that an unsafe condition existed along the pavement surface of Route 10. Moreover, this Court finds that the respondent had notice of the unsafe condition and a reasonable opportunity to correct the condition prior to the claimant's accident. Based on these reasons, the Court finds that the claimant has established liability on behalf of the respondent for the damage to his vehicle.

Accordingly, the Court makes an award to the claimant in the amount of $52.00.

Award of $52.00.

OPINION ISSUED FEBRUARY 12, 1997

WILMA L. SOTO AND CRUZ SOTO
VS.
DIVISION OF HIGHWAYS
(CC-96-351)

Claimant represents self.
Cynthia A. Majestro, Attorney at Law, for respondent.

PER CURIAM:

The claimants, Wilma L. Soto and Cruz Soto, seek an award of $7,348.27 from the respondent, Division of Highways, for damage to their property. The claimants contend that the damage was caused by the respondent's failure to maintain drainage ditches and a retaining wall near their house. The respondent contends that the damage was caused by factors unrelated to the ditches or the retaining wall.

On the afternoon of July 7, 1996, the claimants were in their house along Route 103 in McDowell County when water began flowing into their basement. The water flowed off Route 103, and it was diverted onto the claimants' property through a large hole in a concrete block retaining wall. The wall was approximately ten feet high and located ten feet from the claimants' house. Photographs of Route 103 indicate that the pavement surface was slightly higher than the roof on the house. The claimants notified the respondent's office in McDowell County about the drainage problems along Route 103 and the poor condition of the drainage wall prior to July 7, 1996; however, the respondent did not take any action to correct the problem.

As a result of the flooding incident, the claimants assert that the water damaged their furnace and the basement walls and floor. Photographs of the claimants' house indicated that the paneling, carpet, and tile floor coverings in the basement were severely damaged. The estimate cost to repair the basement walls and floor totals $3,700.00. Mr. Soto testified that a furnace located in the basement was also damaged by the water, but it remained functional after the flood. The estimated cost to replace the furnace totals $2,350.00.

At the hearing of this claim, the claimants asserted that an air conditioner and a window were damaged by snow and other debris which were plowed over the retaining wall and onto their house during the respondent's snow removal operations. However, the claimants did not specify these damages in their Notice of Claim, and they were unable to determine the dates on which the damage to the air conditioner and window occurred.

At the close of the claimants' case in chief, the respondent made a motion to exclude all evidence pertaining to the air conditioner and window on the basis that the Court lacked jurisdiction over any damage caused by the respondent's operation of motor vehicles. The Court informed both parties that it would take the motion under advisement and render a decision after reviewing the transcript.

Upon reviewing the entire record in this claim, the Court finds that the damage arising from the operation of the respondent's snow removal vehicles was not alleged in the Notice of Claim and cannot be considered by the Court.

Ben Savilla, a claim investigator for the respondent, examined the retaining wall and the claimants' house on November 6, 1996. Mr. Savilla determined that the wall was located on the respondent's right-of-way, and several obstructions in the ditch line along Route 103 contributed to the flood damage. Mr. Savilla also stated that there were no gutters or down spouts on the back of the house, and any water that drained off the roof would collect in the back yard and flow toward the house.

Wilson Butt, an engineer for the respondent's maintenance division, accompanied Mr. Savilla during his examination of the claimants' property. Mr. Butt testified that the retaining wall provided adjacent support for the roadway, and the respondent was responsible for maintaining the wall. Mr. Butt also noted that there were obstructions in the ditch line adjacent to Route 103 which created poor drainage conditions.

It is well established that the respondent has a duty to provide adequate drainage of surface water, and drainage systems must be maintained in a reasonable state of repair. *Wayside United Methodist Church vs. Division of Highways,* unpublished opinion issued April 4, 1995; *Haught vs. Dept. of Highways,* 13 Ct. Cl. 237 (1980). To establish liability on behalf of the respondent failed to protect their property from foreseeable flood damage.

Based on the evidence presented in this claim, the Court finds that the respondent had notice of the inadequate drainage system along Route 103 and the condition of the retaining wall adjacent to

the road. The Court also finds that the respondent failed to maintain an adequate drainage system along the road, and this failure was the proximate cause of the claimants' damages. Therefore, the Court makes an award to the claimants in the amount of $3,700.00.

Award of $3,700.00.

OPINION ISSUED FEBRUARY 12, 1997

WEIRTON BANDAG
VS.
DIVISION OF HIGHWAYS
(CC-95-256)

Claimant appears by its President, Tom Herron.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant, Weirton BANDAG, and respondent, Division of Highways, agreed that this claim may be submitted to the Court for determination upon a written stipulation entered into by the parties. The parties stipulated the following finds of fact:

1. A rainstorm occurred on or about June 27, 1995, in Weirton, West Virginia.

2. As a result of this storm, claimant's property experienced an enormous amount of water flowing onto the property from a run-off drain constructed by an independent contractor employed by respondent. This drain was constructed at the direction of an engineer with the respondent.

3. Claimant's shop area sustained damage and claimant incurred costs for the clean-up and replacement costs for its employees work shoes. These damages totaled $1,695.15.

4. Respondent admits that the damages were the result of a design error in the placement of the run-off drain and that the damages alleged by the claimant are fair and reasonable.

The Court, having reviewed the stipulation, is of the opinion that respondent was negligent in the placement of the run-off drain, and further, that respondent is liable for the damages incurred by the claimant. Therefore, the Court makes an award to the claimant in the amount of $1,695.15.

Award of $1,695.15.

OPINION ISSUED FEBRUARY 12, 1997

DOUGLAS M. WHITE
VS.
DIVISION OF HIGHWAYS
(CC-95-373)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

The claimant, Douglas M. White, seeks an award of $500.00 for damage to his vehicle, a 1978 Plymouth. The damage occurred on June 22, 1995, at approximately 7:00 p.m., while the claimant was driving on Huff's Run Road in Ohio County. During the drive, the claimant traveled onto the shoulder of the road to pass an oncoming vehicle and the shoulder collapsed. As a result, the claimant's vehicle slide over an embankment and rolled into a small stream. Although the claimant's vehicle was severely damaged, the claimant was not injured in the accident. The claimant testified that he was traveling twenty miles per hour when the shoulder collapsed, and there were no warning signs posted along the road. The claimant also testified that he has traveled Huff's Run Road numerous times, and he has never had a problem while driving on the shoulders of the road.

Huff's Run Road is a low priority local service road which is approximately twelve feet wide. The surface of the road is a mixture of soil and gravel. A photograph of the accident location corroborated the claimant's testimony that the shoulder of the road collapsed.

Several photographs of the claimant's vehicle illustrated that the roof was destroyed and the front windshield was broken. An accident report prepared by the Ohio County Sheriffs Department stated that the approximate cost to repair the vehicle was $500.00.

Thomas Simms, an assistant maintenance superintendent for the respondent in Ohio County, testified that he attempts to inspect the condition of all the roads in Ohio County at least once every two weeks. According to Mr. Simms, severe flooding "washed out" the embankments and blocked the culverts at several locations along Huff's Run Road prior to June 22, 1995; however, he was unaware that the embankment at the scene of the accident was in poor condition. Mr. Simms believed that the shoulder failure was caused by a stream which had undermined the embankment.

It is well established that the respondent has a duty to maintain the berm or shoulder of a highway in a reasonably safe condition, and liability may ensue when a motorists is forced onto the berm in an emergency or otherwise necessarily uses the berm of the highway. *Sweda vs. Dept. of Highways,* 13 Ct. Cl. 249 (1980) and *Hinkle vs. Division of Highways,* unpublished opinion issued December 10, 1991, CC-89-97.

Based on the evidence presented in this claim, the Court finds that motorists traveling on Huff's Run Road had to travel on the shoulder of the road at times due to the narrow road surface, and the claimant's use of the shoulder was reasonable and foreseeable. The evidence also established that the respondent was aware a flood had weakened the shoulders of the road in several locations, but it took no action to warn motorists of this condition. Therefore, the Court finds that the claimant has established liability on behalf of the respondent. The Court hereby makes an award to the claimant in the amount of $500.00.

Award of $500.00.

OPINION ISSUED FEBRUARY 12, 1997

NANCY M. WILLIAMS
VS.
DIVISION OF HIGHWAYS
(CC-96-127)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

The claimant, Nancy M. Williams, seeks an award of $1,013.95 from the respondent, Division of Highways, for damage to her 1984 Chevrolet Cavalier. The Notice of Claim named Nancy M. Williams and Michael E. Williams as the claimants; however, the court amended the style of the claim since Ms. Williams is the sole owner of the vehicle.

The incident giving rise to this claim during the early morning hours of January 17, 1996, while Michael E. Williams was driving the claimant's vehicle on Route 2 in Tyler County near Sistersville. At this time, driving conditions were dark, foggy, and wet. During the drive, motorists in the oncoming lane flashed their lights at Mr. Williams. Shortly thereafter, Mr. Williams slowed down because he observed two trucks parked along the opposite side of the road with their flashers on. Mr. Williams began to accelerate as he drove past the trucks when the vehicle struck a rock in the road. According to Mr. Williams, foggy conditions prevented him from seeing the rock until it was a few feet ahead of him. The rock was approximately two and one half feet long and ten inches high. Mr. Williams testified that he traveled on Route 2 five days per week from approximately fourteen months prior to the accident. Mr. Williams also stated that he had never observed any rocks on the road or falling rock signs during this time.

As a result of the collision, the claimant's vehicle sustained damage to the oil pan, exhaust system, and suspension. An estimate from TJ Service & Body Shop indicated that the cost to repair the vehicle would total $1,013.95.

Bradley Crawford, the Tyler County maintenance supervisor for the respondent, testified that Route 2 is a top priority road and the section of road where Mr. Williams' accident occurred is a rock fall area. Mr. Crawford was uncertain whether falling rock signs were posted in the area at the time of the accident and determined that one falling rock sign was present and one was missing at the time of his investigation.

The mountainous topography and numerous rural communities in West Virginia require the respondent to construct and maintain roads through areas which are prone to falling rocks. In these areas, the respondent has a duty to reduce the risk of harm to motorists. This duty can be fulfilled by correcting the falling rock problem when such action is feasible or by effectively warning motorist of the potential for falling rocks when correction is not feasible.

Although it is undisputed that the accident giving rise to this claim occurred in a rock fall area, there is conflicting evidence whether the area was marked with falling rock signs. After a careful review of the record, the Court finds that the respondent failed to provide motorists with sufficient warning of the potential for falling rocks where the accident occurred. The Court also finds that Mr. Williams should have been aware that a problem existed in the road, and he failed to act in a reasonable and prudent manner under the existing conditions. Therefore, it is the opinion of the Court that the respondent and Mr. Williams were both negligent.

In a comparative negligence jurisdiction, such as West Virginia, the negligence of a motorists normally reduces or bars any recovery for her claim. However, it is a widely accepted principle that the contributory negligence of a driver in operating a vehicle is not imputed to the owner of the vehicle. *Bartz v. Wheat,* 169 W.Va. 86, 285 S.E.2d 894 (1982). *65A CJS Negligence* §168(2) p. 212. Therefore, it is the decision of this Court to make an award to the claimant in the amount of $1,013.95.

Award of $1,013.95.

OPINION ISSUED FEBRUARY 12, 1997

JUNIOR WOLFORD
VS.
DIVISION OF HIGHWAYS
(CC-96-273)

Claimant represents self.
Cynthia A. Majestro, Attorney at Law, for respondent.

PER CURIAM:

The claimant, Junior Wolford, seeks an award of $7,500.00 from the respondent, Division of

Highways, for flood related damage to his property. The flood occurred during the evening hours of May 15, 1996, and it was caused by the respondent's failure adequately to secure a large culvert pipe in a stream. At the hearing of this claim on November 8, 1996, the respondent admitted liability. Therefore, the only issue to be determined by the Court is the appropriate measure of damage to the claimant's property.

Several photographs of the damage to the claimant's property were admitted into evidence. The photographs illustrate that a substantial amount of mud and debris of the cost to remove the debris and replace topsoil were admitted into evidence. The estimates varied from $7,500.00 to $9,200.00.

Based on the reasons stated above, the Court makes an award to the claimant in the amount of $7,500.00.

Award of $7,500.00.

OPINION ISSUED FEBRUARY 12, 1997

HARRY B. YOUNG, JR.
VS.
DIVISION OF HIGHWAYS
(CC-96-450)

Claimant represents self.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

The claimant, Harry B. Young, Jr., seeks an award of $613.80 from the respondent, Division of Highways, for damage to his vehicle, towing expenses, and lost wages. The incident giving rise to this clam occurred on July 13, 1996, at 11:00 a.m., while the claimant was driving north on Interstate 81 near Spring Mills. During the drive, the claimant's vehicle struck a steel rod which was protruding out of a large hole in the pavement. The steel rod extended approximately one and one half feet above the pavement, and the hole was located at the end of a bridge deck.

As a result of the collision, the radiator was damaged, and the vehicle had to be towed from the accident location. The cost to replace the radiator was $37.10, and the towing bill was $38.00. While

the claimant's vehicle was being repaired, he missed several days of work. A statement from the claimant's employer was submitted into evidence which indicated that the claimant missed forty-eight hours of work and lost $540.80 in wages.

Bruce DeHaven, an expressway supervisor for the respondent, testified that his responsibilities include scheduling road maintenance operations on Interstate 81. As part of his job, Mr. DeHaven travels Interstate 81 on a regular basis to check for road defects; however, he was unaware of the hole and steel rod described by the claimant. Mr. DeHaven also stated that Interstate 81 was resurfaced with a five inch layer of hot mix asphalt during the summer of 1994.

In *Hobbs vs. Dept. of Highways,* 13 Ct. Cl. 27 (1979), this Court determined that the respondent owes a duty to motorists to exercise reasonable care and diligence in maintaining roads under all circumstances. The evidence in this claim established that a road defect existed on a heavily traveled road which posed a substantial risk to the safety of motorists. Although there was no evidence that the respondent had actual notice of the steel rod and hole, the Court finds that the respondent had constructive notice of the road defect. Therefore, the Court makes an award to the claimant in the amount of $615.90.

Award of $615.90.

OPINION ISSUED FEBRUARY 20, 1997

DENZIL S. ALKIRE
VS.
DIVISION OF HIGHWAYS
(CC-96-293)

Claimant represents self.
Cynthia A. Majestro, Attorney at Law, for respondent.

PER CURIAM:

The claimant, Denzil s. Alkire, seeks an award of $7,500.00 form the respondent, Division of Highways, for damage to his 1987 International Truck. The damage occurred on May 18, 1996, at 12:30 a.m., while the claimant was driving south on Interstate 79 near the Clendenin exit. The weather was foggy, and the claimant was traveling sixty miles per hour. During the drive, the claimant swerved into the left lane to avoid a rock in the right lane; however, his vehicle struck a large rock in the left lane. The claimant testified that both rocks were the size of a bushel basket.

As a result of the collision, the claimant's vehicle sustained damage to the radiator, frame, and

cab. The estimate cost to repair the vehicle totaled $13,933.29; however, the claimant testified that the replacement cost of the vehicle was $7,500.00.

The respondent's field office at Amma was notified about the rocks at 12:13 a.m. Phillip Morris, an equipment operator for the respondent, was immediately dispatched to remove the rocks. Mr. Morris testified that the road was cleared by approximately 1:00 a.m. According to Mr. Morris, falling rock signs were posted on both sides of the south bound lanes where the rock fall incident occurred.

The mountainous terrain of West Virginia requires the respondent to construct highways through areas which will occasionally experience falling rocks. Therefore, the Court has held on numerous occasions that the unexplained falling of a rock or boulder onto a highway is insufficient to justify an award. *Coburn vs. Dept. of Highways,* 16 Ct. Cl. 68 (1986); *Hatfield vs. Dept. of Highways,* 15 Ct. Cl. 168 (1984); and *Hammond vs. Dept. of Highways,* 11 Ct. Cl. 234 (1977). In order to establish liability on behalf of the respondent, the evidence must establish that the respondent had notice of the dangerous condition posing the threat of injury to person or property and a reasonable time to take suitable action to protect motorists.

The evidence presented in this claim reveals that the respondent was not aware of the rocks until shortly before the claimant's accident. Once the respondent received notice of the rocks, a person was dispatched to remove the rocks from the highway. The total time lapse from when the respondent received notice of the rocks until the rocks were removed was less than sixty minutes. Based on these reasons, the Court finds that the evidence does not establish any negligence on behalf of the respondent. Therefore, the claim must be denied.

Claim disallowed.

OPINION ISSUED FEBRUARY 20, 1997

BRIAN KEITH HUGGINS
VS.
DIVISION OF HIGHWAYS
(CC-96-300)

Claimant represents self.
Cynthia A. Majestro, Attorney at Law, for respondent.

PER CURIAM:

The claimant, Brian Keith Huggins, seeks an award of $121.27 from the respondent, Division of Highways, for damage to his vehicle, a 1995 Nissan Pathfinder. The damage occurred on June 15, 1996, at approximately 6:00 p.m., while the claimant was driving east on Route 460 near Ramey

Chevrolet in Mercer County. During the drive, the claimant was traveling fifty-miles per hour in the passing lane when his vehicle crossed a broken section of the pavement. The claimant testified that there were several large chunks of pavement in the road an one of the pieces bounced up and struck his vehicle. According to the claimant, the impact made a dent in the side of his vehicle. The estimate cost to repair the dent was $121.27. The claimant travels Route 460 five days per week, and he stated that the pavement was not broken during his previous trip through the area.

Trooper Steven Paul Bruno, of the West Virginia Sate Police, testified that the observed the broken area of pavement during the afternoon of June 15, 1996. However, he did not report the situation to the respondent because it did not appear to be a hazardous condition.

Artice E. Hodges, a supervisor for the respondent in Mercer County, described the break in the pavement as a joint failure. According to Mr. Hodges, joint failures occasionally occur when temperatures exceed 85 degrees, and they are caused by expansion of the pavement. Mr. Hodges also stated that he was unaware of any way to predict when and where a joint failure would occur.

In order to establish negligence on behalf of the respondent for damage caused by a road defect of this nature, a claimant must prove by a preponderance of the evidence that the respondent had either actual or constructive notice of the defect and a reasonable opportunity to take corrective action. *Pritt vs. Division of Highways,* Unpublished opinion issued April 4, 1995, CC-94-26; *Daniels vs. Dept. of Highways,* 15 Ct. Cl. 292 (1985).

Based on the evidence presented in this claim, the Court finds that the respondent did not have notice of the joint failure until 6:00 p.m. on June 15, 1996. Therefore, the claimant has not established that the respondent had notice of the joint failure and a reasonable opportunity to repair it. Accordingly, this claim must be denied.

Claim disallowed.

OPINION ISSUED FEBRUARY 20, 1997

STEVEN SKAGGS
VS.
DIVISION OF CORRECTIONS
(CC-96-382)

Claimant represents self.
Joy Caval, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant brought this claim to recover the value of a certain item of personal clothing that he alleges was lost when he placed the item of clothing in the laundry at Mr. Olive Correctional Center where claimant is an inmate.

A hearing was conducted by this Court in this claim on December 2, 1996, at which time the claimant testified as to the facts and circumstances which gave rise to his claim. Claimant asserts that he received a sweatshirt from his mother and he sent the sweatshirt to the prison laundry sometime during the month of June 1996. When his laundry was returned to him on that same day as is the custom, the sweatshirt was not with his other clothing. He valued the sweatshirt at $80.00.

The Acting Associate Warden of Operations, Linda Lou Pond, testified that all inmates are provided information about operational procedure for laundry services upon their entry into the prison. These procedures are also posted on bulletin boards throughout the facility. Part 7 states "Laundry Responsibility-The Mt. Olive Correctional Complex Laundry Department shall not be responsible for damaged and/or lost inmate personal clothing." Ms. Pond explained that the prison provides state issue clothing to all inmates. Any personal clothing may be stamped if an inmate so desires in order that ownership may be determined. Otherwise, the inmate takes a risk and is responsible for any personal items placed in the prison laundry.

The Court has determined that the respondent provides inmates with clothing and laundry services. However, the respondent also allows inmates to have personal property clothing at the facility if the inmate so chooses. The inmate is then responsible for the item of clothing. There is no responsibility on the part of the respondent if the item is lost during the laundry procedures.

The Court is the opinion that claimant has not established any negligence on the part of the respondent for the loss of his sweatshirt. Therefore, the Court denies this claim.

Claim disallowed.

OPINION ISSUED APRIL 11, 1997

BRAXTON COUNTY MEMORIAL HOSPITAL
VS.
DIVISION OF CORRECTIONS
(CC-97-67)

Claimant represents self.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and

respondent's Answer.

Claimant seeks payment of $254.25 for medical services provided to an inmate in a county jail, but who should have been in the custody of the respondent. Respondent, in its Answer, admits the validity of the claim, but states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the invoice.

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

Claim disallowed.

OPINION ISSUED APRIL 11, 1997

E & M PRODUCTS, INC.
VS.
DIVISION OF CULTURAL AND HISTORY
(CC-97-76)

Claimant represents self.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $120.00 for rental of an automatic dialing service connecting the fire alarm system for Wheeling Independence Hall to the Wheeling Fire Department during the 1995 fiscal year. The document for the services was not received by the respondent in the proper fiscal year; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $120.00.

Award of $120.00.

OPINION ISSUED APRIL 11, 1997

DIVISION OF NATURAL RESOURCES
VS.
DIVISION OF ENVIRONMENTAL PROTECTION
(CC-97-61A)

Claimant represents self.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $1,064.49 for telephone bills and telephone repair bills incurred by claimant on behalf of the respondent State agency in May 1995 and March 1996. The documentation for the telephone services was not received by the respondent in the proper fiscal years; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity of the claim, and states that there were sufficient funds expired in the appropriate fiscal years with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $1,064.49.

Award of $1,064.49.

OPINION ISSUED APRIL 11, 1997

GLOBAL PETROLEUM CORPORATION
VS.
ALCOHOL BEVERAGE CONTROL ADMINISTRATION
(CC-97-73)

Claimant represents self.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $3,955.29 for providing gas utility service to the respondent. The invoice for this service was not received by the respondent in the proper fiscal year; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $3,955.29.

Award of $3,955.29.

OPINION ISSUED APRIL 11, 1997

MERCER COUNTY COMMISSION
VS.
DIVISION OF CORRECTIONS
(CC-97-96)

Claimant represents self.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of $493.68 for travel expenses incurred to return certain fugitives from justice to West Virginia from other states. The travel expense vouchers were not forwarded to the respondent State agency in the proper fiscal year; therefore, the claimant has not been reimbursed for these expenses. These expenses are paid from the Governor's Civil Contingent Fund which is administered through the respondent. Respondent, in its Answer, admits the validity of the claim, but states that there were insufficient funds in the appropriate account for the fiscal year in question from which to pay these travel expenses.

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

Claim disallowed.

OPINION ISSUED JUNE 4, 1997

FREY HOME FOR FUNERALS, INC.
VS.
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
(CC-97-100)

Claimant represents self.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of $400.00 for providing funeral and burial services pursuant to the provisions of the Indigent Funeral and Burial Service Fund. The documentation for the services was not received by the respondent in the proper fiscal year; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity of the claim and the amount, and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $400.00.

Award of $400.00.

OPINION ISSUED JUNE 4, 1997

JAMES M. CASEY
VS.
SUPREME COURT OF APPEALS
(CC-97-104)

Claimant represents self.
John M. Hedges, Attorney at Law, for respondent.

PER CURIAM:

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

Claimant seeks $341.00 for serving as a Special Family Law Master for the respondent. The documentation for these services was not received by the respondent in the proper fiscal year; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $341.00.

Award of $341.00.

OPINION ISSUED JUNE 4, 1997

HORIZON MOBILE HOME SERVICES
VS.
DIVISION OF CORRECTIONS
(CC-97-131)

Claimant represents self.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $5,630.67 for medical services provided to inmates in Mt. Olive Correctional Center, a facility of the respondent, during January and February 1996. Respondent, in its Answer, admits the validity of the claim, but states that there were insufficient funds in the appropriation for the fiscal year in question from which to pay the invoice.

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

Claim disallowed.

OPINION ISSUED JUNE 4, 1997

JENNIFER MYERS

VS.
DIVISION OF HIGHWAYS
(CC-94-172)

Charles West, Attorney at Law, for claimant.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

This claim, originally brought in the name of Sharon Kirk, as guardian of Jennifer Myers, and amended when the Court was informed that Jennifer Myers is now of majority, was filed against the Division of Highways alleging negligent failure to maintain a bridge on Route 3/5 near Breeden, Mingo County.

On May 28, 1993, Jennifer Myers, then 15, was riding her bicycle with several friends in the general vicinity of her home near Breeden. Between 6 and 7 p.m., she was crossing an old railroad bridge converted to highway traffic known as the Zion Church Bridge, when she fell with her bicycle through a gap between the bridge decking and the bridge girders. She fell about ten (10) feet to the creek bed below, and suffered a cerebral concussion and compression fracture of five vertebrae. The parties stipulated that resulting incurred medical expenses were $6,590.25 and that respondent was responsible for maintenance of the bridge.

The record indicates that at the time of the accident, Miss Myers was wearing a helmet, and was sitting astride her bicycle, walking it across the bridge by pushing it with her feet. She testified that she had walked across this bridge previously, but that she had never ridden her bicycle across it. One of her friends was riding in front of her and inadvertently kicked up a loose board in passing. The front tire of Miss Myers' bicycle became lodged in the crack, causing her to lose control of her bicycle and fall through a gap between the bridge deck and girder.

The Zion Church Bridge was constructed for railroad use about 100 years ago and later was converted to highway use, and it was taken into the State highway system in 1933, according to respondent's witnesses. At the time of the accident, there were "Narrow Bridge" signs on both sides. The deck was 12 feet wide, consisting of laminated 2" by 6" planks, nailed together and turned up on end. Parallel 3" by 8" planks were nailed flat on the decking to direct traffic over the underlying, load-bearing I-beams of the bridge. The gap between the deck and the bridge girder, or railing was roughly two (2') feet, three (3") inches.

Wilson Bradley, Huntington District Engineer for respondent and district bridge engineer in 1993, testified that the purpose of the gaps between deck and girder on this type of converted railroad bridge is to discourage traffic from straying from the deck runners and underlying support I-beams, which could cause damage to the bridge.

Barry Mullins, respondent's Mingo County supervisor, testified that there are approximately 500 miles of state road in Mingo County, that State Route 3/5 is a secondary road in terms of maintenance

priority, and that his crew does maintenance on these types of bridges approximately 10 to 12 times a year in the Breeden area. Mullins testified that the last major repairs to the Zion Church bridge were done was in 1991 or 1992, and that the wooden boards on these bridges break often. Mullins testified that the bridge, as depicted on video tape shortly after the accident, was indeed in need of repair and that a truck ran off it not too long before. And he further testified that the problem of boards breaking or coming loose is common on these types of bridges. This court notes that respondent did not produce DOH-12 records that would document maintenance performed during the year preceding the accident.

From the videotape introduced into the evidence as Claimant's Exhibit No. 2, the Court further observes that the bridge in question was a continuous hazard to automotive, bicycle and pedestrian traffic.

The law of West Virginia is well established that the state is neither an insurer nor a guarantor of the safety of travelers upon its highways. This Court has also previously held that two-wheeled motorcycles and bicycles are more hazardous to operate than an automobile, and that more care may be required of the operator. *Turner vs. Dept. of Highways,* 15 Ct. Cl. 185 (1984); *Bartz vs. Dept. of Highways,* 10 Ct. Cl. 170 (1975). Finally, the Court has held that when the respondent should have anticipated the deteriorating condition of wooden bridges under its control that failure to properly maintain them constitutes negligence. *Eller vs. Department of Highways,* 13 Ct. Cl. 155 (1980).

In the Turner decision, this Court disallowed a claim involving a bicycle accident, allegedly caused when respondent left debris on the road causing the claimant to lose control of his bicycle and crash during a cycling tour. The Court lacked sufficient evidence to determine what caused the accident, and whether claimant's own conduct was contributory. In the present case, the evidence indicates that the loose boards triggering this accident was a condition that was readily apparent and clearly foreseeable by respondent. Moreover, the testimony indicates that Jennifer Myers was proceeding with great care over the bridge. The Court finds that Respondent should have known or discovered the loose boards and made necessary repairs to the bridge, and that failure to do so constitutes negligence. This Court also finds that the claimant was free from any comparative negligence.

The parties stipulated to damages of $6,590.25, and claimant has submitted supporting medical documentation. The Court is also of the opinion that claimant should receive compensation for pain and suffering in the amount of $20,000.00.

It is therefore, the opinion of the Court that an award be made to claimant in the amount of $26,590.25.

Award of $26,590.25.

OPINION ISSUED JUNE 4, 1997

LINDA L. STANLEY
VS.
DIVISION OF HIGHWAYS
(CC-96-166)

Claimant represents herself.
Andrew F. Tarr, Attorney at Law for respondent.

PER CURIAM:

Claimant has brought this claim for $89.31 or a lost wheel cover caused by high water on U.S. Route 60.

On March 16, 1996, at about 8 p.m., claimant was driving her 1995 Corsica westbound on U.S. Route 60 near the Chelyan Bridge. It was raining, and at the time there was a significant amount of road construction along this highway. This portion of Route 60 is a narrow, two-lane road with numerous curves and dips. Claimant stated that she was driving approximately thirty (30) miles per hour when she suddenly drove through high water that knocked off the right front wheel cover, or hubcap. She submitted an invoice indicated that a new wheel cover would cost $89.31. Claimant's insurance deductibility is $250.

Claimant testified at the hearing that concrete barriers placed along the road during the construction had channeled water run-off from the above slopes onto the roadway, resulting in the high water. "High Water" signs were subsequently placed along the road.

While the State does not insure the safety of motorists on its highway, it does owe motorists a duty to exercise reasonable care and diligence in the maintenance of highways under all circumstances. Under this standard, a claimant can establish negligence by proving the respondent had either actual or constructive knowledge of a defect and failed to take corrective action within a reasonable time.

The Court finds that the respondent could have foreseen that flooding would result from the concrete barriers erected along the road during construction. Therefore, the Court finds that respondent had constructive notice of the propensity of water to flood Route 60 in the construction area.

Accordingly, the Court makes an award in the amount of the $89.31.

Award of $89.31.

OPINION ISSUED JUNE 4, 1997

UNIVERSITY HEALTH ASSOCIATES

VS.
DIVISION OF CORRECTIONS
(CC-97-113)

Claimant represents self.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment $13,289.45 for medical services provided to inmates in Huttonsville Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, but states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the invoice.

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

Claim disallowed.

OPINION ISSUED JUNE 4, 1997

WV GRADUATE COLLEGE
VS.
WEST VIRGINIA BUREAU OF SENIOR SERVICES
(CC-97-144)

Claimant represents self.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $228.00 in tuition fees for an employee of respondent, formerly the WV Commission on Aging, during the 1991 Fall semester. The claimant presented documentation authorizing the claimant to invoice respondent for said tuition costs. However, tuition documentation

was not received within the appropriate fiscal year, and therefore the bill was not paid. In its Answer, the respondent admits the validity of the claim, and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $228.00.

Award of $228.00.

OPINION ISSUED JUNE 11, 1997

CHARLESTON AREA MEDICAL CENTER
VS.
DIVISION OF CORRECTIONS
(CC-97-173)

Claimant represents self.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment of $2,179.04 for medical services provided to an inmate at Mt. Olive Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim and the amount, but states that there were sufficient funds in its appropriation for the fiscal year in question from which to pay the invoice.

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

Claim disallowed.

OPINION ISSUED JUNE 11, 1997

TEL-TEX COMMUNICATIONS, INC.
VS.
HUMAN RIGHTS COMMISSION
(CC-97-193)

Claimant represents self.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $779.00 for communications services rendered to the respondent in June 1996. The documentation for these services was not received by the respondent in the proper fiscal year; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity of the claim and the amount, and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $779.00.

Award in $779.00.

OPINION ISSUED JUNE 11, 1997

MATTHEW W. WILSON
VS.
BOARD OF TRUSTEES OF THE UNIVERSITY SYSTEM OF WV
(CC-97-178)

Claimant represents self.
Jeffrey G. Blaydes, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $740.00 for damage to various electrical appliances, including a stereo, VCR, humidifier, clock and a video, which damage was caused by a short circuit during the maintenance work at one of respondent's Morgantown housing facilities on February 4, 1997. In its Answer, the respondent admits the validity of the claim and the amount. The Court, having reviewed the claim, is of the opinion that the claimant has sustained property damage due to a maintenance error on the part of respondent.

In view of the foregoing, the Court makes an award in the amount of $740.00.

Award of $740.00.

OPINION ISSUED JUNE 11, 1997

LEROY BUZZARD
VS.
REGIONAL JAIL & CORRECTIONAL
FACILITY AUTHORITY
(CC-96-55)

Claimant represents self.
Joy Caval, Assistant Attorney General, for respondent.

PER CURIAM:

The claimant brings this action for compensation for items of clothing lost by the respondent while claimant was incarcerated.

The claimant states that on or about September 1, 1995, he was an inmate at the South Central Regional Jail, a facility of the respondent. The claimant states that upon his release, the respondent was unable to find his clothes, specifically, pants, Nike shoes, underwear, and a leather Harley-Davidson hat. It appears from the evidence that the claimant was not wearing a shirt at the time of his initial arrest.

The claimant estimated the value of these items as follows: pants $30.00 to $40.00, shoes between $100.00 and $169.00, and the hat at $80.00. No further proof of purchase or other indicia of value was offered. The Court finds that there was a bailment, and that respondent is liable to claimant in the amount of $210.00.

Accordingly, the Court makes an award to the claimant in the amount of $210.00 for his lost property.

Award of $210.00.