REPORTS

OF

Cases Argued and Determined

IN THE

COURT of CLAIMS

OF THE

STATE OF ILLINOIS

VOLUME 21

Containing cases in which opinions were filed and orders of dismissal enterzd, without opinion, between July 1,1951 and April 30,1954

SPRINGFIELD, ILLINOIS
1954

[Printed by authority of the State of Illinois.]

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PREFACE

The opinions of the Court of 'Claimsherein reported are published by authority of the provisions of Section 18 of an Act entitled "An Act to create the Court of Claims, to prescribe its powers and duties, and to repeal an Act herein named," approved July 17, 1945.

CHARLES F. CARPENTIER,
Secretary of State and Ex Officio Clerk of the Court of Claims.

OFFICERS OF THE COURT

JUDGES

FRED P. SCHUMAN, *Chief Justice*
Granite City, Illinois
April 1, 1949 - November 26, 1952

DONALD F. DELANEY, *Chief Justice*
Joliet, Illinois
November 28, 1952 - March 31, 1953

JOSEPH J. TOLSON, *Chief Justice*
Kankakee, Illinois
April 1, 1953 -

DONALD F. DELANEY, *Judge*
Joliet, Illinois
April 1, 1949 - November 27, 1952

ROBERT L. LANSDEN, *Judge*
Cairo, Illinois
April 1, 1949 - March 31, 1953

PAUL FARTHING, *Judge*
Belleville, Illinois
November 28, 1952 - July 5, 1953

GERALD W. FEARER, *Judge*
Oregon, Illinois
April 1, 1953 -

JAMES B. WHAM, *Judge*
Centralia, Illinois
August 1, 1953 -

IVAN A. ELLIOTT, *Attorney General*
January 10, 1949 - January 11, 1953

LATHAM CASTLE, *Attorney General*
January 12, 1953 -

EDWARD J. BARRETT,
Secretary of State and Ex Officio Clerk of the Court
January 8, 1945 - January 11, 1953

CHARLES F. CARPENTIER,
Secretary of State and Ex Officio Clerk of the Court
January 12, 1953 -

JOSEPH A. LONDRIGAN, *Deputy Clerk*
Springfield, Illinois
September 1, 1950 - May 31, 1953

ALFRED H. GREENING, *Deputy Clerk*
Springfield, Illinois
June 1, 1953 -

RULES OF THE COURT OF CLAIMS OF THE STATE OF ILLINOIS

Adopted pursuant to "An Act to create the Court of Claims, to prescribe its powers and duties, and to repeal an Act herein. named." (Approved July 17, 1945. L. 1945, p. 660.)

TERMS OF COURT

Rule 1. The Court shall hold a regular session at the Capital of the State on the second Tuesday of January, May and November of each year, and such special sessions at such places as it deems necessary to expedite the business of the Court.

PLEADINGS

Rule 2. Pleadings and practice, as provided by the Civil. Practice Act of Illinois, shall be followed except as herein other-. wise provided.

Rule 3. The original and five (5) copies of all pleadings shall be filed with the Clerk at Springfield, Illinois. In order that the files in the Clerk's office may be kept under the system, commonly known as "flat filing", all papers presented to the Clerk shall be flat and unfolded. Such papers need not have a cover.

Rule 4. (a) Cases shall be commenced by a verified complaint, which shall be filed with the Clerk of the Court. A party filing a case shall be designated as the claimant, and either the State of Illinois or The Board of Trustees of the University of Illinois, as the case may be, shall be designated as the respondent. The Clerk will note on the complaint, and each copy, the date of filing, and deliver one of said copies to the Attorney General or to the Legal Counsel of The Board of Trustees of the University of Illinois. Joinder of claimants in one case is permitted, as provided by the Civil Practice Act of Illinois. A claimant, or his attorney, may sign the complaint, and any person with knowledge of the facts therein set forth may verify a complaint.

(b) In all cases filed in this Court, all claimants not appearing pro se must be represented of record by a member of the Illinois Bar residing in Illinois. Any attorney in good standing, duly admitted to practice in the State where he resides, may, upon motion, be permitted to appear of record, and participate in a particular case. If the name of a resident Illinois attorney appears on a complaint, no written appearance for such attorney need be filed, but withdrawal and substitution of attorneys shall be in writing, and filed in the case.

(c) The complaint shall be printed or typewritten, and shall be captioned substantially as follows:

IN THE COURT OF CLAIMS OF THE
STATE OF ILLINOIS

A.B. Claimant vs. STATE OF ILLINOIS or THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS Respondent	No.

Rule 5. (a) The claimant shall state whether or not his claim has been presented to any State department or officer thereof, or to any person, corporation or tribunal, and, if so presented, he shall state when, to whom, and what action was taken thereon.

(b) The claimant shall in all cases set forth fully in his petition the claim, the action thereon, if any, on behalf of the State or The Board of Trustees of the University of Illinois, what persons are owners thereof, or interested therein, when and upon what consideration such persons became so interested; that no assignment or transfer of the claim, or any part thereof, or interest therein, has been made, except as stated in the petition; that the claimant is justly entitled to the amount therein claimed from the State of Illinois or The Board of Trustees of the University of Illinois, after allowing all just credits; that claimant believes the facts stated in the petition to be true.

(c) If the claimant bases his complaint upon a contract, or

other instrument in writing, a copy thereof shall be attachedl thereto for reference.

Rule 6. A bill of particulars, stating in detail each item of damage, and the amount claimed on account thereof, shall be attached to the complaint in all cases.

Rule 7. If the claimant be an executor, administrator, guardian or other representative appointed by a judicial tribunal, a duly certified copy of the record of appointment must be filed with the complaint.

Rule 8. If the claimant die pending the suit the death may be suggested on the record, and the legal representative, on filing a duly certified copy of the record of appointment as executor or administrator, may be admitted to prosecute the suit by special leave of the Court. It is the duty of the claimant's attorney to suggest the death of the claimant when that fact first becomes known to him.

Rule 9. Where any claim has been referred to the Court by the Governor, or either House of the General Assembly, any party interested therein may file a verified complaint at any time prior to the next regular session of the Court. If no such person files a complaint, as aforesaid, the Court may determine the case upon whatever evidence it shall have before it, and, if no evidence has been presented in support of such claim, the case may be stricken from the docket with or without leave to reinstate, in the discretion of the Court.

Rule 10. A claimant desiring to amend his complaint may do so at any time before he has closed his testimony, without special leave, by filing the original and five (5) copies of an amended complaint, but any such amendment shall be subject to the objection of the respondent, made before or at final hearing. Any amendments made subsequent to the time the claimant has closed his testimony must be by leave of Court.

Rule 11. The respondent shall answer within thirty (30) days after the filing of the complaint, and the claimant may reply within fifteen (15) days after the filing of said answer, unless the time for pleading be extended; provided, that if the respondent shall fail so to answer, a general traverse or denial of the facts set forth in the complaint shall be considered as filed:

EVIDENCE

Rule 12. At the next succeeding session of the Court after a case is at issue, the Court, upon the call of the docket, shall assign the case to a commissioner, who, within a reasonable time, shall set the time and place for the hearing, and notify opposing counsel in writing. If the Court, or a Judge thereof, decides to hear a case, the Clerk will send out notices of the time and place of the hearing.

Rule 13. (a) All evidence shall be taken in writing in the manner in which depositions in chancery are usually taken. When the evidence is taken, and the proofs in a case are closed, the evidence shall be transcribed, and the original and five (5) copies thereof shall be filed with the Clerk within twenty (20) days of the completion of the hearing.

(b) The format of the transcript of evidence shall conform to that of court reporters as nearly as practicable. Double spacing shall be used for each question and answer, and double or triple spacing shall be used between each question and answer. Letter or legal size paper shall be used, and margins shall be of suitable size.

Rule 14. All costs and expenses of taking evidence on behalf of the claimant shall be borne by the claimant, and the costs and expenses of taking evidence on behalf of the respondent shall be borne by the respondent.

Rule 15. If either party fails to file the evidence as herein required, the Court may, in its discretion, proceed with its determination of the case.

Rule 16. All records and files maintained in the regular course of business by any State Department, commission, board or agency of the respondent, the State of Illinois or The Board of Trustees of the University of Illinois, and divisions and agencies under the control of such Board of Trustees, and all departmental reports made by any officer thereof relating to any matter or case pending before the Court shall be prima facie evidence of the facts set forth therein; provided, a copy thereof shall have been first duly mailed or delivered by the Attorney General or the Legal Counsel of The Board of Trustees of the University of Illinois to the claimant, or his attorney of record.

Rule 17. (a) In any case in which the physical condition of a claimant or claimants is in controversy, the Court may order him, or them, to submit to a physical examination by a physician. The order may be made only on motion for good cause shown, and upon notice to the claimant to be examined, or his attorney, and to all other claimants, or their attorneys, if any, and shall specify the time, place, manner, conditions and scope of the examination, and the person or persons by whom it is to be made.

(b) If requested by the claimant examined, respondent shall deliver to him a copy of a detailed written report of the examining physician setting out his findings and conclusions. After such request, and delivery to the claimant of such detailed written report, respondent shall be entitled, upon request, to receive from the claimant examined a like report of any examination previously or thereafter made of the same physical condition. If the claimant examined refuses to deliver such report or reports, the Court, on motion and notice, may make an order requiring delivery on such terms as are just, and, if a physician fails or refuses to make such a report, the testimony of such physician may be excluded, if offered at the hearing of the case.

ABSTRACTS AND BRIEFS

Rule 18. In all cases where the transcript of the evidence, including exhibits, exceeds seventy-five (75) pages in number, claimant shall furnish in sextuplicate a complete typewritten or printed abstract of the transcript of the evidence, including exhibits, prepared in conformity with Rule 38 of the Rules of the Supreme Court of Illinois. The abstract must be sufficient to present fully all material facts contained in the transcript, and it will be taken to be complete, accurate and sufficient, unless respondent shall file a further abstract in conformity with said Rule 38.

Rule 19. Each party shall file with the Clerk the original and five (5) copies of a typewritten or printed brief setting forth the points of law upon which reliance is had, with reference made to the authorities sustaining their contentions. Accompanying such briefs there shall be a statement of the facts, and an argument in support of such briefs. The original shall be provided with a

suitable cover, bearing the title of the Court and case, together with the name and address of the attorney filing the same printed or plainly written thereon. The filing of brief and argument may only be waived by the party desiring to do so first obtaining consent of the Court upon good cause shown.

Rule **20.** The abstract, brief and argument of the claimant must be filed with the Clerk on or before thirty **(30)** days after all evidence has been completed and filed with the Clerk, unless the time for filing the same is extended by the Court, or one of the Judges thereof. The respondent shall file its brief and argument not later than thirty **(30)** days after the filing of the brief and argument of the claimant, unless the time for filing the brief of claimant has been extended, in which case the respondent shall have a similar extension of time within which to file its brief. Claimant may file a reply brief within fifteen **(15)** days of the filing of the brief and argument of respondent. Upon good cause shown, further time to file the abstract or briefs of either party may, upon notice to the other party, be granted by the Court, or by any Judge thereof.

EXTENSION OF TIME

Rule 21. Either party, upon notice to the other party, may make application to the Court, or any Judge thereof, for an extension of time within which to file any pleadings, papers, documents, abstracts or briefs.

MOTIONS

Rule **22.** (a) All motions shall be in writing. The original and five *(5)* copies of all motions, and suggestions in support thereof, shall be filed with the Clerk of the Court, together with proof of service upon counsel for the other party. When the motion is based upon matter that does not appear of record, it shall be supported by an affidavit. **A** copy of the motion, suggestions in support thereof, and affidavit, if any, shall be served upon counsel for the opposing party at the time the motion is filed with the Clerk.

(b) Objections to motions, and suggestions in support thereof, must also be in writing. An original and five **(5)** copies of all objections to motions shall be filed with the Clerk of the Court, together

with proof of service upon counsel for the other party, within ten **(10)** days of the filing of the original motion.

(c) There shall be no oral argument allowed on motions, or objections to motions.

Rule **23.** In case a motion to dismiss is denied, the respondent shall plead within thirty **(30)** days thereafter, and if a motion to dismiss be sustained, the claimant shall have thirty **(30)** days thereafter within which to file an amended complaint. If the claimant fails to do so, the case will be dismissed.

ORAL ARGUMENTS

Rule **24.** Either party desiring to make oral argument shall so indicate on the cover of his brief, or his petition for rehearing.

REHEARINGS

Rule **25. A** party desiring a rehearing in any case shall within thirty **(30)** days after the filing of the opinion, file with the Clerk the original and five *(5)* copies of his petition for rehearing. The petition shall state briefly the points supposed to have been overlooked or misapprehended by the Court, with authorities and suggestions concisely stated in support of the points. Any petition violating this rule will be stricken.

Rule **26.** When a rehearing is granted, the original briefs, if any, of the parties, and the petition for rehearing, answer and reply thereto shall stand as files in the case on rehearing. The opposite party shall have twenty (20) days from the granting of the rehearing to answer the petition, and the petitioner shall have ten (10) days thereafter within which to file his reply. Neither the claimant, nor the respondent, shall be permitted to file more than one application, or petition for a rehearing.

Rule **27.** When a decision is rendered, the Court, within thirty **(30)** days thereafter, may grant a new trial for any reason, which, **by** the rules of common law or chancery in suits between individuals, would furnish sufficient ground for granting a new trial.

RECORDS AND CALENDAR

Rule 28. (a) The Clerk shall record all orders of the Court, including the final disposition of cases. He shall keep a docket in which he shall enter all claims filed, together with their number, date of filing, the name of claimants, their attorneys of record and respective addresses. As papers are received by the Clerk, in course, he shall stamp the filing date thereon, and forthwith mail to opposing counsel a copy of all orders entered, pleadings, motions, notices and briefs as filed; such mailing shall constitute due notice and service thereof.

(b) Within ten (10) days prior to the first day of each session of the Court, the Clerk shall prepare a calendar of the cases set for hearing, and of the cases to be disposed of at such session, and deliver a copy thereof to each of the Judges, the Attorney General, and to the Legal Counsel of The Board of Trusteesof the University of Illinois.

Rule 29. Whenever on peremptory call of the docket any case appears in which no positive action has been taken, and no attempt made in good faith to obtain a decision or hearing of the same, the Court may, on its own motion, enter an order therein ruling the claimant to show cause on or before the day set by the Court why such case should' not be dismissed for want of prosecution, and stricken from the docket. Upon the claimant's failure to take some affirmative action to discharge or comply with said rule, such case may be dismissed, and stricken from the docket, with or without leave to reinstate on good cause shown. On application, and a proper showing made by the claimant, the Court may, in its discretion, grant an extension of time under such rule to show cause. The fact that any case has been continued, or leave given to amend, or that any motion or matter has not been ruled upon, will not alone be sufficient to defeat the operation of this rule.

FEES AND COSTS

Rule 30. The following schedule of fees shall apply:

Filing of complaint.....$10.00

Certified copies of opinions:

Five (5) pages or less	0.25
For more than five (5) pages and not more than ten (10) pages	0.35
For more than ten (10) pages and not more than twenty (20) pages	0.45
For more than twenty (20) pages	0.50

Rule 31. Every claim cognizable by the Court, and not otherwise sooner barred by law,* shall be forever barred from prosecution therein unless it is filed with the Clerk of the Court within two (2) years after it first accrues, saving to infants, idiots, lunatics, insane persons, and persons under other disability at the time the claim accrues two (2) years from the time the disability ceases.

ORDER OF COURT

The above and foregoing rules, as amended, were adopted as rules, as amended, of the Court of Claims of the State of Illinois on the 12th day of January, A.D. 1954, to be in full force and effect from and after the 23rd day of January, A.D. 1954.

* See limitation provisions of specific statutes.

COURT OF CLAIMS LAW

. AN ACT *to create the Court of Claims, to prescribe* . *vowers and duties, and to repeal an Act* . *ned.*

Section **1.** The Court of Claim,, ` fter called the court, is created. It shall consist of three j.. to be appointed by the Governor by and with the advice and nsent of the Senate, **one** of whom shall be appointed chief justict In case of vacancy in such office during the recess of the Senate, the Governor shall make a temporary appointment until the next meeting of the Senate, when he shall nominate some person to fill such office. **If** the Senate is not in session at the time this Act takes effect, the Governor shall make temporary appointments as in case of vacancy.

Section **2.** Upon the expiration of the terms of office of the incumbent judges the Governor shall appoint their successors by and with the consent of the Senate for terms of 2, 4 and G years commencing on the third Monday in January of the year **1953.** After the espiration of the terms of the judges first appointed pursuant to the provisions of this amendatory Act, each of their respective successors shall hold office for a term of G years and until their successors are appointed and qualified.

Section **3.** Before entering upon the duties of his office, each judge shall take and subscribe the constitutional oath of office and shall file it with the Secretary of State.

Section **4.** Each judge shall receive a salary of $4,000.00 per annum payable in equal monthly installments.

Section **5.** The court shall have a seal with such device as it may order.

Section 6. The court shall hold a regular session at the Capital of the State beginning on the second Tuesday of January, May and November, and such special sessions at such places as it deems necessary to expedite the business of the court.

Section **7.** The court shall record its acts and proceedings. The Secretary of State, ex-officio, shall be clerk of the court,

but may appoint a deputy, who shall be an officer of the court, to act in his stead. The deputy shall take an oath to discharge his duties faithfully and shall be subject to the direction of the court in the performance thereof.

The Secretary of State shall provide the court with a suitable court room, chambers and such office space as is necessary and proper for the transaction of its business.

Section 8. The court shall have jurisdiction to hear and determine the following matters:

A. All claims against the State founded upon any law of the State of Illinois, or upon any regulation thereunder by an executive or administrative officer or agency, other than claims arising under the Workmen's Compensation Act or the Workmen's Occupational Diseases Act.

B. All claims against the State founded upon any contract entered into with the State of Illinois.

C. All claims against the State for damages in cases sounding in tort, in respect of which claims the claimants would be entitled to redress against the State of Illinois, at law or in chancery, if the State were suable, and all claims sounding in tort against The Board of Trustees of the University of Illinois; provided, that an award for damages in a case sounding in tort shall not exceed the sum of $7,500.00 to or for the benefit of any claimant. The defense that the State or The Board of Trustees of the University of Illinois is not liable for the negligence of its officers, agents, and employees in the course of their employment shall not be applicable to the hearing and determination of such claims.

D. All claims for recoupment made by the State of Illinois against any claimant.

Section 9. The Court may:

A. Establish rules for its government and for the regulation of practice therein, appoint commissioners to assist the court in such manner as it directs and discharge them at will; and exercise such powers as are necessary to carry into effect the powers herein granted.

B. Issue subpoenas to require the attendance of witnesses for the purpose of testifying before it, or before any judge of the

Court, or before any notary public, or any of its commissioners, and to require the production of any books, records, papers or documents that may be material or relevant as evidence in any matter pending before it. In case any person refuses to comply with any subpoena issued in the name of the chief justice, or one of the judges, attested by the clerk, with the seal of the court attached, and served upon the person named therein as a summons at common law is served, the circuit court of the proper county, on application of the clerk of the court, shall compel obedience by attachment proceedings, as for contempt, as in a case of a disobedience of the requirements of a subpoena from such court on a refusal to testify therein.

Section 10. The judges, commissioners and the clerk of the court may administer oaths and affirmations, take acknowledgments of instruments in writing, and give certificates of them.

Section 11. The claimant shall in all cases set forth fully in his petition the claim, the action thereon, if any, on behalf of the State, what persons are owners thereof or interested therein, when and upon what consideration such persons became so interested; that no assignment or transfer of the claim or any part thereof or interest therein has been made, except as stated in the petition; that the claimant is justly entitled to the amount therein claimed from the State of Illinois, after allowing all just credits; and that claimant believes the facts stated in the petition to be true. The petition shall be verified, as to statements of facts, by the affidavit of the claimant, his agent, or attorney.

Section 12. The court may direct any claimant to appear, upon reasonable notice, before it or one of its judges or commissioners or before a notary and be examined on oath or affirmation concerning any matter pertaining to his claim. The examination shall be reduced to writing and be filed with the clerk of the court and remain as a part of the evidence in the case. If any claimant, after being so directed and notified, fails to appear or refuses to testify or answer fully as to any material matter within his knowledge, the court may order that the case be not heard or determined until he has complied fully with the direction of the court.

Section 13. Any judge or commissioner of the court may sit at any place within the State to take evidence in any case in the court.

Section 14. Whenever any fraud against the State of Illinois is practiced or attempted by any claimant in the proof, statement, establishment, or allowance of any claim or of any part of any claim, the claim or part thereof shall be forever barred from prosecution in the court.

Section 15. When a decision is rendered against a claimant, the court may grant a new trial for any reason which, by the rules of common law or chancery in suits between individuals, would furnish sufficient ground for granting a new trial.

Section 16. Concurrence of two judges is necessary to the decision of any case.

Section 17. Any final determination against the claimant on any claim prosecuted as provided in this Act shall forever bar any further claim in the court arising out of the rejected claim.

Section 18. The court shall file with its clerk a written opinion in each case upon final disposition thereof. All opinions shall be compiled and published annually by the clerk of the court.

Section 19. The Attorney General, or his assistants under his direction, shall appear for the defense and protection of the interests of the State of Illinois in all cases filed in the court, and may make claim for recoupment by the State.

Section 20. At every regular session of the General Assembly, the clerk of the court shall transmit to the General Assembly a complete statement of all decisions in favor of claimants rendered by the court during the preceding two years; stating the amounts thereof, the persons in whose favor they were rendered, and a synopsis of the nature of the claims upon which they were based. At the end of every term of court, the ,clerk shall transmit a copy of its decisions to the Governor, to the Attorney General, to the head of the office in which the claim arose, to the State Treasurer, to the Auditor of Public Accounts, and to such other officers as the court directs.

Section 21. The Court is authorized to impose, by uniform rules, a fee of $10.00 for the filing of a petition in any case; and to charge and collect for each certified copy of its opinions a fee of twenty-five cents for five pages or less, thirty-five cents for more than five pages and not more than ten pages, forty-five cents for more than ten pages and not more than twenty pages, and fifty cents for more than twenty pages. All fees and charges so collected shall be forthwith paid into the State Treasury.

Section 22. Every claim cognizable by the court and not otherwise sooner barred by law shall be forever barred from prosecution therein unless it is filed with the clerk of the court within two years after it first accrues, saving to infants, idiots, lunatics, insane persons and persons under other disability at the time the claim accrues two years from the time the disability ceases; provided, that any officer or enlisted man in the National Guard, Naval Reserve or Illinois Reserve Militia who sustained an injury to his property, arising out of and in the course of active duty while lawfully performing the same, at any time within 5 years prior to the effective date of this amendatory Act may file a claim therefor within two years after the effective date of this amendatory Act. (As amended by Act approved July 23, 1951.)

Section 23. It is the policy of the General Assembly to make no appropriation to pay any claim against the State, cognizable by the court, unless an award therefor has been made by the court.

Section 24. "An Act to create the Court of Claims and to prescribe its powers and duties," approved June 25, 1917, as amended, is repealed. All claims pending in the Court of Claims created by the above Act shall be heard and determined by the court created by this Act in accordance with this Act. All of the records and property of the Court of Claims created by the Act herein repealed shall be turned over as soon as possible to the court created by this Act.

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CASES ARGUED AND DETERMINED IN THE COURT OF CLAIMS OF THE STATE OF ILLINOIS

(No. **4172—Claimant's heirs awarded $354.30.)**

ROSE HABERICHTER, Claimant, *vs.* **STATE OF ILLINOIS, Respondent.**

Opinion filed July 6, 1951.

EDWARD J. LYONS, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when heirs at law allowed award under.* **Where claimant died during pendency of claim, her heirs are entitled to receive the amounts necessarily expended by decedent in her lifetime in caring for her admitted injuries.**

SCHUMAN, C. J.

Rose Haberichter, in her lifetime, was employed as secretary to the Chairman of the State Housing Board. She was injured in her employment on September **7, 1948,** and sustained a fracture of her right foot. No questions are raised as to jurisdiction, and she earned **$2,940.00** for the year preceding her injury.

The death of Rose Haberichter was suggested in the record, and it was shown that she died on March **26, 1950.** At a subsequent hearing held on December **22, 1950,** the sworn testimony showed that Rose Haberichter left surviving her the following adult persons as her only heirs at law, namely: Ruth E. Betty, sister; Paul H. Haberichter, brother; George T. Haberichter, brother.

The testimony further showed that all last illness expenses and funeral bills had been paid, and that no administration on her estate was had, or would **be** sought.

On the basis of this record, the heirs at law above named are entitled to receive the amounts necessarily expended by decedent in her lifetime in caring for her admitted injuries, which the Court finds as follows: Dr. Fred W. Mueller, **$75.00;** Lillian I. Weld, **$263.00;** Woodlawn Hospital, **$16.30,** for a total of **$354.30.**

William J. Cleary & Co. furnished stenographic services in reporting testimony in the amount of **$65.45,** which the Court finds reasonable.

An award is entered in the amount of $354.30 payable to Ruth E. Betty, Paul H. Haberichter, and George T. Haberichter, all of which is due and payable forthwith.

An award in the amount of $65.45 is also made to William **J.** Cleary & Co. for stenographic services.

This award is subject to the approval of the Governor, as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees".

(No. 4235—Claimant awarded $2,000.00.)

ELDON B. DAWSON, Claimant, us. STATE OF ILLINOIS, Respondent.

Opinion filed May 8, 1951.
Petition of Respondent for rehearing denied July 6, 1961.

James O. Monroe, Jr., Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S OCCUPATIONAL DISEASES ACT—negligence. **Violation of statute requiring twenty-four consecutive hours of rest (Ill. Rev. Stat., 1949, Chap. 48, Sec. 8B) constitutes negligence, entitling claimant to an award under Section 3 of the Workmen's Occupational Diseases Act.**

DELANEY, J.

Claimant in this case seeks an award for contracting active pulmonary tuberculosis under Section 3 of the Workmen's Occupational Diseases Act.

The record consists of the complaint, Departmental Report, amended complaint, Supplemental Departmental Report, transcript of the evidence, order of the Chief Justice of this Court granting claimant an extension of thirty days in which to file abstract and brief, statement, brief and argument of claimant, abstract of evidence, statement, brief and argument of respondent, order of the Chief Justice of this Court granting claimant an extension of time to November 12, 1950 in which to file reply brief, and claimant's reply brief.

The record shows that Eldon B. Dawson is a widower with one child apparently under the age of 16. Date of birth is given as June 2, 1895. He entered State service on October 15, 1942, and was assigned to the farm detail as a truck driver at the Alton State Hospital. At the time of his employment the physical examination of his chest was negative, and the X-Ray examination performed on December 8, 1943 revealed pulmonary fibrosis without evidence of active lung pathology. Mr. Dawson was found to have active tuberculosis with a positive sputum on October 25, 1948, and was admitted to the Madison County Sanitarium.

Claimant drove the garbage truck on occasions when the regular truck driver was off duty. Mr. Dawson was required to work with mental patients diseased with tuberculosis, who talked, spat and coughed near him.

This Court held in the case of *Helen M. Kaspari* vs. *State,* No. 4221, as follows:

"To be entitled to compensation under the Workmen's Occupational Diseases Act, a claimant must show that respondent violated:

1. A rule or rules of the Industrial Commission made pursuant *to* the Health and Safety Act.
2. A statute of this State intended for the protection of the health of employees. *(Domke* vs. *State,* 12 C.C.R. 451.)"

The Departmental Report filed on May 24, 1950, which has become a part of this record by the rules of the Court, states as follows:

"The claimant was permitted to have one day's rest during each calendar week, except during March, 1947 when he worked a full month without a day off in view of the shortage of help.''

Claimant is entitled to the benefits of "An Act to Promote the Public Health and Comfort of Persons Employed by Providing One Day of Rest in Seven", which provides, among other things, that an employee shall be allowed at least twenty-four consecutive hours of rest in every calendar week in addition to the regular period of rest allowed at the close of each working day. Ill. Rev. Stat., 1949, Chap. 48, Sec. 8b; Domke vs. State, 12 C.C.R. 451.

That such statute has been violated is shown by respondent's Departmental Report, and such violation is negligence on the part of respondent under Section 3 of the Workmen's Occupational Diseases Act.

Claimant is, therefore, entitled to an award.

As to damages, there is evidence in the record to the effect that, with continued sanitarium confinement and medication, claimant's tuberculosis may become permanently arrested. We, therefore, conclude that

claimant, Eldon B. Dawson, is entitled to an award of $2,000.00.

Henry P. Keefe, Court Reporter, was employed to take and transcribe the testimony before Commissioner Summers. Charges in the amount of $40.75 were incurred, which are reasonable and customary, and an award is entered in favor of Henry P. Keefe for $40.75.

An award is entered in favor of claimant, Eldon B. Dawson, in the amount of $2,000.00.

(No. 4289—Claimants awarded $3,295.00.)

HARRY WILBUR HANSEN AND GUSTAVE F. ADLER, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed July 6, 1951.

DAVID ALSWANG AND LEE W. CARRIER, Attorneys for Claimants.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

HIGHWAYS—*when barricade unlighted—negligence.* Where there is no question of contributory negligence, presence of unlighted barricade across one lane of traffic constitutes negligence on the part of respondent, entitling claimants to awards.

LANSDEN, J.

Claimants, Harry Wilbur Hansen and Gustave F. Adler, seek to recover from respondent for its negligence in failing to light and warn of the presence of barricades located in the right-hand lane of one of the public highways maintained and controlled by respondent.

The Departmental Report on file herein reads in part as follows:

"Marked Highway Route 83 at and near its intersection with marked highway Route 7 in Cook County, Illinois, is a part of the System of State Highways.

Having that status, Route 83 has been under the jurisdiction of the Department of Public Works and Buildings from 1936 to the present for the purposes of construction, reconstruction, operation and maintenance.

At the place referred to in claimants' complaint, Route 83 is twenty feet in width, constructed of Portland Cement concrete, and has shoulders ten feet in width.

Between points one-half mile and one and one-half miles west of Route 7 on Route 83, the Division of Highways made what are known as four pavement patches. These patches were made during the week of October 10 to 16, 1948. A patch is made by removing a section of broken pavement from the outside edge to the centerline, reforming the subgrade, and filling the opening with new concrete. The lengths of patches are variable; in this instance they were 65, 30, 17, and 28 feet. The last of the four patches was made October 14, 1948, or three days before the accident experienced by claimants. The patches herein referred to were in the south half of the pavement—lane for east bound traffic. There were no patches or obstructions of any kind in the lane for west bound traffic."

Shortly after 10:00 P.M. on October 17, 1948, the car owned by claimant, Gustave F. Adler, and operated by his son, Robert E. Adler, was proceeding along Highway No. 83 in an easterly direction near the intersection of said highway with Route No. 7 in Cook County, Illinois. Riding in the car were seven people. In the front seat, beside the driver, Robert Alder, were his wife, Dorothy, and son, Bobby, who was sitting on Mrs. Adler's lap. In the back seat, sitting on the right hand side, was claimant, Harry Wilbur Hansen. Sitting next to him was his wife, Myrtle, holding the Adler's daughter, Linda, on her lap, and on the left side was sitting Harry Wilbur Hansen, Jr. Mrs. Adler was the daughter of Mr. and Mrs. Harry Wilbur Hansen.

Earlier that evening the occupants of the car had visited another daughter of the Hansens living in Elgin, and were returning home at the time of the accident involved herein.

The car, a 1940 DeSoto sedan, was in good mechanical condition, and had been recently overhauled. Said car belonged to claimant, Gustave F. Adler, who

had loaned it that day to his son, Robert Adler, for the purpose for which it was used.

The route of the Adler car proceeded in an easterly direction along Highway No. **83,** and Adler was driving with his car lights in a dimmed position at a speed of **30-35** miles per hour in his lane. The terrain was gently rolling. The occupants of the car were all quiet. The car windshield was clean. It was dark, but clear, and the pavement was dry.

Just prior to the accident, a truck driven by Ralph R. Hurst, then of St. Paul, Minnesota, was proceeding toward the Adler car in its proper lane, and Mr. Hurst dimmed the truck lights about **1,300** feet from the Adler car.

Suddenly the lights of the Adler car illuminated an unlighted barricade just a few feet in front, and in the lane of the Adler car. The car crashed into the barricade, and Alder lost control. The car turned over, and was so badly wrecked that it was later sold for junk. None of the occupants of the Adler car were injured except Harry Wilbur Hansen, who was thrown out of the car, and pinned beneath the wreckage when the car came to rest.

Several disinterested witnesses testified for claimants. The testimony of Mr. Hurst was taken by deposition at Los Angeles, California, where he was then living. Their testimony showed that the barricade area was not illuminated by flares, and that no flares were burning in any part of the area to warn Robert Adler of the impending danger.

It is our opinion that respondent was guilty of negligence. *Pomprowitx* vs. *State,* **16** C.C.R. **230;** *Rommel* vs. *State,* No. **4306,** opinion filed February **9, 1951.**

Respondent makes no contention as to contribu-

tory negligence being an issue in this case, and the record amply shows freedom from contributory negligence on the part of claimants.

Claimants are, therefore, entitled to awards. As to the damages, Section 8 C of the Court of Claims Act limits recovery for cases sounding in tort to **$2,500.00** for each claimant.

Harry Wilbur Hansen is clearly entitled to $2,500.00. He sustained serious fractures of the right humerus and right scapula, and a fracture of the fourth and fifth dorsal vertebrae. He had multiple contusions, and was in a state of shock €or some time. He remained in the hospital for almost six months, and his medical and hospital bills exceeded $1,100.00. He lost six months wages as a conductor for the Chicago Transit Authority, in which position he had earned **$320.00** per month. He has permanent limitation of motion in his right) shoulder, and his injuries were conceded to be extremely painful.

Gustave F. Adler is entitled to be reimbursed for the damage to his automobile. He received $100.00 for the salvage, and the uncontroverted testimony shows that the vehicle was worth $895.00 just prior to the accident, leaving Mr. Adler's loss at $795.00.

An award is, therefore, entered in favor of claimant, Harry Wilbur Hansen, in the sum of $2,500.00.

An award is, therefore, entered in favor of claimant, Gustave F. Adler, in the sum of $795.00.

(No. 4307—Claimant awarded $272.82.)

MELVIN EVERETT STREET, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed July 6, 1951.

DENNIS J. GODFREY, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*When an award will be made.* Where claimant's injuries arose out of and in the course of his employment by the State of Illinois, an award may be made under the Workmen's Compensation Act.

DELANEY, J.

Claimant, Melvin Everett Street, seeks to recover from respondent under the Workmen's Compensation Act for injuries to the second and third toes of his right foot, as the result of an accident that arose out of and in the course of his employment as a construction laborer in the Department of Public Works and Buildings, Division of Highways.

On June 1, 1949 claimant was first employed at an hourly wage of $1.65. He was injured on the second day of his employment. Claimant was 32 years of age, single, and had no one dependent upon him for support. Other employees, working in the same capacity as claimant, ordinarily work less than 200 days a year. Therefore, under Section 10 of the Workmen's Compensation Act, claimant is presumed to have earned $1,560.00 in the year preceding the accident.

Mr. Street was assigned on June 2, 1949, as one of a group to remove sections of damaged or deteriorated pavement from U. S. Route No. 66 in Montgomery County. A compressed air-operated jack hammer was used to outline the sections and break concrete. The pavement thus broken out was to be removed and replaced with freshly poured concrete.

At approximately 4:00 P.M., at a point about three miles south of the Village of Farmersville, Mr. Street was operating the jack hammer assigned to him, when his arm struck a fellow workman. This caused Mr. Street to lose control of the jack hammer, which bounced onto his right foot, lacerating the foot, and fracturing the second and third toes.

The group foreman knew of the accident immediately after the occurrence, and sent Mr. Street to the St. Francis Hospital, Litchfield, where Dr. Harry A. Yaeger was placed in charge of the case.

On July 9, 1949, Dr. Yaeger submitted the following report to the Division of Highways:

"Nature of Injury—Compound comminuted fracture of second and third right toes, crushing injury of soft tissues."

On July 22, 1949, the Division learned that gangrene had developed in the second toe, and that an amputation would be necessary. At that time the Division learned that Dr. Yaeger was on vacation, and that Dr. J. R. Rebillat of Litchfield was attending Mr. Street until Dr. Yaeger returned. Dr. Rebillat informed the Division that his services were given on an exchange basis, and that he would make no charge to the State for them.

On November 15, 1949, Dr. Yaeger prepared his final report, which is as follows:

"Nature of Injury—Compound comminuted fractures of second and third right toes, crushing injury of soft tissues. Secondary gangrene of second toe. Treatment—amputation of right second toe. X-Rays—show fracture and injuries as indicated above. Estimated date of discharge—September 7, 1949. Estimated date patient able to work—the above date. Permanent disability—amputation of right toe. Date of discharge—September 7, 1949."

No jurisdictional question is raised.

The record consists of the complaint, Departmental Report, stipulation waiving briefs of both parties, and transcript of evidence.

Claimant's weekly compensation rate would be the maximum of $15.00. Since the accident occurred subsequent to July 1, 1947, this must be increased 30%, making the compensation $19.50 per week.

Mr. Street was paid compensation at the rate of $18.00 a week from June 3 to August 31, 1949, a period of 12 6/7 weeks, in the amount of $231.42. Claimant was totally disabled from June 3, 1949 to September 7, 1949, for which loss he should receive from the respondent $19.50 per week for 13 6/7 weeks, or a total of $270.24, from which should be deducted the sum of **$231.42,** which has already been paid by the respondent, leaving a balance of $38.82 due to claimant.

The claimant is also entitled to an additional award for the complete loss of the second toe of his right foot, under Section 8, Paragraph (e) (9), Workmen's Compensation Act, of 12 weeks at the compensation rate of $19.50 per week, or the sum of **$234.00.**

An award is, therefore, made to claimant, Melvin Everett Street, in the sum of $272.82, all of which has accrued, and is payable forthwith.

Betty E. Green was employed to take and transscribe the evidence at the hearing before Commissioner Summers. Charges in the amount of **$9.40** were incurred for the services, which charges are fair, reasonable and customary. An award is, therefore, entered in favor of Betty E. Green, in the amount of $9.40, payable forthwith.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees".

(No. 4356—Claimant awarded $527.50.)

OPAL FOX, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed July 6, 1961.

LEWIS AND LEWIS, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; CHARLES H. EVANS, Assistant Attorney General, for Respondent.

PERSONAL INJURY—*negligence in maintaining wavy, waxed floor.* Undisputed evidence that wax floor was uneven, with dents and ridges, proved sufficient negligence to entitle claimant to an award.

DELANEY, J.

This is a claim against the respondent, the State of Illinois, for personal injuries sustained in a fall in the offices of the Division of Unemployment Compensation, Department of Labor, in the City of West Frankfort, County of Franklin and State of Illinois.

The complaint alleges that the floor was so highly waxed by respondent as to be extremely slippery; that the floor was of a dark color, and, as a result, a person in the exercise of ordinary care and prudence could not observe that the floor was uneven with dents and ridges. Claimant sustained a fracture of her right ankle when she fell on the floor in question.

The record consists of the complaint, motion to strike, transcript of evidence, claimant's brief and argument, and respondent's statement, brief and argument.

After her injury, claimant was treated by Dr. T. W. Tweedy in Royalton, Illinois. As a result of the accident, the claimant lqst 13 .weeks employment at $35.00 per week, or the sum of $455.00, and also expended the sum of $72.50 for doctor, hospital and incidentals, or a total of $527.50. The record does not indicate any permanent injury to claimant's ankle.

The cases of *Carrano* vs. *State,* **18** C.C.R. **30,** and *Mack* vs. *Woman's Club* of *Aurora,* **303** Ill. App. **217,** have been cited. In the Carrano case, this Court referred to the case of the Woman's Club of Aurora where the plaintiff while attending a meeting in the club room, in the City of Aurora, slipped and fell on a waxed floor, thereby sustaining a broken hip. She instituted a suit for damages, claiming that the defendant was negligent in having the floor waxed, which thus rendered it dangerous and unsafe. The case was tried by a jury, which returned a verdict in favor of the plaintiff for **$3,500.00.**

In reversing the judgment, the Appellate Court held that the waxing of floors is a common practice, and too well known a custom to be considered negligence in the absence of evidence tending to prove some positive negligent act or omission on the part of the owner of the premises. Under such circumstances, the Court held that she must be held to have assumed any risks involved in her walking upon the floor, which were within themselves an incident to such act. There appears to have been no hidden danger.

From the record in this case it appears that Mr. Max Chamberlain, the only witness used by respondent on cross examination, admitted that the floor was slightly uneven, that there were slight indentures, and that the contour was slightly wavy.

The Court feels that claimant has proven positive negligent acts or omissions on the part of the respondent, which were the proximate cause of the accident.

An award is, therefore, entered in favor of the claimant, Opal Fox, in the sum of **$527.50.**

(No. 4390—Claimant awarded $853.00.)

BLANCHE RIGGALL, ADMX. ESTATE OF WILLIAM B. HICKERSON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed ***July 6,*** *1951.*

ERNEST G. UTTER, Attorney for Claimant.

IVAN A. ELLIOTT; Attorney General; CHARLES H. EVANS, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when an award will be made.* Where death of claimant's father arose out of and in the course of his employment by the State of Illinois, an award for funeral expenses may be made under the Workmen's Compensation Act.

DELANEY, J.

This complaint arose out of the death of Mr. William Hickerson on December 15, 1950. It was filed by his daughter, Mrs. Blanche Riggall, Administratrix of his estate. Mr. Hickerson was a widower, and lived alone on Star Route, Rushville, Schuyler County, Illinois. He was 77 years of age at the time of his death. All surviving children are of age, married, and none were dependent on him for any degree of support.

Mr. Hickerson was first employed by the Division of Highways on April 8, 1949 as a common laborer at a wage rate of 90 cents an hour. Although his wage rate increased to $1.00 an hour on July 1, 1949, his classification remained unchanged. He worked continuously for the Division, weather permitting and work being available, from the date of his employment until his death on December 15, 1950. Mr. Hickerson's earnings, exclusive of overtime, in the year preceding his death totaled $945.00.

Hourly laborers in the employment of the Division of Highways ordinarily work less than 200 days a year, and eight hours constitute a normal working day.

On December 15, 1950 at about 7:30 A.M., Mr.

Hickerson met his foreman, Mr. Grover Ulter, at the Division's storage lot in the Village of Pleasant View. There they secured a Division truck, and drove to a point on S.B.I. Route No. 100 about 1½ miles south of the junction of Routes Nos. 100 and 10 in Schuyler County. They arrived at this point at about 8:55 A.M., and started loading the truck with cinders from a roadside stock pile. After shoveling cinders for approximately 15 minutes, the truck was filled to about one-third its capacity. At that time, Mr. Hickerson was heard to gasp and fall to the ground. The foreman, Mr. Grover Ulter, of the Village of Frederick examined Mr. Hickerson, and, believing he was dead, called the Sheriff of Fulton County.

Because of the sudden death, the Division was not required to pay compensation, or furnish any medical care during Mr. Hickerson's last illness.

No jurisdictional question is raised. Respondent and claimant were operating under the Workmen's Compensation Act, and the death in question arose out of and in the course of the employment.

The record consists of the complaint, claimant's exhibits Nos. 1 and 2, Departmental Report, transcript of evidence, and stipulation waiving briefs of both parties.

We find that under the provisions of Section 7, Paragraph (e) of the Workmen's Compensation Act in force at the time of the death, the respondent is liable for funeral expenses of the decedent in an amount not to exceed $500.00, which amount is to be paid to the person incurring the expense of burial. The evidence discloses that the claimant, Blanche Riggall, Admx., paid the funeral expenses in the amount of **$453.00.**

She is, therefore, entitled to be reimbursed therefor by the respondent to the extent of $453.00.

We further find that pursuant to the further provisions of said Section 7, Paragraph (e) of the Workmen's Compensation Act in force at the time of the death, the respondent is also required to pay into a Special Fund, of which the State Treasurer is ex-officio custodian, the sum of Four hundred Dollars ($400.00).

An award is, therefore, hereby made as follows:

To Blanche Riggall, Admx. of the estate of William Hickerson, deceased, in repayment for funeral expenses advanced by her, the sum of $453.00.

To the State Treasurer of the State of Illinois as ex-officio custodian of the Workmen's Compensation Special Fund, the sum of $400.00; said sum to be held and disbursed by said State Treasurer in accordance with the provisions of the Workmen's Compensation Act of this State.

Mary L. Le Sage was employed to take and transcribe the evidence at the hearing before Commissioner Summers. Charges in the amount of $15.00 were incurred for these services, which charges are fair, reasonable and customary. An award is, therefore, entered in favor of Mary L. Le Sage, in the amount of $15.00, payable forthwith.

This award. being subject to the provisions of Section 3 of "An Act concerning the payment of compensation awards to State employees", and subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the Road Fund in the manner provided by the foregoing acts.

(No. 4429—Claimant awarded $1,012.50.)

EDMOND C. BIRCH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed July 6, 1951.

TAYLOR AND SCHNEIDERJON, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when an award will be made.* Where claimant's injury arose out of and in the course of his employment by the State of Illinois, an award may be made under the Workmen's Compensation Act.

DELANEY, J.

The claimant, Edmond C. Birch, was on June 1, 1950 employed to mow vegetation on highways under the Department of Public Works and Buildings, Division of Highways. The terms of the employment provided that the work was to be done with a team and mower owned by Mr. Birch. He was paid $1.80 an hour; one dollar was for the pay of the driver, and 80 cents for the use of the team and mower. He was to cut vegetation when, if, and as the Division directed.

On June 13, 1950, Mr. Birch was mowing vegetation on S.B.I. Route No. 37 in Effingham County. At 2:30 o'clock that afternoon, he was working at a point approximately two miles southeast of Edgewood, when a wheel of the mower dropped into a hole on the highway shoulder. The resulting unexpected tipping motion of the mower caused Mr. Birch to fall from the mower seat to the ground. He fell on his left arm and shoulder, fracturing the arm at its upper extremity.

Mr. Birch's foreman saw the accident, and took him to Effingham, where he was placed under the care of Dr. H. F. Webb of the Effingham Clinic.

On June 14, 1950 Dr. Webb submitted the following report to the Division of Highways:

"X-Rays show comminuted fracture surgical neck, left humerus."

On June **14, 1950** the Division of Highways arranged to transfer Mr. Birch to the care of Dr. J. Albert Key and Associates, specialists in orthopedic surgery, in St. Louis, Missouri.

Dr. Key submitted a final report on April **17, 1951,** which reads as follows:

"Mr. Birch was again examined on April **13, 1951,** at which time it was found that there was still some atrophy about the shoulder girdle; there is limitation of elevation, and about 50% limitation of external rotation. There is no tenderness but some weakness, and the patient has some pain on motion. I believe that the shoulder will gradually improve, and feel that he has a permanent partial impairment of 20% of the arm as a whole."

No jurisdictional question is raised. Respondent and claimant were operating under the Workmen's Compensation Act, and the accident in question arose out of and in the course of the employment. Respondent furnished complete medical and hospital treatment. The only question is the extent of disability suffered by claimant.

Claimant was **45** years of age, and unmarried at the time of the accident. There are no children under 18 years of age dependent upon him for support. Claimant was employed as a laborer at a wage of $1.00 an hour. Other Division employees, working in the same capacity as claimant, ordinarily work less than 200 days a year. Therefore, under Section 10 of the Workmen's Compensation Act, claimant is presumed to have earned $1,560.00 in the year preceding the accident.

We find from the evidence that claimant has sustained a 20% loss of use of his left arm, as a result of the accident.

Claimant's compensation rate would be the maxi-

mum of **$15.00.** The injury having occurred subsequent to July **1, 1949,** this must be increased 50%, making a compensation rate of **$22.50** per week. The Division paid Mr. Birch compensation at the rate of **$22.50** a week from June **14, 1950** to January **15,1951,** inclusive, in the amount of **$694.25.**

The record consists of the complaint, Departmental Report, and **a** stipulation filed in lieu of evidence.

For a 20% permanent loss of use of his left arm under Section 8, Paragraph (e) (13), the claimant should receive from the respondent **$22.50** per week for **45** weeks, or the sum of **$1,012.50.**

An award is, therefore, entered in favor of the claimant, Edmond C. Birch, in the amount of **$1,012.50,** payable as follows:

$552.84, which has accrued, is payable forthwith;
$459.66, to be paid in weekly installments of $22.50, beginning July 13, 1951 *for* a period of 20 weeks, with a final payment of $9.66.

This award is subject to the approval of the Governor, as provided in Section **3** of "An Act concerning the payment of compensation awards to State employees".

(No. 4437—Claim denied.)

ROBERT J. ALLEN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed July 6, 1961.

JOSEPH L. MOORE, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; **CHARLES H. EVANS,** Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*Limitations—when claim will be denied.* Where complaint shows on its face that more than one year had elapsed since date of the injury, the claim is barred by limitation under Section 24 of the Workmen's Compensation Act, and will be dismissed.

DELANEY, J.

On May 15, **1951** the claimant filed his complaint. It alleges that on November **23, 1949,** Robert J. Allen, an employee of the Department of Public Works and Buildings, Division of Highways, was injured in the City of Springfield, Illinois, while engaged in the performance of his duties in cleaning a striping tank, when a chemical broke through a pipe, and sprayed the eyes, face and body of claimant.

The record consists of the complaint, motion of respondent to dismiss, and notice to call up motion to dismiss.

Section **24** of the Workmen's Compensation Act, Chap. **48,** Par. 161, Ill. Rev. Stat., **1949,** provides:

"No proceedings for compensation under this Act shall be maintained unless notice **of** the accident has been given to the employer as soon as practicable, but not later than thirty days after the accident, except in cases of hernia, in which cases notice shall be given the employer within fifteen days after the accident. In case of mental incapacity of the employee or any dependents of a deceased employee, who may be entitled to compensation under the provisions of this Act, the limitations of time by this Act provided shall not begin to run against said mental incompetents until a conservator or guardian has been appointed: Provided that where such limitations bar an adult mentally competent member of a class of beneficiaries entitled to receive compensation for death, such limitation shall then bar all beneficiaries notwithstanding that another or others be mentally **or** otherwise incapacitated or incompetent

No defect or inaccuracy of such notice shall be a bar to the maintenance of proceedings of arbitration or otherwise by the employee unless the employer proves that he is unduly prejudiced in such proceedings, by such defect or inaccuracy. Notice **of** the accident shall give the approximate date and place of the accident, if known, and may be given orally or in writing; provided, no proceedings **for** compensation under this Act shall be maintained unless claim for compensation has been made within six months. after the accident; Provided,, that in any case, unless application for compensation is filed with the Industrial Commission within one year after the date of the accident, where no compensation has been paid, or within one year after the date **of** the last payment **of** compensation, where any has been paid, the right to file such application shall be barred; Provided, further, that if the accidental injury results in death within said year, application for compensation for death may be filed with the Industrial **Com**mission within one year after the date of death, but not thereafter."

The complaint shows on its face that more than one year had elapsed from the date of the alleged injury prior to the filing of the complaint herein. Therefore, under the law, this Court is without jurisdiction to hear and determine the claim for the reason that the statute of limitations has run against the claimant.

Having concluded that we are without jurisdiction to hear and determine this claim, it becomes unnecessary to discuss any other questions.

The motion of the Attorney General is allowed.

Complaint dismissed.

(No. 4182—Claimant awarded $5,200.00.)

FLOSSIE H. WRIGHT, **WIDOW,** ET **AL,** Claimant, *vs.* STATE **OF** ILLINOIS, Respondent.

Opinion filed September 7, 1951.

SUMNER C. PALMER AND LOUIS N. BLUMENTHAL, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*Course* of ***employment—when an award will be made.*** Where evidence on rehearing showed that deceased's injury arose out of and in the course of his employment by the State of Illinois, an award **will** be made under the Workmen's Compensation Act.

SAME—*pre-existing* ***disease.*** Where death **is** caused by a pre-existing disease, it must be shown that the disease was aggravated and accelerated by an accidental injury, that said injury was received in the course **of** the employment, and that it was the immediate or proximate cause of death.

SCHUMAN, C. J.

The claimant, Flossie H. Wright, widow of John **A.** Wright, filed her complaint on March **31, 1949,** seeking an award under the Workmen's Compensation Act for the death of her husband on January **5, 1949,**

alleged to have resulted from an accident on December 27, 1948, arising out of and in the course of his employment by the respondent as Chief Engineer at the Chicago State Hospital.

There is no dispute that the decedent, John A. Wright, had a chronic heart ailment.

From an exanimation of the record on December 27, 1948, the decedent had left his office and gone to the general store to get some things for dinner (Record 5). While on the way to the store he slipped off of a curb, fell, and bruised his left hip. While it can be conceded from the medical testimony that the fall created a causal connection with his death in throwing extra exertion on the heart, the principal question for the court to decide is, "Did the fall arise out of and in the course of his employment?''

The burden was on defendant in error to prove that the death of the employee was the result of an accident arising out of and in the course of the employment. The rule is equally well settled that an award must be founded upon facts and inferences reasonably drawn from facts proved by the evidence, and cannot be based upon guess or conjecture. *Fittro* vs. *Ind. Corn.*, 337 Ill. 532-536; *Town of Cicero* vs. *Ind. Corn.*, 404 Ill. 487-492.

As pointed out by the Supreme Court in *Jakub* vs. *Ind. Corn.*, 288 Ill. 87, where the death was caused by a pre-existing heart disease, it must be shown that the disease was aggravated and accelerated by an accidental injury sustained in the course of the employment. Where there is a pre-existing disease, in order to bring the case within the rule, there must be an accidental injury as the immediate, or proximate cause of death. An accidental injury is one which occurs in the course

of the employment, unexpectedly, and without the affirmative design of the employee. It is something which is unforeseen, and not expected by the person to whom it happens. Thus, in pre-existing disease cases, the evidence must show an aggravation, or acceleration of the disease, by some accidental injury. *Fittro* vs. *Ind. Corn.*, id. 537.

In the original opinion entered by the Court it was stated that there was no evidence in the record that deceased was in the performance of his duties as Chief Engineer. A petition for rehearing was allowed on the ground that there was apparently some dispute as to just what transactions occurred at the "General Store" on November 16, 1950. Additional testimony was heard, and it was shown that the general store was on the hospital grounds, and that institutional supplies were kept there; that no supplies were kept for private persons or employees, and that deceased had no personal property in said store; that in order to obtain supplies a requisition would have to be secured from a department head; that deceased's hours were from 8:00 A.M. to 5:00 P.M., and his lunch hour was from 12:00 M. to 1:00 P.M.; that his duties included the maintenance of said store, and mechanical supplies were received at said store; and that when deceased came out of the general store he had nothing in his hands.

The business manager of the store testified that complete orders of foodstuffs and meats are received for the institution, and are not for sale to the public or to employees; that it was possible for employees to get supplies, but the rules required a requisition for the smallest item; that departmental heads could get food, and deliver requisitions later.

Flossie H. Wright, claimant, testified on the date of decedent's fall he did not bring anything home for dinner, and that decedent never personally carried provisions home.

From the additional testimony, it is apparent that decedent's duties required him to be about the general store; that he did sustain an injury during working hours, and on the premises of the State. While the Court does not countenance the practice of changing testimony, it must give every liberal interpretation of the evidence before it.

In view of the additional testimony, and giving to it a liberal interpretation, the Court concludes the injury sustained arose out of and in the course of decedent's employment, and claimant is, therefore, entitled to an award. (*Town of Cicero* vs. *Ind. Corn.*, **404 Ill. 487-492.)**

The earnings of decedent during the year preceding his injuries and resultant death were $6,240.00.

The claim of William J. Cleary & Co. for stenographic services in the amount of $181.10 is found to be reasonable and customary.

An award is, therefore, made in favor of the claimant, Flossie H. Wright, in the amount of $5,200.00, which is to be paid to her as follows:

$2,713.28, which has accrued to September 7, 1951, and is payable forthwith.

The balance of $2,486.72 to be paid in weekly installments at the rate of 019.50 per week commencing September 14, 1951 for a period of 127 weeks, with one final payment of 510.22.

An award is also entered in favor of William J. Cleary & Co. for stenographic services in the amount of $181.10, which is payable forthwith.

All future payments being subject to the terms and conditions of the Workmen's Compensation **Act** of Illinois, jurisdiction of this cause is specifically reserved for the entry of such further orders as may from time to time be necessary.

This award is subject to the approval of the Governor as provided in Section **3** of "An Act concerning the payment of compensation awards to State employees".

(No. 4290—Claim denied.)

ILLINOIS CENTRAL RAILROAD COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion* filed *September 7, 1951.

GRAHAM AND GRAHAM, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

CONTRACTS—*when* ***indemnity contract*** *illegal.* Indemnity contract with railroad is illegal, and cannot be enforced, where no showing **of** express authority to enter same is made, as required by Section 19, Article **4** of the Illinois Constitution.

SCHUMAN, C. J.

Claimant, Illinois Central Railroad Company, filed its claim against the State of Illinois, which, according to the complaint, was predicated solely on a written contract made and entered into between said Railroad Company and the State of Illinois, through the Division of Highways, on the 26th day of September, 1949. The complaint, among other things, alleged that on September **7,1949** one of its employees, namely, Grover Hillard, was injured by the failure of the Division of Highways to construct and maintain a gravel pit and conveyor according to the terms of the contract attached to the complaint.

The facts show that on September 7, 1949 Grover Hillard was employed by the Illinois Central Railroad Company. He testified that he was injured at Bethany, Illinois, while riding a car of gravel, and claimed that the conveyor dropped down and pinned his right arm to the gravel car. He further testified that he was familiar with the tracks and equipment, and that the injury occurred about 6:00 P.M.; that he saw the location of the conveyor around 5:50 P.M., a few minutes before the accident happened; that he had received a message from Pekin, Illinois that the conveyor was there, and that his injury was occasioned by reason of the uprights of the conveyor pinning his arm against the side of the car, and further that the vibration of the train caused the 'conveyor to move towards the car in which he was riding.

Harry E. McWilliams, testifying for the claimant, stated that he had made a sketch showing the location of the conveyor with reference to the tract and the location of the pit, which sketch was indicated as claimant's exhibit No. 11. The sketch was drawn to scale,. and showed the measurements of the different parts of the pit with reference to the railroad track, which exhibit was made in the early morning of September 8, 1949.

A Mr. Harry G. Siebert testified for the claimant, and identified a contract dated September 7, 1949, which contract appears as claimant's exhibit No. 1.

Edson W. Minor, a witness for the claimant, testified that he was a railroad agent for the claimant, and lived at Bethany, Illinois; that he knew of the location of the pit, and that a Mr. Parker, foreman of the unit unloading State material at Bethany, made the arrangements for the unloading of material. He

stated he knew the conveyor was placed in the pit on the morning of September 7, and had contacted the Division engineers of the claimant's company with reference to its installation.

Thomas H. F. Norris, Superintendent of day labor for the Division of Highways of the State of Illinois, testified for claimant, and identified a letter dated September 9, **1949,** which appears as claimant's exhibit No. **12.** He advised the claimant that he would sign a pit agreement as soon as received, and further stated that paragraph 7 referring to indemnity would be stricken from the agreement.

The statement of the attorney for claimant before the hearing on February 8, 1951 indicated that the sole contention of the claimant for recovery against the State was based on alleged violation of paragraph **4** of the contract, which appears as follows:

"Said pit, except while being actually used, shall be kept covered with suitable iron grating or planking, and if planking is used, such planking shall not be less than two **(2)** inches in thickness. Said conveyor, or any part thereof, save while in actual use, shall not be permitted to come within eight and one-half (8½) feet from the center line of said track of the railroad company. Licensee agrees ***to*** indemnify and save harmless the Railroad Company from any liability for death of or injury to persons due to the failure of the licensee to keep and fulfill the obligations in this paragraph **4** provided."

The additional facts show that claimant paid to Grover Hillard the sum of $750.00 for which they took a release and assignment. They also paid a $25.00 doctor bill, **$18.30** hospital bill, and $7.00 for ambulance, making a total claim of **$800.30.** The claim was made against the State on the theory that the contract provided that the State agreed to indemnify and save harmless the Railroad Company from any liability for injury to persons, due to the failure of the State to maintain the conveyor at least eight and one-half feet from the centerline of said railroad track.

The State contended in its answer that the contract was entered into on September 26, 1949, subsequent to the date of the alleged injury, and, therefore, could create no liability on behalf of the State; that the claimant was engaged in interstate commerce, and that the injury to the said Grover Hillard was the result of the negligence of the claimant. It further contended that the claimant's demand had been released, and by reason thereof the State was released from all liability.

It is contended by claimant in its brief that it has the right to recover under the theory of indemnity, and cites numerous cases in support of this contention. Under this principle, it would be necessary to charge and prove that the State was negligent in the maintenance of the conveyor, that the negligence of the State was the primary cause of the injury, and whose positive acts negligently done, produced the defective condition, which caused the injury. It is sufficient to say that the complaint is not predicated on any charge of negligence, but solely on a contractual provision, which is definitely shown by the complaint and the opening statement of claimant's attorney. There are no cases cited by the claimant, which sustain the principle that the State of Illinois can be bound by indemnity contracts of the kind in question here, which, in the Court's opinion, are illegal. It is elementary, for various reasons, both constitutional and otherwise, that the State could not contract to indemnify private individuals or corporations for losses of the nature indicated in paragraph 4 of said agreement. It is apparent from the letter written by Mr. Norris that the indemnity provisions of the contract were to be eliminated. While it is true that he referred only to para-

graph 7, it is apparent that he was speaking of all provisions relating to indemnity. This Court has held in numerous cases that the authority to enter into such a contract must be definitely shown and proven, and, upon failure to do so, the contract could not be enforced. We think that Section 19 of Article 4 of the Illinois Constitution of 1870 is pertinent to the claim wherein it provides:

"The General Assembly shall never grant or authorize extra compensation, fee, or allowance, to any public officer, agent, servant, or contractor, ... ,nor authorize the payment of any claim or part thereof hereafter created against the State under any agreement or contract made without express authority at law."

Nothing has been shown to the Court that such contract of indemnity is authorized by law, and, therefore, the Court feels that such contracts are illegal and void.

For the reasons above assigned, the claim will be denied.

(No. 4313—Claim denied.)

JOSEPH BURNS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 7, 1951.

LEONARD, HOELLEN AND RASZUS, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

ILLINOIS NATIONAL GUARD—*Negligence—when an award will be denied.* Where undisputed evidence showed that the driver of a National Guard jeep had no authority to use it, and was not on government business, he was not an agent of the State of Illinois, and claim based on negligence of driver will be denied.

SCHUMAN, C. J.

Claimant, Joseph Burns, while on duty as a police officer for the City of Chicago on July 27, 1948, was

struck by an Illinois National Guard jeep driven by Sergeant James T. O'Connor of the 109th **A.A.A.** Brigade, Fort Sheridan, Illinois, and sustained rather severe personal injuries.

The complaint alleges that Sergeant O'Connor was operating the jeep as an agent of the State of Illinois, and charges certain specific acts of negligence.

The first question to determine is whether Sergeant O'Connor was an agent of the State, and on its business; or in the scope of any agency at the time of the accident and resultant injuries to the claimant.

The undisputed evidence shows that Sergeant O'Connor did not have competent authority to use the jeep, identified as "Government Vehicle #20136574", and that he was not on official government business, and, hence, not in the line of duty. The evidence showed that Sergeant Nester had issued to Sergeant O'Connor two off post passes, but none to use any government vehicle.

It is apparent from the record that Sergeant O'Connor did not have proper authority to use the government jeep, nor was he on any lawful business authorized by any of his superiors, or in the line of duty.

Claimant cites the case *Hansen* vs. *State,* **6** G.C.R. 548, in which an airplane on an authorized flight crashed into an automobile; and the case of *Gyenes* vs. *State,* 9 C.C.R. 185, in which a National Guardsman, while on active duty, killed a man, and the Court allowed an award, because the statutes exempted the guardsman from any liability. The above cases were both predicated on evidence showing acts, which, occurred in active discharge of duties. For this reason, these cases are not in point.

The complaint herein is based on the negligence of Sergeant O'Connor, and the fact that he was an agent of the State. There is no proof of any agency in this record, and for this reason the claim will be denied. Moreover, the evidence clearly shows that Sergeant O'Connor used the jeep for purely personal reasons.

The Court recognizes the injuries sustained by claimant, but he will be confined to his remedy against Sergeant O'Connor.

Claim denied.

(No. 4316—Claimant awarded $518.95.)

GRACE W. MORRIS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 7, 1961.

G. WILLIAM HORSLEY, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when an award will be made.* **Where claimant's injuries arose out of and in the course of her employment by the State of Illinois, with no loss of salary, an award will be made for monies expended for medical treatment.**

DELANEY, J.

Claimant, Grace W. Morris, filed her complaint on June 30, 1950, wherein she alleges that on June 30, 1949 she was employed by the respondent, State of Illinois, in the State Department of Public Instruction, Division of Special Education for Handicapped Children. While in the course of her employment, she was in the north balcony of the House of Representatives. As she approached a seat, she missed a step, and fell. In falling she hit her back, which caused her pain immediately thereafter.

Claimant went to St. John's Hospital on July 7,

1949. She was treated by Drs. Schilsky and Barringer for a ruptured disc between the sixth and seventh vertebra, a severely strained right lumbar muscle, and torn ligaments.

The claimant was paid full salary for time lost as a result of the accident. There is no compensation due claimant for loss of time.

Claimant expended the sum of $518.95 in her efforts to recover from the injuries received on June 30, 1949, and this figure has been introduced into the record without objection on the part of the respondent.

The record consists of the complaint, Departmental Report, Supplemental Departmental Report, transcript of evidence, claimant's exhibit No. 1, Supplemental Departmental Report dated November 15, 1950, transcript of evidence, stipulation waiving briefs of both parties, and motion of claimant for leave to waive the filing of abstract of evidence.

No jurisdictional question is raised. Respondent and claimant were operating under the Workmen's Compensation Act, and the accident in question arose out of and in the course of the employment.

An award is, therefore, hereby entered in favor of claimant, Grace W. Morris, in the amount of Five Hundred and Eighteen Dollars and Ninety-five Cents ($518.95), payable forthwith.

Harry L. Livingstone was employed to take and transcribe the testimony in support of this claim, for which he made charges of $16.00 and $60.00, making a total charge of $76.00. We find this charge to be fair, reasonable and customary for the services rendered.

An award is, therefore, hereby entered in favor of Harry L. Livingstone in the sum of Seventy-Six Dollars ($76.00).

This award is subject to the approval of the Governor, as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees".

(No. 4351—Claim denied.)

HARRY WHITNEY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 7, 1961.

DIRECTOR, LIEBENSON AND SHEPPARD, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

NEGLIGENCE—*Personal injuries—when claim will be denied.* **Where evidence showed claimant's alleged injuries did not occur on premises of respondent, and there was no showing of negligence, an award will be denied.**

LANSDEN, J.

Claimant, Harry Whitney, seeks to recover from respondent for its alleged negligence.

On October 18, 1949, the Division of Unemployment Compensation of the Department of Labor had an office at 862 East 63rd Street, Chicago, Illinois. Such office was leased from the LaSalle National Bank as Trustee in Trust No. 11135. Lessor under the terms of the lease provided all janitor and maintenance service for the space occupied by respondent's office.

A common stairway and landing led from the ground floor to the entrance to respondent's office, said stairway and landing not being leased to respondent.

Claimant had visited this office several times prior to October 18, 1949. On that day he arrived at the building where the office was located at about 9:30 A.M., walked upstairs, entered the office, was informed

he was early for his scheduled appointment, and told to wait. A few minutes later he felt faint, left the office, and went out on the landing alongside of the common stairway.

Then, claimant testified, he started back into the office, and slipped and fell just inside the door of respondent's office. He did not look at the floor, and could not say what, if anything, he slipped on. He never did categorically state he slipped on cigarette butts or papers on the floor, and he did not remember the degree of polish on the floor.

The injuries, according to claimant's testimony, were serious, especially to his hand, some bones of which were fractured.

However, we are unable to receive claimant's version of the accident at its face value.

Immediately after his fall he stated to George Scott, then manager of respondent's office, that he had fallen outside the office, and, therefore, not on the premiees of respondent.

But the portion of this case, which most impels us to give claimant's testimony very little weight, is that which shows that he continuously received Unemployment Compensation benefits from October 18, 1949 to April, 1950. One receiving such benefits is required to certify he is able to work. Yet, claimant at the hearing stated he could not work during the period except with one hand. According to the numerous interview cards introduced in evidence in this case, claimant stated he was able to work, and no interviewer deemed his injuries serious enough to prevent him from working.

We, therefore, decide that the evidence in this case preponderates in favor of respondent, that claim-

ant's fall did not occur on respondent's premises, and that claimant is not entitled to an award.

There is a further ground for denial of an award. The evidence of claimant, taken at its strongest, shows that claimant did no more than slip on a floor, and not on any foreign substance thereon. The premises were well lighted, and claimant had already that morning been over the area where he claimed he slipped and fell. It was not negligence for respondent to have the floor waxed, or even highly polished. This Court has expressly so decided in *Carrano* vs. *State,* 18 C.C.R. 30, on the authority of *Mack* vs. *Woman's Club of Aurora*, 303 Ill. App. 217. Claimant has shown no negligence on the part of respondent, which would warrant an award.

Award denied.

(No. 4363—Claimant awarded $1,209.63.)

AUSTIN POWELL, Claimant, *vs.* STATE OF **ILLINOIS,** Respondent.

Opinion filed July 6, 1951.
Supplemental Opinion filed September 7, 1951.

ROBERT J. SAUNDERS, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when an award will be made.* Where claimant's injury arose out of and in the course of his employment by the State of Illinois, an award may be made under the Workmen's Compensation Act.

SAME—*modification of award.* Upon a rehearing, Court may reduce an award by the amount of medical expenses previously paid by respondent.

DELANEY, J.

The claimant, Austin Powell, was on May 17, 1950 employed by the respondent in the Department of Public Works and Buildings, Division of Parks and

Memorials. On May 17, 1950, the claimant, in the course of his employment by the respondent; was operating a winch for the raising and lowering of a dredge suction line, which was being used to deepen the lake at Grand Marais State Park. While the claimant was so operating the winch for the drop of the suction line, it went out of control, causing the winch crank to spin arcund and strike the right arm of the claimant twice. These two blows to the claimant's arm caused a fracture of the proximal portion of the radius of the right arm.

Claimant was treated at St. Mary's Hospital where an X-Ray was taken, and a cast put on his right arm by Dr. Robert E. Shea. The X-Ray showed that the radius of the right arm was fractured. This fracture of the right radius healed in such a position as to cause some degree of deformity. The proximal portion of the radius healed with a slight lateral inclination, also a slight medial inclination of the distal fragments. X-Ray of the healed fracture showed excess callus to be present.

From the medical testimony of Drs. Robert E. Shea and Olin B. Boyd, as well as from the Commissioner's examination of the claimant's arm, we feel that claimant has suffered a 25% permanent loss of use of his right arm.

No jurisdictional question is raised. Respondent and claimant were operating under the Workmen's Compensation Act, and the accident in question arose out of and in the course of the employment.

The record consists of the complaint, Departmental Report, stipulation waiving briefs of both parties, transcript of the evidence, claimant's X-Ray exhibits Nos. 1, 2 and 4, and claimant's exhibit No. 3.

On the date of his accident, claimant was **46** years of age, married, and had no children under **18** years of age dependent upon him for support. His rate of pay was **$1.00** per hour; and, although he had worked for respondent for less than one year, employees engaged in similar work earned, in excess of **$1,560.00** per year. Claimant's compensation rate would, therefore, be the maximum of **$15.00** per week. The injury having occurred subsequent to July **1, 1949,** this must be increased 50%, making a compensation rate of **$22.50.**

For 25% permanent loss of use of his right arm, under Section 8, Paragraph (e) (13), the claimant should receive from the respondent **$22.50** per week for **56¼** weeks, or the sum of **$1,265.63.** Although claimant was off duty seven days, he was paid his regular salary, so from the award must be deducted the sum of **$56.00,** making a total amount due of **$1,209.63.** Claimant is also entitled to be reimbursed on account of medical and hospital expenses due to Dr. Robert E. Shea in the amount of **$95.00.**

An award is, therefore, entered in favor of claimant, Austin Powell, in the amount of **$1,304.63,** all of which has accrued, and is payable forthwith.

Igatha Broach was employed to take and transcribe the evidence at the hearing before Commissioner Summers. Charges in the amount of **$23.90** were incurred for these services, which charges are fair, reasonable and customary. An award is, therefore, entered in favor of Igatha Broach in the sum of **$23.90,** payable forthwith.

This award is subject to the approval of the Governor as provided in Section **3** of "An Act concerning

the payment of compensation awards to State employees".

SUPPLEMENTAL OPINION.

DELANEY, J.

On July 6, 1951 an award was entered by this Court in favor of claimant, Austin Powell, in the amount of $1,304.63 under the provisions of the Workmen's Compensation Act.

Subsequent thereto, respondent filed its petition for rehearing, attaching thereto as exhibit No. 1 a cancelled warrant containing the endorsement of Dr. Robert E. Shea. The warrant is numbered 690012, and is dated April 23, 1951. This payment was made to Dr. Shea as satisfaction for medical services rendered to the claimant in this matter, for which he made a charge of $95.00.

Therefore, paragraphs four and five of page two of the opinion filed herein on July 6, 1951 are hereby stricken, and, in lieu thereof, there are substituted the following two paragraphs:

For 25% permanent loss of use of his right arm under Section 8, Paragraph (e) (13), the claimant should receive from the respondent $22.50 per week for 56¼ weeks, or the sum of $1,265.63. Although claimant was off duty seven days, he was paid his regular salary, so from an award must be deducted the sum of $56.00, making an award due of $1,209.63.

An award is, therefore, entered in favor of claimant, Austin Powell, in the amount of $1,209.63.

(No. 4369—Claimant awarded $134.00.)

AURILLA UPDIKE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 7, 1961.

VAN METER AND OXTOBY, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when an award will be made.* **Where claimant's injury** arose **out of and in the course of her employment by the State of Illinois, an award may be made under the Workmen's Compensation Act.**

DELANEY, J.

The claimant, Aurilla Updike, was on November **30, 1949** employed by the Department of Public Welfare at the Lincoln State School and Colony. On November **30,** 1949, the claimant, in the course **of** her employment as Seamstress **I,** was operating a cutting machine in the sewing room; the cutting blade of said machine being about six inches long. While cutting apron collars, she noticed some wrinkling in the material, which she attempted to smooth before cutting. At that instant the cutting blade came down causing an injury, classified as serious, and described as a deep laceration extending in an oblique direction from the medial side of the left little finger just proximal to the distal interphalangeal joint across to the lateral side at the level of the proximal end of the fingernail. The portion, distal to the laceration, is almost completely severed from the rest of the finger. It is possible that there is sufficient injury to the digital arteries so that the blood supply may be inadequate, necessitating amputation of the entire distal phalanx.

Claimant at the time of the accident was married, **and** had no children. Her annual earnings during the year immediately preceding her injury were **$2,005.00.**

No jurisdictional question is raised. Respondent and claimant were operating under the Workmen's Compensation Act, and the accident arose out of and in the course of the employment.

The record consists of the complaint, Departmental Report, and stipulation filed in lieu of evidence.

Claimant is entitled to an award for 50% loss of her left fourth finger, commonly called the little finger, under Section 8, Paragraph (e) *(5)* of the Workmen's Compensation Act, amounting to $225.00. It appears from the Departmental Report that claimant was off duty for a period of one month, and that she was paid the sum of $181.00. Claimant's compensation rate is the maximum of $15.00 per week. Since the accident occurred subsequent to July 1, 1949, this must be increased 50%, making her compensation rate $22.50 per week. As claimant was entitled to four weeks while temporarily totally incapacitated, she should have received *$90.00.* Claimant, therefore, was overpaid the sum of $91.00, which must be deducted from her award, leaving a total award due in the sum of $134.00.

An award is, therefore, entered in favor of claimant, Aurilla Updike, in the sum of $134.00, all of which has accrued, and is payable forthwith.

This is subject to the approval of the Governor, as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees".

(No. 4381—Claimant awarded $236.52.)

JAMES A. CHULLY, Claimant, *vs.* STATE OF **ILLINOIS,** Respondent.

Opinion filed September 7, 1951.

C. **GEORGE** DIMAS, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; **CHARLES** H. **EVANS,** Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION *Ac Twhen an award will be made.* **Where claimant's injury arose out of and in the course of his employment by the *State* of Illinois, an award may be made under the Workmen's Compensation Act.**

SCHUMAN, C. J.

Claimant, James A. Chully, was employed by the Division of Highways, as a highway section helper, and on May 26, **1950** was earning **$198.00** a month. His annual earnings preceding his injury on said date would have amounted to $2,376.00. Claimant was married, and on said date had two children under sixteen years of age dependent on him for support.

There are no jurisdictional questions involved, and the only question presented is the nature and extent of disability.

Claimant, while in the performance of his duties, was helping to close the end gate on a state truck, when his left index finger was caught between the gate and the truck body. Medical testimony showed claimant suffered laceration of the left index finger with a comminuted fracture of the distal phalanx, and lateral ligaments torn at joint.

At the hearing, claimant's finger was examined, and, from the examination and medical testimony, it is concluded that claimant sustained a 30% permanent loss of use of the left index finger.

Claimant lost **1** 2/7 weeks from work during 'which time he was temporarily totally incapacitated. For this he would be entitled to compensation for 2/7 weeks.

Julia Hertz furnished stenographic services, for which she has submitted a statement in the amount **of $27.50,** which the court finds reasonable.

The following awards are entered:

2/7 weeks at $24.00 per week in the amount of $6.86 for temporary total disability; the sum of $288.00 for 30% permanent loss of use of the left index finger, computed at 12 weeks at $24.00 per week, making a total of $294.86, less $55.34 previously paid as wages, making a total net award of $236.52, all of which has accrued and is payable forthwith.

The sum of $27.50 payable to Julia Hertz for stenographic services.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees".

(No. 4353—Claimant awarded $5,340.00 and Life Pension.)

GEORGE E. WRIGHT, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 7, 1951.

HERBERT N. TRAGETHON, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when an award will be made.* Where claimant's injuries arose out of and in the course of his employment by the State of Illinois, an award may be made under the Workmen's Compensation *Act.*

DELANEY, J.

George E. Wright, claimant, was employed by the Military and Naval Department of the State of Illinois at the Camp Lincoln Armory in Springfield, Illinois. He seeks to recover from respondent under the Workmen's Compensation Act for injuries suffered on April 9, 1950.

Claimant was employed as a fireman and watchman, and, in performing his duties on the date of the accident, he was returning to the boiler room after a routine check of the building. Upon entering the boiler room claimant slipped on the stairs, leading to the floor of the boiler room, and fell. The accident occurred at approximately 3:00 to 3:30 A.M., and claim-

ant was not given first aid or medical attention until about 6:30 A.M. when the relief man arrived on the job.

He was removed to his home, a doctor summoned, and on April 10th he was removed to St. John's Hospital. He was first attended by Drs. Franklin Maurer and George Fleischli, who performed an operation on his right hip. The most serious injury was a comminuted fracture of the surgical neck of the right femur, along with abrasions to the right elbow, and injury to the back. He was hospitalized from April 10, 1950 to September 10, 1950. At the time of the hearing there was extensive testimony by both Drs. Maurer and Fleischli as to the nature and extent of the injuries, and the present condition of the claimant. There was extensive testimony as to the condition of the right leg, left leg and back. In addition to the injury, claimant was suffering from an aggravated condition of his left leg, having had varicose veins for a period of years, ankylosis of the right hip, stiffness and soreness in the back, and a hernia, which did not arise out of this accident. Both Drs. Maurer and Fleischli were of the opinion that claimant was totally and permanently disabled, and that he would never be able to pursue a gainful occupation.

On the date of the hearing, claimant was walking with a cane, and, after listening to the medical evidence, talking with the claimant, and observing him in moving, our Commissioner, Henry S. Wise, was of the opinion that he was totally and permanently disabled. He only has an eighth grade education, and has done manual labor all of his life. There is no question that he will never be able to do manual labor again.

No jurisdictional question is raised. Respondent

and claimant were operating under the Workmen's Compensation Act, and the accident arose out of and in the course of the employment.

The record consists of the complaint, Departmental Report, abstract of record, stipulation waiving briefs of both parties, Supplemental Departmental Report, and transcript of evidence.

Claimant was 73 years of age at the time of the accident, married, but had no dependent children. Claimant was paid full salary of $165.00 for the months of May, June and July, and 50% of his monthly salary, or $82.50, for the months of August and September, a total of $660.00. This must be deducted from any award made to claimant.

Claimant is entitled under Section 8, Paragraph (f), to an award of $6,000.00 for permanent total disability, less the sum of $660.00 heretofore paid to him as salary, or the sum of $5,340.00, which is payable as follows:

$1,655.34, which has accrued from April 10, 1950 to September 7, 1951, less $660.00 heretofore paid to claimant as salary, or $995.34, which is payable forthwith;

$4,344.66, to be paid in weekly installments of $22.50 beginning September 14, 1951 for a period of 193 weeks, with a final payment of $2.16; thereafter a pension for life in the sum of 8480.00 annually, payable in monthly installments of 540.00.

All of the doctor and hospital bills were paid by respondent with the exception of $20.00 due Dr. H. B. Henkel, and an award of $20.00 is hereby entered in favor of Dr. H. B. Henkel, payable forthwith.

The testimony at the hearing was taken and transcribed by Harry L. Livingstone, who has submitted a statement of $77.00 for his services. This charge is reasonable and proper.

An award is made in favor of Harry L. Livingstone

for stenographic and reporting services in the amount of $77.00.

This award is subject to the approval of the Governor, as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees".

(No. 4385—Claimant awarded $7,586.57 and Life Pension.)

HENRY I. BROWN, Claimant, *vs.* **STATE OF ILLINOIS,** Respondent.

Opinion filed September 7, 1951.

GEORGE W. KASSERMAN, JR., Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; CHARLES H. EVANS, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when an award will, be made.* **Where claimant's injury arose out of and in the course of his employment by the State of Illinois, an award may be made under the Workmen's Compensation Act.**

DELANEY, J.

Claimant, Henry I. Brown, seeks to recover for complete and permanent disability under the Workmen's Compensation Act, as the result of an accident that arose out of and in the course of his employment as an employee of respondent.

Mr. Henry I. Brown was married, and 40 years of age on February 15, 1950, the date on which the injury complained of arose. He informed the Division that he had four children under 18 years of age dependent upon him for support. He resides in the City of Newton, Jasper County, Illinois.

He was first employed by the Division of Highways on February 14, 1949 as a maintenance labor foreman at a salary of $223.00 a month. He worked continuously in this same classification from the date of his

employment until the date of his injury. His salary was increased to $246.00 a month on July 1, 1949, and he earned a total of $2,849.33 in the year preceding his injury.

On February 15, 1950, Mr. Brown was in charge of a group of men engaged in placing sandbags on a levee to protect it from flood waters of the Wabash River. The work was being done approximately one mile south of Russellville in Lawrence County. At about 2:00 P.M. a tractor, which was being used to haul filled sandbags to the levee, bogged down in soft ground near the levee. The tractor was stalled in a low place, which would be covered with water if the weakened levee, which was nearby, should give away. Mr. Brown and his men gathered around the tractor, and pushed it out of the mud. While pushing on the tractor, Mr. Brown felt a burning pain in his left chest, which radiated down his left arm. Although he felt poorly, he continued working until approximately 5:00 P.M., and then went to a hotel in Palestine, Lawrence County, for the night. He had a light dinner, and went to bed early. At approximately 10:00 P.M. he was awakened by the return of the pain in his left chest. This pain, which was severe enough to cause him to break out in a sweat, lasted approximately 30 minutes and then subsided.

At approximately 5:45 A.M. on February 16, while Mr. Brown was dressing to begin his day of work, the pain returned again, and was so severe that Dr. L. R. Illyes was called to the hotel. Dr. Illyes made a diagnosis of an acute heart attack, and administered medication to relieve the acute symptoms. Later that morning, Mr. Brown became comfortable enough to be moved to the Olney Sanitarium,, Olney, Illinois,

where he was placed in the hands of Dr. Charles W. Harrison for treatment.

On March 3, 1950, Dr. Illyes submitted the following report:

"Heart attack—probably brought on by the heavy lifting and exertion he did the previous day. Treatment—kept patient quiet and gave him medicine to relieve the pain. Estimated date patient able to work—Indefinite. Date patient was discharged—2-16-50."

Dr. Harrison submitted a report on April 11, 1950, which is quoted below:

"Patient suffered from an anterior myocardial infarction, which came on sometime after exertion. Treatment—Sedation. Bed rest. Vasodilators. X-Rays—No Remarks—Electrocardiograms diagnostic of anterior myocardial infarction. Estimated date patient able to work—Light work about July 1, 1950. What permanent disability do you expect?—Unable to state at present time what the cardiac status will be."

On July 8, 1950, Dr. Harrison reported again, as follows:

"Mr. Brown was last seen by me on June 6, 1950, and an EKG was taken at that time. The results were quite satisfactory, with progress expected following a myocardial infarction.

I anticipate that Mr. Brown will be able to return to light work sometime within the next month to six weeks."

Dr. Harrison again reported on July 15, 1950, as follows:

"Mr. Brown was in yesterday, and another electrocardiogram was run. The results of this continue to show improvement, with this last tracing being practically normal. He still does have some tiredness on exertion, which is to be expected, and some pains in the chest, which I attribute to muscle, rather than the heart.

I am releasing him for light work as of August 1st, and would appreciate it if he would be allowed to work only to the point of fatigue, rather than past it, for a week to ten days. This is a trial period for him, and if he handles the first week or so as far as his mental outlook is concerned he would be in a much better position to carry on a normal life thereafter. I believe we have no worries about his heart, other than what might come whether he worked or not. If you have any questions, I shall be glad to answer them for you."

On July 27, 1950, Dr. Harrison sent the Division the following report:

"Mr. Brown was in my office the other day with a rather severe common cold. I talked to his wife today, and she said he was still running some fever and not feeling up to par. If it isn't asking too much, I would like to postpone his return to work until the middle of August.

Thank you kindly."

Dr. Harrison called the Effingham office of the Division of Highways on August 9, 1950 to ask authorization to send Mr. Brown to St. Louis for an examination by Dr. Edward Massie, a specialist in heart diseases:

Dr. Massie submitted the following report on August 17, 1950:

"This letter concerns your patient Mr. Henry Brown. He gives a history of having had a coronary thrombosis. The story is typical. The electrocardiograms which you sent along are also typical of an anterior myocardial infarction. Six months have now passed, and he still has pain. The pain, however, is more in the left upper shoulder, and it seems to sometimes occur down the arm, and he has some numbness of two fingers of the left hand. Moving of his shoulder and arm seem to make the left upper shoulder discomfort worse. It has a duration of some hours, and it does not occur on exertion, and may occur at any time. If he lies down and rests his arm quietly, it seems to go away. In questioning about precardial discomfort on exertion there is now no history suggestive of coronary artery pain. He has become a little anxious about himself, and, although he was not nervous before, he feels more tense, and at times he feels quivering in the left chest.

Examination revealed a well developed man who was slightly overweight with normally reacting pupils, normal optic fundi, negative throat, normal thyroid, no definite cardiac enlargement, fairly good heart sounds, regular rhythm, no significant murmurs, pulse rate 84 per minute, blood pressure 140/100, clear lungs, negative abdomen and no dependent edema.

I took an electrocardiogram with twelve leads as you had done, and find that there is now a good looking tracing, which is just about normal. This resembles your last tracing. Certainly there is tremendous improvement over the initial tracing when he had his acute attack. I fluoroscoped him, and found his lungs to be clear, and the heart size and shape not to be unusual, although the heart size might be at the upper limits of normal.

I feel that this patient still has residuals of a shoulder-arm syndrcme. This accounts for the discomfort in his left shoulder and left arm, and the numbness in the two fingers of his left hand. When he had the acute attack of coronary thrombosis I believe he developed an acute bursitis and arthritis of the shoulder as may

occur in acute coronary thrombosis, and it takes a long time for it to get better. I do not feel that his left shoulder pain or left arm pain is associated with coronary disease at this time. From the point of view of this shoulder condition, what I usually do is refer them to the physical therapy department at Barnes Hospital where they seem to be quite successful in relieving most of this shoulder arm discomfort. Usually the pain goes away, and the patient will feel better after daily treatments there with heat and other types of manipulation, which they do. Sometimes these shoulder pains are just as severe as the original coronary pain, but this is not the case here. It is sufficiently troublesome, however, to make him anxious. Perhaps working the shoulder itself with the use of heat might be worthwhile, but I never seem to get the results they do.

In addition the patient is anxious and concerned. He finds that he is fearful if he has to leave town and stay away from home because his attack occurred in the hotel away from home. In talking to him about returning to work, it appears to me that if he could go to one destination not too far from home, and then return home to sleep that he could go back after several weeks. It should be on the basis of a little work at first and more later. He should not do active physical work, but perhaps do desk or supervisory type of activity. He asked me about his weight, and I told him that it would be worthwhile becoming a little thinner, although he has lost weight, which has been a good thing. As he gets more confidence in himself, I believe he will be in better shape and frame of mind to return to work. If you have anyone there, who knows the art of physical therapy in regard to the shoulder arm syndrome, this would be a worthwhile step in rehabilitating this man. I did not give any specific medications. He told me about what you are giving, and I told him to continue this medication. I do appreciate very much your referring this patient to me, and, if you have questions concerning him, please let me know. Best regards."

On August 29, 1950, Dr. Harrison reported as follows:

"Treatment—Hypnotics. Sedation. Bed-rest. Vaso-dilators. X-Rays—None. Estimated date of discharge—Unknown. Estimated date patient able to work—September 5, 1950. What permanent disability do you expect?—Unable to do manual labor."

On November 2, 1950, Dr. Harrison wrote the report, which is quoted below:

"I believe Mr. Brown's condition has reached a permanent stage as far as his heart is concerned. However, it is my policy to keep a patient under observation for one year following a myocardial infarction. If this meets with your approval, I will continue to do so. I do not expect much change in his condition between now and a year from the date of onset."

Dr. Harrison submitted his final report on December 15, 1950, which is as follows:

"Mr. Brown was in to see me the first part of this week, and at that time we discussed the probabilities of his being able to carry on with his work. He does not feel that he is able to do his job and himself justice by continuing; and, although his heart condition at the present time is apparently quite adequate, he must have complete freedom from mental unrest and worry. I, therefore, advised him to cease work and follow whatever occupation of an entirely sedentary nature he might find."

Mr. Brown returned to light supervisory work on September 1, 1950. Although Mr. Brown was never able to do more than limited supervisory work, he continued work for the Division until December 31, 1950, at which time he asked for and secured an extended leave of absence, because of his inability to do the work satisfactorily.

Following the injury, Mr. Brown was paid full salary through March 20, 1950 in the amount of $280.86. He was paid compensation at the rate of $27.00 a week for the period of April 1 to August 31, 1950, inclusive, in the amount of $632.56. Payments for total temporary disability equaled $913.42. Compensation was terminated August 31, 1950, because it was Mr. Brown's desire to return to work at the beginning of the month, rather than September 5th, as suggested by Dr. Harrison.

The Division has paid the following creditors in connection with Mr. Brown's injury: Dr. L. R. Illyes, Palestine - $6.00; Dr. Edward Massie, St. Louis, Missouri - $50.00; The Olney Sanitarium Clinic, Olney - $249.30; and the Parker Funeral Home (ambulance), Newton - $18.00, totalling $323.30.

No jurisdictional question is raised. Respondent and claimant were operating under the Workmen's Compensation Act, and the accident in question arose out of and in the course of the employment.

The only question is the extent of permanent disability suffered by claimant.

The record consists of the complaint, Departmental Report, stipulation waiving briefs of both parties, transcript of evidence, and abstract of evidence.

From the undisputed medical testimony, and the observations of our Commissioner, Henry S. Wise, the record shows that the claimant is permanently disabled; and has not been able, and is not able to do work of any kind.

We conclude, therefore, after a careful consideration of the record, that the claimant is entitled to an award for permanent total disability.

Claimant's compensation rate with four children is $20.00 per week. Since the accident occurred subsequent to July 1, 1949, this must be increased 50%, making the compensation rate to claimant of **$30.00** per week.

The claimant is, therefore, entitled to an award of $8,499.99 under Section 8, Paragraph (f) and Section 7, Paragraphs (a) (h) (3), less the sum of $913.42, which was paid claimant as wages and for temporary total disability, or a total award of $7,586.57, payable as follows:

$2,434.29, which has accrued from February 16, 1950 to September 7, 1951, from which must be deducted the sum of **$913.42,** making a sum of $1,520.87, which is payable forthwith;

$6,065.70, to be paid in weekly installments of $30.00, beginning September 14, 1951, for a period of **202** weeks with a final payment of $5.70; thereafter **a** pension **for** life in the sum of $680.00 annually, payable in monthly installments of $56.66.

It is recommended that the Division of Highways obtain the amount of the bill of Dr. Harrison of Olney, Illinois, and make payment of same.

The testimony on the hearing before Commissioner Henry S. Wise was taken and transcribed by Neva June Matson, who has submitted a statement for

$84.00 for her services. This charge is reasonable and proper, and an award of $84.00 is hereby entered in favor of Neva June Matson, payable forthwith.

This award is subject to the approval of the Governor, as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees".

(No. 4389—Claim denied.)

EMILY PASCHAL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September Y, 1961.

HERMAN W. SNOW AND JOHN H. BECKERS, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; CHARLES H. EVANS, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when claim will be denied.* **Where evidence showed no limitation in ability to earn, or differential in earnings, an award will be denied under Section 8 (d) and (f) of the Workmen's Compensation Act.**

LANSDEN, J.

Claimant, Emily Paschal, seeks to recover from respondent under the Workmen's Compensation Act for injuries sustained in an accident that arose out of and in the course of her employment as an Institution Worker and acting Chief Housekeeper at the Manteno State Hospital, operated by the Department of Public Welfare.

On February 6, 1950, claimant, then 70 years of age, was struck by a truck, which backed into her while she was engaged in her duties on the hospital grounds. She was examined and treated by a doctor on the staff of the hospital the same day, but was not hospitalized at the time.

From April 17, 1950 to April 28, 1951, claimant was hospitalized at the Institution for what is com-

monly known as milk leg. After this period of hospitalization, claimant took some of her annual vacation.

Except for a few days sick leave, vacation, and the one period of hospitalization above referred to, claimant has worked continuously since February 6, 1950 drawing her full salary of $193.00 per month, which was her rate of pay at the time of the accident.

Obviously claimant is not entitled on this record to compensation for total permanent disability, nor is she entitled to any compensation for partial permanent disability, because the record shows no differential in earnings, or diminution in her ability to earn. *Cogdill* vs. *State,* 18 C.C.R. 24. Therefore, an award to claimant must be denied under Section 8 (d) (f) of the Workmen's Compensation Act.

Claimant also claims reimbursement for drugs and a medical examination in Chicago. Such expenditures were not authorized by respondent,. and claimant elected to make them herself, and is not entitled to recover therefor. (Section 8 (a) of the Workmen's Compensation Act.)

We are not unmindful of the fact that the record shows aggravation of a pre-existing osteoarthritis in the spine, and that in the year subsequent to her accident claimant displayed a progressive disability. Through dieting, she had lost about 50 pounds in weight without any material benefit to her condition of ill-being. However, we have been unable to find any section of the Workmen's Compensation Act that would allow claimant an award on the record before us.

Sylvia MacQueen, Kankakee, Illinois, was employed to take and transcribe the testimony at the hearing before Commissioner Wise. Her charges of

$15.00 are reasonable, and an award is entered in her favor for $15.00.

An award to claimant, Emily Paschal, is denied.

This award is subject to the approval of the Governor. Ill. Rev. Stat., Chap. 127, Sec. 180, as amended 1951, July 1, Laws 1951, p. 1441, H.B. 1077, Sec. 1.

(No. 4391—Claimant awarded $744.80.)

SOL NASH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 7, 1951.

SOL NASH, Claimant, pro se.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when an award will be made.* Where claimant's injury arose out of and in the course of his employment by the State of Illinois, an award may be made under the Workmen's Compensation Act.

LANSDEN, J.

Claimant, Sol Nash, seeks to recover from respondent under the Workmen's Compensation Act for the loss of his right index finger in an accident that arose out of and in the course of his employment as a janitor in the Division of Highways.

On October 30, 1950, claimant was helping two other men lift a heavy oil drum at the South Side Garage, Markham, Cook County, Illinois. The drum slipped, and the rim thereof traumatically severed claimant's right index finger, which was caught under the drum on a work bench. Later the bone stump was smoothed, and claimant has lost all of such finger distal to the middle of the proximal phalanx.

No jurisdictional questions are involved, and respondent has furnished and paid for all hospital and

On January **23, 1951** at approximately **1:30** P.M., claimant, while trimming books, had his left index finger caught by a clamp, and severed by a trimming knife, resulting in the amputation of the terminal and middle phalanges of the left index finger.

No jurisdictional question is raised. Respondent and claimant were operating under the Workmen's Compensation Act. Respondent furnished medical, surgical and hospital care.

The record consists of the complaint, Departmental Report, and stipulation filed in lieu of evidence.

On the date of the accident claimant was 40 years of age, and had four dependent children under the age of eighteen. His earnings were **$290.00** per month, and in the year immediately preceding the accident he earned **$1,750.00.** His compensation rate would, therefore, be $20.00 per week, and the injury having occurred subsequent to July **1, 1949,** this must be increased 50%, making a compensation rate of $30.00 per week.

Claimant is entitled to an award for three weeks temporary total disability, and forty weeks for the loss of his left index finger under Section 8, Paragraph (e) **(2)** of the Workmen's Compensation Act, making a total award of **$1,290.00.** Claimant received full salary in the amount of **$217.50,** and this must be deducted from his award, making a net award of **$1,072.50.**

An award is, therefore, entered in favor of claimant, John T. Nelson, in the amount of **$1,072.50** to be paid to him as follows:

$968.58, less overpayment for temporary compensation of $127.50, or $841.08, which has accrued, is payable forthwith;

$231.42, is payable in weekly installments of $30.00 per week beginning on the 14th day of September, 1951 for a period of 7 weeks, with an additional final payment of $21.42.

(No. 4401—Claimant awarded **$203.00.)**

MARY MITCHELL, Claimant, *vs.* STATE OF ILLINOIS, **Respondent.**

Opinion filed September 7, 1951.

EVA L. MINOR, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; CHARLES H. EVANS, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when an award* ***will*** *be made.* Where claimant's injuries arose out **of** and in the course **of** her employment by the State **of** Illinois, an award may be made under the Workmen's Compensation Act.

SCHUMAN, C. J.

Claimant, Mary Mitchell, was employed as an attendant at the Kankakee State Hospital on August **9,** 1950. She was married, but had no dependent children. Her earnings in the year preceding the injury were $2,309.78.

On August 9, 1950, claimant was injured in an altercation with a patient. No jurisdictional questions are raised. Claimant sustained a contusion above the left eye, a hemorrhage of the eyeball, an open laceration of about 1½″ over the left eye, and numerous bruises about the face with considerable swelling.

Dr. G. W. I. Bard testified for claimant that she would have a permanent scar on her forehead over the left eye, but that it would not have any influence on the eye or face. Other medical testimony tended to minimize the resultant scar. Claimant was examined at the hearing.

Testimony showed claimant expended the sum of $68.00 for medical expenses in the treatment of her injuries.

Claimant seeks payment for temporary total disability, complete and permanent disability, and for disfigurement. There is no evidence in the record to

substantiate the claim for any temporary total disability, or for permanent disability. However, there is some evidence of disfigurement.

Frances Regnier has submitted a bill in the amount of $18.00 for stenographic services, which the Court finds to be reasonable.

On the basis of this record we make the following awards:

The sum of $68.00 to Mary Mitchell for reimbursement of medical expenses necessarily expended by her in the treatment of her injuries, which is payable forthwith.

The sum of 8135.00 for disfigurement of the face, payable at the rate of $22.50 for 6 weeks, all of which has accrued, and is payable forthwith.

An award of $18.00 payable to Frances Regnier for stenographic services.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees".

(No. 4431—Claimant awarded $1,072.50.)

JOHN T. NELSON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 7, 1951.

JOHN T. NELSON, Claimant, pro se.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when an award mill be made.* Wher[e] claimant's injury arose out of and in the course of his employment by the State of Illinois, an award may-be made under the Workmen's Compensation Act.

DELANEY, J.

Claimant, John T. Nelson, seeks to recover under the provisions of the Workmen's Compensation Act for the loss of his left index finger, as the result of an accident that arose out of and in the course of his employment in the Division of Printing.

On January 23, 1951 at approximately 1:30 P.M., claimant, while trimming books, had his left index finger caught by a clamp, and severed by a trimming knife, resulting in the amputation of the terminal and middle phalanges of the left index finger.

No jurisdictional question is raised. Respondent and claimant were operating under the Workmen's Compensation Act. Respondent furnished medical, surgical and hospital care.

The record consists of the complaint, Departmental Report, and stipulation filed in lieu of evidence.

This award is subject to the approval of the Governor, as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees".

(No. 4432—Claimant awarded $6,000.00.)

LORRAINE L. GOETTING, WIDOW, ET AL, Claimant, *vs.* **STATE OF ILLINOIS,** Respondent.

Opinion filed September 7, 1951.

LORRAINE L. GOETTING, Claimant, pro se.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when an award will be made.* Where the death of claimant's intestate arose out of and in the course of his employment by the State of Illinois, an award may be made under the Workmen's Compensation Act.

DELANEY, J.

Lorraine L. Goetting filed her complaint on April 24, 1951, as widow of Arthur L. Goetting, for compensation under the provisions of the Workmen's Compensation Act.

The record consists of the complaint, Departmental Report, and stipulation filed in lieu of evidence.

Mr. Goetting was first employed by the Division of State Police on January 9, 1950, as a State Highway Police Officer at a salary of $259.00 a month. He was married, but had no children under 18 years of age dependent upon him for support. He worked continuously in this classification and at the same salary rate until the date of his death, February 4, 1951. Earnings in the year preceding his injury totaled $3,108.00.

On February 4, 1951, Officer Goetting's assignment consisted of patrolling highways in Madison

County by means of a Division of State Police automobile. On the morning in question, Officer Goetting was proceeding in a southerly direction on S.B.I. Route No. 157 in the car assigned to him. At approximately 10:13 A.M., he approached a crossing of the Illinois Central Railroad in or near the unincorporated community of Peters Station. Apparently Officer Goetting failed to see an Illinois Central Passenger train approaching from the west, and he drove his car into the side of the two-section diesel locomotive. The impact threw Mr. Goetting out of the police car, and drug the car for some distance to the east on the railroad right-of-way.

A passing motorist, who saw the accident, notified the Division of State Police, and called an ambulance. Although it was thought that Officer Goetting was dead, he was removed to St. Elizabeth's Hospital, Granite City, where he was pronounced dead. The car was completely demolished.

The Division of State Police has paid no compensation in connection with this injury, neither has it paid any medical bills.

There is no jurisdictional question presented by the record, and we find that the fatal injuries to the decedent arose out of and in the course of his employment by respondent. The facts have been stipulated to between the parties hereto.

Decedent's compensation rate will, therefore, be the maximum of $15.00 per week. The accident having occurred subsequent to July 1, 1949, this must be increased 50%, making a compensation rate of $22.50 per week.

Claimant is entitled to an award of $6,000.00 compensation under Section 7, Paragraphs (a) and (1)

of the Workmen's Compensation Act.

An award is, therefore, made to claimant, Lorraine L. Goetting, in the sum of $6,000.00 payable as follows:

$687.84, which has accrued, is payable forthwith;

$5,312.16, payable in weekly installments **of $22.50,** commencing September **14,** 1951, and continuing **for 236 weeks,** with a final payment **of** $2.16.

All future payments being subject to the provisions of the Workmen's Compensation Act, jurisdiction is hereby reserved in this cause for the entry of such further order or orders as may from time to time be necessary.

This award is subject to the approval of the Governor, as provided in Section **3** of "An Act concerning the payment of compensation awards to State employees".

(No. 4249—Claimant awarded **$4,667.72.)**

EARL FRANCIS, Claimant, *vs.* STATE OF **ILLINOIS,** Respondent.

Opinion filed October 6, 1961.

ROOT AND HOFFMAN, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER AND CHARLES H. EVANS, Assistant Attorneys General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when an award will be made.* Where claimant's injuries arose out of and in the course **of** his employment by the State of Illinois, an award may be made under the Workmen's Compensation **Act.**

SAME—*permanent partial disability—effort to find and hold position in permanent partial disability case.* Not necessary **for** claimant to exhaust every employment opportunity—must make a reasonable effort.

LANSDEN, J.

On January 9, 1951, an opinion was filed in this case denying claimant, Earl Francis, an award for

permanent partial disability under the Workmen's, Compensation Act, because the record was lacking in proof of a differential in his earning capacity before and after the accident. However, claimant was granted an award for thirty weeks compensation, because he sustained fractures to the bodies of three vertebras in his accident, Section 8 (d) of Workmen's Compensation Act.

On March 9, 1951, we granted claimant a rehearing, and then remanded the case to Commissioner Wise for the purpose of hearing testimony on claimant's differential in earning capacity. Such hearing was held on April 30, 1951, and the case was orally argued before this Court on September 7, 1951.

In 1948, claimant was employed as a maintenance worker in the Division of Highways of the Department of Public Works and Buildings. On April 8, 1948, claimant was one of a group of men assigned to remove a dead tree from the right-of-way of State Aid Route No. 11, one mile south of Coal City, Illinois, in Grundy County. A steel cable was attached to the tree approximately 20 feet from the ground, and a truck was slowly pulling on the cable. Claimant was watching for kinks in the cable, when the truck moved faster than planned, snapping the cable upward and taut in such manner that claimant was struck in the abdomen thereby, hurled into the air, and thrown to the ground on his head and shoulders.

No jurisdictional questions are involved, and respondent has furnished and paid for all medical, hospital and surgical services, and for all appliances required to cure or relieve claimant from the effects of his accident.

The medical testimony and X-Rays in the record

show that claimant sustained fractures to the bodies of three vertebras in his back, that pre-existing arthritis in his spine was greatly aggravated, and that the injuries to his back are permanent.

Prior to his accident claimant earned $187.00 per month, or **$43.16** per week. After the accident, claimant, in the opinion of this Court, displayed sincere diligence in trying to find employment, and finally did secure two different jobs, where he was able to work one-half to two-thirds of the time. His average weekly earnings in these jobs amounted to **$15.26.** In addition, claimant had been elected a Justice of the Peace, and, based on the fees collected by his predecessor in office, he would average **$3.00** per week additional earnings. We feel that claimant has furnished figures adequate for us to calculate his differential in earning capacity, and has thereby brought himself within the rule announced in permanent partial disability cases in *Groveland Coal Mining Co.* vs. *Ind. Corn.,* **309** Ill. **73;** *Franklin County Coal* Co. vs. *Ind. Corn.,* **398** Ill. **528.** We do not feel that **a** claimant in a permanent partial disability case is required to exhaust every employment opportunity within a certain radius of his home, or become a migrant in his search for work, but we do feel that he must make reasonable efforts to find and hold a job, so that the rule announced in the two cited cases can operate. *Molsen* vs. *State, No. 4168,* opinion filed February **14, 1950.**

Claimant is, therefore, entitled to an award under Section 8 (d) of the Workmen's Compensation Act for permanent partial disability.

Based on his rate of pay at the time of his accident of **$43.16** per week, and his average weekly earning capacity **of $18.26** per week subsequent thereto, a

differential of **$24.90** per week is established, one-half of which is **$12.45.**

On the date of his accidental injury, claimant was **62** years of age, married, but had no children under **18** years of age dependent upon him for support. His rate of compensation is **$12.45** per week, which must be increased by 30%, as provided in Section 8 (1) of the Workmen's Compensation Act, or a total rate of **$16.18.** Such payments shall commence as of April **1, 1949,** the day after his employment by respondent was terminated.

Claimant was totally and temporarily disabled from the date of his accident through August **31, 1948,** and for **12** additional days at various times, the last of which was May **31, 1949.** He was paid total compensation of **$532.28,** which will have to be credited against the award hereinafter made.

Phyllis M. Cohenour, Morris, Illinois, was employed to take and transcribe the testimony at the two hearings before Commissioner Wise. Her charges amount to **$54.00** and **$37.50,** respectively. An award is entered in favor of Phyllis M. Cohenour in the sum of **$91.50.**

An award is entered in favor of claimant, Earl Francis, for $5,200.00 under Section 8 (d) of the Workmen's Compensation Act, Ill. Rev. Stat., **1947,** Chap. **48,** Sec. **145,** Par. (d), which is within the limitations prescribed in subparagraphs (b) and (h) thereof, payable as follows:

$2,119.58, less $532.28 already paid for temporary total disability, or the sum of $1,587.30, which has accrued, and is payable forthwith;

$3,080.42, which is payable in weekly installments of $16.18 per week commencing on October 12, 1951, for a period of 190 weeks, plus one final payment of $6.22.

This award is subject to the approval of the Governor. Ill. Rev. Stat., 1949, Chap. 127, Sec. 180.

(No. 4267—Claim denied.)

ERNEST J. JAAX, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 5, 1951.

WILLIAM E. RODRIGUEZ, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; JAMES C. MURRAY, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*Necessity of causal connection—hen an award will be denied.* Where persuasive proof of a causal connection between claimant's infection, and its onset as a result of his employment is lacking, leaving only speculation and conjecture, an award will be denied.

LANSDEN, J.

Claimant, Ernest J. Jaax, seeks to recover from respondent under the Workmen's Compensation Act for injuries allegedly sustained as a result of an accident arising out of and in the course of his employment as a painter at the Chicago State Hospital.

On July 18, 1949, claimant, who had a history of calluses on his left foot, pared and lacerated the callus under the big toe on his left foot with a razor blade.

For about a month prior to that date, claimant had been in charge of eight men, who were redecorating the rooms of the apartment of the superintendent of the Farm Ward Building, which rooms were being completely remodeled. In addition to the painting, the floors were sanded with a power sander, which deposited considerable fine sawdust on the floor. Because of claimant's previous trouble with his feet, and, because they perspired greatly, he wore shoes in which slits had been cut. As a result of the slits in his shoes, considerable sawdust worked through his socks.

On July 20, 1949, claimant's left foot began to pain him considerably, and the following day he was given a shot of penicillin by one of the doctors at the institution, such shots being continued for several days. Later claimant was hospitalized at both the Cook County and Masonic Hospitals for ulcerated calluses, and the treatment thereof by private physicians continued for several months.

Claimant now maintains that the sawdust on the floor caused an infection in his left foot, as a result of which he should be compensated under the Workmen's Compensation Act for a partial loss of use of such foot, plus compensation for a lengthy period of temporary total disability.

To us, the most significant facts in this case are that claimant shuffled through the sawdust for several weeks prior to the time that, he pared his callus without any apparent discomfort, and that it was only immediately after he cut the callus with a razor blade that an infection appeared in his foot, and such infection appeared after a normal period of incubation after the laceration with the razor blade.

Claimant has apparently complied with the jurisdictional prerequisites for this action. He was paid no compensation, and medical services,, except for four shots of penicillin, were obtained by himself.

An analysis of the important infection cases that have been decided by the Supreme Court leads us to the conclusion that an award would, not be warranted in this case. Had claimant raised a blister on his foot while working, and then an infection in the foot set in, he could recover. *Western Shade Cloth* Co. vs. *Ind. Com.*, 308 Ill. 554; *Freeman Coal Mining* Co. vs. *Ind. Com.*, 315 Ill. 84. But, no blister resulted from the chafing

action, if any, of the sawdust in his shoes.

Had claimant suffered a blow on his foot, and later an infection arose near the point of impact, he could recover. *Challenge* Co. vs. *Ind. Corn.*, **292** Ill. 596. But, there is neither a contention, nor any evidence of a traumatic injury to his foot.

This case comes close to *Ryan* vs. *Ind. Corn.*, 329 Ill. **209.** In that case Ryan pared a corn or callus on his toe. Later an infection set in leading to gangrene, which necessitated the amputation of his leg below the knee. Ryan suffered from hardening of the arteries, which sometimes causes gangrene. The Supreme Court held that Ryan had not proved that an accident in employment was the cause of the infection, and, therefore, denied an award.

In this case, we do not believe that claimant has proven that the sawdust caused the infection. His doctor would not categorically go that far in his testimony. We are, therefore, confronted with a case of speculation and conjecture. The infection could have resulted from an introduction of bacteria into his self-inflicted laceration either at his home, or going to and from work. Persuasive proof of a causal connection between claimant's infection, and the onset thereof as a result of his employment is lacking in this record. *Peterson & Co.* vs. *Ind. Corn.*, **281** Ill. 326; *Standard Oil* Co. vs. *Ind. Corn.*, 322 Ill. 524; *Gray:* Attorneys' *Textbook of Medicine,* 3rd ed. (1949), Vol. 1, Paras. 23.16 and 23.17.

William J. Cleary & Co. was employed to take and transcribe the testimony at the hearing before Commissioner Wise. Charges of $73.20 were incurred, which are reasonable and customary. An award is entered in favor of William J. Cleary & Co. for **$73.20.**

An award to claimant, Ernest J. Jaax, is denied.

This award is subject to the approval of the Governor. Ill. Rev. Stat., 1949, Chap. 127, Sec. 180.

(No. 4301—Claim denied.)

JAMES LUZZI, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed July 6, 1951.
Supplemental opinion filed October 6, 1951.

EUGENE P. MEEGAN, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

CIVIL SERVICE ACT—*when* claim *barred.* Payment of salary to an employee, who is deemed to be a de facto employee, constitutes a bar to an action by one claiming the title, or right to the position. *(Laid vs. State of Illinois,* 13 C.C.R. 78.)

SAME — necessity of illegal or wrongful act. No award can be made under the Civil Service Act unless claimant shows an illegal or wrongful act prevented him from working.

SCHUMAN, C. J.

Claimant, James Luzzi, filed his original claim on May 11, 1950, in which he alleged that he had occupied the position of carpenter of the classified Civil Service of the State of Illinois; that he was certified as such on December 1, 1934; and, that he had performed his duties as carpenter until he was laid off on June 6, 1947. Claimant contends that he was wrongfully laid off, while temporary employees were working, and was wrongfully deprived of performing his duties as a carpenter as a member of the classified Civil Service of the State of Illinois. Claimant further contended that he made demands upon the Civil Service Commission and upon the Department of Public Welfare for reinstatement and reassignment to duty, stating that he was ready, willing and able to perform the duties of his position. Claimant contended that assignments were

made to temporary employees, while his name was available on the Civil Service register, and claims that by reason thereof a violation of Section 12a of the Civil Service Act of the State of Illinois was had, and that he is entitled to recover for the period of time that he was unlawfully laid off from June 6, 1947 until he was reinstated to perform his duties as a carpenter on September 13, 1948.

Claimant, in his testimony, admits that the position of maintenance carpenter was filled with temporary appointments, and the conclusion to be drawn from such testimony is that such temporary employees were duly paid the salaries of maintenance carpenters, and, therefore, were de facto employees.

This Court has consistently followed the doctrine, where it is shown by the record, that a payment of salary to an employee, who is deemed to be a de facto employee, constitutes a bar to an action by one claiming the title or right to the position, and, therefore, bars any claim. *(Laird* vs. *State* of *Illinois,* **13** C.C.R. 78).

For the reasons above assigned, the claim will have to be denied.

SUPPLEMENTAL OPINION.

SCHUMAN, *C.* **J.**

Claimant's petition for rehearing is based on the fact that vacancies for the position of carpenter in the classified Civil Service were in existence at the time he was laid off on June 24, 1947, and also vacancies for temporary appointees; and, that the State made no attempt to prove there were no vacancies, or that the salary of claimant was paid to a de facto employee.

Respondent contends that claimant took no action to review the proceedings of the Civil Service Commission. It is apparent that claimant was not removed, discharged, or suspended, but was laid off, because the work was completed at the Veterans Rehabilitation Center.

Claimant's whole case is predicated on the fact that temporary appointees were working, and that he should have been placed in one of these positions. There is no showing where work was available, and, if temporary appointees were working, that any violation of the Civil Service Act occurred. In order for claimant to recover, he would have to show he was wrongfully prevented from performing the duties of his position. *(Laird* vs. *State of Illinois,* **13** C.C.R. *78.)*

Claimant admits that parties employed were temporary employees, and that he commenced no proceedings of any kind before the Civil Service Commission, or any other court.

Section **12** of Chapter 24½, entitled "Civil Service", (S. H. Ill. Rev. Stat.) provides as follows:

> "In employment of an essentially temporary and transitory nature, the appointing officer may, with the authority of the Commission, make temporary appointments to fill a vacancy, but no such authority shall be granted **for** a period of more than thirty days, but it may be renewed **from** time to time **with** the approval **of** the Commission."

The Departmental Report further showed that the carpenter list of the Civil Service Commission was cancelled in **1944.**

Claimant further based his claim on the fact that there was plenty of work to do at the Chicago State Hospital. The Departmental Report shows that claimant was served with a notice of suspension, and discharged on October **23, 1944** before a decision was announced by the Civil Service Commission. Claimant

agreed he would not seek to be reinstated at the Chicago State Hospital.

In view of the statutory provisions on temporary appointees, and the failure of claimant to show he was wrongfully kept from working, and, by his own admission, that temporary employees worked in his place, the Court is of the same opinion that he is not entitled to an award.

The case of *Wilson* vs. *State,* **12** C.C.R. **413,** was a case in which the same attorney appeared for claimant, as in this case. That case involved a hearing before the Civil Service Commission, and the Commission found he was wrongfully deprived of his salary, and ordered his reinstatement. The Court allowed an award for salary during the period of his illegal discharge. That case held that payment of claimant's salary was an affirmative defense.

The case of *People* vs. *Bradford,* **267** Ill. **486,** involved a suit by a City Commissioner for salary. Defense was abandonment of office. The Court held that there was no vacancy in the office, that no legal method was pursued to remove the Commissioner from office! and that he was entitled to his salary.

The case of *City* of *Chicago* vs. *Luthardt,* **191** Ill. **516,** involved a suit where claimant, a Civil Service employee, was prevented from performing his duties by the Chief of Police. The court held that salary was not paid to a de facto officer. The court held the action of the Chief of Police unwarranted, and allowed recovery.

The above cases cited by claimant involve wrongful discharge, and either no lawful de facto officer, or failure to allege, as a defense, payment to a de **facto** officer.

It does not appear from this record whether claimant was legally or illegally discharged, or whether he was rightfully or wrongfully prevented from performing his duties. There can be no question, from claimant's own testimony, that temporary appointees did the work. It is not claimed provisional appointments were made where an eligible list was available. It Is not shown permanent work was available, and that temporary appointments were unlawful. Claimant's own testimony admits payment to other temporary ernployees.

The Court has consistently held that payment of salary to a de facto incumbent during the time that he performed its duties prior to the reinstatement of a de jure officer or employee is a defense **(13** C.C.R. **78).**

The case of *O'Connor* vs. *City* of *Chicago,* **327** Ill. 586, holds that temporary appointees are de facto incumbents, and payment to them a bar to a suit instituted by a claimant, who was reinstated by order of court.

On the basis of the record before us, in view of claimant's own admission that temporary appointees performed the work, a failure to show any illegal or wrongful act in preventing him from working, and the fact that temporary appointees were de facto incumbents, and paid salaries, prevents claimant from recovery in this case.

Petition for rehearing is denied.

(No.4347—Claimants awarded $2,000.00 **and $500.00, respectively.)**

Douglas E. **Dreier and *Ruth*** Dreier, Claimants, ***vs.* State of Illinois,** Respondent.

Opinion filed October 6, 1951.

Ruddy **and** Brown, Attorneys for Claimants.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent,

NEGLIGENCE—*duty of State to remove defective trees under its control.* Where evidence showed that a large limb overhanging the highway had been cracked for a period of two years, the State had constructive notice of such condition, and failure to remove same constituted negligence.

SCHUMAN, C. J.

This claim arises out of an accident, which occurred on August 31, 1949, while claimants were riding in an automobile over U.S. Highway No. 34.

Claimant, Douglas E. Dreier, in company with his wife, Ruth Dreier, and their two minor sons, left their home in Aurora, Illinois around 11:00 A.M. to go to Denver, Colorado on vacation. Around 1:30 P.M., while driving west on said route, about one mile from Mendota, Illinois, a large limb from a tree fell on their car, and claimants sustained serious personal injuries and damages to their car. The limb was 30 to 35 feet long, and around 18 inches in diameter. It was raining, and a strong wind was in progress.

At the hearing, there was a definite conflict in the testimony between claimants' and respondent's witnesses as to the condition of the tree prior to the accident. John W. Humphrey, former highway section man, testified that there had been several storms in the area over a period of years, and that this tree had been in a dangerous condition for several years. He stated he had complained to the District office relative to same, but nothing was ever done to correct the situation. Clarence Scheidenhelm testified that he lived on the south side of the road just west of the tree in question, and that he had noticed a split or crack in the limb for two years preceding the accident. On the

day in question he was working approximately half a mile from the scene of the accident, and that there was a strong wind from the southwest for a period of a few minutes, but that there was no damage done to the corn, and that the only damage he noticed was that to the limb of the tree in question. His wife, Ethel Scheidenhelm, testified that just prior to the accident, when it looked as though a storm was blowing up, she was out in the yard bringing in the children's toys, and that the wind blew very hard for approximately a minute; that she did not see the accident occur, but saw the car shortly thereafter. She knew nothing about the condition of the tree, but had heard her husband remark about it on various occasions. The respondent's witnesses, Edward Gutson, supervisor, and Howard Harvey, landscape foreman, all testified that they were familiar with the area and the tree in question; that there was nothing wrong with the tree or limb prior to the accident, and that, upon inspecting the tree after the accident, it did not show an old break.

The Departmental Report showed that the tree was within the limits of the right-of-way, and, therefore, under the control of the State. There is no contention that the area wherein the tree was located was used as a park, so as to limit the liability of the State.

It, therefore, becomes important to determine the condition of the tree or the limb in question, and, whether it was in a dangerous condition, and whether or not the State had notice, actual or constructive, as to such condition, or performed its duty as to care of the trees, so as to avoid accidents caused by the falling of a limb.

The rule as applied to municipalities is again applicable to the facts in this case. In the case of *Renle*

vs. *City of Chicago*, 268 Ill. App. 266, the court, on page **270,** held:

"In the event any of such trees become a menace to pedestrians, by reason of becoming rotten or decayed, the city had the power to remove the same, and was, moreover, under a duty and obligation so to do, if the circumstances warranted it. The duty to maintain sidewalks in a reasonably safe and proper con&-tion applies not only to the sidewalks, but as well to the trees located on the street, and this rule is recognized not only in this State but generally wherever cities are charged with the control of its streets and highways. (*City of Mt. Carmel* vs. *Shaw*, 155 Ill. 37; *City of Indianapolis* vs. *Slider*, 56 Ind. App. 230; *Lundy* vs. *City of Sedalia*, 162 Mo. App. 218.)"

While the evidence is conflicting, a disinterested witness testified that there was a crack in the limb for two years. This witness, Clarence Scheidenhelm, lived right at the location of the tree, and had observed it every day. The position of the tree, and the enormous size of the limb overhanging the highway warranted a duty on the State to remove the same, if it were defective. That the State had knowledge is in conflict; that it had constructive knowledge seems borne out by the evidence, and required the State to exercise a duty to remove this dangerous obstacle; and, from this record, its failure to do so constituted negligence. There was no question raised as to any contributory negligence on the part of the claimants.

Claimant, Douglas E. Dreier, was pinned in the car. He was removed and taken to Mendota, and later to the hospital in Aurora, Illinois. His injuries were diagnosed as cerebral concussion, multiple abrasions and contusions of the face, hands, arms, anterior chest wall and abdomen. He was hospitalized for a period of eight days, and then remained at home in bed for another two weeks. Claimant was chief engineer for the Walker Process Equipment, Incorporated, of which he was also one of the owners. He was off work from the date of his injuries until December 1, 1949. At

that time he returned and resumed part of his duties,, and on February 1, 1950 he reported for full duty. His salary in the Company was $500.00 per month, and he was paid same by the Company during his period of disability. After his discharge from the hospital he had a rather marked degree of nervousness, inability to concentrate and read, and considerable trouble with his eyes, which had been bad for a period of years.

Claimant, Ruth Dreier, was riding on the right side of the back seat. At the time of the accident she was feeding the baby; and, when the accident occurred, she was thrown into the back of the front seat. As a result, she suffered a cut on the left knee, a broken toe on the right foot, broken nose, and numerous face and body bruises. At the time of the hearing she had a small scar on her face. She received first aid, attention to her nose and other injuries, but was not hospitalized. Her doctor bills amounted to $15.00. Claimant was a housewife, and after the accident it was necessary to send the laundry out for a period of several months at a cost of approximately $20.00 per month, and it was also necessary to secure additional help in the house.

Claimant, Douglas E. Dreier, sustained rather serious and painful injuries, but according to his doctor he recovered, and the only remaining physical disability was his increased nervousness.

Claimant, Ruth Dreier, sustained painful injuries to her face and knees, as well as a fracture of her big toe, but apparently has no permanent disability.

From the evidence in the record, we make the following award:

To claimant, Douglas E. Dreier, the sum of $2,000.00.
To claimant, Ruth Dreier, the sum of $500.00.

(No. 4349—Claimant awarded $6,000.00.)

LA VONA ALFORD JOHNSON, WIDOW, ET AL, Claimant, us. STATE OF ILLINOIS, Respondent.

Opinion filed October 6, 1951.

SCHMIEDESRAMP AND NEU, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; C. **ARTHUR NEBEL,** Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when an award will be made.* Where claimant's intestate died of coronary thrombosis caused by over-exertion, the Court held that, under the evidence, deceased died in the course of his employment, and claimant is entitled to an award under the principle laid down in ***Town of Cicero* vs. *Ind. Corn.*, 404 Ill. 487.**

DELANEY, J.

La Vona Alford Johnson filed her complaint on October 10, 1950, as widow of Chester Howard Johnson, deceased, for compensation under the provisions of the Workmen's Compensation Act.

The record consists of the complaint, Departmental Report, transcript of evidence, abstract of evidence, and statement, brief and argument of claimant.

Mr. Johnson at the time of his death on October 18, 1949 was employed by the respondent as chief maintenance officer at the Illinois Soldiers' and Sailors' Home in Quincy, Illinois. On said date deceased was at the paint shop, where he was employed, discussing work to be done during the day with a group of painters, who were under his supervision. He suddenly became ill, fell to the floor of the paint shop, and died within a few minutes.

Deceased was five feet ten inches tall, and weighed 225 pounds. It was necessary that the deceased work extra hours from time to time, and very often he worked late at night. On Thursday, October 13, 1949, he worked

all day and all night until 5:00 A.M. the following morning. A double sink was removed from Cottage 22 at the Illinois Soldiers' and Sailors' Home in order to put a new bottom in it. The sink weighed about 300 pounds. Mr. Johnson with another employee carried the sink down a narrow 40 foot ramp leading from Cottage 22, and lifted the sink onto a pickup truck. The sink was taken to the tin shop, and Mr. Johnson and another employee lifted the sink from the truck, and carried it about 20 feet into the tin shop. Mr. Johnson drilled holes in the sink with an electric drill. He fitted about 80 rivets into the sink, pounding in the rivets. It was necessary to hit each rivet five or six times with a hammer. At midnight Mr. Johnson went home to rest, then came back to the tin shop about 2:45 A.M. the same morning. He helped another employee carry the 300 pound sink from the tin shop, lift it onto the truck, and with another employee carried the sink up the 40 foot ramp, and placed the sink in Cottage 22. He stayed on the job until 5:00 A.M. At that time he went home and went to bed, but got up about 9:00 A.M. and worked all day, which was Friday, October 14, 1949. On October 17, 1949 he came home about 4:00 P.M., and complained that he was not feeling well. The following morning, October 18, 1949, Mr. Johnson arose about 6:30 A.M., and said he felt a weight on his chest, and that it was difficult for him to breathe. On the morning of October 18, 1949, Mr. Johnson went to work as usual, went to his office, said he did not feel well, went to the tin shop, and thence to the paint shop, where he fell to the floor while giving the painters instructions for the day's work.

According to the testimony of Drs. James L.

Rouner, Hugh S. Espy and George Borden, the cause of death was coronary thrombosis due to overexertion. Dr. Hugh S. Espy, who specializes in internal medicine, further testified that a coronary thrombosis develops on arteries that are already diseased, and, when asked if death occurs suddenly, replied "It may occur suddenly, or it may occur any time within a matter of about two weeks. Ordinarily, we regard the period of two weeks after such an event the dangerous period. Sudden death may occur at any time during that interval regardless of how the individual seems to be getting along."

Claimant was married, but had no children under sixteen years of age dependent upon him for support. His earnings were $5,700.00 for the year prior to his death.

There is no jurisdictional question presented by the record, and we find that the deceased died in the course of his employment by respondent.

Decedent's compensation rate will, therefore, be the maximum of $15.00 per week. The death having occurred subsequent to July 1, 1949, this must be increased 50%, making a compensation rate of $22.50 per week.

Following the ruling of the Supreme Court of Illinois in *Town of Cicero* vs. *Ind. Corn.*, 404 Ill. 487, claimant is entitled to an award of $6,000.00 compensation under Section 7, Paragraphs (a) and (i) of the Workmen's Compensation Act.

An award is, therefore, made to claimant, La Vona

All future payments being subject to the provisions of the Workmen's Compensation Act, jurisdiction is hereby reserved in this cause for the entry of such further order or orders as may from time to time be necessary.

Helen Woolley was employed to take and transcribe the evidence at the hearings before Commissioner Summers. Charges in the amount of $74.00 were incurred for these services, which charges are fair, reasonable and customary. An award is, therefore, entered in favor of Helen Woolley in the amount of $74.08, which is payable forthwith.

This award is subject to the approval of the Governor, as provided by Section 3 of "An Act concerning the payment of compensation awards to State employees".

(No. 4373—Claim denied.)

JACK FLINT, Claimant, *vs.* **STATE OF ILLINOIS, Respondent.**

Opinion filed October 5, 1951.

BROWN, HAY AND STEPHENS; AND, ROSENGARD AND HECHT, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

EVIDENCE—preponderance of evidence determined by Court. Where the Court feels that claimant does not prove his case by a preponderance of the evidence, the claim will be denied.

LANSDEN, J.

Claimant, Jack Flint, seeks to recover from respondent for its alleged negligence in allowing holes and ruts to remain unrepaired on one of its highways, as a result of which claimant had an accident, which

demolished his automobile, and caused him serious personal injuries.

On May 15, 1950, at about 12:30 A.M., claimant started on a trip to his mother's home some 12 or 15 blocks from where he lived. The purpose of the trip was to pick up some vitamins for his baby. Claimant testified his trip was "an emergency like".

His route took claimant along Pulaski Road in a southerly direction between Foster Avenue on the north and Argyle Street on the south. Pulaski Road at the place in question is composed of a bridge and approaches thereto. The roadway is a variable fifty feet in width from curb to curb. Chicago Surface Lines tracks (two sets) occupy the center eighteen feet, five inches, and said agency is responsible for the surface maintenance of that area. The Department of Public Works and Buildings, Division of Highways, operates and maintains that part of the roadway east and west of the area occupied by the car tracks. In other words, the Department maintains two separate sections of roadway, each sixteen feet, more or less, in width. That part of the roadway reserved exclusively for vehicular traffic is paved with concrete, and, from time to time, has been maintained by the application of an asphaltic surfacing material. There are three high elevation street lights mounted on poles along the west side of Pulaski Road, and within the lateral limits of the section of highway where the alleged accident occurred.

Claimant stopped in the westerly of the two south bound lanes of Pulaski Road for a traffic light at Foster Avenue. When the light changed, he started up continuing in the westerly lane, and, at a point 137 feet south of the curb of Foster Avenue, he felt a

bumping sensation in his car, and started to pump his brakes, which he did six or seven times, but his car skidded, went out of control, careened across the car tracks, and crashed almost head-on into a northbound street car. The point where claimant first noticed the bumpy sensation was at the bottom of the incline over the bridge.

It had been raining earlier that evening, and the pavement was moist and damp. Three street lights, 30 feet high, were burning south of the point where the accident occurred.

It is conceded that the concrete surface of the highway near the point of the accident had been scaling, and there were numerous shallow holes in the pavement a little over one inch deep, and ranging up to 2 or 3 feet in diameter. However, claimant testified that he did not see any holes or ruts as he approached the point of the accident, although the street was illuminated, and his car lights were burning.

Two photographs introduced in evidence by claimant show many holes in the street at the scene of the accident, but all of the holes of any size are located in the easterly lane of the two south bound lanes, and the portions of the westerly lane of the two south bound lanes shown in such photographs are comparatively free of holes.

This Court must determine both the law and the facts in a ease. Unlike Courts of Review, we cannot say, "It is for the jury", nor can we avoid our fact finding duties, as trial courts are able to do in jury cases.

Placing ourselves in the position of a fair and impartial jury, without bias or prejudice toward either party, and keeping in mind the many rules of law

relating to negiigence, and contributory negligence, we find the issues in favor of respondent and against claimant.

We are just not satisfied that claimant has proven the allegations of his complaint by a preponderance of the evidence. True it is that an accident occurred, but we do not feel that respondent should be held liable on the basis of the testimony and exhibits in the record before us.

An award to claimant, Jack Flint, is, therefore, denied.

(No. **4377—Claim denied.)**

NEIL BEENES, Claimant, *vs.* **STATE OF ILLINOIS,** Respondent.

Opinion ***filed October 5, 1951.***

STEBBINS, PIERCE AND CONNELL, Attorneys for Claimant.

IVAN **A.** ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

NEGLIGENCE—Highways—State not an insurer. **The State** is only **required** *to* **keep its highways reasonably safe for ordinary travel by** persons **using due care and caution for their own safety.**

CONTRIBUTORY NEGLIGENCE—*exercise* **of** *due care by motorists.* **Where the claimant, in the exercise of ordinary care and caution, could, and should have observed the dangerous condition of the highway, and not blindly ignored it, he** ***cannot*** **recover.**

SCHUMAN, C. J.

The claim in this case is predicated on damages to an automobile of claimant, allegedly caused by the negligence of the State, and consists of a repair bill in the amount of **$315.00,** and towing charges of **$35.00.**

The complaint alleges that claimant, Neil Beenes, in company with his wife, on July **23, 1950,** at about 8:00 **A.M.,** was driving his **1947** Plymouth Sedan over

U. S. Route No. 30 in a westerly direction, and approaching the junction of Route No. 14. While attempting to stop behind a vehicle already stopped at the intersection, his car skidded on loose gravel, and ran into a truck proceeding in the opposite direction.

Claimant testified that he was traveling 35 to 40 miles per hour as he rounded a curve, and saw a slow stop sign; that he applied his brakes, and reduced his speed to 15 to 20 miles per hour; that his car skidded across the highway into the opposite lane, and struck the truck.

Claimant, on cross-examination, testified that there was heavy gravel on the road; that a claim was made against him through his insurance company for damages to the truck, and the claim of the trucking people had been satisfied.

The Departmental Report of the Division of Highways showed that the shoulders of the highway had been graded, and gravel placed thereon preparatory to oiling; that this work was done around June 15, 1950, and the road would have been oiled about August 18, 1950. During said period loose gravel was cast onto the pavement by passing vehicles, and was removed at short intervals.

The rule adopted on liability of municipalities by our courts is applicable to this situation. In the case of *Storen* vs. City of *Chicago,* 373 Ill. 530, the court, on page 534, held:

"A Municipal corporation is not bound to keep its streets and sidewalks absolutely safe for persons passing over any part of them, its duty being to exercise ordinary care. *(Brennan* vs. City of *Streator,* 256 Ill. 468; *Boender* vs. City of *Harvey,* 251 id. 228; *Kohlof* vs. City of *Chicago,* 192 id. 249.) Municipal corporations, not being insurers against accidents, are not liable for every accident occurring within their limits from defects in the streets, but the defects must be such as could have been foreseen and avoided by ordinary care and prudence on the part of the Municipalities."

and, in the case of *Boender* vs. City *of Harvey*, 251 Ill. **228,** the court, on page **231,** held:

"The obstructions **or** defects in the streets or sidewalks of a city, to make the corporation liable, must be of such a nature that they are in themselves dangerous, **or** such that a person exercising ordinary prudence cannot avoid danger **or** injury in passing them, - - in general, such defects as cannot be readily detected."

and, as stated in *Thien* vs. City *of Belleville*, **331 Ill. App. 337,** on page **345:**

"Municipal corporations are not insurers against accidents, and the only duty cast upon the **city** is that it shall maintain the respective portions of the street in reasonably safe condition for the purposes to which such portions **of** the street are devoted. It is **only** bound to use reasonable **care to** keep its streets reasonably safe for ordinary travel thereon by persons using due care and caution **for** their safety. (*Molway* vs. City of ***Chicago,*** **239** Ill. **486;** *Kohlof* vs. City of ***Chicago,*** 192 Ill. **249;** ***City of Salem*** vs. ***Webster,*** **192** Ill. **369.)"**

This Court adopts the same construction of the law as applied to cities in defining the duty required of the State. The State is not an insurer against accidents. It is apparent that the maintenance of the area involved was not unusual, and was for the purpose of properly maintaining the highway. Other vehicular traffic caused loose gravel to accumulate on the paved portion of the highway, which was recognized, and, at intervals, it was removed. To require the State to keep highways absolutely clear of gravel at points and areas as here involved, would make the State an insurer against accidents. This duty is not required.

Claimant alleged in his complaint that, in attempting to stop behind a vehicle already stopped at the intersection, he skidded on loose gravel, which he called large gravel. Certainly the gravel was visible to him, and not a defect, hidden or not apparent. Claimant, in the exercise of ordinary care and caution, should have observed the condition, and conducted himself accordingly. Drivers on highways are bound to observe

conditions readily visible, and not blindly ignore them.

The undisputed evidence shows the loose gravel was on the highway, as a result of other vehicles placing it there. Under the admitted facts, the alleged defect does not constitute actionable negligence on the part of the State.

For the reasons assigned, the claim will be denied.

(No. 4379—Claimant awarded 5245.00.)

CHARLES J. SMITH, JR., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 6, 1961.

CHARLES J. SMITH, JR., Claimant, pro se.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

EMPLOYMENT—*what constitutes notice of termination.* When claimant received no formal notice of termination of employment, failure to receive compensation constituted notice, and amounted to a termination.

SCHUMAN, C. J.

Charles J. Smith, Jr., claimant, was employed by the Department of Labor of the State of Illinois as a Field Investigator II at a monthly salary of $245.00, commencing on February 1, 1948. The instant claim is for salary for the months of December, 1948, January, 1949, and the first fifteen days of February, 1949.

The testimony showed that claimant was principally engaged to secure employment for veterans in the industrial area around Moline and Rock Island, Illinois. Claimant handled work sent him by the Department, and made monthly reports.

There is no dispute that claimant did not receive any formal notification of his termination of employment. However, claimant, himself, was apprised of

this in January, 1949, and received no further work from the Department after November, 1948. In fact, the only report made for January, 1949, was a letter appearing as claimant's exhibit No. 6. Claimant, however, received a letter from Fred E. Staib, Supervisor, Employment Assistance Division, dated December 13, 1948, claimant's exhibit No. **3,** which is not disputed, indicating his December report or inventory would be due before January 10, 1949.

On this record, it is undisputed that claimant had no notification of any termination of his employment until he failed to receive his December check. However, after this, he was on notice, and this amounted to **a** termination.

The Court, therefore, concludes claimant is entitled to his salary for December, 1948 in the amount of **$245.00.**

An award is entered in favor of claimant, Charles **J.** Smith, Jr., in the amount of **$245.00.**

(No. 4384—Claimant awarded $281.25.)

JAMES MARSAGLIA, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion* filed *October 6, 1961.

JAMES MARSAGLIA, Claimant, pro se.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when an award will be made.* Where claimant's injury **arose** out of and in the course **of** his employment by the State **of** Illinois, an award may be made under the Workmen's Compensation Act.

DELANEY, J.

Claimant, James Marsaglia, seeks to recover from respondent under the Workmen's Compensation Act for

the loss of the distal end of his right ring finger, as the result of an accident that arose out of and in the course of his employment as a temporary equipment operator for the Division of Highways.

Mr. James Marsaglia was 23 years of age, married, and resided in the Village of Auburn, Sangamon County, on May 17, 1950, the date of the injury complained of. He informed the Division of Highways that there were no children under 18 years of age dependent upon him for support.

He was first employed by the Division of Highways on January 16, 1950 as a common laborer, and at a wage rate of $1.00 an hour. With the exception of the period from March 30 to May 1, 1950, inclusive, Mr. Marsaglia was employed continuously by the Division of Highways, weather permitting, and work being available, from the date of his first employment until May 17, 1950, the date of his injury. During this period, Mr. Marsaglia was occasionally employed as a temporary equipment operator, and, when so employed, was paid a wage of $1.20 an hour. The Division paid Mr. Marsaglia $606.40 in wages during his period of employment.

On May 17, 1950, Mr. Marsaglia was using a Divison truck for the purpose of hauling dirt to be used in leveling shoulders on S.B.I. Route No. 29 at a point about ¼ mile north of Sharpsburg in Sangamon County. At approximately 2:00 P.M., that day, Mr. Marsaglia was cleaning out the last of a load of clotted dirt and sod from the truck he was driving. To do this, he swung the endgate back and forth. While swinging the endgate, he caught his right ring finger between the endgate and the truck body, severely crushing the distal end of the finger.

He was taken to Dr. H. M. Wolfe, Taylorville, for such treatment as the doctor should advise.

On May 18, 1950, Dr. Wolfe submitted the following report to the Division of Highways:

"Distal end of right ring finger mashed, amputated near joint. Treatment—At St. Vincent's Hospital, Taylorville, Illinois. Distal end of right ring finger amputated near joint. X-Rays—No. Remarks—After recovering from anesthetic, patient left hospital about 5 P.M. Estimated date of discharge—About 2-3 weeks. Estimated date of ability to return to work—Is going to do flag work on road. What permanent disability do you expect?—Loss of end of right ring finger. Date patient was discharged—Not discharged.''

Dr. Wolfe sent the following final report to the Division on June 26, 1950:

"Nature of Injury—Distal end of right ring finger mashed. Treatment—Removed distal end of right ring finger just distal to joint. Antiseptic dressings. X-Rays—No. Date patient was discharged—June 26, 1950. Permanent disability—Loss of end of right ring finger."

Mr. Marsaglia returned to work the day following the amputation of his finger by Dr. Wolfe. Therefore, he was not paid compensation for total temporary disability.

The Division has paid the following creditors because of Mr. Marsaglia's injury: Dr. H. M. Wolfe, Taylorville—$41.00, and St. Vincent's Hospital, Taylorville—$22.75, totalling $63.75.

Although claimant had worked for respondent for less than one year at the time of the accident, employees engaged in similar work earned far in excess of $1,560.00 per year. Claimant's compensation rate is, therefore, the maximum of $15.00. Since the accident occurred subsequent to July 1, 1949, this must be increased 50%, making his compensation rate $22.50.

The record consists of the complaint, Departmental Report, stipulation waiving briefs of both parties, and transcript of the evidence.

No jurisdictional question is raised. Respondent and claimant were operating under the Workmen's Compensation Act.

Claimant is entitled to an award for **50%** loss of his right third, or ring finger, and under Section 8, Paragraph (e) **(4)** of the Workmen's Compensation Act **12½** weeks at his compensation rate of **$22.50** per week, or the sum of **$281.25.**

An award is, therefore, hereby entered in favor of claimant, James Marsaglia, in the amount of **$281.25,** which is payable forthwith.

Harry L. Livingstone was employed to take and transcribe the testimony in support of this claim, for which he made a charge of **$17.40.** We find this charge to be fair, reasonable and customary for the services rendered.

An award is, therefore, hereby entered in favor of Harry L. Livingstone in the sum of **$17.40.**

This award is subject to the approval of the Governor, as provided in Section **3** of "An Act concerning the payment of compensation awards to State employees".

(No. 4404—Claim denied.)

CHARLES O. MCCAY AND WILLIAM A. HASSE, doing business as McCay and Hasse, Claimants, *vs.* **STATE OF ILLINOIS, Respondent,.**

Opinion *Pled October* **6,** *1951.*

MARKMAN, **DONOVAN AND SULLIVAN,** Attorneys for Claimants.

IVAN A. **ELLIOTT,** Attorney General; C. **ARTHUR** NEBEL, Assistant Attorney General, for Respondent.

CONTRACTS—*when extra compensation will not be allowed under.* **Where contract, signed by claimant, incorporated Article 5.7 of the Standard Specifications for Road and Bridge Construction, which Article saves the State harmless from any damages caused by delays, claim for extra compensation will be denied.**

LANSDEN, J.

Claimants, Charles O. McCay and William A. Hasse, doing business as McCay and Hasse, filed their complaint in which they seek to recover damages for delay in connection with a grade separation contract between claimants and respondent acting through the Department of Public Works and Buildings. Respondent has filed a motion to dismiss.

In November, 1946, claimants' proposal to perform certain grade separation work in Cook County near 159th Street and Laramie Avenue was accepted by respondent, and a written contract was entered into. The contract price was slightly over $200,000.00.

At about the same time respondent entered into another contract with the Chicago, Rock Island and Pacific Railroad Company to perform certain other work in connection and conjunction with claimants' work. The Railroad Company was over a year late in doing what it was supposed to do, and claimants were delayed on that account.

Claimants allege that, by reason of the extra year's delay, they had to pay higher wages, and higher prices for materials to their damage in the sum of $30,633.94, and they further allege that no part of the delay was due to claimants' derelictions.

The contract entered into between claimants and respondent is attached to the complaint. Several provisions of the proposal leading up to the contract, found on pages 2, 4 and 6 thereof, preclude extra compensation.

Under Paragraph No. 3 of the document entitled "Contract", it is provided, among other things, that the "Standard Specifications for Road and Bridge Construction", dated July 1, 1942, is an essential document

of the contract between the claimants and respondent, and is made a part thereof. (Claimants' exhibit "A", page 37.) Article 5.7 of the Standard Specifications for Road and Bridge Construction, adopted July 1, 1942, provides in part as follows:

"* * * * * * * *

Each contractor involved shall assume all liability, financial or otherwise, in connection with his contract and shall protect and save harmless the Department from any and all damages or claims that may arise because of inconvenience, delay, or loss experienced by him because of the presence and operations of other contractors working within the limits of the same project, and he shall assume all responsibility for all work not completed or accepted because of the presence and operations of the other contractors.

* * * * * * *"

In *Illinois Steel Bridge* Co. vs. *State,* 7 C.C.R. 75, this Court construed a contract provision almost identical with the above quoted provision from Standard Specifications, and held that such provision relieved the State of any liability for damages caused by delays of another contractor with the State. This decision binds us in this case.

We might also mention that the "equity and good conscience" test, which was used in certain cases cited by claimants, was abolished by the 1945 Court of Claims Act. Ill. Rev. Stat., 1949, Chap. 37, Secs. 439.1-439.24.

The motion of respondent to dismiss is sustained, and the case is hereby dismissed.

(No. 4418—Claim denied.)

CHRIST J. WEBER, ADMR., ET AL, Claimant, *vs.* **STATE OF ILLINOIS,** Respondent.

Opinion filed October 5, 1951.

BALTZ AND GUYMON, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; CHARLES H. EVANS, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*construction.* Section 29 of the Workmen's Compensation Act cannot be construed *to* allow a suit against respondent as a third party for negligence in the maintenance of its highways.

SAME—*where* a *motion to* dismiss *will* be allowed. Where the complaint on ita face showed deceased's employer and respondent were both bound by the provisions of the Workmen's Compensation Act, the motion of respondent to dismiss will be allowed in accordance with Section 29 of the Act.

DELANEY, J.

Claimant states that on March **22,** 1951 he was duly appointed administrator of the estate of Willard G. Weber, deceased, by the Probate Court of St. Clair County, Illinois. The said Willard G. Weber died on July **2,** 1950, leaving certain specified heirs.

The death of the said Willard G. Weber was caused by injuries sustained by him while in the employ of the Commercial Transport, Inc. Said Willard G. Weber was driving a tractor-trailer unit for Commercial Transport, Inc., which overturned when a slab. of the concrete road broke while the truck was passing over **a** weakened portion of the highway. Claimant alleges the negligence of the respondent in the maintenance of said highway in his complaint.

The record consists of the complaint, motion of respondent for an extension of time to file pleadings, order of Chief Justice granting motion for'an extension of time to file pleadings, motion of respondent to dismiss, notice to call up motion to dismiss, and brief of claimant in opposition to motion to dismiss.

Respondent has filed its motion to dismiss the complaint herein, in accordance with the provisions of Section **29** of the Workmen's Compensation Act, for the reason that on its face both the deceased employee, Willard G. Weber, and the respondent were bound by the Workmen's Compensation Act.

Claimant, in his reply brief opposing the motion to

dismiss, claims this case presents an entirely different situation with respect to the manner in which the accident arose. He argues that in all cases he has examined relating to the cause of action against a third person, said cause of action arose out of a positive act of negligence committed by the third person, or his employee, such as the operation of a truck in a negligent manner upon a highway; the operation of a train in a negligent; manner. Claimant further argues that his petition filed in this case alleges that the State of Illinois was negligent in the manner in which it kept in repair a public highway in the State of Illinois.

We find nothing in any of the sections of the Workmen's Compensation Act, which will support such a construction of the Workmen's Compensation Act as argued by claimant.

For the reasons stated, the motion of the Attorney General to dismiss is granted, and the complaint herein is hereby dismissed.

(No. 4421—Claimant awarded $443.00.)

PATRICK J. SULLIVAN, JR., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 5, 1951.

DITCHBURNE AND BOHLING, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; **WILLIAM H. SUMPTER,** Assistant Attorney General, for Respondent.

EMPLOYMENT—*Court Reporter.* **Where evidence shows that free lance reporter was hired to furnish transcript by the Acting Secretary of the Liquor Control Commission, and it was accepted and retained by said Commission,** he **is entitled to an award for such transcript at the usual and customary rate.**

LANSDEN, J.

On December 18, 19 and 20, 1950, the United States Senate Crime Investigating Committee, commonly known as the "Kefauver Committee", held public hearings in the United States Court House in Chicago.

Prior to the commencement of the hearing on the 18th, claimant, Patrick J. Sullivan, Jr., a free lance court reporter, was introduced by Peter G. Kuh, an Assistant State's Attorney of Cook County, to A. G. Geocaris, then the acting Secretary of the Illinois Liquor Control Commission, in the vicinity of the room where the hearing was to be held.

Claimant had been employed by the Corporation Counsel of the City of Chicago, and the State's Attorney of Cook County to report the testimony given at the Chicago hearings of the Kefauver Committee.

When Geocaris learned of this, he talked to claimant about doing some reporting for the Illinois Liquor Control Commission. We assume that Geocaris was authorized, in his official capacity, to bind respondent in whatever arrangement was made with claimant.

The dispute in this case arises out of what claimant and Geocaris talked about, since respondent has refused to pay claimant the sum of $443.00 for a copy of the testimony presented at the Committee hearings on December 18 and 19, 1950. Said transcript was 886 pages in length, and was charged for at the customary rate of fifty cents per page.

Claimant maintains that Geocaris asked for a complete transcript of the Chicago hearings, and is somewhat corroborated by Kuh in this regard.

Geocaris claims that all the Illinois Liquor Control Commission was interested in was the testimony of Abe

Greenberg of the Canadian Ace Brewing Company, and Joseph Fusco of Gold Seal Liquors, two witnesses who were scheduled to appear before the Committee; and, that all the claimant was supposed-to furnish to the Liquor Control Commission was a transcript of the testimony of these two witnesses.

Claimant furnished Geocaris a transcript of the first two days' hearings, and, prior to the commence-. ment of the hearings on the third day, Geocaris learned from counsel for the Committee that Greenberg and Fusco would not appear on account of illness. Thereupon, he called claimant, and told him to do no more reporting for the Liquor Control Commission.

On December 21, 1950, claimant billed the Liquor Control Commission for his services, and later talked to Geocaris about his bill, which such Commission finally refused to pay.

Geocaris retained the transcript furnished him by claimant until March 6, 1951, when it was returned to claimant.

The long delay in returning the transcript would seem to indicate that the Liquor Control Commission made some use thereof, yet on the date of December 19th, or prior to the commencement of the hearings of the 20th, Geocaris knew that the transcript already in his hands contained no testimony of Greenberg and Fusco. If the transcript he received was not what he had ordered, Geocaris should have returned it at once. His delay in so doing permits us to draw the inference that his recollection of the so-called "conditional" offer to claimant could have been inaccurate.

Furthermore, if claimant had not been given an order to furnish the Liquor Control Commission with a copy of the transcript, why did Geocaris call claimant

before the third day's hearing commenced, and instruct him, as Geocaris testified, "to discontinue further services"?

We, therefore, conclude that claimant was engaged to furnish a complete transcript of the testimony for the hearings on December 18 and 19, 1950, and is, therefore, entitled to an award.

An award is entered in favor of claimant, Patrick J. Sullivan, Jr., in the sum of $443.00.

(No. 4428—Claimant awarded $56.38.)

ERNEST JENKINS, Claimant, *vs.* **STATE OF ILLINOIS,** Respondent.

Opinion filed October 6, 1951.

ERNEST JENKINS, Claimant, pro se.

IVAN **A. ELLIOTT,** Attorney General; CHARLES H. EVANS, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when an award will be made.* **Where claimant's injury arose out of and in the Course of his employment by the State of Illinois, an award may be made under the Workmen's Compensation** *Act.*

DELANEY, J.

Ernest Jenkins filed his complaint on April **18, 1951,** alleging that on January **21,** 1951, while an employee of the Department of Public Welfare, Division **of** Nursing, at Jacksonville, Illinois, he was injured when struck in the left eye by a violent patient with his fist.

The record consists of the complaint, Departmental Report, stipulation waiving briefs of both parties, and transcript of evidence.

At the time of the accident, claimant was married, but had no children under 18 years of age dependent upon him for support. His annual earnings during the year immediately preceding the accident were **$3,000.46.**

On January 21, 1951, a newly admitted patient, Arthur Stewart, sat down on the floor while breakfast was being served. Claimant was in front of him, and a patient in back of him. As they were attempting to get him up, said patient struck Mr. Jenkins in the left eye, smashed his glasses, and inflicted an injury described as "discoloration around left eye". The injury was described as follows "sclera of the left eyeball, swollen, with large hematoma around". "Pupil dilated, does not react to the light. Vision very much diminished. Case referred to Dr. Alfred G. Schultz, oculist."

Under date of February 21, 1951, Dr. Schultz reported as follows:

"The above patient was attended by me for an injury sustained while on duty 20 January 1951. He has been under my observation from that time until the present, and now is ready to return to duty.

The diagnosis of the injury sustained was rupture of left eye with prolapse of iris subconjunctivally with hyperemia, subconjunctival ecchymosis, contusion of left lids and orbital region. The eye has cleared quite satisfactorily, and at present his corrected left vision is 20/30-1 in the injured eye. This I do not believe should change periodically for the development of cataract, glaucoma or retinal chenge. At present there is no indication that these complications will develop, but it is still possible."

Dr. Schultz testified at the hearing of this cause as follows:

"There is some discrepancy in vision, that I believe is secondary to this injury. His corrected vision at the present is 20/30, or as a guess, a decrease of about 1/10th of what we would anticipate his vision to have been prior to the injury, judging from his right vision. In addition to the lass of his natural vision there is some permanent disability due to the deformity of the pupil, which allows for an increase in sensitivity to light, and has some dazzle effect on the vision."

No jurisdictional question is raised. Respondent and claimant were operating under the Workmen's Compensation Act, and the accident arose out of and in the course of the employment.

Claimant is entitled to an award of 10% loss of the use of his left eye, under Section 8, Paragraph (e)

(16) of the Workmen's Compensation Act, amounting to $270.00.

The claimant lost five and one-seventh weeks time as a result of the accident, and should be allowed temporary total disability for that period. Claimant's compensation rate is the maximum of $15.00 per week; since the accident occurred subsequent to July 1, 1949, this must be increased 50%, making his compensation rate $22.50 per week. As claimant was entitled *to* five and one-seventh weeks while temporarily totally incapacitated, he should have received $115.71. Claimant received from the respondent $329.33; therefore, he was overpaid the sum of $213.62, which must be deducted from his award, leaving a total award due in the sum of $56.38.

An award is, therefore, entered in favor of claimant, Ernest Jenkins, in the sum of $56.38, all of which has accrued, and is payable forthwith.

Dr. Alfred G. Schultz testified at the hearing that there is a balance due him for services rendered claimant in the sum of $63.50, and he is entitled to payment for these services.

An award is, therefore, entered in favor of Dr. Alfred G. Schultz in the sum of $63.50, payable forthwith.

The evidence discloses that Nancy H. Schindler was employed to take and transcribe the evidence at the hearing before the Commissioner. For said services she made a charge of $51.00, which we find is fair, reasonable and customary.

. An award is, therefore, entered in favor of Nancy H. Schindler, Court Reporter, in the sum of $51.00.

These awards are subject to the approval of the Governor, as provided in Section 3 of "An Act con-

ccrning the payment of compensation awards to State employees".

(No. 4430—Claimant awarded $6,675.00.)

ELSIE M. WHAN, WIDOW, ET AL, Claimant, *vs.* **STATE OF ILLINOIS,** Respondent.

Opinion filed October 5, 1951.

HEBEL, IVES AND DAVIS, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when an award will be made.* Where the drowning of claimant's intestate arose out of and in the course of his employment by the State of Illinois, an award may be made under the Workmen's Compensation Act.

SCHUMAN, C. J.

This is a claim for the death of Otis J. Whan, who, it is alleged, met his death while in the course of his employment for the Department of Conservation of the State of Illinois.

The admitted facts show that Otis J. Whan, 35 years of age, while in the course of his employment for the Department of Conservation, was, on the 16th day of January, 1951, supervising an under-the-ice fishing operation one-half mile north of Two by Four Island in the Mississippi River, about three to four miles south of Muscatine Dam, Iowa. While returning to the Illinois shore, the automobile in which he was riding broke through thin ice, and he was drowned. A formal inquest was conducted by the Coroner of Mercer County, and a verdict rendered "Death by Accidental Drowning".

The facts show that decedent was survived by his widow, Elsie M. Whan, and a son, James Otis, aged

4 years. No jurisdictional questions are involved. Decedent's earnings during the year preceding his death were **$2,712.00.**

On the basis of this record, we make the following award:

An award in favor of claimant, Elsie M. Whan, in the sum of $6,675.00. Of this sum there has accrued to October **2, 1951,** the sum of **$832.50,** being **37** weeks at **$22.50** per week, which is payable forthwith.

The remainder of said award, in the sum of $5,842.50, **is** payable to claimant, Elsie **M.** Whan, at a weekly rate of **$22.53,** commencing October **9, 1951** for **259** weeks, with one final payment of **$15.03.**

Future payments, hereinabove set forth, being subject to the terms of the Workmen's Compensation Act of Illinois, jurisdiction is hereby reserved for the purpose of making such further orders as may, from time to time, be necessary.

This award is subject to the approval of the Governor, as provided in Section **3** of "An Act concerning the payment of compensation awards to State employees".

(No. 4439—Claimant awarded $3,304.91.)

GERTRUDE HABEL, Claimant, *vs.* **STATE OF ILLINOIS,** Respondent.

Opinion filed October 5, 1951.

ROY A. **PTACIN,** Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; **WILLIAM** H. SUMPTER, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when an award* ***will be made.*** Where claimant's injuries arose out of and in the course of her employment by the **State of** Illinois, an award may be made under the Workmen's Compensation Act.

LANSDEN, J.

Claimant, Gertrude Habel, seeks to recover from respondent under the Workmen's Compensation Act for injuries to her right arm that resulted from an

accident, which arose out of and in the course of her employment as an attendant at the Chicago State Hospital, operated by the Department of Public Welfare.

Just before midnight on December 9, 1950, claimant, who had just come on duty, was crossing the porch of the ward in which she was assigned to work. She slipped, fell, and struck her right side, especially her right elbow, causing a dislocated chipped fracture in the elbow joint.

No jurisdictional questions are.involved, and respondent has furnished all hospital and medical treatment required to cure and relieve claimant of the effects of her accident. ,

The injuries to her right arm are now concededly permanent, and the only question before us is the determination of the percentage of loss of use of her right arm claimant has sustained.

The doctor, who examined claimant for respondent, and claimant's doctor, who testified, are in virtual agreement as to limitation of flexion and extension of her right arm, and pronation and supination of her forearm and wrist, the variations in their findings being only 5%. We are prone to follow the findings of claimant's doctor in this regard, since he examined her both prior and subsequent to the last examination by respondent's doctor. At the time of this last examination, he found her limitations to be somewhat more severe than at his first examination.

Claimant has a 30 and 25% loss of flexion and extension, respectively, in her right arm. Pronation and supination show a 25% loss. Abduction in the shoulder is lessened about 30%.

In addition, there was some atrophy of the right shoulder muscles, and a marked enlargement of the

right elbow area. Bony changes in the olecranon process, and the fossae, which fit over the end of the humerus and the ulna, were noted. In addition, there was some osteosclerosis in the lower ends of the radius and the ulna, and one bone fragment was floating in the elbow region, never having attached to any bone since it was chipped off. Crepitation, rigidity, and spasticity of arm muscles were noted on manipulation, indicating traumatic arthritis.

The fall, claimant sustained, affected her wrist, forearm, elbow, and shoulder, and her arm will be carried in fixed flexion in the future. The joint space in her elbow is also permanently roughened. Any surgical attempt to improve claimant's right arm was deemed inadvisable.

From the foregoing, we conclude that claimant has sustained a 66⅔% loss of use of her right arm, and is entitled to an award under Section 8 (e) (13) of the Workmen's Compensation Act.

On the date of her accident, claimant was 41 years of age, married, but had no children under 16 years of age dependent upon her for support. Her earnings in the year prior to her accident amounted to $2,316.00, and her rate of compensation is, therefore, $22.50 per week.

Claimant was temporarily and totally disabled from the date of her accident on December 9, 1950 through June 6, 1951. She returned to work on June 7, 1951. During the period of total temporary disability she was paid the sum of $645.45 as compensation, when she should have been paid only $575.36, leaving an overpayment of $70.09, which must be deducted from her award.

William J. Cleary & Co., Chicago, Illinois, was

employed to take and transcribe the testimony at the hearing before Commissioner Anderson. Charges in the amount of $48.40 were incurred, which are reasonable and customary. An award is entered in favor of William J. Cleary & Co. in the sum of $48.40.

An award is entered in favor of claimant, Gertrude Habel, under Section 8 (e) **(13)** of the Workmen's Compensation Act for a 66⅔% loss of use of her right arm, or 150 weeks at $22.50 per week, or the sum of **$3,375.00** less overpayment above referred to of $70.09, leaving a net award of **$3,304.91,** payable as follows:

$ **385.71,** less overpayment of $70.09, or the **sum** of **$315.62,** which has accrued, and is payable forthwith;

$2,989.29, payable in weekly installments of **$22.50** per week commencing on October **12, 1951** for a period of **132** weeks, plus one final payment of **$19.29.**

This award is subject to the approval of the Governor. Ill. Rev. Stat., **1949,** Chap. **127,** Sec. **180.**

(No. 4444—Claimant awarded $578.25.)

JEFFERSON ICE **COMPANY, AN** ILLINOIS **CORPORATION,** Claimant, *us.* **STATE OF ILLINOIS,** Respondent.

Opinion filed October 5, 1951.

DONALD J. SEELEY, Attorney for Claimant.

IVAN **A.** ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

NEGLIGENCE—*when an award will be made.* Where the undisputed evidence showed that a State truck was operated in a negligent manner, and the claimant, through its agent, was in the exercise of due care and caution for the safety of its property, an award will be made for the damages to claimant's property.

SCHUMAN, C. J.

This claim arises out of an action for damages to a truck of claimant by reason of a collision with a State Highway truck, in which it is claimed the State was

negligent through its agent in the operation of the State truck.

The undisputed facts show that on March 28, **1951,** at about 4:00 P.M., a State truck, operated by Arthur Miller, was parked on the outer lane of westbound traffic facing east on a four lane highway designated as U. S. Route No. 20, near Keeneyville, Du Page County, Illinois. The truck was loaded with fence posts taken up from properties on which had been located snow fences, and was parked behind another truck loaded with fence posts. Arthur Miller started the truck up, gave no signal, and proceeded diagonally across the highway into a driveway leading into **a** farmhouse for the purpose of turning around and going back west. As the State truck so proceeded, it struck the truck of claimant, operated by Robert N. Zerby, which was traveling in an easterly direction, resulting in the claimed damages.

Mr. Zerby, driver of claimant's truck, stated he observed the State truck after he had reached the crest in the road about 200 feet away, sounded his horn, and thought he could have stopped at that point, if he had known what the operator of the State truck intended to do.

The weather was clear, visibility good, and the pavement was dry. The State truck was being operated on the wrong side of the road in an area of open country, and at a place where there were no intersecting streets or highways. Claimant's truck was being operated on its right side of the road.

The evidence, without dispute, shows that the State truck was operated in a negligent manner, which was the proximate cause of the collision and damages to claimant's truck, and, that claimant, through its

agent, was in the exercise of due care and caution for the safety of its truck. The law will not permit the absurdity of looking and not seeing, when respondent's driver could have looked and could have seen claimant's truck, and avoided the collision and resulting damages to claimant's truck.

The damages to claimant's truck were in the amount of $578.25.

An award is, therefore, entered in favor of claimant for $578.25.

(No. 4449—Claim denied.)

WALTER DE VORE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed* October *5, 1951.

GILSTER AND EBERS, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

LIMITATIONS—*when plea of statute of limitations will* **be *sustained.* Where complaint shows on its face that more than two years have elapsed since injury occurred, claim is barred by statute of limitations. (Section 22 of the Court of Claims Act.)**

DELANEY, J.

Claimant, Walter De Vore, filed his complaint on June 21, 1951, wherein he alleges that on January 28, **1949,** while an inmate of the Illinois State Penitentiary at Menard, he was directed to work in the tin shop. On the particular day in question, he was cutting out handles for tin cups for use in the penitentiary by means of an electrically powered tin shears, whose mechanism was engaged or disengaged by means of a clutch, which was foot-operated. Claimant further alleges that this machine had been known to slip on previous occasions, causing the mechanism of the shears

to become engaged with the power unit without actuation by the operator, and without the control of the operator. While performing his regular duties, the tin shears became engaged with the power unit without control of the claimant by means of the clutch slipping into contact. The third and fourth fingers on claimant's left hand were sheared off at the first joints thereof, and his hand tendons were maimed and lacerated; and, as a result, claimant was hospitalized for a month. Claimant seeks $2,500.00 in damages from the respondent, State of Illinois.

The record consists of the complaint, motion of respondent to dismiss, notice to call up the motion of respondent to dismiss, brief of claimant in opposition to the motion of respondent to dismiss, and reply brief of respondent.

Respondent has filed its motion to dismiss the complaint, wherein it alleges that it appears from the face of the complaint that the claim is barred by the statute of limitations, more than two years having elapsed since the injury.

Section 22 of the Court of Claims Act reads as follows:

"Every claim cognizable by the Court and not otherwise sooner barred by law shall be forever barred from prosecution therein unless it is filed with the Clerk of the Court within two years after it first accrues, saving to infants, idiots, lunatics, insane persons and persons under other disability at the time the claim accrues two years from the time the disability ceases."

This Court held in *Mc Elyea* vs. *State,* 7 C.C.R. 69, as follows:

"The law of this State gives unto a prisoner serving a sentence in any penal institution the right to sue or to be sued in the Courts of this State during the period of such confinement. A convict does not lose his personal rights because of his imprisonment, although he is deprived by law of certain rights of citizenship. Therefore, as he possessed said personal rights the claimant was entitled, able and free to exercise them, even though he was confined in the penitentiary."

The complaint shows on its face that more than two years had elasped from the date of the alleged injury to the filing of the complaint. Thereforc, under the law, this Court is without jurisdiction to hear and determine the claim for the reason that the statute of limitations had run against the claimant.

Having concluded that we are without jurisdiction to hear and determine this claim, it becomes unnecessary to discuss any other questions.

The motion of the Attorney General is allowed.

Complaint dismissed.

(No. 4291—Claim denied.)

PETER FULLER, Claimant, *vs.* STATE *OF* **ILLINOIS,** Respondent.

Opinion filed November 13, 1951.

POLLOCK **AND** ENNIS, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S OCCUPATIONAL DISEASES ACT—*elements* of *proof* ***necessary to obtain award under.*** To recover, claimant must establish negligence by showing the State violated (1) a rule or rules **of** the Industrial Commission made pursuant to **the** Health and Safety Act; (2) a statute of this State intended **for** the **protection of** the health of employees. ***(Ramsey vs. State,*** 18 C.C.R. 174.)

SCHUMAN, C. J.

Claimant filed his complaint for damages based on the contracting of tuberculosis, while employed at the Illinois Soldiers' and Sailors' Home at Quincy, Illinois.

The complaint charges that claimant contracted tuberculosis by drinking out of the same cup as used by an inmate, Dixon Motley, who worked with claimant during the years of 1944 through **1946.** The records show that Dixon Motley was transferred to the Veterans Administration Hospital at Excelsior Springs with ac-

tive tuberculosis on July 9, **1946.** Claimant charges the State negligently assigned him to work with an individual known to be suffering from tuberculosis, and negligently provided common drinking facilities for the claimant, and the known tuberculosis patient.

There is no charge in the complaint of a violation of any rule or regulation of the Industrial Commission made pursuant to the Health and Safety Act, or of a violation of a statute of this State intended for the protection of the health of employees. There is no evidence of any violations as above stated.

The evidence fails to show any knowledge on the part of the State that Dixon Motley was tubercular, and that the State knowingly required claimant to drink out of the same container as Motley. The proof shows that claimant was awarded Civil Service payments on the ground that his disease was service connected. However, to recover, claimant must establish negligence by showing that the State violated:

(1) a rule, or rules of the Industrial Commission made pursuant to the Health and Safety Act;

(2) a statute of this State intended for the protection of the health of employees. (Ramsey vs. *State,* 18 C.C.R. 174.)

Neither the complaint, nor the proof establish such negligence, and for this reason the claim must be denied.

Helen Woolley was employed to take and transcribe the evidence at the hearing before Commissioner Summers. Charges in the amount of $26.00 were incurred for these services, which charges are fair, reasonable and customary. An award is, therefore, entered in favor of Helen Woolley in the amount of $26.00, payable forthwith.

On the basis of the record before us, an **award to** claimant will have to be denied.

(No. **4319—Claim denied.)**

WILLIAM E. **FREW,** Claimant, *vs.* **STATE OF ILLINOIS, Respondent.**

Opinion pled January 9, 1961, Judge Delaney dissenting.
Petition of Claimant for rehearing allowed April 10, 1961.
Motion of Claimant to dismiss allowed November 13, 1961.

J. HAROLD DOWNEY, Attorney for Claimant.

IVAN **A.** ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*burden* of *proof.* Where evidence produces inferences based on speculation, conjecture and uncorroborated testimony of claimant, an award will be denied. (*Reinertson* vs. *State,* 17 C.C.R. 10.)

LANSDEN, J.

Claimant, William E. Frew, seeks to recover from respondent under the Workmen's Compensation Act for injuries allegedly sustained as a result of an alleged accident, which claimant maintains occurred in the course of his employment as a foreman in the machine shop of the Illinois State Penitentiary, Stateville, Illinois, operated by the Department of Public Safety.

On February **6,** 1950, shortly after noon, claimant and an inmate of the penitentiary, Horace Carter, lifted a steel shaft, ten feet long and about two inches in diameter, weighing 100-125 pounds, to a height of four and one-half feet, and placed it on a lathe. Claimant then stated to Carter that the shaft was "awful heavy".

Later that afternoon, claimant went to the toilet, but passed nothing. After work, claimant, at his home again sought to pass stool, but nothing happened. About 10:00 P.M. claimant again went to the bathroom at his home, but he fainted, and a doctor **was**

summoned, who prescribed treatment. After the doctor left, claimant again went to the bathroom where he again fainted, but this time he vomited blood, and passed a black colored stool.

Thereupon he was taken to a hospital where he was found to have a perforated, bleeding peptic or duodenal ulcer. He has not recovered from the ulcer, and has ceased working for respondent.

Claimant did not notify his superior of his claim that the lifting of the shaft caused the aggravation of his ulcer until nineteen days after the date thereof, and no one knew of the claim of injury prior to that time.

The question in the case is whether claimant suffered an accidental injury that arose out of and in the course of his employment.

For the record in the case, two equally plausible inferences can be drawn, either of which is necessarily conjectural. One is that the strain of lifting the shaft aggravated the ulcer. The other is that his two attempts to pass a stool resulted in strain severe enough to aggravate this ulcer.

Under such circumstances, an award must be denied, since no award can be had on speculation, conjecture or the uncorroborated testimony of claimant. *Reinertson* vs. *State*, **17** C.C.R. **10;** *Mt. Olive Coal* Co. vs. *Ind. Com.*, **374** Ill. **461.**

Julia Hertz, Joliet, Illinois, was employed to take and transcribe the testimony at the hearing before Commissioner Wise. Her charges amount to **$44.50,** which are reasonable and customary, and an award is entered in her favor for such amount.

An award to claimant, William E. Frew, is denied.

This award is subject to the approval of the Governor. Ill. Rev. Stat., **1949,** Chap. 127, Sec. 180.

(Nos. 4353-4354-4397-4398—Consolidated—Claims denied.)

GENE DOOLITTLE BY LORENA PETERSON, HIS MOTHER AND NEXT FRIEND, No. **4353, WILLIAM OTT,** No. **4354, JOYCE PROKOP, A MINOR, BY JOHN A. PROKOP, HER FATHER AND NEXT FRIEND,** No. **4397, AND SHIRLEY PROKOP,** No. **4398,** Claimants, *vs.* **STATE OF ILLINOIS,** Respondent.

Opinion filed September 7, 1951.
Petition of Claimants for rehearing denied November 13, 1951, Judge Delaney dissenting.

JOHN IRVING PEARCE, Attorney for Claimants.

IVAN A. ELLIOTT, Attorney General; **WILLIAM €1.** SUMPTER, Assistant Attorney General, for Respondent.

NEGLIGENCE—*burden of proof-when claims will be denied.* Claimants must show by a preponderance of the evidence that the State was negligent in its **duty** to maintain highway shoulder, and, upon lack of such showing, the claims **will** be denied.

SAME—contributory negligence. One who has earlier the same evening traveled over a certain stretch **of** highway is charged with a knowledge of its condition, **so** long as the condition is unchanged on his return trip. Thus, to approach a **known** danger without care commensurate with such danger is contributory negligence.

LANSDEN, J.

Having arisen out of the same accident, the four cases now before us for consideration were consolidated for hearing and opinion. **All** claimants seek to recover for the alleged negligence of respondent.

Case No. **4353** was filed by Gene Doolittle, driver of the automobile, for reimbursement for doctor arid hospital bills, and also for personal injuries sustained in said accident.

Case No. **4354** was filed by William Ott to recover for damages sustained in said accident to his 1940 Chevrolet coupe.

Case No. **4397** was filed by Joyce **Prokop,** a minor, by her father and next friend, to recover for personal injuries sustained in said accident.

Case No. 4395 was filed by Shirley Prokop, now Shirley Simonelic, for personal injuries sustained in said accident.

On Sunday, September 3, 1950, the claimant, Gene Doolittle, used, with his permission, a car belonging to his grandfather, claimant, William Ott. Accompanied by Shirley, Joyce, Joan and Audrey Prokop, he drove from Wilmington, Illinois to a drive-in theatre located near Kankakee, Illinois. At approximately 10:00 P.M. that night they left the drive-in theatre in Kankakee, and drove toward their home in Wilmington, Illinois, on Illinois Highway No. 113 North, which highway extends in a northwesterly and southeasterly direction between Wilmington and Kankakee, Illinois. Said highway, No. 113 North, was originally constructed as a 9 foot paved highway, but in 1944 that part of the highway between Kankakee and a point 300 feet northwesterly of what is locally known as Chicago Road was widened to 20 feet, and that part from 300 feet northwesterly of the Chicago Road to Wilmington continued as a 9 foot pavement, with 4 to 6 foot shoulders on each side of the highway. The point northwesterly from Chicago Road is on a curve to the left when traveling toward Wilmington, and immediately southeast of the Chicago Road intersection on the north shoulder of Route No. 113 North is a diamond shaped 24 inch x 24 inch sign with an arrow indicating a curve to the left.

Prior to September 3, 1950, the shoulders of said highway from the end of the two lane pavement to Wilmington were in the process of a maintenance operation to prepare them for black topping, and the shoulders were bladed in preparation for said black topping. The blading operation was done with one end

of the scraper blade resting on the edge of the concrete slab.

As the claimants drove in a northwesterly direction along said highway, and as they rounded the curve at a point where the four-lane pavement merged into the single lane pavement, the driver of the car, Gene Doolittle, lost control of same, and the car went through a fence, and overturned in the field with the consequent injuries to the passengers. The car left the highway at a point approximately 100 feet beyond the end of the two-lane pavement, and came to rest in a field about **30** feet from the highway. Claimants, Gene Doolittle, Joyce Prokop and Shirley Prokop received injuries in the accident. At the hearing there was evidence as to the personal injuries sustained by each claimant, the amount of their bills, and loss of earnings during the period. Also evidence was introduced as to the value of the car in behalf of the claimant, William Ott.

There was also considerable evidence as to the condition of the road at the point in question, and the undisputed failure of the State to erect and maintain necessary signs warning of the change in pavement, and the construction in progress. The evidence on behalf of the claimants as to the condition of the road was very meager and indefinite, and their contentions are not borne out by the photographs taken the day after the accident, and introduced in evidence, to-wit: claimant's exhibits Nos. 1, 2, **5** and **8.** These pictures, in the opinion of the Court, show the shoulders of the road to be in fairly good condition. In fact, the photographs rebut almost entirely claimants' contention that the shoulders were soft and covered with loose dirt and gravel, for tire tracks visible in the photographs disclose no ruts, but merely surface imprints; and the

material on the shoulders, except for some loose stones, is obviously firmly compacted.

The evidence for respondent on the other hand as to the road condition is more definite, and entitled to more weight. James L. Calhoon, maintenance field engineer from the Elgin office, testified that the shoulders at the point in question were in better than average condition, because of the concentrated effort that was being made to smooth them in preparation for the asphalt treatment. John M. Glenny, highway section man, in charge of the specific portion of the highway in question, likewise testified that the shoulders were in good condition; that they were approximately flush with the edge of the pavement, and that all the loose material was removed from the shoulders each day. We conclude that the preponderance of the evidence shows no negligence on the part of respondent.

Although the occupants of the car, other than Doolittle, testified they were either asleep or drowsy, and did not pay much attention to what was going on, Doolittle, who at the time of the accident was driving 40 miles per hour, testified that he was acquainted with the road, and had traveled over it the night in question on the way to the theatre. He had only been driving a car by himself for the period of several weeks, and his inexperience was in a large part the cause of the wreck.

One who has earlier the same evening driven over a certain stretch of highway is charged with a knowledge of its condition so long as the condition is unchanged on his return trip. *Mounce* vs. *State,* No. **4317,** opinion filed April 10, 1951. In that case we held also that to approach a place of known danger without care commensurate with such danger is contributory negligence.

We feel that the holding in the *Mounce* case is applicable in these cases.

In view of the foregoing, awards to all claimants must be denied.

Awards denied.

(No. 4358—Claim denied.)

MARTIN JACKSON **PORTER** AND LILLIAN **STROUP**, Claimants, *us.* STATE OF **ILLINOIS**, Respondent.

Opinion filed September 7, 1951.
Petition of Claimants for rehearing denied November 13, 1951.

MANUEL M. WISEMAN, Attorney for Claimants.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

NEGLIGENCE—burden of proof-when claim will be denied. Where evidence showed no negligence on the part of respondent in its operation of a highway truck used in scattering cinders on a slippery pavement, an award will be denied.

SAME—contributory negligence. Claimants' failure to see lighted truck scattering cinders on slippery pavement constituted contributory negligence, barring claimants from an award.

DELANEY, J.

On October 20, 1950, the complaint herein was filed by Anna Porter, next friend of claimant, Martin Jackson Porter, owner of a 1940 Packard Sedan. Mr. Porter was driving on Highway No. 48, south of Taylorville, Illinois. His car collided with a truck owned by the respondent, and operated by the Department of Public Works and Buildings of the Division of Highways of the State of Illinois.

At about 7:30 P.M. on the evening of March 12, 1950 the claimant came to a slight curve, and met a car going in the opposite direction. Both cars dimmed their lights, and claimant let up on the gas of his car. The lights on the approaching car affected his visibility,

and, after the car passed, he saw a black object on the highway, which proved to be a truck belonging to the respondent.

He was about twenty feet from the truck. In order to avoid colliding with the truck, claimant swerved his car to the left, but on account of snow and ice on the highway, he could not stop. His car struck the truck on the left rear side, causing a total damage in the amount of $250.00. Claimant also alleges he suffered extensive injuries, for which he claims $3,000.00.

Claimant, Lillian Stroup, a sister of Martin Jackson Porter, who was riding in the front seat of the automobile, has also joined in this cause of action, alleging that she also suffered extensive injuries, for which she claims $3,000.00.

The record consists of the complaint, motion of respondent for an extension of time to file pleadings, order of Chief Justice granting respondent an extension of time in which to file pleadings, claimants' amended complaint, transcript of evidence, motion of claimants for leave to waive filing of abstract of evidence, and claimants' statement, brief and argument.

Respondent's truck was scattering cinders on the slippery pavement at the time of the accident. Mr. Lawrence D. Wells was driving the truck at a slow rate of speed, and Mr. Allie Durbin was in the dump bed scattering the cinders.

In this complaint claimants allege that the negligence of respondent in failing to display signal lights, and failure to place signal lights around the truck were the proximate causes of the accident. At the hearing before our Commissioner, Frank Summers, claimants testified that the truck was parked on the right lane of the two lane pavement without lights. The employees

of respondent testified that all of the lights on the truck were burning at the time of the impact, and that a blinker light in the center of the cab on top of the: truck, which is visible from both directions, was also operating at the time.

The record shows that claimants were involved in a prior accident earlier in the evening at Taylorville, Illinois, and both of respondent's employees testified that they saw claimants' car approaching, and that only one head light was burning immediately before the accident.

Although the record shows that claimants have sustained painful and serious injuries, and the loss of the automobile in question, to recover, claimants are required to prove negligence of the respondent. The evidence is to the contrary. The record fails to show that claimants were free from contributory negligence, and that respondent did not exercise due care and caution in the maintenance of the highway.

For the reasons stated, an award is 'denied.

(No. 4396—Claimant awarded $1,064.73.)

REYNOLDS REAVY, Claimant, *vs.* **STATE OF ILLINOIS, Respondent.**

Opinion filed November 13, 1961.

ROBERT T. SWENGEL, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; CHARLES H. EVANS, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when an award will be made.* **Where claimant's injuries arose out of and in the course of his employment by the** State **of Illinois, an award** may **be made under the Workmen's Compensation Act.**

DELANEY, *J.*

Claimant, Reynolds Reavy, was employed on July 9, **1950** by the respondent in the Department of Public

Welfare as Cottage Parent II at the Illinois Soldiers' and Sailors' Children's School at Normal, Illinois. On said date, while in the course of his employment, he fell on the sidewalk, and sustained a fracture of the radius of the right forearm. Claimant was treated by Dr. Ralph Peairs after an X-Ray by Dr. Irwin.

In his report, dated September 5, 1950, Dr. Peairs stated:

"The fracture is apparently healed, but motion of the elbow joint is restricted. He is able to flex the arm to a right angle, and can extend it to about 45 degrees beyond the point of flexion."

In a report of Dr. Peairs, dated September 8, '1950, he stated:

"At present the fracture is apparently healed, but motion of the elbow joint is limited to about 45 degrees. He has not been very cooperative, and I think failure to maintain passive motion while the fracture was healing has much to do with the limited amount of motion in the elbow joint. I believe he will have a useful arm, but motion will probably be permanently limited."

The claimant was examined by Dr. Bruce I. Ryder on October 10, 1950. In his report, Dr. Ryder stated:

"Loss of flexion (at elbow) - 45 degrees. Loss of extension of elbow - 45 degrees. The function of rotation of radius on ulna is deficient in supination. One sees no loss of pronation of radius about ulna - right forearm. There is no-loss of motion about the right shoulder joint. There is no loss of motion about the right wrist joint."

In his final report, dated March 15, 1951, Dr. Peairs stated:

"The fracture has healed, and he is able to use the arm, but motion of the elbow joint is partially limited. Rotation and supination of the forearm is satisfactory. Flexion and extension of the forearm is limited. When the forearm is placed at right angle to the arm, he is able to flex the forearm only about 40 degrees. When extension is made from the same position, movement extends over an angle of about 50 degrees. This limitation of motion will be a partial permanent handicap to him."

No jurisdictional question is raised. Respondent and claimant were operating under the Workmen's

Compensation Act, and the accident in question arose out of and in the course of the employment.

The record consists of the complaint, Departmental Report, stipulation waiving briefs of both parties, transcript of evidence, reporter's bill, and abstract of evidence.

The evidence shows that claimant was **42** years of age at the time of the accident, and had no children under 18 years of age dependent upon him for support. The claimant's earnings in the year preceding the accident were $2,139.23. Claimant's compensation rate would, therefore, be the maximum of $15.00 per week. The injury having occurred subsequent to July 1, 1949, this must be increased 50%, making a compensation rate of $22.50.

From the medical testimony, and the observations of Commissioner Summers of claimant's right arm, we feel that claimant has suffered a 25% loss of use of his right arm. For 25% permanent loss of use of his right arm under Section 8, Paragraph (e) (13), the claimant should receive from the respondent $22.50 per week for 56¼ weeks, or the sum of $1,265.63.

The claimant worked from the day of the accident to July 20, 1950. His wages were at the rate of $186.00 per month at the time of the injury; therefore, he would be entitled to the sum of $62.00 to July 20,1950. He was paid **$330.40** by respondent subsequent to his accident!, which would be an overpayment of $268.40. The claimant has suffered a temporary total loss of 3 weeks from July 20 to August 10, 1950. Claimant should be allowed the sum of $67.50 for **3** weeks of temporary total disability, which represents **3** weeks at the rate of $22.50 per week, or a total sum of $1,333.13 for specific loss and temporary total disability.

Claimant is entitled to the sums of $14.00 that he paid to Dr. Cooper, and **$5.00** to Dr. Ryder.

An award is, therefore, made to claimant, Reynolds Reavy, in the sum of **$1,352.13,** less overpayment for non-productive time of $268.40, or the sum of **$1,083.73,** all of which has accrued, and is payable forthwith.

Mary I. Reynolds was employed to take and transcribe the evidence at the hearing before Commissioner Summers. Charges in the amount of **$59.50** were incurred for these services, which charges are fair, reasonable and customary. An award is, therefore, entered in favor of Mary I. Reynolds in the amount of $59.50, payable forthwith.

This award is subject to the approval of the Governor, as provided in Section **3** of "An Act concerning the payment of compensation awards to State employees".

(No. 4424—Claim denied.)

SYLVIA THOESEN, Claimant, *vs.* **STATE OF ILLINOIS, Respondent.**

Opinion filed November 13, 1951.

J. MICHAEL MADDA AND ABRAHAM B. LITOW, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*burden of proof.* **Where claimant failed to prove by a preponderance of the evidence a causal connection between her present physical condition and an accident arising out of and in the course of her employment by the State of Illinois, an award will be denied.**

LANSDEN,, J.

This is a case under the Workmen's Compensation Act. Commissioner Egill Anderson, one of the

Commissioners of this Court, heard this case, and his report, filed herein, reads in part as follows:

"Claimant, Sylvia Thoesen, a spinster, 50 years of age, height 5 ft. 4½ inches, and weighing 225 pounds, was on December 6, 1950, at 12:30 P.M., employed by respondent as field auditor in the Department of Revenue. While in the course of her employment, and walking down a set of stairs leading to the vault located west of the south bank of elevators at 11 South LaSalle Street, Chicago, claimant fell down six or seven treads to the landing below, landing on her knees, and injuring her legs, bruising her shoulders, back, hips and nose. After the fall claimant rested a while on the landing, and then went downstairs to the vault where she sat for about two or two and one-half hours, and then took a cab home. When she arrived home she fainted several times, and went to bed. A Dr. Richter called on claimant the next day, examined her, and prescribed a sedative that evening, and cold applications to the legs. He called on her again the following day, but prescribed no medicine, and suggested to her that when she felt better she should have X-Rays taken. He called on her the third time around Christmas, gave no treatment, but prescribed some medication. She stayed in bed for seven days, and was off from work from December 6, 1950 to January 2, 1951.

After seven days thrombosis appeared in the inner part of the left leg just above the ankle and outer part of the right leg near ankle. First there was a hard lump, which gradually became painful, and black and blue. This condition of the legs persisted for about three or four weeks in the left leg, and about two weeks in the right leg, when it finally cleared up satisfactorily.

Claimant kept hot compresses on her legs, and took some medication for the pain in the ankles while she was staying at home. After she returned to work, she saw Dr. Richter, at which time he took X-Rays of her ankles at St. Ann's Hospital. Claimant also consulted a Dr. DiCosola, who gave her some medication, pills and a prescription, and recommended heat applications to the ankles.

At the time of the hearing, claimant complained of pain in the ankles and knees while working, and also sometimes at night in bed. She testified that her ankles were swollen; that when she went up and down steps she had to hold onto the railing; that she could not walk the way she used to walk; that these conditions did not exist prior to the accident, and that she never was injured before.

Dr. Samuel Weiner testified in behalf of claimant that on August 20, 1951 he gave her a general physical examination, and also an orthopedic and vascular examination. He testified that her lower extremities showed varicose veins in both legs, palpable thrombosis or clots in the pits of the knees, involving the adjacent portions of the calves of both legs, and both of the ankles showed palpable landmarks, which were found to be resistant to motion on manipulation of both ankles.

Claimant's exhibit No. 1, an X-Ray, was received in evidence. This film was taken August 20, 1951, and showed claimant's right and left legs, and portions of both feet. Dr. Weiner, interpreting this film, testified that the right ankle had an inversion deformity; that it is comparatively turned in to the extent of about 15 degrees in the ankle joint, and that it also showed a linear calcification along the tissues adjacent to the

distal end of the fibula in the ankle joint of the right side; also that the right ankle, looking down into the foot, contained some arthritic spur formation between the first cuneiform bone. Dr. Weiner further testified that from his diagnosis, claimant has residual defeztive circulation of the right leg and ankle, causing a postural disturbance of the ankle and leg; and also a postural thrombophlebitis involvement of the varicose veins of both the right and left leg. He explained that a postural disturbance in the right lower extremity is the inversion deformity of the ankle, which causes a deflection of the weight-bearing axis of the left leg in relation to the ankle, and the only things found there were the residual clots in the veins above the calf and just below the knee. In answer to a hypothetical question incorporating the facts pertaining to claimant herein, Dr. Weiner further testified that there could have been, or might have been, a causal connection between the ill being of the hypothetical person and the alleged accident. He also further testified that the condition of both of claimant's lower extremities was permanent.

Dr. Albert G. Field, expert medical witness for respondent, testified he took two X-Ray films of claimant on September 5, 1951, and same were admitted into evidence as respondent's exhibits Nos. 2 and 3. Dr. Field interpreted respondent's exhibit No. 2 as being an anterior-posterior and lateral view. He stated that there were two projections taken on the same film of claimant's right leg, which disclosed the lower end of the tibia, fibula, and ankle joint. It included the astragalus, the tarsal, and part of the metatarsal bones. He further testified that there was no evidence of bony injury or dislocations; that the anterior-posterior view

disclosed some evidence of sclerosis, and some evidence of osteomyelitis or arteriosclerosis in the blood vessels; that there was no deformity in the site of the ankle joint. He further stated that the ankle joint was well preserved, and the contour of the joint made with the tibia, the astragalus, and the fibula was within normal limits; that there was no break in the continuity; that there was no pronation or supination, inversion or eversion in 'the ankle joint; that the ankle was straight; that there was no division in the lateral view on the left; that the front showed no evidence of bony injury or dislocation; and that there was some slight haziness due to some arthritic condition of the ankle joint.

Dr. Field further testified in interpreting respondent's exhibit No. 3 that there were two projections taken on the same film, the anterior-posterior and lateral views of the left leg, which showed the same amount of bone as the previous film; that the X-Ray showed no evidence of bony injury or dislocation in the ankle joint; that there was no break in the continuity; and that it showed some sclerotic condition of the blood vessels due to the arteriosclerosis condition; that in comparing both films they are identically the same; and that there is no appreciable pronation or supination.

Dr. Field, in interpreting claimant's exhibit No. 1, testified it disclosed no evidence of bony injury or dislocation; that the position of the left leg was within normal limits; that there was some sclerosis along the edges of the soft tissues, due to arteriosclerosis in the blood vessels; that the right leg disclosed some deformity to the ankle joint, which was due to the position the patient's foot was held in at the time of the taking of the film; and that the foot was not straightened out in the same way as the foot on the opposite leg.

Dr. Field further testified he made a physical examination of claimant's lower extremities, and stated that she was overweight; that she walked with a flat-footed gait; that he made comparative measurements; that the fossae on each side were well preserved; that the anatomical landmarks were well preserved; that there was some slight crepitation present on manipulation, flexion was within normal limits, and the leg could be fully extended; that the right foot was somewhat rigid, was markedly pronated, and there was a reflection of both the longitudinal and the transverse arches with hyperextension of the toes with prominent metatarsal heads; that the fossae between the metatarsals were fairly well preserved, with no appreciable swelling; that there was some slight spiderweb condition of the veins in and around the ankle joint, but it was small and non-symptomatic; that the movements of the ankle both actively and passively were well performed, and there was no complaint of rigidity encountered on manipulation; and that there was no enlargement of the veins in either leg.

Dr. Field further testified that the movements of her left lower extremities were fairly well performed; that extension was within normal limits; that there was some slight crepitation present in the muscular part of the leg, which was well preserved; that there was no irregularity or no hardening that could be palpated or outlined in the course of the veins, and there was no swelling or deformity whatsoever in the calves of either the right or left leg. The movements of the left foot were within normal limits—flexion, extension, pronation and supination; that she was wearing arch supports made by Scholls' Laboratory, which were not sufficient

for her feet to remain in normal position, and she had some trouble with her arch supports.

Dr. Field in answer to a hypothetical question, incorporating the facts pertaining to the claimant herein, testified that there was no causal connection between the complaint as enumerated at the hearing, and the injuries as described in the hypothetical question. He further testified that the pronation in claimant's feet had existed for a long time, and she was wearing arch supports to give her adequate support, and the swelling and the puffiness around the ankle joints was due to stress and strain placed on the ankle joints because of her overweight, and he concluded by stating that the deformity in claimant's right ankle was due to pronation of the foot as a result of being flatfooted.

Claimant and respondent at the time of the accident were operating under and subject to the provisions of the Workmen's Compensation Act, and notice of the accident was given the respondent within thirty days, as provided by the said Act. At the time and place of said injury claimant was performing duties for respondent in the course of her employment.

During the period from December 6, 1950 to January 2, 1951, while claimant was off from her work, she was paid her full salary. Claimant resumed her employment with respondent on January 2, 1951, and is now so employed.

For the year immediately preceding the injury claimant, while employed by respondent, earned a salary of $2,676.00.

It is the opinion of the undersigned., after hearing the evidence in this case, and observing the movements of claimant, that she has not proved her case by the preponderance or greater weight of the evidence; that

she has apparently recovered from the effects of the fall in question; that the present condition of her ankles appears to be due to overweight; and that the deformity in the right ankle appears to be due to pronation of the foot as a result of claimant being flat footed, and not due to the accident in question."

We do hereby adopt the statement of facts made by Commissioner Anderson, and agree with his conclusions, and an award to claimant, Sylvia Thoesen, will be denied.

Respondent has paid for all medical expenses in this case except a bill in the amount of $45.00 owed Dr. Albert C. Field. An award is entered in favor of Dr. Albert C. Field, Chicago, Illinois, for $45.00.

William J. Cleary & Co., Court Reporters, Chicago, Illinois, was employed to take and transcribe the testimony at the hearing before Commissioner Anderson. Charges in the amount of $82.00 were incurred. An award is entered in favor of William J. Cleary & Co. for $82.00.

An award to claimant, Sylvia Thoesen, is denied.

These awards are subject to the approval of the Governor. Ill. Rev. Stat., **1949,** Chap. **127,** Sec. 180.

(No. 4426—Claimant awarded $2,266.43.)

MAE FRENCH, Claimant, *vs.* **STATE OF ILLINOIS, Respondent.**

Opinion filed October 5, 1951.
Petition of Claimant for rehearing denied November 13, 1951.

BOWE AND BOWE, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER. Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when an award will be made.* Where claimant's injuries arose out of and in the course of her employment by the State of Illinois, an award may be made under the Workmen's Compensation Act.

LANSDEN, J.

Claimant, Mae French, seeks to recover from respondent under the Workmen's Compensation Act for injuries that resulted from an accident, which arose out of and in the course of her employment as a certified housekeeper at the Veterans Rehabilitation Center in Chicago, operated by the Department of Public Welfare.

On December 20, 1950, claimant, in the course of her duties, was walking from one building to another at said Center when she misstepped, or tripped, and fell, striking the brick pavement on her right side, sustaining a fractured wrist and a fracture of one of the pelvic bones.

No jurisdictional questions are involved, and respondent has furnished all medical and hospital services required to cure and relieve claimant of the effects of her accidental injuries.

Claimant's doctor took ten X-Rays. Those of claimant's right shoulder, right elbow and right knee disclose nothing that could cause recognizable disability, and the doctor's physical examination of claimant corroborates such conclusion.

The X-Rays of claimant's right wrist disclosed a Colles fracture (silver fork) of the radius and ulna, the fracture of the former bone extending into the joint space. Reduction of such fractures was incomplete, and deformity in the wrist was marked. Limitation of flexion and extension of the wrist amounted to 85 and 70%, respectively. In addition, claimant's fingers on

her right hand were stiffened, flexion being limited 25%.

From the foregoing, we conclude that claimant has sustained a 40% loss of use of her right hand.

The X-Ray of claimant's pelvic region disclosed a fracture of the right ischium, and a separation of the os pubes. The Lasuege and Kernig tests disclosed an inflammatory condition in the lower lumbar region at the sciatic nerve. This would indicate a small loss of use of both legs.

Since claimant's discharge from the hospital, she has performed her work and social duties as before, but her gait is careful, and somewhat awkward.

The foregoing indicates to us that claimant has sustained a 10% loss of use of both legs.

Claimant, on the date of her accident, was 71 years of age, and had two grown and married daughters. Her earnings in the year prior to her accident amounted to $2,530.00, and her rate of compensation is, therefore, $22.50 per week.

Claimant was temporarily and totally disabled for one month, or 4-2/7 weeks, and during such period of temporary total disability she was paid her full salary of $215.00, but she was entitled to only $96.43, and was thus overpaid $118.57, which will have to be deducted from her award.

William J. Cleary & Co., Chicago, Illinois, was employed to take and transcribe the testimony at the hearing before Commissioner Anderson, Charges in the amount of $48.85 were incurred, which charges are reasonable and customary. An award is entered in favor of William J. Cleary & Co. in the sum of $48.85.

An award is entered in favor of claimant, Mae French, under Section 8 (e) (12) (15) of the Workmen's Compensation Act as follows:

40% loss of use of her right hand, or 68 weeks at $22.50 per week, being the sum of	$1,530.00
10% loss of use of both right and left legs, or 38 weeks at $22.50 per week, being the sum of	855.00
	$2,385.00
Less overpayment	118.57
Net award	$2,266.43

This award to claimant is payable as follows:

$ 829.29, less overpayment of $118.57, or the sum of $710.72, which has accrued, and is payable forthwith;

$1,555.71, payable in weekly installments of $22.50 per week commencing on October 12, 1951, for a period of 69 weeks, plus one final payment of $3.21.

This award is subject to the approval of the Governor. Ill. Rev. Stat., 1949, Chap. 127, Sec. 180.

(No. 4442—Claimant awarded $861.43.)

NOVA CASEY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 13, 1961.

JOHN W. FRIBLEY, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when an award will be made.* Where claimant's injury arose out of and in the course of his employment by the State of Illinois, and his permanent disability cannot be determined at the time of hearing, an award may be made under Section 19 (b) of the Act.

DELANEY, J.

Nova Casey filed his complaint on June 1, 1951, wherein he alleges that on December 5, 1950, while

employed by the Department of Conservation as a carpenter at the Ramsey Lake Project at Ramsey, Illinois, he was injured while repairing the roof of a shelter.

The record consists of the complaint, Departmental Report, motion of claimant for an award under Section 19 (b) of the Workmen's Compensation Act, transcript of evidence, and reporter's bill.

At the time of the accident, claimant was 53 years of age, married, but had no children under 18 years of age dependent upon him.

He was first employed by the Department of Conservation on March 14, 1950. His rate of pay was $1.50 per hour; and, although he had worked for respondent for less than one year, employees engaged in similar work earned in excess of $1,560.00 per year. Claimant's compensation rate would, therefore, be the maximum of $15.00 per week. The injury having occurred subsequent to July 1, 1949, this must be increased 50%, making a compensation rate of $22.50.

Claimant was injured while on a scaffold supported at one end by a stepladder; he was handing bunches of shingles to a man on the roof. One bunch started to slide down the roof, and, when he stopped the bunch of shingles, the stepladder turned over, and he fell approximately six feet to the concrete floor below.

On the date of the hearing, claimant testified that he had only been able to work on several occasions, and that, at most, his work record would not amount to more than one full day of gainful employment. He further testified concerning his physical condition, and this was verified by Dr. E. P. Staff. Commissioner Henry S. Wise of this Court examined claimant, and found that he was having considerable trouble with his

left foot and ankle, and that he was unable to work on the date of the hearing.

Claimant has filed his motion herein for an order of this Court for payment of compensation up to the date of the hearing on August 30, 1951, and further asks that no final order be entered in said cause determining the extent of permanent disability until a further hearing is had, pursuant to the provisions of Section 19 (b) of the Illinois Workmen's Compensation Act.

Under Section 19 (b) of the Workmen's Compensation Act, claimant is entitled to be paid for 38 2/7 weeks at his compensation rate of $22.50 per week, or a total of $861.43. Since the respondent has not furnished medical services, claimant is also entitled to be reimbursed for the sum of $22.50 paid to Dr. E. P. Staff. The other bills will be offered at the final hearing.

An award is, therefore, entered in favor of claimant, Nova Casey, in the sum of $883.93, all of which has accrued, and is payable forthwith.

The evidence discloses that James Moliski was employed to take and transcribe the evidence at the hearing before Commissioner Henry S. Wise of this Court. For said services he made a charge of $54.10, which we find is fair, reasonable and customary.

An award is, therefore, entered in favor of James Moliski, court reporter, in the sum of $54.10.

All future payments being subject to the provisions of the Workmen's Compensation Act, jurisdiction is hereby reserved in this cause for the entry of such further order or orders as may from time to time be necessary.

This award is subject to the approval of the Governor, as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees".

(No. 4454—Claim denied.)

MAX HECK, Claimant, *vs.* **STATE OF ILLINOIS, Respondent.**

Opinion filed November 13, 1961.

A. M. **FITZGERALD AND WALTER T.** Day, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; **CHARLES H.** EVANS, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*limitations—when claim will be denied.* **Where no compensation was paid, and the complaint on its face showed that more than one year had elapsed since the date of injury, the claim is barred under Section 24 of the Act.**

DELANEY, J.

Claimant filed his complaint herein on July **5, 1951,** and alleges that on January **7,** 1950 he was employed by respondent, the State of Illinois, as a guard at the Menard Penitentiary. On said day he was assigned to duty at the gate, known as the double gate, forming the entrance from the general division to the psychiatric division at said penitentiary, and was then engaged in the performance **of** his duties as such watchman or guard.

On the day in question, while in the course **of** his employment, the claimant opened said gate for the purpose of admitting supplies, whereupon an inmate **of** said penitentiary ran into and against the claimant with great force and violence, causing the claimant to be thrown against said gate. Because of the icy condition of the walks and premises, which were then slippery, the claimant fell on the hard surface, sustaining an abrasion over the tibia of his right leg, which, 'because of the severity thereof and possible internal injury at the said point of abrasion, has refused to heal or be cured.

Claimant further alleges, that, due to his physical condition, he has been retired in advance of the time when he would be entitled to the State Employees' Retirement Pension.

Claimant prays that he be awarded compensation for permanent disability to the amount and extent provided by the Workmen's Compensation Act for at least 50% of the use of his right leg, and that, in addition' thereto, he be awarded compensation for loss of salary and earnings during the period of sixteen months, which he would have and could have received but for said injury, and prays judgment of this Court in the sum of Twenty-five Hundred Dollars ($2,500.00).

The record consists of the complaint, motion of respondent to dismiss, and notice to call up motion to dismiss.

Respondent alleges in its motion to dismiss that the complaint on its face shows that the accident occurred on January 7, 1950, and that the complaint was filed on July 5, 1951, and is not within the one year limitation period as prescribed by Section 24 of the Workmen's Compensation Act. Section 24 of the Workmen's Compensation Act requires that suit be filed within one year after the date of the accident, where no compensation has been paid, or within one year after the date of the last payment of compensation, where any has been paid. Claimant does not allege payment of compensation..

.For the reasons stated, the motion of respondent is sustained, and the complaint is hereby dismissed.

(No. 4408—Claimant awarded $864.16.)

ADA DOUGHERTY, Claimant, *vs.* STATE *OF* **ILLINOIS,** Respondent.

Opinion filed December 14, ***1951.***

MAURICE W. KEPNER, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent,.

WORKMEN'S COMPENSATION ACT—*when* *an award will be made.* Where claimant's injuries arose **out** of and in the course of her employment by the State **of** Illinois, an award may be made under the Workmen's Compensation Act.

DELANEY, J.

The claimant, Ada Dougherty, was on May **12,** 1950 employed by the respondent in the Department of Public Welfare, at the Illinois State Training School for Boys, St. Charles, Illinois. On May **12,** 1950 the claimant, in the course of her employment by the respondent, caught her foot in the loop of a laundry bag, and fell to the floor of the laundry. As a result of the fall, her right wrist was broken. Fluoroscopic examination of her right wrist showed a transverse fracture of the distal end of the radius.

Claimant was treated by Drs. Francisco Diaz arid Lyman Smith at the request of respondent. On March **21,** 1951 Dr. Smith filed a report with the respondent, and a copy of same is made a part of the record in this case, and marked claimant's exhibit No. **3.** In his report, Dr. Smith stated:

"Mrs. Dougherty was last seen by me **on** August ***31,*** 1950. At that time, examination **of** the right wrist revealed a slight degree **of** radial deviation, extension **of** ten degrees, flexion **of** thirty degrees, five degrees of supination, and pronation was complete. There was some slight stiffness **of** the fingers. The index finger in particular reached to within one-half inch of the palm on closing. This result was considered satisfactory considering the severity of her original **wrist** fracture.

She **first** had been seen by me on May 16, 1950 at Elgin State Hospital, at which time the wrist was manipulated and a cast applied. This cast was removed **on** June **24,** 1950, and a posterior mold was used **for** a night splint following that."

On August 8, 1950, Dr. Smith stated she would be able to do light work.

Dr. H. G. Woody examined the claimant on May 18, 1951. His report of this examination, made a part of the record by stipulation, showed the claimant to have a partial permanent disability resulting from a muscle pull caused by a deformity and ununited fracture.

From the medical reports filed herein, the testimony given at the hearing, and also from the Commissioner's examination of the claimant's right wrist and arm, we feel that claimant has suffered a 25% permanent loss of use of her right arm as a result of the accident.

No jurisdictional question is raised. Respondent and claimant were operating under the Workmen's Compensation Act, and the accident in question arose out of and in the course of the employment.

The record consists of the complaint, Departmental Report, transcript of evidence, reporter's bill, claimant's exhibits Nos. 1 - 4, inclusive, stipulation waiving briefs of both parties, motion of claimant for leave to waive filing of abstract of evidence, and stipulation.

On the date of the accident, claimant was 70 years of age, and had no children under 18 years of age dependent upon her for support. Her annual earnings for the year preceding the accident were $1,972.90. Claimant has suffered temporary total disability from May 12, 1950 to August 31, 1950, or 15 6/7 weeks. Claimant's compensation rate would be the maximum of $15.00 per week. The injury having occurred subsequent to July 1, 1949, this must be increased 50%, making a compensation rate of $22.50.

For 25% permanent loss of use of her right arm

under Section 8, Paragraph (e) (13), claimant is entitled to receive from the respondent **$22.50** per week; for 56¼ weeks, or the sum of **$1,265.63,** and for temporary total disability 15 **6/7** weeks at **$22.50** per week, or a sum of **$356.76,** making a total amount due **of $1,622.39.** From this must be deducted the sum of **$758.23** received by claimant for non-productive time.

An award is, therefore, entered in favor of claimant, Ada Dougherty, in the amount of **$864.16,** all of which has accrued, and is payable forthwith.

Harry L. Livingstone was employed to take and transcribe the evidence at the hearing before Commissioner Summers. Charges in the amount of $52.60 were incurred for these services, which charges are fair, reasonable and customary. An award is, therefore, entered in favor of Harry L. Livingstone, in the sum **of $52.60,** payable forthwith.

This award is subject to the approval of the Governor, as provided in Section **3** of "An Act concerning the payment of compensation awards to State employees".

(No. 4415—Claimant awarded $2,111.00.)

GEORGE L. CARNES, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 14, 1961.

SCHIMMEL AND SCHIMMEL, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; **CHARLES H. EVANS,** Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when an award will be made.* **Where claimant's injuries arose out of and in the course of his employment by the State of Illinois, an award may be made under the Workmen's Compensation Act.**

DELANEY, J.

The claimant, George L. Carnes, seeks to recover under the Workmen's Compensation Act for an injury

to his right eye, as the result of an accident that arose out of and in the course of his employment in the Division of Plant Industry, Department of Agriculture,

On November 16, 1950, claimant was struck in the right eye by a prickly ash twig, while inspecting wooded territory for common barberry with a crew of six men. While so inspecting, a twig snapped back striking his eye ball, and cutting the eye. He was treated by Dr. A. M. Paisley, and remained in Our Saviour's Hospital at Jacksonville until November 26, 1950. Mr. Carnes returned to work December 18, 1950, and worked until December 22, 1950. An infection set up in the injured eye. He went back to Dr. Paisley, who sent him to Dr. Vargas. From January 6, 1951 to January 10, 1951 claimant was again in Our Saviour's Hospital. He was released on January 10, 1951 to go to Barnes Hospital in St. Louis, Missouri, where he remained from January 11, 1951 to January 31, 1951 under treatment of Dr. B. Y. Alvis. He returned to work on April 2, 1951.

In a report dated March 21, 1951, and made a part of this record by the rules of the Court, Dr. B. Y. Alvis stated:

> "The eye can be considered industrially blind. The vision is reduced to approximately one-two hundredths."

The record consists of the complaint, Departmental Report, transcript of evidence, stipulation waiving briefs of both parties, and stipulation on medical bills.

No jurisdictional question is raised. Respondent and claimant were operating under the Workmen's Compensation Act, and the accident in question arose out of and in the course of the employment. The only question is the extent of permanent disability suffered by claimant.

Claimant's earnings for the year immediately pre-

ceding his injury were $2,568.00. At the time of the injury, he had no children under eighteen years of age dependent upon him for support. His compensation rate would, therefore, be the maximum of $15.00 per week. The injury having occurred subsequent to July 1, 1940, this must be increased 50%, making a compensation rate of $22.50.

For the loss of sight of his right eye, claimant is entitled to $22.50 per week for 120 weeks, or the sum of $2,700.00, under Section 8, Paragraph (e) (16) of the Workmen's Compensation Act.

As a result of the accident, he was temporarily totally disabled for a period of 19 weeks. He should be allowed $22.50 per week for 19 weeks temporary total disability in the amount of $427.50. Claimant is, therefore, entitled to a total award of $3,127.50. Claimant was paid full salary for the time he was disabled, and the sum of $1,016.50 must be deducted from said award for non-productive time. Respondent has paid all hospital and medical bills of claimant, incurred as a result of said injury.

An award is, therefore, made to claimant, George L. Carnes, in the sum of $2,111.00, payable as follows:

$1,260.00, which has accrued, less payment of $1,016.50 for non-productive time, or $243.50.

$1,867.50, is payable in weekly installments of $22.50 commencing on December 21, 1951, and continuing for 83 weeks.

Janette Webel was employed to take and transcribe the evidence at the hearings before Commissioner Summers, and submitted her invoice for these services in the amount of $16.90, which charges are fair, reasonable and customary.

An award is also entered in favor of Janette Webel in the amount of $16.90, payable forthwith.

This award is subject to the approval of the Governor, as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees".

(No. 4440—Claim denied.)

HUGHES C. BLAKE, DOING BUSINESS AS BLAKE MOTOR SALES, Claimant, *vs.* **STATE OF ILLINOIS,** Respondent.

Opinion filed December *14*, ***1951.***

LEONARD S. **HOPKINS,** Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; **CHARLES** H. **EVANS,** Assistant Attorney General, for Respondent.

UNIFORM **MOTOR** VEHICLE LAW AND UNIFORM **MOTOR** VEHICLE ANTI-THEFT ACT—*construction.* Claim based on damages arising out of the failure of the Secretary of State to show a chattel mortgage on a certificate of title does not state a cause of action, and will be dismissed.

SAME—*Legislative* intent. The object of the Legislature in enacting the Uniform Motor Vehicle Law and the Uniform Motor Vehicle Anti-Theft Act was to protect the public from thefts of automobiles; the evils arising from the unregulated use, sale and transfer of motor vehicles; and, from crimes committed by the use thereof.

SAME—construction—no *effect on* Uniform Sales Act. The Uniform Motor Vehicle Law and Uniform Motor Vehicle Anti-Theft Act were not intended as recording statutes; and, do not in any way alter, modify, or change the effect of the provisions of the Uniform Sales Act.

DELANEY, J.

Claimant has filed his complaint herein, alleging that on February **12, 1948** the State of Missouri, by and through its Director of Revenue, issued to James **J.** O'Connor a certificate of title to a motor vehicle, to-wit : 1941 Buick Sedanet with engine No. **44390604,** showing a lien of a chattel mortgage in the amount of $960.00 to the Commonwealth Loan Company.

On a later date Mr. O'Connor moved to the State of Illinois; and made application to Edward J. Barrett, Secretary of State of Illinois, for a new certificate of Illinois title, surrendering the Missouri title. The said

Edward J. Barrett, Secretary of State, did then issue to Mr. O'Connor certificate of title No. B453505 to said 1941 Buick Sedanet with engine No. 44390604, showing; liens "none".

Claimant further alleges that the Secretary of State failed to make the notation of the chattel mortgage lien to the Commonwealth Loan Company.

On April 17, 1948, Mr. O'Connor sold said 1941 Buick Sedanet to Hughes C. Blake, claimant, and assigned said Illinois certificate of title to claimant. Hughes C. Blake sold said Buick Sedanet to Mr. Raymond F. Hoffman on April **26,** 1948. On May 31, 1949, upon demand and proof of the existence and validity of said mortgage by the Commonwealth Loan Company, and to protect the enjoinment of the motor vehicle by Mr. Raymond F. Hoffman, the said Hughes C. Blake, claimant, paid the balance then due of $475.00 to satisfy said mortgage lien.

Claimant alleges that under Chap. 95½, Par. 78 of the Ill. Rev. Stat., 1949, the Secretary of State, his employees, agents and servants were negligent, which resulted in a loss to him of $475.00, for which he prays judgment.

The record consists of the complaint, motion **of** respondent for an extension of time in which to file pleadings, motion of respondent to dismiss, notice to call up the motion of respondent to dismiss, statement, brief and argument in support of the motion of respondent to dismiss, and answer of claimant to the motion of respondent to dismiss.

The respondent herein has filed its motion to dismiss for the reason that the complaint is insufficient in law to state a cause of action against the respondent.

In the case of *L. B. Motors, Inc.* vs. *R. H. Prichard,*

303 Ill. App. 318, the Appellate Court of the State of Illinois in discussing Paragraph 78 said:

"The object of the legislature in enacting the Motor Vehicle Law and Uniform Motor Vehicle Anti-Theft Act was to protect the public from thefts of automobiles, from evils arising from unregulated use, sale and transfer of motor vehicles, and from crimes committed by their use.

The Motor Vehicle Law and Uniform Motor Vehicle Anti-Theft Act were not intended as recording statutes, and do not in any way alter, modify or change the effect of the provisions of the Uniform Sales Act."

We do not feel that it was the intention of the Legislature to place the responsibility, as alleged by the claimant, upon the office of the Secretary of State.

For the reasons stated, the motion of respondent to dismiss must be sustained.

Case dismissed.

(No. 4468—Claim denied.)

WILLIAM J. TEBEAU, Claimant, *vs.* **STATE OF ILLINOIS,** Respondent.

Opinion filed December *14,* 1961.

FRANK J. MC GARR, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

SERVICE RECOGNITION BOARD—jurisdiction. Where claimant has adequate remedy in a court of general jurisdiction, the Court of Claims is without jurisdiction to make an award; and a plea to the jurisdiction will be sustained, and claim dismissed.

LANSDEN, J.

Claimant, William J. Tebeau, presents to this Court a new question, which also carries with it the hopes of several thousand disappointed veterans of World War II to whom the payment of a bonus under the Illinois World War II bonus law has been denied by the Service Recognition Board. Ill. Rev. Stat., 1951, Chap. 126½, Secs. 47-57.

Claimant served over 35 months in the United States Navy during World War II, all but 19 days of his service being within the period for which a bonus could have been paid. He alleges that he was a resident of the State of Illinois on October 5, 1942, the date he entered the Navy. However, after filing his application in apt time, he was unable to convince either the Service Recognition Board, or the Board of Review of such Board, that he was a resident of this State on October 5, 1942. The final administrative action denying his claim for bonus payment was taken by said Board of Review on September 5, 1950, and he filed his case in this Court on July 27, 1951 seeking an award for the amount of bonus he states the Service Recognition Board unjustly denied to him.

Respondent has filed a motion to dismiss predicated on several grounds, only one of which need be considered in this opinion.

This Court has long been committed to the rule that it has no jurisdiction of a case that can be, or could have been litigated in the courts of general jurisdiction in this State. *Moline Plow* Co. vs. *State,* 5 C.C.R. 277.

More recently in *Barrett* vs. *State,* 13 C.C.R. at page 17, this Court said:

> "The Legislature in creating the Court of Claims did not intend that it should usurp the powers of, contradict, or compete with courts of general jurisdiction."

If claimant had, or has, a remedy in the courts of general jurisdiction in this State, he has no remedy in this Court.

His complaint in essence alleges an abuse of discretion. *Mandamus* is one remedy to correct such abuse. *Nichols Illinois Civil Practice Act,* Vol. 7, Sec. 7160. That a petition for *mandamus* may be used to compel

the Service Recognition Board to pay a bonus claim it has arbitrarily denied was decided in *People ex rel Mosco* vs. *Service Recognition Board,* **403** Ill. **442.**

The motion of respondent to dismiss is, therefore, allowed, and the claim of claimant, William J. Tebeau, is dismissed.

(No. 4240—Claim **denied.)**

REV. VAL J. KLIMEK, Claimant, *vs.* **STATE OF ILLINOIS,** Respondent.

Opinion *filed January* 8, *1956.*

PIERRE N. THOMEY AND ROBERT MAGILL, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; C. **ARTHUR** NEBEL, Assistant Attorney General, for Respondent.

NEGLIGENCE—*burden* of *proof.* **Where doctrine of res ipsa loquitor does not apply, and there** is no **evidence of negligence** on **the part of respondent,** an **award will be denied.**

DELANEY, J.

Claimant, Rev. Val J. Klimek, was employed by the State of Illinois at the Illinois State Training School for Boys at St. Charles as a counselor and Catholic Chaplain, and was so employed for the period of approximately June 1, 1948 to the middle of March, 1949. He was paid a salary of $250.00 per month, from which **a** deduction was made for board, room and laundry. In addition, he was furnished an apartment, consisting of five rooms, located on the third floor of the school building. An additional element of the contract was that claimant was to be provided with someone to clean up his apartment each day. This service was provided by the State designating an inmate, Harry Wanders, who was in need of psychiatric therapy.

While the claimant was so stationed at St. Charles, he also was attending classes at Loyola University in Chicago on Monday and Saturday of each week, with the consent of the Superintendent of the Institution.

On the morning of February 14, 1949, claimant read Mass at 8:00 A.M. with Harry Wanders as an altar boy. Claimant had breakfast, and Wanders commenced his duties with respect to cleaning up the apartment. Claimant left Wanders in his apartment washing dishes, and told him to stay and finish the work when he left for his classes at Loyola at approximately 9:30 A.M. on said date. It was a rule of the Institution that these boys were not to be left alone.

During the morning of February 14, 1949 at approximately 11:00 to 11:30 A.M. the switchboard operator noticed there was something wrong with the telephone in claimant's apartment, but nothing was done at that time toward an investigation. A fire was discovered in the building, and in the apartment at approximately 1:15 P.M. It was not extinguished until 7:00 P.M., and considerable damage was done to the building and contents. Damages to the building amounted to $150,000.00, and contents to $21,000.00, excluding claimant's personal property.

An investigation was held as to the cause of the fire, but the cause was not definitely established.

The record consists of the complaint, motion of respondent to dismiss, notice to call up motion to dismiss, Departmental Report, transcript of evidence, claimant's abstract of evidence and argument, respondent's abstract of evidence, and respondent's statement, brief and argument.

At the beginning of his argument, counsel for claimant states that the Court ruled on the pleadings

that the doctrine of res ipsa loquitur applied. The respondent is correct in that the ruling of the Court on a motion to dismiss the complaint was simply that the complaint was sufficient to allege a cause of action.

We do not feel that the doctrine of res ipsa loquitur applies, and, claimant, having failed to prove any negligence on the part of the State of Illinois, will be denied an award. It becomes unnecessary to discuss any other questions.

(No. 4340—Claimant awarded $6,328.91.)

STANLEY J. HELENIAK, Claimant, *vs.* **STATE OF ILLINOIS,** Respondent.

Opinion pled September 7, 1961.
Supplemental opinion pled January 8, 1962.

GUSTAVE E. **RIEDL,** Attorney for Claimant.

IVAN A. **ELLIOTT,** Attorney General; **WILLIAM** H. SUMPTER, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—***when an award will be made.*** Where medical testimony showed without dispute that claimant's heart condition arose out of and in the course of his employment by the State of Illinois, an award may be made under the Workmen's Compensation Act.

SAME—***modification of award.*** Under the Workmen's Compensation Act, the combined awards for total partial disability and temporary total disability cannot exceed the amount of a death award. Upon petition of respondent for rehearing, an award will be reduced accordingly.

SCHUMAN, C. J.

Claimant, Stanley J. Heleniak, was employed by the Division of Highways as a sign erector at a salary of **$322.00** per month on April **16, 1949,** and worked continuously at said 'position until December 2, **1949,** earning a total of **$2,543.10.**

Claimant, while loading a truck with equipment at about **10:00** A.M. on December **2, 1949,** and while

lifting a tool box collapsed. He was taken to a hospital, and his ailment was diagnosed as acute myocardial infarction. He was off work until February 8, 1950, and on his return was given light work because of his precarious heart condition. On May 3, 1950, while at home,, claimant suffered another heart attack. From the record it is shown that on about June 23, 1950 he was able to return to light work, but was not reemployed by the department.

There are no jurisdictional disputes involved. Claimant's earnings for the year preceding the injury would be predicated on the basis of $3,864.00. He was married, and on December 2, 1949 had three children under 16 years of age dependent on him for support. The medical testimony showed, without dispute, that his heart condition arose out of and in the course of his employment, and has resulted in a permanent partial disability. Claimant was temporarily totally disabled from December 3, 1949 to January 7, 1950, and from May 3, 1950 to June 23, 1950. Previous to the heart attack on December 2, 1949, claimant had enjoyed good health, and had never suffered any previous heart attacks. The record further discloses that after June 23, 1950, he went to work in the Recorder's Office as an errand boy, and was earning $250.00 a month.

The evidence shows, without contradiction, that claimant has sustained a loss of earnings of $16.60 a week due to his injury.

Under the recent pronouncements of this Court, claimant is entitled to an award for permanent partial disability.

William J. Cleary & Co. has submitted a bill in the amount of $68.00 for stenographic services, which the Court finds reasonable.

On the basis of this record, we make the following award:

Claimant is entitled to an award under Section 8 (d) of the Workmen's Compensation Act for permanent partial disability and for temporary total disability.

The following award is entered in favor of claimant, Stanley J. Heleniak:

The sum of $447.43 for temporary total disability for a period of 16 4/7 weeks, covering the period of December 3, 19-19 through February 7, 1950 and from May 3,1950 through June 22,1950, a total period of 16 4/7 weeks, at a compensation rate of $27.00 per week. Of this amount $382.49 has been paid, leaving a balance due claimant in the amount of $64.94, which is payahlc forthwith.

The sum of 36,730 88, being calculated in acrordance with Section 8 (d) of the Workmen's Compensation Act within the limitations therein prescribed. and being at the rate of $16.18 per week for 416 weeks, to be paid as follows:

$1,019.34, which has accrued through September 7, 1951, and is payable forthwith.

$5,711.54, which is payable in weekly installments of $16.18 per week, beginning on September 14, 1951, for a period of 354 weeks.

An award in the amount of $68.00 is also made in favor of William J. Cleary & Co. for stenographic services.

This award is subject to the approval of the Governor, as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees".

SUPPLEMENTAL OPINION

SCHUMAN, C. J.

The Court, in its opinion filed on September 7, 1951, awarded claimant the sum of $6,730.88 for total partial disability, and also allowed $447.43 for temporary total disability. Attention was called to the Court by the respondent in its petition for rehearing that the total amounts for both could not exceed the amount of

a death award. The contention of the respondent is correct, and a total of 28 **6/7** weeks will have to be deducted from the award for total partial disability, leaving a period of **387 1/7** weeks to be paid at the rate of **$16.18,** commencing the last day of temporary total disability.

The award is modified as follows:

The sum of **$447.43** for temporary disability; of this amount **$382.49** has been paid, leaving a balance of **$64.94,** which is payable forthwith.

The sum of **$6,263.97,** being calculated in accordance with Section 8 (d) of the Workmen's Compensation Act, and being at the rate of $16.18 per week for 387 1/7 weeks, to be paid as follows:

$1,303.65, which has accrued through January 7, **1952,** and is payable forthwith.

$4,960.32, which is payable in weekly installments of $16.18 per week, beginning on January **15,1952,** for a period of **306** weeks, with one final payment of $9.24.

This award is subject to the approval of the Governor, as provided in Section **3** of "An Act concerning the payment of compensation awards to State employees".

(No. 4372—Claim denied.)

HERBERT CUTSHALL, EMMA CUTSHALL, LEROY HARLEY AND RUTH HARLEY, Claimants *vs.* **STATE OF ILLINOIS,** Respondent.

Opinion filed January 8, 1952.

PEFFERLE, SHEEHAN AND PEFFERLE, Attorneys for Claimants.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

CONDEMNATION—*jurisdiction.* A decree in condemnation includes all damages past, present and future, both to lands taken and lands not taken. Therefore, the Court of Claims is without jurisdiction to make an additional award.

DELANEY, J.

The claimants, Herbert Cutshall and Emma Cutshall, own the following described real estate, to-wit:

The East one-half (E.½) of the Northwest one-quarter (N.W.¼) of Section twenty-one (21), Township Nine (9) North, Range five (5) West of the third Principal Meridian, lying West of the right-of-way of U. S. Highway Route No. 66 and Federal Aid Route No. 5, situated in Montgomery County, Illinois, containing seventy (70) acres more or less; subject, however, to Articles of Agreement for a Warranty Deed.

On October 21, 1947, the Department of Public Works and Buildings of the State of Illinois filed a petition, making claimants herein parties defendant thereto, seeking to condemn a certain portion of the real estate described herein for the purposes of a right-of-way, and also seeking to condemn an easement for the construction and maintenance of a storm sewer over and across the real estate herein to drain a proposed subway to be constructed under the Illinois Central Railway.

A final decree of the local Circuit Court was entered on July 14, 1948 granting the prayer of the petitioner, and directing petitioners to pay the sum of $2,742.00 to defendants. The payments were made as directed by the Court, and the subway, storm sewer and highway have been constructed on the respective lands.

The claimants have filed their complaint herein seeking to recover for damages to lands not taken, which are alleged to have resulted from the construction of the subway and storm sewer. Claimants allege that the supply of water in a dug well, located near the condemned property, about 21 feet deep, used to water livestock, and to furnish water for household purposes, was greatly diminished after completion of the storm

sewer. It is further alleged in claimants' complaint that the State of Illinois drilled the well 120 feet in depth, and water was obtained, but that this water was contaminated, and could not be used for livestock purposes.

The record consists of the complaint, transcript of evidence, motion of claimants for an extension of time to file abstract and brief, order of Chief Justice granting the motion, motion of claimants for a further extension of time to file abstract and brief, abstract of evidence, statement, brief and argument of claimants, statement, brief and argument of respondent, and respondent's exhibit **"A".**

A decree in condemnation includes damages both to lands taken and lands not taken, and includes all damages past, present and future.

C.R.I. & P. Ry. Co. vs. *Smith,* 111 Ill. 363.
C.P. & *St. L. Ry. Co.* vs. *Niz,* 137 Ill. 141.
C.P. & *St. L. Ry.* Co. vs. *Blume,* 137 Ill. 448.
St. L. & *B. Ry. Co.* vs. *VanHoorebeke,* 191 Ill. *633.*
A.T. & *S.F.* Ry. *Co.* vs. *Jones,* 110 Ill. App. 626.
Lampp vs. *State,* 6 C.C.R. 349.
Baker vs. *State,* 9 C.C.R. 115.
Siekmann vs. *State,* 10 C.C.R. 286.
Longden vs. *State,* 12 C.C.R. 129.
Sauerhage vs. *State,* 16 C.C.R. 217.

From the record in this case the general proposition of law applies.

The Attorney General has asked leave to withdraw respondent's exhibit "A", being a certified copy of final order and decree of the Circuit Court of Momtgomery County, Illinois. Respondent is hereby granted leave to withdraw said exhibit.

This claim is, therefore, denied, and the complaint dismissed.

(No. 4378—Claim denied.)

THEODORE MARCINKIEWICZ, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 8, 1952.

BERNARD S. NEISTEIN, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

JURISDICTION—*damages for unlawful incarceration.* Where claimant was released on a writ of habeas corpus after unlawful incarceration, the Court of Claims, on the authority of *James Montgomery* vs. *State of Illinois,* post, has no jurisdiction to make an award.

SAME—*no jurisdiction to review case of court of general jurisdiction.* The Court of Claims has no jurisdiction to pass upon a decision of the Supreme Court determining the validity of a judgment of a lower court. (*People* vs. Circuit *Court,* 369 Ill. 438.)

SCHUMAN, C. J.

This case is predicated upon a claim against the State of Illinois for the wrongful incarceration of claimant in the Illinois State Penitentiary from December 18, 1933 to February 23, 1950 in violation of Article 11, Sections 2 and 9 of the Constitution of Illinois, and in violation of the Fourteenth Amendment to the Constitution of the United States.

Claimant was indicted for murder in Cook County, tried, and convicted. Claimant appealed his case to the Supreme Court of Illinois, and his conviction was affirmed, and appears in Volume 560 of the Illinois Supreme Court Reports, page 261.

Claimant filed a petition for a Writ of Habeas Corpus in the Criminal Court of Cook County, and obtained his discharge under an order issued by Judge Thomas J. Lynch, who, in his order of February 23, 1950, gave a summary of the facts, and concluded that the State's Attorney had suppressed facts, which amounted to a denial of a fair trial to claimant, and "violated his

constitutional rights under the Fourteenth Amendment of the Constitution of the United States by denying him due process of law."

The State has moved to strike and dismiss the complaint for the reasons therein set forth.

The decision in this case is controlled by our decision in the case of *James Montgomery* vs. *State* of *Illinois.*

In addition to the reasons assigned in the Montgomery case, an additional fact is noted in this case. The claimant appealed his conviction, and the conviction was affirmed in **360** Ill. 261. In the case of *People* vs. *Circuit Court,* **369** Ill. **438,** the Court, on page **441,** held:

"While it is true that circuit and superior courts, and the judges thereof, have concurrent jurisdiction with this court in *habeas corpus* proceedings, that fact, as this **court** has held, does not authorize those courts **or** judges thereof, **to** review a judgment **of** this court by *a* writ **of** *habeas corpus.* When this court, in the exercise of its appellate jurisdiction, has determined the validity of a judgment of the **lower** court, the judges **of** the circuit and superior courts are bound by that judgment, and are without power ***or*** authority, by *habeas corpus* **or** otherwise, to pass upon its validity. This is not only well ***settled*** in this State but is so thoroughly founded on principles of orderly administration ***of*** the law that there ought not to be any judge who doubts **or** is unfamiliar with it."

The Court is of the opinion that it cannot question the validity of the conviction of the claimant in view **of** the holding in the above cited case.

For the reasons assigned in our opinion in the Montgomery case, and the additional reason cited herein, the motion of the respondent to dismiss is allowed, and the claim is dismissed.

(No. 4382—Claimant awarded $1,012.50.)

AMOS R. EATON, Claimant, *vs.* **STATE OF ILLINOIS, Respondent.**

Opinion Pled January 8, 1952.

DUNN AND DUNN, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when an award will be made.* Where claimant's injuries arose out of and in the course of his employment by the State of Illinois, an award may be made under the Workmen's Compensation *Act*.

LANSDEN, J.

Claimant, Amos R. Eaton, seeks to recover from respondent under the Workmen's Compensation Act for injuries to his right wrist and arm, which resulted from an accident that arose out of and in the course of his employment as a farm hand at the Illinois Soldiers' and Sailors' Children's Home, Normal, Illinois, operated by the Department of Public Welfare.

Previously an opinion was filed in this case on April 10, 1951, which overruled respondent's motion to dismiss, and held that claimant was entitled to the benefits of the Workmen's Compensation Act, because each and every employee of respondent without exception is under the Act. *Miller* vs. *State,* 16 C.C.R. 194.

On May 18, 1950, claimant attempted to start the engine of a tractor by cranking, but the engine "kicked", causing the crank to reverse its direction suddenly and with extreme force, so that claimant sustained a chip fracture of his right wrist, and traumatic aggravation from his fingers to his shoulder.

No jurisdictional questions are involved, and the sole question in this case is the nature and extent of claimant's disability.

Claimant lost no time from his employment from May 18, 1950 until August 15, 1950, when he took a

leave of absence from his job with respondent. However, he was bothered all the time by pain and stiffnesa in his right arm and wrist. Claimant resigned from State employment on November 20, 1950.

Although claimant maintains he should be awarded compensation either for total permanent disability or permanent partial disability, the record wholly fails to support such contention.

But, claimant is entitled to an award for the specific loss of partial use of his right arm under Section 8 (e) (13) of the Workmen's Compensation Act.

On the date of the hearing before Commissioner Wise, claimant's injury to his right arm had reached its maximum recovery. His wrist was swollen, and X-Rays showed calcification of the vessels of the wrist. There was evidence of traumatic arthritis in his right shoulder, and his grip in his right hand was lessened. There was limitation of flexion, extension and rotation in his right arm, and a 50% loss of abduction of the arm. A comparison of claimant's left arm with his right disclosed that such uninjured arm was also limited somewhat in its function, because claimant was 75 years of age on the date of his accident.

We conclude that claimant has sustained a 20% loss of his right arm.

Respondent did not furnish claimant with all medical services required to cure and relieve him of the effects of his accident. Claimant paid $12.50 for X-Rays, and $36.00 for osteopathic treatments. Claimant still owes Dr. Ross Elvidge, Normal, Illinois, $65.00 for hydro-therapy treatments and inter-muscular injections. Respondent is liable for these bills.

On the date of his accident, claimant was 75 years of age, married, but had no children dependent upon

him for support. His earnings in the year prior to his accident amounted to $2,217.06, and his rate of compensation is, therefore, $22.50 per week.

Paul E. Kelly, official court reporter, Bloomington, Illinois, was employed to take and transcribe the testimony at the hearing before Commissioner Wise. His charges amount to $76.00, which are reasonable and customary, and an award is entered in favor of Paul E. Kelly for $76.00.

Awards are entered in favor of claimant, Amos R. Eaton, under Sections 8 (a) (e) **(13)** for medical bills, and **a 20%** loss of use of his right arm, respectively, payable as follows:

(1) To claimant for medical bills the sum of $48.50, payable forthwith.

(2) To claimant for the use of Dr. Ross Elvidge for professional services the sum of '$65.00, payable forthwith.

(3) To claimant for a 20% loss of use of his right arm, 45 weeks at **522.50** per week, or the sum of **$1,012.50,** all **of** which has accrued, and is payable forthwith.

These awards are subject to the approval of the. Governor. Ill. Rev. Stat., 1951, Chap. 127, Sec. 180.

(No. 4388—Claimant awarded **550.00.)**

N. B. **COUCHOT,** Claimant, *vs.* **STATE** OF **ILLINOIS,** Respondent.

Opinion filed January 8, 1952.

BARASA AND **BARASA,** Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

HIGHWAYS—*negligence—when an award may be made.* Where evidence showed that the State had constructive notice of a loose manhole cover in a traveled section of the highway, it was negligent in not properly. maintaining same, and an award **may** be made for damages, which were the proximate result of said negligence.

SCHUMAN, C. J.

The claim in this case arises out of alleged damages to an automobile owned by claimant, N. B. Couchot. It is based on the negligence of the State in the maintenance of manhole covers located in a State highway.

It is conceded that the State maintained alternate Route No. 30 (Roosevelt Road) in DuPage County, Illinois.

Alternate Route No. 30 beginning at its intersection with Route No. 53 extends east on a down grade. At this point in the road, the road is referred to as Bakers Hill. On Bakers Hill are located six manholes used in the drainage of the road. The manholes are of a standard type with a metal lid flush with the road surface, and are located in a travel part of the highway.

The evidence, without dispute, shows that the manhole cover fitted loosely in the socket, and tilted when it was run over by a car wheel.

On November 21, 1949, at about 8:30 P.M., the claimant, N. B. Couchot, accompanied by his wife, was driving in a 1948 Chrysler Sedan, which belonged to claimant, at about 40 to 45 miles per hour in an easterly direction in the outer east-bound lane of Roosevelt Road down what was called Bakers Hill, about 1 mile east of Glen Ellyn, DuPage County, Illinois. As said claimant was driving his automobile over one of the manhole covers, it tilted, and, as a result, the right rear tire, tube, wheel, rear spring and fender of the automobile were damaged, and, as shown by the repair bill admitted in evidence, claimant sustained damages in the amount of $57.70, $7.70 of which was paid by the All State Insurance Company, because of the fact that the claimant had a deductible insurance policy of $50.00. Apparently there is no claim made on behalf of the Insur-

ance Company for the $7.70, leaving a balance due claimant for the repairs on his automobile in the sum of $50.00.

It was dark when the accident happened, the pavement was dry, and the traffic was light. Claimant's car was burning the regular driving light with a visibility of about 25 feet or more ahead.

Subsequent to the accident, the manhole cover in question was placed in the manhole collar, and molten asphalt poured around the lid to make it solid in the manhole collar, and prevent it from tilting when automobile wheels passed over it.

There can be no question but that it was the duty of the State in maintaining said manhole covers to see to it that they would not be dangerous to persons lawfully using the highways, and driving their automobiles over them. From all the evidence in this case, it cannot be disputed that the State had constructive notice of the condition of these manhole covers for a reasonable length of time, so as to charge the State with negligence in failing to properly maintain said manhole covers. The only conclusion that the Court can draw from the testimony in this case is the fact that the State's negligence in the maintenance of the manhole covers was the direct and proximate cause of the accident here in question, and that the State should respond to the claimant for the damages to his automobile. The evidence shows, without a doubt, that the claimant, in driving over said highway, was in the exercise of due care and caution for his own safety, and the safety of his automobile.

An award is, therefore, entered in favor of the claimant, N. B. Couchot, in the amount of **$50.00** for the damages to his automobile.

(No. 4435—Claimant awarded $1,971.00 and Life Pension.)

OMER H. HESTER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 8, *1952.*

BRADBURY AND BRADBURY, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; CHARLES H. EVANS, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when* an award will be made. Where claimant's injuries arose out of and in the course of his employment by the State of Illinois, an award may be made under the Workmen's Compensation Act.

LANSDEN, J.

Claimant, Omer H. Hester, seeks to recover from respondent under the Workmen's Compensation Act for injuries sustained in an accident, which arose out of and in the course of his employment as a guard at the Pontiac Branch of the Illinois State Penitentiary, operated by the Department of Public Safety.

No jurisdictional questions have been raised, or can be involved.

On August 1, 1949, claimant, who was assigned to security duties, was making the rounds, punching the clock at the various stations, when his attention was attracted by a light in the elevator shaft of the sheet metal building. Thinking that the light might come from a fire, he investigated the source of the light, and found it to be a reflection of the sun's rays through a slit in pieces of sheet metal. As he turned away, he slipped and grabbed the elevator gate, which gave way, and claimant fell 4½ feet into the bottom of the elevator shaft, and sustained a serious fracture of the neck of his right femur.

After claimant finally dragged himself out of the shaft, he crawled along the floor, and finally his cries were heard by one of his superiors.

He was thereupon taken to the prison hospital, and the next day, since he was a veteran of World War I, he was transferred to the Veterans Administration Hospital, Dwight, Illinois, where he remained, except for two days, until August 22, 1950. He returned to said hospital on March 22, 1951, remaining until June 25, 1951.

The record discloses that claimant's fracture was first reduced by an operation, and the fragments were fixed with a pin through the neck of the femur, and a plate extending down the shaft was held in place by several screws.

This operation was not successful since no union resulted, and muscle pull sheared off some of the plate screws.

On claimant's re-entry into said hospital, the metallic fixation material was removed with the exception of one screw, which could not be taken out. A bone graft was made, and multiple steel pins were driven through the trochanteric area up through the neck and into the head of the femur.

Claimant's fragmented, intra-capsular fracture has never healed. Either the fragments will be absorbed, or a degenerative arthritis will destroy the function of the hip joint.

A fusion operation might be performed, which would relieve claimant of some pain, but would result in permanent immobilization of the hip joint.

At the hearing before Commissioner Wise on October 1, 1951, claimant was unable to walk, and could stand only with the aid of crutches.

Prior to his employment by respondent, claimant was a laborer and farmer, and it appears without question that claimant is totally and permanently disabled

from pursuing any gainful occupation available to him by reason of his education, experience and training. He can no longer perform manual labor, and a housekeeper is required to furnish claimant with his minimum daily needs.

On the date of his accident, claimant was 53 years of age, divorced, and had no children dependent upon him for support. He began working for respondent on July 1,1949, and his rate of pay was $237.00 per month. His rate of compensation is, therefore, $22.50 per week.

From the date of his accident through December 31, 1950, claimant was paid his full salary of $237.00 per month. The payments for the seventeen months, when claimant did not and could not perform any services for respondent, amounted to $4,029.00. Claimant has thus been greatly overpaid, and the award hereinafter entered in his favor must take this into account.

Priscilla M. Bradbury, Robinson, Illinois, was employed to take and transcribe the testimony at the hearing before Commissioner Wise. Her charges amount to $41.00, the same being reasonable and customary, and an award is entered in her favor for $41.00.

Because respondent did not furnish the medical treatment required of it under the Workmen's Compensation Act, claimant, in addition to the hospitalization and surgical services furnished by the Veterans Administration, consulted with, and was treated by Dr. Raymond B. Murphy, Palestine, Illinois. A bill for $330.00 has been submitted by Dr. Murphy, but at the hearing the doctor testified that his charges included an amount for his testimony at the hearing, and for his time in making up reports. Respondent is liable only for those professional services, which tend to cure and relieve claimant of the effects of his accident. Therefore,

claimant and respondent each owe Dr. Murphy something. Although Dr. Murphy's bill is not itemized, we can hold respondent liable for X-Rays, four or five treatments and consultation services, and we find the reasonable value of these services to be **$130.00.** Claimant will, therefore, have to pay Dr. Murphy **$200.00** from his own funds.

An award is entered in favor of claimant, Omer H. Hester, under Section 8 (a) of the Workmen's Compensation Act, for medical services for the use of Dr. Raymond B. Murphy in the sum of **$130.00,** payable forthwith.

An award is entered in favor of claimant, Omer H. Hester, under Section 8 (f) of the Workmen's Compensation Act, for total permanent disability, plus **a** pension for life; or the sum of $6,000.00, plus an annual pension of $480.00, payable monthly in the sum of $40.00 after the payments of $6,000.00 shall have been made.

However, since claimant has been so greatly overpaid, having already received **$4,029.00,** which amounts to **179** weeks at **$22.50** per week, and one week at $1.50, no payment can be made to claimant under the award herein until one week after January 5, **1953,** by which date **179** weeks of compensation will have accrued. At that time claimant should receive only the amount of **$21.00,** being one week's compensation less **$1.50** already paid to him in the said amount of **$4,029.00.**

The remainder of the award is payable as follows:

> **Commencing on January 19, 1953, claimant shall receive the sum of $22.50 per week for 86 weeks, plus one final payment of $15.00; and commencing one month after the date of said final payment of the sum of $6,000.00, claimant shall receive $40.00 each month for life.**

Jurisdiction of this case is specifically reserved for the entry of such further orders as may from time to

time be necessary. *Penwell* vs. *State,* **19 C.C.R. 176;** *Penwell* **vs.** *State,* **18 C.C.R. 8;** *Penwell* vs. *State,* **18 C.C.R. 183.**

These awards are subject to the approval of the Governor. Ill. Rev. Stat., **1951,** Chap. **127,** Sec. **180.**

(No. 4438—Claimant awarded $6,675.00.)

GRACE R. SITTER, WIDOW, ET AL, Claimant, *vs.* **STATE OF ILLINOIS, Respondent.**

Opinion **filed January 8, 1952.**

WARNER AND WARNER, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. **SUMPTER,** Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—When award may be made for death following surgery for injuries. Where claimant's intestate died as a direct result of surgery undertaken to correct an injury, which arose out of and in the course of his employment by the State of Illinois, an award may be made under the Workmen's Compensation Act.

SCHUMAN, C. J.

A claim was filed herein on May **16, 1951** by Grace **R.** Sitter, in her own right as surviving widow of Bon Sitter, and on behalf of decedent's minor daughter, Shirley Ann Sitter.

Bon Sitter, decedent, was employed by the State of Illinois at the Dixon State Hospital, and had been so continuously employed from March **25, 1922** until the date of his death on March **31, 1951.** He was **a** stationary fireman, and was employed in the **power** house and steam plant at the Dixon State Hospital. At the time of his death he was receiving **$325.00** per month, and in the year preceding his death his earnings were approximately **$3,760.00.** He left the claimants, Grace R. Sitter, his widow, and Shirley Ann Sitter,

daughter, who was born on January 10, 1935, as his 'surviving dependents. Both of the claimants reside at 909 Galena Avenue, Dixon, Illinois.

On March 8, 1951, at approximately 11:00 **A.M.,** Bon Sitter, decedent, was assisting Walter Rucker, **a** machinist, in repairing a steam pump in the power plant where he was employed. They had removed a cover plate on the pump to expose the valves, and were replacing the plate. While tightening one of the bolts, which held the cover plate in place, the wrench, decedent was using, slipped, and, as a result of the strain on his muscles and other portions of the body, he suffered an inguinal hernia on his right side. He immediately complained of pain, which fact was verified by Walter Rucker in his report to the State. Mr. Sitter continued working until March 15, 1951, at which time the pain became so great that he called at the dispensary of the State Hospital, and reported the injury to the physician in charge. The injury was diagnosed as a hernia, and an operation was recommended. The operation was performed by Dr. David L. Murphy of Dixon on March 19, 1951 at the Dixon State Hospital. Dr. Murphy in his testimony stated that the decedent was suffering from a right inguinal hernia, and he was positive that it was of recent origin. Mr. Sitter was making a good recovery, although his action after being up and around several days was restricted. On the 29th and 30th of March he apparently was all right, but on the morning of the 31st, a nurse called Dr. Murphy, and reported that Mr. Sitter was in a critical condition. Dr. Murphy immediately went to the hospital, arriving there at about 7:35 **A.M.,** but Mr. Sitter had just expired. Dr. Murphy in his testimony stated that Mr.

Sitter died of a pulmonary embolus, which was a direct,, result of the surgical procedure.

At the hearing on September 27, 1951, Mr. Handy, a State employee, testified as to the decedent's work record and rate of pay. Grace R. Sitter, his widow, testified as to the dependency of herself and child, and the previous good health of Mr. Sitter. Dr. Murphy testified as above set forth.

The decedent was paid salary through March 31, 1951 at the rate of $325.00 per month, this being for one-half month after he quit work on March 15, 1951, but Mr. Handy testified that he had fifteen days due for vacation time and three days' accumulated time for previous overtime work. There is no compensation due for temporary total disability. The facts in this case are practically all admitted by the State in its Departmental Report, and there is no question that this was a death, which arose out of and in the course of decedent's employment. There are no jurisdictional questions involved.

Betty Falk, Dixon, Illinois, was employed to take and transcribe the testimony before Commissioner Wise. Her charges amounted to $15.00, which the Court finds to be reasonable.

An award is entered in favor of Grace R. Sitter, claimant, under the terms and provisions of the Workmen's Compensation Act, in the amount of $6,675.00, payable as follows:

$906.43, which has accrued from April 1, 1951 to January 8, 1952, and is payable forthwith.

$5,768.57, which is payable in weekly installments of $22.50, beginning on January 15, 1952 for a period of 256 weeks, with one final payment of $8.57.

An award is entered in favor of Betty Falk, Dixon,

Illinois, in the amount of **$15.00** for stenographic services.

All future payments being subject to the conditions of the Workmen's Compensation Act, jurisdiction of this case is specifically reserved for the entry of such further orders as may be necessary.

This award is subject to the approval of the Governor, as provided in Section **3** of "An Act concerning the payment of compensation awards to State employees".

(No. 4450—Claimant awarded $1,185.00.)

EDWARD M. TRIPP, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 8, 1952.

R. WALLACE KARRAKER, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; CHARLES **H.** EVANS, Assistant Attorney General, for Respondent.

CIVIL SERVICE ACT—*when a claim will be allowed for payment of salary for the period of unlawful discharge.* **Where a Civil Service employee is illegally discharged, and subsequently restored to his position, he is entitled to the salary provided for said position, where he was ready, willing and able to render said duties, tendered his services, and the salary was not paid to a de facto employee during the period in controversy.**

SCHUMAN, C. J.

The claimant, Edward M. Tripp, was on August **31, 1950** a duly certified Civil Service employee of the State of Illinois, and employed as Supervising Attendant at the Anna State Hospital, Anna, Illinois. On September **1, 1950,** claimant was served with a writ and notice of suspension from his employment, which was signed by C. D. Noble, Superintendent of the Anna State Hospital; and, by Fred K. Hoehler, Director of the Department of Public Welfare, and which notified claimant that he was suspended from his employment for a period of thirty days from September **16, 1950** to Oc-

tober 16, 1950, citing as reasons for the dismissal his political activity as a precinct committeeman.

On the same date, August 31, 1950, Fred K. Hoehler, as Director of the Department of Welfare, filed written charges, addressed to the Illinois Civil Service Commission, requesting the removal of the claimant for the same charges as set forth in the notice served on the claimant re his dismissal or suspension for thirty days. The Hearing Board of the Illinois Civil Service Commission on October 13, 1950 recommended that the claimant be discharged from the certified position of Supervision Attendant I, effective October 16, 1950, and the Illinois Civil Service Commission approved the findings and decision of the Hearing Board under a certification dated October 31, 1950, and certified the decision to the Department of Public Welfare for enforcement. .

The claimant, under the Administrative Review Act, filed a petition in the Circuit Court of Union County, and, under an order of the Circuit Court on the 3rd day of April, A.D. 1951, said Court held that the decision of the Civil Service Commission was without any evidence of political activity, that there was no proof of the charges made, and ordered that the order of the Civil Service Commission dated October 31, 1950 discharging the claimant as a Civil Service employee be quashed, and held to be null and void. There was no appeal from this order of the Circuit Court by the State.

In accordance with the order of the Circuit Court, the claimant was restored to the payroll and to his work at the Anna State Hospital as of April 3, 1951. Claimant does not make any claim for loss of wages for the period of September 16 to October 16, 1950,

but claims wages at the rate of $215.00 per month from October 16, 1950 to April 3, 1951, or for a period of five months and seventeen days, in the amount of $1,185.00.

The evidence discloses that the claimant has been diligent in the protection of his rights, and at all times for which he seeks payment of salary, he was ready, willing and able to perform the duties of his position, tendered the performance thereof, and such tender was refused. It has been repeatedly held by this Court that a Civil Service employee, illegally discharged, and subsequently restored to his position by a judgment of a court of competent jurisdiction, is entitled to the salary provided for said position for the period of illegal discharge, where he is ready, able and willing to perform the duties of said position, and tendered his services to his employer. The respondent in this case offers no proof that claimant's salary had been paid to a de facto incumbent prior to the claimant's reinstatement, and offers no proof that any other agent or de facto incumbent performed the duties of claimant's position during the period in controversy.

The Court, therefore, finds that the claimant is rightfully entitled to an award for payment of his salary during the period of his illegal discharge in the amount of $1,185.00.

An award is entered in favor of the claimant, Edward M. Tripp, in the amount of $1,185.00.

(No. 4185—Claimant awarded $2,181.24 and Life Pension.)

EDITH F. GARRETT, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 8, 195.2.

ROY R. HELM, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when an award will be made.* **Where claimant's injuries arose out of and in the course of her employment by the State of Illinois, an award may be made under the Workmen's Compensation Act.**

DELANEY, J.

Edith F. Garrett, claimant, filed her claim herein on April **13, 1949,** alleging that on June **11, 1948** she was employed by the Department of Public Welfare at the Anna State Hospital, Anna, Illinois, as a nurse. Claimant had been on leave for two days, and returned to the Hospital about 6:30 P.M., and went directly to bed. She slept until **9:00** P.M., went to supper at 9:30 P.M., clocked in for work at 10:40 P.M., talked to the Supervisor a few minutes, and then started to walk on the usual accustomed route from the main building to the Women's Cottage, where she was scheduled to work. During her absence the preceding days, an excavation had been made across the sidewalk between the main building and the Women's Cottage at a point where the sidewalk leads from the front sidewalk to the Women's Cottage. It was dark, and there were no lights, warnings, signs, or barricades of any kind to warn her of the excavation, which was **4½** to **5** feet deep. Claimant fell into the ditch; and, as a result of this fall, she broke the top of the femur that goes into the pelvis of the right leg.

The claimant was on June **17, 1948** taken to St. John's Hospital, St. Louis, Missouri, where on July 22, **1948** Dr. Patrick Murphy repaired the break by placing a Smith-Peterson pin in the bone. The claimant was returned to her home in Brookport, Illinois on October **21, 1948.** In July of **1949,** an X-Ray, made under the direction of Dr. Warner **A.** Gray, showed that the:

Smith-Peterson pin was protruding past the head of the femur, about 1/8th of an inch into what is called the acetabulum. The claimant returned to St. John's Hospital, where Dr. Patrick Murphy found that the bone had grown to the pin. He removed the pin from claimant's hip.

At the hearing of this cause, Dr. Warner A. Gray testified that claimant was unable to do any type, kind or character of work. Dr. Harry Wright also testified that claimant was unable to do any work requiring physical exertion. Commissioner Frank M. Summers of this Court observed the claimant, and feels that she is totally disabled, and that she will remain totally disabled. She is able to move only with the aid of crutches.

No jurisdictional question is raised. Respondent and claimant were operating under the Workmen's Compensation Act, and the accident in question arose out of and in the course of the employment. The only question is the extent of permanent disability suffered by claimant.

The record consists of the complaint, Departmental Report, transcript of evidence, abstract of evidence, statement, brief and argument of elaimant, claimant's X-Ray exhibits Nos. C-1, **C-2** and **C-3.**

The claimant's earnings for the year preceding the accident were $2,040.00. She had no children under **16** years of age dependent upon her for support.

From the undisputed medical testimony, and other testimony in the record, it is shown that the claimant is permanently disabled, and has not been able, and is not able to do work of any kind.

We conclude, therefore, after a consideration of the record, that the claimant is entitled to an award for permanent total disability.

The compensation rate is the maximum of **$15.00** per week, increased 30%, or **$19.50.** Claimant is also entitled to be reimbursed on account of medical and hospital expenditures made by her as follows: Hospital in **1948, $395.10;** ambulance in **1948** to and from St. Louis, Missouri, $70.00; hospital in **1948, $121.00;** and an ambulance charge in **1948** of **$10.00,** or a total of **$596.10.** Dr. John Murphy has submitted a statement for **$300.00** in **1948,** and **$100.00** in **1949,** or a total of $400.00, which should be paid.

The claimant is, therefore, entitled to an award of **$5,200.00,** plus **$596.10** reimbursement of medical and hospital expenses, plus the sum of **$400.00** for the use of Dr. John Murphy, or the sum of **$6,196.10.** From this amount shall be deducted the sum of **$889.86,** which claimant received for lion-productive time.,There should also be **a** further deduction of $3,125.00, which **was** received by the claimant from the Kuhne Simmons Construction Company through the Liberty Mutual Insurance Company. The total award granted claimant is, therefore, **$2,181.24.**

The settlement received from the Insurance Company, and payment made by the respondent for non-productive time equal approximately **206** weeks. From the day after her injury in **1948, 206** weeks is May **23, 1952.** Considering Leap Year, no further compensation payments can be made claimant until May **24, 1952.**

An award is, therefore, entered in favor of claimant, Edith F. Garrett, payable as follows:

$ 400.00, payable to claimant forthwith for the use of Dr. John Murphy;

$1,781.24, payable in weekly installments of $19.50 per week for 91 weeks, commencing May 24, 1952, with one final payment of $6.74; thereafter a pension for life in the sum of $416.00 annually, payable in monthly installments of 834.66.

The testimony had at the hearing was taken and transcribed by Ettamarie Holland, who made charges therefor in the amount of **$36.30.** These charges appear reasonable and proper.

An award is, therefore, entered in favor of Ettamarie Holland in the amount of **$36.30,** payable forthwith.

This award is subject to the approval of the Governor, as provided in Section **3** of "An Act concerning the payment of compensation awards to State employees".

(No. 4324—Claimant awarded $1.500.00.)

WALTER WITTE, Claimant, *vs.* **STATE OF ILLINOIS, Respondent.**

Opinion filed **February 8,** *1952.*

ROBERT E. DOLPH, Attorney for Claimant.

IVAN **'A.** ELLIOTT, Attorney General; C. ARTHUR **NEBEL,** Assistant Attorney General, for Respondent.

NEGLIGENCE—*State liable for* **negligent treatment of inmates. Where evidence showed that an inmate, after being injured, did not receive medical attention from a qualified physician for ten days, the** State **was negligent, and an award will be made for permanent injury and deformity resulting therefrom.**

SCHUMAN, C. J.

On December **29, 1949,** at about 3:30 P.M., claimant, then **41** years old, and an inmate of the Vandalia State Penal Farm, (where he had been committed for vagrancy on September 25, 1949) was engaged in painting one of the buildings located on the grounds of the institution, and, while so working, stepped into an incline, fell, and injured his right knee.

Immediately after the accident, claimant was placed in an automobile by Frank Hartigan, a registered male nurse, and Mr. Churchill, an inmate orderly, and was taken to the institutional hospital. He was carried by

the two men into the hospital. Claimant was then treated by Mr. Hartigan for shock. The next morning; Mr. Hartigan administered a hypodermic, but nothing else that day. The following day claimant was fluoroscoped in the dispensary of the hospital. Mr. Hartigan, Mr. Churchill, and four colored boys attempted to set his right leg. Claimant was placed under anesthetics, and gained consciousness about a half hour later. There was no treatment given, except Mr. Hartigan placed an Ace bandage on the right knee. He received no medication or treatment after that. Dr. S. W. Moore, the institutional physician, saw claimant for the first time on January 8, 1950, ten days after the accident, but prescribed no medication. The Ace bandage had been removed by Mr. Churchill, and the swelling of the knee became worse. On January 9, 1950, weight traction of five pounds was instituted on Dr. S. W. Moore's orders, and under Mr. Hartigan's supervision, to correct the recurrent deformity of the right knee. On January 17, 1950, half of the weights were removed, and, on January 20, 1950, all weights were removed, an Ace bandage was reapplied, and heat treatments administered. Dr. S. W. Moore visited the claimant the second time, after he had been in the hospital for about three weeks. During claimant's stay in the hospital, he was attended by Mr. Hartigan, the male nurse, and Mr. Churchill, the inmate orderly. Dr. S. W. Moore gave claimant a fluoroscopic examination three days before he left the hospital. Claimant remained in the institutional hospital about a month, and was then transferred. to Dormitory B, where he stayed two or three weeks, during which time he saw no physician or surgeon, and received no medication or treatment. He was then sent, to Dormitory D. Claimant made no complaint to any

supervisor, and he did not work on the institutional grounds after he left the hospital. He was released from the institution about March 24, 1950.

During the first week in May, 1950, claimant went to the Hines Hospital, where he stayed a period of about one month. X-Rays were there taken of his right knee.

Dr. Robert B. White, medical expert, testifying for claimant, stated he made a physical examination of claimant on July 27,1951, and found that, in comparing the right and left knees, there was an obvious deformity of the right knee, characterized by a displacement of the head of the fibula. X-Ray pictures were taken of both of claimant's knees on July 28, 1951. These X-Ray films were admitted into evidence as claimant's exhibits Nos. 1, 2, 3 and 4.

In interpreting the X-Ray films, Dr. White stated exhibit No. 1 was a film of claimant's right knee, and showed a healed fracture of the upper end of the tibia, with a marked latter displacement of the fibula, which is attached to the fragment, and a depression and irregularity of the joint surface. Exhibit No. 2 was a picture of claimant's right knee. It showed a side view of the same fracture described in exhibit No. 1, with a marked depression of the joint surface, and irregularity of the surface. Exhibit No. 3 showed the left knee, and was a normal X-Ray picture of a knee. Exhibit No. 4 was also a picture of claimant's left knee, and showed a normal X-Ray picture of a knee. Exhibits Nos. 5 and 6 were X-Ray films taken of the right knee on May 2, 1950 at Hines Hospital, and were admitted into evidence with the qualification that the respondent does not admit the truthfulness of the testimony or the genuineness of the exhibits. In his interpretation of exhibit No.

5, Dr. White stated it showed a healed fracture, and represents the joint surface of the upper end of the tibia, with a marked depression and irregularity of the joint surface. Exhibit No. 6 showed a healed fracture through the upper end of the tibia, involving the joint surface, with a marked depression and irregularity of that joint surface, and a marked displacement of the upper end of the fibula, which is attached to the fracture fragment. There was less healing shown in this particular film taken on May 2, 1950.

Dr. White stated that the age of the fracture shown in exhibit No. 5 was within a year of the fracture. His opinion was based on a comparison with claimant's exhibits Nos. 1, 2, 3 and 4 taken on July 28, 1951, and the marked degree of healing that had occurred sometime before the earlier films and the most recent films.

Dr. White also testified that a fluoroscopic examination of a fracture was not as accurate as an X-Ray picture. He further testified that the injury to claimant's knee was permanent, that he will have or has already had considerable pain in arthritic changes, which will become progressively worse in the next few years; that claimant bore weight with considerable difficulty, and that there was a deformity of the right knee.

At the time of the hearing, claimant walked with a limp of the right foot. He stated he was a pianist, and his only employment at present was playing the piano once a week.

Dr. S. W. Moore, the institutional physician, was on vacation at the time of the accident in question, and did not see claimant until January 8, 1950. Frank Hartigan, the registered male nurse, was instructed to call Dr. C. H. Moore in the absence of Dr. S. W. Moore for such cases, if in doubt as to the necessary treatment.

Dr. C. H. Moore was ill at the time of claimant's accident., and advised Mr. Hartigan to proceed with the reduction of what he felt was a dislocation of the right knee, as revealed by fluoroscopic examination.

There is no question from the testimony in this case that the State was negligent in the treatment of claimant, and in its failure to furnish competent medical services after it assumed responsibility of caring for him.

As a result of the injury and improper care, claimant has sustained a permanent injury to his right knee, and is entitled to an award.

An award in the amount of $1,500.00 in favor of claimant is allowed.

(No. 4420—Claim denied.)

JOHN TERRACINO, GWENDOLYN TERRACINO AND MARY MEYERS, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 8, 1952.
Petition of Claimants for rehearing denied February 8, 1952.

GEORGE YELLEN, Attorney for Claimants.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

HIGHWAYS—*State not an insurer against accidents.* **The State is not an insurer of all accidents that occur because of the condition of its highways.** *(Beenes vs. State of Illinois,* **supra.)**

SAME—negligence. **Where evidence showed that the State posted adequate signs showing dangerous condition of the highway, it is absolved from any liability arising out of the negligence of a driver disregarding such warning signs.**

LANSDEN, J.

This is an action allegedly based on the negligence of respondent in the operation and maintenance of one of its highways.

On July 2, 1950, about 9:30 A.M. claimant, John Terracino, age 43, was driving his 1950 Nash Ambassador automobile, accompanied by his wife, Gwendolyn Terracino, claimant herein, who was sitting by his side in the front seat, and, claimant, Mary Meyers, who was seated on the right rear seat. The car was travelling at about thirty miles per hour in a southwesterly direction along and upon the inside lane of the southwest bound four-lane paved highway, known as U. S. Route No. 66, about seventeen miles from Joliet, Illinois, and approximately four miles northeast of the intersection of U. S. Route No. 66 and U. S. Route No. 66 alternate.

At said time and place an automobile driven by one Mr. McNeil was proceeding about forty miles per hour in a northeasterly direction upon said highway, and apparently struck some depression in the pavement and swerved to the left, colliding head on with the automobile driven by claimant, John Terracino, damaging his automobile, and causing bodily injury to all three claimants herein, and death to Nellie Randolph.

It appears from respondent's exhibit No. 1, the Departmental Report of the Division of Highways, which was received in evidence, that on June 5, 1950 the Department of Public Works and Buildings awarded a contract to the Black Top Roads Company for resurfacing that part of Route U. S. No. 66 from its junction with Alternate Route U. S. No. 66 northeasterly to the DuPage-Cook County line. This section of highway is slightly in excess of seven miles in length, and at the time of claimant's accident had a concrete wearing surface 40 feet in width. Two lanes were available for each direction of traffic; and, on June 22, 1950, the Division of Highways furnished and supervised the erection of

signs at the ends and at intermediate points along said section of highway. Immediately west of the DuPage-Cook County line a standard **X-12** sign was erected on the north highway shoulder facing east. This sign, 8 feet wide and 5 feet high, bore the legend "PAVEMENT PATCHING AHEAD. This road is being kept open for your convenience. DRIVE WITH CAUTION. Barricade and one way traffic ahead." Eight hundred feet west was erected a standard **X-14** sign on the north shoulder facing east, which bore the legend "Speed limit **25** M.P.H. in repair zones." This sign is **42** inches wide and **36** inches high. **A** standard **X-13** sign was erected on the north shoulder of Route U. S. No. **66, a** short distance west of its intersection with State Route No. **83.** This sign, 8 feet long and **6** feet high, bears the legend, "U. S. **66—7** MILES, under construction, patching, widening, and resurfacing. This road is being kept open for your convenience. DRIVE WITH CAUTION." Four hundred feet west of the **X-13** sign was erected a second **X-14** sign, and a third **X-14** sign was erected on the north shoulder of Route U. S. No. **66, 400** feet west of its intersection with Downers Grove Road; and for east bound traffic **X-13** and **X-14** signs were erected at the junction of Route U. S. No. **66** and Alternate Route U. S. No. **66.** An **X-14** sign was erected on the south shoulder of Route U. S. No. **66, 400** feet east of Lemont Road. All of the aforesaid signs were in place on July **1** and **2, 1950.**

The existence and locations of these signs were also verified by the testimony of witnesses in this case.

Claimant, John Terracino, testified that he saw the other car involved in the accident, driven by Mr. McNeil, when about 150 feet away, approaching in a northeasterly direction upon said highway, strike a hole

about one foot wide, one foot six inches long and two inches deep, and then swerve to the left into the path of claimant's car. Claimant, John Terracino, testified further that he then applied his brakes, and steered his car to the right, and, as he did so, said oncoming car swung back to the right colliding head on with his automobile. He further stated that the pavement was rough, jumpy and holey, when the accident happened; that at the time of the collision the two right wheels of his car were on the shoulder, and the two left wheels on the pavement.

Claimants were all seriously injured in the collision, and were taken in an ambulance to the St. Joseph's Hospital in Joliet, Illinois, where they all received medical treatment and hospitalization. Claimant, John Terracino, remained there from July 2, 1950 to August 15, 1950; claimants, Gwendolyn Terracino and Mary Meyers, were there from Julg 2, 1950 to September 9, 1950. Gwendolyn Terracino also went to the Wesley Memorial Hospital on January 17, 1951, where surgery was performed on her knee on January 18, 1951.

At the time of the accident, the skies were clear, the sun was shining, the pavement was dry, and there was no other traffic upon said highway, except the cars involved in the collision.

Route U. S. No. 66 from its junction with Alternate Route No. 66 northeasterly to the DuPage-Cook County line, and upon which highway the accident took place, was being repaired and resurfaced. The first part of the operation was started in May, 1950, or the first part of June, 1950. It consisted of mud packing, which is a mixture of cement, lime and mud; patching the breaks, taking out broken up concrete, stone and brick, and patching up the holes. This work was

finished about June 23, 1950, at which time work was begun to pull out the equipment. The next part of the operation of resurfacing with a mixture of asphalt and stone, which was being carried on by an independent contractor, was then started, and was in operation at the time of said accident. While the resurfacing operation was being carried out, the contractor put up barricades, and stationed flagmen where needed. When the resurfacing of a part of the highway was completed, the contractor took down the barricades, removed them from the highway, and made a smooth lead off by tapering the resurfacing material smooth with the pavement being covered.

As the work of mud packing and patching was being carried on, the respondent's workmen went up and down the highway looking for patch spots, and the road was rechecked for holes and bad spots before the equipment was pulled out. The highway under repair, where the accident occurred, was checked by respondent's workmen two days before the accident happened, and again the day after the accident occurred, and no holes or depressions were discovered.

From the foregoing summary of the facts in the case, we are compelled to conclude that claimants are not entitled to awards.

The State is not an insurer of all accidents, which may occur by reason of the condition of its highways. *Beenes* vs. *State,* No. 4377, opinion filed October 5, 1951.

However, the State is negligent, if, having knowledge of dangerous conditions on its highways, it fails to warn users of the highways of such dangerous conditions. *Pomprowitx* vs. *State,* 16 C.C.R. 230; *Rickelman* vs. *State,* 19 C.C.R. 54; *Rommel* vs. *State,* No. 4306, opinion filed February 9, 1951; *Cruger* vs. *State,* No.

4271, opinion filed October **13, 1950.** Cf: *Mowery* vs. *City of Mounds*, **245** Ill. App. **338.**

However, the record in this case discloses that the State had fulfilled its obligation to users of the highways by the erection of large, unambiguous and prominent signs that adequately warned of the conditions users would encounter in the construction area. Mr. McNeil was apparently not sufficiently impressed with the warning signs that he must have seen, and, we, therefore, absolve respondent of any liability for the accident involved herein, and hold that it was the negligence of McNeil, and not that of respondent, which caused the serious injuries and substantial damages to claimants.

We have intentionally not undertaken a discussion of the doctrine of "intervening agency" as announced by our Supreme Court in several cases, such as, *Illinois Central R.R.* Co. vs. *Oswald,* **338** Ill. **270;** *Briske* vs. *Village of Burnharn,* **379** Ill. **193;** and *Merlo* vs. *Public Service* Co., **381** Ill. **300,** because we feel that such doctrine, assuming its validity, has no application to the facts in this case. Cf. *Leon Green, Illinois Negligence Law* IV, 40 Ill. L. R. **12-27** (May-June **1945).**

Awards to claimants are, therefore, denied.

(No. 4436—Claimant awarded $765.00.)

EDWARD BURGESS, Claimant, *us.* STATE OF ILLINOIS, Respondent.

Opinionfiled February 8,1962.

JAMES *O.* MONROE, Jr., Attorney for Claimant.

IVAN **A.** ELLIOTT, Attorney General; CHARLES H. EVANS, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when an award will be made.* Where claimant's injuries arose out of and in the course of his employment by the State of Illinois, an award may be made under the Workmen's Compensation Act.

DELANEY, J.

Claimant, Edward Burgess, seeks to recover from respondent under the Workmen's Compensation Act for an injury to his left hand, as the result of anaccident that arose out of and in the course of his employment as a common laborer in the Department of Public Works and Buildings, Division of Highways.

Claimant was 60 years of age, and had no children under 16 years of age dependent upon him for support at the time of the injury. He was first employed by the Division of Highways on May 10, 1950 at a wage rate of one dollar an hour. He continued in this same classification, and at the same wage rate, from the date of his employment until the date of his injury on June 2, 1950. Other employees working in the same capacity as claimant ordinarily work less than 200 days a year. Therefore, under Section 10 of the Workmen's Compensation Act, claimant is presumed to have earned $1,560.00 in the year preceding the accident.

On June 2, 1950, Mr. Burgess was one of a group assigned to widen an expansion joint in the concrete pavement surface of U. S. Route No. 50, one quarter mile east of East St. Louis. At approximately 1:30 P.M., Mr. Burgess was swinging a sledge and striking a steel point held against the concrete pavement, thus chiseling away a small portion of the pavement slab. As the sledge struck the point, a small metallic particle broke off of either the point or the sledge, flew through the air, and became imbedded in the back of Mr. Burgess' left hand.

The Division took Mr. Burgess to Dr. W. W. Brown, Collinsville, who gave first attention to Mr. Burgess. Dr. Brown submitted the following report on June 8, 1950:

"Nature of Injury—Laceration of dorsal vein, left hand with foreign body dorsal surface at base of second metacarpal. Treatment—Skin clips—local dressings—penicillin—tetanus anti-toxin. X-Rays—Negative for fracture—foreign body dorsal surface left hand. Remarks—No attempt made to remove foreign body. Estimated date of discharge—10 days. Estimated date patient able to work—No disability. What permanent disability do you expect?—Indefinite."

In the forepart of July, 1950, Dr. Brown went on vacation, and transferred Mr. Burgess to the care of Dr. J. L. Verneuil, Collinsville. On July 6, 1950, Dr. Verneuil removed the steel particle from the hand of Mr. Burgess, and submitted the following report and note on August 18, 1950:

"I treated Mr. Burgess at the request of Dr. Brown while Dr. Brown was on vacation. He had a foreign body (steel) in the dorsum of his left hand. I removed the steel on July 6, 1950.

I treated Mr. Burgess until July 15, 1950, and, at the time he was released from my care, I estimated that he would be totally disabled until July 22, 1950.

Nature of Injury—Puncture wound dorsum left hand. Treatment—Removed piece of steel from dorsum of left hand on July 6, 1950. X-Rays—None. Remarks—Dr. W. W. Brown left on a vacation, and turned this case over to me. Estimated date of discharge—July 22, 1950. (On July 22, I sent this patient back to Dr. Brown for final check-up and care.) Estimated ability to return to work—July 22, 1950. What permanent disability do you expect?—None."

On August 21, 1950, Dr. Brown submitted his final report, which is as follows:

"Nature of Injury—Puncture wound left hand (dorsum). Treatment—Local dressings. July 6, 1950, Dr. Verneuil removed piece of steel from dorsum left hand. X-Rays—June 2, 1950, Foreign body left hand. Remarks—Dr. Verneuil returned Mr. Burgess to my care on July 22, 1950. Date patient was discharged—August 19, 1950. Date able to work—July 22, 1950. Permanent disability—None. Temporary disability when discharged—Small area of fibrosis over site of injury."

No jurisdictional question is raised.

The record consists of the complaint, Departmental Report, stipulation waiving briefs of both parties, transcript of evidence, original supplemental Departmental Report with attached exhibits, copy of supplemental Departmental Report, order of Chief Justice

granting claimant an extension of time in which to file abstract of evidence, and abstract of evidence.

Claimant's weekly compensation rate would be the maximum of **$15.00.** Since the accident occurred subsequent to July **1, 1949,** this must be increased 50%, making his compensation rate **$22.50** per week.

The Division's original report showed that Mr. Burgess was totally disabled from July **6** through July **22,** 1950, and that he was paid compensation from July **13** to **22,** inclusive, in the amount of **$32.15.** The Division failed to note that Mr. Burgess had worked July **13** and **14** at the time his compensation payments were made.

From a review of the evidence, and the observations of Commissioner Frank Summers, we are of the opinion that claimant is entitled to an award for a **20%** permanent loss of use of his left hand.

Claimant is entitled to an award under Section 8, Paragraph (e) **(12)** of the Workmen's Compensation Act for **34** weeks at the compensation rate of **$22.50** per week, or the sum of **$765.00.**

An award is, therefore, made to claimant, Edward Burgess, in the sum of **$765.00,** all of which has accrued, and is payable forthwith.

T. W. Elliott was employed to take and transcribe the evidence at the hearing before Commissioner Summers. Charges in the amount of **$42.00** were incurred for the services, which are fair, reasonable and customary. An award is, therefore, entered in favor of T. W. Elliott in the amount of **$42.00,** payable forthwith.

This award is subject to the approval of the Governor, as provided in Section **3** of "An Act concerning the payment of compensation awards to State employees".

(No. 4475—Claim denied.)

EXCHANGE NATIONAL BANK OF CHICAGO, AS TRUSTEE UNDER TRUST NO. 1004, AND NOT INDIVIDUALLY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed February 8, 1952.

FISHER, HASSEN AND FISHER, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

LEASE—*notice of termination under renewal.* **Where a lease was renewed on the "same terms and conditions", the original provisions for termination were operative under the renewal.**

LANSDEN, J.

Claimant, Exchange National Bank of Chicago, as Trustee under Trust No. 1004, and not individually, hereinafter referred to as Exchange, filed its complaint,, alleging that respondent owes it rent totalling $3,900.00 for the months of July, August, September and October, 1951, for a building located at 4814-18 West Belmont Avenue, Chicago, Illinois.

On June 13, 1946, as Lessor, Pioneer Trust and Savings Bank, as Trustee under Trust No. 9299, hereinafter referred to as Pioneer, entered into a lease with respondent, acting through the Director of Labor, covering the above described premises. The lease commenced on July 1, 1946 and ended June 30, 1950, and called for a total rental of $46,800.00, payable in 48 equal monthly installments of $975.00.

On January 17, 1947, Exchange succeeded to the interests of Pioneer by virtue of the transfer of the premises and the lease to Exchange as Trustee under Trust No. 1004.

The habendum clause of the lease reads as follows:

"The lessee to have and to hold the said premises for the term of forty-eight (48) months, beginning on the first day of July, 1946, and ending on the 30th day of June, 1950, unless the term hereby demised shall be sooner terminated as hereinafter provided."

The lease also contained a termination clause, which reads as follows:

"It is further mutually stipulated and agreed between the lessor and the lessee that the lessee only may terminate this lease on the last day of any calendar month of the term hereof by giving ninety (90) days' notice in writing to the other party of such intention to terminate the lease. Provided further that notice shall be computed from the date of mailing."

The lease also contained a renewal clause, which reads as follows:

"(6) The lessor covenants with the lessee that at the expiration of said lease the lessor will renew the lease for a further period of two years, or any portion of the two year period, upon the same terms and conditions, provided said lessee shall give thirty (30) days' notice in writing to said lessor of its intention to take said two (2) years' renewal of said lease. Provided further that notice shall be computed from the date of mailing."

On May 9, 1950, respondent notified Exchange in writing that it intended "to renew said lease for a term of two (2) years, beginning July 1, 1950, for the same consideration and on the same terms as provided in the aforesaid lease, under the provisions of the renewal clause thereof."

On March 13, 1951, respondent notified Exchange in writing that it was terminating the lease on June 30, 1951.

Respondent did not occupy or use any portion of the premises in question during the months of July, August, September and October, 1951.

Respondent has filed a motion to dismiss predicated, *inter alia*, on the ground that it had full right to terminate the lease by giving the ninety days' notice provided for in the termination clause quoted above.

'The older cases in this State drew a sharp distinction between the renewal and extension of a lease.

If the lease provided for an extension, no new lease was required, if it was elected to exercise a right of extension given in the lease. However, in the case of a renewal, it was definitely held that a covenant to renew was not a present demise, and if it was elected to renew, a new lease would be required. *Hunter* vs. *Silvers,* 15 Ill. 174; *U. S. Brewing* Co. vs. *Wolf,* 181 Ill. App. 509; *Sutherland* vs. *Goodnow,* 108 Ill. 528; *Eichorn* vs. *Peterson,* 16 Ill. App. 601; *Fuchs* vs. *Peterson,* 315 Ill. 370. The cases cited do not draw any distinctions between options or covenants to renew, or the privilege of renewing.

However, the Forcible Entry and Detainer Act of 1874, as amended, Ill. Rev. Stat., 1951, Chap. 57, Sees. 1-22, has rendered academic the refusal or failure of a lessor to execute a new lease, which the renewal clause requires, since the possession of a lessee in such situation is *with right,* and the lease is for all practical purposes continued for the additional period provided in the renewal clause. *Eichorn* vs. *Peterson,* 16 Ill. App. 601; *Fuchs* vs. *Peterson,* 315 Ill. 370. And, insofar as the State is concerned, the constitutional inhibition against making it a defendant in an action at law, or a suit in equity (Ill. Const., Art. IV, Sec. 26) is a complete bar to either a blameless or derelict lessor.

Furthermore, in case of renewal on the same terms and conditions as the original lease, the new lease should contain all of the original provisions except a renewal clause. *Meyer* vs. *Surkin,* 262 Ill. App. 83. This rule removes the sting of a possible perpetuity.

In the case before us, a new lease was never executed after respondent gave Exchange written notice of its intention to renew. In the final analysis, this omission, however, resulted in a renewal for not more than two years on the same terms and conditions as

provided in the original lease, and continued in effect the termination clause quoted above. *Fuchs* vs. *Peterson*, 315 Ill. 370; *Hindu Incense Mfg. Co.* vs. *MacKenzie*, 403 Ill. 390.

Although the last cited case, in effect, puts extensions and renewals of leases in the same legal niche, it does categorically hold that an option to renew a lease "on the same terms and conditions", when exercised, carried with it an option to purchase the premises during the new term, and the language used by Justice Thompson is certainly broad enough to support a holding by us that respondent's election to renew the lease in question "on the same terms and conditions" operated to renew the entire contract, including the termination clause.

Therefore, respondent's written notice of March 13, 1951, that it was terminating the lease on June 30, 1951, having been given more than ninety days prior to the termination date set forth therein, operated to end the lease on June 30, 1951, and respondent is not liable to Exchange for the rent claimed in the complaint.

The other grounds of respondent's motion to dismiss have been shelved, not because of lack of importance, but rather because, if decided in favor of respondent, they would not be decisive of the ultimate issues in the case.

The motion of respondent to dismiss the complaint is allowed, and the complaint is dismissed.

(No. 4477—Claim denied.)

B & F HI-LINE CONSTRUCTION CORPORATION, A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 8, 1952.

THOMAS AND DAVIS, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for, Respondent.

JURISDICTION—*when claim may be dismissed.* Where claimant has adequate remedy in a court of general jurisdiction, the Court of Claims has no jurisdiction.

SCHUMAN, C. J.

The respondent has filed a motion to dismiss the claim herein, and for grounds of said motion alleges:

1. That the Board of Trustees of Southern Illinois University is a corporate body, which may sue and be sued, and, therefore, the Court has no jurisdiction of claims against it.

2. That contracts are void unless entered into under an existing appropriation.

The claim is not predicated on a recovery of the contract price, but based on expenses incurred because of delay in payment, due to the fact that there was no appropriation made for the contract. The claim on its face shows the delay was due to the fact that no appropriation was made. There is no contention made that the claim is based on income producing improvements, where the board would have power to issue revenue bonds to pay for the same.

The Court is of the opinion that the Board of Trustees, being a corporate body with the right of being sued, that a court of general jurisdiction would be the place to bring such a suit, and for this reason this Court is without jurisdiction.

It is not necessary for the Court to consider the second point raised in the motion.

For the reasons heretofore assigned, the motion to dismiss is allowed, and the claim dismissed.

(No. 4479—Claim denied.)

HOWARD L. DELANEY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 8, 1968.

ANTON B. MUTZ, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

PLEADINGS—*allegation of notice.* **No cause of action against the State of Illinois for negligence is stated where allegation of actual or constructive notice of the defect to the State of Illinois is lacking.**

SCHUMAN, C. J.

The respondent has filed a motion to dismiss the claim filed herein on the ground that the complaint is insufficient in law, because it fails to allege respondent had actual or constructive notice of the defect alleged in the complaint.

In order to charge the State with negligence, it is necessary to allege that the State had actual or constructive notice of the defect, and that said defect was dangerous and unsafe for ordinary travel.

The complaint fails to charge such notice, and the motion to dismiss is sustained.

(No. 4482—Claim denied.)

HAROLD T. SEIGLE AND JEROME ROTH, doing business as ELGIN LUMBER AND SUPPLY COMPANY, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 8, 1968.

BEN RIFKEN, Attorney for Claimants.

IVAN A. ELLIOTT, Attorney General; CHARLES H. EVANS, Assistant Attorney General, for Respondent.

JURISDICTION—*limitations.* **Where claim is filed more than two years *after* it first accrues, the Court of Claims is without jurisdiction. (Section 22 of the Court of Claims Act.)**

LANSDEN, J.

Claimants, Harold T. Seigle and Jerome Roth, are partners, and in 1946 and 1947 they conducted a lumber and building materials business in Elgin, Illinois, under the name of Elgin Lumber & Supply Co.

On October 9, 1946, respondent, acting through the Division of Purchases and Supplies of the Department of Finance, purchased certain lumber for use at the Dixon State Hospital, Dixon, Illinois. The lumber was delivered to the hospital on August 27, 1947.

Apparently claimants neglected to request payment of this account in the amount of $915.00 until February, 1951, and such account has never been paid by respondent.

A motion to dismiss has been filed by respondent on the ground that this Court is without jurisdiction to hear and determine the case, because the complaint herein, which was filed on November 30, 1951, was filed more than two years after claimants' claim first accrued.

The applicable portions of Section 22 of the Court of Claims Act, Ill. Rev. Stat., 1951, Chap. 37, Sec. 439.22, read as follows:

> "Every claim cognizable by the court and not otherwise sooner barred by law shall be forever barred from prosecution therein unless it is filed with the clerk of the court within two years after it first accrues, ..."

The complaint shows on its face that more than four years elapsed between the date claimants' claim first accrued, and the date their complaint was filed. This Court is, therefore, without jurisdiction to hear and determine the case, since it has become forever barred by lapse of time. *Ross* vs. *State,* 16 C.C.R. 116.

The motion of respondent to dismiss is allowed, and the complaint is dismissed.

(No. 4484—Claim denied.)

OSCAR E. **HOFF,** Claimant, *vs.* STATE **OF ILLINOIS,** ***Respondent.***

Opinion filed February 8, 1962.

JAMES J. O'TOOLE, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

JURISDICTION—*limitations.* Where complaint showed on its face that more than two years had elapsed from the date of injury, the Court of Claims is without jurisdiction.

SCHUMAN, C. J.

The respondent has filed a motion to dismiss this case, alleging that the claim filed herein is barred by the two **(2)** year statute of limitations. The claim, on its face, shows that it was filed more than two years after it had accrued.

The motion of respondent to dismiss is sustained, and the claim is dismissed.

(No. 4335—Claimant awarded $1,500.00.)

JOHN KROENCKE, Claimant, *vs.* STATE **OF ILLINOIS,** ***Respondent.***

Opinion filed March 11, 1962.

SCHMIEDESKAMP AND DEEGE, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

NEGLIGENCE—blocking of ***culvert.*** Where concrete slab was left on bottom of creek bed after construction of culvert, and, during a flood the slab blocked the culvert, the Court held that a reasonably prudent person could have foreseen this danger, and not to do so constituted negligence.

DELANEY, J.

Claimant, John Kroencke, filed his complaint here-**in** on September **18,** 1950, wherein he alleges that he

sustained damages to his personal property and to certain growing crops by reason of a flood, which occurred on July 20, 1949. He brings this action to recover the said damages, and contends that the flood resulted from the negligence of the State of Illinois in maintaining a highway.

At the time of the flood, claimant, John Kroencke, was a tenant farmer. The farm where Mr. Kroencke lived, and where the damages are alleged to have occurred, is located in the southern part of Adams County, Illinois. It is approximately three miles north of Hull, Illinois. State Route No. 57 adjoins the farm, and the house and buildings lie to the northeast, or up-stream side. A creek, known as Possum Hollow Creek, flows along the north side of the farm, and through a large culvert or bridge under the highway. A levee extends in an easterly direction from the highway to the bluffs to protect the property of John Kroencke.

Prior to the construction of Route No. 57, an old road, which was not a State road, crossed Possum Hollow Creek just to the northeast of the present culvert or bridge. A concrete slab was laid on the creek bottom to provide a ford on the old road. This slab had been lying there for years.

The pavement on the hard road was laid in 1947. The culvert, or bridge, had been installed several years before, but during the War the road was not paved. The culvert consists of four separate sections, each of which is a passage seven feet high and twelve feet wide.

On July 20, 1949, heavy rains fell in an area from Quincy south, approximately forty miles to Pleasant Hill. At the farm where John Kroencke resided, a flood occurred causing damage to claimant's property. When the water subsided, it was discovered that the concrete

slab, which had been lying on the bottom of Possum Hollow Creek, was leaning against the culvert, and partially blocking the two center sections. Steel re-enforcement rods protruded from the concrete slab helping to block the culvert with trees, logs, stumps, brush, sticks and other debris.

Claimant 'allegesthe loss and damage of 400 bushels of corn; 4 tons of hay; 4 tons of straw; 600 bushels of oats; damage to tractor; damage to other farm machinery; damage to small tools; damage to garden; damage to 2 acres of growing corn, and damage to 2 electric motors.

The record consists of the following: Complaint, amended complaint, transcript of evidence, abstract of evidence, statement, brief and argument of claimant, motion of claimant for leave to amend complaint, order of Acting Chief Justice Lansden granting claimant's motion for leave to amend complaint, amendments to complaint, statement, brief and argument of respondent, order granting claimant an extension of time in which to file reply brief, reply brief of claimant, and notice of intention to make oral argument.

The Court is of the opinion that a reasonably prudent person could have foreseen the concrete slab in question disintegrating and blocking the culvert during a flood, and that the negligent omission of the respondent was the proximate cause of the alleged damages. The law attaches to such omission of duty the charge of negligence.

An award is, therefore, entered in favor of claimant in the amount of Fifteen Hundred Dollars ($1,500.00).

(No. 4406—Claim denied.)

LOLA GREER, Claimant, *vs.* **STATE OF ILLINOIS, Respondent.**

Opinion filed February 8, 1952.
Petition of Claimant for rehearing denied March 11, 1952.

CHARLES D. WINTERS AND D. L. DUTY, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*insufficiency of medical evidence.* **Where medical evidence failed to support claimant's contention that her present physical condition was the result of injuries arising out of and in the course of her employment by the State of Illinois, the claim will be denied.**

DELANEY, J.

This complaint was filed February **26, 1951.** The record consists of the complaint, Departmental Report, stipulation waiving briefs of both parties, transcript **of** evidence, claimant's exhibits Nos. **1, 2** and **3,** and Supplemental Departmental Report. No jurisdictional questions have been raised, and all have apparently been complied with.

The claimant, Lola Greer, 47 years of age, was on August **31, 1950** employed by respondent in the Department of Public Welfare at the Dixon State Hospital, Dixon, Illinois. On the above date, at about 3:30 P.M., an explosion of a hot water tank occurred in the dining room of the hospital. Hot water from the tank scalded claimant's back and legs. The explosion also caused a large object to strike the claimant in the **back** on the right side.

The claimant lost nineteen days compensable time as a result of the injuries, for which she has been paid the sum of **$83.32.**

Claimant's exhibits Nos. **1** and **2** show her to be suffering from arthritis, and from a hemorrhagic con-

dition resulting from menopause. A report of Dr. Ben Fox, dated March 9, 1951, shows claimant's condition is not due to injuries received in the course of her employment on August 31, 1950.

The evidence fails to show claimant suffered from injuries resulting from the accident. The claimant, having failed to establish by the evidence that she is entitled to an award, her complaint must be dismissed.

Award denied.

Helen Cox was employed to take and transcribe the testimony before Commissioner Summers. Her charges amount to $48.00, and an award is entered in her favor for such sum, payable forthwith.

This award is subject to the approval of the Governor, as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees".

(No. 4425—Claimant awarded $687.94.)

ARTHUR L. JENKINS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 11, 1952.

SCHMIEDESKAMP AND JENKINS, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; CHARLES H. EVANS, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when an award will be made.* **Where claimant's injuries arose out of and in the course of his employment by the State of Illinois, an award may be made under the Workmen's Compensation Act.**

DELANEY, J.

Arthur L. Jenkins, claimant, filed his complaint herein on April 16, 1951, alleging that on December 19, 1949 he was employed by the Department of Revenue, Division of Petroleum and Oils. Claimant was traveling

from his home to the laboratory in Peoria, Illinois with samples of gasoline in an automobile owned by the respondent, State of Illinois. He passed a number of cars; and, as he pulled back into the proper lane of traffic, a defective steering gear caused the automobile to veer to the left and strike another car. Claimant was removed from the scene of the accident in an ambulance, and taken to the hospital.

Claimant was treated by Dr. James Merritt at respondent's request. The report of Dr. Merritt, dated December 21, 1951, stated:

"The movements of the right shoulder were entirely normal. The right elbow showed limitation of extension some 10 degrees and limitation of flexion some 8 degrees. Pronation and supination of the right forearm were normal.

The movements of the right wrist were entirely normal.

The movements of the right thumb were entirely normal.

In viewing the dorsal aspect of the right hand, it is to be noted a small abnormal bony prominence over the head of the second metacarpal. This was the site of the previously markedly displaced comminuted fracture.

The movements of the right index finger at the metacarpal phalangeal joint reveals complete extension. Flexion of the metacarpal phalangeal joint of the right index finger is 120 degrees. Flexion of the proximal interphalangeal joint of the right index finger is 85 degrees. Extension of the proximal interphalangeal joint of the right index finger is limited 41 degrees.

Examination of the distal interphalangeal joint of the right index finger reveals complete extension is present, but it flexes only 25 degrees from the position of complete extension.

The metacarpal phalangeal joint shows complete extension and flexion 86 degrees from position of complete extension. Extension of the proximal interphalangeal joint is limited 20 degrees. Flexion of the proximal interphalangeal joint is entirely normal. Flexion of the distal interphalangeal joint of the ring finger is only 62 degrees. Extension of the distal phalangeal joint is entirely normal.

All the movements of the right little finger are entirely normal.

There is no sign of atrophy of the right arm, forearm and hand. Exception---- There is now evidence of atrophy of the interrosseous muscles of the right hand.

It is my opinion that the atrophy of the interrosseous muscles of the right hand, which is present at this time, and, which was not in evidence at the time of my previous examination of him on October 30, 1950, constitutes no further disability, and came about from not using the fingers, which he already could not use when I previously examined him."

The record consists of the complaint, motion of respondent to dismiss, notice to call up the motion to

dismiss, memoranda of claimant in opposition to the motion of respondent to dismiss, Departmental Report, transcript of evidence and Supplemental Departmental Report.

No jurisdictional question was raised. The claimant and respondent were operating under the Workmen's Compensation Act, and the accident arose out of and in the course of his employment.

From the medical report of Dr. Merritt, and the examination of Commissioner Summers of this Court, we are of the opinion that the claimant has suffered a 40% permanent loss of use of his right hand.

On the date of the accident, claimant was 53 years of age, and did not have any children under 18 years of age. Claimant started to work for respondent in June of 1949, and received $286.50 per month, which indicates that he receives more than $1,560.00 per year. He was injured on December 19, 1949, and was released by his doctor and returned to work on April 19, 1950. Claimant received full pay during this time, a period of 17 1/7 weeks. Although Mr. Jenkins received $1,227.77 for the period he was unable to work, the Department of Revenue should have paid claimant his compensation rate of $22.50 per week, or the sum of $385.71, which means that claimant was overpaid the sum of $842.06, which must be deducted from his award.

Claimant is entitled to an award under Section 8, Paragraph (e) (12) of the Workmen's Compensation Act for 68 weeks, or the sum of $1,530.00, from which must be deducted the sum of $842.06, or a total award of $687.94.

Claimant's weekly compensation rate would be the maximum of $15.00. Since the accident occurred sub-

sequent to July 1, 1949, this must be increased 50%, making the compensation $22.50 per week.

An award is, therefore, made to claimant, Arthur L. Jenkins, in the sum of $687.94, all of which has accrued, and is payable forthwith.

Helen Woolley was employed to take and transcribe the evidence at the hearing before Commissioner Summers, and has submitted a statement therefor in the amount of $40.75, which charges are fair, reasonable and customary. An award is, therefore, entered in favor of Helen Woolley, in the amount of $40.75, payable forthwith.

This award is subject to the approval of the Governor, as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees".

(No. 4465—Claim denied.)

MARY HOYT BAAR, Claimant, *vs.* **STATE OF ILLINOIS, Respondent.**

Opinion filed March 11, 1952.

KIX MILLER, BAAR AND MORRIS, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

NEGLIGENCE—*pedestrian.* **Where claimant failed to show by a preponderance of the evidence that her injury occurred on a State right-of-way, the claim will be denied.**

SCHUMAN, C. J.

On November 7, 1950, at about 12:30 P.M., claimant, Mary Hoyt Baar, got off the Chicago, North Shore and Milwaukee Railway Company train at its Lake Bluff Station, Illinois. She walked to the south end of the platform at said station, descended the steps of the platform to the ground, and walked a short distance

to a three foot opening, or gate in a fence, which fence is parallel to U. S. Highway No. 41, and about 8 feet 5 inches west of the west edge of the concrete slab of said highway. She passed through this opening in the fence or gateway, then turned to the left, and proceeded in a northeasterly direction. At the time the claimant was accompanied by Margaret P. McEvan, who preceded her through the opening, or gate in the fence, and was some distance, approximately 10 feet ahead of her, and slightly to the left. After claimant had walked approximately 4 to 6 feet beyond the gate, in a northeasterly direction towards said highway, and while turning her head slightly to the left to talk to Margaret P. McEvan, she stepped into a concave shaped hole about 12 inches in diameter and two or three inches deep, fell on her right knee, and received a deep cut about three inches long, which gaped open about three-quarters of an inch on her right knee.

Immediately after the incident in question, claimant received medical attention, and remained at home in bed for about a week after the accident. Claimant was unable to do her ordinary house work, but after the expiration of about three weeks, she was able to attend to her normal duties, and, outside of soreness on touch, the wound gave her no difficulty. The testimony shows that she has a scar on her right knee about 2 inches long as a result of the wound. It also shows that she had incurred bills in a total of about Forty-five Dollars ($45.00) for medical expenses. There was no testimony that a permanent disability of any kind resulted from her injuries.

The evidence without dispute shows that the day was clear, pavements dry, that claimant was familiar

with the passageway in question, and had been across it frequently before.

It was the duty of the claimant to establish by a preponderance or greater weight of the evidence that, the location of the hole, which she complained of, was on State property, and that the State was under a duty to maintain the area where the particular hole was located. The evidence is without dispute that the State maintained a highway near the location in question, and it was stipulated that the State's right-of-way extended three feet beyond the edge of the concrete slab. There is no direct evidence in the record that the hole was in the right-of-way of the State highway.

There was a plat introduced in evidence by the respondent, which indicated that the hole in question was apparently not in the right-of-way proper. It would have been an easy matter for the claimant to have had the exact location measured without guessing as to the exact distance, so as to determine whether or not the hole was on State property. Another serious question that presents itself in this record is the liability of the State for a passageway across a shoulder on the highway where the State is only under a duty to maintain it in a reasonably safe condition for motor traffic.

The Court is of the opinion, after reading the record in this case, that the preponderance of the evidence does not show that the hole complained of was in the right-of-way of the State highway, nor is it shown that the State was under any duty to maintain any portion of its shoulder for a passageway as contended in this case. It was a bright, clear day. Claimant had been over the area on other occasions, was familiar with the passageway, and by the exercise of reasonable care and caution could have seen the hole in question,

and the Court is of the opinion that there is nothing in the record to indicate any negligence on behalf of the State, or a duty on the State to maintain the area in question.

For the reasons assigned, the claim is denied.

(No. 4478—Claimant awarded $44.80.)

TIDE WATER ASSOCIATED OIL COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 11, 1962.

TIDE WATER ASSOCIATED OIL COMPANY, Claimant, pro se.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

PURCHASES—*payment after lapse of appropriation.* Where purchases were properly and duly authorized, invoices submitted within a reasonable time, and there remained a sufficient unexpended balance in the appropriation from which payment could have been made, a claim will be allowed, where payment was not made before the appropriation lapsed.

DELANEY, J.

During the period from May 9 to May 29, 1951, the Department of Public Works and Buildings of the State of Illinois, Division of Highways, purchased and received under Purchase Order No. F-57961 various amounts of gasoline and kerosene from the claimant, Tide Water Associated Oil Company. Three invoices were presented, which amounted to $44.80.

It is stipulated by and between the parties hereto that the Report of the Department of Public Works and Buildings, Division of Highways, filed on March 3, 1952, shall constitute the record in this case.

The report admits that the allegations of the complaint are correct; that gasoline and kerosene were

purchased by the respondent; that the merchandise was received; that the gross value of the purchases is as represented by claimant; that the appropriations were in existence, and an unexpended balance remained in them at the time the items described herein were purchased for the payment of claimant's invoices had they been presented for payment before the appropriation lapsed.

We find from this record that claimant has furnished supplies for the respondent, the purchase of which was properly and duly authorized. Claimant submitted its invoices to the respondent within a reasonable time, and has not received payment therefor; such non-payment is due to no fault on the part of the claimant. When the charges were incurred, there remained a sufficient unexpended balance in the appropriation, from which payment could have been made. Claimant is, therefore, entitled to an award.

Johnson vs. *State,* 16 C.C.R. 96.
The Texas Co. vs. *State,* 16 C.C.R. 55.
Standard Oil Co. vs. *State,* 16 C.C.R. 85.
Northwest Ignition & Radiator Service vs. *State,* 16 C.C.R. 91.
Shell Oil Co. vs. *State,* 16 C.C.R. 91.
Wenthe Brothers *Co.* vs. *State,* 18 C.C.R. 32.

An award is, therefore, entered in favor of the claimant, Tide Water Associated Oil Company, in the sum of Forty-four Dollars and Eighty Cents ($44.80).

(No. 4264—Claim denied.)

JAMES MONTOOMERY, Claimant, *vs.* **STATE OF ILLINOIS,** Respondent.

Opinion filed January 8, *1952.*
Petition of Claimant for rehearing denied April *14, 1952.*

LUIS KUTNER, Attorney for Claimant.

IVAN A. **ELLIOTT,** Attorney General; **WILLIAM** H. SUMPTEH, Assistant Attorney General, for Respondent.

STATE **OFFICERS** AND AGENTS—*State's* Attorney. A State's Attorney is a **County** official, and not an officer or agent of the State.

CONSTITUTION—*violation.* A violation of the Constitution is by individuals, and an action for violation thereof must be against individuals, and **not** against the State.

SAME—The State cannot be liable for the violation of its Constitution.

JURISDICTION—The Court of Claims has no jurisdiction to determine whether a conviction is lawful, and to award damages, if unlawful, without a constitutional provision or statute authorizing such a suit.

SCHUMAN, C. J.

Claimant was indicted, tried and convicted for the crime of rape, and sentenced to the Illinois State Penitentiary on February **5,** 1924. No appeal was taken from this conviction. A petition for a writ of habeas corpus was filed in the Circuit Court of Lake County, State of Illinois, and denied on August 21, 1948. A certiorari was sought in the Supreme Court of the United States to review the denial of the habeas corpus proceedings, and this was denied on October 11, 1948.

A petition for a writ of habeas corpus was then filed in the United States District Court. A motion to dismiss this proceeding was filed by the Attorney General of Illinois, which was denied. A hearing was had, and evidence was introduced by claimant, but no evidence was introduced by the State. Judge Michael L. Igoe held that claimant's conviction and sentence were void, being in violation of the Fourteenth Amendment

to the United States' Constitution, and discharged claimant on August 10, 1949.

The claimant files his claim in this Court seeking to recover the sum of $250,000.00 for unlawful indictment, conviction, sentence and incarceration at the hands of the State of Illinois. He bases his claim on the grounds that Sees. 2 and 9 of Article II of the Illinois Constitution were violated, and his right to a recovery under Sees. 19 and 20 of said Article 11. He asserts his claim under Sec. 8 A of the Court of Claims law on the theory that the constitutional provisions above stated affords him a remedy, in that his claim would be founded upon said law.

The Court of Claims law was amended in 1945, and the pertinent provision in question was added at that time. Prior to the 1945 amendment, all of the decisions of this Court held that the State could not be held accountable for wrongful or negligent acts of its agents or servants. (*Newman* vs. *State,* 17 C.C.R. 187.) However, by the 1945 amendment, the Court was given jurisdiction in tort cases, and the previous rule as to non-liability in such cases was removed by Sec. 8 c .

The claimant does not predicate his claim under Sec. 8 C of the Court of Claims Act, but under Sec. 8 A. The question before the Court to decide is: "Does this Court have jurisdiction to determine whether the conviction was unlawful, and to award damages if it finds the conviction unlawful?"

The first question is whether there is any law in this State upon which such a cause of action could be maintained, if the State were suable. There is no constitutional provision or statute authorizing such a suit. This Court has previously held that it could only

recommend an award where the State would be liable in law or in equity in a court of general jurisdiction, if it were suable. *(Crabtree* vs. *State,* **7** C.C.R. **207;** *Durrett* vs. *State,* **12** C.C.R. **384.)** While it is true that Article' II, Sec. 19 of the Illinois Constitution, provides that every person ought to find a remedy in the law for all injuries and wrongs to his person, property or reputation, the same Constitution also provides under Article IV, Sec. **26,** that the State can never be made a party defendant in any court of law. It, therefore, follows that for this Court to have jurisdiction, the Legislature, by express provision, should have created an act providing for such a remedy.

Judge Igoe, in his opinion, stated that his decision was based on and in accordance with the New Federal Judicial Code effective September 1, 1948. The opinion was predicated on the facts that the State's Attorney suppressed evidence, introduced false testimony, and that claimant was denied due process.

The claim presented here is based on the same set of facts; namely, the wrongful acts of the State's Attorney. The pertinent inquiry is: ''Can the State of Illinois be liable for the wrongful acts of a State's Attorney?" If a suit were presented in a court of record, and if the State were suable, on the theory that a violation of the Constitution was a "claim founded on a law of the State", it would be necessary to determine whether or not a State's Attorney was an agent of the State, and, if so, was the act one that would make the State liable.

It has been held by this Court that a State's Attorney is not an agent of the State or a State officer, but a County officer. In *Cram* vs. *State* of *Illinois,* 11 C.C.R. **282,** the Court, on page **285,** held:

"Although the State's Attorney represents the People of the State of Illinois in all criminal proceedings in his county, yet he is not considered a State Officer."

In the case of Cook County vs. Healy, 222 Ill. 310, the Court, on page 316, in considering the status of the State's Attorney of Cook County, said:

> "The State's Attorney is a county officer, and his status, as such, is fixed by the Constitution, which creates his office. He is elected for and within a county to perform his duties therein, and is not distinguished in any manner from the clerks of the courts, the sheriff, coroner, and other officers connected with the administration of justice within the county."

The Healy case was quoted with approval in the case of The People vs. Newcomer, 284 Ill. 315, where the Court, on page 324, citing the Healy case, said:

> "The State's Attorney is a county officer elected for and within a county to perform his duties therein, and is by statute charged with certain duties.
>
> The State's Attorney being a county officer, the mere fact that money was advanced to him for expenses in a criminal case, even under a promise to return the same, does not give a right of action against the State. If any right of action exists, it is against the officer who received the money and promised to return the same.
>
> The complaint does not state a cause of action against the State, and the motion of the respondent must therefore be sustained."

In *Ashton* vs. *County* of *Cook*, 384 Ill. 287, the Court, on pages 296 and 297, held:

"Section 22 of Article VI of the Constitution creates the office of State's Attorney and provides for his election. Section 32 of the same article refers to the residence, the performance of the duties of the State's Attorney, and other officeru, and the manner in which vacancies in any of such offices may be filled. It is provided that 'All officers, (which includes State's Attorneys) where not otherwise provided for in this Article, shall perform such duties and receive such compensation as is or may be provided by law.' It will be observed that these constitutional provisions do not prescribe the specific duties of the State's Attorney. It has been held that the State's Attorney is an officer provided for by the Constitution, and that he is a county officer. (*Cook County* vs. *Healy*, 222 Ill. 310.) Section 5 of the State's Attorneys Act (Ill. Rev. Stat., 1941, Chap. 14, Par. 5.) directs it shall be the duty of the State's Attorney 'to commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in any court of record in his county, in which the people of the State or county may be concerned,' and second, 'to prosecute all forfeited bonds and recognizances, and all actions and proceedings for the recovery of debts, revenues, moneys, fines, penalties and forfeitures accruing to the State or his county, or to any school district or road district in his county * * * * which may be prosecuted in the name of the People of the State of Illinois'."

This Court, therefore, concludes that the State's Attorney in the instant case is not, and could not be an agent of the State.

In order for the claimant to sustain his claim, he must base it on the fact that the State violated a constitutional enactment. That the State cannot violate the Constitution has been decided by our Supreme Court. In the case of *Owens* vs. *Green, 400* **Ill. 380,** the Court, on page 490, held:

"Where an action at law or suit in equity is brought against **a** State officer **or** the director of **a** department upon the ground that, while claiming to act **for** the State, he violates or invades the personal and property rights **of** the plaintiffs under an unconstitutional act, or assumes authority which he does not have, the action is not against the State. The presumption obtains that the State, or a department **of** the State, will not, and does not, violate its Constitution and laws, but that the violation, if it occurs, is by **a** State officer **or** the head of a department **of** the State, and the officer **or** the head may be restrained by appropriate action instituted by **a** citizen. *(Schwing* vs. *Miles,* **367** Ill. **436;** *Noorman* vs. *Department* of ***Public** Works and Buildings,* **366** Ill. **216.)** We are of the opinion that the present action is one aganist the defendant State officers and not against the State **of** Illinois, and that, consequently, the State is not **an** indispensable party, as contended **by** defendants."

It would lead to an absurdity for this Court to say that the State of Illinois could be held liable for a violation of its Constitution.

For this Court to hold the State liable for the unlawful acts of a State's Attorney would create a situation making the State liable for malfeasance and unauthorized acts of State's Attorneys throughout the entire State, and would result in endless difficulties, which would be subversive to the public interest.

The facts in this case show that the claimant was sentenced by a court of competent jurisdiction. For this Court to review evidence to overrule a decision of that court, without a statute authorizing it to do so, would be to assume jurisdiction never contemplated.

This Court, without a statute authorizing it to award damages in such a case, cannot assume jurisdiction.

The claimant states that the Court should enter an award as an act of social justice. This Court has repudiated this doctrine in many cases, and has held that, in order for claimant to recover, he must come within the provision of some law making the State liable to him on his claim. *(Kelly* vs. *State,* **9** C.C.R. **339).**

For the reasons above assigned, this Court is without jurisdiction to hear and determine this claim.

(No. 4409—Claim denied.)

MARGARET M. WEESE, ADMX., ET AL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 14, 1962.

HEMPHILL AND KELSEY, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

HIGHWAYS—*negligence—burden of proof.* **Claimant failed to prove by a preponderance of the evidence any causal connection between the irregularity in the highway, and the collision between the car driven by her intestate and a truck, and an award was, therefore, denied.**

DELANEY, J.

Margaret M. Weese, as administratrix of the estate of Charles F. Weese, is the claimant in this case. She was appointed administratrix of the estate on July **19, 1950** by the County Court of Macoupin County, Illinois. It is alleged in the complaint that the said Charles F. Weese came to his death on March **11, 1950,** as the direct and proximate result of the negligent and careless manner in which the respondent maintained one of its highways, to-wit, Illinois State Route No. **111.**

The record consists of the original copy of complaint with attached Letters of Administration, copy of complaint, motion of respondent for an extension of thirty days in which to file pleadings, answer of respondent, reply of claimant to answer of respondent, transcript of evidence, abstract of evidence, and waiver of claimant of right to file statement, brief and argument.

The testimony of witnesses showed that at about 8:00 A.M. on the date of March 11, 1950 the claimant's intestate, Charles F. Weese, was driving and operating an automobile in a general northerly direction, upon, along and over Illinois State Highway No. 111. At a point approximately three miles south of the Village of Brighton, Jersey County, Illinois, his automobile was driven over a part of the highway, which it is claimed respondent had allowed to become and remain in a dangerous and hazardous condition. It is further claimed that the surface of the highway at this point had become uneven, and there was a large hole between 3 inches and 6 inches in depth, and about 36 inches across. At that same point on the highway the hole, when struck by the automobile in which Mr. Weese was riding, caused his automobile to be thrown into and upon the west lane of the said highway into the path of a truck, which was being driven in the opposite direction. This collision between the truck and Mr. Weese's automobile resulted in Mr. Weese receiving fatal injuries.

Melvin Stone testified that the speed of Mr. Weese's car, at the time of the accident, was under 45 miles per hour. The car of deceased traveled about 150 feet after hitting the hole, and before colliding with his truck. His truck struck the car of deceased where the door fastens on the windshield.

George Kruse testified that he drove over the spot; where the accident occurred five days a week, and also about ten minutes before the accident occurred. He! stated that there was a rough black top patch at that point, which was down about 3 inches.

James L. Benson testified that the truck and car stopped after the accident about 100 feet from the break in the pavement.

Wilson Shultz testified, when asked to describe the break in the pavement where the accident occurred, that "it was not too big a break, and it was noticeable".

Marion L. Laubscher, in his testimony, stated that the condition of the highway at the place of the accident on March 10, 1950 was wavy, with no holes.

Alfred Watson, in his testimony, stated that he passed over the break in the pavement on March 11, 1950 at a speed of 45 miles an hour to see how rough. it was. He stated that his steering wheel did not jerk, nor turn the wheel.

Claimant, having failed to present sufficient proof of any negligence on the part of the respondent, the State of Illinois, as being the proximate cause of the collision between the truck and Mr. Weese's automobile, and resulting fatal injuries to Mr. Weese, must be denied an award, and said cause is hereby dismissed.

(No. 4434—Claim denied.)

JULIA ANNA MEYERS, WIDOW, ET AL, Claimant, *vs.* **STATE OF ILLINOIS,** Respondent.

Opinion *filed* April *14*, 1952.

HARRY L. PETERS AND WILLIAM A. REDMOND, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant, Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*accidental injury*. To prove accidental injury within the meaning of the Workmen's Compensation Act, an injury must be traceable to a definite time, place and cause.

SAME—coronary thrombosis. Evidence was insufficient to prove that claimant's death by coronary thrombosis arose out of and in the course of his employment, by the State of Illinois.

SCHUMAN, C. J.

Julia Anna Meyers, widow of Harvey C. Meyers, seeks to recover under the Workmen's Compensation Act for the death of her husband, allegedly as a result of a coronary thrombosis suffered by decedent on February 7, **1951,** while he was employed as Chief of Fiscal and Office Administration, Illinois State Employment Service, Division of Unemployment Compensation for the Department of Labor.

Decedent had been employed by the State of Illinois since **1933,** and his earnings for the year preceding his death were **$7,992.00.** He had no children under 18 years of age at the time of his death, and the oldest child was **28** years of age. No jurisdictional questions are raised. At the time of his death he lived with his wife, and two children, namely, Dolores, aged 21, and Charles, aged **19.**

The claim is predicated on the ground that decedent died of a coronary thrombosis caused by the great strain and pressure of his duties, and apparently based

on the ground that the strain and stress covered a long period of time. Julia Anna Meyers, decedent's widow, testified that on the Friday and Monday immediately preceding decedent's death he stayed at home on account of illness, which might have been a touch of the flu; that he worked on Tuesday, the day before his death, but came home tired that day; and, that he generally came home in a tired condition. She further testified that decedent was in good health, outside of the attack of flu, which had kept him home the Monday and Friday prior to his death. He had had a physical examination, and she knew of no previous heart condition.

On February 7, 1951, he reported for duty at the Unemployment Compensation Office at about 8:20 A.M. (He lived in Glen Ellyn, Illinois, and there is no direct testimony as to how he travelled from his home to the office on that day, but he usually and customarily took the train to the Northwestern Railroad Station, and walked from there to the Merchandise Mart.) Decedent was seen walking down the aisle and entering his office by B. Robert Bobisud, one of the department heads, who occupied the adjoining office, at about 8:20 A.M. A few minutes thereafter Neely W. Keith, an employee in the office, entered decedent's office, took a seat at his desk, and talked with him for about twenty minutes. Then Mr. Keith had a telephone call, and went to answer it in his office. After talking on the phone about five minutes, he heard decedent call him. Mr. Keith cut short his telephone conversation, and re-entered decedent's office. At that time, Mr. Bobisud was there, too, and decedent was still sitting at his desk. B. Robert Bobisud testified that decedent, as he was sitting at his desk, was perspiring on his forehead,

and had pallor of skin and face. He asked decedent what was wrong, and decedent answered, "I got a pain across my chest." He then took a handkerchief and wiped his forehead, and called a nurse. Mary Keenan, a registered nurse, entered decedent's office about 8:45 A.M. She testified he was sitting at his desk, and had a pain in the cardiac region; that his pulse was about 70; that he had cold perspiration, and was pale; that she removed his tie and belt, and had a cot put in decedent's office, so that he might lie down. Dr. Smith at this time examined decedent, took his blood pressure, and administered a hypodermic. Then Dr. W. F. Ferris, a general practitioner in the building, who had been called, arrived at decedent's office, and attended him between 9:15 and 9:30 A.M.

Dr. W. F. Ferris testified decedent was lying there in his office in severe pain; that he was pale and breathing rapidly, pulse was weak and rapid; and, that decedent complained of severe pain in his left chest, and perspiration with cold clammy sweat. He was conscious until his death at 10:00 A.M. A pulmotor squad was called, and came to his assistance, but failed to revive him.

Dr. Ferris further testified that he had never seen decedent before, and attended him as an emergency physician; that he diagnosed the cause of death as coronary thrombosis, which he defined to be the result of a condition affecting the coronary arterial system, meaning the muscles of the heart, and a trauma, which occurs in the muscle wall of the coronary arteries, causing a blood clot. He further testified that that is where decedent had the coronary thrombosis, and his condition was his circulation to the arteries with the

resulting symptoms of severe pain and pallor, and a clammy skin condition.

John F. McCarthy, an employee of the Division of Unemployment Compensation in charge of investigations regarding personnel and the unemployment compensation program, testified as to a certain investigation made by him in connection with said Department, which occurred about a year and a half before decedent's death. Alfred C. Sorenson, property consultant, employed by the Unemployment Compensation Division of the Department of Labor, testified as to problems connected with locating leases, space locations for various offices, the control of property and equipment, and the operation and maintenance of equipment used in furnishing these offices. B. Robert Bobisud, Supervisor of Budget and Cost Accounting, Unemployment Compensation and Employment Service Division of the Department of Labor, testified as to the operations of that Department, and stated that the decedent did not appear to be working under any nervous tension, stress or strain. Neely N. Keith, accountant in the Fiscal and Office Administration Section of the Unemployment Compensation and Employment Service Division of the Department of Labor, testified as to the accounting problems of this Section, and also with reference to some correspondence had by decedent through his superior, Commissioner Samuel C. Bernstein, with the International Business Matchines Corporation relative to changing the older equipment used in the office for newer and more modern equipment. At this time the payroll division was using I.B.M. machines. Milton Radice, present Chief of the Fiscal and Office Administration, Unemployment Corn-pensation and Employment Service, Division of the

Department of Labor, and successor to the position held by decedent at the time of his death, testified as to the duties of the office; i. e., that the hours are from 8:30 A.M. to 4:30 P.M.; his duties, and that of his predecessor, the decedent, were to provide for all office services and duplicating facilities; supervise the mail room, mimeograph service, et cetera; to be responsible for purchases, leasing space, State budgets, and the administration of funds of major State agencies, which amounted to approximately eight to eleven million dollars a year; to be responsible for general accounting, as well as the accounting for all expenditures and receipts of funds for administration purposes. There were between 125 and 150 people employed in the office over which decedent had supervision.

From the testimony of the above witnesses and Samuel C. Bernstein, Commissioner of Placement for the Unemployment Commission, it appears that decedent was a conscientious, energetic, diligent and efficient executive; that he approached his duties very seriously, was concerned with all details of the various departments or sections, and was in close touch with his subordinates concerning same; that he was a normal individual, but at times excitable and upset in the course of his duties during frustration and difficulties, and became excited on minor issues.

From an examination of the record it is shown that decedent was a highly efficient administrator, who became nervous and excited over various problems confronting him. This, the claimant contends, caused stress and strain, which brought about the heart attack.

The question for the Court to determine is whether decedent's death was caused by an accidental injury arising out of and in the course of his employment.

This brings about the additional question as to whether the work decedent was doing at the time of his attack., caused, or contributed to the cause of his collapse and death.

There is no evidence in the record of any unusual occurrence on the morning that decedent suffered the attack. On the contrary, he had just arrived at work., and was sitting in his office, apparently not doing any work when the incident occurred. There is no evidence of an "accidental injury" on the morning in question, which would have caused the attack. The mere fact that deceased was at his desk in his place of employment would not constitute an "accidental injury".

In *Marsh* vs. *Ind. Corn.*, 386 Ill. 11, the Court, on page **14,** quoted as follows:

"In *Matthiessen & Hegeler Zinc Co.* vs. *Industrial Board,* **284** Ill. **378,** where **a** fireman in a smelting plant became sick and died from breathing fumes, it was held this constituted an accident entitling recovery under the Workmen's Compensation Act. Accidental injury was defined as such as is 'traceable to a definite time, place, and cause, and the injury occurs in the course of the employment, the injury is accidental within the meaning of the Act'.''

In *Town* of *Cicero* vs. *Ind. Corn.,* **404** Ill. **487,** the Court held:

"We have often held that the award of the Commission must be based upon something more than surmise and conjecture, and it must be shown by competent evidence, not only that the deceased sustained an accidental injury resulting in death, but that such injury arose out of and in the course **of** the employment. ..... It is a well-settled rule that where an employee, in the performance of his duties, and, as a result thereof, is suddenly disabled, an accidental injury is sustained even though the result would not have been obtained had the employee been in normal health. *(Marsh* vs. *Ind. Com.,* **386** Ill. **11;** *Carson-Payson Co.* vs. *Ind. Corn.,* **340** Ill. **632;** *Powers Storage* Co. vs. *Ind. Corn.,* **340** Ill. **498;** *Jones Foundry and Machine* Co. vs. *Ind. Corn.,* **303** Ill. **410;** *Baggot* Co. vs. *Znd. Corn.,* **290** Ill. **530.)"**

The cases of *Town of Cicero* vs. *Ind. Corn., supra, Fittro* vs. *Ind. Corn., 377* Ill. *532, Marsh* vs. *Ind. Corn., supra,* involved cases of physical exertion while engaged in the performance of their duties.

It is apparent from a reading of these cases that decedent must sustain an accidental injury traceable to a definite time, place and cause. The record in this case is based on facts showing emotional strain, frustration and excitement over a long period of time.

Dr. W. T. Ferris testified that he was a general practitioner and not an expert; that in his opinion decedent came to his death as a result of a coronary thrombosis, which is associated with individuals of the executive type, and also dietary; that he could not give an opinion as to decedent because he was not acquainted with him; that he could not give a positive statement, but added that the work of a person, employed in an executive capacity, shouldering a series of responsibilities, and subjected to pressure in the way of frustration, could be a contributing cause; and, that he would have to know more about the decedent than he did in order to say that tension would be a contributing factor.

The Court concludes that there is no evidence in the record that the work the decedent was doing at the time of the attack caused, or contributed to the cause of his collapse and death. There is no evidence of an "accidental injury" traceable to a definite time, place and cause, but the evidence is based on a series of events prior to the heart attack sustained on February 7, **1951.**

In the case of *LeTourneau, Inc.* vs. *Ind. Cowl,* **396** Ill. **435,** the Court held at page **438:**

"It is to be noted that in the instant case the medical testimony all introduced on behalf of the claimant was to the effect that there are several causes contributing to a detached retina. There is no testimony in the record that the work performed by the claimant caused the injury. The testifying physician stated only that strain could cause the detached retina, and we are left to infer that the strain testified to by the claimant was the cause of his injury. The case is similar in this respect to the situation in *Sanitary District of Chicago* vs. *Znd. Corn.,* **343 Ill. 236.** In that case the medical testimony was to the effect that there might or could be a direct

causal connection between the accident and the condition described in a hypothetical question. Citing, with approval, ***Sears Roebuck and Co. vs. Znd. Corn.***, 334 **Ill.** 246, we said: 'It is very clear from the testimony of all the doctors that in concluding that there was causative relation of the accidental injury to the death the witnesses were considering the mere possibilities.' The same situation applies here. The medical testimony in his record leaves the cause of the injury to pure conjecture."

The medical testimony in this case is based on possibilities, and leaves the cause of death to pure conjecture.

For the reasons assigned, the claim is denied.

William J. Cleary and Co. was employed to take and transcribe the evidence before Commissioner Anderson, and a charge of **$155.40** was incurred for such services, which is reasonable and customary. An award for such amount is hereby entered in favor of William J. Cleary and Co., and is payable forthwith.

(No. 4445—Claimant awarded $382.50.)

JAMES E. BROADWAY, Claimant, *vs.* **STATE OF ILLINOIS,** Respondent.

Opinion filed April 14, 1962.

MORRIS B. CHAPMAN, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; CHARLES H. **EVANS,** Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—***when an award will be made.*** Where claimant's injuries arose out of and in the course of his employment by the State of Illinois, an award may be made under the Workmen's Compensation Act.

DELANEY, J.

Claimant, James E. Broadway, was employed on January **23,** 1951 as a common laborer by respondent in the Department of Public Works and Buildings, Division of Highways. On that day, Mr. Broadway was one of a group of men engaged in placing oil drums on

a rack in the Division's storage shed in Stallings, Madison County, Illinois. At approximately 8:30 A.M., Mr. Broadway was rolling a metal drum of kerosene up a board to place it on a service rack. While doing this, the board on which the drum was being rolled broke, causing the drum to fall to the ground. Mr. Broadway's left middle and small fingers were caught between the end of the drum, which fell, and another drum on the rack. The palmar surface of the distal end of his left middle finger was cut and torn, and the distal end of the left small finger was severely bruised.

The Division took Mr. Broadway to St. Elizabeth's Hospital, Granite City, where Dr. Irwin Wiesman was placed in charge of the case.

On January 24, 1951, Dr. Wiesman submitted the following report to the Division of Highways:

"Nature of Injury—Avulsion laceration of volar pad of distal end of left middle finger. Contusion to distal end of left 4th finger. Treatment—Wound closed with six sutures. 5,000 units tetanus anti-toxin given. Surgical dressings. X-Rays—None. Estimated date of discharge—4 to 5 weeks. Estimated date patient able to work—About February 28, 1951. What permanent disability do you expect?—None."

Dr. Wiesman submitted his final report on April 5, 1951, which is as follows:

"Nature of Injury—Avulsion laceration of volar pad of distal end of left middle finger. Contusion to distal end of left 4th finger. Treatment—Wound to left middle finger closed with 6 sutures. 5,000 units of tetanus anti-toxin given. Surgical dressings. X-Rays—None. Estimated date of ability to return to work—March 5, 1951. Date patient was discharged—April 5, 1951. Permanent disability—Permanent scar left middle finger with minimal stiffening of finger. Estimated permanent disability 5%."

Claimant was 44 years of age, and had no children under 18 years of age dependent upon him for support at the time of the injury. Other employees working in the same capacity as claimant ordinarily work less than 200 days a year. Therefore, under Section 10 of the Workmen's Compensation Act, claimant is presumed

to have earned **$1,560.00** in the year preceding the accident.

An examination of the claimant's hand by our Commissioner Frank Summers indicated that claimant received about a 10% total loss of use of his left hand as a result of the injury sustained. From a review of the evidence, and the observations of our Commissioner, we are of the opinion that claimant is entitled to an award for 10% permanent loss of use of his left hand.

Claimant is entitled to an award under Section 8, Paragraph (e) (12), of the Workmen's Compensation Act, of **17** weeks at the compensation rate of **$22.50** per week, or the sum of **$382.50.**

No jurisdictional question is raised. Respondent and claimant were operating under the Workmen's Compensation Act, and the accident arose out of and in the course of the employment. Respondent further furnished complete surgical, medical and hospital treatment.

Mr. Broadway was totally disabled because of this injury from January **24** to March **4, 1951,** inclusive. He was paid compensation at the rate of **$22.50** a week for the period of disability in the amount of **$128.57.** Compensation was terminated on March **5,** the date on which Dr. Wiesman said he was able to return to work. Claimant's weekly compensation rate would be the maximum of **$15.00.** Since the accident occurred subsequent to July **1,1949,** this must be increased 50%, making the compensation rate **$22.50** per week.

The record consists of the following: complaint, Departmental Report, stipulation waiving briefs of both parties, and transcript of evidence.

An award is, therefore, made to claimant, James

E. Broadway, in the sum of $382.50, all of which has accrued, and is payable forthwith.

T. W. Elliott was employed to take and transcribe the evidence at the hearing before Commissioner Summers. Charges in the amount of $28.15 were incurred for these services, which are fair, reasonable and customary. An award is, therefore, entered in favor of T. W. Elliott in the amount of $28.15, payable forthwith.

This award is subject to the approval of the Governor, as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees".

(No. 4472—Claimant awarded $172.45.)

ROBERT PAUL SCOTT, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 14, 1952.

WALTER W. GEISTER, JR., Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

NEGLIGENCE—*State Institutions.* Where evidence showed respondent was negligent in allowing a horse from one of its institutions on the open highway, and that claimant was free from contributory negligence, an award will be made for damages caused by the collision.

SCHUMAN, C. J.

On June 2, 1951, at about 8:45 A.M., Blanche I. Scott, aged 22, sister of claimant, and employed by respondent as a stenographer at the Illinois State Training School for Boys, St. Charles, Illinois, was operating a 1949 Chevrolet Tudor Sedan, belonging to claimant, at 15 m.p.h. in a southerly direction upon the west half of a two lane black top roadway, which leads to the State grounds of said Institution. As she

approached: the entrance to said Institution, known as the "North Entrance", a horse owned by respondent, suddenly ran out of a pasture gate on the west side of the highway, which had been left open, and struck the right front fender of the automobile, damaging the: hood, right front fender, aerial, and roof of the car.

Blanche I. Scott appeared at the hearing on behalf of claimant. She testified that the automobile in question was in good condition; that she had permission from claimant to use the car; and, that the black top highway where the accident happened is a two lane highway about 20 feet wide with a shoulder about 10 feet wide on each side. She stated she was driving 15 m.p.h. when the accident happened, and had been travelling on said roadway a distance of about a block. She first saw the horse when it ran out from the pasture, where the orchard is located, through an open gate on the west side of the road, and into the right front fender of the car; and, that the car was about even with the gate when the accident happened. After the impact she traveled only a few feet, applied the brakes as soon as she saw the horse, and that the car slid on the pavement about a car's length before it stopped. She swung the car to the left, and the car was turned in the middle of the road; that the whole horse came upon the car, and landed on the hood. After the car stopped, the horse slid off on the right side, and thereafter was lame for a while—a few days. She stated she was alone in the car at the time, and that no one was near the gate at the time. She further testified that she had a conversation with one Mr. Frost, a relief house parent at Polk Farm, and an employee of respondent,, who came up to the car at the time and place in question, and told her that the Wilson boys (boys in the

Wilson cottage) had left the gate open, and that she should go up to the office and get in touch with Mr. Carft, the head farmer, and have him look at the horse, and call the veterinarian.

Claimant testified that he had given his sister, Blanche I. Scott, permission to use the automobile in question; that the automobile was in good mechanical condition, and that he had paid **$172.45** to Kohlert's Body Shop for repairs to his automobile for damages sustained in said accident. He stated that the American States Insurance Co., the insurance company carrying collision coverage on his automobile, had reimbursed him in the amount of **$122.45,** leaving a balance owing him in the amount of $50.00.

Claimant's exhibit No. 1, being a repair bill from Kohlert's Body Shop in the amount of **$172.45,** was offered and admitted into evidence.

At the time of the accident Blanche I. Scott was on her way to work for respondent at said Institution. It had been raining during the morning, and at the time of the occurrence it was drizzling, and the highway was wet. The horse in question was owned by respondent.

By stipulation of the parties hereto, and their respective attorneys, the American States Insurance Co. was added as a party claimant to this action by virtue of its subrogation interest.

After hearing the evidence in this case, it is the opinion of the Court that the respondent, through its agents and servants, was negligent in failing to keep the horse properly and securely locked up in the pasture connected with said Institution, and in leaving the gate leading to said pasture open, permitting the horse to leave the pasture at will. It is also the opinion

of the Court, that as a direct result of said negligence! the horse left the pasture, passed through the open gate, and struck claimant's car, damaging the same to the extent of **$172.45.**

The Court is further of the opinion that Blanche **I.** Scott was not guilty of contributory negligence in the operation of said automobile at the time and place in question; and, that she was in the exercise of due care and caution for her own safety and the property of others at the time of the accident.

An award should, therefore, be made to claimant for damages to his automobile, arising out of the accident in question.

Awards are: therefore, entered in this case as follows:

1. *The sum of $122.45 to Robert Paul Scott* **for** *the use of American States Insurance* Co.
2. *The sum of $50.00 to Robert Paul Scott, claimant.*

(No. 3025—Claimant awarded $2,889.70.)

ELVA JENNINGS PENWELL, Claimant, *vs.* **STATE OF ILLINOIS, Respondent.**

Opinion filed May 13, ***1952.***

JOHN W. **PREIHS,** Attorney for Claimant.

IVAN A. **ELLIOTT,** Attorney General; C. ARTHUR **NEBEL,** Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION *Act when an additional award will* ***be*** *made.* **The Court held that where there was no change in claimant's physical condition, she was entitled to an additional allowance for medical and nursing services. (Section 8 (a) of the Workmen's Compensation Act.)**

DELANEY, J.

Claimant, Elva Jennings Penwell, was injured on February **2, 1936,** in an accident arising out of and in

the course of her employment as a Supervisor at the Illinois Soldiers' and Sailors' Children's School at Normal, Illinois. The injury was serious, causing temporary blindness and general paralysis. The facts are fully detailed in the case of *Penwell* vs. *State,* 11 C.C.R. 365, in which awards were made to claimant in the amounts of $5,500.00 for total permanent disability, $8,215.95 for necessary medical, surgical, and hospital services expended or incurred to and including October 22, 1940, and an annual life pension of $660.00. On February 10, 1942, a further award was made to claimant for medical and hospital expenses, incurred from October 22, 1940 to January 1, 1942 in the amount of $1,129.82. On March 10, 1943, a further award was made to claimant for medical and hospital expenses from January 1, 1942 to December 31, 1942 in the amount of $1,164.15. On March 15, 1944, a 'further award was made to claimant for medical and hospital expenses from January 1, 1943 to and including September 30, 1943 in the amount of $853.07. On April 17, 1945, a further award was made to claimant for medical and nursing expenses, incurred from October 1, 1943 to and including February 28, 1945 in the amount of $1,955.29. On September 12, 1946, a further award was made to claimant for medical and nursing expenses, incurred from February 28, 1945 to and including April 1, 1946 in the amount of $1,646.12. On June 5, 1947, a further award was made to claimant for medical and nursing expenses, incurred from April 1, 1946 to and including April 1, 1947 in the amount of $2,108.30. On September 22, 1948, a further award was made to claimant for medical and nursing expenses, incurred from April 1, 1947 to and including April 1, 1948 in the amount of $2,207.80. On April 19, 1949, a further

award was made to claimant for medical and nursing expenses, incurred from April 1, 1948 to and including February 1, 1949. On May 9, 1950, a further award was made to claimant for medical and nursing expenses, incurred from February 1, 1949 to and including February 1, 1950 in the amount of $2,316.09. On April 10, 1951, a further award was made to claimant for medical and nursing expenses, incurred from February 1, 1950 to and including February 1, 1951 in the amount of $2,403.09. Claim is now being made for an additional award of $2,889.70 for medical and nursing expenses from February 1, 1951 to and including February 1, 1952.

Claimant remains totally paralyzed from the waist down, the paralysis being of a spastic type; her physical condition has not improved. She has no control over her lower limbs, nor over her urine and faeces. From February 1, 1951 to and including February 1, 1952 she has been required, to relieve her of her injury, to prevent deformity, to stimulate circulation, and to relieve bedsores, to employ and receive medical services of nurses or attendants to move her to and from her bed, to change her bed clothing at least three or four time a day, to administer light treatment to the affected parts of her paralyzed body, and to rub her body with ointments prescribed by her physician. Because of the complete paralysis of her lower abdomen and legs, the functioning of her kidneys and bladder is impaired, and medical attention is required to flush these organs, and to prevent infection arising from her impaired circulation and paralysis. The services of a physician are needed almost daily, and must be rendered in her home.

Claimant has, therefore, employed a physician on a monthly basis at a charge of $90.00 per month, which

is a lesser rate than ordinarily charged, and for which she seeks reimbursement in the total sum of **$1,282.00,** which sum includes massages and treatments. Claimant also seeks reimbursement, at the rate of **$1.50** per day, in the amount of **$547.50,** for board and room of attending nurses. Such expenditure obviates the employment of both a day and a night nurse. In addition, claimant has expended for nursing services **$730.35,** and for drugs and supplies **$329.85.**

The record consists of the verified petition of claimant, the original receipts and vouchers showing payment of the respective items, waiver of claimant of right to file statement, brief and argument, and stipulation filed in lieu of evidence.

An award is, therefore, made to the claimant for medical and nursing expenses from February **1, 1951** to and including February **1, 1952** in the sum of **$2,889.70,** which has accrued, and is payable forthwith. The Court reserves for future determination claimant's need for further medical, surgical and hospital services.

(No. 4297—Claimant awarded $3,034.20.)

WILLIAM A. FALLS, Claimant, *us.* **STATE OF ILLINOIS, Respondent.**

Opinion filed *May 13, 1952.*

HERMAN R. TAVINS, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

NATIONAL GUARD—*personal* **injuries. Where claimant's injury occurred while he was in the performance of his duties as a member of the National Guard, an award will be made.**

SAME—*damages.* **The Court will take as a guide, but not as a fixed rule, the provisions of the Illinois Workmen's Compensation Act in determining damages in National Guard cases.**

SCHUMAN, C. J.

Claimant, William A. Falls, filed his claim in this Court, alleging that he, at all times mentioned, was and is still a member of the National Guard of the State of Illinois, and that this action is instituted pursuant to the Military and Naval Code of the State of Illinois.

On June 11, 1949, while under orders, and in the exercise of due care and caution for his own safety and the safety of other members of his Company enroute to Camp Logan on a National Guard truck, claimant was struck with a rifle butt across his eyes, which resulted in the serious impairment of his vision. He lost a great deal of time from his employment, and incurred many bills in endeavoring to cure himself of said injuries; and, as a result of which, he has had to have repeated operations on his eye. He now seeks to recover from the State reimbursement for monies expended for medical expenses, loss of time, and such further amounts as the Court might deem equitable and fair for his injuries.

The facts show that William A. Falls was 36 years of age, and was injured while enroute to Camp Logan for rifle practice as a member of the National Guard of the State of Illinois. Claimant was lying asleep in the bed of a truck when a rifle fell, striking him across the eyes, and causing the injuries for which he seeks compensation. Claimant is married, the father of three minor children, ages 10, 9 and 4, and at the time of his injury was employed as a postal clerk in the City of Chicago, Illinois.

The facts further show that prior to the accident the claimant earned $3,770.00 a year as a postal clerk, and worked extra time as a waiter earning as much as

$30.00 to $40.00 a week. Since the accident, he has continued to work as a postal clerk, and his yearly salary averages $4,100.00. However, he has not been able to do the extra work, which he did prior to the accident.

The evidence further discloses that the injuries to claimant's eyes have necessitated two operations; on both occasions he was hospitalized and absent from his employment about sixteen weeks. The facts show that he lost about $1,100.00 in salary, as well as an estimated **$2,500.00,** which he would have been able to make as a waiter in the meantime. Claimant testified that he has not been reimbursed for the time he was absent from his employment, nor for **$350.00,** which he paid to the Provident Hospital, **$234.00** paid to Dr. Brooks, $12.00 for glasses, as well as some sums for medication. The facts further disclose that the State did reimburse him for the first operation, including hospitalization and medical expenses.

It was shown that at the time of the accident, claimant's health was good, and that he had had no previous injury to his eyes, other than an infection in the right eye, which occurred some time in the year **1937.** This necessitated the wearing of glasses for several years, but for the last ten years he had not worn glasses at all. The evidence further shows that he had been employed in the United States Post Office in the City of Chicago for some time, which position required the use of his eyes in the sorting of mail, examining addresses, and in other duties, all of which indicate his eyes were in good condition immediately prior to the injuries in question. It is not necessary to detail all of the facts, other than to state that the record is replete with evidence showing that the claimant did receive rather

serious injuries to his eyes as a result of the accident in question.

The Board of Inquiry, under the National Guard Act, in its report recommended reimbursement to the claimant for hospital and doctor bills, time lost through civilian occupation, payment of all drug bills incurredl as a result of the accident, and reimbursement for stenographic duties performed in connection with the examination.

Claimant consulted Dr. Roosevelt Brooks in Chicago, who diagnosed the condition as being a detached retina of the right eye, and recommended an immediate operation. Claimant was operated on for this particular condition, and on February 1, 1950 suffered a recurrence. On February 22, 1950, he went back to Provident Hospital for another operation.

The testimony of Dr. Thaddeus Frank Bush, a Lieutenant Colonel connected with the National Guard, and the report of the Board of Inquiry, show that the injuries complained of were received in the line of duty; that claimant was not under the influence of alcohol or drugs at the time, and that as a result of the accident claimant has a detached retina in one eye. Dr. Bush testified that, from an industrial standpoint, claimant has lost 51.1% vision in his right eye, and 32.2% vision in his left eye. He further testified that a detachment of the retina will occur in over 60% of similar cases following operations.

There is no dispute as to the injuries having occurred while claimant was in the performance of his duties as a member of the National Guard, nor is there very serious dispute about the nature and extent of his injuries. Apparently, the only question involved is the amount of damages to be allowed to claimant.

This Court, in similar cases, has seen fit to take as a guide, but not as a fixed rule, the provisions of the Illinois Workmen's Compensation Act in determining what payment would be reasonable for the loss of same. The Court feels that, under the present circumstances, the previous decisions of this Court in accepting the Workmen's Compensation Act as a guide applies with equal force to the case here.

Section 8 (e) of the Workmen's Compensation Act provides in the event of loss of vision in an eye, payment of 50% of the average weekly wage during 120 weeks. The Act further provides that for the permanent partial loss of a member, or sight of an eye, payment of 50% of the average weekly wage during that proportion of weeks provided for the loss of such member, or the sight of an eye, which the partial loss of use thereof bears to the total loss of use of such member, or sight of eye.

Claimant's compensation rate, based on the fact that he was the father of three children under sixteen years of age dependent on him for support on the date of the accident, would be **$23.40** per week. From the evidence in this case, the Court concludes that the claimant is entitled to an award for 25% permanent partial loss of use of the left eye, and 50% permanent partial loss of use of the right eye. Using the Compensation Act as a guide, and applying the percentage of loss in this case, the Court finds that the claimant would be entitled to the sum of $2,106.00 for the permanent partial loss of use of both eyes.

The Court further finds that the claimant lost 16 weeks of work, which, figured at the compensation rate of **$23.40** per week, would be the sum of **$374.40,** which is hereby awarded to the claimant.

The Court further finds that claimant shall be reimbursed for medical payments in the amount of **$320.80,** and the amount of **$233.00** payable to claimant for the use of Dr. Roosevelt Brooks.

An award is, therefore, entered in favor of claimant, William A. Falls, in the sum of **$3,034.20.**

(No. **4386—Claimant awarded $185.00.)**

PAUL COMBS, Claimant, *vs.* **STATE OF ILLINOIS, Respondent.**

Opinion filed May *13, 1952.*

LOUIE F. ORR, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

HIGHWAYS—negligence. Where evidence showed respondent was negligent in **failing to place signs warning motorists of a gap in** the **pavement, an award will be made for damages sustained by claimant thereby.**

DELANEY, J.

The claimant filed his complaint on January **19, 1951,** alleging that on July 8, 1950 he was driving his **1941** Chevrolet Sedan along Route No. **3** between Chester and East St. Louis, Illinois, and that his car struck a stretch of broken pavement, which caused the automobile to swerve out of control, and turn over. Claimant, in his testimony, stated that he was traveling between fifty and fifty-five miles an hour when he hit the stretch of rough pavement, and the gap in the pavement extended between one hundred and one hundred and fifty feet in length. Claimant further testified that he saw no sign or warning as he approached the gap in the pavement. The last warning sign he observed was about five or six miles before he struck the gap. This sign said "end of bad pavement". Mr. Combs testified that he did not receive personal injuries

due to the accident. William T. Alston, an employee of the Mixon Motor Company, examined claimant's car, and estimated the damages resulting from the accident to be in the amount of $185.00.

Mary Limbaugh testified that she and her husband had driven over Route No. 3 many times, and on July 8th they were driving along Route No. 3, and saw claimant's car just after the accident. She stated that the gap in the pavement was about seventy-five to one hundred feet long, and that there were no warning signs in the vicinity of the accident. The closest warning sign was five miles away.

Frank J. Kolbohn, a witness, stated he was driving along Route No. 3, and arrived at the place of the accident just after it happened. He stated he saw claimant's car turned upside down on a gravel stretch where the pavement had been removed, and that there were no notices or other warnings that the gap existed.

Claimant testified that it was 7:40 P.M. when the accident occurred, that it was just beginning to get dark, and that other cars were driving with their parking lights on.

The record consists of the complaint, and transcript of evidence.

Claimant, Paul Combs, has proved his case by a preponderance of the evidence. The evidence shows that there was an extended break in the pavement, and that there were no warning signs near the scene of the accident. Respondent was negligent in its maintenance of the highway.

An award is, therefore, entered in favor of claimant, Paul Combs, in the amount of One Hundred and Eighty-five Dollars ($185.00).

(No. 4403—Claim denied.)

PATRICK DAVERN, JR., A MINOR, ET AL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 8, 1952.
Supplemental opinion filed May 13, 1952.

DAVID ALSWANG AND DAVID MENDELSOHN, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER AND HARRY K. O'MELIA, Assistant Attorneys General, for Respondent.

JURISDICTION—*Board of Education.* The Legislature did not, under Section 8 C, extend the jurisdiction of the Court of Claims to cases involving tort liability of agents, servants and employees of any Board of Education.

BOARD OF EDUCATION—status. A Board of Education is a separate corporato entity functioning as a public corporation, acting in its own capacity, and not as an agent of the State.

SAME—jurisdiction. A Board of Education, being a body politic and corporate, may sue and be sued in all courts, and, therefore, the Court of Claims has no juris-. diction.

SCHUMAN, C. J.

The claim filed in this case is predicated on the grounds that the Board of Education of the City of Chicago was an agent of the State of Illinois; that it, operated a playground in the City of Chicago; and that through its duly authorized servant and agent, negligently caused the injury of Patrick Davern, Jr.

The State filed a motion to dismiss the complaint on the ground that it had no responsibility for the negligence of such a municipal corporation. The Court overruled this motion on June 8, 1951. The respondent then filed a motion to vacate said order, and the claim-ant filed his objections to said motion.

The question before the Court is one of jurisdiction. This Court, prior to the enactment of Section 8 C of the Court of Claims Law, consistently held that no

claim could be filed predicated on tort liability of the State, and specifically refused to take jurisdiction of any case involving municipal corporations. *(Smith* vs. *State,* **16** C.C.R. **208.)**

A Board of Education is created unwillingly, and is the method by which the Legislature has complied with the constitutional mandate to maintain a system of free education.

The cases all hold that a Board of Education is not a municipal corporation. In the case of *Schreiner* vs. *City* of *Chicago,* **406** Ill. *75,* the Court held that the Board of Education of the City of Chicago was a separate and distinct entity from the City of Chicago.

In *Lindstrom* vs. *City of Chicago,* **331** Ill. **144,** at **147** and **148,** the Court, in holding that school districts are not liable for torts or negligence of their agents unless such liability is expressly provided for by statute, stated:

"The rule adopted in this State and generally followed throughout this country is, that corporations of the character of school districts are created *nolens volens* by the general law to aid in the administration of State government and are charged as such with duties purely governmental in character. They are, therefore, not liable for the torts or negligence of their agents unless such liability is expressly provided by statute. *(People* vs. *Board of Education,* **325** Ill. **320;** *City of Chicago* vs. *Jewish Consumptives Relief Society,* **323** id. **389;** *Kinnare* vs. *City of Chicago,* **171** id. **332.)** The reason for this rule lies in the fact that a school district of the character here considered is created merely to aid in the administration of the State government. It owns no property, has no private corporate interests, and derives no special benefits from its corporate acts. It is simply an agency of the State having existence for the sole purpose of performing certain duties deemed necessary to the maintenance of "an efficient system of free schools" within its jurisdiction. In creating such district the State acts in a sovereign capacity for the more efficient exercise of governmental functions resting in the State, and such district is exempted from the obligation to respond in damages, as master, for the negligent acts of its servants to the same extent as is the State itself, unless liability is expressly provided by the statute. *(Nagle* vs. *Wakey,* **161** Ill. **387;** *Wilcox* vs. *City of Chicago,* **107** id. **334;** *Town of Waltham* vs. *Kemper,* **55** id. **346.)** In *People* vs. *Board of Education,* **255** Ill. **568,** and *Bradbury* vs. *Vandalia Drainage District,* **236** id. **36,** the distinction between corporations liable for negligent or wrongful acts of their agents, and those which are not is made clear. The latter, being public, involuntary *quasi* corpora-

tions, which are mere political or civil divisions of the State created by general law to aid in the general administration of the government, are not so liable, while those which are liable are so liable because they have privileges conferred upon them at their request, which are a consideration for the duties imposed. To the same effect is *Johnston* vs. *City of Chicago,* **258** Ill. **494.**

Appellants rely upon *Winkelman* vs. *City of Chicago,* **213** Ill. *360,* as authority for their contention that an action of trespass will lie against defendant. That case and the one at bar differ in the fact that there the suit was against the City of Chicago, a municipal corporation. The Board of Education of the City of Chicago is not a municipal corporation."

Respondent cites the case of *Lincke* vs. *Moline Board of Education,* **245** Ill. App. **459,** and that Court, in speaking of the liability of a Board of Education, on pages **462** and **463,** stated:

"******It is simply an agency of the State having existence for the sole purpose of performing certain duties, deemed necessary to the maintenance of an "efficient system of free schools" within the particular locality of its jurisdiction. The State acts in its sovereign capacity, and does not submit its action to the judgment of courts and is not liable for the torts or negligence of its agents, and a corporation created by the State as a mere agency for the more efficient exercise of governmental functions is likewise exempted from the obligation to respond in damages as master for negligent acts of its servants to the same extent as is the State itself, unless such liability is expressly provided by the statute creating such agency."

In all of the cases cited by claimant and respondent it is held that a Board of Education is a corporate entity, an agency of the State, and not a subdivision thereof.

Claimant predicates his case on the ground that a Board of Education is an agent of the State, and that Section 8 C of the Court of Claims Law gives this Court jurisdiction. Section 8 C reads as follows:

"All claims against the State for damages in cases sounding in tort, in respect of which claims the claimants would be entitled to redress against the State of Illinois, at law or in chancery, if the State were suable, and all claims sounding in tort against The Board of Trustees of the University of Illinois; provided, that an award for damages in a case sounding in tort shall not exceed the sum of $7,500.00 to or for the benefit of any claimant. The defense that the State or The Board of Trustees of the University of Illinois is not liable for the negligence of its officers. agents, and employees in the course of their employment shall not be applicable to the hearing and determination of such claims."

This section can only apply where the State would be liable for a tort action. The Section specifically gives a cause of action against The Board of Trustees of the University of Illinois in tort cases. It does not extend to any other corporate entity. If the Legislature intended to include Boards of Education, it could easily have done so. It certainly cannot be said that a Board of Education is an employee of the State of Illinois. The Legislature did not, under Section 8 C, extend the jurisdiction of this Court to cases involving tort liability of agents, servants, and employees of Boards of Education.

There is a distinction between work performed by the State through an agent, and work performed by a corporation in the exercise of a governmental function delegated by the State. The State did not employ the man, who is claimed to have caused the injury to the claimant. This man was employed by the Board of Education, and his salary paid by said Board of Education. Employees hired by a Board of Education in the performance of governmental functions are the employees of the corporation and not of the State.

The State, under a Constitutional provision, cannot be sued either at law or in equity, and it cannot by statute waive immunity. It can by appropriate action delegate to the Court of Claims jurisdiction to make awards on claims cognizable by it. This requires a definite action on the part of the State, and, having failed to extend the law to include Boards of Education, this Court is without jurisdiction to entertain such a claim.

For the reasons assigned, the Court is compelled to vacate its order of June 8,1951, to sustain the motion of respondent, and to dismiss the claim.

SUPPLEMENTAL OPINION

SCHUMAN, C. J.

The petition for rehearing indicates that claimant has misconstrued the term "agency", as applied to the Board of Education of the City of Chicago in the Court's prior opinion.

In *People* vs. *Barrett*, **382** Ill. **321,** the Supreme Court had before it the question of determining the status of the University of Illinois as a Corporate entity, and its relation to the State government. The Court, on page **343,** said:

> "It functions solely as an agency of the State for the purpose of the operation and administration of the University for the State. *In doing this, it junctions as a corporation, separate and distinct from the State, and as a public corporate entity* with all the powers enumerated in the applicable statutes, or necessarily incident thereto. It has and can exercise no sovereign powers. It is no part of the State or State government. (Emphasis supplied.)"

The Court, on page **347,** said:

> "In the sense that it is a department or branch of the State government, the University of Illinois is not an agency or instrumentality of the State. It is a separate, corporate entity, which functions as a public corporation."

The Court, in its opinion, thought it had made the point clear that the Board of Education was a separate corporate entity functioning as a public corporation, and, in this sense, not acting as an "agent", but in its own capacity. While it is an agency set up by the State, it is set up as a separate and distinct corporate entity, and functions in conformity with the statute creating it, and not as an agent.

The statute provides that the Board of Education is a body politic and corporate, and may sue and be sued in all Courts.

It is in the sense that the Board of Education is a corporate entity, and, as such, carries on its functions distinct from the State, that it does not come under

Section 8 C of the Court of Claims Law, because, as such, it is not an agent of the State.

For the reasons above assigned, the petition for rehearing is denied.

(No. 4412—Claimant awarded $500.00.)

WALTER JACKSON, Claimant, *vs.* **STATE OF ILLINOIS,** Respondent.

Opinion Pled May **13,** *1952.*

SIDNEY LYON, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; **WILLIAM H. SUMPTER,** Assistant Attorney General, for Respondent.

MASTER AND SERVANT—*Armory watchman.* **Court held that Armory watchman was acting in the course of his employment when he discharged gun, injuring claimant, and that claimant was thereby entitled to an award.**

SCHUMAN, C. J.

Claimant, Walter Jackson, filed his claim in this Court seeking to recover for injuries sustained by reason' of being struck in the left ankle by a bullet discharged from the gun of one Elmer Johnson, a State employee, which incident occurred on November **6, 1950** at the Giles Avenue Armory in the City of Chicago, Illinois.

On the evening of November **6, 1950,** the Armory was rented or leased to the Taxicab Owners and Chauffeurs Association for the purpose of holding a mass meeting for Congressman William L. Dawson, the meeting being of a political nature. The testimony shows that about 10:45 P.M. an announcement was made that free refreshments would be served in the southwest corner of the Armory, and immediately the crowd became excited and disorderly, and rushed toward the refreshment stand. The Departmental Report filed in this case, signed by Leo M. Boyle, the Adjutant General, states:

"Elmer Johnson, the Armory watchman on duty, observing the crowd was excited and acting disorderly and behaving in such a manner, which would break down the refreshment stand and cause damage to State property. . . . . ."

There is no dispute in the testimony that the Armory watchman, Elmer Johnson, was wearing a gun at the time, and that he tried to restore order. There is no question that he drew the gun, and that the gun was discharged, and struck the claimant in the left foot. The evidence, without contradiction, shows that the commanding officer knew that the watchman carried a gun, since on several previous occasions the Armory had been broken into.

The report of Colonel William O. R. Bourne, Armory Custodian, which was made a part of the Departmental Report, shows that the Armory was rented for the purpose stated, and that it was the duty of Elmer Johnson, the janitor, to be present at all meetings, military and civilian, and to keep the premises clean and orderly at all times. The statement of Elmer Johnson, the watchman, attached to and made a part of the Departmental Report, sets out the fact that the crowd became very disorderly when free refreshments were announced, rushed toward the lunch stand, and it was evident that the property of the State was in danger of being damaged, because he was unable to keep the crowd back and restore order. After observing the crowd was disorderly, and State property was in danger of being damaged, he went to his locker to get his pistol, or revolver, in order to help discipline the crowd; and, that, while the pistol was in his possession, and he was attempting to preserve order, it was discharged, either accidentally or otherwise, and struck claimant in the foot.

A Supplemental Departmental Report was filed in this Court on June 5, 1951, which report was dated

May **14, 1951,** signed by Leo M. Boyle, the Adjutant General, in which it was stated that Elmer Johnson, the watchman, was not required or authorized to carry a revolver or pistol in connection with his duties as a watchman.

The pertinent question for the Court to determine in this case is whether or not the relationship of Master and Servant exists between the State of Illinois and Elmer Johnson, the Armory watchman, at the time of the alleged incident. It is pertinent to note on this phase of the case that the State admitted it was the duty of Elmer Johnson, the Armory watchman, to be present at the time of the political meeting, and further admitted that it was the duty of said watchman to keep the place orderly. Under such a situation, it is the Court's opinion that where the facts stand uncontradicted, as they do in this case, that Elmer Johnson, the Armory watchman, was in the performance of his duties in attempting to restore order, and to save State property, and that the claimant was injured as a result thereof.

There is nothing in the record to indicate that claimant, outside of the fact that he was part of the crowd, did anything to provoke or bring about the assault upon him by the watchman, Elmer Johnson.

In the case of *Metzler* vs. *Layton,* **373** Ill. 88, the Court, on pages **91** and **92,** held:

"An office manager has the duty of protecting the property and business of his employer placed under his control, and that duty, by the very character of his position, is more comprehensive than is the duty of a mere employee or special servant. His employer is responsible for his acts done in safeguarding its property, even though the manager acts unwisely. In Central Motor *Co.* vs. *Gallo,* **94** S.W. (2d) 821, the Court said: "The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused

by the circumstances and the occasion, goes beyond the strict line of his duty or authority and inflicts an unjustifiable injury on a third person."

There is no dispute from the admission by the State that the duties of the watchman were to protect State property, and to preserve order. There'is no dispute in the evidence that Elmer Johnson, the Armory watchman, was attempting to restore order, and to protect State property. It is the opinion of the Court that this brings the case directly within the rule announced in the case of *Metzler* vs. *Layton, supra.*

The medical testimony shows that the claimant sustained a comminuted fracture of the cuneiform bone of the left foot. The record shows that the claimant was in the Cook County Hospital, where he was taken from the Michael Reese Hospital, and remained there for twenty days; that the claimant had his left foot in a cast for three weeks; that the bullet hit the bone in claimant's foot and emerged from the bottom thereof; and that the claimant was incapacitated for a month after the incident. The claimant offered in evidence a bill of the Cook County Hospital in the amount of $180.00, which apparently he became responsible for, although the testimony does not show that the bill was paid, nor was there any testimony that it was a reasonable and customary charge in the area. There was no testimony about loss of earnings, nor any disability with reference to the foot, other than when the claimant stands too much on his leg, it swells; or, when he does some heavy work, it hurts the bottom of his foot.

It is apparent from the record that the claimant suffered no really serious disability as the result of the incident in question, and that his only actual expense as a result of the accident was his hospital bill in the amount of $180.00.

From all of the testimony and the record in this case, it is apparent to the Court that the claimant was injured by an employee of the State of Illinois, when said employee was in the course of his employment; and while said employee was protecting the property of the State. For the reasons assigned, the claimant is entitled to an award.

An award is entered in favor of the claimant in the amount of Five Hundred Dollars ($500.00).

(No. 4466—Claim denied.)

PRINCE HARRISON, Claimant, *vs.* **STATE OF ILLINOIS,** Respondent.

Opinion filed** May **13, 1962.

JOHN H. SEARING, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; CHARLES H, EVANS, Assistant Attorney General, for Respondent.

JURISDICTION—*unlawful incarceration.* **Following** *James Montgomery* **vs.** *State of Illinois, supra,* **the Court held that it had** no **jurisdiction in** this **case.**

DELANEY, J.

Claimant, Prince Harrison, filed his complaint on July **23,** 1951, wherein he alleges damages for the years he was compelled to serve in the Illinois State Penitentiary in violation of his constitutional rights.

On October 24, 1951, respondent filed its motion to strike claimant's complaint, and dismiss this cause. Thereafter, claimant filed his motion to strike respondent's motion to dismiss.

We have held in the case of *James Montgomery* vs. *State,* No. 4264, that for this Court to have jurisdiction of subject matter of this type the Legislature, by express provision, would have to create an act providing for such a remedy.

The motion of respondent to strike and dismiss this cause is hereby sustained.

Case dismissed.

(No. 4493—Claim denied.)

HOMER GARROTT, Claimant, *vs.* STATE OF ILLINOIS, Respondent;.

Opinion filed May 13, 1952.

PAUL D. REESE, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; CHARLES H. EVANS, Assistant Attorney General, for Respondent,.

STATUTORY CONSTRUCTION—*conflicting statutes.* Where acts, containing conflicting provisions, are passed at the same session of the Legislature, the whole record must be examined in order to ascertain the legislative intent. In all cases, the primary question should be the intention of the Legislature, rather than the technical priority of the passage of the acts.

JURISDICTION—*legislative intent.* The intention of the 67th General Assembly was to remove claims arising under the Workmen's Compensation and Occupational Diseases Acts from the Court of Claims to the Industrial Commission of Illinois.

DELANEY, J.

Homer Garrott, claimant, filed his claim herein on February 11, 1952, alleging that on February 27, 1951, he was employed by the Department of Public Works and Buildings, Division of Highways, as a flagman. On that day, claimant was struck by an automobile on U. S. Highway No. 51, approximately one-half mile south of the Village of Cobden, Illinois, and sustained serious injuries, as a result thereof.

The record consists of the complaint, motion of respondent to dismiss filed on February 15, 1952, and objections or suggestions of claimant in opposition to the motion of respondent to dismiss.

This cause now comes before the Court on a motion of respondent to dismiss by the Attorney General, who alleges that the Court has no jurisdiction, since it is

apparent upon the face of the complaint that the claimant is basing his cause of action upon the Workmen's Compensation Act.

Claimant bases his claim upon House Bill No. 900, which was an Act to amend certain sections of the Court of Claims Act, passed by the Sixty-Seventh General Assembly of the State of Illinois, and approved on the 16th day of July, 1951, which reads as follows:

"Be it enacted by the People of the State of Illinois, represented in the General Assembly:

SECTION 1. Sections 2 and 8 of "An Act to create the Court of Claims, to prescribe its powers and duties, and to repeal an Act herein named", filed July 17, 1945, are amended to read as follows:

2. Upon the expiration of the terms of office of the incumbent judges the Governor shall appoint their successors by and with the consent of the Senate for terms of 2, 4 and 6 years commencing on the third Monday in January of the year 1953. After the expiration of the terms of the judges first appointed pursuant to the provisions of this amendatory Act, each of their respective successors shall hold office for a term of 6 years and until their successors are appointed and qualified.

8. The Court shall have jurisdiction to hear and determine the following matters:

A. All claims against the State founded upon any law of the State of Illinois, or upon any regulation thereunder by an executive or administrative officer or agency.

B. All claims against the State founded upon any contract entered into with the State of Illinois.

C. All claims against the State for damages in cases sounding in tort, in respect of which claims the claimants would be entitled to redress against the State of Illinois, at law or in chancery, if the State were suable, and all claims sounding in tort against the Board of Trustees of the University of Illinois; provided, that an award for damages in a case sounding in tort shall not exceed the sum of $7,500.00 to or for the benefit of any claimant. The defense that the State or The Board of Trustees of the University of Illinois is not liable for the negligence of its officers, agents, and employees in the course of their employment shall not be applicable to the hearing and determination of such claims.

D. All claims against the State for personal injuries or death arising out of and in the course of the employment of any State employee and all claims against The Board of Trustees of the University of Illinois for personal injuries or death suffered in the course of, and arising out of the employment by The Board of Trustees of the University of Illinois of any employee of the University, the determination of which shall be in accordance with the substantive provisions of the Workmen's Compensation Act or the Workmen's Occupational Diseases Act, as the case may be.

E. All claims for recoupment made by the State of Illinois against any claimant."

House Bill No. 1078, a further amendment to certain sections of the Court of Claims Act, passed by the Sixty-Seventh General Assembly of the State of Illinois, and approved on July 11, 1951, contains the following:

"Be it enacted by the People of the State of Illinois, represented in the General Assembly:

SECTION 1. Section 8 of "An Act to create the Court of Claims, to prescribe its powers and duties, and to repeal an Act herein named", filed July 17, 1945, is amended to read as follows:

8. The Court shall have jurisdiction to hear and determine the following matters:

A. All claims against the State founded upon any law of the State of Illinois, or upon any regulation thereunder by an executive or administrative officer or agency, other than claims arising under the Workmen's Compensation Act or the Workmen's Occupational Diseases Act.

B. All claims aganist the State founded upon any contract entered into with the State of Illinois.

C. All claims against the State for damages in cases sounding in tort, in respect of which claims the claimants would be entitled to redress against the State of Illinois, at law or in chancery, if the State were suable, and all claims sounding in tort against The Board of Trustees of the University of Illinois; provided, that an award for damages in a case sounding in tort shall not exceed the sum of $2,500.00 to or for the benefit of any claimant. The defense that the State or The Board of Trustees of the University of Illinois is not liable for the negligence of its officers, agents, and employees in the course of their employment shall not be applicable to the hearing and determination of such claims.

D. All claims for recoupment made by the State of Illinois against any claimant.

2. This amendatory Act of 1951 shall not affect any action or claim pending in the Court of Claims at the time it takes effect and all such actions or claims shall be disposed of in the manner provided for before such effective date."

The claimant contends that where two or more amendments to the same section of the Statute, or subject, are passed at the same session of the General Assembly, which are inconsistent or repugnant, the amendment last passed prevails, and is the law, as it is the last expression of the Legislature, which is given effect.

In the Illinois Supreme Court case of *People ex rel Schlaeger, County Collector* vs. *Mattes,* decided on January 22, **1947, 396 Ill. 348, 71** N.E. (2d) 690, Justice Fulton said:

"It is well settled that where acts are passed at the same session, containing conflicting provisions, the whole record of the legislation will be examined in order to ascertain the legislative intent, and in all cases the primary question is the intention of the Legislature, rather than the technical priority of the passage of the acts."

The Court feels that it was the intention of the Sixty-Seventh General Assembly to remove claims arising under the .Workmen's Compensation Act and the Occupational Diseases Act to the Industrial Commission and that it no longer has jurisdiction to determine claims, which fall in these categories.

For the reasons stated, the motion of the Attorney General to dismiss must be sustained.

Cause dismissed.

(No. 4496—Claimant awarded $120.00.)

GRACELAND CEMETERY, Claimant, ***vs.*** **STATE** OF **ILLINOIS,** Respondent.

Opinion ***filed*** May ***13, 1952.***

GRACELAND CEMETERY, Claimant, pro se.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

PURCHASES—*lapsed* ***appropriation.*** Where properly authorized headstones were erected, and statement therefor submitted within a reasonable time, but the same was not approved and vouchered **for** payment before the lapse **of** the appropriation from which it was payable, an award will be made.

DELANEY, J.

Claimant, Graceland Cemetery, filed its complaint on February 19, 1952, alleging non-payment of bills in the sum of One Hundred Twenty Dollars ($120.00)

for cartage and the erection of twelve Government headstones for soldiers buried in Graceland Cemetery.

The record consists of the complaint and Departmental Report. From the Departmental Report, it appears that the statement of claimant was not presented for payment before the appropriation and funds from which these invoices were payable had lapsed.

Where properly authorized headstones were erected, and a statement submitted within a reasonable time, but the same was not approved and vouchered for payment before the lapse of the appropriations from which it is payable, an award for the reasoliable value will be made.

An award is, therefore, entered in favor of Graceland Cemetery for the sum of One Hundred Twenty Dollars ($120.00).

(No. 4-198—Claimant awarded $39.36.)

PUBLIC SERVICE COMPANY OF NORTHERN ILLINOIS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 13, 1952.

K. J. OWENS, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

PURCHASES—*payment after lapse of appropriation.* Where purchases were properly and duly authorized, invoices submitted within a reasonable time, and there remained a sufficient unexpended balance in the appropriation from which payment could have been made, a claim will be allowed, where payment was not made before the appropriation lapsed.

LANSDEN, J.

Claimant, Public Service Company of Northern Illinois, seeks to recover from respondent the sum of **$39.36** for electric service furnished respondent.

All of the facts in the case have been stipulated, and such stipulation is hereby approved.

Seven traffic lights were put in operation on January **6, 1951** on McCormick Road in Cook County, which is part of the State Highway System. For some unknown reason, claimant neglected to submit its voucher for such electric service for the month of January, **1951** to the Division of Highways until November, 1951. By that time the appropriation to pay same had lapsed, although until the lapse there were ample funds to pay it. Therefore, claimant's sole recourse is in this Court.

Respondent admits it owes claimant, and concedes that the billed charge of **$39.36** is in accordance with the rate for such service approved by the Illinois Commerce Commission.

An award is, therefore, entered in favor of Public Service Company of Northern Illinois for the sum of **$39.36,**

(No. 4283—Claimant awarded $4,627.84 and Life Pension.)

BARNEY ROBERTSON, **Claimant,** *vs.* STATE OF ILLINOIS, **Respondent.**

Opinion *filed June 11,* **1958.**

HICKMAN AND HICKMAN; AND, PFEIFER, FIXMER AND GASAWAY, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when* **an** *award will be made.* **Where claimant's injuries arose out of and in the course of his employment by the State of** Illinois, **an award may be made under the Workmen's Compensation Act.**

DELANEY, J.

The claimant, Barney Robertson, was employed by the State of Illinois, Department of Public Welfare, at the St. Charles School for Boys intermittently from 1937 until May 11, 1949. On the latter date, he was injured while performing his duties as a Cottage Parent II.

Shortly after 3:00 P.M. on May 11, 1949, claimant was getting onto a farm wagon, when the team pulling the wagon ran away, and he was thrown over a woven wire fence into a field, and rendered unconscious. He was removed to the hospital where it was found that he had fractures of the second, third, fourth, fifth and sixth ribs, and also a fracture of the right clavicle. The claimant alleges that he is totally and permanently disabled due to the accident.

The record in this case consists of the complaint, Departmental Report, transcript of evidence, abstract of evidence, statement, brief and argument of claimant, motion of respondent for an extension of time in which to file its brief, statement, brief and argument of respondent, motion of claimant for leave to reopen proofs for purpose of introducing additional testimony, motion of claimant for an extension of time in which to file reply brief, petition of claimant for rehearing, additional transcript of evidence, and the oral arguments of counsel for the parties hereto.

No jurisdictional question is raised. Respondent and claimant were operating under the Workmen's Compensation Act, and the accident in question arose out of and in the course of the employment.

Dr. Richard M. Johnson, in his testimony, was asked, "Would it be true, Doctor Johnson, that part or some portion of his physical condition would be due

to the accident of which you have had a history?" Dr. Johnson answered this question as follows, "I would say a part of it is due to the accident, and part of it is not."

Dr. James T. Donosky testified that he had examined claimant on December 27, **1952,** and found him suffering from a condition known as "Freidmann's post concussion syndrome, a permanent condition caused by the brain concussion he received as a result of the accident.'' Dr. Donosky testified that "post concussion syndrome is not an organic disturbance. In other words, if we were to go and examine this man's brain, we would find nothing wrong with it, but, functionally, there is something wrong." The symptoms of post concussion syndrome are headaches, dizziness, getting tired easily, and emotional instability. Claimant has all of these symptoms. Dr. Donosky also found that claimant did not have a perfect union when his fractured collar bone was repaired, and that the present fibrous union causes pain with the raising of the arm and shoulder. Claimant was also said to have a pulsating mass in the right side of the neck, just above the right sterno travicular joint, at the time of Dr. Donosky's examination. Further testifying, Dr. Donosky stated that claimant is now unable to earn a living for himself by manual labor.

Claimant testified he was unable to work on his **20** acre farm, or engage in any other kind of gainful employment since his injury.

From the additional medical testimony, we are of the opinion that claimant is permanently disabled, and has not been able, and is not able to do work of any kind.

We conclude, therefore, after a careful considera-

tion of the record, that the claimant is entitled to an award for permanent total disability.

Claimant was **63** years of age, and had no children dependent upon him for support. He returned to work for respondent on August **3, 1948,** and worked until he was injured. At the time of his accident he received **$175.00** per month, and employees in the same classification earn more than **$1,560.00** per year. His compensation rate would, therefore, be the maximum of **$15.00.** Since the injury occurred subsequent to July 1, **1947,** this must be increased 30%, making a compensation rate of **$19.50** per week.

All medical, hospital, and other expenses have been paid by the respondent.

The claimant is, therefore, entitled to an award of **$5,200.00** less the sum of **$572.16,** which sum was paid to claimant for temporary total disability, or a total award of **$4,627.84,** payable as follows:

$3,136.68, which has accrued from May 12, 1949 to June 11, 1952, from which must be deducted the sum of $572.16, making a sum of $2,564.52, which is payable forthwith;

$2,063.32, to be paid in weekly installments of $19.50 per week, beginning June 18, 1952, for a period of 105 weeks with a final payment of $15.82; thereafter a pension for life in the sum of $416.00 annually, payable in monthly installments of $34.66.

Rose Ferando was employed to take and transcribe the evidence at the hearings before Commissioner Summers. Charges in the amounts of **$35.50, $50.00** and **$26.75** were incurred for these services, which charges are fair, reasonable and customary. An award is, therefore, entered in favor of Rose Ferando in the amount of **$112.25,** which is payable forthwith.

This award is subject to the approval of the Governor, as provided by Section **3** of "An Act concerning the payment of compensation awards to State employees".

(No. 4287—Claimant awarded $2,000.00.)

TERRY LEE DUDLEY, A MINOR, ET AL, Claimant, *vs.* **STATE** OF ILLINOIS, Respondent.

Opinion filed June 11, *1952.*

JOHN E. CARLSON AND SIDNEY DAVIDSON, Attorneys for Claimant.

IVAN **A.** ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

MILITARY AND NAVAL CODE—*when* an award will be made. Payments under Public Law **No.** 108 by the United States do not preclude payments by the State **of** Illinois under the applicable sections of the Military and Naval Code.

LANSDEN, J.

On June **12, 1949,** First Lieutenant Leo F. Dudley, Jr., an officer in the Illinois National Guard, while under competent orders, was killed in an airplane crash at the airport at Quincy, Illinois.

Claimant, Terry Lee Dudley, who was born on January 18, **1947,** was the only child and dependent of decedent, and seeks to recover from' respondent under one section of the Military and Naval Code, Ill. Rev. Stat., **1947,** Chap. **129,** Sec. **143,** which reads as follows:

"In every case where an officeror enlisted man **of** the National Guard or Naval Reserve shall be injured, wounded or killed while performing his duty as an officer or enlisted man in pursuance of orders **from** the Commander-in-Chief, said officer or enlisted man, or his heirs or dependents, shall have a claim against the State **for** financial help or assistance, and the State Court **of** Claims shall act on and adjust the same **as** the merits of each case may demand. Pending action of the Court of Claims, the Commander-in-Chief is authorized to relieve emergency needs upon recommendation of a board **of** three officers, one of whom shall be an officer of the medical department."

Betty L. Dudley is the mother of Terry Lee Dudley, and on June **1,1949** she and decedent were divorced. Mrs. Dudley was awarded the custody of Terry Lee, but was allowed no alimony. Decedent was, by the

decree of divorce, ordered to pay Mrs. Dudley the sum of $15.00 per week for the support of Terry Lee, and also to take care of all medical bills for his son.

Decedent's earnings at the time of his death averaged $75-$80 per week in his employment as a printer.

At the time of the hearing of this case, Terry Lee Dudley was receiving $156.10 per month from three sources: (1) $55.10 per month as the beneficiary of his' father; National Service Life- Insurance policy, (2) $43.00 per month from the Federal Security Agency, as a minor child entitled to Social Security Act benefits, and (3) $58.00 per month from the Veterans Administration, as a minor child and dependent of a National Guard officer killed in line of duty in training or active duty under the National Defense **Act,** as amended, within the purview of Public Law 108, 81st Congress, 1st Session, approved June 20, 1949; 32 U.S.C. Sec. 160 a-c.

Public Law 108 was retroactive to August **14,1945,** and extended to members of the U. S. Naval Reserve, U. S. Marine Corps Reserve, Army of the United States, Air Force of the United States, National Guard of the United States, both ground and air, and the federally recognized National Guard of the several States, the same benefits and pension rights as were afforded members of the Regular Navy and Marine Corps, Regular Air Force and Regular Army, if at the time of disabling injury or death members of such reserve components of the armed forces were in line of duty, and engaged in any type of training or active duty under certain specified sections of the National Defense Act, as amended.

Officers and enlisted men of the Illinois National Guard are members of both the National Guard of the

United States, and the federally recognized National Guard of the several States.

It is, therefore, obvious an Illinois National guardsman is covered in most instances by both Federal and State legislation in the event of disabling injury or death, and this Court for the first time is called upon to determine the impact, if any, of Public Law 108 upon the Ill. Rev. Stat., 1947, Chap. 129, Sec. 143.

One of the primary purposes of both Public Law 108 and the applicable section of the Military and Naval Code is to render more attractive to potential members service in the National Guard, and to afford protection to members thereof in activities, which concededly are often extremely dangerous. In other words, both statutes serve as stimulants to voluntary military service, which service is of utmost importance to the safety, welfare and protection of the Nation and the State.

The State of Illinois has since 1909 provided, through awards of this Court, financial help or assistance to guardsmen injured, or the heirs or dependents of guardsmen killed while performing their duties in the Illinois National Guard under competent orders.

Although not as broad in its coverage as the applicable provisions of the Military and Naval Code, Public Law 108 does cover most activities of national guardsmen in a duty status.

That the United States has now seen fit to legislate for the benefit of Illinois National guardsmen does not mean that the State of Illinois cannot do likewise.

We, therefore, hold that payments under Public Law 108 by the United States do not preclude payments by the State of Illinois under the applicable section of the Military and Naval Code.

The section of the Military and Naval Code, under which claimant is proceeding, does not set up a scale of payments. Previously we have used the Workmen's Compensation Act as a guide. *Hall* vs. *State,* **12** C.C.R. 464; *Quigley* vs. *State,* 17 C.C.R. 27. But, in so doing, we have not considered the Workmen's Compensation Act to be either a ceiling over or a floor under our awards. However, we do in this case conclude that the amounts now being received by claimant under Public Law 108 should operate to reduce the amount that might otherwise be awarded.

By the divorce decree above referred to, it was determined that decedent .should pay to his former wife the sum of $15.00 per week for the support of claimant. This amounts to $780.00 per year. In addition, decedent was required to pay all medical bills. Payments to claimant under Public Law 108 amount to $696.00 per year. The insurance and Social Security payments now being received by claimant should, we feel, be disregarded, as they would be under the Workmen's Compensation Act.

Furthermore, as we understand it, payments under Public Law 108 will cease when claimant reaches 18 years of age. Vet. Reg. No. 10, Part VI, foll. Chap. 12, Title 38 U.S.C.

Since claimant will attain his majority approximately 18½ years from the date of his father's death, and the amount now being received under Public Law 108 is less than provided in the decree of divorce, we believe that the merits of claimant's case indicate a need for financial help, and we conclude that claimant is entitled to an award of $2,000.00.

An award is, therefore, entered in favor of claimant, Terry Lee Dudley, payable to Betty L. Dudley,

his mother, next friend and legal guardian, in the sum of $2,000.00.

(Nos. 4337-4338—Consolidated—Claims denied.)

ANTOINETTE SOMMER, ET AL, NO. 4337, AND ALVIN FRIEDERICH, ET AL, No. 4338, Claimants, *vs.* **STATE OF ILLINOIS, Respondent.**

Opinion Pled *June* 11, 1952.

MERYL T. SCHROEDER AND HERBERT F. LILL, Attorneys for Claimants.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

HIGHWAYS—*negligence.* There is no duty on the part of the State of Illinois to maintain the shoulders of its highways in a manner that would insure the safety of vehicles turning off onto the shoulders, and then attempting to return to the roadway, while traveling at the same rate of speed.

SAME—The State is not bound to the same degree of care in the maintenance of its highways, as that required by a City in the maintenance of its streets.

DELANEY, J.

In case No. **4338,** the claimants are Alvin Friederich, his wife, Ethel, his minor children, James and Carol Jean, his brother-in-law, Vernon Middendorf, and his wife, Delores. The State Farm Mutual Auto Insurance Company of Bloomington, Illinois is a claimant, as subrogee to Alvin Friederich.

Shortly after midnight on May **31, 1950,** the claimants were riding in a **1946** Model Chevrolet Tudor Sedan driven by Alvin Friederich. They were returning to Mascoutah, Illinois from a church picnic at St. Libory on a State Highway marked Routes Nos. **43** and **460.** At a point approximately three and one-half miles east of Fayetteville, Illinois, Alvin Friederich turned off of the paved portion of the road onto the shoulder in order to avoid two cars, which were coming toward him abreast. A collision was avoided, but, as

Friederich attempted to return to the pavement, he lost control of his car, which went across the pavement and into a ditch, severely damaging the car and injuring the claimants.

In Case No. 4337, the claimants are Antoinette Sommer, her husband, Lawrence Sommer, and her minor children, Eileen and Raymond Sommer. The State Farm Mutual Auto Insurance Company has expended certain sums on behalf of these claimants, but asserts no rights in this claim.

On June 28, 1950, at approximately 1:30 P.M., Antoinette Sommer was driving a 1947 Model Chevrolet Tudor Sedan, owned by her husband, Lawrence Sommer, and was accompanied by her minor children, Eileen, Raymond and Jerry. Claimants were driving from their home to Albers, Illinois on Highways Nos. 43 and 460, between Fayetteville and St. Libory. At a point near the place where the Friederichs' accident occurred, Antoinette Sommer drove off of the pavement, and, in attempting to return to it, lost control of the car, which went across the road off of the shoulder, turned over, went across a ditch, and came to a stop with its wheels headed in the opposite direction from which it had started. The car was severely damaged, and all of its occupants, except Jerry Sommer, were injured.

The claimants in each of these cases contend that the State of Illinois was negligent in maintaining the highway, marked Routes Nos. 43 and 460 between Fayetteville and St. Libory, in such a manner that the shoulder was lower than the paved portion, and they seek to recover for the injuries sustained in the respective accidents.

The respondent contends that, although the claim-

ants were licensed and privileged to use the public highways, they used them subject to the restrictions legally placed upon such use, and that the statutes required the vehicles in these cases to be driven upon the right half of the pavement, and as the vehicles in these cases were not so operated, the claimants cannot recover herein. The respondent further contends that the fact that the shoulder was depressed, so that it was lower than the pavement along the highway where the accidents complained of herein occurred, merely created a condition, and the subsequent acts of a third person caused the injury.

The record consists of complaint in Cases Nos. **4337** and **4338,** amended complaint in Case No. **4338,** transcript of evidence, claimants' exhibits Nos. **1 - 13,** inc., respondent's exhibits A and B, abstract of evidence, brief and argument of claimants, statement, brief and argument of respondent, reply brief of claimants, and oral arguments of all of the parties concerned herein.

Vehicles upon highways, which are paved, are required to be driven upon the right half of the pavement, except in certain situations.

(A). Section **54** of the "Uniform Act Regulating Traffic on Highways" provides as follows:

"Upon all roadways of sufficient width **a** vehicle shall be driven upon the right half **of** the roadway, except as follows:

1. When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement;

2. When the right half of a roadway is closed to traffic while under construction or repair;

3. Upon **a** roadway divided into three marked lanes for traffic under the rules applicable thereon; or

4. Upon **a** roadway designated and sign posted for one way traffic.

5. Whenever there is a single tract paved road on one side of the public highway and two vehicles meet thereon, the driver on whose right is the wider shoulder shall give the right-of-way on such pavement to the other vehicle."

Par. 151, Chap. 95½, Ill. Rev. Stat., **1949.**

(B). The terms "roadway" and "improved highway" are defined by Section 12 as follows:

"(d) Roadway. That portion of a highway improved, designed, or ordinarily used for vehicular travel.

(e) Improved highway. Whenever the term 'improved highway' is used in this Act, it shall be construed to include roadways of concrete, brick, asphalt, macadam and gravel."

Par. 109, Chap. 95½, Ill. Rev. Stat., 1949.

Both of the cases before this Court present the question of the duty of the respondent, the State of Illinois, in the maintenance of the shoulder of its highways.

We do not feel respondent has a duty to maintain the shoulders of its highways in a manner that would insure the safety of vehicles turning off onto the shoulder, for whatever their purpose might be, and then attempting to return to the roadway, while traveling at the same speed. We do not feel that the State of Illinois is bound to the same degree of care in the maintenance of its highways as required by a city in the maintenance of its streets.

A close examination of the record does not show negligence on the part of the respondent, the State of Illinois, and for the reasons assigned, the claims must be denied, and the causes of action herein dismissed.

(No. 4370—Claimant awarded $1,369.36.)

ANNIE L. MARSHALL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 11, 1966.

SIDNEY S. SCHILLER, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*When an award will be made.* Where claimant's injuries arose out of and in the course of her employment by the State of Illinois, an award may be made under the Workmen's Compensation Act.

LANSDEN, J.

Claimant, Annie L. Marshall, seeks to recover from respondent under the Workmen's Compensation Act for injuries, which resulted from an accident that arose out of and in the course of her employment as an attendant at the Chicago State Hospital, operated by the Department of Public Welfare. No jurisdictional questions are involved.

On November 13, 1951, an opinion was filed in this case giving claimant a substantial award. On December 7, 1951, respondent filed a petition for rehearing, which was granted on January 8, 1952, and the case was remanded to Commissioner Anderson for the taking of further testimony, after a physical examination of claimant by a doctor of respondent's choosing. The final hearing was had in this case on April 4, 1952. Over twice as much testimony was heard on rehearing as at the original hearing on June 7, 1951.

On July 17, 1950, claimant was assisting in the bathing of a patient, and, when lifting the patient, weighing around 200 pounds, she injured her back by reason of which she was hospitalized thirteen days at the institution's hospital. After returning to work, claimant again injured her back on August 12, 1950, when she slipped and fell on a wet floor.

From the record there is no serious dispute between claimant's and respondent's doctors. By objective and subjective symptoms, and X-Rays, an agreed diagnosis of acute aggravation of pre-existing arthritis in the lumbar region was arrived at. The permanency of such condition of ill being is conceded, and that such con-

dition has rendered claimant permanently and partially disabled is apparent.

Claimant is, therefore, entitled to an award under Section 8 (d) of the Workmen's Compensation Act. In arriving at the amount thereof, the reduced earning capacity of claimant must be determined. *Franklin County Coal* Co. vs. *Ind. Corn.*, **398 Ill.** 515.

Prior to her accident, claimant earned $135.00 per month, or $1,620.00 on an annual basis. Subsequent to her accident she worked in a candy store, but the record discloses that she was able to work only about three quarters of the time she was supposed to. Her average weekly earnings subsequent to her accident were $27.00 per week, or $1,404.00 on an annual basis. The annual differential in her earning capacity is, therefore, **$216.00,** or $4.15 per week.

On the date of her accident, claimant was **34** years of age, married, and had, four children under 18 years of age dependent upon her for support. The names and ages of such children are Sidney McKennie, 16, Herbert Marshall, Jr., 15, Jesse Marshall, 13, and Delores Marshall, **12.** The legitimacy of any of these children is immaterial. *Marshall* vs. *Ind. Corn.*, **342** Ill. 400.

Medical services and appliances were furnished, and paid for only in part by respondent. Claimant paid Dr. S. I. Weiner, Chicago, Illinois, the sum of $25.00 for X-Rays and treatments in an attempt to be cured and relieved of the effects of her injuries, but she still owes Dr. Weiner the sum of $65.00.

During her period of hospitalization, claimant was paid her full salary, which in this case exactly equals her rate of compensation of $30.00 per week. However, such payment of $58.50 will have to be credited against the award hereinafter made.

William J. Cleary & Co., Court Reporters, Chicago, Illinois, was employed to take and transcribe the testimony at the hearings before Judge Delaney and Commissioner Anderson. Charges in the amounts of $60.80 and $138.80, respectively, were incurred, which charges are reasonable and customary. An award is, therefore, entered in favor of William J. Cleary & Co. for $199.60.

Under Section 8 (d) of the Workmen's Compensation Act, an award may not exceed a death award, or extend for more than 8 years, or 416 2/7 weeks. Since claimant's differential in earnings per week is $4.15, one-half is, therefore, $2.08, which must be increased by 65%, making a weekly rate of $3.43, Payments for 8 years will not equal a death award, and, therefore, payments hereunder must cease at the end of 8 years.

An award is entered in favor of claimant, Annie L. Marshall, under Section 8 (d) of the Workmen's Compensation Act for permanent partial disability in the amount of $1,427.86, less the sum of $58.50 already paid, or a net award of $1,369.36. In addition, claimant is entitled to awards of $25.00 and $65.00, respectively, for medical expenses paid or incurred by her. These awards are payable as follows:

$25.00, which is payable forthwith to claimant for medical expenses;

$65.00, which is payable forthwith to claimant for the use of Dr. S. I. Weiner for medical expenses;

$340.06, less payments of 88.50 already made, or the sum of $281.56, which has accrued, and is payable forthwith;

$1,087.80, which is payable in weekly installments of $3.43 per week, commencing on June 18, 1952, for a period of 317 weeks, plus one final payment of $0.49.

Jurisdiction of this case is specifically reserved for the entry of such further orders as may from time to time be necessary.

These awards are subject to the approval of the Governor. Ill. Rev. Stat., **1949,** Chap. **127,** Sec. 180.

(No. 4413—Claimant awarded $4,987.52.)

SYLVIA PULLEY, WIDOW, ET AL, Claimant, *vs.* **STATE OF ILLINOIS,** Respondent.

Opinion filed November 13, 1961.
Supplemental opinion filed June 11, 1952.

R. W. HARRIS, AND POWLESS AND WINTERS, **Attorneys** for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent,.

WORKMEN'S COMPENSATION ACT—*when an award will be made.* Where the death of claimant? intestate arose out of and in the course of his employment by the State of Illinois, an award may be made.

SAME—deduction of recovery in civil proceedings. Where a civil action arose out of the same accident, resulting in a judgment or settlement in favor of claimant, such sums will be deducted from any award made by the Court of Claims under the provisions of the Workmen's Compensation Act.

DELANEY, J.

Sylvia Pulley, widow of Guy Pulley, deceased, Marvin Pulley, a minor, Yvonne Pulley, a minor, Robert Pulley, a minor, Margaret Pulley, a minor, and Wesley Carrol Pulley, a minor, by Sylvia Pulley, their mother and next friend, filed their complaint on March **26, 1951** for compensation under the provisions of the Workmen's Compensation Act.

The record consists of the complaint, Departmental Report, original stipulation filed in lieu of evidence, containing various exhibits, and copy of the stipulation filed in lieu of evidence.

Mr. Pulley was first employed by the Division of Highways on March **14, 1949** as a common laborer at

a salary of ninety cents an hour. On July 1, 1949, his wage rate was increased to one dollar an hour; and, on May 1, 1950, Mr. Pulley was appointed to the job of highway section man with a salary of $224.00 a month.

Mr. Pulley worked continuously during his period of employment with the Division of Highways, and earned a total sum of $2,428.00 in the year preceding his injury. Mr. Pulley had five children under 18 years of age dependent upon him for support at the time of his accident. The Division has paid no compensation for temporary disability.

On January 30, 1951, Mr. Pulley worked at his regular maintenance duties. At approximately 4:00 P.M. on that date, snow began to fall in the area of his maintenance section. Mr. Pulley and a fellow employee, Mr. Jeff Cagle, attached a blade snow plow to the truck assigned to Mr. Pulley, and began to plow snow from a section of the highway assigned to him for maintenance. Mr. Pulley's assistant, Herman Pratt, was instructed by a superior to go home and get some rest, and relieve Mr. Pulley later during the evening. At approximately 10:25 P.M., Mr. Pratt and Mr. Pulley met at the Division of Highways' maintenance shed on the west side of S.B.I. Route No. 166 about four miles south of S.B.I. Route No. 13 in Williamson County. Mr. Pratt had stopped his car on the driveway leading to the maintenance shed. Mr. Pulley was plowing snow in a northerly direction on S.B.I. Route No. 166. As he came to Mr. Pratt's car, he drove the truck partially off the paved portion of the highway, and stopped parallel to the centerline of the highway. Mr. Pratt came from the west side of the highway, preparatory to taking charge of the truck. There were no

obstructions of any kind to traffic in the west lane. As the change of drivers was taking place, Mr. Pratt noticed headlights of a vehicle approaching from the north. The changing of position of the headlight beams suggested to Mr. Pratt that the south bound vehicle was not entirely under control. As a measure of safety, Mr. Pratt ran across the pavement to the west shoulder of the highway. Mr. Pulley elected to stand on the left running board of the Division truck. As the south bound vehicle, a truck loaded with coal; was about to pass the Division truck, it swerved or skidded into the left side of the Division vehicle, crushing Mr. Pulley between the vehicles.

Mr. Pulley suffered severe crushing injuries of his left arm, chest, and head. Immediately following the accident, a third truck, which was also approaching from the north, was flagged to a stop. Mr. Pulley was placed in the third truck, and taken to the Holden Hospital at Carbondale, where Dr. Ben Fox attended him. Death occurred at approximately 12:05 A.M., January **31,** 1951, shortly after Mr. Pulley was brought to the hospital.

Dr. Ben Fox submitted the following report to the Division of Highways:

"Nature of injury—Crushing injury, left chest; partial avulsion, Ieft hand. Treatment—Patient moribund on admission. X-Ray—None made. Date patient was discharged—Expired1/31/51—12 :05A.M."

'Decedent's compensation rate will, therefore, be $30.00 per week.

Claimants are entitled to an award of $8,500.00 under Section 7, Paragraphs (a) (h) **(3)** of the Work-. men's Compensation Act.

An award is, therefore, made to claimant, Sylvia **Pulley,** as widow of Guy Pulley, and as mother **and**

next friend of Marvin Pulley, a minor, Yvonne Pulley, a minor, Robert Pulley, a minor, Margaret Pulley, a minor, and Wesley Carrol Pulley, a minor, in the sum of $8,500.00, payable as follows:

$1,221.43, which has accrued, is payable forthwith;

$7,278.57, payable in weekly installments of $30.00, commencing on November 23, 1951 and continuing for 242 weeks, with a final payment of $18.57.

All future payments, being subject to the provisions of the Workmen's Compensation Act, jurisdiction is hereby reserved in this cause for the entry of such further order or orders as may from time to time be necessary.

This award is subject to the approval of the Governor, as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees".

SUPPLEMENTAL OPINION

DELANEY, J.

On November 13, 1951, an award was entered by this Court in favor of claimants in the sum of $8,500.00, under Section 7, Paragraphs (a) (h) (3) of the Workmen's Compensation Act.

Subsequent thereto, respondent filed a petition to modify said award by reason of an action in the Circuit Court of Williamson County, Illinois, No. 22-51, entitled Edgar L. Pulley, Administrator of the Estate of Guy Pulley, Deceased, Plaintiff vs. George W. Phillips, Defendant, wherein a judgment was entered in favor of Edgar L. Pulley, as Administrator of the Estate of Guy Pulley, Deceased. Said judgment was satisfied in full on June 29, 1951, and a copy of the release has been filed in this cause. Sylvia Pulley, the widow, received the sum of $1,985133 as a result of the settle-

ment, and five of deceased's children under 16 years of age, namely, Marvin Pulley, Yvonne Pulley, Robert Pulley, Margaret Pulley and Wesley Carroll Pulley, received the sum of $305.43 each as a result of the settlement, or a total settlement of $3,512.48.

The proceedings in the Williamson County Circuit Court for the injuries resulting in the death of decedent, Guy Pulley, arose out of the same accident for which the action was brought in this Court.

From the award granted herein on November 13, 1951 must be deducted the sum of $3,512.48. The total award granted claimants, Sylvia Pulley, Marvin Pulley, Yvonne Pulley, Robert Pulley, Margaret Pulley and Wesley Carroll Pulley, is, therefore, $4,987.52.

The settlement received from the death claim in the Williamson County Circuit Court equals approximately 117 2/5 weeks. 117 2/5 weeks from the day after the accident in January of 1951 is April 26, 1953. Considering Leap Year, no further compensation payments can be made claimants until April 26, 1953.

An award is, therefore, entered in favor of claimants, Sylvia Pulley, Marvin Pulley, Yvonne Pulley, Robert Pulley, Margaret Pulley and Wesley Carroll Pulley, payable as follows:

$4,987.52, payable in weekly installments of $30.00 per week for 166 weeks commencing May 3, 1953, with one final payment of $7.52.

The future payments hereinabove set forth being subject to the terms of the Workmen's Compensation Act of Illinois, jurisdiction in this cause is hereby retained for the purpose of making further orders that may from time to time be necessary.

The award is subject to the approval of the Governor, as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees".

(No. 4451—Claimant awarded $1,275.96.)

ROBERT ISHAM, Claimant, *vs.* **STATE OF ILLINOIS,** Respondent,

Opinion filed June 11, 1952.

D. F. RUMSEY, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; CHARLES H. EVANS, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when an award will be made.* **Where claimant's injuries arose out of and in the course of his employment by the State of Illinois, an award may be made under the Workmen's Compensation Act.**

DELANEY, J.

Robert Isham, claimant, filed his complaint on June 28, 1951, seeking an award under the provisions of the Workmen's Compensation Act for an injury to his left foot, as the result of an accident arising out of and in the course of his employment at the Southern Illinois University, Carbondale, Illinois.

On December 28, 1950, claimant, employed by respondent as a guard, stepped on a mat inside the school canteen. The floor was highly polished. The mat slipped, causing claimant to fall, and his left leg hit the wall and baseboard. His left leg and ankle were broken in three places.

Claimant was treated by Dr. John S. Lewis. Respondent has paid the following medical and hospital bills for claimant: Dr. John S. Lewis, $176.50; hospital bill of $71.50, and ambulance service of $15.00.

No question has been raised by respondent as to the compliance by claimant with all the jurisdictional requirements of the Workmen's Compensation Act, and from the record in this case all such requirements have apparently been complied with.

At the time of the accident, claimant had no children under 16 years of age dependent upon him

for support, and the earnings of claimant during the year immediately preceding his injury amounted to **$2,316.00.** His compensation rate would, therefore, be the maximum of **$15.00.** Since the injury occurred subsequent to July **1, 1949,** this must be increased 50%, making a compensation rate of **$22.50** per week.

The record consists of the complaint, Departmental Report, stipulation waiving briefs of both parties, and transcript of evidence.

Examination by Commissioner Summers of this Court of claimant's left foot at the time of the hearing showed the ankle to be completely immobile, and increased in size, which had not been reduced by treatment.

Neither the claimant nor the respondent produced a medical report of claimant's treatment by Dr. Lewis. In the absence of this report, it is the opinion of our Commissioner from his examination of claimant's left foot that he has suffered a 50% loss of use of his left foot, as a result of the injury he received December **28,** 1950.

We find that claimant is entitled to an award for a 50% permanent loss of use of his left foot; under Section **8,** Paragraph (e) (14), Workmen's Compensation Act, for **67½** weeks. Therefore, claimant is entitled to **67½** weeks at **$22.50** per week, or the sum of **$1,518.75.**

Claimant was entitled to temporary total disability from December **28, 1950** to March **5, 1951,** a total of **9 3/7** weeks, at his compensation rate of **$22.50 per** week, or the sum of **$212.13.** The evidence shows that during the period of temporary total disability the claimant was paid the sum of **$454.92,** or his full salary. From the total award must be deducted the sum of

$242.79, representing an overpayment of money 'paid by respondent to claimant for temporary total compensation, leaving a balance of **$1,275.96.**

An award is, therefore, entered in favor of claimant, Robert Isham, in the sum of **$1,275.96,** all of which has accrued, and is payable forthwith.

An award is also entered in favor of Nina Lee Patton for stenographic services in the amount of **$12.45,** which is payable forthwith. The Court finds that this is a fair, reasonable and customary charge, and said claim is allowed.

This award is subject to the approval of the Governor, as provided in Section **3** of "An Act concerning the payment of compensation awards to State employees".

(No. 4470—Claimant awarded $226.00.)

ERNEST E. FROST, Claimant, *vs.* **STATE OF ILLINOIS,** Respondent.

Opinion filed June 11, 1952.

LOUIS ROCKWELL, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; **WILLIAM H. SUMPTER,** Assistant Attorney General, for Respondent.

CIVIL SERVICE ACT—payment of salary during period of unlawful discharge. **Where employee is reinstated by the Civil Service Commission, he is entitled to an award for salary during the period of his unlawful discharge.**

SCHUMAN, C. J.

The claimant, Ernest E. Frost, seeks to recover for one month's wages in the amount of **$226.00** by reason of a ruling of the Civil Service Commission reinstating him to his position.

Claimant was employed as a House Father at the Illinois State Training School for Boys, and entered the classified Civil Service on July **13, 1939.**

On September 8, 1949, claimant was dismissed under an alleged suspension, and suspended for a period of thirty days from September 9, 1949 to October 8, 1949. A suspension notice, dated September 8, 1949, was served on claimant, and the reason given, as set, out in said notice, was "On April 4, 1949, the Institutional doctor declared that you are unable to carry out the duties of a Cottage Parent II due to physical incapacity. On April 9, 1949, an electro-cardiograph examination also indicated a physical incapacity to cope with the duties involved in the position of Cottage Parent II, both physical and emotional. *It* is *therefore necessary to dismiss* you." (Emphasis supplied). This suspension notice was offered and admitted in evidence as claimant's exhibit No. 1.

On October 7, 1949, a hearing was had concerning this matter before Guilford R. Windes, hearing officer of the State Civil Service Commission.

A letter, dated January 31, 1952, from Fred K. Hoehler, Director, addressed to Honorable Ivan A. Elliott, Attorney General, containing excerpts from the finding of the State Civil Service Commission, was offered and received in evidence as claimant's exhibit No. 2. A copy of the decision of the State Civil Service Commission was offered and received in evidence as claimant's exhibit No. 3. On page 9 of said decision, there appears "it is the decision of the hearing officer that the written charges of inability to carry out the duties of Cottage Parent due to physical incapacity were not sustained by the evidence submitted." On pages 9 and 10 of said decision, there also appears "the Commission finds that said hearing officer was duly appointed; that the hearing conducted by said hearing officer was public; that the employee was

present in person, represented by counsel, and called witnesses in his own defense, and the Commission, after considering the record in this cause, and the findings and decision of the hearing officer, hereby approves said findings and decision, and certified them to the Director of Public Welfare for action in accordance herewith. Dated at Springfield, Illinois, the 22nd day of November, 1949." Restoration of claimant to the payroll was effective as of October 9, 1949.

There was no question raised about the willingness and availability of claimant to work, nor any other defense by a pleading. There was no dispute as to the earnings of the claimant being **$226.00** a month.

The Civil Service law was amended in 1949, and the pertinent amendment is as follows (Sec. 14, Chap. 24½, S.H. Rev. Stat.):

"No officer or employee in the classified service of the State who shall have been appointed under said rules and regulations and after said examination —shall be removed or discharged or suspended for a period of more than thirty (30) days except for cause."

The above statute apparently gives an appointing officer the right to remove, discharge or suspend an employee for thirty days, but, if for longer, a hearing must be had by the Commission.

The State is correct in its contention that the Act of 1949 did not provide for payment of compensation in the event the Commission ordered a reinstatement.

However, the Act was amended in 1951 to correct this situation, and it now reads as follows (Sec. 14, Chap. 24½, S.H. Rev. Stat.):

"If the Commission certifies a decision that an officer or employee is to be retained in his position and if it does not order a suspension for disciplinary purposes, the officer or employee shall receive full compensation for any period during which he was suspended pending the investigation of the charges."

If the claimant had been suspended for thirty days, there could be no question that he could not recover. However, a suspension of thirty days was not contemplated, as his notice of suspension was a dismissal. For all practical purposes, claimant was dismissed as of September 9, 1949, and written charges were preferred against him.

The statute provides that, where an employee is discharged for more than thirty days, a hearing is required by the Civil Service Commission within thirty days from the date of the suspension. There are no other written charges that appear in the record, other than the notice of suspension. This notice was, therefore, the written charge for cause.

On the hearing before the Civil Service Commission, the Commission ordered claimant restored to his position, finding that there was not sufficient cause for his discharge. For this reason, claimant was unlawfully discharged.

Under the repeated decisions of this Court, claimant is entitled to an award.

Claimant's salary at the time of his discharge was $226.00 per month. He is entitled to payment of this salary from and including September 9, 1949 to and including October 8, 1949, or one month.

An award is, therefore, entered in favor of the claimant in the sum of $226.00.

(No. 4471—Claimant awarded $204.00.)

ALTA FROST, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 11, 1952.

LOUIS ROCKWELL, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

CIVIL *SERVICE* ACT—*payment of salary during period of unlawful discharge.* Where an employee was reinstated by the Civil Service Commission, an award for salary for the period of the unlawful discharge was made on authority of Ernest Frost vs. State of Illinois, supra.

Sam — suspension for less than thirty days. No recovery can be had for salary during period of unlawful suspension, where the period of unlawful suspension does not exceed thirty days.

SCHUMAN, C. J.

The claimant, Alta Frost, seeks to recover wages for forty-seven days by reason of a ruling of the Civil Service Commission reinstating her to her position. The amount claimed is $306.00.

This case is controlled by the opinion in the Ernest E. Frost case. Claimant, Alta Frost, and Ernest E. Frost are husband and wife, and apparently are employed together as house parents, and the removal or discharge of one involves the other.

There is one exception in this case. The first suspension notice was for a period of seventeen days, and did not involve or require a hearing before the Commission, and was not a discharge as she admittedly was paid in September for eight days. Her discharge was effective by the second suspension notice, setting forth a suspension from September 9, 1949 to October 8, 1949. For this reason, the suspension being for less than thirty days, no recovery can be had for this period of seventeen days, being the period from August 15, 1949 to August 31, 1949.

Claimant, however, is entitled to an award for her unlawful discharge covering the period of thirty days from September 9, 1949 to October 8, 1949 in the amount of $204.00.

An award is, therefore, entered in favor of the claimant in the amount of $204.00.

(No. 4490—Claimants awarded $1,200.00 and $500.00, respectively.)

J. W. CURRAN AND WORLD FIRE AND MARINE INSURANCE COMPANY, A CORPORATION, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June *11, 1952.*

MOREY C. PIRES, Attorney for Claimants.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

DAMAGES—*evidence of cost of restoration.* It is proper to consider the cost of restoration, but when it exceeds the value of the property, the value of the property becomes the ceiling on the amount of damages recoverable after a proper deduction has been made for salvage.

LANSDEN, J.

These claims are based upon Sec. 372a, Chap. **23, Ill.** Rev. Stat., 1951 entitled **"An** Act concerning damages caused by escaped inmates of charitable, penal and reformatory institutions over which the State has control", reading as follows:

"372a. Claims for damages caused by escaped inmates of charitable, penal and reformatory institutions.] § 1. Whenever a claim is filed with the Department of Public Welfare or the Department of Public Safety for payment of damages to property, or for damages resulting from property being etolen, heretofore or hereafter caused by an inmate who has escaped from a charitable, penal or reformatory institution over which the State of Illinois has control while he was at liberty after his escape, the Department of Public Welfare or the Department of Public Safety, as the case may be, shall conduct an investigation to determine the cause, nature and extent of the damages inflicted, and if it be found after investigation that the damage was caused by one who had been an inmate of such institution and had escaped, the said Department may recommend to the Court of Claims that an

sward be made to the injured party, and the Court of Claims shall have power to hear and determine such claims. As amended by act approved Aug. 2, 1951. L. 1951, p. 1892, S.B. No. 535."

The above quoted statute and Section 8 A of the Act creating the Court of Claims, Ill. Rev. Stat., 1951, Chap. 37, Sec. 439.8, specifically confer jurisdiction upon this Court to determine the claims herein involved.

This Court has made awards under the statute prior to its amendment in 1951 when it related only to damages done by escaped inmates of charitable institutions, *Carls* vs. *State*, 15 C.C.R. 26-29; *Johnson* vs. *State*, 15 C.C.R. 126; *Hassell* vs. *State*, 18 C.C.R. 199.

The record in this case consists of the complaint, Departmental Report, transcript of evidence, commissioner's report, and stipulation waiving briefs of both parties, an examination of which discloses the following:

On October 9, 1951, one Stanley Pastewski, then an inmate of Dixon State Hospital, Dixon, Illinois, escaped from the institution, and wandered into an area nearby, known as Riverview, Assembly Park, Dixon, Illinois.

Although he did not own the land upon which it was located, claimant, J. W. Curran, owned a four-room frame dwelling in Assembly Park, upon which claimant, World Fire and Marine Insurance Company, had issued a fire insurance policy in the amount of $500.00.

Pastewski entered the dwelling, found a match and some paper, started a fire upstairs, and then carried some burning paper downstairs, where he ignited an old piece of furniture and more paper. He then went outside, sidled off, watched the fire trucks arrive, and the firemen put out the blaze, and then strolled on

until apprehended, and returned to the institution. Pastewski "liked to see" fires.

Claimant, Curran, promptly made claim to the Department of Public Welfare. An investigation waa conducted, and the liability of respondent established. Said Department has recommended to this Court that the extent of claimant's damages be determined.

As to claimant, World Fire and Marine Insurance Company, an award will be entered for $500.00, since the company paid claimant, Curran, the full amount of its fire policy, and Curran executed a subrogation receipt to such company for such amount.

Manifestly, claimant, Curran, is also entitled to an award, but from the evidence and the law we must determine the amount thereof. It should be borne in mind that there is in this case no question of damages to land, because Curran did not own the land upon which the house rested.

In 1945 Curran bought the house for $1,000.00, when it was at least 20 years old. During the next 6 years, he expended $500.00 to $600.00 for improvements, consisting of wiring, plumbing, roofing, papering, and exterior and interior painting. From 1945 to October, 1951, there was a general appreciation in value of all buildings, which were properly maintained, as was Curran's house.

Curran paid $56.00 per year as rent for land upon which the house was located, and had received $25.00 per month in rent until September, 1951, when the house was vacated, because Curran was going to move it approximately 3 miles to another location, since the landowner needed the lot for a subdivision development.

Although Curran sought to establish a value considerably higher, the insurance man, who wrote the

$500.00 fire policy, testified he would have insured the structure for **$2,000.00.** Pictures introduced in evidence showed the size, type of construction and general condition of the house.

We, therefore, conclude that just before the fire Curran's house was worth **$2,000.00.**

Evidence was also introduced that it would cost **$3,285.00** to restore the house to its former condition.

Although Curran is entitled to the benefit of the rule of law "that that valuation should be adopted, which will be most beneficial to the injured party, as he is entitled to the benefit of his premises intact", *Richards* vs. *Gundlach,* **245** Ill. App. **264,267,** no measure of damages can ever be applied, which would give anyone a profit from a casualty.

It is, of course, proper to consider the cost of restoration, *Fitz Simons* vs. *Braun,* **199** Ill. **390,** but when the cost of restoration exceeds the value of the property, the value of the property becomes the ceiling on the amount of damages recoverable, especially when the building is old. *McCormick on Damages (Hornbook Series)* **1935,** Sec. **126,** pp. **482-484;** Cf. *Chicago & N. W. Ry.* Co. vs. *Davis,* 78 Ill. App. **58.** Certain Illinois cases indicate that this is the rule to apply in this case, for they permit the measure of damages to be the cost of restoration, if such can be done readily and at a relatively modest expense. *Clark* vs. *Public Service* Co., **278** Ill. App. **426, 447,** and cases cited therein; *Cooper* vs. *Kanlcakee Elec. Light* Co., **164** Ill. App. **581, 586.**

The question of the value of the salvage is somewhat troublesome. The Departmental Report fixes it at $500.00. Curran, and others, testified that he had advertised the salvage for sale at $250.00, and found no bidders; and that the labor to dismantle the re-

mainder of the house would exceed the value of the salvage. Commissioner Anderson, who viewed the damaged house, and whose complete description of the structure has been of great value in the preparation of this opinion, expresses an opinion that the salvage is worth $300.00. The pictures in evidence corroborate Commissioner Anderson, and we, therefore, conclude that the salvage should be valued at Commissioner Anderson's figure.

Curran has, therefore, been damaged to the extent of $1,200.00, which is the value of the building, $2,000.00 less insurance received of $500.00, and salvage worth $300.00.

An award is, therefore, entered in favor of claimant, J. W. Curran, for $1,200.00.

An award is also entered in favor of claimant, World Fire and Marine Insurance Company, for $500.00.

(No. **4068—Claimant swarded** $2,500.00.)

HENRY C. MOORE, Claimant, os. **STATE OF ILLINOIS, Respondent.**

Opinion filed March 9, 1951.
Petition of Respondent for rehearing denied April 10, 1961.
Petition of Respondent to reconsider its petition for rehearing denied July 8, 1952.

JOHN R. SNIVELY, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; JAMES C. MURRAY, A. ZOLA GROVES, WILLIAM J. COLOHAN, WILLIAM H. SUMPTER, AND ROBERT J. BURDETT, Assistant. Attorneys General, for Respondent.

CONVICTS—*incarceration not a bar to maintaining action.* **A conviction for a felony** does **not bar a convict from prosecuting a claim before the Court of Claims while in such status.**

HEALTH AND SAFETY ACT—*convict not an employee within the meaning of the Act. A* **convict cannot be considered an employee under Section 137.2 of the Act,**

because the employment relationship contemplated by the statutes is a voluntary one for wages, which relationship is terminable by either party.

NEGLIGENCE—*jurisdiction.* Under Section 8C of the Court of Claims Act, the State waived its tort immunity, allowing the doctrine of respondeat superior to be applied to its negligent exercise of governmental functions.

SAME—*standard of care required of State.* The State is held to the same degree of care in this case, as it, by law, compels others to abide by.

SAME-SAME—*defenses not available.* In this case, where a convict was not occupying a position of independence, the State cannot raise the defense of contributory negligence, or assumed risk.

SAME-SAME-SAME—*evidence.* 'Where evidence showed that State assigned a convict without proper instructions to work on a food grinder, which was not equipped with a hopper, such procedure amounted to actionable negligence, entitling claimant to an award.

LANSDEN, J.

Claimant, Henry C. Moore, seeks to recover from respondent for its negligence, while claimant was a convict at the so-called "Old Prison" of the Illinois State Penitentiary, Joliet, Illinois.

On October 6, 1945, claimant began to serve a sentence for larceny at such penitentiary. His cause of action arose on January 30, 1946. On October 2, 1946, claimant was transferred from the Old Prison to the Stateville Branch, and on October 30, 1946, he was released on parole. On March 13, 1947, he was returned to said place of confinement under a new sentence, and also as a parole violator.

Claimant filed his case on January 27, 1948, while confined in the penitentiary, and the hearing of the case was held at the penitentiary.

We have previously held that a convict can maintain an action in this Court, and that a conviction for a felony does not bar a convict from prosecuting a claim before this Court, while in such status.

In *McElyea* vs. *State,* 7 C.C.R. 69, we said:

"The law of this State gives unto a prisoner serving a sentence in any penal institution the right to sue or be sued in the Courts of this State during the period

of such confinement. A convict does not lose his personal rights because of his imprisonment although he is deprived by law of certain rights of citizenship. Therefore, as he possessed said personal rights the claimant was entitled, able and free to exercise them, even though he was confined in the penitentiary."

In *Robertson* vs. *State,* No. **4211,** opinion filed February **14, 1950,** we followed the *McElyea* case.

Claimant can, therefore, maintain his action. See also *Gordon* vs. *Garrson,* **77** F. Supp. **477.**

Prior to the **1945** Court of Claims Act, no convict could recover for negligence from respondent, because it was held that the operation of penal institutions was a governmental function, and, therefore, the doctrine of *respondeat superior* could not be applied. *Monohan* vs. *State,* **10** C.C.R. **10;** *Hewlett* vs. *State,* **13** C.C.R. **27.**

However, Section **8** C of the **1945** and present Court of Claims Act reads as follows:

"All claims against the State for damages in cases sounding in tort, in respect of which claims the claimants would be entitled to redress against the State of Illinois, at law or in chancery, if the State were suable, and all claims sounding in tort against The Board of Trustees of the University of Illinois; provided, that an sward for damages in a case sounding in tort shall not exceed the sum of $2,500.00 to or for the benefit of any claimant. The defense that the State or The Board of Trustees of the University of Illinois is not liable for the negligence of its officers, agents, and employees in the course of their employment shall not be applicable to the hearing and determination of such claims."

We have held that such Section constitutes a complete waiver by the State of its immunity from liability in tort for the negligent exercise of **a** governmental function, and that the doctrine of *respondeat superior* can be applied against respondent in an action based on negligence. *Rickleman* vs. *State,* No. **4195,** opinion filed October 20, **1949.**

We shall hereinafter refer to said Section 8 C of the **1945** Court of Claims Act as it applies to another phase of the case, but, at this point in our opinion, **we** merely observe that said Section affords claimant an

opportunity to have his claim heard, and to obtain an award, if the facts of the negligence of respondent are established.

Claimant's amended complaint contained three counts. Respondent's answer thereto amounted to a general denial, and no affirmative defenses were set forth therein.

All of these counts seek substantial damages for personal injuries sustained by claimant, who, as an inmate performing duties in the general kitchen at the State Penitentiary at Joliet, sustained serious injuries by reason of his left hand being caught by the worms of a food grinding machine. Count I charged respondent with negligence in permitting grease, oil, soap, water and other slippery material to accumulate on the floor of the kitchen on which claimant slipped ,and lost his balance. Count II charged respondent with negligence in that (a) it assigned him to work under unsafe conditions, (b) failed to give claimant proper instruction in the use of the grinder, or warn him of the dangers thereof, (c) 'failed to provide adequate or proper safeguards for the grinder, (d) operated the grinder without adequate or proper safeguards, and (e) failed to furnish adequate help or assistance to operate the grinder. Count III charged respondent with violation of a rule adopted by the Industrial Commission pursuant to the Health and Safety Act, which provides that meat, fish and other food grinders shall be provided with a hopper of such size and arrangement that the operator's fingers cannot come into contact with the cutting or feeding knives or worm.

As to Count I, we shall not set forth the evidence in detail. There is some conflict therein, but, in our opinion, the greater preponderance of the evidence

discloses that the floor of the kitchen was comparatively dry, and that all reasonable steps had been taken to remove any slippery substances therefrom. Claimant cannot, therefore, prevail as to Count I of his complaint.

As to Counts II and III, about the only fact not in dispute is that a hopper was not attached to the food grinder at the time claimant's left hand was caught in the worm thereof, and so badly mangled that most of his first, second and fourth fingers, and all of his third finger had to be amputated. There were crushing injuries to the palm and tendons of claimant's hand, and one metacarpal bone was fractured.

On the day of the accident, claimant and others assigned to work in the kitchen reported for work after breakfast. First claimant with some other convicts scrubbed, mopped and dried the kitchen floor. Then claimant was directed by Officer R. L. Palmer, Assistant Steward of the institution, to break macaroni. Upon completion of this task, Officer Palmer directed claimant to prepare a relish of pickles and tomatoes, which required use of the electrically operated food grinder.

The knives and worm of the food grinder were kept under lock and key. Officer Palmer got them out, and assisted claimant in assembling the machine.

Once the grinder was assembled, claimant began dipping pickles, dill, tomatoes and liquid out of a can with his right hand, and poured them into the mouth of the grinder with his left hand. He used a wooden mall or chuck that fitted into the oval-shaped mouth of the grinder to tamp the unground food toward the worm to insure and accelerate the grinding process.

After processing some of the relish, which came out of the end of the grinder and dropped into a can, claimant slipped, or stumbled, and his left hand, which

was wet, slipped from the chuck, went down the mouth of the grinder, and there his fingers were caught by the worm, as a result of which he suffered the above described injuries.

The principal dispute in the record involves the availability of a hopper to be placed over the mouth of the grinder, so that an accident of this kind could absolutely be prevented from happening.

The evidence tends to show that a hopper was provided for the grinder, but the Departmental Report on file herein makes no mention of a hopper.

Officer Palmer testified that near the grinder there was a sign posted, which stated: "Do not put your hands in the grinder; always use the wood chucks." Claimant testified that the sign was not put up until after his accident happened. Whether the sign was posted before or after the accident is immaterial, since the wording thereof corroborates the conclusion, which we draw, that the use of the hopper was not insisted upon, or required.

Testimony in the record as to instructions given to claimant further substantiates the conclusion that the use of the chuck was mandatory, but the hopper not, and specific instructions were limited to the chuck in connection with its use with the grinder. The absolute safety afforded by the use of the hopper was not included in the instructions, and it is apparent that the failure of such instructions to include the mandatory use of the hopper was most significant in this case.

Count III is predicated solely on the violation of a rule of the Industrial Commission relating to hoppers for food grinders made pursuant to the Health and Safety Act. Ill. Rev. Stat., 1945, Chap. 48, Sec. 137.1,

et. seq. By Section **137.5** such rules have the force and effect of law.

However, the principal question is whether claimant, as a convict, is in a position to claim the benefits of such statute.

Section **137.2** makes said statute applicable "to all employees engaged in any occupation, business or enterprise in this State, and their employees" with certain exceptions not applicable herein.

Statutes similar to the Health and Safety Act have been on the statute books of this State for many years. Some, such as Laws **1909,** page 202, antedated the Workmen's Compensation Act, and were statutory steps leading to the passage of the latter Act. These statutes were construed to apply to the ordinary relationship of employer and employee, and divested employers of the defenses of assumed risk and contributory negligence in actions brought by employees thereunder. *Streeter* vs. *Western Scraper* Co., **254** Ill. **244.**

With the passage of the Workmen's Compensation Act, certain employments became subject to that statute rather than the previous laws.

This Court has held that a convict is not an employee of the State within the meaning of the Workmen's Compensation Act. *Tiller* vs. *State,* **4** C.C.R. **24.3.** Such holding is consistent with similar holdings from other jurisdictions. *Greenes Case,* **280** Mass. 506; *Lawson* vs. *Travelers' Ins. Co.,* **39** Ga. App. **85.** The basis of such cases is that the employment relationship contemplated by the statutes is a voluntary one for wages, which relationship is terminable by either party. **A** convict cannot meet such a test.

We, therefore, conclude that claimant has no right of action under the Health and Safety Act, since he

cannot be considered as an employee within the contemplation thereof.

As to Count II, we have a different situation. Count II stated a cause of action for the specified acts of negligence. The failure of respondent to test the sufficiency of such allegations of negligence by a motion to dismiss, impliedly, if not expressly, concedes that, if proven, claimant should recover.

Claimant has, in our opinion, proven that he was ordered and assigned to work under unsafe conditions, and that he was not instructed as to the proper 'use of the food grinder, and warned of the dangers thereof. Such omissions on the part of respondent amount to actionable negligence.

Although we have held that claimant cannot sue for a violation of the Health and Safety Act, the fact that respondent itself, acting through the Industrial Commission, has determined that food grinders not mandatorily equipped with hoppers are dangerous to those using them, is an express recognition by respondent that food grinders should be equipped with hoppers to be rendered safe.

We will not create an anomaly by holding that a food grinder without a hopper used by private persons is dangerous, while a similar unequipped grinder used by respondent is not dangerous. Respondent should in this case be held to the same standards, as it by law compels others to abide by.

Furthermore one of the cardinal tenets of the prison system in this State is that convicts, should, if not incorrigible, be trained, so that upon release they can enter industry. 111. Rev. Stat., 1945, Chap. 108, Secs. 10, 74, 76. Although the use of power driven machinery is held to a minimum in penitentiaries, Ill.

Rev. Stat., 1945, Chap. 108, Sec. 78, training in the use of approved safety devices would seem to be one phase of rehabilitating a convict to enter honest employment upon release from imprisonment.

Respondent, however, seeks to invoke the doctrine of assumed risk and contributory negligence against claimant. We do not feel that either defense is available in this case.

Claimant, as a convict, was required to take orders, and carry them out. To refuse to do so would subject him to disciplinary action, and the forfeiture of his limited privileges, including prompt consideration for parole. Thus, he did not occupy a position of independence, which a person outside a penitentiary occupies. His choice of action being limited, he, therefore, kept silent and did as he was ordered. In fact, he did not possess, under the circumstances in this case, the freedom of choice inherent in the doctrines of assumed risk and contributory negligence. We do not, however, hold that such doctrines can never be asserted against a convict, but merely conclude that they do not apply in this case.

The suggestion has been made that, if we grant an award in this case, other convicts will be encouraged to inflict injuries on themselves, and then sue the State for damages.

However, the New York Court of Claims has granted awards to convicts based on negligence of the agents and servants of that State, and an examination of the reported cases does not disclose any such disposition on the part of convicts since the initial award was made to a convict. *Robinson* vs. *State,* 273 N.Y.S. 465; *Bhullar* vs. *State,* 289 N.Y.S. 41; *Revelant* vs. *State,* 300 N.Y.S. 1186; *Scarnato* vs. *State,* 298 N.Y. 376.

Since this is a case of first impression in this State, we have carefully considered all questions raised, and discussed most of them. We conclude that claimant is entitled to an award.

As to damages, Section 8 C of the Court of Claims Act limits recovery in cases sounding in tort to **$2,500.00.**

Claimant's injuries were undoubtedly extremely painful. He was hospitalized for over a month. He has lost about 75% of the use of his left hand. In civilian life he was a truck driver, and earned $50.00 to $70.00 per week. We conclude that claimant is entitled to an award of **$2,500.00, 46** A.L.R. **1230, 1294, 1304.**

An award is, therefore, entered in favor of claimant, Henry C. Moore, in the sum of **$2,500.00.**

(No. 4364—Claimant awarded $1,500.00.)

ANTHONY HROMA, Claimant, *vs.* **STATE OF ILLINOIS, Respondent.**

Opinion *filed* **July** *8, 1952.*

GEORGE W. **Mc** GURN, BURTON H. YOUNG AND **JOHN** J. RIORDAN, Attorneys for Claimant.,

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

CONVICTS—*personal injuries.* **Where evidence showed that the wrong method and equipment were** used **to slaughter a cow, negligence was proven on the part of the State of Illinois, entitling claimant to an award.**

SCHUMAN, C. J.

This claim is brought by Anthony Hroma, who was injured while confined at the Illinois State Penitentiary, Pontiac Branch.

The undisputed facts show that claimant was assisting in slaughtering a cow under the supervision of Oscar Wilmeth, dairy manager, on May **17, 1950,**

and suffered an injury, which resulted in the amputation of his right finger.

There is some dispute as to who struck the blows in an attempt to kill or stun the cow. Claimant testified Wilmeth did, and Wilmeth testified some other inmate did the striking. There is no dispute that a sledge hammer of the ordinary variety was used, and that the cow was struck at least four times. The third blow broke the sledge hammer, and the cow fell to the floor under a door where it could slide into the slaughtering room. Claimant assisted in holding the door on the cow, and Wilmeth left to secure another sledge hammer. Upon his return he ordered the door opened, and struck the cow. The blow caused the head of the cow to jerk and strike the door, and claimant's finger was caught thereby.

Claimant states he had no previous experience in slaughtering operations. Wilmeth testified claimant had observed slaughtering operations. All agree that claimant was performing duties under orders and instructions of his overseers.

John Bussa, an expert in "knocking cattle", testified that the type of hammer used by Wilmeth, or some other person, would only daze the animal, and not kill it; and that the reason for a smaller surface hammer is to hit the "brain box", a particular spot on the animal's forehead, for the purpose of killing; and, the "brain box" being such a small area, the type of sledge hammer used on the occasion in question would diffuse the blow, and not kill the animal.

The evidence shows Wilmeth, was an overseer of slaughtering for 17 years; that when he struck the cow it flounced and hit the door; that Wilmeth did not strike the three original blows, but that they were

struck by inmates. There was no evidence to show what experience the inmates had, and, after striking the cow three times, Wilmeth ordered them to strike it again, whereupon he was informed the sledge hammer had broken.

The evidence shows that proper equipment for slaughtering was not used. According to Wilmeth he could not see the knocking operation, and, after the animal had been hit several times, he, himself, ran and got a sledge hammer, but there is no testimony that he warned claimant, or observed the position of his hands.

This manner of slaughtering a full grown cow created a highly dangerous situation. The claimant was trying to help in subduing the cow, and was injured by acts of persons beyond his control. It is the Court's opinion that it was negligenee on the part of the State in the method and equipment used. The claimant, under the circumstances, could not be guilty of contributory negligence. He did what he was told to do, and was thereby injured.

The medical testimony shows an impairment of the function of the hand. It shows that claimant was hospitalized for eleven days, suffered a good deal of pain, and that, when he strikes the stump of the finger, it causes a shock in his arm, and his grip is impaired; and, that the injury has interfered with his work as a brick mason. One of the doctors testified that further removal of the finger stump should be made to relieve pain from an exposed nerve.

To deny a recovery to this claimant would be to say that he could be placed in an enclosure of danger created by the acts of the employees of the State; and, that claimant was guilty of contributory negligence,

because in holding down an infuriated cow he had his finger in the wrong place.

From the facts in this case, claimant is entitled to recover.

An award, is, therefore, entered in favor of claimant in the amount of **$1,500.00.**

(No. 4422—Claimant awarded $4,953.00 and Life Pension.)

WILLIAM WILLIAMS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 13, 1962.
Petition** of **Claimant for** lump **sum settlement denied July 8, 1952.

ROBERT J. SAUNDERS, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION *Act when an award will be made.* Where claimant's injuries arose out of and in the course of his employment by the State of Illinois, an award may be made under the Workmen's Compensation *Act.*

DELANEY, J.

William Williams, claimant, filed his claim herein on April **11, 1951,** wherein he alleges that on September **6, 1950** he was employed by the respondent at Grand Marais Park, St. Clair County, Illinois, as a watchman. On the above date, in the course of his employment and while inspecting garages, he slipped on a round piece of wood and fell. As a result of the fall, he fractured his left leg at the hip.

The record consists of the complaint, Departmental Report, transcript of evidence, claimant's X-Ray exhibits Nos. **1** and **2,** reporter's bill, motion of claimant for an extension of time in which to file abstract of evidence, order of Chief Justice granting claimant an extension of time in which to file abstract of evidence,

abstract of evidence, motion of claimant for leave to reopen proofs for purpose of introducing additional testimony, order of Chief Justice granting claimant's motion for leave to reopen proofs for the purpose of introducing additional testimony, Supplemental Departmental Report, original transcript of additional testimony, containing claimant's exhibit No. 3, copy of transcript of additional testimony, and statement, brief and argument of claimant.

No jurisdictional question is raised. Respondent and claimant were operating under the Workmen's Compensation Act, and the accident in question arose out of and in the course of the employment. Respondent furnished complete surgical, medical and hospital treatment.

The question to be considered is the extent of permanent disability suffered by Mr. Williams.

Mr. Williams was a widower, and did not have any children dependent upon him for support. He was first employed by respondent on December 31, 1949, and received a salary of $8.00 per day, well in excess of $1,560.00 per year. His compensation rate would, therefore, be the maximum of $15.00; since the injury occurred subsequent to July 1, 1949, this must be increased 50%, making a compensation rate of $22.50 per week.

Claimant returned to work on February 15, 1951, and answered telephones to relieve another employee, who was going on vacation. Claimant was brought to and from work. On November 7, 1951, Mr. Ray Hubbs, Park Superintendent, wrote Mr. Williams as follows:

"You can understand, I am sure, that in a park as large as Grand Marais, it is necessary to have men who are strong and physically active. As a result of your broken hip, it was, of course, not possible for us to use you in your capacity as night watchman, or in any other active employment. For these reasons, when the season slackened, we felt it advisable to discontinue your employment."

The final date of claimant's employment was September 15, 1951.

Dr. Robert E. Shea testified at the hearing of this cause as follows:

"The physical examination revealed a well developed, well nourished, elderly white male, who walked with a decided limp in his left leg, and complained particularly of pain after climbing the flight of stairs to my office. The physical examination was essentially negative except for the lower back and left leg. The lower back showed a moderate degree of muscle spasm in the lumbar-sacro region involving the post vertebral erector muscle. This seemed to be compensatory in nature and due to the fact that Mr. Williams is required to bear most of his weight on the right leg in order to prevent pain from developing in the left hip because of weight bearing on that limb. Upon measuring the length of the legs, it was found that there is approximately two and a half centimeters, or one inch, foreshortening of the left leg, and a compensatory pelvic tilt making up somewhat for the shortening of the left leg. He was wearing a shoe at the time that was built up approximately two centimeters to aid the compensation of the foreshortening. The hip joint itself was limited in all directions, probably by virtue of an arthritic condition resulting from the fracture within the joint itself. All functions of the trunk and hip joint are limited more than fifty percent, probably due to the arthritic condition of the healing process along with the spastic state of the muscles and ligaments about the joint and the effect of the foreshortening of the leg in the healing process. There was approximately sixty percent disuse atrophy of the quadratus femoris muscle groups of the left leg resulting from the long application of traction and disuse. Any function, such as bending, stooping, sitting, or rising from a sitting position, bending the trunk laterally from one side to the other, are markedly decreased in function because of the result of the healing process of the fractured site. Reflexes in the left leg decidedly depressed and patient is melancholy in attitude.

I thought the man was permanently and totally incapacitated insofar as gainful employment is concerned for the future where any industry or corporation is involved, although he is able to get about in a rather clumsy fashion with the aid of a cane. I do not believe he will ever reach a state where he may be able to hold a job to allow him to maintain himself at the present cost of living. I doubt seriously if there will be any improvement in the condition of this patient, and, if anything, I believe there will be greater foreshortening of the leg because of the healing process, and another build up of his shoe will be required to make up for the foreshortening. If this is not done, a curvature of the back with a rotary displacement of the vertebral column in the region of the lower extremities will develop and the patient will have a permanent sclerosis—curvature of the back.

If this callous increases in size continuously, the man is going to have shortening and loss of any function of the hip joint. He is going to develop a painful joint which may require further surgery. The pelvic tilt will become more aggravated due to weight bearing. The lower back is going to develop curvature or sclerosis, and the man is going to be an invalid. If, after a period of a year, this process is continuous, be must be declared totally and permanently disabled.

He will have no use of that limb at all, and pain of the joint itself will make him an invalid. He is not far from that right now."

Dr. Frank Bihss testified as followed:

"The exhibit 1 reveals an oblique projection of the hip. The oblique projection in this means the patient is turned at approximately a forty-five degree angle and having his right hip overlying the left in order that you can visualize the back portion of the left hip in this particular case. This reveals a healed intertrochanteric fracture. That is part of the femur, which is between the base of the neck and the shaft, and the trochanteric are the greater and lesser. The greater trochanteric is pronounced on the outer portion of the shaft where the muscles insert, and the lesser trochanteric is the smaller boney protuberance present on the inner portion of the shaft, and the fracture right at that junction therefore is described as an intertrochanteric fracture. It is healed with a coxa vara deformity. The normal angle has been somewhat impaired and giving an adduction type of deformity. We call that a coxa vara deformity. In other words, here, with some impaction. The lesser trochanteric is displaced immediately upward and you can see a large amount of callous in the lesser trochanteric. That is the oblique projection."

From the undisputed medical testimony, and other evidence in the record, it is shown that the claimant is permanently disabled, and is not able to do work of any kind, and that his physical condition will become progressively worse. We feel his unsuccessful attempt at returning to work to answer telephones shows his inability to gain employment.

Claimant purchased a pair of built-up shoes for the sum of **$25.00,** and he should be reimbursed for this amount.

We conclude, therefore, that the claimant is entitled to an award for permanent total disability.

The claimant is, therefore, entitled to an award of **$6,000.00,** plus reimbursement of **$25.00** for built-up shoes, making a total of **$6,025.00,** less the sum of **$1,072.00,** which was paid for non-productive time, or **a** total award of **$4,953.00,** payable as follows:

$1,998.57, which has accrued from September **7,1950** to May **13, 1952 from** which must be deducted the sum of **$1,072.00,** making a sum of **$926.57,** which is payable forthwith; **$4,026.43** to be paid in weekly installments of **$22.50** beginning **May 20, 1952** for **a** period of **178** weeks with **a** final payment of **$21.43;** thereafter

a pension for life in the sum of $480.00 annually, payable in monthly installments of $40.00.

An award is also made to Henry P. Keefe for stenographic services in the amount of **$67.60,** which is payable forthwith. The Court finds that this is a fair, reasonable and customary charge.

This award is subject to the approval of the Governor, as provided in Section **3** of "An Act concerning the payment of compensation awards to State employees".

(No. 4418—Claimant awarded $7,500.00.)

NEVA T. COMBS, WIDOW, ET AL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed July 8, 1952.

HANAGAN AND HANAGAN, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; ROBERT S. HILL AND CHARLES H. EVANS, Assistant Attorneys General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when an award will be made.* **Where ewidence showed that the death of claimant'sintestate arose out of and in the** course **of his employment by the State of Illinois, an award may be made under the Workmen's Compensation Act.**

DELANEY, J.

This complaint was filed on June **19, 1951** by claimants, Neva T. Combs, widow of Virgil L. Combs, deceased, and Lynn Darlene Combs and Michael Lee Combs, minor children of Virgil L. Combs, deceased, by Neva T. Combs, their mother, natural guardian, and next friend, seeking an award under the provisions of the Workmen's Compensation Act.

The record consists of the complaint, motion **of** respondent for an extension of time in which to file pleadings, order of Chief Justice granting respondeint

an extension of time in which to file pleadings, Departmental Report, and transcript of evidence.

No jurisdictional question is raised. Respondent and claimant were operating under the Workmen's Compensation Act, and the accident in question arose out of and in the course of the employment.

Deceased, Virgil L. Combs, was first employed by the Division of Motor Carriers as a motor carrier inspector on May 25, 1949, and had been so employed to the date of his death on June 9, 1951. The record shows deceased left two children under 18 years of age. His earnings for the year prior to his death were $3,059.00.

The record further shows that on the afternoon of June 9, 1951 deceased started from his home at West Frankfort, Illinois to deliver some ST-1 cards to the Matt & Dalton Garage at Christopher, Illinois, and, about three miles west of the city limits of West Frankfort, his car left the pavement, and went into a ditch on the side of the highway. Within a short time thereafter Mr. Combs died due to a subdural hemorrhage caused by an injury to the meningeal artery.

Deceased's compensation rate would be the maximum of $15.00. Section 8 (j-3) of the Workmen's Compensation Act provides for a weekly maximum payment of $16.00 in the case of two minor children, and, since the injury occurred subsequent to July 1, 1949, this must be increased 50%, making a compensation rate of $24.00 per week.

The claimants are entitled to an award under Section 7 (A-H-3) of the Workmen's Compensation Act in the amount of $7,500.00, payable as follows:

$1,350.86, which has accrued from June 10, 1951 to July 8, 1952, is payable forthwith;

$6,149.14, to be paid in weekly installments of $24.00 beginning July 15, 1952 for a period of 256 weeks, with a final payment of $5.14.

Marguerite Holman was employed to take and transcribe the evidence at the hearing before Commissioner Frank M. Summers. Charges in the amount of $50.00 were incurred for these services, which charges are fair, reasonable and customary. An award is, therefore, entered in favor of Marguerite Holman in the amount of $50.00, which is payable forthwith.

All future payments being subject to the terms and provisions of the Workmen's Compensation Act of Illinois, jurisdiction of this cause is specifically reserved for such further orders as may from time to time be necessary.

This award is subject to the approval of the Governor, as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees'".

(No. 4502—Claimant awarded $184.36.)

ROBERT GOETHUYS, Claimant, *vs.* **STATE OF ILLINOIS, Respondent.**

Opinion filed *July 8*, 1952.

JOHN W. PREIHS, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; CHARLES H. EVANS, Assistant Attorney General, for Respondent.

NEGLIGENCE—*failure of brakes on* **respondent's** *truck.* **Where evidence showed that the proximate cause of the collision was the failure of the brakes on respondent's truck, an award will be made for damages.**

DELANEY, J.

On November 9, 1950, the claimant, Robert Goethuys, was driving his Willys Jeep, pulling a trailer, on Route No. 66, in a southerly direction, near the intersection of said Route No. 66 with Route No. 113S near Braidwood, Illinois. Claimant approached the stop sign,

and, as he proceeded to stop, was struck from the rear by a truck of the Department of Public Safety, which was transporting bread from the Stateville Prison Bakery to the prison at Pontiac, Illinois. The truck was driven by an employee of the respondent, State of Illinois.

Claimant's trailer was demolished, and twenty-five cases of beer were lost for a total damage of **$184.36.**

The record consists of the complaint, stipulation waiving briefs of both parties, and transcript of evidence.

The testimony of the claimant indicates that the brakes of respondent's truck failed, causing the accident, and the respondent did not introduce any evidence.

The negligence of respondent's employee was the proximate cause of the accident, and claimant is entitled to be compensated for his damages.

'An award is, therefore, hereby entered in favor of claimant, Robert Goethuys, in the amount of **$184.36.**

(No. 4505—Claimant awarded $180.00.)

SPRINGDALE CEMETERY ASSOCIATION, AN ILLINOIS CORPORATION, Claimant, *vs.* **STATE OF ILLINOIS,** Respondent.

Opinion filed July 8, 1952.

SPRINGDALE CEMETERY ASSOCIATION, AN **ILLINOIS CORPORATION,** Claimant, pro se.

IVAN A. **ELLIOTT,** Attorney General; C. **ARTHUR NEBEL,** Assistant Attorney General, for Respondent.

PURCHASES—*payment after lapse of appropriation.* Where **evidence showed** that **work was completed during time appropriation was in existence, the cost was reasonable, and funds were available to pay claimant, if statement had** been **presented in apt time, an award will** be **made.**

LANSDEN, J.

In **1949,** the 66th General Assembly appropriated funds to pay for the erection and installation of Government markers at the graves of deceased veterans, buried in Illinois.

Claimant, Springdale Cemetery Association, an Illinois Corporation, during the period from September, 1950 to May 1951, caused 18 such markers to be erected and installed at its cemetery in Peoria County, at an expense of $10.00 per marker.

By the time claimant requested reimbursement, said appropriation had lapsed, and its bill could not be paid. Claimant is, therefore, compelled to proceed in this Court.

All of the facts in this case have been stipulated, and such stipulation is hereby approved.

The Military and Naval Department concedes that the 18 markers were erected during the time the appropriation was alive; that the $10.00 charge, per marker is just and reasonable; and that funds were available to reimburse claimant had its bill been presented in apt time. Said Department has recommended that claimant be reimbursed.

From the foregoing, and based upon similar cases in this Court, claimant is clearly entitled to an award. *Elmwood Cemetery* Co. vs. *State,* No. **4268,** opinion filed December 15, 1950; *Roselawn Memorial Park* vs. *State,* No. **4327,** opinion filed December 15, 1950.

An award is, therefore, entered in favor of Springdale Cemetery Association, an Illinois Corporation, in the sum of $180.00.

(No. 4513—Claim denied.)

RICHMOND INSURANCE COMPANY OF NEW YORK, SUBROGEE OF MAURICE SHIFRIS, Claimant, *vs.* **STATE OF ILLINOIS, Respondent.**

Opinion filed July 8, 1962.

ARNOLD F. BERGER AND SAMUEL LEVIN, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; CHARLES H. EVANS, Assistant Attorney General, for Respondent.

JURISDICTION—*limitations.* **Where claim is not filed within two years after it accrues, the Court is without jurisdiction to entertain it.**

LANSDEN, J.

On August **17,1948,** claimant, Richmond Insurance Company of New York, was the insurer against collision damage of an automobile belonging to one Maurice Shifris.

On that day, a collision occurred on the South Side of Chicago between the Shifris vehicle, and a truck, owned by respondent, and operated by an employee of the Division of Highways.

On September **27, 1948,** claimant liquidated its liability under an insurance policy for **$1,900.00,** and took from Shifris a subrogation receipt.

On March **28, 1949,** attorneys for claimant wrote the Division of Highways concerning the collision, and, on April **1, 1949,** Earl McK. Guy, Engineer of Claims for said Division, replied to said letter denying all liability, and suggested that a claim be filed in this Court.

Claimant filed its complaint herein on May **14, 1952,** alleging that its loss, arising from the accident on August **17,1948,** was due to the negligence of respondent.

On May 21, 1952, respondent filed a motion to dismiss the action on the ground that this Court. is without jurisdiction to hear and determine the case, because it was filed more than two years after the claim, upon which it was based, accrued.

Section 22 of the Court of Claims Act, Ill. Rev. Stat., 1951, Chap. 37, Sec. 439.22, clearly and unequivocally provides that a claim of this type is forever barred unless it is filed within two years of its accrual.

Claimant, having filed its complaint almost four years after the accident occurred, has filed same too late, and this Court is without jurisdiction to entertain the claim. *Weber* vs. *State,* 19 C.C.R. 33; *Robertson* vs. *State,* 19 C.C.R. 146.

The motion of respondent to dismiss is sustained, and the complaint and the case are both dismissed.

(No. 4365—Claim denied.)

BUILDICE COMPANY, INC., A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 18, 1952.

BLUM AND SANG, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER AND HARRY K. O'MELIA, Assistant Attorneys General, for Respondent.

CONTRACTS—*construction.* Where evidence showed that final payment wan accepted, and there was a provision in the contract with reference to the acceptance of final payment waiving all claims, such provision is a binding provision on the parties, and a bar to the claim filed herein.

SCHUMAN, C. J.

The claimant, Buildice Company, Inc., a Corporation, filed its claim in this Court seeking to recover damages for unreasonable delay by the State in per-

mitting it to commence work under a contract dated October 17, 1946.

The contract was to install a refrigeration system in the Kankakee State Hospital, Kankakee, Illinois, at a total cost of $19,340.00. It is conceded claimant was to complete the work in 300 calendar days, but could not commence work until April 15,1950, and, by reason thereof, sustained damages over and above the contract price in the amount of $5,984.00, as listed in exhibit "B" attached to claimant's complaint.

The contract specifically provided under Article IV that the General Conditions of the contract, the specifications, etc., formed the contract. Under the General Conditions of the contract, Article **25,** it is provided :

"The making and acceptance of the final payment shall constitute a waiver of all claims by the owner, otherwise than under Article **15** of these conditions or under requirements of the specifications, *and* of all *claims by the contractor,* except those previously made and still unsettled. (Emphasis Supplied.)"

In the case of *Herlihy Mid-Continent Company* vs. *Sanitary District,* 390 Ill. 160, the Court, on page **166,** said:

"In construing a contract, the primary object is to ascertain the intention of the parties. *(Decatur Lumber and Mfg. Co.* vs. *Crail,* **350 Ill. 319.)** That intention must be determined from the language in the contract. If the intention may be ascertained from the wording of the contract, rules of construction have no application. *(Domeyer* vs. *O'Connell,* **364** Ill. **467.)** No words can be added to or taken from a contract and thereby change the plain meaning of the parties as expressed therein. *(Stevens* vs. *Felman,* **338 Ill. 391.)** Nor may the courts engage in surmises as to what the parties intended but which they failed to express."

The contract in this case is clear and explicit in stating that final payment bars all claims, and cannot be changed by any wording or construction outside of its own terms.

Claimant, in its brief, concedes that the cases cited by it of *Underground Construction Company* vs. *Sanitary*

District, 367 Ill. 360, and the *Herlihy Mid-Contineni! Co.* vs. *Sanitary District, supra,* denied recovery where the contract provided that no damages may be allowed from delays caused by defendant. The contract in the instant case is much broader in effect, when it provides that the acceptance of final payment waives all claims of the contractor. This Court has construed provisions relating to acceptance of final payments in a number of cases. *S. G. Cool Company* vs. *State,* **17** C.C.R. 138; *Urich* vs. *State,* 8 C.C.R. 212; *Midwest Construction Company* vs. *State,* **9** C.C.R. **443;** *Henkel Construction Company* vs. *State,* 10 C.C.R. 538; *Strandberg and Son* Co. vs. *State,* 13 C.C.R. **49.** All of the cases cited, while the language of the contract may vary, have held that the acceptance of final payment constituted a full release.

The contract in this case, as previously cited, stated that the making and acceptance of final payment constituted a waiver of all claims by the contractor. There is no dispute that a check in the amount of $4,340.00 was accepted as final payment, as shown by the exhibits in evidence in this case.

Respondent's exhibit No. 3-b discloses that claimant submitted the required guarantee form to receive its final payment of $4,340.00, and nowhere in the evidence, or in the exhibits, is it shown that claimant advanced any amount for damages due to delay.

The provision of the contract with reference to the acceptance of final payment waiving all claims is a binding provision on the parties, and a bar to the claim filed herein.

An award is denied, and the claim dismissed.

(Nos. 4393-4394—Consolidated—Claims denied.)

WILLIAM WINSTON AND PATRICK CLANCY, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 12, 1952.

CHARLES A. BELLOWS, Attorney for Claimants.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

COVENANT NOT TO SUE—*where an employer released.* **Where action is based on doctrine of respondeat superior, covenant not to sue executed with employee is a bar to action against the employer, as it would be indirectly violated by employer's right *to* reimbursement from employee.**

SCHUMAN, C. J.

On December **16, 1949,** at about 3:30 P.M., John M. Flahive was driving his **1947** Plymouth Sedan automobile north on Torrence Avenue toward the intersection of 147th Street in Calumet City, Cook County, Illinois. In his automobile were William Winston, seated next to the driver, Patrick Clancy, seated at the right, and, Thomas Flisk, seated at the left in the rear seat.

John M. Flahive and his passengers had been to Gibson City, Indiana on Union business for the Brotherhood of Railway and Steamship Clerks. All of said parties were officials of said Union.

The undisputed facts show that the intersection was protected by traffic lights, and, as Flahive approached, the light turned to green in his traffic lane, and a car ahead of him went across the intersection. At said time Stanley Glowexenski, a maintenance patrolman, employed by respondent in its Department of Public Works and Buildings, Division of Highways, was operating a dump truck loaded with cinders in an easterly direction on 147th Street. The State truck failed to stop, and Flahive's car struck it. The truck driver made statements to witnesses, which is corrobor-

ated by respondent's Departmental Report, that he saw the red light and applied his brakes, but that they failed to hold, and both cars approached the intersection at the same time.

As a result of the collision, complaints were filed by Patrick Clancy and William Winston for personal injuries sustained in the collision.

From the undisputed facts, there is no question that the proximate cause of the collision and resultant injuries were due to the negligence of the respondent, through its agent and servant, and no further details of any facts causing said collision are deemed necessary.

The cases were consolidated for trial, and so heard, and will be considered as consolidated by the Court.

The pertinent question in this case is the effect of the covenant not to sue executed by both claimants to Stanley F. Glowezenski, employee of the respondent. The liability of the respondent can only be predicated on the theory of respondeat superior. While both employer and employee may be sued jointly in Illinois, they are not considered joint tort feasors, and, in the event of the employer having to pay for any damages due to the negligence of his employee, he may recover said sum from the employee. The covenant not to sue does not reverse a cause of action against the employer, but only says it does not operate as a release to Stanley F. Gloweeenski. In the event respondent would have to pay additional damages, it could sue its employee for the amount it had to pay, and, would, therefore, involve the employee in litigation to respond its damages, which the covenant was supposed to guard against.

In *Purple Swan Lines* vs. *Egyptian Transportation Co.*, *256* Ill. App. **442,** the Court, on page **444,** said:

"An employee is directly liable to his employer for any damages occasioned by his negligence, whether such damage be direct to the property of the employer, or arise from the compensation which the employer has been obliged to make to third persons for injuries sustained by them; 18 R.C.L. 502."

In *Griffiths and Son* Co. vs. *Fireproofing* Co., *310* Ill. 331, the Court, on page 339, said:

"The further general principle is announced, however, in many cases, that where one does the act which produces the injury, and the other does not join in the act but is thereby exposed to liability and suffers damage, the latter may recover against the principal delinquent, and the law will inquire into the real delinquency, and place the ultimate liability upon him whose fault was the primary cause of the injury."

There is no reason why the rule above enunciated does not apply to the facts in this case. The rule as applied would, if a recovery is allowed against respondent, authorize a cause of action against the covenantee, and, in effect, defeat the very purpose of the covenant. In the case of *Karcher* vs. *Burbank, Et Al,* Mass. 21 N.E. (2d) 549, as reported in 124 A.D.R. 1292, the Court, on pages 1296-1297, said:

"The Company's liability is of a derivative or secondary character, resting solely upon the doctrine of respondeat superior. *Pangburn* vs. *Buick Motor* Co., 211 NY 228, 234, 105 NE 423. The Company was, in effect, the plaintiff's surety, and could, therefore, recover over against him if compelled to pay damages for his negligence while he was acting as its agent within the scope of his authority. *Kramer* vs. *Morgan,* 2 Cir., 85 F (2d) 96. See *Pittsley* vs. *Allen, Mass., 7 NE* (2d) 442. It is a principle of the law of suretyship that a release or covenant not to sue the person known by the covenantor to be the principal will discharge the surety. *Potter* vs. *Green,* 6 Allen 442, 444. See 2 Williston on Contracts (Rev. Ed.) s. 342; compare *Tobey* vs. *Ellis,* 114 Mass. 120; see *Matheson* vs. *O'Kane,* 211 Mass. 91, 94, 95, 97 NE 638, 39, LRA (NS) 475, Ann Cas 1913B, 267. But such a covenant not to sue does not so operate where it contains an express reservation of the covenantor's rights against others. *Sohier* vs. *Loring,* 6 Cush. 537; *Hutchins* vs. *Nichols,* 10 Cush. 299. *Kenworthy* vs. *Sawyer,* 125 *Mass.* 28. In the case at bar the covenant contained no such reservation. Whether or not the defendants knew of the relationship between the plaintiff and the Company when the covenant was entered into, they must have known, on the record that is before us, that any claim they might then have against the Company on account of the plaintiff's negligence would be of a derivative character. Although the result of granting injunctive relief to the plaintiff has the effect of releasing the Company, nevertheless we are of the opinion that this does not amount to a denial of the correctness of the result reached in the

Johnson case. Compare *New York Central Railroad* vs. *William Culkeen & Sons Co.*, 249 Mass. 71, 144 NE 96. *Wells Fargo & Co.* vs. *Taylor*, 254 US 175, 41 S. Ct. 93, 65 L.Ed. 205.

The defendant's covenant was at least an undertaking "to forever restrain from . . . in any way aiding any claim" against the plaintiff. If they should recover judgment in their actions against the Company, a possible cause of action against the plaintiff will have been created. Although these actions are against the Company, the defendants must know that, in theory at least, the ultimate loss in the event that damages are recovered will fall upon the plaintiff, and that under the principle stated in *Levinton* vs. *Poorvu*, Mass. 200 NE 9, the plaintiff, if he does not take over the defense of the actions against the Company, may be bound by any judgment recovered. It has been said, in discussing the effect of a covenant not to sue that "the intention of the parties is carried out by allowing the creditor to take judgment at law, leaving the party who holds the covenant to his remedy in equity for a specific performance, by which he is fully protected not only from paying any more directly, but, if there be sureties, by restraining the creditor from collecting any amount out of them, because that would subject him to their action, and thus indirectly violate the covenant, or, if there be other principal obligators, by restraining the collection of any more than an aliquot part of the debt, or any amount that would subject the party to an action for contribution." "

In the case of *Losito* vs. *Kruse*, 136 Ohio St. 183, 24 N.E. (2d) 705, and annotated in 126 A.D.R. 1194, the Court, on page 1197, said:

"A settlement with and release of the servant will exonerate the master. Otherwise, the master would be deprived of his right of reimbursement from the servant, if the claim after settlement with the servant could be enforced against the master. *Herron* vs. City of *Youngstown*, Ohio Sup. 24 NE (2d) 708; *Bello* vs. City of *Cleveland*, supra; *Brown* vs. *Town of Louisburg*, 126 NC 701, 36 SE 166, 78 Am. St. Rep. 677."

The form of the covenant not to sue, limiting its effect to the employee only, amounts to a release, and necessarily a bar to a cause of action by claimants herein.

For the reasons above assigned, both claims are hereby denied.

(No. 4410—Claim denied.)

LOREN PERRY AND NAOMI PERRY, Claimants, *vs.* **STATE OF ILLINOIS,** Respondent.

Opinion filed September 12, 1952.

DAVID M. WILSON, Attorney for Claimants.

IVAN A. ELLIOTT, Attorney General; CHARLES H. EVANS, Assistant Attorney General, for Respondent.

HIGHWAYS—*contributory negligence.* **Evidence showed that cause of accident was the negligence of claimant in driving through water and mud on the highway at too high a rate of speed.**

LANSDEN, J.

Commissioner Wise, who heard the evidence in this case, has filed a report herein, which reads as follows:

"Loren Perry and Naomi Perry, husband and wife, residents of Springfield, Illinois, filed their complaint herein on April **3, 1951** for damages to an automobile allegedly belonging to claimant, Naomi Perry, and for personal injuries suffered by claimant, Loren Perry. The accident occurred on July **3, 1950** at approximately **9:40** A.M. on **U.** S. Highway No. 67, approximately four to four and one-half miles west of Virginia, Illinois. The car involved was a **1940** Studebaker Four-Door Sedan, which had been driven approximately **40,000** miles.

On the morning of July **3, 1950,** Loren and Naomi Perry, claimants, accompanied by their small son and daughter, left Springfield, Illinois on a trip to Beardstown, Illinois. Loren Perry was driving, and his wife and son were in the front seat, and the daughter in the rear seat. They left a filling station in Springfield at approximately 8:20 A.M., and drove westwardly on Illinois Highway No. **125** to Virginia, Illinois, and then continued on U. S. Highway No. 67. As they were

nearing a point approximately four miles west of Virginia, there was mud and water on the highway in several spots, and at the point of the accident the road made a slight curve across a bridge, and in that area, there was considerable water. Perry was driving about, 40 miles per hour, and slowed to about 35 miles per hour. While driving through the water, he suddenly lost control of the car, which swerved across the highway, and landed in a ditch. Perry, his wife and son were thrown from the car, and both Mr. and Mrs. Perry sustained injuries, but the injuries to Mrs. Perry were not serious, and no claim was made for same in this suit. The daughter and the son were not injured.

There is very little evidence on behalf of claimants as to the condition of the highway, how long the condition had existed, and whether or not the State of Illinois had notice of this condition. Gordon A. Smedley, a former employee of the respondent, testified that he had maintained this section of the highway for approximately the six year period from 1943 to 1949; that the highway in the area of Virginia to Bluff Springs, Illinois was lower than the surrounding area, running through and around the hills, and that during the farming season, when the soil was plowed, the highway would become covered with mud, and that he had helped remove mud on several occasions. He further testified that water from approximately 90% of the land north of the highway drained toward the road.

Naomi Perry testified substantially the same as her husband, but again there was little testimony as to the condition of the highway, and how long said condition had existed. Mrs. Perry testified that her husband was driving about 40 miles per hour, and never over 50, and that he slowed down at her request shortly

before the accident. She also corroborated his testimony as to the injuries sustained, and his inability to perform his former occupation.

The respondent offered no evidence other than the Departmental Report. From the Departmental Report it appears that the highwaymen had been working on a ditch-cleaning job in the area of the accident, and that on the night of July 2, and the early morning of July 3, 1950 there was a heavy rainfall in the area of the accident. The report further shows that in this particular area the highway follows the foot of the hills for several miles, and that, when the hills are cultivated, the State is burdened by filling ditches, and removing mud from the pavement after each rain. The Departmental Report further discloses that the highway section man arrived on the scene prior to the wreck, and found the highway covered with mud and water, and proceeded to the vicinity of Bluff Springs to get the scraper to remove it, and that, when he returned to the scene of the accident, the wreck had occurred. The highway man then proceeded to clear the highway, and put up proper warning signs. From the evidence and the Departmental Report, it appears that this mud and water covered the highway sometime in the early morning of July 3, 1950, and that the highway section man, who lived at Ashland, Illinois, arrived at the scene of the wreck within a reasonable time after the highway became covered; that there was no negligence on the part of the State in discovering the condition, and that its employees did everything possible to clear the highway.

It is my opinion upon hearing the evidence and reading the Departmental Report that this accident was caused solely by the negligence of the claimant,

Loren Perry, in driving at a too high rate of speed through the water and mud on the highway. He had a clear view of the highway, saw the condition of the highway, and attempted to drive through the same at the speed of approximately **35** miles per hour. He was also cautioned by his wife shortly before the accident to slow down. It is my opinion that there was no negligence on the part of the State. For these reasons, I recommend that the claim of both Loren Perry and Naomi Perry be denied."

The report of Commissioner Wise is hereby adopted as the opinion of the 'Court, and his recommendations are approved, since they are in harmony with previous decisions of this Court, such as: *Mounce* vs. *State,* No. **4317,** opinion filed April 10, **1951,** and ***Beenes*** vs. *State,* No. **4377,** opinion filed October **5, 1951.**

Awards to claimants are denied.

(No. 4427—Claimant awarded $427.50.)

FRANK LUSHER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 12, 1952.

W. H. BECKWITH, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; CHARLES H. EVANS, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when an award will be made.* Where claimant's injuries arose out of and in the course of his employment by the State of Illinois, an award may be made under the Workmen's Compensation Act.

SCHUMAN, C. J.

Frank Lusher, claimant, filed his claim herein on April **17, 1951** for injuries sustained as a result of an accident, which occurred on November **30, 1949.**

On the date of November **30, 1949,** claimant was **30** years old, married, but had no dependent children.

He was employed by the Division of Highways on a temporary basis, but the earnings and the hours of work place him within the maximum rate of compensation. On November 30, 1949, at approximately 1:30 P.M., claimant was working with a clean-up gang. The driver of the Division truck backed it a short distance, and struck claimant, who was in a stooping position, fracturing his right femur in the middle third. An ambulance was called, and he was first taken to the Pekin Hospital, and then to the St. Francis Hospital in Peoria where several operations were performed. He was attended by Dr. Hugh Cooper.

NO jurisdictional question is raised. Respondent and claimant were operating under the Workmen's Compensation Act, and the accident arose out of and in the course of the employment.

The evidence showed that claimant had not worked for respondent for a year preceding the date of injury, and that other employees in a similar capacity worked less than 200 days, so the annual earnings would be computed by multiplying the daily rate of $8.00 by 200, which would make claimant's earnings $1,600.00 a year.

The Department has paid bills for doctor and hospital services in the total amount of $742.20.

Claimant was off work from the date of his injury to June 16, 1950, and from July 17 to August 6, 1950, at which time he returned to his regular duties. He was paid compensation for these periods of temporary total disability at the rate of $22.50 per week, in the total amount of $700.67. In the present case no claim was made for additional medical care, or for temporary total disability. The only question involved is the disability to his right leg. From a Departmental Report,

and especially from the report of Dr. Cooper dated November 13, 1950, as well as by evidence, including the report of Dr. Harold F. Diller, and by examination of the claimant, it is shown that he has only slight disability, and an award is made in favor of claimant for 10% loss of use of his right leg.

On the basis of this record, we make the following award:

For 10% permanent and complete loss of the use of the right leg, 19 weeks at $22.50 per week, or a total of $427.50, all of which has accrued, and is payable forthwith.

Ruth E. Cox was employed to take and transcribe the evidence in this case, and has rendered a bill of $20.60, which is found to be fair, reasonable and customary, and an award is entered for said amount.

This award is subject to the approval of the Governor, as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees".

(No. 4441—Claimant awarded $2,000.00.)

CHARLES B. REED, Claimant, *vs.* **STATE OF ILLINOIS, Respondent.**

Opinion filed September *12*, ***1952.***

A. R. CAGLE, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent,

WORKMEN'S OCCUPATIONAL DISEASES ACT—*employee* entitled to one day *rest* in *seven.* Violation by agents of respondent of provisions of Ill. Rev. Stat., 1949, Chap. 48, Sec. 8b constituted negligence, entitling claimant to an award under Section 3 of the Workmen's Occupational Diseases Act.

DELANEY, J.

This claim is brought under Section 3 of the Workmen's Occupational Diseases Act by the above named claimant for alleged damages sustained as a result of

contracting tuberculosis during the course of his employment by the above named respondent.

Claimant entered service on September 11, 1943 as an attendant, and was employed continuously at the Kankakee State Hospital until January 24, 1950. During the course of his employment, he worked in the capacity of a charge attendant, regular attendant and relief attendant.

In his various capacities, while in the employment of respondent, claimant had occasion to come into contact with patients in the tuberculosis ward, and also with patients, who were transferred to the tuberculosis ward. While working in the tuberculosis ward, claimant checked the beds every thirty minutes, and removed the soiled sheets. On different occasions, claimant was also required to work more than six days without a day of rest.

The record consists of the following: complaint, amended complaint, Departmental Report, transcript of evidence, reporter's bill, Supplemental Departmental Report, letter from counsel considered as waiver of, brief of claimant, waiver of respondent of right to file statement, brief and argument.

Chest reports at the time claimant was first employed were suggestive of chronic bronchial infection and fibrotic infiltration. However, no active tuberculosis infection was discovered at the time claimant was first employed.

Although the record shows that claimant refused certain observatory procedures, positive cultures in June and July, 1950 were suggestive of an active tuberculosis process.

During the year of 1950, claimant received $1,125.42. The above earnings are based upon a salary

of $193.00 per month, representing annual earnings of $2,316.00 for persons in a similar class of employment.

Claimant is entitled to the benefits of "An Act to Promote the Public Health and Comfort of Persons Employed by Providing One Day of Rest in Seven", which provides, among other things, that an employee in a hospital, etc., shall be allowed at least twenty-four consecutive hours of rest in every calendar week, in addition to the regular period of rest allowed at the close of each working day. Ill. Rev. Stat. 1949, Chap. 48, Sec. 8b, *Domke* vs. *State,* 12 C.C.R. 451.

That such statute has been violated is shown by claimant's testimony, and such violation was negligence on the part of respondent under Section 3 of the Workmen's Occupational Diseases Act.

Claimant, therefore, is entitled to an award.

As to damages, we feel, after a close examination of the record, that with proper confinement and medication claimant's tuberculosis may become permanently arrested. We, therefore, conclude that claimant is entitled to an award of $2,000.00.

Helen Cox, Court Reporter, was employed to take and transcribe the evidence in this case, and has rendered a statement for services in the amount of $29.40. The Court finds that the amount charged is fair, reasonable and customary in the community where the service was rendered, and said claim is allowed and payable forthwith.

(No. 4455—Claimant awarded $641.65.)

FRANK M. RICE, Claimant, *vs.* **STATE OF ILLINOIS,** Respondent.

Opinion filed September *12, 1952.*

A. M. FITZGERALD AND WALTER T. DAY, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when* an award will be made. Where claimant's injuries arose out of and in the **course** of his employment by the State **of** Illinois, an award may be made under the Workmen's compensation Act.

SAME—*rehearing.* Where evidenae on rehearing showed the period of claimant's temporary total disability, claimant is entitled to the full amount **for** such period **as** provided by the Workmen's Compensation Act.

LANSDEN, J.

Claimant, Frank M. Rice, seeks to recover of respondent under the Workmen's compensation Act for injuries to his right knee in an accident that arose out of and in the course of his employment as a hydrotherapist at the Chicago State Hospital, operated by the Department of Public Welfare.

On June **24,** 1950, claimant was administering hydrotherapic treatments to excited and violent mental patients in the hydrotherapic ward of said institution, when one patient, who was awaiting treatment, attacked him, and as a result thereof claimant sustained a fracture of the tibial spine of his right knee.

Claimant was hospitalized for a short time at the hospital for employees of the institution.

Dr. Harold A. Sofield, Oak Park, Illinois, treated claimant until the latter part of December, 1950, at which time he discharged him from further treatment, because claimant's knee had reached its maximum recovery without further surgery. Respondent has never offered, nor has claimant requested an operation, be-

cause it is doubtful whether an operation would really improve the condition of claimant's right knee.

No jurisdictional questions are involved, and the record discloses that claimant has a limitation of 10% in extension and 15% in flexion in his right knee, coupled with a slight roughening in the joint space. The knee is somewhat weak and unstable, and does cause claimant some pain.

We, therefore, conclude that claimant is entitled to an award under Section 8 (a) (15) (17) of the Workmen's Compensation Act for a 15% loss of use of his right leg.

On February 2, 1952, an award was made to claimant, but on March 11, 1952, we granted claimant's petition for rehearing and motion for new trial, and remanded the case to Commissioner Wise to hear further testimony relating to the duration of claimant's temporary total disability. Such evidence is now in the record, and shows without dispute that claimant was so disabled from June 24, 1950 through May 11, 1951, and that claimant returned to work on May 12, 1951. Claimant also agrees that we are correct in the 15% loss of use of his right leg.

During the period of temporary total disability, claimant was paid $1,031.39 as compensation, or an underpayment of only $0.40, for the 45-6/7 weeks of such disability.

On the date of his accident, claimant, 50 years of age, was married and had one child, four years of age, dependent upon him for support. His earnings in the year prior to his accident amounted to $2,928.60, and his rate of compensation is, therefore, $22.50 per week.

Hugo Antonacci, Springfield, Illinois, was employed to take and transcribe the testimony at the

hearing before Commissioner Wise. He has rendered a statement in the amount of $52.40 for his services, and we find said amount to be reasonable and customary. An award is, therefore, entered in favor of Hugo Antonacci for $52.40.

An award is entered in favor of claimant, Frank M. Rice, under Section 8 (a) (15) (17) of the Workmen's Compensation Act, for a 15% loss of use of his right leg, being 28½ weeks at $22.50, or the sum of $641.25, plus the sum of $0.40, underpayment for temporary total disability, making a net award of $641.65, all of which has accrued, and is payable forthwith.

An award is also entered in favor of claimant for the use of Dr. Harold A. Sofield in the sum of $30.00.

These awards are subject to the approval of the Governor. Ill. Rev. Stat., 1951, Chap. 127, Sec. 180.

(No. 4510—Claim denied.)

JOHN H. CLAYTON, JR., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September Id, 195.2.

JOHN W. FRIBLEY, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

STATE OFFICERS—*change in salary during term.* A variation in salary of an officer is automatically brought about by a change in population or valuation of property. Does not violate constitutional provision prohibiting an increase or decrease in compensation during term of officer.

SAME—*accepting payment for a specific period.* When payment is made to an officer or employee of the State of Illinois for services rendered for a specific period, such payment is payment in full, and no additional compensation may be paid for the same period.

DELANEY, J.

John H. Clayton, Jr., claimant, filed his complaint herein on April 24, 1952, alleging that he is the duly elected, qualified, and acting Judge of the City Court of Johnston City, Illinois, and has been since May 17, 1949. He further alleges that the 1940 Federal census disclosed the population of Johnston City to be 5,413 persons, and that under the provisions of Chap. 37, Par. 355, Ill. Rev. Stat., 1947, he was entitled to a salary of $2,500.00 per year, and that such salary was, in fact, paid until November 16, 1951.

Claimant further alleges that on November 16, 1951 he was advised by the Auditor of Public Accounts of the State of Illinois that inasmuch as the 1950 Federal census disclosed that the City of Johnston City had a population of 4,479 persons, his salary would be reduced to $1,000.00 per annum, which was the amount provided for judges of city courts of cities under 5,000 population. Claimant further alleges that, since November 16, 1951, he has been paid $83.33 per month salary as the Judge of the City Court of Johnston City, Illinois, and brings this action to recover the difference between $83.33 per month and $208.33 per month to which he contends he is entitled. In this claim he seeks to recover for the period from November 16, 1951 to April 16, 1952, in the sum of $625.00.

The statutes in force at the time of the election of the claimant as Judge of the City Court of Johnston City, Illinois provided an annual salary for judges of city courts, based upon a sliding scale, in the words and figures, in part, as follows:

"The judges of said court shall be allowed and receive as an annual salary in lieu of all other fees, perquisites or benefits whatsoever, in cities or towns having a population not exceeding five thousand (5,000) inhabitants, the sum of one thousand dollars ($1,000); and in cities or towns having more than five thousand

(5,000) and not exceeding eight thousand (8,000) inhabitants, the sum of twenty-five hundred dollars ($2,500);" (Chapter 37, Par. 355, Ill. Rev. Stat., 1947.)

Provision was also made to determine the population, as follows:

"The number of inhabitants shall be determined by reference to the Federal census, or a census taken by the city, village or town authorities." (Chap. 37, Par. 353, Ill. Rev. Stat., 1947).

It is clear that the salary of a city judge cannot be increased or decreased by any action after his election. (*Wolf* vs. *Holt*, 210 Ill. 50.) However, where a statute provides a graduated scale at the time of the election to office, the salary may vary during the term according to the population or property values. This rule was stated by the Supreme Court of Indiana in *Crowe* vs. *Board of Com'rs.*, 210 Ind. 404, 3 N.E. (2d) 76, at page 78, as follows:

"There is no merit in the contention that an increase in the salary of an officer during his term is involved. The salary was fixed before he was elected. The amount he was to receive from time to time was made to depend upon the population of the county. It is as though the statute in existence when the officer was elected had provided that he should receive $1,000 the first year, and $2,000 the second year of his term. In the statute under consideration the Legislature chose to make the amount of salary dependent upon population shown by the United States census. It might continue during the latter part of the term the same as before the census. It might be more if the population increased. It might be less if it decreased."

It is held in many jurisdictions that a variation in compensation of an officer automatically brought about by a change in population or valuation of property does not violate a constitutional provision prohibiting an increase or decrease in compensation during the officer's term. Additional authorities following this view are:

Yuma County vs. *Sturgess*, 15 Ariz. 538, 140 P. 504;
Puterbaugh vs. *Wadham*, 152 Cal. 611, 123 P. 804;
State ex rel Moss vs. *Hamilton*, 303 Mo. 302, 260 S.W. 466;
State ex rel Harvey vs. *Linville*, 318 Mo. 698, 300 S.W. 1066;
State ex rel Jaumotte vs. *Zimmerman*, 106 Mont. 464, 73 P. (2d) 548;

Board of County Com'rs. vs. *Mathews*, **147** Okla. 296, 296 P. 481;
Drolte vs. *Board* of County *Com'rs.*, 176 Okla. 622, **56** P (2d) 800;
State *ex rel* Mack vs. *Guckenberger*, 139 Ohio St. 273, 39 N.E. (2d) 840;
Derhammer vs. Board of County *Com'rs.*, **83** N.E. (2d) 400.

The Supreme Court of Ohio in *State ex rel Mack* vs. *Guckenberger*, **39** N.E. (2d) 840, held that a statute effective before the term of a judge commenced could automatically increase or decrease his compensation by reason of a fluctuation of population as shown by the Federal census without conflicting with a constitutional limitation, which provided that the compensation could not be increased or diminished during his term of office. In this case the Court said at page **843:**

"The purpose of the constitutional inhibition now under consideration is *to* make sure that the judge and the electorate are advised before he is appointed **or** elected what his compensation will be, with the assurance that it cannot be changed by the Legislature during the term; that the judge is precluded from using his personal influence or official action to have the Legislature increase his salary; and that at the same time he is protected against the Legislature and the people from decreasing his compensation after his term begins. These same salutary purposes are **fully** and effectually preserved by the terms of the present statute, albeit the compensation of the judge is made variable, from and after the last Federal census becoming effective during his term."

The provisions of the Illinois Constitution prohibiting the increase or decrease in salary during the term of office are based upon similar reasons, as appears from the opinion of the Illinois Supreme Court in the case of *People* vs. *Sweitzer*, 280 Ill. **436,** wherein the Court said at page 442:

"The Constitution expressly prohibits the Legislature from increasing the salaries **of** circuit judges, and, in fact, of all State officers, during the terms for which they are elected, The theory of the framers **of** the Constitution was to make the three branches of government, the legislative, executive and judicial, separate and independent of each other, as far as possible. The power to fix the salaries of State officers is in the legislative branch of the government, the duty to enforce acts **of** the legislature is in the executive branch, and the power to construe the acta **of** the legislature is in the judiciary. The acts of the officers of each branch, while such officers are in power, should not be made to depend upon or be influenced by **the acts of** another branch, nor should there be anything in the conduct **of** either that

would even give rise to a suspicion of such a thing as coercion by reducing salaries or a reciprocal interchange of favors by increasing salaries, hence the reason for the constitutional provision putting it beyond the power of the Legislature to increase or diminish the salaries of State officers in office and in power. This is fully borne out by the Debates and Proceedings of the Constitutional Convention as reported in volume 1, pages 1015, 1018, 1019, 1020, 1058 and 1059, in which the practices which had theretofore obtained in securing, or attempting to secure, increases in salaries by certain State officers were set forth forcibly and at length."

None of the evils sought to be eliminated by the constitutional provisions can possibly arise where the change in compensation is automatically accomplished through the happening of a contingency, such as a fluctuation in population over which the office holder has no control, as is the case now before the Court. It is submitted that the Auditor of Public Accounts properly reduced the amount of the payments to the claimant as Judge of the City Court of Johnston City, Illinois, based upon the 1950 Federal census and the statute providing for such salary. As the claimant has received the salary to which he was entitled by the statutory provisions in force at the time of his election, his complaint herein does not state a cause of action, and should be dismissed.

When payment is made to an officer or employee of the State of Illinois for services rendered for specific periods, such payment is payment in full, and no additional compensation may be paid for the same period. Par. 145, Sub-par. (3), of Chap. 127 provides as follows:

"Amounts paid from appropriations for personal services of any officer or employee of the State, either temporary or regular, shall be considered as full payment for all services rendered between the dates specified in the payroll or other voucher, and no additional sum shall be paid to such officer or employee from any lump sum appropriation, appropriation for extra help or other purpose, or any accumulated balances in specific appropriations, which payments would constitute in fact an additional payment for work already performed, and for which remuneration had already been made."

Section 19, Article IV, of the Illinois Constitution provides:

"The General Assembly shall never grant or authorize extra compensation, fee or allowance to any public officer, agent, servant or contractor, after service has been rendered or a contract made, nor authorize the payment of any claim, or part thereof, hereafter created against the State under any agreement or contract made without express authority of law; and all such unauthorized agreement or contracts shall be null and void; Provided, the General Assembly may make appropriations for expenditures incurred in suppressing insurrection or repelling invasion."

Under the above quoted provisions, it has long; been the rule in the Court of Claims that claimants cannot recover for services rendered the State of Illinois during stated periods after warrants were accepted for such periods. The Court said in *Hollender, Et Al* vs. *State,* 14 C.C.R. 40, at page 43:

"Under this provision of the Statute, it was held in *Mills* vs. *State,* 9 C.C.R. 69, that a claimant cannot accept warrants purported to cover the full amount due him for services during stated periods, and, thereafter, when his active service has ended, obtain an award from the State for an additional amount for those periods for which he had apparently been paid for services in full."

Some of the additional cases in which this rule has been followed by the Illinois Court of Claims are:

Shields and Gruber vs. *State,* 14 C.C.R. 136;
Hollender, Et Al vs. *State,* 14 C.C.R. 40;
Rlapman, Et Al vs. *State,* 13 C.C.R. 139;
Agsten, El Al vs. *State,* 13 C.C.R. 8;
Gholson vs. *State,* 12 C.C.R. 26;
Smith vs. *State,* 11 C.C.R. 374;
Novak vs. *State,* 10 C.C.R. 258;
Broderic vs. *State,* 9 C.C.R. 458;
Mills vs. *State,* 9 C.C.R. 69;
Hunter vs. *State,* 9 C.C.R. 1.

The record consists of the complaint, motion of respondent for an extension of thirty days in which to file pleadings, order of the Chief Justice granting respondent an extension of time in which to file pleadings, motion of respondent for leave to file instanter its motion to dismiss, together with points and authorities

in support thereof, and motion of respondent to dismiss, for the reason that the complaint is substantially insufficient in law to state a cause of action.

Inasmuch as it appears on its face that the complaint is insufficient in law to state a cause of action, the motion of respondent to dismiss the complaint is hereby sustained, and the case is dismissed.

(No. 4118—Prior award **modified.)**

NADINE BURTON, WIDOW, ET AL, Claimant, *vs.* **STATE OF ILLINOIS,** Respondent.

Opinion filed ***October*** *10,* **1952.**

W. W. DAMRON, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*modification* of ***award.*** Remarriage of claimant necessitated modification of award under authority of **Ill. Rev.** Stat., 1947, Chap. 48, Sec. 144a.

LANSDEN, J.

On December 9, 1948, claimant, Nadine Burton, widow of Marsh Burton, decedsed, was given an award for $5,875.00 under the Workmen's Compensation Act for the death of her husband, as the result of an accident that arose out of and in the course of his employment on April 27, 1948. *Burton* vs. *State,* 18 C.C.R. 99. This Court reserved jurisdiction of the case in the event future orders were necessary.

At the time of his death, Marsh Burton had one child, Dennis Gene Burton, then nine months of age.

On January 29, 1952, Nadine Burton remarried, and her name is now Nadine Ledbetter. Such remarriage was, in and of itself, sufficient to require a modi-

fication of the award. Ill. Rev. Stat., 1947, Chap. 48, Sec. 144a.

However, on June 25, 1952, Dennis Gene Burton received accidental injuries, which resulted in his death that day.

Respondent paid claimant under the original award until January 29, 1952. The total of such payments amounted to $3,822.00, leaving an unpaid balance of $1,963.00, payable at the rate of $19.50 per week.

The death of Dennis Gene Burton extinguishes any unpaid balance of the award that might not have accrued prior to the date of his death, but his mother is entitled to receive the payments that accrued from February 7, 1952 to June 25, 1952, a period of 20 weeks. Ill. Rev. Stat., 1947, Chap. 48, Sec. 144g. *Beckemeyer Coal* Co. vs. *Ind. Com.*, 370 Ill. 113; *Waechter* vs. *Ind. Corn.*, 367 Ill. 256.

The amount, which accrued during such 20 weeks period, is the sum of $390.00, which is payable forthwith to Nadine Ledbetter, and, with the payment of such sum, all of respondent's obligations under the previous award and this modification thereof will be completely and finally liquidated.

(No. 4158—Claimant awarded $4,027.21.)

T. I. Moss, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 16, 1950.

Supplemental opinion filed October 10, 1952.

NEIL H. THOMPSON, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL AND CHARLES H. EVANS, Assistant Attorneys General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when* an award *will* be made. Where claimant's injuries arose out of and in the course of his employment by the State of Illinois, an award may be made under the Workmen's Compensation Act.

SAME—rehearing. Where on rehearing claimant was granted an award for permanent partial disability, rather than for temporary total disability previously allowed, the total payments could not exceed the maximum provided for a death award, and the award to claimant must be adjusted accordingly.

DELANEY, J.

Claimant, T. I. Moss, was employed on February 19, 1948 at the State Game Farm, Mt. Vernon, Illinois in the capacity of a night watchman. In the course of his employment, he slipped on some ice. As a result of the fall, claimant injured his right testicle. On February 23, 1948, Dr. C. O. Hamilton removed the injured testicle.

No jurisdictional question is raised. Respondent and claimant were operating under the Workmen's Compensation Act, and the accident in question arose out of and in the course of the employment.

On the date of the accident, T. I. Moss was not married, and did not have any one depending on him for support. The earnings of claimant in the year prior to his accident amounted to $2,100.00. His compensation rate would be the maximum of $15.00; since the injury occurred subsequent to July 1, 1947, this must be increased 30%, making a compensation rate of $19.50 per week.

The record consists of the complaint, stipulation continuing case, original transcript of evidence, and stipulation relative to days absent from employment.

For the loss of his right testicle, claimant should receive the sum of $19.50 per week for fifty weeks, amounting to $975.00 under Article 8 *(c)* - (16¾) of the Workmen's Compensation Act.

The records of the department, which were also 'stipulated to by the parties hereto, indicate claimant was injured on February 19, 1948, and returned to work on March 8, 1948, but became ill two days later and was absent from his job from March 11, 1948 to May 3, 1948, making a total of 10 1/7 weeks. Claimant was paid full salary while absent from his job, the rate of pay being $175.00 per month. Claimant was entitled to receive $197.79 for 10 1/7 weeks temporary total. disability. He was paid $443.75. Claimant was paid $245.96 in excess of the compensation to which he was entitled, and this sum of $245.96 must be deducted from the award.

Dr. C. O. Hamilton of Mt. Vernon, Illinois rendered the claimant professional services in the amount of $53.00, which are unpaid, and the Good Samaritan Hospital of Mt. Vernon, Illinois has submitted an unpaid statement in the amount of $179.50.

An award is, therefore, made in favor of the claimant, T. I. Moss, in the sum of $1,237.50, less the sum of $245.96 paid to claimant for non-productive time:, or a sum in the aggregate of $991.54, payable as follows, to-wit:

To Dr. C. O. Hamilton of Mt. Vernon, Illinois for professional services, **$83.00,** payable forthwith;

To Good Samaritan Hospital of Mt. Vernon, Illinois for hospital care, $179.50, payable forthwith;

To claimant, for loss of his right testicle, **$729.04,** payable forthwith.

The testimony at the hearing was taken and transcribed by Ruth B. Clark, who has submitted a statement for her services in the amount of $45.45. This statement appears reasonable for the services rendered. An award is, therefore, entered in favor of Ruth B. Clark, in the sum' of $45.45, payable forthwith.

This award is subject to the approval of the Governor, as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees".

SUPPLEMENTAL OPINION

DELANEY, J.

Claimant, T. I. Moss, was employed on February 19, 1948 at the State Game Farm, Mt. Vernon, Illinois in the capacity of a night watchman. In the course of his employment, he slipped on some ice. As a result of the fall, claimant injured his right testicle, coccyx and buttocks. Shortly afterwards, it was necessary that he have an operation for removal of the right testicle, and this was followed by a rectal abscess, which was operated upon. Since his injury, claimant has pain in the back, and in the legs. Claimant was examined by Drs. J. Albert Key, Fred C. Reynolds, Lee T. Ford, George Saslow and Harold K. Roberts of St. Louis before a rehearing was had, and their examinations of the back and lower extremity showed that the patient has a ruptured intervertebral disc, which apparently had its origin in the injury, which he describes, and is the primary cause of his disability. No treatment was offered the claimant, as the physicians did not believe a surgical removal of the ruptured disc would restore him to work because of his age, although it would be expected to relieve his pain and general condition.

No jurisdictional question is raised. Respondent and claimant were operating under the Workmen's Compensation Act, and the accident in question arose out of and in the course of the employment.

On the date of the accident, T. I. Moss was not married, and did not have any one depending on him

for support. The earnings of claimant in the year prior to his accident were $175.00 per month, or $2,100.00 a year. At the hearing, claimant testified that he can work about an hour at a time since his injury repairing electric motors, and that he earns about seven dollars a week.

Claimant is entitled to an award under Section 8, Paragraph (d) of the Workmen's Compensation Act of $5,200.00 for permanent, partial disability. The differential between claimant's earnings before and after the accident would exceed the maximum; therefore, his compensation rate is $19.50 commencing February 20, **1948,** the day after the accident.

The record consists of the complaint, amended complaint, stipulation continuing case, original transcript of evidence, stipulation relative to days absent from employment, petition for rehearing, reports of Drs. George Saslow, Harold K. Roberts, and Fred C. Reynolds, transcript of evidence, abstract of evidence, statement, brief and argument of claimant, and stipulation between the parties hereto permitting claimant to cash warrant previously submitted herein in the amount of $729.04.

In an earlier opinion in this cause, we allowed a specific loss, and granted claimant temporary total disability. Respondent also overpaid claimant for nonproductive time. The total amount of temporary total disability allowed, and the overpayment by respondent was in the sum of **$443.75.**

On rehearing, due to additional medical testimony, we are granting claimant an award for permanent partial disability. In *Charles Love* vs. *State of Illinois,* Case No. **4247,** 20 C.C.R. **234,** this Court held that the total of the payments for temporary total disability

and permanent partial disability, together, could not exceed the maximum amount provided for a death award.

From claimant's award of **$5,200.00** must be deducted the sum of **$443.75,** making a net award to claimant of **$4,756.25,** payable as follows, to-wit:

$4,719.00, which has accrued from February 20, 1948, from which must **be** deducted the sum of $443.75, representing overpayment for **non-**productive time, and the sum of $729.04, representing warrant No. 649890 previously cashed by stipulation between the parties hereto, making a sum of $3,546.21, which is payable forthwith;

$481.00, to be paid in weekly installments of $19.50, beginning on October 17, 1952, for a period of 24 weeks with a final payment of $13.00.

Dr. Harold K. Roberts of St. Louis, Missouri has rendered the claimant professional services in the amount of $30.00, which is unpaid; the Department of Neuropsychiatry of Washington University School of Medicine, (Dr. Saslow), St. Louis, Missouri rendered the claimant professional services in the amount of **$25.00,** which is unpaid; Drs. J. Albert Key, Fred C. Reynolds and Lee T. Ford, St. Louis, Missouri rendered the claimant professional services in the amount of **$75.00,** which is unpaid; and Barnes Hospital, St. Louis, Missouri has rendered its statement in the amount of $108.60, which remains unpaid.

An award is made in favor of Dr. Harold K. Roberts of St. Louis, Missouri for professional services in the amount of $30.00, payable forthwith;

An award is made in favor of the Department of Neuropsychiatry of Washington University School of Medicine, (Dr. Saslow), St. Louis, Missouri for professional services in the amount of **$25.00.** payable forthwith;

An award is made in favor of Drs. J. Albert Key, Fred ***C.*** Reynolds and Lee T. Ford, St. Louis, Missouri for professional services in the amount of **$75.00,** payable forthwith; and

An award is made in favor of Barnes Hospital, St. Louis, Missouri **in** the amount of $108.60, payable forthwith.

The testimony at the various hearings of this cause was taken and transcribed by Ruth B. Clark, who has

submitted statements for her services in the amounts of $12.25 and $46.48, making a total of $58.73. These statements appear reasonable for the services rendered. An award is, therefore, entered in favor of Ruth B. Clark, in the amount of $58.73, payable forthwith.

This award is subject to the approval of the Governor, as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees".

(No. 4304—Claimant awarded **$122.00.)**

BRYAN BIRD, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 12, 1952.
Supplemental opinion filed October 10, 1952.

FRANCIS P. FLYNN, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when* an ***award will be denied except for medical expenses.*** Where evidence showed that the earning power of claimant had not been reduced by reason of the injuries, which he sustained in the course of his employment by the State of Illinois, the Court was unable to grant an award **for** other than certain medical expenses incurred by claimant.

LANSDEN, J.

Claimant, Bryan Bird, seeks to recover under the Workmen's Compensation Act for alleged injuries that arose out of and in the course of his employment as a guard at the Illinois State Penitentiary, Stateville, Illinois.

On June 12, 1949, claimant, while riding in a bus furnished by respondent to haul guards to said Penitentiary, was injured in a collision with another vehicle.

Claimant was off work for two weeks, and then returned to work until the end of August, 1949. He worked some in September, all of October, and two

days in November. He was dropped from the roster of the institution on January 3, 1950. However, on May 21, 1950, he went to work as a guard at the Penitentiary in Menard, Illinois, and worked there 22 months, or until March, 1952, at which time he voluntarily quit.

The record further shows that an action at law was filed in the Circuit Court of Will County for claimant, and that he is entitled to recover in said action the sum of $500.00.

On the whole, this record is very unsatisfactory from the standpoint of claimant. There is no way that the Court can calculate whether he was paid any temporary total disability compensation, and we must, therefore, conclude that the amount received in settlement of his action at law would more than equal what might be coming to him for temporary total disability compensation.

Although there was extensive medical testimony in the record, all that it shows is that claimant does have some partial permanent disability, but we are unable to grant claimant an award in this case, because the record conclusively shows that claimant was able to and did earn as mucli or more after his accident than he did before while working for respondent.

In similar cases this Court has previously denied awards on records that were somewhat stronger in favor of claimant than this one. *Rohles* vs. State, No. 4223, opinion filed September 19, 1950; *Paschal* vs. *State*, No. 4389, opinion filed September 7, 1951.

However, claimant is entitled to reimbursement for certain medical expenses incurred by him, and also for his expenses in traveling from his home in Golconda, Illinois to Joliet, Illinois for a medical exami-

nation by a doctor of respondent's choosing, pursuant to an order of this Court.

An award is, therefore, entered in favor of Bryan Bird, for the use of the Estate of Dr. Killinger, Joliet, Illinois in the sum of $22.00; and an award is also entered in favor of claimant, for the use of Dr. L. S. Beecher, Golconda, Illinois in the sum of $100.00. And, an award is entered in favor of claimant for his travel expenses to and from Joliet, as stipulated at the trial, in the sum of $40.00.

Any further awards to claimant are denied.

William J. Cleary & Co., Court Reporters, was employed to take and transcribe the testimony at the hearing before Commissioner Anderson. Charges in the amount of **$139.60** were incurred, which charges are reasonable. An award is entered in favor of William J. Cleary & Co. for $139.60.

These awards are subject to the approval of the Governor. Ill. Rev. Stat., 1951, Chap. 127, Sec. 180.

SUPPLEMENTAL OPINION.

LANSDEN, J.

Pursuant to stipulation of the parties herein that claimant has already been reimbursed by respondent for his agreed expenses of $40.00 in traveling from Golconda, Illinois to Joliet, Illinois, and return, it is necessary to modify the opinion filed herein on September 12, 1952, as follows:

By deleting from the eighth paragraph all of said paragraph appearing after the phrase "incurred by him".

By deleting from the ninth paragraph the following words: "and an award is entered in favor of claimant

for his travel expenses to and from Joliet, as stipulated at the trial, in the sum of $40.00".

All of the remainder of said opinion shall stand as originally approved and filed.

(No. 4447—Claimant awarded **$215.68.)**

VALLEY E. GROSS, Claimant, *vs.* **STATE OF** ILLINOIS, Respondent.

Opinion filed October 10, 1952.

JOSEPH M. DE LAURENTI, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; CHARLES H. EVANS, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION **Ac Twhen** an ***award will be made.*** Where claimant's injuries arose out **of** and in the course of his employment by the State **of** Illinois, an award may be made **under** the Workmen's Compensation Act.

DELANEY, J.

Claimant filed his complaint herein on June 18, 1951 seeking an award under the provisions of the Workmen's Compensation Act.

On October 13, 1950, Valley E. Gross was employed by the respondent as a Visitor of the Illinois Relief Commission in the Madison County Department **of** Welfare. Mr. Gross was sitting at a desk in a swivel tilt back chair. He leaned back, and the chair overturned.

No jurisdictional question is raised. Respondent and claimant were operating under the Workmen's Compensation Act, and the accident in question arose out of and in the course of the employment.

The record consists of the complaint, motion of respondent for an extension of time in which to file pleadings, order of the Chief Justice granting respondent an extension of thirty days in which to file pleadings, Departmental Report, deposition of Dr. Francis

M. Barnes, Jr. taken on January 15, 1952, transcript of evidence taken on February 28, 1952, claimant's exhibit No. 1, original stipulation relative to claimant's exhibits Nos. A - F, inc., and copy of the stipulation.

Mr. Gross was absent from his employment from October 19, 1950 to February 1, 1951. He returned to his employment February 1, 1951, and worked to March 8, 1951. From March 8, 1951 to June 16, 1951 Mr. Gross was put on a leave of absence with pay. Mr. Gross has not worked since March 8, 1951.

The medical evidence in this case consists of claimant's exhibit No. 1, and the deposition of Dr. Francis W. Barnes, who examined the claimant on November 28, 1951, and again on January 8, 1952.

Exhibit No. 1 states that claimant was seen by Dr. Hediger of Highland, Illinois for ten days beginning on November 16, 1950, from whom he received some hypodermic medication and pills. He was then referred to Dr. Rehberger, a chiropractic physician, for one week. Dr. Hediger then referred claimant to Dr. Jones, who hospitalized him at Missouri Baptist Hospital on November 7, 1050, and from which he was discharged on November 21, 1950. Dr. Jones' final diagnosis was "Neuropathy, multiple, due to unknown cause.'' Claimant was discharged with condition unchanged. (Claimant's exhibit No. 1, page 38 trans.)

Claimant entered Jefferson Barracks Hospital, and on May 13, 1951 was seen by Dr. J. J. Gitt, Consultant, in Neurology. Dr. Gitt's findings revealed all deep reflexes were gone except the left biceps in the right, knee with summation. There was a questionable dorsal flicker on the left. Conclusion was, patient had an involvement of the cord secondary to trauma. Recommendations for rectal examination, and X-Rays of the

coccygeal spine were made. Therapy with large doses of Vitamin B-12 was made. The patient was seen in Orthopedic Consultation on May 1, 1951 on account of the pain in the coccygeal region. Consultation Report by Dr. Donald O. Burst, Orthopedic Consultant, revealed only slight tenderness on pressure of the coccyx externally, and rectally over the coccyx, and otherwise there were no irregularities. Rectal examination revealed absolutely no pain on motion of the coccyx. Impression was, "No organic bone pathology found in the coccyx, and recommend no treatment at all". The patient was seen by Dr. H. Schwartz, Neurosurgical Consultant, following a request dated April 25, 1951 (exact date of consultation unknown due to lack of notation). Dr. Schwartz noted that the tendon reflexes were markedly depressed, obtained with reinforcement. The impression was a polyneuritis. This patient was seen by Dr. J. J. Corda, Genitourinary Consultant on April 30, 1951, who stated that the prostate gland had not changed any during the past four months; there have been no urinary symptoms. (Was seen in private consultation by Dr. Corda.) X-Ray examinations: X-Ray of the chest, April 16, 1951, was essentially negative. Examination of the sacrum in the A-P and lateral views failed to reveal evidence of 'pathology of the bony structure. This was dated April 16, 1951. X-Ray examination of the lumbosacral spine, April 2, 1951, showed the presence of osteophytic changes characterized by lipping and spur formation, which was best visualized in the lower lumbar vertebrae and the anterior portions of the bodies. There also appeared to be failure of fusion of the isthmus of L-5 on the left side, but no accompanying spondylolisthesis was visualized. Reports are by Radiologist, S. Kamberg, M.D. Labora-

tory examinations: Alkaline phosphate 1.2 Bod. Units. Acid phosphates 1.6 K.A.U. Icteric index 5.1 units. RBC 4.93 million. Hemoglobin 96%, 14.9 grams. Spinal fluid examination: Zero WBC; 4% RBC, all show some crenation; Sugar 7 mg.%; Globulin, weakly positive; total protein 70 mg.%; complement fixation negative. Gold curve was unsatisfactory. Kahn Test was negative. White Blood Cell count 7,700; stabs 5, segs. 50. Lymphocytes 38, monocytes 5, eosinophils 2. The urine examination was within normal limits.

The patient was placed on Vitamin B-12 Rubrumin, 30 micrograms, daily, for two weeks. Following this, he was put on multivitamin capsules, 1 t.i.d. He was continued following Rubrumin with Vitamin B, 100 mg, t.i.d. Following this treatment, the patient showed improvement. The patient was seen by Neurological Consultant, Dr. Gitt, again on May 14, 1951. The patient revealed to the Consultant that he has definitely improved; the pain in the coccygeal region had diminished. Recommendation for continuance of Vitamin B-12 made.

Inasmuch as the patient had expressed improvement on the Vitamin therapy, it was felt he could be discharged, maximum hospital benefits. The patient was to continue his medication on the outside, and was advised to return to the hospital periodically for check-ups. Examination of reflexes prior to discharge, revealed depressed deep reflexes, and slight elicitation only on reinforcement. There continued to be positive toe signs. The patient is to be discharged May 19, 1951, M.H.B. Diagnosis:

1. Neuropathy, multiple, with history of onset following fall from a tilted chair (October 13, 1950) Date:

May 13, 1951.

Treated—Improved (slight.)

Prognosis is guarded. Disability is moderate.

Recommendation: It is further recommended that this 'patient does not resume any laborious physical or mental tasks until there is evidence of final recovery.

(s) L. M. Hart
L. M. Hart, M.D.
Psychiatric and Neurologic Service.

(Pages 39-42 Claimant's exhibit No. 1.)

From his examination of the claimant on November 28, 1951 Dr. Francis W. Barnes stated "There were no pathological toe signs. The abdominal and cremasteric reflexes were present. Sensation over the head and trunk were normal. No sensory disturbance in the saddle area. No inco-ordination, no muscle group weakness, no tremors were present.

In the first place, my conclusions show it is my opinion that the fall from the chair was the cause of his condition, neurologically speaking, and his disability resulting from that, but I did not make a definite diagnosis upon the fact that it was from an organic condition. I don't know what it is. There is evidence, but I can't clarify it. To go back to the Jefferson Barracks record where the diagnosis of "Multiple Neuropathy" had been made, well, that don't mean anything. With my statement, *I don't know what it is,* is just as good as that term.

I consider that trauma, as related to have occurred on October 13, 1950, was the cause of his present condition, and also the present disability.

I think the condition is permanent. That would be my opinion. It has been going on for a considerable

length of time with no change that I have been able to discover, and I think it is fixed.

I don't know what to give the man for treatment. I don't know what the trouble is. He has an organic nervous condition. Not knowing exactly what it is, a specific line of treatment would be impossible to lay out. He does need medical observation and indicated treatments, of course.

He could remain under the care of his physician and at his physician's discretion, but seen by a specialist when he thought it should be necessary."

Claimant was 57 years of age at the time of his accident, and he did not have any children under the age of 18 years dependent upon him for support. His annual earnings during the year preceding the accident were $2,868.00. His compensation rate, therefore, would be $15.00 per week. However, as the injury was incurred after July 1, 1949, this must be increased 50%, making his compensation rate $22.50 per week.

From the medical testimony and the other evidence in the record, we find that at the present time the disability condition is temporary, and has not reached a permanent condition. Claimant is entitled to an award under Section 19, Paragraph (b) of the Workmen's Compensation Act to the date of hearing on February 28, 1952, or 71 5/7 weeks at the compensation rate of $22.50 per week, or the sum of $1,613.55, less the sum of $1,397.87 for non-productive time, or a total award of $215.68, payable forthwith.

Dr. Edward L. Hediger rendered the claimant professional services in the amount of $545.00, which is unpaid; Dr. L. P. Rehberger rendered professional services in the amount of $57.50, which amount is unpaid; Dr. Andrew B. Jones rendered professional services in

the amount of $175.00, which is unpaid; Dr. Joseph J. Gitt rendered professional services in the amount of 865.00, which amount is unpaid; Dr. Herbert C. Wiegand rendered professional services in the amount of $35.00, which amount is unpaid; Dr. Justin Cordonnier rendered professional services in the amount of $10.00, which amount is unpaid; and the claimant, Mr. Gross, made payment of $25.00 to Dr. Andrew B. Jones for an initial examination, and made payment to Missouri Baptist Hospital in the amount of $70.00, for which he has not been reimbursed.

An award is made in favor of Dr. Edward L. Hediger for professional services in the amount of $545.00, payable forthwith;

An award is made in favor of Dr. L. P. Rehberger for professional services in the amount of $57.50, payable forthwith;

An award is made in favor of Dr. Andrew B. Jones for professional services in the amount of $175.00, payable forthwith;

An award is made in favor of Dr. Joseph J. Gitt for professional services in the amount of $65.00, payable forthwith;

An award is made in favor of Dr. Herbert C. Wiegand for professional services in the amount of $35.00, payable forthwith;

An award is made in favor of Dr. Justin Cordonnier for professional services in the amount of $10.00, payable forthwith; and

An additional award is made in favor of claimant, Valley E. Gross, in the amount of $95.00, representing a payment he made to Dr. Andrew B. Jones of 825.00, and a payment to Missouri Baptist Hospital of 870.00, payable forthwith.

Betty Jo Zagar was employed to take and transcribe the evidence at the hearing before Commissioner Summers. Charges in the amount of $45.40 were incurred for these services, which charges are fair, reasonable and customary. An award is, therefore, entered in favor of Betty Jo Zagar in the amount of $45.40, payable forthwith.

Henry P. Keefe was also employed to take and transcribe the evidence at an additional hearing before Commissioner Summers. Charges in the amount of $80.00 were incurred for these services, which charges are fair, reasonable and customary. An award is, there-

fore, entered in favor of Henry P. Keefe in the amount of $80.00, payable forthwith.

All future payments being subject to the terms and provisions of the Workmen's Compensation Act of Illinois, jurisdiction of this cause is specifically reserved for the entry of such further orders as may from time to time be necessary.

This award is subject to the approval of the Governor, as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees".

(No. 4511—Claim denied.)

BARON-HUOT OIL COMPANY, Claimant, *vs.* **STATE OF ILLINOIS,** Respondent.

Opinion *filed October 10,* ***1962.***

GRANGER, BECKERS AND SNOW, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

TAX—*voluntary* ***payment.*** Where it appears that claimant paid a tax voluntarily, with a full knowledge of the facts, he cannot recover in a suit in the Court of Claims, as his remedy was to pay the fee under protest, and then to proceed in chancery in accordance with Ill. Rev. Stat., 1949, Chap. 127, Secs. 172 and 172a.

LANSDEN, J.

Claimant, Baron-Huot Oil Company, a Corporation, seeks to recover the sum of **$459.90,** which **it** claims it erroneously paid as inspection fees under the Oil Inspection Act. Ill. Rev. Stat., **1951,** Chap. **104,** Secs. **1-18.**

Claimant is a jobber of petroleum products at Kankakee, Illinois, and deals in gasoline, kerosene, range oil and fuel oil. During the period from April, **1950** through January, **1952,** as required by said Act,

claimant filed returns with the Department of Revenue, and paid the inspection fee of .0003 cents per gallon on all gasoline and kerosene received by it. Its auditor, however, during such period, in making up the tax return, included range oil and fuel oil gallonage amounting to 1,532,991 gallons within the kerosene gallonage.

The auditor during such period testified that he learned of the fact that no inspection fees were due on range oil and fuel oil early in 1952, and this action for refund, therefore, resulted.

We will not decide whether the range oil or fuel oil involved in this case was a motor fuel within the meaning of the Oil Inspection Act, and the rules and regulations of the Department of Revenue issued pursuant thereto.

However, claimant cannot prevail in this case, because it failed to comply with Ill. Rev. Stat., 1949, Chap. 127, Secs. 172 and 172a, which require any person paying money to the State, with some exceptions not pertinent here, to pay same under protest, and then to proceed in chancery, and obtain a temporary injunction within **30** days of such protest payment. If a payor fails to proceed in accordance with this statute, payments become a part of the general revenue funds of the State. *Peo. ex rel City of Highland Park* vs. *McKibbin,* 380 Ill. 447.

This Court has held that a failure to pursue this remedy, even when the tax or fee statute involved was later held unconstitutional, acts as an absolute bar to any recovery in this Court. *Farm Bureau Oil* Co., *Inc.*, vs. *State,* 14 C.C.R. 153, and see decisions cited therein.

We see nothing in the record herein, which would warrant any departure from the above rule, which has been uniformly followed in this Court.

The claim of Baron-Huot Oil Company, a Corporation, must be, and hereby is denied.

(No. 4387—Claimant awarded $2,500.00.)

BRADIE SHOCKLEY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed *November 12*, 1952.

WALTER J. SIMHAUSER AND ALLEN T. LUCAS, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent,.

HIGHWAYS—*negligence.* Where evidence showed that an agent of respondent drove a snow plow into a drift at such a speed as to cause the plow to slide into claimant's lane, the State mas proven negligent, allowing claimant to recover damages.

STATUTORY CONSTRUCTION—*prospective* operation *of* amendatory acts. Where the Legislature amended the Court of Claims Act increasing the maximum limit of awards, Ill. Rev. Stat., 1951, Chap. 37, Sec. 439.8, a cause of action which arose prior to the effective date of the amendatory act, was limited to $2,500 00.

LANSDEN, J.

Claimant, Bradie Shockley, brings this action to recover damages for the alleged negligence of respondent in operating a truck, to which a snow plow was attached. along one of the highways in this State.

On February 13, 1950, snow had fallen in substantial quantities in Carroll and Whiteside Counties along Illinois Route No. 78 north of its intersection with U. S. Highway No. 30. The wind was blowing in such fashion as to cause drifts to form at various intervals.

At approximately 3:00 P.M. of that day, a Division of Highways truck was proceeding in a northerly direction along said Route No. 78 plowing snow off of the highway, and the blade of the snow plow was so angled as to cause the snow to be pushed in an easterly direction onto the highway shoulder.

Claimant was proceeding in a southerly direction driving his 1949 Kaiser sedan, to which was attached a two-wheeled trailer in which two Poland China hogs mere being transported.

At and near the point where the 'collision occurred, the highway was straight but undulating.

Although there is the usual conflict of testimony, as we view the record, the facts can apparently be sifted and analyzed to such an extent as to determine the fault in the case without any misgivings on our part.

Claimant, proceeding south, crested a sharp hill and started down. Respondent's truck was at the bottom of the incline, proceeding north. As the two vehicles approached, two sizable snow drifts were encountered. Claimant followed the ruts made by another car through the northerly drift, and entered the southerly drift, following the same ruts, which were entirely within his lane. While claimant's car was coming through the southerly drift, respondent's truck entered it on the southerly side, and, almost immediately upon entering it, respondent's truck veered to the left, and the projecting blade of the snow plow struck the left front wheel of claimant's car, and then continued along the left side of claimant's car.

When the vehicles came to rest, claimant was unconscious, and his car was virtually demolished. The snow plow blade was knocked from its operating position, and dangled along the left side of the truck.

Testimony of disinterested witnesses confirm these facts, and the physical facts at the scene of the accident, coupled with an admission by respondent's driver that he drove the truck into the drift at such speed as to cause it to slide into claimant's lane, all compel us to

conclude that the negligence of respondent has been proven by the preponderance of the evidence.

There is extensive testimony in the record concerning the speed of the two vehicles, the condition of the highways, the lights on the truck, and the control each driver was exercising, but such testimony skirts the fringes of the case, and does not pinpoint the crucial question of the place of impact, which we decide was in claimant's lane.

For the violation of the Uniform Act Regulating Traffic on Highways, Ill. Rev. Stat., 1949, Chap. 95½, Sec. 151, respondent is liable. *Roberson* vs. *State,* **19** C.C.R. 58.

As to claimant's damages, it is obvious, and apparently conceded by respondent, that such damages exceed $2,500.00. However, claimant contends that, although his cause of action arose in 1950, he is entitled to the benefits of the amendment that the Legislature made in 1951 to the Court of Claims Act, which increased the maximum amount this Court can award to any claimant in a tort case from $2,500.00 to $7,500.00. Ill. Rev. Stat., 1951, Chap. 37, Sec. 439.8.

However, we do not believe claimant's contention in this regard is sound. In 1947, the Legislature increased the amount, recoverable in a wrongful death action from $10,000.00 to $15,000.00. Ill. Rev. Stat., 1947, Chap. 70, Sec. 2. (The limit has since been raised to $20,000.00. Ill. Rev. Stat., 1951, Chap. 70, Sec. **2.)** In *Theodosis* vs. *Keeshin Motor Exp.* Co., 341 Ill. App. 8, it was held that a cause of action, which arose prior to the effective date of the amendatory act, was limited to a recovery of $10,000.00, or, in other words, that an amendment of this type operates only prospectively,

and not retrospectively. See also: Ill. Rev. Stat., **1951,** Chap. **131,** Sec. **4.** We respect this holding, and are convinced it is representative of the greater weight of authority, and, therefore, we conclude that claimant's damages are limited to $2,500.00. Ill. Rev. Stat., **1949,** Chap. **37,** Sec. **439.8.**

An award is, therefore, entered in favor of claimant, Bradie Shockley, in the sum of $2,500.00.

(No. 4476—Claim denied.)

NAT HERSHENSON, Claimant, *vs.* **STATE OF ILLINOIS,** Respondent.

Opinion filed November 12, 1958.

DAVID CHAIMOVITZ, Attorney for Claimant.

IVAN **A.** ELLIOTT, Attorney General; WILLIAM H. **SUMPTER,** Assistant Attorney General, for Respondent.

HIGHWAYS—*burden of proof.* **Evidence showed that claimant failed to show by a preponderance of the evidence his freedom from contributory negligence, and negligence on the part of respondent by the acts of a maintenance crew tarring cracks in pavement.**

LANSDEN, J.

Claimant, Nat Hershenson, filed his complaint herein in which he seeks damages for the alleged negligence of respondent, acting through certain employees of the Division of Highways.

The transcript of the testimony in this case is **203** pages in length. Same was filed in this Court on May **15, 1952.** When the time for claimant to file an abstract of the testimony and his brief had expired, the case was assigned for opinion. **A** few days later claimant filed a motion requesting that the case be removed from the advisement docket, and that claimant be granted leave ***to*** file his abstract, brief and argument on or before

September 10, 1952. For good cause shown, said motion was granted.

However, no abstract or brief for claimant or respondent has been filed to date, and the case, therefore, proceeds to a decision on the record as it now stands.

Fortunately for the Court, an analysis of the transcript of the testimony discloses that the case turns on factual, rather than legal questions.

At the outset, it should be observed that the length of the transcript resulted in large measure from the repetitive questioning of most of the witnesses as to certain distances involved in the occurrence. Not only did counsel want to know how many feet there were, but also how many yards, rods, paces, and even inches. In this search for the ultimate in accuracy (or inaccuracy), one of the most important vehicles in the case was almost lost sight of, and another highly important vehicle just disappeared.

On October 19, 1950, at about 3:30 P.M., claimant was proceeding in a westerly direction in his Studebaker car along State Highway No. 17 at a point less than one mile west of its intersection with State Highway No. 170 in Livingston County, and approximately twelve miles east of Streator. Route No. 17 at this point is straight and level for over two miles. The weather was clear and bright, and the pavement dry.

Claimant testified he was following a large truck at a distance of about 150-200 feet, and at a speed of approximately 45 miles per hour. Suddenly the truck pulled to the left into the east bound lane, and claimant then saw ahead of him a parked highway truck, and a highway maintenance crew engaged in putting tar in cracks in the pavement. Then the truck pulled to the right into its proper lane, and claimant was confronted

by a car heading at him in the eastbound lane. To avoid an impending head-on collision, claimant testified that he applied his brakes, swung further to the left, went off the highway, careened through a fence, then hit a tree, and finally stopped at some distance south of the highway. Considerable damage was done to claimant's car, but he suffered only slight injuries.

The three members of the highway maintenance crew, a farmer, who was only a few hundred feet from the scene, and a tractor mechanic, who was repairing the farmer's tractor, all testified for respondent.

The latter two heard the screeching of the skidding tires of claimant's car, but the farmer's house obscured their view of the car as it left the highway, and ultimately crashed into the tree.

Not one witness for respondent recalled seeing, hearing or noticing a truck proceeding ahead of claimant's car, and none even mentioned the car supposedly proceeding eastwardly toward the threatened head-on collision. If there was such a car, it certainly did not stop, although had it been there the driver would have had a front-row seat to view the gyrations of claimant's vehicle, and almost certainly would have stopped to render assistance. This curious hiatus in the record leads us to the conclusion that there was insufficient proof of the very presence of such vehicle.

As for the truck claimant was supposed to have been following at a distance of 150-200 feet, a witness for respondent testified he moved the highway truck westwardly in the proper lane a short distance, and looked into the rear view mirror as he stopped, and he saw, at least four hundred feet behind him, claimant's oncoming car. If claimant was following the truck as closely as he testified, then the truck would have been

visible in the rear view mirror, and probably claimant's car would have been obscured.

The physical facts in the case show, without dispute, that claimant's car left the highway several hundred feet east of the maintenance crew, and that, it came to rest at a point south of, but still east of the location of the maintenance crew.

It is almost proven beyond peradventure of doubt that the maintenance crew had put up three thirty-inch signs bearing the legends: "Men Working", "Road Repairs", and "One-way Traffic" along the highway shoulder. The first sign was 30 feet west of the junction of Highways Nos. 17 and 170. The second sign was 200 feet west of the first, and the third 200 feet further west,. Although the third of these signs was about 3,500 feet east of the highway crew at the time of the accident, because the crew kept moving slowly away from them, the fact remains that claimant could and should have seen them, and acted accordingly.

It was also testified that claimant stated immediately after the accident that he was going 65 miles per hour, and that the sun blinded him.

Claimant also testified that no member of the maintenance crew came over to assist him after the crash. However, every witness for respondent testified to the contrary.

This Court has not been reluctant to grant awards in tort cases, but we are bound by the rule that a claimant must prove his case by a preponderance of the evidence. This claimant has failed to do herein. From the record we conclude that respondent was not negligent, and that claimant has failed to prove his freedom from contributory negligence.

An award to claimant, Nat Hershenson, is, therefore, denied.

(No. 4300—Claimants awarded $4,500.00.)

CORNELIUS E. AND MARGARET E. TENBOER, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 26, 1952.

BULL, YOST AND LUDENS, Attorneys for Claimants.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

JURISDICTION—*Eminent Domain—consequential damages.* **Under Section 8 A of the Court of Claims Act, the Court held it had jurisdiction to hear and determine claims for consequential damages to property arising out of the construction of a public improvement.**

SCHUMAN, C. J.

Complaint was filed herein by claimants on May 5, 1950 to recover for damages to property and loss of business by virtue of a highway improvement in front of their property, and an amended complaint was filed on September 28, 1950, in which the claim for damages for loss of business was eliminated.

The claimants, Cornelius E. Tenboer and Margaret E. Tenboer, husband and wife, are the owners of premises in the town of Union Grove, about three miles west of the City of Morrison in Whiteside County, Illinois, which have been used for many years as a place of business and residence of the claimants. The property was purchased by claimants in the year 1941. It adjoins the Chicago and Northwestern Railway right-of-way, and is immediately to the north of State Bond Issue Route No. 6, also known as U. S. Route No. 30.

On September 11, 1947, the State of Illinois began work on a project designated as State Bond Issue Route No. 6, Section 17-R-IVB. It consisted of a combination reinforced concrete and steel structure over the Chicago and Northwestern tracks. The center line of this structure extends in an east-west direction, south of the

previous alignment of State Eond Issue Route No. 6 through Union Grove:

On May 17, 1948, the State of Illinois began a project designated as State Bond Issue Route No. 6, Section 1. It consisted of an earth-fill leading to the bridge of the project of 17-R-IVB. These projects were completed on October 5, 1949, and September 21, 194.9, respectively.

The grade crossing over State Bond Issue Route No. 6 at the Chicago and Northwestern Railway tracks was closed and barricaded on both sides of the tracks, and across the highway.

The face or front of claimants' building is 30 feet north of the center line of the old pavement, and the center line of the old pavement is 76 feet north of the center line of the new pavement. The difference in elevation between the old and new pavements opposite the east end of claimants' property is 25.5 feet, and the same difference opposite the west end of claimants' property is 21.8 feet. A connection made between the old and new highways is 870 feet west of the west line of claimants' property.

The hearing was had in this matter at Morrison, Illinois on September 27, 1951. The evidence on behalf of the claimants consisted of testimony of Cornelius E. Tenboer, Margaret E. Tenboer, William R. Bealer, a real estate man; Clayton Dykema, a real estate broker; J. A. Bull, owner of the elevator and lumber yard at Union Grove; and John Davis, former assessor of the town of Union Grove. The evidence on behalf of the respondent consisted of testimony of Arthur L. Goodenough, a farmer, who was acquainted with the property in question; and Harry R. Hanley, a civil engineer of the Division of Highways of the State of Illinois. Photo-

graphs were also introduced in evidence by both claimants and respondent.

The respondent raises the question of this Court's jurisdiction to award consequential damages where no property has been taken, but admittedly the property has materially depreciated by reason of the improvement, and its effect on accessibility resulted in a depreciation of the fair, cash market value of the property. To support this contention, respondent cites the case of *People* vs. *Smith*, **374** Ill. **286.** The Smith case passed on the validity of an Act of the Legislature of **1939,** wherein the Court of Claims was given exclusive jurisdiction to ascertain just compensation arising out of cases under Eminent Domain. The Smith case specifically held that the Act was unconstitutional in divesting constitutional courts of jurisdiction over a judicial matter. This can only mean one thing, and that is that the Circuit Court has jurisdiction by mandamus to compel the Director of the Department of Public Works and Buildings to institute appropriate proceedings in accordance with the provisions of the Eminent Domain Act to ascertain the just compensation due for damages. The Smith case was one for consequential damages, because there had been no physical invasion or taking of any property. The first case of this kind arose in *People* vs. *Kingery,* **369** Ill. 289, which was likewise a case for consequential damages. This case, likewise, required the Director to institute proceedings under the Eminent Domain Act for the ascertainment of damages.

Both of the above cases specifically held that the remedies were provided under the Constitution and under the Eminent Domain Act. The Constitution and the Eminent Domain Act are both laws of the State.

Respondent contends, and with merit, that the

Court has repeatedly declined jurisdiction where an adequate remedy exists in the courts of general jurisdiction. All of these cases cited have been cases where the claimant had available to him a remedy established by statute. In the case of *Tebeau* vs. *State of Illinois,* **No. 4468,** recently decided by this Court, the claimant had commenced his proceeding before the Service Recognition Board, and it was held that where a claim was arbitrarily denied he had a remedy by mandamus, citing *People ex rel Mosco* vs. *Service Recognition Board,* **403** Ill. **442.** The basis for the previous decisions of this Court was aptly stated in the case of *Edward J. Barrett* vs. *State,* **13** C.C.R. **13,** where the Court, on page **17,** held:

> **"The Legislature in creating the Court of Claims did not intend that it should usurp the powers of, contradict, or compete with Courts of general jurisdiction."**

However, under Section **8** of the Court of Claims lam, subparagraph **A,** it is provided as follows:

> **"A. All claims against the** State **founded upon** *any law* **of** the **State of Illinois . . . . . (emphasis supplied)."**

Under this provision of the Court of Claims law. the Court is given jurisdiction to determine claiins arising under the Constitution and laws of the State **of** Illinois, which include the Eminent Domain Act, and the provisions of the Constitution on the taking of private property. This Court has consistently taken jurisdiction in cases involving consequential damages arising out of the construction of public improvements. The action, as stated in *People* vs. *Smith, supra,* is not an action for a tort, nor a penalty, nor for forfeiture, but for injury to property, and the right to compensation is a vested property right. For said reason, jurisdiction of this Court is specifically given by the Legis-

lature in a case of this kind arising under the specific terms of the Constitution and the Eminent Domain Act. To sustain this contention, both cases of ***People*** vs. Smith and ***People*** vs. *Kingery, supra,* required the Director to proceed under the Eminent Domain Act to determine plaintiffs' damages. There can be no question that this is a claim under the law of the State of Illinois, and jurisdiction under this Court gives claimant a sure and positive remedy.

The jurisdictional question being resolved, the only, question to determine is the amount of damages, for the reason that, by the evidence, it is admitted claimant has sustained damages.

From the evidence in this record, and from a view of the premises, the Court concludes that claimant has sustained damages in the amount of **$4,500.00.**

An award is, therefore, entered in favor of claimant in the amount of $4,500.00.

(No. 4334—Claim denied.)

JACK T. **WILLIAMS,** Claimant, *vs.* **STATE OF ILLINOIS,** Respondent.

Opinion filed November 26, 1961.

JACOB **CANTLIN,** Attorney for Claimant.

IVAN **A. ELLIOTT,** Attorney General; **WILLIAM** H. SUMPTER, Assistant Attorney General, for Respondent.

HIGHWAYS—*rights* of ***occupants*** of ***adjacent property.*** Claimant has no property rights in the use of the streets or highways for the location and maintenance of his business.

SAME—*damages to adjacent property by improvements necessary to sustain claim.* Claimant must show a direct physical disturbance of a property right different in degree and kind from that sustained by the public at large.

SAME—*use of right-of-way.* Where claimant was deprived of the use of ground, which admittedly was the right-of-way of a public road, there was no basis on which a claim for damages could be allowed.

SCHUMAN, C. J.

The claimant herein seeks damages for the moving of a hatchery building, for loss of business, and expenses of this suit by reason of a new bridge being constructed. adjacent to the location of his building, causing the level of the roadway to be 3 feet higher than formerly.

Claimant's building was constructed in 1933 on what is called Williams Island, which lies between the cities of Sterling and Rock Falls in Whiteside County, Illinois. The building was originally 20 feet by 60 feet, and was placed on land owned by Jennie Williams, mother of the claimant. In 1937, an addition was made to the building of 30 feet by 12 feet. The front of the building faced the highway, and the building line was 1 foot from the west side of the highway right-of-way.

The old highway pavement was about 24 feet from the front of the building, and, after the new bridge was put in, a curb was made at the west side, and also a sidewalk. The distance from the west edge of the pavement to the front of claimant's building was 13 feet.

Claimant had conducted a hatchery business, and, after the road improvements started, he discontinued the business, and rented the building for $40.00 a month. The evidence discloses that the State made an offer of $3,000.00 for moving the building, which apparently was never accepted, and, which was not paid, because the appropriations had all been expended.

The claimant, by his own evidence, does not claim any damages as a result of loss of business, and, as a matter of fact, he voluntarily discontinued his business. The claimant bases his claim solely on the ground that the improvement took away access to the front of his building, where trucks and other vehicles formerly

could back up to his door to unload material, and take out baby chicks and poultry supplies.

There is no evidence in the record of just what interest claimant had in the land where the building was located. There is no competent evidence in the record to disclose any damages sustained by claimant.

The law is clear in Illinois that claimant had no property rights in the use of the streets or highways for the location and maintenance of his business.

In *City of Chicago* vs. *Rhine*, 363 Ill. 619, the Court, at page 625, said:

> "The defendant had no property right in the use of any of the streets of Chicago for the location and maintenance of his business."

In order for claimant to sustain a claim for damages, he must show a direct physical disturbance of a property right different in degree and kind from that sustained by the public at large. All of the cases cited by plaintiff sustain this statement, as do all of the Illinois cases. See: *Illinois Power and Light Corporation* vs. *Wieland*, 324 Ill. 411; *Central* Illinois *Public Service Co.* vs. *Lee*, 409 Ill. 19-24.

Claimant's damages are alleged to have occurred because he was deprived of ground, which is admitted was the right-of-way of a public road. Claimant has no property rights in said area, and, as the result under the record in this case, no damages could be allowed. The law will not allow a claim for damages to land not taken, unless it is from a cause, which the law regards as a basis for damages. *Central Illinois Public Service* **Co.** vs. *Lee, supra; Kramer, Et Al* vs. *State of Illinois*, **10** C.C.R. ***556,*** 560.

For the reasons assigned that the alleged claim is predicated on a cause, which is not the basis for dam**ages,** the claim is denied.

(No. 4407—Claimant awarded $2,500.00.)

FABICK TUGBOAT RENTAL CO., INC., A CORP., Claimant, *vs.* **STATE OF ILLINOIS,** Respondent.

Opinion filed November 26, 1958.

ENSEL, MARTIN, JONES AND BLANCHARD, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

RIVERS AND BRIDGES—failure of *bridge tender* **lo** *open bridge.* **Evidence showed** that **negligence of bridge tender in failing** *to* **open bridge after ample notice was proximate cause of damages, and entitled claimant** *to* **recover.**

DELANEY, J.

Complaint was filed herein by Fabick Tugboat Rental Co., Inc., a Corporation, claimant, on May 15, **1952** to recover for property damage to its motor vessel, the Nina F, and for loss of revenue sustained as the result of a collision of the Nina F with the Jefferson Street bridge, which spans the Des Plaines River at Joliet, Illinois, on May 26, 1950.

On May **26, 1950,** the Nina F, under the command of Captain Albert Mallory, was proceeding upstream on the Des Plaines River in the vicinity of Joliet, Illinois. The Nina F was 68 feet long, and was controlled from the pilot house by automatic air brake controls. It was also equipped with an air horn and various lights. At the time in question, the Nina F was pushing three barges strung out ahead, each of the barges being **195** feet long and *35* feet wide. As the Nina F approached the Rock Island Railroad bridge in Joliet, Captain Mallory gave the proper signals, and stopped until a train crossed the bridge, and the bridge was reopened. North, or upstream from the railroad bridge, was the Jefferson Street bridge, a distance of approximately a quarter of a mile, or **1,320** feet. After the Nina F passed

under the railroad bridge, the Captain signaled the Jefferson Street bridge to open, but received no reply signal. The Captain went about half way between the two bridges, or some 600 feet south of the Jefferson Street bridge, and again gave the proper signal, but received none from the bridge tender. At that time Captain Mallory said he could see the bridge tender at his post, and he signaled him with the lights, but received no return signal. He continued on toward the bridge, and gave another signal when approximately 300 feet from the bridge, and then, not receiving a return signal, he gave a distress signal, and immediately reversed his engine to full astern, but he was unable to stop the Nina F, and the barges and the Nina F crashed into the bridge with the resulting damage.

Captain Mallory further testified that, as he proceeded upstream, he was traveling about two miles per hour, and that in his opinion he could stop the barge in the distance of about 300 feet. After the accident the Captain pulled the barge into the dock, and went back to the bridge tender to inquire why the bridge hadn't been opened. The testimony is that the bridge tender stated that he didn't see or hear any signals. Mallory testified that in his opinion the bridge tender was intoxicated.

The record consists of the complaint, motion of respondent for an extension of thirty days in which to file pleadings, order of Chief Justice granting respondent an extension of time to April 27, 1951 in which to file pleadings, Departmental Report, original transcript of evidence, copy of transcript of evidence, statement, brief and argument of claimant, statement, brief and argument of respondent, and reply brief of claimant.

The only evidence introduced at the hearing was

that of Captain Mallory and Frank V. Horvath, the manager and chief accounting officer of claimant Corn-. pany, and the Departmental Report.

We are of the opinion that failing to raise the bridge, when it had ample notice of the approach of the vessel, was a neglect of duty on the part of the respondent. The State of Illinois, acting by and through its agent, was guilty of negligence, which proximately caused the damages complained of by the claimant.

In the case of *Clement* vs. *Metropolitan West Side El.* Ry. *Co., 123* Fed. 271 (C.C.A. 7th Cir., 1903), which involves facts similar to those in the instant case, the Court said:

"A bridge spanning a navigable river is an obstruction to navigation tolerated because of necessity and convenience to commerce upon land. Such a structure must be so maintained and operated that navigation may not be impeded more than is absolutely necessary, the right of navigation being paramount. It is incumbent upon the owner that the bridge be so constructed that it may be readily opened to admit the passage of craft, and maintained in suitable condition thereto. It is also his duty to place in charge those who are competent to operate the bridge, to watch for signals, and to open the bridge for the passage of vessels, and for the performance of such delegated duty he is responsible. It is also his duty to equip the bridge with proper lights giving warning of the position of the bridge and of its opening and closing. If for any reason the bridge cannot be opened, proper signals should be given to that effect, such as will warn the approaching vessel in time to heave to. A vessel. having given the proper signal to open the bridge and prudently proceeding under slow speed has, in the absence of proper warning, the right to assume that the bridge will be timely opened for passage. She is not bound to heave to until the bridge has been swung or raised and locked, and to critically examine the situation before proceeding (City of *Chicago* vs. *Mullen*, 54 C.C.A. 94, 116 Fed. 292), but may carefully proceed at slow speed upon the assumption that the bridge will open in response to the signal, and may so proceed until such time as it appears by proper warning, or in reasonable view of the situation, that the bridge will not be opened (*Manistee Lumber Company* vs. *City* of *Chicago* (D.C.), 44 Fed. 87; *Central Railroad Company* of *New Jersey* vs. *Pennsylvania Railroad Company*, S C.C.A. 86, 59 Fed. 192), when it becomes the duty of the vessel, if possible, to stop, and, if necessary, to go astern."

The cause of action herein having accrued on May 26, 1950, all claims against the State of Illinois for

damages in cases sounding in tort shall not exceed the sum of $2,500.00.

An award is, therefore, entered in favor of the claimant, Fabick Tugboat Rental Co., Inc., for the sum of $2,500.00.

(No. 4483—Claim denied.)

THOMAS J. FLISK, Claimant, *vs.* STATE **OF** ILLINOIS, Respondent.

Opinion filed September 12, 1952.
Supplemental opinion denying Claimant's petition for rehearing filed November 26, 1952.

OWEN AND LUNDEBERG, Attorneys for Claimant.

IVAN A. ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

DAMAGES—*personal injuries—recovery from* ***joint tort feasor.*** Where claimant recovers an amount equal to the total maximum allowed by the State **of** Illinois **from** a joint tort feasor, no damages can be allowed by the Court **of** Claims.

SCHUMAN, C. J.

This claim arises out of the same set of facts as those set forth in consolidated cases Nos. **4393** and **4394,** wherein William Winston and Patrick Clancy are claimants.

A detailed statement of facts surrounding the occurrence, medical testimony, and resulting disability **of** the claimant will not be necessary for a decision.

The maximum tort liability of respondent in this case is $2,500.00. It is admitted claimant has received the sum of $6,300.00 from persons deemed jointly responsible for his injuries. This amount, under the authority of the State of Illinois, would have to be deducted from any sum allowed by this Court; and hence no damages could be awarded.

A collection of authorities on this point is found in *Aldridge* vs. *Norris*, **337** Ill. App. **369,** the rule being that when suit is brought against one joint wrongdoer, the amount paid by another joint wrongdoer is to be credited on any liability, which may be found to exist against the one sued.

For this reason, the claim will be denied.

SUPPLEMENTAL OPINION

SCHUMAN, C. J.

This case is to be considered in conjunction with the opinion rendered in consolidated cases Nos. **4393** and **4394,** wherein William Winston and Patrick Clancy were claimants. The opinion in that case as to the law applicable to the facts applies here, and the claim would have to be denied on the theory therein established.

The additional point established in this case was to announce the law as to the amount that could be recovered in a case authorizing recovery.

For the reasons advanced, the petition for rehearing is denied.

(No. 4499—Claimant awarded **$762.09.)**

BETTY SECAUR, Claimant, *vs.* ***STATE*** **OF ILLINOIS,** Respondent.

Opinion *filed November* **26,** *1962.*

LESTER B. MARSHALL, Attorney for Claimant.

IVAN **A.** ELLIOTT, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

CIVIL SERVICE ACT—*compensation for* ***period*** of *unlawful* ***discharge.*** Where claimant was reinstated to her position **by a** decision ***of*** the Supreme Court, the facts indicate that she was entitled to salary **for** the period **of** the unlawful discharge.

SCHUMAN, C. J.

This claim arises out of the unlawful discharge of a Civil Service employee, and, claimant, Betty Secaur, seeks to recover wages, which were due her during her unlawful discharge.

Claimant, Betty Secaur, with Civil Service status, was transferred from the Illinois Public Aid Commission of Illinois, and appointed to the classified service of the Department of Registration and Education of the State of Illinois as Field Investigator II on January 1, 1949, and continued to be assigned to that Department until March 19, 1949, when, upon written notice from the Director of said Department, she was discharged. During said period she was paid a salary of $225.00 per month, although during that time she was not assigned to perform any actual work.

The matter of the legality or propriety of claimant's discharge as Field Investigator II, as aforesaid, and her right to receive salary for the period involved in that suit was heretofore litigated in a hearing before the Civil Service Commission of Illinois, which Commission found that her discharge had been for just cause. This decision was appealed to the Superior Court of Cook County, where a hearing was had, and a finding and decision rendered that her discharge was not for just cause, and she was ordered reinstated. After that the State of Illinois took an appeal of the case to the Supreme Court of Illinois, where the decision of the Superior Court of Cook County was affirmed. (408 Ill. 197.) This covered the period of claimant's employment with respondent as aforesaid from July 1, 1949 to the date of her reinstatement in February, 1951. Subsequent to the above Supreme Court decision, claimant filed a petition for mandamus in the Superior Court of

Cook County, and an order was entered by that Court directing the State Treasurer and the State Auditor of Public Accounts to make payment of claimant's salary for the period from July 1, 1949 to the date of heir reinstatement in February, 1951.

During the period in controversy, March 19, 1949 through June 30, 1949, claimant was unemployed, and was ready, willing and able to perform her duties as Field Investigator II for said Department. Prior to receiving said notice of discharge, she made repeated telephone and personal calls to said Department, but, according to her testimony, received no work assignment.

Respondent paid claimant her salary of $225.00 per month from January 1, 1949 to March 19, 1949 voluntarily, and paid claimant her salary, after extended litigation, for the period from July 1, 1949 up to the date of her reinstatement in February 1951, at the rate of $225.00 per month.

It appears, therefore, that claimant is entitled to be paid her salary for the period here in controversy, that is from March 19, 1949 to June 30, 1949, at $225.00 per month.

There is no answer or affirmative defense made in this case, and the only conclusion that the Court can make is that the claimant is entitled to her salary for the period in controversy.

Therefore, an award is entered allowing claimant her salary for the period from March 19, 1949 to June 30, 1949, a period of 3 months and 12 days, at the rate of $225.00 per month, in the amount claimed, being $762.09.

(No. 4526—Claim denied.)

SOUTHEASTERN ILLINOIS ELECTRIC COOPERATIVE, INC., A CORP., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 26, 1952.

S. D. WISE, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

HIGHWAYS—*allegation of due cure.* **Where claimant** fails **to allege due care and caution on its part, the motion** of **respondent** to **strike will be allowed.**

DELANEY, J.

The complaint herein was filed on September **18, 1952,** by the claimant, Southeastern Illinois Electric Cooperative, Inc., **A** Corporation of the State of Illinois, wherein it is alleged employees of the respondent in the operation of a dragline allowed the boom to damage claimant's electric distribution line, which was adjacent to the west side of State Bond Issue Route No. **142;** said distribution line being located upon the private property of farm owners, but being near and adjacent to the west right-of-way line of said Route No. **142.**

Respondent filed its motion to strike alleging:

1. The complaint fails to allege that the claimant was in the exercise of due care and caution for the protection of its property at the time of the alleged damages.

2. The complaint fails to allege that the employee allegedly operating the dragline was acting for or on behalf of the State of Illinois at the time claimant's property was allegedly damaged.

On failure to plead due care and caution, the claimant's complaint is hereby dismissed.

(No. 4417—Claimant awarded $1,500.00.)

EDYTHE MORTON, Claimant, *vs.* STATE OF ILLINOIS, Respondent

Opinion filed January 13, 1969.

JOSEPH H. GOLDENHERSH, Attorney for Claimant.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

HIGHWAYS—*contributory negligence of passenger.* **Where evidence showed accident was caused by the negligent operation of respondent's struck, and the evidence further showed that claimant was not contributorily negligent in failing to perceive the danger, and warn the driver of the car in which she was riding, she was entitled to recover, regardless of whether or not the driver of the automobile was negligent**

DELANEY, C. J.

On March **31, 1950,** the claimant, Edythe Morton, was riding as a passenger in an automobile driven by her son, Lester. There were three other passengers in the car. They were traveling along U. S. Highway No. **460.** An accident occurred about four miles southwest of the City of East St. Louis. At the place of the accident, a crew of men, employed by the Illinois Division of Highways, were engaged in filling a slide-in on the shoulder north of the highway. A truck was being used to transport dirt to the place of the fill-in. As the car in which the claimant was riding was about thirty feet from the truck, the truck lurched forward, and partially blocked the lane in which claimant's car was traveling. The driver of claimant's car swung his car to the left, and struck the center island of the highway. The car overturned, and came to a rest on its side.

After the accident, claimant was taken to St. Mary's Hospital in East St. Louis, where she was given emergency treatment. The claimant suffered a brain concussion.

Previously an opinion was filed in this case denying an award. On petition of claimant and a review of this

case, we now have reached the conclusion that our original opinion was in error, and that claimant is entitled to an award in the sum of **$1,500.00.**

The record consists of the complaint, motion of respondent for an extension of time in which to file pleadings, order of Chief Justice granting the motion of respondent for an extension of time in which to file pleadings, answer of respondent, Departmental Report, transcript of evidence taken on June **29, 1951,** additional transcript of evidence taken on June **29, 1951,** abstract of evidence, brief of claimant, statement, brief and argument of respondent, additional abstract of evidence, reply brief of claimant, oral arguments of attorneys for claimant and respondent, and claimant's petition for rehearing.

Route U. S. No. 460 at the location in question, consists of a four lane concrete pavement—two lanes for each direction of travel. **A** raised median curb separates the opposing lanes of traffic. At each end of the repair zone, there was a barricade set up across the outer or northerly traffic lane, and to the southeast of the easterly barricade on the northerly shoulder facing east was a series of signs indicating the presence of workmen and repair zone ahead. Although the respondent employed a flagman to slow down traffic, there is considerable doubt as to what, if any, signal was given to the driver of claimant's car.

Regardless of whether or not the driver of the automobile in which claimant was a passenger was negligent, this case involves a factual question of the necessity of claimant to perceive a danger, which the driver failed to recognize. We do not believe from the evidence that it was necessary for the claimant to warn the driver in this case, and that she was not contributorily negligent.

The accident under consideration was due to the negligent operation of respondent's truck.

Claimant has expended, as a result of the accident,, the following sums: to Dr. Compton, $40.00; to St. Mary's Hospital, $72.15; and, to Dr. Burroughs, **$49.00.** Clothing of claimant, which cost $200.00, was destroyed. Claimant suffered a concussion, and serious and permanent injuries to her hand. According to the testimony of Dr. Burroughs, her hand, which has a large swollen area, is permanently injured.

An award is, therefore, entered in favor of Edythe Morton, the claimant, in the amount of Fifteen Hundred Dollars ($1,500.00).

(No. **4446—Claimant awarded $1,750.00.)**

WORTH BISHOP, Claimant, *vs.* **STATE OF ILLINOIS,** Respondent.

Opinion filed **January IS, 1963.**

DUNN AND HAYES, Attorneys for Claimant.

LATHAM CASTLE, Attorney General; **WILLIAM** H. **SUMPTER,** Assistant Attorney General, for Respondent.

HIGHWAYS—*negligence.* **Where evidence showed that agent of respondent was negligent in failing to have flares** and **lights burning on highway maintenance truck while stalled during cindering operation, which was being conducted in a fog, an award to claimant** for **damages will be allowed.**

LANSDEN, J.

Claimant, Worth Bishop, seeks to recover damages from respondent for the negligent operation of a truck, which was engaged in keeping snow and ice off of State Route No. 47 in Livingston County.

The accident involved herein occurred on November **22,** 1950. Claimant suffered minor personal injuries, but his automobile was demolished.

Claimant was a sailor in the United States Navy stationed at Great Lakes, and on the afternoon of November 22, 1950 at approximately 4:30 P.M. he, accompanied by his wife, and another sailor by the name of William D. Jones, left their home in Waukegan driving to Mt. Zion, Illinois, near Decatur, for the purpose of spending Thanksgiving with their families. Shortly before the accident they stopped at a drug store in Dwight, Illinois for sandwiches and milk shakes. Prior to this time the weather had been good, and the pavement clear, but after leaving Dwight they ran into fog, slight snow flurries, and icy patches on the pavement. At this time claimant was driving, his wife was in the center, and Jones on the right side of the front seat. They drove south on Illinois Route No. 47, and, when about 10 or 12 miles south of Dwight, the accident occurred.

The evidence in the case consisted of the testimony of claimant, Worth Bishop, his wife, Madalyn Bishop, Lloyd Doran, Asa J. Edwards, Blaine Righter and Ethel McCreery.

Claimant testified that he was driving south on Illinois Route No. 47 on the west side of the highway at a speed of 35 to 40 miles per hour; that the pavement was icy in spots, visibility was somewhat poor, and that he had his lights on dim in order to see better in the fog; that when they reached a point approximately 10 or 12 miles south of Dwight he saw a truck stopped or parked on the highway, and he immediately applied his brakes, and swerved to the left, but the right front of his car struck the left rear of the truck. He further testified that there were no lights burning on the truck, and no flares or warning signals out guarding against possible danger; that the truck was a State Highway

maintenance truck in charge of Asa Edwards and Lloyd Doran, and that he had a conversation with Edwards, in which he stated that the flare lights were not burning;. He testified that the car was a 1947 Oldsmobile club coupe, which he had purchased in October of 1950 for $1,125.00, and that after the accident he sold the car to the auto wreckers for $227.50. Claimant also testified to the injuries received in the accident, and at the time of trial had a small scar on his head, mostly covered by hair, and not too visible at the time of the hearing. He further testified that he was a patient at the Veterans Hospital at Dwight, Illinois for six days, and was later attended by doctors at Great Lakes. He had additional expenses of $15.00 for towing, cleaning bills to car and clothing of $15.00, transportation charges back to Waukegan, loss of his suit, which he valued at $60.00, and other charges for transportation after returning to his home. At the time of the hearing he had made a good recovery from his injuries, and, other than the slight scar, bore no effects of any injuries.

Claimant's wife testified substantially the same as her husband, and said she saw no lights on the truck prior to the accident, or after the accident. She also testified as to a conversation with one of the State employees.

The testimony of Blaine Righter consisted of the fact that he operated a service station a short distance north of the scene of the accident, and that the State employees had stopped there for cigarettes a short time before the accident. He knew nothing about the accident, except that, after closing the service station, he heard a car pass, and then later heard the collision.

Asa J. Edwards, the highway employee in charge of the State truck, testified that they were out cindering

the highway that night, and that they were driving south on Route No. 47 returning to Forrest, Illinois; that they had stopped at the filling station just north of the I.C. tracks, and, after leaving the filling station, and approaching the tracks, began cindering the highway, which was slippery; that at that time something happened to the truck motor, and they got out of the truck to repair same, and it was at this time that the truck was struck by the car. Edwards testified that there were lights on the rear of the truck, and that a flare was burning both before and after the accident.

Lloyd Doran, a highway section helper, testified that, while they were cindering near the I. C. tracks at a point about two miles north of Saunemin, the motor on the truck failed, and that he and Edwards got out of the truck, and attempted to repair same. There was some dispute as to how long they had stopped, and he stated that it was about 3 or 4 minutes, and he further testified that the flash lights on the truck were not burning, although they did have lights.

Ethel McCreery, a registered nurse, testified that she lived in Fairbury, Illinois, and that on the night in question she was returning from Joliet, Illinois to her home; that at a point about 5 miles north of the scene of the accident she pulled up behind the State truck, and almost hit same, because there were no lights burning on the truck, and, that because of her inability to pass, because of an approaching car, she was forced into the ditch; that a passing motorist took her to Saunemin, where they secured the services of a wrecker, which pulled her car from the ditch; that she then proceeded on south on Route No. 47, and, at a short distance south of her mishap, she came upon the scene of the accident; that the truck at that time did not have lights burning,

but that the lights of the car were burning. She also stated that the night was foggy, and the road slippery.

In weighing the evidence in this case, we have been greatly impressed by the testimony of witness McCreery. Her testimony was that of a wholly disinterested person. However, we can not say the same for the testimony of Doran and Edwards. In the testimony of each were discrepancies and inconsistencies that, in our opinion, seriously weaken the probative force of their testimony on the disputed and crucial facts. There is no doubt in our minds that there had been trouble with the lights on the truck, that the battery was weak, and, that when the motor stalled, and Edwards tried to use the starter, the lights, if any were operating, were wholly inadequate for the time, place and position of the truck.

We, therefore, conclude that respondent was negligent in failing to have lights and flares working, and in use, and that claimant is entitled to an award.

The damages to claimant's automobile amounted to $900.00, and he was out-of-pocket approximately another $100.00 for miscellaneous expenses. His injuries were not serious, but were painful, and fortunately not disfiguring. We believe an allowance of $750.03 for his personal injuries would be reasonable. Claimant's total damages amount to $1,750.00.

An award is entered in favor of claimant, Worth Bishop, for $1,750.00.

(No. 4520—Claimant awarded $379.25.)

JOHN SINOPOLI, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January *13, 1953.*

MICHAEL F. RYAN, Attorney for Claimant.

LATHAM CASTLE, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

CIVIL SERVICE ACT—*award for salary during period of unlawful discharge.* Where evidence showed no de facto employee was appointed, and that the appropriation covering the period had lapsed, an award will be made for salary during period of unlawful discharge.

FARTHING, J.

The claimant, John Sinopoli, began his employment with the Illinois Department of Agriculture on February 1, 1931, and on May 1, 1942 he was certified as a Grain Sampler in the Division of the Chicago Grain Inspection. His title was later changed to "Grain Sampler I". He was discharged, without a hearing before the Illinois State Civil Service Commission, on May 7, 1949. The ground stated was that Sinopoli was a "probationary appointee".

On June 26, 1950, in the case of *People ex rel Sinopoli* vs. *Yung, Director of the Department of Agriculture,* No. 49 *S* 19260 in the Superior Court of Cook County, that Court ordered the writ of mandamus to issue as prayed. It directed the reinstatement of Sinopoli as a Grain Sampler I as of May *7*, 1949, and found that he should be paid back salary from May 7, 1949 to and including his reinstatement, but that the appropriation for the period from May *7* to June 30, 1949 had expired. Payment of back salary in the mandamus case was, therefore, limited to the period from July 1, 1949 to the date of reinstatement. Sinopoli was restored to his former position on July 25, 1950, and paid his

back salary of $210.00 per month from July 1, 1949 to July 25, 1950.

John Sinopoli filed his complaint in this Court on June 26, 1952. He asked that an award be made for back salary in the amount of $379.25, which covered the period from May 7, 1949 to June 30, 1949.

Besides the complaint, the record includes respondent's motion for an extension of time within which to plead, order of the Chief Justice granting said motion; claimant's brief, transcript of evidence, and the Commissioner's Report.

Respondent's exhibit No. 1 states that no de facto employee was appointed to the vacancy of John Sinopoli during the period from May 7 to June 30, 1949, and that the Department of Agriculture had no information that claimant was gainfully employed during any part of said period. It further stated that the Department's Division of Grain Inspection found, upon inspection of the complaint, that it contained no erroneous factual averments.

The claimant has fully proved his case, as shown by the record. He was unjustly prevented by respondent from performing his duties as Grain Sampler I in the Division of Chicago Grain Inspection, Department of Agriculture of the State of Illinois, from May 7, 1949 to June 30, 1949, both inclusive, for which loss of time he should be compensated at the rate of $210.00 per month for that period, as claimed, in the amount of $379.25.

An award is entered in favor of John Sinopoli, claimant, for $379.25.

(No. 4491—Claimant awarded $6,419.50.)

THE COUNTY OF RANDOLPH, Claimant, **us. STATE OF ILLINOIS,** Respondent.

Opinion filed February 6, *1953.*

JOHN A. HEUER AND WILLIAM **A.** SCHUWERK, Attorneys for Claimant.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

HABEAS CORPUS—*reimbursement* lo Counties ***for expenses.* Under** Ill. **Rev. Stat.,** 1949, **Chap. 65,** Sees. **37 - 39; Chap. 37,** Sec. **439.8, an award was made to claimant following** County ***of Randolph*** vs. ***State*** of Illinois, **19** C.C.R. **114.**

LANSDEN, J.

Claimant, County of Randolph, Illinois, by the chairman of its Board of County Commissioners and its State's Attorney, seeks to recover from respondent the sum of **$6,449.00.** This action is based on a specific statute, which confers jurisdiction on this Court to hear cases brought thereunder. Ill. Rev. Stat., **1949,** Chap. **65,** Secs. **37-39;** Chap. **37,** Sec. **439.8.**

The purpose of such statute is to reimburse certain counties in Illinois for expenses, costs and fees incurred because of the large volume of petitions for writs of habeas corpus in *forma pauperis* filed therein. The Counties of Will and Randolph are the principal beneficiaries of such statute.

Such counties have previously been given five awards in this Court, and those cases have decided that certain fees, expenses and costs are reimbursable under such statute. *County* of *Will* vs. *State,* **18** C.C.R. **189;** *County* of *Will* vs. *State,* **19** C.C.R. **192;** *County* of *Will* vs. *State,* **20** C.C.R. **105;** *County of Randolph* vs. *State,* **19** C.C.R. **114;** *County of Randolph* vs. *State,* **20** C.C.R. **243.**

A stipulation of facts has been filed herein, and is hereby approved.

The stipulation discloses that the Illinois State Penitentiary is located in Randolph County. Between January 24, 1950 and November 19, 1951, 375 petitions for writs of habeas corpus were filed in *forma pauperis* in the office of the Clerk of the Circuit Court of Randolph County by inmates of such institution. None of the petitioners were at the time of their commitment residents of, or committed by any court in Randolph County. In 27 cases the Clerk's filing fee was paid by the petitioner. Writs were issued, and hearings were held in 191 cases. In each of the 191 cases, the State's Attorney of Randolph County represented the People of this State at the hearing, and, in addition, the Clerk of the Circuit Court was required to furnish a photostatic copy of the petition to the Attorney General of the State of Illinois at a cost of $1.00 per petition.

In the above cited cases, we found that the Clerk of the Circuit Court was entitled to a $5.00 filing fee in each case, and reimbursement for the furnishing of photostats at cost. In *County of Randolph* vs. *State,* 19 C.C.R. 114, we found the State's Attorney was entitled to a fee of $20.00 for each case in which he appeared at the hearing representing the People.

Previously, the Sheriff of Randolph County claimed reimbursement for serving and returning the writs of habeas corpus, and for mileage. In *County of Randolph* vs. *State,* 19 C.C.R. 114 and 20 C.C.R. 243, it was held that the Sheriff was not entitled to any fees for serving the writs, or for mileage, but that he was entitled to $1.00 for returning each writ.

In this case the Sheriff no longer seeks any reimbursement for serving the writs, or for mileage. He still

seeks the $1.00 fee for returning each writ, and also claims **$2.50** in each of the 191 cases wherein the writs were issued and hearings held, because the Sheriff actually attended before the Judge of the Circuit Court with each of the prisoners in the 191 such cases.

The Sheriff is clearly entitled to be reimbursed for these fees, since Ill. Rev. Stat., 1949, Chap. 53, Sec. 37, provides in part as follows:

"The fees of sheriffs in counties of the first and second class shall be as follows:

. . . . . .

For attending before a judge with prisoner, on a writ of habeas **corpus,** in counties **of** the first and second class, two dollars and fifty cents **per** day . . . . . "

. . . . . .

Our opinion in *County of Randolph* vs. *State,* 19 C.C.R. 114, wherein we allowed the State's Attorney $20.00 in each case in which he represented the People, is also authority for allowing the Sheriff **$2.50** for attending with each prisoner, regardless of how many prisoners there might be before the Judge of the Circuit Court at any one session of court.

The Clerk of the Circuit Court of Randolph County is entitled to receive $5.00 for each petition filed, or the sum of $1,875.00, but he has already received $135.00 in 27 cases, leaving a balance due of $1,740.00. Ill. Rev. Stat., 1949 and 1951, Chap. 53, Sec. 31. In addition, he is entitled to receive $1.00 for photostats in 191 cases, or the sum of $191.00.

The Sheriff of Randolph County is entitled to receive $1.00 for returning each of the 191 writs of habeas corpus that were issued, or the sum of $191.00, and an additional sum of **$2.50** in each of the 191 cases wherein he attended before the Judge of the Circuit Court with the prisoner, or the sum of $477.50, or a

total sum of **$668.50.** 111. Rev. Stat., **1949** and **195'1,** Chap. **53,** Sec. **37.**

The State's Attorney of Randolph County is entitled to receive $20.00 for each of the **191** cases in which he appeared at the hearing representing the People, or the sum of $3,820.00. Ill. Rev. Stat., **1949** and **1951,** Chap. **53,** Sec. 8.

An award is, therefore, entered in favor of the County of Randolph for the sum of **$6,419.50.**

(No. 4524—Claimant awarded $227.00.)

ABE M. SAPERSTEIN, Claimant, *vs.* **STATE OF ILLINOIS, Respondent.**

Opinion filed February 6, 1953.

STURMAN AND BLOCH, Attorneys for Claimant.

LATHAM CASTLE, Attorney General; J. R. KERWIN, Assistant Attorney General, for Respondent.

NEGLIGENCE—*mistake in information as to availability of corporate name.* **Where claimant expended sums of money to secure a corporate charter from the Secretary of State, upon reliance that the particular name was available, subsequent discovery of the non-availability of the name, where no use was made of the corporation, entitled claimant to an award for the expenses of incorporation.**

FARTHING, J.

Claimant, Abe M. Saperstein, asks damages from respondent, because of monies expended in the incorporation of the "CHICAGO BRUINS BASKETBALL CLUB, INC.", having first been informed by the Secretary of State's office that such name was available, which later proved to be a mistake. Claimant was without fault in the matter, and made no use of the corporation; or its name, when the fact was discovered that another corporation by that name had been chartered, and was in existence, so that the name could not be used by claimant.

On August 7, 1950, claimant retained an attorney to incorporate his company under the name quoted under the laws of Illinois. The answer to the inquiry of this attorney as to the availability of the name was favorable, and on August 14, 1950, seven days later, the application in duplicate, and the check covering fees and franchise tax due the State were filed in the Office of the Secretary of State. The charter evidenced by Certificate No. 30839 was issued on August 15, 1950. A duplicate copy was mailed to the attorney, and recorded in Cook County.

A few days later, it was discovered that the Master Card Index, which had been examined by one of the employees in the Secretary of State's Office when the inquiry as to name was made, showed that a corporation of that name had existed, but had been dissolved. However, the Visual Card Index showed the opposite—that said corporation was still in existence. On August 21, 1950, the attorney was notified of the mistake by letter from the Secretary of State.

The expenses claimant incurred consisted of recording charter in Cook County, $4.40; seal, minute book, and stock certificates, $33.04; fees and franchise tax paid the Secretary of State, $43.96; and attorney's fee, $150.00; or a total of Two Hundred Twenty-Seven Dollars ($227.00).

The record consists of a complaint filed August 19, 1952, Departmental Report, transcript of evidence, and the Commissioner's Report.

The facts are not in dispute. The claimant had no alternate source from which he could secure information as to the availability of the name sought to be used to incorporate other than through the office of the Secretary of State of Illinois. A mistake was made in that

office, which caused the claimant to expend the sums named above, all of which constitute a total loss to him.

An award is, therefore, entered in favor of Abe M. Saperstein, the claimant, in the amount of Two Hundred Twenty Seven Dollars ($227.00).

(No. **4346—Prior** award modified.)

CORINE W. ARNOLD, WIDOW, ET AL, Claimant, us. STATE OF ILLINOIS, Respondent.

Opinion *filed March 20, 1953.*

No appearance for Claimant.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General.

WORKMEN'S COMPENSATION ACT—*modification of award.* Where dependent child attains the age of eighteen years, the award will be modified accordingly, with the Court retaining jurisdiction of the case for the entry of further orders, if necessary.

LANSDEN, J.

On February 9, 1951, an award in favor of claimant, Corinne W. Arnold, widow of Clarence C. W. Arnold, deceased, was entered in the sum of $6,675.00. *Arnold* vs. *State,* 20 C.C.R. 229.

At the time of said award there was one child of decedent, Barbara Corinne Arnold, who became 18 years of age on December 4, 1952. The widow of the deceased was alone entitled to $6,000.00, but, by reason of the existence of the one child under the age of 18 years, the award was fixed at $6,675.00.

On March 2, 1953, respondent filed a motion to modify the award, because of the fact that the one child had reached the age of 18 years.

Following our opinion in *Corcoran* vs. *State,* 19 C.C.R. 159, we computed the modification of the award as follows:

At the time Barbara Corinne Arnold became **18** years of age **$2,613.21** had already been paid on said award. These payments amount to .39149% of the total award of **$6,675.00;** .39149% of the **$675.00** attributable to the one child amounts to **$246.26; $264.26** subtracted from **$675.00** equals **$410.74.** The balance of the award remaining unpaid subsequent to December **12, 1952** amounts to **$4,061.79,** from which should be subtracted the sum of **$410.74,** leaving a balance of the award to be paid in the sum of **$3,651.05.**

The award heretofore entered in this case is, therefore, modified, and said sum of **$3,651.05** shall be paid at the rate of **$22.50** per week for a period of **162** weeks, plus one final payment of **$6.05.**

The Court is informed that the Department of Finance has continued payments of the original award subsequent to the date of December **12, 1952,** but the continuation of such payments has not prejudiced the State, and was the proper thing to do all things considered.

All future payments being subject to the terms and conditions of the Workmen's Compensation Act, jurisdiction of this case is specifically reserved for the entry of such further orders as may from time to time be necessary. This opinion is not to be construed as eliminating Barbara Corinne Arnold forever from a possibility of participation in the award. In the event of the death or remarriage of her mother, Barbara Corinne Arnold would be entitled to the unpaid balance of the award. *Waechter* vs. *Ind. Com.,* **367** Ill. **256; Swift &** Co. vs. *Ind. Corn.,* **288** Ill. **132;** *Beckemeyer Coal* **Co.** vs. *Ind. Corn., 370* Ill. **113;** *Swift &* Co. vs. *Ind.* **Corn.,** 309 Ill. **11.** The rights of Barbara Corinne Arnold

were fixed prior to her reaching the age of **18,** and her rights can never be extinguished as long as any amount remains unpaid under this award as modified.

(No. 4469—Claim denied.)

JOSHUA E. WELLS, Claimant, *vs.* **STATE OF ILLINOIS, Respondent.**

Opinion filed **March 20,** *1953.*

BULL, YOST AND LUDENS, Attorneys for Claimant.

LATHAM CASTLE, Attorney General; **WILLIAM H. SUMPTER,** Assistant Attorney General, for Respondent.

HIGHWAYS—*proximate* cause. Where evidence showed that the cause of claimant's damages by flooding was his construction of dikes, and the blocking of a drain pipe, which impeded the natural flow of water from his property, and not by the improvement made by the State of Illinois, an award was denied.

LANSDEN, J.

Claimant, Joshua E. Wells, seeks to recover from respondent for its alleged negligence, as a result of which claimant's home was damaged by flooding.

The real estate, which claimant had owned for the past 25 or **27** years, is located west of Morrison, Illinois, and lies to the west and south of Illinois State Route No. 6, also known as U. S. Route No. **30,** in Whiteside County.

The damages complained of are the results of floods in February, 1951 and July, 1951. Prior to 1939, Illinois Highway No. 6 passed along the east edge of claimant's property in a northerly direction to the north side of Unionville Park, and then turned west across the north side of said Park. This Park is located north of claimant's property, and is considerably higher in elevation. It appears that drainage from this Park and the highway, prior to the change in construction, flowed in a southerly direction toward claimant's **prop-**

erty. Claimant's property is located on the north bank of Rock Creek, which is the natural outlet for all of the surface water arising in claimant's property, and the territory to the north, including Union Park. Claimant has constructed a dike along the north bank of the creek, extending from the highway to the cliff west of his house. There is also a dike running north and west, which completely surrounds the house. In addition, claimant has constructed a 12 inch pipe under the dike, which serves as an outlet for the water from his property to the creek.

The evidence in this case consists of testimony of Joshua E. Wells, claimant, and Vance E. Hopper, a civil engineer for the Highway Department.

Claimant testified in detail as to the location of his property, the old highway, the new highway; the dikes, etc., as shown by the exhibit introduced in this cause. He also testified as to the drainage of the territory north of his property, both prior to and after the construction of the new highway in 1939. It appears that the drainage of the surface water, both before and after the new construction, was in a southerly direction across claimant's property, and down the highway to Rock Creek. The evidence does not reveal any additional water being gathered for discharge, except that the rate of discharge might be greater now, because of the increased amount of highway surface. Claimant testified that the property had been flooded before by surface water, and that, when Rock Creek became full, he blocked the pipe leading from his property to the Creek with sand bags. This is the situation, which prevailed in February, 1951 and July, 1951. On both of these occasions there was an unusually heavy rainfall, and the claimant, because the creek was flooded, put

his sand bags in position in order to keep the creek from over-flowing on his property; and, by doing so, he prevented the water, which flowed naturally from the north across his property, from escaping, and is, in fact, at fault in getting the water on his property. In other words, the water could not escape, because of the dikes he had constructed, and the sand bags, which he had placed in position. All of these facts were verified by 'Mr. Hopper, highway engineer.

Commissioner Wise, who heard the evidence in the case, concludes his report as follows:

"After hearing all of the evidence, and visiting claimant's property on two occasions, it is my opinion that the State was not negligent in the construction of the highway, has not been guilty of any negligence in the construction of drainage outlets, and the damages to claimant resulted because of the heavy rainfall on the two dates in question, and because of his own acts in stopping the natural flow of the water off of his property.

It is *my* recommendation that his claim be denied:"

We agree with the recommendation of Commisioner Wise, and, therefore, an award to claimant, Joshua E. Wells, is denied.

(No. 4474—Claim denied.)

PERRY BODIE, doing business as "THE BODIE LINES" of West Liberty, Iowa, Claimant, *us.* STATE OF ILLINOIS, Respondent.

Opinion filed March 20, 1953.

JOSEF T. SKINNER, Attorney for Claimant.

LATHAM CASTLE, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

HIGHWAYS—*contributory negligence.* Where a preponderance of the evidence showed the presence of illuminated warning signs to indicate pavement failure, claimant's truck driver in failing to observe them was contributorily negligent, and respondent was thereby absolved from liability.

LANSDEN, J.

Claimant, Perry Bodie, doing business as "The Bodie Lines" of West Liberty, Iowa, seeks to recover from respondent for its alleged negligence, as a result of which a tractor and trailer, driven by an employee of claimant, overturned, causing damage to the equipment and cargo.

The accident occurred on June 5, 1951. Donald Jenks, the driver, testified that on the day before the accident he left West Liberty, Iowa driving a 1948 tractor, and pulling a 1949, 34 foot trailer, loaded with 110 hogs for delivery to Armour and Company in Chicago; that he was driving eastwardly on U. S. Highway No. 34, and, after leaving Mendota, Illinois, and approaching the scene of the accident, he was passed first by a bus and then a car; that as these two vehicles approached a bump in the pavement, due to the repair of a pavement failure at a point about two miles east of Meriden, the bus pulled over to the north side of the pavement and stopped, the car pulled along side the bus on the south side and stopped; that he pulled up behind the bus, but was unable to stop, and then pulled over on the shoulder, and overturned in the ditch on the north side of the highway. He further testified that the accident occurred on said date of June 5th between 5:00 and 5:30 A.M.; that prior to the accident he was driving at a reasonable speed; and, that the drivers in front of him gave no signal of their intention to stop. He further testified that there were no warning signs or flares along the highway warning of the construction work.

At the time of the accident the weather was clear, and, although there is some dispute as to whether it

was daylight or dark, the preponderance of the evidence is daylight, but before sunrise.

Mr. Bodie testified as to the damages, but knew nothing about the facts of the accident.

Ben H. Turner, an insurance representative of Princeton, Illinois, testified as to certain photographs, which were admitted into evidence.

Mr. Zumstein of the Ottawa Highway office testified as to the rules and regulations of the Highway Department.

Alvin Jensen, a highway engineer, testified as to the construction, design and placement of highway signs at and near the point in question on March 14, 1951, although he was not able to state whether they were in position at the time of the accident.

These signs consisted of the following: "Bump" at point of accident; "Rough Pavement" 200 feet east and west; "Slow" 400 feet east and west; and, "Rough Pavement" 1300 feet east and west of the point of accident.

James Leonard, an employee of the Highway Department, testified that the signs and flares were in position on the night of the accident, that he had personally put the flares out, and that after the accident several of them were in the ditch.

Melvin Mathesius, *a* farmer, who resides at the scene of the accident, testified that the accident occurred at approximately 5:30 A.M. on said date, and that at that time it was daylight. He further testified as to the **2** foot sign, 200 feet west of the scene of the accident.

Ira Fuller of Peru, Illinois, driver of a bread truck, testified that he passed over this highway practically every day; that he passed over same on the morning of June 5th someplace around 4:00 A.M.; that the

signs and flares were all in position, and burning at the time.

To us, it is most significant that both the bus and car slowed down almost to a stop at the bump, which was the result of the pavement failure. This indicates that signs and flares were efficaciously placed to accomplish their purpose, or that the bump was sufficiently visible to be an adequate warning of its own presence. In either event, claimant's driver would be chargeable with contributory negligence, and respondent would not be liable. *Gibbs* vs. *State,* 19 C.C.R. 21; *Kennedy* vs. *State, 20* C.C.R. **156.**

The placing of illuminated warning signs, which was proven by the preponderance of the evidence, would absolve respondent from any liability under the circumstances. *Cruger* vs. *State, 20* C.C.R. **138;** *Rommel* vs. *State, 20* C.C.R. *220.*

In view of the foregoing, an award to claimant must be, and hereby is denied.

(No. 4492—Claim denied.)

A. M. **KERSHAW,** Claimant, *vs.* **STATE** OF **ILLINOIS,** Respondent.

Opinion filed October 10, ***1952.***
Petition of claimant ***for*** *rehearing denied March 20, 1953.*

HARRY G. STORY, Attorney for Claimant.

IVAN A. ELLIOTT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

LIMITATION—*damages to private property by reason of construction of public improvement.* Cause of action for damages to private property by reason of a public improvement accrues at the time the improvement was completed, and the two year statute of limitations, Ill. Rev. Stat., **1951,** Chap. 37, Sec. 439.22, begins to run from that date.

DAMAGES—*party damaged by a* ***public*** *improvement.* A right to action for damages **to** private property, not taken for public use, but alleged to have been damaged

by reason of the construction of a public improvement, is in the owner of the property at the time of the making of the improvement, and a subsequent alienee of the property has no right of action.

DELANEY, J.

The claimant, A. M. Kershaw, filed his complaint, herein on January 30,1952, setting forth three counts, wherein he alleges that on June 19, 1950, June 28, 1951, and for several years prior thereto he was the owner of the following described real estate, to-wit:

West one-half (W.½) of the Southwest one-quarter (S.W.¼) of Section 22; also the Northwest one-quarter (N.W.¼) of the Northwest one-quarter (N.W.¼) of Section 27; also the East one-half (E.½) of the Northeast one-quarter (N.E.¼) of Section 28, all situated in Township 16 North, Range 10 West of the Third Principal Meridian, Morgan County, Illinois, containing 193 acres, more or less.

Through and across a portion of the above described lands in an easterly and westerly direction, there flows a certain stream of water known as Big Indian Creek, which flowed through a natural water course until the respondent constructed a highway bridge, fills and approaches for the bridge along Route No. 78. The bridge by the nature of its construction limits and constricts the free and uninterrupted flow of water of Big Indian Creek, and the opening left for the passage of water is insufficient to permit the normal unimpeded and uninterrupted flow of water from said creek in periods of high water.

Claimant further alleges that, on the occasions above referred to, his lands were flooded, and the impounded water moved off more slowly than normal drainage of surface water did prior to the construction of the bridge and approaches, leaving large bodies of water standing on the crops. That in an attempt to avoid flood conditions, the claimant constructed a levy or dike separating his land, but that despite this added barrier his lands were covered with several feet of water.

On May 13, 1952, respondent filed its motion to dismiss for the reason that the claim is barred by the statutory limitations contained in Par. 439.22, Chap. 37, 111. Rev. Stat., 1951, alleging that the highway bridge, fills and approaches complained of were all completed more than twenty years prior thereto, the construction of the bridge being completed on August 21, 1929, and the earth fills being completed on December 23, 1929, and the pavement being completed on September 9, 1930, and attached its affidavit thereto.

In the case of *W. Jeff Horney and Frances Parke Horney* vs. *State of Illinois,* 9 C.C.R. 354, this Court has discussed at length the question of liability of the State of Illinois for taking or damaging private property for public use.

The only liability of the State for taking or damaging private property for public use is under Section 13 of Article 2 of the Constitution of Illinois. In all cases upon the constitutional provision that private property shall not be taken or damaged for public use, there can be but one recovery, and such recovery includes all damages resulting from the improvement, past, present or future. A claim for the recovery of damages to private property not taken for public use, alleged to have been caused by reason of construction of public improvement, accrues when the improvement in question is made; and, if claim therefor is not made within two years after the making of same, the claim is barred by the statutory limitations contained in Par. 439.22, Chap. 37, Ill. Rev. Stat., 1951. It appears from the record that the construction described herein was completed more than twenty years prior to the filing of this cause of action. A right of action for damages to private property not taken for public use, but

alleged to have been damaged by reason of the construction of a public improvement, is in the owner of the property at the time of the making of the improvement, and a subsequent alienee of the property takes the same as it existed at the time of the conveyance, and has no right of action for damages resulting from the prior improvement, and accruing after the conveyance.

For the reasons assigned, the motion of respondent to dismiss the complaint of claimant is hereby sustained.

(No. 4504—Claimants awarded $583.60.)

L. L. BENOIST AND R. E. BENOIST, doing business as BENOIST BROTHERS HARDWARE, A PARTNERSHIP, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 20, 1953.

L. L. BENOIST AND R. E. BENOIST, doing business as BENOIST BROS. HARDWARE, A Partnership, Claimants, pro se.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

PURCHASES—*payment after lapse of appropriation.* Where case was heard on stipulation of facts, and appears to be just, an award will be made for merchandise received. where payment was not made before the lapse of the appropriation.

FARTHING, J.

The claimants, L. L. Benoist and R. E. Benoist, doing business as Benoist Brothers Hardware, seek an award against respondent in the sum of $583.60 for merchandise, which was ordered from them in April, 1951, and delivered in July, 1951 to the Department of Public Health of the State of Illinois at the Mount Vernon State Tuberculosis Sanitorium.

A stipulation of facts has been filed herein, and is hereby approved. The file contains, in addition, the amended complaint of claimants.

The claimants have not been paid for the merchandise, and the time has expired for payment from the applicable appropriation. No defense is made to this claim, and, from the stipulation, the claim appears to be just.

An award is, therefore, entered in favor of the claimants, L. L. Benoist and R. E. Benoist, doing business as Benoist Brothers Hardware, for the sum of $583.60 against the respondent, the State of Illinois.

(No. 4506—Claimant awarded $2,668.29.)

EVERETT K. POYNTER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 20, 1953.

MICHAEL F. RYAN, Attorney for Claimant.

LATHAM CASTLE, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

CIVIL SERVICE—*classification of guard.* The position of a guard is that of an employee, and not an office.

SAME—de facto employee. Where duties of alleged de facto employee differed from those of claimant, and the alleged de facto employee was retained after claimant was restored, respondent did not sustain defense that claimant's position was filled by a de facto employee.

SAME—SAME—*damages set off against actual earnings during period of discharge.* Measure of damages where no de facto employee has taken claimant's position is the difference between what amount he would have earned, and his actual earnings during the period.

PROCEDURE—*leave to amend pleadings.* Granting leave to amend an answer, and set up affirmative defense is discretionary with the Court.

FARTHING, J.

On April 18, 1952, Everett K. Poynter filed his complaint in this cause. Claimant seeks an award of

$7,908.30 for back salary as a guard from April 16, 1947, on which date he states he was unlawfully discharged, to April 18, 1950.

The file contains for our consideration, the complaint, amended answer, amendment to the amended answer of respondent, Departmental Report, Supplemental Departmental Report, claimant's reply to the amended answer, claimant's petition for an order directing Hon. Michael J. Seyfrit, Director, Department of Public Safety, to file written answers to certain interrogatories, his answers thereto, transcript of evidence, Commissioner's report, motion of claimant for an extension of time to January 14, 1953, in which to file his statement, brief and argument, stipulation with reference to such extension of time, order granting said extension, respondent's motion for leave to file a further amendment to its amended answer, order of the Chief Justice granting respondent's motion so to amend, objections of claimant to said last named motion, brief and argument for claimant, respondent's brief and argument, and claimant's reply brief.

Poynter passed the requisite civil service examination, and on October 25, 1942 was certified and appointed to the position of guard at the Illinois Penitentiary, Pontiac Branch. He worked for the respondent there until his discharge on April 16, 1947.

He filed a complaint in the Superior Court of Cook County on June 27, 1947 to review said decision, being Case No. 47 S 10543. On April 18, 1950, the Superior Court rendered a judgment finding that the removal and discharge of claimant as a guard was illegal and void. Claimant was accordingly restored to his former position as such guard on August 14, 1950.

On November 6, 1950, Poynter filed a mandamus suit in the Superior Court to recover back salary from April 16, 1947 to August 14, 1950. This was Case No. 50 S 18348. On March 12, 1951, the Court rendered a judgment ordering payment to claimant of salary at $237.00 per month from April 18, 1950 to August 14, 1950, making a total of $920.73, which respondent paid to Poynter.

On November 29, 1951, the Superior Court dismissed, without prejudice, Poynter's claim for back salary from April 16, 1947 to April 18, 1950 for the reason that the biennial appropriations for the periods 1947-1949 and 1949-1951 had lapsed under the provisions of the 1870 Illinois Constitution.

The Position and Classification Division had declared Poynter's position vacant on May 29, 1947. Edgar F. Roddy was assigned to fill the vacancy as a guard on June 14, 1947. The Departmental Reports show that Roddy was assigned to fill the vacancy as a guard on Requisition No'. 658 to the former Poynter classification of 11-7-722-100. His salary was $195.00 per month. On July 1, 1947, his salary was increased to $215.00 per month, and on July 1, 1949 to $237.00 per month.

From April 16, 1947 to April 18, 9950, Poynter was variously employed. The record shows his earnings during the period totalled $5,405.90. However, in the period from January 1 to March 10, 1948, his wages from the Pontiac Dairy Company amounted to $552.00. If he had been paid a guard's salary for that period, which was $215.00 per month, he would have received only $499.36. The difference is $52.64. Likewise in the period from September 17 to December 29, 1949, he received wages from the Turner Farm Seeds Company,

according to the testimony, in the amount of $919.05. But, as a guard, at a salary of $237.00 per month for this period, he would have received only $805.80, a difference of $113.25. The respondent is not entitled in any event to credit for wages claimant earned in either of the two periods beyond what he would have received as a guard. The two amounts total $165.89.

If claimant had continued to work as a guard, his total wages would have amounted to $7,908.30 for the period in question. His total earnings in the same period shown by this record amounted to $5,405.90, and subtracting the $165.89 therefrom, leaves a balance of $5,240.01. The difference between his wages as a guard and his earnings during the period is $2,668.29.

Claimant contends that the Departmental Report and Supplemental Report in evidence are not supported by Rule **16** of this Court, but as to this he is in error.

Counsel is likewise in error in contending that respondent has, in law, no right to ask and receive leave to file an amendment to its amended answer setting up the affirmative defense of claimant's outside employment and earnings. Granting leave to amend is discretionary, and claimant's objections were properly overruled.

Claimant's counsel contends that respondent failed to prove its affirmative defense that a de facto employee replaced a de jure employee, did the work the de jure employee would otherwise have done, and received the salary he should have received, and relies on the case of *People ex rel Verdung* vs. *Dunham,* 294 111. App. 613. (Petition for leave to appeal denied, 296 Ill. App. 33.) The duties of claimant and those assigned to Edgar F. Roddy, who was given claimant's classification number when Roddy was certified, were dif-

ferent. This is not of as great a significance, as the fact that Roddy continued to work as a guard after claimant's reinstatement until October 21, 1950, when he entered the military service. In our opinion, respondent failed to prove this defense.

Claimant's counsel also contends that the position of a guard is an office, and that Poynter was not an employee. Reliance is placed on *City of Chicago* vs. *Luthardt,* 191 Ill. 516, and *People ex rel Jacobs* vs. *Coffin,* 282 Ill. 599. Counsel also contends that *Kelly* vs. *Chicago Park District,* 409 Ill. 91, is not in point. It is counsel's position that, if an office is involved, Poynter's outside earnings cannot be deducted from the salary he would have received during the time he was wrongfully separated from his employment as a guard.,

We cannot agree with this contention. The holdings in *People ex rel Jacobs* vs. *Coffin,* 282 Ill. 599, and *Kelly* vs. *Chicago Park District,* 409 Ill. 91, demonstrate that a guard is an employee. We cannot agree with counsel's contention that claimant has pleaded and proved that an office is involved herein, rather than employment. In the reply brief counsel states "The duties of a guard, as classified by the Civil Service Commission, created by authority contained in the Civil Service Act and State appropriations, are governmental in nature, and of definite duration (that is for good behavior)." This does not meet the requirements to establish the claim that this guard held an office, instead of being an employee.

There remains due to Everett K. Poynter, the claimant, the sum of $2,668.29 from the respondent, the State of Illinois, and an award in that amount is hereby made in favor of the claimant.

(No. 4514—Claimant awarded summary judgment of $22,334.64.)

J. L. SIMMONS COMPANY, INC., A DELAWARE CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 20, 1965.

WALTER T. DAY, Attorney for Claimant.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

PROCEDURE—*summary judgment.* **Rule 2 of the Court of Claims provides that the Civil Practice Act of Illinois shall be followed in said Court, except as otherwise provided in the rules. Since there are no other rules relating to summary judgments, the procedure set out in Sec. 57 of the Civil Practice Act, and Rules 15 and 16 of the Rules of the Supreme Court is correct practice before the Court of Claims.**

LANSDEN, J.

Although there have been numerous cases before this Court in which the State of Illinois has virtually conceded its liability, this is the first case in which a claimant has made a motion for summary judgment.

On October 7, 1948, claimant and respondent, acting through the Department of Public Works and Buildings, entered into a contract bearing No. 65546, whereby claimant was to construct the Mt. Vernon State Tuberculosis Sanitarium at Mt. Vernon, Illinois. Claimant completely performed the work required of it under the contract, and the Sanitarium has been accepted, and is now being used by respondent.

This case is divided into two phases. The first phase is a claim for an additional sum of $25,889.70 for excavating an unusually hard substance, which was encountered in the course of preparing the foundation of the building. This phase is not involved in the motion for summary judgment.

The second phase of the case involves the sum of $22,334.64, and arises from the fact that in the latter

part of 1951 respondent tendered to claimant a State warrant for such sum as final payment under said contract. Claimant, acting on the advice of counsel, refused to accept and cash said warrant, and returned same to respondent, because claimant felt that the acceptance of said warrant might act as a release or waiver of its additional claim involved in the first phase of this case, inasmuch as there was in the contract a provision, which, in substance, provided that the acceptance by claimant of the tendered warrant would operate as a complete release, discharge and waiver of any claim for further moneys under the contract. That the advice of claimant's counsel may well have been correct is indicated by previous decisions of this Court, such as, *Henkel Const.* Co. vs. *State,* 10 C.C.R. 538; and *Worden-Allen* Co. vs. *State,* 16 C.C.R. 138.

Thereafter, claimant filed its complaint herein seeking recovery of the amounts involved in the two phases of the case. Respondent filed a motion to dismiss, which was, after oral argument, overruled on November 26, 1952, because we felt that facts alleged and questions presented necessitated a disposition of the case on its merits.

On January 30, 1953, claimant filed its motion for summary judgment, supported by affidavit, in which an immediate award of $22,334.64 is sought for the amount involved in the second phase of the case. Respondent has filed no counter-affidavits, and we believe we are completely safe in assuming that respondent concedes that claimant is entitled to an award on the motion for summary judgment.

Rule 2 of the Rules of this Court provides that pleadings and practice, as provided by the Civil Practice Act of Illinois, shall be followed in this Court,

except as otherwise provided in our rules. Since none of our rules relate to summary judgments, the procedure to be followed is spelled out in Sec. 57 of the Civil Practice Act, Ill. Rev. Stat., 1951, Chap. 110, Sec. 181, and Rules 15 and 16 of the Rules of the Supreme Court. Claimant has correctly followed such procedure, and respondent has raised no defense to the motion.

Since the entry of an award on claimant's motion for summary judgment will dispose only of phase two of the case, and still leave phase one to be determined, Rule 16 of the Rules of the Supreme Court provides several alternatives in such a circumstance "as justice may require". We believe that justice requires the entry of an immediate award, which is equivalent to the second alternative in said Rule 16.

An award is, therefore, entered in favor of claimant, J. L. Simmons Company, Inc., in the sum of $22.334.64.

Jurisdiction of phase one of this case is specifically reserved for future determination.

(No. 4515—Claimant awarded $141.01.)

THE TEXAS COMPANY, A DELAWARE CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed *March 20,* ***1966.***

GEORGE A. BENDER, Attorney for Claimant.

LATHAM CASTLE, Attorney General; GRANVILLE BEARDSLEY, Assistant Attorney General, for Respondent.

PURCHASES—payment after appropriation has lapsed. Case heard on stipulation and bill of particulars, which showed claimant was entitled to an award for merchandise delivered to respondent, where appropriation had lapsed.

FARTHING, J.

On June 12, 1952, the Texas Company, a Delaware Corporation, filed its complaint in this Court seeking an award of $143.51 for gasoline and other petroleum products sold and delivered to respondent's Division of Highways, and other accredited departments on orders dated October 5, 1949 and ending June 30, 1950, and dated May 5, 1950 and ending June **30,** 1951, as per claimant's bill of particulars, also filed June 12,1952.

On February 19, 1953, the parties filed their stipulation of facts in lieu of a record, which with the complaint, the report from the Engineer of Claims, filed on July 12, 1952, and said bill of particulars, completes the file for our consideration.

The stipulation .is hereby approved, and shows that $2.50 is barred by limitation, but that there is due the Texas Company the balance of its claim, or $141.01, which is unpaid.

The claimant did not submit bills for the merchandise to the respondent until after the appropriation to pay for the purchases had lapsed.

An award is, therefore, entered in favor of the claimant, The Texas Company, for the sum of $141.01 against the respondent, the State of Illinois.

(No. **4355—Claimant awarded $2,343.40.)**

LENORA CHAVIS, A MINOR, ET AL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 10, 1951.
Supplemental opinion filed ***March*** *31, 1953.*

DON SCOTT AND ALPHEUS GUSTIN, Attorneys for Claimant.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when an award will be made.* Where the evidence showed that the death of claimant's intestate arose out of and in the course of his employment by the State of Illinois, an award may be made under the Workmen's Compensation Act.

SAME—*modification of prior award.* Where a settlement is reached with a third party, an award under the *Act* must be reduced accordingly.

DELANEY, J.

Claimant, Lenora Chavis, a minor, by and through her mother and next friend, Marcella Gibbs, filed her claim on October 16, 1950. The decedent, Jerome Chavis, was employed by the respondent in the Department of Public Works and Buildings, Division of Highways, at the time of his death. On September 15, 1950 Mr. Chavis was one of a group of men employed in placing temporary patches on the concrete pavement of U. S. Route No. 45 in Saline County. At approximately 11:45 A.M. on that date, the Division of Highway's truck, which was used to transport men and materials, was stopped facing south in the lane for south bound traffic. The point was south of a break in the pavement, and approximately one mile south of the Village of Carrier Mills. Mr. Chavis and a fellow employee were removing broken concrete preparatory to filling the hole with a mixture of gravel and bituminous material. A third employee was stationed a short distance north of the group to direct traffic past the point of operations. The operator of a car approaching from the north failed to respond to the flagman's signal to slow down, and drive past the workmen. Instead, the operator of the car drove straight ahead, and struck Mr. Chavis. Mr. Chavis was thrown into the Division truck, and then over to the highway shoulder. A passing motorist took Mr. Chavis to the Harrisburg Hospital, Harrisburg, Illinois, where Dr. W. J. Blackard was placed in charge of the case. Mr. Chavis died suddenly

the following morning, September 16, 1950, from an embolus.

During the year immediately preceding his death, Mr. Chavis earned the sum of $2,376.00. Mr. Chavis was paid full salary for September 16, 1950, only, in the amount of $6.60. The Division has paid the Harrisburg Hospital **$246.00** for its services to Mr. Chavis. Dr. W. J. Blackard is a staff employee of the Harrisburg Hospital, and his fee is included in the hospital charge.

The record consists of the complaint, Departmental Report, transcript of evidence and claimant's exhibits Nos. 1 and 2.

No jurisdictional questions are presented by the record, and it is admitted by stipulation that decedent's injuries arose out of and in the course of his employment.

Decedent had one child under 18 years of age dependent upon him for support.

Under the provisions of Section 7 (a) of the Workmen's Compensation Act, the amount of compensation to be paid for an accidental injury resulting in death shall be $4,000.00. Since the death occurred subsequent to July 1, 1949, this must be increased 50%, making a total of $6,000.00.

The compensation rate is the maximum of $15.00 per week, which also must be increased 50%, or the sum of $22.50 per week.

An award is, therefore, made to claimant, Lenora Chavis, in the amount of $6,000.00, less the sum of $6.60 for non-productive time, or a total award of $5,993.40, payable to Marcella Gibbs (mother and next friend of claimant, Lenora Chavis, a minor, and for her use and benefit), as follows:

$662.13, which has accrued, and is payable forthwith;
$5,331.27, is payable in weekly installments of $22.50, commencing on April 17, 1951 and continuing 236 weeks, with a final payment of $21.27.

The testimony was taken and transcribed by Donna J. Wirth, who made charges therefor in the amount of $9.75. These charges appear reasonable and proper.

An award is, therefore, entered in favor of Donna J. Wirth in the amount of $9.75, which is payable forthwith.

This award is subject to the approval of the Governor, as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees".

SUPPLEMENTAL OPINION

LANSDEN, J.

On April 10, 1951, an award was entered in favor of claimant for the net amount of $5,993.40 under the Workmen's Compensation Act for the death of her father.

On October 17, 1952, respondent filed a motion, accompanied by a stipulation, to modify said award by reason of the fact that a settlement had been made with the third party, who negligently caused the death of claimant's father. No payments have been made under said award since the motion was filed.

It is the established rule in this Court that, when a settlement is received from a third party, an awasd to a claimant under the Workmen's Compensation Act must be reduced accordingly. Wood vs. State, 19 C.C.R. 161; *Pulley* vs. *State*, No. **4413,** supplemental opinion filed June 11, 1952.

However, the stipulation of facts herein is approved in part and disapproved in part, and the award will be modified, as hereinafter provided, in accordance with an investigation, which the Court caused to be made on its own motion.

. Out of the total settlement of $4,200.00, only $3,650.00 is chargeable to claimant. The remaining $550.00 was paid to a purported heir of the deceased with the approval of the County Court of Saline County, Illinois. Such purported heir was denied participation in our award by an order entered July 8, 1952.

The sum of **$2,304.63** was paid to claimant before payments were stopped, leaving a balance of $3,688.77. From this latter sum should be deducted the sum of $3,650.00 chargeable to claimant, leaving a balance due on the award of $38.77.

However, further payments cannot be made until the total sum of $5,954.63 has accrued. *Kays* vs. State, 18 C.C.R. 127; Hester vs. State, No. 4435, opinion filed January 8, 1952. We calculate that the sum of $5,954.63 will accrue on November 11, 1955.

The award heretofore made is modified by providing that no further payments shall be made thereunder until one week after November 11, 1955, at which time $22.50 can be paid to claimant, plus payment the following week of one final payment of $16.27, which will completely liquidate respondent's liability under the award as modified.

Jurisdiction of this case is specifically reserved for the entry of such further orders as may be necessary.

(No. 4416—Claimant awarded $9,000.00.)

RAYMOND J. ROBERTS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion *filed* March *31, 1953.*

ROBERT MC CLORY, Attorney for Claimant.

LATHAM CASTLE, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

MILITARY AND NAVAL CORM—award for personal injuries under. Where claimant, a member of the Illinois National Guard, was injured in the line of duty, he is entitled to an award under authority of *Echols* vs. *State,* 10 C.C.R. 113, and Ill. Rev. Stat., 1949, Chap. 129, Sec. 143, for the injuries sustained, and, in addition, an award for estimated future medical expenses.

LANSDEN, J.

Claimant, Raymond J. Roberts, seeks to recover under the provisions of the Military and Naval Code, Ill. Rev. Stat., 1949, Chap. 129, Secs. 142 and 143, for injuries sustained by him, while serving as an enlisted man in the 33rd Division of the Illinois National Guard.

On August 20, 1949, claimant, who held the rating of corporal, under competent orders went with a detail of men to the Oak Brook Polo Club in Du Page County on a recruiting mission. While returning from such mission, the jeep, in which claimant was riding, was forced off of the road, overturned, and landed on top of him, causing terrific injuries.

A board of medical officers later convened, and found that claimant was injured in the line of duty, and not the result of his own misconduct. In addition, such board recommended that claimant be paid his full pay *for* six months, and, inferentially, if not actually, recommended that this Court consider his case with a view to giving him an award under Ill. Rev. Stat., 1949, Chap. 129, Sec. 143.

Not only has claimant received full pay for six

months, but respondent has also paid hospital and doctor bills exceeding the sum of $6,000.00. Claimant was hospitalized for 166 days.

Although Public Law 108, 32 U.S.C. Sec. 160 a-c, U.S. Code Cong. Service, 81st Cong., 1.949, Vol. I, p. 207, extends the benefits of certain federal pension laws to state national guardsmen, it is limited to specific types of activities, and a recruiting mission is not included within its purview. In fact, the National Guard Bureau, Department of the Army, Washington, D. C., has definitely ruled that claimant is not entitled to the benefits of Public Law 108.

Therefore, claimant's remedy is under and by virtue of the Illinois Military and Naval Code.

Ill. Rev. Stat., 1949, Chap. 129, Sec. 142 relates to injuries to national guardsmen, but claimant has received all he can under such section, and, in view of the favorable action of the board of medical officers, claimant is entitled to consideration for an award under Ill. Rev. Stat., 1949, Chap. 129, Sec. 143, which section allows an award over and above the amount paid by virtue of Sec. 142.

The interrelation of these two sections is fully discussed in *Echols* vs. *State*, 10 C.C.R. 113, and *Insalato* vs. *State*, 12 C.C.R. 27. The record discloses that claimant has complied with all the prerequisites necessary to vest jurisdiction of his claim in this Court.

Therefore, the sole problem to decide in this case is the amount of the award to claimant.

Claimant, who was 21 years of age at the time of his accident, was attending school. His injuries were, as stated before, terrific, and that he survived them is attributable to the outstanding care and skill of his doctors. Several major and minor operations were per-

formed on claimant. He still requires periodic treat-. ments, and will probably require some periodic medical care for years to come.

Claimant sustained a fractured pelvis, and his pelvic area is permanently tilted. He walks with a limp, because his left leg is one and one-half inches shorter than his right. A ruptured urethra causes claimant continuous trouble, and requires medical cleansing and dilation at regular intervals, There were minor spinal and nerve injuries, which cause pain, and claimant has urinary incontinence, and impaired function of his testes.

This Court has many times used the Workmen's Compensation Act as a guide in arriving at an award in a case of this type. A long line of cases, commencing with *Williams* vs. *State,* 3 C.C.R. 209, and extending through *Quigley* vs. *State,* 17 C.C.R. 27, has so used the Workmen's Compensation Act as a guide. However, it is only a guide, and neither a ceiling over, nor a floor under our awards to national guardsmen. *Dudley* vs. *State,* No. 4287, opinion filed June 11, 1952.

Furthermore, in an award of this type can be included an amount for medical treatment, for which a claimant has become obligated, or will become obligated in the future. *Boyers* vs. *State,* 9 C.C.R. *530.*

To summarize, we believe that claimant would be entitled to an award of $6,000.00 for his injuries under the Workmen's Compensation Act, and we feel that such an amount should be given him by this Court for his injuries. In addition, for his medical expenses, we cannot, of course, arrive at a precise amount. However, since respondent has already paid over $6,000.00 for claimant's medical bills, we believe that an award of $3,000.00 might well cover those medical bills, which

have not been paid by respondent, as well as future medical bills.

An award is, therefore, entered in favor of claimant, Raymond J. Roberts, in the sum of $9,000.00.

(Nos. **44524453—Consolidated—Claimants** awarded $1,500.00 and $3,500.00, respectively.)

MARGARET C. BROWN, ADMX., ESTATE OF **RCT.** DONALD **A.** BROWN, N.G. 26 349 763, No. 4452; MABEL T. GROSS, ADMX., ESTATE OF PRIVATE JOHN R. GROSS, DECEASED, 2ND. BN., 132D INF. REGT., HD. CO., N.G. 26 348 960, No. 4453, Claimants, *vs.* STATE OF **ILLINOIS,** Respondent.

Opinion filed *March* 31, 1953.

WALTER **A.** EDMISTON, Attorney for Claimants.

LATHAM CASTLE, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

NATIONAL GUARD—*remedy for wrongful death.* The only remedy an heir or dependent of a deceased member of the National Guard can have against respondent must arise under the Military and Naval Code, Ill. Rev. Stat., 1949, Chap. 121, Seo. 143.

LANSDEN, J.

These two cases were consolidated, because they arose out of the same accident, and involve virtually the same factual and legal questions.

On July **5,** 1950, Donald **A.** Brown was a recruit, and John R. Gross was a private in the 132nd Infantry Regiment of the 33rd Division, Illinois National Guard. Such Regiment and Division were undergoing summer training at Camp McCoy, Wisconsin, pursuant to orders of the National Guard Bureau, Department of the Army, Washington, D. C.

On the day in question, while in the line of duty under competent orders, and not under the influence of liquor or drugs, a jeep, in which Brown and Gross were

riding with a superior officer, was struck by an ambulance belonging to the U. S. Army, and operated by Regular Army personnel, which personnel was a part. of the Regular **Army** complement permanently based at Camp McCoy as the housekeeping detail. As a result of the collision, both Brown and Gross were killed.

It is clear that the negligence of Regular Army personnel caused the deaths of Brown and Gross, and it is also conceded that Brown and Gross were engaged in activities by virtue of which benefits could be and were being paid under Public Law 108, **32** U.S.C., Sec. 160a-c, U.S. Code Cong. Service, 81st Cong., **1949.** Vol. 1, p. **207.**

Under decisions of the federal courts, heirs and dependents of Brown and Gross would have no cause of action under the Federal Tort Claims Act, **28** U.S.C. Sec. **2671,** et seq., against the United States, but would have only the benefits of Public Law 108 available to them. ***Feres*** vs. *U. S.,* **340** U.S. **135; 95** L. Ed. 152. Cf. ***Brooks*** vs. *U.* S., **337** U. S. **49; 93** L. Ed. 1200.

This Court has twice held that the entitlement to benefits under Public Law 108 does not act as a bar to recovery against respondent. *Dudley* vs. *State,* No. **4287,** opinion filed June **11, 1952;** *Sypniewski* vs. *Stale,* No. **4527,** opinion filed March **20, 1953.** The remedies available under the Military and Naval Code of Illinois were held to be cumulative.

However, claimants herein seek recovery under the Illinois Injuries Act (Wrongful death), Ill. Rev. Stat., **1949,** Chap. **70,** Sec. 1. Aside from the fact that the accident in these cases occurred outside Illinois, and such statute has no extra territorial application, this Court has previously held that the only remedy

an heir or dependent of a deceased national guardsman can have against respondent is by the Military and Naval Code, Ill. Rev. Stat., **1949,** Chap. **121,** Sec. **143.** *Charles, Admx.* vs. *State, 8* C.C.R. **371.**

Also, this Court has held that under Sec. **143** of Chap. **129** it is immaterial whether a claimant sues as an heir or dependent, or that the personal representative brings the action for their benefit. *Reddick* vs. *State,* **2** C.C.R. 84; *Witte* vs. *State,* **1** C.C.R. **249.**

Said Sec. **143** reads as follows:

"In every case where an officer or enlisted man of the National Guard or Naval Reserve shall be injured, wounded or killed, or sustains an injury to his property while performing his duty as an officer or enlisted man in pursuance of orders from the Commander-in-Chief, said officer or enlisted man, or his heirs or dependents, shall have a claim against the State for financial help or assistance, and the State Court of Claims shall act on and adjust the same as the merits of each case may demand. Pending action of the Court of Claims, the Commander-in-Chief is authorized to relieve emergency needs upon recommendation of a board of three officers, one of whom shall be an officer of the medical department."

Applying the facts of these cases to the above statute, we find as follows:

Margaret Brown was the mother of Donald **A.** Brown, and was divorced from his father. The deceased, who was **16** years of age at the time of his death, was in the custody of his mother, and she was paid **$325.00** per month as alimony, of which $50.00 per month was for the support of the deceased. Mrs. Brown received $450.00 from the United States under Public Law **108,** and the father, who paid the funeral bill, was paid **$100.00** by the United States. It is apparent that the parents of Donald **A.** Brown had high hopes for their son, including boarding school and college education, and the record also discloses that the deceased son was of real assistance materially and emotionally to his mother. Although it could be demonstrated that Mrs. Brown suffered no direct financial loss as the result of the

death of her son, numerous decisions under the Illinois Injuries Act, and previous decisions of this Court under the Military and Naval Code have held that the death of a minor son gives rise to more than nominal damages. *Sanders* vs. *State,* **6** C.C.R. 151; *Jamison* vs. *State,* **7** C.C.R. 190; *Franklin* vs. *State,* 10 C.C.R. 535. We, therefore, believe that Margaret **A.** Brown is entitled to an award of $1,500.00.

Mabel T. Gross was the mother of John R. Gross, who was in his twenties at the time of his death. Mabel T. Gross was divorced from her husband, and for several years had received no financial contribution from him. John R. Gross was married five weeks before his death, and his widow was receiving $75.00 per month under Public Law 108, plus $100.00 paid by the United States to apply on the funeral bill. The record indicates that John R. Gross had been accustomed to contribute ten to fifteen dollars per week to assist his mother, and that, although no payments were made during the five weeks of his marriage, it is a certainty that the deceased son would have contributed to his mother's support after his marriage, since both he and his wife were employed. Mabel T. Gross was sickly, and earned only about $1,500.00 per year in part time employment. Under all the circumstances, we believe that Mabel T. Gross is entitled to an award of $3,500.00.

In arriving at the amounts of the awards in these cases, we have not overlooked the long line of cases, commencing with *Williams* vs. *State,* 3 C.C.R. 209, which indicate that the Workmen's Compensation Act is a guide. However, it is only a guide, and is neither a ceiling over, nor a floor under our awards. *Dudley* vs. *State,* No. 4287, opinion filed June 11, 1952. We are

also mindful of numerous decisions that comment on the decreased purchasing power of the dollar today. It is with all these criteria in mind that we have arrived at the amount of the awards herein.

An award is, therefore, entered in favor of claimant, Margaret C. Brown, individually, in the sum of $1,500.00.

An award is, therefore, entered in favor of claimant, Mabel T. Gross, individually, in the sum of $3,500.00.

(Nos. 4516-4517—Consolidated—Claimants awarded $3,000.00 and $6,000.00, respectively.)

PAULINE HOWARD AND LEE R. HOWARD, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 31, 1953.

SCHMIEDESKAMP AND DEEGE, Attorneys for Claimants.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

HIGHWAYS—negligenee. Evidence showed that respondent was negligent when its agent stopped a snow plow on a slippery hill, backed it up, stopped, got out, and then hastened back, and put on the brakes of the truck when he observed a car at close range approaching down the hill from his rear.

FARTHING, J.

Claimants are husband and wife. Their complaints were filed on June 13, 1952, and amended October 27, 1952. They seek awards for injuries and property loss suffered in a collision between the automobile they were driving, and a truck of respondent on State Highway No. 61 on December 17, 1951 about 4:30 P.M.

The file for our consideration consists of a complaint and amendment thereof in each case, transcript

of evidence, abstract, claimants' statement, brief and argument, and the Commissioner's report.

At the hearing of this cause on March 20, 1953, leave having been given, counsel for claimants amended the two amended complaints by increasing the ad dannum from $2,500.00 to $7,500.00.

The claimant, Lee R. Howard, aged 62, a rural mail carrier for approximately 41 years, of Stillwell, Illinois, and Pauline Howard, his wife, were in Bowen, and were driving to Quincy, Illinois over State Highway No. 61 on December 17, 1951 about 4:30 P.M. When they reached a point one-half mile east of the Loraine Junction, claimants were driving west on the north half of the paved road. Mr. Howard was driving their 1950 Model Kaiser De Luxe automobile. At the point mentioned above, there is a hill. Snow was falling at the time, and the highway was slippery. The brakes, tires and automobile were in good condition. Mr. Howard was driving at about 40 miles per hour. When he reached the crest of the hill, he saw the respondent's highway truck headed west also, but standing on the pavement about 40 feet away. Mr. Howard put his brakes on lightly, but, because of the icy pavement, the car skidded, and the brakes did not help. Howard saw a third car was approaching at this point from the west, and there was an embankment sloping up from the pavement on the north at an angle of 45 degrees with no ditch there. Howard could neither pass the respondent's truck on the north, nor on the south, and his brakes were of no help. Claimant's car struck respondent's truck. Mr. Howard was thrown into the windshield, and against the steering wheel, which broke. His head was cut, an artery was severed, ligaments in his neck were strained, he suffered bruises, cuts, con-

tusions, an injury to his cervical spine, a cerebral concussion, was in the hospital, suffered from dizziness three weeks, and was off from his work six weeks. He earned $375.00 a month. Mrs. Pauline Howard's forehead was cut so that twelve stitches were made necessary, and she sustained a brain concussion. Two of her teeth were chipped, and loosened. Her chest was bruised, a rib was broken, both bones were broken in one wrist, and one leg and ankle were injured. She remained in the hospital three weeks and one day. Mrs. Howard could do very little about her housekeeping for another month, and for six months had to hire help. She is 55 years old. The hospital bills and doctor's bill amounted to $695.00, and Mrs. Howard's dental bill was $50.00. Howard's automobile had to be sold for salvage, and brought $210.00, a loss of $985.00.

Mr. Howard could not see the truck until he got to the top of the hill. When complainants reached the top of the hill, there was no level space, but the highway sloped down towards the west immediately. Howard testified there was a level shoulder on the north side of the paved surface, approximately 15 feet wide, at a point 60 feet west of the collision point.

Dr. Aldo K. Germann treated both complainants. His charges totalled $447.75. In his opinion, Mr. Howard suffered an injury to the intervertebral disc lying between the seventh and eighth cervical vertebrae. In his opinion, both Mr. and Mrs. Howard suffered permanent injuries. Respondent had three employees: Gay Brown, who drove; and Francis M. Hardy and Claude Caley, who were using a Ford truck, to which a snow plow was attached. On December 17, 1951, these men plowed snow off of the road, and spread cinders on Bear Creek Hill. They were going west on Route No. 61

about dusk. It was snowing hard, as shown by Gay Brown's testimony. They passed the scene of this collision, stopped, backed their truck up the hill 40 feet or more, stopped again, and the driver, Brown, got out of the truck to look at the pavement. He saw the Howard car approaching from the rear. Mr. Howard put his brakes on, his car skidded across the road, and went from side to side. Brown said he could tell there would be a collision, and that he got back into the truck, shut the door, and put on the brakes. He said this was to keep himself, and his two helpers, who were in the seat with him from getting hurt. He said this hill is about a quarter of a mile long, and admitted that farther down the truck could have been pulled off the pavement, near the foot of the hill. He said his lights were on, but admitted no flares or other warnings were shown, in addition to what were actually on his truck. No work had been done at the time on the north half of the pavement at this point. Snow had made the road slick. The Howard car pushed the truck about 20 feet down the hill. Mr. Hardy was not sure, but thought the truck was moving slowly, and about to stop when the collision occurred. He said he struck his head against its door frame, was knocked out, but came to, and got out of the truck. He testified the truck lights were on before and after the collision.

Mr. Claude Caley was unable to tell whether the truck had come to a stop. He testified that its lights were on. Like Brown and Hardy, he said no signal flares or flags had been put out by the respondent's employees, other than what the truck had on it. He said they were about to spread some cinders on this hill. These witnesses placed the truck about 400 feet west of the crest of the hill, whereas claimants, and

their witnesses, gave that distance as from 40 to 60 feet.

In spite of the difference as to the distance from the crest of the hill in question to the scene of the collision, the testimony of respondent's own witnesses shows that the collision was imminent when the Howard car came in view. It was after 4:00 P.M., and snow was falling. The road was slick. Brown, the truck driver, said he had stopped his truck, shifted into reverse, backed up the hill, stopped his truck, stepped out of the cab. He saw the Howard car, feared a collision, got in, shut the truck cab door, put on the brakes. The truck was struck, and moved forward down the hill about **20** feet. **A** person of ordinary prudence, exercising reasonable care for his own safety and the safety of others on the highway, would not stop a truck attached to a snow plow, in snowy weather, on a slick hill, back it up the hill, stop again, get out, hasten back, and put on the brakes of the truck, when he had just observed a car at close range approaching down the hill from his rear.

We need not go into the counts of the amended complaint in detail. We are of the opinion that respondent's employee, Gay Brown, was guilty of negligence, and that this is proved by his own testimony. This was the proximate cause of the injuries and loss the complainants have suffered.

Taking into consideration the property damage, medical and hospital bills, pain, suffering, loss of wages, and the permanent injury to his cervical spine, in our opinion $6,000.00 is due Lee R. Howard, the complainant in Case No. 4517. Pauline Howard, the complainant in Case No. **4516,** did not incur as great property damage, and, while both bones were broken

in one arm at the wrist, and she suffered two large cuts; that had to be sutured, her permanent injury is not as great as that of her husband. Her injuries are not trifling and, in our judgment, she is entitled to $3,000.00. An award is, therefore, made in favor of the complainant, Lee R. Howard, in the one case for $6,000.00, and in favor of Pauline Howard, the complainant in the remaining case, for $3,000.00 against the respondent, the State of Illinois.

(No. 4519—Claimant awarded $2,500.00.)

GERTRUDE SKAGGS, ADMX., ET AL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 31, 1953.

WALTER T. DAY, Attorney for Claimant.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

HIGHWAYS—*maintenance of bridges.* The State is bound by a greater degree of care in the maintenance of its bridges, than in the maintenance of other portions of its highway.

SAME—*notice.* Evidence showed that the State had constructive notice of the collapse of the bridge, which was the proximate cause of the death of claimant's intestate.

JURISDICTION—*statutory construction.* There is no distinction between the date of death as in the Injuries Act, and date of award as in the Court of Claims Act. Therefore, the amendment to Section 8 C of the Court of Claims Act, increasing the maximum amount which could be awarded in tort cases, applies only to actions accruing subsequent to the effective date of the Act.

DELANEY, C. J.

Gertrude Skaggs filed her complaint on June 19, 1952, as Administratrix of the Estate of Freddie Horace Skaggs, seeking to recover for damages sustained as a result of the death of her husband in an accident, which occurred on State Highway No. 29, approxi-

mately five miles southwest of Mason City, Illinois, on June 28, 1951.

The record consists of the complaint, answer of respondent, original transcript of evidence, copy of transcript of evidence, abstract of evidence, motion of claimant for an extension of time to February 4, 1953 in which to file statement, brief and argument, order of Chief Justice granting the motion of claimant for an extension of time to February 4, 1953 in which to file statement, brief and argument of claimant, and the oral arguments of attorneys representing the parties herein.

The evidence discloses that the decedent and claimant were married on July 1, 1943 in St. Louis, and at the time of the accident were husband and wife, although they were not living together, but he was contributing to her support. Mr. Skaggs was employed as a bridge carpenter on a railroad, and on June 27, 1951 worked near Barr Station, north of Springfield, and after work he drove to Pekin, Illinois to obtain his pay check. Sometime during the late evening of June 27, or the early morning of June 28, 1951 he was returning from Pekin to the work train, and was driving south on State Route No. 29. While driving south on said highway, and while attempting to cross a bridge over a creek, known as "Sleepy Hollow", the bridge and approaches thereto collapsed, or had previously collapsed, allowing his car to fall into the stream. The car was carried down the stream some 500 feet, and the next morning he was found in the car drowned.

The physical facts would indicate that the bridge approach was still in position at the time Skaggs approached the bridge, since there was glass from his headlights on the northwest corner of the bridge, in-

dicating that his car had collided with the bridge, and the road had then collapsed, allowing the car to fall some 15 feet into the water. The evidence as to the bridge indicates that it had been in place for quite a few years, but that there had been several complaints made about the approach being undermined, and that the bridge abutments themselves were being undermined. The claimant's case was supported by the testimony of Frank C. Snyder, Carl W. Seinert, and Howard McLaughlin, who lived in the immediate vicinity of the bridge. Snyder testified that on one occasion he took the highway section man to the bridge, and pointed out that the fill supporting the bridge approach was washing out, was undermined, and that on occasions dogs had chased rabbits back as far as 15 to 20 feet under the slab. There was also testimony to the effect that the bridge abutments were being undermined, and that the State had erected a dam at the east edge of the bridge abutments in order to raise the water level, and allow the natural fill to build up around the abutments, so that they would not become further Undermined. In addition to building the dam, cinders and other objects were dumped into the bed of the stream in order to build up the ground level. There is also evidence to the effect that complaint was made that the cinders would not hold the wash, and that concrete and other more substantial materials were needed. These facts as to the condition of the approaches, fills, and abutments were substantiated by the witnesses for both claimant and respondent, although the respondent's witnesses, including Mr. Shewmaker, engineer for the Highway Department, and the highway section man contended that they had made proper repairs of the conditions, as they occurred.

The evidence further discloses that on the evening and night of June 27, 1951 a very heavy rainfall occurred in the Sleepy Hollow Valley, and that there were special rules and regulations in effect with the Highway Department as to their activities when rain occurred in this neighborhood. The highway section men had made an inspection trip sometime around midnight, or prior thereto, but did not find anything unusual in the immediate vicinity. The fact that the bridge had collapsed was first discovered by Pearl Marcum, who was driving north on Highway No. 29, returning from Springfield, Illinois to her home north of the bridge. At that time she noticed something was wrong, and stated that the north edge of the bridge was some three or four feet below the road level, but she was unable to state whether or not the bridge approach had collapsed because of the darkness. She aroused neighbors in the immediate vicinity, the highway section men were called, and proper flares and warning signals were placed in position.

Sometime in the early morning of June 28, 1951 the car of Mr. Skaggs was discovered some 500 feet downstream from the bridge, and Mr. Skaggs was found in the front seat of the car. An ambulance was called, and his body was removed to a funeral home.

Although the respondent is not an insurer of the traveling public on its highways, it has the duty of keeping its highways in a reasonably safe state of repair. We feel that the respondent is bound by a greater degree of care in the maintenance of bridges than the maintenance of other portions of the highway.

Respondent claims it did not have actual notice that the bridge had collapsed. The evidence, however, indicates that the respondent had constructive notice.

The negligence of respondent was the proximate cause of the accident, and the death of Mr. Skaggs.

Claimant raises a further question as to the amount of the award that the Court of Claims is authorized to make.

In the 67th General Assembly, Section 8 C of the Court of Claims Act was amended by House Rill No. 900, in the following manner:

"All claims against the State for damages in cases sounding in tort, in respect of which claims the claimants would be entitled to redress against the State of Illinois, at law or in chancery, if the State were suable, and all claims sounding in tort against The Board of Trustees of the University of Illinois; provided, that an award for damages in a case sounding in tort shall not exceed the sum of $7,500.00 to or for the benefit of any claimant. The defense that the State or The Board of Trustees of the University of Illinois is not liable for the negligence of its officers, agents, and employees in the course of their employment shall not be applicable to the hearing and determination of such claims."

This Act was approved by Governor Adlai E. Stevenson on July 16, 1951.

It is claimant's contension that under the Court of Claims Act, as amended, the Court can now make an award in excess of $2,500.00; and, that while the Injuries Act specifically fixes the date of death as the determining factor, limiting the amount of recovery, there is a distinction between the date of death, as in the Injuries Act, and date of award, as in the Court of Claims Act.

It is the opinion of this Court that it was the legislative intent that the amended act would apply only when the date of the injury, which would be the date the cause of action accrued, is subsequent to the effective date of the amendment. It is also the opinion of the Court that there is no distinction between the date of death, as in the Injuries Act, and date of award, as in the Court of Claims Act. Therefore, any cause of action accruing subsequent to July 16, 1951

would be governed by the amended act. ***Shockley*** vs. State, No. **4387,** opinion filed November 12, 1952.

An award is, therefore, made to claimant, Gertrude Skaggs, Administratrix of the Estate of Freddie Horace Skaggs, in the sum of Twenty-Five Hundred Dollars ($2,500.00).

(No. 4521—Claimant awarded $1,127.85.)

MARY G. **RIEFF,** Claimant, *vs.* **STATE OF ILLINOIS,** Respondent.

Opinion on motion of Respondent to dismiss filed September 12, 1952. Opinion granting award filed March 31, 1968.

MICHAEL F. **RYAN,** Attorney for Claimant.

LATHAM CASTLE, Attorney General;, **WILLIAM** H. **SUMPTER,** Assistant Attorney General, for Respondent.

CIVIL *SERVICE* ACT—***award for salary during period of unlawful discharge.*** Where in a mandamus action the cause was dismissed, without prejudice, because of the lapse of the appropriation, an award was allowed after a proper set-off was made of monies earned during period of unlawful discharge.

SAME—***who constitutes an employee.*** The source of funds either from the State or Federal Government does not change the rights of a Civil Service employee of the State of Illinois, where there is a claim of unlawful discharge.

SCHUMAN, C. J.

The Court is called upon to rule on a motion to dismiss in this case on jurisdictional grounds.

The provisions of the Federal Social Security Act amounts to Federal assistance where the State has an Unemployment Compensation Act, which meets with the requirements of the Federal Act. It can be conceded that administrative costs are paid to the State by the Federal Government, but, claimant, although paid from Federal funds, is a State employee.

The claim is predicated on claimant's unlawful discharge, as found by legal proceedings. This Court has repeatedly held, under such a state of facts, that

claimant can recover wages during the period of an unlawful discharge, ,subject to any affirmative defenses that may be raised by the State.

The basis of the action being an unlawful discharge of a State employee, the Court fails to see any necessity for joining Federal officials, because it makes no difference where the money came from.

The remedy of claimant is based on her rights as a Civil Service employee of the State, as provided by statute. If, as here, it is judicially determined she was unlawfully discharged, her claim arises therefrom, and not from any other source.

The motion to dismiss does not raise any defects appearing on the fact of the complaint, and is not supported by a required affidavit where such defects .are not apparent.

If, claimant, on a hearing, is not entitled to an award, the Court could best decide this from the record.

For the reasons above assigned, the motion of respondent to dismiss is denied, without prejudice to raise any of the defects or defenses raised therein in an answer.

SUPPLEMENTAL OPINION

FARTHING, J.

On June 28, 1952, Mary G. Rieff filed her complaint, seeking an award for salary she was denied by being unlawfully discharged from her position as an Unemployment Claims Examiner I in the Division of Unemployment Compensation of the Department of Labor of the State of Illinois. The period involved is from December 8, 1948 to June 29, 1950, both inclusive. When she was discharged, claimant's salary was $200.00

per month, but salaries for such employees were increased to $220.00 per month effective July 1, 1949.

The file contains for our consideration the complaint, respondent's motion to dismiss, opinion by this Court rendered September 12, 1952, respondent's answer, Departmental Report, claimant's reply to respondent's answer, claimant's motion, supported by stipulation, for an extension of time through February 11, 1953 within which to file brief, order granting said motion, transcript of evidence, and the Commissioner's report.

Mary G. Patlak, formerly Mary G. Rieff, the claimant, was on June 3, 1940 certified and appointed Unemployment Claim Examiner I in the classified service of the Division of Unemployment Compensation of the Department of Labor of the State of Illinois, and continued in that employment until she was discharged on November 30, 1948. She received salary up to December 8, 1948.

On petition of claimant to the Illinois Civil Service Commission, a hearing was had on March 4, 1949, and, on June 20, 1949, the Commission upheld the discharge of claimant.

On July 14, 1949, claimant filed a complaint for judicial review of the decision of the Illinois State Civil Service Commission in the case entitled *Mary G. Rieff* vs. *Illinois State Civil Service Commission, et al,* in the Superior Court of Cook County, Illinois, No. 49 S 10283. On June 29, 1950, judgment was rendered reversing and setting aside the discharge of claimant from her Civil Service position. Claimant was reinstated to her former position as Unemployment Claim Examiner I on August 21, 1950.

In case entitled *People of the State of Illinois, ex rel, Mary G. Rieff* vs. *Frank Annunzio, et al,* No. **50** *S.* **17981,** in the Superior Court of Cook County, Illinois, a mandamus proceeding for back salary, a judgment order was entered, awarding to plaintiff her back salary from June **29, 1950** to August **21, 1950,** at the rate of **$220.00** per month, and at the same time retaining jurisdiction as to the balance of plaintiff's claim for back salary from December 8, **1948** to June **29, 1950.**

On November **29, 1951,** the court in said cause entered an order, dismissing the case without prejudice concerning the plaintiff's right to back salary for the period December 8, **1948** to June **29, 1950.** In the petition praying for said order, it is alleged that, because of the lapse of the appropriation for the biennium covering plaintiff's claim, the appropriation was unavailable in mandamus for the payment of her back salary for said period from December 8, **1948** to June **29, 1950.**

The record shows that, if complainant had been continuously employed by respondent during the period in question, she would have earned **$3,980.04.** Her testimony shows that she was employed by various employers during that period, and that she earned a total of **$2,852.19.** This leaves **a** difference of **$1,127.85,** and, since she was unlawfully discharged, this amount should be paid to her.

An award is, therefore, made to the complainant, Mary G. Rieff now Patlak, and against the respondent, the State of Illinois, for **$1,127.85.**

(No. 4539—Claimant awarded $4,058.50.)

THE COUNTY OF RANDOLPH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed **March** *31, 1953.*

WILLIAM A. SCHUWERK, Attorney for Claimant.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

COUNTIES—*reimbursement for writs of* **habeas corpus** *in* **forma pauperis. Upon stipulation of facts and expenses, an award was entered pursuant to** Ill. **Rev.** Stat., **1951, Chap. 65, Secs. 37-39; and Chap. 37,** Sec. **439.8.**

LANSDEN, J.

Claimant, County of Randolph, Illinois, by the chairman of its Board of County Commissioners and its State's Attorney, seeks to recover from respondent the sum of **$4,058.50.** This action **is** based on a specific statute, which confers jurisdiction on the Court of Claims to hear cases brought thereunder. Ill. Rev. Stat., **1951,** Chap. **65,** Secs. **37-39;** Chap. **37,** Sec. **439.8.**

The purpose of such statute is to reimburse certain counties in Illinois for expenses, costs, and fees incurred, because of the large volume of petitions for writs of habeas corpus in *forma pauperis* filed therein. The Counties of Will and Randolph are the principal beneficiaries of such statute.

Such counties have previously been given six awards in this Court, and those cases have decided that certain fees, expenses, and costs are reimbursable under such statute. *County of Will* vs. *State,* 18 C.C.R. **189;** *County of Will* vs. *State,* **19** C.C.R. **192;** *County of Will* vs. *State, 20* C.C.R. **105;** *County of Randolph* vs. *State,* 19 C.C.R. **114;** *County of Randolph* vs. *State,* **20** C.C.R. **243;** *County of Randolph* **vs.** *State,* **No. 4491,** opinion filed February **6, 1953.**

A stipulation of facts has been filed herein, and is hereby approved.

The stipulation discloses that the Illinois State Penitentiary is located in Randolph County. Between January 2, 1952 and December 11, 1952, 285 petitions for writs of habeas corpus were filed in *forma pauperis* in the office of the Clerk of the Circuit Court of Randolph County by inmates of such institution. None of the petitioners were, at the time of their commitments, residents of, or committed by any court in Randolph County. In 27 cases the Clerk's filing fee was paid by the petitioner. Writs were issued, served, and returned, and hearings were held in 113 cases. In each of the 113 cases the Sheriff attended before the Court with the prisoners, and the State's Attorney of Randolph County represented the People of this State at the hearing. In addition, the Clerk of the Circuit Court was required to furnish a photostatic copy of the petition to the Attorney General of the State of Illinois at a cost of $1.00 per petition.

The above cited cases have decided all of the questions involved in this case, and claimant is entitled to an award as alleged, and in the amount set forth in the complaint.

The Clerk of the Circuit Court of Randolph County was entitled to receive $5.00 for each petition filed, or the sum of $1,425.00, but he did receive $135.00 in 27 cases, leaving a balance of $1,290.00 due, Ill. Rev. Stat., 1949 and 1951, Chap. 53, Sec. 31. In addition, he was entitled to receive $1.00 for photostats in 113 cases, or the sum of $113.00.

The Sheriff of Randolph County was entitled to receive $1.00 for returning each of the 113 writs of habeas corpus that were issued, or the sum of $113.00;

and, an additional sum of $2.50 in each of the 113 cases wherein he attended before the Judge of the Circuit Court with the prisoner, or the sum of $282.50, or a total sum of $395.50, Ill. Rev. Stat., 1949 and 1951, Chap. 53, Sec. 37.

The State's Attorney of Randolph County was entitled to receive $20.00 for each of the 113 cases in which he appeared at the hearing representing the People, or the sum of $2,260.00, Ill. Rev. Stat., 1949 and 1951, Chap. 53, Sec. 8.

An award is, therefore, entered in favor of the County of Randolph for the sum of $4,058.50.

(No. 4541—Claim denied.)

HENRY ATKINSON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March *31*, 1966.

HENRY ATKINSON, Claimant, pro se.

LATHAM CASTLE, Attorney General, for Respondent.

JURISDICTION—*when* raised. Question of jurisdiction may be raised at any time, even by the Court on its own motion.

LIMITATIONS—*disability*. Confinement in the penitentiary is not such a disability as would toll the running of the statute of limitations.

LANSDEN, J.

On February 19, 1953, claimant, Henry Atkinson, filed his complaint in this Court seeking to recover an award for injuries sustained by him on September 30, 1949, allegedly due to the negligence of respondent, while claimant was an inmate of the Illinois State Penitentiary, Stateville Branch.

Section 22 of the present Court of Claims Act, Ill. Rev. Stat., 1949, Chap. *37*, Sec. 439.22, provides that the filing of a claim, unless sooner barred, within

two years of its accrual, is jurisdictional "saving to infants, idiots, lunatics, insane persons, and persons under other disability at the time the claim accrues two years from the time the disability ceases". *Weber* vs. *State,* 19 C.C.R. **33,** and *Auto Electric* Co. vs. *State,* **20** C.C.R. 198.

Although respondent has filed no motion pointing out that the complaint has been filed too late, since jurisdiction of this Court is involved, and the question of the jurisdiction of this Court may be raised at any time, even by the Court on its own motion, we, therefore, must determine whether we can hear this case. *Flynn* vs. *State,* 19 C.C.R. 184.

The complaint, on its face, shows that claimant is not now, and has not, since his claim accrued, been under any disability, which would toll the running of time against him.

It has always been the rule in this Court that confinement in the penitentiary is not such a disability7 as would toll the running of the statute. *McElyea* vs. *State, 7* C.C.R. 69, *Robertson* vs. *State,* 19 C.C.R. **146.** The latter case contains a complete discussion **of** the problem involved herein, and in that case the claim was dismissed, because the former convict,therein involved waited too long to file his case.)

In view of the foregoing, claimant has filed his complaint too late, and this Court is without jurisdiction to hear it.

The case is dismissed.

(No. 3025—Claimant awarded $3,441.54.)

ELVA JENNINGS PENWELL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 24, 1966.

JOHN W. PREIHS, Attorney for Claimant.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when an award will be made.* **Where claimant's injuries arose out of and in the course of her employment by the State of Illinois, an award may be made under the Workmen's Compensation Act.**

TOLSON, C. J.

Claimant, was injured on February **2, 1936** in an accident arising out of and in the course of her employment as a Supervisor at the Illinois Soldiers' and Sailors' Children's School at Normal, Illinois. The injury was serious, causing temporary blindness and general paralysis. The facts are fully detailed in the case of *Penwell* vs. *Xtate,* **11** C.C.R. **365,** in which an award was made to the claimant in the amount of **$5,500.00** for total permanent disability, **$8,215.95** for necessary medical, surgical, and hospital services, expended or incurred to and including October **22, 1940,** and an annual life pension of **$660.00.**

On February **10, 1942,** a further award was made to claimant for medical and hospital expenses, incurred from October **22, 1940** to January **1, 1942,** in the amount of **$1,129.82.**

On March **10, 1943,** a further award was made to claimant for medical and hospital expenses from January **1, 1942** to December **31, 1942** in the amount of **$1,164.15.**

On March **15, 1944,** a further award was made **to** claimant for medical and hospital expenses from Jan-

uary 1, 1943 to and including September 30, 1943 in the amount of $853.07.

On April 17, 1945, a further award was made to claimant for medical and nursing expenses, incurred from October 1, 1943 to and including February 28, 1945, in the amount of $1,955.29.

On September 12, 1946, a further award was made to claimant for medical and nursing expenses, incurred from February 28, 1945 to and including April 1, 1946, in the amount of $1,646.12.

On June 5, 1947, a further award was made to claimant for medical and nursing expenses, incurred from April 1, 1946 to and including April 1, 1947, in the amount of $2,108.30.

On September 22, 1948, a further award was made to claimant for medical and nursing expenses, incurred from April 1, 1947 to and including April 1, 1948, in the amount of $2,207.80.

On April 19, 1949, a further award was made to claimant for medical and nursing expenses, incurred from April 1, 1948 to and including February 1, 1949..

On May 9, 1950, a further award was made to claimant for medical and nursing expenses, incurred from February 1, 1949 to and including February 1, 1950, in the amount of $2,316.09.

On April 10, 1951, a further award was made to claimant for medical and nursing expenses, incurred from February 1, 1950 to and including February 1, 1951, in the amount of $2,403.09.

On May 13, 1952, a further award was made to claimant for medical and nursing expenses, incurred from February 1, 1951 to and including February 1, 1952, in the amount of $2,889.70.

Claimant has filed her verified petition for reimbursement for necessary nursing expenses, drugs, supplies, and medical care in the amount of $3,441.54, covering the period from February 1, 1952 to and including February 1, 1953, all of which is supported by receipts showing payment in full.

The record consists of the petition of claimant, original receipts for monies expended for medical, hospital and nursing care, waiver of claimant of right to file statement, brief and argument, and waiver of respondent of right to file statement, brief and argument.

The petition discloses that, since the date of the last award, her condition has not improved, that she still is totally paralyzed from the waist down, and that she has no control over her lower limbs, or over her bodily elimination.

The petition further discloses that, because of her helpless condition, she requires nursing care on a twenty-four hour basis, that she has incurred nurses' bills in the amount of $885.98, and expenses for room and board of nurses in the amount of $638.75.

The petition further discloses that she has spent the sum of $271.81 for drugs and supplies, and has expended for the services of a physician the sum of $1,645.00.

An award is, therefore, made to claimant for medical, hospital and nursing care from February 1, 1952 to and including February 1, 1953 in the sum of $3,441.54, which has accrued, and is payable forthwith.

The Court reserves for future determination claimant's needs for future medical care.

(No. 4512—Claimant awarded $2,500.00.)

DALE RIGGINS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 24, 1953

HERSHEY AND BLISS, Attorneys for Claimant.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

HIGHWAYS—*duty of State.* The State is not an insurer of the traveling public, and when unexpected hazards occur, which could not have reasonably been foreseen, no recovery is allowable. However, when the State is in the process of repairing or removing a highway, it is duty bound to use reasonable care to warn the traveling public of the hazards, which it voluntarily created.

SAME—*placement of barricades or warning signs.* Where the preponderance of the evidence showed that no warning signs or barricades had been placed to indicate a "dead end" road, recovery was allowed for the accident and injuries resulting therefrom.

STATUTES—*construction of amendment.* Where a statute is amended increasing the amount of award allowable in tort cases, the date of the accident and not the date of the award will determine the limits of the amount of the award.

TOLSON, C. J.

Dale Riggins filed his complaint on April 29, 1952 seeking to recover for damages sustained by him in an accident on July 6, 1951, while driving his motorcycle on 'State Route No. 66, north of the City of Litchfielcl, Illinois.

The record consists of a verified complaint, original transcript of evidence, copy of transcript of evidence, abstract of evidence, waiver of brief of claimant, and request for oral argument, which request was later withdrawn. No answer was filed by respondent. Therefore, in accordance with Rule 11 of this Court, a general traverse is considered to have been filed.

On July 6, 1951, claimant was 23 years of age, and was employed by the Illinois Central Railroad Company as a freight agent at Macon, Illinois. On July 6, 1951, he, accompanied by Eldon Huber, was riding a motorcycle in a southerly direction on State Route No.

66, north of the City of Litchfield, Illinois, at a point where old highway No. 66 and new highway No. 66 cross the C. B. & Q. Railroad. As they came from the north, they turned off of new highway No. 66, since the overpass was being constructed over the railroad at that point, and proceeded in a southerly direction on the old highway. After they passed over the overpass on the old highway, and proceeded in a southerly direction, they turned off on a spur road leading to the right. Since the spur was not connected with the new highway, they ran off of the pavement, and had the accident in question. As a result of the accident, plaintiff's left foot was badly mangled, and he was taken to the hospital in Litchfield, Illinois, where he remained for one month and one day. He was afterwards taken to the Illinois Central Hospital in Chicago, and remained there until October 30, 1951. His left foot was amputated on October 17, 1951. His expenses at the Litchfield Hospital, and medical services amounted to $642.00. He was off work for a period of eleven months until June 6, 1952, and his earnings were $325.00 per month.

The crux of this case is whether or not certain warning signs or barricades were in place at the fork in the road, so that the travelling public would not turn to the right, and enter upon a dead end road. The answer to this question will determine whether respondent was guilty of negligence, as charged in the complaint, or whether claimant was guilty of contributory negligence by not heeding the warning signs.

In behalf of the petitioner, six witnesses testified as to the facts and circumstances of the case, and may be summarized as follows:

Claimant, Riggins, testified that he and a companion, Huber, were riding on his motorcycle to

Litchfield, Illinois, on July 6, 1951, about 10:00 P.M. He stated the machine was in good working order, was equipped with standard lights, and that he was unfamiliar with the road. He further stated that, after passing over the overhead he came to a Y in the road, that he took the right hand spur, and continued to drive upon an apparently good paved road for approximately 170 feet at about 30 - 35 miles per hour, until the road abruptly ended. Both he and Huber were thrown from the motorcycle. He positively declared there were no barricades or warning signs at the fork of the road to warn him of the dangerous condition.

Eldon Huber, claimant's companion, corroborated Riggins' testimony as to speed, lights, and condition of the road, and stated positively there were no warning signs or barricades at the Y in the road.

Charles T. Riggins, father of claimant; Lela Riggins, mother of claimant; and, Charles F. Riggins, brother of claimant, testified that on July 7, 1951, the day after the accident, they went to the scene, and there were no warning signs or barricades.

Charles T. Riggins further testified that he returned to the scene of the accident on July 12, 1951, and at that time a sign was in place at the fork of the road, and that it bore the inscription "July, 1951", but no date, and that he took two pictures of the sign, which were introduced into evidence as claimant's exhibits Nos. 4 and 5. He denied that the sign was so in place on July 7, 1951, when he first visited the scene.

Harold Lehnert, a mechanic from Litchfield, arid a stranger to the Riggins family, testified that he drove a wrecker to the scene of the accident about 12:00 P.M. on July 6, 1951, and removed the motorcycle. He stated that he backed the wrecker down the spur

to the end of the pavement, and used a cable to drag in the motorcycle. He unequivocally stated that there were no warning signs or barricades in place on the night of July 6, 1951.

Three witnesses testified in behalf of respondent, and their testimony may be summarized as follows:

Edward Hoolihan stated that he was employed by the State Highway Department as a maintenance man, that the scene of the accident was part of his territory, and that he travelled his territory once a day to inspect and maintain the road. With reference to the existence or non-existence of the "dead end sign", heretofore referred to, he elaborated on the usual practices of the Highway Department to first barricade the road, do the work, and thereafter put up the "dead end sign". He stated that he did not erect signs or barricades, but thereafter maintained them. He testified that he went to the scene of the accident on July 7, 1951 with his immediate supervisor, Thomas Telfer. He stated he did not know when the sign was put up, but concluded that the "sign, the barricade or something" was there on July 6, 1951.

Thomas Telfer, supervisor in the maintenance division, testified that he went to the scene with Edward Hoolihan on July 7, 1951, and that a "dead end sign" and a barricade 16 feet long was in place across the pavement, and that it would not have been possible for Harold Lehnert to back his wrecker off the end of the spur. He further testified that a Mr. Crawley of the Highway Department erected the sign.

L. R. Bailey, a field engineer for the State, identified certain plats, and stated that the barricade was in place in March of 1952, but had no knowledge of its existence on July 6, 1951.

In'evaluating this conflicting testimony, the Court is impressed with the testimony of Mr. Lehnert, who was a total stranger. It is also significant that, since questions of the existence or non-existence of the "dead end sign" was so important in this case, Mr. Crawley, who erected the sign at *some time,* was not called as a witness to testify *when* the work was performed.

The law is well settled that the State is not an insurer of the travelling public on its highways, and when unexpected hazards occur, which could not have reasonably been foreseen, no recovery is allowable, though injury occur.

However, when the State is in the process of repairing, or, as in this case, removing a highway, it is duty bound to use reasonable care in warning the travelling public of the hazard, which it has voluntarily created.

The Court, therefore, finds from the evidence that the respondent was negligent in failing to erect warning signs, barricades, or other devices on the dead end road involved in this case.

The Court further finds that claimant has established by a preponderance of the evidence that he was free from contributory negligence.

The final point to be decided by this Court is the amount of the award, and in this regard it is to be noted that claimant is seeking **$7,500.00.**

Respondent has not by its pleading, or otherwise, raised the question of allowable award; hence, the Court must examine the statute in force at such time.

Claimant's petition alleges he was injured on July **6,** 1951. On July 16, 1951, House Bill No. 900 was approved by the Governor, and reads as follows:

"Jurisdiction. 8. The Court shall have jurisdiction to hear and determine the following matters:

C. All claims against the State for damages in cases sounding in tort, in respect of which claims the claimants would be entitled to redress against the State of Illinois, at law or in chancery, if the State were suable, and all claims sounding in tort against The Board of Trustees of the University of Illinois; provided, that an award for damages in a case sounding in tort shall not exceed the sum of $7,500.00 to or for the benefit of any claimant. The defense that the State or The Board of Trustees of the University of Illinois is not liable for the negligence of its officers, agents, and employees in the course of their employment shall not be applicable to the hearing and determination of such claims."

The statute in force prior to such amendment (July 17, 1945) is substantially the same with this important difference—"the award shall not exceed the sum of $2,500.00".

In construing Section 8 C, this Court has previously held in the case of *Gertrude Skaggs* vs. *State of Illinois*, No. 4519, and *Shockley* vs. *State of Illinois*, No. 4387, that the date of the injury, and not the date of the award, would determine the amount of the award, and that any cause of action accruing subsequent to July 16, 1951 would be governed by the amended act.

It, therefore, necessarily follows that claimant is limited by the law in force on July 6, 1951.

An award is, therefore, 'made to Dale Riggins in the sum of Two Thousand Five Hundred Dollars ($2,500.00).

(No. 4538—Claim denied.)

REUBEN F. BURINGTON AND KATHERINE BURINGTON, doing business as VALLEY MEMORIAL PARK, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 24, 1953.

HOLLERICH AND HOLLERICH, Attorneys for Claimants.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

JURISDICTION—*limitations.* Where more than two years have elapsed from the time services were rendered on which claim was based, the Court has no jurisdiction to entertain it.

FARTHING, J.

On January 16, 1953, the complainants filed this suit. They seek an award of $140.00, which covers the cost of transporting and erecting 14 headstones over the graves of war veterans now buried in Valley Memorial Park, which is owned and maintained by the complainants.

The file for our consideration contains the verified complaint, and a motion to dismiss the suit.

The complainants cite the 1951 Ill. Rev. Stat., Chap. 21, Xec. 59a, as the basis for their complaint. The section provides that the Adjutant General shall secure the services of a qualified person as Superintendent of War Veterans' Graves Registration. "It shall also be his duty to prepare requisitions on the Federal Government for headstones when same are desired, and to supervise their transportation from the railroad station to and erection at the grave of the veteran, certifying bill for same to the Adjutant General for payment."

There is no allegation in the complaint that the claim in suit was ever certified to the Adjutant General for payment by said Superintendent of War Veterans Graves Registration. Paragraph 3 of the coniplaint alleges that on September 20, 1950 claimants submitted a written bill to the Military and Naval Department, War Veterans' Graves Registration of this State for $190.00, covering transportation and erection of 19 headstones at $10.00 each. They were paid $50.00, which covered their charges for 5 of the headstones, as shown in paragraph 4.

Complainants' bill of particulars shows all 14 items are for services rendered in 1948 and 1949.

The respondent's motion to dismiss is based on the same Rev. Stat., Chap. 37, Par. 439.22, which limits a claimant to two years within which to file his claim against the State of Illinois. Since the suit was filed in this Court on January 16, 1953, these claims are barred by that statute, and the respondent's motion must be allowed.

This suit is, therefore, ordered dismissed.

(No. 4254—Prior award modified.)

MARY E. SEATON, WIDOW, ET AL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinionfiled May 12, 1953.

MARY E. SEATON, WIDOW, ET AL, Claimant, pro se.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*change* **of** *name* of *beneficiary* of *award.* Award modified to substitute claimant's married name for all future payments.

FEARER, J.

On April 18, 1950 an opinion was filed in this cause wherein an award was entered in favor of claimant,, Mary E. Seaton. Said opinion was reported in Volume 19, page 174, Court of Claims Reports.

At the time the award was made and entered, claimant had two children, Neil D. Seaton, aged 9, and Mary Constance Seaton, aged 5.

On February 14, 1953 the claimant, Mary E. Seaton, remarried, and her present married name is Mary E. Seaton Watts.

It is, therefore, ordered that the award made to the claimant in accordance with the opinion filed on April 18, 1950 be modified as follows: Mary E. Seaton Watts shall be substituted for Mary E. Seaton; and, all future payments, subsequent to the date of her remarriage on February 14, 1953, shall be made payable to Mary E. Seaton Watts, mother and natural guardian of Neil D. Seaton and Mary Constance Seaton. In all other respects, the award made, based on the opinion filed on April 18, 1950, shall remain in full force and effect, and be carried out in accordance with said award.

All future payments being subject to the Workmen's Compensation Act, jurisdiction of this case is specifically reserved for the entry of such further orders as may from time to time be necessary.

(No. 4495—Claimant awarded $5,000.00.)

JAMES MONROE KERNS, Claimant, **us. STATE OF ILLINOIS,** Respondent.

Opinion filed March 20, 1965.
Petition of ***Respondent for rehearing denied May 12, 1965, Judge Fearer dissenting.***

FLESCHER AND TAYLOR, Attorneys for Claimant.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

HIGHWAYS—*notice* **of** ***holes in pavement.*** **Evidence showed that respondent was negligent in the maintenance of the area where the accident occurred, and that respondent had either actual knowledge, or should have had knowledge of the almost continuous deterioration of the area.**

LANSDEN, J.

James Monroe Kerns, a resident of Taylorville, Illinois, **44** years old, and a trucker, filed his claim herein on February **13, 1952,** to recover for personal injuries sustained in an accident in Taylorville, Illinois on January **5, 1952** at approximately 3:00 P.M.

The accident occurred at the intersection of State Route No. 48 with the County Building Road and Cheney Street in Taylorville, Illinois. Route No. 48 runs at that point in an easterly and westerly direction, and is a twenty foot concrete pavement with a fifty foot overall right-of-way. It is joined from the north by the County Building Road, which is a paved road, approximately four lanes in width. South of Route No. 48 the street is known as Cheney Street, and it is a combination gravel, oil and cinder street. The area, where the accident occurred, was under the control of, and was maintained by respondent.

On January **5, 1952,** claimant, driving one of his own trucks, came from the north on the County Building Road, and, as he approached Route No. **48,** came to a stop at the stop sign. He then shifted into gear,

and started across Route No. 48. As his wheels left Route No. 48, he hit a large hole in Cheney Street, which threw him into the top of his cab, onto the steering wheel, and back in the seat. He stated he was temporarily paralyzed in the legs, and that afterwards he was attended by Dr. James Lynch, and that he has a fractured or crushed herniated intervertebral disc in his back.

At the time of the accident the weather was clear, but it had been snowing, and the Cheney Street area, adjacent to the south edge of State Route No. 48, was in a freezing and thawing condition, and was covered with slush; and all holes in such area were filled with water and slush, and thereby concealed.

That there were holes in Cheney Street, starting at the south edge of State Route No. 48, is conceded by every witness in the case. The only fundamental difference in the testimony is as to the depth of the numerous holes.

The record contains numerous statements of witnesses, such as: "The front wheels fell off into a hole"; "The front wheels bounced out"; "I hit that hole"; "It was quite a hole"; "I said it (the hole) must be a dandy"; "It bounced me out of my seat"; "It was a nasty hole"; "We had put cinders there and there were some holes in it"; "They (the holes) dig out pretty fast"; "The shoulder was gouged out from time to time"; "I did notice that it had been very rough"; "I have bounced into the holes"; "I would say it was a little rough"; "There were several holes immediately adjacent with the intersection"; "It was quite rough and there were several holes at that particular intersection"; and, "It (the intersection) was rough. In the winter it digs out in holes."

Claimant measured the hole his truck hit, and found it to be twenty to twenty-four inches across, and fourteen to eighteen inches deep. Respondent's witnesses stated that the largest hole was only four to five inches deep, although none had actually made any measurements.

From the foregoing, we conclude that respondent was negligent in the maintenance of the area where the accident occurred, and that respondent had either actual knowledge, or should have had knowledge of the almost continuous deterioration of the area without regular, efficient maintenance. *Rickelman* vs. *State*, 19 C.C.R. **54.** We further conclude that respondent's negligence was the proximate cause of the accident.

Any issue of claimant's contributory negligence was effectively removed from the case by reason of the following questions directed to him, and his answers thereto, to which no objection was made:

"Q. As you crossed there were you using due care and caution?

A. I went fourteen years without an accident. I think that will answer your question.

Q. On this occasion were you exercising due care and caution?

A. Yes, I was."

Claimant is, therefore, entitled to an award.

As to damages, it is undisputed that claimant has a disc injury; that he has had considerable pain; that he is required to wear a brace; that he cannot perform certain lifting operations; that he still operates his business, but, as before, others do most of the work; that the condition is permanent unless the disc is removed, and a spinal fusion accomplished, which is **a** major operation with a lengthy period of hospitalization

and convalescence; and, that claimant has incurred doctor and hospital bills of approximately **$450.00.**

In view of all the circumstances, we believe claimant is entitled to the sum of $5,000.00.

An award is, therefore, entered in favor of claimant, James Monroe Kerns, in the sum of *$5,000.00.*

(No. **4497—Claim denied.)**

GENE W. MASON, Claimant, *vs.* **STATE OF ILLINOIS, Respondent.**

Opinion pled March 20, 1953.
Petition of Claimant for rehearing denied **May** *12, 1953.*

MUSGRAVE, EWINS, PRICE AND NOTZ (JOHN H. HANSON **of** Counsel), Attorneys for Claimant.

LATHAM CASTLE, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

HIGHWAYS—*contributory negligence–known dangers.* **It is incumbent on** claim-**ant to traverse the highways with care commensurate with known dangers, and failure to do so, especially where respondent has placed warning signs at various intervals, precludes recovery.**

LANSDEN, J.

Claimant, Gene W. Mason, seeks to recover from respondent for its alleged negligence in allowing defects to exist in one of its highways, as a result of which an accident occurred, and claimant sustained personal injuries and damages to his property.

The scene of the accident was in Cook County on State Highway No. 21, commonly known as Milwaukee Avenue, a short distance north of Dempster Street, and almost in front of the Ballard Road Highway Police Station. Milwaukee Avenue at such place was controlled and maintained by respondent.

On July 5, **1951,** at about 7:30 A.M., claimant and his brother were returning to Chicago from a holiday

trip to Wisconsin. Each was riding a motorcycle, and claimant was leading at a speed of about 50 miles per hour. Claimant struck some defect in the highway, which upset his motorcycle, and caused his injuries and damage to his property. The brothers had traversed the same road on July 3, 1951 going north to Wisconsin.

The Departmental Report of the Division of Highways, which was admitted in evidence, reads as follows:

"On and prior to July 5, 1951, that part of State Bond Issue Route No. 21 (Milwaukee Avenue) between River Road on the north and Harlem Avenue on the south was under contract for repairs, widening, and resurfacing. Two contracts were involved—the first for patching and widening, and the second for resurfacing.

The work was proceeding from north to south, and active work of either contractor had not reached as far south as Ballard Road by July 5, 1951.

Immediately south of River Road on the west shoulder of the highway a Division of Highways' Standard X-13 sign was erected in April, 1951, and was in place on July 5, 1951. This sign is 72" x 96" in size, and bore the following legend:

Route 21
Chicago—River Road
Under Construction
Patching, Widening
and Resurfacing
This road is being kept open
for your convenience
DRIVE WITH CAUTION

In addition to, and to the south of the foregoing sign, another Standard S-20A was erected. This sign is 36" x 36" in dimension, and bore the legend "ROUGH ROAD." This sign was erected in April, 1951, and remained in place until August, 1951.

Reflectorized signs **36"** x 36'' with the legend "ROUGH ROAD" were erected at the following intersections, in addition to River Road and Harlem Avenue: Oakton Street, Central Avenue, Dempster Street, and Golf Road (S.B.I. 58). These signs were erected in April, 1951, and were in place on July 5, 1951. At each intersection the sign to warn south bound traffic was erected on the west highway shoulder, approximately 200 feet south of the intersecting road."

Although it is conceded that there was some defect in the highway at the scene of the accident, the witnesses, who testified in the case, were unable to agree as to the exact nature of the defect.

Claimant and his brother said it was a low bump, which was first noticed **30** feet away. However, claimant finally said there were a series of bumps. Another witness said the bump was about seven inches high and quite sharp. Other witnesses, one of whom saw the accident at some distance, testified that there was a hole in the highway, and not a bump.

However, the precise defect is not of vital importance in this case, because claimant himself testified that Milwaukee Avenue between River Road and Harlem Avenue "generally it was a no good road".

Under such circumstances, it was incumbent upon claimant to traverse the particular stretch of highway with care commensurate with the known danger, and, failing to do so, especially after respondent had placed warning signs at various intervals, claimant cannot recover. Previous decisions of this Court have uniformly denied recovery in factual situations similar to that developed by the testimony in this case. *Beenes* vs. *State,* No. **4377,** opinion filed October 5, 1951; *Terracino* vs. *State,* No. **4420,** opinion filed January 8, 1952;

Doolittle vs. *State*, No. **4353,** opinion filed September **7, 1951;** *Bodie* vs. *State*, No. **4474,** opinion filed March 20, **1953.**

An award to claimant must be, and hereby is denied.

(No. 4531—Claimant awarded $60.50.)

HELEN **WALTERS,** Claimant, *vs.* **STATE OF ILLINOIS,** Respondent.

Opinion filed May 12, 1953.

HELEN WALTERS, Claimant, pro se.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

HIGHWAYS—*negligence.* Where a fifty gallon drum of paint was dropped from a Division of Highways truck causing damages to claimant's wearing apparel and automobile, an award will be made.

FARTHING, J.

The claimant, Helen Walters, filed her complaint on October **20, 1952.** There is no material variation of any material fact between her complaint and the Departmental Report made by the Division of Highways, dated January 20, **1953.**

The proof shows that on June **17, 1952,** about 3:00 P.M., Helen Walters was driving her **1950** Nash sedan in a westerly direction on 111th Street in Chicago. As she approached the intersection with Longwood Drive, there was in front of her car a platform truck used by respondent's Department of Public Works and Buildings, Division of Highways, which truck had on board a 50 gallon metal drum of white centerline paint. At the point in question, the highway rises towards the west, and the grade is rather steep. The truck stalled near the top, and started to roll backward. The truck driver applied his brakes, and stopped his

truck suddenly, which caused the 50 gallon drum of paint to be thrown off of the truck. The drum struck the pavement and burst, throwing paint upon claimant's automobile, the inside of the car, the windows of which were open, as well as on claimant's dress. At that moment, Helen Walters was about to pass the truck on its left. Claimant was compelled to expend $151.00 for cleaning and refinishing her car, and for new seat covers, but her Insurance Company paid $138.00 of that amount, so that her cost was only $13.00. She wore a new shantung dress, which was ruined, and was valued at $30.00. While her car was being repaired, she was compelled to pay $17.50 for transportation to her work. This makes a total of $60.50, and an award is hereby made in favor of claimant for that amount.

(No. 4323—Claim denied.)

HARRISON ALLEN, Claimant, vs. STATE OF ILLINOIS, Respondent.
Opinion filed March 20, 1953.

Motion of Claimant for new trial and petition for rehearing denied June 26, 1953.

JOHN R. SNIVELY, Attorney for Claimant.

LATHAM CASTLE, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

CONVICTS—*personal injuries.* Where the evidence showed that the injuries sustained by a convict, who, while engaged in manual labor, dropped a block of concrete on his foot, were not attributable to negligence on the part of respondent, an award will be denied.

SAME—*Sunday work for convicts.* Where the evidence showed that the work performed by claimant was "necessary labor for the State" within the meaning of Ill. Rev. Stat., 1947, Chap. 108, Sec. 31, he has no basis for recovery.

LANSDEN, J.

Claimant, Harrison Allen, seeks to recover from respondent for alleged negligence, as a result of which

a portion of the second toe on claimant's left foot had to be amputated.

On August 1, 1948 claimant was an inmate at the Illinois State Penitentiary at Joliet, Illinois, serving an indeterminate sentence for robbery. On that day, which was a Sunday, claimant was working in a detail with other inmates cleaning up rubble, broken stone and concrete, and loading the material into a dump truck. Claimant and another inmate picked up a piece of broken concrete weighing over one hundred pounds, and lifted it up over the edge of the body of the truck. But, instead of resting on the truck, the block of concrete slipped off, and, since claimant's left foot was caught in some projecting bolts, he was unable to get out of the way of the falling concrete, which landed on his left foot, and injured it to such an extent that amputation was required of one joint and part of another of the second toe of his left foot.

Claimant's complaint is in two Counts, the first of which alleges five negligent acts or omissions on the part of respondent.

The first charge of negligence is that claimant was ordered to work under unsafe conditions. The evidence shows the conditions to be usual and customary for the work to be performed, and, therefore, not unsafe.

The second is that claimant was not instructed as to his labor, and warned of the dangers thereof. This charge fails, because the labor to be performed was the commonest of manual labor, and, if there were any dangers, they would be as readily apparent to claimant as to respondent.

The third and fourth are that respondent failed to provide adequate or proper safeguards. For labor of the type performed by claimant and in its particular

place, we are unable to ascertain what safeguards were lacking, which would render respondent liable.

The fifth is that claimant was not furnished adequate help or assistance. Aside from the fact that the record shows no additional help was needed by claimant, almost unlimited manpower is one asset that exists at every penitentiary, and was available, if claimant had requested help.

We conclude that not only was negligence not proven under Count I, but that claimant himself can be charged with contributory negligence. We do not decide whether the doctrine of assumption of risk applies.

The second Count of the complaint is based on a statute, which claimant maintains was violated by his working on Sunday. This statute, Ill. Rev. Stat., 194'7, Chap. 108, Sec. 78, reads in part as follows:

> "Sec. 78. Eight hour day prescribed—
> Use of machinery
> The Department of Public Safety shall, so far as practicable, cause all the prisoners in said institutions, who are physically capable thereof, to be employed at useful labor, not to exceed eight hours of each day, other than Sundays, and public holidays, ..."

However, there is another statute that relates to work on Sundays, Ill. Rev. Stat., 1947, Chap. 108, Sec. 31, which reads as follows:

> "Sec. 31. Sunday
> Facilities for attending religious services regularly on Sundays shall be afforded each convict, so far as the same can be done judiciously, and upon no pretext shall a convict on contact be required to labor on Sunday, nor shall any convict be required to do other than necessary labor for the State on that day."

Aside from the fact that the record shows that claimant volunteered to work on Sunday, which might well constitute a waiver on his part of the benefits, if any, of Section 78 quoted above, we are of the opinion

that for security reasons, and for the further reason that the construction in progress on week days could proceed more rapidly, the work claimant performed constituted "necessary labor for the State".

The record shows that rubble, resulting from demolition of a building by a private contractor, was cleared away by convicts on Saturdays and Sundays, when employees of the contractor did not work, and thereby there was no mingling of convicts with outsiders. This clearing up was not only necessary to the construction project, but also could only be performed by convicts on Saturdays and Sundays for security reasons.

Sections **78** and **31** should be construed together. One prohibits more than eight hours labor on any day, and the other limits labor on Sundays to necessary labor for the State. If the two statutes are in conflict, Section 78, as far as Sunday work is concerned, must yield to Section **31.**

We, therefore, hold that claimant cannot recover on Count II of his complaint.

An award to claimant must be, and hereby is denied.

(No. 4500—Claim denied.)

KAY LIPSCOMB AND JOSEPH LIPSCOMB, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 19, 1952.
Petition of Claimants for rehearing denied March 20, 1955.
Motion of Claimants for new trial allowed March SO, 1956.
Motion of Respondent to vacate order oj Court handed down on March SO, 1953 allowed June 26, 1955.

JOHN B. HARRIS, Attorney for Claimants.

LATHAM CASTLE, Attorney General; CHARLES H. EVANS, Assistant Attorney General, for Respondent.

HIGHWAYS—*contributory negligence.* Where evidence showed that claimant was negligent in her duty to exercise reasonable care, and to use ordinary precautions, weather conditions considered, her failure to do so precludes recovery.

NEW *TRIAL—requirements for—newly discovered evidence.* Claimants' petition for a new trial does not meet the following requirements: (1) The evidence must appear to be such that will probably change the result if a new trial is granted; (2) It must have been discovered since the trial; (3) It must be such as could not have been discovered by the exercise of due diligence; (4) It must be material to the issue; (5) It must not be merely cumulative to the evidence offered at the trial.

DELANEY, C. J.

Claimants in this cause are husband and wife. They lived at 3008 East Twenty-third Street in Granite City, Illinois on August 27, 1951, the date Kay Lipscomb fell, and received the injuries for which suit was filed with this Court on February 27, 1952.

East Twenty-third Street in the City of Granite City (formerly City of Nameoki) is designated in the Department of Public Works and Buildings, Division of Highways' records as State Aid Route No. 9, Madison County, Section 62-15d. The pavement on this section was originally constructed by Madison County, and was taken over by the State in 1934 for purposes of maintenance.

The area in the vicinity of the 3000 block on East Twenty-third Street was subdivided, and sidewalks installed prior to the highway improvement made by Madison County. The roadway improvement consisted of a concrete pavement twenty feet in width, arid shoulders ten feet wide on each side of the pavement. A berm, six feet in width, exists between the outside edge of the shoulder and the existing concrete sidewalk, which is four feet wide.

On August 17, 1951, an agreement was reached between representatives of the Division of Highways and the City of Granite City whereby the Division of Highways would install four subsurface drainage inlets

and two culverts, finish blade earth shoulders, and, after an asphalt treatment of shoulders was made by the City of Granite City, spread 3/8-inch chips on the asphalt.

The shoulders on the section of highway herein referred to, which includes the portion adjacent to claimants' dwelling, was bladed by a special maintenance crew on August 1, 2, 3, 6, 7, 8, 15 and 20, 1951. Regular maintenance work was done during this same period. Rain was recorded during the month of August, 1951 in the East Twenty-third, Street area, including some precipitation on both August 26 and 27, 1951. Difficulty was experienced in maintaining the highway shoulders in a smooth and unrutted condition because of rain, and the constant use of the shoulders by commercial and passenger vehicles. Many adjacent property owners or tenants, who did not have private garage facilities, used the highway shoulders and berms for parking purposes during the day and night.

Mrs. Lipscomb is a housewife, and her husband's work shift on the date of the injury was from 11:00 P.M. until 7:00 A.M. The fall and resultant injuries occurred at approximately 9:00 P.M. Mr. Lipscomb owned a 1948 Plymouth Coupe, which the claimants were in the habit of parking in front of the apartment building where they lived. The claimants parked their automobile on the dirt berm, which would make the right door of the machine open onto the sidewalk. The vehicle was parked in this position at the time Kay Lipscomb fell. The photographs show a great deal of water behind the car, but none on the left side, in front, or on the right side. It appears from these pictures that it would have been possible, and, undoubtedly the best way under the circumstances, to have entered from

the right side. It would not have been necessary for Mrs. Lipscomb, a woman of 64 years of age at the time of the accident, to have walked through any mud or water to board the car in that manner. A second alternative, apparent from the pictures, was for Mrs. Lipscomb to have walked on the sidewalk past the right hand side of the car, and then to have passed around the car from the front. The pictures indicate that the area in front of the car was smooth, level and had no water standing. Mrs. Lipscomh knew it had been raining all day, and the day and night before. She also knew the area, where she was attempting to walk at the time she fell, was slick and muddy.

In the Appellate Court case of *Swalm* vs. *City of Joliet*, 219 Ill. App. 123, involving a claim for damages based upon an alleged fall on a sidewalk, the Court said, at page 131 thereof, as follows:

> "While it is true that when one walks over a walk, which he knows to be dangerous, he must use care commensurate with the known danger, and that a greater amount of care is required under such circumstances than is required from pedestrians ordinarily."

And at pages 128 and 129:

> "It is undoubtedly the law that one who uses a public street, and is familiar with its conditions, must use reasonable care in proportion to the danger, if any, known to him. What constitutes reasonable care in any given case depends on the circumstances of that particular case. If one knows of the dangerous condition of a sidewalk, that fact would call for the exercise of a greater amount of care than would be required in the absence of such knowledge. The amount of care required of pedestrians on public streets varies, and depends on the circumstances of each particular case, but the degree of care required never varies, and is always reasonable care. *City of Spring Valley* vs. *Gavin*, 182 Ill. 232; *Village of Jefferson* vs. *Chapman*, 127 Ill. 438."

The record consists of the complaint, motion of respondent for an extension of thirty days in which to file pleadings, order of Chief Justice granting respondent an extension of time to April 27, 1952 in which to file

pleadings, Departmental Report, original transcript of evidence, copy of transcript of evidence, stipulation re medical bills, abstract of evidence, motion of claimants for an extension of twenty days from July 30, 1952 within which to file brief or memorandum of authorities, order of Chief Justice granting the motion of claimants for an extension of twenty days from July 30, 1952 within which to file brief or memorandum of authorities, memorandum of claimants, statement, brief and argument of respondent, and reply memorandum of claimants.

Under the circumstances of this case, we feel claimant has not proven due care and caution. It is the duty of persons on the public streets to exercise reasonable care, and when one fails to use ordinary precaution, weather conditions considered, such conduct is by the general knowledge and experience of mankind considered as negligence.

For this reason, the claims of Kay Lipscomb and Joseph' Lipscomb will be denied, and their complaint dismissed.

SUPPLEMENTAL OPINION

TOLSON, C. J.

On December 19, 1952, an opinion of this Court was entered denying an award to claimants on the ground that claimant failed to show due care and caution in her own behalf.

On January 15,,1953, claimants filed a petition for rehearing setting forth certain allegations of matters that the Court had overlooked or misapprehended.

On March 30, 1953, claimants filed a motion for a new trial setting forth five allegations; the first three

are substantially the same as those filed under the petition for rehearing; the fourth and fifth allegations are as follows:

"(4) Other evidence is available to the claimants, which will remove any doubt that the claimant, Kay Lipscomb, was not guilty of contributory negligence, and that she was in the exercise of reasonable care immediately before and at the time she sustained the injuries in question.

(5) If a retrial or rehearing of this case is granted, claimants will be in position to produce, and will produce the evidence referred to in the preceding paragraph, and will show the existence of facts not previously shown, which will make it evident that said claimant was in the exercise of reasonable care at the time she sustained her injuries."

On March 30, 1953, an order was entered by one of the members of the Court, denying the petition for rehearing, but ordering a new trial, and directing that the matter be referred to a Commissioner for further hearing.

On April 24, 1953, respondent filed a motion requesting the Court to vacate the order entered on March 30, 1953, authorizing the new trial, for the reason that paragraphs four and five, heretofore set out in full, in the motion for a new trial were insufficient in fact or law to justify such an order.

The basis for a new trial is found in Rule 27 of the Court of Claims.

"When a decision is rendered, the Court, within thirty (30) days thereafter, may grant a new trial for any reason, which, by the rules of common law or chancery in suits between individuals, would furnish sufficient ground for granting a new trial."

A new trial may be granted for many reasons, but, when the request is based on an allegation of newly discovered evidence, the Courts of this State have laid down the following rules:

"Applications for a new trial on the ground of newly discovered evidence, in order to justify its allowance, should fulfill the following requirements: (1) The evidence must appear to be such as will probably change the result, if a new trial

is granted; (2) it must have been discovered since the trial; (3) it must be such as could not have been discovered before the trial by the exercise of due diligence; (4) it must be material to the issue; and (5) it must not be merely cumulative to the evidence offered on the trial."

People vs. *Williams, 242* Ill. 197.
People vs. *Tillman,* 383 Ill. *560.*

It is further required by Affidavit of Witnesses, relied upon to make the new proof, that the testimony has been discovered since the trial, so that no laches are imputable to the 'party, and that the new testimony is so material and conclusive that it will probably lead to a differentresult.

Janeway vs. *Burton, 201* Ill. 78.
People vs. *Dabney,* 315 Ill. 320.

Paragraphs four and five, heretofore set forth in full, do not comply with the requirements of law in the matter of applications for new trials on the basis of newly discovered evidence, and the motion to vacate the order of March 30, 1953, granting a new trial, must be allowed.

It is therefore ordered, adjudged and decreed that the order of March 30, 1953, granting a new trial be, and the same is hereby vacated.

(No. 4552—Claim denied.)

RICHARD F. SMITH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 26, 1963.

MALO, NELSON, BROCK AND SHEARON, Attorneys for Claimant.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

FINES—*voluntary payment.* Where *payment of* fine is voluntarily made under mistake of law, with full knowledge of the facts, no recovery can be had without a specific statute authorizing such recovery.

FARTHING, J.

We have for our consideration in this case the complaint, the motion of respondent to dismiss the complaint, and brief and argument of respondent.

The facts, well pleaded, must, of course, be taken as true. In brief they show that claimant was arrested on January **24, 1952,** and the next dag information was filed in the County Court of Iroquois County, Illinois charging him with violation of Sec. **131** of the '(Uniform Act Regulating Traffic on Highways". He was tried in said Court, convicted, and fined on January **28, 1952.** He paid a total fine of **$1,472.80** on that day.

He was discharged, but later on February **7,** 195% he filed a motion in arrest of judgment, and this motion was allowed by the Court on November **20, 1952.**

The money for said fine had been paid by claimant to the Clerk of the County Court, and by him remitted to the State Treasury.

No statute is cited making provision for repayment of a fine voluntarily paid. Such a voluntary payment is made under a mistake of law, if it develops later that the fine should not have been imposed.

This Court dismissed the suit in *Potter* vs. *State, 18* C.C.R. 1. In that case there had been an appeal, and a holding that' no violation of Illinois law had in reality been charged against Potter in the prosecution. His fine and costs were ordered repaid. He had paid the fine and costs, and the money had been paid into the State Treasury, just as in the instant case.

Similarly, when a fee or tax is paid voluntarily, with knowledge of the facts, it cannot be recovered in the absence of a statute authorizing such recovery. *Great American Ins. Co.* vs. *State,* **19** C.C.R. **91;** ***American Can Co.*** vs. *Gill,* **364** Ill. **254.**

The County Court of Iroquois County lost jurisdiction when the fine and costs were paid. The payment was made under a mistake of law, and was voluntary.

Respondent's motion to dismiss this cause must, therefore, be, and it is hereby allowed.

(No. 4442—Claimant awarded $1,012.50.)

NOVA CASEY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed July 17, 1953.

JOHN W. FRIBLEY, Attorney for Claimant.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*entry of final order.* Jurisdiction having been reserved by the Court, an award was made after final hearing.

FEARER, J.

Claimant, Nova Casey, filed his claim herein on June 1, 1951 for an injury, which occurred on December 5, 1950.

On the day of the accident claimant was fifty-three years of age, married, but had no dependent children under eighteen years of age. At the time of the accident, he was employed by the Department of Conservation as a carpenter at the rate of $1.50 per hour, and was working forty hours per week. The maximum rate of compensation at that time for claimant was $22.50 per week.

Findings of fact have been made, and an award ordered under Section 19b of the Workmen's Compensation Act. Also, an order was entered to pay medical and court reporter's fees.

The award, referred to under Section 19b of the Workmen's Compensation Act, which was entered on the 13th day of November 1951, granted claimant

38 2/7 weeks temporary total compensation at a rate of $22.50 per week, or a total of $861.43. There was also an award made at said time for $22.50 to be paid to Dr. E. P. Staff, and the court reporter's fees were ordered paid to James Moliski, his charges being $54.10.

Jurisdiction was reserved in this cause for the entry of a final order after a final hearing. A final hearing was had, and findings of fact made.

There was an agreement between the parties that claimant, Nova Casey, would submit himself to examination by Dr. Fred C. Reynolds of St. Louis, Missouri. X-Rays were taken by Dr. Wendell G. Scott. A medical report was filed in this cause in the clerk's office on July 10, 1953.

The Court has reviewed the file containing all the evidence taken at previous hearings, as well as at the time of the final hearing. Medical reports and the testimony offeredby Doctors at said hearing have also been examined.

After due consideration, it is the opinion of this Court that claimant is not entitled to a further award for temporary total compensation. Awards for medical expenses not heretofore paid are hereby made as follows: Dr. Fred C. Reynolds, $25.00; Dr. Wendell G. Scott for X-Rays, $20.00. The fee of $11.90 for the transcript of testimony at the final hearing, which was taken by Betty J. Beveridge, is also allowed.

It is further the opinion of this Court that an award should be made to claimant for the specific loss of 1/3 of the use of his left foot in the sum of $1,012.50.

This award is subject to the approval of the Governor, as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees".

(No. 4091—Prior award modified.)

BERTHA MILLIE WEAVER, WIDOW, ET AL, Claimant, *vs.* **STATE OF ILLINOIS,** Respondent.

Opinion filed September 25, 1955.

JOSEPH M. WILLIAMSON, Attorney for Claimant.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*modification of award.* **Following Corcoran vs. *State,* 19 C.C.R. *159,* award modified where minor child became eighteen years of age.**

TOLSON, C. J.

On November **9, 1948,** an award in favor of Bertha Millie Weaver, widow, and Eugene F. Weaver, a minor, was entered in the sum of **$5,785.00,** which case was reported in 18 C.C.R., page **72.** Jurisdiction was specifically reserved by the Court for the entry of such further orders as might be necessary.

The award, among other matters, found that Eugene F. Weaver was a minor child of the decedent, Lee C. Weaver, being born on September **27, 1934.** The widow, Bertha Millie Weaver, was found to be entitled to the sum of **$5,200.00,** and, by reason of the existence of a minor child, the award was increased to the amount of **$5,785.00.**

On August **13, 1953,** respondent filed a motion to modify the award because of the fact that Eugene F. Weaver had attained the age of eighteen on September **27, 1952,** and in its motion also alleged that the said child was physically and mentally competent.

In compliance with our opinion in *Corcoran* vs. *State,* **19** C.C.R. **159,** we, therefore, compute the modification of the award as follows:

As of September **26, 1952,** $4,407.00 should have become due and payable to claimant, which represents

76.18% of the total award. Since the child has now become eighteen years of age, the balance of the award made to claimant must be reduced by the remaining percentage of the award made for the benefit of the child, or 23.82% of $585.00, or $139.35.

At the present time, the records in the Finance Department reflect a balance, due and payable to claimant, of $676.00, which must be reduced by $139.35, or $536.65. The latter amount is to be paid to claimant in 27 weekly installments of $19.50, beginning on June 12, 1953, with one final payment of $10.15.

All future payments being subject to the terms and conditions of the Workmen's Compensation Act, jurisdiction of this case is specifically reserved for the entry of such further orders as may from time to time be necessary. This opinion is not to be construed as eliminating Eugene F. Weaver forever from a possibility of participating in the award. In the event of the death or remarriage of his mother, Eugene F. Weaver would be entitled to the unpaid balance of the award. *Waechter* vs. *Ind. Corn.*, 387 Ill. 256; *Swift* & Co. vs. *Ind. Corn.*, 288 Ill. 132; *Beckerneyer Coal* Co. vs. *Ind. Corn.*, 370 Ill. 113; *Swift* & Co. vs. *Ind. Corn.*, 309 Ill. 11. The rights of Eugene F. Weaver were fixed prior to his reaching the age of eighteen, and his rights can never be extinguished as long as any amount remains unpaid under this award, as modified.

(No. 4438—Prior award modified.)

GRACE R. SITTER, WIDOW, ET AL, Claimant, *vs.* **STATE OF ILLINOIS, Respondent.**

Opinion filed September 25, 1953.

WARNER AND WARNER, Attorneys for Claimant.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*modification of award.* Following *Corcoran* vs. *State,* 19 C.C.R. 159, award modified where minor child became eighteen years of age.

TOLSON, C. J.

On January 8, **1952,** an award in favor of Grace R. Sitter, widow, and Shirley Ann Sitter, a minor, was entered in the sum of $6,675.00. This case has not as yet been published in the Court of Claims Reports. Jurisdiction was specifically reserved by the Court for the entry of such further orders as might be necessary.

The award, among other matters, found that Shirley Ann Sitter was a minor child of the decedent, Bon Sitter, being born on January 10, **1935.** The widow, Grace R. Sitter, was found to be entitled to the sum of $6,000.00, and, by reason of the existence of a minor child, the award was increased to the amount of $6,675.00.

On August **13, 1953,** respondent filed a motion to modify the award because of the fact that Shirley Ann Sitter had attained the age of eighteen on January **10, 1953,** and in its motion also alleged that the said child was physically and mentally competent.

In compliance with our opinion in *Corcoran* vs. *State,* **19** C.C.R. **159,** we, therefore, compute the modification of the award as follows:

As of January **9, 1953, $2,089.29** of the original award had become due and payable to claimant. These payments amount to 31.3% of the total award of **$6,675.00.** Since the minor child has now become eighteen years of age, the balance of the original award must be reduced by the remaining percentage of the award made for the benefit of the child. 68.7% of the minor's award amounts to **$463.72.** The balance of the original award at the present time amounts to $4,486.07, which must now be reduced by **$463.72,** leaving a new balance of **$4,022.35.**

The award, heretofore entered, is, therefore, modified, and the sum of $4,022.35 shall be paid to claimant at the rate of **$22.50** per week for **178** weeks as of February **11, 1953,** with one final payment of **$17.35.**

All future payments being subject to the terms and conditions of the Workmen's Compensation Act, jurisdiction of this case is specifically reserved for the entry of such further orders as may from time to time be necessary. This opinion is not to be construed as eliminating Shirley Ann Sitter forever from a possibility of participating in the award. In the event of the death or remarriage of her mother, Shirley Ann Sitter would be entitled to the unpaid balance of the award. *Waechter* vs. *Ind. Com.,* **387** Ill. **256;** *Swift &* Co. vs. *Ind. Corn.,* **288** Ill. **132;** *Beckemeyer Coal Co.* vs. *Ind. Corn., 370* Ill. **113;** *Swift* & Co. vs. *Ind. Corn.,* **309** Ill. **11.** The rights of Shirley Ann Sitter were fixed prior to her reaching the age of eighteen, and her rights can never be extinguished as long as any amount remains unpaid under this award, as modified.

(No. 4529—Claim denied.)

LILLIAN KAMIN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed *September 25, 1953.*

GARIEPY AND GARIEPY, Attorneys for Claimant.

LATHAM CASTLE, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

STATE PARKS—*negligence.* State owes a duty to public to exercise reasonable care in establishing, maintaining and supervising its parks.

Sam—assumed *risk.* Where the evidence showed that a pathway in a State park was established as a trail, claimant, in hiking along said nature path for recreation, assumed the risks inherent in the sport of hiking as a whole, and those risks, which were obvious to her, including the lack of guard rails, and the proximity of a canyon to the trail.

WHAM, J.

This is an action brought by the claimant, Lillian Kamin, against the respondent, State of Illinois, to recover $2,500.00 in damages for personal injuries, which she sustained on August 26, 1952, when she fell from a nature path, or trail, into what is known as "French Canyon" in Starved Rock State Park, while on a hike conducted by a State employed nature guide.

She charges in her complaint filed herein that her fall and resulting injuries were caused by the instructions and directions of the guide, and contends in her brief and argument that respondent was negligent in constructing the path in an unsafe manner, failing to erect guard rails between the pathway and the edge of the canyon, and inviting her to use the path without warning her of the dangerous condition of the path and proximity of the canyon.

It is respondent's position that the only duty owed to claimant was to refrain from wilfully and wantonly injuring her; that, even if it was under a duty to use reasonable care toward claimant, it was guilty of no

negligence causing such injuries; that said injuries resulted from claimant's own lack of care, or, through the lack of care on the part of some third person over whom respondent had no control; and, that claimant, assumed the obvious risks encountered on said hike.

The facts concerning the happening of the accident,, as shown by the evidence, are as follows:

Claimant, Lillian Kamin, forty-five years of age, and her husband were on vacation. They were staying at the Starved Rock Lodge, located in Starved Rock State Park, Utica, Illinois, during three days in August, 1952, where they had, stayed on previous occasions. At about 10:15 A.M., on August 26, claimant, accompanied by her husband, and some 35 to 40 other people, including Al Shea, a guide employed by the respondent at Starved Rock State Park, started a hiking tour to French Canyon in said park. Claimant was dressed in sport clothes, including low heeled shoes. The day was warm and clear, the trails were dry, and the hiking conditions were good. The group, including claimant, formed a single file behind the guide, and followed him along the trail. After walking for some 15 minutes, a distance of about a quarter of a mile (a half of said distance on a narrow sandstone path about two feet wide), the group reached a point near the brink, or edge, of French Canyon. Claimant testified that she was walking on the stone path directly behind her husband, and approximately 15 or 16 persons back from Mr. Shea, when he fell into the canyon, and, that the path upon which she was walking then gave way, causing her to also fall into the canyon some 12 to 15 feet below the path. She further testified that her husband was not touching her, and did not pull her down, but that "The earth gave way and we fell". She identified claimant's exhibit No.

8, a photograph taken by her son a day or so after the occurrence in question, as a correct representation of the path at the point from which she fell. Other photographs of the path were admitted in evidence, and attached to respondent's exhibit No. **A,** being a part of the Departmental Report. Claimant's husband was not injured, and did not testify.

The undisputed facts show that there was no guard rail at the edge of the canyon. The Departmental Report states that the canyon was marked clearly, and posted along the trail 20 feet before reaching the point of the accident. It further states that the condition of the trail at the point where claimant fell is the same as it was the day of the accident, and that conducted hiking tours are taken over the same trail every week end.

The photographs, admitted in evidence, indicate that this is a natural unimproved nature trail, or path, through a wooded rocky area.

Claimant testified that, prior to starting on the hike, it was announced in the lodge that Al Shea would guide the group on a new route to French Canyon; that he told the group to follow him down the path, and to stay on the bath. She further stated that she had no fault to find with Mr. Shea as an individual, and stated that they were not being guided too fast.

The only evidence offered by respondent concerning the happening of the accident and description of the trail is the Departmental Report, which under Rule 16 of the Rules of the Court of Claims, is prima facie, evidence of the facts set forth therein.

The facts, contained in said Report, conflict in certain respects with claimant's testimony. The guide, Al Shea, stated therein that after the group had proceeded down seven natural sandstone steps, which **led**

to the trail and the stream-bed of the canyon, and were waiting for the last two couples on the hiking tour (claimant, her husband, and another couple), he glanced back, and saw claimant's husband standing on the narrow trail at the bottom of the steps with his back to the canyon, and assisting claimant down the steps. As he, the guide, conversed with the members of the party, he heard the snapping of twigs and branches at the point of the accident, and, looking back toward the two couples, saw claimant's husband sliding over the edge of the canyon, and claimant actually flying through the air, as though she had been pulled or pushed by force.

The condition of the sandstone steps is described by the guide in this portion of the Report as being "not wet . . . but are hazardous due to the loose sand that wears off of the sandstone". These steps are further described as "eroded naturally in sandstone".

In the report of Mr. John A. Heitmann, custodian of Starved Rock State Park, to the State Superintendent of Parks, which was made a part of the Departmental Report, it is stated that claimant's husband was assisting her down some natural stone steps on the trail above French Canyon at a point where it was narrow, that he stepped back from the trail into soft dirt at the edge of the canyon, lost his balance, and fell, pulling claimant with him to the bed of the canyon.

In the Accident and First Aid Report, also signed by John A. Heitmann, and incorporated in the Departmental Report, under the portion thereof headed "State in Patient's Own Words Where and How Accident Occurred", it is stated as follows: "Mrs. Kamin slipped on the trail, while receiving assistance from her husband,

causing him to lose his balance, and both parties fell a distance of 10'''.

Claimant objects to consideration being given to the report of the custodian, Heitmann, to the Superintendent of Parks, for the reason that it is based solely upon the report of the guide, and contains conclusions, in addition to the facts given him. We agree with claimant, and will not consider that portion of the report, which is based on conclusions, rather than facts. We will, however, consider the report of the guide, inasmuch as it contains facts, rather than conclusions.

Claimant also objects to consideration being given to the facts set forth in the Accident and First Aid Report on the grounds that it conflicts with the custodian's report to the Superintendent of Parks. We do not consider this to be a well founded objection. The First Aid Report purports to represent claimant's own version of the accident at the time it was made, and whether or not it conflicts with respondent's version of the accident is immaterial. Such First Aid Report will be considered by this Court.

Respondent contends that claimant was, at the time and place of her injury, a mere licensee on respondent's property, and that respondent owed her no duty except to refrain from wilfully and wantonly injuring her. Respondent bases its contention on the rule of law that distinguishes a licensee and a business visitor in regard to privately owned property. We find no quarrel with this distinction in the cases cited, but do not consider such to be the rule under the facts presented in this case. Here the State of Illinois was operating a public nature park for the benefit of the people of the State. The park and trails were open for use by all persons, including the claimant, whether or not they

were paying guests at Starved Rock Lodge. The State of Illinois employed the nature guide to conduct tours and hikes through the park, including the hike in which claimant participated.

The courts of Illinois in actions for injuries to patrons of public parks, owned by municipalities, have denied recovery for negligence on the part of park employees upon the doctrine of governmental immunity. *Lythell* vs. *City of Waverly*, 335 Ill. App. 397. The same theory has been followed by this Court in cases involving claims for injuries to patrons of State parks. *Berg* vs. *State of Illinois*, 12 C.C.R. 79. The 1945 Court of Claims Act, however, has abolished this defense as to suits against the State of Illinois.

Those States, which have refused to apply the doctrine of governmental immunity in actions against municipalities for injuries sustained in public parks, have required such municipalities to exercise ordinary and reasonable care toward the public using such parks. 29 A.L.R. 868, **63** *C.J.S., Municipal Corporations*, Sec. 907 at 319 and 320.

There have been several cases involving suits for personal injuries against the State of New York for injuries sustained in its parks, and the New York courts have held that, although the State is not an insurer of the safety of those who make use of the park facilities, the State must exercise reasonable care in the maintenance of its parks, and in supervising the use thereof by the public. *Mitchell* vs. *State*, 85 N.Y.S. **2** (d) 80; *Pope* vs. *State*, 96 N.Y.S. *708*. And, it has been held to be so, irrespective of whether a fee was charged the public. *Smyke* vs. *State*, 117 N.Y.S. 2 (d) 163. This rule appears to us to be just and reasonable, and it is our holding that in the present case the respondent owed

the claimant the duty to exercise, through its agent and servant, Al Shea, the guide, reasonable care in conducting the hike to French Canyon, and through its agents and servants generally, the duty to exercise reasonable care in establishing and maintaining the path, or trail, over which the conducted hiking tour was taken under the direction of the guide.

In determining whether or not the State of Illinois has failed to exercise reasonable care in the establishment and maintenance of the pathway, and, whether or not in the exercise of reasonable care it should have erected a guard rail at the place of the accident, as contended by claimant, we must consider the location, character, use and purpose of this path and portion of the park. Obviously, from the testimony and the photographs admitted in evidence, this pathway was established as a trail for those interested in hiking through rough country in a natural state, and was not intended to be used for ordinary pedestrian travel, as is a sidewalk in a city.

Although there might well be certain sidewalks in Starved Rock State Park, the use of which are designed for ordinary pedestrian travel, and which the State might well be required to maintain in the same manner and condition as a city is required to maintain its sidewalks, the nature path herein involved is not one of these.

The rule governing the establishment and maintenance even of city sidewalks is one that varies with the location, character and extent of the use to which they are put. In *Thien* vs. *City of Belleville,* **331** Ill. App. **337,** the court sets forth the following rule at page **345**:

". . . .The degree of care which a city is required to exercise to keep its streets and sidewalks in a reasonably safe condition varies according to the location, character and extent of the use to which they are put. No arbitrary rule can be laid down as to defects in highways or streets for which municipalities will be liable, or as to the degree of care required of the person injured."

In the case of *Boender* vs. *City of Harvey,* **251** Ill. **228,** at pages **230** and **231,** the court stated:

". . . .Municipal corporations are not insurers against accidents. The object to be secured is reasonable safety for travel, considering *the amount* and *kind of travel* which *may fairly be expected upon the particular road* **or** *street. A highway in the country need not be of the same character as a street in a large* city. (*Molway* vs. *City of Chicago,* **239** Ill. 486.). . . .only duty cast upon the city is that it shall maintain the respective portions of the street in a reasonably safe condition **for** the purposes to which such portions **of** the street are devoted."

Therefore, what might be considered a defective or negligently maintained, constructed, or established walk, or path, in one case, would not be so in another.

In regard to claimant's contention that the path upon which she was walking gave way, *or* subsided, causing her to fall, we note that from **15** to 31 persons, in addition to the guide, had walked upon this path immediately in front of claimant and her husband without the path giving way. Since the date of the accident, the path is still used for conducted hiking tours, and is in the same condition as of the date of the accident. There is no evidence in the record con-. cerning the condition or physical makeup of this path, which would give a reasonably prudent person cause to believe that it might give way, or subside. There is no evidence that respondent had either actual or constructive notice that the path would give way. The testimony of claimant to the effect that it did happen, does not in itself establish negligence.

The State is no more an insurer against accidents arising out of the use of its nature paths, than is a city of its sidewalks. The law of Illinois is clear that, before

a municipality can be held liable for injuries caused by defective conditions of a sidewalk, it is necessary that there be some evidence showing, or tending to show, that the city had actual or constructive notice of the alleged unsafe condition. *Arnett* vs. *City* of *Roodhouse,* **330** Ill. App. **524** at **527** and **528;** *Boender* vs. *City of Harvey,* **251** Ill. **228** at **231** and **232;** *O'Donoughue* vs. *City of Chicago,* **167** Ill. App. **349** at **352** and **353;** *Coffin* vs. *City* of *Chicago,* **254** Ill. App. **29;** *City of Nokomis* vs. *Farley,* **113** Ill. App. **161** at **163;** *Karcxenslca* vs. *City of Chicago,* **239** Ill. **483** at **485;** *Powell* vs. *Village of Bowen,* **92** Ill. App. **453** at **454** and **455.** And, the burden of proving such actual or constructive notice, and the existence of such defect, is upon the claimant. *Thien* vs. *City* of *Belleville,* **331** Ill. App. **337** at **345.** In *Dominic Di Orio., Et Al* vs. *State of Illinois,* **20** C.C.R. **53,** this Court has applied these same rules of law to suits involving defects in highways against the State.

Therefpre, even taking the evidence in this case most favorably to the claimant in regard to her contention that the path gave way, or subsided, we find that there is no showing that the respondent was negligent in this regard, due to the failure of claimant to prove such actual or constructive notice to respondent.

Claimant contends that the State was negligent in failing to construct guard rails at the place where the accident occurred, and in failing to warn her of the dangerous condition of the trail and proximity of the canyon. It is clear from the evidence that claimant knew there were no guard rails at that point, and was aware of the proximity of the canyon.

The Departmental Report establishes that the canyon was clearly marked, and posted beside the trail **20**

feet before reaching the point of the accident. Claimant does not deny this fact, stating only that there were no danger signs along the path. It is apparent from the photographs of the approach to the canyon from above, attached to and a part of the Departmental Report, that the lack of guard rails, and the proximity and location of the canyon were readily apparent to anyone proceeding along the trail, if they had looked. In her reply brief, claimant concedes that the canyon adjoining the pathway was visible to her.

Claimant should have foreseen that, if one should, for any reason, fall at the particular place involved herein, such person would in all likelihood fall to the bottom of the canyon. We hold that claimant, in hiking along this rough nature path for recreation, assumed the risks inherent in the sport of hiking as a whole, and those risks that were obvious to her, including the lack of guard rails, and the proximity of the canyon to the trail.

Professor Prosser in his work on *Torts* states at pages **383** and **384:**

"In by far the greater number of cases, the consent to assume the risk is not expressed, but is found to be implied from the conduct of the plaintiff under the circumstances. By entering freely and voluntarily into any relation or situation which presents obvious danger, the plaintiff may be taken to accept it, and to agree that he will look out for himself, and relieve the defendant of responsibility. . . . . One who enters upon the premises of another, even as a business visitor, assumes the danger of all known or obvious conditions which he finds there. The consent is found in going ahead with full knowledge of the risk."

In Section **340,** *Restatement of the Law of Torts,* Vol. **2,** page 927, it is provided as follows:

"A possessor of land is not subject to liability to his licensees, whether business visitors or gratuitous licensees, for bodily harm caused to them by any dangerous condition thereon, whether natural or artificial, if they know of the condition and realize the risk involved therein."

This doctrine of assumption of the risk is recognized and followed by the courts of Illinois. *Weber* vs. *City Water Company of East St. Louis and Granite City,* **206** Ill. App. **417** at **422** and **424;** *Campion* vs. *Chicago Landscape Company,* **295** Ill. App. **225** at **234** and **242.**

The above rule, set forth in the *Restatement of Torts,* has been specifically applied in *Griffin* vs. *State,* **295** N.Y.S. **304,** in which case the facts were similar to those involved herein. A patron of a State park fell into a mountain gorge from a lookout balcony, after descending several unguarded, rough, and irregular steps leading to the balcony. There was no protecting guard rail at the edge of the balcony, or steps. This condition was clearly visible to the deceased. The court in denying a claim for wrongful death against the State of New York cited Section **340,** *Restatement of, Torts,* and concluded at page **309** that:

". . . .The failure of the State, if there was a failure, to provide for greater protection against the precipitous bank of the gorge, was directly before her eyes as **she proceeded to the point of danger. This was true** as **much as if she had been coming dpwn the trackless side of the mountain. She voluntarily exposed herself to whatever danger was there, whatever the cause. All of the evidence in the case leads to a single conclusion — she did what she did knowingly, and did this** as **a matter of choice."**

Claimant also contends in her brief that the evidence in the Departmental Report to the effect that the natural sandstone steps "were not wet, but are hazardous due to the loose sand that wears off of the sandstone" constituted negligence on the part of the State for maintaining a dangerous place, where claimant was invited to walk. This evidence only shows that the steps were undergoing erosion on the walking surface thereof, and indicates no condition, which would cause a subsidence, or giving away of the pathway. If claimant slipped, or lost her balance on this eroded step

by reason of the existence of the loose sand upon the step, as is intimated by claimant's brief, in alternative to her position that the trail actually subsided, and. gave way, we still see no basis for liability. The condi-. tion of the surface of the steps was as visible to claim-. ant, as it was to the guide, Al Shea, and the other members of the hiking party. She testified that she had been walking upon the stone path for some distance, and it was "sort of stone, little tiny stones". This was an obvious condition, and the risk of slipping, or losing one's balance in walking upon the steps and path could as easily have been foreseen by claimant as by respondent.

In the case of *Murray* vs. *Bedell Co.*, 256 Ill. App. 247, a business invitee slipped and fell in the vestibule of a store by reason of mud and water creating a slippery condition. The Appellate Court, in reversing a verdict in favor of the plaintiff, said at pages 249-50-51:

" 'Owners or lessees of stores, office buildings, banks, hotels, theaters, or other buildings where the public is invited to come on business or pleasure, are not insurers against all forms of accidents that may happen to any who come.' See also ***Dudley*** vs. *Abraham,* 107 N.Y.S. **97.**

In the case at bar the plaintiff was as well apprised of the condition existing in the vestibule as the defendant, and should be held to as high a degree of care for her own safety as would be required of the defendant."

The Appellate Court held the trial court should have directed a verdict in favor of the defendant.

The New York Court in *Duncan* vs. *State,* 111 N.Y.S. 2 (d) 590, 279 Appellate Division 970, in denying a claim for injuries where claimant, after having safely descended the stairway in a State Park, stepped on a loose rock, which caused her to fall, stated that, since she was aware of the nature of the terrain, and the risks, if any, were apparent, the State was not liable.

In regard to claimant's contention that Al Shea, the guide, was negligent, it is to be noted that nowhere in the record does there appear any evidence wherein claimant complains of any act or omission on the part of the guide. In claimant's brief and argument, however, she contends that the guide did not warn the members of the hiking party and the claimant of any dangerous conditions, or of the proximity of the trail to the canyon, where she fell. It clearly was not negligence on the part of Shea to fail to warn claimant that the trail might subside. He had no more knowledge of this contingency than did claimant. There was likewise no reason for him to warn claimant of the absence of any guard rail, or to point out that the canyon adjoined the trail. These facts were obvious to anyone proceeding on the tour, including claimant. It was not negligence on the part of Mr. Shea to fail to call her attention to the loose sand on the eroded sandstone steps, and the small stones upon the path. These conditions too were obvious to claimant. The guide was no more an insurer of claimant's safety, than was the State. He followed a regular trail, and, it is immaterial whether it was the first conducted tour taken over the trail. It is obvious from claimant's exhibit No. 8, a photograph taken a few days after the accident, of the path from which she fell, and from remarks in the record of claimant's counsel, that this was a "clean cut path". If claimant is not entitled to recover from respondent by reason of the condition of said path, then certainly the guide was not negligent in directing the tour over this path.

Therefore, considering the evidence in this case most favorable to claimant, we find that she has failed to establish her right to recover. In addition to this,

the evidence as a whole is conflicting in certain material respects noted earlier in this opinion. The conflict of evidence, together with the natural and reasonable inferences to be drawn from all the facts and circumstances involved, leads us to the conclusion that claimant has not borne the burden of proving by the greater weight of the evidence that the accident occurred in the manner relied on by her. Since we have held that she is not entitled to recover, even considering the evidence most favorable to claimant, we will not extend the opinion further by discussing the weight of the evidence, or considering the question of damages. For the reasons hereinabove stated, the claim is denied.

(No. 4536—Claimants awarded $1,913.66.)

JACK M. VISCO, ROSE VISCO AND LA SALLE CASUALTY COMPANY, A CORPORATION, Claimants, *vs.* **STATE OF ILLINOIS, Respondent.**

Opinion filed October 30, 1953.

SNYDER, CLARKE AND DALZIEL, Attorneys for Claimants.

LATHAM CASTLE, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

HIGHWAYS—*constructive* ***notice.*** Where evidence showed that hole in pavement, 16 inches wide, 30 inches long and 10 inches deep had existed for a week, the State could be charged with constructive notice of such condition of the highway.

DAMAGES—*pre-existing* ***disease.*** Where evidence showed that claimant had an operation for glaucoma one year prior to the accident, another operation 'three months after the accident, and a third, eleven months after the accident; and testimony of doctors established that the later operations were necessitated either by aggravation, emotional shock, or a natural recurrence of its own volition, claimant failed to establish the proximate cause of the recurrence by a preponderance of the evidence.

TOLSON, C. J.

Jack M. Visco, Rose Visco and LaSalle Casualty Company filed their complaint on December **16, 1952**

seeking to recover for their respective damages based on alleged negligence of the State in maintaining State Highway No. **45,** north of Milburn, Illinois.

The record consists of a verified complaint, original transcript of evidence, abstract of evidence, brief and argument of claimants, brief and argument of respondent, and reply brief of claimants.

The facts are as follows:

On April 8, 1951, at about 11:30 A.M., claimant, Jack M. Visco, was driving his **1950** Lincoln Sedan about **40** to **45** m.p.h. in a northerly direction in the north bound lane of State Highway No. **45,** a two-lane concrete road, approximately one-half mile north of Milburn, Lake County, Illinois, when he ran into a hole, which was about 18 inches wide, 30 inches long, and 10 inches deep at the center, with the right front wheel and right rear wheel of the car. The impact caused the automobile to swerve to the left, cross the road, travel a distance of about 70 feet, and then collide with a large tree, causing great damage to the vehicle, and physical injuries to Rose Visco, also claimant herein, who was seated beside the driver, her husband. Their eight year old son, Raymond, was seated at her right, and Jack Maslow and Mrs. Maslow occupied the rear seat.

The claimant, Rose Visco, testified substantially to the above facts. Jack M. Visco corroborated his wife's testimony, and stated that his car was in a good mechanical condition at the time of the accident; that the brakes were in good shape; and, that the windshield was clear. He testified he first saw the hole from a distance of about 20 feet, applied his brakes, and slowed down the speed of the car to about **20** to **25** m.p.h. He further stated there was clay or dirt around

the hole; that the highway was divided in the center by a black line, and was dry; that the weather during the morning was on the hazy side; and, that there was no other traffic at the time of the accident at the place in question.

Rose Visco, claimant, was rendered unconscious by the impact, but gained consciousness shortly after the accident. She was taken in an ambulance to the Victory Memorial Hospital in Waukegan, Illinois. She testified that, when she entered the hospital, she had pain at the back of her neck, a bump on her forehead, and a terrific headache. She also stated she was very upset and nervous.

Two disinterested witnesses, Jessie Miller and Elizabeth Otto, testifying in behalf of claimants, stated they had driven their cars over said roadway a few days before the accident, and had seen the hole, which caused the accident. They identified the location of the hole as being in the north bound lane, and near a farm house where they had been visiting the day of the accident. They further stated the hole had been there for about a week. Jessie Miller stated that it was about 12 inches from the east edge of the pavement, and was a rather large sized hole. Elizabeth Otto stated the hole was round, about 18 inches in diameter, and about 10 inches deep, and that it contained some loose gravel.

Dr. Irving Breakstone, called as a medical expert for claimant, Rose Visco, testified he first treated her at the Victory Memorial Hospital on April 8, 1951. At that time she was complaining of pain in the neck and lower portion of the head, and was in a state of shock. She also had a headache, and a little pain in her right eye. She was hospitalized, and given daily diathermy treatments to the muscles around the neck. She was

also given tablets for pain, and sedation with some codeine as a pain relieving agent. Dr. Breakstone further stated she was discharged from the hospital on April 11, 1951, at which time she was still complaining of pain in the muscles of her neck and right eye, and that the X-Rays taken of her cervical spine at the hospital were negative of fracture or bony pathology.

Dr. J. R. Fitzgerald called as a medical expert for claimant, Rose Visco, testified he first treated her in June of 1950. At that time she had a cataract in the right eye which had become over-ripe, and was producing a condition called glaucoma. The eye was slightly crossed, and her sight was reduced to perception of light. Not long after that, sometime in June of 1950, the cataract was removed, and for a period of time the glaucoma was relieved, and the sight was improved in the eye. On February 27, 1951, when he treated her, he found the operation removing the cataract had been successful, glaucoma was under control, and, the visual acuity of the eye with correction lenses was 20/40. He further stated he treated Rose Visco on April 14, 1951, and the visual acuity in the right eye was identical to his previous examination, 20/40. The right eye looked perfectly clear, but, the eye which had been slightly crossed before, was definitely more crossed, although there was no evidence of paralysis of the muscle. However, the pressure had gone up, and was definitely above normal. He further testified she had a stiff neck, and that, while her eyes weren't bothering her particularly, she was dizzy. X-Rays taken were negative. There was no complaint of pain in the right eye. He saw her later on quite a few occasions, and her treatment resolved itself to the problem of combating the glaucoma. The pressure continued to

rise, and various medications were tried to reduce the pressure. They were completely unsuccessful, and on July 8, 1951 an operation was necessitated, and at the same time the crossed eye was also operated on for the improvement of its appearance. The operation was performed at St. Anne's Hospital, where she remained for five or six days. It improved the crossing of the eye, but apparently had practically no effect on the glaucoma. Again on March 7, **1952,** an operation for glaucoma (technical name cyclodialysis) was performed, and following that the pressure became normalized, and has remained so ever since. On February **17,** 1953, when he last examined her, Dr. Fitzgerald stated the vision in the right eye was limited to counting fingers several feet in front of the eye, and that it was maximally corrected. The vision of the right eye, as compared with February, 1951, constituted considerable deterioration due to glaucoma. He further testified in response to a hypothetical question, incorporating the facts involved in the accident, as well as his personal experience as a treating physician and surgeon, that he found no evidence of direct injury to the eye, to the muscles of the eye, or to the nerves that control the muscles of the eye, and that the nervous and emotional shock of the accident may have precipitated and aggravated the pre-existing condition. He stated that nervous and emotional shock can definitely induce certain types of glaucoma, or aggravate pre-existing types of glaucoma. The eye was slightly crossed when he first saw her, but it was not sufficiently crossed to be considered a cosmetic blemish. After the accident it was a cosmetic blemish, which required surgery. He stated the emotional and nervous shock had aggravated

that condition, for the reason that there was no direct injury to the muscle or the nerve.

Henry L. Somers, called as a witness for respondent, testified he was employed by respondent as a foreman of the State Highway Maintenance Division in Lake County, and in such capacity he had supervision of the highways. He stated he had been engaged in such work for four years in the same area, which included the highway known as State Highway No. 45. He further stated repairs were being made to the pavement on Route No. 45 from Highway No. 120 north to approximately Route No. 73, or the State line, and that he had travelled over this roadway three or four times a week for the purpose of inspecting and supervising the crews, which were working on the road. He inspected Highway No. 45, approximately one-half mile north of Milburn on April 6, 1951, found no breaks, holes, or excavated openings in the pavement, and travelled both ways several times on said date. Mr. Somers testified he travelled over the area again on April 9th or 10th after the accident, and he did not see a hole in the pavement in the area of the roadway, approximately one-half mile north of Milburn on Highway No. 45; he further testified he had no occasion to cut into the pavement at the point where the accident in question occurred. Upon interrogation, he stated that coldmix, an asphalt substance, was used for temporary fillings, and removed when permanent repairs were made; that it was strictly against the rules of the State Highway Department to leave any excavation or holes overnight, and especially over a week end. If there was a bump in the roadway, a "bump" sign was set up; and, if there were imperfections or the pavement was rough, a "rough pavement" or "danger" sign was erect-

ed. These signs were placed **200** or **300** feet before the imperfection in the pavement. He further stated the road was curved at the point, approximately one-half mile north of Milburn, and that there were several imperfections, not holes, in the northbound lane.

In considering the question of negligence, the Court will take judicial notice of the following:

During World War **11,** the highways of the State were subjected to extraordinary wear, and, due to shortages of strategic material, repair work was postponed, so that nearly all of the highway system was in poor condition. Since the war, enormous sums have been spent to restore the highways, but there has been insufficient time and money to completely rebuild the entire system, and the travelling public cannot but be aware of these facts. Consequently, all, who use the highways, must drive their vehicles in accordance with road conditions.

Since July **1, 1945,** numerous "highway cases" have been filed in the Court of Claims, and the negligence complained of falls roughly into three classifications.

1. Positive acts of negligence.

a. *Toler* vs. *State,* 16 C.C.R. **315,** wherein State excavated pavement, and thereafter did not place barricades or warning devices.

b. *Pomprowitz* vs. *State,* 16 C.C.R. **230,** wherein State excavated pave.. ment, and thereafter did not place flares in front of barricade.

2. Knowledge of a dangerous condition in the highway, and failure to repair, or give adequate warning.

a. *Rickelman* vs. ***State,*** 19 C.C.R. **54,** wherein State cut pavement to install a tile line, the asphalt patch thereafter applied subsided due to poor sub-grade, and the State, with knowledge **of** this condition, failed to repair, or post warning signs.

3. Constructive knowledge of a dangerous condition, and failure to repair or give adequate warning.

a. ***Herrin* vs. *State,*** 20 C.C.R. 110, wherein complainant stepped out of a car on the shoulder of the road, and fell into a broken concrete drop box inlet - - hazardous condition had existed for a long time, and the State should have known of this condition, had the proper inspections been made.

The complainants in the instant case must prevail, if at all, on the basis of constructive knowledge of a dangerous condition, and failure to repair or warn.

In reviewing the evidence, two disinterested witnesses testified that the hole in the pavement existed for a week, and that they could hear cars, travelling along said highway, hit the hole from their home, which was located away from the highway.

The size of the hole was 16 inches wide, **30** inches long, and 10 inches deep. It is unthinkable that the foreman of the State maintenance crew, who stated that he had made regular inspections, could have overlooked this hole, if he was performing his duties as he should, and the only reasonable inference is that he was negligent.

There cannot be any hard or fast rule in determining when it can be said that the State had "constructive notice" of a dangerous condition, and each case must be decided on its own particular facts. In the instant case, the enormous size of the hole, and the fact that it had existed for at least a week, leads us to the conclusion that the State had constructive knowledge of the dangerous condition, and failed to either repair, or erect warning signs.

The Court, in arriving at this conclusion, has not overlooked its previous decisions, in which it was held

that the State was not an insurer of all accidents, which occurred by reason of the condition of its highways. *Beenes* vs. *State*, No. 4377, filed on October 5, 1951.

In the case of *Dominic Di Orio* vs. ***State,*** *20* C.C.R. 53, it was stated:

"It would establish a dangerous precedent for this Court to hold that the State would be liable **for** all defects on a highway, which it was under a duty to maintain. There is no evidence in this record of the nature of the hole, its size, how long it had been there, how it had been created, or of any notice to the State of its existence, either actual or constructive. There is, therefore, nothing in the record to show that the respondent was guilty of any negligence. To hold that the State would be liable without notice, actual or constructive, would be making the State an insurer.

This Court, by prior decision, is committed to the rule that the evidence must show that the State had actual or constructive notice of the defect, and negligently failed to take precaution to protect the traveling public. (*Dockery* vs. ***State,*** 18 C.C.R. **177.)"**

The Court, therefore, finds from a preponderance of the evidence that the State was guilty of negligence in the present case. It further finds from a preponderance of the evidence that complainants were free from contributory negligence.

The evidence discloses that the damage to the automobile amounted to $1,063.31; that Jack M. Visco was charged with $80.00 as his share of the deductible amount on the insurance policy; and, that LaSalle Casualty Company paid the balance of the repair bill in the amount of $983.31.

The claim of Rose Visco is for $2,500.00, based on doctor and hospital bills in the amount of $845.20, and the balance for pain and suffering, as well as diminished sight in her right eye.

Without repeating the facts heretofore set forth, it is true that Dr. Fitzgerald stated, in his opinion, the emotional shock, resulting from the accident, aggravated the pre-existing glaucoma, and that two additional operations were necessitated to relieve this con-

dition. He also stated on cross-examination (Abstract, page 17):

"You never discharge them as cured, because glaucoma itself is never cured in the sense that the condition **can** never recur. It is like diabetes; it is under control. *It* can. ***recur*** of ***its own volition.*** It doesn't necessarily take **a** shock to cause it to recur."

There can be no argument but what Mrs. Visco suffered painful injuries, and suffered shock from this unpleasant experience. However, the testimony of Dr. Breakstone, together with the negative X-Ray reports, leads the Court to the conclusion that the injuries were relatively superficial, and that the most serious consequence was emotional shock.

It is to be noticed that the first operation for glaucoma was in June of 1950. The accident occurred on April 8, 1951. The second operation for glaucoma was in July of 1951, three months after the accident, which apparently did not relieve the condition. The third operation for glaucoma was in March of 1952, eleven months after the accident.

The courts of Illinois have held that a negligent injury, which aggravates a pre-existing tendency to disease, is deemed in law to be the proximate cause of the disease. *Chicago City Railway Company* vs. *Xaxby,* 213 Ill. 274.

If the operation in July of 1951, three months after the accident, had cleared up the condition of glaucoma, claimant would have been able to present a much stronger case. However, it required a second operation, eleven months after the accident, to attain the desired result.

This Court, sitting as a Jury, is confronted with two possibilities of the cause of the recurrence of the glaucoma, both of which are entirely logical, i.e., emo-

tional shock, or recurrence of its own volition. Since the claimant must establish her case by a preponderance of the evidence, the Court finds that she has failed to establish that the negligence of the State was the proximate cause of the recurrence of her glaucoma.

Claimant has submitted nine statements showing payment in full for doctor, hospital and related charges. This Court, having decided that the recurrence of glaucoma was not attributable to the negligence of the State, must consequently disallow seven of such charges.

The Court, therefore, makes the following awards:

1.	To Jack M. Visco, the sum of.		$80.00
2.	To LaSalle Casualty Company, A Corporation, the sum of. ..		$983.31
3.	To Rose Visco, as follows:		
	a. Dr. Breakstone	$30.00	
	b. Victory Memorial Hospital.	70.35	
	c. Rose Visco, for pain and suffering.	750.00	
			$850.35

(No. 4543—Claimant awarded $3,408.35.)

JACK STEWART, DOING BUSINESS AS JACK STEWART AND ASSOCIATES, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion pled June 26, 1953.
Petitions of Claimant and Respondent for rehearing denied October 30, 1953.

LITTLE, CLAUSEN AND PRESBREY, Attorneys for Claimant.

LATHAM CASTLE, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

PURCHASES—*authority* of ***State Purchasing Agent.*** State Purchasing Agent has no authority to make an increase in price after a bid is accepted.

SAME—discount. State was not entitled to discount within twenty days after delivery and acceptance, when no payments were made during this period.

PLEADINGS—*Departmental* ***Reports.*** Where a purported Departmental Report is in fact an answer, it was properly excluded by the Commissioner.

FARTHING, J.

We have for our consideration the following: Complaint, respondent's exhibit No. **3,** purporting to be a Departmental Report, objection to which was sustained by the Commissioner, transcript of evidence, respondent's exhibits Nos. 1, 2, **4** and 5, claimant's exhibits Nos. 1 - 18, inc., abstract of evidence, and the Commissioner's Report.

Claimant bases his suit on the fact that the prices of goods furnished, particularly cotton fabrics, increased after his bids were accepted. He stated he then had conversations with the State Purchasing Agent, in which the latter agreed to allow claimant to increase his selling prices, so long as they did not exceed the prices quoted by the next lowest bidder. These increased the total to **$9,343.95.** The other branch of his claim is that, although the State was entitled to a 7% discount, if payment was made within 20 days from the delivery and acceptance of the goods, or the date of invoice, whichever was the later date, while no payments were made within the discount period, the State nevertheless took a 7% discount on all purchases.

Although no briefs have been furnished us, and no statute has been called to this Court's attention, we must take judicial notice of the Illinois statutes. Except in cases of emergency, we find that Ill. Rev. Stat., 1949, Chap. 127, Par. 28, requires advertising for bids for supplies for the various departments of the State, and, further, quality considered, that purchases be made from the lowest bidders. Pars. 6 and 9 of Chap. 127 cover the State Purchasing Agent. None of these paragraphs authorize the Purchasing Agent to increase the amounts payable beyond the price contained in the accepted bid.

Claimant's counsel makes no reference to the rules as to bids the Department of Finance is authorized to make by Chap. 127, Sec. 36.6, prescribing uniform procedure in purchasing supplies. He has not shown that any authority was delegated the Purchasing Agent to make increases in prices after claimant's bids were accepted.

The State was not entitled to the discount. There is due to the claimant on that branch of his case the sum of $3,408.35.

There is no proof, and there is no statutory authority that would permit the Purchasing Agent to increase the purchase price beyond the amount of the bid. The claimant could not in any way vary the forms for bidding submitted to him by the State. His attempts to do so are mere surplussage, for the bids must of necessity be upon the same terms, and, by submitting a bid in competition with other bidders, he could not be awarded a contract on any other terms than those upon which his competitors made their bids. The Purchasing Agent had no authority to make subsequent increases in price.

An award is made to the claimant, Jack Stewart, in the amount of $3,408.35 against the respondent, the State of Illinois.

The Commissioner ruled correctly when he sustained the objection to respondent's exhibit' No. 3, purporting to be a "Departmental Report", admissible under Rule 16 of this Court. It was in fact an answer to the complaint. Such Reports may properly include copies of records of State Departments and official documents. This Court has been subjected to much criticism by reason of the delays incident to the obtaining of information by the Attorney General, as counsel

for the State. It is suggested that more prompt service may be obtained, if, instead of submitting to these unconscionable delays, the heads of Departments are called as witnesses, and, they, or the persons in charge of the particular records, are required to appear before the hearing officer of this Court. Claimants, who have honest claims, must of necessity await the action of this Court, the Governor, and the General Assembly, before payment of their claims can be had. The claimant, and this Court itself, are entitled to reasonably prompt cooperation from the various Departments of State government.

(No. 4547—Claimant awarded $350.20.)

RAY SERGENT, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 30, 1953.

JENKINS, OLSEN AND CANTRILL, Attorneys for Claimant.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

HIGHWAYS — negligence. Where respondent provided a road sign and portable "A" frame barricade horse, which, because of its instability, was blown into claimant's car, it is immaterial whether the contractor or respondent placed the sign in the spot where claimant's damages were sustained.

SAME—*highway* signs. The State has a duty to the motoring public to so place and erect State highway signs in such a manner that they will not, because of their own weight and instability, fall upon persons using the public highways.

FEARER, J.

Claimant, in his written complaint filed on March 20, 1953, alleged in substance that on August 4, 1952 he was riding in the right front seat of an automobile being driven by Doris Sergent; and that the automobile was proceeding in a southerly direction on U. S. Highway No. 66, approximately one mile south of Spring-

field, Illinois. After stopping at the sign at the intersection of U. S. Highway No. 66 with the road, which by-passes the City of Springfield, and while proceeding slowly across the intersection, a direction sign located about 25 feet south of said stop sign fell, or was blown upon the automobile in which the claimant was riding. Claimant's right arm was resting upon the window frame of the automobile, and the sign fell upon his right elbow causing a wound, which required medical attention. Claimant further alleges that respondent was negligent in constructing said sign with an inadequate base, and in erecting it so close to the traveled portion of the highway as to endanger persons rightfully using the highway.

A stipulation was filed waiving briefs and arguments of both claimant and respondent.

The evidence produced, consisting of the testimony of the claimant and a report of the Division of Highways, fairly tended to show that the direction sign had been placed immediately adjacent to the traveled portion of the highway, and it fell, or was blown upon the claimant and the automobile in which he was riding, at the instant said automobile was passing the sign. No explanation as to why the sign fell was offered by respondent. From the testimony of claimant, it would appear that the sign was blown over by a gust of wind. Obviously, the State of Illinois has a duty to the motoring public to so place and erect State highway signs in such a manner that they will not, because of their own weight and instability, fall upon persons using the public highways. While the evidence as to whether the respondent, or the contractor, who was then working upon the highway, placed the sign is extremely meager, in our opinion this is immaterial, in

view of the fact that respondent provided the sign, and the portable "A" frame barricade horse to which the sign was affixed. Also, respondent failed to introduce any evidence indicating that it was not responsible for the placing of the sign. Naturally this fact was not, and of necessity could not be, within the knowledge of claimant. Such a defense is in the nature of an affirmative defense, which would rest upon respondent to prove by a preponderance of the evidence.

The claimant demanded the sum of Five Thousand Dollars ($5,000.00). His evidence proved expenditures for medical treatment in the sum of Twenty Dollars ($20.00), and loss of earnings in the amount of One Hundred and Fifty-Five Dollars and Twenty Cents ($155.20). In addition, the claimant is entitled to the sum of One Hundred and Seventy-Five Dollars ($175.00) for pain and suffering, or a total of Three Hundred and Fifty Dollars and Twenty Cents ($350.20).

The Court, therefore, awards to claimant, Ray Sergent, the sum of Three Hundred and Fifty Dollars and Twenty Cents ($350.20).

(No. 4550—Claim denied.)

MABLE HUBBARD AND ROY HUBBARD, .Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion *filed* October SO, *1953.*

R. W. HARRIS, Attorney for Claimants.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

HIGHWAYS—*negligence.* Where evidence showed the State had erected adequate signs warning public **of** the condition **of** the road, its duty to the traveling public was discharged.

SAME—contributory negligence. Where evidence showed adequate signs stating condition of the road had been erected, and claimant had travelled the same road

earlier that day, she failed to establish by a preponderance of the evidence her freedom from **contributory negligence.**

TOLSON, C. J.

Mable Hubbard and Roy Hubbard, her husband, have filed their complaint, seeking damages for personal injuries sustained by the said Mable Hubbard, and damages to Roy Hubbard's **1948** Oldsmobile, by reason of an accident, which occurred on State Route No. **37** on July 8, **1952.**

The record consists of a verified complaint, transcript of the evidence, brief and argument of claimant, and brief and argument of respondent.

The facts in the case are as follows: On July 8, **1952** about **9:00** P.M., claimant, Mable Hubbard, left her home in Marion, Illinois driving her husband's **1948** Oldsmobile to Cairo, Illinois. She drove over State Route No. **37,** which was being resurfaced in certain areas. The weather was rainy, and, a road crew, which was working about one and one-half miles south of Grand Chain, the scene of the accident, was obliged at noon to cease its operations for the day, because of the downpour.

Mrs. Hubbard left Cairo about 12:30 P.M., and reached the area under repair about 2:30 in the afternoon. She stated that, when she reached this rough area, she slowed down from a speed of **40** to **45** miles per hour, which she had been maintaining, and almost immediately a car, travelling in the same direction, passed her, and, in so doing, threw mud, water and an oily substance upon her windshield, so that her view of the road was impaired.

She stated at about that moment her car struck a hole in the road, which caused the front end of the car to bounce up and down, and she lost control of the

car. Whether the car went off on the right shoulder is not too clear from the evidence, but, in any event, the car ended on the left shoulder. Mrs. Hubbard struck her chin on the steering wheel, and was rendered unconscious. Of a more serious nature, she suffered a dislocation and fracture of her left humerus, and required hospitalization. The front and left sides of Roy Hubbard's car were damaged in the amount of **$327.82.**

The evidence discloses that State Route No. **37** was under construction, and, at the area complained of, a portion of the highway had been removed more than a year before, and had been replaced with gravel.

On July 7, 1952, the day before the accident, this particular strip had been graded, and thereafter coated with a "primer" of cut asphalt. Finally stone chips to the depth of one-half inch were spread to prevent traffic from picking up the primer.

The evidence further discloses that a series of warning signs had been erected by the contractors some distance from the particular area, bearing the following inscriptions: "Road under construction", "Resurfacing, please drive carefully", "State of Illinois, Division of Highways".

Near the particular area, two additional signs were in place—"Slow" and "Low shoulder".

Mrs. Hubbard stated that she did not see the signs, possibly because of the heavy rainfall, but, in any event, there is no dispute but what the signs were actually in place. It is also significant to note that claimant was fully aware of the rough area, because she had driven across it just a few hours earlier on her way to Cairo.

This Court has heretofore held that the State of Illinois is not an insurer against all accidents, which

occur by reason of the condition of its highways. *Terracino* vs. *State,* No. **4420,** filed on January 8, 1952; *Beenes* vs. *Xtate,* No. **4377,** filed on October 5, 1951.

This Court has also held that, if the State has knowledge, actual or constructive, of a dangerous condition on its highways, and fails to warn the public of the condition, with resultant injury, it must respond with damages for its negligence. *Pomprowitx* vs. *State,* 16 C.C.R. **230;** *Rickelman* vs. *State,* 19 C.C.R. **54.**

The Court of Claims, as does all of the Courts of the State of Illinois, requires a claimant to establish by a preponderance of the evidence that he or she is free from contributory negligence. *Stephens* vs. *State,* 19 C.C.R. **207.**

Applying these rules of law to the facts in evidence, it is patent that the State, by erecting a series of warning sings indicating that road construction was in progress, and by also placing two additional warning signs in the immediate vicinity of the rough area, has completely discharged its duty to the public.

In addition to the above, complainant has not established by a preponderance of the evidence that she was free from contributory negligence, in that she admitted knowledge of this rough area by reason of having travelled over it a few hours earlier, and must, therefore, be charged with knowledge of its condition —good or bad.

For the reasons above stated, an award will be denied.

(No. 4554—Claimant awarded **$434.21.)**

STANDARD OIL COMPANY, INDIANA, INC., Claimant, pro se.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

PURCHASES—*separability of claims.* Where a claim consists of a number of separate and distinct transactions, the Court has jurisdiction to make **an** award **for** those items not barred by the Statute of Limitations.

made in the regular course of business by the State of Illinois, and the materials, services, and prices were as represented.

The Court, therefore, awards to claimant, Standard Oil Company of Indiana, the sum of **$434.21.**

(No. 4494–Claim denied.)

FREDRICK **HYSON**, Claimant, *vs.* STATE OF **ILLINOIS**, Respondent.

Opinion filed December 18, 1953.

G. WILLIAM HORSLEY, Attorney for Claimant.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

HIGHWAYS—*negligence—burden of proof.* Where claimant failed to show by a preponderance of the evidence that just prior to the accident he was driving with due care and caution for his own safety and the safety of others, and that the negligence of respondent's agents was the proximate cause of the accident in question, an award will be denied.

FEARER, J.

On February 15, 1950, between the hours of seven and eight A.M., the claimant, Fredrick Hyson, who was self-employed, owned, and was operating his 1949 Ford Tractor and Kingham Trailer in a northerly direction on Route No. 66, a concrete public highway in the State of Illinois, at or about two miles north of Chenoa, Illinois in Livingston County. On said day, Richard Duffy (who at the time of the hearing was in the military service stationed in Japan) was an employee of the State of Illinois, and was in charge of, and driving a truck of the Division of Highways of the Department of Public Works and Buildings of the State of Illinois; and, there was working for him, as an agent of the State of Illinois, Andes W. Johnson. These men were employed for maintenance work by the respon-

dent, and assigned to the area in question for general maintenance operations.

On the morning in question, Duffy and Johnson left Pontiac, Illinois in a State truck loaded with cinders at or about the hour of seven-thirty, and drove from the garage in Pontiac, Illinois on Route No. 116 to Route No. 66, and thence south on Route No. 66 to the line between Livingston and McLean Counties. Their duty on the morning in question was to spread cinders on icy spots, bridges, intersections and approaches to bridges. Upon reaching the end of their area, they turned around, and headed north. Before spreading cinders on the approach to the bridge where the accident in question occurred, Mr. Duffy pulled the State truck onto the east shoulder to permit Mr. Johnson to get in the back of the truck for the purpose of spreading cinders, which he was doing at the time the accident occurred. The tractor and trailer, which claimant was driving, skidded on an icy spot on the approach to the bridge, causing claimant's tractor to strike a guard post located along said highway. The tractor then proceeded in the traffic lane provided for south bound traffic, and struck a truck traveling in a southerly direction, as the result of which claimant suffered personal injuries, damage to his tractor and trailer, and loss of earnings.

There is no question but what the respondent, through its agents, was spreading cinders on the approaches to the bridge, and on the bridge just prior to and at the time of the accident; and that the claimant's tractor did not come into contact with the State highway truck, but drove on and into the truck traveling in a southerly direction. Claimant testified that the State truck was not moving when he first saw it, and

at that time he was within 25 to 30 feet of the State truck. Johnson testified that the State truck was moving at a slow speed, so that he could properly spread the cinders on the north bound traffic lane. Claimant testified that he did not see any lights on the State truck. Johnson testified that the blue revolving light on the top of the cab was working just prior to and at the time of the accident in question.

Claimant charges a violation of Chap. 95½, Sec. 218 (b), Bar Association Edition, which prohibits the parking of a vehicle on a State highway unless an emergency exists, and it is impossible to drive said vehicle onto the shoulder, without warning traffic traveling on said highway; and, also charges a violation of Chap. 95½, Sec. 148, I.R.S., Bar Association Edition, which makes it a violation to operate a motor vehicle at a slow rate of speed on a State highway, so as to impede, or block the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation, or compliance with the law.

It is our opinion from the testimony offered that Mr. Duffy was driving the State truck, Mr. Johnson was shoveling cinders at the time of the accident in question, and that the State truck was visible to traffic traveling upon said highway at the time of and just prior to the accident in question. Had claimant been looking, he would have seen the truck on the highway, and noted that cinders were being spread on the bridge, and approaches thereto. Furthermore, had claimant had his truck under control, and been driving at a speed, which took into consideration the condition of the highway, the bridge, and the approaches thereto, his tractor would not have skidded, and gone from its

proper traffic lane to the south bound traffic lane, and struck the truck traveling in a southerly direction.

The burden is upon the claimant to prove by a preponderance or greater weight of the evidence that just before and at the time of the accident in question he was driving and operating his tractor with due care and caution for his own safety, and the safety of others traveling upon such highway; and that it was the negligence of respondent's agents, which was the proximate cause of the accident. In this respect, we think the claimant has failed. It is our opinion that, just prior to and at the time of the accident in question, Duffy and Johnson, employees of respondent, were performing their duty in the area assigned to them for the protection of the traveling public.

For the reasons above set forth, the claimant is not entitled to recover.

(No. 4514—Claimant awarded $25,889.70.)

J. L. SIMMONS COMPANY, INC., A DELAWARE CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 18, 1965.

WALTER DAY, Attorney for Claimant.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

PRACTICE—*summary* judgment. Where there is no dispute as to a part of a claim, relief may be had in the Court of Claims by way of a summary judgment.

CONTRACTS—necessity and eztent of investigation by contractor. Where architectural drawings and test borings did not show the true character of the subsoil, and additional borings by the contractor would not have revealed its true nature, the contractor had a righ't to rely on this representation without an investigation to prove its falsity, in spite of the fact that the drawing stated that the test borings were not to be used by the contractor in the preparation of estimates, and were not a part of the contract.

SAME—*interpretation.* Courts will give great weight to the interpretation placed on a contract by the parties thereto.

TOLSON, C. J.

On May 16, 1952, J. L. Simmons Company, Inc., filed its complaint against the State of Illinois for the sum of $48,224.34, said sum being the balance claimed due it under a contract for the construction of the Mt. Vernon State Tuberculosis Sanitarium at Mt. Vernon, Illinois.

The prayer for relief requested a summary judgment in the amount of $22,334.64, which amount was not in dispute, and an award of $25,889.70 for the balance claimed under the contract.

The record consists of a complaint, motion of claimant for summary judgment, transcript of evidence, abstract of evidence, statement, brief and argument of claimant, and statement, brief and argument of respondent.

On March 20, 1953, this Court granted the motion for summary judgment in the amount of $22,334.64, which leaves the remaining claim of $25,889.70 for determination.

The facts of the case are as follows:

On October 8, 1948, the claimant was awarded a contract to construct the Mt. Vernon State Tuberculosis Sanitarium. (Reference will be made at a later time in this opinion to the contract, correspondence and architectural drawings.)

After the top soil was stripped from the building site, a "substance" was encountered that could not be removed with power equipment, and the contractor was obliged to use air hammers and dynamite to complete the excavation.

On March 5, 1949, the Simmons Company notified Philip B. Maher, the architect for the State, of this condition, and requested a meeting of all interested

parties at the site of operations to determine the amount of additional compensation that Simmons Company would be entitled to under its contract, and for the State to consider revising its drawings to take advantage of this newly discovered condition by raising the elevations of the bottom of the pier footings, thereby saving certain costs for materials.

Thereafter, a series of letters were written between the parties, which resulted in a change order, wherein the State received a credit of $587.50 for the savings in material.

The claim of the Simmons Company for extra compensation for "rock excavation" was carefully skirted by the State Architect in the correspondence heretofore referred to, but, in the letter of May 1, 1950, between Philip B. Maher, State Architect, and C. Herrick Hammond, Supervising Architect for the State, Mr. Maher recommended the settlement of the claim in the amount of $25,889.70 on the basis that the substance encountered was not known to exist by either party, and was properly compensable under Article XXII of the general contract.

On June 30, 1951, C. Herrick Hammond, Supervising Architect, accepted the proposal of the Simmons Company on behalf of the State, and ordered the necessary changes.

The building was completed and accepted by the State, and, when final payment was requested by the Simmons Company, the Department of Finance, before executing the voucher, requested an opinion from the Attorney General covering this payment, and, on receiving an adverse ruling, declined to issue a voucher for the disputed item.

Two questions are presented to this Court for consideration:

1. Can the Supervising Architect effect a change in the contract, which would increase the amount of the contract?

2. If the Supervising Architect can amend the contract, was the "substance" rock within the meaning of the contract?

The contract, specifications and drawings cover hundreds of pages, and by the terms are construed together as one document. The one architectural drawing introduced in evidence is a plot plan of the site, which details the elevations of the land involved, discloses locations of certain borings, as well as the nature of the sub-soil encountered. The drawing states that there is no rock or quick sand on the site, but also states that the test borings are not to be used by the contractor in the preparation of estimates, and is not a part of the contract.

The "substance" that caused this difficulty was broken up in granules by the auger when the borings were made, and, when examined by the bidders, in no way represented its true character when the top soil was removed. It is conceded by all parties that the nature of this "substance" was unknown when the contract was let, and that additional borings by the contractor would not have revealed its true character.

The following portions of the contract appear to be controlling in the matter of its interpretation:

AGREEMENT

ARTICLE IV: UNIT PRICES FOR CHANGES: The following unit prices will apply in the event additions to or deductions from the work to be performed under this contract are required:

	Unit Prices Add	Deduct
No. 1—1:2½:4 concrete per yard.	$25.00	$22.00
No. 2—1:2:3½ concrete per yard.	26.00	23.00
No. 3—Reinforcing steel per 100#	14.00	12.00
No. 4—Forms per square foot.	.60	.50
No. 5—Earth excavation per yard (hand).	3.50	3.00
No. 6—Earth excavation per yard (machine).	1.25	1.05
No. 7—Rock excavation per yard (if encountered).	40.00	35.00

ARTICLE V. The Contractor and the Owner agree that the General Conditions of the Contract, the Specifications and the Drawings, together with this Agreement, form the Contract, and are as fully a part of the Contract as if hereto attached or herein repeated.

ARTICLE VI: It is understood and agreed by and between the Parties' hereto that this Contract is the entire agreement between the Parties, and that no alterations, changes or additions therein shall be made, except in writing approved by the Parties hereto.

GENERAL CONDITIONS OF THE CONTRACT

ARTICLE 1.

PRINCIPLES AND DEFINITIONS:

(b) The Owner, the Contractor, and the Supervising Architect are those named as such in the Agreement. They are treated throughout the Contract Documents as if each were of the singular number and masculine gender.

ARTICLE 2.

EXECUTION, CORRELATION AND INTENT OF DOCUMENTS:

The Contract Documents shall be signed in triplicate by the Owner and Contractor. In case of failure to sign the General Conditions, Drawings, or Specifications, the Supervising Architect shall identify them.

The Contract Documents are complementary and what is called for by any one shall be as binding as if called for by all. The intention of the documents is to include all labor and material reasonably necessary for the proper execution of the work. It is not intended, however, that materials or work not covered by, or properly inferable from, any heading, branch, class or trade of the specifications shall be supplied, unless distinctly so noted on the drawings. Materials or work described in words which so applied have a well known technical or trade meaning shall be held to refer to such recognized standards. When the specifications and drawings conflict, the specifications shall govern.

ARTICLE 8:

THE SUPERVISING ARCHITECT'S STATUS:

The Supervising Architect shall have general supervision and direction of the work. He is the Agent of the Owner only to the extent provided in the Contract Documents. He has authority to stop the work whenever such stoppage may be necessary to insure the proper execution of the Contract.

ARTICLE 9:

THE SUPERVISING ARCHITECT'S DECISIONS:

The Supervising Architect shall, within a reasonable time, make decisions on all claims of the Owner or Contractor and on all other matters relating to the execution and progress of the work or the interpretation of the Contract Documents.

ARTICLE 10:

FOREMAN, SUPERVISION:

The Contractor shall give sufficient supervising to the work using his best skill and attention. He shall carefully study and compare all drawings, specifications and other instructions and shall at once report to the Supervising Architect any error, inconsistency or omission which he may discover.

ARTICLE 22:

CHANGES IN THE WORK:

The Owner, without invalidating the Contract, may make changes by altering, adding to or deducting from the work, the Contract sum being adjusted accordingly. All such work shall be executed under the conditions of the original contract, except that any claim for extension of time'caused thereby shall be adjusted at the time of ordering such change.

No change shall be made, unless in pursuance of a written order from the Supervising Architect, stating that the owner has authorized the change, and no claim for an addition to the Contract sum shall be valid unless so ordered.

The value of any such change shall be determined in one or more of the following ways:

(a) By estimate and acceptance in a lump sum.
(b) By unit prices named in the contract or subsequently agreed on.

ARTICLE 23:

CLAIM FOR PAYMENT:

If the Contractor claims that any instructions, by drawings or otherwise, involve extra cost under this Contract, he shall give the Supervising Architect written notice thereof before proceeding to execute the work, and, in any event, within two weeks of receiving such instructions. No such claims shall be valid unless so made.

ARTICLE 25:

CERTIFICATES AND PAYMENTS:

If the Contractor has made application as above, the Supervising Architect shall, not later than the date when each payment falls due, issue to the Contractor a certificate of such amount as he decides to be properly due.

The following correspondence reflects the interpretation placed on the contract by the Simmons Company and the architects for the State:

J. L. SIMMONS CONPANY, INC.

5 March, 1949

Philip B. Maher, Architect
157 East Erie St.
Chicago, 11, Illinois

Gentlemen:

SUBJECT: Mt. Vernon State Tuberculosis Sanitarium, Mt. Vernon, Illinois—Rock Excavation.

The writer visited the above subject job on February 16, 1949, and inspected the excavation at the request of our superintendent, Mr. Carl Stephens, who the day before had taken some snapshots showing the various parts of the excavation. We are enclosing one print of eight different pictures, as we were at the time in a very hard rock like shale.

When in the office of the Division of Architecture and Engineering the following week on another matter, the writer mentioned to Mr. C. W. Macardell the fact that we had hit this very hard material, and were having considerable trouble in dislodging it, having to use a backhoe in the bottom of the excavation, cross-cutting in one way, and then using a dragline bucket from a crane on the bank to pick up the crumbs on the excavation.

The writer has kept in touch with Mr. Stephens, and this condition has steadily grown worse, until on Saturday, 26 February, our superintendent called my office in Springfield, and advised that this shale strata had become so hard that it was necessary to dynamite in order to dislodge any of this material. The State superintendent on the job, Mr. Clifford Jones, is fully advised of the existing condition, and the writer understands that he has submitted samples of this material to his office in Springfield, together with a report concerning the nature of the excavation.

It is requested that either a representative of your firm, or the State of Illinois, or both, visit the site of the operations, and determine with our superintendent the amount of rock excavation involved, so that we may be compensated according to the terms of our contract.

It is further requested that consideration be given to raising the elevation of the bottom of the pier footings Nos. 10, 11, 12, 22, 23, 24, 42, 41, and 40, that is, if the same material is encountered in those pier footings as was encountered in the rest of the excavation.

Very truly yours,

J. L. SIMMONS COMPANY, INC.

J. L. SIMMONS COMPANY, INC.

Springfield, Illinois
6 May, 1949

Philip B. Maher, Architect
157 East Erie Street
Chicago, 11, Illinois

SUBJECT: Mt. Vernon State Tuberculosis Sanitarium,
Mt. Vernon, Illinois—Rock Excavation

Gentlemen:

We enclose three prints each of drawing marked Rock Excavation, Mt. Vernon Tuberculosis Sanitarium, Mt. Vernon, Illinois, dated 4/20/49, together with three photostats each showing footing numbers, and the amount of hand rock excavation in each footing, and section numbers on general rock excavation, as identified on previously mentioned drawing.

You will note that the total rock excavation constitutes 2,746 cubic yards. These prints are for your information and study, and for presentation to the State of Illinois for payment at the cubic yard price as set out in our contract.

Very truly yours,

J. L. SIMMONS COMPANY, INC.

PHILIP B. MAHER
ARCHITECT
June 30,1949

J. L. Simmons Company, Inc.
2146 North Woodford Street
Decatur, 60, Illinois

Attention: Mr. Fred A. Berndt

Gentlemen:

Mt. Vernon State Tuberculosis Sanitarium

We have checked your allowances for certain columns because of their shorter length due to soil conditions at the site, and arrive at a figure of 8587.50 credit instead of 9507.00, which you submit.

In regard to the extra claimed for rock excavation, we have discussed this matter with our engineers, and our representative on the job, McCoy & Wilson, and neither recognize the material excavated to be "rock" as mentioned under the term of your contract calling for a removal price of 940.00 per cubic yard.

Very truly yours,

/a/ W.T.S.
Walter T. Stockton

PHILIP B. MAHER
ARCHITECT
May 1, 1950

To: C. Herrick Hammond, Supervising Architect
Springfield, Illinois

The J. L. Simmons Company has submitted to us a request for extra compensation for removal of so-called rock formation encountered by them during the excavating work for the Mt. Vernon State Tuberculosis Sanitarium. The net extra' requested is $25,889.70, and the quantity involved is 2,958 cu. yds. out of a total of 7,475 cu. yds. taken from the excavation.

The above amount is the result of checking by your representative, Mr. Clifford Jones, and has been agreed upon by all concerned as being correct. The area under consideration is at the south central and southeast portion of the building.

We have asked the J. L. Simmons Company to submit expense records to substantiate their statement, and we have on file copies of weekly labor and material costs for excavation work from December 5,1948, thru May 8, 1949. The following figures and facts are presented herewith as a matter of record:

Actual Cost			
Bulk, Trench, and Hand Excavation		$25,322.60	
Superintendent and Time Keeper		4,950.00	
			$30,272.60
Less Estimated Cost			
Bulk Excavation	6080 Cu. Yds. @ $1.00	$6,080.00	
Trench Excavation	785 Cu. Yds. @ 1.50	1,178.00	
Hand Excavation	610 Cu. Yds. @ 3.00	1,830.00	
			9,088.00
Net Extra Cost			$21,184.60
Overhead and Profit, 21%			4,448.77
Bond, 1%			256.33
Total Extra Cost			$25,889.70

As to the actual material encountered, our engineer, Mr. Syberen Frank Nydam, has had samples of it in his office for some months. It does not have the properties of genuine rock, but seems to be a kind of shale, which becomes rock-like on exposure to air, and disintegrates when placed in water. Our representative on the job, Mr. Harry Throgmorton of McCoy & Wilson, has stated on two occasions that the material is not "rock", and our own observations lead us to the same conclusion in the light of the unit prices set up in the General Contract, wherein rock is implied as being a material of sufficient hardness and density to demand the payment of $40.00 per cubic yard for its removal "if encountered". The cost of removing this material was about $8.30 per yard.

Since the specifications do not provide for any material other than "earth" and "rock", and it is generally agreed that the material under discussion is not "rock", it is, therefore, technically impossible to approve the extra compensation requested by the contractor.

However, as you are aware, there is shown on the first sheet of the architectural drawings a complete record of all borings taken on the site. While this is distinctly labeled as not being a part of the drawings, and the State is in no way obligated therefor, it is nevertheless an accurate record of the borings, and, they do not, and, in our opinion, no amount of additional borings would disclose the conditions, which developed as the excavating progressed. In other words, there is nothing the general contractor could have done to warn him of the situation encountered. Furthermore, you will recall he has submitted a credit of $587.50 because of the fact that certain columns were not required to be extended to the depths shown on the drawings due to the hardness of the bearing surface.

Therefore, because of the fact that the State recognized by the words "if encountered" that they are willing to compensate a contractor for removal of a certain type of material not known to exist on the site at the time of awarding the contract, and, since a similar condition exists at the Mt. Vernon State Tuberculosis Sanitarium, we will be pleased to be a party to further discussion, if you agree with us that the J. L. Simmons Company is entitled to a hearing.

Very truly yours,
W.T.S.
Walter T. Stockton

DIVISION OF ARCHITECTURE AND ENGINEERING
June 30, 1951

To: J. L. Simmons Company, Inc.

From: Supervising Architect

I have been directed to notify you of the acceptance of your proposal, dated June 8, 1951, in the amount of Twenty Five Thousand Eight Hundred Eighty Nine and 70/100 Dollars ($25,889.70) for the following additional work:

> Because rock was unexpectedly encountered in the excavations, as outlined in proposal, dated June 8, 1951, to which is attached breakdown.

A formal order will be forwarded you for signature coincident with its execution by the officers so authorized to execute the order for the State.

Pending receipt of the above order, it is requested that this letter be taken as authority to proceed with the work.

Yours very truly,

DEPARTMENT OF PUBLIC WORKS
AND BUILDINGS.

DIVISION OF ARCHITECTURE AND ENGINEERING
October 11, 1951

To: J. L. Simmons Company, Inc.

From: Supervising Architect

Under date of June 8, 1951, you submitted a proposal to this office covering the cost to you of rock excavation in connection with the above project, and you were notified, under date of June 30, 1951, of its acceptance.

Our letter of acceptance was based on advice from the Director of the Department of Public Health that its acceptance met with his approval; however, he so informed this office, without awaiting the advice of the Department of Finance, to whom the matter had been referred, and, who, in turn, referred it to the Attorney General.

You have been informally advised of the action taken by the Attorney General, as well as the Departments of Finance and Public Health, and we quote from the Attorney General's letter to the Department of Finance, expressing his opinion, that the Director of Finance should not approve such a payment, as follows:

> "It is therefore apparent that this contract contains an express stipulation as to the compensation to be paid. The contract contains no provision, which can be construed to authorize payment of an additional amount due to the fact that excavation at the site proved more onerous and costly than originally contemplated by the contractor.
>
> I am therefore of the opinion that the Director of Finance should not approve an invoice voucher for payment of this additional amount of $25,889.70 to the J. L. Simmons Company, Inc. under contract 66546."

Yours very truly,

DEPARTMENT OF PUBLIC WORKS
AND BUILDINGS.

The State contends that the contract price was a flat bid, and, if the work became more onerous than was contemplated, the contractor was nevertheless obliged to complete it according to the terms thereof.

Complainant contends that the contract price is a general figure, subject to change by additions or subtractions, all under the direction of the Supervising Architect, that changes in fact were made, which were both beneficial and detrimental to the State.

This Court recognizes that contracts for public works involving the expenditure of hundreds of thousands of dollars are by their very nature complex, and that it

is virtually impossible to anticipate every contingency that may develop. Some latitude and discretion must be placed with someone to handle these matters on behalf of the State, and by the terms of this contract the Supervising Architect was delegated to effect these changes.

Article V of the agreement states affirmatively that all of the documents pertaining to the contract form the "contract", and Article II of the general conditions states that all of the documents are complementary, and what is called for in one shall be as binding as if called for by all.

The Court, therefore, concludes that the restrictive interpretation suggested by respondent cannot be followed, but that the contract must be construed in the light of all documents in evidence.

Considering first the plot plan of the site—the document shows the location of 15 test borings, the sub-soil data chart is a positive representation of the nature of the sub-soil.

The appendix contains a positive statement that no rock or quick sand will be encountered. Also in positive terms is a precautionary note advising contractors not to use test boring data in the preparation of estimates, as it is not a part of the general contract,.

The leading case construing such contracts is *Hollerback* vs. *United States,* **233** U. *S.* 165, in which plaintiff filed a suit in the United States Court of Claims to recover on a contract for extras for the repair of a dam on Green River, Kentucky. Plaintiff alleges certain representations in the contract prepared by the Government stated that the present dam was backed with broken stone, sawdust and sediment to a given depth, when, in fact, such statement was in error. The

contract included the usual statements that a bidder was to visit the site, and make his own investigation to enable him to make an intelligent proposal.

The Court of Claims ruled that the contractor was at fault for not making the required investigation, and denied the claim. On appeal the Supreme Court held to the contrary.

"A government contract should be interpreted, as are contracts between individuals, with a view to ascertaining the intention of the parties, and to give it effect accordingly, if that can be done consistently with the terms of the instrument. In Paragraph 33 the specifications spoke with certainty as to a part of the conditions to be encountered by the claimants. True, the claimants might have penetrated the seven feet of soft slushy sediment by means of which they would have discovered the log crib work filled with stones, which was concealed below, but the specifications assured them of the character of the material, . . a matter concerning which the government might be presumed to speak with knowledge and authority. We think the positive statement of the specifications must be taken as true and binding upon the government, and that upon it, rather than upon the claimants, must fall the loss resulting from such mistaken representations. We think it would be going quite too far to interpret the general language of the other paragraphs as requiring independent investigation of facts, which the specifications furnished by the government as a basis of the contract left in no doubt. If the government wished to leave the matter open to the independent investigation of the claimants, it might easily have omitted the specification as to the character of the filling back of the dam. In its positive assertion of the nature of this much of the work, it made a representation upon which the claimant had a right to rely without an investigation to prove its falsity.:

The Court of Claims of Illinois in the case of *Arcole Construction Company* vs. *State*, 11 C.C.R. **423,** followed the rule laid down in the Hollerback case, and the facts of that case are as follows:

Claimant, Arcole Construction Company, was awarded a contract to repave Roosevelt Avenue in the City of Chicago. Plans and specifications were prepared by the State, and through oversight no reference was made to that portion of the road bed containing abandoned street rail ties, which were embedded in concrete, and not visible through ordinary examination. The contractor was unable to remove this portion of the high-

way with power shovels, but had to resort to air hammers to chip it out. The extra expense amounted to **$24,944.85,** and a claim was made for this amount. The Court ruled that where plans and specifications are prepared by the owner, and there is a *material misrepresentation* therein, and, as a result of such misrepresentation, the contractor is misled to his damage, he is entitled to recover the damage so sustained. An award of $23,092.09 was granted.

The present case might well be decided on the basis of a *material misrepresentation,* as set forth in the Arcole case, supra. However, the claimant and Supervising Architect have placed their own construction on the contract to arrive at the same conclusion.

This was probably brought about in that the State amended the contract to effect a savings in the amount of **$587.50,** and, since the claimant did not press his claim for removal of "rock" at the rate of $40.00 per cubic yard, as provided by Article IV of the agreement, Article XXII of the general conditions of the contract was used as the medium in determining the amount of the extra costs encountered by claimant.

The courts of this State have held that the interpretation of a contract made by the parties themselves will be given great weight. In the case of *Lehmann* vs. *Revel,* **254** Ill. **262,** the court ruled that the Park Commissioners, who had accepted the benefits of a contract, which was in part illegal, in that it exceeded the powers of the municipality, were estoppeled to defend on the theory of lack of powers.

This Court, therefore, concludes that claimant is entitled to recover on either the theory of *material misrepresentation,* or the contract as interpreted by the parties themselves, providing the removal of the "sub-

stance" was not part of the contract, which claimant was obliged to perform according to its terms.

Claimant has introduced into evidence a sample of the "substance" encountered at the building site. It is about 3 inches by 4 inches, and one inch thick. In its present condition, it is extremely hard and heavy, and gives the typical appearance of a paper weight. It is conceded that when first taken from the ground it presents a different character, and thereafter hardens. Carl M. Bays, a recognized geologist, testified that the "substance" was a true rock, coming from the Pennsylvania strata. Respondent contends that the "substance" was not a true rock, but admitted that the material was dense, compact, indurated and stratified.

It is interesting to note that the Department of Public Works and Buildings, through its Division of Highways, has defined the word "rock" as follows:

STANDARD SPECIFICATIONS FOR ROAD AND BRIDGE CONSTRUCTION

SECTION 11. ROADWAY EXCAVATION

Construction Methods

Earth Excavation. All roadway excavation shall be classified as earth excavation, except those materials provided **for** in rock excavation.

Rock excavation. Rock excavation shall include:

(a) All boulders and rocks measuring ½ cubic yard or more.

(b) Solid or ledge rock that cannot be excavated without resorting to continuous drilling and blasting.

(c) Slate, shale, sandstone, and other hard material that cannot be excavated with a modern power shovel of ¾ cubic yard capacity, adequately powered, and in good mechanical condition, without continuous drilling and blasting. The Contractor shall prove by demonstration that slate, shale, sandstone, or other hard material encountered cannot be moved with heavy equipment without continuous drilling and blasting.

The last edition of *Words and Phrases* at pages 572 and 573 has the following definition:

ROCK

"Rock is meant the stratum or formation of stone, or other fixed, hard material underlying and supporting the loose material of which the surface of the earth is ordinarily composed, and includes a rock known as soapstone." *Okey* vs. *Mayers* 91 N.W. 771; 117 Iowa 514.

ROCK EXCAVATION

"All conglomerate deposits so firmly cemented as to present characteristics of solid rock and which it is not practicable to excavate with a *power shovel,* except after drilling and blasting . . . may be classified as "Rock Excavation", which may include "hardpan" which is a cemented or compact deposit." *Lathers* vs. *State,* 229 N.W. 50; 238 Wisconsin 291.

In the light of this evidence, it is apparent that the "substance" encountered was true "rock" within the meaning of the contract, and is, therefore, compensable as an extra.

An award of $25,889.70 is hereby granted to the complainant, J. L. Simmons Company, Inc., A Delaware Corporation.

(No. 4555—Claimant awarded $3,273.10.)

G. W. GLADDERS TOWING COMPANY, INC., A MISSOURI CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 18, 1953.

EVERETT PROSSER, Attorney for Claimant.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

HIGHWAYS—negligence** of **bridge tender. Where bridge tender's unexplained premature closing of a pivot bridge damaged claimant's tow boats, the State was negligent, and claimant entitled to an award.

TOLSON, C. J.

G. W. Gladders Towing Company, Inc., a Missouri Corporation, filed its complaint on June 19, 1953, seeking compensation for a certain barge tow that was damaged by the alleged neglect of a bridge tender, who was an employee of respondent.

The record consists of a verified complaint, Departmental Report, transcript of the evidence, petition asking leave to waive briefs and arguments, and order granting the petition.

The facts of the case are as follows:

On June **20,** 1951, the Emily Jean tow barge, owned by the complainant, was pushing four barge tows up the Illinois River toward Chicago, its ultimate destination. The barges were tied together two abreast, and were loaded with furnace oil. The Emily Jean was at the rear, pushing the barges at a speed of 3/4 miles per hour, just enough speed to maintain steerage. The overall length of the tow was about **598** feet.

As the tow approached the 9th Street Bridge, the Captain of the Emily Jean gave a single whistle blast, which was the signal to open the bridge. This blast was answered by the bridge tender with a blast from a siren.

The 9th Street Bridge was the pivot type, and, in this instance, it swung downstream, so that the tow could proceed ,between the concrete abutments on either side. The tow started through the opening, and the front two barges had passed under the bridge area, when the bridge tender, for some unknown reason, started to return the bridge to a closed position, and, in so doing, crashed the bridge upon the rear tow boats, causing substantial damage to tow boat No. N.B.C. 752, and minor damage to tow boat Martin No. 1.

The Captain of the Emily Jean interrogated the bridge tender about closing the bridge prematurely, but could get no explanation. The bridge tender did not testify in this proceeding, so the reason, or excuse, for his action remains unanswered.

The tow, after minor repairs, continued to Chicago, and on its return trip was examined by an independent Marine Surveyor at St. Louis. The two barges were repaired by the St. Louis Shipbuilding and Steel Company at a cost of **$3,237.10.** The amount of the bill, and the reasonableness of the charge are not in dispute.

It was stipulated between the parties at the hearing before the Commissioner that the 9th Street Bridge near Lockport, Illinois is under the control and management of the Division of Waterways of the Department of Public Works and Buildings of the State of Illinois, and that, at the time and place of the accident, Ludwig S. Sonce, the bridge tender, was an employee of the Division of Waterways.

The evidence in this case discloses with clarity, the consequences of man power failure. The negligence of the bridge tender in closing the bridge prematurely was the sole and proximate cause of the damage.

In the case of *Joseph* ***A.*** *Mertel* vs. *State,* **20** C.C.R. **285,** a barrier gate on the Shippingsport Bridge at La Salle, Illinois fell on the truck of claimant causing damage. The Court applied the doctrine of Res Ipsa Loquitor, and allowed an award.

In the instant case, the negligence is apparent, and stands without contradiction.

An award is, therefore, made to the complainant, G. W. Gladders Towing Company, Inc., a Missouri Corporation, in the amount of **$3,273.10.**

(Nos. 4457, 4458, 4459, 4460,4461,4462, 4463—Consolidated—Claims denied.)

ROSE MINNIE GRAY, ET AL, MINNIE P. AYDT, DONALD LINTON, ET AL, CAROLYN SUE LINTON, ET AL, ROSE MINNIE GRAY, MINNIE P. AYDT, ET AL, DIANA GRAY, ET AL, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January *12,* 1964.

R. VANCE HARTKE and PYLE AND MCCALLISTER, Attorneys for Claimants.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

HIGHWAYS—*State not an insurer.* The state is not an insurer against all accidents, which may occur by reason of the condition of its highways. However, the State is negligent, if, having knowledge of dangerous conditions on its highways, it fails to warn users of the highways of such dangerous conditions.

SAME—*"Acts of God."* A sudden hatch of willow bugs in the night time, without warning, and lasting but for a few hours, was an "Act of God", and an accident caused by the slippery bridge resulting from the coating of willow bugs could not reasonably have been anticipated by the State.

SAME—*guard rails.* Where an operator loses control of an automobile, and it plunges through a barrier, it is usually held that such accidents are so unusual that there is no duty imposed to erect such a barrier as would have prevented the automobile from leaving the highway.

TOLSON, C. J.

The cases involved in this opinion were consolidated by order of the Court, as they involve claims for damages resulting from a common disaster.

In Case No. 4457 the complaint, as amended, seeks damages in the amount of $15,000.00 for the wrongful death of Malcolm B. Gray for the benefit of his widow, Rose Minnie Gray, and daughter, Diana Gray.

In Case No. 4458 the complaint seeks damages in the amount of $2,500.00 for injuries received by Minnie P. Aydt, a passenger in the car. The claim for damages was later increased to $7,500.00.

In Case No. 4459 the complaint seeks damages in

the amount of $2,500.00 for injuries received by Donald Linton, a minor, who was a passenger in the car.

In Case No. 4460 the complaint seeks damages in the amount of $2,500.00 for injuries received by Carolyn Sue Linton, a minor, who was a passenger in the car.

In Case No. 4461 the complaint seeks damages in the amount of $2,500.00 for injuries received by Rose Minnie Gray, who was a passenger in the car. The claim was later increased to $7,500.00.

In Case No. 4462 the complaint seeks damages in the amount of $15,000.00 for the wrongful death of Violet Hengstenberg for the benefit of Minnie P. Aydt, her mother, and Rose Minnie Gray, her sister.

Case No. **4463** was dismissed by agreement of the parties.

The record consists of the several complaints, as amended, answer of respondent, transcript of evidence, numerous motions and orders, brief of claimants, brief of respondent, and commissioner's report.

The complaints in substance allege the following:

1. That the State of Illinois failed to erect flasher signal lights on the temporary bridge;
2. That the State of Illinois failed to erect reflector warning signs;
3. That the State of Illinois failed to provide a watchman to warn automobiles of the dangers of the bridge;
4. That the State of Illinois negligently installed wooden runways on the bridge;
5. That the State of Illinois negligently failed to prevent the bridge road bed from becoming slick and slippery;
6. That the State of Illinois negligently permitted plaintiffs to use said bridge with knowledge that the bridge was unsafe and unfit for travel;
7. That the State of Illinois negligently constructed said bridge;
8. That the State of Illinois was negligent in inspecting said bridge.

The respondent interposed several defenses, which may be summarized as follows:

1. That the State was not negligent in any manner, as charged;
2. That all passengers in the car were engaged in a joint adventure, and that the driver of the car was negligent, thereby barring all claims.

3. That in Cases Nos. 4457 and 4462 the claims are barred by the Statute of Limitations, as the original complaint did not state a cause of action, and the amended complaint was not filed within a year of the date of death.

4. That the insurance company of the general contractor has paid the sum of $4,500.00 for a covenant not to sue, and that such payment inures to the respondent in the event any award is made.

The facts in these cases are as follows:

On June 30, 1950, Arnold Hengstenberg, Violet Hengstenberg, Donald Linton, Malcolm Gray, Rose Minnie Gray, Minnie Aydt and Carolyn Sue Linton left their home in Evansville, Indiana to drive to Bloomington, California to visit a relative. All in the party were closely related to one another. It is significant to note at this point that they crossed the bridge in question on their way going west.

On their return trip, they left an undisclosed point in the State of Kansas at 3 A.M. Arnold Hengstenberg and Malcolm Gray alternated at the wheel, and they arrived at a truck stop in Carmi, Illinois shortly before midnight. They had been driving constantly for twenty-one hours.

Three of the seven stopped for coffee, and, upon returning to the car, Arnold, also known as Bill, Hengstenberg took the wheel. His wife, Violet, sat at his right, and Donald Linton sat next to the right front door. In the back seat, the passengers were seated left to right as follows: Malcolm Gray, Rose Minnie Gray, Minnie Aydt and Carolyn Sue Linton. As the car was crossing the bridge, it went out of control, crashed through the guard rail, and fell 35 to 40 feet into the Little Wabash River. Arnold Hengstenberg, Violet Hengstenberg and Malcolm Gray were killed, and the other four passengers received serious injuries.

Since the temporary bridge is the focal point of the alleged negligence, the Court believes it necessary

to set out in length the nature of its construction. The Little Wabash River flows through' the City of Carmi, Illinois in a southerly direction. In September of 1949 construction of a new bridge was started to carry the travel of Routes Nos. 1 and 460. A temporary bridge was built one block south of the regular bridge site. The temporary bridge was 493 feet in length, 24 feet in width, accommodating two lanes of vehicular travel; and, in addition, had a sidewalk 4 feet 4 inches wide on the north side for pedestrians. There were four runways extending the length of the bridge, each 30 inches wide, and built of two by tens, with the edges beveled down to one eighth of an inch. At the extremities of the roadway portion of the bridge were hub-guards built of 8 inch timbers. The guard rail was built of 2 by 6 lumber bolted to 4 by 6 posts set 6 feet apart. The bridge had 3 lights, one at each end, and one in the middle.

The approaches to the bridge on the land side had received an application of calcium chloride to hold down the dust, which caused moisture to collect, and thereby made the wooden bridge floor slippery. To counteract this, the State applied a coating of hot asphalt and coarse sand to the runways to prevent the surface from becoming slippery, and it appears from the evidence that from tests made it was possible to stop a car travelling 30 miles per hour without skidding.

In the city of Carmi, Illinois, the State erected a series of 7 signs re-routing travel on Routes Nos. 1 and 460 across the temporary bridge. The last two signs are worthy of special mention. A 2 foot by 2 foot, "slow" sign was erected 365 feet west of the approach to the west end of the bridge, and a 2 foot by 2 foot

reflectorized sign "speed limit 15 miles per hour" was erected 85 feet from the west end of the bridge. Both of these signs were lighted by flares placed in front of them.

The final road condition that may well have been the proximate cause of the accident was the slippery surface of the roadway. The accident occurred at about 12:05 A.M. on the morning of July 14, 1950. At certain times of the summer "willow bugs" hatch at night, and live for just a few hours. The bridge was covered with countless thousands of them, and their bodies created such a slippery condition that State Police Officers found it difficult to walk across the bridge without slipping. By the same token, it is understandable that the roadway was similarly as slippery.

Returning to the record, the speed of the car driven by Arnold Hengstenberg is in dispute. Mrs. Aydt, who was seated in the middle of the back seat, testified that he was driving "not very fast, he was driving very slow". She also stated that she was not in a position to see the road, and did not observe any of the signs heretofore mentioned.

Clarence Robinson, a State Police Officer, in answer to a hypothetical question, testified that in his opinion the car was being driven at a speed of not less than 30 miles per hour.

The evidence itself discloses the following: The car was driven in an easterly direction in the south lane of travel. It began to zig-zag, and crossed over the north lane. It jumped a hub rail of 3 inches, a water pipe of 3 inches; it crossed the 4 foot sidewalk, knocked down at least one 4 by 6 post, and thereafter fell in the river. This mute evidence establishes beyond

doubt that the car was being driven faster than the posted speed limit of 15 miles per hour.

Complainants have not established by the evidence, or the authorities, that it is the duty of the State to erect flasher lights, or provide watchmen; nor have complainants shown that the State was negligent in the construction, operation or inspection of the said bridge.

To the contrary, the State has shown by the testimony of several engineers that the temporary bridge was constructed according to standard engineering principles, and was built to sustain two twenty ton highway trucks passing on the opposite lanes at the same time; and, in fact, the bridge had been inspected by State Engineers the day before the accident in question.

The law in Illinois is well settled regarding the duty of the State in the maintenance of its highways.

"The State is not an insurer of all accidents that may occur by reason of the condition of its highways. *Beenes* **vs.** *State,* **No. 4377, opinion filed** on **October 5, 1951.**

However, the State. is negligent, if, having knowledge of dangerous conditions on its highways, it fails to warn users of the highways of such dangerous conditions. *Pomprowitz* **vs.** *State,* **16** C.C.R. **230;** *Rickelman* **vs.** *State,* **19** C.C.R. **54;** *Rommel* **vs.** *State,* **No. 4306, opinion** filed **on February 9, 1951;** *Cruger* **vs.** *State,* No. **4271, opinion filed on October 13, 1950, Cf:** *Mowery* **vs.** *City* of *Mounds,* **245 Ill. App. 338."**

By posting warning signs that were adequately lighted, and treating the roadbed to prevent it from becoming slippery, the State has completely discharged its duty to build and maintain the roadbed in a reasonably safe condition.

The charge that the State failed to keep the roadbed from becoming slippery presents an unusual fact situation. As has been pointed out, the State coated the roadbed with hot asphalt and coarse sand for the

particular purpose of furnishing a rough driving surface. However, the benefits were lost due to the phenomena of nature when the hatch of "willow bugs" coated the bridge in such quantities that it was impossible to walk on the bridge without slipping.

An "Act of God" is defined as follows: *Words and Phrases*, page 170:

"Act of God". "Extraordinary floods, storms of unusual violence, sudden tempests, severe frosts, great draughts, lightning, earth quakes, sudden death and illness, have been held "Acts of God", citing *American Locomotive Co.* vs. *Hoffman.*

An "Act of God" is in an event which could not happen by the intervention of man. *Indiana I. & I. Railroad* vs. *Hawkins,* 81 Ill. App. **570."**

In the instant case, the bug hatch was an "Act of God". It came in the night time without warning, and lasted for but a few hours. The State did not have knowledge, actual or constructive, of this condition. To hold that the State should have anticipated this danger, and prepared for this short lived emergency, would be to hold the State a virtual insurer of all accidents.

The remaining charge that the State failed to build guard rails of sufficient strength is contrary to established law.

"Where an automobile has gotten out **of** control of the driver, and goes through a barrier, it is usually held that such accidents are so unusual that there is no duty imposed to erect such a barrier as would have prevented the automobile from leaving the highway." **27 A.L.R. 342,** *Brigla* vs. *St. Paul,* **134** Minn. 99.

Summarizing the evidence, the Court finds that the claimants were aware of the temporary bridge, as they had driven over it but a short while before the tragedy. The bridge was constructed according to sound engineering principles, and was maintained and inspected in a reasonable manner. The bridge was lighted. Warning signs were in place, and were lighted. The slippery condition of the roadbed was caused by

a phenomena, which could not reasonably have been anticipated by the State. The automobile was being driven at a speed in excess of 15 miles per hour.

For the reasons set forth, all claims must be denied.

(No. 4503—Claim denied.)

OLIVE A. JOHNSON, as ADMINISTRATOR OF THE ESTATE OF HAYWARD HAILEY JOHNSON, DECEASED, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 12, 1954.

ROBERT J. HARDING and MIDDLETON AND WATERS, Attorneys for Claimant.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

HIGHWAYS—*contributory negligence.* Where there was no showing that claimant's intestate endeavored to avoid striking a lighted cinder truck parked on the highway, where visibility conditions were good for a safe driving range, the pavement was wet but not slippery, and an accident could have been avoided if claimant's intestate had seen the truck, claimant could not recover because of the contributory negligence of the intestate.

SAME—*exemption of State employees from Uniform Act Regulating Traffic on Highways.* Where State employees were stopped on the highway fixing a broken chain on a sprocket used for spreading cinders, they were engaged in performing services which exempted them from the Uniform Act Regulating Traffic on Highways. Ill. Rev. Stat., Chap. 95½, Sec. 120.

FEARER, J.

The claimant, Olive A. Johnson, widow, brings this action as Administrator of the Estate of Hayward Hailey Johnson, deceased, for the wrongful death of plaintiff's intestate (Chap. 70, Pars. 1 and 2, Ill. Rev. Stat., 1949). Her complaint was filed on March 10, 1952.

The accident, which resulted in the death of Hayward Hailey Johnson, occurred on March 12, 1951 at approximately the hour of 10:40 P.M. on Route No. 157 and Belt Line 40, about ¼ mile south of the

northern junction of said Routes in the County of Madison and State of Illinois. Route No. 157 is described as a 40 foot concrete highway, with four lanes running generally from north to south, with grass shoulders located on both sides.

Plaintiff's intestate at the time and place aforesaid was driving and operating his 1950 Oldsmobile in a southerly direction along and upon said highway. He was engaged in educational work for the Methodist Church. On the evening of March 12, 1951, after conducting services at the Methodist Church in Gillespie, Illinois, he left Gillespie at about 9:15 P.M., and traveled a distance of between 35 to 40 miles before the collision occurred, which resulted in his death.

On March 12, 1951, Eugene A. Fritts and John Wolf were employed by the State of Illinois, Division of Highways of the Department of Public Works and Buildings, and assigned for maintenance work on Route No. 157 and Belt Line 40, the location where the accident occurred. Both of the State employees had worked on the highway in question on March 12, 1951. Due to the fact that it was misting and snowing on that evening, they were ordered to take the State truck, which was involved in the accident, and transport cinders for the purpose of cindering bridges, intersections and any slippery areas on said highway. However, in this regard, there was no evidence in the record as to the highway in question being slippery. There was evidence that it was merely wet. It was not snowing at the time of the accident. The night in question was dark, but there was no fog or precipitation. It is evident that vehicles traveling upon the highway with proper lights were visible within a safe driving range, and could readily have been observed.

At the time of the accident, the State truck was loaded with cinders, and was equipped with a spreader attachment located on the back portion of the truck, which was operated by a chain and sprocket. A shdrt time prior to the accident the chain, which ran off of the sprocket, became loose and fell upon the highway. Mr. Fritts and Mr. Wolf had located the chain, and stopped the truck facing in a southerly direction in the outside traffic lane, being on the extreme west side thereof. While affixing the chain to the sprocket, they saw plaintiff's intestate's car traveling in the same traffic lane in which the truck was parked.

Prior thereto, and at said time, the State truck was equipped with the following lights: A blue revolving light located on the top of the cab, three lights on the rear portion of the cab, two clearance lights on the body, one tail light, and two head lights; and, in addition thereto, fluorescent adhesive strips were affixed to the rear portion of the truck.

The middle of the front portion of claimant's intestate's automobile was damaged, as was the middle of the rear portion of the State Highway truck. There was no evidence of skid marks made by plaintiff's intestate's automobile, or any evidence of turning, or attempting to avoid striking the State truck. There was offered, however, the testimony of William Warfield, who was in the ambulance with plaintiff's intestate. When asked how the accident happened, Mr. Johnson stated that he must have fallen asleep.

The respondent first contends an exemption under the provisions of the Uniform Act Regulating Traffic on Highways, being Chap. 95½, Par. 120, Ill. Rev. Stat., 1949.

"The provisions of this Act would not apply to persons, automobiles, motor vehicles and other equipment while actually engaged in work upon the surface of the highway, but shall apply to such persons and vehicles in traveling to or from such work."

Respondent further contends that claimant failed to prove that plaintiff's intestate was in the exercise of due care and caution just prior to and at the time of the accident in which he was injured, and which ultimately resulted in his death.

Claimant, on the other hand, contends that, at the time of the accident in question, the State employees were not engaged in performing services, which would exempt them from the provisions of the Uniform **Act** Regulating Traffic on Highways. We are of the opinion that the Uniform Act Regulating Traffic on Highways would apply to the State employees just prior to and at the time of the accident.

In considering all of the competent testimony introduced by claimant, we are of the opinion that claimant has failed to prove by a preponderance or greater weight of the evidence that Hayward Hailey Johnson was free from contributory negligence. The only testimony offered by claimant as to freedom from contributory negligence on the part of plaintiff's intestate was her testimony as to his careful habits in the operation of motor vehicles, and the length of time that it took for him to drive from Gillespie to the scene of the accident.

Our Courts have repeatedly held that even though respondent violated a State statute, that that in itself would not entitle claimant to recover damages where claimant's intestate was guilty of negligence, which contributed to his injuries and resulting death. Before claimant could recover in this case, there would have to be some showing that he did something to

avoid striking the truck. Inasmuch as the highway was not slippery, but merely wet, and the truck was visible for a distance within a safe driving range by reason of the lights burning thereon, which seemed to be sufficient in number, had claimant's intestate been looking, he would have seen the truck on the highway, and could have avoided the accident.

"The manifest purpose of the Wrongful Death Act is to grant an action for the exclusive benefit of the widow, or next of kin of the deceased person. An action cannot be maintained under our Wrongful Death Act, except in cases where the injured party himself could have maintained the action had death not ensued, the cause of action being created in favor of the personal representative of the deceased against anyone causing the death by wrongful act, and contributory negligence of the deceased is a bar to recovery under the Act." *Howlett* vs. *Doglio*, 402 Ill. 311, 319.

We, therefore, deny claimant's claim for an award under the Wrongful Death Act.

(No. 4546—Claim denied.)

RUBY O'NEIL, ALSO KNOWN AS RUBE- BENSON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 12, 1954.

I. J. STAGMAN, Attorney for Claimant.

LATHAM CASTLE, Attorney General; WILLIAM H. SUMPTER, Assistant Attorney General, for Respondent.

NEGLIGENCE—*res ipsa loquitur*. The doctrine of res ispa loquitur will not apply in malpractice cases, where scientific exposition of the subject matter is essential.

SAME—same. The doctrine of res ipsa loquitur applies in medical ,malpractice cases only where a layman is able to see, as a matter of common knowledge and observation, or from the evidence can draw an inference, that the consequences

of professional treatment were not such as would ordinarily have followed after due care had been exercised.

***SAME—treatment** in **State** hospital.* Claimant failed *to* show that fractures received in electric therapy treatments were the result of any negligence on the part **of** respondent or its agents.

WHAM, J.

This is a suit for damages in the amount of $2,500.00 growing out of alleged injuries to the person of claimant, while committed to the Elgin State Hospital for mental treatment during the month of April, 1946.

Claimant in her complaint alleges that on March 13, 1946 she was adjudged incompetent by order of the County Court of Cook County, and committed to the Elgin State Hospital. Subsequently she was paroled, and again recommitted on March **22, 1948** to the Chicago State Hospital. She alleges that during her confinement at the Elgin State Hospital she was subjected to electric shock treatments, during which treatments she received personal injuries consisting of a dislocated shoulder, injury to the right elbow joint, and fracture of the left arm. She further alleges that during her confinement to the Elgin State Hospital, and, in particular, during the month of April, 1946, certain experimental theraputics were indulged in without adequate scientific basis, and that during the process of such experimentation the injuries complained of were occasioned.

Respondent has filed no answer to the petition of claimant, and, by virtue of Rule 11 of the Court of Claims, is presumed to have filed a general denial to the allegations of the complaint.

Neither in the complaint, nor in the brief and argument filed by claimant is there any contention that agents of respondent were guilty of any act of

negligence proximately causing the injuries complained of. It is fundamental that there can be no recovery unless claimant was injured through an act of negligence proximately causing the injuries.

The only evidence offered on behalf of claimant, concerning the happening of the alleged injuries, is her own testimony. She testified that, when she entered the Elgin State Hospital on March 16, 1946, her right and left elbows, arms and shoulders were normal, and she had complete use of these members. Shortly after she entered the hospital, she received electric shock treatments inducing unconsciousness for a period of six weeks, and, after regaining consciousness, she immediately noticed she was unable to use her arms and elbow. She testified that X-Rays were taken of her arms, and that shortly thereafter she had a conversation with a lady doctor, who had assisted in treating her, in which conversation the lady doctor stated, "I want to explain to you the condition of your arms. You will never be able to use them any more the way you used to." She testified that, after she was discharged from the hospital, she discovered a complete handicap of the free use of her arms, that her left arm, was crooked, and that it was a strain to feed herself. She specifically testified that she did not know what took place during the time she was in the coma, nor what treatments were administered in that period.

Respondent's Departmental Report, submitted by D. Louis Steinberg, M.D., Superintendent of the Elgin State Hospital, stated that claimant was committed as mentally ill to the Elgin State Hospital from Cook County on March 16, 1946, and was received at the hospital on March 20, 1946. On March 23, 1946, because of claimant's acute psychotic mental condition,

electric shock therapy was instituted. Such Report further stated than an X-Ray examination on April 24, 1946, after the treatments were completed, revealed extensive calcification of the soft tissues in both shoulders with little arthritic changes noted, and also showed extensive calcification of the soft tissues, in the right elbow, while no arthritic changes were evident. X-Ray diagnosis reflected calcifying periarthritis of both shoulders and right elbow. The Departmental Report further stated that the shoulders were not dislocated, nor were any bones broken during the electric shock treatments, and that claimant was conditionally discharged to her husband on June 15, 1946, and absolutely discharged, as improved, on June 15, 1947. On March 22, 1948, the patient was committed to the Chicago State Hospital, and was admitted there on March 24, 1948.

A Report from the Psychopathic Hospital, dated March 24, 1948, stated that claimant sustained a spiral fracture of the left humerus, middle third, while being dressed for transportation to the State Hospital, and was treated for such by casting on March 22, 1948. The Departmental Report further stated that the patient was absolutely discharged from the Chicago State Hospital, as recovered, on January 8, 1951. On April 26, 1951, the patient was committed to the Chicago State Hospital, and was absolutely discharged, as recovered, on February 2, 1953. The Report stated the claimant sustained no injuries to any of her bones, while she was a patient at the Elgin State Hospital, and that she was not subjected to "certain experimental theraputics", as charged in the complaint.

The Report contained the following information with regard to the treatment rendered claimant: "Electric shock therapy was a standard form of treatment

in mental conditions such as patient exhibited. Upon her arrival here in 1946, patient was so acutely disturbed that her life was endangered from exhaustion. Her mental condition improved under electric shock treatment."

Medical testimony was offered by both claimant and respondent, and exhibits, consisting of various X-Rays, were also offered in evidence, which evidence we do not intend to discuss.

Assuming that the claimant was injured during the electric shock treatment, which we do not hold to be a fact by such assumption, the sole question then involved is whether or not the rule of res ipsa loquitur applies. It plainly appears from the pleadings, the evidence, and the brief and argument **of** claimant, that no specific act of negligence is either averred, proved or asserted. Although claimant makes no specific mention of the doctrine, she is, in effect, relying upon it in this case.

Res ipsa loquitur is a form of circumstantial evidence creating an inference of negligence, which may be utilized by claimant in establishing a prima facie case. As stated by the Supreme Court of Illinois in *Chicago Union Traction* Co. vs. *Giese,* 229 Ill. 260, "the circumstances surrounding a case where the maxim res ipsa loquitur applies amount to evidence from which the fact negligence may be found."

In order for such doctrine to be available to a elaimant, it is well established generally, and, in Illinois specifically, that the injury must have been caused by a thing in the exclusive control or management of the defendant, and, further, that the accident must be such as in the ordinary course of events will not happen, if

those who have such control and management use proper care.

The case of *Bollenbach* vs. *Bloomenthal,* **341** Ill. **539,** recognizes this principle, and is the leading case involving an attempt on the part of a plaintiff to apply the doctrine of res ipsa loquitur in a case wherein a dentist was charged with malpractice resulting in injury to his patient. The Court in denying the application of such doctrine quoted from one of the leading cases in the country, *Ewing* vs. *Good, 78* F. **442,** which opinion was rendered by Chief Justice Taft, then sitting in the United States Circuit Court of Appeals. In that case plaintiff sued a physician to recover damages for an alleged improper treatment of her eyes; her claim being that for his lack of proper care and skill she lost the sight of one eye, and part of the sight of the other. In holding there could be no recovery, Mr. Justice Taft said:

> "The naked facts that the defendant performed operations upon her eye, that pain followed, and that subsequently the eye was in such bad condition that it had to be extracted, established neither the neglect and unskillfulness **of** the treatment nor the causal connection between it and the unfortunate event herein. **A** physician **is** not a warrantor of cures, **If** the maxim res ipsa loquitur were applicable *to* a case like this, and a failure to cure were held to be evidence, however slight, of negligence on the part of the physician or surgeon causing the bad result, few would be courageous enough to practice the healing art, for they would have to assume financial liability for nearly all the ills that flesh is heir to."

The Court in the Bollenbach case recognized the principle concerning the non-application of the doctrine of res ipsa loquitur previously set forth in *Chicago & Eastern Illinois Railroad Company* vs. *Reilly,* 212 Ill. 506, that "Where a condition can be accounted for as readily on the hypothesis of pure accident and absence of negligence as upon the ground of negligence, the rule is well settled that proof of an injury is not, of itself, proof of negligence where nothing is done out of

the usual course of business, unless that course of itself is improper.''

This same doctrine is clearly stated in the case of *Kraus* vs. *Becker, Ryan & Company,* **265** Ill. App. **525,** where the Appellate Court, in denying the application of the doctrine of res ipsa loquitur, stated at pages **532** and **533:**

"The reason for the rule rests upon the presumption that in view of the surrounding circumstances the accident would not have happened had the defendant used ordinary care, and therefore, when the surrounding circumstances leave room **for** a differentpresumption, the reason for the rule fails. *McGowan* vs. *Nelson, 36* Mont. **67.**

In well considered cases resting upon the application of the doctrine **of** res ipsa loquitur, as tending to establish prima facie evidence, and where liability was upheld, it will be invariably found that in every instance there was an essential element present, that is proof of the existence of the cause or thing, which was alleged to have been the negligent act, which produced the injury, **or proof** of such facts from which the existence of such cause or thing constituting the alleged negligent act **was** the only reasonable inference that could be properly drawn. *Conover vs. Delaware, C. & W. R.* **Co., 92** N.J.L. **602."**

Generally. speaking, it is the law in Illinois, and generally throughout the country, that in a malpractice action the doctrine of res ipsa loquitur is not applicable, but the plaintiff, in order to recover, must offer affirmative evidence; and, as a general rule, expert testimony to show that the bad result or injury was caused by an alleged unskillful or negligent act. To that effect see *Olander* vs. *Johnson,* **258** Ill. App. **89,** wherein it is stated at page **96:**

"Before a plaintiff can recover in a malpractice case, it must be shown by affirmative evidence, first, that defendant was unskillful and negligent, and second, that his want of skill and care caused injury to the plaintiff. If either element is lacking in the proof, no case is presented for the consideration of a jury. *(Ewing* vs. *Goode,* **78** Fed. **442;** *Moline* vs. *Christie,* 180 Ill. App. **334;** *Wallace* vs. *Yudelson,* **244** Ill. App. **320;** *Sims* **vs.** *Parker,* **41** Ill. App. **284;** *McKee* vs. *Allen,* supra; *Phebus vs. Mather,* **181** Ill. App. **274;** *Graiziger* vs. *Henssler,* **229** Ill. App. **365.)**

Mere conjecture or supposition should not be sufficient to overcome the presumption in favor of the attending physician. Alleged negligence and resulting injury must be proved as averred. **A** physician is not an insurer. *(Goodman* vs.

Bigler, supra; *Sims* vs. *Parker*, supra; *Blodgett* vs. *Nevius*, **189** Ill. App. **544;** *Wallace* vs. *Yudelson*, supra; *Graiziger* vs. *Henssler*, supra.) **Proof of** a bad result **or of** a mishap is **of** itself no evidence **of** negligence **or** lack of skill. (*Sims* vs. *Parker*, supra; *Moline* vs. *Christie*, supra; *Blodgett* vs. *Nevius*, supra.)

The doctrine of res ipsa loquitur is not applicable to situations like the case at bar (*Guell* vs. *Tenney*, **262** Mass. **54, 159** N. W. **451;** *Funk* vs. *Bonham* (Ind. App.), **151** N. E. 22; *Goodman* vs. *Bigler*, supra; *Graiziger* vs. *Henssler*, supra), **for** unless the accident or injury sustained by the plaintiff bespeaks the defendant's wrong, there is no proof **of** culpable negligence. (*Chicago & E. I. R.* Co. vs. *Reilly*, **212** Ill. **506.)**

As a general rule, there must be expert testimony to show that a bad result was caused by the alleged unskillful **or** negligent act. (*Moline* vs. *Christie*, supra; *Goodman vs. Bigler*, supra; *Kruger* vs. *McGaughey*, **149** Ill. App. **440;** *Nelson* vs. *Sandell*, **202** Iowa 109, 209 N. W. **440; 46 A.L.R. 1447.)"**

To the same effect see *Bollenbach* vs. *Bloornenthal*, **341** Ill. **539;** *Graiziger* vs. *Henssler*, **229** Ill. App. **365;** and *Goodman* vs. *Bigler*, **133** Ill. App. **301.**

There are, however, certain cases within the malpractice classification in which the doctrine of res ipsa loquitur is applicable. In the case of *Johnson* vs. *Marshall*, **241** Ill. App. 80, the Appellate Court of the Second District in Illinois held in a case where a physician was being sued by a patient for negligently treating him by X-Ray, resulting in burns to the plaintiff's face, that under the facts involved therein the doctrine of res ipsa loquitur could be invoked, inasmuch as that particular occurrence was such as in the ordinary course of events does not happen, if due care had been exercised. At page **91** the Court stated:

"When the fact that plaintiff was burned severely is taken in connection with the assurance given by the defendant to the plaintiff that it would not hurt him and with the testimony of Dr. Irvin which tends to prove that the X-Ray machine with ordinary skill will not burn a patient, at a point other than intended, we think the testimony fairly tends to show that plaintiff was burned because **of** a lack **of** ordinary care in the operation **of** the machine. The showing made, notwithstanding the rule contended for by the defendant in malpractice cases, is sufficient in our opinion to authorize the submission **of** the question of fact to the jury for them ***to*** determine whether **or** not the defendant was guilty of the negligence alleged in the declaration **or** some count thereof."

Whether the maximum of res ipsa loquitur applies in the present case, or any given case, is a question of law for the court to determine from the facts involved. *McCleod* vs. *Nel-Co. Corp.*, **350** Ill. App. **216** at **235;** *Roberts* vs. *Economy Cabs, Inc.*, **285** Ill. App. **424** at **428** and **429.**

We must, therefore, in order to determine whether the doctrine applies in this case, make this inquiry: Do the facts and circumstances show that the alleged injury to claimant would not have happened in the ordinary course of events had the defendant used ordinary care in conducting the electric shock therapy treatment? And, more specifically, is the treatment of such nature that the only reasonable inference to be drawn from the occurrence of injury during treatment was that the treatment was improperly and negligently conducted?

The question can only be determined from a knowledge of the electric shock therapy treatment itself. This particular question has not been before the Illinois courts, and, due to the relatively recent development of such treatment, has arisen in only two cases in the United States that we have been able to find.

The first case before any court of review was the case of *Quinley* vs. *Cocke, Et* AZ, Supreme Court of Tennessee, **192** S. W. (2d) **992,** decided on March **2, 1946.** In that case Dr. E. W. Cocke and Gartley Ramsey Hospital of Memphis were charged in the complaint with general negligence resulting in the fracture of plaintiff's hip and thigh during a certain electric shock treatment for plaintiff's nervous disorders, and first discovered by plaintiff upon regaining consciousness. His complaint was based upon the doctrine of res ipsa loquitur, and the trial court directed

a verdict for both defendants. Plaintiff appealed as to the defendant, Dr. Cocke, to the Circuit Court of Appeals, which court affirmed the trial court, and plaintiff further appealed to the Supreme Court of Tennessee. The sole question raised on appeal was whether or not the rule of res ipsa loquitur applied. The court discussed the method of electric shock therapy treatment, which is one of a most violent nature, at page 994:

"While the treatment is being given the patient is lying down on a treatment pad with his head in a downward position. A certain amount of electric current is caused to pass through the head and body as a result of which the patient becomes unconscious and remains so for several hours . . . . Evidently they hold the patient, due to the fact that he is having violent convulsions."

At page 997, the court summarized certain scientific journals filed with the record in the case, and dealing with electric shock therapy and personality disorders, to-wit, the American Journal of Psychiatry, the Pennsylvania Medical Journal, the American Journal of Medical Sciences, and the Journal of the American Medical Association, and stated that:

"While these periodicals minimize to a certain extent the danger of fractures to the spine and other bones, the fact is fully established that, as a result of violent convulsions caused by this treatment, they sometimes do occur when the treatment is properly given."

All of which the court stated was supported and confirmed by the testimony of an expert witness to the effect that, "Such fractures occur while the shock treatment is being given 'even with every precaution to prevent them' ".

In summarizing the case, the court said at pages 96 and 97:

"Now in the instant case the plaintiff introduced no evidence showing a lack of skill in administering the shock treatment, that he was given an excessive shock of electricity, or for an unusual length of time. There is no evidence to show that

the treatment given differed in any way from that which is usual and customary of a skilled practitioner in a situation of this kind, there is manifest need of a 'scientific exposition of the subject matter' for the court and jury to clearly understand the nature of the treatment, as well as the usual results that follow. The treatment is something new in medical science. It originated in Italy in 1938, and was first practiced in the United States in 1939 or 1940. Due to its very recent origin all knowledge of the scientific application of the principle is necessarily limited to only a few experts."

The court, in refusing to apply the doctrine of res ipsa loquitur, stated at page 997:

"In order to warrant the application of the doctrine in the instant case, the court would have to take judicial notice that, as a matter of common knowledge and experience, fractures of the spine and other bones do not occur as the result of 'shock therapy' in the absence of negligence. This we cannot do."

In deciding this case, the court stated that ordinarily the doctrine of res ipsa loquitur is inapplicable in malpractice cases, although it recognized exceptions to this general rule in cases such as X-Ray burns, etc., where "there is manifest such obvious gross want of care and skill as to afford of itself an almost conclusive inference of negligence". The Court then stated that, however, "the rule will not apply in malpractice cases 'where scientific exposition of the subject matter is essential' ". *Shain's Res Ipsa Loquitur*, pages 468, 469 and 470.

The next case involving this question was *Farber* vs. *Olkon*, 246 P. (2d) 710, District Court of Appeals, Second District, Division 2, California, decided on July 25, 1952, which case involved an action by George Farber, an incompetent person, by Joshua Farber, guardian of his person and estate, against David M. Olkon, Et Al, doing business as Los Angeles Neurological Institute. The complaint in that case, as in the Tennessee case, charged general negligence against the defendants in the administering of the electric shock therapy treatment to plaintiff, resulting in both legs

being fractured during treatment. The trial court directed a verdict in favor of the defendants, which action was sustained by the District Court of Appeals. The court at page 715 said:

"The law of this State is that generally the plaintiff in malpractice litigation must prove the negligence of the physician by expert proof . . . . Negligence on the part of the physician is not presumed, but must be affirmatively shown.''

The court stated that those decisions, in which the doctrine of res ipsa loquitur has been invoked, are situations, "where a layman is able to say as a matter of common knowledge and observation that the consequences of professional treatment were not such as ordinarily would have followed, if due care had been exercised".

The court then cites the *Quinley* vs. *Cocke* case, supra, stating at page 715 that:

"The court there rejected the doctrine of res ipsa loquitur. So, in deed the court below (the trial court) in the case at bar did likewise and properly so. The machine of respondent was not defective. The convulsion was the indispensable element of the treatment. If it did not affect violently all parts of the body, it would bring no soothing effects to the mind of one in George's condition. The trial judge accurately observed: 'The injury, the evidence shows, was foreseeable, and its possibility was a calculated risk. . . Whether or not fractures of the bones are accepted hazards of electro convulsive therapy, whether or not they occur even though all standards of procedures of good practice are observed] the manner in which such treatments are given, their purposes and their effects, what is likely or unlikely to happen in the course of their administration, what is the usual and what is the unusual consequence, and the mental and physical effect of the treatment are not matters of common knowledge with which laymen are familiar. To know about them, to evaluate them, to say whether ordinary fractures would not occur in the absence of negligence] we require the opinion of experts.' "

The above case was then appealed to the Supreme Court of California, and affirmed on March 17, 1953, said case being reported in 254 P. (2d) 520.

The Supreme Court commented extensively upon the testimony offered concerning the nature of the treatment at page 525:

"The undisputed testimony of both defendant, Dr. Wayne, and witness, Dr Thompson, in the instant case establish that electro shock treatment is designed to have an effect upon the entire body. The entire body is actually thrown into a convulsive state, and the aim and hope, of course, is that this convulsion and all of the biochemical changes that occur with this type of convulsion will produce a helpful and beneficial effect upon the patient's mental condition; that the most frequent, most normal and most common hazard, which is germane, which is inherent in the method of treatment is fractures. There are certain other hazards, and, in deed, there are some cases in which death has actually resulted directly from the hazard germane to the treatment, but these are calculated risks of the treatment. . . Fractures occur as the result of muscle tension, whether it is in shock treatment or stepping off of a curb. . . And in treatment there is muscle tension which is a part of the treatment, and, therefore, . . . fracture becomes a calculated and even an expected risk of the treatment. . . . There is a certain percentage of fractures which occur not withstanding any kind of precaution or care that can be taken to prevent it. . . . The area of fracture is completely unpredictable. The overall instance of fractures in shock treatment varies anywhere from perhaps one and a half to about three and a half per cent. If one considers fractures of the spine. . . the incidence is between ten and forty percent.

The Supreme Court directly affirmed the trial court's holdings stating:

"The trial court correctly concluded that the opinions of experts are required to evaluate the proceedings and hazards of shock therapy in any particular case. . . . And that the evidence does not 'show any combination of facts and expert opinion from which a layman can draw the inference that the consequences of the treatment administered to plaintiff were not such as ordinarily, that is, normally, may follow if due care has been exercised'.''

The court then stated: "accordingly no basis for invoking the doctrine of res ipsa loquitur was established", and cites the case of Quinley vs. *Cocke,* **183** Tenn. 428, **192** S. W. (2d) **992.**

The Supreme Court further recognized the rule, which we believe should apply in determining whether or not facts concerning the nature of a certain kind of treatment place that treatment in such a category that the doctrine of res ipsa loquitur will apply in the event of injury, and stated at page **524:**

"It further appears that the doctrine of res ipsa loquitur may not be invoked by plaintiff. The doctrine applies in medical malpractice cases only where a layman is able to say, as a matter of common knowledge, and observation; or from the

evidence can draw an inference that the consequences of professional treatment were not such as ordinarily should have followed if due care had been exercised."

We feel that the above decisions of the Tennessee and California courts, and the principles announced therein, are sound, and should be followed in the present case. The evidence herein established that the electric shock treatment, administered at the Elgin State Hospital to claimant, Ruby O'Neil, was a standard form of treatment used in such cases. There is no evidence to the effect that fractures do not occur in the ordinary course of events during the proper administration of such treatment. There is no evidence that the treatment is of such a nature that fractures occurring therein constitute a reasonable inference of neglect or improper conduct.

The burden of establishing facts to justify such an inference must be borne by claimant in order to invoke the doctrine of res ipsa loquitur, unless such facts are sufficiently within the common knowledge, observation and experience of men to allow the court to take judicial notice of them. For this Court to take such judicial notice would be not only to disregard the lack of common knowledge, observation and experience of men concerning this type of treatment, but also to ignore the recorded views of the highest courts of two States, which have had the benefit of expert testimony and scientific medical journals in reaching its conclusions. It is our holding that the doctrine of res ipsa loquitur could not be invoked in a suit against the doctor, and other persons individually, who rendered the treatment to claimant, and, therefore, cannot be invoked in this suit against the State of Illinois.

To hold otherwise, would be to ignore, in our judgment, the fundamental requirement, so clearly

recognized by the Illinois courts, namely, that the doctrine of res ipsa loquitur may only be applied when the accident is of such a character as in the ordinary course of events will not happen, if those who have management and control of the thing causing the injury use proper care. To obliterate this requirement, would completely change the entire concept upon which the doctrine of res ipsa loquitur is based.

It is further to be noted that when claimant was subjected to these treatments, she was "so acutely disturbed that her life was endangered from exhaustion", and that her mental condition was improved by reason of the treatment. It would, in our judgment, be bad policy to hold that the doctrine of res ipsa loquitur applies in such *a* case. To do so would certainly have a deterring effect upon members of the medical profession in making use of this and similar methods of treatment for the fear of being subject to malpractice actions, and compelled to meet the presumption or inference of negligence with affirmative testimony years after such treatment was rendered. If such were the case, "few would be courageous enough to practice the healing art", *Ewing* vs. *Good,* ,78 F. **442** at **443,** and the forward development of new methods of treatment would be discouraged.

There being no evidence of negligence proximately causing the alleged injuries of claimant, and for the reasons hereinabove set forth, this claim is denied.

(No. 4551—Claim denied.)

WHITLA C. MODGLIN, ADMINISTRATOR OF THE ESTATE OF CHARLES PHILLIP MODGLIN, DECEASED, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January id, 1954.

R. W. HARRIS, Attorney for Claimant.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

NEGLIGENCE—*attractive nuisance.* **The attractive nuisance doctrine does not apply to ponds in State parks, where an unusual danger does not exist.**

SAME—evidence. **An unguarded fish and lily pond, irregularly shaped, approximately 15 feet long, 2½ feet deep, located in the Dixon Springs State Park, held not to be an attractive nuisance.**

FEARER, J.

On March **26, 1953,** a claim was filed in this Court by Whitla C. Modglin, Administrator of the Estate of Charles Phillip Modglin, deceased, for the wrongful death of her infant son, Charles, as the result of his drowning in a fish and lily pond, located near the caretaker's home in the State Park at Dixon Springs, Illinois.

On October **26,** 1951, Charles Phillip Modglin, an infant of approximately eight years of age, resided with his mother, father, brothers and sisters in the Village of Dixon Springs, County of Pope and State of Illinois. On said date Mr. and Mrs. Modglin owned and operated a general store, which also served as the post office for Dixon Springs, of which Mr. Modglin was the acting postmaster. At the same time, he was also employed in a plant at Paducah, and, during the time that he was away from the store and post office, which was between 6:00 A.M. and 4:00 P.M., the store and post office were tended by his wife.

The custodian of the State Park was Felix Burgess,

who lived in the custodian's house, located in the Park, with his wife. At the time of the accident he also had in his employ a Mr. V. L. Ditterline.

The custodian's house, near which the pool in question was located, is approximately 500 feet from the general store, where Mrs. Modglin last saw her son on the afternoon in question. There was testimony that, during the time she was working in the store and post office, she permitted the children, including Charles, to play in and about the store, and around the custodian's house. The testimony and the exhibits offered showed it to be a small concrete pool, irregularly shaped, approximately 15 feet long, 2½ feet deep, and contained fish and lily pads. A small wooden bridge was constructed across the pool with two guard rails located on one side, and one guard rail located on the opposite side. There appears to be no question but what the pool was easily accessible, and was not guarded by a fence, or barricaded in any way; and that children were frequently seen playing around it. The custodian's yard and the pool were enclosed by woven wire and split rail fences. The entrance to the yard was through a woven wire gate. The enclosure, however, was not .sufficient to keep people from entering the custodian's yard.

The evidence discloses that Charles Modglin was a boy of average height and weight for his age, had a defect in his speech, was physically handicapped, and was not at the time attending any school, but frequently visited the grades attended by his brothers and sisters.

Mrs. Modglin testified that, during the day when she was busy in the store, he was permitted to play in and around the store, and in the custodian's yard,

and had been seen on prior occasions playing around the fish pond. She was unable to state the hour when she last saw her son standing on the porch of the store, and didn't know his whereabouts on that day until she was notified that her son had been found submerged in the fish pond. She was present when Mr. E. L. Ditterline, an employee of the respondent, removed her son, who was sitting in an upright position, from the pond. A doctor was summoned immediately, and the doctor testified that the boy was dead when he first examined him, and that it was his opinion death was caused by drowning. The record is silent as to the boy playing around the pool, how he happened to fall into the pool, and whether anyone else was present at the time, as he was not seen from the time he left the store, until he was found submerged in the pool. There is no testimony other than the doctor's testimony as to how the boy met his death. However, we are of the opinion that he met his death by drowning.

Claimant contends it was the duty of the respondent to so maintain the fish pond that children of tender years would not have access to the yard in which the pond was located, and that the pool in question was an attractive nuisance, which would render the respondent liable for any injuries or damages sustained.

The only question confronting the Court is whether or not the fish and lily pond, located in the State Park, could be considered an attractive nuisance. We find that innumerable decisions have been rendered on this question, and in each case the determining factors were the location of the body of water, accessibility, attractiveness to children within the area, depth of the water, the size, the use made of the pond or body of water by

children, such as the skipping of stones, swimming;, playing with boats, and its general overall use by children.

The pool, or body of water, that we have to consider in this case, might be found in any city park:, privately owned property, or State park. It was not a pond, or body of water, the size or depth referred to in cases where the Court construed the body of water to be an attractive nuisance.

The most recent case we have found is *Gustafson* vs. *Consumers Sales* **Agency, 414** Ill. **235.** The defendant in this case owned premises, which it negligently failed to grade, permitting water to collect in the ravine to a depth of 15 feet in certain portions. The Court pointed out that there were sticks, logs and other objects on this artificial water course, which remained open and unguarded; and was located in a neighborhood thickly populated, and adjacent to a public street. It was proven that the defendant knew, or should have known, that children played in and around this pond, and played on it during the winter months, when it was frozen. The child referred to in this case was seven years of age, and met his death on January **14,** 1950, when he fell through the ice, while playing on the pond.

The Court in this case was not called upon to decide the question of whether or not the body of water was an attractive nuisance, but was concerned with an amendment to the complaint in the Appellate Court, where the question first arose, to take care of an omission in the complaint as filed. However, since it was an attractive nuisance case, the Court discussed the question of whether or not an attractive nuisance was established by the evidence. In this regard, we

quote from a portion of the opinion, which is found on page **249:**

"Although it is settled that an open body of water on private property is not in itself an attractive nuisance, *(Mindeman* vs. *Sanitary Dist.,* **317** Ill. 529; *Peers* **vs.** *Pierre,* 336 Ill. App. 134) nevertheless, where the water contained unusual attractive elements, such as a floating log (*McMahon* **vs.** *City of Pekin,* 154 Ill. 141), or a thick scum, which appeared like a path *(Cicero State Bank* vs. *Dolese & Shepard Co.,* **298** Ill. **App.** 290), or a boardwalk above the water *(Howard* vs. *City of Rockford,* 270 Ill. App. 155) the courts have held that the watercourse constituted an attractive nuisance."

In reading the cases cited in the opinion, it is apparent that, before a body of water or watercourse has been declared to be an attractive nuisance, the objects and conditions referred to in this opinion must be in existence, so that it would attract children of tender years, and if these conditions were not found, it was decided that an attractive nuisance did not exist, and, therefore, no liability.

The case of ***Moore*** vs. *North Chicago Refiners & Smelters, Inc.,* **346** Ill. App. **530,** was one in which an infant, four years of age, was drowned in a pond of water on defendant's property. At the conclusion of the evidence offered in behalf of the plaintiff, the defendant made a motion for a directed verdict, which was sustained by the trial court. The Appellate Court of the Second District reversed the trial court, holding that) the body of water in question was an attractive nuisance, and based its ruling upon the following facts: (1) The pond was approximately 15 feet wide, **200** feet long, located along the railroad right-of-way within a populated area. **(2)** Paths extended across the property upon which the pond was located, which were used by the public generally in visiting the pond. **(3)** There was a considerable amount of rubbish around and in the pond, and small rafts and other articles were seen floating in the water. The court held that there was

enough evidence introduced in regard to the pond, which made it a question of fact for the jury to pass on, and that the court should not have directed the verdict taking the case from the jury. In commenting on the evidence, or lack of evidence, as to whether or not the pond in question was an attractive nuisance as described by our Courts, we quote from page 533 of the opinion:

"Unguarded premises which are thus supplied with dangerous attractions are regarded as holding out implied invitations to such children. 'The owner of land where children are allowed or accustomed to play, particularly if it is unfenced, must use ordinary care to keep it in safe condition, for they, being without judgment and likely to be drawn by childish curiosity into places of danger, are not to be classed with trespassers, idlers and mere licensees.' *City of Pekin* vs. *McMahon*, 154 Ill. 141."

In the case of *Peers* vs. *Pierre*, 336 Ill. App. 134, the defendant owned ten acres of land in the Village of Skokie, Illinois. There was an excavation made on his property, and water, seeping therein through the gravel, formed a pond. The child in the case was seven years of age. The complaint was drawn on the attractive nuisance theory, alleging that the pond or body of water was located in a thickly populated neighborhood, wherein many small children lived and played, as there was a sand beach around the pond, and it was surrounded by hills. The complaint also alleged that the pond was visible, and accessible to all the children in the neighborhood. There was evidence the pond was not enclosed, and for a period of five years had been a place of amusement for many small children of tender years. At the close of plaintiff's evidence, the court directed a verdict finding the issues for the defendant. The plaintiff appealed from the judgment upon the verdict, and contended that there was enough evidence, viewed in its most favorable aspects to the plaintiff, for

the case to go to the jury; and, that it was a question of fact to be decided by the jury whether or not this particular body of water was an attractive nuisance. Defendant's position was that the evidence did not show he maintained a dangerous agency, such as to come within the attractive nuisance doctrine. The plaintiff proved that boys, older and younger than the decedent, habitually played in and about the pond; that there were stones and small sticks therein, and sticks were seen floating on the surface of the pond. Plaintiff also proved that boys swam therein, played boats, and, that a girl of tender years, who lived near the pond, almost drowned therein. It was also proved the defendant was notified of the habits of the children living in and about the pond. Evidence was also introduced to the effect that facing the road leading to the pond was a warning sign. However, the infant, who drowned, was not old enough to understand the meaning of the sign. Many cases are cited in this opinion, in some of which the court found an attractive nuisance did exist. We quote from page **138** of the opinion:

"We infer from a reading of these cases that the ponds or pools were not, in themselves, considered attractive nuisances. This inference is borne out by the cases in this and other jurisdictions cited by the defendant.

We are satisfied after reading ***Mindeman*** vs. *Sanitary District*, 31i Ill. 529; Baker vs. ***Fruin-Colnon Construction Co.*, 271** Ill. App. **300;** Kelly vs. ***First Bank & Trust Co.*, 256** Ill. App. **439;** and Wood, Admr. vs. Consumers **Co., 334** Ill. App. **530,** that the pond in which the decedent, William Peers, was drowned was not an attractive nuisance. In the Mindeman case the court quoted extensively from *Barnhart* vs. ***C. M. St. P. R. Co.*, 89** Wash. **304, 154** Pac. **441;** where a boy 8 years old was drowned when he fell from a raft on the surface of a pool on the railroad property. The substance of the quotation is that there is a distinction between the so-called 'turntable' cases, and those involving pools of water; that no one can deny that a pool of water is attractive to boys, but that it is not a dangerous agency so as to come within the doctrine of attractive nuisances, because the number of deaths in comparison to the total number of boys visiting ponds for purposes of playing, fishing and swimming is comparatively small. The Washington Court in that case refused to go as far as our Supreme Court in ***City of Pekin*** vs. ***McMahon.*** We see no need of referring to other case8 outside this jurisdiction. The weight of

authority is to the effect that the attractive nuisance doctrine does not apply to ponds, where there is no unusual danger. 36 A.L.R. 224. In the Mindeman case our Supreme Court said the courts seemed to be of one mind in holding that a canal pond or other open body of water is not of itself an attractive nuisance."

In all of the cases cited, and in others which we have read, we have not found one case wherein a state, municipality or an individual has been held liable for maintaining fish or lily ponds of the size and depth of the pond located in Dixon Springs State Park, and are of the opinion that this pond, even though unguarded, did not amount to an attractive nuisance.

For the reasons cited herein, we deny claimant's claim under the Injuries Act for the wrongful death of Charles Phillip Modglin.

(No. 4528—Claimant awarded $80.75.)

CALVERT FIRE INSURANCE COMPANY, A MARYLAND CORPORATION, AND RUBE DUNBAR, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 26, 1954.

SNAVELY, MILLER AND MEEHLING, Attorneys for Claimants.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

HIGHWAYS—*negligence.* Where the evidence showed that workmen threw cinders into the line of travel of a passing automobile, the State was liable for the damage resulting therefrom.

NEGLIGENCE—*intervening efficient* cause. Where claimant drove for a quarter of a mile after the accident before pulling off of the highway, the damages caused by contact with a post, while pulling off of the highway, was not attributable to the original negligence of respondent.

TOLSON, C. J.

Calvert Fire Insurance Company, a Maryland Corporation, and Rube Dunbar, filed their complaint herein, alleging that a certain Hudson automobile,

owned by Dunbar, and insured by Calvert Fire Insurance Company, was damaged by the negligence of a maintenance employee of the Division of Highways.

The amount involved is $153.10, $50.00 of which was paid by Dunbar under the so-called "deductible" clause of the policy, while the Insurance Company has paid the balance of $103.10. The Insurance Company, in turn, received a subrogation receipt from Dunbar for the amount of its payment, and has joined in this proceeding.

The facts of the case are as follows:

On December 15, 1951, at about 10 **A.M.,** Rube Dunbar was driving a new Hudson automobile in a westerly direction on U.S. Route No. 40, at a point about two miles east of Marshall, Illinois. The road was coated with ice, and driving conditions were very hazardous. **A** State Highway maintenance crew was working on U.S. Route No. 40, spreading cinders mixed with chloride in an effort to correct the icy conditions of the highway.

Dunbar testified that the particular State Highway truck had stopped on the top of a hill, and a man was standing in the bed of the truck shoveling cinders. He further testified that he stopped behind the truck, and, upon receiving an arm motion to proceed, started to pass. When he came abreast of the truck, the employee, later identified as John Gunder, threw a shovelful of cinders on the hood and windshield of his Hudson automobile. He stated that, at the moment of impact, he had started down the hill, and, since there was no place to pull off of the road, he continued for a quarter to a half mile to the crest of the next hill, and then stopped to clean off the car. In either driving on or off the shoulder, the evidence is not clear, he scraped the

right front fender and right side of the car on a post, and lost some of the ornamental trim.

Whether John Gunder, the Highway employee, motioned Dunbar to proceed or not is in dispute, but,, in any event, the Court is of the opinion that he was negligent in not looking before he threw cinders into the line of travel.

If the car had gone out of control, and had been damaged immediately after being hit by the cinders, this Court would have no difficulty in finding that the negligent act of the State employee was the proximate cause of the damages, but such was not the case. Dunbar had full control of the car at all times. He was able to see through the windshield, even after turning off the wipers, and he drove it a further distance of a quarter to half mile before stopping.

Two questions are now before the Court:

1. Was there an "intervening efficient cause" that relieves, or mitigates, the State from its negligence?

2. If there was an "intervening efficient cause", was it probable and foreseeable by respondent, so that the State cannot break the casual connection, and thereby relieve itself of responsibility?

The doctrine of intervening efficient cause is set forth in the case of *Johnston* vs. *City of East Moline,* **405** Ill. 460, 91 N.E. (2d) **401.**

"An intervening and efficient cause is a new and independent force, which breaks the casual connection between the original wrong and the injury, and itself becomes the direct and immediate cause of the injury. *Pullman Palace Car* Co. vs. *Laack,* **143** Ill. **242, 32** N.E. **285, 18** L.R.A. **215;** *Illinois Central Railroad* Co. vs. *Oswald,* **338 Ill. 270, 170** N.E. 247. The intervention of independent concurrent intervening forces will not

break casual connection, if the intervention of such forces was itself probable or foreseeable. *Sycamore Preserve Works* vs. *Chicago & Northwestern Railway* Co., **366** Ill. **11, 7** N.E. (2d) **740, 111** A.L.R. **1133;** *Wintersteen* vs. *National Cooperage & Woodenware* Co., **361** Ill. **95, 197** N.E. **578;** *Garibaldi & Cunco* vs. *O'Connor,* **210** Ill. **284, 71** N.E. **379, 66** L.R.A. **73;** *Armour* vs. *Gollcowslca,* **202** Ill. **144,** 66 N.E. **1037."**

It may be argued that respondent could reasonably expect that Dunbar would stop his car at the earliest possible moment to inspect and clean his car, thus negativing the rule of "intervening efficient cause". However, the fact remains that Dunbar selected the site to pull off of the highway. He alone had the exclusive opportunity to stop where he did, select a better site, or even drive a short distance further into the Village of Marshall. Nor does it appear from the evidence that the stop was, in fact, an emergency. Dunbar could see through the windshield, and the only reason he turned off the wipers was to prevent a possible scratching of the windshield.

The Court, therefore, finds that the portion of the damage caused by the contact with the post was brought about by an efficient intervening cause, and is not attributable to the original negligence of the respondent.

The evidence further indicates that Dunbar declined to have the scratches on the car repainted, because he didn't want a "touch up" job. Instead he had the whole of the lower portion of the car repainted, whether scratched or not. Since the car was new, the Court finds that this was not unreasonable, and is a proper element of damage.

The repair bill, admitted in evidence, is sufficiently

itemized for the Court to separate the portion of the bill involved in the collision with the post.

Parts	$60.10
Labor—3½ hours at $3.50	12.25
	$72.35

The balance of the bill in the amount of $80.75 is properly chargeable to the negligence of the respondent,.

An award is, therefore, made to the claimants in the amount of $80.75.

(No. 4532—Claimant awarded $1,355.46.)

JOSEPH A. MERTEL, Claimant, *vs.* **STATE** OF **ILLINOIS,** Respondent.

Opinion filed February 26, 1954.

KEVIN D. KELLY, Attorney for Claimant.

LATHAM CASTLE, Attorney General; MARION G. TIERNAN, Assistant Attorney General, for Respondent.

HIGHWAYS — res *ipsa loquitur*. **Where a bridge gate, in the sole control** of **respondent, fell on claimant's truck, and the evidence was** insufficient **to rebut the presumption of negligence, claimant was entitled to recover under the doctrine of res ipsa loquitur.**

WHAM, J.

This case involves a claim against the State of Illinois in the amount of One Thousand Three Hundred and Fifty-Five Dollars and Forty-six Cents ($1,355.46) for damages to a motor truck owned by claimant, Joseph A. Mertel.

The evidence establishes that claimant was the owner of a 1950 International concrete mixer truck, which at about 9:00 o'clock in the forenoon of May 24, 1952 was being driven by his son, Anthony Mertel, on business for claimant, in a southerly direction upon U.S. Highway Route No. 51, across Shippingsport

bridge, which spans the Illinois River at LaSalle, Illinois.

It is a lift span bridge which is raised from time to time to allow clearance for river traffic. At each end there is a steel guard gate suspended by cables from the bridge super structure, which gate is lowered to the floor of the bridge by a cable pulley arrangement at the same time the bridge is raised, the purpose of the gate being to protect operators of motor vehicles approaching the bridge at such times. The gate is raised to a height of 14 feet when the bridge is lowered. It is 3 feet high and 22 feet in length, being the width of the bridge, and is constructed of steel angle irons on the top, bottom and ends, and strap iron woven through the center thereof forming diamond shaped spaces, weighing approximately 1,500 pounds.

When claimant's truck reached the south end of the bridge, the guard gate suddenly, and without warning, dropped from its raised position onto the front end of the truck.

The driver, Anthony Mertel, who was the only eye witness to the accident, testified that he was driving south at a speed of 25 miles per hour, and first saw the gate falling about 5 or 6 feet in front of the truck; that he ducked low in the cab to protect himself, lost control of the truck momentarily, and, after regaining control, brought the truck to a stop approximately 100 feet from the point of impact with the gate. He further testified that he then inspected the gate, which had been carried by the momentum of the truck for approximately 70 feet from the point of impact, and found that about 12 feet of 5/16 inch cable was attached to the end of the gate, but that no cable was attached to the other end thereof. A series of photographs taken

immediately after the accident were admitted in evidence as exhibits, and, together with the testimony of Anthony Mertel, established that the end of the cable attached to the gate as aforesaid was frayed. The cable controlling the movement of the gate travels through a slot in a steel beam to the top of the bridge, where it winds around a shiv when the gate is being raised, with no pulley or other device at that point to prevent friction.

Mr. Arthur J. Fischer, head bridge tender and witness for respondent, confirmed the fact that the cable attached to the gate was frayed on the end, but persisted in stating that the cable did not come in contact with the steel beam at any point between pulleys, although he admitted that it could come in contact with the beam, and that grease had been applied by mechanics to the beam, "to avoid any possible friction". He further testified that the cable passed through a 3 inch opening in the steel beam.

The question here involved is: "Did the cable break, and the gate fall by reason of negligence on the part of respondent?"

There is no direct proof of an act of negligence by any agent of respondent. However, this case, in our judgment, involves a situation wherein the doctrine of res ipsa loquitur may be invoked by claimant, and such is urged by claimant's counsel in his brief and argument.

This Court has previously applied the doctrine of res ipsa loquitur in a case wherein the facts were identical to those involved herein. The accident happened in the same manner and on the same bridge. Not only that, but the truck involved was owned by Joseph A. Mertel, the claimant herein, and was driven by the

same driver, Anthony Mertel. *Joseph A. Mertel* vs. *State of Illinois*, 20 C.C.R. 285.

The bridge mechanism, gate, and cable were in the sole control of respondent. Under the rule of the doctrine, the occurrence of the accident amounts to evidence from which the fact of negligence may be found. We accept this evidence as constituting negligence, in the absence of proof by respondent rebutting such an inference or presumption, or explaining the cause of the accident on some other ground than its own negligence.

Respondent contends in its brief and argument that the evidence sufficiently rebuts the inference, or presumption of negligence, raised by the application of the doctrine of res ipsa loquitur. We do not agree with respondent. The fact that the bridge had been raised, and the gates lowered within an hour prior to the happening of the accident, as testified to by respondent's witness, Mr. Fischer, is not sufficient to overcome this presumption of negligence, nor is the portion of the Departmental Report, which states that the bridge is inspected once every two weeks by mechanics, or bridge maintenance supervisors, and the operating machinery of the bridge "operated and watched daily by bridge tenders", of any help to respondent in overcoming the effect of the doctrine. No evidence is offered by respondent showing what the inspections consisted of, the thoroughness of said inspections, and the results of the inspections conducted.

Respondent also contends that the inference of negligence was rebutted by evidence that the driver of claimant's truck had been warned not to proceed at an excessive rate of speed, because the bouncing and vibration of the bridge created thereby would cause an

accident to occur on the bridge. It is respondent's contention that, notwithstanding this warning, the driver of the truck drove at an excessive rate of speed, which "caused the span to bounce up and down, and to vibrate; and, the chain pin that holds the supporting chain at one end of the barrier gate, because of said bouncing and vibration, broke, causing one end of the gate to fall a short distance, and become wedged in the side guides, after which the continued bouncing and vibration of the span set up by the rapidly approaching truck mixer, loaded with nearly twenty tons of concrete, caused the pin holding the supporting chain on the other end of the gate to break, whereupon the entire gate fell". (Paragraph 7, Departmental Report.)

The only evidence in this case as to speed was the testimony of the driver of claimant's vehicle, Mr. Anthony Mertel. He testified that he was driving 25 miles per hour, when traveling over said bridge. The only evidence offered by respondent was the testimony of Mr. Fischer, who stated that he did not see claimant's truck until after the accident had happened, and on cross-examination stated that he could not judge the speed of claimant's vehicle. He testified on direct examination that 25 miles per hour was not an excessive speed to drive, while crossing the bridge. We do not find any evidence of excessive speed in this record.

We further find that, regardless of this, there is no competent evidence in the record to sustain respondent's contention that the vibration of the bridge caused the chain pin to break, and the gate to fall, as set forth in the Departmental Report. The portion of the Departmental Report quoted above is not competent evidence of this fact, since it is obviously based

upon conclusions, rather than facts. We held in the case of *Lillian Kamin* vs. *State* of *Illinois*, No. 4529, opinion filed on September 25, 1953, that a Departmental Report shall be prima facie evidence of the facts set forth therein, but is not prima facie evidence of the conclusions set forth.

We find that there is no evidence in the record sufficient to rebut the presumption, or inference of negligence, raised by the application of the doctrine of res ipsa loquitur, and further find that claimant has borne the burden of proving negligence on the part of respondent, due care and caution on the part of claimant, and that the negligence of respondent proximately caused the damage to claimant's truck.

The evidence clearly established that both front fenders, the grill, radiator, carburetor, manifolds, cab, headlights and crank shaft of claimant's truck were damaged in the total sum prayed for, namely, Thirteen Hundred and Fifty-Five Dollars and Forty-six Cents ($1,355.46).

We, therefore find judgment in favor of elaimant, and enter an award in his favor in the amount of Thirteen Hundred and Fifty-Five Dollars and Forty-six Cents ($1,355.46).

(No. **4549—Claim** denied.)

ARLIE GRANT, MABLE GRANT, LOIS ANN GRANT, A MINOR, BY ARLIE GRANT, HER FATHER AND NEXT FRIEND, AND BETTY NELL GRANT, A MINOR, BY ARLIE GRANT, HER FATHER AND NEXT FRIEND, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion *filed February 26, 1954.*

R. W. HARRIS, Attorney for Claimant.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

HIGHWAYS—*extent* of duty of State to warn *public* of road repairs. Where respondent's agents erected barricades, set out signs and "pot" flares to warn public of road repairs, the obligation of the State to the users of the highway was fulfilled.

NEGLIGENCE—intervening cause. Evidence showed that the proximate cause of the accident was not negligence on the part of the State, but was due to the negligence of a third party skidding into claimant's lane of traffic.

FEARER, J.

Arlie Grant, Mable Grant, Lois Ann Grant, a minor, by Arlie Grant, her father and next friend, and Betty Nell Grant, a minor, by Arlie Grant, her father and next friend, filed their complaint on March 26, 1953 for personal injuries sustained by them as an outgrowth of an accident, which occurred on July 14, 1952 on State Highway No. 37 in the County of Johnson, State of Illinois, one-half mile south of the Village of Buncombe.

The record consists of the verified complaint, original transcript of evidence, copy of transcript of evidence, abstract, supplemental abstract of evidence, and claimants' and respondent's briefs and arguments. No answer was filed by respondent. Therefore, in accordance with Rule 11 of this Court, a general traverse is considered to. have been filed.

On July 14, 1952, Mable Grant, the wife of Arlie Grant, and their two daughters, Lois Ann Grant and Betty Nell Grant, aged four and three years respectively, were riding in a southerly direction on Route No. 37 in a 1941 Chevrolet, owned and driven by Arlie Grant, to which automobile was attached a small trailer. Also riding in the back seat of said automobile was a friend of Arlie Grant by the name of Samuel R. Smith. At or about the hour of 8:00 P.M. on said day, the Grants were driving to Anna, Illinois for the purpose of buying ice for their grocery store, which they owned and operated in Buncombe.

On or about July **14, 1952,** employees of the Division of Highways of the State of Illinois were in the process of repairing three small sections of the concrete road south of Buncombe on Route No. *37.* The first hole was from one quarter to one half mile south of Buncombe, and was located on the east side of the dividing line to the center of the highway, being the north bound traffic lane. The second repair work was being done about a mile to a mile and a half south of Buncombe, where the concrete was removed on the east side of said highway. The third hole was about four miles north of Goreville. We are concerned only with the first two repair zones south of Buncombe. The concrete removed was rectangularly shaped, extending from the east edge of the pavement to the center line, and was six or eight feet across, and approximately nine inches deep.

Barricades were placed on either side of each hole in the pavement, and were described as "horses", constructed out of two by sixes, painted with black and yellow diagonal stripes, and supported by "A" frames. The same type of barricade was constructed on the east side of the pavement south of the first barricade zone.

Three "pot" type flares were placed on the south of each barricade, and two on the north side of each barricade. The "pot" type flares burned a mixture of gasoline and kerosene, and were the type usually employed by the Highway Department in construction work. Three signs were placed to the south of each hole, which bore the following legends: "Road Repairs Ahead"; "One Way Traffic"; and, "Barricade". These signs were placed approximately two hundred **feet** apart, with one "pot" type flare at each sign. To the

north of each hole, and, on the opposite side of the road, were two signs bearing the following legends: "Slow", and "One Way Traffic". A flare was also placed at each of these signs.

Assigned to the area in question (being area 940) on the evening of the accident were the employees of the State, who were repairing the highway; namely, Thomas N. Durham, Herbert Billingsley, Sam Cash and Frank Stout, the latter being the foreman. Work was completed at or about the hour of 4:30 P.M. on the day of the accident, and several of the witnesses testified that before they left the job each "pot" type flare was lighted and burning. There was an understanding between the employees, that, in the event of a rainstorm or inclement weather, the foreman, Frank Stout, would return to the area under construction to check the flares. After they left work on that afternoon it rained and blew severely. However, the foreman testified that he went home after work, and remained at home until about eight o'clock, when he first heard that an accident had occurred. From the time he quit work until he heard of the accident, he was not advised of anything concerning the flares, or the signs; and at his farm there was only a trace of rain, and no wind to speak of.

Claimant's witnesses testified that, at the time of the accident in question, no flares were burning at any of the signs, or at or near the barricades south of Buncombe.

On the evening in question, Robert Lavender, a young man approximately 18 years of age, who lived in Vienna, Illinois, left his home in his 1947 Roadmaster Buick, and drove north on Route No. 37 toward Johnston City at approximately 60 miles per hour. He drove

around the barricade approximately a mile and a half south of Buncombe, and, in doing so had to drive on the west side of the pavement, which was damp in spots, and then he continued on at the same rate of speed. As he approached the first repair area south of Buncombe, he saw the Grant car approaching from the north. The witnesses in the Grant car and Lavender testified that they saw the barricades at the hole. Mr. Lavender testified that he applied his brakes, and the front end of his car swung into the lane for south bound traffic in front of the Grant car, and the two cars collided. He further testified that the flares at the barricade were not burning at the time of the collision. He stated that his lights were on dim, and that he saw the lights of the Grant car. After the impact his automobile was on the west side of the pavement in the south bound traffic lane' and off of the highway. Mr. Grant's car was headed east and west in the middle of the road. The impact took place between twenty and thirty feet south of the barricade. As to the condition of the road, he testified that it had rained two hours before the accident, and the road was not quite dry at the time of the accident. He further testified that he did not see any signs around the barricade, where the accident occurred, or the "pot" type flares until after the accident. He saw the Grant car a quarter of a mile before the impact, and was fifty yards from the barricade, when he applied his brakes, and the Grant car was one hundred feet north of the barricade at the time he applied his brakes.

Complaints were filed in the Circuit Court of Johnson County, Illinois against Robert Lavender, which were settled, and Covenants Not To Sue were given by or in behalf of each of the claimants, copies of which

are included in the record as exhibits, which show that Arlie Grant gave a Covenant in consideration of the payment of $3,500.00; Mable Grant, $250.00; Lois Ann Grant, $750.00; and, Betty Nell Grant, $500.00.

There is no question but that the **1945** Court of Claims Act in effect recognizes the obligation of the State to maintain and repair the Illinois State Highway System, and, as such, removes the State's sovereign immunity for cases of this type. However, the State of Illinois is not an insurer against all accidents upon its highways, but is required only to keep them in a reasonably safe condition for the purpose to which the portion in question is devoted, and the placing of signs warning of the conditions to be met fulfills the obligation of the State to the users of the highway.

***Terracino* vs. *State,* No. 4420, Opinion filed** on January **8, 1952;**
Beenes* vs. *State, No. **4377, Opinion filed** on **October 5, 1951.**

This case can be distinguished from that of *Di Orio* vs. *State,* **20** C.C.R. ***53,*** in that it was a case where a condition was created in the highway, and no notice given to respondent. In said case there was a question as to how long the hole had been in the highway, and whether the State had actual or constructive notice of the defect in the highway.

There is no question but what the burden is upon the claimants to prove by a preponderance or greater weight of the evidence, first, that they were free from contributory negligence, and, secondly, that respondent was guilty of negligence, and that the claimants were injured in person and property by reason of the negligence of the respondent's agents. There was an intervening factor in this case, which we cannot overlook, and, which, in our minds, appears to be the proximate cause of the injuries sustained by claimants. This was

recognized by the insurer of Robert Lavender in buying peace for the amounts set forth in the record. The exhibits referred to are not proper exhibits, and are not influencing the Court in trying to fix the liability, but are only proper in mitigation in reduction of an award, if one is made, and are not to be considered by us now in arriving at our decision in this case.

There is no question but what the claimants had every reason to believe that the car, which they saw approaching from the south, would stay in its proper lane of traffic, and allow them to clear the barricade. Even though claimants testified that there were no lights upon the signs, or around the barricades, they would not have had an accident had the automobile of Robert Lavender not skidded into their lane of traffic. We cannot overlook the fact that the State did have barricades around the excavations, did place "pot" type flares at each sign around the excavations, and did have warning signs on both sides of the road from two hundred to six hundred feet from the barricades. The testimony of Robert Lavender showed that he saw the first barricade, drove his automobile on the opposite side of the road without striking the barricade, saw the barricade where the accident occurred fifty yards prior to reaching it, saw claimants' car at least one hundred feet north of the barricade, and, knowing the condition of the highway, drove his automobile at a speed, which could be considered unreasonable, contrary to Chapter 95½, Sec. 49. It appears from his own testimony that he saw the oncoming vehicle, and did not apply his brakes, or attempt to stop his automobile, until he was too close to the barricade and the oncoming vehicle to avoid the accident in question. It appears to us that it was his negligence, and not the

negligence of the respondent, which was the proximate cause of claimant's injuries. In our opinion, respondent's agents erected a sufficient number of signs, barricaded the excavated portion of the highway, and lighted the flares before leaving their work that afternoon; and, that Frank Stout was not charged with any notice, actual or constructive, that the flares were not lighted at the time of the accident. In that regard, we do not believe that the respondent is chargeable with having someone in constant attendance, so that flares do not go out, but is only required to use ordinary care and caution in erecting and providing a sufficient amount of warning and protection to the traveling public, when work is terminated at the end of a day. In our opinion, the road was left in a reasonably safe condition by respondent's agents, when they left their work at 4:30 P.M. on July 14, 1952.

As to the flares not being lighted at the time of the accident, from the testimony of the employees of the respondent as to the understanding with the foreman, and the foreman's testimony that, after the flares were lighted, he returned home, and that at his farm the wind did not blow, and the rain was slight, one could not say that he would be chargeable with knowledge that the flares were not lighted at the barricade.

As to the amount of rain, his testimony seems to be substantiated by the testimony of Robert Lavender, who stated that the pavement between Vienna and Buncombe was damp only in spots.

In view of all the facts and circumstances relative to the preparations made for warning the traveling public, the conduct of Robert Lavender in the operation of his automobile; and, considering the cases previously decided by this Court and other courts in this State

touching upon the question of proximate cause, it is evident that the claimants have failed to prove their asserted causes of action by a preponderance or greater weight of the evidence. The State is not an insurer of all motorists traveling upon its highways.

Therefore, the claimants' claims filed herein are denied.

(No. 4563—Claimant awarded $616.00.)

ARCHIE W. ARMSTRONG, IRA A. ERWIN, LOUIS WOLFF, JOHN M. HAMILTON, AND DAVID UMSTED, AS TRUSTEES UNDER THE WILL OF HARRIET HUMISTON, DECEASED, Claimants, *vs.* **STATE OF ILLINOIS,** Respondent.

Opinion filed February 26, 1954.

TUESBURG AND ARMSTRONG, Attorneys for Claimants.

LATHAM CASTLE, Attorney General; MARION G. TIERNAN, Assistant Attorney General, for Respondent.

CONTRACTS—*award for* ***value*** *of* ***use and occupancy where no written lease existed.*** Where the evidence showed that respondent's agent inadvertently failed to present a lease to claimants for signature, but continued to occupy and farm the lands previously leased, an award will be made for the sum due, as evidenced **by** the prior lease between claimants and respondent for the identical property.

WHAM, J.

It appears from the record of this case that there is no dispute concerning the facts involved. Claimants, as trustees under the will of Harriet Humiston, are the owners in fee simple of the following described real estate:

The South Twenty-Two **(22)** acres, of the West Sixty-five (65) acres, of the West Half (W½) of the Northeast Quarter (NE¼), of Section Twenty-seven (27), Township Twenty-eight **(28)** North, Range Five ***(5)*** East of the Third Principal Meridian in Livingston County, Illinois.

For a period beginning on the 1st day of July, 1949, and ending on the 1st day of July, 1950, claimants

demised and leased, by written lease, to the State of Illinois, acting by and through the Department of Public Safety, the real estate above described at a rental of Two Hundred and Five Dollars and Thirty-three Cents ($205.33) for the period of said lease. For twenty years prior to July 1, 1949, said premises had been leased to respondent by written lease in a form similar to that entered into on July 1, 1949. Through all these years, the written leases were prepared by the Chief Clerk of the Illinois State Penitentiary, Pontiac Branch, and delivered to the attorneys for claimants, and their predecessors in office, for signature, During all of these years, the leases had been executed by claimants, and their predecessors in office, and by the Director of the Department of Public Safety. The land was farmed by the State of Illinois in connection with the Pontiac Branch of the Illinois State Penitentiary.

During said years, separate leases were made—one running from March 1 to July 1 at a rental of One Hundred and Two Dollars and Sixty-seven Cents ($102.67), and the other from July 1 to March 1 of the succeeding year at a rental of Two Hundred and Five Dollars and Thirty-three Cents ($205.33).

Through inadvertence, the Chief Clerk of the Illinois State Penitentiary, Pontiac Branch, did not prepare, and submit to the claimants for signature, leases for the period beginning March 1, 1950 and ending March 1, 1952, although the State of Illinois continued to occupy said land and farm it in the same manner as had been done in all the previous years, as though such leases had been signed, and were in force.

No rent has been paid by the State of Illinois for the use and occupancy of these lands for the period above named, and there is now due from the State of

Illinois to claimants the sum of Six Hundred and Sixteen Dollars ($616.00) for rent for said period, which is also the reasonable value of the use of the land during said period.

Inasmuch as there is no dispute as to the facts, and the claim appears to the Court to be a just and lawful one, which should be paid, it is, therefore, the judgment and order of this Court that an award be made to claimants in the amount of Six Hundred and Sixteen Dollars ($616.00).

(No. 4575—Claim denied.)

CURTIS GEE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 26, 1954.

HARRY S. GREENSTEIN, Attorney for Claimant.

LATHAM CASTLE, Attorney General; MARION G. TIERNAN, Assistant Attorney General, for Respondent.

FALSE IMPRISONMENT—*inmate of penitentiary.* Where warden accepted prisoner pursuant to a writ valid on its face, imprisonment was not unlawful, and no cause for false imprisonment can arise for such imprisonment against the warden or respondent.

WHAM, J.

This case comes before us on a motion by respondent to dismiss the complaint, which charges that claimant, Curtis Gee, was falsely imprisoned by respondent, and damaged thereby in the amount of Thirty-five Thousand Dollars ($35,000.00). Respondent contends that claimant has failed to state a cause of action in his complaint.

It is claimant's contention that the following facts pleaded in the complaint are sufficient to properly state a cause of action for false imprisonment: (1) On May 31, 1939, claimant was arrested, and held by the Chi-

cago police without a warrant, and without a preliminary examination until June 8 of that year; (2) While in their custody he was assaulted, and forced to sign a confession to the effect that he murdered his own son; (3) On June 8, 1939, he was indicted for this crime by the Cook County Grand Jury, and was tried before the court on June 15, 1939 without a jury, as a result of which he was convicted, and sentenced to the Illinois State Penitentiary at Joliet for a term of 199 years; (4) During said trial the confession was admitted in evidence over objection of defendant on the ground that it was involuntary; (5) On July 16, 1939, claimant was taken to the penitentiary at Joliet, and delivered into the custody of the warden, in accordance with the judgment, which operated as a commitment order; (6) On May 25, 1951, the Criminal Court of Cook County, on petition of claimant, entered an order vacating the arraignment, judgment, and sentence theretofore entered, and setting the case for retrial on June 14, 1951; (7) Thereafter the case was called for trial on October 15, 1951, at which time said case was stricken from the setting with leave to reinstate, and, since that time, no further action has been taken by the State's Attorney to reinstate the case; (8) Claimant was released from custody on October 16, 1951, and has been at liberty since that date.

The complaint then charges that claimant, during the twelve year period of imprisonment, suffered loss of wages in the amount of Seventeen Thousand Two Hundred and Seventy-Seven Dollars and Seventy-Three Cents ($17,277.73), and was injured in his reputation in the amount of Fifteen Thousand Dollars ($15,000.00).

Claimant in his brief and argument, filed in oppo-.

sition to the motion of respondent to dismiss, states that he is not basing his complaint upon the actions of the Chicago City Police, or the State's Attorney of Cook County. He acknowledges that respondent cannot be bound by their acts, since they are not agents of respondent. He contends, however, that the State of Illinois must respond in damages for the actions of the warden of its penitentiary at Joliet, and other penal officials, for falsely imprisoning claimant in the Illinois State Penitentiary at Joliet. Claimant reasons that the complaint states a cause of action on the theory that the warden committed claimant by virtue of an invalid judgment, and on void process, and that, by reason of such, the detention was wrongful.

Upon consideration of the law, as we understand it to be, the facts set forth in the complaint do not state a cause of action against the State of Illinois for false imprisonment.

Volume **22** of *American Jurisprudence* at page **357** sets forth the fundamental rule of law governing the remedy of false imprisonment.

> "Mere loss of freedom cannot constitute false imprisonment even though it is unjust; the imprisonment must be unlawful. No system of jurisprudence has yet been invented that is infallible. Mistake and injustice to the individual will occur under any judicial system, in the application of either civil or criminal jurisprudence. One may be acquitted upon the merits of the case, or discharged upon some question of law, but that fact does not in and of itself make the restraint placed upon his liberty false imprisonment."

Illinois follows this general rule requiring the element of "unlawful imprisonment" before the detention of an individual gives rise to an action for false imprisonment.

In the case of *Shelton* vs. *Barry,* **328** Ill. **App. 497,** the court said at page ***506:***

" . . . False imprisonment consists in the unlawful restraint against his will of an individual's personal liberty or freedom of locomotion. A false arrest is one means of committing a false imprisonment. In false imprisonment malice is usually material only on the issue of damages. If *the imprisonment is under legal authority, it may be malicious, but it cannot be false.*"

In the case of *Liogas* vs. *Lowenguth,* **215** Ill. App. **216,** at page 218, the court, in defining false imprisonment, said:

" . . . 'False imprisonment is a trespass committed by an unlawful arrest and imprisonment. If the imprisonment is under legal process, but the action was begun and carried on maliciously and without probable cause, it is a malicious prosecution and not false imprisonment.' (*Mexican Cent. Ry.* Co. vs. *Gehr,* 66 Ill. App. **173.** See also *Cokling* vs. *Whitmore,* **132** Ill. App. **574;** *Morrell* vs. *Martin,* **17** Ill. App. 336.)"

To this same effect, see *Green* vs. *Ross,* **257** Ill. App. **344,** at page **348,** wherein the court stated:

". . . Under the evidence showing that the appellee was imprisoned under legal process and in consequence of judicial determination, the court should have directed a verdict of not guilty on false imprisonment charge."

Applying these principles to this case, we have determined that the imprisonment of claimant by the warden of the State penitentiary was not unlawful within the connotation of that term. The fact that claimant had been arrested, and held without a warrant prior to the trial of his case, did not in and of itself affect the validity of the judgment of conviction against him, or the jurisdiction of the court to hear the case. *The People* vs. *Brown,* **368** Ill. **177.**

It is true that, from the pleadings, it appears that the court, in entering the judgment of conviction against claimant, was in error, but such error had no effect upon the validity of the judgment, as long as the judgment of conviction stood. It was not a void judgment, as contended by claimant. It was a judgment, valid on its face at the time the warden accepted claimant as a prisoner.

The judgment of conviction was the authority for the detention of claimant in the penitentiary, and the only judicial process to which the prison authorities of the State were required to look prior to accepting the custody of claimant. *The People* vs. *Anderson,* **407** 111. 503; *The People* vs. *Kennay,* **391** Ill. **572;** *The People* vs. *Daulley,* **387** Ill. **403.**

As stated by Judge Lindley in the case of *Uryga* vs. *Ragen, Et Al,* U.S. Court of Appeals, 7th Circuit, 181 F. (2d) 660, at page **664,** wardens under Illinois law are:

" . . . merely administrative employees acting in pursuance of writs and orders valid on their face."

To require the warden or other prison officials' to look beyond a judgment of conviction valid on its face committing a person to their custody would be completely outside the scope of their authority, and would, in effect, place them in a position of either underwriting the correctness and legality of every judgment, verdict, and ruling by the court involved in the trial of each prisoner submitted to them, and accepting such prisoners at their financial risk, or refusing to accept such prisoners, and thereby flouting the mandates of our courts. This situation could not be tolerated within any system of orderly administration of the laws.

For the above reasons, it is the opinion of this Court that the complaint fails to state a cause of action, and that respondent's motion to dismiss should be allowed.

It is, therefore, the order of this Court that this cause be, and is hereby dismissed.

(No. 3025—Claimant awarded $3,786.48.)

ELVA JENNINGS PENWELL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 3, 1954.

JOHN W. PREIHS, Attorney for Claimant.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*supplemental award.* Under the authority of *Penwell* vs. *State,* 11 C.C.R. 365, claimant awarded expenses incurred for nursing care, drugs, etc. for the period from February 2, 1953 to February 1, 1954.

TOLSON, C. J.

Claimant was injured on February 2, 1936 in an accident arising out of and in the course of her employment as a Supervisor at the Illinois Soldiers' and Sailors' Children's School at Normal, Illinois. The injury was serious, causing temporary blindness and general paralysis. The facts are fully detailed in the case of *Penwell* vs. *State,* 11 C.C.R. 365, in which an award was made to the claimant of $5,500.00 for total permanent disability, $8,215.95 for necessary medical, surgical, and hospital services, expended or incurred to and including October 22, 1940, and an annual life pension of $660.00.

On February 10, 1942, a further award was made to claimant for medical and hospital expenses, incurred from October 22, 1940 to January 1, 1942, in the amount of $1,129.82.

On March 10, 1943, a further award was made to claimant for medical and hospital expenses from January 1, 1942 to December 31, 1942 in the amount of $1,164.15.

On March 15, 1944, a further award was made to claimant for medical and hospital expenses from Janu-

ary 1, 1943 to and including September 30, 1943 in the amount of $853.07.

On April 17, 1945, a further award was made to claimant for medical and nursing expenses, incurred from October 1, 1943 to and including February 28, 1945, in the amount of $1,955.29.

On September 12, 1946, a further award was made to claimant for medical and nursing expenses, incurred from February 28, 1945 to and including April 1, 1946, in the amount of $1,646.12.

On June 5, 1947, a further award was made to claimant for medical and nursing expenses, incurred from April 1, 1946 to and including April 1, 1947, in the amount of $2,108.30.

On September 22, 1948, a further award was made to claimant for medical and nursing expenses, incurred from April 1, 1947 to and including April 1, 1948, in the amount of $2,207.80.

On April 19, 1949, a further award was made to claimant for medical and nursing expenses, incurred from April 1, 1948 to and including February 1, 1949.

On May 9, 1950, a further award was made to claimant for medical and nursing expenses, incurred from February 1, 1948 to and including February 1, 1950, in the amount of $2,316.09.

On April 10, 1951, a further award was made to claimant for medical and nursing expenses, incurred from February 1, 1950 to and including February 1, 1951, in the amount of $2,403.09.

On May 15, 1952, a further award was made to claimant for medical and nursing expenses, incurred from February 1, 1951 to and including February 1, 1952, in the amount of $2,889.70.

On April 24, 1953, a further award was made to claimant for medical and nursing expenses, incurred from February 1, 1952 to and including February 1, 1953, in the amount of $3,441.54.

Claimant has filed her verified petition for reimbursement for necessary nursing expenses, drugs, supplies, and medical care in the amount of $3,786.48, to and including February 1, 1954, all of which is supported by receipts showing payment in full.

The record consists of petition of claimant, original receipts for monies expended for medical, hospital and nursing care; waivers of claimant and respondent to file statement, brief and argument, which were allowed in this case.

The petition discloses that, since the date of the last award, claimant's condition has not improved, and that the possibility of a recovery is in serious doubt.

The petition discloses that she has paid the sum of $1,508.25 for nursing care, and the further sum of $638.75 for board furnished her nurses. It also shows that claimant has paid out the sum of $281.94 for drugs and supplies. The petition further discloses that she has paid out the sum of $677.00 for services of a physician, and the further sum of $658.77 for hospital care; as well as the sum of $21.77 for miscellaneous expenses, making in all a total for expenses in the amount of $3,786.48.

An award is, therefore, made to claimant for medical, hospital and nursing care from February 1, 1953 to and including February 1, 1954, in the sum of $3,786.48.

The Court reserves for future determination claimant's needs for additional medical care.

(No. 4522—Claim denied.)

HOMER J. TIPPS AND ANNA B. TIPPS, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 18, 1965.
Petition of Claimants for rehearing denied April 23, 1954.

DALE TEMPLEMAM, Attorney for Claimants.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

HIGHWAYS—*relocation.* Abutting property owners do not have a vested right in the volume of traffic passing their property.

DAMAGES—*relocation of highway.* The measure of damages, if any, from the relocation of a highway, is the difference between the fair cash market value of the property immediately before and after the improvement.

SAME—same. Where evidence failed to show claimants sustained such losses as would give rise to actionable damages by reason of the relocation of a State highway, an award will be denied.

FEARER, J.

At the time Homer J. Tipps and Anna B. Tipps, his wife, filed their complaint herein, they owned in joint tenancy six acres of land east of Springfield, Illinois. The land was located near Route No. 36 across from the Oak Crest Country Club, and was improved with eight tile cabins and a four room house. At the time of the hearing all of the property had been sold, but the claim in question had not been assigned. No claim is now being made for damages to the house and three acres of the land. Claim for damages is only being made for the eight cabins and two acres of land, and an additional acre of ground, by reason of water flowing across this land.

In 1952 the State of Illinois relocated a part of State Route No. 36, between the Oak Crest Country Club and the corner of Camp Butler Cemetery, eliminating a right angle turn from this highway. Its construction was completed in August of 1952.

The property, upon which the tourist cabins were situated before the relocation of Route No. 36, did not adjoin said highway. However, when the road was relocated, the cabins were not visible from the new highway. Access could be obtained to said cabins from the old highway, which was not removed.

Claimants in their complaint seek the following damages, as set forth in paragraph 6:

a. 3 acres rendered useless, due to water running across and standing upon the same, Fifteen Hundred Dollars.
b. Building and maintenance of a road by claimants across their acreage for business purposes, Two Thousand Dollars; or the damage to claimants' business due to a lack of such road, at such times as the same was washed out, Four Thousand Dollars.
c. Expenses of engineering, surveying and planning such roads, Five Hundred Dollars.

If claimants have any right of recovery, it must be by virtue of the constitutional provision, namely, Article II, Section 13, to the effect that "private property shall not be taken or damaged for public use without just compensation".

A considerable amount of testimony has been introduced relative to drainage of water prior to the relocation of the new highway, and the drainage after the relocation. However, from the exhibits, which are plats of the area, and area photographs, it appears that the area contained in the water shed was increased by approximately eight acres after the relocation of Highway No. 36, but that there was no diversion of the flow of surface water. However, on the theory that this case was tried, and the law involved, we do not believe that this would be too material, as the claimants first contend under paragraph 6, sub-paragraph a, that three acres of land were rendered useless, due to water running across and standing upon the same. In this regard,

claimants introduced testimony that without the private roadway, claimants did not build, their income from the cabins fell from **$1,244.00** for the year before the construction to no income whatsoever after the relocation of the highway. There was no testimony introduced that the cabins were ever flooded, or were inaccessible, or rendered useless, and there were only two or three occasions testified to when water was seen flowing across claimants' land. It is hard for us to understand how this could cause such a decrease in business, or prohibit the claimants from renting the cabins. It seems that, if there was such a decrease of income, it was due to the fact that the highway was relocated, and claimants did not see fit to construct a driveway from their land, on which the cabins were situated, to the relocated highway, which they were given permission to do by the State of Illinois, thereby making the property accessible for their customers.

The relocation of State Route No. 36 made the cabins inaccessible from the new highway, and not visible from the road, which seems to be the real reason why there was a decrease in business. It is the law of this State that abutting property owners do not have a vested right in the volume of traffic passing their property. This was discussed in the case of *Grothe* vs. *State of Illinois,* 10 C.C.R. **50;** *Calumet Federal Savings & Loan Assn.* vs. *City of Chicago,* 306 Ill. App. **524.** In the Grothe case, this Court held that the State was not liable for loss of business caused by closing a State route for a period of several months.

Our courts have also held that if an obstruction, or improvement, does not practically affect the enjoyment or use of property not taken, but merely causes inconvenience or loss of business to the occupant of

the property, an action for damages will not lie. *City of Chicago* vs. *Union Bldg. Assn.*, **102** Ill. **379;** *City of Winchester* vs. *Ring*, **312** Ill. **544;** and *Malleable Iron Co.* vs. *Park Comrs.*, **263** Ill. **446.**

In considering sub-paragraph b of paragraph 6, claimants are seeking damages for the building and maintenance of a road across their land, and also for damages to claimants' business, due to a lack of such road. There is no evidence that claimants ever constructed a road from their property to the new high.-way. This paragraph is based purely upon speculative, and not actual damages. Even if they had constructed a road, they would not be entitled to recover the cost of said road from the State.

Sub-paragraph c of paragraph **6** covers expenses of engineering, surveying and planning. There is no evidence of any actual expenditure for engineering, surveying and planning. Even **if** claimants had expended money for engineering, it would not be a proper item of damages recoverable from the State of Illinois.

The proper measure of damages, if any, is the difference between the. fair cash market value of the property immediately before and after the improvement.

Nauyoks, Et Al vs. *State,* **11** C.C.R. **542.**
Oetting vs. *State,* **11** C.C.R. **527.**
Walkowiak, Et Al **vs.** *State,* **12** C.C.R. **335.**
Spur Dist. Co. **vs.** *State,* **13** C.C.R. **94.**
Tenboer, *Et Al* vs. *State,* No. **4300,** opinion filed on **November 26, 1952.**

There was no testimony offered by the claimants to show the difference between the fair cash market value of the property on which the cabins were located before and after the relocation of Route No. **36.** As to the additional acre for which claimants seek damages, the claimant, Homer J. Tipps, testified that he received

$1,000.00 for the acre of land, which was the value placed upon this land and other land in the vicinity prior to the relocation of Route No. 36.

Inasmuch as the burden of proof is upon the claimants to prove damages by a preponderance or greater weight of the evidence as a result of the relocation of Highway No. 36, we find that claimants have failed to prove their claim, and an award for damages must, therefore, be denied.

SUPPLEMENTAL OPINION

FEARER, J.

On the 18th day of December, 1953, this Court filed an opinion denying an award to claimants. On January 18, 1954, a petition for rehearing was filed.

In the Court's opinion, the pertinent portions of the complaint were referred to, and particular reference was made to paragraph 6, wherein the damages claimed were set forth in sub-paragraphs a, b, and c.

Claimants did not offer any competent evidence to substantiate the damages set forth. Furthermore, pertinent proof was not made as to the fair cash market value of the real estate affected prior to the relocation, and the fair cash market value of the real estate subsequent to the relocation of said highway by the respondent.

In our opinion, we set forth the points and authorities relied upon in denying claimants' claim, and stated that we did not believe it was necessary to go into the question of the diversion of the flow of surface water, but were of the opinion that the construction did not cause a diversion of the flow of surface water, as proved by competent exhibits introduced by respondent, and testimony offered in support thereof.

If the claimants did suffer a loss in business, this could be attributable to the relocation of the highway, which, of course, would not entitle claimants to dam-, ages, as set forth in our opinion with points and au-. thorities cited therein.

The petition of claimants for rehearing is, therefore, denied.

(No. 4527—Claimant awarded $5,175.00.)

STEVE **A.** SYPNIEWSKI, A MINOR, BY CELIA SYPNIEWSKI, HIS MOTHER AND NEXT FRIEND, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion *filed* April *23, 1954.*

ELLIODOR M. **LIBONATI,** Attorney for Claimant.

LATHAM CASTLE, Attorney General; MARION G. TIERNAN, Assistant Attorney General, for Respondent.

MILITARY AND NAVAL Corm—interpretation. Claimant's status under the language "while performing his duty as an officer or enlisted man in pursuance of orders from the Commander-in-Chief," is more restrictive than the "in line of duty" status.

SAME—*when* claimant *is performing* his duties *in* pursuance *of orders from* the Commander-in-Chief. Where the evidence showed that claimant was in line **of** duty when he sustained his injuries; that he had not completed his kitchen police assignment, was still assigned under orders to that particular duty, and was expected to report for further work in the kitchen at the evening meal; where claimant was upon the military post when he received his injuries, and subject at all times to be recalled for further work; and, whereby, because of the nature of the duty to which claimant was assigned, it was contemplated by the authorities that claimant would not be continuously engaged throughout his assignment to said duty, but would of necessity have a certain amount of free time during his assignment; claimant, who was injured by a hand grenade, which he picked up while hiking on the military reservation during a rest period from his kitchen police duties, was so injured "while performing his duty as an officer **or** enlisted man in pursuance of orders from the Commander-in-Chief".

WHAM, J.

This case involves **a** claim for recovery under Article XVI, Section 11 of the Military and Naval

Code of Illinois, Ill. Rev. Stat., 1949, (State Bar Association Edition), Chap. 129, Par. 143.

On July 31, 1949, the claimant, Steve A. Sypniewski, was a member of the 33rd Ordnance Company, 33rd Infantry Division of the Illinois National Guard, and held the rank of Private First Class. The National Guard Division and its members were on regular maneuvers, engaged in actual field training at Camp McCoy, Wisconsin; and were at that time federally recognized, and engaged in such training under the provisions of the National Defense Act.

On the morning of the day in question, claimant, who had been assigned to kitchen police duty, had finished a part of that duty, and was not scheduled to report back until the evening meal. He and two companions decided to go for a hike in the woods on the military reservation, and, while so engaged, saw a hand grenade partly embedded in the dirt. He touched it, and the grenade exploded, causing serious injuries to claimant. The complaint filed herein prays damages in the amount of $10,000.00 against the State of Illinois, based upon the alleged loss of the thumb and index finger of claimant's right hand, loss of practically all of the sight of claimant's left eye, and other injuries enumerated in a general manner; and allegagations of medical expenses, incurred in the past, and to be incurred in the future.

The record of the Adjutant General of Illinois, contained in respondent's exhibit No. 1, and all of the facts in the record establish that claimant was in the line of duty at the time of the accident in question, which fact was conceded by respondent at the hearing. Such records, and the testimony offered in the case further establish that claimant was not injured by

reason of any willful neglect or misconduct on his part. There are no facts shown in the record of this case, which establish any unlawful act on the part of claimant. Whether or not he was in the complete exercise of due care in touching the hand grenade is not an issue in determining whether recovery can be had under the statute in question.

It is likewise immaterial that claimant, due to his being in the service of the United States at the time of the injury in question, has a remedy under the provisions of Public Law 108, 32 U.S.C.A., Sec. 160 (a) through (c). The question has been previously resolved in favor of claimant by the Court's decision in this cause, which was filed on March 20, 1953.

One serious question raised by respondent deals with the meaning that should be given to the provision of the Military and Naval Code, wherein, as a condition to recovery under Section 11 of said Code, it is required that the injury to claimant must have occurred "while, performing his duty as an officer or enlisted man in pursuance of orders from the Commander-in-Chief".

Respondent urges, and, in our judgment, rightly so, that the Legislature had in mind a more strict requirement for recovery under this Section than a mere line of duty status. If such had been the intention of the Legislature, it is reasonable to assume they would have used that language, rather than those terms contained in the statute set forth above.

It is conceivable that a person may occupy a line of duty status, while not performing "his duty as an officer or enlisted man in pursuance of orders from the Commander-in-Chief", for instance, while on leave of absence or furlough for personal reasons. On the other hand, a line of duty status is a necessary condition to

a finding that he was so performing his duty in pursuance of such orders.

Respondent argues that, at the time claimant received his injuries, he was participating in a "frolic of his own", and was not performing his duty under orders, since he had not been assigned to accompany the other guardsmen to the place where the accident occurred, and had the right to refuse to accompany them, if he so desired.

Claimant, however, contends that the facts involved not only show claimant to have been injured while in the line of duty, but, also, while performing his duty in pursuance of orders from the Commander-in-Chief.

We find no previous decisions in point. This presents a close question. It is one that calls for a determination of policy, which will reasonably give effect to what we consider the intent of the Legislature in enacting the Military and Naval Code. It is one that, in determining the result on the particular facts, requires a consideration of the degree of meaning, which should be given to the terms involved.

The term "performing his duty as an officer or enlisted man in pursuance of orders from the Commander-in-Chief" could be held to mean simply being on active duty. This, in our judgment, is a broader construction of the term than the Legislature intended.

On the other hand, the term could be held to mean that the guardsman must be actually engaged in performing precisely the physical acts ordered done, and only those acts necessary in complying with each particular order given. For example, in the case at bar, claimant, under such a meaning of the term, would only be covered by the law while actually engaged in pre-

paring the food, washing the kitchen utensils, carrying out the garbage, cleaning the floor, etc., and would not be covered while engaged in a five minute "break" to smoke a cigarette. Obviously, the Legislature intended no such narrow construction of the term.

Somewhere between these two extremes lies the answer to the problem, and the test that should be applied.

The admitted facts consign this case to a position on the border line of the question, but we have concluded, after much consideration, that claimant was performing his duty as an enlisted man in pursuance of orders from the Commander-in-Chief at the time of his injuries, and should be allowed to recover under Section 11 of the Military and Naval Code.

The facts, which we consider to justify this result, are these: (1) It is conceded by both parties to this action that claimant was in the line of duty when he sustained the injuries; the records of the Adjutant General of the State of Illinois reflect such a finding by the military authorities; and, the facts contained in the record of this case are not of such a nature to require our overruling such findings. **(2)** Claimant had not completed his kitchen police assignment, was still assigned under orders to that particular duty, and was expected to report for further work in the kitchen at the evening meal. **(3)** Claimant was upon the military post when he received his injuries, and was subject at all times to being recalled for further work. **(4)** By the nature of the duty to which claimant was assigned, it was contemplated by the authorities that claimant would not be continuously engaged throughout his assignment to said duty in performing actual work in the kitchen, but would, of necessity, have a certain

amount of free time during his assignment to kitchen police duty, and while still subject to call for further work.

Respondent also contends that, by virtue of the interpretation given Sections 10 and 11 of the Military and Naval Code by the Court in the case of *Insalata* vs. *State of Illinois,* 12 C.C.R. 27, this Court can take no jurisdiction of the case, for the reason that claimant has failed to exhaust his remedies under Section 10 of the Code, and that Section 11 of the Code can only be applied after the remedies afforded by Section 10 have been exhausted.

These two Sections, as constituted at the time of the occurrence of the accident, read as follows:

"¶10. Any officer or enlisted man of the National Guard or Naval Reserve, who may be wounded or disabled in any war, while on duty and lawfully performing the same, so as to prevent his working at his profession, trade or other occupation from which he gains his living, shall be entitled to be treated by an officer of the medical department detailed by the surgeon general, and to draw one-half his active service pay, as specified in Sections 3 and 4 of this article, for not to exceed thirty days of such disability, on the certificate of the attending medical officer; if still disabled at the end of thirty days, he shall be entitled to draw pay at the same rate for such period as a board of three medical officers, duly convened by order of the Commander-in-Chief, may determine to be right and just, but not to exceed six months, unless approved by the State Court of Claims.

¶11. In every case where an officer or enlisted man of the National Guard or Naval Reserve shall be injured, wounded or killed while performing his duty as an officer or enlisted man in pursuance of orders from the Commander-in-Chief, said officer or enlisted man, or his heirs or dependents, shall have a claim against the State for financial help or assistance, and the State Court of Claims shall act on and adjust the same as the merits of each case may demand. Pending action of the Court of Claims, the Commander-in-Chief is authorized to relieve emergency needs upon recommendation of a board of three officers, one of whom shall be an officer of the medical department."

The case of *Insalata* vs. *State of Illinois,* supra, involved an injury to a guardsman, who, the Court found, showed an unwillingness to avail himself of the medical and dental services provided for members of the Illinois National Guard. A claim was filed in the

Court of Claims under the provisions of Section **11** of the Code. No action was taken under Section **10** of the Code. The Court, in denying the claim, stated at pages **30** and **31** :

"**If** both Sections **10** and **11** automatically become applicable to claims of this kind, then two separate tribunals might at the same time be called upon to adjust the same claim. This Court has held that such was not the intent of the Legislature. (*Echols* vs. *State of Illinois,* supra.) It appears rather, that the Legislature intended that Section **11** should provide for additional financial help or assistance in cases where such is justified. In other words, Section **10** is first to be applied so that the injured claimant may have one-half of his active service pay and medical services. If his disability is serious enough, Section **10** provides for **a** continuance **of** one-half pay and medical services for **a** period not to exceed six months unless approved by this Court. If the disability exceeds six months, claimant may invoke the jurisdiction of this Court, and show his need for financial help and assistance in addition to that provided for by Section **10.** To **say** that Section **11** gives this Court unlimited jurisdiction, regardless of the provisions of Section **10,** is contrary to the general rules **of** statutory construction. Section **11** supplements, and provides for further possible help and assistance, but it does not supersede Section 10. Furthermore, the financial need of the claimant can only properly be determined by this Court when it has knowledge **of** the proceedings had under Section 10, and the payments made in accordance therewith."

And, at page **32:**

"Legislative provisions **for a** preliminary inquiry, such as is provided for in Section **10,** are fully within the legislative province. *Bangs* vs. *State* of *Illinois,* **10** C.C.R. **127;** *Blue* vs. *State* of *Illinois,* **10** C.C.R. **200.** It is our opinion, from a consideration of Sections **10** and **11 of** the Military and Naval Code, that a claimant, before invoking the jurisdiction of this **Court,** must show:

(1) What payment has been made to him on the certificate of the attending medical officer of one-half active service pay.

(2) What payment has been made to him by order of the board of medical officers of one-half active service pay.

(3) What medical services have been furnished to him.

(4) What need exists for financial help or assistance, in addition to the one-half active service pay and medical services already furnished.

There being no proof in this case of a compliance with the provisions of Section 10 of the Military and Naval Code, this Court is without jurisdiction. *Echols* vs. *State of Illinois,* supra.''

We have considered these two sections of the Code, and also the above decision, and can see no reason to follow that decision in the instant case.

In the first place, claimant has received all of the necessary medical treatment from the State and Federal Governments, and is making no claim or request for further medical treatment. Although both past and future medical expenses are claimed as damages in the complaint, no evidence of such appears in the record, nor is there any mention or claim for same made by claimant in his brief and argument. Claimant, likewise, has made no claim for one-half of his active service pay, which he would have been allowed by the provisions of Section **10** of the Code. He claims only damages for permanent personal injuries, which have handicapped his advancement in an occupation that he entered subsequent to the injury. Financial help and assistance for these items of damage, in our judgment, should be awarded under Section **11,** rather than Section 10.

It appears to us that to deny claimant the right to a recovery under Section **11,** merely because action was not formally taken by the military authorities under Section **10,** would be to place more regard on following a certain line of procedure, than in accomplishing a just result, and would be in discord with what we consider the Legislative intent to have been.

Furthermore, it is noted from the record (respondent's exhibit No. 1) that on October **25, 1949,** shortly after his release from the hospital, claimant forwarded a letter to the Adjutant General of the State of Illinois, through military channels, requesting information regarding the procedure to be followed in making a claim for disability compensation, stating that he was unable to find suitable employment. There is nothing anywhere in the record, which indicates any lack of cooperation on the part of claimant, or a lack of interest in

pursuing the matter. What else claimant could have done, we do not know. There is no procedure prescribed by Section 10 of the statute for claimant to have followed in forcing action thereunder. The initiative, it seems to us, for obtaining action under Section 10 of the Code rests upon the military authorities. We do not intend to penalize claimant for inaction on the part of any other person. We do not, however, mean to imply that the military authorities should or should not have taken action, since that question is not now before the Court.

We now direct our attention to a consideration of the amount claimant should receive under the provisions of Section 11 of the Military and Naval Code.

In arriving at the amount, we note from the evidence that claimant, prior to his injuries, had last been employed at a tea room in Chicago, earning $25.00 a week. After the accident, and subsequent to treatment for his injuries at the Great Lakes Naval Hospital, he was next employed the latter part of December, 1949 as a mail clerk baggage handler for the Illinois Central Railroad at $60.00 per week, where he worked for approximately one and one-half months. He again worked for approximately six months at the tea room at $25.00 a week, and, thereafter, for Master Specialties Company in Chicago, where he earned $1.25 an hour. Shortly thereafter, claimant went to California to continue his employment with this Company, and, while in California, was also employed by North American Aviation Company at $1.50 per hour. While in California, his work consisted of machine work on jigs and small dies, riveting, and general finishing work. He then returned to Chicago, and obtained employment as a machinist with the Pullman Standard Company

at $1.65 per hour, where he is still employed at the present time, now earning $1.91 per hour. In 1950 and 1951 he attended Chicago Vocational School, studying the precision machinist trade. He contends that, although he is able to perform the duties of a machinist, he cannot become a precision machinist, because of the defective sight in his left eye, and loss of the right thumb and forefinger.

The evidence shows that claimant had worn glasses three or four years prior to the accident in question for reading and close work. Respondent's exhibit No. 1 contains a report of the physical examination at the place of enlistment on April 15, 1948, which shows claimant to have a 20/20 vision without correction. Claimant testified that, since the accident, he is unable to see through his left eye without glasses; and, that with glasses he can "almost make people out" at a distance of approximately five or six feet.

After the hearing in the case, claimant was examined by Dr. Thadd F. Bush, and, by agreement of the parties, the report of Dr. Bush was filed, and made a part of the record in this case. The report of Dr. Bush reads as follows:

"Mr. Steve A. Sypniewski presented himself at this office on June 20, 1953 stating that, while in the military service at Camp McCoy, Wisconsin on July 31, 1949, a dud hand grenade was detonated in his hand by accident, burning his face, injuring his right hand and left eye, and otherwise incurring bodily injury.

Following this episode he had been cared for by the military medical personnel in the vicinity of Camp McCoy, and to date he yet experiences considerable visual disturbances in his left eye.

Upon examination, the right eye mas determined to be essentially normal with the following refractive finding: the visual acuity without correction was 20/70, and was correctible to 20/30 + 3 by a minus 1.50 sphere plus 0.75 cylinder at axis 90. The left eye showed evidence of superior medial ophthalmic venous engorgement with signs of an old healed mild peridiscoid proliferative retinitis with some evidence of vitreous clouding and an occasional molluscae. There was a slight peripheral visual constriction within 5 to 10 degrees, and some pallor of the disc. Other findings were absent with the exception of the following refractive

error. Visual acuity without correction was 20/200 correctible to 20/70 plus 1 by a minus 8.25 sphere plus 0.50 cylinder axis 80.

The visual acuity in both eyes is decidedly substandard, and that in the left eye is strictly poorer than that of the right eye."

Included in respondent's exhibit No. 1 is a report of William F. Kuhn, II, Lt. Col. M.C., Chief of Surgical Service, which states that claimant by virtue of the explosion, suffered 100% loss of the terminal phalanx of his right thumb, and 100% loss of the terminal and middle phalanges of his right index finger.

Claimant testified that the other incidental injuries received at the time of the explosion no longer bothered or affected him. Claimant, at the time of the hearing, was a married man.

The Court has many times used the Workmen's Compensation Act as a guide in arriving at an award in a case of this type. Although we are not bound by the Act, we believe that in this case it should form the basis for an award. It seems especially appropriate, inasmuch as the accident was due to no fault on the part of respondent, and, in our judgment, a lack of due care on the part of claimant. The facts indicate that claimant has been steadily employed ever since returning to work after his wounds had healed. However, there is no question but what his earning capacity has been affected by the injuries he received, which injuries are permanent.

Applying the 1949 Illinois Workmen's Compensation Act, we find that claimant has suffered 100% disability of his right thumb, which would entitle him to an award of $1,575.00 under the Compensation Act for such loss. We further find that under the Compensation Act he has suffered a 100% disability of his index finger, for which, under the Act, he would be entitled to receive the sum of $900.00.

The examination of Dr. Bush reflected the visual acuity of claimant's left eye, without correction, as being 20/200, which is generally regarded by the Industrial Commission as constituting industrial blindness. The examination further reflects that said eye was correctible to 20/70. We will, however, follow the most general rule applied by the Industrial Commission in Workmen's Compensation cases, namely, that the test for defective vision is made on an uncorrected basis. Considering a complete loss of the left eye, under the 1949 Illinois Workmen's Compensation Act claimant would be entitled to receive $2,700.00 for the loss of said eye.

It is, therefore, our order that claimant be, and he is hereby awarded the sum of Five Thousand One Hundred Seventy-Five Dollars ($5,175.00).

(No. 4545—Claim denied.)

ERVIN WILLIAMS AND INEZ WILLIAMS, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed *April 23*, 1964.

, ALBERT SAIKLEY, Attorney for Claimants.

LATHAM CASTLE, Attorney General; THOMAS G. CRONIN, Assistant Attorney General, for Respondent.

HIGHWAYS—assumed *risk*. Where the preponderance of the evidence showed ample signs warning of closed road and detour had been erected, and claimants ignored the signs, did not follow the detour as posted, and drove on the pavement, which had not cured, they did so at their peril, and assumed all the risks and hazards incident thereto.

FEARER, J.

Ervin Williams and 'Inez Williams, husband and wife, filed their complaint on March 18, **1953** for personal injuries and property damage to an automobile,

owned and driven by Ervin Williams, as an outgrowth of an accident on September 30, 1952, at or about the hour of 7:30 P.M., on Illinois State Route No. 1, approximately two miles north of the City of Hoopeston, Vermilion County, Illinois.

Respondent's amended answer was filed on August 19, 1953 denying each and every allegation of the complaint of Ervin Williams, and, as an additional defense, alleged that the injuries or damages, which were allegedly caused in whole or in part, or were contributed to by reason of the negligence on the part of claimant, were not caused by any negligence of respondent; or, in the alternative, if there was any negligence, it was that of some third person, firm, or corporation, over whom respondent had no control, or for whom respondent would not be responsible. As to the claim of Inez Williams, no written answer was filed. Therefore, under the rules of this Court, heretofore adopted, and specifically Rule 11, a general traverse or denial of the facts set forth in the complaint shall be considered.

The claimants, in their verified complaint, allege that, at the time and place aforesaid, Ervin Williams was driving his 1950 Studebaker Sedan in a northerly direction upon Illinois State Route No. 1, and that Inez Williams, his wife, was riding as a passenger in said automobile. The highway upon which they were traveling, approximately two miles north of the City of Hoopeston, Vermilion County, Illinois, was a paved highway of a width of approximately sixteen feet. Claimant's automobile was being operated in a northerly direction on the easterly half of said highway at a speed of approximately thirty-five miles per hour, and both of the claimants were in the exercise of due

care and caution for their own safety and the safety of others. It is further alleged that the said highway was under the control of respondent, and that it was the duty of respondent to keep and maintain said highway in a reasonably safe condition for the use of motorists traveling upon it.

The particular acts of negligence of respondent charged in the complaint were the cutting out of a portion of said highway, approximately five to eight feet in length, and two feet deep; and failure to barricade said excavation, and place lighted flares to warn persons traveling upon said highway of the repairs being made thereon. It is further alleged that respondent did not place any signs warning persons traveling upon said highway of the defective condition. The complaint also contains a general allegation of the negligence of respondent in failing to warn persons using said highway of its dangerous condition. As a direct and proximate result thereof, both claimants sustained severe personal injuries, and property damage to the automobile, and each pray for damages in the amount of $7,500.00.

A Departmental Report was offered in evidence, made an exhibit, and, under the rules of this Court, the pertinent portions thereof are considered as evidence offered by respondent. The Departmental Report makes reference to the fact that Illinois Route No. 1 is also designated and known as Federal Aid Route No. 1, and, having this designation, is a part of the system of State Highways, particularly that part of said Route No. 1 between points near the cities of Hoopeston, Vermilion County, and Milford, Iroquois County. It, therefore, is under the jurisdiction of the Department of Public Works and Buildings, Division

of Highways, for all purposes of construction, reconstruction, repairs, maintenance and operation.

On May 16, 1952, the respondent, through the Department of Public Works and Buildings, let a contract for repaving that part of Route No. 1 between points one and one-half miles north and two and three-fourths miles south of the Wellington Road connection in Iroquois County. A letting was also held at the same time for the widening of two slab bridges on said section of Route No. 1. The southern-most bridge is approximately two and one-quarter miles south of the Wellington Road connection. The contracts were awarded to the Orr Construction Company.

As of September 30, 1952, the pavement on Section 17R, referred to in the Departmental Report, had been completed with the exception of the twenty foot approach slabs at the north and south ends of the south bridge on Section 17RB. The openings referred to were 24 feet in length (full width of pavement), 20 feet wide, and approximately 20 inches in depth. The bridge approach slabs had not been poured, and the highway shoulders were not finished. The entire section of the highway'referred to from Route U.S. No. 24 to the Vermilion-Iroquois County Line was closed to through or regular traffic. Local property owners were permitted ingress and egress by way of the finished pavement, and regular or through traffic was detoured around the construction projects.

Northbound traffic on Route No. 1 was detoured west on State Route No. 9 to State Route No. 49; thence north on State Route No. 49 to Route U.S. No. 24; thence east on Route U.S. No. 24 to its junction with Route No. 1. Route No. 9 is two miles south of the Vermilion-Iroquois County Line road; two and

three-fourths miles south of the south end of the pavement project, and three and one-quarter miles south of the bridge where the accident occurred.

The reflectorized signs referred to, notifying northbound motorists that Route No. 1 was closed between the Vermilion-Iroquois County line and Route U.S. No. 24 were as follows:

A 42" by 42" sign located on the east highway shoulder of Route No. 1, and bearing the message "DETOUR". This sign was 1000 feet south of Route No. 9.

A 15" by 30" sign located on the east highway shoulder of Route No. 1, and bearing the symbol of an arrow pointing to the left (west). This sign was 500 feet south of Route No. 9.

A 36" by 36" sign located on the east highway shoulder of Route No. 1, and 500 feet south of Route No. 9, bearing the message "ILL. 1 CLOSED NORTH TO U.S. 24—DETOUR." Also, on this sign was an arrow pointing west.

A sign 18" by 48" located at the junction of the east highway shoulder of Route No. 1 and the north shoulder of Route No. 9, and bearing the symbol of an arrow pointing west.

A 36" by 36" sign located on the east highway shoulder of Route No. 1 with the message "BARRICADE AHEAD". This sign was 600 feet south of the Vermilion-Iroquois County Line Road, and was illuminated by two kerosene torches, which were on the ground immediately in front of the sign.

The Departmental Report shows that in addition to the signs referred to, a barricade was fixed across the entire width of the pavement on Route No. 1 in line with the north right-of-way line of the Vermilion-

Iroquois County Line Road. This barricade was **36"** high, and at its center was attached a **24"** by 30″ sign with the message "ROAD CLOSED". The barricade and sign were illuminated by four kerosene torches, which were placed on the pavement immediately in front of the barricade.

Another barricade was placed across the entire width of pavement on Route No. 1 at a point three-fourths of a mile north of the Vermilion-Iroquois County Line Road. This barricade was **36"** high, and at its center was attached a **24"** by 30″ sign with the message "ROAD CLOSED". The location of this barricade could also be described as being one-half mile south of the bridge where the accident in question occurred.

Similar signs to those described above were in place to direct east and west bound traffic on Route No. 9.

In view of the fact that the testimony offered on behalf of claimants is diametrically opposed to the testimony offered on behalf of respondent, we believe that it is advisable to set forth in some detail the pertinent and competent evidence incorporated in the Departmental Report made by Earl McK. Guy, Engineer of Claims for the Division of Highways.

We are cognizant of the fact that the signs, barricades, and the illumination of signs and barricades as to re-routing and warning traffic is only material in considering the conditions just prior thereto, and at the time of the accident in question. However, it is of a corroborating nature, when the testimony of certain witnesses for respondent is considered. It should also be pointed out at this time that the Departmental Report of Mr. Guy has not been contradicted by any

testimony, other than that offered by claimants' witnesses in describing what they observed in and around the location where the accident occurred.

The witnesses to whom we refer are Ervin Williams and Inez Williams, his wife, claimants, neither of whom saw any signs, barricades, or other devices whatsoever warning motorists of the repairs being made to said highway and the approach to said bridge. They did describe the hole in the pavement in which their automobile was driven, which caused the injuries and property damage, for which they are seeking to recover. The other witness, testifying to practically the same thing on behalf of claimants, was George Hanover, who was driving some distance behind, following claimants' car. He testified that he saw them drive into the hole, and come to rest on the west side of the pavement, north of the place where there was a break in the pavement. Another witness, testifying to practically the same thing, was George Williams, the garage operator, who went to the scene of the accident the same evening for the purpose of returning the wrecked automobile to Earl Park, Indiana. Also, Roger Paul Williams, brother of Ervin Williams, testified that he went to the scene of the accident on the same evening, arriving there after the garageman, and corroborated the testimony of other witnesses for claimants.

There appears to be no conflict as to authorities cited, and the law applicable in this case. The burden of proof is upon the claimants to prove by a preponderance or greater weight of the evidence, first, that the claimants were not guilty of negligence, which in any way contributed to their own injuries; second, that the respondent was guilty of negligence, and that it was the negligence of the respondent, which was the proxi-

mate cause of claimants' injuries; and, third, the question of damages. Failure to prove any one of the above propositions would defeat claimants' right to recover.

We have not commented on the medical testimony, as there is no question but what both of the claimants received personal injuries and property damage, which are quite extensive, and which are not questioned by the respondent.

We do believe it is necessary to go into some detail as to the testimony of respondent's witnesses in view of the Departmental Report, which was received in evidence in this case. This testimony was also very ably referred to in the Commissioner's Report filed herein; and, furthermore, for the reason that not one of claimants' witnesses observed the barricades, signs, lights, or any warning whatsoever, which seems very strange to us, where construction work was being done as extensively as at the location in question.

We must also bear in mind that the road in question was newly constructed, and had been closed completely to traffic moving in a northerly and southerly direction where the new highway was being constructed, and was open only as a means of ingress and egress to farmers living along said highway; and the only means they had of reaching the roads marked "DETOUR", which were not under construction, was by driving along the newly made shoulders adjacent to said highway.

Arthur McIntyre appears to be a completely disinterested witness. He testified that he was traveling on Route No. 1 about 8:00 P.M. on the night in question; that he lived north of the place where the accident occurred; that he was accompanied by his wife and three sons, and had driven south to Hoopeston. He

testified that there was a barricade south of the bridge; that one end of the barricade was standing, and a flare was lighted some distance from it; that, as he continued in a southerly direction, he saw another barricade extending completely across the road where the new project started, and there were three or four flares illuminating it. He further testified that there was a reflectorized sign about 600 feet south on the east side of the road at the County Line Road. He also saw several flares lying near the bridge, one of which appeared to be damaged.

George R. Willett, another witness on behalf of respondent, testified that the barricade just south of the bridge was broken, and appeared to have been hit. He further testified that there was glass on the pavement about fifty to sixty feet south of the opening near the broken barricade.

The other witnesses, who testified, were employees of the Division of Highways, Department of Public Works and Buildings, and the Orr Construction Company. These witnesses corroborate the Departmental Report, in that; (1) Reflectorized signs were in place to warn northbound motorists that Route No. 1 was closed between the Vermilion-Iroquois County Line Road and Route U.S. No. **24; (2)** All signs faced to the south; **(3) A 42"** by 42″ sign was located on the east highway shoulder of Route No. 1, approximately 1000 feet south of Route No. 9, which bore the message "DETOUR"; **(4) A** 15″ by 30″ sign was located on the east highway shoulder of Route No. 1, approximately 500 feet south of Route No. 9, bearing the symbol of an arrow pointing to the west; (5) **A 36"** by **36"** sign was located on the east highway shoulder of Route No. 1, approximately 500 feet south of Route

No. 9, bearing a sign "ILL. 1 CLOSED NORTH TO U.S. No. 24—DETOUR", and an arrow pointing to the west; (6) An 18" by 48" sign was located at the junction of the east highway shoulder of Route No. 1, 600 feet south of the Vermilion-Iroquois County Line Road, bearing the sign "BARRICADE AHEAD", and illuminated with two kerosene torches placed immediately in front of it. Their testimony further corroborated the Departmental Report, in that: (1) A barricade which was 36" high, and to which in the center was attached a 24" by 30" sign, marked "ROAD CLOSED", was across the entire width of the pavement on Route No. 1, in line with the north right-of-way line of the Vermilion-Iroquois County Line Road, and was illuminated by four kerosene torches placed on the pavement immediately in front of the barricade; (2) A similar barricade was erected about three-quarters of a mile north of the Vermilion-Iroquois County Line Road.

The witnesses for the Orr Construction Company testified as to the placing and lighting of the flares in the late afternoon. Other witnesses testified that they saw flares, barricades and signs on the evening of the accident in question.

Claimants and their witnesses testified, in addition to the failure of respondent to place barricades and signs of warning, that their automobile was being driven at a reasonable rate of speed; the mechanical condition of their car was good; there were no obstructions upon said highway; that it was dusk; that they were driving with the car lights on; that the road was dry, and visibility was good; and that they noticed nothing unusual, which would have warned them of the hole in the pavement where the accident occurred.

It is difficult for us to understand why they did

not see any signs of the construction work being done in and around the approach to the bridge for a reasonable distance, which should have been visible to them in time to bring their car under control, and thus enabled them to avoid striking the hole in the pavement. Furthermore, in deciding the question of contributory negligence, whether one of law or fact, we cannot ignore the Departmental Report as to the extensiveness of the construction of said highway and approaches to the bridges; the testimony of the employees of respondent and the Orr Construction Company; and, also, the testimony of the farmer, who lived north of where the accident occurred, and who testified that he drove past the scene of the accident on the night in question, and saw claimants' automobile.

Witnesses for both claimants and respondent testified as to a broken barricade in and near the place where claimants' car went into the broken pavement, and to glass lying near and in said hole. The witness, George R. Willett, who testified on behalf of respondent, stated that the barricade just south of the bridge was broken, and appeared to have been hit; and, that there was glass upon the pavement about fifty to sixty feet south of the opening near the broken barricade.

From the record, as it now stands, we are satisfied that the portion of the pavement referred to was new pavement; that the detour and warning signs, as set forth in this opinion, were still standing; that driving on the pavement, and on the shoulders, in making the detour where construction work was still in progress, was restricted to farmers living in the vicinity of said project, giving them the right of ingress and egress; and, that through traffic was properly warned to stay off of said newly constructed pavement.

It is, ,therefore, our opinion that if claimants ignored the signs of warning, did not follow the detour as posted, and drove on the pavement, which had not cured, and in the vicinity where the approach to the bridge was being repaired, they did so at their peril, and assumed all the risks and hazards incident thereto. The record is silent as to anything being said, or any warning or protest being offered by Inez Williams, who was riding as a passenger with her husband. Furthermore, we are of the opinion that, as to her injuries, and the injuries and property damage suffered by her husband, Ervin Williams, it was his negligence, which was the proximate cause of their personal injuries and property damage.

As previously stated, the burden of proof is upon claimants to prove by a preponderance or greater weight of the evidence that it was the negligence of respondent, which was the proximate cause of their injuries, and that they were free from any negligence whatsoever, and did not in any way contribute to their own injuries and damage. It is our opinion that claimants failed in this respect.

The award for personal injuries and property damage of Ervin Williams and Inez Williams is, therefore, denied.

(No. 4566—Claim denied.)

WAYNE ECCLES, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 23, 1964

JOHN R. SPRAGUE, Attorney for Claimant.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

HIGHWAYS—*jurisdiction.* Upon motion to dismiss, supported by affidavit, which showed that the State did not have jurisdiction over the highway in question for any purpose, claim based upon injury resulting from the use of said highway will be dismissed.

FEARER, J.

On September 11, 1953, claimant filed his claim herein.

On March 26, 1954, respondent filed a motion to dismiss, supported by an affidavit of R. R. Bartelsmeyer, Chief Highway Engineer, Division of Highways of the Department of Public Works and Buildings, wherein affiant stated that the records of the State of Illinois, Department of Public Works and Buildings, Division of Highways, disclosed that it did not have jurisdiction over State Aid Route No. 34 in St. Clair County, Illinois for any purpose of construction, reconstruction, maintenance, repair, or operation; and did not have such jurisdiction prior to, on, or after January 14, 1953, being the date of the alleged injury sustained by claimant on said highway. Affiant further stated that an investigation was made in the field, and it was disclosed that the State of Illinois did not have jurisdiction over State Aid Route No. 34 in St. Clair County, Illinois, for any purpose whatsoever.

There is also attached to said motion the affidavit of C. Arthur Nebel, Assistant Attorney General of the State of Illinois, wherein reference is made to the statutes of the State of Illinois, particularly Chap. 121, Par. 37, Ill. Rev. Stat., 1953 edition.

Affiant, Nebel, stated that the State of Illinois did not maintain State Aid Route No. 34 east of State Aid Route No. 19 in St. Clair County, Illinois. Affiant further stated that State Aid Route No. 34, east of State Aid Route No. 19 in St. Clair County, Illinois at

the place alleged in said complaint, was maintained by the County of St. Clair.

There was also filed in this cause on March 26, 1954 a proof of service of the motion filed herein. There have been no objections to the motion and suggestions in support thereof filed by claimant.

Claimant does not allege in his complaint that the respondent, Department of Public Works and Buildings, Division of Highways, had under its jurisdiction the road in question, and, as the record now stands, said highway was under the jurisdiction of the County of St. Clair, and not the State of Illinois.

The motion of respondent to dismiss is, therefore, sustained, and the case accordingly dismissed.

(No. 4573—Claim denied.)

LILA M. DALY, ADMINISTRATOR OF THE ESTATE OF JESSIE BERNARD DALY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed *April 23, 1954.*

ALBERT SCOTT and WALTER J. SEBO, Attorneys for Claimant.

LATHAM CASTLE, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

PRACTICE—*burden of proof.* If the burden of proof, which the claimant must assume, is based upon a hypothesis, coupled with a presumption of due care, it is not based on direct and conclusive evidence, but is a mere possibility, and falls short of the requirements of proving a case by a preponderance of the evidence.

HIGHWAYS—*wrongful death.* Where there were no witnesses to an accident, and the travelled portion of the highway was in good repair, claimant failed to prove case by a preponderance of the evidence.

TOLSON, C. J.

Lila M. Daly filed this claim on September 18, 1953 as the widow of Jessie Bernard Daly, and as the mother and next friend of his three minor children.

The complaint was later amended by joining Lila M. Daly as administrator of the estate of Jessie Bernard Daly.

The record consists of a verified complaint, transcript of evidence, amended complaint, abstract of evidence, statement, brief and argument of claimant, statement, brief and argument of respondent, and reply brief of claimant.

The claim is predicated upon the alleged wrongful death of Jessie Bernard Daly on March 21, **1953.** On the said date, at about 15 minutes before 2:00 P.M., Mr. Daly left his home, where he resided with his wife, Lila M. Daly, and their three minor children. He told his wife that he was going for a ride on a motorcycle, which he owned, and that he would return shortly. At about 2:00 P.M., the witness, Raymond Thurman, was driving south on Route No. 78 toward Canton, Illinois. As he came over a grade in the road, he saw a motorcycle in his lane of the road, and lying between his car and the motorcycle was the body of Jessie Bernard Daly. He was lying with his feet and legs on the pavement, and the rest of the body was off of the pavement on the west side of the road to the north of the entrance to the Canton Country Club. Thurman did not see the accident happen. He stopped as soon as he could, and covered the body with a blanket. Mr. Daly was not moving, and was not able to talk. He died from the injuries received, and it was subsequently discovered that he had suffered a rupture of the aorta. There apparently was no'eye witness to the accident.

Route No. 78, north from the city of Canton, Illinois, was originally constructed by the County of Fulton, but in 1928 the Department of Public Works and Buildings took over this section of highway, and

made it a part of Route No. 78. Since that time the highway has been maintained by the Division of Highways. In 1945 the brick and concrete pavement was covered with a bituminous mixture, which is a so-called "black top". The pavement is bordered on the east side by an earth shoulder seven feet in width. On March 21, 1953, a tree was located on the east border of the highway, at a point just south of the entrance to the Canton Country Club. It was from 12 to 20 inches from the edge of the pavement, and the roots extended under the pavement. The motorcycle was between 20 and 30 feet north of the entrance to the Canton Country Club, and Mr. Daly's body was about 5 feet beyond it. The north edge of the entrance to the Country Club is approximately 55 feet north of the tree in question. The bark of the tree was marked, as though it had been struck, and there appeared to be bits of flesh on the tree. Immediately to the south of the tree was a concrete culvert headwall, 29 feet long, standing 12 inches above the ground, and 28 inches from the edge of the pavement. The witness, David Settles, a State Highway Policeman, testified that to the south of the tree he saw no skid marks, but he did see tire marks, which started just south of the south edge of the headwall of the culvert, and ended at the tree. He assumed that the tire marks were made by the motorcycle of Mr. Daly. The handlebars and right side of the motorcycle were damaged. The shoulder, where the marks were located, was a mixture of dirt, sand and rock, with a little grass. It was dry, but neither hard nor soft. There was no indication in the marks of any sliding or skidding, or any indication that the motorcycle had turned back onto the pavement after leaving it south of the headwall. There

were no skid marks between the tree and the motorcycle, but there was a scuffed mark where the motorcycle may have hit the pavement.

The accident apparently occurred about 2:00 P.M. It was daylight, the pavement was dry, the day was windy, and the wind was blowing in gusts. The tree in question was a big tree, which had been growing there for many years. Mr. Daly had been riding a motorcycle for at least ten years, and was considered a good driver. The motorcycle, which he was riding, had been owned by claimant for approximately two years. Mr. Daly had lived in Canton most of his life, and had been upon this road many times. He had travelled this road as recently as two or three days before the accident.

Claimant has advanced the theory that the decedent was forced off of the road by a tremendous gust of wind, and that the State was negligent in permitting a tree to remain adjacent to the right-of-way, thereby creating a hazard and a nuisance; and, concludes that the rule of law in Illinois, as disclosed in the case of City of *Joliet* vs. *B. S. Shufelt,* **144** Ill. **403,** applies in this case, and that claimant is entitled to recover. A portion of said case reads as follows:

> "In *Joliet* vs. *Verley,* **35** Ill. **58,** we held that if **a** plaintiff while observing due care **for** his personal safety was injured by the combined result of an accident and the negligence of the City **or** Village, and without such negligence his injury would not have occurred, the City or Village will be liable, although the accident may have been the primary cause **of** the injury, if the consequences could, with common prudence and sagacity, have been foreseen and provided against."

Since there were no eye witnesses to the accident, claimant was permitted to offer evidence as to the reputation of the decedent for being a careful driver, and when such evidence is admitted, the law presumes that persons so testifying have also observed in claim-

ant instincts of self-preservation. *Hills* vs. *Richardson,* **281** Ill. App. **75.**

Respondent contends that: **(1)** The State is not an insurer against all accidents upon its highways, but is required only to keep the highways in a reasonably safe condition. *Terracino* vs. *State,* No. 4420, filed on January 8, **1952; (2)** The user of a highway is under a duty to exercise care, commensurate with the conditions known to exist. *Duffie, Et* AZ, vs. *State,* **19** C.C.R. **40;** and, finally, that claimant must prove the exercise of due care and caution, and that the burden of proof is upon claimant to establish her claim by a preponderance of the evidence.

Counsel for claimant has developed an ingenious theory, and has supported it by a scholarly brief. However, this Court, in order to accept the theory, must conclude that the motorcycle was forced off of the road by a gust of wind to *the exclusion* of *any other cause.*

It is generally conceded that motorcycle travel is a hazardous undertaking, and, beyond all dispute, more hazardous than driving a conventional automobile.

Mr. David Settle, a State Highway Policeman and a witness for the claimant, testified that he had driven a motorcycle for many years as a State Police Officer, and that a wind of such velocity, as was that on March **21, 1953,** could appreciably affect the path of a motorcycle, and that such a wind could alter the course of a motorcycle for half the width of the highway in question. He also stated that you cannot turn the front wheel of a motorcycle when it is being ridden, but that you can control it by shifting your weight, and that, if you shift your weight too far, you might fall off, or cause the motorcycle to skid.

It is pure conjecture on the part of the claimant to conclude that the motorcycle was forced off of the road by a gust of wind to the exclusion of any other cause. This hypothesis is reasonable, and it may in truth be the fact, but it is still a hypothesis. If it is possible to turn a motorcycle by the mere shifting of the weight of the body of the driver, it is just as reasonable to assume that the decedent shifted his weight, and caused the motorcycle to leave the pavement.

If the burden of proof, which the complainant must assume, is based on a hypothesis, coupled with a presumption of due care, it becomes quite obvious that the claimant's case is not grounded on direct and conclusive evidence, but is a mere possibility, and, therefore, falls short of the requirements of proving a case by a preponderance of the evidence.

Taking the complainant's theory in its most favorable light, i.e., that a gust of wind forced the motorcycle off of the pavement, the Court is then presented with the problem as to whether or not the decedent drove the motorcycle commensurate with the conditions, which were known to exist, and, since driving a motorcycle under such conditions presents extraordinary risks, this Court cannot say that a general reputation for being a good driver will satisfy this requirement of the law.

There is no dispute with the law, as is presented in the case of *Joliet* vs. *Shufelt, supra,* but the distinction between the two cases is quite evident. In the Shufelt case, the cause of the initial accident was a broken driving rein. In the instant case, the Court does not know by a preponderance of the evidence what caused the initial accident, and must, therefore, conclude that

the line of cases presented by the claimant are not controlling.

The presence of the elm tree, located adjacent to the highway, undoubtedly presented a needless hazard to the driving public, but this Court cannot say that its location was negligence per se. If the evidence in this case disclosed that the decedent struck the head-wall of the culvert instead of the tree, there would be no question but what the Court would be obliged to deny liability. The fact that the tree was closer to the highway than the culvert is not such a distinction in fact, which would enable the Court to arrive at any different conclusion, for the fact remains that the travelled portion of the highway was in good repair, and provided adequate and safe use under normal conditions.

For the reason that claimant has failed to prove her case by a preponderance of the evidence, the claim must be denied.

CASES IN WHICH ORDERS OF DISMISSAL WERE ENTERED WITHOUT OPINION

4105 C. E. Conkwright
4229 Charles Sickman, Et Al
4280 Anderson Electric Inc., A Corporation
4303 Mabel Lyvers, Admx., Et Al
4359 Orpha Ohlweiler
4405 Jennie D. Rundle
4419 Albert Moore, Et Al
4423 Percy W. Herald
4433 Lawrence A. Rippberger
4443 Esta K. Richerson
4464 Clear Creek Drainage and Levee District of Union and Alexander Counties, Illinois
4485 Ethel M. Bialeschki, Widow, Et Al
4487 Abe and Josephine Vasquea
4488 Jo Anne Vasquea, Et Al
4489 Joseph Delehanty
4501 Excess Insurance Company of America
4533 Hibbard, Spencer, Bartlett and Company, An Illinois Corporation
4535 Clarence Lahr, Et Al
4542 Carl Nork
4548 Janet Butterly
4591 Mary Stover
4606 Mabel Danielson

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