

STATE OF WISCONSIN CLAIMS BOARD

The State of Wisconsin Claims Board convened on November 15, 2007, at the State Capitol Building and on November 29, 2007, at the Department of Administration Building, in Madison, Wisconsin to consider the claim of Georgia Thompson against the State of Wisconsin, Department of Administration.

The Board Finds:

Claim for damages related to defense of federal criminal charges arising from the performance of the claimant's duties as a DOA employee. In January 2006, a federal grand jury indicted the claimant, charging misapplication of funds and theft of honest services. The indictment alleged that the claimant, as a member of the evaluation committee for a state travel procurement, intentionally influenced the vendor selection process for the political advantage of her supervisors and to help her own job security. The claimant plead not guilty and vigorously defended against the charges, but was convicted and sentenced to 18 months in prison with a \$4,000 fine. The claimant began serving her sentence on November 27, 2006. She appealed her conviction and on April 5, 2007, within two hours of hearing oral argument, the Seventh Circuit Court of Appeals reversed her conviction and ordered her acquittal and immediate release from prison that very day. The court's decision makes it clear that the claimant's actions were proper and lawful. The claimant is not able to bring a claim under § 895.46(1) or § 775.05, Stats., but instead makes a claim for reimbursement based on equitable principles, because the criminal charges against her were based on the proper and lawful discharge of her duties as a state employee. The claimant believes that reimbursement of a state employee's legal fees in a case such as this is appropriate and just and is also good public policy. The claimant requests reimbursement for her legal fees, fines, assessments and taxes relating to this claim.

The Department of Administration supports payment of this claim. DOA had no role in the charges brought against the claimant and the claimant is not alleging any negligence on the part of any DOA employee, however, the claim is filed "against" DOA because the charges involved discharge of the claimant's duties as an employee of DOA. At no time during the travel procurement, criminal investigation or trial has DOA alleged that the claimant abused her discretion or acted outside the scope of her employment and DOA promptly re-employed the claimant upon her release from prison. DOA states that the claimant has been and remains a hard-working, respected and dedicated employee. DOA points to the fact that the Seventh Circuit Court of Appeals took the unusual step of calling for her immediate release from prison, noting that the evidence against her was "beyond thin." DOA believes that the claimant has suffered much because of her imprisonment for a crime she did not commit. DOA points to the fact that state employees from all agencies in state government, including the legislature and the court system, routinely exercise discretion in the proper discharge of their duties. DOA does not believe that these employees, acting in good faith and exercising their best judgment based on established law and policy, should work in fear of facing criminal charges for making the "wrong" decision, and when acquitted, not receiving appropriate restitution for the damages they suffer. DOA agrees with the claimant's analysis that relief is not available to her under § 895.46(1) or Chapter 775, Stats., and requests that the Board reimburse the claimant based on equitable principles.

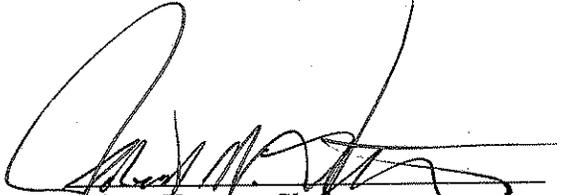
The Board recommends that the legislature direct the Department of Administration to pay Hurley, Burish and Stanton, S.C. directly for defending Ms. Thompson, its employee, against federal criminal charges arising from the performance of her duties as a DOA employee. Wis. Stats. § 895.46(1) requires the state to pay reasonable attorney's fees and costs its employees incur while defending civil and some criminal actions taken against them by virtue of state employment. The Board

concludes that although indemnification of Ms. Thompson in this particular criminal prosecution is not specifically contemplated by § 895.46(1), indemnification of Ms. Thompson furthers the purpose of that statute and is equitable in light of Ms. Thompson's acquittal. The legal fees, fines and assessments incurred in this matter are an obligation of the employer (State of Wisconsin) rather than its employee (Ms. Thompson). Such an indemnification eliminates Ms. Thompson's obligation to pay the fees and costs and therefore creates no tax burden for Ms. Thompson when the State of Wisconsin is instead obligated to pay them directly. Finally, the Board concludes that the attorney's fees incurred in this matter are reasonable and recommends that the Legislature direct the Department of Administration to pay the fees, fines and assessments in full in the amount requested, \$228,792.62. The Board further recommends that payment should be made from the Department of Administration appropriation § 20.505(1)(kf), Stats.

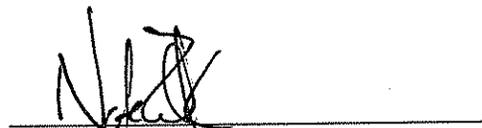
The Board recommends:

Payment of \$228,792.62 be made to Hurley, Burish and Stanton, S.C., by the State of Wisconsin from § 20.505(1)(kf), Stats., for the defense costs, fines and assessments of State of Wisconsin employee Georgia Thompson.

Dated at Madison, Wisconsin this 4TH day of DECEMBER, 2007.


Robert Hunter, Chair
Representative of the Attorney General


Cari Anne Renlund, Secretary
Representative of the Secretary of
Administration


Nate Zolik
Representative of the Governor


Mark Miller
Senate Finance Committee

STATE OF WISCONSIN CLAIMS BOARD

The State of Wisconsin Claims Board convened on November 15, 2007, at the State Capitol Building and on November 29, 2007, at the Department of Administration Building, in Madison, Wisconsin to consider the claim of Anthony Hicks.

The Board Finds:

The claimant's original innocent convict claim was filed on November 26, 1997. At that time, the claim was placed in abeyance pending the resolution of a lawsuit against the claimant's trial attorney, which was settled in December 2004. Additional documentation was requested from the claimant and that information was submitted in November 2005. The claim was scheduled for hearing before the Board on December 13, 2006. At that meeting the Board voted unanimously to pay the claimant \$25,000 compensation for his wrongful imprisonment, plus attorney's fees in the reduced amount of \$53,030.86. (Reduced from the requested amount of \$106,061.71.) Payment was made in the form of one check in the amount of \$78,060.36 to the trust account of the claimant's attorney.

On January 17, 2007, the claimant filed a Petition for Rehearing of the Claims Board Decision specifically relating to the matter of attorney's fees.

On January 19, 2007, the claimant's attorney requested that the Board issue a separate payment check of \$25,000 to Mr. Hicks, so that his compensation would not be delayed pending resolution of the attorney's fees question. The Board Secretary requested return of the original check and then issued a new check in the amount of \$25,000. On January 25, 2007, the claimant's attorney requested that the Board issue another check in the amount of the original award for attorney's fees, since the Petition for Rehearing only addressed the question of whether any additional attorney's fees should be awarded. The Board Chair denied that request.

On February 2, 2007, the Board considered whether to grant the Petition for Rehearing and also considered the request for partial payment of attorney's fees. The Board unanimously voted to vacate the portion of its December 13, 2006, decision relating to attorney's fees. The Board referred the issue to the Division of Hearings and Appeals for consideration before a Hearing Examiner. The Board specifically requested that the Hearing Examiner address six questions relating to the authority of the Board to issue awards for attorney's fees under § 775.05, Stats. The Board denied the request from the claimant's attorney for partial payment of the attorney's fees pending resolution of the Petition for Rehearing.

The Hearing Examiner has submitted his Proposed Decision to the Board on the Petition for Rehearing and the questions submitted by the Board for his consideration. The matter at issue before the Board today is whether or not to adopt the Proposed Decision submitted by the Hearing Examiner as the Claims Board's Decision on this matter.

The Board concludes that the Proposed Decision of the Hearing Examiner should be adopted in part and rejected in part.

The Board disagrees with the Hearing Examiner's conclusion that the Board may not award attorney's fees and costs in addition to statutorily capped compensation awards pursuant to § 775.05, Stats. and rejects that portion of the Proposed Decision. The legislative history presented by the Hearing Examiner is not conclusive and not enough to depart from Board determinations in previous § 775.05 claims, including the December 19, 2002, Frederic Saecker decision, the December 2, 2004, Steven Avery decision and the December 13, 2006, Anthony Hicks decision. *See Claim of Saecker*, Claim No. 1999-040-CONV (2002); *Claim of Avery*, Claim No. 2004-066-CONV (2004); *Claim of Hicks*, Claim No. 1997-135-CONV (2006). Accordingly, the Board concludes it has the authority to award attorney's fees and costs in addition to statutorily capped compensation awards made pursuant to § 775.05, Stats.

However, the Board does adopt the recommendation of the Hearing Examiner to utilize the Wisconsin Equal Access to Justice Act, § 814.245 (5)(a)2, Stats., ("EAJA") as a method to determine the appropriate amount of attorney's fees to award in § 775.05 claims before the Board. The Board will utilize the EAJA to determine the hourly rate and multiply that by the number of attorney hours expended unless the hours claimed appear unreasonable. See Hearing Examiner's Proposed Decision, page, 4, paragraph 12, attached.

To apply this determination to the claim at hand, the Board first looks to Mr. Hicks' fees for his criminal defense attorney, Mr. Hurley. Mr. Hurley's firm was able to document spending 690.15 hours between 1992 and 1997 on Mr. Hicks' case. The EAJA rate for that time period was \$75.00 per hour as determined by the legislature in 1985. Since the EAJA rate was determined long before the work was performed, the Board concludes that a cost of living adjustment is reasonable and will utilize the cost of living calculator provided by the Bureau of Labor Statistics on their website. A small portion of Mr. Hurley's fees could not be documented or recovered. The Board will not pay the undocumented fees. Accordingly, the Board concludes that Mr. Hurley's fees will be paid in the reduced amount of \$78,591.94 broken down as follows:

Year	Hours Billed	Inflation Adjusted Rate	Total
1992	3.1	\$ 98.00	\$ 303.80
1993	158.9	\$ 101.00	\$16,048.90
1994	179.6	\$ 103.00	\$18,498.80
1995	196.4	\$ 106.00	\$20,818.40
1996	91.1	\$ 109.00	\$ 9,929.90
1997	61.05	\$ 112.00	\$ 6,837.60
			\$72,437.40
		Costs	\$ 6,154.54
			\$78,591.94

The Board now looks to Mr. Hicks' fees for his civil attorney, Mr. Olson. Mr. Olson spent a total of 94.2 hours and over \$33,000 preparing Mr. Hicks Claims Board claim. The Hearing Examiner noted that "...at \$5,000 per year, an inmate receives roughly 57 cents per hour of confinement; if Mr. Olson's fee award were approved, Hicks' attorney would receive payment equal to more than 600 times his own rate of compensation." See Hearing Examiner's Proposed Decision, paragraph 30, page 11, attached. The Hearing Examiner also noted that "with all due respect to Attorneys Olson and Dixon, where an inmate's conviction has already been reversed based on new evidence of the inmate's innocence, the task of obtaining the full recovery available from the Claims Board should not typically require extraordinary skill or expertise. This is all the more likely, where, as here, the prosecutor does not oppose payment of the claim." See Hearing Examiner's Proposed Decision, paragraph 52, page 16, attached. The Board concludes that the number of hours submitted by Attorney Olson was excessive.

A similar Claims Board claim presented at this same meeting by Ms. Georgia Thompson, required only 16 hours of preparation by a qualified attorney, in contrast to the 94.2 hours spent by Attorney Olson and his firm. Sixteen hours appears to have been adequate. The Board recognizes that Mr. Hicks' claim involved the additional step of submitting briefs to the Hearing Examiner regarding the Board's authority to award attorney's fees in addition to statutorily capped compensation, and therefore concludes that additional time to prepare the claim was necessary. The Board concludes that doubling the time it took a

qualified attorney to prepare a similar claim for the Board could reasonably account for the extra effort necessary to prepare briefs for the Hearing Examiner. Accordingly, the Board concludes that 32 hours is a reasonable number of hours for which to compensate Mr. Olson. The Board allocates these 32 hours proportionally across the years in which the work was performed, based on the original annual hours reported by Mr. Olson. The Board again applies the hourly rate provided in the EAJA and adjusts it for inflation.

Therefore, the Board concludes that Mr. Olson will be paid in the reduced amount of \$6,175.70, calculated as follows:

Year	32 Hours Allocated by % of Hours Billed	Inflation Adjusted Rate	Total
1997	0.4	\$ 112.00	\$ 44.80
1998	0.1	\$ 114.00	\$ 11.40
2000	0.4	\$ 120.00	\$ 48.00
2004	0.6	\$ 150.00	\$ 90.00
2005	14.2	\$ 155.00	\$ 2,201.00
2006	1.8	\$ 160.00	\$ 288.00
2007	14.5	\$ 165.00	\$ 2,392.50
			\$ 5,075.70
		Costs:	\$ 1,100.00
			\$ 6,175.70

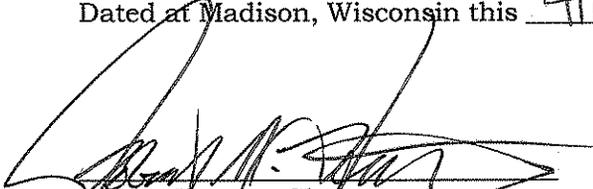
The Board further concludes, under authority of § 16.007(6m), Stats., that payments for Mr. Hurley and Mr. Olson should be made from the Claims Board appropriation § 20.505(4)(d), Stats.

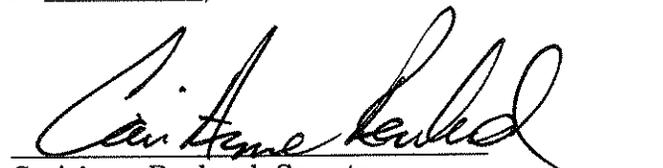
The Board concludes:

That payment of the following amounts to the following entities on behalf of the claimant from the following statutory appropriations is justified under s. 16.007, Stats:

Stephen Hurley	\$78,591.94	§ 20.505(4)(d), Stats.
Jeff Scott Olson	\$6,175.70	§ 20.505(4)(d), Stats.

Dated at Madison, Wisconsin this 4TH day of DECEMBER, 2007.


Robert Hunter, Chair
Representative of the Attorney General


Cari Anne Renlund, Secretary
Representative of the Secretary of Administration


Nate Zolik
Representative of the Governor


Mark Miller
Senate Finance Committee



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Claim of
Anthony Hicks

Case No. CB-07-0001

PROPOSED DECISION

PRELIMINARY FINDINGS

1. By claim filed November 26, 1997, Anthony Hicks has sought compensation from the State of Wisconsin through the Wisconsin Claims Board under Wis. Stat. § 775.05 as an innocent person convicted of a crime. The claim was initially held in abeyance pending the resolution of a lawsuit against Hicks' attorney, which was settled in December 2004. Additional documentation was requested from Hicks, which was submitted in November 2005. Pursuant to standard procedure, the claim was forwarded to the original prosecutor, who responded in support of the claim. The claim was scheduled for hearing before the Board on December 13, 2006. At that meeting the Board voted unanimously to pay Hicks \$25,000 compensation for his wrongful imprisonment, plus attorneys' fees in the reduced amount of \$53,030.86.

2. On January 17, 2007, Hicks filed a Petition for Rehearing of the Claims Board Decision specifically relating to the matter of attorneys' fees. Additional information was filed in support of the attorneys' fee claim. On February 2, 2007, the Claims Board vacated the portion of its December 13, 2006, decision relating to attorneys' fees and granted Hicks' Petition for Rehearing on that portion of his claim. In the same Order, the Board referred the attorneys' fees portion of Hicks' claim to the Division of Hearings and Appeals for consideration by a hearing examiner and issuance of a proposed decision for the Board's consideration. The order of referral specifically identified the following questions to be addressed in the hearing examiner's proposed decision:

1. Does the limit on compensation to be paid by the board under § 775.05(4) include any amount to which the board finds the petitioner is entitled for attorneys fees, costs and disbursements?
2. Does § 227.485, Stats., § 814.245(5)(a)2, Stats., or any other statute limit the amount of attorneys' fees which may be granted under § 775.05, Stats?
3. Should the Petitioner be permitted to submit additional evidence or information related to attorneys' fees which was not presented with the original claim?

4. Does the fact that the Petitioner received a settlement from his original attorney in an amount which is unknown to the board affect the appropriate award of attorneys' fees?
5. Does the board have discretion to determine the appropriate attorneys' fees awarded?
6. If attorneys' fees should be awarded, what are the appropriate attorney's fees which should be awarded:
 - a. for the post conviction defense of the Petitioner?
 - b. for the preparation and presentation of the claim before the Claims Board?

3. The Dane County District Attorney's Office was notified of the proceedings before the Division of Hearings and Appeals but indicated it did not ask to be heard in the matter. A schedule was established for appellant's submission of argument and additional evidence on the questions raised in the Board's order. Claimant's submissions were received on May 21, 2007, at which time the matter became ripe for decision.

4. Pursuant to Wis. Stat. § 227.47(1), the following persons or entities participated in and are certified as PARTIES to this proceeding:

Anthony Hicks, by

Attorney Jeff Scott Olson
The Jeff Scott Olson Law Firm, S.C.
131 West Wilson Street, Suite 1200
Madison, WI 53703

Based on the entire record of the case, the administrative law judge recommends that the Claims Board adopt the following Findings of Fact, Conclusions of Law and Order as the final decision in this matter.

FINDINGS OF FACT

5. As noted above, the Board approved Anthony Hicks' claim that he was convicted of a crime for which he was innocent, giving the statutory maximum of \$25,000. In December 1991, Hicks was convicted of robbery, burglary and sexual assault. He was subsequently sentenced to 19 years in prison. Hicks was released on bail on July 23, 1996, following the Wisconsin Supreme Court's order granting him a new trial, having been incarcerated for more than four and a half years. Charges against Hicks were dropped on April 23, 1997, after new DNA tests were shared with the prosecution in preparation for the new trial ordered by the Wisconsin Supreme Court. (Olson Aff., Nov. 17, 2005)

6. Attorney Jeff Scott Olson is the lawyer who has principally represented Mr. Hicks before the Board in these proceedings. Attorney Amy Dixon, who worked with Mr. Olson for some the time that Olson was representing Hicks, also helped on the claim. As set out in Mr. Olson's November 17, 2005, affidavit, between November 4, 1997, and November 16, 2005, Mr. Olson billed a total of 21.3 hours on Mr. Hicks' claim, while Ms. Dixon billed a total of 24.9 hours. Broken down by calendar year for the years 1997-2003 and 2005 and by six-month periods for 2004, the billed hours for these two attorneys were as follows:

	Mr. Olson	Ms. Dixon
1997	1.0	0.0
1998	0.3	0.0
1999	0.0	0.0
2000	1.1	0.0
2001	0.0	0.0
2002	0.0	0.0
2003	0.0	0.0
2004 (1 st half)	0.0	0.0
2004 (2 nd half)	1.8	0.0
2005	17.1	24.9

(Olson Aff., Nov. 17, 2005, Ex. H)

7. In his November 17, 2005, affidavit, Attorney Olson applied an hourly rate of \$365 to the hours he had billed on Mr. Hicks' claim, to derive a total fee of \$7,774.50 for services rendered on or before that date. An hourly rate of \$270 was applied to Ms. Dixon's hours, to derive a total fee of \$6,723. Total attorneys' fees being claimed for Mr. Olson and Ms. Dixon's services as of November 17, 2005, were \$14,497.50.

8. Mr. Olson's November 17, 2005, affidavit indicated disbursements of \$1,100.10 for copying/Xerox printing. (Olson Aff., Nov. 17, 2005, Ex. H) Adding this amount to Mr. Olson's and Ms. Dixon's attorneys' fees gave a grand total of \$15,597.60 in fees and disbursements claimed as of that date by the Olson Law Firm.

9. Having reviewed the initial (November 17, 2005) fee and cost submission of Attorneys Olson and Dixon, as well as the substantive submissions to the Claims Board made on Mr. Hicks' behalf, the hearing examiner is unable to conclude that either hours billed or total disbursements were unreasonable. (Olson Aff., Nov. 17, 2005, Ex. H)

10. Following referral of the attorneys' fee issue to the Division of Hearings and Appeals, Attorney Olson submitted a supplemental affidavit indicating that he had billed 48 hours for services rendered subsequent to Mr. Hicks' November 17, 2005, Claims Board filing. Multiplying 48 hours times Mr. Olson's hourly rate of \$365 yields \$17,500 as total fees claimed for this period. No additional expenses are claimed. A total of 5.2 hours are shown as billed for services rendered in 2006, with the remaining 42.8 hours are for services in 2007. (Olson Aff., May 18, 2007, Ex. #)

11. Having reviewed the fee submission of Attorney Olson for services rendered after November 2005, as well as the submissions made on Mr. Hicks' behalf during that period both to the Claims Board and to the Division of Hearings and Appeals, the hearing examiner is unable to conclude that hours billed were unreasonable. (Olson Aff., May 18, 2007, Ex. C)

12. As set out in the Conclusions of Law, this decision recommends that the Board rule that it lacks authority to award an innocent convict claimant an amount greater than the \$25,000 overall statutory maximum, which Hicks has already received. This decision goes on to recommend that the Board recommend to the Legislature that it award Hicks an additional amount in order to compensate him for his attorneys' fees and costs, using the level of recoverable fees established in Wis. Stat. §§ 227.485 and 814.245(5)(a). The attorneys' fee rate under these statutes for services rendered prior to July 1, 2004, was \$75 per hour, inflated for cost of living increases. The statutory rate of \$75 per hour became effective in November 1985. The Bureau of Labor Statistics is the federal agency that calculates the Consumer Price Index. The Bureau's website's inflation calculator shows that \$75 in 1985 had the same buying power as \$112 in 1997, \$114 in 1998, \$116 in 1999, and \$120 in 2000 (all derived values rounded). Multiplying these amounts times Attorney Olson's hours in 1997, 1998, and 2000, gives the following an inflation-adjusted totals:

1997: 1.0 hours x \$112/hour = \$112

1998: 0.3 hours x \$114/hour = \$ 34

2001: 1.1 hours x \$120/hour = \$132

Total: \$278

13. The attorneys' fee rate under Wis. Stat. §§ 227.485 and 814.245(5)(a) was increased to \$150 per hour, inflated for cost of living increases, effective July 1, 2004. The Bureau of Labor Statistics' website's inflation calculator shows \$150 in 2004 having the same buying power as \$155 in 2005, \$160 in 2006, and \$165 in 2007 (all derived values rounded).

Multiplying these amounts times Attorney Olson's hours in 2004, 2006, and 2007, and times Attorneys Olson and Dixon's hours in 2005, gives the following an inflation-adjusted totals:

2004: (2 nd half):	1.8 hours x \$150/hour	= \$ 270
2005:	42 hours x \$155/hour	= \$ 6,510
2006:	5.2 hours x \$160/hour	= \$ 832
2007:	42.8 hours x \$165/hour	= \$ <u>7,062</u>
Total:		= \$14,674

14. Attorney Stephen Hurley represented Mr. Hicks in the post-conviction and appeal proceedings that resulted in the reversal of his conviction and his release from prison. Mr. Hicks' November 17, 2005, Claims Board submission included an affidavit from Mr. Hurley which explained that his firm had changed its computerized billing systems since representing Hicks and that as a result the firm was not able to produce an itemization of all of Hicks' accrued charges for attorneys' fees and expenses. Nevertheless, as of November 17, 2005, Attorney Hurley was able to represent that his firm's accrued fees for representing Hicks totaled \$90,464.11, and that of this amount, the firm had received only \$24,362.00 in payment. (Hurley Aff., Nov. 14, 2005)

15. After the Board approved Hicks' claim, including reduced payment of his attorneys' fee request, Attorney Hurley submitted an affidavit attaching detailed billing records for the period December 1992 to November 2000. Attorney Hurley's affidavit states that earlier attempts to compile these records had been unsuccessful. His affidavit explains that the reason he was able to compile the records at this time was that his office manager determined that they could be compiled through a time-consuming process of looking through all billing records for all clients, which, unbeknownst to Mr. Hurley, were maintained in a paper form at a second off-site storage location. Mr. Hurley went on to explain that records older than December 1992 had been destroyed and could not be recovered electronically due to the switch in billing systems. For the period December 1992 to November 2000, Attorney Hurley's firm billed \$80,897.75 on an hourly basis for services rendered to Mr. Hicks and had expenses totaling \$6,227.26. Mr. Hurley states in his January 17, 2007, affidavit that total billings for Mr. Hicks were close to or exceeded \$100,000. (Hurley Aff., Jan. 17, 2007, ¶¶ 11-14, Exs. A and B)

16. Although Exhibit B to Attorney Hurley's January 17, 2007, affidavit provides a summary of the amounts billed to Hicks for services rendered, it does not show the number of attorney hours billed, either in total or by year. With difficulty, it might be possible for the Board or its hearing examiner to extract hour totals per year. However, aside from the difficulty of the task, there is a reasonable chance that someone unfamiliar with Mr. Hurley's billing system would make mistakes in this calculation. (Hurley Aff., Jan. 17, 2007, Exs. A and B)

17. Having reviewed the attachments to the January 17, 2007, affidavit of Attorney Hurly, the hearing examiner is unable to conclude that either hours billed by Mr. Hurley's firm or its total disbursements were unreasonable. However, five hours are billed for Attorney Hurley's being deposed and testifying in Hicks' malpractice action against his original defense attorney.

18. In support of his petition for rehearing, Hicks submitted the affidavits of several prominent attorneys who were not seeking fees: Michael Fox, Hal Harlowe, Percy Julian, Robert Kasieta, Mary Kennelly, Stephen Meyer, Stephen Morgan, Patrick Patterson, Lester Pines, and Sally Stix. The affidavits generally support the number of hours expended by Mr. Olson and Ms. Dixon on Hicks' claim and their hourly rates and offer an opinion as to the purpose for the Claims Board being able to award attorney's fees on innocent convict claims. The attorney affiants generally express the view that a significant reduction in the amount billed by defense counsel and counsel before the Claims Board would "both a) deter qualified criminal defense attorneys from attempting to assist innocent persons in securing their exonerations, and b) deter qualified civil litigators from representing them before the Claims Board once they are exonerated, or create a climate in which such lawyers charge a percentage of the innocent person's already woefully inadequate compensation in addition to the Claims Board award of fees to them." (Stix Aff., ¶ 21) Mr. Olson's and Mr. Hurley's rehearing affidavits express similar views but from the perspective of retained counsel. (Olson. Aff., Jan. 17, 2007; Hurley Aff., Jan. 17, 2007)

19. Attorney Hurley's affidavit indicates that he billed at an hourly rate of \$150 for himself and \$95-\$120 for other attorneys in his firm working on Hicks' post-conviction efforts. Hicks submitted affidavits from other attorneys stating that Mr. Hurley's rates were within the range of hourly rates customarily charged by attorneys of similar skill, reputation, experience, and ability in the Madison area for the period in question.

20. Hicks submitted affidavits from several attorneys in support of his petition for rehearing stating that the rates charged by Attorneys Olson and Dixon were within the range of hourly rates customarily charged by attorneys of similar skill, reputation, experience, and ability in the Madison area for the period in question. Because this decision concludes that the Board lacks the authority to award additional fees to Hicks or his attorneys and because it recommends that the Board recommend to the Legislature that Hicks' attorneys be reimbursed pursuant to the formula established in the Equal Access to Justice Act, no finding is made as to whether Attorneys Olson's or Dixon's or Hurley's fees are customary or reasonable, or necessary to induce competent counsel to handle innocent convict claims or pursue post-conviction relief.

21. As set out above and summarized on the last page of his brief filed with the Division of Hearings and Appeals, Hicks' fee claim seeks \$87,175.01 for Attorney Hurley and his firm's work, \$15,597.60 for Attorney Olson and his firm's work through the filing of the Claims Board petition in November 2005, and \$17,520.00 for Attorney Olson and his firm's work since the filing of the Claims Board petition, or a total of \$120,292.61. These amounts include disbursements.

22. In his brief filed with the Division of Hearings and Appeals, Attorney Olson represents that a jury rendered a verdict of \$2,606,950 in favor of Hicks and against his original defense attorney. Mr. Olson further represents that following remand from the Court of Appeals, Hicks' malpractice claim was compromised for less than 4% of the original verdict. The compromised amount was based largely on the fact that Hicks' original attorney did not carry professional liability insurance. (Olson Aff., May 18, 2007, ¶ 5)

CONCLUSIONS OF LAW

23. Wisconsin Statutes § 775.05 provides:

Compensation for innocent convicts. (1) The claims board shall hear petitions for the relief of innocent persons who have been convicted of a crime.

(2) Any person who is imprisoned as the result of his or her conviction for a crime in any court of this state, of which crime the person claims to be innocent, and who is released from imprisonment for that crime after March 13, 1980, may petition the claims board for compensation for such imprisonment. Upon receipt of the petition, the claims board shall transmit a copy thereof to the prosecutor who prosecuted the petitioner and the judge who sentenced the petitioner for the conviction which is the subject of the claim, or their successors in office, for the information of these persons.

(3) After hearing the evidence on the petition, the claims board shall find either that the evidence is clear and convincing that the petitioner was innocent of the crime for which he or she suffered imprisonment, or that the evidence is not clear and convincing that he or she was innocent.

(4) If the claims board finds that the petitioner was innocent and that he or she did not by his or her act or failure to act contribute to bring about the conviction and imprisonment for which he or she seeks compensation, the claims board shall find the amount which will equitably compensate the petitioner, not to exceed \$25,000 and at a rate of compensation not greater than \$5,000 per year for the imprisonment. Compensation awarded by the claims board shall include any amount to which the board finds the petitioner is entitled for attorney fees, costs and disbursements. If the claims board finds that the amount it is able to award is not an adequate compensation it shall submit a report specifying an amount which it considers adequate to the chief clerk of each house of the legislature, for distribution to the legislature under s. 13.172(2).

(5) The claims board shall keep a complete record of its proceedings in each case and of all the evidence. The findings and the award of the claims board shall be subject to review as provided in ch. 227.

Does the limit on compensation to be paid by the board under § 775.05(4) include any amount to which the board finds the petitioner is entitled for attorneys fees, costs and disbursements?

24. Adopting the hearing examiner's attorneys' fee decision in *Claim of Saecker*, Case No. CB-01-004, the Board has previously ruled that attorneys' fees and costs awarded under Wis. Stat. § 775.05(4) are not to be paid out of the claimant's award. After finding the fee award portion of the statute to be ambiguous, the hearing examiner in *Saecker* wrote:

I believe that in enacting § 775.05(4), the Legislature intended to confer on the Claims Board the discretion to determine an amount that would fairly compensate a person who has been falsely convicted of a crime for his or her reasonable attorneys fees. I also believe that the Legislature intended that this amount be in addition to the amount awarded to compensate a claimant for his or her imprisonment.

The language of the statute denotes the exercise of discretion. Moreover, the Board is instructed that attorneys fees and costs are to be "included" in the petitioner's compensation. If the statute were interpreted as requiring an innocent convict to pay his attorney out of the amount paid to compensate him for his imprisonment, fees would not be included in the awarded compensation, but subtracted from it. To require a claimant's fees to be paid from his or her compensation award could easily leave the claimant without any award at all, since compensation is capped at \$5,000 for each year of imprisonment and \$25,000 overall. There is also little reason for the Legislature to direct the Board to determine the amount of a claimant's attorney fees, if the amount is to be paid from the award. The claimant and the attorney are capable of establishing this sum by private agreement.

The possibility that the Legislature intended fees to be awarded only if another statutory basis is present is not a reasonable construction of § 775.05(4). If another statute already entitles the petitioner to fees and costs, there is no reason for § 775.05(4)'s fee provision, and this part of the statute would be superfluous.

The only two candidates for a petitioner's claiming fees that I am aware of are the two statutes already alluded to—the federal Civil Rights Attorneys Fee Statute, 42 U.S.C. § 1988, and Wisconsin's Equal Access to Justice Act, Wis. Stat. § 227.485.

Of these two statutes, § 227.485 was not in existence when § 775.05(4) was enacted. Accordingly, the award of fees under the state statute could not have been in the Legislature's contemplation. Even if § 227.485 had been in existence, the same problem that Saecker faces here would preclude the award of

fees in a case before the Board. The Claims Board serves as an adjudicative or quasi-adjudicative body. If the Board rules in favor of a petitioner in an administrative proceeding—the predicate to a fee award under § 227.485—then the petitioner cannot claim that the Board's position was not substantially justified. Nor can the Board be regarded as the losing party to administrative proceedings that it has itself adjudicated and adjudicated in favor of the claimant.

For similar reasons, it is not reasonable to ascribe to the Legislature an intent that fees be awarded under § 775.05(4) only if recoverable under 42 U.S.C. § 1988. Section 1988 fees are recoverable by a prevailing civil rights plaintiff. In the appropriate case, § 1988 fees would be potentially recoverable by a person falsely convicted of a crime who claimed that his conviction resulted from a violation of his civil rights. But fees are recoverable under 42 U.S.C. § 1988 in civil actions, not in administrative proceedings, such as one before the Claims Board. In addition, § 775.05 establishes a no-fault system of compensation for innocent convicts. It is not relevant to the determination of innocence—the only issue that needs to be answered under the statute—whether the conviction in some way violated the claimant's civil rights. Because § 1988 fees would not be recoverable on a § 775.05 claim, the Legislature's purpose could not have been to authorize the Claims Board to award fees only if recoverable under the federal attorneys fee statute.

Claim of Saecker, Attorneys' Fee Decision at 6-7.

25. In *Saecker*, the Board awarded \$20,000 in attorneys' fees (in this decision, unless otherwise indicated, the term fees or attorneys' fees is intended to include recoverable costs or disbursements). This amount had been stipulated to by Saecker's attorney and the Buffalo County District Attorney, even though the district attorney's office was not held liable for the payment of the fees. The amount was also evaluated using the fee award amount established in the Equal Access to Justice Act, Wis. Stat. §§ 227.485 and § 814.245(5)(a), as a benchmark of reasonableness and fair compensation.

26. In *Claim of Avery*, the Board stated that it was "constrained by § 775.05, Stats., to a maximum of \$25,000, plus attorneys fees." The Board awarded Avery \$25,000, plus attorney's fees of \$23,791.61. The attorneys' fee awarded represented Avery's actual post-conviction attorneys' fees and expenses, but did not grant any amount to compensate the Innocence Project at the University of Wisconsin Law School, which had been instrumental in securing Avery's release, but which did not charge him for its services.

27. Wisconsin Statutes § 227.57(8) provides that a reviewing court shall reverse or remand a case to an agency if it finds that the agency's exercise of discretion is inconsistent with prior agency practice, if the deviation from prior practice is not explained to the satisfaction of the court. Such a deviation from prior agency practice will be sustained if grounded upon a rational basis. *Arrowhead United Teachers Organization v. Wisconsin Employment Relations Com'n*, 116 Wis. 2d 580, 342 N.W.2d 709. Based on further research of contemporaneous drafting documents of the Legislative Reference Bureau (on microfiche at the State Law

Library), the hearing examiner concludes that his proposed decision in *Saecker* regarding attorneys' fees was incorrect, and that legislative intent is best effected by treating a claimant's attorneys' fees as recoverable from the \$5,000 per year and \$25,000 overall statutory limits. The purpose of statutory construction is to determine and give effect to legislative intent. *State v. Setagord*, 211 Wis. 2d 397, 406, 565 N.W. 2d 506 (1997). The deviation from the award of fees in *Saecker* and *Avery* that is being proposed is viewed as necessary to carry out the Legislature's purpose and therefore satisfies the rationality requirement of Wis. Stat. §227.57(8).

28. The current language regarding the inclusion of attorneys' fees, costs and disbursements in the amount awarded under § 775.05(4) was added through the enactment of 1979 Wis. Laws ch. 126.¹ Assembly Bill 110 originally proposed increasing the amount that could be recovered without legislative action to \$15,000 per year and \$50,000 total. Another proposal would have made compensation equal to the Governor's daily salary at the time of imprisonment. Ultimately, the awardable amount was reduced to \$5,000 per year and \$25,000 overall. Other drafts reduced the burden of proof to the preponderance of the evidence standard (prior to the 1979 amendment, the statute required proof of innocence beyond a reasonable doubt), would have permitted claims to be filed while the claimant was still in prison, required claimants to relinquish their right to seek additional compensation from the Legislature by accepting the Board's award, unless the Board's decision was unanimous, and so on. The attorneys' fee language is noteworthy in two reports. First, it appeared in all versions of the bill, and second, neither its cost nor purpose was mentioned in any fiscal note. The only place in the drafting record that mentions the attorneys' fee provision is a request sheet for Representative Barry, with the following hand-written instructions:

Innocent persons damaged by imprisonment -- overall maximum of \$50,000- (legal fees and damages) - may accept claims board figure & go on to legislature if unanimous vote - otherwise must take settlement or leave it and appeal. Use preponderance of evidence rather than "beyond a reasonable doubt" standard + comp. for part of term permitted - per tel con 10/12/78

(Copy attached)

29. Making the state liable for open-ended attorney costs would have a significant fiscal impact. The lack of fiscal analysis or discussion of the new fee language in the drafting documents suggests that the new statute was not intended to establish such open-ended liability. In contrast, the provisions of the Equal Access to Justice Act, enacted six years after § 775.05's amendment, detail the procedure for seeking attorneys' fees against state agencies which have advanced unjustified positions, as well as the precise rate at which attorney time is to be paid. Under § 775.05, if the amount awarded by the Claims Board is viewed as inadequate, the Board is authorized to recommend payment of a greater amount to the Legislature, which retains plenary authority over the appropriation of state monies. Moreover, as the above language from the drafting file indicates, when the bill was first put forward, it was understood that the overall

¹ Two non-substantive changes to the innocent convict statute were also adopted as part of the 1979 session laws: the Claims Board chapter was renumbered from 285 to 775 (1979 Wis. Laws ch. 32, § 52), and gender-neutral language was added (1979 Wis. Laws ch. 176).

maximum payment--originally \$50,000--would encompass both "legal fees and damages." AB 110's provision for the inclusion of attorney fees in the Board's award survived to the final version of the statute. The substitute amendment which would have made the rate of compensation equal to the Governor's daily salary at the time of imprisonment would have also added the language, "In addition, the claims board may award compensation for any amount to which the board finds the petitioner is entitled for attorney fees, costs and disbursements." (See attachment) This language was not adopted. Finally, the statute's current language regarding fees is consistent with a purpose of allowing the Board to award attorneys' fees in combination with the compensatory portion of the award, but only up to the capped amount.

30. The above analysis is not absolutely certain--for example, the fact that a drafter understood that "legal fees and damages" would be included in the overall maximum payment is not irrefutable proof that the bill's proponent or the legislators voting for it had the same understanding. However, there is no evidence of any alternative understanding. Moreover, the authorization of open-ended fee awards could result in the Claims Board awarding multiples of the capped compensatory amounts--at \$5,000 per year, an inmate receives roughly 57 cents per hour of confinement; if Mr. Olson's fee award were approved, Hicks' attorney would receive payment equal to more than 600 times his own rate of compensation. The lack of discussion of, amendment to, or fiscal analysis of the fee provision, combined with the absence of procedural and substantive standards for making fee awards, combined with the express direction that fees and costs be *included* in the amount awarded, render this analysis significantly more plausible than the analysis in *Saecker*, which was based solely on the language of the statute, coupled with policy considerations articulated by the hearing examiner.

31. While not critical to this analysis, two principles of government law lend it further support. The first is the well-established rule that administrative bodies have only those powers which are expressly conferred or necessarily implied by the statutes under which they operate. *PSC v. Wisconsin Bell, Inc.*, 211 Wis. 2d 751, 754, 566 N.W.2d 496 (Ct. App. 1997) The second is that costs may not be taxed against the state unless expressly authorized by statute, and that statutes allowing costs are in derogation of the common law and should be strictly construed. *Martineau v. State Conservation Commission*, 54 Wis. 2d 76, 79-80, 194 N.W.2d 664, 666 (1972).

32. Taken together, and recognizing the Legislature's power to award additional compensation if the amount the Board grants is viewed as insufficient, these principles call into question the Board's jurisdiction to award amounts greater than the statutory annual and overall limits.

Does § 227.485, Stats., § 814.245(5)(a)2, Stats., or any other statute limit the amount of attorneys' fees which may be granted under § 775.05, Stats?

33. Wisconsin Statutes § 814.245(5)(a)2. is the civil action counterpart to Wis. Stat. § 227.485, which is applicable in administrative proceedings. Both statutes authorize the award of fees to a party prevailing against a state agency, unless the agency's position is found to have been "substantially justified." As the above-quoted language from *Claim of Saecker* indicates, neither Wis. Stat. § 227.485 nor Wis. Stat. § 814.245(5) fit an innocent convict claim on which

the Claims Board has acted favorably. Accordingly, the direct answer to the Board's second question is that neither statute limits the amount of attorneys' fees which may be granted under § 775.05. Nor is this hearing examiner aware of any other statute, aside from §775.05 itself, which directly limits the amount that can be awarded. However, as set out in the preceding section, this decision concludes that the Legislature did not intend to grant the Board the authority to award attorneys' fees to a claimant, where the sum of compensation and fees exceeds either the \$5,000 annual or the \$25,000 overall cap.

Should the Petitioner be permitted to submit additional evidence or information related to attorneys' fees which was not presented with the original claim?

34. This decision recommends that claimants be permitted to submit additional evidence or information related to attorneys' fees beyond what was presented with the original claim. The language of the statute does not indicate that fees, if awarded, are to be capped at the amount incurred at the time the claim is submitted.

35. A basic reason for a claimant's submitting supplemental materials regarding attorneys' fees is that his or her attorney may not have completed all the work on the claim by the time of its filing. This can happen, as it did in *Saecker*, because the claim is contested, or, as occurred here as well as in *Saecker*, because the Board or its hearing examiner requests further briefing or evidence.

36. In *Claim of Saecker*, the fees awarded Saecker as attorneys' fees included amounts for work performed after the submission of the claim.

Does the fact that the Petitioner received a settlement from his original attorney in an amount which is unknown to the board affect the appropriate award of attorneys' fees?

37. Attorneys' fees incurred in post-conviction proceedings to establish a criminal defendant's innocence would properly constitute an item of special damages in a malpractice action against the defendant's original attorney. Putting aside the \$5,000 annual and \$25,000 overall caps on compensation, awarding fees for post-conviction representation under § 775.05 could potentially result in a double recovery to such a malpractice award. In contrast, attorneys' fees expended in pursuing a claim for compensation under § 775.05 would not ordinarily constitute an item of damages in a malpractice action against original defense counsel. Accordingly, there would be no risk of double recovery, were the Board to award an amount up to the actual fees and costs of Attorneys Olson and Dixon.

38. One way of avoiding the potential for double recovery would be to inquire of the claimant as to the amount and breakdown of damages received from the prosecution of a malpractice action. Here, Attorney Olson has volunteered the information that Mr. Hicks received a jury verdict of \$2,606,950 against his original attorney, and that that amount was later compromised for "less than 4%", or less than \$104,278. While a breakdown of the jury award was not provided, given the magnitude of the discounting of the original verdict, there is little risk of double recovery, even if the Board were to award an amount up to Attorney Hurley's

actual attorneys' fees. There is no risk whatsoever of a double recovery, if the Board adopts this decision's holding that the \$25,000 maximum awarded under § 775.05(4) properly includes any award of attorneys' fees and costs.

Does the board have discretion to determine the appropriate attorneys' fees awarded?

39. As discussed above, the amounts established in § 775.05 were intended to cover both attorneys' fees and compensation for persons erroneously convicted. Under this interpretation, realistically, the Board has very little real discretion to determine the appropriate attorneys' fees to be awarded. While \$5,000 per year and \$25,000 overall are not nominal amounts, by 2007 neither amount can be regarded as capable of fully compensating an erroneously convicted individual for the loss of liberty, dignity, social standing, family relations, and earnings he or she has endured.

40. Hicks assumes that fees can be awarded *in addition to* the capped statutory amounts. With that assumption, Hicks acknowledges the Board's discretion to determine the appropriate fee award but argues that its discretion is constrained by decisions interpreting federal and state fee-shifting statutes. *See, e.g., Lynch v. Crossroads Counseling Center, Inc.*, 2004 WI App 114, 46, 275 Wis.2d 171, 684 N.W.2d 141.

41. If the Board possesses the authority to award attorneys' fees in addition to the statutory limits on compensation (contrary to the holding recommended by this decision), it would not be required to adopt Hicks' argument that under federal and state fee-shifting statutes the starting point in determining any fee award is a determination of a reasonable hourly rate--according to Hicks, his attorneys' actual billed rates--to be multiplied times a reasonable number of hours. The following discussion of Hicks' argument is presented solely in the event the Board disagrees with this decision's fundamental recommendation and rules that it has the authority to grant an innocent convict claimant fees in addition to the \$25,000 statutory maximum.

42. Hicks' reliance on federal and state case law rests on the unspoken but critical assumption that Wis. Stat. § 775.05(4) is a "fee-shifting statute." As the term implies, a fee-shifting statute shifts the costs of legal representation from the prevailing party--more often a prevailing plaintiff rather than a prevailing defendant--to the losing party, by requiring the losing party to pay some portion of the prevailing party's legal costs. Thus, for example, Wis. Stat. § 109.03(6), at issue in *Lynch*, provides that "[i]n an action by an employee . . . *against* the employer on a wage claim . . . the court may allow the prevailing party, in addition to other costs, a reasonable sum for expenses." (*Quoted at Lynch*, ¶ 36; emphasis added by hearing examiner)

43. In the case of an innocent convict claim presented to the Wisconsin Claims Board, if fees were to be awarded, they would not be assessed against a losing party in the ordinary sense of the term. In many cases, as here, the prosecutor recognizes that an unjust conviction occurred and does not oppose compensation. To the extent the prosecutor in the original conviction is regarded as the losing party--as, for example, in *Saecker*, where the claim was opposed--it is not the district attorney's office that pays the fee award, nor a state appropriation

for district attorneys, but a special legislative appropriation, from which the Claims Board can direct the payment of claims.

44. Because there is no party against whom fees are assessed, the award of fees under § 775.05 differs from the operation of a fee-shifting statute. The absence of a party liable for the prevailing party's fees means that there is no party with an incentive to critically review and advocate against the award of fees. The interests of a losing party provide an institutional check against overreaching fee claims. The Board can and will review fee applications to ensure their facial reasonableness. However, neither the Board nor its hearing examiner is in a position to elicit counter-affidavits, for example. Independent investigation is generally inconsistent with adjudication. Nor does the adjudicator wish to become adverse to a party appearing before it.

45. Further distinguishing § 775.05(4)'s fee provision from fee-shifting statutes is the lack of intended deterrence or enforcement. While the conviction of an innocent person can result from wrongful prosecutorial acts, it can also occur without any improper behavior on the part of the prosecution, the Court, or the jury. Moreover, even if a conviction has resulted from wrongful conduct, the compensation is paid directly from the state treasury, through a special Claims Board appropriation, and not as an assessment against the district attorney's office. Any deterrent to wrongful practices is likely to be attenuated at best. Finally, Hicks and his attorney-affiants ask the Board simply to take it on faith that § 775.05(4)'s reference to attorneys' fees and costs has the purpose of encouraging attorneys to pursue post-conviction relief and to bring claims for compensation for wrongfully convicted individuals before the Claims Board. No legislative historical materials have been presented in support of this presumed purpose. Whether attorneys might pursue such relief without having the state pay Attorneys Olson's or Hurley's substantial rates is briefly touched on in the next section.

46. Should the Board hold it possesses the authority to award fees over and above the statutory limits, this decision would recommend that the amount of fees be calculated using the fee rate established in Wis. Stat. § 227.485, as indicative of the Legislature's view of a reasonable rate of compensation for attorneys in proceedings against state agencies. The details of such an award are outlined in the next section, in response to the final referred questions.

If attorneys' fees should be awarded, what are the appropriate attorney's fees which should be awarded:

For the post conviction defense of the Petitioner?

47. As set out above, this decision concludes that the maximum amount the Board can award an innocent convict claimant, inclusive of attorneys' fees, is the \$25,000 statutory maximum. This amount has already been paid to Hicks. Accordingly, no additional fees can be awarded. This conclusion conflicts with the award in *Claim of Avery*, in which the Board approved payment of the attorney's fees incurred by Stephen Avery in establishing his innocence. The decision of Avery's claim did not set out the legal basis for awarding fees incurred in seeking post-conviction relief. Moreover, as with the fee decision in *Claim of Saecker*, the desirability of adhering to prior Board practice must give way to the principal of carrying out the Legislature's intent.

48. The issue is not whether the rejection of Mr. Hurley's claim will encourage or discourage competent attorneys to take up the cause of those claiming to have been convicted in error. The Board's obligation is to exercise its authority only to the extent intended by the Legislature and not to decide what the Legislature should have intended. Nevertheless, it is worth noting that Mr. Hurley took on Hicks' representation at a time when it appeared that claimants were not recovering attorneys' fees over an above the statutory caps. See Shelley Fite, *Compensation for the Unjustly Imprisoned: A Model for Reform In Wisconsin*, 2005 Wis.L.Rev. 1181, 1195-96 (indicating *Claim of Saecker*, decided in 2002, as first § 775.05 case in which award of attorneys' fees resulted in total award greater than \$25,000)

49. Section 775.05 expressly authorizes the Board to recommend to the Legislature that it grant a claimant a greater amount than the Board can award. Without regard to whether an additional amount should be recommended strictly as compensation for Mr. Hicks, this decision proposes that the Board recommend to the Legislature the payment of an amount that would reasonably compensate Mr. Hurley and his firm for their work in securing Mr. Hicks' post-conviction release and exoneration. Whether the Board has the authority to make the award directly (contrary to the conclusion of this proposed decision) or is simply recommending additional compensation to the Legislature, this decision proposes utilizing the rate of compensation established in Wis. Stat. § 227.485, multiplied by the reasonable number of hours expended, as the basis for deriving a fair and reasonable level of compensation in an innocent convict case. This is the amount the Legislature has previously determined to provide an appropriate level of compensation in proceedings against state agencies, where an agency's position is found not to have been substantially justified. The fact that an individual has been erroneously convicted does not necessarily mean that either his prosecution or conviction lacked justification under the facts, law and state of forensic science at the time. It may be noted that the original drafts of the 1979 amendment referred to compensation for "wrongful imprisonment"; the word "wrongful" was deleted from the enacted version. (See attached) If the fee recoverable under § 227.485 is appropriate where an agency's position lacked substantial justification, the same amount arguably provides an appropriate award where the state's position was justified. It should also be recalled that the rate of compensation established in § 227.485 was utilized to test the reasonableness of the stipulated fee award in *Saecker*.

50. With respect to Attorney Hurley's compensation, if the Board either decides it has the authority to pay fees equivalent to those authorized by Wis. Stat. § 227.485 or decides to recommend such payment to the Legislature, the record is not sufficiently clear to allow it to state with confidence the number of hours Mr. Hurley and his firm billed in each calendar year. Attorney Hurley should be asked to provide yearly totals of his firm's attorney hours, upon which his final compensation can be calculated. Mr. Hurley's billings are for work predating the increase in the level of fees recoverable under Wis. Stat. § 227.485 and 814.245. Accordingly, the proper hourly rate is derived by multiplying \$75 times the relevant cost of living inflator. In addition, this decision would propose that the Board recommend payment of Mr. Hurley's actual costs, which have been represented to be \$6,227.26.

For the preparation and presentation of the claim before the Claims Board?

51. The same conclusion applies to Mr. Olson's firm's fee claim as applied to Mr. Hurley's firm. The Board has already awarded Hicks the maximum amount that is within its jurisdiction to grant. Accordingly, no additional fees may be awarded to Mr. Olson or his firm.

52. Because this decision concludes that the Board lacks the authority to pay Mr. Olson's and Ms. Dixon's fees, it does not reach the question of whether the hourly rates being claimed by Mr. Olson are necessary to attract competent legal representation, as Hicks and his affiants assert. Still, with all due respect to Attorneys Olson and Dixon, where an inmate's conviction has already been reversed based on new evidence of the inmate's innocence, the task of obtaining the full recovery available from the Claims Board should not typically require extraordinary skill or expertise. This is all the more likely, where, as here, the prosecutor does not oppose payment of the claim. The Board may take official notice that the rate of compensation paid to court-appointed attorneys by the State Public Defender's Office is \$40 per hour. See <http://www.wisspd.org/html/acd/billing.asp#HR>. If the statute were amended to provide for the award of fees over and above the current caps, payment of \$150 per hour plus inflation, as currently provided under Wisconsin's Equal Access to Justice Act, might well be sufficient to induce attorneys to bring innocent convict claims.

53. As with the work performed by Attorney Hurley, this decision proposes that the Board recommend to the Legislature that Hicks receive additional compensation sufficient to pay Mr. Olson the reasonable number of hours expended on his case, times the rate established in Wis. Stat. § 227.485. Section 227.485(5) directs a hearing examiner to use the cost criteria set out in Wis. Stat. § 814.245(5). Section 814.245(5)(a)2. was amended by 2003 Wis. Act 145, becoming effective July 1, 2004. The statute formerly established an hourly attorney fee of \$75, "unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents, justifies a higher rate." Following amendment, the current rate is \$150, subject to the same qualifications for cost of living or special factors.

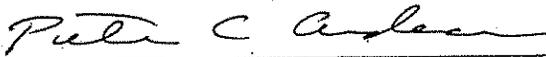
54. The factual findings calculate an inflation-adjusted amount based on Mr. Olson's and Ms. Dixon's actual hours expended and the \$75 per hour and \$150 per hour Equal Access to Justice Act rates. The calculations yield \$278 in fees for services rendered prior to July 1, 2004, and \$14,674 in fees for services rendered after that date. Mr. Olson's disbursements totaled \$1,100.10. The sum of these amounts is \$16,052.10. This decision recommends that the Board recommend to the Legislature that it pay this additional amount to Mr. Hicks for payment to Attorney Olson.

PROPOSED DECISION AND ORDER

For the reasons set forth above, IT IS ORDERED that the claim of Anthony Hicks for the recovery of attorneys' fees and costs be and hereby is DENIED. IT IS FURTHER RECOMMENDED that the Wisconsin Legislature award Anthony Hicks the sum of \$16,052.10 as payment of costs and attorneys' fees incurred on his behalf by the law firm of Jeff Scott Olson. IT IS FURTHER REQUESTED that Attorney Stephen Hurley duly provide to the Board for submission to the Wisconsin Legislature in accordance with the methodology set forth above annual summaries for the years 1992-1997 of hours billed by the attorneys of his firm in pursuing post-conviction relief for Anthony Hicks.

Dated at Madison, Wisconsin on July 13, 2007.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: 
Peter C. Anderson
Administrative Law Judge

REQUEST

Extra Copies

JK OLD NOTE ON 483 LRS

Date rec'd 9/25 Received by JK Wanted Drafter JK

S A Bill Jt. Res. Res. Sub.Amdt. Amdt.

SUBJECT INNOCENT CONVICT CLAIMS

FOR BARRY BY/Representing him

INDEX CLAIMS This file MAY BE SHOWN to any legislator (Signature)

MAY CONTACT

INSTRUCTIONS: INNOCENT persons damaged by imprisonment - overall maximum of \$50,000 (legal fees and damages) - may accept claims board figure & go onto legislature if UNANIMOUS vote - otherwise must take settlement or leave it and appeal. Use preference of evidence rather than

Work/0	Prelim/P	1st	2nd	3rd	4th	5th	6th
	Drafter	JK	JK				
	Reviewed	KG	KG				
	Typist	TW	TW				
	Proofed	TW/DS	DS/TW				
Original to drafter	All copies to drafter	Submitted 10/17	11-29				
		FE DEBT	FE DEBT	FE DEBT	FE DEBT	FE DEBT	FE DEBT
		RET TAX	RET TAX	RET TAX	RET TAX	RET TAX	RET TAX

FE sent for 2-1 FE submitted

Requested ORIGINAL draft: OK(phine) (Signature)

Received JACKET:

"beyond a reasonable doubt" standard
+ conf. for part of term permitted - per the
CSN 10/12/78

1 SECTION 1. 20.865 (1) (a) of the statutes is amended to read:

2 20.865 (1) (a) Judgments. A sum sufficient to pay the amounts due
3 under ss. 21.13, 59.31, 285.05 (5) (4), 285.06, 286.43 and chapter 582,
4 laws of 1911.

5 SECTION 2. 285.05 (2) to (4) of the statutes are amended to read:

6 285.05 (2) Any person who ~~serves a term of imprisonment under~~ is
7 imprisoned as the result of his or her conviction for a crime in any court
8 of this state, of which crime he the person claims to be innocent, or any
9 person who has been pardoned on the ground of innocence and whose
10 imprisonment is thereby shortened, may petition the claims board for
11 compensation for such wrongful imprisonment.

12 (3) After hearing the evidence on the petition, the claims board
13 shall find either that ~~it is clear beyond a reasonable doubt that~~ the pre-
14 ponderance of evidence is that the petitioner was innocent of the crime
15 for which he or she suffered imprisonment, or that ~~it is not clear beyond~~
16 ~~a reasonable doubt~~ the preponderance of evidence is that he or she was not
17 innocent. Upon the hearing the record of the trial in which the convic-
18 tion was had may be presented to the claims board for the purpose of
19 enabling it to understand the situation, but the finding of the claims
20 board shall be based only on such evidence or circumstances as have been
21 discovered or have arisen since conviction.

22 (4) If the claims board ~~shall find~~ finds that the petitioner was
23 innocent and that he or she did not by his or her act or failure to act
24 contribute to bring about the conviction and imprisonment for which he or
25 she seeks compensation, the claims board shall find the amount which will
26 compensate him the petitioner for his or her wrongful imprisonment, but
27 not to exceed ~~\$5,000~~ \$50,000 and at a rate of compensation not greater
28 than ~~\$1,500~~ \$15,000 per year for the imprisonment. Compensation awarded

1 by the claims board shall include any amount to which the board finds the
2 petitioner is entitled for attorney fees, costs and disbursements. If the
3 claims board shall-find finds that the amount it is able to award will is
4 not be an adequate compensation it shall report an amount to the legis-
5 lature which it shall-deem deems adequate.

6 SECTION 3. 285.05 (5) of the statutes is renumbered 285.05 (6) and
7 amended to read:

8 285.05 (6) The claims board shall keep a complete record of its pro-
9 ceedings in each case and of all the evidence. The findings and the award
10 of the claims board shall be subject to review as provided in ch. 227.
11 Any petitioner who accepts an award waives his or her right to such
12 review.

13 SECTION 4. 285.05 (5) of the statutes is created to read:

14 285.05 (5) The petitioner shall be required to sign a complete
15 release disavowing any further claim against the state for any damages
16 suffered or expenses incurred in conjunction with his or her imprisonment
17 as a precondition to receipt of an award by the claims board. However, if
18 the findings and decision of the board are made by unanimous vote, the
19 petitioner may accept the award without signing a release and may appeal
20 to the legislature to supplement the award.

21 (End)

TO ASSEMBLY SUBSTITUTE AMENDMENT 1,
TO 1979 ASSEMBLY BILL 110

1 Amend the substitute amendment as follows:

2 1. On page 2, delete lines 18 to 26 and substitute "she seeks
3 compensation, the claims board shall find-the-amount-which-will compensate
4 him--for--his-wrongful-imprisonment-but-not-to-exceed-\$5,000-and the peti-
5 tioner at a rate of compensation not-greater-than-\$1,500-per-year equal to
6 the daily salary of the governor at the time of imprisonment for each day
7 of the imprisonment. If-the-claims-board-shall-find-that-the-amount-it-is
8 able--to--award--will--not--be-an-adequate-compensation-it-shall-report-an
9 amount-to-the-legislature-which-it-shall-deem-adequate. In addition, the
10 claims board may award compensation for any amount to which the board
11 finds the petitioner is entitled for attorney fees, costs and disburse-
12 ments."

13

(End)

ASSEMBLY AMENDMENT *cf*

TO 1979 ASSEMBLY BILL 110

- 1 Amend the bill as follows:
- 2 1. On page 2, line 26, substitute "\$25,000" for "\$50,000".
- 3 2. On page 2, line 27, substitute "\$5,000" for "\$15,000".
- 4 (End)