

## STATE OF WISCONSIN CLAIMS BOARD

The State Claims Board conducted hearings at the State Capitol Building in Madison, Wisconsin, on April 29, 2005, upon the following claims:

|    | <u>Claimant</u>                | <u>Agency</u>                             | <u>Amount</u>  |
|----|--------------------------------|---|----------------|
| 1. | Andrea L. Mudrey               | Department of Employee Trust Funds        | \$31,919.74    |
|    | Katherine L. Mudrey            | Department of Employee Trust Funds        | \$31,919.74    |
| 2. | Tussie Mussie, Ltd.            | Department of Revenue                     | \$2,902.13     |
|    | Tussie Mussie, Ltd.            | Department of Revenue                     | \$3,018.81     |
|    | Tussie Mussie, Ltd.            | Department of Revenue                     | \$3,094.56     |
| 3. | Pamela J. Knauer               | Department of Revenue                     | \$22,817.97    |
| 4. | Allstate Insurance Co.         | Office of the Commissioner of Insurance   | \$6,595,649.00 |
|    | Allstate Indemnity Co.         | Office of the Commissioner of Insurance   | \$882,918.00   |
|    | Allstate Life Insurance Co.    | Office of the Commissioner of Insurance   | \$261,646.00   |
|    | Northbrook National Insurance  | Office of the Commissioner of Insurance   | \$270,349.00   |
|    | Northbrook Property & Casualty | Office of the Commissioner of Insurance   | \$919,343.00   |
|    | Northbrook Indemnity Co.       | Office of the Commissioner of Insurance   | \$773,992.00   |
|    | American Manufacturers Mutual  | Office of the Commissioner of Insurance   | \$377,755.00   |
|    | American Motorists Insurance   | Office of the Commissioner of Insurance   | \$718,024.00   |
|    | American Protection Insurance  | Office of the Commissioner of Insurance   | \$182,041.00   |
|    | Lumbermens Mutual Casualty     | Office of the Commissioner of Insurance   | \$2,121,711.00 |
| 5. | Jennifer L. Hall               | Dept. of Ag., Trade & Consumer Protection | \$2,195.30     |

The following claims were considered and decided without hearings:

|    | <u>Claimant</u> | <u>Agency</u>         | <u>Amount</u> |
|----|-----------------|-----------------------|---------------|
| 6. | Randy Neu       | Department of Revenue | \$1,447.79    |
|    | Randy Neu       | Department of Revenue | \$2,895.60    |
|    | Randy Neu       | Department of Revenue | \$2,034.62    |
|    | Randy Neu       | Department of Revenue | \$625.74      |
|    | Randy Neu       | Department of Revenue | \$3,076.07    |
|    | Randy Neu       | Department of Revenue | \$3,076.07    |

### *The Board Finds:*

1. **Andrea L. Mudrey** of Minneapolis, Minnesota and **Katherine L. Mudrey** of Monroe, Wisconsin each claim \$31,919.74 for additional death benefits from the retirement account of their deceased mother. The claimants' mother, Lynn Martinson, was diagnosed with terminal cancer, and was told that she had only a few months to live. She chose to stop working and decided to begin drawing on her Wisconsin Retirement System (WRS) annuity. Ms. Martinson contacted DETF and was provided with various forms and documents explaining the available annuity options. She selected Life with 60 Payments Guaranteed with Accelerated Payments. Ms. Martinson died in May 2001. The claimants believe that the documents provided by DETF did not adequately explain the available options and that, as a result, Ms. Martinson selected an option that, the claimants allege, she would not have selected had she been adequately informed. The claimants appealed to the Employee Trust Funds Board, but withdrew the claim because of the overwhelming hurdle of the doctrine of sovereign immunity. The claimants state that their mother was an educated woman, who would have been able to understand her options had they been clearly presented. The claimants point to DETF publications provided to Ms. Martinson that do not adequately explain the effect

that death would have on payments, including the document, *Choosing an Annuity Option*, which contains tables with final columns that are cut off by the edge of the page. The claimants allege that, given Ms. Martinson's prognosis and her secure financial situation, it made no sense for her to choose accelerated payments because she had no need of the additional funds that option provided. The claimants also point to statements by Ms. Martinson's sister, Nancy Drake, that Ms. Martinson made it clear before her death that it was her desire to assist her daughters financially. Ms. Drake also states that Ms. Martinson was very ill by the time she make her death benefit choice and was no longer in a position to understand the complexities of the options provided to her. In support of Ms. Drake's statement, the claimants provide a letter from Ms. Martinson's physician, indicating that she was taking medication which would have impaired her cognitive function. The claimants state that, although she was assisting her sister with other financial matters, Ms. Drake was unaware that Ms. Martinson was making decisions regarding her WRS annuity. Finally, the claimants state that DETF has since changed its paperwork to make the impact of death on annuity payments more clear. The claimants believe that, given her expressed desire to assist her children financially, Ms. Martinson would have chosen Life with 180 Payments Guaranteed, without Accelerated Payments had she been adequately informed by DETF. The claimants state that this choice would have provided an additional \$31,919.74 to each claimant.

The Department of Employee Trust Funds recommends denial of this claim. DETF points to the fact that there is absolutely no dispute that Ms. Martinson did choose the "L60" Accelerated Payments option. DETF states that it has a duty to carry out the clearly expressed wishes of a WRS participant and has no authority to second guess that participant's benefit choice. Although the claimants assert that they withdrew their administrative appeal due to sovereign immunity issues, DETF points to the fact that the department never asserted this defense and believes the appeal was withdrawn due to the claimants' inability to show any entitlement under the law to the benefit they requested. DETF states that the claimants have submitted misleading copies of documents that they allege DETF provided to Ms. Martinson, including one document with half its pages missing. (The missing pages are the ones where the impact that death would have on payments is clearly explained.) The claimants have also submitted an alleged copy of the *Choosing an Annuity Option* document provided to Ms. Martinson. DETF states that this is clearly not the document provide to Ms. Martinson, but is a printout of a later edition posted on the DETF Web Site. DETF provides a copy of the document actually provided to Ms. Martinson in January 2001, which contains a full version of all pages and tables. DETF points the fact that all of the documents received by Ms. Martinson explain her available options in full, including the impact of death on benefits and also provided information on how to change her benefit choice if she wished to do so. DETF states that the claimants are speculating when alleging what Ms. Martinson would or would not have wished regarding benefit payments to her children, and points to the fact that they have provided no evidence whatsoever that Ms. Martinson discussed her death benefit choice with anyone. DETF also points to the fact that the claimants initially allege that Ms. Martinson would have been able to understand her options if they had been clearly explained, and then later argue that she was mentally incapacitated due to her illness—both of which cannot be true. In closing, DETF reminds the board that it does not have the authority to order any payment from the Public Employee Trust Fund. See 74 Op. Atty. Gen. 193, 196 (1985).

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

2. Patricia Buch and George Wagner, d/b/a **Tussie Mussie, Ltd.**, of Hartford, Wisconsin make three claims in the amounts of \$2,902.13, \$3,018.81 and \$3,094.56 for refund of overpayment of sales and use taxes for the months of September and October in 1999, 2000, and 2001. The claimants state that Ms. Buch, who handled taxes for the business, became seriously ill and because of the burden of her illness, chose the simpler task of simply paying estimated assessments rather than filing sales taxes for the periods in question. The claimants state that, although they realized some overpayment might result from paying the estimates, they had no idea the overpayments were so large until they filed their actual returns. The claimants request refunds of the over paid amounts.

The Department of Revenue recommends denial of these claims. DOR states that the claimants had experience in filing sales tax returns since 1987. DOR states that a history of filing late sales tax returns began in the mid 1990's and continued through 1998. DOR issued estimated assessments in response to the

claimants' failure to file sales tax returns for September and October 1999, September and October 2000 and September and October 2001. DOR states that, beginning in 2000, the claimants began to pay the estimated sales tax assessments as issued, rather than file the actual returns. DOR states that the claimants did not file the actual sales tax returns for the assessed periods until January 2004. DOR states that s. 77.59(4)(b), Stats., prohibits the department from refunding the amount collected on an estimated assessment and that pursuant to s. 75.54(4)(b), Stats., the two-year statute of limitations for filing claims for refund has expired.

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

**3. Pamela J. Knauer** of Minocqua, Wisconsin claims \$22,817.97 for refund of money garnisheed from her wages for estimated tax returns for the years 1994-1999. The claimant states that her husband suffers from Obsessive Compulsive Disorder, a psychiatric condition that causes him to hoard useless items such as old magazines, newspapers and junk mail. The claimant states that her husband would mix important business and tax documents in with these hoarded items in order to justify keeping the material. The claimant states that her husband repeatedly assured her that their tax situation was "under control." The claimant alleges that she did not realize that there was a problem until her wages were garnisheed. The claimant states that she attempted to do the taxes herself several times, but was unable to find the needed records for her husband's business and that he was uncooperative in assisting her. The claimant had to dig through many boxes of hoarded information in their garage and two rented storage units in order to gather the required documents. The claimant states that because of the hoarding, caused by her husband's disorder, it took her two years to locate the documents she needed and then took their accountant several months to prepare the returns. The claimant alleges that her husband incorrectly reassured her that the money being garnisheed would be returned. The claimant states that had the returns been timely filed, they would have received refunds for 1995-1999. The claimant also points to the fact that the statute of limitations for receiving a refund was increased from two years to four years in 2000 and that they would have fallen within the four year statute of limitations had it been in effect when they filed. The claimant believes that the overpayments were a result of her husband's psychiatric disorder and requests reimbursement of the overpaid amount.

The Department of Revenue recommends denial of this claim. On March 26, 2001, DOR issued assessments to both Pamela and Edwin Knauer for failure to file income tax return for the years 1994-1999. These assessments were due on May 29, 2001. At the time that these assessments were referred for collection, DOR already had a certification in place against Ms. Knauer's wages for other unresolved tax liabilities related to her husband's business. Certification of Ms. Knauer's wages for these assessments began in April 2001 and ended in February 2004, when the requested income tax returns were filed. During the period of certification, Mr. Knauer filed many late sales and withholding returns related to his business. DOR specifically requested that payments be applied to those actual liabilities, rather than the estimated income tax assessments in order to minimize the taxpayers' losses under the statute of limitations. DOR believes that Ms. Knauer is an educated individual who was aware of her husband's tax problems as well as his inability to manage financial matters well before the DOR began garnishment of her wages for these income tax assessments. DOR believes that, at the very least, Ms. Knauer should have been aware that she was not signing tax returns every April. Finally, DOR states that s. 71.75(5), Stats., prohibits DOR from refunding the amount that was collected on the original assessments because no refund was claimed within the prescribed two year period, which expired on March 26, 2003.

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

**4. Allstate Insurance Company** (\$6,595,649), **Allstate Indemnity Company** (\$882,918), **Allstate Life Insurance Company** (\$261,646), **Northbrook National Insurance Company** (\$270,349), **Northbrook Property and Casualty Insurance Company** (\$919,343), and **Northbrook Indemnity Company** (\$773,992), of Northbrook, Illinois; and **American Manufacturers Mutual Insurance Company** (\$377,755), **American Motorists Insurance Company** (\$718,024), **American Protection Insurance Company** (\$182,041), and **Lumbermens Mutual Casualty Company** (\$2,121,711), of Long Grove,

Illinois, make claims in the indicated amounts for refund of Wisconsin taxes allegedly overpaid. WI, like most states, imposes a premium tax on foreign insurers doing business in the state. (WI insurers are exempt from paying this premium.) However, in addition to this premium tax, WI's Retaliatory Tax (s. 76.66, Stats.) provides that foreign insurers will not pay less in WI taxes than the amount of taxes imposed on WI insurers by a foreign insurer's state, and WI's Reciprocal Provision (s. 76.67, Stats.) provides that foreign insurers will not pay more in WI taxes than the amount of taxes imposed by that insurer's state on WI insurers. The claimants are Illinois property and casualty insurers doing business in WI. During the years 1992-1996, IL law imposed a 2% premium tax on WI insurers, which, because of the Retaliatory Tax, resulted in WI imposing a 2% premium tax on IL insurers. In 1997, the Illinois Supreme Court declared the 2% premium tax imposed by IL to be unconstitutional (*Milwaukee Safeguard v. Selcke*). The claimants state that, because the IL premium tax was declared unconstitutional, IL never imposed a premium tax on WI insurers and, therefore, under WI's Reciprocal Provision, no premium tax should have been paid by the claimants. The claimants allege that WI's Reciprocal Provision must be interpreted to impose WI tax based on the requirements of IL law, not based on erroneous interpretations given to that law by officials of IL. The claimants also believe that they have followed proper procedure in bringing these claims before the Claims Board and that OCI's argument that they should have pursued their claim under s. 76.68, Stats., is erroneous. The claimants allege that s. 775.01, Stats., expressly authorizes them to pursue this action before the board. Claimants further state that whether or not IL did or did not refund any taxes to WI insurers is not relevant and has no bearing on the proper interpretation of WI's Reciprocal Provision. The claimants also assert that, contrary to OCI's contention, WI law does not require taxpayers to protest tax payments. The claimants state that s. 775.01, Stats., expressly authorizes them to pursue their claims against OCI regardless of whether the tax payments were made under protest. The claimants note that, although IL law requires that taxpayers make payment under protest before commencing an action against the state, these claims are governed by WI law, not IL law. The claimants also state that the "voluntary payment doctrine" argued by OCI does not apply because s. 775.01, Stats., is not conditioned upon payment of tax under protest. The claimants also note that the statute of limitations has expired for any other insurers to bring similar claims before the board.

The Office of the Commissioner of Insurance recommends denial of these claims. OCI points to *New York Life Ins. Co. v. State*, in which exactly the same kind of claim was made: that because a New York court invalidated tax obligations required after they were imposed on WI companies, the NY company was entitled to a retroactive refund of its WI tax payment. OCI states that the Wisconsin Supreme Court rejected that argument in *New York Life*. Although the claimants acknowledge that decision, they argue that subsequent changes in WI's statutory language were intended to change the rule of *New York Life*. OCI believes this argument is without merit. OCI states that the statutory changes were merely for purposes of simplification. OCI believes that the plain language of the statute, which refers to the taxes "a state or foreign county requires," applies not only to a state's laws in theory, as the claimants allege, but also to how that state's officials administer and interpret those laws. OCI points to the LRB analysis and legislative history, which show that there was no intent by the legislature to create a different rule of law than that made by *New York Life*. OCI also argues that the claimants did not avail themselves of the appropriate statutory recourse for relief provided by s. 76.68(2), Stats. Additionally, OCI states that the claimants failed to protest these taxes at the time of payment and therefore failed to give notice to WI so that the state could set aside the contested funds. OCI believes that the claimants' failure to do so bars their current claims. In support of that argument, OCI states that WI courts have repeatedly endorsed the voluntary payment doctrine, which places the obligation to challenge a payment, before or at the time of payment, upon the party making the challenge. The claimants allege that the voluntary payment doctrine does not apply because s. 775.01, Stats., does not specifically require protest at time of payment. OCI believes that the claimants are misinterpreting the limited exception to the voluntary payment doctrine. OCI states that this doctrine applies whether the claimants bring suit under common law or statute and that the doctrine is the default rule—there need not be an affirmative statement requiring the protest. OCI also points to the fact that the Illinois Court of Appeals has denied claims from non-protesting WI insurers for refund of the Premium Tax. OCI states that refunding the claimants, who also never protested the tax, would unjustly enrich IL insurers to the detriment of WI insurers and would be inconsistent with reciprocal and retaliatory statutes. Finally, OCI notes that the claimants are but one group of potentially 160 IL insurers doing business in WI and that the potential for additional claims is great.

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

5. **Jennifer L. Hall** of Richland Center, Wisconsin claims \$2,195.30 for lost income due to an allegedly unreasonable delay in restoring her farm to Grade A status. Pursuant to a license name change request, an inspection of the claimant's farm was performed on July 16, 2004. DATCP food safety inspector Amy Bender conducted the inspection and field representative Pete Dillenberg was also in attendance. The claimant states that Ms. Bender appeared dissatisfied with previous repairs that had been completed. The claimant states that Ms. Bender left without telling her the results of the inspection, and that Mr. Dillenberg informed her that the farm had been downgraded to Grade B. The claimant states that Mr. Dillenberg told her to contact him once the repairs had been completed and that he would schedule a re-inspection with Ms. Bender. The claimant states that she completed the repairs on July 25<sup>th</sup> and called Mr. Dillenberg to inform him on July 26<sup>th</sup>. The claimant states that Mr. Dillenberg began trying to reach Ms. Bender on July 30<sup>th</sup> but that she did not reply. The claimant states that Mr. Dillenberg left messages for Ms. Bender on August 13, 14, 15 and 16 but that she did not return any of his calls. Mr. Dillenberg apparently finally reached Ms. Bender by chance on August 24<sup>th</sup>. Ms. Bender allegedly told Mr. Dillenberg that she had not responded because he had not called during business hours. The re-inspection was scheduled for August 27<sup>th</sup>, six weeks after the initial downgrade. The claimant states that, during this inspection, Ms. Bender told the claimant Mr. Dillenberg was "the reason" that she had been downgraded and that Ms. Bender had not received any call from him until August 24<sup>th</sup>. The claimant noticed that there seemed to be an acrimonious working relationship between Mr. Dillenberg and Ms. Bender, which the claimant believes is the primary cause for the delay in scheduling her re-inspection. The claimant states that she lost \$2,195.30 because she had to ship Grade B milk for 6 weeks instead of Grade A, and requests reimbursement for her lost income.

The Department of Agriculture, Trade & Consumer Protection recommends payment of this claim. The department states that when deficiencies are found during routine inspections, normal practice is to issue a notice indicating the intent to downgrade and setting a date for re-inspection. If the deficiencies were found to be corrected during the re-inspection, the Grade A permit would be retained. It appears that in this instance, the normal notice of intent was not provided to the claimant. If this notice had been issued, the claimant would have received the date for her re-inspection on that day and would therefore have known the date by which she would have to correct the deficiencies in order to maintain her Grade A permit without interruption. DATCP agrees that the 6 week delay to restore the Grade A permit was unwarranted and that the claimant received a lower price for her milk during that period. DATCP does not dispute the amount of the differential claimed by the claimant and recommends payment of her claim.

The Board concludes the claim should be paid in the amount of \$2,195.30 based on equitable principles. The Board further concludes, under authority of s. 16.007 (6m), Stats., payment should be made from the Department of Agriculture, Trade & Consumer Protection appropriation s. 20.115 (1)(a), Stats.

6. **Randy Neu** of Hartland, Wisconsin makes six claims in the amounts of \$1447.79, \$2895.60, \$2034.62, \$625.74, \$3076.07, and \$3076.07, for refunds of sales taxes overpaid for various periods from August 1995 through September 1996. The claimant states that DOR levied his bank accounts and garnished his wages for payment of these estimated assessments, interest and penalties for the periods in question. The claimant states that, when he filed the requested returns in April 2004, he discovered that, even though he had liabilities on at least 31 other open accounts, the DOR allocated all of the monies seized to these assessments, resulting in overpayment on those accounts, when the remaining owed accounts still had balances and were accruing interest charges. The claimant states that DOR denied all request for refund, credit or other consideration of the overpayments because of the statute of limitations. The claimant does not believe that it was fair for DOR to appropriate the seized monies in such a way and that there was no way for him to know this was occurring. He requests reimbursement of the overpaid amounts.

The Department of Revenue recommends denial of these claims. DOR states that the claimant has had experience filing and paying sales taxes since registering with DOR in 1991. DOR records indicate that late sales tax filings began in 1992 and continued into 1995. Several periods prior to those claimed were also estimated for failure to file sales tax returns and there were also estimated income tax assessments for the years 1989 through 1993. The claimant filed the requested sales and income tax returns in April 2004. DOR

states that, following the adjustment of the estimated sales tax assessments that are the subject of this claim, in consideration of the overpayments made, DOR adjusted the \$20,788.45 remaining delinquent balance on the claimant's other accounts to zero. DOR therefore believes that the claimant has received more than sufficient consideration and relief for the total overpayments he claims of \$13,155.88.

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

***The Board concludes:***

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

Andrea L. Mudrey  
 Katherine L. Mudrey  
 Tussie Mussie, Ltd. (3 claims)  
 Pamela J. Knauer  
 Allstate Insurance Company  
 Allstate Indemnity Company  
 Allstate Life Insurance Company  
 Northbrook National Insurance Company  
 Northbrook Property & Casualty Insurance Company  
 Northbrook Indemnity Company  
 American Manufacturers Mutual Insurance  
 American Motorists Insurance Company  
 American Protection Insurance Company  
 Lumbermens Mutual Casualty Company  
 Randy Neu (6 claims)

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

Jennifer L. Hall

\$2,195.30

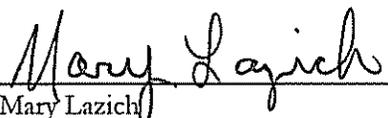
s. 20.115(1)(a)

Dated at Madison, Wisconsin this 10th day of May, 2005.

  
 Alan Lee, Chair  
 Representative of the Attorney General

  
 John E. Rothschild, Secretary  
 Representative of the Secretary of Administration

  
 Amy Kasper  
 Representative of the Governor

  
 Mary Lazich  
 Senate Finance Committee

  
 Dan Meyer  
 Assembly Finance Committee