STATE OF WISCONSIN CLAIMS BOARD

The State Claims Board conducted hearings at the State Capitol Building in Madison, Wisconsin, on December 9, 2005, upon the following claims:

	Claimant	Agency	Amount
1.	Carl A. Haas Racing Teams	Wisconsin State Fair Park	none
2.	Noble Grain Farms	Department of Natural Resources	$45,570.00
3.	Estate of Paul D. Rivers	Department of Revenue	$4,671.15

The following claims were considered and decided without hearings:

	Claimant	Agency	Amount
4.	Larry D. Conley	Department of Corrections	$233.63
5.	Charles C. Downing	Department of Corrections	$173.22
6.	Flint Ink North America	Department of Financial Institutions	$19,667.00
7.	Hugasian Motors, Inc.	Department of Transportation	$2,000.00

In addition, the Board considered a motion to refer the innocent convict claim (s. 775.05, Stats.) of Richard A. Moeck to a hearing examiner.

The Board Finds:

1. **Carl A. Haas Racing Teams, Ltd.** of Lincolnshire, Illinois files this procedural claim arising from the claimant's desire to file a third-party action against Wisconsin State Fair Park. The claimant is the former lessee of the Milwaukee Mile Racetrack. During the lease term, the claimant contracted with Southern Bleacher Company to make improvements to the site. The claimant alleges that this contract was entered into with the knowledge and consent of the State. The claimant states that a dispute arose between Southern Bleacher and one of its subcontractors, Seater Construction Company, which resulted in Southern Bleacher terminating Seater's contract. In February 2004 Seater Construction filed suit against both Southern Bleacher and the claimant for money allegedly due Seater. The claimant states that it was named as a party in the suit as the "owner" of the racetrack. The claimant believes that the proper defendant in this case should be Wisconsin State Fair Park, the actual owner of the racetrack. The claimant does not believe it is able file a third-party action to bring State Fair Park into this litigation without first submitting this claim to the Claim Board.

While State Fair Park admits that it is the owner of the Milwaukee Mile Racetrack, this fact does not translate into liability for the actions of the claimant or Southern Bleacher. Wisconsin State Fair Park strongly recommends denying any liability relating to the lawsuit brought by Seater Construction against the claimant and Southern Bleacher. State Fair Park points out that as the lessee, the claimant was responsible for track improvements. There was no state contract for the work and no consideration or approval by the State Fair Park Board, the Building Commission or the Department of Administration's Division of State Facilities.

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. (*Member Rothschild not participating.*)

2. **Noble Grain Farm** of Burlington, Wisconsin claims $45,570.00 for crop damage allegedly caused by the DNR's installation of a dam on the Bong Recreational Base (the Bong), which is adjacent to the farm. The dam was installed on Hoosier Creek in 1967, creating a 30-40 acre flowage known as the northern flowage. The claimants purchased the farm in 1974. The prior landowner had installed an earth berm along the property line to stop overflow from the Bong. The claimants state that the prior owner told them he had installed drainage tile on the property to help with the flooding problem that already existed. The claimants

state that in the late 1980's, an additional 80 acres (the southern flowage) began flooding. The claimants state that their drainage tile kept up with the flooding until about 1990, when it increased to the point that their tile could not keep up with the flow. They state that, although the southern flowage has a higher elevation than the northern flowage, the water from the southern flowage is not able to drain fast enough into the northern flowage and that the resulting back up in the southern flowage floods the claimants' property. The claimants believe that the inadequate flow from the southern to northern flowages is caused by improper placement of the dam, which does not allow the drainage tile around the creek to function adequately. They state that the flooding became intolerable about seven years ago and that they contacted the DNR and the Drainage Board. They state that the Drainage Board suggested that the DNR never should have installed the dam because the creek and tile are under the control of the Drainage District. The claimants allege that the DNR has been reluctant to make necessary improvements. The claimants state that they incurred crop losses in 7 of the last 14 years due to flooding and that, although they do have catastrophic crop insurance, it does not cover this type of damage. The claimants request reimbursement for these crop losses.

The DNR opposes payment of this claim. The DNR states that, even without the dam, the claimants' land would still be subject to flooding, because drainage from the Bong toward the claimants' property is a natural condition, as indicated by the wetland soil types on that area of the farm and the elevation drop from the Bong to the farm, which results in a natural, westerly flow. The DNR states that this natural flow from the Bong to the farm was altered in the 1970's, not by any action of the DNR, but by the prior owner of the land, who installed the berm and in doing so, essentially created the Southern Flowage and the resulting potential flow into the northern flowage. The DNR states that there is no evidence that any actions by the DNR caused the drainage onto the farm to be worse than under natural conditions. The DNR also presents historical aerial photographs which show that this portion of the farm was not usually cropped even before the construction of the northern flowage. Although the DNR initially questioned the existence of a tile system connecting the north and south flowages, the department now believes that such a system may exist, but that it is located approximately 600' east of the original mapped location, with the result that the drain tile system enters the northern flowage. The DNR states that this tile system appears to have been damaged during the construction of a gas pipeline in the area. However, despite the possibly damaged tile system, the DNR states that the discharge of this drain into the northern flowage cannot be shown to be the cause of the drainage onto the claimants' property. Finally, the DNR states that it has undertaken a number of projects to try and mitigate the flooding onto the farm and that, although attempts to lessen the flow have not been as successful as hoped, the DNR has no legal liability for the natural flow of water onto the claimants' land and no legal duty to prevent such flow. The DNR points to *Tiedman v. Middleton*, which provides that alterations which redirect the natural flow of water but do not increase it, do not increase the landowners liability.

The Board concludes that at this time 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 would be willing to reconsider this claim if new or additional evidence becomes available in the future.

3. **The Estate of Paul D. Rivers, deceased**, formerly of Kewaunee, Wisconsin claims $4,671.15 for taxes allegedly overpaid by Paul Rivers. In 2001, Mr. Rivers' wages were certified for an assessment of unpaid income taxes for the years 1996 through 1999. In 2002, Mr. Rivers' wages at a subsequent employer were also certified for this assessment. Mr. Rivers' statement indicates that he tried to resolve the tax issue between October 2003 and April 2004. Mr. Rivers stated that when he filed the returns, they resulted in a tax due of only $5,424.27, although $12,563.20 had been garnished from his wages. Mr. Rivers died in March 2005 and his surviving children are now pursuing this claim, with the assistance of Dawn Wittig, Mr. Rivers' ex-wife. His children request payment of $7,138.92, to be divided equally among them.

The DOR recommends denial of this claim. DOR records indicate that in April 2001, the department issued an assessment for failure to file for the years 1996 through 1999. DOR records also indicate that the department already had a certification action in place to collect other unpaid tax liabilities, and that the 1996-99 assessment became a part of that collection action. DOR states that it certified Mr. Rivers' wages from February though May of 2001, and then began again with his subsequent employer in January 2002. The DOR states that Mr. Rivers did not contact the department to resolve this issue until October 27, 2003. The 1996-99 returns were filed on Novemer 6, 2003, and at that time Mr. Rivers asked

the DOR to complete his 2000 through 2002 returns based on his wage statements, which the department did. DOR records indicate that the total amount closed to refund pursuant to s. 71.75(5), Stats., was $10,938.91. DOR records indicate that the 2000 through 2003 tax liabilities were referred for collection in 2004. The DOR states that Mr. Rivers submitted a Petition for Compromise, requesting that his overpayment be applied to the new assessments. The DOR accepted that request and credited $6,267.76 to the 2000-03 tax years. Based on that that Petition for Compromise, this claim should be reduced to $4,671.15. The department points to the fact that s. 71.57(5), Stats., prohibits the DOR from refunding any remaining overpayment because no refund was claimed before the two-year statute of limitations, which expired on April 23, 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. **Larry D. Conley** of Milwaukee, Wisconsin claims $233.63 for property allegedly damaged by DOC personnel. In February 2003 the claimant was transferred from Waupun Correctional Institution (WCI) to the Wisconsin Secure Program Facility (WSPF). The claimant states that at the time of the transfer, WCI staff did not note any damaged property on his inventory sheet and that the property was solely in DOC's custody. In February 2004, the claimant was transferred to Green Bay Correctional Institution (GBCI) and was given his property. The claimant alleges that he discovered that the base of his fan was broken and he filed a complaint on March 8, 2004. He states that he later discovered that his glasses and radio were also broken and he filed a subsequent complaint on March 17, 2004, regarding those items. The claimant states that DOC's procedures for handling property and noting damages are lax and that the DOC was negligent in the handling of his property. The claimant requests reimbursement for his damaged fan, radio and glasses.

The DOC does not object to payment of this claim in the reduced amount of $21.94 which represents the cost of the damaged fan, minus 10% depreciation. The DOC denies any responsibility for the alleged damage to the claimant's eyeglasses and radio. The DOC points to the WSPF inventory sheet from March 5, 2003, which indicates that the fan was broken, but no other property damage is noted. The claimant received a copy of that inventory sheet, but did not file a complaint until after his transfer to GBCI in February 2004. Furthermore, the DOC notes that, had the other property been damaged during the transfer from WCI to WSPF or from WSPF to GBCI, the claimant would have found out about it at the same time he noticed the damage to his fan. The DOC points to the fact that, although he received all his property back at the same time, his initial complaint mentions only the broken fan and that it was not until 12 days later that the claimant filed a complaint alleging damage to the glasses and radio. The DOC believes that the claimant has not presented sufficient evidence to show that the DOC is responsible for that damage and therefore only recommends payment for the damage to the fan, as reduced by depreciation.

The Board concludes the claim should be paid in the reduced amount of $21.94 based on equitable principles. The Board further concludes, under authority of s. 16.007 (6m), Stats., payment should be made from the Department of Corrections appropriation s. 20.410(1)(a), Stats.

5. **Charles C. Downing** of Waupun, Wisconsin claims $173.22 for the cost of a smoking cessation program. The claimant is an inmate at Waupun Correctional Institution (WCI). He states that in April 2001, he purchased Nicoderm CQ patches to quit smoking as part of a smoking cessation program at WCI. He states that he successfully quit and remained smoke free until January 2004, when he started smoking again. The claimant believes that his relapse was caused by the fact that WCI was not smoke-free and that it was this constant exposure to smoking by inmates and staff in living, work and recreational areas that caused him to start smoking again. The claimant states that only 2 or 3 prisons allow smoking and that WCI should have been changed to non-smoking after the successful litigation against the tobacco companies. The claimant believes that the state was negligent in not providing a smoke-free environment and requests reimbursement for the cost of his failed smoking cessation program.

The DOC recommends denial of this claim. The DOC states that there is no guarantee that inmates participating in smoking cessation programs will be successful or that if they are, that their success will be permanent. The DOC does not believe that the state should be held liable for the claimant's lack of resolve. The DOC points to the fact that there are many non smoking inmates at WCI who do not begin smoking as a result of exposure to second hand smoke. The DOC also points to the fact that the claimant was able to

refrain from smoking for almost 3 years. The DOC does not believe that it should be held responsible for his decision to start smoking again.

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.

6. **Flint Ink North America Corporation** of Ann Arbor, Michigan claims $19,667.00 for overpayment of fees in connection with the filing of its 2005 Foreign Corporation Annual Report. The claimant states that it was experiencing computer software problems at the time this report was filed, which resulted in the submission of a "negative" gross business figure. The claimant states that the computer error was discovered in a later audit. The claimant realizes that this error was not due to any negligence on the part of DFI, but requests that, in fairness, it be refunded the overpayment caused by the error.

The DFI recommends against payment of this claim because the department has no means by which it can verify any of the information provided by the claimant in either the original report, or the later report as adjusted by the articles of correction. The DFI points to the fact that the claimant has exclusive control over the information on which the report's figures are based. The DFI states that, although it did provide a $226 refund to the claimant, this was based on an obvious mathematical error in the original report. The department performed its examination of the report in accordance with its responsibilities set forth by statute and should not be held responsible for any alleged errors by the claimant. Finally, the DFI points out that the Claims Board has a long history of denying claims of this nature.

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.

7. **Hugasian Motors, Inc.** of Sturtevant, Wisconsin claims $2,000.00 for lost value of a vehicle incorrectly titled by the DOT. The claimant states that he accepted a 2000 Ford Mustang in trade on March 19, 2005, which was presented with a clear Wisconsin title. After researching the average price and wholesale value of the vehicle, the claimant priced the vehicle at $7,995. The claimant took the vehicle to the Metro Milwaukee Auto Auction in April. An employee of the auction runs a computer check on the vehicles as they come in and she told the claimant that there were three brands on the vehicle. The claimant states that up to that point he hand no knowledge of any brands and had relied on the clean Wisconsin title. Because the brands were announced at the auction, the vehicle sold for only $4,100, of which, after fees, the claimant only received $3,945. The claimant requests payment of $2,000 because he feels that he lost at least that much profit due to the DOT's title error.

The DOT recommends payment of this claim in an amount not to exceed $2,000. The DOT's investigation into this matter discovered that the vehicle was incorrectly titled in December 2001. The Illinois title submitted to DOT at that time included the brands "FLOOD" and "REBUILT". However, the new Wisconsin title that was issued only noted "Previously Titled in Illinois." The Wisconsin title should have stated "Previously titled in Illinois as FLOOD" and "Previously titled in Illinois as REBUILT." The DOT finds negligence on the part of a former DOT employee and recommends payment of the claim.

The Board concludes the claim should be paid in the amount of $2,000.00 based on equitable principles. The Board further concludes, under authority of s. 16.007 (6m), Stats., payment should be made from the Department of Transportation appropriation s. 20.395(5)(cq), Stats.

Consideration of motion to refer the innocent convict claim of Richard A. Moeck to a hearing examiner. Richard A. Moeck has filed an innocent convict claim under s. 775.05, Stats., with the Claims Board. Claims Board Secretary, John Rothschild, has made a motion that the claim should be heard by a hearing examiner designated by the Board, rather than by the entire Claims Board. The hearing examiner would conduct the hearing for the claim and would submit a proposed Findings of Fact and Decision to the Claims Board for their approval.

After consideration of the issue, the Board unanimously concludes that the claim of Richard A. Moeck should be referred to the Department of Administration's Division of Hearings and Appeals to be heard by a hearing examiner, who will then a submit a proposed Findings of Fact and Decision to the Claims Board for its approval.

The Board concludes:

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

   Carl A. Haas Racing Teams, Ltd.
   Noble Grain Farm
   Estate of Paul D. Rivers
   Charles C. Downing
   Flint Ink North America Corporation

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

Larry D. Conley	s. 20.410(1)(a)	$21.94
Hugasian Motors, Inc.	s. 20.395(5)(cq)	$2,000.00

3. **The Board concludes that the claim of Richard A. Moeck should be referred to the Division of Hearings and Appeals and considered by a designated hearing examiner, who will then submit to the Board a proposed Findings of Fact and Decision for the Board's approval.**

Dated at Madison, Wisconsin this 27th **day of** DECEMBER, 2005.

Robert Hunter, 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