

STATE OF WISCONSIN CLAIMS BOARD

On July 21, 2022, the State of Wisconsin Claims Board met via Zoom videoconference and considered the following claims:

Hearings were conducted for the following claims:

<u>Claimant</u>	<u>Agency</u>	<u>Amount</u>
1. JRT Top Notch Roofs	Department of Administration	\$213,302.77
2. Walsh Construction	Department of Transportation	\$8,630,650.62
3. Mercy Health Systems and MercyCare Insurance Company	Department of Health Services	\$3,069,168.00

The following claims were decided without hearings:

<u>Claimant</u>	<u>Agency</u>	<u>Amount</u>
4. Joseph May	Innocent Convict Compensation	\$2,330,528.00
5. Charles Bliesner	Department of Corrections	\$219.83
6. Joshua Flynn	Department of Corrections	\$1,663.13
7. De'Angelo Wallace	Department of Corrections	\$175.65

With respect to the claims, the Board finds:

(Decisions are unanimous unless otherwise noted.)

1. JRT Top Notch Roofs of Milwaukee, Wisconsin claims \$213,302.77 for damages allegedly related to a contract with the Department of Administration for the Esker Hall roof replacement project at UW-Whitewater. The bid documents stated that project would begin “on or before” a date provided in the notice to proceed and the notice to proceed said the project would begin “on or before” May 17, 2021.

JRT was awarded the contract and submitted a tentative project schedule with a 4/5/21 start date. DOA rejected that schedule and told JRT they were not allowed to mobilize until 5/17/21 (the Monday after commencement). JRT claims that this start date was contrary to the bid documents and notice to proceed. JRT alleges that the later start date impacted its ability to acquire project materials in a timely manner due to industry-wide shortages. JRT explained the shortages multiple times, but DOA allegedly refused to negotiate in good faith. Despite JRT’s efforts to meet DOA’s demands, DOA stopped communicating with JRT and terminated the contract. JRT believes the schedules it submitted were contractually compliant and that DOA had no right to terminate the contract.

JRT demands that DOA rescind the contract termination and reinstate JRT on the project. If JRT is not allowed to complete the project, it requests \$213,302.77 in lost revenue.

DOA points to the fact that the contract signed by JRT stated work was to begin “on or after” a date specified in the Notice to Proceed. DOA notes that the bid documents clearly stated that mobilization was not scheduled to take place until June 2021, therefore, JRT’s bid would have been based on a mobilization date after 5/17/21. To the extent that there was any confusion in the bid documents, bidders were to notify DOA prior to the bid opening, which JRT did not do. DOA concedes that the Notice to Proceed inadvertently stated that work would begin “on or before” 5/17/21 but believes that any alleged confusion was resolved when DOA clearly informed JRT that it would not be permitted to mobilize until that date.

In response to JRT’s concerns about procuring materials, DOA proposed extending the completion deadline by 16 days. The fact that JRT was not satisfied with this resolution does not mean DOA acted in bad faith. DOA notes that the contract allowed JRT to obtain and request reimbursement for offsite materials storage. DOA believes that any difficulties

obtaining project materials were caused by JRT's failure to purchase those materials in a timely manner.

DOA alleges it was within its rights to terminate the contract. DOA has already re-bid the project and awarded it to another contractor. If the state were required to pay lost revenue to JRT, the taxpayers would have to pay twice for one project. DOA notes that the contract only entitled JRT to monthly installment payments for work performed and that JRT's claim fails to establish that it performed any work for DOA for which it is entitled to payment.

The Board concludes that this claim raises questions of fact that are better evaluated by a court of law, and therefore, the Board denies payment of this claim.
(Member Hanson not participating.)

2. Walsh Construction of Chicago, Illinois claims \$8,630,650.62 for damages allegedly relating to the contract for the I-94 Freeway North Package Project. The project began in Fall 2018 and was broken into five stages with disincentive pay reductions and liquidated damages for not finishing Stage 4 of the project by 12/16/19. Walsh encountered excessive topsoil on site that was significantly thicker than what was shown in the contract documents. Walsh also found topographical errors in the project plans which necessitated the purchase of additional fill material. Walsh claims that these differing site conditions (DSCs) comprised an excusable, compensable delay under the contract. Walsh provided DOT with written notice of the DSCs, but DOT allegedly did not acknowledge Walsh's notification for more than four months.

Walsh points to the fact that the Dispute Resolution Board (DRB) unanimously recommended that Walsh receive additional compensation for the DSCs and acceleration costs for 83 days of delay. DOT agreed to compensate Walsh for the direct costs of the DSCs but refused to provide additional compensation for the cost of acceleration, relief from liquidated damages and disincentive pay, or additional time to complete Stage 4 of the project.

Walsh alleges that it performed significant extra work on the project and was forced to accelerate its work due to DOT's refusal to grant a reasonable time extension. Walsh believes DOT's actions constituted breach of contract and that Walsh is entitled to compensation for damages.

DOT notes that it repeatedly emphasized the fast-paced construction schedule for this project and Walsh's signed contract required its commitment to a schedule that met intermediate project milestones and contract completion dates.

DOT denies its response to Walsh's DSC notices was untimely. DOT began discussions with Walsh immediately after receiving the notices and remained in communication while reviewing its claims. DOT alleges that Walsh's claims were confusing because they raised compensable and non-compensable issues and shifted over time—requesting varying types of relief and citing varying contract provisions. DOT states that there is no language in the contract allowing for acceleration and that DOT neither accepted Walsh's claim for acceleration nor directed Walsh to accelerate at any stage. DOT believes acceleration was unnecessary because DOT allowed numerous time and efficiency modifications to the contract, which provided significant schedule relief to Walsh's benefit.

DOT notes that Walsh submitted its claim to the DRB under "Excusable Weather Delays" and the DRB acknowledged that the contract clearly did not provide time extensions for severe weather. DOT did not agree with the DRB's finding that Walsh was not barred from seeking acceleration costs because if weather related delays were not compensable under the contract, then Walsh was not entitled to acceleration arising from weather delays.

DOT asserts that it met its obligations under the contract by compensating Walsh for costs associated the DSCs and providing appropriate schedule relief to Walsh's benefit. DOT does not believe Walsh is entitled to any additional compensation and recommends denial of this claim.

The Board concludes that this claim raises questions of fact regarding whether Walsh was entitled to a contract extension under the circumstances that are better evaluated by a court of law, and therefore, the Board denies payment of this claim.

3. Mercy Health Systems and MercyCare Insurance of Janesville, Wisconsin (collectively "Mercy") claims \$3,069,168.00 for Medicaid underpayments for 2017 and 2018

BadgerCare Plus Contract. DHS provides Hospital Access Payments (HAPs) to hospitals that serve large numbers of Medicaid recipients. HAPs are intended to offset the cost of uncompensated care and are based on a hospital's historic use by Medicaid patients. Mercy states that DHS's vendor, Milliman, undercounted Mercy's eligible hospital encounters when calculating HAP rates for 2017, 2018 and 2019. Mercy alleges that it could not have uncovered this error on its own because it was not privy to data showing how Milliman counted hospital admissions until late November 2018, when Milliman began providing additional data. Upon receipt of that additional data, Mercy realized there was an error and contacted DHS. After repeated requests by Mercy, DHS/Milliman investigated the issue and eventually admitted the undercounting error in January 2019. DHS corrected the HAP rate for Mercy's 2019 contract but refuses to correct the error for its 2017 and 2018 contracts, resulting in millions of dollars of underpayments for those years. Mercy believes it has been unfairly penalized by an error it did not cause and could not have prevented and requests that the Claims Board recommend payment of this claim in full to the Wisconsin Legislature.

DHS recommends denial of this claim. DHS believes that Mercy is seeking to retroactively change the terms of its 2017 and 2018 contracts to fix a data counting error that Mercy should have corrected before signing the contracts. DHS notes that the data Milliman used to calculate the HAP rates came from Mercy. DHS also points to the fact that prior to finalizing HAP rates for each contract year, Milliman sent hospital encounter data to Mercy, noting that it was being "provided to the HMOs so they can validate the data." DHS believes that Mercy failed to verify the data as instructed before signing its contracts. DHS believes that even if Milliman was initially at fault for miscounting hospital encounters, Mercy had multiple opportunities to uncover that error and notify DHS prior to signing its contracts. DHS notes that HAPs are funded by an assessment collected from hospitals and matching federal funds. All available HAP funds are distributed each year, therefore, the funds for 2017 and 2018 are no longer available.

The Board defers decision of this claim to a later date in order to obtain additional information from the parties.

4. Joseph May. *The Board's conclusion for Mx. May's claim for innocent convict compensation will be issued in a separate decision.*

5. Charles Bliesner of Green Bay, Wisconsin claims \$219.83 for the value of a television allegedly damaged due to DOC staff negligence. Bliesner alleges to have closed and locked his cell upon departing for evening medications, which he claims is the procedure required by the institution rule book. He alleges that DOC staff unlocked his cell prior to his return and looked away to allow inmate Kratz to enter and damage his television. Bliesner alleges the incident is captured on video and that inmate Kratz admitted to damaging the television. In the event an inmate's cell is left open, Bliesner claims it is DOC's responsibility to close and lock it.

DOC believes there is no evidence of staff negligence and recommends denial of this claim. Bliesner filed a complaint via the Inmate Complaint Review System (ICRS), which was ultimately dismissed as the review found no staff involvement in damage to the television. DOC notes that Bliesner's ICRS complaint did not allege staff allowed or assisted inmate Kratz into his cell, or that staff looked away while inmate Kratz damaged the television, which he now claims. Upon DOC's review, there was video evidence of inmate Kratz entering Bliesner's cell, however, staff did not open the cell for him specifically, or look away to allow entrance or damage. DOC explains it is the inmate's responsibility to close the cell door upon departure. Doors are then opened in groups, by one staff who has access to that functionality. Due to the number of inmates in the cell hall and receiving medications, staff could not feasibly wait to open individual cell doors when each inmate returns. DOC indicates that inmate Kratz received a conduct report for entering Bliesner's cell but he did not admit to damaging the television and DOC found no actual evidence of him doing so.

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. Joshua Flynn of Lake Tomahawk, Wisconsin claims \$1,663.13 for money deducted from his inmate account by DOC. Flynn's 2020 Judgment of Conviction (JOC) stated that all fines, court costs, fees, and surcharges were to be "made payable to the agent," which Flynn interpreted as collected during extended supervision, however, DOC began deducting the funds during his incarceration. Flynn requested clarification from the sentencing court, which responded that "the judgment of conviction clearly indicates that fines, costs, other fees, victim witness surcharge and DNR surcharge are all to be collected while you are on extended supervision." DOC received this clarification from the court but continued deducting the money from Flynn's account. Flynn filed several inmate complaints about the deductions, but DOC continued the deductions. Flynn filed a petition for writ of certiorari in Dane County Circuit Court, which found that "DOC does not have the authority to act against the express orders of the circuit court, even though the order contradicts DOC's statutory authority." DOC did not appeal the ruling and stopped the deductions.

Flynn alleges that numerous court cases support his position that DOC does not have the authority to collect money contrary to the language in a JOC. Flynn believes DOC deliberately ignores these decisions and deducts funds contrary to court orders. Flynn alleges that he would not be unjustly enriched by a Claims Board award because his obligations could be reset to the original amounts, which he would owe during extended supervision. Flynn also requests reimbursement for costs associated with his certiorari action, which he believes was only necessary due to DOC's actions.

DOC states that it is statutorily obligated to collect victim/witness and DNA surcharges from inmates. DOC notes that the deductions applied to Flynn's fines reduced his outstanding obligations and were therefore used for his benefit. Although eventually overruled by Dane County Circuit Court, DOC alleges that it was not negligent in deducting the funds pursuant to DOC's established policy and statutory authority. DOC stopped the deductions when ordered to do so by the court. DOC believes the court cases cited by Flynn involve circumstances that are not relevant to this claim. DOC believes there is no equitable basis for paying the claim and that reimbursing Flynn money that has already been used for his benefit would constitute unjust enrichment. Dane Co Circuit Court did not award costs to Flynn and therefore DOC believes his request for costs related his certiorari action should also be denied.

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. *(Members Hanson and Felzkowski dissenting.)*

7. De'Angelo Wallace of Green Bay, Wisconsin claims \$175.65 for the value of a television allegedly damaged by DOC staff during a cell search. Officer Vang conducted a search of Wallace's cell on September 26, 2021. Wallace alleges that his television worked "perfectly fine" prior to the search, but he discovered damage immediately after. Wallace indicates he had photographs on his television of his children to provide motivation, and that the photographs were not there to cover any existing damage. He further alleges there was a video camera in front of his cell that would provide evidence of Officer Vang damaging his television.

DOC believes there is no evidence of negligence by DOC staff and recommends denial of this claim. DOC reviewed the matter via the Inmate Complaint Review System ("ICRS") and found no evidence that staff damaged Wallace's television. DOC notes this was a random cell search and Officer Vang completed an incident report afterward. The incident report noted the television was turned on and working when Officer Vang both entered and exited the cell, and that there were photographs covering the left side of the screen. There was no available video footage of the incident, which, if available, would have been reviewed as part of the ICRS process. DOC notes that Wallace still has possession of the television (at least at the time he filed his claim with the Claims Board) and that the left side of the screen is damaged, but it turns on and the rest of the screen works. DOC believes the television was damaged prior to Officer Vang's search and the damage was covered by photographs.

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:

That decision of the following claim is deferred to a later date:

Mercy Health Systems and MercyCare Insurance Company

That the following identified claims are denied:

JRT Top Notch Roofs
Walsh Construction
Charles Bliesner
Joshua Flynn
De'Angelo Wallace

Dated at Madison, Wisconsin this 9th day of August, 2022

DocuSigned by:
Corey Finkelmeyer
BF5581201F4B43A...
Corey Finkelmeyer, Chair
Representative of the Attorney General

DocuSigned by:
Anne L. Hanson
61D5A62732224A7...
Anne L. Hanson, Secretary
Representative of the Secretary of
Administration

DocuSigned by:
Mary Felzkowski
B6B12E7EB3CD4F8...
Mary Felzkowski
Senate Finance Committee

DocuSigned by:
Terry Katsma
BA192F27B6E74B1...
Terry Katsma
Assembly Finance Committee

DocuSigned by:
Ryan Nilsestuen
E104300B792D4A1...
Ryan Nilsestuen
Representative of the Governor