

IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE  
WESTERN DIVISION

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TN CLAIMS COMMISSION  
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**TERRY HOLLIDAY**

**Claimant,**

**v.**

**CLAIM NO. T20101729**

**STATE OF TENNESSEE,**

**Defendant**

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**JUDGMENT**

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**I.**

**INTRODUCTION**

**THIS MATTER CAME TO BE HEARD** before Nancy C. Miller-Herron, Commissioner of the Tennessee Claims Commission, Western Grand Division, on April 17, 2014, sitting in Henning, Tennessee. Mr. Glenn K. Vines, Jr., Esq., appeared for the Claimant. Mr. Lee Pope, Esq., appeared for the State of Tennessee. Based upon the evidence presented at trial, the testimony of the parties, the statements of counsel and the record as a whole, the Commission **ORDERS** that a judgment be entered for the Claimant.

On September 1, 2009, Claimant, who was incarcerated at West Tennessee State Prison, hereinafter referred to as WTSP., was on produce detail picking okra when he fell off the side of a truck being operated by Correctional Officer Vincent Mallory. Mr. Holliday suffered injuries in the fall, including several broken ribs and, subsequently, a hemothorax.

Terry Holliday brings his claim against the State of Tennessee under Tenn. Code Ann. §9-8-307(a)(1)(A), relating to negligent operation or maintenance of a motor vehicle, Tenn. Code Ann. §9-8-307(a)(1)(E), relating to negligent care, custody and control of persons, and Tenn. Code Ann. §9-8-307(a)(1)(C), relating to negligently created or maintained dangerous conditions on state controlled real property.

## II.

### **EVIDENTIARY ISSUES BRIEFED POST-TRIAL**

#### **A. Camper Top—Subsequent Remedial Measures**

Claimant sought to introduce proof that, prior to Claimant's accident, the State of Tennessee had plans to place camper tops on all the trucks transporting inmates to pick crops in the fields and that camper tops already had been placed on some of them. The State objected to the introduction of this evidence as a subsequent remedial measure. Since the issue was not raised until the day of trial, Claimant was allowed to make an offer of proof and the State of Tennessee was allowed to brief the issue post-trial.

During Claimant's offer of proof at trial, Corrections Officer Mallory testified that the truck in which Claimant was riding on September 1, 2009 did not have a camper top like the trucks in photographs marked for identification only as Tr. Ex. 3. (Tr., p. 55, lines 8-9; p. 57, lines 1-5)

During the offer of proof, Mallory was asked whether he knew it was dangerous to transport inmates without a camper top and whether he brought

that fact to the attention of his superiors. Mallory first answered, "I don't remember that." (Tr., p. 58, line 2)

He then was asked to read the following excerpt from his own January, 2014 deposition regarding whether a camper top for the truck in question was in the works before Claimant's fall:

A. Yes, because I brought it to their attention. If you don't do something, something bad is going to happen.

Q. And they wouldn't put a camper top on it.

A. No. And that truck should have been the first one on there.  
(Tr., p. 58, lines 17-21)

Mallory said he did not remember that testimony. (Tr., p. 58, lines 24-25)  
When asked whether the court reporter had typed it down wrong, Mallory responded: "I guess she did because I don't remember saying this." (Tr., p. 60, lines 23-24) He later stammered, ". . . evidently I said it. It says I said it." (Tr., p. 61, lines 24-25)

When asked whether reading from the transcript refreshed his memory about his testimony the day of the deposition, Mallory responded, "No, it don't." (Tr., p. 65, line 22)

Mallory acknowledged that camper tops were installed on all of the trucks within one week of Holliday's fall. (Tr., p. 67, lines 6-10)

Tennessee Rule of Evidence 407 provides as follows:

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the **subsequent remedial measures** is not admissible to prove strict liability, negligence, or culpable conduct in connection with the event.

As noted by the courts, the purpose of this rule is to encourage business to adopt remedial measures and thereby make the public safer. *Martin v. Norfolk Southern Ry. Co.*, 271 S.W.3d 76, 85 (Tenn. 2008).

In *Martin*, the plaintiffs argued that the clearing of vegetation at the railroad crossing was not remedial because it was done not in response to Mrs. Martin's death, but months later in accordance with the railroad's internal company policies. The Tennessee Supreme Court held that this argument was without merit and excluded evidence of the clearing "because it corrected an allegedly dangerous condition and made the crossing safer for future motorists." (citation omitted) *Id.*

Similarly, in the case at bar, Claimant argues evidence that the State was planning to, but had not gotten around to, adding a camper top to the truck should be allowed because it is not a subsequent remedial measure but part of an already existing plan.

The Commission **FINDS** that evidence that the State had a plan to add a camper top to the truck Officer Mallory was driving and that it did, in fact, later add the camper top is evidence of a subsequent remedial measure which must be excluded from the evidence proffered at the instant trial.

#### **B. Medical Costs: Collateral Source Rule**

The State of Tennessee argued that payments made on Claimant's medical bills by First Medical Management, hereinafter referred to as FMM, and Correctional Medical Services, hereinafter referred to as CMS, do not fit under the collateral source rule and therefore should be admitted into evidence.

Lisa Parks, Director of Budget and Fiscal Services for the Tennessee Department of Correction, testified on behalf of the State. Parks testified that she is familiar with the department's payment of medical bills incurred by inmates. (Tr., p. 224, lines 8-10) Parks stated that the state has a contract with a medical vendor that pays the bills. So the state pays the contractor and the contractor pays the hospital or other medical provider. (Tr., p. 225, lines 1-5) Parks stated that at the time of Mr. Holliday's accident, the state had two contracts, one with FMM and one with CMS. (Tr., p. 225, lines 21-25)

On cross examination, Parks explained that what the State would actually pay was "the per diem and we do a hospitalization charge for, you know, that's specified in our contract. . ." (Tr., p. 228, lines 10-12) Parks indicated the State likely would have paid for actual inpatient hospital charges exceeding fifty thousand dollars, which she did not see in this case. (Tr., p. 229, lines 13-17)

Parks was asked about a specific invoice for \$998 for Lauderdale County Ambulance. She noted that the invoice itself lists "the *policy name* first, Medical Management." (sic) (Tr., p. 230, line 10). She stated that FFM paid the ambulance bill. (Tr., p. 230, lines 12-14) The State would have paid FMM their per diem rate based on the 2009 contract. (Tr., p. 231, lines 11-13)

Parks acknowledged she could not state the amount of funds paid by the State of Tennessee on behalf of Terry Holliday for the medical services related to the accident. (Tr., p. 228, lines 14-17) She did say that the State would have paid a set dollar amount per day for medical services per inmate. (Tr., p. 232, lines 15-17)

In a tort action, “the fact that the plaintiff has received payments from a collateral source, other than the defendant, is not admissible in evidence and does not reduce or mitigate the defendant's liability.” *Frye v. Kennedy*, 991 S.W.2d 754, 762 (Tenn. App. 1998); citing *Donnell v. Donnell*, 220 Tenn. 169, 415 S.W.2d 127, 134 (1967). *See also Steele v. Ft. Sanders Anesthesia Group, P.C.*, 897 S.W.2d 270, 282 (Tenn. App. 1994).

The Commission **FINDS** that FMM and CMS were collateral sources akin to insurance companies. As the State's own witness noted, their names were even listed as the policy name on the medical invoices. (Tr., p. 230, line 10) Therefore, the fact that payments were made by FMM and/or CMS for Claimant's medical treatment is not admissible and will not be considered by the Commission when assessing damages against the State.

It should be noted that the State presented no evidence regarding the amount of credit due to the State for payments allegedly made to FMM and CMS on behalf of Claimant.

### III.

#### **SUMMARY OF TRIAL TESTIMONY**

Corrections Officer Vincent Mallory testified first in this matter. Mallory testified that he has been a corrections officer at WTSP since 1999. (Tr., p. 46, lines 21-24; p. 97, lines 17-19) Mallory further testified that he worked the produce detail at the prison in September, 2009; part of his duties included transporting inmates to the field in a half-ton Dodge pick-up truck. (Tr., p. 49, line 11- p. 50, line 3)

Mallory stated that on the date Claimant fell, the pick-up he was riding in had a wooden rail down each side. (Tr., p. 53, lines 21-25.) He stated that these rails appear in the collage of photographs marked Trial Exhibit 2 (Tr., p. 54, lines 6-10)

Mallory insisted that Claimant fell because he was sitting on a bucket which he [Claimant] had placed on top of the bench in the truck. He said he had asked Holliday not to sit on that bucket three days in a row, but Holliday disobeyed him. (Tr., p. 68, lines 13-18)

Mallory was asked whether the rails on the truck he was driving on September 1, 2009 were rotten. He replied, "The rails wasn't rotten." (Tr., p. 71, line 7) Mallory was then asked about the following passage from his January deposition, beginning at page 52, line 11:

Q. This truck that you were driving on this incident should have been the first one---

A. Yes, it should have been the first one because the rails were rotten; yep. And I was shuttling inmates like—like---like cattle every d-a-m day." (Tr., p. 71, lines 9-15)

When asked if that was his testimony during the deposition, Mallory responded, "Yes, sir." (Tr., p. 71, line 22) When asked why he testified on January 15, 2014 that they were rotten, Mallory said, "I didn't think they were rotten." (Tr., p. 72, line 6) When asked why he gave that testimony, Mallory responded, "I don't know what to tell you." (Tr., p. 72, line 10)

Mallory testified that the rails are attached to the top of the bed of the truck and stuck three inches down into the three holes that pick-up trucks have on each side. Examining the pictures in Trial Exhibit 1, Mallory stated that the rails

appeared to be in okay condition. (Tr., p. 101, line 21- p. 102, line 5) Mallory further stated that they appeared to be okay when he picked the inmates up that morning. (Tr., p. 102, lines 6-7) He noted that they were not designed to take the weight of a whole person, which is why he tells the inmates not to lean on the rails. (Tr., p. 102, lines 8-13)

Mallory admitted again that his deposition states that he testified in January, 2014 that the rails were rotten on September 1, 2009, because they had been out in the weather for 10 or 15 years. (Tr., p. 103, line 25-p. 104, line 7)

Mallory testified that in September, 2009, he generally took the inmates working in the produce fields to the potato barn for lunch. (Tr., p. 74, lines 22-24) Mallory said before he started the truck in motion for the potato barn, he saw Holliday sitting on the bucket and told him to get off, but Holliday did not do so. (Tr., p. 75, lines 6-14) Mallory said even though Holliday did not obey these instructions, he put the truck in drive and “was easing over the—over the mound of dirt going to the turn row so I could drive down the turn row.” (Tr., p. 76, lines 2-4) Mallory indicated that when Holliday’s fall happened he was trying to “accelerate to get the—up a hill” (Tr., p. 76, lines 14-15) and back on the highway. (Tr., p. 76, lines 17-18) He acknowledged that when he was accelerating his front wheel hit the mound of dirt and Mr. Holliday went over the side of the truck. (Tr., p. 77, lines 15-22)

Mallory testified that no other inmates had fallen out of the back of this truck. (Tr., p. 98, lines 9-11)

Mallory acknowledged that he probably shouldn't have made the turn and accelerated with Holliday sitting on a bucket. (Tr., p. 79, line 8) Mallory stated, "I should have fired him." (Tr., p. 79, line 24)

Mallory said he didn't fire Holliday "because he worked. He—he picked produce. He sure did." (Tr., p. 80, lines 1-3) Mallory was then referred to his January 15, 2014 deposition when he testified about Holliday's work ethic: "He wouldn't work in a pie factory running a taster. I had a lot of trouble out of this guy. Man." (Tr., p. 81, lines 3-5) Mallory further testified that he testified about Holliday: "And it was all the time, 'Come on Holliday, do something for me, will you? Will you do something for me today, Holliday?'" (Tr., p. 82, lines 9-12)

Mallory testified that after Holliday fell he called a code and lots of prison personnel came to the scene of the accident, including nursing staff and wardens and Mallory's supervisors and internal affairs. (Tr., p. 85, line 8-p. 86, line 1) Mallory said that as soon as they arrived, he told them Holliday was sitting on a bucket. (Tr., p. 87, lines 7-9) However, there was not a photograph of a bucket in the collage of photographs introduced by the State.

Mallory testified that he gave prison investigators a written statement the day of the accident. "Everybody got a copy, I believe," Mallory stated. (Tr., p. 88, line 19) Mallory's statement was not produced during discovery or at the trial of this matter.

WTSP inmate Jerry Wolford also testified in this matter. He stated that he worked in produce detail between the end of 2008 and 2010. (Tr., p. 106, lines 22-24)

Wolford testified that it was common for inmates to sit on buckets while in the truck, though they were told not to do so. (Tr., p. 111, lines 20-25)

When asked whether Mallory's wheels hit anything before Mr. Holliday fell, Wolford replied, "Yeah. There was a little rut there." (Tr., p. 115, line 23) Wolford said after Mallory hit the rut, the rails "snapped and him and the rail both hit the ground." (Tr., p. 116, lines 3-4) Wolford explained further, "and there's a wash and when the truck hit the wash, it rocked, and when it rocked, you know, the rocking back against the railing, and the railing and him both hit the ground." (Tr., p. 121, line 23- p. 122, line 2)

When asked about the condition of the railings before Holliday's fall, whether the railings appeared to be rotten, Wolford testified: "Not rotten. They were weathered, but, you know, that's from any wood being out in the weather—" (Tr., p. 126, lines 16-18)

Wolford was then asked about the following exchange during his pre-trial deposition:

Q. Now, he gave a sworn statement that some of the rails were broke on—before this incident happened.

A. I---I---I mean it is wood. After years, wood is going to rot.  
(Tr., p. 127, lines 20-24)

Wolford indicated he didn't really remember saying this. Wolford stated, "I—I can't remember if they was—if they was in real good shape or real bad shape, completely rotten. You know, that—I mean they were there." (Tr., p. 128, lines 17-19)

Wolford further testified that he helped build houses when he was a kid and is pretty familiar with the condition of wood. (Tr., p. 130, lines 7-18)

Wolford testified that Holliday “was hollering, said his ribs was broke” (Tr., p. 116, line 6) and that he was acting like he was in pain. (Tr., p. 116, line 9)

Claimant, Terry Holliday, testified in the trial of this matter. Holliday testified that he was an inmate at WTSP, both fairly recently as well as many years ago. He said his crimes grew out of his addiction to alcohol and cocaine (Tr., p. 134, line 2-p. 135, line 6) He said he was sober for 18 years after he was in trouble the first time. (Tr., p. 135, lines 11-13) He was most recently sentence to 2 years at WTSP for stealing a trailer. (Tr., p. 136, lines 8-10)

Holliday testified that he did not receive any write-ups or disciplinary charges while he was incarcerated. (Tr., p. 136, lines 12-16) He also stated that he was sober during his incarceration and has stayed sober since he was released, for a total of almost seven years. (Tr., p. 136, lines 17-25) Holliday testified that he continues to attend AA meetings weekly and probably always will. (Tr., p. 137, lines 13-22)

Holliday testified that when he was released from prison the first time, he started painting for a living, eventually branching out into home-building. His wife kept the business going while he was incarcerated. (Tr., p. 138, lines 6-24) Holliday said they now do mostly residential painting and remodeling work. (Tr., p. 139, lines 6-7)

Holliday testified that he had been on produce detail at WTSP for only about a week before he was injured. (Tr., p. 140, lines 12-14) Holliday testified

that Officer Mallory was driving the truck when he fell out of it. (Tr., p. 142, lines 13-15)

Holliday testified that the week he worked produce detail, he picked okra. (Tr., p. 143, line 12) He said he and the other inmates would fill their buckets with okra, dump its contents in a hopper and start picking again. (Tr., p. 144, lines 1-3) But he testified that there were never any buckets on the truck that they rode in. (Tr., p. 144, lines 23-25) He said the buckets were stacked "like Dixie cups . . . beside the hopper that all the produce is dumped into." (Tr., p. 145, lines 8-10) Holliday went on to explain that the buckets were loaded on the tractor if they were to be moved. (Tr., p. 146, lines 17-19)

Holliday said he was injured around lunchtime after they had gotten into the truck to ride to the potato barn to get their sack lunches. (Tr., p. 147, lines 9-17)

Holliday said the white Dodge truck he was riding in had wooden sideboards on the right and left sides. (Tr., p. 148, lines 4-7) Holliday testified that the wooden rails on the right side of the truck were in better shape than those on the left. (Tr., p. 148, lines 14-16) He stated that the rails on the left side "had a section of it broken off toward the back." (Tr., p. 148, lines 20-21)

Holliday explained that a day or two before his fall, five inmates were riding back from the field on the left side bench. He said, "we were running over these ruts and—and it was rough." (Tr., p. 150, lines 3-4) Holliday said the weight of the five men bouncing over the rough terrain broke the board they were

sitting on “and the board teepee’d over the top of the wheel well.” (Tr., p. 150, lines 10-11)

Holliday testified that after the board broke the people who rode on the left side “had to ride in a squatting position because there was nowhere to sit.” (Tr., p. 152, lines 5-7) He noted that Mallory inspected the truck so he had seen it. (Tr., p. 152, lines 19-21)

Holliday testified that on the day of his accident, he was on the broken side of the truck where there was not a bench to sit on. (Tr., p. 156, line 14) He said there was not a five gallon bucket to sit on either. (Tr., p. 157, lines 19-21) Holliday explained that those riding on the left side had to prop their arms “on the side rail of the bed.” (Tr., p. 158, lines 19-20)

When asked how the accident happened, Holliday explained that when Mallory stops and starts the truck, “it’s just abrupt. He don’t—he don’t ease—he don’t—he don’t break away easy.” (Tr., p. 159, lines 18-19) Holliday went on:

When—when he comes to places that he has to stop, he stomps it, and everybody in the truck gets thrown up to the cab. And when he takes off, . . .it’s abrupt that way. (Tr., p. 159, lines 20-24)

Holliday further testified that a lot of weight in the back of a truck puts stress on the suspension system, exaggerating the motion of the truck bed when it hits anything. (Tr., p. 160, line 21- p. 161, line 6)

Holliday testified that when he overloads his own truck, it doesn’t take much to make the truck bed roll. (Tr., p. 164, line 25- p. 165, line 8) He estimated that the rated capacity for a truck the size he was riding in the day he

was hurt was “about 1700 pounds. That’s what my—that’s what my trucks are.”  
(Tr., p.165, lines 17-18)

Holliday stated that when Mallory hit the gully, the truck bed rolled to the left and he was ejected from it. (Tr., p. 161, lines 14-19) He said he “heard the crack of the rail.” (Tr., p. 161, lines 20-21)

Holliday said he hit the ground on the side of his head and on his shoulder. (Tr., p. 161, line 24- p. 162, line 2) He said his hips closed up into this chest and he could hear bones breaking. (Tr., p. 162, lines 4-9) Holliday testified:

I laid there for just a couple of seconds before I really—before the pain really hit. And—and then it was just—it was unbearable. I couldn’t breathe. . . I figured I was going to die.” (Tr., p. 162, lines 12-21)

Holliday went on: “I was hurting everywhere. I was hurting in my head, my neck, my—my shoulder. I couldn’t breathe.” (Tr., p. 167, lines 11-12)

Holliday said one of the other inmates put him into a sitting position. “[H]e kind of just put his back to mine and kept me—made me a chair.” (Tr., p. 167, lines 8-9)

Holliday said he was rushed to the nearest hospital where he was x-rayed and diagnosed with broken ribs. (Tr., p. 167, line 18- p. 168, line 20) He said his pain while he was at the hospital was a 10 on a 10 point scale. (Tr., p. 169, lines 1-7) After 4 or 5 hours, Holliday was taken back to the prison infirmary where he said he “didn’t do well at all.” (Tr., p. 169, line 19)

Although Holliday was supposed to be placed in a hospital bed that inclines at least 15 degrees, he was not, apparently because there was not such

a bed available at the prison. (Tr., p. 170, lines 5-14) The bed where he was placed did not even have handles to allow him to pull himself up. (Tr., p. 170, lines 19-20) His recovery did not go very well. (Tr., p. 170, line 17)

Holliday testified that his symptoms worsened and breathing became more difficult. (Tr., p. 171, lines 4-8) By this time, he was back in general population. He called his wife and told her he was “going to die.” (Tr., p. 172, lines 19-20)

Eventually he was taken back to the local hospital where they did an x-ray and discovered that his lungs were filling with blood. (Tr., p. 173, line 23- p. 174, line 6) He was then taken by ambulance to Meharry Hospital in Nashville, where they did additional x-rays and diagnostic tests. (Tr., p. 174, lines 9-17) By that point, Holliday was in “grave condition.” (Tr., p. 174, line 19)

Holliday testified that doctors at Meharry made several attempts to use a needle to extract the blood from his lungs, but some of it had coagulated there. (Tr., p. 175, line 20- p. 176, line 23) Physicians at Meharry eventually surgically inserted a tube into his lung so they could suction the clots. They evacuated three liters of coagulated blood. (Tr., p. 177, lines 1-8) Holliday said this procedure improved his condition; his pain went from a 10 to a 6 or 7. (Tr., p. 177, lines 11-15) Holliday testified that he was hospitalized for around 2 weeks. (Tr., p. 177, line 17)

When asked whether he was now back to normal, Holliday estimated that he was “not much over 50 percent.” (Tr., p. 179, line 3) He said his improvement plateaued about a year after the accident. (Tr., p. 179, lines 8-9)

Holliday stated that his broken ribs were displaced or crooked. X-rays done by his family physician confirmed that they hadn't connected or healed. He said he would have to have a surgical procedure to wire them together. He explained that he had not yet had the surgery because he is self-employed and uninsured. He is hoping to get insurance through the Affordable Care Act. (Tr., p. 179, line 23- p. 180, line 20)

Holliday said he is hoping that he'll be able to have the surgery and get his ribs wired back together so they might heal up. (Tr., p. 186, lines 15-19) He noted that his doctors were concerned about doing other procedures for which anesthesia was needed because of the breathing issues. (Tr., p. 187, lines 1-9)

When asked to explain how else the nonunion of his ribs affected his life, Holliday testified that the end of the ribs grind when he moves or twists in certain ways, which causes pain. (Tr., p. 181, lines 1-7) He said he is not able to lift much on his left side. He estimated that the strength of his left arm is probably only about 25% of the strength in his right arm. (Tr., p. 181, lines 15-18)

Holliday also testified that the problem with his ribs has greatly affected his sleep because he can no longer sleep on his back. Holliday noted that most of the time he sleeps in a recliner. (Tr., p. 184, line 3) He also testified that his "breathing is still not where it used to be, where it once was." (Tr., p. 182, lines 12-13) He says he gets winded very quickly when he tries to exert himself. (Tr., p. 182, line 24- p. 183, line 2)

With regard to his work as a painter, Holliday said that he is not able to carry long ladders or lift five gallon buckets or pull nails out of a piece of wood.

When his son is not with him, he has to hire people to do those tasks. (Tr., p. 183, lines 11-17) He said he can't lift anything heavier than a milk jug without it hurting. (Tr., p. 186, lines 3-4)

With regard to how it has affected his personal life, Holliday said now that his two and a half year-old grandson has gotten bigger, he is not able to pick him up. He also is not able to lift weights or run anymore like he did before the accident. (Tr., p. 184, line 25- p. 185, line 19)

Holliday testified that the day of the accident the prison investigator took many photographs of the scene. But he has never seen a photograph of the bed of the truck or of the bucket he was supposed to have been sitting on. Holliday said if the investigator had taken a picture of the truck bed, "it would have clearly shown that there wasn't no bench on that side of the truck to sit on." (Tr., p. 189, lines 22-23)

#### **IV.**

#### **Expert Testimony**

Thomas Rawlinson, M.D., who is board certified in internal medicine and practices with Memphis Internal Medicine, testified on behalf of Claimant. (Tr., Ex. 6, p. 5, line 18; p. 6, lines 19-22) Dr. Rawlinson testified that he performed a record review on Terry Holliday; he did not treat or examine Holliday. (Tr., Ex. 6, p. 9, lines 9-14) Holliday's medical records were attached to Rawlinson's deposition as Collective Ex. 2. (Tr., Ex., p. 19, lines 1-5)

Rawlinson testified that the treatment Claimant received for his injuries, including the long stay at a Nashville hospital, was reasonable and necessary. (Tr., Ex. 6, p. 22, lines 2-8)

Dr. Rawlinson testified that x-rays show nonunion of some of the rib fracture sites. "It would be very difficult for them ever to be normal again or to join up in a normal manner." (Tr., Ex. 6, p. 23, lines 18-20) He opined that this nonunion could cause chronic pain. (Tr., Ex. 6, p. 23, lines 21-24) He said that he had treated patients for nonunion of ribs. (Tr., Ex. 6, p. 24, lines 2-4)

Dr. Rawlinson opined that Claimant's injuries were caused by the "trauma he sustained after falling off the truck." (Tr., Ex. 6, p. 24, lines 13-14) He further opined that it would be very unlikely that the hemothorax was caused by some other, pre-existing condition. (Tr., Ex. 6, p. 27, lines 12-15) Dr. Rawlinson later testified that Claimant's fall from the truck "caused it [the hemothorax]. I don't think there is any question about it." (Tr., Ex. 6, p. 31, lines 19-20)

Dr. Rawlinson stated that he reviewed the bills for Claimant's treatments. He opined that they "appear reasonable and standard in this area." (Tr., Ex. 6, p. 25, lines 20-21)

## **V.**

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Commissioner has thoroughly reviewed the record in this case, including the testimony of the witnesses who appeared at the hearing of this cause, the testimony of Dr. Rawlinson whose deposition was introduced for proof, the arguments of counsel and, indeed, the entire record as a whole. The

Commission would note that it found the testimony of Officer Vincent Mallory to be largely *incredible* and quite at odds with his pre-trial deposition. After carefully weighing the credibility of each of the witnesses, the Commissioner makes the following findings of fact.

**A. The Claimant established that the State violated § 9-8-307(a)(1)(A), relating to negligence in the operation of a motor vehicle.**

The trial testimony established that while Officer Mallory, a state employee, was not driving the Dodge truck at a high rate of speed, he had a tendency to start and stop the truck abruptly.

Claimant testified that:

When—when he comes to places that he has to stop, he stops it, and everybody in the truck gets thrown up to the cab. And when he takes off, . . .it's abrupt that way. (Tr., p. 159, lines 20-24)

Claimant testified that just prior to his fall, Mallory took off abruptly as he usually did. He apparently hit some kind of a gully, maybe “the remains of a turn row or a plow row.” (Tr., p.160, lines 17-18) Claimant said when Mallory hit this rut or gully abruptly, the truck bed rolled and the rail on the left side, which already was broken, cracked. He was ejected from the truck. (Tr., p. 161, lines 5-21)

Mallory himself indicated that when Holliday’s fall happened he was trying to “accelerate to get up the—up a hill” (Tr., p. 76, lines 14-15) and back on the highway. (Tr., p. 76, lines 17-18) He acknowledged that when he was

accelerating and his front wheel hit the mound of dirt, Mr. Holliday went over the side of the truck. (Tr., p. 77, lines 15-22)

The Commission **FINDS** that state employee Mallory was negligent in his operation of a motor vehicle and that his negligent operation of the truck was a legal cause of Claimant's ejection from the truck and subsequent injuries.

**B. The Claimant established that the State violated § 9-8-307(a)(1)(E), relating to negligent care, custody and control of persons.**

With regard to the second category of allegations under §9-8-307 (a)(1)(E), Claimant alleges the State was negligent in its care, custody and control of him by failing to maintain a safe working environment.

There is no question that supervisors at WTSP owed Claimant and other inmates a duty of care to maintain safe conditions on the prison grounds and to make reasonable efforts to protect the inmates from harm. *Lewis v. State*, 73 S.W.3d, 88, 92 (Tenn. Ct. App. 2001). *See, generally, McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn.1995).

With regard to breach of that duty, the record contains a considerable amount of testimony that the rails on the truck in which Claimant was riding were rotten or rotting. Officer Mallory read from his own deposition during which he testified that the rails on the truck in which Claimant was riding the day of his accident were rotten. (Tr., p. 71, line 22) In addition, Claimant's own testimony established that the bench on the left side of the truck had broken a few days earlier, leaving those inmates riding on the left side in a kneeling position. (Tr., p. 150, line 3- p. 152, line 7)

It is clear that Claimant sustained injuries caused by a fall from a truck which occurred while Claimant was being transported to lunch at a nearby barn.

The Commission **FINDS** that Defendant's decision to transport Claimant in the Dodge truck with the broken bench and the rotting rails, apparently without taking any affirmative steps to protect him or the other inmates, was a violation of §9-8-307 (a)(1)(E) and a legal cause of Claimant's ejection from the truck and subsequent injuries.

**C. The Claimant established that the State violated §9-8-307 (a)(1)(C), relating to dangerous conditions on state-controlled real property.**

Claimant also seeks damages under §9-8-307 (a)(1)(C) for "negligently created or maintained dangerous conditions on state controlled real property." The State rightly notes that there is a requirement in Subsection (C) that the proper state officials have notice "at a time sufficiently prior to the injury for the state to have taken appropriate measures." Tenn. Code Ann. §9-8-307(a)(1)(C). However, Officer Mallory testified during his deposition that the rails were rotten because they had been out in the weather 10 or 15 years, something state officials obviously knew. (Tr., p. 103, line 25-p. 104, line 7)

The Commission **FINDS** that the day of Claimant's fall, the Dodge truck with a broken bench and a rotting rail was a dangerous condition on state-controlled real property.

## VI.

### DAMAGES

In *McIntyre v. Ballentine*, 833 S.W.2d 52 (Tenn. 1992), the Tennessee Supreme Court adopted a modified system of comparative fault. Since *McIntyre*, the trial court must apportion fault to anyone having a degree of culpability. *Carroll v. Whitney*, 29 S.W.3d 14, 22 (Tenn. 2000); *Dotson v. Blake*, 29 S.W.3d 26 (Tenn. 2000); *Berocets v. Harde Falls Pontiac-Olds, Inc.*, 891 S.W.2d 905 (Tenn. 1994). The trier of fact must first determine the total amount of Claimant's damages, then apportion the damages on the percentage of fault attributable to each tortfeasor. *Grandstaff v. Haws*, 36 S.W.3d 482, 494 (Tenn. Ct. App. 2000).

In the case at bar, the record is replete with evidence of Claimant's damages, including substantial pain and suffering. The failure of Claimant's ribs to heal properly is documented in his medical records. (Tr. Ex. 5) Dr. Rawlinson testified that the nonunion of Claimant's ribs could cause chronic pain. (Tr., Ex. 6, p. 23, lines 21-24) Claimant characterized his own pain at times as a 10 on a 10 point scale. (Tr., p. 169, lines 1-7) By the time he was transported to Meharry in Nashville, he was in grave condition and had to endure a surgical procedure to remove coagulated blood from his lungs. (Tr., p. 174, line 9- p. 177, line 19) Claimant testified that since his accident he continues to have difficulty breathing and weakness on the side with the broken ribs. (Tr., p. 181, line 1- p. 183, line 2)

Claimant also testified that since his injury, he has had to scale down what he can do in his business, and that he has not been able to run or lift weights,

and that he even has difficulty lifting his grandson. (Tr., p. 183, line 11- p. 185, line 19)

Claimant testified that he hopes to have future surgery to have his ribs wired together in hopes that they will heal. (Tr., p. 186, lines 15-19)

Based on Claimant's pain and suffering, medical expenses, loss of enjoyment of life and all other damages, the Commission **FINDS** that Claimant sustained damages in the amount of one hundred twenty-five thousand dollars (\$125,000).

The Commission declines to find that Claimant was at fault. Claimant was assigned the task of picking okra in the field. To do that, he had to ride in the back of the white Dodge with the broken bench and rotten rail. There was no evidence whatsoever that he would have been free to decline.

The Commission, therefore, **FINDS** that zero percent (0%) of the fault reasonably can be apportioned to the Claimant. The Commission further **FINDS** that one hundred percent (100%) of the fault reasonably can be apportioned to the State of Tennessee.

## VII.

### CONCLUSION

It is **ORDERED, ADJUDGED and DECREED** that Claimant, Terry Holliday, is awarded a judgment against the Defendant, State of Tennessee, in the amount of one hundred twenty-five thousand dollars (\$125,000).

Costs of this cause are taxed pursuant to TCA §9-8-307 (d).

IT IS SO ORDERED this 9 day of July, 2014.

  
**NANCY C. MILLER-HERRON**  
**COMMISSIONER**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and exact copy of the foregoing has been mailed by first class U.S. mail, postage prepaid, electronically transmitted, or hand-delivered to:

Mr. Glen K. Vines, Jr., Esq.  
Nahon, Saharovich & Trotz, PLC  
488 South Mendenhall  
Memphis, TN 38117

Mr. Lee Pope, Esq.  
Assistant Attorney General  
Civil Rights and Claims Division  
P.O. Box 20207  
Nashville, TN 37202-0207

on this the 11<sup>th</sup> day of July, 2014.

  
**PAULA SWANSON, CLERK**  
Tennessee Claims Commission