
IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE
EASTERN GRAND DIVISION

2014 APR 21 A 10:07

VICTOR D. MCMILLER, # 100564)
)
 Claimant,)
)
 v.) Claims Commission No. T20110052
) Regular Docket
 STATE OF TENNESSEE,)
)
 Defendant.)

FINAL JUDGMENT

This matter arises out of an alleged fall Victor D. McMiller (Mr. McMiller) suffered on July 8, 2010, at the Northeast Correctional Complex (NECX). Mr. McMiller is an inmate housed at NECX, and alleges that he fell while attempting to climb up to his top bunk bed. Mr. McMiller claims the State was negligent in assigning him to a top bunk because of his Health Assessment Classification of B which among other things, restricted him to bottom bunks and placed limitations on climbing activities. The fall allegedly caused head, neck, and lower back injuries. Mr. McMiller asserts that he made numerous requests to be assigned a bottom bunk, citing his Health Assessment Classification in support thereof. According to Mr. McMiller, the requests were unsuccessful.

Subsequently, he filed a claim with this Commission under Tenn. Code Ann. § 9-8-307(a)(1)(E) against the State, claiming it had been negligent in its care, custody, and

control of his person by failing to assign him to a bottom bunk pursuant to his Health Assessment Classification. Tenn. Code Ann. § 9-8-307(a)(1)(E) provides as follows:

(a)(1) The commission or each commissioner sitting individually has exclusive jurisdiction to determine all monetary claims against the state based on the acts or omissions of "state employees," as defined in § 8-42-101, falling within one (1) or more of the following categories:

(E) Negligent care, custody and control of persons

The Commission received the Notice of Transfer from the Division of Claims Administration on October 14, 2010. The State filed its answer to the Complaint on January 31, 2011.

The claim was placed into abeyance by agreement on April 12, 2011, and was subsequently reinstated on February 22, 2012.

Claimant then filed with the Commission on March 19, 2013, a Motion for Summary Judgment which was Denied on May 9, 2013.

On November 19, 2013, trial in this matter was held in Mountain City, Tennessee. Following the trial, both parties submitted post-trial briefs in support of their positions.¹

The Evidence Presented

¹ On April 3, 2014, the Commission received a document from Mr. McMiller styled "Motion For The Status Of The Case And The Truth Of The Case". In addition to re-visiting some of his previous arguments in this case, Mr. McMiller states that the supposed "Friendship Relation" between the undersigned and counsel for the State will somehow influence our decision in this matter. That contention has no merit whatsoever and the case will be decided on the evidence properly presented to us and the applicable law applied to that evidence-nothing else. Further, there is no "friendship relation" in any form between the undersigned and Ms. Lorch other than attorney and a Claims Commissioner whose actions are governed by the Code of Judicial Conduct.

The Commission first recognizes that there are numerous factual disputes involved in this case.²

The testimony at trial and submitted by deposition is as follows.

TESTIMONY of JAMES BROWN ALLEN

James Brown Allen (Officer Allen) has been employed with the department for twenty-three (23) years and is currently a captain on third shift, but was a lieutenant on first shift at the time of this incident. (TR 1, p. 31).

On June 4, 2010, upon returning from a court appearance in Sullivan County Mr. McMiller was informed during the intake process by Officer Allen that he would be “going to Unit 4.” (TR 1, p. 32). Unit 4 is a segregation unit. (TR 1, p. 38). When asked by Mr. McMiller why he would be going to Unit 4 when he had violated no rules, Officer Allen informed him that there were no available beds on the compound. (TR 1, p. 37). When Mr. McMiller informed Officer Allen that he would have to file a grievance for being placed in Unit 4, Officer Allen responded by telling Mr. McMiller to go ahead and file the grievance. (TR 1, p. 33). Prior to being taken to Unit 4, another inmate was charged with a violation that mandated his being sent to Unit 4, and Officer Allen informed Mr. McMiller that a bed on the compound had become available. (TR 1, p. 37). Mr. McMiller asked “Well, is it a top bunk bed, or a bottom bunk bed?” (TR 1, p. 37). Officer Allen informed Mr. McMiller that he was unsure of the status of the bunk as either top or bottom and gave Mr. McMiller the option to go ahead with housing in Unit 4, to which Mr. McMiller replied “No, I’ll take it.” (TR 1, p. 37).

² There are two volumes of testimony in this case. References to the testimony will be cited as follows: (TR ___, p. ___). Additionally, there were 15 Exhibits filed. Those will be referred to as follows: (EXH ___).

When questioned about housing general population inmates in Unit 4, Officer Allen responded that general population inmates "have been [housed] ... in situations like that". (TR 1, p. 38). Officer Allen also stated that the bunk in Unit 4 would have been a bottom bunk. (TR 1, 38).

Officer Allen was then asked about a policy that provides for placing a general population inmate in Unit 4. Policy #506.14 contains a provision which in section VI.(A)(7) states the following:

Transients may be segregated from the general population at a receiving institution. If the inmate is not placed in general population but is placed in segregation for reasons other than punitive or administrative segregation and/or protective custody, the period of time shall not exceed 14 days. (See Policy #506.13). (EXH 2).

Officer Allen testified that policy 506.14 provides for the housing of general population inmates in Unit 4 when situations such as Mr. McMiller's arise. (TR1, p. 41).

Officer Allen was then referred back to policy #506.14 in paragraph B entitled "Special Housing" which states in pertinent part:

1. Inmates with special medical needs are housed according to the level of care needed. (See Policy #113.32) Physically disabled inmates in the general population should be assigned to an institution and housing unit that can accommodate the disabling condition and facilitate mobility to activity areas as resources permit. Inmates with special medical needs shall not have their cell or location changed without the unit manager/shift commander consulting with Health Services. When emergency action is required, this consultation shall occur as soon as possible but no later than the next working day. The Director of Classification will maintain a list of institutions that cannot accommodate non-ambulatory inmates. This list will be included in the *Classification Users Guide*, Section K entitled Programs and Placement. (EXH 2).

Officer Allen defined disabled as "an inmate that is physically unable, like in a wheelchair, or something like that ...". (TR1, p. 42). He went on to state that he did not

consider Mr. McMiller as being physically disabled based on this definition and that he had observed Mr. McMiller ambulating normally. (TR1, p. 42). However, on redirect examination by Mr. McMiller, Officer Allen answered “no, there was no check with health services” regarding the health classification of Mr. McMiller prior to the housing incident at hand. (TR1, p. 44).

Officer Allen testified that the portion of the policy that stated “inmates shall not have their cell or location changed” was not germane to this incident because Mr. McMiller was not being moved or relocated, but rather was returning from a court appearance. (TR1, P. 45-46). As far as he was concerned, Mr. McMiller did not have a cell assignment at the time of the incident, and his previous cell location would have been given to another inmate “a day or two after he [Mr. McMiller] left, if it was that long, because we [the prison] were so full at the time”. (TR1, p. 46). In response to questioning by the Commission, Officer Allen testified that cells are not held for inmates when they depart the facility. (TR1, p. 46).

According to Officer Allen, Mr. McMiller never came back to him in regard to this situation between June 4, 2010 and July 8, 2010. (TR1, p. 43). Officer Allen stated that Mr. McMiller could have consulted with him about the situation, but he didn't. (TR 1, p. 43).

TESTIMONY of EVELYN HAGLER

Evelyn Hagler is now the Inmate Relations Coordinator (IRC) in Unit Eight of NECX where Mr. McMiller was assigned. Her job “is to take care of inmates immediate needs, their accounts, their housing, and their clothing, and accounts, commissary, and the cleanliness of the unit ... I'm right there on the immediate first step”. (TR 1, p. 54).

On direct examination, Officer Hagler was asked if Mr. McMiller came to her and showed an AVO³ or health assessment. Officer Hagler responded saying "I don't recall the conversation of you [Mr. McMiller] telling me that you had an AVO, or your health assessment required you to have a bottom floor bottom bunk". (TR 1, p. 52). She further testified that she could not "accurately" say that Mr. McMiller came into her office in 2010 stating that there was an AVO or health assessment requiring a bottom floor bottom bunk classification. (TR1, p. 52). Officer Hagler stated that she does remember Mr. McMiller being in the unit and even appearing in the office for various reasons, but does not remember him coming to her office to "bring this up" as it pertains to the AVO or health assessment. (TR 1, p. 54).

On cross-examination Officer Hagler was asked if Mr. McMiller ever asked to be moved to a bottom bunk prior to July 8, 2010. Her response was "I can't honestly say that he did or did not. That is a long time back. If he had asked me for one, chances are we would have worked to see that he got it. I don't recall him coming to me in distress, needing a bottom floor bottom bunk." (TR1, p. 55).

Officer Hagler described an AVO as "a document that says that this inmate may need, or does need a time to heal ... Say for instance, an inmate got hurt on the ball field, sprung his ankle, he may need a bottom bunk for X number of days ... The inmate would be given a copy of it, and any time an issue came up, he would have to show it to the staff in order to get extra food brought to the unit, or bottom floor bottom bunk, or something as simple as a shower chair. (TR 1, p. 56-57). Officer Hagler further testified that a health assessment is "something that is done through medical, and it gives us a

³ AVO stands for "Avoid Verbal Orders" and is a follow up document to a health assessment. The term AVO is no longer used, and has been replaced by LAN which stands for "Limited Activity Notice".

general description of what the inmate can do. Something like he can function, but he can't lift a mop bucket up the steps. So, we have to go by both. This is for a year, an AVO is a time limit document that says that he needs this, for this period of time." (TR 1, p. 57). While she had recollections of Mr. McMiller presenting various documents over time, there was no specific memory of him bringing this specific issue to her attention. She states that "it's possible ... but I don't recall him showing me one that was in date. If it was there, I would have checked it, either through medical document or through the computer". (TR 1, p. 57).

Officer Hagler remembers Mr. McMiller "being an inmate in Unit 8. He didn't limp. He didn't act like he was in pain. He went to chow, which he would have had to walked to. He went to the ball field. He went to the library. He maneuvered like all other inmates in there. I have 128 at most of the time, and he never stood out as being chronic ..." (TR 1, p. 55).

On July 8, 2010, after the fall, Officer Hagler did not specifically remember Mr. McMiller asking for a bottom bunk. (TR 1, p. 56). She did testify that "because of the accident that happened, he could have". (T1, p. 56). Officer Hagler stated that upon Mr. McMiller's return to the facility after the fall "the count room had the inmate that was on the bottom bunk switch with him [Mr. McMiller], to make the switch". (TR1, p. 56).

TESTIMONY of DAVID SEXTON

David Sexton is currently the Warden at Morgan County Correctional Complex (MCCX) but at the time of this incident was the warden at Northeast Correctional Complex (NECX). (TR 1, p. 59). Warden Sexton has been with the Tennessee Department of Correction for thirty-five (35) years. (TR 1, p. 59).

Warden Sexton testified that he has known Mr. McMiller for several years, going back prior to the year 2000. (TR 1, p. 59-60). His testimony further revealed that Mr. McMiller has had other periods of incarceration with TDOC. (TR 1, p. 60). Warden Sexton testified that he doesn't recall ever catching Mr. McMiller in an outright lie, but did state that he "think[s] he could be manipulative". (TR 1, p. 80).

On direct examination Warden Sexton was asked if he recalled a conversation that took place on a sidewalk when Mr. McMiller allegedly asked if his cell could be held while he was gone because of difficulties he had experienced in obtaining a bottom bunk when returning to the prison from various court dates. Warden Sexton indicated that he did not recall this specific conversation but stated that "many guys ask me that question" and "that's very possible [Mr. McMiller] asked me that". (TR 1, p. 61). On cross examination, Warden Sexton testified that holding beds will not likely happen "[b]ecause our mandate is to keep our institution as full as possible, and that keeps the cost per inmate per day down, and central dispatch, when they see an empty bed we've got one coming on chain bus, it's just that simple". (TR 1, p. 80)

Mr. McMiller wrote a letter (Exh. 3) to Warden Sexton dated July 19, 2010, to advise of the fall he suffered while attempting to climb to the top bunk and to inquire as to why Unit Manager Harold Angel did not save the bottom bunk after you [Warden Sexton] "said to hold the room". (TR 1, p. 61-62). Mr. McMiller then questioned Warden Sexton about some handwriting that was on the letter. Exhibit 3 contains handwriting which states "Jerry Hayes, does he [Mr. McMiller] have an AVO for a bottom bunk, why

is he not assigned?"⁴ (TR 1, p. 63-66). The letter also contained writing that stated "He [Mr. McMiller] does have AVO for bottom bunk" with the signature of Warden Sexton. (TR 1, p. 65). Warden Sexton explained that all of the handwriting and initials found on the letter were his. (TR 1, p. 65-66). Warden Sexton clarified the handwritten notations stating that he "started to send that to Mr. Hayes, and then ... remembered ... he was not present" and "so, I didn't send it, I marked through it". (TR 1, p. 66). At that point, Warden Sexton "redirected [the letter] to Mr. Angel". (TR 1, p. 66). Mr. McMiller again sought explanation as to which individuals had written the various portions of writing contained on the exhibit. The Commission in attempting to clarify this specific issue asked Warden Sexton directly "Who wrote the messages, who wrote the responses?" to which he replied "I wrote all of it". (TR 1, p. 69). Upon further questioning, Warden Sexton explained that this entire communication took place after the fall. (TR 2, p. 233).

Warden Sexton was then referred to Exhibit 4 (NECX Policy 506) and was asked questions about the intake procedures for returning inmates. Warden Sexton stated that the "Count room" is responsible for assigning an inmate a cell and bed. (TR 1, p. 71). Upon a prisoner's return to the NECX facility, the Count room "should look to see if any special housing [is] required". (TR 1, p. 71-72). He also testified that the information on the assessment form and the AVO would show up on that inquiry. (TR 1, p. 72). When asked where Mr. McMiller was assigned on the date in question, Warden Sexton stated "I think you were assigned a bottom bunk in Unit 4, and you chose to go to a top bunk in Unit Eight ...". (TR 1, p. 72).

⁴ The handwriting found on this exhibit had been marked through at some point. Warden Sexton later explained that this was his handwriting, and that he had stricken portions of that writing after discovering that the person to whom the message was initially written was not available that day.

Warden Sexton's attention was then directed to Exhibit 1 and he was asked to read the following passage which stated: "No more than thirty minutes of continuous standing or walking. Housed on first floor bottom bunk, no climbing and balancing uneven ground." (TR 1, p. 75-76). Warden Sexton testified that there are no ladders on the bunks, and getting to the top bunk is accomplished "By standing on the edge of the bottom bunk and getting on the top bunk". (TR 1, p. 76). It was agreed by both Mr. McMiller and Warden Sexton that the top bunk is four and a half to five feet high off the ground. (TR 1, 76-77). When referred to Exhibit 6, (the cell bed assignment sheet) Warden Sexton testified that Mr. McMiller was in fact assigned to Unit Eight, Cell Sixteen, Bed B on June 4, 2010, which was a top bunk. (TR 1, p. 82). He also testified that Mr. McMiller was offered a bottom bunk in Unit 4. (TR 1, p. 82)

On July 8, 2010, Mr. McMiller's cell assignment shows he was in Bed A, in cell Sixteen and was later assigned to Bed A in the infirmary on that same day. (TR 1, p. 82). Subsequently, on July 19, 2010, Mr. McMiller was put in Unit Twelve, Cell Two, Bed A, which is also a bottom bunk. (TR 1, p. 82).

Warden Sexton also explained the circumstances inside the prison as it relates to the individual cells and the inmates who reside in them. He testified that "if a guy is in a cell, and he is up in there by himself, prison terminology is that's his cell, the new guy coming in has to fit within his guidelines". (TR 1, p. 85). However, if one inmate leaves, then the remaining inmate "becomes the one that's in there the longest and that's just the prison, the way the prison thing works, [it] has been for thirty-five years". (TR 1, p. 85). He further stated that for trouble to start the remaining inmate "doesn't [necessarily] have to be a gang member, and it is true that [a prisoner] could be assigned a bottom

bunk and if somebody bigger than him, more powerful than him, [comes into the cell] at night when the doors close, he can tell him to get in the top bunk.” (TR 1, p. 86). When this occurs, the inmate who has been forced to move is “not going to come and tell us the guy made him get in the top [bunk], because you don’t tattle on people in prison”. (TR 1, p. 86). Warden Sexton explained that the offer to house Mr. McMiller in Unit 4 was made to ensure that such a problem would not occur. (TR 1, p. 86).

Warden Sexton also pointed out that Unit 4 often held inmates who were in protective custody or for punitive situations, but also inmates in transit as well. There was a “conglomerate of things” that necessitated the usage of Unit 4. (TR 1, p. 87). He further testified that inmates being housed in Unit 4 for reasons such as Mr. McMiller’s would likely not be there for more than forty-eight (48) hours before being assigned back to general population. (TR 1, p. 87).

Warden Sexton was then questioned by the Defendant State in its case in chief. He testified that there were one thousand eight hundred and fifty (1,850) beds at NECX. (TR 2, p. 207). He stated that while there were enough beds for everybody at NECX, every bed assignment “may not be a bed in the compound ...” (TR 2, p. 207). He also pointed out that there were not enough bottom bunks to accommodate every inmate with medical reasons requiring a bottom bunk. (TR 2, p. 207).

In returning to the issues surrounding the use of Unit 4 for temporary housing, Warden Sexton agreed that life for inmates there is “a little bit different”. (TR 2, p. 208). There is no access to television, and recreation is limited to an hour “or maybe a little longer” each day if possible. (TR 2, p. 208-209). Other than the lack of television access

and limited recreation time, life is very similar to being in general population. (TR 2, p. 209).

Warden Sexton did not recall a specific conversation with Mr. McMiller regarding the holding of a cell, but agrees that his answer to that question is usually "If I can hold it, I will hold it, but that may not be possible, due to the fact that we try to stay full all the time". (TR 12, p. 209). He explained that when inmates go out one day and return the next, a hold "generally works". However, if the inmate is away for three or four days to a week, the hold does not work. (TR 2, p. 210). Procedurally, Warden Sexton informs the count room to "place a hold on [a] cell", and they understand that the hold is good unless it has to be used for some reason. (TR 2, p. 210). Warden Sexton stated that there is never a guarantee that a cell will be held. (TR 2, p. 210).

Another issue surrounding Unit 4 is visitation. Warden Sexton testified that Mr. McMiller would have been allowed to see his father while he was in Unit 4. (TR 2, p. 210). He further stated that inmates being housed in Unit 4 for punitive purposes are allowed visitation at the Warden's discretion, "especially in the case of a sickness or something". (TR 2, p. 211).

Warden Sexton was then asked to explain the purpose of the AVO. He explained that a health assessment is followed up with an AVO (now referred to as LAN) that is documented on a computer and is effective for a certain period. A copy of this documentation is provided to the inmate, and he then takes the AVO to the housing unit officer. (TR 2, p. 213). Warden Sexton gave the example of an AVO which might say "Bring my meals to the house for seven days" in order to demonstrate the time duration is often set out in these documents. (TR 2, p. 213). AVO documents are also supposed

to be shown to the inmate's work supervisor. (TR 2, p. 213). Warden Sexton stated that most officers don't look on the computer to check health assessments because inmates carry a copy of the AVO. In practice, the officer might instruct the inmate to do something he is exempted from doing. The inmate will then tell the officer that the doctor has instructed him to not undertake the ordered activity for some set amount of time. The AVO provides written documentation to the officers that the inmate may avoid verbal orders given in conflict with medical recommendations. (TR 2, pp 213-214).

By contrast, Warden Sexton testified that a "Health Assessment" record remains on the computer system until the next physical examination which usually is performed either one year or two years apart depending on individual circumstances. (TR 2, p. 214). A health assessment may remain in the computer system for the entire time between examinations even though an AVO expires earlier. (TR 2, pp. 214-215). When an AVO or LAN is warranted, the inmate will provide the officer with documentation thus proving the restriction in activity. The AVO may expire prior to the health assessment because there is the possibility of an inmate becoming "overly well" prior to the expiration of the current health assessment. (TR 2, p. 215). Warden Sexton testified that officers are to follow the AVO rather than the health assessment. (TR 2, pp. 215-216). As far as Warden Sexton knew, there was no valid AVO at NECX provided by Mr. McMiller prior to the fall. (TR 2, p. 216). He further testified that no information request forms or grievances were filed by Mr. McMiller, and if written inquiries or an AVO had been provided, then he "would have done everything in [his] power to see that he got the bottom bed, bottom bunk". (TR 2, pp. 216-217).

Mr. McMiller asked if he should have been placed on a bottom bunk on the day in question to which Warden Sexton replied that his “understanding is they did put you on a bottom bunk in Unit 4, and you chose to go to a top bunk in Unit Eight ...”. (TR 2, p. 219). Warden Sexton also stated that it was not standard practice for every intake officer to call ahead to the unit officer to inquire whether or not the inmate already housed in a particular cell also possessed an AVO which would prohibit an accommodation of the incoming inmate’s health issues. (TR 2, pp. 220-221). However, he did later testify that some officers may do this. (TR 2, p. 224). He further explained that the usage of Unit 4 for transit purposes was a method implemented to “work with” inmates rather than taking a “straight hard line”. For example, this allows inmates to wait in Unit 4 until a different cell becomes available in the event the currently assigned cell is unacceptable for various reasons such as inmates who don’t get along. (TR 2, p. 223-224). When asked if an inmate could be forced to give up his bottom bunk for another inmate with an AVO, Warden Sexton replied that it could be done, but the repercussions of forcing a move can be significant considering the potential gang affiliations that may exist with the inmate being asked to move. (TR 2, p. 224-225). In any event, Warden Sexton stated that Mr. McMiller did not have an AVO requiring a bottom bunk at the time of his assignment, but instead had only a health assessment. (TR 2, p. 234).

Warden Sexton also testified that once the count room officer left at the end of his shift, nobody would have had any reason to go back and see if Mr. McMiller’s condition necessitated a bottom bunk unless he informed someone of that need. (TR 2, p. 221). In fact, Warden Sexton stated, it was approximately a month from the time Mr. McMiller was assigned to the top bunk and the day of the fall. During that time, “he

never went back the next day, or the next week, or two weeks, and brought it to anybody's attention" a bottom bunk was needed. (TR 2, p. 221-222).

Mr. McMiller then referred Warden Sexton to Exhibit 2 which deals with a TDOC policy section entitled "Chronic or Disabling Medical Conditions." (TR 2, p. 226). The portion of the policy, section 305 from Exhibit 2, states the following: "Inmates with special medical needs should not have their cell or location changed without the unit manager, shift commander consulting with health services." Warden Sexton opined that even though Mr. McMiller was a chronic care inmate, he is not a "special needs" inmate. (TR 2, 229). In clarifying his opinion, Warden Sexton stated that a diabetic could be considered a "chronic care" inmate, but that does not "necessarily make you special needs." (TR 2, p. 230). Warden Sexton further testified that a special needs inmate is one who does not have any legs, or arms, things of this nature. (TR 2, pp. 229-230). When asked if Mr. McMiller was considered to have special needs, Warden Sexton replied that it would not be his "judgment ... medically to decide whether you're special needs or not", but no, he "would not consider [Mr. McMiller] as a special needs inmate" at that time. (TR 2, p. 232).

Again after being referred to Exhibit 2, Warden Sexton explained that when Mr. McMiller came back from a court appearance in June of 2010, he did not have an assigned cell at that point. (TR 2, p. 239). In other words, Warden Sexton asserts that the NECX Policy 506.14-1 dealing with special housing and the prohibition on location changes does not apply in this case. (TR 2, p. 239).

TESTIMONY of HAROLD B. ANGEL

Harold Angel has been employed with the Tennessee Department of Correction for approximately thirty (30) years and is a unit manager in Complex two, units seven through ten. (TR 1, p. 103). Mr. Angel is responsible for supervision of the area with regard to security and the treatment of the personnel that work there. (TR 1, p. 103).

Mr. Angel stated that he first became aware of Mr. McMiller's AVO or health assessment sometime after the accident. (TR 1, p. 91). He stated that if he had been aware of the health assessment on June 14, 2010, he "would have moved" Mr. McMiller. (TR 1, p. 92).

Mr. Angel was asked if he had any recollection of an encounter with Mr. McMiller and a counselor named Mike Phillips when Claimant asked for a copy of his medical assessment form. Mr. Angel responded that he remembered occasions when he was in Mr. Phillips' office, but did not recall a specific meeting where Mr. McMiller asked Mr. Phillips to print a copy of his health assessment form. (TR 1, pp. 92-93). According to Mr. Angel, anytime Mr. Phillips logs onto the computer network, he must enter his "BI Number", which allows him access to files such as health assessments. (TR 1, p. 93) Mr. Angel was asked why Mr. Phillips would have input his "BI Number" into the system on June 14, 2010, and he responded by stating that anytime Mr. Phillips was working, he would be logged in with that number. (TR 1, p. 101.). Ultimately Mr. Angel testified that he was not involved in a meeting between Claimant and Mr. Phillips in any way. (TR 1, p. 104).

On cross-examination Mr. Angel testified that from June 4, 2010, when Claimant returned to the facility from a court appearance, until July 8, 2010, the date of the fall, he never received any complaints from Mr. McMiller about being housed on a top bunk.

(TR 1, p. 103). He further testified that no verbal or written requests were given to him by Claimant during this time. (TR 1, p. 104). According to Mr. Angel, he would have "looked at the health assessment ... to see if he had a health assessment that indicated he needed a bottom bunk" had a complaint been made to him during the time Mr. McMiller was housed on the top bunk. (TR 1, p. 104). If Claimant indeed needed a bottom bunk, and one was available, he would have been assigned to that bottom bunk. (TR 1, p. 104).

Mr. Angel reflected on his perception of Mr. McMiller's physical status at that time and stated that he did not appear physically disabled at all. (TR 1, p. 105). Mr. Angel testified that he observed Claimant partaking in normal activities such as going out on recreation call to the ball field, and ambulating like "everyone else" at chow time. (TR 1, p. 105). Mr. Angel did clarify on re-direct examination that he had only observed Mr. McMiller walking to the "ball field" but had not actually seen him participating in any kind of physical activities. (TR 1, p. 106). Exhibit 3 was provided to Mr. Angel and he was asked if he recalled a conversation in which Claimant asked he and Warden Sexton regarding the "holding" of a bottom bunk for Mr. McMiller. Mr. Angel did not recall this conversation, but agreed that it is very possible this discussion took place. (TR 1, p. 108-109). However, Mr. Angel testified, similarly to Warden Sexton, that rooms are generally not held due to overcrowding circumstances. (TR 1, p. 109).

Again Exhibit 3 was referenced regarding the housing of Claimant on a bottom bunk. Mr. Angel testified that according to Exhibit 3, Mr. McMiller was assigned a bottom bunk in Unit Twelve, Bed Two. (TR 1, p. 110). This assignment to a bottom bunk was made after Claimant's fall of July 8, 2010. In reviewing Exhibit 6 (Cell bed

assignment sheet), Mr. Angel agreed that Mr. McMiller was assigned at the time of the fall to bed 816B, which was a top bunk. (TR 1, p. 111).

Concerning ~~on~~ the cell assignment to a top bunk, Mr. Angel testified the count room made the assignment, and he had no personal knowledge of the interaction between Mr. McMiller and the officers on his return from the Sullivan County Court appearance. (TR 1, pp. 113-114). Mr. Angel denies any recollection at all of Claimant coming to him and requesting a bottom bunk or making a complaint about being assigned to the top bunk. (TR 1, p. 114).

Mr. Angel was then asked by the Commission to explain the difference between a health assessment and an AVO. Mr. Angel stated that health assessments are performed by physicians when an inmate comes through the initial classification process upon entering the facility. (TR 1, p. 115). Those health assessments are then performed periodically, usually every year or so after initial entry into the ^{system} complex. (TR 1, p. 116). By contrast, the AVO assignments vary depending on the individual inmate's age, physical condition and any chronic illnesses present at the time of examination. (TR 1, p. 116). While Mr. Angel could not remember exactly what the acronymic phrase was for AVO, he did recall that it involved limitations on inmates' activities for various reasons prescribed by medical personnel. (TR 1, p. 117).

Mr. Angel further testified more specifically regarding Claimant's AVO status stating that he was never presented with an AVO by Mr. McMiller. (TR 1, p. 117). He stated that the first time he was approached by the Claimant about this issue was after the fall. (TR 1, p. 118). Mr. Angel also identified other TDOC personnel who Claimant could have approached about obtaining a bottom bunk including a nurse, Evelyn

Hagler, Dr. Lee, or even Warden Sexton. (TR 1, p. 118). Mr. Angel was unaware of any discussions between these individuals and Mr. McMiller. (TR. 1, p. 118).

It was ultimately Mr. Angel's testimony that Mr. McMiller never asked for a bottom bunk prior to his fall. (TR 1, p. 119).

TESTIMONY of EDWARD MICHAEL PHILLIPS

Mr. Phillips was at the time of this incident and currently a Correctional Counselor Three at NECX. (TR 1, p. 120). He has been with TDOC for twenty-three (23) years. (TR 1, p. 125). Mr. Phillips is responsible for handling classification, parole, and trust fund issues, and sometimes family contacts as far as a death in the family. (TR 1, p. 126). While the job title he possesses is "Counselor" he testified that he is not a licensed counselor, and is more accurately described as a "case manager". (TR 1, p. 126).

On direct examination, Mr. Phillips testified that he did not recall printing Mr. McMiller's health assessment on June 14, 2010, but admits that he must have done so on that day because his BI number is on the form. (TR 1, pp. 121-122).

Mr. Phillips did not recall the Claimant ever asking him for help in getting a bottom bunk assignment. (TR 1, p. 121). He further testified that if an inmate presents him with an AVO, he can call the unit manager and inform him/her that he is supposed to be on the bottom bunk, but the assignment is ultimately up to the count room. (TR 1, pp. 121-122). To make a change in the bunk assignment, Mr. Phillips testified that he would have to fill out the "cell change" paperwork to have the count room make the appropriate changes. (TR 1, pp. 122-123). He also stated that he is unaware of any penalties involved if the count room fails to make these changes, but believed that such

a change would be performed by those personnel if the paperwork was completed. (TR 1, pp. 122-123).

Mr. Phillips was directed to Exhibit 6, and asked if the normal procedure for changing bunk assignment is to call down to the count room and ask them to make a switch. Mr. Phillips responded stating that this was not the normal procedure and further explained that proper paperwork would still have to be completed before any changes can be made. (TR 1, p. 124). He further detailed that there is no way to just "call down there" and say "swap these two". (TR 1, p. 124). He also explained that if he had been asked for a bottom bunk by Claimant, he would have called Mr. Angel and addressed the situation with the count room. (TR 1, p. 128). He also indicated that he would have investigated the AVO and health assessment to ensure they were the most current ones, and proceed from there. (TR 1, p. 128). It was his testimony that he did not recall going through any of these investigative processes prior to July 8, 2010. (TR 1, pp. 128-129).

Mr. Phillips then described the procedure a unit officer would follow if presented with an AVO. He indicated that unit officers have no authority regarding cell assignments. (TR 1, p. 124). If a unit officer is presented with an AVO, he would call the supervisor who could vary depending on who is present at that time. In 2010, it should have been the sergeant for the complex. (TR 1, pp. 124-125). Mr. Phillips could not recall who would have occupied that particular position in 2010 because it is assigned by rotation. (TR 1, p. 125).

On cross examination, Mr. Phillips testified that prior to July 8, 2010, Mr. McMiller had never complained about his bunk assignment. (TR 1, p. 126). Concerning

Claimant's health assessment (Exhibit 1), Mr. Phillips admitted to printing it but stated that he did not recall Mr. Angel being present at the time. In fact he said it had been so long he didn't "even remember printing" it out for Claimant. (TR 1, pp. 126-127). Further, Mr. Phillips stated that he did not recall why Mr. McMiller asked for the health assessment printout. (TR 1, p. 127). He stated that inmates ask for printouts for various reasons, one of which is trying to obtain better prison jobs. (TR 1, pp. 126-127).

Mr. Phillips was also aware of Claimant's cellmate, a Mr. Elder. (TR 1, p. 127). Mr. Phillips described Mr. Elder as an inmate serving time for murder and he "can't be easily pushed around". (TR 1, pp. 127-128). Mr. Phillips testified that Mr. Elder is has a life sentence and is generally a quiet person, but not one to be messed with. (TR 1, pp. 130-131). Mr. Elder is currently classified as a medium restricted inmate, which means he has not behaved in any physically threatening way in the last eighteen (18) months. (TR 1, p. 131).

Mr. Phillips was also asked about his general opinion of Mr. McMiller's physical condition. He testified that Mr. McMiller "always seemed to be pretty healthy". (TR 1, p. 129). He based this assertion on his observations of Claimant's "everyday daily activities" including walking to and from the ball field and chow hall. (TR 1, p. 129). It was Mr. Phillips' opinion that Mr. McMiller appears healthy in general even considering his surgical procedures. (TR 1, p. 130).

The question was then posed to Mr. Phillips about the ramifications of refusing an assigned bunk. He testified that refusing to take a bunk assignment results in an assignment to Unit 4 (the hole). (TR 1, pp. 134-135). Mr. Phillips also testified however,

that in a transit situation such as the one faced by Mr. McMiller, the housing in Unit 4 would have likely been for only “a day, maybe two”. (TR 1, p. 134).

Finally, Mr. Phillips testified that in his experience, he “never had any issues with [Mr. McMiller], either when [he] was in security or as a counselor”. (TR 1, p. 135).

TESTIMONY of JERRY ALLEN HAYES

Jerry Allen Hayes is now retired but at the time of this incident was the health administrator at NECX. (TR 1. p. 137). He was employed in that capacity for approximately twenty-two (22) years.

Mr. Hayes testified that Dr. Dane Lee was the prison physician at the time of Claimant’s fall. (TR 1, p. 137-138). Dr. Lee was responsible for treatment of inmates at both NECX and the Carter County Annex. (TR 1. P. 137-138). Dr. Lee worked full-time at NECX, and inmates from the Carter County Annex were brought to him at NECX. (TR 1, p. 138).

Mr. Hayes was referred to Exhibit 7, which was a prison information request dated June 25, 2010. The information request sent to Mr. Hayes sought a response as to whether or not Claimant was to be assigned a bottom bunk. (TR 1, p. 140). Mr. Hayes did not deny either the inquiry or his response, but did not have any specific recollection of the occurrence. (TR 1, p. 140-141).

Mr. McMiller wrote Mr. Hayes a letter on June 25, 2010, inquiring as to whether he should be assigned a bottom bunk. Exhibit 8, a memorandum, contained Mr. Hayes’ response which stated “yes, [Mr. McMiller’s] restrictions do include housing on the first floor and bottom bunk”. (TR 1, p. 142). According to Mr. Hayes, the health assessment

on file at that time was from another institution, possibly Morgan County, but he couldn't remember for certain. (TR 1, p. 142). Mr. Hayes then explained that health assessments are the physician's records which are now stored on a computer database. (TR 1, pp. 142-143). Mr. Hayes clarified that the health assessment is not an "order", but rather just a computer record of what the physician said. He went on to state that an "official doctor's order would be on a different form, and ... in your record along with the AVO". (TR 1, p. 143). When asked if a health assessment would be a substitute for an AVO, Mr. Hayes responded that he "thinks so". (TR 1, p. 145). He further explained that although he is not in security, it was his belief that security pulls the health assessment and compares it with the AVO. (TR 1, p. 145). However, the fact that a health assessment restricted an inmate to a bottom bunk was provided with the understanding that a bottom bunk would have to be available because frequently they were not. (TR 1, p. 145). Mr. Hayes did not recall the specifics of Mr. McMiller's case, but he did testify that when there were no bottom bunks available on the compound, and an inmate had such a restriction, the infirmary contained twelve (12) bottom bunk beds that were always available. (TR 1, p. 145). He also stated that inmates would often be forced to stay in the infirmary against their will because inmates did not like the fact amenities such as television were unavailable there. (TR 1, p. 145) The infirmary did allow for daily exercise, and if there were no security concerns the inmates would sometimes be allowed out longer than their allotted hour. (TR 1, p. 145). Mr. Hayes also explained that the bunks in the infirmary could only be used if an inmate needed one, and not if he simply wanted one. (TR 2, pp. 154-155).

By contrast, the AVO, now called a LAN, is a physical printout which listed any restriction placed on an inmate. (TR 1, p. 143). The AVO was used by inmates as demonstrable proof to the officers that restrictions were in place, and what those restrictions were specifically. (TR 1, pp. 142-143). Mr. Hayes explained that an "order" for a bottom bunk would be a "physician's order", but the inmate would only be given an AVO. (TR 1, p. 144). Mr. Hayes also testified that he doesn't think an AVO or health assessment overrides security interests. (TR 1, p. 148). He further explained that if the doctor writes an order for a bottom bunk and none are available, the medical personnel understand that issue and then take necessary actions if required. (TR 1, p. 148). Mr. Hayes was then asked if NECX security personnel should follow doctors' orders. In his answer, he explained that nurses always follow doctors' orders because they have no choice, but security personnel are sometimes placed in an impossible situation when an inmate has a medical condition but the facility doesn't have available accommodations. (TR 2, p. 149-150). Mr. Hayes further testified that there was "a lot of trouble with throwing people off of their bottom bunk. Some people got hurt". (TR 2, p. 151). These incidents would occur when a man was moved to the top bunk when he didn't want to be there. Mr. Hayes reiterated that he is not a security person, but understanding the issues with gangs, or other circumstances, was a frequent problem which led to some inmates being injured. (TR 2, p. 155). It was later agreed to by security and the medical staff that if there was a real medical condition, then medical would get involved, and the infirmary would be used at that point. (TR 2, pp. 151-152). Additionally, Mr. Hayes stated that Unit 4 was used for administrative housing in situations like those just discussed. (TR 2, p. 156). Somewhere around this time, Mr. Hayes began writing the

phrase “when available” because of the overcrowding problem in the prison. (TR 2, p. 153).

Based solely on personal observation, Mr. Hayes stated that Mr. McMiller appeared pretty healthy for his age. (TR 2, p. 154). However, he could not testify as to whether or not Claimant would have met the criteria for housing in the infirmary. (*Id.*).

TESTIMONY of JACK FLEEMAN

Mr. Fleeman is currently retired but was a correctional officer at NECX at the time of this incident. (TR 2, p. 161). In total, Mr. Fleeman had worked as a correctional officer for eighteen (18) years. (*Id.*). He testified that he had worked with TDOC for about three and a half years. (*Id.*). He had worked previously on the compound for the State through a company named Tricor for fourteen and a half years. (*Id.*).

On July 8, 2010, the day of the incident, Mr. Fleeman was advised by a couple of other inmates to look in Claimant’s cell.⁵ (TR 2, p. 164). After the suggestion was made to him, Mr. Fleeman went to Claimant’s cell, but could not see inside without opening the door. (TR 2, p. 180). As he approached the cell, Mr. Fleeman noticed the door was unlocked and slightly ajar. He simply pulled it open with the handle. (TR 2, p. 179). Mr. Fleeman stated that when he entered the cell, he observed Claimant lying on the floor at the foot of his bed. (TR 2, p. 163). Although he did not see the actual fall, Mr. Fleeman testified that Claimant complained of neck pain, and Mr. McMiller was instructed not to move and a “Code” was called. (TR 2, p.163). Mr. Fleeman testified

⁵ Mr. Fleeman could not recall the names of the inmates who suggested he look in Mr. McMiller’s cell.

that he called in a “Code Four” which is a request for medical attention. (TR 2, p. 162-163).

Mr. Fleeman testified that each officer kept a log book of daily activities. (TR 2, p. 165). Entries from Mr. Fleeman’s logbook were entered as Exhibit 9. According to Exhibit 9, Operations advised Mr. Fleeman that Mr. Elder⁶ would be swapping bunks with Mr. McMiller. (TR 2, p. 167). This directive from Operations occurred after the alleged fall. (*Id.*). Mr. Fleeman was unable to remember whether he or someone else entered the required incident report. (TR 2, p. 169).

Mr. Fleeman was then asked about a conversation when Mr. McMiller was first assigned to the top bunk of the cell. Mr. Fleeman was informed by Mr. McMiller that he was supposed to have a bottom bunk. Mr. Fleeman responded by telling Mr. McMiller that he had no control over the bed assignments and those questions would need to be addressed with someone else. (TR 2, p. 168).

Mr. Fleeman testified that AVO restrictions were not something he had authority to deal with, and that the IRC or unit manager would be the proper contact. (TR 2, p. 170). Mr. Fleeman further stated that it would not be his job to ask an inmate without an AVO to switch bunks with one who had one. (*Id.*). The paperwork brought by the inmate provides the bunk assignment, and the instructions contained therein are followed. (*Id.*). It was Mr. Fleeman’s testimony that if an inmate had an AVO for a bottom bunk, then he would have been assigned to the bottom bunk. (TR 2, p. 171). Mr. Fleeman clarified the procedures stating that the information comes from the captain’s station, through operations, who calls ahead prior to the inmate’s arrival and informs the officer that a particular inmate will be moving in, and where he will be assigned including cell number

⁶ Mr. Elder was Claimant’s cellmate at the time of the fall, as discussed previously in this decision.

and bunk. (TR 2, p. 173). Upon arrival, he is provided paperwork by operations that indicates to which cell and bunk the inmate is assigned. (*Id.*). In the event an inmate claims that he is not supposed to be assigned to a top bunk, Mr. Fleeman testified he would instruct him to contact the IRC or the unit manager. (TR 2, p. 174). The time required for a change in assignment is probably determined by availability. (TR 2, pp. 174-175).

Mr. Fleeman testified that Mr. McMiller never personally gave him any personal problems, but that he did complain a lot. (TR 2, p. 175). He further testified that even with the complaining there were no incidents where Claimant "cursed" or ever became "combative". (*Id.*).

Mr. Fleeman was also asked on direct examination what happens when an inmate refuses to accept a cell assignment. Mr. Fleeman stated that he would have nothing to do with such a refusal, but procedurally he would have called operations to find out what to do. (TR 2, p. 176). He further testified that a likely result would be temporary assignment to Unit 4 until an acceptable cell was available. (*Id.*).

Mr. Fleeman then testified that when an inmate returns from a court appearance, he is assigned based on availability because the cell he left was likely already assigned to someone else by that point. (TR 2, p. 178). If an inmate wanted to return to that cell, he would have to follow procedures to be moved. (*Id.*).

As for the bunks themselves, Mr. Fleeman stated that the top bunks are approximately five feet off the ground. (TR 2, p. 180). He further testified that inmates reach the top bunk in various ways such as climbing up on one end, climbing from the

side by putting one foot on the bottom bunk, or even “spring[ing] off the floor and jump[ing] up there”, depending on how athletic they are. (*Id.*).

Mr. Fleeman opined that Mr. McMiller walked normally and had never required assistance of a wheelchair. (TR 2, p. 181). He had observed him walking to the “chow hall” and “ball field” on numerous occasions. (*Id.*). According to Mr. Fleeman, the ball field is on “the other end of the compound from Unit 8”. (*Id.*).

Mr. Fleeman also opined that he did not believe Mr. McMiller actually fell, and instead felt the entire occurrence was staged. (TR 2, p. 181). He further testified that it was his belief that Mr. McMiller staged this incident because he was upset about not having been assigned a bottom bunk previously. (TR 2, p. 182).

Mr. Fleeman was then asked about the demeanor of Claimant’s cell mate, Mr. Elder. He stated that Mr. Elder had been in the unit for some time, and “the majority of the time he was a comedian”. (TR 2, p. 186). He further testified that Mr. Elder along with another inmate, Tarter, were always joking, cutting up, and making people laugh. (*Id.*). He also stated he never knew of Mr. Elder being involved in any arguments, and he was a very hard worker employed at the woodworking plant. (*Id.*).

TESTIMONY of GLADYS MARIE MATHERLY

Ms. Matherly was employed at NECX as a Registered Nurse (RN) both part time and full time from 1991 until 2011. (TR 2, p. 188). There was a period during her time of employment when she was located in Carter County. (*Id.*).

Ms. Matherly was first questioned about a conversation with Mr. McMiller involving a request for an injection for pain. Ms. Matherly testified that she had no recollection of the occurrence. (TR 2, p. 189).

Ms. Matherly was then presented with Exhibit 1 and asked about the validity of Mr. McMiller's AVO. Ms. Matherly first stated that she was never able to use the computer for any task other than inputting an incident report. (TR 2, p. 190). Ms. Matherly then explained that the Class B Medical Classification is not enforced by medical. (*Id.*). She further stated that even if a doctor assigns a particular medical classification to an inmate such as requiring a bottom bunk, medical has nothing to do with the enforcement of that classification. (*Id.*). According to Exhibit 1, Mr. McMiller's health classification was assigned in 2008, and he would have been scheduled for an exam sometime in 2010. (TR 2, p. 191). She also testified that his current medical classification at that time would have remained in effect until either a change was made for some medical reason or the next scheduled physical examination. (TR 2, p. 192).

Ms. Matherly testified that if a doctor gives an order for a bottom bunk, it has nothing to do with her opinions of that assessment. It is simply what the doctor says, and as a nurse she doesn't "question the doctor". (TR 2, p. 193).

Ms. Matherly would not comment as to what her assessment of Mr. McMiller's physical condition is without first examining him. (TR 2, p. 195).

TESTIMONY of SERGEANT DOUTHITT

Ms. Douthitt is currently serving as the chairperson of the grievance board, but was a yard sergeant at the time of this incident. (TR 2, p. 198). She has worked for the Tennessee Department of Correction for twenty (20) years. (*Id.*).

Ms. Douthitt was given a document (Exhibit 11) which contains a list of grievances filed by Mr. McMiller. (TR 2, p. 199). According to Exhibit 11, only one

grievance was filed by Claimant between June 6, 2010 and July 8, 2010. (TR 2, p. 200). A copy of that one grievance was entered as Exhibit 12. According to Exhibit 12, the sole grievance filed by Mr. McMiller involved an unrelated incident where he alleged that an officer called him a name and threw a paper at him. (TR 2, p. 201).

According to Ms. Douthitt, records are kept of grievances filed. (TR 2, p. 203).

TESTIMONY of VICTOR D. MCMILLER

Mr. McMiller is an inmate housed at NECX, and has been in and out of prison for over thirty (30) years. (TR 2, p. 265). He is currently serving time for fraud involving credit cards, two counts of schedule III drugs offenses, three counts of schedule II drugs offenses involving cocaine, aggravated burglary, theft of property, and forgery of checks. (TR 2, p. 265).

Mr. McMiller states that on July 8, 2010, he suffered a fall allegedly caused by a failure on the part of NECX and its personnel to provide him a bottom bunk pursuant to his health assessment. (TR 2, p. 250).

Mr. McMiller testified that while he did have a health assessment prescribing "bottom floor bottom bunk" restrictions, he could not produce an AVO or LAN based on that health assessment. (TR 2, pp. 250-251). According to Claimant, several documents were lost while he was in the Special Needs Facility. (TR 2, p. 251). He could not recall which documents were missing, but he does not have them now. (*Id.*).

Mr. McMiller further testified that he fell back and hit his head, neck, and lower back on July 8, 2008. (TR 2, pp. 251-252). Further, he stated that the pre-existing

degenerative bone disease and stenosis should have no bearing in this matter because his physical condition worsened after the fall. (TR 2, p. 252).

Immediately following the fall, Mr. McMiller testified that he was taken to medical because of an issue in his groin that prevented him from walking. (TR 2, p. 255). Mr. McMiller stated that he was in excruciating pain, and that it was very difficult going to the Special Needs Facility being “handcuffed, belly chained, shackles on [his] feet”, riding on “plastic hard seats”. (*Id.*). He further testified he is “still in pain to this day”. (*Id.*).

Subsequently, Mr. McMiller underwent a low back surgical procedure followed by a neck procedure. (TR 2, p. 252). According to Mr. McMiller, it was six or seven months after the fall before the first surgery was done. (TR 2, p. 253). Mr. McMiller stated that he requested an MRI, but was instead sent for an x-ray evaluation. (*Id.*). It was Mr. McMiller's opinion that the MRI would have provided more accurate and timely diagnostic information. (TR 2, p. 254). Mr. McMiller explained that after the neck surgery, he began having a delay in flexing his wrist. (TR 2, p. 256). The wrist issue remained at the time of trial. (*Id.*).

Mr. McMiller next responded to the allegations that he staged the fall. He stated that his account of the fall is true, and there is no reason to make up such a story. (TR 2, p. 258).

Mr. McMiller concluded his direct testimony by saying he should have never been on the top bunk. (TR 2, p. 260). Additionally, he stated that there should never have been a choice presented to him which resulted in his placement on a top bunk. (*Id.*). He testified that he understands that prisons are overcrowded, but asserted that he was not

to blame for that situation. (TR 2, P. 260-261). He further opined that the other inmate in the cell should have been forced to move from the bottom bunk to the top to accommodate his health assessment. (*Id.*). In fact, he argued, if Captain Allen had overseen the staff properly in this matter, “all this mess right here could have been prevented ...”. (TR 2, p. 261).

On cross-examination, Mr. McMiller stated that he doesn’t remember exactly what happened at the time of the fall. (TR 2, p. 262). He testified that the “only thing [he] can remember is that when [he] went to climb up, everything just went black, and [he] fell back”. (TR 2, p. 263). He has no other recollection regarding the incident that day. (*Id.*).

DEPOSITION TESTIMONY of DR. DANE LEE

Dr. Lee is a board certified family and urgent care physician licensed to practice in both Virginia and Tennessee.⁷ (Lee Dep., p. 7). Dr. Lee worked at NECX under contract with a medical company for approximately five (5) years. (Lee Dep., p. 8).

Dr. Lee stated that he has known Mr. McMiller since his arrival at NECX in November of 2009. (Lee Dep., p. 8). He treated Claimant during his time at NECX. (*Id.*).

Dr. Lee first examined a report of Mr. McMiller’s physical examination performed by Dale Hadden⁸ on November 10, 2008. (Lee Dep., p. 11). The report indicated that Mr. McMiller presented with both neck pain and low back syndrome (LBS). (*Id.*).

The Health Classification Summary located on the next page of the report dated November 12, 2008 shows that Mr. McMiller also has an orthopedic disorder known as

⁷ Citations to the deposition of Dr. Dane Lee will be as follows: (Lee Dep., p. ___)

⁸ Dale Hadden is not a Medical Doctor, but is a Nurse Practitioner.

degenerative disc disease (DDD). (Lee Dep., pp. 11-12). The report also contained x-ray results showing “diffuse mild to moderate disc space narrowing, most pronounced in the L4-L5 area,” as well as “mild L5-S1 facet arthropathy”. (Lee Dep., p. 12). Another x-ray dated November 14, 2008 shows “disc space narrowing at C3-C4, C4-C5, C5-C6 and C6-C7”.⁹ (Lee Dep., p. 13).

Dr. Lee testified that Claimant has some osteoarthritis or degenerative changes around the facets which are located on the vertebral bodies on the back of the spine. (Lee Dep., pp. 13-14). Dr. Lee explained that degenerative disc disease occurs when discs age and begin to slowly dehydrate. Cracks then begin to form and the disc starts to compress. (TR 2, p. 14). The result is a compressed disc instead of a healthy thick disc. (*Id.*). Dr. Lee opined that Mr. McMiller’s x-ray results are a common condition in people of his age. (*Id.*).

Dr. Lee then testified that if he had performed a medical evaluation of Mr. McMiller, there would not have been a designation to a bottom bunk given the x-ray results. (Lee Dep., p. 15). According to Dr. Lee, bottom bunks are typically provided to those inmates who are over the age of sixty-five (65), are morbidly obese or have either an x-ray finding or some other medical proof which would necessitate such an assignment. (Lee Dep., p. 16). Mr. McMiller did not fit the required criteria for such an assignment according to Dr. Lee. (*Id.*). He further explained that the evaluation performed by the nurse practitioner was done at a different facility which may not have the same overcrowding issues NECX was dealing with as far as bottom bunk assignments are concerned. (*Id.*)

⁹ Dr. Lee clarified that the radiologist’s report was reversed. He explained that the report discussing the lumbar spine is located on the report where the cervical spine should be addressed and vice-versa.

On July 8, 2010, the day of the fall, a code four medical emergency was called for Mr. McMiller. (Lee Dep., p. 17). According to the medical records "inmate stated he was trying to get up on bunk and fell, complaining of neck pain and lower back pain, no numbness or tingling to legs or arms". (*Id.*). The medical records and Dr. Lee both indicate that he saw Mr. McMiller on the day of the fall. (*Id.*). The initial emergency room evaluation revealed that Mr. McMiller reportedly was alone in his cell as he attempted to climb to the top bunk and suddenly developed lumbar back pain at which point he fell on his back and bumped his head on the floor. (Lee Dep., p. 18). "A review of the chart at that time revealed he had been trying to get on the bottom bunk since November." (*Id.*). The initial evaluation further revealed that Mr. McMiller frequently falls. (*Id.*). According to Dr. Lee, Claimant denied any problems with, or owing any money to his cellmate as this is often the cause of alleged falls from any bunk be it top or bottom. (*Id.*).

Physically speaking, Dr. Lee stated that Mr. McMiller was lying on the stretcher primarily complaining of back pain and demonstrating moderate diaphoresis which simply means he was sweating. (Lee Dep., p. 19). Interestingly, Mr. McMiller was "clenching the sides of the stretcher and tightening his legs, arms, back and belly" and was entirely "stiffened up". (*Id.*). According to Dr. Lee, this tightening reaction gave the indication of a potential seizure or the influence of some drugs in Claimant's system. (*Id.*). Dr. Lee explained that the majority of people try to rest or relax when in pain rather than stiffening up. (*Id.*). He further testified that the symptoms were "a little bit confusing on the initial presentation", and Mr. McMiller had no tenderness in the cervical spine. (Lee Dep., pp. 19-20). There were no abrasions, contusions or lacerations found upon evaluation. (Lee Dep., p. 20). Mr. McMiller was taken off the backboard and was

able to sit up and take Robaxin and Lortab for pain. (*Id.*). The report states “questionable lumbar strain/cervical strain” which Dr. Lee explained was due to the peculiar presentation made by Mr. McMiller and the uncertainty of anything diagnostic at that time. He was then admitted to the infirmary to further investigate the situation. (*Id.*).

Later that same day, Mr. McMiller was able to get out of bed and go to lunch in the chow hall. (Lee Dep., pp. 20-21). Dr. Lee stated that Claimant's ability to move around indicated that the medications were working. (Lee Dep., p. 21).

Again on July 8, 2010, Mr. McMiller denied any complaints, refused medication, and desired to return to his cell. (*Id.*). The request was denied and Mr. McMiller remained in the infirmary for another day to ensure that there were no issues with a seizure disorder or drug issues which were possible causes of the unusual initial presentation. (Lee Dep., pp. 21-22). The extra time in the infirmary is occasionally used to further investigate any issues involving antagonism between cellmates. (Lee Dep., p. 22).

On July 9, 2010, Mr. McMiller was moving all his extremities without difficulty and was medically cleared to go “out to Court via security”. (*Id.*). Mr. McMiller did not return to the infirmary for any kind of treatment until July 19, 2010, when he presented with migraine headaches. (Lee Dep., p. 23). According to the records, Mr. McMiller signed up for sick leave for the following day –July 20, 2010- but failed to show up at sick call. (*Id.*). Mr. McMiller again appeared in the infirmary on July 26, 2010, asking to see a doctor. (Lee Dep., p. 24). Subsequently on August 5, 2010, Claimant was present for sick call but refused both medication and a physical exam to determine his range of motion and level of pain. (*Id.*). Claimant was back in the infirmary on August 12, 2010,

complaining of injuries from a fall from his bed and stating he had not been seen by a doctor. (*Id.*). At this point, Mr. McMiller was informed that he was being placed on the nurse practitioner's list for chart review, and a lumbar x-ray was ordered for acute pain. (*Id.*).

The x-ray was made on August 30, 2010, and showed no acute fracture. (Lee Dep., p. 25). However, the results did show interior spondylitic changes which are "degenerative changes, osteoarthritis in the back, in the vertebral bodies". (*Id.*). Ultimately, the radiologist interpreted the x-ray as indicative of mild arthritic changes which are normal in a person of Mr. McMiller's age. (Lee Dep., p. 26). Dr. Lee testified that those changes are not caused from a fall, but are from the aging process. (*Id.*).

On September 13, 2010, records show that Mr. McMiller again signed up for sick call complaining of neck and back pain. (*Id.*). The Physician's Orders indicate that Mr. McMiller was to have an x-ray of the cervical spine for "chronic pain with right side radiculopathy". (*Id.*). Dr. Lee explained that radiculopathy involves neurological problems which cause pain to radiate down the hand or arm. (Lee Dep., p. 27). The "chronic pain" portion of the diagnosis refers to long term pain of more than two months. (*Id.*). Dr. Lee testified that he prescribed Ultram for the cervical radiculopathy. (*Id.*).

The cervical spine x-ray dated October 7, 2010, revealed degenerative changes of the mid-cervical spine which related to arthritic and osteoarthritis changes not attributable to a fall from a bed. (Lee Dep., pp. 27-28). Dr. Lee stated that the x-ray again showed no fractures, and explained that typically fractures only occur in falls from "pretty good heights". (Lee Dep., p. 28).

It was Dr. Lee's opinion that the x-rays made of Mr. McMiller do not show any injuries resulting from a fall. (Lee Dep., pp. 28-29).

Mr. McMiller was admitted on November 5, 2010, to Sycamore Shoals Hospital in Elizabethton, for an MRI. (Lee Dep., p. 31). Dr. Lee explained that cervical stenosis occurs when the opening through which the spinal cord runs is not large enough. (Lee Dep., p. 30). According to Dr. Lee, the MRI report showed "degenerative changes of the cervical spine superimposed on a congenitally narrow spinal cord with the most affected level at the C6-C7 level where there is moderate to severe central canal stenosis". (Lee Dep., p. 31). Dr. Lee further explained that this is a congenital defect that Mr. McMiller has had since birth. (*Id.*). Dr. Lee then stated that the MRI also showed degenerative arthritic changes in the cervical spine. (*Id.*).

In a letter dated January 31, 2011, from Neurosurgical Associates in Nashville, Dr. Michael Schlosser stated he examined Mr. McMiller's MRI and the results demonstrated "fairly severe disc disease at C5-C6 and C6-C7". (Lee Dep., p. 32). According to Dr. Lee, these findings are again consistent with the congenital defect of not having sufficient room for the spinal cord to navigate through the cervical spine which would be unrelated to a fall. (Lee Dep., p. 33). It was the recommendation of Dr. Schlosser that Mr. McMiller undergo an "anterior cervical discectomy and fusion at the C5-C6 and C6-C7" area, but Claimant wanted to delay the procedure due to unrelated circumstances. (Lee, Dep., p. 34) Dr. Lee testified that a delay in carrying out this procedure can create a higher risk for permanent injury resulting from a pinching of the nerve, which if left untreated, can lead to some permanent effects. (*Id.*). At this time, Mr. McMiller was scheduled for the discectomy on July 13, 2011. (*Id.*).

Dr. Lee stated that he did provide in the Physician's Order for an "AVO to ride the chase van to Nashville" which is sometimes done when an inmate is having significant back or neck pain. (Lee, Dep., p. 35). It was understood, according to Dr. Lee, that even with that order, it was in the discretion of security to follow the order. (*Id.*).

On February 18, 2011, Mr. McMiller presented in a wheel chair complaining of left flank pain. Dr. Lee stated that his records indicate that Claimant denied any bowel or bladder abnormalities, and exhibited occasional transient numbness down the left leg over the anterior thigh and in the left groin. (Lee Dep., pp. 35-36). That visit also revealed that the degenerative disc disease in the cervical spine area was still present, and the lumbar spine had become much worse. (Lee Dep., p. 36). An MRI revealed a ruptured disc at the L3-L4 level. (Lee Dep., p. 37). According to Dr. Lee, it was at this visit for flank pain that the ruptured disc was first discovered, some seven months after the fall. (*Id.*).

A neurosurgery consultation was approved, an appointment was made, and Mr. McMiller was given Neurontin in addition to his Lortab medication. (Lee Dep., p. 38).

Mr. McMiller filed a grievance on May 12, 2011, demanding immediate surgery be performed on his back. (*Id.*). Dr. Lee notes that the Problem Oriented Progress record of July 14, 2011, shows that Claimant had the laminectomy procedure, and reported that the numbness to his left thigh and testicular area was resolved. (Lee Dep., pp. 38-39).

The next Progress record dated August 15, 2011, revealed that Mr. McMiller asked for a wheelchair, but Dr. Lee testified that Claimant was able to ambulate across

campus utilizing a cane without problems, and therefore he denied the request. (Lee Dep., p. 39).

Another Progress record dated September 7, 2011 shows that Captain Allen called medical to inform them that Claimant was refusing to go to the Special Needs Facility. (Lee Dep., pp. 39-40). Dr. Lee testified that Captain Allen was advised that Mr. McMiller was under an order that would not allow him to refuse to go to the prison hospital. (Lee Dep., p. 40). This same conversation also involved the previously mentioned order which allowed Mr. McMiller to ride in the chase van. Dr. Lee stated that "cannot refuse" was written in Claimant's chart because of his history of refusing appointments. In discussing the chase van, Dr. Lee explained that when overcrowding or security issues existed, inmates were not always allowed to ride in the chase van even when there was a physician's order to do so. (Lee Dep., pp. 40-41). Dr. Lee testified that he wanted Mr. McMiller to follow up with the neurosurgeon to address any post-surgical problems. (Lee Dep., p. 41). He then stated that getting those appointments is difficult, and Mr. McMiller was not being cooperative. (*Id.*)

Dr. Lee then reviewed Dr. Schlosser's progress note dated September 12, 2011, which indicated that Mr. McMiller continued to have back pain and numbness stemming from his history of lumbar degenerative disc disease, disc displacement and lumbar stenosis, none of which is attributable to a fall. (Lee Dep., pp. 41-42). According to Dr. Lee, the surgical reports showed that Mr. McMiller's surgery went well, but a common problem with degenerative disc disease is its presence in the entire spine often resulting in the inability to alleviate the pain. (Lee Dep., p. 42).

Dr. Lee then clarified the order in which Mr. McMiller's surgeries took place. He testified that originally Mr. McMiller's neck procedure was scheduled prior to July, but was delayed by Claimant. (Lee Dep., p. 43). Dr. Lee stated that the delay of the neck surgery was unrelated to the Claimant's back problems and rather was to deal with other family business. (*Id.*). After scheduling the neck procedure, Mr. McMiller began having more back problems and an appointment was made for evaluation. (*Id.*).

According to Dr. Lee, Mr. McMiller's medical records demonstrate a long history of degenerative disc disease with cervical and lumbar back pain dating back to the early 1990's when Claimant suffered a back injury while not incarcerated. (Lee Dep., p. 40). Dr. Lee also stated that the prior accident from the early 1990's could have exacerbated Mr. McMiller's congenital cervical stenosis issue and degenerative disc disease. (Lee Dep., p. 45).

After the lumbar spine surgery was performed, Dr. Lee stated that the surgeon's notes indicate that the neck surgery should be delayed for a month or so to allow the back to "heal up some." (*Id.*). It was at this point that Mr. McMiller inquired about an MRI of the head due to severe headaches. (Lee Dep., pp. 45-46).

Dr. Lee testified that this was also the time period when he was named in a lawsuit by Mr. McMiller for the delay of the back surgery. (Lee Dep., p. 46). Dr. Lee also stated that Mr. McMiller's failure to cooperate with him led to a "deteriorating" relationship. (*Id.*). Dr. Lee then offered to relocate Claimant to the Charles Bass facility, which is located near Nashville so that all of these medical procedures could be performed without the need for a long ride in the chain bus. (*Id.*). Dr. Lee testified that Mr. McMiller refused the offer of relocation to Charles Bass. (*Id.*).

The Problem Oriented Progress record of December 12, 2011, indicates that Mr. McMiller was on a sick call complaining of pain in the left arm and back which prevented him from being able to sleep. (Lee Dep., p. 48). Dr. Lee testified that the records indicate that Mr. McMiller stated that the “neurosurgeon messed up my arm, [and] also wants to refuse followup at Special Needs Facility”. (*Id.*).

Dr. Lee testified that consultation notes from January 12, 2012, show Mr. McMiller complaining about arm weakness and numbness following the neck surgery. Those notes also indicate that the surgeon expected Claimant to improve over time and felt he would benefit from physical therapy. (*Id.*). Dr. Lee opined that none of Claimant’s arm weakness or numbness is related to a fall. (Lee Dep., pp. 48-49). Dr. Lee then stated that a referral was made for physical therapy on January 12, 2012. (Lee Dep., p. 49).

Dr. Lee testified regarding a May 28, 2012, encounter with Mr. McMiller during which he evaluated “tiny subcentimeter indeterminate noncalcified nodules in the left upper lobe and right lower lobe of the lungs”. (Lee Dep., p. 49). Dr. Lee also discovered a ten (10) millimeter nodule in the left adrenal gland. (*Id.*). Based on Dr. Lee’s notes, Mr. McMiller continued to have occasional nerve pain in the left arm and a slightly weaker grip than that of the right arm. He denied any nausea, vomiting, diarrhea, fever, or chills. (Lee Dep., pp. 49-50). Dr. Lee stated that he recommended a repeat CT scan of the lungs¹⁰. (Lee Dep., p. 50). Dr. Lee again referred to medical notes demonstrating Mr. McMiller’s refusal to have the procedure and even sign the refusal form. (*Id.*).

Dr. Lee was then referred to page forty (40) of the medical records dated October 19, 2012, when Mr. McMiller reportedly complained of neck and back pain. (Lee Dep., pp. 50-51). The record also refers to a “motor vehicle accident around 10 years ago ...”

¹⁰ Dr. Lee indicated that this was a mistake in the records and the proper test was a CT of the adrenal gland.

and a surgery of the cervical and lumbar spine, but there is no mention of any fall from a bunk bed. (Lee Dep., p. 51).

Dr. Lee then testified that he could not agree with a reasonable degree of medical certainty that Mr. McMiller's fall in July of 2010 caused his need for back and neck surgery in July and November of 2011. (*Id.*). He further testified that he could not attribute "any significant injury to Mr. McMiller" within a reasonable degree of medical certainty. (*Id.*). He explained that x-rays made after the fall actually looked better than prior x-rays taken before Mr. McMiller entered NECX. (*Id.*). Dr. Lee also reiterated that it typically takes a "pretty significant height fall to cause an injury which ... causes a vertebral body fracture or a boney fracture or a ... herniated disc". (*Id.*). He stated that Mr. McMiller's condition appeared to be a "worsening of his congenital stenosis and the degenerative disc disease which he had already previously had". (*Id.*). Dr. Lee opined that the fall "could have increased his pain associated" with the degenerative disc disease, but he could not say that the fall caused his primary issues. (*Id.*).

On cross-examination, Dr. Lee testified that an inmate with an AVO for a bottom bunk should be given a priority for that bunk provided there is one available. (Lee Dep., p. 54).

Dr. Lee then explained that any referrals to neurosurgeons must be made in Nashville due to contract obligations. (Lee Dep., p. 55).

In response to questions relating to the day of the fall, Dr. Lee testified that he did prescribe Robaxin and Lortab to Mr. McMiller for pain. (Lee Dep., p. 56). Dr. Lee explained that there is no way to prove pain, and the only criteria he can base that decision on is patient history. (*Id.*).

Dr. Lee was asked why there was a delay in scheduling the MRI for Mr. McMiller's back. Dr. Lee stated that while he didn't have an exact time of delay, it did take "a little while" because the x-ray has to be performed prior to any MRI testing. (Lee Dep., pp. 56-57).

Dr. Lee testified that there were several inmates treated for falls from a top bunk over the last five years, but the number of actual falls is difficult to calculate because most of those incidents resulted from cell mate altercations. (Lee Dep., pp. 57-58). However, he did state that there have been some with "legitimate" falls off of a bunk. (Lee Dep., p. 58).

Dr. Lee then explained that when head injuries occur, the procedure varies depending on the specific injury. (Lee Dep., pp. 58-59). He did specify that if an inmate falls and hits his head, he would be kept in the infirmary for observation. (Lee Dep., p. 59). Dr. Lee stated that Mr. McMiller was released to attend court on July 9, 2010, the day after the fall, but explained that his injuries were more focused on the back and neck rather than the head. (*Id.*).

Dr. Lee testified that Mr. McMiller was assigned a bottom bunk, but whether or not that assignment comes to fruition is in the hands of security personnel. (Lee Dep, p. 60). He went on to state that sometimes security would call medical prior to moving an inmate, and other times they did not call. (*Id.*).

Questions were then presented to Dr. Lee about taking Mr. McMiller's pain medications from him, but he had no recollection of either the incident or a conversation with the warden regarding this issue. (Lee Dep., p. 62). However, he did testify that it could have been an issue with formulary medications or the prescription could have

been written by the neurosurgeon and it simply ran out, but he did not know. (Lee Dep., p. 66).

Dr. Lee stated that he was familiar with AVOs and health assessments, but explained that he only notes the health assessment when he is redoing them at the annual physical or a physical done based on age. (Lee Dep., p. 63). Dr. Lee testified that he does not look at the AVO status, and no change can be made to an AVO status until the reassessment is completed. (Lee Dep., pp. 63-64).

When asked why Mr. McMiller was not provided with physical therapy at NECX, Dr. Lee responded that the facility does not have those capabilities. (Lee Dep. p, 64).

In response to questioning about the delayed surgery, Dr. Lee responded that he was aware that Mr. McMiller's wanted to wait because his father was ill and eventually passed away. (Lee Dep., p. 67).

Dr. Lee agreed that the fall could result in pain to Mr. McMiller's head, back, and neck. (Lee Dep., p. 68). He went on to state that Claimant will likely require pain medication for the rest of his life, but asserts that this would be the case regardless of the fall. (Lee Dep., pp. 70-71). He explained that most individuals with degenerative disc disease and spinal stenosis require pain medication for most of their life. (Lee Dep., p. 71).

On re-direct examination, Dr. Lee testified that he was not a State employee when he was working at NECX. (Lee Dep, p. 72).

He also explained that his reference to Mr. McMiller's need for pain medication would be present regardless of the fall due to his degenerative disc and stenosis conditions. (Lee Dep., pp. 72-73).

Dr. Lee testified that housing the inmates is a priority, and sometimes security personnel are forced to go outside the parameters of the AVO restrictions whether by offering a more secure facility if available or by contacting medical to seek further information. (Lee Dep, pp. 73-74).

As it pertains specifically to Mr. McMiller, Dr. Lee testified that he would not have assigned him to a bottom bunk based on the absence of any surgery and the failure to meet other required criteria in conjunction with a shortage of bottom bunks at the facility. (Lee Dep. p. 75).

APPLICABLE LAW

a. Provisions from the Tennessee Claims Commission Act

This claim is brought pursuant to Tenn. Code Ann. § 9-8-307(a)(1)(E) which, provides as follows:

(a)(1) The commission or each commissioner sitting individually has exclusive jurisdiction to determine all monetary claims against the state based on the acts or omissions of "state employees," as defined in § 8-42-101(3), falling within one (1) or more of the following categories: ...

(E) Negligent care, custody and control of persons;

The determination of the State's liability under subsection (E) must be based on the "traditional tort concepts of duty and the reasonably prudent person's standard of care." Tenn. Code Ann. § 9-8-307(c).

b. Basic Tennessee Negligence Law Principles

Of course, every negligence case filed in this state- including premises liability or "slip and fall" cases such as this- requires the claimant to prove five separate, discrete elements by a preponderance of the evidence. Those elements are:

- 1) A duty of care owed by the defendant to the claimant;
- 2) Conduct by the defendant breaching that duty;
- 3) Injury or loss (i.e. damages);
- 4) Causation in fact (the “but for” test);
- 5) Proximate or legal cause (the “substantial factor” test).

Coln v. City of Savannah, 966 S.W.2d 34, 37 (Tenn. 1998); Bradshaw v. Daniels, 854 S.W.2d 865, 869 (Tenn. 1993); McCall v. Wilder, 913 S.W.2d 150, 153 (Tenn. 1995).

Although the concept of duty in the context of a negligent care, custody, and control case is discussed at greater length later in this decision, we set out here a general discussion of the concept of duty.

First however we observe that the mere fact that an injury occurred does not automatically raise a presumption of the defendant’s negligence. *Mullins v. Seaboard Coastline Railway Co.*, 517 S.W.2d 198, 201 (Tenn. Ct. App. 1974); *Fulton v. Pfizer Hospital Products Group, Inc.*, 872 S.W.2d 908, 911 (Tenn. Ct. App. 1993); see also *Armes v. Hulett*, 843 S.W.2d 427, 438 (Tenn. Ct. App. 1992).

Duty has been defined as “the legal obligation a defendant owes to a plaintiff to conform to a reasonable person standard of care in order to protect against unreasonable risks of harm.” *Staples v. CBL Ass’n*, 15 S.W.3d 83, 89 (Tenn. 2000). Whether a duty is owed to a Claimant by the Defendant State “is entirely a question of law to be determined by reference to the body of statutes, rules, principles, and precedents which make up the law; and it must be determined only by the court.” *Bradshaw v. Daniel*, 854 S.W.2d 865,870 (Tenn. 1993); *Staples*, 15 S.W.3d at 89.

Making the determination requires the fact finder to consider the delicate balance between the “foreseeability and gravity of harm [as compared to] the commensurate burden imposed on the [defendant] to protect against [that] harm.” *Id.* at 89. In so doing, a court must consider “whether the interest of the plaintiff which has suffered invasion was entitled to legal protection at the hands of the defendant.” *Bradshaw*, 854 S.W.2d at 869 (quoting *Lindsey v. Miami Dev. Corp.*, 689 S.W.2d 856, 859 (Tenn. 1985)).

Of course, once a duty is established, a claimant must prove that the defendant State somehow breached that duty and that such a breach resulted in damages.

Finally, if he is to be successful with his claim, claimants such as Mr. McMiller must prove both cause in fact and legal (or proximate) cause by a preponderance of the evidence. Cause in fact “is a very different concept from . . . proximate cause” and “refers to the cause and effect relationship between the tortious conduct and the injury.” *Kilpatrick v. Bryant*, 868 S.W.2d 594, 598 (Tenn. 1993) (quoting Joseph H. King, Jr., *Causation, Evaluation, and Chance in Personal Injury Torts Involving Pre-existing Conditions and Future Consequences*, 90 Yale L.J. 1353, 1355 n.7 (1981)). The concept involves an evaluation of the “but-for” consequences of an act, meaning that “[t]he defendant’s conduct is a cause [in fact] of the event if the event would not have occurred *but for* that conduct.” *Id.*, (quoting Prosser & Keeton, *The Law of Torts*, 266 (5th ed. 1984) (emphasis added)).

Legal cause, on the other hand, is recognized as the “ultimate issue” in negligence cases. *McClenahan v. Cooley*, 806 S.W.2d 767, 774 (Tenn. 1991). As then Judge Koch wrote in *Rains v. Bend of the River*, 124 S.W.3d 580 (Tenn. Ct. App. 2003),

“the concept of ‘legal cause’ was formerly known as ‘proximate cause’ ... [and] connote[s] a policy decision made by the judiciary to establish a boundary of legal liability.”¹¹ *Id.* at 592.

Courts in Tennessee have developed a three part test used when evaluating whether legal cause has been shown:

(1) the tortfeasor's conduct must have been a ‘substantial factor’ in bringing about the harm being complained of; (2) there is no rule or policy that should relieve the wrongdoer from liability because of the manner in which the negligence has resulted in the harm; and (3) the harm giving rise to the action could have reasonably been foreseen or anticipated by a person of ordinary intelligence and prudence.¹² *McClenahan*, 806 S.W.2d at 775.

This test does not require that the exact manner in which an injury occurred be foreseen as long as the tortfeasor could have, or through the exercise of reasonable diligence should have, foreseen the general manner in which the injury occurred. *Id.* at 775. “If the plaintiff’s injuries are of a type that could not have been reasonably

¹¹ Prosser & Keeton have explained legal cause as follows:

Once it is established that the defendant’s conduct has, in fact, been one of the causes of the plaintiff’s injury, there remains the question whether the defendant should be held legally responsible for the injury. Unlike the **fact of causation**, with which it is often hopelessly confused, **this is primarily a problem of law**. It is sometimes said to depend on whether the conduct has been so significant and important a cause that the defendant should be legally responsible. But both significance and importance turn upon conclusions in legal policy, so that they depend essentially on whether the policy of the law will extend the responsibility for the conduct to the consequences that have, in fact, occurred The legal limitation on the scope of liability is [thus] associated with policy – with our more or less inadequately expressed ideas of what justice demands, or for what is administratively possible and convenient.

Prosser & Keeton, *supra*, at 36 (emphasis added); *see also George v. Alexander*, 931 S.W.2d 517, 521 n.1 (Tenn. 1996).

¹² The term “substantial” has been explained as follows:

The word ‘substantial’ is used to denote the fact that the defendant’s conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense in which there always lurks the idea of responsibility, rather than in the so-called ‘philosophic sense’, which includes every one of the great number of events without which any happening would not have occurred. Each of these events is a cause in the so-called ‘philosophic sense’ yet the effect of many of them is so insignificant that no ordinary mind would think of them as causes. *Lewis v. State*, 73 S.W.3d 88, 93 (Tenn. Ct. App. 2001) (*quoting Quaker Oats v. Davis*, 232 S.W.2d 282, 289 (1949)).

foreseen, a duty of care never arises.” *Doe v. Linder Constr. Co.*, 845 S.W.2d 173, 178 (Tenn. 1992).¹³

Also significant in any discussion of cause in fact and legal or proximate cause are two decisions from the Middle Section Court of Appeals. In *Waste Management, Inc. of Tennessee v. South Central Bell Telephone Co.*, 15 S.W.3d 425 (Tenn. Ct. App. 1997), Judge Koch wrote there that the inquiry in a cause in fact analysis “is not a metaphysical one, but rather a common sense analysis of the facts that laypersons can undertake as competently as the most experienced judges.” *Id.* at 430.

Later, in 2003, that same court in *Rains v. Bend of the River*, 124 S.W.3d 580 (Tenn. Ct. App. 2003)(perm. app. d’nd Nov. 24, 2003), again speaking through Judge Koch, said that a determination of proximate cause “ ... connotes a policy decision made by the judiciary to establish a boundary of legal liability, These decisions are based on consideration of logic, common sense, policy, precedent, and other more or less inadequately expressed ideas of what justice demands or of what is administratively possible and convenient.” *Id.* at 593.

c. DISCUSSION OF CUSTODY, CARE, AND CONTROL OF PERSON CASE

LAW

It is well established that prison officials, while not insurers of their prisoners’ safety, do have a duty to exercise ordinary and reasonable care to protect the life and health of those in their custody. *Cockrum v. State*, 843 S.W.2d 433, 436 (Tenn.Ct.App.1992) perm. app. d’nd (1992). Except in the most obvious situations, the

¹³ The Eastern Section Court of Appeals, in a September 10, 2013, decision, *Huskey v. Rhea County, Tennessee*, No. E2012-02411-COA-R3-CV, 2013 WL 4807038 (Tenn. Ct. App. Sept. 10, 2013), contains a thorough discussion of cause in fact and legal or proximate cause at pages *11-13. In that decision, the Court significantly relies on the decisions in *Hale v. Ostrow*, 167 S.W.3d 713 (Tenn. 2005), *Burgess v. Harley*, 934 S.W.2d (Tenn. Ct. App. 1966); and *McClenahan v. Cooley*, 806 S.W.2d for a thorough discussion of these concepts.

determination of whether prison officials acted reasonably in their protection of an inmate's safety requires expert proof or other supporting evidence. *Id.* at 438).

d. Comparative Fault Issue

Under Tennessee's system of modified comparative fault developed after the Supreme Court's decision in *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992), the fault or negligence of the plaintiff in causing the event must be less than the combined fault of the defendant(s). A separate consideration discussed later here is the effect of any negligence on the part of Mr. McMiller which might diminish his recovery.

In *Eaton v. McLain*, 891 S.W.2d 587 (Tenn. 1994), the Supreme Court set out several considerations for the fact finder to ponder in reaching its assessment of the percentages of comparative fault attributable to each party:

[T]he percentage of fault assigned to each party should be Dependent upon all the circumstances of the case, including such factors as: (1) the relative closeness of the causal relationship between the conduct of the defendant and the injury to the plaintiff; (2) the reasonableness of the party's conduct in confronting a risk, such as whether the party knew of the risk, or should have known of it; (3) the extent to which the defendant failed to reasonably utilize an existing opportunity to avoid the injury to the plaintiff; (4) the existence of a sudden emergency requiring a hasty decision; (5) the significance of what the party was attempting to accomplish by the conduct, such as an attempt to save another's life; and (6) the party's particular capacities, such as age, maturity, training, education, and so forth. *Id.* at 592; *see also Coln v. City of Savannah*, at 44). (Emphasis supplies)

Again, it must be emphasized that these are not exclusive factors, and we believe that other considerations unique to a particular fact pattern may be considered in divvying up fault between the parties.

Finally, in a case such as this where the parties are one claimant and one defendant, the Court of Appeals in its recent decision in *Huskey v. Rhea County*, *supra*, citing *Grandstaff v. Hawks*, 36 S.W.3d 482 (Tenn. Ct. App. 2000), explained how the negligence of the claimant should be compared with the fault of the defendant:

The Tennessee Supreme Court has distinguished between “comparative negligence” and “comparative fault.” See *Coln v. City of Savannah*, 966 S.W.2d at 40 n. 6; *Owens v. Truckstops of Am.*, 915 S.W.2d at 425–26 n. 7. Comparative negligence measures the plaintiff’s negligence for the purpose of reducing the plaintiff’s recovery. Comparative fault encompasses the allocation of recovery among multiple or joint tortfeasors according to their percentage of fault. The Court made this distinction on the theory that a plaintiff’s recovery may only be reduced because of the plaintiff’s negligence, whereas a defendant’s liability may be based on theories of liability other than negligence, for example, strict liability. *Huskey*, 2013 WL at *10 (citing *Grandstaff*, 36 S.W.3d at 491 n. 12 (citing *Owens v. Truckstops of Am.*, 915 S.W.2d at 426 n. 7.))

DECISION

Every element of Mr. McMiller’s claim must be proven by a preponderance of the evidence. The phrase “preponderance of the evidence” is fairly well defined in Tennessee law. It is:

“...that amount of factual information presented to you [the Commission] in this trial which is sufficient to cause you [us] to believe that the allegation is probably true. In order to preponderate, the evidence must have the greater convincing effect in the formation of your [our] belief.” *Austin v. City of Memphis*, 684 S.W.2d 624, 631 (Tenn. Ct. App. 1984).

In *Teter v. Republic Parking System, Inc.*, 181 S.W.3d 330, 340-41 (Tenn. 2005), our Supreme Court used the following language in connection with this concept:

“The standard of proof required in a case ‘serves to allocate the risk of error and to instruct the fact finder as to the degree of confidence society expects for a particular decision.’ ...

Generally, in civil cases, facts are proved by a mere preponderance of the evidence. ... The preponderance of the evidence standard requires that the truth of the facts asserted be **more probable than not**," *Id.*, at 341 (Internal citations omitted; emphasis supplied.)

A preponderance of evidence can be established through either direct or circumstantial evidence. A well-established "train" of circumstances may even outweigh opposing direct testimony. See *McConkey v. Continental Ins.*, 713 S.W.2d 901, 904 (Tenn. App. 1984), citing *Aetna Casualty and Surety Company v. Parton*, 609 S.W.2d 518, 520 (Tenn. App. 1980).

In that same connection, the Court said in *Marshall and Jones v. Jackson Oil, Inc.*, 20 S.W.3d 678 (Tenn. App. 1999) that:

"It is elemental that a party asserting a lawsuit claim must establish the claim by satisfactory proof convincing to the fact-finder. ... To carry the burden of proof, a party may employ either direct evidence from witnesses with personal knowledge or circumstantial evidence from persons who know and can testify to related facts that reasonably tend to establish the desired facts." *Id.* at 683.

The Committee on Pattern Jury Instructions (Civil) of the Tennessee Judicial Conference, For Use In Jury Trials, has promulgated T.P.I. – Civil (Charge Number 2.40) regarding the concept of preponderance of the evidence. Paragraphs 3 and 4 of that charge read as follows:

"The term 'preponderance of evidence' means that amount of evidence that causes you to conclude that an allegation is probably true. To prove an allegation by a preponderance of the evidence, a party must convince you that the allegation is more likely true than not true.

If the evidence on a particular issue is equally balanced, that evidence has not been proven by preponderance of the evidence

and the party having the burden of proving that issue has failed.”¹⁴
Id. at 65.

The Committee based this language on the Western Section Court of Appeals’ decision in *Austin v. City of Memphis*, *supra*.

The proof in this case graphically illustrates the difficulty TDOC officials have in accommodating the physical needs of large numbers of prisoners while at the same time carrying out their primary function which is to operate a penal facility.

In this case, Claimant’s injuries allegedly arose out of a fall which occurred on July 8, 2010, a little over a month after his June 4, 2010, return to NECX from a court appearance in Sullivan County, Tennessee. The initial issue before the Commission involves whether the State was negligent in its care, custody and control of Mr. McMiller since it was his custodian at the time of the fall. More specifically, the issue is whether the State was negligent in not finding a bottom bunk for Mr. McMiller which resulted in his alleged fall on July 8, 2010.¹⁵ On June 4, 2010, Mr. McMiller was assigned to Unit Four, a prisoner segregation section of the facility colloquially referred to as “the hole”. Unit Four is used to house prisoners for safety and disciplinary purposes. The proof also shows that prisoners “in transit” between various TDOC facilities may also be kept there. Additionally, because of overflows in the prison population, other prisoners may be temporarily sent there. The cells in Unit Four, we believe, accommodate one

¹⁴ The Committee in the Use Note appended to this instruction set out the following as “other useful phrases”:
“The proposition is more probably more true than not true.” [Ill. Pat. Inst., 2d ed., 1971] “The evidence that supports his claim on that issue must appeal to you as more nearly representing what took place than that opposed to his claim.” [New York Pat. Inst. 1965] “A party must persuade you that his claim is more probably true than not true.” [Pat. Inst. For Kansas]

¹⁵ Officer Fleeman testified that he did not believe Claimant had fallen while, on the other hand, inmate Marshall who is now dead signed an affidavit stating that Claimant did indeed fall. (TR 2, p. 181; and EXH 14).

prisoner and apparently there is no access to television.¹⁶ According to the un rebutted proof, had Mr. McMiller agreed to go to Unit Four when he returned from his Sullivan County court date, he would have spent a maximum of fourteen (14) days in the segregation facility and, in all likelihood only one or two days in that section of the prison. Rather than going to “the hole”, Claimant chose to occupy a cell in Unit Eight where only a top bunk was available.

A great deal of time was spent at trial dealing with the subject of what effect Claimant's decision to go to Unit Eight rather than to the hole, has on the outcome of the liability issue in this case.

It is important that the alleged fall did not occur until after Mr. McMiller would have been reassigned to the main compound because of the fourteen (14) day limitation found in TDOC Policy #506.14. Actually, he would have been out of Unit Four twenty (20) days prior to the alleged fall assuming he stayed the full fourteen (14) days in Unit Four. The Commission finds these time frames significant given the State's argument concerning Mr. McMiller's volitional choice of a top bunk in Unit Eight over a bottom bed in “the hole” constituting the preponderating cause which led to his alleged fall. Clearly he would no longer have been assigned to Unit Four even if he had agreed to go there on June 4 in light of the fourteen (14) day restriction found in Policy #506.14.¹⁷

Therefore the issue of whether Claimant did or did not cause his own fate is a non-issue in light of this written prison policy since under normal circumstances he

¹⁶ The proof shows that just prior to Claimant being sent to Unit Four, another prisoner was found to be in possession of a cell phone and was consequently punished by being sent to Unit Four which, in turn, made available a bed in Unit Eight. When given the choice between going to Unit Four and taking the top bunk in Unit Eight, Mr. McMiller chose the latter.

¹⁷ We assume McMiller could have voluntarily remained in Unit Four until a bottom bunk came open.

would not have been there on July 8.

Thus, in essence, the issue more specifically becomes whether the State was negligent in even allowing Mr. McMiller to be assigned a top bunk given the documented health assessment restrictions prepared by medical personnel at TDOC's Morgan County Facility, we believe, in 2008. Exhibit one (1) entered into evidence at trial provides as follows:

"No heavy lifting-20 pounds max, able to freq lift or carry objects weighing up to 10 pounds, no more than 10 minutes continuous strenuous activity, no more than 30 minutes of continuous standing or walking housed on first floor/bottom bunk, no climbing and balancing uneven ground (sic)" *Id.* (Emphasis supplied)

The resolution of this issue requires an analysis of the legal concepts of duty and breach of duty. Additionally, if we find that the State did breach a duty owed, we must then determine whether Claimant himself was negligent regarding the actions and decisions which caused his injuries and if so, to what extent.

Exhibit one (1) establishes that while he was housed at the Morgan County Correctional Complex (MCCX), Mr. McMiller had an AVO for a bottom bunk on the first floor of the prison facility. Although Dr. Lee testified that he would not personally have assigned Mr. McMiller to a bottom bunk based on the x-rays and medical records made while Claimant was at MCCX, he also stated that although an AVO may be temporary in duration, the underlying health assessment, which provides the basis for the AVO, cannot be changed until a prisoner's next regularly scheduled medical reassessment is completed. (Lee Dep., p. 15, 63-64, 75). Now retired health administrator Jerry Hayes testified that a health assessment is not a doctor's order but that such an evaluation could serve as a substitute for an AVO. (TR 1, p. 142-143, 145). Warden Sexton also

testified that AVOs are usually carried by prisoners in order that they can be presented to correctional officers when various questions arise concerning the terms of their imprisonment. (TR 2, p. 213-214). According to the warden, the officers are supposed to follow the terms of an AVO rather than the health assessment. Mr. McMiller testified that he had an AVO for a bottom bunk assignment, but that it had been lost during one of his transfers within the TDOC system. (TR 2, p. 250-251). Importantly, Mr. Hayes testified that assignment to a bottom bunk depends on availability, and that AVOs and/or health assessments do not override security interests. (TR 1, p. 145, 148).

The proof here also shows that TDOC policy #506.14 (EXH. 2), paragraph B, states that “as resources permit[s]” an inmate with special medical needs “should be assigned” to an institution and unit which is capable of accommodating his disabling condition. Further, TDOC policy #506.14 (EXH. 2) states that inmates in transit within the TDOC system may be assigned to a segregated unit (the “hole”) rather than a prison’s general population for a short period not to exceed fourteen (14) days although the prisoner is not being punished or being placed in segregation for his own safety.

Trial proof showed that segregation or “the hole” is also used sometimes when there are simply too many prisoners at a facility for the beds available in the general population sector of the prison or for various transient purposes such as when inmates depart and return to the facility for some reason.

There was also significant testimony in this case concerning whether Mr. McMiller’s apparent bottom bunk placement before he went to Kingsport could have been held for him until his return. Warden Sexton testified categorically that generally beds simply cannot be held for a prisoner who has left the facility because of prison

crowding issues. (TR 1, p. 80). Captain Allen, who dealt with Claimant's placement on his return from Kingsport, testified that when Mr. McMiller returned to Mountain City, there were simply no beds available in general population until a top bunk assignment came open when another prisoner was found to be in possession of a cellular telephone. (TR 1, p. 37). Mr. McMiller protested vigorously that he should not be sent to the hole since nothing he had done warranted placement there.

What we do know from Captain Allen is that NECX was at full capacity on June 4, 2010, and that Mr. Allen, then a lieutenant, did not check with health services concerning Mr. McMiller's health assessment or AVO status. (TR 1, p. 44). Nevertheless, Allen was faced with trying to find a place for Mr. McMiller somewhere in a very crowded prison at the time of his return. As pointed out above, a bed did come open in Unit Eight and Mr. McMiller chose to take that bed assignment rather than going to Unit Four even though the available space there consisted of a top bunk assignment.

Mr. McMiller relies heavily on TDOC policy #506.14 where subparagraph B provides, *inter alia*, that "[i]nmates with special medical needs shall not have their cell or location changed without the unit manager/shift commander consulting with Health Services." However, Mr. McMiller's bed assignment on June 4, 2010, was not a change. Rather, his status was that of a prisoner who had been out of the facility returning to NECX from an outside venue. The evidence is unrebutted that it was a rare instance when a prisoner's bed could be held for him when he was temporarily away from NECX.

Even though Warden Sexton testified that Claimant did not have an AVO for a bottom bunk at the time of his fall, his last health assessment done at MCCX (see Exhibit 1), stated that he should be assigned to a bottom bunk on a ground level floor.

(TR 2, p. 234, EXH 1). This assessment had never been changed, and Mr. Hayes testified it could serve as a substitute for an AVO. (TR 1, p. 145).

The proof is convincing here that Claimant, from the time he returned to NECX, was constantly harping on his contention that he should be given a bottom bunk based on his medical conditions -even on dates after any initial fourteen (14) day assignment to the hole would have expired. For example, correctional officer Fleeman testified Claimant brought the subject up with him. (TR 2, p. 168). On June 14, 2010, Mr. Phillips, at Claimant's request, printed for him the health assessment marked as Exhibit 1. Then on June 28, 2010, medical director Hayes confirmed that Claimant should be placed on the bottom bunk in a first floor cell. (EXH. 8). Although Unit manager Angel testified that Claimant lodged no verbal or written complaint requesting a move between June 4 and July 8, 2010, that testimony is brought into serious dispute by the interactions Claimant had with Phillips, Hayes and Fleeman during this period.

It is also apparent from the testimony in this case that although Mr. McMiller believes that he is a disabled inmate, Warden Sexton was of the opinion that actually a disabled inmate is one who had serious problems caused by a variety of factors, and that although Mr. McMiller did have some medical issues, he would not have considered him a special needs inmate as those individuals are persons suffering from conditions such as no arms or legs. (TR 2, pp. 229-232).

The liability issue in this case is extremely close. As stated earlier, what we have before us is a situation where prison officials dealing with limited facilities which must be parceled out between a large number of prisoners and persons, such as Mr. McMiller, an individual who because of prior accidents or pre-existing medical conditions has

physical limitations which warrant a bed assignment to a lower bunk on a bottom floor.

The first element of every negligence claim is establishing the presence of a duty, which is the legal obligation the State owed to Mr. McMiller to conform to a reasonable person standard of care in order to protect him against unreasonable risks of harm. *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn.1995). The scope of this duty rests on all the relevant circumstances, including the foreseeability of harm to the claimant. *Pittman v. Upjohn Co.*, 890 S.W.2d 425, 433 (Tenn.1994). Specifically, in *Cockrum v. State*, 843 S.W.2d 433 (Tenn.Ct.App.1992) perm. app. d'nd (Dec. 1992), the Supreme Court described the duty of care owed by prison officials to inmates:

Prison officials have a duty to exercise ordinary and reasonable care for the protection of the persons in their custody. *Kane v. State*, App. No. 89-75-II, slip op. at 4, 14 T.A.M. 51-8, 1989 WL 136963 (Tenn.Ct.App. Nov. 15, 1989); *Langley v. Metropolitan Gov't*, App. No. 87-323-II, slip op. at 12, 13 T.A.M. 51-3, 1988 WL 123001 (Tenn.Ct.App. Nov. 18, 1988). The scope of this duty does not generally extend to protecting prisoners from self-inflicted injury or death.

Prison officials are not insurers of a prisoner's safety. *Figueroa v. State*, 604 P.2d at 1205; *Pretty on Top v. Hardin*, 597 P.2d at 60-61. In a case such as this one, their conduct must only be reasonably commensurate with the inmate's known condition. See *Stokes v. Leung*, 651 S.W.2d 704, 708 (Tenn.Ct.App.1982). Except in the most obvious cases, whether the prison officials acted reasonably to protect a prisoner's safety requires expert proof or other supporting evidence. *Hughes v. District of Columbia*, 425 A.2d 1299, 1303 (D.C.App.1981). *Id.* at 436, 438. (Emphasis supplied).

The Commission finds that the State owed a duty of reasonable care to Mr. McMiller as his custodian. However, the issue as to whether or not there has been a breach of that duty requires a more difficult analysis. Foreseeability is a key component in that analysis.

As the *Doe v. Linder Constr. Co.*, 845 S.W.2d 173 (Tenn.1992) court put it:

Foreseeability is the test of negligence. If the injury which occurred could not have been reasonably foreseen, the duty of care does not arise, and even though the act of the defendant in fact caused the injury, there is no negligence and no liability. ... “[T]he plaintiff must show that the injury was a reasonably foreseeable **probability**, not just a remote **possibility**, and that some action within the [defendant’s] power more probably than not would have prevented the injury.” *Id.* at 178 (internal citations omitted). (Emphasis supplied).

We are particularly mindful of the appellate court’s rulings in *Cockrum* and *Doe*. According to the Supreme Court’s ruling in *Doe*, a Claimant must show, by a preponderance of the evidence, “that [his] injury was a reasonably foreseeable probability, not just a remote possibility” *Id.* at 173. Was it probable that Mr. McMiller would fall on July 8, 2010, while climbing the four and a half to five feet height separating his bunk from the floor in light of his medical condition at the time and the established health assessment completed at MCCX nearly one and a half years earlier? The issue under the preponderance of evidence standard is not whether this was possible but rather was it probable. Additionally, the Commission must also determine according to *Cockrum*, whether NECX officials exercised ordinary and reasonable care in light of Claimant’s known condition based on his medical records, prior health assessment and AVO. In answering that question, according to *Cockrum*, we must ask whether NECX officials’ actions were “reasonably commensurate with the inmate’s known condition” while acknowledging that they are not insurers of his safety. *Id.* at 436. In making those determinations, the Supreme Court in *Cockrum* stated that Claimant must prove his case through “expert proof or other supporting evidence.” *Id.* at 438.

Mr. McMiller argues that in light of his well-documented health problems, amply

set out in his medical records which were sent with him to NECX, his fall and resulting injuries were a foreseeable probability. He argues that he should never have been confronted with the choice between a ground level bed in Unit Four and a top bunk in Unit Eight. Rather, Claimant asserts that he should have originally been assigned to Unit Eight, and if that bed assignment was to a top bunk and the other cell occupant did not have an AVO or health assessment for a bottom bunk, then the cellmate should have been ordered to move to the top bunk to accommodate Mr. McMiller's health assessment restrictions.

Mr. McMiller also argues that an assignment to Unit Four would have been completely unwarranted since he had committed no disciplinary infraction warranting placement in "the hole". It was also of concern to Mr. McMiller that sending him to Unit Four would prohibit visitation with his father who at the time was terminally ill. He further testified that if anyone was assigned to Unit Four, it should have been an inmate who refused to give up the bottom bunk to a fellow inmate possessing an AVO or health assessment containing such a restriction.

On the other hand, Captain Allen and Warden Sexton testified that TDOC policy 506.14 (EXH. 2) allowed for the temporary housing of general population inmates in Unit Four for prisoners in transit or when beds were unavailable in the general population compound because of crowding at NECX. The testimony revealed that these sorts of situations did occur at NECX, and that Mr. McMiller would in all likelihood have been placed in Unit Four for only a couple of days before a bunk came available in the main prison compound, but at a maximum no longer than fourteen (14) days per TDOC policy.

The Commission recognizes that while Warden Sexton's testimony revealed that a bunk would have likely become available, the evidence also demonstrated that there was a possibility that a bottom bunk assignment might not happen since the prison was operating at maximum capacity. Thus, there is no proof in the record that simply going to Unit Four for only a couple of days or even the maximum time allowed -fourteen (14) days- would guarantee a bottom bunk assignment upon release to the main compound.

While Mr. McMiller asserts vigorously that there was no reason for requiring him to be housed in the more restrictive Unit Four facility, Warden Sexton countered that there would have been no differences in privileges available to Mr. McMiller other than the absence of television. Sexton further testified that all of the beds in Unit Four are at normal bed level. He also addressed Mr. McMiller's concerns about visitation with his father who was very ill at the time. The warden explained that visitation would not have been withheld from Mr. McMiller, and that it was at his discretion to allow any prisoner housed in Unit Four, even for disciplinary reasons, to be allowed visitation.

Warden Sexton, a veteran and extremely able Tennessee prison administrator who has known Mr. McMiller for years, testified that there are one thousand eight hundred and fifty (1,850) beds at NECX but not enough bottom bunks to accommodate every inmate who wants one. (TR 2, p. 207).

The State contends that after the initial assignment to Unit Eight, Mr. McMiller made no further attempts to bring his bottom bunk assignment to the attention of prison personnel. This argument was contradicted by Jerry Hayes, NECX medical director at the time of Claimant's fall, who testified that he received a letter from Mr. McMiller on June 25, 2010 (EXH.7), inquiring whether or not a bottom bunk assignment should have

been provided to him on his return from Sullivan County. Exhibit Eight (8) confirms this inquiry since the medical director responded to Mr. McMiller that his records did suggest first floor, lower bunk housing assignment. (TR 1, p. 142, EXH. 8). However, Mr. Hayes went on to testify that cell assignments were a security issue and not a medical one. He also stated that he believes the health assessment documentation can serve as an acceptable substitute for an AVO or LAN, and that officers probably refer to the health assessments for comparison with an inmate's AVO. (TR 1, p. 145). However, Mr. Hayes testified that health assessment restrictions, such as assignment to a bottom bunk, were always made with the understanding that such assignments would be implemented if accommodations were available. He explained that sometimes inmates were even housed in the prison hospital or infirmary when suitable accommodations were unavailable in the main compound. Importantly, Mr. Hayes also testified that it was not his belief that an AVO or health assessment overrode security interests. It was his opinion that medical personnel understood the security issues and were willing to take necessary steps to take account of those concerns if necessary. According to Mr. Hayes, NECX officials had dealt with incidents which arose when an inmate was moved out of his bunk assignment to accommodate another prisoner's restrictions. Those situations had sometimes resulted in inmate injuries. Mr. Hayes also testified that he was aware of instances of Unit Four being used for non-disciplinary reasons such as Mr. McMiller's situation, as well as in connection with inmates in transit.

There is no dispute regarding the proposition that Mr. McMiller made a conscious decision to be housed in general population, albeit in a top bunk, rather than going to Unit Four where he would have been guaranteed a bottom bunk for at least fourteen

(14) days.

The Commission finds troubling the State's position pertaining to Mr. McMiller's own fault in not going to Unit Four. The State's argument hinges on the idea that if Mr. McMiller had chosen to go to Unit Four, then the circumstances leading to the alleged fall could have been avoided. It appears to the Commission that this, as discussed above, is not necessarily so. Assuming that Mr. McMiller had gone to Unit Four and stayed the maximum fourteen (14) day period, and was then transferred to the main compound on June 18, 2010, there was no guarantee whatsoever that a bottom bunk would have been available or assigned. The alleged fall did not occur until thirty-four (34) days after his assignment to Unit Eight which would have been potentially twenty (20) days after a maximum stay of fourteen (14) days in Unit Four. Simply stated, Mr. McMiller's decision not to go to Unit Four has no relevance as it pertains to any fault allocation to Mr. McMiller since his fall occurred well after his time there would have expired.

The Commission is fully cognizant of the possibility that a bottom bunk might have been available at the end of Claimant's maximum fourteen (14) day stay in Unit Four. However, based on the testimony provided at trial, there was certainly no assurance of such an assignment given the convincing testimony about the overcrowding problems faced by the prison. The testimony of Warden Sexton, Mr. Hayes and other prison personnel all show that the prison was indeed crowded, and that security interests typically override the inmates' medical restrictions. Therefore, it is difficult to comprehend how Mr. McMiller's decision to go to the main compound rather than to Unit Four has any significant bearing as it relates to the alleged fault of Claimant

in bringing about this incident. The fall did not occur during the time when he would have been assigned to Unit Four, and he potentially could have ended up in a top bunk even after being transferred back to the main compound placing him in exactly the same situation he was in at the time of the fall.

Warden Sexton testified that Claimant did not have an AVO for a bottom bunk and that in the month between his assignment to Unit Eight and his fall, it was never brought to anyone's attention that he wanted a bottom bunk. (TR 2, pp. 216-217, 221-222, 234). Sergeant Douthitt, Chairperson of the Prison Grievance Board, testified there was no record of Mr. McMiller filing a grievance concerning his bed assignment between June 4 and July 8, 2010. This testimony was countered by Mr. McMiller's insistence that he did have such a conversation regarding this subject with Warden Sexton, who he has known for many years. According to Mr. McMiller, he spoke with Warden Sexton and Mr. Angel as they walked across the prison grounds on an unspecified date. Further, Claimant had clearly communicated with medical director Hayes on June 25, 2010, on this subject (See Exhibits 7 and 8) and additionally, on June 14, 2010, Mr. Phillips had printed out in his office a copy of Mr. McMiller's health assessment at the request of the inmate. Mr. McMiller's position was that Mr. Angel was also present in Mr. Phillips' office when this took place. (TR 1, p. 121-122). Additionally Correctional Officer Fleeman testified that Claimant discussed a bottom bunk assignment with him. (TR. 2, p. 168) The Commission has no trouble finding that Mr. McMiller did in fact attempt to bring his bed assignment to the attention of TDOC personnel.

Mr. Hayes also testified at trial that he believed a health assessment could

substitute for an AVO (LAN), but that a bottom bunk had to be available. (TR 1, p. 145). He also testified that in such a situation, beds in the infirmary could also be used for prisoners needing such an accommodation. (TR 1, p. 145). However, again, in the infirmary as in Unit Four, prisoners do not have access to television although they could avail themselves of expanded exercise time. According to Mr. Hayes, there are certain medical criteria that must be present for an inmate to be assigned to the infirmary, but we do not have any evidence before us to make a determination of whether Mr. McMiller would have met those requirements. On the other hand, there was also no evidence presented at trial that Mr. McMiller ever asked about being assigned specifically to the infirmary, pending the opening up of a bottom bed assignment in the main compound.

Mr. McMiller conceded that he did not have in his physical possession at the time of his fall the AVO (LAN) mandating his assignment to a lower bunk. (TR 1, pp. 65-66) He claimed that a part of his paperwork had been lost during prison transfers. He did point out that the medical records provided to him during the course of discovery showed that on November 10, and 12, 2008, while being examined at another TDOC facility, a nurse practitioner had documented low back pain confirming serious pre-existing spine problems per x-rays made at that time. Attached to Dr. Lee's deposition was a "Medical Records Affidavit" prepared in 2008 at MCCX by a nurse practitioner named Dale Hadden. That affidavit contains notations, on page 458, indicating that Mr. McMiller suffers from chronic neck and back pain. Other notations on the same page shows more specifically that Claimant was diagnosed with degenerative disc disease and neck pain stemming from a previous bus accident.

Other important testimony concerning the duty issue shows that no check of Claimant's medical records was made at the time of Mr. McMiller's return to NECX from the Kingsport court appearance. (TR 1, p. 44). On the other hand, Captain Allen testified that on Claimant's return, following his initial inquiry about placement in a lower bunk, he never complained to [Captain Allen] again. (TR 1, p. 43). Allen's position at the time was as a lieutenant. (TR 1, p. 31). As pointed out above, the Commission notes that Mr. McMiller did take steps through Mr. Hayes and Mr. Phillips to inquire about his health assessment and any restrictions on his housing situation caused by those restrictions. Further, officer Fleeman testified that Mr. McMiller "was upset ..., that he wasn't on the bottom bunk." (TR 2, p. 182)

Several witnesses testified that to their observation, Mr. McMiller did not appear to be physically debilitated. (TR 1, pp. 42-43, 55, 105, 129-130, TR 2, pp. 180-181). The proof also shows that the individual occupying the lower bunk in Unit Eight when Mr. McMiller was assigned there, a Mr. Elder, while described by some as being quite funny was also felt by others as someone to be careful with. Mr. Elder is serving a life sentence for murder, and it appeared to be Mr. McMiller's contention that he had some sort of prison gang affiliation. Accordingly, the Commission is somewhat perplexed by Claimant's insistence that the individual in the bottom bunk –Elder- should have been ordered to move to the top bunk in order to accommodate his needs particularly in light of Dr. Lee's testimony that there had been legitimate falls from top bunks most of which were caused by altercations between prisoners. (Lee Dep., p. 58). It seems to the Commission that by insisting TDOC officials should have forced Elder to move to the top bunk, Claimant could well have set himself up for the very sort of injuries which the

proof shows had occurred at NECX when such bed swaps were mandated-the same sort of injury he claims to have suffered here.¹⁸

The issue is therefore drawn concerning whether the State breached any duty it owed to Mr. McMiller to ensure that he was placed in a bottom bunk when he returned from court on June 4, 2010.

The proof is quite clear, based on Dr. Lee's deposition and the medical records attached to it, that Mr. McMiller has a fairly serious case of degenerative disc disease and a congenitally narrow spinal canal at the cervical levels. Those conditions were documented in his 2008 health assessment carried out at the Morgan County Correctional Complex (MCCX). The proof suggests Claimant was due for another health assessment in November of 2010. In light of those facts, it appears that Mr. McMiller may well in fact have had an AVO for a bottom bunk although the actual documentation had been lost in one of his transfers between TDOC facilities. See EXH. 3. There is no indication in this record that the AVO had expired or been countermanded for some reason.¹⁹ We also know that when Mr. McMiller returned from Sullivan County, no check was initially made with health services concerning his assignment to the top bunk in Unit Eight. It is noteworthy that if a check of Mr. McMiller's health assessment records had been undertaken, his restricted bed assignment would have been found but assignment to a lower bunk would have been subject to availability.

The Commission, in connection with the duty issue, cannot ignore the fact that

¹⁸ Interestingly, Claimant was moved to a bottom bunk the day of his fall. We assume this bunk was in the same cell he occupied at the time with Mr. Elder.

¹⁹ The Commission notes that no AVO was offered into evidence at trial. According to Mr. McMiller, the AVO and some other documents were lost by prison personnel. The proof shows that AVOs were typically limited in duration, but the health assessments remained current until a subsequent medical evaluation was performed.

bed space is at a premium at NECX, and that officials there must meet the health and security requirements for a very large population of inmates. Restrictions contained in health assessments, according to the proof, are subject to bed availability as well as security concerns. In Mr. McMiller's case, the only lower level beds available when he returned from Sullivan County, were in the more secure, segregated portion of the prison (Unit Four). However, at the last moment, before he was to be taken to Unit Four, a top level bunk came open in the Unit Eight cell. Mr. McMiller contends that Mr. Elder, should have been ordered out of the bottom bunk and into the top bunk. On the other hand, Mr. McMiller expressed concerns over his personal safety because of what he suspects were Mr. Elder's prison affiliations. In fact, the proof shows that Mr. Elder is a person, according to the staff, who could not be "easily pushed around" by other prisoners. (TR 1, p. 127) Additionally, Dr. Lee testified that falls from bunks had occurred (as a result of inmate altercations). And as testified to by several witnesses, Mr. McMiller did not appear to be particularly debilitated. (TR 1, pp. 42-43, 55, 105, 129-130, TR 2, pp. 180-181). The warden in fact described other sorts of health problems which he considered more restrictive. (TR 2, pp. 229-232).

Other medical proof in this case is troubling. Dr. Lee stated that Mr. McMiller was not cooperative in keeping appointments made for him with a neurosurgeon in Nashville. (Lee Dep., p. 41). Dr. Lee testified that these specialized appointments are difficult to obtain. Further, Dr. Lee testified that at one point, Claimant refused to be transferred to TDOC's Special Needs Facility in Nashville. (Lee Dep., pp. 39-40). On another occasion, Claimant refused to be relocated to the Charles Bass Center in

Nashville in connection with the treatment of his injuries.²⁰ The Commission is also unable to understand Mr. McMiller's refusal to undergo a CT scan of his adrenal gland when Dr. Lee became suspicious of a possible problem there. It may be recalled that Mr. McMiller was incensed that it took several months for an MRI of his spine to be arranged. Why he would refuse a CT scan of a potentially serious situation with regard to his adrenal gland is hard to understand. Why indeed Claimant would make such decisions in light of his self-proclaimed dire medical condition is hard to comprehend and leads us to conclude that Claimant at times is prone to make choices which are not in his own best interest.

Warden Sexton testified that while he did not believe Mr. McMiller would lie to him, he did think he was manipulative. (TR 1, p. 80). We agree wholeheartedly with Warden Sexton's assessment and note that some of the crimes for which Mr. McMiller is currently incarcerated involve fraud.²¹

The Commission continues to be impressed by the Court's language in *Doe* requiring that Claimant's injury be not just a "possibility" but a "foreseeable probability" before we can find negligence and award damages. *Id.* at 178. Further, in avoiding a damage award, prison officials must act in a fashion "reasonably commensurate with the inmate's known condition." See *Cockrum* at 438.

In this case, we conclude that NECX officials had several opportunities to avail themselves of information contained within several of their own records which Claimant

²⁰ These refusals are perhaps understandable in light of the fact that Claimant's father (who lived in nearby Kingsport) was terminally ill at some point between 2010 and sometime near the events underlying this claim. The proof also shows Claimant did not like the transfers to Nashville because he was very uncomfortable during those trips.

²¹ According to the record, Mr. McMiller is currently serving time for convictions involving credit card fraud, two counts of Schedule III drugs, three counts of Schedule II drugs involving cocaine, aggravated burglary, theft of property, and forgery of checks.

consistently attempted to bring to their attention.

Even though TDOC's own medical department had made it clear in 2008 that Mr. McMiller should be assigned to a bottom bunk at ground floor level, this simply was not done when he returned to Mountain City from Kingsport in June of 2010. Mr. McMiller constantly brought this issue up with NECX officials between June 4 and July 8, 2010. In all fairness one must also ask why Mr. McMiller, if he was so afraid of a top bunk assignment, did not request a temporary bed in the prison hospital or even in Unit Four. In each place he definitely would have been in a bed at a level lower than the top level bunk bed in Unit Eight from which he fell. Residence in either location would in all likelihood have been temporary. While the absence of television in both Unit Four and the infirmary would have been somewhat irritating, that is a small price to pay in order to avoid the danger Mr. McMiller so loudly now argues he wished to avoid. The proof is clear that prisoners such as Mr. McMiller while in Unit Four would have enjoyed privileges unavailable to individuals placed there for punitive or administrative segregation purposes. And while there were restrictions in place in the infirmary, as well as the absence of television access, it was an option open to Mr. McMiller to which he should have given close consideration if he was so frightened of being placed in a top bunk.

These were decisions that only Mr. McMiller could make in light of his particular situation.

We also readily acknowledge TDOC's problem of finding appropriate bed space in a crowded facility serving many prisoners with medical problems and physical limitations far worse than those afflicting Mr. McMiller.

Taking all of this proof into consideration, and using the comparative fault methodology set out in *McIntyre*, the Commission finds that the State was fifty-five percent (55%) at fault for the fall which we do believe Mr. McMiller suffered, but that Claimant's own failure to avail himself of other temporary bedding options, in light of the real life limitations facing NECX administrators, constitutes forty-five percent (45%) of the comparative negligence in this case.

However, even though we have concluded that the State was more to blame for Mr. McMiller's injuries than the inmate himself, there is another insurmountable problem for Claimant here.

Quite simply, that problem is that Mr. McMiller has presented absolutely no medical evidence rebutting Dr. Lee's testimony.²²

In *Western Sizzlin, Inc., v. Harris*, 741 S.W.2d 334 (Tenn.Ct.App.1987), the appellate court discussed in detail the issue of damages citing *Redbud Coop Corp., v. Clayton*, 700 S.W.2d 551 (Tenn.Ct.App.1985) which stated as follows:

“... [T]his Court must bear in mind that uncertain, contingent, or speculative damages should not be awarded. *Maple Manor Hotel Inc. v. Metropolitan Government of Nashville and Davidson County*, 543 S.W.2d 593, 599 (Tenn.App.1975). However, uncertain or speculative damages are prohibited only when the existence of damages is uncertain not when the amount of damage is uncertain. *Cummins v. Brodie*, 667 S.W.2d 759, 765 (Tenn.App.1983). All that an award for damages requires is proof of damages within a reasonable degree of certainty. *Wilson v. Farmers Chemical Association*, 60 Tenn.App. 102, 111, 444 S.W.2d 185, 189 (1969), and *Acuff v. Vinsant*, 59 Tenn.App. 727, 737, 443 S.W.2d 669, 674

²² To the extent that Mr. McMiller is claiming medical malpractice on the part of Dr. Lee, any such claim will not be considered here in light of Claimant's complete failure to comply with Tenn. Code Ann. §§ 29-26-121 and 122 which require pre-suit notice and the filing of a Certificate of Good Faith.

(1969).”²³

The only proof in evidence in this case addressing the issue of whether Claimant’s alleged fall caused his current cervical and lumbar spine problems came from Dr. Lee. Dr. Lee testified that while the fall could have increased Mr. McMiller’s pain level, his medical conditions were pre-existing and did not cause the primary issues which necessitated Claimant’s lumbar and cervical surgeries which took place after the fall.

What we do know from Dr. Lee’s deposition is that x-rays made after the fall showed that Claimant had “diffuse mild to moderate” narrowing at the L4-L5 area as well as disc space narrowing in the cervical spine at the C3-4, 4-5, and 6-7 levels. (Lee Dep., pp. 11-12). Additionally, those x-rays documented osteoarthritic and degenerative changes around the facet joints of the spine. (Lee Dep., pp. 13-14). Dr. Lee also testified that Claimant had a congenitally narrow spinal canal on which were superimposed degenerative changes in the spinal column. (Lee Dep., pp. 30-31). Dr. Lee attributed none of Mr. McMiller’s arm weakness or numbness to the fall. (Lee Dep., pp. 48-49).

However, it must also be acknowledged that Mr. McMiller was finally able to obtain an MRI of his spine in Elizabethton in February of 2011, which revealed that he in fact did have a ruptured disc at the lumbar 3-4 level. (Lee Dep., p. 37). As pointed out above, Dr. Lee would not state with a reasonable degree of medical certainty that the fall caused the need for the surgeries which Mr. McMiller has certainly gone through. In the face of that testimony it then became Claimant’s burden to overcome Dr. Lee’s

²³ The categories of damages available in a personal injury case are thoroughly discussed in *Overstreet v. Shoney’s Inc.*, 4 S.W.3d 694 (Tenn.Ct.App.1999) perm. app. d’nd (Oct. 1999)

testimony with countervailing medical proof. This he did not do and consequently we are left only with Dr. Lee's testimony regarding the causation of Claimant's spine problems.²⁴

Therefore, we find that even though the State's negligence exceeded by a small degree that of the Claimant, we cannot find that Mr. McMiller has established by a preponderance of the evidence the causal connection between his fall of July 8, 2010, and the conditions which have resulted in two separate surgeries and the current condition of Claimant's cervical and lumbar spine.

For these reasons, Mr. McMiller's claim must be and is DENIED.

Entered this the 15 day of April, 2014.



William O. Shults, Commissioner

P.O. Box 960
Newport, TN 37822-0960
(423) 613-4809

²⁴ The Commission does wonder how Claimant's pain might have increased, as testified to by Dr. Lee, without there being some connection between the fall and the damaged spine and increased pain. These are open medical issues regarding which Claimant has presented no proof whatsoever. That failure of proof simply cannot be overlooked as Claimant must prove every element of his claim by a preponderance of the evidence submitted at trial. Dr. Schlosser, Claimant's treating neurosurgeon did not testify regarding this issue.

CERTIFICATE

I certify that a true and exact copy of the foregoing Order has been transmitted to:

**Victor D. McMiller Sr., #100564
NECX
P.O. Box 5000
Mountain City, TN 37683-5000**

**Pamela S. Lorch, Esq.
Attorney General's Office
P.O. Box 20207
Nashville, TN 37202**

This the 21 day of April, 2014.



Paula Swanson, Clerk of the Commission