

IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE
MIDDLE DIVISION

FILED
IN CLAIMS COMMISSION
CLERK'S OFFICE

2014 NOV 12 A 10:30

BELLSOUTH)
TELECOMMUNICATIONS, INC.,)
D/B/A AT&T (TN)) Claim No. T20120124
)
Claimant,)
)
v.)
)
STATE OF TENNESSEE)
) Regular Docket
Defendant.)

JUDGMENT FOR CLAIMANT

This claim came to be tried before Robert N. Hibbett, Claims Commissioner and Trial Judge of the facts and law, on September 23, 2014 at Legislative Plaza in Nashville, Tennessee. The Claimant, Bellsouth Telecommunications, Inc., D/B/A AT&T (Bellsouth), seeks damages arising from the Tennessee Department of Transportation (TDOT) replacing a culvert and cutting Bellsouth's underground cable. Mark Reagan, Esq., appeared for the Claimant. Assistant Attorney General Michael L. Delisle represented the State of Tennessee. The Trial Transcript and Exhibits were filed on October 16, 2014.

JURISDICTIONAL BASIS

The Claims Commission's jurisdiction over this action is set forth in Tenn.

Code Ann. § 9-8-307(a)(1)(M), which states:

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:

* * *

(M) Negligent operation of machinery or equipment;

STIPULATION

The State of Tennessee admitted causing the damage to the cable that is the subject of this claim. (Trial Transcript page 4)

FINDINGS OF FACT

Pursuant to statute, the Tribunal shall make findings of fact and conclusions of law:

Testimony of Michael Steltmann

Mr. Steltmann is a claims manager and investigator for AT&T (Bellsouth). He investigated the damage to the Bellsouth Cable that occurred on Petway Road (State Route 250), which is the subject of this claim. He is responsible for

the breakdown of the costs incurred to repair the damages. He testified using Trial Exhibit 1.

The repair to the cable occurred on September 1, 2010. The Claimant is requesting \$116.50 an hour for the eight hours of work done by its technician for a total of \$931.99 for labor costs. This is not based on the technician's actual pay per hour. The amount is based on what it costs Bellsouth to have someone on the payroll including insurance, benefits, 401(k) match, administrative costs, supervisor costs, vehicle costs, tools and other factors. The total cost distribution for labor is shown in Trial Exhibit 2 (sealed).

The Claimant had to replace 300 feet of composite cable at \$3.12 per foot for a total of \$938.06. The cost of the two pedestals is \$161.11. There were material costs for clamps, connectors, wipes and paper towels. The total amount requested for materials totals \$1,116.02. The total amount of damages requested by Bellsouth is \$2,048.01.

Testimony of Jerry Forbes

Jerry Forbes is the assistant highway maintenance supervisor in the Cheatham County TDOT office. Les Stewart is his immediate supervisor.

He recalled that TDOT replaced a culvert under Petway Road on August 31, 2010 and being present at the site. He notified the Tennessee One-Call system before TDOT began work on the culvert. He testified that the One-Call ticket (Trial Exhibit 3) would have been valid for the excavation on August 31, 2010.

At the time the cable was damaged, he was not present because he was back at the shop. When he got back to the job site, he was informed that the cable had been hit. The Tribunal accredits the testimony of Mr. Forbes.

Testimony of Les Stewart

Mr. Stewart is the TDOT maintenance supervisor of Cheatham County. He testified that TDOT replaced a metal pipe across Petway Road in late August 2010 because one end had become covered. He testified the telephone cable ran across the top of the culvert. They set a track hoe and pulled the old pipe out. He did not know what cut the cable but something did, whether it was the track hoe or the old pipe. He testified that the cable was at least five or six feet down underground. He did not remember seeing any mark where the cable was. Bellsouth did not put the cable underground but temporarily ran it over the road using trees. The Tribunal accredits and believes the testimony of Mr. Stewart.

CONCLUSIONS OF LAW

LIABILITY

The State argues that the State complied with the law requiring it to notify One-Call with the location of the excavation and that there is no proof of where the damage occurred in relation to the marks that outline where the cable was. However, just because TDOT utilized the One-Call service and was permitted to excavate, does not mean it is excused from damage it has caused to utility lines. It had the obligation to use reasonable care to avoid damage to utilities. The statute is clear on this point:

(c) An excavator shall exercise reasonable care to avoid damage caused by an excavation or demolition within the safety zone around the marked location of the underground utilities. For the purpose of this section, "safety zone" means a strip of land at least four feet (4') wide, but not wider than the width of the utility plus two feet (2') on either side of the utility.

(d) If, upon arrival at the site of a proposed excavation, the excavator observes clear evidence of the presence of an unmarked utility in the area of the proposed excavation, the excavator shall not begin excavating until an additional notice is made to the one-call. The excavator may then proceed, exercising reasonable care to avoid damage to the utility which may be caused by such excavation or demolition.

(e) If no facilities exist in the tract or parcel of land, the operators shall make a reasonable effort to so advise the individual who initiated the request, provided the request is received in accordance with § 65-31-106.

(f) The approximate location of underground utilities does not include a designation of location as to depth below the surface of the ground. Excavators must use reasonable care to ascertain for

themselves the exact depth of the underground utilities below the surface of the ground. If, after so ascertaining, the excavator learns that its excavation or demolition is likely to interfere with the operation of the underground utility facilities, it must again notify the affected operator of such underground utility facilities and reasonably cooperate with the operator of the underground utility facilities to conduct its excavation or demolition in such a way that the operations of the underground utility facilities are not disturbed or the affected underground utility facilities are placed out of the way of the proposed excavation or demolition.

Tenn. Code Ann. § 65-31-108

The Tribunal finds that TDOT made little effort to locate Bellsouth's lines or use reasonable care to avoid damage to the lines other than to notify One-Call. Based on the stipulation that TDOT did, in fact, damage the cable, the State is liable for the damage pursuant to the Underground Utility Damage Prevention Act.

DAMAGES

In determining damages, the Tribunal must follow the law as enacted by the General Assembly directing that the State of Tennessee is liable for actual damages only. Tenn. Code Ann. § 9-8-307(d). The State has argued that the Claimant's fully distributed costing methodology is incorrect in costing the labor

expended on the repairs. Claimant proposes including the overhead expenses of the company as part of labor costs as a sound accounting method.

The Tribunal has searched the case law of Tennessee Appellate Courts for guidance on fixed or overhead costs being included as part of the repair bill in a tort claim. The parties have not submitted any Tennessee appellate opinions on this issue. The Claimant has provided multiple cases from other jurisdictions supporting its theory that labor costs should be fully distributed reflecting the fixed costs of the company. This appears to be the rule in many jurisdictions but Tennessee has not explicitly followed this rule. The following passage from American Jurisprudence, Second Edition is both probative and persuasive in the present matter in stating the majority rule:

An award of damages for property damage should not include fixed overhead costs that would have to be paid whether or not the defendant caused any damage, because such expenses are not a natural consequence of the defendant's negligence.

22 Am. Jur. 2d Damages § 416

The Tribunal shall use this section and the General Assembly's directive that the State is only liable for actual damages as touchstones in order to award damages in this matter.

Again, one of the main contentions between the parties concerning damages is the costing of the labor expended. Using the fully distributed costing methodology, the Claimant argues that each repair hour should be valued at approximately \$116.50. This figure is based on the average effective wage of \$48.00 in addition to \$68.50 that contains the various fixed and overhead costs of the entire company. (See Trial Exhibit 2 sealed) Although the fully distributed costing methodology is a rational and useful tool to determine labor costs for cost accounting purposes and to fulfill the requirements of the FCC, this does not obligate the Tribunal to accept this methodology to determine the actual costs of labor in repairing the telephone line. Therefore, the Tribunal shall not include the average fixed and overhead costs but use the average effective wage of \$48.00 to determine labor costs multiplied by 8 hours. The Claimant is awarded \$384.00 in labor costs for its repairs.

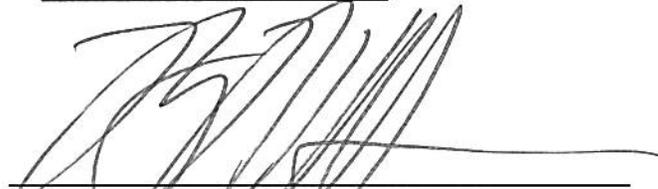
The Tribunal finds that the material costs as listed in Trial Exhibit 1 to be reasonable and necessary. The Claimant is awarded \$1,116.02 in material costs. The total amount of damages to be awarded total \$1,500.02.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED:

1. That the Claimant is awarded \$1,500.02 in damages for the cost of repairs.

2. That the parties shall bear their own discretionary costs.
3. That the costs of the trial are taxed to the State of Tennessee.
4. Trial Exhibit 2 shall remain under seal.

ENTERED this 5 day of November, 2014.



ROBERT N. HIBBETT
Claims Commissioner
Sitting as Trial Judge of Record

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing document has been served upon the following parties of record:

MICHAEL L. DELISLE
Attorney General's Office
P.O. Box 20207
Nashville, TN 37202-0207

MARK B. REAGAN
Attorney for Claimant
105 Broadway, Suite 300
Nashville, TN 37201

This 12th of Nov., 2014.



PAULA SWANSON
Administrative Clerk
Tennessee Claims Commission