

VERMONT TRANSPORTATION BOARD MEETING JANUARY 15, 2015

Board Members Present:

Nick Marro, Chairman, term expires 2/28/2016
Wesley Hrydziusko, term expires 2/28/2015
James Fitzgerald, term expires 2/28/2015
William Tracy Carris, term expires 2/28/2017

Board Members Absent:

Vanessa Kittell, term expires 2/28/2016
Robin Stern, term expires 2/28/2015
Tom Dailey, term expires 2/28/2016

Others Present:

John Zicconi, Board Executive Secretary
Yasir Kaheil, Claimant (via telephone)
Kevin Oddy, VTrans Legal Program Administrator

Call to Order:

Chairman Marro called the Thursday, January 15, 2015 meeting to order at 9:35 a.m., which was held at the Dewey Conference Room R235 on the National Life Campus, One National Life Drive, Montpelier, VT.

1. NEW BUSINESS

1.1 Review/Approve Minutes of the September 16, 2014 Meeting

On a motion by Mr. Fitzgerald seconded by Mr. Hrydziusko, the Board unanimously voted to approve the minutes of the September 15, 2015 Board meeting as submitted.

1.2 TB:418 Kaheil Small Claim Hearing

On July 7, 2014, Mr. Kaheil filed a damage claim in the amount of \$2,000 with the Department of Vermont Risk Management, stating that his vehicle struck a deer along Interstate 89 about two miles south of the Canadian border. Mr. Kaheil claimed the state was liable because Highgate has a large deer population, and there were no deer warning signs posted along the Interstate at or near the location of his accident.

On August 12, 2014, Vermont Risk Management Liability Claims adjuster Danielle V. Lewis denied the claim on the grounds that the state was not responsible for the damages.

Ms. Lewis in her denial letter said the state follows the federally adopted Manual on Uniform Traffic Control Devices (MUTCD) and has discretion on where it places deer warning signs. Such signs, Ms. Lewis wrote, are placed only in locations based on “engineering study or on engineering judgment” after consultation with state game wardens and Agency of Transportation staff biologists who recommend such signage. These experts only OK such signs in areas where they have determined that a roadway location is located along a “significant deer travel corridor.”

On August 18, 2014, Mr. Kaheil filed an appeal with the Vermont Transportation Board.

Mr. Kaheil said that his vehicle, while traveling northbound along Interstate 89 in the town of Highgate at about 10 p.m. on June 13, 2014, struck a deer. The collision damaged his car. After consulting with police, the car was driven north of the Canadian border, where it was towed.

Mr. Kaheil said that his case hinges on whether his collision was “random.” He said that his collision was not random because the Highgate area contains one of the state’s most dense deer populations, and that local knowledge indicates that deer/vehicle collisions along this segment of the Interstate are common.

Mr. Kaheil said that the State Police Officer who came to his aid told him deer collisions are common in this area, yet the state does not track or map where such collisions occur, or their frequency. As a result, there is no way for VTrans to know how often these collisions occur, or if their frequency is increasing, Mr. Kaheil said. He argued that the state is negligent because VTrans should chart such information and use it to make decisions on where to place highway warning signs.

Mr. Kaheil said that he was traveling less than the posted speed limit of 65 mph when his car collided with the deer.

Mr. Oddy said that VTrans does not dispute that Mr. Kaheil’s vehicle struck a deer in the northbound lane of Interstate 89 about two miles south of the Canadian border, and that the vehicle was damaged by the collision. Mr. Oddy, however, said that Mr. Kaheil failed to demonstrate that the damage to his vehicle resulted from negligence on the part of VTrans.

Mr. Oddy said that to establish liability, Vermont law says that Mr. Kaheil has to show that highway authorities had actual knowledge of the roadway defect, or that the defect existed so long that the highway authorities should have known of its existence, and that the authorities failed to take reasonable action to take corrective action.

Mr. Oddy said that vehicle/deer collisions along I-89 in the Northwest section of Vermont are random occurrences of which VTrans cannot predict where or when they will occur.

Mr. Oddy said that Vermont’s motor-vehicle statutes place an affirmative obligation on the operator to adjust his speed to what is reasonable and prudent for the conditions, and with regard to potential hazards. He argued that 23 V.S.A. § 1081(a) requires the motorist to control his speed to what is necessary to avoid colliding with any persons, vehicle or other object on or adjacent to the highway. Further, Mr. Oddy said that Vermont Law requires that drivers, while traveling at night as Mr. Kaheil was, must operate their vehicles in such a way as to be able to stop within the distance of the vehicle’s headlights.

Mr. Oddy also said that Mr. Kaheil’s claim is barred because the state has sovereign immunity in such cases. While the Vermont Tort Act, 12 V.S.A. Chapter 189 provides a partial waiver of the state’s sovereign immunity, the Act contains a “discretionary function” exception, he said.

Mr. Oddy said that Mr. Kaheil's claim is barred because placing deer-crossing signs on a state highway is a discretionary function, and because the Vermont Supreme Court has recognized that the decision whether or not to erect a warning sign involves an element of judgment or choice and is therefore a discretionary act.

Mr. Kaheil said that despite the Agency's defense of sovereign immunity due to the fact that it has discretion on where to post deer-crossing signs, such signs should have been posted in the area of his collision because data collected by the Vermont Department of Fish and Wildlife shows that the Highgate area contains one of Vermont's most dense deer populations.

Given both the speed of which people travel on an Interstate highway, as well as the volume of traffic that uses I-89, Mr. Kaheil said that VTrans owed him a duty to warn him that deer potentially could be in the highway at this location, that VTrans breached that duty by not erecting deer-crossing signs in the area, and that the breach was the proximate cause of the damage to his vehicle because had he been warned he would have used a higher degree of caution while traveling in that area.

Mr. Fitzgerald said that a deer-crossing sign is located along Interstate 89 in a location near the Champlain Country Club just north of Exit 20 in St. Albans. Mr. Kaheil disputed this, and said he never saw such a sign. Mr. Oddy also said that he is aware that both deer and moose crossing signs are posted along Interstate 89 heading towards St. Albans, but he did not say exactly where these signs are located.

Mr. Marro closed the hearing at 10:08 a.m. Mr. Zicconi said the Board would deliberate in private later in the meeting, and likely issue a written decision in early February.

After conducting the rest of the day's business, which is outlined below, and at 10:35 p.m., the Board on a motion by Mr. Fitzgerald seconded by Mr. Carris entered into deliberative session, pursuant to Title 1 § 313, to discuss TB-418 Kaheil Small Claim.

Mr. Zicconi was invited to attend the deliberative session.

At 10:50 p.m. the Board exited deliberative session.

1.3 TB-416 G. Stone Motors

Mr. Zicconi told the Board that the parties engaged in mediation shortly before Christmas but were unsuccessful. As a result, Board Member Robin Stern, who is chairing the prehearing process, has set in motion a prehearing process that will allow the parties to engage in discovery. If all goes well, the case could be ready for hearing beginning May 20th. The hearing is expected to last at least two days, so Mr. Zicconi asked Board members to clear their calendars on those days.

Mr. Carris informed the Board that he knows a salesman that works at G. Stone Motors, but that their relationship is not particularly close. He said that he believes he can be impartial when presiding over the case. Mr. Carris said the salesman is a close friend of his brothers. He asked if anyone on the Board held a belief that he should not participate in the case. No one questioned Mr. Carris' participation. Mr.

Zicconi asked Mr. Carris to discuss the matter with Ms. Stern, who is chairing the case because Mr. Marro has recused himself because his brother-in-law, Ritchie Burger, is a lawyer representing General Motors.

1.4 TB-422 FairPoint Communications

Mr. Oddy presented the Board VTran's written administrative record regarding TB-422. Mr. Zicconi said the case was filed just a week and a half ago, and appears to be a dispute over whether VTrans is charging FairPoint fair market value for its ability to have transmission lines cross over the state's railroad right of way. Mr. Zicconi said he would review the paperwork that Mr. Oddy just delivered, and discuss the case with the Board at a later date.

Mr. Zicconi told the Board that he has engaged Board consultant Tom Viall to help him review the legal aspects of the case.

Mr. Marro told the Board that his initial inclination is to appoint Board Member Tom Dailey and possibly himself as hearing officers to preside over pretrial matters. Mr. Marro asked Mr. Zicconi to contact both himself and Mr. Dailey once he and Mr. Viall have made themselves more familiar with the case's details.

1.5 Executive Secretary's Report

Mr. Zicconi informed the Board that the terms of three Board members – Mr. Fitzgerald, Ms. Stern and Mr. Hrydziusko – expire at the end of February, and that all three will not return for another term. Both Ms. Stern and Mr. Hrydziusko have reached the maximum number of terms they can serve on the Board and are not eligible for reappointment, while Mr. Fitzgerald has chosen to retire. The Governor has yet to appoint replacements, he said.

Mr. Zicconi said that winter vacation schedules, including his own, make it unlikely that the Board can meet in February. As a result, the next Board meeting likely will not be held until March.

1.6 TB-412 Roy Small Claim

Mr. Zicconi told the Board that the claimant, Kristine Roy, has not returned phone or written messages in months, and asked if the Board wanted to consider dismissing the case. Mr. Oddy said the Agency would like the case dismissed, and offered to file a motion asking for dismissal. Mr. Marro said he would prefer the Agency ask for dismissal rather than the Board act on its own. Mr. Oddy said he would file a dismissal motion at a later date.

1.7 TB-413 Pester Small Claim

Mr. Zicconi said that Bruce Pester wrote the Board and asked that his small claim be dismissed.

On a motion by Mr. Fitzgerald seconded by Mr. Hrydziusko, the Board unanimously voted to dismiss TB-413.

1.8 TB-419 Birong Small Claim

Mr. Zicconi said the Danelle Birong wrote the Board and asked that her small claim be dismissed.

On a motion by Mr. Fitzgerald seconded by Mr. Hrydziusko, the Board unanimously voted to dismiss TB-419.

2. OLD BUSINESS

2.1 2014 Annual Report

Mr. Zicconi passed out draft copies of the Board's annual report for review. While this was the first time the Board had seen the report's design, all had read drafts of the report's chapters before the meeting.

Mr. Marro said the report is filled with information that legislators rarely hear unless they attend the kind of public hearings that the Board held because the type of people who attended, mostly young adults under the age of 35, very rarely lobby the General Assembly.

Mr. Zicconi said that both he and Mr. Marro will present the report to the Legislature later in the month should the Board approve the draft as final.

On a motion by Mr. Fitzgerald seconded by Mr. Carris, the Board unanimously voted to approve the draft as final.

3. OTHER BUSINESS

3.1 Round Table

No one had any items to discuss.

4. ADJOURN

On a motion by Mr. Fitzgerald seconded by Mr. Hrydziusko, the Board unanimously voted to adjourn at 10:51 a.m.

Respectfully submitted,

John Zicconi
Executive Secretary

**Next Board Meeting:
March 19, 2015 at 9:30 a.m.
Conference Room R235, Dewey Building, One National Life Drive, Montpelier, VT**