COMMONWEALTH OF PENNSYLVANIA

SHOVEL TRANSFER & STORAGE, INC.	:	BEFORE THE BOARD OF CLAIMS
	:	
VS.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
PENNSYLVANIA LIQUOR CONTROL	:	
BOARD	:	DOCKET NO. 1120

FINDINGS OF FACT

1. This matter is on remand from the Supreme Court of Pennsylvania at No. 26 W.B. Appeal Docket 1998 [699 A.2d 1324 Pa. Commw. (1997)] wherein the Pennsylvania Supreme Court reversed the Commonwealth Court of Pennsylvania and held that a valid contract existed between the Claimant and Respondent, Pennsylvania Liquor Control Board. Judgment was entered in the Supreme Court on October 27, 1999 and this Board received the remand on October 29, 1999, wherein we were instructed to reach a determination of damages due to Shovel Transfer & Storage, Inc. as a result of the Respondent's breach of contract. (Record)

2. Robert P. Shovel, the sole-owner and President of Shovel Transfer & Storage, Inc. testified on behalf of the Claimant. Mr. Shovel established that Shovel Transfer & Storage, Inc., filed bankruptcy in 1993. The Claimant was a family business and Mr. Shovel had been in that business well over 40 years. (N.T. 12-15)

3. Mr. Shovel identified the most recent Contract the Claimant had with the Respondent, Pennsylvania Liquor Control Board. According to Mr. Shovel, the Contract was to run for a term of five years from 1987 to 1992. The work under the Contract was to be performed at 55th and Allegheny Valley Road, in Lawrenceville, Pennsylvania, where Mr. and Mrs. Shovel owned a warehouse referenced in the Contract. (N.T. 16-18; Exhibit C-18)

4. Mr. Shovel also identified a letter from Mr. Giles Couch, Contract Administrator for the Commonwealth, dated November 10, 1986. Mr. Couch's letter sent a certified true and correct copy of the signature page of the Southwestern Pennsylvania Service Contract which was to run from February 4, 1987 through February 3, 1992 inclusive according to Mr. Couch's letter. Mr. Couch indicated in his letter: "The Contract as written is valid for the period February 4, 1987 through February 3, 1992 inclusive. The new language is consistent with the provisions of Part II, paragraph 10 of the Contract. The term 'option period' is left in the Contract only because we wished to remain consistent with the language elsewhere in the Contract when this term is utilized. (Paragraph 10, 35)" (N.T. 18-19; Exhibit C-13)

5. The warehouse in question had available 237,000 square feet of warehouse space

and 15,000 square feet of office space. It was serviced by Conrail with a rail siting right up to the building. (N.T. 20; Exhibit C-40)

6. Mr. Shovel established that the Claimant took certain actions in preparation for the performance of the Contract between the parties. The corporate entity, the Claimant herein, entered into a Lease dated November 20, 1986, between Robert P. Shovel and Joan Shovel, his wife, as Lessors and the Claimant as the Tenant. Mr. and Mrs. Shovel purchased the building in the fall of 1986. The Respondent, Pennsylvania Liquor Control Board, as indicated in the Contract, was to pay $60,000 a month in storage charges. (N.T. 20, 21, 34-35; Exhibits C-17, C-18)

7. The Respondent, Pennsylvania Liquor Control Board ("PLCB") did not perform the Contract which is the subject of this action. (N.T. 21; Exhibit C-18)

8. Mr. Shovel testified that Shovel Transfer & Storage, Inc. paid Lichefeld/ Massaro Incorporated approximately $281,000 to rehab the warehouse to conform with the specifications of the PLCB. Mr. Shovel identified numerous invoices and checks utilized to pay those invoices relative to these renovations. The invoices totaled $281,675.97. (N.T. 23-29; Exhibits C-41, C-42, C-43, C-44)

9. Although no substantiating documentation was presented, Mr. Shovel also testified that the PLCB required a sprinkler system to store liquor and he hired J & J Fire Protection and spent approximately $25,000 remodeling the sprinkler system in the building, which had been vacant for five years. (N.T. 21, 29)

10. The Claimant also testified to having spent approximately $10,000 on a phone system and approximately another $8,200 on electrical work and new lighting. (N.T. 29, 30)

11. Mr. Shovel also outlined, in very general terms, the cost associated with moving from Youngwood, Pennsylvania to the Lawrenceville location, at "approximately a hundred thousand dollars. . . ." Mr. Shovel testified that he had to move 4,000 pallets, all of the office furniture and the towers, wheels and tools associated with maintaining the trucks in a 7,500 square foot garage. Mr. Shovel stated that there were 15 forklifts which had to be moved along with approximately 20 hand pallet jacks. The move included the labor necessary to load and transport the equipment at the Youngwood operation along with the labor needed to unload and place the equipment at the Lawrenceville operation. The round trip from Youngwood to the Pittsburgh area was approximately 65 miles and Mr. Shovel noted that the company incurred fuel charges and payment of Teamster truck drivers. Mr. Shovel also testified that his company would not have incurred these costs if it did not have what was understood to be a Contract with the Liquor Control Board, which Mr. Shovel relied upon as President of the corporation authorizing the expenditures. (N.T. 31-33)

12. Mr. Shovel identified a Lease between Robert P. and Joan Shovel, his wife, Lessors, and Shovel Transfer & Storage, Inc., as Tenant. Mr. Shovel established that the Pennsylvania

Liquor Control Board, pursuant to the Contract with the corporation, was going to pay $60,000 a month storage charges, the corporation was in turn going to pay Mr. & Mrs. Shovel who were going to pay the mortgage on the bank. The Lease with the corporation was approximately the same length of time as the Contract with PLCB. The rent payable to the Shovels under the Lease was $31,000 per month or $1.8 Million Dollars over a five-year period. The original acquisition loan for the purchase of the building, according to Mr. Shovel, was $2,500,000. Shovel Transfer & Storage, Inc. guaranteed the $2,500,000 loan to the bank. (N.T. 34, 35, 71, 72; Exhibit C-17)

13. In addition to the rental/lease payment due the Shovels from the corporation, the corporation was also obligated to pay utilities, insurance and taxes on the property. Mr. Shovel testified that the corporation paid rent to Mr. and Mrs. Shovel during 1987 and 1988 as the corporation was using revenues from the Youngwood Contract which was still operating during that time period. (N.T. 38-40; Exhibit C-17)

14. Mr. Shovel established that the total utility for heat, electric, water and sewage for 1987 was $69,611.71, for 1988 the figure was $59,078.68, for 1989 the figure was $81,811, for 1990 the figure was $103,498 and for 1991 the figure was $6,331. These figures were generated from the corporate general ledger recorded by the Claimant's Financial Officer. (N.T. 41-46; Exhibits C-45, C-46, C-47, C-48, C-49)

15. As to the property tax on the warehouse in Lawrenceville, Pennsylvania, Mr. Shovel established that the taxes included school taxes, county taxes, and city taxes due to the various taxing agencies. (N.T. 47)

16. The Contract which is the subject of this action is entitled "SOUTHWESTERN PENNSYLVANIA DISTRIBUTION SERVICES CONTRACT" and at PART II, entitled "TERM, CHANGES, CONDITIONS" appears paragraph eight which sets forth the term of the contract. At paragraph eight, sub-paragraphs (a) and (b), the Contract indicates as follows:

> (a) The term of this contract shall be for a period of time beginning on February 4, 1987 and ending at the close of business February 3, 1990.
>
> (b) The Contract shall be renewed for two (2) additional periods of one (1) Contract year each subject to all conditions, agreements and covenants herein contained and subject to the availability and appropriation of funds necessary to reimburse the Contractor for services provided the PLCB under this contract.

> The first option shall begin on February 4, 1990 and shall end on February 3, 1991. The second option period shall begin on February 4, 1991 and shall end on February 3, 1992.

(Exhibit C-18)

17. Mr. Shovel also testified that the annual taxes on the warehouse building approximated $90,000 per year. At one point, he fell behind paying the taxes and the building was going to be sold at a Sheriff's Sale; however, he refinanced the building to pay off the back due taxes and stop the Sheriff's Sale. His estimate of approximately $90,000 for annual taxes included the years 1987, 1988 and 1989. The Claimant corporation was the guarantor for the bank when the Shovels refinanced the warehouse. (N.T. 47-51, 54; Exhibit C-50)

18. Mr. Shovel testified and introduced copies of corporate checks that were utilized to make payments to stop the Sheriff's Sale of his building for back taxes. (N.T. 53; Exhibit C-52)

19. Mr. Shovel also testified that he paid Robert C. McCarthy Agency approximately $20,000 per year for liability and hazard coverage on the warehouse. (N.T. 58, 59; Exhibit C-54)

20. Mr. Shovel also testified regarding the Claimant's efforts to mitigate its damages. He indicated that when he found out that the Contract was actually going to be bid that he prepared a pamphlet and sent it out to everyone that he knew was storing liquor or other commodities in the Pittsburgh area. In July of 1989 Mr. and Mrs. Shovel entered into a Lease with Penske Truck Lines who rented approximately 3,900 square feet of garage space at the warehouse. This Lease generated $10,869 per year. Mr. Shovel also indicated that Revco Drugstores, Inc., also entered into possession of 187,000 square feet of space at the warehouse from the period May 1, 1989 through April 30, 1991. Revco paid the Shovels $897,600 over the term of their Lease. (N.T. 19, 20, 61-66; Exhibits C-40, C-55, C-56, C-58)

21. Mr. Shovel testified that the annual income statement of the corporation for the years 1987 through 1991 showed no income to the corporation for rent for 1987 and no income to the corporation for rent for 1988. In 1989, the corporation showed $99,679 in income for rent and in 1990 the corporation showed $38,977 for rent. For the year 1991, the corporation showed $8,431 for income from rent. (N.T. 66-68; Exhibit C-58)

22. Mr. Shovel also reviewed his personal income tax returns for the years 1989 through 1991 and established that he reported receiving $479,799 in rental income for 1989, $553,189 for 1990 and $565,625 for 1991. These numbers were established through Mr. Shovel's Schedule "E"'s from his income tax forms for those years. The rental income reported by the Shovels represented the rents received essentially from the Penske and Revco Leases. (N.T. 69, 70; Exhibit C-59)

23. With respect to the acquisition loan in the amount of $2,500,000 utilized by the Shovels for the original purchase of the warehouse and guaranteed by the corporate Claimant, Mr. Shovel testified that he would not have executed the corporate guarantee as president of the Claimant without having the PLCB Contract in place. (N.T. 78, 79; Exhibit C-14)

24. Mr. Shovel also testified that he and his wife loaned, upon the advice of his CPA, Shovel Transfer approximately $890,000 from their personal funds, when the corporation could not pay any additional rent. After repayment of some of the loans from the Shovels by the Claimant, the amount due the Shovels personally as of January, 1991, was $859,834. (N.T. 80-89; Exhibits C-61, C-62, C-63, C-64)

25. Shovel Transfer & Storage, Inc., filed bankruptcy on August 31, 1993, under Chapter 11, at case No. 93-23048 in the United States Bankruptcy Court for the Western District of Pennsylvania. (N.T. 95-97)

26. Mr. Shovel identified $2, 580,811.10 as the amount due Integra Financial Corporation pursuant to the mortgage obligation and guarantee of the Claimant in connection with the warehouse. (N.T. 98, 99; Exhibit C-67)

27. Mr. Shovel also identified a claim in the amount of $704,411 filed by the Western Pennsylvania Teamsters' and Employers' Pension Fund. Ultimately, after approximately three-years in bankruptcy, the bank foreclosed on the warehouse building and a plan of liquidation was approved by the Bankruptcy Court, after which, the Claimant did not operate as a going concern. (N.T. 92, 100, 102; Exhibit C-67)

28. As a result of the bankruptcy proceedings, the successor bank in interest (National City Bank) was paid $2,127,447.08 regarding the mortgage on the warehouse, leaving a deficit of approximately $400,000, whereas the Teamster claim was settled for approximately $150,000. The $150,000 was paid by National City Bank, which apparently has a subrogation-like interest in any award rendered by this Board, up to the amount paid to the Teamsters. Mr. and Mrs. Shovel were not repaid their personal loans to the corporation. (N.T. 105-107; Exhibit C-70)

29. Mr. Shovel also identified corporate Federal tax returns for the years 1983 through 1987. For 1983, Shovel Transfer & Storage, Inc., earned a gross profit in the amount of $1,345,532, for 1984 the gross profit was $1,331,610, for 1985 the gross profit reported was $1,380,846, for 1986 the gross profits were $1,464,719, and for 1987 the profit figure reported was $1,391,353. (N.T. 109-112; Exhibits C-71, C-72, C-73, C-74, C-75)

30. In contrast, Shovel Transfer & Storage, Inc., reported gross profit for the year 1988 in the amount of $203,064 and for the year 1989 the gross profit was reported as $11,727. For 1990 the corporate tax return showed a gross profit of $46,879, while in 1991, the corporation showed a gross profit of $97,952. (N.T. 113-115; Exhibits C-77, C-78, C-79)

31. Mr. Shovel estimated the value of the business which was lost as a result of the corporation filing bankruptcy at approximately $4,000,000. Crediting the earnings he received under the Youngwood Contract, he estimated the net loss at approximately $2,600,000. (N.T. 117, 118; Exhibit C-80)

32. Under cross-examination, Mr. Shovel acknowledged that as a result of moving his warehouse facility from Youngwood, Pennsylvania to Pittsburgh, Pennsylvania, the distribution costs would have been lowered, and therefore, Shovel Transfer would have made less money on distribution as a result of the formula contained in the Contract and the fact that most of the stores where deliveries were being made would have been closer to the warehouse. Mr. Shovel also acknowledged that the payments for distribution were calculated under the Youngwood Contract. (N.T. 125-127)

33. Mr. Shovel also acknowledged, under cross-examination, that the Contract provided that the shipping or receiving levels were not to be construed as minimum guaranteed amounts, and that the PLCB was permitted to delete stores or change the number of stores if they chose to do so. (N.T. 128-130; Exhibit C-18)

34. During cross-examination Mr. Shovel candidly acknowledged that he did not finish the burglar alarm installation, did not obtain a bailee for hire license nor did he provide the certification required by the Commonwealth with respect to the roof, the structural soundness, the sprinkler and burglar alarm for the building. Mr. Shovel indicated that when he found out that the Liquor Control Board was not moving into his facility, he felt complying with those mandates of the Contract was like throwing money down a "black hole." (N.T. 136-140; Exhibits R-14, R-15)

35. Mr. Shovel acknowledged that he rejected an offer to purchase the warehouse for $4,000,000 in 1989. Mr. Shovel also acknowledged that he received tax benefits as a result of the Shovels lending their personal money to the corporation to pay rent. (N.T. 149, 151, 152; Exhibit R-30)

36. Mr. Shovel also acknowledged that under the Lease with Revco, Revco agreed to pay 74% of the utilities and taxes and agreed to maintain liability and property insurance for their portion of the building. (N.T. 152)

37. Mr. Shovel admitted that the warehouse also generated income for storage and handling from companies such as All American Budget and National Biscuit Company. (N.T. 153-156; Exhibit R-28)

38. Mr. Shovel testified during re-direct examination, that based upon Mr. Couch's letter and

the language in the Contract that he understood the Contract to be a five-year Contract. (N.T. 169; Exhibit C-13)

39. Mr. Shovel explained during re-direct examination that the reason that he rejected the $4,000,000 offer to purchase his warehouse was due to the fact that in 1988 he received a decision from the Commonwealth Court of Pennsylvania that he had won his case against the State and that the case was either going to be settled or that he was going to get his Contract with the PLCB back.

He also indicated that, on the advice of his Accountant, and because he still owed $2,500,000 on the building, the fact that he had only been there for a year and a half and had accelerated depreciation, after the payment of taxes there would have been little money left after the $4,000,000 sale. (N.T. 175, 176)

40. PLCB offered Nelson McCormick as a witness. Mr. McCormick oversees all the contracting and purchasing for the Liquor Control Board, except for the products sold, and is currently the Chief of the Procurement Division for the Liquor Control Board. Mr. McCormick testified that Shovel's Youngwood operation for the fiscal year 1987 to 1988 paid to Shovel for liquor storage and handling the sum of $1,157,623.37 and $2,535.053.16 for shipping liquor from the Youngwood warehouse to its various stores. An additional $30,093.53 was paid to Shovel for shipments of liquor from the Youngwood warehouse to PLCB's other warehouses. (N.T. 184-187; Exhibit R-41)

41. Mr. McCormick also testified that in his experience the PLCB contracts are not "automatically" renewed when there is an option. (N.T. 194, 195) Mr. McCormick indicated that he was involved in the Request For Proposal Committee which eventually worked on the Pittsburgh Contract which was ultimately awarded to Geneco. After the RFP was released by the Liquor Control Board, Mr. McCormick visited the Shovel premises and Mr. Shovel made a statement to him to the effect that "I guess I should have followed my attorney's advice and done something to mitigate my losses on this building." (N.T. 195, 196)

42. The Pennsylvania Supreme Court, in its decision concerning this matter, provided guidance regarding the calculation of damages. In that regard, the Pennsylvania Supreme Court specifically held as follows:

> "Although we cannot agree with the lower tribunal's determination regarding the signatures, we do agree with the lower tribunals determination that there were conditions, which remain unfulfilled, and thus postponed the PLCB's duty to perform the contract. . . . Thus, Shovel's failure to fulfill these conditions postponed the PLCB's duty to perform the contract. . . . Although Shovel's failure to fulfill the conditions postponed the PLCB's duty to perform the contract, this does not affect our determination that a contract existed. Since a contract existed, it is clear that Shovel could fulfill its conditions under the terms of the contract and

> activate the PLCB's duty to perform the contract at any time prior to the termination of the contract. However, the PLCB repudiated this contract on December 7, 1987 by a letter to Shovel indicating its intent to 'let the contract out for bidding' - making clear its intent not to perform under the contract. Thus, as of December 7, 1987 Shovel could no longer fulfill the conditions under the contract, since the PLCB terminated the contract. . . . In the instant case, reliance damages seem to be an appropriate remedy. The evidence indicates that Shovel proceeded with the purchase of the warehouse, only following the PLCB's letter of November 17, 1986, in which it indicated that Shovel was to have the facility ready to receive shipments by February 4, 1987. In addition, Shovel had extensive renovations performed on the facility, to comply with the PLCB's requirements, in order to ready the facility for shipments. These measures -- the purchase and renovations of the facility -- were clearly in preparation for performance of the contract.

CONCLUSIONS OF LAW

1. Per the Pennsylvania Supreme Court's Opinion and Order entered at No. 26 W.B. Appeal Docket 1998, this Board will enter an award based upon the damages incurred by the Claimant.

2. The Claimant incurred costs to remodel office space and upgrade the warehouse building to meet PLCB's specifications. Shovel proved it paid a contractor (LMI) in the amount of $281,675.95. Shovel Transfer & Storage, Inc., is entitled to recoup those costs, as they were directly related to the Claimant's reliance upon the PLCB Contract.

3. The Board finds the Claimant failed to prove with sufficient specificity its claims for improvements to the warehouse directed by PLCB, including the claim for new electrical lighting, the claim for painting, the claim for updating the sprinkler system and the claim of relocating from Youngwood, Pennsylvania to the Pittsburgh warehouse. In each instance, the Claimant's testimony was exceedingly general and virtually no back-up documentation was presented to this Board so as to enable the Board to render an accurate damage award.

4. The Board will make an award to the Claimant based upon the Claimant's reliance upon the Pittsburgh Contract to generate revenue in the form of storage fees of $60,000 per month. This award will be calculated, per the Pennsylvania Supreme Court's decision, from December 7, 1987 through February 3, 1990. The Board finds that although Shovel had reason to anticipate the Contract might be renewed for both of the one year option periods, after the initial three-year period, there was no absolute guarantee that the PLCB would actually exercise either of the option periods.

5. Although the Lease between the Claimant and Mr. and Mrs. Shovel contemplated the payment of utilities, taxes, and insurance to Mr. and Mrs. Shovel by the Claimant, the Contract with

PLCB did not provide for the reimbursement of these costs. The $60,000 per month storage charges to be paid by PLCB to Shovel Transfer & Storage, Inc., included all such charges and thus no award will be made regarding such charges.

6. The Board will not make an award regarding the Corporate Lease obligation, since the $31,000 per month that the Corporation would have paid to Mr. and Mrs. Shovel, along with the taxes, utilities and insurance, are all part and parcel of the $60,000 per month payment which would have been received from the PLCB. In addition, the Corporation entered into a five-year Lease, although the Claimant only had a guarantee of a three-year Contract with the PLCB.

7. Similarly, the Board will make no award regarding Shovel's claim that the Corporation guaranteed the acquisition loan to the Pittsburgh warehouse. Again, this guarantee would have been an obligation the Corporation could have met had the PLCB paid $60,000 per month as per the Contract.

8. The Board finds Shovel's remaining claims, such as loan repayment, Teamster control liability, loss of value/bankruptcy are either included in the Board's award, or are so completely remote and speculative so as to preclude an award of damages. The Board will not duplicate damage awards, but rather will only place a Claimant in the position it would have been but for the actions of the PLCB in breaching the Contract.

9. The Board finds the Contract as between the PLCB and the Claimant to be unambiguous with respect to the length of time the Contract was to run. Accordingly, we reject the Claimant's contention that the November 10, 1986, letter from Mr. Giles Couch, Contract Administrator for the Commonwealth, somehow modified the clear language regarding the option periods provided under the "Term, Changes, Conditions" section of the Contract, contained at paragraph 8, sub-paragraphs (a) and (b).

10. Mr. and Mrs. Shovel mitigated their damages by entering into leases with other tenants for the space that was to be occupied by the Claimant; however, and this mitigation of damages can not enure to the benefit of the Claimant. More specifically, the Penske Truck Lines Lease, which included approximately 3,900 square feet of garage space at the warehouse, generated $10,869 per year and the Revco Drugstores, Inc. Lease, which involved 187,000 square feet of space at the warehouse paid the Shovels $897,600 over the term of the Lease. The Penske Lease was entered into in July of 1989 whereas the Revco Lease ran from the period May 1, 1989 to April 30, 1991. The aforementioned rent monies were paid to the Shovels personally and not to the Claimant.

11. The Board will make no award regarding the loans made to Shovel Transfer & Storage, Inc. by the Shovels personally, since Mr. and Mrs. Shovel are not parties to this Claim and their personal losses, although they are most unfortunate, are not before this Board.

12. Just as this Board would be unable to speculate as to losses sustained by the Claimant with respect to revenues that might have been generated by the delivery of the alcohol stored at the Claimant's warehouse in Pittsburgh, so too, we view the Teamster Claim which was ultimately settled for approximately $150,000 during the course of the Claimant's bankruptcy, as too remote and speculative in relationship to PLCB's breach. Accordingly, no award will be rendered pertinent to that claim.

13. As to the bankruptcy and Shovel's claim for lost profits/loss of business value, we again view such elements of the claim as completely remote and speculative. In addition to the issues of foreseeability relative to the Claimant's ultimate bankruptcy, we are also cognizant of the Shovel's rejection of a $4,000,000 offer to sell the warehouse in 1988, which may have greatly mitigated the corporate exposure, not to mention the Shovel's personal losses. Whether or not the sale/purchase would have ultimately been consumated is of course, also purely speculative.

14. We reject the Commonwealth's suggestion that because the Youngwood Contract was still in place, subsequent to the breach of the Pittsburgh Contract, any income received by the Claimant pursuant to the former Contract serves to mitigate the damages from the breach of the Pittsburgh Contract.

OPINION

This case began on June 8, 1987, by filing of a Claim by Shovel Transfer & Storage, Inc. (hereinafter referred to "Shovel" or "the Claimant") in the amount of $7,881,775.40. At the request of the Commonwealth of Pennsylvania, Pennsylvania Liquor Control Board (hereinafter referred to as "the Commonwealth" or "PLCB"), pursuant to a Motion to Stay Proceedings, filed on July 6, 1987, this Board entered an Opinion and Order granting PLCB's request on August 21, 1987, due to the pendency of certain issues before the Commonwealth Court of Pennsylvania. On June 10, 1988, this Board vacated the stay upon Shovel's Motion and directed the Commonwealth to file responsive pleadings within thirty (30) days. On July 29, 1988, the Commonwealth filed another Motion to Stay Proceedings, due to the pendency of an appeal before the Supreme Court of Pennsylvania and on October 11, 1988 the Board

granted PLCB's Motion due to the matter pending before the Supreme Court of the Commonwealth of Pennsylvania. On January 16, 1990, a Motion to Vacate Stay of Proceedings, proposed Order and a copy of the Opinion of the Pennsylvania

Supreme Court was filed by the Claimant and on April 6, 1990, this Board entered an Opinion and Order vacating the stay and granting the parties 120 days to complete discovery.

On June 25, 1990, the Claimant filed a Motion for Leave to file an Amended Claim and proposed Order and then filed a supporting brief on August 24, 1990. On September 25, 1990, PLCB filed a Response to the Motion for Leave to File an Amended Claim and on October 19, 1990, the Board rendered an Opinion denying the Claimant's Motion. With regard to that decision, the Claimant filed a Motion for Certification of Board's Order of October 19, 1990 and on November 14, 1990, the Board entered an Order granting the Motion for Certification as the Order of October 19, 1990 involved a controlling question of law as to whether there was a substantial ground for a difference of opinion that would materially advance the ultimate determination of the litigation. On January 2, 1991 , the Commonwealth Court of Pennsylvania entered an Order granting a Petition for Permission to Appeal which had been filed by the Claimant, establishing a briefing schedule and staying all proceedings before this Board. On August 22, 1991, the Commonwealth Court of Pennsylvania remanded this matter to the Board and vacated the Board's previous Order of October 19, 1990. In conjunction with that decision, this Board entered an Order on December 19, 1991, permitting Shovel to amend its Claim and on January 6, 1992, an Amended Claim was filed in the amount of $300,000+. On February 7, 1992, the Commonwealth filed a responsive pleading to the first Amended Claim and New Matter and Shovel filed

a reply to the New Matter on February 28, 1992. Thereafter, the parties engaged in additional discovery and hearings were scheduled for December, 1993. This Board bifurcated the issues relating to the validity of the contract and hearings were held related to that issue on December 7, 1993 and December 8, 1993. Thereafter, each party filed proposed Findings of Fact, Conclusions of Law and Supporting Briefs and on November 4, 1994, the Board rendered an Opinion and Order finding that no valid contract existed between the parties and dismissing Shovel's Claim. On November 28, 1994, the Claimant filed an Appeal and the matter was transferred to Commonwealth Court.

On October 19, 1995, Commonwealth Court granted a Motion to Quash Appeal which had been filed by the PLCB and dismissed Shovel's appeal. Shovel filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court which granted the Petition on April 22, 1998. On October 29, 1999, the Pennsylvania Supreme Court reversed both the Commonwealth Court and this Board and found that a valid contract existed between the parties. Thereafter, the file was returned from Commonwealth Court and on January 26, 2000, after receiving a request to set a hearing date, this Board set May 8, 2000, as the date for a hearing on the issue of damages. Subsequently, the hearing date was changed to May 11, 2000, and after consideration of a Motion in Limine, a hearing on the issue of damages was held May 11, 2000. Shovel's Findings of Fact, Conclusions of Law and Brief were filed on July 7, 2000 and the Commonwealth's Findings of Fact, Conclusions of Law and Brief were filed on August 10, 2000.

As indicated in the Findings of Fact, which precede this Opinion, the Pennsylvania Supreme Court has specifically indicated, in dictum that "reliance damages seem to be an appropriate remedy." While we are guided by that language, this Board was also somewhat confused by other matters discussed by the Supreme Court. For instance, the Court indicated that the purchase and renovations of the facility were

clearly in preparation in performance of the Contract; however, the facility was not purchased by the Claimant, but rather by Mr. and Mrs. Shovel and, as indicated in the Conclusions of Law, the Shovel's personal claims cannot be the subject of an award by this Board as Mr. and Mrs. Shovel were never parties to the contract with the Commonwealth which is before this Board. The Supreme Court also indicated that although Shovel failed to fulfill certain conditions required by the Contract, thus postponing PLCB's duty to perform, PLCB nevertheless repudiated the Contract on December 7, 1987. This finding, of course, raised an issue as to whether or not the Commonwealth was responsible for reliance damages incurred by the Claimant prior to December 7, 1987. As illustrated in the Conclusions of Law, we found no obligation on the part of the Commonwealth to pay storage fees as contemplated by the contract prior to December 7, 1987, but did find that improvements made to the building by the corporation in contemplation of the contract were compensable even if they occurred before the December 7, 1987 date, because they were inextricably related to the ultimate performance of the Contract.

As we have seen in so many cases, an extraordinary amount of time and effort goes into the liability phase of a case and the damage portion of the claim is almost an afterthought. While we are cognizant of the fact that a claimant need not prove its claim with complete mathematical certainty, this Board also is not obligated to perform accounting functions and prove the accuracy of a claim. While we are also cognizant of the fact that the losses claimed by Shovel must at least be substantiated by reliable evidence and with reasonable certainty. See Acchione & Canuso, Inc. v. Pa. Department of Transportation, 501 Pa. 337, 461 A.2d 765 (1983); Standard Pipeline Coating Company, Inc. v. Solomon & Teslovich, Inc., 334 Pa. Super. 367, 496 A.2d 840 (1985); Larry Armbruster & Sons, Inc. v. Public School Building Authority, 95 Pa. Commw. 310, 505 A.2d 395 (1986) So too with the instant case, with only damages to prove,

the Claimant presented portions of its Claim in terms which were far too general for this Board to make an accurate award. Although the LMI invoices, which were the subject of our award, were calculated to the penny at $281,675.97,

Mr. Shovel calculated the cost of improving the sprinkler system "in the neighborhood of $25,000. . . ."(N.T. 29) Similarly, Mr. Shovel testified that he spent "approximately $10,000 on the phone system."(N.T. 30) As to the new lighting, Mr. Shovel testified as to the cost, that "it was like $8,200."(N.T. 30) With respect to repainting, again Mr. Shovel indicated he spent "in the neighborhood of $3,500" for a spray painter.(N.T. 31) Remarkably, when discussing the move from Youngwood, Pennsylvania to the Pittsburgh, Pennsylvania warehouse, Mr. Shovel indicated simply: "[t]hat cost me approximately a hundred thousand dollars to move that warehouse." Unfortunately, while such claims may have been the subject of an award by this Board, we cannot and will not prove a Claimant's damages. That function is properly left to each Claimant that comes before this Board.

While we are making an award to the Claimant regarding the $60,000 per month payment which would have been paid by PLCB from December 7, 1987 (per the Pennsylvania Supreme Court's decision) to February 3, 1990 (per the Contract between the parties), we reject the Claimant's attempt to "mix and match" the Shovel's personal losses with the Claimant's corporate losses. Although we repeatedly overruled the objections by counsel for the Commonwealth when such information was presented to this Board during the hearing conducted on May 11, 2000, related to the presentation of evidence concerning the Shovel's personal losses, in reality many of the objections had merit. We, as a Board and fact finder, regularly adopt a philosophy of allowing most evidence into the record and subsequently, during

consideration of the case, separate the wheat from the chaff. Claims such as loans made by the Shovels personally to the Claimant which were not repaid by the Claimant must be rejected by this Board. Similarly, claims classified by the Claimant as "consequential damage" e.g. the Claimant's failure to pay to the Teamsters Pension Plan and the ultimate demise of the company through bankruptcy are far too remote and speculative for this Board to make an award.

While we genuinely believe PLCB's breach of the Contract had an extraordinary and adverse impact upon the Claimant, we also must bear in mind that the Shovels rejected a four million dollar offer to sell the Pittsburgh warehouse, which at the time may have been essentially a break-even proposition for the Shovels and the Claimant. Instead, Mr. Shovel readily acknowledged that he rejected an offer to purchase the warehouse for four million dollars received in October, 1988. We suspect that had the offer been accepted and had the sale gone through, much of the damages both as to the Claimant and the Shovels personally, may have been avoided. This exercise in speculation is relevant only to the extent that Shovel's claims for loss of business value due to the bankruptcy must therefore be viewed with skepticism. Those claims are alleged to have arisen because of the burden of all the costs associated with the Pittsburgh warehouse, yet the Shovels chose not to unload the burden when they had the opportunity. There was therefore no evidence on the record that these damages were reasonably foreseeable at the time of contract formation. See Delahanty v. First Pennsylvania Bank, N.A., 318 Pa. Super. 90, 464 A.2d 1243 (1983); See also Taylor v. Kaufhold, 368 Pa. 538, 84 A.2d 347 (1951).

Because we are awarding the payment called for under the Contract, we are obligated to reject much of the "reliance" damages incurred by the Claimant because the payments from PLCB were not made in the first instance. With the award of $60,000 per month, we cannot entertain damage claims for taxes,

insurance, utilities, "rent obligation requiring loan repayment", "the corporate lease obligation", etc. All such obligations could have been met had the Commonwealth paid the Claimant the $60,000 per month payments we now award.

We must also note that it would be patently unfair, given our refusal to "mix and match" damages, to subtract from our award rents received by the Shovels' efforts to mitigate their personal losses. Those rents include the monies received by the Shovels personally from the Penske Truck Lines Lease and the Revco Drugstores, Inc. Lease.

In summary, the Claimant is entitled to $1,552,880.18 representing reimbursement at $60,000 per month from December 7, 1987 through February 3, 1990, with the first and last month of that period being prorated at $46,451.61 and $6,428.57, respectively, plus $281,675.95 representing reimbursement of Shovels' improvements to the Pittsburgh warehouse which were substantiated by a reasonable degree of certainty. Accordingly, an appropriate Order shall be entered with an award in the total amount of $1,834,556.13.

ORDER

AND NOW, this 14th day of February, 2001, it is hereby **ORDERED** that an award be entered in favor of the Claimant, Shovel Transfer & Storage, Inc., in the amount of One Million Eight Hundred Thirty-Four Thousand Five Hundred Fifty-Six Dollars and Thirteen Cents ($1,834,556.13), plus interest at the legal rate of six percent (6%) from the date of December 7, 1987, the date the Claim accrued as per the Pennsylvania Supreme Court's decision dated October 27, 1999.

Upon receipt of payment of said award, Plaintiff shall forthwith file with the Board a Praecipe that the case be marked settled and ended with prejudice.

BOARD OF CLAIMS

OPINION SIGNED

_____
David C. Clipper
Chief Administrative Judge

_____
Louis G. O'Brien
Engineer Member

_____
James W. Harris
Citizen Member