COMMONWEALTH OF PENNSYLVANIA

PADULA & SONS, INC.	:	BEFORE THE BOARD OF CLAIMS
	:	
VS.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARMENT OF TRANSPORTATION	:	
	:	
VS.	:	
	:	
E. KOZLOWSKI TOWING AND REPAIR	:	DOCKET NO. 3569

FINDINGS OF FACT

I. Parties

1. Plaintiff, Padula & Sons, Inc. ("Padula") is a Pennsylvania corporation engaged in the excavating business with its principal place of business located at 45 Padula Road, Tunkhannock, PA 16857. (N.T. 8, Stipulation of Facts 1).

2. Defendant, Commonwealth of Pennsylvania, Department of Transportation ("Department") is an agency of the Commonwealth of Pennsylvania. (Stipulation of Facts 2).

3. Defendant, E. Kozlowski Towing and Repair ("Kozlowski") is a Pennsylvania corporation which does heavy truck repair and recovery/towing of vehicles. (N.T. 82).

4. Defendant, the Department, joined Kozlowski as an additional defendant on July 2, 2003. (Record).

5. Robert J. Padula, Jr. is the President of Padula, since it was incorporated in 1989, and he performs the bidding, estimates and the paperwork for the corporation. (N.T. 8).

6. Robert Padula, Sr., is the Vice-President of Padula and he is responsible to run specific jobs and to have the equipment in the proper location. (N.T. 68).

7. Eugene Short is the equipment manager for the Department in the Montrose office, Susquehanna County and was basically responsible to set up contracts. (N.T. 10, 133).

8. Nick Bonczkiewicz is the employee of Kozlowski who responded to recover the backhoe. (N.T. 84).

9. Richard Ainey is a Foreman 2 with the Department and has been employed by the Department for twenty-one years. (N.T. 177).

10. Bill Hector is the District Equipment Manager for District 4-0 in Dunmore, PA. (N.T. 205).

11. Robert Minnick is a product support representative. He has been with Caterpillar Equipment for twenty-one years and has been giving estimates on repairs for the last thirteen years. (N.T. 114, 115).

II. Background

12. Padula and the Department have had a working relationship since 1971. The parties frequently worked together, and the Department gave Padula good evaluations. (N.T. 5, 69).

13. Padula made a demand for payment for rental income due and for repair damages for backhoe no.2 to the Department on September 6, 2002 and that claim was denied on September 16, 2002. (P-20, pp. 1-2).

14. Padula filed its complaint with the Board of Claims on December 19, 2002. (Docket Sheet)

III. The Two Written Contracts

15. On January 25, 2001, Padula executed two written contracts with the Department, R22-5095 and R22-5096. (Stipulation of Facts 3; N.T. 12; P-20).

16. Contracts R22-5095 and R22-5096 were each "call out" contracts that provided that the Department could call Padula to send a backhoe with a qualified operator paid by Padula to wherever the Department specified in Susquehanna County. The two written contracts ran from February 5, 2001 through December 31, 2002. (N.T. 13, 14; P-20).

17. Contracts R22-5095 and R22-5096 specified that Padula would operate the backhoes and move the machines between work sites as required by the Department. Under the contracts, Padula was also to supply the fuel and safety equipment for the machines and maintain them. (N.T. 13, 14; P-20).

18. Under Contracts R22-5095 and R22-5096, the Department agreed to pay Padula $40.00 per hour for each hour that a backhoe was in use. (P-20)

19. The terms of the two written contracts also required Padula to purchase and maintain property damage insurance, bodily injury insurance and workers' compensation insurance. (N.T. 17, 18; P-20).

20. Exhibit "C" to the Department's master rental agreement was incorporated by reference into each written contract. It contained a hold harmless and indemnification provision that stated, "Contractor agrees to save harmless and indemnify the Commonwealth, its officers and/or agents from all damages, costs or expenses that may at any time be imposed or claimed resulting from the performance of this contract." (P-20)

IV. The Oral Contract

21. In the latter part of March 2002, Mr. Short contacted Robert Padula, Jr., by telephone, because the Department had an immediate need for two backhoes. He asked Mr. Padula, Jr. to agree to some specific rental terms, all of which were different from those in the two written agreements. (N.T. 10, 11, 14, 16, 65, 74, 138).

22. Mr. Short asked that Padula supply two backhoes for the Department's use, but he did not want Padula to supply the operators because the Department had its own operators. The backhoes would remain in the Department's possession and Padula would not be providing them on a "call out" basis. (N.T. 10-11, 14, 18, 138-139)

23. Mr. Short offered that the Department would pay $40.00 per hour for a minimum of 7.5 hours per day (i.e. $300.00 per day) for each weekday that the equipment was in the Department's possession. If the Department used the backhoes on the weekends, the Department would pay for those days as well. (N.T. 11, 14, 137, 139).

24. Mr. Short indicated that the Department would also pay for fuel and move the backhoes from site to site. (N.T. 10, 11, 14, 16, 137, 138).

25. At the time of their March 2002 telephone conversation, neither Mr. Padula, Jr. nor Mr. Short had the written agreements in front of them. (N.T. 139-140).

26. When negotiating the terms of the March 2002 oral agreement, neither party discussed the inclusion of any indemnity or hold harmless provision as part of their oral agreement. (N.T. 18. 67, 138)

27. Mr. Short's superiors approved the March 2002 terms that Mr. Short and Mr. Padula, Jr. discussed on the telephone. (N.T. 137-138, 146-147).

28. Pursuant to the oral agreement that the parties made at the end of March 2002, Padula provided the Department with two backhoes on April 1, 2002. (N.T. 15, 19).

29. Under the late March 2002 oral agreement, the Department had possession of one backhoe from April 1 to May 9, 2002 and the other backhoe from April 1 until July 15, 2002, the date when it was damaged. (N.T. 19-20 , 33).

30. Mr. Padula Jr's understanding was that the insurance and indemnification requirements of agreements R22-5095 and R22-5096 pertained only to those written contracts under which Padula was supplying backhoes with operators and did not apply to the new oral agreement under which Padula gave up possession, operation and control of the backhoes to the Department. (N.T. 17, 18).

V. Damage To Backhoe No. 2

31. On July 15, 2002, at the job site where the Department was operating backhoe no.2, Elwood Litvin, the assistant to the Department's foreman, Mr. Ainey, requested that the backhoe be used to dig a tail drain further into the swamp to prevent ponding at the outlet. (N.T. 150-151, 178-179).

32. Mr. Ainey initially expressed his concern about using backhoe no. 2 to dig the tail drain further into the swamp, and the operator of backhoe no. 2 also had expressed his concern, but Mr. Litvin made the decision to continue with the digging. (N.T. 179, 188,189).

33. On July 15, 2002, while digging the tail drain, the Department's backhoe operator drove backhoe no. 2 in such a manner that it became stuck in mud and water in a swamp. (Stipulation of Fact 7; N.T. 84, 85, 87, 88, 96, 201-203).

34. On July 15, 2002, the Department called Kozlowski and requested that the company send a wrecker to remove backhoe no. 2 from the swamp. (Stipulation of Facts 8; N.T. 83, 84).

35. Mr. Bonczkiewicz has been employed by Kozlowski for eight years as both a mechanic and a recovery operator. (N.T. 82).

36. Mr. Bonczkiewicz testified that backhoe no. 2 was "stuck in a very serious situation" and that the "machine was basically submerged" in the swamp when he arrived at the scene. (N.T. 84).

37. Upon evaluating the situation, Mr. Bonczkiewicz advised the Department's employees that backhoe no. 2 was likely to be damaged further by pulling it out of the swamp. (N.T. 86).

38. Despite this advice from Mr. Bonczkiewicz, a Department employee on site told Mr. Bonczkiewicz to go ahead and "pull it out." (N.T. 86, 87).

39. The back boom and wheel of backhoe no. 2 were damaged by the wrecker as it pulled it out of the swamp. The Department paid Kozlowski the $325.00 it billed for its services. (K-1; N.T. 93-96, 104-105)

40. The Department did not notify Mr. Padula, Jr. about the damage to backhoe no. 2 until the day after it happened. (N.T. 33, 34).

41. On July 16, 2002, between 10:00 and 11:00 a.m., Mr. Padula, Jr. received a telephone call from Mr. Short, advising him that his backhoe had gotten stuck and it had been necessary to have a wrecker tow it out. Mr. Short requested that he go to view the backhoe. (N.T. 33).

42. The day after the backhoe was damaged, Mr. Short advised Mr. Padula, Jr. that everything the Department did was wrong and that the Department would repair the backhoe. (N.T. 38, 59).

43. Mr. Padula, Sr. spoke with Mr. Short and Mr. Hector and was advised that the Department would fix the damage and pay the cost of repairing the backhoe. (N.T. 71, 72, 143).

44. On July 17, 2002, there was a conference call with Padula, Mr. Short, and Ron Bonacci, the county manager, at which time they advised Padula that the Department would fix the damaged backhoe. (N.T. 164, 165).

45. On July 22, 2002, Mr. Hector met with Mr. Padula, Sr. and gave him a letter saying the Department would not be fixing, or paying for damages to backhoe no. 2. (N.T. 208).

46. Mr. Hector testified that Mr. Padula, Sr.'s reaction to the news that the Department would not be paying was not good, and Mr. Hector stated that he agreed with Mr. Padula, Sr. (N.T. 209).

47. Based on an inspection of backhoe no. 2 on May 23, 2003, Robert Minnick, a product support representative for Cleveland Brothers Equipment Company, which sells and repairs Caterpillar Heavy Equipment, estimated that repairs to backhoe no. 2 would cost $10,517.98. (N.T. 114-117, 119-120; P-19).

48. As of February 22, 2005, the same estimator revised the backhoe repair estimate to reflect the increase in cost for parts and labor over the two year period since the prior estimate. The revised estimate was $11,770.37, to which the Department had no objection. (N.T. 110-111, 122-123; P-24).

49. At the hearing, a new estimate made by Mr. Minnick was introduced into the record in the amount of $6,201.44 for replacement of the transmission for backhoe no. 2. This estimate had not previously been provided to the Department. (N.T. 126; P-25).

50. Prior to preparing the estimate, Mr. Minnick did not inspect the backhoe's transmission and only based his repair estimate on Mr. Padula, Sr.'s statement that he had recently tried to move backhoe no. 2 and it was jumping out of gear. (N.T. 126, 127).

VI. Padula's Claim For Payment For Rental Of Backhoes

51. Exhibit P-1, page 3, reflects the dates and hours that Padula claims it did not receive payment due under the parties' oral contract for backhoe no. 1. The amount due and unpaid is 111.5 hours @ $40.00 per hour, totaling $4,460.00. (P-1, pg. 3).

52. Padula does not seek payment for April 19 and May 2, 2002 as set forth in Exhibit P-1, page 3. (N.T. 26).

53. With regard to the dates of April 18, 2002 and May 3, 2002, as set forth on Exhibit P-1, page 3, Padula seeks payment for 4.0 hours and 2.5 hours to meet the 7.5 hours per day agreed upon rate. These hours are included in the total 111.5 unpaid hours shown in Finding of Fact no. 51.

54. After Mr. Padula, Jr. received a check from the Department, that did not include full payment for all the dates that the Department was in possession of backhoe no. 1, Mr. Padula, Jr. contacted Mr. Short who advised that he would get the payments straightened out. (N.T. 20-21).

55. Mr. Padula, Jr. made many telephone calls in an effort to receive the appropriate compensation and finally began to deal with the Department's district office in Dunmore. (N.T. 22-24).

56. Padula was not paid for 39 hours ($1,560.00) for the time backhoe no. 2 was in the Department's possession from July 2, 2002 through July 12, 2002. (N.T. 28, 30-31; P-2).

57. Mr. Short stated that some days, the Department did not use the backhoes and called the person on the Department's staff who was responsible for such non-use "a turnip head." Mr.

Short wrote to Padula and indicated that he would try to correct the payments and get the compensation that Padula was owed for all of the hours. (N.T. 137).

58. Mr. Padula said that he was told by the Department that if backhoe no.2 had not been damaged, the Department planned to use it until the end of August, 2002. Mr. Short did not remember making this statement but did not deny it either. (N.T. 39-40, 137, 150).

59 The Department kept backhoe no. 2 for 34 work days, from July 16, 2002 through August 30, 2002. The rental fee for that period is $10,200.00 (34 x 7.5 x $40.00). (N.T. 39-40, 137, 150).

60. Sometime after July 22, 2002, the Department asked Padula for the use of another backhoe, and Padula refused to supply it. (N.T. 39, 62, 63).

CONCLUSIONS OF LAW

1. The Board of Claims has jurisdiction over the parties and over the subject matter asserted in this Claim pursuant to the Act of May 20, 1937, P.L. 728, as amended, 72 P.S. §4651-1 through 10.

2. Padula and PennDot entered into two written contracts beginning February 5, 2001 involving the "call out" rental of two backhoes with operators from Padula to be paid for at the rate of $40.00 for each hour of use.

3. It is Padula's burden to prove by a preponderance of the evidence the existence of an oral contract between Padula and the Department.

4. Padula sustained its burden of proof by demonstrating that the required contract elements of an offer, acceptance and consideration were present and that a new oral contract was formed by Padula and the Department in late March 2002.

5. The terms of the new oral contract were different from the two written contracts because the oral contract terms provided that the Department would take possession and control of Padula's backhoes, would operate them, gas them, move them from site to site and pay for them at a daily minimum rate of $300.00 instead of an hourly use rate with no minimum.

6. The parties did not agree to include any indemnity or hold harmless provision in their oral contract. Also, they did not agree to incorporate any terms from the written contracts by reference into their oral contract.

7. Mr. Short is the agent of the Department who acted with actual and/or apparent authority when he made the oral contract with Padula in March 2002.

8. The Department breached the oral agreement with Padula by failing to properly compensate Padula for $4,460.00 in rental fees owed for backhoe no. 1, and $11,760.00 ($1,560.00 + $10,200.00) in rental fees owed for backhoe no. 2.

9. The Department breached the oral agreement by returning backhoe no. 2 in a severely damaged condition and is thereby responsible for $11,770.37 in repair costs.

10. Padula cannot recover any costs for repair of the transmission of backhoe no. 2 from the Department because no estimate of this damage claim was provided to the Department prior to the hearing, and there was insufficient proof introduced at the hearing that there was damage to the transmission or that such damage was caused by the Department.

11. Padula is awarded prejudgment interest of six percent (6%) on the total damages of $27,990.37 from September 6, 2002 (the date the claim was filed with the Department) to the date this judgment is entered.

12. The Board has jurisdiction over the claim filed by the Department against additional defendant Kozlowski because Kozlowski was properly impleaded and the claim is based upon breach of the contract for towing between Kozlowski and the Department arising from the same incident as Padula's claim against the Department.

13. Kozlowski fully performed its contract with the Department by pulling backhoe no.2 out of the swamp exactly as instructed by the Defendant. Although the backhoe was damaged by Kozlowski, the Department has failed to establish this damage was due to any breach of contract by way of Kozlowski's performance. Kozlowski has no liability for any damage to the backhoe.

14. Kozlowski has no liability to the Department for damage to backhoe no. 2 based on indemnity because the department failed to prove there was any indemnity provision in their contract with Kozlowski.

OPINION

This complaint in this action was filed with the Board on December 19, 2002, alleging breach of contract. Plaintiff, Padula & Sons, Inc. ("Padula"), claims it is owed money by the Department of Transportation ("Department") for the rental of two backhoes and the damage to one of the backhoes while it was in the Department's control and possession. Neither plaintiff nor defendant challenged the jurisdiction of the Board to decide this matter that involves two written contracts and either an oral modification to those contracts or a new oral contract. The Board finds it has subject matter jurisdiction under the Board of Claims Act in effect on the date this case was filed. 72 P.S. sec. 4651-4; See Employers Insurance of Wausau V. Department of

Transportation, 865 A.2d 825 (Pa. 2005). In order to determine whether the Department has any liability to Padula, the Board must determine what contract terms governed the rights and liabilities of the parties.

The parties entered into two written contracts, # R 22-5095 and # R 22-5096, (Ex. P-20, p. 3) and under each contract, Padula agreed that it would provide the Department with a backhoe driven by a qualified operator for a rental fee of $40.00 per hour on a "call out" basis during the period February 5, 2001 through December 31, 2002. The two contracts stated that Padula was responsible for moving the backhoes from site to site at the direction of the Department, and for supplying the fuel and safety equipment for the machines. The contracts required that Padula maintain insurance for worker's compensation, property damage and bodily injury. Exhibit C to the master agreement for all rental contractors, Rental Contract 357011, contained a broad indemnity and hold harmless clause that protected the Department from all damages, costs and expenses in connection with Padula's operation of the backhoes. (Ex. P-20, p. 4). The Department contends (and Padula does not contradict this assertion) that although this indemnity and hold harmless clause in Exhibit C is part of another contract document not in evidence before the Board, it was incorporated by reference as part of the two written contracts with Padula.

During late March 2002, Mr. Eugene Short, the equipment manager for the Department in Susquehanna County, contacted Robert Padula, Jr., because the Department had an immediate need for two backhoes. Mr. Short advised Mr. Padula, Jr. that he wanted to rent the backhoes as soon as possible, and he asked Padula to supply them without operators because the Department wanted to use its own operators. He proposed that if Padula would supply the backhoes, the Department would pay for fuel and would be responsible for moving them from site to site. Mr. Padula, Jr. was concerned about payment for this new arrangement under which the Department would be driving and have control and possession of his backhoes while he would lose the

opportunity to utilize the backhoes on other jobs during the hours when the Department was not operating them. Mr. Short said he had already consulted others at the Department and was willing to offer Padula a $40.00 per hour rate and would guarantee a minimum of 7.5 hours per day for each weekday that the equipment was in the Department's possession. The Department would also pay for weekend days if the equipment was in use. During this March telephone conversation about the terms of the rental, neither Mr. Short nor Mr. Padula, Jr. discussed any indemnification or hold harmless provision. Neither man referred to the written contracts while discussing the new terms or orally incorporated any provisions of those contracts into their March agreement. At the hearing, Mr. Short admitted that the terms of the agreement made in March, 2002, were different from the terms of the original written contracts.

On April 1, 2002, Padula delivered the backhoes to the Department as requested, and the Department proceeded to operate the backhoes for pipe installation. On July 15, 2002, a Department employee operating backhoe no. 2 drove it into a swamp and it became stuck in mud and water. The Department contracted with E. Kozlowski Towing and Repair ("Kozlowski") to send a wrecker to retrieve the damaged backhoe. Mr. Nick Bonczkiewicz, the employee of Kozlowski who came to the swamp to recover the backhoe, advised the Department's employees at the site that the backhoe was likely to be damaged further when it was towed out of the swamp, but he was instructed to go ahead and "pull it out." The backhoe's back boom and wheel were damaged during the removal. The Department waited until the next day, July 16, 2002, to call Mr. Padula, Jr., and advise him of the damage to backhoe no. 2.

Padula claims that the Department breached their oral contract by failing to pay the full amount of the rental due for the backhoes in the Department's possession between April 2002 and August 2002. Although the parties disagree about the rental rate and whether the Department is responsible for the damage to backhoe no. 2, the facts recited above are not

otherwise in dispute. However, the parties offer different interpretations of these facts and opposing legal theories for determining liability.

The Department takes the position that since it had two written contracts for the rental of equipment from Padula and that each ran for a two-year period, all actions by the parties were pursuant only to these two written contracts. The Department characterizes the telephone conversation in late March, 2002, by Mr. Short as an oral modification of only a single term of the two written contracts. The Department argues that the parties only orally changed Padula's obligation to supply operators. Viewing the oral agreement reached in March 2002, as a minor modification to the written contracts allows the Department to argue that all the other provisions of the two written agreements were still in force, particularly the indemnity and hold harmless provision found in Exhibit C to the master rental agreement. The Department contends that the indemnity and hold harmless provision applies to the damage it did to the backhoe when it was driven into the swamp and dragged out, so that Padula has no right to recover for any repairs to backhoe no. 2. The Department also disputes Padula's claims for rental payments at the daily minimum weekday rate of $300.00 ($40.00/hr. for 7.5 hours). The Department did not address the issue in its brief, and the only evidence presented at the hearing was that this was the agreed rental rate.

While it is clear that the parties had two written contracts for the rental of operators and equipment and that they remained in effect from February 2001 until December 2002, the facts in this case do not support the Department's contention that the parties were operating under those written contracts with just one oral modification. The facts support the plaintiff's view that the parties made a new oral contract in March, 2002, and that the oral contract was independent from the parties' existing written contracts because it had significantly different terms. In fact, the parties totally changed their basic business relationship.

The two written contracts were "call-out" contracts for equipment on an "as-needed" basis whereby Padula agreed to provide its equipment with operators to go to whatever work site was specified by the Department, perform the tasks it was directed to do and be paid only for the actual hours the backhoes worked. Padula remained in control and possession of the backhoes at all times under the written agreements. Padula provided an indemnity and hold harmless to the Department to protect it from liability for any damage done by Padula's operators to persons or property while driving the equipment.

The terms of the late March 2002 oral contract created a different type of business arrangement. The new oral contract was not a "call out" contract because the Department agreed to take control and possession of the backhoes. The Department wanted complete control over where, when and how the backhoes were used, and Padula gave up physical control of the backhoes in exchange for a new guaranteed minimum daily rate of compensation. Giving up possession and control of this equipment to the Department substantially changes the basis on which Padula provided indemnification under the written agreements.

Plaintiff Padula has the burden of showing that a valid oral contract was formed. Viso v. Werner, 471 Pa. 42, 369 A.2d 1185 (1977). Such a contract must include the elements of an offer, an acceptance and consideration. Triffin v. Thomas, 316 Pa. Super. 273, 462 A.2d 1346 (1983). Padula proved that all the required legal elements of an offer, acceptance and consideration in the form of the exchange of mutual promises were present. Padula performed its part of the new oral contract by providing the backhoes and allowing the Department to have possession and complete control over them. The Department breached the oral contract by failing to pay the agreed rental amounts and damaging Padula's equipment.

The Department's contention that the indemnity and hold harmless clause protects the Department from liability for repairing the damage backhoe no.2 is rejected. The indemnity clause, "Exhibit C" that is attached to the master contract, states:

> "Contractor agrees to save harmless and indemnify the Commonwealth, its officers and/or agents from all damages, costs or expenses that may at any time be imposed or claimed resulting from the performance of this contract."

The Department has not established that this clause was part of the parties' March 2002 oral agreement. See Lehigh Air Conditioning Corp. v. Commercial Electric Construction, Inc., 38 Leh. Law J. 336 (Ct. Com. Pl.1967).

The parties never discussed any indemnity as a possible term of the oral contract. Neither mentioned inserting any provision stating that Padula would be responsible for any damage done to the backhoes by the Department's operator's while the Department was in control and possession of the backhoes. Neither mentioned the written contracts or incorporated any of their terms into the oral agreement in their March 2002 discussions.[1]

The Board finds that the parties entered into an oral contract in March, 2002 and the Department breached that contract by returning backhoe no. 2 in a severely damaged and inoperable condition. The Department is liable to Padula for the cost of the repairs.

A. Damage to Backhoe No. 2

Padula is seeking a total of $17,971.81 in repair costs for backhoe no. 2. On May 29, 2002, Padula received an estimate of $10,517.98 to repair backhoe no. 2. (Ex. P-19). At the hearing Padula introduced this estimate along with a revised estimate for the same repairs of $11,770.37 dated February 22, 2005. The second estimate reflected the increased costs for parts and labor during the three years since the first estimate. (Ex. P-24). The Department did not object to the estimate of $11,770.37, and the Board awards that amount as repair damages.

[1] The courts of this Commonwealth have consistently ruled that if parties intend to include within the scope of their indemnity agreement a provision that also covers losses due to the indemnitee's own negligence, they must do so in language that is clear and unequivocal. Perry v. Payne, 66 A. 553, 557 (Pa. 1907); see also Pittsburgh Steel co. v. Patterson-Emerson-Comstock, Inc., 171 A.2d 185, 187 (Pa. 1961); Ruzzi v. Butler Petroleum Co., 588 A.2d 1, 4 (Pa. 1991). As Perry reasoned, because the "liability on such indemnity is so hazardous, and the character of the indemnity so unusual and extraordinary, that there can be no presumption that the indemnitor intended to assume the responsibility unless the contract puts it beyond doubt by express stipulation. Perry, 66 A. at 557. Not only did the parties not discuss indemnification in making the oral contract here, even if Padula had agreed to provide indemnity to the Department as set forth in the two written contracts, R22-5095 and R22-5096, that indemnity does not cover the Department's own conduct under the Perry test.

On the day of the hearing, Padula also introduced an additional estimate in the amount of $6,201.44 for replacement of the transmission for backhoe no. 2. (Ex. P-25). The Department objected to this additional estimate because it was never shown to the Department prior to the hearing. Also, the estimator never actually inspected the backhoe but based his repair estimate upon statements of Mr. Padula, Sr. that he recently tried to move the backhoe, and it was jumping out of gear. The Board finds that the repair estimate for the transmission was provided to the Department too late for the Department to evaluate. In addition, since the estimate was not confirmed by any inspection of the backhoe or connected directly to the incident that occurred three years earlier in the swamp, not only does it fail to rise to the level of a reliable estimate, there has been no causal connection established. Thus, the Board finds that the Department is not liable for the additional $6,201.44 repair costs for the transmission.

B. Claim Against Kozlowski

The Department added E. Kozlowski Trucking and Repair, Inc to this action as an additional defendant, claiming that Kozlowski is liable for any damage to backhoe no.2 under theories of breach of contract and indemnity. While on site at the location where the backhoe was stuck on July 15, 2002, an employee of Kozlowski advised the Department that backhoe no. 2 was likely to be damaged by pulling it out of the swamp. The Kozlowski employee testified that the backhoe was "stuck in a very serious situation" and that the "machine was basically submerged" when he arrived at the scene. After the Kozlowski employee advised the Department of his concerns regarding damaging the backhoe further, a Department employee instructed him to proceed. Kozlowski pulled the backhoe out of the swamp and as instructed, the back boom and wheel proved to be damaged.

Kozlowski objected to the Board's jurisdiction over the Department's claim. The Board finds it has subject matter jurisdiction because there was a contract between the Department and Kozlowski for the services of a heavy wrecker and Kozlowski has been properly impleaded

pursuant to the Board of Claims Act (72 P.S. §4651-6). The Department orally requested Kozlowski pull backhoe no. 2 out of the swamp, Kozlowski agreed and performed just as the Department requested and billed the Department $325.00 for its services. (Ex. K-1). The Department paid the bill, but when Padula sued for damage to the backhoe, the Department filed this third party claim against Kozlowski.

The Board finds there is no liability on the part of Kozlowski because it was the Department that caused the backhoe to become stuck in the swamp, and it was the Department that instructed Kozlowski to pull the backhoe out of the mud despite being forewarned by Kozlowski of the potential for additional damage in doing so. Kozlowski performed the services required under the contract, and the damage it did to the back boom and wheel were the result. The Department presented no evidence of any improper performance by Kozlowski of its contract or any indemnity clause in their contract. The claim against Kozlowski is denied.

C. Rental Amount Due for Backhoe No. 1

Backhoe no. 1 was in the Department's possession from April 1, 2002 until May 9, 2002. The parties agreed to a rate of payment under their oral contract of $40.00 per hour for a minimum of 7.5 hours for weekdays and additional payments for weekends if the backhoe was used. Padula claims that the Department owes an additional $4,460.00 for rental fees for backhoe no. 1. In Exhibit P-1 Padula sets forth the days and hours that backhoe no. 1 was in the possession of the Department for which it has not been paid.

The Department did not dispute the contents of Exhibit P-1 or the testimony of Mr. Padula, Jr. about it. In addition, there is virtually no argument in the Department's brief regarding the rental claim for backhoe no. 1 except to say that Padula increased the amount of its rental claim in its amended complaint after securing legal representation. The Board finds that the Department owes Padula $4,460.00 for rental fees for backhoe no.1 for the days and hours set forth on page 3 of Exhibit P-1.

D. Rental Amount Due for Backhoe No. 2

Backhoe no. 2 was damaged on July 15, 2002. Padula claims that $1, 560.00 is due for rental time prior to the accident and $10,200.00 after the accident. (Ex. P-2). Mr. Padula, Jr. testified that the Department told him that it planned to keep backhoe no. 2 until the end of August 2002. The amount claimed for rental time post accident is based upon the Department's statement about keeping the backhoe until the end of August 2002.

Again, the only argument that the Department makes in opposing the rental amounts claimed by Padula prior to the accident was that Padula increased its demands in its amended complaint after securing legal representation. As a result, and based upon Padula's exhibit, the Board finds for Padula in the amount of $1,560.00 for rental of backhoe no. 2 up until the time of the accident, July 15, 2002.

As for Padula's claim of $10,200.00 in rental due subsequent to the accident, the Department argues that Padula should have repaired the backhoe and put it back into use after learning on approximately July 16, 2002, that the Department had damaged it. The Department argues that Padula failed to mitigate its damages . While the Board agrees with the Department that Padula had an obligation to mitigate its damages, the Board notes that initially the Department's employees told Padula they would arrange to repair the backhoe. More senior Department employees later changed the Department's position and refused to repair the equipment. The Board cannot conclude that Padula would have been able to repair backhoe no. 2 and put it back to work during the relatively short period of time between July 16, 2002 and August 30, 2002. Since the Board finds that the Department had agreed to use backhoe no. 2 until the end of August 2002, the Board finds for Padula in the amount of $10,200.00 due for the period from July 16, 2002 until August 30, 2002. The Department is liable to Padula for a total of $11,760.00 for rental of backhoe no. 2.

The Board finds that the Department breached its oral contract with Padula and is liable for a total of $27,990.00 in damages. Pursuant to 62 P.C.S.A. §1751, Padula is awarded 6% prejudgment interest on this amount from September 6, 2002, the date the claim was filed with the Department, to the date of the entry of the order in this case. Additionally, post-judgment interest shall be awarded on the judgment until said amount is paid in full.

ORDER

AND NOW, this 30th day of September, 2005, it is **ORDERED** and **DECREED** that judgment be entered in favor of Plaintiff, Padula & Sons, Inc., and against Defendant, Commonwealth of Pennsylvania, Department of Transportation, in the sum of Thirty-Two Thousand Seven Hundred and Twenty-Four Dollars ($32,724.00) which is the sum of the following:

$11,770.00 for damages to backhoe no. 2.

$ 4,460.00 for rental charges due for backhoe no. 1.

$11,760.00 for rental charges due for backhoe no. 2.

$ 4,734.00 for pre-judgment interest.

IT IS FURTHER ORDERED that Plaintiff is awarded post-judgment interest on the total judgment award of $32,724.00 at the rate of six percent (6%) per year from the exit date of this Order until the judgment is paid in full.

IT IS FURTHER ORDERED that the claim filed by Defendant, Commonwealth of Pennsylvania, Department of Transportation, against Additional Defendant, E. Kozlowski Towing and Repair, is **DENIED.**

IT IS FURTHER ORDERED that each party will bear its own costs and attorneys' fees.

BOARD OF CLAIMS

OPINION SIGNGED

_____
Jeffrey F. Smith
Chief Administrative Judge

_____
Ronald L. Soder, P.E.
Engineer Member

_____
John R. McCarty
Citizen Member