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BEFORE THE VICTIM COMPENSATION AND GOVERNMENT CLAIMS BOARD  
OF THE STATE OF CALIFORNIA

In the Matter of the Claim of:

**Craig Smith**

Claim No. G578565

**Notice of Decision**

On February 18, 2010, the California Victim Compensation and Government Claims Board adopted the attached Proposed Decision of the Hearing Officer as its Decision in the above-referenced matter.

Date: February 22, 2010



Tisha Heard  
Board Liaison  
Victim Compensation and  
Government Claims Board

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BEFORE THE VICTIM COMPENSATION AND GOVERNMENT CLAIMS BOARD  
OF THE STATE OF CALIFORNIA

In the Matter of the Claim of:  
**Craig Smith**  
Claim No. G578565

**Proposed Decision**  
**(Penal Code § 4900 et seq.)**

**Introduction**

A hearing on this claim was held on June 23, 2009, in Sacramento, California, by Roslyn Mack, the Hearing Officer assigned to hear this matter by the Executive Officer of the California Victim Compensation and Government Claims Board.

The claimant, Craig Smith, represented himself.

The California Department of Justice, Office of the Attorney General (Attorney General) was represented by Michael Farrell, Esq.

After consideration of all the evidence, it is determined that Craig Smith failed to prove by a preponderance of the evidence that he did not commit a crime, and that he did not intentionally or negligently contribute to his arrest and conviction for acts of driving under the influence of alcohol. Thus, the Hearing Officer recommends that Smith's claim for compensation under Penal Code section 4900 be denied.

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## Procedural History

### I. Smith's Conviction for Driving Under the Influence.

At approximately midnight on December 1, 2005, Smith was suspected of driving under the influence (DUI) after the San Diego police responded to the scene of a traffic collision involving Smith's vehicle. He was subsequently placed under arrest for driving under the influence of alcohol after he failed a field sobriety test. A breath test at the police station later revealed that Smith had a blood alcohol level of .17 percent. Smith told the police that he had consumed alcohol after the collision that damaged his car. On December 20, 2005, Smith was charged with violating Vehicle Code sections 23152(a)<sup>1</sup> and 23152(b).<sup>2</sup> Smith was also charged as a habitual offender because he had five prior DUI convictions from 1986 through 2004.

On February 17, 2006, a jury found Smith not guilty of violating Vehicle Code section 23152(b). The jury was not able to reach a verdict regarding whether Smith was guilty of violating Vehicle Code section 23152(a), so the court declared a mistrial as to the violation of Vehicle Code section 23152(a). On April 17, 2006, after Smith was retried, a jury determined that he was guilty of violating Vehicle Code section 23152(a). On October 30, 2006, Smith was sentenced to four years in prison.<sup>3</sup>

On December 8, 2006, Smith appealed his DUI conviction and argued that the trial court improperly admitted evidence in his second trial that he had a blood alcohol level of .17 percent and that the judge improperly instructed the jury that a blood alcohol level of .08 percent or more created a permissive presumption of a DUI. Smith further argued that the trial court should have instructed the jury to presume that he was not driving with a blood alcohol level of .08 percent or more.

On May 11, 2006, in a parole revocation hearing, Smith admitted to possessing alcohol and driving under the influence of alcohol on the night of the incident at issue.

On March 5, 2008, the Court of Appeals reversed Smith's conviction, finding that the jury should not have been allowed to consider whether Smith drove with a blood alcohol level of .08 percent or

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<sup>1</sup> Driving under the influence of any alcoholic beverage or drug.

<sup>2</sup> Driving with a blood alcohol content of .08% or greater.

<sup>3</sup> Smith received an enhanced sentence as a result of his history of DUI convictions. In his claim for compensation pursuant to Section 4900, Smith denies two prior DUI convictions, but acknowledges the remaining convictions.

1 more because he had already been found not guilty of that offense.<sup>4</sup> The Court found that the evidence  
2 that Smith's blood alcohol level was .17 was admissible, but that the jury should have been instructed  
3 to presume that his blood alcohol was less than .08 at the time that he was driving based upon the prior  
4 acquittal of the per se DUI charge. However, the court noted that there was sufficient evidence to  
5 support the jury's verdict that Smith was driving under the influence of alcohol.

6 For example, the second jury could find that Smith's post-accident .17 percent  
7 blood-alcohol level supported an inference that he drank a substantial amount of  
8 alcohol both *before and after* the accident, and that (when considered with all the  
9 evidence) he had enough alcohol in his system while driving to cause impairment

10 . . . .<sup>5</sup>

11 On April 26, 2008, Smith was released from prison.

12 **II. Smith's Application.**

13 On October 20, 2008, Smith filed this claim with the Board pursuant to Penal Code sections  
14 4900 et seq, requesting compensation for 544 days of incarceration. Smith denies that he committed  
15 the crime of driving under the influence and asserts that the police officer never observed Smith driving  
16 poorly. Smith alleges in his claim that (1) the officer fabricated the information that established  
17 probable cause so that he could arrest Smith, and (2) the retrial violated the Double Jeopardy clause of  
18 the United States Constitution and federal civil rights laws.

19 **III. The Attorney General's Recommendation.**

20 The Attorney General opposes Smith's claim on the grounds that Smith failed to prove that he  
21 did not commit the crime for which he was incarcerated. The Attorney General stated that the evidence  
22 against Smith supported the jury's determination that Smith was guilty of driving under the influence  
23 even though Smith was innocent of driving with a blood alcohol of .08 percent or greater. The Attorney  
24 General also stated in their recommendation that Smith's defense that he drank after the collision is not  
25 credible and was rejected by the jury and the appellate court. Instead, there was substantial evidence  
26 that Smith drove while he was under the influence of alcohol.

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28 <sup>4</sup> *People v. Smith* (2008) 161 Cal. App. 4<sup>th</sup> 622, 625 [non pub. Opn.].

29 <sup>5</sup> *People v. Smith* (2008) 161 Cal. App.4<sup>th</sup> 622, 636, fn 8.

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## Summary of the Evidence

### I. Police Report of the December 2005 DUI.

The police report prepared in connection with the December 2005 DUI arrest provides the following information. At around midnight, Police Officer Gonzales was the first officer to arrive at the scene of the collision. Smith told Officer Gonzales he did not know who rear-ended him. When asked for his driver's license, Smith presented a Missouri rather than a California driver's license.<sup>6</sup> Officer Gonzales noticed that there was liquid on the front passenger seat of Smith's car and that there was also a partially filled mug in the car. Smith told the officer that he did not know what the liquid was that was on the front passenger seat. Smith said that before the collision, he was at a bar and had a couple of drinks. His last drink was at 11:30 p.m.

Officer Gonzales noticed that Smith had bloodshot eyes and smelled of alcohol. Smith's eyes jerked when Officer Gonzales conducted an eye test requiring Smith to follow a pen with his eyes, which indicated to Officer Gonzales that Smith was intoxicated. Officer Gonzales then conducted a field sobriety test. Smith could not stand on one leg, stand without swaying, recite the alphabet, or count backwards. Smith also failed to follow directions when asked to walk and turn. Based upon Smith's physical symptoms and poor performance on the sobriety tests, Officer Gonzales arrested Smith for driving under the influence of alcohol or drugs. Officer Gonzales noted that Smith's mug was 20 percent full of alcohol, and that the alcohol in the mug appeared to be the same liquid on the car seat. There is nothing in the report stating that Smith told the officer that he drank alcohol after the collision. A breathalyzer test later determined that Smith had a blood alcohol level of .17 percent, nearly twice the legal limit.

In a second report, Police Officer Ramos obtained the following statement from Deng, the other driver who rear-ended Smith's car. Deng told the officer that while he was at a bar, he got into a fight with Smith and a bartender. While in the parking lot, Smith hit Deng, and Deng decided to follow Smith when Smith drove away from the bar. When Smith suddenly stopped his car, Deng rear-

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<sup>6</sup> At the trial, Officer Gonzales mistakenly stated that Smith's license was revoked, which was not mentioned in the police report.

1 ended him. The officer determined that Deng was driving under the influence of alcohol in violation of  
2 Vehicle Code 23152(a).

3  
4 **II. Witness Testimony at the Re-Trial.**

5 During the second trial, witnesses provided the following testimony.

6 The bartender from the bar testified that Smith was a regular at the bar and that he was not  
7 drunk when he arrived. Deng bought Smith two screw-drivers. Deng became angry when the  
8 bartender told him that she had problems processing his credit card, and she had to push Deng out of  
9 the bar. She asked Smith to leave while she set the alarm. When she left the bar, she saw Smith  
10 drive away and Deng seemed to chase Smith's car.

11 A criminologist who was experienced in the mechanics of field sobriety tests and breath tests  
12 testified that a person could be found mentally and physically impaired by alcohol based upon his  
13 performance on the field sobriety tests. Alcohol first affects a person's mental abilities, including  
14 memory, judgment, and the ability to multi-task and react to multiple events. All of these mental  
15 abilities are important for safe driving. Further, if a person displays physical symptoms of alcohol  
16 intoxication, then that person is likely already mentally impaired. If Smith had only drunk two drinks at  
17 the bar without any prior alcohol consumption, that alcohol would likely have burned off by the time of  
18 the breath test at 12:30 a.m.<sup>7</sup> Here, however, Smith had a blood alcohol level of .17 percent. If a  
19 person has a blood alcohol level of .17 percent approximately 45 to 50 minutes after their last drink of  
20 alcohol, that further supports that the person's ability to drive was impaired at the time of the field  
21 sobriety test.

22 **III. Craig's Testimony at his Penal Code Section 4900 Hearing.**

23 At the hearing on his claim for compensation under Penal Code sections 4900 et seq., Smith  
24 provided the following testimony.

25 On his way to the bar, Smith stopped at a store and purchased brandy and soda to drink  
26 later if there was nothing going on at the bar. When he arrived at the bar, Smith played pool first with  
27 an unidentified patron and then with Deng. Smith easily beat Deng in their game. Deng bought

28  
29 <sup>7</sup> Healy based this estimate on a 200 pound male.

1 Smith his first alcoholic drink at 9:40 p.m. Smith and Deng played another game of pool, and Smith  
2 intentionally lost the game by scratching on the last ball. Smith had another drink around 10:30 p.m.

3 After playing pool with Smith, Deng became frustrated and began arguing with the  
4 bartender. Smith saw the bartender use a pool stick to force Deng out of the bar. Smith remained in  
5 the bar with the bartender and one other person. Fifteen minutes later, the bartender decided to  
6 close the bar because there were no customers. The bartender told Smith to leave through the front  
7 door, and the bartender left through the back door. When Smith opened the front door, Deng, who  
8 was standing at the front door, grabbed Smith's shirt and began yelling at Smith. Deng then struck  
9 Smith in the right eye. Smith defended himself and twice knocked Deng to the ground. Because  
10 Deng was much younger than him, Smith believed that he needed to get away from Deng. Smith ran  
11 to his car and started to drive towards his home.

12 Smith did not call 9-1-1 because the altercation had ended and because he did not trust  
13 police officers. Smith stopped at a stop sign about a mile away from the bar and he was adamant  
14 that he was obeying all traffic laws. Smith was suspicious that Deng was following him. Smith  
15 noticed a fast-moving car in his rear-view mirror. Because he could not move his car due to traffic at  
16 the intersection, the pursuing car rear-ended his car, causing his car to spin around and face in the  
17 opposite direction.

18 Smith immediately knew that it was Deng who had rear-ended his car and was concerned  
19 that Deng might have a weapon. Smith nervously exited his car, viewed the damage to his car, and  
20 then immediately climbed back into the car.<sup>8</sup> He had a 20 ounce mug with a top in his center  
21 console. To calm his nerves, Smith grabbed the unopened brandy and the soda from the back seat,  
22 broke the seal on the brandy, poured the entire bottle of brandy into the mug, and then added the  
23 soda, spilling some of the drink onto the front passenger seat. Smith did not recall how he was able  
24 to mix the drink. Smith cautiously left his car once again. He looked around for Deng, and then he  
25 walked approximately a block away. When a witness to the collision approached, Smith became  
26 scared and returned to his car. Smith gargled with mouthwash, but does not remember when he did

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28 <sup>8</sup> Smith did not mention this in his initial claim pursuant to Penal Code sections 4900 et seq.

1 this. Smith denied gargling with the mouthwash to conceal the alcohol on his breath. Smith then  
2 stood away from his car and smoked a cigarette.

3 An ambulance came first, and then twenty minutes later Officer Gonzales arrived on the  
4 scene. When the officer arrived, Smith was twenty feet away from his car and his car keys were in  
5 his pocket. Officer Gonzales did not know which vehicle Smith was driving until Smith told him.  
6 Although Smith believed that Deng was the other driver, Smith did not tell Officer Gonzales of his  
7 suspicions because Smith could not confirm it. Another officer learned of the fight after talking with  
8 Deng. Officer Gonzales then asked Smith about the fight and Smith told the officer about the incident  
9 at the bar. Smith told the officer about drinking alcohol after the collision and about the spill on the  
10 seat. Smith acknowledged that at the trial he said that he told Officer Gonzales that he did not drink  
11 anything else, but insists that he was referring to the period while he was at the bar. Smith  
12 contended that these statements were omitted from the police report.

13 Smith told Officer Gonzales that he would fail the field sobriety test because he could not  
14 do the one leg test due to a bad leg. Smith testified that the effects of the alcohol he drank after the  
15 accident became steadily worse throughout the night. Smith insisted that he failed the field sobriety  
16 test due to the effects of the alcohol he consumed after the accident and because he was distressed  
17 as a result of the altercation and accident. Smith acknowledged that at 12:30 a.m., he had a blood  
18 alcohol level .17 percent and could vaguely remember things.

19 Smith asserted that Officer Gonzales fabricated evidence during the prosecution, including  
20 the location of the drinking cup and Smith's statements to the officer. Smith testified that no  
21 witnesses reported that his driving was impaired. He was the victim of Deng's attack and Deng  
22 chased him down with his car. Smith was upset that Deng was never prosecuted for assaulting him.

23 As a result of this conviction, Smith was incarcerated from October 30, 2006, through April  
24 26, 2008, for a total of 544 days. Smith incurred legal defense costs, lost his job, was unable to pay  
25 his taxes, and has not been able to return to his field as an information technology system  
26 administrator because he does not have recent work experience. Smith also lost his car, although  
27 Deng is paying Smith for the damage to his car that was not covered by insurance. Smith is suing  
28 Officer Gonzales and the City of San Diego for violating his civil rights.

29

1 Smith acknowledged in the hearing that he is an alcoholic and that he drank socially and on  
2 the weekends. He also acknowledges that in 2001, he was arrested for driving with a half-full bottle  
3 of brandy in the car and with a blood alcohol level of .19 percent. He was charged with, and  
4 convicted of, a felony violation of driving under the influence. Smith was on parole for this conviction  
5 at the time of the December 2005 arrest. Because Smith violated his parole, he was sentenced to an  
6 additional year in prison. Smith testified that he did not understand the terms and conditions of his  
7 parole and that was why he was found to have violated his parole.

### 8 Findings

9 A preponderance of the evidence supports the following findings:

- 10 1. Smith had five DUI convictions from 1986 through 2004.
- 11 2. On December 1, 2005, Smith consumed alcohol at a bar.
- 12 3. Smith and Deng had a physical altercation outside the bar.
- 13 4. Smith then left the bar by driving his car.
- 14 5. Deng later rear-ended Smith's car.
- 15 6. Smith consumed brandy and soda while in his car.
- 16 7. Smith gargled with mouthwash to conceal the smell of alcohol on his breath.
- 17 8. Smith's testimony that he only drank two drinks at the bar is not credible.
- 18 9. Smith's blood alcohol level was .17 percent approximately 45 minutes after he left the  
19 bar. Smith failed the field sobriety test conducted at the scene of the collision due to  
20 being intoxicated.
- 21 10. The police report by Officer Gonzales is a reliable account of Smith's conduct and level  
22 of intoxication at the scene of the collision and shortly thereafter.
- 23 11. Smith's 2005 felony DUI conviction was supported by the evidence presented at his  
24 criminal trial.
- 25 12. Smith admitted to possessing alcohol and driving under the influence of alcohol on  
26 December 1, 2005, which violated his parole for an earlier felony conviction for driving  
27 under the influence of alcohol.

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## Determination of Issues

Penal Code section 4900 provides that any person erroneously convicted of any felony and sentenced to prison may present a claim to the Board for the pecuniary injury sustained as a result of the erroneous conviction. Penal Code section 4903 requires that the claimant must prove all of the following by a preponderance of the evidence in order to state a successful claim:

- 1) that the crime with which he was charged was either not committed at all, or, if committed, was not committed by him;
- 2) that he did not by any act or omission on his part, either intentionally or negligently, contribute to the bringing about of the arrest or conviction for the crime; and
- 3) that he sustained a pecuniary injury through his erroneous conviction and imprisonment.<sup>9</sup>

Preponderance of the evidence means evidence that has more convincing force than that opposed to it.<sup>10</sup> If the claimant meets his burden of proof, the Board shall recommend to the Legislature that an appropriation of \$100.00 per day of incarceration served after the conviction be made for the claimant.<sup>11</sup>

In evaluating a claim, the Board may consider the following factors. However, these factors will not be deemed sufficient evidence to warrant the Board's recommendation that the claimant be indemnified unless there is substantial independent corroborating evidence that the claimant is innocent of the crime charged:

- 1) claimant's mere denial of commission of the crime for which he was convicted;
- 2) reversal of the judgment of conviction on appeal;
- 3) acquittal of the claimant on retrial; or
- 4) the failure of the prosecuting authority to retry the claimant for the crime.<sup>12</sup>

<sup>9</sup> *Diola v. Board of Control* (1982) 135 Cal.App.3d 580, 588, fn. 7; *Tennison v. Victim Compensation and Government Claims Board* (2000) 152 Cal. App. 4<sup>th</sup> 1164.

<sup>10</sup> *People v. Miller* (1916) 171 Cal. 649, 652.

<sup>11</sup> Pen. Code, § 4904.

<sup>12</sup> Cal. Code Regs., tit. 2, § 641.

1 The Board may also consider as substantive evidence the testimony of witnesses who the  
2 claimant had an opportunity to cross-examine, and evidence to which claimant had an opportunity to  
3 object, admitted in prior proceedings relating to the claimant and the crime with which he was charged.  
4 Finally, the Board may consider any information that it deems relevant to the issue before it.<sup>13</sup>

5 Here, Smith failed to meet his burden of proving that he is eligible for compensation under  
6 Penal Code section 4900. First, Smith failed to show by a preponderance of the evidence that he did  
7 not commit the crime with which he was charged. Second, he failed to show that he did not  
8 contribute to his arrest and conviction.

9 **I. The Preponderance of the Evidence Indicates that Smith Committed a Crime.**

10 Smith's 4900 claim fails because he has not proven by a preponderance of the evidence that  
11 he did not commit the crime of driving under the influence of alcohol on December 1, 2005. Although  
12 Smith asserts that he was obeying all traffic laws at the time of the collision, it is not necessary to  
13 show poor driving for the purposes of a conviction for driving under the influence.<sup>14</sup> Vehicle Code  
14 section 23152(a) provides that "It is unlawful for any person who is under the influence of any  
15 alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to  
16 drive a vehicle. " "A person is under the influence, if as a result of drinking or consuming an alcoholic  
17 beverage his mental or physical abilities is so impaired that he is no longer able to drive a vehicle with  
18 the caution of a sober person, using ordinary care, under similar circumstance."<sup>15</sup> Thus, the manner  
19 in which defendant drives is not enough to determine if the defendant is or is not under the influence.

20 Smith concedes that he had a blood alcohol level of .17 nearly an hour after the collision  
21 and that his memory was affected by the alcohol. Smith's assertion that the alcohol he drank after  
22 the collision is the reason his blood alcohol level was above the legal level is not credible. Notably,  
23 Smith has a significant history of drinking and driving convictions. In 2001, Smith was convicted of  
24 felony driving under the influence after he was arrested with a half-full bottle of brandy in the car. He  
25 was later determined to have a blood alcohol level of .19 percent. Smith engaged in similar conduct

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27 <sup>13</sup> *Id.*

28 <sup>14</sup> Vehicle Code, § 23152(a).

29 <sup>15</sup> CALCRIM 2110 (2006).

1 when he was arrested on December 1, 2005. According to the police report, Smith had blood shot  
2 eyes, smelled of alcohol, failed the sobriety test at the scene, and there was a mug containing an  
3 alcoholic beverage in a beverage holder in his car. It is undisputed that Smith was driving his vehicle  
4 prior to the collision. The preponderance of the evidence indicates that Smith consumed alcohol prior  
5 to the motor vehicle collision. Thus, the evidence supports a finding that he was operating his vehicle  
6 while under the influence of alcohol.

7 Although the Court of Appeal overturned Smith's 2005 conviction, the court noted that there  
8 was sufficient evidence to support the jury's verdict that Smith was driving under the influence of  
9 alcohol.

10 For example, the second jury could find that Smith's post-accident .17 percent  
11 blood-alcohol level supported an inference that he drank a substantial amount of  
12 alcohol both *before and after* the accident, and that (when considered with all the  
13 evidence) he had enough alcohol in his system while driving to cause  
14 impairment. . . .<sup>18</sup>

15 The testimony and evidence presented at the 4900 hearing directly supports such a finding.  
16 Significantly the burden of proof for the prosecution in a criminal trial is guilt beyond a reasonable  
17 doubt, while the burden of proof for a claimant in a 4900 claim is preponderance of the evidence.  
18 Finally, Smith's admission in his parole revocation hearing to violating his terms of parole by driving  
19 under the influence further supports the finding that Smith was under the influence of alcohol before  
20 and after his arrest in December 2005.

21 ~~Even if Smith had satisfied his burden of showing by preponderance of the evidence that he  
22 did not commit the crime, his claim still fails.~~

## 23 **II. The Preponderance of the Evidence Indicates that Smith Contributed to His Arrest.**

24 To succeed on a Penal Code section 4900 claim, a claimant cannot have, by any act or  
25 omission, either intentionally or negligently contributed to his arrest or conviction.<sup>17</sup> Here, Smith did  
26 not prove by a preponderance of the evidence that he did not, either intentionally or negligently,  
27 contribute to his arrest and conviction.

28 <sup>16</sup> *People v. Smith* (2008) 161 Cal. App.4<sup>th</sup> 622, 636, fn 8.

29 <sup>17</sup> Pen. Code, § 4903.

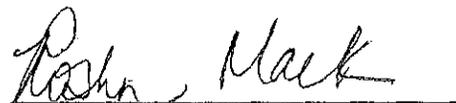
1 First, Smith contributed to his conviction by not calling the police or 9-1-1 for assistance after  
2 being rear-ended. Although Smith asserts that he mistrusted the police, Smith's conduct on the night  
3 in question was a violation of his parole for a previous DUI conviction, indicating that he did not call 9-  
4 1-1 because he did not want to be found in violation of his parole.

5 Further, it is determined that the police report provides a reliable account of Smith's statement  
6 and behavior immediately following the collision. Prior to the police appearing on the scene, Smith  
7 gargled with mouthwash in an unsuccessful attempt to cover the smell of alcohol. Smith failed field  
8 sobriety tests, and he lied to the police officer about the amount of alcohol that he had drunk and the  
9 liquid on the passenger seat. Smith did not tell the police officer at the scene of the collision that he  
10 had consumed some alcohol after the collision. Based upon all of this information, it is determined  
11 that Smith's conduct contributed to his arrest and conviction.

12 **Recommendation**

13 Because it is determined that Smith has not proven that he did not commit the crime for which  
14 he was incarcerated and because he contributed to his arrest and conviction, Smith is not eligible for  
15 compensation under Penal Code section 4900 et seq. Thus, it is recommended that his claim be  
16 denied.<sup>18</sup>

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18 Date: January 27, 2010

19   
20 Roslyn Mack  
21 Hearing Officer  
22 California Victim Compensation and  
23 Government Claims Board

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29 <sup>18</sup> Because Smith failed to meet his burden, the issue of pecuniary loss is rendered moot.