

**County Commissioners—Mileage—Expenses—Compensation  
—Highways.**

County commissioners are entitled to per diem and expenses in removing dangers or obstructions on highways because the law compels them to discharge this duty .

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My dear Mr. Heily :

You have submitted for my opinion the following questions :

“1. Stillwater county has no road supervisors, in the discretion of the board none being warranted. Now, assuming the board of commissioners are notified that some part of the public highway is in a dangerous condition which might lead to serious damage or accident to the traveling public and resultant liability on the part of the members of the board. If in such case the board or one of its members under direction of the board makes an inspection of the damaged point for the purpose of determining the necessary repair and to guard against possible damage liability, is per diem and expense of such inspection a proper charge against the county?

“2. Under section 8, chapter 128, session laws of 1925, the board ‘may, in its discretion, cause to be done whatever may be necessary for the best interests of the roads and road districts of its several counties.’ Should the board in its discretion determine that the best interests of the roads or road districts or

the road system require that the board or one of its members under order and direction of the board inspect some part or all of the roads of the county and by its action cause such inspection to be made, would per diem and expenses be a proper charge?"

In the recent case of *Becker vs. Chapple*, 72 Mont. 199, the supreme court determined that county commissioners may be personally liable for failure to discharge their duties with respect to the highways resulting in injuries to anyone using the highways. In a specially concurring opinion by Mr. Justice Holloway, he said:

"Whether the commissioners who discharge this duty are entitled to specific compensation therefor is a question which cannot arise in this action."

The particular statute before the court in that case was section 1625, R. C. M. 1921. The court in discussing this statute said:

"Inasmuch as the amended act referred to above, which is now section 1627, revised codes of 1921, places a positive legal duty upon the board of commissioners to remove defects and obstructions in the highway, after notice, any member thereof who neglects to perform that duty becomes liable under section 4520, revised codes of 1921."

In that case it appeared that the commissioners had notice of the defective condition of the highway and that it thereupon became their duty to remedy the defect.

In an opinion rendered by this office to Mr. Frank Woody appears this statement:

"As sections 1431 and 8896, in express terms impose upon and require the chairman of the board of county commissioners to perform certain definite and specific duties in connection with insanity inquisitions and as a member of the jury commission, it is hardly reasonable to believe that the legislature intended that he should not receive any compensation whatever for such services. Section 4607 provides that all claims against the county presented by members of the board for per diem or mileage 'or other services rendered by them,' shall be verified, etc., and seems to recognize the fact that statutory provisions may specially require one or more members of the board to perform duties not in any manner connected with sessions of the board for which they are entitled to mileage and per diem under section 4464, and that for performing such duties they shall receive compensation. It is, therefore, reasonable to believe that the legislature intended, when imposing these specific duties on the chairman of the board, that he should receive compensation for performing the same, and that such compensation should be at the same rate as he receives for attending sessions of the board, viz., \$8.00 per day and mileage at the rate of 10 cents per mile."

Hence, in those cases where the county commissioners have actual notice of a defect or obstruction in the highway, it becomes their duty to remove the same and that in so doing they are entitled to per diem and expenses. This does not mean, however, that they may inspect highways before having notice of a defect or obstruction.

It is my opinion, therefore, that the answer to your first question must be in the affirmative.

Your second question, I believe, is answered by the opinions rendered Mr. Woody, and that per diem and expenses may not be allowed under the circumstances therein stated.

Very truly yours,  
L. A. FOOT,  
Attorney General.