[Cite as *In re Hughes*, 2006-Ohio-2169.]

IN THE COURT OF CLAIMS OF OHIO

VICTIMS OF CRIME DIVISION
www.cco.state.oh.us

IN RE: LISA R. HUGHES	:	Case No. V2005-80703
LISA R. HUGHES	:	OPINION OF A THREE-COMMISSIONER PANEL
Applicant	:	

: : : : :

{¶ 1} The applicant, Lisa Hughes, filed a reparations application seeking reimbursement of expenses incurred with respect to a December 28, 2003 motor vehicle incident. On March 4, 2005, the Attorney General denied the applicant's claim pursuant to R.C. 2743.52(A) contending that the applicant's injuries failed to result from one of the motor vehicle exceptions listed in R.C. 2743.51(C)(1). According to the Cincinnati Police Department report, the offending driver was pulling a trailer. The driver attempted to turn his vehicle around on a dead end street at night. While attempting the turn, the driver drove the vehicle over the front lawn of a residence. The driver then proceeded to strike a parked car. The applicant saw what was happening and attempted to move her vehicle to avoid a collision. Suddenly, the driver made the turn from the dead end street, striking the applicant and her vehicle as it was leaving. Upon investigation by the Cincinnati Police Department, the vehicle, trailer, nor the driver of the vehicle have been located. The applicant was unable to describe the driver of the vehicle in question. The incident was classified as a hit-skip accident and no further investigation was conducted. On April 6,

2005, the applicant filed a request for reconsideration. On October 11, 2005, the Attorney General issued a Final Decision reversing his initial decision with respect to the applicant being a victim of criminally injurious conduct. The Attorney General based his change of position on a letter dated March 25, 2005, from police Officer Marcus Moore and Sergeant Bill Combs of the Cincinnati Police Department, which in pertinent part stated:

> "Ms. Hughes exited her residence after being alerted to loud noises outside. A Sport Utility Vehicle (SUV) towing a trailer was attempting to turn around at the end of Ms. Hughes' no outlet street. In an attempt to turn around, the vehicle had driven into the grassy front yard of Ms. Hughes' next door neighbor. Ms. Hughes believed if she moved her vehicle, the SUV driver would have adequate room to complete the turn without further damaging her neighbors yard. Ms. Hughes stated she shouted to the driver to wait and she would move her car and Ms. Hughes believed the driver acknowledged her.
>
> As Ms. Hughes walked toward her vehicle, the SUV abruptly accelerated, pulled from the yard area and the trailer struck her as the SUV passed by, causing serious injuries. To date, the SUV, the trailer, nor the SUV driver have not [sic] been identified. The investigation determined that the SUV struck two parked vehicles, prior to striking Ms. Hughes', then two additional vehicles after striking Ms. Hughes. It is clear that the SUV driver knew or should have known that he struck Ms. Hughes. It is the opinion of Officer Marcus Moore, the lead investigator of this investigation, and myself, that the SUV driver operated recklessly without due regard for the safety of persons or property.
>
> It is further our opinion that the actions of the SUV driver constitutes Vehicular Assault (ORC 2903.08) and Stopping after an accident, exchange of identity and vehicular registration (ORC 4549.02) both felony offenses. The SUV driver, if identified, would be charged with these offenses."

{¶ 2} On October 11, 2005, the Attorney General issued a Final Decision pursuant to the holding in *In re Fout-Craig*, V93-27851tc (2-5-99) which determined that 75 percent of the applicant's insurance settlement with Progressive Insurance Company was for non economic loss

while 25 percent represented economic loss (a collateral source). The Attorney General granted the applicant an award of reparations in the amount of $363.62 for unreimbursed work loss and $3.77 for unreimbursed allowable expense, Health Alliance was granted $23.20, and KCI USA Inc. was granted $17.12. The total award granted equaled $407.71. On November 7, 2005, the applicant filed a notice of appeal to the Attorney General's Final Decision. On January 5, 2006, the Attorney General submitted his brief. The Attorney General re-evaluated his position concerning the apportionment of the settlement with Progressive Insurance Company and now believes 80 percent should represent non economic loss and 20 percent should represent economic loss. The Attorney General also discovered that the applicant received a $1,000.00 medical payment from her insurance company which must also be considered a collateral source. The Attorney General also noted that the applicant's property loss expenses are not compensable under the Victims of Crime Compensation Program. Hence, this matter came to be heard before this panel of commissioners on January 25, 2006 at 11:05 A.M.

{¶ 3} An Assistant Attorney General attended the hearing and presented brief comments for the panel's consideration. Neither the applicant nor anyone on her behalf appeared at the hearing. The Assistant Attorney General stated that the insurance settlement from Progressive Insurance Company should be apportioned at 80 percent for pain and suffering and 20 percent for collateral source reimbursement. It was also noted that the applicant had received $1,000.00 in medical pay from her insurance carrier. The Assistant Attorney General asserted that the applicant failed to prove she suffered additional work loss, but noted that should the applicant obtain supporting documentation in the future that would be proper subject for a supplemental compensation application.

{¶ 4} From review of the file and with full and careful consideration given to all the information presented at the hearing, this panel makes the following determination. We find that

the applicant fails to qualify as a victim of criminally injurious conduct under any of the motor vehicle exceptions listed in R.C. 2743.51(C)(1).

{¶ 5} Revised Code 2743.51(C)(1) states:

> (C) "Criminally injurious conduct" means one of the following:
>
> (1) For the purposes of any person described in division (A)(1) of this section, any conduct that occurs or is attempted in this state; poses a substantial threat of personal injury or death; and is punishable by fine, imprisonment, or death, or would be so punishable but for the fact that the person engaging in the conduct lacked capacity to commit the crime under the laws of this state. Criminally injurious conduct does not include conduct arising out of the ownership, maintenance, or use of a motor vehicle, except when any of the following applies:
>
> (a) The person engaging in the conduct intended to cause personal injury or death;
>
> (b) The person engaging in the conduct was using the vehicle to flee immediately after committing a felony or an act that would constitute a felony but for the fact that the person engaging in the conduct lacked the capacity to commit the felony under the laws of this state;
>
> (c) The person engaging in the conduct was using the vehicle in a manner that constitutes an OVI violation;
>
> (d) The conduct occurred on or after July 25, 1990, and the person engaging in the conduct was using the vehicle in a manner that constitutes a violation of section 2903.08 of the Revised Code.

{¶ 6} Revised Code 2903.08 in pertinent part states:

> (A) No person, <u>while operating or participating in the operation of a motor vehicle</u>, motorcycle, snowmobile, locomotive, watercraft, or aircraft, <u>shall cause serious physical harm</u> to another person or another's unborn in either of the following ways:
>
> (1)(a) As the proximate result of committing a violation of division (A) of section 4511.19 of the Revised Code or of a substantially equivalent municipal ordinance;

(2) Recklessly.

(B)(2) Whoever violates division (A)(2) of this section is guilty of vehicular assault. Except as otherwise provided in this division, vehicular assault is a felony of the fourth degree.

OR

(A) No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall cause serious physical harm of the type described in division (E)(2) or (5) of section 2901.01 of the Revised Code to another person.

(B) Whoever violates this section is guilty of vehicular assault a felony of the fourth degree.

(C) As the proximate result of committing a violation of division (1)(3) of section 4561.15 of the Revised Code or of a substantially equivalent municipal ordinance.

(2) *Recklessly.*

(B)(1) Whoever violates division (A)(1) of this section is guilty of aggravated vehicular assault . . .

(C) Whoever violates division (A)(2) of this section is guilty of vehicular assault. (Emphasis added.)

{¶ 7} Revised Code 2901.22(C) defines the culpable mental state of "recklessly" as follows:

(C) A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

{¶ 8} In In re Calhoun, supra, a judge of the Court of Claims ruled that:

{¶ 9} * * to establish his eligibility for an award of reparations pursuant to R.C. 2743.51(C)(1)(d) and 2903.08, it is necessary for the applicant to prove, by a preponderance of the evidence, that the offender operated his vehicle with "heedless indifference to the consequences" of his action. To establish this type of operation requires that the acts and risks of the offender must be known and disregarded. This proof must be established by factual evidence and probabilities, not by possibilities and speculation.

{¶ 10} In the case at bar, the incident happened at night. In the Cincinnati Police report, the applicant related she was unable to identify the driver of the vehicle due to the bright headlights. The applicant could offer no description of the driver's sex, race or physical description. It appears unlikely that the applicant received an acknowledgment from the shadowy figure when she attempted to move her vehicle. The driver of the SUV was never located and it is unclear what motivated the driver to leave the scene of the incident. It is speculative to assert that the driver left the scene merely because he struck the applicant. The driver could have left because he negligently struck another vehicle and quickly departed without realizing that he had caused injury to the applicant.

{¶ 11} We note that the panel deals with facts established by a preponderance of the evidence not speculation of supposition.

{¶ 12} In *In re Ward*, V04-61136tc (4-8-05), 2005-Ohio-2581, the panel denied the claim of a person injured as a result of a hit and skip incident. The panel stated that:

> "Victims of hit and run accidents typically do not qualify as victims of criminally injurious conduct under the motor vehicle exception, since the offending driver is almost

never captured and therefore no evidence of the offender's intent, possible fleeing due to prior felonious conduct, or alcohol and/or drug use can usually be obtained. Although the Attorney General recently announced a change in his policy concerning victims of hit and run accidents under the Ohio Victims of Crime Compensation Program, we however note that such changes, in order to be lawful and effective, must be made by the Ohio General Assembly and not administratively by the Attorney General. " *Id. at 6.*

{¶ 13} On July 27, 2005, the court affirmed the panel's decision and stated that there is no authority to support the Attorney General's finding that persons injured in motor vehicle collisions caused by a hit and skip motorist qualify as victims of criminally injurious conduct. *In re Ward*, V04-61136jud (7-27-05), 2005-Ohio-4231.

{¶ 14} At the present time, there is no remedy available for people who are injured in a hit and run accident unless one of the aforementioned exceptions applies. While worthy of consideration, the evidence offered by the Attorney General's office to support the applicant's claim is speculative at best and, therefore, does not rise to the standard required for the applicant to prevail. It is within the sole discretion of the legislature to amend the statute. *In re White*, V05-80541tc (3-7-06).

{¶ 15} Accordingly, the applicant fails to qualify as a victim of criminally injurious conduct, by a preponderance of the evidence. In as much as this panel may want to grant an award to this applicant and others similarly situated in accordance with the present Attorney General's internal policies, we must find that no actual evidence was presented to demonstrate that the offending motorist in this case, engaged in conduct that would allow this applicant to qualify as a victim of criminally injurious conduct. The offending driver was never captured and

there were no witnesses to the accident. Therefore, the Attorney General's Final Decision of October 11, 2005 is reversed.

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GREGORY P. BARWELL
Commissioner

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JAMES H. HEWITT III
Commissioner

_____
RANDI OSTRY LE HOTY
Commissioner

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IN RE: LISA R. HUGHES	:	Case No. V2005-80703
LISA R. HUGHES	:	ORDER OF A THREE-COMMISSIONER PANEL
Applicant	:	

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IT IS THEREFORE ORDERED THAT

1) The October 11, 2005 decision of the Attorney General is REVERSED;

2) This claim is DENIED and judgment is rendered for the state of Ohio;

3) Costs are assumed by the court of claims victims of crime fund.

[Cite as *In re Hughes*, 2006-Ohio-2169.]

_____
GREGORY P. BARWELL
Commissioner

_____
JAMES H. HEWITT III
Commissioner

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RANDI OSTRY LE HOTY
Commissioner

ID #\4-drb-tad-030706

A copy of the foregoing was personally served upon the Attorney General and sent by regular mail to Hamilton County Prosecuting Attorney and to:

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To S.C. Reporter 4-14-2006