

[Cite as *In re Lewis*, 2006-Ohio-4027.]

IN THE COURT OF CLAIMS OF OHIO

VICTIMS OF CRIME DIVISION

www.cco.state.oh.us

IN RE: FRANCINE LEWIS : Case No. V2005-80169

FRANCINE LEWIS : OPINION OF A THREE-
COMMISSIONER PANEL

Applicant :

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{¶ 1} Francine Lewis ("applicant" or "Ms. Lewis") filed a reparations application regarding an August 22, 2001 bank robbery. While Ms. Lewis was working as a senior account executive, an armed robber entered the bank and held a gun to her face. Ms. Lewis has not worked since this incident. She was terminated from her bank employment on or about March 31, 2003. Ms. Lewis is ready, willing, and able to work. However, her efforts to secure employment since her 2003 termination from the bank have been fruitless. Ms. Lewis testified that she suffers from Post-Traumatic Stress Disorder ("PTSD"), and therefore is constrained by the type of work she can perform and may only accept a job with the expressed approval of her treating psychologist.

{¶ 2} On October 15, 2003, the Attorney General granted the applicant \$8,950.78, of which \$2,365.51 represented COBRA expenses incurred from April 1, 2003 through October 31, 2003

and \$6,585.27 represented work loss incurred from September 10, 2001 through February 22, 2002. On July 6, 2004, the applicant, still employed, filed a supplemental reparations application seeking additional reimbursement. On November 29, 2004, the Attorney General granted the applicant an additional award in the amount of \$4,238.82, of which \$4,166.06 represented COBRA expenses incurred from November 1, 2003 through September 12, 2004 and \$72.76 in prescription expenses. On December 27, 2004, the applicant filed a request for reconsideration. On February 28, 2005, the Attorney General denied the claim under R.C. 2743.60(D), because the applicant received a collateral source award in the amount of \$37,699.69 in net Temporary Total Disability benefits for her PTSD from September 1, 2001 through May 20, 2004. On March 22, 2005, the applicant filed a notice of appeal to the Attorney General's February 28, 2005 Final Decision. On September 21, 2005, this panel heard the matter and held a final determination in abeyance. This panel ordered the Attorney General to file a supplemental memorandum addressing the applicant's total economic loss from August 22, 2001 through June 30, 2005, and ordered the applicant to file a response to the Attorney General's supplemental memorandum.

{¶ 3} On December 2, 2005, the Attorney General filed a supplemental memorandum with new economic loss calculations.

On December 21, 2005, the panel again heard this matter and on December 30, 2005, we again held in abeyance a final determination, and ordered the Attorney General to file a supplemental memorandum addressing the applicant's total economic loss from August 22, 2001 through December 31, 2005, to include unemployment compensation benefits. This panel also ordered the applicant to file a response to the Attorney General's supplemental memorandum and we continued the matter.

{¶ 4} On March 15, 2006, the Attorney General filed a supplemental memorandum indicating that unemployment compensation benefits calculations could not be performed because the applicant, after she was terminated from the bank, never filed for unemployment compensation. The Assistant Attorney General surmised that more than likely the applicant was ineligible to receive unemployment compensation because she had been receiving benefits from the Bureau of Workers' Compensation ("BWC") for years, and those benefits would have offset any potential unemployment compensation benefits. This panel again heard this matter on March 22, 2006.

{¶ 5} Ms. Lewis, her attorney, and an Assistant Attorney General attended the hearing and presented testimony and oral argument. At the initial hearing, Ms. Lewis testified that, at the time of the robbery, she had worked at Bank One as a senior

account executive for eight and a half years. As a result of the bank robbery, Ms. Lewis sought psychological counseling and was diagnosed with PTSD. Her psychologist, Robert Madrigal, Ph.D., concluded that Ms. Lewis suffered from a percentage of permanent impairment as a result of her allowed BWC condition of "acute stress reaction." (See Dr. Madrigal's Letter dated July 20, 2005). Ms. Lewis further testified that before she can accept a new job, it first has to be approved by Dr. Madrigal because her PTSD restricts her work environment to areas where there is little likelihood of another robbery. In particular, Dr. Madrigal advised her that if she were to return to a banking environment, it would be restricted to a position that did not deal directly with the public and currency.

{¶ 6} Although the applicant worked as an account executive at Bank One since 1993, she also holds a degree in Communications Journalism from The Ohio State University. However, it appears that Ms. Lewis' only work experience is in the banking industry. Since her termination from Bank One nearly two years after the robbery, Ms. Lewis has sought employment by sending out form letters and resumes to a variety of financial, banking, and insurance institutions. These positions included, but are not limited to, business

development, human resources, direct marketing, consultant, loan officer, account executive, banking

{¶ 7} office manager, credit analyst, credit underwriter, mortgage loan originator, and retail deposit project manager. To date, Ms. Lewis' efforts to secure employment have proved fruitless.

{¶ 8} When the applicant was terminated from Bank One on or about March 31, 2003, she was already receiving BWC benefits for her on-the-job injury. Ms. Lewis testified that she did not seek Social Security Disability ("SSD") benefits because she is ready, willing, and able to work. In this regard, and at the first hearing, William Fullerton ("Mr. Fullerton"), a Columbus based attorney who primarily practices in Workers' Compensation law, testified concerning the Social Security Administration's disability benefits. When presented with the facts of this case, Mr. Fullerton testified that if the applicant is indeed physically and mentally capable of working (as she claims), then she would be ineligible for SSD benefits. He explained that the Social Security Administration assesses a person's ability to work, not the person's ability to secure employment.

{¶ 9} In this case, the applicant presents the unique situation of being able to work but being unable to secure

employment. Thus, Ms. Lewis seeks an award of work loss from this Fund.

{¶ 10} Revised Code 2743.51(G) reads:

(G) 'Work loss' means loss of income from work that the injured person would have performed if the person had not been injured and expenses reasonably incurred by the person to obtain services in lieu of those the person would have performed for income, reduced by any income from substitute work actually performed by the person, or by income the person would have earned in available appropriate substitute work that the person was capable of performing but unreasonably failed to undertake.

{¶ 11} "[A]vailable appropriate substitute work is the same or similar work that the applicant was capable of performing prior to the criminally injurious conduct." *In re Monfort*, V04-60806tc (2-11-05), 2005-Ohio-1453, paragraph 6. In this case, and by her own testimony, Ms. Lewis is not psychologically capable of performing the same or similar work, in the same or similar environment as before the robbery. Yet she is capable of working.

{¶ 12} Typically, when "victims of crime are injured to the point that they no longer are able to engage in their former employment and therefore must seek a different form of employment in order to make ends meet[,] * * * we have

reimbursed victims, who have sustained work loss, the difference between replacement work (a completely different field of work) and substitute work (same and [sic] similar type work as the victim's previous job)." *Id.* at paragraph 6. The *Monfort* panel, under R.C. 2743.51(G), reimbursed the applicant the difference between replacement and substitute work. In this case, we cannot award Ms. Lewis the difference because she has not availed herself of replacement work. But because the statute does not require Ms. Lewis to perform replacement work, we find that she presents a viable work loss claim.

{¶ 13} The substitute work Ms. Lewis sought includes managerial positions in debit card services, product, compliance, and team management, banking product and retail deposit manager, and work as an underwriter, credit analyst, consultant, market coordinator, business development representative, loan officer, mortgage originator, and work in human resources and direct marketing. Ms. Lewis also stated that she sought employment assistance from MedProolutions, a company specializing in rehabilitation programs for persons with on-the-job injuries, as well as Return to Work Services, LLC - all to no avail. Hence, the claim file contains sufficient evidence that Ms. Lewis has sought, and continues to, seek similar work, since she is psychologically unable to perform the

same job she did prior to the criminally injurious conduct. Because the Victims of Crime Compensation Fund is designed to return victims to their status prior to the criminally injurious conduct and does not require the applicant seek replacement work, we are statutorily constrained from denying her an award for work loss under the facts of this case. See *In re Woodfork*, V04-60130tc (12-17-04), 2004-Ohio-7342. In *Woodfork*, we allowed a work loss claim to a United States Postal Service employee, injured after being assaulted at work, for lost time she sustained when her employer sent her home early for failing to physically perform the same work as before the criminally injurious conduct. The *Woodfork* panel reasoned that whether the applicant's employer involuntarily or purposely prevented her from working was irrelevant, because she would have continued with her regular job and would not have sustained any work loss had she not been assaulted.

{¶ 14} Likewise, Ms. Lewis would have continued with her regular job and would not have sustained any work loss had she not been victimized. Ergo, under the statutory requirement, we find that Ms. Lewis should be granted \$36,810.40 in work loss incurred from September 10, 2001 through June 30, 2005.

Work Loss (Bank One)

\$ 6,918.37	9/10/01 - 12/31/01
\$22,722.14	1/1/02 - 12/31/02
\$22,893.88	1/1/03 - 12/31/03
\$13,771.41	1/1/04 - 8/8/04
\$20,525.54	8/9/04 - 12/31/04
<u>+11,538.05</u>	1/1/05 - 6/30/05
\$98,369.39	Total work loss incurred from 9/10/01-6/30/05

\$10,430.33	9/10/01 - 3/11/02 - Short term disability
\$ 3,171.68	3/12/02 - 5/31/02 - Long term disability
<u>+37,699.59</u>	9/10/01 - 8/8/04 - Net BWC benefits
\$51,301.60	Total collateral sources (C.S.)incurred from
9/10/01 - 8/8/04	

\$98,369.39	Total work loss incurred from 9/10/01-6/30/05
<u>-51,301.60</u>	Total C.S. received from 9/10/01 - 8/8/04
\$47,067.79	Net unreimbursed work loss incurred from
9/10/01	- 6/30/05

\$50,000.00	Maximum award amount
<u>-13,189.60</u>	Previously granted awards(10/15/03 & 11/29/04)
\$36,810.40	Unreimbursed work loss from 9/10/01 - 6/30/05

{¶ 15} Therefore, the February 28, 2005 decision of the Attorney General shall be reversed and the applicant shall be granted an award in the amount of \$36,810.40 for unreimbursed work loss.

GREGORY P. BARWELL
Commissioner

RANDI OSTRY LE HOTY
Commissioner

JAMES H. HEWITT III
Commissioner

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Commissioner Randi Ostry LeHoty and Commissioner Gregory P. Barwell, concurring opinion:

While I note that the Victims of Crime Compensation Fund is remedial in nature for the express purpose of economically reimbursing crime victims who meet certain statutory requirements, it is not a de facto Unemployment Compensation Fund, nor should it be. Applicant's failure to seek and perform work that she is actually capable of performing, which perhaps may or should include a broader range of prospects, is not a statutorily disqualifying or mitigating factor. But it may be worthy of legislative consideration.

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RANDI OSTRY LEHOTY
Commissioner

GREGORY P. BARWELL
Commissioner

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IT IS THEREFORE ORDERED THAT

1) The February 28, 2005 decision of the Attorney General is hereby REVERSED and judgment is rendered for the applicant in the amount of \$36,810.40;

2) This claim is remanded to the Attorney General for payment of the award;

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

GREGORY P. BARWELL
Commissioner

RANDI OSTRY LE HOTY
Commissioner

JAMES H. HEWITT III
Commissioner

ID #\34-tad-060606

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

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