[Cite as *In re Kilburn*, 2009-Ohio-7230.]

Court of Claims of Ohio

Victims of Crime Division

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IN RE: SHERRY KILBURN

SHERRY KILBURN

Applicant

Case No. V2008-30146

Judge Clark B. Weaver, Sr.

DECISION

{¶1} This matter came on to be considered upon the Attorney General's appeal from the September 5, 2008 order issued by the panel of commissioners. The panel's determination modified the final decision of the Attorney General, and granted judgment in favor of applicant in the amount of $1,770.40.

{¶2} R.C. 2743.52(A) places the burden of proof on an applicant to satisfy the Court of Claims Commissioners that the requirements for an award have been met by a preponderance of the evidence. *In re Rios* (1983), 8 Ohio Misc.2d 4, 8 OBR 63, 455 N.E.2d 1374. The panel found, upon review of the evidence, that applicant presented sufficient evidence to meet her burden.

{¶3} The standard for reviewing claims that are appealed to the court is established by R.C. 2743.61(C), which provides in pertinent part: "If upon hearing and consideration of the record and evidence, the judge decides that the decision of the panel of commissioners is unreasonable or unlawful, the judge shall reverse and vacate the decision or modify it and enter judgment on the claim. The decision of the judge of the court of claims is final."

{¶4} At the hearing before the panel of commissioners, applicant testified that she was injured as a result of a hit-skip accident and that she subsequently received the proceeds of an insurance settlement.

{¶5} The Attorney General asserts that applicant is entitled to an award of reparations representing mileage expense and work loss; however, the Attorney General determined that all of the medical expense incurred by applicant should have been reimbursed by readily available collateral sources. At the judicial hearing, the Attorney General argued that the methodology and calculations used by the panel to determine applicant's economic loss were inconsistent with prior decisions that the court has issued in similar cases. The court disagrees.

{¶6} According to the panel's decision, John Martin, the Attorney General's economic loss supervisor, testified that certain "subrogation costs" were deducted from applicant's gross collateral source reimbursement to calculate a net collateral source figure. Martin further testified that the Attorney General had relied on the rationale set forth in *In re Kissinger*, V93-72805tc (7-21-00) and *In re Kennard*, V97-63444tc (11-13-00).

{¶7} As an initial matter, and pursuant to the holding in *In re Fout-Craig*, V93-27851tc (2-5-99), the panel apportioned the proceeds of the insurance settlement between economic and non-economic loss. The panel determined that pursuant to *Fout-Craig*, 50 percent of applicant's settlement constituted a collateral source while the remaining 50 percent was considered non-economic loss. According to the calculations in the memoranda submitted by both applicant and the Attorney General, the parties agree that applicant's gross collateral source reimbursement amounts to $5,241.66.[1]

{¶8} Based upon the evidence and applicant's testimony, the panel determined that applicant's civil attorney had negotiated with the medical providers to reduce the amount of applicant's medical expense and that a portion of the proceeds of the insurance settlement was used to pay the remaining medical expense. In its decision, the panel calculated applicant's total economic loss by subtracting both the provider

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[1] The court notes that the figure representing applicant's gross collateral source reimbursement that was submitted by the parties differed by one cent due to a rounding error.

adjustments and the insurance proceeds from the total amount of the expenses that she incurred as a result of the criminally injurious conduct. The panel concluded that the total economic loss incurred by applicant was $7,012.05, which was reduced by $5,241.65, the adjusted collateral source benefit, resulting in a net unreimbursed economic loss in the amount of $1,770.40.

{¶9} The court finds that the Attorney General's reliance on the decisions in both *Kissinger* and *Kennard* is misplaced inasmuch as those decisions addressed the effect of subrogation rights which had been asserted to recover a portion of the proceeds from an automobile insurance settlement that had been paid to applicants. In this case, the insurance settlement was not subject to subrogation. Once the *Fout-Craig* apportionment had been determined, the calculation of applicant's net unreimbursed economic loss was simply a matter of deducting applicant's collateral sources from the expenses that she had incurred.

{¶10} The economic loss figures presented in the Attorney General's brief do not correspond to either the figures shown in the panel's decision or to the figures and calculations that were included in the somewhat cryptic expense exhibit that was attached to the Attorney General's final decision. Although the parties agree that the panel's decision should be modified to correct a clerical error that resulted in the amount of applicant's mileage expense being overstated by $2, the court finds that the Attorney General has otherwise failed to show that the panel's economic loss calculations are inaccurate.

{¶11} Upon review of the file in this matter, the court finds that the panel of commissioners was not arbitrary in finding that applicant was entitled to an award of reparations.

{¶12} Based on the evidence and R.C. 2743.61, it is the court's opinion that the decision of the panel of commissioners was reasonable and lawful. Therefore, the court shall modify the decision of the three-commissioner panel to reflect the $2 decrease in applicant's mileage expense.

ORDER

{¶13} Upon review of the evidence, the court finds the order of the panel of commissioners must be modified and the Attorney General's appeal must be denied.

{¶14} IT IS HEREBY ORDERED THAT:

{¶15} The order of September 5, 2008, (Jr. Vol. 2269, Pages 165-173) is MODIFIED and judgment is GRANTED in favor of applicant in the amount of $1,768.40;

{¶16} This claim is REMANDED to the Attorney General for payment;

{¶17} Costs assumed by the reparations fund.

CLARK B. WEAVER SR.
Judge

AMR/cmd

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

Jr. Vol. 2271, Pg. 42
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