

# Court of Claims of Ohio Victims of Crime Division

The Ohio Judicial Center

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Columbus, OH 43215  
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IN RE: DAVID S. LEMIEUX

DAVID S. LEMIEUX

Applicant

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Case No: V2004-60920

Commissioners:

Karl C. Kerschner, Presiding

Thomas H. Bainbridge

Randi Ostry LeHoty

## ORDER OF A THREE COMMISSIONER PANEL

{¶1} On November 10, 2003, the applicant, David Lemieux, filed a compensation application as the result of an assault which occurred on August 24, 2003. On January 22, 2004, the Attorney General granted the applicant an award of reparations in the amount of \$138.21 for allowable expense. On March 10, 2004, the Attorney General granted the applicant a second award of reparations in the amount of \$4,380.64, which represented additional medical and mileage expenses. On July 26, 2004, the Attorney General made a third award to the applicant, in the amount of \$3,089.50, which represented additional medical expenses.

{¶2} On December 3, 2004, a panel of commissioners issued an order granting the applicant an emergency award for work loss in the amount of \$2,000.00. On January 28, 2005, a panel of commissioners issued an order granting the applicant an additional award of reparations in the amount of \$1,826.43. Accordingly, for the period from August 24, 2003 through November 20, 2003, the applicant had incurred a total work loss of \$3,826.43.

{¶3} On May 2, 2005, the Attorney General granted the applicant an emergency award in the amount of \$1,826.43. On June 24, 2005, the Attorney General granted the applicant an additional award in the amount of \$5,465.12, which represented allowable expense in the amount of \$55.00 and work loss for the period November 21, 2003 through December 31, 2004. On September 8, 2005, the Attorney General again granted the applicant an award for work loss for the period January 1, 2004 through December 31, 2004, in the amount of \$1,697.92.

{¶4} On December 9, 2005, a panel of commissioners issued an order granting the applicant an additional award of \$12,845.48, which amount included the prior award of \$1,697.92, granted by the Attorney General on September 8, 2005.

{¶5} On November 5, 2007, the applicant filed a supplemental compensation application seeking additional work loss after December 31, 2004. On January 29, 2008, the applicant submitted a request for an emergency award. On February 15, 2008, the Attorney General issued a finding of fact and decision awarding the applicant an emergency award in the amount of \$2,000.00. On May 5, 2008, the Attorney General rendered a finding of fact and decision on the applicant's supplemental compensation application. The Attorney General noted that the applicant had previously been granted awards of reparations in the amount of \$33,626.81, however, the applicant had failed to prove by a preponderance of the evidence that he incurred additional work loss. On May 9, 2008, the applicant submitted a request for reconsideration. On July 7, 2008, the Attorney General issued a Final Decision finding no reason to modify its decision of May 5, 2008. On July 14, 2008, the applicant filed a notice of appeal from the July 7, 2008 Final Decision. Hence a hearing was held before this panel of commissioners on December 3, 2008 at 12:25 P.M.

{¶6} The applicant, David Lemieux appeared via telephone, while his attorney Michael Falleur appeared in person. The state of Ohio was represented by Assistant Attorneys General Stacy Hannan and Amy O'Grady who appeared in person.

{¶7}The issue before the panel was whether applicant incurred additional work loss for the years 2005 and 2006 as a result of the permanent eye injury he sustained at the time of the criminally injurious conduct. The applicant testified he earned \$11,517.00 in 2006. This money was earned on an as needed basis from a contractor, Walid Construction, Inc. Currently, the applicant testified he is employed as a pretzel bagger at a pretzel-making company. Due to his eye injury he is no longer able to be employed as a finish carpenter. In 2005, the applicant reported income in the amount of \$3,900.00, for work done on rental properties for an individual named Stiles. Finally, the applicant related that Mr. Walid stated he could no longer employ him due to the limitations imposed by his permanent eye injury.

{¶8}The Attorney General cross-examined the applicant concerning his tax returns of 2005, and established the returns were filed three years late. The \$3,900.00 was an estimate of what he had earned in 2005 and the tax return was not accompanied by any 1099 forms. He did not provide contact information for any employers he alleged he tried to contact for work in 2005.

{¶9}The Attorney General then questioned the applicant concerning his work history in 2006. The applicant stated he worked for Walid Construction in 2006 and employment records in Mr. Walid's possession would be an accurate reflection of the times he worked and the money he earned. Work records indicate the applicant received net pay from Walid Construction Inc. for the period August 22, 2006 through December 28, 2006 in the amount of \$8,800.01.

{¶10}The Attorney General called economic loss supervisor John Martin to testify. He provided background information as to how self employment income is verified. With respect to this claim, there were no supporting documents attached to the 2005 tax return and accordingly work loss could not be calculated since income of \$3,900.00, could not be verified.

{¶11}The Attorney General then introduced State's Exhibit A, an affidavit of the applicant. Mr. Martin was directed to a portion of the affidavit which indicated the

applicant's 2005 income was based on an estimate. Mr. Martin asserted an estimate was not an appropriate basis for calculating work loss. A 2006 tax return was filed without a 1099 form since the 1040EZ tax form prohibit the use of 1099 income. The applicant stipulated that the income on the 2006 tax return was prepared with the use of a W-2 form rather than a 1099 form.

{¶12}The Attorney General then introduced State's Exhibit B, pay records from Walid Construction for the period from August 22, 2006 through December 5, 2007. These records indicate the applicant was being paid at the rate of \$17.00 per hour with no medical or disability coverage. The Attorney General also introduced State's Exhibit C, an Excel spreadsheet prepared by Mr. Martin to tabulate the information contained on the Walid Construction pay records. Finally, the Attorney General introduced State's Exhibit D, the initial employment information report received from Walid Construction dated December 19, 2003. The report indicated that the applicant received \$15.00 per hour for his work with Walid Construction, but that all dates of employment were prior to the injury.

{¶13}The applicant cross-examined Mr. Martin concerning the figures used for the applicant's initial work loss. Mr. Martin stated initially a figure of \$50.29 per day was used to calculate the applicant's work loss but that was a combination of two sources of income, one from Walid Construction and the other from self employment income. A typical work year would consist of 260 working days times \$50.29 per day resulting in an income of \$13,075.40. These were the figures used as a basis for the applicant's income prior to his injury. Questioning then concerned the applicant's 2005 income tax. Mr. Martin conceded tax returns have been used in the past, but in this particular instance since estimated income had been used, there would be insufficient evidence to use the 2005 income tax return as a basis for calculating work loss. However, if the figures appearing on the 2005 and 2006 tax returns are used as a basis of applicant's income, the applicant would have sustained work loss for the years 2005 and 2006. Whereupon the testimony of the witness was concluded.

{¶14}In closing the applicant asserted that the Attorney General calculated the applicant's income at \$13,075.40 prior to his injury. This figure should be used as a base for future work loss. From the information provided by tax returns in 2005 and 2006, the applicant has been unable to meet his prior income level. Accordingly, the applicant asserts he has established by a preponderance of the evidence that he incurred work loss for the years 2005 and 2006.

{¶15}The Attorney General asserted that the tax returns alone, without accompanying 1099s, were insufficient evidence upon which to base a calculation of work loss. The Attorney General asserted that the applicant has failed to prove by a preponderance of the evidence that he incurred work loss in 2005 and 2006. Whereupon the hearing was concluded.

{¶16}The governing statute in this matter, R.C. 2743.51(G), states as follows:

"(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."

{¶17}"There are two elements needed to prove that work loss was incurred. First, one must prove work loss was sustained by showing an inability to work. Second, one must prove the monetary amount of the work loss." *In re Berger* (1994), 91 Ohio Misc. 2d 85, 87, 698 N.E. 2d 93.

{¶18}Work history can be established by evidence, notwithstanding the victim's failure to file tax returns and pay taxes on a regular basis. *In re Butler*, V89-83822tc (11-8-91). "For affidavits, once admitted into evidence, are to be considered and weighed in the same manner as all other evidence." *In re Rea* (1989), 61 Ohio Misc. 2d 732, 741, 584N.E. 2d 1350.

{¶19} From review of the file and with full and careful consideration given to all testimony and information presented at the hearing, we find the applicant has proven by a preponderance of the evidence that he incurred work loss for the periods, 2005 and 2006. We find the applicant has established this work loss on the basis of the tax returns filed, his affidavit and his testimony. The Attorney General has not presented evidence to rebut the information presented by the applicant. This claim shall therefore be remanded to the Attorney General for calculation of work loss. The Attorney General shall use the prior figure of \$13,075.40 as the applicant's annual earned income prior to his injury. The Attorney General has calculated the applicant's net income based on his 2005 and 2006 tax returns and granted him the difference between those amounts and his base income of \$13,075.40. Therefore, the Attorney General's decision of July 7, 2008 is reversed.

IT IS THEREFORE ORDERED THAT

- {¶20}1) State's Exhibits A, B, C, and D are admitted into evidence;
- {¶21}2) The July 7, 2008 decision of the Attorney General is REVERSED and judgment is rendered in favor of the applicant;
- {¶22}3) This claim is remanded to the Attorney General for work loss calculations in accordance with the directions provided above;
- {¶23}4) This order is entered without prejudice to the applicant's right to file a supplemental compensation application, within five years of this order, pursuant to R.C. 2743.68;
- {¶24}5) Costs are assumed by the court of claims victims of crime fund.

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KARL C. KERSCHNER  
Presiding Commissioner

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THOMAS H. BAINBRIDGE  
Commissioner

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RANDI OSTRY LE HOTY  
Commissioner

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

Filed 2-13-09

Jr. Vol. 2271, Pgs. 58-65

To S.C. Reporter 7-13-11