[Cite as *In re Barnes,* 2014-Ohio-5906.]

Court of Claims of Ohio
Victims of Crime Division
The Ohio Judicial Center
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IN RE: DENISE BARNES

DENISE BARNES

Applicant
Case No. 2011-60654 VI

Commissioners:
Anderson M. Renick, Presiding
Daniel R. Borchert
Holly True Shaver

ORDER OF A THREE-COMMISSIONER PANEL

{¶1} On October 25, 2006, applicant, Denise Barnes filed a compensation application as the result of being in an accident on November 26, 2005, caused by a drunk driver. On December 12, 2006, the Attorney General issued a finding of fact and decision determining that applicant qualified as a victim of criminally injurious conduct; however no award could be granted. The Attorney General explained:

{¶2} "[Y]ou have incurred economic loss as a result of the crime. However, information received by the Attorney General indicates that you have received proceeds from an insurance settlement relating to this incident. Specifically, you received proceeds in the amount of $102,155.02, and after deducting attorney fees ($33,333.33), costs ($729.53), and monthly administrative fees ($150.00) you received $67,942.16 as a net settlement. Pursuant to *In re Fout-Craig*, V93-27851tc (2-5-99), the applicant has the burden to prove which portion of the settlement amount, if any, constitutes reimbursement for non-economic loss.

{¶3} "Based on the Victim Impact Questionnaire and the information contained in the claim file, your injuries resulted in some permanent loss of function, scarring, and limitations in recreational activities. The Attorney General submits that such factors should result in a 20/80% disbursement of the settlement between

economic and non-economic loss. Accordingly, the Attorney General makes the following findings:

{¶4} "After applying the apportionment identified above to your net settlement ($67,942.16), the Attorney General finds that $54,353.73 of your net settlement proceeds constitutes compensation for non-economic losses, and $38,588.43 ($13,588.43 + $25,000 in med-pay) constitutes a collateral source that must be applied to the economic loss you have submitted. Since the collateral source amount outweighs the $31,053.05 of economic loss you have incurred to date ($22,186.43 the total amount of money directly paid to providers out of your settlement on the disbursement sheet + $8,866.43 the total amount of out of pocket expenses from the Detail Expense Exhibit), the law requires that your claim be denied at this time."

{¶5} Applicant filed supplemental compensation applications on April 17, 2007, April 28, 2009, and November 8, 2010 seeking reimbursement for co-pays incurred and mileage expenses. While the Attorney General acknowledges that applicant had incurred additional expense, these expenses did not exceed the remaining collateral source balance from the insurance settlement. The Attorney General answered applicant's supplemental compensation application with decisions rendered on April 25, 2007, August 27, 2009, and December 29, 2010, respectively, noting on each occasion that collateral sources exceed the applicant's additional allowable expenses.

{¶6} On March 9, 2011, applicant filed a supplemental compensation application again seeking an award for additional medical and mileage expenses incurred, but also asserting a claim for work loss based upon a lost job opportunity. On May 9, 2011, the Attorney General issued a finding of fact and decision for the March 9, 2011 supplemental which acknowledged that applicant incurred additional allowable expense which lowers the balance of the remaining collateral source amount to $5,064.97. Furthermore, applicant's claim for work loss was denied since she failed to prove she incurred such an expense.

{¶7} On June 2, 2011, applicant submitted a request for reconsideration. On July 14, 2011, the Attorney General rendered a Final Decision finding no reason to modify the initial decision concerning work loss. On July 19, 2011, applicant filed a notice of appeal from the July 14, 2011 Final Decision of the Attorney General.

{¶8} However, prior to a hearing on the merits, a panel of commissioners issued an order granting applicant's motion to withdraw the appeal and directing the Attorney General to render a decision on the pending supplemental compensation application.

{¶9} On October 31, 2011, applicant filed a supplemental compensation application. The Attorney General again conceded that applicant incurred additional allowable expense in the amount of $233.14, but when this amount is off-set against the remaining collateral source a balance of $4,831.83 remains.

{¶10} On September 26, 2012, applicant filed another supplemental compensation application. Applicant asserted a claim for work loss, based on wages she could have earned if she was not injured. On January 24, 2013, the Attorney General issued a finding of fact and decision based on the supplemental compensation application which denied applicant's claim for work loss based upon the lack of information. Applicant submitted a request for reconsideration. On April 5, 2013, the Attorney General rendered a Final Decision finding no reason to modify the initial decision. On April 8, 2013, applicant filed a notice of appeal from the April 5, 2013 Final Decision of the Attorney General. Hence, a hearing was held before this panel of commissioners on October 24, 2013 at 9:55 a.m.

{¶11} Applicant Denise Barnes appeared at the hearing accompanied by her attorney, Michael Falleur, while Assistant Attorney General Megan Hanke represented the state of Ohio.

{¶12} The only issue before this panel is work loss. Applicant urges that she was employed by a home healthcare business operated by Cindy Heit-Welch from February 1995 through April 1998, at which point, Cindy Heit-Welch sold her

business and their employment relationship ended. Subsequently, on November 26, 2005, applicant was involved in a vehicular crash with a drunk driver and sustained serious personal injuries. During the course of applicant's recovery, she had the need for the use of home health care services provided by Cindy Heit-Welch's new company Gem City Home Care. Applicant contends during her stay at Cindy Heit-Welch's facility, they discussed reemployment. However, due to applicant's medical problems that was not an option. Applicant now asserts that after she had fully recovered from her injuries, in August of 2008, her work loss should be calculated on the loss of a job opportunity with Gem City Home Health Care.

{¶13} The Attorney General contended that the work loss in this case should be calculated based on her work loss with her employer at the time of the criminally injurious conduct, Wiggins Cleaning. The Attorney General explained that the purpose of the crime victim's compensation program is to put applicant in the same position economically that she was in at the time of her injury. The evidence in the claim file reveals that Denise Barnes was unable to work from November 26, 2005 through June 1, 2006 and the issue of re-employment does not need to be considered since the facts clearly establish her employment status at the time she was injured.

{¶14} Applicant called Cindy Heit-Welch to testify via telephone. Ms. Heit-Welch related that Denise Barnes had been a former employee and had advanced from the position of a receptionist to Human Resources Specialist. Their working relationship ended when Ms. Heit-Welch sold her Home Health Care business in 1999. The two became reacquainted when Ms. Barnes was in need of Ms. Heit-Welch's services for home health care from Ms. Heit-Welch's new business Gem City. Ms. Heit-Welch related that, at some time in 2008, she discussed Ms. Barnes' re-employment with her new company for the position of Human Resources Specialist, but those talks terminated due to Ms. Barnes' physical limitations to perform the travel requirements necessary to fulfill the obligations of

this position. Ms. Heit-Welch provided a range of pay that she would have compensated Ms. Barnes, but conceded no specific employment terms were ever discussed.

{¶15} Upon cross-examination, Heit-Welch stated that initially when she started Gem City, she had no need for a Human Resources Specialist and it was not until 2006 that she hired such a person on a part-time basis. She conceded that she had no contact with Ms. Barnes from 1998, when Ms. Barnes terminated her employment with Heit-Welch's initial company, until sometime in 2008 when she provided services to Ms. Barnes. She had no knowledge of Ms. Barnes' employment history during this ten year period. Finally, a job interview outlining the responsibilities and duties of a position at Gem City was never conducted. Whereupon, the testimony of Cindy Heit-Welch was concluded.

{¶16} Denise Barnes took the witness stand and testified concerning her employment history from the time she left Cindy Heit-Welch's employment in 1998 until the present. Her jobs during that period consisted of cleaning various facilities, working as a teacher's-aide, and currently working at a home health care business in an unspecified position. Finally, Denise expressed her desire to work at Gem City as opposed to any position she held since the criminally injurious conduct of November 26, 2005.

{¶17} While applicant stated on direct examination that Heit-Welch told her she would like to rehire applicant when she opened her new business, applicant admitted that she had no contact with Heit-Welch in 2001. Furthermore, she was employed with Wiggins Cleaning from 2004 through 2006. Applicant stated her employment history after she left Heit-Welch's Advantage Home Care consisted of house, library, office cleaning and working as a teacher's-aide at Brookside School. When asked why she had not sought Human Resources positions, she related her lack of education in that field. Finally, her current position with Buckeye Home Health requires her to perform both receptionist and medical records duties.

{¶18} On redirect examination, the only questions posed concerned Denise's hip replacement surgery which occurred in May 2011. Whereupon, the testimony of applicant was concluded.

{¶19} The Attorney General called William Fulcher, Deputy Directory of Investigations with the Ohio Attorney General's Office, to testify. Mr. Fulcher stated that he calculated work loss in this case. First, he considered her employment at the time of the injury with Wiggins Cleaning and then looked back five years before the injury to determine which method of calculation was more advantageous to Ms. Barnes. It turned out that work loss was calculated based on her employment at the time she was injured. Applicant incurred eight days of work loss for a total net work loss of $159.04.

{¶20} On cross-examination, Mr. Fulcher testified that family or lifestyle issues are not considered when calculating work loss. Based upon a telephone contact with Cindy Heit-Welch, Mr. Fulcher was under the impression that no job had been offered to Denise Barnes. Subsequent letters written by Ms. Heit-Welch to the Attorney General's office did not persuade Mr. Fulcher to change his opinion. When questioned about the case *In re Balish*, V2005-80436tc (1-14-10), Mr. Fulcher related he did not testify about the case nor was he involved in any work loss negotiations. Whereupon, the testimony of Mr. Fulcher was concluded.

{¶21} In closing, applicant urges that this case is dependent on the credibility of the testimony of applicant and her witness, Cindy Heit-Welch. Applicant directs this panel to the decisions rendered in *Balish* and *In re Zenni,* 63 Ohio Misc. 2d 68 (Ct. of Cl. 1992), for aid in reaching a determination in this matter. Finally, family issues i.e., child care and divorce should be considered when determining the calculation of work loss.

{¶22} The Attorney General stated that this case should be decided on the two prong-test outlined in *In re Berger*, 91 Ohio Misc. 2d 85 (Ct. of Cl. 1994). First, applicant must prove work loss was sustained by showing an inability to work and second, applicant must prove the monetary amount of the work loss. At the

time of the criminally injurious conduct the applicant was employed by Wiggins Cleaning at a rate of $7.50 per hour. The purpose of the Crime Victim's fund is to put applicant back into the same economic position that existed at the time she was injured. The Attorney General determined applicant's work loss using her employment status at the time she was injured, as well as looking back five years to her prior employment. The most advantageous calculation for applicant was to use her current employment which was the method adopted by the Attorney General. The Attorney General contended that both *Balish* and *Zenni* can be distinguished from the case at bar. Accordingly, the Final Decision of the Attorney General should be affirmed.

{¶23} In closing, applicant reiterated her position with respect to Ms. Heit-Welch's desire to re-employ applicant and again focused on the *Balish* decision to support that position. Whereupon, the hearing was concluded.

{¶24} R.C. 2743.51(G) in pertinent part states:

"'Work loss' means loss of income from work that the injured person would have performed if the person had not been injured …"

{¶25} There are two elements necessary to prove work loss. First, one must prove work loss was sustained by showing an inability to work. Second, one must prove the monetary amount of work loss. Both elements must be proved by corroborating evidence. *In re Berger*, 91 Ohio Misc. 2d 85 (Ct. of Cl. 1994). In order to establish the loss of a job expectation, the applicant must prove a prior agreement existed between the applicant and the prospective employer, the terms of the employment, such as wages, hours, and specific conditions of employment must be established and agreed upon by the applicant and the prospective employer, and the loss of the job must relate solely to being a victim of criminally injurious conduct. See *In re Langwasser*, V2009-40790jud (6-8-11), 2011-Ohio-7084; *In re Brown,* V93-68964sc (7-24-94) affirmed tc (12-27-94); *In re Carreon*, V93-58560sc (7-29-94).

{¶26} From review of the case file and upon full and careful consideration given to the testimony presented at the hearing, and the arguments of the parties, we find the applicant has failed to prove, by a preponderance of the evidence, that she suffered work loss as defined by R.C. 2743.60(G).

{¶27} While applicant urges us to follow the holdings in *Zenni*, a review of the case reveals it involves calculation of dependent's economic loss based upon earnings from a previous position, due to *Zenni's* inconsistent work history at the time of his death. A panel of commissioners determined that, "it is reasonable to reach back five years to obtain an average income upon which to calculate dependent's economic loss." *Zenni* had worked for the Hamilton County Clerk of Court's Office, started a failed restaurant business, and was attempting to embark on a career in real estate during this five year period. While the opinion discusses the decedent's inquiry with the Clerk's Office about a possible return, the calculation of dependent's economic loss was based on his past five years of work history and did not consider his possible return to the Clerk's Office in the calculation of the award.

{¶28} Applicant also directs us to the decision in *Balish,* which addresses loss of a job expectation in the following manner:

{¶29} "Applicant's attorney Michael Falleur appeared, while Assistant Attorney General Amy O'Grady represented the state of Ohio. The parties indicated that the sole issue to be addressed at the hearing was work loss and an agreement had been reached with respect to this issue . . .

{¶30} However, contact with Jim Holowicki of Holowicki Enterprises revealed that he had in fact offered the applicant a position with his organization in 2005. Mr. Balish was unable to accept this position to the injuries he sustained at the time of the criminally injurious conduct. Accordingly, the parties are in agreement that the applicant suffered the loss of a job expectation with Holowicki Enterprises. Therefore, the parties request this matter be remanded to the

Attorney General for further investigation, calculation, and payment of an award for work loss."

{¶31} A panel of commissioners followed the parties' request and the claim for work loss was remanded to the Attorney General for calculation and payment. While applicant urges this panel to explore the claim file in the *Balish* case and learn about the negotiations that led to this agreement, this panel will consider only evidence presented in the claim file in the case at bar and evidence presented at the hearing. Since no evidence was presented concerning these negotiations and the panel speaks through its journal, the *Balish* decision has no precedential value.

{¶32} A review of the claim file reveals that on April 8, 2011, in an email from Cindy Heit-Welch to Kate Wasson (an investigator in the Attorney General's office) Ms. Heit-Welch stated "[t]he position offered to Denise was not posted." On June 15, 2011, Ms. Heit-Welch again emailed Ms. Wasson reporting that no written offer had been made to Ms. Barnes and no one was hired for the same position. In a telephone conversation on October 24, 2011 between Ms. Wasson and Ms. Heit-Welch, memorialized by Ms. Wasson, Ms. Heit-Welch stated she had a discussion with Ms. Barnes concerning an HR position which would pay about $15.00 to $20.00 per hour ($31,200.00 to $41,600.00 per year). However, Ms. Heit-Welch noted this was a discussion, not a job offer.

{¶33} In an affidavit submitted by applicant, Cindy Heit-Welch affirmed in pertinent part:

{¶34} "Once we both were aware that Denise could not perform the job I sought that she undertake, we did not discuss the matter further. I hired a different person into that job.

{¶35} "When Denise worked for my company in the late 1990s, she was paid $12.00 per hour for work as an H.R.Specialist. She would have done similar work, but in an expanded capacity, had she been able to accept work with Gem City Home

Care in 2008. Her pay would have been no less than what she was paid in the 1990s, and actually would have been significantly higher, per hour."

{¶36} The evidence submitted by applicant does not meet the specific terms of employment, i.e., wages, hours, and specific conditions of employment, for this panel to find applicant suffered a loss of a job exception. See *Langwasser, Brown*, and *Carreon*. Finally, a discussion of a job opportunity does not equate to a job offer.

{¶37} Furthermore, applicant was employed at the time of the incident and the Attorney General utilized both the five year income averaging method and her wages at the time of the incident to determine which method was more advantageous to applicant.

{¶38} Therefore, the April 5, 2013 decision of the Attorney General is affirmed.

IT IS THEREFORE ORDERED THAT

1) Applicant's October 1, 2013 motion to permit Cindy Heit-Welch to testify via telephone is GRANTED;

2) The April 5, 2013 decision of the Attorney General is AFFIRMED;

3) This claim is DENIED and judgment is rendered in favor of the state of Ohio;

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;

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

ANDERSON M. RENICK
Presiding Commissioner

DANIEL R. BORCHERT
Commissioner

HOLLY TRUE SHAVER
Commissioner

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

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