



Court of Claims of Ohio

Victims of Crime Division

The Ohio Judicial Center
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IN RE: CURTIS DAILEY

WILLADEAN DAILEY

CHRISTAN MASH

Applicants
Case No. 2013-00326 VI

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

ORDER OF A THREE COMMISSIONER PANEL

- {¶1} On December 21, 2011, Curtis Dailey filed a compensation application as a result of an incident that occurred on December 3, 2011, when his daughter's boyfriend struck him in the head multiple times with a piece of firewood. Dailey lost consciousness during the assault and was treated at both O'Bleness Memorial Hospital in Athens and Grant Medical Center in Columbus, Ohio. At the time of the assault, Dailey had been living in Pennsylvania but was visiting family in Ohio at the home of his ex-wife, Willadean Dailey.
- {¶2} Dailey was granted an initial award of reparations in the amount of \$9,518.72. Part of that award represented replacement services loss for health care rendered by Diane Burkhart, a Medical Home Care Home Health Aide. Burkhart kept a daily log of the services she provided to Dailey, and he paid her in cash or money orders. Those expenses were reimbursed for the period from December 6, 2011 through February 25, 2012.
- {¶3} Dailey's primary care physician was Deborah Bishop, M.D., whose office was in Lake City, Pennsylvania. In his initial claim, Dailey's expenses related to office visits to Dr. Bishop from December 23, 2011 through May 23, 2012 were

reimbursed. Dailey was also reimbursed for travel expenses he paid to Burkhart when she took Dailey to visit Dr. Bishop from December 2011 through February 2012. In addition, costs for medications prescribed by Dr. Bishop that were filled on June 21, 2012 at the Girard Pharmacy in Girard, Pennsylvania were reimbursed.

{¶4} Subsequent to Dailey's claim being granted, applicants Willadean Dailey and Christan Mash (Dailey's daughter) both filed supplemental applications. On September 12, 2012, Mash filed a supplemental application seeking replacement services loss for services she provided to Dailey from August 30 through September 10, 2012, including shopping, laundry, cooking, and cleaning. Mash calculated her expenses as roughly 40 hours per week at a rate of \$15 per hour.

{¶5} On September 17, 2012, Willadean filed a supplemental application, wherein she sought mileage for two trips to take Dailey to Dr. Bishop on June 21 and July 20, 2012. Willadean explained in her application that Dailey had moved in with her on June 1, 2012, and that he lived with her until he began to live with Christan at the end of August 2012. Willadean also sought compensation for replacement services loss from June 1 through August 15, 2012. Willadean calculated her expenses based upon providing eight hours of care per day to Dailey, at a rate of \$15 per hour. The Attorney General consolidated the supplemental applications with Dailey's claim.

{¶6} On November 21, 2012, the Attorney General filed a finding of fact and decision wherein the supplemental applications were denied on a number of bases. First, the Attorney General asserted that there was no medical documentation in the file to support the necessity of care for Dailey beyond May 2012. The travel/mileage expenses that Willadean sought for the two trips to Dr. Bishop's office were denied on the basis that they could not be verified because Dr. Bishop's medical license was suspended in September 2012, and the Attorney General's calls to her office were not returned during the investigation of the supplemental applications. On December 6, 2012, applicants filed a request for reconsideration wherein they stated that Dailey had obtained a new primary care physician and was examined on December 4, 2012 to verify his need for home

health care. Willadean also provided pharmacy print outs to prove that they traveled to Dr. Bishop's office in Lake City, Pennsylvania for appointments on June 21 and July 20, 2012. Attached to the request for reconsideration is a note from Wayne Myles, D.O., dated December 4, 2012, stating that Dailey was in need of round-the-clock care because of cognitive defects resulting from injuries in an attack.

{¶7} On January 4, 2013, Mash filed a second supplemental application seeking compensation for replacement services loss provided to Dailey from September 10 through Dec. 31, 2012, for 4 days per week, 8 hours per day, at a rate of \$15 per hour. On May 3, 2013, the Attorney General filed a Final Decision wherein the Attorney General asserted that its medical consultant, John W. Cunningham, M.D., M.S., stated that he was unable to verify the necessity for the claimed replacement services loss past May 2012 due to a lack of medical documentation. Dr. Cunningham considered the letter from Dr. Myles, but concluded that to determine what level of care was necessary, Dailey would have to be examined by an independent home health care occupational therapist or a nurse practitioner to assess his abilities and needs. The Attorney General found no reason to modify the initial decision. On May 31, 2013, applicants filed a notice of appeal from the Attorney General's Final Decision.

{¶8} On October 24, 2013, a hearing was held before this panel of commissioners. Applicants Willadean and Curtis Dailey attended the hearing with their attorney, Philip Gauer. Assistant Attorney General Gwynn Kinsel represented the state of Ohio.

{¶9} Willadean Dailey testified that the assault had a significant effect on Dailey. Willadean explained that as a result of the assault, Dailey can no longer drive, his short-term memory is impaired, he forgets things, he has caused fires cooking in her home, he forgets to feed his dog, he cannot manage money, and he cannot be trusted to complete simple tasks. In her experience with caring for him for over two months, she believes that he continues to require round-the-clock care. Willadean took Dailey to Dr. Myles in December 2012 and testified that she was told that Dailey's condition was permanent. According to Willadean, she

documented her hours of caregiving as instructed by employees of both the Attorney General's office and the Meigs County victims assistance program, and she thought she could rely on their advice in order to receive compensation.

{¶10} In support of their claims, applicants submitted two letters from Marianne Malawista, PhD, the speech-language pathologist who treated Dailey at O'Bleness Memorial Hospital from December 2011 through May 2012. In April 2012, Dr. Malawista provided two letters that detail the problems that Dailey reported to her after the attack, including significant deficits in self-care activities of daily living, such as money management, food preparation, paying bills, general safety, and personal hygiene. Dr. Malawista states that Dailey suffers from post-concussion cognitive/language issues, and she recommended a neuropsychological evaluation to determine a prognosis for recovery. She stated that Dailey continued to display significant memory problems, particularly following time lapse.

{¶11} Applicants also presented a letter from Wayne Myles, D.O., from his practice at Holzer Health System in Albany, Ohio. Dr. Myles states that he reviewed the notes from Dr. Malawista dated April 6 and 20, 2012, and that he examined Dailey on January 11, 2013. In Dr. Myles' opinion, there had been no changes in Dailey's condition since May 2012.

{¶12} The Attorney General presented the testimony of Danielle Longhenry, an investigator with the Attorney General's office. The panel found Longhenry qualified as an expert in the field of public benefits. According to Longhenry, Dailey became eligible for the Medicaid spend-down program in July 2012, whereby his costs for home health care would have been eligible for payment by Medicaid. Longhenry also explained that Dailey eventually applied for the Medicaid waiver program on May 10, 2013, and that at the time of the hearing, he was still on a waiting list. Once Dailey is approved for the Medicaid waiver program, a home health nurse would perform an assessment to determine his needs. According to Longhenry, Willadean and Christan could apply to be certified as home health aides for Dailey and their expenses could be paid through the waiver program.

{¶13} An applicant has the burden of proof to satisfy the Court of Claims Commissioners that the requirements for an award have been met. *In re Rios*, 8 Ohio Misc.2d 4 (Ct. of Cl. 1983).

{¶14} R.C. 2743.51(B) states, in part:

“‘Collateral source’ means a source of benefits or advantages for economic loss otherwise reparable that the victim or claimant has received, or that is readily available to the victim or claimant, from any of the following sources:

“* * *

“(2) The government of the United States or any of its agencies, a state or any of its political subdivisions, or an instrumentality of two or more states, unless the law providing for the benefits or advantages makes them excess or secondary to benefits under sections 2743.51 to 2743.72 of the Revised Code;

“(3) Social security, medicare, and medicaid.”

{¶15} R.C. 2743.60(H) states:

“If a claimant unreasonably fails to present a claim timely to a source of benefits or advantages that would have been a collateral source and that would have reimbursed the claimant for all or a portion of a particular expense, the attorney general, a panel of commissioners, or a judge of the court of claims may reduce an award of reparations or deny a claim for an award of reparations to the extent that it is reasonable to do so.”

{¶16} In addition, “where an applicant fails to file a claim for benefits with a specified collateral source that would have provided reimbursement of economic loss, and where the failure to file prevented the applicant from receiving such collateral source benefits, that expense shall be considered recouped from a readily available collateral source within the meaning of R.C. 2743.51(B) and R.C. 2743.60(D).” *In re Schroepfer*, 4 Ohio Misc.2d 15 (Ct. of Cl. 1983).

{¶17} Upon review of the evidence, the panel finds the following. There is no dispute that Dailey’s primary care physician, Dr. Bishop, had her medical license suspended on September 11, 2012. However, evidence in the claim file shows that prescriptions were filled at the Girard Pharmacy in Girard, Pennsylvania, for medications prescribed by Dr. Bishop on June 21 and July 20, 2012, prior to her

license suspension. The panel finds that those prescriptions and doctor visits were causally related to the criminally injurious conduct. The panel further finds that documentation in the claim file supports Willadean's claim that she drove Dailey to Dr. Bishop's office for appointments on June 21 and July 20, 2012. Therefore, the panel finds that applicants have proven by a preponderance of the evidence that Dailey was seen by Dr. Bishop on those dates. Indeed, in the initial application, Dailey's prescriptions from June 21, 2012 were paid. Therefore, that portion of the Attorney General's November 21, 2012 finding of fact and decision and May 3, 2013 Final Decision denying Willadean's travel expenses shall be reversed. The claim shall be remanded to calculate Willadean's travel expense for the June 21 and July 20, 2012 trips to Dr. Bishop's office.

{¶18} Turning to the claims for replacement services loss, evidence in the claim file supports Longhenry's testimony that Dailey became eligible for Medicaid in July 2012, and that an assessment of his need for home health care could have been initiated at that time. Pursuant to R.C. 2743.62(B), the Attorney General had the authority to order applicant to undergo a mental examination to assess his ability to care for himself. The Attorney General's medical consultant appeared to render his conclusions based on the lack of medical documentation. While it appears that such course of action would have been in the best interests of the victim, the Attorney General chose not to follow this course of action. Accordingly, the panel finds that any claims for replacement services loss from July 1, 2012 forward must be denied pursuant to R.C. 2743.60(H), failure to utilize a readily available collateral source. Therefore, inasmuch as Christan's claims for replacement services loss relate to the period after July 1, 2012, the panel finds that the final decision of the Attorney General as to her claims must be affirmed. After Dailey is evaluated for his medical needs, applicants may file supplemental applications with regard to services that are not eligible for Medicaid.

{¶19} However, the panel further finds that Willadean's testimony was credible and persuasive as to the amount of care that she provided to Dailey during the month

of June 2012. Moreover, the evidence shows that Dailey was not eligible for Medicaid during the month of June 2012. The panel finds that the letters from Dr. Malawista and Dr. Myles show by a preponderance of evidence that Dailey continues to suffer from cognitive defects and that his condition has not improved since May 2012. Although the Attorney General argues that Dailey's medical treatment has been sporadic and intermittent, the panel is persuaded that applicants have proven by a preponderance of the evidence that Dailey suffered significant cognitive deficits as a result of the criminally injurious conduct, that he requires some level of in-home care, and that his condition has not significantly improved since May 2012.

{¶20} The panel finds that Willadean was credible and persuasive when she testified that in June 2012, she allowed Dailey to reside with her and that she provided eight hours of care per day to him. The panel further finds that Willadean's calculations of eight hours of care at a rate of \$15 per hour is reasonable. Although the Attorney General argues that Willadean did not provide sufficient documentation, a panel of commissioners has stated that while documentation is preferred, it is not mandatory. See *In re Evans*, V2001-32003tc (11-30-01). Therefore, the Attorney General's final decision shall be reversed, in part, and the claim will be remanded to the Attorney General for payment of replacement services loss provided by Willadean Dailey for the month of June 2012, as documented in her September 17, 2012 supplemental application.

{¶21} Lastly, with regard to applicants' argument that agents of the Attorney General's office or of the Meigs County victims assistance program told them that their claims would be paid, as a general rule, the doctrine of promissory estoppel does not apply against the state. *Raabe v. Ohio Bd. of Speech-Language Pathology and Audiology*, 10th Dist. No. 04AP-954, 2005-Ohio-2335. Moreover, mistaken advice or opinions of a government agent do not give rise to a claim of promissory estoppel. *Halleur v. Emigh*, 81 Ohio App.3d 312 (9th Dist.1992). Therefore, the panel finds applicants' arguments in that regard unpersuasive.

{¶22} In summary, the May 3, 2013, final decision of the Attorney General shall be affirmed, in part, as follows: with regard to the supplemental claims of Christan

Mash and the claims of Willadean Dailey for replacement services loss from July 1-August 15, 2012. The May 3, 2013, final decision shall be reversed, in part, as follows: with regard to Willadean's claims for replacement services loss for the month of June 2012 and the travel expenses to Dr. Bishop's office in June and July 2012.

IT IS THEREFORE ORDERED THAT

- 1) The State's Exhibits A and B are ADMITTED;
- 2) The May 3, 2013 Final Decision of the Attorney General is AFFIRMED, in part, as follows: with regard to the supplemental claims of Christan Mash and the claims of Willadean Dailey for replacement services loss from July 1 through August 15, 2012;
- 3) The May 3, 2013 Final Decision of the Attorney General is REVERSED, in part, as follows: with regard to Willadean's claims for replacement services loss for the month of June 2012 and the travel expenses to Dr. Bishop's office in June and July 2012;
- 4) This claim is remanded to the Attorney General's office for economic loss calculations and payment;
- 5) This order is entered without prejudice to the applicants' right to file a supplemental compensation application, within five years of this order, pursuant to R.C. 2743.68;
- 6) 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 Meigs County Prosecuting Attorney and to:

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