



# Court of Claims of Ohio

## Victims of Crime Division

The Ohio Judicial Center  
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Columbus, OH 43215  
614.387.9800 or 1.800.824.8263  
[www.cco.state.oh.us](http://www.cco.state.oh.us)

IN RE: DEWAYNE ANDERSON

DEWAYNE ANDERSON

Applicant  
Case No. 2014-00013 VI

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

### ORDER OF A THREE COMMISSONER PANEL

- {¶1} On June 9, 2012, applicant, DeWayne Anderson, filed a compensation application for economic loss as a result of injuries that he sustained on June 11, 2012, when he was the victim of attempted murder. On October 29, 2012, the Attorney General filed a finding of fact and decision determining that applicant qualified as a victim and was eligible for an award of reparations. The sole issue before the panel is applicant's appeal of the December 20, 2013 final decision of the Attorney General, which pertains to applicant's June 19, 2013 supplemental application.
- {¶2} On June 19, 2013, applicant filed a supplemental application for "lost wages for time taken off to go to appointments, lost overtime wages from December 17, 2012 to May 26, 2013, prescription bills, and mileage to and from appointments and prescription[s]." On October 16, 2013, the Attorney General filed a supplemental finding of fact and decision determining that applicant be granted an award in the amount of \$7,635.75, of which \$6,758.91 represented work loss, and the remainder represented mileage, prescription, medical, and counseling expense. With regard to lost overtime, the Attorney General found that applicant would have worked 234 hours of overtime from January 1, 2013 through May 26,

2013, which represents 13 hours of overtime per week for 18 weeks. The Attorney General noted that per applicant's employer, no overtime was available from December 18-31, 2012.

{¶3} On October 21, 2013, applicant filed a request for reconsideration with regard to the Attorney General's calculation of overtime. On December 20, 2013, the Attorney General rendered a Final Decision finding no reason to modify the initial decision. The Attorney General noted in a memorandum from Lanell Reese that upon further investigation with plaintiff's employer, the weekly overtime average should have been calculated at 7.6 hours per week, not 13 hours per week, and that applicant had been overpaid in the October 16, 2013 supplemental finding of fact and decision. Therefore, the Attorney General argued that no additional overtime award should be considered, and noted that all overpaid overtime would be recovered from any future award.

{¶4} On January 8, 2014, applicant filed a notice of appeal from the Final Decision of the Attorney General. On August 28, 2014, a hearing was held before this panel of commissioners. Assistant Attorney General Gwynn Kinsel appeared at the hearing and represented the state of Ohio. Applicant and his attorney, Mark Poole, attended the hearing as well.

{¶5} Applicant testified that he retired from Roxanne Labs in January 2014, where he had worked for 15.5 years. Applicant's hourly rate was \$22.03, and his overtime hourly rate was \$33.05. After the June 11, 2012, criminally injurious conduct, applicant returned to work on September 1, 2012. Applicant's treating physician allowed him to return to a 40-hour work week, but restricted him from working overtime due to medical issues. Applicant testified that beginning in 2011, his overtime hours increased dramatically. Applicant explained that his employer had a mandatory overtime policy in place, and asserts that from January 2013 through May 26, 2013, he would have worked 396 hours of overtime.

{¶6} According to applicant, he would have worked 10-hour shifts Monday through Thursday, eight hours of overtime on Friday, and eight hours of overtime on

Saturday. Applicant also stated that he would have worked six hours of overtime from Monday to Thursday. Applicant asserts that as a result of the criminally injurious conduct, he lost 22 hours of overtime every week from January 1, 2013 through May 26, 2013. In other words, applicant asserts that he would have worked any and all available overtime hours.

{¶7} Applicant submitted six exhibits for the panel's consideration. Exhibits 1-5 are documents that are contained in the claim file regarding applicant's work loss claim. Exhibit 6 is applicant's pensionable earnings report, which lists his annual pensionable earnings from 2008 through 2013. Applicant urges the panel to examine his annual earnings to determine an accurate method of calculating overtime. Applicant noted that due to a heart condition that he suffered prior to the criminally injurious conduct, he did not work overtime in 2011 until October, when his physician stated that he could return to working overtime hours.

{¶8} Tammy Popper testified that she was a human resources specialist and that she had worked for Roxanne Labs since June 2012. With regard to applicant's claim for overtime, she testified that she spoke to Walter Kalinow, applicant's supervisor, but that she did not agree with his overtime calculations. Popper explained that to calculate overtime, she reviewed applicant's employment records from June 2011 to June 2012, and found that he worked 360 overtime hours for that 12-month period. Popper then reviewed employment records for the four employees who had worked the most overtime in applicant's department, and calculated an average of 380 hours per year. Popper estimated that applicant would have worked only 7.6 hours of overtime per week, based upon dividing 380 hours by 50 weeks per year. Popper stated that for two weeks in December, there is no overtime available. According to Popper, applicant was not working every available overtime hour prior to the criminally injurious conduct. In addition, Popper stated that no employee in applicant's department had worked 22 hours of overtime per week every week. Upon cross-examination, Popper stated that Roxanne Labs does have mandatory

overtime, in the amount of 8 hours per week per employee.

- {¶9} Lanell Reese testified that she is an economic loss specialist for the Attorney General's office. Reese testified that she calculates work loss based on the average number of hours an applicant has worked, not on the hours an applicant might work. According to Reese, she initially calculated that applicant would have worked 13 hours of overtime per week for 18 weeks, based upon the information she obtained from employee Amy Montgomery from applicant's employer. Reese based her initial calculation on correspondence from Montgomery and Cindy Harmon, another employee in the human resources department. (Applicant's Exhibits 1, 4.)
- {¶10} After applicant filed his request for reconsideration, Reese contacted Popper, who recalculated applicant's overtime based upon an average of 380 hours per year. Reese stated that with Popper's new calculations, applicant should have been awarded only 7.6 hours of overtime per week. According to Reese, the 7.6 hour figure should be used instead of the 13 hour figure, and any supplemental application filed by applicant should be reduced accordingly.
- {¶11} The panel notes that when the overtime calculations were initially made, the response to Reese's inquiry stated that an employee in applicant's department would be required to work eight hours of mandatory overtime, and that an additional seven hours of overtime would be available throughout the week. (Page 951 of transmitted file.)
- {¶12} R.C. 2743.52 (A) places the burden of proof on the 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*, 8 Ohio Misc.2d 4, 455 N.E.2d 1374 (Ct. of Cl. 1983).
- {¶13} R.C. 2743.51(G) defines work loss as "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.” “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*, 91 Ohio Misc. 2d 85, 87, 698 N.E.2d 93 (Ct. Cl.1994).

{¶14} Upon review, we find that the initial calculation of 13 hours per week of overtime is reasonable and should be used to calculate applicant’s lost overtime. We come to this conclusion based upon applicant’s testimony, evidence in the claim file, and the Attorney General’s initial calculations. Popper’s calculation of 7.6 hours per week is not reliable for the following reasons. Popper admitted that applicant would have worked eight hours of mandatory weekly overtime. In addition, although Popper testified that applicant worked 360 hours of overtime from June 2011 to June 2012, applicant testified that he did not work overtime in 2011 until October due to a heart condition. Accordingly, the panel finds that it would be unreasonable to rely on Popper’s calculations which are based upon a 12 month period that includes four months in 2011 when applicant did not work any overtime. The panel finds that a more accurate representation of applicant’s actual overtime earnings can be calculated by looking at his yearly earnings from 2012 and subtracting his base pay, which results in an average of 13.65 hours of weekly overtime. Accordingly, the panel finds that the Attorney General’s original calculation of 13 hours per week, which is supported by applicant’s employer’s HR department and substantiated by his annual earnings, is the best method to calculate lost overtime. Conversely, applicant’s calculation that he would have worked 22 hours of overtime every week is not supported by the evidence.

{¶15} Therefore the December 20, 2013 Final Decision of the Attorney General shall be affirmed. The panel also notes that the overtime calculations as shown in the

October 16, 2013 finding of fact and decision shall remain in full force and effect.

{¶16} Accordingly, any supplemental application filed by applicant is not subject to recoupment of any previous award representing overtime.

IT IS THEREFORE ORDERED THAT

- 1) Applicant's Exhibits 1-6 are ADMITTED;
- 2) The December 20, 2013 Final Decision of the Attorney General is AFFIRMED;
- 3) This claim shall be forwarded to the Attorney General to process payment consistent with this decision;
- 4) This order is entered without prejudice to 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.

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DANIEL R. BORCHERT  
Presiding Commissioner

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ANDERSON M. RENICK  
Commissioner

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HOLLY TRUE SHAVER  
Commissioner

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

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