[Cite as *In re Desir*, 2015-Ohio-5677.]

Court of Claims of Ohio
Victims of Crime Division
The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

IN RE: JEAN MICHEL DESIR

JEAN MICHEL DESIR

Applicant

Case No. 2012-70491 VI

Magistrate Daniel R. Borchert

ORDER OF THE MAGISTRATE

{¶1} On March 4, 2013, a panel of commissioners issued a decision denying applicant's request that the award to his medical providers be paid directly to him so he could negotiate the amount of each bill with the medical provider. This panel also denied applicant's claim for a commuted work loss stating in pertinent part:

> **a)** "…the applicant has presented no evidence from a medical provider that proves by a reasonable degree of medical certainty that he is permanently disabled and can no longer return to his former employment. As a matter of fact, a Medical Information Report from his treating physician Joseph Minarchek, M.D., dated May 25, 2012 answers the question, Return to work full time '1-2 years.' The doctor leaves the answers to the following questions blank 'Return to limited work and with the following restrictions.' In a Guardian Insurance 'STD Attending Physician's Statement of Disability' Dr. Minarchek based on an evaluation conducted on May 16, 2012 indicates applicant's return to work date as March 15, 2013. Based on the medical information

contained in the case file applicant has failed to meet his burden of proof."

{¶2} However, the panel remanded this case back to the Attorney General for calculation of work loss after June 19, 2012.

{¶3} Prior to the panel's decision the Attorney General had granted applicant an award of reparations in the amount of $4,871.75, of which $2,500.00 represented reimbursement of medical expenses and $2,371.75 represented work loss for the period March 14, 2012 through June 19, 2012, travel expenses, and evidence replacement loss.

{¶4} On July 28, 2014, the Attorney General issued an amended finding of fact and decision based upon the panel's remand. First, the Attorney General related that $323.21, which had been granted to the applicant for reimbursement of mileage and evidence replacement expenses had been returned by the applicant based upon the subrogation provision contained in R.C. 2743.72. Second, the Attorney General was informed applicant entered into a confidential settlement agreement with parties related to the occurrence of the criminally injurious conduct. Through the use of the Attorney General's statutory subpoena power he obtained information evidencing that applicant received a settlement in the amount of $100,000. Based on the holding in *In re Fout-Craig*, V93-27851tc (2-5-99), the Attorney General determined that 28 percent of the settlement should represent reimbursement of economic loss sustained as the result of the criminally injurious conduct and 72 percent should represent non-economic loss i.e., pain and suffering. Accordingly, $28,000 was offset against any future economic loss the applicant may sustain. The Attorney General also noted that any attorney fees and costs regarding the civil settlement could be offset against this amount. However, no such information has been supplied.

{¶5} The Attorney General's investigation also revealed that applicant was eligible to receive Short Term and Long Term Disability benefits as the result of his

injuries which would constitute a collateral source under the program. Accordingly, the Attorney General did not grant applicant an additional award for economic loss.

{¶6} On August 12, 2014, applicant submitted a request for reconsideration. Applicant asserted that he should receive an award for commuted work loss pursuant to the holding of *In re Caminiti*, 17 Ohio Misc. 2d 9, 478 N.E.2d 1327 (Ct. of Cl. 1984). Applicant submitted his own affidavit, a Guardian Life Insurance benefits summary, a Thirty-One Gifts Employment Payroll summary and a Thirty-One Gifts employment termination letter in support of his request.

{¶7} On August 26, 2014, the Attorney General rendered a Final Decision denying the applicant's claim pursuant to the doctrine of *res judicata*.

{¶8} On September 2, 2014, applicant filed a notice of appeal from the Attorney General's Final Decision of August 26, 2014. Hence, a hearing was held before this magistrate on November 18, 2014 at 10:00 a.m.

{¶9} Applicant, Jean Michel Desir, and his attorney, Robert Kerpsack appeared at the hearing, while Senior Assistant Attorney General Georgia Verlaney represented the state of Ohio.

{¶10} Applicant gave a brief opening statement, asserting that evidence contained in the applicant's brief consisting of applicant's affidavit and a letter from applicant's treating physician Dr. Nappi support the contention that applicant is permanently disabled.

{¶11} The Attorney General countered that there is insufficient new medical evidence or testimony which supports the proposition that applicant should receive a commuted work loss. Furthermore, the collateral source issue must be addressed with respect to the incurrence of any additional economic loss.

{¶12} Jean Michel Desir was called to testify. Initially, Mr. Desir was questioned concerning the accuracy of his affidavit submitted with his request for reconsideration

and also with his brief. He confirmed that the statements in the affidavit accurately reflected his memories to the best of his recollection.

{¶13} Next, he described the limitations to his hand he is currently experiencing due to the injuries sustained at the time of the criminally injurious conduct. He has regained some functions to his hand with respect to movement of his hand and fingers. However, repetitive movement causes pain to his upper arm. And, in Mr. Desir's opinion, his hand has not returned to full function. He stated he has problems washing himself, but can grasp a cup and write.

{¶14} Mr. Desir stated he has not returned to work since the criminal incident, however, he has returned to school at Strayer University, studying criminal justice. He asserted he estimates that he has incurred future work loss in excess of $200,000. Mr. Desir acknowledged that he received $700.00 per month in disability benefits, however, medical confirmation is necessary for continued benefits. He also related he received $39,034.19 as the result of personal injury settlements.

{¶15} Mr. Desir's employment with Thirty-One Gifts was terminated on March 6, 2014. Finally, Mr. Desir stated he applied for Social Security Disability benefits but his claim was denied due to lack of quarters worked when he was paying into Social Security.

{¶16} Mr. Desir stated he would be willing to find a job that did not require manual dexterity. He will receive his degree in criminal justice in 2015 and apply for a job with Homeland Security or a related enterprise, with the expectations of earning $50,000 per year.

{¶17} Upon cross-examination, Mr. Desir acknowledged that a portion of his studies at Strayer University are conducted online and he has the ability to drive a vehicle. Based upon the Attorney General's request, Mr. Desir raised his right arm and opened and closed his hand making a fist. Whereupon, applicant's testimony was concluded.

{¶18} Upon a short recess wherein applicant's counsel inspected the case file the hearing was continued with the re-direct examination of Mr. Desir.

{¶19} Mr. Desir clarified when he was studying criminal justice at Miami-Jacobs Career College it was for the purpose of being security personnel which required the use of a firearm. However, since his injury this is no longer possible, so now his studies at Strayer University focus on the business aspects of criminal justice. Mr. Desir expressed his opinion that armed personnel would be compensated at a higher rate than one who was restricted to office work. He asserted the difference might be $10,000 per year. Whereupon, the testimony of applicant was concluded. Applicant offered the attachments to his brief into evidence.

{¶20} In closing, applicant stated medical evidence from Dr. Nappi has been submitted showing Mr. Desir sustained a permanent disability and, in turn, he has sustained work loss in the excess of $50,000. Accordingly, applicant requests he be granted a commuted award for work loss.

{¶21} The Attorney General countered that the latest calculation of Mr. Desir's work loss is until February 12, 2014. The Attorney General acknowledged that Mr. Desir has incurred work loss and will continue to incur work loss, however, this case is not the appropriate case for the granting of a commuted work loss. Furthermore, the focus must be on new medical evidence which supports Mr. Desir's contention that he is permanently disabled by a reasonable degree of medical certainty. The only new evidence is a checklist provided with applicant's notice of appeal. A review of the checklist revealed most items are favorable for Mr. Desir's recovery. The only restrictions imposed are crawling and lifting over a designated weight. The Attorney General also argues that this document does not specifically indicate that the limitations imposed are the result of the injuries sustained at the time of the criminally injurious conduct.

{¶22} The Attorney General contended that commuting work loss has been utilized only in exceptional circumstances. The Attorney General cited a variety of cases wherein this court commuted work loss only when the victim suffered severe traumatic injury which resulted in no expectation of ever resuming gainful employment. This was contrasted with the case of *In re McGowan*, V88-40992sc (6-30-89) aff'd tc (2-14-91), where the victim lost her left hand as the result of the victimization, but was not rendered totally disabled or unemployable as the result of the injuries. Therefore, a commuted work loss was not warranted.

{¶23} In accordance, applicant's injuries do not lend themselves to a commuted work loss. Furthermore, based on the applicant's testimony he has a desire to return to work and is pursuing a college education to achieve his goal. With respect to future work loss, this loss can be addressed by filing supplemental compensation applications taking into consideration any collateral source benefits received.

{¶24} In rebuttal, applicant stated that due to Mr. Desir's disability he has received both Short and Long Term Disability benefits. The court has been supplied with the most recent report from Mr. Desir's treating physician which indicated he has a permanent disability. Furthermore, he can no longer engage in a field of employment which requires the use of a firearm or the ability to restrain an individual. Mr. Desir has currently incurred work loss of $40,000 and it is reasonable to except that he will incur the maximum of $50,000 in a short period. Therefore, work loss should be commuted. Whereupon, the hearing was concluded.

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

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

{¶26} In "*In re Birdsong*, V77-0381sc (3-5-84), the single commissioner commuted a victim's work loss award and stated that each commutation case should be considered on a case-by-case basis in relation to certain crucial factors, which are as

follows: 1) the nature and extent of the victim's disability; 2) the type of work the victim previously performed; 3) the victim's ability to perform his job in the future; 4) the possibility of retraining for other gainful employment; and 5) the number of years remaining in the applicant's expected work life. Likewise, in *In re Vasiliou,* V79-3700sc (5-10-84), the single commissioner followed the rationale outlined in *Birdsong, supra*, and commuted that victim's work loss award. In *Caminiti, supra*, Judge Victor stated that 'the court recognized that where a victim has a history of employment, and there is the likelihood the victim would have returned to work had he not been injured, that a solid basis had been established upon which to predicate a work loss claim.' Judge Victor followed the rationale of *Birdsong* and *Vasiliou* and found that it was in the best interest of that victim to commute his projected work loss award and grant him the maximum award of reparations…However, in *In re McGowan*, V88-40992tc (2-14-91), a panel of commissioners upheld the single commissioner's decision not to commute a victim's projected work loss award since: 1) the victim was not rendered totally disabled or unemployed as a result of the criminally injurious conduct, 2) the victim had a reasonable expectation of more than 30 years of future work life, during which she could acquire other training in a diverse number of fields, and 3) the victim was only a seasonal employee.

{¶27} "In this particular case, we believe that it is in Archie Azbell's best interest to commute his projected work loss award, since he has met all the necessary criteria. At the time of the injury, Archie Azbell was a 22 year old male who earned a nominal income from steady employment. Today, Archie Azbell is totally and permanently disabled and is in a coma, which prevents him from ever returning to work." *In re Azbell*, V2004-60059tc, 2004-Ohio-4182, ¶7-8.

{¶28} One who suffered injuries which prohibits the individual from returning to their former occupation may seek occupational training necessary to return to the work

force. Such occupational training is considered an allowable expense pursuant to R.C. 2743.51(F)(1). See *In re Wilson*, V88-49671tc (4-29-92).

{¶29} In the case at bar, a panel of commissioners determined as of the hearing date on January 23, 2012, "applicant has presented no evidence from a medical provider that proves by a reasonable degree of medical certainty that he is permanently disabled and can no longer return to his former employment." Furthermore, the panel in *Azbell*, cited above, required that applicant prove he is "totally disabled." Accordingly, the only medical evidence which this magistrate may consider concerns that submitted after January 23, 2012.

{¶30} A review of the medical evidence contained in the claim file, as well as the Guardian Insurance form completed by Dr. Nappi and the testimony of the applicant does not satisfy his burden of proof required by *Caminiti* or *Azbell.* I cannot recommend that applicant be granted a commuted work loss in this situation. However, that is not to say that applicant will not incur future work loss or allowable expense.

{¶31} I recommend that the Attorney General's August 26, 2014 Final Decision be affirmed with respect to commuted work loss, but also be remanded for calculations of additional work loss and allowable expense. Since, applicant did not dispute the Attorney General's apportionment of the settlements he has received being 28 percent for economic loss and 72 percent for non-economic loss this court adopts those calculations as its own. Applicant may reduce the amount attributable to economic loss by submitting with the Attorney General the attorney fees and costs incurred relative to these settlement agreements.

{¶32} Pursuant to R.C. 2743.51(B) and the holdings in *In re Norek*, V85-51799jud (3-5-87) and *In re Martin*, 63 Ohio Misc. 2d 82, 619 N.E.2d 1227 (Ct. of Cl. 1993), the Attorney General shall calculate applicant's work loss. Furthermore, this court finds applicant's testimony credible with respect to the career limitations imposed by his injuries, therefore, the costs incurred to pursue his business degree at Strayer

University in Criminal Justice shall be considered an allowable expense pursuant to R.C. 2743.51(E)(1) and the holding in *Wilson*.

{¶33} Therefore, I recommend affirming the Attorney General's Final Decision of August 26, 2014 and remanding this case to the Attorney General for calculation of economic loss and decision.

{¶34} *A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).*

_____

DANIEL R. BORCHERT
Magistrate

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

Filed 1/14/15
Jr. Vol. 2289, Pgs. 56-64
Sent to S.C. Reporter 3/7/16