[Cite as *In re Cunningham*, 2015-Ohio-5691.]

IN RE: MARK CUNNINGHAM	Case No. 2015-00280-VI
	Judge Patrick M. McGrath
MARK CUNNINGHAM	Magistrate Daniel R. Borchert
Applicant	ORDER GRANTING MOTION TO DISMISS

{¶1} On May 20, 2015, the Attorney General filed a motion to dismiss the applicant's appeal. The motion to dismiss is now before this court. The rules of evidence do not apply in appeals from the Attorney General decision under the Ohio Victims of Crime Compensation Act, *In re Martin*, V78-3410 jud (3-14-80). However, guidance should be obtained from the court's rules and the Rules of Civil Procedure in determining how to rule on procedural dispositive motions. *In re Huff*, 91 Ohio Misc.2d 131, 698 N.E.2d 122 (Ct. of Cl. 1996).

{¶2} The Attorney General asserted that applicant's appeal should be dismissed for failure to follow R.C. 2743.61(A).

{¶3} R.C. 2743.61(A) in pertinent part states:

> **a)** "If a claimant does not file a request for reconsideration of a decision of the attorney general to make an award or to deny a claim or of the amount of an award within thirty days after the decision is rendered, the award, the denial of the claim, or the amount of the award is final unless the attorney general in the interests of justice allows the reconsideration after the expiration of that period of time."

{¶4} Furthermore, R.C. 2743.61(C) states:

> **a)** "Notices of an appeal concerning an award of reparations shall be filed within thirty days after the date on which the award or the denial of a claim is made by a final decision of the attorney general. If a notice of appeal is not filed within the thirty-day period, the award or denial of the claim is

final unless the court of claims in the interests of justice allows the appeal."

{¶5} The Attorney General related that on February 24, 2014, he rendered a finding of fact and decision which contained the following:

{¶6} "Mark Cunningham has incurred economic loss as a result of the crime. However, information received by the Attorney General indicates that Mr. Cunningham has received proceeds from an insurance settlement as a result of this incident. 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.

{¶7} "Based on the Victim Impact Questionnaire and the information contained in the claim file, Mr. Cunningham sustained significant neck and back injuries. Specifically, he is continuing to experience ongoing issues with both is neck and back. The Attorney General submits that such factors should result in a 30/70 disbursement of the settlement between economic and non-economic loss. Accordingly, the Attorney General makes the following findings:

{¶8} "After deducting attorney fees and costs, Mr. Cunningham received a net settlement in the amount of $12,500.00. After applying the apportionment identified above (30/70) to the net settlement, the Attorney General finds that $3,750.00 constitutes a collateral source that must be used to off-set the economic loss he has incurred, and $8,750.00 constitutes compensation for non-economic loss that is not an off-set.

{¶9} "Mr. Cunningham incurred unreimbursed economic loss in the amount of $17,095.23. After subtracting the off-set as well as $1,000.00 in Med-Pay, the Attorney General now finds that he has incurred unreimbursed economic loss in the amount of $12,345.23. Accordingly, this amount will be paid at this time."

{¶10} Applicant did not file a request for reconsideration as the result of this decision. On April 16, 2014, applicant filed a supplemental compensation application. On June 13, 2014, the Attorney General issued a finding of fact and decision for the supplemental compensation application, denying applicant's request for additional reimbursement of economic loss. Again, applicant did not file a request for reconsideration.

{¶11} On July 7, 2014, applicant filed a second supplemental compensation application. On August 28, 2014, the Attorney General rendered a finding of fact and decision granting the applicant an additional award of reparation in the amount of $221.69, of which $201.04 represented work loss while $20.65 represented mileage expense.

{¶12} On November 21, 2014, applicant filed a third supplemental compensation application. Attached to the supplemental compensation application was a memorandum which in pertinent part stated:

{¶13} "Now that we know that the extent of Mark's injuries are so great that he will never return to meaningful employment, the *Fout-Craig* apportioning at just 70% non-economic loss is woefully inadequate. There was merely $12,500 in coverage available on an injury claim that would have been valued at multiple millions of dollars. A token 1% for economic loss would be more reflective of the actual harm done to a 47 year old man who is permanently disabled and has had in excess of $1 million paid in medical expenses for his treatment to date. His enjoyment of life and livelihood has been drastically altered by this event. The difference would be $3,625 going to Mark relative to this minimal insurance policy."

{¶14} Also, handwritten on the supplemental application was the following:

{¶15} "Purpose of this supplemental is to readdress *Fout-Craig* percentage – Mark injuries + ongoing disability are far worse than originally thought to be. F/C% on this small policy should be no less than 90/10 favoring non-economic loss."

{¶16} In response to the supplemental compensation application, the Attorney General sent a letter to the applicant which stated:

{¶17} "The Attorney General received your Supplemental Compensation Application on November 21, 2014. The Supplemental Application does not seek to address additional economic loss, but instead attempts to readdress the Attorney General's findings issued in the February 24, 2014, Finding of Fact and Decision. Accordingly, the Attorney General construes your Supplemental Application as an untimely and improperly filed Request for Reconsideration.

{¶18} "Where a claimant does not file a Request for Reconsideration within thirty days after a Finding of Fact and Decision is rendered, the decision is final unless the Attorney General, in the interest of justice, allows the reconsideration after the expiration of that period of time. R.C. 2743.61(A) In this case, your untimely and improperly filed request will not be considered as you have not provided us with any information as to the reasons for your delay."

{¶19} In response to the Attorney General's letter, the applicant submitted a letter, dated March 30, 2015, which in pertinent part stated:

{¶20} "I received your letter in regards to the Supplemental claim filed on Mark's behalf last November. This is rather unique, as the format is not of a "decision"; however, the context and timing of the document suggests than an [sic] FFD is not forthcoming. Therefore, no Reconsideration Request is needed, and a direct Appeal to the Court of Claims appears appropriate…

{¶21} "Mark's situation poses an issue on *Fout-Craig* matters that put victims in a Catch 22 situation. Forcing a victim to pick the lesser of 2 bad options should not be part of this program…

{¶22} "Mark's is a good example of the Catch 22 decision. I told him the 70/30 apportioning was too low for his injuries as we knew them in February, 2014. Since the auto policy afforded only $12,500.00 in coverage, the 10-20% shortchange in

percentage would make a $2,500.00 difference, or less. The award exceeded $12,000.00 and was so badly needed that Mark and Sharon were in tears with thanks that this money would come last spring. If we'd have "Recon'ed" the F/C percentage, Mark would have been denied that $12,000.00+ for at least 3 more months and maybe a year if that matter had to go to the Court of Claims. It would be irresponsible to put Mark in a position of having to choose between accepting an unreasonable F/C percentage that costs him $2,000.00, or wait up to a year to be paid $12,000.00 that would have come to him in about 6 more weeks if he stayed silent…

{¶23} "I'm treating that Catch 22 by explaining to the victim that they do have a choice, but the delay per Reconsideration might only gain them another $2,000 at most. Typically, these claims pay at least $5,000.00 and often much more, so the delay to Recon is not a viable choice. It is cleaner, and in the victims' best interests, to accept the initial award or awards and ask that the F/C be addressed again once we know more about the long term impact their injuries. That seems most appropriate to the victims for whom the program is created, and avoids unreasonable results which should never be embraced." On March 31, 2015, applicant filed a notice of appeal.

{¶24} It is the Attorney General's position that applicant's appeal should be denied since, "[T]he initial Finding of Fact and Decision was made on February 24, 2014. Mr. Cunningham did not request reconsideration for the decision and an award for $12, 615.67 was issued. Thereafter, Mr. Cunningham filed two separate Supplemental Applications and the Attorney General issued two additional Findings of Fact and Decision on those Supplemental Applications. Mr. Cunningham did not request reconsideration of either of those decisions."

{¶25} Accordingly, the Attorney General stated that, "[n]o statutory authority exists to allow Mr. Cunningham to circumvent the jurisdiction of the Attorney General by attempting to file an appeal where no final decision has been issued on the application."

{¶26} On May 29, 2015, applicant filed a reply memorandum to the Attorney General's motion to dismiss. Applicant argued at the time of the Attorney General's Finding of Fact and Decision on February 24, 2014, the extent of applicant's injuries were not realized until James Rutherford M.D.'s letter of October 29, 2014. Applicant argues a *Fout-Craig* determination should be evaluated when the extent of the injuries are fully known or realized. Applicant provides no statutory or case law to support this proposition.

{¶27} *In re Fout-Craig*, V93-27851tc (2-5-99), stands for the proposition that an applicant has the burden to prove what portion of a settlement, if any, constitutes reimbursement for non-economic loss. The Attorney General issued a Finding of Fact and Decision on February 24, 2014, making a *Fout-Craig* apportionment of the $12,500.00 insurance settlement, the applicant received from the offending driver's insurance carrier, based upon applicant's Victim Impact Questionnaire and information contained in the claim file. The Attorney General determined 30% of the settlement should represent reimbursement for economic loss incurred, while 70% would represent non-economic loss (i.e. pain and suffering, etc.) which would not be used to offset any economic loss the applicant incurred as a result of the criminally injurious conduct of May 2, 2013.

{¶28} Applicant accepted the Attorney General's apportionment and chose not to file a request for reconsideration. R.C. 2743.61(A) in clear, unambiguous language states:

> **a)** "If a claimant does not file a request for reconsideration of a decision of the attorney general to make an award or to deny a claim or of the amount of an award within thirty days after the decision is rendered, the award, the denial of the claim, or the amount of the award is final unless the attorney general in the interests of justice allows the reconsideration after the expiration of that period of time."

> **b)** In the case at bar, not only did applicant decided not to file a request for reconsideration, but filed two supplemental compensation applications not raising the *Fout-Craig* apportionment as an issue. A review of the applicant's filing revealed applicant was aware the "apportioning was too low for his injuries," but due to economic consideration chose not to file a request for reconsideration.

{¶29} R.C. 2743.61(C) requires applicant to file a notice of appeal from a final decision of the Attorney General within thirty days of their issuance, a provision applicant also chose not to follow.

{¶30} This court finds no merit in applicant's argument that *Fout-Craig* decisions should remain fluid since applicant can point to no statutory provision or case law which supports such a proposition.

{¶31} Furthermore, R.C. 2743.61(A) provides the Attorney General with the discretion to determine if the interests of justice require the consideration of a late filed request for reconsideration. This court will not intervene with the Attorney General's judgment in this matter. See *State ex rel. DeWine v. Court of Claims of Ohio*, 130 Ohio St. 3d 244, 2011-Ohio-5283, 957 N.E.2d 280.

{¶32} Finally, it is clear applicant will not be prejudiced by the denial of this appeal since applicant indicated a supplemental compensation application has been filed with the Attorney General on May 21, 2015, seeking additional work loss, which applicant contends may reach the maximum award under the statute. A *Fout-Craig* decision would have no effect on the calculation of work loss.

{¶33} Based on the foregoing, the court concludes that there are no genuine issues of material fact and that defendant's motion should be granted as a matter of law. As a result, defendant's motion to dismiss is GRANTED. The previously scheduled hearing of June 25, 2015 at 10:00 a.m. is VACATED. Court costs are assumed by the Victims of Crime fund.

PATRICK M. MCGRATH
Judge

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

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