[Cite as *In re Aaron*, 2015-Ohio-5693.]

IN RE: CATHY AARON	Case No. 2015-00618-VI
THOMAS AARON CATHY AARON	Magistrate Daniel R. Borchert
Applicants	DECISION OF THE MAGISTRATE

{¶1} On November 25, 2014, applicants, Thomas and Cathy Aaron, filed a compensation application on behalf of Cathy Aaron as the result of a drunk driving accident which occurred on July 11, 2014. On March 18, 2015, the Attorney General issued a finding of fact and decision determining that Cathy Aaron met the necessary jurisdictional requirements to qualify as a victim of criminally injurious conduct pursuant to R.C. 2743.51(C)(1)(e). The Attorney General's investigation revealed that Cathy Aaron received an insurance settlement in the amount of $25,000.00. The Attorney General determined based upon the holding in *In re Fout-Craig*, V93-27851tc (2-5-99), that the settlement should be apportioned 30/70, with 30 percent representing reimbursement for economic loss and 70 percent representing non-economic loss. Accordingly, $7,500.00 represented collateral source reimbursement. The Attorney General's investigation revealed that Cathy sustained economic loss in the amount of $9,042.94, offset by $7,500.00, which resulted in applicants being granted an award of reparations in the amount of $1,542.94. It should be noted that this amount represented work loss from July 14, 2014 through February 28, 2015.

{¶2} On April 18, 2015, applicants submitted a request for reconsideration. On June 22, 2015, the Attorney General rendered a Final Decision finding no reason to modify the initial decision.

{¶3} On June 29, 2015, applicants filed a notice of appeal from the June 22, 2015 Final Decision of the Attorney General. Hence, a hearing was held before this magistrate on September 24, 2015 at 11:00 a.m.

{¶4} Applicant, Cathy Aaron appeared along with her attorney, Mark Poole, while Assistant Attorney General Megan Hanke represented the state of Ohio.

{¶5} Applicant argued that July 11, 2014, was a life altering day for Cathy Aaron, who as a result of the criminal conduct endures physical pain and has been unable to work since the accident. The appeal in this matter concerns the Attorney General's calculation of Cathy's work loss. It was noted applicant's medical expenses exceeded $300,000.00, forcing her to file bankruptcy. Applicant contended that Cathy's work loss should be calculated based on her work history, rather than the calculation used by the Attorney General.

{¶6} The Attorney General asserted the calculation of work loss was reasonable and lawful. Ms. Aaron real time work status was used when work loss was calculated. The Attorney General's investigation revealed in January 2014, prior to the accident, Ms. Aaron was laid off from her permanent position with Gallipolis Developmental Center. She was subsequently reclassified as an interim employee, which allowed her to fill in for other employees when they were absent. At the time of her employment, Ms. Aaron was filling in for another employee. Subsequently, Ms. Aaron was re-classified by her employer as an intermittent employee, which restricted the total hours she was able to work at 1000 hours. Based upon this information, the Attorney General calculated Ms. Aaron's work loss.

{¶7} Cathy Aaron was called to testify. Ms. Aaron recounted the accident involving the drunk driver and the injuries she sustained.

{¶8} Prior to the accident she was employed at the Gallipolis Developmental Center, working fulltime. Ms. Aaron was presented with Applicant's Exhibit 1, a letter she received indicating she was hired as an interim employee, dated October 14, 2008. She testified that she was working fulltime five years later until the date of the accident.

{¶9} She testified that currently she is unable to work and has not worked since the date of the accident. Ms. Aaron was shown Applicant's Exhibit 2, a request for an

emergency award from the Victims of Crime Compensation Program. Ms. Aaron acknowledged that this document accurately described her medical and financial condition. Upon receiving the Attorney General's finding of fact and decision, she realized the calculation for work loss was incorrect, since she was working fulltime prior to the accident.

{¶10} Ms. Aaron was then shown Applicant's Exhibit 3, a Memorandum prepared by Attorney General's investigator Julie Duerr which addresses the issue of work loss. Ms. Aaron read into the record a portion of the Memorandum which started "Ms. Aaron worked an average of 80 regular hours and 8.09 OT hours in the six pay periods immediately prior to the incident." She stated this accurately reflected her working history six weeks prior to the accident.

{¶11} Cathy was shown the Attorney General's work loss exhibit, which applicant classified as Applicant's Exhibit 4. From July 13, 2014, the first work day after the accident until August 31, 2014, the Attorney General calculated work loss using 80 hour bi-weekly plus overtime wages. For the period September 1, 2014 through December 31, 2014, the Attorney General calculated work loss based on 28.32 hours per bi-weekly pay period. Work loss calculated from January 1, 2015 through February 28, 2015, used the same bi-weekly hour calculation. Applicant acknowledge calculation of work loss dramatically changed on September 1, 2014. She was then asked if she was aware that the Gallipolis Developmental Center informed the Attorney General that as of September 1, 2014, she would be classified as an intermittent employee. She was not informed of this change by her employer and only became aware of it based on information provided by the Attorney General's office.

{¶12} She testified she was a fulltime employee prior to the accident and was never informed of her change in employment status. She worked fulltime for five and one half years prior to her injury. Cathy was handed Applicant's Exhibit 5 through 11, these exhibits consisted of W-2 statements she received from her employer.

Applicant's W-2's reflect her gross earnings for the following years: 2009, $28,183.61; 2010, $38,548.54, 2011, $30,401.99; 2012, $31,733.47, 2013, $29,673.06 and 2015, $20,366.79. Ms. Aaron stated she had no reason to believe her employment status would change after the injury date and was informed of the change by the Attorney General not her employer. Ms. Aaron questioned the validity employment status information provided to the Attorney General from the Gallipolis Developmental Center. She stated she has never been informed by her employer about a change in her employment status. She does not believe the Attorney General's calculations accurately reflect the work loss which she incurred and continues to incur.

{¶13} Upon cross-examination, she clarified that her employer was a state agency. Ms. Aaron acknowledged she was hired in 2009 as an interim employee. This position required her to fill in for other employees that were on leave. Applicant acceded that her position was temporary. However, when she learned about her change in status she did contact her employer, and spoke to Jeannie Williams who told her about her change in status. Whereupon, Cathy Aaron's testimony was concluded.

{¶14} The Attorney General called Julie Duerr, lead investigator for the Attorney General's office to testify. Ms. Duerr was presented with State's Exhibit A, B, and C, the work loss exhibit, a memorandum prepared by Ms. Duerr, and employment information received from applicant's employer. Ms. Duerr explained how work loss was calculated. Initially, applicant's work loss was based on six weeks average of wages prior to the injury. This resulted in applicant receiving 80 plus hours of work loss on a bi-weekly basis. The remaining calculation after August 31, 2014, was based on applicant's status as an intermittent employee. Ms. Duerr related her conversation with Gallipolis Developmental Center, where she was informed that Ms. Aaron was filling in for an employee on leave, however when that employee terminated her employment on August 31, 2014, Ms. Aaron status was changed to intermittent employee, which provides for a maximum of 1,000 working hours per year. This information was

provided by Jeanne Williams of the Human Resources Department of applicant's employer.

{¶15} Upon cross-examination, Ms. Duerr acknowledged that the work loss calculations prior to August 31, 2014, were based on the actual hours Ms. Aaron worked. Ms. Duerr stated in the conversation with Ms. Williams she inquired if another employee was off on leave would the applicant have been assigned to these duties, and she was informed applicant was assigned as an intermittent employee. Whereupon, the testimony of Ms. Duerr was concluded.

{¶16} Applicant's Exhibits 1-10 and State's Exhibits A, B, and C were admitted into evidence without objection of the parties.

{¶17} In closing, applicant stated Ms. Aaron worked for Gallipolis Development Center for five and one half years working 80 plus hours every two weeks. Applicant questioned why her status would change when other interim employees still work there in excess of 80 hours. Applicants contend the work loss for the entire period should be calculated on the basis of Cathy's work history prior to her injury. Applicants questioned the validity of the information provided to the Attorney General. Ms. Aaron deserves work loss which is fair and consistent with her work history.

{¶18} The Attorney General argued work loss was correctly calculated in this case. For the period prior to her injury an average of six weeks wage loss was calculated which accurately reflected her work loss. For the period after August 31, 2014, work loss was based on information the Attorney General received from Ms. Aaron's employer. Accordingly, the Attorney General's decision was reasonable and lawful and should be affirmed.

{¶19} Finally, applicants urge this court to only consider Ms. Aaron's earnings prior to her injury when calculating work loss. Whereupon, the hearing was concluded.

{¶20} 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 (Ct. of Cl. 1994).

{¶21} R.C. 2743.52(A) places the burden of proof on an 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).

{¶22} Where applicant was disabled as the result of criminally injurious conduct and during his disability period a layoff occurs at his place of employment, the layoff date controls the extent of compensable work loss *In re Nicholson*, V94-33081jud (3-29-96); See also, *In re Patterson*, V77-0185sc (1-28-81).

{¶23} From review of the case file and with full and careful consideration given to the parties, I recommend the Attorney General's June 22, 2015 decision be affirmed. Pursuant to R.C. 2743.59 the Attorney General has the duty to investigate a claim based on the filing of a compensation application. The Attorney General fulfilled that duty by contacting Cathy Aaron's employer. In State's Exhibit C the Attorney General presented evidence that her job status could be changed without notice. Applicant signed the following statement on October 14, 2008, which states:

{¶24} "TO WHOM IT MAY CONCERN:

a) "I realize that the position that I am under final consideration for at the Gallipolis Developmental Center is **INTERIM**. As an INTERIM employee, I realize that I will be working as a **THERAPEUTIC PROGRAM WORKER**

in the position of an employee who is on **LEAVE OF ABSENCE WITHOUT PAY AND/OR DISABILITY LEAVE BENEFITS AND/OR WORKER'S COMPENSATION**.

b) "I understand that when this employee returns to full duty and/or terminates my INTERIM APPOINTMENT may result in immediate termination without notice.

c) "I realize that a Personnel Action must be approved and I will be notified of a starting date upon this approval.

d) "I agree and accept this INTERIM position with the above understanding."

{¶25} Ms. Aaron knew her conditions of employment upon taking this position. Furthermore, on April 19, 2014, Ms. Aaron requested a "voluntary change from full-time interim position Maynard to full-time interim position Hash." On August 9, 2014, Hash left the position and went on disability leave. At that time there was no full-time position for Aaron to fill and she was moved to an intermittent position, which restricts an employee to working only 1,000 hours per fiscal year. State's Exhibit C.

{¶26} The Attorney General fulfilled its obligation to fully investigate the claim and based its decision on the investigation findings. The Attorney General has no control over applicant's work status. If applicant is unsatisfied with her work status this is a matter between her and her employer, Gallipolis Developmental Center.

{¶27} Accordingly, I recommend the Attorney General's June 22, 2015 decision be affirmed. Applicants may submit a supplemental compensation application if additional economic loss relating to the criminally injurious conduct of July 11, 2014 is incurred.

{¶28} *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 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:

Filed 11/19/15
Sent to S.C. Reporter 4/1/16