



Court of Claims of Ohio Victims of Crime Division

The Ohio Judicial Center
65 South Front Street, Fourth Floor
Columbus, OH 43215
614.387.9860 or 1.800.824.8263
www.cco.state.oh.us

IN RE: KEVIN A. WARD

KEVIN A. WARD

Applicant

Case No. V2004-61136

Commissioners:
Randi Ostry LeHoty, Presiding
Thomas H. Bainbridge
Tim McCormack

OPINION OF A THREE-COMMISSIONER PANEL

{1}On April 8, 2005, a panel of commissioners issued a decision finding the applicant was unable to qualify as a victim of criminally injurious conduct since his injuries arose from a hit and skip accident. At the time the decision was rendered, hit and skip accidents did not qualify as exceptions to the motor vehicle exclusion contained in R.C. 2743.51(C)(1). On July 27, 2005, a judge of the Court of Claims affirmed the decision of the three-commissioner panel.

{2}On April 4, 2007, Amended Substitute House Bill 461 became effective. This legislation amended R.C. 2743.51(C)(1) and allowed victims of hit and skip accidents to qualify under the victims of crime compensation program. The legislation was retroactively applied to all hit and skip accidents occurring on or after July 1, 2000. Consequently, the applicant was sent a letter informing him of his right to reopen his claim.

{3}On March 2, 2007, a supplemental compensation application was filed on the applicant's behalf to reconsider any expenses incurred as the result of the hit and skip accident, which occurred on November 27, 2003. On May 10, 2007, the Attorney General issued a finding of fact and decision finding the applicant was a victim of

criminally injurious conduct but denying an award since all the medical expenses he had incurred were eligible for reimbursement from Medicaid, a readily available collateral source. On May 23, 2007, the applicant submitted a request for reconsideration. The applicant asserted that Medicaid took \$4,166.66 from a settlement he received. The applicant sought reimbursement for that amount. On July 25, 2007, the Attorney General rendered a Final Decision finding no modification of the initial decision was necessary. On August 23, 2007, the applicant filed a notice of appeal from the July 25, 2007 Final Decision of the Attorney General. Hence, a hearing was held before this panel of three commissioners Thomas H. Bainbridge, Lloyd Pierre-Louis and Tim McCormack on November 1, 2007 at 10:40 A.M.

{4}Assistant Attorney General Joseph Mastrangelo appeared on behalf of the Attorney General's office while the applicant's attorney Michael Falleur appeared on behalf of the applicant. Both parties presented oral argument for the panel's consideration. Mr. Falleur stated that as a result of the hit and skip accident the applicant received \$12,500.00 for uninsured motorist coverage and \$2,000.00 in medical pay from U.S. Auto Services. The issue presented to the panel was what portion of the settlement should be considered payment for economic loss as opposed to non-economic loss i.e., pain and suffering. The settlement was apportioned as follows:

Med. Pay U.S. Auto Services Inc.	\$ 2,000.00
Uninsured Motorist Coverage	<u>\$ 12,500.00</u>
	\$ 14,500.00
Costs:	\$ 49.50
Legal expenses	\$ 4,166.66
Reimbursement to Medicaid	<u>\$ 4,166.66</u>
	\$ 8,382.82

{5}Mr. Falleur stated that the applicant has life altering injuries. The applicant concedes that the medical pay money was a collateral source. However, the applicant argues that after the \$2,000.00 in medical pay is deducted, the remaining \$2,166.66

which was paid to reimburse Medicaid from his settlement should not be considered a collateral source. Mr. Falleur asserted that due to the severity of the applicant's injuries all the money received from the insurance settlement less the legal costs, attorney fees and medical pay should be considered reimbursement for non-economic loss. If the panel would determine the injuries sustained do not justify a 100 percent apportionment of non-economic loss, a lesser percentage would still result in a portion of the \$2,166.66 being reimbursed to the applicant.

{6}Assistant Attorney General Joseph Mastrangelo contended that in this case there is no allowable expense. Medicaid paid all the expenses, so the applicant had no out-of-pocket expenses. The crime victims program should not be required to pay for the subrogation claims asserted by Medicaid. Mr. Mastrangelo asserted that the holding in *In re Fout-Craig* has no applicability in this case. Whereupon the hearing was concluded.

{7}On November 16, 2007, the applicant filed a motion to permit a post hearing memorandum and a request for an additional hearing on this matter. The applicant asserts circumstances have changed since the hearing in that the Social Security Administration has taken \$1,128.00 from the applicant's settlement. Also, the case of *In re Kennard*, V97-63444tc (11-13-00) should be considered to provide guidance in the calculation of the applicant's award.

{8}On December 17, 2007, the Attorney General filed a response to the applicant's motions. The Attorney General stated all issues were presented at the November 1, 2007 hearing and there was no need to rehear this matter or consider any additional information.

{9}On March 7, 2008, a panel of commissioners granted the applicant's motions and this case was set for rehearing. Hence a hearing was held before this panel of commissioners on June 11, 2008 at 10:30 A.M.

{10}Attorney Michael Falleur appeared on behalf of the applicant while the Attorney General's office was represented by Assistant Attorneys General Stacy Hannan and Heidi James. Both parties offered oral argument for the panel's

consideration. Mr. Falleur posited that there were two issues that needed to be resolved in this case. The first issue concerned the Social Security Administration. Prior to the criminally injurious conduct the applicant was receiving Supplemental Security Income (SSI) from the Social Security Administration. When the Social Security Administration learned that he had received the insurance settlement it was determined that his assets were too high to receive SSI benefits. Consequently, future SSI benefits were reduced until the Social Security Administration had recouped \$1,128.00, which was considered to be an overpayment. Mr. Falleur asserted that the applicant lost the benefit of his insurance settlement by having to “repay” the Social Security Administration. The second issue concerned the proceeds of the insurance settlement paid for reimbursement to Medicaid. Mr. Falleur argued the holding in *In re Dungey*, V92-49877jud (2-23-99) should control. Finally, Mr. Falleur proposed that in light of the severity of the applicant's injury - incomplete quadriplegia - the applicant's settlement should be apportioned 5 percent for economic loss and 95 percent for non-economic loss - pain and suffering. Accordingly, Mr. Falleur asserts that the applicant should be granted an award in the amount of \$1,750.00, which represents the \$4,166.66 paid for reimbursement of Medicaid minus \$2,000.00 in medical pay, a readily available collateral source and \$416.66 the 5 percent of the settlement which represented economic loss recovery.

{11}Assistant Attorney General Stacy Hannan outlined the Attorney General's position. Ms. Hannan contended that money paid for reimbursement of Medicaid from the applicant's settlement does not constitute an economic loss. Furthermore, the panel's prior holding in *Fout-Craig*, V93-27851tc (2-5-99) has no relevance to the case at bar. Ms. Hannan directed the panel's attention to *In re Radel* (1993), 66 Ohio Misc. 2d 123, 643 N.E. 2d 609, and urged the adoption of the rationale expounded in that case.

{12}In the alternative, if the panel chooses to adopt the *Fout-Craig* analysis in this case Ms. Hannan asserts based upon the injuries sustained by the applicant the more appropriate apportionment should be 10 percent for economic loss and 90 percent

for non-economic loss. Ms. Hannan cited the injuries sustained by the applicants in the *Kennard* and *In re Kissinger*, V93-72805tc (7-21-00) cases as justification for the apportionment in this case. Finally, it is the Attorney General's position that reimbursement of the funds the Social Security Administration collected from the applicant is not an economic loss within the definition of the crime victims compensation act. Whereupon the hearing was concluded.

{13}From review of the file and with full and careful consideration given to all information presented at the hearing we are presented with three issues that must be decided. First, whether or not the funds the Social Security Administration recouped from the applicant's settlement constitute economic loss, second whether the recoupment by Medicaid is reimbursable allowable expense and finally whether the *Fout-Craig* analysis applies in this case.

{14}With respect to the recoupment of SSI benefits taken by the Social Security Administration, we find that this loss is not compensable under the parameters of the Victims of Crime Compensation Act. We are bound by the definition of economic loss contained in R.C. 2743.51(E). The loss sustained by the applicant in this situation simply does not meet that definition.

{15}In order to address the second issue presented to us it is necessary to review case precedent. The Attorney General directs us to the case of *In re Radel*. In *Radel* the applicant sought an award for \$25,000.00 which he was forced to pay to settle a subrogation claim with the applicant's health insurance provider, Community Mutual Insurance. In denying the applicant's claim for reimbursement the panel stated:

**** were the court to grant applicant an award reparations for reimbursement of the \$25,000 paid to Community Mutual under the subrogation agreement, the reparations fund would, in effect, be rendered a collateral source to Community Mutual. The Attorney General further stated that such an award would be in blatant contravention of the subrogation provisions of R.C. 2743.72. We agree." *In re Radel* (1993), 66 Ohio Misc. 2d 123, 125. Conversely, the applicant's attorney directs us to the holdings in *In re Dungey* and *In re Bush*,

V2000-01431tc (4-11-01). In *In re Dungey*, a judge of the Court of Claims determined that:

“[w]hile funds received by the Victims of Crime Program cannot be subrogated to an insurance company, any payment received by an applicant, whether from an uninsured motorist settlement or some other source, is considered a collateral source only to the extent to which an applicant receives the benefit of that payment.”

{16}In *In re Bush*, a panel of commissioners adopted the parties’ agreement that “pursuant to *In re Kissinger*, V93-72805tc (7-21-00) and *In re Kennard*, V97-63444tc (11-13-00), the \$30,000.00 from the applicant’s insurance recovery paid in subrogation to the Bureau of Workers’ Compensation (BWC) should not be deducted before apportionment is made, and that amount should be recognized as a medical expense payment when determining the applicant’s economic loss.” *In re Bush*, V2000-01431tc (4-11-01).

{17}We find that the transfer of settlement money to Medicaid effectively reduced the amount as a readily available collateral source. The applicant was deprived the full benefit of the proceeds of his uninsured motorist coverage, a readily available collateral source, by the transfer of \$4,166.66 to Medicaid. This holding does not place the Victims of Crime Compensation Program in the position of being a collateral source to Medicaid, but merely allows the applicant to receive the full measure of benefits he received under his uninsured motorist policy.

{18}Finally, we hold due to the severity of the applicant’s injuries the rationale contained in *In re Fout-Craig* should apply. Based upon a review of the material contained in the claim file, we find the proceeds from the uninsured motorist coverage should be apportioned 90 percent for non-economic loss and 10 percent for economic loss.

{19}Therefore, the July 25, 2007 decision of the Attorney General is reversed and the applicant is granted an award in the amount of \$1,949.99, which represents 90 percent of the amount the applicant was required to repay Medicaid less the payment of the medical pay received from his insurance carrier.

RANDI OSTRY LE HOTY
Presiding Commissioner

THOMAS H. BAINBRIDGE
Commissioner

TIM MC CORMACK
Commissioner



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ORDER OF A THREE
COMMISSIONER PANEL

IT IS THEREFORE ORDERED THAT

{20}1) The July 25, 2007 decision of the Attorney General is REVERSED and judgment is rendered in favor of the applicant in the amount of \$1,949.99;

{21}2) This claim is remanded to the Attorney General for payment of the award in accordance with this order;

{22}3) This order is entered without prejudice to the applicant's right to file a supplemental compensation application, within five years of this order, pursuant to R.C. 2743.68;

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ORDER

{23}4) Costs are assumed by the court of claims victims of crime fund.

RANDI OSTRY LE HOTY
Presiding Commissioner

THOMAS H. BAINBRIDGE
Commissioner

TIM MC CORMACK
Commissioner

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

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