

[Cite as *In re Brill*, 2005-Ohio-7137.]

IN THE COURT OF CLAIMS OF OHIO

VICTIMS OF CRIME DIVISION

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IN RE: ERIC BRILL : Case No. V2005-80207
ERIC BRILL : OPINION OF THE THREE-
Applicant : COMMISSIONER PANEL

: : : : :

{¶ 1} On November 17, 2003, Eric Brill ("Mr. Brill" or "applicant") filed a supplemental compensation application seeking reimbursement of expenses incurred with respect to an August 24, 2001 shooting incident. The applicant, a former Whitehall City Police Officer, lost an eye as a result of the incident. On May 17, 2004, the Attorney General denied the applicant's claim pursuant to R.C. 2743.60(D) contending that all the applicant's economic loss had been or may be recouped from a collateral source, namely the Ohio Police & Fireman's Pension Fund ("OP&FPF"). On August 12, 2004, the applicant filed a request for reconsideration. On March 10, 2005, the Attorney General denied the claim once again. On April 6, 2005, the applicant filed a notice of appeal to the Attorney General's March 10, 2005 Final Decision. On July 29, 2005 and October 27, 2005, the Attorney General filed Briefs recommending the Final Decision be affirmed, since: (1) the OP&FPF is a collateral source; 2) the applicant unreasonably failed to seek readily available nursing services via the Bureau of Workers' Compensation ("BWC"); (3) the applicant never incurred replacement services loss; and (4) the applicant received collateral source benefits that exceed his losses. Hence, this matter came to be heard before this panel of three commissioners on November 2, 2005 at 11:10 A.M.

{¶ 2} The applicant, applicant's counsel, and an Assistant Attorney General appeared at the hearing and presented testimony, exhibits, and oral argument for the panel's consideration. Mr. Brill testified that he had only been on the Whitehall police force 13 months when he sustained a gunshot injury, while on duty, to his left eye. Mr. Brill explained that he was treated at the hospital over the course of several days, during which he underwent plastic and exploratory surgery. Mr. Brill noted that he eventually lost his left eye and now utilizes a prosthetic eye. When he was released from the hospital approximately two weeks later the applicant testified that his physician, Dr. Cahill, informed him as well as his then fiancé that he would need around-the-clock care for the next six weeks. However, he would still be unable to drive for eight weeks. Mr. Brill testified that he was prescribed numerous types of medications. He stated that he suffers from depth perception problems and anxiety as a result of the shooting. The applicant stated that he was unable to perform simple tasks, such as bathing, cooking, feeding himself, driving, walking, cleaning, etc. The applicant stated that during that eight week period his then fiancé assisted him with his personal care needs. Mr. Brill stated that he paid Melody Brill for replacement services, since he was unable to perform the above mentioned tasks. (See Exhibits A and B). Lastly, the applicant testified that he currently receives a monthly benefit from the OP&FPF.

{¶ 3} Melody Brill ("Mrs. Brill"), the applicant's wife, testified that on August 24, 2001 the applicant was shot. Mrs. Brill explained that Dr. Cahill informed her that the applicant would need 24 hour care for six weeks. Mrs. Brill stated that she took a leave of absence from her job at the Limited to care for the applicant, but incurred no wage loss (utilized her sick time). Mrs. Brill stated that she assisted the applicant during his period of disability by changing his

dressings, administering his medications, cooking, cleaning, assisted with feeding, bathing, dressing, walking, etc. Mrs. Brill stated that on October 20, 2001 she and the applicant were married, but asserted that despite their prior living together before the marriage she and the applicant equally shared in the house-hold duties since they both had demanding careers.

{¶ 4} Sandra Glasner, the applicant's witness, testified that she has been a registered nurse since 1971. Ms. Glasner noted that she has worked in various medical fields, but she is currently employed as the Director of Clinical Services for a medical consulting firm, where she responds to individual requests for medical services. When questioned about her recommendation of services for the applicant, based upon his injuries and his physicians's instructions, Ms. Glasner indicated that she would have sent: 1) a registered nurse to the applicant's home twice a day for 1 hour to administer medications and to change his bandages, 2) a home health aid to the applicant's home to assist with certain needs for 4 hours a day, and 3) a sitter to supervise the applicant the remainder of the day (18 hours). Ms. Glasner indicated that a registered nurse would have earned approximately \$55.00 per visit, a home health aid would have earned approximately \$17.00 per hour, and a sitter would have earned approximately \$12.00 - \$13.00 per hour in 2001. Based upon the nature of the applicant's injuries, Ms. Glasner testified that she would have been required to send a nurse to administer medications and to change the applicant's dressings.

{¶ 5} From review of the file and with full and careful consideration given to all the evidence proffered, this panel makes the following determination.

{¶ 6} First Issue: Whether the OP&FPF is a collateral source?

{¶ 7} Revised Code 2743.51(B)states:

(B) "Collateral source" means a source of benefits or advantages for economic loss otherwise reparable that the victim or claimant has received, or that is readily available to the victim or claimant, from any of the following sources:

- (1) The offender;
- (2) The government of the United States or any of its agencies, a state or any of its political subdivisions, or an instrumentality of two or more states, unless the law providing for the benefits or advantages makes them excess or secondary to benefits under sections 2743.51 to 2743.72 of the Revised Code;
- (3) Social security, medicare, and medicaid;
- (4) State-required, temporary, non-occupational disability insurance;
- (5) Workers' compensation;
- (6) Wage continuation programs of any employer;
- (7) Proceeds of a contract of insurance payable to the victim for loss that the victim sustained because of the criminally injurious conduct;
- (8) A contract providing prepaid hospital and other health care services, or benefits for disability;
- (9) That portion of the proceeds of all contracts of insurance payable to the claimant on account of the death of the victim that exceeds fifty thousand dollars;
- (10) Any compensation recovered or recoverable under the laws of another state, district, territory, or foreign country because the victim was the victim of an offense committed in that state, district, territory, or country.

"Collateral source" does not include any money, or the monetary value of any property, that is subject to sections 2969.01 to 2969.06 of the Revised Code.

{¶ 8} A collateral source is a secondary source of benefits or advantages for economic loss that the victim/applicant has received or is readily available to recover. In this case, the applicant receives benefits from the OP&FPF that he would not have received had he not been a

victim of criminally injurious conduct.¹ Based upon the above, we find the OP&FPF to be a collateral source.

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The file contains an October 22, 2003 letter from Jennifer Harville, Processing Supervisor for the OP&FPF, which reads that on August 25, 2002 Mr. Brill “was granted on-duty permanent and total disability retirement.”

{¶ 9} Second Issue: Whether the applicant "unreasonably" failed to avail himself of BWC nursing services?

{¶ 10} Revised Code 2743.60(D) states:

(D) The attorney general, a panel of commissioners, or a judge of the court of claims shall reduce an award of reparations or deny a claim for an award of reparations that is otherwise payable to a claimant to the extent that the economic loss upon which the claim is based is recouped from other persons, including collateral sources. If an award is reduced or a claim is denied because of the expected recoupment of all or part of the economic loss of the claimant from a collateral source, the amount of the award or the denial of the claim shall be conditioned upon the claimant's economic loss being recouped by the collateral source. If the award or denial is conditioned upon the recoupment of the claimant's economic loss from a collateral source and it is determined that the claimant did not unreasonably fail to present a timely claim to the collateral source and will not receive all or part of the expected recoupment, the claim may be reopened and an award may be made in an amount equal to the amount of expected recoupment that it is determined the claimant will not receive from the collateral source.

If the claimant recoups all or part of the economic loss upon which the claim is based from any other person or entity, including a collateral source, the attorney general may recover pursuant to section 2743.72 of the Revised Code the part of the award that represents the economic loss for which the claimant received the recoupment from the other person or entity.

{¶ 11} Revised Code 2743.60(H) states:

(H) If a claimant unreasonably fails to present a claim timely to a source of benefits or advantages that would have been a collateral source and that would have reimbursed the claimant for all or a portion of a particular expense, the attorney general, a panel of commissioners, or a judge of the court of claims may reduce an award of reparations or deny a claim for an award of reparations to the extent that it is reasonable to do so.

{¶ 12} The Victims of Crime statute imposes a duty upon a victim/applicant to reasonably recover benefits from a readily available collateral source. In *In re Schroepfer* (1983), 4 Ohio Misc.2d 15, the applicant (18 years old) was a resident of New Jersey, but was attending college in Ohio when he was assaulted (the applicant's parents were receiving public assistance at the time of the assault and hence a portion of the applicant's medical bills were paid by Medicaid, but only those bills that were timely submitted to Medicaid). In *Schroepfer*, the court held that where an applicant for reparations fails to file a claim for benefits with a specified collateral source that would have provided reimbursement of economic loss, and where the failure to file prevented the applicant from receiving such collateral source benefits, that expense shall be considered recouped from a readily available collateral source within the meaning of R.C. 2743.51(B) and R.C. 2743.60(D). However, the panel in *In re Hatton*, V92-59732tc (4-28-94), held that "[S]ince the applicant was not a welfare recipient at the time of the criminally injurious conduct and it is uncertain whether he would have been approved for coverage, then welfare is not a readily available collateral source for the applicant pursuant to R.C. 2743.51(B)." *Id. at 2.*

{¶ 13} Moreover, in *In re Roser* (1994), 86 Ohio Misc.2d 1, a judge of the court held that: 1) other Victims of Crime programs are potential collateral sources, 2) Ohio applicants are

not required to file reparations applications in states where the criminally injurious conduct occurred; and 3) the applicant did not act unreasonably when he did not file a Michigan reparations application (the applicant was an Ohio resident who was injured in Michigan). Lastly, in *In re Johnson-Derks*, V92-85270tc (11-18-96), the panel cited *Hatton* and further stated that "applicants should not be forced to apply for welfare and other public assistance." *Id.* at 5.

{¶ 14} The Victims of Crime program was designed to return victims/applicants to their status prior to the criminally injurious conduct. The goal of the program is remedial in nature. Therefore after reviewing Ohio Administrative Code 4123-7-25, we find Mr. Brill could have only recovered expenses from the Bureau of Workers' Compensation for services provided by a registered or licensed practical nurse. The applicant's BWC physician was responsible for submitting the necessary paperwork for approval of nursing services and not the applicant. Despite Mr. Brill's physician's instructions that he have around-the-clock care, Mr. Brills's physician nevertheless failed to submit the proper paper work in order for the applicant to recover nursing expenses. In light of the above, we do not find that the applicant unreasonably failed to avail himself of a readily available collateral source.²

{¶ 15} Third Issue: Whether the applicant incurred replacement services loss?

{¶ 16} Revised Code 2743.51(H) states:

(H) "Replacement services loss" means expenses reasonably incurred in obtaining ordinary and necessary services in lieu of those the injured person would have performed, not for income, but for the benefit of the person's self or family, if the person had not been injured.

{¶ 17} An important decision concerning whether an expense must actually be incurred in order to receive reparations for replacement services is *In re Eader* (1982), 70 Ohio Misc. 17. In *Eader*,

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See *In re Arnold*, V2002-51508tc (1-16-03), where the panel found that it was the responsibility of the medical provider to submit the necessary information to the applicant's insurance carrier. When a provider fails to do so, the panel held it would be unreasonable and unlawful to deny a

supra, the court stated unequivocally: "The only reasonable construction of the words 'incurred in obtaining' is that the amount or value is intended, which can only be ascertained after the fact of the loss or expenditure." *Eader* primarily discussed dependent's replacement services loss, defined under R.C. 2743.51(J), and ordinary replacement services loss. The *Eader* decision required a documented out-of-pocket loss for replacement services loss reimbursement. Over the years, however, numerous subsequent cases have allowed recovery by virtue of a quasi-contractual relationship. See *In re Fitzpatrick*, V80-3704sc (5-12-82) and *In re Pollack*, V78-3169sc (8-7-81). Even allowable expense, defined under R.C. 2743.51(F), may be recovered without documented proof of an actual incurred loss if a victim/applicant files a Remedial Treatment and Care Agreement.

{¶ 18} More specifically in *In re Myers*, V95-53620tc (5-26-99), the panel allowed a claim for replacement services loss after determining that a quasi-contractual obligation for payment existed due to the substantial nature of the applicant's services. The panel noted, while discussing *Pollock, supra*, that in cases involving family members, the presumption (that family members provide gratuitous services based upon moral or familial duty) may be overcome when such service is so substantial that it goes beyond what could be reasonably expected. The panel further noted that the replacement service provider need not expect compensation at the time services are rendered in order to recover (The victim/daughter suffered a severe injury as a result of criminally injurious conduct that rendered her unable to care for herself or her three minor children. The applicant/mother provided 24 hour care to the victim and her household. The panel noted that the value of the services provided should be calculated based upon the local prevailing rates for such service). Also in *In re Evans*, V2001-32003tc (11-30-01), the panel

claim for an award of reparations when the applicant did everything within his ability to have the claim properly paid.

allowed a claim for replacement services loss based upon: 1) the presentation of medical documentation of the applicant's injuries, 2) the physical limitations imposed upon the applicant as a result of the injuries, and 3) corroborating testimony as to the nature and the amount of such services. The panel stated that they preferred documentation of each and every service payment, but noted "the reality that a paper trail does not often exist when a close friend or family member offers their assistance to a victim. We do not think that, given other credible evidence, a lack of receipts means the services provided did not occur or the time expended was not worthy of payment." *Id. at 3*. Likewise, we agree with the above holdings.

{¶ 19} In the present case, the applicant and Mrs. Brill resided together prior to the criminally injurious conduct. However, the applicant did not require Mrs. Brill's assistance for his personal care. Following the criminally injurious conduct, the applicant required 24 hour care and Mrs. Brill performed all the duties the victim previously performed for himself. Mrs. Brill went above and beyond the call of duty to the applicant, although she had no legal obligation to care for the applicant since the couple was not yet married at the time.

{¶ 20} Moreover, the Attorney General's argument that Mr. Brill failed to incur replacement services loss, because he paid Mrs. Brill three years later out of their joint account and because the funds were redeposited into the couple's joint account, is not well-taken. Once Mrs. Brill received the check for replacement services it was her choice to do what she wished with the funds, since she voluntarily performed said services. Based upon the above, we find that Mrs. Brill's services were unquestionably ordinary and necessary in light of the applicant's condition, the applicant's physician's instructions for 24 hour care, and Ms. Glasner's testimony.

{¶ 21}

Fourth Issue: Whether the applicant’s collateral

source benefits outweigh his economic loss?

{¶ 22} We find, based upon the following calculations, that the applicant has sustained

\$ 20,706.35 in economic loss.

Work Loss (regular)

\$ 15,760.65

8/27/02 - 12/31/02³

\$ 58,036.94

1/1/03 - 12/31/03

+ 61,550.59

1/1/04 - 12/31/04

\$135,348.18

gross regular work loss (8/27/02 - 12/31/04)

Work Loss (private duty)

Speedway \$ 5,243.89

8/27/02 - 12/31/03

Bobcor \$ 9,903.44

8/27/02 - 12/31/03

Fox Fire + 3,007.29

8/27/02 - 12/31/03

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On December 4, 2002, the Attorney General granted the applicant \$15,838.20 for private duty work loss incurred from August 25, 2001 through August 26, 2002.

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\$18,154.62	gross private duty work loss (8/27/02 - 12/31/03) ⁴
<u>Desk Job Income</u> (collateral source)	
\$ 11,911.71	8/27/02 - 12/31/03
\$ 35,501.22	1/1/03 - 12/31/03
+ 36,877.02	1/1/04 - 12/31/04
\$ 84,289.95	gross desk job income (8/27/02 - 12/31/04)
<u>Pension Benefits</u> (collateral source)	
\$ 9,885.60	8/27/02 - 12/31/02
\$29,656.80	1/1/03 - 12/31/03
+29,656.80	1/1/04 - 12/31/04
\$69,199.20	gross pension benefits (8/27/02 - 12/31/04)
\$135,348.18	gross regular work loss (8/27/02 - 12/31/04)
+ 18,154.62	gross private duty work loss (8/27/02 - 12/31/03)
\$153,502.80	
- 84,289.95	gross desk job income (8/27/02 - 12/31/04)
\$ 69,212.85	
\$ 69,199.20	gross pension benefits (8/27/02 - 12/31/04)
- 13.65	total collateral source benefits (8/27/02 - 12/31/04)
\$ 20,720.00	replacement services loss
\$ - 13.65	total collateral source benefits (8/27/02 - 12/31/04)
\$ 20,706.35	total reimbursement to the applicant

The Attorney General noted that 2004 private duty work loss calculations are unavailable at this time.

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{¶ 23} Therefore, the March 10, 2005 Attorney General decision shall be reversed to grant the applicant an award in the amount of \$20,706.35 for unreimbursed replacement services loss.

THOMAS H. BAINBRIDGE
Commissioner

CLARK B. WEAVER, SR.
Commissioner

LLOYD PIERRE-LOUIS
Commissioner

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IN RE: ERIC BRILL	:	Case No. V2005-80207
ERIC BRILL	:	<u>ORDER OF THE THREE-</u>
Applicant	:	<u>COMMISSIONER PANEL</u>

: : : : :

IT IS THEREFORE ORDERED THAT

- 1) The March 10, 2005 decision of the Attorney General is REVERSED to render judgment in favor of the applicant in the amount of \$20,706.35;
- 2) This claim is referred to the Attorney General pursuant to R.C. 2743.191 for payment of the award;
- 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;

- 4) Costs are assumed by the court of claims victims of crime fund.

THOMAS H. BAINBRIDGE
Commissioner

CLARK B. WEAVER, SR.
Commissioner

LLOYD PIERRE-LOUIS
Commissioner

ID #7-dld-tad-112105

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

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To S.C. Reporter 1-20-2006

