

[Cite as *In re Peaco*, 2005-Ohio-2652.]

IN THE COURT OF CLAIMS OF OHIO
VICTIMS OF CRIME DIVISION

IN RE: MICHAEL B. PEACO, JR.	:	Case No. V2004-61250
MICHAEL B. PEACO, JR.	:	<u>OPINION OF A THREE-</u> <u>COMMISSIONER PANEL</u>
Applicant	:	
: : : : :		

{¶ 1} February 23, 2004, the applicant filed a supplemental compensation application seeking reimbursement of expenses incurred with respect to an October 22, 2002 incident, whereby he was intentionally struck with a motor vehicle by Aaron Basford. On June 16, 2004, the Attorney General granted the applicant an award, after an economic loss apportionment analysis of 33/67 percent, in the amount of \$11,622.04 for unreimbursed allowable expense. On July 12, 2004, the applicant filed a request for reconsideration. On November 9, 2004, the Attorney General issued a Final Decision indicating that no modification of the previous decision was warranted. On December 6, 2004, the applicant filed a notice of appeal to the Attorney General's November 9, 2004 Final Decision. The applicant indicated that he was unable to work for a period of time as a result of the criminally injurious conduct and therefore lost approximately \$24,000.00 in wages. Hence, this appeal came to be heard before this panel of three commissioners on February 23, 2005 at 9:50 A.M.

{¶ 2} The applicant, applicant's counsel, and an Assistant Attorney General attended the hearing and presented testimony and oral argument for the panel's consideration. Michael Peaco, Jr. testified that he and his father are members of Millwright-Pile Driver Local Union No. 1871. The applicant stated that he and his father work as a team for 95 percent of their assignments. Mr. Peaco explained that his father typically incurs more work hours at the beginning of a job, however his hours usually equal or out number his father's hours at the end of an assignment because he works more overtime than his father. The applicant testified that on October 22, 2002 he was employed with Commercial Contracting and would have continued to work for Commercial Contracting alongside his father, but for the injury. The applicant stated that his father worked 704 hours between October 22, 2002 and March 3, 2003 (the applicant's disability period). Mr. Peaco also stated that he earns \$33.00 per hour with benefits, however his net salary is only \$25.00 per hour.

{¶ 3} Applicant's counsel argued, based on the evidence presented, that the applicant's claim for work loss (704 hours x \$25.00 per hour = \$17,600.00) should be allowed. Counsel stated that the applicant and his father would have worked approximately the same number of hours during the Commercial Contracting assignment, but for the applicant's injury. Counsel urged the panel to consider the applicant's father's work history between October 22, 2002 and March 3, 2003 as a reasonable and reliable source for calculating the applicant's work loss during his period of disability.

{¶ 4} The Assistant Attorney General conceded that the applicant is entitled to an award for work loss, but objected to using the applicant's father's work history as a guide for calculating the applicant's work loss. The Assistant Attorney General stated that Mr. Peaco

testified that his father, as foreman, sometime worked more hours during the beginning of a job, which could have resulted in more hours being worked by the applicant's father but not by the applicant. The Assistant Attorney General suggested that Mr. Peaco's own work history, during the past year, should be used as a guide for calculating his work loss, instead of his father's work history between October 22, 2002 and March 3, 2003.

{¶ 5} From review of the file and with full and careful consideration given to all the information presented at the hearing, this panel makes the following determination. We find that the applicant incurred additional economic loss as a result of the criminally injurious conduct. Mr. Peaco testified that he and his father worked as a carpentry team for most assignments and hence their work hours would have been similar during the time period in question. Mr. Peaco testified that he believed, based upon his father's work schedule, that he would have worked at least 704 hours at \$25.00 per hour between October 22, 2002 and March 3, 2003 if he had not been assaulted. We agree that the father's work history between October 22, 2002 and March 3, 2003 is a reasonable and reliable method of calculating the applicant's work loss. Nevertheless, after further review of the documents, we find that 692 is a more accurate number of the hours lost by the applicant during his period of disability and hence the applicant should be reimbursed \$17,300.00 (692 hours x \$25.00 per hour in work loss).

{¶ 6} Furthermore, we note that the applicant bears the burden of proving, by a preponderance of the evidence, what percentage of proceeds received should be considered compensation from non economic loss (pain and suffering). According to the holding in In re Fout-Craig, V93-27851tc (2-5-99), the apportionment of a victim's non economic loss compensation involving insurance proceeds shall be determined on a case-by-case basis

according to the particular facts and circumstances of the case. We note that the applicant suffered a broken leg and ankle and sustained some permanent scarring and loss of function as a result of the criminally injurious conduct. Based upon the testimony presented and the Victim Impact Questionnaire contained in the claim file, this panel finds that 70 percent is a reasonable percentage to be attributable to non economic loss in this case. Moreover, we find that the applicant also incurred replacement services loss (child care and household duties) between October 22, 2002 through January 10, 2003 in the amount of \$1,080.00. Based on the above, the applicant's award of reparations shall be calculated in the following manner:

\$12,500.00	Gross settlement proceeds
<u>- 8,014.81</u>	<u>Legal fees and expenses</u>
\$ 4,485.19	Net settlement proceeds
\$ 4,485.19	Net settlement proceeds
<u>x 30%</u>	<u>Economic loss apportionment percentage</u>
\$ 1,345.56	Gross collateral source deduction
\$ 1,345.56	Gross collateral source deduction
<u>- 14,323.15</u>	<u>Medical expenses</u>
-\$12,977.59	Net collateral source deduction
\$17,300.00	Net work loss (692 work hours lost x \$25.00 per hour)
\$14,323.15	Allowable expense
<u>+\$1,080.00</u>	<u>Replacement services loss</u>
\$32,703.15	Economic loss
\$32,703.15	Economic loss
<u>-11,622.04</u>	<u>Award previously granted on June 16, 2004</u>
\$21,081.11	Total unreimbursed economic loss ¹

¹See In re Fout-Craig, V93-27851tc (2-5-99) and In re Kennard, V97-63444tc (11-13-00).

{¶ 7} In light of the above, we find that the November 9, 2004 decision of the Attorney General shall be reversed and the applicant shall be granted an award in the amount of \$21,081.11 for unreimbursed economic loss.

JAMES H. HEWITT III
Commissioner

THOMAS H. BAINBRIDGE
Commissioner

GREGORY P. BARWELL
Commissioner

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MICHAEL B. PEACO, JR. : ORDER OF A THREE-
Applicant : COMMISSIONER PANEL

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IT IS THEREFORE ORDERED THAT

{¶ 8} 1) The November 9, 2004 decision of the Attorney General is REVERSED to render judgment in favor of the applicant in the amount of \$21,081.11;

{¶ 9} 2) This claim is remanded to the Attorney General for payment of the \$21,081.11 award;

{¶ 10} 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;

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

JAMES H. HEWITT III
Commissioner

THOMAS H. BAINBRIDGE
Commissioner

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GREGORY P. BARWELL
Commissioner

ID #\1-dld-tad-032905

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

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To S.C. Reporter 5-25-2005