

[Cite as *In re Ross*, 2007-Ohio-2927.]

**IN THE COURT OF CLAIMS OF OHIO
VICTIMS OF CRIME DIVISION**

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IN RE: THOMAS J. ROSS	:	Case No. V2006-20062
THOMAS J. ROSS	:	Commissioners:
Applicant	:	James H. Hewitt III, Presiding
_____	:	Thomas H. Bainbridge
_____	:	Gregory P. Barwell
	:	<u>ORDER OF A THREE-</u>
	:	<u>COMMISSIONER PANEL</u>
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{¶1} The applicant, a police officer for the City of Cleveland, filed a reparations application seeking reimbursement of expenses incurred after he sustained injury to his left calf while chasing a person suspected of drug abuse (cocaine) and resisting arrest on September 1, 2004.¹ On September 29, 2005, the Attorney General denied the claim pursuant to R.C. 2743.52(A) because the Attorney General was unsuccessful in attempts to obtain information to verify work loss. On October 24, 2005, the applicant filed a request for reconsideration asserting that he incurred private duty work loss from his primary and special duty employer. The applicant initially failed to provide documentation supporting the special duty income and the details concerning any payment(s) from any collateral source. The Attorney General maintained that benefits

1

The medical assessment revealed that the applicant suffered a significant calf muscle strain, making it difficult for him to walk. His treatment plan advised rest and anti-inflammatory medication and to remain off work for a two-week period of time.

from the American Family Life Assurance Company of Columbus ("AFLAC") are a collateral source. Thus, the Attorney General sought support as to what benefits may have been paid. The applicant was advised to provide documentation to support his economic loss. If such materials were not forthcoming, a supplemental application could be filed. On December 28, 2005, the Attorney General issued a Final Decision indicating that the previous decision warranted no modification. On January 25, 2006, the applicant filed a notice of appeal to the Attorney General's December 28, 2005 Final Decision contending that AFLAC is an accidental death, dismemberment, and injury policy and not a collateral source because the policy does not replace lost wages. The applicant's appeal also included various court subpoenas which the applicant contends he could have responded to had he not suffered the injury. Finally, the applicant also supplied documentation from a private duty employer and from several ceremonial events to substantiate his claim for work loss. On December 21, 2006 at 10:30 A.M., this matter came to be heard before this panel of three commissioners.

{¶12} Applicant's counsel and an Assistant Attorney General attended the hearing and presented oral argument for this panel's consideration. Applicant's counsel stated that the applicant is entitled to receive an award totaling \$2,008.45 in unreimbursed primary and private duty work loss, since AFLAC does not qualify as a collateral source under R.C. 2743.51(B). Counsel argued that AFLAC is an insurance event policy and is not triggered by mere economic loss sustained by a policy holder, even though economic loss is usually suffered by the insured. Counsel asserted that an AFLAC policy is akin to recovery for pain and suffering as well as for the added

aggravation of dealing with the circumstances of an unfortunate event (i.e., hospitalization, physical therapy, loss of a limb, etc.). Lastly, counsel stated that AFLAC does not reimburse a policy holder for medical expense or work loss but rather reimburses a policy holder a flat rate monetary benefit merely based upon a particular event occurring. However, the Assistant Attorney General maintained that AFLAC qualifies as a collateral source based on the plain and unambiguous language of R.C. 2743.51(B)(7) and hence the applicant's claim must be reduced by the amount of benefits that the applicant received from AFLAC.

{¶3} Revised Code 2743.51(B) states:

“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 or that is received as a benefit from the Ohio public safety officers death benefit fund created by section 742.62 of the Revised Code."

{¶4} Revised Code 2743.60(D) in pertinent part states:

"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."

{¶5} Revised Code 2743.60(H) states:

“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.”

{¶6} From review of the file and with full and careful consideration given to all the evidence presented at the hearing, this panel makes the following determination. This is an issue of first impression as it involves one of the first instances where the panel is asked to determine whether AFLAC benefits under the Ohio’s Victims of Crime Program should be considered a collateral source.² First, we find that AFLAC qualifies as a collateral source, as the term is defined under R.C. 2743.51(B)(7). The core of AFLAC’s business is to design insurance policies that can be used to help with those out-of-pocket expenses not covered by existing primary insurance. Based on that premise, we find AFLAC benefits to be proceeds of a contract of insurance payable to the victim for loss sustained due to criminally injurious conduct. See *In re Martin* (1993), 63 Ohio Misc. 2d 82.

{¶7} In short, the *Martin* case stands for the proposition that when an applicant receives benefits from whatever source, after the criminally injurious conduct, that the applicant was not receiving prior to the incident, those benefits offset lost wages and are deemed collateral sources.

2

On this date, in a related case, the panel ruled that AFLAC benefits qualify as a collateral source. See, *In re Rinkus*, V2006-20119tc (4-2-07).

{¶8} In this instance, the applicant is believed to have submitted the claim for benefits beyond the prescribed time limits detailed by the AFLAC insurance policy.³ Indeed, at the hearing, the applicant had not received a final determination based on this claim. If the applicant unreasonably fails to utilize the readily available collateral source, that expense shall be considered recouped within the meaning of R.C. 2743.51(B) and R.C. 2743.60(D). According to the holding in *In re Schroepfer* (1983), 4 Ohio Misc. 2d 15, the failure to submit expenses to a readily available collateral source creates a presumption that all expenses have been recouped. Although evidence of an applicant's failure to submit expenses to a readily available collateral source is presumed, that presumption may be rebutted by the applicant with additional evidence to the contrary. A rebuttal presumption "disappears" when a party challenging the presumed fact produces evidence to the contrary, which counterbalances it or leaves the case in a state of equilibrium. *Carson v. Metro Life Ins. Co.* (1951), 156 Ohio St. 104, 108.

{¶9} One must remember that the goal of the program is remedial in nature. The Ohio Victims of Crime Program was designed to return victims/applicants to their status prior to the criminally injurious conduct. If we were to mandate that an applicant/victim seek every potential form of recovery and undertake extraordinary means to do so that would run afoul of the program's mission and goal. Therefore, we find that certain factors should be considered on a case-by-case analysis when

3

The AFLAC policy provides as follows: "Written notice of claim must be given within 60 days after a covered loss or as reasonably possible."

determining whether a victim/applicant should be required to seek recovery from a potential collateral source. Those factors are as follows: (1) is the source of benefits or advantage for economic loss listed under R.C. 2743.51(B) as a collateral source; (2) is the item in question a source of benefits or an advantage for economic loss; (3) is the source of benefits or advantage for economic loss “readily available” - meaning is it highly plausible that recoupment of such benefits within a reasonable time frame of applying for such benefits will occur; and (4) will the victim/applicant run the risk of incurring a substantial and unreasonable monetary cost to recover benefits from the source of benefits or advantage for economic loss. A Court of Claims judge held that R.C. 2743.60(D) clearly provides that the Attorney General, a panel of commissioners, or a judge has the discretion to determine whether to grant an award of reparations to an applicant who has not received benefits from a collateral source. See *In re Massri*, V04-60334jud (11-22-2004), 2004-Ohio-7264. Also note that the panel granted an award to an applicant who failed to apply for Social Security Disability benefits based on legal advice that she would not qualify for such benefits. See *In re Lewis*, V05-80169tc, 2006-Ohio-4027.

{¶10} In this case, we find that Mr. Ross should have filed a claim with AFLAC, since AFLAC proceeds are a source of benefits which were readily available within six months of application for such, and that he could have requested those benefits without substantial cost.

{¶11} Should it evolve that AFLAC eventually responds with a decision on this claim, and with an award of benefits pursuant to this policy of insurance, the applicant is

entitled to file a supplemental compensation application, within five years of this decision, to determine what benefits, if any, that he may be entitled to receive. Based on the above, we find the December 28, 2005 decision of the Attorney General shall be affirmed.

{¶12} IT IS THEREFORE ORDERED THAT

{¶13} 1) The December 28, 2005 decision of the Attorney General is AFFIRMED;

{¶14} 2) This claim is DENIED and judgment is entered for the state of Ohio;

{¶15} 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;

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

JAMES H. HEWITT III
Presiding Commissioner

THOMAS H. BAINBRIDGE
Commissioner

GREGORY P. BARWELL
Commissioner

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

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-1-

ORDER