

[Cite as *In re Zimmer*, 2003-Ohio-4985.]

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

IN RE: SHARON L. ZIMMER	:	Case No. V2003-40186
SHARON L. ZIMMER	:	<u>OPINION OF A THREE-</u>
Applicant	:	<u>COMMISSIONER PANEL</u>
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{¶1} On February 5, 2003, the Attorney General issued a Finding of Fact and Decision that denied the applicant’s claim for an award of reparations due to collateral source availability, specifically the applicant’s settlement. On February 26, 2003, the Attorney General issued a Final Decision denying the claim again for the same reasons. On March 7, 2003, the applicant appealed the Attorney General’s Final Decision. On April 16, 2003, the Attorney General filed a Brief recommending the Attorney General’s Final Decision be affirmed contending that a 33/67 economic loss apportionment amount is a reasonable figure based upon the facts of this case. The Attorney General also stated that the applicant’s claimed gymnasium expense is unrecoverable since no medical documentation was provided which would establish that the expense was sustained as a result of the criminally injurious conduct. This appeal came to be heard before this panel of three commissioners on June 5, 2003 at 11:00 A.M.

{¶2} The applicant, applicant’s counsel and an Assistant Attorney General attended the hearing and presented testimony and oral argument for this panel’s consideration. Sharon Zimmer testified that she was severely injured in a motor vehicle accident on June 18, 2001. The

applicant stated that she was transported to Good Samaritan Hospital where she remained for 3 ½ days. Ms. Zimmer advised the panel that she suffered three fractured ribs, three fractured vertebrae, a fractured pelvis, a broken foot, a bruised torso, and facial injuries. The applicant indicated that after being discharged from the hospital, she immediately began physical therapy. Ms. Zimmer explained that her physician, Dr. Elmi, instructed her to continue therapy. The applicant stated that since Bally's offers the same type of program, but at a cheaper price than the hospital she continued her therapy at Ballys. Ms. Zimmer stated that she was off work approximately four months until she returned part-time. During the time she was off work, the applicant indicated that friends and family members assisted her with tasks (shopping, laundry, yard work, driving, etc. . .) that she was unable to perform due to her injuries. Ms. Zimmer stated that by the end of 2001 she had returned to work full-time.

{¶3} Carole Urbanas, the applicant's long-time friend, briefly testified concerning the applicant's need for assistance for approximately four months after the incident. Ms. Urbanas also testified about the changes, both physical and emotional, that she witnessed the applicant undergo since the June 18, 2001 incident. Ms. Urbanas' testimony concerning the impact of the June 2001 incident essentially corroborated the applicant's testimony.

{¶4} Applicant's counsel argued that, based on the testimony presented concerning the physical and emotional impact of the criminally injurious conduct on the applicant, a 20/80 economic loss apportionment figure is appropriate in this case. Counsel also contended that the applicant should be reimbursed for the gymnasium fees because Dr. Elmi instructed the applicant to continue physical therapy, focusing on water and gymnasium type exercises. Counsel urged

the panel to consider the residual effects that this incident has had upon the applicant as in In re Kennard, V97-63444tc (11-13-00).

{¶5} The Assistant Attorney General maintained that the 33/67 economic loss apportionment figure is correct in this case. The Assistant Attorney General stated that counsel's argument that this case requires a 80/20 split, as was done in Kennard, supra, is faulty. The Assistant Attorney General asserted that the facts of Kennard, supra, are not like the present case and hence Kennard, supra, cannot be used as the standard for determining economic loss apportionments. The Assistant Attorney General insisted that economic loss apportionment cases must be determined on a case-by-case basis. The Assistant Attorney General contended that the applicant has the burden of proof and based on the evidence presented a 33/67 apportionment figure was reasonable. The Assistant Attorney General stated that the applicant testified that she is back to work, that she has no limitations nor is she taking any anti-depressants as a result of the incident. The Assistant Attorney General encouraged the panel to consider not just the injury itself but also the limited effects of the applicant's injury in this case. Lastly, the Assistant Attorney General asserted that the applicant's claim for reimbursement of the gymnasium fees should be denied since the applicant failed to prove the expense was necessary.

{¶6} 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. First, this panel finds the applicant has proven, by a preponderance of the evidence, that she incurred economic loss. As a result of the criminally injurious conduct and according to the applicant's testimony and Victim Impact Statements, Ms. Zimmer sustained extremely serious injury that

has left her with a permanent limp on her left side. Ms. Zimmer sustained three fractured ribs, three fractured vertebrae, a fractured pelvis, a broken foot, a bruised torso, and facial injuries. The applicant continues to suffer serious physical and emotional effects. The applicant indicated that she still takes over-the-counter medication when needed, has trouble ambulating, she cannot run, has gained weight, has been unable to maintain a sexual relationship and has retained individuals to help her perform certain needed tasks. Therefore, we do not base our opinion on or liken this case to Kennard, supra, but find solely on the facts of this case that 80 percent is a reasonable apportionment amount to be attributed to non economic loss considering the degree of the applicant's injuries and the effects that the injuries have had and shall continue to have on the applicant.

\$80,000.00		gross settlement
<u>- 26,912.30</u>		attorney fees + costs
\$ 53,087.70		net settlement
\$53,087.70		net settlement
	<u>x 20%</u>	economic loss apportionment %
\$10,617.54		gross collateral source
\$10,617.54		gross collateral source
<u>- 9,222.89</u>		applicant paid medical & sub expense
\$ 1,394.65		net collateral source
\$ 4,210.29		net economic loss based on 2-5-03 detail expense exhibit
<u>- 1,394.65</u>		net collateral source
\$ 2,815.64		reimbursable economic loss amount

{¶7} Second, this panel finds that a determination of whether Ms. Zimmer is entitled to an award for the gymnasium expense requires application of the principles of traditional proximate cause standards. The quantum of evidence required is a preponderance of competent, material and relevant evidence of record on that issue. Furthermore, there is a long standing

requirement in the law of evidence in Ohio that damages for claimed personal injuries are recoverable only for injuries directly resulting from and as a natural consequence of the injury sustained. The evidence must tend to show that reasonable certainty of such a result exists. See In re Toney, V79-3029jud (9-4-81), In re Saylor (1982), 1 Ohio Misc. 2d 1, and In re Bailey, V78-3484jud (8-23-82). The applicant testified that she attended Bally's based upon the recommendation of her physician for continued physical exercise. Dr. Elmi's May 5, 2003 letter clearly indicates that he advised the applicant to continue exercising to aid in her recovery after the June 18, 2001 motor vehicle accident. The applicant opted to obtain a membership at Bally's instead of incurring costly hospital fees to utilize the same types of therapeutic services. Hence, we find that the applicant incurred the gymnasium expense as a direct result of the criminally injurious conduct.

{¶8} Therefore, this panel finds the February 26, 2003 decision of the Attorney General shall be reversed to grant the applicant an award in the amount of \$2,815.64 in unreimbursed economic loss. This claim shall also be remanded to the Attorney General for calculations and payment of the applicant's gymnasium fees incurred at Bally's.

{¶9} IT IS THEREFORE ORDERED THAT

{¶10} 1) The February 26, 2003 decision of the Attorney General is REVERSED and judgment is rendered in favor of the applicant in the amount of \$2,815.64;

{¶11} 2) This claim is remanded to the Attorney General for payment of the \$2,815.64 award and for calculation, decision and payment of the applicant's gymnasium fees;

{¶12} 3) This order is entered without prejudice to the applicant's right to file a supplemental compensation application pursuant to R.C. 2743.68;

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

CLARK B. WEAVER, SR.
Commissioner

DALE A. THOMPSON
Commissioner

ROBERT B. BELZ
Commissioner