

IN THE COURT OF CLAIMS OF OHIO
VICTIMS OF CRIME DIVISION

IN RE: ARCHIE N. AZBELL	:	Case No. V2004-60059
LARRY L. AZBELL	:	<u>OPINION OF A THREE-</u>
Applicant	:	<u>COMMISSIONER PANEL</u>
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{¶1} The applicant filed a reparations application, on behalf of the victim, seeking reimbursement of expenses incurred in relation to an August 7, 2002 aggravated vehicular assault incident. The applicant is the victim’s father and was appointed Archie Azbell’s legal guardian, since the accident has left him totally and permanently disabled and in a coma. On October 16, 2003, the Attorney General denied the claim for work loss pursuant to R.C. 2743.60(D) contending that all the victim’s economic loss had been or may be recouped from a collateral source, namely the Bureau of Workers’ Compensation. On October 21, 2003, the applicant filed a request for reconsideration. On December 15, 2003, the Attorney General modified his previous decision and granted the victim an award of reparations in the amount of \$2,457.91 for unreimbursed work loss incurred from August 8, 2002 through December 31, 2003. On January 15, 2004, the applicant filed a notice of appeal to the Attorney General’s Final Decision contending that the victim has ongoing work loss, which totals over \$50,000.00 that

should be reimbursed in a lump sum award. Hence, this matter came to be heard before this panel of three commissioners on April 7, 2004 at 10:30 A.M.

{¶2} The applicant's counsel and an Assistant Attorney General attended the hearing and presented oral argument for the panel's consideration. Applicant's counsel explained that the victim was injured while riding his bike and suffered a severe traumatic brain injury. Counsel advised the panel that Archie Azbell is now totally and permanently disabled and is in a coma, but is not on life support. Counsel indicated that the funds will be used as a Medicaid trust in order to ensure a better quality of life for the victim throughout the years. Counsel argued, pursuant to the holding in In re Caminiti (1984), 17 Ohio Misc. 2d 9, wherein a work loss award was commuted for a 20 year old victim who was shot in the stomach which left him a paraplegic, 85 percent occupationally disabled and confined to a wheelchair, thereby limiting his employment opportunities. Counsel stated that Archie Azbell's projected work loss, in light of his condition, should also be commuted and the maximum award of reparations granted.

{¶3} The Assistant Attorney General continued to maintain that the applicant failed to prove the victim's projected work loss should be commuted under the present circumstances. The Assistant Attorney General cited various cases, which she contended supported her position. The Assistant Attorney General asserted that Caminiti, supra, does not allow carte blanche commuting approval, but the proposition that each prospective commutation case must be examined on a case-by-case basis. The Assistant Attorney General argued that it is inappropriate to commute an award in this case, since the victim may not survive the next 30-40 years in order to actually incur the work loss sought, and that paying this victim would be essentially granting an award for dependent's economic loss, which may only be paid if a victim has expired as a

result of the criminally injurious conduct. The Assistant Attorney General further argued that requiring this applicant to file an annual supplemental compensation application for additional work loss is not an unreasonable request.

{¶4} R.C. 2743.51(G) states:

{¶5} "Work loss" means loss of income from work that the injured person would have performed if the person had not been injured and expenses reasonably incurred by the person to obtain services in lieu of those the person would have performed for income, reduced by any income from substitute work actually performed by the person, or by income the person would have earned in available appropriate substitute work that the person was capable of performing but unreasonably failed to undertake.

{¶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. Upon review of commutation cases, we have determined that the facts of this particular case warrants commuting the victim's projected work loss award and granting the maximum award in the amount of \$50,000.00.

{¶7} According to In re Birdsong, V77-0381sc (3-5-84), the single commissioner commuted a victim's work loss award and stated that each commutation case should be considered on a case-by-case basis in relation to certain crucial factors, which are as follows: 1) the nature and extent of the victim's disability; 2) the type of work the victim previously performed; 3) the victim's ability to perform his job in the future; 4) the possibility of retraining for other gainful employment; and 5) the number of years remaining in the applicant's expected work life. Likewise, in In re Vasiliou, V79-3700sc (5-10-84), the single commissioner followed the rationale outlined in Birdsong, supra, and commuted that victim's work loss award. In Caminiti, supra, Judge Victor stated that "the court recognized that where a victim has a history

of employment, and there is the likelihood the victim would have returned to work had he not been injured, that a solid basis had been established upon which to predicate a work loss claim.” Judge Victor followed the rationale of Birdsong and Vasiliou and found that it was in the best interest of that victim to commute his projected work loss award and grant him the maximum award of reparations. Likewise, other commutation cases followed that upheld commuting a victim’s award of reparations.¹ However, in In re McGowan, V88-40992tc (2-14-91), a panel of commissioners upheld the single commissioner’s decision not to commute a victim’s projected work loss award since: 1) the victim was not rendered totally disabled or unemployed as a result of the criminally injurious conduct, 2) the victim had a reasonable expectation of more than 30 years of future work life, during which she could acquire other training in a diverse number of fields, and 3) the victim was only a seasonal employee.

{¶8} In this particular case, we believe that it is in Archie Azbell’s best interest to commute his projected work loss award, since he has met all the necessary criteria. At the time of the injury, Archie Azbell was a 22 year old male who earned a nominal income from steady employment. Today, Archie Azbell is totally and permanently disabled and is in a coma, which prevents him from ever returning to work. Prior to the assault, Archie Azbell’s life-expectancy was 50 years with a work-life expectancy between 37-42 years. It is not unreasonable to

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In re Chasten, V86-30434sc (11-12-87), where the single commissioner commuted a victim’s projected work loss award (the victim sustained a gunshot wound to the head and was left blind and permanently disabled). In re Pesek, V82-36471sc (4-23-84), where the single commissioner relied on previous commutation cases and commuted a permanently disabled 30 year old victim’s projected work loss award.

conclude that the victim, despite his present comatose state, had he not been injured would have continued to work until at least 60 years of age, thereby earning a salary well in advance of the Victims' Fund maximum award. Furthermore, we do not believe the applicant should be required to perform the tedious process of filing annual supplemental compensation applications when it is now quite apparent and obvious that the victim will never work again. Moreover, we believe the funds will be appropriately used to improve the overall quality of Archie Azbell's life. Therefore, the December 15, 2003 decision of the Attorney General shall be modified to award \$50,000.00 to the applicant, on behalf of the victim, as unreimbursed work loss.

{¶9} IT IS THEREFORE ORDERED THAT

{¶10} The December 15, 2003 decision of the Attorney General is MODIFIED to render judgment in favor of the applicant, on behalf of the victim, in the amount of \$50,000.00;

{¶11} This claim is referred to the Attorney General pursuant to R.C. 2743.191 for payment of the award;

{¶12} Costs are assumed by the court of claims victims of crime fund.

THOMAS H. BAINBRIDGE
Commissioner

CLARK B. WEAVER, SR.
Commissioner

STEVEN A. LARSON
Commissioner

ID #\1-dld-tad-041404

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

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To S.C. Reporter 8-10-2004