

Court of Claims of Ohio Victims of Crime Division

The Ohio Judicial Center

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Columbus, OH 43215

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IN RE: JOHN AUSTIN

Case No. V2006-21182

JOHN AUSTIN

Applicant

Commissioners:

Karl C. Kerschner, Presiding

Thomas H. Bainbridge

Tim McCormack

ORDER OF A THREE-
COMMISSIONER PANEL

{¶ 1} The applicant filed a reparations application seeking reimbursement of expenses incurred with respect to a December 4, 2003 shooting incident. On March 10, 2006, the Attorney General found the applicant qualified as a victim of criminally injurious conduct, though it asserted all the applicant's medical expenses could have been reimbursed through Medicaid and Medicare, readily available collateral sources. The Attorney General also found the applicant had presented insufficient evidence to prove, by a preponderance of the evidence, that he sustained work loss. On August 21, 2006, the applicant filed a supplemental compensation application again seeking an award for work loss he experienced as the result of the criminally injurious conduct. On September 28, 2006, the Attorney General denied the applicant's claim for work loss. The Attorney General's investigation discovered that the Social Security Administration's records revealed the applicant had not reported income since 1996. On October 25, 2006, the applicant filed a request for reconsideration. On November 28, 2006, the Attorney General again denied the applicant's claim. On December 14, 2006, the applicant submitted a notice of appeal from the Attorney General's November 28, 2006 Final Decision.

{¶ 2} On September 27, 2007, the Attorney General submitted a brief indicating, based on a review of the applicant's tax returns submitted for the years 2002-2003, the applicant incurred work loss for a period of six months. The Attorney General stated the applicant should be granted work loss in the amount of \$1,760.35. On November 28, 2007, the Attorney General submitted another brief stating based upon medical evidence received from Dr. Tayal, the applicant has been disabled from the date of the criminally injurious conduct to the present day. Accordingly, the Attorney General now asserts the applicant should be awarded \$10,696.77 for work loss. On December 6, 2007 at 12:00 P.M., this matter was heard by this panel of three commissioners.

{¶ 3} The applicant, applicant's attorney, and an Assistant Attorney General attended the hearing and presented testimony, exhibits, and oral argument for the panel's consideration. The parties were in agreement that the applicant incurred work loss, however, the calculation of the work loss is in dispute. The applicant's counsel asserts the work loss should be based upon the gross profits of the applicant's business, while the Assistant Attorney General argues that the appropriate basis for calculation of work loss should be the net profits of the business.

{¶ 4} Mr. Austin testified concerning the criminally injurious conduct and the operation of his business, June Bug II. He stated due to his injuries he is disabled and can no longer work. The applicant also testified concerning his 2002 and 2003 tax returns. The 2002 tax return reflects approximately six months of self-employment. Applicant, through his expert, claimed the business's "net gross income" was \$23,495.00. The applicant also reviewed the 2003 tax return and claimed a "net gross income" of \$24,008.00. This represented approximately eleven months of operation up to the criminally injurious conduct of December 4, 2003.

{¶ 5} The applicant's counsel called Ron Shelton, the applicant's tax preparer, via telephone. Mr. Shelton recounted his background and experience. Mr. Shelton detailed the tax ramifications of operating a small self-operated business such as the one in which applicant was engaged. It was Mr. Shelton's opinion that the proper calculation of the applicant's work loss would be to subtract from gross receipts on sales, the costs of goods to obtain gross profits for the business. On the applicant's 2002 Schedule C return his gross receipts on sales was \$45,610.00, his costs of goods was \$22,115.00 for a gross profit of \$23,495.00. On the applicant's 2003 Schedule C return his gross receipts on sales was \$69,114.00, while his cost of goods was \$45,106.00 for a gross profit of \$24,008.00. In Mr. Shelton's opinion to calculate Mr. Austin's work loss for 2004 he would take the gross profits for 2002 and 2003, average those together, to arrive at average gross profits. The average gross profit would equal \$23,752.00. Multiply that number by three for a total of \$71,256.00 and subtract the average of fixed costs of \$21,015.00 for a total work loss for 2004 of \$50,241.00.

{¶ 6} When questioned by panel commissioners, Mr. Shelton conceded that 80 percent of small businesses fail in their third year and conceded his projection is not based on knowledge of Mr. Austin's actual business success. Mr. Shelton's projections assume Mr. Austin's business would have been a success and are projections made for a typical successful business.

{¶ 7} The Assistant Attorney General called acting Assistant Section Chief and Economic Loss Manager, William Fulcher, to testify. Mr. Fulcher related that Mr. Austin was receiving benefits from the Social Security Administration. Mr. Fulcher explained that the Attorney General reached their recommended work loss of \$10,696.77 by calculating his net earnings. Net earnings are calculated by taking the net profit from line 31 of Mr. Austin's Schedule C tax return and adding \$690.00, the expenses the

applicant claimed for vehicle expenses, for a total net earnings of \$3,847.00. From that amount all appropriate taxes are subtracted. Accordingly, the Attorney General projected Mr. Austin's work loss as follows:

December 4, - December 31, 2003	\$ 266.72
January 1, - December 31, 2004	\$ 3,494.03
January 1, - December 31, 2005	\$ 3,467.36
January 1, - December 31, 2006	<u>\$ 3,468.66</u>
Total Work Loss	\$10,696.77

{¶ 8} In response to questions from the panel of commissioners, Mr. Fulcher related that work loss would be calculated using Mr. Austin's net income because awards from the program are not taxable. The Attorney General would not support the use of a gross profits argument since this method would not consider the tax ramifications on Mr. Austin's income.

{¶ 9} Finally, the applicant's counsel asserted this panel should determine work loss based on the testimony of Mr. Shelton. Specifically, applicant's counsel asserted Mr. Shelton's calculation of work loss based on "gross net income," line 7 of Schedule C, more accurately reflected the work loss sustained by Mr. Austin than the Attorney General's calculations. The applicant's counsel also directed this panel to consider the holding in *In re Jeffcut*, V2002-51451tc (4-21-04). Furthermore, applicant's counsel asserted the Attorney General's calculations do not consider any increase in the amount of earnings Mr. Austin's business would have generated from year to year.

{¶ 10} The Assistant Attorney General cited *In re Eader* (1982), 70 Ohio Misc. 17, for the proposition that an applicant's work loss should be calculated on his net rather than gross wages. Furthermore, an award of reparations is not taxable so gross

wages are not a permissible measure of the loss suffered by the applicant. Accordingly, the Assistant Attorney General believes that the calculations contained in the Attorney General's brief of November 28, 2007, should be used to determine the applicant's work loss.

{¶ 11} Both parties are in agreement with respect to the disability dates for Mr. Austin's work loss-December 4, 2003 through December 31, 2006-and both parties agree that Mr. Austin sustained work loss with respect to the injuries he suffered at the time of the criminally injurious conduct. The only issue in dispute is the method of calculation used to determine the amount of work loss.

{¶ 12} From review of the file and with full and careful consideration given to the evidence presented at this hearing, including the exhibits submitted by the applicant, this panel makes the following determination. We find the applicant's work loss should be based on the Attorney General's calculations for work loss, however, the increase in income must be included. We believe a 3.5 percent per year increase is appropriate. Accordingly, Mr. Austin's work loss is as follows:

December 4, - December 31, 2003	\$ 266.72
January 1, - December 31, 2004	\$ 3,616.32
January 1, - December 31, 2005	\$ 3,742.89
January 1, - December 31, 2006	<u>\$ 3,873.89</u>
Total Work Loss	\$11,499.82

{¶ 13} We reject the applicant's argument concerning the use of line 7 Schedule C gross income to calculate work loss since this method ignores the longstanding case precedent established by *In re Eader*. Also, the argument urging the adoption of the reasoning in *In re Jeffcut* to calculate Mr. Austin's work loss is rejected. The *Jeffcut*

case concerned a business which had an extensive history, unlike Mr. Austin's business which was in its start-up stage. Furthermore, the applicant's counsel attempted to persuade his witness, Mr. Shelton, to offer testimony concerning projected sales, however, Mr. Shelton refused to provide such information stating it was speculative. Accordingly, the holding in *Jeffcut* is distinguished from the facts in this case and offers this panel no direction.

{¶ 14} Therefore, the applicant is granted work loss for the period December 4, 2003 through December 31, 2006 in the amount of \$11,499.82.

{¶ 15} IT IS THEREFORE ORDERED THAT

{¶ 16} 1) The applicant's December 5, 2007 motion for telephone testimony is GRANTED;

{¶ 17} 2) The applicant's Exhibits 1 and 2 are admitted into evidence;

{¶ 18} 3) The November 28, 2006 decision of the Attorney General is REVERSED and judgment is rendered in favor of the applicant in the amount of \$11,499.82;

{¶ 19} 4) 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;

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

KARL C. KERSCHNER
Presiding Commissioner

[Cite as *In re Austin*, 2008-Ohio-5711.]

THOMAS H. BAINBRIDGE
Commissioner

TIM MC CORMACK
Commissioner

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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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Jr. Vol. 2268, Pgs. 42-48

To S.C. Reporter 11-3-2008