

[Cite as *In re Green*, 2004-Ohio-3521.]

IN THE COURT OF CLAIMS OF OHIO

VICTIMS OF CRIME DIVISION

IN RE: SAKAIYA Q. GREEN	:	Case No. V2003-40836
SHELBY D. GREEN	:	<u>DECISION</u>
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Applicant	:	Judge Fred J. Shoemaker
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{¶1} This matter came on to be considered upon the Attorney General's appeal from the January 29, 2004, order issued by the panel of commissioners. The panel's determination reversed the final decision of the Attorney General, which denied applicant's claim for an award of reparations. The Attorney General had determined that the victim engaged in substantial contributory misconduct since the victim tested positive for phencyclidine (PCP) on the coroner's toxicology report.

{¶2} R.C. 2743.52(A) places the burden of proof on an applicant to satisfy the Court of Claims Commissioners that the requirements for an award have been met by a preponderance of the evidence. *In re Rios* (1983), 8 Ohio Misc.2d 4, 8 OBR 63, 455 N.E.2d 1374. The panel found, upon review of the evidence, that applicant presented sufficient evidence to prove that the decedent did not illegally use PCP at the time of the criminally injurious conduct.

{¶3} The standard for reviewing claims that are appealed to the court is established by R.C. 2743.61(C), which provides in pertinent part: "If upon hearing and consideration of the record

and evidence, the judge decides that the decision of the panel of commissioners is unreasonable or unlawful, the judge shall reverse and vacate the decision or modify it and enter judgment on the claim. The decision of the judge of the court of claims is final.”

{¶4} The Attorney General’s final decision relied on *In re Dawson* (1993), 63 Ohio Misc.2d 79 for the proposition that the toxicology report established that the decedent engaged in felonious drug use. The panel also found that the Attorney General’s reliance on *Dawson* was misplaced because that case involved a claim that was denied pursuant to former R.C. 2743.60(E) rather than R.C. 2743.60(F). However, a judge of the Court of Claims has recently determined that the holding in *Dawson* regarding the sufficiency of the evidence contained in a toxicology report was equally applicable to cases involving an allegation that the victim engaged in felonious drug use pursuant to R.C. 2743.60(F). *In re Howard*, V04-40411jud (2-24-04).

{¶5} Nevertheless, the Attorney General bears the burden of proof by a preponderance of the evidence with respect to the exclusionary criteria of R.C. 2743.60(F). *In re Williams*, V77-0739jud (3-26-79); and *In re Brown*, V78-3638jud (12-13-79).

{¶6} R.C. 2743.51(M) states:

{¶7} “(M) ‘Contributory misconduct’ means any conduct of the claimant or of the victim through whom the claimant claims an award of reparations that is unlawful or intentionally tortious and that, without regard to the conduct’s proximity in time or space to the criminally injurious conduct, has a causal relationship to the criminally injurious conduct that is the basis of the claim.”

{¶8} R.C. 2743.60(F) provides:

{¶9} "In determining whether to make an award of reparations pursuant to this section, the attorney general or panel of commissioners shall consider whether there was contributory misconduct by the victim or the claimant. 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 to the extent it is determined to be reasonable because of the contributory misconduct of the claimant or the victim.

{¶10} "\*\*\*

{¶11} "For purposes of this section, if it is proven by a preponderance of the evidence that the victim engaged in conduct at the time of the criminally injurious conduct that was a felony violation of section 2925.11 of the Revised Code [possession or use of a controlled substance], the conduct shall be presumed to have contributed to the criminally injurious conduct and shall result in a complete denial of the claim."

{¶12} In order to deny applicant's claim pursuant to R.C. 2743.60(F), the Attorney General must prove that the victim's alleged contributory misconduct had a causal relationship to the criminally injurious conduct. Although evidence of felony drug use is presumed to have contributed to the criminally injurious conduct, that presumption may be rebutted with additional evidence. A rebuttable presumption "disappears" when a party challenging the presumed fact produces evidence to the contrary, which counterbalances it or leaves the case in equipoise. *Carson v. Metro. Life Ins. Co.* (1951), 156 Ohio St. 104, 108.

{¶13} In this case, the panel determined that the decedent

did not engage in contributory misconduct based upon information contained in the toxicology report. Although "a trace amount of PCP" was detected in the decedent's urine, the drug was not found in his blood and the coroner concluded that the decedent's drug use probably occurred "days before his death." The Cuyahoga County Coroner concluded that the "toxicology evidence establishes that Sakaiya Green was not using PCP at the time of his death." Based upon the coroner's report, the panel found that there was no causal connection between the presence of PCP in the decedent's system and the criminally injurious conduct.

{¶14} Upon review of the file in this matter, the court finds that the panel of commissioners was not arbitrary in finding that applicant has shown by a preponderance of the evidence that she was entitled to an award of reparations.

{¶15} Based on the evidence and R.C. 2743.61, it is the court's opinion that the decision of the panel of commissioners was reasonable and lawful. Therefore, this court affirms the decision of the three-commissioner panel, and hereby remands applicant's claim to the Attorney General for economic loss calculations and decision.

{¶16} Upon review of the evidence, the court finds the order of the panel of commissioners must be affirmed.

{¶17} IT IS HEREBY ORDERED THAT:

{¶18} 1) The order of January 29, 2004, (Jr. Vol. 2252, Pages 111-112) is approved, affirmed and adopted;

{¶19} 2) This claim is REMANDED to the Attorney General for economic loss calculations and decision;

{¶20} 3) Costs assumed by the reparations fund.

FRED J. SHOEMAKER  
Judge

AMR/cmd

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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