

[Cite as *In re Kempton*, 2007-Ohio-2929.]

IN THE COURT OF CLAIMS OF OHIO

VICTIMS OF CRIME DIVISION

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IN RE: WARD J. KEMPTON	:	Case No. V2006-20640
WARD J. KEMPTON	:	Commissioners:
	:	Randi Ostry LeHoty, Presiding
Applicant	:	Gregory P. Barwell
	:	Karl C. Kerschner
_____	:	
_____	:	<u>ORDER OF A THREE-</u>
	:	<u>COMMISSIONER PANEL</u>
	: : : : :	

{¶1} Ward Kempton ("applicant" or "Mr. Kempton") filed a reparations application seeking reimbursement of expenses incurred regarding a December 18, 2005 felonious assault incident. On April 24, 2006, the Attorney General denied the claim under R.C. 2743.60(F) contending that the applicant engaged in substantial contributory misconduct relating to a dispute concerning a stolen marijuana cigarette. On May 7, 2006, the applicant filed a request for reconsideration. On June 5, 2006, the Attorney General modified the previous decision and granted the applicant an award in the amount of \$1,013.70 for unreimbursed allowable expense and work loss. The award reflects a twenty-five percent reduction of the award under R.C. 2743.60(F). On July 3, 2006, the applicant filed a notice of appeal to the Attorney General's June 5, 2006 Final Decision asserting he missed more than three days of work as a result of the criminally injurious conduct. On September 6, 2006, the Attorney General filed a

statement recommending an award of \$1,835.82¹ to the applicant after a twenty-five percent reduction under R.C. 2743.60(F). Upon review, a panel of three commissioners remanded this matter on October 31, 2006 and ordered the parties to submit detailed memoranda explaining how the decision to reduce the applicant's award was reached. A panel of three commissioners reheard this matter on November 16, 2006 at 10:25 A.M.

{¶12} According to the police report, on December 18, 2005, law enforcement was dispatched to 52 Converse Street regarding a stabbing incident. Upon arrival the police officers saw a pool of blood on the front porch and a blood trail, but were unable to locate the victim, later identified as the applicant. The officers were advised by dispatch that the applicant had returned to his residence (46 May Avenue) and was lying on the kitchen floor in a large pool of blood. The applicant reported that he had been cut several times by Mike Triplett ("Mr. Triplett" or "offender"). The officers noted that the applicant had been cut three times (on the leg and on the face from his mouth to his ear) and that he was intoxicated. The applicant denied having a knife and no knives were found on him. The applicant was transported to the hospital.

{¶13} The police officers then spoke to Mr. Triplett, the resident of 52 Converse Street, who advised them that he had brought an unknown male (the applicant) back to his residence. Mr. Triplett, who was also intoxicated, stated that the applicant took a small amount of marijuana from him and when the applicant refused to return it a fight

¹The applicant incurred \$1,283.85 in allowable expense and \$1,163.91 in work loss from December 18, 2005 through February 6, 2006.

ensued. Mr. Triplett admitted that he cut the applicant with a knife during the fight. Mr. Triplett was arrested and charged with felonious assault.

{¶4} Applicant's counsel and an Assistant Attorney General attended the hearing and presented an exhibit and oral argument. Applicant's counsel argued that based on the facts of this case the applicant's award should be reduced only nominally. Applicant's counsel explained that a nominal reduction sends a message to the applicant by not entirely compensating his loss, but also acknowledges that the offender's conduct of stabbing the applicant was disproportionate to the applicant's misconduct. Counsel provided the panel with a list of factors he considered noteworthy when making R.C. 2743.60(F) findings and determinations and asserted the applicant's award should be reduced by only five to ten percent, since the applicant's misconduct was de minimus in nature.

{¶5} The Assistant Attorney General maintained that reducing the award by 25% is appropriate and reasonable in light of the applicant's share of misconduct. The Assistant Attorney General argued that the applicant's award must still be sufficiently reduced to adequately punish him for his illegal conduct and stated that a five to ten percent reduction would violate public policy by not appropriately deterring any future misconduct by the applicant.

{¶6} Revised Code 2743.51(M) states:

(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.

{¶7} Revised Code 2743.60(F) states in part:

(F) 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.

{¶8} With respect to the exclusionary criteria of R.C. 2743.60, the Attorney General bears the burden of proof by a preponderance of the evidence. *In re Williams*, V77-0739jud (3-26-79); and *In re Brown*, V78-3638jud (12-13-79). According to R.C. 2743.51(M) and relevant case law, there are three elements that must be established before a *prima facie* case of contributory misconduct can be met: (1) specific, unlawful or intentionally tortious conduct by the victim or applicant;² 2) that specific conduct must have a causal relationship to the criminally injurious conduct; and 3) the victim or applicant must have or should have reasonably foreseen the likelihood of the criminally injurious conduct occurring if he engaged in such conduct.³ Furthermore, in order to

²See *In McGary II*, V91-83761jud (11-16-94).

³See *In re Ewing* (1987), 33 Ohio Misc. 2d 48.

deny an award under R.C. 2743.60(F), the Attorney General must prove that the victim's or applicant's contributory misconduct was substantial.⁴

{19} Contributory misconduct determinations depend heavily upon the particular facts and circumstances of each case and thereby warrant a case-by-case analysis. *In re Williams*, V2001-32691tc (10-11-02). In evaluating the existence and level of contributory misconduct under R.C. 2743.60(F) for this case, this panel considered the following nonexclusive list of considerations:⁵

1. Age and corresponding mental capacity of the victim/applicant;
2. The victim/applicant's familiarity/relationship with the offender;
3. The victim/applicant's mens rea;

⁴See *In re Spaulding* (1991), 63 Ohio Misc.2d 39.

⁵We note that review of the above listed considerations is not required for every R.C. 2743.60(F) case. The list is merely a guide when reviewing contributory misconduct issues.

4. Whether the victim/applicant suffered from diminished capacity due to intoxication or other mitigating factor;
5. Whether the victim/applicant suffered a disproportionate level of harm compared to the victim/applicant's level of misconduct;
6. Whether the victim/applicant's degree of misconduct was a de minimus or substantial violation of the law; and
7. Whether granting of reparations award violates public policy of the Victims of Crime Act.

{¶10} Mr. Kempton was 32 years old at the time of incident and there is no evidence that suggests he suffered from any long-term or permanent mental impairment. According to information in the file, the victim and offender did not have a prior relationship or familiarity with one another. Mr. Kempton's mens rea is unknown, but we believe the applicant had sufficient understanding of the nature of his theft action, even though he was intoxicated. However due to the offender's excessive use of force, the applicant suffered a disproportionate level of harm compared to the level of his misconduct. The applicant's degree of misconduct was minor, since the theft was merely a misdemeanor violation while the offender's conduct was significant and felonious in nature. Further, our decision to grant an award to this applicant does not violate the program's public policy, because by reducing it, we acknowledge the applicant's contribution to his injuries.

{¶11} When Mr. Kempton stole the marijuana cigarette from the offender, he engaged in specific unlawful conduct (theft). Mr. Kempton's specific unlawful conduct

was the direct cause of him being assaulted, because but for the applicant's conduct he would not have been assaulted. Mr. Kempton should have known that he was likely to be assaulted (punched or struck) by the offender if he stole from him. Even though we find that Mr. Kempton engaged in contributory misconduct, we nevertheless find that Mr. Kempton did not engage in substantial contributory misconduct because the applicant's misconduct was minor compared to the offender's misconduct; the offender escalated the incident by brandishing a knife; and the applicant suffered severe and unnecessary injury to his face and legs.

{¶12} Based on the above factors and analysis, we find the applicant's misconduct warrants a reduction in the award by 15% under R.C. 2743.60(F). Therefore, the June 5, 2006 decision of the Attorney General shall be modified and the applicant shall be granted an award in the amount of \$2,080.59 for unreimbursed allowable expense and work loss incurred from December 18, 2005 through February 6, 2006.

{¶13} IT IS THEREFORE ORDERED THAT

{¶14} 1) The June 5, 2006 decision of the Attorney General is MODIFIED to reflect a 15% reduction and judgment is rendered in favor of the applicant in the amount of \$2,080.59;

{¶15} 2) This claim is remanded to the Attorney General for payment of the award;

{¶16} 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;

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

RANDI OSTRY LE HOTY
Presiding Commissioner

GREGORY P. BARWELL
Commissioner

KARL C. KERSCHNER
Commissioner

ID #s2064.wpd 2.wpd\10-dld-tad-112906

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

Filed 4-2-2007
Jr. Vol. 2264, Pgs. 21-28
To S.C. Reporter 6-8-2007