

[Cite as *In re Oman*, 2007-Ohio-3489.]

IN THE COURT OF CLAIMS OF OHIO

VICTIMS OF CRIME DIVISION

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IN RE: GARY A. OMAN	:	Case No. V2006-20933
GARY A. OMAN	:	Commissioners:
Applicant	:	Gregory P. Barwell, Presiding
	:	Thomas H. Bainbridge
	:	Karl C. Kerschner
_____	:	
_____	:	<u>ORDER OF A THREE-</u>
	:	<u>COMMISSIONER PANEL</u>
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{¶1} Gary Oman (“applicant” or “Mr. Oman”) filed a reparations application seeking reimbursement of expenses incurred with respect to a February 22, 2006 assault incident involving Gary Simmons (“offender” or “Mr. Simmons”). On June 28, 2006, the Attorney General denied the claim pursuant to R.C. 2743.52(A), R.C. 2743.60(D), and R.C. 2743.60(F). On July 13, 2006, the applicant filed a request for reconsideration. On September 12, 2006, the Attorney General issued a Final Decision indicating that the previous decision warranted no modification. On October 11, 2006, the applicant filed a notice of appeal to the Attorney General’s September 12, 2006 Final Decision. On March 26, 2007, the Attorney General filed a brief recommending the Final Decision be affirmed on the basis that the applicant failed to qualify as a victim of criminally injurious conduct. The Assistant Attorney General also contended that the

applicant had engaged in substantial contributory misconduct because he initiated the incident.¹ On April 2, 2007, the applicant filed a brief requesting that the Final Decision be reversed claiming that he did not engage in substantial contributory misconduct. On April 4, 2007 at 10:30 A.M., this matter was heard before this panel of three commissioners.

{¶2} The applicant (via telephone), applicant's counsel, and an Assistant Attorney General attended the hearing and presented testimony and oral argument for the panel's consideration.

{¶3} Mr. Oman (now age 55) testified that at the time of the February 2006 incident he was disabled and had been receiving Social Security Disability income since January 2006. Mr. Oman explained that he suffers from a hip condition caused by diabetes. The applicant stated that he has difficulty ambulating due to his hip condition and therefore uses a cane to assist with mobility. The applicant explained that he has undergone two hip replacement surgeries (June 2005 and December 2006) and is currently undergoing rehabilitation.

{¶4} Mr. Oman testified that Mr. Simmons (now age 25) rented a room from him for \$50.00 per week. According to Mr. Oman, Mr. Simmons was responsible for helping to pay the utilities, for purchasing his own food, and that he was prohibited from allowing anyone else to live in the room with him. Mr. Oman explained that over time Mr. Simmons began to abuse his renter's privileges by allowing his female friends to live

¹The Attorney General's brief also contained economic loss calculations. The Attorney General calculated the applicant's loss to be \$2,813.30 in unreimbursed economic loss.

there and eat Mr. Oman's food. Mr. Oman stated that he repeatedly spoke to Mr. Simmons about the violations, to no avail.

{¶15} Mr. Oman testified that on February 22, 2006 he told Mr. Simmons' two female friends to leave the premises, and that they left but returned at approximately 9:00 P.M. Upon their return, one of the women asked Mr. Oman for a lighter and he told them to leave again. Mr. Oman knocked on Mr. Simmons' bedroom door in order to tell him that the women needed to leave, at which time Mr. Oman testified he was abruptly shoved by Mr. Simmons. Mr. Oman stated that he fell down and severely injured his wrist. He asserted that the women immediately fled the premises, but that he and Mr. Simmons remained and separately called emergency 911.

{¶16} Mr. Oman testified that the paramedics arrived, examined him, and informed him that his wrist was severely injured. The police arrived while the paramedics were attempting to transport him to the hospital. A police officer asked Mr. Oman while he was in the ambulance if he wanted to press charges and he responded by asking if the matter could wait until the next day, because he was going to the hospital for treatment. This was the applicant's only communication with the police regarding the assault.

{¶17} Mr. Oman testified that the next morning the offender called him and begged him not to press charges. He did not press charges, based upon Mr. Simmons' promises of no further misconduct. However, the applicant related that a week later the offender's misconduct resumed. The applicant explained that he contacted the police, but was told it was too late to prosecute Mr. Simmons with respect to the February 22,

2006 incident. The applicant noted that Mr. Simmons left the premises approximately one month after the incident. On February 28, 2006 Mr. Oman underwent surgery on his wrist and incurred replacement services loss during that period of disability.

{¶8} Officer James Alexander (“Officer Alexander”) of the Akron Police Department testified that he responded on February 22, 2006 to a report of a fight at Mr. Oman’s home. Officer Alexander stated that he spoke to both Mr. Oman (in the house and in the ambulance) and Mr. Simmons (in the house) about the incident. Officer Alexander confirmed the applicant told him that Mr. Simmons pushed him down, however he did not want to press charges against him. Officer Alexander also confirmed Mr. Oman informed him he wanted Mr. Simmons’ friends to leave his home and that he referenced drug use and prostitution. Officer Alexander testified that Mr. Simmons reported that the applicant had come to his room and pushed him, that Mr. Simmons pushed the applicant back, and that the applicant fell down and broke his wrist. Officer Alexander referred the applicant to the prosecutor and explained that no one was arrested due to insufficient evidence concerning who initiated the incident.

{¶9} Applicant’s counsel stated, based upon Mr. Oman’s testimony and evidence in the claim file, that the claim should be allowed. Applicant’s counsel argued that Mr. Oman was disabled and hence physically unable to assault the offender. Applicant’s counsel also noted the age disparity between the parties. Applicant’s counsel stated that even if the applicant pushed Mr. Simmons first, the applicant’s conduct was de minimus because the applicant’s misconduct caused no physical harm to Mr. Simmons. Lastly, applicant’s counsel argued that the police report was

inaccurate based on Officer Alexander's inability to recall either the applicant's disability or to which hand the applicant sustained injury.

{¶10} The Assistant Attorney General maintained that the claim should be denied, because the applicant was not a victim of criminally injurious conduct and because the applicant engaged in substantial contributory misconduct. The Assistant Attorney General argued that Officer Alexander's testimony and the police report are credible and accurate. The Assistant Attorney General asserted that Mr. Oman was upset and initially struck Mr. Simmons out of frustration. Moreover, the Assistant Attorney General noted that the applicant told the police that he did not want to press charges against Mr. Simmons.

{¶11} From review of the file and with full and careful consideration given to all the information presented at the hearing, we find that Mr. Oman qualifies as a victim of criminally injurious conduct because he was assaulted on February 22, 2006. We also find that Mr. Oman did not engage in substantial contributory misconduct. See R.C. 2743.51(M).

{¶12} 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 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 Contributory misconduct determinations depend 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).

{¶13} Mr. Oman was 53 years old at the time of the incident and there is no evidence that suggests he suffered from any long-term or permanent mental impairment. According to information in the file, Mr. Oman rented a room to Mr. Simmons for \$50.00 per week and Mr. Simmons was to help pay the utilities, purchase his own food, and not allow anyone else to reside in the room with him. We believe Mr. Oman had sufficient understanding of the nature of his actions, 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 de minimus while the offender's conduct was significant in nature since the applicant

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

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

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

sustained severe injury to his wrist. Further, our decision to grant an award to this applicant does not violate the program's public policy, because by reducing the award, we acknowledge the applicant's contribution to his injuries.

{¶14} When Mr. Oman pushed the offender, he engaged in specific unlawful conduct. Mr. Oman should have known that he was likely to be assaulted by the offender if he pushed him. Even though we find that Mr. Oman engaged in contributory misconduct, we nevertheless find that Mr. Oman did not engage in substantial contributory misconduct because the applicant's misconduct was de minimus compared to the offender's misconduct. The offender escalated the incident by using excessive force that ultimately caused severe injury to Mr. Oman.

{¶15} Based on the above factors and analysis, we find Mr. Oman's misconduct warrants a reduction in the award by twenty (20) percent under R.C. 2743.60(F). Therefore, the September 12, 2006 decision of the Attorney General shall be modified and the applicant shall be granted an award in the amount of \$2,250.64 (\$2,813.30 x .80) for unreimbursed allowable expense and work loss incurred from February 22, 2006 through June 17, 2006.

{¶16} IT IS THEREFORE ORDERED THAT

{¶17} 1) The September 12, 2006 decision of the Attorney General is REVERSED to render judgment in favor of the applicant in the amount of \$2,250.64;

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

{¶19} 3) All future awards to applicant, if any, shall be reduced by twenty (20) percent pursuant to R.C. 2743.60(F);

{¶20} 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;

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

GREGORY P. BARWELL
Presiding Commissioner

THOMAS H. BAINBRIDGE
Commissioner

KARL C. KERSCHNER
Commissioner

ID #\7-dld-tad-043007

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

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To S.C. Reporter 7-6-2007

Case No. V2006-20933

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ORDER