



# Court of Claims of Ohio Victims of Crime Division

The Ohio Judicial Center  
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IN RE: E. P.

DAVID W. PAHNER

Applicant

Case No. V2008-30774

Commissioners:

Thomas H. Bainbridge

Karl C. Kerschner

Randi Ostry LeHoty

## OPINION OF A THREE COMMISSIONER PANEL

{1}The appeal before this panel involves whether E.P., a child of thirteen, qualifies as a victim in her own right based on her observation of her father, a police officer, while he was in a trauma unit at the hospital after he was shot in the line of duty. Based upon the specific facts of this case, and the tender age of E.P., we find that the applicant has established by a preponderance of the evidence that E.P. has met the requirements to qualify as a secondary or indirect victim as expounded in *In re Clapacs* (1989), 58 Ohio Misc. 2d 1, 567 N.E. 2d, 1351; *In re Fife* (1989), 59 Ohio Misc. 2d1, 569 N.E. 2d 1079; and *In re Freeman*, V2000-02330tc (1-14-02) affirmed jud (4-23-02).

### *I. Procedural History*

{2}On March 20, 2008, the applicant, David Pahner, filed a compensation application on behalf of his minor daughter, E.P. as the result of her seeing him in the emergency room after he was shot. The applicant sought to qualify his daughter as a secondary victim and to have an award granted on her behalf for counseling expenses. On June 13, 2008, the Attorney General issued a finding of fact and decision holding

that E.P. had not incurred any economic loss attributable to criminally injurious conduct. Furthermore, the Attorney General found that E.P. was not in the zone of danger, that she had no direct awareness of the crime, and that she did not arrive on the scene immediately afterwards as to qualify her as a secondary or indirect victim of crime. On June 25, 2008, the applicant submitted a request for reconsideration. On August 25, 2008, the Attorney General rendered a Final Decision finding no reason to modify the initial decision. On August 26, 2008, the applicant filed a notice of appeal from the August 25, 2008 Final Decision of the Attorney General. Hence a hearing was held before this panel of commissioners on December 3, 2008 at 10:00 A.M.

### *II. Applicant's Position*

{3}The applicant asserts that he suffered a gunshot wound in the line of duty on July 12, 2006. He was immediately transferred to the Cincinnati Medical Center, where shortly after being admitted, his daughter E.P. observed him prior to treatment. The applicant contends this observation coupled with the uncertainty of his future well-being caused E.P. to suffer severe emotional distress. This distress resulted in counseling expenses for which the applicant seeks compensation. The applicant contends this claim should be awarded and E.P. should be found to be a victim in her own right in accordance with the court's prior holdings in *In re Clapacs* (1989); *In re Fife* (1989); and *In re Freeman*.

### *III. Attorney General's Position*

{4}The Attorney General asserts that the facts do not support a finding that E.P. qualifies as an indirect or secondary victim. Furthermore, the circumstances in this case are distinguishable from the court's prior holdings in *Clapacs*, *Fife* and *Freeman*. Accordingly, the Attorney General's Final Decision should be affirmed.

### *IV. Witness Testimony and Argument*

{5}The applicant, his attorney and an Assistant Attorney General appeared at the hearing. The applicant related that on the day of the incident he was working as an Addyston police officer. He recalled the events leading up to the shooting and said the offender shot him at point blank range in the stomach. Luckily, the applicant was wearing a safety vest at the time of the incident. Shortly thereafter he was transported to a trauma unit at University Hospital; his clothes were removed and a line for I.V.'s was established. It was at this time that his daughter entered the unit accompanied by four or five of his fellow police officers. The applicant stated he was subsequently informed that prior to her arrival at the trauma unit his daughter was questioning the officers as to whether her father was alive. After E.P. entered the room, the doctor in charge ordered everyone who was nonessential for the treatment of the applicant out of the room. The applicant was not able to verbally communicate with his daughter.

{6}The applicant stated that E.P. appeared fine for the duration of the summer, however, after the school year began she experienced difficulty breathing. Her condition got progressively worse until in May 2007, when she stated that she could not breathe and that she was dying. The applicant transported E.P. to Children's Hospital where she was diagnosed as suffering from an anxiety attack. However, the situation became progressively worse until E.P. was hospitalized in February 2008 for acute panic disorder. The applicant stated that Dr. Broderick determined that E.P.'s mental condition resulted from E.P. witnessing the applicant in the trauma unit on the day he was shot. The applicant related E.P. had not experienced any problems with breathing or panic attacks prior to the applicant's injury.

{7}Prior to the Attorney General cross-examining the applicant, medical documentation, identified as State's Exhibit A, was introduced as evidence. The evidence indicated that the applicant was in stable condition upon his admission. The applicant stated he did not recall any statements to medical personnel which minimized the extent of his injuries or the pain he was experiencing.

{8}Kathy Pahner, the victim's mother, was called to testify. Ms. Pahner related her recollection of the events of the day when her husband, the applicant, was shot. She did not see her husband until after surgery had been performed and was unaware that E.P. had seen her father prior to the surgery. Ms. Pahner testified that E.P. started to experience problems in fall of 2006, which culminated in hospitalization in February 2008, as the result of an attempt to kill herself.

{9}Upon questioning by the panel, Ms. Pahner stated no other traumatic event had occurred in her daughter's life other than her father being shot.

{10}The applicant introduced photos of his wounds a few minutes after he had been shot. The photos were marked Applicant's Exhibit 1 and were admitted into evidence.

{11}The applicant asserts that he has satisfied his burden of proof to qualify E.P. as an indirect or secondary victim of crime. E.P. was only thirteen years old at the time of the incident and her view of her father was analogous to the situation presented in *In re Freeman*. Based upon her time of arrival at the hospital, her subsequent medical treatment, and her age, the applicant argues that E.P. has satisfied the requirements necessary to qualify as a secondary victim pursuant to *In re Fife*, *In re Clapacs*, and *In re Freeman*. After thorough review of the claim file two documents were discovered which addressed E.P.'s observation of her injured father: (1) an intake assessment form from Cincinnati Children's Hospital Medical Center dated November 27, 2007, and (2) a letter dated July 1, 2008, written by Mark Pruden, Licensed Professional Clinical Counselor, Cincinnati Police Chaplain. The intake assessment references the fact that E.P. was the first family member to arrive at the hospital; that she observed a "1.5 hole" in her father's stomach; and that she did not know whether her father was alive or dead. Mr. Pruden's letter states in pertinent part: "There has apparently been some question as to whether what E.P. experienced could have resulted in a significant posttraumatic stress reaction. There are two important factors that must be considered in such a determination:

{12}First - and here I speak as a volunteer police chaplain with over 26 years of experience intervening in situations such as this one - it must be understood that the potential injury or death of law enforcement officer is a specter that hangs continually over the head of each of that officer's family members. It is a subject they prefer not to discuss, and one that, if raised, will typically bring instant tension. The notification to a family member that the officer has been injured in a hostile field encounter results in immediate panic and terror. This is why, whenever possible, we prefer that an officer who has been injured be the one to make the notification phone call - the family will at least have some first-hand evidence of assurance their officer is O.K. Lt. Pahner was in no condition to make such a call that evening. Second - and here I speak as a licensed and board-certified mental health professional - there are three distinct populations that are vulnerable to a diagnosable posttraumatic stress reaction in the aftermath of a situation such as Lt. Pahner's;

{13}A person who directly experiences an extreme traumatic stressor involving actual or threatened death, serious injury, or threat to one's physical integrity.

A person who witnesses an event that involves death, injury, or threat to the physical integrity of another person.

A person who learns of violent death, serious harm, or threat of death or injury experienced by a family member or other close associate.

[E.P.] clearly fits not just one, but both the last two of the above three categories."

{14}The Attorney General asserted that E.P. did not fit the criteria necessary to qualify as a secondary victim. The Attorney General conceded that a close family relationship did exist between E.P. and her father, however, in this case the applicant was shot in the line of duty, wore a protective vest and was stable upon his admission to the hospital. Clearly, the applicant was not in a life-threatening situation and to allow E.P. eligibility under these facts would open up the flood gates for a wide variety of

police officers' family members to qualify under the program. Furthermore, in the case at bar, the applicant has failed to prove that E.P.'s shock was attributable to the sensory or contemporaneous observation of the incident or that E.P. was in close proximity to the crime scene. Whereupon, the hearing was concluded.

#### *V. Legal Analysis*

{15} *In re Clapacs*, at paragraphs one and two of the syllabus states:

"1. The Court of Claims, Victims of Crime Division, will use a case-by-case analysis to ascertain the impact a criminal incident may have upon a person other than the individual directly involved in the crime and will consider, *inter alia*, the following factors: (a) the person's proximity to the location of the crime, (b) the relationship between that person and the person actually assaulted, and (c) the shock directly attributable to the sensory and contemporaneous observance of the incident. (R.C. 2743.51(L), applied.)

"2. The phrase 'personal injury' contained in the R.C. 2743.51(L) definition of 'victim' includes both psychological injury as well as physical harm. Thus, emotional distress, experienced as a result of criminal activity, constitutes 'personal injury'."

*In re Fife*, at paragraph two of the syllabus states:

"2. The term 'personal injury,' as used in R.C. 2743.51(L)(1) in reference to a psychological injury, requires a showing of more than mere sorrow, concern or mental distress. That is, the psychological injury must be of such a debilitating nature as to impede or prohibit the resumption or enjoyment of day-to-day activities."

{16} A panel of commissioners in *In re Freeman*, stated in pertinent part:

{17} "Pursuant to *In re Clapacs*, the determination of whether an applicant qualifies as a victim in her own right is to be based on a case-by-case analysis. After

examining the facts of the present case, we conclude that it is appropriate in this instance to find that the applicant qualifies as a victim in her own right. Based on the nature of the injuries suffered by the applicant's son, the brief period of time that passed between the stabbing incident and the applicant's observation of her son, and the condition of her son at the time the applicant saw him, we find that the wounded body of the applicant's son was the 'scene' of the assault, whether it lay on the basketball court where he was stabbed or on a table in the hospital emergency room.

{18}“The visual impact of perceiving the peril that had befallen her son was the cause of the applicant's psychological injury. Therefore, the fact that the applicant's son suffered a particularly bloody assault contributed to the severity of the impact on the applicant, as did the applicant's proximity to the place of the stabbing and to the hospital, as this facilitated the applicant's timely arrival 'on the scene,' causing her to be confronted by the severity of her son's injury.

{19}“In this case, the hospital scene observed by the applicant was not a 'more sterile' setting than the basketball court where the stabbing occurred, as proposed by the Assistant Attorney General. If the applicant had arrived later, once surgery was underway or at any later time when she would have walked into a room where her son wore clean coverings and the room itself did not reveal the nature of the assault that had taken place, then the 'scene' would have been altered to such an extent that the shock of seeing her damaged child, although still distressful, would have been much milder by comparison to that which the applicant witnessed.”

{20}Black's Law Dictionary Sixth Edition (1990) defines preponderance of the evidence as: “evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.”

{21}Black's Law Dictionary Sixth Edition (1990) defines burden of proof as: “the necessity or duty of affirmatively proving a fact or facts in dispute on an issue raised

between the parties in a cause. The obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court.”

*VI. Panel Determination*

{22}Upon full and careful review of all of the testimony presented at the hearing and the medical information contained in the claim file, we find the applicant has satisfied his burden that E.P. qualifies as a secondary victim of crime. We reach this decision mindful of the Attorney General’s caveat not to open the flood gates to an ever expanding pool of victims. However, *In re Clapacs* directs us to consider each event on a case-by-case basis. Under that directive, we find that E.P., the thirteen-year-old daughter of the applicant had a close relationship with the applicant. At her tender years, the observation of her father covered with blood, even in a hospital setting satisfied the requirement that her shock was attributable to her sensory and contemporaneous observation of the crime “scene.” The medical evidence contained in the claim file coupled with the un rebutted testimony of Kathy Pahner satisfies that a causal connection existed between E.P.’s trauma experience in the emergency room and her subsequent psychological problems. The Attorney General failed to provide any evidence to undermine or disqualify the testimony or evidence presented at the hearing. The holding in *In re Freeman* allows us to focus on the less than “sterile” hospital setting as the crime scene. Finally, the Attorney General failed to rebut the testimony of E.P.’s parents that the observation of her father in his wounded condition resulted in her well-documented psychological treatment. Our holding is strictly limited to these facts and is not meant to expand the scope of the very limited class of

secondary victims. Therefore, the applicant has proven by a preponderance of the evidence that E.P. qualifies as a secondary victim. The Attorney General's Final Decision of August 25, 2008 is reversed.

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THOMAS H. BAINBRIDGE  
Commissioner

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KARL C. KERSCHNER  
Commissioner

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RANDI OSTRY LE HOTY  
Commissioner



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ORDER OF A THREE  
COMMISSIONER PANEL

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IT IS THEREFORE ORDERED THAT

{23}1) State's Exhibit A is admitted into evidence;

{24}2) Applicant's Exhibit 1 is admitted into evidence;

{25}3) The August 25, 2008 decision of the Attorney General is REVERSED  
and judgment is rendered in favor of the applicant;

{26}4) This claim is remanded to the Attorney General for calculation of  
economic loss;

{27}5) 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;

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ORDER

{28}6) Costs are assumed by the court of claims victims of crime fund.

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THOMAS H. BAINBRIDGE  
Commissioner

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KARL C. KERSCHNER  
Commissioner

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RANDI OSTRY LE HOTY  
Commissioner

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

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