[Cite as *In re Hlebak*, 2014-Ohio-5991.]

Court of Claims of Ohio
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IN RE: KURT L. HLEBAK

KURT L. HLEBAK

Applicant
Case No. 2007-90285 VI

Magistrate Daniel R. Borchert

DECISION OF THE MAGISTRAT

{¶1} On January 7, 2013, applicant, Kurt Hlebak, filed a supplemental compensation application seeking additional work loss. Previously, applicant had been granted awards of reparations totaling $25,168.52. Applicant seeks additional work loss for the period November 2011, until the present.

{¶2} On June 4, 2013, the Attorney General issued a finding of fact and decision based upon the supplemental compensation application, denying applicant's claims for additional medical expenses and work loss. On January 8, 2014, applicant submitted a request for reconsideration. Applicant asserted that when he returned to work with Velotta Paving in 2007, he was earning $30.00 per hour. However, applicant claimed due to the condition of his knee his employer reduced his hourly rate to $27.00 per hour in 2008, $25.00 per hour in 2009, and $23.00 per hour in 2010, all the while reducing the number of hours he was scheduled to work. Finally, applicant contended in 2011 he could no longer work due to his knee condition.

{¶3} On July 7, 2014, the Attorney General rendered a Final Decision finding no reason to modify his decision of June 4, 2013. On July 15, 2014, applicant filed a

notice of appeal from the July 7, 2014 Final Decision of the Attorney General. Hence, a hearing was held before this magistrate on October 8, 2014 at 10:00 a.m.

{¶4} Applicant, Kurt Hlebak, and his attorney, Philip Sheridan, Jr., appeared at the hearing, while the state of Ohio was represented by Assistant Attorney General Melissa Montgomery.

{¶5} In his opening statement, applicant contended that the criminally injurious conduct caused his knee injury. As this condition worsened it caused a reduction in his hourly rate and the number of hours he was allowed to work. Ultimately, in November of 2011, his knee condition forced his employer to terminate him. Accordingly, applicant seeks an award based upon the reduction of his hourly rate and hours he was allowed to work and total work loss after November 2011.

{¶6} In response, the Attorney General cited the lack of medical confirmation that the injuries sustained at the time of the criminally injurious conduct were related to his current claims for work loss. Neither of applicant's treating physicians would make a causal connection between the injury and subsequent work loss and a separate paper evaluation by Dr. Cunningham revealed a zero percent connection between his initial injury and his claim for continuing work loss. Therefore, the Attorney General requests his decision denying work loss be affirmed.

{¶7} Applicant, Kurt Hlebak took the witness stand. Applicant explained how the assault on June 16, 2006 occurred. He related he was hit in the jaw with a 2x4, knocking him unconscious, and was subsequently struck in the knee with rebar. He was transported to the emergency room, x-rays were taken, and approximately one week later he met with Dr. Heyl. Mr. Hlebak also related after this incident, while walking downstairs at his mother's house, his knee gave out. Applicant asserted that

this had never happened to him before the assault of June 16, 2006. He related Dr. Heyl performed arthroscopic surgery on his right knee followed by a long period of physical therapy. He returned to work with Velotta Paving but due to the knee condition his hours and hourly pay rate were reduced, until he was laid off due to his inability to perform his job.

{¶8} Dr. Heyl treated his condition with cortisone injections, however when these treatments did not have the desired results Mr. Hlebak was referred to Dr. Williams. Applicant admitted that he did not inform Dr. Williams about the prior assault only that his referral from Dr. Heyl concerned his knee problems. Dr. Williams performed another surgery, on the right knee. After the surgery, he continued to experience problems to the point that his hip began to hurt. The last diagnosis he received recommended hip replacement surgery.

{¶9} The Attorney General chose not to cross-examine the witness and Mr. Hlebak's testimony was concluded.

{¶10} In closing, applicant stated that since no prior or subsequent injury occurred to the knee but for the assault, all conditions to the knee were the result of the assault. Furthermore, applicant contended that the statute does not require medical evidence to prove a work loss occurred. Therefore, the medical records plus applicant's testimony should support a finding that the criminally injurious conduct caused the work loss.

{¶11} The Attorney General countered that the statute requires that applicant satisfy his burden of proof that he has an inability to work due to the injuries suffered as a result of the criminally injurious conduct and the monetary amount of the work loss suffered. The Attorney General distinguished the cases cited in applicant's brief from

the case at bar. First, *In re Lewis*, V2005-80169tc (7-21-06), 2006-Ohio-4027, dealt with a psychological injury suffered by the victim, however, unlike the case at bar, that injury was supported by medical documentation. Second, *In re Gardner*, 63 Ohio Misc. 3d 192, 620 N.E.2d 307 (Ct. of Cl. 1993), that case also involved a psychological injury, but applicant's psychologist testified at the hearing to prove such injury was related to the criminally injurious conduct. Finally, *In re Gibson*, V2009-40129tc (5-28-09), a case decided based on the agreement of the parties. Consequently, there were no findings concerning the causal connection between the injuries caused by the criminally injurious conduct and the continuing work loss.

{¶12} Furthermore, the Attorney General is aware of no case which stands for the proposition that the applicant's testimony should have more weight than the medical opinion of his treating physician. Applicant's medical providers, as well as Dr. Cunningham, are of the opinion that applicant's continued work loss is not related to the injuries sustained at the time of the criminally injurious conduct. Accordingly, the Attorney General's Final Decision should be affirmed. Whereupon, the hearing was concluded.

{¶13} R.C. 2743.60(G) in pertinent part states:

a) "'Work loss' means loss of income from work that the injured person would have performed if the person had not been injured…"

{¶14} There are two elements necessary to prove work loss. First, one must prove work loss was sustained by showing an inability to work. Second, one must prove the monetary amount of work loss. Both elements must be proven by corroborating evidence. *In re Berger*, 91 Ohio Misc. 2d 85, 685 N.E.2d 93 (Ct. of Cl. 1994).

{¶15} R.C. 2743.52 places the burden of proof on the applicant to satisfy the court of claims that the requirements for an award have been met by a preponderance of the evidence. *In re Rios*, 8 Ohio Misc. 2d 4, 455 N.E.2d 1374 (Ct. of Cl. 1983).

{¶16} 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."

{¶17} Black's Law Dictionary Sixth Edition (1990) defines burden of proof as: "the necessity of 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 or belief concerning a fact in the mind of the trier of fact or the court."

{¶18} The Court of Claims stated in *In re Toney*, V79-3029jud (9-4-81): "Accordingly a determination of whether a Victim of Crime's claimant is entitled to an award of reparations for economic loss arising from criminally injurious conduct requires application of principles of traditional proximate cause standards. The trier of the fact, at a minimum, must be provided with evidence that a result is more likely to have been caused by an act, in the absence of any intervening cause. The quantum of evidence required is a preponderance of competent, material and relevant evidence of record on that issue."

{¶19} There is a positive requirement of long standing in the law of evidence in Ohio that damages for claimed personal injuries are recoverable only for injuries directly resulting from and as a natural consequence of the injury sustained. It is not permissible to establish a claimant's claim to certain bodily disorders unless it is established such were connected with the accident. Evidence that the complaint

"might" or "may" result from the injury is not competent. The evidence must tend to show that reasonable certainty of such a result exists. *In re Saylor,* 1 Ohio Misc. 2d 1, 437 N.E.2d 321 (Ct. of Cl. 1982).

{¶20} Upon review of the case file and with full and careful consideration given to the testimony of applicant and the arguments made by the parties at the hearing, I find the applicant has failed to prove by a preponderance of the evidence that he incurred additional work loss as the result of the injuries he sustained on June 16, 2006. While applicant is correct that R.C. 2743.60(G) does not require medical documentation to prove work loss and this court has granted work loss when the applicant's presence at work has caused safety concerns, *In re Stiggers*, V2006-20216tc (5-3-07), 2007-Ohio-2985; cosmetic appearance detracted from employer's business, *In re Rust*, V2003-40275tc, 2004-Ohio-1097; or applicant was forced to lie about the cause of her injuries, *In re Tucker*, V2004-60415tc (11-2-04), 2004-Ohio-7265, such is not the case here.

{¶21} A review of the medical records reveals the following: Dr. Heyl, performed a procedure on applicant on August 18, 2006 and related under HISTORY OF PRESENT ILLNESS.

{¶22} "Mr. Hlebak is a 42-year-old male who is being brought in to Euclid Hospital for outpatient arthroscopy on his right knee. He has a history of having experienced giving away of the knee while going downstairs and he developed pain and swelling in the knee. Prior to this injury by approximately three weeks, he had had an injury to his distal right thigh where he had been assaulted and struck with a pipe resulting in a hematoma of his thigh which had been resolving well prior to his second injury which resulted in swelling within the knee joint. His first injury did not cause knee joint

effusion but did cause subcutaneous hematoma with fluid in the distal thigh. He had an MRI study which showed a tear of the medial meniscus and he continued to have persistent swelling and pain in the right knee and has agreed to undergo arthroscopic surgery. He does have a history of previous injuries to the knee and he also works with laying concrete which requires a great deal of kneeling."

{¶23} When Dr. Heyl was questioned, what percentage of the patient's (applicant's) inability to work in November 2011 was a result of the crime he indicated zero percent. He expanded on this answer by writing, "He was hit in Rt thigh in assault, 3 wks prior to injury to Rt knee going downstair." Later, Dr. Williams wrote "Injury on 2006, I did not see him until 2013, Patient never indicated any V.O.C. injury."

{¶24} While applicant testified it is his belief that the assault of June 16, 2006, was the direct and proximate cause of his knee problem, his view is not supported by his treating physician Dr. Heyl. Accordingly, applicant has failed to meet his burden to prove by a preponderance of the evidence that his work loss, incurred in November 2011 was related to the injuries sustained at the time of the criminally injurious conduct.

{¶25} For the forgoing reasons, judgment is recommended in favor of the state of Ohio.

{¶27} *A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely*

and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).

DANIEL R. BORCHERT
Magistrate

ID #2007-90285/11-6-14 magistrate decision/DRB/tad

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

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