

[Cite as *In re Branham*, 2015-Ohio-5681.]

Court of Claims of Ohio

Victims of Crime Division

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IN RE: NIKIA BRANHAM

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Applicant
Case No. 2014-00548 VI

Commissioners:
Daniel R. Borchert, Presiding
Anderson M. Renick

ORDER OF A TWO- COMMISSIONER PANEL

{¶1} On May 24, 2013, applicant, Nikia Branham, filed a compensation application as the result of a hit and run accident which occurred on March 13, 2013. On September 5, 2013, the Attorney General issued a finding of fact and decision initially denying applicant's claim for an award of reparations pursuant to R.C. 2743.60(E)(1)(e), since it was alleged illegal opiates were found in her system at the time she was admitted to Miami Valley Hospital.

{¶2} On September 13, 2013, applicant submitted a request for reconsideration, denying she used illegal drugs and explaining that she was administered opiates upon her admission to the hospital after the accident. On September 23, 2013, the Attorney General rendered a Final Decision acknowledging that the opiates were medically authorized, but nevertheless denying applicant's claim since all hospital expenses incurred at both Good Samaritan Hospital and Health Center and Miami Valley Hospital were subject to the Hospital Care Assurance Program ("HCAP"). Furthermore, applicant's claim for work loss was denied because the Attorney General's investigation revealed that applicant was not employed at the time of the criminally injurious conduct.

{¶3} On October 23, 2013, applicant filed a supplemental compensation application seeking an award for reimbursement of medical expenses, work loss and replacement services loss. On February 21, 2014, the Attorney General issued a finding of fact and decision based upon the supplemental compensation application. The Attorney General granted applicant an award in the amount of \$2,156.04, for work loss incurred from March 22, 2013 through June 13, 2013. Applicant's claim for replacement services loss was denied. On March 17, 2014, applicant submitted a request for reconsideration, accompanied by additional medical expenses she incurred as well as a claim for additional work loss.

{¶4} On May 15, 2014, the Attorney General rendered a Final Decision finding no reason to modify his decision of February 21, 2014. On June 6, 2014, applicant filed a notice of appeal from the May 15, 2014 Final Decision of the Attorney General. Hence, a hearing was held before this panel of commissioners on November 20, 2014 at 12:30 p.m.

{¶5} Applicant, Nikia Branham and her attorney Mark Poole appeared at the hearing, while the state of Ohio was represented by Assistant Attorney General Melissa Montgomery. Prior to the commencement of the hearing, the parties were informed that commissioner True-Shaver took ill and the hearing would be conducted by the two remaining commissioners. The parties expressed no objection and the hearing proceeded. Initially, the parties stipulated to the qualifications and credentials of Drs. Schear and Cunningham.

{¶6} Applicant stated this appeal concerns the issue of additional work loss. The Attorney General determined applicant was a victim of criminally injurious conduct as the result of the actions of a fleeing felony. Applicant was previously granted work loss for the period March 20, 2013 through June 13, 2013. Applicant contends she is still

disabled as the result of the injuries received and she seeks additional work loss to the present day.

{¶7} The Attorney General argued that his decision accurately reflected that as a result of the injuries applicant sustained at the time of the criminally injurious conduct she was unable to work for two months. The Attorney General's work loss calculation included the two month disability period plus an additional month for Ms. Branham to obtain other employment. The Attorney General also noted that applicant was involved in a prior automobile accident on March 7, 2013, wherein she sustained an ankle and back injury. This accident occurred six days prior to the criminally injurious conduct.

{¶8} The Attorney General noted a six-month period lapse in treatment after the March 13, 2013 criminal incident until applicant sought follow-up treatment with Dr. Schear. The Attorney General sent correspondence to Dr. Schear, seeking to clarify what percentage of her alleged disability was attributable to each accident. However, Dr. Schear returned the form blank and submitted a report from an office visit of December 13, 2013. Accordingly, the Attorney General contacted Dr. Cunningham who conducted a paper review of applicant's medical records and determined the award granted by the Attorney General for work loss was reasonable.

{¶9} Applicant took the witness stand. Ms. Branham related how the accident of March 13, 2013 occurred and she testified that she sustained a broken clavicle, a spleen injury, fractured ribs, and a collapsed lung. She testified she was confined to the hospital for ten days, but five days after her release she returned to the Trauma Center associated with Miami Valley Hospital due to blood in her lung. While she continued to experience pain and discomfort she was unable to continue treatment or physical therapy due to the lack of money and no insurance.

{¶10} Ms. Branham related that at the time of her injury she was employed by Arbors of Dayton as a State Tested Nursing Assistant ("S.T.N.A"). While she had

obtained her credentials as a Licensed Practical Nurse ("LPN"), due to financial reasons, unrelated to this incident, she was unable to retain this certification. Accordingly, she was working as an S.T.N.A. which required the ability to lift, move, and assist patients who lacked full mobility. Consequently, her rib injuries prevented her from performing these functions. Therefore, Arbors of Dayton terminated her employment.

{¶11} Ms. Branham explained that after filing her compensation application, members of the Attorney General's staff urged her to seek follow-up treatment. However, when she attempted to return to the trauma clinic she was rebuffed because she had no insurance and could not afford to pay for treatment. She related she eventually saw Dr. Schear in December, but only after she had saved up money to afford the office visit.

{¶12} Applicant outlined the financial as well as emotional hardships she is suffering as the result of the injuries she sustained. She has been unable to work since the date of the injury and she believes she has sustained work loss beyond the date approved by the Attorney General.

{¶13} Ms. Branham stated she became aware of Dr. Cunningham when she received her award for work loss. She observed that Dr. Cunningham's analysis is limited since he has never examined her, while Dr. Schear's opinion is fully informed since he has examined her and is well aware of both her condition and the limitations it imposes upon her.

{¶14} Ms. Branham explained the automobile accident of March 7, 2013, was caused by her operation of a vehicle while she was under the influence of alcohol ("DUI") wherein the vehicle struck a car and a house. As a result of that incident she injured her ankle.

{¶15} Applicant was presented Applicant's Exhibit 1, the Attorney General's finding of fact and decision of February 21, 2014. Applicant acknowledged that she was granted work loss from March 22, 2013 through June 13, 2013. Applicant's Exhibit 2, is a note dated December 30, 2013, which indicated due to the injuries sustained on March 13, 2013 she would be "unable to work for the next month." Applicant's Exhibit 3, indicated office visits with Dr. Schear on May 30 and June 2, 2014. The May 30, 2014 slip confirms applicant is still unable to work and the June 2, 2014 slip confirms that x-rays show "abnormalities" with her ribs. Applicant was shown Applicant's Exhibit 4, a note from Dr. Schear, which shows Ms. Branham was excused from work from August 12, 2014 to September 2, 2014, "due to car accident on 3/3/13." Upon a September 2, 2014 visit, Dr. Schear wrote a note extending her disability date to December 1, 2014. This note was identified as Applicant's Exhibit 5.

{¶16} Finally, applicant was handed Applicant's Exhibit 6, a letter from applicant's counsel to Dr. Schear dated August 14, 2014. The letter directed Dr. Schear to answer a number of questions concerning applicant's physical condition. Applicant read the questions and answers contained in the letter into the record. In essence, the letter addresses Ms. Branham's medical condition and limitations, and it expresses a return to work date of December 1, 2014. Ms. Branham concurs with the return to work date.

{¶17} Upon cross examination, Ms. Branham explained the qualifications and the job duties involved with an S.T.N.A. Applicant clarified that the gap in her medical treatment was financial in nature. Applicant acknowledged that she has Medicaid which covers only pap smears and birth control, but she does not qualify for medical and dental coverage because she has no dependents. When questioned concerning HCAP, she stated she was denied and when encourage by the Attorney General staff she re-applied but was not approved.

{¶18} Applicant testified that after the alcohol related accident of March 7, 2013, she was placed on light duty but was not fired as the result of this incident since the DUI charges were reduced to failure to control. She conceded that she has not applied for her old job with restrictions. Applicant also recounted a fall she experienced on the day before the DUI incident where she fell on the ice and injured her back.

{¶19} Ms. Branham was given State's Exhibit 1, a facsimile dated October 29, 2013, in which Dr. Schear's office stated they had not seen applicant. However, applicant clarified that Dr. Schear had several offices and the office from which this fax was generated was not the office where she received treatment.

{¶20} On redirect, applicant stated that she had not seen Dr. Schear on October 29, 2013. Her treatment with him did not begin until December of 2013. Whereupon, the testimony of applicant was concluded. Applicant rested her case and moved to admit her six exhibits. The Attorney General expressed no objections to these admissions and applicant's exhibits were admitted into evidence.

{¶21} The Attorney General called Dr. John Cunningham to testify. Dr. Cunningham acknowledged that he reviewed medical records in relation to the claim filed by Nikia Branham. Dr. Cunningham was handed State's Exhibit 2, a document entitled File Review dated January 10, 2014, which was prepared by him. Dr. Cunningham explained the methodology he uses to analyze a case, ensuring that the course of events, diagnosis, and treatment mesh, based on a review of all available hospital, medical, and treatment records. He evaluated the three injurious events, noting that applicant sustained a "nondisplaced right L1 spinous process fracture" which occurred from a fall, a "right ankle sprain" from an automobile accident of March 7, 2013, and a bilateral rib fracture, pneumothorax, left pulmonary contusion, and splenic laceration from the criminally injurious conduct of March 13, 2013.

{¶22} Dr. Cunningham discussed applicant's follow-up treatment on April 4, 2013, wherein applicant complained of right ankle, sternum, and left and right rib pain. Dr. Cunningham noted applicant did not seek follow-up treatment until October 31, 2013. Her next follow-up visit was on November 8, 2013, for rib fracture pain. A chest x-ray at that time revealed a partial healing of the ribs. When questioned whether the lack of medical treatment for six months, would adversely affect her recovery for the rib injuries, Dr. Cunningham responded "not much." Dr. Cunningham testified that based upon the medical records applicant should have been able to return to work by "mid-May 2013, however, subjective pain experienced by an individual could lengthen the disability period."

{¶23} Upon cross examination, Dr. Cunningham acknowledged he has neither met nor treated Ms. Branham. He reiterated that her ribs were not healed as of the x-rays taken in November of 2013. He stated the only records he reviewed from Dr. Schear was a report dated December 30, 2013, and he has not received nor was he provided with more recent records. When questioned as to whether he would be surprised that Ms. Branham continued to suffer pain or residual pain as the result of her rib injuries he stated he would not. Finally, Dr. Cunningham confirmed the physical nature of the duties of an S.T.N.A. Whereupon, the testimony of Dr. Cunningham was concluded and the state rested its case.

{¶24} In closing, applicant stated additional work loss beyond June 13, 2013, has been proven by a preponderance of the evidence. Furthermore, the opinion of Ms. Branham's treating physician should have more weight than the opinion of a consulting physician who never saw or treated her for her injuries. Even Dr. Cunningham acknowledged that as of November 8, 2013, her ribs were not fully healed. This date was far beyond the June 13, 2013 date on which the Attorney General relies to calculate applicant's work loss. Furthermore, evidence submitted by Dr. Schear

indicates applicant is still unable to work at the present time, either as an S.T.N.A or LPN. Whereupon, applicant encouraged this panel to extend Ms. Branham's work loss beyond June 13, 2013.

{¶25} The Attorney General initially stated that Dr. Schear has refused to cooperate with the investigation by not providing medical records and refusing to attribute what portion of Ms. Branham's disability resulted from her ankle injury, as opposed to the rib fractures. The Attorney General reinforced his position that Ms. Branham should have been able to return to work without restrictions in May of 2013. The Attorney General noted that applicant received no treatment for her ribs for a six-month period.

{¶26} The Attorney General related that Dr. Schear's failure to testify leaves unanswered questions. First, whether x-rays were taken which can substantiate the rib pain that applicant alleges she endured and second, what percentage of her alleged disability was related to her ankle injury as opposed to her rib fractures.

{¶27} The Attorney General urges this panel to follow the holding in *In re James*, 2012-70190VI tc (3-4-13) aff'd jud (7-18-13), where applicant failed to prove her injuries were causal related to the criminally injurious conduct due to a nine-month gap in treatment. In the case at bar, there was a six-month gap in applicant's treatment. Initially, on October 31, 2013, she complained of ankle pain which was not related to the March 13, 2013 criminal incident. It was not until November 8, 2013, that she sought treatment for her rib injuries.

{¶28} The Attorney General asserted that Ms. Branham has failed to prove, by a preponderance of the evidence, that she is solely unable to work as the result of the March 13, 2013 hit-skip accident. The Attorney General argued that there is no causal connection between the injuries sustained at the time of the March 13, 2013 criminal

incident and the follow-up care received in November of 2013, due to the six-month gap in medical treatment.

{¶29} Accordingly, the Attorney General recommends his decision be affirmed.

{¶30} In rebuttal, applicant stated it is pure speculation on the Attorney General's part to assert some intervening or superseding action on the applicant's part caused her continuing rib pain. Furthermore, Dr. Schear's treatment concerned only rib pain, not any problems with an ankle injury. Whereupon, the hearing was concluded.

{¶31} R.C. 2743.51(G) in pertinent part states:

{¶1} "(G) 'Work loss' means loss of income from work that the injured person would have performed if the person had not been injured..."

{¶32} Black's Law Dictionary Sixth Edition (1990) defines preponderance of the evidence as: "evidence which is 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."

{¶33} 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."

{¶34} The credibility of witnesses and the weight attributable to their testimony are primarily matters for the trier of fact. *State v. DeHass*, 10 Ohio St. 2d 230, 227 N.E. 2d 212 (1967), paragraph one of the syllabus. The court is free to believe or disbelieve, all or any part of each witness's testimony. *State v. Antill*, 176 Ohio St. 61, 197 N.E. 548 (1964).

{¶35} From review of the case file and with full and careful consideration given to the testimony of applicant and Dr. Cunningham and the arguments presented by counsel at the hearing, we find applicant has proven, by a preponderance of the

evidence, that she incurred additional work loss from June 13, 2013 to December 1, 2014. We reach this decision based upon the credibility of applicant's testimony and a review of the medical evidence contained in the claim file.

{¶36} The Attorney General urges us to rely on the holding in *James*, stating that the six-month gap in applicant's medical treatment shows that there is no relation between the injuries experienced on March 13, 2013, and her subsequent medical treatment in November of 2013, and beyond. However, *James* case be distinguished from the case at bar. *In James*, the victim never sought medical treatment until nine months after the criminally injurious conduct and never informed her treating physician about the assault. Furthermore, in *James*, the victim failed to establish a causal connection between her dental injuries and the injuries suffered at the time of the criminally injurious conduct.

{¶37} In the case at bar, applicant was immediately transported to the hospital after the criminally injurious conduct and there was no question that these injuries, i.e. fractured ribs, pneumothorax and lacerated spleen, were caused by the criminally injurious conduct and were the basis for granting applicant's initial award for work loss. Nothing in applicant's testimony or medical records support a finding that applicant received additional rib injuries in a subsequent event, and to make such a finding would be purely speculative. The Attorney General's expert stated the gap in treatment of her rib injuries would not have affected her recovery from the rib fracture. Furthermore, Dr. Cunningham clarified that his work loss findings were based on objective, not subjective findings. Even he conceded that applicant would have experienced pain in November of 2013, since her ribs were only partially healed, and pain certainly extends one's disability period.

{¶38} This panel believes applicant's testimony was credible and Dr. Schear, her treating physician, was in the best position both to assess the pain applicant suffered

and to determine when she could return to work as an S.T.N.A., a physically demanding position.

{¶39} Second, the Attorney General contends that if applicant is granted work loss there should be an apportionment between the injuries sustained in two earlier events and those sustained at the time of the criminally injurious conduct.

{¶40} A panel of commissioners in *In re Hoban* V2006-20275 tc (10-15-08), attempted to reach such a result based upon expert testimony when it found “applicant suffered a disability of only seventeen percent due to the injuries both physical and psychological that he suffered on the day of the incident. The applicant’s inability to find and keep gainful employment was attributable to injuries he sustained in a pre-automobile accident and a variety of family related issues.” A judge of the court of claims in reversing the panel with respect to this reasoning in pertinent part stated:

{¶41} “Based upon the plain language of R.C. 2743.51(G), the court finds that applicant is entitled to an award of work loss which represents loss of income from work that he would have performed if he had not been injured by the criminally injurious conduct, regardless of any determination regarding his percentage of disability.”

{¶42} “ * * *

{¶43} “Based on the evidence and R.C. 2743.61, it is the court’s opinion that the decision of the panel of commissioners to reduce applicant’s award for work loss in proportion to the percent that his disability is related to the criminally injurious conduct was unreasonable and unlawful.” *Hoban*, 2009-Ohio-7224 ¶14 & 18.

{¶44} Accordingly, the Attorney General’s argument to apportion applicant’s work loss between various injury events lacks merit.

{¶45} IT IS THEREFORE ORDERED THAT

{¶46} Applicant’s and the Attorney General’s Exhibits are admitted into evidence;

{¶47} Applicant's motion to allow her and Dr. Schear to testify via telephone is MOOT;

{¶48} The Attorney General's motion to allow Dr. John Cunningham to testify via telephone is MOOT;

{¶49} The May 15, 2014 decision of the Attorney General is REVERSED and judgment for additional work loss is rendered in favor of the applicant;

{¶50} This claim is remanded to the Attorney General for calculation of additional work loss in accordance with the above decision;

{¶51} This order is entered without prejudice to applicant's right to file a supplemental compensation application, within five years of this order, pursuant to R.C. 2743.68;

{¶52} Costs are assumed by the court of claims victims of crime fund.

DANIEL R. BORCHERT
Presiding Commissioner

ANDERSON M. RENICK
Commissioner

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