

[Cite as *In re White*, 2015-Ohio-5692.]

IN RE: LUNDEN WHITE

Case No. 2015-00312-VI

LUNDEN WHITE

Magistrate Daniel R. Borchert

Applicant

DECISION OF THE MAGISTRATE

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{¶1} On October 14, 2014, applicant, Lunden White, filed a compensation application as the result of an alleged assault suffered on September 4, 2014. On February 12, 2015, the Attorney General issued a finding of fact and decision denying applicant's claim based on his failure to prove that he was a victim of criminally injurious conduct pursuant to R.C. 2743.51(C)(1). The Attorney General based its decision on the fact applicant told urgent care providers a different version of how his injuries occurred than the police.

{¶2} On February 18, 2015, applicant submitted a request for reconsideration. Applicant acknowledged initially he told urgent care providers that he was injured skate boarding since he did not want the reputation as a "hooligan." Furthermore, since the offenders stole his identification he feared retaliation. After encouragement from his family he truthfully reported the incident to police on September 8, 2014. Accordingly, applicant contended he should qualify as a victim of criminally injurious conduct, since statements made to police are made under the penalty of perjury while statements made at urgent care were for the sole purpose of receiving medical treatment in an expeditious manner.

{¶3} On March 24, 2015, the Attorney General rendered a Final Decision finding no reason to modify the initial decision. On April 6, 2015, applicant filed a notice of appeal from the March 24, 2015 Final Decision of the Attorney General. Hence, a hearing was held before this magistrate on August 5, 2015 at 10:00 a.m. On August 3, 2015, applicant filed a motion to allow applicant's witness, Kristin Urdiales to testify via telephone. Applicant's motion is granted. Applicant and his attorney Matthew

Shaughnessy appeared at the hearing, while the state of Ohio was represented by Assistant Attorneys General Melissa Montgomery and Cassandra Manna.

{¶4} In an opening statement applicant related on September 4, 2014, he was approached by five or six males. One male swung at him, while another tripped him as he attempted to run away. Subsequently, he was beaten by this group and his cellphone and money were stolen. The next day he sought medical treatment at an urgent care center, due to his wrist injury. Applicant related to medical personnel that he injured himself skateboarding. However, four days later, he went to police and informed them he was a victim of an assault.

{¶5} Consequently, due to the two different versions of the events causing his injury, the Attorney General denied his claim for an award of reparations from the Ohio Victims of Crime Compensation Program.

{¶6} However, testimony will be presented by Lunden White and his mother explaining the situation. Furthermore, testimony from Kristin Urdailes, a witness to the injuries will be offered. After conclusion of applicant's case, it will be established that applicant qualifies as a victim of criminally injurious conduct.

{¶7} The Attorney General countered that applicant reported to urgent care that his injuries were sustained as a result of a skateboarding mishap. Medical records reveal the only injuries sustained by applicant were abrasions to his hand and shoulder. Based upon the applicant's inconsistent statements made to urgent care and police and the lack of corroborating evidence applicant's claim was denied. Accordingly, the Attorney General's decision to deny applicant's claim should be affirmed.

{¶8} Applicant Lunden White testified that while walking with three friends, a group of males walking in the opposite direction approached him. One member of the group took a swing at him for no apparent reason. Applicant tried to run but was tripped by another member of the group and subsequently assaulted him. He related he balled his body up in a defensive position, but one member of the group kicked him in the arm

and wrist, which resulted in his injury. Applicant stated he tried to speak to campus security about the incident, but they took no interest. He acknowledged that he did not contact police on the day of the incident.

{¶9} He sought medical treatment the next day due to the injury sustained to his wrist. He stated he informed medical personnel at urgent care he sustained his injury by falling off a skateboard. He related he told this lie because he did not want to be perceived as a troublemaker and his father accompanied him to urgent care and he did not want his family to know he had been assaulted. He stated he told his brother what really happened but told his brother not to share it with other family members, however, his brother informed applicant's grandmother about the true cause of the injuries he received. His grandmother convinced him to make a police report even though he expressed fear of retaliation. Applicant stated he had no knowledge that the Victims of Crime Compensation Program existed until he received a letter from his attorney, which postdated his filing of the police report.

{¶10} Upon cross-examination, applicant again described the events leading up to the assault, the assault, and the departure of the offenders. After the assault he went to a friend's house. At that time his shoulder, elbow, and knee were bleeding.

{¶11} Applicant stated he saw his mother approximately a week later. However, he saw his grandmother the morning after the assault, but told her he sustained the injury by falling off a skateboard. At that time, his father accompanied him to urgent care. He was treated for a broken wrist at that time. Whereupon, the applicant's testimony was concluded.

{¶12} Applicant next called Michelle Alexander, applicant's mother, to testify. Ms. Alexander stated the first time she saw Lunden after his injuries she did not believe his injuries were consistent with a fall from a skateboard. A few days later, Lunden's brother informed her that Lunden's injuries occurred due to an assault rather than a skateboard injury. Ms. Alexander believed Lunden's injuries were consistent with an

assault. Upon cross-examination, Ms. Alexander said Lunden had bruises on his head. Whereupon, Ms. Alexander's testimony was concluded.

{¶13} Kristin Urdiales was called to testify via telephone. Ms. Urdiales related on the night of the incident she was walking with a group of friends that included applicant. She was walking behind Lunden when she observed a group of guys approach Lunden, when one took a swing at him. Applicant started running with the group in pursuit. Lunden was tripped and was kicked while he was on the ground. After the group left, she and her group helped applicant up, but did not call 911. She related applicant could not move his wrist due to the injury. He was bleeding from his knee and elbow.

{¶14} The Attorney General cross-examined the witness, establishing that they had known each other for approximately two years and were not dating. Ms. Urdiales described the group of assailants as numbering between four to six, and were approximately in their late twenties. There was no verbal communication by the group with Lunden prior to the assault. The group kicked Lunden in his leg, arms, and side. After the group left campus security came by but offered no assistance. Although Lunden was hurt neither campus security nor police were called and Lunden was not taken to a medical facility for treatment. Whereupon, the testimony of Ms. Urdiales was concluded and applicant rested his case.

{¶15} In closing, applicant asserted his burden of proof had been met. Testimony from Kristen Urdiales corroborated applicant's testimony that he sustained his injury as a result of an assault. At the time of the medical treatment, applicant had no reason to report the incident since he did not want his father to know and he did not know the identity of his attackers. Based upon the totality of evidence presented at the hearing, applicant asserted he met his burden of proof with respect to proving he was the victim of criminally injurious conduct by a preponderance of the evidence. Accordingly, the Attorney General's Final Decision should be reversed.

{¶16} The Attorney General conceded that there was a possibility that applicant was assaulted, but applicant presented insufficient evidence to meet his burden of proof. The Attorney General stated statements made to medical providers are inherently reliable, which should outweigh the testimony presented at the hearing. While applicant indicated to police that the assailants stole his wallet and cellphone, applicant made no mention of these events during his testimony. The Attorney General pointed out that while his mother testified to injuries sustained to applicant's head and face, applicant did not mention these injuries in his testimony. The Attorney General asserted that his injuries were consistent with a fall, rather than an assault. It was also speculated that a police report might have been made for insurance purposes for the recovery of his cellphone.

{¶17} The Attorney General directed this court's attention to *In re White*, 2008-30979-VI tc (7-1-09). This case should be relied on in reaching a conclusion in this matter. Accordingly, the Attorney General's Final Decision should be affirmed.

{¶18} Applicant reiterated the argument that criminally injurious conduct has been proven and the Attorney General's pointing out minor inconsistencies of the witnesses, support reliability since no two witnesses will observe any event, especially a traumatic one, in the same manner.

{¶19} Finally, applicant asserted a statement made to a medical provider is not made under oath, while making a false police report could subject applicant to a criminal charge. Accordingly, the Attorney General Final Decision should be reversed. Whereupon, the hearing concluded.

{¶20} R.C. 2743.51(C)(1) in pertinent part states:

- a) "(C) 'Criminally injurious conduct' means one of the following:
- b) "(1) For the purposes of any person described in division (A)(1) of this section, any conduct that occurs or is attempted in this state; poses a substantial threat of personal injury or death; and is punishable by fine,

imprisonment, or death, or would be so punishable but for the fact that the person engaging in the conduct lacked capacity to commit the crime under the laws of this state.”

{¶21} The applicant must prove criminally injurious conduct by a preponderance of the evidence. *In re Rios*, 8 Ohio Misc. 2d 4, 455 N.E.2d 1374 (Ct. of Cl. 1983).

{¶22} Applicant must produce evidence which furnishes a reasonable basis for sustaining his claim. If the evidence furnishes a basis for only a guess, among different possibilities, as to any essential issue in the case, he fails to sustain the burden as to such issue. *In re Staten*, V2011-60051tc (5-27-11), 2011-Ohio-4321, citing *Landon v. Lee Motors, Inc.* 161 Ohio St. 82, 118 N.E.2d 147 (1954).

{¶23} 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.”

{¶24} 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.”

{¶25} 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). I find applicant and Kristin Urdiales’ testimony to be credible.

{¶26} From review of the case file and with full and careful consideration given to the testimony presented at the hearing and the arguments of the parties, I find applicant has proven, by a preponderance of the evidence, that he was a victim of criminally injurious conduct.

{¶27} The Attorney General contended that this court should rely on *White* when making a decision in this case. *White* involved a person who alleged she was injured by an 11 year-old foster child. Unlike the case at bar, *White* told police she had no recollection of how her injuries occurred, the same response she made to medical personnel at the time of her treatment; and there were no witnesses who could substantiate that applicant's injuries were incurred as the result of an assault. In the case at bar, applicant and his witness, Kristen Ursales presented credible testimony that applicant's injuries were the result of an assault.

{¶28} Accordingly, I recommend that the Attorney General's Final Decision of March 24, 2015 be reversed and the claim remanded to the Attorney General for calculation of economic loss incurred.

{¶29} *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 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).*

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DANIEL R. BORCHERT  
Magistrate

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

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