

[Cite as *In re Pethtel*, 2016-Ohio-1413.]

IN RE: MICHAEL PETHTEL

Case No. 2014-00759-VI

MICHAEL PETHTEL

Magistrate Daniel R. Borchert

Applicant

DECISION OF THE MAGISTRATE

{¶1} On April 2, 2014, applicant, Michael Pethtel filed a compensation application as the result of the death of his son, Brandon Pethtel. The applicant seeks to be considered a victim in his own right.

{¶2} On July 17, 2014, the Attorney General issued a finding of fact and decision denying applicant's claim. The Attorney General outlined the factors necessary to qualify as a victim in his own right pursuant to *In re Clapacs*, 58 Ohio Misc.2d 1, 567 N.E.2d 1351 (Ct. of Cl. 1989). While the Attorney General conceded that applicant had a close personal relationship with the crime victim, his son and sustained psychological injury so severe as to impede or prohibit applicant from doing or enjoying day-to-day activities, the Attorney General asserted applicant did not have direct awareness of the crime or arrive in the immediate aftermath. The Attorney General contended applicant did not view the accident scene with the victim present and only saw the victim in a hospital setting.

{¶3} Applicant submitted a request for reconsideration arguing he qualified as an indirect victim pursuant to the holding in *Clapacs* and other related claims. On September 9, 2015, the Attorney General rendered a Final Decision finding no reason to modify its initial decision.

{¶4} On September 12, 2014, the applicant filed a notice of appeal from the September 9, 2015 Final Decision of the Attorney General. Hence, a hearing was held before this magistrate on August 18, 2015 at 1:30 p.m. Applicant, Michael Pethtel and his attorney, Michael Falleur appeared at the hearing, while Assistant Attorney General Heidi James represented the state of Ohio.

{¶5} Applicant stated this claim concerned Michael Pethtel's assertion that he was an indirect or secondary victim as the result of the death of his son, Brandon Pethtel. As the result of this situation he experienced work loss.

{¶6} The Attorney General countered that although applicant has met two prongs of the test laid down in *Clapacs*, that being a close relationship with the victim and psychological injury of such a debilitating nature so as to impede or prohibit the resumption or enjoyment of day-to-day activities, he did not have a contemporaneous sensory observation of the crime scene. Accordingly, the requirements under *Clapacs* have not been met and the Attorney General's decision denying applicant's claim should be affirmed.

{¶7} Applicant called Tonya Pethtel, wife of applicant and mother of Brandon Pethtel, to testify. Ms. Pethtel summarized the events leading up to the accident involving Brandon. Tonya related that she was informed Brandon was in an accident by a law enforcement officer who appeared at her door. The officer was unable to relate the physical condition Brandon was in as a result of the accident only that he had been transported to Cambridge Hospital. At the time of the notification, she had no idea concerning the site of the accident.

{¶8} However, as her and her husband were leaving for the hospital they noticed a number of police cars. At that time, she realized she was near the accident site and when questioning officers about her son's condition she was told he was sent to Cambridge Hospital. Upon arrival at Cambridge Hospital they were informed Brandon had been transferred to Columbus to Children's Hospital. However, she did not know Brandon's medical condition specifically as she had only been told he suffered a broken leg and head trauma.

{¶9} Upon entering the room at Children's Hospital, Tonya noticed her cousin, Michael McWhorter was there and Brandon was covered with a sheet with one foot sticking out. Tonya grabbed his foot and it was ice cold. Tonya related that a nurse told

her she could hug her son and tell him to fight for his life. She described Brandon's eyes as being open but vacant and a knot on his head. A short time later a doctor came into the room, and told Brandon's parents he needed to show them x-rays. When they entered the adjoining room two doctors and a nurse were present. At that time they were told their son had severe internal bleeding, and he probably would not survive. However, a short time later they were informed Brandon was being taken for a CAT scan. But before transportation could be accomplished, Brandon's condition had deteriorated to the point that CPR had to be performed. She stated she heard her son crying prior to his death.

{¶10} At the time of the incident, her husband worked for Time Warner. Tonya stated Michael was unable to return to work for four months and his initial attempts to return to work were unsuccessful. Initially, he was on short term disability but then he had to switch to FMLA, to preserve his job. She stated she believed he returned to work after approximately one year. He saw counselor Deborah Smith during this period but once he returned to work full-time due to his hours, visits with Ms. Smith became exceedingly more difficult.

{¶11} Upon cross-examination, Tonya believed the police officer arrived at her home between 11:30 pm-12:00 am. Minutes later they left their home and could see the accident scene, but due to the plethora of emergency and police vehicles she could only vaguely see the vehicle her son had been riding on. Tonya believed it was approximately ninety-six miles from her home to Columbus. Whereupon, Tonya Pethtel's testimony concluded.

{¶12} Applicant called Detective Michael McWhorter, Columbus Police Accident Investigation Unit, to testify. Initially, he stated that Tonya was his cousin. He stated he was informed of the accident by his Aunt. He proceeded to Children's Hospital and upon arrival Brandon was still alive. He observed the attempted transportation of Brandon to the CAT scan room and was present when Brandon died. He was unable to

offer a timeline when Brandon's parents arrived or how long they were present before Brandon's death due to the emotional nature of the situation.

{¶13} Under cross-examination, Detective McWhorter stated he did not know when Brandon arrived at the hospital and he believed he was at the hospital approximately thirty minutes prior to the Pethtel's arrival. He described the scene inside the treatment room as chaotic with medical personnel working to keep Brandon alive. Brandon's bloody clothes were present and the sheet covering the lower half of Brandon's body was covered in blood. Brandon was intubated at this time. When questioned concerning the time frame from the arrival of the Pethtel's to the death of Brandon, McWhorter testified due to the emotional nature of the situation he could not offer an accurate estimation. Whereupon, Michael McWhorter's testimony was concluded.

{¶14} Michael Pethtel was called to testify. He related that due to his proximity to the accident scene, he must drive by the site on a daily basis. Michael stated he was off work from the date of the accident, April 13, 2013 until the middle of August. However, due to his emotional condition he was unable to function and, consequently, left his employment until September-October 2013. Mr. Pethtel related he experiences flashbacks and nightmares and sought help from his counselor Deborah Smith. The Attorney General had no questions for the witness and Mr. Pethtel's testimony was concluded. Applicant rested his case.

{¶15} The state had no witnesses and the case proceeded to closing arguments.

{¶16} Applicant argued that this case presented a unique situation since the crime scene was adjacent to the family home. Applicant cited the case of *In re E.P.*, Ct. of Cl. No. V2008-30774tc (May 4, 2009), 2009-Ohio-7215, where a minor observed her father, a police officer, in a bloody condition in the hospital's E.R. *E.P.* never observed the actual scene where her father was injured, but nevertheless qualified as a secondary victim. Applicant cited *In re Freeman*, Ct. of Cl. No. V2000-02330tc

(January 14, 2002) aff'd jud (April 23, 2002) another case where applicant was found to be a secondary victim without visiting the crime scene. In the case at bar, applicant experienced the aftermath of the accident due to the presence of police and emergency vehicles within a short distance from the family home. Applicant argued that the sensory perception began when Mr. Pethtel encountered the crime scene on the way to the hospital. The shock was intensified when applicant saw his son at the hospital struggling to survive.

{¶17} Applicant cited *In re Santiago*, Ct. of Cl. No. V2007-90668tc (January 31, 2008), 2008-Ohio-2767 aff'd jud (May 23, 2008), 2008-Ohio-7149, a claim where a mother saw her daughter not at the crime scene but in a hospital setting, spending time with her until her daughter's demise. A panel of commissioners found applicant in that case qualified as a victim in her own right.

{¶18} Applicant stated the close proximity to the crime scene compounded Mr. Pethtel's difficulty in trying to recover from a tragic event. Accordingly, the Attorney General's decision should be reversed and Mr. Pethtel should be found to qualify as a victim in his own right.

{¶19} The Attorney General conceded that applicant has satisfied the close personal relationship and the severe emotional distress requirements contained in *Clapacs*. However, the Attorney General asserted applicant has failed to satisfy the requirement that the shock was directly attributable to the sensory and contemporaneous observation of the incident.

{¶20} The Attorney General believed the *Santiago* and *Freeman* cases can be distinguished from the case at bar. In *Freeman*, the mother witnessed her injured son moments after the crime was committed and in *Santiago* it was an unusual set of facts, since the mother spent days with her daughter prior to her death.

{¶21} The Attorney General asserted the court should rely on the holding in *In re Bradley*, Ct. of Cl. No. 2012-70416-VItc (June 19, 2014), 2014-Ohio-5908. In that case,

the applicant drove from her home in Cleveland to Cincinnati and then learned her son had died. She was allowed to see her son in a hospital setting after his death. The room where the viewing occurred had been cleaned and her son's body was covered with clean bedding to prevent applicant from view his wounds. A panel of commissioners found applicant had failed to prove the sensory and contemporaneous observation of the incident requirement. The Attorney General argues that *Bradley* is analogous to the case at bar since the applicant viewed his son in a hospital setting rather than at the site of the crime.

{¶22} The Attorney General argues although the site of the accident was a short distance from their home, applicant did not observe the crime scene, but only observed police and emergency vehicles. Also, applicant was unaware of the condition of his son at the time. Furthermore, applicant had to travel approximately ninety-six miles to reach Children's Hospital, and at which time they observed their son in a sterile environment.

{¶23} In *E.P.* the victim learned of her father's shooting moments after it happened and observed him in the emergency room being treated for burns received as a result of the criminal incident. However, in the case at bar much more time elapsed from the occurrence of the criminally injurious conduct to applicant's observation of his son. Accordingly, the Attorney General's decision should be affirmed.

{¶24} Applicant asserted *Bradley* is not analogous to the case at bar since in *Bradley* the victim had already died and hospital staff had the opportunity to clean the room and avoid any observation of the wounds suffered by the decedent. In *Bradley*, a panel of commissioners held that the observation of the body was equivalent to viewing a body at the morgue. However, in the case at bar the testimony of Detective McWhorter revealed the bloody clothing and body of the victim were observable as well as the fact that the victim was not deceased at the time of the viewing. Whereupon, the hearing was concluded.

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

- a)** “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.)
- b)** “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’.”

{¶26} *In re Fife*, at paragraph two of the syllabus states:

- a)** “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.”

{¶27} The applicant has the burden to prove he is a victim by a preponderance of the evidence. See *Clapacs* and *Fife*.

{¶28} 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.”

{¶29} 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.”

{¶30} From review of the case file and upon full and careful consideration given to the testimony of the witnesses and the arguments of the parties, I find the only issue which must be addressed is whether applicant experienced shock directly attributable to the sensory and contemporaneous observation of the crime scene. The Attorney General has conceded applicant had a close personal relationship with the victim, his son and suffered psychological injury which impeded or prohibited him from performing or enjoying his daily activities.

{¶31} I find based on the facts of this incident applicant has met his burden with respect to the sensory and contemporaneous observation requirement. Within minutes of the tragic event, a uniformed officer appeared at applicant’s door to inform him his son had been injured in a vehicular accident. Initially, applicant was informed that his son had been transported to Cambridge Hospital. Applicant left immediately to be with this son, within a short distance from his home, he came upon the crime scene. Applicant knew this was the scene of the accident based upon the number of police and emergency vehicles. While applicant did not observe the specific site of the accident, considering this was an active crime scene for a hit and run accident it would have been inappropriate or possibly illegal to attempt to circumvent police and medical personnel to gain access to the scene. Furthermore, at that time applicant’s concern was the well-being of his son not the observation of the vehicle in which he was a passenger.

{¶32} When applicant initially observed his son, based on the testimony of Detective McWhorter, the room contained bloody clothes, the sheet partially covering the victim was blood stained, victim had a large bump protruding from his head, and the victim was fighting an unsuccessful battle for his life.

{¶33} I find this case is distinguishable from *Bradley*, since in *Bradley* the applicant drove approximately four hours from her home in Cleveland to the hospital in

Cincinnati. Upon arrival the victim was deceased and hospital staff had the opportunity to clean up the room and the victim prior to the applicant's observation. A panel of commissioners in *Bradley* analogized the scene to a morgue setting. Such was not the case in this situation. Upon applicant's arrival his son, was clinging to life and applicant observed the extent and severity of the injuries sustained.

{¶34} I find the hospital encounter was similar to the scene presented in *E.P.* and *Freeman*. In both cases the applicant observed their loved one in a bloody condition. In both cases medical personnel were actively seeking to treat the victim. Even though the events occurred in the hospital the court found the sensory and contemporaneous requirement was met.

{¶35} In the case at bar, applicant was informed of the injury causing accident within minutes of its occurrence by a uniformed officer, but also had the opportunity to view the crime scene in the distance. This was coupled with the fact that the victim was in a blood covered setting, intubated, physical injuries were visible, and medical personnel were desperately trying to save the victim's life. I find the case at bar is closely related to the circumstances found in *E.P.* and *Freeman* and accordingly, applicant qualifies as an indirect victim of crime.

{¶36} Therefore, I recommend the Attorney General's decision of September 9, 2015 should be REVERSED and the claim remanded to the Attorney General for calculation of economic loss.

{¶37} *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).

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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