

[Cite as *In re Zerkle*, 2016-Ohio-8612.]

IN RE: FRED ZERKLE

FRED ZERKLE

Applicant

Case No. 2016-00313-VI

Magistrate Daniel R. Borchert

DECISION OF THE MAGISTRATE

{¶1} On August 10, 2015, applicant, Fred Zerkle, filed a compensation application. Applicant seeks reimbursement for medical costs incurred related to his experiences in the aftermath of the terrorist attacks in New York City on September 11, 2001. Applicant volunteered with the Red Cross and went to the scene of the attack shortly after its occurrence.

{¶2} On January 8, 2016, the Attorney General issued a finding of fact and decision denying applicant's claim since he traveled to New York in November and December 2001, when there were no terrorist attacks. The Attorney General asserted applicant did not experience a substantial threat of personal injury or death, a requirement to prove criminally injurious conduct. Accordingly, applicant's claim was denied.

{¶3} On January 29, 2016, applicant submitted a request for reconsideration. Applicant asserted he has met the definition of a victim of terrorism pursuant to R.C. 2743.51(C)(3).

{¶4} On March 21, 2016, the Attorney General rendered a Final Decision, again noting that applicant did not qualify as a victim of criminally injurious conduct as defined by R.C. 2743.51(C)(1).

{¶5} On April 13, 2016, applicant filed a notice of appeal from the March 21, 2016 Final Decision of the Attorney General. Hence, a hearing was held before this magistrate on July 27, 2016 at 11:00 a.m.

{¶6} Applicant, Fred Zerkle, appeared via telephone while his attorney, Michael Falleur, appeared in person. The state of Ohio was represented by Associate Assistant Attorney General Melissa Montgomery.

{¶7} In opening, applicant questioned the purpose and intent of the addition of R.C. 2743.51(C)(3) to the statute. In this case, applicant went to New York City to aid in the aftermath of the terrorist attack which occurred on September 11, 2001. Applicant was a firefighter at the time and went to the city under the auspices of the Red Cross. Upon his return to Springfield Ohio, he became a post worker until both emotional and health issues prevented him from continuing to work. Applicant asserted his respiratory problems and Post Traumatic Stress Disorder (“PTSD”) were directly related to his experiences at the site of the terrorist attack. Applicant related that Mr. Zerkle filed claims for Social Security Disability and from the 911 fund, so economic loss would not be the issue. The only issue to be addressed was whether Fred Zerkle qualified pursuant to R.C. 2743.51(C)(3).

{¶8} The Attorney General related that eligibility would be the main focus of the hearing. However, the Attorney General does not concede that Mr. Zerkle’s health issues are causally related to his cleanup efforts in New York City. The Attorney General contended that the inclusion of R.C. 2743.51(C)(3) does not create a new definition for eligible crime victims.

{¶9} The Attorney General asserted that Mr. Zerkle is not a victim of criminally injurious conduct or terrorism. The investigation revealed that Mr. Zerkle traveled to New York City in either October or November 2001. Accordingly, any respiratory problems were caused by applicant’s cleanup activities and the PTSD issue was attributable to conversations he had with survivors or family members who lost loved ones in the 911 attacks. Neither one of these conditions qualify him as a victim of criminally injurious conduct. The Attorney General asserted the terrorist conduct ended on September 11, or the next day. However, when applicant arrived on the scene the

terrorist act had concluded. Accordingly, the Attorney General urged this court to find Mr. Zerkle was not the victim of criminally injurious conduct pursuant to R.C. 2743.51(C)(3).

{¶10} Fred Zerkle was called to testify. Mr. Zerkle stated prior to September 11th, he was employed as a firefighter. After September 11th, he felt compelled to go to New York City to assist with the cleanup operations. He was involved with disaster relief which required him to fill out paperwork but also sift through the ground-zero site. He related he discovered various body parts during this operation. Zerkle related he spent approximately one month in New York City.

{¶11} Upon his return to Springfield, he related he became a postal worker. Sometime later he stated he experienced what he described as a light heart attack. Later, he experienced lung issues and finally PTSD. Currently, he is unemployed. He related he was physically and emotionally fine prior to his trip to New York City and shortly after his return, but then physical and mental health issues arose. Applicant believes all these issues related to his experience at ground-zero in New York City.

{¶12} Upon cross-examination, applicant stated he believed he arrived in New York City a couple months after the events of September 11th.

{¶13} Upon redirect-examination, Zerkle was directed to comment on pictures taken while he was there. He related he took the photographs. The photographs depict the aftermath of the terrorist attacks. Whereupon, applicant's testimony was concluded. Both parties rested their case and the case proceeded to closing arguments.

{¶14} Applicant urged that R.C. 2743.51(C)(3) expended the definition of who could qualify as a victim. Furthermore, the events of September 11th should not be confined to the day it happened, but should encompass the aftermath. Applicant contended the fouled air caused by the terrorist attack lasted six months or longer. Applicant referred to a letter written by Carol Barlage, M.D., dated June 25, 2015, wherein she stated: "Fred Zerkle suffers from post traumatic stress disorder and chronic

obstructive pulmonary disease. The onset of both of these conditions was after he was involved as an emergency responder in the 911 situation in New York City.”

{¶15} Applicant argued the terrorist attack did not end on September 11th but extended months later as long as people were injured in the aftermath cleanup effort.

{¶16} The Attorney General asserted R.C. 2743.51(C)(3) stated “For purposes of any person described in division (A)(1) or (2) of this section, terrorism that occurs within or outside the territorial jurisdiction of the United States.” The Attorney General’s interpretation of R.C. 2743.51(C)(3), expands the definition who can be a claimant, to a victim of terrorism, however, a victim must still prove he is a victim of criminally injurious conduct.

{¶17} The Attorney General then quoted R.C. 2743.52(A) which states: “The attorney general shall make awards of reparations for economic loss arising from criminally injurious conduct, if satisfied by a preponderance of the evidence that the requirements of an award of reparations have been met.” Accordingly, R.C. 2743.51(C)(3) does not absolve applicant of his duty to prove he was a victim of criminally injurious conduct.

{¶18} The Attorney General stated terrorism is clearly criminally injurious conduct but applicant has failed to prove he was a victim of terrorism or of a violent act or an act dangerous to human life. R.C. 2743.51(R)(1).

{¶19} The Attorney General referred to the case of *In re Kunkel*, V2011-60221tc (October 11, 2011). In that case, applicant was notified while working that her house was on fire. Upon her return home, her home suffered extensive damage and the offender was arrested. A panel of commissioners determined she was not a victim of crime since she was not at home at the time of the fire. She related she sustained injury due to breathing in smoke, but her claim was denied.

{¶20} The Attorney General asserted *Kunkle* can be analogized to the case at bar. In both cases neither applicant was present at the time of the occurrence,

however, both suffered injury in the aftermath. Yet the panel in *Kunkle* found she was not a victim of criminally injurious conduct pursuant to R.C. 2743.51(C)(1) since she was not present at the time of the fire and accordingly, the fire did not pose a substantial threat of personal injury or death.

{¶21} In the case at bar, applicant testified it was several months after the events of September 11th occurred that he arrived in New York City. He was never in the zone of danger. The Attorney General does not dispute he suffered physical and mental injury in the cleanup effort, however, in the same manner that *Kunkle* was not the victim of arson, Mr. Zerkle was not the victim of terrorism.

{¶22} The Attorney General related that in 2010 the Federal Government passed the First Responder's Act, Mr. Zerkle should be eligible under that act, but cannot receive compensation from Ohio Victims of Crime Compensation since he failed to meet the definition of one who was a victim a violent act or an act that is dangerous to human life. Accordingly, the Attorney General argued his Final Decision should be affirmed.

{¶23} Applicant argued that Mr. Zerkle does not have to qualify under the definition of criminally injurious conduct contained in R.C. 2743.51(C)(1), but only under R.C. 2743.51(C)(3). Applicant agreed the zone of danger did clear on September 11th, but terrorism continued until the site of the attack did not pose a health hazard. Accordingly, applicant was a victim of criminally injurious conduct, but as defined by R.C. 2743.51(C)(3) not R.C. 2743.51(C)(1). Whereupon, the hearing concluded.

{¶24} R.C. 2743.51(C)(1) & (3) in pertinent part states:

{¶25} "(C) 'Criminally injurious conduct' means one of the following:

{¶26} "(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...

{¶27} “(3) For the purposes of any person described in division (A)(1) or (2) of this section, terrorism that occurs within or outside the territorial jurisdiction of the United States.”

{¶28} R.C. 2743.51(R) & (S) states:

{¶29} “(R) ‘Terrorism’ means any activity to which all of the following apply:

{¶30} “(1) The activity involves a violent act or an act that is dangerous to human life.

{¶31} “(2) The act described in division (R)(1) of this section is committed within the territorial jurisdiction of the United States and is a violation of the criminal laws of the United States, this state, or any other state or the act described in division “(3) The activity appears to be intended to do any of the following:

{¶32} “(a) Intimidate or coerce a civilian population;

{¶33} “(b) Influence the policy of any government by intimidation or coercion;

{¶34} “(c) Affect the conduct of any government by assassination or kidnapping.

{¶35} “(4) The activity occurs primarily outside the territorial jurisdiction of the United States or transcends the national boundaries of the United States in terms of the means by which the activity is accomplished, the person or persons that the activity appears intended to intimidate or coerce, or the area or locale in which the perpetrator or perpetrators of the activity operate or seek asylum.

{¶36} “(S) Transcends the national boundaries of the United States” means occurring outside the territorial jurisdiction of the United States in addition to occurring within the territorial jurisdiction of the United States.”

{¶37} R.C. 2743.52(A) places the burden of proof on an 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).

{¶38} The Court of Claims dealt with terrorism long before the General Assembly amended the Crime Victims Compensation Act, effective March 10, 1998, to include

provision R.C. 2743.51(C)(3), (R), and (S). On March 29, 1991, a single commissioner rendered a decision in *In re Pescatore*, V89-56876sc (March 29, 1991), finding Michael Pescatore qualified as a victim of criminally injurious conduct as the result of the terrorist bombing of Pan American Flight 103 over Lockerbie, Scotland. Accordingly, the immediacy of the conduct which caused the injury was necessary.

{¶39} R.C. 2743.51(R) refers to “activity” and “act” these terms are unique to this statutory section. Merriam-Webster Dictionary defines activity as (1) “the state of being active: behavior or action of a particular kind” or (2) “something that is done as work or for a particular purpose.” Act is defined as “anything done, being done, or to be done; deed; performance.” While it appears these definitions encompass a wide variety of activities, these activities or acts have to be violent and cause an immediate threat of substantial personal injury or death. In the case at bar, applicant was not injured as a direct result of any act of terrorism.

{¶40} Next, applicant’s claim that he suffered injury due to the residual effects of the September 11th attacks. The Attorney General pointed to the *Kunkle* case which denied applicant’s claim for smoke inhalation problems experienced after her home was damaged due to an arson fire. A panel of commissioners found the problems, *Kunkle* experienced from the aftermath of the fire did not qualify her as a victim of criminally injurious conduct.

{¶41} Also, *In re Storozuk*, V90-58992sc (May 28, 1993), dealt with a similar issue. On October 24, 1989, an illegal fireworks factory exploded destroying applicant’s home. Applicant sought an award of reparations for counseling expenses and work loss as the result of the explosion. Applicant related in the cleanup efforts at his residence he “observed destruction of human life.” However, “what he found did not belong to a close relative.” The panel determined he could not qualify as a victim in his own right since he was not present when the explosion occurred. The only way he could qualify as a victim was pursuant to the holding in *In re Clapacs*, 58 Ohio Misc.2d 1, 567 N.E.2d

1351 (Ct. of Cl. 1989). The panel determined the only way applicant could qualify as a victim if he arrived on the crime scene during its occurrence or immediately thereafter and he had a close relationship to the victim involved. In *Storozuk* applicant could not meet any of the requirements contained in *Clapacs*. Applicant in case at bar also has met none of these requirements.

{¶42} Applicant has failed to present in case law from this jurisdiction or another jurisdiction which supports the proposition that a person who arrived at the scene of a terrorist event, months after its occurrence, qualified as a victim of crime. Accordingly, I recommend the Attorney General's Final Decision of March 21, 2016 be affirmed.

{¶43} *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