

[Cite as *In re Bealer*, 2003-Ohio-7324.]

IN THE COURT OF CLAIMS OF OHIO
VICTIMS OF CRIME DIVISION

IN RE: CALVIN BEALER	:	Case No. V2003-40321
CALVIN BEALER	:	<u>OPINION OF A THREE-</u>
Applicant	:	<u>COMMISSIONER PANEL</u>
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{¶1} On August 27, 2002, the applicant filed a reparations application seeking reimbursement of expenses incurred with respect to a May 11, 2002 assault. On December 26, 2002, the Attorney General issued a Finding of Fact and Decision denying the claim pursuant to R.C. 2743.60(F) contending that the applicant engaged in substantial contributory misconduct since he tested positive for opiates on the hospital toxicology report. On March 25, 2003, the Attorney General issued a Final Decision denying the claim again based upon the same reasoning. On April 21, 2003, the applicant filed an appeal of the Attorney General's Final Decision contending that he was administered an intravenous infusion (IV) by EMS or hospital personnel. On September 19, 2003, a panel of commissioners held a final determination in abeyance and continued the hearing to allow the Attorney General's witness, Dr. Frires, the opportunity to testify. Hence, this appeal came to be reheard before this panel of three commissioners on October 9, 2003 at 10:50 A.M.

{¶2} The applicant's counsel and an Assistant Attorney General attended the hearing and presented an exhibit and oral argument for the panel's consideration. The Assistant Attorney General informed the panel of Dr. Frires' unavailability and indicated she would like to substitute witnesses, however the new witness was also unavailable to testify.

{¶3} The Assistant Attorney General maintained that the applicant's claim must be denied pursuant to R.C. 2743.60(F). The Assistant Attorney General also asserted that In re Dawson (1993), 63 Ohio Misc. 2d 79 and In re Parrish, V02-51915tc (8-1-03) are controlling authority with respect to toxicology related issues. The Assistant Attorney General insisted that she met her burden of proof under Dawson, supra, when the applicant tested positive for a controlled substance. However, under Parrish, supra, the Assistant Attorney General contended that the applicant failed to meet his shifted burden of proof since the applicant offered no evidence to contradict the positive toxicology report and his testimony was purely self-serving. The Assistant Attorney General contended that the legislature codified Dawson under R.C. 2743.60(F) to result in a complete denial of the claim if the victim or applicant tested positive for a controlled substance on a toxicology evaluation.

{¶4} The applicant's attorney argued that based on his client's testimony (that he was not an illegal drug user) and the EMS report, Exhibit A, the applicant's claim should be allowed. Counsel stated that R.C. 4765.38, which governs EMT-intermediates, was violated when his client was administered an IV without proper authorization from an appropriate source.

{¶5} From review of the file and with full and careful consideration given to all the information presented at the hearings, this panel makes the following determination. Under the Victims' Program the burden of proof is "by a preponderance of the evidence" therefore State v.

Lowe (1993), 86 Ohio App. 3d 749 which speaks of toxicology reports in terms of criminal cases where the standard of proof is “beyond a reasonable doubt” has no bearing on this case. Next, we find the Assistant Attorney General’s argument that Dawson and Parrish are controlling authority for all toxicology related issues is not well-taken by this panel. Both Dawson and Parrish fell under the old Victims’ law since the criminally injurious conduct dates occurred before July 1, 2000. However, this claim involves a criminally injurious conduct date of May 11, 2002 and therefore falls under Amended S.B. 153. Under Amended S.B. 153, R.C. 2743.60(E) now permits those victims and applicants who have engaged in non-violent felonious conduct within ten years of the criminally injurious conduct or during the pendency of the claim, with the exception of drug trafficking, to participate in the fund. Furthermore, we find the decisions of Dawson and Parrish were clearly rendered with respect to former R.C. 2743.60(E) cases, therefore we reject the Assistant Attorney General’s argument that Dawson and Parrish apply to the present case or any R.C. 2743.60(F) case.

{¶6} Moreover we find the Court of Appeals of Ohio, Eleventh Appellate District decision in Jerome v. Ohio State Bd. of Emergency Med. Serv. (2002), 149 O App. 3d 106, to be relevant. The Court of Appeals held that an EMT-basis or EMT-intermediate, which is governed by R.C. 4765.37 and R.C. 4765.38, may perform *any listed* emergency medical service approved by the board, after obtaining authorization from a physician or a nurse designated by a physician. In the present case, we note that the EMS report indicates that the applicant was serviced by two EMT-P, paramedics. Under R.C. 4765.39(B)(5), an EMT-P may administer appropriate drugs and intravenous fluids. However, R.C. 4765.39(C)(1) states that services described in section (B) shall be performed by a paramedic *only* pursuant to the written or verbal

authorization of a physician . . . or registered nurse designated by a physician. Likewise we believe the court's position in Jerome, supra, arguably applies to an EMT-P: An EMT-P is *only* authorized to perform those services listed under R.C. 4763.39 after obtaining prior authorization from an appropriate source. Nevertheless, it appears from the EMS report that this applicant was administered an unauthorized IV despite the negative orders given by hospital personnel.

{¶7} Based upon the above reasons, we find that the Attorney General has failed to prove by a preponderance of the evidence that the applicant engaged in substantial contributory misconduct by illegally ingesting opiates. Therefore, the March 25, 2003 decision of the Attorney General shall be reversed and the claim shall be remanded to the Attorney General for economic loss calculations, decision, and payment of the award.

{¶8} IT IS THEREFORE ORDERED THAT

{¶9} 1) The March 25, 2003 decision of the Attorney General is REVERSED to render judgment in favor of the applicant;

{¶10} 2) This claim is remanded to the Attorney General for economic loss calculations, decision, and payment of the award;

{¶11} 3) This order is entered without prejudice to the applicant's right to file a supplemental compensation application pursuant to R.C. 2743.68;

{¶12} 4) Costs are assumed by the court of claims victims of crime fund.

CLARK B. WEAVER, SR.
Commissioner

DALE A. THOMPSON
Commissioner

STEVEN A. LARSON
Commissioner

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