[Cite as *In re Ferry*, 2007-Ohio-4704.]

Court of Claims of Ohio

Victims of Crime Division

The Ohio Judicial Center

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IN RE: WADE A. FERRY

WADE A. FERRY

Applicant

Case No. V2007-90188

Commissioners:
Karl C. Kerschner, Presiding
Thomas H. Bainbridge
Tim McCormack

ORDER OF A THREE-COMMISSIONER PANEL

{¶1} Wade Ferry ("applicant" or "Mr. Ferry") filed a reparations application seeking reimbursement of expenses incurred with respect to a June 11, 2005 drunk driving incident. On January 3, 2007, the Attorney General denied the claim pursuant to R.C. 2743.60(E) contending that the applicant's blood tested positive for the presence

of cocaine under Miami Valley Hospital's ("MVH") toxicology report. On January 24, 2007, the applicant filed a request for reconsideration. The applicant contended the claim should be allowed since the hospital's toxicology report indicated the results are only to be used for "medical purposes" and that such results are "unconfirmed." On February 15, 2007, the Attorney General denied the claim once again. On March 8, 2007, the applicant filed a notice of appeal to the Attorney General's February 15, 2007 Final Decision. At 3:10 P.M. on June 6, 2007, this matter was heard before this panel of three commissioners.

{¶2} The applicant, applicant's counsel, and an Assistant Attorney General attended the hearing and presented testimony and oral argument for the panel's consideration.

{¶3} Mr. Ferry testified that on June 11, 2005 at approximately 10:15 P.M., he was at home and was outside playing ball on the curb when he was struck by a motor vehicle driven by a drunk driver. Mr. Ferry explained that he suffered severe injuries to his arm and both knees. Mr. Ferry acknowledged that he had consumed approximately four beers earlier that evening in celebration of a new job. However, the applicant denied using any illegal drugs.

{¶4} Vicki Studebaker ("Ms. Studebaker"), Vice President of Operations for Compunet Clinical Laboratories, testified that she oversees the laboratory at MVH. Ms. Studebaker explained that her staff does not collect the specimens, but simply processes the specimens received from hospital personnel. Ms. Studebaker stated that a urine specimen was collected from Mr. Ferry and that the specimen tested positive for cocaine. Ms. Studebaker indicated that MVH, as a well as many other hospitals,

routinely administer toxicology screenings on trauma patients in order to more accurately evaluate and treat such patients.

{¶5} Ms. Studebaker explained that Mr. Ferry's toxicology screening was performed for medical purposes only and noted that the results were unconfirmed (no second test was performed to verify the results). Ms. Studebaker also explained that legal toxicology tests must indicate: 1) a chain of custody, 2) consent, and 3) verification of the results, unlike medical toxicology tests.

{¶6} Ms. Studebaker testified, however, that it is rare to find a false positive result for cocaine. Ms. Studebaker stated that cocaine is not a drug that is typically prescribed to patients, but is commonly found exclusively to be a substance of abuse. When questioned about MVH's laboratories statistics, Ms. Studebaker indicated that approximately only 1 out of 1000 toxicology results are inaccurate.

{¶7} Applicant's counsel argued that the claim should be allowed, based upon: 1) the applicant's testimony; 2) the fact that the applicant's urine sample was not collected until approximately five hours after the incident; 3) the test results are "unconfirmed"; and 4) the fact that the test administrator indicates that the test results are "for medical purposes only." However, the Assistant Attorney General maintained that Mr. Ferry failed to effectively rebut the results of the toxicology report, which indicate he engaged in felonious drug use at that time of the criminally injurious conduct.

{¶8} The Attorney General bears the burden of proof by a preponderance of the evidence concerning R.C. 2743.60 matters. *In re Williams*, V77-0739jud (3-26-79) and *In re Brown*, V78-3638jud (12-13-79). The standard for reviewing felonious drug

use cases has been described by *In re Dawson* (1993), 63 Ohio Misc. 2d 79, which held that a positive toxicology report for a controlled substance is sufficient evidence that a victim or applicant engaged in felonious drug use. Recently, the *Dawson* decision was affirmed in *In re Howard* (2004), 127 Ohio Misc. 2d 61. See also in *In re Green*, V03-40836jud (5-13-04), 2004-Ohio-3521, (holding that a positive toxicology report is a rebuttable presumption, which was rebutted therein based upon the coroner's conclusion that the victim had not been using drugs at the time of the criminally injurious conduct).

{¶9} Here, we find that the Attorney General has successfully established by and through the MVH's toxicology report and Ms. Studebaker's testimony that the victim's urine tested positive for the presence of cocaine. Further, the applicant failed to rebut the presumption of felonious drug use created by the positive toxicology report.

{¶10} After review of the file and with full and careful consideration of all the information presented at the hearing, we find that the applicant has failed to successfully rebut the presumption of felonious drug use.[1] We find Ms. Studebaker's testimony compelling in that: 1) cocaine is not routinely prescribed to manage pain, but is exclusively used as a drug of abuse; 2) cocaine very rarely produces a false positive result; and 3) MVH has a very high accuracy rate for toxicology results. We find equally compelling the applicant's failure to provide any contrary expert evidence to rebut the presumption created by the positive toxicology report.

[1]See *In re Prince*, V04-60989jud (10-5-2005), 2005-Ohio-6048 and *In re White*, V06-21123tc (6-15-07).

{¶11} Specifically, the applicant failed to present sufficient evidence that: (1) he did not knowingly and voluntarily ingest cocaine;[2] (2) the toxicology results were faulty, due to unprofessional or improper sample collection procedures;[3] or (3) he did not actually engage in felonious drug use at the time of the criminally injurious conduct.[4] Therefore, the February 15, 2007 decision of the Attorney General shall be affirmed.

{¶12} IT IS THEREFORE ORDERED THAT

{¶13} 1) The Attorney General's May 30, 2007 motion for telephone testimony is hereby GRANTED;

{¶14} 2) The February 15, 2007 decision of the Attorney General is hereby AFFIRMED;

{¶15} 3) This claim is DENIED and judgment is rendered in favor of the state of Ohio;

[2]See *In re Parrish*, V02-51915tc (8-1-2003), 2003-Ohio-4982.

[3]See *In re Wilson*, V04-60997tc (4-21-2005), 2005-Ohio-2648.

[4]See *In re Green*, V03-40836jud(5-13-2004), 2004-Ohio-3521.

4) Costs are assumed by the court of claims victims of crime fund.

KARL C. KERSCHNER
Presiding Commissioner

THOMAS H. BAINBRIDGE
Commissioner

TIM MC CORMACK
Commissioner

ID #\1-dld-tad-061407

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

Filed 8-3-2007
Jr. Vol. 2265, Pgs. 194-199
To S.C. Reporter 9-13-2007