

[Cite as *In re Shorter*, 2004-Ohio-3238.]

IN THE COURT OF CLAIMS OF OHIO

VICTIMS OF CRIME DIVISION

IN RE: JAMES W. SHORTER : Case No. V2003-40623
JAMES W. SHORTER : ORDER OF A THREE-
Applicant : COMMISSIONER PANEL
(1998-61402) :
: : : : :

{¶1} The applicant filed a supplemental compensation application seeking reimbursement of expenses incurred with respect to an October 18, 1996 assault incident. On August 7, 2002, the Attorney General denied the applicant's claim pursuant to R.C. 2743.52(A) contending that the applicant failed to prove he incurred additional economic loss related to the criminally injurious conduct. On September 30, 2002, the Attorney General denied the claim once again. On January 30, 2003, the applicant filed a notice of appeal to the Attorney General's September 30, 2002 decision. However, the court did not receive notice of the appeal until June 19, 2003. On September 19, 2003, a panel of commissioners reversed the Attorney General's September 30, 2002 decision, granted the applicant an award in the amount of \$2,336.82 in unreimbursed work loss, ordered the Attorney General to file a supplemental memorandum addressing any additional economic loss and set the matter for a new hearing. On November 14, 2003, the Attorney General filed a supplemental memorandum indicating that the applicant failed to submit any additional documentation to show, by a reasonable degree of medical certainty, that his purported knee injury is related to the criminally injurious conduct. Hence, this matter came to be heard before this panel of three commissioners on February 12, 2004 at 10:55 A.M.

{¶2} The applicant's counsel and an Assistant Attorney General attended the hearing and presented testimony and oral argument for this panel's consideration. James Shorter testified that he was assaulted on October 18, 1996 in Cincinnati, Ohio and sustained severe head injuries and a left knee injury. Mr. Shorter explained that he was struck with a beer bottle and kicked in the head, whereby he fell onto his left knee and was rendered unconscious. The applicant advised the panel that he underwent surgery for his head injury and that he remained hospitalized for approximately one month. Mr. Shorter explained that prior to the assault he never experienced any knee pain. However while undergoing rehabilitation at the Drake Center, the applicant stated that pain to his left knee became apparent. He stated that he consumed Tylenol 3 tablets regularly in order to counteract the pain. In 1998, Mr. Shorter explained that he moved to Florida where he continued treatments at the VA Hospital for his knee pain. The applicant explained that he was prescribed a knee brace to wear, but was also given the options of having to undergo injection therapy or surgery if his knee did not improve. Mr. Shorter stated that he was administered the injections to no avail. He explained that, at this time, his physician has yet to determine whether he will undergo surgery. Lastly, the applicant advised the panel that as a result of his brain injury he sustained partial paralysis to the left side of his body.

{¶3} Applicant's counsel stated, based upon the applicant's testimony as well as the claim file, that the applicant's claim should be allowed. Counsel argued that the applicant's knee injury was documented in the January 1997 Drake Center, Inc. Rehabilitation Report, within a reasonable time frame (approximately 2-3 months) after the criminally injurious conduct. Counsel argued that due to the severity of the applicant's head injury that his physician's primary focus, quite possibly, was the applicant's head injury. While the applicant's leg injury remained,

perhaps, an unknown or forgotten secondary concern. Counsel reiterated that the applicant testified that he had no knee problems prior to the assault. Counsel argued that the panel is permitted, based upon the information presented, to reasonably conclude the manner in which the applicant sustained injury to his knee. Counsel further argued that whether the knee injury occurred during the assault or during rehabilitation, the incident is still compensable since the injury relates to the criminally injurious conduct. Lastly, counsel stated that the applicant only seeks reimbursement for transportation and prescription expense with respect to the knee injury.

{¶4} The Assistant Attorney General maintained that the applicant failed to sufficiently prove that his knee injury relates to the criminally injurious conduct. The Assistant Attorney General argued that pursuant to In re Bailey, V78-3484jud (8-23-82) medical documentation is needed to prove that the applicant's knee injury relates to the criminally injurious conduct within a reasonable degree of medical certainty. The Assistant Attorney General contended that the claim file contains inconsistent medical records and no definitive statement from a physician that the applicant's knee injury arose from the October 1996 assault incident. Accordingly, the Assistant Attorney General stated that the claim must be denied.

{¶5} From review of the file and with full consideration given to the information presented at the hearing, this panel makes the following determination. We believe that a determination of whether a victim of criminally injurious conduct is entitled to an award for economic loss requires application of the principles of traditional proximate cause standards. The quantum of evidence required is a preponderance of competent, material, and relevant evidence of record on that issue. Furthermore, there is a long standing requirement in the law of evidence in Ohio that damages for claimed personal injuries are recoverable only for injuries

directly resulting from and as a natural consequence of the injury sustained. The evidence must tend to show that reasonable certainty of such a result exists. See In re Toney, V79-3029jud (9-4-81), In re Saylor (1982), 1 Ohio Misc. 2d 1, and In re Bailey, V78-3484jud (8-23-82).

{¶6} Despite the Assistant Attorney General's assertion, we find that there is ample medical documentation (via MRI reports, physician notes, and x-rays) to substantiate the applicant's assertion that his left knee injury reasonably relates to the criminally injurious conduct. Moreover, we find the applicant's testimony concerning the totality of events that transpired to be credible, especially in light of the severity of the applicant's brain injury. Medical information in the file clearly proves that the applicant sustained a traumatic brain injury (TBI) which resulted in some paralysis to the applicant's left side of his body. In light of that information, we find it reasonably foreseeable that the applicant, perhaps not immediately, would suffer some pain to the left side of his body. We also note that Mr. Shorter testified that when he was struck he fell onto his left knee. Surely it is not inconceivable to reasonably conclude, in light of the applicant's imminent brain injury, that his physicians' or even he focused on the major ailment at hand. Perhaps the applicant did not realize that the injury occurred earlier during the assault or even if he did he was unable to communicate such to his physician, in light of his condition. Even if the injury arose during the applicant's rehabilitation process, we still find that the injury relates to the criminally injurious conduct since the applicant would have never been in therapy but for the assault. Evidence shows that the applicant sustained a meniscus tear to his left knee, which we believe is attributable to the criminally injurious conduct. Moreover it appears that Mr. Shorter's knee injury is growing worse, whereby he may be required to undergo corrective knee surgery in the near future. Based on the above findings

and rationale, we find that the applicant's left knee injury relates to the criminally injurious conduct within a reasonable degree of medical certainty. Therefore, the September 19, 2003 panel of commissioners' decision shall be affirmed and the claim shall be remanded to the Attorney General for economic loss calculations and decision.

{¶7} IT IS THEREFORE ORDERED THAT:

{¶8} 1) The September 19, 2003 decision of the panel of commissioners (Jr. Vol. 2251, Pgs. 66-68) is AFFIRMED to render judgment in favor of the applicant;

{¶9} 2) This claim is remanded to the Attorney General for economic loss calculations and decision in light of the panel's findings;

{¶10} 3) This order is entered without prejudice to the applicant's right to file a supplemental compensation application, within five years of this order, pursuant to R.C. 2743.68;

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

JAMES H. HEWITT III
Commissioner

CLARK B. WEAVER, SR.
Commissioner

THOMAS H. BAINBRIDGE
Commissioner

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

Filed 4-1-2004
Jr. Vol. 2253, Pgs. 63-68
To S.C. Reporter 6-21-2004