[Cite as *In re A.M.*, 2018-Ohio-5483.]

IN RE: A. M. LAURIE MOHER Applicant	Case No. 2018-01153VI Magistrate Daniel R. Borchert DECISION OF THE MAGISTRATE

{¶1} On June 22, 2016, applicant, Laurie Moher, filed a compensation application on behalf of her adopted daughter, A.M., as a result of neglect/abuse. On September 12, 2016, the Attorney General issued a finding of fact and decision determining that applicant met the necessary jurisdictional requirements to qualify to receive an award and A.M. qualified as a victim of criminally injurious conduct as defined by R.C. 2743.51(C)(1). Applicant was granted an award in the amount of $966.25, of which $550.00 represented counseling expenses for A.M., while $416.25 represented 75 percent of counseling expenses incurred by applicant, to assist the victim A.M. in dealing with the trauma she suffered. Anne Mangold of Positive Pathways determined this treatment percentage breakdown.

{¶2} On November 18, 2016, applicant filed a supplemental compensation application seeking reimbursement for additional counseling and mileage expenses. On March 20, 2017, the Attorney General rendered a finding of fact and decision concerning the supplemental compensation application. Applicant was granted a supplemental award of $1,406.72, of which $96.72 represented mileage expenses, $950.00 for services rendered to A.M. and $360.00, which represented 75 percent of the counseling expenses provided to applicant.

{¶3} The Attorney General determined the Remedial Treatment and Care Agreement, Laurie Moher entered into with Advance Therapeutic Parenting for $3,500.00 was invalid. The Attorney General noted that R.C. 2743.51(F)(2) states:

> "(2) An immediate family member of a victim of criminally injurious conduct that consists of a homicide, a sexual assault, domestic violence, or a severe and permanent incapacitating injury resulting in paraplegia or a similar life-altering condition, who requires psychiatric care or counseling as a result of the criminally injurious conduct, may be reimbursed for that care or counseling as an allowable expense through the victim's application. The cumulative allowable expense for care or counseling of that nature shall not exceed two thousand five hundred dollars for each immediate family member of a victim of that type and seven thousand five hundred dollars in the aggregate for all immediate family members of a victim of that type."

{¶4} The Attorney General noted applicant has incurred expenses under R.C. 2743.52(F)(2) totaling $776.25. Accordingly, only $1,723.75 remains. Therefore, the Remedial Treatment and Care Agreement exceeds the money available to applicant. Accordingly, this agreement could not be enforced.

{¶5} Applicant also asserted an expense for an in-home educator. However, this cost was not submitted to the Attorney General. The Attorney General argues this expense was beyond the scope of R.C. 2743.51(F)(1), and accordingly it was denied.

{¶6} On March 24, 2017, applicant submitted a request for reconsideration. Applicant contends the determination that her counseling expenses should not be controlled by the parameters of R.C. 2743.51(F)(2), but rather 2743.51(F)(1). Also, applicant contends the in-home tutoring should be granted.

{¶7} On September 20, 2017, the Attorney General rendered a Final Decision on the supplemental compensation application. The Attorney General contacted Dr. Michael Murphy, Ph.D., who reviewed the treatment notes and medical documentation and determined the expenses applicant sought to be reimbursed were not related to the underlying criminal conduct which occurred in 2008. Accordingly, the Attorney General denied applicant's claim for additional expenses.

{¶8} On December 1, 2017, applicant submitted a second supplemental compensation application. On March 30, 2018, the Attorney General issued a finding of fact and decision concerning the second supplemental compensation application. The Attorney General, after consulting with Dr. Michael Murphy, determined that additional counseling expenses were not reasonably related to the criminally injurious conduct which occurred in 2008. Accordingly, applicant's claim for a supplemental award was denied.

{¶9} On April 2, 2018, applicant submitted a request for reconsideration. Applicant states the Attorney General's expert, Dr. Murphy incorrectly determined the criminally injurious conduct was A.M. witnessing the assault of her mother. However, the criminally injurious conduct suffered by A.M. was the neglect/abuse she suffered at the hands of her biological mother and the mother's live-in-boyfriend, a convicted sex offender. Because of Dr. Murphy's misunderstanding of the criminal conduct in question his opinions should be rejected.

{¶10} On July 11, 2018, the Attorney General rendered a Final Decision finding no reason to modify the March 30, 2018 finding of fact and decision. On August 2, 2018, applicant filed a notice of appeal from the July 11, 2018 Final Decision of the Attorney General. Hence, a hearing was held before this magistrate on October 30, 2018 at 11:00 a.m.

{¶11} Applicant's attorney, Matthew Shaughnessy, appeared in person, while applicant, Laurie Moher, appeared via telephone. The state of Ohio was represented by Assistant Attorney General Candice Suffren.

{¶12} Applicant stated the only issue to be addressed is the reduction of applicant's counsel expenses by 25 percent. Applicant decided not to pursue the expense of an in-home instructor due to a change in circumstances.

{¶13} The Attorney General stated the 75 percent of the counseling expense incurred by applicant, Laurie Moher, were related to her adopted daughter A.M.

However, the remaining 25 percent of the expense was unrelated. Accordingly, the Attorney General's decision should be affirmed.

{¶14} Applicant was called to testify via telephone. Applicant related her and her husband are adoptive parents of A.M. Prior to her adoption A.M. was emotionally, physically, and mentally abused. At the time of the adoption A.M. was skin and bones. Consequently, applicant had to give her Ensure to promote weight gain.

{¶15} Applicant stated she began seeing Anne Mangold, at Positive Pathways due to A.M. She had not sought counseling prior to A.M.'s adoption. Dr. Mangold required applicant to attend counseling sessions with A.M. to fully understand A.M.'s condition. Applicant never saw Dr. Mangold without A.M. present. The sole purpose of the counseling session was to allow applicant to gain a better understanding of A.M. and how to deal with her on a day-to-day basis.

{¶16} Upon cross-examination, applicant was asked if any issues were discussed which did not concern A.M. Applicant related that no other issues were discussed. Whereupon, the testimony of applicant was concluded and applicant rested her case.

{¶17} In closing, applicant first addressed a Mental Health Report submitted by the Attorney General's Office to Anne Mangold dated July 29, 2016. The report revealed treatment was not being provided to applicant for "conditions that existed prior to the victimization" and she had not received any therapy prior to seeing Dr. Mangold. Therefore, Dr. Mangold responded to the question "In your opinion, is the above stated problem a direct result of the alleged crime?" Yes. "What percent of therapy is directly related to the crime?" Dr. Mangold replied 100 percent. Dr. Mangold stated the issues to be address are: "[h]ow to parent a child with RAD (reactive attachment disorder) and "identify with triggers from own past." However, in later contacts with the Attorney General's Office Dr. Mangold related only 75 percent of the treatment applicant received

was related to the victimization of A.M. This percentage was later confirmed in a letter dated November 29, 2016.

{¶18} Applicant argues it is unreasonably to quantify what portion of the counseling expenses are related to her parenting responsibilities to A.M. as opposed to her own past background and relationships. Applicant asserts that the counseling expenses were only incurred as the result of the adoption of A.M.

{¶19} Applicant then refers to R.C. 2743.51(F)(1), stating nothing in this section would allow for a reduction of counseling expenses.

{¶20} Applicant relied on holdings in *In re Hoban*, Ct. of Cl. V2006-20275tc (10-15-08) reversed jud, 2009-Ohio-7224 and *In re Branham*, 2014-00548VI tc (1-14-15), for the proposition since work loss cannot be apportioned between events unrelated to the criminally injurious conduct, the same should be true for medical expenses. Both a panel of commissioners and a judge of the Court of Claims determined an apportionment of work loss was unreasonable. The same should hold true for mental health counseling. In this case the treatment received by applicant was for A.M. remedial treatment and care.

{¶21} In closing, the Attorney General stated on two separate occasions Dr. Mangold indicated that 75 percent of the treatment provided to applicant was for the benefit of A.M. Pursuant to R.C. 2743.51(C)(1), an award can only be granted for expenses related to criminally injurious conduct. Based upon the documentation contained in the file, it was Dr. Mangold, the treating physician who stated that only 75 percent of the treatment was related to the criminally injurious conduct. Accordingly, the Final Decision of the Attorney General should be affirmed.

{¶22} Finally, applicant referred to the letter of November 29, 2016, written by Dr. Mangold. On the first page of the letter it refers to the 75 percent of the treatment for applicant is related to A.M. However, on the second page of the letter, under the

topic goals applicant will identify her triggers and her coping skills to help A.M. Whereupon, the hearing was concluded.

{¶23} R.C. 2743.51(F)(1) and (2) state:

"(F)(1) 'Allowable expense' means reasonable charges incurred for reasonably needed products, services, and accommodations, including those for medical care, rehabilitation, rehabilitative occupational training, and other remedial treatment and care and including replacement costs for hearing aids; dentures, retainers, and other dental appliances; canes, walkers, and other mobility tools; and eyeglasses and other corrective lenses. It does not include that portion of a charge for a room in a hospital, clinic, convalescent home, nursing home, or any other institution engaged in providing nursing care and related services in excess of a reasonable and customary charge for semiprivate accommodations, unless accommodations other than semiprivate accommodations are medically required.

"(2) An immediate family member of a victim of criminally injurious conduct that consists of a homicide, a sexual assault, domestic violence, or a severe and permanent incapacitating injury resulting in paraplegia or a similar life-altering condition, who requires psychiatric care or counseling as a result of the criminally injurious conduct, may be reimbursed for that care or counseling as an allowable expense through the victim's application. The cumulative allowable expense for care or counseling of that nature shall not exceed two thousand five hundred dollars for each immediate family member of a victim of that type and seven thousand five hundred dollars in the aggregate for all immediate family members of a victim of that type."

{¶24} R.C. 2743.51(W) states:

"(W) 'Immediate family member' means an individual who resided in the same permanent household as a victim at the time of the criminally injurious conduct and who is related to the victim by affinity or consanguinity."

{¶25} The determination of whether an applicant is entitled to an award of reparations for economic loss arising from criminally injurious conduct requires application of principles of traditional proximate cause standards. The trier of fact, at a minimum, must be provided with evidence that a result is more likely to have been caused by an act, in the absence of any intervening cause. The quantum of evidence required is a preponderance of the competent, material, and relevant evidence of record on that issue. *In re Toney*, Ct. of Cl. No. V79-3029jud (September 4, 1981).

{¶26} Applicant has the burden of proof to show by a preponderance of the evidence that expenses incurred for treatment received were related to the injuries sustained at the time of the criminally injurious conduct by a reasonable degree of medical certainty *In re Bailly*, Ct. of Cl. No. V78-3484jud (August 23, 1982).

{¶27} 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). Applicant must produce evidence which furnishes a reasonable basis for sustaining her claim. If the evidence furnishes a basis for only a guess, among different possibilities, as to any essential issue in the case, she fails to sustain the burden as to such issue. *In re Staten*, Ct. of Cl. No. V2001-60051tc (May 27, 2011), 2011-Ohio-4321, citing *Landon v. Lee Motors, Inc.* 161 Ohio St. 82, 118 N.E.2d 147 (1964).

{¶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} To establish a claim by a preponderance of the evidence, an applicant must show, to a reasonable medical probability, that the claimed economic loss was more likely than not the result of the criminally injurious conduct. *In re Ballachino*, Ct. of Cl. No. V79-3557sc (October 19, 1981), aff'd tc (March 17, 1983), quoting *In re Shope*, Ct. of Cl. No. V78-03002sc (April 16, 1981). Medical documentation must support the causal relationship between expenses, for which compensation is sought through under the Compensation Act, to the criminally injurious conduct. See *In re Travis*, Ct. of Cl. No. V2009-40668 (March 31, 2014), and *In re I.V.*, Ct. of Cl. No. V2010-50922tc (June 9, 2011).

{¶31} Upon review of the case file and careful consideration given to the testimony of applicant and the argument of the attorneys involved in this case, I find this claim should be controlled by the language contained in R.C. 2743.51(F)(2). Applicant has not established that she qualifies as a victim in her own right or as an indirect victim under the prior holdings in *In re Clapacs*, 58 Ohio Misc.2d 1, 567 N.E.2d 1351 (Ct. of Cl. 1989); and *In re Fife*, 59 Ohio Misc.2d 1, 589 N.E.2d 1078 (Ct. of Cl. 1989). Accordingly, applicant's award is controlled by R.C. 2743.51(F)(2), which allows a maximum award of $2,500.00 for immediate family members.

{¶32} Applicant's argument that this case is analogous to the holding in *Hoban*, is without merit. *Hoban* concerned the interpretation of R.C. 2743.51(G), work loss. A judge in *Hoban* determined when considering work loss, it would be unreasonable and unlawful to proportion an award of work loss based upon past incidents which did not cause the immediate need for applicant to take off work.

{¶33} However, judges in the Court of Claims have consistently held in order to grant an award for medical expenses a causal connection must exist between the injuries sustained and the medical treatment needed. This causal connection must be

established by a reasonable degree of medical certainty, *Bailly*; *In re Saylor*, 1 Ohio Misc.2d 1, 437 N.E.2d 321 (Ct. of Cl. 1982).

{¶34} In the case at bar, applicant argues the mental health counseling she received from Dr. Mangold was 100 percent related to the victimization of A.M. However, on two separate occasions, in conjunction with Attorney General requests, Dr. Mangold indicated in her professional opinion that only 75 percent of the treatment applicant received was related to the victimization of A.M. Accordingly, I will defer to the opinion of the medical professional as to the percentage of treatment which was related to A.M.

{¶35} Therefore, I recommend the Attorney General's decision of July 11, 2018 be affirmed.

{¶36} *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:

Filed 12/21/18
Sent to S.C. Reporter 4/29/19