

STATE OF NORTH CAROLINA
COUNTY OF DAVIDSON

IN THE OFFICE OF ADMINISTRATIVE
HEARINGS

FILE NO. 13 CPS 14371

KIMBERLY H. OLIVER,

Petitioner,

v.

NC CRIME VICTIMS COMPENSATION
COMMISSION,

Respondent.

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**FINAL DECISION –
ORDER OF DISMISSAL**

THIS MATTER came on for hearing before the Honorable Selina M. Brooks Administrative Law Judge presiding, on January 28, 2015, in High Point, North Carolina.

APPEARANCES

For Petitioner: Charles R. Foster
205 E. Westwood Avenue
High Point, NC 27262

For Respondent: Yvonne B. Ricci
Assistant Attorney General
N.C. Department of Justice
Public Safety Section
9001 Mail Service Center
Raleigh, NC 27699-9001

PRE-TRIAL AGREEMENT

A Pre-Trial Agreement was entered on consent of counsel for the parties by the Honorable Selina M. Brooks on January 28, 2015.

WITNESSES

The following witnesses appeared and testified on behalf of Petitioner:

1. Kimberly H. Oliver, Petitioner
2. Dewey Shively
3. Samuel F. Parker (LCSW), the Director of the Employee Assistance Program at Family Service of the Piedmont, accepted as an expert in counseling services

The following witnesses appeared and testified on behalf of Respondent:

1. Officer Adam Thomas Kallfez, Thomasville Police Department
2. Antonette Douglas, Claims Investigator, N.C. Department of Crime Control and Public Safety, Division of Victim Compensation Services

EXHIBITS

Petitioner's exhibits 1-8 were admitted into evidence.

Respondent's exhibits 1-7 were admitted into evidence.

ISSUES

1. Whether the Petitioner has presented substantial evidence to establish that the requirements for an award have been met in accordance with N.C. Gen. Stat. §§ 15B-2(12a) and -4(a)?
2. Whether the Petitioner has presented substantial evidence to establish that she was a victim of criminally injurious conduct, within the meaning of N.C. Gen. Stat. §§ 15B-2(5) and -2(13)?

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following:

FINDINGS OF FACT

1. The Petitioner in this case is Kimberly Oliver, a resident of Davidson County, North Carolina.
2. Respondent is the Division of Victim Compensation Services within the North Carolina Department of Public Safety. Respondent is created under Chapter 15B of the North Carolina General Statutes and charged with administering the Crime Victims Compensation Fund in North Carolina.
3. The Petitioner was dating Norris Leon Thomas who was an engineer in the United States Army stationed at Fort Eustis in Newport News, Virginia. Mr. Thomas did not live with the Petitioner and her two daughters, ages eighteen (18) and nineteen (19), but would often come to the Petitioner's home in Thomasville and stay with her during the weekends. Mr. Thomas was visiting with the Petitioner on the weekend beginning September 14, 2012. (Resp. Exs. 1 and 7; Testimony of Petitioner).
4. Petitioner testified to the following facts: On September 15, 2012, Mr. Thomas

went to the Petitioner's home after 6:00 p.m., intoxicated. Mr. Thomas wanted the Petitioner to go out with him to eat. Because Mr. Thomas was drunk, the Petitioner told him she did not want to go out with him and went upstairs to her bedroom, followed by Mr. Thomas a short time later. The Petitioner and Mr. Thomas began to argue, and he grabbed her by the wrist and pushed her against the wall. Petitioner felt a "pop" in her right wrist. Mr. Thomas, who is over six feet tall and weighs more than two hundred pounds, threw her on the bed. Mr. Thomas held her in a "headlock" and tried to grope her inappropriately. The Petitioner was eventually able to get away from Mr. Thomas and he later left her home upon her request to do so. (Resp. Ex. 7; Testimony of Petitioner).

5. After Mr. Thomas left, the Petitioner did not immediately seek medical treatment for any alleged injuries at any local medical facility or pharmacy. (Testimony of Petitioner)
6. The Petitioner and her daughters stayed at the home of a friend Dewey Shively that evening. (Testimony of Petitioner) Mr. Shively gave Petitioner a towel with crushed ice in it to place on her right wrist and he also advised her to file a police report. (Testimony of Shively)
7. The Petitioner did not receive any medical attention until she was able to be examined by her primary care physician, Dr. Sara Furr, at Cornerstone Health Care on September 18, 2012. The medical note prepared by Dr. Furr states that "to my questioning, patient denies any history of trauma to wrist or hand. Does work at computer all day." It does not include a specific report from the Petitioner that she was physically and sexually assaulted by Mr. Thomas during a domestic dispute on September 15, 2012. (Resp. Ex. 4; Testimony of Petitioner).
8. Petitioner is employed in the call center at Bank of America and spends "approximately four hours a day typing." (Testimony of Petitioner)
9. On September 18, 2012, the Petitioner appeared before a magistrate in Davidson County resulting in warrants being issued to Mr. Thomas for misdemeanor sexual battery and assault on a female. (Resp. Ex. 2) Mr. Thomas turned himself in at the police department. (Testimony of Kallfez)
10. Thomasville Police Officer Adam T. Officer Kallfelz testified that he accompanied Mr. Thomas to the Petitioner's residence on September 18, 2012, in order for Mr. Thomas to get his personal property. While the Petitioner denies that she was home during this time on September 18, 2012, Officer Kallfelz testified that he knocked on the Petitioner's door and waited about fifteen to twenty minutes, but no one answered the door. Officer Kallfelz further testified that he could see through a window and saw a woman that looked like the Petitioner in the residence. (Resp. Ex. 2; Testimony of Officer Kallfelz).

11. Officer Kallfez advised Mr. Thomas that in order to retrieve his property from Petitioner that he would need to obtain a warrant from a magistrate. (Testimony of Kallfez)
12. On September 20, 2012, Petitioner was seen by Mark Warburton, MD, at High Point Orthopedic and Sports Medicine who, after examining Petitioner, gave an assessment of “sprained right wrist.” (Pet. Ex. 3)
13. Mr. Thomas went before a Magistrate and obtained a warrant against Petitioner on September 26, 2012. (Resp. Ex. 2)
14. The Petitioner obtained a 50B Domestic Violence Order of Protection against Mr. Thomas on October 8, 2012 (Guilford County, 12 CVD 1617), that was renewed for one more year on October 7, 2013. Mr. Thomas did not appear at either setting of the Petitioner’s Complaint and Motion for Domestic Violence Protective Order in Guilford County District Court. (Pet. Ex. 6)
15. Following a bench trial in Davidson County District Court on December 5, 2012, at which both the Petitioner and Mr. Thomas testified, Mr. Thomas was found not guilty. (Resp. Ex. 3; Testimony of Petitioner).
16. On March 21, 2013, Petitioner filed a Victim Compensation Application with Respondent, seeking compensation for expenses incurred as a result of the alleged September 15, 2012, incident. (Resp. Exs. 1 and 5).
17. Antonette Douglas (hereinafter “Investigator Douglas”), Respondent’s Claims Investigator with more than nine years experience investigating crime victims compensation claims, was assigned to Petitioner’s claim.
18. After reviewing the Thomasville Police Department Arrest Report, interviewing United States Army Agent Fennewell who indicated that there was no investigation warranted, reviewing the September 18, 2012 medical note from Cornerstone Administrative Services, and the fact that Mr. Thomas was found not guilty of misdemeanor sexual battery and assault on a female, Investigator Douglas recommended to Respondent that Petitioner’s claim be denied on the grounds that no incident could be substantiated so that the Petitioner was not a victim of criminally injurious conduct as defined in N.C. Gen. Stat. §§ 15B-2(5) and -2(13). (Resp. Exs. 2-6; Testimony of Douglas).
19. By a letter mailed to Petitioner on May 8, 2013, Respondent denied Petitioner’s claim for compensation on the ground that Petitioner “did not suffer personal injury or death directly and proximately resulting from criminally injurious conduct within the meaning of G.S. 15B.” (Resp. Ex. 6; Testimony of Douglas).

BASED UPON the foregoing Findings of Fact, the Undersigned hereby makes the following:

CONCLUSIONS OF LAW

1. Both parties were properly before the Administrative Law Judge in that jurisdiction and venue are proper and both parties received notice of the hearing.
2. Respondent has the authority and responsibility under Chapter 15B of the North Carolina General Statutes to investigate and award or deny claims for compensation under the Crime Victims Compensation Act.
3. Under North Carolina's Crime Victims Compensation Act, Respondent is permitted to compensate only victims or those who file claims on behalf of victims. "Victim," in turn, is defined as "[a] person who suffers personal injury or death proximately caused by criminally injurious conduct." N.C. Gen. Stat. § 15B-2(13).
4. Pursuant to N.C. Gen. Stat. § 15B-4(a), "compensation for criminally injurious conduct shall be awarded to a claimant if substantial evidence establishes that the requirements for an award have been met." Further, N.C. Gen. Stat. § 15B-4(a) provides, "[t]he Commission shall follow the rules of liability applicable to civil tort law in North Carolina."
5. The Petitioner bears the burden of showing that the victim's injury was based on criminally injurious conduct within the meaning of N.C. Gen. Stat. § 15B-2(5). *See Holly Ridge Assocs., LLC v. N.C. Dep't of Env't & Natural Res.*, 176 N.C. App. 594, 606-608, 627 S.E.2d 326, 336-337 (2006). (Unless a statute provides otherwise, the petitioner has the burden of proof in all contested cases.) *See also, Peace v. Employment Sec. Comm'n*, 349 N.C. 315, 328, 507 S.E.2d 272, 281 (1998).
6. "Criminally injurious conduct," is defined as "[c]onduct that by its nature poses a substantial threat of personal injury or death, and is punishable by fine or imprisonment or death, or would be so punishable but for the fact that the person engaging in the conduct lacked the capacity to commit the crime under the laws of this State." N.C. Gen. Stat. § 15B-2(5).
7. "Substantial evidence," is defined as "[r]elevant evidence that a reasonable mind might accept as adequate to support a conclusion." N.C. Gen. Stat. § 15B-2(12a).
8. The uncontroverted evidence shows that on December 5, 2012, Norris Leon Thomas was found not guilty by a Davidson County District Court Judge of misdemeanor sexual battery and assault on a female.

9. The Petitioner has not met her burden of proving by a preponderance of the evidence that she is a victim of criminally injurious conduct as defined in Chapter 15B of the North Carolina General Statutes.
10. Petitioner has not carried her burden in demonstrating that Respondent acted outside its authority, acted arbitrarily and capriciously, used improper procedure, failed to act as required by law or rule, or acted erroneously when it denied her claim for crime victim's compensation in accordance with N.C. Gen. Stat. § 15B-2(5).

BASED UPON the foregoing Findings of Fact and Conclusions of Law, the Undersigned hereby makes the following:

DECISION

Respondent's decision to deny Petitioner's claim for Crime Victims Compensation is hereby **AFFIRMED**.

NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, in the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within thirty (30) days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' Rule, 26 N.C. Admin. Code 03.012, and the Rules of Civil Procedure, North Carolina General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within thirty (30) days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

IT IS SO ORDERED.

This the 17th day of April, 2015.

Selina M. Brooks
Administrative Law Judge