

STATE OF NORTH CAROLINA  
COUNTY OF MECKLENBURG

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
14CPS08579

EDWARD ANDREW CARDER PETITIONER,  V.  NORTH CAROLINA DIVISION OF VICTIM COMPENSATION SERVICES RESPONDENT.	<b>FINAL DECISION</b>
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**THIS MATTER** came on for hearing before the Honorable J. Randall May Administrative Law Judge presiding, on July 6, 2015, in Charlotte, North Carolina.

**APPEARANCES**

**For Petitioner:** Edward Andrew Carder, *Pro Se*  
939 Owen Boulevard, Apt. B  
Charlotte, NC 28213

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

**WITNESSES**

The following witnesses appeared and testified on behalf of Petitioner:

1. Constance Carder, Petitioner's wife
2. Edward Andrew Carder, Petitioner

The following witnesses appeared and testified on behalf of Respondent:

1. Sergeant Andy Greenway, Lake Lure Police Department
2. Edward Andrew Carder, Petitioner
3. Liddie Shropshire, Claims Investigator, N.C. Department of Public Safety, Division of Victim Compensation Services

## EXHIBITS

### **Petitioner:**

1(a) – 1(e) - Twenty-six photographs taken by Constance Carder.

### **Respondent:**

1. Petitioner's Application for Victim's Compensation
3. Crime Victims Compensation Commission Initial Investigator Case Report
4. Decision of Director: Denied
5. ACIS Report for the alleged offender Gary Coleman
6. Crime Victims Compensation Commission Updated Investigator Case Report (case opened for re-review)
7. Substitute Decision of Director: Denied

## ISSUES

I. Whether Respondent substantially prejudiced Petitioner's rights and acted outside its authority, erroneously, arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule, when it denied Petitioner's claim for crime victim's compensation.

II. Whether the victim was participating in a non-traffic misdemeanor at or about the time that the victim's injury occurred, within the meaning of N.C. Gen. Stat. § 15B-11(b)(1).

III. Whether the victim engaged in contributory misconduct, within the meaning of N.C. Gen. Stat. § 15B-11(b)(2).

**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. Petitioner is Edward Andrew Carder, a resident of Charlotte, North Carolina. At the outset of this hearing, Petitioner knowingly and voluntarily consented to proceeding *pro se*.

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. On September 26, 2014, Respondent denied Petitioner's claim for victim's compensation, based on an investigation concluding that the "criminally injurious conduct for which claimant has applied for compensation was not reported to a law enforcement officer or agency within 72 hours of its occurrence, and investigation of this claim has established no good cause for the delay" citing N.C. Gen. Stat. § 15B-11(a)(3). Respondent conducted a subsequent review of the facts and circumstances of Petitioner's claim. As a result the re-investigation and

Substitute Decision of Director concluded that the “victim engaged in misconduct that contributed to the circumstances which resulted in the injury from which this claim for compensation arises,” citing N.C. Gen. Stat. § 15B-11(b). Petitioner timely filed his Petition for a contested case hearing on November 5, 2014.

3. At the hearing, Respondent specifically relied on N.C. Gen. Stat. § 15B-11(b) as the basis for its denial of Petitioner’s claim. The statute provides in pertinent part:

- (b) A claim may be denied or an award of compensation may be reduced if
  - (1) The victim was participating in a nontraffic misdemeanor at or about the time that the victim’s injury occurred; or
  - (2) The claimant or a victim through whom the claimant claims engaged in contributory misconduct.

(b1) The Commission or Director [Respondent] . . . shall exercise discretion in determining whether to deny a claim under subsection (b) of this section. In exercising discretion, the Commission or Director shall consider whether any proximate cause exists between the injury and the misdemeanor or contributory misconduct, when applicable. **The Director or Commission shall deny claims when it finds that there was contributory misconduct that is a proximate cause of becoming a victim.** However, contributory misconduct that is not a proximate cause of becoming a victim shall not lead to an automatic denial of a claim.

N.C. Gen. Stat. § 15B-11(b)(1), (b)(2), and (b1) (emphasis added).

4. On July 19, 2014, Lake Lure Police Department Sergeant Andy Greenway responded to a reported fight at the “Tiki Bar” in the Geneva Hotel in Lake Lure. Sergeant Greenway approached the Petitioner who was holding a hatchet that he said he had gotten out of his car for protection. The Petitioner told Sergeant Greenway that some people had jumped him. According to Sergeant Greenway the Petitioner told him that his wife told him that someone at the bar had touched her inappropriately. The Petitioner confronted the alleged offender Gary Coleman and then they got into a fight. Sergeant Greenway did notice that the Petitioner had some blood on his ear and had the Petitioner checked out by EMS. Sergeant Greenway did not see any blood on Mr. Coleman. (Testimony of Sergeant Greenway)

5. Sergeant Greenway testified that at that time it was the practice of the Lake Lure Police Department not to complete an incident report unless it was an incident that was going to be investigated by the Department. Since the incident occurred outside of law enforcement’s presence and Sergeant Greenway was being told conflicting stories about why and how the fight occurred he told both the Petitioner and Mr. Coleman that they could take out warrants against each other for misdemeanor assault. Sergeant Greenway testified that he talked with the manager and staff at the “Tiki Bar.” Sergeant Greenway testified that the bartender and bar staff who allegedly witnessed the incident told him that the Petitioner came up and started the altercation with Mr. Coleman. (Resp. Ex. 6; Testimony of Sergeant Greenway)

6. Liddie Shropshire, a fifteen year Claims Investigator for the N.C. Department of Public Safety, Division of Victim Compensation Services was assigned to investigate and process the claim submitted by the Petitioner to the Respondent. Ms. Shropshire initially recommended that Petitioner's claim be denied for failure to report the incident to law enforcement within 72 hours; however, since the Petitioner did obtain a warrant against the alleged offender, Gary Coleman she reinvestigated Petitioner's application. (Resp. Exs. 3 and 4; Testimony of Shropshire)

7. Ms. Shropshire completed a criminal history check for Mr. Coleman that showed that he was charged with misdemeanor sexual battery and misdemeanor assault inflicting serious injuries and was subsequently found not guilty of these charges on February 13, 2015. (Resp. Ex. 5; Testimony of Shropshire)

8. Ms. Shropshire's reinvestigation of the Petitioner's claim included interviews with Sergeant Greenway and Rutherford County Assistant District Attorney McCalman and the review of the criminal history of the alleged offender Gary Coleman. Following the reinvestigation of Petitioner's claim, Ms. Shropshire recommended that Petitioner's claim be denied due to contributory misconduct and misdemeanor criminal activity. Ms. Shropshire specifically noted in her updated case report that "[a]lthough no charges were filed at the scene, LE states both couples could have been charged with mutual assault. However, based on information received by LE from witnesses most likely the victim [Petitioner] would have been charged with misdemeanor assault as he was reported to be the aggressor." (Resp. Ex. 6; Testimony of Shropshire).

9. The Petitioner's wife Constance Carder testified that the Petitioner was protecting her from being attacked by a group of women at the hotel and that this in part contributed to the altercation between Petitioner and Mr. Coleman. Mrs. Carder admitted that the Petitioner had been drinking all day on July 19, 2014. Mrs. Carder alleged in her testimony that while she was standing at the bar waiting on her drink Mr. Coleman assaulted her sticking his hand in her crotch. Mrs. Carder later told her husband while seated at a table what Mr. Coleman had allegedly done to her. According to Mrs. Carder the Petitioner stood up and told Mr. Coleman to keep his hands off my wife. The two men argued with one another, and Mr. Coleman allegedly charged at the Petitioner like a bull and there was a fight. (Testimony of Mrs. Carder)

10. The Petitioner testified that he was at the bar getting drinks for he and his wife and he noticed that something was wrong with her. When the Petitioner brought the drinks to the table where his wife was seated she told him what Mr. Coleman had allegedly done to her and the two men began to argue. Allegedly Mr. Coleman hit the Petitioner in the forehead and then the two men begin to "scuffle." The bar staff eventually break the two men apart. Petitioner alleged that three men attacked him from behind seriously injuring him.

11. Petitioner testified that on August 9, 2014, he took out a warrant against Gary Coleman as a result of the alleged incident that occurred at the bar in the Geneva Hotel. Mr. Coleman was charged with misdemeanor sexual battery and misdemeanor assault inflicting serious injuries. Petitioner admitted that Mr. Coleman was tried on these charges in Rutherford County District Court and was found not guilty of these charges. (Resp. Ex. 5; Testimony of Petitioner)

**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. N.C. Gen. Stat. § 15B-4(a) provides that “compensation for criminally injurious conduct shall be awarded to a claimant if substantial evidence establishes that the requirements for an award have been met.”
4. To meet all the requirements for an award, Petitioner must show he is a “claimant” and has incurred an “allowable expense” as or on behalf of a “victim” of “criminally injurious conduct.” N.C. Gen. Stat. § 15B-2(2), (1), (5), (13). In addition, Petitioner bears the burden of showing none of the disqualifying criteria in N.C. Gen. Stat. § 15B-11 operate to bar his claim. *See Richardson v. N.C. Dep’t of Pub. Instruction Licensure Section*, 199 N.C. App. 219, 228, 681 S.E.2d 479, 485 (“It is well-settled that a petitioner has the burden of proof at an administrative hearing to prove that he is entitled to relief from the action of the administrative agency. This burden is on the petitioner even if he must prove a negative.” (citing *Overcash v. N.C. Dep’t of Env’t & Natural Res.*, 179 N.C. App. 697, 635 S.E.2d 442 (2006), *disc. rev. denied*, 361 N.C. 220, 642 S.E.2d 445 (2007))), *disc. rev. denied*, 363 N.C. 745, 688 S.E.2d 694 (2009).
5. Substantial evidence is defined as “relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” N.C. Gen. Stat. § 15B-2(12a).
6. Substantial evidence exists to show that Petitioner properly filed his application as a “victim” of “criminally injurious conduct” pursuant to N.C. Gen. Stat. § 15B-2(5) and (13).
7. Pursuant to N.C. Gen. Stat. § 15B-11(b), “[a] claim may be denied or an award of compensation may be reduced if: (1) The victim was participating in a nontraffic misdemeanor at or about the time that the victim’s injury occurred; or (2) The claimant or a victim through whom the claimant claims engaged in contributory misconduct.”
8. “The Commission or Director, whichever has the authority to decide a claim under G.S. 15B-10, shall use the Commission’s/Director’s discretion in determining whether to deny a claim under subsection (b) of this section. In exercising its discretion, the Commission or Director shall consider whether any proximate cause exists between the injury and the misdemeanor or contributory misconduct, when applicable. The Director or Commission shall deny claims when it finds that there was contributory misconduct that is a proximate cause of becoming a victim. However, contributory misconduct that is not a proximate cause of becoming a victim shall not lead to an automatic denial of a claim.” N.C. Gen. Stat. § 15B-11(b1).

9. First, with respect to the nontraffic misdemeanor, “[a]ssault is defined as either ‘a show of violence causing a reasonable apprehension of immediate bodily harm’ or ‘an intentional offer or attempt by force or violence to do injury to the person of another.’” *State v. Uvalle*, 151 N.C. App. 446, 454, 565 S.E.2d 727, 732 (2002) (quoting *State v. Thompson*, 27 N.C. App. 576, 577, 219 S.E.2d 566, 567-68 (1975), *disc. rev. denied*, 289 N.C. 141, 220 S.E.2d 800 (1976)). Pursuant to N.C. Gen. Stat. § 14-33(a), “[a]ny person who commits a simple assault . . . is guilty of a Class 2 misdemeanor.”

10. Substantial evidence demonstrates that Petitioner committed simple assault at or about the time of the criminally injurious conduct, and accordingly, Respondent properly denied Petitioner’s claim based upon N.C. Gen. Stat. § 15B-11(b)(1).

11. Next, in determining whether Petitioner’s claim was properly barred based upon contributory misconduct, “[t]he test . . . is two-pronged, that is, 1) was there misconduct on the part of [the victim] and, if so, 2) was that misconduct a proximate cause of his injury?” *McCrimmon v. Crime Victims Comp. Comm’n*, 121 N.C. App. 144, 148, 465 S.E.2d 28, 31 (1995).

12. “Misconduct is defined as . . . ‘[a] transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behavior, willful in character, improper or wrong behavior.’ While misconduct includes unlawful conduct as a matter of law, it may be something less than unlawful conduct, though more than an act done in poor taste. Misconduct requires some deviation from the accepted norm or standard of proper behavior. Accordingly, the conduct of the claimant is misconduct if it is not within the accepted norm or standard of proper behavior, which includes unlawful conduct. Consistent with principles of tort law, the test for determining accepted norms and proper behavior is best determined by use of a reasonable man standard or what a reasonable person would have done under similar and like circumstances.” *Evans v. N.C. Dep’t of Crime Control & Pub. Safety*, 101 N.C. App. 108, 117-18, 398 S.E.2d 880, 885 (1990) (quoting *Black’s Law Dictionary* 901 (5th ed. 1979)).

13. For a victim’s misconduct to constitute “contributory misconduct” for purposes of N.C. Gen. Stat. § 15B-11(b)(2), the misconduct “must combine with criminal action on the part of another to become a real, efficient and proximate cause of the injury. . . . This Court has defined proximate cause as a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff’s injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed. The test of foreseeability as an element of proximate cause does not require that the actor should have been able to foresee the injury in the precise manner in which it actually occurred. Neither does the actor need to foresee the events which are merely possible, but only those which are reasonably foreseeable. Therefore, where a claimant’s injuries are a direct result of the criminally injurious conduct of another, the claimant’s own misconduct must have been a proximate cause of those injuries in order for the Commission to deny or reduce a claim under the statute.” *Id.* at 117, 398 S.E.2d at 885.

14. “Accordingly, if there is in the record substantial evidence that a person of ordinary prudence would have reasonably foreseen that the conduct in question would lead to an injurious

result, and if this conduct was unlawful or if it breached the standard of conduct acceptable to a reasonable person, the Commission should be affirmed in denying or reducing claimant's benefits. If there is not substantial evidence in the record to support such conclusions, any order of the Commission reducing or barring claimant's recovery under the Act must be reversed." *Id.* at 118, 398 S.E.2d at 885.

15. Although contributory misconduct can take many forms, "when a victim challenges another, or the victim accepts the challenge of another, to engage in a physical encounter, or voluntarily participates in a multi-person fracas, wherein either one or both or any of the parties receive physical injuries, whether by fair or foul means, such victim's conduct constitutes contributory misconduct as a matter of law. Neither such victim, or anyone claiming through him, is entitled to an award of reparations from the Victim of Crimes Fund." *In re Pettry*, 587 N.E.2d 983, 984 (Ohio Ct. Cl. 1990) (internal quotations marks and citation omitted); *see also Fisher v. Kan. Crime Victims Comp. Bd.*, 124 P.3d 74, 84 (Kan. 2005) (noting that one factor for finding contributory misconduct is the "failure to retreat or withdraw from a situation when an option to do so is readily available").

16. Although Petitioner may not have been the primary aggressor in the fight that resulted in the injuries to Petitioner, the evidence does show that Petitioner participated in the fight. Petitioner admitted that he confronted Mr. Coleman in the bar and that they engaged in a "scuffle." Additionally, Sergeant Greenway testified that he told both the Petitioner and Mr. Coleman that they could take out warrants against each other for misdemeanor assault. Petitioner voluntarily participated in a fight, and although Petitioner may have received the most severe injuries, the evidence shows that Petitioner engaged in contributory misconduct. Accordingly, the evidence supports Respondent's decision to deny Petitioner's claim for compensation based upon N.C. Gen. Stat. § 15B-11(b)(2).

17. Ultimately, Petitioner has not carried his 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 Petitioner's claim for crime victim's compensation based upon N.C. Gen. Stat. § 15B-11(b)(1) and (b)(2).

**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 25<sup>th</sup> day of August, 2015.

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J. Randall May  
Administrative Law Judge