



{¶2} The applicant, applicant's counsel (and certified legal intern), and an Assistant Attorney General attended the hearing and presented testimony, an exhibit, and oral argument for the panel's consideration. Ms. White, the mother of the victim, briefly testified that she was not aware of any illegal drug use by her son and noted that he was employed at the time of his death. Ms. White explained that her son visited her home from approximately December 22, 2005 through January 3, 2006. Ms. White stated that during his visit, she failed to notice any unusual or strange behavior from her son.

{¶3} Dr. Amanda Jenkins ("Dr. Jenkins"), Chief Toxicologist for the Cuyahoga County Coroner's Office, testified that the Cuyahoga County Coroner's Office ("CCCO") performed a medical legal death investigation of the decedent. Dr. Jenkins related that the decedent's blood and urine tested positive for the presence of cocaine and benzoylgonine (a cocaine metabolite formed from cocaine and alcohol) on the CCCO's toxicology laboratory report.

{¶4} Dr. Jenkins testified that although the U.S. Department of Health and Human Services has established mandatory guidelines for screening and confirmation tests for workplace drug testing, the CCCO is not required to follow them. In fact, the state of Ohio is not required to follow any mandatory toxicology level minimums for medical death investigations. Dr. Jenkins elaborated that Ohio laboratories are permitted to establish their own guidelines and procedures regarding minimum drug levels for toxicology laboratory results based upon the laboratory's particular method of testing.

{¶5} Dr. Jenkins testified that the CCCO has established internal standards, practices, and procedures to guard against contamination, inadvertent contact, test errors, and false positive results. Dr. Jenkins explained that in order to ensure accurate results, CCCO's laboratory mandates that four different individuals on four different days administer four different sets of tests for the purpose of testing cocaine and cocaine metabolites. If a different result is reached by a member of the testing group, then confirmation tests are performed. Dr. Jenkins also noted that the decedent's positive score for cocaine and benzoylecgonine fails to fall near CCCO's toxicology laboratory minimums. Lastly, Dr. Jenkins stated that the decedent's toxicology report is accurate and does not indicate a false positive result.

{¶6} Revised Code 2925.11 provides, in pertinent part, the following:

(A) No person shall knowingly obtain, possess, or use a controlled substance.

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(C) Whoever violates division (A) of this section is guilty of one of the following:

(1) If the drug involved in the violation is a compound, mixture, preparation, or substance included in schedule I or II, with the exception of marijuana, cocaine, L.S.D., heroin, and hashish, whoever violates division (A) of this section is guilty of aggravated possession of drugs. The penalty for the offense shall be determined as follows: (a) Except as otherwise provided in division (C)(1)(b), (c), (d), or (e) of this section, aggravated possession of drugs is a felony of the fifth degree. (Emphasis added.)

{¶7} Revised Code 2743.60(E)(1)(e) states:

Except as otherwise provided in division (E)(2) of this section, the attorney general, a panel of commissioners, or a judge of the court of claims shall not make an award to a claimant if any of the following applies:

(e) It is proved by a preponderance of the evidence that the victim at the time of the criminally injurious conduct that gave rise to the claim engaged in conduct that was a felony violation of section 2925.11 of the Revised Code or engaged in any substantially similar conduct that would constitute a felony under the laws of this state, another state, or the United States.

{¶8} The Attorney General bears the burden of proof by a preponderance of the evidence. *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 typically been determined 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. However since *Dawson*, various cases have emerged over the years concerning the issue of felonious drug use.<sup>1</sup> More recently, the *Dawson* decision

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*In re Trice*, V92-83781tc (4-26-95), the panel determined that they must presume a knowing and voluntary ingestion when a hospital toxicology report reveals the presence of an illegal substance. However, as stated in *In re Wallace*, V98-38869tc (5-26-99), the presumption is valid only when no evidence to the contrary is presented. Therefore, there have been occasions when a victim or applicant was successful in challenging an illegal or coerced ingestion and/or the validity and accuracy of a positive toxicology evaluation. See also *In re Treadwell, Sr.*, V97-32891tc (10-20-98), where the panel held that when a drug test is performed for employment, a positive toxicology report may not be used against an applicant where no evidence has been presented concerning the procedures used in collecting a specimen or how such records are maintained; *In re Johnson*, V98-34260tc (1-31-00), where the panel found that the applicant had successfully rebutted the presumption of a knowing and voluntary ingestion of cocaine; *In re France*, V01-31201tc (10-15-01) affirmed jud (1-10-02), where the panel held that absent a showing of substantial evidence concerning a defect in the collection process or the maintenance of records, which would demonstrate a defect in the report or the result, or which would otherwise challenge or impugn the scientific integrity of the testing methodology or its conclusions, *Dawson* should be followed; *In re Ware*, V01-31091tc (12-28-01) affirmed jud (8-20-02), where the panel determined that a physician's letter (expert opinion) was sufficient evidence to find that the results of a toxicology report were questionable to reverse the denial of the applicant's claim; *In re Abernathy*, V01-32470tc (7-31-02), where the panel reversed the Attorney General's final decision denying the claim after an

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, that a positive toxicology report (finding a trace amount of PCP in the victim's urine and none in his blood) is a rebuttable presumption and the court allowed the applicant's claim when the CCCO concluded that the victim had not been using drugs at the time of the criminally injurious conduct, but rather days before the criminally injurious conduct.

{¶9} In this case, we find that the Attorney General has successfully proven via the CCCO's toxicology report and Dr. Jenkins' testimony that the victim's blood and urine tested positive for the presence of cocaine and benzoylecgonine. Now, the burden lies with the applicant to rebut the *Dawson* presumption of felonious drug use.

{¶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 sufficiently rebut the *Dawson* presumption.<sup>2</sup> The applicant failed to present sufficient evidence that: (1) the victim did not knowingly and voluntarily ingest cocaine;<sup>3</sup> (2) the toxicology results were faulty, due to unprofessional or improper sample collection procedures;<sup>4</sup> or (3) the victim did not actually engage in felonious drug use at the time of the criminally injurious

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Assistant Attorney General revealed to the panel that she received documentation confirming that the applicant was administered narcotics while at the hospital; and *In re Parrish*, V02-51915tc (8-1-03), 2003-Ohio-4982, where the panel allowed a claim where evidence was presented that the victim had been drugged with ecstasy, raped, and killed.

<sup>2</sup>See *In re Prince*, V04-60989jud (10-5-2005), 2005-Ohio-6048

<sup>3</sup>See *In re Parrish*, V02-51915tc (8-1-2003), 2003-Ohio-4982

<sup>4</sup>See *In re Wilson*, V04-60997tc (4-21-2005), 2005-Ohio-2648

conduct.<sup>5</sup> Therefore, the October 31, 2006 decision of the Attorney General shall be affirmed.

**{¶11}** IT IS THEREFORE ORDERED THAT

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

**{¶13}** 2) The October 31, 2006 decision of the Attorney General is hereby AFFIRMED;

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

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

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TIM MC CORMACK  
Presiding Commissioner

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RANDI OSTRY LE HOTY  
Commissioner

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<sup>5</sup>See *In re Green*, V03-40836tc (5-13-2004), 2004-Ohio-3521

[Cite as *In re White*, 2007-Ohio-3490.]

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LLOYD PIERRE-LOUIS  
Commissioner

ID #4-dld-tad-050407

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

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