

STATE OF FLORIDA
 DIVISION OF ADMINISTRATIVE HEARINGS
 OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
 TAMPA DISTRICT OFFICE

Joseph Garcia,)	
)	
Employee/Claimant,)	
)	
vs.)	OJCC Case No. 08-012741EHL
)	
Hillsborough County Sheriff's Office,)	Accident date: 5/25/2007
)	
Employer,)	
)	
and)	
)	
Commercial Bank Management, Inc.,)	
Carrier/Servicing Agent.)	
_____)	
)	
)	

FINAL COMPENSATION ORDER ON PETITION FOR BENEFITS OF 5/13/08

THIS CAUSE was heard before the undersigned at Tampa, Hillsborough County, Florida on 12/9/08, upon the Claimant's claims for compensability, TTD/TPD, medical authorization and penalties, interest, costs and attorney's fees. The petition for benefits was filed 5/13/08. Mediation occurred on 9/17/08 and the parties' pretrial compliance questionnaire was filed 9/17/08. Claimant's counsel Tonya Oliver, Esq., was present on behalf of Claimant. L. Gray Sanders, Esq., was present on behalf of the Employer/Carrier (hereafter "E/C).

At the time of trial the parties entered into the following stipulations:

1. The Court had jurisdiction of the parties and of the subject matter of the petition/claim.
2. Venue properly lies in Hillsborough County, Florida.
3. The correct date of accident is 5/25/07.
4. There was an employer/employee relationship at the time of the accident.
5. There was workers' compensation coverage in effect by the carrier at the time of the accident.
6. Claimant is entitled to the maximum compensation rate if benefits are awarded.

7. Claimant provided timely notice of his accident and injury.
8. Claimant underwent a pre-employment physical examination which he passed. There was no agreement that the examination failed to reveal any evidence of hypertension or heart disease.

I have identified the exhibits admitted at trial on my evidence log which is attached and incorporated into this order. There were no objections by either party to admission of the above exhibits. In addition to the exhibits, Claimant testified live.

The claims made at the time of trial were for determination of the following:

1. TTD from 5/29/07 to 7/2/07 at \$724.00/week.
2. TPD from 7/3/07 to 7/23/07 at \$724.00/week.
3. Authorization of a cardiologist.
4. Entitlement to penalties, interest, costs and attorney's fees at the expense of the employer/carrier.

The defenses raised by the Employer/carrier to the claims were as follows:

1. Entire claim denied. Claimant's cardiac condition is not an injury defined in Chapter 440.
2. The employment is not the major contributing cause of claimant's condition.
3. E/C has rebutted presumption in F.S. 119.18 or presumption does not apply.
4. There is no TTD/TPD due or owing.
5. There is no entitlement to penalties, interest, costs or attorney's fees at the expense of employer/carrier.

In making my findings of fact and conclusions of law in these claims and defenses, I have carefully considered and weighed all the evidence presented to me. I have resolved all conflicts in the testimony, both live and by deposition, presented to me. Although I may not reference each piece of evidence presented by the parties, I have carefully considered all the evidence and exhibits in making my findings of fact and in reaching my conclusions of law. Based upon the foregoing, the evidence and applicable law, I make the following findings of fact and draw the following conclusions of law:

1. I have jurisdiction of the parties and the subject matter of these claims.
2. The stipulations of the parties are accepted and adopted by me as findings of fact.
3. The evidence closed in this matter on 12/9/08, at the time closing arguments were made by the parties.

Recitation of the factual evidence

4. E/C objected before claimant testified and again during claimant's testimony to any testimony regarding whether claimant's pre-employment physical examination failed to reveal signs of hypertension or heart disease on the grounds that claimant was not competent to testify as to what signs would indicate the presence or absence of such conditions. The parties agreed that claimant underwent a pre-employment physical

and that the report of the examination could no longer be located through no fault or action of either party. I overruled the objection and found that claimant should not be penalized for the employer's failure to maintain possession of the report. I further ruled that I could take judicial notice, or more properly official notice, of the fact that law enforcement agencies would not hire someone who showed signs of either condition because such a job applicant would not be considered fit for duty and would not pass the pre-employment physical. While E/C argued that law enforcement agencies pressured doctors to pass applicants, it did not challenge my ability to take notice of this fact and did not request a separate hearing so that it could present evidence that I was incorrect in my statement. Once I have taken judicial notice of a fact—in this case the fact that claimant would not have been hired had the examination revealed any evidence of hypertension or heart disease, then claimant is no longer required to prove this fact by producing a copy of the examination report. I have not shifted the burden of proof away from claimant to E/C, as E/C argued at trial; I have simply removed the requirement of evidentiary proof by establishing the existence of a fact through judicial or official notice.

5. The claimant testified at trial and in his depositions he was 56 years old and was a college graduate. He began working for the employer on 11/1/77. Prior to beginning employment he had a physical examination with Dr. Cardoso. He underwent an EKG and had his blood pressure checked during the examination. The examination did not reveal any signs of heart disease or high blood pressure. After the examination he took the doctor's report to his employer who no longer had a copy of it; he no longer had a copy either. Initially he worked as a patrol deputy but he was promoted to detective in 1981 and since that time he had been in the property crimes division. He worked from 8:00 a.m. to 4:30 p.m. (42 hours/week) and worked overtime. Two to three times per month he was called in to work during the night. His job required him to make contact with suspects and witnesses. He received 60 to 90 new cases each month and was required to close 13% of his files each month. He was under a lot of stress because of the volume of cases and the closure requirement. He was diagnosed with diabetes in his early 40s; he used medication to control the disease but not insulin. He developed hypertension in 2002. Neither of his parents had heart disease but his mother had hypertension and his father had type 2 diabetes. In March 2007 he was scheduled for cataract surgery and the pre-operative EKG indicated he had suffered a heart attack. He continued working at that point and did not lose any time from work. He then went to a cardiologist, Dr. Canedo, who told him he had an arterial blockage and performed an angiogram on 5/25/07. Dr. Canedo recommended by-pass surgery but he first needed to get his insulin level lower. He had the by-pass surgery on 5/31/07. He was off work from 5/29/07 until 7/2/07 recovering from surgery. He returned to work light duty from 7/3/07 until 7/23/07 when he was released to full duty work. He was paid sick leave while he was off work. His supervisor knew why he was off work but he did not fill out a notice of injury until after he got back to work. Claimant was not he had any heart disease until he had the angiogram and he was never told he had heart disease before he took his pre-employment physical in 1977. At the time of the hearing claimant remained under the care of a cardiologist and expected to do so for the rest of his life. He was taking

medication for his heart condition and high blood pressure; it was his understanding that he needed to treat his high blood pressure in order to treat his heart disease. I accepted this testimony as evidence only of claimant's perception but not as medical evidence. The dosage for his blood pressure had been increased recently because when he went for a mandatory physical training program, his blood pressure was elevated. He was not allowed to complete the training because of his blood pressure reading.

6. Dr. Matthias, cardiologist, testified in his deposition he had performed an independent medical examination of the claimant on 9/16/08. Claimant had bypass surgery because of severe coronary artery disease. Claimant suffered from essential hypertension controlled by medication; essential hypertension was high blood pressure in the arteries for which no cause was known. Dr. Matthias defined cause of a disease to mean that condition that had been proven to inevitably result in development of the disease. A risk factor on the other hand was a factor that studies had shown to have higher correlation with the development of the disease. A person could have all the risk factors of a known disease or condition and never develop it. On the other hand a person could have no known risk factors and still develop the particular disease. The identified risk factors for coronary artery disease were diabetes, high blood pressure, high cholesterol, smoking, family history, abdominal obesity and psychosocial stress. The incidence of heart disease was higher in law enforcement individuals but there were no studies linking the job stress of law enforcement to the development of heart disease. Claimant had a positive family history for heart disease. He also had hypertension, high cholesterol, diabetes and was engaged in the occupation of policeman for 33 years. Dr. Matthias could not assign any hierarchy to the list of risk factors and did not believe that any other physician could either. Dr. Matthias did state that the longer that someone suffered from a risk factor for the disease, the more likely it was for that risk factor to play a role in the development of the disease. Claimant had suffered from diabetes since 1998. The linkage between the diabetes and the presence of coronary artery disease was weak but the link between diabetes and microvascular disease was strong. There are many more studies linking diabetes to heart disease and hypertension than there are studies linking the occupation of law enforcement to those conditions. The risk factors for hypertension were family history, obesity and smoking. Claimant did not have any clear-cut risk factors for hypertension other than the "possibility" that stress may play a role in that disease. Dr. Matthias agreed that he could not identify a specific cause for claimant's hypertension, diabetes or coronary artery disease. He only had opinions regarding what were identified risk factors for these conditions. There was no way to determine if diabetes was a greater risk factor in the development of coronary artery disease than family history. Claimant should have been out of work at least six to eight weeks following his bypass surgery. Frequently with police officers Dr. Matthias kept his patients out of work for three months because that job was physically very demanding. Claimant had reached maximum medical improvement as of 9/16/08. He had a 25% rating for his coronary artery disease and an additional 10% rating for his hypertension. Claimant needed to continue to follow up with his internist and cardiologist.

7. Dr. Rabow, cardiologist, testified in his deposition he had performed an independent medical examination of claimant on 11/13/07 and diagnosed him with coronary artery disease, diabetes, essential hypertension and high cholesterol. Dr. Raybow agreed that there was no known cause of essential hypertension. Claimant had undergone coronary bypass surgery in May 2007. Claimant was suffering from uncontrolled diabetes at the time of his cardiac surgery. Uncontrolled diabetes was more likely to lead to vascular disease affecting the arteries of the heart than controlled diabetes. Dr. Raybow believed that if diabetes were controlled then the process of hardening of the arteries was slowed but he did not know if there are was any research to support his belief. Diabetes was a risk factor for developing heart disease but not hypertension. Diabetes predisposed claimant to the development of coronary artery blockages. The risk factors for the development of coronary artery disease were hypertension, diabetes, high cholesterol, smoking and family history. Claimant had a history of diabetes, hypertension and high cholesterol. Of those risk factors, diabetes was the most important one. Dr. Raybow believed that the longer a risk factor was present the more likely it was to lead to the development of heart disease. The most important risk factors in predisposing someone to coronary artery disease were diabetes, hypertension and high cholesterol. In claimant's case Dr. Raybow believed that claimant's diabetes was the most significant contributing factor. In one recent study if a patient had diabetes it was found that he had an exceptionally high risk of developing coronary disease. Dr. Raybow defined cause as a reason why someone would develop a certain medical problem. A risk factor was a medical or non-medical problem that could make it more likely that a person would develop a medical condition. Dr. Raybow believed that in the medical and scientific community there was evidence to show that risk factors were a direct link to the development of coronary artery disease. However there was no specific way for Dr. Raybow to know which of claimant's risk factors caused him to develop coronary artery disease. Statistically claimant was more likely to develop coronary artery disease because he was diabetic. The amount of time claimant needed to be off work after his surgery would have depended on the type of job that he had. Individuals with sedentary work could go back to work within one month. Individuals who had jobs with physical demands might need as much as three months off work. He did not believe claimant had any permanent physical impairment but he was not familiar with the workers compensation guidelines. Claimant had recovered from his surgery and was asymptomatic but would require adjustment of medications to control his coronary artery disease. Dr. Rabow did not specify what medications he was referring to. Claimant had reached maximum medical improvement.

Findings of fact and conclusions of law

8. My determination of compensability in this matter is governed by F. S. 112.18(1) which provides that heart disease or hypertension is presumed compensable in the event claimant is a law enforcement officer who successfully passed a physical examination which showed no evidence of either condition upon beginning employment.

9. The parties agreed and I find claimant was a law enforcement officer and a member of the class entitled to the presumption.
10. The parties agreed and I find claimant successfully passed a pre-employment physical.
11. I take official notice of the fact that the employer would not have hired claimant if the pre-employment physical had revealed any evidence of hypertension or heart disease because claimant would not have been fit for duty if it had. I therefore find that claimant's pre-employment physical examination failed to reveal any evidence of hypertension or heart disease.
12. There was no testimony to support a finding that claimant suffered any disability from his hypertension and therefore he is not entitled to a presumption of compensability for that condition. *City of Port Orange v. Sedacca*, (Fla. 1st DCA 2007). I need not reach the issue of whether the medical testimony regarding the nature of essential hypertension and whether it is arterial or cardiovascular was sufficient to prove that claimant's hypertension affected his cardiovascular system as required by *Bivens v. City of Lakeland*, 1 D07-5688 (Fla. 1st DCA 2008, 10/2/08). Further neither physician testified that it was necessary for claimant to treat his high blood pressure in order to treat his coronary artery disease. While Dr. Rabow agreed claimant would need to continue to use medications, he did not address specifically which medications were necessary to treat claimant's coronary artery disease. And Dr. Mathias was not asked about this issue at all. Therefore I have no basis for finding that it will be necessary to treat claimant's high blood pressure in the future in order to treat his coronary artery disease and cannot award benefits for claimant's hypertension on the theory that claimant is entitled to treatment of an unrelated condition in order to treat the related condition. I deny that portion of the petition seeking to establish compensability of and treatment for claimant's essential hypertension.
13. However claimant suffered disability as a result of his heart disease when he was absent from work from 5/29/07 to 7/2/07 and on light duty status from 7/3/07 to 7/23/07. I conclude as a matter of law that claimant was entitled to the presumption of compensability afforded by F.S. 112.18 for his coronary artery disease.
14. I reject E/C's argument that it overcame the presumption of compensability. At best E/C established, based upon Dr. Rabow's testimony, that claimant's diabetes was the most significant risk factor he had for developing coronary artery disease. While Dr. Rabow thought that claimant's diabetes was highly significant as a contributing factor in the development of claimant's coronary artery disease, he did not testify that it was a causative factor. Dr. Rabow agreed that claimant had other risk factors and he had no way of determining which, if any of them, led to claimant's heart disease. Risk factors are not sufficient evidence of causation. *Punsky v. Clay County Sheriff's Department*, 1D07-3901 (Fla. 1st DCA 2008). In order to rebut the presumption E/C must present competent and substantial evidence that convinces me that that claimant's heart disease "was *caused* (emphasis added) by some non-work-related factor...." *City of Tarpon Springs v. Vaporis*, 953 So.2d 597(1st DCA 2007). I find I had no testimony that claimant's heart disease was caused by anything, only that he had risk factors for developing the disease.

15. All the medical evidence supported a finding that claimant was entitled to TTD from 5/29/07 through 7/2/07 and TPD from 7/3/07 to 7/23/07. The parties agreed that claimant was paid vacation pay during that time period and that if I awarded benefits, the parties would work out the restoration of whatever portion of claimant's vacation time his worker's compensation payments represented. In other words, claimant was not seeking to be paid twice for his lost time. Because claimant was paid timely during his absence, I decline to award any penalties or interest.
16. I award claimant treatment for his coronary artery condition with a cardiologist as requested for so long as such care remains reasonable and medically necessary. I decline to award claimant any treatment for his hypertension as discussed above.
17. I award claimant's counsel a reasonable attorney's fee and taxable costs at the expense of E/C and I reserve jurisdiction to determine the amount of said fee and costs if the parties are unable to come to an agreement.

WHEREFORE, IT IS ORDERED AND ADJUDGED:

1. Claimant's coronary artery disease is compensable.
2. E/C shall reimburse/reinstate claimant's vacation/leave time from 5.29/07 through 7/2/07 at his TTD compensation rate and shall reimburse/reinstate claimant's vacation/leave time from 7/3/07 through 7/23/07 at his TPD compensation rate.
3. E/C shall provide claimant with medical care for his coronary artery disease with a cardiologist.
4. That portion of the petition seeking treatment for claimant's hypertension is dismissed on its merits.
5. E/C shall pay claimant's counsel a reasonable attorney's fee and taxable costs and I reserve jurisdiction to determine the amount of said fee and costs if the parties are unable to come to an agreement.

DONE AND MAILED to the parties and Attorney Sanders and ELECTRONICALLY MAILED to Attorney Oliver this 10th day of December, 2008, in Tampa, Hillsborough County, Florida.



Ellen H. Lorenzen
Judge of Compensation Claims
Division of Administrative Hearings
Office of the Judges of Compensation Claims
Tampa District Office
1000 North Ashley Drive, Suite 309
Tampa, Florida 33602-3330
(813)272-2380
www.jcc.state.fl.us

Joseph Garcia
13316 Arena Place
Tampa, Florida 33612

Hillsborough County Sheriff's Office
Post Office Box 3371
Tampa, Florida 33601

Commercial Risk Management, Inc.
Post Office Box 18366
Tampa, Florida 33679

Tonya Anne Oliver, Esquire
tonyaaoliver@yahoo.com

L. Gray Sanders, Esquire
Barbas Nunez Sanders Butler & Hovsepian
1802 West Cleveland Street
Tampa, Florida 33606