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

Jonathan Race,
Employee/Claimant,

vs.

Orange County Fire Rescue/Johns Eastern Company, Inc.,
Employer/Carrier/Servicing Agent.
_______________________________/

OJCC Case No. 16-004024WJC

Accident date: 05/21/2013

Judge: W. James Condry, II

# FINAL COMPENSATION ORDER

After proper notice to all parties, a final hearing was held on this claim in Orlando, Orange County, Florida on the afternoon of Tuesday, November 29, 2016. Present at the final hearing were attorneys Kristine Callagy for the Claimant and Kristen Magana for the Employer/Servicing Agent, hereinafter referred to as the E/SA. Also in attendance at the hearing was the Claimant, Jonathan Allen Race. The only live testimony was received from Mr. Race. The remainder of the evidence was received via deposition and other documents as detailed below.

*This order addresses the Petition for Benefits filed with DOAH on 02/18/16.*
*The claim was unsuccessfully mediated as to the remaining issues on 05/11/16.*

## OVERVIEW

The Claimant, a fifty-one year-old certified firefighter was accepted as sustaining a compensable cardiovascular injury under the Florida Heart and Lung Bill on May 21, 2013. The Claimant previously received workers' compensation benefits for a cardiac arrhythmia disorder with the same employer involving a February 8, 1999 date of loss. The Claimant has sought additional impairment benefits which the E/SA challenges in part because of the relationship between the 2013 and 1999 cardiac arrhythmia conditions. For the reasons expressed below I find that the Claimant's claim to benefits should be granted in part.

**The specific issues to be determined at the 11/29/16 final hearing were as follows:**

1. Whether the Claimant is entitled to the payment of permanent impairment benefits at the rate of 38% based on the opinion of the expert medical advisor, Dr. Ramon Castello?
2. Whether the Claimant is entitled to the payment of penalties, interests, costs and attorney fees at the expense of the E/SA?

**The E/SA defended the claim on the following grounds:**

1. That the Claimant was previously paid benefits for a 25% rating for the same condition per the JCC's order dated 12/30/03.
2. That the claim for impairment benefits is barred by the doctrines of res judicata and/or collateral estoppel.
3. That no penalties, interests, costs or attorney's fees are due or owing.
4. That the E/SA claims prevailing party costs under Section 440.34(3), Florida Statutes.

***STIPULATIONS OF THE PARTIES***

1. That the Judge of Compensation Claims has jurisdiction over the parties and the subject matter.
2. That venue properly lies in Orange County.
3. That there was an employer/employee relationship at the time of the 05/21/13 accident.
4. That there was worker's compensation insurance coverage in effect on the date of the accident.
5. That the Claimant gave timely notice of the accident.
6. That the accident was accepted as compensable.
7. That by party agreement the Claimant's date of maximum medical improvement is 09/05/13.
8. That there was timely notice of the pretrial conference and the final hearing.

***JUDGE'S EXHIBITS***

1. The pre-trial stipulation and pre-trial compliance questionnaires completed by the parties on 05/26/16 and the 05/27/16 order approving same. This exhibit includes the pretrial stipulation and any timely amendments thereto (See DNs 18 & 20).
2. A composite exhibit consisting of the Claimant's trial memorandum, the E/SA's trial memorandum and any submitted case opinions. Said documents were considered for argument purposes only. (See DNs 47-49).
3. The 11/17/16 & 11/18/16 deposition transcript of Dr. Ramon Castello and attachments (DN 45)
4. The 12/30/03 final compensation order (DN 53).
5. The parties' written closing arguments (See DNs 55 & 56).

***JOINT EXHIBITS***

1. The payout ledger on the claim (DN 54).
2. The 13-week wage schedule (DN 46).

***CLAIMANT'S EXHIBIT***

1. The 07/18/16 deposition transcript of Dr. Steven Borzak and attachments (DN 44).

***E/SA EXHIBITS***

1. The 07/06/16 deposition transcript of Dr. Sunil Kakkar and attachments (See DNs 40-43).
2. The 03/20/03 deposition transcript of Dr. Arnold Einhorn and attachments (See DNs 51 & 52).
3. A composite exhibit consisting of the E/SA's 06/24/16 Motion to admit medical records, medical attachments and the order approving same (See DNs 21 & 23).

***PROFERRED EXHIBITS***

NONE

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

In making my findings of fact and conclusions of law in this claim, I have carefully considered and weighed all of the evidence presented. I have observed and assessed the candor and demeanor of the only witness that testified live before me, and I have resolved all of the conflicts in the live testimony, deposition testimony and documentary evidence. I have carefully considered all of the evidence admitted even though I have not commented on or summated every piece thereof. Nevertheless, in my ruling I have set forth my ultimate findings of fact with mandate as required by *Section 440.25(4) (e), Florida Statutes (2013)*. Based on the foregoing, the evidence, and applicable law, I make the following determinations having weighed and elected to reject as unpersuasive the evidence and inferences inconsistent with these findings:

1. I find that I have jurisdiction over the parties and the subject matter and I accept as true those matters for which the parties have stipulated.
2. I find from the testimony of the Claimant and as further corroborated by the medical and other evidence in the record that Mr. Race was hired as a certified fire fighter in January of 1989. When he retired in 2014 he did so as a Captain serving as an EMS supervisor while also performing EMS duties. On February 8, 1999 the Claimant was first diagnosed with a compensable cardiac arrhythmia condition. A claim for workers' compensation was filed and the Claimant was provided with authorized treating providers.
3. The initial authorized medical specialist in his case was Dr. Arnold Einhorn, a cardiologist, who

formally treated the Claimant for atrial fibrillation. Virtually all of the records reflect atrial fibrillation as the condition formally diagnosed and treated for the 1999 accident. However there is one medical report dated July 24, 2002 wherein the Claimant was noted to have been seen in the hospital and treated for atrial flutter. But the Claimant according to that July 2002 medical note had since reverted back to normal sinus rhythm. There were no other medical references to atrial flutter that I could find or that was otherwise pointed out to me in the trial record until 2013. Consequently there was no documented evidence of atrial flutter being a recurring condition treated prior to 2013.

4. Claimant's medical care was eventually transferred over from Dr. Arnold Einhorn to Dr. Sunil Kakkar in 2005. Other than a March 17, 2010 replacement of the Claimant's pacemaker originally implanted for treatment of the 1999 accidental injury, the Claimant was doing well with his arrhythmia condition being controlled by medications. Dr. Einhorn placed the Claimant at maximum medical improvement for the 1999 accident/injury by July of 2002 and he assigned a 25% impairment rating. That impairment rating was also accepted by Dr. Sunil Kakkar.
5. Then in May of 2013 the Claimant had an episode which Dr. Kakkar felt to be atrial flutter (See DN 40 @ pg 12). The Claimant's symptoms at that time involved irregular rapid heartbeats and general weakness that prompted the Claimant to seek out medical attention. Dr. Kakkar eventually sent the Claimant to Dr. Chandra Bomma, an electrophysiologist, where an ablation procedure designed to short-circuit or prevent the arrhythmia was performed on June 19, 2013. Unfortunately the ablation procedure was unsuccessful with a recurrence in the episodes of atrial flutter as well as atrial fibrillation. Claimant accordingly received additional medications to control his heart rate and to re-establish a normal rhythm. The medical care was provided by the E/SA. The trial record reflects that the arrhythmia condition was eventually controlled with no continuing symptoms.
6. Dr. Kakkar placed the Claimant at MMI on September 5, 2013 and he assigned a 25% impairment rating which he testified encompassed the Claimant's arrhythmia conditions as a whole rather than just the 2013 ablation (See DN 40 @ pgs @ 18-19 & 32). Dr. Kakkar testified that in his opinion there was no separate impairment rating. The impairment rating would in his opinion embrace the atrial flutter and the atrial fibrillation as well as hypertension and the minimal non-obstructive coronary artery disease. The hypertension and coronary artery disease was never found to be disabling.
7. Dr. Kakkar testified that the first time he treated the Claimant for atrial flutter was in 2013 (See

DN 40 @ pg 24).

8. Following the May 21, 2013 accident the Claimant reportedly received additional workers' compensation documentation from the employer to include an informational brochure and the like. The Claimant also was paid temporary indemnity benefits for being out of work because of the 2013 accident and he was paid at a compensation rate based on his new date of loss. Such handling of the claim I find illustrates that it was opened up and handled as a separate claim.
9. The Claimant testified at trial that to date he has been on the same medications for his arrhythmias' since 2013. He believes the medications have been working well. He testified that he feels good. From his testimony elicited at trial there were no expressed symptoms communicated. Neither was there any documentation of reported symptoms by either of the doctors in their examination and treatment of the Claimant after the Claimant was placed at MMI in September of 2013.
10. The Claimant was examined by his independent medical examiner, Dr. Steven Borzak, through a medical records review after which the doctor prepared a June 29, 2016 five-page IME report. Dr. Borzak diagnosed the Claimant with atrial fibrillation and hypertension (See DN#44 @ pg 8). He believed the Claimant reached MMI by September 5, 2013 and Dr. Borzak originally assigned a 48% impairment rating contrary to the 25% rating assigned by Dr. Kakkar. As will be discussed in greater detail below, Dr. Borzak subsequently revised the impairment rating he assigned after being deposed on July 18, 2016. Nevertheless, because of the conflict in the opinions of the doctors as to the appropriate impairment rating an expert medical examiner was appointed after the Claimant filed a notice of conflict on July 7, 2016.
11. On July 18, 2016 Dr. Ramon Castello was appointed as the expert medical advisor in this case with the doctor called upon to address the maximum medical improvement date and the appropriate impairment rating for the Claimant's compensable arrhythmia condition that is attributable to his 2013 date of loss.
12. The parties acknowledge that there are no case opinions that appear to be directly on point regarding several of the matters that are posed as issues before me to decide that being: 1) whether the Claimant is entitled to an impairment rating as a result of the new accident? And 2) whether the E/SA is entitled to an offset or credit for impairment benefits already paid should an impairment rating be assigned for the 2013 accident?
13. The parties agree that the Claimant experienced a new period of disability that entitles him under the case law to a finding of a new date of accident. The parties further agree that as a

result of the new 2013 accident the Claimant achieved maximum medical improvement on September 5, 2013 (See position 28:06 thorough 28:26 of the recorded trial proceedings). There was some confusion in the record as to whether the date of MMI was September 5th or September 13th. But because there is evidence to support the parties' stipulation, I accept the September 5, 2013 date as the appropriate date of maximum medical improvement for the 2013 date of loss. Without such stipulation I would assign the MMI date as September 13, 2013 based on the testimony of the EMA.

14. The parties do not agree however that the Claimant gets a totally new impairment rating by virtue of him having suffered a new period of disability. The Claimant argues that he is so entitled and the E/SA argues that he is not. The E/C did however pay the Claimant temporary total indemnity benefits during his new period of incapacity in 2013.
15. The E/SA first contends that the claim to impairment benefits should be barred on res judicata or collateral estoppel grounds. In the alternative the E/SA alleges that it should at a minimum receive credit for what it has already been paid out in impairment benefits because the Claimant has essentially the same injury. As such the impairment rating for the 2013 period of disability the E/SA alleges should not be treated as a new, separate and distinct impairment whereby a full payment of IB benefits based on the new impairment rating would be had but rather the E/SA argues any rating should represent an additional or increased rating for which it should receive credit for impairment benefits already paid. The E/SA further maintains that the EMA's impairment rating should be rejected because it is not supported by the applicable Florida Uniform Permanent Impairment Rating Schedule. Lastly, the E/SA offers that any award of interests and penalties should be awarded from the date of this final compensation order finding the appropriate impairment rating and not from any other date.

**WHETHER THE CLAIMANT'S CLAIM IS BARRED BY THE DOCTRINE OF RES JUDICATA?**

16. The E/SA maintains that given the Claimant's arrhythmia injury/condition in 1999 and the final hearing held in December of 2003 addressing impairment benefits for same, the Claimant's current claim for IB benefits should be barred by the doctrines of res judicata or collateral estoppel. For the reasons explained below, I reject the argument that res judicata and collateral estoppel applies to the facts in this case to otherwise bar benefits.
17. It is well settled that the piecemeal nature of workers' compensation does not preclude the

application of res judicata. But the principle only applies when the elements of res judicata are clearly present and the facts allow its proper application. The determining factor in deciding whether the cause of action is the same is whether the facts or evidence necessary to maintain the suit are the same in both actions. If the facts and evidence change then a res judicata defense should be rejected. See ***Kilyn Construction, Inc. v. Pierce*, 200 So.3d 259 (Fla. 1st DCA 2016)** and ***Smith v. Time Customer Service*, 132 So.3d 841 (Fla. 1st DCA 2013).** In regard to the defense of collateral estoppel the proper application prevents the parties in the second suit from litigating those points in question which were actually adjudicated in the first suit. It requires that the parties and the issues to be identical and the particular matters to be fully litigated and decided by a court or tribunal of competent jurisdiction. See ***U.S. Fidelity & Guaranty Company v. Odoms*, 44 So.2d 78 (Fla. 5th DCA 1984).**

18. Here it is most evident to me that the Claimant had a new development of medical problems that began over nine years after the final hearing that was held on December 4, 2003. I find the facts are such that the current problems in dispute could not have been reasonably anticipated and litigated at the time this matter first went to trial in 2003. Not only is there a new period of disability or temporary incapacity establishing a new accident date that was not and could not have been anticipated at that time, but there are medical problems of a nature different from those that were formally litigated back in 2003. The record reflects that the formal diagnosis when the claim was litigated in 2003 for the 1999 accident was atrial fibrillation. There was no formal diagnosis of atrial flutter on which the E/SA was clearly shown to be on notice of or that was called into dispute. There was no evidence of ongoing treatment for the condition of atrial flutter nor was the condition specifically called into question and litigated.
19. As pointed out in paragraph 3 of pages 3 & 4 above there was only one reference to atrial flutter in a report dated July 24, 2002 and the record bears out, including the deposition testimony of Dr. Kakkar, that there was no indication of complaints or treatment of atrial flutter again until the incident of 2013 that serves as the basis for the May 21, 2013 date of loss. After that 2013 date of accident the Claimant had several occasions where he received documented treatment for both atrial fibrillation and atrial flutter. Moreover atrial flutter was finally listed among the formal diagnosis for ongoing treatment where it had not previously been so listed. These different arrhythmias although similar, involved some slightly different treatment regimes according to the doctors' overall testimony necessary to stabilize and return the Claimant to normal sinus rhythm. The record reflects that the arrhythmias originate in a different area of the

heart. And Dr. Borzak testified that you could say that the Claimant's got a different arrhythmia. He had atrial fibrillation before and he's got atrial flutter now (See DN 44 @ pg 26). Furthermore even if there was a prior flutter Dr. Borzak testified that he could not say if it's the same flutter or a different flutter. Dr. Costello also could not rule out the prospect of a new flutter (See DN# 45 @ pg 48). This testimony is likewise suggestive of new facts.

20. In light of the above evidence and testimony, I find the operative facts in 2016 sufficiently differ from the operative facts in the December of 2003 trial in deciding the current matters at issue. This is especially true in my opinion when a totally new accident was involved with the claim not arising out of the very same transaction. I find the claim was the product of evidentiary factors not known at the time of the initial claim proceeding. Moreover there was in effect a change in condition in terms of disability, symptoms and formal diagnosis ultimately affecting treatment and care which was in fact different at least to a degree from that which existed at the time of the 2003 hearing. For example in terms of different treatment the Claimant was required to undergo a different ablation procedure and he was required to take an anticoagulant medication as a result of the subsequent accident involving his atrial flutter which affected his employment as a firefighter. At a minimum I find there was a change in condition and according to these changes the Claimant's impairment rating was negatively affected as will be addressed below. For the foregoing reasons I reject the E/SA's claim that the Claimant's request for impairment benefits is barred on res judicata and/or collateral estoppel grounds.

**WHETHER THE CLAIMANT IS ENTITLED TO THE PAYMENT OF IMPAIRMENT BENEFITS BASED ON THE RATING ASSIGNED BY DR. RAMON CASTELLO?**

Entitlement to Impairment Benefits:

21. *Section 440.15(3)(a)* provides, "**Once the employee has reached the date of maximum medical improvement, impairment benefits are due and payable within 14 days after the carrier has knowledge of the impairment.**" *Section 440.15(3)(c)* provides that, "**All impairment income benefits shall be based on an impairment rating using the impairment schedule referred to in paragraph (b).**" Paragraph (b) of *Section 440.15(3)* provides for the use of the 1996 uniform permanent impairment rating schedule which governs the subject 2013 date of loss. See also Florida Administrative Code Rule 69L-7.604.

22. I find that the Claimant had a new accident with the disablement or temporary incapacity he suffered on May 21, 2013. And I find that said disablement was caused by his cardiac

arrhythmia condition that is presumptively compensable under the Florida Heart and Lung Bill thereby entitling him to the additional temporary indemnity and medical benefits. The E/SA neither argued nor offered any evidence challenging the presumptive compensability of the injury or condition. Furthermore the E/SA does not dispute that a new date of disability has been historically recognized by our First District Court as a new date of accident. See ***City of Mary Ester v. McArtor*, 902 So.2d 942 (Fla. 1st DCA 2005).** And with a new accident additional benefits can be payable such as the temporary indemnity benefits that were paid in this case.

23. Although not directly on point with the facts here, I find that because the Claimant can be entitled to additional temporary total disability benefits because of the new accident there is no appreciable sound and logical reasoning that I can discern that would preclude the Claimant from being eligible for the payment of impairment benefits (additional or otherwise) because of his new accident provided his injury or injuries as a result of that accident result in an increased impairment rating following the accident. Although not directly on point, it is evident that impairment benefits can be payable following a new accident under a Florida Heart and Lung Bill case. See the case of ***Orange County Fire Rescue v. Jones*, 959 So.2d 785 (Fla. 1st DCA 2007).** And because the case law would require temporary indemnity benefits to be paid at the compensation rate governed by the new accident date, it seems only logical and reasonable that impairment benefits resulting from a new accident should be payable at the rate based on that new date of loss.

24. Finding the Claimant had a new accident; I find he is entitled to a determination of his impairment rating, if any, after achieving maximum medical improvement for the new accident and injury. I find the weight of the evidence is sufficient to establish a new or at least an aggravated injury given the formal diagnosis of atrial flutter and the significant medical interventional activity required for treating the Claimant's multiple symptoms following his accident in 2013. That treatment included a different ablation procedure and aggressive changes in medication.

25. Dr. Castello, the EMA, testified that his impairment rating represented the impairment attributable to the condition resulting from the 2013 accident (See DN 45 @ pg 10). He looked at the condition as it was an event on its own (See DN 45 @ pg 18). However he also testified that his impairment rating took into consideration the atrial flutter and the atrial fibrillation together (See DN 45 @ pg 41). I find if nothing else there is more than sufficient medical testimony based on the procedures and medical treatment required after the 2013 accident to

suggest finding a greater impairment than that which existed when the Claimant was rated in 2003 for the 1999 arrhythmia condition. Such a conclusion is supported not only by the opinion of the expert medical advisor in this case who assigns a higher impairment rating, but is supported by the opinion of the Claimant's independent medical examiner, Dr. Steven Borzak who likewise assigns a higher impairment rating.

26. I find both physicians' opinions more persuasive than Dr. Kakkar's opinions on the impairment rating issue when considering the record evidence as a whole. In reaching this conclusion notably there also was no evidence of Dr. Einhorn evaluating and rendering an opinion on the Claimant's impairment rating after the May 21, 2013 accident to suggest that the impairment rating remained the same. Furthermore I am not persuaded that the arrhythmia detected in May 2013 is merely a continuation of the conditions previously accepted as compensable, treated and rated. That is because when the compensation order was entered in 2003 it was in connection with a formal diagnosis of atrial fibrillation (See DN 53). And even Dr. Kakkar acknowledged that he never knowingly treated the Claimant for atrial flutter until the accident of May 21, 2013. If he had no such knowledge I cannot reasonably infer that the E/SA did either. For all of the above reasons I reject the conclusion that the impairment rating for the Claimant's arrhythmia condition(s) at this time is the same as that assigned by Dr. Einhorn in 2002. I am persuaded by the opinions of the EMA and Dr. Borzak that the impairment rating is higher.

<u>Proper Impairment Rating</u>:

27. As referenced in paragraph 11 on page 5 above, Dr. Ramon Castello was appointed as the EMA in this case to address the conflict in opinions as to the appropriate impairment rating for the May 21, 2013 date of loss. Dr. Castello examined the Claimant sometime before October 4, 2016 and reviewed associated medical records and deposition transcripts pertaining to this claim including those records and deposition transcripts of Doctors Borzak, Kakkar and Einhorn (DN 45 @ pgs 7-8). Dr. Castello was called upon to determine the appropriate date of maximum medical improvement and impairment rating for the Claimant's compensable arrhythmia condition that is attributable to his May 21, 2013 date of loss. Dr. Castello concurred with the MMI date assigned by Dr. Sunil Kakkar and Dr. Castello concluded that the Claimant sustained a 38% impairment rating opining that Claimant belongs in Class 3 of cardiac arrhythmias (DN 45 @ pgs 10 & 17).

28. Dr. Castello was aware from his review of the deposition transcripts and from his interview with

the Claimant that Mr. Race previously received treatment for his atrial fibrillation and atrial flutter. And the doctor was aware that the Claimant had previously been rated with a 25% impairment rating. But as he understood it, there was an argument as to whether the matter in 2013 was yet a new event that he had to re-re-rate or not. He acknowledged that he had a hard time understanding the issue because he thinks it is more of a legal issue rather than a medical one (DN 45 @ pgs 13 & 16). In any event following the accident that occurred, it is clear that Dr. Castello did not agree that the Claimant still had a 25% impairment rating as previously assigned by Doctors Einhorn and Kakkar. Dr. Castello believed the impairment rating was higher than a 25% in part finding the Claimant falling within a higher impairment classification class for arrhythmias because of the interventional care Claimant required after the new accident. In short I do not find there to be clear and convincing evidence in the record to reject his opinion of a higher impairment rating although there is significant controversy as to whether the impairment rating that he ultimately assigns of 38% is supported by the Florida Uniform Permanent Impairment Rating Schedule which he is required by statute and under the case law to observe.

29. Dr. Castello testified that when he assigned his rating he did so as if it was an event on its own regardless of anything that happened prior (See DN 45 @ pg 18). He determined that the Claimant's condition falls within Class 3 of the four classes of arrhythmias because based on the history he received from the Claimant and his review of the medical records, the Claimant had a lot of symptoms after his atrial fibrillation and atrial flutter that occurred in 2013 that required multiple changes of medications after an unsuccessful ablation procedure (DN 45 @ pgs 18-19). Furthermore the Claimant eventually had to retire because of the need for oral anticoagulation medications required because of risk factors associated with his atrial fibrillation following the 2013 accident. Dr. Castello therefore believed that the Class 3 category more accurately described the Claimant's situation.
30. In regard to the range of Class 3, Dr. Castello testified that he thought based on the complexity of the symptoms and the interventional treatment required to successfully treat the arrhythmias the range of the rating within the class should be in the first third. Hence he assigned the 38% rating within the permitted rating range of 30-54% (See DN 45 @ pgs 19-20). The doctor acknowledged that one has to wait to see what the affect of the treatment is before performing the rating determination (DN 45 @ pg 23).
31. Class 3 under the Florida Uniform Permanent Impairment Rating Schedule at page 125

provides------"*The patient has symptoms* (emphasis added) despite the use of dietary therapy or drugs or of an artificial pacemaker and a cardiac arrhythmia is documented with ECG, but the patient is able to lead an active life and the symptoms due to the arrhythmia are limited to infrequent palpitations and episodes of lightheadedness or other symptoms of temporarily inadequate cardiac output."

32. Class 2 under the Florida Uniform Permanent Impairment Rating Schedule at page 125 provides------"*The patient is asymptomatic* (emphasis added) during ordinary daily activities and a cardiac arrhythmia is documented by ECG; and moderate dietary adjustment, or use of drugs, or an artificial pacemaker, is required to prevent symptoms related to the cardiac arrhythmia or the arrhythmia persists and there is organic heart disease."

33. In resolving the conflicting testimony on the impairment rating issue in this case it is well settled that the expert medical advisor's opinion is presumptively correct unless the judge finds and articulates clear and convincing evidence to reject the EMA's opinion. See ***Amos v. Gartner, Inc.**, 17 So.3d 829 (Fla. 1st DCA 2009)*. The question of impairment rating is a medical question upon which the judge must rely on medical testimony. To this end I find in addition to actually reviewing the guides themselves the judge can and should reasonably rely upon medical opinions addressing the proper interpretation of the guides on the impairment rating issue. It is clear that where the proper impairment schedule covers a particular injury such as arrhythmias in this case, impairment benefits shall be based on that impairment schedule. When the impairment schedule is not followed any rating assigned as a result may be reversible as a matter of law. See ***Sheaffer v. Publix Supermarkets, Inc.**, 109 So.3d 308 (Fla. 1st DCA 2013)*.

34. In the ***Sheaffer*** case referenced above a psychiatric injury was involved wherein all of the doctors testified that if the injured worker was to stop taking her psychiatric medication, her psychiatric condition would decompensate. The trial judge however accepted the opinion of a doctor who assigned a 0% impairment rating wherein that physician testified in deposition that the use of ongoing medication was not a factor in determining impairment. In reversing the trial judge the appellate court held that the judge failed to take into proper account the provisions of *Section 440.15(3)(b)* and *(c)* requiring all impairment income benefits to be based on an impairment rating using the impairment schedule. Because there was unrebutted medical testimony in that case that the injured worker would be at severe risk of "decompensating" if she were to stop taking her psychiatric medication, and because the Guides indicated that the

injured worker would have a PIR of 1% as a result of such treatment needs, the judge was reversed for accepting an opinion inconsistent with the guides. The trial judge accepted an opinion from a doctor who testified medical treatment was not a relevant consideration in determining impairment rating when the guideline said it was relevant and otherwise mandated a rating. Hence the reversal.

35. In the instant case I find Dr. Castello placed the Claimant in a Class 3 for his arrhythmic condition because of the degree of medical intervention that was required after the 2013 accident date to get the Claimant's arrhythmias under control. Based on his deposition testimony Dr. Castello initially believed that the Claimant- - - either had continuing symptoms even following his treatment after MMI or that Class 3 for arrhythmias impairment classification did not require symptoms. I find either assumption was incorrect and unsupported by the facts.
36. I find the record evidence in this case indisputably shows that the Claimant had no symptoms expressed or demonstrated upon reaching MMI following his 2013 accident. Dr. Castello also agreed that according to Dr. Kakkar, at least by September 2013 the Claimant was asymptomatic. I further find contrary to the testimony of Dr. Castello that the plain language of the guides provides for a patient having symptoms despite the use of dietary therapy or drugs or an artificial pacemaker being required to prevent symptoms related to the cardiac arrhythmia. Under the guides both Class 3 and Class 4 require the patient to have symptoms whereas Class 1 and Class 2 do not.
37. This plain reading and interpretation of the guide is consistent with the interpretations of all of the other doctors in this case who placed the Claimant in Class 2 for his arrhythmia conditions because of the absence of symptoms. Dr. Arnold Einhorn first placed the Claimant in Class 2 even after a MAZE surgical or ablation procedure and pacemaker implant because the Claimant was asymptomatic (See DN 51 @ pgs 9-10 & 17). Dr. Einhorn testified that if the Claimant was symptomatic he would probably fall under Class 3 or possibly under Class 4. Dr. Sunil Kakkar, the Claimant's authorized treating physician, also placed the Claimant in a Class 2 category finding no symptoms upon Claimant reaching MMI with which to place Claimant in a higher Class (See DN 40 @ pgs 21-22). The Claimant's independent medical examiner, Dr. Steven Borzak, originally placed the Claimant in a Class 3 category and assigned a 48% impairment rating, but upon questioning on cross-examination during his deposition on July 18, 2016 and upon acknowledging that there were no symptoms, Dr. Borzak revised his impairment rating to

27% placing the Claimant in Class 2. (See DN 44 @ pgs 21-24).I find there is unrebutted medical testimony that the Claimant had no symptoms after reaching MMI. Thus I find under a strict reading of the guides the Claimant cannot fall under Class 3. The provisions of the guidelines do not outline a basis for placement in Class 3 or in Class 4 in the absence of symptoms.

38. I find Class 2 limits the assigned impairment rating in the range of 15-29% which would exceed the 38% rating assigned by Dr. Castello.
39. I find the arrhythmia conditions Claimant has are clearly covered by the Florida Uniform Permanent Impairment Rating Schedule and that in the absence of symptoms the factual evidence in this case simply do not support the criteria for eligibility under classes 3 or 4. I do not find Dr. Costello's explanation from the factual evidence in the trial record supports by analogy that the Claimant should fall under Class 3 or 4. Therefore I find clear and convincing evidence to reject his opinion as to the proper Class for which the Claimant's arrhythmias apply. The guides require symptoms, the record shows no symptoms and the doctor's explanation does not with any sufficient recognized authority explain away the need for symptoms.
40. Dr. Castello opined that what determines the class is really the functional status of the person (DN45 @ pg 24) and what degree of intervention is necessary to get the person asymptomatic or the condition under control (DN45 @ pgs 23, 25 & 29). The doctor confirmed that the antiarrhythmics provided after the ablation procedure eventually controlled the atrial flutter/atrial fibrillation problem (DN45 @ pg 29). And although ablations are not listed in the guidelines the doctor referenced pacemakers by analogy to ablations. Pacemakers are indeed referenced in the guides and in the absence of symptoms, even with the use of a pacemaker without symptoms; a patient does not fall under the classification of Class 3 or Class 4. The doctor acknowledged that the real distinction between Class 2 and Class 3 is the persistence of symptoms despite the modalities of treatment. Nevertheless he testified that it would be the complexity involved in controlling the disease that would cause him to place the Claimant in a higher Class. Such however is not a standard clearly delineated under the guides in either Classes 3 or 4.
41. In rejecting the Class 3 impairment I am compelled to reject the 38% impairment rating assigned by Dr. Castello. I find clear and convincing evidence does not support it. As heretofore mentioned, Class 2 impairment is limited to the rating range of 15-29%. That being said, the guidelines however provide no specific guidance as to how a doctor would assign a particular

rating within that limited rating range. But I find it comports more with logic and reason that the range should increase considering the complexity and nature of symptoms and ultimate treatment required to effectively treat the arrhythmia conditions. Given the ablation procedure and multiple medications required to treat and render the Claimant asymptomatic after the May 2013 accident I accept the testimony of Dr. Borzak over that of Dr. Kakkar that the Claimant's condition with the atrial fibrillation and atrial flutter was more complicated and required more aggressive treatment resulting in a higher impairment rating following his accident than that what existed before. Hence I accept Dr. Borzak's impairment rating of 27% over the 25% rating assigned by Dr. Kakkar as more believable and more consistent with the totality of the evidence before me. That evidence suggests at least a change in condition following Claimant's subsequent employment exposures and new accident. Again, with the accident I find with the Claimant's cardiac arrhythmias he has an increased impairment rating entitling him to the payment of impairment benefits.

Whether there is an offset of the Impairment Rating?:

42. I find the payment of benefits is based on injury and not accident. The medical testimony suggests that the Claimant's injury is essentially the same, a cardiac arrhythmia condition. The arrhythmia's present have been described as cousins that frequently appear together and there is evidence to suggest that there was at least an occasion prior to May of 2013 that the Claimant also experienced atrial flutter in addition to atrial fibrillation. Dr. Castello also testified that he would not be surprised that the Claimant previously had atrial flutter at the time he also had the Maze procedure for the atrial fibrillation. In many respects the treatment of the conditions are substantially similar according to the doctors. Although there was apparently more instances of atrial flutter documented after the 2013 accident the doctors indicated that their impairment ratings embraced both conditions. The guidelines do not make a distinction between atrial fibrillation and atrial flutter in the rating process.
43. Dr. Castello acknowledged that he was confused as to whether the condition following the 2013 accident should be viewed as an additional thing or whether it should be taken completely separate. In other words whether the May 2013 event warrants a separate rating or whether it is suppose to be combined with the 25% rating that was assigned before. From what I have ultimately gleaned from his testimony as a whole Dr. Castello simply assigned an impairment rating based on what he thought the overall impairment rating would be at the time following

the 2013 accident. The impairment rating was essentially for the same general disease process two wit cardiac arrhythmias complicated by the second accident.

44. This is a matter of first impression for me. And without further guidance and based on the evidence presented I am persuaded that the Claimant's cardiac arrhythmia conditions as a whole prior to the 2013 accident was 25% and after the accident the cardiac arrhythmia conditions as a whole was 27% resulting in a two percent increase in impairment. This interpretation is also consistent with the Claimant's IME, Dr. Borzak's, testimony that based on the recurrence of Claimant's arrhythmias and the procedures the Claimant had in 2013 to treat them and render him asymptomatic it was not unreasonable to increase the Claimant's rating a few points (See DN 44 @ pg 28). I find the E/SA would therefore be obligated to pay impairment benefits based on the difference in the impairment ratings at a compensation rate based on the new date of loss.
45. In reaching this conclusion I am not persuaded based on the facts that the Claimant has a new and totally independent 27% impairment rating requiring the payment of impairment benefits based on the full 27% rating. I find from the evidence presented that the Claimant's rating for cardiac arrhythmias generally has increased from 25% to 27% based on his new accident and that the 2% increase in impairment benefits should be paid accordingly based on the compensation rate applicable to his new accident date.

**WHETHER THE CLAIMANT IS ENTITLED TO THE PAYMENT OF PENALTIES?**

46. *Section 440.15(3)(a)* provides, "Once the employee has reached the date of maximum medical improvement, impairment benefits are due and payable within 14 days after the carrier has knowledge of the impairment."
47. Although the impairment rating was somewhat of a moving target in this case the facts establish that the earliest the carrier or servicing agent had reasonable knowledge of the 27% impairment rating assigned by Dr. Borzak is when the doctor revised his impairment rating downward from 48% when deposed on July 18, 2016 and provided an explanation for said downward revision. And at that time in deposition the doctor advised that there was a few points increase in the Claimant's impairment rating. I find benefits became due within 14 days after the E/SA had knowledge of the impairment increase. And the best inference I can draw from this record is that the knowledge and notice was secured at that deposition reflecting an increased rating over the 25% rating previously assigned to 27%. The Benefits became payable 14 days after such knowledge.

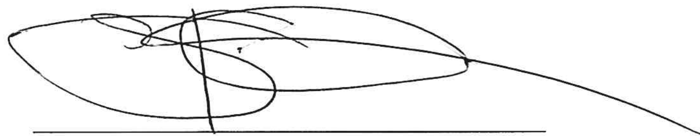
**WHETHER THE CLAIMANT IS ENTITLED TO THE PAYMENT OF HIS REASONABLE ATTORNEY FEES AND COSTS AT THE EXPENSE OF THE E/SA?**

48. I find that as challenged benefits have been awarded, the Claimant is entitled to the payment of his reasonable attorney fees and costs at the expense of the E/SA for the benefits secured. Jurisdiction is reserved to determine the amount of said fees and costs in the event the parties are unable to agree.

**WHEREFORE** it is hereby **ORDERED** and **ADJUDGED** that:

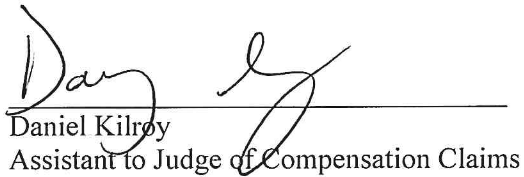
1. The request for the payment of impairment benefits based on the 38% rating assigned by Dr. Castello is denied. Impairment benefits are awarded based on the 27% rating assigned by Dr. Borzak representing a 2% increased impairment rating from his 1999 accident. The impairment benefits are to be paid with appropriate statutory interest and penalties.
2. The request for the payment of the Claimant's reasonable attorney fees and costs at the expense of the E/SA for benefits secured under this order is granted. Jurisdiction is reserved to determine the amount of said fees and costs if the parties cannot agree.
3. Jurisdiction is reserved for the E/SA establish any claim to prevailing party costs pursuant to *Section 440.34(3), Florida Statutes*, and the case of ***Aquilar v. Kohl's Department Stores, Inc., 68 So.3d 356 (Fla. 1st DCA 2011).***

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida.



Honorable W. James Condry, II
Judge of Compensation Claims
400 West Robinson Street, Suite 608-North
Orlando, Florida 32801-1701

I HEREBY CERTIFY that the Judge of Compensation Claims entered the foregoing Compensation Order. A true and accurate copy of the order was electronically served on the parties' attorneys of record on this the 31st day of January 2017.



Daniel Kilroy
Assistant to Judge of Compensation Claims

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