

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

Jerome Vermette,	)	
	)	
Employee/SA claimant,	)	
	)	
vs.	)	OJCC Case No. 08-021389EHL
	)	
Hillsborough County Sheriff's Office,	)	Accident date: 4/28/2008
	)	
Employer,	)	
	)	
and	)	
	)	
Commercial Risk Management,	)	
	)	
Carrier/Service Agent.	)	
	)	
_____	)	

FINAL COMPENSATION ORDER ON PETITION FOR BENEFITS OF 8/11/08

THIS CAUSE was heard before the undersigned at Tampa, Hillsborough County, Florida on 5/7/09, upon the Claimant's claims for TTD, medical authorization and costs and attorney's fees. The petition for benefits was filed 8/11/08. Mediation occurred on 11/25/08 and the parties' pretrial compliance questionnaire was filed 11/25/08. Claimant's counsels' Tonya Oliver, Esq. and Scott Tremblay, Esq. were present on behalf of Claimant. L. Gray Sanders, Esq., was present on behalf of the Employer/Carrier (hereafter "E/SA). Kim Santiesteban was also present during trial.

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 4/28/08.
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.

Exhibits received into evidence at the time of trial are listed on the evidence log at the end of this order.

In addition to the exhibits, Claimant and Dr. Mathias testified live.

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

1. Establish compensability.
2. TTD from the date of accident until claimant retired. Initially at trial claimant framed this claim as TTD from date of accident and continuing but at the end of trial claimant agreed he was only seeking TTD until he retired, 6/30/08.
3. Evaluation and treatment by 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. Claim barred by statute of limitations.
2. Claimant failed to provide timely notice.
3. No coverage under Chapter 112; claimant is not entitled to the presumption.
4. There is no medical evidence of entitlement to TTD.
5. The employment is not the major contributing cause of the claimant's injury and disability.
6. Claimant is voluntarily limiting his income.
7. 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 5/7/09, at the time closing arguments were made by the parties.

#### Recitation of the factual evidence

4. The claimant testified at trial and in his deposition he was 56 years old. He had some post-graduate course work in criminal justice. He began working for the Sheriff's Department in 1977 after passing a pre-employment physical. He worked as a detective in the white collar unit of the property bureau the last 27 years of his employment. He worked 42 hours/week, Monday through Friday but he was on call and might have to

work evenings. His job required him to interview suspects and witnesses and to arrest suspects. He had deadlines to complete paperwork and to close cases. He had a heavy workload. Every year he was required to pass a physical agility test (PAT) which required him to run a one mile obstacle course, jumping over a platform, weaving between pylons, and crawling on the ground covered in sand, within 7 minutes and 5 seconds. He also had an off-duty job at a local sports arena but he stopped working that job in late March or early April 2008. He had entered the deferred retirement option program (DROP) and was required to retire by 6/30/08. On 4/11/08 he had notified the sheriff (E/SA exhibit 6) that his last day of work would be 5/30/08 and he wanted to be paid accrued vacation time from 5/31/08 through 6/30/08, the date of his retirement. The sheriff allowed officers to accumulate unused sick leave and vacation leave from year to year. However the amount of vacation time was capped (in other words, if he did not use it, he would lose any amount over the cap). He could accrue sick leave without limit but would be paid 100% of the first 480 hours, none of the next 480 hours, and one half of all hours over 960 hours. He had accumulated over 2000 hours of sick leave by the time of his retirement.

5. Claimant testified he was first diagnosed with a heart condition in 1997 when he was hospitalized because of a rapid heart beat and fluid in his lungs. He could not recall telling Dr. Pascual at the time of the hospitalization that he had been previously diagnosed with high blood pressure and did not recall being treated for high blood pressure while in the hospital. He was in the hospital two weeks and then returned to work. He had continued to treat with the cardiologist, Dr. Pascual, after 1997. He began treating with Drs. Cromer and Schweinhaupt, his primary care physicians' group, in 1995. Dr. Cromer first began treating him for high blood pressure 1/16/02 and for diabetes on late 2003. He also had low thyroid and was being treated for that condition. Both his brother and sister had low thyroid as well. In his deposition claimant testified he had been diagnosed with high blood pressure in the early 1990's but at trial he explained that he confused hypertension with hyperthyroid. I am puzzled by that testimony because the medical records are replete with claimant's statements that he had high blood pressure as far back as the early 1990's and because claimant has low thyroid, or hypothyroid, not excessive thyroid, or hyperthyroid.
6. In 2007, as late as September, he failed his PAT and was told he would have to retest every month until he passed. He assumed if he did not pass the test he would be terminated. In addition claimant testified in his deposition he had difficulty working the last 6 or 8 months because he was always tired. He saw Dr. Pascual in December 2007 as part of his getting ready to retest. But the sheriff never actually asked him to take the PAT again. On 4/11/08 he completed a retirement form at his supervisor's request indicating he would work until 5/30/08 and then take vacation until the day of his retirement, 6/30/08. He believed it was financially advantageous to work until the last day he could before the DROP required he leave. (I suppose this was so because claimant would continue to accumulate sick leave and retirement pay but as events transpired, claimant only lost one month of accumulated sick leave and did not testify that his DROP payout changed in any way because he stopped coming in to work a month earlier than planned so I was never certain what the financial disadvantage that claimant emphasized really was.) On 4/28/08 claimant returned to Dr. Pascual for a

regularly scheduled appointment (he went twice a year) and once again discussed his job and the PAT. He was not feeling well—he was tired, he had shortness of breath, his legs were swelling, he could not run—even though his test results did not show any worsening of his cardiac condition and he asked Dr. Pascual if Dr. Pascual thought he was going to be able to continue working until 6/30/08 (something that was slightly incorrect because claimant was only going to actually continue working until 5/30/08 and would have been on vacation after that until his actual date of retirement, 6/30/08). Dr. Pascual stated he was at high risk of a heart attack or stroke if he continued to work and claimant asked Dr. Pascual for a letter to give to his employer so he could take sick leave.

Claimant took that letter to his sergeant the next day and completed sick leave requests for the rest of April and all of May 2008 (claimant's exhibit 3). One or two of those days during that time period were paid as holiday pay and the rest was paid as sick leave.

7. Claimant learned of the provisions of F.S. 112.18 in December 2007 from a co-employee, Mr. Garcia. Claimant filed his first workers' compensation notice of injury on 2/14/08. At that time he reported the date of accident as 10/9/97, the date he was hospitalized. That claim was denied because police officers were not covered by F.S. 112.18 at that time. He did not pursue the matter further until he saw Dr. Pascual 4/28/08 and realized he was going to have to stop work immediately. Once he saw Dr. Pascual he filed a second accident form using the date of 4/28/08 as the date of accident. He continued to see Dr. Pascual and Dr. Cromer twice a year. He took a number of medications, some for his heart and some for his diabetes. He weighed 310 to 315 pounds; he weighed 233 pounds in 1977. He had been able to lose some weight but his thyroid condition, inability to exercise and his diabetes medication made weight loss difficult. His physical condition was getting worse and he had swelling and tingling in his feet (he had been diagnosed with neuropathy), chest pain with pain in his left arm, dizziness, blurred vision, fatigue and shortness of breath. No doctor had suggested he return to work. When he saw Dr. Talit for the IME, Dr. Talit did not ask him what his specific job duties were. Since his retirement he did some yard work, tried to ride a stationary bicycle and babysat his grandchildren two to three times a week.
8. Medical records from Dr. Cromer, claimant's primary care physician, were largely illegible. Claimant had some complaints of knee pain in 2006 but I could not determine if he complained about his knee after that. Records regarding prescriptions were few and mostly contained in illegible chart notes.
9. Medical records from Dr. Leffers, orthopedist, indicated claimant had a torn medial meniscus repaired in 2006. Claimant also saw Dr. Lunseth, orthopedist, for this condition on one occasion.
10. Medical records from Dr. Swierzewski, urologist, were irrelevant to this case but it was interesting to note that he was the only physician who reported a complaint of fatigue and that was recorded on only one of three visits in 2008.
11. Dr. Pascual, cardiologist, was deposed for historical purposes only. Dr. Pascual testified he began treating claimant 10/9/97 for atrial fibrillation and an enlarged heart. Claimant had been diagnosed with hypertension before that but was not treating it. Claimant had a cardiac catheterization and was subsequently treated with medications and cardioversion (an electrical shock to the heart to restore proper rhythm). After 11/20/97, claimant was seen again on 1/19/00, 7/26/00, 1/30/02, 3/18/02, 7/15/02, 1/13/03, and 9/29/03.

Claimant did not return to Dr. Pascual until 2/27/06. He was then seen 11/26/07, 4/28/08 and 10/27/08. At the last visit claimant continued to have dilated cardiomyopathy which had improved since 1997 but which Dr. Pascual did not expect to go away, atrial flutter, essential hypertension, hypolipidemia, diabetes and obesity. The visits after 1997 were routine office visits. Claimant's condition had improved from what it was in 1997 and was currently stable and typical for someone with cardiomyopathy. Claimant's weight fluctuated; he tried to lose weight but had difficulty doing so. There was very little change in claimant's medications since 2002. In April 2008 he wrote a letter for claimant at claimant's request. Dr. Mathias and claimant had discussed claimant's job several times and Dr. Mathias had advised him to retire several times. In April 2008 claimant said he needed a letter so he could retire and Dr. Mathias provided one. He was not certain what claimant's job duties were and had not seen a job description. Dr. Mathias believed claimant suffered from job stress that made it harder for him to lose weight and that he needed to retire because of that stress factor. In addition claimant was not capable of chasing after a suspect because of his weight and heart condition. Claimant was hospitalized in 1997 for his cardiac condition.

12. I carefully reviewed the records attached to Dr. Pascual's deposition. Rather surprisingly, despite claimant's testimony that he had shortness of breath, chest pain with pain in his left arm and dizziness, these complaints were never recorded by Dr. Pascual. To the contrary, Dr. Pascual noted an absence of these complaints in every chart note, except that of 11/26/07 when there are no comments one way or the other about symptoms although Dr. Pascual recommended a nuclear stress test because he was concerned that claimant's diabetes might prevent him from feeling chest pain. Dr. Pascual kept records of claimant's medications and I noted that on 10/29/97 claimant was using Altace, a medication that according to the Physician's Desk Reference is used for treatment of high blood pressure and heart failure as well as Lasix, a diuretic frequently prescribed for treatment of high blood pressure. If claimant had been prescribed those medications for his symptoms of enlarged heart, I would have expected their use to be discontinued but claimant continued to take those drugs for years. In 2002 claimant was switched from Altace to Lotrel, another medication for treating high blood pressure. So while claimant may be technically correct that Dr. Pascual did not begin treating his high blood pressure until 2002, he was clearly under treatment for that condition from the time he left the hospital in 1997. Dr. Pascual's note from the hospital indicated claimant had been treated for hypertension for one year but was not then on any medication for that condition. Claimant was discharged on both Altace and Lopressor (another medication for hypertension). Claimant testified at trial that he confused hypertension with his thyroid condition. I note that Dr. Pascual always commented on both conditions in his records and so while claimant may confuse terminology, Dr. Pascual did not.
13. Dr. Talit, cardiologist, testified in his deposition he performed an IME of claimant on 12/19/08. Claimant had all risk factors for heart disease except that he was not a smoker. Claimant was obese at the time he started employment. Claimant was diagnosed with diabetes by 2003. Claimant was diagnosed with atrial fibrillation in 1997. He had been diagnosed with hypertension several years before that but claimant said he did not like taking medications and apparently had not treated his hypertension. Claimant was not compliant with Dr. Pascual's recommendation that he lose weight. Claimant was

morbidly obese although he had lost some weight. Claimant's father had heart disease and hypertension as well as diabetes. Claimant's brother had hypertension and his sister had heart disease. There was a pattern of thyroid problems in his brothers and sisters. Claimant was at risk to suffer from hypertension because of his obesity. Claimant had essential hypertension; there was no known cause for essential hypertension. Dr. Talit believed that claimant suffered from tachycardia mediated cardiomyopathy in 1997 (a condition wherein the pumping ability of the heart decreases because of extended periods of atrial fibrillation). That condition improved once claimant began treating the atrial fibrillation and his heart function (that is, the amount of blood pumped out of the heart) improved, although it was still not normal. Claimant was then able to work until his condition deteriorated again in 2008 and he became tired and began having swelling in his legs again. Dr. Talit had no explanation for the deterioration of claimant's condition because claimant's testing showed his ejection fraction (the amount of blood pumped out of the heart) in 2008 was unchanged from the prior testing. Claimant's stress test showed no evidence of blockages. There were no objective findings to explain the change in claimant's condition. As of the date of Dr. Talit's examination, claimant had essential hypertension (controlled with medication), sleep apnea, hyperlipidemia, mildly impaired contractility and low thyroid. Neither claimant's hypertension nor heart disease was disabling. Claimant's pre-employment physical did not indicate he had signs of hypertension or heart disease when he was hired. Claimant's obesity pre-existed his hiring. Diabetes, obesity and hypertension can predispose an individual to developing congestive heart failure, some arrhythmias, sleep apnea and cardiomyopathy. Dr. Talit disagreed with Dr. Pascual's conclusion that claimant had idiopathic cardiomyopathy; Dr. Talit believed claimant's heart enlargement was a result of his atrial fibrillation. Cardiomyopathy is a type of heart disease and more specifically is a disease of the heart muscle. Dr. Talit agreed with Dr. Pascual that claimant suffered from right bundle block, which was a disorder of the electrical connections within the heart, but stated that condition was of no clinical significance. It did not limit claimant and did not require treatment. Claimant's atrial fibrillation could have been caused by his obesity, hypertension, or sleep apnea. Claimant's essential hypertension was arterial in nature. Risk factors were conditions that predisposed an individual to acquiring a medical condition. They are medical conditions in and of themselves which are associated with other conditions. Obesity is a major factor in producing hypertension. There was nothing in medicine to determine causes of any condition; all that could be talked about were probabilities and statistically associated comorbidities. Metabolic syndrome (the combination of factors claimant had: obesity, diabetes and hypertension) is the major contributing cause of essential hypertension. It was unlikely that claimant could have the risk factors he did and not develop hypertension. There were many potential causes for cardiomyopathy. Dr. Talit was of the opinion that claimant's cardiomyopathy was caused by his tachycardia (the rapid heartbeat of atrial fibrillation). Dr. Talit did not agree with Dr. Pascual's opinion that claimant was not capable of working as of 4/28/08 although he did agree that claimant should have stopped working in 1997 until his arrhythmia was treated. Claimant told Dr. Talit his ability to exercise was impaired because of his knee condition. Dr. Talit saw no objective findings indicating claimant could not work as a detective investigating white-collar crimes which claimant described

as an easy job. Claimant could not chase criminal but he could do a desk job. He could handle a mild to moderate workload. Dr. Talit agreed that first responders, when exposed to significantly stressful events, had increased risk of heart events. But he disagreed that a police officer performing routine work was at increased risk. Stress would be a very minor risk factor for developing hypertension; claimant was much more at risk for hypertension because of his weight and age than because of stress at work. Morbid obesity was a major factor in the conditions claimant had.

14. Dr. Talit expanded on his deposition testimony at trial when he testified he did not agree claimant had signs of left ventricular hypertrophy. He reviewed at least 4 ultrasounds of claimant's heart and the measurements on those tests were so close to normal that if claimant had such hypertrophy, it would not be symptomatic. He also disagreed that claimant continued to suffer from cardiomyopathy because claimant's heart size was only one millimeter more than what was considered normal and his ejection fraction was only a little bit below normal. Dr. Talit agreed that in 1997 claimant was significantly ill because of cardiomyopathy but stated that claimant had improved since then and he no longer considered claimant to be suffering from this condition. Claimant had continued to have normal heart rhythm since being treated in 1997. Dr. Talit's opinion regarding claimant's ability to work as a detective was that he was just as capable of doing that sort of work as he was in the time period before 4/28/08 (except while recovering from cardiomyopathy in 1997). However Dr. Talit did not think that claimant should ever have been working in a job where he might have to chase people because of his weight and high blood pressure. Because of claimant's weight and family history, Dr. Talit stated he would have high blood pressure just from walking and running would have elevated it too much to be safe.
15. Dr. Mathias, cardiologist, testified in his deposition he performed an IME of claimant on 1/26/09. Claimant was overweight. His EKG revealed a complete right bundle-branch block (a slowing of the electrical current). This block was a result of damage to the electrical system on the right side of the heart. Dr. Mathias diagnosed claimant with idiopathic cardiomyopathy (diagnosed in 1997), left ventricular hypertrophy, essential hypertension, a history of atrial fibrillation, diabetes, dyslipidemia, and hypogonadism. Cardiomyopathy is a form of heart disease: the heart muscle is flabby and diseased, the heart is enlarged, and the heart does not pump well. This condition had no known cause and was not related to accepted risk factors for coronary artery disease. Claimant's cardiomyopathy had stabilized. Ventricular hypertrophy (another type of heart disease) is thickened heart muscle, frequently due to hypertension. Essential hypertension is arterial high blood pressure with no known cause. Atrial fibrillation, another type of heart disease, is a condition where the upper chambers of the heart beat too rapidly, resulting in a rapid and irregular heartbeat. If an individual suffered from atrial fibrillation that was difficult to the control, then he could undergo an ablation procedure to destroy the malfunctioning area of the heart and prevent an irregular heart beat from starting. Dyslipidemia was a disorder of the cholesterol and lipids. That condition was not the cause of claimant's heart diseases. Hypogonadism was low testosterone. Claimant's pre-employment physical showed no signs of hypertension or heart disease. Based on claimant's height and weight when he was hired, claimant was not obese at the time of hiring although he was slightly overweight for his build at that time. Claimant

was retired but had been employed as a detective for 31 years. Claimant's employment was significant because epidemiological studies showed law enforcement was an occupation associated with a high incidence of heart disease. Dr. Mathias agreed that claimant should have ended his employment because of his cardiac problems. Claimant was not capable of working as a police officer: he was tired all the time and short of breath; he was taking a number of medications; and he had no energy. Dr. Mathias did not believe claimant was physically capable of working as a police officer. However he had not seen a job description for the position of detective and was not aware of the requirements necessary to hold that job. Claimant had a 55% impairment rating from his cardiomyopathy. He had a 20% rating from his atrial fibrillation. He had a 30% rating from his ventricular hypertrophy. He was unable to combine the ratings to give a body as a whole rating. Claimant was obese. Obesity did not cause cardiomyopathy. It did not cause ventricular hypertrophy. It did not directly cause atrial fibrillation. It was a risk factor for hypertension but not a cause of hypertension. A risk factor was a condition that is statistically associated with a higher incidence of a disease. A cause is a condition that inevitably leads to a disease. Claimant's obesity was his only risk factor for cardiomyopathy. His hypertension and cardiomyopathy were risk factors for atrial fibrillation. Obesity and family history are risk factors for developing essential hypertension; claimant had both those risk factors. Claimant needed to continue to take medications for his cardiac conditions and remain under care with a cardiologist. Claimant did not have coronary artery disease. There was an association between being overweight and hypertension as well as coronary artery disease. Essential hypertension is associated with increasing age. While there was an association between age and coronary artery disease, claimant did not have coronary artery disease. There was no association between age and cardiomyopathy. Dr. Mathias believed claimant was compliant in using his medications and trying to lose weight. Claimant did have metabolic syndrome which was diagnosed when claimant had at least three of several conditions. Claimant had hypertension, abdominal obesity, diabetes, and high triglycerides and thus had metabolic syndrome. However this syndrome was a risk factor for coronary artery disease which claimant did not have. The risk factors for hypertension were family history, obesity, smoking and stress; in claimant's case, only one of these (stress) was associated with his employer. Dr. Mathias was not aware that claimant did not treat with Dr. Pascual from 2003 to 2006.

#### 16. Findings of fact and conclusions of law

17. F.S. 112.18(1) provides, "Any condition or impairment of health of any Florida state, municipal, county, port authority, special tax district, or fire control district firefighter or any law enforcement officer or correctional officer as defined in [s. 943.10\(1\)](#), (2), or (3) caused by tuberculosis, heart disease, or hypertension resulting in total or partial disability or death shall be presumed to have been accidental and to have been suffered in the line of duty unless the contrary be shown by competent evidence. However, any such firefighter or law enforcement officer shall have successfully passed a physical examination upon entering into any such service as a firefighter or law enforcement officer, which examination failed to reveal any evidence of any such condition."

18. I find claimant was a law enforcement officer as required by the statute.
19. I find claimant's pre-employment physical failed to reveal any evidence of heart disease or hypertension. E/SA argued that claimant's weight at the time he was hired implied he had hypertension but I cannot make such an inference and the medical testimony was that the records of the pre-employment physical did not show any evidence of heart disease or hypertension.
20. I find claimant suffered a partial disability as a result of his hypertension and heart disease. Both Drs. Mathias and Talit agreed that claimant should not perform at least some of the duties of a police officer. Dr. Talit was of the opinion that claimant should never have been running because his weight would cause a potentially dangerous rise in claimant's blood pressure. The fact that Dr. Talit felt this limitation of part of claimant's required job duties existed before 4/28/09 is irrelevant to F.S. 112.18 which does not require that the total or partial disability arise at the time the condition is diagnosed, only that claimant have been diagnosed with one of the conditions after employment and have some disability because of it. Claimant may have had a job that required him to run only once a year (at his PAT) but he was nonetheless required to be able to run in order to keep his job. Claimant then lost actual time from work from 4/28/08 through 5/30/08 and was paid sick leave during that time period. E/SA seemed to argue that the only reason claimant took sick leave was because he became aware that he would not be able to claim the advantage afforded by the presumption of F.S. 112.18 unless he had some period of disability. However claimant could simply have taken one day of sick leave on 6/29/09 and as long as he had a note from Dr. Pascual stating he could not work that day because of his blood pressure or his heart, he would have met the requirements of F.S. 112.18. I agree that some of claimant's testimony is surprising; for instance, I am baffled by his changed testimony regarding when he was diagnosed with hypertension and his complaints at trial that do not appear in any of the Dr. Pascual's reports. But none of these factual issues are relevant to the application of F.S. 112.18 and E/SA did not raise the issue of misrepresentation. E/SA urged that I reject the testimony of Dr. Pascual regarding claimant's inability to work on 4/28/08 because Dr. Pascual was not an authorized doctor and not an IME or EMA. Both the testimony of Dr. Talit and Dr. Mathias support a finding the claimant's inability to work after 4/28/08 was related to his heart conditions and support a finding that claimant had at least some disability from his heart conditions, so that there is evidence from two IME physicians that I am relying on and not solely testimony from an unauthorized doctor.
21. Because claimant was a law enforcement officer, because he developed hypertension and heart disease after he passed a pre-employment physical showing no signs of such disease, and because he was disabled from some of his required job functions, and because he was paid sick leave from 4/28/08 through 5/30/08, I find claimant met all of the qualifying factors of F. S. 112.18 and was able to take advantage of the presumption. Once I have made this finding, E/SA's defense that the employment was not the major contributing cause of claimant's injury and disability became irrelevant.
22. I must next determine whether E/SA successfully rebutted the presumption that claimant's hypertension and heart disease arose from his employment and first determine what standard of proof (clear and convincing versus competent and substantial) is required.

23. Punsky v. Clay County Sheriff's Office, \_\_\_ So.2d \_\_\_, 34 FLWD-516 (Fla. 1<sup>st</sup> DCA 2009) clarified the issue of level of proof. I am aware that the decision is currently before the Florida Supreme Court for review but for now Punsky is controlling. The court in Punsky reviewed the decisions in Caldwell v. Division of Retirement, 372 So.2d 438 (Fla. 1979) and City of Temple Terrace v. Bailey, 481 So.2d 50 (Fla. 1<sup>st</sup> DCA 1985) and concluded that if claimant provides proof of a work-related cause for his/her heart condition, then E/SA must rebut causation by clear and convincing evidence. But if claimant relies on the presumption in F.S. 112.18 as a substitute for proof of causation, then the level of evidence required to rebut the presumption drops to competent and substantial. I find in this case that Dr. Mathias did not provide any testimony establishing a causal link between claimant's hypertension and heart disease and claimant's employment, only risk factors. I find claimant can establish compensability in this matter only by reliance on the presumption contained in F. S. 112.18. Therefore E/SA must provide only competent and substantial evidence of a non-industrial cause of claimant's condition, not clear and convincing evidence.
24. E/SA presented Dr. Talit's testimony in order to rebut the presumption. The over-all conclusion I have formed regarding Dr. Talit's testimony was the claimant suffered from obesity which put him at risk of developing a number of conditions, including diabetes and high blood pressure. But taking Dr. Talit's testimony as a whole, I do not find that Dr. Talit provided competent and substantial evidence that there was some non-industrial cause of claimant's hypertension or enlarged heart, only that claimant's obesity put him at risk for the development of certain conditions. I do not find a catch-all question in a deposition ("Have all your answers been within a reasonable degree of medical certainty or probability?") to be sufficient to provide competent and substantial testimony regarding causation. I therefore find E/SA did not rebut the presumption afforded claimant by F. S. 112.18.
25. I find the employer was on actual notice of claimant's conditions (hypertension and enlarged heart) and since the employer had actual notice of claimant's "injury," it had sufficient notice pursuant to the requirements of F.S. 440.185.
26. While E/SA raised the statute of limitations as a defense in this matter, it was not argued at trial or in E/SA's trial memo. Since claimant's petition was filed less than two years after his date of disability, I am not certain why this defense was raised unless E/SA intended to argue that the disability began in 1997 when claimant was hospitalized. Nonetheless, E/SA did not explain or argue this defense and failed to produce testimony establishing that claimant was provided the necessary notice of the statute of limitations. I therefore reject this defense.
27. Lastly E/SA defended the claim for TTD on the grounds that claimant was voluntarily limiting his income. To the extent that claimant took vacation pay from 5/31/08 through 6/30/08 and retired thereafter, I agree. However claimant conceded there was no entitlement to TTD for any time period other than 4/28/08 through 5/30/08 at trial and I reject the defense as to that time period.
28. In sum I find claimant's hypertension, cardiomyopathy and ventricular hypertrophy are compensable conditions pursuant to F.S.112.18. I further find claimant was disabled for a period of one month, 4/28/08 through 5/30/08, as a result of his compensable conditions and was entitled to TTD during that time period, together with interest and penalties.

The parties agreed they would administratively determine whether claimant was due any additional monies during that time period (since he was paid sick leave).

29. I find claimant to be entitled to continuing treatment with a cardiologist as a result of his compensable conditions.
30. Because I have awarded the benefits sought, I award 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.

WHEREFORE, IT IS ORDERED AND ADJUDGED:

1. Claimant's hypertension, cardiomyopathy and ventricular hypertrophy are compensable.
2. E/SA shall pay claimant TTD from 4/28/08 through 5/30/08, together with interest and penalties with credit being given to E/SA for sick leave benefits already paid to claimant.
3. E/SA shall pay claimant's counsel a reasonable attorney's fee and taxable costs. 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 ELECTRONICALLY MAILED to the attorneys this 12th day of May, 2009, in Tampa, Hillsborough County, Florida.



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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

EVIDENCE LOG Jerome Vermette

OJCC # 08-021389EHL

TRIAL DATE 5/7/09

COURT EXHIBIT	JOINT EXHIBIT	CLAIMANT EXHIBIT	E/SA EXHIBIT
1. Pretrial stipulation and order		1. Deposition of Dr. Mathias	1. Composite of medical records

		electronically filed 4/9/09	electronically filed 4/7/09, admitted for historical purposes only.
2. Claimant's trial memo		2. Claimant's list of prescriptions.	2. Deposition of claimant electronically filed 5/4/09.
3. E/SA's trial memo		3. Leave request forms.	3. Deposition of Dr. Talit, electronically filed 5/4/09.
4. Petition for benefits			4. Deposition of Dr. Pascual electronically filed 5/4/09, admitted for historical purposes only (except for those records belonging to another patient)
			5. Description of accident form.
			6. Retirement form

Jerome Vermette  
16424 Turnbury Oak Drive  
Odessa, Florida 33556

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

Commercial Risk Management  
Post Office Box 18366  
Tampa, Florida 33679

Tonya Anne Oliver, Esquire  
tonyaaoliver@yahoo.com

L. Gray Sanders, Esquire  
gsanders@barbaslaw.com

