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

Victor D. Trapero,
Employee/Claimant,

vs.

Miami Dade County Fire Rescue/Miami Dade County Risk Management,
Employer/Carrier/Servicing Agent.

/

OJCC Case No. 14-007409RJH

Accident date: 9/30/2013

Judge: Ralph J. Humphries

FINAL COMPENSATION ORDER

This Cause came on for a merits' hearing before the undersigned Judge of Compensation Claims on **July 14, 2015** with the undersigned presiding from Jacksonville, Duval County, Florida. Claimant's counsel, Tonya Oliver, Esquire, was also in Jacksonville. The parties and counsel for the employer/carrier, Lynda Slade, Esquire, appeared in Miami Dade County, Florida and the hearings proceeded by video teleconference. The subject matter of this hearing was petitions for benefits filed on April 1, 2015 and January 26, 2015. Mediation conferences on the petitions were held on June 30, 2014 and April 10, 2015. The claimant, **Victor Trapero**, was present and represented by Tonya Oliver, Esquire. The employer/carrier, **Miami Dade County Fire Rescue/Miami Dade County Risk Management**, hereinafter referred to as the "Employer" or as the "E/C" was represented by Lynda Slade, Esquire. Live testimony was received from the claimant. Additional testimony was received from Jennifer Linares, who is the claims adjuster for the E/C. Other testimony was presented by deposition.

The following stipulations have been reached between the parties:

1. The court has jurisdiction of the parties;
2. Venue properly lies in Miami Dade County, Florida;
3. The date of accident is alleged to be September 30, 2013;
4. There was an employer/employee relationship at the time of the alleged accident;
5. Workers' compensation insurance coverage was in effect on the date of accident;

6. Timely notice of the accident, injury, or occupational disease was given by the claimant on the date of accident or was not at issue;
7. Timely notice of the final hearing has been given;
8. The AWW was not in issue.

The substantive claims for determination at the current merits' hearing are the following:

1. Compensability of disabling arterial and cardiovascular hypertension/heart disease;
2. Authorization of care and treatment with a cardiologist, primary care physician or internal medicine specialist for above condition;
3. Payment of 7% impairment rating for condition per Dr. Borzak; and
4. Penalties, interest, costs, and attorney's fees.

The defenses raised by the E/C were the following:

1. Section 112.18(1) does not apply to claimant as claimant had competent evidence of hypertension on his pre-employment physicals. Claimant was hypertension at the initial pre-employment physical and had an abnormal EKG and was referred to a cardiologist for more thorough workup prior to being approved for firefighter duty.
2. There is competent and substantial evidence of other non-work related factors which are causing claimant's hypertension. Even if there was no evidence of hypertension on claimant's pre-employment physicals, there is evidence of non-work related causes.
3. Claimant's diagnosis of hypertension has not resulted in a partial or total disability. Claimant has not presented any records that his condition resulted in a partial or total disability as required in order for the heart bill statute to apply.
4. Claimant not entitled to payment of indemnity benefits as his claim is not compensable under the heart bill and benefits cannot be paid on a denied claim.
5. Penalties, interest, costs, and attorney's fees are not due or owing.

The following documents were admitted into evidence at the current hearing:

Judge's Exhibits:

1. Petition for Benefits filed with DOAH on April 1, 2014;

2. Response to Petition for Benefits filed with DOAH on April 11, 2014;
3. Petition for Benefits filed with DOAH on January 23, 2015;
4. Response to Petition for Benefits filed with DOAH on February 4, 2015;
5. Order Denying Claimant's Motion In Limine filed with DOAH on February 4, 2015;
6. Order Appointing EMA filed with DOAH on February 4, 2015;
7. Order Determining Questions to Be Asked and Documents to Be Provided EMA filed with DOAH on February 17, 2015;
8. EMA report of Dr. Pianko filed with DOAH on March 23, 2015;
9. Pretrial Questionnaire completed by the parties and filed with DOAH on June 8, 2015;
10. Claimant's Prehearing Statement admitted for purposes of argument only and not as evidence, filed with DOAH on July 9, 2015;
11. Employer/Carrier's Trial Memorandum admitted for purposes of argument only and not as evidence, filed with DOAH on July 10, 2015.

Joint exhibits:

1. Deposition of Dr. Pianko with attachments;
2. Deposition of Dr. Madeline Rodriguez-Alonso with attachments;
3. Deposition of Dr. José Gomez-Rivera with attachments;
4. Deposition of Dr. Michele Grundstein with attachments.

Claimant's Exhibit:

1. Deposition of Dr. Steven Borzak with attachments.

Employer's Exhibits:

1. Deposition of Dr. Stratego Castanes with attachments;
2. Deposition of the claimant.

In my determination herein I have attempted to distill all the testimony and salient facts together with the findings and conclusions necessary to the resolution of this matter. I have not necessarily attempted to summarize the substance of the claimant's testimony or the testimony of any live or deposition witness, nor have I attempted to state nonessential facts.

Because I have not done so should not be construed that I have failed to consider all of the evidence.

Based upon the evidence, I make the following findings of fact and conclusions of law:

1. I have jurisdiction of the parties and the subject matter.
2. The stipulations of the parties are accepted and adopted by me as findings of fact.
3. The evidence closed in this matter on July 14, 2015 after which closing arguments were made by the parties.
4. Claimant seeks to establish he suffered a compensable accident under the provisions of Florida Stat. §112.18 (1) occurred on September 30, 2013. In order to do so, the claimant must prove 4 elements to establish the presumption of a compensable condition. There is no dispute that he is a member of the protected class and that he has developed hypertension, a covered condition. The employer/carrier disputes that he underwent a pre-employment physical that failed to reveal evidence of hypertension and also disputes that claimant's hypertension resulted in any disability.
5. According to the claimant's testimony, he was working the morning of September 30, 2013 in a light duty capacity when he suffered severe headaches. As he was going home, he stopped at a fire station to take his blood pressure. His supervisor took his blood pressure and reportedly told the claimant his pressure was 184/126. E/C's objection to this testimony was sustained although I allowed the testimony to establish claimant's state of mind but not as proof of the blood pressure reading obtained. The claimant was then transported to the hospital. During transport, an IV was started that included medication which, according to the claimant, afforded him relief. E/C's objection to this testimony was also sustained with the testimony allowed to establish claimant's state of mind but not the purpose of the medication reportedly delivered. He was taken to West Baptist Hospital emergency room. No records from West Baptist Hospital were admitted into evidence. A "supervisor's report" that reportedly contains a blood pressure reading is referenced by Dr. Borzak. No such report was placed into evidence.
6. For the reasons discussed hereafter, I find the claimant has failed to prove by competent evidence a hypertensive event on September 30, 2013 or that there was any resulting disability. While there is no dispute a blood pressure reading of 184/126 is hypertensive, there is an absence of competent evidence to prove claimant's blood pressure reached

that level on that date. There is no evidence in the record showing the supervisor had the requisite knowledge or skill to properly perform a blood pressure test. Claimant argues there is sufficient evidence to establish the blood pressure and disability based upon the testimony of Dr. Borzak. Dr. Borzak, however, relies primarily on the supervisor's report which is not before me and his understanding of medical records from West Baptist Hospital which also are not before me. In his report, Dr. Borzak wrote "a Supervisor's report noted that the claimant went to a fire station with headache and was found to have a blood pressure of 184/126." In his deposition, Dr. Borzak testified, when asked the claimant's blood pressure on September 30, 2013, "the record I have available is a supervisor's report where it was noted that he had a blood pressure of 184/126." (Page 24). At page 45, when asked if he had any medical documentation of the blood pressure reading for September 30, 2013, Dr. Borzak testified he had only the supervisor's report. He did not know the basis for the information in that report. He agreed he had no medical documentation or record indicating the claimant's blood pressure on that date. At page 47, he testified there was "evidence that the blood pressure was elevated but I don't have the documentation that says what his blood pressure was." At page 55-56, Dr. Borzak testified regarding the claimant's blood pressure on September 30, 2013 as follows: "I had indirect evidence that his blood pressure was elevated based on the supervisor's report, based on his report, based on the course of events, based on the subsequent medical reports referring to hypertension that existed before. So while it would have been nice to have – – please let me – – And the reports that released him back to work referred to hypertension that was present previously. So there is a lot of indirect evidence that his blood pressure was elevated, I just don't have the piece of paper that says what the measurement was." Later in the deposition, at pages 58-59, when asked about the claimant's disability on September 30, 2013, Dr. Borzak testified "that level of blood pressure, **the specific number**, would keep him from working on that day at that time until his blood pressure was better controlled." (Emphasis added). He went on to say, however, he would not restrict a firefighter with a hypertensive reading such as 151/73. Thus it is clear that while Dr. Borzak considered the claimant disabled if his blood pressure was 184/126, he would not opine the claimant was disabled at some lesser number such as 151/73.

7. There is nothing in the record to establish the competence of the person taking the claimant's blood pressure on September 30, 2013, the methodology employed or any

other basis to show this is evidence upon which Dr. Borzak can reasonable rely in determining claimant's blood pressure that date. Section 90.704, Florida Statutes provides that an expert may rely upon facts or data that need not be admissible in evidence if the facts or data were of a type reasonably relied upon by experts in the subject to support the opinion expressed. There is no testimony or other showing that the supervisor's report contains facts or data upon which an expert can reasonably rely in determining an individual's blood pressure. Reading Dr. Borzak's report and deposition testimony as a whole, I conclude that testimony establishes nothing more than that claimant's blood pressure was elevated on September 30, 2013. I find the opinions of Dr. Borzak are not based upon competent substantial evidence in the record and are not the type of evidence upon which I can reasonably rely to conclude anything more. As a result, I find the claimant's evidence fails to establish the level of the claimant's hypertension, if any, on September 30, 2013. Having failed to establish the level of the claimant's hypertension on that date, I find the claimant has failed to establish any disability resulting therefrom.

8. Even were I to conclude the evidence was sufficient to establish a hypertensive episode resulting in disability on September 30, 2013, I find the claimant cannot meet the requirement of §112.18(1) that he underwent a pre-employment physical that failed to reveal evidence of hypertension. In order to create that presumption, the statute requires that a claimant "must 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" hypertension. Dr. Stratego Castanes was initially authorized by the employer. It was her opinion the claimant had a diagnosis of hypertension as a result of the pre-employment physicals performed on April 21, 2005 and May 23, 2005. Dr. Steven Borzak was claimant's IME physician. His opinion conflicted with that of Dr. Castanes. As a result, Dr. Leonard Planko was appointed by me to serve as expert medical advisor. He was asked the following question: "Is there evidence of hypertension on the claimant's preemployment physicals of April 21, 2005 and May 23, 2005?" His response in his report dated March 16, 2015 was as follows: "Review of his preemployment physical including resting blood pressure as well as exercise related blood pressure shows that there is evidence of hypertension on the claimant's preemployment physicals. On April 21, 2005, his baseline blood pressure was 151/73. At 6 minutes of exercise, blood pressure went to 200/105 and then to 213/88. At the end of exercise, his blood pressure was 221/113. During

recovery at 3 minutes, blood pressure was 204/80. At 7 minutes post exercise blood pressure was 171/67. Baseline blood pressure before exercise was elevated 151/73. There was exaggerated blood pressure response to exercise with elevated systolic and diastolic blood pressure. In addition, there was a continued hypertensive response during recovery. On the second stress test 5/23/05, baseline blood pressure now was normal 130/80. There was improvement but blood pressure remained high with abnormal hypertensive response to exercise. At 8 minutes blood pressure was 201/84. At the end of exercise, blood pressure was 189/99. One minute recovery, blood pressure was 215/80: at 4 minutes blood pressure remained elevated at 195/65. Therefore, there was evidence of hypertension most prominent on April 21, 2005 with baseline blood pressure high at 151/73 before exercise and a markedly abnormal hypertensive response to exercise as well as slow return to normal during recovery. On repeat stress test 5/23/05, baseline blood pressure was better but there remained an abnormal hypertensive response to exercise." At page 32-33 of his deposition, Dr. Pianko was asked if the severe hypertensive response the claimant had on the stress test was evidence of hypertension, he responded it was. He went on to testify: "Well, again, the baseline, the first baseline supine blood pressure was consistent with hypertension. The second one was normal. But repeated on two separate stress tests a month later, a markedly abnormal hypertensive response to exercise would put him in the hypertension category. With me, I would not put him on medications at that time, but it was suggestive of hypertension, or certainly a prediction that he would develop hypertension, which in fact he did five years later."

9. Dr. Pianko's EMA opinion is presumed to be correct unless I determine there is clear and convincing evidence to the contrary. See §440.13(9)(c), Florida Statutes. To overcome that presumption, the claimant must present "evidence... of a quality and character so as to produce in the mind of the JCC a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established [and therefore the falsity or inaccuracy of the expert medical advisor's opinion]." *Walgreen Co. v. Carver, 770 So.2d 172, 174 (Fla. 1st DCA 2000).* While counsel for the claimant has challenged that opinion during the deposition of Dr. Pianko, I find the claimant has failed to present evidence sufficient to persuade me, as trier of fact, that Dr. Pianko's opinion is false or inaccurate. Thus I find the claimant has failed to establish he underwent a pre-employment physical that failed to reveal evidence of hypertension and therefore he is not entitled to the presumption afforded by §112.18(1), Florida Statutes.

10. Claimant argues I should not consider the pre-employment physical results obtained on April 21, 2005 and should rely solely on the results of the May 25, 2005 physical under the authority of *Miami-Dade County v. Davis, 26 So.3d 13 (Fla. 1st DCA 2009)* and the statutory language. I reject that argument. It is my conclusion those two examinations were all part of the single pre-employment process leading to the claimant's hire by the employer. I also conclude the facts are clearly distinguishable from those set forth in *Davis.* Claimant had an initial work up with an EKG, blood work and other evaluation on April 13, 2005. The initial stress test of April 21, 2005 followed. Although the claimant returned on May 25, 2005 for a repeat stress test, there is no evidence the other testing, that initially done on April 13, 2005, was repeated following the failed stress test of April 21, 2005. It is my conclusion the May 25, 2005 was a continuation of a single pre-employment physical process and the entirety of the results should be considered in determining if there is evidence of hypertension during the pre-employment physical. As already stated, I have concluded there was evidence of hypertension during that physical.

11. Even were I to conclude claimant had presented sufficient evidence of a hypertensive event resulting in disability on September 30, 2013 and sufficient evidence to create a presumption of occupational injury under §112.18(1), Florida Statutes, the employer/carrier can rebut that presumption by "evidence of sufficient weight to satisfy the trier of fact that the... hypertension had a non-industrial cause. It is the evidence of non-industrial causation that may be found to rebut the presumption, not the mere existence of risk factors or conditions." *Punsky v. Clay County Sheriff's Office, 18 So.3d 577 (Fla. 1st DCA 2009).* I find the opinions of Dr. Pianko meet that burden. As stated above, Dr. Pianko's opinion is presumed correct. Because of a conflict in the opinions of Dr. Castanes and Dr. Borzak on causation, Dr. Pianko was asked to address the following question: "What is/are the major contributing cause(s) for the claimant's hypertension?" He responded in his report as follows "This is a multifactorial problem and my impression is that he had borderline pre-existing hypertension at the time of his hiring. He had on two separate stress tests an abnormal exercise blood pressure response with markedly elevated systolic and diastolic lead pressure as well as slow diminution of his pressure with rasp. The claimant did have another stress test by Dr. Argulles ruled out coronary artery disease but did not address hypertension as well as abnormal response to exercise. Other contributing causes include hyperlipidemia with elevated cholesterol, low LDL, family history of hypertension and brother age 51 as well as

his father, obesity, and sleep apnea." During the course of his deposition, Dr. Pianko's opinions in this regard were challenged by claimant. While he agreed these are risk factors and that no objective test exists to establish these or any other risk factors caused claimant's hypertension, his opinion is consistent with logic and reason and supported by statistical data.

12. At page 18-19 of his deposition, Dr. Pianko expressed concern about the abnormally high blood pressure readings during the course of the exercise stress tests performed by the claimant. He, like Dr. Castanes, testified it was likely the claimant would develop hypertension. The evidence establishes the claimant did, indeed, develop hypertension in 2011. As Dr. Pianko testified at page 22, "If we didn't have the high numbers from the exercise stress test I would be less apt to correlate the two. But the fact the numbers were so high suggest to me, and you know, was not surprising to me, that he would have a higher tendency than the average person of developing hypertension." At page 22, he referred to it as "a statistical correlation. There is a greater chance to develop it."

13. At page 28 et seq., Dr. Pianko agreed claimant's sleep apnea, family history of hypertension, high cholesterol levels and obesity were risk factors and no objective tests exist that can establish those were the cause of claimant's hypertension. He went on to state, however, there are epidemiological studies supporting his conclusions. At page 30-31, he stated "The more predictors you have, the greater chance you have of developing hypertension over time." Ultimately, he was asked at page 38: "Is it your opinion that the constellation of risk factors, the severe obstructive sleep apnea, the hyperlipidemia, the family history, and the obesity are the major cause of claimant's hypertension?" Dr. Pianko responded: "Yes. Again, I was asked by opposing counsel if I could show any one particular study for any one person. No. I don't think anyone can. A lot of these things are epidemiological as to trying to put the more risk factors someone has, the more likely it is to be related to those risk factors and not essential hypertension. But any one particular person, I don't think anyone can definitively say whether risk factors actually cause the development of hypertension. But it's the likelihood of that happening which we do in clinical practice." He then testified "To be honest, the most important factor here was the exaggerated hypertensive response. I don't think that gave him hypertension, per se. I would not have put someone on medications based on that. But if this was my patient, I would have monitored them very closely. I would have looked for reduction of other risk factors, and trying to prevent the

development of hypertension. But having the exaggerated blood pressure response, having family history, having obesity and sleep apnea, these are all significant factors that give someone a higher likelihood of developing it, more than essentially just working as a firefighter." I find the opinions of Dr. Planko comport with logic and reason. I find the claimant has failed to establish the falsity or inaccuracy of the EMA opinion of Dr. Planko. I therefore accept the opinion of Dr. Planko and find the claimant's hypertension was caused by non-industrial factors and it is therefore not compensable.

Wherefore, it is CONSIDERED, ORDERED, and ADJUDGED as follows:

1. The claim for compensability of claimant's hypertension is hereby denied.
2. The claim for authorization of a cardiologist, primary care physician or internal medicine specialist is hereby denied.
3. The claim for impairment benefits is denied. The claim for penalties, interest, costs and attorney's fees is denied.
4. All pending petitions for benefits are hereby dismissed with prejudice.

DONE AND ORDERED this 22nd day of July, 2015, in Jacksonville, Duval County, Florida.

Ralph J. Humphries
Judge of Compensation Claims
Division of Administrative Hearings
Office of the Judges of Compensation Claims
Jacksonville District Office
1809 Art Museum Drive, Suite 200
Jacksonville, Florida 32207-2840
(904)348-2790
www.fljcc.org

COPIES FURNISHED:

Miami Dade County Risk Management
111 NW 1 Street Suite 2340
Miami, FL 33128
isd-mdcwc@miamidade.gov

Tonya Anne Oliver, Esquire
Bichler, Kelley, Oliver, Longo & Fox, PLLC
13031 West Linebaugh Avenue, Suite 102
Tampa, FL 33626
tonya@bichlerlaw.com,claudine@bichlerlaw.com

Lynda S. Slade, Assistant County Attorney
County Attorney`s Office
111 NW 1st Street-28th Floor
Miami, FL 33128
lslade@miamidade.gov,dianab@miamidade.gov