

STATE OF FLORIDA
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
TAMPA DISTRICT

[REDACTED]
Claimant,

OJCC Case # [REDACTED]

v.

[REDACTED]
[REDACTED] and [REDACTED] RISK,
Employer/Carrier.

Date of Accident: [REDACTED]

Nancy L. Cavey, Esq., for Claimant

[REDACTED] Esq., for Employer/Carrier

COMPENSATION ORDER

This cause came on for final hearing before the undersigned judge of compensation claims on January 22, 2009. Pursuant to Petitions for Benefits filed on July 2, 2008, July 2, 2008, November 6, 2008 and December 9, 2008, Claimant seeks: (1) a determination of the compensability of his January 9, 2008 heart attack; (2) reimbursement in the amount of \$2, 632.15 in out-of-pocket expenses associated with treatment for the heart attack; (3) authorization of a cardiologist to provide medical care; (4) payment of \$4,656.81 in outstanding balances due to various providers for care and treatment following Claimant's January 9, 2008 industrial injury; (5) payment of impairment benefits based upon an impairment rating of 25%, as opined Drs. [REDACTED] and [REDACTED]; and, (6) penalties, interest, costs and an attorney's fee.

Employer/Carrier assert the following defenses: (1) Claimant's cardiac condition is not the result of his employment with Hernando County; (2) Claimant did not suffer a compensable injury; (3) Claimant's employment with Hernando County is not the major contributing cause of his condition; (4) should Claimant establish entitlement to the presumption under §112.18, Fla. Stat., Employer/Carrier will present competent evidence to rebut the presumption; (5) no impairment benefits are due; and; (6) no penalties, interest, costs or fees are due. In addition, Employer/Carrier seek an award of costs pursuant to §440.34(3), Fla. Stat.

WITNESSES

Claimant testified on his own behalf. [REDACTED], Human Resources Director, [REDACTED] testified for Employer/Carrier.

DOCUMENTARY EVIDENCE

Petitions for Benefits filed on 7/2/08, 7/2/08, 11/6/08 and 12/9/08	Claimant's Composite Exhibit #1
Deposition of [REDACTED], M.D. taken on 1/15/09	Claimant's Exhibit #2
Deposition of [REDACTED], M.D. taken on 1/14/09	Claimant's Exhibit #3
Medical Composite	Claimant's Exhibit #4
Uniform Pre-Trial Stipulations	Joint Exhibit #1
Deposition of [REDACTED], M.D. taken on 1/7/09	Employer/Carrier's Exhibit #1

FINDINGS OF FACT

1. The undersigned judge of compensation claims has jurisdiction over the parties and the subject matter of this proceeding.
2. All matters upon which the parties have reached agreement as set forth in the pre-trial stipulation are approved and incorporated herein by reference as findings of fact.
3. In addition to the stipulations contained in the pre-trial stipulation, the parties advised the undersigned of additional stipulations.

These are, as follows:

- (a) Claimant's average weekly wage and compensation rate are \$996.20 and \$664.14, respectively, excluding fringe benefits;
- (b) Claimant was paid sick time for January 10, 2008 through April 13, 2008, during which period he was disabled;
- (c) If Claimant prevails on the issue of compensability, all bills relating to care and treatment resulting from the industrial accident will be handled administratively; and,
- (d) Claimant is a law enforcement officer, and as such is a member of the protected class defined in §112.18, Fla. Stat. (2008).

4. Claimant was employed as a deputy with the [REDACTED] Office on [REDACTED] when he suffered a heart attack. He seeks a determination that his heart attack is compensable. In support of this contention, Claimant relies upon the provisions of §112.18, Fla. Stat. (2008), commonly

referred to as the "firefighters' presumption". The statute, which applies to law enforcement and correctional officers, as well provides, in relevant part, as follows:

(1) Any condition or impairment of health of any Florida ...law enforcement 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...law enforcement officer shall have successfully passed a physical examination upon entering into any such service as a...law enforcement officer, which examination failed to reveal any evidence of any such condition. Such presumption shall not apply to benefits payable under or granted in a policy of life insurance or disability insurance, unless the insurer and insured have negotiated for such additional benefits to be included in the policy contract. §112.18(1), Fla. Stat. (2008)

5. At trial, Claimant testified that he began work as a deputy with the [REDACTED] [REDACTED] (hereinafter "[REDACTED]") in 1993. After a brief period in 2000, when he worked as a patrolman in New Hampshire, Claimant returned to [REDACTED] in 2002. He has worked as a deputy with [REDACTED] since that time.

6. On January 4, 2002, Claimant underwent a pre-employment physical examination by [REDACTED], a family practitioner. Dr. [REDACTED] found no physical abnormalities during the examination. At the time, Claimant was taking what [REDACTED] described as a small amount of Atenolol, which is a beta-blocker. This is a prescription medication used to control heart rate and blood pressure. Dr. [REDACTED] was unable to say whether Claimant was suffering from hypertension at the time of the pre-employment physical examination.

7. On cross-examination, Dr. ██████████ acknowledged that on October 24, 2002, he caused Claimant to be admitted to ██████████ Hospital¹; however, it was never made clear precisely why this was done. ██████████ testified that, at the time, Claimant's medical history included tachycardia and smoking (approximately one and a half packs per day). In addition, Claimant's father suffered from significant coronary disease such that he passed away at the age of 55. Dr. ██████████ felt that the circumstances of Claimant's father's death constituted a risk factor; but, he did not specify for what condition or disease.

8. On ██████████, Claimant was suddenly awakened with severe chest pains. He drove himself to ██████████ Medical Center, where he was admitted to intensive care by Dr. ██████████. Dr. ██████████ noted an impression of angina. Claimant was also evaluated by cardiologist ██████████ ██████████, who caused Claimant to be transferred to ██████████ Hospital for "further anticipated intervention". See, *Claimant's Exhibit #4*. Once at ██████████, Claimant's care was taken over by Dr. ██████████, an interventional cardiologist. Claimant was diagnosed with posterior wall myocardial infarction, tachycardia, hypertension, coronary artery disease, esophageal reflux and family history of ischemic heart disease. Claimant underwent a coronary arteriography, placement of a metal stent and a femoral angiography for AngioSeal² placement.

9. Dr. ██████████, a cardiologist, evaluated Claimant on October 6, 2008 in connection with an IME on behalf of Employer/Carrier. Claimant described the events which led him to seek medical attention on January 9, 2008. According to

¹ In fact, it may well have been ██████████ Hospital, where Claimant also received treatment following his industrial accident.

² AngioSeal is a vascular closure device.

██████████ Claimant reported he had no history of heart disease of any type. Asked for his diagnosis and summary of his opinion upon completion of the IME, the doctor responded:

A. My diagnosis was that he had coronary artery disease with a history of an acute heart attack that was successfully treated in January of 2008 with an emergency angioplasty and subsequent stent placement.

He also had essential hypertension, hypercholesterolemia, a history of gastroesophageal reflux disorder, a history of chronic headaches which were not by history migraine headaches, and also a history of tachycardia and palpitations.
Employer/Carrier's Exhibit #1, p. 13, lines 15-23.

10. ██████████ testified that Claimant's 25-year history of smoking approximately 20 cigarettes per day as "a major risk factor as far as the development of coronary atherosclerosis, which is the underlying process that leads to coronary thrombosis and myocardial infarction with damage to the heart muscle." *Id.*, p. 8, line 25 through p.9, line 3. ██████████ also listed family history of heart disease, hypertension and high cholesterol as risk factors for an individual being at risk for heart disease. Several times during his deposition, Dr. ██████████ confirmed that essential hypertension and arterial hypertension are the same.

11. When asked if he had an opinion as to the cause of Claimant's coronary artery disease and heart attack, Dr. ██████████ replied:

A. I think in his case after reviewing his history and all the records supplied to me, it was my opinion that his cigarette smoking was very high on the list of risk factors for his developing the atherosclerosis of the coronary arteries.

It was also my opinion that the cholesterol value that he had was also a risk factor, and the fact that his father had died at age 55 was very high on the list as

well because, according to NCEP Guidelines, and that's the National Cholesterol Education Program in this country, and that's made up of many of the stellar researchers in the field of coronary artery disease, they consider an individual who has coronary artery disease either at age 55 or below that to have what's considered premature coronary artery disease. And I think his father met that criterion. Therefore, I think there is probably, in my opinion, a relationship here as far as the genetics of the family being a risk factor in his developing coronary artery disease. *Id.*, p. 15, line 14 through p. 16, line 17.

According to Dr. ██████████ Claimant was not disabled, nor did he have work restrictions at the time of the IME. ██████████ assigned a 25% impairment rating for Claimant's heart attack and a 10% rating for the hypertension. Dr. ██████████ opined that Claimant would probably have been markedly impaired had he not had the sequence of treatments and continues to have, presently.

12. On cross-examination, Dr. ██████████ confirmed that his review of the records documenting Claimant's 2002 pre-employment physical examination led him to the conclusion that the exam was essentially normal. ██████████ stated that he was particularly interested in whether Claimant had any prior history of cardiovascular problems. The records confirmed Claimant had no such prior history. Claimant's blood pressure at the time of that exam was normal. Significantly, ██████████ confirmed that individuals with all of the risk factors for coronary artery disease and heart attack that he identified during the deposition may never develop those conditions.

13. Dr. ██████████ opined that Claimant would have been unable to work following the interventional procedures performed at ██████████ Hospital on January 9, 2008. He also indicated that, typically, four to six weeks would be an appropriate

recovery period for these procedures. During this recovery period, Claimant would have been off work. ██████ was unable to state "with absolute certainty" that Claimant's documented risk factors were the cause of his myocardial infarction. *Id.*, p. 30, line 17. In fact, ultimately, Dr. ██████ confirmed that underlying risk factors are not "...within a reasonable degree of medical certainty, causes." *Id.*, p. 31, lines 23-24.

14. Claimant underwent his own IME with Dr. ██████, a specialist in internal medicine, cardiology critical care, interventional cardiology and electrophysiology on ██████. Dr. ██████ addressed his diagnoses in the following manner:

A. He[Claimant] has coronary artery disease. He's had a prior myocardial infarction with a stent to the left anterior descending coronary artery. He has essential hypertension as per a note from his family doctor's office. He has a history of tachycardia controlled on beta blockers. *Claimant's Exhibit #3, p. 6, lines 13-18.*

██████ agreed with Dr. ██████ diagnosis of arterial hypertension, which is a form of essential hypertension. Of particular note is Dr. ██████ response when asked about the significance of an absence of risk factors vis-à-vis development of essential hypertension and coronary artery disease:

A. I can split the answer up into two. For both essential hypertension and coronary artery disease individuals can develop either of them without risk factors. A recent paper suggested that 30 percent of patients with coronary artery disease do not have identifiable risk factors, which means that our research into the risk factors of coronary artery disease are[sic] still lacking. I would estimate that a similar percentage applies to essential hypertension. *Id.*, p. 8, lines 3-11.

According to Dr. [REDACTED] he could not state, within a reasonable degree of medical certainty, that Claimant's risk factors -- which include his job -- ultimately led to the development of his essential hypertension and coronary artery disease. Further, there is no scientific method of assigning a hierarchy to an individual's various risk factors.

15. It is Dr. [REDACTED] opinion that Claimant has reached MMI with a 20% impairment for his coronary artery disease, a 5% impairment for his essential hypertension and a 15% impairment for his unrelated tachycardia. No restrictions or limitations were assigned; however, [REDACTED] opined that Claimant would need to continue with his current medications, follow-up with a cardiologist twice a year and undergo blood work three to four times a year. Dr. [REDACTED] also stated that Claimant was definitely disabled from work at the time he underwent implantation of the stent. Claimant's period of disability was estimated at approximately four to six weeks following placing of the stent.

16. On cross-examination, Dr. [REDACTED] specifically identified Claimant's perceived risk factor. They were identified as: family history or heredity; hypertension; history of hyperlipidemia; the fact that Claimant takes Lipitor; a 25-year history of smoking; and, occupational stress. Dr. [REDACTED] also stated that essential hypertension, a cardiovascular condition, has no known cause. Further, [REDACTED] explained the "essential hypertension" and "arterial hypertension" are two terms which are used to describe the fact that the pressure in an individual's arteries is too high.

Application of §112.18, Fla. Stat. (2008)

17. The parties have stipulated that Claimant is a member of the protected class defined in §112.18(1), Fla. Stat. (2008). Thus, the undersigned finds that the presumption applies. It must next be determined whether Employer/Carrier have presented evidence sufficient to meet their burden in order to overcome the presumption.

18. There are numerous cases which address the presumption provided in §112.18(1), Fla. Stat. These cases are not always in harmony with each other on the issues such as under what set of facts the presumption applies or even the burden of proof required to overcome the presumption. The district court has held that the statutory presumption merely relieves the claimant of the necessity of proving occupational causation. Further, the presumption only applies when the contested condition results in partial or total disability or death. *Bivens v. City of Lakeland*, 933 So.2d 1100 (Fla. 1st DCA 2008). Nevertheless, the instant case is one which, in the undersigned's opinion, satisfies the primary criteria addressed in the majority of recent cases interpreting this particular statutory provision. In particular, the rationale of *Punsky v. Clay County Sheriff's Office*, 33 Fla. L. Weekly D1820 (Fla. 1st DCA July 21, 2008) appears to control, here. In *Punsky*, the district court held that presumption was not overcome in light of employer/carrier's failure to provide evidence of a specific non-occupational cause of the deputy's heart disease. See also, *Butler v. City of Jacksonville*, 980 So.2d 1250 (Fla. 1st DCA 2008).

19. The First District Court of Appeal, in its more recent decisions, has held that all that is required to rebut the presumption of §112.18, Fla. Stat. is competent substantial evidence. It is not necessary that the employer/carrier prove that a specific hazard or non-occupational hazard is the cause of the tuberculosis, heart disease or hypertension. Rather, the employer/carrier need only show -- via competent substantial evidence -- that the disease was caused by some non-work-related factor. *City of Tarpon Springs v. Vaporis*, 953 So.2d 597(Fla. 1st DCA 2007); *Saldana v. Miami-Dade County*, 980 So.2d 823 (Fla. 1st DCA March 10, 2008); *Lentini v. City of West Palm Beach*, 980 So.2d 1232 (Fla. 1st DCA 2008); *emphasis added*; *cf. Punsky, supra*; *Butler, supra*. This language would seem to highlight the dangers inherent in attempting to reconcile legal definitions and medical issues. *Punsky, supra*, specifically states risk factors do not amount to causation. *Id.*, at 1823. What argues most compellingly in Claimant's favor is the fact that none of the recent cases which interpret the meaning and effect of the presumption suggests that inference or supposition based on the presence of risk factors is sufficient to overcome the presumption of occupational causation.

20. In the instant case, all three physicians testified that the results of Claimant's pre-employment physical examination were normal. While there is a great deal of testimony from Drs. ██████ and ██████ relative to risk factors identified in Claimant's medical history, neither physician offered an opinion to the effect that **any one** non-work-related factor or condition caused Claimant's heart attack or his hypertension. More importantly, neither physician was willing to equate risk factors with causes. *See, Punsky, supra*. The undersigned

specifically finds that Employer/Carrier have failed to rebut the presumption under any standard espoused by relevant decisional law. Put another way, Employer/Carrier have failed to present competent evidence sufficient to overcome the presumption. In addition, Employer/Carrier have failed to present competent substantial evidence sufficient to overcome the presumption. According to Dr. [REDACTED] and Dr. [REDACTED], Claimant was totally disabled from [REDACTED] for a period of approximately four to six weeks thereafter.³ See, *Bivens, supra*. Thus, all elements of the statutory presumption have been met. The undersigned finds that Claimant suffered a compensable heart attack on [REDACTED]

21. Dr. [REDACTED] placed Claimant at MMI with a rating of 25% for his heart attack. Dr. [REDACTED] assigned a rating of 20% for Claimant's heart attack. The undersigned accepts Dr. [REDACTED] opinion as to impairment resulting from the compensable heart attack. Neither has assigned any work restrictions due to Claimant's [REDACTED] industrial accident.

22. Both physicians have acknowledged the necessity of the care Claimant received in connection with his [REDACTED] heart attack, as well as the need for on-going medical care in the form of medication and periodic testing. As previously stated, the parties have stipulated that if Claimant prevails on the issue of compensability, all bills relating to care and treatment resulting from the industrial accident will be handled administratively.

CONCLUSIONS OF LAW

23. Claimant suffered a compensable heart attack on [REDACTED]

³ From the standpoint of calendar days, this equates to a period ending on [REDACTED]

24. Claimant is entitled to reimbursement of out-of-pocket expenses associated with treatment for the heart attack.

25. Claimant is entitled to payment of outstanding balances due to providers for care and treatment related to his [REDACTED] compensable heart attack.

26. Claimant is entitled to impairment benefits based upon a rating of 25%, as opined by Dr. [REDACTED]

27. Employer/Carrier are directed to authorize a cardiologist to provide medical care relating to Claimant's compensable heart attack.

28. The claim for penalties and interest is granted.

29. The claim for an attorney's fee and taxable costs is granted. The undersigned reserves jurisdiction as to the amount of a reasonable fee and costs in the event the parties are unable to reach agreement.

Done and ordered in Tampa, Hillsborough County, Florida.

[REDACTED]

[REDACTED]

Judge of Compensation Claims

I HEREBY CERTIFY that a true and correct copy has been sent via electronic mail on [REDACTED]