STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
PORT ST. LUCIE DISTRICT OFFICE

Kenneth Youngblood,
Employee/Claimant,

vs.

Martin County Sheriff's Office/North American Risk Services, Inc.,
Employer/Carrier/Servicing Agent.
_____/

OJCC Case No.: 16-008907KFO

Accident date: 1/31/2016

Judge: Keef F. Owens

FINAL COMPENSATION ORDER

This cause was heard before the undersigned in Port St. Lucie, St. Lucie County, Florida on February 28, 2017, upon the Petition for Benefits filed on April 14, 2016 (Docket Number (DN 1)). The Employer/Carrier filed a response on April 27, 2016 (DN 5). Kristine Callagy, Esq. was present on behalf of the Claimant. Mark Hill, Esq. was present on behalf of the Employer/Carrier.

The issues which remained to be addressed at the time of the hearing included:

1. Payment of TTD benefits from 1/31/16 to the present and continuing at the correct rate.

2. Payment of TPD benefits from 1/31/16 to the present and continuing at the correct rate.

3. Authorization for medical care and treatment with a cardiologist.

4. Compensability of disabling arterial and cardiovascular hypertension and/or heart disease pursuant to section 112.18(1), Florida Statutes.

5. Penalties and interest pursuant to section 440.20(6)-(8), Florida Statutes, or as otherwise provided by law/reasonable costs pursuant to section 440.34, Florida Statutes, or as otherwise provided by law.

6. Attorney's fees pursuant to section 440.34, Florida Statutes, or as otherwise provided by law.

The defenses included:

1. No TTD or TPD due; does not meet the waiting period.

2. Not compensable; presumption of compensability is rebutted.

3. Claimant settled all heart related conditions by settlement agreement dated 5/22/14 and 5/23/14, and therefore no benefits are due.

4. No penalties, interest, costs, or attorney's fees are due.

5. Medical care is not medically necessary or causally related.

A second Petition for Benefits was filed on October 27, 2016. For the reasons discussed more fully below, the October 27, 2016, petition will not be addressed by this order and jurisdiction is specifically reserved over the petition and the issues raised therein.

The following documentary items were received into evidence:

Judge Exhibits:

Exhibit #1: Petition for Benefits filed April 14, 2016.

Exhibit #2: Response to Petition for Benefits of April 14, 2016, filed on April 27, 2016.

Exhibit #3: Mediation conference report filed August 16, 2016.

Exhibit #4: Uniform Statewide Pretrial Stipulation filed on August 31, 2016.

Exhibit #5: Pretrial Order and Notice of Final Hearing entered on September 1, 2016.

Exhibit #6: Petition for Benefits filed October 27, 2016.

Exhibit #7: Attachments to Petition for Benefits filed October 27, 2016

Exhibit #8: Response to Petition for Benefits of October 27, 2016, filed November 2, 2016.

Exhibit #9: Mediation Conference Report filed January 6, 2017.

Exhibit #10: Expert Medical Advisor Report of Dr. Ramon Castello filed February 2, 2017. Subsequent to the final hearing, it was determined that the version of Dr. Castello's report provided to the undersigned directly by the EMA was not complete. The complete report, including the post-deposition addendum, was subsequently filed on March 1, 2017. Both versions of the report are admitted.

Exhibit #11: Claimant's Trial Memorandum filed February 24, 2017 (argument purposes only).

Exhibit #12: Employer/Carrier Trial Memorandum filed February 24, 2017 (argument purposes only).

Joint Exhibits:

Exhibit #1: Deposition of Sylvia Dupree taken on July 15, 2016, and attachments filed on February 16, 2017.

Exhibit #2: Deposition of Dr. Ramon Castello taken on February 17, 2017, and filed on February 24, 2017.

Claimant's Exhibits:

Exhibit #1: Deposition of Dr. Steven Borzak taken on December 1, 2016, and exhibits filed on December 21, 2016.

Exhibit #2: Claimant's pre-employment physical (pdf pages 153-158 of Docket Number 52).

Employer/Carrier's Exhibits:

Exhibit #1: Deposition of Dr. Michael Nocero taken on December 14, 2016, and filed on December 28, 2016.

Exhibit #2: Settlement Agreement and Release filed on February 24, 2016.

Exhibit #3: Deposition of Kenneth Youngblood taken on June 24, 2016, and filed on February 24, 2017.

Exhibit #4: Order Under §440.20(11)(c), (d) & (e), Florida Statutes (2001) (pdf pages 32-33 of Docket Number 66).

Exhibit #5: Notice of Denial (pdf page 30 of Docket Number 66).

Additionally, the employer/carrier requested that the undersigned take judicial notice of the language included within the Petitions for Benefits resulting from the claimant's prior

workers' compensation claims. The claimant did not object to the same, so judicial notice is taken of those petitions.

At the hearing, the sole live witness was the Claimant, Kenneth Youngblood. All other testimony was submitted by deposition. In making my findings of fact and conclusions of law, I have carefully considered and weighed all the evidence presented to me. Although I will not recite in explicit detail the witnesses' testimony and may not refer to each piece of documentary evidence, I have attempted to resolve all of the conflicts in the testimony and evidence. Based on the foregoing and the applicable law, I make the following findings:

The undersigned has jurisdiction of the parties and the subject matter. The stipulations of the parties are adopted and shall become part of the findings of fact herein. The documentary exhibits offered by the parties are admitted into evidence and shall become part of the record, unless stated otherwise.

Factual background

The claimant, Kenneth Youngblood, was hired by the Martin County Sheriff's Office in September 2000. He underwent a pre-employment physical and was cleared for duty. He became a certified law enforcement officer in 2002.

In 2011, the claimant was diagnosed with ventricular tachycardia. He underwent a procedure to implant a defibrillator as a result. He pursued a workers' compensation claim as a result of this condition, and the claim was denied.

In 2012, the claimant had additional cardiac health issues. The diagnosis was the same as in 2011. He pursued a workers' compensation claim as a result of the condition, and the claim was denied.

The claimant retained an attorney and settled both of these claims at a mediation which took place on April 24, 2014. The claimant testified that it was his understanding that the settlement covered the alleged accidents which took place in 2011 and 2012. The language appearing in the settlement agreement is discussed in greater detail below. Despite the settlement of the claims, the claimant continued his employment with the Martin County Sheriff's Office.

On January 31, 2016, while at home, the claimant experienced "fluttery" symptoms, found it difficult to catch his breath, and felt "weird." He felt the symptoms were different than those which occurred in 2011 and 2012. He characterized the 2011 and 2012 symptoms as feeling as if his heart was racing.

The claimant sought medical care at Martin Memorial Hospital South. The claimant was admitted and remained in the hospital for a "few days." The claimant was advised that his diagnosis was atrial fibrillation. He missed two to three weeks from work following the incident. Although he was unsure of the exact amount of time he was absent, he agreed that he missed at least eight days from work. He used sick time. When he returned to work, he returned in a full duty capacity.

The employer/carrier retained Dr. Michael Nocero to serve as their independent medical examiner. On or about October 13, 2016, Dr. Nocero prepared a report in which he opined that prior echocardiograms revealed severe septal hypertrophy compatible with nonischemic cardiomyopathy and more specifically idiopathic hypertrophic subaortic stenosis (IHSS). He felt this diagnosis was strongly correlated with ventricular tachycardia and atrial fibrillation. As a result, he concluded that the arrhythmia of January 2016 was related to the claimant's previously

diagnosed condition of IHSS which first affected him with ventricular tachycardia in November 2011.

The claimant retained Dr. Steven Borzak to serve as his independent medical examiner. On or about October 25, 2016, Dr. Borzak prepared a report in which he noted that prior to the January 31, 2016, date of accident, the claimant was diagnosed with LVOT tachycardia. On January 31, 2016, the claimant experienced atrial fibrillation, which Dr. Borzak opined is different and unrelated to the prior LVOT tachycardia and occurs through a completely different mechanism.

As a result of the disagreement in the opinions of Dr. Nocero and Dr. Borzak, the undersigned appointed Dr. Ramon Castello to serve as the expert medical advisor. In response to the questions submitted to Dr. Borzak, he opined that the claimant's diagnosis in 2011 and 2012 was left ventricular outflow tract tachycardia as well as asymmetric septal hypertrophy. He opined that the diagnosis related to the January 31, 2016, event was atrial fibrillation. He further opined that the claimant's cardiac events in 2011 and 2012 were unrelated to the January 31, 2016, event.

Legal Analysis

Petition for Benefits of October 27, 2016.

First, it must be determined whether the Petition for Benefits of October 27, 2016, should be addressed in this order, whether the claims raised therein were waived due to the failure to include them within the pretrial stipulation, or whether the claims should be heard at a later date.

At the initiation of the final hearing, the undersigned asked whether it was correct that two Petitions for Benefits were at issue. The claimant's attorney agreed, and the

employer/carrier's attorney was silent on the issue. Prior to marking the judge's exhibits, the undersigned invited the parties to note if there was any objection to the exhibits marked. When the undersigned marked the October 27, 2016, Petition for Benefits, no objection was raised by either party, suggesting that it was the parties' expectation that the October 27, 2016, petition would be addressed. It was not until the undersigned inquired about the failure to include the claims raised within the October 27, 2016, petition in the pretrial that the employer/carrier argued that those claims were waived.

The timeline associated with this issue must be examined in order to resolve the dilemma. The first Petition for Benefits in this matter was filed on April 14, 2016. The parties attended mediation related to this petition on August 16, 2016. Since the issues were not resolved during mediation, the parties filed a written pretrial stipulation on August 31, 2016. Finally, an order approving the pretrial was entered on September 1, 2016.

The employer/carrier retained Dr. Michael Nocero to serve as their IME. He completed a report on October 13, 2016, which is silent with respect to the issue of a permanent impairment rating. Subsequently, on October 25, 2016, Dr. Steven Borzak (the claimant's IME) prepared a report in which he opined that the claimant reached maximum medical improvement on July 18, 2016, with a 19% permanent impairment rating. Accordingly, two days later, on October 27, 2016, the claimant filed the Petition for Benefits seeking permanent impairment benefits consistent with Dr. Borzak's rating.

During his deposition on December 14, 2016, Dr. Nocero testified that he agreed with Dr. Borzak that the appropriate permanent impairment rating for the claimant's condition is 19%. During deposition on December 21, 2016, Dr. Borzak confirmed his opinion regarding the 19%

permanent impairment rating. Despite this agreement, the parties agreed that the EMA (who was appointed to address a disagreement amongst the experts) would be asked to provide an opinion regarding the correct permanent impairment rating.

The parties attended a compulsory mediation on January 6, 2017, regarding the October 27, 2016, Petition for Benefits (although the April 14, 2016, petition was readdressed). The mediation report indicates that the parties "did" complete a pretrial stipulation before leaving the mediation conference. This must be a reference to the previous pretrial submitted on August 31, 2016.

No written pretrial was completed subsequent to the filing of the October 27, 2016, Petition for Benefits. No pretrial hearing occurred, or was scheduled, on the October 27, 2016, Petition for Benefits. Neither party attempted to amend the August 31, 2016, pretrial stipulation to add any claims, defenses, witnesses, or exhibits.

The claimant argues that the issue raised in the October 27, 2016, petition is a claim for permanent impairment benefits. The issue of the correct permanent impairment rating was submitted to the Expert Medical Advisor, and the issue was addressed during the EMA's deposition. As a result, the claimant argues that the issue is ripe for adjudication.

The employer/carrier argue that the claims raised in the October 27, 2016, petition were waived because they were not included within the initial pretrial stipulation and the pretrial stipulation was not subsequently amended to add the impairment benefits claim. They cite rule 60Q-6.113(2)(a), Rules of Procedure for Workers' Compensation Adjudications, which provides:

> (2) The parties or, if represented, their attorneys of record shall confer and complete a written pretrial stipulation. The claimant or claimant's counsel shall forward the pretrial stipulation to the employer/carrier or their counsel, if represented, no later than 14 calendar days prior to the pretrial hearing. The employer/carrier or their counsel shall

> complete their portion and return the pretrial stipulation to the claimant or claimant's counsel, if represented, no later than seven calendar days prior to the pretrial hearing. The judge may excuse any party who has complied with filing their completed and signed portion of the pretrial stipulation from live or telephonic attendance at the pretrial hearing. The judge may cancel the pretrial hearing if the stipulation is timely filed. In pretrial stipulations and at any pretrial hearing, the parties shall:
>
> (a) *State the claims, defenses, and the date of filing of each petition for benefits to be adjudicated at the final hearing. Any claims that are ripe, due, and owing, and all available defenses not raised in the pretrial stipulation are waived unless thereafter amended by the judge for good cause shown.* Any amendment, supplement, or other filing shall only be accepted if it clarifies the claims and/or defenses pled. Absent an agreement of the parties, in no event shall an amendment or supplement be used to raise a new claim or defense that could or should have been raised when the initial pretrial stipulation was filed, unless permitted by the judge for good cause shown. The failure to diligently seek and obtain discovery, standing alone, does not constitute good cause for failure to timely raise a claim or defense; (emphasis added).

The applicable statute, section 440.25, provides little guidance regarding the pretrial. It simply states:

> If the parties fail to agree to written submission of pretrial stipulations, the judge of compensation claims shall conduct a live pretrial hearing. The judge of compensation claims shall give the interested parties at least 14 days' advance notice of the pretrial hearing by mail or by electronic means approved by the Deputy Chief Judge.

Section 440.25(4)(a), Fla. Stat.

Rule 60Q-6.113(2)(a), Rules of Procedure for Workers' Compensation Adjudications, appears to focus on the point in time at which either the written pretrial stipulation is completed or the parties attend a live pretrial hearing. It states: "Any claims *that are ripe, due, and owing,* and all available defenses not raised in the pretrial stipulation are waived unless thereafter amended by the judge for good cause shown." (emphasis added). This portion of the rule appears to provide that at the time the pretrial stipulation is completed, the claimant must include all claims that are ripe, due, and owing. In the instant case, when the pretrial stipulation was completed on August 31, 2016, no physician had opined that the claimant was at maximum

medical improvement with a permanent impairment rating. This opinion did not come until October 25, 2016, when Dr. Borzak issued his report. Furthermore, no Petition for Benefits seeking permanent impairment benefits had been filed as of August 31, 2016. As a result, the claimant could not have raised the claim for permanent impairment benefits on August 31, 2016, and the failure to do so should not be deemed to be a waiver of the claim.

The rule frowns upon an amendment to the pretrial which adds a claim. It provides: "Any amendment, supplement, or other filing shall *only* be accepted if it *clarifies* the claims and/or defenses pled. Absent an agreement of the parties, *in no event shall an amendment or supplement be used to raise a new claim* or defense that *could or should have been raised when the initial pretrial stipulation was filed*, unless permitted by the judge for good cause shown." (emphasis added). As a result, the rule appears to allow an amendment to add a claim which should have been raised in the original pretrial (but which was not included) if good cause is shown. The rule does not appear to specifically address the factual pattern under which a pretrial is completed and a subsequent Petition for Benefits is filed which raises new issues which did not exist at the time of the initial pretrial. The rule's silence on this issue may be due to the expectation that a separate pretrial procedure will be initiated by the filing of the new petition after the completion of a pretrial which addresses all previously filed petitions.

In *Martinez v. Collier County Public Schools*, 804 So. 2d 559 (Fla. 1st DCA 2002), the First District Court of Appeal reversed the judge of compensation claim's dismissal of a petition due to the claimant's failure to appear for a pretrial conference. The court noted that even if good cause for failure to attend did not exist, the dismissal was too severe a sanction.

In the instant case, the claimant did not fail to attend a scheduled pretrial conference. In fact, no pretrial conference was scheduled. If the dismissal of a petition due to the claimant's failure to appear for a scheduled pretrial conference without good cause is too severe a sanction, then a finding that the claimant has waived his claims in the instant case (which would have the same effect as dismissal) for failure to submit a written pretrial or to amend the original pretrial stipulation when a pretrial conference was not even scheduled is also too severe.

The claimant's failure to complete a new pretrial or to amend the previous pretrial may have been induced by the undersigned's failure to schedule a pretrial hearing on the October 27, 2016, Petition for Benefits. If the undersigned had scheduled a pretrial hearing date, then the parties likely would have completed a new pretrial, amended the old pretrial, or attended a live pretrial hearing. Although scheduling a separate pretrial hearing may not be required, it would insure that each Petition for Benefits is ripe procedurally (i.e., addressed by a pretrial) by the time of the final hearing.

The only prejudice identified by the employer/carrier associated with proceeding on the October 27, 2016, petition was the potential liability for the payment of the impairment benefits. The employer/carrier candidly conceded that there were no additional defenses to be raised to the claim for permanent impairment benefits other than those raised in the response to the October 27, 2016, petition. They also stated that they did not believe that any additional evidence would need to be prepared or submitted to address the permanent impairment benefit issue. The employer/carrier agreed that they were not arguing that due to due process concerns the issue should be tried at a later date; instead, they argued that the issue has simply been waived.

On the other hand, the employer/carrier's trial memorandum did not identify the issues

raised in the October 27, 2016, Petition for Benefits as issues to be addressed at the final hearing. This suggests that the employer/carrier did not expect that petition to be addressed at the final hearing.

"Ruling on an issue that is not properly before the JCC is a violation of a party's due process rights." *Rosa v. Progressive Employer Services*, 84 So. 3d 472, 473 (Fla. 1st DCA 2012). If the JCC determines that an issue is not ripe for adjudication, it is error to address it. *See Castillo v. American Airlines*, 25 So. 3d 577 (Fla. 1st DCA 2009) (holding it was error for the JCC to address claims in a petition which had not been mediated or the subject of a pretrial over the objection of the employer/carrier). Although the October 27, 2016, petition was mediated, it was not the subject of a pretrial.

In light of all of the considerations noted above, the undersigned reserves jurisdiction over the October 27, 2016, Petition for Benefits. This petition can be heard at a subsequent hearing, if necessary. This will prevent the unduly harsh result of barring the claimant's claim for permanent impairment benefits while providing adequate notice to the employer/carrier that the claim will be heard. It will also allow both parties, through the pretrial process, to clearly identify the claims, defenses, witnesses, and exhibits which will be addressed.

Compensability of atrial fibrillation.

The claimant seeks a finding of compensability with respect to arterial and cardiovascular hypertension and/or heart disease pursuant to section 112.18(1), Florida Statutes. This section provides, in relevant part:

> 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, correctional officer, or correctional probation 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 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 any such condition. Such presumption does 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.

Section 112.18(1), Fla. Stat. As a result, it must be determined whether the claimant has met his burden of demonstrating entitlement to the statutory presumption.

a. Whether the presumption applies.

The claimant testified that he is a deputy sheriff with the Martin County Sheriff's Office and a certified law enforcement officer. As a result, he is a county law enforcement officer under section 112.18(1), Fla. Stat.

The claimant seeks a determination of compensability for heart disease, specifically, atrial fibrillation. Dr. Borzak testified that atrial fibrillation is considered a heart disease. As a result, the claimant seeks the application of the presumption for a condition covered by section 112.18(1), Fla. Stat.

The claimant testified that he was admitted and remained in the hospital for a "few days" following his onset of symptoms on January 31, 2016. He missed two to three weeks from work following the incident. Although he was unsure of the exact amount of time he was absent, he agreed that he missed at least eight days from work. This is sufficient to establish the disability required under section 112.18(1), Fla. Stat. *See Carney v. Sarasota County Sheriff's Office*, 26 So. 3d 683 (Fla. 1st DCA 2009) (holding claimant who required one overnight stay in hospital and was absent from work for only a portion of a day with no loss of wages sufficiently met the

disability requirement under section 112.18(1), Fla. Stat.). Furthermore, Dr. Castello opined that the claimant was disabled while in the hospital.

Finally, the claimant underwent a pre-employment physical examination which cleared him for work. The resulting documents failed to demonstrate any evidence of atrial fibrillation or heart disease. Dr. Borzak testified that his review of the pre-employment physical records did not reveal any evidence of heart disease. Dr. Nocero, the claimant's IME, conceded that the physical did not reveal hypertrophic cardiomyopathy, ventricular tachycardia, or atrial fibrillation.

Therefore, I find that the claimant has met his burden of demonstrating entitlement to the presumption established in section 112.18(1), Fla. Stat.

b. Whether the presumption has been rebutted.

The presumption established by section 112.18(1), Fla. Stat., may be rebutted by the employer/carrier with evidence of a non-occupational cause of the claimant's condition. In a case in which the claimant is relying solely upon the presumption (such as the instant case), the employer/carrier may meet this burden with competent substantial evidence. *See Punsky v. Clay County Sheriff's Office*, 18 So. 3d 577 (Fla. 1st DCA 2009).

The employer/carrier argue that the presumption is rebutted by Dr. Nocero's opinion that the claimant's atrial fibrillation was caused by idiopathic hypertrophic subaortic stenosis (IHSS). Dr. Nocero's theory was addressed, and rejected, by Dr. Castello.

In his written report, Dr. Castello suggested that he disagreed with Dr. Nocero's hypothesis that the claimant suffered from idiopathic hypertrophic subaortic stenosis (IHSS).

During his deposition, he made his disagreement more pronounced and specifically stated that the claimant did not have IHSS.

> Well, the diagnosis of IHSS is essentially made by or it is primarily by echocardiography, and that definitely is my specialty, and I reviewed the echocardiograms on both the diagnosis at the time of 2011 but certainly the one that was done on the second event on January 31st. And, okay, so the criteria to have this septal hypertrophy, one of the criteria is that the septum has to measure -- the septum is the wall that separates the two ventricles -- and the posterior wall, which is another concept that I am going to talk about now is one of the walls of the left ventricle. So in order to diagnose somebody with asymmetric septal hypertrophy, then the thickness of the muscle of the septum has to be 1.5 times the one of the posterior wall. If -- if there is not this asymmetry, then you have what is called left ventricular hypertrophy but not asymmetric. And in the last echo, the one that was done on February 1st, the septal thickness was 1.4, and the posterior thickness was 1.3, and that is why and I don't recall exactly which one of the doctors, but I believe it was Dr. Libman or one of the treating cardiologist then felt that the diagnosis of hypertrophic cardiomyopathy was certainly in question.
>
> In addition, when Dr. Nocero comments on that the patient was having idiopathic hypertrophic subaortic stenosis or obstructive asymmetric hypertrophy – those terms are interchangeable -- but the term implies that there is an obstruction of -- placed by the muscle of the heart to the exit of the blood from the ventricle into the aorta. So we also know this entity as dynamic aortic stenosis. So when you have a -- a narrow valve right there in the aortic valve, then you have what we call a fixed obstruction. In other words, it is always the same.
>
> But because this obstruction is caused by the squeeze of the muscle on the ventricle, then it tends to be increasing as the part of the cardiac cycle occurs, particularly systal. And also, those patients are notorious for having a different gradient in different days or different examinations. Well, anyway, there was no demonstration of grading or obstruction in any of the echoes that I reviewed. So I don't believe that he had this condition. He had a condition of symmetric of left ventricular hypertrophy but not the kind of asymmetric hypertrophy or IHSS.

I accept Dr. Castello's opinion that the claimant did not suffer from IHSS. If the claimant did not suffer from IHSS, then Dr. Nocero's theory that the atrial fibrillation was caused by IHSS cannot be true.

Even if Dr. Nocero's retreat from the IHSS diagnosis is considered, I do not accept his opinion and do not find that there is a non-occupational cause which defeats the presumption.

Specifically, in deposition Dr. Nocero backpedaled from the certainty with which he opined that the claimant suffered from IHSS in his report. During deposition, he claimed that regardless of whether the claimant suffered from IHSS, it was more important to note that the claimant suffered from cardiomyopathy. He then claimed the cardiomyopathy caused the atrial fibrillation.

This theory was also addressed by Dr. Castello. Dr. Castello ultimately testified:

> So in terms of if this was a worsening of the cardiomyopathy, frankly, when we think of worsening of cardiomyopathy, what we think of is deterioration of the left ventricular function and ejection fraction, *not so much that somebody has gone from having one particular arrythmia to another kind*.
>
> So even if you consider, and as I said, when I answered this question, I was certainly thinking more of is atrial fibrillation a worsening of the outflow tract tachycardia? The answer is no. *But if we were to say that this was a deterioration of the left ventricular hypertrophy, again, the answer is probably not either. I think they are just two separate entities that occur in that setting but not necessarily connected*. (emphasis added).

He also testified:

> QUESTION: Then if – if we were to role play, could you make an argument that hypertrophic non-obstructive cardiomyopathy caused or lead up to the claimant's atrial fibrillation? (objection omitted)
>
> DR. CASTELLO: I don't know. I am not a lawyer. I think what I mentioned before is that people with left ventricular hypertrophy can have some – many kinds of arrhythmia, afib being one of them. *But again, when you start talking causation, then I think that – I don't see that relation. In fact, it is not even listed as one of the classic risk factors for atrial fibrillation*. (emphasis added).

I accept Dr. Castello's testimony that there is likely no relationship between the claimant's cardiomyopathy and his atrial fibrillation. As a result, I find that the employer/carrier have failed to meet their burden of demonstrating a non-occupational cause of the claimant's atrial fibrillation. Therefore, the presumption has not been rebutted.

c. Whether the prior settlement agreement bars the instant claim.

The employer/carrier also argue that the instant claim is barred by the claimant's previous settlement of the claims arising out of his November 17, 2011, and February 27, 2012, dates of accident. The claimant argues that his current condition is unrelated to the condition which was previously settled.

The settlement agreement is entitled "Settlement Agreement and Release." It refers to two dates of accident: November 17, 2011, and February 27, 2012. It refers to two corresponding OJCC numbers. The agreement states that the claimant will be paid $75,000.00 in order to release the employer/carrier/third-party administrator from their liability under workers' compensation law "on account of the above captioned industrial accidents." It also states: "Any further medical care, treatment, or expense that may arise in the future related to any released date of accident, regardless of the cause thereof, will be the responsibility of the Claimant." Subsequently, it states: "Claimant, by signing this Settlement Agreement and Release, fully and forever relinquishes the right to pursue, seek, or receive all workers' compensation and workers' compensation-related benefits from the above captioned Employer/Carrier/TPA arising out of the released dates of accident."

This matter is complicated by the following language from the settlement agreement:

> The claimant specifically acknowledges that on finality of this Settlement Agreement and Release, rights to all future medical care and treatment related ***or arguably related*** to the workers' compensation claim released herein, whether remedial or palliative in nature, are forever and fully relinquished, whether or not the Claimant's condition has been brought to a state of maximum medical improvement and regardless of whether the Claimant's condition(s) improves or seriously deteriorates for any reason whatsoever. (emphasis added).

The settlement agreement incorporates additional documents by reference. The settlement agreement states:

> The 3-page Mediation Report and 8-page Mediation Settlement Agreement, both dated April 23, 2014, are expressly incorporated within this Settlement Agreement & Release. *Any inconsistency between this agreement and any term in the Mediation Settlement Agreement (including its incorporated exhibits) shall be resolved by resort to the latter*. (emphasis added).

As a result, in order to gain a full understanding of the agreement between the parties, the Mediation Settlement Agreement must also be examined.

The Mediation Settlement Agreement outlines the amount of the settlement and also states: "Additionally, the proposed language from the E/C is likewise incorporated into this agreement (See Exhibit "B")." In turn, Exhibit "B" to the Mediation Settlement Agreement states, in relevant part:

> 3. All medical and indemnity benefits, past and future, *flowing from or causally related to the conditions arising out of* the 2 claimed accident dates of 11/17/2011 and 2/27/12 are settled.
> delete: (hypertrophic cardiomyopathy and left ventricular hypertrophy and ventricular tachycardia) are settled. (emphasis added).

As a result, there is an inconsistency between the "Settlement Agreement and Release" and the "Mediation Settlement Agreement" regarding the scope of the settlement. The settlement agreement states, rather expansively, that the right to future medical benefits related "or arguably related" to the released claim is relinquished. The mediation agreement is more restrained, stating that the right to future benefits "flowing from or causally related to the conditions arising out of" the November 17, 2011, and February 27, 2012, dates of accident is settled.

The parties specifically agreed within the settlement agreement that in the event of an inconsistency between the settlement agreement and the mediation agreement, the mediation agreement prevails. As a result, in determining whether the instant claim is barred by the previous settlement, the mediation agreement controls. Therefore, it must be determined whether the instant claim flows from or is causally related to the condition or conditions arising out of the November 17, 2011, and February 27, 2012, dates of accident.

The condition arising out of the November 17, 2011, and February 27, 2012, dates of accident was left ventricular outflow tract tachycardia. Dr. Castello conclusively resolved the issue of whether the claimant's current condition (atrial fibrillation) flows from or was caused by his previous condition (tachycardia). In his initial report, he explained that left ventricular outflow tract tachycardia and atrial fibrillation are two very different arrhythmias with two different mechanisms and two different treatments. He also stated that the events of 2011/2012 and the accident of January 31, 2016, are unrelated events, noting that atrial fibrillation is not a worsening of ventricular tachycardia. He made this statement again in deposition. Furthermore, he was asked:

> QUESTION: I am trying to clear this up. I mean is there an argument that can be made that left ventricle outflow tract tachycardia can lead to or cause atrial fibrillation?
>
> DR. CASTELLO: I don't think so. . . .

The issue of whether there was a relationship between the claimant's 2011/2012 episodes of tachycardia and his current condition of atrial fibrillation was submitted to Dr. Castello in his capacity as the EMA. His opinions are accepted. As a result, I find that the claimant's current claim for benefits related to atrial fibrillation does not flow from and is not causally related to the

condition arising out of the two prior accident dates. Therefore, the previous settlement does not bar his current claim.

The employer/carrier argued that their burden was simply to show that the claimant's current condition is arguably related to his prior claims. They argue that the current condition (atrial fibrillation) and the 2011/2012 condition (tachycardia) share a common cause: cardiomyopathy. Furthermore, they argue that since the claimant filed a Petition for Benefits in the prior claims seeking a determination that his cardiomyopathy was compensable, that condition is a part of the prior settled claim. Therefore, the employer/carrier argue that the previous settlement bars the current claim.

First, for the reasons discussed above, the "arguably related" standard appearing within the settlement agreement is not the correct standard. Second, even if the claimant does suffer from cardiomyopathy, the prior settlement precluded future claims for those conditions "flowing from or causally related to *the conditions arising out of* the 2 claimed accident dates" (emphasis added). The focus is not on the "claim" but on the "conditions arising out of" the prior accident dates. As a result, the conditions the claimant alleged were related in 2011 and 2012 are irrelevant. It is those conditions which, in fact, arose out of the dates of accident that are barred.

Hypertrophic cardiomyopathy is not a condition *arising out of* the claimant's two prior accident dates. The evidence suggests that this condition, if the claimant does in fact have it, is pre-existing with respect to the 2011, 2012, and 2016 dates of accident. As argued by the employer/carrier, this condition is non-occupational in nature. The evidence does not support a finding that the cardiomyopathy arose out of the claimant's prior accidents. As a result,

conditions which flow from the cardiomyopathy (apart from possibly tachycardia) are not barred by the settlement.

Finally, even if the focus of the inquiry for purposes of determining the preclusive effect of the prior settlement is whether the claimant's atrial fibrillation flowed from or was causally related to hypertrophic cardiomyopathy, I find that it did not and was not. Once again, as noted above, Dr. Castello testified:

> So in terms of if this was a worsening of the cardiomyopathy, frankly, when we think of worsening of cardiomyopathy, what we think of is deterioration of the left ventricular function and ejection fraction, *not so much that somebody has gone from having one particular arrythmia to another kind*.
>
> So even if you consider, and as I said, when I answered this question, I was certainly thinking more of is atrial fibrillation a worsening of the outflow tract tachycardia? The answer is no. *But if we were to say that this was a deterioration of the left ventricular hypertrophy, again, the answer is probably not either*. *I think they are just two separate entities that occur in that setting but not necessarily connected*. (emphasis added).

As a result, I find that the claimant's atrial fibrillation did not flow from and was not caused by cardiomyopathy.

In conclusion, I find that the prior settlement agreement does not bar the instant claim.

Authorization for medical care and treatment with a cardiologist.

The claimant seeks authorization for medical care and treatment with a cardiologist. In light of the finding that the claimant's atrial fibrillation is a compensable condition, the claimant is entitled to authorization for medical care and treatment with a cardiologist for that condition.

Temporary indemnity benefits.

The claimant seeks temporary total disability and temporary partial disability benefits from January 31, 2016, and continuing. According to Dr. Castello, the claimant reached maximum medical improvement on February 11, 2016. As a result, the claimant's disability was

of insufficient duration to give rise to entitlement to temporary indemnity benefits for the 7-day waiting period. *See* section 440.12(1), Fla. Stat.

Although the claimant could be eligible for indemnity benefits from February 7, 2016, through February 11, 2016, I find that there is insufficient evidence to support a claim for indemnity benefits. The claimant's actual wage records and attendance records were not submitted. The claimant believed that he was gone for two to three weeks, but he conceded on cross-examination that he was not sure. On redirect examination, he agreed that he missed at least eight days from work. If the claimant returned on the ninth day, then he would only be entitled to one day of indemnity benefits.

In any event, none of the experts opined that the claimant required any work restrictions from February 7, 2016, through February 11, 2016. In response to the question of whether the claimant was disabled as a result of the January 31, 2016, accident, Dr. Castello opined that the claimant was disabled during the three days that he was in the hospital. This suggests that Dr. Castello, the EMA, did not feel that the claimant was disabled during any other period. As a result, the claims for temporary total disability and temporary partial disability benefits are denied.

It is **ORDERED and ADJUDGED**:

1. The claims for temporary partial disability and temporary total disability benefits are denied.

2. The claim for authorization for medical care and treatment with a cardiologist is granted.

3. The claim for a finding of compensability of the claimant's disabling arterial and cardiovascular hypertension and/or heart disease pursuant to section 112.18(1), Florida Statutes, is granted. Specifically, the claimant's atrial fibrillation condition is found to be compensable.

4. The claims for penalties and interest are denied.

5. The claims for attorney's fees and costs are granted. Jurisdiction is reserved with respect to the amount of attorney's fees and costs in the event the parties cannot reach an agreement regarding the same.

Done and electronically served on Counsel and Carrier this 8th day of March, 2017, in Port St. Lucie, St. Lucie County, Florida.

Keef F. Owens
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