

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

EMPLOYEE:
MARK CLARK

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EMPLOYER:
VOLUSIA COUNTY DEPARTMENT
OF CORRECTIONS

ATTORNEY FOR EMPLOYER/CARRIER:
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CARRIER:
COUNTY RISK MANAGEMENT
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CLAIM NUMBER: 07-019858TGP
DATE OF ACCIDENT: 3/10/07

ORDER DENYING COMPENSABILITY

UPON DUE NOTICE TO THE PARTIES, the above entitled claim came on for a final Merit Hearing before the undersigned Judge of Compensation Claims on June 2, 2008, at Daytona Beach, Volusia County, Florida to determine issues raised in the Petition for Benefits filed July 20, 2007. The Court has jurisdiction of the parties and of the subject matter. The Employee/Claimant Mark Clark was present at the final hearing along with his attorney, Steven Pyle, Esq. Assistant County Attorney, Nancye R. Jones, Esq., and Christina B. Livvendahl, Risk Manager for Volusia County appeared on behalf of the Employer/Carrier.

By letter dated June 4, 2008, the undersigned advised the parties of the Court's proposed findings and instructed counsel for the Employer/Carrier to prepare a proposed Order Denying Compensability.

ISSUES TO BE DETERMINED BY THE COURT

A Pre-Trial Stipulation was entered into by the parties on December 7, 2007. This Pre-Trial Stipulation listed the following as issues to be determined at the final hearing:

1. Total Temporary Disability and Total Partial Disability from March 10, 2007 to present;
2. Determination of compensability of Claimant's heart disease and hypertension;
3. Authorization for a cardiologist to treat the Claimant's coronary artery disease and hypertension;
4. Determination of the appropriate average weekly wage and compensation rate;
5. Penalties, interest, cost, and attorney's fees.

At the outset of the hearing, the Claimant waived the request for temporary partial disability and narrowed the disability benefits requested to only include temporary total disability from March 24, 2007, to October 2, 2007. The parties stipulated that the appropriate average weekly wage was \$926.48 and the compensation rate was \$617.68.

DEFENSES OF THE EMPLOYER/CARRIER

The Employer/Carrier raised the following defenses in the Pre-Trial Stipulation:

1. No presumption;

2. No causal connection;
3. No accident in the meaning of the workers' compensation laws;
4. Idiopathic condition or ordinary disease of life;
5. No disability.

STIPULATIONS

Pursuant to the Pre-Trial Stipulation that was entered into by the Parties and approved December 18, 2007, the parties stipulated to the following:

1. That the place of the alleged accident or agreed venue is Volusia County, Florida;
2. That there was an Employer/Employee relationship on the alleged date of accident;
3. That workers' compensation coverage was in effect on the alleged date of accident;
4. That the accident or occupational disease had not been accepted as compensable, nor had the alleged injuries or conditions been accepted as compensable;
5. That there was timely notice of the alleged industrial injury;
6. That there was timely notice of the Pretrial and Final Hearing;
7. That the undersigned has subject matter jurisdiction over the Parties;
8. That the average weekly wage/compensation rate is not in dispute, or at issue;
9. That if benefits under Section 440.13, Florida Statutes (medicals) are

determined to be due or stipulated to herein, the Parties agree that the exact amounts payable to healthcare providers would be handled administratively and medical bills need not be placed into evidence at trial.

EXHIBITS RECEIVED INTO EVIDENCE AT THE HEARING:

JCC EXHIBITS

1. Pretrial Compliance dated December 18, 2007 and Notice of Hearing attached thereto;
2. Memorandums of Law without attachments, for argument purposes only.

CLAIMANT'S EXHIBITS

1. Deposition of IME Dr. Mathias dated May 9, 2008.
2. Curriculum Vitae and Report of Dr. Mathias.
3. Remaining composite of medical records reviewed by Dr. Mathias.

EMPLOYER/CARRIER EXHIBITS

1. Deposition of IME Dr. Kakkar dated May 28, 2008 along with his Curriculum Vitae and records attached thereto.
2. Records reviewed by Dr. Kakkar, received post-hearing and admitted into evidence as agreed to at the hearing.

LIVE TESTIMONY

1. Claimant - Mark Clark for Employee.

FINDINGS AND CONCLUSIONS

In making my Findings of Fact and Conclusions of Law in this matter, I have carefully considered and weighed all of the testimony and evidence presented to me,

including all live and deposition testimony, as well as documentary evidence, and have carefully resolved any and all conflicts contained therein. I have also carefully observed the candor and demeanor of the witnesses who testified live before me, and have resolved all of the conflicts that may have arisen between the testimony and other evidence submitted by the Parties.

After having carefully considered the testimony at trial, as well as the evidence, the appropriate statutory provisions, and the applicable case law, I make the following findings:

1. The undersigned has jurisdiction over the Parties and the subject matter of this claim.
2. The stipulations of the Parties as to certain facts on the Pretrial Stipulation are proper, and are hereby approved and adopted by the undersigned.
3. I find that the Claimant satisfied each of the requirements for application of the presumption of compensability for hypertension and heart disease as claims under the Heart/Lung Bill, Fla. Stat. §112.18 (2007).
 - a. Specifically, I find there is uncontradicted evidence in the Record establishing that the Claimant is a member of the protected class specified by said Statute, and that the Claimant had undergone a pre-employment physical at or near the time of his employment that failed to show any evidence of heart disease or hypertension.
 - b. I find that the Claimant established that he had been diagnosed with hypertension and heart disease during the course of his employment with the Employer/Carrier.

- c. Finally, I find that the Claimant established the occurrence of a “disabling event” occurring on March 10, 2007, which required total inability or incapacitation from work from the date of accident through October 22, 2007.
4. Importantly, I find that this case involves a situation where the Record lacks any medical opinion establishing a causal connection, within any degree of causation, between the Claimant’s work activities and the Claimant’s heart attack, heart disease, or hypertension. In making this finding, I rely on the testimony of both experts presented in this case, including the opinion of Dr. Mathias. Dr. Mathias clearly testified that he did not know the cause of coronary artery disease and did not know the cause of essential hypertension. This case can be distinguished from a situation where a claimant has provided a medical opinion relating the claimant’s heart attack, hypertension, or heart disease to employment activities within a reasonable degree of medical certainty.
5. Each of the following risk factors were identified by the physicians in this case: obesity, long-term history of smoking, family history of premature coronary artery disease, glucose deficiency, sleep apnea, high cholesterol, and hyperlipidemia. However, I find that the Claimant has failed to provide competent substantial evidence that his alleged psycho-social stress is derived from his employment activities as a correctional officer. In making this finding, I note the deposition testimony of Dr. Mathias, that he could not distinguish between psycho-social stresses caused by things outside work verses things at work. I rely upon the consistent opinion of Dr. Kakkar on this

issue, where Dr. Kakkar agreed he could not distinguish between stress with regard to whether it was work-related stress or related to something outside the work. Based upon the totality of circumstances presented in this case, including a complete lack of medical evidence that the Claimant sustained psycho-social stress identified with his employment activities, I reject the Claimant's argument that employment related psycho-social stress is a risk factor in this claim.

6. I find that the Employer/Carrier has overcome the presumption of compensability under the Heart/Lung Bill with the presentation of "clear and convincing" and "competent and substantial" evidence that the Claimant's heart disease and hypertension were not cause by any work related activities. The Employer/Carrier has satisfied their burden to overcome the presumption of the Heart/Lung Bill with the presentation of the opinion of Dr. Kakkar. Dr. Kakkar's testimony provides clear and convincing medical evidence, beyond the competent substantial standard, that the Claimant would have developed both coronary artery disease and hypertension based upon the cumulative result of risk factors not associated with the Claimant's employment activities. Although both Dr. Mathias and Dr. Kakkar opined similarly in many respects, to the extent that their opinions may arguably differ, I accept the opinion of Dr. Kakkar as most consistent with the totality of evidence. In this regard, I note the deficiencies in the history reviewed by Dr. Mathias as pointed out by the Employer/Carrier on cross-examination, including that Dr. Mathias was not aware of the Claimant's sleep apnea

condition and glucose intolerance, both considered risk factors in this case. I find that Dr. Kakkar was provided with a more complete history regarding the Claimant's relevant medical condition and the existence of non-work related risk factors.

7. Consistent with these findings, but not determinative of the outcome of this case, I accept Dr. Kakkar's testimony with regard to the significance of various risk factors. Dr. Kakkar identified the Claimant's habitual smoking, high cholesterol, and hyperlipidemia as "significant" risk factors. On the other hand, Dr. Kakkar described Claimant's alleged psycho-social stress as a relative factor but "...not one of the major risk factors that we come across that causes coronary artery disease or hypertension."
8. I accept the Employer/Carrier's argument that, under the applicable case law, including the most recent case of Lentini v. City of West Palm Beach and Johns Eastern, Fla 1st DCA (May 5, 2008) and the case of City of Tarpon Springs v. Vaporis, 953 So. 2nd 597 (Fla. 1st DCA 2007), that in order to overcome the presumption of compensability in this case, the Employer/Carrier is not required to present competent substantial evidence of any one particular "specific hazard or non-occupational hazard", but must present competent substantial evidence that the disease was caused by some non-work-related factor. I find that the Employer/Carrier has satisfied their burden to rebut the presumption under the totality of circumstances in this case. Again, I accept Dr. Kakkar's opinion, for reasons set forth above, that it was the Claimant's combination of non-work related risk factors that

caused the coronary artery disease and hypertension and that the Claimant would have developed both the coronary artery disease and hypertension regardless of the type of job he had.

9. Based upon the totality of circumstances, I specifically find that the Employer/Carrier has presented "clear and convincing" evidence that the Claimant's hypertension and coronary artery disease were not suffered in the line of duty. In making this finding, I note, as stated above, that the Claimant has failed to prove that a risk factor in this claim is psycho-social stress related to employment activities. I rely on the consistent opinions of Dr. Kakkar and Dr. Mathias, mentioned above, that they could not distinguish between psycho-social stresses caused by things outside work verses things at work. Consequently, without medical evidence of work related psycho-social stress regarding this particular Claimant in the Record, I find that Dr. Kakkar's opinion, that the combination of non-work related risk factors caused the coronary artery disease and hypertension, meets the "clear and convincing" standard.
10. Alternatively, even if it is decided that the Claimant has sustained psycho-social stress related to employment activities, a position this Court rejects, I find that no medical opinion establishing a causal relationship, within a reasonable degree of medical certainty, between the alleged work related psycho-social stress and the heart attack, heart disease, or hypertension has been offered in this case. Therefore, I find that, even if the alleged psycho-social stress is considered related to employment activities, a finding rejected

by this Court, the Employer/Carrier is not required to provide "clear and convincing" evidence to overcome the presumption and, in fact, successfully rebutted the presumption in this case with the presentation of "competent substantial" evidence. This finding is based on the plain meaning of Florida Statute §112.18(1) and the interpretation of this Statute by the First DCA, including the most recent opinion in the Lentini case cited above. I specifically distinguish the mere existence of a risk factor derived from employment activities, such as the alleged psycho-social stress, from a situation where the Claimant has presented a medical opinion, within a reasonable degree of medical probability, establishing causation between the particular risk factor at issue and the Claimant's hypertension or heart disease. This distinction is described by Dr. Kakkar, when referring to the definition of "risk factor" on cross-examination and is accepted by this Court. I find that without evidence of medical causation of either the Claimant's heart attack, heart disease, or hypertension to employment activities, the Employer/Carrier is not held to the "clear and convincing" standard and need only present "competent substantial" evidence to overcome the presumption of compensability afforded by Florida Statute §112.18(1).

WHEREFORE

IT IS the order of the undersigned Judge of Compensation Claims that:

1. The Claimant's claim for compensability of the heart attack, heart disease, and hypertension conditions is denied.

2. The Claimant has failed to established compensability of his alleged conditions under Fla. Stat. §112.18(1)(2007) or any other accepted theory of responsibility.
3. The Claimant has failed to establish compensability of the alleged March 10, 2007, industrial accident.
4. The Claimant is not entitled to medical treatment or disability benefits.
5. Penalties, interest, costs and attorney's fees are not due and owing and shall not be paid by the Employer/Carrier, as the Claimant has failed to prevail on any aspect of his claim.
6. Any arguments or issues not raised at the Final Hearing are hereby waived.

DONE AND ORDERED in Chambers, Daytona Beach, Volusia County, Florida this 9th day of June, 2008.

Thomas G. Portuallo
Honorable Thomas G. Portuallo
Judge of Compensation Claims

THIS IS TO CERTIFY that the above Order was entered into by the Judge of Compensation Claims and a copy of served by U.S. Mail to the parties as listed above this 9th day of June, 2008.

Debra Smith
Executive Secretary