

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

Michal Ochkie,  
Employee/Claimant,

OJCC Case No. 18-031263RJH

vs.

Accident date: 11/27/2018

City of St. Augustine/Florida League of  
Cities/ Workers' Compensation Claims  
Department, and Florida Municipal  
Insurance Trust,  
Employer/Carrier/Servicing Agent.

Judge: Ralph J. Humphries

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**FINAL COMPENSATION ORDER**

**This Cause** came on for a merits' hearing before the undersigned Judge of Compensation Claims on **August 29, 2019** in Jacksonville, Duval County, Florida. The subject matter of this hearing was a petition for benefits filed on December 28, 2018 and an amended petition for benefits filed on January 4, 2019. A mediation conference on the petition was held on April 15, 2019. The claimant, **Michal Ochkie**, was present and represented by Suzanna M. Scarborough, Esquire. The employer/carrier, **City of St. Augustine/Florida Municipal Insurance Trust-WC** hereinafter referred to as the "Employer" or as the "E/C" was represented by Alan D. Kalinoski, Esquire. Live testimony was received from the claimant. Additional testimony was received by depositions.

***The following stipulations have been reached between the parties:***

1. This office has jurisdiction of the parties;
2. Venue properly lies in St. John's County, Florida;
3. The date of accident is alleged to be November 27, 2018;
4. There was an employer/employee relationship at the time of the 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 stipulated to be \$1207.67.

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

1. Compensability of heart disease;
2. Temporary total disability benefits from November 27, 2018 through December 7, 2018;
3. Authorization of a cardiologist;
4. Penalties, interest, costs, and attorney's fees.

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

1. No accident or occupational disease resulting in heart disease on November 27, 2018 arising out of and in the course of employment; The claimant does not meet the criteria set forth in Section 112.18, Florida Stats., to be entitled to the presumption;
2. The claimant had pre-existing heart disease on or about September 10, 2018 while covered by a prior workers compensation carrier and there is no evidence of any progression of the cardiac condition to give rise to a new date of accident;
3. The claimant did not receive treatment for a covered condition which incapacitated the claimant from performing his work as a law enforcement officer on November 27, 2018;
4. If the claimant were to present the required criteria to give rise to application of the presumption, employer/carrier will present evidence to rebut application of the presumption;
5. The claimant's heart disease is due to one or more of the constellation of non-work-related risk factors;
6. No medical verification of disability to entitle the claimant to temporary total disability benefits from November 27, 2018 Ford, pursuant to Section 440.15 (2), Florida Stats.;
7. The claimant did not lose any wages and he continued to work full duty following the alleged accident;
8. There was no referral for a cardiologist attached to the petition for benefits as required by Section 440.192 (2) (i), Florida Statutes;
9. 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 December 28, 2018;
2. Amended Petition for Benefits filed with DOAH on January 4, 2019;
3. Response to Petition for Benefits, filed with DOAH on January 7, 2019;
4. Pretrial Questionnaire completed by the parties and filed with DOAH May 10, 2019. Claimant's counsel inadvertently failed to include a list of the claims to be adjudicated within the body of the pretrial questionnaire. Counsel for the employer/carrier concedes all issues were known to the E/C and appropriate defenses were raised. The E/C affirmatively waived any objection to proceeding to an adjudication of the merits of the claims as set forth in the Amended Petition for Benefits filed January 4, 2019.
5. E/C witness and exhibit list filed with DOAH on May 22, 2019;
6. Claimant's amendment to pretrial stipulation filed with DOAH on June 26, 2019;
7. Claimant's 2<sup>nd</sup> amendment to the pretrial stipulation filed with DOAH on July 8, 2019;
8. Claimant's motion to admit medical records into evidence filed with DOAH on July 8, 2019;
9. Notice Designating IME Physician filed with DOAH on July 9, 2019;
10. E/C objection to claimant's motion to admit medical records filed with DOAH on July 9, 2019; the objection is sustained as to the medical records from Flagler Hospital and Dr. Whitlock as those records were not from authorized providers. As more particularly set forth hereinafter, however, those records may be utilized and relied upon by Dr. Chernobelsky and Dr. Koren as part of their testimony and in the expression of their opinions.
11. E/C objection to claimant's 2<sup>nd</sup> amendment to the pretrial stipulation filed with DOAH on July 9, 2019. Confirming the ruling I made on the record, this objection is overruled.
12. Claimant's Prehearing Statement admitted for purposes of argument only and not as evidence, filed with DOAH on August 27, 2019;
13. Employer/Carrier's Trial Memorandum admitted for purposes of argument only and not as evidence, filed with DOAH on August 27, 2019.

**Claimant's Exhibit:**

1. Deposition of Donna Hayes filed with DOAH on August 27, 2019;
2. Deposition of Dr. Chernobelsky with attachments filed with DOAH on August 26, 2019. E/C maintains its objections to documentary evidence as more particular set forth in its objection to claimant's motion to admit medical records filed July 9, 2019. That objection is sustained and the medical records shall not be independently admitted into evidence. I find, however, that these records are the type of records upon which a medical expert would typically rely and objections to the opinions of Dr. Chernobelsky, premised upon the objections to these records are overruled. E/C has made no showing these records are not reliable or are not as they purport to be. Indeed, counsel for the employer/carrier addressed questions to Dr. Michael Koren premised upon his review of many of these same records and reliance on their content.
3. Deposition of Dr. Michael Koren with attachments filed at docket Nos. 39-47 on August 27, 2019. E/C maintains its same objections as set forth hereinabove. E/C's objection is sustained but, identical to my ruling with Dr. Chernobelsky, it is my determination these records can properly be considered by Dr. Koren in rendering any testimony or opinions herein.

**Employer's Exhibits:**

1. Deposition of Dr. Koren and exhibits but excluding those records objected to as set forth hereinabove. See ruling immediately above.

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 August 29, 2019 after which closing arguments were made by the parties.
4. On the day of the alleged accident, the claimant was working as a corporal with the employer with whom she had worked for 11 years. At that time, she was engaged in dual roles of supervising the detective squad as well as performing her regular duties. While working, she experienced extreme chest pain and shortness of breath. Pain also extended down her left arm. She reports difficulty breathing. Claimant had experienced similar symptoms in September 2018 but reports the pain of November 27, 2018 was "100 times worse." She reported the incident and was transported to Flagler Hospital.
5. Claimant testified regarding her pertinent medical history. She reports having experienced arrhythmia in 2006 but did not require medications or medical intervention.
6. Claimant began smoking cigarettes in approximately 2001 but would do so in high stress situations. She testified her smoking was as little as one pack per month to as much as one pack per week. She would also smoke while drinking socially. She would quit smoking off and on and beginning September 2018, she quit smoking completely. She reports smoking one pack per week prior to quitting.
7. On September 10, 2018, she reported to Flagler Hospital with chest tightness and pain in her left arm. She was admitted for one night. She is not aware of any diagnosis relating to her heart and was not prescribed any medications. It is her understanding testing was done to rule out acid reflux.
8. Claimant was transported by rescue to her hospitalization on November 27, 2018 where she remained until December 1, 2018. While hospitalized, various testing was performed to include an EKG, stress tests and a cardiac catheterization on November 30, 2018. Her understanding of the results of the catheterization included a diagnosis of coronary artery disease with an artery that was 80% blocked. A stent could not be placed because of the size of the vessel at the location of blockage. She was informed she would be on medications and monitoring for the rest of her life. At the time of discharge, she was prescribed various medications including nitroglycerin, statin's and others. She was not allowed to return to work until December 7, 2018 as she was required to perform a stress test, and pass that test, before she could return. That test was performed on December 5, 2018. She has performed full duty since her return to work on December 7.
9. After her hospitalization, she was sent by the carrier to see Dr. Koren who was authorized by the carrier until such time as the claim was denied. She believes she saw

him 5 times. Although some medications were changed, she continues with regular medications. Despite that, she continues to experience some chest pain and shortness of breath with exertion and/or stress.

10. Claimant testified that as a result of her hospitalization, she was unable to work during that hospitalization.
11. Regarding her family history, claimant's father had coronary artery disease. He was required to undergo a triple bypass surgery at the age of 51. She also understands both grandmothers had heart issues. She denies her one brother or 2 sisters have any history of heart condition or disease.
12. During the course of her cross-examination, the claimant denies any history of hypertension or high cholesterol. She later testified she has never been diagnosed with high cholesterol.
13. Dr. Alexander Chernobelsky, a board certified cardiologist, service claimant's IME physician. His experience includes serving as an authorized treating physician for patients under the heart/lung bill. He has treated "hundreds" in that capacity. He has also provided IME services in these types of cases but reports the vast majority are on behalf of the employer/carrier. He is an authorized EMA physician for Florida as well.
14. Dr. Chernobelsky performed a records review and prepared a report in rendering his services as an IME physician. His review of the records demonstrated the claimant was 35 years old on the time of the events giving rise to this claim. In his opinion, the claimant suffered coronary artery disease. This was confirmed by her clinical presentation, lab work, stress test and the cardiac catheterization.
15. Dr. Chernobelsky confirmed that while many similarly situated patients have a stent placed, the vessel that was blocked in the claimant's case was very small and very distant thus the clinician involved determined a stent would not be helpful.
16. During the course of his deposition, Dr. Chernobelsky testified the claimant was unable to work during her hospitalization. In his report, he commented upon her presentation at the hospital. Her symptoms were typical of angina. Her EKG was abnormal. Her nuclear stress test showed anterior attenuation artifact. Her catheterization showed the distal lesion or blockage. Included in Dr. Chernobelsky's report is the statement claimant was, on November 27, 2018, disabled from her coronary artery disease.

17. Dr. Chernobelsky also reviewed the claimant's pre-employment physical performed on October 8, 2008. That physical showed no evidence of coronary artery disease. E/C has presented no evidence to the contrary.
18. In Dr. Chernobelsky's opinion, he is unable to state with reasonable medical certainty the cause of the claimant's coronary artery disease. His report and testimony included references to literature regarding family history and its relationship as risk factors to the development of coronary artery disease. Based upon his review of that literature and the information regarding the claimant's father and grandparents having heart disease, he thinks the risk associated with family history and the development of heart disease is exceedingly small. Furthermore, in his opinion, risk calculators associated with the development of coronary artery disease are inapplicable to patients younger than 40. He testified that the incidence of coronary artery disease in those younger than 40 is so small as to lack any scientific basis to establish medical certainty.
19. In reviewing the claimant's medical records at the time of her hospitalization on November 27, 2018, there was an absence of any history of coronary artery disease, hypertension, diabetes or hyperlipidemia. Her smoking would be a risk factor but he agreed it was a generally acceptable principle that the less one smoked, the less a risk factor this involved.
20. Dr. Chernobelsky saw no medical evidence the claimant had a diagnosis of hypertension at the time of her hospitalization at Flagler Hospital on November 27.
21. During the course of cross-examination, Dr. Chernobelsky was questioned at length regarding risk factors and causation. Despite that examination, his opinion remained unchanged, i.e., he was unable to state with reasonable medical certainty the cause of the claimant's CAD.
22. Based upon the claimant's evidence, I find the claimant has established the elements necessary to create a presumption her CAD is compensable. The E/C does not contest the claimant's is a member of the protected class nor do they argue coronary artery disease is not a covered condition. Based upon the testimony of Dr. Chernobelsky, it is clear and I so find the claimant's pre-employment physical was without evidence of heart disease. I accept the opinions of Dr. Chernobelsky expressed on deposition and in his report that the claimant was disabled when hospitalized beginning November 27, 2018. This comports with the evidence which includes evidence she was taken by rescue to

the hospital, admitted to the hospital, and required to undergo multiple examinations and tests culminating in the cardiac catheterization of November 30, 2018.

23. The meaning of disability has been explored in some detail in the case *Rocha v. City of Tampa*, 100 So.3d 138 (Fla. 1<sup>st</sup> DCA 2012). In *Rocha*, the issue, as here, is whether the Claimant proved his condition resulted in total or partial disability as required by F.S. 112.18(1). The *Rocha* court framed the issue as follows: “[W]hether a claimant can rely solely on a medical work restriction to prove disability for purposes of section 112.18...” *Id.* at 141. In its analysis, the court recognized there are individuals who might “retain the physical strength and coordination to perform” the job but are given work restrictions to avoid potential further injury or death due to heart disease or hypertension. In finding *Rocha* was disabled, the court stated: “To hold otherwise would encourage such a claimant to ignore the advice of his doctor in fear that a panel of judges’ years hence might deem the work restriction unwarranted. Further, it would encroach upon the doctor-patient relationship, and violate both the basic tenets of public safety and the clear purposes of the Workers’ Compensation Law.” *Rocha* at 142.
24. Consistent with the holding in *Rocha*, I find that Ochkie was disabled from working during her hospitalization which directly resulted from her coronary artery disease as opined by Dr. Chernobelsky. There is no competent evidence she was not disabled during this period. Furthermore, her condition necessitated a trip by rescue to the hospital where tests and an invasive procedure were performed. As a result, I find Claimant has met the presumption for compensability of his coronary artery disease.
25. Having established the necessary elements to create the presumption of compensability, the next issue to be determined is whether the employer/carrier has established, by competent substantial evidence, claimant’s condition resulted from non—occupational causes. In this regard, the question is whether the testimony of employer/carrier’s expert, Dr. Koren, rebuts the presumption of compensability. Dr. Chernobelsky claimant’s IME physician, cannot identify a specific cause of claimant’s CAD. While he acknowledged certain risk factors existed, he denied the ability to identify any specific cause of claimant’s condition. The proof necessary to rebut the presumption is as was stated in *Punsky v. Clay County Sheriff’s Office*, 18 So. 3d 577 (Fla. 1<sup>st</sup> DCA 2009): “there is a clear path for the application of the section 112.18(1) presumption. The presumption does not vanish upon presentation of contrary evidence. (citation omitted). Instead, it remains with the claimant who establishes his or her entitlement to the

presumption and the presumption is itself sufficient to support an ultimate finding of industrial causation unless overcome by evidence of sufficient weight to satisfy the trier of fact that the tuberculosis, heart disease or hypertension had a non-industrial cause. (citation omitted) 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” As *Punsky* makes clear where, as here, the claimant offers no evidence of occupational cause beyond the presumption, the E/C can defeat the presumption by competent substantial evidence of non-occupation cause or causes.

26. The testimony of Dr. Koren was presented by the employer/carrier an effort to establish non-occupational cause of the claimant’s condition. Dr. Koren is also a Board certified cardiologist who estimates having treated 200 Worker’s Compensation claimants under the heart lung bill. He, too, has served as a an independent medical examiner in 7-10 cases. In this case, he was authorized by the carrier to treat the claimant and did so until the claim was denied. As part of his evaluation and treatment of the claimant, he reviewed the Flagler Hospital records from the hospitalization of November 2018. Dr. Koren’s opinion is consistent with that of Dr. Chernobelsky as to claimant’s diagnosis. He diagnosed the claimant as having coronary artery disease that was not amenable to intervention thus treatment was by medications.
27. Dr. Koren did not review claimant’s pre-employment physical.
28. In discussing risk factors, Dr. Koren described the claimant as “fairly obese.” He agreed with the history given him by E/C counsel that claimant had a family history of hypertension and heart disease to include a heart attack by her father when in the early 50s and her mother having “a couple strokes.” There is nothing in the record to support claimant’s mother having any cardiac condition. Dr. Koren reports the claimant is a “relatively heavy smoker at some times and indeterminate smoker even when he was seeing her. He also stated the claimant had hypertension and cholesterol as risk factors. Ultimately, Dr. Koren stated claimant had “premature coronary disease and she has multiple cardiovascular risk factors. So we believe that there is a cause and effect between the multiple cardiovascular risk factors and its presentation.”
29. Apparently, Dr. Koren is of the opinion the claimant had hyperlipidemia prior to her November 2018 hospitalization because of her response to rosuvastatin. Although there is no medical record establishing the existence of hyperlipidemia, Dr. Koren concludes that, retrospectively, concluding it must have been high because of the numbers

arguably resulting from that medication. Dr. Chernobelsky expressed a contrary opinion believing this to be highly speculative and without factual basis or support. I agree.

30. Dr. Koren was also challenged regarding his statement the claimant was a heavy smoker and later an intermittent smoker. His conclusions in this regard also appear to be factually unfounded. According to the testimony of the claimant, she quit smoking in September 2018 yet Dr. Koren testified she had previously been a heavy smoker and was an intermittent smoker when he saw her. Thus it appears his factual basis for including this as a risk factor is not supported by the evidence or varies from Dr. Koren's understanding of claimant's history.
31. Regarding family history of heart disease, claimants counsel clarified with Dr. Koren that it was not her mother that had heart disease but her maternal and paternal grandmother. He had no information regarding their ages at such time as heart disease was diagnosed. Again, Dr. Koren's testimony appears to have been based on incomplete information.
32. As to the claimant's weight, Dr. Koren initially, he testified she was "fairly obese" but on further examination by claimant's counsel, he described her as "mildly overweight."
33. The testimony of Dr. Koren is challenged by that of Dr. Chernobelsky. Dr. Chernobelsky does not believe there is any scientific basis to determine causation of CAD associated with risk factors and a person age 35. He stated that to quantify such a risk is in his opinion "impossible." He does not believe it is scientifically possible to do so. In his opinion, the cause of coronary artery disease in the claimant "is unknowable, at least at this juncture of scientific knowledge of coronary artery disease. Ultimately, Dr. Chernobelsky testified "I think it is extraordinary – it would be extraordinary to have a 35-year-old woman who had been smoking for however long, not on a daily basis, and who has her father, who barely meets criteria for premature coronary artery disease, without diabetes, without other things, to develop significant obstruction of coronary artery disease. It's extraordinarily uncommon. So I lack scientific information to tell you that these risk factors are likely to have been the cause or contribute more than 50% to her development of coronary artery disease. What I'm saying is, it's extraordinarily unlikely for a person to do that." He further testified "So I cannot tell you that her smoking or her being overweight contributed to anything. Is it statistically shown to increase a person's risk? Yes. But her risk is so ridiculously small to start with that even if you increase that risk, it continues to be ridiculously small."

34. Having considered the testimony of Dr. Chernobelsky and that of Dr. Koren, I accept in all respects the opinions and testimony of Dr. Chernobelsky over that of Dr. Koren where that testimony is in conflict. I believe his opinions are based on a better understanding of the claimant's medical history to include family medical history, smoking history, and other history as is relevant to the opinions expressed. I further find his opinion is based on scientific principles whereas the opinions of Dr. Koren as expressed in this case are speculative and without scientific support. I find the opinions of Dr. Chernobelsky to better comport with logic and reason than those of Dr. Koren.
35. Thus I find the employer/carrier has failed to establish by competent substantial evidence that claimant's coronary artery disease resulted from non-occupational causes. The employer/carrier has failed to rebut the presumption claimant's condition is causally related to her employment.
36. I find the claimant meets the criteria set forth in Florida Stat. §112.18 to be entitled to the presumption her condition is causally related to her workplace employment and that she sustained heart disease with an accident date of November 27, 2018.
37. I reject any argument the claimant had pre-existing heart disease on or about September 10, 2018. The evidence does not establish the claimant met the criteria for a presumption of that condition existing on that date or that she meets the requirements of Florida Stat. §112.18.
38. I reject the defense raised by the employer/carrier that the claimant did not receive treatment for a covered condition which incapacitated the claimant from performing her work as a law enforcement officer on November 27, 2018. The claimant was taken by rescue to the hospital where she was admitted for 4 days. During the course of that admission, she had treatment that culminated in a cardiac catheterization. The unrebutted testimony established claimant was disabled as of that date.
39. I reject the employer/carrier's contention claimant's heart disease is due to one or more of the constellation of non-work related risk factors as more particular set forth hereinabove.
40. I find the claimant was temporarily and totally disabled for the period November 27, 2018 until discharged from the hospital on December 1, 2018. While the claimant testified to having been disabled for longer appeared of time, there is no medical evidence in the record to support that contention.

41. I find the claimant requires authorization of a cardiologist to evaluate and treat her condition based upon the testimony of Dr. Chernobelsky.
42. I find that the claimant's attorney has performed a valuable service and is entitled to an award of a reasonable attorney's fee and taxable costs against the employer for securing the benefits awarded by this Final Compensation Order.
43. Any and all issues raised by way of the petition for benefits, but which issues were not dismissed or tried at the hearing, or which were ripe, due and owing but not raised at the hearing, are presumed resolved, or in the alternative, deemed abandoned by the claimant, and therefore, are denied and dismissed with prejudice.

**Wherefore, It Is CONSIDERED, ORDERED, and ADJUDGED** as follows:

1. The claim for compensability of claimant's coronary artery disease is hereby granted.
2. The claim for authorization of a cardiologist to evaluate and treat claimant's compensable coronary artery disease is hereby granted.
3. The claim for temporary total disability benefits is denied because claimant's period of disability does not meet the statutory threshold for those benefits.
4. The E/C shall pay a reasonable attorney's fee and taxable costs to the claimant's attorney for securing the benefits being awarded by this Final Compensation Order. Jurisdiction is hereby reserved to determine the amount thereof if the parties are unable to amicably resolve this issue.

DONE AND SERVED this 9th day of October, 2019, in Jacksonville, Duval County, Florida.



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