

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

Michael D'Apice,

Claimant,

vs.

OJCC CASE NO: 05-037449 TGP  
JUDGE: Thomas G. Portuallo  
DATE ACCIDENT: November 16, 2005

State of Florida - Department of  
Corrections/Division of Risk  
Management,

Employer/Carrier.

Paul A. Kelley, Esquire, Bichler & Kelley, P.A., for Employee/Claimant  
Lawrence J. Feinstein, Esquire, Vernis & Bowling, P.A. for Employer/Carrier

---

**ORDER ON MEDICAL AND DISABILITY BENEFITS**

---

**AFTER PROPER NOTICE** to all Parties, the above entitled cause came on to be heard before Thomas G. Portuallo, Judge of Compensation Claims (JCC), in Daytona Beach, Volusia County, Florida, on Monday, January 7, 2008, at 1:00 p.m. Present at the trial was the Claimant, Michael D'Apice, and his attorney, Paul A. Kelley, Esquire, of Winter Park. Appearing on behalf of the State of Florida Department of Corrections and Division of Risk Management was Lawrence J. Feinstein, Esquire, of Deland. The Petitions for Benefits at issue were filed on October 20, 2006; February 23, 2007; May

25, 2007; and June 27, 2007. This Court has jurisdiction of the Parties and the subject matter of this trial.

Subsequent to this trial, by letter dated January 11, 2008, the undersigned set forth the terms of the proposed ruling and requested Paul A. Kelley, the attorney for the Employee/Claimant, to prepare a proposed Order. Following receipt of the proposed Order, and after making various modifications, this Order is now entered.

The Parties **STIPULATED** to the following:

1. The date of accident is November 16, 2005;
2. The place of the accident and venue is Volusia County;
3. There was an Employer/Employee relationship on the date of accident;
4. There was workers' compensation insurance coverage in effect on the date of accident;
5. The accident or occupational disease was accepted as compensable;
6. The injuries or conditions included in Florida Statute §112.18, specifically the Claimant's hypertension and cardiac disease conditions, were accepted as compensable as related to the November 16, 2005 accident, but not the periodontal problem, Levitra, or the obesity control issue;
7. There was timely notice of the accident, injuries or occupational diseases;
8. There was timely notice of the Pretrial Conference and Trial;
9. The correct Average Weekly Wage and Compensation Rate are \$788.81, including fringe benefits, and \$525.87, respectively;
10. The following physicians were authorized to provide treatment for the Claimant's cardiac conditions: Dr. David Williams; Dr. James D. Waumett; Dr. Maria

Lopez; Dr. Edward Supinski, and Dr. Patrick Mathias;

11. That the request for a smoking cessation program was not ripe, as it had not been mediated or pretried before Trial;

12. If benefits under Section 440.13, Florida Statutes (medical) are determined to be due or stipulated due herein, the parties agree that the exact amounts payable to the health care providers will be handled administratively and medical bills need not be placed in evidence at trial; and

13. The Judge of Compensation Claims has jurisdiction over the subject matter and of the Parties hereto.

14. Subsequent to the undersigned's ruling letter being provided, the Parties were able to come to an agreement regarding a portion of past indemnity benefits at issue. It has been represented to this Court without objection that the agreement is as follows: the Employer/Carrier shall pay to the Claimant one (1) week of temporary total disability benefits following the November 16, 2005, heart catheterization and stenting; the Employer/Carrier shall also pay to the Claimant three (3) weeks of temporary total disability benefits following the June 26, 2006, cardiac catheterization; and the Employer/Carrier shall pay to the Claimant nine (9) weeks of temporary total disability benefits following the August 29, 2006, quadruple bypass, which pays him through October 30, 2006, when indemnity benefits were initiated. Although the parties were able to, post-hearing, stipulate to payment of a portion of indemnity benefits as described above, additional issues regarding the payment of indemnity benefits remain in dispute to be resolved by this Court in the contents of this Order.

The **ISSUES** to be determined are:

1. Authorization and payment of Levitra pursuant to the recommendation of Dr. Patrick Mathias, the authorized treating physician;
2. Authorization for care and treatment under the supervision of a periodontal specialist pursuant to the recommendation of Dr. Patrick Mathias;
3. Authorization for treatment in a supervised weight loss program (Bariatric Weight Loss Facility) pursuant to the recommendation of Dr. Patrick Mathias;
4. Payment of Temporary Total Disability benefits, as appropriate, from November 16, 2005, to present and continuing;
5. Payment of Temporary Partial Disability benefits, as appropriate, from November 16, 2005, to present and continuing; and
6. Penalties, interest, costs and attorney's fees to be paid by the E/C/SA pursuant to Florida Statutes §440.34 and §440.32.

The following **ISSUES** were **WITHDRAWN** by the Claimant at the time of Trial:

1. Payment of past due medical bills to Halifax Medical Center in the amount of \$42,651.60; and
2. Payment of past due medical bills to HHCSI Open Heart Physician Services in the amount of \$6,550.00.

The **DEFENSES** raised by the Employer/Carrier are:

1. Levitra is not a medical necessity, there are no objective relevant medical findings to support his claim for treatment of erectile dysfunction, and the Claimant's condition is personal to him and unrelated and/or pre-existed the industrial accident;
2. The Claimant's industrial injury is not the major contributing cause of his

need for a periodontal specialist or bariatric weight loss;

3. The Claimant's need for periodontal treatment and weight control pre-existed his industrial accident;

4. The Claimant is capable of performing modified work;

5. The Claimant is not totally disabled from working; and

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

The following **DEFENSES** were **WITHDRAWN** by the Employer/Carrier at the time of Trial:

1. The bills from HHCSI Open Heart Physician Services and Halifax Medical Center have been paid; and

2. The Claimant is not entitled to TPD benefits pursuant to 440.15(4)(e).

At the time of the hearing, the following **EXHIBITS** were offered and accepted into evidence:

JCC's Exhibit #1: The Pretrial Stipulation that was approved by this Court on August 9, 2007;

JCC's Exhibit #2: The Claimant's Amendment to the Pretrial Stipulation dated December 12, 2007;

JCC's Composite Exhibit #3: The Claimant's Trial Memorandum, 7 pages, filed January 4, 2008, and Employer/Carrier's Trial Memorandum, 5 pages, filed January 3, 2008, all attachments removed, both accepted for argument purposes only;

Parties' Joint Exhibit #1: The Employer/Carrier's Payout Ledger;

Employee/Claimant's Exhibit #1: The Deposition of Dr. Patrick Mathias, taken on December 17, 2007, together with attachments, however the Employer/Carrier's

objection to the two page letter dated March 6, 2007, from Dr. Horvatt to Dr. DeGraff, is removed from the attachments and not admitted into evidence. Notwithstanding the foregoing, any opinions of Dr. Mathias that may have been based upon said letter are still admissible. The remaining portions of the deposition and attachments are admitted without objection;

Employee/Claimant's Exhibit #2: The Deposition of Tawanna Burk, taken September 17, 2007, together with attachments, admitted with no objections;

Employee/Claimant's Exhibit #3: The records of the Claimant's Pre-employment Physical which took place December 12, 1998, through December 16, 1998, admitted with no objections;

Employer/Carrier's Exhibit #1: The Deposition of Dr. William Handelman, taken on October 3, 2007, together with attachments, admitted with no objections;

Employer/Carrier's Composite Exhibit #2: The medical records of Florida Health Care Plan, admitted for factual purposes only, except that the medical opinions of Dr. Maria Lopez and Dr. Edward Supinski were agreed by the Claimant to be admissible. The undersigned also admits the opinions of all physicians which were authorized pursuant to the testimony of the adjuster, Tawanna Burk. Specifically, the opinions of Dr. Patrick Mathias, Dr. Edward Supinski, Dr. David Williams, Dr. Maria Lopez, and Dr. Robert Barrett were also accepted as authorized treating physicians. Any medical reports contained otherwise contained within this exhibit generated by physicians, who are not authorized, have been considered by the undersigned for factual purposes only. However, even if I accept the Claimant's position that only the opinions of Dr. Supinski and Dr. Lopez should be considered, the ruling in this case would be the same on all

pending issues;

Employer/Carrier's Exhibit #3: The Deposition of Michael D'Apice, taken September 6, 2007, with appropriate weight given to his testimony.

### **STATEMENT OF THE CLAIM**

MICHAEL D'APICE, hereinafter referred to as "Claimant" or "Employee", is a 44 year old male, who was employed as a Correctional Officer at the Tomoka Correctional Institute for the State of Florida Department of Corrections, hereinafter referred to as "Employer". Officer D'Apice was hired by the State on December 27, 1998, following a pre-employment physical, which failed to reveal any evidence of hypertension or heart disease.

During the course of his career with the Employer, Officer D'Apice began experiencing chest pain and pressure, along with shortness of breath. Ultimately, Mr. D'Apice was diagnosed with essential hypertension and heart disease, and underwent an angioplasty on November 16, 2005, where two stents were implanted. Subsequently, he had four way coronary artery bypass surgery on August 29, 2006, as a result of significant blockages.

The cardiac conditions were accepted as compensable by the Employer/Carrier. Initially, the Claimant was authorized to receive treatment with the physicians through the Florida Health Care Plan. In October of 2006, Dr. Patrick Mathias, cardiologist, was authorized to provide medical care and treatment for the work related conditions and their sequela.

Following the cardiac procedures, the Claimant continued to experience

symptoms and complaints associated with his cardiac conditions. In order to help control his hypertension and improve his overall cardiac condition, his physicians recommended weight loss, smoking cessation, and exercise, which the Claimant attempted on his own. Mr. D'Apice made some progress on his own, but it did not result in lasting improvement. Each time, he would return to his former condition, and at times, became worse.

As Mr. D'Apice was not able to obtain adequate results and symptoms continued, Dr. Mathias recommended a supervised weight loss program to help him obtain and maintain optimum weight control, and to help reduce his blood pressure and symptoms. He specifically suggested a supervised Bariatric Weight Loss Program, but was not recommending Bariatric Surgery at the time. Although the Employer/Carrier said the Claimant could attend a free Bariatric class in Celebration, Florida, they have either failed or refused to authorize, set up, or provide a supervised weight loss program within the Claimant's locale.

The Claimant also requested authorization of Levitra for erectile dysfunction. Prior to his cardiac conditions, Mr. D'Apice had reported to his physicians that he had periodic erectile dysfunction and occasional premature ejaculation. In addition, he was previously being provided Viagra through Dr. Mathias, and had similar medications from prior physicians as well. It is unclear who paid for these prescriptions or whether samples were simply provided.

Officer D'Apice also filed a claim requesting a periodontal specialist to provide treatment for the periodontal disease. He testified that, prior to his cardiac procedures, he had some dental issues, which he described as normal. However, following the



onset of the cardiac issues, Mr. D'Apice testified that he has lost at least seven teeth. In addition, he can't eat solid foods, gets abscesses, and has had to use a significant amount of antibiotics.

In addition, the Claimant has requested payment of temporary indemnity benefits, as appropriate, from November 16, 2005. Officer D'Apice resigned his position, and last worked September 8, 2006, one month after to his coronary by-pass surgery. The Claimant also missed work between the angioplasty and stenting. He claims to be due indemnity benefits during these "gap" periods, as well as ongoing temporary total disability benefits from the date of his resignation to the present. The Claimant is currently receiving impairment benefits from the Employer/Carrier. Indemnity benefits were first initiated by the Employer/Carrier on October 30, 2006, according to the testimony of Tawanna Burk.

In making my **FINDINGS OF FACT AND CONCLUSIONS OF LAW** in this claim, I have carefully considered and weighed all of the testimony and evidence presented to me, including all live and deposition testimony, as well as exhibits, and have resolved any and all conflicts therein. The undersigned has also carefully observed the candor and demeanor of the Claimant, Michael D'Apice, who was the only live witness to testify before me, and have resolved all of the conflicts in the testimony and the evidence. This Court finds that the Claimant was credible and his testimony was consistent with logic and reason. Furthermore, his testimony regarding his symptoms, complaints, conditions, efforts to improve, and his medical treatment, was consistent with the testimony of the medical experts.

In this case, the opinions of the Claimant's expert, Dr. Patrick Mathias, and the

Employer/Carrier's expert, Dr. William Handelman, agreed in many areas, but likewise differed on some points. To the extent that the opinions were consistent, I accept that testimony from each physician. However, wherever the testimony may be in conflict, I accept the testimony and opinions of Dr. Patrick Mathias over that of Dr. William Handelman. To the extent that any of the opinions, of the authorized physicians, contained within the medical composite from Florida Health Care Plan physicians may be in conflict with that of Dr. Mathias, I accept the opinions of Dr. Mathias over those of any others, as being more consistent with logic and reason when viewed in light of the totality of the medical evidence and facts of this claim.

In arriving at these findings of fact and conclusions of law, this Court has rejected all of the evidence and inferences which may be inconsistent with its findings and conclusions. After having carefully considered the testimony at the trial, as well as all of the evidence, the statute, and applicable case law, I make the following determinations:

1. The Judge of Compensation Claims has jurisdiction of the Parties and the subject matter of this claim.

2. The stipulations of the Parties as to certain facts are proper, and are therefore, hereby approved and adopted by me.

3. I find the requested periodontal treatment to be compensable under the hindrance theory. In making this finding, the undersigned accepts the position of the Claimant that the requested medical treatment under the supervision of a periodontal specialist is compensable under the theory that this benefit is medically necessary with the primary purpose of treatment to remove a hindrance to recovery from the compensable cardiac conditions.

This position is supported by the findings of the First District Court of Appeals in the case of Robbin Tyson v. Palm Beach County School Board and F.A. Richard and Associates, 913 So. 2d 1005 (1st DCA 1005). In making this finding, this Court accepts the clear and direct opinion testimony of Dr. Mathias during his deposition, including his opinions as expressed in response to cross-examination by Attorney Feinstein, beginning on page 41, as follows:

**"Questions by Larry Feinstein:**

Q. And with respect to the periodontal disease, it is reasonably and medically necessary to effectively treat Mr. D'Apice's heart disease to treat also his periodontal disease?

**Answers by Dr. Patrick Mathias:**

A. His periodontal disease puts him at higher risk for further problems with his heart and therefore needs to be addressed.

Q. And am I correct in stating that some of the risks involved with his particular type of periodontal disease has to do with a greater potential for -- I guess getting certain germs that could be detrimental to his cardiac health?

A. There are two risks. One is the risk of endocarditis. If you've got badly infected gums, those bugs can enter your bloodstream and enlarge the heart. The second is that chronically inflamed gums result in the production of certain chemicals. Those chemicals have a definite correlation, strong correlation with the subsequent development of heart attacks.

Q. And just for the Judge's sake, what is endocarditis?

A. An infection of the valves -- one of the valves in the heart.

Q. Okay. So is it fair to say then that if Mr. D'Apice's periodontal disease is not treated, that this could have a detrimental effect on his overcoming or fully recovering from coronary heart disease or other heart disease?

A. Yes.

Q. And if his periodontal disease is not treated, he runs the risk of further blockage and/or another heart attack?

A. Yes."

4. I likewise find the requested supervised Bariatric weight loss treatment program to be compensable under the hindrance theory. In making this finding, the undersigned accepts the position of the Claimant that the requested supervised Bariatric weight loss treatment program is compensable under the theory that this benefit is medically necessary with the primary purpose of treatment to remove a hindrance to recovery from the compensable cardiac conditions.

Similar to the request for the periodontal specialist, this position is also supported by the findings of the First District Court of Appeals in the Robbin Tyson case. In making this finding, this Court accepts the clear and direct opinion testimony of Dr. Mathias during his deposition, including his opinions as expressed in response to cross-examination by Attorney Feinstein, beginning on page 40, as follows:

**"Questions by Attorney Feinstein:**

Q. Doctor, is it your opinion today that it's reasonably and medically necessary for Mr. D'Apice to lose weight in order to effectively treat his heart disease?

**Answers by Dr. Patrick Mathias**

A. Yes.

Q. And how much weight do you think he needs to lose?

A. Between 70 and 90 pounds.

Q. And would it be your opinion today that in order to safely lose that amount of weight in a short period of time it would require some sort of medical supervision?

A. Yes.

Q. And that would include a doctor's supervision as well as a dietician?

A. Yes.

Q. And that would be the possible, I guess, result of Mr. D'Apice not losing a sufficient amount of weight in a sufficient amount of time?

A. That component of risk for his heart disease then remains unchecked and he's at a higher risk of requiring further blockages.

Q. So it would be safe to say that his current inability to lose weight is detrimental to his full recovery from heart disease?

A. Yes.

Q. And also from exacerbating his existing condition?

A. Yes."

5. Dr. Mathias also testified on page 49 of his deposition that, "My main motivation for writing referrals for the weight loss and the periodontal disease were because I was concerned about the effects that they would have on his heart". This line of testimony supports the finding that the "primary purpose" of these referrals is to remove a hindrance to recovery from the compensable coronary heart disease and hypertension.

This Court accepts Dr. Mathias' opinion on the medical necessity and reason for

referrals for bariatric weight loss treatment and periodontal specialist for disease treatment over any contradictory medical opinion in the Record. The undersigned further accepts Dr. Mathias' opinion on the issues as Dr. Mathias is the Claimant's primary treating physician and is most familiar with the Claimant's symptomatology and heart condition, more so than any other physician whose opinion appears in the Record. I further find that Dr. Mathias has rendered the most clear and logical opinion relating to the issues of supervised bariatric weight loss treatment and treatment with a periodontal specialist. Dr. Mathias' opinions on both of these issues are most consistent with the totality of evidence presented in this case, including the diagnostic test studies, medical history of the Claimant, and totality of circumstances presented in this case. This Court also accepts the argument of Mr. Kelley as presented in at Hearing that Dr. Mathias is most qualified to render an opinion on these issues. The Employer/Carrier's expert, Dr. William Handelman, is board certified in internal medicine, and recently passed the board exam in echocardiography. Whereas, Dr. Patrick Mathias, the Claimant's expert, is board certified in cardiology, critical care medicine, interventional cardiology, internal medicine, clinical cardiac electrophysiology, and is also certified by the American Society of Hypertension Specialist.

6. In finding that the Employer/Carrier is responsible for authorization of the supervised Bariatric weight loss treatment and periodontal specialist disease treatment, I do find that the Claimant had a preexisting history on both of these conditions, and accept the Employer/Carrier's position that the Claimant failed to prove that the major contributing cause, or the direct and proximate cause, of the need for such treatment is the industrial accident. There is uncontroverted documented evidence in the Florida

Health Care Plan medical records that the Claimant's obesity and dental problems preexisted the industrial accident. The Claimant also testified at trial that he had general tooth aches and dental problems, and may have even lost a couple of teeth before, although he lost at least seven since the cardiac problems. Mr. D'Apice also testified he weighed approximately 240 pounds when he was hired, and between 250 to 260 pounds in 2005. He even indicated he was "stocky and solid" in High School. Accordingly, I find the Claimant had chronic periodontal disease and obesity for years prior to the industrial accident. Furthermore, this Court finds there is a lack of medical evidence in the Record to support a determination that these conditions are medically causally related to the industrial accident. Accordingly, the authorization for these two medical benefits is limited to treatment of these conditions on the grounds the weight condition and periodontal disease both present a hindrance to treatment of the underlying compensable heart condition and hypertension. Therefore, I find the primary purpose of this treatment is the removal of such hindrances to recovery from the compensable accident. As these treatments are being awarded based on the conditions being a hindrance to recovery from the compensable cardiac conditions, the approval of these benefits will continue only to the extent that the primary purpose of such treatment remains the removal of hindrances to recovery from the underlying compensable cardiac conditions.

7. I find the Claimant has not proven, by competent substantial evidence, that the recommendation for Levitra is medically necessary and causally related to the industrial accident by way of major contributing cause, or by way of direct and proximate cause. In making this finding, I note the composite medical exhibit, from Florida Health

Care Plan physicians, documents that the Claimant had preexisting periodic erectile dysfunction and premature ejaculation issues. The records clearly indicate that the Claimant had tried Viagra prior to the industrial accident. This is especially evident in the various reports of Dr. Edward Supinski, including the report of May 20, 2005, which indicates the Claimant has complained of P.E. prior to the industrial accident. Although there was testimony presented by both Dr. Handelman and Dr. Mathias, that the dysfunction may be a result of the heart attack, cardiac condition, hypertension, or medications for these conditions, neither physician could testify that the underlying compensable cardiac claims, or the medications to treat them, were the major contributing cause of the dysfunctional condition.

Unlike the requested weight loss and periodontal treatment, I find the request for provision of Levitra based on erectile dysfunction or premature ejaculation not to be a hindrance to the recovery from the underlying compensable cardiac conditions. The depositions of both experts support this finding. In response to questioning by Attorney Feinstein, Dr. Mathias testified as follows:

**"Questions by Attorney Feinstein:**

Q. Now what if his -- what if Mr. D'Apice had problems predating his open heart surgery where he was seeking out or using Viagra?

**Answers by Dr. Patrick Mathias:**

A. If he had problems with erectile dysfunction prior to his being placed on Toporol, then we obviously can't blame the Toporol. It could aggravate things. It could definitely aggravate things, but it certainly wasn't the dominant factor.

Q. Okay. So if he was experiencing problems with erectile dysfunction even



prior to this accident date we have of November of '05, would that indicate that the major contributing cause of that dysfunction is something that preexisted?

A. Yes.

Q. I also note -- I think it was Levitra that may have been prescribed and I had gone to their website, they mention that high cholesterol can affect erection quality, is that your understanding as well?

A. Yes, by causing vascular disease in the pelvic vasculature.

Q. Okay. So if there was -- I don't know if you had a chance to review a preemployment physical from Mr. D'Apice back in '98 with the Volusia County where --

A. I did not.

Q. Are you aware that he had increased cholesterol back around the turn of the century or in '03 or at least preexisting his work event?

A. I had not reviewed that.

Q. Let me ask you this: If you were to assume that the facts will reveal that he had elevated cholesterol prior to November of '05, would that be a factor in his need for this -- strike that. Would that be a cause for his erectile dysfunction?

A. High cholesterol, it's a lot weaker factor than smoking, but is a cause and incidentally he was on beta blockers back in 2005. His doctors had him on beta blockers, so...

Q. And what is that, beta blockers?

A. That's Toprol. That's a medication that absolutely wrecks a person's sex life.

Q. Okay. As far as his weight loss goes --

A. Yes."

The Claimant also attempted to have the erectile dysfunction accepted in order to avoid psychiatric or emotional stress from inability to perform, which could cause issues with his blood pressure. I reject that argument and find no medical evidence within the Record to support it. Specifically, Dr. Handelman was asked to address this issue in his deposition in questioning by Attorney Kelley. I accept Dr. Handelman's opinions on this issue which were as follows:

**"Questions by Attorney Kelley:**

MR. KELLEY: I know. It was an ugly question.

MR. FEINSTEIN: -- as to the qualifications of the doctor regarding the psychiatric component.

**Answers by Dr. William Handelman**

A. Um--

Q. (BY MR. KELLEY:) If you're comfortable answering it. If it's outside of your expertise, I'll understand that.

A. -- I think you have to consider the personality disorder or the psychiatric disorder and whether it's organic or functional; and, certainly, assisting a man in obtaining an erection and having intercourse can boost confidence and ego, if, indeed, that is the major causative factor.

Q. Doctor, let me ask you this: Inability to perform with regard to impotence, can that aggravate or trigger the hypertensive response? In other words, can that elevate his blood pressure?

A. Can that cause stress?

Q. Yes.

A. Yes, of course. Stress, you know, causes releases of epinephrine and norepinephrine and other vasoactive substances in the body. Norepinephrine is a vasoconstrictor.

Q. Would it therefore, Doctor, be appropriate, then, medically necessary, to treat the impotence to avoid the additional stressors and elevation of the blood pressure with regard to the hypertension condition?

A. Again, I think that we need some clarification as to the ideology of his psychopathology. You know what I'm saying?

Q. I do.

A. That is, is this all functional or is there an organic component? Is there a psychosis involved in which it's not going to make any difference or is this just anxious depression? You know, there's a number of factors that would put it outside of my ability to answer.

Q. Assume for the purpose of the question that it's related to his hypertension or his medication for his cardiac disease. Would the treatment, then, of the impotence by the Viagra or the Levitra be appropriate to avoid triggering elevations in the blood pressure?

A. Yes sir. Yes."

Based on the foregoing, this Court finds that the Claimant failed to present competent substantial evidence that the recommendation for Levitra was made with the primary purpose to remove a hindrance to recovery from the Claimant's underlying compensable coronary artery disease or hypertension conditions. Further, in review of

all medical evidence in the Record, including a review of Dr. Mathias's testimony and reports in their entirety, the undersigned does not find evidence that would support a finding that Levitra was recommended with the "primary purpose" to remove a hindrance to recovery from the compensable industrial accident. Again, I note the authority of Robbin Tyson v. Palm Beach County School Board and F.A. Richard and Associates, 913 So. 2d 1005 (1st DCA 1005) on this issue. Likewise, I find there is insufficient medical evidence in the Record to support the Claimant's argument that Levitra was recommended primarily in order to remove anxiety or emotional stressors which may act as a hindrance to recovery from the Claimant's compensable hypertension condition. Therefore, based on the foregoing findings, the request for authorization and payment of Levitra is denied.

8. Additionally, although the undersigned finds the majority of the Claimant's testimony as truthful, based upon this Court's observation of the candor and demeanor while he testified live, I do reject the portion of the Claimant's testimony with regard to the preexisting P.E. problems and history regarding the lack of erectile dysfunction prior to the industrial accident as being somewhat weak. With regard to this issue, I specifically find that the Claimant demonstrated poor memory for history of these problems at Hearing, based upon the Court's observation of the candor and demeanor of the witness while testifying live. I find the Claimant was successfully impeached by the Employer/Carrier at Hearing on this issue and demonstrated poor memory with regard to whether he had taken Viagra in the past. Therefore, this Court rejects any factual history in the Record offered by the Claimant in order to support a medical opinion establishing causal relationship of the recommendation for Levitra to the

industrial accident. Accordingly, I find the totality of the circumstances presented in this case, including the Claimant's poor recollection of treatment for P.E. prior to the industrial accident, and eventual admission that the Claimant did take Viagra prior to the industrial accident, cannot support a finding that the recommendation for Levitra by Dr. Mathias is causally related to the industrial accident, by way of direct and proximate cause, or by major contributing cause.

In making this finding, the undersigned notes the lack of objective medical evidence or diagnostic studies confirming the Claimant's instant complaints of E.D. in this case. I further note the authority of A.Duda and Sons Inc. and CNA Claims Plus v. Joseph A. Kelley, 900 So. 2d 664 (Fla. 1st DCA 2005), in this regard.

9. I hereby reject the Employer/Carrier's argument that the applicable Workers' Compensation statute regarding medical causation, identified at Hearing by the Employer/Carrier as Florida Statute §440.15 and §440.09, results in a "change in the playing field" applicable to the "hindrance" argument specifically raised in this case. The undersigned further rejects the Employer/Carrier's argument that case law with regard to removing a hindrance to recovery from the underlying compensable Workers' Compensation condition, such as in the case of Robbin Tyson v. Palm Beach County School Board and F.A. Richard and Associates, 913 So. 2nd 1005 (1st DCA 2005), is rendered inapplicable to the case at bar. This Court finds that the plain meaning of the Workers' Compensation Statute does not support the Employer/Carrier's position that the prior case law on this issue, such as Robbin Tyson, be deemed inapplicable to the case at bar.

10. I accept the position of the Claimant, as stated at Hearing, and find

temporary disability benefits are owed during gap periods as stipulated by the parties post-hearing.

Subsequent to the provision of my ruling letter, the Parties were able to stipulate to the certain specific indemnity benefit due to the Claimant from the Employer/Carrier. I accept their agreement and incorporate the same herein by reference. More specifically, it was agreed that the Claimant is entitled to one (1) week of temporary total disability benefits from the Employer/Carrier, beginning November 16, 2005, while he was recuperating from his angioplasty and stenting procedure. This finding is supported by the medical records, as well as the Claimant's live testimony before me at trial wherein he testified he lost approximately a week or two of work following this procedure. Ms. Tawanna Burk, the adjuster who testified by phone before me at trial, testified that the Claimant was never paid for this period.

In addition, Parties agreed the Claimant to be entitled to temporary total disability benefits for three (3) weeks, beginning June 26, 2006, following his cardiac catheterization. Mr. D'Apice testified before me that he was off work following the catheterization until he was released on July 20, 2006 to return to work on a light duty capacity. Ms. Burk likewise testified the Claimant was not paid indemnity benefits during this period of time either.

The Parties also agreed that the Claimant is entitled to nine (9) weeks of temporary total disability benefits from August 25, 2006 through October 30, 2006. Officer D'Apice testified that he worked up until the point he underwent quadruple coronary artery bypass grafting on August 29, 2006. The Claimant never returned to work after that point. However, the Employer/Carrier began paying indemnity benefits

on October 30, 2006, pursuant to the live telephone testimony of the adjuster, Tawanna Burk.

I accept these stipulations and agreements, and find them to be consistent with the testimony and evidence presented to me at trial.

11. I find that the Claimant has been paid temporary total disability benefits from October 30, 2006 through April 15, 2007, pursuant to the testimony of Ms. Burk, based on the payout sheet.

12. I find, based on the payout ledger, as well as the testimony of Ms. Burk and the Claimant, the Employer/Carrier began paying impairment benefits April 26, 2007. Ms. Burk testified that the impairment benefits were effective December 21, 2006, based on Dr. Mathias placing the Claimant at MMI as of December 20, 2006. Impairment benefits have been paid through January 2, 2008.

13. Despite the provision of Impairment Benefits, this Court finds that the Claimant has not reached a point of maximum medical improvement as of the date of the Final Hearing. Dr. Mathias specifically testified in his deposition, beginning on page 43 and continuing that the Claimant was not at maximum medical improvement in January 2007, due to the need to treat the periodontal issues, weight loss, and the Claimant's complaints of chest discomfort. Officer D'Apice was seen again by Dr. Mathias' in May 2007, as was still not found to be at maximum medical improvement. On page 44 and 47 of his deposition, Dr. Mathias testified that the Claimant was still not at maximum medical improvement, and was still temporarily totally disabled as a result of the industrial accident. Therefore, the undersigned accepts the Claimant's position that overall maximum medical improvement has not been attained in this case as

described by Dr. Mathias in his deposition.

14. I find that the Employer/ Carrier must reclassify the impairment benefits paid to the appropriate temporary total disability benefits. Again, the Employer/Carrier is entitled to an offset for any disability benefits awarded pursuant to this Order or agreement of the parties. As previously stated herein, Dr. Mathias clearly indicated that the Claimant was not at maximum medical improvement as of his deposition on December 17, 2007, page 47.

15. In addition to the stipulated periods of disability described above, I find temporary disability benefits are owed from January 2007, to the date of Final Hearing. The Employer/Carrier is entitled to an offset for any indemnity benefits paid during the period of disability awarded pursuant to this Order. I base this finding on the opinion and testimony of Dr. Mathias. I note Dr. Mathias testified on page 47 of his deposition that the Claimant was temporarily totally disabled between January 2007, and May 2007, and temporarily totally disabled since last seen on May 1, 2007. Likewise, as of his deposition on October 3, 2007, Dr. Handelman also indicated the Claimant was at not at maximum medical improvement, pending additional studies and the recommended treatment. Both physicians agreed Mr. D'Apice could no longer work as a Correctional Officer. Although Dr. Mathias stated at one point that the Claimant may be able to work in a sedentary capacity at best, Dr. Mathias further elaborated on page 47 of his deposition that the Claimant is temporarily and totally disabled from January 2007. Dr. Handelman suggested he may be able to do sedentary to light duty. However, he should have no exertional work, make no stressful decisions, and be under no stressful conditions in the work environment. The Claimant testified, he was told by



Dr. Mathias, that he was on an "off work" status. Accordingly, based on the totality of evidence, I find that the Claimant is entitled to temporary total indemnity benefits pursuant to the deposition testimony and opinion of Dr. Mathias, page 47. I find Dr. Mathias' opinion that the Claimant is temporarily and totally disabled from January 2007, is the most logical opinion and most consistent with the totality of evidence. I note there is no evidence before me that the Claimant has been informed that he was released to return to work. Consistent with the award of temporary total disability since January 2007, but certainly not determinative, I note Dr. Mathias' medical records indicate he believes the Claimant to be permanently and totally disabled.

16. I do not find the Claimant to be entitled to temporary partial disability benefits. Although, prior to January 2007, the Claimant had sedentary work restrictions described by Dr. Mathias and the medical composite, including the inability to return to former employment as a corrections officer, causally related to the industrial accident by way of major contributing cause, there was no evidence that the Claimant had been informed of a release to return to work. Subsequently, Dr. Mathias explained the Claimant was temporary totally disabled since January 2007, deposition Dr. Mathias page 47. Therefore, for the period of time following January 2007, up to the date of Hearing, I find temporary total disability benefits to be appropriate.

17. I reject and deny all defenses to disability benefits raised by the Employer/Carrier during the gap periods at issue, as well as their argument that the Claimant is at maximum medical improvement.

18. I find the Claimant to be entitled to, and therefore award, penalties and interest with regard to the disability benefits awarded.

19. I also find the Claimant to be entitled to, and therefore award, taxable costs and this Court reserves jurisdiction to determine the amount of taxable costs.

20. This Court reserves jurisdiction to determine both entitlement and amount of attorney's fee for the successful prosecution of these benefits.

**WHEREFORE**, based upon the foregoing findings of fact and conclusions of law, it is the Order of the undersigned Judge of Compensation Claims that:

1. The Employer/Carrier shall authorize a periodontal specialist to provide treatment for the periodontal disease, as recommended by Dr. Patrick Mathias pursuant to the terms of this Order.

2. The Employer/Carrier shall authorize and set up supervised Bariatric Weight Loss treatment within the Claimant's locale, pursuant to the recommendation of Dr. Patrick Mathias and pursuant to the terms of this Order.

3. The request for authorization and payment of Levitra is denied.

4. The Employer/Carrier shall pay one (1) week of temporary total disability benefits from November 16, 2005; three (3) weeks of temporary total disability benefits from June 26, 2006; and nine (9) weeks of temporary total disability benefits from August 29, 2006 through October 30, 2006, together with penalties and interest for each of these periods of time, for failing to timely provide these benefits.

5. The Employer/Carrier shall reclassify the impairment benefits paid to temporary total disability benefits.

6. The Claimant is awarded temporary total disability benefits from January 2007, through the date of the Final Hearing on January 7, 2008.

7. The Employer/Carrier shall be entitled to an offset for indemnity or

impairment benefits previously paid during the period of time temporary disability benefits are awarded pursuant to this Order.

8. The Employer/Carrier shall reimburse the Claimant for reasonable costs incurred in preparation for these proceedings. This Court reserves jurisdiction to determine the amount of taxable costs.

9. This Court reserves jurisdiction to determine the issues of both entitlement and amount of attorney's fee relative to the benefits secured.

10. Any arguments or issues that were ripe and not raised at the time of the Trial are considered waived. The smoking cessation issue was discussed at trial, however, as it was not mediated or pretried, and was not yet ripe for adjudication at the January 7, 2008, Final Hearing.

**DONE AND ORDERED** in Chambers at Daytona Beach, Volusia County, Florida.

*Thomas G. Portuallo*

---

HONORABLE THOMAS G. PORTUALLO  
JUDGE OF COMPENSATION CLAIMS

**I HEREBY CERTIFY** that the foregoing Order was entered on this 29th day of January, 2008, and that a copy was sent on that date by U.S. Mail to the parties and counsel at their addresses of record.

*Debra Smith*

---

Executive Secretary