

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

Donald Smith,)	
Employee/Claimant,)	
)	
vs.)	
)	OJCC Case No. 06-027158JL
State of Florida, Fish and)	
Wildlife Conservation)	Accident date: 5/10/2003
Commission/Division of Risk)	
Management,)	
Employer/Carrier/)	
Servicing Agent.)	

FINAL ORDER

AFTER DUE NOTICE to the parties, a Final Hearing on this matter was held in Tallahassee, Leon County, Florida, on December 21, 2007. The parties were represented by counsel as indicated below. The undersigned judge of compensation claims has jurisdiction of the parties and the subject matter.

The first Petition for Benefits (PFB) was filed on September 13, 2006. The PFB was mediated on January 22, 2007, and the mediation resulted in an impasse. The matter was pre-tried on March 2, 2007 and scheduled for Final Hearing on April 12, 2007. On March 19, 2007, a subsequent PFB was filed requesting the same benefits. On March 22, 2007, an Amended Notice of Voluntary Dismissal was filed dismissing the PFB filed on March 19, 2007. A subsequent Notice of Voluntary Dismissal was filed on March 27, 2007, again stating that the PFB filed on

March 13, 2007 was being voluntarily dismissed. A separate Amended Notice of Voluntary Dismissal was also filed on March 27, 2007 dismissing the first PFB filed on September 15, 2006, and explaining that the prior Notices of Voluntary Dismissal dismissing the PFB filed on March 19, 2007 were filed in error. Based on the voluntary dismissals filed, the Final Hearing scheduled for April 12, 2007 was cancelled.

Due to the barrage of confusing Notices of Voluntary Dismissals, procedural arguments ensued regarding whether there were any viable petitions pending requiring a mediation conference which was scheduled on May 30, 2007 regarding the March 19, 2007. After an Evidentiary Hearing on June 18, 2007, the undersigned Judge of Compensation Claims entered an Order Granting in Part and Denying in Part Employee's Motion to Correct Error Due to Mistake, Inadvertency, or Excusable Neglect and the PFB filed on September 15, 2006 was resurrected while the PFB filed on March 19, 2007 was found to have been voluntarily dismissed. Because of the above actions of Claimant's counsel, the matter was not tried until December 21, 2007.

At the Final Hearing, the Claimant sought the following benefits:

1. Compensation for temporary total disability (TTD)

benefits from May 10, 2003 to July 2, 2003, together with penalties and interest on all past due payments of compensation.¹

2. An attorney's fee for Claimant's counsel of record;
and

3. The cost of these proceedings.

The Claim was defended on the following grounds:

1. Claim is barred by the Statute of Limitations;

2. The claim is barred due to timely Notice of Injury;

3. The Employer/Carrier are entitled to an offset for income earned from May 10, 2003 and continuing;

4. Claimant is not entitled to TTD benefits because the Claimant received full salary during the period indemnity benefits are being claimed;

5. Employer/Carrier denies Claimant's entitlement to penalties, interest, costs and attorney's fees at their expense;
and

6. Employer/Carrier seeks costs against the Claimant in the event Employer/Carrier prevails in these proceedings.²

The parties have entered into the following stipulations:

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

2. Venue properly lies in Franklin County, Florida,

¹ This issue/claim was voluntarily withdrawn or stricken by counsel for the Employee during closing argument.

² Employer/Carrier asserted no defenses to the claim for a cardiologist.

however, upon the request and consent of the parties, this matter was tried in Tallahassee, Leon County, Florida.

3. Notice of Hearing was properly furnished and received as required by the Workers' Compensation Law.

4. On May 10, 2003, the Claimant was employed by the captioned Employer earning an average weekly wage of \$1,453.03 (base wage - \$1,379.56 per week; fringe benefits - \$62.22 per week; and CJIC - \$11.25 per week) and yielding a maximum compensation rate of \$608.00 per week.

5. The following was stipulated at trial:

a. Employer/Carrier stipulates that the Claimant is entitled to the statutory presumption regarding the compensability of his cardiac and hypertension condition as provided in section 112.18(1), Florida Statutes;

b. Employer/Carrier stipulates that the Claimant was totally disabled from 5/10/2003 to 7/2/2003; and

c. Should the Claimant prevail in overcoming the Employer/Carrier's defenses regarding the Statute of Limitations and/or untimely Notice of Injury, the Claimant is entitled to medically necessary treatment by a cardiologist.

At the trial of this cause, the following Exhibits were admitted into evidence.

Claimant's Exhibits

1. Petition for Benefits filed 9/15/2006.
2. First Report of Injury dated 9/20/2006.
3. Broken arm Poster.
4. Deposition of Cindy Hoffman taken 12/6/2007.
5. Deposition of Beth Smith taken 12/6/2007.
6. Deposition of Ann Parker taken 12/6/2007.

Employer/Carrier's Exhibits

1. Composite Exhibits consisting of Notice of Injury dated 8/2/1989; and Notice of Injury dated 2/9/1993.
2. Job Description for Law Enforcement Captain.
3. Correspondence from Claimant to Director of Law Enforcement dated 3/11/2003.
4. Memorandum for DROP participants dated 7/24/1998.

Joint Exhibits

1. Pretrial Stipulation and Order entered 3/5/2007.
2. Response to Petition for Benefits dated 9/27/2006.

The following individual testified live before me:

1. Donald R. Smith, the Claimant.

After due consideration of this matter and after having the opportunity to review and consider the aforesaid exhibits which were admitted into evidence, and having observed and considered the candor and demeanor of the witnesses who appeared and testified before me, and having endeavored to resolve all

conflicts of facts in the evidence presented herein, I hereby make the following findings of fact and conclusions of law:

1. The undersigned judge of compensation claims has jurisdiction of the parties and the subject matter of this claim;

2. The stipulations entered into by and between the parties herein are hereby approved and adopted as findings of fact and are incorporated herein by reference;

3. In my determination herein I have attempted to distill 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.

4. Any and all issues raised by way of the petition or petitions for benefits which are the subject matter of the final hearing, but which issues were not tried at the hearing are presumed resolved, or in the alternative, deemed abandoned by the employee/claimant and therefore **denied**. See Betancourt v. Sears Roebuck & Co., 693 So.2d 253 (Fla. 1st DCA 1997).

5. On or about May 10, 2003, Donald R. Smith, the

captioned Claimant, was employed by the Florida Fish and Wildlife Conservation Commission (FWC) as a Law Enforcement Captain in its Carrabelle Office. As stated above, the Employer/Carrier has stipulated that the Claimant's cardiac and hypertensive conditions are, as provided by section 112.18(1), Florida Statutes, statutorily presumed to have been contracted in connection with the Claimant's law enforcement activities since the Claimant passed a pre-employment physical examination without evidence of heart disease or hypertension. Although, heart disease is not ordinarily compensable as an occupational disease, the Florida Legislature, by enacting section 112.18(1), Florida Statutes, established a statutory presumption that heart disease suffered by firemen or law enforcement officer is connected with the exertion of work so long as the individual passes a pre-employment physical examination without evidence of such disease. Sledge v. City of Ft. Lauderdale, 497 So. 2d 1231, 1233 (Fla. 1st DCA 1986). Therefore, the claim for heart disease is a claim for occupational disease rather than an accident by injury. *Id.*

Counsel for the parties assert that the sole issue for adjudication is whether the Employer/Carrier's defenses regarding the Statute of Limitations and untimely Notice/Report of Injury act to defeat or bar the pending claim. However, in

view of counsel for the Employee voluntarily withdrawing the sole remaining claim for TTD benefits from 5/10/2003 to 7/2/2003, I am somewhat perplexed whether the essential element for coverage under Chapter 440 involving an occupational disease, to wit: "disablement" and the date thereof can be met.

6. At the commencement of trial, counsel for the Employer/Carrier stipulated both as to Claimant's entitlement to the statutory presumption under section 112.18(1), Florida Statutes, and that the Claimant was totally disabled from 5/10/2003 to 7/2/2003. However, this stipulation was reached prior to Claimant's counsel withdrawing the claim for temporary indemnity benefits during his closing statement.

7. The undersigned judge can only reach two conclusions regarding this dilemma. One conclusion is that counsel for the Employee tacitly concedes that the Employer/Carrier's defenses regarding an offset for an income earned from 5/10/2003 and continuing, and the defense that the Claimant is not entitled to temporary indemnity benefits because he was receiving full salary during the period claimed are meritorious and therefore withdrew the claim for such benefits. The second conclusion is that once Claimant's counsel withdrew the claim for temporary indemnity benefits, the Employer/Carrier's stipulation regarding total disability from 5/10/2003 to 7/2/2003 would have no effect

since there is no longer a claim for temporary indemnity benefits. However, there was no recanting of the stipulations

8. Considering the totality of the evidence and the presentation of this case, I find the most logical interpretation is the first conclusion recited above, that is that the Claimant conceded that he is not entitled to any temporary indemnity benefits for the period requested since the Employer/Carrier was entitled to an offset because he received full wages during the periods claimed. Therefore, based on the Employer/Carrier's stipulations, subject to the Statute of Limitations and untimely Notice of Injury defenses, the statutory presumption under section 112.18(1), Florida Statutes, should continue to stand especially in view of the fact that the Claimant did not present any lay or medical evidence due to the Employer/Carrier's stipulation regarding disability.

9. Based on the evidence presented, I find the Employer/Carrier's untimely Notice of Injury defense to be without merit. Section 440.185(1), Florida Statutes, provides that an employee who suffers a work injury shall advise the employer of the injury within 30 days after the date of injury and that failure to do so shall bar a claim or petition for benefits. However, section 440.185(1) (a) also provides for an exception to the aforementioned provision if the "employer or

employer's agent had actual knowledge of the injury."

The deposition of Beth Smith, Human Resource Liaison for FWC and the Division of Law Enforcement, testified that she was aware of the Claimant's heart attack having occurred on 5/10/2003. She also testified that she had no memory of Marine Law Enforcement Officers being provided information regarding the provisions of section 112.18, Florida Statutes, also referred to as the Heart-Lung Bill. She claims that she first learned of the bill sometime in 2005 or 2006.

10. Ms. Smith's testimony was corroborated by the depositional testimony of Cindy Hoffman, Director of Human Resources with FWC. Ms. Hoffman also testified that she had no memory of providing information to Marine Law Enforcement Officers regarding the Heart-Lung Bill. Therefore, I find that the Employer, by and through its agents, had both actual and constructive knowledge of the Claimant's coronary condition. Moreover, I also accept the Claimant's testimony that he did not file a Notice of Injury within 30 days of suffering his heart attack on 5/10/2003 because he did not know of the nexus between his cardiac event and his work activity as provided by the Heart-Lung Bill. Mr. Smith testified that no one with the state or his department provided him with any information or informational brochure regarding the Heart-Lung Bill, or that

his heart attack could have been related to his work. Once he was called to be a potential witness regarding a co-employee's claim under section 112.18 in 2006, he realized the connection and immediately filed his PFB on September 15, 2006 and the First Report of Injury was filed on 9/20/2006.

11. I also find that there were exceptional circumstances as provided in section 440.185(1) (d), Florida Statutes, which justified his failure to report his heart attack within 30 days of said event. As Mr. Smith testified, during his employment with FWC, he was not a member of any Police Benevolent Association which might have informed him about the Heart-Lung Bill. As the witnesses testified, the statutory presumption under section 112.18, Florida Statutes, was not well known among law enforcement personnel of FWC in 2003 or 2004. Finally, the Employer here did not within seven days after actual knowledge of the Claimant's heart attack file a First Report of Injury as required under section 440.185(2), Florida Statutes.

12. I also find the Employer/Carrier's Statute of Limitation defense to be without merit. Section 440.19(1), Florida Statutes, provides that a PFB shall be barred unless the employee has advised the employer of the injury pursuant to section 440.185(1), Florida Statutes, and a PFB is filed within two years after the date which the employee knew or should have

known that the injury arose out work performed in the course and scope of employment.

As stated above, it was not until 2006 that the Claimant became aware of the nexus between his cardiac condition and hypertension and his employment due to the provisions of section 112.18(1), Florida Statutes. Again, this was corroborated by both Ms. Smith and Ms. Hoffman. The Claimant here has presented clear and convincing evidence that no informational brochure was provided to him following his heart attack by FWC as required under section 440.185(4), Florida Statutes, which might have put Claimant on notice of the possible nexus between his cardiac event and his work. The Employer/Carrier's argument that the Claimant's ignorance of the law is no excuse for failure to timely report or file is an axiom also applicable to the Employer in this instance.

Therefore, I find that the Employer/Carrier is estopped from raising the Statute of Limitations defense for these reasons, and I specifically reject the Employer/Carrier's defense regarding the Statute of Limitations and untimely Notice of Injury

13. Having rejected the Employer/Carrier's defenses regarding untimely Notice of Injury and Statute of Limitations, the parties' stipulations regarding (a) the statutory

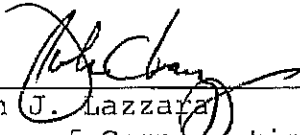
presumption under section 112.18, Florida Statutes, (b) that the Claimant was totally disabled from 5/10/2003 to 7/2/2003, and (c) that the Claimant is entitled to medically necessary treatment by a cardiologist are applicable, and the Claimant is entitled to a reasonable attorney's fee under section 440.34(3)(b), Florida Statutes, in an amount to be determined at a later time, for prevailing on his claim. The Claimant is also entitled to an award of cost as relate to the benefits secured.

WHEREFORE, it is **ORDERED** as follows:

1. That based on the parties' stipulation, the date of disablement is 5/10/2003;
2. That the parties herein shall comply with the stipulations outlined on page 4 above;
3. That the Employer/Carrier shall pay Claimant's attorney a reasonable attorney's fee in an amount to be determined at a later time; and
4. The Employer/Carrier shall pay the costs of these proceedings.

DONE AND ORDERED at Tallahassee, Leon County, Florida.






John J. Lazzara
Judge of Compensation Claims
Division of Administrative Hearings
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Tallahassee District Office

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Certificate of Service

I **HEREBY CERTIFY** that the foregoing Order was entered and a true copy furnished by regular mail on this 24th day of January, 2008 to the captioned parties and their attorneys, if represented, at the following addresses:


Secretary to
Judge of Compensation Claims

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