

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

Harley Foust,
Employee/Claimant,

OJCC Case No. 15-018177MGK

vs.

Accident date: 5/12/2015

City of Homestead Police
Department/Preferred Government Claims
Solutions/PGCS,
Employer/Carrier/Servicing Agent.

Judge: Margret G. Kerr

FINAL MERITS ORDER

THIS CAUSE came before the undersigned Judge of Compensation Claims (hereinafter “JCC”), for a merits hearing on October 28, 2016, regarding the Petition for Benefit (PFB) filed May 4, 2016. The records remained open until 10/31/2016 to allow the electronic filing of certain documents produced at the time of Final Hearing. The Claimant was represented by Jason Fox Esq., and the Employer/Carrier/Servicing Agent (hereinafter “E/C/SA”), was represented by Eric Stettin Esq. This Order ensues.

EXHIBITS:

JOINT:

1. Deposition of adjuster Cathy Meeks with exhibits, filed 10/31/2016 (ID#81).
2. Deposition of claimant, Harley Foust with exhibits, filed 10/26/2016 (ID#76).
3. Medical report of Dr. David Perloff, filed 10/26/2016 (ID#73).
4. Medical report of Dr. Leonard Pianko, filed 10/26/2016 (ID#74).

JCC:

1. Claimant’s amended Trial Memorandum filed 10/31/2016 (ID#79) – for identification only.
2. E/C/SA’s amended Trial Memorandum filed 10/26/2016 (ID#77) – for identification only.
3. Executed Uniform Pre Trial Stipulation and Questionnaire filed 10/31/2016 (ID#82).
4. The undersigned takes judicial notice of the documents listed on the OJCC docket and F.S. 112.18, 943.13 and 943.10 with the agreement of the parties.

CLAIMS:

1. Compensability of Claimant's coronary artery disease and hypertension.¹
2. Costs and attorney's fees.

DEFENSES:

1. Temporary partial disability benefits are not owed as the Claimant was terminated for misconduct.
2. No causal connection between industrial injury and lost wages claimed.
3. Temporary total disability benefits were paid from 7/31/2014 through 8/6/2014, no temporary total benefits owed.
4. No penalties, interest, costs or attorney fees owed.

After hearing argument of counsel and reviewing the evidence and otherwise being fully advised on the facts and applicable law herein, I find that:

1. I have jurisdiction over the subject matter and the parties, and the exhibits are introduced into evidence.
2. The parties requested that the undersigned adjudicate entitlement to attorney's fees and reserve on the amount due, if any.
3. The parties stipulated to certain facts:
 1. Officer Foust underwent a pre employment physical on 1/28/1983 and was hired as an Auxiliary Law Enforcement Officer with the City of Homestead Police Department on 10/2/1983.
 2. The pre employment physical contained no evidence of hypertension or heart disease.
 3. Officer Foust was promoted to full time Law Enforcement Officer on 10/4/1984.
 4. Officer Foust was diagnosed with coronary heart disease and hypertension.
 5. Officer Foust suffered a disabling event due to his coronary heart disease and hypertension on or about 5/12/2015.
 6. Officer Foust's last day with the Employer was 5/31/2015.
 7. Timely notice of the event was provided to the employer (on or about 4/14/2015)
 8. The claim was denied on 5/27/2015.
 9. Officer Foust underwent bypass surgery on 7/28/2015.
4. At issue is the threshold question of whether the pre employment physical conducted

¹ Following a joint motion by the parties, this matter was bifurcated on the issue of compensability by order entered 7/12/2016.

by the City of Homestead in 1983 is sufficient to satisfy the pre employment requirement of section 112.18 Fla. Stat.

5. After undergoing his pre employment physical, Claimant was initially hired as an Auxiliary Officer for the City of Homestead at a salary of \$1.00 per year. At that time, he was also working as a journeyman plumber. As an Auxiliary Officer, he rode with a full-time officer a minimum of 16 hours per month.

6. The City of Homestead then paid for Claimant to attend police academy, from which he graduated on 11/4/1983. Almost one year later, Claimant was promoted to full duty officer on 10/4/1994 at a wage of \$9.01 per hour for a 40 hour week. As a full duty officer, he was assigned a regular duty schedule as opposed to as an auxiliary officer where he rode with a full duty officer who was assigned the schedule. Thus he changed from effectively part time work at \$1.00 per year to full time work at \$9.01 per hour. He continued to work as a plumber for approximately a year before giving up his second job. Claimant acknowledges he did not undergo another pre employment physical prior to being promoted to a full time law enforcement officer.

7. Section 112.18(1)(a) Fla. Stat (1983) provides a rebuttable presumption for firefighters that heart disease and/or hypertension is suffered in the line of duty. In 2002, section 112.18(1)(a) was amended to include all law enforcement officers. It now states

Any condition or impairment of health of . . . any law enforcement officer, as defined in s. 943.10(1) . . . caused by . . . heart disease . . . resulting in total or partial disability or death shall be presumed to have been accidental and to have been suffered in the line of duty unless the contrary be shown by competent evidence. However, any such firefighter or law enforcement officer must have successfully passed a physical examination upon entering into any such service as a firefighter or law enforcement officer, which examination failed to reveal any evidence of any such condition.

Section 112.18(1)(a) Fla. Stat. (2011)

8. At the time of Claimant's employment with the City of Homestead, there was no presumption applying to law enforcement officers, only to firefighters.

9. E/C argues Claimant does not satisfy the requirement of passing a pre employment physical as his physical was undertaken prior to being hired as a part time auxiliary office rather than when he was promoted to a full time law enforcement position.

10. Claimant argues his employment was a promotion not a new hire and his pre employment physical therefore satisfies the requirements of section 112.18(1)(a). Further, as the presumption applying to law enforcement officers was not enacted until eighteen years after he was hired, it does not apply retroactively to him.

11. There is no dispute Claimant underwent his pre employment physical twenty one months prior to being promoted to full duty status. E/C argues the pre employment physical performed when Claimant was hired as an auxiliary officer is insufficient to entitle Claimant to the presumption and cites *Hubbard v. City of Homestead*, 11-004200CMH, PCA 93 So.3d 1017 (Fla. 1st DCA 2011) in support of their argument. The facts in *Hubbard* are distinguishable from the present case as here, Claimant was hired almost 18 years prior to the extension of section 112.18(1)(a) to law enforcement officers.

12. At issue therefore, is whether section 112.18(1)(a) should be retroactively applied to require Claimant to undergo a second pre employment physical to be entitled to the presumption, where the employer does not require or offer such an examination.

13. The general rule is that, in the absence of clear legislative intent to the contrary, a law affecting statutory rights, liabilities, and duties is presumed to apply only prospectively.

14. I find that in 2002, 18 years after being hired by the City of Homestead, Claimant's substantive rights were affected by the extension of section 112.18(1)(a) to all law enforcement officers. No evidence was presented that in 2002, the City of Homestead was in any way thwarted or prevented from notifying and requiring full time law enforcement officers hired before that date to undergo an employment physical.

15. Further, E/C here is using the Claimant's pre employment physical as both a sword and a shield. The City of Homestead required a pre employment physical prior to hiring Claimant, which he undertook without incident. The employer then paid for Claimant to attend academy training at their expense before promoting him to full time law enforcement status. The promotion was twenty one months after undergoing the physical, which was sufficient to satisfy the employer's hiring criteria and upon which they relied.

16. For the employer to now argue the pre employment physical was sufficient to satisfy their hiring requirements but is insufficient to satisfy the requirements of the presumption under section 112.18(1)(a) and place the burden on Claimant to somehow know to complete a physical sufficient to meet the standards required by statute places a burden on Claimant which is not

articulated in either F.S 440 et seq or 112.18.

17. I find the employer acquiesced to the pre employment physical performed on 1/28/1983 to also act as the pre employment physical when Claimant was promoted to full duty status on 10/4/1984.

18. Under the facts of this case, I conclude the pre employment physical conducted twenty one months before Claimant became a full time law enforcement officer, was conducted "at or near" the time of entering into full duty status sufficient to satisfy the presumption requirement of section 112.18(1)(a).

19. I further find the pre employment requirements of the section 112.18 Fla. Stat. (2002) are inapplicable to Claimant's date of employment.

Based on the foregoing, it is hereby:

ORDERED and ADJUDGED that:

1. The claim that Claimant is entitled to the rebuttable presumption of compensability pursuant to section 112.18 Fla. Stat. 2002 is GRANTED.
2. The Claimant's claim for entitlement to attorney's fees and costs is GRANTED to the extent benefits are awarded herein.
3. The amount of fees and costs will be adjudicated at a later date.

DONE and ORDERED this 10th day of November, 2016, in Miami, Miami-Dade County, Florida.



Margret G. Kerr
Judge of Compensation Claims
Division of Administrative Hearings
Office of the Judges of Compensation Claims
Miami District Office
401 Northwest 2nd Avenue, Suite N-918
Miami, Florida 33128-3902
(305)377-5413
www.jcc.state.fl.us

COPIES FURNISHED:

Harley Foust
15991 SW 254 Street
Homestead, FL 33031

Preferred Government Claims Solutions/PGCS
OJCCmail@pgcs-tpa.com

Jason L. Fox
Bichler, Oliver, Longo & Fox, PLLC
Jason@bichlerlaw.com, Nicole@bichlerlaw.com

Eric L. Stettin
Weiss Serota Helfman Cole Bierman & Popok, P.L.
estettin@wsh-law.com, skosto@wsh-law.com