STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
ST. PETERSBURG DISTRICT OFFICE

Daniel Rivera,
Employee/Claimant,

vs.

City of Tarpon Springs,
Employer,

Florida League of Cities/ Workers' Compensation Claims Department,
Carrier/Servicing Agent.
_____/

OJCC Case No. 16-010794SLR

Accident date: 4/12/2016

Judge: Stephen L. Rosen

FINAL ORDER

This Cause came on for hearing before the undersigned Judge of Compensation Claims on January 19, 2017. The claimant, Daniel Rivera, was represented by Tonya A. Oliver, Esq. and George B. Cappy, Esq. The employer, City of Tarpon Springs, and the carrier, Florida Municipal Insurance Trust-WC, were represented by Alan D. Kalinoski.

For purposes of this order, the employee will be referred to as "employee" or "claimant". The employer/carrier will be referred to as "employer" or "carrier" or "employer/carrier".

This Final Order resolves the petition for benefits filed May 5, 2016.

All evidence was received and the record was closed on January 19, 2017.

Claim was made for the following:

1. Compensability of disabling heart disease pursuant to F. S. 112.18(1).

2. Authorization of a cardiologist, primary care physician, or internal medicine specialist for heart disease.

3. Reimbursement of costs of litigation and reasonable attorney's fees at the expense of the employer/carrier.

The claim was defended on the following grounds:

1. No accident or occupational disease resulting in heart disease on April 12, 2016 arising out of or in the course of employment.

2. The claimant does not meet the criteria set forth in F. S. 112.18 to be entitled to application of the presumption. Alternatively, if the claimant were to establish the required criteria to give rise to application of the presumption, the evidence is sufficient to rebut application of the presumption.

3. The claimant's heart disease is due to one or more of the constellation of non-work related risk factors.

4. There was no referral for a cardiologist or internal medicine specialist attached to the petition for benefits as required by F. S. 440.192(2) (i).

5. No reimbursement of costs or reasonable attorney's fees is due at the expense of the employer/carrier.

Claimant's Affirmative Defense:

1. The employer/carrier cannot rebut the presumption with competent substantial evidence or clear and convincing evidence pursuant to F. S. 440.09, F. S. 440.15 or case law with objective medical evidence of causation.

The parties entered in the following stipulations:

1. I have jurisdiction of the parties and the subject matter of this claim.

2. Venue lies in Pinellas County, Florida where the accident occurred.

3. The claimant does not allege a specific accident arising out of and in the course and scope of his employment with the employer herein but the parties agree that the claimant had a cardiac catheterization performed on April 12, 2016.

4. On April 12, 2016, there existed an employer/employee relationship with workers' compensation coverage as noted in this order.

5. There was timely notice of the final hearing given to the parties and this case is not governed by a managed care arrangement in place on April 12, 2016.

6. The petition for benefits was filed on May 5, 2016 and the response was filed on May 9, 2016. In addition, notices of denial were filed by the employer/carrier on April 19, 2016 and May 9, 2016. These notices of denial or attached to the deposition of the claims adjuster which is noted below as an exhibit.

The following documents were offered into evidence:

Judge's Exhibits:

1. Petition for benefits filed May 5, 2016, with attached medical record. The medical record was objected to as hearsay and because it was not authored by an authorized treating physician, independent medical examiner, or expert medical advisor, the objection is sustained except for history in that report, if any.

2. Response to petition for benefits filed May 9, 2016.

3. Mediation conference report filed August 17, 2016.

4. Uniform pretrial stipulation form and order approving uniform pretrial stipulation form filed September 22, 2016.

5. Claimant's trial memorandum with separately filed table of cases (for argument only).

6. Employer/carrier's trial memorandum (for argument only).

7. Notice of filing DOAH docket ID filed January 17, 2017 for purposes of appellate identification if necessary.

Claimant's Exhibits:

1. Deposition of Jane Dowdy, claims adjuster, taken October 12, 2016, with attachments.

2. Deposition of Satish Sivasankaran M. D. ("Dr. Siva"), claimant's independent medical examiner, taken December 29, 2016, with attachments.

3. Deposition of Jane Kniffen, taken November 7, 2016, with attachments.

Additionally, claimant offered that his attorney had attempted to file a petition for

benefits this day but because the OJCC filing system was off-line, said petition was not filed. Claimant wished to reserve jurisdiction on that unmediated petition and the employer/carrier objected. Because the petition has not been officially filed and I have not had the opportunity to review same, I do not rule on any claim of preservation nor defense on ripeness of the issues in the unfiled petition.

Employer/Carrier's Exhibits:

1. Deposition of Hall Whitworth M. D., Employer/carrier's independent medical examiner, taken November 21, 2016, with attachments.

It should be noted that during the deposition of the respective medical experts, as well as on the pretrial stipulation form, the parties both raised Daubert objections to the opinions of those experts. However, neither party made specific objections to opinions during the course of the deposition. Neither party moved for a separate hearing for ruling on Daubert objections. I find that a blanket objection made at the beginning of the deposition is insufficient to preserve a Daubert objection to the admissibility of medical opinions. Therefore, both blanket objections based on Daubert are overruled.

After reviewing all documentary evidence, hearing live testimony, and otherwise being fully apprised of the applicable case and statutory law, I find:

1. I have jurisdiction of the parties and the subject matter of this claim.

2. Venue lies in St. Petersburg District, Florida

3. The documentary exhibits offered by the parties without objection are admitted into evidence and shall become a part of the record herein.

4. The claimant, Daniel Rivera, is a detective for the police Department of the City of Tarpon Springs. He began his employment with this employer in 1989. At that time, he passed a pre-employment physical. Although that pre-employment physical noted that his blood pressure was 140/90, he was never told that that was considered to be abnormal and he proceeded through his employment with the employer without any mention to him that his blood pressure was abnormal at the time of his pre-employment physical. In fact, in 1989 that blood pressure rating was considered to be normal by physicians as testified in their depositions in this case.

5. For the past 14 years, the claimant also was with a DEA task force working undercover as a detective regarding illegal drug sales. His duties included travel throughout the middle district of Florida, involvement in physical altercations with suspects, involvement in illegal drug buys undercover, and, throughout these activities until March 31, 2016, was never diagnosed or treated for heart disease.

6. The claimant admits to being a cigarette smoker for about 15 years, having quit about a year before March 31, 2016. Additionally, 7 to 10 years before that date, he was diagnosed and treated for type II diabetes.

7. On March 31, 2016, he underwent a mandatory life scan process provided by his employer. The scan showed some abnormalities and immediately scheduled an appointment with his private physician on April 4, 2016. A CT/angiogram done showed these abnormalities and the claimant was also placed on 2 medications for high cholesterol and blood pressure control.

8. On April 12, 2016, the claimant underwent a cardiac catheterization which involves the insertion of a tube into a major vessel in his groin area. His undisputed testimony is that he was taken off work and before he could return to work, his employer required a return to work slip from his physician. That was given to him on April 20, 2016 and the claimant returned to work. He has continued his regular duties thereafter.

9. The claimant denies any type of injury by accident whatsoever in the course and scope of his employment resulting in a diagnosis of mild diffuse coronary atherosclerosis. He relies strictly on the application of "the Presumption".

10. F. S. 112.18 provides that, in short, any law enforcement officer who is diagnosed with heart disease which resulted in total or partial disability or death shall be presumed for that condition to have been suffered in the line of duty unless the contrary be shown by competent evidence.

11. The statute allows for 4 elements to be satisfied for the presumption to apply. In the instant case, the parties are in agreement that the claimant is a member of a protected class and that the

claimant developed a protected condition (heart disease). The employer/carrier mentions that the claimant underwent a pre-employment physical that showed his blood pressure to be 140/90 that day but also states that that reading does not rise to a defense that the claimant was diagnosed with hypertension in his pre-employment physical. Therefore I find that the claimant has satisfied 3 of the 4 elements for the presumption to apply without strenuous objection by the employer/carrier.

12. Thus, we come to the 4th element which is that the protected condition resulted in temporary, partial, or permanent disability. This has been defined as a temporary or permanent incapacitation from the claimant performing his duties as a law enforcement officer.

13. The employer/carrier argues that the claimant was definitely incapacitated after the cardiac catheterization was performed on April 12, 2016. However, the incapacitation was due to a diagnostic study rather than treatment for a covered condition and therefore disability is not satisfied for the presumption to attach.

14. The claimant was out of work for 8 days until April 20, 2016, but the testimony of the employer/carrier's expert confirms that the claimant should have been out of work at least 2 days after the procedure. Additionally, the undisputed testimony is that the claimant was required to provide a return to work slip from his doctor to his employer before he could return to his duties as a law enforcement officer.

15. There is no specific statutory or case law definition of whether the inability to perform duties as a law enforcement officer is due to a diagnostic study or actual treatment for heart disease. However, based on existing case law, I accept the testimony of the employer/carrier's independent medical examiner that the claimant should have been out of work for at least 2 days due to the invasive cardiac catheterization process. Therefore, based on the totality of the medical and lay testimony in this claim, I find that the claimant has satisfied the 4th element for the presumption to apply.

16. Having found that the Presumption, as it appears in F. S. 112.18, applies to this claimant, I

now turn to the defenses of the employer/carrier in the affirmative defense of the claimant.

17. In virtually all first responder claims under this statute, the employer/carrier must overcome the Presumption authored by the Florida legislature for the purpose, as defined by the appellate courts, of raising first responders to a higher level of employee by allowing a stated condition (heart disease) to satisfy the causal relation issue between that condition and the first responder's employment. The question is then raised: does the employer/carrier, as the proverbial underdog in these claims, present sufficient evidence to rebut the presumption? In the instant case, because the claimant has not shown an alternative industrial accident as the cause for his heart disease, if the employer/carrier successfully rebuts the presumption, then the burden of proof shifts back to the claimant to affirmatively present evidence to basically re-re-but the rebuttal presented by the employer/carrier.

18. Employer/carriers, in defense of these first responder claims, present what are known are risk factors as the cause of a claimant's coronary disease. There is no objective medical test to show which, or a combination of risk factors, may cause coronary artery disease. All human beings have some form of risk factor for coronary artery disease whether it is familial history, poor eating habits, obesity, diabetes, physical or mental stress, etc. The existence of these risk factors, in and of themselves, do not cause the presumption to simply vanish. There must be some objectivity to support the employer/carrier's position that a risk factor or risk factors rebut the presumption of compensability of coronary artery disease.

19. In the instant case, the evidence shows that the claimant suffered from type II diabetes for 7 to 10 years before April 12, 2016 and was also a smoker for about 15 years before quitting approximately one year before April 12, 2016. Although there are no objective tests to determine these 2 risk factors caused the claimant's coronary artery disease, common sense dictates that diabetes and smoking can lead to the onset of coronary artery disease. The employer/carrier advocates that it has rebutted the presumption based on the presence of these 2 risk factors for the claimant. Thus, the claimant's coronary artery disease, according to the employer/carrier's rationale, was caused by non-industrial components and should be found to be not compensable.

20. On the other hand, it is undisputed that the claimant had a physically and emotionally stressful job as an undercover detective working for both the employer and the federal government law enforcement systems. He suffered altercations with suspects, chased suspects on foot, made undercover drug buys which could have resulted in physical harm, and basically worked for this employer for many years in a physically and mentally demanding stressful job. Both witness physicians indicated that stress is also a risk factor towards the cause of coronary artery disease, the claimant basically argues that the employer/carrier's non-industrial risk factors and the claimant' s employment risk factors, none of which can be medically objectively quantified, balance out. Thus, because the presumption is an expression of strong public policy, where evidence is conflicting, the quantum of proof is balanced in the presumption should prevail.

21. Although valiantly presented, I find that the employer/carrier's evidence is neither competent and substantial nor clear and convincing so as to rebut the presumption that the claimant's coronary artery disease is due to his employment. Therefore, I find that the claimant is entitled to workers' compensation benefits for coronary artery disease. The employer/carrier shall authorize medical care by a physician of its choosing either as a primary care physician, internal medicine physician, or cardiologist.

22. The attorneys for the claimant, Tonya A. Oliver, Esq. and George B. Cappy, Esq., have provided a valuable service to their client by establishing compensability and securing authorized medical care and are entitled to reimbursement of costs of litigation as well as reasonable attorney's fees (combined) at the expense of the employer/carrier.

WHEREFORE, it is ordered that the employer/carrier shall:

1. Provide medical care to the authorization of a primary care physician, internal medicine physician, or cardiologist of its choosing.

2. Pay to the attorneys for the claimant (combined) reasonable attorney's fees and reimbursement of costs of litigation.

DONE AND SERVED this 20th day of January, 2017, in St. Petersburg, Pinellas County, Florida.

Stephen L Rosen

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