

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

DEPARTMENT OF CORRECTIONS and
DIVISION OF RISK MANAGEMENT,

Appellants,

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

CASE NO. 1D07-6420

v.

EVELYN CLAUDIO,

Appellee.

Opinion filed September 29, 2008.

An appeal from an order of the Judge of Compensation Claims.
E. Douglas Spangler, Judge.

Courtney J. Collins and Margaret E. Sojourner of Langston, Hess, Bolton, Shepard &
Augustine, P.A., Maitland, for Appellants.

Todd J. Sanders of Bichler & Kelley, P.A., Winter Park; Tonya Oliver of Law Office
of Tonya A. Oliver, Port Richey, for Appellee.

PER CURIAM.

AFFIRMED.

WEBSTER, LEWIS, and HAWKES, JJ., CONCUR.

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
FT. MYERS DISTRICT OFFICE**

Evelyn Claudio,)	
)	
Employee/Claimant,)	
)	
vs.)	OJCC Case No. 06-029489EDS
)	
Department of Corrections,)	Date of Accident: 9/13/2006
)	
Employer,)	
)	
and)	
)	
Division of Risk Management,)	
)	
Carrier/Serviceing Agent.)	
_____)	

COMPENSATION ORDER

THIS CAUSE was heard by the undersigned in Fort Myers, Lee County, Florida on October 26, 2007 upon Claimant's claims for the worker's compensation benefits claimed in the Petition for Benefits docketed on October 6, 2006. The Employee was present at the hearing and was represented by her attorney, Tonya Oliver, Esquire. The Employer/Carrier was represented by Courtney Collins, Esquire.

The claims specifically remaining for final hearing were:

1. Compensability of the alleged injuries incurred from the date of accident on September 13, 2006.
2. Authorization of a board certified cardiologist.
3. Penalties, interest, costs, and fees.

These matters were defended by the Employer/Carrier on these arguments:

1. Compensability is denied.
2. Compensable and substantial evidence exists that the cardiac condition is not causal by the Employee as a corrections officer.
3. No costs or fees are due and owing.

The parties submitted the claim for hearing upon the following record:

COURT EXHIBITS

1. Composite of Petitions for Benefits, Notice of Final Hearing, Pretrial Stipulation, and Order Approving Pretrial Stipulation and Notice of Final Hearing.

2. Motion for Sanctions and objection.

EMPLOYEE EXHIBITS

1. Pre-employment physical.
2. Deposition of Idriss Ould, completed on May 7, 2007.
3. Deposition of Vladimir Ilic, M.D., completed on October 5, 2007.
4. Deposition of Louis Rosenfield, M.D., completed on October 17, 2007.
5. Claimant's Trial Memorandum, received as argument only.

EMPLOYER/CARRIER EXHIBITS

1. Deposition of Evelyn Claudio, completed on November 13, 2006.
2. Deposition of Neil Kaplan, M.D., completed on July 18, 2007.
3. Employer/Carrier's Hearing Information Sheet.
4. Employer/Carrier's Trial Memorandum, received as argument only.

The Employee appeared and testified live at the hearing. In making my findings of fact and conclusions of law regarding these claims and defenses, I have carefully considered and weighed all the evidence presented to me. I have resolved all conflicts in the testimony presented to me. Although I may not reference each specific piece of evidence submitted by the parties, I carefully considered all the evidence and exhibits in making my findings of fact and rendering my conclusions of law.

Based upon the testimony contained in the depositions, testimony of witnesses, stipulations, and exhibits and after careful consideration of the arguments of counsel, I make the following findings of fact:

1. The Employee, Evelyn Claudio, is a 44 year old employee of the State of Florida Department of Corrections employed at the Fort Myers work camp. She filed a Petition for Benefits on October 6, 2006 indicating that on September 13, 2006 she had an accident arising and occurring in the course and scope of her employment resulting in disability and in a need for medical care for a cardiac condition.
2. By way of background the claimant has worked for the State of Florida Department of Corrections on two (2) occasions. After working for approximately ten (10) years she resigned and worked for code enforcement in Collier County. However, on April 11, 2003 she was reemployed by the Department of Corrections and reassigned to the Hendry County work camp. At the time of her reemployment, the claimant was examined as part of a pre-employment physical examination process. What was purportedly a pre-employment physical form, undated, was admitted into evidence a form that exhibits that on the date of this examination she had a blood pressure of 136/95. However, all medical providers who testified in this matter reviewed this form and no medical provider indicated that the form exhibited any abnormalities. Following this physical examination, the claimant was reemployed by the Department of Corrections as a corrections officer.
3. The history of the events leading up to September 13, 2006 actually began as early as December 2, 2005. Medical records admitted indicate that on December 2, 2005 the employee was evaluated by a Dr. Irit Hemed, M.D. as part of an initial evaluation for

being established as a patient in that practice. The history portion of the evaluation indicates that the claimant told Dr. Hemed that she had begun having chest discomfort and tightness over the year prior to being seen by Dr. Hemed, however, denied shortness of breath. The chest discomfort and tightness was not associated with any specific activity and it did improve upon exercise. As part of the initial assessment, Dr. Hemed indicated, "dyspnea" and respiratory abnormalities and requested that an EKG be scheduled and administered. The results of the EKG proved to be abnormal. As a result of the testing the claimant was referred for further evaluation with a cardiologist.

4. That evaluation occurred on January 6, 2006 by Dr. James Butler. Dr. Butler's notes admitted into evidence for historical purposes indicate that the doctor interpreted the diagnostic tests admitted in December to show a left bundle branch block and cardiomyopathy. The records of Dr. Butler and Dr. Hemed both indicate that in addition to the complaints the claimant exhibited on December 2, 2005 with Dr. Hemed, she also testified in history to a family history of coronary artery disease. Specifically on December 2, 2005 the Employee allegedly told Dr. Hemed that, "her father just died". The record also indicates that, "the cause of death was myocardio infarction". The record also indicates the father had a previous history of hypertension. With regard to her mother, the patient was reported as indicating that her mother was still alive with a history of diabetes and hypertension.
5. Following the initial evaluation by Dr. Butler on January 6, 2006 the claimant continued to follow up with that practice leading up to her admission on September 13, 2006 for a cardiac catheterization procedure. It was the admission in the hospital for that procedure and the conduct of that procedure that lead to the filing of this claim. The cardiac catheterization completed on September 13, 2006 confirmed that the Employee had what has been described as cardiomyopathy, nonischemic.
6. Following the cardiac catheterization on September 13, 2006, the Employee indicated that she returned to work for a short period of time, but continued to have difficulties. She was scheduled for a second procedure, which procedure occurred approximately one (1) month after the catheterization, in mid October 2006, and resulted in implantation of a defibrillator and a pacemaker. The Employee has not returned to work subsequent to the implantation of the defibrillator and pacemaker.
7. As indicated earlier, the Employee filed a Petition for Benefits on October 6, 2006, on a date between the two (2) surgeries. The Employer/Carrier for their part responded to the Petition for Benefits on October 16, 2006 indicating an intention to implement the provisions of Section 440.20(4), F.S. Pursuant to that provision, the Employer/Carrier provided temporary total indemnity from September 21, 2006 through January 17, 2007. The Employer also paid the original costs of all the procedures undertaken by the Employee in September and October 2006 and paid \$111,430.00 of medical bills as a result. On January 16, 2007, however, the Employer/Carrier filed a Notice of Intent to deny the entire claim alleging that the condition resulting in the Employee's cardiac condition was congenital, idiopathic, and was preexisting to her employment.
8. The hearing conducted on October 26, 2007 proceeded therefore for determination of compensability of claimant's cardiomyopathy pursuant to Section 112.18, F.S., commonly known as the Heart-Lung Bill, and medical care and attention with a cardiologist, costs and attorneys fees. There is no request for indemnity beyond the dates already indicated as paid by the Employer/Carrier through January 17, 2007.

9. In a pretrial motion the Employer/Carrier requested that an expert medical advisor be appointed. This motion was originally denied prior to the hearing on the basis that there was insufficient evidence submitted in support of the motion to demonstrate a bonafide conflict in the testimony of the authorized medical physicians testifying in this matter. The Employer/Carrier renewed the motion immediately prior to commencement of receipt of evidence on October 26, 2007. The undersigned again denied this motion this time on the basis that the facts in this case would be determined in accordance with the provisions of Section 112.18, F.S.
10. That statutory provision was amended as of July 1, 2003 to include correctional officers within the context and scope of its coverages. The statutes state: "Any condition or impairment of health of any...correctional officer...caused by tuberculosis, heart disease, or hypertension 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 corrections officer...shall have successfully passed a physical examination upon entering into any such service...which examination failed to reveal any evidence of any such condition..." Section 112.18, F.S. (2005) As the Employee argues herein the claimant in this matter successfully meets all the tests required for protection under this statute. She has shown she is a member of a protected class, to wit, a corrections officer; she successfully passed a pre-employment physical prior to re-entering service as a corrections officer; she developed heart disease subsequent to the commencement of her employment as a corrections officer; and as a result of this condition she has become disabled.
11. Having established these elements there is a statutory presumption that the heart disease is accidental and to be deemed to have been suffered in the course and scope of an employment. The seminal case construing the statute is Caldwell vs. Division of Retirement, Florida Department of Administration 372 So. 2nd 438 (Fla. 1979). The Florida Supreme Court indicated that once the presumption is established, the burden of persuasion switches to the Employer/Carrier. The burden imposed upon the Employer/Carrier is to persuade the trier of fact that the disease in question was caused by a non-occupationally related agent. To rebut the presumption it is necessary that the Employer/Carrier show that the disease causing disability was caused by a specific, non-work related event or exposure. If there is conflicting evidence, or the quantum of proof is balanced, the presumption should prevail. If there is evidence supporting the presumption the Employer/Carrier can only overcome the presumption by presenting clear and convincing evidence. In the absence of cogent proof to the contrary the public policy supporting the presumption must be given effect.
12. Having reviewed these principles, the undersigned reaffirms the decision that a request for EMA under these circumstances is not appropriate. Once the Employee establishes *prima facie* that the statutory presumption applies, pursuant to the provisions of the Caldwell case, if there is a conflict in the evidence, the presumption prevails. Therefore, an EMA is not deemed necessary or appropriate to the resolution of the issues in this case.
13. In that regard, both parties did utilize independent medical experts to evaluate the facts and circumstances of this claim. The Employee was seen and evaluated by Dr. Louis D. Rosenfield, M.D., a cardiologist, in Port Charlotte, Florida on April 13, 2007. His deposition was offered into evidence. The Employer/Carrier objected to the admission of

the evidence on the basis that although the examination took place on April 13, 2007, the deposition did not occur until October 17, 2007 and the Employer/Carrier had no knowledge of Dr. Rosenfield's status as an IME until well after the date of the initial evaluation. As such, the Employer/Carrier argued that pursuant to Section 440.13(5), F.S., the deposition was statutorily inadmissible. The undersigned overruled this objection on the basis that there was no demonstrable prejudice to the Employer/Carrier and therefore Dr. Rosenfield's deposition testimony is part of the record of this case. For his part Dr. Rosenfield testified that he actually saw the claimant on four (4) separate occasions. He initially evaluated the claimant on April 13, 2007. He subsequently saw her on April 23, 2007 following the administration of some objective tests. He briefly visited with her on May 4, 2007, and finally on September 19, 2007. Dr. Rosenfield offered a report which was admitted into evidence as part of his deposition as well as records of each of the visits referenced above. Dr. Rosenfield also indicated he had records from Dr. Hemed as well as the records of the Cardiology Group, Dr. Butler, and Dr. Ilic leading up to the initial cardiac catheterization as well as Dr. Burton who actually performed the implantation of the defibrillator and the pacemaker in October 2006. As a result of his evaluation Dr. Rosenfield confirmed that in fact the Employee was suffering from a heart condition known as nonischemic cardiomyopathy. He explained this as being non-obstructive coronary artery disease cardiomyopathy. He explained that there were no known blockages in the coronary arteries, no atherosclerotic development in the arteries, and no evidence of a previous myocardial infarction which would have shown damage to the heart muscle. He was unable to attach any specific cause to the development of the cardiomyopathy condition and he characterized it as being idiopathic, or without any known cause. The doctor noted, however, that commonly nonischemic cardiomyopathy develops in persons secondary to a viral infection or pregnancy. There are other factors leading to this development which would include alcohol, chemotherapy, radiation from cancer treatment, and other factors. Dr. Rosenfield did not note any history of any such factors in the claimant's medical history. Cardiomyopathy is a weakened heart muscle. In this claimant's particular case she has been described with a "very weak heart muscle". The doctor believed that the implantation devices were absolutely medically necessary to prevent a potential sudden death. Dr. Rosenfield interpreted the pre-employment physical form as being normal. In conclusion, Dr. Rosenfield indicated that in fact the diagnosis remained idiopathic nonischemic cardiomyopathy. Dr. Rosenfield was unable to state whether there was any relationship between the claimant's employment as a correctional officer and the acute development of cardiomyopathy as indicated in 2006.

14. The Employer/Carrier had the Employee evaluated by a Dr. Neil Kaplin of Miami, Florida as their IME physician. Similarly, Dr. Kaplin noted that the diagnosis for the claimant was idiopathic nonischemic cardiomyopathy. Dr. Kaplin testified that all diagnostic testing and treatment received up to the date of his evaluation which was completed on May 7, 2007 as reasonable and medically necessary. Dr. Kaplin likewise indicated that the nature of the cardiomyopathy was idiopathic in that there was no history presented in the medical records, or in the testimony of the claimant, that indicated any factor specifically leading to the development of cardiomyopathy. The doctor specifically indicated that he did not believe performance of duties of a correctional officer position would have had any relationship to the development of a cardiomyopathy. However, the doctor likewise confirmed that one (1) of the most common causes of cardiomyopathy is a viral infection. In reviewing the causes of cardiomyopathy Dr. Kaplin stated that it could come from blocked arteries. However, there was no evidence of blocked arteries for the claimant. It could come as a result

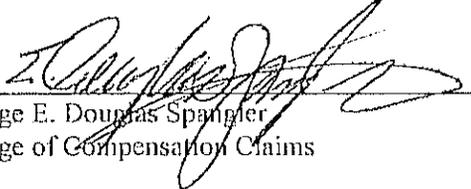
longstanding hypertension; again there was a negative history in this regard. It could occur after a viral infection. Additionally, it could occur secondary to medication and is more common in persons who drink heavily. Again, these were negative factors in the claimant's history. Because of no specific medical evidence to support any of those theories as to the development of causation the cardiomyopathy was classified as idiopathic. Dr. Kaplin reiterated that quite commonly it occurs, however, after a viral infection.

15. While Dr. Kaplin did not discuss viral infection beyond what was stated above, Dr. Rosenfield, however, indicated that the time period between the occurrence of a viral infection and the development of cardiomyopathy does not need to be a great period of time. The testimony of these two (2) expert cardiologists confirms the testimony and the opinions of the treating cardiologist, Dr. Ilic and Dr. Butler as presented in the testimony of Dr. Ilic and his deposition and the attached records showing the history and chronology of treatment up to the time of the surgeries in September and October 2006.
16. In evaluating the evidence presented by the cardiologists in this matter as it relates to the application of Section 112.18, F.S., and whether or not evidence presented rises to an appropriate level to rebut the presumption the undersigned concludes that it does not. There is no question that cardiomyopathy as described by the physicians in this matter is heart disease. Applying the statute as interpreted by Caldwell vs. Division of Retirement, Florida Department of Administration, the undersigned notes that the evidence in this matter is not really conflicting. The undersigned also notes the testimony of the two (2) cardiology experts do not support the notion that the heart disease in any respect had any connection to the employment. Under these circumstances, the undersigned believes that the Employer/Carrier could rebut the presumption if they are able to present competent substantial evidence that the heart disease in question in this matter was caused by a specific, non-work related event or exposure. In this instance, for example, the Employer/Carrier could rebut the presumption if it was able to present evidence that the claimant had contracted a specific viral infection not connected with her employment, which viral infection could be viewed by the cardiologists to be the causative agent of the cardiomyopathy. However, no such evidence exists in this matter and the undersigned is left with no definitive evidence whatsoever as to the etiology of the cardiomyopathy. Therefore, the undersigned concludes that the presumption in this matter should prevail as to determine otherwise would violate the public policy supporting the enactment of the presumption and the expansion of the presumption to include corrections officers as expressed by the legislature in the 2002 amendment to the statute.
17. Finally, the undersigned noted that in medical histories provided by the Employee to Dr. Hemed, the Employee freely admitted to a family history of cardiac disease and diabetes. Upon reviewing the deposition of the claimant, which was completed on November 13, 2006, or approximately one (1) month after her second surgery, the Employee denied specifically questions asked by the Employer/Carrier's counsel as to a family history of heart disease, hypertension, strokes, or diabetes. The Employer/Carrier never raised these contradictions in defense of their claim. It is noted, however, that when the medical experts testified in this matter they were fully aware of the history as provided by the claimant in Dr. Hemed's records. Despite that history, the diagnosis of all medical providers who supplied evidence in this matter remained the same that the claimant's medical condition was an idiopathic nonischemic cardiomyopathy. As such the undersigned concludes that the inconsistencies noted were not material to the provision of benefits or the outcome of this claim.

Wherefore, on the basis of the foregoing, it is ORDERED and ADJUDGED:

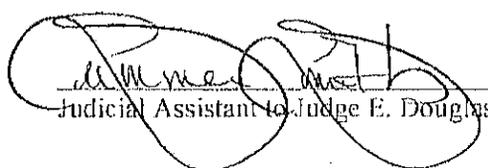
1. That pursuant to the Petition for Benefits filed on October 6, 2006 the claimant's cardiomyopathy condition is deemed to be compensable.
2. The Employer/Carrier shall provide medical care and attention as the nature of the condition and the process of recovery or management of same requires with a board certified cardiologist.
3. The attorney for the Employee is entitled to a reasonable attorney's fee and costs in connection with this matter, and jurisdiction is reserved for determination of an amount.

DONE AND ENTERED in the Chambers of Fort Myers, Lee County, Florida.



Judge E. Douglas Spangler
Judge of Compensation Claims

I certify that a true copy of the foregoing Order was served by mail on all parties and
this 28th day of June 2007.



Judicial Assistant to Judge E. Douglas Spangler

