STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGE OF COMPENSATION CLAIMS SARASOTA

Timothy Carney, Claimant, vs. Sarasota County Sheriff's Office, and Opta Comp, Employer/Carrier/Servicing Agent.	))))))))	OJCC Case No.: 08-020697DBB Date of Accident: 11/21/2007

FINAL COMPENSATION ORDER

This cause was heard before the undersigned Judge of Compensation Claims at Sarasota, Manatee County, Florida on March 10, 2009 for a final hearing on the claimant's claims for authorization, provision and payment of a cardiologist for evaluation and treatment of the claimant's heart condition; determination of compensability under F.S. 112.18; costs, interest, penalties, and attorney's fees; and payment of impairment benefits at 22 percent. The petitions for benefits were filed on August 1, 2008 and March 2, 2009, and mediation occurred on December 8, 2008. The parties' Uniform Statewide Pretrial Stipulation was filed on December 19, 2008. The claimant was represented by Tonya A. Oliver, Esquire, and the employer/carrier (E/C), by Maria D. Korn, Esquire.

The E/C defended on the basis that: condition is personal in nature-work is not the major contributing cause; not compensable under 112.18 F.S.; no disability; no penalties, interest, costs, or attorney's fees due; and no objection to payment of impairment benefits if the claim is compensable.

The parties entered into the following stipulations:

a. The date of accident is 11/21/2007 and Sarasota, Florida is the proper venue.

b. There was an employer/employee relationship on the date of accident and employer had workers' compensation insurance coverage in effect.

c. E/C did not accept the accident or injury as compensable.

d. Claimant timely reported the accident and the parties received timely notice of the final hearing.

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

f. If the claim is determined to be compensable, impairment benefits will be paid based on a 22 percent impairment rating.

The following documentary items were received in evidence:

Exhibit 1: Uniform Statewide Pretrial Stipulation as amended at the beginning of the final hearing.

Exhibit 2: Deposition of Patrick F. Mathias, M.D. taken on February 27, 2009.

Timothy Carney and Barbara Brief appeared and testified at the hearing. Counsel for the parties presented oral argument and written Trial Memoranda.

In making my findings of fact and conclusions of law in this matter, I have carefully considered and weighed all the evidence that was submitted to me by deposition testimony, documentary evidence, medical reports, and by live testimony presented at the hearing. I have observed the candor and demeanor of the witnesses who appeared live before me and I have resolved all conflicts in the testimony and evidence. I have attempted to distill the testimony and facts together with the findings and conclusions necessary to the resolution of this claim. I have not attempted to painstakingly summarize the substance of the claimant's testimony or the testimony of any deposition witness in this matter, nor have I attempted to state non-essential facts. Because I have not done so does not mean that I have failed to consider all of the evidence. Based upon the evidence and the applicable law, I make the following determinations of fact and conclusions of law:

1. I have jurisdiction over the subject matter and parties, and venue is proper in Sarasota, Florida.

2. The stipulations of the parties are approved and accepted as findings of fact.

3. Claimant, Timothy Carney, 57 years old, began employment with Sarasota County Sheriff's Office, employer herein, on November 9, 1981 as a patrol police officer. A

preemployment physical was performed prior to claimant's employment, and he understood he was cleared for duty without any evidence of heart disease. Claimant testified that he had no prior high blood pressure, heart disease, or atrial fibrillation prior to his employment with the Sheriff's Office. Claimant performed all patrol officer duties and then became a vice/narcotics detective. He then became a patrol supervisor, and currently is employed in technical services. He is required to maintain his proficiency at the gun range and make arrests when necessary.

Two days prior to the date of accident alleged of November 21, 2007 claimant saw a cardiologist on referral from his primary physician due to problems with his heart rate. He was feeling fatigued, short of breath, and had an elevated heart rate. Claimant was given a Holter monitor to wear, turned it in for reading, and was to be called with the results in a week. On November 21, 2007 the cardiologist called claimant and told him to come to the office right away. The cardiologist wanted him put in the hospital and started on medication. Claimant notified his supervisor before he left, and stayed in the hospital overnight, where he was monitored and medications were begun to regulate his heartbeat.

Claimant testified that his normal work hours are 8 AM to 4:30PM, and vary occasionally depending on meetings. He was not scheduled to work November 22, 2007 as it was the Thanksgiving holiday. He was also not scheduled to work Friday November 23, 2007 as it was also a holiday, and not scheduled to work the following Saturday and Sunday. Claimant was released from the hospital on Thanksgiving and was able to return to work full duty without restrictions on Monday, November 25, 2007, his next regular day of work. He continues to see the cardiologist and take medications for his atrial fibrillation. The medications have side effects, and he continues to have fatigue, shortness of breath, and irregular heartbeat on occasion. Claimant has been advised that his job position has been administratively withdrawn, and that his last day of work will be March 31, 2009.

Claimant said that he missed the last couple of hours of work on November 21, 2007 but he was not sure if he completed a time adjustment record (TAR) to reflect those hours. He is a salaried employee, and did not have any wage loss as a result of the missed hours. Claimant said

that he would not have been able to continue his job duties on November 21, 2007 when he left work, and he could not have responded if called in because he was in the hospital. The time he was in the hospital was the only time he has missed from work due to his heart condition.

4. Barbara Brief is the personnel manager at the Sarasota County Sheriff's Office. She testified that she knows claimant and reviewed his job description, which indicates he is a Major in the technical operations department, with typical hours of 8 AM to 4 PM. She said the physical demands of his job are minimal in regards to running, stooping, lifting, climbing, balancing, or crouching. She said that if employees take any time off they are required to complete a TAR, and claimant did not complete any TAR from November 21, 2007 through November 26, 2007. He also did not give her any documents containing work restrictions after he was in the hospital. Brief was not aware of any conversations between claimant and his supervisor or if he advised his supervisor that he was leaving work to go to the hospital.

5. Dr. Patrick Mathias is board-certified in internal medicine, cardiology, critical care, interventional cardiology, and electrophysiology, and is certified by the American Society of Hypertension as a hypertension specialist. Dr. Mathias conducted claimant's independent medical examination (IME) on February 2, 2009. He reviewed the records of claimant's treating cardiologist Dr. Culp and obtained a history from claimant. The history was that around 2005 claimant noticed an occasional fluttering in his chest, and a Holter monitor in 2007 showed atrial fibrillation. Claimant was admitted to the hospital in November 2007 and started on medications to treat this atrial fibrillation. The physical examination conducted by Dr. Mathias was completely normal. Dr. Mathias also performed an EKG, which showed that claimant's heart rate was a little slow, and he had sinus bradycardia and a right bundle branch block, but his rhythm was regular.

Dr. Mathias diagnosed symptomatic atrial fibrillation. Dr. Mathias explained that the upper chambers of claimant's heart are beating chaotically, irregularly, at a rate of greater than 600 times a minute, and as a result, his heartbeat tends to be rapid and irregular. Dr. Mathias

said that the regularity and normalcy of claimant's heart beat has been reestablished by the medications he's on. He said that atrial fibrillation is a form of heart disease.

Dr. Mathias reviewed claimant's hospital records and Dr. Culp's records, and testified that claimant had episodes of atrial fibrillation with a rapid ventrical response, which means that when he goes into the irregular heartbeat, his heart rate is very rapid and this could be hazardous, which is why Dr. Culp admitted him for treatment. According to Dr. Mathias, epidemiological studies have shown that law enforcement is correlated with a higher incidence of heart disease, and the requirements of law enforcement is such that an arrhythmia atrial fibrillation has to be treated or controlled before someone can function as a police officer.

Dr. Mathias reviewed claimant's preemployment physical done on October 2, 1981 and testified that there was no evidence that claimant had hypertension or heart disease, and he had a normal EKG. He said if claimant had atrial fibrillation it would have shown up on the EKG. It was Dr. Mathias' opinion that claimant has lone atrial fibrillation, which is atrial fibrillation for which a cause is simply not evident; it's an isolated electrical phenomenon. Dr. Mathias said that faced with a situation like claimant's he would have discharged him from the hospital, seen him in the office in about ten days to two weeks, confirmed he had no symptoms, and then perhaps send him back to work. He said he did not know how to answer whether he would place restrictions on claimant, the reason being that claimant has been doing fairly well, but he hasn't had a stress test or any other objective way to evaluate the response of his atrial fibrillation to intense physical and emotional stress.

It was Dr. Mathias' opinion that claimant is at maximum medical improvement, and fits in a class two per the guides, with a 22 percent impairment. He said claimant will need to be continued on his present medications and follow with his cardiologist, and it is inevitable that as time goes on the atrial fibrillation gets more and more difficult to control, and claimant will require other, stronger medications, and eventually an atrial fibrillation ablation.

6. In this case E/C does not dispute that claimant is a law enforcement officer subject to the protection of section 112.18(1)(2008), who presently has what qualifies as heart

disease and who successfully passed a physical examination upon entering into service as a law enforcement officer, which examination failed to reveal any evidence of any heart disease. However, E/C contends that claimant has not demonstrated that his condition has resulted in total or partial disability, and therefore his claim must fail.

Claimant, on the other hand, argues that when claimant was told to go to the hospital to undergo treatment to regulate his atrial fibrillation, he was incapacitated and unable to perform his duties, and that it is irrelevant that the day he spent in the hospital was a holiday when he was not required to work.

7. To be entitled to the statutory presumption of section 112.18(1), the claimant's heart disease must result in total or partial disability or death. *See, Bivens v. City of Lakeland*, 993 So.2d 1100 (Fla. 1st DCA 2008), citing *City of Port Orange v. Sedacca*, 953 So.2d 727, 729-730 (Fla. 1st DCA 2007). As noted by the *Bivens* court, section 440.02(13), Fla. Stat. (2007) defines "disability" as "incapacity because of the injury to earn in the same or any other employment the wages which the employee was receiving at the time of the injury". That court went on to note that a finding of disability hinges solely on the employee's ability to earn income, not upon other factors such as whether the employee has experienced wage loss, and quoted the *City of Port Orange* case for the conclusion that the statue requires a claimant actually be incapable of performing his work.

The *Bivens* court noted there was no evidence that claimant's MVA affected his ability to perform his duties as a fire inspector; he testified that he was always able to perform the physical requirements of the job, including dragging hoses and laying supply lines, and no work restrictions were ever placed on claimant when he was being evaluated or diagnosed with MVA. That court found that the fact that claimant missed several days of work due to medical appointments does not demonstrate disability, and cited the facts of *Michels v. Orange County Fire/Rescue*, 819 So.2d 158, 160 (Fla. 1st DCA 2002), where the claimant underwent rounds of medical therapy causing him to miss significant periods of work at regular intervals, but he was always able to return to his full work duties, and he was not found to be disabled until he became

incapable or precluded from working because of his disease, which event was removed from his diagnosis and treatment by several years. The court noted that detection of a disease always requires testing, medical evaluations, or some type of treatment, and these measures, by themselves don't demonstrate disability.

Bivens missed one day of work for a doctor's appointment and six days after a heart catheterization, and several hours for a stress test. The court concluded that such time off does not demonstrate disability as claimant's condition did not prevent him from performing his job responsibilities. The court said: "If testing or treatment, standing alone, equaled 'disability,' everyone would be disabled upon their first visit to a doctor's office. The *Bivens* court concluded that his MVA did not cause an incapacity resulting in wage loss, and without that, he could not demonstrate disablement; without disablement, Bivens could not qualify for the statutory presumption.

In another case involving atrial fibrillation, *Sledge v. City of Fort Lauderdale,* 497 So.2d 1231 (Fla. 1st DCA 1986), the court found that the record revealed that Sledge was still employed as a fireman, and that he had not become incapacitated in any manner from his heart disease from performing his duties as a fireman. This finding was made despite that history that beginning in 1978 Sledge has several acute attacks of heart palpitations, hospitalization and medication, and at one point was paid disability by the City. The *Sledge* decision continues to be cited for the definition of disability. *See, City of Mary Esther v. McArtor*, 902 So.2d 942 (Fla. 1st DCA 2005).

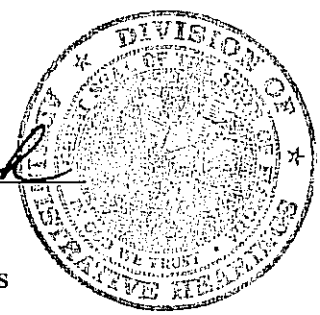
8. Applying the holdings of the above case law to the case herein, I agree with E/C that the facts more closely follow the *Bivens* decision. Claimant herein was able to perform his job duties, including during the several months after he began noticing his increased heart rate and other symptoms, as well as the two days he wore the Holder monitor. He was in the hospital only overnight, and after release on medication, is under no restrictions. Certainly *Bivens* could have made the same argument that he was unable to perform his firefighter duties while he was in the hospital undergoing heart catheterization as claimant makes herein, but the mere fact that

claimant required hospitalization to control his heartbeat does not automatically equate to an incapacity because of the injury to earn in the same or any other employment the wages which the employee was receiving at the time of the injury. In this case, absent any restriction on his work duties and responsibilities, and per the holding of *Bivens*, claimant has not established that his loss of time for hospitalization for medication to control his heartbeat establishes a disability entitling him to the statutory presumption.

9. Therefore, because claimant has not established that his condition has resulted in a disability, the claims should be denied.

WHEREFORE, based upon the foregoing, it is **ORDERED AND ADJUDGED:** claimant has not established that his condition has resulted in a disability, therefore the claims are denied.

DONE and ORDERED in chambers in Sarasota, Florida.



Diane B. Beck
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I CERTIFY that the foregoing Final Compensation Order was entered and a copy served by U.S. mail/electronic mail on each party and counsel at the addresses below on March 30, 2009:

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