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

Marcus Crowden Employee/Claimant, vs. Orange County and Alternative Service Concepts. Employer/Carrier,	)	OJCC Case No. 09002813JTF Judge: David Langham

FINAL ORDER GRANTING COMPENSABILITY AND AUHORIZATION FOR CARE AND TREATMENT, COSTS AND ATTORNEY FEES

THIS CAUSE was heard before the undersigned at Orlando, Orange County, Florida on October 15, 2009 before the undersigned sitting as visiting Judge. The subject of Claimants claims as set forth in the pretrial compliance questionnaire ("PTCQ") filed June 18, 2009 are temporary total or temporary partial disability from December 17, 2008 through the present, adjustment of the average weekly wage, authorization of care and treatment of Claimant's hypertension with internist or other physician, compensability of hypertension via §112.18, and penalties, interest, attorney's fees and costs.

The undersigned appeared for trial by Video Teleconference System (VTS). The petition for benefits was filed February 3, 2009. The final hearing occurred two hundred fifty-four (254) days after the petition was filed. Kelli Hastings, Esq. was present in Orlando on behalf of the Claimant. Karen Cullen, Esq. was present in Orlando on behalf of the Employer/Carrier (hereafter "E/C").

Submitted into evidence at the Final Hearing were the following documents, each accepted and placed into evidence without any objection except where noted, as joint exhibits, Claimant's exhibits, or E/C exhibits, with each individual exhibit being further identified by a numerical designation as follows:

JUDGE'S EXHIBITS MARKED FOR THE RECORD:

1. The PTCQ filed June 18, 2009 was marked as Judge's exhibit "1" for the record.

2. The Employer/Carrier's Trial Summary filed October 12, 2009 was marked as Judge's exhibit "2" for the record.

3. Claimant's trial memorandum filed October 12, 2009 was marked as Judge's exhibit "3" for the record.

4. The Employer/Carrier's amendment to Pretrial Compliance Questionnaire filed August 10, 2009 was marked as Judge's exhibit "4" for the record.

5. A composite of documents filed October 15, 2009 by the Employer/Carrier including copies of case law and a physical was marked as Judge's exhibit "5" for the record.

6. Claimant's Motion in Limine filed October 9, 2009 was marked as Judge's exhibit "6" for the record.

JOINT EXHIBITS:

1. None.

CLAIMANT'S EXHIBITS:

1. The Deposition of Michael Nocero, M.D. taken September 21, 2009 was marked as Claimant's exhibit "1" and accepted as evidence.

2. A composite of medical records from Centra Care was marked as Claimant's exhibit "2" and accepted as evidence.

3. A Compensation Order entered by the Honorable John Thurman on July 19, 2004 was marked as Claimant's exhibit "3" and accepted as evidence.

4. Correspondence to Claimant dated October 18, 1983 was marked as Claimant's exhibit "4" and accepted as evidence.

5. An Amended Order entered January 5, 2004 by the Honorable Thomas Mihok was marked as Claimant's exhibit "5" and accepted as evidence.

EMPLOYER/CARRIER'S EXHIBITS:

1. The Deposition of Marcus Crowden taken April 7, 2009 was marked as Employer/Carrier's exhibit "1" and accepted as evidence.
2. A composite including a physical examination form and correspondence from Centra Care was marked as Employer/Carrier's exhibit "2" and accepted as evidence.
3. Correspondence dated December 19, 2008 was marked as Employer/Carrier's exhibit "3" and accepted as evidence.
4. Correspondence dated December 11, 2008 was marked as Employer/Carrier's exhibit "4" and accepted as evidence.
5. A second correspondence dated December 11, 2008 was marked as Employer/Carrier's exhibit "5" and accepted as evidence.
6. A physical dated December 5, 2008 was marked as Employer/Carrier's exhibit "6" and accepted as evidence.
7. A May 1, 2002 Arbitration Award was marked as Employer/Carrier's exhibit "7" and accepted as evidence.[1]

In making the determinations set forth below, I have attempted to distill the salient facts together with the findings and conclusions necessary to resolve this claim. I have not attempted to painstakingly summarize the substance of the parties' arguments, nor the support given to my conclusions by the various documents submitted and accepted into evidence; nor have I attempted to state nonessential facts. Because I have not done so does not mean that I have failed to consider all of the evidence. In making my findings of fact and conclusions of law in this claim, I have carefully considered and weighed all evidence submitted to me. I have considered arguments of counsel for the respective parties, and analyzed statutory and decisional law of Florida.

[1] This exhibit in evidence includes duplicate pages 5 and 6. The purpose of this redundancy is not clear from the record in this matter.

Based upon the parties' stipulations and the evidence and testimony presented, I find:

1. The Judge of Compensation Claims has jurisdiction of the parties and the subject matter of this claim. The parties' stipulations and agreements are accepted, adopted and made an order of this Office.

2. Any and all issues raised by way of the Petitions for Benefits ("PFB"), but which issues were not dismissed or tried at the hearing, are presumed resolved, or in the alternative, deemed abandoned by the Claimant and, therefore, are Denied and Dismissed with prejudice. See, Betancourt v. Sears Roebuck & Co., 693 So.2d 680 (Fla. 1st DCA 1997); see also, McLymont v. A Temporary Solution, 738 So.2d 447 (Fla. 1st DCA 1999). The prevailing party may be entitled to costs. F.A. Richard & Assocs. v. Fernandez, 975 So.2d 1224 (Fla. 1st DCA 2008); Palm Beach Cty. Sch. Dist. v. Ferrer, 990 So.2d 13 (Fla. 1st DCA 2008); Morris v. Dollar Tree Store, 869 So.2d 704 (Fla. 1st DCA 2004). At trial, Claimant dismissed his claims for temporary total or temporary partial disability from December 17, 2008 through the present, adjustment of the average weekly wage, and penalties and interest. These claims were plead by petition, listed in the June 18, 2009 PTCQ, and reiterated again on the eve of trial in Claimant's Trial Memorandum filed October 12, 2009. As to these issues, the Employer/Carrier is the prevailing party.

3. The Florida Evidence Code controls admissibility of evidence in workers' compensation proceedings.[2] The Division of Administrative Hearings ("DOAH") Rules of Procedure, Section 60Q6.101, et. seq. Florida Administrative Code governs the procedural aspects of this claim.[3] Those Rules are referred to herein as "DOAHRP."

4. The order has two purposes. One is to afford the parties the opportunity for appellate review as appropriate. For that purpose, this order need contain only "findings of ultimate material fact . . .

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2 See, e.g., Martin Marietta Corp. v. Roop, 566 So.2d 40 (Fla. 1st DCA 1990); Odom v. Wekiva Concrete Products, 443 So.2d 331 (Fla. 1st DCA 1983).

3 On February 23, 2003, the OJCC enacted procedural rules, designated 60Q-6.101, et seq. The Florida Supreme Court recognized the enactment and efficacy of those rules in repealing the former Florida Rules of Workers' Compensation Procedure. See, In Re Florida Rules of Workers' Compensation Procedure 891 So.2d 474 (Fla. 2004).

necessary to support the mandate." Garcia v. Fence Masters, Inc., and AIG Claims Services, Inc., 16 So.3d 200 (Fla. 1st DCA 2009). Each trial of the Office of the Judges of Compensation Claims also provides the parties and the public with the reasoning that resulted in the outcome reflected. It is often the case that this purpose requires more discussion than what is required by the Court for their purposes. I therefore expound upon my perceptions of the evidence more fully than perhaps necessitated for appellate review. In respect to the Court's admonition in Garcia, however, I have striven to clearly state the ultimate findings upon which my decisions ultimately rest. The absence from this order of recitation of specific testimony or documentary quotes should therefore be interpreted as a conscious effort to comply with the Court's admonition. Whether mentioned in this order specifically or not, the undersigned has carefully reviewed and considered all evidence admitted at trial. Certainly, any party has ample opportunity to address any perceived deficiency in the extent to which this order enunciates findings. See, Holland v. Cheney Brothers, Case no. 1D08-5917 (Fla. 1st DCA 2009)(rendered October 14, 2009)(not final until time expires to file motion for rehearing and disposition thereof).

5. On Friday, October 9, 2009, six days before trial of this matter on October 14, 2009 Claimant filed a Motion in Limine. Claimant did not call that motion up for hearing prior to the trial. The motion is procedurally defective. The motion does not "include a statement as to whether a hearing on the motion is necessary." Rule 60Q6.115(4). Pursuant to the DOAHRP, that Employer/Carrier is afforded "ten days" following service of a motion to "file a response in opposition." Id. Because Claimant filed the motion less than ten days prior to trial, the response time was not afforded. The Judge of Compensation Claims "may dispose of written motions without a hearing within ten days following the expiration of the time for service of a response." Id. That could not occur in this instance, because the time for the E/C to respond (10 days from the initial service on October 9, 2009) was October 19, 2009. This was four days post-trial.

Claimant's counsel's Motion cannot be construed as filed timely in view of hoping for a determination of that motion within the three (3) business days between service and trial itself.

Furthermore, the purpose of a motion in limine is to prevent the introduction of improper evidence, "the mere mention of which at trial would be prejudicial." See, Buy-Low Save Ctrs., Inc. v. Glinert, 547 So.2d 1283 (Fla. 4th DCA 1989); Dailey v. Multicon Dev., Inc., 417 So.2d 1106 (Fla. 4th DCA 1982); Fittipaldi USA, Inc. v. Castroneves, 905 So.2d 182, 187 (Fla. Dist. Ct. App. 3d Dist. 2005). This is primarily employed when a jury will be the finder of fact, and a party seeks to have an evidentiary determination made in advance, such that no mention of excluded evidence will be heard by the Jury. This methodology prophylacticaly prevents the finder of fact in a jury trial setting from being exposed to prejudicial material which the presiding Judge concludes in advance is prejudicial. The logic of that process is obvious. The logic of that process in a proceeding in which the Judge will be the finder of fact, such as a workers' compensation claim, is less obvious, and even somewhat curious. The methodology might be effectively employed months prior to trial when a ruling thereon might preclude the necessity of expensive and time-consuming discovery on some topic, for example when a Frye challenge is raised to some potential scientific evidence. See, Castillo v. E.I. Du Pont de Nemours & Co., 854 So.2d 1264, 1268 (Fla. 2003). In that setting there is a purpose for the Motion in Limine, and resolution of some issue well before trial is a service to the parties. That is not the situation in the case at bar.

The Motion in Limine in this instance, filed three business days before trial and after the discovery had been completed, seeks an order excluding documents from evidence. This motion, due to the timing employed, serves no real purpose in these proceedings that could not have been served as easily with objections at trial. The documents for which exclusion is sought include a July 28, 2003 physical and a 1999 termination, with related arbitration documents. Claimant argues that the issues addressed by these documents were litigated by the same parties, which are

present in the case at bar, previously in OJCC case number 03-032343ORL. Claimant argues that the findings of Judge Thurman in his July 19, 2004 Compensation Order control the determinations in the case at bar and that collateral estoppel should prevent the re-litigation here of factual issues that were litigated by these parties in case 03-032343ORL, and upon which Judge Thurman made findings of fact.

Clearly, "compensation orders are governed by the same principles of res judicata, ***collateral estoppel***, and law of the case as are applied to judgments in other courts, except to the extent section 440.28, Florida Statutes, permits modification. (Emphasis added). PLM Florida Hotels, Inc. v. DeMarseul, 611 So.2d 1360, 1362 (Fla. 1st DCA 1993), review denied Demarseul v. PLM Florida Hotels, Inc., 620 So.2d 760 (Fla. 1993); Buena Vista Constr. Co. v. Capps, 656 So.2d 1378, 1380 (Fla. 1st DCA 1995). See also, United Stated Fidelity and Guaranty Co. v. Odoms, 444 So.2d 78(Fla. 5th DCA 1984). Collateral estoppel prevents the parties in the second suit from litigating those points in question which were actually adjudicated in the first suit. See, Husky Industries, Inc. v. Griffith, 422 So.2d 996 (Fla. 5th DCA 1982). The essential elements of collateral estoppel are:

(1) that the parties and issues be identical,
(2) that the particular matter be fully litigated and determined in a contest,
(3) which results in a final decision,
(4) in a court of competent jurisdiction.

Odoms 79-80; Mobil Oil Corp. v. Shevin, 354 So.2d 372 (Fla. 1977). In Florida workers' compensation law, there may be multiple "accident dates" that stem from a singular disease process diagnosis. See, City of Mary Esther v. McArtor, 902 So.2d 942 (Fla. 1st DCA 2005). As the requirements or elements of Fla. Stat. §112.18 are litigated, there may be issues that are pertinent in a case related to one date of accident, such as whether the individual has a covered condition or whether the individual passed a physical at the time of entering service, such determinations may likely be pertinent in later litigation of some different "date of accident"

regarding that same diagnosis or disease. Where there is identity of the parties, and the other elements of collateral estoppels are present, that doctrine may be appropriately employed to avoid the expense of re-litigating any coincident issues. Therefore, the collateral estoppel issue is pertinent, and bears analysis and discussion.

However, in the case at bar, the third element mentioned in Odoms and Shevlin is missing. There is no "final decision" before me from OJCC Case number 03-032343ORL. In Florida workers' compensation, the "order making an award or rejecting the claim" is a "compensation order." Fla. Stat. §440.25(4)(e). Review of such an order is "by appeal to the District Court of Appeal, First District." Fla. Stat. §440.271. That review occurred regarding the July 14, 2004 Compensation Order, in OJCC Case number 03-032343ORL. That review resulted in reversal of that order. Orange County Fire Rescue v. Crowden, 913 So.2d 101 (Fla. 1st DCA 2005). In reversing, the Court held "there was no competent, substantial evidence that claimant sustained a work-related injury of any nature." Based upon that conclusion, the Court reversed the July 14, 2004 Compensation Order in OJCC Case number 03-032343ORL. Claimant's arguments that this reversal has no effect upon the findings rendered by the Judge in deciding that case are unconvincing. That order included, or should have, the "findings of ultimate material fact . . . necessary to support the mandate." Garcia v. Fence Masters, Inc., and AIG Claims Services, Inc., 16 So.3d 200 (Fla. 1st DCA 2009). The Court's reversal of the July 14, 2004 Compensation Order in OJCC Case number 03-032343ORL in this circumstance where all of the award of benefits therein was likewise reversed, renders that July 14, 2004 Compensation Order in OJCC Case number 03-032343ORL a nullity.

The Employer/Carrier neither cited nor provided any decisional law in opposition to the Motion in Limine. Perhaps due to the short notice filing three business days prior to trial, or for some other reason. Nonetheless, it is the responsibility of the parties to a case to present authority to support their arguments. See generally, Holiday Inn v. Sallee, 496 So.2d 227, 229 (Fla. 1st

DCA 1986); Univ. of W. Fla. v. Mixson, 752 So.2d 92 (Fla. 1st DCA 2000); Weaver v. Southern Bell, 703 So.2d 1213 (Fla. 1st DCA 1997). No Florida decisional law has been located regarding collateral estoppel effects of a reversed order. This is likely because the conclusion that reversal renders the reversed order moot is simply intuitive. That conclusion may be further bolstered by the scarcity of reported decisions regarding this issue nationwide. However, I find the Court's analysis in East Bay Union of Machinists, etc. v. Fibreboard Paper Products Corp., 285 F.Supp. 282, 286 (D. Cal. 1968) instructive. The Court held "the reversal with directions for a new trial placed the parties in the same position as if the action had never been tried, except that the opinion of the District Court of Appeal must be followed in the State Trial Court as the law of the case," citing, Mears v. Superior Court, 186 Cal.App.2d 770, 9 Cal.Rptr. 113 (1961). Certainly this is not controlling authority. However, this is an eloquent expression of the determinations set forth above.

I conclude that the findings and holdings in the July 14, 2004 Compensation Order in OJCC Case number 03-032343ORL are not relevant to the proceeding before me. When that order was reversed on October 25, 2005, the parties to that case were thereby "placed in the same position" as if the case had never been tried. The compensation order was a nullity following that appellate action. The passage of time has done nothing to alter the status of that compensation order, which remains today a nullity.

Claimant's Motion in Limine seeking to avoid the Judge of Compensation Claims considering certain documents is appropriately denied on its merits and collateral estoppels does not affect the issues in this case, as plead. It bears mentioning that such an issue could have been handled through objections at trial without the filing of a motion in limine in this "bench trial" setting. Furthermore, if the motion in limine procedure is to be employed, filing such a motion three business days before trial with any expectation that it will be resolved prior to trial is likely unrealistic and inappropriate in most circumstances.

6. Much of the testimony at trial involved the Employer/Carrier's defense of intoxication or drug use. In the pretrial compliance questionnaire, the E/C plead this as follows: "the Claimant was intoxicated or under the influence of illegal substances and is therefore not eligible for benefits under F.S.440.101(2)." Fla. Stat.§440.101 states that if the Employer implements a drug free workplace program "in accordance with" Fla. Stat.§440.102, including "notice, education, and procedural requirements for testing," then pursuant to Fla. Stat.§440.101(2), if "a drug or alcohol is found to be present in the employee's system at a level prescribed by rule adopted pursuant to this act, the employee may be terminated and forfeits his or her eligibility for medical and indemnity benefits." In this case, Claimant testified in his deposition that the Employer had a drug-free workplace. At trial, he explained that he meant that he knew that employees were not allowed to use drugs at work. Claimant's broad statement acknowledging a drug free workplace has not been shown to be sufficient to sustain a finding that the Employer had a statutorily sufficient "drug free workplace" program in place, pursuant to the litany of requirements therefore, set forth in Fla. Stat.§440.102(3)(a):

> 1. A general statement of the employer's policy on employee drug use, which must identify:
> a. The types of drug testing an employee or job applicant may be required to submit to, including reasonable-suspicion drug testing or drug testing conducted on any other basis.
> b. The actions the employer may take against an employee or job applicant on the basis of a positive confirmed drug test result.
> 2. A statement advising the employee or job applicant of the existence of this section.
> 3. A general statement concerning confidentiality.
> 4. Procedures for employees and job applicants to confidentially report to a medical review officer the use of prescription or nonprescription medications to a medical review officer both before and after being tested.
> 5. A list of the most common medications, by brand name or common name, as applicable, as well as by chemical name, which may alter or affect a drug test. A list of such medications as developed by the Agency for Health Care Administration shall be available to employers through the department.
> 6. The consequences of refusing to submit to a drug test.
> 7. A representative sampling of names, addresses, and telephone numbers of employee assistance programs and local drug rehabilitation programs.
> 8. A statement that an employee or job applicant who receives a positive confirmed test result may contest or explain the result to the medical review officer within 5

working days after receiving written notification of the test result; that if an employee's or job applicant's explanation or challenge is unsatisfactory to the medical review officer, the medical review officer shall report a positive test result back to the employer; and that a person may contest the drug test result pursuant to law or to rules adopted by the Agency for Health Care Administration.

9. A statement informing the employee or job applicant of his or her responsibility to notify the laboratory of any administrative or civil action brought pursuant to this section.

10. A list of all drugs for which the employer will test, described by brand name or common name, as applicable, as well as by chemical name.

11. A statement regarding any applicable collective bargaining agreement or contract and the right to appeal to the Public Employees Relations Commission or applicable court.

12. A statement notifying employees and job applicants of their right to consult with a medical review officer for technical information regarding prescription or nonprescription medication.

Claimant's broad statement acknowledging a drug free workplace is not sufficient to prove compliance by the Employer with the requirements of Fla. Stat.§440.102(5). Furthermore, the testimony of Cindy Dennis and Chief Joe Washington did not substantiate the Employer's compliance with these enunciated requirements and protocols. As a specific example, I note that Chief Washington, at best, was able to attest that someone else with the Employer contracted with another company, who is supposed to assure compliance with the requirements. This testimony, and the testimony of Ms. Dennis is not competent or sufficiently substantial to support a factual finding that the Employer had a statutorily compliant drug-free work place program in effect. As such, the provisions of Fla. Stat.§440.101 are not effective in this case to bar the recovery of compensation.

7. The E/C did not list any defense regarding Fla. Stat. §440.09(3), which is a separate "intoxication" defense to compensability of claims. Claimant objected to argument of that legal standard at trial on the basis that this theory was not plead. The E/C argued that their defense of "intoxication" without specific reference to Fla. Stat. §440.09 nonetheless put the Claimant on notice of the defense. Whether it is appropriate to consider evidence or defenses over a "notice" objection is controlled by an analysis of whether the failure to timely disclose same resulted in "actual prejudice." See, Binger v. King Pest Control, 401 So.2d 1310 (Fla. 1981); see also, Cedar

Hammock Fire Dept. v. Bonami, 672 So.2d 892 (Fla. 1st DCA 1996); Burgess v. Buckhead Beef, 15 So.3rd 25 (Fla. 1st DCA 2009); Med Logistics v. Marchines, 911 So.2d 823 (Fla. 1st DCA 2005). Certainly, the E/C here asserted "intoxication" as a defense. I cannot conclude that this was sufficient in this setting. Had the E/C asserted no statutory basis for that defense, the Claimant might well be found to have been on notice that all "intoxication" or "drug use" defenses were being raised. However, including one specific statutory provision in this defense could very well lead the Claimant to conclude that particular statutory defense was being raised, to the exclusion of the other "substance use" defenses. Claimant argues that the legal maxim inclusio unis es exclusio alterius[4] supports his objection to the consideration of this Fla. Stat. §440.09 intoxication defense, first raised at trial. This maxim generally states that the specific inclusion of some item(s) by implication excludes all other items. That legal maxim is not a rule of pleading, however, but a rule of statutory construction. It is not controlling in this situation. However, I am persuaded that the Fla. Stat. §440.09 intoxication defense was not plead, and to allow it as a defense raised this late would result in actual prejudice to the Claimant.

Furthermore, however, I conclude that the Fla. Stat. §440.09 intoxication defense does not operate to bar compensability in this case, even if it had been timely and appropriately plead. Fla. Stat. §440.09(3) operates in conjunction with Fla. Stat. §440.09(7), particularly paragraph (b). That section creates a legal presumption ("that the injury was occasioned primarily by the influence of the drug upon the employee") "if the employee has, at the time of injury, . . . a positive confirmation of a drug as defined in this act." Therefore, by the simple terms of this statute, the presumption arises in the event there is a positive drug test "at the time of injury." The "time of injury" or "date of accident" an occupational disease case is the "date of disability." Orange County Fire Rescue v. Jones, 959 So.2d 785, 786 (Fla. 1st DCA 2007); see also, City of

[4] A legal maxim accepted by the Florida Courts and applied to the Workers' Compensation Law. Ring Power Corp. v. Campbell, 697 So.2d 203 (Fla. 1st DCA 1997).

Mary Esther v. McArtor, 902 So.2d 942 (Fla. 1st DCA 2005); James v. Armstrong World Indus., 864 So.2d 1132 (Fla. 1st DCA 2003).

Claimant reported an issue with his blood pressure to the Employer. According to Claimant's testimony, Battalion Chief Mano came to his home and directed him to present at Centra Care on December 17, 2008. The Centra Care records in evidence support that Claimant was seen December 17, 2008 with complaints of "BP noted high" and "mild orthostatic dizziness, too severe to work safely." His blood pressure was measured that day as 142/88, and work restrictions were imposed on lifting, climbing and standing/walking. These are documented in an office note that date. A DWC-25 form was also completed that bears that date. That form also iterates the work restrictions in response to question 23. December 17, 2008 is the date of "disability," albeit it partial, see, McArtor. December 17, 2008 is the "date of accident." The evidence does not support that there was "a positive confirmation of a drug" on the date of accident, or therefore "at the time of injury." The records of Centra Care from December 11, 2008 support that Claimant tested positive for "marijuana metabolites" on that date. However, that date was six days prior to the "date of accident," and thus six days prior to the "time of injury." The competent evidence does not support that Claimant had a positive drug test on, or even close to, the date of accident.

In sum, the Employer/Carrier has not proven that they complied with the requirements of Fla. Stat.§440.102 such that Fla. Stat.§440.101 would bar entitlement to benefits in this case. Furthermore, the absence of a "positive confirmation of a drug" on December 17, 2009 precludes the application of Fla. Stat. §440.09(3) and or Fla. Stat. §440.09(7) in this circumstance.

8. Claimant seeks compensability of his "disability" of December 17, 2008 as a workers' compensation accident. He relies upon the provisions of Fla. Stat. §112.18, which provides:

> (1) Any condition or impairment of health of any Florida state, municipal, county, port authority, special tax district, or fire control district firefighter or any law enforcement officer or correctional officer as defined in

> s. 943.10(1), (2), or (3) 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 firefighter or law enforcement officer shall 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. Such presumption shall not apply to benefits payable under or granted in a policy of life insurance or disability insurance, unless the insurer and insured have negotiated for such additional benefits to be included in the policy contract.

This statute therefore presumes certain "conditions" or "impairments" of health to be accidental and "suffered in the line of duty." To avail himself of this statutory presumption, Claimant must demonstrate:

(1) that he is a firefighter, law enforcement officer, or correctional officer, and
(2) that he successfully passed a physical examination upon entering into such service as a firefighter, and
(3) that he has been diagnosed with a covered condition during employment, and
(4) that he has suffered resulting total or partial disability

The evidence in this case is uncontroverted that Claimant was hired as a firefighter for Orange County in 1983. Claimant testified that he was "wrongfully terminated" in March 1999 after a traffic stop resulted in criminal charges against him for misdemeanor drug paraphernalia possession. He testified that when he informed his supervisor of that arrest, he submitted to a drug test, which was positive for marijuana. He testified that he was also charged with felony insurance fraud, to which he plead no contest and was sentenced to probation. Claimant testified that he was terminated, but then "went through a process and I was reinstated" in June 2003. He testified that the termination was "reduced to a suspension." Claimant testified that he became employed in 1986 at Wet 'n Wild water park, and that between March 1999 and June 2003 he continued that work, and remains employed there now, as a first aid paramedic. Claimant testified that in September 2001 he also began work as a firefighter for Osceola County and continued there through May 2003. The May 1, 2002 decision of Arbitrator William D. Ferguson supports that Claimant's grievance regarding his 1999 termination was "reduced to a suspension

and Grievant (Claimant) is to be reinstated without back pay or benefits. On January 5, 2004, the Honorable Thomas Mihok, Circuit Judge in and for the Ninth Judicial Circuit, Orange County, Florida, entered an amended order enforcing the Arbitrator's decision. Therein, the Judge ordered Claimant "reinstated" and concluded that the "County cannot condition Crowden's reinstatement on an annual physical examination." Judge Mihok further concluded that Claimant was "not applying to be a firefighter. Rather, he is awaiting reinstatement pursuant to the arbitration award." On December 11, 2008 the Employer sent a "Notice of Predetermination Hearing." In a separate letter that day, the Employer advised Claimant that his "status is being changed to relieved of duty" and that he was required to use "sick time" or be placed on "leave without pay." This letter instructed Claimant to refrain from visiting any fire station or facility unless directed to do so by a supervisor. On December 19, 2008 the Employer issued a "Predetermination Hearing Decision" which recited the December 5, 2008 physical and positive drug test. This letter concluded that "your employment with the Orange County Fire Rescue Department will be terminated upon receipt of this letter," and advised Claimant of his right to appeal that decision. This evidence supports that Claimant was a firefighter from October 1983 through his termination on December 19, 2008.

At trial, significant time was devoted to the suspension of Claimant on December 11, 2008 and whether he was an "active" firefighter on December 17, 2008. I find this suspension in 2008 no more compelling that the suspension (so designated retroactively) in 1999, see below. The correspondence from the Employer establishes that the termination occurred December 19, 2008. Through that time, Claimant was a firefighter with the Employer. Claimant has therefore proven the first element necessary to avail himself of the Fla. Stat. §112.18 statutory presumption (that he is a firefighter, law enforcement officer, or correctional officer).

In order to avail himself of the Fla. Stat. §112.18 statutory presumption, Claimant must next prove that "he successfully passed a physical examination upon entering into such service"

as a firefighter. In this regard, Claimant relies upon correspondence from the Employer dated October 18, 1983. This letter congratulated Claimant, advised him that he "successfully completed" his medical examination" and that the Employer was then "officially offer(ing) a position as an Orange County Firefighter." The Employer/Carrier relies upon a later physical that occurred July 28, 2003. That examination led Dr. Portnoy to conclude that Claimant was hypertensive and obese. The Employer/Carrier argue that this physical is the operative physical because Claimant had been away for a period of years following his termination in 1999, and was again "entering into such service" as a firefighter. Judge Mihok concluded in 2004 that Claimant was not "applying to be a firefighter," but instead was awaiting reinstatement. Judge Mihok concluded that the County could not condition Claimant's reinstatement upon a physical at that time. I am not controlled by Judge Mihok's conclusions, but I find them pertinent nonetheless. This is not a situation in which Claimant left the Employer of his own accord and later elected to return to the employer. The competent evidence here supports that Claimant entered service as a firefighter in 1983, was terminated by the Employer, but pursuant to his contract of employment was reinstated as a firefighter on June 2, 2003. Claimant was not "entering into such service" in 2004 when he was eventually reinstated. The result of the Arbitrator's decision was that Claimant was not terminated (in retrospect), but spent a considerable period suspended from the Employer. Suspension is not the equivalent of being terminated, and as he was merely suspended, he effectively remained an employee of the Employer throughout that period. Claimant has therefore proven the second element necessary to avail himself of the Fla. Stat. §112.18 statutory presumption (that he successfully passed a physical examination upon entering into such service as a firefighter).

In order to avail himself of the Fla. Stat. §112.18 statutory presumption, Claimant must next prove that "he has been diagnosed with a covered condition during employment." The July 28, 2003 physical demonstrates hypertension. That conclusion is verified by Dr. Portnoy's

conclusion that Claimant was hypertensive and obese. Hypertension is a specifically listed "covered condition" in Fla. Stat. §112.18. Consistent with my conclusion that Claimant was an Employee of the Employer from 1983 through December 19, 2008, (albeit with at least one interruption when he was suspended) that diagnosis of hypertension occurred "during employment. Claimant has therefore proven the third element necessary to avail himself of the Fla. Stat. §112.18 statutory presumption (that he successfully passed a physical examination upon entering into such service as a firefighter).

In order to avail himself of the Fla. Stat. §112.18 statutory presumption, Claimant must next prove that "he has suffered resulting total or partial disability." Dr. Nocero opined that excusing Claimant from active firefighting duty on December 17, 2008 was a reasonable decision, in light of the duties of firefighting and the symptoms complained of, particularly dizziness. Dr. Nocero opined that Claimant was "actually incapacitated from active combat firefighting" on December 17, 2008 and would have remained so for a "business week," or approximately five days, until reassessed. Dr. Nocero opined that nonetheless Claimant was able at that time to "do other stuff." Dr. Nocero's testimony is not contradicted on this record. The Office of the Judges of Compensation Claims is charged with determinations of credibility of witnesses. Prather v. Process Systems, 867 So.2d 479 (Fla. 1st DCA 2004); Ullman v. City of Tampa Parks Dep't, 625 So.2d 868, 873 (Fla. 1st DCA 1993) (citing Orange City Water Co. v. Barkley, 432 So.2d 698 (Fla. 1st DCA 1983). The Florida Supreme Court in Crowell v. Messana Contractors, 180 So. 2d 329, 330 (Fla. 1965), held that the competent substantial evidence rule must allow room for the compensation judge "as trier of the facts [to] accept the testimony of one doctor over the testimony of several others." See also, United States Casualty Co. v. Maryland Casualty Co., 55 So.2d 741 (Fla. 1951); Chavarria v. Selugal Clothing, Inc., 840 So.2d 1071, 1076 (Fla. 1st DCA 2003). The District Court, citing Chavarria has reiterated that competent substantial evidence is the standard in occupational disease cases involving the presumptions of

Fla. Stat. §112.18. Punsky v. Clay County Sheriff's Office, 34 Fla. L. Weekly D 516 (Fla. 1st DCA 2009)(en banc). The Judge is not compelled to accept even uncontradicted, or presumptively correct testimony. Ullman; Prather. On this record however, I accept and adopt the opinions of partial disability rendered by Dr. Nocero. Claimant has therefore proven the fourth element necessary to avail himself of the Fla. Stat. §112.18 statutory presumption (that he has suffered resulting total or partial disability).

9. The compensability of Claimant's hypertension is therefore presumed pursuant to Fla. Stat. §112.18. Dr Nocero testified that he did not "think his employment would cause hypertension" and he identified some "risk factors" that Claimant does have for hypertension. He later admitted that the cause is "unknown" and that he cannot rule-out Claimant's employment as a (or the) cause. The effect of the presumption in Fla. Stat. §112.18 is that Claimant's hypertension "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." On this record, I conclude that there may be other causes possible and other "risk factors." However, the Employer/Carrier has not rebutted the presumption of Fla. Stat. §112.18 with competent substantial evidence. Punsky.

Wherefore, it is ORDERED AND ADJUDGED:

1. Claimant's claim for compensability of his hypertension is GRANTED. Claimant's claim for authorization of medical care for his hypertension is GRANTED. Claimant is entitled to attorneys fees and taxable costs for the prosecution of these claims and same are GRANTED. Jurisdiction is reserved for determination of the amount of such fees and costs.

2. Jurisdiction is reserved for determination of costs to which the Employer/Carrier is entitled, if any, as a result of prevailing on the issues of temporary total or temporary partial disability from December 17, 2008 through the present, adjustment of the average weekly wage, penalties and interest.

DONE AND ORDERED in Chambers, Pensacola, Escambia County, Florida, this 22nd day of October 2009.

JUDGE OF COMPENSATION CLAIMS

CERTIFICATE

This is to certify that the above **FINAL ORDER GRANTING COMPENSABILITY AND AUHORIZATION FOR CARE AND TREATMENT, COSTS AND ATTORNEY FEES** was entered on the date stated, and that copies were emailed to the parties' counsel as set forth below.

JUDGE OF COMPENSATION CLAIMS

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