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

Billy Harper,
Employee/Claimant,

vs.

City of Tavares, and City of Tavares/Gallagher Bassett Services, Inc., Gallagher Bassett Services, Inc.,
Employer/Carrier/Servicing Agent.
_____/

OJCC Case No. 16-004243WJC

Accident dates: 01/05/2016 & 04/20/16

Judge: W. James Condry

FINAL COMPENSATION ORDER

After proper notice to all parties, a final hearing was held on this claim in Orlando, Orange County, Florida on the afternoon of Wednesday, November 16, 2016. Present at the final hearing were attorneys Kristine Callagy for the claimant and James B. Birmingham for the employer/carrier/servicing agent, hereinafter referred to as the E/SA.

In-person trial testimony was received from the claimant, Billy Joe Harper. The remainder of the evidence was presented via deposition and other documents as detailed below.

This order addresses the Petitions for Benefits filed with DOAH on 02/22/16 & 06/17/16.

The claim was unsuccessfully mediated on 10/03/16.

OVERVIEW

The claimant is a 37 year old police corporal with the City of Tavares who alleges compensable cardiovascular disease (hypertension) under the Florida Heart and Lung Bill. He points to two incidences in 2016 where evaluation of symptoms he developed while working revealed elevated blood pressure for which he was placed by his family physician in a temporarily disabled status. Claimant seeks a finding of compensability under the Florida Heart and Lung Bill of his hypertensive condition that was discovered and treated during the course of his employment as a law enforcement officer. For the reasons expressed below I find that the Mr. Harper does have a compensable claim and that the authorization of certain benefits as requested should be granted.

The specific issues to be decided at the 11/16/16 hearing were as follows:

1. Whether claimant is entitled to a finding of compensability of his hypertension pursuant to Florida Statute Section 112.18(1)?
2. Whether the claimant is entitled to the authorization of a cardiologist for treatment of his heart condition under the Florida Heart and Lung Bill?
3. Whether claimant is entitled to the payment of impairment benefits based on the 4% impairment rating assigned by Dr. David Perloff?
4. Whether claimant is entitled to the payment of penalties, interest, costs and attorney fees at the expense of the E/SA?

The E/SA defended the claim on the following grounds:

1. That the claim has been denied in its entirety in that the claimant does not meet the statutory requirements of *Section 112.18(1), Florida Statutes*.
2. That the claimant did not sustain an accident within the course and scope of his employment on 01/05/16 or 04/20/16.
3. That the alleged dates of accident are not the major contributing cause of the claimant's condition.
4. That the claimant's hypertension/cardiac condition is personal in nature and/or pre-existing and not related in part or in whole to his employment.
5. That the authorization for evaluation and treatment with a cardiologist is denied.
6. That impairment benefits are not due.
7. That no penalties, interest, cost or attorney fees are due or owing.
8. That the E/SA is entitled to prevailing party costs pursuant to *Section 440.34(3), Florida Statutes (2015)*.

STIPULATIONS OF THE PARTIES

1. That the Judge of Compensation Claims (JCC) has jurisdiction over the parties and the subject matter.
2. That venue properly lies in Lake County.
3. That there was an employer/employee relationship at the time of the alleged 01/05/16 and 04/20/16 accidents.
4. That there was worker's compensation insurance coverage in effect on the date of the alleged accidents.
5. That there was timely notice of the pretrial conference and the final hearing.

6. That the claimant's average weekly wage is $1,261.34.

JUDGE'S EXHIBITS

1. The pre-trial stipulation and pre-trial compliance questionnaire with attachments approved by orders entered on 05/24/16 and10/13/16 and any timely amendments thereto (DNs 24-25 & 91).
2. A composite exhibit consisting of the claimant's trial memorandum dated 05/07/12 and the E/SA's trial memorandum dated 05/04/12. The composite items were considered for argument purposes only.

JOINT EXHIBITS

1. The 08/30/16 deposition transcript of Dr. Bruce Weaver and attachments (DN 71).
2. The 04/12/16 deposition transcript of claims adjuster, Melissa Plourde, and attachments (DN 72).
3. The 03/29/16 deposition transcript of Human Resources Analyst for the City of Tavares, Christina Bublitz, and attachments (DN 73).
4. The claimant's pre-employment physical (DN 73 at pgs 19-21).

CLAIMANT'S EXHIBITS

1. The 08/31/16 deposition transcript of Dr. David Perloff and attachments (DN 74 & 76-80).

E/SA EXHIBITS

1. The 03/21/16 deposition transcript of the claimant, Billy Joe Harper, and attachments (DN 64).
2. The 07/01/16 deposition transcript of the claimant, Billy Joe Harper, and attachments (DN 65).
3. The 08/29/16 deposition transcript of Dr. Michael Nocero, Jr., and attachments (DN 66).
4. The 09/13/16 deposition transcript of records custodian/center manager for US Healthworks, Deborah Maxwell Hancock, and attachments (DN 67).
5. The 07/11/16 deposition transcript of records custodian/director of health information services for Florida Hospital Waterman, Karen Diane Mathias, and attachments (DN 68).
6. A composite exhibit consisting of certain pleadings, orders, etc. (DN 86).

PROFERRED EXHIBITS

NONE

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In making my findings of fact and conclusions of law in this claim, I have carefully considered and weighed all of the evidence presented. I have observed and assessed the candor and demeanor of the only witness that testified live before me, and I have resolved all of the conflicts in the live testimony,

deposition testimony and documentary evidence.

I have carefully considered all of the evidence admitted even though I have not commented on or summated every piece thereof. Nevertheless, in my ruling I have set forth my ultimate findings of fact with mandate as required by *Section 440.25(4) (e)*.

Pursuant to *Section 440.015,* I have not interpreted the facts in this case liberally in favor of either the rights of the injured worker or the rights of the employer. I have, as required, construed the law in accordance with the basic principles of statutory construction. Based on the foregoing, the evidence, and applicable law, I make the following determinations having weighed and elected to reject as unpersuasive the evidence and inferences inconsistent with these findings:

1. I find that I have jurisdiction over the parties and the subject matter and I accept as true those matters for which the parties have stipulated.
2. *Section 440.02(1)* provides that "Accident" **means only an unexpected or unusual event or result that happens suddenly.**
3. *Section 440.09(1)* provides that the employer must pay compensation or furnish benefits required by *Chapter 440* if the employee suffers an accidental compensable injury or death arising out of work performed in the course and the scope of employment.
4. The section further requires that the injury, its occupational cause, and any resulting manifestation or disability must be:
    a. Established to a reasonable degree of medical certainty based on objective relevant medical findings; and,
    b. The accidental compensable injury must be the major contributing cause of any resulting injuries. "Major contributing cause" is defined under Section 440.09(1) as, "**the cause which is more than 50 percent responsible for the injury as compared to all other causes combined for which treatment is sought.**"
5. Generally with claims involving occupational disease or repetitive exposure, both causation and sufficient exposure to support causation must be proven by clear and convincing evidence. However in regard to those cases where the Florida Heart and Lung Bill presumption under *Section 112.18(1), Florida Statutes* applies, an employee is relieved from the necessity of proving the occupational causation of a covered disease under the section. See ***Talpesh v Village of Royal Palm Beach, 994 So.2d 353(Fla. 1st DCA 2008)***. Although the presumption relieves a claimant from the necessity of proving occupational causation, a claimant must still establish the existence of the four elements or criteria required in order to support the presumption. See also

Caldwell v. Div.of Ret., Fla. Dep't of Admin., 372 So.2d 438,441(Fla. 1979).

6. The claimant acknowledges that his claim in this case is solely dependent upon his successful establishment of the presumption under the Florida Heart and Lung Bill. Absent the presumption the record evidence is insufficient to prove that the claimant's employment was the cause of his diagnosed essential hypertension. The claimant acknowledges that his claim to compensability of his hypertension therefore rests with the presumption.
7. Pursuant to the statute and case law, the Claimant must show four elements for the presumption to apply:
   a. That the Claimant is a member of a protected class.
   b. That the Claimant developed a protected condition.
   c. That the Claimant underwent a pre-employment physical that failed to reveal evidence of the claimed protected condition.
   d. That the Claimant was either totally or partially "disabled" as a result of the protected condition.

WHETHER MR. HARPER IS ENTITLED TO THE SECTION 112.18(1) PRESUMPTION?

8. In regard to the protected class of employees such as law enforcement officers, *Section 112.18(1), Florida Statutes* provides that, "**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.**" The statute goes further to provide that, "**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.**"
9. I find under the facts of this case that Mr. Harper is a member of the protected class of employees addressed by *Section 112.18(1)* by having been hired as a law enforcement officer with the City of Tavares on February 19, 2007. His employment status in this capacity as a police corporal for the city has not been disputed.
10. I find the record evidence further establishes that Mr. Harper has a covered condition under the

statute of hypertension which has been confirmed by all of the medical providers in this case including Doctors Perloff, Nocero and Weaver.

11. Disputed however is whether Mr. Harper successfully passed a pre-employment physical examination upon entering service as a law enforcement officer which examination failed to reveal any evidence of hypertension and also whether Mr. Harper was actually disabled by hypertension.

Pre-Employment Physical:

12. I have considered the trial testimony of the Claimant and weighed it in the context with his deposition testimony, the medical records and the deposition testimony of the other witnesses. I find the claimant to be very credible with straight forward candor, demeanor and comportment. I find that at the time hired Mr. Harper successfully passed a pre-employment physical given to him on February 6, 2007 and which passing such exam led to his subsequent hire with the City of Tavares on February 19th. The examining physician had marked the physical exam as normal and the Claimant was cleared for duty. This conclusion is even confirmed by Dr. Nocero, the E/SA's IME (DN 66 @ pg 53) as well as by the Claimant's IME, Dr. Perloff (DN 74 @ pg 11). I find no indicia from this record of the examining physician treating the pre-employment examination as abnormal.
13. Although an elevated blood pressure reading was recorded with a slightly elevated systolic pressure reading of 140/60, there is non-agreement as to whether such a reading is indeed "evidence of hypertension." All of the doctors confirm that there can be multiple reasons why a one-time pressure reading can be elevated and that multiple readings of consistently high pressures over time would be necessary to confirm the actual existence or presence of hypertension.
14. First in evaluating the medical evidence in this case I will point out that I do not give lesser weight to the opinions of Dr. David Perloff compared to those of the E/SA's IME Dr. Michael Nocero just because the former performed a records review IME only as opposed to an in-person physical examination of the Claimant as well. Nothing precludes an IME from conducting a records only review. See ***Gary Steinberg v. City of Tallahassee, 186 So.3d 61 (Fla. 1st DCA 2016)***. Neither do I find that Dr. Nocero was more advantaged than Dr. Perloff by conducting his physical examination of the Claimant in opining whether there was evidence of hypertension at the time of the 2007 pre-employment physical. Lastly I do not find that Dr.

Nocero was more advantaged than Dr. Perloff in rendering an opinion as to whether the Claimant was in a disabled status in January and April of 2016 because both periods of alleged disability occurred before either independent medical examiner evaluated the claimant or examined his treatment records. I find primary reliance on the pre-existing medical records was equally germane and critical to both physicians in their disability analysis. Therefore I conclude the records were sufficient for Dr. Perloff to equally determine whether the Claimant has a diagnosis of hypertension, whether the records supported a past finding of disability and whether the pre-employment physical showed evidence of hypertension. Moreover Dr. Perloff did not testify that he felt the need to physically examine the claimant in order to satisfactorily answer the questions that were posed to him. Dr. Perloff testified that there are occasions that he does not need to meet with the patient because the data is right there in the records (DN 74 @ pg 24). Ostensibly that was the case here as Dr. Perloff failed to indicate otherwise when the E/SA's attorney cross-examined him in deposition.

15. Dr. Perloff when asked in his opinion whether the Claimant's pre-employment physical showed any evidence of hypertension, his answer was, "*not really*." (DN 74 @ pg 9). The blood pressure could have been elevated due to nervousness doing the physical. The doctor testified that there is a difference between finding a single isolated elevated blood pressure reading which is just a measurement and a diagnosis of hypertension which is actually a disease process. When asked further on cross-examination he testified that it is kind of hard to say whether the single isolated value is truly evidence of hypertension or not (DN 74 @ pg 23). He acknowledged that there was no indication from the pre-employment physical that more than one blood pressure reading was taken on that day. There was nothing on the report indicating that the examining physician recommended that the claimant see a cardiologist or primary care physician regarding that blood pressure reading and lastly, the claimant's physical assessment was reported as normal and the claimant fit for duty (DN 73 @ pg 21).
16. Significantly, Dr. Perloff testified that it is important to note that he looked through the patient's primary care physician records back to 2013 and he showed no evidence of hypertension off of antihypertensive medications during those time periods. Consistent with this finding Dr. Weaver testified that he first saw Claimant in December of 2011. And during his treatment of the Claimant as his primary care physician he had not treated the Claimant for problems with hypertension before January of 2016. See (DN 71 @ pgs 11 & 28). In the absence of any other history of treatment for hypertension Dr. Perloff reasoned that it was hard

for him to believe that the 2007 isolated blood pressure of 140/60 really represented hypertension because it is extremely rare that patients become hypertensive and then are not (DN 74 @ pg 41). Thus it was his opinion that the reading in 2007 was a single isolated incident and not an actual diagnosis or evidence of hypertension at the time.

17. Interestingly, the E/SA's IME, Dr. Michael Nocero, Jr., also testified that blood pressure itself is not a diagnosis; it is a biomarker. He testified that the point he is trying to make is that one can't always say that biomarkers are a diagnosis of hypertensive cardiovascular disease. Once you have a diagnosis of hypertensive cardiovascular disease it's got to be treated (DN 66 @ pgs 17-18). The doctor commented that if there is an elevated blood pressure reading then other readings are necessary to confirm whether hypertension actually exists. As I glean from both doctors' testimony (cumulatively speaking) that a one-time elevated blood pressure reading could be evidence that might later prove hypertension with subsequent blood pressure readings but it is not necessarily evidence of hypertension standing alone.
18. I have thoroughly considered the arguments of the E/SA and its position that the plain language of the statute should be strictly applied. And I thoroughly acknowledged the standard of statutory construction that where language is clear and unambiguous courts should rely on the words used in the statute without involving rules of construction. However the statute does not clarify what is "evidence" of a covered condition. Thus this determination appears to be a matter that turns on the medical testimony. Therefore in this case what the doctors testify is evidence of hypertension and what is the formal definition of "evidence" are both crucial factors in resolving the matter at hand.
19. In evaluating whether a one-time elevated blood pressure reading is evidence of hypertension, I find the trial level opinion of Judge Almeyda in ***Jonathan Kahn v. City of Miami Springs 15-008009ERA (Decided 03/24/15)*** although not binding, is most persuasive.
20. I find the facts in this case relating to the Claimant's pre-employment physical are substantially similar to those in ***Khan***. There was no indication on the pre-employment physical report that the blood pressure reading by the physician was read as abnormal. There was no indication on the form as to the methodology for the test, whether multiple readings were taken, or the circumstances at the time of the recorded reading. Neither of the doctors in this case could definitively state that the claimant actually had hypertension at the time in 2007. And even the E/SA's IME Dr. Nocero did not believe the claimant should have been diagnosed with hypertension even as late as January of 2016. His August 4, 2016 IME report also opined that

the Claimant did not have hypertension at the time of his pre-employment physical (DN 66 @ pg 71).

21. In referencing the seventh edition of Black's Law Dictionary, Judge Almeyda noted that "*Evidence*" is defined as "*something that tends to prove or disprove the existence of an alleged fact.*" The question then presented is does a single reading of blood pressure, without proof it was done correctly; serve to prove the existence of hypertension as a fact? Like Judge Almeyda, I find based on the facts of this case as akin to the facts in ***Kahn*** that it does not. I find the report listing the exam as normal, is more probative than the listed reading and to the extent their testimonies conflict, I accept Dr. Perloff's opinions over those of Dr. Nocero that the reading was a single isolated incident and not an actual diagnosis or evidence of hypertension. In reaching this conclusion I see nowhere in the pre-employment physical where Claimant was recommended for any follow-up care. And to the extent the history Dr. Nocero reports claimant gave to him during the IME conflicts with this conclusion, I find the claimant's testimony at trial and in his deposition to be more persuasive. I do not find that the Claimant was instructed by the pre-employment physical physician to undergo follow-up care for hypertensive evaluation. And I further find that the fact Claimant's primary care physician, Dr. Weaver, did not treat Claimant or evaluate him before January of 2016 for elevated blood pressure readings or hypertension is supportive of this conclusion. Therefore I find Claimant has satisfied the clean pre-employment physical criterion for application of the presumption.
22. I find the above ruling is consistent with a reasonable interpretation of the statutory requirements of *Section 112.18* and evidences the importance of thorough and non-hasty pre-employment physicals as Dr. Nocero alluded to deposition (DN 66 @ pg 21). I find the first three prongs of the presumption have been met based on the facts presented in this case. The Claimant is in a protected class, he has a protected condition and he has established the existence of a clean pre-employment physical.

Disability:

23. *Section 440.02(13), Florida Statutes*, defines, "Disability" as incapacity because of the injury to earn the same or any other employment the wages which the employee was receiving at the time of the injury. Hence the issue is whether he was disabled because of hypertension. The 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. The

essential question is whether the claimant was incapable of performing his duties as a law enforcement officer and, therefore, did not have the actual capacity to *earn* his wages as such because of his injury (hypertension). Furthermore, disability is not established by medical work restrictions imposed "for purely precautionary reasons unrelated to" the condition covered by Section 112.18. See ***Jacksonville Sheriff's Office v. Shacklett, 15 So.3d 859 (Fla. 1st DCA 2009)***.

24. As to the remaining disability prong of the presumption, the claimant points to two occasions whereby he maintains he was disabled because of hypertension and on both of those occasions he was taken off of work by his primary care physician Dr. Bruce Weaver.
25. The first incident Claimant was reportedly experiencing headache and anxiousness when responding to a call to the mayor's house to effectuate a warrant on January 4, 2016. Claimant was seen at Florida Hospital Waterman but not taken off of work by the facility. He was being evaluated for his complaints of elevated blood pressure. Notably, the Claimant also raises no formal claim to injury or disability as of January 4th. Furthermore on the trial record Claimant's attorney advised that they were not specifically seeking a finding of disability as of that date. Claimant's petition however seeks a date of loss of January 5, 2016. This is predicated on his treatment with his primary care physician Dr. Bruce Weaver.
26. Claimant followed up with his primary care physician on January 5, 2016 and Dr. Weaver took the claimant off of work for 48 hours from January 5th until January 8th. After obtaining a blood pressure reading of 160/80 Dr. Weaver recommended that the Claimant keep a blood pressure log, write down the numbers he could obtain himself and then follow back up with Dr. Weaver in one week to see if the recorded pressures were consistently high or whether his reading was a single episode issue. The stated purpose for taking the Claimant off of work was that the Claimant stated that he was feeling some stress-related issues at that time he felt maybe it had something to do with work. The doctor was hoping that if Mr. Harper stayed out of work for 48 hours his blood pressure might come down. Therefore the stated reasoning for the off work status was in hopefully lowering of the elevated blood pressure. After seeing the Claimant on January 12, 2016 and reviewing Claimant's recorded blood pressure readings revealing high numbers in the 140s to high 80s touching on 90, the doctor placed the claimant on the blood pressure medication Lisinopril.
27. The second incident was on April 20, 2016 when claimant testified that he developed a headache, anxiety and blurred vision after a verbal confrontation with one of his supervisors, Sergeant Amy Reynolds. Claimant went to a nearby Tavares firehouse station to have

paramedics check his blood pressure. Afterwards Claimant reported to his primary care physician, Dr. Weaver. Dr. Weaver again advised the Claimant to refrain from working until his blood pressure stabilized. He at that time was taken off of work for three days.

28. Dr. Perloff while deposed pointed to periods of disability the Claimant had while under the care of Dr. Weaver. Dr. Perloff testified in deposition that, "I don't find that there's evidence he was not disabled. In fact, I find there's pretty clear evidence that he does meet the element of disability here" (DN 74 @ 17). Dr. Perloff also indicated in his IME report that was received into evidence that the time the claimant missed from work as a result of his hypertension was reasonable (DN 80 @ 1).
29. I specifically find that the claimant was taken off of work because of his elevated blood pressure and not solely because of stress as the E/SA argues. The testimony of Dr. Weaver makes it clear that the Claimant was taken off of work with the design to lower the Claimant's elevated blood pressures (DN 71 @ pg 15). Hence this record is devoid of evidence that the Claimant's restrictions were unrelated in any way to his confirmed hypertension. Even if stress was a factor the desire to lower what Dr. Weaver described as severe elevations in blood pressures was clearly the design for the off work status.
30. For the foregoing reasons I find Mr. Harper has met the requirement of "disablement" for the law enforcement officer presumption to apply under *Section 440.02(13), Florida Statutes* as well as under the standards as set forth under the cases of ***Bivens v City of Lakeland, 993 So.2d 1100 (Fla. 1st DCA 2008, Carney v Sarasota County Sheriff's Office, 26 So.3d 683 (Fla. 1st DCA 2009)*** and ***Rocha v. City of Tampa, 100 So.3d 138 (Fla. 1st DCA 2012)***.
31. In addition to arguing that the Claimant was taken off from work solely because of a diagnosis of stress, which I reject for the reasons previously discussed, the E/SA argues that the Claimant's elevated blood pressure readings were not sufficient to place him in a disability status. However while fully accepting the testimony of Dr. Perloff that the disability period was reasonable I also find that the Claimant reasonably relied upon the advice of his physician in observing the no work status that was assigned to him in January and April of 2016. In acting upon such medical advice I find he had a resultant incapacity to earn the wages he was receiving at the time of injury. I reject the argument that a claimant must have emergent hypertension in order to be placed in an off work status as there is no statutory or case authority for such proposition. And Dr. Perloff was unaware of any treatise to suggest when somebody should be taken off of work with regard to blood pressure readings. This would suggest that the actions of

Dr. Weaver were not improper and as heretofore mentioned the Claimant reasonably relied upon the restrictions that were assigned to him.

32. To the extent their testimonies conflict I accept the opinions of Dr. Perloff on the disablement issue as to Claimant being in an off work status over those of Dr. Nocero finding the former's testimony to be more persuasive given the record evidence as a whole. And I find Dr. Perloff's opinions on this issue comports more with logic and reason in this case.
33. Although there are conflicts in the medical opinions of the physicians in this case neither party timely requested the appointment of an expert medical advisor to address the issues pursuant to *Section 440.13(9) (c)*. On the authority of ***U.S. Agri-Chemicals Corp. v Camacho, 975 So.2d 1219 (Fla. 1st DCA 2008)*** I find that their failure to timely ask for an EMA constitutes a waiver of such a request. For purposes of judicial economy and in order to resolve the claim promptly and efficiently after the commencement of the November 16, 2016 final hearing, I have declined to exercise my discretion to appoint an EMA on my own motion. I have considered that my failure to make such an appointment according to the case law will not constitute reversible error. As the trier of fact I have endeavored to objectively resolve any conflicts in the medical opinion testimony as well as any other conflicts in the record evidence by weighing and evaluating the testimony in its totality and drawing what reasonable inferences and conclusions that may be had from such evidence.
34. In summary, I conclude that Mr. Harper is entitled to the *Section 112.18(1)* presumption because:
    a. He is a law enforcement officer and a member of the protected class of employees under the presumption statute.
    b. He passed a pre-employment physical with the employer that did not evidence the existence of hypertension at the time of his hire as a police officer.
    c. He was later revealed to have hypertension, a covered condition.
    d. He was at least temporary disabled as result of the hypertension and elevated blood pressure.
35. Having found the claimant has met the presumption, the burden of proof shifts to the E/SA to overcome that presumption by showing a specific non-occupational cause of the claimant's hypertension. The E/SA has failed to do so and there have been no allegations or testimony from any doctor that the cause of the Claimant's hypertension is non-occupational. Hence the finding of compensability of the condition stands.

WHETHER MR. HARPER IS ENTITLED TO THE AUTHORIZATION OF A CARDIOLOGIST FOR EVALUATION AND TREATMENT OF HIS HYPERTENSION?

36. Having found the Claimant's hypertension to be compensable the uncontroverted medical testimony is that the Claimant requires medical treatment in the form of medications. See (DN 74 @ pg 15). The testimony of Dr. Perloff from his IME report that was received into evidence also indicates that the Claimant's care will consist of bi annual office visits to see his cardiologist in addition to the antihypertensive medication (DN 80 @ pg 1). None of the doctors dispute at this time that the claimant has hypertension but only who should be responsible for it. From this cumulative evidence I find the trial record supports the authorization of a cardiologist to treat the claimant for his compensable hypertension and as such the request for the authorization of such care as the nature of the injury and process of recovery requires is granted.

WHETHER MR. HARPER IS ENTITLED TO THE PAYMENT OF IMPAIRMENT BENEFITS BASED ON THE 4% IMPAIRMENT RATING ASSIGNED BY DR. PERLOFF?

37. I find conflicting testimony between Dr. Perloff and Dr. Nocero as to an appropriate impairment rating should the claimant's hypertension be found compensable. Both doctors agree that the Claimant has reached maximum medical improvement for his hypertensive condition. Dr. Perloff recommends a 4% impairment rating and Dr. Nocero a 0% rating.
38. Although he acknowledges that there is very little guidance in the 1996 Florida Uniform Permanent Impairment Guide to tell how to choose between 0% and 14% in a patient who is class one, Dr. Perloff bases his rating on the number of medications the claimant requires to control his blood pressure although there is no evidence of end organ damage. Because the Claimant requires one medication to control his hypertension Dr. Perloff would assign a 4% rating.
39. Dr. Nocero on the other hand does not believe an impairment rating is appropriate at all in light of the absence of end organ damage and no demonstration of diastolic pressures repeatedly in excess of 90 mm Hg. In citing to page 120 of the 1996 Florida Uniform Permanent Impairment Rating Schedule relating to impairment classification for hypertensive cardiovascular disease Dr. Nocero opines that there is nothing in the rating schedule to clearly support the rating assigned by Dr. Perloff and the reasoning he advances in the support of his rating. Given my review of both physician's deposition testimony and the impairment rating schedule I find that

Dr. Nocero's opinion on this issue to be more persuasive and find a 0% rating applies. Hence the requested payment of impairment benefits based on the 4% rating assigned by Dr. Perloff is respectfully rejected and denied.

WHETHER MR. HARPER IS ENTITLED TO THE PAYMENT OF HIS REASONABLE ATTORNEYS FEES AND COSTS AT THE EXPENSE OF THE E/SA?

40. Having found a compensable claim and the Claimant entitled to some of the benefits sought, his request for the payment of attorney fees and costs at the expense of the E/SA for benefits secured under this order is granted. Jurisdiction is reserved as to the amount of said fees and costs in the event the parties are unable to amicably resolve the issue.

WHEREFORE it is hereby **ORDERED** and **ADJUDGED** that:

1. The request for the finding of compensability of the Claimant's hypertension pursuant to Section 112.18(1), Florida Statutes, is GRANTED.
2. The request for the authorization of a cardiologist for treatment of his hypertension is GRANTED.
3. The request for the payment of impairment benefits based on the 4% impairment rating assigned by Dr. David Perloff is DENIED.
4. The request for the payment of interest and penalties on the claim to impairment benefits is DENIED.
5. The request for the payment of the Claimant's reasonable attorney fees for benefits secured under this order is GRANTED with jurisdiction reserved as to the amount.
6. Jurisdiction is reserved as to both parties' claimed entitlement to the payment of prevailing party costs as provided for under *Section 440.34(3), Florida Statutes*, and the case of ***Karen Aguilar v. Kohl's Department Stores, Inc., 68 So.3d 356 (Fla. 1st DCA 2011)***.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida.

Honorable W. James Condry, II
Judge of Compensation Claims

I HEREBY CERTIFY that the Judge of Compensation Claims entered the foregoing Compensation Order. A true and accurate copy of the order was electronically served on the parties attorneys of record on this the 6th day of December 2016.

Susan Berman
Assistant to Judge of Compensation Claims

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