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

Pete Taylor,
Employee/Claimant,

vs.

Miami Dade Police Department/Miami Dade County Risk Management,
Employer/Carrier/Servicing Agent.
_____/

OJCC Case No. 13-005079SMS

Accident date: 2/14/2013

Judge: Sylvia Medina-Shore

COMPENSATION ORDER

THIS CAUSE came before the undersigned Judge of Compensation Claims for a final hearing on 7/25/16 regarding petition for benefits (PFB) filed 10/2/15. The claimant is represented by Paolo Longo, Jr., Esquire. The self-insured employer is represented by Daron S. Fitch, Esquire. At the 7/25/16 final hearing, the below documentary evidence was admitted and the attorneys made closing arguments. No live witnesses testified at the final hearing.

Documentary Exhibits:

JCC-

1. EMA report of Dr. David Perloff filed 5/12/16 (DE#99).

Joint-

A. Deposition of Dr. Perloff filed 7/25/16 with attachments (DE#111).

Claimant-

1. Deposition of Dr. Steven Borzak with attachments filed 4/14/16 (DE#95).

E/C-

1. Deposition of Dr. Stratego Castanes with attachments taken 11/20/14 filed 4/14/16 (DE#96).

2. Deposition of Dr. Stratego Castanes with attachments taken 2/24/16 filed 4/14/16 (DE#97).

Claims:

1. Determination of maximum medical improvement (MMI).
2. Permanent impairment benefits from 7/2/2013 and continuing at the correct rate for the 45% permanent impairment rating assigned by Steven Borzak, M.D.
3. Penalties, interest, attorney's fees and costs (PICA).

Defenses:

1. No impairments benefits are currently owed on the grounds that claimant has not reached overall MMI. Alternatively, if claimant has reached MMI, claimant does not have a 45% permanent impairment rating (PIR).
2. PICA is not due or owing.

Findings of Facts and Conclusions of Law:

1. The Claimant, Sergeant Pete Taylor has been employed by the Miami-Dade Police Department since 1990 or for 26 years. Sergeant Taylor was diagnosed with hypertension in 1997. However, he is currently working full duty without any physical restrictions.

2. On February 14, 2013, Sgt. Taylor experienced a severe headache and went the hospital. He was referred to his PCP. On February 15, 2013, Dr. Smets kept claimant off work for two days. Claimant's heart claim was initially denied by his employer and subsequent litigation ensued. On March 23, 2015, the Employer/Carrier ultimately accepted compensability of the Claimant's essential hypertension and corresponding left ventricular hypertrophy (LVH) condition.

3. E/C authorized Dr. Castanes, cardiologist and interventional cardiologist for treatment. Claimant treated with Dr. Castanes on April 3, 2013, July 2, 2013 and December 31, 2015. Dr. Castanes opines claimant has not reached maximum medical improvement (MMI). If pressed to consider MMI (which the doctor did not agree to), Dr. Castanes opined in her deposition that claimant suffered a Class 1 impairment sustaining a 10% PIR (Pgs. 24-26 of Dr. Castanes' 2/24/16 deposition).

4. On October 14, 2014, claimant underwent his IME with Dr. Borzak. Dr. Steven Borzak assigned both an MMI date and a Class 3 impairment sustaining a 45% PIR with a July, 3, 2013 MMI date (Pgs. 35-36 of Dr. Borzak's deposition). Based on the conflict between the two medical provides, the undersigned appointed Dr. David Perloff as an Expert Medical Advisor (EMA).

5. Dr. Perloff conducted his EMA on April 26, 2016. He agreed with Dr. Borzak's 45% PIR opinion. While he agreed with Dr. Borzak that claimant has reached MMI status, he opined claimant's MMI date is 4/15/16. The Employer/Carrier contends Dr. Perloff's opinion is unfounded since it is based on the American Medical Association (AMA) Permanent Impairment Guidelines and not the statutorily required 1996 Florida Uniform Impairment Guides. As Dr. Castanes relied on the Florida Impairment Guidelines in formulating the 10% PIR, E/C argue same PIR is appropriate assuming claimant reached MMI.

MMI Determination-

6. The medical evidence supports the following blood pressure readings and weight of the claimant: **2/15/2013** (Dr. Smets)- 132/90 and 225 pounds; **4/3/13 (**Dr. Castanes)- 160/80 and 220 pounds; **7/2/13** (Dr. Castanes)- 128/80 and 225 pounds; **8/9/13** (Dr. Smets)- 126/82 and 221 pounds; **10/14/14** (IME)- 142/88 and 208 pounds; **12/31/15** (Dr. Castanes)- 130/82 and 210 pounds; and 4/26/16 (EMA)- 128/80 and 206 pounds.

7. On April 3, 2013, Dr. Castanes ordered a 24 hour monitoring of claimant's blood pressure. Claimant's 24 hour blood pressure monitoring substantiated poorly controlled blood pressure and thus, Dr. Castanes prescribed additional blood pressure medications. By the 7/2/13 visit, claimant's blood pressure was under control although claimant had gained 5 pounds. On 8/9/13, claimant's blood pressure was under control also.

8. At the 10/14/14 IME appointment, claimant's blood pressure of 142/88 was borderline normal (a little elevated) when comparing it to the 140/90 normal limit. However, on 12/31/15 and 4/26/16, claimant's blood pressure readings were well within normal limits, especially when taking into account his diabetes. While additional blood pressure readings may offer a more comprehensive view of claimant's blood pressure status, I accept the opinions of Drs. Borzak and Perloff that there are sufficient blood pressure readings to find claimant reached MMI as to his compensable essential hypertension and LVH condition.

9. I further accept Dr. Perloff's MMI date of 4/15/16. Dr. Perloff, as well as Drs. Castanes and Borzak, all agree that MMI determination based on one blood pressure reading would not be appropriate. However, in the present case, since 7/2/13, claimant has had three blood pressure readings well within normal range (8/9/13, 12/31/15, and 4/26/16) and one blood pressure reading borderline normal on 10/14/14. Given the consistent blood pressure readings throughout the recent years, and Dr. Perloff's observation of claimant's recent weight loss, I find claimant reached MMI as to his compensable essential hypertension and LVH condition on 4/15/16.

Permanent Impairment Rating-

10. Claimant seeks permanent income impairment benefits based on a 45% PIR under Class 3 per Dr. Borzak and Dr. Perloff. The E/C take the position that Dr. Castanes' 10% PIR under Class 1 is appropriate for claimant's medical condition based on the Florida Uniform

Permanent Impairment Rating Schedule (sometimes referred herein as the Florida Guidelines), if claimant is at MMI.

Statutory Authority and Administrative Code Rules-

11. F.S. 440.15(3)(c) requires that all impairment income benefits shall be based on an impairment rating using the impairment scheduled referred to in paragraph (b).

12. F.S. 440.15(3)(b) spells out that the (Florida) uniform permanent impairment schedule must be based on medically or scientifically demonstrable findings as well as systems and criteria set forth the American Medical Association's Guides to the Evaluation of Permanent Impairment; the Snellen Charts, published by the AMA Committee for Eye Injuries; and the Minnesota Department of Labor and Industry Disability Schedules.

13. To determine an injured employee's physical impairment rating, Florida Administrative Code Rule 69L-7.604 states that the "American Medical Association's Guide to the Evaluation of Permanent Impairment, 3rd Edition . . . is adopted as the schedule for determining the existence and degree of permanent impairment for all injuries *prior to* July 1, 1990." Fla. Admin. Code Ann. r. 69L-7.604(1) (1997) (emphasis added). However, the "1996 Florida Uniform Permanent Impairment Rating Schedule is incorporated into this rule by reference *and shall be used* for injuries *occurring on or after [the] effective date"* of the 1996 Florida Uniform Permanent Impairment Rating Schedule. *Id*. (emphasis added).

14. Likewise, pursuant to Florida Administrative Code Rule 69L-7.604(2), any physician assigning a permanent impairment rating for injuries occurring after 1996 must use the 1996 Florida Uniform Permanent Impairment Rating Schedule to assign permanent impairment ratings.

15. It is *undisputed* claimant has compensable essential hypertension and LVH. It is *undisputed* that claimant's LVH has not been detected in any of the EKG or ECG's he has

undergone. However, pursuant to an echocardiogram (ultrasound of the heart) performed on 4/18/13 it is *undisputed* claimant has severe LVH, with his interventricular septumis 1.8 centimeters while the upper limits of normal is 1.1 centimeters.

16. The dispute arises in assigning a permanent impairment rating to claimant's essential hypertension and LVH. There are 4 different Classes under the category of Hypertensive Cardiovascular Disease. None of the physicians in the instant case rated claimant's LVH condition under Class 2 or 4. Therefore, the undersigned will address the medical evidence regarding Classes 1 and 3.

Florida Impairment Rating Guide-

17. Pursuant to the Florida Guidelines, in order to qualify for a Class 1 (0-14%) impairment classification for hypertensive cardiovascular disease:

> "the patient has no symptoms and the diastolic pressures are repeatedly in excess of 90 mm Hg; and the patient is taking antihypertensive medication but has none of the following abnormalities: (1) abnormal urinalysis or renal function tests; (2) history of hypertensive cerebrovascular disease; (3) evidence of left ventricular hypertrophy; (4) hypertensive vascular abnormalities of the optic fundus, except minimal narrowing of arterioles."

18. In Class 3 (30-45%) Impairment

> "the patient has no symptoms and the diastolic pressures are repeatedly in excess of 90 mm Hg; and the patient is taking antihypertensive medication and has any of the following abnormalities:
>
> (1) diastolic pressure readings usually in excess of 120 mm Hg; (2) proteinuria or abnormalities in the urinary sediment, with evidence of impaired renal function as measured by elevated BUN and serum creatinine, or by creatinine clearance below 50%; (3) hypertensive cerebrovascular damage with permanent neurological residual; (4) left ventricular hypertrophy according to findings of physical examination, ECG, or chest radiograph, but no symptoms, signs, or evidence by chest radiograph of congestive heart failure; or (5) retinopathy, with definite

> hypertensive changes in the arterioles, such as "copper or silver wiring," or A-V crossing changes, with or without hemorrhages and exudates."

Diastolic Pressures Repeatedly Exceeding 90 mm Hg Requirement-

19. Drs. Perloff and Castanes point out that the first portion of Class 1 and 3 under the hypertensive cardiovascular disease in the Florida Guidelines does not indicate whether the patient's repeated diastolic pressures in excess of 90 mm Hg must occur before or after medication treatment. In the present case, it is *undisputed* that claimant's 24 hour blood pressure monitoring undertaken on 4/3/2013 confirmed blood pressure readings in excess of 90 mm Hg, while claimant was taking one blood pressure medication. However, when additional blood pressure medications were added to claimant's regime, his blood pressure readings fell below 90 mm Hg (as they should).

20. Drs. Castanes and Perloff note that it would be almost impossible to rate anybody with hypertension if repeated diastolic pressures in excess of 90 mm HG were required even after taking the appropriate antihypertensive medication because blood pressure management has improved significantly via medication. I accept Dr. Perloff's opinion that the requirement of repeated diastolic pressures in excess of 90 mm is required to occur before antihypertensive medication brings the blood pressure under control. I find Dr. Perloff's opinion is supported by the medical evidence herein and comports with logic and reason.

Left Ventricular Hypertrophy Requirement-

21. LVH is the thickening of the wall of the heart that is caused by elevated blood pressure. It is either present or not present (Pg. 22 of Dr. Perloff's deposition). Claimant's LVH, as captured by the echocardiogram, is severe as it is more than 50 percent greater than he should actually be (Pg. 30). However, claimant's LVH still does not appear in the EKGs.

22. When asked to assume claimant had reached MMI, Dr. Castanes opined

claimant was left with a 10% PIR (Class 1) for his LVH. Dr. Castanes explained that claimant does not have evidence of LVH in the EKGs. However, Class 1 subsection (3) does not limit evidence of the LVH to any specific diagnostic tool. As it is undisputed claimant **DOES** have severe LVH based on the echocardiogram, I reject Dr. Castanes' opinion. Rather, I find that Class 1 does not apply to claimant's medical condition. I accept Dr. Perloff's opinion to that effect.

23. In the present case, Dr. Borzak assigned 45% PIR under Class 3 for Hypertensive Cardiovascular Disease of the Florida Impairment Guidelines as he heard a S4 gallop upon physical examination of the claimant at the 10/14/2014 IME appointment. A S4 gallop is a sound a physician hears when the atrium is contracting against a stiffened left ventricle. However, neither Dr. Castanes nor Dr. Perloff heard an S4 gallop upon physical examinations. As Dr. Castanes conducted several physical examinations of the claimant and the EMA appointment was the most recent and neither heard an S4 gallop, I reject Dr. Borzak's opinion that claimant has an S4 gallop.

24. Dr. Borzak testified to utilizing the Florida Impairment Guidelines in assigning a 45% PIR. In addition to the alleged S4 gallop, he based said PIR on the LVH captured in the echocardiogram. Likewise, Dr. Perloff (the appointed EMA) utilized the Florida Impairment Guidelines ***and*** the AMA Guides to arrive at the 45%PIR. Dr. Perloff testified it is extremely difficult to accurately diagnose severe LVH using the suggested diagnostic testing in the 1996 Florida Impairment Guides.

25. The medical evidence is consistent that an echocardiogram is more technologically advanced than an EKG/ECG and therefore, better in diagnosing LVH. Dr. Perloff explained that an ECG "has a low sensitivity of 25 to 61%, but a fairly high specificity 75-95% for detecting LVH (Dr. Perloff deposition, page 23)." As the Florida Guidelines do not

include LVH being diagnosed by an echocardiogram, Dr. Perloff referred to the AMA Guides to see if echocardiography, the "gold standard for diagnosis of left ventricular hypertrophy," is considered part of the diagnostic criteria for LVH (Dr. Perloff EMA report Page 2, Paragraph 4). It is undisputed that the AMA guides were last revised in September of 2012 whereas the Florida Guidelines were last revised in 1996, 20 years ago.

26. Dr. Perloff used the AMA guides to aid his decision because the 1996 Florida Uniform Impairment Guides have an outdated diagnostic testing for LVH. Furthermore, the 1996 Florida Uniform Impairment Guides were based on the AMA Guides. Specifically, Dr. Perloff's in his deposition quotes the 1996 Guides by stating "the schedule must be based on medically or scientifically demonstrable findings as well as the systems and criteria set forth in the American Medical Association's Guides to the evaluation of permanent impairment" (Dr. Perloff deposition, page 19, lines 3-7). Therefore, Dr. Perloff used the AMA Guides to aid his decision in assigning the impairment rating of the LVH. Furthermore, Dr. Perloff reiterates that Dr. Borzak is correct in that information — technology has moved along to the point where we should be using a more up-to-date technology (Dr. Perloff deposition, pages 24, lines 15-18).

27. Based on this finding, Dr. Perloff utilized both the 1996 Florida Guidelines in combination with the AMA guides and determined LVH "by ECG or echocardiography without symptoms of heart failure would place a patient in Class 3- 30 to 49% permanently impaired" (Dr. Perloff EMA report , page 2, paragraph 4). As a result he assigned a 45% impairment rating.

28. Case law (regarding the AMA guides) has indicated that when the Guides to not cover a particular impairment, the JCC may rely on the doctor's qualified expert opinion which utilizes experience in treating the clamant and the particular type of injury or other generally accepted medical standards. See, Norvilus v. Best Western Sea Spray, 636 So.d 858, 859 (Fla.

1st DCA 1994). However, I find the Florida Guidelines provides physicians a method in which to assign impairment ratings when the medical condition is not covered by any category within the same guideline.

29. In the introduction to the Florida Guidelines under "Philosophy and Concepts", it explains that "the overall final impairment rating sustained by an individual shall be the physician's evaluation of permanent impairment as found in this Guide. If a permanent impairment is covered by this Guide, no assignment or rating of that permanent impairment at variance with this Guide is permissible (Pg. 5 of the Florida Guidelines)."

30. In the present case, I find claimant's permanent impairment is NOT covered by the Florida Guidelines. As an echocardiogram is not one of the diagnostic tools listed in Class 3 for LVH, claimant would not qualify for that category of impairment. Simply, while claimant has diagnosed HNP and severe LVH, his permanent impairment is not covered by any of the Classes under Hypertensive Cardiovascular Disease in the Florida Guidelines.

31. The Florida Guidelines further indicate, "***if a category applicable to the impairing condition cannot be found in this rule, then the category most closely resembling the impairment or the degree of impairment based on analogy should be chosen (Pg. 5 of the Florida Guidelines***)."

32. I find, accepting the opinions of Dr. Perloff, that the category most closely resembling the impairment and degree of impairment of the claimant is Class 3 (30-54% PIR). As claimant's LVH is severe, I accept Dr. Perloff's higher PIR of 45% as it is based on the echocardiogram, an advanced objective diagnostic tool. Therefore, based SOLELY on the Florida Guidelines, I find that Dr. Perloff appropriately selected the category (Class 3) as most closely resembling the impairment and the degree of impairment of claimant's condition, notwithstanding the AMA guides.

EMA-

33. An EMA's opinion is presumed to be correct and may only be rejected on the basis of clear and convincing evidence, See § 440.13(9)(c), Fla. Stat. (1999). We have said that an expert medical advisor's opinion has "nearly conclusive effect." Pierre v. Handi Van, Inc., 717 So.2d 1115, 1117 (Fla. 1st DCA 1998) (dicta). It creates a presumption that can be overcome only by "evidence... of a quality and character so as to produce in the mind of the JCC a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established [and therefore the falsity or inaccuracy of the expert medical advisor's opinion]. Slomowitz v. Walker, 429 So.2d 797 at 800 (Fla. 4th DCA 1983), See also Westinghouse Elec. Corp. v. Shuler Bros., Inc., 590 So.2d 986, 988 (Fla. 1st DCA 1991).) McKesson Drug Co. v. Williams, 706 So.2d 352, 353 (Fla. 1st DCA 1998). Burns v. Hilton Enterprises, 853 So.2d 1107, (Fla. 1st DCA 2003) and Manuel v. Amstaff, 915 So.2d 679, (Fla. 1st DCA 2005) and Collins v. Mosaic Fertilizer, LLC, 121 So. 3d 1119, 1120 (Fla. Dist. Ct. App. 2013).

34. The E/C take the position that Dr. Perloff's consideration of the AMA guides are unfounded in law and constitute clear and convincing evidence to reject his opinions. I find E/C's argument unconvincing. Dr. Perloff referred to the AMA guides for assistance in determining claimant's impairment rating. I do not find it created a flaw in his testimony. All the doctors, including Dr. Perloff, opined claimant does not satisfy Class 3 as written in the Florida Guidelines. Further, claimant's LVH condition is not covered under any of the other categories (Classes, 1, 2, and 4).

35. The applicable Florida Guidelines have not been revised in 20 years. Some of the sections are vague leaving room for different interpretations by physicians. There is no doubt the workers' compensation system would certainly benefit from up-dated Florida Guidelines. However, I find the 1996 Florida Guidelines themselves provide physicians with a

method to assess impairment in situations, like the present case, where the category applicable to the impairing condition cannot be found. I find Dr. Perloff's selection of 45% PIR (Class 3 impairment) is substantiated by the overwhelming medical evidence and the Florida Guidelines (without consideration of the AMA guides). As such, I accept all of Dr. Perloff's EMA opinions.

WHEREFORE, IT IS ORDERED:

1. E/C shall pay claimant permanent impairment benefits, with statutory penalties and interest, from 4/15/16 and continuing based on the 45% permanent impairment rating.

2. Claimant's attorney is entitled to an E/C paid attorney's fees and costs for securing the benefits herein. Jurisdiction is reserved on amount of the fee and costs for future determination at a hearing, in the event the parties are unable to amicably resolve it.

3. The 10/2/15 PFB is dismissed with prejudice.

DONE AND E-MAILED TO THE ATTORNEYS OF RECORD AND THE CARRIER THIS 11TH DAY OF AUGUST OF 2016. THE ATTORNEYS OF RECORD SHALL PROVIDE A COPY OF THE INSTANT ORDER TO THEIR RESPECTIVE CLIENTS UPON RECEIPT OF IT.

Sylvia Medina-Shore
Judge of Compensation Claims