STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
SEBASTIAN/MELBOURNE DISTRICT OFFICE

Christopher Brooke,
Employee/Claimant,

vs.

Brevard County Board of Commissioners/
Preferred Government Claims Solutions,
Employer/Carrier/Servicing Agent.
_____/

OJCC Case No. 18-006497RLD

Accident date: 1/31/2018

Judge: Robert L. Dietz

FINAL COMPENSATION ORDER

THIS CAUSE was heard before the undersigned in Sebastian, Indian River County, Florida on August 27, 2018. The Petitions for Benefits (PFB) was filed on March 15, 2018 (Docket Number (DN) 1). Mediation occurred on July 9, 2018. The parties' Uniform Statewide Pretrial Stipulation was filed on July 11, 2018 (DN 16). Kristine Callagy, Esq, was present on behalf of the Claimant. Derrick E. Cox, Esq. was present on behalf of the Employer/Carrier.

The claims are for: (1) compensability of disabling arterial and cardiovascular hypertension and heart disease; (2) authorization of medical care and treatment with a cardiologist or appropriate physician for care and treatment of the cardiovascular conditions; (3) costs and attorney's fees. The claims for temporary total disability/temporary partial disability benefits starting January 31, 2018, and continuing, penalties and interest were withdrawn prior to the hearing.

The defenses were (1) The Claimant was not disabled due to the alleged accident; (2) Claimant did not sustain a compensable injury by accident arising out of the course and scope of employment; (3) the major contributing cause of Claimant's alleged disability and need for

treatment is unrelated to his employment; (4) Claimant was not disabled due to the alleged accident; (5) Claimant's alleged disability is due to medical non-compliance; (6) all benefits denied per Section 440.09(3); (7) reverse presumption applies; (8) costs and attorney's fees are not due and owing.

The following pleadings were identified as relevant to this hearing:

Judge's Exhibits:

Exhibit #1: Order Approving Uniform Pretrial Stipulation entered July 16, 2018 (DN 19)

Exhibit #2: Order Dismissing Some But Not all Claims Without Prejudice entered August 7, 2018 (DN 22)

Exhibit #3: Employer/Carrier's Trial Memorandum filed August 23, 2018 (DN 35)

Exhibit #4: Claimant's Trial Memorandum filed August 23, 2018 (DN 36)

The following documentary items were introduced and received into evidence:

Joint Exhibits:

Exhibit #1: Uniform Pretrial Stipulation and Pretrial Compliance Questionnaire filed July 11, 2018 (DN 16)

Exhibit #2: Mediation Conference Report filed July 9, 2018 (DN 14)

Claimant's Exhibits:

Exhibit #1: Petition for Benefits #1 filed March 15, 2018 (DN 1)

Exhibit #2: Response and Objections to Employer/Carrier's Defenses filed July 11, 2018 (DN 17)

Exhibit #3: Deposition of Nancee Hache, Adjuster, taken June 4, 2018, filed August 22, 2018 (DN 24, pp. 1-26)

Exhibit #4: First Report of Injury filed August 22, 2018 (DN 24, p.27)

Exhibit #5: Notice of Denial filed August 22, 2018 (DN 24, p.31)

Exhibit #6: Deposition of Cynthia Colman, Payroll Representative, taken August 2 2018, filed August 22, 2018 (DN 25, pp. 1-28)

Exhibit #7: Wage and Time Statement Documents from October 28, 2017, through July 27, 2018, filed August 22, 2018 (DN 25, pp. 29-81)

Exhibit #8: Deposition of Steven Borzak, M.D. taken August 9, 2018, filed August 22, 2018 (DN 26, pp. 1-48)

Exhibit #9: *Curriculum Vitae* of Steven Borzak, M.D. filed August 22, 2018 (DN 26, pp. 49-55)

Exhibit #10: Medical Records from Health First Medical Group filed August 22, 2018 (DN 26, pp. 58-100)

Exhibit #11: Medical Records from Health First Medical Group filed August 22, 2018 (DN 27)

Exhibit #12: Medical Records from Health First Medical Group filed August 22, 2018 (DN 28)

Exhibit #13: Medical Records from Palm Bay Community Hospital filed August 22, 2018 (DN 29, pp. 1-14)

Exhibit #14: Medical Records from Life Scan Wellness Centers filed August 22, 2018 (DN 29, pp. 15-59)

Exhibit #15: Medical Records from Holmes Regional Medical Center filed August 22, 2018 (DN 29, pp. 65-85)

Exhibit #16: Fit Test Report dated February 28, 2011, filed August 22, 2018 (DN 29, pp. 86-87)

Exhibit #17: Health Evaluation Summary dated March 3, 2011, filed August 22, 2018 (DN 29, pp. 90-100)

Exhibit #18: 2011 Medical Records and Dr. Borzak's IME Report filed August 22, 2018 (DN 30)

Exhibit #19: Out-of-work note filed August 23, 2018 (DN 40)

Employer/Carrier's Exhibits:

Exhibit #1: Amendment to Pretrial Stipulation filed July 13, 2018 (DN 18)

Exhibit #2: Supplemental Witness List filed July 26, 2018 (DN 20)

Exhibit #3: Deposition of Michael Zocchi, Assistant Chief of Professional Development, taken August 7, 2018, filed August 22, 2018 (DN 32)

Exhibit #4: Deposition of Sunil Kakkar, M.D. taken August 8, 2018, filed August 22, 2018 (DN 34, pp. 1-39)

Exhibit #5: *Curriculum Vitae*, Sunil Kakkar M.D. filed August 22, 2018 (DN 34, pp. 40-42)

Objections to Exhibits

The Employer/Carrier objected to Claimant's Exhibits 10-19 as not being from authorized treating doctors, IMEs or EMAs, being hearsay and not authenticated. The Claimant responded that both IMEs (Dr. Sunil Kakkar and Dr. Steven Borzak) utilized the same medical records in testifying. The records are admitted only as records utilized by the IME doctors to render their opinions and for history purposes only. See Office Depot v. Sweikata, 737 So.2d 1189 (Fla. 1st DCA 1999). An IME's medical records are not inadmissible as untrustworthy *per se*. Ross Dress for Less, Inc. v. Radcliff, 751 So.2d 126 (Fla. 2d DCA 2000).

Daubert Objections

Both parties raised Daubert objections against the opinions of the other's IME. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Initially, it must be determined if the Daubert objection was timely filed. The Claimant raised two Daubert objections in Dr. Kakkar's deposition (DN 34, pp. 9-10, 15-16) and further preserved their objection in the Pretrial. The Employer/Carrier did not raise a Daubert objection until the Final Hearing. The failure to timely raise a Daubert challenge to the admission of expert testimony

may result in the court refusing to consider the untimely motion. See Booker v. Sumter County Sheriff's Office, 166 So.3d 189 (Fla. 1st DCA 2015) (objection at time of receipt of IME report was considered timely). The Employer/Carrier's objection was in response to the Claimant's indication that they were continuing to raise the Daubert objection. Raising the objection at the Final Hearing is not timely. The Employer/Carrier's Daubert objection is overruled.

The Claimant's Daubert objections relate to Dr. Sunil Kakkar's deposition:

Q. And after reviewing all of the medical records and taking the patient history and performing the physical examination, did you come up with a diagnosis or diagnoses?

A. Yeah, I mean, in some way he has essential hypertension, which is probably getting exacerbated by his obesity, sleep apnea, and maybe some element of anxiety.

Ms. Callagy: I'll just assert a Daubert objection to that opinion on causation under Florida Statute 90.702

(DN 34, pp. 9-10)

*****

Q. And the essential hypertension, the major contributing cause of that based on his overall – between his employment or his medical history, what would you attribute it to?

A. I think his medical history, the family medical history, both parents have hypertension, so he would get hypertension in his lifetime. And then his weight isn't helping him. He's quite overweight.

Ms. Callagy: I'll assert the same Daubert objection to that opinion.

(DN 34, pp. 15-16)

The First District Court of Appeal has characterized the kind of opinions prohibited by Daubert as those based only on clinical experience and training. Booker at 194. To decide this issue, I have read Dr. Kakkar's deposition transcript and the attached records, including his resume. I find that Dr. Kakkar's opinions regarding the issues in this case are not the kind of "pure opinion" evidence inadmissible under Daubert.

Dr. Kakkar's resume includes degrees and training at All India Institute of Medical Sciences in New Delhi, and fellowships in cardiovascular disease in New York and the Texas Heart Institute in Houston, and research in systolic and diastolic function during isometric exercise, ischemic disease, and wall abnormalities in left bundle branch blocks. I conclude that Dr. Kakkar is a qualified expert witness that is able to render an opinion on causation of hypertension and cardiologic issues.

The evidence demonstrates that he has a sufficient foundation and knowledge, skill, experience and training to testify about issues such as causation, risk factors, major contributing cause, disability, MMI and permanent physical impairment in a workers' compensation case. The undersigned finds his opinion to be appropriate despite the doctor's lack of reliance upon medical journals to support his position (no specific journal article was referenced by either doctor). The fact that there are few certainties in this area of cardiology does not diminish the doctor's attempts to shed light on Mr. Brooke's medical condition and the cause for the high blood pressure readings on January 31, 2018. Unlike in Giaimo v. Florida Autosport, Inc., 154 So.3d 385 (Fla. 1st DCA 2014) (an apportionment case where the doctor's opinions regarding percentages of responsibility between an accident and a pre-existing condition were based on pure opinion), Dr. Kakkar has provided insight into the principles used to reach his opinions and

conclusions. The evidence also demonstrates how the principles or methods were applied to the facts of this case. Adversaries will never be in agreement as to whether the other side's expert's opinions have reached a sufficient level for admissibility, particularly when risk factors are involved in the analysis.

This workers' compensation case involves an area of medicine where it is generally accepted that the cause of hypertension in a specific case is unknown. Therefore, the burden of proof in the case (and whether the presumption is applicable) is often outcome determinative. Where there is no jury to be protected from being misled by evidence of dubious value, I conclude Dr. Kakkar's opinions are based on facts and data sufficient enough, and are the products of principles and methods reliable enough, to cross the Daubert admissibility threshold. See Rojas v. Rodriguez, 185 So.3d 710, 711 (Fla. 3d DCA 20167) (quoting Clair v. Perry, 66 So.3d 1078, 1080 (Fla. 4th DCA 2011)) ("exclusion of witness testimony ... is a drastic remedy that should be invoked only under the most compelling circumstances."). Both IMEs had the opportunity to review the same medical records of the Claimant which was a factor in admitting the opinions of the doctors in Booker v. Sumter Cnty. Sheriff's Office, 166 So.3d 189 (Fla. 1st DCA 2015).

United States Circuit Court Judge Richard Posner, a distinguished legal scholar, has written:

> The primary purpose of the Daubert filter is to protect juries from being bamboozled by technical evidence of dubious merit, Seaboard Lumber Co. v. United States, 308 F.3d 1283, 1301-02 (Fed. Cir. 2002), as is implicit in the courts' insistence that the Daubert inquiry performs a "gatekeeper" function. E.g.,

> Smith v. Ford Motor Co., 215 F.3d 713, 718 (7th Cir. 2000). In a bench trial it is an acceptable alternative to admit evidence of borderline admissibility and give it the (slight) weight to which it is entitled. The Federal Circuit in Seaboard Lumber Co. v. United States, *supra*, 308 F.3d at 1302, while pointing to the concern with protecting juries from confusion, did say that the Daubert standard must be followed in bench trials as well. But it did not say that it must be followed rigidly in such trials. Daubert requires a binary choice – admit or exclude – and a judge in a bench trial should have discretion to admit questionable technical evidence, though of course he must not give it more weight than it deserves.

SmithKline Beecham Corp. v. Apotex Corp., 247 F. Supp 2d 1011, 1041-42 (N.D. Ill. 2003) (sitting by designation), *aff'd on other grounds*, 403 F.3d 1331 (Fed. Cir. 2005).

I find nothing bamboozling in Dr. Kakkar's opinions and testimony. The role of risk factors on hypertension is a routine issue in day-to-day workers' compensation presumption cases and among the doctors that treat the condition. I do not find this to be the application of junk science. Workers' compensation patients cannot be treated by the competent medical community, and in particular the competent cardiologic community, with the rigid interpretation of Daubert often requested by parties. In fields where medicine does not have all the answers, there would be no doctors left willing to render opinions in workers' compensation cases. By the fact that the parties use the same handful of doctors statewide in case after case involving the heart/lung presumption, the parties have identified the qualified doctors. When the parties decide to involve new doctors into this highly specialized field, the Daubert evaluation may again become meaningful in determining the quality of the evidence. Until then, the judge of

compensation claims is left with the limited options in most cases of striking both sides' experts, or admitting them both. For our purposes here, the less drastic remedy is chosen to accept the testimony and give it the weight the opinions deserve. The Claimant's Daubert objections are overruled. Even if the Claimant's Daubert objections were sustained, the striking of those two opinions would not have impacted the outcome of this case.

Testifying at the hearing was Christopher Brooke (the Claimant). Although I will not recite in explicit detail the witness's and deponents' testimony and may not refer to each piece of documentary evidence, I have attempted to resolve all of the conflicts in the testimony and evidence. Based on the foregoing and the applicable law, I make the following findings:

1. The undersigned has jurisdiction over the parties and the subject matter.

2. The stipulations agreed to by the Parties in the Uniform Pretrial Stipulation filed on July 11, 2018 (DN 16) are accepted and adopted.

Findings of Fact

3. Christopher Brooke, the Claimant, is a 34 year old solo fire medic and certified firefighter who has worked for the Brevard County Board of County Commissioners since March 2011 performing patient care and transport, and general firefighting activities. He submitted for a pre-employment physical and no follow-up was required.

4. Nurse Sandra Armstrong at the primary care physician's office diagnosed hypertension in December 2015 and Mr. Brooke was given four medications. He reported side effects from the medications and changed medications. He stopped taking Amlodipine in mid-January, 2018 in an effort to wean himself off his medications. On January 30, 2018, he called in sick at 10:18 p.m. due to experiencing cloudy thoughts and not feeling well. This was for his

scheduled shift from 7:00 a.m. January 31, 2018, to 7:00 a.m. February 1, 2018. He went to Nurse Armstrong's office on January 31, 2018, and blood pressure readings were taken of 156/86 and 150/90, which were elevated. A third reading was normal. His Amlodipine dosage was increased to 2.5 mg., two times a day. He was given a work note that he turned in to the Employer which stated: "For Medical reasons, please excuse the above named employee from work for the following dates: 1/31/2018. Special Instructions: None." (DN 40).

5. The seven days before January 31, 2018, Mr. Brooke worked his regular shift of 24 hours on January 25th and January 28th, and 24 hours overtime on January 29th, for a total of 72 hours for which he was paid. After January 31, 2018, he returned to work his next scheduled work day of February 3, 2018, worked 24 hours regular time, 24 hours overtime on February 4, 2018, 24 hours regular time on February 6, 2018, and 24 hours shift trade on February 7, 2018 (non-paid), for a total of 96 hours, and was paid for 72 hours. In addition, he took sick leave for his missed 24 hour shift on January 31 –February 1, 2018.

IMEs

6. The Claimant obtained a records review IME with Dr. Steven Borzak on June 8, 2018. Dr. Borzak testified that essential hypertension is cardiovascular hypertension and that the cause is unknown (DN 26, pp. 8-10). On January 31, 2018, three blood pressure readings were documented: 156/86, 154/90 and 136/86 (DN 26, p.9). The first two were elevated, the third was normal (DN 26, p.27). Dr. Borzak identified risk factors as including family history, obesity, sleep apnea (at least which is untreated) and job stress, but indicated that it was impossible to conclude that risk factors are the cause of the hypertension (DN 26, p.14) or that they rise to the level of the cause of hypertension to a reasonable degree of medical certainty (DN 26, p.25).

Some people have hypertension without cardiac risk factors (DN 26, p.15). He did not feel the Claimant was at maximum medical improvement because he couldn't confirm that the hypertension was well controlled (DN 26, p.13).

7. The Employer/Carrier obtained an IME with Dr. Sunil Kakkar on June 20, 2018. He also diagnosed essential hypertension with no known cause but probably getting exacerbated by obesity, sleep apnea, and some anxiety (DN 34, pp.10, 18). Dr. Kakkar noted that taking Dolobid for knee pain and taking Singulair at bedtime for allergies both can make you feel tired and somnolent (DN 34, pp. 13-14). He was unable to assign responsibility for the high blood pressure readings to any risk factors (DN 34, p.24). Dr. Kakkar testified that the Claimant was at maximum medical improvement but had sustained no permanent physical impairment and no work restrictions (DN 34, p.17). He was unsure why Mr. Brooke received an off-work slip (DN 34, p.20) but did not equate that with disability (DN 34, pp. 28-29).

Presumption Under Section 112.18(1)(a), Fla. Stat. (2017)

8. To be entitled to the presumption, Mr. Brooke must prove he:

(1) Is a member of a protected class,

(2) Had a pre-employment physical that did not show evidence of the condition

(3) Suffers from one of the conditions within the scope of the presumption,

(4) The condition resulted in disability or death.

9. The parties stipulated on the Pretrial that Mr. Brooke is a member of a protected class and had a pre-employment physical that showed no evidence of hypertension.

Suffers From One of the Conditions Within the Scope of the Presumption.

10. Mr. Brooke has been diagnosed with essential hypertension by both doctors. Dr. Borzak testified that this simply means the cause of the condition is unknown (DN 26, pp. 9-10). Dr. Kakkar agreed (DN 34, p.18). The Employer/Carrier has presented no evidence to the contrary but relies on Bivens v. City of Lakeland, 993 So.2d 110, 1102 (Fla. 1st DCA 2008), *case dismissed*, 14 So.3d 241 (Fla. 2009), to argue that essential hypertension is not within the scope of the presumption. I reject this argument. The court explained in Williams v. City of Orlando, 89 So.3d 302 (Fla. 1st DCA 2012), that Bivens is limited to cases where a claimant produces no evidence that the essential hypertension is arterial or cardiovascular. Here, Dr. Borzak stated in his report and testified that he diagnosed Claimant with essential hypertension that is cardiovascular (DN 26, pp. 8-9). There was no conflicting medical opinion. Dr. Borzak's testimony constitutes sufficient evidence that Claimant's hypertension is cardiovascular, a condition within the scope of the presumption.

Disability

11. The final criteria required to establish the presumption is disability. Section 112.18(1) requires the Claimant to suffer total or partial disability due to the covered condition. Section 440.151(3) defines "disablement" as disability as described in Section 440.02(13) which defines it as the incapacity because of the injury to earn in the same or any other employment the wages which the employee was receiving at the time of the injury.

12. Disability must be caused by the protected condition and not something else. City of Gainesville v. Beck, 450 So.2d 309 (Fla. 1st DCA 1984). The determination of disability depends not upon the employer's decision to pay the injured person's salary while he was

incapacitated, but on the person's capacity to earn income. City of Mary Esther v. McArtor, 902 So.2d 942 (Fla. 1st DCA 2005) (stating that the Sledge v. City of Fort Lauderdale, 497 So.2d 1231, 1233 (Fla. 1st DCA 1986) definition of "disablement means the event upon which the employee becomes actually incapacitated, partially or totally, from performing his employment" more closely reflects the statutory concept of "disability").

13. Nurse Armstrong's out-of-work slip provides no indication as to any restriction or disability keeping Mr. Brooke from earning income (DN 40). Michael Zocchi, the Assistant Chief of Professional Development, testified that to have sick leave excused, you had to have a doctor's note (DN 32, pp. 16-17). Mr. Brooke worked 48 regular hours and 24 overtime hours the week before he went to Nurse Armstrong, and 96 hours (48 regular, 24 overtime, and 24 hours shift trade) in the next seven days after he went to Nurse Armstrong. Mr. Brooke did use sick leave on the day he went to see Nurse Armstrong based on "cloudy thoughts and not feeling well" which means he was additionally paid for the January 31-February 1, 2018 work shift.

14. In Jacksonville Sheriff's Office v. Shacklett, 15 So.3d 859 (Fla. 1st DCA 2009), the claimant reported for medical evaluation upon feeling ill and experiencing chest pains. After undergoing cardiac testing the results of which were negative, the claimant was diagnosed with hypertension and prescribed medications for that condition. The Court determined that because no evidence of restrictions were assigned for the hypertension, no disability had been shown.

15. Mr. Brooke had fewer symptoms and worked more hours in the week before and after the date of accident than the claimant in Shacklett. On January 31, 2018, the first two blood pressure measurements were elevated, but the third and final one taken before he left the office was normal. There is no medical evidence that Mr. Brooke could not have performed his job

functions on January 31, 2018. On February 14, 2018, he returned to Nurse Armstrong and his blood pressure reading was normal. The next day (two weeks after the date of accident), Mr. Brooke completed the 45 pound back pack test covering the 3 miles in 29 minutes, 35 seconds (less than a ten minute mile pace) (DN 32, p.12).

16. Mr. Brooke's activities and work performance both before and after January 31, 2018, do not evidence disability preventing Mr. Brooke from performing his job duties as a solo fire medic on January 31, 2018. While Dr. Borzak stated at the end of his IME report that Mr. Brooke was disabled on January 31, 2018, he testified that he based the opinion on Nurse Armstrong's off work slip, restrictions and finding of disability (DN 26, pp. 9-10, 37). Nurse Armstrong's off work slip is in the record (DN 27, pp. 72-75), and there is no evidence of restrictions or finding of disability on the off work slip or in her office visit report. Dr. Kakkar testified that Mr. Brooke was not disabled based on his review of Nurse Armstrong's record and the absence of restrictions or findings of disability (DN 31, pp. 14, 28-29). I accept Dr. Kakkar's opinions over Dr. Borzak's on the issue of disability. In the absence of an appropriate medical predicate, I do not find that there is a basis for finding disability on January 31, 2018. As a result, Mr. Brooke is not entitled to the Section 112.81(1), Fla. Stat. (2017) presumption.

Compensability

17. In the absence of the presumption, the burden of proof is on the claimant to establish that the accident arises out of and in the course and scope of the employment. I do not find that this burden has been met. The medical testimony discussed the possible reasons for the two high blood pressure readings ranging from a multitude of risk factors to Mr. Brooke's back-to-back shifts on January 28 and 29. Double shifts were a common event for Mr. Brooke

including two double shifts the week after the accident. Michael Zocchi testified by deposition that Mr. Brooke worked double the hours of the average fire medic (DN 32, p.14). There is no evidence that meets the required threshold of reasonable medical certainty that suggests that a work-related accident caused Mr. Brooke to submit a sick leave request while off-work the evening of January 30, 2018 (some 15 hours after going off-duty). I do not find that the evidence supports that Mr. Brooke's two high blood pressure readings on January 31, 2018 (32 hours after going off-duty), arose out of or were in the course and scope of his employment.

18. In reviewing the defenses, and recognizing that they were raised for the purpose of attempting to overcome the presumption, it should be noted that there is no evidence that a specific risk factor was the cause of Mr. Brooke's symptoms. I do not find persuasive medical testimony combining all risk factors as the cause of hypertension, particularly when the medical testimony is in agreement that the cause of hypertension is unknown. Where a specific risk factor constitutes a non-work-related cause for cardiac or pulmonary conditions, like familial hyperlipidemia in Punsky v. Clay County Sheriff's Office, 18 So.3d 577 (Fla. 1st DCA 2009), there is a basis for overcoming the presumption and denying compensability. Such a determination is not necessary here because the presumption does not apply.

Authorized Medical Treatment with a Cardiologist or Appropriate Doctor

19. Since the Claimant's January 31, 2018 hypertension condition is not compensable, the claim for authorized medical treatment with a cardiologist or appropriate doctor for that condition is denied.

Medical Non-Compliance Defense

20. The Employer/Carrier has raised an affirmative defense of medical non-

compliance to the claim for compensability. A claimant is obligated to take all reasonable steps to reduce the liability of the employer, including promptly seeking appropriate medical attention. See Lobnitz v. Orange Memorial Hospital, 126 So.2d 739 (Fla. 1961). Where a claimant fails to obtain appropriate care, without reasonable excuse, and that failure causes or increases a claimant's disability, disability benefits for the period of increased disability may be denied. See *Id.* As medical non-compliance is in the nature of an affirmative defense, the Employer/Carrier bears the burden of proof, by a preponderance of the evidence, of each of the elements of that defense. See Davis v. Marion County, 667 So.2d 297 (Fla. 1st DCA 1995).

21. The claimed non-compliance in this case is Mr. Brooke's failure to take Amlodipine. Mr. Brooke testified that he was attempting to wean himself off the medication and stopped taking it in mid-January 2018. I find that Mr. Brooke's efforts to wean himself off medication is well intentioned. He was on at least seven medications at the time. His medical training makes it unclear whether the decision to stop taking Amlodipine was ill-advised, just unsuccessful, or even related to his not feeling well and cloudy thoughts on January 30, 2018. Dr. Kakkar testified that Dolobid (which Mr. Brooke was taking for knee pain) and Singulair (which Mr. Brooke was taking for allergies at bedtime) can make you feel tired or somnolent (DN 34, pp. 13-14). There is no credible medical testimony meeting the required medical certainty identifying the cause of Mr. Brooke's symptoms. As a result, I do not accept a medical non-compliance defense.

Section 440.09(3) Defense

22. Section 440.09(3), Fla. Stat. (2017) states:

> Compensation is not payable if the injury was occasioned primarily by the

intoxication of the employee, by the influence of any drugs, barbiturates, or other stimulants not prescribed by a physician, or by the willful intention of the employee to injure or kill himself, herself, or another.

(underline added)

23. There is no evidence that Mr. Brooke was trying to injure himself. Attempting to wean yourself off medication, absent any other evidence, and particularly by a person with medical training, is not a basis for concluding that Mr. Brooke was trying to injure himself. There is no evidence of willful intent to injure. The defense that Section 440.09(3) is applicable is denied.

Reverse Presumption Defense

24. The Employer/Carrier argues that the Claimant is subject to a reverse presumption created by statute that precludes recovery where the Claimant's non-compliance with recommended medical treatment including prescriptions, causes an aggravation of the Claimant's condition.

25. The statutory language in Section 112.18(1)(b), Fla. Stat. (2017) makes no reference to firefighters as being included in the application of the reverse presumption. The Employer/Carrier's argument that the statutory presumption language in Section 112.18(1)(a) applies to firefighters and therefore the reverse presumption in Section 112.18(1)(b) must apply to them as well requires the assumption that the legislature committed a scrivener's error in passing the statute. There is no evidence to support such an assertion nor is there any indication that the Legislature intended firefighters to be included in the reverse presumption. The Legislature has had the opportunity to correct the language if in fact there had been a scrivener's

error committed. No such correction has been made. As a result, the undersigned finds that the reverse presumption applies to those first responders that are named, namely law enforcement officers, correctional officers or correctional probation officers as defined in Section 943.10(1), (2), or (3), Fla. Stat. (2017) and does not apply to firefighters who are not statutorily referenced, either in Section 112.18(1)(b) or Section 943.10(1), (2), or (3), Fla. Stat. (2017). The affirmative defense of reverse presumption is denied.

Costs and Attorney's Fees

26. Since compensability has been denied, the claims for costs and attorney's fees are denied.

It is **ORDERED and ADJUDGED** that**:**

1) The claim that the Claimant is entitled to the presumption afforded by Section 112.18(1), Fla. Stat. (2017) is denied because there is no disability.
2) The claim for compensability of disabling cardiovascular hypertension and heart disease is denied.
3) The claim for authorization of medical care and treatment with a cardiologist or appropriate physician for care and treatment of the cardiovascular condition is denied.
4) The affirmative defense of medical non-compliance is denied.
5) The Section 440.09(3), Fla. Stat. (2017) defense is denied.
6) The affirmative defense of reverse presumption is denied.
7) The claims for costs and attorney's fees are denied.

Done and electronically served on Counsel and the Carrier this 7th day of September,

2018, in Sebastian, Indian River County, Florida.

Robert L. Dietz
Judge of Compensation Claims
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