

**STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS  
OFFICE OF THE JUDGE OF COMPENSATION CLAIMS  
JUDGE PAUL T. TERLIZZESE  
Melbourne District**

**EMPLOYEE:**

Alan F. Moros  
1430 Bourke Lane  
Melbourne, FL 32940

**EMPLOYER:**

Brevard County Board of Commissioners  
2725 Judge Fran Jamieson Way  
Building B, 2nd Floor  
Viera, FL 32940

**CARRIER:**

Preferred Governmental Claim Solutions  
P.O. Box 958456  
Lake Mary, FL 32795-8456

**ATTORNEY FOR EMPLOYEE:**

Tonya Oliver, Esquire  
Law Office of Tonya A. Oliver, Esquire, P.A.  
11912 Oak Trail Way  
Port Richey, FL 34668

**ATTORNEY FOR EMPLOYER/CARRIER:**

Derrick E. Cox, Esquire  
Hurley, Rogner, Miller, Cox,  
Waranch & Westcott, P.A.  
1560 Orange Avenue, Suite 500  
Winter Park, FL 32789

**OJCC CASE NO.:** 10-021897PTT

**D/A:** 9/15/2009

---

**ORDER DENYING COMPENSABILITY OF CLAIM**

---

THIS MATTER came on for a Final Merits Hearing before the undersigned Judge of Compensation Claims on Wednesday, March 23, 2011, on a Petition for Benefits filed with DOAH on September 20, 2010. On Thursday, March 24, 2011, the parties reconvened for a Ruling Conference where detailed findings of fact and conclusions of law were announced by the undersigned, both of which are incorporated herein by direct reference. Present and representing the Employee at the Final Merits Hearing were Attorneys Tonya Oliver, Esquire and Michael Clelland, Esquire. Present and representing the Employer/Carrier was Derrick E. Cox, Esquire.

The issues presented for my determination were compensability of the claim, payment of temporary total disability/temporary partial disability benefits from September 15, 2009 through October 11, 2009, authorization of a Cardiologist, and penalties, interest, costs, and attorney's fees.

The claim was defended on the grounds that the Claimant did not sustain a compensable injury by accident arising out of the course and scope of his employment, that the major contributing cause of the Claimant's disability and need for treatment was unrelated to the Claimant's employment, and that no penalties, interest, costs, and attorney's fees were due and owing.

The following exhibits were admitted into evidence:

JCC Exhibits:

1. The Notice of Hearing, served September 24, 2010;
2. The Notice of Hearing, served September 30, 2010.

Joint Exhibits:

1. The Pretrial Stipulation, filed December 21, 2010.

Claimant's Exhibits:

1. The Claimant's Trial Memorandum, which was marked for identification and argument purposes only;
2. The pre-employment physical examination composite;
3. The deposition of Ms. Wendy Hall;
4. The deposition of Dr. Patrick Mathias.

Employer/Carrier's Exhibits:

1. The Supplemental Witness List, filed December 23, 2010;
2. The Employer/Carrier's Prehearing Checklist, which was marked for identification and argument purposes only;
3. The Employer/Carrier's Trial Memorandum, which was marked for identification and argument purposes only;
4. The deposition of Dr. Sunil Kakkar.

In making my additional findings of fact and conclusions of law in this claim, I have carefully considered and weighed all of the evidence that was presented to me. I have observed the candor and demeanor of the witnesses, and resolved all of the conflicts in the live and deposition testimony, and evidence. In writing this Order, I have attempted to distill the salient issues together with findings and conclusions necessary to their resolution. Even though I have not attempted to summarize the testimony of each witness or to state non-essential facts, this does not mean that I have failed to consider all of the evidence. After careful consideration of all of the evidence presented, and after having resolved any conflicts therein, I hereby find additionally as follows:

1. The written and verbal Stipulations of the parties are factual, and incorporated by reference as if set out at length herein.

2. Based on all of the evidence that has been presented to me, I hereby deny compensability of this claim.

3. The Claimant sought compensability of his claim solely pursuant to the presumption afforded to firefighters, law enforcement or correctional officers under Florida Statute §112.18. The Claimant's attorney filed no pleading, nor made any argument that the Claimant's heart attack occurring on September 15, 2009 was compensable under any other theory, and I specifically find that there is no medical or lay testimony to support compensability of this claim under any other provision of the Workers' Compensation Statute or case law. All other theories and burdens of proof were waived.

In order to be afforded the benefits of the presumption contained in Florida Statute §112.18, the statute requires that the law enforcement officer, "Must 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 such condition." The pre-

employment physical examination stipulated by the parties, and admitted into evidence was completed on May 8, 1985. The Claimant's blood pressure reading was 140/80, (borderline), and the EKG revealed sinus tachycardia, left atrial enlargement, and borderline ECG. I find that the pre-employment physical examination did, in fact, reveal evidence of heart irregularities or disease, based on the testimony provided by Dr. Kakkar. Specifically, Dr. Kakkar testified that the Claimant's blood pressure reading was 140/80, which was borderline normal/abnormal. Dr. Kakkar further testified that the Claimant's EKG had a slightly fast heartbeat, and tachycardia with left atrial enlargement. Dr. Kakkar also testified that the Claimant's EKG was not quite normal, and the Claimant's blood pressure was borderline. Dr. Mathias testified that the Claimant's heart rate was a little high, even though he characterized the EKG as being normal. Dr. Mathias also specifically testified that atrial enlargement is heart disease. Overall, I find that the testimony of both Dr. Mathias and Dr. Kakkar demonstrate that the pre-employment physical revealed evidence of abnormalities and heart disease.

The Claimant argued that since the doctor who completed the pre-employment physical examination cleared the Claimant for employment as a deputy sheriff, the pre-employment physical did not constitute evidence of heart disease. In response to this argument, I first find that the doctor who completed the pre-employment physical examination was not an authorized doctor, IME physician or EMA physician. Therefore, that doctor's substantive opinions are inadmissible for purposes of this hearing, beyond a factual or historical basis. Moreover, every Claimant seeking the benefit of the presumption under Florida Statute §112.18 must have passed their physical examination, and been cleared for duty, because otherwise they never would have been hired as a firefighter, law enforcement officer or correctional officer. If the Claimant only had to show that he/she passed a pre-employment physical and was cleared for duty in other words "got hired", then this portion of Florida Statute §112.18 would be meaningless. This

section of the statute was clearly intended to cover situations, such as this case, where the pre-employment physical reveals even early evidence of heart disease, but the evidence does not prevent the Claimant from being hired as a firefighter, police officer or correctional officer.

Overall, I find that the testimony of the doctors, coupled with the results of the pre-employment physical and EKG, reveals evidence of heart disease. Therefore, I find that the Claimant has not met the requirements of Florida Statute §112.18, and is not entitled to the rebuttable presumption outlined in that statute.

4. Second, even if the Claimant satisfied the statutory requirements outlined in Florida Statute §112.18 to obtain the benefit of the presumption, I find that the Employer/Carrier successfully rebutted the presumption by both competent, substantial evidence and clear and convincing evidence. The Claimant in this case testified at trial, and in his history to Dr. Kakkar, that he has a strong family history of cardiac disease. The Claimant's father passed away at age 57 following a lengthy history of heart-related problems. Moreover, the Claimant's half-brother, on his father's side, also passed away due to a heart condition at the age of 45. In addition to his family history of heart disease, the Claimant also has a long history of low HDL, which is an abnormal finding.

At trial, the Claimant also provided a history of the events leading up to his heart attack on September 15, 2009, and I had an opportunity to observe the Claimant's candor and demeanor during his trial testimony. The Claimant testified that he left for vacation on September 12, 2009 to hunt elk in Colorado. After flying out on Saturday, September 12, 2009, the Claimant went hunting on September 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup>. The Claimant was hunting in the mountains of Colorado where the altitude is high, and the terrain can be steep. The Claimant testified that he did not shoot any elk on the 13<sup>th</sup> or 14<sup>th</sup>. On the morning of the 15<sup>th</sup>, the Claimant woke up between 4:30 a.m. and 5:00 a.m., to have breakfast and then begin the hunt. Several hours after

commencing the hunt, the Claimant saw and/or heard a bull elk from a distance. The Claimant and Mr. David McCormick began making their way in the direction of the bull elk, and David McCormick began making elk calls. At that time, the Claimant was wearing a backpack and carrying his bow, and arrows. During the hunt, the Claimant and Mr. David McCormick decided to remove their backpacks because they were going to enter an area with very thick brush. The Claimant testified that the brush was too thick to make visible contact with the elk. At this point during the hunt, the Claimant began feeling nauseous, with pain between his shoulder blades, and he abandoned the hunt to go to the emergency room.

I find that the Claimant was a reasonably credible witness, and I accept his testimony regarding the rough details of the hunting trip. However, I note that the Claimant failed to volunteer a majority of the information regarding the more specific details of his hunting trip, during direct examination. I also find it significant that the Claimant did not provide this crucial information to his own retained expert witness, Dr. Mathias. Instead, the details of the Claimant's hunting trip were primarily brought out during cross-examination, or by a thorough history by the Employer/Carrier's expert, Dr. Kakkar. The Claimant also admitted to multiple instances of theft and poaching during cross-examination, but I find that this testimony had no ultimate or determinative bearing on my decision in this case.

I have also considered the more persuasive testimony of Dr. Sunil Kakkar. Dr. Kakkar served as the Employer/Carrier's IME physician for this case. The Claimant gave Dr. Kakkar a history of having a heart attack on September 15, 2009, while hunting in Colorado on vacation. The Claimant also gave Dr. Kakkar a history of long term low HDL, and he told Dr. Kakkar that he was taking Zocar, Niaspan, and Fish Oil for his low HDL. The Claimant told Dr. Kakkar, upon more thorough questioning, that his father died relatively young at age 57 from a heart attack after a number of years of heart problems, and that he had a half-brother on his father's

side who died at the age of 45 from heart disease or problems.

Dr. Kakkar testified that the Claimant has coronary artery disease, which was going on for a long time. Dr. Kakkar noted that, on September 15, 2009, the Claimant was up in high altitude in Colorado. Dr. Kakkar stated that the Claimant's exertion that day triggered and brought on his heart attack. Dr. Kakkar's opinions concerning major contributing cause included:

When you have a fellow who is 46 years old, he had two male members in his family died—one died in 40's and one died in 50's, he probably had the disease in his 40's. He has a very strong family history. He is following the same path. On top of that he has low HDL and slightly elevated LDL and cholesterol which is a very high risk factor for coronary artery disease. So, he had these two risk factors, he developed the disease, and the final straw was that he was up in high altitude doing physical activities, hunting, and he had a heart attack.

Based on the convincing testimony provided by Dr. Kakkar, I find that the Employer/Carrier successfully rebutted any presumption argued by the Claimant. Specifically, I find that the Employer/Carrier successfully proved a specific alternate cause and explanation for the Claimant's heart attack on September 15, 2009, through the testimony of Dr. Kakkar. I accept Dr. Kakkar's testimony that the Claimant has a strong family history of heart disease, early signs of disease on the pre-employment physical, along with low HDL, and that the "final straw" which led to the Claimant's heart attack was caused by the Claimant's exertional hunting activities in the altitude of the mountains of Colorado, as described by the Claimant during his testimony at trial.

I also reviewed the deposition testimony of Dr. Patrick Mathias, the Claimant's IME physician. Dr. Mathias agreed that the Claimant had long term abnormal cholesterol, and a family history of coronary artery disease. However, Dr. Mathias was unaware that the Claimant's half-brother on his father's side died of heart disease at age 45. Dr. Mathias

conceded that looking at the Claimant's siblings may have some significance regarding the Claimant's heart disease. Dr. Mathias further conceded that the greater the family history of heart disease, the more likely an individual will have heart disease. Based on Dr. Mathias' own testimony regarding the significance of family history, I find that Dr. Mathias was lacking critical predicate and foundation information, necessary to form a full and complete opinion in this case.

I find it even more significant that Dr. Mathias was unaware that the Claimant was actively hunting at the time of his heart attack. Dr. Mathias testified that the Claimant did not tell him that he was actually hunting, in the field or mountains, when his heart attack occurred. In fact, when asked if the Claimant was actually hunting at the time of the heart attack, Dr. Mathias testified as follows:

**“I do not think so, because, I am sure he would have mentioned that to me, but I - - I do not know for sure.”**

I do not know why the Claimant failed to reveal the relevant details of his hunting trip to his own expert witness. It is clear from Dr. Mathias' testimony that he certainly would have expected the Claimant to disclose critical pieces of information.

Dr. Mathias conceded that a condition caused by stress, fright or excitement could potentially trigger a heart attack. Dr. Mathias further conceded that an incident of stress, fright or excitement would change his opinion of any trigger or provoking factor. Dr. Mathias conceded that without the triggering factor, the Claimant may not have had a heart attack, at that point or ever, despite a history of underlying coronary artery disease. This testimony shows that Dr. Mathias agreed that an incident, such as the exertional hunt at altitude, described by the Claimant, could have been the triggering factor which led to his heart attack.

I find that there were many similarities in the opinions rendered by Dr. Kakkar and Dr. Mathias. However, to the extent that the opinion of Dr. Kakkar differs from the opinion of Dr. Mathias, I accept the opinion of Dr. Kakkar and reject the opinion of Dr. Mathias. I find Dr. Kakkar's testimony to be much more persuasive, and that Dr. Kakkar sought out and was provided with a more accurate and thorough history. I also specifically find that the Employer/Carrier adequately established a specific alternative cause for the Claimant's heart attack, sustained on September 15, 2009, based on Dr. Kakkar's testimony.

On September 15, 2009, the Claimant awoke to hunt large game animals, in the wilds of Colorado. The Claimant was wearing a backpack, and carrying a bow and arrows. At the time of his heart attack, the Claimant had been hunting in the mountains for approximately four hours. It is clear that the Claimant was not taking a leisurely stroll through some meadow on a ranch, at the time of his heart attack. It is equally clear to me that, based on a combination of the Claimant's testimony and the testimony of Dr. Kakkar, the Claimant's hunting activities performed on September 15, 2009 were the trigger that provoked and produced the Claimant's heart attack, and resulting disability and need for medical treatment. I find that the Employer/Carrier provided clear and convincing evidence of a specific non-occupational cause of the Claimant's heart disease sufficient to overcome the statutory presumption afforded the Claimant under Florida Statute §112.18, (even if the Claimant was entitled to the presumption), and that the major contributing cause of the Claimant's disability and need for treatment for his cardiac condition is unrelated to his employment. Therefore, compensability of this claim is denied.

WHEREFORE, it is the order of the undersigned Judge of Compensation Claims as follows:

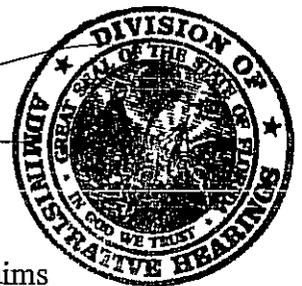
1. Based on the evidence presented in this case, I hereby deny compensability of this claim, with prejudice.

2. Since compensability has been denied, the Claimant's request for payment of temporary total disability/temporary partial disability benefits, authorization of a cardiologist, and penalties, interest, costs, and attorney's fees, is also denied and dismissed with prejudice.

3. Finally, since the Employer/Carrier prevailed in this proceeding, I hereby find that the Employer/Carrier is entitled to reimbursement of all taxable costs pursuant to Florida Statutes section 440.34(3). I hereby retain jurisdiction to determine the costs payable to the Employer/Carrier, for the proceedings in this case.

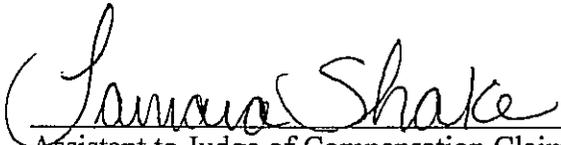
DONE and ORDERED in Melbourne, Florida, this 6<sup>th</sup> day of April, 2011.

  
Honorable Paul F. Terlizzese  
Judge of Compensation Claims  
Division of Administrative Hearings  
Office of the Judges of Compensation Claims  
Melbourne District Office  
700 South Babcock Street Suite 400  
Melbourne, Florida 32901  
(321) 984-4866  
[www.jcc.state.fl.us](http://www.jcc.state.fl.us)



**CERTIFICATE OF SERVICE**

**THIS IS TO CERTIFY** that the foregoing Order was entered and a true and correct copy was furnished by electronic mail on this 6<sup>th</sup> day of April, 2011, to counsel.

  
Assistant to Judge of Compensation Claims