

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
FT. MYERS DISTRICT OFFICE

Brian Culnan,
Employee/Claimant,

OJCC Case No. 16-016852JAW

vs.

Accident date: 8/28/2015

Collier County Sheriff's Office/North
American Risk Services, Inc.,
Employer/Carrier/Service Agent.

Judge: Jack A. Weiss

FINAL COMPENSATION ORDER

This matter came before the Judge of Compensation Claims for final hearing on February 27, 2017, in Fort Myers, Florida, on petition for benefits filed July 13, 2016. The undersigned reserves jurisdiction over the claims in the February 24, 2017, petition for benefits as those claims have not yet been mediated. Paul Kelley, Esquire, appeared for Claimant. Rex Hurley, Esquire and Jonathan Cooley, Esquire, appeared for Employer/Carrier. The claims and defenses are listed in Appendix I. Documents and exhibits admitted into evidence are listed in Appendix II.

At the hearing Brian Culnan appeared and testified before me. In making my findings of fact and conclusions of law, I have carefully considered and weighed all the evidence presented to me. Although I will not recite in explicit detail the witness's testimony and may not refer to each piece of documentary evidence, I have attempted to resolve all the conflicts in the testimony and evidence. Based on the foregoing and the applicable law, I make the following findings:

FINDINGS OF MATERIAL FACT

1. The undersigned Judge of Compensation Claims has jurisdiction of the parties

and the subject matter of this claim.

2. The stipulations entered into by and between the parties in the pretrial stipulation and announced on the record are hereby approved and adopted as findings of fact and are incorporated herein by reference.

3. Claimant, Brian Culnan, testified live at final hearing. Claimant is 51 years old and he has been with the Collier County Sheriff's Office since October 13, 1998. Prior to being hired Claimant underwent a pre-employment physical. Following the pre-employment physical Claimant had to undergo further testing for his vision. He went to the second opinion for his eyes and Claimant was cleared fit for duty. Claimant was not aware of any abnormalities.

Currently, Claimant has the rank of corporal and he is a detective in the criminal intelligence bureau. He has been at this position since 2012.

Claimant underwent a physical as he was approaching his 50s, he was concerned, and he was having fatigue. He was slowed down at work and he had to nap at home before he could complete his chores. He was diagnosed with an aortic aneurysm. Ultimately he underwent surgery at the Cleveland Clinic in Weston.

Claimant has returned to work with the Employer full duty, and he has not missed time from work, since January 11, 2016. He is performing his same job duties now as he was before August 28, 2015. From August 28, 2015 through January 10, 2016, Claimant did not lose any income as he used his sick leave. Had he not used his sick leave he would not have received any income from August 28, 2015 through January 10, 2016.

4. Dr. Steven Borzak testified via deposition taken February 23, 2017. Dr. Borzak has practiced in Florida since 2001. He has been board certified in internal medicine since 1987

and board certified in cardiology since 1991. Dr. Borzak conducted an independent medical examination of Claimant on February 16, 2017. He diagnosed Claimant with a thoracic aortic aneurysm which resulted in severe aortic insufficiency and heart failure with corrective surgery to repair the aneurysm. The cause of which is unknown. There is nothing to suggest an abnormality of the aortic valve. There is no hypertension and no manifestation of atherosclerosis. Dr. Borzak noted that his evaluation differed from that of Dr. Nocero, who believed Claimant had bicuspid-valve associated aortopathy, but the surgical inspection of the valve proved this was incorrect.

Dr. Borzak testified that his definition of heart disease “is a disease involving the heart or vascular system.” Dr. Borzak also testified that Claimant’s aortic aneurysm was not caused by hypertension and he could not say it was caused by coronary heart disease. It is possible that the aortic aneurysm was caused by Claimant’s genetics, in which case it would not be work-related. It is also possible, however, that the aortic aneurysm was caused by or contributed to by his employment as a law enforcement officer.

Claimant’s diagnosis is not covered by the 1996 Florida Uniform Permanent Impairment Rating Schedule. It is not under any of the subcategories in the cardiovascular system portion of the Rating Schedule, specifically: valvular heart disease, coronary heart disease, congenital heart disease, hypertensive disease, cardiomyopathies, pericardial heart disease, or arrhythmias. Since Claimant had surgery for the aneurysm, which is similar in many ways to surgery for coronary artery disease (bypass surgery or valve surgery), Dr. Borzak placed Claimant in the coronary disease section and assigned Claimant a 24% permanent impairment. He placed Claimant at MMI as of February 16, 2017, the date he evaluated Claimant.

5. Dr. Michael Nocero testified via deposition taken February 21, 2017¹. He has been a cardiologist in Florida since 1973, board certified in internal medicine since 1972, and board certified in cardiovascular disease since 1976. He conducted an independent medical evaluation of Claimant but he never actually examined Claimant. Instead, he reviewed the medical records and issued a report dated September 20, 2016.

During a routine physical exam in August 2015 Claimant was found to have a murmur of aortic insufficiency. His blood was leaking across his aortic valve.

On August 26, 2015, Claimant underwent cardiac catheterization and he was found to have severe aortic insufficiency and an aneurysm of the ascending arch of the aorta. Coronary angiograms were normal. He did not provide a history of any rheumatic heart disease. His complaint was easy fatigability, no shortness of breath, no chest pain.

On September 9, 2015, Claimant underwent repair of the aortic valve and resection of the aneurysm of the ascending arch of the aorta. Claimant was not a smoker. He did have a history of elevated cholesterol and he was on medication for this. No family history of aneurysms of the aorta. From a review of the surgeons' report, Claimant had a very large aneurysm that was in the root of the heart right above the aortic valve, which is the first portion of the thoracic aorta in the chest. While in his report Dr. Nocero opined that Claimant may have had a congenital bicuspid valve, after reading the surgeon's report Dr. Nocero opined that this was not the case. It is possible Claimant's aortic aneurysm was caused by a genetic condition, such as Marfan's Syndrome, Loeys-Diezt, Ehlers-Danlos, or Turner's Syndrome. But without the pathology report on the aneurysm Dr. Nocero was unable to make this determination during his testimony.

¹ Claimant objected during Dr. Nocero's deposition to questions on page 16, line 18; page 18, line 17; page 20, line 11, and page 22, line 3: those objections are sustained.

From the surgeon's report, Claimant had an ascending aortic aneurysm that was repaired. This was located in the root right above the aortic valve but it is not involving the heart itself. Per Dr. Nocero, he does not define the aorta as part of the heart. It is part of the cardiovascular system, but it is not itself part of the heart. Thus, in his opinion the aortic aneurysm and condition for which Claimant treated in August 2015 was not caused by heart disease. Nor was the condition caused by hypertension.

Dr. Nocero commented on the 24% impairment rating assigned by Dr. Borzak. Dr. Nocero noted that even Dr. Borzak admitted that an ascending aortic aneurysm is not in the 1996 Florida Uniform Permanent Impairment Rating Schedule, and that Dr. Borzak made an analogy to coronary heart disease. Dr. Nocero thought that was a stretch and he would not do it. Dr. Nocero agreed with Dr. Borzak that Claimant's condition is not covered by the Florida Rating Schedule. As for MMI, Dr. Nocero opined that would have occurred the day Claimant returned to work fully duty: January 11, 2016.

6. Kristl Varnes testified via deposition taken September 9, 2016². She is a senior claims adjuster. On this claim she conducted the three point contact on August 31, when she spoke with the Employer, and then on September 1 when she spoke with the Claimant. Next she requested medical records from the physicians. The claim was not accepted as compensable. The denial was issued on September 8, 2015. Ms. Varnes issued the denial and she indicated it was because the employee has not met all elements of the presumption under section 112.18 and therefore is not entitled to invoke the presumption; the employee does not have a compensable occupational disease under section 440.151; and EC reserves the right to plead any and all

² The undersigned sustains the EC's hearsay objection on page 14, line 7, to the first report of injury. The EC's hearsay objection on the pre-employment physical is ruled upon in the Discussion section of the order.

defenses. Ms. Varnes explained that Claimant did not have a condition caused by hypertension or heart disease as she did not have any medical records showing that he suffered from either condition. When asked if heart disease was a compensable occupational disease for law enforcement officers under section 440.151, Ms. Varnes replied that it would depend on “whether they met all four elements of the presumption.”

DISCUSSION

Claimant seeks compensability of his aortic aneurysm pursuant to the statutory presumption contained in section 112.18. To meet the presumption, Claimant must prove:

1. That Claimant is a member of the protected class (law enforcement officer, correctional officer, or correctional probation officer);
2. That Claimant developed tuberculosis, heart disease, or hypertension;
3. That Claimant successfully passed a pre-employment physical that did not reveal any evidence of such condition; and
4. That such condition caused total or partial disability or death.

Here, EC stipulates Claimant is a member of the protected class. EC also stipulates that Claimant’s condition resulted in disability, and the parties agreed Claimant was off work from August 28, 2015 through December 1, 2015, he was on light duty from December 2, 2015 through January 10, 2016, and he was full duty as of January 11, 2016. The parties disagree as to the other two requirements of the statutory presumption.

Both parties rely on *City of Venice v. Van Dyke*, 46 So. 3d 115 (Fla. 1st DCA 2010). In *Van Dyke* the court accepted the *Dorland’s Illustrated Medical Dictionary* definition of heart disease as “any organic, mechanical, or functional abnormality of the heart, its structures, or the

coronary arteries. But significantly in *Van Dyke*, the doctor assigned an impairment rating under the 1996 Florida Uniform Rating Schedule for valvular heart disease. The court held that competent substantial evidence supported the JCC's finding that the injured worker's aortic disease was a condition that could reasonably be classified as heart disease.

In the instant case, however, the undersigned finds that competent evidence does not support Claimant's argument that his aortic aneurysm is heart disease. Dr. Nocero testified that Claimant had a repaired aortic aneurysm located in the root right above the aortic valve but not involving the heart itself. Dr. Nocero testified that while the aorta is part of the cardiovascular system, it is not itself part of the heart. Thus, the aortic aneurysm condition Claimant treated for starting in August 2015 was not caused by heart disease or hypertension.

Dr. Borzak did not disagree, as he testified that Claimant's aortic aneurysm was not caused by hypertension and he could not say it was caused by coronary heart disease. Dr. Borzak told us that Claimant's condition is not under any of the subcategories in the cardiovascular system portion of the Florida Rating Schedule, specifically: valvular heart disease, coronary heart disease, congenital heart disease, hypertensive disease, cardiomyopathies, pericardial heart disease, or arrhythmias. He assigned a 24% impairment rating as he analogized Claimant's condition to heart disease. Well, if he analogized it to heart disease, then it is not heart disease.

The undersigned recognizes that Claimant's condition may be defined as heart disease under the definition in *Van Dyke*. But that case involved more than the dictionary definition. There the injured worker received a rating under the valvular heart disease section of the Florida Rating Schedule. The testimony also supported that the injured worker's condition qualified as

heart disease. In the instant case neither situation exists. Claimant's condition does not meet any of the cardiovascular sections of the Florida Rating Schedule, and the greater weight of the evidence is that Claimant's condition is not heart disease.

Moreover, EC argues that Claimant failed to prove that he successfully passed a pre-employment physical that did not reveal any evidence of heart disease. EC objected to the pre-employment physical as hearsay during the adjuster's deposition taken on September 9, 2016. EC objected to the pre-employment physical as hearsay on the pretrial stipulation filed on January 4, 2017. EC objected to the pre-employment physical as hearsay during Dr. Borzak's deposition taken on February 21, 2017. At final hearing EC specifically raised the hearsay objection, and after hearing argument of counsel, the undersigned reserved ruling on the objection until this order. For the reasons expressed below the objection is sustained.

EC argued the document which Claimant asserts is the pre-employment physical was not authenticated, as there was no testimony from a physician, records custodian, or even from the Employer regarding the pre-employment physical. As such, the statements contained within the pre-employment physical are hearsay as Claimant is asserting the statements contained therein for the truth of the matter asserted.

Claimant argued the pre-employment physical is a business record kept in the ordinary course of the Employer's business. The pre-employment physical was provided to Claimant in response to a request to produce propounded to the Employer and Carrier as well by the adjuster during her deposition. The adjuster testified that the pre-employment physical was provided to her by the Employer. As for the opinions within the pre-employment physical, Claimant argued that per the "*Swikata* rule" Claimant is only seeking as evidence the fact statements in the pre-

employment physical and not the opinions.

In response EC argued that for something to be considered a business record that three or four baseline questions are typically asked to prove that a record constitutes a business record, but none of those questions were asked of the adjuster. And it clearly is not the Carrier's business record. Dr. Borzak is not the records custodian either, but even if he was, the pertinent questions were not asked him either. As to the facts contained within the pre-employment physical, EC agrees that indeed is what Claimant is relying upon, as Claimant needs to prove the truth of the matter contained within the document, and for that Claimant must get passed the hearsay objection.

The undersigned agrees with EC. Claimant was aware as early as the adjuster's deposition on September 9, 2016 that EC had a hearsay objection to the pre-employment physical. EC reiterated that objection on the pretrial stipulation filed January 4, 2017 as well as during Dr. Borzak's deposition taken February 21, 2017.

Claimant argued too that the adjuster only denied the claim because Claimant did not suffer from hypertension or heart disease, not because he did not pass the pre-employment physical. But aside from the statute of limitations defense the undersigned is unaware of what defenses an adjuster waives by failing to state it on the response to the petition for benefits. Here too the adjuster specifically stated that "EC reserves the right to plead any and all defenses." In addition, the adjuster stated as a basis for her denial in the July 26, 2016, response to petition for benefits that Claimant has not met *all* the elements of section 112.18 to be afforded the presumption. As outlined above, there are four elements that an injured worker must meet to be entitled to the statutory presumption, so Claimant has known from the very beginning of this

claim that the EC's position was that Claimant was unable to meet all four of the conditions. Coupled with the hearsay objection during the adjuster's deposition, Claimant knew as early as September 9, 2016 that EC objected to the statements contained within the pre-employment physical as hearsay. Claimant's arguments fail to overcome the hearsay objection as EC is correct the pre-employment physical is not the adjuster's business record or Dr. Borzak's business record, the pertinent business record exception questions were not asked of either the adjuster or Dr. Borzak, and no testimony was offered from the Employer in an effort to cure the hearsay objection.

Moreover, while Dr. Borzak testified over the hearsay objection that the pre-employment physical did not show any indication of hypertension or heart disease, Dr. Borzak admitted on cross-examination that he did not do the pre-employment physical and he does not know if he had the complete pre-employment physical records. As such, the undersigned finds that Claimant has failed to prove that he underwent a pre-employment physical which did not reveal evidence of any covered condition.

Based on the above, it is:

ORDERED AND ADJUGDED:

1. The claim for compensability of heart disease (aortic aneurysm) pursuant to section 112.18 is denied and dismissed with prejudice.
2. The claim for authorization and payment for evaluation and treatment with a board certified cardiologist to treat the heart disease and aortic aneurysm is denied and dismissed with prejudice.
3. The claim for payment of temporary total disability benefits, as appropriate, from August 28, 2015, to the present and continuing at the correct rate or in the alternative, reimbursement of

Claimant's sick, annual, personal, and other leave time utilized while out of work for injury is denied and dismissed with prejudice.

4. The claim for payment of temporary partial disability benefits, as appropriate, from August 28, 2015, to the present and continuing at the correct rate or in the alternative, reimbursement of Claimant's sick, annual, personal, and other leave time utilized while out of work for injury is denied and dismissed with prejudice.

5. The claim for an advance from Employer/Carrier in the amount of \$2,000.00 is denied and dismissed with prejudice.

6. The claims for penalties and interest are denied and dismissed with prejudice.

7. As Claimant did not prevail, he is not entitled to reimbursement of taxable costs and his attorney is not entitled to an Employer/Carrier paid attorney's fee.

DONE AND SERVED this 29th day of March, 2017, in Ft. Myers, Lee County, Florida.



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APPENDIX I – CLAIMS AND DEFENSES

CLAIMS

1. Compensability of heart disease (aortic aneurysm) pursuant to section 112.18
2. Authorization and payment for evaluation and treatment with a board certified cardiologist to treat the heart disease and aortic aneurysm
3. Payment of temporary total disability benefits, as appropriate, from August 28, 2015, to the present and continuing at the correct rate or in the alternative, reimbursement of Claimant's sick, annual, personal, and other leave time utilized while out of work for injury
4. Payment of temporary partial disability benefits, as appropriate, from August 28, 2015, to the present and continuing at the correct rate or in the alternative, reimbursement of Claimant's sick, annual, personal, and other leave time utilized while out of work for injury
5. Claimant requests an advance from Employer/Carrier in the amount of \$2,000.00. Claimant has suffered a physical impairment, actual or apparent, as a result of the work related accident and injuries
6. Penalties, interest, costs, and attorney's fees

DEFENSES

1. Not compensable
2. Claimant has not met all the elements of the presumption
3. Aortic aneurysm is not a condition caused by heart disease or hypertension and is therefore not compensable
4. If presumption under section 112.18, Fla. Stat. is met, Employer/Carrier will rebut by showing either competent evidence or clear and convincing evidence that a non-work related cause or risk factor caused the aortic aneurysm and need for treatment
5. No temporary total disability or temporary partial disability due; Claimant is at MMI
6. Cardiologist is not medically necessary
7. Penalties, interest, costs, and attorney's fees are not due and owing

APPENDIX II – DOCUMENTARY EVIDENCE AND EXHIBITS

JCC Exhibits

1. Petition for benefits filed 7/13/2016 (DN 1)
2. Response to petition for benefits filed 7/26/2016 (DN 5)
3. Motion for advance filed 9/27/2016 (DN 3)
4. Order scheduling evidentiary motion hearing issued 9/29/2016 (DN 15)
5. Response to Claimant's motion for advance filed 10/18/2016 (DN 22)
6. Claimant's withdrawal of motion for advance filed 10/31/2016 (DN 23)
7. Mediation conference report issued 11/9/2016 (DN 25)
8. Uniform statewide pretrial stipulation filed 1/4/2017 (DN 41)
9. Pretrial order and notice of final hearing issued 1/6/2017 (DN 42)
10. EC trial memorandum (argument only) (DN 44)
11. Claimant trial memorandum (argument only) (DN 45)

Joint Exhibits

1. Deposition of Kristl Varnes taken 9/9/2016, filed 2/27/2017 (DN 54)

Claimant Exhibits

1. Deposition of Dr. Steven Borzak, taken 2/23/2017, filed 2/27/2017 (DN 51-53)

Employer/Carrier Exhibits

1. Deposition of Dr. Michael Nocero, taken 2/21/2017, filed 2/23/2017 (DN 47)