

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

**Carlene Marie Fernald,**  
Employee/Claimant,

**OJCC Case No.** 11-017914TGP

vs.

**Accident Date:** 11/2/2009

**State of Florida Department of  
Corrections/State of Florida/Division of  
Risk Management,**  
Employer/ Carrier/Servicing Agent

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**Judge Ralph J. Humphries**

**FINAL COMPENSATION ORDER**

**This Cause** came on for a merits' hearing before the undersigned Judge of Compensation Claims on **October 17, 2012** in Daytona Beach, Volusia County, Florida. This subject matter of this hearing was petition for benefits filed on August 4, 2011. A mediation conference on the petition was held on December 9, 2011. The claimant, **Carlene Fernald**, was present and represented by James Spears, Esq. The employer/carrier, **State of Florida, Department of Corrections**, hereinafter referred to as the "Employer" was represented by Robert Osburn, Esq.

***The following stipulations have been reached between the parties:***

1. The court has jurisdiction of the parties;
2. Venue properly lies in Duval County, Florida;
3. The date of accident is alleged to be November 2, 2009;
4. There was an employer/employee relationship at the time of the accident;
5. Workers' compensation insurance coverage was in effect on the date of accident;
6. The accident or occupational disease was initially accepted as compensable by the E/C and authorized care or treatment by Dr. Nocero was provided to the claimant;
7. Timely notice of the accident, injury, or occupational disease was given by the claimant on the date of accident or was not at issue;
8. Timely notice of the final hearing has been given;
9. The pay ledger may be stipulated into evidence.

**The substantive claims for determination at the current merits' hearing are the following:**

1. Determination and correction of AWW/CR based on all earnings as defined by law for the 13 week period immediately preceding the industrial accident, not including the week the accident occurred. Claimant has not been provided with a Wage Statement to date. This issue was withdrawn at hearing.
2. Temporary total disability benefits beginning 11/2/2009 to the present and continuing. This issue was withdrawn at hearing.
3. Temporary partial disability benefits beginning 11/2/2009 to the present and continuing. This issue was withdrawn at hearing.
4. Authorization for care and treatment with a primary care physician for heart disease. Claimant is not currently treating under the care of an authorized physician.
5. Authorization for care and treatment with a cardiologist for heart disease. Claimant is not currently treating under the care of an authorized physician.
6. Compensability of disabling heart disease pursuant to Section 112.18(1), Florida Statutes; and
7. Costs and attorney's fees.

**The defenses raised by the E/C were the following:**

1. Parties have stipulated as follows:
  - a) Claimant is entitled to invoke the presumption;
  - b) Claimant suffered a period of disability;
  - c) JCC is to decide if E/C has presented competent evidence rebutting the presumption.;and
2. Entire claim is denied; and
3. Costs and attorney's fees are not due or owing.

**The following documents were admitted into evidence at the current hearing:**

**Judge's Exhibits:**

1. Petition for Benefits filed with DOAH on August 4, 2011;

2. Response to Petition for Benefits, filed with DOAH on August 18, 2011;
3. Pretrial Questionnaire completed by the parties and filed with DOAH January 12, 2012;
4. EMA Report of Dr. Howard Tee, filed with DOAH on August 22, 2012;
5. Claimant's Trial Memorandum admitted for purposes of argument only and not as evidence, filed with DOAH on August 24, 2012;
6. Employer/Carrier's Trial Memorandum admitted for purposes of argument only and not as evidence, filed with DOAH on April 30, 2012; and
7. Employer/Carrier's Trial Memorandum of Law filed with DOAH on August 23, 2012;
8. Employer/Carrier's Motion for EMA, filed with DOAH April 26, 2012;
9. Response to Motion for EMA, filed with DOAH April 30, 2012; and
10. Final Evidentiary Order filed with DOAH April 30, 2012.

**Joint Exhibit:**

1. Deposition of Dr. Howard Tee taken August 15, 2012 and filed with DOAH August 24, 2012.

**Claimant's Exhibit:**

1. Deposition of Dr. Patrick Mathias taken April 26, 2012 and filed with DOAH April 30, 2012.

**Employer's Exhibits:**

1. Notice of Denial filed with DOAH April 30, 2012; and
2. Deposition of Dr. Michael Nocero taken April 4, 2012 and filed with DOAH April 30, 2012.

In my determination herein I have attempted to distill all the testimony and salient facts together with the findings and conclusions necessary to the resolution of this matter. I have not necessarily attempted to summarize the substance of the claimant's testimony or the testimony of any live or deposition witness, nor have I attempted to state nonessential facts.

Because I have not done so should not be construed that I have failed to consider all of the evidence.

**Based upon the evidence, I make the following findings of fact and conclusions of law:**

1. I have jurisdiction of the parties and the subject matter.
2. The stipulations of the parties are accepted and adopted by me as findings of fact.
3. The evidence closed in this matter on October 17, 2012 after which closing arguments were made by the parties.
4. At the time of the accident, the claimant was working as a Certified Corrections Officer. She reported the accident and received authorized treatment from Dr. Michael Nocero.
5. The claimant testified at the final hearing. She has worked for the Department of Corrections for more than 18 years. She is a sergeant at Tomoka Correctional Institution, a maximum-security facility. She began her career as a correctional officer. She is now in charge of the environmental and health and safety for the facility. Her duties include helping assure safety of individuals at the facility, inmate injuries, sanitation as well as workers compensation injuries. As a result of her duties, she has daily contact with the inmates. Her current schedule is from eight in the morning until five in the afternoon but she has had other shifts in the past including night shifts.
6. Claimant has smoked cigarettes for approximately 20 years and estimates she smokes one and a half packs per day although she is trying to cut back and quit smoking. She reports she is down to 10 cigarettes a day and she smokes only at work. She does so as a break from the stress and chaos of her employment. Her intent is to stop smoking completely.
7. She has high cholesterol which was first diagnosed in 2005 when she started taking medications for that condition. She denies any family history of heart attacks. Both parents are still alive and her siblings also have reported no history of heart attacks although they smoke as does her mother.
8. The claimant reports significant stress associated with her attendance at a murder trial the two weeks immediately preceding her heart attack. This trial was for an inmate who murdered her best friend. She was present the entire two weeks of the trial and she described that is the worst two weeks of her life. She also described it as the most stressful thing in her life followed by the stress of her having to return to work. She testified she was there voluntarily and was not required to be there as part of her workplace duties. That trial ended on Friday before her heart attack the following Monday.

9. Even before the murder trial, the claimant considered her work to be a high stress job. She described it as very dangerous. Despite that, she was not taking any anxiety or depression medications before the trial. She now takes both.
10. As to the events of November 2, 2009, the claimant got up and readied herself for work. As she was driving to work, she began to feel tightness in her chest, her arm was numb and she had pain in her jaw and stomach. Despite that, she continued to drive thinking her condition was a gallbladder issue. Ultimately, however, she called her husband who picked her up and took her to Halifax Hospital. An EKG was performed and she was advised she had a heart attack. Since that time, she has been treating with the cardiologist with whom she is to follow up every six months to a year.
11. Prior to the heart attack, the claimant was taking only cholesterol medications. Since that time, in addition to the cholesterol medications, she takes Plavix, aspirin, Xanax, blood pressure medications and Zoloft
12. On cross-examination, the claimant conceded she probably has smoked 25 years rather than 20. It was also disclosed that she required an increase in her cholesterol medications beginning less than a week before her heart attack. Claimant agreed she was not required to attend the trial but did so because it involved the death of her best friend. She attended on her own volition.
13. I found the testimony of the claimant to be credible and straightforward. While there was a change in her testimony regarding the history of her smoking, I conclude that to be nothing more than an honest mistake, one she clarified upon reflection. I believe her testimony.
14. The testimony of two cardiologists was presented by way of deposition. Dr. Michael Nocero was initially authorized by the employer/carrier to treat the claimant. It was his opinion that the claimant suffered from coronary artery disease with obstruction in the right coronary artery. A plaque ruptured which led to a total occlusion of the right coronary artery. The occlusion was treated with angioplasty and stenting. On the ultimate question to be considered by me, Dr. Nocero opined claimant's heart disease was caused by her history of smoking and high cholesterol. As he stated: "It's my opinion that those two risk factors worked together interacting with one another to lead to coronary artery disease and subsequent plaque rupture and acute heart attack." (Nocero deposition p.10).

15. The claimant also was evaluated by Dr. Patrick Mathias who was claimant's independent medical examiner. Dr. Mathias testified he could not identify the cause of claimant's coronary artery disease. He identified risk factors for coronary artery disease to include hypertension, smoking, family history, diabetes and hyperlipidemia. Other risk factors are abdominal obesity, psycho social stress and the intake of fruit and vegetables. Dr. Mathias does not consider high cholesterol to be a cause of heart disease. He was of the opinion the claimant's stress was potentially a contributing factor to her heart disease. He discounted the link between cigarette smoking and claimant's heart disease because there was no family history suggesting a link. In summary, Dr. Mathias could not identify the cause of the claimant's coronary artery disease.
16. As a result of conflicting opinions between Dr. Mathias and Dr. Nocero, Dr. Howard Tee was appointed as expert medical advisor. Dr. Tee agreed that claimant has coronary artery disease. He identified high cholesterol and smoking as risk factors for her coronary artery disease stating that "if you had to choose what her number one cause of her heart attack, I would have to say that her smoking would be the number one cause of her heart attack, because patients who smoke can rupture plaque and cause heart attacks." He went on to state claimant "has plaque because she has hypercholesterolemia. And when you have high cholesterol and you smoke, smoking itself can cause a rupturing of the plaque and this has been documented with multiple data." He agreed stress can cause heart attacks or rupture of plaque but he listed smoking is the number one cause, hypercholesterolemia as the number two cause and stress as third. Ultimately, Dr. Tee agreed that "although there are some other contributing factors... the smoking and the high cholesterol provided for at least more than 50% than the anxiety." (Tee deposition pp. 26-27).
17. The parties stipulated the claimant was entitled to the statutory presumption found in Section 112.18, Florida Statutes that claimant's heart disease was causally related to her occupation as a correctional officer. The issues to be determined by me are the level of proof necessary to rebut that presumption and whether the evidence in this case does so. The statutory presumption is dispositive unless rebutted by medical evidence. See, e.g. *Fuller v. Okaloosa Corr. Inst.* 22 So.3d 803, (Fla. 1<sup>st</sup> DCA 2009). The employer/carrier, to rebut that presumption, must prove by medical evidence "the disease... was caused by a specific, non-work-related event or exposure." *Caldwell v. Division of Retirement*, 372 So.2d 438 (Fla. 1<sup>st</sup> DCA 1979). The employer/carrier can

also rebut the presumption by proving a "combination of wholly non- industrial causes." *Punsky v. Clay County Sheriff's Office*, 18 So.2d 577, 583-84 (Fla. 1<sup>st</sup> DCA 2009).

18. It is claimant's contention the proof necessary to rebut the presumption must be clear and convincing whereas the employer/carrier argues only competent substantial evidence need be presented. It is my determination the employer has met that burden regardless of the level of proof required to do so. In this case, an expert medical advisor was appointed to resolve the conflict in opinions between Dr. Nocero and Dr. Mathias. Florida Statute Section 440.13(9)(c) states: "The opinion of the expert medical advisor is presumed to be correct unless there is clear and convincing evidence to the contrary as determined by the judge of compensation claims." It is my conclusion, and I so find, claimant has failed to present clear and convincing evidence sufficient to reject the opinion of Dr. Tee. I conclude that since it requires clear and convincing evidence to reject the opinions of the expert medical advisor, and claimant has failed to meet that burden, the opinions of that expert medical advisor themselves constitute clear and convincing evidence sufficient to rebut the statutory presumption claimants heart disease is causally related to the workplace.
19. Furthermore, I find the stress claimant attributes to the murder trial of her best friend is unrelated to her employment. Claimant candidly admitted she attended that trial of her own volition. She was not required by her employer to be there. All three physicians agreed claimant's stress associated with that trial was significant and was a factor in her heart disease resulting in heart attack. Since I conclude that stress was not work related, it is but another "non-industrial" cause of her heart disease and heart attack. Even were it concluded claimants attendance at this trial was work-related, I still find the opinions of Dr. Tee satisfactorily rebut the statutory presumption set forth in Florida Statute 112.18.
20. Any and all issues raised by way of the petition for benefits, but which issues were not dismissed or tried at the hearing, or which were ripe, due and owing but not raised at the hearing, are presumed resolved, or in the alternative, deemed abandoned by the claimant, and therefore, are denied and dismissed with prejudice.

**Wherefore, It Is CONSIDERED, ORDERED, and ADJUDGED** as follows:

1. The claim for seeking compensability of the claimant's heart disease is hereby denied.
2. The claims seeking authorization of a cardiologist or primary care physician to treat the claimant are hereby denied.

3. The claim for attorney's fees and costs are hereby denied.
4. The pending petitions for benefits are hereby dismissed with prejudice.

**DONE AND ORDERED** in Chambers at Jacksonville, Duval County, Florida on this 5th day of November, 2012.



A handwritten signature in black ink, reading "Ralph J. Humphries".

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**Ralph J. Humphries**  
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