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

Danny Lee Rudisill, Employee/Claimant, vs. Florida Highway Patrol/Department of Highway Safety, Employer, and Division of Risk Management, Carrier/Servicing Agent.	)	OJCC Case No. 07-028374MHH Accident date: 10/26/2001

FINAL COMPENSATION ORDER ON PETITIONS FOR BENEFITS OF 10/10/07, 5/9/08 and 6/23/08

THIS CAUSE was heard before the undersigned at Lakeland, Polk County, Florida on 8/28/08, upon the Claimant's claims for compensability, impairment benefits, TTD, medical benefits and penalties, interest, costs and attorney's fees. The petitions for benefits were filed 10/10/07, 5/9/08 and 6/23/08. Mediation occurred on 8/25/08 and the parties' pretrial compliance questionnaire was filed 8/18/08. Claimant's counsel Paul Kelley, Esq., was present on behalf of Claimant. Rex Hurley, Esq., was present on behalf of the Employer/Carrier (hereafter "E/C). Claimant's spouse was also present during trial.

At the time of trial the parties entered into the following stipulations:

1. The Court had jurisdiction of the parties and of the subject matter of the petition/claim.
2. Venue properly lies in Polk County, Florida.
3. The correct date of accident is 10/26/01.
4. There was an employer/employee relationship at the time of the accident.
5. There was workers' compensation coverage in effect by the carrier at the time of the accident.

6. AWW is $1172.47 with a corresponding TTD CR of $571.

The following exhibits were received into evidence at the time of trial:

COURT EXHIBITS

1. Pretrial stipulation of the parties.
2. Claimant's trial memorandum, accepted as argument only.
3. Employer/carrier's trial memorandum, accepted as argument only.
4. Petitions for benefits.

CLAIMANT EXHIBITS

1. Deposition of Dr. Mathias.
2. First notice of injury, dated 9/25/07.

CLAIMANT PROFERRED EXHIBIT

1. Records of Lakeland Regional Hospital, 10/26/01. I am sustaining the objection of E/C on the grounds that these records were not properly authenticated. Further after reviewing the deposition of Dr. Nocero, while he may have had records from Lakeland Regional Hospital to review, it appeared to me that he was reading the results of claimant's angioplasty and was not reading directly from these particular records proffered by claimant.

EMPLOYER/CARRIER EXHIBITS

1. Deposition of Dr. Nocero.
2. Deposition of claimant.

In addition to the exhibits, Claimant testified live.

The claims made at the time of trial were for determination of the following:
1. Compensability of hypertension, atrial ectopy and coronary artery disease.
2. TTD from 10/26/01 through 11/27/01, or in the alternative reimbursement of sick leave/vacation time.
3. Evaluation and treatment by a Board certified cardiologist, preferably Dr. Jamaleddine.
4. Payment of impairment benefits.
5. Entitlement to penalties, interest, costs and attorney's fees at the expense of the employer/carrier.

The defenses raised by the Employer/carrier to the claims were as follows:
1. Accident/conditions are not compensable.

2. Presumption found in F. S. 112.18 does not apply.
3. Presumption has been rebutted.
4. Claimant had no disability.
5. TTD not due to alleged accident.
6. Claims are barred by statute of limitations.
7. Claimant failed to give timely notice of the accident.
8. No impairment due to accident.
9. Claimant did not have a pre-employment physical prior to entering into employment.
10. There is no entitlement to penalties, interest, costs or attorney's fees at the expense of employer/carrier.

In making my findings of fact and conclusions of law in these claims and defenses, I have carefully considered and weighed all the evidence presented to me. I have resolved all conflicts in the testimony, both live and by deposition, presented to me. Although I may not reference each piece of evidence presented by the parties, I have carefully considered all the evidence and exhibits in making my findings of fact and in reaching my conclusions of law. Based upon the foregoing, the evidence and applicable law, I make the following findings of fact and draw the following conclusions of law:

2. I have jurisdiction of the parties and the subject matter of these claims.
3. The stipulations of the parties are accepted and adopted by me as findings of fact.
4. The evidence closed in this matter on 8/28/08 at the time closing arguments were made by the parties.

Recitation of the factual evidence

5. Claimant testified at trial and in his deposition he was 58 years old. He had two periods of employment with the employer. The first began in 1978 when he was hired by the employer after passing two physical examinations with no evidence of high blood pressure or a heart condition, one with his family doctor and one with the employer's doctor in Tallahassee. His employment was contingent upon his successfully completing the police academy. He began training at the Academy but injured his ankle and had to withdraw. After discussing the situation with the employer he voluntarily resigned his employment with the understanding that he could re-enroll in the academy the following January. He did not take another physical examination before re-enrolling. Upon completion of the academy in 1979, he was assigned to work in Miami. He worked continuously for the employer since that time but in 1998 he was transferred to Polk County. He always worked shifts that rotated monthly. Shift rotation impacted his sleep and his eating habits. He generally worked 5 days/week, 8 hours/day. His job subjected him to stress, particularly when for 4 to 5 years when he was a homicide investigator. He had been involved in fights and been hit and bitten. He had been involved in incidents with armed individuals and in the 1980's while working in Miami, he had been shot at during riots.

6. In 1991 claimant was diagnosed with high blood pressure and diabetes. He began taking medications for both conditions and stopped smoking. In 1995 he had cardiac by-pass surgery involving all three coronary arteries. After surgery he was out of work for about 2 months and worked light duty for one month. After that he returned to his regular duty work. Claimant contacted the employer's human resources department in Tallahassee about the "heart/lung" bill (F. S. 112.18) and was told that it only applied to firefighters. Following surgery he had no cardiac symptoms, except for his high blood pressure and palpitations, until October 2001. On approximately 10/25/01 he was working in his yard when he began having chest pain, dizziness, palpations, sweating, and pain radiating to his left hand and back. He was short of breath and felt as he had in 1995. He stopped working and his symptoms resolved. The next morning, 10/26/01 his symptoms recurred as he was shaving in the morning. He thought he was having a heart attack and his wife took him to the hospital where he was admitted for four or five days. During that time period he had another cardiac catheterization and a stent was placed in one of his coronary arteries. While hospitalized he spoke with both his supervisors, Sgt. Brennan and Sgt. Bass and explained he was having cardiac problems and had a stent placed. He believed that one or the other of these men and perhaps both of them visited him in the hospital. Neither supervisor told him about the provisions of F.S. 112.18 and he continued to believe that he was not covered by that statute. Claimant was absent from work for at least a week and perhaps as long as one month after having the stent placed and received sick leave pay for those days. He then returned to his regular duty work and continued to perform those duties as of trial.
7. In September 2007, claimant was at a district meeting and happened to talk to Sgt. Corey (not his supervisor). Sgt. Corey asked about his health and then told him that he could file a workers' compensation claim under the "heart/lung bill." This was the first time claimant was aware that he was covered. He spoke with his supervisor, Sgt. Batter, who completed a notice of injury. The date of accident shown on the notice is the date he reported the accident to Sgt. Batter. Claimant continued to take medications for his diabetes, high blood pressure and heart condition. He continued to have palpitations. His mother and father and his brother all had heart disease. He had smoked one to two packs of cigarettes a day for 30 years but he stopped smoking in 1991. He was aware that he could file a workers' compensation claim if he was hurt on the job but he did not know of the separate provisions of F.S. 112.18 until September 2007. He belonged to the union for many years but was no longer a member; the union had sent out newsletters occasionally.
8. Dr. Mathias, cardiologist, testified in his deposition he performed an IME of claimant on 6/6/08. Claimant reported he had been diagnosed with diabetes, high cholesterol and hypertension since 1991. He also had a history of arthritis, gout and pancreatitis. He had been diagnosed with coronary artery disease in 1995 with bypass surgery. He had angioplasty in 2002. Claimant stopped smoking in 1991. He had a family history of hypertension and coronary artery disease. Claimant had worked as a state trooper. His shift changed every two to four weeks and he was never able to establish a rhythm with his shifts. This was significant because shift workers had a higher incidence of

cardiovascular problems. Claimant was 6'2" tall and weighed 240 pounds. His blood pressure was 134/84. Otherwise his physical examination was normal. His EKG showed extra heartbeats coming from the upper chambers of his heart (ectopy). This finding was not significant because claimant was not reporting symptoms but it might give an indication that he was at risk for developing atrial fibrillation. Claimant had a pre-employment physical on 7/12/77. At that time his blood pressure was 122/86 and there was no finding of heart disease. His blood pressure reading did not indicate hypertension or heart disease. One of claimant's doctors had provided a letter on 7/9/93 indicating that claimant was capable of performing his duties as a state trooper but that he should be given duties with lesser amounts of stress. Medical records indicated that claimant began having signs of heart disease in 1993. He had coronary artery bypass in 1995. Dr. Matthias diagnosed claimant with diabetes, essential hypertension, and dyslipidemia. He also had coronary artery disease and asymptomatic atrial ectopy. By definition essential hypertension is high blood pressure for which there is no evident cause. Claimant had risk factors for developing essential hypertension: he had a positive family history; he was mildly overweight; and he was under stress at work. Dr. Matthias defined a risk factor as a factor that has a statistical association with a higher incidence of development of a particular disease. However the link between a risk factor and the development of the disease was not clear and a risk factor was not a clear-cut causative link. Claimant's job would produce the type of stress that would be a contributing factor to the development of his hypertension. Dr. Matthias could not give an opinion as to what the major contributing cause of claimant's coronary artery disease was. Claimant's risk factors for coronary artery disease were his family history, diabetes, essential hypertension and high cholesterol. Claimant's job also posed that the kind of stress that would contribute to the development of coronary artery disease. It was medically necessary to treat claimant's hypertension in order to control his coronary artery disease. It was also necessary to treat claimant's dyslipidemia in order to control his coronary artery disease. It was also necessary to treat claimant's diabetes in order to control his coronary artery disease. Claimant needed to continue in treatment with his cardiologist. He required blood work four to six times a year and that needed to be seen either by an endocrinologist or an internist who treated diabetics. He would require periodic stress testing. Claimant needed to continue taking the medications already prescribed for him. Claimant was incapacitated from his job as a trooper while he was in the hospital and for varying time periods after that. He should have been off work at least eight weeks after his bypass surgery. He should have been off work seven days after his cardiac catheterization. He should have been off work two to four weeks after his angioplasty and stenting. Claimant reached maximum medical improvement on 6/6/08 from his essential hypertension with an 8% permanency rating. Claimant also reached maximum medical improvement on that date from his coronary artery disease with a 22% impairment rating. Claimant reached maximum medical improvement on that same date from his ectopy with a 15% impairment rating. Claimant was capable of returning to work as a trooper without any restrictions. Dr. Matthias believed that claimant was suffering from ectopy because of

his hypertension and coronary artery disease but he said he could not conclusively prove that. Dr. Matthias could not give an opinion regarding the major contributing cause of claimant's ectopy. Similarly Dr. Matthias had no opinion regarding the major contributing cause of claimant's hypertension. Dr. Matthias could not say that claimant's stress from work was a specific cause of his hypertension or his coronary artery disease. Claimant's hypertension did not cause him any disability. Claimant did not lose any work because of his hypertension. Claimant had several factors for the development of coronary artery disease. Claimant's work did not cause any of these risk factors. Claimant's health conditions were found in the general population and not just restricted to a particular occupation. But his conditions had a higher incidence in certain occupations and specifically in law enforcement. Dr. Matthias agreed that claimant was probably at maximum medical improvement from his bypass surgery by June 1998. Dr. Matthias did not know how long claimant was out of work following his 2001 stenting procedure. At the time of Dr. Matthias examination claimant was doing fairly well. Claimant's 22% rating for his coronary artery disease would be the same whether he had the bypass or he simply had stenting. Claimant would require the same care recommended by Dr. Matthias if he only had the stenting procedure.

9. Dr. Nocero, cardiologist, testified in his deposition he performed an IME of claimant on 5/14/08. Claimant had been employed as a highway patrolman since 1979. Prior to beginning employment he had a physical examination which did not find any signs of cardiac problems or hypertension. In 1991 he was diagnosed with diabetes and stopped smoking after 30 years. In 1993 he had chest pain and was told he had multiple risk factor s for coronary artery disease, including high blood pressure, smoking, obesity and a family history. He underwent cardiac catheterization which confirmed he had coronary artery disease. Several years later he had recurrent chest pain and he underwent bypass surgery of all three major arteries of the heart. He was off work for 6 weeks and then returned to full duty for the employer. Three years later his cholesterol and triglycerides were very elevated. Claimant underwent a nuclear cardiac scan which was normal, indicating his bypass surgery had been successful. In 2000 his scan was again normal. In 2001 his chest pain recurred and he was diagnosed with unstable angina. He underwent a repeat catheterization that showed he had occlusions of two coronary arteries. Claimant had two stents placed at that time. Claimant then returned to full duty with the employer. Dr. Nocero did not know how long claimant was off work in 2001 but felt that 4 weeks of TTD would have been appropriate. He continued to have elevated cholesterol and high blood pressure. A nuclear scan in April 2007 indicated claimant had normal blood flow. At the time of the exam claimant had no chest pain or shortness of breath. He was continuing to work for the employer but most of his work was field work; he was responsible for the firing range for part of his time at work. Claimant's family history was significant for cardiac disease in both his mother and father. Claimant's examination was normal although claimant was overweight and he complained of occasional palpitations which he had had most of his life. There were no cardiac abnormalities other than atrial ectopy (premature atrial contractions). Dr. Nocero

diagnosed claimant with coronary artery disease, status post bypass surgery, status post angioplasty of the right internal mammary artery graft, essential hypertension, type two diabetes, hypercholesterolemia and metabolic syndrome. Dr. Nocero did not believe that claimant's employment was a major contributing cause of claimant's diabetes, hypertension, obesity, or family history of coronary artery disease. Claimant had a metabolic disorder which consisted of obesity, elevated cholesterol and elevated triglycerides with low HDL cholesterol and high blood sugars which could be due to actual diabetes or carbohydrate intolerance. The work activities were not the major contributing cause of any of these conditions individually or of the metabolic syndrome. Claimant's work was not the major contributing cause of his ectopy. Claimant had never lost any time from work because of his ectopy. Claimant had never lost any time from work because of his hypertension. Dr. Nocero recalled that the medical records of the 2001 hospitalization showed claimant was admitted with high blood pressure and was having arrhythmia but could not recall if claimant remained hospitalized because of either of those problems; he believed that the major reason for the hospitalization was concern over claimant's blocked arterial graft. There were certain known risk factors for developing coronary artery disease: hypertension, cigarette smoking, high cholesterol, diabetes, metabolic syndrome (specifically low HDL levels as part of the metabolic syndrome). A family history of heart disease had not been confirmed as a risk factor. There was a strong association between diabetes and coronary artery disease. Claimant had all known risk factors and added together, they outweighed any risk factor associated with claimant's employment as a highway patrolman. If taken together, claimant's obesity, his diabetes, his high cholesterol, his low HDL and his history of smoking were the major contributing cause of his coronary artery disease. However on cross-examination Dr. Nocero clarified that no single one of those factors would be a specific cause of claimant's coronary disease but taken all together, they worked in concert to cause his coronary artery disease. I note that Dr. Nocero was asked during direct examination by E/C to state what percentage of claimant's coronary artery disease was due to hypertension, cholesterol, diabetes, cigarettes, metabolic syndrome, mow HDL and what percentage was due to his work activities, Dr. Nocero assigned no percentage to claimant's work activities, including his stress and shift work. Dr. Nocero testified that claimant's work activities and stress associated with his work were not a cause or causative factor in the development of claimant's coronary disease. Dr. Nocero was acquainted with a recent study that indicated that psychosocial stress was a risk factor for the development of coronary artery disease, hypertension and arrhythmia but he felt that "this is still a big controversy. And we're at a point at this present time where we still don't have an objective handle on just how work stress works into the development of coronary artery disease." Claimant's work stress "quite possibly" was another in the constellation of risk factors claimant had for the development of coronary artery disease. In discussing further the risk factor of obesity, Dr. Nocero stated claimant was obese but also stated that he did not measure claimant's waist which was the proper method to determine if claimant's obesity was of the type considered necessary in making the diagnosis of metabolic syndrome. Claimant was

muscular in build and muscle weighs more than fat. Dr. Nocero's diagnosis of obesity was based solely on claimant's weight and height. Dr. Nocero agreed on cross-examination that an individual could have all the risk factors but still not develop coronary artery disease or hypertension, although he thought that would be very uncommon. Conversely an individual could have none of the risk factors and still develop coronary artery disease and hypertension; once again, that would be an anomaly and not typical. There was no known cause for essential hypertension. Dr. Nocero explained there was a distinction between a risk factor and a cause. A risk factor was something that was associated with a pathological process; for example, hypertension was associated with coronary artery disease. A cause was the process by which a multiplicity of risk factors came together to lead to a pathologic response, such as coronary artery disease. No one knew how an individual acquired a risk factor but a doctor could identify the end result of a combination of risk factors. Although risk factors for heart disease were known, there was no way to rank them or determine which was worst in a particular individual. There was no way to measure the effect of a risk factor for coronary artery disease in an individual who had a number of the risk factors associated with the development of that pathology. Risk factors were a possible association but not a definite link. Cause was an actual process that led to disease and was a definite link. Smoking became less of a risk factor once an individual had smoked more than 15 years previously. I note that claimant ceased smoking in 1991, or 4 years before his by-pass surgery and 10 years before his stenting procedure. Dr. Nocero did not believe that work stress was a probably or major risk factor for developing coronary artery disease; he would include in the "constellation" of risk factors that claimant had, along with his shift work. Dr. Nocero agreed he would not rule out the work place factors as a contributing or aggravating factor in the development of claimant's coronary artery disease. Dr. Nocero believed that risk factors displayed a synergistic effect in leading to the development of disease; they combined in an exponential manner, rather than in a straight line manner. Claimant's work associated risk factors never combined to such an extent to become the major contributing cause of the development of his coronary artery disease. Claimant's hypertension was included in the group of risk factors that was the major contributing cause of his coronary artery disease but claimant's work could only "possibly" be a contributing factor to his hypertension. According to one recent study diabetes was a factor in causing microvascular disease (disease of small capillary blood vessels) but might not be a factor in causing macrovascular disease (large blood vessels such as the coronary arteries). However Dr. Nocero also stated that the study did not mean that clinicians could ignore diabetes when treating coronary artery disease and might only mean that they did not have to be worried about treating the diabetes as aggressively as had been thought necessary. Dr. Nocero stated also that "this is subject to change as more research is ongoing." Dr. Nocero himself stated he continued to treat his diabetic patients aggressively but expected to see more improvement with kidney function than with coronary artery function. He also said that the topic was very confusing. Claimant required angioplasty and a stent in 1991 because he had developed stenosis of the right arterial graft (done in the 1995

surgery) as a result of ongoing progression of his atherosclerosis. Claimant's atherosclerosis progressed because of his high blood pressure, smoking, diabetes and elevated cholesterol. Claimant had reached MMI with a 20% impairment as a result of his coronary artery disease and 7.5% because of his high blood pressure. There was no impairment rating for the ectopy because it was a benign arrhythmia even though the Florida Guidelines provided for a zero to 14% rating. If claimant had documented arrhythmia that was asymptomatic during normal activities but which was documented, was required to make dietary adjustment and use medications, the Florida Guides indicated that a rating of 15 to 29% could be assigned. Claimant would require medication for the rest of his life and would need to see a cardiologist twice a year. The need to see a cardiologist was due to the progression of claimant's atherosclerosis. Dr. Nocero agreed that it was necessary to treat claimant's hypertension in order to treat and control his coronary artery disease. Dr. Nocero did not think that claimant's ectopy was not of the type that required treatment to be certain it was not leading to increased hypertension or heart disease. Claimant's arrhythmia, based on claimant's statements and history, did not seem to be causing him a lot of trouble and that was why Dr. Nocero did not rate him for it and did not think that he needed to have it monitored. Claimant had no work restrictions. Dr. Nocero clarified that atherosclerosis and coronary artery disease were the same terms.

Findings of fact and conclusions of law

10. There are four relevant statutory sections argued in this case.
11. First, F. S. 112.18 (2001) provided "any condition or impairment of health of any Florida state, municipal, county, port authority, special tax district, or fire control district firefighter or state law enforcement officer caused by tuberculosis, heart disease, or hypertension resulting in total or partial disability or death shall be presumed to have been accidental and to have been suffered in the line of duty unless the contrary be shown by competent evidence. However, any such firefighter or state law enforcement officer shall have successfully passed a physical examination upon entering into any such service as a firefighter or state law enforcement officer, which examination failed to reveal any evidence of any such condition. There have been later changes to this statute to expand the class of covered individuals but they are not relevant to this case. Caldwell v. Division of Retirement, 372 So.2d 438 (Fla. 1979) explained that the presumption of this section relieves claimant from proving causation and transfers the burden to E/C to prove by *clear and convincing* evidence that the disease was caused by a specific, non-work related exposure. In Tarpon Springs v. Vaporis, 953 So.2d 597 (Fla. 1st DCA 2007), the court held that there must be *competent and substantial* evidence that the disease was caused by a non-work related factor. There would seem to be a conflict in the degree of proof required between Caldwell (a Supreme Court case dealing with retirement benefits) and Vaporis (a 1st DCA case dealing with workers' compensation benefits), a discrepancy noted by Judge Kahn in his concurring opinion in Butler v. City of Jacksonville, 980 So.2d 1250(Fla. 1st DCA 2008).

12. Second, F. S. 943.13 (2001) provided, "On or after October 1, 1984, any person employed or appointed as a full-time, part-time, or auxiliary law enforcement officer or correctional officer; on or after October 1, 1986, any person employed as a full-time, part-time, or auxiliary correctional probation officer; and on or after October 1, 1986, any person employed as a full-time, part-time, or auxiliary correctional officer by a private entity under contract to the Department of Corrections, to a county commission, or to the Correctional Privatization Commission shall: ...(6) Have passed a physical examination by a licensed physician, based on specifications established by the commission." I note that in 1978 and 1979, the provisions regarding the requirement of a physical examination applied to a date of hire of 8/1/1974 for law enforcement officers. Thus this would have been the statute at the time claimant was hired. In 2007 the provisions of (6) were changed to read, "Have passed a physical examination by a licensed physician, physician assistant, or certified advanced registered nurse practitioner, based on specifications established by the commission. In order to be eligible for the presumption set forth in s. 112.18 while employed with an employing agency, a law enforcement officer, correctional officer, or correctional probation officer must have successfully passed the physical examination required by this subsection upon entering into service as a law enforcement officer, correctional officer, or correctional probation officer with the employing agency, which examination must have failed to reveal any evidence of tuberculosis, heart disease, or hypertension. A law enforcement officer, correctional officer, or correctional probation officer may not use a physical examination from a former employing agency for purposes of claiming the presumption set forth in s. 112.18 against the current employing agency." E/C argued that this 2007 amendment was applicable to claimant's case.
13. The third statutory provision is that of F. S. 440.19 (2001) which provides that "all employee petitions for benefits under this chapter shall be barred unless the employee...has advised the employer of the injury...pursuant to s. 440.185(1) and the petition is filed within 2 years after the date on which the employee knew or should have known that the injury...arose out of work performed in the course and scope of employment."
14. F.S. 440.185(1) (2001) requires the employee to report his injury within 30 days or his petition will be barred unless "The employer...had actual knowledge of the injury."
15. Claimant testified his employer was aware he suffered from heart disease (the injury in this case) and was aware he was hospitalized in 2001 for this condition. Claimant testified the employer paid him sick leave while he was off work in 2001. I find that claimant met the notice requirements of F. S. 440.185 because his employer had actual knowledge of his injury.
16. As to the provisions of F. S. 440.19, I agree that the statute of limitations would have begun to run upon the beginning of claimant's disability on 10/26/01 But I find that while claimant knew about the general availability of workers' compensation if he was injured on the job, he was not aware that heart disease and hypertension were conditions that were covered by the separate "heart/lung" bill and moreover had been

told by the employer that the "heart/lung" bill did not apply to him. I find that the mere posting of the "arm in the cast" poster did not constitute notice to claimant of the provisions of F. S. 112.18. I further find that the fact that claimant may have belonged to a union in 2001 or at other times during his employment did not constitute notice to claimant of the provisions of F. S. 112.18. I find that claimant first became aware of the applicability of F. S. 112.18 in September 2007 and that this was the first time he knew that his condition could be related to his employment. I find that within 30 days of becoming aware of the applicability of F. S. 112.18 to his condition, claimant notified the employer of an "accident" and within two years of first becoming aware of the applicability of F. S. 112.18 to his condition, he filed a petition for benefits. Thus I find that the claimant's petitions were not time barred by F. S. 440.19(2001).

17. I consider the issue of whether claimant met the requirements of F. S. 112.18.
18. I find claimant is a member of a covered class of employees because he is a law enforcement officer.
19. I find claimant suffers from hypertension and heart disease (coronary artery disease and ectopy) based upon the testimony of both experts.
20. I find claimant suffered a disability lasting from one to 4 weeks when he underwent angioplasty and stenting in 2001 based upon claimant's uncontroverted testimony that he was absent from work because of his heart disease beginning 10/26/01 for a period of at least one week and perhaps as long as one month and upon the testimony of both experts that claimant should have been TTD for two to 4 weeks after his stenting procedure. I find that this disability resulted from claimant's coronary artery disease and not from his hypertension or ectopy based upon the testimony of both experts.
21. The next requirement of F.S. 112.18 is that claimant must have passed a pre-employment physical "upon entering into any such service as a ... law enforcement officer, which examination failed to reveal any evidence of any such condition." Claimant testified he took two pre-employment physicals before beginning employment with the employer in 1978 and that neither revealed the existence of hypertension or heart disease. E/C did not contest that testimony. Claimant then resigned his employment because he was not able to complete the police academy and was rehired in 1979. He did not undergo another examination at that time. The statute in effect at the time claimant was rehired in 1979 required claimant to have passed a physical examination before undertaking employment and the fact that claimant was rehired was evidence the employer accepted the original physical examination and waived the requirement that claimant undergo another. The question in my mind is whether the employer's waiver of the requirement of a second physical examination before rehiring claimant in 1979 makes claimant unable to make use of the presumption of F.S. 112.18. In City of Tarpon Springs v. Vaporis, 953 So.2d 597 (Fla. 1st DCA 2007), the court held that claimant had successfully passed a pre-employment physical when the examination was begun 10 days before he began working but not completed until 15 days after he began working. But in Cumbie v. City of Milton, 496 So.2d 923 (Fla. 1st 1986) claimant was hired before F.S. 943.13 was passed and his employer did not require a physical examination until two years

later, at which time claimant had no evidence of hypertension or heart disease. None-the-less the majority opinion elected to follow rulings of the Industrial Relations Commission and agreed that because claimant had not taken a pre-employment physical, he was not able to make use of the provisions of F. S. 112.18. Factually I had no testimony from either party as to when claimant took his physical in 1978, when he first started the academy or when he left the academy so I do not know if there was only a brief lapse of time which apparently is acceptable between the two dates of employment or the almost two year time lapse suggested by E/C. I have reviewed the provisions of F. S. 943.13 (1978, 1979 and 2001) which simply states that the officer must have passed a physical examination without using the language found in F. S. 112.18 which requires that the officer successfully pass an examination "upon entering into any such service as a ...state law enforcement officer." F. S. 943.13 (of any year) does not contain language stating when the examination must be taken. In reading the two provisions *in pari materia* and upon the cases cited above, I conclude a prospective law enforcement officer need only pass a physical examination at some point in time in order to be hired but he must begin his physical examination *upon entering employment* in order to qualify for the presumption of compensability afforded by F. S. 112.18. This interpretation is logical inasmuch as F. S. 112.18 only applies to certain health conditions that are presumed compensable. I therefore distinguish claimant's case where he had two periods of employment separated by some unknown period of time and where he did not take a physical examination from Vaporis, in which the claimant began taking his physical examination before entering into employment but did not complete it until after he began employment. I do not find the 2007 amendment to F.S. 943.13 relevant to my decision and therefore do not need to consider whether that new provision is retroactive to claimant's case because of my finding that claimant did not take a pre-employment physical prior to beginning his employment with the employer in 1979.

22. If I had ruled that claimant's physical examination in 1978 could be used to establish entitlement to the presumption, then I would have found that claimant was entitled to the presumption of F.S. 112.18 and the burden would have shifted to E/C to prove that some other factor caused claimant's condition and need for treatment. E/C relied upon Dr. Nocero's testimony that claimant had a "constellation" of risk factors that taken together were the major contributing cause of his development of coronary artery disease. The question is, is it sufficient for E/C to prove that a group of risk factors unrelated to the employment is the cause of claimant's condition or must E/C prove that there is one specific cause of claimant's condition in order to defeat the presumption of compensability.
23. Both experts agreed that a risk factor could not be considered the same thing as the cause of any particular condition. Dr. Mathias testified that while claimant had risk factors for the development of coronary artery disease, the major contributing cause of his heart disease was the employment.
24. Dr. Nocero, on the other hand, testified that when all claimant's non-work associated risk factors combined, they outweighed any possible affect that his employment related risk factors, if risk factors they were, had in the development of his heart

disease. The work related factors (psychosocial stress and shift work) were at best aggravating or contributing factors but were not causative and were not the major contributing cause of claimant's coronary artery disease.

25. In Punsky v. Clay County Sheriff's Office, ---So.2d----, Case Number 1D07-3901, 7/21/08 (Fla. 1st DCA 2008), (I note that there has been a motion for rehearing filed in this case which was pending as of the date of this order) the court held that "E/C did not meet their burden in rebutting the presumption because they did not provide evidence of a specific, non-occupational cause of Claimant's heart disease." And further, "As the E/C failed to present evidence of a specific cause of claimant's heart disease, the presumption has not been overcome...." However in Vaporis, the court held that E/C may overcome the presumption by the providing competent substantial evidence that persuades the JCC that the disease was caused by *some* non-work related factor and E/C does not have to prove that it was caused by a "specific hazard or non-occupational hazard." See also, Lentini v. City of West Palm Beach, 980 So.2d 1232 (Fla. 1st DCA 2008), Saldana v. Miami-Dade County, 978 So.2d 823 (Fla. 1st DCA 2008). Thus the recent decisions of the 1st DCA indicate that the E/C meets its burden of rebutting the presumption of compensability by showing with competent and substantial evidence that there is some other cause of claimant's heart condition without requiring that E/C demonstrate one specific cause.

26. In the instant case, Dr. Nocero testified that claimant had a combination of factors known to be associated with the risk of developing heart disease and that those factors combined to become the cause of claimant's heart disease, even though he could not identify any one of the factors as more significant than another and even though individually each factor was simply a risk factor for the development of heart disease. Both Dr. Nocero and Dr. Mathias stated they could not give an opinion that claimant's employment was the major contributing cause of his hypertension, coronary artery disease and ectopy, although Dr. Mathias felt the employment was a contributing cause. If, therefore, I had found that claimant had passed a physical examination upon entering his employment with the employer, I would have found that E/C rebutted the presumption of compensability of claimant's coronary artery disease by establishing that there was a non-work related cause (the combination of risk factors that amounted to the cause of claimant's heart disease). I would therefore have denied the petition seeking TTD or reimbursement of sick leave/vacation time, impairment benefits, penalties and interest and medical treatment for claimant's coronary artery disease.

27. With respect to claimant's hypertension, both physicians agreed that there was no known cause of essential hypertension and that claimant did not suffer any disability from that condition. E/C therefore had no testimony to rebut the presumption with respect to claimant's hypertension but because I have found above that claimant did not take a physical examination before beginning employment in 1979 and because the hypertension had not led to any disability, claimant could not make use of F.S. 112.18 to establish compensability. Therefore I would have denied the petition seeking impairment benefits and medical treatment for claimant's hypertension.

28. Neither physician had any opinion regarding causation of claimant's ectopy and even claimant agreed he had had that condition all his life. The ectopy did not lead to any disability and I would have denied the petition seeking impairment benefits and medical treatment for claimant's ectopy even if he had successfully passed a physical examination before beginning employment.
29. Because I have found claimant did not successfully complete a pre-employment physical before beginning employment in 1979, because I would have found E/C rebutted the statutory presumption regarding causation of claimant's coronary artery disease, because I would have found that claimant had no disability from either his hypertension or ectopy and therefore could not take advantage of F. S. 112.18 for those two conditions, I am denying the requested medical treatment.
30. Because I have denied all the benefits sought, I similarly deny the petition seeking attorney's fees and costs at the expense of E/C.

WHEREFORE, IT IS ORDERED AND ADJUDGED:

1. The petitions of 10/10/07, 5/9/08 and 6/23/08 are dismissed on their merits.

DONE AND MAILED to the parties and electronically mailed to the attorneys this 29th day of August, 2008, in Lakeland, Polk County, Florida.

S

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

Michael Pierce, Employee/Claimant, vs. State of Florida, Department of Corrections/Division of Risk Management, Employer/Carrier/ Servicing Agent.	)	OJCC Case No. 06-03521BJL Accident Date: 5/26/2006

FINAL ORDER

AFTER DUE NOTICE to the parties, a Final Hearing on this matter was held in Tallahassee, Leon County, Florida, on July 10, 2008. The parties were represented by counsel as indicated below. The undersigned Judge of Compensation Claims has jurisdiction of the parties and the subject matter.

An Initial Petition for Benefits (PFB) was filed on December 4, 2006, seeking compensability of the claimant's coronary artery disease and subsequent heart attack, along with appropriate workers' compensation benefits. The matter was mediated, pretried and scheduled for Final Hearing on May 30, 2007. On May 29, 2007 the PFB was voluntarily dismissed. A subsequent PFB was re-filed on December 19, 2007 for date of accident of January 24, 2006, restating the same issues and claims previously raised. An Amended PFB was later filed on

March 27, 2008 using a date of accident of May 26, 2006, again requesting the same benefits.

The matter was again mediated on February 27, 2008, which mediation resulted in an impasse. Pretrial proceedings were held on March 14, 2008 and the matter was set for trial for June 4, 2008. Claimant subsequently filed a Notice of Waiver of Time Limitations pursuant to section 440.25, F.S., after requesting that the Final Hearing scheduled for June 4, 2008 be continued and the case was rescheduled and heard on July 10, 2008.

At the hearing, the claimant sought the following benefits:

1. Adjudication of the compensability of the claimant's heart disease conditions pursuant to section 112.18, Florida Statute, that lead to a heart attack requiring a quadruple coronary bypass surgery, ultimately resulting in the development of cardiomyopathy and arrhythmias;

2. Compensation for temporary total or temporary partial disability (TT/TPD) benefits from May 24, 2006 to the present and continuing, or in the alternative;

3. Compensation for permanent total disability (PTD) benefits, together with PTD supplemental benefits, from May 24, 2006 to the present and continuing;

4. Such further medical treatment as the nature of the injury and the process of recovery requires; to wit: medical

care and treatment with a board certified cardiologist to treat the claimant's heart disease conditions;

5. Interest and penalties on all past due payments of compensation;

6. An attorney's fee for claimant's counsel of record to be paid by the employer/carrier; and

7. The cost of these proceedings.

The claim was defended on the following grounds:

1. Claimant not entitled to statutory presumption under section 112.18, F.S. and is unable to meet the burden of proof for compensability of the claimant's heart disease conditions as an occupational disease;

2. Should the claimant present evidence of entitlement to section 112.18, F.S., statutory presumption, and being that the employer/carrier will present competent evidence to rebut said presumptions;

3. The claimant's current cardiac condition is not the result of an injury by accident arising out of and in the course and scope of the claimant's employment;

4. Claimant's employment is not the major contributing cause of the claimant's disability or need for treatment;

5. The employer/carrier seeks a retroactive offset should any indemnity benefits be awarded based upon employer-paid

wages; prior payment of temporary indemnity benefits; claimant's receipt of social security disability (SSD) benefits; and claimant's receipt of in-line-of-duty disability benefits, for the similar periods indemnity benefits are being requested;

6. Employer/Carrier seeks costs should be the prevailing party in this cause; and

7. Employer/Carrier denies claimant's entitlement to penalties, interest, costs and attorney's fees at their expense.

The parties have entered into the following stipulations:

1. The Judge of Compensation Claims has jurisdiction of the parties and the subject matter of this claim.

2. Venue properly lies in Jefferson County, Florida, however, pursuant to the consent of the parties this matter was tried in Leon County, Florida.

3. Notice of Hearing was properly furnished and received as required by the Workers' Compensation Act.

4. On 5/26/2006, the captioned claimant was employed by the captioned employer earning an base average weekly wage (AWW) of $589.96 and fringe benefits of $106.51, for a total AWW of $696.47, yielding a compensation rate of $464.32 per week.

5. Counsel for the parties agreed that depositions of lay witnesses would be received in evidence in lieu of the personal appearance of said witnesses at trial.

6. In spite of the various dates of accident reflected on the PFBs, counsel for the parties stipulated that the date of accident regarding this case is May 24, 2006.

At the trial of this cause, the following Exhibits were admitted into evidence.

Claimant's Exhibits

1. Petitions for Benefits filed on 12/19/2007 and 3/27/2008.

2. Deposition of Debra Roberts taken 7/1/2008.

3. Deposition of Rebecca Bishop taken 5/29/2008.

4. Deposition of Zina Culpepper, together with attachments, taken on 6/15/2008.

5. Deposition of Susan Grissom, together with attachments, taken on 4/26/2007.

6. Deposition of Dr. Richard Allen Kerensky, M.D., together with attachments, taken on 5/14/2007.

7. Deposition of Jackie Jordan, together with attachments, taken 5/2/2007.

8. Deposition of Dr. Patrick F. Mathias, M.D., together with attachments, taken 5/21/2007.

9. Deposition of Dr. Michael A. Nocero, Jr., M.D., taken 5/12/2008. *(Employer/Carrier's objection to said deposition on the grounds that it went beyond the scope of impeachment as*

limited by that certain Order entered on July 8, 2008 is Granted In Part and the questions and responses regarding the issues of causation and risk factors are stricken as they were addresses or could have been addressed at Dr. Nocero's first deposition of 5/21/2007.)

Employer/Carrier's Exhibits

1. Deposition of Dr. Michael A. Nocero, Jr., M.D., together with attachments, taken 5/21/2007.

2. Deposition of Dr. Andre F. Jawde, M.D., together with attachments, taken on 3/14/2007.[1]

3. Department of Corrections Physician's Assessment dated 8/26/2002.

Joint Exhibits

1. Pretrial Stipulation and Order entered 3/17/2008.

The following individual testified live before me:

1. Michael J. Pierce, Jr., the claimant.

After due consideration of this matter and after having the opportunity to review and consider the aforesaid exhibits which were admitted into evidence, and having observed and considered the candor and demeanor of the witness who appeared and testified before me, and having endeavored to resolve all

[1] Some months prior to the final hearing, the undersigned judge disclosed to counsel for the parties that he had treated with Dr. Andre F. Jawde, M.D., beginning in 1993 until approximately 1994. Counsel for the parties were advised that in spite of this previous doctor-patient relationship, the undersigned could fairly and impartially consider and evaluate all the evidence and medical testimony presented in this cause without bias or prejudice towards either side. This disclosure was made so that counsel would have the option to file a Motion for Disqualification if they deemed the same necessary. No such motion or request for disqualification was filed in this cause.

conflicts of facts in the evidence presented herein, I hereby make the following findings of fact and conclusions of law:

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 herein are hereby approved and adopted as findings of fact and are incorporated herein by reference;

3. In my determination herein I have attempted to distill 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.

4. Any and all issues raised by way of the petition or petitions for benefits which are the subject matter of the final hearing, but which issues were not tried at the hearing are presumed resolved, or in the alternative, deemed abandoned by the employee/claimant and therefore denied. See Betancourt v. Sears Roebuck & Co., 693 So.2d 253 (Fla. 1st DCA 1997).

5. On May 24, 2006, the captioned claimant, Michael J.

Pierce, Jr., who is now 48 years of age, was employed as a Correctional Officer by the captioned employer, State of Florida, Department of Corrections (DOC). Mr. Pierce is a high school graduate and received a Law Enforcement Certificate from a technical college. His military service consisted of a three month stint from September to December 1978, after which time he was discharged from military service due to ear problems. He began his employment with DOC on February 7, 1979. He underwent a pre-employment physical on January 9, 1979, which testing was determined to be within normal limits by both of the independent medical examiners testifying in this cause. He was placed at the Port Charlotte Correctional Institute (PCCI) and assigned as a Yard Officer overseeing close management prisoners. His duties consisted of care, custody, control and supervision of inmates. He continued at the PCCI until 2001 when he was transferred to the Desoto Correctional Institute (DCI) for approximately one year. He returned to the PCCI sometime in 2002 and remained there until September, 2004, when he resigned his position and moved to his home state of Ohio to work for a construction company. He said that construction job lasted about seven weeks when he was laid-off.

6. Mr. Pierce returned to Florida and applied for re-employment with DOC sometime in April, 2005. He underwent a

second pre-employment physical on April 27, 2005, and this testing was also found to be within normal limits. He began full-time employment as a Correctional Officer on June, 2005, and was assigned to the Jefferson Correctional Institute (JCI) in Monticello, Florida.

7. The claimant described the JCI as a maximum security prison where his duties consisted of supervising and controlling prisoners and protecting inmates from each other during showers and handcuffing inmates. He stated that the work at JCI was not as "bad" as the FCCI. During his tenure as a correctional officer, he described being involved in fights with inmates, being spat upon, and had feces thrown on him. He described some of the risks of a DOC officer are possible exposure to HIV or Hepatitis from possible contact with prisoners' feces and blood. The claimant claims he was involved in altercations with prisoners dozens of times but suffering no serious injuries therefrom. He described his job as stressful. Because of his good job performance, Mr. Pierce reached the rank of Sergeant.

8. The Claimant testified that on the morning of May 24, 2006, following two consecutive days off work, he awakened with chest pains. He was taken to the Emergency Room at Archibold Medical Center in Thomasville, Georgia, where he was found suffering a massive acute myocardial infarction. Mr. Pierce

then underwent emergency cardiac catheterization which revealed total occlusion of his left main coronary artery and severe coronary artery disease (CAD) in the left anterior descending and in the ramus intermedius branch, along with severe disease in the right coronary artery. He underwent angioplasty and stenting to restore blood flow through the totally occluded left coronary artery.

Claimant was then transferred to Tallahassee Memorial Hospital (TMH) where he came under the care of Dr. Richard A. Kerensky, M.D., an interventional cardiologist. At TMH Mr. Pierce was placed on a bypass machine and ultimately underwent quadruple coronary artery bypass surgery. Mr. Pierce remained in a coma for approximately six weeks thereafter before regaining consciousness.

The claimant was later transferred to Shands Hospital at the University of Florida for possible heart transplant. Although close to death, Mr. Pierce's condition improved holding in abeyance the need for an immediate heart transplant. An intracardiac defibrillator was placed in claimant's chest due to continued low ejection fraction.[2] After a one month stay at Shands, the claimant was discharged. Further testing indicated that the claimant suffered from ongoing congestive heart failure

[2] Ejection fraction is a measurement of how well the heart contracts. Page 46, Deposition of Dr. Andre F. Jawde, M.D.

as a result of the massive acute myocardial infarction.

9. Claimant eventually came under the care of Dr. Kerensky and he underwent additional stenting and was diagnosed with underlining insulin dependent diabetes. Dr. Kerensky believes that Mr. Pierce had undiagnosed diabetes before his heart attack.

10. There is no indication that the employer/carrier here provided Mr. Pierce any informational brochure regarding his rights under Ch. 440. The claimant testified that is was sometime in September, 2006, after speaking with a co-employee that he became aware that his condition might fall under the Heart/Lung Bill. He contact his counsel and a notice of injury was filed on or about November 20, 2006. Although the employer did not stipulate that timely notice of injury was made, neither did they present evidence or a defense in that regard. I accept Mr. Pierce, who I found credible and candid, that he timely filed his notice of injury when he became aware of the nexus between his cardiac condition and his work.

After receiving the notice of injury, the carrier initially conditional accepted the claimant's cardiac condition as compensable and began providing TTD benefits on or about November 29, 2006 for the period beginning November 20, 2006. The employer/carrier also authorized Dr. Andre F. Jawde, M.D., a

cardiovascular surgeon, to evaluate and treat Mr. Pierce. However, on March 20, 2007 the employer/carrier denied the claim and discontinued all medical and indemnity benefits. The Claimant relies on his group medical coverage for his medical care.

11. The claimant testified that prior to his heart attack he felt that he was in good physical shape. He says that he was muscular and weighed 180 lbs. and his height is 5'5". He claims that he was a runner and also engaged in weightlifting. He admits to being a long-term smoker since 1978 (started smoking at age 16) and he smoked 1 to 1½ packs per day, except during a period in 1983 when he claims he quit for approximately 1½ years. Following his heart attack he has stopped smoking. Mr. Pierce claims that he did not know that he was diabetic until after his heart attack. He admits that there is a family history of heart disease where his father, who is deceased, suffered from hypertension and a coronary valve problem. His brother suffered heart attacks at age 51 and 56.

Mr. Pierce currently receives Social Security Disability (SSD) benefits retroactive to January, 2007, in the amount of $1,383.00 per month, and in-line-of-duty (ILOD) benefits totaling $1,630.00. Since his retirement he is covered under the State's Blue Cross and Blue Shield Health Plan for which he

says he pays COBRA premiums. The claimant's monthly disability benefits equal his AWW at the time of his heart attack.

Currently, the claimant states that he experiences lack of strength, shortness of breath, sleeps with an oxygen mask, and is limited to lifting no more than 10 lbs. He has returned to Ohio to live as of August, 2007. He says that following his heart attack, his weight dropped to 131 lbs. and his present weight is approximately 170-175 lbs.

12. In workers' compensation matters, heart attacks are found to be compensable if the injured worker can prove an occupational cause. Victor Wine and Liquor, Inc. v. Beasley, 141 So. 2d 581 (Fla. 1971). However, approximately 40 years ago the Florida Legislature enacted legislation recognizing heart disease and hypertension as presumptive occupational-related conditions for a certain class of public servants, namely firefighters. This was a social policy in appreciation and gratitude for the dangerous work and risks firefighters undertake in protecting the public. The legislation known as the "Heart/Lung Bill" is embodied in section 112.18, Florida Statutes. Effective July 1, 2002, the legislature amended said section and added correctional officers and broadened the definition of law enforcement officers. Section 112.18(1), F.S., applicable to this date of accident, in pertinent part,

provides that

> "Any condition or impairment of health of any Florida State...correctional officer as defined in s. 943.10(1), (2), or (3), caused by tuberculosis, heart disease, or hypertension resulting in total or partial disability or death shall be presumed to have been accidental and to have been suffered in the line of duty unless the contrary be shown by competent evidence. However, any such firefighter or law enforcement officer shall 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 any such condition."

This presumption is however a rebuttable presumption. See City of Miami v. Thomas, 657 So.2d 927 (Fla. 1st DCA 1995). A presumption has been defined as "an inference required by a rule of law to be drawn as to the existence of one fact from the existence of some other established basic fact or combination of facts." Caldwell v. Division of Retirement, Florida Department of Administration, 372 So.2d 438, 440 (Fla. 1979). Moreover, said presumption is a rebuttable presumption which effects the burden of proof. Id.

13. The statutory presumption contained in section 112.18, F.S., has been found to be applicable to Chapter 440, Florida Workers' Compensation Law. South Trail Fire Control District v. Johnson, 947 (Fla. 1st DCA 1984).

To trigger the occupational presumption under section

112.18, Florida Statute, an injured worker must establish the following four elements for eligibility. First the injured worker must show that he/she is a member of one of the protected class defined in the section. Second, the injured worker must show that he/she suffers from one or more of the protected conditions or diseases outlined in section 112.18. Third, the protected condition or disease must result in at least a temporary disability. Section 440.02(13), F.S., defines "disability" as the incapacity because of the injury to earn the same or any other employment the wages which the employee was receive at the time of the injury. The disability can be either temporary or permanent. The City of Miami v. Thomas, 657 So. 2d 927 (Fla. 1st DCA 1995). And finally the injured worker must show that he/she passed a pre-employment physical. Note, however, this last prerequisite is not required for correctional officers. See State v. Reese, 911 So. 2d 1291 (Fla. 1st DCA 2005) and Gray v. Dept. of Corrections, 918 So. 2d 322 (Fla. 1st DCA 2005).

14. The evidence presented is unrefuted that at the time of his heart attack the claimant was employed as a correctional officer with the Florida DOC and was clearly a member of a protective class covered by section 112.18.

The independent medical examiners (IME) for the claimant

and the employer/carrier, as well as Dr. Kerensky and Dr. Jawde all testified that the claimant had CAD which resulted in a massage acute heart attack requiring a quadruple bypass that caused the claimant to develop cardiomyopathy, congestive heart failure, arrhythmia, and pulmonary hypertension. These physicians agree that these diagnoses are all considered to be heart disease contemplated by section 112.18, F.S. All these conditions/diseases are listed as a protected condition falling under the category of heart disease or hypertension in section 112.18.

It is also undisputed that the claimant has been unable to be gainfully employed and has suffered a "disability" as a result of his heart disease and sequela following his heart attack. He therefore meets the third prong for occupational presumption eligibility.

15. The independent medical examiners for the claimant and the employer/carrier both agree that there was no evidence of hypertension or heart disease on either of the two claimant's pre-employment physicals, even though that requirement is not applicable to correctional officers.

16. In addition to his reliance on the statutory presumption under section 112.18, F.S., the claimant argues that based on the testimony of his IME physician, Dr. Mathias, there

is an occupational nexus for his CAD and resulting heart attack. The claimant asserts that Dr. Mathias, testified that work stress could be a significant risk factor in the claimant's heart disease, even though it is impossible to state an cause of CAD. Dr. Mathias claims that epidemiological studies[3], which were attached to his deposition, show correctional officers have a higher incident of heart disease than other blue collar occupations. In fact, a review of said studies show that law enforcement officers rated fourth in the study compared to other described occupations. Therefore, I find no credible evidence that claimant established an occupational causation for his heart attack as required under Victor Wine.

17. Having found that the statutory presumption under section 112.18 is applicable here and the sole basis for compensability of his cardiac conditions, the burden of proof shifts to the employer/carrier to rebut the presumption. In City of Tarpon Springs v. Vaporis, 953 So. 2d 597 (Fla. 1st DCA 2007), the Court recently held that the "firefighter's presumption merely switches the burden of proof from the claimant to the employer, and may be overcome by, as the statute plainly states, 'competent evidence.'" In Vaporis, the Court found that the JCC erroneously applied a greater burden of proof

[3] "Effect of Potential Modifiable Risk Factors Associated with Myocardial Infarction in 52 Countries (The INTERHEART Study) and "Case-Control Study: Association of Psychosocial Risk Factors with Risk of Acute Myocardial Infarction in 11,119 cases and 13,648 Controls from 52 Countries", (The INTERHEART Study), www.thelancet.com, Volume 364, September11, 2004.

to the employer/carrier when the JCC stated that the medical testimony did not establish that "some other specific hazard or non-occupational hazard was the cause of the claimant's disease." Vaporis at 599. The Court went on to say that all that section 112.18 requires to overcome the presumption is "competent substantial evidence that convinces the JCC that the disease was caused by some non-work-related factor not that it was caused by any sort of specific hazard or non-occupational hazard." See also Saldana v. Miami-Dade County, 978 So. 2d 823 (Fla. 1st DCA 2008). I distinguish these cases from Caldwell v. Div. of Ret., Fla. Dep't of Admin., *supra*, where the Florida Supreme Court held that "if there is **evidence supporting** the presumption the employer can overcome the presumption **only by clear and convincing evidence.**" (emphasis added). *Id* at 441. I interpret the phrase "evidence supporting the presumption" to mean that if the injured worker shows an unusual exertion or trauma or employment activity that causes a protected disease/condition, rather than relying solely on the statutory presumption which requires no proof of causation and shifts the burden to rebut on the Employer/Carrier, then, in that event, the Employer/Carrier can overcome the presumption only by presenting clear and convincing evidence, instead of the less stringent competent and substantial evidence standard. If find

here that since there is no proof of an occupational cause for the claimant's CAD and subsequent heart attack, the competent and substantial standard applies.

18. Section 112.18 states that a protected condition or disease is presumed to be accidental and to have been suffered in the line of duty "unless the contrary be shown by competent evidence." Dr. Mathias, the claimant's IME physician, testified that it is impossible medically or scientifically to state a cause for CAD. Dr. Nocero, the claimant's IME physician, and Dr. Jawde, the claimant's previously authorized treating physician, both seem to agree with Dr. Nocero's proposition. Nevertheless Doctors Nocero and Jawde provided reasonable and convincing opinions regarding reasons for the claimant's CAD and resulting heart attack and subsequent coronary sequela. Dr. Mathias stated that risk factors that may lead to heart disease are merely statistical correlations and cannot be considered a cause. Yet in his deposition he admitted that the claimant had several risk factors for heart disease. He stated that smoking was a risk factor since it is shown that there is a higher incident of heart disease in smokers, but found that it was not a "cause" for heart disease. He also found that the claimant's family history was also a second factor but not a cause, as well as job stress. He also stated that he could not assign a risk

factor in a hierarchy. He stated that risk factors are based on statistical correlation with high populations of patients and that using such information to infer causation in an individual is "absurd" because one may have all risk factors and still not develop CAD. Relying on the INTERHEART Study Dr. Mathias stated that stress was a significant risk factor in claimant's work, but essentially found no scientific supported basis to assign a cause to the claimant's CAD and occluded veins and heart attack. On cross-examination Dr. Mathias admitted that while it is impossible to state what caused a given individual's heart attack, one can draw "mathematical and scientific conclusions about the incident of cardiovascular disease in a population with identical risk factors." He also conceded that risk factors are clinically significant and that he uses them and are used in everyday clinical cardiac practice. However, he stated that he could not within a reasonable degree of medical certainty state what causes cardiovascular disease.

19. In contrast, Dr. Nocero, the employer/carrier's IME physician, found that the claimant's history consisted of a family history of coronary disease with a brother having suffered two heart attacks at ages 51 and 56, and a deceased father who had a coronary valve problem. The claimant had a long history of cigarette smoking since age 16 up to the date of

his heart attack in May, 2006 when he was 45 years old. Dr. Nocero also found that the claimant had pre-heart attack diabetes and elevated cholesterol levels prior to his heart attack.[4] Dr. Nocero said that in the development of CAD its "usually or probabilistically not one thing that does it. It's a bunch of things (risk factors) coming together that do it." He stated that these risk factors deposit cholesterol in the arteries where it doesn't belong and cause clotting.

Dr. Nocero found that the claimant's three major risk factors consisting of elevated cholesterol, smoking and diabetes work in concert led to cholesterol deposit in the coronary arteries causing the claimant's subsequent heart attack. He also found that Mr. Pierce's relatively young age at the time he suffered his heart attack (45 years old) showed that he had premature CAD and that genetic cause played a role (in its development). The doctor testified that the more risk factors a person has the greater the risk of having CAD and eventually developing heart attack and/or death. He testified that within the scientific community it is generally accepted that elevated cholesterol, cigarette smoking and diabetes are risk factors for the development of CAD. Dr. Nocero stated that within a reasonable degree of medical certainty the cause of the

[4] Dr. Kerensky also thought the Claimant had undiagnosed diabetes and evaluated cholesterol prior to his cardiac event.

claimant's cardiac condition was premature coronary atherosclerosis played out on an infrastructure of cigarette smoking for prolonged period of time and diabetes.

I find that in Mr. Pierce's case, the evidence is sufficiently convincing that the major three risk factors mentioned by Dr. Nocero was in fact the cause or reason for the claimant's CAD resulting in a heart attack. In other words, greater weight of the medical evidence indicates that the claimant's multiple risk factors worked in concert, and that concerted interchange of these risk factors caused his massive heart attack. Moreover, Dr. Nocero also supports his opinion by pointing out that because of the claimant's relatively young age when he suffered his heart attack, this fact reinforces his belief that one or all of the claimant's risk factors caused his coronary artery disease. The doctor stated that the claimant's young age at the time of his cardiac event made him suspect a genetic (heredity) role together with cigarette smoking, diabetes and elevated cholesterol as the cause of the claimant's coronary artery disease. Dr. Nocero found that these risk factors work together producing a cause of the claimant's heart condition. He did admit that stress could also possibly be a risk factor in CAD, but that stress did not have the weight of cigarette smoking, diabetes and elevated cholesterol contrary to

the opinion stated by Dr. Mathias.

Of significance and importance in this case was the medical testimony and opinions of Dr. Andre Jawde, M.D., the claimant's previously authorized treating cardiovascular physician. I find that Dr. Jawde's opinion supports the testimony of Dr. Nocero.

Dr. Jawde testified that he saw the claimant on January 4, 2007 on the authority of the Employer's managed care arrangement, Corvel. He reviewed medical records from Shands Healthcare and Tallahassee Memorial Hospital; although, he did not have a complete set of records. He testified that the claimant's past history consisted of being a long term smoker, family history of heart disease with one sibling who had previously suffered multiple heart attacks. The claimant informed him that he did not know whether he had hypertension or diabetes before his heart attack and did not know his past cholesterol status. Dr. Jawde testified that long term cigarette smoking is a major risk factor for cardiovascular disease because it can damage the inner lining of blood vessels and promote hypertension. He stated that he did not have the claimant's pre-injury cholesterol levels but that whatever his levels were, they were too high for Mr. Pierce. The doctor also found that the claimant's elevated cholesterol (dyslipidemia) was another major risk factor for CAD, and that other risk

factors were smoking, hypertension and diabetes which he called the big four. He found that Mr. Pierce's sibling who suffered a heart attack at 51 was a nebulous risk factor, but that this showed a family history which made Mr. Pierce more genetically prone to have heart disease.

Dr. Jawde found that the claimant is currently stable and can engage in activities of daily living, but no demanding activity since his heart functions at a diminished level. He found that the claimant could be a candidate for heart transplant or may need a biventricular pacemaker. He stated that Mr. Pierce was as well as could be expected but that he had significant limitations. He found that the current treatment Mr. Pierce is receiving is appropriate. He stated that he could not say with any certainty what role his employment played in the claimant's cardiac event. Dr. Jawde testified that the claimant had CAD that was not manifested prior to his employment. He stated that while working Mr. Pierce certainly experienced stress but could not state what role work stress played in the progression of CAD. The doctor also stated what role the claimant employment has played in triggering the destabilization and developing heart attack is not known, even though it was a factor but could not be measured or quantified. In any event, Dr. Jawde opined that work-related stress even

though a factor was not a major risk factor compared to smoking, family history and lipid disorder. He found that scientific studies make a correlation between smoking and an increased risk of CAD, which correlation is accepted by the medical community since "it's a well established thing beyond any doubt." Dr. Jawde, however could not give a percentage weight to each risk factor based on any scientific equation, but that in Mr. Pierce's case cigarette smoking was more than 50% of the major risk factors for CAD.

20. On cross-examination, Dr. Jawde testified that the trigger to destabilizing of the soft plaque causing blood clots could have been the stress of the claimant's job, but he could not state scientifically what caused the heart attack. He said that CAD is "a disease where we talk about risk factors because there is not one cause. People develop it based on conditions that we call risk factors that would favor its development." He found that Mr. Pierce is currently in a category of patients described as Class III, possibility Class IV, where he is heavily dependent on medication and should be confined to either bed, chair or wheelchair in terms of physical activity.

21. After reviewing and considering all of the medical evidence presented, in addition to the medical authorities attached to the depositions relied on by the medical witnesses,

I find that the employer/carrier in this case has presented sufficient competent and credible evidence that convinces me that the claimant's coronary artery disease developed as a result of non-work-related risk factors which in concert worked to develop said disease at a relatively young age thereby triggering his eventually myocardial infarction and resulting coronary sequela. I believe that this finding is in accord with the holdings in Vaporis, Saldana, and Lentini v. City of West Palm Beach, 980 So. 2d 1232 (Fla. 1st DCA 2008) requiring only "competent and substantial evidence that convinces a JCC that the (coronary artery) disease was caused by some non-work-related factor(s)…". Like in Lentini, Mr. Pierce did not present evidence of an occupational causation and relied exclusively on statutory presumption which requires only competent substantial evidence to rebut the presumption.

I distinguish this case from Punsky v. Clay County Sheriff's Office, 33 Fla. L. Weekly D1820 (Fla. 1st DCA July 21, 2008), wherein the Court found that "risk factors do not amount to causation." In trying to reconcile the differences and inconsistencies between recent appellate opinions regarding section 112.18 presumption cases relative to whether or not a specific cause must be identified for heart disease and the quantum of proof necessary to rebut the presumption, I find that

in this case the greater weight of the medical evidence (Doctors Nocero and Jawde over Doctor Mathias) favors the employer/carrier and is sufficient to rebut the statutory presumption of occupational causation provided in section 112.18. I find and accept the medical opinions of Dr. Nocero, the employer/carrier's IME physician, and Dr. Jawde, the claimant's prior authorized treating physician, to be more logical, reasonable, and credible then those of Dr. Mathias, who at times during his deposition seem to take the role of advocate rather than medical expert. In addition the claimant's relatively short period of employment with this employer of approximately 9 years, 30 years of smoking, and his pre-existing medical conditions consisting of undiagnosed asymptomatic diabetes and elevated cholesterol, all point to rational conclusion that the combination of these risk factors equate to what is generally considered the "cause" or reason of his coronary artery disease triggering his heart attack.[5] Therefore for the foregoing reasons, I find that the employer/carrier has successfully rebutted the statutory presumption relied on by the claimant for the compensability of his cardiac condition.

22. The claimant eluded that compensability of his cardiac condition can be found based on the 120 day rule found in

[5] Cause: aka: a reason for an action or condition, Merriam-Webster's Collegiate Dictionary, 11th Edition.

section 440.20(4), F.S. That section, in pertinent part, provides that

> "... [a] carrier that fails to deny compensability within 120 days after the initial provision of benefits or payment of compensation as required under subsection (2) or s. 440.192(8) waives the right to deny compensability unless the carrier can establish material facts relevant to the issue of compensability that it could not have discovered through reasonable investigation within the 120 day period. The initial provision of compensation or benefits, for purposes of this subsection, means the first installment of compensation or benefits to be paid by the carrier under subsection 2..."

The evidence presented here consisting of the deposition of Susan Grissom, Workers' Compensation Specialist, Department of Financial Services, shows that the First Report of Injury or Illness, dated November 20, 2006, was received on November 21, 2006. Ms. Grissom testified that by correspondence of November 27, 2006, Mr. Pierce was advised that workers' compensation benefits would be provided on a "conditional basis" under the 120 day "pay and investigate" provision of section 440.20(4), Florida Statute. The payout sheet attached to her deposition shows that a check for temporary indemnity benefits was first issued on November 29, 2006 in the amount of $393.30 for the period beginning November 20, 2006 to November 26, 2006.[6]

[6] On page 6 of the claimant's trial memorandum, counsel inaccurately stated that TTD benefits were first provided on November 17, 2006.

The carrier eventually filed its Notice of Denial on March 20, 2007, denying the compensability of the claim. I find that the initial provision of benefits was made on November 29, 2006 and the Notice of Denial was filed on March 20, 2007, 111 days from the initial provision of benefits. Even if one were to use the first date for the period initial benefits were paid of November 20, 2006, the denial was still filed within the 120 day period provided by the above statute. Consequently, the employer/carrier here did not waive its right to deny compensability.

23. In his trial memorandum, the claimant's counsel asserts that the employer/carrier herein should be estoppel from denying this claim in that their defensive position herein is inconsistent with the position the employer took when it granted Mr. Pierce's In-Line-of-Duty Disability Retirement Application. However, it was the Florida Department of Management Services, Division of Retirement, a different state agency, not the employer here who approved Mr. Pierce's application. Although both are state agencies, I find that there are two different forums with different procedural rules and statutes, even though section 112.18, is applicable to workers' compensation matters.

I find claimant's reliance on McCurdy v. Collis, 508 So. 2d 380, 384 (Fla. 1st DCA 1987), to be misguided and inapplicable

here. In McCurdy, the action was for tortious interference. Counsel quotes from the decision that the Court held that "a party who assumes a certain position in legal proceeding may not thereafter assume a contrary position." However, counsel neglected to include or complete the rest of the sentence in opinion which says that the doctrine of estoppel applies "especially if it is prejudicial to the party who acquiesced [relied] in the former position." There is no such showing of reliance by the claimant here.

Moreover, similar to the Court's decision in Bob Wilson Dodge v. Mohammed, 629 So. 2d 287 (Fla. 1st DCA 1997) reversing the JCC's Final Order awarding PTD benefits based solely upon the determination the claimant had been award SSD benefits by the Social Security Administration, a decision of another forum is not necessarily binding on this tribunal. In Mohammed, the Court held that a "claimant must prove every element of his workers' compensation claim."

I also find no evidence of reliance on the part of Mr. Pierce regarding the positions taken by the employer in this case. In fact, within days of receiving the claimant's notice of injury the employer/carrier here appropriately began providing workers' compensation benefits under the "pay and investigate" provision of section 440.20(4), Florida Statute.,

advised that acceptance of the claim was conditional, and provided the claimant with clear notice of their intention to investigate the matter. The fact that the employer/carrier initially accepted the claim compensable does not trigger estoppel nor does it have any bearing on its ultimate liability for payment of future workers' compensation benefits should a claim be filed for additional benefits. See Azarian v. Azarian, et al, 166 So. 2d 442 (Fla. 1964).

Finally, the claimant failed to show that the employer misrepresented a material fact, or that he relied upon such misrepresentation, and changed his position based upon his misrepresentation to his detriment. Regency Electric Company v. Honrath, 673 So. 2d 897 (Fla. 1st DCA 1996).

24. In conclusion, having found that the claimant failed to establish an occupational cause for his coronary artery disease and resulting cardiac events and conditions, and the employer/carrier having sustained its burden of show competent evidence rebutting the statutory presumption in section 112.18, Florida Statute, and for the other reasons stated herein, the claim for compensability of the captioned event and resulting cardiac conditions as well for workers' compensation benefits must be denied.

WHEREFORE, it is **ORDERED** that the aforesaid claim of the

employee, Michael J. Pierce, based upon his claimed injuries and conditions, suffered while employed with the State of Florida, Department of Corrections, occurring on or about May 24, 2006 is hereby **DENIED.**

DONE AND ORDERED at Tallahassee, Leon County, Florida.

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Certificate of Service

I HEREBY CERTIFY that the foregoing Order was entered and a true copy furnished by regular mail on this 29th day of August, 2008 to the captioned parties, or their attorneys if represented, at the following addresses:

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