

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SHEILA KIESS,)
)
 Petitioner,)
)
 vs.) Case No. 03-2287
)
 FLORIDA INTERNATIONAL)
 UNIVERSITY,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on September 29, 2003, at sites in Tallahassee and Miami, Florida.

APPEARANCES

For Petitioner: James C. Casey, Esquire
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For Respondent: Peter A. Blanco, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner, who was hurt while working for Respondent as a law enforcement officer, suffered a catastrophic injury on or after January 1, 1995,

making her eligible for lifetime health insurance benefits pursuant to Section 112.19(2)(h)1., Florida Statutes.

PRELIMINARY STATEMENT

This case arises from a claim for lifetime health insurance benefits that Petitioner Sheila Kiess presented to Respondent Florida International University—for whom she had worked as a law enforcement officer—after suffering the catastrophic injury which, she asserts, made her eligible for the benefits in question pursuant to Section 112.19(2)(h)1., Florida Statutes. By letter dated May 19, 2003, Respondent denied Petitioner's claim, contending that "the root cause and/or the major contributing cause of [her] current disability" was a work-related accident that occurred in September 1994—several months too soon to serve as the basis for benefits under Section 112.19(2)(h)1.

Petitioner timely requested a hearing, and on June 12, 2003, the matter was referred to the Division of Administrative Hearings ("DOAH"). Thereafter, the undersigned scheduled a final hearing for September 29, 2003.

At the final hearing, Petitioner testified on her own behalf and offered four exhibits, which were identified as Petitioner's Exhibits 1 through 4 and received in evidence. Respondent offered the deposition testimony of Dr. Charles Virgin (as Respondent's Exhibit 1), two depositions of

Petitioner (as Respondent's Exhibits 2 and 3), and one other document (as Respondent's Exhibit 4). Each of these items was admitted into evidence.

The final hearing transcript was filed with DOAH on October 13, 2003, and the parties timely filed their respective Proposed Recommended Orders before the established deadline, which was October 31, 2003.

Unless otherwise indicated, citations to sections within Chapter 112 of the Florida Statutes refer to the 1997 Florida Statutes, while citations to sections of Chapter 440 refer to the 1995 Florida Statutes.

FINDINGS OF FACT

1. From 1982 through January 1999, Petitioner Sheila Kiess ("Kiess") was employed by Respondent Florida International University ("FIU") as a law enforcement officer.

2. On September 16, 1994, Kiess was injured at work in the course of subduing a violent young man who managed, in the struggle, to kick her right arm, causing severe pain. (This event will be referred to hereafter as the "First Accident.") Kiess immediately reported to a clinic for medical attention, following which she returned to duty and completed her shift.

3. Through workers' compensation, Kiess received regular, ongoing medical treatment for her injured right arm, which continued to hurt and became even more painful as time passed.

She continued to work as well but was not able to use her right arm. On December 17, 1994, Kiess's doctor deemed her "unable to work," at which point she stopped working.

4. Kiess's treating physician released her to return to modified duty on January 4, 1995. Accordingly, on or about that date, despite being still without the beneficial use of her right arm, Kiess resumed her duties as Shift Supervisor on the 4:00 p.m. to midnight shift.

5. On January 24, 1995, while on duty, Kiess was called upon to help restrain an unruly person. Her previously injured right arm was twisted while wrestling with the combatant, causing great pain. (This event will be referred to hereafter as the "Second Accident.")

6. After the Second Accident, Kiess received medical treatment, again through workers' compensation, at the same clinic where she had been seen regularly for the preceding four months as a result of the First Accident. She continued to work, with limitations on the use of her right arm.

7. Some months later, Kiess came under the care of an orthopedic surgeon named Dr. Charles Virgin, who first saw her on June 12, 1995. Dr. Virgin determined that Kiess had sustained damage to the tendons around her right elbow.

8. On April 23, 1996, Dr. Virgin operated on Kiess's elbow, surgically removing damaged tissue and repairing the

extensor tendon. At some point thereafter, Kiess returned to work.

9. As Kiess healed from the surgery, the "old pain" associated with the preoperative trauma to her right arm gradually began to subside. In August 1996, however, Kiess began to experience "new pain" that was the result of a condition diagnosed as Reflex Sympathetic Dystrophy ("RSD").¹ The RSD most likely was caused by the preoperative trauma, or by the surgery, or by some combination thereof.

10. About one year later, Dr. Virgin determined that, as of August 14, 1997, Kiess had reached maximum medical improvement ("MMI").² For workers' compensation purposes, Dr. Virgin assigned Kiess a permanent impairment rating of six percent of the body as a whole.

11. Despite having achieved MMI, Kiess suffered—and as of the date of the final hearing continued to suffer—constant, crippling pain, muscle spasms, swelling, and other symptoms caused by RSD. On July 27, 1998, Dr. Virgin wrote that Kiess was "temporarily totally disabled and . . . unable to work as a result of her employment injury." After that, Kiess did not regularly, if ever, resume her duties at FIU.

12. Effective January 21, 1999, FIU terminated Kiess from her employment as a police officer because her physical limitations could not be reasonably accommodated.

13. FIU's workers' compensation carrier accepted Kiess as permanently and totally disabled, effective November 26, 2001.

Ultimate Factual Determinations

14. The parties have stipulated and agreed, and consequently the undersigned determines as an ultimate fact, that Kiess has suffered a "catastrophic injury" as that term is defined in Section 440.02, Florida Statutes.

15. There is likewise no dispute that both the First Accident and the Second Accident occurred in the line of duty; that each did so is, therefore, accepted and found as a matter of ultimate fact. Further, it is undisputed, and hereby found, that the injuries Kiess suffered as a consequence of the referenced accidents occurred as a result of her responses to situations involving either an emergency or an unlawful act perpetrated by another.

16. Finally, for reasons more fully explained below, it is determined that Kiess, on or after January 1, 1995, suffered a "catastrophic injury" in the line of duty.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2002).

18. The statutory provisions upon which Kiess bases her claim for health insurance benefits were enacted in 1996 as part

of the Alu-O'Hara Public Safety Act ("Act"). See Ch. 96-198, § 3, at 650-51 Laws of Fla. (1996). Codified at Section 112.19(2)(h), Florida Statutes, the relevant provisions of the Act provide in pertinent part:

1. Any employer^[3] who employs a full-time law enforcement, correctional, or correctional probation officer who, on or after January 1, 1995, suffers a catastrophic injury, as defined in s. 440.02(34), in the line of duty shall pay the entire premium of the employer's health insurance plan for the injured employee, the injured employee's spouse, and for each dependent child of the injured employee until the child reaches the age of majority or until the end of the calendar year in which the child reaches the age of 25 if the child continues to be dependent for support, or the child is a full-time or part-time student and is dependent for support. The term "health insurance plan" does not include supplemental benefits that are not part of the basic group health insurance plan. If the injured employee subsequently dies, the employer shall continue to pay the entire health insurance premium for the surviving spouse until remarried, and for the dependent children, under the conditions outlined in this paragraph.

* * *

2. In order for the officer, spouse, and dependent children to be eligible for such insurance coverage, the injury must have occurred as the result of the officer's response to fresh pursuit, the officer's response to what is reasonably believed to be an emergency, or an unlawful act perpetrated by another. Except as otherwise provided herein, nothing in this paragraph shall be construed to limit health insurance coverage for which the officer, spouse, or

dependent children may otherwise be eligible, except that a person who qualifies under this section shall not be eligible for the health insurance subsidy provided under chapter 121, chapter 175, or chapter 185.

(Emphasis added.)

19. The ultimate dispute in this case is one of timing, namely, whether Kiess, on or after January 1, 1995, suffered a work-related "catastrophic injury" as defined in Section 440.02(34). If the answer is "yes," then, the parties agree, Kiess is entitled to the benefits, and if "no," she is not.

20. The parties generally agree that the date of Kiess's "catastrophic injury" must be either September 16, 1994 (the First Accident) or January 24, 1995 (the Second Accident). Each party, in other words, implicitly accepts the notion that the "catastrophic injury" occurred simultaneously with the causative accident. Therefore, the parties, in their Pre-Hearing Stipulation, framed the dispositive issue as being which "accident (9/16/94 vs. 1/24/95) . . . resulted in the permanent impairment that led to the current disability."

21. To sort out this dispute requires a careful examination of the relevant definition of the term "catastrophic injury," which is found in the Workers' Compensation Law. According to Section 440.02(37), Florida Statutes,

"Catastrophic injury" means a permanent impairment constituted by:
(a) Spinal cord injury involving severe

paralysis of an arm, a leg, or the trunk;
(b) Amputation of an arm, a hand, a foot, or a leg involving the effective loss of use of that appendage;
(c) Severe brain or closed-head injury as evidenced by:
1. Severe sensory or motor disturbances;
2. Severe communication disturbances;
3. Severe complex integrated disturbances of cerebral function;
4. Severe episodic neurological disorders;
or
5. Other severe brain and closed-head injury conditions at least as severe in nature as any condition provided in subparagraphs 1.-4;
(d) Second-degree or third-degree burns of 25 percent or more of the total body surface or third-degree burns of 5 percent or more to the face and hands;
(e) Total or industrial blindness; or
(f) Any other injury that would otherwise qualify under this chapter of a nature and severity that would qualify an employee to receive disability income benefits under Title II or supplemental security income benefits under Title XVI of the federal Social Security Act as the Social Security Act existed on July 1, 1992, without regard to any time limitations provided under that act.[⁴]

(Emphasis added.)

22. The term "permanent impairment," which is an integral part of the definition of "catastrophic injury," is itself a term of art, being defined in Section 440.02(19), Florida Statutes, as follows:

"Permanent impairment" means any anatomic or functional abnormality or loss determined as a percentage of the body as a whole, existing after the date of maximum medical

improvement, which results from the injury.

(Emphasis added.)

23. The definition of "permanent impairment" incorporates two more terms of art—"date of maximum medical improvement" and "injury"—which are defined, respectively, as follows:

"Date of maximum medical improvement" means the date after which further recovery from, or lasting improvement to, an injury or disease can no longer reasonably be anticipated, based upon reasonable medical probability.

* * *

"Injury" means personal injury or death by accident arising out of and in the course of employment,⁵ and such diseases or infection as naturally or unavoidably result from such injury. Damage to dentures, eyeglasses, prosthetic devices, and artificial limbs may be included in this definition only when the damage is shown to be part of, or in conjunction with, an accident. This damage must specifically occur as the result of an accident in the normal course of employment.

See § 440.02(8) and § 440.02(17), Fla. Stat. (emphasis added).

24. One other definition, finally, is useful in understanding the terms under review:

"Time of injury" means the time of the occurrence of the accident resulting in the injury.

See § 440.02(23).

25. As the above definitions make clear, the term "catastrophic injury" does not refer, in this context, to the

bodily damage caused when the accident occurs; the separately defined word "injury" covers that. Instead, "catastrophic injury" refers to a condition that comes into being, if at all, only later, at the end of the recovery process ("after the date of maximum medical improvement"), once the "injury" has healed. By definition, a "catastrophic injury" must follow the "accident"/"injury" in terms of chronology; causally, it must result from the "accident"/"injury". In sum, a "catastrophic injury" cannot happen at the moment of the occurrence of the "accident"/"injury."

26. This means that in Section 112.19(2)(h)1., Florida Statutes, the phrase "in the line of duty" was intended to prescribe not when but how the "catastrophic injury" must have happened; the connotation is necessarily causal because a "catastrophic injury," as relevantly defined, cannot occur "in the line of duty" in the temporal sense of the latter phrase.

27. This understanding of Section 112.19(2)(h)1 is reinforced by Section 112.19(2)(h)2, which adds that, for the injured officer to be eligible for subsidized health insurance, "the injury must have occurred as the result of the officer's response to fresh pursuit, the officer's response to what is reasonably believed to be an emergency, or an unlawful act perpetrated by another." See § 112.19(2)(h)2., Fla. Stat. (emphasis added). Effectively defining what is meant by "in the

line of duty,"⁶ subpart 2 specifies what the officer must have been doing when the "injury" occurred—not, tellingly, when the "catastrophic injury" became manifest. The statute's use of the word "injury" to refer to the harm occurring at the time of the accident is consistent with the definitions in Section 440.02 and suggests that the legislature intended to maintain in Section 112.19(2)(h) the distinction between "injury" and "catastrophic injury" that is drawn under the Workers' Compensation Law.

28. In determining whether Kiess suffered a "catastrophic injury" on or after January 1, 1995, then, it is not the date of the causative accident that is relevant, as the parties have supposed, but rather the date of the "catastrophic injury." This conclusion obviates the need to ascertain the degree to which each accident contributed causally to Kiess's "catastrophic injury," since it is undisputed that the First Accident and the Second Accident each occurred "in the line of duty" as that phrase is used in Section 112.19(2)(h)1., Florida Statutes.

29. Unlike "time of injury," which is a defined term, there is no statutory definition that fixes the date of a "catastrophic injury." However, because a "catastrophic injury" entails a "permanent impairment," see City of Pensacola Firefighters v. Oswald, 710 So. 2d 95, 97 (Fla. 1st DCA 1998),

and because a "permanent impairment" ordinarily cannot be determined until "after the date of maximum medical improvement,"⁷ the date of MMI in most cases should mark the earliest emergence of a "catastrophic injury." In this case, in any event, because Kiess did not reach MMI until August 14, 1997, at the earliest, and because, moreover, the evidence shows overwhelmingly that Kiess had not fully recovered from the First Accident as of January 1, 1995, it is easily concluded that Kiess's "catastrophic injury" occurred after January 1, 1995.⁸

30. Accordingly, Kiess is eligible to receive health insurance premiums pursuant to Section 112.19(2)(h), Florida Statutes.

31. As a final matter, in addition to contending that Kiess should be deemed ineligible for the health insurance benefits that she has claimed, FIU urges that Kiess be adjudged in violation of Section 112.19(2)(h)1.b., Florida Statutes, which makes it a first degree misdemeanor "to willfully and knowingly make, or cause to be made, or to assist, conspire with, or urge another to make, or cause to be made, any false, fraudulent, or misleading oral or written statement to obtain health insurance coverage as provided [hereunder]." The statute, however, neither authorizes FIU to prosecute this crime on behalf of the State of Florida nor grants DOAH jurisdiction to adjudicate such allegations of criminal misconduct.

Therefore, the question whether Kiess violated Section 112.19(2)(h)1.b will not be answered here.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Respondent FIU enter a final order accepting Petitioner Kiess's claim for health insurance benefits pursuant to Section 112.19(2)(h)1., Florida Statutes.

DONE AND ENTERED this 17th day of November, 2003, in Tallahassee, Leon County, Florida.

S

JOHN G. VAN LANINGHAM
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Filed with the Clerk of the
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this 17th day of November, 2003.

ENDNOTES

^{1/} According to Dr. Virgin, whose testimony in this regard is accepted as credible, RSD is "a disconnect in the neurophysiologic sense between the stimulator and the perception of that stimulator." Thus, persons with RSD might experience pain when touched, rather than the sensation of a touch. Heat

might feel cold to such persons, pressure might feel like a pinprick, and a pinprick like pressure.

^{2/} There is a suggestion in the record that Kiess reached MMI in January 1998. The undersigned has found that the earlier date set forth in the text is more likely the correct one, but notes that this discrepancy is immaterial.

^{3/} No issue was raised concerning FIU's status as an "employer" as that term is defined in Section 112.19(1)(a), Florida Statutes.

^{4/} The parties agree that Kiess's injuries fall within subparagraph (f) of this definition.

^{5/} The terms "accident" and "arising out of and in the course of employment" also have special meanings in the law of workers' compensation, but, because it is undisputed that each of the accidents in question constituted an "accident arising out of and in the course of employment," a detailed examination of these terms is unnecessary.

^{6/} The first sentence of Section 112.19(2)(h)2 is tantamount to a narrow definition of "in the line of duty;" note that, for present purposes, "in the line of duty" is not synonymous with "on the job."

^{7/} As explained in Oswald, a permanent impairment rating must be assigned, for workers' compensation purposes, before the date of MMI in those cases where the claimant is not yet at MMI six weeks prior to the expiration of temporary benefits, which are payable for up to two years. Id. While interesting, however, this particular nuance of the Workers' Compensation Law is of no moment here, for even if Kiess were deemed to have suffered a "catastrophic injury" at the end of 98 weeks after the time of injury, the operative date for purposes of Section 112.19(2)(h) would be long after January 1, 1995, regardless which accident were chosen as the starting point.

^{8/} Underscoring this conclusion is the fact that Kiess did not begin to develop RSD until around August 1996. Before that disabling condition arose, Kiess had been making good progress towards recovery after the surgery in April 1996 on her damaged right arm. Thus, as late as the summer of 1996, it would still have been reasonable to assume that Kiess was not going to be

permanently impaired—and hence was not going to suffer a “catastrophic injury.”

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.