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

Vernon Keith Bradshaw, Employee/Claimant, vs. Custom Architectural Metals, Inc./Travelers Property and Casualty Corporation, Employer/Carrier/Servicing Agent. and Wal-Mart Stores/Sedgwick Employer/Carrier/Servicing Agent.	)	OJCC Case No. 89-002402TGP Accident dates: July 21, 1989 and August 12, 1991 Judge: Thomas G. Portuallo

ORDER ON PERMANENT TOTAL DISABILITY AND PERMANENT TOTAL SUPPLEMENTAL BENEFITS

After proper notice to all the parties, a Final Merit Hearing was held before the undersigned Judge of Compensation Claims on September 26, 2011, in Daytona Beach, Volusia County, Florida. The Petitions for Benefits at issue were filed on May 24, 2010, and October 8, 2010. The Claimant, Vernon Bradshaw, was represented by Attorney William Berzak. Employer/Carrier #1, Custom Architectural Metals, Inc./Travelers Insurance Company, was represented by Attorney Thomas McDonald. Employer/Carrier #2, Wal-Mart/Sedgwick CMS, was represented by Attorney Michael Waranch.

Statement of the Case

The Claimant is presently 73 years old.

The Claimant's first industrial accident occurred on July 21, 1989, while working for Custom Architectural Metals (Employer/Carrier #1). On that day, while at work, a car from a third party lost control and struck him, pinning him to a wall and injuring the claimant's left side and in particular, his left knee, arm, hip, and low back.

The Claimant was able to return to work and suffered a second industrial accident on August 12, 1991, while working for Wal-Mart (Employer/Carrier #2). On that day, the Claimant was climbing a ladder when his previously injured left knee gave out, causing the Claimant to fall and sustain multiple fractures to his left ankle and other injuries.

A final hearing was held on May 16, 1994, on a claim for indemnity benefits, including permanent total disability, the allocation of indemnity benefits, and medical benefits between the two Employer/Carriers. In an Order dated June 21, 1994, the claim for permanent total disability was denied. However, past wage loss benefits and chiropractic treatment were awarded. The remaining medical benefits and indemnity benefits were allocated between the Employer/Carrier's on 75% - 25% basis.

Thereafter, following further discovery and litigation, the parties entered into a stipulation on September 20, 1996, accepting the Employee as permanently and totally disabled effective March 24, 1996, with Employer/Carrier #1 being responsible for Compensation benefits of $267.25 a week and Employer/Carrier #2 being responsible for

$197.75 a week. The stipulation also reserved jurisdiction with the JCC on any reimbursement issue between the Employer/Carriers.

At mediation on May 7, 2004, the parties entered into a stipulation that the Claimant was entitled to the maximum compensation payable in 2004 for $626.00 with Employer/Carrier #1 paying 75% and Employer/Carrier #2 paying 25%.

Issues and Defenses

At the initial Pretrial Questionnaire, the Claimant identified the issues to be determined at the Final Hearing as follows:

1. Determination of Correct PTD and Supp benefits payable by Employer/Carrier #1 and Employer/Carrier #2 pursuant to June 21, 1994 Compensation Order without reduction for allocation between Employer/Carriers;

2. Payment of past-due indemnity benefits from Employer/Carrier #1 and Employer/Carrier #2 based on correct rate for indemnity benefits;

3. Payment of statutory interest and penalties; and

4. Payment of attorney's fees and reimbursement of costs.

Employer/Carrier #1, Custom Architectural Metals/Travelers Insurance Company, defended these issues on the initial Pretrial Questionnaire on the grounds that:

1. The June 21, 1994, Order does not affect permanent total disability/supplemental benefits as it specifically denied permanent total disability benefits;

2. Employer/Carrier #1 is paying permanent disability/supplemental benefits at correct rate, so no past indemnity is owed; and

3. No penalties, interest, costs or attorney's fees due.

Employer/Carrier #2, Wal-Mart/Sedgwick CMS, defended these issues at the initial Pretrial Questionnaire on the grounds that:

1. Paying permanent total disability benefits at the correct rate;

2. No penalties, interest, costs, or attorney's fees due.

At the September 26, 2011, Final Hearing, Employer/Carrier #2, Wal-Mart/Sedgwick CMS, amended their defenses and stipulated that they would pay the Claimant past due indemnity benefits at the compensation rate corresponding to the August 12, 1991, date of accident, $161.99, for the period of time of February 3, 2010, up to the date of the final hearing.

Position of the Parties

- **Claimant**

The Claimant argued that the JCC's prior Order in this case, dated June 21, 1994, and subsequent stipulations of the parties, mandated that both Employer/Carriers shall pay full permanent total disability benefits, presently at the rate of $760.20, to the Claimant without regard to allocation between the two Employer/Carriers and, thereafter, the parties should administratively handle the issue of reimbursement between both Employer/Carriers. The Claimant asserted the award permanent total disability benefits at the rate of $760.20 should be based upon a determination of a matter of law, including application of the legal doctrines of "res judicata" and "law of the case", and that medical evidence and vocational evidence do not need to be presented in this case.

Additionally, the Claimant argued that, pursuant to the wording of June 21, 1994 Order, the Claimant should not be "punished" for his return to work and, therefore, he

should receive his full permanent total disability and supplemental benefits, presently at the rate of $760.20. The Claimant argued that, in order to accomplish this, the JCC's prior determination in the 1994 Order, that Employer/Carrier #2 shall be limited to payment of a compensation rate of $161.99, should be changed or modified so that Employer/Carrier #2 may pay above this amount. Otherwise, the Claimant argued that the JCC's prior determination, that Employer/Carrier #1 shall pay no more than 75% of the allocation, should be changed or modified so that Employer/Carrier #1 may pay above this amount.

- **Employer/Carrier #2, Wal-Mart/Sedgwick CMS**

Employer/Carrier #2, Wal-Mart/Sedgwick CMS, argued that they owe no more than $161.99, their compensation rate for their particular date of accident, pursuant to the "law of the case" and the expressed rulings contained in the 1994 Order which limited payment by both Employer/Carriers to their respective compensate rates. Further, Employer/Carrier #2 argued that Employer/Carrier #1 should be ordered to pay the remaining amount of permanent total disability benefits, including supplemental benefits.

- **Employer/Carrier #1, Custom Architectural Metals/Travelers**

Employer/Carrier #1, Custom Architectural Metals/Travelers Insurance Company, argued that the Claimant cannot "cherry pick" the parts of the 1994 Order that his wants to impose while ignoring the portions of the 1994 Order that he wishes the Court to ignore. Employer/Carrier #1 argued that the 1994 Order in this case awarded wage loss benefits and allocated responsibility between the Employer/Carriers as to the payment of temporary indemnity benefits, wage loss, and medical benefits, but denied permanent

total disability as "premature". Employer/Carrier #1 argued that the 1994 Order awarded benefits that are significantly distinguished from the benefits currently at issue and that the 1994 Order does not govern the pending claim for the correct payment of permanent total and supplemental benefits.

Additionally, Employer/Carrier #1 argued that the prior stipulations of the parties solely addressed the pay rate of permanent total disability benefit during specific prior years and, therefore, those stipulations do not support an award of benefits as currently requested by the Claimant.

Documentary Evidence

At the Final Merit Hearing, the following documentary exhibits were admitted into evidence:

JCC's Exhibit # 1	Order of this Court dated March 1, 2011, Granting Claimant's Motion to consolidate claims and Claimant's Motion to Consolidate, filed February 25, 2011.
JCC's Exhibit # 2	Order of this Court dated March 15, 2011.
JCC's Exhibit # 3	Claimant's Memorandum of Law, admitted for argument purposes only.
JCC's Exhibit # 4	Employer/Carrier #1's Memorandum of Law, with citation of supplemental authority, admitted for argument purposes only.
JCC's Exhibit # 5	Employer/Carrier #2's Memorandum of Law, admitted for argument purposes on only.
Claimant's Exhibit # 1	Order of Judge of Compensation Claims, Robert C. Cooper, dated January 31, 1992.

Claimant's Exhibit # 2	First District Court of Appeal Opinion in this case, filed August 30, 1993.
Claimant's Exhibit # 3	Order of Judge of Compensation Claims, Rand Hoch, dated June 21, 1994.
Claimant's Exhibit # 4	Stipulation of the parties, dated September 20, 1996.
Claimant's Exhibit # 5	Mediation Settlement Agreement Report dated May 7, 2004.
Claimant's Exhibit # 6	Payout sheet for Travelers Insurance Company.
Claimant's Exhibit # 7	Payout sheet for Sedgwick CMS.

Findings of Fact and Conclusions of Law

In making my findings of fact and conclusions of law in this matter, I have carefully considered and weighed all the evidence presented to me including all the documentary exhibits and I have resolved any and all conflicts therein. After having carefully considered the arguments of the parties and all evidence presented in this case, I make the following findings of fact and conclusions of law:

1. The stipulations of the parties as listed above and as identified in the Pretrial Questionnaire are approved and adopted by me.

2. This Court has jurisdiction over the subject matter and over the parties.

3. In making the determinations set forth below, I have attempted to distill the salient facts together with the findings and conclusions necessary for the resolution of this claim. I have not attempted to painstakingly summarize the substance of all the documentary evidence nor have I attempted to state nonessential facts. Because I have not done so does not mean I have failed to consider all the evidence.

Undisputed Facts

4. I accept each of the undisputed facts in this case, listed below, as consistent with the position of all parties and consistent with the totality of evidence in this case.

5. It is not disputed that there is no pending claim for reimbursement or contribution between the two Employer/Carriers in this case.

6. It is not disputed that the JCC's prior Order in this case, dated June 21, 2004, denied the claim for permanent total disability (Claimant's Exhibit # 3). I note the 1994 Order, page 14, found as follows:

> Based on my acceptance of Dr. Huster's testimony that the Employee has not reached maximum medical improvement, I find that the claim for permanent total disability is premature and is dismissed without prejudice. Any previously paid wage loss or PTD benefits paid by Wal-Mart/Claims Management, Inc. must be reclassified as temporary partial benefits.
>
> Further, I note the 1994 Order, page 14, found:
>
> In short, it is my determination that there is a reasonable probability or at least a reasonable possibility that the Employee may be rehabilitated to the extent he can achieve suitable employment given his age, education, previous occupation, injury and medical restrictions. Accordingly, retraining should be explored further.

7. It is not disputed that the JCC's prior Order in this case, dated June 21, 2004, page 18, found that;

> Neither employer/carrier shall be required to pay or reimburse temporary disability or wage loss benefits in excess of their respective compensation rates.

8. It is not disputed that the Claimant's average weekly wage for the first date of accident of July 21, 1989, is $600.00.

9. It is not disputed that the average weekly wage for the second accident of August 12, 1991, is $242.99, with a corresponding compensation rate of $161.99.

10. It is not disputed that both Employer/Carriers ultimately agreed to accept the Claimant as permanently totally disabled effective March 24, 1996, by way of stipulation dated September 20, 1996 (Claimant's Exhibit # 4).

11. It is not disputed that the Claimant's average weekly wage for the first date of accident of July 21, 1989, with a corresponding maximum compensation rate of $362.00, has been utilized by the parties for paying past permanent total disability benefits, not including supplemental benefits.

12. It is not disputed that, in general, pursuant to the Florida Workers' Compensation Law as applicable to the first date of accident in this case, July 21, 1989, lifetime supplemental benefits are payable to a Claimant who is permanently and totally disabled. Additionally, it is not disputed that, in general, pursuant to the Florida Workers' Compensation Law as applicable to the second date of accident in this case, July 21, 1989, supplemental benefits end once a Claimant attains age 62.

13. It is not disputed that the Claimant in the present case attained the age of 62 on August 1, 2000.

Burden of Proof

14. I find the Claimant failed to satisfy his burden of proof, by a preponderance of evidence, in order for this Court to determine the correct permanent total disability and supplemental benefits payable by Employer/Carrier #1 and Employer/Carrier #2.

15. I find the Claimant failed to satisfy his burden of proof, by a preponderance of evidence, that he is entitled to past due indemnity benefits from Employer/Carrier #1 and Employer/Carrier #2 based upon a correct rate of indemnity benefits.

16. I find that the Claimant failed to satisfy his burden of proof, by a preponderance of evidence, that any prior Order of this Court should be changed or modified.

17. In making these findings, again, I note there was no medical evidence and no vocational evidence presented in this case. Also, I note that permanent total disability benefits were not awarded pursuant to an Order of the JCC, but instead were denied by the JCC. Also, I note permanent total disability benefits were eventually paid in this case based upon a scant stipulation of the parties. Without additional evidence in the Record, the undersigned cannot determine that the Claimant is permanently and totally disabled due to any particular date of accident, due to any particular compensable injury, or due to a combination of compensable injuries. I cannot determine the average weekly wage applicable to the stipulated benefit of permanent total disability. Thus, I cannot determine the Claimant's appropriate rate of pay for permanent total disability benefits and supplemental benefits. Additionally, I cannot determine whether the Claimant is entitled to supplemental benefits since reaching age 62 in the year 2000.

18. Further, when considering the total circumstances of this case, I find that each of the above mentioned determinations are material to the issues in this case when considering the disparity in the average weekly wage for each date of accident and the

differences in workers' compensation law with regard to the payment of supplemental benefits beyond the age 62 as applicable to each date of accident.

19. I find the Claimant failed to present sufficient evidence for this Court to make a reasonable determination on the issues in this case. Accordingly, I find the Claimant's outstanding Petitions for Benefits, seeking payment of permanent total disability and supplemental benefits are denied without prejudice so that the Judge of Compensation Claims may determine the merits of the claim based upon medical and vocational evidence, if necessary.

"Res Judicata"

20. At the Final Hearing, the Claimant argued that the issues presently before this Court are subject to determination solely based upon a matter of law, specifically the legal doctrine of res judicata. As such, as noted above, no corroborating evidence on the merits of claim for permanent total disability benefits was presented, including no medical and no vocational evidence. The Claimant argued that the Judge of Compensation Claims' previous findings by Order dated June 21, 1994, in this case are binding on the undersigned Judge of Compensation Claims when determining the issues regarding payment of permanent total disability and corresponding supplemental benefits presently before this Court.

21. After reviewing the totality of evidence and arguments in this case, I find that the legal doctrine of res judicata does not apply to the present set of circumstances. Instead, I find the legal doctrine of res judicata is a procedural bar which essentially precludes the re-litigation, in a subsequent cause of action, of claims that were raised or

claims that could have been raised at an earlier time. Res judicata is a legal defense to claims. Under the doctrine of res judicata, if a final hearing occurred and mature claims were not litigated, those claims are considered waived and subsequent litigation is precluded. Please see: Topps v. State of Florida, 865 So. 2d 1253 (Fla. 2004); Boyton Landscape and Liberty Mutual Insurance Co. v. James Dickinson, 752 So. 1236 (Fla. 1st DCA 2000); and Heidi Thomas v. Eckerd Drugs and AIG, 987 So. 2d 1262 (Fla. 1st DCA 2008).

Alternative Finding on Res Judicata

22. If it is determined that the legal doctrine of res judicata is applicable to the circumstance of this case, a position I reject, I make the alternative ruling that res judicata does not support an award of benefits under these circumstances.

23. In making this finding, I accept the position of Employer/Carrier #1, Custom Architectural Metals, Inc./Travelers Insurance, on this issue as set forth in their pretrial Memorandum of Law and at the final hearing (JCC's Exhibit # 4). I find the argument of Employer/Carrier #1 on this issue is most logical, reasonable, and consistent with the totality of evidence and circumstances of this case.

24. I accept the argument of Employer/Carrier #1 that, to make a matter res judicata, there must be identity of things sued for, identity of cause of action, identity of persons and parities, and identity of quality or capacity of person for whom or against whom a claim is made. I accept the argument that res judicata is not applicable when the subsequent claim relates to a different time frame or involves facts that arose after the prior order had been entered, as in the instant case. I find that Employer/Carrier #1 cited

appropriate legal authority to support their position on these issues, including the cases of ICC Chemical Corporation v. Freeman, 640 So. 2d 92 (Fla. 1st DCA 1994), Myers v. Hillsboro County School Board, 982 So. 2d 735 (Fla. 1st DCA 2008), and Nelco Companies v. Lott, 937 So. 2d 1219 (Fla. 1st DCA 2006).

25. I find that the identity of the benefits awarded in the 1994 Order in this case is not the same as the benefits currently at issue. I note it is not disputed that the 1994 Order awarded wage loss benefits and allocated responsibility between the employer/carriers as to the payment of temporary indemnity benefits, wage loss benefits, and medical benefits. On the other hand, the subject of the pending claim is permanent total disability benefits and supplemental benefits which were denied as "premature" by the terms of the 1994 Order. Accordingly, I find the 1994 Order is not res judicata with regard to the benefits currently at issue.

26. I accept the argument of Employer/Carrier #1 that the distinction between the indemnity and medical benefits awarded in the 1994 Order and the indemnity benefits now at issue is not just a technical or academic distinction. I find that the JCC's reasoning for ordering the payment of benefits in 1994 by first paying the Claimant without regard to allocation is found in the contents of the 1994 Order, pages 15 and 16. There, the JCC based the rate of pay of wage loss benefits on Florida Statutes 440.15(5)(c) and (d) (1989), which governs situations where the Claimant is entitled to receive wage loss benefits from an earlier injury and suffers a subsequent injury causing temporary disability or additional wage loss (Claimant's Exhibit # 3, page 15 and 16). I find that the determination contained in the 1994 Order, that the Claimant should not be

"punished" for returning to work at lower pay, was made in conjunction with the award of wage loss benefits and JCC's interpretation of Florida Statutes 440.15(5)(c) and (d) (1989). Further, based upon the plain meaning of the Statute, I find that Florida Statutes 440.15(5)(c) and (d) (1989) do not govern the rate of payment of permanent total disability or supplemental benefits. Accordingly, I find the 1994 Order, including the finding that the Claimant should not be "punished" for returning to work at lower pay, does not govern the outcome of the current dispute regarding the payment of permanent total and supplemental benefits.

27. Additionally, I find it is logical and reasonable to conclude that the JCC, in the 1994 Order, limited his ruling to only those pre-MMI benefits specifically awarded in the contents of the 1994 Order. It is logical to find that, because permanent total disability benefits were denied by the JCC in the 1994 Order as "premature", the 1994 Order contained no alternative rulings governing the current rate of pay or allocation of responsibility between the two Employer/Carriers for future entitlement to permanent total disability benefits and the 1994 Order limited the payment of indemnity benefits by both Employer/Carriers to their respective compensation rates.

28. Consistent with this finding, I note the 1994 Order does not include alternative findings that the Claimant is permanently and totally disabled due to any particular date of accident, due to any particular compensable injury, or due to a combination of compensable injuries. Again, I note that these are material findings when considering the disparity in the average weekly wage for each date of accident and the differences in Florida Workers' Compensation Law with regard to the payment of

supplemental benefits beyond the age 62 as applicable to each date of accident.

"Law of the Case"

29. The Claimant argued that the Judge of Compensation Claims' previous findings in 1994 in this case are the "law of the case" and are binding on the undersigned Judge of Compensation Claims when determining the pending issues regarding the correct payment of permanent total disability and corresponding supplemental benefits. Likewise, Employer/Carrier #2 argued that 1994 Order is the "law of the case".

30. After reviewing the totality of evidence and arguments, I find that the legal doctrine referred to as the "law of the case" is not applicable to the issues presently before the undersigned Judge of Compensation Claims. I reject the application of the doctrine of the "law of the case" on the grounds that I find that there is no appellate ruling in this case that governs the pending issues.

31. In making this finding, I note that the Supreme Court of Florida, in Florida Department of Transportation v. Angelo Juliano, 801 So. 2d 101 (Fla. 2001), explained that; "The doctrine of the law of the case requires that questions of law actually decided on appeal must govern the case in the same court and the trial court, through all subsequent stages of the proceedings". In Juliano, the Florida Supreme Court stated that; "Under the law of the case doctrine, a trial court is bound to follow prior rulings of the appellate court as long as the facts on which such decision are based continue to be the facts of the case". Further, the Juliano Court stated; "…the law of the case doctrine is limited to questions of law actually presented and considered on a former appeal…".

32. In the present case, although I note there was an appeal of Judge Cooper's Order of 1992 (Claimant's Exhibit # 1) resulting in an opinion of the First DCA dated August 30, 1993 (Claimant's Exhibit # 2), I find that the opinion of the First DCA did not determine questions of law presently at issue. Instead, the opinion of the First DCA reversed Judge Cooper's denial of wage loss benefits and remanded to the Judge of Compensation Claims for a determination on the issue of apportionment of liability between the two Employer/Carriers. As such, I find the August 30, 1993, opinion of the First DCA set forth no "law of the case" that would govern the issues presently before the Judge of Compensation Claims. Consistent with this finding, I note the Claimant and Employer/Carrier #2 in the present case point to portions of the 1994 Order as the alleged "law of the case" governing the instant issues.

Enforcement of Prior Order or Stipulations Waived

33. In the case at bar, although not specifically raised or identified by pleading filed by any party, the Claimant and Employer/Carrier #2 essentially requested that this Court enforce portions of the JCC's 1994 Order and enforce the prior stipulations of the parties in order to secure payment of permanent total disability benefits and supplemental benefits at the requested rate of pay. I find the arguments of the Claimant and Employer/Carrier #2 were tantamount to a motion to enforce a prior order of a JCC or a motion filed under Rule 60Q-6.116(5) requesting enforcement of a prior stipulation of the parties.

34. However, after reviewing the totality of circumstances and pleadings in this case, I find that the Claimant and Employer/Carrier #2 failed to timely raise or

identify this issue with sufficient specificity to be considered at the final hearing of September 26, 2011. I find no such issue, motion to enforce, or motion under Rule 60Q-6.116(5) was raised prior to the final hearing by any party.

35. As such, I find it would be unfairly prejudicial to Employer Carrier #1, Custom Architectural Metals, Inc./Travelers Insurance Company, to require them to defend such a claim, motion to enforce, or motion under Rule 60Q-6.116(5) at the September 26, 2011, final hearing. Under these circumstances, I find that any motion to enforce a previous order of this Court, or motion under Rule 60Q-6.116(5) regarding prior stipulations of the parties, filed in order to obtain payment of indemnity benefits presently at issue was waived by the parties.

Alternative Finding on Enforcement of Prior Order

- **Burden of Proof**

36. If it is determined that the parties did not waive a request to enforce portions of the 1994 Order, a position I reject, I find the Claimant and Employer/Carrier #2 failed to present a preponderance of evidence to prove that the June 21, 1994 Order logically or reasonably governs the outcome of the pending issues related to the rate of pay of permanent total disability and supplemental benefits

37. In making this alternative finding, I have reviewed the 1994 Order in its entirety. Based upon the plain meaning of the 1994 Order, wherein the claim for permanent total disability benefits was denied as "premature", I find the 1994 Order did not address the correct rate of payment of permanent total disability and supplemental benefits and, therefore, is not applicable the pending issues. I reject the argument of both

the Claimant and Employer/Carrier #2, that it is irrelevant to the issues presently before this Court that the JCC in 1994 denied the claim for permanent total disability.

38. Consistent with this finding, again, I note there are material findings with regard to the payment of permanent totally disability benefits that are not contained in the 1994 Order. The 1994 Order does not include findings that the Claimant is permanent and totally disabled due to any particular date of accident, due to any particular compensable injury, or due to a combination of compensable injuries.

- **Prior Findings On Causation of Injuries to Work Activities**

39. I cannot find that the JCC's 1994 determinations with regard to causation of the Claimant's injuries to his work activities can logically or reasonably govern the outcome of the pending issues related to the current rate of pay of permanent total disability and supplemental benefits.

40. In making this finding, I note the 1994 Order found that; "…the primary cause for the second accident appears to be the knee injury from the first accident" (Claimant's Exhibit # 3, pages 18). I also note that the 1994 Order found "…the employee's injuries on August 12, 1991 were caused by both the knee giving way and by the additional risks associated with his job at Wal-Mart" (Claimant's Exhibit # 3, pages 17). Notwithstanding these findings, I note that the factors considered by the prior Judge of Compensation Claims when determining the relationship of the Claimant's injuries to his work activities on each date of accident at issue substantially differ from those factors that should be considered by the Judge of Compensation Claims when determining issues related to an award of permanent total disability benefits in this case.

41. For instance, when determining whether the Claimant's injuries are related to his work activities on each date of accident, it is logical and reasonable to conclude that the JCC considered medical opinions and lay testimony. In fact, I note that on page 17 of the 1994 Order, the JCC specifically identified those factors he considered when determining the causal relationship of the Claimant's injuries to his work activities on each date of accident at issue; that being the pre-MMI medical evidence and the Claimant's testimony. On the other hand, given the nature of the Claimant's injuries in this case, when determining the issues related to permanent total disability benefits, it is logical and reasonable to conclude that the Judge of Compensation Claims should also consider post-MMI vocational factors along with post-MMI medical opinions and lay testimony. Accordingly, I cannot find that the JCC's determinations in 1994 with regard to causation of the Claimant's injuries to his work activities logically or reasonably govern the outcome of the pending issues related to the current rate of pay of permanent total disability and supplemental benefits.

- **Prior Findings on Apportionment**

42. As with the JCC's findings in 1994 with regard to causation, I cannot find that JCC's findings in 1994 with regard to apportionment of medical benefits and wage loss benefits between both Employer/Carriers in this case can logically or reasonably govern the outcome of the pending issues related to the rate of pay of permanent total disability and supplemental benefits.

43. In making this finding, I note in the 1994 Order, the JCC determined the issue of apportionment of medical benefits and wage loss benefits between the

Employer/Carrier's by ordering that; "The remaining medical benefits and indemnity benefits shall be allocated between the Employers/Carriers on a 75-25 basis as set forth above in this Order" (Claimant's Exhibit #3, page 20). Notwithstanding this finding, again, I find it is logical and reasonable to conclude that, at the time of the 1994 Order, the JCC did not consider the Claimant's post-MMI medical status or the Claimant's post-MMI vocational factors in determining the reimbursement issue. Yet, I find it is precisely these factors which a Judge of Compensation Claims may reasonably and logically consider when determining issues related to an award of permanent total disability benefits given the nature of the Claimant's injuries in this case.

44. Furthermore, for reasons mentioned above, I find it is logical and reasonable to conclude that the JCC, in the 1994 Order, limited his ruling to only those pre-MMI benefits specifically awarded in the contents of the 1994 Order. In making this finding, again, I find the 1994 Order found that an award of PTD benefits would be "premature" and, therefore, the 1994 Order contained no alternative rulings that can reasonably be said to govern the current rate of pay of PTD and the 1994 Order limited the payment of disability benefits by each Employer/Carrier to their respective compensation rates.

- **Prior Findings on Wage Loss Benefits**

45. Additionally, I cannot find that the JCC's 1994 findings with regard to the rate of pay of certain wage loss benefits can logically or reasonably govern the outcome of the pending issues related to the rate of pay of permanent total disability and supplemental benefits.

46. In making this finding, again, I note the 1994 Order addressed the rate of pay of wage loss benefits based on Florida Statutes 440.15(5)(c) and (d) (1989), which governs situations where the Claimant is entitled to receive wage loss benefits from an earlier injury and suffers a subsequent injury causing temporary disability or additional wage loss (Claimant's Exhibit # 3, page 15). For reasons mentioned earlier in this Order, I find that the JCC's determination in 1994 that the Claimant should not be "punished" for returning to work at lower pay was made in conjunction with the award of wage loss benefits and Judge Hoch's interpretation of Florida Statutes 440.15(5)(c) and (d) (1989).

47. Further, based upon the plain meaning of the Statute, I find that Florida Statutes 440.15(5)(c) and (d) (1989) do not govern the rate of payment of permanent total disability or supplemental benefits. Accordingly, I find the 1994 Order, including the finding that the Claimant should not be "punished" for returning to work at lower pay, does not govern the outcome of the current dispute regarding the payment of permanent total and supplemental benefits.

Alternative Finding on Enforcement of Prior Stipulations

48. If it is determined that the parties did not waive a request for this Court to make a determination under Rule 60Q-6.116(5) with regard to prior stipulations of the parties, a position I reject, I find the Claimant and Employer/Carrier #2 failed to present a preponderance of evidence to show that the prior stipulations of the parties logically or reasonably govern the outcome of the pending issues in this case.

49. In making this finding, I have reviewed the prior stipulations of the parties in evidence (Claimant's Exhibits #4 and #5). I find the stipulations of the parties dated

September 20, 1996, and May 7, 2004, do not contain essential terms that would logically or reasonably govern the outcome of the pending claim regarding the current rate of pay of permanent totally disability benefits and supplemental benefits. Consistent with this finding, I note the 1996 and 2004 stipulations do not address the current status of this case where the increase in the amount of supplemental benefits over the years has resulted in a payment beyond the compensation rate applicable to Employer/Carrier #2 and where the Claimant has now attained age 62.

50. I make this finding based on the plain meaning of the terms of the stipulations themselves. I find the terms of both stipulations are not vague and are not ambiguous; they simply do not address the issue currently in dispute. Neither stipulation includes an agreement that the Claimant is permanent and totally disabled due to any particular date of accident, due to any particular compensable injury, or due to a combination of compensable injuries. As mentioned above, these factors are material to the issue currently in dispute when considering the disparity in the average weekly wage for each date of accident and the differences in workers' compensation law with regard to the payment of supplemental benefits after age 62 as applicable to each date of accident.

Modification of 1994 Order

51. At the final hearing, the Claimant argued that the JCC's prior determination, in the Order of June 21, 1994, that limited Employer/Carrier #2 to payment of a maximum compensation rate of $161.99, should be "changed". Alternatively, the Claimant argued that the JCC's prior determination, that Employer/Carrier #1 shall pay no more than 75% of the allocation, should be "changed".

52. I find that, at the final hearing, although not specifically or timely raised by pleading, the Claimant essentially requested that this Court "change" or modify portions of the JCC's 1994 Order in order to secure payment of permanent total disability benefits and supplemental benefits. To the extent that it is determined that this argument is tantamount to a motion to modify portions of the JCC's 1994 Order under the authority of Florida Statutes 440.28, I find any such request to be waived. After reviewing the totality of circumstances and pleadings in this case, I find that the Claimant failed to timely raise or identify this issue with sufficient specificity to be considered at the final hearing of September 26, 2011.

53. As such, I find it would be unfairly prejudicial to Employer Carrier #1, Custom Architectural Metals, Inc./Travelers Insurance Company, to require them to defend such a claim for modification or motion for modification under Florida Statutes 440.28 at the September 26, 2011, final hearing.

Alternative Finding on Modification

54. If it is determined that the Claimant did not waive a motion for modification under Florida Statutes 440.28, a position I reject, I deny any such a request for modification on the grounds that it was sought beyond the 2 year time limit allowed under Florida Statutes 440.28.

55. Further, I find the Claimant failed to present a preponderance of evidence to support a finding that there has been a change in condition or a mistake in determination of fact that would subject the 1994 Order to modification under Florida Statutes 440.28. Again, I note no medical evidence and no vocational evidence were

presented in this case.

WHEREFORE it is ORDERED and ADJUDGED that:

1. The Petitions for Benefits filed on May 24, 2010, and October 8, 2010, are **DISMISSED without prejudice**.

DONE AND ORDERED this 5th day of October, 2011, in Daytona Beach, Volusia County, Florida.

Thomas G. Portuallo
Judge of Compensation Claims
Division of Administrative Hearings
Office of the Judges of Compensation Claims
Daytona Beach District Office
444 Seabreeze Boulevard, Suite 450
Daytona Beach, Florida 32118
(386)254-3734
www.jcc.state.fl.us

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Order has been electronically transmitted via email to the attorneys of Record and sent by U.S. mail to the parties as listed below on this 5th day of October, 2011:

Debra Smith
Executive Secretary to the Judge of
Compensation Claims

Vernon Keith Bradshaw
96 Dirksen Drive
De Bary, Florida 32713

Custom Architectural Metals, Inc.
4881 Distribution Court
Orlando, Florida 32822

Travelers Property and Casualty Corporation
Post Office Box 715
Orlando, Florida 32802

Wal-Mart Stores
2620 Enterprise Road
Orange City, Florida 32763

Sedgwick CMS
Post Office Box 1288
Bentonville, Arkansas 72712

William G. Berzak
cindywberzak@aol.com;williamberzak@aol.com

Michael S. Waranch, Esquire
mwaranch@hrmcw.com

Thomas H. McDonald, Attorney
thmcdona@travelers.com;dbriggs@travelers.com