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

Gary L. Thomas, Employee/Claimant, vs. Team Staffing Services/Broadspire, Employer/ Carrier/Servicing Agent.	)	Judge: Neal P. Pitts OJCC Case No. 11-010927NPP Accident date: 3/10/2011

FINAL COMPENSATION ORDER

This Cause came on for a merits' hearing before the undersigned Judge of Compensation Claims on February 22, 2012, in Orlando, Orange County, Florida. This matter was the subject matter of petitions for benefits filed on May 12, 2011, August 16, 2011, and August 31, 2011, which were the subject matter of a mediation conference held on September 7, 2011.

The claimant, Gary L. Thomas, Jr., was present and represented by John Brooks, Esq. The employer, Team Staffing Services, and its TPA, Broadspire, hereinafter collectively referred to as the "Employer," was represented by William H. Rogner, Esq. Testimony was received during the hearing from the claimant, Beth Steele, and Timothy Steele. The remaining documentary evidence presented is outlined in a later portion of this order.

The following stipulations have been reached between the

parties:

1. The court has jurisdiction of the parties and the subject matter;
2. The date of accident is March 10, 2011;
3. Venue properly lies in Orange County, Florida;
4. Mediation was held on September 7, 2011;
5. Workers' compensation insurance coverage was in effect on the date of the alleged accident;
6. Employer/Employee relationship was in effect on the date of the accident;
7. Timely notice of the final hearing has been provided;
8. The pay ledger may be admitted into evidence;
9. Petitions for benefits were filed with DOAH by the claimant on May 12, 2011, August 16, 2011, and August 31, 2011;
10. A Notice of Denial was filed with DOAH by the EC on July 1, 2011;
11. No medical care has been authorized and no benefits have been paid; and
12. The claimant's AWW is stipulated to be $136.08.

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

May 12, 2011 Petition For Benefits:

1. Authorization of medical care of an orthopaedic nature;
2. TTD/TPD from date of accident to present and continuing; and
3. PICA.

August 16, 2011 Petition For Benefits:

1. TTD/TPD at the correct comp rate;
2. Authorization of medical treatment due to bilateral leg pain and right foot/ankle pain;
3. Compensability of the claim; and
4. PICA.

August 31, 2011 Petition For Benefits:

1. Authorization of medical care with Dr. Wagner;
2. Payment of medical bills associated with treatment by Dr. Wagner; and
3. PICA.

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

1. No accident.
2. No injury.
3. Alleged accident occasioned primarily by the claimant's intoxication.
4. All benefits were forfeited-claimant made false or misleading statements for the purpose of securing workers' compensation benefits.

5. Claimant is not TTD.

6. TPD:

    1. Loss of earnings unrelated to injury;

    2. Loss of job due to misconduct; and

    3. No job search.

7. Dr. Wagener is not authorized. As claimant's IME, he may not be designated at the treating physician.

8. Claimant is responsible for Dr. Wagner's IME charges; and

9. No PICA due.

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

Judge's Exhibits:

1. Pretrial Questionnaire completed by the parties;
2. Pretrial Order And Order Governing Trial entered on September 19, 2011;
3. Claimant's Amendment to Pretrial Stipulation filed with DOAH on September 28, 2011;
4. Petition for Benefits filed with DOAH on May 12, 2011;
5. Petition for Benefits filed with DOAH on August 16, 2011;
6. Petition for Benefits filed with DOAH on August 31, 2011;
7. Response to Petition for Benefit filed with DOAH on July 1, 2011;
8. Response to Petition for Benefit filed with DOAH on

September 19, 2011;

9. Mediation Conference Report for a mediation conducted on September 7, 2011;
10. Order on Motion To Take Judicial Notice Of The Decision Of The Unemployment Compensation Appeals Referee, entered November 18, 2011; and
11. Final Evidentiary Order Denying Motion In Limine, entered on February 8, 2012.

Claimant's Exhibits:

1. Claimant's Hearing Memorandum, admitted for purposes of argument only;
2. Deposition of Beth Steele, taken on August 2, 2011;
3. Deposition of Cynthia Harrod, taken on November 15, 2011; and
4. Deposition of Tyler Germanos, taken October 24, 2011.

Employer's Exhibits:

1. EC's Memorandum of Law, admitted for argument purposes only and not as evidence;
2. Deposition of Donald Bucklin, M.D., taken on November 15, 2011, with attachments;
3. Deposition of Joseph D. Funk, D.P.M., taken on January 11, 2012, with attachments;

4. Deposition of Mabel Martinez, taken on November 7, 2011, with attachments;
5. Deposition of Gary Thomas, taken on August 15, 2011, with attachments;
6. Notice Of Defense Under Section 440.105 And 440.09, Florida Statutes;
7. Decision of Appeals Referee dated September 9, 2011; and
8. EC's Notice Of Filing Termination Letters Dated 3/22/11 & 6/13/11.

SUMMARY OF UNDISPUTED OR UNCONTROVERTED EVIDENCE:

1. The claimant is 25 years old and was employed by Team Staffing Services on March 10, 2011. The claimant's hire date was in August, 2005. Through Team Staffing Services, the claimant was contracted to work at various auto auction sites with which the employer had a contractual relationship, including Orlando Auto Auction, Mannheim Central Florida Auto Auction, and Florida Auto Auction.
2. The claimant suffered an injury by accident arising out and during the course and scope of his employment on March 10, 2011 while working on the premises of the Mannheim Central Florida Auto Auction. At that time and place, his right foot was run over by a GMC box truck while the claimant was directing traffic at the auction. There were

many eyewitnesses to the accident. The claimant continued working after the accident and did not seek medical attention at that time.

3. The original incident reported to Mannheim was that a collision involving two vehicles had occurred in lane 22. The procedure which Mannheim would follow as a result of this type of incident is the preparation of an incident report. Because it involved Team Staffing employees, it would have been sent to Team Staffing either the next day if it were a night sale. Additionally, Team Staffing had a representative on the property who would have been the contact person to which this type of incident would have been reported.

4. Tyler Germanos, a Mannheim employee, is the individual who prepared the initial incident report regarding the collision of the two vehicles in lane 22. He was asked to write up an incident report regarding the accident, which he did on March 10, 2011. A copy of that report is an exhibit to his deposition.

5. Either that night or the next morning, Mr. Germanos learned that the claimant had injured his ankle in this incident. Thus, he asked the claimant to come into the

office and provide a written statement. This discussion and report occurred on March 11, 2011 at the TRA location.

6. Mr. Germanos then completed his second report identified as the Manheim "Illness/Injury Statement." This was prepared after he learned that the claimant has suffered an injury in the March 10, 2011 incident. According to this form, the claimant refused medical treatment on the date of the accident because he was not in any pain. This statement was signed by the claimant and dated March 11, 2011.

7. According to Mr. Germanos, as far as he remembers, a copy of each of the above three statements would have been sent to Ms. Steele by email. He never had any personal conversations with Ms. Steele or with a representative of Team Staffing regarding this incident. Thus, the only communication would have been via email.

8. No doctor's appointment was scheduled immediately following the March 10, 2011 accident. Rather, on March 16, 2011, a representative of the Employer, Beth Steele, arrived unannounced at the Mannheim location and requested that the claimant be called up to the front office. The claimant complied and was transported by Ms. Steele the U.S. Healthworks' clinic.

9. Ms. Steele waited in the waiting area of the clinic while the claimant checked in and signed papers. The claimant has no recollection of signing a drug test authorization form, but does not dispute that his signature is on the form. However, the claimant asserts that the remaining entries on the form were not placed there by him.

10. The claimant testified that he was evaluated and his foot was x-rayed. Ms. Steele went out to her automobile, and therefore, cannot provide testimony with regards to what occurred while the claimant was being seen by medical personnel with the U.S. Healthworks' clinic. The claimant was provided with pills, an ice pack, and a boot by the clinic. After the claimant finished his appointment, Ms. Steele transported the claimant to the downtown bus station.

11. Following the appointment, the claimant continued to work for this employer but at a different auto auction until he was terminated on June 13, 2011 because of a failed drug test. According to the pay information, the claimant worked four days a week during the weeks of March 14 through April 3, 2011, and the week of April 11, 2011 through April 18, 2011. He worked 2 days a week for the week of April 4 through April 10, 2011, and from April 19,

2011 through May 9, 2011. He then worked 1 day a week from May 16, 2011 through June 13, 2011.

MEDICAL EVIDENCE:

1. The claimant has been evaluated by two podiatrists; Dr. Funk and Dr. Wagner. Dr. Wagner is the claimant's IME examiner who evaluated the claimant on August 26, 2011. He diagnosed midfoot contusion with a compression injury and neuralgia of the right foot. He recommended an MRI of the right foot to evaluate for soft tissue damage. He placed work restrictions of very limited standing and walking in a good supportive athletic shoe and to elevate the foot while sitting.
2. Dr. Funk is the EC's IME examiner who evaluated the claimant on October 12, 2011. His initial diagnosis was contusion with neuropraxia, dorsal right foot, affecting the dorsal cutaneous nerve, radiating to the common peroneal nerve right foot. He placed no temporary work restrictions. He recommended an MRI and EMG study of the lower extremity. The EC authorized this and they were performed on November 29, 2011.
3. Dr. Funk indicated in his deposition that both studies were essentially normal as it related to any injuries sustained in the crush incident of March 10, 2011. The

EMG study reflected no pathologic nerve condition being present.

4. According to Dr. Funk, the claimant reached MMI on November 29, 2011 with a 0% impairment and full duty work restrictions. His diagnosis is contusion injury with a very mild neuropraxia. Dr. Funk testified on page 12 of his deposition that the claimant did not require any further treatment related to the contusion neuropraxia injury suffered in the accident of March 10, 2011.

ANALYSIS OF THE RELEVANT LAW:

1. The EC has alleged that the claimant violated the provisions of §440.105(4)(b) and §440.09(4), frequently referred to as the "fraud defense," *see Arreola v. Admin. Concepts*, 17 So.3d 792,793 (Fla. 1st DCA 2009), because the claimant testified in his deposition and during the merits' hearing that he never provided a urine sample when he was seen at the U.S. Healthworks' clinic on March 16, 2011.

2. To establish a violation of §440.105(4)(b), so as to justify the ultimate sanction of denial of any further benefits under chapter 440, the Employer has the burden to prove by the preponderance of the evidence that a claimant knowingly or intentionally engaged in one of the acts

prohibited by the statue for the purpose of securing workers' compensation benefits. *See Matrix Employee Leasing v. Hernandez*, 975 So.2d 1217 (Fla. 1st DCA 2008); *Village of N. Palm Beach v. McKale,* 911 So.2d 1282 (Fla. 1st DCA 2005); *Pavilion Apts. v. Wetherington,* 943 So.2d 226 (Fla. 1st DCA 2006).

3. Workers' compensation benefits must be denied if statements of medical history, prior accidents, or the extent of current injuries are knowingly false, fraudulent, incomplete, or misleading. *Village Apts. v. Hernandez*, 856 So. 2d 1140 (Fla. 1st DCA 2003); *Lee v. Volusia County Sch. Bd.*, 890 So. 2d 397, (Fla. 1st DCA 2004; *Citrus Pest Control v. Brown*, 913 So. 2d 754 (Fla. 1st DCA 2005).

4. It is not necessary that the false, fraudulent or misleading statement be material to the claim; only that the claimant thought the statement would have a material impact on his case and was made with the intent to secure workers' compensation benefits. *See Village Apts. and McKale*. In workers' compensation claims, a claimant's responses to inquiries regarding his or her medical history, prior accident, and current condition are in

support of the claim for benefits. *Village Apts. v. Hernandez*, 856 So. 2d 1140 (Fla. 1st DCA 2003).

5. Regardless of whether the claimant is under oath, if the claimant makes any statements which the claimant knew are false, incomplete, or misleading, the statements fall within the scope of §440.105(4)(b), Fla. Stat., and result in the loss of workers' compensation benefits. However, only oral or written statements made by the claimant may serve as the predicate for disqualification of benefits. *See Dieujuste v. J. Dodd Plumbing, Inc.*, 3 So.3d 1275 (Fla. 1st DCA 2009).

6. When an objective misrepresentation has been made by the claimant, the JCC must answer the ultimate question of whether the claimant subjectively believed or intended that the statement, when made, to be false, and whether the claimant subjectively believed or intended the statement would assist him in securing benefits. *See Steel Dynamics, Inc.-New Millennium v. Markham,* (Fla. 1st DCA, October 25, 2010,); *Arreola v. Admin. Concepts*, 17 So.3d 792 (Fla. 1st DCA 2009). A claimant's state of mind is an issue of fact to be determined by the JCC in evaluating the evidence, including the credibility and demeanor of the witnesses.

7. It is not axiomatic that providing false information following a compensable accident automatically will disqualify a claimant from receiving benefits. See *Steel Dynamics, Inc.-New Millennium v. Markham,* (Fla. 1st DCA, October 25, 2010). Rather, because all testimony is to a certain extent shaded by the personal experience and the subjective perceptions of the providing witness, a revelation that a witnesses' experience or perception is different than that of the fact finder or another witness is not, in and of itself, evidence of a willful or knowing intent to deceive; rather, it is commonly a demonstration of the varying degrees to which even well intentioned individuals may interpret (or misinterpret) and later relay, objective events. It is only where a sufficient showing of a knowing or intentional misrepresentation for a specific purpose of deceiving and securing compensation benefits is demonstrated to the satisfaction of the JCC that §440.09(a) operates to divest a claimant of entitlement to compensation benefits. *Id.* at 11.

FINDINGS OF FACT AND CONCLUSIONS OF LAWS:

In making my findings of fact, I have carefully considered and weighed all of the evidence presented to me. Although I may not reference each piece of evidence

presented by the parties, I have carefully considered all the evidence and the exhibits in making my findings of fact. I have resolved all conflicts in the evidence, both live testimony and by deposition, where they existed. Based upon the evidence, I make the following findings of fact:

1. I have jurisdiction of the parties and the subject matter of these claims.
2. The evidence closed in this matter on February 22, 2012, after which closing arguments were made by the parties.
3. I accept the uncontroverted facts that the claimant sustained a compensable accident and injury on March 10, 2011 when his right foot was crushed. There also appears to be no dispute in the medical evidence that the claimant suffered some type of contusion and a mild nerve injury.
4. Based upon the foregoing law, I am compelled to find by the greater weight of the evidence that the EC did not establish that the claimant knowingly and intentionally made objectively false, fraudulent, or misleading statements for the purpose of obtaining workers' compensation benefits. Therefore, I am compelled to deny the affirmative defense raised by the EC that the

claimant's right to receive benefits should be terminated because he violated §440.09(4), Fla. Stat.

5. There are inconsistencies in the evidence surrounding the alleged drug test and whether the claimant was under the influence of any drug when he was taken to the clinic on March 16, 2011, and these inconsistencies create enough genuine doubt which prevent the undersigned from finding that the greater weight of the evidence established the claimant had provided a urine sample on March 16, 2011. These inconsistencies include the following.

6. In her deposition, Ms. Steele testified that she personally requested that the drug test be performed when she checked the claimant into the clinic. However, the "Treatment Authorization" form attached to Mabel Martinez's deposition indicates that it was verbally authorized by Franny Cooperstein, the payroll manager. This is odd because it was Ms. Steele who was present requesting the test and thus could have signed this request form personally. There was no explanation for this discrepancy.

7. Ms. Steele testified in her deposition that she picked the claimant up between 3:30 and 4:30 in the afternoon

on March 16, 2011 and took him to the clinic. During the trial, she was certain that the claimant gave the sample at 4:30 and didn't come out of the clinic until after 5:00 p.m. because she made a call on her cell phone at 5:01 letting them know that the claimant would return to work the next day.

8. According to Ms. Martinez's deposition testimony, the claimant was at the facility at 3:30 p.m. and the sample was taken at 4:30 p.m. If the drug sample were to have been taken at 4:30, then the claimant would have waited in the facility for an hour before being seen by Ms. Martinez and thus would had to have been picked up earlier than 3:30 by Ms. Steele.

9. There are no medical records from U.S. Healthworks in evidence (other than the Florida Drug Free Workplace Chain of Custody Form and the Treatment Authorization Form). Thus, there is no indication from his chart as to when the claimant actually checked into the facility and when he was released. This is potentially dispositive evidence that is missing. While the claimant did not offer this evidence either, the burden of proof is not on the claimant but rather on the Employer.

10. Dr. Bucklin, the MRO, testified that the sample detected 781 nanograms of cannabis. With a cutoff point of 15, that finding is approximately 52 times the amount of cannabis beyond the cutoff point. According to Dr. Bucklin, this is one of the highest recordings he had seen in a while. Yet, the sample was taken supposedly after the claimant had worked most of the day and without anyone finding anything suspect about his behavior during the work day. This includes Ms. Steele who did not testify that there was anything about the claimant's behavior that aroused her suspicions regarding the presence of drugs; only because of the general rationale involving the "transient type of people working at the auction."

11. I find that this raises a genuine issue as to whether the claimant could have had that high of concentration of cannabis in his system and yet displayed no behavior at work or in his interaction with Ms. Steele that raised anyone's suspicion regarding, not just the presence of a drug in his system, but at a level that is significantly higher than the cutoff point. Because the Employer has the burden of proof on this issue, I conclude that this is another piece of the evidence

which precludes a finding that the greater weight of the evidence established the claimant knowingly or intentionally made objectively false, fraudulent, or misleading statements for the purpose of obtaining workers' compensation benefits.

12. I further find it inconsistent that the claimant would have been allowed to continue working after the results of the alleged March 16, 2011 drug test were reported to the Employer on March 23, 2011 by Dr. Buckner. The Employer asserts that the claimant was terminated by letter dated March 22, 2011 (dated one day before Dr. Buckner testified he actually notified Ryan Steele of the failed drug test). The claimant testified that he never received this letter and had no idea that he had failed a drug test.

13. This letter was not sent certified mail. Nor was this letter disclosed by Ms. Steele during her deposition. Interestingly, the claimant continued to work until June 13, 2011, during which time he continued to pick up his paycheck on a weekly basis at the Employer's South Orange Blossom Trail office. I conclude that this is another piece of the cumulative evidence which precludes a finding that the greater weight of the evidence

established the claimant knowingly or intentionally made objectively false, fraudulent, or misleading statements for the purpose of obtaining workers' compensation benefits.

14. Finally, the only direct evidence that the claimant actually provided a urine sample is the deposition testimony of Ms. Martinez. Ms. Steele could not provide this testimony because she was in her automobile during this time.

15. The claimant testified live and vehemently denied providing a urine sample. He further testified that he had already left the clinic prior to 4:30, and therefore, could not have provided any urine sample at that time.

16. I had an opportunity to assess the claimant's credibility and demeanor while testifying. I could not detect any obvious signs that he was providing false testimony.

17. Ms. Martinez did not testify live. Rather, her testimony was submitted via her deposition. Therefore, I had no opportunity to assess her credibility or demeanor. I do note, however, in her deposition, she could not be certain that she remembered the claimant. She believed

that she did but could not be 100% certain. Without the opportunity to observe her credibility, with the other discrepancies listed above, I do not find her testimony, in light of the above discrepancies and the claimant's vehement and consistent denials, to be persuasive enough to make a finding on the greater weight of the evidence that the claimant provided a urine sample on March 16, 2011.

18. Based upon the finding that the greater weight of the evidence does not establish that the claimant provided a urine sample on March 16, 2011, I deny the defense that alleged accident was occasioned primarily by the claimant's intoxication. Independent of this alleged urine drug test, I find that the EC has not established that intoxication played any role in the claimant's accident on March 10, 2011. Rather, the evidence appears to establish that he was in the wrong place at the wrong time doing what he was contracted to do.

19. Based upon the normal EMG and MRI studies, I accept Dr. Funk's opinion that the claimant reached MMI on November 29, 2011 with a 0% impairment and full duty work restrictions. I further accept his diagnosis that the

claimant suffered a contusion injury with a very mild neuropraxia.

20. I accept Dr. Wagner's opinion that that the claimant had light duty work restrictions, as of August 26, 2011, of very limited standing and walking in a good supportive athletic shoe and to elevate the foot while sitting. I accept Dr. Wagner's opinion over the contrary opinion of no work restrictions expressed by Dr. Funk because I find Dr. Wagner's opinions to be more reasonable, persuasive and logical based upon the totality of the evidence, including the claimant's lay testimony regarding his foot pain and inability to work four days a week because of that pain. It is further consistent with the claimant's deposition testimony on page 59 of his deposition that the nurse at US Healthworks advised him to stay off his feet as much as possible, elevate the foot, and to use the shoe she provided.

21. I find that the claimant was on restricted, light duty status from August 26, 2011 through November 29, 2011 when the claimant was found to be at MMI by Dr. Funk after his review of the normal EMG and MRI diagnostic studies. Therefore, I award TPD benefits from August 26, 2011 through November 29, 2011, less offsets for

unemployment benefits received during this time period and actual earnings, plus penalties and interest.

22. In awarding temporary partial benefits during this time period, I find that the claimant has established a causal connection between his injury and the subsequent wage loss. See *Wyeth/Pharma Field Sales v. Toscano*, 40 So.3d 795 (Fla. 1st DCA 2010); *Williams v. Archer W. Contractors*, 43 So.3d 780 (Fla. 1st DCA 2010).

23. I deny the defense that the claimant was terminated for misconduct so as to prevent the claimant's entitlement to TPD benefits. "Misconduct" is a statutory term. It includes but is not limited to: 1) conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of the employee, or 2) carelessness or negligence of such a degree or recurrence as to manifest culpability, wrongful intent, or evil design, or to show an intentional and substantial disregard of an employer's interests or of the employee's duties and obligations to the employer. *See* section 440.02(18), Fla. Stat.

24. These provisions parallel similar provisions in the Unemployment Compensation Law. Thus, the law applicable

to factual instances arising under the unemployment setting is applicable to factual scenarios arising under workers' compensation. *See Thorkelson v. New York Pizza & Pasta, Inc.*, 956 So. 2d 542 (Fla. 1st DCA 2007).

25. While a single violation of an employer's policy may constitute misconduct, repeated violations of explicit policies, after several warnings, are usually required. *See Ash v. Fla. Unemplmt. App. Comm'n*, 872 So.2d 400 (Fla. 1st DCA 2004); *Barchoff v. Shells of St. Pete Beach, Inc.*, 787 So.2d 935 (Fla. 1st DCA 2001). A single isolated incident of poor judgment does not rise to the level of misconduct if the claimant is not acting willfully, wantonly, or in substantial disregard of the employer's interest. *See Cohen v. Fla. Unemplmt. App. Comm'n*, 868 So.2d 664 (Fla. 1st DCA 2004).

26. In the case *sub judice*, I find that the EC has not established the defense of misconduct. I specifically note that there is no evidence of willful and repeated violations of explicit policies, after several warnings. Finally, there is no evidence that the claimant acted willing, wantonly, deliberately or in substantial disregard of the employer's interest. With the above

findings regarding the urine test, there is no competent substantial evidence to support this defense.

27. I deny the claim for TTD benefits because there is no medical testimony which supports this claim. This claim must be established solely by medical evidence and not lay testimony.

28. I further deny the claim for TPD benefits for any other time periods. Before August 26, 2011, there is no medical evidence of work restrictions. Nor is there any testimony that Dr. Wagner would have related such restrictions back to the date last seen at US Healthworks.

29. I deny the claim for authorization of orthopaedic type care. I find that there is no competent substantial evidence to establish that the claimant requires orthopaedic type care.

30. I deny the claim for authorization of medical treatment due to bilateral leg pain and right foot/ankle pain, and the related claim for authorization of treatment with Dr. Wagner. Based upon Dr. Funk's testimony, which I accept, I find that there currently is no further medical care that is reasonable and medically necessary and causally related to the accident of March 10, 2011.

31. I deny the claim for payment of medical bills associated with treatment by Dr. Wagner. The evaluation with Dr. Wagner is in the nature of an IME evaluation and not treatment. As such, it is a cost which may be taxable against the EC.

32. I find that the claimant's attorney has performed a valuable service and is entitled to an award of a reasonable attorney's fee and taxable costs against the employer for the award of indemnity benefits pursuant to this Compensation Order and for successfully defending against the affirmative defense raised under §440.105(4)(b) and §440.09(4).

33. Any and all issues raised by way of the petitions for benefits, but which issues were not dismissed or tried at the hearing, or which were ripe, due and owing but not raised at the hearing, are presumed resolved, or in the alternative, deemed abandoned by the claimant, and therefore, are denied and dismissed with prejudice.

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

1. The claim for TPD and the stipulated AWW rate of $136.08 for the period of August 26, 2011 through November 29, 2011, less any offsets for

unemployment benefits and income earned during this period, is hereby awarded.

2. The claim for penalties and interest on the above benefits is hereby awarded.

3. The claim for costs and attorney's fees is hereby granted for the benefits being awarded in paragraphs 1 and 2 above and for successfully defending against the affirmative defense raised under §440.105(4)(b) and §440.09(4). Jurisdiction is hereby reserved to determine the amount thereof if the parties are not able to amicably resolve this issue.

DONE AND ORDERED in Orlando, Orange County, Florida on the 16th day of March, 2012.

Neal P. Pitts
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing order was entered and a true copy was furnished by electronic transmission on this 16th day of March, 2012, to the following.

Secretary to Judge Neal P. Pitts
Judge of Compensation Claims

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