

**FINAL AWARD ALLOWING COMPENSATION**  
(Modifying Award and Decision of Administrative Law Judge)

Injury No. 03-133451

Employee: James Lutes  
Employer: DaimlerChrysler (Settled)  
Insurer: Old Carco, LLC (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the parties' briefs, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modification set forth below.

**Discussion**

Second Injury Fund liability

The administrative law judge determined that the Second Injury Fund is liable for 35.625 weeks of enhanced permanent partial disability benefits. Employee appeals, arguing the administrative law judge should instead have awarded 134.61 weeks of permanent partial disability benefits from the Second Injury Fund. Employee advances higher ratings for his preexisting conditions referable to the low back and bilateral wrists, and also argues the administrative law judge should have included claimed preexisting permanent partial disability referable to the right hand for a trigger finger condition, the right elbow, the cardiovascular system, and the right shoulder.

First, with regard to the right hand trigger finger, we note that in his testimony, employee did not identify any complaints or difficulties specifically referable to this condition, and employee's settlement with the employer for the 1999 claim does not appear to have included any separate rating or amount for permanent partial disability referable to the trigger finger diagnoses and surgeries. Meanwhile, post-operative notes from the treating surgeon, Dr. Mitchell Rotman, are not supportive of a finding of preexisting permanent partial disability with regard to the trigger fingers; instead, Dr. Rotman opined employee was magnifying his symptoms and that his subjective complaints were psychologically induced. On the other hand, the record does contain a report from an independent medical examination by Dr. Bruce Schlafly with ratings of 25% permanent partial disability of the left long and right ring fingers referable to the trigger finger release surgeries. But in his brief, employee does not even mention this report from Dr. Schlafly, much less advance any argument why we should rely upon it where employee does not provide any testimony of his own to substantiate these ratings.

Instead, employee asks us to adopt the rating of his medical expert, Dr. Robert Poetz, that employee suffered a 20% permanent partial disability of the right hand referable to

Employee: James Lutes

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the right trigger finger condition. But at his deposition, Dr. Poetz conceded that he didn't know whether employee had any continuing problems from his 1998 or 1999 upper extremity conditions. See *Transcript*, page 343. Dr. Poetz's willingness to rate a condition where he was unaware whether employee actually experienced any ongoing problems renders his opinion lacking any persuasive force whatsoever. After careful consideration, we deem this record insufficient to support a finding that employee suffered any preexisting permanent partial disability referable to a right hand trigger finger condition and/or surgery.

Second, with regard to the right elbow, we note that Dr. Poetz rated 10% permanent partial disability for what he described as an October 1998 right elbow injury or diagnosis of medial epicondylitis. Given that there is no other evidence on this record of an October 1998 injury or event involving the right elbow, we would expect Dr. Poetz to provide some explanation for his rating. But at his deposition, Dr. Poetz made clear that he could not remember anything about this claim or about employee, that he was unwilling to discuss or defend his findings, and that his report would have to speak for itself. Unfortunately, Dr. Poetz's report is conclusory and lacks any explanation with regard to this claimed 1998 right elbow condition or injury, so it cannot speak for itself.

Employee did not offer any testimony that he suffered a 1998 right elbow injury; instead, employee seemed to believe he had right elbow problems in 2001. See *Transcript*, pages 40, 80. We find employee's testimony lacking persuasive force on this point, as he was clearly confused. Apart from a January 31, 2000, note from Dr. Rotman memorializing a complaint of right elbow pain of four months in duration (but also finding no evidence of impairment referable thereto), employee provides no other evidence that would support a finding that he suffered preexisting permanent partial disability referable to the right elbow as of the date of the primary injury in this matter. For this reason, and because Dr. Poetz was clearly unwilling or unable to provide any explanation for his rating, we find the record insufficient to support a finding that employee suffered any preexisting permanent partial disability of the right elbow as of October 15, 2003, the date of the primary injury.

Turning to the cardiovascular condition, we note that once again, employee did not provide any testimony of his own to establish how this condition constituted a permanent partial disability as of the date of injury in this matter. Nor does employee cite, in his brief, any medical records or other evidence that would support such a finding. Instead, employee relies solely upon a rating from Dr. Poetz. But notably, Dr. Poetz did not provide a diagnosis or rating for a preexisting cardiovascular condition in his reports dated July 24, 2001, October 27, 2008, or March 9, 2009. Instead, the first rating from Dr. Poetz for this condition appears in his report of February 17, 2010, wherein Dr. Poetz merely lists the condition as "pre-existing," and does not specify whether any such disability preexisted the primary injury at issue in this matter. See *Transcript*, page 472. As we have noted above, Dr. Poetz refused to provide any rationale or explanation for his findings at his deposition. As a result, we find this rating from Dr. Poetz insufficient on its face to establish employee suffered from a preexisting cardiovascular permanent partial disability as of the date of injury in this matter, because we have no way to

Employee: James Lutes

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determine what Dr. Poetz meant by “pre-existing” where he did not render this finding until February 2010.

Finally, with regard to the right shoulder, we note that employee asks us to rate it three times and include each rating in our assessment of Second Injury Fund liability. One of these ratings appears to correspond to an opinion from Dr. Poetz that employee suffered 10% permanent partial disability referable to an alleged October 1998 right shoulder injury, but the other two ratings correspond to the same alleged 2001 right shoulder injury. Specifically, in his brief, employee asks us to include both the amount of permanent partial disability reflected in a settlement as well as the amount of permanent partial disability rated by Dr. Poetz *for the same condition*. Suffice to say we are not persuaded by employee’s argument that we should find a total of 27.5% preexisting permanent partial disability referable to the right shoulder.

We cannot overlook, however, the fact that the administrative law judge excluded preexisting permanent partial disability referable to the right shoulder on the sole basis that she did not, in a separate proceeding, find that condition to have constituted a compensable work injury. See *Award*, page 6. This is clear error, because § 287.220 RSMo does not require that a preexisting permanent partial disability result from a compensable work injury to be included in a claim against the Second Injury Fund for permanent partial disability benefits. Accordingly, although we are in no way persuaded by employee’s brief or arguments, we discern a need to modify the award of the administrative law judge to correct this error.

We defer to (and hereby adopt) the administrative law judge’s ratings referable to employee’s primary injury and preexisting conditions of ill-being, as well as her finding that a 15% load factor is appropriate to account for the synergistic interaction of these conditions. After careful consideration, we deem appropriate the 2.5% rating reflected in employee’s settlement of the 2001 right shoulder claim against the employer. We recalculate Second Injury Fund liability for enhanced permanent partial disability benefits, as follows:

63 weeks (30% permanent partial disability of the left elbow) + 31.5 weeks  
(18% of the left wrist) + 35 weeks (20% of the right wrist) + 108 weeks  
(27% of the body as a whole referable to the lumbar spine) + 5.8 weeks  
(2.5% of the right shoulder) = 243.3 weeks x the 15% load factor = 36.495  
weeks of enhanced permanent partial disability.

At the stipulated permanent partial disability rate of \$347.05, we conclude the Second Injury Fund is liable for \$12,665.59 in permanent partial disability benefits.

### **Conclusion**

We modify the award of the administrative law judge as to the issue of Second Injury Fund liability. Employee is entitled to, and the Second Injury Fund is hereby ordered to pay, \$12,665.59 in permanent partial disability benefits.

Employee: James Lutes

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The award and decision of Administrative Law Judge Margaret Landolt, issued April 15, 2015, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

The Commission approves and affirms the administrative law judge's allowance of an attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 4<sup>th</sup> day of September 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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SEPARATE OPINION FILED  
Curtis E. Chick, Jr., Member

Attest:

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Secretary

Employee: James Lutes

**SEPARATE OPINION**

(Concurring in Part and Dissenting in Part)

I concur with the majority's decision to correct the administrative law judge's clearly erroneous decision to deny compensation for employee's preexisting right shoulder permanent partial disability, but I would also conclude that employee's attorney is not entitled to an attorney fee lien upon the additional amounts awarded by this Commission.

Section 287.260 RSMo permits the Commission to allow an attorney fee lien upon an award of compensation "if the [attorney's] services are found to be necessary." Here, employee's attorney failed to brief or even mention the fact that the administrative law judge clearly erred in denying compensation for the prior right shoulder permanent partial disability. As noted by the majority, the administrative law judge's basis for excluding the right shoulder disability finds no support whatsoever in the law.

Yet, employee's attorney ignored this issue, and filed a brief so riddled with typographical and logical errors that it is difficult to even interpret his arguments. As best I can determine, the only real argument in employee's brief is that we should give unthinking deference to the ratings from employee's expert, Dr. Poetz. The majority has thoroughly catalogued the problems with the opinions from Dr. Poetz, so there is no need for me to repeat them here. I would point out, however, that if Dr. Poetz had been provided better information and asked more relevant questions at his deposition, this record might have provided compelling support for an additional award of compensation for employee's preexisting right elbow, trigger fingers, and cardiovascular conditions.

Ultimately, my point is that employee is receiving additional compensation in our award not through any advocacy on the part of his attorney, but simply because this Commission was constrained to correct a clearly erroneous legal conclusion on the part of the administrative law judge. In other words, I do not find that the attorney's services were necessary in this appeal, and I believe it is unfair and unreasonable to permit him to retain 25% of employee's additional workers' compensation benefits where, in my view, he did not earn that fee.

Because the Commission majority has decided to permit employee's attorney a fee lien on the additional compensation awarded herein, I dissent in part from their award.

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Curtis E. Chick, Jr., Member

## AWARD

Employee: James Lutes

Injury No.: 03-133451

Dependents: N/A

Employer: DaimlerChrysler (Settled)

Before the  
**Division of Workers'  
Compensation**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Old Carco LLC (Settled)

Hearing Date: January 15, 2015

Checked by: MDL

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: October 15, 2003
5. State location where accident occurred or occupational disease was contracted: St. Louis, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
Employee was lifting doors when he was struck in the left elbow
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Left elbow
14. Nature and extent of any permanent disability: 30% PPD of the left elbow previously settled with Employer and PPD benefits from SIF due to combination
15. Compensation paid to-date for temporary disability: N/A
16. Value necessary medical aid paid to date by employer/insurer? N/A

Employee: James Lutes

Injury No.: 03-133451

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: Unknown
- 19. Weekly compensation rate: \$662.55/\$347.05
- 20. Method wages computation: By stipulation

**COMPENSATION PAYABLE**

21. Amount of compensation payable:	SETTLED
22. Second Injury Fund liability: Yes	
35.625 weeks of permanent partial disability from Second Injury Fund	\$12,363.66
TOTAL:	\$12,363.66
23. Future requirements awarded: None	

Said payments to begin and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Mr. William Roussin

## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee: James Lutes

Injury No.: 03-133451

Dependents: N/A

Before the  
**Division of Workers'  
Compensation**

Employer: DaimlerChrysler (Settled)

Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Old Carco LLC (Settled)

Checked by: MDL

### **PRELIMINARIES**

A hearing was held on January 15, 2015 at the Division of Workers' Compensation in the City of St. Louis, Missouri. The parties agreed to leave the record open for one week for the submission of a deposition transcript. On January 22, 2015 the record was closed. James Lutes ("Claimant") was represented by Mr. William Roussin. DaimlerChrysler Corporation ("Employer") which is self-insured, previously settled its liability with Claimant, and this matter proceeded to a hearing against the Second Injury Fund ("SIF") which was represented by Assistant Attorney General Adam Sandberg. Mr. Roussin requested a fee of 25% of Claimant's award. This matter was tried concurrently with Injury Nos. 01-127134, 04-140366, and 06-129264, which are the subjects of separate awards. The exhibits submitted contained numerous highlighted portions and handwritten notes. None of the markings or notes were made by the Court and were present at the time they were received.

The parties stipulated that on or about October 15, 2003 Claimant sustained an accidental injury arising out of and in the course of employment; Claimant was an employee of Employer; venue is proper in the City of St. Louis, Missouri; Employer received proper notice<sup>1</sup> of the injury; the claim was timely filed; and the appropriate rates of compensation are \$662.55 for Permanent Total Disability ("PTD") benefits and \$347.05 for Permanent Partial Disability ("PPD") benefits. The issue to be resolved is whether the SIF is liable for PTD or PPD benefits.

### **SUMMARY OF EVIDENCE**

Claimant is a 58 year old man with a ninth grade education who last worked for Employer on May 4, 2009. His last day of work was when the plant closed. Claimant served in the military for one year. Claimant does not have a high school diploma or a GED. From 1979 to 1990 Claimant worked for Ashland Chemical as a truck driver. Claimant worked through the local Teamsters Union and drove a tractor trailer locally. His job involved loading and unloading both liquid and dry chemicals. Claimant left his job because of back problems. Claimant also managed a small restaurant called The Catfish Inn. He also worked at two different golf courses

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<sup>1</sup> At the time of the hearing, the SIF raised notice as an issue. In its post-trial brief, the SIF withdrew notice as an issue.

as the head of maintenance. His maintenance jobs did not include administrative duties such as filling out paper work. His job was to keep the equipment running, and his skills were self-taught. Claimant does not have computer skills and is unable to type.

Claimant began working for Employer in 1996. During his tenure, he worked in the paint and chassis departments, and as a floater. All of his work for Employer was physically demanding, and included heavy lifting, standing, stooping, repetitive overhead work, and bending. Claimant used spray and torque guns. When Claimant started working for Employer he worked 9 or 10 hour days, but by the time the plant closed he was working 8 hours a day.

### **PRIOR INJURIES**

Claimant had the following pre-existing injuries:

Claimant had three prior lumbar surgeries. In 1989 Claimant had a L5-S2 discectomy, and a right hemilaminectomy and discectomy in 1995. Claimant's last back surgery was an L4-S1 fusion in April 1998. Following his surgeries Claimant had pain in his back that traveled down his back into his legs.

Claimant had bilateral carpal tunnel syndrome and underwent bilateral carpal tunnel releases and trigger finger releases in 1999. Claimant settled his claim with Employer for 18% PPD of the left wrist and 20% PPD of the right wrist with a 10% load factor, and settled his SIF claim for preexisting 27% PPD of the body as a whole for his back. As a result of his hand injuries Claimant's right index finger becomes numb and he has problems with stiffness in his right thumb.

### **PRIMARY INJURY**

Claimant testified on October 15, 2003 while he was lifting a door it struck him on his left elbow. Claimant reported the accident and was sent to the plant medical department. On January 8, 2004 a Report of Injury was filed alleging an injury to Claimant's left elbow on October 11, 2003. Claimant saw Dr. Rotman on January 22, 2004 for an examination of his left elbow. Claimant reported an injury a few months before. Dr. Rotman injected Claimant's left elbow which relieved 30 to 40% of Claimant's pain. Dr. Rotman also ordered a bone scan which was performed and was negative. Dr. Rotman performed another injection on October 28, 2004. After conservative treatment failed, Dr. Rotman performed a left lateral epicondylectomy on July 29, 2005. Claimant was released to full duty on October 20, 2005. Claimant's symptoms did not resolve and Dr. Rotman performed a left medial epicondylectomy on July 14, 2006. Claimant was released to full duty on October 5, 2006. After Claimant had continuing symptoms in his left elbow, Dr. Rotman performed a left ulnar nerve transposition on September 14, 2007. Claimant was released to full duty on November 9, 2007. Dr. Rotman found Claimant to be at maximum medical improvement on February 14, 2008 and rated his disability at 7% PPD of the left elbow.

Dr. Poetz examined Claimant on January 18, 2007 and prepared a report dated October 27, 2008. Dr. Poetz opined Claimant sustained 35% PPD of the left elbow. Dr. Poetz examined Claimant before his last elbow surgery of September 2007, but reviewed records which discussed

Claimant’s last left elbow surgery before he prepared his report in 2008. Dr. Poetz saw Claimant again on January 15, 2009 and October 6, 2009, and kept the same 35% PPD rating to the left elbow.

Dr. Poetz did not opine Claimant was permanently and totally disabled due to the October 15, 2003 left elbow injury in combination with his prior medical conditions.

Dr. Poetz diagnosed and rated the following preexisting conditions:

- Lumbar discogenic disease; status post lumbar surgeries including fusion – 40% PPD of the body as a whole at the lumbar spine
- Bilateral Carpal tunnel syndrome – 30% PPD of the right wrist and 25% PPD of the left wrist
- Bilateral trigger fingers – 20% PPD of each hand
- Right elbow medial epicondylitis from October 1998 –10% PPD of the right elbow
- Right shoulder tenosynovitis October 1998 – 15% PPD of the right shoulder
- Right shoulder impingement syndrome with exacerbation of preexisting right shoulder tenosynovitis August 1, 2001 – 10% PPD of the right shoulder

Dr. Poetz opined the present and prior disabilities resulted in a total which exceeds the simple sum by 20%.

Claimant settled his claim with Employer for 30% PPD of the left elbow.

**FINDINGS OF FACT AND RULINGS OF LAW**

Based upon a comprehensive review of the evidence, my observations of Claimant at hearing, and the application of Missouri law, I find:

The parties stipulated Claimant sustained an accident arising out of and in the course of employment on or about October 15, 2003. That accident resulted in an injury to Claimant’s left elbow and necessitated the medical treatment that followed including three surgeries.

Claimant was not permanently and totally disabled as a result of the accident of October 2003. There is insufficient evidence expert or otherwise to prove that Claimant was permanently and totally disabled as a result of the combination of his 2003 accident and injury and his preexisting injuries.

Claimant has established a right to recover from the Second Injury Fund. A claimant in a worker's compensation proceeding has the burden of proving all elements of his claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 911 (Mo.App. E.D.2008). In order for a claimant to recover against the SIF, she must prove that he sustained a compensable injury, referred to as “the last injury,” which resulted in permanent partial disability. Section 287.220.1 RSMo. A claimant must also prove that she had a pre-existing permanent partial disability, whether from a compensable injury or otherwise, that: (1) existed at the time the last injury was sustained; (2) was of such seriousness as to constitute a hindrance or obstacle to his employment or reemployment should he become unemployed; and

(3) equals a minimum of 50 weeks of compensation for injuries to the body as a whole or 15% for major extremities. *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W.3d 267, 272 (Mo.App. E.D. 2008)(Citations omitted). In order for a claimant to be entitled to recover permanent partial disability benefits from the Second Injury Fund, she must prove that the last injury, combined with his pre-existing permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities. *Elrod v. Treasurer of Missouri as Custodian of the Second Injury Fund*, 138 S.W.3d 714, 717-18 (Mo. banc 2004). Claimant has met the burden imposed by law.

Claimant sustained 30% PPD of the left elbow as a result of the primary injury. At the time the last injury was sustained, Claimant had pre-existing PPD of 27% of the body as a whole – lumbar spine; 18% PPD of the left wrist; and 20% PPD of the right wrist; which meet the statutory threshold, and were of such seriousness as to constitute a hindrance or obstacle to employment or re-employment.

Although Claimant settled an alleged 2001 right shoulder injury with Employer for 2.5% PPD of the right shoulder, I found Claimant failed to prove he sustained an occupational disease arising out of and in the course of employment on August 1, 2001 that resulted in disability to his right shoulder (See the Award in Injury No. 01-127134).

The credible evidence establishes that the last injury, combined with the pre-existing permanent partial disabilities, and causes a greater overall disability. SIF liability is calculated as follows: 63 weeks for his left elbow+ 108 weeks for his body as a whole – low back + 31.5 weeks for his left wrist + 35 weeks for his right wrist = 237.5 weeks x 15% = 36.625 weeks x \$347.05 = \$12,363.66.

This award is subject to an attorney’s lien of 25% in favor of Claimant’s attorney Mr. William Roussin.

Made by: \_\_\_\_\_  
 MARGARET D. LANDOLT  
 Administrative Law Judge  
 Division of Workers' Compensation



**FINAL AWARD ALLOWING COMPENSATION**  
(Modifying Award and Decision of Administrative Law Judge)

Injury No. 04-140366

Employee: James Lutes  
Employer: DaimlerChrysler (Settled)  
Insurer: Old Carco (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the parties' briefs, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modification set forth below.

**Discussion**

*Second Injury Fund liability*

The administrative law judge determined that the Second Injury Fund is liable for 42.71 weeks of enhanced permanent partial disability benefits. Employee appeals, arguing the administrative law judge should instead have awarded 114.38 weeks of permanent partial disability benefits from the Second Injury Fund. Employee advances higher ratings for his preexisting conditions referable to the low back and bilateral wrists, and also argues the administrative law judge should have included claimed preexisting permanent partial disability referable to the right hand, the right elbow, the cardiovascular system, and the right shoulder.

First, with regard to the right hand, we note that in his testimony, employee did not identify any complaints or difficulties specifically referable to this condition, and employee's settlement with the employer for the 1999 claim does not appear to have included any separate rating or amount for permanent partial disability referable to the trigger finger diagnoses and surgeries. Meanwhile, post-operative notes from the treating surgeon, Dr. Mitchell Rotman, are not supportive of a finding of preexisting permanent partial disability with regard to the trigger fingers; instead, Dr. Rotman opined employee was magnifying his symptoms and that his subjective complaints were psychologically induced. On the other hand, the record does contain a report from an independent medical examination by Dr. Bruce Schlafly with ratings of 25% permanent partial disability of the left long and right ring fingers referable to the trigger finger release surgeries. But in his brief, employee does not even mention this report from Dr. Schlafly, much less advance any argument why we should rely upon it where employee does not provide any testimony of his own to substantiate these ratings.

Instead, employee asks us to adopt the rating of his medical expert, Dr. Robert Poetz, that employee suffered a 20% permanent partial disability of the right hand referable to the right trigger finger condition. But at his deposition, Dr. Poetz conceded that he didn't know whether employee had any continuing problems from his 1998 or 1999 upper extremity conditions. See *Transcript*, page 343. Dr. Poetz's willingness to rate a condition where he was unaware whether employee actually experienced any ongoing

Employee: James Lutes

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problems renders his opinion lacking any persuasive force whatsoever. After careful consideration, we deem this record insufficient to support a finding that employee suffered any preexisting permanent partial disability referable to a right hand trigger finger condition and/or surgery.

Second, with regard to the right elbow, we note that Dr. Poetz rated 10% permanent partial disability for what he described as an October 1998 right elbow injury or diagnosis of medial epicondylitis. Given that there is no other evidence on this record of an October 1998 injury or event involving the right elbow, we would expect Dr. Poetz to provide some explanation for his rating. But at his deposition, Dr. Poetz made clear that he could not remember anything about this claim or about employee, that he was unwilling to discuss or defend his findings, and that his report would have to speak for itself. Unfortunately, Dr. Poetz's report is conclusory and lacks any explanation with regard to this claimed 1998 right elbow condition or injury, so it cannot speak for itself.

Employee did not offer any testimony that he suffered a 1998 right elbow injury; instead, employee seemed to believe he had right elbow problems in 2001. See *Transcript*, pages 40, 80. We find employee's testimony lacking persuasive force on this point, as he was clearly confused. Apart from a January 31, 2000, note from Dr. Rotman memorializing a complaint of right elbow pain of four months in duration (but also finding no evidence of impairment referable thereto), employee provides no other evidence that would support a finding that he suffered preexisting permanent partial disability referable to the right elbow as of the date of the primary injury in this matter. For this reason, and because Dr. Poetz was clearly unwilling or unable to provide any explanation for his rating, we find the record insufficient to support a finding that employee suffered any preexisting permanent partial disability of the right elbow as of June 2004.

Turning to the cardiovascular condition, we note that once again, employee did not provide any testimony of his own to establish how this condition constituted a permanent partial disability as of June 2004. Nor does employee cite, in his brief, any medical records or other evidence that would support such a finding. Instead, employee relies solely upon a rating from Dr. Poetz. But notably, Dr. Poetz did not provide a diagnosis or rating for a preexisting cardiovascular condition in his reports dated July 24, 2001, October 27, 2008, or March 9, 2009. Instead, the first rating from Dr. Poetz for this condition appears in his report of February 17, 2010, wherein Dr. Poetz merely lists the condition as "pre-existing," and does not specify whether any such disability preexisted the primary injury at issue in this matter. See *Transcript*, page 472. As we have noted above, Dr. Poetz refused to provide any rationale or explanation for his findings at his deposition. As a result, we find this rating from Dr. Poetz insufficient on its face to establish employee suffered from a preexisting cardiovascular permanent partial disability as of the date of injury in this matter, because we have no way to determine what Dr. Poetz meant by "pre-existing" where he did not render this finding until February 2010.

Finally, with regard to the right shoulder, we are not persuaded by employee's suggestion that he suffered a 15% permanent partial disability of the right shoulder at the time of the primary injury. We cannot overlook, however, the fact that the administrative law judge excluded preexisting permanent partial disability referable to the right shoulder on the sole basis that she did not, in a separate proceeding, find that condition to have constituted a compensable work injury. See *Award*, page 6. This is clear error, because § 287.220 RSMo does not require that a preexisting permanent

Employee: James Lutes

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partial disability result from a compensable work injury to be included in a claim against the Second Injury Fund for permanent partial disability benefits. Accordingly, although we are in no way persuaded by employee's brief or arguments, we discern a need to modify the award of the administrative law judge to correct this error.

We defer to (and hereby adopt) the administrative law judge's ratings referable to employee's primary injury and preexisting conditions of ill-being, as well as her finding that a 15% load factor is appropriate to account for the synergistic interaction of these conditions. After careful consideration, we deem appropriate the 2.5% rating reflected in employee's settlement of the 2001 right shoulder claim against the employer. We recalculate Second Injury Fund liability for enhanced permanent partial disability benefits, as follows:

47.25 weeks (22.5% permanent partial disability of the right elbow) + 63 weeks (30% of the left elbow) + 31.5 weeks (18% of the left wrist) + 35 weeks (20% of the right wrist) + 108 weeks (27% of the body as a whole referable to the lumbar spine) + 5.8 weeks (2.5% of the right shoulder) = 290.55 weeks x the 15% load factor = 43.58 weeks of enhanced permanent partial disability.

At the stipulated permanent partial disability rate of \$347.05, we conclude the Second Injury Fund is liable for \$15,124.44 in permanent partial disability benefits.

### **Conclusion**

We modify the award of the administrative law judge as to the issue of Second Injury Fund liability. Employee is entitled to, and the Second Injury Fund is hereby ordered to pay, \$15,124.44 in permanent partial disability benefits.

The award and decision of Administrative Law Judge Margaret Landolt, issued April 15, 2015, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

The Commission approves and affirms the administrative law judge's allowance of an attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 4<sup>th</sup> day of September 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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SEPARATE OPINION FILED

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

Employee: James Lutes

**SEPARATE OPINION**

(Concurring in Part and Dissenting in Part)

I concur with the majority's decision to correct the administrative law judge's clearly erroneous decision to deny compensation for employee's preexisting right shoulder permanent partial disability, but I would also conclude that employee's attorney is not entitled to an attorney fee lien upon the additional amounts awarded by this Commission.

Section 287.260 RSMo permits the Commission to allow an attorney fee lien upon an award of compensation "if the [attorney's] services are found to be necessary." Here, employee's attorney failed to brief or even mention the fact that the administrative law judge clearly erred in denying compensation for the prior right shoulder permanent partial disability. As noted by the majority, the administrative law judge's basis for excluding the right shoulder disability finds no support whatsoever in the law.

Yet, employee's attorney ignored this issue, and filed a brief so riddled with typographical and logical errors that it is difficult to even interpret his arguments. (Notably, it appears that the author of the brief merely recycled the entire factual and argument sections of employee's brief in an entirely different claim.) As best I can determine, the only real argument in employee's brief is that we should give unthinking deference to the ratings from employee's expert, Dr. Poetz. The majority has thoroughly catalogued the problems with the opinions from Dr. Poetz, so there is no need for me to repeat them here. I would point out, however, that if Dr. Poetz had been given better information and asked more relevant questions at his deposition, this record might have provided compelling support for an additional award of compensation for employee's preexisting right elbow, trigger fingers, and cardiovascular conditions.

Ultimately, my point is that employee is receiving additional compensation in our award not through any advocacy on the part of his attorney, but simply because this Commission was constrained to correct a clearly erroneous legal conclusion on the part of the administrative law judge. In other words, I do not find that the attorney's services were necessary in this appeal, and I believe it is unfair and unreasonable to permit him to retain 25% of employee's additional workers' compensation benefits where, in my view, he did not earn that fee.

Because the Commission majority has decided to permit employee's attorney a fee lien on the additional compensation awarded herein, I dissent in part from their award.

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Curtis E. Chick, Jr., Member

## AWARD

Employee: James Lutes

Injury No.: 04-140366

Dependents: N/A

Employer: DaimlerChrysler (Settled)

Before the  
**Division of Workers'  
Compensation**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Old Carco LLC (Settled)

Hearing Date: January 15, 2015

Checked by: MDL

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: June 2004
5. State location where accident occurred or occupational disease was contracted: St. Louis, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
Employee developed pain in his right elbow due to the repetitive nature of his work.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Right elbow
14. Nature and extent of any permanent disability: 22.5% PPD of the right elbow previously settled with Employer and PPD benefits from SIF due to synergistic effect
15. Compensation paid to-date for temporary disability: N/A
16. Value necessary medical aid paid to date by employer/insurer? N/A

Employee: James Lutes

Injury No.: 04-140366

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: Unknown
- 19. Weekly compensation rate: \$662.55/\$347.05
- 20. Method wages computation: By stipulation

**COMPENSATION PAYABLE**

21. Amount of compensation payable:	SETTLED
22. Second Injury Fund liability: Yes	
42.71 weeks of permanent partial disability from Second Injury Fund	\$14,822.51
TOTAL:	\$14,822.51
23. Future requirements awarded: None	

Said payments to begin and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Mr. William Roussin

## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee: James Lutes

Injury No.: 04-140366

Dependents: N/A

Before the  
**Division of Workers'  
Compensation**

Employer: DaimlerChrysler Corporation (Settled)

Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Old Carco LLC (Settled)

Checked by: MDL

### **PRELIMINARIES**

A hearing was held on January 15, 2015 at the Division of Workers' Compensation in the City of St. Louis, Missouri. The parties agreed to leave the record open for one week for the submission of a deposition transcript. On January 22, 2015 the record was closed. James Lutes ("Claimant") was represented by Mr. William Roussin. DaimlerChrysler Corporation ("Employer") which is self-insured, previously settled its liability with Claimant, and this matter proceeded to a hearing against the Second Injury Fund ("SIF") which was represented by Assistant Attorney General Adam Sandberg. Mr. Roussin requested a fee of 25% of Claimant's award. This matter was tried concurrently with Injury Nos. 01-127134, 03-133451, and 06-129264, which are the subjects of separate awards. The exhibits submitted contained numerous highlighted portions and handwritten notes. None of the markings or notes were made by the Court and were present at the time they were received.

The parties stipulated that on or about June 2004 Claimant sustained an occupational disease arising out of and in the course of employment; Claimant was an employee of Employer; venue is proper in the City of St. Louis, Missouri; Employer received proper notice<sup>1</sup> of the injury; the claim was timely filed; and the appropriate rates of compensation are \$662.55 for Permanent Total Disability ("PTD") benefits and \$347.05 for Permanent Partial Disability ("PPD") benefits. The issue to be resolved is whether the SIF is liable for PTD or PPD benefits.

### **SUMMARY OF EVIDENCE**

Claimant is a 58 year old man with a ninth grade education who last worked for Employer on May 4, 2009. His last day of work was when the plant closed. Claimant served in the military for one year. Claimant does not have a high school diploma or a GED. From 1979 to 1990 Claimant worked for Ashland Chemical as a truck driver. Claimant worked through the local Teamsters Union and drove a tractor trailer locally. His job involved loading and unloading both liquid and dry chemicals. Claimant left his job because of back problems. Claimant also managed a small restaurant called The Catfish Inn. He also worked at two different golf courses as the head of maintenance. His maintenance jobs did not include administrative duties such as

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<sup>1</sup>At the time of the hearing, the SIF raised notice as an issue. In its post-trial brief, the SIF withdrew notice as an issue.

filling out paper work. His job was to keep the equipment running, and his skills were self-taught. Claimant does not have computer skills and is unable to type.

Claimant began working for Employer in 1996. During his tenure, he worked in the paint and chassis departments, and as a floater. All of his work for Employer was physically demanding, and included heavy lifting, standing, stooping, repetitive overhead work, and bending. Claimant used spray and torque guns. When Claimant started working for Employer he worked 9 or 10 hour days, but by the time the plant closed he was working 8 hours a day.

### **PRIOR INJURIES**

Claimant had the following pre-existing injuries:

Claimant had three prior lumbar surgeries. In 1989 Claimant had a L5-S2 discectomy, and a right hemilaminectomy and discectomy in 1995. Claimant's last back surgery was an L4-S1 fusion in April 1998. Following his surgeries Claimant had pain in his back that traveled down his back into his legs.

Claimant had bilateral carpal tunnel syndrome and underwent bilateral carpal tunnel releases and trigger finger releases in 1999. Claimant settled his claim with Employer for 18% PPD of the left wrist and 20% PPD of the right wrist with a 10% load factor, and settled his SIF claim for preexisting 27% PPD of his back. As a result of his hand injuries Claimant's right index finger becomes numb and he has problems with stiffness in his right thumb.

Claimant injured his left elbow at work in 2003. Claimant underwent three surgeries on his left elbow including a lateral epicondylectomy in 2005, a left medial epicondylectomy in 2006, and an ulnar nerve transposition in 2007. Claimant settled that claim with Employer for 30% PPD of the left elbow. Following his left elbow injury, Claimant had continuing pain in his left elbow.

### **PRIMARY INJURY**

Following Claimant's 2003 left elbow injury; he began to overuse his right elbow, and developed right lateral epicondylitis. In August 2005 Claimant underwent a right lateral epicondylectomy. Claimant was released to full duty in October 2005. After his surgery Claimant still had pain and burning. Claimant settled his claim with Employer for 22.5% PPD of the right elbow.

Dr. Poetz examined Claimant on January 18, 2007 and prepared a report dated October 27, 2008. Dr. Poetz diagnosed right lateral epicondylitis as a result of Claimant's June 2004 injury, and rated his disability at 25% PPD of the right elbow.

Dr. Poetz diagnosed and rated the following preexisting conditions:

- Lumbar discogenic disease; status post lumbar surgeries including fusion – 40% PPD of the body as a whole at the lumbar spine

- Bilateral Carpal tunnel syndrome – 30% PPD of the right wrist and 25% PPD of the left wrist
- Bilateral trigger fingers – 20% PPD of each hand
- Right elbow medial epicondylitis from October 1998 –10% PPD of the right elbow
- Right shoulder tenosynovitis October 1998 – 15% PPD of the right shoulder
- Right shoulder impingement syndrome with exacerbation of preexisting right shoulder tenosynovitis August 1, 2001 – 10% PPD of the right shoulder
- Left lateral and medial epicondylitis and status post lateral and medial epicondylectomies; left elbow failed medial epicondylectomy and cubital tunnel syndrome;, and status post left elbow ulnar nerve intramuscular transposition with flexor pronator lengthening October 15, 2003 – 35% PPD of the left shoulder

Dr. Poetz opined the present and prior disabilities resulted in a total which exceeds the simple sum by 20%.

Dr. Poetz did not provide an opinion that Claimant was totally disabled when he examined him on January 18, 2009. No doctor or vocational expert opined that Claimant was totally disabled from his right elbow injury in combination with his preexisting conditions.

### **FINDINGS OF FACT AND RULINGS OF LAW**

Based upon a comprehensive review of the evidence, my observations of Claimant at hearing, and the application of Missouri law, I find:

The parties stipulated Claimant sustained an occupational disease arising out of and in the course of employment on or about June 2004. That occupational disease resulted in an injury to Claimant's right elbow and necessitated the medical treatment that followed including surgery.

Claimant was not permanently and totally disabled as a result of the June 2004 injury. There is insufficient evidence expert or otherwise to prove that Claimant was permanently and totally disabled as a result of the combination of his 2004 occupational disease and his preexisting injuries.

Claimant has established a right to recover PPD benefits from the Second Injury Fund. A claimant in a worker's compensation proceeding has the burden of proving all elements of his claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 911 (Mo.App. E.D.2008). In order for a claimant to recover against the SIF, she must prove that he sustained a compensable injury, referred to as "the last injury," which resulted in permanent partial disability. Section 287.220.1 RSMo. A claimant must also prove that she had a pre-existing permanent partial disability, whether from a compensable injury or otherwise, that: (1) existed at the time the last injury was sustained; (2) was of such seriousness as to constitute a hindrance or obstacle to his employment or reemployment should he become unemployed; and (3) equals a minimum of 50 weeks of compensation for injuries to the body as a whole or 15% for major extremities. *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W.3d 267, 272 (Mo.App. E.D. 2008)(Citations omitted). In order for a claimant to be entitled to recover permanent partial disability benefits from the Second Injury Fund, she must prove that the last injury, combined with his pre-existing permanent partial disabilities, causes greater

overall disability than the independent sum of the disabilities. *Elrod v. Treasurer of Missouri as Custodian of the Second Injury Fund*, 138 S.W.3d 714, 717-18 (Mo. banc 2004). Claimant has met the burden imposed by law.

Claimant sustained 22.5% PPD of the right elbow as a result of the primary injury. At the time the last injury was sustained, Claimant had pre-existing PPD of 27% of the body as a whole – lumbar spine; 18% PPD of the left wrist; 20% PPD of the right wrist; and 30% PPD of the left elbow which meet the statutory threshold, and were of such seriousness as to constitute a hindrance or obstacle to employment or re-employment.

Although Claimant settled an alleged 2001 right shoulder injury with Employer for 2.5% PPD of the right shoulder, I found Claimant failed to prove he sustained an occupational disease arising out of and in the course of employment on August 1, 2001 that resulted in disability to his right shoulder (See the Award in Injury No. 01-127134).

The credible evidence establishes that the last injury, combined with the pre-existing permanent partial disabilities, and causes a greater overall disability. SIF liability is calculated as follows: 47.25 weeks for his right elbow+ 108 weeks for the body as a whole – low back + 31.5 weeks for his left wrist + 35 weeks for his right wrist + 63 weeks for his left elbow = 284.75 weeks x 15% = 42.71 weeks x \$347.05 = \$14,822.51.

This award is subject to an attorney’s lien of 25% in favor of Claimant’s attorney Mr. William Roussin.

Made by: \_\_\_\_\_  
 MARGARET D. LANDOLT  
 Administrative Law Judge  
 Division of Workers' Compensation



**FINAL AWARD DENYING COMPENSATION**  
(Affirming Award and Decision of Administrative Law Judge  
with Supplemental Opinion)

Injury No. 06-129264

Employee: James Lutes  
Employer: DaimlerChrysler (Settled)  
Insurer: Old Carco, LLC (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, and considered the whole record, we find that the award of the administrative law judge denying compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

**Discussion**

Medical causation

The administrative law judge determined that employee failed to meet his burden of proof with respect to the issue of medical causation. Specifically, she found that employee did not sustain a compensable injury by occupational disease affecting his bilateral shoulders as of December 1, 2006, because the opinions from employee's medical expert, Dr. Robert Poetz, were less credible and persuasive than those from a treating physician, Dr. Mitchell Rotman. Employee appeals.

Remarkably, though, employee does not, in his brief, challenge the administrative law judge's actual rationale in denying this claim, and only briefly mentions the issue of medical causation. Instead, employee devotes almost his entire brief to the argument that he is permanently and totally disabled. As a result, there is no real argument from employee currently pending before this Commission that the administrative law judge erred in denying this claim, other than the mere suggestion in his application for review that the administrative law judge should have deferred to employee's settlement of this claim with the employer. Suffice to say employee has failed to persuade us to reach a different result than that reached by the administrative law judge with respect to the issue of medical causation.

We do wish to note, however, that it appears that Dr. Rotman did not actually examine employee's shoulders after the December 1, 2006, claimed date of injury in this matter. Rather, the record suggests Dr. Rotman's last relevant examination of employee took place on October 5, 2006, when employee presented for follow-up after a left medial epicondylectomy and also complained of right shoulder pain. See *Transcript*, page 575. The Second Injury Fund points to a stray notation contained in a medical record attributed

Employee: James Lutes

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to a Dr. Gupta suggesting that Dr. Rotman later reviewed a February 26, 2007, right shoulder MRI and told Dr. Gupta that the pathology shown therein was in the nature of degenerative arthritis rather than an acute injury. See *Transcript*, page 1121. But this (purported) opinion from Dr. Rotman does not clearly contradict employee's gradual-onset theory of injury, and given the hearsay nature of this evidence, we are not particularly inclined to rely on such in any event. Accordingly, we must disclaim the administrative law judge's reliance on the findings of Dr. Rotman, as it appears there is not actually any relevant opinion from Dr. Rotman on this record.

Having said that, we reiterate that the burden was, of course, employee's to prove that his occupational exposures were the prevailing factor causing him to suffer an injury by occupational disease. See § 287.067 RSMo. But, as noted by the administrative law judge, the only relevant testimony from employee at the hearing was that he had problems in both shoulders as of December 2006. Employee's attorney asked him some questions about his job duties relevant to other claims for bilateral hand, wrist, and elbow injuries, but failed to adduce testimony making any meaningful connection between employee's work duties and his claim of bilateral shoulder injuries manifesting or culminating in December 2006. In fact, it is not at all clear to us from employee's testimony what his actual duties as of December 2006 entailed, as the leading questions from employee's attorney combined with employee's vague responses create a rather confusing record with regard to chronology.

Likewise, for all of the reasons listed by the administrative law judge, we agree that the opinions from Dr. Poetz are insufficiently persuasive to satisfy employee's burden with respect to the issue of medical causation. We additionally note that Dr. Poetz, in his report, states that the injuries which occurred on December 1, 2006, are the substantial and prevailing factor causing *all* of employee's claimed permanent partial disabilities—including those clearly referable to preexisting conditions of ill-being. See *Transcript*, pages 463-64. In other words, not only does Dr. Poetz fail to provide a relevant causation opinion (the statute requires that employee's *occupational exposures*, not his injuries, be shown to constitute the prevailing causative factor) he appears to assign all of employee's disability, including that referable to preexisting low back and carpal tunnel surgeries, to employee's claimed primary bilateral shoulder injuries. This nonsensical opinion may have been (and probably was) the result of mere inattention or careless drafting on the part of Dr. Poetz, and if the doctor had been asked to acknowledge or explain this circumstance at his deposition, we might be able to treat it as such. But Dr. Poetz was not asked to provide *any* causation opinion at his deposition with respect to this claim, and he instead merely recited the permanent partially disabling conditions he believed employee to suffer with regard to his bilateral shoulders. As a result, there is ultimately no medical causation opinion from Dr. Poetz on this record that we could reasonably credit.

We also wish to note that on cross-examination, Dr. Poetz revealed that he was unwilling or unable to explain or defend his findings, other than to read directly from his report. In fact, Dr. Poetz went so far as to instruct counsel for the Second Injury Fund, "I don't know anything unless it's in the [report]. ... So don't bother to ask me questions that aren't already in the [report]." *Transcript*, page 330. Given Dr. Poetz's professed

Employee: James Lutes

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ignorance of material facts and complete reliance upon a fatally deficient report, we must agree with the administrative law judge that his opinions lack persuasive force and that employee has failed to meet his burden of proof that he sustained compensable injuries by occupational disease in December 2006.

**Conclusion**

We affirm and adopt the award of the administrative law judge as supplemented herein.

The award and decision of Administrative Law Judge Margaret D. Landolt, issued April 15, 2015, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

Given at Jefferson City, State of Missouri, this 4<sup>th</sup> day of September 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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CONCURRING OPINION FILED  
Curtis E. Chick, Jr., Member

Attest:

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Secretary

Employee: James Lutes

**CONCURRING OPINION**

I concur in the majority's decision to deny this claim on the issue of medical causation. To credit Dr. Poetz's opinions would force us to assume Dr. Poetz made typographical errors both in finding employee's "injury" (as opposed to his "occupational exposures") the prevailing factor, and in assigning all of employee's claimed disabilities to the primary injury. We would then need to correct that opinion and put it into a format that we could use to support an award of compensation. Obviously, we cannot do this.

I write separately because I believe employee hurt his shoulders at work, and I am convinced this claim might have been compensable if it had been handled differently. This is evident in the fact that employee is generally a credible witness, but his attorney failed to ask the relevant questions that might have supported an occupational disease claim. "I had problems in both shoulders in December 2006" is simply not enough, and it astounds me that more effort was not undertaken to develop the record.

This lack of effort is also strikingly apparent in the medical evidence. Why secure an expert medical opinion at all (the expense of which employee was undoubtedly expected to pay for out of his award) if one isn't going to take the basic steps necessary to put it in a format that the fact-finder can reasonably rely upon? As the majority points out, this record does not contain a relevant competing expert medical opinion from Dr. Rotman. It follows that if Dr. Poetz had been asked before trial to correct or explain the nonsensical causation opinion set forth in his report, or (at the very least) if he had been asked the appropriate questions at his deposition, this Commission might have been faced with an effectively uncontested expert opinion on the issue of medical causation. This probably would have tipped the scales in employee's favor and resulted in an award of compensation from the Second Injury Fund.

These failures on the part of employee's attorneys strike me as especially egregious where it is overwhelmingly apparent (at least to me) that employee is permanently and totally disabled, and that if he had proved a compensable primary injury by occupational disease, he likely would have secured an award of permanent total disability benefits from the Second Injury Fund. In other words, we are effectively prevented from awarding the lifetime benefits to which employee appears to be entitled simply because his attorneys failed to adduce evidence sufficient to make even a prima facie case for compensation. The Commission should never be put in such a position.

Because the record as it stands will not support an award in employee's favor, I must reluctantly concur in the majority's award denying this claim.

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Curtis E. Chick, Jr., Member

## AWARD

Employee: James Lutes

Injury No.: 06-129264

Dependents: N/A

Employer: DaimlerChrysler (Settled)

Before the  
**Division of Workers'  
Compensation**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Old Carco LLC (Settled)

Hearing Date: January 15, 2015

Checked by: MDL

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: Alleged December 1, 2006
5. State location where accident occurred or occupational disease was contracted: St. Louis, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? No
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: N/A
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: N/A
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: N/A
16. Value necessary medical aid paid to date by employer/insurer? N/A

Employee: James Lutes

Injury No.: 06-129264

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: Unknown
- 19. Weekly compensation rate: \$718.87/\$376.55
- 20. Method wages computation: By stipulation

**COMPENSATION PAYABLE**

- |                                       |         |
|---------------------------------------|---------|
| 21. Amount of compensation payable:   | SETTLED |
| 22. Second Injury Fund liability: No  |         |
| TOTAL:                                | 0       |
| 23. Future requirements awarded: None |         |

Said payments to begin and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

## FINDINGS OF FACT and RULINGS OF LAW:

Employee: James Lutes

Injury No.: 06-129264

Dependents: N/A

Before the  
**Division of Workers'  
Compensation**

Employer: DaimlerChrysler Corporation (Settled)

Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Old Carco LLC (Settled)

Checked by: MDL

### PRELIMINARIES

A hearing was held on January 15, 2015 at the Division of Workers' Compensation in the City of St. Louis, Missouri. The parties agreed to leave the record open for one week for the submission of a deposition transcript. On January 22, 2015 the record was closed. James Lutes ("Claimant") was represented by Mr. William Roussin. DaimlerChrysler Corporation ("Employer") which is self-insured, previously settled its liability with Claimant, and this matter proceeded to a hearing against the Second Injury Fund ("SIF") which was represented by Assistant Attorney General Adam Sandberg. Mr. Roussin requested a fee of 25% of Claimant's award. This matter was tried concurrently with Injury Nos. 01-127134, 03-133451, and 04-140366, which are the subjects of separate awards. The exhibits submitted contained numerous highlighted portions and handwritten notes. None of the markings or notes were made by the Court and were present at the time they were received.

The parties stipulated that on or about December 1, 2006 Claimant was an employee of Employer; venue is proper in the City of St. Louis, Missouri; Employer received proper notice<sup>1</sup> of the injury; the claim was timely filed; and the appropriate rates of compensation are \$718.87 for Permanent Total Disability ("PTD") benefits and \$376.55 for Permanent Partial Disability ("PPD") benefits. The issues to be resolved are whether Claimant sustained an occupational disease arising out of and in the course of employment on or about December 1, 2006; medical causation; and whether the SIF is liable for PTD or PPD benefits.

### SUMMARY OF EVIDENCE

Claimant is a 58 year old man with a ninth grade education who last worked for Employer on May 4, 2009. His last day of work was when the plant closed. Claimant served in the military for one year. Claimant does not have a high school diploma or a GED. From 1979 to 1990 Claimant worked for Ashland Chemical as a truck driver. Claimant worked through the local Teamsters Union and drove a tractor trailer locally. His job involved loading and unloading both liquid and dry chemicals. Claimant left his job because of back problems. Claimant also managed a small restaurant called The Catfish Inn. He also worked at two different golf courses as the head of maintenance. His maintenance jobs did not include administrative duties such as

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<sup>1</sup> At the time of the hearing, the SIF raised notice as an issue. In its post-trial brief, the SIF withdrew notice as an issue.

filling out paper work. His job was to keep the equipment running, and his skills were self-taught. Claimant does not have computer skills and is unable to type.

Claimant began working for Employer in 1996. During his tenure, he worked in the paint and chassis departments, and as a floater. All of his work for Employer was physically demanding, and included heavy lifting, standing, stooping, repetitive overhead work, and bending. Claimant used spray and torque guns. When Claimant started working for Employer he worked 9 or 10 hour days, but by the time the plant closed he was working 8 hours a day.

### **PRIOR INJURIES**

Claimant had the following pre-existing injuries:

Claimant had three prior lumbar surgeries. In 1989 Claimant had a L5-S2 discectomy, and a right hemilaminectomy and discectomy in 1995. Claimant's last back surgery was an L4-S1 fusion in April 1998. Following his surgeries Claimant had pain in his back that traveled down his back into his legs.

Claimant had bilateral carpal tunnel syndrome and underwent bilateral carpal tunnel releases and trigger finger releases in 1999. The surgeries were performed by Dr. Mitchell Rotman. Claimant settled his claim with Employer for 18% PPD of the left wrist and 20% PPD of the right wrist with a 10% load factor, and settled his SIF claim for preexisting 27% PPD of his back. As a result of his hand injuries Claimant's right index finger becomes numb and he has problems with stiffness in his right thumb.

Claimant reported right shoulder complaints to Dr. Rotman on January 31, 2000. Claimant reported the onset of these problems was one year before this visit. Dr. Rotman noted "extreme magnification of symptoms" and "multiple non-physiologic findings." Dr. Rotman gave his impression: "Given this gentleman's lack of effort today and his magnification of symptoms as well as non-physiologic findings, there is really nothing that I can offer for him. I certainly could not come up with a diagnosis to explain all of his subjective symptomatology. He is discharged. There is no evidence of impairment at the shoulder and elbow."

Claimant saw Dr. Rotman again on March 19, 2001 and did not make any complaints about his right shoulder.

On August 1, 2001 a Report of Injury was filed for a sprain injury to Claimant's right shoulder and right elbow, with an August 1, 2001 date of injury. Claimant first reported right shoulder complaints to Employer's Medical Department on January 15, 2002, five and a half months after his alleged date of injury. On February 26, 2002 Claimant stated his right shoulder problems started approximately 2 ½ years ago.

On February 27, 2002 x-rays were taken of Claimant's acromioclavicular joints in both shoulders which were negative.

On March 15, 2002 Claimant again reported to Employer's Medical Department and stated he was not sure what caused his right shoulder to hurt. He denied any acute injury and

denied doing any overhead work. He stated his shoulder pain increased and decreased for no reason even on the weekend.

Claimant saw Dr. Bruce Schlafly on August 19, 2003 for bilateral shoulder pain, particularly in the right shoulder. Claimant was complaining about pain across the right shoulder and the back of his neck at the time. Range of motion of the shoulder was limited on both sides. The right was stiffer than the left. There was mild crepitation with range of motion on both shoulders. Dr. Schlafly thought the right shoulder would require an MRI scan to evaluate the possibility of a rotator cuff injury but recommended he seek treatment with an orthopedic surgeon who specializes in shoulder surgery. Dr. Schlafly diagnosed impingement syndrome and rotator cuff tendonitis, and possible rotator cuff tear, and thought Claimant was incapable of performing overhead work with the right arm.

Dr. Rotman prepared an IME dated March 7, 2005 which addressed an alleged right shoulder injury on August 1, 2001. Upon physical examination no pain was elicited over his rotator cuff and there was no evidence of impingement in any of the maneuvers. His motion was smooth and there was no crepitus, clicking, instability, or atrophy in the shoulder. Dr. Rotman noted Claimant had a previous bone scan on June 17, 2002 which showed a little bit of uptake over the AC joint, and he had a slight spur present on the x-ray at the AC joint. Based upon his examination Dr. Rotman found Claimant had no pain referred to the AC joint whatsoever and no pain referred to the rotator cuff. Dr. Rotman found no evidence of a shoulder impingement or a rotator cuff problem. He stated, "In fact, I really cannot see anything going on with his right shoulder or any evidence of a work-related condition there." Dr. Rotman concluded, "Therefore, I do not see any evidence of an injury with regards to the right shoulder that can be related to a work injury from August of 2001." Dr. Rotman rated no disability in the right shoulder. Dr. Rotman did not provide any restrictions to Claimant's right shoulder.

Claimant settled his claim with Employer for 2.5% of the right shoulder.

Claimant injured his left elbow at work in 2003. Dr. Rotman performed three surgeries on his left elbow including a lateral epicondylectomy in 2005, a left medial epicondylectomy in 2006, and an ulnar nerve transposition in 2007. Claimant settled his claim with Employer for 30% PPD of the left elbow. Following his left elbow injury, Claimant had continuing pain in his left elbow

Following Claimant's left elbow injury; he began to overuse his right elbow, and developed right lateral epicondylitis. In August 2005 Dr. Rotman performed a right lateral epicondylectomy. Claimant was released to full duty in October 2005. After his surgery Claimant still had pain and burning. Claimant settled his claim with Employer for 22.5% PPD of the right elbow.

### **PRIMARY INJURY**

Claimant testified he was having additional problems with his shoulders which manifested themselves in December of 2006, which he reported to Employer within days. Claimant testified he was sent to Dr. Rotman and he thinks he received a shot, and x-rays showed some spurs in his right shoulder.

On October 25, 2006 Claimant reported to Employers' Medical Department complaining of right shoulder pain. At the time Claimant was working in the chassis department at the end of the line where he had been doing mostly driving for over a year. Claimant had not been doing any above the shoulder work for over a year. Claimant reported that his shoulder had been an issue for a while.

A Report of Injury was filed on December 1, 2006, alleging injuries to Claimant's shoulders.

Records from Employer's Medical Department reveal on February 12, 2007 Claimant reported complaints of right anterior shoulder pain. An MRI was taken of Claimant's right shoulder on February 26, 2007. The results of the MRI are summarized in Employer's Medical Department records as follows:

“There is some thickening and increased signal intensity of the rotator cuff particularly of the supraspinatus tendon compatible with tendinosis. A surface tear is not seen. Arthrosis at the acromioclavicular joint. No significant impingement is present. The glenohumeral joint is unremarkable. The articular cartilage is normal. The glenoid labrum is intact. No fracture is seen. No significant joint effusion is present. However, a small amount of fluid is present in the subacromial bursa and in the acromioclavicular joint as well as the glenohumeral joint. Impression: Tendinosis right rotator cuff.”

The Medical Department records reflect Dr. Gupta discussed the MRI findings with Dr. Rotman and Dr. Malak, and Dr. Rotman felt Claimant had only degenerative arthritis with no acute rotator cuff tear nor acute injury.

Dr. Malak advised Claimant on March 21, 2007 that he did not believe any event or exposure at work caused, aggravated or contributed to his right shoulder problems and that he could see Dr. Rotman under his private insurance.

There are no medical records that show treatment or examination of Claimant's left shoulder.

Dr. Poetz examined Claimant on January 18, 2007 and prepared a report dated October 27, 2008. At the time of the examination Claimant complained of pain in his right shoulder, difficulty working overhead, and difficulty reaching behind his back with his right arm. He did not mention any difficulties with his left shoulder. Dr. Poetz did not make any diagnosis of a right or left shoulder injury with respect to a December 1, 2006 date of injury.

Claimant was examined again by Dr. Poetz on January 15, 2009, and Dr. Poetz prepared a report dated March 9, 2009. At that time Claimant complained of pain in both shoulders, right significantly worse than left, and difficulty working overhead. Dr. Poetz noted Claimant last received treatment for his right shoulder in 2007. Dr. Poetz did not include any review of records for treatment to the left shoulder. Dr. Poetz diagnosed right shoulder tendonitis with exacerbation of the pre-existing impingement syndrome and tenosynovitis as a result of a

December 1, 2006 injury and rated his disability at 10% PPD of the right shoulder. Dr. Poetz also diagnosed a left shoulder tendonitis as a result of a December 1, 2006 injury and rated his disability at 15% PPD of the left shoulder. Dr. Poetz provided no opinion that Claimant was totally disabled.

Claimant settled his Claim with Employer for 2.5% PPD of each shoulder.

Claimant continued to work full duty for Employer until May 4, 2009.

Dr. Poetz examined Claimant again on October 6, 2009 and prepared a report on February 17, 2010 and for the first time opined Claimant is permanently and totally disabled, as a result of the December 1, 2006 injury in addition to his prior injuries and conditions.

### **FINDINGS OF FACT AND RULINGS OF LAW**

Based upon a comprehensive review of the evidence, my observations of Claimant at hearing, and the application of Missouri law, I find:

Claimant failed to meet his burden of proving he sustained an occupational disease arising out of and in the course of employment on or about December 1, 2006. Claimant bears the burden of proving the essential elements of his claim by producing evidence from which it may be reasonably found that an injury resulted from the cause for which the employer would be liable. *Griggs v. A.B. Chance Co.*, 503 S.W.2d 697 (Mo.App. 1973).

Claimant's only testimony regarding a December 1, 2006 injury was that he had problems with his shoulder. Dr. Poetz examined Claimant in December 2007 and Claimant mentioned pain in his right shoulder but said nothing about his left shoulder. There are no treatment or diagnostic records regarding Claimant's left shoulder. Claimant had long standing problems with his right shoulder that date back to 1999. Claimant failed to prove that his right shoulder complaints are the result of an occupational disease manifesting itself in December 2006.

In October 2006, two months before the alleged December 1, 2006 work injury, Claimant was complaining to Employer's Medical Department that he had pain in his right shoulder, and that it had been a problem for a while. When Dr. Poetz saw Claimant on January 18, 2007, he did not diagnose a December 1, 2006 bilateral shoulder injury. Dr. Poetz did not diagnose a December 1, 2006 bilateral shoulder injury until he saw him again on January 15, 2009, which is two years after the alleged date of injury.

I am not persuaded by Dr. Poetz's diagnosis. There is no evidence by testimony or medical records to support a claim for a December 1, 2006 left shoulder injury. As far as right shoulder injury, I am not persuaded by the testimony of Dr. Poetz, and find Dr. Rotman's opinion to be more credible and persuasive. Dr. Rotman is an orthopedic surgeon who specializes in the upper extremities. Dr. Sclafly recommended Claimant be evaluated by a surgeon who specializes in shoulders. Dr. Rotman had been treating Claimant for years. He performed numerous surgeries on Claimant at the request of Employer, for injuries which he found to be work related, and I see no motive for him to deny treatment for Claimant's right shoulder if he believed it was for a work related injury.

Claimant's testimony was completely devoid of any detail that would describe a new occupational disease manifesting itself in December 2006. The medical records do not support a new occupational disease manifesting itself in December 2006.

Because Claimant failed to prove he sustained an occupational disease in December 2006, his Claim against the SIF is denied.

Made by: \_\_\_\_\_  
MARGARET D. LANDOLT  
*Administrative Law Judge*  
*Division of Workers' Compensation*