

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

Injury No.: 02-156273

Employee: Terry Mosier
Employer: Diamler Chrysler (Settled)
Insurer: Self-Insured (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: August 25, 2002
Place and County of Accident: St. Louis, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated January 8, 2007. The award and decision of Administrative Law Judge Suzette Carlisle, issued January 8, 2007, is attached and incorporated by this reference.

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

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

Additionally, respondent filed Respondent's Motion for Attorneys Fees and Costs on Appeal pursuant to section 287.560 RSMo. In that motion, respondent requested attorneys' fees in the amount of fifteen thousand dollars (\$15,000.00) for its handling of this appeal. The Commission hereby denies Respondent's Motion for Attorneys Fees and Costs on Appeal.

Given at Jefferson City, State of Missouri, this 11th day of June 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Terry Mosier

Injury No.: 02-156273

Dependents: N/A
Employer: Daimler Chrysler (Settled)
Additional Party: Second Injury Fund (Only)
Insurer: Self-Insured (Settled)
Hearing Date: September 25, 2006

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

Checked by: SC:tr

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: August 25, 2002
5. State location where accident occurred or occupational disease was contracted: St. Louis, Mo.
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: Claimant injured his right shoulder while moving a large piece of equipment with the help of co-employees.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: right shoulder
14. Nature and extent of any permanent disability: 25% referable to the right shoulder at the 232 week level (settled)
15. Compensation paid to-date for temporary disability: -0-
16. Value necessary medical aid paid to date by employer/insurer? \$14,773.58

Employee: Terry Mosier Injury No.: 02-156273

17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: Sufficient to be at maximum rate
19. Weekly compensation rate: PTD - \$649.32, PPD - \$340.12
20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable: (Settled)
22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:
weekly differential \$309.20 payable by SIF for 58 weeks beginning July 12, 2003
and, thereafter, for Claimant's lifetime at the rate of \$649.32 per week

TOTAL:

Indeterminate

Said payments to begin as of July 12, 2003, 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:

Shawn Falvey

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Terry Mosier	Injury No.: 02-156273
Dependents:	N/A	Before the Division of Workers'
Employer:	Daimler Chrysler (Settled)	Compensation Department of Labor and Industrial
Additional Party:	Second Injury Fund (Only) Jefferson City, Missouri	Relations of Missouri
Insurer:	Self-Insured (Settled)	Checked by: SC:tr

PRELIMINARY MATTERS

A hearing for a final award was held on September 25, 2006, in the Missouri Division of Workers' Compensation, St. Louis office, at the request of Terry Mosier ('Claimant') pursuant to §287.450. Attorney Shawn Falvey represented Claimant. Assistant Attorney General Tracey Cordia represented the Second Injury Fund ("SIF"). The Claimant settled his case against Daimler Chrysler ("Employer") who is self-insured ("Insurer") prior to this proceeding. The record closed after presentation of all the evidence. Venue is proper and jurisdiction properly lies with the Missouri Division of Workers' Compensation.

STIPULATIONS

1. Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation law.
2. Employer's liability was fully insured.
3. A Claim for Compensation was filed within the time prescribed by law.
4. Claimant's average weekly wage was sufficient to be at the maximum rates.
5. The rate for permanent total disability (PTD) is \$649.32. The rate of permanent partial disability (PPD) is \$340.12.
6. Claimant settled his case against the Employer and Insurer for 25% of the right shoulder.

The issue to be decided is the nature and extent of Second Injury Fund liability for either PTD or PPD.

SUMMARY OF EVIDENCE

Any objections not expressly ruled upon are overruled. Claimant offered Exhibits A through J. Exhibits A through C and E through J were admitted without objection. SIF objection to Exhibit D is overruled. As a rule, questions as to the sources and bases of the expert's opinion affect the weight, rather than the admissibility of the opinion, and are properly left to the [fact finder]. (Citation omitted). *Wulfing v. Kansas City Southern Industries, Inc.* 842 S.W.2d 133, 152 (Mo.App. W.D.1992). (Overruled on other grounds by *Executive Bd. of Missouri Baptist Convention v. Carnahan*, 170 S.W.3d 437 (Mo.App. W.D. 2005)), See *Shoemaker v. Ekunno* 960 S.W.2d 527, 532 (Mo.App. E.D.1998). SIF offered no exhibits.

SUMMARY OF EVIDENCE

Findings of Fact

I find, by a preponderance of the evidence, the following facts based on the testimony, medical records and expert opinions presented during the hearing:

Background

1. Claimant is a 51-year-old resident of Iron County, Missouri and a former employee of Employer. Claimant worked at Employer's Fenton location from March 12, 1973 to December 2002 as an assembler, material handler (driving a forklift and tow motor), and as a janitor for general services. Claimant retired on December 31, 2002.
2. Claimant dropped out of school in 1972. During layoffs with Employer, Claimant successfully completed the high school equivalency test in 1975, and received certification in heating, cooling and refrigeration from Jefferson Community College in 1990. He did not work in this field. Claimant possesses no other formal education or training.
3. Claimant testified that before the August 2002 accident, he was worked full time as a general services janitor, and he could mop, sweep, and empty cans, while standing most of the time and frequently bending, twisting, and lifting up to 20 pounds. Claimant requested help from his co-workers as needed. Claimant also performed his own yard work.

Primary Injury – August 25, 2002

4. On August 25, 2002, Claimant sustained a right rotator cuff tear while lifting a lawnmower up stairs with two co-workers. Dr. Petkovich performed an arthroscopic repair and reconstruction of Claimant's right rotator cuff, and resection of the distal clavicle on February 13, 2003. On July 11, 2003, Dr. Petkovich noted Claimant had good range of motion and x-rays revealed good alignment. Dr. Petkovich found Claimant had reached maximum medical improvement and released him to work as tolerated; noting Claimant had retired (Ex B).
5. Claimant testified he did not return to work after being released from care because he was unable to work. After the shoulder injury his complaints included: dull shoulder pain, inability to fly fish, use crutches or a manual wheelchair, pain reaching overhead and inability to sit for long periods.
6. Between 1983 and surgery in February 2003, Claimant testified he worked full time with the assistance of co-workers as needed. He also changed jobs with Employer three times in an effort to reduce discomfort from pre-existing conditions.
7. Claimant settled his primary case with Employer for 25% PPD of the right shoulder on April 14, 2005

Pre-existing Conditions

8. On July 26, 1981, Claimant testified he was involved in an automobile accident where he fractured his ankles, left knee, pelvis, lumbar spine, three ribs, and left hip, sustained a concussion and lost several teeth. Claimant was off work until September of 1983 and received Social security disability. He returned to work early in order to preserve his employment and benefits. Upon his return to work, Claimant testified plant medical imposed permanent light duty restrictions. The restrictions, known as "PQX", were circulated to all departments and limited the work Claimant could perform. Restrictions included no repetitive bending or stooping and limited lifting to 25 pounds.
9. Claimant testified he sustained injuries to his urethra and scrotum, as a result of the automobile accident; and underwent a skin graft of his right ankle and left knee, and pins in the left ankle. He had a fractured hip and he was in a cast for both legs from his hips to his toes from July until November 1981. Claimant was admitted to the hospital on three occasions between July and December of 1981.
10. Claimant testified he has been in pain since the automobile accident, and he has not been able to bass or trout fish. His

ankles swell by the end of the day, the right being the worse. Claimant testified to the following complaints from the automobile accident: difficulty sitting for long periods, pain from his left hip required him to remove his wallet from his left pocket, pain from his low back to his left ankle, tightness around the waist, difficulty standing upright. Claimant propped his left ankle to relieve discomfort. After the August 2002 injury Claimant testified both ankles became worse. Claimant has used a cane since 1982.

11. Claimant sustained bilateral carpal tunnel releases in 1991 and 1992. He felt immediate relief however the pain returned a year later; extending to his upper arm and chest area.
12. On May 17, 1994, Claimant received a repeat triple arthrodesis of the right ankle. On July 11, 1994, Claimant's right foot was debrided for infection and partial skin necrosis. Following treatment Claimant missed a year from work. After the repeat fusion, Claimant could not play baseball, run, fly- fish, hunt or hike.
13. To reduce pressure on his feet, Claimant requested a transfer to a less strenuous forklift job. While waiting for a forklift job to open, he worked eight years relying on his left foot. In 1995, Claimant received a transfer to a forklift position. However, the job duties increased due to downsizing. Climbing onto the forklift and lifting became a problem for Claimant due to his low back and left knee. Claimant testified his left side became overworked during this time.
14. To reduce pressure on his feet in 2000, Claimant transferred to a maintenance position with general services, performing janitorial work. Claimant was required to bend and stoop while attending to robots, changing covers, and performing other custodial duties. Claimant only performed two hours of physical work per eight hour shift. The job required eight hours of physical work per week, and provided an opportunity for Claimant to sit. Claimant also worked Saturdays on a three man crew performing a high blast deep cleaning when the production line was down.
15. On May 18, 2000, an angioplasty was performed and his right coronary artery was stented. Claimant carries a medical reference card in case of an emergency. He was advised take it easy and not become over-exposed to the sun, as this was one of the side effects of the condition. Claimant admitted he told Mr. Lalk he had no problems with his heart.
16. Claimant testified that in 2001, Dr. Ostracke informed him he needed a left ankle fusion, but he waited because he did not want to miss work or lose more mobility. Claimant testified his left ankle began to deteriorate due to over compensating for the right.
17. In 2005, Dr. Weltmer performed a left total ankle replacement, lengthened the achilles and removed hardware. Claimant also began using a powered electrical wheelchair after surgery (Ex A).
18. Claimant testified there are no jobs in the plant that accommodate his restrictions; and he cannot compete in the open labor market due to his pre-existing conditions. Currently, crutches cause discomfort because they hurt his right shoulder. Claimant has used manual and powered wheelchairs to accommodate his physical condition. Friends constructed a ramp for him to go in and out of the house in his wheelchair. Claimant takes a number of medications for arthritis, cholesterol, sleep aids, and esophagus reflux disease.
19. Presently, Claimant's typical day includes bird watching, watching television, sitting in a recliner and going outside in his powered wheelchair.

Robert Poetz, M.D.

20. Robert Poetz, M.D., board certified in family medicine, testified by deposition on Claimant's behalf. Dr. Poetz examined Claimant on November 12, 2004. He diagnosed right rotator cuff repair and reconstruction; pre-existing bilateral carpal tunnel releases; fractures to the pelvis, left hip, femur, knee, ankle with open reduction internal fixation; right ankle fracture and reconstruction; compression fracture L2; grafted right knee, ankle and torso; lumbar strain; hypertension; and hyperlipidemia (Ex D-1).
21. Dr. Poetz recommended Claimant take medication and injections and avoid strenuous activities. He opined diagnostics and surgery may be needed for the right shoulder and left ankle in the future.
22. Dr. Poetz provided the following ratings: 45% right shoulder, 35% right hand, 10% body as a whole pelvis, 20% left hip, 15% left leg, 20% left knee, 40% left ankle, 45% right ankle, 25% lumbar spine, 5% body as a whole lumbar spine, and 20% body as a whole for hypertension and hyperlipidemia.
23. Dr. Poetz opined the combination of the right shoulder injury and prior disabilities render Claimant permanently and totally disabled and unemployable in the open labor market (Ex. D).
24. Dr. Poetz admitted on cross-examination that he did not review medical records for hypertension, hyperlipidemia, depression, stent, carpal tunnel releases or the automobile accident. Dr. Poetz admitted he is not a vocation rehabilitation expert, does not perform surgery or place people in jobs. Dr. Poetz based his opinion on prescriptions provided by

Claimant, his evaluation, and the August 2002 records.

Mr. Timothy Lalk

25. Timothy G. Lalk, a vocational rehabilitation counselor, interviewed Claimant on December 1, 2005. Mr. Lalk testified by deposition that Claimant reported bilateral ankle pain; hip and low back pain, hand weakness, depression, decreased mobility of the right shoulder, and knee weakness. Claimant also reported inability to stand more than fifteen minutes or lift more than five pounds, kneel or squat, discomfort with sitting more than forty-five minutes, shortness of breath when walking, tension headaches for five years, and sinus problems. Claimant informed Mr. Lalk that he was able to stand longer before the 2002 accident than he could stand at the time of the December 2005 interview.
26. Mr. Lalk reviewed Dr. Poetz's report and summarized Claimant's history. Mr. Lalk did not review any medical records.
27. Mr. Lalk did not find Claimant possessed any transferable skills that would permit him to work in a skilled sedentary position. Claimant does not type, and complained of ankle pain with sitting. He had no experience in bookkeeping, inventory control, or shipping and receiving.
28. Mr. Lalk viewed Dr. Petkovich's restriction to 'work as tolerated' to be dependent, open-ended and based upon Claimant's perceived symptoms. Mr. Lalk opined the combination of both Dr. Petkovich and Dr. Poetz's restrictions would not permit Claimant to return to work in any of his previous capacities without significant accommodations.
29. Mr. Lalk concluded Claimant was unable to secure and maintain employment in the open labor market or compete for a position. Claimant's ability to work a full day was hampered by problems of being on his feet more than fifteen minutes, and difficulty sitting, which he resolved by reclining.
30. Mr. Lalk testified Claimant was limited to unskilled sedentary work. However, he noted that Claimant's limp, use of a cane, and apparent discomfort would be apparent to potential employers, who would not hire him for unskilled work over candidates who were more physically capable.
31. Mr. Lalk did not find Claimant to be a good candidate for post-secondary training. He did not recommend Claimant for vocational rehabilitation services due to his symptoms, inability to perform sedentary work or physical exertion through a full work day on a daily basis (Ex. E).
32. Given Claimant's difficulty standing, walking, and changing positions, Mr. Lalk opined an employer would be reluctant to hire him. Mr. Lalk testified his opinion considered Claimant's recent left ankle treatment and a recommended right ankle fusion, as they were consistent with Claimant's reported symptoms. However, Mr. Lalk testified if Claimant did not have left ankle surgery in 2005, his conclusions would have remained the same because Claimant did not indicate the surgery impacted his ability to function.

Rulings of Law

In this case, Claimant asserts he is permanently and totally disabled due to a combination of his primary injury and pre-existing disabilities. In post-hearing briefs, SIF acknowledged Claimant is permanently and totally disabled, but asserted the condition is due to subsequent deterioration of a pre-existing condition; therefore the SIF is not liable.

In a workers' compensation proceeding, the employee has the burden to prove by a preponderance of credible evidence all material elements of his claim, including Second Injury fund Liability. *Meilves v. Morris*, 422 S.W.2d 335, 339 (Mo. 1968).

Total disability is defined as the "inability to return to any employment and [does] not merely mean inability to return to the employment in which the employee was engaged at the time of the accident." § 287.020.7, RSMo (1994). The test for permanent total disability is whether, given the claimant's situation and condition, he is competent to compete in the open labor market. *Laturno v. Carnahan*, 640 S.W.2d 470, 472 (Mo.App.1982). In determining if claimant is totally disabled, the Commission must decide whether, in the ordinary course of business, any employer would reasonably be expected to hire him in his present physical condition and reasonably expect him to perform the work for which he is hired. *Garcia v. St. Louis County* 916 S.W.2d 263, 266 (Mo.App. E.D. 1995) (overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003).

After careful consideration of the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

Permanent Total Disability

I find Claimant permanently and totally disabled. Dr. Petkovich released Claimant from medical care at maximum medical improvement after the August 2002 injury, and recommended he increase activity and work as tolerated.

I. Robert Poetz, M.D.

I find Dr. Poetz's opinion credible that Claimant is unable to compete in the open labor market due to a combination of his pre-existing conditions and the primary injury. Dr. Poetz found decreased range of motion of Claimant's right shoulder, pain with movement, hypertrophy of the MP and IP joint of the left 4th metacarpal, angulation of the middle and distal phalanx with triggering; and lack of flexion of the ring finger. Lower extremity examination revealed bilateral ankle hypertrophy, pes planus and deformity of bilateral 5th toes, left knee and right ankle skin graft scars and bilateral ankle scars. An x-ray of the right ankle dated August 29, 1994, revealed two screws and an anchor (Exhibit F). Dr. Poetz also noted complaints of low back pain during examination.

Dr. Poetz admitted he knew of no specific restrictions imposed on Claimant's ability to work from either pre-existing conditions or the August 2002 injury. Dr. Poetz recommended Claimant avoid heavy lifting, strenuous activity, excessive and repetitive use of his upper extremities, overhead activities, prolonged sitting, standing, walking, stooping, bending, squatting or twisting, and any activity that exacerbates symptoms or increases the disease process.

II. Mr. Timothy Lalk

I find Mr. Lalk's opinion credible that Claimant is unable to compete in the open labor market. Mr. Lalk found Claimant to be a cooperative and a credible historian. Claimant complained of inability to remain on his feet more than fifteen minutes and pain with sitting. In an effort to resolve physical discomfort, Claimant reported spending 80 percent of his day in a recliner. He noted Claimant walked in apparent pain, and with a cane and a limp.

There was conflicting evidence regarding Claimant's ability to stand and work prior to August 2002. It is the rule that where, from a fair consideration of other facts and circumstances, the contradictory statements of a witness can be explained, it is for the trier of fact to determine which version shall be accepted as true. *Griggs v. A. B. Chance Co.*, 503 S.W.2d 697, 704 (Mo.App. 1973). I find Mr. Lalk's opinion credible that he did not believe Claimant could have performed his janitorial duties without help from his co-workers.

Mr. Lalk noted Dr. Petkovich's restriction for Claimant 'to work as tolerated' was based on Claimant's perceived symptoms. Mr. Lalk opined Claimant did not perceive he was able to work, which is why he retired. Mr. Lalk noted Claimant could not work for Employer with Dr. Poetz's restrictions without significant accommodations.

Mr. Lalk found Claimant possessed no transferable skills. Claimant scored high school level in reading, tenth grade in comprehension and sixth grade in math. Given Claimant's age and history, he did not believe Claimant's academic development would improve. Based upon academic test results and history, Mr. Lalk also concluded Claimant was not a candidate for post-secondary or professional training.

Mr. Lalk concluded Claimant was qualified for unskilled sedentary work. However, Mr. Lalk opined employers would not hire Claimant given his difficulty walking, standing and changing positions. Therefore, he concluded Claimant would be unable to secure, maintain, or compete for employment in the open labor market due to his inability to function through most of the day.

Mr. Lalk also admitted his vocational opinion considered treatment to Claimant's left ankle in 2005 and a recommendation for fusion. He considered it because it was consistent with Claimant's symptoms. However, he did not believe his conclusion would be different if Claimant had not had surgery in 2005. Mr. Lalk based his opinion on Claimant's history, which did not indicate the surgery impacted his ability to function.

Claimant appeared at the hearing using a cane. Claimant testimony was credible that the plant physician imposed lifting restrictions in 1983. His testimony was consistent with medical records concerning the adjustments he made at work. Claimant did not believe he could continue to work after the August 2002 injury, so he retired while still receiving treatment. Most of his day is spent in sedentary positions; from the recliner to the wheelchair, attempting gain relief. Claimant's upper and lower extremities sustained significant injuries over time, which two experts agree render him unable to compete in the open labor market. No contrary evidence was presented at the hearing. For these reasons, I find Claimant to be permanently and totally disabled.

Disability from the last injury alone

The next issue is whether the disability is due to the last injury alone. In computing permanent and total disability in the situation where claimant suffers from a previous disability, the [fact finder] first determines the degree of disability as a result of the last injury. The ALJ or the Commission then determines "the degree or percentage of employee's disability that is attributable to *all injuries or conditions existing at the time the last injury was sustained*..." § 287.220.1, RSMo (1994) (emphasis added). "Until that disability is determined, it is not known whether the second injury fund has any liability..." *Hughey v. Chrysler Corp.* 34 S.W.3d 845, 847 (Mo.App. E.D. 2000). If a claimant's last injury in and of itself rendered the claimant permanently and totally disabled, then the Second Injury Fund has no liability and employer is responsible for the entire amount. *Id* at 847.

I find Claimant sustained 25% permanent partial disability of the right upper extremity from the August 25, 2002 injury. Claimant settled the primary shoulder case with Employer for 25% of the right upper extremity (Ex I). ‘...Mere admission of the settlement agreement as evidence does not bind the Fund to the terms of the settlement agreement to which it was not a party.’ *Totten v. Treasurer of State* 116 S.W.3d 624, 628 (Mo.App. E.D. 2003). However, Claimant sustained a complete tear of his right rotator cuff; which was surgically repaired. Therefore, I find substantial evidence for 25% PPD of Claimant’s right shoulder from the primary injury, and further find the last injury alone did not take Claimant out of the workforce.

Pre-existing disabilities

The next inquiry involves Claimant’s injuries or conditions prior to the 2002 work injury. The ALJ or the Commission then determines “the degree or percentage of employee’s disability that is attributable to *all injuries or conditions existing at the time the last injury was sustained...*” § 287.220.1, RSMo (1994) (emphasis added). Thus, the Second Injury Fund is not liable for any progression of claimant’s preexisting disabilities not caused by claimant’s last injury. *Garcia v. St. Louis County* 916 S.W.2d 263, 266 (Mo.App. E.D. 1995) (overruled on other grounds by *Hampton* at 121 S.W.3d 220).

I find the following conditions pre-dated Claimant’s 2002 injury and were a hindrance and obstacle to his employment ^[1]:

- 1981- right ankle triple arthrodesis
- 1981 -multiple fractures to left knee, ankle, hip and pelvis
- 1991-92 - bilateral carpal tunnel releases
- 1994- repeat right ankle triple arthrodesis, excision of left knee exostosis, skin graft right thigh to right foot, and a second procedure for right foot irrigation and debridement

I. Robert Poetz, M.D.

I find Dr. Poetz’s opinion is supported by credible evidence regarding Claimant’s pre-existing disability. The nature and extent of the permanent-partial pre-existing condition must be proven by a reasonable degree of certainty. *Griggs v. A.B. Chance Co.*, 503 S.W.2d 697, 703 (Mo.App.1973). Expert opinion evidence is necessary to prove the extent of the preexisting disability. (*Citations omitted*) *Messex v. Sachs Elec. Co.* 989 S.W.2d 206, 215 (Mo.App. E.D. 1999). (overruled on other grounds by *Hampton* at 121 S.W.3d 220). Dr. Poetz admitted he did not review any medical records, diagnostics or surgical notes in rendering an opinion regarding Claimant’s pre-existing disability. However, the disability ratings were based on his evaluation and Claimant’s history; which correlates with Claimant’s testimony and are referenced and supported by the medical records in evidence.

II. Claimant’s Testimony

The record contained no mention of fracture to Claimant’s pelvis, left hip or left femur. However, Claimant testified he was casted from the hip to the ankle for these injuries for several months. Claimant testified his left ankle was pinned, which was consistent with removal of pins during surgery in 2005. Claimant missed two years of work following the car accident. Claimant testified and medical records show that in 1994 Claimant received a repeat right ankle triple arthrodesis. Claimant missed another year from work after the 1994 revision. Dr. Weltmer, the treating physician in 1994, noted Claimant had multiple foot and ankle surgeries performed thirteen years earlier.

The car accident affected Claimant’s ability to perform his duties using his lower extremities. Claimant changed jobs in an effort to reduce pressure on his feet in 1995 and 2000. Claimant experienced decreased hand strength and sought assistance with work prior to 2002. In fact, two employees were assisting him when the 2002 injury occurred.

I find Claimant’s testimony credible regarding significant pre-existing disability to his ankles, left knee, lumbar spine, coronary artery disease, and carpal tunnel syndrome.

Based on Claimant’s age, level of academic achievement, and physical condition, I find Claimant to be permanently and totally disabled due to a combination of his pre-existing injuries and the August 25, 2002 work injury. I find Claimant to be unable to compete in the open labor market. Dr. Petkovich placed Claimant at maximum medical improvement from the shoulder injury on July 11, 2003. I find the SIF liable for \$309.20 per week beginning July 12, 2003 for 58 weeks and \$649.32 per week thereafter for the remainder of Claimant’s life.

Subsequent Deterioration of a pre-existing condition

The next question is whether Claimant’s left ankle problems after 2002 were a deterioration of a pre-existing

condition. I find Claimant's need for left ankle treatment after 2002 was due to deterioration of the pre-existing ankle condition. Dr. Poetz's report did not mention the June 15, 2005 left ankle replacement. However, Dr. Poetz testified by deposition that two fused ankles become more degenerative due to the lack of any strong weight bearing ankle. Dr. Poetz's answer suggests Claimant "strong" left ankle bore the weight for the right ankle since 1981, which may have contributed to the degenerative changes in the left ankle.

In this case, Claimant's last injury was to the right shoulder, not the ankle. Claimant testified Dr. Ostracke informed him in 2001 the left ankle would need surgery, but the record does not reflect this. Claimant testified both ankles became worse after he retired. Medical records are consistent with Claimant's testimony that he did not receive treatment for his ankles between 1994 and 2003. I find Claimant did not meet his burden to show the progression of the left ankle disability was caused by his last injury. I do not find the left ankle replacement in 2005 was caused by the right shoulder injury.

CONCLUSION

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Claimant is found to be permanently and totally disabled as of July 11, 2003. SIF is ordered to provide Claimant with a weekly differential of \$309.20 per week beginning July 12, 2003 through August 21, 2004. Thereafter, SIF is to pay permanent total disability benefits of \$649.32 weekly for Claimant's lifetime. As Claimant is found eligible to receive permanent total disability benefits from the SIF, the issue of permanent partial disability benefits from the SIF is moot. Claimant's attorney is entitled to a 25% lien for services rendered.

Date: _____

Made by: _____

Suzette Carlisle
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation

[\[1\]](#) Insertion of the coronary stent was not included because Claimant testified he did not have problems relating to it.