

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

Injury No.: 05-144364

Employee: Julia Reno
Employer: DaimlerChrysler
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 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 Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 8, 2011, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Margaret D. Landolt, issued December 8, 2011, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 18th day of September 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

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

Attest:

Secretary

Employee: Julia Reno

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based upon my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed.

Relying upon the opinion of Dr. Irvine, the administrative law judge ruled that employee failed to meet her burden of proving her back and cervical spine conditions were causally related to her work for employer. I disagree.

I find credible the opinion of Dr. Volarich that the heavy lifting that employee performed after her transfer to the St. Louis plant was the prevailing factor in causing both her lumbar and cervical spine problems. I would award to employee permanent partial disability of 45% of the body as a whole referable to the lumbar spine and 20% permanent partial disability of the body as a whole referable to the cervical spine in accordance with the opinions of Dr. Volarich.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

Curtis E. Chick, Jr., Member

AWARD

Employee: Julia Reno

Injury No.: 05-144364

Dependents: N/A

Employer: DaimlerChrysler

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

Additional Party: Second Injury Fund

Insurer: Self-insured

Hearing Date: September 7, 2011

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 October 31, 2005
5. State location where accident occurred or occupational disease was contracted: alleged 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? N/A
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:
Employee alleged she sustained an occupational disease of her low back from repetitive heavy lifting.
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: 0
15. Compensation paid to-date for temporary disability: 0
16. Value necessary medical aid paid to date by employer/insurer? 0

Employee: Julia Reno

Injury No.: 05-144364

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: Unknown
- 19. Weekly compensation rate: \$696.97/\$365.08
- 20. Method wages computation: By stipulation

COMPENSATION PAYABLE

- 21. Amount of compensation payable: 0
- 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: Julia Reno

Injury No.: 05-144364

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: DaimlerChrysler

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

Additional Party: Second Injury Fund

Insurer: Self-insured

Checked by: MDL

PRELIMINARIES

A hearing was held on September 7, 2011 at the Division of Workers' Compensation in the city of St. Louis, Missouri. Mr. Anthony Pugliese represented Julia Reno ("Claimant"). DaimlerChrysler Corporation ("Employer") which is self-insured was represented by Mr. James Kennedy. The Second Injury Fund ("SIF") was represented by Assistant Attorney General Carol Barnard. This case was tried concurrently with Injury Nos. 05-041703 and 06-134005, which are the subjects of separate awards. Mr. Pugliese requested a fee of 25% of Claimant's award.

The parties stipulated that on or about October 31, 2005, Claimant was an employee of Employer; venue is proper in the city of St. Louis, Missouri; Claimant's rates of compensation are \$696.97 for Temporary Total Disability ("TTD") benefits and \$365.08 for Permanent Partial Disability ("PPD") benefits.

The issues for resolution by hearing are: whether Claimant sustained an occupational disease arising out of and in the course of employment on or about October 31, 2005; whether Claimant provided the requisite notice to Employer of her occupational disease; medical causation; whether Claimant is entitled to TTD benefits from October 19, 2006 to May 27, 2008; nature and extent of PPD benefits; liability of the SIF; whether the claim is barred by the statute of limitations; and whether Claimant is permanently and totally disabled.

Although all of the evidence in this case was reviewed, only evidence necessary to support this award will be summarized.

SUMMARY OF EVIDENCE

Claimant is a 51 year old woman who was hired by Employer in 1983. She worked at their plant in Huntsville Alabama, which manufactured electronic panels for their vehicles. There is no evidence the work Claimant did for Employer in Huntsville, Alabama involved heavy lifting or excessive use of her back. In February 2005, Claimant moved to St. Louis to work for Employer, and began working at their assembly plant in Fenton on February 21, 2005, and worked there until she left on October 19, 2006. Claimant retired from Employer in May 2008.

After Claimant transferred to the Fenton plant, she was classified as a Tech III. The first department she was assigned to was the Body Shop, where they assembled all of the metal pieces of the mini vans which were then welded together by a robot. Her title in the Body Shop was Floater, which meant she filled in as needed in the body shop department. She worked in the body shop from February to October, 2005. Her first job was putting rear quarter panels on a rack. There were 19 panels weighing 23 pounds on a rack, and she had to step up onto a rack that was one foot off the ground and pick up a panel, back out of the rack, and then set it down. She had to load about 25-50 panels an hour. There was a big metal box on a platform on the floor, and she had to tilt it towards her and pull large pieces of metal which weighed 2 to 5 pounds apiece out of a box. She picked up as many at a time as she could. This required her to bend at the waist. She worked eight to nine hours a day, with twelve minute breaks in the morning and afternoon, and 30 minutes for lunch.

Shortly after Claimant began working at that job, she began to have pain in her low back which radiated into her right buttocks and down her right leg. Claimant saw her primary care physician, Dr. Allen, on April 28, 2005, complaining of low back pain. Claimant told Dr. Allen she had been lifting a lot at work, and had a stiff back from the birth of her daughter. Dr. Allen prescribed physical therapy. She gave Claimant a work restriction of no lifting over ten pounds, and then released her to full duty after one week. Claimant called Employer and told them she would be off work on medical leave for one week. When she returned to work, Employer required a medical release from Dr. Allen. Claimant testified she told the plant medical department she had done a job on Friday and hurt her back and that was why she was off for one week. Claimant testified Employer did not offer her any medical treatment. She testified she reported the incident to her supervisor, and told him the job she was on hurt her back, and he said he would take care of it. According to Claimant, she never heard from him again.

The plant medical records indicate Claimant reported to the medical department on May 5, 2005. The records indicate she was absent since April 25, 2005, and was released by Dr. Allen. The diagnosis was lateral epicondylitis, back pain, and anxiety. The records state Claimant was there to reinstate and she gave a long history of back pain, ever since her daughter was born in 1992. Claimant indicated her pregnancy caused lower back pain, and that her last MRI had been done two years before.

After working in the body shop, Claimant transferred to the inspection department as a floater. Claimant worked in the inspection department from October 15 until she left in 2005. Claimant testified her back flared up when she was doing a job called "lock and latch".

Claimant has a long history of low back problems. In 2002 Claimant had an MRI of her lumbar spine. The clinical history she gave at that time was low back pain radiating to both lower extremities. The MRI was performed to evaluate for herniated disc. The MRI was essentially unremarkable.

On September 27, 2006, Claimant saw Dr. Petkovich for an orthopedic consultation. Claimant's chief complaint was of pain in her low back and right lower extremity. She denied any specific history of injury. She indicated it had been bothering her for the past several months. Claimant denied any prior problems with her lower back. Dr. Petkovich diagnosed muscular and ligamentous lumbosacral strain with prior vascular disease and possible lumbar

discogenic component. He recommended an MRI and physical therapy. An MRI was performed on October 5, 2006. The clinical history given was of back pain and bilateral lower extremity discomfort and bilateral lower extremity weakness. Claimant reported having had low back pain for the previous 14 years, with no specific injury. The MRI revealed degenerative disc disease at L4-5 with desiccation and signal loss with a large central protrusion, which prolapsed slightly below the level of the interspace. There was no significant interspace narrowing at that location.

When Claimant saw Dr. Backer on December 19, 2006, she have a history of low back complaints on and off for 14 years, more severe at times than others. Dr. Backer examined Claimant, and did not find signs of radiculopathy. He noted her MRI showed a bulging disk at L4-5 with a small central and inferior herniation. He discussed with Claimant the uncertainties of outcome with back surgery for just degenerative disk disease. He discussed the possibility of a lumbar diskogram with the knowledge that if she went on to have a back surgery based on the results of the diskogram that the success rate is somewhere between 60 to 70% with a 30 to 40% failure rate.

On January 5, 2007, Claimant saw Dr. Bailey, a pain management specialist. Her chief complaint was low back pain. She gave a 14 year history of back pain that began with the gradual onset of pain that starts in the low back and radiates into the legs. She characterized the pain as constant, and severe and indicated that compared to prior episodes, the pain was getting worse. Dr. Bailey's impression was lumbar degenerative disk disease. Dr. Bailey scheduled a discogram with post discogram CT scan. A discogram was performed on February 6, 2007, and the impression was lumbar degenerative disc disease. The CT of the lumbar spine performed on February 6, 2007 showed an L4-5 annular tear.

On April 25, 2007, Claimant underwent a posterior spinal decompression and interbody fusion utilizing Concord cage, autologous bone from same incision and pedicle screw fixation. The post operative diagnoses were degenerative disk, L4-5; with chronic disabling low back pain. After her surgery, Claimant was seen by Dr. Backer for a follow up visit, and reported that she had not received any significant improvement in her symptoms following her surgery. In another follow up visit in June, 2007, Claimant had not improved. Dr. Backer recommended an epidural steroid injection.

Claimant's low back surgery was not successful. Claimant was never able to return to work after her back surgery. She was able to obtain early retirement disability benefits. Claimant currently takes pain medication prescribed by her doctor. Claimant has constant pain in her low back, right leg, and occasionally in her left leg. She has shooting pains into her right knee. She has pain all day, every day, and is never pain free. Lying down or reclining gives her some relief. She has difficulty sleeping, and takes Flexeril for sleep. She is only able to sleep for a couple of hours before she is awakened by pain. She never sleeps a full night. Claimant does minimal household chores. She is able to do some light laundry, sweeping, dishes, and some dusting. She cannot make beds. She is unable to do her lawn work, and is no longer able to walk for exercise. She can walk about 1/2 hour with difficulty, and then she needs to sit down. She uses a chair in her shower. She wears slip on shoes because she cannot bend to put on her shoes. She is able to cook a little bit, but mostly she eats fast food. She has difficulty standing at the stove and cooking. If a pot is very heavy she can't pick it up. She is only able to do light grocery shopping. Riding in the car for distances is difficult. She now lives 620 miles from St. Louis.

Driving to St. Louis was difficult. Claimant has to make frequent stops and when riding she reclines and puts her feet up. She is unable to care for her grandson.

On April 24, 2008, Claimant was examined by Dr. Sandra Tate, for an IME to determine whether she was permanently and totally disabled. Claimant gave a history of low back pain since 1992. She reported her pain was fairly mild in nature and she would usually receive some physical therapy treatment that would completely resolve her symptoms over a short period of time. Claimant reported to Dr. Tate that she last worked in October 2006, due to the fact that she just could no longer perform the activities of her job with lifting due to her complaints of back pain. She filed for FMLA at that time, and saw her primary care doctor several times and was given physical therapy and anti-inflammatory medications. She was then referred to Dr. Petkovich who ordered an MRI of her lumbar spine, and recommended epidural steroid injections which were performed in his office on two occasions without any significant improvement of symptoms. Dr. Tate opined Claimant would have significant difficulties performing any jobs that she may have a seniority of bargaining for in the plant. She therefore opined Claimant is permanently and totally disabled for the rest of her life.

Dr. Volarich examined Claimant on May 27, 2008, prepared a report, and testified on behalf of Claimant. Dr. Volarich testified the repetitive nature of Claimant's work lifting sheets of metal parts weighing approximately 23 pounds for several months leading up to October 2005 were the substantial contributing factors as well as the prevailing or primary factors causing disk protrusion with annular tear at L4-5 that required surgical fusion at the L4-5 level which resulted in post laminectomy syndrome. Dr. Volarich testified as a result of those lifting activities she also developed a disc bulge at C6-7 in the cervical spine and aggravated degenerative disc disease at the C7-T1 level that caused neck pain and regional myofascial pain. Dr. Volarich testified Claimant sustained 45% PPD of the body as a whole rated at the lumbar spine as a result of the disk protrusion and annular tear at L4-5 due in part to posterior decompression, fusion and instrumentation. He also rated 25% PPD of the cervical spine due to the disk bulge at C6-7 and aggravation of the degenerative disk disease at C7-T1 all of which required conservative care.

Mr. James England, a rehabilitation counselor evaluated Claimant on August 6, 2008, prepared a report, and testified on behalf of Claimant. Mr. England testified Claimant would not be able to sustain any kind of work activity on a regular day to day basis.

Dr. David Irvine, an orthopedic surgeon examined Claimant on October 14, 2009, prepared a report, and testified on behalf of Employer. Dr. Irvine diagnosed degenerative disc disease in both the cervical and lumbar spine. Dr. Irvine testified Claimant's cervical and lumbar spine conditions were caused by degenerative changes and the aging process. Although Dr. Irvine assessed PPD in Claimant's lumbar and cervical spines, he did not believe the disability was caused by her work, but was rather the result of the degenerative process.

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 her burden of proving her back and cervical spine conditions were causally related to her work for Employer. I find the opinion of Dr. Irvine more persuasive that the conditions of Claimant's lumbar and cervical spine were a result of degenerative changes and the aging process. Claimant has a long standing history of back problems that go back to the early 1990s. Claimant began working for Employer in St. Louis on February 21, 2005, and first started reporting back complaints to Dr. Allen on April 28, 2005, just slightly over one month after she started her job with Employer in St. Louis. When an MRI was performed on October 5, 2006, it showed degenerative changes at L4-5 with a large central protrusion.

When Claimant saw Dr. Bailey, he diagnosed degenerative lumbar disc disease, as did Dr. Tate. The only expert who attributed Claimant's spine condition to her work for Employer was Dr. Volarich, and I do not find his opinion on medical causation to be credible in light of all of the evidence in this case.

Because I do not find Claimant's spine condition was caused by her work with Employer, the remaining issues are moot, and the claim against the Second Injury Fund is denied.

Date: _____

Made by: _____

MARGARET D. LANDOLT
Administrative Law Judge
Division of Workers' Compensation

FINAL AWARD ALLOWING COMPENSATION
(Modifying the Award of the Administrative Law Judge)

Injury No.: 06-134005

Employee: Julia Reno

Employer: DaimlerChrysler

Insurer: Self-Insured

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.¹ We have read the briefs, reviewed the evidence and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision affirming the award and decision of the administrative law judge, as modified herein. 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 modifications set forth below.

Preliminaries

Employee, now 53 years of age, worked for employer from 1983 until 2006. She filed a claim for compensation alleging her work activities for employer caused injury to her shoulder. The administrative law judge heard the claim on September 7, 2011, along with employee's claim against employer for an alleged work-related back condition (Injury No. 05-144364). In her award on Injury No. 05-144364, the administrative law judge concluded that employee's back injury was not caused by her work for employer.

The administrative law judge found that employee met her burden of proving she sustained a work-related injury on or about January 12, 2006, that resulted in injury to her right shoulder. The administrative law judge awarded to employee from employer 29 weeks of permanent partial disability benefits (12.5% permanent partial disability at the level of the shoulder). The administrative law judge denied employee's claim for permanent total disability benefits from the Second Injury Fund. The administrative law judge concluded that if employee is permanently and totally disabled, the permanent total disability is due solely to her preexisting back condition.

Employee filed an Application for Review alleging the administrative law judge erred by failing to find that employee was permanently and totally disabled due to effects of her shoulder injury in combination with her preexisting disabilities. Employee's preexisting disabilities include peripheral vascular disease and disabilities of employee's lumbar spine, cervical spine, elbow, legs, feet, and wrists.

Supplemental Factual Findings

Four medical experts offered opinions bearing on this matter. At the request of employee's counsel, Dr. Volarich evaluated employee, prepared a written report, and

¹ Statutory references are to the Revised Statutes of Missouri 2005, unless otherwise indicated.

Employee: Julia Reno

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testified by deposition. At the request of employer's counsel, Dr. Irvine evaluated employee, prepared a written report, and testified by deposition. Dr. Sandra Tate evaluated employee at employer's request and prepared a written report. At the request of the Second Injury Fund, Dr. Katz reviewed medical records/charts, prepared a written report, and testified by deposition.

We find the opinions of Dr. Volarich to be the most persuasive on the issue of the medical causation of employee's shoulder condition of ill. We believe Dr. Volarich had the fullest understanding of employee's job duties for employer and the effect those duties had on employee's shoulder. We also find Dr. Volarich's opinions persuasive as to the nature and extent of employee's preexisting disabilities, and the scope of employee's physical limitations related to her disabilities.

Dr. Irvine's opinions are undercut because, although he admitted he had little information regarding employee's job duties, he nonetheless testified that employee's job duties did not cause employee's shoulder condition. We grant little weight to Dr. Katz's opinions because he did not have the opportunity to evaluate employee.

Mr. England believes that employee is permanently and totally disabled, as does Dr. Tate. Mr. England considered the physical limitations imposed by Dr. Volarich in forming his vocational opinions. Dr. Volarich advised that employee "should change positions frequently to maximize comfort and rest when needed including resting in a recumbent fashion." Considering just the need to lie down, Mr. England testified that he does not think there is any work available to employee *if* employee has to lie down periodically during the day. Employee testified that reclining provides some relief from her low back pain. But when asked directly about how frequently she reclines, employee clarified that her strategy for minimizing back discomfort is to be constantly moving and changing positions. Based upon employee's testimony, we find that employee does not spend significant time reclining during the day. We do not believe the physical limitations related solely to employee's back, considered alone, prevent employee from competing in the labor market.

Mr. England testified he believes that the combination of employee's medical conditions – including the shoulder condition that is the subject of this claim – render employee unemployable. Mr. England provided an example of how employee's shoulder injury combines with a preexisting condition to restrict employee's employment opportunities. He pointed out that if one considers only the physical restrictions related to employee's lower extremities, employee's employment prospects are limited to unskilled sedentary work, such as cashiering or light assembly. But the restrictions imposed for employee's upper extremities such as no overhead lifting and no repetitive work render employee unsuitable for those types of unskilled, sedentary jobs. We find Mr. England's opinions to be credible.

We believe it is the physical restrictions resultant from employee's shoulder condition in combination with her preexisting permanent partial disabilities that render employee unable to compete in the open labor market.

Employee: Julia Reno

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No treating physician or expert offered an opinion that employee is at maximum medical improvement for her shoulder condition but employee is not seeking additional treatment for her shoulder. As best we can determine, the last medical visit for which employee was seeking treatment for her right shoulder was on October 12, 2006. Consequently, we find employee reached maximum medical improvement on October 12, 2006.

We affirm the award of the administrative law judge that employee sustained a 12.5% permanent partial disability as a result of the work-related shoulder injury.

Second Injury Fund Liability

The next issue we must consider is the liability, if any, of the Second Injury Fund. "Section 287.220 creates the Second Injury Fund and sets forth when and in what amounts compensation shall be paid from the fund in 'all cases of permanent disability where there has been previous disability.' In deciding whether the fund has any liability, the first determination is the degree of disability from the last injury considered alone. Accordingly, pre-existing disabilities are irrelevant until the employer's liability for the last injury is determined."^{2, 3}

"In order to be entitled to Fund liability, the claimant must establish either that (1) a preexisting partial disability combined with a disability from a subsequent injury to create permanent and total disability or (2) the two disabilities combined to result in a greater disability than that which would have resulted from the last injury by itself."⁴ "Liability of the Second Injury Fund is triggered only 'by a finding of the presence of an actual and measurable disability at the time the work injury is sustained.'"⁵ To implicate the Second Injury Fund, the preexisting disability must also be of such seriousness as to constitute a hindrance or obstacle to employment.⁶

As discussed in the previous section, we conclude that employee's preexisting permanent partial disabilities combined with her shoulder injury to create permanent total disability. We find that employee has proven that she had actual and measurable preexisting disabilities of her lower extremities, wrists, elbow, low back, and cervical spine. We further find that those disabilities were hindrances or obstacles to employee's employment or re-employment.

Employee has proven each of the elements of her permanent total disability claim against the Second Injury Fund. Consequently, we find that the Second Injury Fund is liable to employee for the payment of permanent total disability benefits.

Award

We modify the administrative law judge's award on the issue of permanent disability. We award permanent total disability benefits from the Second Injury Fund to employee. From October 13, 2006, to May 3, 2007, the Second Injury Fund shall pay to employee

² *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240 (Mo. 2003)(internal citation omitted).

³ The *Landman* and *E.W.* cases cited herein were overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

⁴ *Gassen v. Lienbengood*, 134 S.W.3d 75, 79 (Mo. App. 2004)(citation omitted).

⁵ *E.W. v. Kansas City School District*, 89 S.W.3d 527, 537 (Mo. App. 2002)(internal citation omitted).

⁶ Section 287.220.1 RSMo.

Employee: Julia Reno

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a weekly benefit of \$331.89 – the difference between employee’s permanent total disability rate of \$696.97 and her permanent partial disability rate of \$365.08. Thereafter, the Second Injury Fund shall pay to employee a weekly benefit of \$696.97 for her lifetime, or until modified by law.

We further approve and affirm 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.

The award and decision of Administrative Law Judge Margaret D. Landolt, issued December 8, 2011, is attached and incorporated by this reference except to the extent modified herein.

Given at Jefferson City, State of Missouri, this 18th day of September 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Julia Reno

Injury No.: 06-134005

Dependents: N/A

Employer: DaimlerChrysler

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

Additional Party: Second Injury Fund

Insurer: Self-insured

Hearing Date: September 7, 2011

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: January 12, 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? 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 repetitively slamming lift gates on assembly line
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Right shoulder
14. Nature and extent of any permanent disability: 12.5% PPD of the right shoulder
15. Compensation paid to-date for temporary disability: 0
16. Value necessary medical aid paid to date by employer/insurer? 0

Employee: Julia Reno

Injury No.: 06-134005

- 17. Value necessary medical aid not furnished by employer/insurer? 0
- 18. Employee's average weekly wages: Unknown
- 19. Weekly compensation rate: \$675.90/\$354.05
- 20. Method wages computation: By stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

29 weeks of permanent partial disability from Employer	\$10,267.45
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22. Second Injury Fund liability: No

TOTAL: \$10,267.45

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. Anthony Pugliese

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Julia Reno

Injury No.: 06-134005

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: DaimlerChrysler

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

Additional Party: Second Injury Fund

Insurer: Second Injury Fund

Checked by: MDL

PRELIMINARIES

A hearing was held on September 7, 2011 at the Division of Workers' Compensation in the city of St. Louis, Missouri. Mr. Anthony Pugliese represented Julia Reno ("Claimant"). DaimlerChrysler Corporation ("Employer") which is self-insured, was represented by Mr. James Kennedy. The Second Injury Fund ("SIF") was represented by Assistant Attorney General Carol Barnard. This case was tried concurrently with Injury Nos. 05-144364 and 05-041703, which are the subjects of separate awards. Mr. Pugliese requested a fee of 25% of Claimant's award.

The parties stipulated that on or about January 12, 2006, Claimant was an employee of Employer; venue is proper in the city of St. Louis, Missouri; Claimant's rates of compensation are \$696.97 for Temporary Total Disability ("TTD") benefits and \$365.08 for Permanent Partial Disability ("PPD") benefits.

The issues for resolution by hearing are: whether Claimant sustained an occupational disease arising out of and in the course of employment on or about January 12, 2006; whether Claimant provided the requisite notice to Employer of her occupational disease; medical causation; whether Claimant is entitled to TTD benefits from January 12, 2006 to present; nature and extent of PPD benefits; liability of the SIF; whether the claim is barred by the statute of limitations; and whether Claimant is permanently and totally disabled.

Although all of the evidence in this case was reviewed, only evidence necessary to support this award will be summarized.

SUMMARY OF EVIDENCE

Claimant is a 51 year old woman who was hired by Employer in 1983. She worked at their plant in Huntsville Alabama, which manufactured electronic panels for their vehicles. In February 2005, Claimant moved to St. Louis to work for Employer, and began working at their assembly plant in Fenton on February 21, 2005, and worked there until she left on October 19, 2006. Claimant retired from Employer in May 2008.

After Claimant transferred to the Fenton plant, she was classified as a Tech III. The first department she was assigned to was the Body Shop, where they assembled all of the metal pieces of the mini vans which were then welded together by a robot. Her title in the body shop was Floater, which meant she filled in as needed in the body shop department. She worked in the body shop from February to October, 2005. Her first job was putting rear quarter panels on a rack. There were 19 panels weighing 23 pounds on a rack, and she had to step up onto a rack that was one foot off the ground and pick up a panel, back out of the rack, and then set it down. She had to load about 25-50 panels an hour. There was a big metal box on a platform on the floor, and she had to tilt it towards her and pull large pieces of metal which weighed 2 to 5 pounds apiece out of a box. She picked up as many at a time as she could. This required her to bend at the waist. She worked eight to nine hours a day, with twelve minute breaks in the morning and afternoon, and 30 minutes for lunch.

Shortly after Claimant began working at that job, she began to have pain in her low back which radiated into her right buttocks and down her right leg. Claimant saw her primary care physician, Dr. Allen, on April 28, 2005, complaining of low back pain. Claimant told Dr. Allen she had been lifting a lot at work, and had a stiff back from the birth of her daughter. Dr. Allen prescribed physical therapy. She gave Claimant a work restriction of no lifting over ten pounds, and then released her to full duty after one week. Claimant called Employer and told them she would be off work on medical leave for one week. When she returned to work, Employer required a medical release from Dr. Allen. Claimant testified she told the plant medical department she had done a job on Friday and hurt her back and that was why she was off for one week. Claimant testified Employer did not offer her any medical treatment. She testified she reported the incident to her supervisor, and told him the job she was on hurt her back, and he said he would take care of it. According to Claimant, she never heard from him again.

The plant medical records indicate Claimant reported to the medical department on May 5, 2005. The records indicate she was absent since April 25, 2005, and was released by Dr. Allen. The diagnosis was lateral epicondylitis, back pain, and anxiety. The records state Claimant was there to reinstate and she gave a long history of back pain, ever since her daughter was born in 1992. Claimant indicated her pregnancy caused lower back pain, and that her last MRI had been done two years before.

Claimant has a long history of low back problems. In 2002 Claimant had an MRI of her lumbar spine. The clinical history she gave at that time was low back pain radiating to both lower extremities. The MRI was performed to evaluate for herniated disc. The MRI was essentially unremarkable.

On January 11 and 12th, 2006, Claimant was working as a floater on a lift gate job. She was told she wasn't closing the lift gates all the way, and she needed to slam them shut. On February 14, 2006, Claimant reported to the Medical Department complaining of right shoulder pain since performing the lift gate job on January 11 and 12. Upon examination she had some tenderness in the A/C joint area. The diagnosis was possible right shoulder strain vs. degenerative joint disease. Claimant returned to the plant medical department on March 22, 2006, and again on May 3, 2006, complaining of right shoulder pain. X-rays of her right

shoulder were essentially negative. Claimant continued to complain of right shoulder pain, but no treatment was offered to Claimant by Employer.

On September 27, 2006, Claimant saw Dr. Petkovich for an orthopedic consultation. Claimant's chief complaint was of pain in her low back and right lower extremity. She denied any specific history of injury. She indicated it had been bothering her for the past several months. Claimant denied any prior problems with her lower back. Dr. Petkovich diagnosed muscular and ligamentous lumbosacral strain with prior vascular disease and possible lumbar discogenic component. He recommended an MRI and physical therapy. An MRI was performed on October 5, 2006. The clinical history given was of back pain and bilateral lower extremity discomfort and bilateral lower extremity weakness. Claimant reported having had low back pain for the previous 14 years, with no specific injury. The MRI revealed degenerative disc disease at L4-5 with desiccation and signal loss with a large central protrusion, which prolapsed slightly below the level of the interspace. There was no significant interspace narrowing at that location.

When Claimant saw Dr. Backer on December 19, 2006, she have a history of low back complaints on and off for 14 years, more severe at times than others. Dr. Backer examined Claimant, and did not find signs of radiculopathy. He noted her MRI showed a bulging disk at L4-5 with a small central and inferior herniation. He discussed with Claimant the uncertainties of outcome with back surgery for just degenerative disk disease. He discussed the possibility of a lumbar diskogram with the knowledge that if she went on to have a back surgery based on the results of the diskogram that the success rate is somewhere between 60 to 70% with a 30 to 40% failure rate.

On January 5, 2007, Claimant saw Dr. Bailey, a pain management specialist. Her chief complaint was low back pain. She gave a 14 year history of back pain that began with the gradual onset of pain that starts in the low back and radiates into the legs. She characterized the pain as constant, and severe and indicated that compared to prior episodes, the pain was getting worse. Dr. Bailey's impression was lumbar degenerative disk disease. Dr. Bailey scheduled a discogram with post discogram CT scan. A discogram was performed on February 6, 2007, and the impression was lumbar degenerative disc disease. The CT of the lumbar spine performed on February 6, 2007 showed an L4-5 annular tear.

On April 25, 2007, Claimant underwent a posterior spinal decompression and interbody fusion utilizing Concord cage, autologous bone from same incision and pedicle screw fixation. The post operative diagnoses were degenerative disk, L4-5; with chronic disabling low back pain. After her surgery, Claimant was seen by Dr. Backer for a follow up visit, and reported that she had not received any significant improvement in her symptoms following her surgery. In another follow up visit in June, 2007, Claimant had not improved. Dr. Backer recommended an epidural steroid injection.

Claimant's low back surgery was not successful. Claimant was never able to return to work after her back surgery. She was able to obtain early retirement disability benefits. Claimant currently takes pain medication prescribed by her doctor. Claimant has constant pain in her low back, right leg, and occasionally in her left leg. She has shooting pains into her right knee. She has pain all day, every day, and is never pain free. Lying down or reclining gives her some relief. She has difficulty sleeping, and takes Flexeril for sleep. She is only able to sleep for

a couple of hours before she is awakened by pain. She never sleeps a full night. Claimant does minimal household chores. She is able to do some light laundry, sweeping, dishes, and some dusting. She cannot make beds. She is unable to do her lawn work, and is no longer able to walk for exercise. She can walk about 1/2 hour with difficulty, and then she needs to sit down. She uses a chair in her shower. She wears slip on shoes because she cannot bend to put on her shoes. She is able to cook a little bit, but mostly she eats fast food. She has difficulty standing at the stove and cooking. If a pot is very heavy she can't pick it up. She is only able to do light grocery shopping. Riding in the car for distances is difficult. She now lives 620 miles from St. Louis. Driving to St. Louis was difficult. Claimant has to make frequent stops and when riding she reclines and puts her feet up. She is unable to care for her grandson.

Currently Claimant has difficulty with her right shoulder. She cannot raise her shoulder above horizontal and cannot reach behind her. She can hold only 2 or 3 pounds or less in front of her. She cannot reach across her body or overhead. She carries only light bags, and asks her daughter to help her with grocery shopping. She has difficulty with her personal care such as washing and styling her hair and dressing herself.

Dr. Volarich examined Claimant on May 27, 2008, prepared a report and testified on behalf of Claimant. Upon examination of Claimant's right shoulder impingement testing was positive. Apprehension, clunk and Adson's testing were negative. Trace crepitus was found at the AC joint with range of motion. Trace atrophy of the deltoid and rotator cuff was also found. Dr. Volarich diagnosed repetitive trauma right shoulder causing impingement – not evaluated or treated, and rated her disability 35% PPD of the right shoulder.

Dr. Sandra Tate also examined Claimant on April 18, 2008, and diagnosed right shoulder findings compatible with adhesive capsulitis of uncertain etiology.

Dr. Irvine examined Claimant on October 14, 2009, prepared a report, and testified on behalf of Employer. Dr. Irvine diagnosed right shoulder pain. Dr. Irvine opined Claimant right shoulder examination was inconsistent. Her strength was normal. He did not find any work condition as being a prevailing factor in her current symptoms. He did not rate any PPD of her right shoulder.

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 met her burden of proving she sustained a work related injury on or about January 12, 2006, that resulted in an injury to her right shoulder. The plant medical department initially diagnosed shoulder strain. Dr. Volarich diagnosed impingement, Dr. Tate diagnosed findings consistent with adhesive capsulitis, and Dr. Irvine diagnosed shoulder pain. I find the opinion of Dr. Volarich on medical causation more persuasive than Dr. Irvine's and more consistent with the evidence in this case. Claimant clearly complained to the plant medical department shortly after performing the gate job that she had injured her right shoulder, and the plant medical department provided some minimal treatment for a possible shoulder strain.

Although the medical experts do not agree on a diagnosis, the ratings provided by the experts range from 0 to 35% PPD of the right shoulder. I find Claimant sustained PPD of 12.5% of the right shoulder.

Although there is no evidence Claimant gave written notice to Employer of her right shoulder injury, she clearly complained to the plant medical department of her right shoulder injury, and Employer was not prejudiced by Claimant's lack of notice. The claim for compensation was timely filed. There is no evidence Claimant missed any work because of her shoulder, and the claim for TTD benefits is denied.

Claimant failed to prove she is entitled to permanent total disability benefits. If Claimant is permanently and totally disabled, it is solely because of her back condition, which preexisted her right shoulder injury, and significantly deteriorated after her shoulder injury. Because the 12.5% PPD award falls below the threshold for SIF liability, the claim against the Second Injury Fund is denied.

This award is subject to an attorney's lien in the amount of 25% in favor of Claimant's attorney Mr. Anthony Pugliese.

Date: _____

Made by: _____

MARGARET D. LANDOLT
Administrative Law Judge
Division of Workers' Compensation