

TEMPORARY OR PARTIAL AWARD  
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 04-005399

Employee: Rudy Clemoens  
Employer: DST Output  
Insurer: Liberty Mutual Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund (Open)  
Date of Accident: January 26, 2004  
Place and County of Accident: Jackson County, 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, which provides for review concerning the issue of liability only. Having reviewed the evidence and considered the whole record concerning the issue of liability, the Commission finds that the award of the administrative law judge in this regard 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 and adopts the award and decision of the administrative law judge dated December 20, 2005.

This award is only temporary or partial, is subject to further order and the proceedings are hereby continued and kept open until a final award can be made. All parties should be aware of the provisions of section 287.510 RSMo.

The award and decision of Administrative Law Judge Rebecca S. Magruder, issued December 20, 2005, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 12<sup>th</sup> day of April 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

## TEMPORARY AWARD

Employee: Rudy Clemoens

Injury No. 04-005399

Dependents: N/A

Employer: DST Output

Insurer: Liberty Mutual Insurance Company

Additional Party: N/A

Hearing Date: November 21, 2004

Checked by: RSM/lh

### 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 26, 2004.
5. State location where accident occurred or occupational disease was contracted: Jackson County, 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? Not applicable – Occupational Disease
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 lifts, pulls and pushes heavy items repetitively and has done so for the past 11 years as part of his job duties.
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: low back
14. Compensation paid to-date for temporary disability: None.
15. Value necessary medical aid paid to date by employer/insurer? None.
16. Value necessary medical aid not furnished by employer/insurer? None
17. Employee's average weekly wages: \$\$640.00
18. Weekly compensation rate: \$426.67 for temporary total disability

19. Method wages computation: By agreement

### **COMPENSATION PAYABLE**

20. Amount of compensation payable:

Employer is to provide medical treatment to relieve back pain claimant experiences and any temporary benefits that may become due. SEE FINDINGS OF FACT AND RULINGS OF LAW

TOTAL: undetermined

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

Employee: Rudy Clemoens

Injury No: 04-005399

Dependents: N/A

Employer: DST Output

Insurer: Liberty Mutual Insurance Company

Additional Party: N/A

Hearing Date: November 21, 2005

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At the hearing, the parties stipulated:

- 1) that from January 26, 2004, DST Output was an employer operating under the provisions of the Missouri workers' compensation law and that their liability under said law was fully insured by Liberty Mutual Insurance Company;
- 2) that from December 2002 through January 26, 2004, Rudy Clemoens was an employee of DST Output and was working under the provisions of the Missouri workers' compensation law;

- 3) that the average weekly wage for purposes of this temporary hearing was \$640, and that the applicable rate for temporary total disability is \$426.67 per week.

The primary issue to be determined in this case is whether Rudy Clemoens sustained injury by accident or occupational disease arising out of and in the course of his employment with DST Output. The Claimant's pleadings constitute a claim for accident, series of accidents or occupational disease. The Employer contends that if the claim is ultimately found compensable and is found so on the basis of an accident then Employer is also asserting a notice and statute of limitations defense. The evidence presented at the hearing consisted of the Claimant's testimony, numerous medical records and the deposition testimony of Dr. Theodore Sandow, and the exhibits attached thereto. Employer and Insurer's evidence consisted of the deposition testimony of Rudy Clemoens and the deposition testimony of Dr. Jeffery MacMillan, and the exhibits attached thereto.

Rudy Clemoens, the Claimant in this case, commenced employment with DST Output in 1993. DST Output was described by the Claimant as a company who does mass mailings. For the past seven years, the Claimant has been a supervisor in the warehouse and prior to that he worked in the warehouse as a puller. During his first four years of employment with DST, he had to lift overhead 70 pounds at least 20 times a day. He worked five days a week, eight hours a day and for about six weeks a year worked six days a week, twelve hours a day. In addition to lifting 70 pounds overhead, the physical duties of Claimant's job as a puller involved bending, lifting and stooping.

Claimant was promoted to the position of supervisor four years after he commenced employment at DST. As a supervisor, he oversees approximately 15 employees who are pullers. Although Claimant has many more supervisory activities and must walk around inspecting and making sure the work is being performed properly, he still has to pick up the slack when a crewmember is absent. Therefore, while his physical activities have lessened somewhat over the past seven years, he testified that he rarely has a full crew and often does have to pitch in doing the work of a puller. While the lifting has changed over the years to a maximum of 50 pounds instead of 70 pounds, I find that the Claimant is essentially involved in the same type of duties he was as a puller. While there may be a day or two every week or so where the Claimant does not have to actually do the job of a puller, I find that most days of most weeks he is involved in the same type of physical activities that he has been since he began employment with DST.

Having listened to the Claimant's testimony and having reviewed his deposition testimony as well as the medical records and medical depositions in this case, I find that the Claimant is a credible witness. Although the Claimant admittedly has difficulty remembering dates, his overall testimony is quite truthful and believable. Based on the evidence presented, I find that the Claimant first experienced pain in his back sometime in 2000. He went to his family doctor at that time complaining of pain in his low back going down his leg. He described his pain as having been ongoing for several months at that time.

On June 23, 2001, the Claimant went to see Dr. Merck who was the head of a pain center. The Claimant sought treatment from Dr. Merck for his low back pain, which he described as having gone on for two years. Dr. Merck's plan was to proceed with a series of steroid epidural injections to Claimant's low back. Dr. Merck ordered an MRI of the Claimant's lumbar spine in 2001, which demonstrated degenerative disc disease at L2-3, L4-5, and L5-S1. Dr. Merck saw Mr. Clemoens again on December 5, 2002, with a continued history of low back pain and again recommended some epidural steroid injections. The Claimant continued to seek treatment.

The first MRI was performed on June 25, 2001. Another one was performed on February 11, 2004. I find based on the deposition testimony of Dr. Sandow and Dr. MacMillan that there was basically no difference between those two MRIs. According to the Claimant's doctor, the MRIs showed no significant advancement between the two films. Therefore, Dr. Sandow testified that he could not say that there has been a progression of the degeneration of the Claimant's back from 2001 to 2004 when the second MRI was taken.

Based on the evidence presented, I find the Claimant's back pain was bad enough to seek treatment

from a doctor for the first time in June of 2000, when he visited with his family doctor. At that time, he gave a history of back pain and tingling down his right leg for approximately four months. Some time after he saw Dr. Frank in 2000 and when he first saw Dr. Merck at the Pain Center on June 23, 2001, the Claimant suffered an incident at work which literally brought him to his knees in pain. Although he doesn't remember exactly what occurred, he testified that he just bent down to check something on one of the racks and when he got back up, he experienced pain so intense that it brought him to his knees. He attempted to bend down to do something or observe something and when he had tried to raise up is when he felt the excruciating pain. He testified that he did not report this episode to his employer. Claimant went to Dr. Merck at the Pain Center on his own in June of 2001 and again in December of 2002. The Claimant testified that Dr. Merck put the Claimant on a 15 pound lift limit and that the employer accommodated as much as possible, but the Claimant still had to get the job done. Therefore, I find the Claimant still had to do repetitive lifting, bending and twisting. The Claimant was confused, however, as to whether or not this happened between June of 2000 and June of 2001, or whether it happened in December of 2002. The record is simply unclear as to when this event occurred. Claimant did testify that in 2003 he filled out an incident report and that his claim was denied. He sought the services of an attorney and a claim was filed in early 2004. Claimant testified and I find in accordance with his testimony that the one thing that makes his symptoms much better and makes him feel better is being away from work. The Claimant testified that in June of this year he took a seven-day vacation and that he had a great deal less pain when he wasn't working.

As was stated previously, Employee's claim for compensation can be construed to allege a specific accident, a series of accidents, or an occupational disease. The evidence demonstrates that the Claimant did have a couple of isolated events which caused particular distress and symptoms to the Claimant but the evidence also demonstrates that the Employee's constant repetitive lifting, pushing, and pulling may have contributed to or caused his alleged injury. So long as a claimant proves that he has an injury which is job related, the courts have held that it does not matter whether the cause of the injury was a single event or a progressive injury, which resulted from repeated constant exposure to on-the-job hazards. The only requirement is that the injury be job related. *See Smith v Climate Engineering*, 939 S.W.2d 429 (Mo.App. 1996); *Kintz v. Schnucks Market*, 889 S.W.2d 121 (Mo.App. 1994). I find that the evidence in this case is uncontroverted regarding the physical requirements of his job in that his job activities are clearly more strenuous than general physical requirements of the general public. Furthermore, I find that the Claimant's work activities definitely involved repetitive lifting, pushing and pulling, activities which he did not perform on any kind of regular basis in his personal life.

The evidence is additionally uncontroverted that the Claimant unquestionably suffers from symptomatic degenerative disc disease, including abnormalities at L4-L5 and L5-S1. I find that as a result of this disc disease the Claimant has the following symptoms: weakness, severe pain, and range of motion limitations. Both of the experts in this case, Dr. Sandow and Dr. MacMillan, set forth in their reports and testimony similar testimony and conclusions regarding the current state of Mr. Clemons' physical condition. The only real area of controversy then is whether or not Mr. Clemons' job duties, i.e., repetitive lifting, pulling, and pushing at DST Output, caused or aggravated the symptomatic degenerative disc disease from which he suffers. Dr. Sandow, the Claimant's expert in this case, was of the opinion that Claimant's work activities aggravated the Claimant's underlying degenerative disc and joint disease. Dr. McMillan, the employer's expert in the case, was of the opinion that the Claimant's disc disease and accompanying back pain were not job related in that neither was caused or aggravated by the Claimant's work activities. The opinions and deposition testimony of the experts in this case is extremely important in making the ultimate conclusions of fact and law with regard to the issue of medical causation. Obviously, the issue of medical causation in this case absolutely requires expert opinion as it is beyond lay understanding. Due to the significance and importance of the expert testimony, I think it is important in this case to review in detail the testimony by both experts, which I found most helpful in resolving the causation issue.

Jeffrey T. MacMillan, M.D., is a board certified orthopedic surgeon who has been practicing orthopedic surgery for 15 years. The American Board of Orthopedic Surgery first certified him in July of 1994. He received his medical degree in 1985 from the University of Pennsylvania. Theodore L. Sandow, M.D., the Claimant's expert in this case, is also a board certified orthopedic surgeon. He received his medical degree at

Loyola University in Chicago and took an orthopedic fellowship at the Mayo Clinic. Dr. Sandow was first certified by the American Board of Orthopedic Surgery in 1968. Both Dr. Sandow and Dr. MacMillan are practicing orthopedic surgeons.

Dr. MacMillan, who examined the Claimant on November 9, 2004, reviewed medical records prior to examining the Claimant. Dr. MacMillan analyzed this case based on the history given him by the Claimant of a slowly progressive worsening of discomfort that seemed to increase over the years. Dr. MacMillan also reviewed two MRIs and testified that these MRIs were both taken in 2004, the first in February 11, 2004, and the second September 21, 2004. See Employer and Insurer's Exhibit 2, p 8. After reviewing the medical records and conducting a physical exam, Dr. MacMillan testified that the Claimant had degenerative disc disease at several levels but most severely the L4-5 and L5-S1 levels. Dr. MacMillan went on to explain his opinion regarding the etiology of degenerative disc disease. He opined that degenerative disc disease is a condition that evolves over the course of the life of an individual as part of the natural aging process. Furthermore, Dr. MacMillan, does not believe that activity, whether work related or otherwise, has much to do with the development of degenerative disc disease. Rather, it is his opinion that the biggest factor that affects degenerative disc disease is time, the natural aging process. Dr. MacMillan did testify that he believed that a specific accident or injury could cause an underlying degenerative disc disease to become symptomatic but that repetitive work or everyday activities do not cause the condition to become symptomatic. Again, Dr. MacMillan analyzed this case in terms of repetitive activities rather than one specific injury. On cross-examination Dr. MacMillan was asked to look at the report of an MRI of the Claimant taken in June of 2004. While Dr. MacMillan did agree that the radiologist reports from the 2004 and 2001 MRIs had some differences, he did not see significant differences. Dr. MacMillan testified that he was aware that the Claimant was 54 years old and that his MRI was characteristic of somebody in his or her forties or fifties. He testified that the degenerative changes on an ongoing process and that the older the Claimant gets the more the process will continue. He further testified that the only thing the Claimant could do to slow down the degeneration would be to die. He further explained that any population is a bell curve and that there were going to be individuals that have degenerative changes far worse than what was seen in Mr. Clemons. He also testified that the degenerative process typically starts around the end of adolescence. Dr. MacMillan did admit that while there was no specific repetitive activity that would necessarily render an asymptomatic condition symptomatic, activity may cause individuals to experience more discomfort while they are active. If they back off of the activity a little bit, they have less discomfort. He explained that the symptom is not altering the course of the aging process, i.e., the degenerative process. He explained that it is very common to have "somebody who has really ugly radiographic studies, no symptoms. It's equally common to have somebody who has problems with a benign looking radiograph finding and they have significant symptoms. For the vast majority of people there are some degenerative changes and some symptoms. They will have days when the symptoms flare up and days when their symptoms feel really good. Their x-rays aren't changing at all from one day to the next. Symptoms are not indicative of injury. Just because you go out and mow your lawn and your back hurts doesn't mean you have made your degenerative disc worse. You have made it squawk a little bit that day. The symptoms will settle down. Your degenerative disc isn't settling down. It's just not hurting so much." See Employer's Exhibit 2, p 25. When asked whether continually lifting 30 to 100 pounds per day on a regular basis over a 40 to 60 hour work week for 5 years would have any affect on the objective structure of the person's back, Dr. MacMillan responded as follows: "The problem that we have is that within the literature, there is almost an equal amount of information that suggests that activity is protective against injury and degenerative changes as it may be injurious. So that the conclusion you have to draw is that there is a stalemate. We can't prove whether activity makes degenerative changes worse or prevents people from getting the degenerative changes. Ultimately what it boils down to is that we know degenerative changes are age-related changes." Although Dr. MacMillan was of the opinion that there could be trauma-related disc herniation, he explained that in terms of a catastrophic failure of the tissue. He explained that lifting 1 pound 100 times is not the same as lifting 100 pounds once. In other words, if it takes 100 pounds to rupture a disc, lifting 1 pound 100 times doesn't get you there. Employer and Insurer's Exhibit 1, p 33. Dr. MacMillan explained in detail the proposition that activity may actually be protective against deterioration of the tissues. He explained this in terms of blood supply. He testified that "if you are not constantly bearing weight and unbearing the weight, there is no way to circulate the fluids that those tissues require in order to get their nutrition." Employer and Insurer's Exhibit 2, pp 31 and 32.

Claimant's testified that the only time he experienced significant relief was when he was on vacation and away from his work activities. This testimony is in accordance with Dr. MacMillan's opinion that claimant's activities have no permanent effect with regard to his underlying degenerative condition or with regard to his ongoing symptoms. Thus, while Claimant's work activities may temporarily cause his underlying degenerative disc disease to be symptomatic, those symptoms are permanent only to the extent that Claimant is performing the work activities. Thus, Dr. MacMillan's opinion would seem to encompass the proposition that claimant's work activities may aggravate any minor symptoms the Claimant may have had due to his underlying degenerative joint disease. The increased symptomatology due to activity, however, is not, according to Dr. MacMillan, a permanent injury or condition. In other words, due to the natural aging process, the Claimant's underlying degenerative disc disease may have become somewhat symptomatic over time with or without activity. Whenever the Claimant engages in significant activity, however, he may experience greater symptoms and greater pain as a result of that. The issue in this case, however, is not the extent of permanent disability. The issue is whether the claimant has sustained or is sustaining a compensable injury due to his job activities. If in fact the Claimant's symptomatology is remitted or lessened significantly when he quits work activities, is he still entitled to medical treatment and temporary benefits if his work causes increased pain whenever he does work? I find Dr. MacMillan's testimony is more relevant to the issue of permanent disability than to whether claimant is suffering a work related injury. In fact, I think Dr. MacMillan's testimony supports the proposition that the claimant sustains injury, i.e., increased pain, so long as he continues to perform his work activities.

Dr. Sandow examined the Claimant on March 29, 2004. Dr. Sandow also analyzed causation in this case on the basis of repetitive bending, twisting and lifting required by the Claimant's work. The Claimant told Dr. Sandow as he had told Dr. MacMillan that the pain had built up over a period of time. The Claimant described his work to Dr. Sandow as requiring repetitive bending, twisting and lifting. Dr. Sandow, like Dr. MacMillan, was of the opinion that degeneration of the disc is part of the aging process. However, it was Dr. Sandow's opinion that the Claimant's work activities as described to him by the Claimant aggravated his underlying degenerative disc disease. Dr. Sandow testified that he had reviewed the actual 2001 MRI scan as well as the 2004 MRI scan. It was Dr. Sandow's opinion that the 2004 MRI was essentially unchanged from the 2001 MRI. Dr. Sandow felt that the Claimant's symptoms had progressed but that the underlying degenerative disc degeneration had not visibly changed on the MRIs. In addition to diagnosing degenerative disc disease at L4-L5 and L5-S1 as Dr. MacMillan diagnosed, Dr. Sandow also diagnosed degenerative joint disease. Dr. Sandow found arthritic changes on indicated the Claimant had arthritic changes in his facet joints. He testified that joint and disc disease accompanying one another.

It was Dr. Sandow's opinion that people who are involved in work that requires frequent lifting, aggravate their underlying degenerative conditions. It was Dr. Sandow's opinion that the mere presence of degenerative disc disease does not imply that an individual will absolutely have back pain. However, it was his opinion that if there are other aggravating factors such as repetitive job activities, then that individual is more likely to be at greater risk to have the symptoms of back pain. Claimant's Exhibit A, p 22.

The testimony and opinions of both experts in this case are persuasive. The burden of proving a compensable accident is on the claimant in a workers' compensation case. I find that Claimant has met his burden of establishing a compensable injury under the law. Dr. MacMillan's opinion that the Claimant's degenerative condition is not caused or aggravated by the Claimant's job activities is certainly supported by the 2001 and 2004 MRI films studied by Dr. Sandow. The degeneration of Claimant's disc has not increased substantially over these three years. However, I find that that claimant's symptoms have continued to worsen. Thus, while the Claimant's underlying degenerative condition may not in fact have been substantially aggravated by his work activities or by the passage of time at least between 2001 and 2004, I find the Claimant's symptoms have worsened. Moreover, I find in accordance with Dr. Sandow's testimony, that a large part of the pain the Claimant experiences is a result of his work activities. Even Dr. MacMillan admits that activity can and does cause temporary back pain and symptoms. Therefore, I find that the Claimant's work activities do temporarily aggravate the Claimant's underlying degenerative disc disease and are a substantial factor in causing, aggravating or worsening any symptoms the Claimant would otherwise have but for the work

activities. As was stated previously, when the Claimant takes a vacation, his symptoms lessen significantly. Thus, while I may find Dr. MacMillan's opinion more persuasive than Dr. Sandow's with regard to permanent disability, I find that the work activities do cause the Claimant's condition, at least temporarily, to be more symptomatic than they otherwise would be.

Granted, the symptoms ameliorate when the Claimant is away from his work activities. However, the Claimant has worked since 2000 or 2001 with back pain and continues to do so. Due to the pain, which is aggravated by his job duties, he is in need of medical treatment. While Claimant may not in fact have what constitutes a permanent injury, he has a compensable injury aggravated at least temporarily by his work activities and is in need of treatment for his increased pain. Therefore, I find the Claimant has sustained a compensable injury and is entitled to medical care and any temporary benefits the treating doctor deems necessary.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

Rebecca S. Magruder  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Patricia "Pat" Secret  
*Director*  
*Division of Workers' Compensation*