

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

Injury No.: 03-090656

Employee: Terry Penberthy  
Employer: United Parcel Service  
Insurer: Liberty Mutual Fire Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund (Dismissed)  
Date of Accident: September 4, 2003  
Place and County of Accident: St. Louis County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations 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 March 6, 2006, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Linda J. Wenman, issued March 6, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 20<sup>th</sup> day of November 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

DISSENTING OPINION FILED

\_\_\_\_\_  
John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

DISSENTING OPINION

After a review of the entire record as a whole, and consideration of the relevant provisions of the Missouri

Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed. I believe the administrative law judge erred in concluding that employee failed to meet the burden of proof on the issues of accident and medical causation.

The administrative law judge called employee's credibility into question because he believed that employee gave incomplete medical histories to health care providers and provided less than complete testimony at hearing. However, claimant's testimony at hearing was consistent with the initial report he gave employer which was documented in the Report of Injury. Employee consistently reported symptomology, including severe back pain that radiated down through his left buttock and into his left leg. Employee's account of the work-related injury on September 4, 2003 was unwavering. For this reason, I find employee to be credible and worthy of belief.

Employee has the burden of proving all the essential elements of a claim for workers' compensation benefits by reasonable probability, not absolute certainty. *McDermott v. City of Northwoods Police Dep't*, 103 S.W.3d 134, 138 (Mo. App. E.D. 2002). Employee must prove not only that the accident arose out of and in the course of his employment, but that the alleged injury was directly caused by the accident. *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 279 (Mo. App. E.D. 1997) (overruled on other grounds).

The administrative law judge found that employee failed to prove that he suffered an accident on September 4, 2003. However, competent and substantial evidence shows that employee did suffer an accident, as on that day, an unforeseen identifiable event produced objective symptoms of an injury. The specific event that was the cause of employee's injury was the moving of a dolly. The objective symptoms produced as a result of his injury included an onset of pain that radiated into his left buttock and down his left leg. Employee promptly reported his injury to employer which resulted in the completion of a Report of Injury. The Report of Injury clearly stated that the employee's injury occurred while he was pulling and lifting a dolly to align it to a trailer. Employee testified that working with such equipment was part of his regular job duties for employer.

A pre-existing but non-disabling condition does not bar recovery of compensation if a job-related injury caused the condition to escalate to the level of disability. *Avery v. City of Columbia*, 966 S.W.2d 315, 322 (Mo. App. W.D. 1998) (overruled on other grounds). Therefore, aggravation of a pre-existing condition is a compensable injury if employee establishes a direct causal link between his job duties and the aggravated condition. *Smith v. Climate Engineering*, 939 S.W.2d 429, 433-34 (Mo. App. E.D. 1996) (overruled on other grounds). Employee may do so by showing that the performance of his usual and customary duties lead to a physical breakdown or change in pathology. *Bennett v. Columbia Health Care*, 80 S.W.3d 524, 529 (Mo. App. W.D. 2002) (overruled on other grounds); *Smith*, 939 S.W.2d at 436.

The administrative law judge found that employee did not prove his injury was clearly work related and therefore was not compensable. However, employee's injury arose out of and in the course of his employment. Employee was required to move equipment with the use of a dolly as a part of his regular job duties. Therefore, employee's injury resulted when he was in the course of performing his usual and customary work duties. As a result of his injury, employee experienced a change in his condition. Employee began to report a significantly higher level of pain immediately following his injury on September 4, 2003.

In addition to the physical breakdown evidenced by the record, a change in pathology was established by the contrast in the MRIs taken on August 22, 2003 and September 8, 2003, as noted by both Dr. Kitchens and Dr. Hanaway. An MRI of employee's back performed on August 22, 2003 showed a herniated disc at the L4-L5 level. Dr. Kitchens opined that the MRI performed on August 22, 2003 showed a smaller herniation than the MRI performed after the accident on September 8, 2003. Dr. Hanaway concurred, stating that the September 8, 2003 MRI showed a more prominent herniation. In addition, employee was recommended back surgery which had never been recommended prior to his injury.

If substantial evidence exists that employee's pre-existing condition did not impede his work performance, then sufficient competent evidence would warrant a finding that the disability was caused by the aggravation of a pre-existing condition, *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206, 214-15 (Mo. App. E.D. 1999), and that the pre-existing condition was not disabling. Furthermore, disability sustained by the aggravation of a pre-existing non-disabling condition caused by a work-related accident is compensable even though the accident would not have caused the injury in a person without the condition. *Kelley v. Banta & Stude Constr. Co.*, 1 S.W.3d 43, 48 (Mo.

App. E.D. 1999).

The record shows that employee had a history of back related problems, most notably, a herniated disc at the L4-L5 level and pain that radiated through his left lower extremity. However, employee's work-related injury clearly caused his established back condition to worsen. Employee's pain level increased considerably after his injury which prevented him from performing the job duties that he had been able to perform without difficulty prior to his injury. Not only was employee unable to perform his regular job duties after his injury, but he was unable to perform duties even when restricted to a light level of work. In addition, prior to his work-related injury on September 4, 2003, employee's condition was not severe enough to require surgery. It was only after his work-related injury that back surgery was medically necessary. Although employee was not asymptomatic prior to his injury, he was able to perform his regular job duties up and until his injury on September 4, 2003. This supports a finding that employee's pre-existing condition was neither disabling nor an impediment to his performance. Competent and substantial evidence supports the fact that employee was suffering from a pre-existing non-disabling condition that was aggravated by his September 4, 2003 work injury.

Therefore, employee has met his burden by establishing that he suffered a work-related injury on September 4, 2003 and that his back condition is medically causally related to the work-related injury. Accordingly, I would reverse the decision of the administrative law judge and award compensation.

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

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John J. Hickey, Member

## AWARD

Employee:	Terry Penberthy	Injury No.:	03-090656
Dependents:	N/A		
Employer:	United Parcel Service		
Additional Party:	Second Injury Fund – dismissed by award		
Insurer:	Liberty Mutual Fire Insurance Company		
Hearing Date:	December 9, 2005 Record open until December 16, 2005	Checked by:	LJW:tr

## 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 alleged accident or onset of occupational disease: September 4, 2003
5. State location where accident occurred or occupational disease was contracted: St. Louis County, 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? 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 alleges a low back injury after using a dolly to align a converter with a double tractor-trailer.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Alleged as lumbar spine
14. Nature and extent of any permanent disability: None
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? \$2,459.71

Employee: Terry Penberthy

Injury No.: 03-090656

17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$984.20
19. Weekly compensation rate: \$656.13 / \$347.05
20. Method wages computation: Stipulated

#### **COMPENSATION PAYABLE**

21. Amount of compensation payable: None
22. Second Injury Fund liability: None

## FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Terry Penberthy	Injury No.:	03-090656
Dependents:	N/A	Before the	
Employer:	United Parcel Service	<b>Division of Workers'</b>	
Additional Party:	Second Injury Fund - dismissed	<b>Compensation</b>	
Insurer:	Liberty Mutual Fire Insurance Company	Department of Labor and Industrial	
		Relations of Missouri	
		Jefferson City, Missouri	
		Checked by:	LJW:tr

### PRELIMINARIES

A hearing was held regarding the above referenced Workers' Compensation claim by the undersigned Administrative Law Judge on December 9, 2005. Attorney Harry J. Nichols represented Terry Penberthy (Claimant). United Parcel Service, (Employer) was insured by Liberty Mutual Fire Insurance Company, and represented by Attorney Maureen L. Cary. At the conclusion of testimony the record remained open until December 16, 2005, to allow Claimant to produce itemized medical bills from Cardinal Neurosurgery & Spine, Inc., (Dr. Kitchens) and Missouri Baptist Medical Center, and to allow Employer's response (Exhibit G). The case was formally submitted on January 9, 2006. Hearing venue is correct, and jurisdiction properly lies with the Missouri Division of Workers' Compensation.

Prior to the start of the hearing the parties identified the following issues for disposition in this case: accident; arising out of and in the course and scope of employment; medical causation; liability for past medical expenses; future medical care; temporary total disability (TTD); and nature and extent of permanent partial disability (PPD). Claimant offered Exhibits B-F, Employer offered Exhibits 2-17, and the parties offered Joint Exhibits 1-A and 1-B. These exhibits were admitted into the record. On December 13, 2005, Claimant offered Exhibit G, and on December 16, 2005, Employer filed an objection to portions of the exhibit on foundation grounds. Exhibit G is comprised of itemized bills from twelve separate providers or dates of service. Employer's objection is sustained, and only the itemized bills from Cardinal Neurosurgery & Spine, Inc., (Dr. Kitchens) and Missouri Baptist Medical Center are admitted from Exhibit G. Any objections not expressly ruled on in this award are overruled.

### SUMMARY OF EVIDENCE

Only testimony necessary to support this award will be reviewed and summarized.

**Claimant:** Claimant began working for Employer during October 1999 driving tractor-trailer trucks. On September 4, 2003, Claimant used a dolly to position a converter while hooking up a double trailer. Using the dolly required Claimant to push and pull a converter weighing over one thousand pounds. Prior to leaving Employer's terminal, Claimant began to feel sharp pain in his low back that radiated into his buttocks and down his leg. Claimant drove his trip, and upon his late afternoon return, Claimant notified Employer of his symptoms.

Employer authorized Claimant to seek treatment at St. Joseph's Emergency Room in St. Charles, Missouri. Claimant was next directed to Dr. Byler, who evaluated Claimant and ordered an MRI of Claimant's lumbar spine. The MRI was obtained on September 8, 2003, and Employer directed Claimant to Dr. Mirkin. Dr. Mirkin informed Claimant he would likely need surgery. Claimant had a preexisting history of back problems/injuries, but Claimant testified Dr. Mirkin was the first physician to ever suggest he would need back surgery. Claimant acknowledged seeking the care of a chiropractor prior to the injury because he had a "bad back." Prior to this injury, Claimant had worked forty to fifty-five hours per week.

Claimant testified he was off work for a couple of weeks without TTD benefits being paid, and was then returned to work on light duty. Employer terminated Claimant on October 15, 2003, while he was on light duty. Claimant continued to seek medical care on his own, including physical therapy, medication and a series of steroid injections. Attempted conservative medical treatment failed, and on December 5, 2003, Dr. Kitchens performed a L4-5 microdiscectomy and hemilaminectomy. During this period of treatment, Employer did not pay benefits.

Claimant did not work from the date of termination until his release from medical care on March 15, 2004. Upon his release from care Claimant testified his back was better, he had less low back pain, and less radicular pain. Claimant returned to work with another employer on March 22, 2004. Since his return to work, Claimant has re-injured his back and may require additional surgery.

Upon cross-examination, Claimant was unable to recall the exact date of his injury with Employer. Claimant acknowledged providing Dr. Byler and Dr. Mirkin a medical history in which he denied experiencing back pain during the past ten years. Yet, he acknowledged two 1998 low back injuries that occurred with a different employer that remain unresolved, and other low back settlements that combine to produce a total of 29% BAW, including two settlements that occurred in that ten year period. Finally, Claimant testified he lost no time from work with Employer in the three years preceding his September 4, 2003 injury, but when challenged with an assertion of a work excuse issued by Dr. Margherita during 2002, Claimant could not remember the event.

### **Pertinent MRI Interpretation Findings**

**Nydic 8/22/03 – Exhibit 1-B:** Disc desiccation from L3-S1 with loss of height at L3-S1 levels; osteoarthritic change in the apophyseal joints at L3-4 with extrusion of disc content; osteoarthritic change in apophyseal joints at L4-5 with extruded disc content inferior to the level of the L4-5 interspace to the left of the thecal sac; osteoarthritic change in apophyseal joints at L5-S1; and no central spinal stenosis. The MRI was read by radiologist, Dr. John Crotty.

**Nydic 9/8/03 – Exhibit 1-B:** Exam was compared to 8/23/03 MRI. Mild diffuse disc bulge at L2-3 is not different; disc bulge at L3-4 is not different, and focal central disc extrusion with extruded disc material inferior to the L3-4 level is not different; disc bulge at L4-5 with large focal left paracentral disc extrusion is not different, and mass effect on the nerve roots exiting inferior to L4-5 on the left is not different; mild diffuse disc bulge at L5-S1 is not different. Overall, no significant change in the appearance of the lumbar spine was seen since the 8/22/03 exam, and no new abnormality was seen. The MRI was read by radiologist, Dr. Michael Raney.

**Berland Imaging, Inc. – Exhibit 1-B:** At the request of Claimant's personal physician, Dr. Margherita, Claimant's 8/22/03 and 9/8/03 MRIs were sent to radiologist, Dr. John Merkle, for an independent comparison evaluation. Dr. Merkle concluded as follows:

Both studies were performed on the same machine using identical protocols. At the L4-5 disc, a circumferential bulge is noted with superimposed paracentral herniation. The herniation posteriorly displaces the left L5 nerve root. The circumferential bulge, superimposed herniation and hypertrophic bony over-growth of both posterior facets results in lateral recess and inferior neural foraminal narrowing bilaterally, the left greater than right, with acquired spinal stenosis. No change has occurred at this level between the two studies. The herniation has extended inferiorly along the posterior-superior aspect of the L5 vertebral body, but has not ruptured through the posterior longitudinal ligament.

**Dr. Kitchens 12/11/03 – Exhibit 3:** "Review of his MRI from August 22, 2003, reveals a disc herniation at the left side at the L4-5 level, but on direct comparison, this is smaller than the disc herniation seen on September 8, 2003."

**Dr. Hanaway – Exhibit B:** "This is dictation of an MRI scan done on 9/8/03 of the lumbar spine. There may be some subtle changes here compared to the previous (s)can (8/22/03), but certainly there is a very prominent L3-4 disk protrusion and the disk herniation left lateral at L4-5 I think looks a little more prominent on these pictures which are done in the same place not more than three weeks apart."

**Dr. Mirkin – Exhibit 11, pg. 10:** A comparison of the 8/22/03 and 9/8/03 lumbar MRIs showed "essentially the same anatomical findings."

**Dr. Chabot – Exhibit 12, pg. 17:** There was no difference between the 8/22/03 and 9/8/03 lumbar MRIs.

### **Medical Causation Opinions**

**Dr. Mirkin:** Dr. Mirkin examined Claimant on September 12, 2003, after Dr. Byler referred Claimant for orthopedic treatment. When Dr. Mirkin inquired about lumbar injuries prior to September 4, 2003, Claimant reported a 1991 injury but no real pain in his back for the last ten years. When Claimant was asked why he had undergone a lumbar MRI on August 22, 2003, Claimant told Dr. Mirkin he was just having his back checked out. Following his examination, Dr. Mirkin diagnosed Claimant as having degenerative disc disease with significant left L4-5 disc herniation, and likely to require surgery. Dr. Mirkin opined Claimant's large L4-5 disc herniation was present prior to his reported September 4, 2003 injury, and work was not a substantial factor in causing Claimant's current need for treatment.

Upon cross-examination, Dr. Mirkin testified it is remotely possible Claimant may have had few back symptoms prior to his reported September 4, 2003 injury, but it is unlikely.

**Dr. Chabot:** Dr. Chabot examined Claimant on August 30, 2004. Following a review of Claimant's medical records and his examination, Dr. Chabot opined Claimant's work on September 4, 2003 was not a substantial factor in Claimant's need for medical treatment and subsequent surgery.

Upon cross-examination, Dr. Chabot acknowledged Claimant's treating chiropractic reports prior to September 4, 2003 did not reflect neurological findings present after September 4, 2003, but Dr. Chabot noted the reports were short, and not easy to decipher. Dr. Chabot conceded Claimant's surgeon, Dr. Kitchens, found Claimant's August 22, 2003 disc herniation to be smaller than the herniation present on the later MRI. Dr. Chabot indicated the size of a herniation doesn't always make a difference, and he did not share the difference noted by Dr. Kitchens. Dr. Chabot further noted that based on Claimant's pre-September 4, 2003 chiropractic records, Claimant already suffered from back pain with left lower extremity radiculopathy that prompted the ordering of the August 22, 2003 MRI.

### **FINDINGS OF FACT & RULINGS OF LAW**

Having given careful consideration to 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:

#### **Issues relating to accident and medical causation**

Section 287.020 RSMo., defines accident as an unexpected or unforeseen event or series of events that occur suddenly, without fault, and produce objective symptoms of an injury. The injury must be "clearly work related", and that term is defined as work being a substantial factor in the resulting medical condition. Further, an injury is not compensable merely because work was a triggering or precipitating factor. The aggravation of a preexisting condition is a compensable injury if the claimant establishes a direct casual link between job duties and the aggravated condition. See *Smith v. Climate Engineering*, 939 S.W.2d 429, 433-34 (Mo. App. E.D. 1996) (overruled on other grounds). Determinations of this kind require the assistance of expert medical testimony. Medical causation not within lay understanding or experience requires expert medical evidence. *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596 (Mo. banc 1994) (overruled on other grounds). The weight to be accorded an expert's testimony should be determined by the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. *Choate v. Lily Tulip, Inc.*, 809 S.W.2d 102 (Mo.App. 1991) (overruled on other grounds).

Claimant bears the burden of establishing the essential elements of his claim. Two of the essential elements include establishing accident and medical causation. Claimant does not meet either burden. His description of the injury is not of a sudden injury; rather, Claimant testified he began to experience a sharp pain in his back before leaving Employer's terminal, not while moving the heavy object he described. At best, what Claimant described is an event that triggered his underlying condition. Additionally, Claimant credibility has been called into question. He provided incomplete medical histories to health care providers trying to provide appropriate treatment for his acute condition, and when confronted with less than complete testimony at hearing, his memory became cloudy. Claimant's alleged accident was un-witnessed. Given his inconsistencies it puts into question his version of what intensified his low back symptoms.

Further, while two of Claimant's physicians may have commented favorably regarding comparison of his herniated L4-5 disc between the August and September MRIs, neither physician offered an opinion linking the change to his work activities on September 4, 2003. By contrast, Employer's medical experts, Dr. Mirkin and Dr. Chabot, clearly opine Claimant's work was not a substantial factor in Claimant's resulting need of treatment. Additionally, multiple radiologists compared Claimant's MRIs and failed to find the subtle or slight changes noted by Dr. Kitchens and Dr. Hanaway. These physicians fail to find a change in Claimant's pathology between his August 22, 2003 MRI and his September 8, 2003 MRI. I find the opinions expressed by Employer's medical experts to be persuasive, and find Claimant fails to meet his burden to establish either accident or medical causation.

### **CONCLUSION**

Claimant has failed his burden to establish accident and medical causation. All other issues are moot. Employer owes no further benefits regarding this injury. Claimant's SIF claim is dismissed as the primary claim has failed.

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

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

LINDA J. WENMAN  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

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Patricia "Pat" Secrest  
*Director*  
*Division of Workers' Compensation*