

CORRECTING ORDER

(Correcting Issuance Date of Final Award Denying Compensation)

Injury No.: 06-021774

Employee: Jack Johnson  
Employer: Indiana Western Express, Inc. (IWX)  
Insurer: Protective Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: Alleged February 9, 2006  
Place and County of Accident: Alleged Greene County, Missouri

On July 9, 2008, we issued a Final Award Denying Compensation with a Dissenting Opinion by Commissioner Hickey. The Final Award erroneously stated that we issued the award July 9, 2007.

Pursuant to §287.610.6 RSMo, we issue this Correcting Order to correct the issuance date of the Final Award Denying Compensation to July 9, 2008. In all other respects, the Final Award Denying Compensation remains unchanged.

Given at Jefferson City, State of Missouri, this 24th day of July 2008.

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

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

Injury No.: 06-021774

Employee: Jack Johnson  
Employer: Indiana Western Express, Inc. (IWX)  
Insurer: Protective Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: Alleged February 9, 2006  
Place and County of Accident: Alleged Greene 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. 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 November 15, 2007, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Robert H. House, issued November 15, 2007, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 9th day of July 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

DISSENTING OPINION FILED

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John J. Hickey, Member

Attest:

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Secretary

DISSENTING OPINION

After 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 issue of medical causation.

Competent and substantial evidence supports a finding that employee suffered an injury on February 9, 2006 and that the accident was the prevailing factor in employee's resulting medical condition and disability. The administrative law judge erred in finding that

employee's back condition was not medically causally related to the accident on February 9, 2006.

Employee's injury occurred in February of 2006, after the 2005 amendments to the Workers' Compensation Law. Section 287.020.3(1) RSMo (2005), provides:

"An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability." The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability."

The new standard requires that employee show that the accident was the prevailing factor in causing employee's resulting medical condition and disability. Aggravation of a preexisting condition is compensable under §287.020 if employee proves a direct causal link between the accident and the aggravated condition, i.e., that the accident was the prevailing factor in causing the aggravated condition. Employee has met this burden.

The administrative law judge conceded that there is no dispute that an incident occurred on February 9, 2006. Employee credibly testified that when he opened the door to his truck that he was jerked by a gust of wind and injured his low back. Employee reported his injury to employer and was sent by employer to a doctor who diagnosed him with a lumbosacral strain.

The issue is whether the incident was the prevailing factor in causing the aggravation of employee's medical condition and disability. Two medical experts offered opinions as to causation. Dr. Macmillan, orthopedic surgeon, testified on behalf of employer. Dr. Macmillan noted that employee had a prior injury to his back in August of 2004. On April 4, 2005, employee underwent a transcutaneous disk resection, neural and annular decompression, discogram at L4-L5 and L5-S1. Dr. Macmillan believed that employee's objective medical condition remained unchanged following his surgery and that there was no new injury. He concluded that there was no indication that employee fully recovered from his previous back injury as he continued to experience back pain following his surgery. Dr. Macmillan stated that he disagreed with the opinion of Dr. Stuckmeyer that employee's work injury on February 9, 2006 was the prevailing factor in causing employee's back condition.

At the request of employee's counsel, Dr. Stuckmeyer, orthopedic surgeon, performed an independent medical examination of employee on March 6, 2007. Dr. Stuckmeyer found that although employee had significant pre-existing problems with his back having undergone surgery, employee had a resolution of a majority of his complaints with regard to his lower extremities, but continued to have persistent back pain. Dr. Stuckmeyer opined that as a direct result of employee's February 2006 accident, employee exacerbated and aggravated his underlying pre-existing condition. Dr. Stuckmeyer opined that the February 2006 accident was a primary or prevailing factor in the aggravation injury and need for medical treatment.

I find Dr. Stuckmeyer's opinion on the issue of causation to be more credible as his opinion is supported by the record as a whole. I believe Dr. Macmillan to be less persuasive for the following reasons: Dr. Macmillan testified that there was no indication that there was a change in employee's condition; however the record supports that employee's condition did improve following his surgery and last visit with Dr. Marks. Dr. Macmillan testified that his opinion was based in large part upon the fact that there were no medical records with regard to employee's back from June 30, 2005, following employee's last visit with Dr. Marks, through February 2006. Dr. Macmillan focused on the fact that employee reported persistent back pain during his June 30th office visit and believed that not enough time elapsed for employee's condition to have significantly improved. However, more than six months passed between employee's last visit with Dr. Marks and his February 2006 injury. The fact that no medical records document employee's improvement does not mean that his condition did not improve. The fact that employee did not seek medical attention during that time would indicate that his condition was improving. Had employee's condition not improved or had he continued to suffer significant back pain, it would seem logical that employee would have sought medical care and treatment during that time.

Moreover, Dr. Macmillan testified that he believed employee was credible with regard to his complaints. Dr. Macmillan found employee to be credible and it was employee's testimony that his condition did in fact improve. In addition, employee returned to work without restrictions and worked until his February 2006 injury which also indicates that employee's condition had improved. Dr. Macmillan's assertion that there was no change in employee's condition from June 2005 to February 2006 is not supported by the record.

Furthermore, I find employee to be credible. Employee testified that he was self-employed at the time of his prior back injury in 2004. Employee testified that he injured his back August 30, 2004 and subsequently underwent surgery. He testified that the surgery relieved the symptoms in his legs for the most part. Employee experienced right gluteal pain, a little bit of leg pain and low back pain following his surgery; however, he continued to exercise on his own and got to the point where he felt quite a bit better. Employee testified by October his condition had improved. In late September, early October, employee felt he was physically capable of driving a truck. At the time employee applied for his job for employer, he was no longer taking prescription pain medication as indicated on his application for employment with employer. Employee informed the doctor performing the physical examination for employer of his prior back surgery. Employee testified that he drove 10 hours straight on a regular basis for employer and never missed any work due to back problems. Employee testified that he did not have any difficulties performing his duties as a truck driver prior to his February 9, 2006 injury. Employee did not seek medical attention for any back problem

between June 30, 2005 and his injury on February 9, 2006.

Employee's return to work without restrictions clearly supports his contention that his condition improved. Employee began working for employer in November of 2005. Employee worked for employer from November of 2005 up and until his injury on February 9, 2006. In order to work for employer, employee was required to undergo a physical examination. Prior to beginning his employment, employee underwent a DOT physical which cleared him for work with employer. Clearly, employee's condition was improved as he not only sought out employment as a truck driver but passed the physical examination which was a prerequisite to becoming employed with employer. There is no indication that employee was found to be disabled as a result of his 2004 back injury nor was he restricted from performing duties as a truck driver as a result. Contrarily, employee was found physically capable of performing the duties of a truck driver and was able to perform work as a truck driver for nearly three months.

After his February 9, 2006 injury, employee testified that his condition worsened. Employee testified that he now has constant back pain and only sleeps 3-4 hours a night. Employee testified that he can stand/walk for 10-15 minutes and sit for about 30 minutes. Employee testified that he still takes Hydrocodone for the persistent pain.

Employee was referred to Dr. Morris on February 9, 2006 and was diagnosed with a lumbosacral strain with lumbar disk degeneration and placed on work restrictions. Dr. Morris evaluated employee on February 27, 2006 and noted employee was not working as the provider had taken him off work. Dr. Morris recommended no repetitive lifting over 10 lbs; no prolonged standing or walking greater than 2 hours; and no bending, no pushing/pulling over 10 lbs; and that he should be sitting 75% of the time.

Competent and substantial evidence shows that employee's condition did change after his February 2006 accident, supporting a finding that the accident was the primary or prevailing factor in the aggravation of employee's back condition.

Therefore, employee has met his burden by establishing that he suffered a work-related injury on February 9, 2006 and that the accident was the prevailing factor in the aggravation of his back condition. 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: Jack Johnson

Injury No: 06-021774

Dependents: N/A

Employer: Indiana Western Express, Inc. (IWX)

Before the  
DIVISION OF WORKERS'  
COMPENSATION  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Additional Party Second Injury Fund

Insurer: Protective Insurance Company

Hearing Date: October 3, 2007

Checked by: RHH/meb

#### 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 February 9, 2006

5. State location where accident occurred or occupational disease was contracted: Greene 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? 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:  
Claimant alleges that he was injured when a gust of wind jerked him forward while he was trying to open his semi-tractor door.
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: back
14. Nature and extent of any permanent disability: N/a
15. Compensation paid to-date for temporary disability: \$2,096.46
16. Value necessary medical aid paid to date by employer/insurer? \$1,851.00
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$1,158.38
19. Weekly compensation rate: \$696.97/365.08
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

The claim for compensation is denied.

22. Second Injury Fund liability:

The claim against the Second Injury Fund is denied.

Total: \$ .00

23. Future requirements awarded: None

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Jack Johnson

Injury No: 06-021774

Dependents: N/A  
Employer: Indiana Western Express, Inc. (IWX)  
Additional Party Second Injury Fund  
Insurer: Protective Insurance Company

Before the  
DIVISION OF WORKERS'  
COMPENSATION  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Checked by: RHH/meb

The parties presented evidence at a hearing on October 3, 2007. Claimant appeared in person and with his attorney, Jerry Kenter. Employer and insurer appeared through their attorney, Bill Richerson. The parties presented the following issues for determination: One, whether claimant sustained an injury by accident arising out of and in the course and scope of employment; two, whether claimant's current physical condition was caused by his alleged accidental injury at work; three, whether claimant is entitled to temporary total disability benefits from March 1, 2006, to the date of the hearing and in the future; four, whether claimant is entitled to future medical benefits; and, five, whether claimant is entitled to costs for the medical report of Dr. James Stuckmeyer, pursuant to Section 287.560, RSMo.

The parties agreed that employer and insurer are entitled to a credit for overpayment of temporary total disability benefits in the amount of \$110.34. The parties additionally agreed that claimant's average weekly wage was \$1,158.38, that the workers' compensation rate was \$696.97 for temporary total disability benefits and \$365.08 for permanent partial disability benefits, that temporary total disability benefits were paid in the amount of \$2,096.46, and that medical benefits were paid in the amount of \$1,851.00.

Claimant was an over-the-road truck driver for IWX, beginning around November 9, 2005. He worked as a truck driver from that date until he was injured, on February 9, 2006, when a gust of wind jerked him forward while he was trying to open his semi-tractor door. He felt immediate back pain and reported his injury. He made it back to the employer's facility in Fort Worth and was referred to the Concentra Clinic where he was examined by Dr. Mark Morris. Dr. Morris noted that claimant presented with a leftward pelvic list and that he hurt on his left side at about the L3-S1 level. Dr. Morris also noted that claimant's range of motion was decreased. He was diagnosed as presenting with a lumbosacral strain.

Claimant had previously been injured while working as an owner-operator, driving his own semi-tractor and trailer which ultimately resulted in back surgery. Claimant's previous injury occurred on August 30, 2004. The surgery for his back injury was performed by Dr. Richard Marks in Richardson, Texas, on April 4, 2005. Dr. Marks in his operative report described the procedure he performed on claimant as "[t]ranscutaneous disc resection with micrograsper, neuro and annular decompression, discogram and discographic interpretation, L4-L5 and L5-S1." This was described by Dr. Jeffrey MacMillan, an examining physician of employer, to be what he would term as a microdisectomy. It could also be termed percutaneous disectomy or automated microdisectomy. Regardless of the terminology used, the surgery, upon reviewing the operative report and Dr. MacMillan's interpretation of the procedure, was insertion of a canula into the disc to remove disc material.

An MRI was performed following claimant's surgery, which was summarized by Dr. Marks on review of the radiological report, but not the actual films, as follows:

"The radiologist's commentary indicates at L4-L5 disc is moderately desiccated and narrowed, 3.5 mm central protrusion minimally indents the thecal sac without causing central stenosis. The thecal sac has a AP diameter of 12 mm. Protrusion is unchanged on flexion, slightly accentuated on extension. No canal stenosis. No extension. No foraminal stenosis. Facet joints are normal. At 5-1 disc moderately desiccated narrowed 2 mm bulge extends to the anterior epidural sac without displacing the S1 roots or compressing the thecal sac. Bulges unchanged on flexion, slightly accentuated on extension. No foraminal stenosis. Mild facet joint hypertrophy is present. This is compared to his preoperative MRI of 09-28-04 showing approximately same size 1-2 mm protrusion at L5-S1. However, showing a 6 x 4 mm broad-based protrusion versus extrusion at 4-5.

Claimant also had an MRI following the incident he described as occurring on February 9, 2006. Dr. Marks again had the opportunity to examine claimant. As Dr. Marks wrote:

"Review of the MRI of 02/24/06, the radiologist's impression is desiccation at 4-5, desiccation at 5-1, suggestion of small left L5 laminotomy correlating with previous surgery. Enhancement to

the posterior annulus at 4-5 and 5-1 is felt to be consistent with prior surgery. This is Dr. Knight's interpretation. In personal review of the MRI, I note that there is moderate desiccation at 4-5 and 5-1; however, though the radiologist did not point it out, I believe that there is approximately 3-4 mm discal protrusion at 5-1, approximately 2-3 mm at L4-L5.

Dr. James Stuckmeyer, an orthopedic surgeon in Lee's Summit, Missouri, reviewed the records and rendered an opinion at the request of claimant's attorney. In reviewing the medical records, he described the findings in the MRI following claimant's surgery, noting the two disc protrusions. However, Dr. Stuckmeyer, in reviewing the records of the MRI following claimant's alleged injury in this case, misstated Dr. Marks' March 28, 2006, review of the MRI. Dr. Stuckmeyer stated the following: "[h]owever, he did state that the radiologist pointed out a 3-4 mm disc protrusion at L5-S1 and a 2-3 mm disc protrusion at L4-5." Clearly, Dr. Marks on March 28, 2006, independently noted those disc protrusions, not the radiologist.

Dr. Jeffrey MacMillan, an orthopedic surgeon in Overland Park, Kansas, noted the following regarding those two MRIs: "[s]o you have MRIs bracketing the alleged injury, but there is really no significant change between those two studies. So, on the second study, there is no evidence of a new injury and, typically, there has to be some objective evidence that something happened or something changed." Moreover, Dr. MacMillan concluded that, ". . . there is no indication in the medical records that Mr. Johnson ever really recovered from the symptoms that he had following the hurricane-related injury. The last entry from Dr. Marks suggested that he continues to have fairly severe activity limiting back pain even following the procedure that he performed."

Dr. Stuckmeyer ultimately concludes as follows: "I feel within reasonable medical certainty that prior to the accident date in discussion Mr. Johnson had significant preexisting problems with his back having undergone a prior surgical procedure. However, the patient did have resolution of a majority of his leg symptoms but persistent chronic back pain. As a direct consequence of the most recent industrially-related accident occurring in February of 2006, the patient has exacerbated and aggravated this underlying preexisting condition. It is my opinion that the accident of February 2, 2006 (sic), was a primary or prevailing factor in the aggravation injury and the need for medical treatment."

It is clear that Drs. MacMillan and Stuckmeyer differ as to the causation of claimant's current complaints. Dr. MacMillan finds it unrelated to any injury in February of 2006, and Dr. Stuckmeyer finds that the injury is related to such incident. Consequently, the major issue presented by the parties is whether claimant's current physical condition was caused by his alleged accident. Indeed, there is no evidence to dispute that an incident occurred on February 9, 2006, as claimant describes, when a gust of wind caught the door he was trying to open and jerked him forward. Claimant alleges that that incident caused his current complaints. Thus, the issue of accident rises or falls with the determination of causation. Indeed, §287.020, in effect at the time of this injury, states that: "[a]n injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. 'The prevailing factor is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.' 287.020.3(1), RSMo. Additionally, an accident must produce "at the time objective symptoms of an injury." §287.020.2. Moreover, "[i]n determining compensability and disability, where inconsistent or conflicting medical opinions exist, objective medical findings shall prevail over subjective medical findings. Objective medical findings are those findings demonstrable on physical examination or by appropriate test or diagnostic procedures." §287.190.6(2).

It is clear from the evidence in this case that claimant had a significant back injury preexisting his accident that occurred on February 9, 2006. His preexisting injury of August 30, 2004, ultimately resulted in surgery. An MRI performed following that surgery is remarkably similar to the MRI performed following claimant's accident of February 9, 2006. Dr. MacMillan has opined that "there is really no significant change between these two studies." Consequently, the objective findings of the MRIs indicate that claimant's objective medical condition has remained virtually unchanged since his August 30, 2004, injury and resulting surgery. However, claimant's testimony is that his condition significantly worsened following his February 9, 2006, accident. Dr. MacMillan has opined that his "best guess is that you got a guy who's been out of work for several months, he has to somehow get back to work and try to support his family and he goes back to work and lo and behold his back hurts as bad as it did after the initial injury." He stated that because there was no change in the MRI "there is no objective evidence that anything happened between his first treatment and the second injury. So, the assumption that you have to make is that there is no new injury. This is all part -- it's all a continuation of the first injury." Indeed, Dr. MacMillan stated that "you have somebody who has clearly documented severe symptoms before the alleged injury. You have very similar symptoms after the alleged injury, and you have an MRI before the alleged injury that shows degenerative changes, and you have a virtually indistinguishable MRI after the alleged injury. So there is no objective evidence that anything changed."

On the other hand, Dr. Stuckmeyer opined to the contrary. He found that claimant's February 9, 2006, accident "was a primary or prevailing factor in the aggravation injury and the need for medical treatment." Although Dr. Stuckmeyer noted claimant's significant preexisting problems, he found that a majority of claimant's leg symptoms resolved but that claimant continued to have persistent back pain.

The ultimate decision regarding the compensability of this case is which doctor is correct as to whether claimant's current physical condition was caused by his alleged accidental injury at work on February 9, 2006. Based upon all of the evidence in this case, I conclude that claimant did not sustain an injury by accident arising out of and in the course and scope of his employment on February 9, 2006, and that his current physical complaints were not caused by the event of February 9, 2006. There is no evidence to dispute claimant's testimony that an event occurred on that date; however, I find that claimant sustained no new injury

that caused his current physical complaints. Indeed, the evidence is that his actual physical condition, as determined by objective findings, remains virtually identical to what it was following his surgery from his August 20, 2004, injury. The medical evidence clearly demonstrates that when claimant ceased treatment on June 30, 2005, with Dr. Marks, he still had significant physical complaints similar to his current complaints and MRI findings that are also similar to those following the August 20, 2004, event. When Dr. Marks last saw claimant on June 30, 2005, he discussed treatment options, including discectomy and fusion. Claimant testified that a large portion of his symptoms abated as Dr. Stuckmeyer additionally noted. Indeed, claimant underwent a DOT physical on November 2, 2005, which cleared him to work for IWX. However, the findings on that report noted that claimant had previous surgery in the section noting previous surgery deformities limitation of motion and tenderness. Since only the previous surgery portion is underlined, it is unclear whether there are any findings of limitations of motion or tenderness. Nevertheless, since Dr. Stuckmeyer noted the claimant's history that claimant continued to have persistent chronic back pain with a resolution of majority of leg symptoms following his first surgery and prior to the last injury, it may well be concluded that claimant was still having back pain, tenderness and some leg symptoms at the time of the DOT physical. The DOT physical was performed by Dr. Morris who also saw claimant on February 9, 2006, noting at that time that claimant had a leftward pelvic list along with decreased range of motion and L3-S1 level paraspinals. However, by March 10, 2006, Dr. Morris noted that claimant stood straight with no list, normal reflexes, normal sensation, and did not note any tenderness. Thus, it is fairly certain that claimant continued to have some back and leg symptoms following his 2004 injury with some waxing and waning over time. Claimant's symptoms following his February 9, 2006, accident were similar to those that he suffered following the August 30, 2004, accident. From claimant's testimony and the findings of Dr. Stuckmeyer, claimant's symptoms may have worsened somewhat following the February 9, 2006, injury, but that is not the opinion of Dr. MacMillan. I find more persuasive the opinions of Dr. MacMillan based upon his analysis of the "very similar symptoms" and "virtually indistinguishable MRI" upon comparative MRI studies and records for the 2004 and 2006 events, along with Dr. Morris' notations of an initial worsening of symptoms following the February 9, 2006, event that lessened by March 10, 2006.

I find that claimant has failed to meet his burden of proof by proving that his current physical condition was caused by the event of February 9, 2006. Claimant has failed to meet the burden of proving said proposition to be more likely true than not. § 287.080, RSMo. As a result, I deny the claim.

Date: November 15, 2007

Made by: Robert H. House

Robert H. House  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

Jeffrey W. Buker  
Jeffrey W. Buker  
*Director*  
*Division of Workers' Compensation*