

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

Injury No.: 06-009468

Employee: John Wilken  
Employer: Qualserv Corporation  
Insurer: Twin City Fire Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

The above captioned workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the briefs of the parties, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge. The July 6, 2009, award and decision of Administrative Law Judge Nelson G. Allen is attached hereto solely for reference.

**Issues Presented**

Did employee sustain an injury by accident?

Was employee's accident the prevailing factor in causing his resulting back condition and other medical conditions?

Did employee's resulting back and other medical conditions arise out of and in the course of his employment?

**Findings of Fact**

*Background*

Employee began working for employer in 1988. At the time of the alleged work-related accidents, employee was 61 years-old and worked for employer as a lead polisher.

Employee testified that before the alleged work accidents, he had no problems with his back. Employee stated he worked full-time and had no difficulty performing his duties. Employee asserts he was not operating under any physician restrictions and took no narcotic pain medications.

*Accidents, Treatment and Sequela*

Employee alleges that he experienced back pain and stiffness on January 24, 2006, after he twisted while lifting a 20-pound stainless steel kitchen counter. Employee alleges he felt increased pain in his back on February 6, 2006, while stepping down awkwardly from a milk crate upon which he was working while holding a 10-12 pound polishing tool.

Employer referred employee to Concentra for treatment. At Concentra, employee was treated with pain medications, therapy and electro-stimulation treatment. On February 10, 2006, during electro-stimulation treatment for his back pain, employee

Employee: John Wilken

- 2 -

sustained a burn to his lower back. Employee testified that between his back pain and the burn, he was basically immobile. Employee testified that he was directed by medical personnel not to move around. Employee stated that, due to his back pain and burn, he could not lie down or sit back to sleep. Instead, he slept sitting on the edge of a chair resting his head and hands on his cane.

On February 26, 2006, employee developed deep vein thrombosis that caused a pulmonary embolism. Based upon conversations with his physicians, employee understands that the pulmonary embolism was caused by his immobility. Employee was hospitalized three times due to the pulmonary embolism.

#### *Expert Medical Opinions*

Drs. Koprivica and MacMillan agree that employee had significant and serious preexisting conditions of ill related to his back and spine. In particular, employee suffered from preexisting multi-level degenerative disc disease, moderate stenosis the length of his lumbar spine, and severe stenosis at L5-S1 with spondylolisthesis. Both doctors believe employee is not a surgical candidate. Both doctors believe employee is permanently and totally disabled.

Dr. Koprivica testified that if employee's history that he had no preexisting back symptoms is accurate, Dr. Koprivica believes that the February 6, 2006, incident was the prevailing factor in aggravating employee's spondylolisthesis. Dr. Koprivica believes the back pain from the February 6 incident combined with the treatment burn were the prevailing factors leading to employee's immobility; employee's immobility led to employee's development of deep venous thrombosis; employee's deep venous thrombosis led to the pulmonary embolism; the pulmonary embolism led to the development of pulmonary hypertension and secondary atrial dilation with chronic atrial fibrillation which constitute employee's ongoing cardiopulmonary disease. Dr. Koprivica believes that employee will need ongoing medical care for his cardiopulmonary disease. Finally, Dr. Koprivica believes that the February 6, 2006, incident was the prevailing factor in rendering employee permanently and totally disabled.

Dr. MacMillan questions employee's history that he had no preexisting back symptoms in light of what Dr. MacMillan describes as a "train wreck" of a spine. Even if he were to accept employee's history as accurate, Dr. MacMillan does not believe the February 6, 2006, incident caused a structural change in employee's back that constitutes an injury. Further, Dr. MacMillan does not believe the February 6, 2006, incident is the prevailing factor in employee's back condition or permanent total disability. Rather, Dr. MacMillan believes the prevailing factor in causing employee's back condition and disability was employee's developmental, congenital and age-related degenerative spinal conditions. Dr. MacMillan agrees that the sequela of employee's injury developed as described by the treating physicians, which is consistent with Dr. Koprivica's opinion.

Employee: John Wilken

- 3 -

## **Conclusions of Law**

### *Accident*

Section 287.020.2 RSMo, defines "accident" for purposes of the Workers' Compensation Law.

The word "accident" as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.

We believe employee experienced pain during the 2006 work mishaps described above. Pain can be a symptom of an injury. Both of employee's early 2006 work mishaps constitute accidents under the above definition.

### *Injury and Causation*

Section 287.020.5 defines "injury": "The terms 'injury' and 'personal injuries' shall mean violence to the physical structure of the body...and such disease or infection as naturally results therefrom."

287.020.3 RSMo, describes when an injury is compensable:

(1) In this chapter the term "injury" is hereby defined to be an injury which has arisen out of and in the course of employment. 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.

(2) An injury shall be deemed to arise out of and in the course of the employment only if:

(a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and

(b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

(3) An injury resulting directly or indirectly from idiopathic causes is not compensable.

Missouri courts have had occasion to interpret the meaning of the above-quoted section in the context of work aggravations of preexisting conditions.

[U]nder current law, in order for an event that arises out of and in the course of one's employment to entitle an employee who has a prior disability to additional benefits, the event must be a prevailing factor that

Employee: John Wilken

- 4 -

results in further disability. It is not sufficient that the event simply aggravates a preexisting condition. § 287.020; *Gordon v. City of Ellisville*, 268 S.W.3d at 459.

*Johnson v. Ind. Western Express, Inc.*, 281 S.W.3d 885, 892-893 (Mo. App. 2009), citing *Gordon v. City of Ellisville*, 268 S.W.3d 454 (Mo. App. 2008).

We find credible Dr. MacMillan's medical opinions. We do not believe the work incidents caused a change in the physiology of employee's spine; that is, we do not believe that the work incidents caused "violence to the physical structure" of employee's spine. In short, employee did not sustain an injury as that term is defined in the Workers' Compensation Law.

We agree with the opinion of Dr. MacMillan that neither the January 24, 2006, incident nor the February 6, 2006, incident was the prevailing factor in causing employee's resulting back condition, its sequela, or employee's resultant disability. Employee's back injury did not arise out of or in the course of his employment.

**Conclusion**

We reverse the award of the administrative law judge. We deny compensation. All other issues are moot.

Given at Jefferson City, State of Missouri, this 16<sup>th</sup> day of March 2010.

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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**DISSENTING OPINION FILED**

John J. Hickey, Member

Attest:

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Secretary

Employee: John Wilken

**DISSENTING OPINION**

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on 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 affirmed.

I believe employee's testimony that his back was asymptomatic before the work accidents. I agree with the administrative law judge that twisting while lifting and/or stepping is a mechanism known to cause back injuries. Employee suffered pain immediately upon twisting. The twisting was the primary factor, in relation to any other factor, in causing the back pain, that led to the treatment, that led to the burn, that led to the immobility, that led to the deep vein thrombosis, that led to the pulmonary embolism, that led to the cardiopulmonary disease, that led to the permanent and total disability and the need for medical care.

"Under current law in order for an event that arises out of and in the course of one's employment to entitle an employee who has a prior disability to additional benefits, the event must be a prevailing factor that results in further disability." *Johnson v. Ind. Western Express, Inc.*, 281 S.W.3d 885, 892-893 (Mo. App. 2009).

"Disability" is defined as "inability to do something"; "deprivation or lack of esp. of physical, intellectual, or emotional capacity or fitness"; "the inability to pursue an occupation or perform services for wages because of physical or mental impairment"; "a physical or mental illness, injury, or condition that incapacitates in any way." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976).

*Loven v. Greene County*, 63 S.W.3d 278, 284 (Mo. App. 2001), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

The evidence in this case overwhelmingly establishes that the work accident of February 6, 2006, and its sequela resulted in employee suffering more disability than he did before the incident. After the unfortunate cascade of medical events initiated by the February 6 incident, employee had a marked decline in his physical ability and was unable to perform services for wages. Since employee could work without difficulty before the February 6 incident, surely his complete inability to work after the incident is a "further disability" sufficient to satisfy the test laid out in *Johnson*.

I would affirm the award of the administrative law judge. I respectfully dissent from the decision of the majority of the Commission to deny benefits in this case.

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John J. Hickey, Member

## AWARD

Employee: **JOHN WILKEN**

Injury No.: **06-009468**

Employer: **QUALSERV CORPORATION**

Additional Party: **THE TREASURER OF THE STATE OF MISSOURI AS CUSTODIAN OF THE SECOND INJURY FUND**

Insurer: **TWIN CITY FIRE INSURANCE COMPANY**

Hearing Date: **MAY 12, 2009**

Checked by: **NGA**

### 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 24, 2006**
5. State location where accident occurred or occupational disease was contracted: **CLAY 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? **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 WAS A WELDER AND POLISHER. HE TWISTED WHILE LIFTING A HEAVY KITCHEN COUNTER AND ALSO STEPPED DOWN FROM A MILK CRATE WHILE WELDING.**
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, LEGS, CARDIOVASCULAR SYSTEM AND BODY AS A WHOLE.**
14. Nature and extent of any permanent disability: **PERMANENTLY TOTALLY DISABLED.**
15. Compensation paid to-date for temporary disability: **\$41,917.42**
16. Value necessary medical aid paid to date by employer/insurer? **\$265,197.19**
17. Value necessary medical aid not furnished by employer/insurer? **NONE**
18. Employee's average weekly wages: **N/A**
19. Weekly compensation rate: **\$696.97 / \$365.08**
20. Method wages computation: **BY STIPULATION**

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

Unpaid medical expenses:

**60-1/7 weeks of temporary total disability (or temporary partial disability) x \$696.97 = \$41,917.42 (HAS BEEN PAID)**

Permanent total disability benefits from Employer beginning **April 6, 2006** for claimant's lifetime at **\$696.97 per week.**

22. Second Injury Fund liability: **NONE.**
23. Future requirements awarded: **SUCH MEDICAL TREATMENT AS MAY BE REASONABLE AND NECESSARY TO CURE AND RELIEVE THE CONDITIONS CAUSED BY CLAIMANT'S INJURIES.**

Said payments to begin **JANUARY 25, 2006** 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: **MICHAEL W. DOWNING.**

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

Employee: **JOHN WILKEN**

Injury No.: **06-009468**

Employer: **QUALSERV CORPORATION**

Additional Party: **THE TREASURER OF THE STATE OF MISSOURI AS CUSTODIAN OF THE SECOND INJURY FUND**

Insurer: **TWIN CITY FIRE INSURANCE COMPANY**

Hearing Date: **MAY 12, 2009**

Checked by: **NGA**

Prior to presenting evidence, the parties stipulated the issues to be determined by this hearing are:

1. Whether the claimant sustained an injury by accident or occupational disease arising out of and in the course of his employment.
2. Whether or not the claimant's alleged injury is the prevailing factor in claimant's current medical condition and resulting disability.
3. Liability of the employer for past medical treatment in the amount of \$11,272.13 for past medical treatment.
4. Liability of the employer for future medical aid.
5. Nature and extent of employer's disability.
6. Liability of the Second Injury Fund.

The parties agreed that on or about January 24, 2006, John Wilken was an employee of Qualserv Corporation. The employer was operating under and subject to the provision of the Missouri Workers' Compensation law and was fully insured by Twin City Fire Insurance Company.

The parties also agreed that the employer had proper notice of claimant's injury and that the proper notice of claimant's injury and that the claimant had filed a timely Claim for Compensation. The correct rate of compensation is \$696.97 per week for both temporary total disability and permanent total disability and \$365.08 per week for permanent partial disability. Compensation has been provided in the amount of \$41,917.42, representing a period of 60-1/7 weeks for a period of time from February 9, 2006 through April 5, 2007. The employer has provided medical aid in the amount of \$265,197.19. The claimant is asking for reimbursement of medical expense in the amount of \$11,272.13.

The claimant is 63 years old. He is overweight. Dr. Koprivica said he was 5 foot 9 inches tall and weighed 289 pounds. He has worked as a welder and polisher for the employer since 1988. The employer makes stainless steel kitchen equipment for restaurants and military bases. He has a 9<sup>th</sup> grade education and no vocational training. I found him to be a believable witness.

Mr. Wilken testified that January 24, 2006, he twisted and picked up a heavy counter top and injured his back. He had some pain and soreness in his back but continued to work. He was welding above his head. He was standing on a milk crate to give him height. He stepped off the milk crate in an awkward manner and felt additional pain in his back.

The claimant reported this to the employer who provided medical treatment.

The claimant then received medical treatment which included medication and physical therapy, as well as, electro-stimulation.

While undergoing the electro-stimulation treatment, he received a burn in his lower back. He said he was in such pain that he restricted his movements. The burn was the result of improper use of an electric stimulation.

As a result of his back pain, the claimant became immobilized. He would sleep sitting up in a recliner.

On February 9, 2004, Mr. Wilken sustained a deep vein thrombosis, which is a blood clot in his legs. These clots migrated to his lungs creating a pulmonary embolism, which resulted in a host of problems, including a heart condition (atrial fibrillation).

All of the doctors that have treated the claimant have been of the opinion that he is totally disabled as a result of the pulmonary embolism. He must carry and use oxygen.

Dr. Brent Koprivica, D.O., testified by deposition taken on April 30, 2008 and admitted into evidence as Claimant's Exhibit No. E. All objections thereto are hereby overruled.

Dr. Koprivica found that prior to the injury claimant had severe lumbar spondylosis with multi-level degenerative disc disease, spondylolisthesis and multiple levels of spinal stenosis.

The claimant had testified that these were all asymptomatic. He said he had no prior back pain or back problems. He had never been to a doctor for back problems. Dr. Koprivica found there was no evidence of any industrial disability of any significance based on his low back condition prior to January 24, 2006.

It was Dr. Koprivica's opinion that the claimant's low back injuries at work were the prevailing factor in his development of symptomatology based on his multi-level lumbar spondylosis.

This back pain and the resulting treatment causing a burn, resulted in his immobility, which caused the development of the deep vein thrombosis, which in turn ultimately led to the development of the massive pulmonary embolism. He found the claimant's back injury was the prevailing factor resulting in his permanent and total disability.

Dr. Jeffrey MacMillan, M.D., testified by deposition taken on May 9, 2008 and admitted into evidence as Employer and Insurer's Exhibit Number 1. All objections thereto are hereby overruled.

Dr. MacMillan is a board certified orthopedic surgeon. He examined the claimant on August 27, 2007.

Dr. MacMillan found that the claimant had three pre-existing conditions of his back.

The first was spondylitic changes in his spine. He said this narrowing of the disc spaces was age-related and degenerative in nature.

His second finding was that the claimant has congenitally short pedicles. He said this genetic condition leaves the claimant with little room for his spinal cord and in essentially a functional stenosis.

The third finding was that the claimant had spondylolisthesis. He said this is also a developmental defect.

Dr. MacMillan found that these three conditions were the prevailing factor in claimant's injury. He said the claimant had just age-related degenerative changes superimposed on his congenitally and developmentally abnormal spine.

On cross-examination, Dr. MacMillan did admit that as a result of the deep venous thrombosis, the claimant is permanently disabled and would never return to work. He also said that no employer in the usual and customary course of business would be reasonably expected to employ the claimant given his medical problems.

He also stated that Mr. Wilken will require future continuing medical care.

Michael J. Dreiling testified by deposition taken on April 8, 2008 and admitted in evidence as claimant's Exhibit Number F. All objections thereto are hereby overruled.

Mr. Dreiling testified as a vocational expert. He found that Mr. Wilken is not a candidate to return to work in the labor market and is essentially and realistically unemployable. He did not believe that any employers in the usual course of business would be reasonably expected to employ this individual in his existing physical condition.

I believe Dr. Koprivica. There was no evidence that the claimant had ever had any prior problems with his back. He completed denied ever being treated by a doctor for a back condition. He said he had never even been to a chiropractor.

I do not believe that something that would be asymptomatic would be the prevailing factor over an event that is known to cause injury, such as twisting while lifting or stepping down from an object.; certainly not when the event was accompanied by immediate pain and discomfort and was reported timely.

I find and believe from the evidence that the claimant sustained an injury on January 24, 2006 arising out of and in the course of his employment when he twisted while lifting a heavy counter

top and later when he stepped down from a milk crate. This resulted in the claimant being immobilized causing the deep venous thrombosis that resulted in his permanent condition.

I find and believe from the evidence that the prevailing factor in the claimant current medical condition and resulting disability was his injury on January 24, 2006 and not his pre-existing spinal condition.

I find that as a result of claimant's accidental injuries at work, the claimant is permanently totally disabled. I find that he is unable to compete in the open labor market for employment. No prospective employer would be expected to employ the claimant in any type of gainful employment.

I order and direct the employer to pay to the claimant the sum of \$696.97 per week from April 6, 2007 for the remainder of claimant's life.

I do not find that the claimant has sustained its burden of proof as to the alleged past medical bills of \$11,272.13. This portion of claimant's claim for compensation is denied.

I do believe the claimant will require additional medical treatment in the future. All doctors agree to this. I order and direct the employer to provide such medical treatment in the future as may be reasonable necessary to cure and relieve the claimant from the conditions caused by his injury.

There was no evidence that the claimant's pre-existing carpal tunnel surgery or any other disability he may have had combined with this injury to result in any additional disability. Claimant's claim against the Second Injury Fund is denied.

This award is subject to a lien in the amount of 25% of this award in favor of Michael W. Downing for necessary legal services provided claimant.

Date: July 6, 2009

Made by: /s/ Nelson G. Allen  
*Nelson G. Allen,*  
*Chief Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest

/s/ Naomi Pearson  
*NAOMI PEARSON*