

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

Injury No.: 03-047330

Employee: William Dixon
Employer: Brian Andre d/b/a Andre Tuck Pointing
Insurer: Uninsured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: May 14, 2003
Place and County of Accident: St. Louis City, 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. We have reviewed the evidence, read the briefs of the parties, heard oral argument, and considered the entire record. Pursuant to section 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge dated June 13, 2005. The award and decision of Administrative Law Judge Matthew D. Vacca, is attached hereto solely for reference.

The dispositive issue is whether or not the employee sustained an injury due to an accident arising out of and in the course of employment, caused by the unprovoked assault against the employee. The administrative law judge denied workers' compensation benefits by determining that the employee failed to sustain his burden of proof concerning a work related assault. The Commission disagrees with this conclusion and reverses the award of the administrative law judge determining that the employee was injured due to a work-connected assault.

I. Assaults

In certain circumstances, assaults to an employee may be compensable, and in those claims the issue raised is whether the assaults arose out of the employment.

Statutory authority for compensation for injuries by assault is set forth in section 287.120.1 RSMo 2000, which provides, in part: "the term 'accident' as used in this section shall include, but not be limited to, injury or death of the employee caused by the unprovoked violence or assault against the employee by any person."

"Unprovoked" means that the injured employee must not be an aggressor. *Dillard v. City of St. Louis*, 685 S.W.2d 918 (Mo. App. E.D. 1984); *Loepke v. Opies Transport, Inc.*, 945 S.W.2d 655 (Mo. App. W.D. 1997); and *Wolfe v. Dubourg House/Arch Diocese of St. Louis*, 93 S.W.2d 855 (Mo. App. E.D. 2003).

The leading case on this issue is *Person v. Scullin Steel Company*, 523 S.W.2d 801 (Mo. banc 1975), in which the Supreme Court held that there are three categories of assault:

1. Assaults that are related to the dangerous nature of the employee's duties, or the environment in which the employee is required to work, or the outgrowth of frictions generated by the work itself, or that are in some way the result of a risk directly attributable to the employment.
2. Assaults committed in the course of private quarrels that are purely personal to the participants.
3. Assaults that result from irrational and unexplained incidents of a neutral origin that occur in the course of employment.

Assaults that fall in the first and third categories above are compensable. Only assaults that fall in the second category above are not compensable.

Whether an injury was an incident of the employment must be determined by the particular facts and circumstances of each case. *Dillard v. City of St. Louis*, 685 S.W.2d 918 (Mo. App. E.D. 1984).

II. Facts

It was undisputed that employer failed to insure or self-insure for workers' compensation purposes as required by section 287.280 RSMo. It was further undisputed that due to the injuries sustained, employee incurred fair, reasonable, and necessary medical expenses to cure and relieve from the effects of the injury in the amount of \$5,942.44. Employee requested that if the injuries sustained were found to be attributable to a compensable assault that funds from the Second Injury Fund be withdrawn in the amount of \$5,942.44 to cover the medical expenses incurred. Employee also requested employer be liable for temporary total disability benefits in the amount of \$720.00 representing two weeks of temporary total disability at the agreed to compensation rate of \$360.00/\$340.12. Other than medical expenses of \$5942.44 and temporary total disability in the amount of \$720.00, employee was not requesting payment of any additional benefits.

After reviewing the entire record, the Commission finds there is no evidence to support a finding that the assault in question was attributable to a private quarrel. Likewise there was no evidence adduced to support a finding that the assault in question was attributable to a neutral origin. The evidence does support a finding that the incident in question was a work-connected assault. Employer asserts as its defense that the incident in question was not an unprovoked assault, rather, employee was the aggressor; and consequently the injury sustained did not arise out of and in the course of employment.

In summary fashion, employee testified to the following events: upon completion of the workday on May 14, 2003, employee returned to employer's shop to put away equipment; employee purchased beer with employer's credit card which was consumed by employee and co-employees on the employer's premises; employer was present on the premises; at some point, a quarrel arose between employer and a co-employee, Dave Wilson; another employee, Jimmy Carpenter, was also involved; when the quarrel escalated to pushing and shoving, employee testified that he intervened, separating the participants and employee attempted to escort the two co-employees from the premises; and as employee was escorting the two co-employees down the street away from the employer's premises, employee was struck by the employer with a bat in the left lower ribs. Additional fisticuffs ensued before other employees separated the combatants and the fighting ceased.

Employer's version of the events was as follows: employer arrived at the premises at approximately 5:00 p.m. on May 14, 2003, being advised by the employer's secretary that some of the employees had overcharged him for work done that day; the secretary also advised the employer that a customer had complained about the conduct of one of his employees that day while on the job; employer addressed the employees and while so doing beer cans were being thrown; employer then advised several of the employees they were discharged and they were ordered to remove themselves from the employer's property; and at that point, according to the employer, a fight broke out among himself and the employee, and the two co-employees, Mr. Wilson and Mr. Carpenter.

Employer testified that a baseball bat was thrown by employee that struck employer; and employer in retaliation threw it back at employee; and the fight continued between him and the three employees until other employees "broke it up."

Four additional employees testified, i.e., James Gaulden, Joseph Paul Hickman, Billy Martin and Otis Foster; none of these witnesses sponsored by the employer indicated that employee was the aggressor in this altercation.

Employer and insurer's Exhibit No. 1, St. Louis County Police Department Investigative Report, concluded that "due to the conflicting statements of the parties involved as well as those of the witnesses I was unable to determine a primary aggressor in the incident, ..."

III. Findings of Fact and Conclusions of Law

The instant appeal does not present a novel issue to the Commission. If the facts and evidence presented by the employee are deemed to be credible, trustworthy and persuasive, the Commission could find that there was an injury sustained due to an accident arising out of and in the course of the employee's employment attributable to

an unprovoked assault; or, on the other hand, if the facts and evidence presented in behalf of the employer are more believable, persuasive, credible and worthy of belief, the Commission can find that there was no injury due to an accident arising out of and in the course of employment due to the fact employee could be found to be the aggressor in a provoked assault.

The Commission finds the evidence proffered in behalf of the employee to be the more credible.

Employee credibly testified he was assaulted while attempting to breakup an altercation between the employer and two other co-employees. There is no credible evidence convincing the Commission that the employee was an aggressor in this altercation. The Commission has reviewed the testimony of all witnesses, reviewed all exhibits offered into evidence, and believes the version of events presented by the employee to be more believable and consistent, rather than the version presented by the employer, which is replete with inconsistencies and contradictions discrediting the employer's contention that employee was an aggressor in this assault.

The Commission concludes that employee was assaulted by the employer with a baseball bat after employee attempted to breakup a fight/quarrel between the employer and two other co-employees, which assault arose out of work connected frictions. The Commission does not find the employee was an aggressor during this altercation. Accordingly, since the assault was attributable to the outgrowth of frictions generated by the work itself, the injuries sustained by the employee are compensable.

IV. Benefits Awarded

Employee is awarded the following workers' compensation benefits: (1) temporary total disability benefits in the amount of \$720.00 representing two weeks' benefits at employee's compensation rate of \$360.00/\$340.12; and (2) medical expenses in the amount of \$5,942.44.

Since the employer failed to insure or self-insure for workers' compensation purposes as required by section 287.280 RSMo, funds from the Second Injury Fund in the amount of \$5,942.44 may be withdrawn to cover the medical expenses incurred and awarded in the amount of \$5,942.44.

The compensation awarded to the employee shall be subject to a lien in the amount of 25% of all payments ordered in favor of attorney John Larsen for necessary legal services rendered the employee.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 6th day of March 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: William Dixon Injury No.: 03-047330

Dependents: N/A Before the

Division of Workers'

Employer: Brain Andre d/b/a Andre Tuck Pointing **Compensation**
Department of Labor and Industrial
Additional Party: Second Injury Fund Relations of Missouri
Jefferson City, Missouri
Insurer: Uninsured
Hearing Date: May 26, 2005 Checked by: MDV: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 accident or onset of occupational disease: N/A
5. State location where accident occurred or occupational disease was contracted: N/A
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? N/A
7. Did employer receive proper notice? N/A
8. Did accident or occupational disease arise out of and in the course of the employment? No
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Uninsured
11. Describe work employee was doing and how accident occurred or occupational disease contracted: N/A
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: N/A
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: -0-
16. Value necessary medical aid paid to date by employer/insurer? -0-

Employee: William Dixon Injury No.: 03-047330

17. Value necessary medical aid not furnished by employer/insurer? \$5,942.44
18. Employee's average weekly wages: \$540.00
19. Weekly compensation rate: \$360.00/\$340.12
20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable: None
22. Second Injury Fund liability: No

TOTAL: -0-

23. Future requirements awarded: N/A

Said payments to begin N/A and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	William Dixon	Injury No.: 03-047330
Dependents:	N/A	Before the
Employer:	Brian Andre d/b/a Andre Tuck Pointing	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
Insurer:	Uninsured	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
		Checked by: MDV:tr

ISSUES PRESENTED

The issues presented for resolution by way of this hearing are accident, arising out of and in the course of employment, past medical expenses in the amount of \$5,942.44, two weeks of temporary total disability benefits, and the liability for the Second Injury Fund for unpaid medical bills because the Employer is uninsured.

SYNOPSIS

Claimant, William Dixon, was an employee of Brian Andre performing tuck-pointing in the City of St. Louis. On May 14, 2003, an altercation took place at Employer's premises at 9615 South Broadway. Claimant alleges that the Employer, Brian Andre, attacked him with a baseball bat causing his need for medical treatment. Employer contends that Claimant and two other employees were drunk on his premises and causing a disturbance. When Andre fired the individuals, they attacked Andre and therefore Employer contends because Claimant was the aggressor his injuries do not fall under the Workers' Compensation Act.

FINDINGS OF FACT

1. Claimant, William Dixon, was an employee of Brian Andre, doing business as Andre Tuck Pointing, in the City of St. Louis making an average weekly wage of \$540.00 a week.
2. On May 14, 2003, Claimant was part of a three-man crew which worked for Brian Andre Tuck Pointing.
3. On that date the three-man crew finished work and returned to the “shop” at 9615 South Broadway, bought beer and proceeded to drink it on Employer’s premises.
4. Claimant had six beers, his co-worker Wilson had ten beers, and co-worker Carpenter had four beers.
5. The employees were not required to punch a time clock, but apparently worked on the honor system.
6. An altercation took place at approximately 5:00 p.m. when Brian Andre arrived at the shop at 9615 South Broadway. He had been contacted by his secretary who said that Claimant and his crew were drinking and had come back to the shop early. Brian Andre told the crew he was not going to pay them for eight hours of work and employee Wilson got belligerent with Andre. Facts diverge at this point with Claimant contending that he tried to break up an altercation between Andre and Wilson and Andre testifying that all three members of the crew attacked him when he told them he was not paying them for eight hours when they failed to work eight hours and, further that they were all fired and ordered to leave his premises.
7. Various witnesses on behalf of the Employer testify to various portions of the altercation with everybody identifying a baseball bat or a cork ball bat which was broken at some point. Claimant contends that after he broke up the fight between Andre and Wilson and was leaving the premises and walking down the street he was chased by Andre and struck in the ribs causing the injuries claimed herein. Andre and the other employees testified that Claimant and his crew were the aggressors and beat Andre with a cooler and that a cork ball bat was involved but they don’t know who acquired it first.
8. St. Louis County Police investigated the altercation and the police officer made the following report, “Due to the conflicting statements of the parties involved as well as those of the witnesses I was unable to determine a primary aggressor in the incident, therefore no one was taken into custody.” (Exhibit 1, page 7).
9. Employer Brian Andre was subsequently charged with assault but the charges against him were dismissed.
10. Employee Dixon was later charged with peace disturbance as a result of driving by Employer’s premises and shouting threats at Andre on another date. He plead guilty and paid \$150.00 fine to those charges.
11. Employer Andre plead guilty to second-degree assault charges in 1996.
12. Employer did not have workers’ compensation insurance on the date of this incident, although required to do so by law. He has brought suit against his insurance agent for accepting premiums but not procuring the insurance.

RULINGS OF LAW

1. Claimant has not established an accident which arose out of and in the course of his employment.

DISCUSSION

Assaults are compensable under the Workers’ Compensation law pursuant to 287.120.1 RSMo (2004). “The term accident shall include an injury or death of the employee caused by the unprovoked violence or assault against the employee by any person.” *Id.*

In order to recover under the workers’ compensation law for an unprovoked assault, the claimant cannot be the aggressor.

Claimant bears the burden of proof and assumes the risk of non-persuasion and assumes the obligation to establish the truth of the claim by the preponderance of the evidence. *England v. Regan Marketing*, 939 S.W.2d 62 (Mo.App. 1997).

I cannot ascertain with any reasonable probability as to what transpired in this altercation. I find neither Claimant nor Employer more credible than the other, or any of the witnesses more credible than any of the other witnesses. Thus, Claimant has failed to sustain his burden of proof and the jurisdiction of the Division has not been established over a work-related incident. Therefore, the claim must be dismissed for a lack of jurisdiction.

DISCUSSION

The police report accurately sums up this case. I am in no better position years later to determine the aggressor than the police officer was on the day in question.

Date: _____ Made by: _____

Matthew D. Vacca
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation