

TEMPORARY AWARD ALLOWING COMPENSATION  
(Reversing Award and Decision of Administrative Law Judge  
and Remanding to Division of Workers' Compensation)

Injury No.: 03-097976

Employee: Keith McCutchen  
Employer: Peoplease Corporation  
Insurer: Providence Property & Casualty Insurance  
Date of Accident: July 14, 2003  
Place and County of Accident: Mississippi 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 not supported by competent and substantial evidence and was not made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge dated August 16, 2004. The award and decision of the administrative law judge (ALJ) is attached and incorporated by this reference.

The Commission further approves an allowance of attorney's fee in the amount of 25% of the benefits awarded herein as being fair and reasonable. The Commission denies employee's request that attorney fees and costs of litigation be assessed against the employer/insurer under section 287.560 RSMo.

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

This award is temporary or partial in nature, is subject to further order and shall be kept open until a final award can be made. All parties should be aware of the provisions of section 287.510 RSMo.

This matter comes before the Commission on an Application for Review filed by employee from an award denying compensation.

The issues presented to the ALJ were:

- 1) whether the injury arose out of and in the course of employment;
- 2) the average weekly wage and the compensation rate;
- 3) the medical causal relation between employee's injuries and his employment;
- 4) the liability of employer/insurer for medical bills incurred by employee;
- 5) the liability of employer/insurer for further medical aid; and, lastly,
- 6) the liability of employer/insurer for temporary total disability from July 14, 2003, until the date of the hearing on April 29, 2004.

Employee claims that he was injured as the result of an assault that took place in the work place on July 14, 2003. Employee claims he was assaulted by a co-employee (his son) who became angry and upset after employee gave him a work order. Employee claims the assault was the outgrowth of friction generated on the job and was a rational consequence of the hazard of his supervisory position.

Employer/insurer argued that the injuries sustained in the assault would not be compensable because employee initiated

the altercation and would be disqualified as the aggressor in the altercation. As the aggressor, the injuries would not arise out of and be in the course of employment under section 287.120.1 RSMo.

Both employee and his son were employed by Peoplease and assigned to Edwards Transportation. Edwards is a trucking company. Employee was the foreman in the shop area and the son was originally hired to work on tires but, over time, was asked to do various duties. The son came to resent the fact that anyone working in the shop thought they had the right to order him to perform tasks.

On July 14, 2003, employee instructed his son to take a four-wheeled ATV and spray weeds around the company building. The four-wheeler broke down and son came back to the shop to fix the problem. Employee instructed him to clean up another four-wheeler and finish the job. The co-employee son refused. Employee told him he was fired and son threw a bolt and hit employee in the mouth. Son then took a broom from a trashcan and struck employee twice. Employee fell over some tires. Son threw a couple of wrenches and picked up a lead pipe to continue the assault. Son struck employee with the pipe. Employee drew his pocket knife and son exited the building.

Employee sustained injuries to his arms, back and neck. Employee underwent physical therapy, given medications and was seen by a neurosurgeon. He was given a 25-pound weight restriction and then that was reduced to 10-pounds and office work only. At that point employee was laid off. He has seen a couple of physicians, through Medicaid, since his lay off in early November of 2003. He has had pain injections and prescription refills.

It should be pointed out that the co-employee son testified that he started the fight because he "was fed up with work. I mean I would consider it being overworked and underpaid. I was picking up the loose ends of everybody else's stuff. The jobs they would do, they'd leave all their stuff laying there and then they would expect me to pick it up and I was just fed up with it." "It wasn't anything personal. It was just build up of the way they were treating me out there." "...when he told me I'd be fired, it made me mad and that's the reason I did it." "I was mad. Because I was doing somebody else's job."

Other employees testified that employee started things when son refused the work assignment and made a nasty comment. Employee then threw something at son. Testimony also indicated that son told co-workers that his dad (employee) started it.

The ALJ accepted the testimony as to employee throwing something first. He, therefore, concluded that employee was the aggressor and denied compensation. We disagree. Having reached the decision that the claim was not compensable the remaining issues were not addressed.

Assaults are compensable under the law in section 287.120.1 which provides, in part, "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."

To be the victim of an unprovoked assault the claimant must not be the aggressor and must not be the one who caused the assault.

The question of the cause of an assault involves the weighing of testimony from various parties and each case is fact specific. The Commission is charged with determining issues of credibility and the weight to be given conflicting evidence. *Hughey v. Chrysler Corp.*, 34 S.W.3d 845, 846 (Mo. App. E.D. 2000); *Chatmon v. St. Charles County Ambulance District*, 55 S.W.3d 451, 457 (Mo. App. E.D. 2001).

In considering the evidence, we find the testimony of employee and of co-employee to be the more comprehensive. We accept the incident as related by employee and son. We accept son's explanation as to the reason he attacked employee.

Accordingly, we find the matter compensable and must reverse the denial of benefits.

Even if we were to accept the story of father throwing something at son, we would not find this to have initiated the assault. According to the testimony of the son, he assaulted the father because of being fed up with his job, getting orders to do other people's work and general frustration. Nowhere, does the son say he assaulted employee because something was thrown at him. To the contrary, the son expressly indicates work as the precipitating factor in the assault.

We find the matter meets the criteria for compensability under *Dillard v. City of St. Louis*, 685 S.W.2d 918, 923 (Mo. App. E.D. 1984); *Loepke v. Opies Transport, Inc.*, 945 S.W.2d 655 (Mo. App. W.D. 1997); *Wolfe v. DuBourg*

*House/Archdiocese of St. Louis*, 93 S.W.3d 855 (Mo. App. E.D. 2003).

To be disqualified as an aggressor it must be shown that the employee's injuries were caused by his own threats and demonstrations of assault upon another. *Dillard* at 923. Here, any action of employee was ancillary to the reason for the ultimate assault. We accept the testimony of the assailant son in this regard.

Having determined that the claim is compensable we must now address the remaining issues.

We find employee's condition of ill being with respect to his neck and low back to be causally related to his injury. The only medical evidence before the Commission compels this finding. Employer/insurer chose not to introduce evidence from their own expert as to the question of causation. We, therefore, accept the evidence of Dr. Shuter concerning causation. *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879 (Mo. App. S.D. 2001).

We find the evidence to establish an average weekly wage of \$785.93 generating a compensation rate of \$523.94 for temporary total disability and \$347.05 for permanent partial disability.

We find employer/insurer liable for past medical expenses as set out in the transcript with no credit being allowed for payment by an ancillary source. Payment for the said bills shall be made to the provider, employee and his attorney. Employer/insurer disputed payment of the bills on the grounds of authorization, reasonableness and necessity and relatedness of the treatment. There is no dispute employer/insurer knew of the incident in question. There is no dispute that employer/insurer knew employee was being treated for injuries sustained in the assault. There is no evidence that employer/insurer took any steps to assert their statutory right to control the course of medical treatment. There is no evidence to establish any claim that the bills are not reasonable, necessary and related.

We find that employee is entitled to, and employer/insurer shall provide, such future medical aid, including prescriptions and therapy, as may be determined to be necessary to cure and relieve employee's condition of ill being. Section 287.140 RSMo

We find employee's claim for temporary total disability from November 7, 2003, thru the date of the hearing on April 29, 2004, to be meritorious. Employer/insurer shall pay the sum of \$523.94 per week for the 25 weeks in question. Such payment shall be made to employee and his attorney.

The matter is remanded to the Division of Workers Compensation (Division) for further proceedings. As this is a temporary or partial award, jurisdiction remains with the Division. Among the issues to be immediately addressed are the medical status and expenses since the hearing as well as the entitlement of employee to temporary total benefits from the date of the hearing and continuing.

Given at Jefferson City, State of Missouri, this 26<sup>th</sup> day of May 2005.

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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Attest: John J. Hickey, Member

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Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

## AWARD

Employee: Keith McCutchen

Injury No. 03-097976

Dependents: N/A

Employer: Peoplease Corporation

Additional Party: N/A

Insurer: Providence Property and Casualty Insurance Company

Hearing Date: Commenced April 29, 2004, completed June 21, 2004 Checked by: LK/sm

### SUMMARY OF FINDINGS

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 contracted: N/A
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 happened or occupational disease contracted: N/A
12. Did accident or occupational disease cause death? No
13. Parts 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 total disability: -0-
16. Value necessary medical aid paid to date by employer-insurer? -0-
17. Value necessary medical aid not furnished by employer-insurer? N/A
18. Employee's average weekly wage: N/A
19. Weekly compensation rate: N/A
20. Method wages computation: N/A
21. Amount of compensation payable: -0-
22. Second Injury Fund liability: N/A
23. Future requirements awarded: N/A

## FINDINGS OF FACT AND RULINGS OF LAW

On April 29, 2004, the employee, Keith McCutchen, appeared in person and by his attorney, Nancy Mogab, for a temporary or partial award. The employer-insurer was represented at the hearing by their attorney, Pete Nacy. At the time of the hearing, the parties agreed on certain undisputed facts and identified the facts that were in dispute. These undisputed facts and issues, together with a summary of the evidence and the findings of fact and rulings of law, are set forth below as follows:

### UNDISPUTED FACTS:

1. The parties agreed to a change of venue from Mississippi County to Cape Girardeau County, Missouri.
2. The employer, Peoplease Corporation, was operating under and subject to the provisions of the Missouri Workers' Compensation Act and its liability was fully insured by Providence Property and Casualty Insurance Company.
3. The employer had notice of the employee's alleged accident.
4. The employee's claim was filed within the time allowed by law.
5. The employer-insurer has not paid any medical bills.
6. The employer-insurer has not paid any temporary total disability.

### ISSUES:

1. Accident
2. Average weekly wage and rate of compensation
3. Medical causation
4. Previously incurred medical benefits
5. Claim for additional medical aid
6. Temporary total disability
7. Employee's claim for attorney's fees and costs under Section 287.560 RSMo.
8. Claim for mileage

### EXHIBITS:

- A. Medical records of Dr. Park
- B. Medical records of Ferguson Medical Center
- C. Medical records of ReStart
- D. Answer filed by Peoplease Corporation/Edwards Transportation
- E. Deposition of Dr. Shuter (The record was left open for the submission of this Exhibit that was received into evidence on May 26, 2004.)
- F. Medical bills (The record was left open for the submission of this exhibit. Most of the bills were received on May 26, 2004. An additional bill was received on June 21, 2004.)
- G. Employee earnings register. (The record was left open for the submission of this exhibit and was received on May 26, 2004.)

### SUMMARY OF THE EVIDENCE:

The employee, Keith H. McCutchen, is 46 years old. He has a son named Keith Lee McCutchen who is almost 21. Keith H. McCutchen was employed at Peoplease/Edwards Transportation as a shop supervisor. He last worked for Edwards in November of 2003. He was hired in 2000.

He supervised Scott Henry, Butch Bell, David Sterling, and Keith Lee McCutchen (his son). He was supervising these individuals in the summer of 2003. The employee's supervisor was Eugene Fry, and above him was Keith Edwards, the owner of the company. The employee was told what work needed to be done that day and he was responsible for assigning people to get those jobs done. Tractor/trailers were worked on in two bays.

The employee had been the shop supervisor for about six months. He had several problems with Butch Bell, which never did get worked out. Mr. Bell wanted what he wanted and knew that he did not have any authority over him. The management never said anything to Butch.

In June of 2003, he had problems with his son, Keith Lee McCutchen refusing to do work. His son got in his face and told him that he was not his boss, he did not hire him and he could not fire him. His son was yelling at him but he did not yell back. He told Eugene Fry that they had a problem. Eugene came to the shop and sent Keith Lee McCutchen home. After Keith Lee was sent home, he talked to Eugene Fry and told him that they should let him go because of Keith Lee not doing what he was supposed to do. They did not fire him. Other than that incident, the employee never complained about Keith Lee to the management.

After lunch on July 14, 2003, they were working on a tractor-trailer in the shop. Scott Henry was working on the engine, David Sterling was underneath the truck greasing it, and Butch Bell was underneath the trailer working. Keith Lee McCutchen was using a four-wheeler to spray Round-up on the fencerow and other areas of the lot to kill weeds. Keith Lee McCutchen came in and said that the four-wheeler was not working right. The employee told him to stop spraying and to wash another four-wheeler, which was muddy.

The employee testified that his son, Keith Lee McCutchen, "went off on him." Keith Lee McCutchen and started cussing and threw a bolt and hit the employee in the mouth. The employee told him that he was fired and was done. Keith Lee grabbed a stick out of a trashcan and started swinging. The employee used his arm to block his face and head. Keith Lee McCutchen hit the employee in the right forearm and on the neck. The stick then broke. The employee fell over some tires and fell over the truck tires and twisted. After the stick broke, his son picked up a pipe that was four feet long and an inch in diameter pipe and started swinging it at him. His son hit him in the left forearm, which cut it and started to bleed. His son threw a 12-inch metal file, which hit him in the right side of the stomach. The employee backed up and pulled a knife, opened it up, and acted like he was going to throw it. His son ran out of the door.

Scott Henry grabbed the employee from behind and told him to go inside the office, which they did. He did not see Keith Lee after he left the area. The employee had a knot about an inch-and-a-half long on the bottom part of his right forearm and had a hole and a knot on his left forearm that was bleeding. One of the girls, Susan Kelly, took him to Ferguson Medical Group to Dr. Heath. Dr. Heath x-rayed his arms and put stitches in. His whole body was sore, especially his arms, back and neck. He had had pain in lower back going into left buttocks down into back of left leg down into calf and across his ankle to big toe and next toe. An MRI was performed and he was referred to Dr. Park, a neurosurgeon. He was hurting in his low back and down through his buttocks and back of his leg. Dr. Park ordered physical therapy. He was put on 25-pound weight restrictions and put on light duty in September. He received a notice of termination from Peoplease on November 7, 2003.

The employee was divorced from Keith Lee McCutchen's mother. He supported his son while he was growing up. In 2000 or 2001, his son worked at Edwards for about three or four months before he was fired. During the several months before the July 14 incident, he did not have any personal fights with his son, Keith Lee. His relationship with his son, Keith Lee, was good, and he saw him frequently. He and Keith Lee live about a mile-and-a-half apart, and saw him frequently when he was growing up.

During cross-examination, the employee stated that he saw his son at least several times a week. They rode and raced motorbikes and went fishing. They had a good relationship. When asked why he thought his son assaulted like he did, the employee stated that his son was being overworked and underpaid and doing other people's jobs for them. The employee could not remember what work that his son, Keith Lee, refused to do in June of 2003. In the past, the employee has had words with Butch Bell. The employee stated that he has had to get stern with David Sterling and Butch Bell. He asked Keith Edwards to help him but he did not.

The pipe that Keith used hit the wash vat and then hit him in the arm. Keith threw a metal file and that is when he pulled the knife to scare his son. The employee did not report the incident to the police. The employee testified that Eugene Fry started cussing him about that incident and stated that it was his fault, but he does not know why he thought it was his fault.

Also testifying on behalf of the employee was his son, Keith Lee McCutchen. He is 20 years old and is currently employed by Morton Buildings doing construction work. Prior to that he worked at Henderson Trucking as a mechanic for three months. He left because he and his boss, Johnny Henderson, got into an argument, which almost became physical.

In 2001, he was supposed to graduate from high school but with about a month left in the school year he had words with a teacher and he got suspended for the rest of the year. He had to redo his whole senior year. In the summer of 2001, he worked for Edwards but he had trouble getting along with his supervisor, Gary. He got fed up and quit working at Edwards. He went back to school in the fall of 2001, and finished high school in 2002.

He started working again for Edwards and Kevin Potts was his supervisor. Kevin was fired and his dad became the supervisor. In June of 2003, he got into an oral argument with his dad about work. He was fed up with his job. His dad asked him to do something and he told his father that he was not going to do it. He started yelling at his father. It almost ended in a physical confrontation. Eugene Fry told him to go home and come back the next day. His father told him that if he did not straighten up that he would get fired. He came back and worked until the July incident.

On July 14, 2003, he was assigned to kill weeds by spraying Round-up with the use of a four-wheeler. He could relax being on the four-wheeler and it was an easy job. The four-wheeler broke down and he took it into the shop to get it running. He started working on it but then his dad told him to clean up another four-wheeler that was covered in mud. He did not want to clean it, so he told his dad that he was not going to do it. He started yelling at his father. His father told him that he was fired. He then took a bolt that he had taken off the four-wheeler and threw it at his dad and it hit him in the mouth. He then reached over into a trashcan and took a broken broom handle, and swung it at his father. He hit his father twice and then the stick broke. His dad fell over tires and backed up by a workbench table. He picked up a couple of things including a wrench, a chisel and a file and threw them at him. The file hit his father in the stomach. He then picked up a

lead pipe and hit his father in the arm. When he was swinging the pipe and broom handles and throwing things, his father did not pick up any object until after the pipe hit him. His father then pulled out his pocketknife and acted like he was going to throw it at Keith Lee. Keith Lee then ran outside to the parking lot.

Eugene told him that he was fired and told David Sterling to take him home. Mr. Sterling took him home in the shop truck. He lived about a mile away. Mr. Sterling asked him what had happened. He said that he did not know and that his mind became blank. He told him that he was mad and wanted to go back out there and fight some more but he stayed at home. He was not injured during the incident. David Sterling asked him a couple of times in the truck what had happened because he said he had not seen it.

He did not start the fight with his dad due to any personal reason or problem with his father or because it was his father. He was fed up with work, thought he was underpaid and overworked. He was doing work for everyone else including cleaning up for them. He had always gotten along good with his father. His father did not treat him badly but he was fed up with being treated badly. The other persons in shop would tell him what to do even though they had no authority over him.

During cross-examination he stated that before his parents got divorced, he talked a lot in school and got a lot of detention. He had in-school suspensions in the 4<sup>th</sup> and 5<sup>th</sup> grade. He got along with his father before the divorce and visited a lot with his father after the divorce. He saw his father throughout the week and on weekends. He went fishing and bike riding with his father growing up. He got into fights in school due to people picking on him.

He did not finish school on time because he got into an argument with a teacher. She called him a "son of bitch" in school in class but does not know why. He cussed her back. They told him that he could not graduate. He decided got a job with Edwards and went back to school the next year. When he worked for Edwards in 2001, he could not get along with his supervisor, Guy, because he treated him like he was a small kid. He was fed up after three months and quit going to work. The second time he worked his father became the supervisor. In June of 2003, he had a confrontation with his father and exchanged words. In July of 2003, his father told him to stop working on the four-wheeler and to clean another four-wheeler that had mud on it. It bothered him to clean the four-wheeler because he was not the one that got it in the mud. Guy had gotten it muddy and he did not like Guy. He told his father that he did not want to do it. His father said if he did not do it, he would be fired which made him mad.

Prior to July 14, 2003, he had never thrown anything at his father. He threw the bolt at his father because he was mad and he was asked to do someone else's job and was tired of taking orders. In most situations, his father would be the last one he would want to assault. He told David Sterling when he was taking him home that he wanted to fight again but he was just upset and just said it.

During redirect, Keith Lee McCutchen stated that he has a bad temper.

Floyd "Butch" Bell testified on behalf of the employer-insurer. He has been employed with Edwards for three years. He testified that Keith McCutchen and his son, Keith Lee McCutchen, argued all the time and often had confrontations. Keith Lee did not like his father telling him what to do.

In July of 2003, he witnessed part of a fight. He was working under a trailer and when he came out from under it, Keith McCutchen and his son, Keith Lee McCutchen, were arguing. The employee was telling his son to do something. His son told him that he was already working, was not going to do it, and was tired of him telling him what to do. Keith Lee McCutchen said "F You." Mr. Bell did not see Keith Lee McCutchen throw anything at Keith H. McCutchen. He saw Keith H. McCutchen draw back and throw something at Keith Lee, but did not know exactly what it was. Mr. Bell watched part of the fight. Keith H. McCutchen threw something at his son, Keith Lee which was the first strike of the physical confrontation. Keith Lee McCutchen then picked up a stick and hit his father. The stick broke. Keith Lee McCutchen then picked up a piece of pipe. Keith H. McCutchen threw his arm up and Keith Lee hit him across the arm with a piece of pipe. Mr. Bell then left and went on the other side of the truck because he is on probation and is not supposed to be around fights. That is all he saw of the physical fight.

During cross-examination, Mr. Bell stated that prior to July 14, he had not seen any physical fights. Keith Lee McCutchen did not have arguments with anyone else like he did with his daddy. Mr. Bell never had an argument with Keith Lee, and never saw Keith Lee have any arguments with any other employee. He heard arguments between Keith, the father, and Keith Lee, the son, seven or eight times before the physical altercation took place. Keith Lee told him that he was not going to do something and his father told him that he was and it would be over with. Usually it was about something to do about work. He can never remember an argument that was not about work.

On July 14, 2003, Mr. Bell was working underneath the trailer and was on a skid. He heard Keith Lee McCutchen and Keith McCutchen arguing. He finished the job, got out from underneath the trailer, and walked to the side where they were. They were next to a parts washer and Keith Lee was washing something. Next to the washer tub, there is a table that had tools on it. When he first saw them they were both shouting, and neither one of them had anything in their hands. A few seconds later, Keith Lee, the son, started cussing and told his father, Keith McCutchen, that he did not have to do what he was told to. Keith McCutchen, the father, said that he was tired of cussing him. Keith McCutchen, the father, picked

something up and threw it at Keith Lee McCutchen, the son. He heard it roll across the floor but never looked at it and never knew for sure what it was. He saw blood coming down from the side of Keith Lee McCutchen's head. Keith Lee McCutchen then picked up a stick and hit his father, Mr. McCutchen, with the stick, which then broke. Keith Lee then picked up a piece of pipe and hit his father on the right arm. Mr. Bell then left and went around the other side of the truck and stayed there until it was all over with. Mr. Bell is on probation for drugs.

The blood was not on Keith Lee's forehead when he first came out from underneath the trailer. Mr. Bell observed the father, Keith Lee McCutchen, throw the item and then he saw the blood on Keith Lee's head near the temple. Keith Lee was not holding anything at that time. McCutchen used his right hand to throw the item and the cut was on the left side of Keith Lee's head. Mr. Bell stated that the cut was caused by the item that Keith McCutchen threw at his son, Keith Lee McCutchen.

After the incident, Keith McCutchen went into the office. When he came out he was limping and blood was all over arm. Keith McCutchen spoke to him for about a minute and then Susan Kelly took him to the doctor. Approximately 20 minutes after Mr. McCutchen was walking with David Sterling. Scott Henry took Keith Lee into the office. Mr. Bell did not see any blood then. From the time of the altercation until he saw Scott Henry take Keith Lee into the office it was about 10-15 minutes. The next time he saw Keith Lee was about a week later in the shop talking to Scott Henry and David Sterling. Keith Lee was not there very long.

David Sterling testified on behalf of the employer-insurer. He has worked for Edwards for 10 years. Keith McCutchen was his supervisor in June and July of 2003. Mr. Sterling has never had any altercation with Keith Lee McCutchen. In June of 2003, he witnessed an altercation between Keith Lee McCutchen and his father, Keith McCarthy. He also saw them arguing a little bit every once in a while but he thought it just a father and son thing. They had misunderstandings quite a few times.

On July 14, 2003, he was underneath a truck and heard stuff flying but did not know what it was. He came out from under the truck and saw Keith Lee McCutchen with a pipe confronting his father, Keith McCutchen. After the fight was broken up, he was instructed by Eugene Fry to take Keith Lee McCutchen home in the shop truck. In the truck, Keith Lee appeared to be mad and was cursing. Keith Lee had a trickle of blood on the left side of his head. Keith Lee McCutchen stated that his daddy had hit him first and started the whole thing. Keith Lee got out at Henderson's down the road to be with one of his buddies. Mr. Sterling went back to the shop.

During cross-examination, Mr. Sterling stated that he was lying on a creeper under the truck/tractor and had been greasing the truck for three or four minutes. He had not finished the job. He came out the side of the truck where the McCutchen's were standing. When he first saw them, Keith Lee had a pipe in his hand and Keith McCutchen did not have anything in his hand. Keith McCutchen was trying to get away from Keith Lee and was moving back toward the door. He heard Scott Henry yelling and trying to break up the fight. By time Mr. Sterling got up from creeper, they were already outside. Scott Henry was holding Keith McCutchen. Keith McCutchen had blood on his arm.

Because he was under the truck, Mr. Sterling did not see the start of the fight and did not see Keith McCutchen throw anything at Keith Lee. When he first stuck his head out from under the truck he did not see Floyd Bell in the center aisle. Mr. Bell came around from the other side of the truck after it was all over.

Eugene Fry told him to take Keith Lee home. He saw a cut and some blood on the side of Keith Lee's head and a little blood on his shirt. Keith Lee stated to him that his dad had "started it all." He drove just a little ways when Keith Lee saw one of his friends at Henderson Trucking, which is just right down the road, and he pulled in and let Keith Lee out. About an hour after the incident, Keith Lee came back and went inside the office to have his head looked at to see if he needed stitches.

Prior to July 14, 2003, he does not recall any other verbal or physical fights or altercations involving Keith Lee with anyone else other than with his daddy. He remembers three times with Keith Lee and his daddy. One time, Mr. Sterling was working on a motor, and Keith McCutchen told him to step down and watch them almost get into a fight. They were hollering and arguing but he does not know what it was about. They worked it out. Approximately a month or so before July 14, Keith McCutchen called Eugene due to his son giving him a lot of trouble. At Eugene Fry's request, Mr. Sterling took Keith Lee home. There were other times they got into it. Mr. Sterling does not know the cause of the arguments. He heard arguing back and forth, but thought it was just a father and son deal.

Scott Henry testified on behalf of the employer-insurer. He has worked for Edwards on and off since 1994, and was employed in June and July 2003. He testified that there were personal confrontations between Keith McCutchen and his son, Keith Lee. They argued just about everyday, but did not know the nature of their arguments.

On July 14, 2003, he observed a physical confrontation between Keith McCutchen and Keith Lee. Keith Lee had been working on a four-wheeler and his father was standing besides him. He was on the other side of the truck when he heard them arguing. He was not watching them but heard an unknown object fly across the room. He then went around to the other side of the truck, and saw Keith Lee and Keith McCutchen hollering. He saw Keith Lee swing a tree branch at Keith McCutchen, but is not sure if it hit him. Keith Lee then picked up a round file and threw it at Keith McCutchen. He is

not sure if that hit him, but he saw it hit the floor. He saw Keith Lee pick up a pipe, and strike his father on his arm. Keith McCutchen tried to defend himself and pulled out his pocketknife. Mr. Henry told the father to put the knife up and the son to put the lead pipe down. Mr. Henry tried to get them out of the door. Mr. McCutchen appeared to be angry.

Keith Lee appeared to be angry and upset, and had a little bit of blood coming from what he thought was the right side of his head. As soon as fight broke up, Keith Lee was still shaking. When he asked him what happened, Keith Lee stated that his daddy had hit him. Mr. Henry told Keith Lee to get in truck and go away, and he went into the office with Keith McCutchen. The girls in the office took him to the doctor's office to have his wound treated. Keith Lee came back and was taken into the office. The owner's wife looked at his head to see if he needed to go to the doctor. The time period from time the pipe was swung until Keith Lee was in the office was about 10 minutes.

During cross-examination, Mr. Henry stated that when he first heard the argument he was on the driver's side of the truck with the hood up working on the engine, which was blocking his view. Keith Lee was working on the four-wheeler. He then heard something hit the wall or the shop floor. He walked around the front of the truck to see what happened. By the time he got around the front of the truck, the McCutchens were in the middle of the shop. He did not see Mr. McCutchen throw anything

When he came around the truck, he saw Keith Lee pick up part of a rotten tree limb, swing it, and it either hit the grinder bolted to the table or the table, it splintered, fell apart, and fell onto the floor. He does not know exactly where it landed. He did not see Keith Lee hit Keith McCutchen with a stick. After the stick broke, Keith Lee picked up a metal file and threw it at his father but not sure if it hit him. Keith Lee then picked up the pipe and started swinging it. As Keith McCutchen was backing up, Keith Lee was approaching him with a pipe. Scott Henry was following them and trying to get them to stop. After Keith Lee hit Keith with the pipe, Keith McCutchen ran around the front side of the bus. Scott Henry was trying to push Keith Lee out of the shop. When Keith McCutchen came back around, he had his pocketknife out. Mr. Bell had been standing at the back of the trailer and to the side close to where Mr. McCutchen ran. .

When they were outside, he was pushing Keith McCutchen toward the office. He saw blood on his arm. Even when they were in the office, Keith McCutchen tried to come back out at least two times, but never made it to door. When Keith McCutchen started to go in the office, Scott Henry told Keith Lee to "put the damn pipe down." Keith Lee got mad and said, "I am not going to let him get me." Henry told him to put it down and Keith Lee slammed the pipe down on the ground. Scott Henry went into the office and checked on Keith McCutchen. Mr. Fry had a conversation with Keith McCutchen about what had happened. Mr. Fry asked Keith McCutchen what had happened and he responded. Mr. Henry stayed in the office about three or four minutes, until Susan Kelly took Keith to the doctor.

Mr. Henry and Butch Bell went back to work. They discussed the incident and said that they could not believe that it happened. Mr. Bell did not indicate to him that he had seen what had happened. David Sterling and Keith Lee had left after he went in the office and were gone when he came out. He had been working for about three minutes when David Sterling came back. Mr. Sterling stated that he had taken Keith Lee to either Henderson's or to home. Mr. Henry could not remember where he said for sure. He, David Sterling, and Butch Bell had a 5-6 minute conversation about the fight and wondered what it was about. David Sterling did not tell him that he had seen any portion of the altercation but did say that he heard something hit the floor. David Sterling did tell him what Keith Lee had said to him when they were in the truck.

Keith Lee then came back to the shop. He asked Keith Lee what had happened. Keith Lee talked to all three of them for about a minute. Mr. Henry saw the blood on Keith Lee's head and took him into the office to have the girls look at his head to see if he needed to go to the doctor. Patty Edwards and Susan Kelly offered to take him to the doctor but he declined. The next morning, the owner, Keith Edwards, spoke to him about what happened and what he had seen. Their conversation took about three or four minutes and Mr. Edwards told him that both of the McCutchens would be fired.

He did not see Keith McCutchen throw an item at Keith Lee. Keith Lee told him how he got blood on his head. He stated that his dad hit him in the head, and thought it was a screwdriver, a socket or something but not sure what it was.

A week or two before July 14, Keith Lee and Keith McCutchen had an argument, and he thought they were going to come to blows that day but they just pushed each other a little bit. He did not know if the prior argument was personal or not. To his knowledge, Mr. McCutchen did not have any altercations with anyone else in the shop. He was never under the impression that the fight that started that day was due to a personal reason.

Mr. Sterling was called back for further cross examination, stated that he remembered the incident about a month prior to July 14 and that he had taken Keith Lee home that day. Mr. Fry told him to take him home, which was about  $\frac{3}{4}$  to 1 mile from the shop. He is positive that he took him home because his mom was there. She was out in the yard and asked Keith Lee what had happened. Keith Lee told her that they had a misunderstanding with his daddy. She came to the shop the next day.

After the July 14 incident, when he came back from taking Keith Lee a block-and-a-half to Henderson's, he went back to work and told Bell that he had a conversation with Keith Lee about the fight and he told Bell what Keith Lee said about the fight. Mr. Bell did not tell him that Mr. McCutchen had thrown something at Keith Lee. He asked Mr. Bell the day after the incident what had happened because he did not see it all. Mr. Bell said that he had seen something thrown but

did not see all of the fight. Mr. Bell did not tell him who threw something but saw something thrown. He was not listening that well as to who he said threw it. Two or three days after the incident Mr. Bell did tell several of them that he had seen Mr. McCutchen throw something at Keith Lee.

Keith Lee testified on rebuttal. With regard to the June of 2003 incident, he does not remember what it was exactly that his father wanted him to do but it was not personal. David Sterling took him down to Henderson's just down the road and dropped him off. A friend of his was there at Henderson's. He is sure that David Sterling did not take him to his house that day. His friend at Henderson's took him home. If his mother came to the shop after the June incident, he was unaware of it.

On July 14, when he went into the office, he had blood running down his ear. The owner and his wife, Patty, took him into the bathroom and wiped all the blood off head, and asked if he wanted to go the doctor. He did not talk to Scott during that time. They had David take him home. He talked to David on the way home but did not tell David that his father started the fight and did not tell him that his father hit him first. When he talked to David, he had a lot of adrenaline running through him and was upset and excited. He did not return to Edwards Transportation that day and has not been back since. He never went back a week later.

Keith Lee McCutchen testified that he hurt his head when he hit his father the second time with the stick and it broke and a piece of it struck his head which caused a scratch and some blood. He did not tell Scott Henry that his father had hit him, because he did not talk to Scott Henry at all after the incident.

The employee testified on rebuttal that he did not start the fight by throwing something at his son. He did not notice if Keith Lee had a cut on his head. The next day, Scott Henry, Butch Bell, and David Sterling told him that he was going to be fired. Keith Edwards did not tell him that. The next day, Keith Edwards took him into the office, and asked him what happened. He told Keith Edwards what had happened, and was not fired.

The medical records show that the employee saw Dr. Heath on the day of the incident. Dr. Heath noted that the employee was allegedly struck by his son with a pipe. Apparently they got into a discussion. He is his son's supervisor and their relationship he says is tenuous. The handwritten notes were, attacked by son at work injury/cut to left forearm, and bruised right forearm and elbow to left side of neck. Dr. Heath saw the employee the next day, July 15, 2003, and noted that the employee was involved in an altercation with his son at work. He is his son's boss and his son apparently hit him with an aluminum pipe. He was getting away from his son, and kind of tripped over a tire, and twisted himself (Employee Exhibit B).

Both of the parties filed briefs on briefs on May 26, 2004.

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

### ***Issue 1. Accident.***

The witnesses are in basic agreement that during the altercation, Keith Lee McCutchen picked up a stick and hit his father with it, threw a metal file at his father, and then picked up a lead pipe and hit his father with it. It is disputed as to what transpired before Keith Lee McCutchen picked up the stick and who started the physical fight.

#### Employee's version of events prior to the altercation:

The employee testified his son started cussing him and then threw a bolt that hit him in the mouth. Keith Lee then picked up the stick. The employee testified that he did not start the fight by throwing something at his son. Keith Lee McCutchen, the employee's son, testified that he told his dad that he was not going to wash the four-wheeler and started yelling at his father. His father told him that he was fired. Keith Lee threw a bolt, which hit his father's mouth. Keith Lee then picked up the stick.

#### Employer-Insurer's version of events prior to the altercation:

Floyd Bell's credible testimony was that the employee told his son to do something. The son then told him that he was not going to do it and that he was tired of him telling him what to do. Keith Lee McCutchen started cussing his father and told his father "F. . . You." The employee stated that he was tired of his son cussing him and then threw an object at Keith Lee. This was the first strike of the physical confrontation. Mr. Bell then saw blood coming down from the side of Keith Lee's head. At that point, Keith Lee picked up the stick.

David Sterling's credible testimony was that he heard stuff flying and the first thing he saw was Keith Lee with the pipe. After the fight, he saw a cut and blood on his head and a little blood on his shirt. Keith Lee told him that his daddy had hit him first and started the whole fight.

Scott Henry's credible testimony was that he heard an argument and heard an object hit either a wall or the floor. When he first saw the McCutchens, Keith Lee already had the stick. He saw that Keith Lee had a little blood coming from

his head. Immediately after the fight, Keith Lee told him that his daddy had hit him in the head with an object that caused his head to bleed.

#### Events after the altercation:

There is also contradictory evidence about what transpired after the fight ended. Scott Henry testified that immediately after the fight, Keith Lee told him that his daddy had hit him in the head with an object that caused his head to bleed. Keith Lee testified that he did not talk to Scott Henry after the incident. David Sterling testified that Keith Lee told him that his father started the fight by hitting him first. Keith Lee testified that he did not tell David that his father started the fight and did not tell him that his father hit him first.

Floyd Bell, David Sterling, and Scott Henry's credible testimony was that after Keith Lee had been dropped off, he came back to the shop and was taken into the office to see if he needed medical treatment for the cut on his forehead. Keith Lee testified that after David Sterling dropped him off he never came back to Edwards either on the day of the incident or any at other time.

Keith Lee's direct testimony and his rebuttal testimony are contradictory. On direct, he stated that he was not injured during the incident. In rebuttal, he admitted that he did have blood running down his head and ear. His explanation of what caused him to bleed is not credible. He stated that when he hit his father the second time with the broomstick, the stick broke and a piece of it struck his head, which caused a scratch and blood.

#### FINDINGS OF FACT:

I find that the testimony of the employer-insurer's witnesses is credible. I find that the testimony of the employee and his son, Keith Lee McCutchen is not credible with regard to how the altercation began and what transpired after the fight. I make the following Findings of Fact:

On July 14, 2003, Keith McCutchen directed his son, Keith Lee McCutchen to wash a four-wheeler. They got into an argument. Keith Lee McCutchen told his father that he was not going to wash it, he was tired of telling him what to do, started cussing at his father, and told his father to "F . . . You." Keith McCutchen threw an object at his son, Keith Lee McCutchen. This object struck Keith Lee McCutchen in his forehead and caused a cut that bled. I find that Keith McCutchen started the physical fight by hitting his son in the head with an object. Keith Lee McCutchen then picked up a stick and struck his father, which caused the stick to break. Keith Lee then threw a file at his father and then picked up a pipe and struck his father with it several times. After the fight ended, Keith McCutchen was taken to the doctor. Immediately after the fight, Keith Lee McCutchen, told Scott Henry that his father had hit him in the head with an object that caused his head to bleed. Keith Lee McCutchen told David Sterling that his father had hit him first and started the fight. After David Sterling dropped Keith Lee McCutchen off at Henderson's, he came back to the shop and was taken into the office to determine if he needed medical treatment for the cut to his head.

#### RULINGS OF LAW:

Employer-Insurers are responsible for accidents that arise out of and in the course of employment. Section 287.120.1 RSMo, states, "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." The Court of Appeals in Wolfe v. Dubourge House/Archdiocese of St. Louis, 93 S.W.3<sup>d</sup> 855 (Mo. App. 2003), citing Loepke v. Opies Transport, Inc., 945 S.W. 2d 655, 660 (Mo. App. 1997) stated that 'Unprovoked means that the claimant is not the aggressor.' The Court further held that, "A claimant is not entitled to compensation if the claimant was the aggressor and sustained injuries as a result of his or her own threats and demonstrations of assault on another." In Staten v. Long-Turner Construction Company, 185 S.W.2d 375 (Mo. App. 1945) held that an aggressor is not in the course of his employment and is not entitled to compensation for an injury caused by his own uncontrolled emotions, threats and demonstrations of assault upon another.

In Van Black v. Trio Masonry, Inc., 986 S.W.2d 200 (Mo. App. 1999), the Court of Appeals upheld the denial of benefits of an employee who was seriously injured in a fight with another worker on the job site on the basis that the worker was the aggressor in the altercation and pursuant to the "Aggressor defense" was not entitled to compensation. Van Black, the claimant, was subjected to numerous taunts and obscenities, approached Scruggs who was another employee and swung at Scruggs before being physically assaulted by Scruggs. The Court held that injuries from provoked assaults where the claimant was the aggressor are not compensable. The Court also stated that Scruggs was not the aggressor even though the incident as a whole began with his verbal taunting of Van Black. The Court citing Stephens v. Spuck Iron & Foundry Co., 214 S.W.2d 534, 539 (Mo. 1948), held that offensive language does not equate with aggression in this context.

The Supreme Court in Stephens v. Spuck Iron & Foundry Co., 214 S.W.2d 534 (Mo. 1948) held that the employee was not the aggressor as a matter of law because he used offensive language because language or epithets, however, offensive will not justify or excuse an assault.

Keith McCutchen was subjected to insolence and obscenities from his son. However, as set forth in Stephens, this

did not make his son, Keith Lee McCutchen, the aggressor as a matter of law. Keith McCutchen became the aggressor when he threw an object that hit his son, Keith Lee McCutchen in the head and inflicted an injury. I find that the claimant, Keith McCutchen was the aggressor in the altercation. The violence or assault against the employee by his son was provoked. Based on Section 287.120.1 RSMo, and the applicable case law, I find that the claimant, Keith H. McCutchen, was the aggressor, was not in the course of his employment, did not sustain a compensable accident, and therefore is not entitled to compensation for the injuries the he sustained. The employee's claim for compensation is denied. Based on this denial, the other issues are moot and shall not be ruled upon.

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

Made by:

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Lawrence C. Kasten  
*Associate Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

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Renee Slusher  
*Director*  
*Division of Workers' Compensation*