

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

Injury No.: 11-062983

Employee: Robert Reis
Employer: Shade Tree Service Company
Insurers: United States Fire Insurance Co.
c/o Crum & Forster Insurance Co.
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

This 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, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we reverse the award and decision of the administrative law judge.

Introduction

The parties asked the administrative law judge to decide the sole issue whether employee suffered a compensable accident on August 2, 2011. The parties requested that if the issue was determined in favor of employee, the administrative law judge would issue a temporary and partial award; conversely, the parties requested that if the issue was determined in favor of the employer, the administrative law judge would issue a final award denying both the primary claim and the Second Injury Fund claim.

The administrative law judge rendered the following findings and conclusions: (1) employee's own uncontrolled emotions, threats, and demonstrations of assault upon another are the source of his injury; (2) that employee was an aggressor in an altercation with his supervisor; and (3) no compensable claim occurred.

Employee filed a timely Application for Review with the Commission alleging the administrative law judge erred: (1) in finding employee was the aggressor in the altercation on August 2, 2011; (2) in interpreting and applying the Missouri law concerning assaults in the workplace; (3) in excluding employee's deposition from the evidentiary record; and (4) in applying strict construction in the context of the "aggressor defense."

For the reasons set forth herein, we reverse the administrative law judge's award and decision.

Findings of Fact

Employee worked for approximately eight years for employer as a foreman. Employee's duties included tree-trimming and some paperwork. This workers' compensation claim is the product of events that occurred during employee's work shift on August 2, 2011.

Employee's supervisor, Ethan Taylor, had a history of instigating verbal and physical altercations with his subordinates. On April 20, 2011, for example, Mr. Taylor was addressing another employee when he called Adam MacClain, a foreman, a "motherfucker." Mr. MacClain overheard the exchange, stepped out of his work truck, and asked if there was anything Mr. Taylor would like to say to him. Mr. Taylor marched toward Mr. MacClain, got nose-to-nose with him, and yelled in Mr. MacClain's face. Mr. Taylor was so close to Mr. MacClain that he was practically spitting in Mr. MacClain's face. Mr. Taylor formed his hands into fists and bumped Mr. MacClain two or three times with his chest hard enough to cause Mr. MacClain to step backward. Mr. Taylor told

Employee: Robert Reis

- 2 -

Mr. MacClain that he “better do something with himself.” Mr. MacClain asked what Mr. Taylor meant. Mr. Taylor told Mr. MacClain, “You know what I mean.” The altercation ended only when Mr. MacClain got in his truck and left.

On August 2, 2011, employee was working with another foreman, Daniel Kennedy, in a park in St. Louis County. Employee was supervising Mr. Kennedy. It was an extremely hot day, and employer had given employees the option of quitting early, but employee and Mr. Kennedy stayed to finish their work.

Ethan Taylor came to the job site several times throughout the course of the day to check on employee’s progress, and to request that employee and Mr. Kennedy finish their work with the bucket truck, because Mr. Taylor felt that it looked bad for two men to be working out of two trucks, and he wanted to reassign the bucket truck to another crew.

At about 2:50 p.m., employee and Mr. Kennedy had finished their work for the day and were sitting in the work truck. Employee was sitting in the driver’s seat, and Mr. Kennedy was sitting in the passenger’s seat. Employee planned to finish the paperwork and then drive to the location where employees left their trucks at the end of the day.

Although there is a dispute with regard to the precise situation of the work truck, we conclude that the truck was parked such that it was difficult to exit on the driver’s side.

While employee and Mr. Kennedy were sitting in the truck at about 2:50 p.m., Mr. Taylor again visited the job site and approached the truck to speak to employee and Mr. Kennedy. The parties present conflicting testimony as to what occurred in the course of that interaction.

Employee testified as follows. Mr. Taylor approached the truck and Mr. Kennedy opened his door. Mr. Taylor started to reprimand Mr. Kennedy for sitting in the truck. Employee told Mr. Taylor that Mr. Kennedy had just gotten in the truck, and that they were leaving. Mr. Taylor walked back to his truck, then came back. In a stern tone, Mr. Taylor said that employee and Mr. Kennedy were sitting right out by the road where the customer could see them, and that he couldn’t have employee and Mr. Kennedy sitting in the truck. Employee again told Mr. Taylor they were preparing to leave. Mr. Taylor went back to his truck. This process occurred approximately four times, with Mr. Taylor approaching the truck, then walking away, then returning to tell employee and Mr. Kennedy they couldn’t be sitting in the truck like that. The fourth time, Mr. Taylor used profanity. Employee responded that Mr. Taylor needed to get him a transfer. Mr. Taylor opened the passenger door, leaned in, pointed at employee, and said, “You get your own God damn transfer. I want you out of the truck.” Employee told Mr. Kennedy to get out of the truck. Mr. Kennedy just sat there looking straight ahead, and did not move. Because Mr. Kennedy wouldn’t move, employee started to exit the passenger’s side of the truck by going around Mr. Kennedy.

Daniel Kennedy testified as follows. Both employee and Mr. Taylor were angry and their voices were raised during the interaction. Mr. Taylor was saying that employee and Mr. Kennedy couldn’t be sitting in the truck; employee was trying to tell Mr. Taylor that he was doing paperwork. Mr. Taylor would approach the truck, then back off and pace around, then return. Mr. Kennedy felt like the argument was dying down, but then it would fire back up. Nobody instructed Mr. Kennedy to exit the vehicle. Both employee and Mr. Taylor were using foul language during their interactions.

Ethan Taylor testified as follows. Mr. Taylor came up to the truck and told employee and Mr. Kennedy that it was a real bad spot to be sitting doing nothing, and that they needed to be doing some kind of work. Both Mr. Kennedy and employee responded that they were getting ready to leave. Mr. Taylor said, “I’m talking to [employee] right now.” Employee then screamed

Employee: Robert Reis

- 3 -

over something like, "Where in the hell were you about an hour and a half ago?" Mr. Taylor told employee, "Wait, wait, you can't talk to me that way." Employee responded, "You know what, I'm tired of your shit," and asked for a transfer. Mr. Taylor responded that employee could get a transfer, but that employee didn't have to talk to him that way. Mr. Taylor denied using profanity.

The parties present conflicting testimony as to what happened next. Employee testified as follows. Employee was exiting the truck to comply with Mr. Taylor's instruction that he and Mr. Kennedy get out of the truck. Because Mr. Kennedy didn't get out, employee went around him. The cab of the truck was large enough for employee to go over and around Mr. Kennedy's legs. Employee was trying to put his legs on the running board of the truck when Mr. Taylor tried to bear hug his legs or waist. Employee tried to wiggle away, but Mr. Taylor was able to get a good grip on him, and then he carried employee to the left and body slammed him to the ground. Mr. Taylor put his forearm on employee's throat and was trying to choke him out. Suddenly, blood was running into employee's eyes and Mr. Taylor saw it and snapped out of it and jumped off employee and walked to his truck. Employee denies striking Mr. Taylor.

Daniel Kennedy testified that employee just went over his lap. Mr. Kennedy speculates that employee went head first, but "it was kind of a flash." Mr. Kennedy wasn't expecting it. The next thing Mr. Kennedy remembers is that employee and Mr. Taylor were both lying on the ground. Mr. Kennedy did not see any punches thrown.

Ethan Taylor testified as follows. Immediately after Mr. Taylor told employee that he could get a transfer, employee lunged over the seat. Mr. Taylor stepped back and stumbled. When Mr. Taylor looked back, employee was already out and in Mr. Taylor's face, where employee either kicked or kneed Mr. Taylor in the mouth. Mr. Taylor felt like he was hit pretty hard. Both he and employee fell to the ground, and Mr. Taylor rolled on top of employee to make sure employee didn't land on top of him. After he was on top of employee, Mr. Taylor crawled up on him to try to hold him down because employee was kind of wild at the time. Mr. Taylor agrees that no punches were thrown.

After carefully reviewing the testimony from each of these witnesses, we find the following facts as to the physical interaction between employee and Mr. Taylor. Although there is considerable conflicting testimony in the record regarding the circumstances resulting in injury, and although the employee certainly could have conducted himself in a more appropriate manner, considering all of the testimony we conclude that there is no real evidence that either employee or Mr. Taylor demonstrated any intent to harm each other and that employee's injury (and Mr. Taylor's) were unintended consequences of a dispute that grew out of tension inherent in the nature of the performance of their work duties.¹

Conclusions of Law

Accident

The parties dispute whether employee suffered an "accident," as that term is defined in § 287.020.2 RSMo, which provides, in relevant part, as follows:

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.

¹ In particular, we are impressed with the neutral witness testimony that no punches were thrown and by the fact that both parties apparently disengaged when it became apparent someone was injured.

Employee: Robert Reis

- 4 -

Section 287.120.1 RSMo additionally provides, in relevant part, as follows:

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.

We are persuaded that the facts that we have found satisfy each of the statutory criteria for an "accident," because employee (1) suffered an unexpected traumatic event or unusual strain (falling onto his back during the course of the struggle with Mr. Taylor) (2) identifiable by time and place (August 2, 2011, at employee's work truck) (3) that produced, at the time, objective symptoms (pain in employee's low back) of an injury caused by a specific event (employee's falling onto his back) (4) during a single work shift. We conclude that employee sustained an accident on August 2, 2011.

Because we have found that neither employee nor Mr. Taylor intended any violence in the course of their physical interaction on August 2, 2011, we conclude that employee's injuries were not caused by an assault against the employee. Accordingly, we discern no need to apply the assault doctrine or consider the question whether the "aggressor defense" survives the 2005 amendments to the Missouri Workers' Compensation Law.

Injury arising out of and in the course of employment

The parties asked the administrative law judge to determine "whether a compensable accident occurred." *Transcript*, page 5. The parties' use of the word "compensable" necessarily implicates the issue whether employee's injuries arose out of and in the course of employment, such that employer liability is triggered under § 287.120.1 RSMo to furnish compensation for "personal injury or death of the employee by accident arising out of and in the course of the employee's employment." Accordingly, we deem it appropriate to consider herein the question whether employee's injuries arose out of and in the course of employment.

Section 287.020.3(2) RSMo provides, as follows:

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.

The issue of medical causation is not before us, and so we specifically disclaim any findings, conclusions, or analysis with respect to that issue. To the extent that subsection (a) above requires us to determine the prevailing factor in causing employee's claimed injury, we discern the issue to be one of legal, rather than medical, causation. Upon consideration of all the circumstances, we conclude that it is reasonably apparent that the accident is the prevailing factor in causing employee's claimed low back injury.

We conclude that subsection (b) is satisfied because employee's injuries were the unintended consequences of a dispute that grew out of tension inherent in the nature of the performance of work duties. The record contains no evidence that would support a finding that workers would have been equally exposed to the particular workplace tensions involved here outside the

Employee: Robert Reis

- 5 -

employment in normal nonemployment life. We must conclude, therefore, that employee's injuries arose out of and in the course of employment.

Award

We reverse the award of the administrative law judge. Employee suffered a compensable accident on August 2, 2011. Employee's claim against the Second Injury Fund is reinstated.

This award is subject to a lien in favor of Dean Christianson, Attorney at Law, in the amount of 25% for necessary legal services rendered.

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

This award is only temporary or partial. It is subject to further order, and the proceedings are hereby continued and kept open until a final award can be made. All parties should be aware of the provisions of § 287.510 RSMo.

The award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued January 25, 2013, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 25th day of September 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

DISSENTING OPINION FILED
James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Robert Reis

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. Therefore, I adopt the decision of the administrative law judge, in its entirety, as my decision in this matter.

Because the Commission majority has decided otherwise, I respectfully dissent.

James G. Avery, Jr., Member

FINAL AWARD

| | | |
|------------------|------------------------------|--|
| Employee: | Robert Reis | Injury No.: 11-062983 |
| Dependents: | N/A | Before the |
| Employer: | Shade Tree Service Company | Division of Workers' Compensation |
| Additional Party | Second Injury Fund | Department of Labor and Industrial Relations Of Missouri |
| Insurer: | Crum & Forster Insurance Co. | Jefferson City, Missouri |
| Hearing Date: | October 29, 2012 | Checked by: KOB:dwp |

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: August 2, 2011
5. State location where accident occurred or occupational disease was contracted: Saint Louis County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? No.
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Claimant was involved in an altercation with his supervisor.
12. Did accident or occupational disease cause death? No
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: N/A
16. Value necessary medical aid paid to date by employer/insurer? N/A

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: N/A
- 19. Weekly compensation rate: N/A
- 20. Method wages computation: N/A

COMPENSATION PAYABLE

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

TOTAL: 0.00

- 23. Future requirements awarded: N/A

Said payments to begin immediately 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: Dean Christianson

FINDINGS OF FACT and RULINGS OF LAW:

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|------------------|------------------------------|--|
| Employee: | Robert Reis | Injury No.: 11-062983 |
| Dependents: | N/A | Before the Division of Workers' Compensation |
| Employer: | Shade Tree Service Company | Department of Labor and Industrial Relations |
| Additional Party | Second Injury Fund | Of Missouri |
| Insurer: | Crum & Forster Insurance Co. | Jefferson City, Missouri |
| Hearing Date: | October 29, 2012 | Checked by: KOB:dwp |

PRELIMINARIES

The matter of Robert Reis (“Claimant”) proceeded to hearing to determine whether Claimant sustained a compensable injury. Attorney Dean Christianson represented Claimant. Attorney Matthew Barnhart represented Shade Tree Service Company (“Employer”) and its insurer, Crum and Forster Insurance Company. The Second Injury Fund is a party to the underlying claim, but is not participating due to the limited issues raised.

The parties agreed that on or about August 2, 2011, Claimant was an employee of Employer. The parties agreed venue is proper in the City of Saint Louis, Employer received proper notice, and Claimant filed the claim within the time required by law. Employer denied the case as a non-compensable assault. Because the parties presented a single issue, no determination was made regarding average weekly wage or rates.

The only issue to be determined is whether a compensable accident occurred on August 2, 2011. If a finding is made in favor of Claimant, the parties agreed a partial or temporary award would be issued. If Employer were to prevail on the issue of compensability, the parties agreed a final, appealable award would be appropriate.

SUMMARY OF EVIDENCE

As is common with any situation where a physical altercation arises, the witnesses describe the events differently. The following is a summary of the sometimes conflicting testimony. Any objections not expressly ruled on during the hearing or in this award are now overruled.

Claimant is a 47 year-old man who lives in Michigan, is 6 feet tall, and weighs 190 pounds. From 2003 through 2011, Claimant was a foreman for Employer. His supervisor at the end of his tenure was Ethan Taylor (“Taylor”). Claimant has a history of chronic and intermittent back pain since he underwent lumbar disc surgery in 1998. Every one or two months, for almost two years prior to the alleged accident, Claimant saw his primary care doctor for back pain, took narcotic medication, received referrals for injections and to neurosurgery, and was warned of the risks of opioid tolerance. Despite the symptoms, he continued to work as a tree trimmer.

On August 2, 2011, Claimant was the foreman of a two-man crew working with Dan Kennedy ("Kennedy"), who is also a foreman, but on this occasion was working under Claimant. They were assigned two trucks to clear trees around electrical lines in a north Saint Louis County park. During the course of the workday, Taylor, Claimant's supervisor, came by several times to check on the work. Conversations during the day were unremarkable.

Although it was a particularly hot day and a heat alert was in effect which would have allowed the crews to stop working early, Claimant's crew continued to work until the 2'o clock hour. Claimant testified that work usually ends at 3:30, but they must be in the lot, which was 20 minutes away.

Claimant testified he moved the truck to the location to chip brush around 2:45, and he stayed in the driver's seat with air conditioning running while Kennedy loaded the brush into the chipper. Claimant testified the truck was parked on an incline which made the driver's side of the truck higher than the passenger's side. He also testified he was somewhat blocked from exiting the driver's side door by the line of trees. Claimant testified that it was his practice as foreman to do paperwork in the truck from 2:30 to 3:00 while the crew did final cleanup. On that particular day, Claimant was not doing paperwork because of the heat. When he was finished, Kennedy joined Claimant in the cab of the truck, sitting in the passenger seat. The crew was thus situated when, around 2:50, Taylor drove his truck to their location and approached the truck.

Claimant testified that as Taylor approached the vehicle, Kennedy opened the door to allow communication. Claimant testified Taylor started getting on Kennedy for sitting in the truck. Then Claimant started to explain that they were just about to leave. Taylor said that he did not want both of them in the truck. His tone was mellow at first. Then Taylor explained that if Union Electric would see the entire crew sitting in the truck it would make a bad impression. Claimant thought that was ridiculous. It was obvious, according to Claimant's testimony, Taylor did not like Kennedy because he was "bucking to be supervisor" and he had a college degree.

Claimant testified that the third time Taylor approached the truck, saying, "I can't have you guys in this [expletive deleted] truck," Claimant said, "Then get me a transfer." Taylor responded, "Get your own transfer," and proceeded to demand that Claimant exit the truck. Claimant testified Taylor used various swear words. When Kennedy did not move, Claimant went around and over him to exit the truck onto the running board.

Claimant testified that as he was coming onto the running board, Taylor tried to wrap up his legs with a "bear hug." He testified Taylor got a grip around his knees, carried him to the left, and body slammed him flat on his back to the hard ground. Claimant then testified Taylor put his forearm on his throat twice to choke him out. At that point, Claimant testified Taylor had blood running from his nose. The parties then separated, with Taylor returning to his truck to make a phone call. Claimant testified Taylor responded to his inquiry regarding filing an incident report with further profanity and threats.

Claimant returned to his truck, and Kennedy drove Claimant back to the lot. Claimant reported to the DePaul Health Center emergency room at 4:00 pm. Claimant testified he was admitted to DePaul for 2 nights and three days, but the records show he was seen, evaluated and discharged from the emergency room within a three-hour period, being discharged at 7:00 pm

with a diagnosis of pulled muscles. His story about being thrown to the ground is consistent in all records. Jeff Larson, the union hall representative, told Claimant he had to go to the police to report the incident, and Claimant appeared at the police station to report an assault around 8:00 pm. According to the medical records, Claimant returned to the hospital around midnight on August 3, with complaints of left sided back and leg pain. His history of prior back surgery was noted and he was admitted for observation. Although doctors cleared him for discharge the evening of August 3, Claimant was allowed to stay until the next morning to arrange for a ride.

Claimant recounted several examples where he personally observed Taylor using aggressive words, "trying to push buttons" or otherwise being argumentative. He did not recount any other episodes where he observed Taylor using physical violence.

Daniel Kennedy ("Kennedy") has been a foreman for Employer since February 2011. On the day of the incident, the only time he worked with Claimant, he was a trimmer and Claimant was the supervisor. Kennedy testified Taylor showed up at the end of the day and approached the truck they occupied in an agitated state because the two of them were in the truck. According to Kennedy, Taylor approached the truck yelling about the truck and the crew not working. Kennedy opened the door and started to respond to Taylor, but Taylor told him that he was talking to Claimant. Kennedy then described sitting back and observing the angry, voices-raised, back and forth exchange that went on between Taylor and Claimant. Both used foul language. Taylor seemed to be indicating they were doing something they should not do, and Claimant took issue with that. Kennedy said Taylor never instructed Claimant to exit the vehicle. During this heated exchange, Claimant went out the passenger door by climbing over him. "In a flash," Claimant was outside the door, and both Claimant and Taylor, were on the ground. Kennedy did not see Taylor bear hug Claimant's knees, and he did not see any punches thrown.

Kennedy testified that, in general, Taylor uses curse words, but he could not think of a specific incident where Taylor called an employee names. Kennedy testified both parties cursed, but does not specifically recall what foul language was used. Kennedy testified Taylor reported the incident to the police but neither seemed super angry. The tension built, climaxed, and seemed to be over. Kennedy drove back to the lot over some bumpy areas, and when he did, Claimant exclaimed with pain.

Ethan Taylor is 5 feet 8 inches, weighs 198 pounds, and has been employed with Employer for 9 years, the last three or so as general foreman. He was Claimant's foreman on August 2, 2011. According to Taylor, when he approached Claimant and Kennedy, he noticed the truck was parked in the middle of the park, on a hill, with cones. He does not recall a real obstruction on the driver's side. He did not expect to see his workers in the truck with the air conditioning. Taylor testified he parked his truck near the other truck, walked about 100 to 200 feet and began talking to the crew through the passenger door. He explained he was concerned with how the client would perceive two individuals sitting in the truck. He explained Employer's unwritten policy that workers never take breaks together, but always had someone working.

Taylor offered a different account of the conversation between him and Claimant. He spoke mostly to Claimant, and denied every using curse words. Claimant responded by saying he was "tired of his shit" and asked for a transfer. Taylor responded that he could get his own

transfer. At the time he made that comment, he was standing inside the door about one or two feet from the entrance to the truck. Taylor testified that in the course of the conversation, Claimant suddenly lunged over the passenger seat and at him. Taylor tripped backwards and rolled on the ground. He was able to turn his body to avoid a full blow to the back. He said Claimant was in his face and that his head or knee struck him in the mouth. There were no punches thrown. He sustained a blow to the mouth that caused him to bleed, and he sought treatment with his dentist for a “traumatized tooth.” The dental charges were nearly \$400.00.

Taylor denied ever threatening to kill Claimant. He denied using any curse words during the encounter with Claimant, or in general, except for one time when the curse word was used in jest. I do not find Taylor’s testimony on the issue of cursing credible. I find it more likely that Claimant used curse words in general, and specifically on the date of accident

Officer Kaminski of the Ferguson Police Department did not testify, but he did collect information for Investigative Report 11-14838 (Exhibit C). According to the report, Taylor appeared at the police station at 3:15 pm, to report he had been assaulted by Claimant. As Taylor approached his subordinates in the parked truck, the report recounted:

Ethan stated he advised the workers they could not sit in the truck and Robert Reis climbed over the passenger and kicked him (Taylor) in the mouth, causing a slight cut in the inside of his mouth. After being kicked, Ethan advised both subjects were down on the ground and Ethan pinned Robert down on the ground until he calmed down.¹

At 8:00 pm, Claimant (referred to in the report as “Robert”) appeared at the police station to report to Officer Kaminski he had been assaulted by Taylor. According to the report, Taylor (“Ethan” in report) yelled at him and

...requested Robert to get out of the truck. Robert...began to climb over the passenger to get out of the truck. When he was almost out of the truck Robert advised Ethan grabbed him, pulled him out of the truck and body slammed him into the ground. After a slight scuffle on the ground, Robert advised Ethan to let him go and that’s when Robert noticed Ethan had a bloody lip. Robert stated after he was let go by Ethan he immediately went to the hospital to get his back checked out.

In rebuttal, Claimant offered the testimony of **Adam McClain**, a former employee of Employer, who described a situation where Taylor used profanity and acted in a threatening manner. McClain acknowledged the local union sent a letter regarding treating fellow union members with respect, and that he was testifying to protect a fellow union man. He wanted to testify because he felt strongly about Claimant being fired and did not want that to happen to anyone else.

¹ The Report (Exhibit C) contains a reference to a written statement, but such is not attached.

FINDINGS OF FACT

The outcome of this case turns on the credibility of the witnesses as to the key facts. Of the three witnesses to the incident in question, only Kennedy is consistently credible. The testimony of Claimant and Taylor is less than credible for several reasons, not only because each has a vested interest in the outcome of this case. Nevertheless, there are only a few facts that are in dispute, and those center around which of the participants was the aggressor. Only findings necessary to support the award will be made. I hereby find:

On August 2, 2011, at sometime before 3:00 in the afternoon, Claimant and Daniel Kennedy were sitting in a parked truck when their supervisor, Ethan Taylor, approached the truck in an agitated state. He was concerned with the perception that both employees were not working. As Taylor approached the vehicle, Kennedy opened the passenger door, but Taylor made it clear he was talking to Claimant, who was seated in the driver's seat. Claimant and Taylor proceeded to engage in an angry, voices-raised, verbal exchange in which both used foul language. Taylor was standing within the relatively confined space between the open passenger door and the truck, less than 24 inches from the door frame. The top step or running board of the truck roughly came to the level of Taylor's hip.

Suddenly, Claimant crawled over Kennedy to exit the truck through the passenger door. What happened next is the key point of contention – either Claimant lunged at Taylor from the elevated position of the truck's running board, as Taylor testified, or Taylor wrapped up Claimant's knees with a bear hug, carried him to the left, and body slammed him flat on the ground. Kennedy cannot verify either of the participants' versions. He testified that "in a flash" Claimant was outside the truck, and both Claimant and Taylor were on the ground. After this initial physical contact, Taylor climbed on Claimant to hold him down. The parties separated after both became aware Taylor was bleeding. No punches were thrown by either party.

Thereafter, Taylor immediately went to the Ferguson Police Department to report an assault. Taylor went to an urgent care, but was told he did not need stitches because the laceration was on the inside of his mouth. He then went to his dentist to treat his mouth injury. According to the dental records, he had a traumatic injury to the number 7 tooth

Claimant returned to the parking lot with Kennedy driving. He then went to the DePaul Health Center hospital at 4:00 pm, was seen, evaluated and discharged from the emergency room. Records show he was in the emergency room for three hours, and discharged at 7:00 pm with a diagnosis of pulled muscles. His story about being thrown to the ground is consistent in all records. Because his union rep told Claimant he had to go to the police to report the incident, Claimant appeared at the police station to report an assault around 8:00 pm. He returned to the hospital around midnight with complaints of left sided back and leg pain. His history of prior back surgery was noted and he was admitted for observation. Although doctors cleared him for discharge the evening of August 3rd, Claimant was allowed to stay until the next morning to arrange for a ride.

On the key issue of what happened upon Claimant's exit from the passenger side of the truck, I do not find Claimant's explanation that Taylor "body slammed" him to be credible. Logistically, it is highly improbable Taylor could have stopped the momentum of a man

propelling himself out of the vehicle, lifted him from the bottom third of his body, turned him within a confined space, and slammed him into the ground. Claimant did not offer any explanation as to how Taylor's lip became bloodied, nor did he recount any defensive attempts he made to ward off the alleged surprise attack, such as grabbing some part of the truck or holding onto Taylor. Claimant was not ordered out of the truck, according to both Kennedy and Taylor. Thus, Claimant had no reason to exit from the passenger side other than to confront Taylor.

I find that Claimant climbed over Kennedy, and lunged out of the truck at Taylor, who was standing within the confined space created by the open passenger door and the truck. As he exited the vehicle, Claimant struck Taylor's mouth with some part of his body – if Claimant were to stand straight on the top of the running board, it is likely his knees would have been at the level of Claimant's neck and chin. Thereafter, both men landed on the ground where they struggled briefly before separating.

Because the parties submitted this case on the limited issue of whether Claimant has a compensable claim, it is not necessary to additional factual findings.

RULINGS OF LAW

The pivotal legal issue is whether Claimant sustained an injury by accident arising out of and in the course of employment. Employers are liable to furnish compensation to an employee who suffers a personal injury “by accident arising out of and in the course of his employment.” §287.120.1. An “accident” is defined as: “an unexpected or unforeseen identifiable event or series of events happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury.” § 287.020.2. 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” (emphasis added).

In order for an injury to be compensable, it must both “aris[e] out of” and be “in the course of” Claimant's employment. § 287.120.1. An injury “aris[es] out” of one's employment if it results from a natural and reasonable incident connected with the employment and is “the rational consequence of some hazard connected with the employment.” *McCutchen v. Peoplease Corp.*, 195 S.W.3d 421, 426 (Mo.App. S.D.,2006). An injury is said to be “in the course of” one's employment “when it occurs within the period of employment, at a place where the employee may reasonably be and while he is reasonably fulfilling the duties of his employment.” *Id.* In certain circumstances, assaults to an employee may be compensable, and in those claims the issue raised is usually whether the assaults arose out of the employment.

In Missouri, an employee who is injured in an on-the-job assault may be entitled to compensation if the assault is related to a risk directly attributable to the employment (the dangerous nature of the duties, the dangerous work environment or the outgrowth of frictions generated by the work itself), or the assault results from irrational and unexplained incidents of a neutral origin that occur in the course of employment. *Loepke v. Opies Transport, Inc.*, 945

S.W.2d 655, 661 (Mo.App. W.D.,1997)². Injuries resulting from assaults committed in the course of private quarrels are not compensable under § 287.120. *Id.* Where, as here, the injury occurs in an assault that is the outgrowth of frictions generated by the work itself, the assault is deemed to arise out of and in the course of employment.

However, an employee injured during an assault at work may forfeit workers compensation benefits if he was the “aggressor.” The aggressor defense arose from a series of cases finding 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. *Staten v. Long-Turner Const. Co.*, 185 S.W.2d 375, 381 (Mo.App.1945); *McDonald v. Grahn Mfg. Co., Inc.* 700 S.W.2d 157, 159 (Mo.App. W.D. 1985)(The employee’s aggression operates as a complete bar to compensation regardless of the facts and circumstances which occasioned the assault). In 1969, the legislature amended the definition of “accident” by adding the following language to §287.120.1: “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.” *Flowers v. City of Campbell*, 384 S.W.3d 305 (Mo.App. S.D.,2012).³ Thus, the aggressor defense is rooted in the proposition the aggressor takes himself out of the course of employment, as well as in the inclusion of “injury ...[caused by] unprovoked violence or assault” in the statutory definition of accident.

Assault cases often focus on whether the claimant was the victim of “unprovoked” violence. “Unprovoked means that the claimant is not the aggressor.” *Loepke v. Opies Transport, Inc.*, 945 S.W.2d 655, 660 (Mo.App. W.D.1997). 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. *Id.*; see also *Wolfe v. DuBourg House/Archdiocese of St. Louis*, 93 S.W.3d 855, 858 -859 (Mo.App. E.D.,2003). Whether the claimant was the aggressor is an issue of fact. See *Sublett v. City of Columbia*, 652 S.W.2d 189, 192 (Mo. Ct. App. 1983)(The issue is one of credibility, and the cases say that the issue is one for the [finder of fact] to solve).

The body of cases in Missouri offers some guidance as to which facts are significant in determining whether a party is an aggressor. In *Van Black v. Trio Masonry, Inc.*, 986 S.W.2d 200, 202 (Mo. Ct. App. 1999), it was determined offensive language does not equate with aggression, citing *Stephens v. Spuck Iron & Foundry Co.*, 358 Mo. 372, 214 S.W.2d 534, 539 (1948). See also, *McCutchen v. Peoplease Corp.*, 195 S.W.3d 421, 425 (Mo. Ct. App. 2006)(an employee reacting violently to a verbal assault can be considered as the initial aggressor). The

²This is one of several cases cited herein that were among those overruled, on an unrelated issue, by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224-32 (Mo. banc 2003). Such cases do not otherwise conflict with *Hampton* and are cited for legal principles unaffected thereby; thus I will not further note *Hampton's* effect thereon.

³ Although it was the intent of the legislature in adding the “unprovoked violence or assault” language to make compensable the so-called assaults of ‘neutral’ origin, see *Person v. Scullin Steel Co.*, 523 S.W.2d 801, 806 (Mo. 1975), the issue of whether the claimant “provoked” the assault is raised in assaults that are the outgrowth of friction generated on the job. *Dillard v. City of St. Louis*, 685 S.W.2d 918, 923 (Mo.App. E.D. 1984)

claimant does not need to actually strike his assailant first to be considered the initial aggressor. *Id*; see also *Staten v. Long–Turner Const. Co.*, 185 S.W.2d 375, 379–381 (Mo.App. W.D.1945). In *McMutchen* at 425, the court found significant the aggressor’s act of throwing a bolt at the claimant, which “escalated the situation from a verbal disagreement into a physical altercation.” Which party was visibly injured by the encounter has been found persuasive. *McDonald v. Grahn Mfg. Co., Inc.*, 700 S.W.2d 157, 160 (Mo. Ct. App. 1985). While these cases highlight important factors, they also emphasize that the outcome of any aggressor case will be driven by the specific facts of the case.

In the instant case, both Claimant and Taylor were engaged in verbal assault using offensive language, but the situation escalated from a verbal disagreement into a physical altercation when Claimant, “in a flash,” climbed over the passenger seat, lunged out of the truck, and struck Taylor, bloodying his lip and traumatizing his tooth. Claimant thereafter landed on the hard ground, which was the source of his alleged injury. Although Claimant testified to a factual scenario where he was the victim of an assault, I do not find that testimony credible (see findings above). I find Claimant to be the aggressor, and not the victim of an unprovoked attack.

In addition to Claimant’s lack of credibility on the key issue of how he was injured, there are several other facts to support the finding Claimant was the aggressor. Taylor’s bloody mouth was the only visible injury between the two, and the only explanation given for that injury was that Claimant struck him. Taylor immediately reported the assault, while Claimant did not file his report until after he spoke with his union representative. Taylor was the supervisor, and had the right to give the instructions about which Claimant complained. I find the credible evidence establishes Claimant’s own uncontrolled emotions, threats and demonstrations of assault upon another are the source of his injury. He was not the victim of an unprovoked assault, and therefore did not sustain an accident in the course of his employment.

In his post-trial brief, Claimant devoted much of his argument to the proposition that the 2005 legislative changes to Chapter 287 have changed the previous judicial construct of the “aggressor defense.” In *Flowers v. City of Campbell*, 384 S.W.3d 305 (Mo.App. S.D.,2012), the court addressed whether the 2005 legislative changes altered the prior judicial interpretation of the “assault doctrine.”⁴ The court “conclude[d] that the legislature intended no changes in the assault doctrine, as it had been announced ... in judicial decisions preceding the 2005 amendments to Chapter 287.” The Court held:

Although other changes were made to § 287.120, the legislature reenacted the language in § 287.120.1 stating that “[t]he 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.” 2005 Mo. Laws 913–14. When a familiar rule has received a settled judicial construction from our Supreme Court and the legislature reenacts the same statutory language without change, we presume the legislature knew about and adopted this construction of the statute.

Thus, prior rulings involving the “assault doctrine” and the “aggressor defense,” both rooted in §287.120.1’s definition of “accident,” are still binding under strict construction.

⁴ The *Flowers* decision acknowledged the three classes of assault in workers’ compensation cases, those with some risk directly attributable to the employment, those arising from private quarrels, and those of “neutral origin,” and reiterated that injuries resulting from private quarrels remain not compensable.

Further proof the aggressor defense is alive and well in Missouri is found in *Van Black v. Trio Masonry, Inc.* 986 S.W.2d 200, 203 (Mo.App. W.D.,1999). In that case, the court acknowledged a majority of jurisdictions now reject the aggressor defense. *McDonald v. Grahn Mfg. Co., Inc.*, 700 S.W.2d 157, 159 n. 1 (Mo.App. W.D.1985); 1 Arthur Larson & Lex K. Larson, Workers' Compensation Law, § 11.15(a), § 11.15(c). Jurisdictions which retain the defense include states that do so because the defense is authorized by statute. *Triad Painting Co. v. Blair*, 812 P.2d 638, 643–644 (Colo.1991). Such is the case in Missouri, where § 287.120(1) was amended in 1969 to include “unprovoked assaults” within the statutory definition of “accident.” That subsection authorizes workers' compensation for injuries from accidents arising out of employment, and now states that the term “accident” 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.” Thus, Missouri law still prevents the aggressor in an assault from recovering benefits.

Finally, there is no requirement in Missouri that the aggressor act with intent or purpose. To impose such an analysis, as suggested by Claimant, would exceed the plain and unambiguous terms of the statute, which is forbidden under strict construction. *Robinson v. Hooker*, 323 S.W.3d 418, 423-24 (Mo.App. W.D. 2010)

CONCLUSION

Claimant was an aggressor in an altercation with his supervisor. No compensable claim occurred. The claim is denied against Employer and the Second Injury Fund.

Date: _____

Made by: _____

KARLA OGRODNIK BORESI
Administrative Law Judge
Division of Workers' Compensation